

## **The Odd Man Out: An Air Carrier's Obligation to Ground Victims under the Aviation Disaster Family Assistance Act**

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### **TIP**

**While airlines are encouraged to treat the families of ground victims the same as the families of passengers following an aviation accident, the requirement to do so is unclear under federal law.**

In the wake of the Pan Am Flight 103 bombing and the USAir Flight 427, ValuJet Flight 592, and TWA Flight 800 accidents, the House of Representatives overwhelmingly passed the Aviation Disaster Family Assistance Act of 1996 (ADFAA).<sup>1</sup> With only minor revisions, this bill was enacted as Title VII of the Federal Aviation Reauthorization Act of 1996.<sup>2</sup> The ADFAA, codified at 49 U.S.C. §§ 1136 and 41113, requires the National Transportation Safety Board (NTSB) and individual air carriers to take actions to address the needs of families of passengers involved in aircraft accidents in which there is a major loss of life. The ADFAA requires that all certificated air carriers (cargo and passenger) submit plans to the Department of Transportation (DOT) and the NTSB on how they will address the needs of the families of victims in the event of an aviation disaster involving one of their aircraft.<sup>3</sup>

In the aftermath of the Korean Air Flight 801 accident, a major shortcoming of the ADFAA was realized—it only applied to U.S. carriers.<sup>4</sup> To rectify the disparity between U.S. and foreign carriers, the Foreign Air Carrier Family Support Act (FACFSA)<sup>5</sup> was enacted in 1997, only four months after the crash of Korean Air Flight 801.<sup>6</sup> The FACFSA essentially imposes the same family assistance requirements on foreign air carriers that apply to U.S. air carriers.<sup>7</sup> However, for foreign air carriers, the family assistance requirements only apply to accidents that occur within the United States.<sup>8</sup>

The main purpose of this article is to examine air carriers' obligations under the ADFAA and the FACFSA to the families of ground victims of an aviation accident, by comparing the language of the ADFAA and the FACFSA to the legislative intent of the Acts and by examining various carriers' family assistance plans.

### **Aviation Disaster Family Assistance Act of 1996**

**Family assistance plan requirements.** The ADFAA requires that each certificated U.S. air carrier submit to the DOT and the NTSB a family assistance plan that includes, among other things, assurances that:

- Each passenger's family will be consulted about the disposition of all remains and personal effects of the passenger within the air carrier's control;
- If requested by a passenger's family, any possession of the passenger within the air carrier's control will be returned to the family unless it is needed for the accident investigation or any criminal investigation;
- Any unclaimed possession within the air carrier's control will be retained for at least 18 months;
- Each passenger's family will be consulted about the air carrier's construction of any monument to the passengers, including any inscription on the monument;
- The air carrier will work with appropriate organizations on an ongoing basis to ensure that families of passengers receive an appropriate level of services and assistance following each accident; and
- The air carrier will assist a passenger's family in traveling to the location of the accident and provide for the physical care of the family while they are staying at such location.<sup>9</sup>

The ADFAA also includes a very important mandate, although generally misinterpreted, that air carriers must make an assurance in their family assistance plans that "the treatment of the families of non-revenue passengers (*and any other victim of the accident*) will be the same as the treatment of the families of revenue passengers."<sup>10</sup> It appears from a review of numerous air carrier family assistance plans that many air carriers interpret the statute to mean simply that they must treat all aircraft occupants equally, whether a revenue customer or any type of nonrevenue passenger (e.g., dead-heading crew member, air marshal, FAA examiner, airline or contract maintenance personal, "stowaway," etc.). However, the legislative history of the ADFAA indicates that Congress, at least initially, intended for air carriers to treat the families of ground victims the same as the families of all passengers. The section-by-section summary of the House report accompanying the ADFAA states that an air carrier's family assistance plan must include an assurance that "the treatment of the families of non-revenue passengers *and victims on the ground* will be the same as the treatment of the families of revenue passengers."<sup>11</sup> But the language of the legislation as introduced and as enacted does not make a specific reference to ground victims. Additionally, the DOT has opined that the ADFAA requires that certificated U.S. air carriers submit a family assistance plan to "address the needs of families of passengers, employees or any third-party victims involved in aircraft accidents."<sup>12</sup>

Under the ADFAA, the DOT may not approve an application for an air transportation certificate unless the applicant includes with its application a family assistance plan that meets the requirements of § 41113(b).<sup>13</sup> The ADFAA was unclear, however, on whether plans submitted by air carriers already having an air transportation certificate would be reviewed and "approved" and what would happen if the

DOT decided a plan did not meet the minimum requirements of § 41113(b). In December 1997, after an initial review of all the submitted plans that “concentrated solely on whether the plans address all of the assurances required by the statute,” the DOT notified all the air carriers that it had “accepted” all submitted family assistance plans, although “acceptance” of a plan did not constitute “approval” of a plan.<sup>14</sup> Further, the DOT advised the air carriers that:

After any accident, the NTSB will monitor the involved carrier’s implementation of the assurances given in its plan. If the NTSB determines that the air carrier did not meet the assurances required by the legislation and submitted in its plan, the NTSB will refer the matter to the [DOT]. We will investigate and pursue enforcement action where necessary. Such action could result in a cease and desist order and civil penalties, or, in egregious cases, modification or revocation of the carrier’s authority to operate. Moreover, individuals could be subject to criminal prosecution in connection with any misrepresentation made to the Federal government.<sup>15</sup>

**U.S. air carrier family assistance plans.** As noted, many U.S. air carriers do not mention ground victims or “third-party victims” anywhere in their family assistance plans. The following excerpts from various passenger and cargo carriers’ family assistance plans<sup>16</sup>—which are intended to satisfy § 41113(b)(9)’s requirement of an assurance of equal treatment of the families of revenue and nonrevenue passengers (and any other victim of the accident)—exemplify the apparent confusion surrounding the scope of the ADFAA:

- “[The Carrier] intends to provide comparable assistance to all survivors and families directly affected by an aircraft accident, including revenue passengers, crewmembers and non-revenue passengers.”
- “Provide the same level of assistance listed above for crewmembers and their families as well as others traveling on a non-revenue basis.”
- “[The Carrier] provides family assistance without regard to an individual’s status as a revenue customer, non-revenue customer, or crew member.”
- “The Airline provides assistance to passengers and crew members, including employees of air carriers, without regard to:
  - an individual’s status as a revenue customer, non-revenue passenger, or crew member;
  - whether the person paid for the transportation, occupied a seat, or held a reservation for the flight.”
- “Provide the same support and treatment of families of non-revenue passengers (and any other person aboard the aircraft) as for revenue passengers.”

Some carriers have adopted the actual language of § 41113(b)(9), or something similar, which, while still not specifically mentioning ground victims, arguably assures that “other” victims of an accident, including ground victims, will be treated the same as revenue passengers. For example:

- “Ensure the treatment of families of non-revenue passengers (and any other victim of the accident) will be the same as the treatment of the families of revenue passengers.”

- “The treatment of families of nonrevenue passengers (and any other victim of the accident) will be the same as the treatment of the families of revenue passengers.”
- “The Airline provides uniform family assistance without regard to an individual’s status as a revenue customer, non-revenue passenger, or other victim of the accident.”
- “In the event of an accident, [the Carrier] will strive to ensure that the family of each crewmember, jumpseat occupant, or other victim is given equal treatment, in the most courteous, compassionate, and respectful manner possible by [the Carrier].”

However, a few U.S. air carriers expressly provide for the equal treatment of the families of ground victims and the families of victims aboard the aircraft. For instance:

- “All ground casualties are the responsibility of the airline and will be treated in the same manner as the aircraft passengers.”
- “[The Carrier] will also notify families of [the Carrier’s] ground personnel or other ground casualties impacted by the accident.”
- “[T]he airline is committed to ensuring that surviving passengers or ground victims of the accident and their family members, receive the appropriate level of information and services to meet their immediate needs.”

Any misunderstanding or confusion concerning an air carrier’s obligation to ground victims under the ADFAA is understandable given the language of the Act. Certainly, the main emphasis of the ADFAA is on the families of passengers involved in an aircraft accident. Even the titles of the United States Code sections codifying the ADFAA—“Assistance to families of passengers involved in aircraft accidents” (§ 1136) and “Plans to address needs of families of passengers involved in aircraft accidents” (§ 41113)—lead one to believe that these sections deal exclusively with passengers and their families. Simply inserting “and any other victims” after “passengers” in each section title would have helped clarify the applicability of these sections to ground victims. Further, the ADFAA refers only to the families of “passengers” throughout. If the ADFAA was meant to cover third-party victims, the term “passengers” could have simply been replaced with “victims” where appropriate.

Adding to the confusion is the awkward placement in § 41113(b)(9) of the parenthetical reference to “any other victim of the accident” immediately following the term “nonrevenue passengers.” One can reasonably interpret the parenthetical as solely expanding the term “nonrevenue passengers” to include, for example, dead-heading crew members, FAA observers, and maintenance personnel. Any uncertainty over the meaning of the parenthetical may have been compounded by the 2000 amendment to the ADFAA definition of “passenger.” As originally enacted, the ADFAA defined “passenger” to include “an employee of an air carrier aboard an aircraft.”<sup>17</sup> In April 2000, the definition of “passenger” was expanded to include “any other person aboard the aircraft without regard to whether the person paid for the transportation, occupied a seat, or held a reservation for the flight,”<sup>18</sup> essentially clarifying the air carriers’ duties to any type of nonrevenue passengers. This expanded definition of passenger in § 1136 could easily be construed to be the logical counterpart to the parenthetical in § 41113(b)(9).

**U.S. air carrier treatment of ground victims.** If air carriers’ family assistance plans are supposed to cover ground victims as well as passengers, the omission of ground victims (or any third-party victims) in the carriers’ plans may seem like nothing more than a mere technicality with little practical reper-

cussions. However, consider a situation where a commercial aircraft accident claims the lives of hundreds of people on the ground. It is not hard to imagine a scenario where the crash of an aircraft with only 50 passengers on board could claim the lives of two or three times as many people on the ground. A catastrophic mechanical failure that causes a loss of control, especially during approach or departure from an airport located in a heavily populated urban area—LaGuardia, JFK, Reagan National, O’Hare, LAX, just to name a few—could result in an aircraft impacting an apartment building, office complex, school, sports arena, hospital, or even an airport passenger terminal.

If the ADFAA is interpreted to require that air carriers treat the families of ground victims the same as the families of passengers, then arguably air carriers must provide the families of ground victims the same support and services they must provide to the families of passengers—i.e., consultation with family members about the disposition of remains and personal effects, consultation with family members regarding monuments, transportation to the accident site and lodging while there, counseling, etc. Therefore, in an accident involving a large number of ground victims, the additional cost to the air carrier and/or its insurer due to the carrier’s obligations under the ADFAA in terms of true monetary expenditures, employee man-hours, and lost revenue could be quite significant.

An air carrier’s equal treatment of all victims of an accident is no doubt commendable. It also creates much-needed goodwill for the air carrier in the aftermath of an accident. In addition, the damage to the air carrier’s reputation, which would already be harmed by the air crash, could be severely exacerbated if the carrier chose to provide services only to the families of passengers and not ground victims. The media, social media venues, and the blogosphere would almost certainly brand the air carrier as a heartless, uncompassionate, profit-pinching organization. Nonetheless, some may argue that the cost of obtaining that goodwill and reputation control may never be adequately recovered and could result in an open-ended increase in a carrier’s exposure; therefore, extending family assistance support and services to ground victims’ families should be carefully considered.

Fortunately, since the enactment of the ADFAA there has not been a U.S. commercial aviation accident that resulted in a significant number of ground victims (i.e., more than 10 fatalities).<sup>19</sup> The American Airlines Flight 587 accident in Belle Harbor, New York, on November 12, 2001, resulted in five ground deaths. The January 8, 2003, Air Midwest Flight 5481 accident in Charlotte, North Carolina, did not have any ground fatalities, although it easily could have resulted in numerous ground victims if the aircraft had impacted the passenger terminal instead of a maintenance hangar. The February 12, 2009, Continental Connection Flight 3407 accident resulted in only a single ground fatality. This relatively small number of ground deaths, in comparison to the number of passengers on board and the potential for a greater number of ground deaths if the aircraft crashed in an urban residential area, is more typical of a commercial aviation accident.

Because there are usually relatively few ground victims in commercial aviation accidents, air carriers, regardless of their ADFAA mandated family assistance plans, have typically treated the families of ground victims the same as the families of passengers. But it is unknown how a carrier whose family assistance plan only covers the families of passengers would react if an accident claimed the lives of 200, 500, or 1,000 ground victims. In the event of an aviation accident with a large number of ground victims, various victims’ family groups, local politicians, the media, and possibly even certain government agencies (e.g., the DOT and the NTSB) would pressure the air carrier to provide the same support

and services to the ground victims' families as it provides to the passengers' families. Also, as mentioned before, the traditional and social media firestorm that would undoubtedly ensue might also cause the carrier to voluntarily provide the same support and services to the ground victims' families.

However, an argument can be made by an air carrier that, based on the language of the ADFAA and the DOT's and the NTSB's "acceptance" of its family assistance plan, it has no duty to provide family assistance to the families of the ground victims. A carrier must also seriously consider the DOT's warning that the NTSB will determine the adequacy of an air carrier's family assistance plan *after* the implementation of the plan following an accident. Further, the NTSB's Office of Transportation Disaster Assistance's (TDA's) Federal Family Assistance Plan for Aviation Disasters expressly states that airlines are expected to "[p]rovide the same support and treatment to families of non-revenue passengers or any other victim of the accident (for instance, *ground fatalities*) as is provided for revenue passengers."<sup>20</sup> Because it appears that the NTSB's position is that family assistance plans should address the needs of passengers, employees, and third-party victims, including ground victims, denying family assistance and support service to the families of ground victims could potentially lead to an enforcement action, civil penalties, or possibly even the revocation of a carrier's air transportation certificate.

The DOT's warnings of potential enforcement actions against airlines for violations of their family assistance plans should be taken seriously, as the DOT recently fined Asiana Airlines \$500,000 for multiple violations of its family assistance plan following the July 6, 2013, crash of Flight 214 in San Francisco.<sup>21</sup> The violations included failure to (1) provide a toll free number for passengers' families to call following the accident and insufficient staffing to answer calls to the number; (2) timely notify passengers' families of passengers involved in the accident; and (3) commit sufficient resources to carry out its family assistance plan.<sup>22</sup> Although all ground victims in this crash were originally passengers or crew members on the flight before they were ejected from the aircraft upon the crash landing, the heavy fine against Asiana Airlines should serve as a stark warning that the DOT takes violations of family assistance plans seriously and could take similar enforcement actions against an air carrier if the families of ground victims are not treated the same as families of passengers and crew members following an accident.

### **Foreign Air Carrier Family Support Act**

**Family assistance plan requirements.** Although FACFSA was enacted to "essentially impose the same family assistance requirements on foreign airlines that now apply to U.S. airlines,"<sup>23</sup> and generally the legislation mirrors the ADFAA, there are a few significant differences. Most noticeably for the purposes of this article, § 41313(c)(9) ("Equal treatment of passengers") requires that foreign air carriers make an assurance in their family assistance plans that "the treatment of the families of nonrevenue passengers will be the same as the treatment of the families of revenue passengers." But unlike its ADFAA counterpart, it makes no mention of "any other victim of the accident." The legislative history of the FACFSA provides no explanation of why the parenthetical used in § 41113(b)(9) to extend application of the ADFAA to "any other victim of the accident" was never included.

In May 1998, the DOT issued a questions and answers sheet that, in part, addressed this discrepancy between the ADFAA and the FACFSA.<sup>24</sup> While the DOT offered no explanation for the difference in the language of § 41113(b)(9) and § 41313(c)(9), it did clarify that the FACFSA “technically *does not* apply to the treatment of third-party victims, including persons on the ground,” although it “strongly urge[d] foreign air carriers to incorporate coverage for third-party victims in their plans.”<sup>25</sup>

**Foreign air carrier family assistance plans.** A review of over a dozen foreign family assistance plans<sup>26</sup> reveals that few foreign carriers have adopted the DOT’s plea to provide for the equal treatment of ground victims and passengers. Those that have include third-party victims, for example, as follows:

- “The treatment of families of non-revenue passengers (and any other victim of the accident) will be the same as the treatment of the families of revenue passengers.”
- “[The Carrier] intends to provide comparable assistance to all survivors and families directly affected by an aircraft accident, i.e., revenue passengers, aircraft crewmembers on duty, non-revenue passengers, and other persons.”

**Foreign air carrier treatment of ground victims.** It is clear that foreign air carriers technically have no obligation to provide family assistance support and services to the families of ground victims. However, assuming a small number of ground victims, foreign carriers would most likely treat the families of ground victims the same as the families of passengers. In the event that a foreign air carrier had an accident in the United States that resulted in a large number of ground victims, given the expense of providing the family assistance and support services, especially in a foreign country, and with no obligation to provide those services to the ground victims’ families, the decision to provide family assistance support and services to those families may be much more difficult.

### Conclusion

Despite the legislative history of the ADFAA and the DOT’s apparent view that U.S. air carriers’ family assistance plans are to cover ground victims as well as all types of passengers, many U.S. carriers’ plans deal only with the families of passengers and never make any reference to the families of ground (or third-party) victims. This is most likely due to the language of the ADFAA itself and to the DOT’s and the NTSB’s continued “acceptance” of plans omitting assurances that ground victims’ families will be treated the same as passengers’ families. A U.S. air carrier’s equal treatment of all victims of an accident is certainly commendable and no doubt creates goodwill for the air carrier. However, given the ambiguous language of the ADFAA, the potentially unlimited increased exposure, and the associated costs, a U.S. air carrier whose plan does not currently address the needs of ground victims’ families should think carefully before committing to extend family assistance support and services to those families.

On the other hand, it is clear that the FACFSA imposes no obligation on foreign air carriers to address the needs of ground victims’ families. Despite the DOT’s plea for equal treatment of ground victims and passengers, it appears that most foreign air carriers have excluded ground victims from their family assistance plans. However, for a number of different reasons, depending on the nature of the accident and number of ground victims, a foreign air carrier may opt to voluntarily extend its family assistance support and services to the families of ground victims.

**Notes**

1. H.R. 3923, 104th Cong. (1996); 142 CONG. REC. H10,552-02 (daily ed. Sept. 18, 1996) (401 “yeas” and four “nays”); *see, e.g.*, H.R. REP. NO. 104-793, at 5–7 (1996).
2. Pub. L. No. 104-264, §§ 701–05, 110 Stat. 3213, 3264 (1996) (codified at 49 U.S.C. §§ 1136, 41113).
3. 49 U.S.C. § 41113(a) (2006).
4. H.R. REP. NO. 105-371, at 3 (1997); *see, e.g.*, 143 CONG. REC. H10,561-03, H10,562 (daily ed. Nov. 9, 1997) (statement of Rep. Robert Underwood).
5. Pub. L. No. 105-148, 111 Stat. 2681 (1997) (codified at 49 U.S.C. § 41313).
6. Korean Air Flight 801 crashed on August 6, 1997. The FACFSA was enacted on December 16, 1997.
7. *Compare* 49 U.S.C. § 41113 (ADFAA), *withid.* § 41313 (FACFSA).
8. *Id.* § 41313(a)(1). Accordingly, neither the ADFAA nor FACFSA applies to Malaysian Airlines flight MH370, a passenger flight that disappeared from radar on March 8, 2014, en route from Kuala Lumpur, Malaysia, to Beijing, China, with 227 passengers and 12 crew members. As this article goes to press, the missing plane has not been located.
9. *Id.* § 41113(b).
10. *Id.* § 41113(b)(9) (emphasis added).
11. H.R. REP. NO. 104-793, at 11 (1996) (emphasis added).
12. Letter from Nancy E. McFadden, Gen. Counsel, Dep’t of Transp., to 166 U.S. Certificated Air Carrier Executives (Dec. 3, 1997).
13. 49 U.S.C. § 41113(c).
14. Letter from McFadden to Air Carrier Executives, *supra* note 12.
15. *Id.*
16. All U.S. air carrier family assistance plans are available at [www.regulations.gov](http://www.regulations.gov) (search “DOT-OST-1996-1960”).
17. 49 U.S.C. § 1136(h)(2), *amended by* Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, § 401(c), 114 Stat. 61, 129 (2000).
18. Pub. L. No. 106-181, § 401(c), 114 Stat. at 129 (codified at 49 U.S.C. § 1136(h)(2)(B)).
19. Although the terrorist hijacking of American Airlines Flights 11 and 77 and United Airlines Flight 175 resulted in a significant number of ground deaths, they are not representative of typical commercial aviation accidents due to the criminal nature of the attacks, the sheer magnitude of the loss, and other physical and logistical limitations. The applicability of the ADFAA to the 9/11 events and a discussion of the relevant legal issues are beyond the scope of this article. For a discussion of the application of the ADFAA to the 9/11 attacks, see Kristin Buja Schroeder, *Failing to Prevent the Tragedy, but Facing the Trauma: The Aviation Disaster Family Assistance Act of 1996 and the Air Transportation Safety and System Stabilization Act of 2001*, 67 J. AIR L. & COM. 189 (2002).
20. NTSB OFFICE OF TRANSP. DISASTER ASSISTANCE, FEDERAL FAMILY ASSISTANCE PLAN FOR AVIATION DISASTERS 14 (2008), *available at* [www.nts.gov/doclib/tda/Federal-Family-Plan-Aviation-Disasters-rev-12-2008.pdf](http://www.nts.gov/doclib/tda/Federal-Family-Plan-Aviation-Disasters-rev-12-2008.pdf) (emphasis added).
21. Asiana Airlines, Inc., Consent Order, Docket No. DOT-OST-2014-0001 (Feb. 25, 2014), *available at* [www.regulations.gov/#!documentDetail;D=DOT-OST-2014-0001-0006](http://www.regulations.gov/#!documentDetail;D=DOT-OST-2014-0001-0006).
22. *Id.*
23. H.R. REP. NO. 105-371, at 4.
24. Foreign Air Carrier Family Support Act of 1997 Questions and Answers, No. 14 (May 15, 1998) (on file with authors).
25. *Id.* (emphasis added).



26. All foreign air carrier family assistance plans are available at [www.regulations.gov](http://www.regulations.gov) (search “DOT-OST-1998-3304”).