

**THE ODD MAN OUT: AN AIR CARRIER'S OBLIGATION TO  
GROUND VICTIMS UNDER THE AVIATION DISASTER FAMILY  
ASSISTANCE ACT**

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# **THE ODD MAN OUT: AN AIR CARRIER'S OBLIGATION TO GROUND VICTIMS UNDER THE AVIATION DISASTER FAMILY ASSISTANCE ACT**

## **I. INTRODUCTION.**

In the wake of the Pam Am 103 bombing and the USAir Flight 427, ValuJet Flight 592, and TWA 800 accidents, the House of Representatives overwhelmingly passed the Aviation Disaster Family Assistance Act of 1996 (the “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 Airlines 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 Airlines Flight 801.<sup>6</sup> The FACFSA essentially imposed the same family assistance requirements, including the submission of a plan to the NTSB and DOT, 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. This article will compare the language of the ADFAA and

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<sup>1</sup> H.R. 3923, 104th Cong. (1996); 142 Cong. Rec. H10552-02, 1996 WL 528652 (Cong. Rec.) (401 “yeas” and 4 “nays”); *see, e.g.*, H.R. REP. NO. 104-793, 2d Sess., at 5-7 (1996) (emphasis added), 1996 WL 532668 (Leg. Hist.).

<sup>2</sup> Pub. L. No. 104-264, §§ 701-705, 110 Stat. 3213, 3264 (1996)

<sup>3</sup> 49 U.S.C.A. § 41113(a) (2006).

<sup>4</sup> H.R. REP. NO. 105-371, 1st Sess., at 3 (1997), 1997 WL 689812 (Leg. Hist.); *see, e.g.*, 143 Cong. Rec. H10561-03, H10562 (Nov. 9, 1997), 1997 WL 696107 (statement of Rep. Underwood).

<sup>5</sup> Pub. L. No. 105-148, 111 Stat. 2681 (1997).

<sup>6</sup> The Foreign Air Carrier Family Assistance Act was enacted on December 16, 1997. The crash of Korean Airline Flight 801 occurred on August 6, 1997.

<sup>7</sup> *Compare* 49 U.S.C. § 41113 *with* 49 U.S.C. § 41313 (2006).

<sup>8</sup> *Id.* § 41313(a)(1).

FACFSA to the legislative intent of the ADFAA and FACFSA and will examine various carriers' family assistance plans.

## II. THE AVIATION DISASTER FAMILY ASSISTANCE ACT OF 1996.

### A. Family Assistance Plan Requirements.

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

- The family member of each passenger will be consulted about the disposition of all remains and personal effects of the passengers within the control of the air carrier;<sup>9</sup>
- If requested by the family of a passenger, any possession of the passenger within the control of the air carrier will be returned to the family unless it is needed for the accident investigation or any criminal investigation;<sup>10</sup>
- Any unclaimed possession within control of the air carrier will be retained for at least 18 months;<sup>11</sup>
- The family of each passenger will be consulted about the construction by the air carrier of any monument to the passengers, including any inscription on the monument;<sup>12</sup>
- The air carrier will work with appropriate organization on an ongoing basis to ensure that families of passengers receive an appropriate level of services and assistance following each accident;<sup>13</sup> and
- The air carriers will assist the family of a passenger in traveling to the location of the accident and provide for the physical care of the family while the family is staying at such location.<sup>14</sup>

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<sup>9</sup> *Id.* § 41113(b)(5)

<sup>10</sup> *Id.* § 41113(b)(6).

<sup>11</sup> *Id.* § 41113(b)(7)

<sup>12</sup> *Id.* § 41113(b)(8)

<sup>13</sup> *Id.* § 41113(b)(10)

<sup>14</sup> *Id.* § 41113(b)(12)

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 nonrevenue passengers (*and any other victim of the accident*) will be the same as the treatment of the family of revenue passengers.”<sup>15</sup> It appears from a review of numerous air carrier family assistance plans that most 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 (i.e., dead-heading crew member, air marshal, FAA examiner, airline or contract maintenance personal, “stow-away,” 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 revenue passengers. The Section-by-Section Summary of the House Report accompanying the ADFAA (H.R. 3923) 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>16</sup> However, 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 passengers, employees or any third-party victims involved in aircraft accidents.”<sup>17</sup>

Under the ADFAA, the DOT may not approve any 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>18</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 that a plan did not meet the minimum requirements of § 41113(b). In December of 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>19</sup> Further, the DOT advised the air carriers that:

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<sup>15</sup> *Id.* § 41113(b)(9) (emphasis added).

<sup>16</sup> H.R. REP. NO. 104-793, 2d Sess., at 11 (1996) (emphasis added), 1996 WL 532668 (Leg. Hist.).

<sup>17</sup> Nancy E. McFadden, General Counsel, Dept. of Transportation, Letter to 166 U.S. Certificated Air Carrier Executives, December 3, 1997.

<sup>18</sup> 49 U.S.C. § 41113(c).

<sup>19</sup> McFadden, *supra* note 17.

After an 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 Department. 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>20</sup>

## **B. U.S. Air Carrier Family Assistance Plans.**

As noted, most U.S. air carriers do not mention ground victims or "third-party victims" anywhere in their family assistance plans, much less make an assurance that they will be treated the same as other revenue or nonrevenue passengers. The following excerpts from various passenger and cargo carriers' family assistance plans,<sup>21</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 will provide family assistance without regard to an individual's status as a revenue customer, non-revenue passenger or crew member."
- ❖ "[Carrier] provides family assistance without regard to an individual's status as a revenue customer, non-revenue customer, or crew member."
- ❖ "The Airline will provide assistance and treatment to all passengers and their families, including employees of the Airline or any other air carrier and other non-revenue passengers family on an equal basis consistent with the assistance offered or provided to revenue passengers and their families."
- ❖ "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;

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<sup>20</sup> *Id.*

<sup>21</sup> All U.S. air carrier family assistance plans are available at <http://www.regulations.gov>. (DOT Docket No. OST-1996-1960).

- 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.”
- ❖ “Assure families that the families of all victims (crewmembers, couriers, jumpseaters, etc.) that they will be treated equally.”
- ❖ “All occupants of the aircraft will receive the same support and treatment under this plan as a passenger as defined in this plan.”

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:

- ❖ “[Carrier] is committed to providing the same support services and treatment for families of non-revenue passengers (and any other victim of the accident) as for revenue passengers.”
- ❖ “[The Airline] intends to provide comparable assistance to all survivors and families directly affected by an aircraft accident, *i.e.*, revenue passengers, aircraft crew members on duty, nonrevenue passengers, and other persons.”
- ❖ “Families of non-revenue passengers and of [Carrier] employee passengers (and any other victim of the accident) shall be treated the same as any other passenger’s family under this Plan.”
- ❖ “In the event of an accident, [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 possibly by the company.”

Any misunderstanding or confusion concerning an air carrier’s obligation to ground victims under the ADFAA, however, is understandable given the language of the ADFAA. Certainly, the main emphasis of the ADFAA is on the families of passengers involved in an aircraft accident. Even the titles of the sections of the United States Code which codify the ADFAA, 49 U.S.C. § 1136 – *Assistance to families of passengers involved in aircraft accidents* and 49 U.S.C. § 41113 – *Plans to address needs of families*

*of passengers involved in aircraft accidents*, lead one to believe that these sections deal exclusively with passengers and their families. To help clarify the applicability of these sections to ground victims, all that needed to be done was to simply insert “and any other victims” after “passengers” in each section title. Further, throughout the ADFAA only the families of “passengers” are referred to. 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 of the parenthetical reference to “other victims of the accident” immediately following the term “nonrevenue passengers” in § 41113(b)(9). One can reasonably interpret the parenthetical as solely expanding the term “nonrevenue passengers” to include, *inter alia*, dead-heading crew members, FAA observers, and maintenance personal. Any uncertainty over the meaning of the parenthetical may have been compounded by the 2000 amendment to the ADFAA that expanded the definition of “passenger.” As originally enacted, the ADFAA stated that the term “passenger” was also to include “an employee of an air carrier aboard an aircraft.”<sup>22</sup> In April of 2000, the ADFAA was amended to expand the definition of “passenger” 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>23</sup> essentially clarifying the air carriers’ duties to any type of nonrevenue passengers. This expansion of the definition of passenger in § 1136 could easily be construed to be the logical counterpart to the parenthetical in § 41113(b)(9).

### C. 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 repercussions. However, consider a situation where a commercial aircraft accident claims the life 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

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<sup>22</sup> 49 U.S.C.A. § 1136(h)(2), *amended by* Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, Pub. L. 106-181 § 402, 114 Stat. 129 (2000), *codified in* 49 U.S.C.A. § 1136(h)(2)(A) (2006).

<sup>23</sup> Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century, Pub. L. 106-181 § 402, 114 Stat. 129 (2000), *codified as* 49 U.S.C.A. § 1136(h)(2)(B) (2006).

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 the 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, transport to the accident site and lodging while at the accident site, counseling, etc. Therefore, the additional cost to the airline and/or its insurer due to its obligations under the ADFAA in terms of true monetary expenditures (i.e., lodging and meals for the ground victim’s family, processing and return of the ground victims’ personal effects, etc.), employee man-hours (i.e., employee counselors assigned to the families of ground victims), and lost revenue (i.e., transporting family members of ground victims to the accident site, memorial services, and anniversary ceremonies) in an accident involving a large number of ground victims 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 mainstream 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 the families of the ground victims 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>24</sup> 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 American Airlines Flight 587 accident in Belle Harbor, New York on November 12, 2001 resulted in five ground deaths. And the recent 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.

Since there are usually relatively few ground victims in commercial aviation accidents, airlines, 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 life of 200, 500, or 1000 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 (i.e., the DOT and the NTSB) would pressure the air carrier to provide the same support and services to the families of the ground victims as they provide to the families of passengers. 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 families of ground victims.

However, an argument can be made by an air carrier that, based on the language of the ADFAA and the DOT's and 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

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<sup>24</sup> 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 on-going criminal investigation of the attacks, the sheer magnitude of the loss, and other physical and logistical limitations. The applicability of the ADFAA to the September 11<sup>th</sup> events and a discussion of the relevant legal issues are beyond the scope of this paper. For a discussion of the application of the ADFAA to the September 11<sup>th</sup> 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 System Stabilization Act of 2001*, 67 J. Air L. & Comm. 189 (2002).

accident. If the NTSB has adopted the DOT's opinion that family assistance plans should address the needs of passengers, employees, and third-party 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.

### **III. THE FOREIGN AIR CARRIER FAMILY ASSISTANCE ACT.**

#### **A. 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>25</sup> and generally the legislation mirrors the ADFAA, there are a few significant differences. Most noticeably for the purposes of this article, 49 U.S.C. § 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 on 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 49 U.S.C. § 41113(c)(9) to extend application of the ADFAA to “any other victim of the accident” was never included.

In March of 1998, the DOT issued a Questions and Answers sheet that, in part, addressed this discrepancy between the ADFAA and the FACFSA.<sup>26</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 they “strongly urge foreign air carriers to incorporate coverage for third-party victims in their plans.”<sup>27</sup>

#### **B. Foreign Air Carrier Family Assistance Plans.**

A review of over a dozen foreign assistance plans<sup>28</sup> reveals that few foreign carriers have adopted the DOT's plea to provide for the equal treatment of ground victims and passengers. At least one of the foreign

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<sup>25</sup> H.R. Rep. No. 105-371, at 4.

<sup>26</sup> Foreign Air Carrier Family Support Act of 1997 Questions and Answers, No. 14, dated May 15, 1998, available at <http://www.dot.gov/affairs/taskforce/faq.html>.

<sup>27</sup> *Id.* (emphasis added)

<sup>28</sup> All foreign air carrier family assistance plans are available at <http://www.regulations.gov>. (DOT Docket No. OST-1998-3304).

carrier's family assistance plans reviewed arguably applies to third-party victims, stating that "the carrier is prepared to act in the best interest of survivors and victims' families." Further, this carrier's plan generally used the term "victim" instead of "passenger" throughout the plan.

### **C. 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 U.S. 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 families of ground victims, the decision to provide family assistance support and services to the families of ground victims may be much more difficult.

### **III. 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 victims (or third-party victims). This is most likely due to the language of the ADFAA itself and to the DOT's and NTSB's continued "acceptance" of plans that exclude assurances that the families of ground victims will be treated the same as the families of passengers. 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 plans do not currently address the need of the families of ground victims may need to 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 the families of ground victims. 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.