Comments

A Plaintiff's Guide to Surviving the General Aviation Revitalization Act (GARA) Defense: What Works and What Doesn't

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I. INTRODUCTION

Since its peak in 1978, the general aviation[1] industry in the United States has been on a steady decline.[2] An industry that once sold 17,811 general aviation aircraft per year only sold 899 by 1992.[3] The result has been job losses totaling 100,000 and the deterioration of the United States' position in international trade.[4]

Although several factors contributed to the decline in the general aviation industry,[5] in hearings before Congress, manufacturers and users of general aviation consistently identified excessive product liability costs as a major cause of the industry's decline.[6] Even though safety has improved over the past decades—the accident rate for general aviation dropped thirty percent from 1981 to 1994—manufacturers' litigation costs have continued to increase.[7] As a result, Congress enacted the General Aviation Revitalization Act of 1994 (GARA) in an effort to revitalize a once flourishing industry.[8] GARA establishes "an 18 year statute of repose for a civil action against an aircraft manufacturer for damages arising out of an accident involving a general aviation aircraft."[9] Under GARA, a manufacturer is protected from liability if its aircraft is in-

1. Robert Martin, *General Aviation Manufacturing: An Industry under Siege*, *in* THE LIABILITY MAZE 478, 478 (Peter W. Huber & Robert Litan eds., 1991) ("General aviation" refers to all civil aviation that does not involve regularly scheduled passenger traffic).
2. S. REP. NO. 103-202, at 1 (1993).
3. *Id.*
4. H.R. REP. NO. 103-525, pt. 1, at 2 (1994).
5. 140 CONG. REC. S3280, S3280 (1994) (statement of Sen. Daschle).
6. H.R. REP. NO. 103-525, pt. 1, at 2.
7. 140 CONG. REC. H4998, H5000 (1994) (statement of Rep. Clinger).
8. *See* H.R. REP. NO. 103-525, pt. 1, at 1-3.
9. *Id.* at 1.

volved in an accident more than eighteen years after the aircraft was delivered to its first purchaser.[10] If a new component part is added to the aircraft or replaced by another part, the statue of repose starts over for that part "beginning on the date of completion of the replacement or addition."[11]

The stated purpose of the statute was "to limit excessive product liability costs, while at the same time affording fair treatment to persons injured in general aviation aircraft accidents."[12] One reason Congress determined a statute of repose would not be unfair to consumers is that most general aviation aircraft accidents are caused by pilot error rather than a manufacturing or design defect. Ninety-three percent are caused by pilot error,[13] while only one percent are caused by manufacturing or design defects.[14] Of those accidents caused by a manufacturing or design defect, nearly all of such defects are discovered early in the life of the aircraft.[15] Thus, Congress determined it was "extremely unlikely that there [would] be a valid basis for a suit against the manufacturer of an aircraft that is more than 18 years old."[16] However, Congress noted that "even though a claimant is unlikely to be successful in a lawsuit against the manufacturer of an aircraft which is more than 18 years old, these suits are frequently filed."[17] Manufacturers have to spend money either litigating these suits or settling to avoid litigation.[18] In addition, it would be unfair to hold manufacturers liable after their aircraft have a proven record of reliability: "A statute of repose is a legal recognition that, after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible for an accident or injury occurring after that much time has elapsed."[19]

The enactment of GARA marked the first imposition of a federal statute of repose.[20] Congress stressed that because of the uniqueness of the aviation industry, it was willing to take this unprecedented step; aviation is unlike any other industry in that it is the only one subjected to

10. General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, §§ 2(a), 3(3), 108 Stat. 1552, 1552-53 (1994) [hereinafter GARA].

11. *Id.* § 2(a)(2).

12. H.R. REP. NO. 103-525, pt. 1, at 1-2 (1994).

13. 104 CONG. REC. S2991, S2992 (1994) (statement of Sen. McCain).

14. H.R. REP. NO. 103-525, pt. 1, at 3.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. 140 CONG. REC. H4998, H4999 (1994) (statement of Rep. Fish).

20. *Id.* at H5004 (statement of Rep. Synar).

"'cradle to grave' Federal regulatory oversight . . . ."[21] Because of this oversight, limiting a manufacturer's liability will not be to the detriment of safety.[22] Even without the deterrent of infinite liability, manufacturers of general aviation still have to satisfy the rigid safety standards required by the Federal Aviation Administration (FAA).[23]

Congress identified two other elements of fairness in GARA.[24] First, GARA provides four exceptions from the statute of repose: for knowing misrepresentations by manufacturers, for passengers seeking treatment for medical emergencies, for persons injured while not aboard the aircraft when it crashed, and for manufacturers' written warranties.[25] Second, the statute is "rolling" with regard to newly installed parts, so that if the part causing the accident is less than eighteen years old, the manufacturer of that part is not protected by GARA.[26]

Despite all of these rationalizations for the appropriateness of a federal statute of repose, there will still be occasions when a legitimate claimant injured in a general aviation accident because of a design or manufacturing defect is, nevertheless, barred by GARA from bringing a cause of action against the manufacturer. A claimant seeking to bring an action that might be barred by GARA needs to be familiar with the language of the statute and how courts have applied the statute.[27] For the claimant pursuing a products liability action against a general aviation manufacturer, "GARA erects a formidable first hurdle . . . ."[28] But if the claimant defeats the GARA defense, for example, by showing that one of its exceptions applies or by showing that some aspect of the statute is not satisfied, then the claimant will be left only to contend with her state's usual products liability laws.

This Comment provides an analysis of the practical application of the statute in order to guide plaintiffs who may seek products liability actions against general aviation manufacturers. It looks at the issues that have arisen regarding the application of GARA since its enactment in 1994 and analyzes the various outcomes in the case law to provide some indication of which arguments have merit and which ones are certain losers. Since GARA does not apply to an accident unless the aircraft involved is a general aviation aircraft, this Comment starts, in section II, by helping the reader understand what "general aviation aircraft" means according

21. H.R. REP. NO. 103-525, pt. 2, at 5-6 (1994).
22. *See id.*
23. *Id.*
24. H.R. REP. NO. 103-525, pt. 1, at 3 (1994).
25. *Id.*
26. *Id.*
27. *See* Rickert v. Mitsubishi Heavy Indus., Ltd., 929 F. Supp. 380, 383 (D. Wyo. 1996).
28. *Id.*

the definition set forth in GARA. Then, in section III, the Comment discusses issues surrounding how to determine when the statute begins to run. In section IV, it explains how courts have determined who is a "manufacturer" protected by GARA, since the statute itself does not provide a definition. Next, section V explores the issue of how to know when a manufacturer is acting in its capacity as a manufacturer, and when it is not. Section VI seeks to provide some clarity to the difficult questions that arise regarding GARA's rolling provision, including how courts have handled revised flight manuals and overhauled or redesigned parts. In section VII, the Comment then discusses the four exceptions to GARA's statute of repose, focusing mainly on the exception that has generated the most litigation—the "knowing misrepresentation" exception. Section VIII looks at the jurisdictional issues that have arisen in applying GARA, including whether GARA confers subject matter jurisdiction on federal courts and whether GARA applies to accidents that occurred outside the United States. Finally, section IX outlines the various constitutional challenges that have been lodged against GARA and explains why they have all failed.

II. Defining "General Aviation Aircraft"

For GARA to bar a claim against a general aviation manufacturer, the injury, accident, or death giving rise to the claim must involve a "general aviation aircraft" as defined by GARA.[29] GARA defines a general aviation aircraft as:

> [A]ny aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations as defined under regulations in effect under the Federal Aviation Act of 1958 (49 U.S.C.App. 1301 et seq.) [as amended by 49 U.S.C.A. § 40101 et seq.] at the time of the accident.[30]

Plaintiffs need to be aware of how courts have construed and applied this definition because, if a plaintiff can successfully argue that the aircraft does not satisfy some aspect of this definition, then GARA cannot operate to bar that claim.

To be considered a general aviation aircraft as defined by GARA, the aircraft must have either a type or airworthiness certificate.[31] The

29. General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, § 2(a), 108 Stat. 1552, 1552-53 (1994).

30. *Id.* § 2(c).

31. *Id.* § 2(c). Airworthiness certificate "means an airworthiness certificate issued under section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(c)) [see 49 U.S.C.

certificate may be either "restricted" or "standard."[32] GARA adopts the Federal Aviation Act definition of "airworthiness certificate."[33] Because the Act does not distinguish between a standard and a restricted airworthiness certificate, an argument that GARA only applies to aircraft with a "standard" airworthiness certificate and not a "restricted" airworthiness certificate must fail.[34]

An airworthiness certificate does not become invalid merely because modifications were made to the aircraft after it was certified, as long as the alterations are done in accordance with FAA regulations Parts 43 and 91.[35] In order to retain its airworthiness certificate after modifications, the FAA must approve the aircraft for return to service,[36] but the regulations do not require a new airworthiness certificate be issued after modifications are made.[37] The plaintiff in *Schwartz v. Hawkins & Powers Aviation, Inc.* erroneously argued that because modifications made subsequent to the accident had not been approved, the previously issued airworthiness certificate was invalid.[38] Instead, the plaintiff should have argued that the aircraft had not been approved for return to service, which is required for the certificate to remain valid.[39] The district court held that the aircraft in question had a valid airworthiness certificate at the time of the accident.[40] Had the plaintiff offered evidence that the aircraft had not been approved for return to service, the court may have found that the airworthiness certificate was, in fact, invalid—and therefore that the aircraft was not a general aviation aircraft protected by GARA.

In addition, an aircraft that meets the definition of a "public aircraft" is not precluded from also being considered a general aviation aircraft.[41] The plaintiff in *Schwartz* argued that the aircraft in question was not a

§ 44704(d)(1)] or under any predecessor Federal statute." *Id.* § 3(2). Type certificate "means a type certificate issued under section 603(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(a)) [see 49 U.S.C. § 44704(a)] or under any predecessor Federal statute." *Id.* § 3(4).

32. Schwartz v. Hawkins & Powers Aviation, Inc., No. 04-CV-195-D, 2005 U.S. Dist. LEXIS 12188, at *11-12 (D. Wyo. 2005).

33. GARA § 3(2). The Federal Aviation Act states, "The registered owner of an aircraft may apply to the Administrator for an airworthiness certificate for the aircraft. The Administrator shall issue an airworthiness certificate when the Administrator finds that the aircraft conforms to its type certificate and, after inspection, is in condition for safe operation." 49 U.S.C. § 44704(d)(1) (2005).

34. *Schwartz*, 2005 U.S. Dist. LEXIS 12188, at *11-12.

35. *Id.* (citing 14 C.F.R. § 21.181 (2006)).

36. 14 C.F.R. § 43.5 (2006).

37. *Schwartz*, 2005 U.S. Dist. LEXIS 12188, at *12 (referencing 14 C.F.R. § 43.5 (2006)).

38. *Id.*

39. *See id.* at *12-13.

40. *Id.* at *13.

41. *Id.* at *11.

general aviation aircraft under GARA because it satisfied the definition of public aircraft under the Federal Aviation Act.[42] The term public aircraft, as used in the Federal Aviation Act, generally refers to certain aircraft owned or leased by the federal government.[43] The court rejected the plaintiff's argument because each statute has and uses its own definitions and nothing in GARA states that a public aircraft, as defined by the Federal Aviation Act, cannot also be a general aviation aircraft, as defined by GARA.[44]

III. When the Statute Begins to Run

GARA's eighteen-year limitation period begins to run on "the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer"[45] or, with respect to any part that is added to the aircraft or that replaces another part, the date that such part is added or replaced.[46] If the aircraft is not delivered directly from the manufacturer, then the period begins on "the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft."[47] GARA bars a claim if the accident upon which it is based occurred more than eighteen years after the aircraft was delivered.[48]

Note that the statute does not state that the limitation period begins from the date the *general aviation* aircraft is initially delivered.[49] Rather, the period begins on the delivery date of the *aircraft*.[50] This means that even if the aircraft, upon delivery, does not meet the definition of a "general aviation aircraft," the statutory period still begins to run.[51] The aircraft only need be a general aviation aircraft at the time of the accident for GARA to apply.[52] In *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, the helicopter that was the subject of the litigation was initially delivered to the military in 1970 and used as a "public aircraft."[53] Because the helicopter was not required to have, and did not have, a type or airworthiness certificate it did not qualify as a "general aviation aircraft" under

42. *Id.* at *10.
43. 49 U.S.C. § 40102(a)(41) (2006).
44. *Schwartz*, 2005 U.S. Dist. LEXIS 12188, at *10-11.
45. General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, § 2(a)(1)(A), 108 Stat. 1552, 1552-53 (1994).
46. *Id.* § 2(a)(2).
47. *Id.* § 2(a)(1)(B).
48. *See id.* §§ 2(a)(1), 3(3).
49. *See id.* § 2(a).
50. *Id.* § 2(a).
51. Estate of Kennedy v. Bell Helicopter Textron, Inc., 283 F.3d 1107, 1112 (9th Cir. 2002).
52. *See id.*
53. *Id.*

GARA at that time.[54] The plaintiff argued that GARA's statutory period did not begin to run until the aircraft became a "general aviation aircraft" in 1986—when it received its first type certificate and airworthiness certificate—which was less than eighteen years before the accident.[55] The court disagreed, finding that the plain language of the statute contradicted the plaintiff's argument.[56] According to GARA, an aircraft cannot satisfy the definition of a general aviation aircraft until the accident occurs because "one condition which must be met in order for an aircraft to qualify as a general aviation aircraft is that it 'was not, *at the time of the accident*, engaged in scheduled passenger-carrying operations . . . .'"[57] GARA, therefore, does not require that the aircraft delivered must be a general aviation aircraft in order for the statute to begin to run because, by definition, an aircraft cannot satisfy GARA's definition of general aviation aircraft until after an accident occurs.[58]

IV. Who is a Manufacturer

Nowhere does GARA define who qualifies as a manufacturer of general aviation protected by GARA.[59] Because of this, courts have had to address issues regarding how to identify the manufacturer of the particular product and regarding whether the statute protects successor manufacturers and foreign manufacturers.[60]

Because aircraft parts are constantly being replaced[61] and may be replaced by many different manufacturers, it may be difficult to determine who the manufacturer of the allegedly defective part is.[62] One issue that arose in *Campbell v. Parker-Hannifin Corp.* was whether the defendant, Cessna, was the manufacturer of the new gyroscopic artificial horizon part that replaced an older part in 1994.[63] This was significant because the aircraft, which had been manufactured by Cessna, had been

54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* (emphasis added).
58. *See id.*
59. *See generally* General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, 108 Stat. 1552, 1552-53 (1994).
60. *See, e.g.*, Campbell v. Parker-Hannifin Corp., 69 Cal. App. 4th 1534, 1545-46 (Cal. Ct. App. 1999) (dealing with how to identify the manufacturer of a particular part); Burroughs v. Precision Airmotive Corp., 78 Cal. App. 4th 681, 692 (Cal. Ct. App. 2000) (finding successor manufacturers are protected by GARA); Mason v. Schweizer Aircraft Corp., 653 N.W.2d 543, 548-49 (Iowa 2002) (finding successor manufacturers are protected by GARA); Lahaye v. Galvin Flying Serv., Inc., 144 F. App'x. 631, 633 (9th Cir. 2005) (holding GARA protects foreign manufacturers of general aviation).
61. Butchkosky v. Enstrom Helicopter Corp., 855 F. Supp. 1251, 1255 (S.D. Fla. 1993).
62. *See Campbell*, 69 Cal. App. 4th at 1546.
63. *Id.* at 1546-47.

delivered more than eighteen years before the accident.[64] If the plaintiff could establish that Cessna was the manufacturer of the replacement part, then the statutory period would start over in 1994, and the plaintiff's case against Cessna would not be time-barred.[65] The problem was that even though the dataplate attached to the part had the name "Cessna" stamped on it, the dataplate also bore the words "Manufactured by Aeritalia Settore Strumentazione."[66] After Cessna declared that it did not design or manufacture the part, the plaintiff was unsuccessful in arguing that the name "Cessna" being stamped on the part raised enough of an inference that Cessna was the manufacturer to survive summary judgment.[67]

Successor manufacturers are protected by GARA to the same extent the predecessor manufacturer would have been with respect to the newly acquired product lines.[68] A successor manufacture is a manufacturer that acquires an existing product line as part of its ongoing business.[69] The district court in *Burroughs v. Precision Airmotive Corp.* noted that "[t]he term 'manufacturer' is nowhere defined in GARA, and GARA does not specifically include successor manufacturers within the protection of the statute."[70] The court, nevertheless, found that the statute protects successor manufacturers because they take over the responsibilities of the predecessor.[71] To find otherwise would undermine the objective of GARA since the successor manufacturer is also part of the general aviation industry.[72]

A successor manufacturer should be distinguished from a company that merely acquires the assets of a general aviation manufacturer.[73] The issue in *Michaud v. Fairchild Aircraft Inc.* was whether the defendant successor corporation was a manufacturer protected by GARA.[74] The defendant corporation, FAI, purchased the assets of the company that manufactured the aircraft in question from its trustee in bankruptcy.[75] The Delaware appellate court in *Michaud* distinguished FAI from the successor manufacturer in *Burroughs*: "FAI did not take over the respon-

64. *Id.* at 1538.
65. *Id.* at 1545.
66. *Id.* at 1546.
67. *Id.*
68. Burroughs v. Precision Airmotive Corp., 78 Cal. App. 4th 681, 692 (Cal. Ct. App. 2000); Mason v. Schweizer Aircraft Corp., 653 N.W.2d 543, 548-49 (Iowa 2002).
69. *Burroughs*, 78 Cal. App. 4th at 692.
70. *Id.*
71. *Id.*
72. *Id.*
73. *See* Michaud v. Fairchild Aircraft Inc., No. 00C-06-156 SCD, 2001 Del. Super. LEXIS 482, at *8 (Del. Super. Ct. Nov. 16, 2001).
74. *See id.* at *5.
75. *Id.* at *5-6.

sibilities of the predecessor corporation; it simply acquired its assets."[76] Because FAI did not continue to manufacture the predecessor's products, it was not protected by GARA.[77] Unlike the successor in *Burroughs*, FAI was "not the type of entity GARA was designed to protect."[78]

Regarding whether GARA applies to foreign manufacturers, one could argue that since GARA was designed to revitalize the *domestic* general aviation industry[79] and since the statute does not specifically state that foreign manufacturers are protected,[80] then Congress must have intended for GARA only to protect domestic manufacturers of general aviation. Yet, the only court to directly discuss this issue held to the contrary.[81] The Ninth Circuit supported its conclusion that GARA also protects foreign manufacturers of general aviation by pointing to the definition of "general aviation aircraft" provided in GARA, which refers to "*any* aircraft for which the [FAA] has issued a type certificate or airworthiness certificate."[82] Since an aircraft manufactured by a foreign entity can receive a type or airworthiness certificate and satisfy GARA's definition of a general aviation aircraft, then GARA must apply to foreign manufacturers.[83]

V. Capacity as a Manufacturer

For a manufacturer to be protected under GARA, the claim must be made against the manufacturer in its capacity as a manufacturer.[84] Congress did not want parties that were acting in a capacity other than as a manufacturer to be protected by GARA just because they also happened to be manufacturers. For example, if a manufacturer committed a negligent act as a mechanic or as a pilot that caused the accident, "the victims would not be barred from bringing a civil suit for damages against the party in its capacity as a mechanic."[85] A manufacturer acting in those capacities is not protected by GARA "to the extent that its role caused or contributed to the accident."[86] Accordingly, plaintiffs have advanced ar-

76. *Id.* at *8.
77. *Id.*
78. *Id.*
79. *See* H.R. Rep. No. 103-525, pt. 1, at 1-2 (1994).
80. *See* General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, § 2(a), 108 Stat. 1552, 1552-53 (1994).
81. Lahaye v. Galvin Flying Serv., Inc., 144 F. App'x. 631, 633 (9th Cir. 2005) (holding previous case implicitly held GARA protects foreign manufacturers of general aviation (citing Lyon v. Agusta S.P.A., 252 F.3d 1078 (9th Cir. 2001))).
82. *Lahaye*, 144 F. App'x at 633.
83. *See id.*
84. *See* GARA § 2(a).
85. H.R. Rep. No. 103-525, pt. 2, at 6-7 (1994).
86. Mason v. Schweizer Aircraft Corp., 653 N.W.2d 543, 551 (Iowa 2002).

guments for how a manufacturer could have been acting in another capacity.[87]

Arguments that failure-to-warn claims are not subject to GARA because the duty to warn does not stem from the manufacturer's role as a manufacturer have been unsuccessful.[88] Claimants have attempted to avoid GARA altogether by couching their claims in terms of failure to warn instead of in terms of manufacturing or design defect.[89] Plaintiffs making this argument have alleged that the defendant's duty to warn of manufacturing or design defects is ongoing and is not derived from the manufacturer's duty as a manufacturer.[90] Since GARA only applies to suits against a manufacturer in its capacity as a manufacturer, then, under this theory, GARA would not apply. Courts, however, have found that allowing a failure to warn claim to succeed would eviscerate GARA altogether because any time a manufacturing or design defect suit was barred, a plaintiff could instead sue on the theory of failure to warn of such a defect.[91] Clearly, this was not Congress's intent.[92]

Similarly, selling separate maintenance materials is not an undertaking separate from the manufacture of the aircraft or component part sufficient to trigger a duty to warn distinct from the manufacturer's duties as a manufacturer.[93] The plaintiff in *Mason v. Schweizer Aircraft Corp.* purchased a helicopter from the defendant and subsequently purchased materials from the defendant regarding how to inspect and maintain the helicopter.[94] When the helicopter crashed because of a cracked air filter housing, the plaintiff alleged the defendant's duty to warn of the defective housing did not arise because the defendant manufactured the housing but because it undertook to sell maintenance and inspection materials.[95] The plaintiff argued that "the services provided by [the defendant] went beyond its role as the manufacturer."[96] After noting that a manufacturer has an initial legal obligation to provide a maintenance manual, the Iowa Supreme Court found that when a manufacturer subsequently sells revised manuals, it does not cross "the line from manufac-

87. *See, e.g.,* Schwartz v. Hawkins & Powers Aviation, Inc., No. 04-CV-195-D, 2005 U.S. Dist. LEXIS 12188, at *17 (D. Wyo. Apr. 7, 2005); *Mason*, 653 N.W.2d at 549-50; Burroughs v. Precision Airmotive Corp., 78 Cal. App. 4th 681, 692 (Cal. Ct. App. 2000).

88. *See, e.g., Burroughs*, 78 Cal. App. 4th at 692; Campbell v. Parker-Hannifin Corp., 69 Cal. App. 4th 1534, 1547 (Cal. Ct. App. 1999).

89. *See Burroughs*, 78 Cal. App. 4th at 692, 694.

90. *See, e.g., Burroughs*, 78 Cal. App. 4th at 698; *Campbell*, 69 Cal. App. 4th at 1546.

91. *See, e.g., Campbell*, 69 Cal. App. 4th at 1547 (citing Alter v. Bell Helicopter Textron, Inc., 944 F. Supp. 531, 540 (S.D. Tex. 1996)).

92. *See* H.R. REP. NO. 103-525, pt. 1, at 1-2 (1994).

93. Mason v. Schweizer Aircraft Corp., 653 N.W.2d 543, 551 (Iowa 2002).

94. *Id.* at 545.

95. *Id.* at 550.

96. *Id.* at 551.

turer to service provider . . . ."[97]

For the same reasons that a manufacturer's duty to warn is derived from its duty as a manufacturer, so too is a successor manufacturer's duty to warn derived from its duty as a manufacturer. In *Burroughs v. Precision Airmotive Corp.*, the corporation that initially designed, manufactured, and sold the carburetor, which was the subject of the litigation, had sold the product line, including the carburetor, to the defendant.[98] The plaintiff claimed that the defendant successor corporation was liable for the carburetor's failure because the defendant, after purchasing the product line, undertook to provide service bulletins and other information about the predecessor manufacturer's carburetors, implying that the successor's duty to warn was somehow distinct from the predecessor's duty to warn.[99] The California appellate court in *Burroughs* found that the defendant's "duty with respect to reporting and issuing service bulletins and information was the same as its predecessors' and derives from its status as the manufacturer . . . for the product."[100] The defendant, therefore, was acting in its capacity as a manufacturer when it issued the bulletins and was protected by GARA.[101]

VI. Component Parts: The "Rolling" Feature

In Congress's attempt to strike "a fair balance between manufacturers, consumers, and persons injured in aircraft accidents," it made GARA a "rolling" statute of repose by providing that whenever a part in an aircraft is substituted with a replacement part, the statutory eighteen-year period starts over for that newly added or replaced part.[102] Thus, a newly manufactured component part receives the same limitation period as the aircraft in which it is installed.[103] In addition, the new time period only applies to the manufacturer of the new component part.[104]

A. The Problem of Maintenance and Repair Manuals

Recall that basing a claim on the failure to warn of a design or manufacturing defect rather than on the defect itself cannot circumvent GARA's eighteen-year statute of repose.[105] Presumably because failure

97. *Id.*
98. Burroughs v. Precision Airmotive Corp., 78 Cal. App. 4th 681, 699 (Cal. Ct. App. 2000).
99. *See id.* at 700.
100. *Id.* at 699-700.
101. *Id.* at 700.
102. *See* H.R. Rep. No. 103-525, pt. 1, at 3 (1994).
103. 140 Cong. Rec. H4998, H5001 (1994) (statement of Rep. Glickman).
104. *See* Campbell v. Parker-Hannifin Corp., 69 Cal. App. 4th 1534, 1545-46 (Cal. Ct. App. 1999).
105. *See* General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, § 2, 108 Stat. 1552, 1552-53 (1994).

to warn claims could not succeed in circumventing GARA, plaintiffs turned to a similar, and sometimes difficult to distinguish, theory that maintenance and repair manuals are component parts.[106] As component parts, when maintenance or repair manuals are revised or updated, GARA's rolling provision would be triggered for that part.[107] For a manual to trigger the rolling feature of GARA, a plaintiff must show that the manual itself was substantially altered, or a provision was deleted, within the repose period and that such "revision or omission is the proximate cause of the accident."[108]

The key distinction between cases in which courts have allowed an aircraft manual to trigger GARA's rolling feature and those that have not is whether the plaintiff alleges that the manual itself is defective or whether the plaintiff merely alleges the manual failed to warn about a separate manufacturing or design defect.[109] The Ninth Circuit in *Caldwell v. Enstrom Helicopter Corp.* distinguished the plaintiff's action from a failure to warn claim by noting that the plaintiff was not alleging that the helicopter involved in the crash was defective and that the helicopter's manual failed to warn of that defect; rather, the plaintiff claimed the manual itself was the defective part.[110] The crash in *Caldwell* occurred because the helicopter's pilot did not know that the helicopter could not burn the last two gallons of gasoline in the fuel tanks.[111] As a result, the helicopter ran out of usable fuel within 10 minutes of its destination and crashed.[112] The plaintiff conceded that the fuel tanks themselves worked properly, but argued that the manual was defective "because it [did] not include relevant information about the limits on the fuel tanks' ability to burn the last two gallons of fuel."[113] The plaintiff successfully argued that the manual was a part of the helicopter and since it had been revised within the last eighteen years, GARA's rolling feature was triggered.[114]

Relying on *Driver v. Burlington Aviation, Inc.*, a pre-GARA case applying a North Carolina statute of repose, the Ninth Circuit in *Caldwell* agreed that the plaintiff's claim was distinct from a mere failure to warn

106. *See, e.g.*, Mason v. Schweizer Aircraft Corp., 653 N.W.2d 543, 552 (Iowa 2002); Carolina Indus. Prods., Inc. v. Learjet, Inc., 189 F. Supp. 1147, 1170-71 (D. Kan. 2001); Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1156 (9th Cir. 2000).

107. *Mason*, 653 N.W.2d at 552; *Carolina Indus. Prods., Inc.*, 189 F. Supp. at 1170-71; *Caldwell*, 230 F.3d at 1156.

108. *Caldwell*, 230 F.3d at 1158.

109. *Id.* at 1157.

110. *Id.* at 1156.

111. *Id.*

112. *Id.*

113. *Id.* at 1156-57.

114. *Id.*

claim, which would be barred by GARA.[115] In *Driver*, the plaintiffs alleged that the crash of a Cessna model 152 aircraft occurred because the pilot relied on Cessna's information manual, which provided "dangerously inadequate information."[116] The plaintiffs sued Cessna for negligent misrepresentation,[117] but Cessna argued that the plaintiffs' underlying action was actually a products liability action for the defective aircraft.[118] The trial court found the claim was barred by North Carolina's statute of repose and granted the defendant's motion to dismiss.[119] The reviewing court disagreed:

> We find . . . that if plaintiffs' underlying action is a products liability action, the product to which the action applies is not the aircraft as Cessna suggests, but the instructional manual. There are no allegations in plaintiffs' amended complaint contending that the aircraft was in any way defective. In fact, plaintiffs concede that carburetor icing is a common condition which occurs in any aircraft . . . .[120]

Because neither party pled the date of the manual's sale, which would be the date triggering the repose period, the trial court did not have enough information to dismiss the plaintiffs' action.[121]

The Ninth Circuit in *Caldwell*, after finding that the plaintiff's claim was not for a defective aircraft but for a defective manual, was left only to decide whether the flight manual was a part of the aircraft capable of triggering GARA's rolling provision.[122] There are only two possibilities for the status of an aircraft flight manual: it is either "a part of the aircraft, or it is a separate product."[123] Turning to the facts in *Caldwell*, the court noted that the FAA requires manufacturers of helicopters to include a flight manual with each helicopter.[124] Given this requirement, the helicopter's manual could not be considered a separate product.[125] If the plaintiff, therefore, could show that the defendant "substantively altered, or deleted, a warning about the fuel system from the manual within the last eighteen years, and it is alleged that the revision or omission is the proximate cause of the accident, then GARA does not bar the action."[126]

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115. *Id.* at 1157.
116. Driver v. Burlington Aviation, Inc., 430 S.E.2d 476, 480 (N.C. Ct. App. 1993).
117. *Id.*
118. *See id.* at 483.
119. *Id.*
120. *Id.*
121. *Id.*
122. Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1157 (9th Cir. 2000).
123. *Id.*
124. *Id.* (referencing 14 C.F.R. § 27.1581(a)(2)).
125. *Id.*
126. *Id.* at 1158.

A plaintiff proffering the argument that was successful in *Caldwell* may have to contend with the pre-GARA case, *Alexander v. Beech Aircraft Corp.*, in which the Tenth Circuit applied Indiana's statute of repose to very similar facts and came to a different conclusion.[127] But the two cases can be distinguished. Similar to *Caldwell*, the aircraft accident that was the subject of the litigation in *Alexander* occurred because the aircraft ran out of fuel.[128] In addition to claiming that the aircraft manual was a defective replacement part because it overstated the amount of usable fuel, the plaintiff also argued that the aircraft's "fuel gauges were not accurate, the fuel tanks trapped fuel, [and] the fuel system had a propensity to dump or vent fuel overboard . . . ."[129] All of these circumstances contributed to the aircraft's running out of gas, but the only claim that would not be barred by the state statute of repose was the one for the defective manual.[130] In *Alexander*, the Tenth Circuit noted that the plaintiff did not claim the defective manual made the conditions of the flight more dangerous than if only the other defects were present, and found that the plaintiff's claim was essentially one for a failure to warn of the defects in the fuel system that "existed at the time of the original manufacture and delivery of the aircraft . . . ."[131] The *Alexander* court held the following: "[W]e agree with the district court's reasoning on the lack of merit in the plaintiffs' 'replacement part' theory . . . . In these arguments the plaintiffs are asserting a claim of failure to warn concerning conditions in the aircraft as manufactured and delivered in 1967."[132] This holding—that the failure to warn claim disguised as a replacement part theory was barred by the statute of repose—is consistent with *Caldwell*, which also held that a claim for a failure to correct a defect by issuing a warning cannot circumvent GARA's statute of repose.[133] The difference in *Caldwell* was that the court concluded that the plaintiff's claim was genuinely based on a defective manual rather than some underlying claim that would have been barred by GARA.

More difficult to reconcile is how other courts have come to the conclusion that an aircraft manual is not a part of the aircraft.[134] For example, the Tenth Circuit in *Alexander* said the manual, rather than being a part of the aircraft, was merely "part of the evidence proffered by plain-

127. *See* Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1217, 1221-22 (10th Cir. 1991).

128. *Id.* at 1217.

129. *Id.* at 1221.

130. *See id.*

131. *Id.*

132. *Id.* at 1222.

133. *See* Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1157-58 (9th Cir. 2000).

134. *See* Alter v. Bell Helicopter Textron, Inc., 944 F. Supp. 531, 538 (S.D. Tex. 1996); *Alexander*, 952 F.2d at 1220.

tiffs which bears on a failure to warn theory . . . ."[135] The district court in *Alter v. Bell Helicopter Textron, Inc.*, applying GARA, similarly found an aircraft manual was not a part of an aircraft, relying, in part, on the holding in *Alexander*.[136]

The court in *Caldwell* dealt with these seemingly contrary holdings by distinguishing them as failure to warn claims rather than claims based on a defective manual.[137] The rule in *Caldwell* may be the better one to follow because, despite earlier seemingly contrary holdings, several courts have applied the standard set forth in *Caldwell* to decide whether a defective manual triggers GARA's rolling provision.[138]

Aside from pointing out that several courts have applied the *Caldwell* standard, a plaintiff could undermine the holdings in *Alexander* and *Alter* in several other ways. First, the *Alexander* court's conclusion regarding the true nature of the plaintiff's claims would, in fact, render the manual nothing more than evidence. The *Alexander* court held that the plaintiff was essentially trying to use the replacement part theory as a backdoor to sue for defects that were present at the time of delivery and that the claim was really for a failure to warn of those defects, a cause of action that would be barred by the statute of repose for the same reasons the defects themselves could no longer be subject to suit.[139] Therefore, viewing the entire suit as one based on a failure to warn, the only logical function of the manual in such a suit *would be* as evidence bearing on the failure to warn theory. The status of the manual as a part becomes immaterial when the court concludes that the plaintiff's suit is actually for defects in the fuel system.

Second, the *Alexander* court was construing an Indiana statute of repose, and the question of whether a manual is a "part" was evaluated pursuant to Indiana state law and does not speak to what Congress had in mind when it used the word "parts" in GARA's rolling provision.[140]

Finally, the *Alter* court's support for its conclusion that an aircraft manual is not a part is unconvincing. One case that the *Alter* court cited for support did not involve a rolling provision at all and only considered whether an instruction manual was a separate product according to the

135. *Alexander*, 952 F.2d at 1220.

136. *See Alter*, 944 F. Supp. at 538.

137. *Caldwell*, 230 F.3d at 1157 (distinguishing *Alter*, 944 F. Supp. at 538-39; Schamel v. Textron-Lycoming, 1 F.3d 655, 657 (7th Cir. 1993); *Alexander*, 952 F.2d at 1220; Burroughs v. Precision Airmotive Corp., 78 Cal. App. 4th 681, 694-95 (Cal. Ct. App. 2000)).

138. *See* Hinkle v. Cessna Aircraft Co., No. 247099, 2004 Mich. App. LEXIS 2894, at *43-45 (Mich. Ct. App. Oct. 28, 2004); Robinson v. Hartzell Propeller Inc., 326 F. Supp. 2d 631, 661-62 (E.D. Penn. 2004); Carolina Indus. Prods., Inc. v. Learjet, Inc., 189 F. Supp. 1147, 1170-71 (D. Kan. 2001).

139. *Alexander*, 952 F.2d at 1222.

140. *Id.* at 1220-21.

state statute of repose being construed.[141] In another case, the question of whether a manual was a part of an aircraft was not even considered.[142] Instead, the issue in *Schamel v. Textron-Lycoming* was whether the provision of service manuals was a separate and discrete, post-sale undertaking giving rise to a duty of care not derived from the manufacturer's duty as a manufacturer.[143] The Seventh Circuit in *Schamel* found that it was not.[144] But this goes more to whether the manufacturer was acting in its capacity as a manufacturer than whether the manual is a part of the aircraft. Finally, in several of the cases the *Alter* court cited, the court was not applying GARA, but rather, applying the state's statute of repose.[145]

Though courts have applied the *Caldwell* standard, plaintiffs should be careful to note that even courts apparently adopting the *Caldwell* standard have nonetheless found that GARA barred the claim by distinguishing the facts of *Caldwell* from the facts presented in the case before them. For instance, in *Hinkle v. Cessna Aircraft Co.* a Michigan appellate court held that the supplement manual in question did not trigger GARA's rolling feature because it did not satisfy the *Caldwell* standard in three respects.[146] First, because the plaintiff did not provide any evidence that the manual at issue "related to that specific airplane or that it provided specific instructions for the particular airplane in this case," the plaintiff did not establish that the manual was a part of that aircraft.[147] Second, the plaintiff did not establish or even allege that there was a causal connection between the supplement manual and the crash.[148] Finally, the plaintiff "provided no evidence to demonstrate that the supplement added to or replaced a particular provision of the original flight manual."[149] Likewise, the district court in *Robinson v. Hartzell Propeller Inc.* held that the flight manual at issue did not fall within GARA's rolling provision because the plaintiff provided no evidence that the allegedly defective manual proximately caused the accident or that a warning had been substantively altered or deleted.[150] The district court in *Carolina Industrial Products, Inc. v. Learjet, Inc.* similarly found that the manual in question did not fall within GARA's rolling provision because the plaintiffs,

141. Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1134-35 (6th Cir. 1986).

142. *See Schamel*, 1 F.3d at 657.

143. *Id.*

144. *Id.*

145. *See id.* at 656 (applying Indiana's statute of repose); *Alexander*, 952 F.2d at 1220 (applying Indiana's statute of repose); *Kochins*, 799 F.2d at 1130 (applying Tennessee's statute of repose).

146. Hinkle v. Cessna Aircraft Co., No. 247099, 2004 Mich. App. LEXIS 2894, at *42 (Mich. Ct. App. Oct. 28, 2004).

147. *Id.* at *43.

148. *Id.* at *43-44.

149. *Id.* at *44.

150. Robinson v. Hartzell Propeller Inc., 326 F. Supp. 2d 631, 662 (E.D. Penn. 2004).

unlike the plaintiffs in *Caldwell*, did not allege that the flight manual proximately caused the accident.[151] Thus, even though courts have generally accepted the principle that a manual is capable of being a component part that triggers GARA's rolling provision, the high standard set forth in *Caldwell* makes it difficult for plaintiffs to establish such a claim.

B. Modified or Overhauled Parts

Another issue that has arisen in interpreting GARA's rolling provision is whether a modified or overhauled part that has been added to the aircraft or that has replaced another part can qualify as a "new component, system, subassembly, or other part."[152] The plaintiff in *Robinson* alleged that the overhaul of the aircraft's propeller "rendered the propeller a 'new part'" capable of restarting the statutory period for that part because the overhaul "'essentially' restored the propeller to its original 'physical properties.'"[153] Since the propeller was overhauled within the past eighteen years, a claim based on the propeller's failure, the plaintiff argued, should not be barred by GARA.[154] The district court in *Robinson* disagreed, finding that the language of the statute prevented an overhauled part from triggering GARA's rolling provision: "An overhauled propeller does not replace another propeller and it is not added to the aircraft. It is removed for maintenance and returned to the aircraft."[155] Because the statutory period only restarts for a part that is added to the aircraft or that replaces another part, an overhauled part could not trigger the rolling provision.[156]

The Ninth Circuit came to the same conclusion when confronted by a similar argument, though its reasoning differed.[157] In *Lahaye v. Galvin Flying Service, Inc.*, the plaintiff alleged that the accident giving rise to the litigation was caused by a defectively designed trim actuator rather than a defect in the part itself.[158] Because the trim actuator had been overhauled within the last eighteen years, the plaintiff reasoned, the claim was not barred by GARA.[159] The court, however, found that the claim was barred by GARA because the aspect of the trim actuator that

151. Carolina Indus. Prods., Inc. v. Learjet, Inc., 189 F. Supp. 1147, 1171 (D. Kan. 2001).

152. General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, § 2(a)(2), 108 Stat. 1552, 1552-53 (1994).

153. *Robinson*, 326 F. Supp. 2d at 663.

154. *See id.*

155. *Id.*

156. *Id.*; *see also* Hinkle v. Cessna Aircraft Co., No. 247099, 2004 Mich. App. LEXIS 2894, at *29 (Mich. Ct. App. Oct. 28, 2004) (finding that an "as new" or "same as new" condition does not satisfy GARA's requirement that the part be new).

157. *See* Lahaye v. Galvin Flying Serv., Inc., 144 F. App'x. 631 (9th Cir. 2005).

158. *Id.* at 633.

159. *Id.*

the plaintiff claimed was defective was not new; that is, the design of the trim actuator was not affected by the overhaul of the part.[160] The court did not have to reach the question of whether, had the defective aspect of the part also been created by a recent overhaul of the part, it would have allowed the claim to go forward.[161]

A related argument that was rejected by a California appellate court dealt with whether a subsequent reconfiguration of a system can render the system new for purposes of triggering a new repose period.[162] The plaintiff in *Hiser v. Bell Helicopter Textron, Inc.* claimed that the installation of a retrofit kit rendered the entire fuel transfer system new.[163] Even though not all of the physical components of the fuel system had been replaced, the plaintiff claimed the defendant essentially replaced the original design of the system with a new one by substituting some parts and reconfiguring others.[164] The court conceded that the reconfigured fuel system could constitute a new design: "Since a 'system' is a combination of parts or components working together, the substitution and rearrangement of these parts arguably constitutes a new design of the fuel transfer system."[165] Ultimately, the court held that the plain language of the statute prevented the plaintiff's theory, based on a new design, from succeeding in triggering GARA's rolling provision: "[T]he words 'component, system, subassembly, or other part,' without any other modifiers, or reference to 'design,' connote the replacement of a physical item, i.e., a piece of hardware, and *not* a new intangible concept or design."[166]

These cases indicate that courts generally construe GARA's replacement parts provision to mean that only physical parts that were actually added to the aircraft or that replaced other parts can trigger GARA's rolling provision, and then only if those particular parts caused the accident giving rise to the litigation. In addition, an overhaul or modification that changes the overall design of the part or system will not be considered a "new part" for purposes of triggering GARA's rolling provision.

VII. Exceptions

There are four situations in which GARA does not apply. First, GARA does not protect a manufacturer that has knowingly misrepresented, withheld, or concealed from the FAA certain required safety in-

160. *Id.*
161. *See id.*
162. *See* Hiser v. Bell Helicopter Textron, Inc., 111 Cal. App. 4th 640, 650 (Cal. Ct. App. 2003).
163. *Id.*
164. *Id.*
165. *Id.* at 649.
166. *Id.* at 650.

formation.[167] Second, "if the person for whose injury or death the claim is being made is a passenger for purposes of receiving treatment for a medical or other emergency," then GARA does not bar the claim.[168] Third, GARA does not bar a claim "if the person for whose injury or death the claim is being made was not aboard the aircraft at the time of the accident."[169] Finally, GARA provides an exception for written warranties.[170] If an action is "brought under a written warranty enforceable under law," then GARA's time limitation will not apply.[171] The exception that has produced the most litigation—the "knowing misrepresentation" exception—is discussed first and in more detail, followed by a brief discussion of the remaining three exceptions.

A. The "Knowing Misrepresentation" Exception

A manufacturer is not protected by GARA if it knowingly misrepresents certain safety information to the FAA.[172] This exception was included, in part, because of concerns that, without such an exception, manufacturers may have less incentive to report defects to the FAA "[b]ecause there would be complete immunity from private suits after the statutory period . . . ."[173] The manufacturers' only incentive to report safety information would be avoiding regulatory penalties, which, some felt, was not a strong enough incentive when safety is concerned.[174] Not only does private action more adequately deter fraudulent conduct, but also "[r]egulatory agencies simply lack the resources to ferret out all cases of concealed fraud."[175] In addition, allowing total immunity to manufacturers even when they have knowingly misrepresented or concealed important safety information would undermine GARA's goal of striking a fair balance between manufacturers and consumers:[176] "It is unfair to allow manufacturers of general aviation aircraft or parts to escape liability for a defect if that manufacturer had knowledge or information of the defect that caused the accident in advance, yet failed to come forward with the information."[177] Specifically, the misrepresentation exception provides that GARA does not apply:

167. General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, § 2(b)(1), 108 Stat. 1552, 1552-53 (1994).
168. *Id.* § (2)(b)(2).
169. *Id.* § (2)(b)(3).
170. *Id.* § (2)(b)(4).
171. *Id.*
172. *Id.* § (2)(b)(1).
173. 140 Cong. Rec. S2995, S2995 (1994) (statement of Rep. Metzenbaum).
174. *Id.*
175. *Id.*
176. *See* H.R. Rep. No. 103-525, pt. 1, at 3 (1994).
177. 140 Cong. Rec. S2995, S2995 (1994) (statement of Rep. Metzenbaum).

> if the claimant pleads with specificity the facts necessary to prove . . . that the manufacturer with respect to a type certificate or airworthiness certificate for, or obligations with respect to continuing airworthiness of, an aircraft or a component, system, subassembly, or other part of an aircraft knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is material and relevant to the performance or the maintenance or operation of such aircraft, or the component, system, subassembly, or other part, that is causally related to the harm which the claimant allegedly suffered[.][178]

1. Elements of the Exception

To state a claim that the knowing misrepresentation exception applies, a plaintiff must plead the following with specificity: "(1) knowledge; (2) misrepresentation, concealment, or withholding of required information to the FAA; (3) materiality and relevance; and (4) a causal relationship between the harm and the accident."[179] This formulation of the elements of the knowing misrepresentation exception, set out by the district court in the *Rickert v. Mitsubishi Heavy Indus, Ltd.*, makes clear that the word "knowingly" modifies "concealed" and "withheld," as well as "misrepresentation."[180]

a. Establishing Knowledge

To establish the applicability of the knowing misrepresentation exception, the plaintiff must show that the misrepresentation was made knowingly. Whether a claim that a manufacturer *should* have known of a defect will satisfy the "knowledge" requirement is unclear. Is it enough that the information was available to the manufacturer, and the manufacturer did not disclose the information to the FAA even though it was required information? The plaintiff in *Campbell v. Parker-Hannifin Corp.* alleged that Cessna should have known there was a problem with the vacuum pumps in the Cessna 310N aircraft because the National Transportation Safety Board (NTSB) had issued a report expressing concerns about the safety of the vacuum pumps in the Cessna 210N aircraft and recommending the FAA further study the issue.[181] A California appellate court disposed of the issue by finding that the report did not support the plaintiff's claim for two reasons: (1) the report concerned a different model aircraft than the one involved in the accident in this case,

178. General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, § 2(b)(1), 108 Stat. 1552, 1552-53 (1994).

179. Rickert v. Mitsubishi Heavy Indus., Ltd., 923 F. Supp. 1453, 1456 (D. Wyo. 1996).

180. *See id.*

181. Campbell v. Parker-Hannifin Corp., 69 Cal. App. 4th 1534, 1547 (Cal. Ct. App. 1999).

and (2) the NTSB recommendation to the FAA indicated that the FAA was aware of the problem, which undermines the argument that Cessna was misrepresenting or concealing the information since FAA already had the information.[182] Thus, the court did not have to reach the question of whether, had the report supported the plaintiff's claim, the publication of the report would have established the defendant's knowledge of the problems. The court could have rejected the plaintiff's claim on the theory that the availability of the report was irrelevant to the question of whether the manufacturer knowingly concealed information. Under that theory, the report would be irrelevant regardless of whether it pertained to the aircraft in question.

The plaintiff in *Hinkle v. Cessna Aircraft Co* was more successful and was able to establish knowledge and survive summary judgment.[183] In 1995, the plaintiff's husband was killed while piloting an aircraft manufactured by Cessna that had been delivered for sale in 1973.[184] Because delivery had been more than eighteen years before the accident, Cessna was protected by GARA unless one of the four exceptions applied.[185] The plaintiff in *Hinkle* alleged that Cessna "represented data to the FAA based on engine horsepower in excess of four hundred horsepower" even though the engines were approved for all operations at only 375 horsepower.[186] She submitted affidavits from experts stating that in order to satisfy the single engine climb requirements of Civil Air Regulation 2.85(b), Cessna knew it had to misrepresent the horsepower data.[187] In addition, the plaintiff claimed that this misrepresentation was used in the Pilot's Operating Handbook, relied upon by the plaintiff's husband.[188] As a result, the plaintiff's husband "falsely believe[d] that a margin between the climb rate and the minimum control speed existed," which, an expert concluded, contributed to the accident.[189] Therefore, the court reversed the summary disposition that the lower court had granted in favor of Cessna.[190]

b. What Information is Required

The question of whether a manufacturer was required to disclose the allegedly misrepresented or concealed information depends, in part, on

182. *Id.* at 1548.
183. Hinkle v. Cessna Aircraft Co., No. 247099, 2004 Mich. App. LEXIS 2894, at *31-40 (Mich. Ct. App. Oct. 28, 2004).
184. *Id.* at *2.
185. *See id.* at *31.
186. *Id.* at *35.
187. *Id.* at *34-36.
188. *Id.* at *36-37.
189. *Id.* at *37.
190. *Id.* at *38.

how a court interprets Federal Aviation Regulations (FARs), such as 14 C.F.R. § 21.3.[191] The district court in *Cartman v. Textron Lycoming* indicated that a manufacturer is only required to affirmatively disclose information in three situations: (1) when it is "required by statute or regulation," (2) when it is "in response to a direct inquiry by the FAA," or (3) when it is "necessary in order to correct information previously supplied directly by the defendant to the FAA."[192] Regarding the first category of information that must be affirmatively disclosed, FAR section 21.3(c) provides a list of occurrences that have to be reported to the FAA by the holder of a Type Certificate.[193] Among them is "[a]n engine exhaust system failure, malfunction, or defect which causes damage to the engine, adjacent aircraft structure, equipment, or components."[194] Yet, the district court in *Cartman* held there was no affirmative duty to report to the FAA the alleged problem with the carburetor float, without discussing whether there might be such a duty under section 21.3.[195] This may be because the plaintiffs did not plead there was a duty under section 21.3 or because the court determined the alleged problem was not significant enough to warrant assigning a duty to disclose.[196]

In a later case, *Butler v. Bell Helicopter Textron, Inc.*, a California appellate court articulated its understanding of section 21.3: "The regulation merely requires a manufacturer to report 'any failure, malfunction, or defect' in a part manufactured by it, when the manufacturer has determined the defect has resulted in one of the occurrences listed in the regulation."[197] The plaintiff in *Butler* alleged that section 21.3 required the defendant manufacturer to report in-flight failures of a helicopter's tail rotor yoke to the FAA.[198] The court agreed, and since the defendant knowingly withheld the required information, summary judgment in favor of the defendant based on GARA was improper.[199]

In addition, the court in *Butler* found that the reporting requirements of section 21.3 applied to any failure of a part that is in use in a typecertified aircraft even if the failure of the part occurred in a non-typecertified

191. Todd R. Steggerda, *GARA's Achilles: The Problematic Application of the Knowing Misrepresentation Exception*, 24 TRANSP. L.J. 191, 217 (1997).

192. Cartman v. Textron Lycoming Reciprocating Engine Div., No. 94-CV-72582-DT, 1996 U.S. Dist. LEXIS 20189, at *11 (E.D. Mich. Feb. 27, 1996).

193. Federal Aviation Regulation, 14 C.F.R. § 21.3 (2005).

194. *Id.*

195. *Cartman*, 1996 U.S. Dist. LEXIS 20189, at *11.

196. *See id.* at *10 (noting that the "misrepresentation exception" does not apply because of a failure to disclose "possible" safety concerns).

197. Butler v. Bell Helicopter Textron, Inc., 109 Cal. App. 4th 1073, 1086-87 (Cal. Ct. App. 2003) (quoting from 14 C.F.R. § 21.3).

198. *Id.* at 1083.

199. *Id.* at 1087.

aircraft.[200] The defendant in *Butler* argued that since section 21.3 requires "the holder of a Type Certificate" to report certain failures, such a type certificate holder only had to report failures in its typecertified aircraft.[201] Therefore, because the previous failures that the plaintiff alleged should have been reported involved non-typecertified, military helicopters, the defendant argued that it should not be required to report those failures.[202] The court found that the plain language of the regulation requires the failures be reported since they involved a part that is also used in typecertified aircraft:

> Part 21.3 says Bell is required to report "any failure. . .in any product, part, process or article manufactured by it" that it determines has resulted in the listed occurrences. Those occurrences include tail rotor yoke failure. Bell determined in 1989 that inflight fatigue failure of the yoke it manufactured cause the military aircraft accidents. Consequently, Bell's obligation to report those failures is patent.[203]

The defendant could not avoid the reporting requirements merely by using the same part for typecertified and military aircraft.[204]

c. Causation

The causation element requires that there be a causal link between the misrepresented, withheld, or concealed information and the accident. The argument that the FAA might have questioned, evaluated, and intervened to prevent safety issues had the FAA been provided with the required information regarding a design or manufacturing defect has been successful.[205] The appellate court in *Butler* found that such a link was enough to survive summary judgment regarding the causation element:

> If the FAA had been aware of five catastrophic yoke failures in 1989 . . . , the FAA may have been inclined to question the increase, or required further evaluation . . . . We cannot conclude . . . what the FAA would have done, and we certainly cannot conclude as a matter of law there was no relationship between the withheld information and the accident.[206]

Once the plaintiff has succeeded in establishing fact issues regarding the other elements, the causation element should not present too much of a challenge to the plaintiff trying to satisfy this fairly lenient standard and to survive summary judgment.

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200. *Id.* at 1086.
201. *Id.* at 1081-83.
202. *Id.* at 1086.
203. *Id.* at 1084.
204. *Id.*
205. *Id.* at 1087.
206. *Id.*

2. Specific Pleading Requirement

Note that the above elements must be pleaded with specificity.[207] This requirement has been likened to Federal Rule of Civil Procedure 9(b), "which requires that parties plead fraud 'with particularity.'"[208] The district court in *Rickert v. Mitsubishi Heavy Industries, Ltd.* clarified just how specific a plaintiff must be.[209] In *Rickert*, an aircraft piloted by the plaintiff's husband crashed into a tall ridge during descent.[210] Since approximately 21 years had passed between first delivery of the aircraft and the accident, GARA would bar a claim against the manufacturer unless an exception applied.[211] The plaintiff claimed the knowing misrepresentation exception applied and offered expert testimony identifying three misrepresentations by Mitsubishi:

> First, [the expert] claims that Mitsubishi misrepresented the de-icing systems used on the aircraft. Second, [he] asserts that Mitsubishi misrepresented the controllability of the aircraft. Finally, he alleges that Mitsubishi concealed information from the FAA by failing to report what it should have known were serious design defects in the aircraft.[212]

The court rejected all three claims, finding that none qualified as a misrepresentation to the FAA, and granted summary judgment to Mitsubishi.[213] The alleged misrepresentations were generally based on differences of opinion and mistakes, and the expert failed to identify how any of them involved misrepresented or concealed information.[214] Even if the court assumed the expert's opinions were true, the opinions did not allege a knowing misrepresentation or concealment.[215] At most the expert's opinions could be used to show Mitsubishi was negligent.[216]

The plaintiff heeded the court's message that it would not use such a liberal definition of "misrepresentation," and on a motion to reconsider, convinced the court to reverse its earlier grant of summary judgment to Mitsubishi.[217] A former employee of Mitsubishi who had piloted the aircraft in question provided an affidavit stating the following regarding an

207. General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, § 2(b)(1), 108 Stat. 1552, 1552-53 (1994).

208. Rickert v. Mitsubishi Heavy Indus., Ltd., 923 F. Supp. 1453, 1456 (D. Wyo. 1996). Federal Rule of Civil Procedure 9(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b).

209. *Rickert*, 923 F. Supp. at 1457-62.

210. *Id.* at 1454.

211. *Id.* at 1456.

212. *Id.* at 1457.

213. *Id.* at 1462.

214. *Id.* at 1458.

215. *Id.* at 1460.

216. *Id.*

217. Rickert v. Mitsubishi Heavy Indus., Ltd., 929 F. Supp. 380, 384 (D. Wyo. 1996).

FAA's Special Certification Review investigating the safety of the aircraft: "[W]e only tested the short body aircraft when we knew that the long body aircraft was the problem. We withheld this distinction from the FAA."[218] Another former employee also submitted an affidavit stating that "Mitsubishi actively covered-up the problem of horizontal tail plane icing on the long body MU-2 aircraft, and withheld and concealed this information from the FAA before, during and after the Special Certification Review."[219] Each of these affidavits created a genuine issue of material fact regarding whether Mitsubishi misrepresented to or concealed from the FAA required safety information.[220]

B. Other Exceptions

No reported cases clarify the application of the exceptions for passengers receiving treatment for medical emergencies or written warranties.[221] Regarding the "warranty" exception, legislative history makes clear that the written warranty exception was meant to clarify that GARA does not abrogate a manufacturer's written warranty that extends beyond eighteen years: "This means that in the event a manufacturer desires to specifically warrant the safety of its product for a period of time beyond the applicable statute of repose, the courts would honor the manufacturer's written warranty."[222] One congressman suggested that even under a warranty, a manufacturer would not be liable for damages resulting from an accident that occurred more than eighteen years after first delivery of the aircraft.[223] A manufacturer would only be required to abide by the terms of the warranty, and "[w]arranties are not written to cover accidents."[224]

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218. *Id.* at 382.

219. *Id.* at 382.

220. *Id.*

221. The three cases in which a plaintiff alleged a breach of a written warranty are not instructive. In *Schwartz v. Hawkins & Powers Aviation, Inc.*, the court found that the "written warranty" exception did not apply because the plaintiff failed to allege that there was a written warranty. No. 04-CV-195-D, 2005 U.S. Dist. LEXIS 12188, at *17 (D. Wyo. Apr. 7, 2005). Similarly, in *Hinkle v. Cessna Aircraft Co.*, the warranty claim was considered waived on appeal because the plaintiff merely raised the issue without supporting it with analysis or case law. No. 247099, 2004 Mich. App. LEXIS 2894, at *45-46 (Mich. Ct. App. Oct. 28, 2004). Finally, in *Hiser v. Bell Helicopter Textron, Inc.*, because the court found there was substantial evidence supporting the jury's finding that a part that had been replaced within last 18 years caused the accident, it did not need to reach the question of whether GARA's warranty exception applied. 111 Cal. App. 4th 640, 655 (Cal. Ct. App. 2003).

222. H.R. Rep. No. 103-525, pt. 2, at 7 (1994) (section-by-section analysis).

223. *General Aviation Revitalization Act of 1993: Hearing Before the Subcomm. on Aviation of the H. Comm. on Pub. Works & Transp.*, 103d Cong. 93 (1993) (post-hearing questions from Rep. Clinger to General Aviation Manufacturers Association).

224. *Id.*

Congress included the "medical emergency" exception out of a concern for innocent victims who are passengers in aircraft for the purpose of receiving medical attention.[225] Because, unlike pilots, they "know nothing about the age or condition of the aircraft they happen to fly in [they] should not be deprived of just compensation for damages . . . ."[226]

One case that briefly discusses the exception for claimants not aboard the aircraft dealt with a claim for intentional infliction of emotional distress.[227] The survivors of pilots killed in a plane crash claimed GARA did not bar their claims for emotional distress merely because the survivors were not on the plane at the time of the accident.[228] The district court held, without reference to the exception, that GARA barred their claims for emotional distress because, pursuant to the language of section 2(a), their damages "undoubtedly . . . arose out of the accident . . . ."[229] While the literal language of the exception could be construed to apply to an emotional distress claim by a survivor, legislative history suggests Congress meant for the exception to apply to people on the ground who are physically struck by a crashing aircraft.[230] One congressman noted that the exception protects "innocent victims on the ground who are injured or killed when a defective aircraft crashes, when the plane drops out of the sky . . . ."[231] He went on to question what would happen if there were no such exception and a plane crashed into a school or a residential area, concluding that "[i]nnocent bystanders should not be left uncompensated *when they are injured or killed by defective aircraft that just fall out of the sky*."[232] This language suggests that, at least to this congressman, the "not aboard the aircraft" exception should not apply to claims of emotional distress by survivors of those killed in accidents.

VIII. Jurisdictional Issues

In interpreting and applying GARA, parties have raised issues regarding both subject matter jurisdiction and territorial jurisdiction. Regarding subject matter jurisdiction, parties seeking to remove a state court cause of action to federal courts have claimed that federal courts have subject matter jurisdiction over claims in which the application and

225. 140 Cong. Rec. S2995, S2995 (1994) (statement of Rep. Metzenbaum).

226. *Id.*

227. Schwartz v. Hawkins & Powers Aviation, Inc., No. 04-CV-195-D, 2005 U.S. Dist. LEXIS 12188, at *5 (D. Wyo. Apr. 7, 2005).

228. *Id.* at *18.

229. *Id.*

230. 140 Cong. Rec. S2995, S2995 (1994) (statement of Rep. Metzenbaum).

231. *Id.*

232. *Id.* (emphasis added).

interpretation of GARA is required.[233] Regarding territorial jurisdictional, plaintiffs have argued that accidents occurring outside the United States are not subject to GARA's statute of repose and that manufacturers are not, thereby, protected from liability with regard to such accidents.[234]

A. Federal Question Jurisdiction

GARA preempts state law that would allow a suit against a general aviation manufacturer filed more than eighteen years after delivery of the aircraft, or replacement or addition of a component part.[235] The statute states at section 2(d), "This section supersedes any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action established by subsection (a)."[236] Issues have been raised regarding whether 2(d) "completely preempt[s] state law in the field of aviation hardware safety"[237] and, alternatively, whether GARA creates enough of a federal issue that federal courts have subject matter jurisdiction over claims involving GARA.[238]

1. Complete Preemption of State Tort Law

GARA does not completely preempt state law: "Based on the hearing record, the Committee voted to permit, in this exceptional instance, a very limited Federal preemption of State law."[239] The House Judiciary Committee voted to approve GARA instead of "seeking to revise substantially a number of substantive and procedural matters relating to State tort law . . . ."[240] At least one court noted that GARA's 2(d) was a "savings clause" that "clarif[ies] the scope and strengthen[s] the role of state tort law applicability to aviation products liability actions."[241] GARA does not create a federal cause of action, nor does it preempt a "state's substantive law regarding negligence or breach of warranty claims."[242] Rather, it is a very limited, narrow response to the "'per-

233. *See* Lucia v. Teledyne Cont'l Motors, 173 F. Supp. 2d 1253, 1270 (S.D. Ala. 2001); Wright v. Bond-Air, Ltd., 930 F. Supp. 300, 304 (E.D. Mich. 1996).

234. *See* Alter v. Bell Helicopter Textron, Inc., 944 F. Supp. 531, 541 (S.D. Tex. 1996).

235. General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, §§ 2(d), 3(3), 108 Stat. 1552, 1552-53 (1994).

236. *Id.* §2(d).

237. *Lucia*, 173 F. Supp. 2d at 1270.

238. *Wright*, 930 F. Supp. at 304.

239. H.R. Rep. No. 103-525, pt. 2, at 4 (1994) (section-by-section analysis).

240. *Id.* at 5.

241. *Lucia*, 173 F. Supp. 2d at 1270.

242. *Wright*, 930 F. Supp. at 305.

ceived' liability crisis in the general aviation industry"[243] that only preempts state law that would expose general aviation manufacturers to liability for longer than eighteen years after delivery of an aircraft to the first purchaser.[244] Otherwise, "in cases where the statute of repose has not expired, State law will continue to govern fully . . . ."[245] Thus, GARA does not apply to states that have their own statutes of repose that are shorter than eighteen years.[246]

2. *"Substantial" Federal Question*

The only case to squarely address the issue of whether GARA raises a federal question found that GARA did not confer federal question jurisdiction.[247] The defendants' argument in *Wright v. Bond-Air, Ltd.* was not that federal question jurisdiction should be conferred because GARA completely preempted federal law, but that it should be conferred because GARA raises a federal question substantial enough to warrant federal question jurisdiction.[248] After the defendants in *Wright* removed the plaintiff's state court action to federal district court, the federal court granted the plaintiff's motion to remand the action back to state court.[249] Defendants alleged the plaintiff had pleaded facts intended to satisfy GARA's knowing misrepresentation exception without referencing GARA directly in order to disguise the federal nature of the claim.[250] The court, therefore, should look beyond the plaintiff's pleadings to find that the state-created claim raised a substantial federal question because it necessarily turned on "some construction of federal law."[251] Under this theory of federal question jurisdiction, the court looks at whether "some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims."[252]

The court found that the cases relied upon by the defendant did not support the defendant's argument that GARA raised a federal question because those cases involved "situation[s] where the exact same conduct [was] proscribed by federal and state statutes."[253] In contrast, Congress

243. H.R. REP. NO. 103-525, pt. 2, at 6 (1994) (section-by-section analysis).
244. General Aviation Revitalization Act (GARA) of 1994, Pub. L. No. 103-298, § 2(d)(1), 108 Stat. 1552, 1552-53 (1994).
245. *Wright*, 930 F. Supp. at 305 (quoting 1994 H.R. REP. 1994 WL 422719 at *6).
246. H.R. REP. NO. 103-525, pt. 2, at 7 (section-by-section analysis).
247. *Wright*, 930 F. Supp. at 305.
248. *See id.* at 303.
249. *Id.* at 305.
250. *Id.* at 303.
251. *Id.* at 302. Federal question jurisdiction also exists if federal law created the cause of action, but that was not alleged here. *Id.*
252. *Id.* at 303.
253. *Id.* at 305.

did not intend for GARA to substantively revise state tort law, and the statute only preempts state law that would allow lawsuits beyond eighteen years.[254] In all other circumstances, state law would continue to govern.[255] Nor does the fact that applying GARA requires consideration of FAA regulations raise a substantial federal issue.[256] The court, therefore, held that the federal issue raised in the plaintiff's state law claim was not "sufficiently substantial . . . to confer federal question jurisdiction."[257]

Defendants' argument that federal jurisdiction should be granted because there was a federal interest in uniform interpretation of the statute also failed because the U.S. Supreme Court had previously considered and rejected this argument.[258] Federal question jurisdiction requires more than a federal interest in uniformity; it requires that the federal statute preempt state-court jurisdiction.[259] In addition, concern over uniform application of federal statutes is mitigated by the fact that the Supreme Court "retains power to review the decision of a federal issue in a state cause of action."[260]

B. Applicability to Accidents Outside the United States

In the only reported case directly addressing whether GARA applies to accidents that occurred outside the United States, the court found that it did.[261] In arguing that GARA did not apply to accidents in foreign countries, the plaintiff in *Alter v. Bell Helicopter Textron, Inc.* relied on cases tending to show the inapplicability of a federal statute in a foreign country.[262] For example, in *Smith v. United States* the "Supreme Court held that the Federal Tort Claims Act, 28 U.S.C. § 2680(k), did not waive the United States' sovereign immunity for tort claims arising in Antarctica."[263] In *Boureslan v. Aramco, Arabian Am. Oil. Co.*, the Fifth Circuit held that "Title VII does not regulate the employment practices of U.S. employers which employ U.S. citizens outside the United States."[264]

The problem with relying on these cases, as the district court in *Alter*

254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 304 (referring to the U.S. Supreme Court's holding in Merrell Dow Pharms. Inc. v. Thompson, 478 U.S. 804, 807-08 (1986)).
259. *Id.* (citing *Merrell Dow Pharms, Inc.*, 478 U.S. at 816).
260. *Id.*
261. *See* Alter v. Bell Helicopter Textron, Inc., 944 F. Supp. 531, 541 (S.D. Tex. 1996).
262. *Id.*
263. *Id.* (discussing the holding in Smith v. United States, 507 U.S. 197, 204 (1993)).
264. *Alter*, 944 F. Supp. at 541 (explaining the holding in Boureslan v. Aramco, Arabian Am. Oil Co., 892 F.2d 1271 (5th Cir. 1990)) (*en banc*).

pointed out, is that they refer to statutes that *create* a cause of action.[265] The effect of not applying them in a foreign country is that certain claims that would be valid if they arose in the United States would not be valid if they arose abroad.[266] In contrast, GARA "*eliminates* certain claims against aircraft and component manufacturers."[267] Therefore, not applying GARA to accidents that happen in foreign countries "would have the anomalous effect of preventing litigants from bringing an action in the United States for an accident occurring in the United States while allowing litigants to bring the same action in the United States if the accident occurred abroad."[268] This "anomalous effect" coupled with the fact that GARA was clearly intended "to bar any claim based on state law," led the court to conclude that GARA applies to accidents that occur outside the United States, as well as to accidents that occur inside the United States.[269]

IX. Constitutionality of Gara

Before GARA was enacted, eight states had previously repealed their statutes of repose or declared them unconstitutional.[270] States that declared their statutes of repose unconstitutional generally did so "because they [were] held to violate the principle that State courts are to be open to every person for redress of any injury."[271] Presumably because of this success at the state level, litigants have tried to convince courts that GARA violates the U.S. Constitution.[272] Constitutional challenges based on violations of the Commerce Clause, the Equal Protection Clause, and the Due Process Clause have all been unsuccessful.[273]

A. Commerce Clause

Courts have held that Congress has the authority to enact GARA under its Commerce Clause powers,[274] which authorize Congress "[t]o regulate commerce with foreign nations, and among the several states

265. *Alter*, 944 F. Supp. at 541.
266. *Id.*
267. *Id.*
268. *Id.*
269. *See id.*
270. Christopher C. McNatt, Jr. & Steven L. England, *The Push for Statutes of Repose in General Aviation*, 23 Transp. L.J. 323, 327-28 (1995).
271. H.R. Rep. No. 103-525, pt. 2, at 4 (1994).
272. *See, e.g.*, Robinson v. Hartzell Propeller Inc., 326 F. Supp. 2d 631, 668-69 (E.D. Pa. 2004); Hinkle v. Cessna Aircraft Co., No. 247099, 2004 Mich. App. LEXIS 2894, at *8-17 (Mich. Ct. App. 2004); Lyon v. Agusta S.P.A., 252 F.3d 1078, 1085-86 (9th Cir. 2001).
273. *See Robinson*, 326 F. Supp. 2d at 668-69; *Hinkle*, 2004 Mich. App. LEXIS 2894, at *8-17; *Lyon*, 252 F.3d at 1085-88.
274. *Robinson*, 326 F. Supp. 2d at 669; *Hinkle*, 2004 Mich. App. LEXIS 2894, at *9-10.

. . . ."[275] The U.S. Supreme Court has identified "three broad categories of activity that Congress may regulate under its commerce power":

> First, Congress may regulate the use of the channels of interstate commerce. . . . Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. . . . Finally, Congress' commerce authority includes the power to regulate those activitieshaving a substantial relation to interstate commerce . . . i.e., those activities that substantially affect interstate commerce . . . .[276]

GARA was properly enacted under either the second or third category: Aircraft are an instrumentality of interstate commerce, and "[t]he general aviation industry is certainly one that substantially affects interstate commerce."[277] GARA was passed in response to the decline in the general aviation industry—which led to decreased production, substantial job loss, elevated prices, and a lack of research and development—one cause of which was excessive litigation costs.[278]

In passing GARA, Congress was not only concerned about interstate commerce, but international commerce as well. One of the reasons Congress enacted GARA was because Congress believed relieving manufacturers of excessive litigation costs would enhance the competitiveness of American manufacturers.[279] Thus, Congress was acting within its Commerce Clause power when it intervened to revitalize a failing industry that has widespread interstate and international consequences. Accordingly, an argument that Congress exceeded its Commerce Clause power by passing GARA will not succeed.[280]

B. Equal Protection

The federal government is forbidden from making or enforcing laws that "deny to any person within its jurisdiction the equal protection of the laws."[281] Legislation challenged on Equal Protection grounds that involves neither a suspect classification, such as race, nor a fundamental

275. U.S. Const. art. 1, § 8, cl. 3.

276. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

277. *Hinkle*, 2004 Mich. App. LEXIS 2894, at *11.

278. H.R. Rep. No. 103-525, pt. 1, at 1 (1994).

279. *See id.* at 2-3.

280. *See Hinkle*, 2004 Mich. App. LEXIS 2894, at *10-11; Robinson v. Hartzell Propeller Inc., 326 F. Supp. 2d 631, 669 (E.D. Pa. 2004).

281. U.S. Const. amend. XIV, § 1. While the quoted language comes from the Fourteenth Amendment's Equal Protection Clause (which refers only to the inability of states to deny equal protection), the Fifth Amendment's Due Process Clause (which applies to the federal government) is construed as having an Equal Protection component. United States v. Armstrong, 517 U.S. 456, 464 (1996); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

interest, such as voting, is evaluated under "rational basis review."[282] Under rational basis review a court looks at "whether the legislation is reasonably related to a legitimate governmental purpose."[283] The problem plaintiffs face when challenging GARA on Equal Protection grounds is that GARA easily satisfies this test.

Congress certainly has a legitimate interest in protecting a vital industry[284] that generates billions of dollars per year and that can potentially employ hundreds of thousands of workers.[285] In hearings held in consideration of GARA, Congress heard testimony and received evidence indicating that at least one of the causes of the industry's decline was excessive product liability costs.[286] Several alternative factors have been cited as the real causes of the decline,[287] but regardless of whether high litigation costs were actually the cause of the general aviation industry's decline, Congress certainly had a rational basis for thinking it was and for concluding that one way to revitalize the industry was to enact a statute of repose. And that is all that is required for the legislation to survive a constitutional challenge under rational basis review.[288]

The Equal Protection arguments that have been raised are based on the distinction GARA makes between general aviation and commercial aviation.[289] But under rational basis review, "[a] legislative classification may not be set aside if any set of facts may reasonably be conceived to justify it."[290] The plaintiffs in *Robinson* contended there was no rational reason to distinguish between general aviation manufacturers and commercial aviation manufacturers,[291] while the plaintiffs in *Hinkle* argued there was no rational reason to distinguish between the general aviation public and the commercial aviation public."[292] The courts in both cases were able to articulate a rational reason for the distinction: Either Con-

282. Fed. Commc'ns Comm'n v. Beach Commc'ns, 508 U.S. 307, 313 (1993).

283. *Hinkle*, 2004 Mich. App. LEXIS 2894, at *13.

284. *See Robinson*, 326 F. Supp. 2d at 669.

285. GENERAL AVIATION MANUFACTURERS ASSOCIATION, REPORT TO THE PRESIDENT AND CONGRESS: THE RESULTS OF THE GENERAL AVIATION REVITALIZATION ACT (noting that in the 1980s and early 1990s, over 100,000 general aviation jobs were lost).

286. *See generally General Aviation Revitalization Act of 1993: Hearing Before the Subcomm. on Aviation of the H. Comm. on Pub. & Transp.*, 103d Cong. 1-89 (1993).

287. H.R. REP. No. 103-525, pt. 2, at 5 (referring to the reasons for decline cited by Charles Hvass, Jr.). For a more comprehensive treatment of alternative reasons for the decline in general aviation, see Scott E. Tarry & Lawrence J. Truitt, *Rhetoric and Reality: Tort Reform and the Uncertain Future of General Aviation*, 61 J. AIR L. & COM. 163 (1995).

288. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 (1979).

289. *See* Hinkle v. Cessna Aircraft Co., No. 247099, 2004 Mich. App. LEXIS 2894, at *12 (Mich. Ct. App. Oct. 28, 2004); *Robinson*, 326 F. Supp. 2d at 669.

290. *Hinkle*, 2004 Mich. App. LEXIS 2894, at *13 (quoting *Westlake Transp., Inc. v. Pub. Serv. Comm'n*, 662 N.W. 2d 784, 801 (Mich. Ct. App. 2003)).

291. *Robinson*, 326 F. Supp. 2d at 668.

292. *Hinkle*, 2004 Mich. App. LEXIS 2894, at *12.

gress decided "that it wanted to provide limited protection for this vulnerable segment of the aviation industry without limiting tort claims against commercial carriers in the hopes that the revitalization of the general aviation industry would spread to other sectors of the aviation industry,"[293] or it decided that the general aviation industry was more seriously threatened by excessive litigation costs.[294]

The plaintiffs in *Hinkle* further argued that Congress's choice of an eighteen-year statute of repose was irrational since "the average age of a general aviation aircraft is typically over thirty years old."[295] Again, the court concluded that instituting an eighteen-year statute of repose was a rational way to protect a flagging industry from infinite liability.[296] Relevant to this holding, but not mentioned by the court, is Congress's finding that "[n]early all defects are discovered during the early years of an aircrafts [sic] life."[297] After a "product has operated safely for a very long period of time . . . accidents are more likely to be due to improper maintenance or repair of the product or operator error . . . " than a manufacturing or design defect.[298]

For these reasons, claims for design or manufacturing defect of older aircraft are unlikely to succeed.[299] Such claims, nevertheless, were often filed, and manufacturers had to spend money defending themselves or settle to avoid litigation expenses.[300] Given these findings, Congress's decision to limit the statutory period to eighteen years even though many of the aircraft in service were over thirty years old is rationally related to its goal of revitalizing the general aviation industry by protecting it from liability.

C. Due Process

The Fifth Amendment of the U.S. Constitution provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[301] Plaintiffs have challenged the constitutionality of GARA on substantive Due Process grounds, arguing that GARA deprived them of a property interest by "fail[ing] to provide plaintiff with an alternative right or remedy before the aircraft reaches its average age."[302] But

293. *Robinson*, 326 F. Supp. 2d at 669.
294. *Hinkle*, 2004 Mich. App. LEXIS 2894, at *15.
295. *Id.* at *12.
296. *Id.* at *15-16.
297. H.R. Rep. No. 103-525, pt. 1, at 2 (1994).
298. S. Rep. No. 103-202, at 6 (1993).
299. H.R. Rep. No. 103-525, pt. 1, at 2 (1994).
300. *Id.*
301. U.S. Const. amend. V.
302. Hinkle v. Cessna Aircraft Co., No. 247099, 2004 Mich. App. LEXIS 2894, at *16 (Mich. Ct. App. 2004); *see also* Lyon v. Augusta S.P.A., 252 F.3d 1078, 1086 (9th Cir. 2001).

courts have held that a cause of action is not a vested property right until there is a final judgment.[303] The district court in *Robinson* found that "[i]n GARA, Congress has not taken away plaintiffs' cause of action or right to be heard in court. It has only set a time limit for bringing an action."[304] A substantive Due Process challenge, therefore, must fail because a plaintiff will be unable to "demonstrate the presence of a . . . property interest to which the protection of due process may attach."[305] Even if there were a vested property interest, claimants would still have to contend with the lenient rational basis standard.

D. Application to Pre-Enactment Accidents

Any claim filed after GARA's enactment date, August 17, 1994, is subject to GARA's statute of repose, regardless of whether the accident occurred before GARA was enacted.[306] The Ninth Circuit in *Lyon v. Agusta S.P.A.* reasoned that since section 4(b) of the statute specifically states that GARA "shall not apply . . . to civil actions commenced before the date of the enactment of this Act" and section 4(a) states that, after enactment, GARA will take effect unless one of the four exceptions listed in (b) applies, then Congress must have intended that any action filed after enactment would be subject to GARA.[307] The Ninth Circuit in *Lyon,* therefore, found that GARA barred the plaintiffs' cause of action since the action was filed after GARA's enactment date, even though the accident from which the cause of action arose occurred before its enactment.[308] The plaintiffs in *Lyon* challenged the application of GARA to their pre-enactment accident on substantive and procedural Due Process grounds and on Equal Protection grounds.[309]

First, the plaintiffs argued that applying GARA to their claims violated their substantive Due Process rights because it deprived them of their cause of action, in which they had a vested property right, presumably because the property right arose when the pre-GARA accident happened, but was cut short by the subsequent enactment of GARA.[310] The Ninth Circuit rejected the plaintiffs' substantive Due Process challenge because it had previously held that "although a cause of action is a 'species of property, a party's property right in any cause of action does not

303. *Hinkle*, 2004 Mich. App. LEXIS 2894, at *16; *Lyon*, 252 F.3d at 1086.
304. *Robinson*, 326 F. Supp. 2d at 668.
305. *Hinkle*, 2004 Mich. App. LEXIS 2894, at *16-17.
306. *See Lyon*, 252 F.3d at 1085.
307. *Id.*
308. *Id.* at 1089.
309. *Id.* at 1085-87.
310. *See id.* at 1086.

vest until a final *unreviewable* judgment is obtained.'"[311]

Next, the plaintiffs claimed that applying GARA to their cause of action violated "a procedural due process right because a statute of limitations cannot be shortened in a way that eliminates the plaintiff's ability to file an action."[312] But the Ninth Circuit distinguished between statutes of repose and statutes of limitations by discussing the different focus of each:

> The latter bars a plaintiff from proceeding because he has slept on his rights, or otherwise been inattentive. Therefore, it is manifestly unjust to tell somebody that he has X years to file an action, and then shorten the time in midstream. However, a statute of repose proceeds on the basis that it is unfair to make somebody defend an action long after something was done or some product was sold.[313]

Under a statute of repose, then, requiring someone to defend an action after the statutory period has run would be unfair regardless of "the injured party's alacrity or merit."[314] While courts evaluate both statutes of repose and statutes of limitations under rational basis review, what is rational for one may not be rational for the other.[315] Because, "barring irrational or arbitrary conduct, Congress can adjust the incidents of our economic lives as it sees fit," the Ninth Circuit found the application of GARA's statute of repose to the plaintiffs' pre-enactment accident satisfied rational basis review since it only reallocated the benefits and burdens of economic life.[316]

Finally, the plaintiffs' Equal Protection challenge was based on the fact that other people involved in the accident in question who had already filed actions were allowed to proceed under GARA.[317] They alleged Congress had no rational reason to protect those who had already filed actions, while barring the plaintiffs' claim based on the same accident.[318] The Ninth Circuit rejected this constitutional challenge, in part, because it had previously rejected a similar argument.[319] In that earlier case, the Ninth Circuit had to resolve an issue that arose because of a U.S. Supreme Court decision, which held that the proper statute of limitations in securities cases was one year. In response to the Court's holding, Congress decided to allow relief despite the one-year statute of

311. *Id.* (quoting Grimsey v. Huff, 876 F.2d 738, 743-44 (9th Cir. 1989)).
312. *Lyon*, 252 F.3d at 1086.
313. *Id.*
314. *Id.*
315. *Id.* at 1087.
316. *Id.* at 1086-87.
317. *Id.* at 1087.
318. *Id.* at 1087-88.
319. *Id.* at 1087-88 (quoting to the Ninth Circuit's holding in Gray v. First Winthrop Corp., 989 F.2d 1564, 1573-74 (9th Cir. 1993)).

limitation, for those who had already filed securities actions on the day of the Court's decision.[320] When a challenge was brought to the disparate application of the statute of limitations on Equal Protection grounds, the Ninth Circuit held the following:

> It is not irrational for Congress to limit its remedy to those individuals who have gone so far as to file suit in reliance upon the existing statute of limitations. These individuals will suffer the most concrete injury because they have expended significant time and effort to bring their action, not to mention substantial funds for attorney's fees and court costs.[321]

Congress similarly acted rationally when it exempted those who had already filed actions before GARA's enactment date from GARA's statute of repose.[322]

The case law makes clear that courts find GARA to be constitutionally permissible, at least with respect to the Commerce, Equal Protection, and Due Process Clauses. Because it is unlikely that such arguments will ever be successful, plaintiffs should look to other theories for ways to survive the GARA defense.

X. Conclusion

GARA was enacted with the strong support of both manufacturers of general aviation and its users.[323] Even though the users of general aviation are the ones most likely to be involved in general aviation accidents—and, therefore, the ones most likely to support GARA's repeal—they supported enactment of the statute because they are also the ones who have to pay higher prices for aircraft as a result of excessive litigation.[324] There have been indications that GARA has been successful in revitalizing the general aviation industry. After only five years, 25,000 new jobs had been created, aircraft production was up one hundred percent, "revenues from the export of general aviation [had] more than doubled," and research and development had grown by more than 150 percent.[325] There are no signs that the General Aviation Revitalization Act will be repealed anytime soon. A plaintiff's only hope for obtaining relief in a products liability suit against general aviation manufacturers, therefore, is to know how GARA applies to her claim.

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320. *Lyons*, 252 F.3d at 1087 (referring to the U.S. Supreme Court's holding in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991)).

321. *Lyons*, 252 F.3d at 1087-88.

322. *Id.* at 1088.

323. 139 Cong. Rec. E2183, E2184 (1993) (statement of Rep. Glickman).

324. H.R. Rep. No. 103-525, pt. 1, at 2 (1994).

325. *General Aviation Manufacturers, Five Year Results: A Report to the President and Congress on the General Aviation Revitalization Act*, *available at* http://www.gama.aero/pubs/getFile.php?catalogID=11.