The Push for Statutes of Repose in General Aviation

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I. INTRODUCTION

On August 17, 1994, President Clinton signed into law the General Aviation Revitalization Act of 1994 (hereinafter GARA).[1] GARA was passed primarily to salvage the American general aviation industry which had been decimated by spiraling litigation costs. Those costs were incurred in defending products liability actions that stemmed from crashes involving an aging fleet of small privately piloted aircraft. Throughout Congressional debate on GARA, sponsors cited the loss of thousands of jobs resulting from liability costs incurred by general aviation manufacturers.

GARA provides an eighteen-year statute of repose on general aviation aircraft and their component parts. Plaintiffs may avoid the time bar if they prove by clear and convincing evidence that the manufacturer misrepresented, or concealed from the FAA, information relevant to the maintenance or operation of the aircraft. It is a "rolling" statute in regard to modifications or replaced parts.

GARA was not only passed to provide a stimulus to the faltering general aviation industry, but also to provide national uniformity in products liability actions against general aviation manufacturers. This article explores the push to create a uniform statute of repose in general aviation addressing specific state laws which parties were often forced to contend with actions stemming from general aviation accidents.

II. COSTS TO GENERAL AVIATION MANUFACTURERS STEMMING FROM THE LIABILITY EXPLOSION

General aviation manufacturers have provided the citizens of the United States with access to the ever expanding network of airports in this country. General aviation is the life-line of many small communities. Over 5000 communities rely solely on general aviation for their access to the nation's airways.[2] However, "[f]rom 1978 to 1992, American general aviation manufacturers spent as much to defend product liability suits as they had spent for the prior 30 years in developing new aircraft."[3]

In the 1980's liability costs for general aviation manufacturers soared. In the period from 1983 to 1986 the legal department of Beech Aircraft Company kept track of suits involving their aircraft and found that the average cost of defending the 203 suits which arose in that time period exceeded $500,000.[4]

By the early 1990's what had been a very prosperous industry in the

1. Pub. L. No. 103-298, 108 Stat. 1552 (1994).
2. 140 CONG. REC. S2991 (daily ed. Mar. 16, 1994) (Statement of Sen. Kassebaum).
3. 140 CONG. REC. S2991, S2992-93 (daily ed. Mar. 16, 1994) (Statement of Sen. McCain).
4. 140 CONG. REC. S2991, S2992 (daily ed. Mar. 16, 1994) (Statement of Sen. Gorton).

late 1970's neared non-existence. In 1978, 17,000 piston-engine aircraft were produced; by 1993 the number had decreased to 555.[5] The total production of aircraft fell from 18,000 in 1978 to 900 in 1992.[6]

Employment in industries that rely on general aviation suffered a loss of 100,000 jobs.[7] In the general aviation manufacturing industry, the number of manufacturing employees fell from 6000 in 1978 to 1000 in 1992.[8]

As of 1994, "the average piston-engine airplane [was] over 28 years old and . . . one-third of the fleet [was] over 33 years old. . . ."[9] Federal legislators realized that it was time to provide federal protection to the general aviation industry. Congress was assured that if a uniform statute of repose was signed into law, Cessna Aircraft would create 25,000 jobs over the ensuing five years.[10] With members of the Senate and the House rallying to the call of job creation, GARA was passed and signed into law.

III. The Push for Statutes of Repose

American industry has long fought for laws limiting liability exposure. In response to what has been viewed by many as a liability explosion, the leaders of America's manufacturing concerns convinced at least twenty-four state legislatures that industry should not be indefinitely liable for what they produced.

A. Reasons Behind the Push

Often, those injured or killed in general aviation accidents have high future earning capacity. They are commonly professionals or business executives with the financial means to participate in the expensive pursuit of private flight and the very expensive pursuit of litigation upon injury. As a result there are higher jury awards stemming from general aviation cases as opposed to those accidents involving products of other industries.

The costs of defending these suits is added to the price of every new aircraft manufactured. For example, Beech Aircraft adds approximately $70,000 to the cost of each new aircraft to cover its litigation costs.[11] By 1994, the litigation costs of American manufacturers were 20 to 50 times

5. 140 Cong. Rec. S2991, S2993 (daily ed. Mar. 16, 1994) (Statement of Sen. Pressler).
6. 140 Cong. Rec. S2995, S2996 (daily ed. Mar. 16, 1994) (Statement of Sen. Hutchison).
7. 140 Cong. Rec. S2991, S2992 (daily ed. Mar. 16, 1994) (Statement of Sen. McCain).
8. 140 Cong. Rec. S2995, S2996, *supra* note 6.
9. 140 Cong. Rec. S2991, S2993, *supra* note 5.
10. 140 Cong. Rec. S2991, S2994 (daily ed. Mar. 16, 1994) (Statement of Sen. Pressler) (discussing the testimony of Cessna president Russ Meyer before the Senate Aviation Subcommittee on October 27, 1993).
11. 140 Cong. Rec. S2995, S2996, *supra* note 6.

higher than their foreign competitors.[12] As a whole, litigation costs for American general aviation manufacturers increased from $24 million in 1976 to $210 million in 1986.[13]

Through increasing products liability costs, sales of aircraft produced by American general aviation manufacturers fell from 17,000 units in 1979 to 900 in 1992.[14] That figure represents a decrease in sales of over 90 percent. What was once a leading American industry with a $340 million trade surplus in 1978 became a foreign dominated market with an $800 million trade deficit in 1992.[15] Once a thriving American industry, general aviation shrank into insignificance as an employer. According to the General Aviation Manufacturers Association industry, unemployment figures exceeded 70% in 1992.[16]

B. Leaders of the Movement

The General Aviation Manufacturers Association and the CEO's of America's largest general aviation manufacturers were the primary promoters of statutes of repose favoring the general aviation manufacturing industry. Much of the general aviation industry is concentrated in Kansas.[17] As a result of this concentration, members of the Kansas Congressional delegation were the primary sponsors of legislation aimed at preserving and reviving the general aviation industry.[18]

GARA gained wide spread support; supporters included: the International Association of Machinists,[19] the Aircraft Owners and Pilots Association (AOPA), the Experimental Aircraft Association, Helicopter Association International, the National Air Transportation Association and the National Business Aircraft Association.[20] Following the passage of S. 1458, the bill which eventually became GARA, AOPA sent its 325,000 members a letter urging each member to contact his or her Congressional Representative to express support for the companion bill, H.R.

12. 140 Cong. Rec. S2995, S2997 (daily ed. Mar. 16, 1994) (Statement of Sen. Burns).

13. 140 Cong. Rec. S3006, S3007 (daily ed. Mar. 16, 1994) (Statement of Sen. Danforth).

14. S. Rep. No. 203, 103d Cong., 1st Sess. 11 (1993).

15. 140 Cong. Rec. S2995, S2996, *supra* note 6.

16. S. Rep. No. 203.

17. Beech, Cessna and Learjet all manufacture their products in Wichita, Kansas. The other primary general aviation manufactures located in the United States are Piper in Florida, Mooney and Fairchild in Texas, Gulfstream in Georgia, American General in Mississippi, and Parker Hannifin in California. *See* Rep. Dan Glickman, *Want to Create New Aviation Jobs?*, Roll Call, Apr. 25, 1994.

18. Representative Dan Glickman (D-Kan.) and Senator Nancy Kassebaum (R-Kan.) were the primary sponsors of the General Aviation Revitalization Act of 1994.

19. 140 Cong. Rec. S3006, S3007, *supra* note 13.

20. *Kassebaum, Glickman, Hansen Take Steps to Move GA Statute-of-Repose Legislation*, 58 The Weekly of Business Aviation 101 (Mar. 7, 1994).

3087.[21] The heads of many of the nation's general aviation manufacturers reacted positively to the passage of S. 1458. Chuck Suma, president of Piper observed that the legislation ". . . will have a very positive impact on the future of general aviation," while Robert Crowley, chairman of American General, stated that "[p]roduct liability is the largest cost of a single-engine aircraft. This bill gives us hope for the future." Jacques Esculier, chief-executive of Mooney remarked that "[t]he limitation of product liability should give a new impulse to our industry."[22]

Proposed statutes of repose often were challenged by the American Trial Lawyers Association (ATLA) and federal efforts to impose statutes of repose were successfully derailed by ATLA since 1986.[23] Other opponents included consumer groups such as Citizen Action and Public Citizen which deemed statutes of repose "patently unfair and draconian," and believed victims injured by defective products should not be barred by Congress from the courthouse.[24]

IV. State by State Analysis of Statutes of Repose at the Time of GARA's Enactment[25]

GARA preempts any State law to the extent the law permits a civil GARA action to be brought eighteen (18) years after the point the aircraft was placed in the market or the subject component part was added to or replaced. Most states do not have statutes of repose. However, when GARA was signed, sixteen states had statutes of repose that ran for either the "useful safe life" of the product or from five to twelve years.[26] Before passage of GARA, only North Dakota had enacted a statute of repose specific to the general aviation manufacturing industry; the North Dakota statute has never been applied.[27] Prior to passage of GARA eight states repealed or declared unconstitutional their statutes of re-

21. *Aircraft Owners and Pilots Association*, 315 Aviation Daily 487 (Mar. 28, 1994).

22. *Senate Supports Product-Liability Bill*, Flight International, Mar. 23, 1994, at 20.

23. *Senate Passes, 91-8, a Bill Setting 18-year Statute of Repose; Legislation on Product Liability for Light Aircraft Manufacturers*, 12 Commuter-Regional Airline News No. 11 at 1 (March 21, 1994).

24. *Kassebaum, Glickman, Hansen Take Steps to Move GA Statute-of-Repose Legislation*, 58 The Weekly of Business Aviation 101 (March 7, 1994).

25. The applicable statute of repose is cited in the footnote appended to each subheading.

26. Ark. Code Ann. § 16-116-105 (Michie 1987); Colo. Rev. Stat. § 13-80-107 (1987); Conn. Gen. Stat. § 52-577a (1991 & Supp. 1995); Ga. Code Ann. § 51-1-11 (Michie 1982 & Supp. 1995); Idaho Code § [6-1403] 6-1303 (1990); 735 Ill. Comp. Stat. 5/13-213 (1992); Ind. Code Ann. § 33-1-1.5-5 (Burns 1992); Kan. Stat. Ann. § 60-3033 (1982 & Supp. 1993); Ky. Rev. Stat. Ann. § 411-310 (Michie 1992); Mich. Comp. Laws § 600.5805 (1987 & Supp. 1995); Minn. Stat. § 604.03 (1988); Neb. Rev. Stat. § 25-224 (1989); N.C. Gen. Stat. § 1-50(6) (Supp. 1993). Or. Rev. Stat. § 30-905 (1993); Tenn. Code. Ann. § 29-28-103 (1980 & Supp. 1994); & Wash Rev. Code § 7.72.060 (1992).

27. N.D. Cent. Code §28-01.4-04. (1995).

pose.[28] When GARA became law, two states considered legislation aimed at protecting the general aviation industry.[29]

Additionally at the time GARA became law, twenty-five states did not provide for nor had provided for a products liability action statute of repose, nor did they have any pending legislation in this area.[30] The following analysis of state law discusses the laws in force as well as those declared unconstitutional and sheds light on why it was important for Congress to step in to provide uniformity in the area of general aviation accidents.

ALABAMA[31]

Alabama's ten-year statute of repose began to run at the time the product was first used by a consumer who was not a distributor or another manufacturer and who had purchased the product to incorporate the product in question into one of its own products.

In 1992 this provision was declared unconstitutional. In *Lankford v. Sullivan, Long & Hagerty*,[32] the Alabama Supreme Court ruled that the statute of repose violated Article I, § 13, of the Alabama Constitution providing that for each injury a remedy by due process of law must exist. The plaintiffs in *Lankford* sought recovery for injuries incurred when an elevator in which they were riding collapsed and fell. The trial court granted the manufacturer-defendant's summary judgment motion in accordance with statute of repose. The Alabama Supreme Court found that the legislature's determination that the growth in products liability litigation was a "social evil" was unreasonable.[33]

The finding of unreasonableness in *Lankford* was based on numerous law review articles, foremost among them was an article by Professor Francis McGovern.[34] Professor McGovern asserts that statutes of repose may reduce recoveries by some plaintiffs, but that insurance premiums

28. ARIZ. REV. STAT. ANN. § 12-551 (1992); ALA. CODE § 6-5-502 (1993); FLA. STAT. ch. 95.031 (1982 & Supp. 1995); N.H. REV. STAT. ANN. § 507-D:2 (1983); N.D. CENT. CODE §28-01.1-02 (1991); R.I. GEN. LAWS § 9-1-13 (1985); S.D. CODIFIED LAWS § 15-2-12.1 (1984 & Supp. 1995); & UTAH CODE ANN. § 78-15-3 (1988).

29. The Colorado General Assembly was considering House Bill 94-1182. The Texas Legislature was considering TX73RHB 1343.

30. These states were: Alaska, California, Delaware, Hawaii, Iowa, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. In addition there was also no protection in the District of Columbia, Puerto Rico and the Virgin Islands.

31. ALA. CODE § 6-5-502 (1993).

32. 416 So. 2d 996 (Ala. 1992).

33. *Id.* at 1001.

34. Francis McGovern, *The Variety, Policy and Constitutionality or Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579 (1981).

for the defendant will remain unaffected.[35] In support of its finding, the court further cited a study by the Insurance Services Office which found "that only 2.7 percent of products involved in products liability actions were purchased more than six years prior to the injury-causing event."[36] Among those products with long life spans were aircraft and tractors. In conclusion, the court determined that the statute of repose was "arbitrary on its face" and could not be upheld.[37]

ARIZONA[38]

The Arizona legislature approved a twelve-year statute of repose which began to run as the product was first sold for use or consumption. The statute governed only strict products liability actions; it did not apply to actions based on ordinary negligence of the manufacturer or seller or breach of an express warranty provided by the manufacturer or seller.

The constitutionality of the Arizona statute was challenged in an action arising out of a 1988 crash involving a 1969 Beech aircraft.[39] The Federal District Court in *Carr* found the statute constitutional by holding that it did not violate either the equal protection or the due process clause of the fourteenth amendment. Using the rational basis test, the court found that "the Arizona legislature 'could have reasonably determined that, by protecting manufacturers from liability for products sold 12 years before an injury, the perceived crisis of rising products liability insurance rates would be alleviated and new product development would be promoted.'"[40] The court also clearly stated that there was no due process violation affiliated with statutes of repose "which do nothing more than preclude the assertion of one possible theory of recovery at trial."[41]

However, the statute of repose was declared unconstitutional in a 1993 Arizona Supreme Court decision involving an injury to a person working on an escalator.[42] The *Hazine* court avoided the discussion of due process and equal protection and instead based its declaration of unconstitutionality on a provision of the Arizona Constitution prohibiting laws abrogating a plaintiff's right to recovery.[43] The court determined that the plaintiff had a constitutional right to sue based on strict liability; therefore, the statute of repose was declared unconstitutional.

Prior to that declaration the statute of repose was successfully used

35. *Id.* at 595.
36. 416 So. 2d at 1002.
37. *Id.* at 1004.
38. ARIZ. REV. STAT. ANN. § 12-551 (1992).
39. Carr v. Beech Aircraft Corp., 758 F. Supp. 1330 (D. Ariz. 1991).
40. *Id.* at 1334 (citing Bryant v. Continental Conveyor & Equip. Co., 751 P.2d 509, 513 (Ariz. 1988)).
41. *Id.* at 1335.
42. Hazine v. Montgomery Elevator Co., 861 P.2d 625 (Ariz. 1993).
43. *Id.* at 627 (The court focused its discussion on ARIZ. CONST. art. 18, § 6.).

by the Cessna Aircraft Corporation. Cessna avoided a claim of strict products liability where a plaintiff claimed modifications such as repair directives, inserts to an owner's manual and a placard on procedures for restarting a stalled engine, were sufficient to extend the window of availability for a strict products liability action.[44]

ARKANSAS[45]

Arkansas law allows the manufacturer to present evidence of fault on the part of a consumer injured by a product when that consumer knew or should have known that the product had exceeded its "anticipated life." Since the plaintiff is not absolutely barred by the running of time, this is not a true statute of repose.

COLORADO[46]

Colorado has a seven-year statute of repose that runs from the first time the product is used for its intended purpose by someone not engaged in the business of manufacturing, selling or leasing of the product. The statute does not apply to injuries arising from hidden defects, prolonged exposure to hazardous material, intentional misrepresentation or fraudulent concealment of a material fact concerning the product that proximate causes the injury. Additionally, if the manufacturer issues an express warranty that extends beyond seven years, that warranty provision overrides the statute.

The precursor to the current statute of repose, a ten-year provision, was challenged in *Anderson v. The M.W. Kellogg Co.*[47] The plaintiff in *Anderson* brought an action based on negligence, strict liability, misrepresentation and breach of warranty against the successor of the corporation that had constructed the conveyor belt on which the plaintiff lost his arm. The trial court granted the defendant's motion for summary judgment based on the fact that the injury occurred in November of 1982, over twenty years after the construction of the conveyor belt. The Colorado Supreme Court affirmed the trial court's decision relying on both the clear language of the statutes the fact that no material issues of fact were in question.[48] However, the court went on to find the products liability statute of repose constitutional.[49] Using the rational basis test, the court determined that the "classifications enumerated as the four exceptions to the statute of repose bear a reasonable relationship to the legislative objectives of protecting the rights of certain types of injured plaintiffs while limiting the liability exposure of manufacturers and vendors of

44. Davis v. Cessna Aircraft Corp., 812 P.2d 1119 (Ariz. Ct. App. 1991).
45. ARK. CODE ANN. § 16-116-105 (Michie 1987).
46. COLO. REV. STAT. § 13-80-107 (1987).
47. 766 P.2d 637 (Colo. 1988).
48. *Id.* at 640-41.
49. *Id.* at 641-45.

equipment."[50] These enumerated exceptions are also elements of the current statute.[51] "The repose provisions also serve to eliminate tenuous claims involving older products or equipment for which evidence of defective conditions may be difficult to produce."[52] The court concluded that the statute of repose does not violate the principle of equal protection.

While GARA was winding its way through Congress, Colorado legislators were grappling with another repose bill designed to grant immunity to general aviation manufacturers and parts suppliers manufacturing their products in Colorado.[53] The bill, Colorado Aviation Manufacturers Act, went beyond the typical statute of repose in that it "[p]rohibit[ed] any lawsuit against an aircraft or aircraft components manufacturer for any product defect."[54] According to its drafters, the bill was designed to attract general aviation manufacturers to Colorado to support the development of Denver International Airport.[55] However, the bill was not passed because it provided manufacturers with few economic incentives[56] and it had serious constitutional flaws. The bill gave special treatment, immunity, to aircraft and aircraft components manufacturers, based on assumption of risk by those involved in an aircraft accident.[57] If passed, the statute probably would have violated the fourteenth amendment guarantee of equal protection; it left those injured in aircraft accidents without any remedy for their injuries unless the manufacturer engaged in misrepresentation or fraud.[58]

CONNECTICUT[59]

In Connecticut, parties are subject to a ten-year statute of repose. Once the manufacturer relinquishes control of the product, the statute of repose begins to run. The statute does not apply where the manufacturer intentionally misrepresented a product or fraudulently concealed information about the product. Further, express warranties providing longer periods of coverage may be used to override the time bar.

In an action arising out of an injury to a man struck by a filler cap

50. *Id.* at 645.

51. These exceptions are (1) hidden defects, (2) prolonged exposure to hazardous material, (3) intentional misrepresentation of a material fact and (4) fraudulent concealment of a material fact.

52. Anderson, 776 P.2d at 645.

53. H.B. 1182, 59th Colo. Gen. Assembly, 2d Sess. (1994).

54. *Id.* at "Bill Summary".

55. *Id.* at § 13-21-602(1)(G)&(I).

56. Under generally accepted choice-of-law principles, the law of the site of the accident applies in general aviation accidents. Therefore, the strict liability limits of the statute would only help Colorado manufacturers if the accident occurred in Colorado.

57. *Supra*, n. 53 at § 13-21-604(2)(A).

58. *Id.* at § 13-21-610.

59. CONN. GEN. STAT. § 52-577a (1991 & Supp. 1995).

that blew off of a compression tank, the Supreme Court of Connecticut determined that the statute of repose was constitutional.[60] The compression tank was purchased by the plaintiff's employer on May 18, 1971; the injury occurred on May 23, 1978; the action was filed May 21, 1981, ten years and three days after the manufacturer relinquished control of the product. The trial court dismissed the plaintiff's action in accordance with the ten-year statute of repose. On appeal the plaintiff claimed the statute violated the open courts[61] and equal protection[62] provisions of the Connecticut Constitution as well as well as the equal protection clause of the fourteenth amendment of the United States Constitution. Finding no constitutional violation, the court cited an earlier decision, "[t]he classification made by the legislature in passing General Statutes § 52-577a is reasonable, not arbitrary, and rests upon a difference having a fair and substantial relation to the object of the legislation."[63]

FLORIDA[64]

At one time, Florida had a twelve-year statute of repose. This statute was declared unconstitutional in a 1980 Florida Supreme Court decision.[65] In *Battilla*, Justice McDonald argued, in dissent, that there was a rational and legitimate basis in the legislature's "determin[ation] that perpetual liability places an undue burden on manufacturers."[66] Justice McDonald's argument was cited five years later when the Florida Supreme Court retreated from its declaration of unconstitutionality of the statute of repose.[67] The revival of the statute was short-lived; the Florida legislature abrogated the statute of repose for products liability actions in 1986.[68]

Following the *Battilla* decision, but prior to the temporary revival of the statute of repose in *Pullam*, a 1983 crash involving 1972 Cessna occurred in Florida.[69] The action was not brought until 1985, which was beyond the twelve-year limit of the statute of repose. The trial court granted Cessna's motion for summary judgment based on the statute of

60. Kelemen v. Rimrock Corp., 542 A.2d 720 (Conn. 1988).

61. CONN. CONST. § 10.

62. CONN. CONST. § 20.

63. 542 A.2d at 726 (citing Daily v. New Britain Machine Co., 512 A.2d 893, (Conn. 1986)).

64. FLA. STAT. ch. 95.031 (1982) (Amended by 1986 Fla. Laws ch. 86-272, to eliminate the statute of repose as it applies to products liability actions. The revised version of the statute is at FLA. STAT. ch. 95.031 (Supp. 1995).).

65. Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980).

66. *Id.* at 875 (J. McDonald dissenting).

67. Pullam v. Cincinnati, Inc., 476 So. 2d 657, 659 (Fla. 1985); *appeal dismissed*, 475 U.S. 1114 (1986).

68. 1986 Fla. Laws ch. 86-272; *see also*, Shaw v. General Motors Corp., 518 So. 2d 900 (Fla. 1987).

69. National Ins. Underwriters v. Cessna Aircraft Inc., 522 So. 2d 53 (Fla. Ct. App. 1988).

repose. However, on appeal, Cessna lost because the court ruled that the *Pullam* revival of the statute of repose was not retroactive.

GEORGIA[70]

Georgia has a ten-year statute of repose that begins to run on the date of first sale for use or consumption of the product. The statute does not apply to actions of the manufacturer who manifests a willful, reckless, or wanton disregard for life or property.

IDAHO[71]

In Idaho actions are barred if an injury arises after the "useful safe life" of the product. The manufacturer must prove by a preponderance of the evidence that the "useful life" had terminated. A presumption arises that the product exceeded its "useful safe life" if the claim is made more than ten years after the time of delivery of the product. The plaintiff who presents clear and convincing evidence that the product has not exceeded its "useful safe life" may defeat the presumption. The ten-year period does not apply to situations where the manufacturer intentionally misrepresented a fact about the product or fraudulently concealed information about the product, if such misrepresentation or concealment is a substantial cause of the plaintiff's injuries. An express warranty exceeding ten years overrides the time barring provisions of the statute.

Under the rational basis test, the statute is considered constitutional.[72] It also has been found to not violate the "open courts" provision of the Idaho Constitution.[73]

ILLINOIS[74]

The Illinois statute of repose precludes actions in which the injury occurs twelve years from the date of first sale, lease or delivery of possession by a seller *or* ten years from the date of first sale, lease or delivery or possession to its initial user, consumer, or other non-seller, whichever expires earlier. The statute is considered "rolling" if the manufacturer alters or modifies to the product after its initial sale, lease or delivery of possession and those modifications or alterations are the cause of the injury. The claim will not be time barred unless the applicable time limit has run since the modification or alteration. Providing replacement parts with the same formula or design as the original part does not allow for "rolling" of the time bar in actions based on defective design. Express warranties that exceed the time bars override the statute.

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70. GA. CODE ANN. § 51-1-11 (Michie 1982 & Supp. 1995).

71. IDAHO CODE § [6-1403] 6-1303 (1990) (Brackets due to mistake in codification in which two Acts were assigned chapter 13. The Compiler of Idaho Code has therefore designated The Idaho Product Liability Reform Act as chapter 14.).

72. Olsen v. J.A. Freeman Co., 791 P.2d 1285 (Idaho 1990).

73. *Id.*

74. 735 ILL. COMP. STAT. 5/13-213 (1992).

INDIANA[75]

Indiana has a ten-year statute of repose running with delivery of the product to its initial user or consumer. If injury occurs between eight and ten years following delivery to the initial user or consumer, the plaintiff has two years to bring his action.

The Supreme Court of Indiana,[76] the Tenth Circuit Court of Appeals[77] and the Seventh Circuit Court of Appeals[78] have analyzed the Indiana statute of repose in aviation cases. In *Dague,* in ruling on questions certified from the United States Court of Appeals for the Seventh Circuit, the court found the Indiana products liability statute of repose constitutional. *Dague* involved the crash of a Piper Pawnee aircraft which the decedent of the plaintiff was piloting. The aircraft was manufactured in 1965 and placed in the stream of commerce on March 26, 1965. The pilot died on September 5, 1978, from injuries he sustained from the crash on July 7 of the same year in Indiana. The federal district court granted Piper's motion for summary judgment based on the statute of repose. Upon appeal, the federal appellate court certified questions regarding the constitutionality of the statute to the Indiana Supreme Court.

The *Dague* court determined that it was "[t]he clear intention of the legislature . . . to limit the time within which product liability actions [could] be brought."[79] The court did not agree with the plaintiff's assertion that the statute was meant to provide for a two-year statute of limitations to bring a products liability action with no regard for the time the product entered the stream of commerce. The court instead found that the statute clearly set forth a ten-year period in which the injury must occur and that only if the injury occurs between eight and ten years after the product was placed in the stream of commerce would the ten-year period be extended by the two-year period.[80] Therefore, clearly barred the plaintiff's action the court ruled that the statute. Additionally, the court found that the Indiana Products Liability Act did not violate the "open courts" provision[81] or the "one-subject" requirement[82] of the Indi-

75. IND. CODE ANN. § 33-1-1.5-5 (Burns 1992).

76. Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981).

77. Alexander v. Beech Aircraft Corp., 952 F.2d 1215 (10th Cir. 1991). Alexander was originally filed in the Federal District Court for the District of Kansas because the defendant's primary place of business was in Kansas.

78. Schamel v. Textron-Lycoming, 1 F.3d 655 (7th Cir. 1993).

79. Dague, 418 N.E.2d at 210.

80. *Id.*

81. IND. CONST. art I, § 12 ("All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law.").

82. IND. CONST. art. IV, § 19 ("An act, except an act for the codification, rearrangement of laws, shall be confined to one subject and matters properly connected therewith.").

ana Constitution.

Alexander involved the crash of model A23A Beechcraft Musketeer. The aircraft was manufactured in 1967; the accident occurred in 1984. The aircraft crashed in Indiana after running out of fuel. The United States Court of Appeals for the Tenth Circuit affirmed the district court's dismissal of the action based on Indiana's statute of repose. In their appeal, the plaintiffs asserted that the Beech Pilot/Operator Manual, dated 1979, was a replacement part that led to the accident because the it may have created misconceptions regarding the amount of available fuel. The court held that the plaintiffs failed to present sufficient evidence indicating that the manual was a replacement part and that inadequacies in the manual were more appropriately pled as part of a failure to warn action. The court additionally ruled that the statute of repose does not deny due process or equal protection and therefore is not violative of the Fourteenth Amendment of the United States Constitution.[83]

The Seventh Circuit case of *Schamel*[84] involved the 1988 crash of a 1959 Piper Comanche powered by a Textron-Lycoming engine. The plaintiff alleged that the connecting rods used in the engine caused the crash. In affirming the district court's grant of summary judgment favoring Textron-Lycoming, the appellate court found that the last date the connecting rods were available from the defendant's distributors was in 1974 sixteen years prior to the accident. The court went on to state that the plaintiff's contention that the part could have stayed on the shelves of a Textron-Lycoming distributor until 1979 was unsupported by evidence. The defendant did not have the burden of rebutting every possible factual scenario.[85]

KANSAS[86]

In Kansas, products liability actions are barred if injury arises after the "useful safe life" of the product. It is the responsibility of the manufacturer to establish "useful safe life" by a preponderance of the evidence. If the claim arises more than ten years after the time of delivery of the product, the presumption is that the product exceeded its "useful safe life." This presumption may be rebutted by the plaintiff who presents clear and convincing evidence that the product has not exceeded its "useful safe life." The ten-year period does not apply when the manufacturer intentionally misrepresented a fact about the product or fraudulently concealed information about the product, if such misrepresentation or concealment substantially caused the plaintiff's injuries. An express

83. Alexander, 952 F.2d at 1225.

84. Schamel, 1 F.3d at 655.

85. *Id.* at 657-58.

86. KAN. STAT. ANN. § 60-3303 (1982 & Supp. 1993).

warranty for a time exceeding ten years overrides the time barring provisions of the statute.

The Kansas courts apply the doctrine of *lex loci delicti*.[87] In other words, the law where the wrong and injury occurs governs in tort actions brought in Kansas courts. Although Kansas is the center of general aviation manufacturing in the United States, the Kansas statute of repose has not been applied to any reported aviation cases.

The "useful safe life" language has been used to avoid summary judgment because it raises a question of fact.[88] The *Miller* court refused to grant a defendant/manufacturer's motion for summary judgment in a products liability action that arose from an accident which according to the defendant occurred at least thirteen years after the manufacture of the product in question. The plaintiff presented allegations indicating that the product in question had a "useful safe life" of thirty years. This language may benefit plaintiffs in their attempts to hold manufacturers liable for injuries stemming from products which the manufacturer at some point stated would last for a certain period of years longer than period which raises a presumption that the "useful safe life" expired.

KENTUCKY[89]

The Kentucky statute of repose provides a rebuttable presumption favoring the manufacturer if the injury occurs more than five years after the date of sale to the first consumer or more than eight years after the date of manufacture.

MICHIGAN[90]

In Michigan products liability cases, if the product which is the alleged cause of the injury has been in use for ten years the plaintiff must prove his prima facia case in a products liability action without the benefit of any presumption. For example, in the typical strict products liability action, negligence need not be shown by the plaintiff; in Michigan, once the ten-year period has run the plaintiff likely will have to prove negligence of the defendant in a products liability action. Therefore, the statute does not act as an absolute bar to recovery for plaintiffs who have suffered injuries from use of a product over ten years old. The statute merely places a heavier burden on those plaintiffs injured by products in use for over ten years.

MINNESOTA[91]

The statute of repose in Minnesota allows for a defense in a products

87. Alexander, 952 F.2d at 1223.
88. Miller v. G & W Elec. Co., 734 F. Supp. 450 (D. Kan. 1990).
89. KY. REV. STAT. ANN. § 411.310 (Michie 1992).
90. MICH. COMP. LAWS § 600.5805 (1987 & Supp. 1995).
91. MINN. STAT. § 604.03 (1988).

liability action that the product had exceeded its ordinary "useful life." "Useful life" is determined by analysis of a number of factors including the "useful life" stated by the manufacturer in its manuals furnished with the product.

The Minnesota Supreme Court has found that the choice of the language, "useful life," by the Minnesota Legislature has presented many problems for litigants.[92] In *Hodder*, the court undertook an in depth analysis of the "useful life defense" and concluded that "useful life" is more useful to determine comparative liability of the parties than to determine if an action is barred.[93] The court raised many questions regarding the language and insisted that the language was ambiguous; but, the legislature has yet to respond to the court's holdings.

NEBRASKA[94]

In Nebraska, a products liability action must be commenced within ten years of the date of sale or lease for use or consumption. The running of this statute has been interpreted to commence when the product is relinquished for use or consumption.[95] The product may be placed into the stream of commerce upon conveyance to a distributor, but until that distributor sells the product to an end-user, the ten-year period does not begin to run. This interpretation has important implications for those products inventoried for lengthy periods of time.

NEW HAMPSHIRE[96]

The New Hampshire statute of repose has been declared unconstitutional,[97] but remains on the books. The statute of repose provides for a twelve-year period from the time the manufacturer parts with possession and control or sells the product. For those defendants who are under a legal duty to inspect, maintain, repair, modify, alter or improve the product this time period is "rolling." Additionally, the time period is extended six years (but is not shortened to less than twelve years) beyond the date at which the defendant's legal duty as imposed by the government to alter, repair, recall, inspect or issue a warning or instructions about the product is incurred. The twelve-year period does not apply to situations in which the manufacturer has fraudulently misrepresented, concealed or failed to disclose a fact about the product. An express war-

92. Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988), *cert. denied*, 492 U.S. 926 (1989).

93. *Id.* at 832.

94. NEB. REV. STAT. § 25-224 (1989).

95. Witherspoon v. Sides Constr. Co., 362 N.W.2d 35 (1985).

96. N.H. REV. STAT. ANN. § 507-D:2 (1983 & Supp. 1994).

97. Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983) (The statute violates the New Hampshire Constitution by treating classes of plaintiffs differently, in that those injured in products liability actions are subject to time limitations different than the time limitation which applies to plaintiffs who bring personal injury actions which are not based on products liability.).

ranty for a time greater than twelve years will override the time barring provisions of the statute.

NORTH CAROLINA[98]

North Carolina does not have a statute of repose for strict products liability actions, however, it does have a six-year statute of limitations for defective products actions. That limit has been interpreted to operate as a statute of repose. The statute requires that a plaintiff injured by a defective product bring his action within six years of the date of initial purchase for use or consumption.

In a recent case involving the crash of Cessna 152, the North Carolina Court of Appeals held actions based on allegations of defective products must be brought within six years of the date of initial purchase for use or consumption.[99] The aircraft sold initially by Cessna in 1978, crashed in 1989, precluding any action based on claims that the aircraft or its components were defective. However, Cessna issued the plaintiff an Information Manual at an undetermined date that which allegedly omitted important information regarding carburetor icing which was a possible cause of the 1989 crash. The court determined that the manual itself was the defective product; since the date of delivery to the plaintiff was not indicated by either the plaintiff or the defendant, in the pleadings, the dismissal of the plaintiff's defective product action was unwarranted.[100]

NORTH DAKOTA[101]

At one time, North Dakota had a ten-year statute of repose which began to run from the date of initial purchase for use or consumption. The statute ran up to eleven years from the date of manufacture. This statute was found to violate of the equal protection provision[102] of the North Dakota Constitution.[103]

The entire products liability statute was repealed in 1993 and replaced by a new products liability statute excluding a statute of repose.[104] However, in 1995 the North Dakota legislature did pass a "useful safe life" statute of repose for general aviation manufactures but the statute has yet to be applied.[105]

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98. N.C. GEN. STAT. § 1-50(6) (Supp. 1993).

99. Driver v. Burlington Aviation, Inc., 430 S.E.2d 476 (N.C. Ct. App. 1993).

100. *Id.* at 483.

101. N.D. CENT. CODE §28-01.4 (1995) *See also*, N.D. CENT. CODE §28-01.1-02 (1991) (repealed by 1993 N.D. Laws ch. 324, § 5).

102. N.D. CONST. art. I, § 21.

103. Hanson v. Williams County, 389 N.W.2d 319 (N.D. 1986).

104. 1993 N.D. Laws ch. 324, §§ 4,5.

105. N.D. CENT. CODE §28-01.4 (1995).

OREGON[106]

Oregon has an eight-year statute of repose which begins to run on the date the product is first purchased for use or consumption.

The statute applies only to those "acts or omissions taking place before or at the time that the [manufacturer] places a product in the stream of commerce."[107] In *Erickson*, the Oregon Supreme Court undertook an in-depth analysis of the statute of repose for products liability actions. Much of the court's opinion focused on the legislative history of the statute; it tended to show that the statute was a compromise between business and consumer interests. The court found that the end result of the legislative hearings was a limitation on those actions stemming from the acts or omissions of the manufacturer prior to placing the product in the stream of commerce. A different statute, a ten-year statute of limitations for negligence actions, was the statute the court looked to in order to determine that injuries stemming from the acts of a manufacturer after a product had been placed in the stream of commerce could be barred.

Erickson involved the crash of a logging helicopter caused by the failure of a compressor disk in one of the helicopter's engines. The crash occurred ten years after the helicopter had been placed on the market; therefore, the plaintiff's action would have been barred by the statute of repose. However, the manufacturer provided the plaintiff with incorrect information concerning the "useful safe life" of the compressor disk four years before the accident.[108] Over the manufacturer's protests, the court determined that the act was governed by the ten-year statute of limitations for negligence actions rather than the eight-year statute of repose for products liability actions. The plaintiff prevailed.

RHODE ISLAND[109]

The Rhode Island legislature enacted a ten-year statute of repose which began to run on the date the product was first purchased for use or consumption. However, the time bar was declared unconstitutional in *Kennedy v. Cumberland Engineering Co.*[110] In *Kennedy* the Rhode Island Supreme Court agreed with its peers in Florida[111] and New Hampshire[112] by deciding that the statute of repose unconstitutionally barred a class of product liability plaintiffs from getting their day in court.

106. OR. REV. STAT. § 30.905 (1993).

107. Erickson Air-Crane Co. v. United Technologies Corp., 735 P.2d 614, 618 (Ore. 1987).

108. The manufacturer provided the plaintiff with a maintenance chart indicating that the compressor disk had a "useful safe life" of 6000 hours. In fact, it had a "useful safe life" of 4000 hours and at the time of the accident, had been in use for 4300 hours.

109. R.I. GEN. LAWS § 9-1-13 (1985).

110. 471 A.2d 206 (R.I. 1984).

111. Battilla v. Allis Chalmers Mfg., 392 So. 2d 874 (Fla. 1980).

112. Heath v. Sears, Roebuck & Co., 464 A.2d 288 (N.H. 1983).

SOUTH DAKOTA[113]

Until 1985, South Dakota had a relatively short statute of repose. The six year statute began to run with delivery of the product. This provision was repealed in 1985.[114]

TENNESSEE[115]

In Tennessee, an action must be brought within ten years of the date the product is first purchased for use or consumption, or within one year of the expiration of the "anticipated life" of the product, which ever is shorter.

This statute of repose was addressed by the United States Court of Appeals for the Fourth Circuit in a case involving the crash of a 1972 Cessna.[116] The aircraft was manufactured in Kansas in 1972. It crashed on January 17, 1985 in Tennessee while in route from Ohio to South Carolina, killing its sole occupant. Among the claims asserted by the plaintiff were negligence and strict liability. The appellate court affirmed the district court's order dismissing the plaintiff's tort actions based on the Tennessee statute of repose. The court found that the Tennessee statute applied because South Carolina courts applied the rule of *lex loci delicti* and the Tennessee statute of repose did not contravene South Carolina public policy.[117]

In a recent Tennessee Court of Appeals decision involving the crash in Kentucky of an aircraft powered by an Avco engine, it was determined that under Tennessee law the principle of "most significant relationship" governed the choice of law to be made by the courts.[118] The appellate court, affirmed the trial court's application of the Tennessee statute of repose and determined that the stipulated facts clearly showed that the most significant contacts of the parties were in Tennessee.[119] The plaintiffs were all Tennessee residents, the engine had recently been overhauled in Tennessee and the trip had started in Tennessee. The sole tie to Kentucky was the fact that the accident had occurred there, which was insufficient in light of the fact that Tennessee did not apply the doctrine of *lex loci delicti*. Additionally, the Pennsylvania contacts as the primary place of business of the defendant and the state in which the engine was manufactured were not significant enough to require the court to apply

113. S.D. CODIFIED LAWS § 15-2-12.1 (1984) (Replaced by S.D. CODIFIED LAWS § 15-2-12.2 (Supp. 1995), which eliminates the statute of repose and implements a three years statute of limitations for products liability actions.).

114. 1985 S.D. Laws ch. 157, § 2.

115. TENN. CODE ANN. § 29-28-103 (1980 & Supp. 1994).

116. Thornton v. Cessna Aircraft Co., 886 F.2d 85 (4th Cir. 1989).

117. *Id.* at 87-89. "[I]t is neither against good morals or natural justice or prejudicial to the general interests of the citizens of South Carolina." *Id.* at 89.

118. Bramblett v. Avco Corp., 1994 Tenn. App. LEXIS 178 (Tenn. Ct. App. Apr. 5, 1994).

119. The engine had been manufactured in 1959 and the accident occurred in 1987.

Pennsylvania law. The court therefore affirmed the dismissal of the plaintiffs' suits.

TEXAS

At the time GARA became law, Texas had no statute of repose for products liability actions in place. However, there was legislation pending in the Texas Legislature specifically aimed at protecting of the general aviation industry.[120] The legislation "relat[ed] to the time in which a products liability action against a seller of general aviation aircraft must be commenced."[121] It provided for a twenty-five-year statute of repose.[122] Under the proposed legislation, time began to run from "the date the aircraft [is] delivered to its first purchaser or lessee in [Texas] who [is] not engaged in the business of selling or leasing general aviation aircraft."[123] This legislation was not enacted and would have conflicted with GARA's 18 year statute of repose.

UTAH[124]

Utah's statute of repose was a six-year statute which ran from the date of initial purchase for use or consumption, but could be extended to ten years from the date of manufacture. The statute was declared unconstitutional in a 1985 Utah Supreme Court decision.[125]

In *Berry*, the court found that the statute of repose violated the open courts provision[126] and the right to recovery for wrongful death provision[127] of the Utah Constitution. *Berry* involved the crash of a twenty-three year old Beech airplane that resulted in the death of the pilot.[128]

WASHINGTON[129]

In Washington, the product seller will not be liable in a products liability action if it can show by a preponderance of the evidence that the product exceeded its "useful safe life." If twelve years passed from the time of delivery, a rebuttable presumption that the product had exceeded its "useful safe life" at the time of the accident exists. The statute does not apply to situations where the manufacturer intentionally misrepresented facts or concealed information about the product, if such action

120. H.B. 1343, 73d Leg., 1st Sess. (1993).

121. *Id.*

122. *Id.* at (B).

123. *Id.*

124. UTAH CODE ANN. § 78-15-3 (1988) (repealed by 1989 Utah Laws. ch. 119, § 1) (The new § 78-15-3 (1992) does not contain a statute of repose.).

125. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985).

126. UTAH CONST. art. I, § 11.

127. UTAH CONST. art. XVI, § 5.

128. The facts concerning the accident were not set forth in the opinion and the decision of the lower court was not published.

129. WASH. REV. CODE 7.72.060 (1992).

was a proximate cause of the plaintiff's harm. Express warranties exceeding the useful safe life of the product override the statutory time bar.

V. What Type of Statute of Repose is "Best" for the General Aviation Industry?

GARA has provided general aviation manufacturers with the benefit of an outside boundary to limit the time they may be subject to products liability and negligence actions. Statutes of repose will continue to be discussed in state legislatures, since there is no prohibition under GARA for shorter state statutes of repose. At the outset, it can undeniably be asserted that from the individual plaintiff's perspective that the "best" statute of repose is none at all. But, from the manufacturers' perspective, what would be best for the industry as a whole?

The basic difference between the existing statutes of repose is that some run for a given period of years, while others run for the "useful safe life" of the product. Courts have indicated that the "useful safe life" formulation presents many questions of fact and is very indeterminate. On the other hand, the period of years methodology, provides clearer guidance. It is in a manufacturer's best interest, to have the statute run for a period of years, as provided under GARA, because it could then more accurately predict long term liability costs and save litigation costs.

If a period of years is the "best" methodology to follow, the next issue which must be addressed is the most appropriate term of years. A period which is too short may not only be unconstitutional, it may also make the purchase of general aircraft unattractive. To prevent judicial voidance of the statute it must not unreasonably limit access to the courts. Although some state courts have voided statutes providing for ten- or twelve-year repose, many other state courts have not. Attraction of new buyers must also be considered since a potential consumer will not purchase an aircraft if the consumer knows that he or she may not be compensated for injuries arising out of use of the aircraft after only a few years of use.

Another factor to consider is whether the statute should be "rolling." Under a "rolling" statute of repose any product modifications restart the running of the statute as it applies to the subject modification. From the manufacturer's perspective a "rolling" statute is not likely to be attractive, because it does not provide a clear date at which liability will be avoided. From a social policy perspective the courts would prefer a "rolling" statute since it would allow aircraft owners to add updated component parts to their aircraft with the assurance that the parts are likely reliable.

One item which has been claimed by some plaintiffs to be a compo-

nent part is the operators manual. Operators manuals and maintenance manuals are frequently updated. As documents, these items should not be treated as component parts subject to products liability claims. Defects in these manuals are more appropriately litigated in failure to warn cases. Therefore, any statute of repose which is written to be "rolling" should specifically exclude manuals from coverage.

Thus, on the state level, the "best" statute of repose from the manufacturers' perspective would appear to be a "rolling" statute of eighteen years or less that specifically declares the "rolling" provision does not apply to operators manuals and maintenance manuals.

VI. Conclusion

GARA's federal preemption provision provides general aviation manufacturers with the uniformity needed to formulate long range plans and increase employment. There will be challenges to GARA's federal preemption of state tort law, but GARA will likely withstand any such challenges as it would be subject merely to a rational basis test. However, state statutes of repose will continue to be important in general aviation accidents. Those statutes based on the "useful safe life" of the product will continue to provide interesting factual battles.

Manufacturing interests will continue their lobbying of state legislatures in an attempt to secure shorter statutes of repose, or at least "useful safe life" statutes, as GARA merely provides an outside time limit. In lobbying state legislatures, general aviation manufacturers will have the support of many other industries, because states have avoided industry specific statutes of repose and have chosen to adopt broad products liability statutes of repose which apply to all industries.

Along the way consumer action groups will sustain their equally strong lobbying efforts. These efforts, although very strong, may not be enough to counter-balance legislators' concerns over a weak economy, the disappearance of industries and the loss of jobs.

Since GARA has been in effect only fifteen months, its economic benefits have yet to be fully demonstrated. Although GARA has provided the benefit of uniformity for general aviation manufacturers, state legislative efforts should continue as GARA merely provides an outside time limit within which the states must now operate.