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Ninth Circuit Holds the General Aviation Revitalization Act is Immediately Appealable under the Collateral Order Doctrine: *Estate of Kennedy v. Bell Helicopter Textron, Inc.*

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**NINTH CIRCUIT HOLDS THE GENERAL AVIATION
REVITALIZATION ACT IS IMMEDIATELY APPEALABLE
UNDER THE COLLATERAL ORDER DOCTRINE:
*ESTATE OF KENNEDY V. BELL HELICOPTER TEXTRON, INC.***

CARTER BOISVERT

IN 1994, CONGRESS enacted the General Aviation Revitalization Act (“GARA”) in an effort to rejuvenate the general aviation aircraft industry out of concern over the product liability costs imposed on manufacturers by the tort system.¹ The passage of GARA created an eighteen-year statute of repose in certain lawsuits that involve general aviation aircraft manufacturers.² In the recent case of *Estate of Kennedy v. Bell Helicopter Textron, Inc.*,³ the Ninth Circuit Court of Appeals interpreted the GARA statute of repose in a dispute over when the running of the statute should begin. While the court correctly analyzed GARA according to the plain language of the statute, the court unnecessarily expanded the collateral order doctrine⁴ to allow immediate appeals when a trial court rejects the GARA defense to liability.⁵

On November 5, 1996, Robin Grant Kennedy was killed while piloting a helicopter used for aerial logging in Washington

¹ For a detailed discussion of the effects of GARA on the general aviation aircraft industry, see Victor E. Schwartz & Leah Lorber, *The General Aviation and Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. AIR L. & COM. 1269 (2002); see also Phillip J. Kolczynski, *GARA: A Status Report*, Avweb Aviation Law (Jan. 14, 2001), at <http://www.avweb.com/news/avlaw/181905-1.html>.

² General Aviation Revitalization Act, Pub. L. No. 103-298, § 2(a), 108 Stat. 1552 (1994) (codified at 49 U.S.C. § 40101 note).

³ *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107 (9th Cir. 2002).

⁴ The collateral order doctrine allows immediate appeals, despite final judgment, of district court decisions that are conclusive, resolve important questions completely separate from the merits, and would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994).

⁵ *Estate of Kennedy*, 283 F.3d at 1110-11.

when the helicopter came apart in mid-air and crashed.⁶ Bell Helicopter originally manufactured the helicopter and delivered it to the U.S. Navy in 1970.⁷ The Navy subsequently sold the helicopter as military surplus for civilian use in 1984, and since that time it had been owned by various private entities.⁸ After Kennedy's death, his estate filed a diversity products liability action in the U.S. District Court for the Western District of Washington against Bell Helicopter Textron, Inc., and Garlick Helicopters, Inc., and the parties filed cross-motions for summary judgment.⁹

Bell Helicopter argued in its motion for summary judgment that GARA barred all claims brought against it by Kennedy.¹⁰ The district court, however, in granting partial summary judgment for the plaintiff, rejected this defense and found that Bell Helicopter manufactured the helicopter and, therefore, had a duty to warn of design defects under Washington law.¹¹ Bell Helicopter filed a notice of appeal before final judgment, arguing appellate jurisdiction existed for its GARA statute of repose claim under the collateral order doctrine.¹²

While the critical issue in the case concerned the event triggering the running of the GARA statute of repose, the court of appeals established its appellate jurisdiction by applying the collateral order doctrine. Under Section 1291 of the Judicial Code, appeals as of right are confined to those from "final decisions of the district courts."¹³ In *Kennedy*, the court stated that "the collateral order doctrine arises from a 'practical construction' of § 1291's final decision rule and establishes a narrow class of decisions that do not terminate the litigation, but must, in the in-

⁶ *Id.* at 1109.

⁷ *Id.* at 1111.

⁸ *Id.*

⁹ *Id.* at 1109. The district court dismissed all claims against Garlick by granting its motion for summary judgment, finding that it did not manufacture the helicopter and therefore could not be liable under Washington products liability law. *Id.*; WASH. REV. CODE ANN. § 7.72.030(1) (West 1992).

¹⁰ *Estate of Kennedy*, 283 F.3d at 1109.

¹¹ *Id.* The court granted partial summary judgment for the plaintiffs because the court found that genuine issues of material fact existed on the issues of whether Bell Helicopter failed to warn and if a design defect existed that proximately caused Kennedy's accident. *Id.*

¹² *Id.* at 1110.

¹³ 28 U.S.C.A. § 1291 (West 1993). A final decision is normally not deemed to occur "until there has been a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989).

terest of achieving a healthy legal system nonetheless be treated as final.”¹⁴ The court further outlined the three requirements needed to fall into this narrow class of immediately appealable orders. Specifically, the district court decision must: 1) be conclusive, 2) resolve important questions completely separate from the merits, and 3) render those questions effectively unreviewable on appeal from a final judgment.¹⁵ In reviewing these factors, the court stated, “[t]he district court’s order is conclusive, and, like qualified immunity accorded to government officials, the applicability of the GARA statute of repose is an important question which is resolved completely separate from the merits of the litigation.”¹⁶ Therefore, the *Kennedy* court quickly concluded that the decision of the district court easily met the first two factors.

The third requirement, that the important questions be effectively unreviewable on appeal from a final judgment, required more discussion from the court. The court concluded that the GARA statute of repose met the third condition as well because the explicit statutory right not to stand trial created by GARA would be irretrievably lost if the district court forced Bell Helicopter to defend itself in a full trial.¹⁷ “The plain language of GARA provides, ‘no civil action. . . may be brought. . . if the accident occurred – (1) after the applicable limitation period.’”¹⁸ The rationalization for its finding comes from the court’s belief that Congress intended to revive the economic health of the general aviation aircraft manufacturing industry by lifting the requirement that manufacturers tolerate the possibility of litigation for an indefinite time after they sell an airplane.¹⁹

The court also differentiated a statute of repose from a statute of limitations, claiming that the focus of each is entirely different.²⁰ A statute of repose, according to the court, proceeds on the basis that nobody should be liable once a specified amount of time has passed, and from that point forward, it would be

¹⁴ *Estate of Kennedy*, 283 F.3d at 1110 (citing *Digital Equip. Corp.*, 511 U.S. at 867).

¹⁵ *Id.*; *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Abney v. United States*, 431 U.S. 651, 659 (1977); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

¹⁶ *Estate of Kennedy*, 283 F.3d at 1110.

¹⁷ *Id.*

¹⁸ *Id.* (citing Pub. L. No. 103-298, § 2(a), 108 Stat. 1552 (1994) (codified at 49 U.S.C. § 40101 note)).

¹⁹ *Estate of Kennedy*, 283 F.3d at 1110-11.

²⁰ *Id.* at 1111.

unjust to permit an action to proceed.²¹ The court established its appellate jurisdiction under the collateral order doctrine by noting that the right to be free from the burdens of trial is an essential aspect of the GARA statute of repose.²²

After establishing its jurisdiction, the court addressed the main issue of the case concerning the event that triggered the running of the statute of repose. Kennedy argued that the 18-year period did not begin to run until 1986, the year the helicopter was first type certified and received its first airworthiness certificate.²³ Since the Navy originally used the helicopter, Kennedy argued it was not a general aviation aircraft until sold in 1984, but rather it was a "public aircraft" defined to include aircraft "used only for the U.S. Government,"²⁴ and therefore, the aircraft did not require a type certificate or an airworthiness certificate when used by the Navy.²⁵ The court rejected this argument and agreed with Bell Helicopter that the initial delivery of the aircraft triggered the limitations period, even though it could not be considered a general aviation aircraft at that time.²⁶ The court concluded that the GARA statute of repose began to run once Bell Helicopter delivered the helicopter to the U.S. Navy in 1970, and therefore the limitations period had expired by the time of the crash in 1996, barring Kennedy's claim.²⁷

Circuit Judge Paez, in his dissenting opinion, took issue with the court's expansion of the collateral order doctrine to include a statute of repose defense. He believed strongly that the court's holding was an "unwarranted exception" that would give

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1112. GARA, which provides "no civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft," defines a general aviation aircraft in part as "any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration." Pub. L. No. 103-298, §§ 2(a) & (c), 108 Stat. 1552 (1994) (codified at 49 U.S.C. § 40101 note).

²⁴ 49 U.S.C.A. § 40102(a)(37) (West 1996).

²⁵ *Estate of Kennedy*, 283 F.3d at 1112.

²⁶ *Id.* The court noted that under GARA § 2(a)(1)(A), the limitations period begins upon delivery of the "aircraft" and does not refer to the delivery of a "general aviation aircraft." Moreover, GARA § 3(1) defines "aircraft" as "any contrivance invented, used, or designed to navigate, or fly, in the air." *Id.*; Pub. L. No. 103-298, §§ 2(a)(1)(A), 3(1), 108 Stat. 1552 (1994) (codified at 49 U.S.C. § 40101 note).

²⁷ *Estate of Kennedy*, 283 F.3d at 1112.

defendants in a protected industry the added advantage in litigation of piecemeal review anytime Congress enacted a statute of repose.²⁸ According to Judge Paez, the summary judgment order denying Bell Helicopter's statute of repose defense did not meet the condition that the appealed-from order be "effectively unreviewable on appeal from final judgment."²⁹ Judge Paez argued that because general aviation manufacturers may obtain full review on appeal after final judgment, the court should not use the collateral order doctrine to hear an appeal from an order denying a GARA statute of repose defense.³⁰

Furthermore, Judge Paez felt the majority opinion misplaced its comparison of GARA's defense to a government official's claim of qualified immunity,³¹ noting that "qualified immunity, however, is fundamentally distinct from the GARA statute of repose."³² The protections of qualified immunity are rooted in preventing the social costs created "from the broad-ranging discovery that can be peculiarly disruptive of effective government."³³ GARA, according to Judge Paez, conspicuously did not contain these social costs and its purpose is not to relieve the general aviation manufacturers from social costs, but from the economic costs of claims of products liability, which any defendant faces in a tort action.³⁴ Finally, Judge Paez argued that GARA resembles the text of many statutes of limitations,³⁵ so Congress intended only to provide a defense to liability, and not immunity from suit and a right to appeal under the collateral order doctrine.³⁶

The majority's holding correctly applied the plain meaning of the GARA statute of repose, but its inclusion of the GARA defense into the collateral order doctrine is misplaced. The U.S. Supreme Court has stressed that the "narrow" exception to the final judgment rule should remain that way and should never

²⁸ *Id.* at 1113 (Paez, J., dissenting).

²⁹ *Id.*

³⁰ *Id.*

³¹ "Orders denying a claim of immunity are generally immediately appealable where the immunity guarantees a right not to stand trial." *Meek v. County of Riverside*, 183 F.3d 962, 968 (9th Cir. 1999).

³² *Estate of Kennedy*, 283 F.3d at 1114.

³³ *Id.*

³⁴ *Id.*

³⁵ Judge Paez pointed to the statute of limitations under 28 U.S.C. § 1658, which states, "a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." *Id.* (citing 28 U.S.C.A. § 1658 (West 1994)).

³⁶ *Id.* at 1115 (Paez, J., dissenting).

swallow the general rule that a party is entitled to a single appeal that should be postponed until final judgment has been entered.³⁷ The conditions required for a collateral order appeal are stringent, subject to broad scrutiny, and courts must consider not only whether a particular injustice will be avoided by a prompt appeal, but also the entire category to which a claim belongs.³⁸ Moreover, merely identifying some interest that would be forever lost has never alone satisfied the third requirement necessary to fall under the collateral order doctrine.³⁹ The inclination to prevent expanding the scope of the doctrine cannot be superseded merely by labeling an interest as "a right not to stand trial."⁴⁰ "Virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a right not to stand trial."⁴¹ The decisive issue is whether "the essence" of the asserted right is a right not to stand trial.⁴² Unlike qualified immunity or double jeopardy, a statute of repose is not essentially a right to not stand trial.

When a district court has denied a defendant's claim of right not to stand trial on double jeopardy grounds or claims of immunity, these decisions are immediately appealable because these rights cannot be vindicated effectively after final judgment is rendered.⁴³ The Double Jeopardy Clause is specifically a guarantee against being put to trial twice for the same offense.⁴⁴ Claims of immunity are an immunity from suit rather than a mere defense to liability and would be lost if a case erroneously went to trial.⁴⁵ The court in *Kennedy* wrongly analogizes GARA to these defenses of immunity and double jeopardy because GARA, as a defense to liability, can be effectively reviewed on appeal from a final judgment.

Judge Paez's dissent in *Kennedy* provides a sound argument by comparing the GARA statute of repose to the common language

³⁷ *Digital Equip. Corp.*, 511 U.S. at 868.

³⁸ *Id.* at 871.

³⁹ *Id.* at 872.

⁴⁰ *Id.* at 873.

⁴¹ *Id.*

⁴² *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988).

⁴³ *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

⁴⁴ The Fifth Amendment of the United States Constitution provides, "nor shall any person be subject (for the same offense) to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. "This prohibition is not against being twice punished, but against being twice put in jeopardy." *Abney v. United States*, 431 U.S. 651, 661 (1977).

⁴⁵ *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995).

of a statute of limitations.⁴⁶ If Congress had intended to provide immunity from suit, the language used in GARA could have expressed that intent.⁴⁷ The Third and Sixth Circuit Courts of Appeals have acknowledged the similarity between the Double Jeopardy Clause and statutes of limitations, but have held that statutes of limitations do not satisfy the third requirement of the collateral order doctrine.⁴⁸ Several other courts have held that statutes of limitations do not allow immediate appeals under the collateral order doctrine.⁴⁹ “Although statutes of limitations embody historically important rights of repose and fairness for defendants which are fundamental to our system. . .the rights they protect are not irreparably lost absent immediate review.”⁵⁰ While the operation of the GARA statute of repose functions differently than a statute of limitations, by employing the language Congress chose, GARA should be compared with a statute of limitations for purposes of the collateral order doctrine.

Congress enacted GARA to protect general aviation aircraft manufacturers from the long tail of liability tort action to which they were exposed under a tort action.⁵¹ The statute should be interpreted as a defense to liability rather than an immunity from suit. Otherwise, anytime Congress enacts a statute of repose, a defendant can argue for a “piecemeal review” of the suit based on the holding in *Kennedy*. This decision could prompt more discussion of a well-settled area of the law preventing immediate appeals to a statute of limitations defense when the language of the statute is similar to the GARA statute of repose. The intent of the U.S. Supreme Court with regard to the collateral order doctrine is to keep exceptions to the final judgment rule limited. The inclusion of a defense that can be effectively reviewed on appeal after final judgment directly contradicts this intent.

⁴⁶ *Estate of Kennedy*, 283 F.3d at 1115 (Paez, J., dissenting).

⁴⁷ *Compare* Pub. L. No. 103-298, § 2(a), 108 Stat. 1552 (1994) (codified at 49 U.S.C. § 40101 note), *with* 28 U.S.C.A. § 1658.

⁴⁸ *United States v. Levine*, 658 F.2d 113, 126 (3d Cir. 1981); *United States v. Davis*, 873 F.2d 900, 908-09 (6th Cir. 1989).

⁴⁹ *United States v. Garib-Bazain*, 222 F.3d 17, 18 (1st Cir. 2000) (dismissing immediate appeal for lack of jurisdiction because statute of limitations defense does not fall under collateral order doctrine); *United States v. Weiss*, 7 F.3d 1088, 1091 (2d Cir. 1993) (holding the statute of limitations under 18 U.S.C. § 3282 does not allow an immediate appeal).

⁵⁰ *Powers v. Southland Corp.*, 4 F.3d 223, 232-33 (3d Cir. 1993).

⁵¹ *See* H.R. Rep. No. 103-525, pt. I. at 1-4 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638, 1638-41.

