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## A Close and Critical Analysis of the New General Aviation Revitalization Act

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# A CLOSE AND CRITICAL ANALYSIS OF THE NEW GENERAL AVIATION REVITALIZATION ACT

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	386
II.	HISTORICAL REVIEW .....	386
III.	THE SCOPE OF GARA'S APPLICATION TO "GENERAL AVIATION AIRCRAFT" .....	388
A.	WHAT CONSTITUTES "GENERAL AVIATION AIRCRAFT" .....	388
B.	THE TYPE CERTIFICATE AND AIRWORTHINESS CERTIFICATE .....	390
C.	MAXIMUM PASSENGER SEATING CAPACITY.....	391
D.	NOT ENGAGED IN SCHEDULED PASSENGER- CARRYING OPERATIONS.....	392
IV.	THE EIGHTEEN-YEAR PERIOD OF REPOSE.....	393
V.	ENTITIES WHO MAY ASSERT THE GARA DEFENSE .....	396
A.	U.S. MANUFACTURERS AND DISTRIBUTORS .....	396
B.	FOREIGN MANUFACTURERS .....	399
C.	MANUFACTURERS OF AIRCRAFT INVOLVED IN FOREIGN ACCIDENTS .....	400
VI.	APPLICATION OF GARA TO AIRCRAFT PARTS .....	401
VII.	EXCEPTIONS TO GARA .....	405
A.	MISREPRESENTATION, CONCEALMENT, AND WITHHOLDING OF INFORMATION .....	405
B.	THE "EMERGENCY" EXCEPTION .....	412
C.	THE "NOT ABOARD" EXCEPTION .....	414
D.	THE "EXPRESS WARRANTY" EXCEPTION .....	414
VIII.	OTHER PROVISIONS .....	415
A.	PREEMPTION OF STATE LAW.....	415

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B. THE "EFFECTIVE DATE" .....	416
IX. ANTICIPATED EFFECTS OF GARA .....	417
X. CONCLUSION.....	419

## I. INTRODUCTION

THE GENERAL AVIATION Revitalization Act (GARA) was enacted in the United States when signed by President Clinton on August 17, 1994.<sup>1</sup> GARA is a federal statute of repose that places an eighteen-year time limit on bringing a products liability action against manufacturers of allegedly defective aircraft and/or component parts that cause an accident.

This Article takes a close look at GARA and its provisions. The first part discusses GARA's scope of application and those who may assert the defense. The second part examines the application of GARA to general aviation aircraft accidents. The third part analyzes certain aspects of GARA and discusses anticipated problems in the litigation arena. Recent GARA case law is also incorporated throughout the Article.

## II. HISTORICAL REVIEW

GARA was passed in response to an onslaught of public pressure from the U.S. general aviation industry, including the following: General Aviation Manufacturers Association, Aircraft Owners and Pilots Association, Experimental Aircraft Association, International Association of Machinists, Helicopter Association International, National Business Aircraft Association, and National Air Transportation Association.<sup>2</sup> The pressure stemmed from a near cessation of manufacturing activity in the industry allegedly caused by excessive products liability lawsuit damage awards and related litigation costs.<sup>3</sup> Such costs had risen significantly since the 1970s when strict liability became a viable cause of action against manufacturers in the aviation industry.<sup>4</sup> Kansas Senator Nancy Kassebaum and Representative Dan Glickman played a significant role in pushing the legisla-

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<sup>1</sup> 49 U.S.C. § 40101 (1994).

<sup>2</sup> Christopher C. McNatt, Jr. & Steven L. England, *The Push for Statutes of Repose in General Aviation*, 23 TRANSP. L.J. 323, 326 (1995). The forces that had opposed GARA from the start were the American Trial Lawyers Association and citizen organizations such as Citizen Action and Public Citizen. *Id.* at 327.

<sup>3</sup> *Id.* at 324.

<sup>4</sup> *Id.*

tion through both the House and Senate,<sup>5</sup> as Kansas had a very large segment of the general aviation manufacturing industry.

Of the world's small aircraft, approximately seventy-five percent operate in the United States.<sup>6</sup> More than 5000 small communities use general aviation as their access to the domestic scheduled air carrier market.<sup>7</sup> General aviation and its related industries contribute more than \$40 billion annually to the U.S. economy, along with employing more than 540,000 people.<sup>8</sup> Proponents of GARA claim that industries related to general aviation have lost 100,000 jobs due to the high number of products liability suits.<sup>9</sup> Though some experts believe that the decline of general aviation aircraft manufacturing was caused by other factors unrelated to liability costs, they concede that the dramatic rise in costs due to product liability exposure and related manufacturer product insurance premiums is significant.<sup>10</sup> After years of industry lobbying, negotiating, drafting, and redrafting, the final compromised result is GARA.

GARA's purpose is to:

[E]stablish a Federal statute of repose to protect general aviation manufacturers from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years. 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.<sup>11</sup>

The first reported cases involving the GARA defense indicate that GARA is subject to very strict judicial scrutiny.<sup>12</sup> There is an

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<sup>5</sup> *Id.* at 326. The House passed the bill by a clear majority, and the Senate voted 91 to 8 in favor of the bill. See *Senate Passed, 91-8, A Bill Setting 18-Year Statute of Repose*, COMMUTER REGIONAL AIRLINE NEWS, Mar. 21, 1994, at 19.

<sup>6</sup> Scott E. Tarry & Lawrence J. Truitt, *Rhetoric and Reality: Tort Reform and the Uncertain Future of General Aviation*, 61 J. AIR L. & COM. 163, 167 (1995).

<sup>7</sup> McNatt & England, *supra* note 2, at 324.

<sup>8</sup> Tarry & Truitt, *supra* note 6, at 167.

<sup>9</sup> McNatt & England, *supra* note 2, at 325.

<sup>10</sup> Tarry & Truitt, *supra* note 6, at 193.

<sup>11</sup> 140 CONG. REC. H4998-99 (daily ed. June 27, 1994) (statement of Rep. Fish). The anticipated spool-up in production and orders has been slow. As of April 1996, the first manufactured Cessna 172 in 10 years made its maiden trial flight; meanwhile, Cessna had only 300 deposited agreements to purchase its light aircraft. *First New Cessna 172 Flies*, AV. WK. & SPACE TECH., Apr. 29, 1996, at 21.

<sup>12</sup> See, e.g., *Altseimer v. Bell Helicopter Textron, Inc.*, 919 F. Supp. 340, 342-43 (E.D. Cal. 1996); *Alter v. Bell Helicopter Textron, Inc.*, H-95-5046, 1996 WL 616321, at \*5-11 (S.D. Tex. June 17, 1996).

indication that once a case is arguably within GARA's ambit, plaintiff's counsel will argue that one of the four exceptions applies, most notably the "misrepresentation, concealment or withholding of information" exception.<sup>13</sup>

### III. THE SCOPE OF GARA'S APPLICATION TO "GENERAL AVIATION AIRCRAFT"

GARA contains four sections: short title, time limitations, definitions, and effective date.<sup>14</sup>

#### A. WHAT CONSTITUTES "GENERAL AVIATION AIRCRAFT"

GARA applies to accidents involving "general aviation aircraft," which is defined in subsection (c) 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 . . . .<sup>15</sup>

The first inquiry looks to the word "aircraft" to determine the scope of application. Does "aircraft" include helicopters, gliders, gyrocopters, blimps, and hot air balloons? The Federal Aviation Act provides guidance. Aircraft means "any contrivance invented, used, or designed to navigate, or fly in, the air."<sup>16</sup> This broad definition includes virtually anything that is built with the intent of departing company with the ground.

A more difficult problem arises with regard to the word "general," which is not defined in GARA. GARA only requires the issuance of either a type certificate or airworthiness certificate for its statute of repose to apply.<sup>17</sup> Once one of those certificates is issued, it appears that the aircraft is considered one of "general aviation," unless it is being used for a "scheduled passenger-carrying operation" at the time of the accident.<sup>18</sup>

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<sup>13</sup> See 49 U.S.C. § 40101(2)(b)(1); see also discussion *infra* part VII.

<sup>14</sup> The complete version of GARA is located in the appendix to this Article.

<sup>15</sup> 49 U.S.C. § 40101(2)(c) (citation omitted).

<sup>16</sup> 49 U.S.C. § 40102(a)(6) (1994).

<sup>17</sup> *Id.* § 40101(2)(c).

<sup>18</sup> *Id.*

Interestingly, GARA distinguishes between a "civil aircraft," which means "an aircraft except a public aircraft,"<sup>19</sup> and a "public aircraft." A public aircraft is an aircraft used only for the United States government, and it is not per se bound by or required to comply with the Federal Aviation Regulations (FAR).<sup>20</sup> If public aircraft are not issued a type or airworthiness certificate, GARA clearly would not apply. However, since numerous government transport planes are identical to their civilian counterparts, they nonetheless may have been issued a type certificate, and may arguably be governed by GARA, even though governmental use of the aircraft may not be considered "general aviation." Such use does not appear to be within the purpose, intent, or common definition of general aviation. Another gray area arises when certificated aircraft are leased for governmental use—that is, a non-general aviation function, which would likely preclude the application of GARA, depending on the facts and underlying lease arrangement.<sup>21</sup>

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<sup>19</sup> *Id.* § 40102(a)(16).

<sup>20</sup> *Id.* § 40102(a)(37). The United States Code specifically defines "public aircraft":

(A) means an aircraft—

(i) used only for the United States Government; or

(ii) owned and operated (except for commercial purposes), or exclusively leased for at least 90 continuous days, by a government (except the United States Government), including a State, the District of Columbia, or a territory or possession of the United States, or political subdivision of that government; but

(B) does not include a government-owned aircraft—

(i) transporting property for commercial purposes; or

(ii) transporting passengers other than—

(I) transporting (for other than commercial purposes) crewmembers or other persons aboard the aircraft whose presence is required to perform, or is associated with the performance of, a governmental function such as firefighting, search and rescue, law enforcement, aeronautical research, or biological or geological resource management; or

(II) transporting (for other than commercial purposes) persons aboard the aircraft if the aircraft is operated by the Armed Forces or an intelligence agency of the United States.

*Id.*

<sup>21</sup> For example, if government employees charter an aircraft under FAR Part 135, GARA would apply. However, if the government leases a Beech King Air for six months, the aircraft or component manufacturer would have a difficult time convincing a court that the aircraft was used in "general aviation," even if it had a type or airworthiness certificate.

## B. THE TYPE CERTIFICATE AND AIRWORTHINESS CERTIFICATE

The first element that must be met for an aircraft to fall within GARA is that the Federal Aviation Administration (FAA) must have issued it a type certificate or an airworthiness certificate.<sup>22</sup> If not, the aircraft is not considered a general aviation aircraft under GARA, and, thus, the manufacturer is not entitled to protection under GARA.<sup>23</sup> Even if a certificate is suspended or revoked, all that appears to be required is the original issuance of the certificate by the FAA, as the manufacturer does not retain any control over the continuing airworthiness of its aircraft after delivery.

With regard to defining type and airworthiness certificates, Section 3 of GARA refers to another section of the United States Code that defines each term. Type certificates are issued for aircraft, aircraft engines, propellers, and appliances.<sup>24</sup> They are issued only after the FAA determines that each submitted part "is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed."<sup>25</sup> Type certificates are issued to ensure that aircraft and their parts are safe.<sup>26</sup> According to the FAR, "type," as "used with respect to the certification of aircraft, means those aircraft which are similar in design."<sup>27</sup> Examples include a DC-7 and a DC-7C.<sup>28</sup> Unlike airworthiness certificates, type certificates are issued on approval of the design, specifications, and manufacturing process.<sup>29</sup> Thus, the FAA does not issue a type certificate for each part, but it may specify in the FAR the appliances that require a type certificate.<sup>30</sup> Manufacturers are left to ensure that their parts fully comply with the type certificate.

Airworthiness certificates are issued by the FAA to each aircraft upon request from an aircraft's registered owner, who is typically the manufacturer before the initial sale of the aircraft. They are issued when the FAA "finds that the aircraft conforms

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<sup>22</sup> 49 U.S.C. § 40101(2)(c).

<sup>23</sup> *Id.*

<sup>24</sup> 49 U.S.C. § 44704(a)(1) (1994).

<sup>25</sup> *Id.* § 44704(a)(2).

<sup>26</sup> *Id.*

<sup>27</sup> 14 C.F.R. § 1.1 (1996). Part 21 of the FAR sets forth the regulations for type certificates (subpart B), provisional type certificates (subpart C), changes to type certificates (subpart D), supplemental type certificates (subpart E), and production type certificates (subpart F). *See* 14 C.F.R. § 21 (1996).

<sup>28</sup> 14 C.F.R. § 1.1.

<sup>29</sup> *Id.*

<sup>30</sup> 49 U.S.C. § 44704(a)(2)(A).

to its type certificate and, after inspection, is in condition for safe operation.”<sup>31</sup> Airworthiness certificates are classified by the regulations as “standard” and “special.” Standard airworthiness certificates are issued “for aircraft type certificated in the normal, utility, acrobatic, commuter, or transport category . . . and for aircraft designated by the Administrator as special classes of aircraft.”<sup>32</sup> Special airworthiness certificates are “primary, restricted, limited, and provisional airworthiness certificates, special flight permits, and experimental certificates.”<sup>33</sup> Importantly, in light of the significant increase in the manufacturing and use of home-built aircraft, the operation of these aircraft requires an experimental airworthiness certificate, which technically brings them under the definition of general aviation aircraft because they are issued an airworthiness certificate.<sup>34</sup> Thus, GARA likely would protect manufacturers of home-built aircraft.<sup>35</sup> Under the FAR, even short term ferry permits are considered airworthiness certificates.<sup>36</sup> Thus, it appears that any civil aircraft operating lawfully will be considered to have at least one type of airworthiness certificate that brings it within the scope of GARA.

“General aviation aircraft” must be issued *either* a type certificate or an airworthiness certificate in order to fly lawfully. Yet, issuance of an airworthiness certificate is not required for GARA to apply as long as the aircraft was issued a type certificate.<sup>37</sup>

### C. MAXIMUM PASSENGER SEATING CAPACITY

The second qualifying factor with regard to general aviation aircraft is that at the time the type and/or airworthiness certificate was “originally issued, [the aircraft] had a maximum seating capacity of fewer than 20 passengers.”<sup>38</sup> This figure does not include seating for the pilot and copilot, as they are “crewmembers,” not “passengers.”<sup>39</sup> Maximum seating capacity

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<sup>31</sup> *Id.* § 44704(c).

<sup>32</sup> 14 C.F.R. § 21.175(a) (1996).

<sup>33</sup> *Id.* § 21.175(b).

<sup>34</sup> *See id.* § 21.191(g),(h).

<sup>35</sup> *See id.* (dealing with amateur-built and kit-built aircraft).

<sup>36</sup> *See* 14 C.F.R. § 21.197 (1996).

<sup>37</sup> *See* 49 U.S.C. § 40101(2)(c).

<sup>38</sup> *Id.*

<sup>39</sup> 14 C.F.R. § 129.25(a)(3) (1996) explains that “passenger seating configuration” means:

[T]he total number of seats for which the aircraft is type certificated that can be made available for passenger use aboard a flight



will usually be contained in the type certificate data sheets, which prescribe the applicable limitations for each particular aircraft model.<sup>40</sup>

#### D. NOT ENGAGED IN SCHEDULED PASSENGER-CARRYING OPERATIONS

The third and final limitation contained in the definition of general aviation aircraft is that "at the time of the accident, [the aircraft was not] engaged in scheduled passenger-carrying operations as defined under regulations in effect under the Federal Aviation Act of 1958."<sup>41</sup> Obviously, general aviation would not include scheduled air carrier services. Part 108 (Airplane Operator Security) and Part 129 (Foreign Air Carrier Operations) of the Code of Federal Regulations both define "scheduled passenger operations" as follows: "holding out to the public of air transportation service for passengers from identified air terminals at a set time announced by timetable or schedule published in a newspaper, magazine, or other advertising medium."<sup>42</sup> This definition is somewhat vague because it requires the timetable or schedule to be published in an advertising medium. Arguably, a carrier who advertises its *routes* only, but who has its *timetables* available on a Computer Reservation System, might not fall within the technical definition of scheduled passenger operations even though its operations would be scheduled. Non-scheduled charter operations, on the other hand, clearly fall within the ambit of GARA.<sup>43</sup>

Part 135 of the Code of Federal Regulations (Air Taxi Operators and Commercial Operators) defines "scheduled passenger-carrying operations" as "passenger-carrying operations that are

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and includes that seat in certain airplanes which may be used by a representative of the Administrator to conduct flight checks but is available for revenue purposes on other occasions.

<sup>40</sup> Part 125 of the FAR contains special regulations for aircraft that have a seating capacity for 20 or more passengers. See 14 C.F.R. § 125.1 (1996). It is titled "Certification and Operations: Airplanes Having a Seating Capacity of 20 or More Passengers or a Maximum Payload Capacity of 6000 Pounds or More." *Id.* pt. 125. Part 125 may have been used as a reference to set the line of demarcation of "general aviation aircraft" at seating capacity of fewer than 20 passengers. It is not clear why GARA did not also include the maximum payload provision also contained in Part 125. See *id.* § 125.9.

<sup>41</sup> 49 U.S.C. § 40101(2)(c).

<sup>42</sup> 14 C.F.R. § 108.3(e) (1996); *id.* § 129.25(a)(6). It is noted that GARA looks to the definition of "scheduled passenger-carrying operations" as it is defined "at the time of the accident." 49 U.S.C. § 40101(2)(c).

<sup>43</sup> 14 C.F.R. §§ 108.1 & 108.3(e).

conducted in accordance with a published schedule[,] which covers at least five round trips per week on at least one route between two or more points, includes dates or times (or both), and is openly advertised or otherwise made readily available to the general public.”<sup>44</sup>

Why the different application of GARA to different types of flight operations? The distinguishing factor is that scheduled air services are not within the realm of general aviation and are governed by a different set of regulations for operation, pilot requirements, and maintenance scheduling. The regulations for scheduled passenger operations have stricter safety requirements, allowing the manufacturers to set tighter maintenance schedules and, thus, play a continuing role in the safety maintenance and repair of aircraft.

Therefore, it is the aircraft’s functional use at the time of the accident—whether the flight was scheduled or nonscheduled—that will determine whether or not GARA applies. Plaintiffs’ attorneys will certainly want to establish that the flight was “scheduled” if their case would otherwise be subject to GARA’s statute of repose.

#### IV. THE EIGHTEEN-YEAR PERIOD OF REPOSE

Section 2 of the General Aviation Revitalization Act is entitled “Time Limitations on Civil Actions Against Aircraft Manufacturers.”<sup>45</sup> Subsection (a) provides:

Except as provided in subsection (b), 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 or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred—

(1) after the applicable limitation period beginning on—

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

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<sup>44</sup> 14 C.F.R. § 135.261(b)(1) (1996). This definition is more narrow than those found in Parts 108 and 129, and should not be used under GARA. It is limited by its own terms because it only applies to 14 C.F.R. § 135.265, which sets forth “[f]light time limitations and rest requirements” for scheduled operations. *See id.* § 135.265.

<sup>45</sup> 49 U.S.C. § 40101(2).

(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft . . . .<sup>46</sup>

The significant term "limitation period" is defined in Section 3 to mean "18 years with respect to general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft."<sup>47</sup>

The time limitation is important because it determines when the running of the statute commences and what type of act must fall within the eighteen-year time period. Subsections 1(A) and (B) appear clear and unambiguous. However, what constitutes "delivery of the aircraft" may be a key issue in close-call cases. Furthermore, a manufacturer who asserts a GARA defense will have the burden to prove the date of delivery.<sup>48</sup>

GARA is unique in defining what must occur within the eighteen-year limit. Subsection (a) clearly states that the "accident" is the event that must occur within the limitations period.<sup>49</sup> Numerous other statutes have a more defense-oriented event, providing that the *legal action* must be filed within the limitations period.<sup>50</sup> Under GARA, once the accident that caused the injury occurs within the repose period, the lawsuit needs only be filed within the applicable statute of limitations period.<sup>51</sup>

Another consideration is the use of the word "accident" in Section 2, which requires that the damage arise "out of an accident."<sup>52</sup> Although GARA does not define "accident," a provision of the Code of Federal Regulations provides some guidance, defining an "aircraft accident" to mean "an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage."<sup>53</sup>

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<sup>46</sup> *Id.* § 40101(2)(a).

<sup>47</sup> *Id.* § 40101(3).

<sup>48</sup> Some states use the date that the product was first used for its intended purpose as the triggering date, *see, e.g.*, COLO. REV. STAT. § 13-80-107 (1987), while other states use the date that the manufacturer relinquishes control of the product, *see, e.g.*, CONN. GEN. STAT. § 52-577a (1991 & Supp. 1995).

<sup>49</sup> *See* 49 U.S.C. § 40101(2)(a).

<sup>50</sup> *See, e.g.*, 12 U.S.C. § 1821(d)(5)(F) (1994).

<sup>51</sup> 49 U.S.C. § 40101(2)(a).

<sup>52</sup> *See id.*

<sup>53</sup> 49 C.F.R. § 830.2 (1995). This provision also specifically defines "serious injury" and "substantial damage."

It is conceivable that an incident may occur that does not fall within this definition of accident. An example is the temporary failure of an aircraft engine that caused emotional distress to passengers on board even though the plane landed safely. However, it is absurd to think that GARA was intended to cover only injuries considered to be more serious under the technical definition of accident. Furthermore, the above definition is limited in its application to Part 830 of the Code of Federal Regulations involving notification and reporting of accidents and incidents.<sup>54</sup> This Article refers to that definition merely to lend guidance to an otherwise unclear term. A much broader definition of accident is contained in the 1985 United States Supreme Court's decision in *Air France v. Saks*.<sup>55</sup> Writing for the majority, Justice O'Connor held that an accident is an event that is "caused by an unexpected or unusual event or happening that is external to the passenger."<sup>56</sup> The definition in *Saks*, however, is limited to application under the Warsaw Convention.<sup>57</sup>

One issue that has arisen in recent GARA case law is determining the triggering date of GARA when the aircraft manuals (or updates to the manuals) are issued less than eighteen years before the accident. In *Alter v. Bell Helicopter Textron*,<sup>58</sup> the plaintiff alleged that the crash of a Bell 206 helicopter was caused, in part, by the defendant's failure to provide sufficient maintenance manual instructions for inspecting an engine compressor stator vane.<sup>59</sup> Defendant Bell had issued and revised the manual approximately two times each year since 1974. The plaintiff argued that the delivery of the manuals within the repose period constituted a new triggering of the time period. The court disagreed, stating:

Section 2(a)(2) of GARA states that a replacement "component, system, subassembly, or other part" must replace a "component,

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<sup>54</sup> 49 C.F.R. pt. 830 is entitled "Notification and Reporting of Aircraft Accidents or Incidents and Overdue Aircraft, and Preservation of Aircraft Wreckage, Mail, Cargo, and Records."

<sup>55</sup> 470 U.S. 392 (1985).

<sup>56</sup> *Id.* at 405.

<sup>57</sup> *See id.*

<sup>58</sup> No. H-95-5046, 1996 WL 617321, at \*1 (S.D. Tex. June 17, 1996).

<sup>59</sup> In its decision, the court quoted from the Israeli government's accident investigation report, which stated: "The manufacturer's instruction relating to the inspection of the engine compressor stator vanes erosion, during the periodical checks, was drafted in a misleading manner, which brought up the understanding that thickness had to be checked at the outer end rather than at the root of the vane." *Id.* at \*5.

system, . . . or other part" "originally in" or "added to" the aircraft. The manual was not a "part" "originally in" or "added to" the aircraft. The manual revisions are not a replacement "component, system, subassembly, or other part" that started a new limitations period under section 2(2)(a).<sup>60</sup>

From a policy standpoint, *Alter* presents a catch-22 situation. On the one hand, as long as manufacturers are protected under GARA with regard to updating their aircraft manuals, they have a complete incentive to do so without the concern of additional liability exposure. Yet, on the other hand, it is difficult to distinguish between the triggering of a new statute of repose for a new part that is required by the manufacturer to be replaced for safety reasons, and no new triggering date when the manufacturer changes or revises its maintenance manual to make the aircraft safer for flight. The continued maintenance of an aircraft in accordance with the manufacturer's manual is no less significant than the replacement of aircraft parts. When a part is no longer safe, it is replaced. When a maintenance procedure is no longer safe, it is revised. Yet, a replacement part will trigger a new period, while under *Alter*, a revised manual will not, even when the overall effect on safety may be the same. Insufficient maintenance manuals may contribute to a product's failure, just as a design or manufacturing defect would cause a product to fail.

## V. ENTITIES WHO MAY ASSERT THE GARA DEFENSE

### A. U.S. MANUFACTURERS AND DISTRIBUTORS

Section 2(a) prevents suit "against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer."<sup>61</sup> Therefore, only manufacturers are protected by GARA. United States manufacturers are the primary target of the products liability suits since they are blamed for any defect in their aircraft. Moreover, they are easy targets because they have deep pockets. As a result of being hit with the largest damage awards, U.S. aircraft manufacturers have lobbied for and received favorable legislation. Consequently, they are ultimately protected under GARA.

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<sup>60</sup> *Id.* at \*6.

<sup>61</sup> 49 U.S.C. § 40101(2)(a).

But what about distributors, sellers, and lessors who do not fall squarely within the definition of manufacturers? It does not appear that GARA protects them *per se*; however, state law may allow them to assert all defenses available to the manufacturer, which might include GARA. Some states, for products liability purposes, may include all entities in the chain of distribution in their definition of "manufacturer."<sup>62</sup> Under those circumstances, distributors, sellers, and lessors can be considered a manufacturer under GARA unless preempted by federal common law (for example, where a significant conflict exists between federal and state law, or where a unique federal interest arises to apply its own law).<sup>63</sup>

Furthermore, many states have their own statutes of repose that may also act to protect non-manufacturers in the chain of distribution.<sup>64</sup> Even though the underlying policy behind GARA should also protect non-manufacturers, there is no provision that specifically includes them. However, if not covered under GARA and absent strict liability, the plaintiffs will have a difficult burden of proof in products liability claims against non-manufacturers.

The tentative draft of the new Restatement of the Law (Third) of Torts recognizes claims in strict liability for "one who sells or otherwise distributes a product."<sup>65</sup> This broad definition would include the manufacturer and those in the chain of distribution,

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<sup>62</sup> For example, the term "manufacturer" is defined under the California Business and Professional Code to include any "distributor of a manufacturer who sells, transfers, or exchanges an appliance to or with a retailer." CAL. BUS. & PROF. CODE § 22410(b) (West 1987).

<sup>63</sup> See *Boyle v. United Technologies Corp.*, 487 U.S. 500, 507 (1988).

<sup>64</sup> For a review of state statutes of repose that were in effect at the time of the passage of GARA, see McNatt & England, *supra* note 2, at 327-42.

<sup>65</sup> RESTATEMENT (THIRD) OF TORTS § 5 (Tentative Draft No. 2 1995). The definition of "one who sells or otherwise distributes" is as follows:

(a) One "sells" a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include, but are not limited to, manufacturers, wholesalers, and retailers.

(b) One "otherwise distributes" a product when, in a commercial context other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.

including wholesalers and retailers. Therefore, even though individual state domestic law will govern claims in strict liability (which is usually the only viable cause of action against entities in the chain of distribution), non-manufacturers who sell aircraft or their component parts will not be covered under GARA unless they fall within the definition of "manufacturer."

The second limitation contained in Section 2(a) of GARA provides that GARA only applies to manufacturers of "any new component, system, subassembly, or other part of the aircraft."<sup>66</sup> The word "new" seems to imply the original manufacturer. However, some component parts, such as engines, are rebuilt and "zero timed" and, thus, returned to their original specifications, even though the work may be performed by someone other than the original manufacturer.<sup>67</sup> The concern here is that for products liability purposes, some states treat entities who rebuild and/or overhaul component parts as manufactur-

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(c) One also "sells or otherwise distributes" a product when, in a commercial context, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in Subsection (a) or (b).

*Id.*

<sup>66</sup> 49 U.S.C. § 40101(2)(a).

<sup>67</sup> The FAA recently defined "overhauled" and "rebuilt":

*Overhauled.* Describes an airframe, aircraft engine, propeller, appliance, or component part using methods, techniques, and practices acceptable to the Administrator, which has undergone the following:

(1) Has been disassembled, cleaned, inspected, repaired when necessary, and reassembled to the extent possible.

(2) Has been tested in accordance with approved standards and technical data, or current standards and technical data acceptable to the Administrator (i.e. manufacturer's data), which have been developed and documented by the holder of one of the following:

(a) TC [Type Certificate]

(b) Supplemental Type Certificate (STC), or material, part, process, or appliance approval under section 21.305.

(c) PMA [Parts Manufacturer Approval]

*Rebuilt.* Describes an aircraft, airframe, aircraft engine, propeller, or appliance, using new or used parts that conform to new part tolerances and limits or to approved oversized or undersized dimensions that has undergone the following:

(1) Has been disassembled, cleaned, inspected, repaired as necessary, and reassembled to the extent possible.

(2) Has been tested to the same tolerances and limits as a new item.

FAA U.S. DEP'T OF TRANSP., ADVISORY CIRCULAR NO. 20-62D (May 24, 1996).

ers for strict liability application.<sup>68</sup> However, for all intentional purposes and in light of GARA, such entities would not be considered manufacturers and, thus, would not be protected under the federal statute of repose.

One situation that is certain to arise is the failure of a part that is used for replacement during the overhaul or rebuilding of an original component part. The original part may be more than eighteen years old (and the manufacturer, therefore, is protected under GARA for that part), but the replacement part is less than eighteen years old. In that situation, it appears clear that the eighteen-year statute of repose period begins to run when the work involving the "subassembly" or "other part" is completed, and the part is installed as a "replacement or addition."<sup>69</sup>

The last qualification under Section 2 of GARA is that the manufacturer is only protected "in its capacity as a manufacturer."<sup>70</sup> When the manufacturer acts in any capacity other than its role in the manufacturing of the original part, it loses the protection of GARA to the extent that its role caused or contributed to the accident. What other role might a manufacturer play? Many component part manufacturers offer overhaul and part rebuilding services. In addition, some manufacturers are becoming involved in certain maintenance programs related to their own aircraft, as their expertise and facilities allow them to actively compete in the industry.<sup>71</sup> As a result, if a manufacturer plays a role deviating from that of an original manufacturer, it will not reap protection under GARA.

#### B. FOREIGN MANUFACTURERS

The undisputed intent of GARA is to protect the U.S. general aviation manufacturing industry.<sup>72</sup> However, GARA does not distinguish between domestic and foreign manufacturers. It ap-

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<sup>68</sup> See generally *Anderson v. Olmstead Util. Equip., Inc.*, 573 N.E.2d 626, 629 (Ohio 1991) ("strict liability applies with equal force to a commercial entity engaged in remanufacturing or rebuilding a defective product"); *Michalko v. Cooke Color & Chem. Corp.*, 451 A.2d 179, 182 (N.J. 1982) (a party who "undertakes to rebuild part of a machine in accordance with the specifications of the owner" can be held strictly liable).

<sup>69</sup> See 49 U.S.C. § 40101(2)(a)(2).

<sup>70</sup> *Id.* § 40101(2)(a).

<sup>71</sup> For a review of the status and competition of the aircraft maintenance industry, see *AVIATION WK. & SPACE TECH.*, Mar. 11, 1996, at 44-53, which is a special issue covering numerous maintenance topics.

<sup>72</sup> See discussion *supra* part II.



plies to "the manufacturer of the aircraft [and] the manufacturer of any new component, system, subassembly, or other part of the aircraft."<sup>73</sup> For GARA to apply to a foreign manufacturer, the "general aviation aircraft" must have been issued a type certificate or airworthiness certificate by the FAA.<sup>74</sup>

In *Pollack v. Agusta, S.P.A.*,<sup>75</sup> an aircraft crashed into an apartment building in Santa Monica, California. The three occupants of the aircraft were killed, and their survivors brought suit against the manufacturer of the aircraft engine, Marchetti, an instrument of the Italian government. The action was dismissed based on GARA; however, the decision did not indicate whether a foreign manufacturer is barred from raising GARA as a defense.<sup>76</sup>

### C. MANUFACTURERS OF AIRCRAFT INVOLVED IN FOREIGN ACCIDENTS

The extraterritorial limits of GARA have been tested in at least one case. In *Alter v. Bell Helicopter Textron, Inc.*,<sup>77</sup> Ilan Alter was killed after the Bell 206 helicopter of which he was a passenger crashed in Israel. The plaintiff brought suit in state district court in Texas, but defendants Bell and General Motors removed the case to federal court. One argument raised in response to the defendants' GARA defense was that GARA did not apply to accidents in a foreign country, even though the suit was brought in the U.S.<sup>78</sup>

The *Alter* decision first distinguished *Smith v. United States*<sup>79</sup> and *Boureslan v. Aramco, Arabian American Oil Co.*<sup>80</sup> *Smith* and *Boureslan* involved statutes that created a cause of action, whereas *Alter* concerned GARA, which prevented claims against manufacturers.<sup>81</sup> The *Alter* court recognized that the plaintiff's position "would have the anomalous effect of preventing liti-

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<sup>73</sup> 49 U.S.C. § 40101(2)(a).

<sup>74</sup> *Id.* at § 40101(2)(c).

<sup>75</sup> No. CV 94-7769, slip op. at 1 (C.D. Cal. Dec. 6, 1995).

<sup>76</sup> *See id.* at 3-6.

<sup>77</sup> No. H-95-5046, 1996 WL 617321, at \*1 (S.D. Tex. June 17, 1996).

<sup>78</sup> *Id.* at \*10.

<sup>79</sup> 507 U.S. 197, 204-05 (1993) (holding that there was no waiver of the U.S. government's sovereign immunity for tort claims arising in Antarctica under the Federal Tort Claims Act).

<sup>80</sup> 892 F.2d 1271, 1274 (5th Cir. 1990) (en banc) (holding that U.S. employers employing U.S. citizens outside the U.S. are not regulated by Title VII), *aff'd sub nom.* E.E.O.C. v. Arabian Am. Oil Co., 449 U.S. 244 (1991).

<sup>81</sup> *Alter*, 1996 WL 617321, at \*10.

gants 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.”<sup>82</sup> In barring the claims against Bell, the court noted that the action was based on Texas state law, and that it was GARA’s intent to bar state law claims, even when the accident occurred outside the United States.<sup>83</sup>

## VI. APPLICATION OF GARA TO AIRCRAFT PARTS

Section (2)(a)(2) of GARA provides another avenue of protection for aircraft parts that are originally in, or subsequently added to, an aircraft. The provision states:

[W]ith respect to any *new* component, system, subassembly, or other part which replaced another component, system, subassembly, or other part *originally in*, or which was *added to*, the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period beginning on the date of completion of the replacement or addition.<sup>84</sup>

With regard to parts that are subsequently used as replacement parts or added to the aircraft, GARA is clear that if those parts are “new,” the repose period begins to run “on the date of completion of the replacement or addition” of those parts.<sup>85</sup> However, when replacement or added parts are not new but are *used* at the time of installation, GARA is not clear as to whether or not it applies. Nowhere does GARA discuss or even mention its application to used parts. The first sentence of Section 2(a)(2) refers to “any *new* component, system, subassembly, or other part.”<sup>86</sup> A fair reading of this phrase is that the word “new” refers to all possible parts that can be added to the aircraft, including “other part[s].” In addition, since the statute of repose commences upon “completion of the replacement or addition,” it can only apply to new parts because used parts would have a different triggering date that begins when they were originally new and placed into service on an aircraft (which may not be the aircraft involved in the accident). Subsequently installed used parts would not have been originally placed on the aircraft that was involved in the accident, as set forth in the last phrase

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 49 U.S.C. § 40101(2)(a)(2) (emphasis added).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (emphasis added).

of Section 2(a)(2). Thus, when parts are originally placed on an aircraft, the statute begins to run on such parts upon "delivery" of the aircraft. Once the statute is triggered for those parts pursuant to GARA, the statute continues to run on those parts even if they are subsequently removed and installed on another aircraft as a used part.<sup>87</sup>

An example is *Estate of Glover v. American Resource Corp.*,<sup>88</sup> which involved an action stemming from a 1995 aircraft accident in Argentina. General Electric, the manufacturer of the aircraft's engine, moved for summary judgment based upon the running of GARA's eighteen-year statute of repose. It was undisputed that the engines were installed on other aircraft in 1972 and 1973 respectively. The same engines were subsequently installed as used engines on the subject aircraft in 1988. After original installation, GE performed ordinary and routine maintenance on the engines. GE's motion was denied on burden of proof grounds because GE had "not shown that it did not replace any 'component, system, subassembly, or other part' which caused the crash."<sup>89</sup> The court went on to note that "[t]he fact that General Electric did not recondition or overhaul the engines and performed only routine maintenance does not raise the reasonable inference that it did not replace any part which might have caused the crash. Thus, it has not met its burden of showing [that] it is entitled to judgment."<sup>90</sup>

*Glover* supports the fact that once a part is originally installed on an aircraft, GARA's eighteen-year statute of repose begins to run, even when the part is removed and installed as a used part on another aircraft. *Glover* also stands for the proposition that defendant manufacturers who also perform subsequent maintenance on a part must prove that they did not replace any part with a new part (that may have caused the accident) within the eighteen-year period.

Another problem arises in determining whether or not rebuilt parts and overhauled parts that are placed on an aircraft are considered new for the purposes of GARA. In other words, does

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<sup>87</sup> It is important to note that GARA requires that all new parts be installed *on aircraft* in order for the statute to commence running. If the parts become used for something other than aircraft use, the statute only commences running, if at all, *once placed on an aircraft* in a used state. See 49 U.S.C. § 40101(2).

<sup>88</sup> No. 160673, slip op. at 1 (Cal. Super. Ct. Sept. 13, 1996).

<sup>89</sup> *Id.* at 4 (quoting 49 U.S.C. § 40101(2)(a)(2)).

<sup>90</sup> *Id.*

the statute begin to run anew when a once used part is overhauled or rebuilt?

A strong argument can be made under the FAR and FAA Advisory Circular 20-62D<sup>91</sup> that a rebuilt part should be treated as a new part, and that the running of GARA should start anew when the rebuilt part is placed on an aircraft. The basis for this argument is that in order for a part to be considered "rebuilt" under the FAA Advisory Circular 20-62D, it must have "been tested to the same tolerances and limits as a *new* item."<sup>92</sup> A rebuilt part also can be "zero timed" per cycle and have the same operational time per cycle limits as if it were new. Thus, a strong argument can be made that rebuilt parts are new parts, which, when installed as rebuilt, should start the GARA statute of repose running anew. When an original manufacturer rebuilds a part, it should be subject to a new running of GARA. However, GARA should protect an original manufacturer when it neither rebuilds the part nor supplies component parts for the rebuilt part.

On another note, an entity that is not the original manufacturer but that rebuilds a part may be considered a part manufacturer for products liability purposes, depending on the applicable law. If the part was rebuilt and installed more than eighteen years before it fails, the rebuilding entity will certainly argue that it was a manufacturer for the purposes of asserting GARA as a defense.

An "overhauled" part, on the other hand, does not have to meet the new tolerances and limits of the original part. Overhauled parts merely need to be repaired to a condition acceptable to the FAA as established by either the holder of the Type Certificate, the Supplemental Type Certificate, or the Parts Manufacturer Approval.<sup>93</sup> Whether or not overhauled parts should be considered new under GARA will be determined on a case-by-case basis, with each case relying on fact-intensive discovery. The nature and extent of the overhaul will be decisive. On the one hand, a company overhauling a part may not reasonably expect to be exposed to liability for the next eighteen years if the part is considered new. On the other hand, purchasers of an overhauled part will certainly not expect the statute of repose to have run before the part is even installed on their aircraft.

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<sup>91</sup> FAA, U.S. DEP'T OF TRANSP., ADVISORY CIRCULAR NO. 20-62D (May 24, 1996).

<sup>92</sup> *Id.* at 4(j)(2) (emphasis added).

<sup>93</sup> *Id.* at 4(i)(2).

Claims for negligent maintenance and repair will also be included in a products liability case where the failed part was rebuilt or overhauled. As discussed previously, some courts may treat rebuilding and overhaul as repair while others consider them to be the manufacture of a product and, therefore, subject to strict liability.<sup>94</sup>

This apparent problem with used parts is significant because the general aviation industry has a large pool of and market for used parts, including the exchange of worn engines for rebuilt or overhauled engines that are not new. In order to determine the status of a failed component or its subparts, plaintiffs' attorneys should immediately obtain the aircraft and engine logbooks, along with all work orders and invoices. In addition, the mechanics who worked on the aircraft should be interviewed to determine if any parts or components were installed on the aircraft during the limitation period.

An instructive case on whether GARA applies to used parts is *Altseimer v. Bell Helicopter Textron, Inc.*,<sup>95</sup> which involved claims for personal injury and property damage stemming from a helicopter accident in California. The action was filed in federal court after passage of GARA and, therefore, was governed by GARA. The court granted Bell's motion for summary judgment based on Rule 56 of the Federal Rules of Civil Procedure, holding that Bell was entitled to judgment as a matter of law under GARA since it was undisputed that the subject helicopter and failed

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<sup>94</sup> See *supra* text accompanying notes 67-71. A majority of jurisdictions do not recognize strict liability against those who merely perform repairs. See *Winans v. Rockwell Int'l Corp.*, 705 F.2d 1449, 1452 (5th Cir. 1983) (citing *Johnson v. William C. Ellis & Sons*, 604 F.2d 950, 955 n.5 (5th Cir. 1979) (citing collective authorities); *contra Consumers Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093, 1098-99 (3d Cir. 1986) (holding that plaintiff may recover for strict liability against the defendant who rebuilt plaintiff's turbine engine, but installed a defective and inadequately inspected used part that caused the engine to explode). The *Consumers Power* court recognized that New Jersey imposes strict liability on the providers of defective *repair and rebuilding* services. *Id.* at 1098 n.3 (emphasis added) (citing *Michalko v. Cooke Color & Chem. Co.*, 451 A.2d 179, 186 & n.4 (N.J. 1982)). See also *Anderson v. Olmstead Util. Equip., Inc.*, 573 N.E.2d 626, 629 (Ohio 1991) (holding that strict liability applies with equal force to a commercial entity engaged in remanufacturing or rebuilding a defective product); *Michalko v. Cooke Color & Chem. Co.*, 451 A.2d 179, 183 (N.J. 1982) ("the fact that the product was built according to the plans and specifications of the owner does not constitute a defense to a claim based on strict liability for the manufacture of a defective product when the injuries are suffered by an innocent foreseeable user of the product").

<sup>95</sup> 919 F. Supp. 340 (E.D. Cal. 1996).

part were both “more than 18 years old.”<sup>96</sup> The failed part at issue in *Altseimer* was the rotor drive gear box, which had been rebuilt by other entities on two occasions before the accident.<sup>97</sup> The published opinion by Judge Shubb is short and does not go into detail about the history of the gear box. The decision suggests that once the part is delivered, the time period begins to run even if the part has been moved from the original aircraft to another aircraft, though that may not have occurred in *Altseimer*. This is consistent with the underlying policy of GARA to protect the manufacturer after original delivery since the manufacturer retains no further control of the product after that time.

## VII. EXCEPTIONS TO GARA

GARA contains four specific exceptions that are set out in Section 2(b).

### A. MISREPRESENTATION, CONCEALMENT, AND WITHHOLDING OF INFORMATION

The first exception to GARA provides:

[I]f the claimant pleads with specificity the facts necessary to prove, and proves, 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 . . . .<sup>98</sup>

The first phrase of this exception regarding pleading is a procedural requirement commonly found in state or local rules of civil procedure that require plaintiffs to plead specific facts supporting each element of their misrepresentation and/or concealment claim. This requirement is important because it immediately puts the burden on the claimant to affirmatively set

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<sup>96</sup> *Id.* at 342-43.

<sup>97</sup> Since Bell, as a manufacturer, was not involved in rebuilding the gear box, the court did not address any issues regarding the application of GARA to the rebuilt part. See *supra* text accompanying notes 67-71.

<sup>98</sup> 49 U.S.C. § 40101(2)(b)(1).

forth the facts supporting each allegation.<sup>99</sup> It is intended to prevent plaintiffs from pleading general claims that either are not supported by facts or are frivolous, and thus acts to bring only justiciable issues before the court. If GARA would normally apply but for this exception, plaintiffs still would have to plead the specific facts in the first instance and not wait to plead until after the manufacturer filed its answer asserting GARA as an affirmative defense.

At least one procedural problem arises in the application of this exception: claimants may not have access to information that the manufacturer has, and, therefore, by strict application, the claimants cannot meet their burden to plead specifically. Consequently, claimants may need to perform limited discovery to determine whether or not such facts exist. Depending on the circumstances, courts may stay any motions on the pleadings pending limited pertinent discovery and allow plaintiffs to amend their pleadings based upon the results of that discovery.<sup>100</sup>

There are three areas where, if information is misrepresented, concealed, or withheld by the manufacturer, the exemption would apply: (1) a type certificate, (2) an airworthiness certificate,<sup>101</sup> or (3) the continuing airworthiness of the aircraft and/or its parts. The subject information that relates to the issuance of those certificates will be at least eighteen years old, if not much older.

Under GARA, the type of information that was withheld from the FAA must have been "required information that is material and relevant."<sup>102</sup> "Required information" is not defined in GARA, but parties can look to the FAR for some guidance. Part 21 of the FAR sets forth the procedural requirements for the issuance of type certificates and airworthiness certificates.<sup>103</sup> Part 23 prescribes the airworthiness standards that must be met for the issuance of type certificates and includes a detailed list of the specific standards.<sup>104</sup> Even though Part 23 does not list the required information that must be furnished to the FAA, failure to comply with the standards set forth will constitute the withholding of required information. Furthermore, manufacturers

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<sup>99</sup> See *id.*

<sup>100</sup> See FED. R. CIV. P. 56(f).

<sup>101</sup> See discussion on type and airworthiness certificates *supra* part III.B.

<sup>102</sup> 49 U.S.C. § 40101(2)(b)(1).

<sup>103</sup> See 14 C.F.R. §§ 21.321-493.

<sup>104</sup> See 14 C.F.R. pt. 23 (1996).

who hold type certificates have a continuing duty to report to the FAA all part failures, malfunctions, and defects that they determine have resulted or can result in any of the occurrences listed in the FAR.<sup>105</sup> This information must be reported in order to obtain continuing airworthiness.<sup>106</sup>

The information withheld must be “material and relevant” to the “performance or the maintenance or operation” of the aircraft or part.<sup>107</sup> Materiality looks to the relationship between the proffered evidence and the issues in the case.<sup>108</sup> Relevance is the tendency of evidence to help establish the proposition that it is offered to prove.<sup>109</sup>

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<sup>105</sup> See 14 C.F.R. § 21.3(a). The Federal Aviation Regulations require type certificate manufacturers to report all defects that they determine have resulted, or can result, in any of the following occurrences:

(1) Fires caused by a system or equipment failure, malfunction, or defect.

(2) An engine exhaust system failure, malfunction, or defect which causes damage to the engine, adjacent aircraft structure, equipment, or components.

(3) The accumulation or circulation of toxic or noxious gases in the crew compartment or passenger cabin.

(4) A malfunction, failure, or defect of a propeller control system.

(5) A propeller or rotorcraft hub or blade structural failure.

(6) Flammable fluid leakage in areas where an ignition source normally exists.

(7) A brake system failure caused by structural or material failure during operation.

(8) A significant aircraft primary structural defect or failure caused by any autogenous condition (fatigue, understrength, corrosion, etc.).

(9) Any abnormal vibration or buffeting caused by a structural or system malfunction, defect, or failure.

(10) An engine failure.

(11) Any structural or flight control system malfunction, defect, or failure which causes an interference with normal control of the aircraft or which derogates the flying qualities.

(12) A complete loss of more than one electrical power generating system or hydraulic power system during a given operation of the aircraft.

(13) A failure or malfunction of more than one attitude, airspeed, or altitude instrument during a given operation of the aircraft.

*Id.* § 21.3(c).

The above information need not be reported if the occurrences are a result of improper maintenance, usage, or were otherwise reported. *Id.* § 21.3(d)(1).

<sup>106</sup> See *id.* § 21.1.

<sup>107</sup> 49 U.S.C. § 40101(2)(b)(1).

<sup>108</sup> See 1 CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 185, at 773 (John W. Strong ed., 4th ed. 1992).

<sup>109</sup> See *id.*; see also FED. R. EVID. 401.



With regard to the continuing airworthiness of the aircraft, the manufacturer has a duty to warn aircraft owners of all unsafe conditions of which it is aware.<sup>110</sup> This duty can be met in a number of ways, depending on the nature and severity of the problem. The concern could be inadequate operating or maintenance instructions, unsafe parts, or unsafe procedures or conditions. The manufacturer may issue a service bulletin advising aircraft owners and operators of a potential problem along with a course of remedial action to alleviate the concern. If the unsafe condition is serious, the FAA will issue an "Airworthiness Directive," which requires compulsory compliance and contains instructions for continued airworthiness.<sup>111</sup> In addition, manufacturers provide strict maintenance guidelines that must be followed in order to maintain an aircraft in a current airworthy condition and to allow it to fly lawfully under the FAR.<sup>112</sup>

In order for the first exception to GARA to apply, the information at issue must have been (1) knowingly misrepresented to the FAA, (2) concealed from the FAA, or (3) withheld from the FAA.<sup>113</sup> "Knowingly" can be an extremely difficult element to prove. To add to the difficulty, GARA does not specifically describe the burden of proof that must be met to legally establish "knowingly." The standard of proof will depend on the type of motion used to raise GARA as a defense and the applicable jurisdictional law.<sup>114</sup> The initial burden of proof, however, is on the manufacturer to show that it is entitled to a GARA defense.<sup>115</sup> To date, most cases have sought judgment in favor of the manu-

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<sup>110</sup> See 14 C.F.R. § 21.3; see also 49 U.S.C. § 40101(2)(b).

<sup>111</sup> See 14 C.F.R. §§ 39.1, 39.3, 39.11, 39.13. Part 39 of the FAR is entitled "Airworthiness Directives" and sets forth the following:

39.1 Applicability.

This part prescribes airworthiness directives that apply to aircraft, aircraft engines, propellers, or appliances (hereinafter referred to in this part as "products") when —

(a) An unsafe condition exists in a product; and

(b) That condition is likely to exist or develop in other products of the same type design.

39.3 General.

No person may operate a product to which an airworthiness directive applies except in accordance with the requirements of that airworthiness directive.

*Id.* §§ 39.1, 39.3.

<sup>112</sup> *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 929 F. Supp. 380, 381 (D. Wyo. 1996).

<sup>113</sup> 49 U.S.C. § 40101(2)(b)(1).

<sup>114</sup> See *Alter*, 1996 WL 617321, at \*3-4.

<sup>115</sup> See *id.*

facturer by way of a motion for summary judgment.<sup>116</sup> Rule 56 of the Federal Rules of Civil Procedure requires the plaintiff to establish "a genuine issue as to any material fact."<sup>117</sup>

Some jurisdictions require clear and convincing evidence to satisfy the "knowing misrepresentation" element. It is important to note that knowingly only precedes and, thus, only applies to misrepresentation, and not to the concealment or withholding of information.<sup>118</sup> Absent the knowingly requirement, the burden of proof should be the "preponderance of the evidence" standard because the intent element has been removed.<sup>119</sup> As a result, negligent withholding of information as established by a preponderance of the evidence should be enough for the exemption to apply. Therefore, if the manufacturer withheld or concealed information that was commonly disclosed in the industry, the exception will defeat the application of GARA.

The more difficult element of proof to establish is the requisite causal relationship between the manufacturer's conduct and the claimant's damage. In other words, the information that was misrepresented, concealed, or withheld must be related to, bring about, and be the cause of the damage.<sup>120</sup> In aircraft accidents, the evidence may be completely destroyed by impact or fire. Thus, product failure in the first instance may be difficult, if not impossible, to establish. When that is the case, the burden of proof for asserting the exception of misrepresentation or failure to disclose may be insurmountable.

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<sup>116</sup> See, e.g., *Altseimer*, 919 F. Supp. at 342.

<sup>117</sup> FED. R. CIV. P. 56(f). When the evidence is sufficient so that a reasonable jury could return a verdict in favor of the non-moving party, the dispute as to a material fact is "genuine." *Lang v. Retirement Living Publishing Co.*, 949 F.2d 576, 580 (2d Cir. 1991). A "material fact" is one that might affect the outcome of the case under governing law. *Coll v. PB Diagnostic Sys., Inc.*, 50 F.3d 1115, 1121 (1st Cir. 1995).

<sup>118</sup> As discussed later in the Article, one reported decision attempts to require pleading of the knowledge requirement with specificity, even though "knowledge" is not a prerequisite to establishing concealment or withholding. See discussion on *Rickert v. Mitsubishi Heavy Indus., Ltd.* and accompanying notes *infra*.

<sup>119</sup> One article mistakenly suggests that the "clear and convincing" standard applies not only to misrepresentation, but also to concealment and presumably to withholding of information as well. See McNatt & England, *supra* note 2, at 324.

<sup>120</sup> *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 923 F. Supp. 1453, 1456 (D. Wyo.), *rev'd*, 929 F. Supp. 380 (1996).

One published GARA case provides guidance, as it specifically deals with the misrepresentation issue.<sup>121</sup> *Rickert v. Mitsubishi Heavy Industries, Ltd.*<sup>122</sup> arose out of the crash of a MU-2B-35-J twin-engine turbo-prop that occurred on April 6, 1993 when pilot Tom Rickert was flying a patient and two attendants on an approach into an airport in Casper, Wyoming. The clouds were low, requiring Rickert to fly an instrument approach. Approximately eight miles from the airport, the aircraft collided with a tall ridge and exploded, killing all on board. Rickert's wife brought suit in Wyoming federal district court against the aircraft manufacturer, Mitsubishi, alleging negligence and strict liability. The claims for strict liability included numerous alleged "design defects" involving the aircraft's unsafe susceptibility to icing and lack of adequate ice protection and ice-warning systems. After limited discovery, Mitsubishi filed a motion for summary judgment, claiming that the action was barred by GARA's eighteen-year statute of repose. Because the MU-2 aircraft was first sold in April 1972, it was twenty-one years old at the time of the accident. The plaintiff responded to the motion by claiming that GARA did not apply because the fact scenario fell within the misrepresentation exception to GARA.<sup>123</sup>

United States District Judge Brimmer granted Mitsubishi's Rule 56 motion for summary judgment, holding that Rickert was unable to satisfy the misrepresentation, concealment, or with-

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<sup>121</sup> One unreported decision discussing the exception is *Cartman v. Textron Lycoming Reciprocating Engine Div.*, No. 94-CV-72582-DT, 1996 WL 316575, at \*1 (E.D. Mich. Feb. 27, 1996). *Cartman* involved an action against a component part manufacturer. The Michigan district court granted the defendant's motion for summary judgment because it held that the plaintiff's evidence did not satisfy an exception to GARA, which requires a showing that the manufacturer knowingly misrepresented, concealed, or withheld "required information" related to the type certificate, airworthiness certificate, or continuing airworthiness. *Id.* at \*3-4.

<sup>122</sup> 923 F. Supp. 1453 (D. Wyo.) [hereinafter *Rickert I*], *rev'd*, 929 F. Supp. 380 (D. Wyo. 1996) [hereinafter *Rickert II*].

<sup>123</sup> *Id.* at 1454-57. In clarifying a procedural matter in its first decision, the *Rickert I* court held that with regard to the misrepresentation, concealment, or withholding of information exception, GARA requires the pleading of specific facts necessary to prove the exception. *Id.* at 1456. Mitsubishi's challenge to the adequacy of the pleadings was not raised by summary judgment under Rule 56 of the Federal Rules of Civil Procedure; it actually was raised in a motion to dismiss pursuant to Rule 12(b)(6), or a motion for judgment on the pleadings under Rule 12(c). *See id.* Upon finding a genuine issue of material fact, the court indicated that it would have allowed the plaintiff to amend her pleadings if she had produced facts sufficient to create a genuine issue of fact under GARA's "knowing misrepresentation" exception. *Id.*

holding of information exception.<sup>124</sup> Mere differences of opinion about design were insufficient to meet the exception.<sup>125</sup> Rickert then filed a motion to reconsider, which included a stay of judgment pending further discovery based on allegations that Mitsubishi had stonewalled Rickert's prior discovery efforts. Judge Brimmer agreed and ordered limited additional discovery to be followed by the filing of supplemental briefs on the summary judgment motion.<sup>126</sup> On reconsideration, the court reversed its prior decision to grant a summary judgment in favor of Mitsubishi and set the case for trial on the merits.<sup>127</sup>

In his order in *Rickert II*, Judge Brimmer reaffirmed the elements required for the "knowing misrepresentation" exception to defeat a motion for summary judgment. Specifically, Judge Brimmer held: "[The] exception requires a plaintiff to produce evidence sufficient to create a genuine issue of material fact concerning: (1) knowledge; (2) misrepresentation, concealment, or withholding of required information to or from the FAA; (3) materiality and relevance; and (4) a causal relationship between the harm and the accident."<sup>128</sup>

One concern with the court's first element is that under GARA, the "knowledge" requirement only applies to misrepresentation, not to the concealment or withholding of information.<sup>129</sup> With regard to the "casual relationship" element, the court may have made a mistake. The causation element should require that the information misrepresented have a nexus to the cause of the accident, and not merely a cause between the harm and the accident, because GARA specifically requires that the information withheld be "causally related to the harm which the claimant allegedly suffered."<sup>130</sup>

Rickert's motion for reconsideration contained affidavits from two past Mitsubishi employees.<sup>131</sup> In a nutshell, the affidavits stated that numerous MU-2 accidents were caused by the

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<sup>124</sup> *Id.* at 1462.

<sup>125</sup> *See id.* at 1457.

<sup>126</sup> *See Rickert II*, 929 F. Supp. at 381.

<sup>127</sup> *Id.* at 384.

<sup>128</sup> *Id.* at 381 (citing *Rickert I*, 923 F. Supp. at 1456).

<sup>129</sup> The exception applies to facts "knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the [FAA]." 49 U.S.C. § 40101(2)(b)(1) (emphasis added).

<sup>130</sup> *Id.*

<sup>131</sup> One of the employees was Thomas McGregor who was the Director of Flight Operations for Mitsubishi from 1978 to 1986. The other employee, Clifford Cole, worked with Mitsubishi from 1973 to 1985 as International Manager,

build-up of excessive ice on the wings, and that this ice problem was not investigated or disclosed to the FAA.<sup>132</sup> According to the affidavits, on a Special Certification Review of the MU-2 by the FAA, Mitsubishi only tested the short body aircraft when it knew that the problem lay with the long body aircraft.<sup>133</sup> One affidavit went on to state that "Mitsubishi actively covered-up the problem of horizontal tail plane icing on the long body MU-2 aircraft."<sup>134</sup> Even though these affidavits were vigorously attacked by Mitsubishi from all angles,<sup>135</sup> the court held that the affidavits created an issue of material fact sufficient to defeat summary judgment.<sup>136</sup> Judge Brimmer concluded:

This case should stand as a lesson for all plaintiffs who would bring product[s] liability lawsuits against aircraft manufacturers. GARA erects a formidable first hurdle to such suits, not only at the summary judgment stage but also at the trial stage. The plaintiff who leaps GARA's knowing misrepresentation exception then faces the usual product[s] liability obstacles.

Rickert's task, therefore, is two-fold. She must satisfy GARA's knowing misrepresentation exception, and then prove her product[s] liability claims.<sup>137</sup>

The decision in *Rickert II* places a strong burden on plaintiffs to offer very specific evidence of knowledge of material facts sufficient to establish misrepresentation. The court, however, did not deal with the aspects of the exception concerning concealment or withholding of information, even though the plaintiff proffered evidence in support thereof. *Rickert II* recognizes that even if GARA is defeated on a motion for summary judgment, it may not sleep for long, as it can later be raised in the form of a directed verdict or jury verdict.

#### B. THE "EMERGENCY" EXCEPTION

In its second exception, GARA provides that it does not apply "if the person for whose injury or death the claim is being made is a passenger for purposes of receiving treatment for a medical

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South American Regional Manager, and International Vice President. *Rickert II*, 929 F. Supp. at 382.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *See id.* at 383.

<sup>136</sup> *Id.* The court opined that "at the summary judgment stage, the [c]ourt will neither weigh evidence nor assess credibility." *Id.*

<sup>137</sup> *Id.* at 383-84.

or other emergency.”<sup>138</sup> The policy behind this exception is clear—a medical patient typically will not be able to choose to fly in an aircraft that is less than eighteen years old. In most cases, there will be a lack of informed consent, particularly since some patients may be unconscious. Even if the patients are conscious and require emergency air transport, they are probably under duress and likely on medication. The only patients who are entitled to this exception are the ones who are on the flight “for the purpose of *receiving* treatment for a medical . . . emergency.”<sup>139</sup>

Although the phrase “or other emergency” is not defined, there is a similar policy to include it in the exception. As written, the phrase can be read two ways: (1) “if the person for whose injury or death the claim is being made is a passenger for purposes of . . . other emergency,” or (2) “if the person for whose injury or death the claim is being made is a passenger for purposes of receiving treatment for [an] . . . emergency.” The first interpretation is the better one because it is more consistent with the underlying policy of the exception since in an emergency, the passenger may not be in a position to make a clear decision whether or not to ride in an aircraft. For instance, an emergency may include situations where medical treatment was not provided, such as air evacuation from areas threatened by flood, fire, and sea rescue.

The “emergency” exception is limited to claims made for injury or death to a passenger, but it is not clear what constitutes a “passenger.” According to Part 1 of the Federal Aviation Regulations, a flightcrew member is a “pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time,”<sup>140</sup> and, therefore, is clearly not a “passenger.” But what about medical and rescue personnel on board? They are not part of the flightcrew; thus, the issue is to determine whether they are “crewmembers” or “passengers.”

Although Part 1 does not define passenger, it is clear that if such personnel are not crewmembers, they can only be passengers. Part 1 lends little guidance because the definition of crewmember is vague, describing a crewmember as “a person assigned to perform duty in an aircraft during flight time.”<sup>141</sup> A

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<sup>138</sup> 49 U.S.C. § 40101(2)(b)(2).

<sup>139</sup> *Id.* (emphasis added).

<sup>140</sup> 14 C.F.R. § 1.1.

<sup>141</sup> *Id.*

crewmember's duty in the aircraft should relate to the safety of the flight, such as the work of a flight attendant, and not to duties that relate solely to the emergency. In addition, emergency personnel may have significant duties that do not take place "during flight time." Thus, in a situation that does not involve "passengers for the purpose of receiving medical treatment," but is an "other emergency," non-crewmembers should be considered "passengers" who may assert the second exception.

### C. THE "NOT ABOARD" EXCEPTION

GARA also does not apply "if the person for whose injury or death the claim is being made was not aboard the aircraft at the time of the accident."<sup>142</sup> The policy behind this exception may be that persons who are not on board the aircraft do not assume any of the associated risks inherent in flying the aircraft. They are like innocent bystanders. This exception only contains two requisite elements that must be met. "Aboard" means on the aircraft, and not embarking or disembarking to the extent that it takes place outside the plane of the aircraft fuselage. The "time of the accident" element means at the time of the event that causes the damage, even if the damage itself does not arise when the accident occurs.

It is important to note that GARA applies to "damages for death or injury to persons *or damage to property*."<sup>143</sup> However, the third exception does not include claims for property damage. Thus, a claim by plaintiffs who suffered only a loss of property is subject to a GARA defense, unless they also suffered "injury or death," which acts to remove the application of GARA from all claims, including those alleging property damage. This appears to be a drafting error because the policy to protect innocent bystanders should also include protection against property damage, as they are both external to the aircraft, are unrelated to the aircraft's flight operations, and do not assume any risk associated with flying an aircraft more than eighteen years old.

### D. THE "EXPRESS WARRANTY" EXCEPTION

The final exception to GARA is one in contract for an express warranty. GARA is inapplicable "to an action brought under a written warranty enforceable under law but for the operation of

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<sup>142</sup> 49 U.S.C. § 40101(2)(b)(3).

<sup>143</sup> 49 U.S.C. § 40101(2)(a) (emphasis added).

this Act.”<sup>144</sup> Thus, when a manufacturer expressly agrees to warrant its product beyond GARA’s eighteen-year repose period, that warranty waives any limitations in GARA and will be treated as an exception. Determining whether a warranty exists raises another controversy.<sup>145</sup>

### VIII. OTHER PROVISIONS

Two other provisions require brief mention: the preemption provision and the effective date provision.

#### A. PREEMPTION OF STATE LAW

Section 2(d), which is entitled “Relationship to Other Laws,” states that GARA expressly preempts such law to the extent that such state law allows an action to be brought beyond the eighteen-year limitation period.<sup>146</sup> GARA’s exact words are: “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).”<sup>147</sup> The preemption is limited to state statutes granting claimants more rights. Thus, if a state has an applicable statute of repose that is for a shorter duration, GARA will not affect that statute.

In August of 1994, sixteen states enacted statutes of repose for products liability claims.<sup>148</sup> Some of the statutes ran for as few as five years, while others ran up to twelve years. Another type of statute of repose runs for the “useful safe life” of the product. GARA will not affect these statutes except to place a cap on the “useful safe life” in jurisdictions where a court might otherwise find the useful life to be more than eighteen years.<sup>149</sup>

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<sup>144</sup> *Id.* § 40101(2)(b)(4). “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.” H.R. REP. NO. 103-525(II), 103d Cong., 2d Sess. 8 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1644, 1649.

<sup>145</sup> For example, in *Alter* (discussed *supra* notes 58-60 and accompanying text), the plaintiff alleged that omission of specific engine inspection instructions constituted an express (or implied) warranty that the engine could be adequately inspected as set out in the manuals. *See Alter*, 1996 WL 617321, at \*5-6.

<sup>146</sup> 49 U.S.C. § 40101(2)(d).

<sup>147</sup> *Id.*

<sup>148</sup> *See* McNatt & England, *supra* note 2, at 327-42 (discussing the various state statutes of repose).

<sup>149</sup> *See, e.g., id.* at 335-36 (discussing Kansas case law regarding “useful safe life”).



The question on state law preemption arose in *Wright v. Bond-Air, Ltd.*,<sup>150</sup> where the plaintiff's husband was killed while flying a Cessna 310L twin engine airplane. The plaintiff brought suit in state court, alleging negligence and breach of warranty against Cessna and Teledyne, the manufacturers of the engine. The two defendants removed the action to federal district court, claiming that GARA had vested the federal court with subject matter jurisdiction.<sup>151</sup> The plaintiff moved to remand the case to state court, and the federal court ordered the defendants to show cause as to why the case should not be remanded for lack of subject matter jurisdiction.<sup>152</sup>

After the defendants failed to meet their burden, Federal District Judge Edmunds granted the motion to remand, holding that the plaintiff's state law causes of action did not constitute a "substantial federal question" and, therefore, were not preempted by federal law.<sup>153</sup> While GARA is a federal law that may affect state statutes of limitations or repose, it does not act to preempt the substantive state law claims of negligence and breach of warranty.<sup>154</sup> The *Wright* court held that:

[P]laintiff's complaint alleging violations of FAA regulations in an attempt to invoke a GARA exception, when Congress has determined that there should be no private federal cause of action under GARA and when Congress has not provided a private federal remedy for FAA violations, does not state a claim "arising under" federal law.<sup>155</sup>

As a result, merely raising GARA as a defense is not sufficiently substantial to confer federal question jurisdiction under 28 U.S.C. § 1331.<sup>156</sup>

## B. THE "EFFECTIVE DATE"

The last provision in GARA is Section 4, which is entitled "Effective Date; Application of Act." Section 4(a) simply states that

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<sup>150</sup> 930 F. Supp. 300 (E.D. Mich. 1996).

<sup>151</sup> *Id.* at 301. Removal was sought pursuant to 28 U.S.C. § 1331 (1994) (setting forth federal question jurisdiction).

<sup>152</sup> *Wright*, 930 F. Supp. at 301-02.

<sup>153</sup> *Id.* at 302.

<sup>154</sup> *Id.* The court concluded that the Federal Aviation Act of 1958 "does not preempt traditional state law claims for negligence and does not provide for a private right of action for violations of FAA regulations." *Id.* at 305 (citing *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318, 324 (E.D. Mich. 1993)).

<sup>155</sup> *Id.*

<sup>156</sup> *See id.*

GARA takes effect on the date of enactment, which was August 17, 1994.<sup>157</sup> The application provision of Section 4(b) recognizes that GARA does not apply to actions commenced before the date of enactment.<sup>158</sup> For example, in *Altseimer v. Bell Helicopter Textron, Inc.*,<sup>159</sup> the federal district court specifically held that since the action was commenced by the filing of the complaint on May 23, 1995, GARA applied, and summary judgment in favor of the manufacturer was warranted.

Similarly, in *Cartman v. Textron*,<sup>160</sup> the plaintiff filed his original complaint more than two months before the enactment of GARA. However, he did not serve his amended complaint on Rogers Corporation, the manufacturer of the faulty carburetor that allegedly caused the plane crash injuring the plaintiff, until May of 1995, approximately seven months after the enactment of GARA. When Rogers raised the GARA defense, the plaintiff took the position that the amended complaint "relates back" to the date the original complaint was filed, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure.<sup>161</sup> The court rejected the plaintiff's argument, holding that at least one element was not met because Rogers had no notice of the action before the enactment of GARA and, therefore, would be prejudiced by the plaintiff's failure to provide notice.<sup>162</sup> According to the *Cartman* court, notice before the enactment of GARA was "crucial."<sup>163</sup>

## IX. ANTICIPATED EFFECTS OF GARA

As reflected in the *Altseimer* and *Rickert* decisions, GARA is definitely having an effect on actions against manufacturers. As the *Altseimer* court recognized, "[A]lthough harsh, such result [of denying plaintiffs' claims if the aircraft and/or its parts are older than eighteen years at the time of the crash] is consistent with the purpose of GARA . . ."<sup>164</sup> However, aircraft will continue to crash, and claimants, through their attorneys, will look for recompense wherever it may be found. When GARA is raised as a defense, plaintiffs are confronted with a significant hurdle. It is anticipated that a tremendous amount of work will go toward

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<sup>157</sup> 49 U.S.C. § 40101(4)(a).

<sup>158</sup> *Id.* § 40101(4)(b).

<sup>159</sup> 919 F. Supp. 340, 342-43 (E.D. Cal. 1996).

<sup>160</sup> No. 94-CV-72582-DT, 1996 WL 316575, at \*1 (E.D. Mich. Feb. 27, 1996).

<sup>161</sup> *Id.* at \*2.

<sup>162</sup> *Id.* at \*2-3.

<sup>163</sup> *Id.* at \*2.

<sup>164</sup> *Altseimer*, 919 F. Supp. at 342.

establishing the misrepresentation, concealment, or withholding exception. Even though GARA requires plaintiffs to plead specific facts necessary to prove this exception, as reflected in *Rickert II*, it is likely judges will be lenient in allowing limited discovery of facts relating to GARA.

Absent an exception, GARA will cause plaintiffs to shift away from targeting manufacturers as defendants and move toward other entities who may be at fault. Future target defendants will include mechanics and maintenance repair facilities as well as aircraft owners and operators. Since an aircraft is presumed to be safely designed and constructed after eighteen years of use, plaintiffs may claim that any product failure was caused by negligent ownership, operation, inspection, or maintenance of the aircraft.

One aspect that must be reviewed is the number of general aviation aircraft that are more than eighteen years old and, thus, protected under GARA. The booms and busts of the general aviation manufacturing industry have been quite sporadic since 1950.<sup>165</sup> In that year, approximately 3500 aircraft were built. The industry enjoyed a rapid and consistent rise in production until 1965, the year that nearly 16,000 aircraft were constructed. Production tapered off to a temporary low of 7000 per year in 1970 and 1971, after which it climbed to an all-time high of nearly 18,000 in 1978. Then the crash began. By 1980, production dropped to 12,000. Two years later, in 1982, production was more than 2000, but has remained below 2000 units annually since 1982.<sup>166</sup>

What is of great significance is the effect of GARA on the number of aircraft that it will cover from its inception in 1994 until 1998. In rough calculation, when GARA was signed, it immediately covered approximately 48% of the general aviation aircraft built since 1950 (48% of the aircraft had been built before 1976, which was the eighteen-year cutoff). However, because of the boom in the late 1970s and the bust since the early 1980s, the current and immediate rate of increase aircraft covered by GARA is astounding. By 1995, 58% of the aircraft were covered. By 1996, 68% were covered; the number is expected to

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<sup>165</sup> The figures contained in this paragraph are taken from Tarry & Truitt, *supra* note 6, at 186-91.

<sup>166</sup> *Id.*

rise to 77% by 1997 and to 85% by 1998.<sup>167</sup> One may accurately predict the decrease in claims against manufacturers on a related scale, with a corresponding decrease in insurance premiums.

## X. CONCLUSION

It is important to note that GARA is not the end-all solution to get the general aviation manufacturing industry back on its feet, as products liability claims were only one of many factors that led to the sharp fall in production.<sup>168</sup> However, with the enlightening announcement from Cessna Aircraft Company that it would resume manufacturing piston-powered general aviation aircraft, thereby creating many new jobs,<sup>169</sup> and the increased likelihood that GARA will help pull Piper Aircraft Company out of Chapter 11 bankruptcy,<sup>170</sup> the anticipated positive economic effects of GARA should not be overlooked, even though the extent of those effects is not known.

GARA itself is ambiguous in many areas. Attorneys and courts alike will be challenged for years to come in establishing case law that will interpret and apply each and every provision of GARA. As for the present, the flow of cases has just begun.

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<sup>167</sup> *Id.* These figures do not take into account aircraft manufactured after 1992. However, even with an increase in production, those added figures will have an insignificant effect on the 45-year statistical period.

<sup>168</sup> See generally *id.* at 190-200 (discussing numerous factors that led to the massive drop in aircraft production and recognizing the dangers of placing all the blame on tort lawsuits).

<sup>169</sup> Donald A. Andersen, *Recent Cases and Developments in Aviation Law*, 60 J. AIR L. & COM. 3, 84 (1994). On October 27, 1993, Cessna President Russ Meyer represented to the Senate Aviation Subcommittee that if a statute of repose was passed, Cessna would increase production to the extent that 25,000 jobs would be created within five years after passage. McNatt & England, *supra* note 2, at 325. However, the anticipated spool-up in production and orders has been slow. As of April 1996, the first Cessna 172 manufactured in 10 years made its maiden trial flight; meanwhile, Cessna had only 300 deposited agreements to purchase its light aircraft. *First New Cessna 172 Flies*, AVIATION WK. & SPACE TECH., Apr. 29, 1996, at 21.

<sup>170</sup> Andersen, *supra* note 169, at 84.

## APPENDIX

## GENERAL AVIATION REVITALIZATION ACT OF 1994

Pub. L. 103-298, Aug. 17, 1994, 108 Stat. 1552, provided that:  
SECTION 1. SHORT TITLE.

This Act may be cited as the 'General Aviation Revitalization Act of 1994'.

SEC. 2. TIME LIMITATIONS ON CIVIL ACTIONS AGAINST AIRCRAFT MANUFACTURERS.

(a) IN GENERAL.—Except as provided in subsection (b), 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 or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred—

(1) after the applicable limitation period beginning on—

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or

(2) with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage, after the applicable limitation period beginning on the date of completion of the replacement or addition.

(b) EXCEPTIONS.—Subsection (a) does not apply—

(1) if the claimant pleads with specificity the facts necessary to prove, and proves, 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;

(2) if the person for whose injury or death the claims is being made is a passenger for purposes of receiving treatment for a medical or other emergency;

(3) if the person for whose injury or death the claim is being made was not aboard the aircraft at the time of the accident; or

(4) to an action brought under a written warranty enforceable under law but for the operation of the Act.

(c) **GENERAL AVIATION AIRCRAFT DEFINED.**—For the purposes of this Act, the term ‘general aviation aircraft’ means any 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.) [see 49 U.S.C. 40101 et seq.] at the time of the accident.

(d) **RELATIONSHIP TO OTHER LAWS.**—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).

### SEC. 3. OTHER DEFINITIONS.

For purposes of this Act—

(1) the term ‘aircraft’ has the meaning given such term in section 101(5) of the Federal Aviation Act of 1958 (49 U.S.C. 1301(5)) [see 49 U.S.C. 40102(a)(6)];

(2) the term ‘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. 44704(c)(1)] or under any predecessor Federal statute;

(3) the term ‘limitation period’ means 18 years with respect to general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft; and

(4) the term ‘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.

**SEC. 4. EFFECTIVE DATE; APPLICATION OF ACT.**

(a) **EFFECTIVE DATE.**—Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act [Aug. 17, 1994].

(b) **APPLICATION OF ACT.**—This Act shall not apply with respect to civil actions commenced before the date of the enactment of this Act.