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A Critical Evaluation of the General Aviation Revitalization Act of 1994

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A CRITICAL EVALUATION OF THE GENERAL AVIATION REVITALIZATION ACT OF 1994

JENNIFER L. ANTON

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Except in topsy-turvy land you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff.¹

¹ *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d Cir. 1952) (Frank, J., dissenting).

I. INTRODUCTION

ON AUGUST 17, 1994, President Bill Clinton signed into law the General Aviation Revitalization Act (GARA),² which purportedly was intended to help bolster the aviation industry by relieving it from an "onslaught of product liability litigation."³ GARA is the first piece of federal legislation to establish rules governing state law tort claims.⁴ GARA amended the Federal Aviation Act by imposing an eighteen-year statute of repose on all civil actions for death, injury or property damage caused by general aviation aircraft and their component parts.⁵

The General Aviation Revitalization Act is the result of over a decade of active Congressional lobbying by the manufacturers of general aviation aircraft.⁶ GARA was enacted to "help regenerate a once-healthy industry and help create thousands of jobs."⁷ Congress touted the statute as a "narrow and considered response to the 'perceived' liability crisis in the general aviation industry."⁸ It was intended to "provide manufacturers of aircraft and related components, protection from lawsuits alleging defective design or manufacture long after original production."⁹ To achieve this result, GARA "cut[s] off the product[s] liability tail¹⁰ for general aviation manufacturers of aircraft and component parts after eighteen years."¹¹ GARA provides manufactur-

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

³ Timothy S. McAllister, *A "Tail" of Liability Reform: General Aviation Revitalization Act of 1994 & the General Aviation Industry in the United States*, 23 TRANSP. L.J. 301, 302 (1995) (quoting Gary W. Allen, *The General Aviation Revitalization Act of 1994: Taming the Wild Blue?*, LAWYER-PILOTS BAR ASS'N J., Summer 1994, at 6).

⁴ See Steven R. Pounian & Blanca Rodriquez, *Recent Developments in Aviation Law*, 31 TORT & INS. L.J. 149, 160 (1996).

⁵ See GARA §§ 2(a), 3(3).

⁶ See *infra* Part IV.A.

⁷ Vicki Lawrence MacDougall, *Products Liability Law in the Nineties: Will Federal or State Law Control?*, 49 CONSUMER FIN. L.Q. REP. 327, 340-41 (1995) (quoting President's Statement Upon Signing General Aviation Revitalization Act of 1994, 30 WEEKLY COMP. PRES. DOC. 1678 (Aug. 22, 1994)).

⁸ H.R. REP. NO. 103-525(II), at 6 (1994).

⁹ David Moffitt, *The Implications of Tort Reform for General Aviation: The General Aviation Revitalization Act of 1994*, 1 SYRACUSE J. LEGIS. & POL'Y 215, 220 (1995).

¹⁰ In insurance law, the "liability tail" is the length of time during which a tortfeasor may be subject to suit. The shorter the tail, the more predictable the payout of claims over a period of time and thus, the more willing an insurance company is to insure. Aircraft have long life spans, and thus, the potential for lawsuits arising from the product extends over a long period of time; hence, the long-tail of the aircraft's potential liability.

¹¹ McAllister, *supra* note 3, at 311.

ers the ability to calculate a product's liability tail for insurance purposes.¹² The statute purports to relieve manufacturers from products liability exposure, which in turn, will free up money that can then be invested in research and development of new and old piston-engine, general aviation aircraft.¹³ The re-starting of the production of these designs by the established manufacturing companies will then revitalize the industry.¹⁴

To effect the intent of Congress, GARA's statute of repose bars injured plaintiffs from filing suit against manufacturers of defective aircraft built prior to August 17, 1976. With the enactment of GARA, approximately seventy-five percent of all general aviation aircraft in the United States are exempted from any future civil liability.¹⁵ In other words, close to three-quarters of these small plane pilots and their passengers are "unable to recover damages from an aircraft manufacturer in the event of a crash or other injury, even if the cause of the accident is due to a legitimate defect in the aircraft's design, manufacture or marketing."¹⁶ GARA does not protect other actors in the general aviation industry from liability.¹⁷ Pilots, mechanics and base operators are still vulnerable to suit¹⁸ and will certainly bear the burden of litigation costs as they become the named defendants when accidents occur.

Most legal commentary on the General Aviation Revitalization Act analyzes the provisions of the Act and describes the reasons for which the Act was enacted. There is sparse discussion regarding the Act's potential negative effects on those not protected, but nonetheless affected, by GARA's statute of repose. This paper closely scrutinizes GARA's effects on those industry actors and accident victims and explains why the general aviation manufacturers' arguments in support of GARA's enactment

¹² See *id.* at 316.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See Robert F. Hedrick, *A Close and Critical Analysis of the New General Aviation Revitalization Act*, 62 J. AIR L. & COM. 385, 418-19 (1996)

[B]ecause of the boom in the late 1970s and the bust since the early 1980s, the current and immediate rate of increase [in] aircraft covered by GARA is astounding. By 1995, 58% of the aircraft were covered. By 1996, 68% were covered; the number is expected to rise to 77% by 1997 and to 85% by 1998.

¹⁶ Patrick J. Shea, Note, *Solving America's General Aviation Crisis: The Advantages of Federal Preemption over Tort Reform*, 80 CORNELL L. REV. 747, 784 (1995).

¹⁷ See McAllister, *supra* note 3, at 311-12.

¹⁸ See H.R. REP. NO. 103-525(II), at 7 (1994).

were misleading. The Article begins by introducing the general aviation industry and its history. The Article then briefly discusses the products liability law on which the Act is based. Thirdly, the Article traces the legislative history of the Act, including the arguments made by both the proponents and opponents of the Act. Next is an in-depth analysis of the statute and the case law interpreting it. The Article then focuses on the different general aviation industry actors by describing how each group is affected by the Act. An analysis of the constitutionality of GARA follows. The Article concludes by returning to the arguments presented by the proponents and opponents of GARA and reexamining why GARA should not have been enacted. This final section criticizes the legislative policies relied upon by Congress and describes why the general aviation industry's arguments in support of GARA's enactment were fallacious.

II. THE GENERAL AVIATION INDUSTRY

A. WHAT IS THE GENERAL AVIATION INDUSTRY?¹⁹

"General aviation is defined as all private-sector aviation that does not involve regularly scheduled passenger traffic."²⁰ General aviation includes the construction, maintenance and flight operations of aircraft such as corporate jets, helicopters, and home-built sailplanes.²¹ General aviation manufacturers build general aviation aircraft, major aircraft components (e.g. engines and propellers), and smaller components.²² Operators of general aviation aircraft provide a variety of aviation services that are not efficiently provided by alternative modes of transportation.²³ Such services include: pilot training, crop-dusting, emergency medical evacuation, business aviation, air cargo, flight training, pleasure flying, air taxi, and air charter.²⁴ "General aviation aircraft also provide passenger service in areas that commercial airlines are unwilling or unable to service."²⁵ "Over

¹⁹ See *infra* Part V.D.

²⁰ John H. Boswell & George Andrew Coats, *Saving the General Aviation Industry: Putting Tort Reform to the Test*, 60 J. AIR L. & COM. 533, 535 (1995).

²¹ See McAllister, *supra* note 3, at 303.

²² See Boswell & Coats, *supra* note 20, at 535.

²³ See Scott E. Tarry & Lawrence J. Truitt, *Rhetoric & Reality: Tort Reform and the Uncertain Future of General Aviation*, 61 J. AIR L. & COM. 163, 167 (1995).

²⁴ See *id.*; see also Boswell & Coats, *supra* note 20, at 535.

²⁵ Tarry & Truitt, *supra* note 23, at 167.

5000 communities rely solely on general aviation for their access to the nation's airways."²⁶

The general aviation industry is composed of a variety of actors, including the "Big Three" airframe manufacturers (Cessna Aircraft Co., Piper Aircraft Corp., and Beech Aircraft Corp.), small airframe manufacturers, and component parts manufacturers.²⁷ It also includes dealers, fixed base operators (FBOs), kit-plane manufacturers, private flight instructors, mechanics, and pilots.²⁸

A general aviation aircraft is statutorily defined as an aircraft, approved by the Federal Aviation Administration, that seats less than twenty passengers and that is not engaged in scheduled passenger operations.²⁹

B. HISTORY OF INDUSTRY GROWTH

A plethora of trained pilots, aircraft mechanics, and aero-engineers emerged from the aftermath of World War II, eager to test their innovative and entrepreneurial spirits in the industry of general aviation manufacturing.³⁰ They began building "a multitude of single- and multi-engine light piston aircraft" in their "backyard garages, [in] small-town factories, and [in] major manufacturers' plants."³¹ The skies were becoming filled with "new designs from manufacturers like Cessna, Piper, Beech, Stinson, and Luscombe."³² Small town airports became popular, and surplus military airfields were rapidly being converted to civilian use.³³ Ex-army air corps personnel provided aircraft maintenance, fuel services, sales support, and pilot training for the next generation.³⁴

The tremendous increase in the number of pilots flying and the number of aircraft being produced lasted throughout the

²⁶ Steven L. England & Christopher C. McNatt, Jr., *Symposium on the General Aviation Revitalization Act: The Push for Statutes of Repose in General Aviation*, 23 TRANSP. L.J. 323, 324 (1995).

²⁷ See McAllister, *supra* note 3, at 303.

²⁸ See *id.*; Ladd Sanger, Note, *Will the General Aviation Revitalization Act of 1994 Allow the Industry to Fly High Once Again?*, 20 OKLA. CITY U. L. REV. 435, 435 (1995).

²⁹ See GARA § (2)(c).

³⁰ See McAllister, *supra* note 3, at 304.

³¹ *Id.*

³² *Id.*

³³ See *id.*

³⁴ See *id.*

1960s and 1970s.³⁵ During these two decades, the "Big Three" created a comprehensive product line of general aviation aircraft, established an infrastructure that provided sales and training, and aggressively marketed the industry of general aviation.³⁶

C. DECLINE OF THE INDUSTRY

In the 1980s general aviation first began to stagnate and then to decline.³⁷ The 1990s saw further decline as demand for general aviation products and services continued to wane.³⁸ General aviation ownership gradually became more of a luxury and less accessible to the average American.³⁹ As a result, production began to stall and then virtually ceased.⁴⁰

During this period, the industry's annual production of general aviation aircraft plunged from over 17,000 aircraft in 1979 to 2600 in 1983.⁴¹ Cessna, the largest manufacturer of general aviation aircraft, ceased production of piston-engined aircraft in 1986.⁴² By 1993 production had further decreased to 954 aircraft.⁴³

In the mid-1980s the industry began to attribute the decline in manufacturing to an alleged increase in the cost of insuring and defending products liability actions relating to defective design and manufacture.⁴⁴ Manufacturers concluded that they needed to limit their exposure to products liability actions in order to assure a revival of the production of light piston aircraft for general aviation use.⁴⁵

III. APPLICABLE LAW

Products liability is a term of art that refers to the "liability of a manufacturer or seller of a chattel which is defective and/or unreasonably dangerous and causes" injury to an individual.⁴⁶

³⁵ *See id.*

³⁶ *See id.* at 304-05.

³⁷ *See id.*

³⁸ *See id.* at 305.

³⁹ *See id.* at 305-06.

⁴⁰ *See id.* at 306.

⁴¹ *See* Sanger, *supra* note 28, at 436.

⁴² *See* S. REP. NO. 103-202, at 3 (1993).

⁴³ *See* H.R. REP. NO. 103-525(I), at 2 (1994).

⁴⁴ *See* McAllister, *supra* note 3, at 306.

⁴⁵ *See id.* at 307.

⁴⁶ WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 641 (4th ed. 1971).

There are at least four objectives of liability law: (1) to compensate accident victims; (2) to deter injurers; (3) to spread risk equitably; and (4) to foster innovation and safety.⁴⁷ American law generally provides three theories to plaintiffs who seek to recover against manufacturers: (a) warranty (contractual remedy); (b) strict liability (tort remedy); and (c) negligence (tort remedy).⁴⁸ General aviation litigation is dominated by tort claims.⁴⁹

Because the tort liability laws governing aircraft litigation are governed by state law, there is some variation among jurisdictions.⁵⁰ The majority of states allow liability for a defective product to extend throughout the entire life of the product, with the statute of limitations beginning to run only after an injury occurs.⁵¹ However, a minority of states have enacted statutes of repose which cut off a plaintiff's right to bring a cause of action after a specified time, measured from the delivery of a product, regardless of the time of accrual of the cause of action.⁵² A statute of repose extinguishes a plaintiff's cause of action before it can ever arise.⁵³

IV. TORT REFORM EFFORTS AFFECTING THE GENERAL AVIATION INDUSTRY

A. LEGISLATIVE HISTORY

While the general aviation manufacturing industry was experiencing economic difficulty, its members began to lobby the federal government for reform of the tort system, particularly in the

⁴⁷ See Tarry & Truitt, *supra* note 23, at 167-68.

⁴⁸ See Moffitt, *supra* note 9, at 217.

⁴⁹ See *id.*

⁵⁰ See *id.* at 218.

⁵¹ See *id.*

⁵² See BLACK'S LAW DICTIONARY 1411 (6th ed. 1990). When GARA was signed, sixteen states had statutes of repose that ran for either the "useful safe life" of the product or from five to twelve years. See, e.g., ARK. CODE ANN. § 16-116-105 (Michie 1987); COLO. REV. STAT. ANN. § 13-80-107 (West 1997); CONN. GEN. STAT. § 52-577a (1997); GA. CODE ANN. § 105-106 [51-1-11] (1991 & Supp. 1997); IDAHO CODE § [6-1403] 6-1303 (1990); 735 ILL. COMP. STAT. ANN. 5/13-213 (West 1992); IND. CODE ANN. § 33-1-1.5-5 (Michie 1992); KAN. STAT. ANN. § 60-3303 (1994); MINN. STAT. § 604.03 (1988); NEB. REV. STAT. § 25-224 (1995); N.C. GEN. STAT. § 1-50(6) (1996); OR. REV. STAT. ANN. § 30.905 (1988); TENN. CODE ANN. § 29-28-103 (1980); WASH. REV. CODE ANN. § 7.72.060 (West 1992). For a more in-depth discussion regarding state statutes of repose, see England & McNatt, *supra* note 26.

⁵³ See Sanger, *supra* note 28, at 447.

area of aviation products liability.⁵⁴ They pushed for reform at the “[f]ederal level, where it was believed that the overarching [f]ederal authority over aviation safety offered the best chance of achieving uniformity of legislation.”⁵⁵ Congress believed that federal legislation was justified in this instance because aircraft were considered unique when compared to other products.⁵⁶

Because much of the general aviation industry is based in Kansas,⁵⁷ members of the Kansas congressional delegation became the primary sponsors of legislation aimed at revitalizing the industry.⁵⁸ In 1986 legislators introduced a series of Senate and House bills calling for the uniformity of personal injury and property damage liability rules arising out of general aviation accidents.⁵⁹ For example, House Resolution 4142,⁶⁰ introduced by Representative Dan Glickman (D-Kan.), provided for a uniform federal aviation products liability law, eliminated joint and several liability (except for defects in airplanes or their parts), and barred suits for injuries caused by products that had exceeded their useful lives.⁶¹ A twenty-year statute of repose appeared in the Senate’s General Aviation Accident Liability Standards Act of 1986.⁶²

The following year, new bills with new names were introduced in furtherance of the reform effort.⁶³ House members introduced the General Aviation Standards Act of 1987.⁶⁴ In the Senate, Senator Nancy Kassenbaum (R-Kan.) introduced the General Aviation Accident Liability Standards Act of 1987,⁶⁵ which contained “comprehensive rules on liability, comparative responsibility, and remedial measures designed to ease the bur-

⁵⁴ See McAllister, *supra* note 3, at 308-09.

⁵⁵ *Id.* at 309; see generally H.R. REP. NO. 103-525(II), at 7 (1994); MacDougall, *supra* note 7, at 341.

⁵⁶ See MacDougall, *supra* note 7, at 341.

⁵⁷ Beech, Cessna and Learjet manufacture their products in Wichita, Kansas. See England & McNatt, *supra* note 26, at 326 n.17.

⁵⁸ See *id.* at 326.

⁵⁹ See Albert Lin, Comment, *Jurisdictional Splashdown: Should Aviation Torts Find Solace in Admiralty?*, 60 J. AIR. L. & COM. 409, 444 (1994).

⁶⁰ H.R. RES. 4142, 99th Cong. (1986).

⁶¹ See *id.*

⁶² S. 2794, 99th Cong. (1986); see Todd R. Steggerda, *GARA's Achilles: The Problematic Application of the Knowing Misrepresentation Exception*, 24 TRANSP. L.J. 191, 225 (1997).

⁶³ See Steggerda, *supra* note 62, at 226.

⁶⁴ H.R. 2238, 100th Cong. (1987).

⁶⁵ S. 473, 100th Cong. (1987).

den of liability insurance on aviation manufacturers.”⁶⁶ The proposal also provided the federal courts with original jurisdiction, concurrent with state courts, in all civil actions arising out of aviation accidents.⁶⁷ Congress killed both the Kassenbaum bill and the similar House version.⁶⁸

In 1989 Congress again refused to pass legislation virtually identical to the Kassenbaum bill.⁶⁹ The Committee on the Judiciary rejected the bills because it had difficulty blaming the general aviation industry’s decline solely on increased liability insurance premiums.⁷⁰ During the next three years, Senator Kassenbaum introduced two more versions of the General Aviation Accident Liability Standards Act, both of which Congress rejected.⁷¹

In September of 1993, during the 103rd Congress, Senator Kassenbaum introduced Senate Bill 1458, known as the General Aviation Revitalization Act.⁷² In the House, Congressman Glickman introduced an identical bill.⁷³ The scope of this bill was limited to the singular issue of creating a fifteen-year statute of repose on civil actions brought against general aircraft manufacturers and manufacturers of general aviation component parts.⁷⁴ The restricted scope of this bill significantly improved its chances for passage.⁷⁵

The bill passed out of committee in the Senate with the fifteen-year statute of repose.⁷⁶ However, the bill ultimately passed by the entire Senate contained an eighteen-year repose period.⁷⁷ The Senate passed the bill on March 16, 1994, by a margin of ninety-one to eight.⁷⁸

The House version of the Senate Bill, H.R. 3087, also included a fifteen-year statute of repose in its original form.⁷⁹

⁶⁶ Lin, *supra* note 59, at 445-46.

⁶⁷ *See id.* at 446.

⁶⁸ *See id.* at 449.

⁶⁹ *See id.*

⁷⁰ *See* S. REP. NO. 101-303, at 3 (1990).

⁷¹ *See* S. 645, 102d Cong. (1991); S. 67, 103d Cong. (1993); *see also* Lin, *supra* note 59, at 450.

⁷² S. 1458, 103d Cong. (1993).

⁷³ *See* H.R. 3087, 103d Cong. (1993).

⁷⁴ *See* Lin, *supra* note 59, at 450.

⁷⁵ *See id.* at 450-51.

⁷⁶ *See* Steggerda, *supra* note 62, at 226.

⁷⁷ *See id.* at 227.

⁷⁸ *See id.* at 226. There is virtually no legislative history describing the reason for increasing the repose period from 15 to 18 years.

⁷⁹ *Id.* at 228.

However, the Aviation Subcommittee of the House Public Works and Transportation Committee amended the bill's statute of repose to eighteen years.⁸⁰ On June 27, 1994, the House passed a compromise bill and two months later, President Clinton signed the bill into law.⁸¹ On August 17, 1994, President Clinton touted the bill as "legislation that accommodates the need to revitalize our general aviation industry, while preserving the legal rights of passengers and pilots."⁸² GARA became effective immediately upon its passage and is not applicable to civil actions commenced before the date of enactment.⁸³

B. PASSAGE OF GARA

1. *The Proponents' Arguments for GARA*

The general aviation manufacturing industry wholeheartedly supported GARA and was represented primarily by the General Aviation Manufacturers Association (GAMA), the Aircraft Owners and Pilots Association (AOPA), the Experimental Aircraft Association, the International Association of Machinists, the Helicopter Association International, the National Business Aircraft Association, and the National Air Transportation Association.⁸⁴ The proponents of the bill argued that its passage was necessary in order to relieve the general aviation industry from burdensome strict products liability verdicts and associated defense costs as well as resulting increased insurance premiums. They argued that these factors led to the demise of a once vital and prosperous industry. The proponents asserted that GARA would necessarily eliminate manufacturers' exposure to liability after their products had proven their integrity.⁸⁵

According to Congressional testimony, small airplane manufacturing and production decreased from over 17,000 aircraft annually in the United States in the late 1970s to under 1000 per

⁸⁰ See *id.* at 230. There is virtually no legislative history describing the reason for increasing the repose period from 15 to 18 years.

⁸¹ See *id.* at 231.

⁸² Statement of President William J. Clinton Upon Signing S. 1458, 30 WEEKLY COMP. PRES. DOC. 1678 (Aug. 17, 1994).

⁸³ See GARA §§ (4)(a)-(b).

⁸⁴ See Hedrick, *supra* note 15, at 386.

⁸⁵ See *General Aviation Act of 1993: Hearing on H.R. 3087 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transp.*, 103d Cong. 133 (1993) [hereinafter *Hearing on H.R. 3087*] (statement of Russell W. Meyer, Jr., Chairman and CEO, Cessna Aircraft Co.).

year in 1993.⁸⁶ Single-engine piston-driven aircraft production decreased from 14,000 aircraft in 1978 to 555 in 1993.⁸⁷ Cessna, one of the nation's largest small aircraft manufacturers, in its heyday produced an average of 6500 aircraft annually.⁸⁸ However, in 1986, Cessna ceased manufacture of single-engine airplanes entirely.⁸⁹

Along with this decline in production came a loss of jobs.⁹⁰ An estimated 100,000 jobs were lost throughout the entire industry⁹¹—20,000 in the general aviation manufacturing industry and 80,000 in related industries (e.g. aircraft sales and service).⁹²

During the 1980s accident litigation and defense costs in the general aviation industry steadily escalated.⁹³ Aircraft manufacturers were forced to shift a greater proportion of their resources to defending lawsuits and compensating plaintiffs.⁹⁴ "According to GAMA, in 1976, total product liability costs, including claim and defense costs for light aircraft airframe and component manufacturers, were \$24 million."⁹⁵ By 1986 the total costs of products liability for light aircraft reached \$210 million.⁹⁶ In 1987 the "Big Three" calculated that their "annual costs for product liability ranged from \$70,000 to \$100,000 per unit built and shipped during the year."⁹⁷

Manufacturers attributed the drop in general aviation aircraft production to the "tremendous increase in the industry's [products] liability insurance costs."⁹⁸ According to Cessna Chairman, Russell W. Meyer, the reason for ceasing production of

⁸⁶ See H.R. REP. NO. 103-525(I), at 2 (1994).

⁸⁷ See *id.*

⁸⁸ See *General Aviation Revitalization Act of 1993: Hearing on S. 1458 Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transp.*, 103d Cong. 1 (1993) (statement of Russell W. Meyer, Jr., Chairman and CEO, Cessna Aircraft Co.).

⁸⁹ See *General Aviation Revitalization Act: Hearing on H.R. 3087 and S. 1458 Before the Subcomm. on Econ. and Commercial Law of the House Judiciary Comm.*, 103d Cong. 1 (1994) [hereinafter *Hearing on H.R. 3087 and S. 1458*] (statement of Russell W. Meyer, Jr., Chairman and CEO, Cessna Aircraft Co.).

⁹⁰ See H.R. REP. NO. 103-525(I), at 2 (1994).

⁹¹ See S. REP. NO. 103-202, at 2 (1993).

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

⁹³ See Tarry & Truitt, *supra* note 23, at 179.

⁹⁴ See *id.*

⁹⁵ S. REP. NO. 103-202, at 3 (1993).

⁹⁶ See *id.*

⁹⁷ Tarry & Truitt, *supra* note 23, at 180.

⁹⁸ H.R. REP. NO. 103-525(I), at 1 (1994).

single-engine airplanes was “[s]olely because of the unlimited cost of products liability.”⁹⁹ Manufacturers have the deepest pockets “in a chain of potential liability,” but are the least responsible for the ongoing safety of aircraft produced many years ago.¹⁰⁰ Thus, GARA’s statute of repose would still allow potential plaintiffs to seek recovery from the party most directly responsible for their loss—*e.g.*, a mechanic who negligently repaired a part or the manufacturer of a defective replacement part.¹⁰¹

The industry argued that it deserved this legislative protection because plaintiffs continued to pursue litigation against manufacturers even when the National Transportation Safety Board (NTSB) accident findings did not uncover aircraft defects.¹⁰² Furthermore, GARA would enable the industry to avoid having to contend with the difficulties associated with constructing a good defense in actions concerning older products.¹⁰³ These difficulties arise “because of the obstacle of securing evidence.”¹⁰⁴

Proponents of the Act argued that its passage would lead to: (1) 25,000 new jobs in the industry within five years;¹⁰⁵ (2) 100,000 new jobs within the support industries;¹⁰⁶ (3) greater student pilot start-ups leading to an increased supply of pilots and aircraft mechanics;¹⁰⁷ (4) increased spending on research and development;¹⁰⁸ and (5) an improved balance of trade due to greater exporting.¹⁰⁹ Cessna even promised to restart piston aircraft production and to produce 2000 new aircraft per year in

⁹⁹ *Hearing on H.R. 3087 and S. 1458*, *supra* note 89 (statement of Russell W. Meyer Jr., Chairman and CEO, Cessna Aircraft Co.).

¹⁰⁰ Moffitt, *supra* note 9, at 223.

¹⁰¹ *See id.*

¹⁰² *See* Robert Martin, *General Aviation Manufacturing: An Industry Under Seige*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 485-86 (Peter W. Huber & Robert E. Litan eds., 1991).

¹⁰³ *See* MODEL UNIF. PROD. LIAB. ACT, 44 Fed. Reg. 62,714, 62,734 (1979).

¹⁰⁴ *Id.*

¹⁰⁵ *See Hearing on H.R. 3087 and S. 1458*, *supra* note 89 (statement of Russell W. Meyer Jr., Chairman and CEO, Cessna Aircraft Co.).

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See* Geoffrey M. Hand, Comment, *Should Juries Decide Aircraft Design? Cleveland v. Piper Aircraft Corp. and Federal Preemption of State Tort Law*, 29 U.S.F. L. REV. 741, 798 (1995).

¹⁰⁹ *See Hearing on H.R. 3087*, *supra* note 85, at 51 (statement of Russell W. Meyer, Jr., Chairman and CEO, Cessna Aircraft Co.).

exchange for the passage of GARA.¹¹⁰ These predictions and promises, of course, assume that excessive liability was, in fact, the principal cause of the industry's difficulties, and that a statute of repose is, in fact, a sufficient remedy.¹¹¹

Interestingly, the Aircraft Owners and Pilots Association (AOPA) also supported GARA.¹¹² Pilots are frequently the plaintiffs in these lawsuits, and their support of the bill was certainly persuasive. Opponents of GARA were (and continue to be) baffled by the AOPA's support and criticize its President, Phil Boyer, for having "sold out" its members by supporting the legislation.¹¹³

2. *The Oppositions' Arguments to GARA*

a. Why the General Aviation Industry does not Deserve GARA

The American Trial Lawyers Association (ATLA) and consumer groups such as Citizen Action and Public Citizen joined together to fight against enactment of GARA's statute of repose.¹¹⁴ These groups were opposed to tort reform legislation favoring general aviation manufacturers for several reasons. First, they complained about the inequity in offering liability protection to a particular industry.¹¹⁵ They queried why an industry "that was enjoying great profitability [should] be granted tort immunity for up to 50 years of economic activity[.]"¹¹⁶ Beech and Cessna made record profits in 1992 and 1993.¹¹⁷ Total revenues in the industry hit \$2.1 billion, the highest level since 1981.¹¹⁸ The opponents argued that

[t]he extent of the profitability of the "Big Three" as of 1992 was impressive: Cessna was sold to Textron for \$100 million. Beech recorded its highest revenues ever. Cessna and Beech both tran-

¹¹⁰ See H.R. REP. NO. 103-525(II), at 5 (1994); S. REP. NO. 103-202, at 2 (1993).

¹¹¹ See Moffitt, *supra* note 9, at 221.

¹¹² See *Hearing on H.R. 3087, supra* note 85, at 57 (statement of Phil Boyer, President, Aircraft Owners and Pilots Association).

¹¹³ See Daniel Donnelly et al., *The General Aviation Revitalization Act Panel Discussion*, 63 J. AIR L. & COM. 169, 179 (1997).

¹¹⁴ See McAllister, *supra* note 3, at 309; England & McNatt, *supra* note 26, at 327.

¹¹⁵ See McAllister, *supra* note 3, at 309.

¹¹⁶ *Id.* at 309 n.42.

¹¹⁷ See Philip Shuchman, *It Isn't That the Tort Lawyers Are So Right, It's Just That the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 485, 530 (1997).

¹¹⁸ See *Hearing on H.R. 3087, supra* note 85, at 110 (statement of Robert B. Creamer, Citizen Action).

sitioned into production of corporate jets and multi-engine turbine aircraft. These aircraft are more profitable than single- or multi-engine light piston aircraft by a factor of ten. In light of this, ATLA argued that any reduction in liability would not assure production of light piston aircraft by the "Big Three."¹¹⁹

The opponents attacked the manufacturers' allegation that products liability judgments had driven up insurance defense costs so high that aircraft could not be produced or sold at reasonable prices.¹²⁰ They asserted that "[t]he problem is not one of excessive cost; the problem is one of limited demand. Pilots, businesses, flying clubs, fixed base operations—none of them buy new airplanes because they can get essentially the same thing for less money in a used airplane."¹²¹ Used aircraft cost between one-half and one-fourth that of new aircraft and are considered by pilots to be of essentially the same quality.¹²²

Furthermore, during the 1950s, 1960s, and 1970s, the aviation industry flooded the market with airplanes.¹²³ "The market matured and new sales collapsed. This had nothing to do with the costs of product liability, except that the cost of meeting the liability exposure of the entire fleet had to be spread over a greatly reduced number of new unit sales."¹²⁴

ATLA also argued that limiting liability would deprive injured pilots and passengers of their rights to compensation.¹²⁵ They insisted that "the fact that general aviation is viewed as an 'inherently dangerous activity' mitigates against any lessening of the standard of care applied to general aviation products."¹²⁶

ATLA protested that the industry was not deserving of tort reform in light of "the laxity of [Federal Aviation Administration (FAA)] certification standards and the certification process."¹²⁷ The industry did not deserve GARA's protection because "FAA certification standards with respect to [certain] safety issues . . . do not bring the number of defective products to an acceptable

¹¹⁹ McAllister, *supra* note 3, at 309 n.42.

¹²⁰ See *Hearing on H.R. 3087*, *supra* note 85, at 111 (statement of Robert B. Creamer, Citizen Action).

¹²¹ *Id.*

¹²² See *id.* at 112.

¹²³ See *id.*

¹²⁴ *Id.*

¹²⁵ See McAllister, *supra* note 3, at 309 n.42.

¹²⁶ *Id.*

¹²⁷ *Id.* at 309.

level.”¹²⁸ Furthermore, the general aviation manufacturing industry did not deserve special protection because of “manufacturer collusion in the National Transportation Safety Board (NTSB) accident investigations.”¹²⁹

Opponents also argued that GARA would reduce manufacturers’ financial incentives for providing aircraft safety and would “severely limit the rights of the innocent victims of aircraft accidents to receive fair compensation for their injuries.”¹³⁰

b. Why the Industry’s Arguments for GARA are Wrong

ATLA asserted that the general aviation industry’s decline was not due primarily to increased products liability costs, but rather to a variety of other factors. They argued that the decline was due to (1) industry mismanagement;¹³¹ (2) increased fuel prices;¹³² (3) the Gulf War;¹³³ (4) the elimination of the investment tax credit formerly applicable to the purchase of some aircraft;¹³⁴ (5) the lack of trained pilots;¹³⁵ (6) the increase in the market for used planes;¹³⁶ (7) the 10% luxury tax imposed in 1990;¹³⁷ (8) the durability, quality and longevity of existing aircraft;¹³⁸ (9) the increased availability of kit-type aircraft;¹³⁹ (10)

¹²⁸ *Id.* at 309 n.43. For example, “[t]he FAA did not require shoulder harnesses until 1973, even though it was known for years that they would materially cut down on fatalities in crashes.” *Hearing on H.R. 3087, supra* note 85, at 116 (statement of Robert B. Creamer, Citizen Action). Furthermore, there were several types of aircraft that had chronic defects that went for several years without implementation of any FAA mandated corrective action programs:

Cessna 411 with lack of rudder authority during single engine operations. - Cessna 210 with bladder fuel tanks that trap water. - Mooney Turbo 210 with vapor lock. - V-Tail Beech Bonanzas with a basic design flaw due to lack of aeronautical knowledge during the 1950’s. - Lear 23 crashes ([of which] over 50% of the aircraft built have crashed). - Piper Malibu with an unprecedented number of crashes[s] due possibly to a defective autopilot.

McAllister, *supra* note 3, at 309 n.43.

¹²⁹ McAllister, *supra* note 3, at 310.

¹³⁰ *Hearing on H.R. 3087, supra* note 85, at 109 (statement of Robert B. Creamer, Citizen Action).

¹³¹ See Sanger, *supra* note 28, at 442.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See H.R. REP. NO. 103-525(II), at 5 (1994).

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.*; S. REP. NO. 103-202, at 2 (1993).

¹³⁸ See S. REP. NO. 103-202, at 2 (1993).

¹³⁹ See *id.*

the relatively inexpensive cost of buying used aircraft;¹⁴⁰ (11) airline deregulation legislation resulting in lower prices and a surge in commercial airline traffic;¹⁴¹ and (12) concentration of the general aviation industry in the more profitable jet aircraft market.¹⁴²

Opponents rejected the manufacturers' theory that aviation liability insurance premiums would decline in the wake of GARA's enactment, because, they argued, the insurance rates did not increase in the first place because of the costs of claims.¹⁴³ The insurance rate increase in the 1980s was attributable to "conditions in the investment markets, changes in insurance industry investment practices, and the so called 'insurance cycle.'"¹⁴⁴ None of the changes in the cost of insurance premiums has any relationship to fluctuations in the volume of underlying claims.¹⁴⁵ If the manufacturers want their insurance premiums to decrease, opponents argued, they should lobby Congress to address the liability insurance companies' practices, especially its uncompetitive nature.¹⁴⁶

Furthermore, opponents asserted, "[t]o significantly increase piston engine sales requires one of three factors: a significant increase in the number of piston engine pilots and hours flown; product innovation that gives a purchaser a reason to buy a new instead of used aircraft; or the rapid deterioration of many older piston airplanes."¹⁴⁷ GARA will have no effect on any of these.¹⁴⁸

In addition, GARA "will not improve demand for piston engine airplanes"—it will merely cut manufacturers' costs.¹⁴⁹ The opposition asserted,

Of course we could have the same effect by cutting the wages of employees, or cutting taxes, or providing an outright subsidy to these companies. We do not believe such a subsidy is warranted in this marketplace. But more important [sic], limiting the rights of victims to recover damages has two terrible side effects: it reduces the financial incentive to safety and it takes money

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See H.R. REP. NO. 103-525(II), at 5 (1994).

¹⁴³ See *Hearing on H.R. 3087, supra* note 85, at 114 (statement of Robert B. Creamer, Citizen Action).

¹⁴⁴ *Id.*

¹⁴⁵ See *id.* at 115.

¹⁴⁶ See *id.*

¹⁴⁷ *Id.* at 113.

¹⁴⁸ See *id.* at 114.

¹⁴⁹ *Id.* at 115.

from those who should be the last to contribute—the victims of accidents.¹⁵⁰

The opposition put it simply: Of course Cessna wants this bill.

Cessna is currently liable for any accident that is the result of the negligent production or design of any of the 160,000 aircraft it has built that is still in service. Under this bill Cessna would be liable for only the 21,000 aircraft (only 13% of the total) that were built after 1976.¹⁵¹

V. STATUTORY ANALYSIS

A. OVERVIEW

The General Aviation Revitalization Act amended the Federal Aviation Act by adding section 1119, which provides an eighteen year statute of repose on all civil actions for death, injury, or property damage caused by general aviation aircraft and their component parts.¹⁵² GARA prohibits a person from bringing suit for death, injury, or property damage that occurs while on board a general aviation aircraft that was manufactured more than eighteen years prior to the accident.¹⁵³ GARA is a “rolling” statute of repose.¹⁵⁴ This means that when a particular part in an aircraft is replaced by a new part, the eighteen year period begins again for the replacement part.¹⁵⁵

There are four instances in which GARA’s statute of repose will not be invoked: (1) when the manufacturer knowingly misrepresents certain safety information to the FAA; (2) when the injured person was a passenger for purposes of receiving treatment for a medical or other emergency; (3) when the injured person was not aboard the aircraft at the time of the accident; or (4) when a written warranty by the manufacturer provides for more than eighteen years protection.¹⁵⁶

B. THE EFFECTIVE DATE

The General Aviation Revitalization Act’s statute of repose became effective on the date of its enactment, which was August

¹⁵⁰ *Id.* at 115-16.

¹⁵¹ *Id.* at 116.

¹⁵² *See* GARA §§ 2(a), 3(3).

¹⁵³ *See id.*

¹⁵⁴ *See* H.R. REP. NO. 103-525(I), at 3 (1994).

¹⁵⁵ *See id.*

¹⁵⁶ *See* GARA §§ 2(b)(1)-(4).

17, 1994.¹⁵⁷ The Act does not apply to civil actions commenced before the date of enactment.¹⁵⁸

The issue of GARA's effective date was addressed by a California federal district court in *Altseimer v. Bell Helicopter Textron, Inc.*¹⁵⁹ In *Altseimer*, the accident occurred prior to August 17, 1994 (the effective date of the Act), but the plaintiffs did not file their complaint until May 23, 1995.¹⁶⁰ The court rejected the plaintiffs' argument that GARA should not apply because the cause of action accrued prior to the effective date.¹⁶¹ The court held that because the plaintiffs' claims were filed after the effective date of the statute, their claims were subject to GARA's preemptive provisions.¹⁶²

The applicability provision was also interpreted in *Cartman v. Textron Lycoming Reciprocating Engine Division*,¹⁶³ where the action accrued and the original complaint was filed prior to GARA's enactment.¹⁶⁴ The issue in *Cartman* was not whether the original cause of action was preempted by GARA's provisions. Rather, the plaintiff argued that his amended petition, joining another defendant and filed seven months after the effective date of GARA, related back to the original complaint and thus was not preempted by GARA.¹⁶⁵ The court rejected the plaintiff's argument and treated the plaintiff's amended complaint as a separate claim.¹⁶⁶ Thus, GARA precluded the products liability claim against the new defendant.¹⁶⁷

The *Cartman* decision potentially affects those claims that were filed prior to GARA, but in which discovery is still active.¹⁶⁸ GARA "erects a serious barrier to the addition of defendants through an amended complaint."¹⁶⁹ Unless the plaintiff can demonstrate that the amended complaint relates back to the

¹⁵⁷ *Id.* § 4(a).

¹⁵⁸ *See id.* § 4(b).

¹⁵⁹ 919 F. Supp. 340 (E.D. Cal. 1996).

¹⁶⁰ *See id.* at 342.

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ No. 94-CV-72582-DT, 1996 U.S. Dist. LEXIS 20189 (E.D. Mich. Feb. 27, 1996).

¹⁶⁴ *See id.* at *6.

¹⁶⁵ *See id.* at *7.

¹⁶⁶ *See id.* at *8.

¹⁶⁷ *See id.* at *12.

¹⁶⁸ *See Steggerda, supra* note 62, at 200.

¹⁶⁹ *Id.*

original, the amended complaint will stand as a separate claim and will be subject to GARA's statute of repose.¹⁷⁰

C. JURISDICTIONAL ISSUES

1. *Federal Preemption of State Products Liability Law*

GARA is the first piece of federal legislation to establish federal rules governing state products liability laws.¹⁷¹ The federal government has long been reluctant to impose federal regulations on issues that are traditionally governed by state common law, such as tort law.¹⁷² It has also been hesitant to impose national standards that preempt state law because it recognizes that "an individual's right to sue is grounded in state common law that reflects the experiences of the legal system and the values of the citizens of a particular state."¹⁷³ The federal government also wants to avoid the likely procedural and jurisdictional confusion that accompanies such interference.¹⁷⁴

Clearly, Congress believed it was appropriate to impose regulations affecting state tort law concerning the general aviation industry.¹⁷⁵ The general aviation industry was different because the industry is subjected to strict regulation by the federal government.¹⁷⁶ The regulatory oversight exists from the cradle to the grave.¹⁷⁷ There are federal inspections and certifications of aircraft;¹⁷⁸ federal training, testing and certification of pilots;¹⁷⁹ and FAA regulation of air routes, fuel handling operations and aviation accidents.¹⁸⁰ Congress also justified its interference with state law by touting the statute as a very limited federal preemption.¹⁸¹

GARA's statute of repose does not affect state courts' rights to adjudicate aviation products liability cases involving "claims for defective design or manufacture."¹⁸² GARA only supersedes state law to the extent that a state's law permits a such a civil

¹⁷⁰ See *id.*

¹⁷¹ See Pounian & Rodriquez, *supra* note 4, at 160.

¹⁷² See *Conning the IADC Newsletters*, 62 DEF. COUNS. J. 297, 301 (1995).

¹⁷³ *Id.*

¹⁷⁴ See *id.*

¹⁷⁵ See H.R. REP. NO. 103-525(II), at 4 (1994).

¹⁷⁶ See *id.* at 6.

¹⁷⁷ See *id.* at 5.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* at 6.

¹⁸¹ See *id.* at 4.

¹⁸² McAllister, *supra* note 3, at 312.

action to be brought after the eighteen year period.¹⁸³ State products liability law continues to govern products liability actions for defective aircraft design or manufacture and state common law governs all actions for damages.¹⁸⁴ GARA specifically states that its statute of repose "supersedes any State law to the extent that such law permits a civil action . . . to be brought after the applicable limitation period for such civil action" ¹⁸⁵

2. GARA Conferring Subject Matter Jurisdiction onto Federal Courts

An example of the limited nature of GARA's preemptive scope is found in *Wright v. Bond-Air, Ltd.*,¹⁸⁶ where the defendants tried to use GARA as a means for conferring subject matter jurisdiction on the federal courts under 28 U.S.C. § 1331.¹⁸⁷ In this case, James M. Wright, Jr. was flying a twin-engine Cessna when he was killed in a fatal crash.¹⁸⁸ His estate filed a wrongful death and products liability lawsuit in state court, alleging negligence and breach of warranty.¹⁸⁹ The defendants removed the case to federal court by asserting that the court had subject matter jurisdiction over the case.¹⁹⁰ They argued that the case arose under federal law, e.g. GARA.¹⁹¹ The plaintiff moved to remand the case back to state court, based on lack of federal jurisdiction.¹⁹²

The defendants argued that federal jurisdiction was proper because, under the "artful pleading" exception to the well-pleaded complaint rule, the plaintiff had disguised the federal nature of its state law claim.¹⁹³ The defendants argued that the plaintiff's claim did not mention GARA, but that the plaintiff's argument was framed in a manner designed to satisfy GARA's knowing misrepresentation exception.¹⁹⁴ The defendants claimed that whether a GARA exception is satisfied is a federal question because the exception creates a "federal condition precedent that Plaintiff must necessarily plead and prove. Without

¹⁸³ See GARA § 2(d).

¹⁸⁴ See McAllister, *supra* note 3, at 315-16.

¹⁸⁵ GARA § 2(d).

¹⁸⁶ 930 F. Supp. 300 (E.D. Mich. 1996).

¹⁸⁷ See *id.* at 301.

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *id.* at 301-02.

¹⁹³ See *id.* at 302.

¹⁹⁴ See *id.* at 304-05.

such proof, a court cannot recognize that Plaintiff's state law cause of action has accrued and cannot permit her state-law tort claims to be litigated."¹⁹⁵

The defendants' clever argument did not persuade the court. The *Wright* court concluded that GARA does not create a federal cause of action.¹⁹⁶ It is merely a statute of repose designed to serve a "gatekeeping function."¹⁹⁷ Congress did not intend to create a body of federal common law and GARA does not preempt a state's substantive law.¹⁹⁸ Furthermore, "the mere fact [that] GARA requires consideration of FAA regulations, does not raise a sufficiently substantial federal issue so as to confer federal question jurisdiction."¹⁹⁹ The court noted, "'GARA erects a formidable first hurdle' to a plaintiff bringing a product liability lawsuit against a general aviation aircraft manufacturer, but once a plaintiff 'leaps GARA's knowing misrepresentation exception,' her case goes forward and she 'then faces the usual product liability obstacles.'"²⁰⁰

3. *Application of GARA to Accidents Occurring Outside the United States*

Another jurisdictional issue that has arisen under GARA is whether the Act applies to aviation accidents occurring in foreign countries. The United States District Court for the Southern District of Texas addressed this matter in *Alter v. Bell Helicopter Textron, Inc.*²⁰¹ The plaintiffs in *Alter* argued that GARA did not apply to accidents occurring in a foreign country, even when the suit was brought in the United States.²⁰² The court rejected the argument, holding that such an "interpretation of GARA would have the anomalous effect of preventing litigants from bringing an action in the United States for an accident occurring in the United States while allowing litigants to bring the same action in the United States if the accident occurred abroad."²⁰³

¹⁹⁵ *Id.* at 304.

¹⁹⁶ *See id.* at 305.

¹⁹⁷ *Id.*

¹⁹⁸ *See id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* (citing *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 929 F. Supp. 380, 383 (D. Wyo. 1996)).

²⁰¹ 944 F. Supp. 531 (S.D. Tex. 1996).

²⁰² *See id.* at 541.

²⁰³ *Id.*

D. WHAT CONSTITUTES "GENERAL AVIATION AIRCRAFT?"

GARA applies to accidents involving general aviation aircraft.²⁰⁴ "General aviation aircraft" is defined by the statute as:

[A] any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration,

[B] which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and

[C] 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 . . . at the time of the accident.²⁰⁵

The Act defines "general aviation aircraft" as "any aircraft . . .,"²⁰⁶ but does not define the term "aircraft." However, the Federal Aviation Act does define the term.²⁰⁷ "Aircraft" means "any contrivance invented, used, or designed to navigate, or fly in, the air."²⁰⁸ "This broad definition includes virtually anything that is built with the intent of departing company with the ground," and would likely include helicopters, gliders, blimps, and hot air balloons.²⁰⁹

To be considered a general aviation aircraft, the FAA must have issued the aircraft a type certificate or an airworthiness certificate.²¹⁰ "Even if a certificate is suspended or revoked, all that appears to be required is the original issuance of the certificate by the FAA"²¹¹

A type certificate is issued by the FAA to ensure the safety of "aircraft, aircraft engine[s], propeller[s] and appliance[s]."²¹² The FAA will only issue a type certificate when it has concluded that each submitted part "is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed."²¹³ "Unlike airworthiness

²⁰⁴ GARA § 2(a).

²⁰⁵ *Id.* at § 2(c).

²⁰⁶ *Id.*

²⁰⁷ 49 U.S.C. § 40102(a)(6) (1994).

²⁰⁸ *Id.*

²⁰⁹ Hedrick, *supra* note 15, at 388.

²¹⁰ *See* GARA § 2(c).

²¹¹ Hedrick, *supra* note 15, at 390.

²¹² 49 U.S.C. § 44704(a)(1) (1994).

²¹³ *Id.* § 44704(a)(2).

certificates, type certificates are issued on approval of the design, specifications, and manufacturing process.”²¹⁴

The FAA will issue an airworthiness certificate when it “finds that the aircraft conforms with its type certificate and, after inspection, is in condition for safe operation.”²¹⁵ They are issued upon request from an aircraft’s registered owner.²¹⁶ This tends to be the original manufacturer and such request is typically made before the initial sale of the aircraft.²¹⁷

To qualify as a general aviation aircraft, an aircraft must have seated no more than twenty passengers at the time its type or airworthiness certificate was issued.²¹⁸ “This figure does not include seating for the pilot and copilot, as they are considered ‘crewmembers,’ not ‘passengers.’”²¹⁹

The final requirement an aircraft must fulfill to be considered a general aviation aircraft is that it must not have been engaged in scheduled passenger-carrying operations *at the time of the accident*.²²⁰ Thus, “general aviation would not include scheduled air carrier services.”²²¹ The Code of Federal Regulations defines “scheduled passenger operations” as “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.”²²² This requirement is included in GARA because scheduled air services are governed by stricter safety requirements regarding maintenance schedules.²²³

²¹⁴ Hedrick, *supra* note 15, at 390.

²¹⁵ 49 U.S.C. § 44704(c) (1994).

²¹⁶ *See id.*

²¹⁷ *See* Hedrick, *supra* note 15, at 390. There are two types of airworthiness certificates, “standard” and “special.” *Id.* at 391. Standard airworthiness certificates are issued to “aircraft type certificated in the normal, utility, acrobatic, commuter, or transport category” *Id.* Special airworthiness certificates are “primary, restricted, limited, and provisional airworthiness certificates, special flight permits, and experimental certificates.” *Id.* (quoting 14 C.F.R. § 21.175(a) (1996)). This definition brings home-built aircraft under the definition of general aviation aircraft when they are issued experimental special airworthiness certificates. *See id.* This is important because the kit aircraft that are so popular today will be protected by GARA’s repose period. *Id.* at 390-91.

²¹⁸ *See* GARA § 2(c).

²¹⁹ Hedrick, *supra* note 15, at 391 (citing 14 C.F.R. § 129.25 (a)(3) (1997)).

²²⁰ *See* GARA § 2(c) (emphasis added).

²²¹ Hedrick, *supra* note 15, at 392.

²²² 14 C.F.R. § 108.3(e) (1997).

²²³ *See* Hedrick, *supra* note 15, at 393.

E. THE EIGHTEEN-YEAR STATUTE OF REPOSE

Section 2 of the General Aviation Revitalization Act determines when the running of the statute of repose commences and what type of conduct will trigger the statute. The section provides that

no civil action 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 manufacturer²²⁴

Under GARA, an accident must have occurred during the repose period for a plaintiff to retain his cause of action.²²⁵ The date of filing is irrelevant.²²⁶ Under GARA, as long as the accident that caused the injury occurred within the repose period, the lawsuit need only be filed within the applicable statute of limitations.²²⁷ GARA's eighteen-year statute of repose on manufacturers begins to run:

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

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

(C) with respect to a new or replacement part, on the date of completion of the addition or replacement.²²⁸

When the aircraft is originally manufactured, the entire aircraft is governed by the eighteen year repose period. As components of the aircraft are replaced,²²⁹ the repose period for each new part will be a new eighteen years.²³⁰ Thus, a plaintiff has eighteen years from the date of installation of the new part to bring suit even if the airplane itself was older than eighteen

²²⁴ GARA § 2(a).

²²⁵ See Hedrick, *supra* note 15, at 394.

²²⁶ See *id.*

²²⁷ See *id.*

²²⁸ See GARA §§ 2(a)(1)(A)-(B), 2(a)(2).

²²⁹ Component parts are replaced as required by federal regulations and manufacturer's recommendations. See Sanger, *supra* note 28, at 144. Commonly replaced parts include propellers and engines. See *id.* Hence, even though the repose period no longer applies to the airframe, the components that make up the remainder of the aircraft will continually fall within the eighteen year repose period. See *id.*

²³⁰ See *id.*

years.²³¹ The plaintiff cannot allege that the plane itself was defective; he is limited to arguing that the replacement part was defective.²³²

A manufacturer who asserts the GARA defense will have the burden of proving the aircraft's date of delivery.²³³ What constitutes "delivery of the aircraft" may become a pivotal issue in some GARA cases and jurisdictions may differ in their interpretation of the term.²³⁴

Another term that could create confusion is the requirement that the damage arise "out of an accident."²³⁵ Although GARA does not define "accident," the Code of Federal Regulations provides some guidance by defining the term "aircraft accident" as "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."²³⁶ GARA was probably not intended to cover only those injuries falling under this narrow definition.²³⁷ Because this definition is codified in the part of the Code of Federal Regulations regarding notification and reporting of incidents and accidents,²³⁸ it is not binding on GARA.²³⁹ A broader definition of the term is found in the United States Supreme Court case concerning the Warsaw Convention, *Air France v. Saks*.²⁴⁰ In this case, the term accident is defined as an occurrence "caused by an unexpected or unusual event or happening that is external to the passenger."²⁴¹

Because the average single engine aircraft is thirty-one years old,²⁴² the original airframe manufacturer of most aircraft is immune from liability due to expiration of the statute of repose.²⁴³

²³¹ See MacDougall, *supra* note 7, at 340.

²³² See *id.*

²³³ See Hedrick, *supra* note 15, at 394.

²³⁴ *Id.*

²³⁵ GARA § 2(a); Hedrick, *supra* note 15, at 394.

²³⁶ 49 C.F.R. § 830.2 (1997).

²³⁷ See Hedrick, *supra* note 15, at 395.

²³⁸ 49 C.F.R. § 830.1(a) (1996).

²³⁹ See Hedrick, *supra* note 15, at 395.

²⁴⁰ 470 U.S. 392 (1985).

²⁴¹ *Id.* at 405.

²⁴² As of 1993, the average age of a single engine aircraft was twenty-seven years. See S. REP. NO. 103-202, at 3 (1993).

²⁴³ See Sanger, *supra* note 28, at 444; see also Hedrick, *supra* note 15, at 395.

However, the component part manufacturers remain subject to suit because many of the aircraft's parts have been replaced within the last eighteen years.²⁴⁴

A thorough review of the legislative history of GARA provides little insight as to how the eighteen year repose period was agreed upon. In fact, the justification for the statute of repose was articulated in House Report 103-525(I), which states, "[i]t is extremely unlikely that there will be a valid basis for a suit against the manufacturer of an aircraft that is more than 18 years old. Nearly all defects are discovered during the early years of an aircraft's life."²⁴⁵ This so-called 'justification' enabled the proponents of the legislation to claim that GARA was fair to both consumers and manufacturers.²⁴⁶

In reality, this 'justification' is "based on a misguided presumption regarding products liability law—that all product defects will surely surface within the first eighteen years of an aircraft's life. Although this presumption may be true for manufacturing defects, it is by no means accurate where design defects are concerned."²⁴⁷ "When a product fails during normal use in the early part of its life span, the reason for the failure can almost always be attributed to a manufacturing defect. Responsible manufacturers do not design their products to fail so close to the starting line."²⁴⁸

With [thirty-one] years representing the average age of general aviation aircraft in this country, and forty or fifty years often representing the useful life of such aircraft, the eighteen-year statute of repose contained in the 1994 Act may be said to cover only 'the early part' of an aircraft's life span. If this is true, the misguided presumption upon which the 1994 Act is based will leave many legitimate design defect claimants without legal recourse.²⁴⁹

GARA's eighteen-year repose period is arguably arbitrary and capricious. It does not correspond to the useful life of general aviation aircraft,²⁵⁰ which is generally forty to fifty years, nor

²⁴⁴ See Sanger, *supra* note 28, at 444.

²⁴⁵ H.R. REP. NO. 103-525, pt. 1, at 3 (1994).

²⁴⁶ See Shea, *supra* note 16, at 784.

²⁴⁷ *Id.*

²⁴⁸ *Id.* (quoting JAMES A. HENDERSON, JR. & AARON D. TURENZKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESSES 564 (2d ed. 1992) (emphasis deleted)).

²⁴⁹ *Id.*

²⁵⁰ Several state statutes of repose bar causes of action when the injury occurs after the useful safe life of the product. See IDAHO CODE § 6-1303 (1990); KAN.

does it relate to the average age of general aviation aircraft in the country (thirty-one years).²⁵¹ In fact, it is roughly one-half of the latter and one-third of the former.

F. WHO MAY ASSERT THE GARA DEFENSE?

Section 2(a) of the General Aviation Revitalization Act prevents suits against: "[(A)] the manufacturer of the aircraft or [(B)] the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as manufacturer"²⁵²

Only manufacturers are protected by GARA.²⁵³ GARA applies "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"²⁵⁴ Thus, GARA protects manufacturers of aircraft parts if an accident occurred after the part had been in use for over eighteen years.²⁵⁵ When a part has been replaced by a new part or when a new part is added to an aircraft, the eighteen-year statute of repose applies.²⁵⁶ The repose period begins to run "on the date of completion of the replacement or addition" of those parts.²⁵⁷

It is unclear whether dealers, distributors, sellers, and lessors fall within the definition of manufacturers.²⁵⁸ On its face, the statute does not protect them; however, some states have enacted statutes that include these entities in their definition of "manufacturer" for products liability purposes.²⁵⁹

In the aviation industry, it is common for consignment to occur—for a manufacturer to retain ownership of an aircraft while allowing the dealer to market and sell the product.²⁶⁰ Although the manufacturer "owns" the aircraft, it has delivered the prod-

STAT. ANN. § 60-3303 (1994); MINN. STAT. ANN. § 604.03 (West 1988); WASH. REV. CODE ANN. § 7.72.060 (West 1992).

²⁵¹ See England & McNatt, *supra* note 26, at 325.

²⁵² GARA § 2(a).

²⁵³ See Hedrick, *supra* note 15, at 396.

²⁵⁴ GARA § 2(a)(2).

²⁵⁵ *Id.*

²⁵⁶ See *id.*

²⁵⁷ *Id.*

²⁵⁸ See Hedrick, *supra* note 15, at 397.

²⁵⁹ See *id.* In California, the term "manufacturer" includes "any . . . distributor of a manufacturer who sells, transfers, or exchanges an appliance to or with a retailer." CAL. BUS. & PROF. CODE § 22410(b) (West 1997).

²⁶⁰ See Sanger, *supra* note 28, at 443.

uct "to a person 'engaged in the business of selling or leasing such aircraft'"²⁶¹ Thus, the eighteen-year period begins running from the time the aircraft is delivered to the dealer. Whereas the manufacturer is protected by GARA's statute of repose, the dealer is probably not.

While a manufacturer is protected by the statute, it is unclear whether a remanufacturer²⁶² or component parts overhauler²⁶³ is protected by GARA's statute of repose.²⁶⁴ Arguably, they are not protected by GARA because they are not manufacturers of "new" components, systems, subassemblies, or other parts of the aircraft. However, a rebuilt part could be considered "new" under GARA.²⁶⁵ Because a rebuilt part must meet the same stringent criteria as a new part, there is a strong argument that it should be considered as such under GARA.²⁶⁶ If a rebuilt part is considered a new part, the running of the statute will start anew when the rebuilt part is placed on an aircraft.²⁶⁷

Manufacturers of overhauled parts will not be able to assert the remanufacturers' argument. Overhauled parts are not subject to the same stringent requirements as a new part, and thus, an overhauler's ability to assert GARA as a defense will likely be determined on a case-by-case basis.²⁶⁸ "The nature and extent of the overhaul will be decisive."²⁶⁹

GARA will only protect a manufacturer "in its capacity as a manufacturer."²⁷⁰ "When the manufacturer acts in any capacity other than [in] its role in the manufacturing of the original

²⁶¹ *Id.* (quoting GARA § 2(a)(1)(B)).

²⁶² Although the term "remanufacturer" is not defined in any federal statute, rule or regulation, it has been defined by some states in the aviation context. For example, the state of Pennsylvania defines "remanufacture" as "the disassembly of such aircraft, vehicles, parts or components, including electric or electronic components, the integration of those parts and components with other used or new parts or components, including the salvaging, recycling or reclaiming of the used parts or components and the assembly of the new or used aircraft, vehicles, parts or components." 72 PA. CONS. STAT. ANN. § 7201(c)(7) (West 1997). *See infra* notes 349-53 and accompanying text.

²⁶³ A component parts overhauler examines the aircraft thoroughly and makes necessary repairs or adjustments.

²⁶⁴ *See* Hedrick, *supra* note 15, at 398-99.

²⁶⁵ *See id.* at 403.

²⁶⁶ *See id.*

²⁶⁷ An entity that is not the original manufacturer, but that is in the business of rebuilding parts, will argue that it is a manufacturer and entitled to assert the GARA defense. *See id.* at 403.

²⁶⁸ *See id.*

²⁶⁹ *Id.*

²⁷⁰ GARA § 2(a)(2).

part, it loses the protection of GARA to the extent that its role caused or contributed to the accident."²⁷¹ Since many manufacturers provide overhaul, rebuilding services, and maintenance services, their work in those capacities may be susceptible to suit after the expiration of the period of repose.²⁷²

GARA does not apply to used replacement parts or additions.²⁷³ In *Estate of Glover v. American Resource Corp.*,²⁷⁴ the California Superior Court held 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."²⁷⁵ The *Glover* court also held that for GARA to apply, a defendant manufacturer who performs maintenance on a part subsequent to manufacture must prove it did not replace any part with a new part.²⁷⁶

G. EXCEPTIONS TO THE APPLICATION OF GARA'S STATUTE OF REPOSE

1. *Misrepresentation and Fraud Exception*

GARA allows a plaintiff to file suit against a manufacturer after the eighteen-year repose period has expired when the plaintiff proves the manufacturer knowingly misrepresented, concealed, or withheld from the FAA a defect that caused the harm.²⁷⁷ This exception applies only in personal injury actions, not property damage cases.²⁷⁸

The fraud exception requires the plaintiff to:

(A) prove that the manufacturer misrepresented, concealed or withheld required information relating to a type certificate or airworthiness certificate or an obligation with respect to the continuing airworthiness of an aircraft or a component, system sub-assembly, or other aircraft part.

(i) The information misrepresented, concealed, or withheld must be material and relevant;

²⁷¹ Hedrick, *supra* note 15, at 399.

²⁷² *See id.*

²⁷³ *See id.* at 401.

²⁷⁴ No. 160673, slip op. at 1 (Cal. Super. Ct. Sept. 13, 1996).

²⁷⁵ Hedrick, *supra* note 15, at 402.

²⁷⁶ *See id.*

²⁷⁷ *See* GARA § 2(b)(1).

²⁷⁸ *See* Sanger, *supra* note 28, at 446.

(ii) the information must have been misrepresented knowingly (whether it must have been concealed or withheld knowingly is unclear); and

(iii) the conduct must have been causally related to the harm suffered (i.e., death, personal injury, property damage).²⁷⁹

(B) plead with specificity.²⁸⁰

GARA requires that a plaintiff who asserts the misrepresentation/fraud exception plead with specificity to avoid frivolous claims or claims unsupported by the evidence.²⁸¹ In other words, the claimant must "affirmatively set forth the facts supporting each allegation."²⁸²

Plaintiffs often have a difficult time satisfying the requirements of this exception, because they must prove (a) the manufacturer *knowingly* misrepresented and (b) the misrepresented condition was causally related to the injury suffered by the plaintiff.²⁸³ The 'knowledge' element is difficult to satisfy because it is unlikely that a claimant would have access to such information from the manufacturer about the aircraft.²⁸⁴ The 'causation' element is also difficult to prove.²⁸⁵

In aircraft accidents, the evidence may be completely destroyed by impact or fire. Thus, product failure in the first place 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.²⁸⁶

In order for the misrepresentation exception to GARA to apply, the information at issue must have been "knowingly misrepresented to the Federal Aviation Administration, or concealed

²⁷⁹ The statute reads as follows: "if the claimant pleads . . . the facts necessary to prove . . . that the manufacturer . . . knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information" GARA § 2(b)(1).

²⁸⁰ *See id.*

²⁸¹ *See Hedrick, supra* note 15, at 405-06.

²⁸² *Id.*

²⁸³ *See Sanger, supra* note 28, at 446.

²⁸⁴ *See Hedrick, supra* note 15, at 406. The question of pre-trial discovery thus remains unanswered. How far will a court allow a plaintiff to search for information relevant to the alleged misrepresentations? In *Rickert v. Mitsubishi Heavy Indus., Ltd.*, the defendant had been "less than forthcoming" with its discovery responses and the court ordered additional discovery. 929 F. Supp. 380, 381 (D. Wyo. 1996).

²⁸⁵ *See Hedrick, supra* note 15, at 409.

²⁸⁶ *Id.*

or withheld from the Federal Aviation Administration”²⁸⁷ Because the word “knowingly” only precedes the word “misrepresented,” it is arguable that the intent element applies only to misrepresentation and not to concealment or withholding.²⁸⁸

In practice, the misrepresentation exception to GARA has been difficult for plaintiffs to satisfy. In *Rickert v. Mitsubishi Heavy Industries, Ltd.*,²⁸⁹ a pilot and three passengers were killed when a twenty-one-year-old Mitsubishi twin-engine aircraft crashed into a mountain range near Casper, Wyoming.²⁹⁰ Rickert claimed that the accident was caused by in-flight accumulation of ice on the aerodynamic surfaces of the aircraft which resulted in a loss of control. The plaintiff alleged that the aircraft was negligently and defectively designed²⁹¹ and that Mitsubishi had knowingly misrepresented, concealed, or withheld required information from the FAA regarding aircraft controllability in atmospheric icing conditions.²⁹² Rickert further alleged that the defendant had submitted false flight reports to the FAA and had failed to report numerous other defects.²⁹³

The evidence presented to the court consisted of expert testimony regarding the aircraft’s design and whether the plane met the FAA certification requirement.²⁹⁴ The court granted the defendant’s motion for summary judgment, holding that “Rickert [could not] avoid GARA’s period of repose simply by dressing up her evidence . . . as ‘misrepresentations’ and ‘concealments.’”²⁹⁵ The court noted that the expert reports and evidence, if true, at most supported an allegation that Mitsubishi was “obstinant [sic], short-sighted, negligent and perhaps reckless” when it designed and manufactured the aircraft.²⁹⁶ However, this evidence did not prove that Mitsubishi knowingly misrepresented to or concealed anything from the FAA.²⁹⁷ The court further held that GARA required specificity—not merely “innuendo and inference.”²⁹⁸

²⁸⁷ GARA § 2(b)(1).

²⁸⁸ See Hedrick, *supra* note 15, at 409.

²⁸⁹ 923 F. Supp. 1453 (D. Wyo. 1996).

²⁹⁰ See *id.* at 1454.

²⁹¹ See *id.*

²⁹² See *id.* at 1457.

²⁹³ See *id.*

²⁹⁴ See *id.* at 1457-62.

²⁹⁵ *Id.* at 1462.

²⁹⁶ *Id.* at 1461.

²⁹⁷ See *id.* at 1461-62.

²⁹⁸ *Id.* at 1462.

Rickert filed a motion to reconsider, arguing that the defendant had stonewalled the plaintiff's earlier discovery efforts.²⁹⁹ The court granted the motion, stayed the summary judgment order, and allowed further discovery.³⁰⁰

After discovery was completed and new evidence was heard, the court reversed its summary judgment order.³⁰¹ Rickert produced affidavits of a former Mitsubishi director of flight operations and an international vice-president.³⁰² Both witnesses claimed that Mitsubishi had withheld information from the FAA concerning icing problems with this aircraft.³⁰³ The court ruled that this information satisfied the GARA requirement of producing evidence and created a genuine issue of material fact concerning a known misrepresentation or concealment.³⁰⁴

The *Rickert* court held that the knowing misrepresentation exception is satisfied if the plaintiff can prove with specificity the following elements: "(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."³⁰⁵ The court noted that the plaintiff "cannot withstand a GARA-based motion for summary judgment simply by creating a genuine issue of material fact concerning . . . negligence or strict liability."³⁰⁶ This case clearly applies the knowledge requirement to all three elements: misrepresentation, concealment, and withholding. The court did not consider that the knowledge requirement applied only to the misrepresentation element as the statute reads on its face.

In *Cartman v. Textron Lycoming Reciprocating Engine Div.*,³⁰⁷ the misrepresentation exception was again at issue. The plaintiff in *Cartman* suffered injuries when the aircraft he was piloting crashed.³⁰⁸ The plaintiff presented a memorandum to the court that was written by a representative of the defendant corpora-

²⁹⁹ See *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 929 F. Supp. 380, 381 (D. Wyo. 1996).

³⁰⁰ See *id.*

³⁰¹ See *id.* at 384.

³⁰² See *id.* at 382.

³⁰³ See *id.*

³⁰⁴ See *id.* at 383.

³⁰⁵ *Id.* at 381.

³⁰⁶ *Id.*

³⁰⁷ No. 94-CV-72582-DT, 1996 U.S. Dist. LEXIS 20189 (E.D. Mich. Feb. 27, 1996).

³⁰⁸ See *id.* at *2.

tion in order to prove that the defendant “knowingly misrepresented, concealed and withheld information regarding the safety of the composite float to and from the Federal Aviation Administration.”³⁰⁹ The plaintiff argued that the memorandum “misrepresented to the FAA that auto fuel, rather than known design and manufacturing defects, accounted for the composite float’s propensity to cause unexpected engine failure.”³¹⁰ The plaintiff “never explicitly assert[ed]” that the defendant had knowledge of the memorandum, but did assert that the “defendant was aware of the alleged design and manufacturing defects in the float.”³¹¹

The court granted the defendant’s motion for summary judgment and held that the period of repose is not waived merely because a defendant failed to inform the FAA about possible safety concerns regarding a part or possible misrepresentation by other parties.³¹² In order to prove misrepresentation, the court held that a plaintiff must prove either (1) a misrepresentation or concealment of information with respect to a type of airworthiness certificate or (2) that proof exists that the manufacturer violated his obligations to submit to the FAA information with respect to the continuing airworthiness of the component part.³¹³ A plaintiff must also prove that the manufacturer had an affirmative duty to provide the information to the FAA.³¹⁴ This can be proven through statute, case or regulation.³¹⁵ The court refused to infer a duty to volunteer information to the FAA that is “(1) not required by statute or regulation, (2) not in response to a direct inquiry by the FAA, or (3) not necessary in order to correct information previously supplied by the defendant to the FAA.”³¹⁶

2. *Emergency Exception*

The statute of repose does not apply to a passenger who is being transported in a general aviation aircraft for the purpose “of receiving treatment for a medical or other emergency.”³¹⁷

³⁰⁹ *Id.* at *9-10.

³¹⁰ *Id.* at *10.

³¹¹ *Id.*

³¹² *See id.*

³¹³ *See id.* at *11.

³¹⁴ *See id.*

³¹⁵ *See id.*

³¹⁶ *Id.*

³¹⁷ GARA § 2(b)(2).

The policy behind this exception is that a medical patient typically is unable to choose to fly in an aircraft that is less than eighteen years old.³¹⁸ The emergency provision may be interpreted in two different ways.³¹⁹ A narrow reading would exempt a passenger only when he was being transported by the aircraft in a medical emergency.³²⁰ A broader interpretation of the provision would allow suit by a plaintiff who was being transported in a medical emergency or any other type of emergency, including those that are not necessarily medically related.³²¹ For example, if a single-engine helicopter rescued a person from the top of a building in a flood and the helicopter crashed, the person could retain his right to sue the manufacturer.³²² Thus, under this broad statutory interpretation, recovery would hinge on what courts consider an "emergency." Whether courts will interpret the provision narrowly or broadly remains to be seen.

In addition, it is unclear what constitutes a "passenger."³²³ Whereas pilots, flight engineers, and flight navigators are considered "flightcrew,"³²⁴ medical and rescue personnel are not and thus may be considered passengers.³²⁵ This interpretation would be consistent with the exception's underlying policy concerning lack of choice.

3. *Exception for Persons Not On Board at Time of Accident*

GARA only bars claims by persons who were on board the aircraft at the time of the accident.³²⁶ Consequently, a person traveling in another aircraft who is involved and injured in a mid-air collision would not be barred from suing after the repose period had expired.³²⁷ Nor would a person who is on the ground at the time of accident.³²⁸ This exception was likely intended to protect those plaintiffs who have not voluntarily subjected themselves to general aviation aircraft, while still prohibiting actions

³¹⁸ See Hedrick, *supra* note 15, at 413.

³¹⁹ See Sanger, *supra* note 28, at 445.

³²⁰ See *id.*

³²¹ See *id.*

³²² See *id.*

³²³ See Hedrick, *supra* note 15, at 413.

³²⁴ See 14 C.F.R. § 1.1 (1998).

³²⁵ See Hedrick, *supra* note 15, at 413.

³²⁶ GARA § 2(b)(3).

³²⁷ See Sanger, *supra* note 28, at 444.

³²⁸ See *id.*

by those injured plaintiffs who knowingly and voluntarily choose to fly in this class of aircraft.³²⁹

4. *Warranty Exception*

A suit may be brought under a manufacturer's warranty if the warranty period exceeds eighteen years.³³⁰ Since warranties of this type typically are made through the manufacturer's "marketing materials, sales presentations, or formal written warranties[.]" litigation under this exception will likely be concerned with whether a warranty exists.³³¹ Whether a warranty exists will be determined by the provisions of the Uniform Commercial Code, which define the requirements of a warranty.³³²

VI. THE EFFECTS OF GARA

A. GARA'S EFFECT ON INDUSTRY LIABILITY

Although GARA was intended to free up money for research, development, and production of general aviation aircraft, there remain powerful incentives for the "Big Three" to focus their efforts on turbine and jet aircraft production: profitability and marketability.³³³ Single-engine aircraft are neither as profitable nor as marketable as turbine and jet aircraft.³³⁴ "GARA simply frees up funds previously used in litigation defense" for use in producing turbine and jet aircraft, for which there is proven market demand.³³⁵ There is no requirement that these established manufacturers re-start production of light piston aircraft.³³⁶ "Established manufacturers' willingness to rise to the challenge of engaging in large scale production to replace aging general aviation fleets is questionable. More likely, these manufacturers may use the reduced liability savings to pad more profitable ventures."³³⁷

³²⁹ See *id.* at 444-45.

³³⁰ See GARA § 2(b)(4); see also Sanger, *supra* note 28, at 446.

³³¹ Sanger, *supra* note 28, at 446.

³³² See *id.*

³³³ See McAllister, *supra* note 3, at 316.

³³⁴ See *id.*

³³⁵ *Id.* at 319.

³³⁶ See *id.* "It is difficult to believe that the primary sponsors of the relief legislation did not strike some bargain with Cessna and the other manufacturers to open new production facilities and provide new jobs as part of the package for their support." Tarry & Truitt, *supra* note 23, at 198.

³³⁷ McAllister, *supra* note 3, at 316-17.

It is unlikely that purchasers of general aviation aircraft will be provided new product choices as a result of GARA.³³⁸ The "Big Three" have no incentive to expend their resources on new, state-of-the-art product lines.³³⁹ In fact, just the opposite is true. Producing new lines exposes them to liability. They are thus more likely to re-produce twenty-plus year-old designs (if, in fact, they resume production of light piston aircraft at all).³⁴⁰

B. GARA'S EFFECT ON SMALL MANUFACTURERS

GARA does nothing to bolster opportunities for new manufacturers and suppliers eager to enter the market. For those start-up manufacturers and suppliers, eighteen years of liability exposure must be factored into financial plans and could be prohibitive.³⁴¹ Because insurers are unwilling to insure unless there is a proven track record of safe operation, these new manufacturers and suppliers will likely find themselves unable to enter the market.³⁴² This effectively

makes 'Big Three' 1970's product lines freshly competitive in a market better suited to innovation and small production runs. The threat of 'Big Three' production of proven product lines may force small manufacturers to leave the market or abort start-up, with no assurance [that] the 'Big Three' will re-start large-scale production or ensure the marketability of light piston general aviation aircraft.³⁴³

"This is unfortunate. Small manufacturers are the only innovators in the industry, and their continued success and viability is put in jeopardy by GARA."³⁴⁴

C. GARA'S EFFECT ON COMPONENT PARTS MANUFACTURERS

For all practical purposes, GARA does nothing to protect manufacturers of engines and component parts from liability exposure.³⁴⁵ Because these parts are either replaced or ordered by the Federal Aviation Regulations to be redesigned before eighteen years have elapsed, these manufacturers will face continual

³³⁸ See *id.* at 319.

³³⁹ See *id.*

³⁴⁰ See *id.*

³⁴¹ See *id.* at 317.

³⁴² See *id.*

³⁴³ *Id.*

³⁴⁴ *Id.* at 319.

³⁴⁵ See *id.* at 317.

liability exposure.³⁴⁶ These component parts manufacturers will thus become the new “deep pocket” in aviation products liability litigation.³⁴⁷ They will now be bearing their pre-GARA liability plus the redirected liability.³⁴⁸ These companies’ likely unwillingness and/or inability to accept this shift in liability exposure will almost certainly affect the future of GARA and the general aviation industry as a whole.³⁴⁹ It will likely result in increased insurance premiums for these actors, who will pass the costs on to their consumers.³⁵⁰ “The net outcome will be higher component prices for aircraft owners.”³⁵¹

Although GARA protects manufacturers of new general aviation aircraft and component parts, it is unclear whether this provision protects companies that remanufacture, rebuild, or overhaul component parts.³⁵² Remanufacturing consists of removing a part from an aircraft and sending it “to the factory or another parts remanufacturer who then reconstructs the component so that it meets the same standards as a new part. Generally, remanufactured parts are viewed as functionally equivalent to new components.”³⁵³ This process is popular because such recycled parts are less expensive than purchasing new parts.³⁵⁴ It is common in the general aviation industry for remanufactured parts to be used.³⁵⁵ For example, radios, alternators, and engines may be remanufactured.³⁵⁶ Remanufacturing may be done by both original manufacturers and third-party remanufacturers.³⁵⁷

As previously stated in Part V.F., there is no guidance as to whether a remanufacturer or component parts overhauler is protected by GARA’s statute of repose.³⁵⁸ Arguably, they are not protected by GARA because they are not manufacturers of “new” components, systems, subassemblies, or other parts of the aircraft. However, a rebuilt part could be considered “new”

³⁴⁶ See *id.* at 317-18; see also Sanger, *supra* note 28, at 461.

³⁴⁷ See McAllister, *supra* note 3, at 318.

³⁴⁸ See Sanger, *supra* note 28, at 461.

³⁴⁹ See McAllister, *supra* note 3, at 318.

³⁵⁰ See Sanger, *supra* note 28, at 461.

³⁵¹ *Id.*

³⁵² See *id.* at 458; see also Hedrick, *supra* note 15, at 398-99.

³⁵³ Sanger, *supra* note 28, at 458.

³⁵⁴ See *id.*

³⁵⁵ See *id.*

³⁵⁶ See *id.*

³⁵⁷ See *id.*

³⁵⁸ See *supra* Part V.F.; see also Hedrick, *supra* note 15, at 398-99.

under GARA, because a rebuilt part must meet the same stringent criteria as a new part.³⁵⁹ If a rebuilt part is considered a new part, the running of the statute will start anew when a rebuilt part is placed on an aircraft.³⁶⁰

Manufacturers of overhauled parts will not be able to assert the remanufacturers' argument. Overhauled parts are not subject to the same stringent requirements as new parts and thus, an overhauler's ability to assert GARA as a defense will likely be determined by evaluating the nature and extent of the overhaul on a case-by-case basis.³⁶¹

D. GARA'S EFFECT ON OTHER INDUSTRY ACTORS

GARA does not insulate the aviation service industry from liability exposure.³⁶² Because plaintiffs join as many defendants as possible in hopes of recovering complete financial relief, maintenance shops, pilots, mechanics, fixed base operators, fuel suppliers, air traffic controllers, and airport authorities are easy targets.³⁶³ "With fewer 'deep pocket' manufacturers available as defendants, plaintiffs will resort to collecting [from] a larger pool of smaller defendants. As most maintenance shops are small and poorly capitalized, this vital piece of general aviation infrastructure is exposed to much more potential liability" with the enactment of GARA.³⁶⁴

As stated previously in Part V.F., consignment commonly occurs in the aviation industry—where a manufacturer retains ownership of an aircraft while the dealer markets and sells the product.³⁶⁵ Although the manufacturer "owns" the aircraft, it has delivered the product "to a person engaged in the business of selling or leasing such aircraft"³⁶⁶ Thus, the manufacturer is protected by the statute, while the dealer is probably not.³⁶⁷ As a result, dealers will likely be targets for plaintiffs in suits alleging defective aircraft.³⁶⁸ The dealer will be unable to

³⁵⁹ See Hedrick, *supra* note 15, at 402-03.

³⁶⁰ An entity that is not the original manufacturer, but that is in the business of rebuilding parts, will argue that it is a manufacturer and entitled to assert the GARA defense. See *id.* at 403.

³⁶¹ See *id.*

³⁶² See McAllister, *supra* note 3, at 318.

³⁶³ See *id.*; see also Sanger, *supra* note 28, at 460.

³⁶⁴ McAllister, *supra* note 3, at 318.

³⁶⁵ See *supra* Part V.F.; see also Sanger, *supra* note 28, at 443.

³⁶⁶ GARA § 2(a)(1)(B); see also Sanger, *supra* note 28, at 443.

³⁶⁷ See Sanger, *supra* note 28, at 443.

³⁶⁸ See *id.* at 461.

split payment of a plaintiff's judgment with the manufacturer and will be unable to recover contribution from the manufacturer.³⁶⁹ Because the manufacturer is immune from liability, the dealer will be responsible for bearing the entire burden of a judgment in those states with joint and several liability laws.³⁷⁰ The dealer will also bear the entire cost of defending the suit.³⁷¹ This could result in the "elimination of independent dealers and implementation of factory direct retail sales."³⁷²

However, "[w]hile GARA affords protection to manufacturers in their capacity as manufacturers, that protection may not include retail sales activity."³⁷³ A literal interpretation of the statute indicates that only those activities directly related to the manufacture of the aircraft will be shielded under GARA.³⁷⁴ Thus, "once the manufacturer begins selling the aircraft, it again becomes vulnerable to suit."³⁷⁵ Plaintiffs will likely attempt to circumvent the statute by suing the manufacturer in its capacity as a retailer and alleging strict tort liability and/or failure to inform and warn. Should the courts, however, decide to interpret the statute as including 'retail sales' in its definition of 'manufacturing', independent dealers will be subjected to conducting business on an uneven playing field.³⁷⁶ This could have a devastating effect on independent dealers.³⁷⁷

Pilots are also likely to become targets of aviation litigation as a result of GARA. General aviation insurance companies have already announced that pilots and mechanics will be subject to insurance premium increases as a result of the enactment of GARA.³⁷⁸

A manufacturer's employees may also be held individually liable for product failures under GARA.³⁷⁹ GARA's statute of repose reallocates the risk of accident from the manufacturer of the aircraft onto everyone else associated with the aircraft.³⁸⁰

³⁶⁹ See *id.* at 461-62.

³⁷⁰ See *id.* at 462.

³⁷¹ See *id.*

³⁷² *Id.*

³⁷³ *Id.* at 463.

³⁷⁴ See *id.*; see also GARA § 2(a) ("no civil action . . . may be brought against the manufacturer . . . in its capacity as a manufacturer . . .").

³⁷⁵ Sanger, *supra* note 28, at 463.

³⁷⁶ See *id.*

³⁷⁷ See *id.*

³⁷⁸ See *id.* at 460.

³⁷⁹ See Pounian & Rodriguez, *supra* note 4, at 161.

³⁸⁰ See Sanger, *supra* note 28, at 463.

E. GARA'S EFFECT ON CONSUMERS

Oftentimes, the consumers of general aviation aircraft become plaintiffs when accidents occur. The policy behind precluding consumer accident victims from recovering from manufacturers even when there existed a legitimate design or manufacturing defect is that the consumers voluntarily assumed the risk of the accident.³⁸¹ The consumer is assumed to have accepted the risk of accident voluntarily and is presumed to know the age of the aircraft and its component parts.³⁸² However, it is likely that a consumer and certainly a passenger will *not* have this information.³⁸³ Many aircraft manufactured in the 1970s look virtually identical to those manufactured in the late 1980s—"general aviation aircraft . . . have changed very little in the past twenty-five years."³⁸⁴ "Even pilots have difficulty distinguishing the two generations of aircraft, let alone the average business traveler."³⁸⁵ "[A] passenger may board a twenty-year old aircraft and be precluded from filing suit even though that person is under the impression that the aircraft is relatively new."³⁸⁶

VII. LEGAL CHALLENGES TO GARA

A. CONSTITUTIONALITY OF A STATUTE OF REPOSE

Whereas a statute of limitations extinguishes, after a period of time, the right to bring an accrued cause of action, a statute of repose limits potential liability by restricting the time during which a cause of action can arise.³⁸⁷ A statute of repose cuts off a plaintiff's right to bring a cause of action after a specified time, measured from the delivery of a product, regardless of the time of accrual of the cause of action.³⁸⁸ It "extinguishes a [plaintiff's] cause of action before it can even arise."³⁸⁹

³⁸¹ See *id.* For a more in-depth discussion on the topic of allowing informed consumers to allocate their own risk regarding defective products, see Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988).

³⁸² See Sanger, *supra* note 28, at 463.

³⁸³ See *id.*

³⁸⁴ *Id.* at 463-64.

³⁸⁵ *Id.* at 463.

³⁸⁶ *Id.* at 464.

³⁸⁷ See BLACK'S LAW DICTIONARY 1411 (6th ed. 1990).

³⁸⁸ See *id.*

³⁸⁹ Sanger, *supra* note 28, at 447.

To date, there have been no reported cases challenging the constitutionality of GARA. Since most tort law, and thus most statutes of repose, are governed by state law, most constitutional challenges to statutes of repose have been brought in state courts.³⁹⁰ These challenges have typically been based on theories of “denial of due process, denial of access to the courts, taking of property, and violations of equal protection.”³⁹¹ State courts are split in their decisions regarding the constitutionality of the statutes—some have found them constitutional³⁹² while others have ruled that statutes of repose violate the Constitution.³⁹³ Because GARA is a federal statute, any challenge to its constitutionality will be governed by the United States Constitution. Challenging a federal statute of repose under the United States Constitution will prove much more difficult than challenging a state statute of repose under a state constitution for a number of reasons.

1. *Open Courts/Due Process*

Statutes of repose foreclose a plaintiff's ability to recover for an injury before one even occurs, whereas a statute of limitation punishes a plaintiff for not pursuing his claim in a timely fashion.³⁹⁴ This fundamental difference arguably denies plaintiff's due process in seeking a remedy.³⁹⁵ Thirty-seven state constitutions contain provisions that provide (1) that all courts shall be open and (2) that every person shall have a remedy by due process of law.³⁹⁶ These provisions are often referred to as “open courts” clauses and “remedies” clauses and are intended to guarantee citizens “access to the courts and a judicial procedure based on fairness and equality.”³⁹⁷ Several state supreme courts

³⁹⁰ See *id.* at 448-49.

³⁹¹ *Id.* at 449.

³⁹² See *Anderson v. M.W. Kellogg Co.*, 766 P.2d 637 (Colo. 1988); *Kelemen v. Rimrock Corp.*, 542 A.2d 720 (Conn. 1988); *Olsen v. J.A. Freeman Co.*, 791 P.2d 1285 (Idaho 1990); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207 (Ind. 1981).

³⁹³ See *Sanger*, *supra* note 28, at 448-49; see also *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996 (Ala. 1982); *Hazine v. Montgomery Elevator Co.*, 861 P.2d 625 (Ariz. 1993); *Battilla v. Allis Chalmers Mfg. Co.*, 392 So. 2d 874 (Fla. 1980); *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983); *Hanson v. Williams County*, 389 N.W.2d 319 (N.D. 1986); *Brennaman v. R.M.I. Co.*, 639 N.E.2d 425 (Ohio 1994); *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195 (R.I. 1984); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985).

³⁹⁴ See *Sanger*, *supra* note 28, at 449.

³⁹⁵ See *id.*

³⁹⁶ See *Lankford*, 416 So. 2d at 999.

³⁹⁷ *Berry*, 717 P.2d at 674-75.

have found their respective state statutes of repose unconstitutional under a rational relation test because they violated the Constitution's open courts provisions or denied the plaintiffs due process.³⁹⁸ However, there is no corollating federal open courts provision, and thus plaintiffs will not be able to challenge the GARA's statute of repose on this basis.

Generally, state courts have collapsed their consideration of state open courts provisions and due process challenges into one inquiry.³⁹⁹ Therefore, the only way a federal court could find GARA's statute of repose unconstitutional is to find access to the courts implicit in the federal due process clause.⁴⁰⁰

2. *Property Rights*

Courts tend to hold that "an unaccrued cause of action is not a property right."⁴⁰¹ A person has no property right in a common law rule.⁴⁰² "Since an unaccrued cause of action is not a property right, enacting a statute that prevents the cause of action from arising is not a[n unconstitutional] taking, for which compensation is due."⁴⁰³

3. *Equal Protection*

Challengers to state statutes of repose often base their attack on violation of equal protection grounds under state constitutions. The plaintiffs typically challenge the statutes of repose by alleging that the statute creates two classes of individuals, those who are injured within the repose period and those who are not.⁴⁰⁴ These statutes tend to be held unconstitutional when the state courts analyze the statutes under an intermediate standard of review,⁴⁰⁵ which requires the statute of repose to be substantially related to a legitimate governmental interest. Because the

³⁹⁸ See *Lankford*, 416 So. 2d at 1004; *Hazine*, 861 P.2d at 629; *Heath*, 464 A.2d at 299; *Brennaman*, 639 N.E.2d at 430; *Berry*, 717 P.2d at 676.

³⁹⁹ See *Sanger*, *supra* note 28, at 449.

⁴⁰⁰ See *id.* at 455.

⁴⁰¹ *Id.* at 453.

⁴⁰² See *Berry*, 717 P.2d at 675-76 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976); *Second Employers' Liab. Cases*, 223 U.S. 1, 50 (1912)).

⁴⁰³ *Sanger*, *supra* note 28, at 453.

⁴⁰⁴ See *id.* at 454; *Hanson*, 389 N.W.2d at 326-27.

⁴⁰⁵ See *Hanson v. Williams County*, 389 N.W.2d 319, 325 (N.D. 1986) (applying an intermediate standard of review because it involved the important issues of human life and safety. The court rejected the notion that a statute of repose was merely an economic matter.); see also *Lankford*, 416 So. 2d at 999-1001; *Heath*, 464 A.2d at 294-95; *Berry*, 717 P.2d at 680-83.

right to sue or recover is not a fundamental right and because accident victims are not considered a suspect class under the United States Constitution, the federal judiciary would be required to apply a rational relation test to any GARA challenge based on equal protection grounds. This standard is much easier to satisfy than the states' intermediate test, and thus, any federal equal protection challenge to GARA will likely be rejected.

When the federal government enacted GARA, it imposed onto accident victims a legal rule in an area of the law that traditionally has been governed by the individual states. State constitutions and state courts have been tailored over time to meet the needs of their citizens in the tort arena. Whereas plaintiffs often have been able to successfully challenge state statutes of repose under their state constitutions and in their state courts, this federal interference into tort law effectively bars plaintiffs from challenging the statute of repose on constitutional grounds.⁴⁰⁶

B. CIRCUMVENTING THE STATUTE OF REPOSE

Creative lawyering can occasionally result in circumvention of the statute of repose in courts that disfavor such statutes.⁴⁰⁷ For example, in *Driver v. Burlington Aviation, Inc.*,⁴⁰⁸ the North Carolina Court of Appeals held an aircraft manufacturer liable, even though the state statute's repose period had expired, by concluding that the instruction manual, not the aircraft, was the defective product at issue.⁴⁰⁹ In this case, Philip Driver was severely injured when a Cessna model 152 aircraft, in which he was a passenger, lost control and crashed.⁴¹⁰ The operator of the aircraft had rented it from the defendant.⁴¹¹ The plaintiffs argued that the aircraft's information manual was defective because it omitted information concerning dangers associated with the air-

⁴⁰⁶ When federal courts have evaluated the constitutionality of state statutes of repose under the United States Constitution, they have consistently upheld their constitutionality. See *Schamel v. Textron-Lycoming*, 1 F.3d 655 (7th Cir. 1993); *Eaton v. Jarvis Prods. Corp.*, 965 F.2d 922 (10th Cir. 1992); *Harris v. Black Clawson Co.*, 961 F.2d 547 (5th Cir. 1992); *Dinh v. Rust Int'l Corp.*, 974 F.2d 500 (4th Cir. 1992); *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215 (10th Cir. 1991); *Pitts v. Unarco Indus., Inc.*, 712 F.2d 276 (7th Cir. 1983), *cert. denied*, *Pitts v. GAF Corp.*, 464 U.S. 1003 (1983).

⁴⁰⁷ See Sanger, *supra* note 28, at 464.

⁴⁰⁸ 430 S.E.2d 476 (N.C. Ct. App. 1993).

⁴⁰⁹ See *id.* at 483.

⁴¹⁰ See *id.* at 479.

⁴¹¹ See *id.*

craft.⁴¹² The court held the manufacturer of the manual (Cessna) liable under a products liability theory because the "product to which the action applies is not the aircraft as Cessna suggests, but the instructional manual."⁴¹³ There were no allegations that the aircraft was in any way defective.⁴¹⁴ In fact, the plaintiffs conceded that the aircraft did not function defectively or improperly under the circumstances.⁴¹⁵ They argued only that the manual did not mention the aircraft's propensity for icing in such meteorological and operational conditions.⁴¹⁶

The court held that the 'defective product' at issue in the case was the information manual, not the aircraft.⁴¹⁷ Thus, the statute of repose began on the date the manual was purchased, which allowed the plaintiffs to pursue their cause of action.⁴¹⁸

"For the purposes of GARA, the *Driver* . . . decision is important because it suggests that courts may be willing to utilize items such as a manual to circumvent a statute of repose."⁴¹⁹ "[A] plaintiff [can] pursue almost any [cause of] action by pleading that the manual was purchased within the last eighteen years and was defective because it failed to warn of a possible danger."⁴²⁰ The net result of the *Driver* rationale "would be to render GARA meaningless."⁴²¹

Although the *Driver* court accepted the "manual as a replacement part" argument, plaintiffs have asserted the argument in a number of federal jurisdictions, all of which have rejected it.⁴²² For example, the southern district of Texas rejected the argument in *Alter v. Bell Helicopter Textron, Inc.*,⁴²³ a case involving the GARA defense.

In *Alter*, the plaintiffs' husbands were killed in a crash involving a Bell helicopter.⁴²⁴ The surviving wives alleged that defend-

⁴¹² See *id.* at 483.

⁴¹³ *Id.*

⁴¹⁴ See *id.*

⁴¹⁵ See *id.*

⁴¹⁶ See *id.*

⁴¹⁷ See *id.*

⁴¹⁸ See *id.*

⁴¹⁹ Sanger, *supra* note 28, at 464.

⁴²⁰ *Id.* at 465-66.

⁴²¹ *Id.* at 466.

⁴²² See, e.g., *Schamel v. Textron-Lycoming*, 1 F.3d 655 (7th Cir. 1993); *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215 (10th Cir. 1991); *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128 (6th Cir. 1986); *Butchkosky v. Enstrom Helicopter Corp.*, 855 F. Supp. 1251 (S.D. Fla. 1993).

⁴²³ 944 F. Supp. 531 (S.D. Tex. 1996).

⁴²⁴ *Id.* at 533.

ant Bell (1) carelessly designed, manufactured, tested and sold the aircraft and its component parts and (2) carelessly and negligently issued maintenance manuals that contained a misleading statement that proximately caused the helicopter crash in which their husbands were killed.⁴²⁵ They asserted that the manuals were issued within the eighteen-year limitation period because the defendant reissued and revised them approximately twice a year since 1974.⁴²⁶ The plaintiffs argued that GARA did not preclude their defective marketing and failure to warn claims because the maintenance manual revision is a "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 to which the eighteen-year repose period separately applies.⁴²⁷

The court rejected the plaintiffs' argument and held that "manufacturers' maintenance . . . manuals are not a 'separate' product or component upon which [the] plaintiffs may base a claim to avoid a repose statute."⁴²⁸ The instructions are not considered a "product" as defined by the Act.⁴²⁹ The court noted that several other federal jurisdictions had rejected the type of argument that the plaintiffs were asserting.⁴³⁰

The court distinguished the *Driver* case because the plaintiffs in *Driver* did not contend that the aircraft was in any way defective.⁴³¹ The plaintiffs in *Driver* did not argue that the manual was a defective replacement part to an aircraft, but that it was a defective product in and of itself.

Critics of the *Alter* decision have argued that

[t]he 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.⁴³²

⁴²⁵ See *id.* at 537.

⁴²⁶ See *id.*

⁴²⁷ *Id.* at 538 (citing GARA § 2(a)(2)).

⁴²⁸ *Id.*

⁴²⁹ See *id.* at 539.

⁴³⁰ See *id.* at 538-40.

⁴³¹ See *id.* at 540.

⁴³² Hedrick, *supra* note 15, at 396.

Despite the *Alter* decision, a plaintiff may still be able to circumvent GARA's statute of repose by suing the manufacturer who issued the manual if he sues within the eighteen-year period and does not allege defects in the aircraft. This is precisely the theory that allowed the plaintiff in *Driver* to recover.

Arguably, the manual can also be used to circumvent the statute by alleging that it is a warranty.

VIII. TOP ELEVEN REASONS WHY GARA IS WRONG

GARA's enactment was based on a number of fallacious theories. Because the purpose and policy behind GARA are based on erroneous information, the intended effects of it might never be realized.

A. MYTH #1: GARA WILL REMEDY THE PRODUCTS LIABILITY CRISIS.

REALITY: If the real purpose of GARA was to cure the products liability crisis, it will certainly prove not to be an effective remedy. The manufacturers insist that the industry's decline was due to large products liability judgments and litigation defense costs. If so, what will protect manufacturers from suits involving the "80,000 to 100,000 general aviation aircraft that are too young to be affected by the statute of repose?"⁴³³ Not GARA. What will protect manufacturers like Cessna when, and if, they begin manufacturing thousands of new aircraft?⁴³⁴ Not GARA. In fact, if GARA is supposed to revitalize the general aviation industry by enabling it to produce thousands of new aircraft, what is to prevent the same cycle from happening again? These manufacturers will be subject to suit on thousands of new aircraft which will increase litigation defense costs and insurance premiums—the very things that purportedly destroyed the industry in the first place.

With the enactment of GARA, the general aviation industry is destined to repeat history by flooding the market with thousands of new aircraft. This so-called revitalization will likely lead to yet another crash. But this time, the trial lawyers will not be to blame for the demise of an industry. Perhaps the industry and society would be better served by re-evaluating general aviation's management and business decisions than by re-victimizing victims.

⁴³³ Shea, *supra* note 16, at 787.

⁴³⁴ See *id.*

B. MYTH #2: 100,000 JOBS HAD BEEN LOST IN THE GENERAL
AVIATION INDUSTRY DUE TO EXCESSIVE LIABILITY
EXPOSURE PRIOR TO THE ENACTMENT OF
GARA.

REALITY: The manufacturing industry never provided any studies to Congress to substantiate this job-loss figure. On April 2, 1996, Cessna, Mooney, Beech, and Piper were asked to submit their "figures reflecting on an annualized basis, the total employment by [their] compan[ies] from 1978 through 1995."⁴³⁵ Cessna responded on April 15, 1996, by saying, "[w]e decline to provide the information you have requested."⁴³⁶ Mooney replied on April 9, 1996, stating, "Mooney Aircraft Corporation is a privately-owned company and as such is prohibited from disclosing financial and certain other information."⁴³⁷ Beech never responded. Piper responded on April 4, 1996, with the following figures: As of 1978 Piper employed 3219 workers. In 1991, the year Piper entered bankruptcy, the company employed only 140 workers. By 1995 after its emergence from bankruptcy, Piper was employing 616 workers, resulting in a total loss of 2603 jobs.⁴³⁸

Cessna and Beech are both headquartered in Wichita, Kansas (Sedgwick County). Examination of Sedgwick County's employment figures revealed that in 1978, the year general aviation production peaked at 17,811 aircraft,⁴³⁹ 183,187 workers were employed. By 1994, the year GARA was enacted, 210,146 people were employed in the county. Sedgwick County was not rendered a jobless wasteland by our tort system prior to the enactment of GARA.⁴⁴⁰

⁴³⁵ Daniel Donnelly, *General Aviation Revitalization Act—Friend or Foe?*, in 1996 ANNUAL CONVENTION NATIONAL COLLEGE OF ADVOCACY 1629, 1632 (ATLA Meeting, Boston, Mass. July 27-31, 1996) (quoting Letters from Attorney Daniel Donnelly to Cessna Aircraft Co., Beech Aircraft Corp., Mooney Aircraft Corp., and Piper Aircraft Corp. (Apr. 2, 1996)).

⁴³⁶ *Id.* at 1632 n.16 (quoting Letter from T. W. Wakefield, Vice President and General Counsel, The Cessna Aircraft Co., to Attorney Daniel Donnelly (Apr. 15, 1996)).

⁴³⁷ *Id.* at 1632 n.17 (quoting Letter from Kyle M. Jaster, Chief Financial Officer, Mooney Aircraft Corp., to Attorney Daniel Donnelly (Apr. 9, 1996)).

⁴³⁸ *See id.* at 1632 n.18 (citing Letter from Patrick H. Faller, Director of Human Resources, The New Piper Aircraft, Inc., to Attorney Daniel Donnelly (Apr. 4, 1996)).

⁴³⁹ *See* General Aviation Manufacturers Association, 1997 STATISTICAL DATA BOOK 4 (1997).

⁴⁴⁰ *See* Donnelly, *supra* note 435, at 1632.

Furthermore, *The World Aviation Directory* calculates the change in employment of each of the following general aviation from 1986-1994 manufacturers as follows: Cessna -2400; Beech +1450; Piper -400; and Mooney +450. This represents a total job loss during that period of 900 jobs, hardly a figure approaching 100,000.⁴⁴¹

C. MYTH #3: THE GENERAL AVIATION INDUSTRY WAS FACING FINANCIAL DEVASTATION AS A RESULT OF ITS EXPOSURE TO PRODUCTS LIABILITY LAWSUITS.

REALITY: According to GAMA, in 1978, the net billings for general aviation aircraft were \$1,781,200,000. In 1994 they were \$2,357,100,000.⁴⁴² Even Russell W. Meyer, CEO of Cessna, acknowledged this success at a hearing before the Senate Subcommittee on Aviation by saying, "[W]e are doing very well at Cessna. We are building a line of business jets. We happen to be the world's leader in the industry. We have something like sixty percent of the market, and we are very proud of our growing line of Citations."⁴⁴³

D. MYTH #4: GARA WAS NECESSARY BECAUSE THE MANUFACTURERS EXPERIENCED A DECREASE IN GENERAL AVIATION SALES DUE TO PRODUCTS LIABILITY COSTS BEING TOO HIGH, CAUSED BY A DEFECT IN THE TORT SYSTEM (RATHER THAN BY PRODUCT DEFECTS).

REALITY: The manufacturers submitted evidence of their "exorbitant" liability costs and then causally linked those costs to the demise of the industry. There are a number of inaccuracies in the manufacturers' evidence and rationale that makes GARA a "solution" to a non-existent problem. Because the manufacturers' problems were premised on fallacious arguments, GARA ends up being only a subsidy for manufacturers; a cure for a non-existent disease. Applying GARA is like giving morphine to someone who has a common cold. Sure, it feels good, but it will not cure the cold.

The fallacy in the manufacturers' arguments for enacting GARA concerns their calculated annual products liability costs

⁴⁴¹ See *id.* at 1632 n.20.

⁴⁴² See General Aviation Manufacturers Association, 1997 STATISTICAL DATA BOOK 4 (1997).

⁴⁴³ Donnelly, *supra* note 435, at 1633.

of \$70,000 to \$100,000 per unit built.⁴⁴⁴ This figure was touted by the “Big Three” as a justification for enacting the legislation. However, their methods for calculating this figure is questionable.⁴⁴⁵

Assume that a manufacturer has a fleet of 100,000 aircraft in active service in a given year. Furthermore, assume that the same manufacturer produces only 200 units during the year. Finally, assume that its liability insurance premiums total \$20 million per year. If the manufacturer divides its insurance cost (\$20 [million]) by the number of units produced and sold in a given year (200), the resulting insurance cost is \$100,000 per unit of production. This is precisely how Cessna, Piper, and Beech arrived at such cost figures. It is important to recognize that each one of the 100,000 outstanding aircraft represents a potential liability suit. Any accounting system or costing scheme that allocates these costs to current production dramatically (and artificially) increases the cost, and perhaps the selling price, of airplanes.⁴⁴⁶

These fallacious cost figures can be very persuasive as evidence demonstrating that the liability system is out of control.⁴⁴⁷

GAMA lobbied Congress with the following statistics: “[I]n 1976, total product liability costs, including claim and defense costs for light aircraft airframe and component manufacturers, were \$24 million. In 1986, the total costs of product liability for light aircraft reached \$210 million.”⁴⁴⁸ Interestingly, however, GAMA presented no data between the years of 1986 and 1994. GAMA reported on April 19, 1996, that it had no such data.⁴⁴⁹ Furthermore, it was unable to provide a breakdown and justification of the 1976-1986 data.⁴⁵⁰

Also compelling are data reflecting general aircraft retail increases between 1977 and 1985.⁴⁵¹ GAMA and other proponents of GARA purported that products liability increases led to increased retail costs, resulting in such aircraft being “out of reach” for the average American. In 1977 and 1978 annual retail prices increased as follows:

⁴⁴⁴ See Tarry & Truitt, *supra* note 23, at 180.

⁴⁴⁵ See *id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ See *id.*

⁴⁴⁸ S. REP. NO. 103-202, at 3 (1993).

⁴⁴⁹ See Donnelly, *supra* note 435, at 1633 (citing Conversation between Ed Bolan of GAMA and Attorney Daniel Donnelly (Apr. 19, 1996)).

⁴⁵⁰ See *id.* (citing Conversation between Ed Bolan of GAMA and Attorney Daniel Donnelly (Apr. 19, 1996)).

⁴⁵¹ See AIRCRAFT BLUEBOOK PRICE DIGEST (Spring 1995).

<u>Cessna 210</u>	<u>Beech 33A</u>	<u>Piper PA 28-181</u>	<u>Mooney 20J</u>
15.39%	8.05%	8.9%	9.53%

From 1979 through 1985, when products liability costs purportedly "soared," prices increased annually as follows:

<u>Cessna 210</u>	<u>Beech 33A</u>	<u>Piper PA 28-181</u>	<u>Mooney 20J</u>
11.64%	10.45%	10.57%	13.30%

The difference in the average annual increase between 1977-1978 (when GAMA data reflects no increase in products liability costs) and 1979-1985 (when products liability costs "soared") are as follows:

<u>Cessna 210</u>	<u>Beech 33A</u>	<u>Piper PA 28-181</u>	<u>Mooney 20J</u>
-3.75%	+2.4%	+1.67%	+3.77%

The average annual increase in retail costs of the four models during the products liability "crisis" was a mere +1.02%.⁴⁵²

Even more revealing is a comparison between the average annual increases in new aircraft prices during the period 1979 through 1983 (when GAMA says products liability costs increased from \$25 million to \$73 million annually) with the increases during the period 1984 and 1985 (when GAMA says products liability costs "soared" from \$73 million to \$210 million annually).⁴⁵³

	<u>Cessna 210</u>	<u>Beech 33A</u>	<u>Piper PA 28-181</u>	<u>Mooney 20J</u>
1979-1983	12.65%	14.31%	12.91%	13.27%
1984-1985	9.13%	.79%	4.72%	13.40%

"This data at the very least suggests that the increases in the retail prices of new aircraft during the period 1979-1985 were not driven by products liability costs but by other, unrelated factors."⁴⁵⁴

The fact that products liability costs were not responsible for the dramatic increase in the retail price of new aircraft was inadvertently admitted by Charles M. Suma, President and CEO of The New Piper Aircraft when he responded to the following inquiry:

⁴⁵² See Donnelly, *supra* note 435, at 1634.

⁴⁵³ See *id.* at 1633, Table 2 (citing GAMA, BRIEFING MATERIALS ON GENERAL AVIATION REVITALIZATION ACT 1).

⁴⁵⁴ *Id.* at 1634.

"What do you tell your owners, or any pilot who says, 'I thought this whole product liability thing was going to result in lower prices?'"

"I was very clear with everybody to whom we talked that its not going to mean lower prices."⁴⁵⁵

E. MYTH #5: THE DECLINE IN GENERAL AVIATION AIRCRAFT SALES WAS DUE TO SOARING PRODUCTS LIABILITY COSTS.

REALITY: The decline in general aircraft aviation sales from 1978 through 1994 was due to factors unrelated to products liability costs.

1. *Oversupply*

The industry reached "fantastic levels of production in the late 1970s" when manufacturers were optimistic that we had reached an age where "owning and operating a general aviation aircraft would come within the reach of the average American."⁴⁵⁶ This optimism and accompanying surge of production likely played a role in the downward spiral of the industry in the 1980s.⁴⁵⁷ "There is good evidence to suggest that for a number of reasons, manufacturers and others involved in the sale of aircraft misjudged the market and set the industry up for a bust."⁴⁵⁸

In 1986 (the year Cessna ceased producing piston aircraft), the ratio of active certificated pilots to active aircraft reached a twenty-six year low, falling from 5.64 pilots per aircraft in 1968 to 3.22 pilots per aircraft in 1986. This represents a decrease of forty-two percent. In 1993, the ratio was still only 3.77 pilots per aircraft.⁴⁵⁹ In fact, Piper's CEO, Charles M. Suma commented on this oversupply in 1995 by declaring, "from the early 1970s through the mid-1980s [,] . . . the industry was producing more new aircraft than the market could absorb."⁴⁶⁰

2. *Failure to Implement Product Improvement and Innovation*

According to Chuck Husick, former Vice-President of Cessna, the industry failed to give its single engine customers product

⁴⁵⁵ *The New Piper's Chuck Suma*, AOPA PILOT, Feb. 1996, at 57, 62.

⁴⁵⁶ Tarry & Truitt, *supra* note 23, at 185.

⁴⁵⁷ *See id.* at 188-90.

⁴⁵⁸ *Id.* at 188.

⁴⁵⁹ *See* Donnelly, *supra* note 435, at 1635.

⁴⁶⁰ *Suma Outlines Plans for New Models, New Technology from New Piper Aircraft*, WKLY. BUS. AVIATION, Aug. 7, 1995, at 55.

improvement and innovation to match its big price hikes.⁴⁶¹ The industry saw the decline coming and rather than pushing for new technology, it gave buyers improved doors and windshields.⁴⁶² As a result, “[p]ilots, businesses, flying clubs, fixed base operations—none of them buy new airplanes because they can get essentially the same thing for less money in an used airplane.”⁴⁶³

3. *High Operating Costs*

Cessna’s chief economist, E.F. Kraus, attributed the decline of general aviation sales, in part, to high operating costs—e.g. fuel, maintenance, etc.⁴⁶⁴

4. *Increased Complexity of the Aviation Environment*

The proliferation of various forms of restricted use airspace and the increased regulation of airspace have also been recognized as factors in the decline in aircraft sales.⁴⁶⁵

5. *Abolition of Favorable Tax Treatment for Aircraft Acquisition*

The elimination of the investment tax credit has significantly affected the sale of new aircraft.⁴⁶⁶

6. *Competition for Expendable Income*

Competition for consumer dollars has also affected general aviation sales. Factory-produced aircraft must now compete with home built aircraft, which have become tremendously popular in recent years. While the purchase and production of light piston aircraft was decreasing, “sales of light piston aircraft kits were at an all-time high.”⁴⁶⁷ In the 1990s “[r]egistration and certification of . . . experimental home-built aircraft skyrocketed.”⁴⁶⁸ Good used aircraft also increased the competition.⁴⁶⁹

⁴⁶¹ See Weeghman, *The Big Crash: Searching for the Cause of General Aviation’s Appalling Nosedive*, AVIATION CONSUMER, Nov. 1, 1986, at 20.

⁴⁶² See *id.*

⁴⁶³ *General Aviation Revitalization Act of 1993: Hearing on H.R. 3087 Before the House Subcomm. on Econ. and Commercial Law of the House Comm. on Judiciary*, 103d Cong. 111 (1994) (statement of Robert B. Creamer, Citizen Action).

⁴⁶⁴ See E.F. Kraus, *Technical Thresholds for Revitalizing General Aviation*, AIAA, (Sept. 14-16, 1987) 2, 4.

⁴⁶⁵ See *id.*

⁴⁶⁶ See H.R. REP. NO. 103-525(II), at 5 (1994).

⁴⁶⁷ McAllister, *supra* note 3, at 307.

⁴⁶⁸ *Id.*

7. Other Factors

A myriad of other factors contributed to the decline in new general aviation aircraft sales. For instance, the combination of inflation and the changes in GI Bill flight training benefits contributed to the “surge in production that created an unsustainable production volume.”⁴⁷⁰ Furthermore, “some unbelievable [sic] bad business decisions by the manufacturers 15 to 20 years ago” coupled with the manufacture of “some lousy products” contributed to the industry’s decline.⁴⁷¹

The demand for newly manufactured general aviation aircraft was not met due to several other unforeseeable factors. “Fuel prices skyrocketed in 1979, the prime lending rate reached a high of nineteen percent in 1981, and the nation’s economy experienced negative growth” from 1980 through 1982.⁴⁷² Airline deregulation, the air traffic controllers strike of 1981, the high rate of mergers and acquisitions in the 1980s, and descending corporate profits between 1978 and 1986 also contributed to the decline in general aviation sales.⁴⁷³

These are the factors that placed the purchase of a general aviation aircraft “beyond the reach of even wealthier consumers.”⁴⁷⁴ Even without the so-called “products liability crisis,” the general aviation industry, in all likelihood, would have suffered a dramatic decline.⁴⁷⁵ “Its own commercial strategy of flooding the market in the late 1970s combined with the disastrous general economic conditions of the early 1980s” would have wrought havoc on the industry.⁴⁷⁶

F. MYTH #6: AIRCRAFT “PROVE” THEMSELVES WITHIN EIGHTEEN YEARS AND THUS ARE ENTITLED TO IMMUNITY AFTER SUCH TIME.

REALITY: “Although this presumption [that an aircraft that has not been involved in an accident within eighteen years has proven itself to be safe] may be true for manufacturing defects, it is by no means accurate where design defects are con-

⁴⁶⁹ In 1987 ten-year-old singles sold for only 23% of new aircraft prices. See Donnelly, *supra* note 435, at 1636.

⁴⁷⁰ Tarry & Truitt, *supra* note 23, at 188.

⁴⁷¹ *Id.* at 190 (citing Letter from John Baker, President of the Aircraft Owners & Pilots Association, to Attorney John Howie (Sept. 29, 1988)).

⁴⁷² *Id.* at 190.

⁴⁷³ See Donnelly, *supra* note 435, at 1637.

⁴⁷⁴ Tarry & Truitt, *supra* note 23, at 190.

⁴⁷⁵ *Id.* at 192.

⁴⁷⁶ *Id.*

cerned.”⁴⁷⁷ “When a product fails during normal use in the early part of its life span, the reason for the failure can almost always be attributed to a manufacturing defect. Responsible manufacturers do not design their products to fail so close to the starting line.”⁴⁷⁸

With [thirty-one] years representing the average age of general aviation aircraft in this country, and forty or fifty years often representing the useful life of such aircraft, the eighteen-year statute of repose contained in the 1994 Act may be said to cover only “the early part” of an aircraft’s life span. If this is true, the misguided presumption upon which the 1994 Act is based will leave many legitimate design defect claimants without legal recourse.⁴⁷⁹

To assess whether an aircraft proves itself as being defect-free, one must examine the model aircraft, not an isolated aircraft, as was done by GARA proponents. “For example, to have looked at a specific ‘V’-tail Bonanza prior to 1980, and to have pronounced that specific aircraft free from defect would have been absurd because, as of 1980, 250 of this model aircraft had come apart in the air due to a design defect.”⁴⁸⁰

The manufacturers also fail to understand that aircraft accidents seldom have but one cause, but normally occur because, at a point in time, several contributing causes coincide.

Aircraft defects standing alone seldom result in crashes. In the presence of other contributing causes, however, they are lethal. The fact that a certain latent design defect does not result in a crash because other contributing causes are not yet present is no evidence that the model is defect free.⁴⁸¹

G. MYTH #7: BECAUSE THE NTSB DID NOT FIND A DESIGN DEFECT AS A PROBABLE CAUSE OF AN ACCIDENT, THE AIRCRAFT IS DEFECT-FREE.

REALITY: In 1987, at the request of the House Aviation Subcommittee of the Public Works and Transportation Committee, Beech Aircraft analyzed 203 general aviation accident lawsuits filed during the 1980s.⁴⁸² Beech found that the NTSB and FAA

⁴⁷⁷ Shea, *supra* note 16, at 784.

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ Donnelly, *supra* note 435, at 1637.

⁴⁸¹ *Id.*

⁴⁸² See Martin, *supra* note 102, at 485-86.

investigations indicated that none of the 203 accidents were caused by design or manufacturing defects.⁴⁸³

Beech's findings are more a testimonial to the ineptitude of the manner in which the NTSB and the FAA conduct many investigations and to the success of the general aviation industry in steering investigations away from the manufacturers by having their investigators participate, than to general aviation['s] aircrafts' being free of design and manufacturing defects.⁴⁸⁴

Evidence can be found in every plaintiff's aviation trial lawyer's files. In many cases, the NTSB found probable cause of the crash to have been pilot error. However, through pre-trial discovery and investigation, the cause is often determined to have been a design defect in the aircraft or in its manuals.⁴⁸⁵

H. MYTH #8: GARA WAS NECESSARY BECAUSE DEFENDANTS HAVE SUCH A DIFFICULT TIME DEFENDING OLDER AIRCRAFT DUE TO LOST OR DESTROYED INFORMATION.

REALITY: It is the plaintiff who has the burden of proof in personal injury aviation litigation. Therefore, if information has been lost or destroyed, it is the plaintiff who suffers most—by losing his right to recourse.

Oftentimes in aviation cases, documents such as design drawings, engineering change requests, orders, test reports, and service history (including customer complaints and accident and incident history) are "destroyed by manufacturers under the euphemism of 'record retention' programs."⁴⁸⁶ The solution to stripping an accident victim of his right to recourse because the defendant has succeeded in disposing of the essential evidence to prove a case against it might be the enactment of better record retention laws. At the very least, those who destroy the evidence should not have the advantage of arguing that the absence of such evidence warrants immunity for defective products.⁴⁸⁷

⁴⁸³ See *id.* at 486.

⁴⁸⁴ Donnelly, *supra* note 435, at 1638.

⁴⁸⁵ See *id.*

⁴⁸⁶ *Id.* at 1639.

⁴⁸⁷ See *id.*

I. MYTH #9: PASSAGE OF GARA WILL RESULT IN AN INCREASE
IN PRODUCTION AND JOBS.

REALITY: Proponents of GARA argued that its passage would lead to a 100,000 job increase within the general aviation industry. Post-enactment of GARA, those who had touted the 100,000 job-loss figure, became substantially more conservative by asserting "[t]he newly-enacted general aviation product liability law may create up to 25,000 new jobs."⁴⁸⁸

Russell W. Meyer of Cessna promised that with the passage of GARA, Cessna would begin producing 2000 aircraft annually.⁴⁸⁹ However, even those within the same camp express skepticism at this assertion. For example, when asked whether Cessna's plans to make 2000 airplanes a year by 1997 or 1998 was likely, the chief executive of Lycoming replied, "No, I don't see it as sustainable. At the outside, probably half of the two thousand."⁴⁹⁰

Furthermore, no one within the industry is crazy enough to assert that GARA would bolster the industry back to the 1978-79 annual production rate of 17,000 aircraft, even though those production figures were used by the industry as the standard from which the industry had fallen due to the ravages of the tort system.⁴⁹¹

J. MYTH #10: PRODUCTS *HAVE* BEEN DESIGNED AND DEVELOPED
TO INCREASE AIR SAFETY, BUT THE MAKERS' FEAR OF EXPOSURE TO
LIABILITY HAS PREVENTED THEM FROM INTRODUCING AND
MARKETING THE PRODUCTS. IN OTHER WORDS, STRICT PRODUCTS
LIABILITY STIFLES SAFETY.

REALITY: Strict liability does not stifle safety. Statutes of repose stifle safety. What incentive does a manufacturer have to follow the aircraft after the eighteen year repose period has expired? Why spend money maintaining and inspecting such aircraft? "Nothing in this legislation encourages the production of better, safer aircraft" and nothing in GARA helps to ensure that

⁴⁸⁸ *Clinton Signs Liability Law, Cessna Weighs New Production*, AVIATION WK. & SPACE TECH., Aug. 22 1994, at 61 (emphasis added).

⁴⁸⁹ See H.R. REP. NO. 103-525(II), at 5 (1994); S. REP. NO. 103-202, at 2 (1993).

⁴⁹⁰ *Lycoming's CEO on Competition and Cessna's Chances*, AVIATION CONSUMER, Nov. 1995, at 10.

⁴⁹¹ See *Hearing on H.R. 3087, The General Aviation Revitalization Act of 1993 Before the House Public Works and Transp. Subcomm. on Aviation*, at 157 (Oct. 27, 1993) (statement of Edward W. Stimpson, President, General Aviation Manufacturers Association).

the general goals of the tort system as a whole are furthered.⁴⁹² There is no mention in GARA of (a) fostering innovation or safety; (b) compensating the injured victims of defective aircraft over eighteen years old; or (c) deterring injurers.⁴⁹³ In fact, GARA defeats the goals of the tort system.

GARA's statute of repose eliminates any incentive for manufacturers to engineer their products to be safe after the eighteen year period expires.⁴⁹⁴ Now, manufacturers may choose to design their aircraft to last a mere eighteen years.⁴⁹⁵ Pilots who fly an aircraft older than eighteen years are without any legal redress.⁴⁹⁶ "AOPA and the pilots it represents . . . have traded their long-term safety and access to legal redress for industry negligence. The AOPA and its members may have pursued a false illusion of thousands of cheap, light pistons rolling off the production lines."⁴⁹⁷ GARA is an "'industrial policy' which [sic] serves as a 'bail-out' or 'subsidies to selected industries.'"⁴⁹⁸

K. MYTH #11: ENACTMENT OF GARA WILL ENABLE CESSNA TO
FULFILL ITS PROMISE TO RESTART PRODUCTION OF
SINGLE-ENGINE AIRCRAFT.

REALITY: It is likely that Cessna's decision to reenter the single-engine market was sweetened considerably by incentives offered by state, county and local government "giveaways" valued at approximately \$35 million.⁴⁹⁹ The incentives include free land, \$8.3 million in property tax abatements, \$20 million in cash, \$2 million in worker training programs and a \$500,000 training center.⁵⁰⁰ Thus, Cessna's ability to restart production will likely "be shaped by more than tort reform."⁵⁰¹

IX. CONCLUSION

The passage of GARA has not yet resulted in a decrease in liability insurance costs for general aviation manufacturers, as

⁴⁹² Shuchman, *supra* note 117, at 530.

⁴⁹³ *See id.*

⁴⁹⁴ *See* McAllister, *supra* note 3, at 320.

⁴⁹⁵ *See id.*

⁴⁹⁶ *See id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ Shuchman, *supra* note 117, at 530.

⁴⁹⁹ *See* Barbara Carton, *Aviation: Cessna Says It Will Make More Small Airplanes*, WALL ST. J., Mar. 14, 1995, at B1.

⁵⁰⁰ *See id.*

⁵⁰¹ Tarry & Truitt, *supra* note 23, at 199.

was intended.⁵⁰² Insurance companies will not reduce the cost of premiums until they know two things. First, they want to see if the number of lawsuits is reduced substantially and second, they want to wait for more aircraft to move into GARA's eighteen year cutoff period.⁵⁰³ Apparently, insurance underwriters will continue to extract high premiums until more judicial opinions are handed down.⁵⁰⁴

Only time will tell how GARA's effects will be felt by general aviation manufacturers, other industry actors, and consumers. In the meantime, other reform efforts are underway in Congress, such as efforts to overhaul the nation's liability laws. In fact, the general aviation manufacturers were invited to Washington earlier this year to discuss how well GARA was working for the industry.

Lawyers are the target for general aviation's scam, but even the biggest scumbag ambulance-chaser can't sue a manufacturer without a plaintiff.

—J. Mac McClellan, Editor, *Flying Magazine*, July 1993.⁵⁰⁵

Aviation lawsuits do not arise when air crashes do not occur.

—Daniel Donnelly, Attorney, *ATLA Meeting*, July 1996.⁵⁰⁶

⁵⁰² See Charles Spence, *Is Tort Reform Working as Promised?*, GEN. AVIATION NEWS & FLYER, Mar. 21, 1997, at 28.

⁵⁰³ See *id.*

⁵⁰⁴ See *id.*

⁵⁰⁵ Reference on file with author.

⁵⁰⁶ Donnelly, *supra* note 435, at 1641.