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Saving the General Aviation Industry: Putting Tort Reform to the Test

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SAVING THE GENERAL AVIATION INDUSTRY:
PUTTING TORT REFORM TO THE TEST

JOHN H. BOSWELL*
GEORGE ANDREW COATS**

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INTRODUCTION

A. GENERAL AVIATION DEFINED

GENERAL AVIATION is defined as all private-sector aviation that does not involve regularly scheduled passenger traffic. General aviation includes business aviation, air cargo, flight training, pleasure flying, agricultural aerial application, air taxi and air charter, aerial law enforcement, air ambulance service, and countless other aviation activities that do not fall under the auspices of scheduled airlines.

The general aviation industry includes manufacturers of general aviation aircraft, major aircraft components (such as engines and propellers), and smaller components. The American general aviation industry once employed hundreds of thousands of workers in dozens of states who produced tens of thousands of aircraft annually for use in this country and around the world.

During the 1980s tort lawsuits decimated the general aviation industry. Employment dropped by sixty-five percent. Major manufacturers closed plants, filed bankruptcy, and all but halted production. Of all segments of the American economy adversely effected by the tort litigation...

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2 Id.
3 Russell W. Meyer, Statute of Repose — Key to Industry Future, General Aviation Mfg. Ass’n Indus. Rev.: 1994 Outlook and Agenda 1 (Feb. 9, 1994). More than 100,000 jobs have been lost in general aviation manufacturing, service, maintenance, and related industries during the past 10 years. Id. Employment of United States piston engine manufacturers alone has declined 78% since 1978. Id.
5 Meyer, supra note 3, at 1.
6 Id. Cessna closed its single engine aircraft production lines in 1986 based solely on a perceived unlimited exposure to litigation. Id.; see also House Hearings, supra note 4 (statement of Charles Suma, President and CEO, Piper Aircraft Corp.). Although products liability was not the only reason Piper filed bankruptcy in July, 1991, the uninsured posture the company assumed due to the cost of liability insurance rendered the company unfundable through traditional financing sources.
explosion, the Brookings Institute cited general aviation as the segment hardest hit.\(^7\)

**B. AN INTRODUCTION TO TORT REFORM**

Modern products liability lawsuits emerged due to drastic changes in American tort law that first took root in the mid-1960s, evolved and gained acceptance in the 1970s, and constituted the law of the land by the 1980s.\(^8\) Concepts such as strict products liability, punitive and emotional damages, and joint and several liability mushroomed in popularity and acceptance.\(^9\) The evolution of these legal devices was fueled by the intellectual appeal of their underlying tenets. The jurists, legislators, and legal scholars leading the fight for expanding tort law saw such devices as tools for social improvement, through which industry would bear the costs of injury to consumers regardless of fault\(^10\) and defendants would be punished for consciously indifferent or grossly negligent treatment of consumers.\(^11\)

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*Martin, supra note 1, at 478-99. By 1986, Beech shut down most of its light airplane production lines. Id. at 484.*

*\(^7\) See generally Martin, supra note 1, at 478-99.*


*\(^9\) See, e.g., Martin, supra note 1, at 480-83; Henderson & Twerski, supra note 8, at 1257-61. Strict products liability was an outgrowth of a number of legal developments during the early 1960s. Professor William Prosser authored Section 402A of the Second Restatement of Torts in 1963, which revolutionized the concept of strict liability. Contemporaneously, a number of landmark cases from jurisdictions such as California and New Jersey abandoned previously held privity requirements for products liability actions and adopted Professor Prosser's concepts of strict liability in tort. Id.*

*\(^10\) See *AMERICAN LAW OF PRODUCTS LIABILITY § 1:4, at 17-18* (Timothy E. Travers et al. eds., 3d ed. 1987). The purpose of imposing strict liability on manufacturers is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers who market such products rather than by injured persons. Id. Products liability, including strict liability, grew out of a public policy judgment that consumers required more protection than that offered by traditional legal concepts such as negligence and breach of warranty. Id.*

*\(^11\) See Justice Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 Ala. L. Rev. 61, 69-70 (1992). Punitive damages serve to punish behavior that society condemns, but which is not criminal. Id. While punitive damages have existed as a legal concept for centuries, punitive*
As a result of such social engineering, proponents envisioned accelerated innovation and increased safety for the general public, as well as a more equitable distribution of costs associated with product use.\(^\text{12}\)

By the mid-1980s, tort reform became a buzzword of national political debate.\(^\text{13}\) Concerns developed that "the new tort law" had abandoned such time-honored legal concepts as fault-based liability, minimum evidence levels to prove liability, and quantifiable measures of damages. As the economy initially felt the effects of the new tort law, an increasing segment of the legal, industrial, and political communities worried that ever expanding tort law would cripple industry after industry, stifle innovation, discourage safety improvements, and price new safer consumer goods out of the reach of average consumers.\(^\text{14}\)

In response to such concerns, tort reform efforts were conceived and debated at both the state and national level.

damage awards were rarely assessed, and were usually small in amount as recently as thirty years ago. \(\text{Id. at 62-69; see TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2742 (1993) (O'Connor, J., dissenting).}\)

\(^\text{12}\) See Martin, \(\text{supra note 1, at 492.}\) If imposition of strict liability against manufacturers of general aviation airplanes would effectively deter accident-causing behavior by encouraging innovation and product improvement, then years of vigorous enforcement should have produced benefits in the safety of general aviation. Another historical justification for the expansion of products liability has been the perceived availability of insurance in voluntary markets to fund additional losses that might be imposed on manufacturers. \(\text{Id.}; \text{see also Epstein, supra note 8, at 646.}\)

\(^\text{13}\) Sharon G. Burrows, Note, Apportioning a Piece of a Punitive Damage Award to the State: Can State Extraction Statutes be Reconciled with Punitive Damages Goals and the Takings Clause?, 47 U. MIAMI L. REV. 437, 437-38 (1992). An apparent dramatic increase in the number and dollar amount of punitive damage awards over the last several decades has fueled a debate over the propriety of allowing punitive damages. \(\text{Id.}; \text{see also Jennifer H. Arlen, Compensation Systems and Efficient Deterrence, 52 MD. L. REV. 1093, 1093 (1993).}\) Legal scholars and legislators are increasingly interested in alternatives to the tort system. \(\text{Id.}\)

\(^\text{14}\) \(\text{Id.}\) Most agree that the tort system seriously needs reformation. Victims often cannot afford the time or expense associated with pursuing claims, successful plaintiffs may be undercompensated, and potential defendants suffer from crushing liability, much of which goes to administrative costs including attorneys' fees rather than to victims. \(\text{Id.}; \text{see also John A. Goerd, Civil Justice Reform Model State Amendments: How Will They Affect State Courts?, STATE CT. J. 14 (Winter 1993).}\) The report of the President's Council on Competitiveness suggests that tort reform is needed based on the tremendous costs of the American civil justice system, which constitute a significantly larger percentage of the United States gross national product than do litigation costs in other industrialized countries. \(\text{Id.}\)
Common tort reform concepts include: limiting or eliminating punitive damages or redirecting such damages to the state; raising the degree of proof necessary to establish strict liability or entitlement to punitive damages; restricting or prohibiting contingency attorney fee contracts and contingency litigation expense contracts; and assessing the cost of successfully defending such lawsuits to the plaintiff or plaintiff’s attorneys.15

A number of state legislatures and courts have implemented tort reform measures.16 Throughout the 1980s, national tort reform was hotly debated and legislators introduced various omnibus tort reform bills in Congress.17 None of these comprehensive measures were passed, however, and despite the level of debate, very few tort reform efforts achieved success on a national level.18

C. TORT REFORM FOR GENERAL AVIATION

In the 1990s, a growing number of congressional members directed their tort reform efforts toward rescuing the general aviation industry.19 Legislators have introduced a number of ambitious bills designed to help general aviation and then have watched their bills die at the committee level.20 In the summer of 1994, however, congressional proponents of tort reform did succeed in passing a modest stat-
ute of repose for general aviation products. After eighteen years from the date of manufacture, the maker of a general aviation product can not be held liable for negligence or strict products liability claims arising from the product.

In many respects, the general aviation industry provides an ideal laboratory for tort reform. Few industries are in such dire need of tort reform. Few consumer groups offer such overwhelming support for tort reform. Tort reform concepts ranging from the new national statute of repose to more ambitious ideas, such as punitive damage redirection, could be tested on the relatively small scale afforded by the general aviation industry. If tort reform fails in the general aviation industry context, flaws could be demonstrated without affecting a large percentage of the general population. But, if tort reform works for general aviation, successful elements could then be adapted to other segments of the economy.

D. GENERAL AVIATION INDUSTRY BACKGROUND

In the late 1970s, the American general aviation industry served as a model to the world. The industry produced reliable, affordable light aircraft, which in turn provided an unequaled spring board to aviation, technical, mechanical,

21 See General Aviation Revitalization Act of 1994, 49 U.S.C.A. § 40101 (Pub. L. No. 103-298) (West 1994) [hereinafter The Revitalization Act]. The Revitalization Act, which was signed into law on August 17, 1994, appears as Appendix I to this article. The Act is discussed infra at notes 115-133 and accompanying text.

22 Id.

23 See generally Martin, supra note 1, at 478-99.

24 See Phil Boyer, President's Position: Landing Liability Reform, AOPA PILOT, May 1994, at 2 (stating that 92% of members of the Aircraft Owners and Pilots Association, the largest general aviation consumer group, support statute of repose legislation for general aviation); see also General Aviation Liability Standards Act of 1989: Hearings on S. 640 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. (1989) (statement of John S. Yodice, General Counsel, Aircraft Owners and Pilots Association) [hereinafter Yodice]. The Aircraft Owners and Pilots Association and the Experimental Aircraft Association, another major general aviation consumer group, both support products liability reform for general aviation. Id.
and travel industry careers worldwide.25 The dream of flight was a realizable goal for most Americans thanks to the general aviation industry.

E. THE ROLE OF GENERAL AVIATION IN THE AMERICAN ECONOMY

In many ways, the general aviation industry developed as a typical American industry. The manufacturing and marketing of general aviation products emulated auto production in many respects. Small companies founded by entrepreneurs grew to multi-production plant enterprises using components manufactured by smaller companies.26 At their zenith, however, general aviation manufacturers never reached the size of the major auto makers, or even the commercial and military aircraft makers.27

Unlike the average consumer product, the design and production of light aircraft was always subject to the same type of stringent federal regulation that applies to commercial aircraft production.28 This regulatory scheme does not

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27 See supra notes 25-26 and accompanying text (describing growth of general aviation industry).

The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time . . . such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety. . . .

Id.

The development and production of any type of aircraft is one of the most closely regulated American industries. See Martin, supra note 1, at 488. Most of the cost related to FAA oversight and regulation of design, testing, production, and certification of airplanes is borne by the aircraft manufacturers. Id.

A general aviation manufacturer would have to spend approximately $50 million to meet FAA requirements for type certification to design, build, test, and certify an entirely new four-passenger, single-engine airplane. Production line and inventory costs would also amount to approximately $50 million. Id.
Finally, despite its ailing state, general aviation continues to play a major role in our nation's transportation system. General aviation aircraft fly over 30 million hours annually, carrying 120 million passengers over 4 billion miles. General aviation provides the exclusive means of air transportation for over 5,000 communities.

**F. The Health and Performance of the General Aviation Industry Prior to the Tort Onslaught**

Perhaps the archetypical general aviation product is the Cessna 172 Skyhawk. The Skyhawk is a single-piston engine, four-seat airplane. First built in 1955, more Skyhawks have been produced than any other airplane ever made. The Skyhawk is also one of the safest light aircraft ever built. In 1979, a new Skyhawk cost $22,300.

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29 Martin, supra note 1, at 488. If the FAA questions regulatory compliance of an existing general aviation product, the manufacturer must develop and supply any information the FAA requires to support the product and its compliance with FAA standards and regulations. Id.

30 See Meyer, supra note 3, at 8. General aviation aircraft fly almost four times the annual airline flight hours. Id.

31 Id.

32 Clark, supra note 26, at 5, 8. When initially introduced in the 1950s, the Cessna 172 was unique because it was one of the first general aviation aircraft to employ a nose wheel design. The Cessna 172 was also one of the earlier general aviation aircraft constructed entirely out of metal. During its lengthy production run, the Skyhawk has been powered by a variety of Continental and Lycoming four and six cylinder piston engines, producing from 145 to 195 horsepower. The Skyhawk is small and simple enough to make an excellent basic flight training and instrument flight training aircraft, yet is versatile, serving in probably every general commercial general aviation application. Because it was produced in such large numbers, the Skyhawk is still a primary aircraft used to train new pilots, and is the aircraft of choice for many general aviation pilots.

33 See Barry Schiff, Testpilot, AOPA Pilot, Aug. 1994, at 154, 164. Cessna produced 33,629 Skyhawks. The only aircraft of any type produced in greater numbers was the Messerschmitt BF 109. Nazi Germany produced almost 35,000 BF 109s (a fighter aircraft) before and during World War II.

34 Clark, supra note 26, at 239-44. The National Transportation Safety Board (NTSB) publishes figures showing frequency of accidents for various types of aircraft categorized by cause of accident. These categories include engine failures, in-flight airframe failures, stalls, hard landings, ground loops, landing undershoots, and
1978, American manufacturers produced 14,389 single-engine aircraft, including 2,023 Skyhawks manufactured by Cessna.

II. TORT LAWSUITS RUN AMOK

During the 1980s and early 1990s, a rash of tort lawsuits based on wildly improbable factual backgrounds plagued the general aviation industry. Although judgments were entered against manufacturers in relatively few cases, many of the suits filed were characterized by such a surrealistic, lottery-like quality that they strained the furthest bounds of legal reason. Such cases give credence to the ever-present industry fear of seven, eight, and nine digit emotional distress and punitive damage awards. The following cases present just a few examples of the decisions that have plagued general aviation.

A. CLEVELAND v. PIPER

A glider operator at a small, suburban airport used a Piper Super Cub to tow gliders. The glider company became involved in a dispute with the airport operator, which forbade continued use of the airport for glider operations. To enforce the ban, the airport owner parked a van on the runway. Despite the ban, Cleveland, an employee of the glider operator, planned to use the Super Cub to

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make a film while towing a glider aloft. Cleveland and a mechanic removed the front seat from the two-seat Cub and installed a wooden bench and camera mount, which he built for the camera and photographer. The pilot and the photographer boarded the aircraft and, despite seeing the parked van on the runway, proceeded to attempt takeoff. The results were predictably tragic. The Super Cub collided with the van, and Cleveland struck his head on the camera, which resulted in severe injury.

Cleveland's wife sued Piper on Cleveland's behalf, alleging design defects, including lack of crashworthiness (no rear seat shoulder harness) and lack of forward visibility (the airplane employed a tail wheel design). Despite the pilot's obvious modification of the plane and negligent operation, the jury awarded the plaintiff $2.5 million. The jury concluded the Super Cub, versions of which had been certified airworthy and in production for over forty years, was defective. Piper was unsuccessful in its attempt to vindicate the federally approved design in appeals all the way to the United States Supreme Court despite amicus curiae arguments by the United States on Piper's behalf.

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43 Id.
44 Id.
45 Cleveland, 890 F.2d at 1542.
46 Id.
47 Id. at 1543-45. The trial court submitted the case to the jury under design negligence and crashworthiness negligence theories. The design negligence theory referred to allegations that Piper designed the Super Cub with inadequate forward visibility and, when submitted to the jury, this negligence was compared with that of Cleveland, the airport owner who parked the van on the runway, and the mechanic who assisted Cleveland in modifying the Super Cub. The crashworthiness negligence issue limited the jury to comparing the alleged negligence of Piper in failing to include a rear seat shoulder harness with the negligence of Cleveland. When this case was first appealed to the Tenth Circuit, the Tenth Circuit remanded in part on the basis that this form of submission was erroneous under New Mexico law and that the negligence of all tortfeasors should have been submitted comparatively, regardless of whether design or crashworthiness negligence was at issue. Cleveland, 890 F.2d at 1546.
48 See Pitko, supra note 39, at 235. The first version of the Piper Cub was produced in 1937. A type certificate for the Super Cub was issued by the Civil Aeronautics Administration in 1949, and the Super Cub is still in production today. Id.
49 Cleveland, 114 S. Ct. at 291. The May 1986 jury verdict awarded Cleveland $2.5 million. The trial court reduced the award to $1,042,500 plus post judgment inter-
A family of four was killed in a Beechcraft Debonair while the pilot was making an instrument approach at night in bad weather. The National Transportation Safety Board (NTSB) investigated the accident and concluded that: no fire existed on board prior to the crash, the engine was working properly prior to the crash, and the crash was the result of pilot error.

Despite these conclusions, the family's survivors filed suit against Teledyne Continental Motors, the manufacturer of the Beechcraft's engine, alleging that the engine was defective. Specifically, the plaintiffs alleged that gasoline escaped from an engine nozzle and started an in-flight fire, which, in turn, caused the crash. Although the plaintiffs had no direct evidence to support their theory, the jury awarded the plaintiffs $107 million in actual pain and suffering and costs. Cleveland, 890 F.2d at 1543-44. Piper appealed the judgment and the court of appeals determined that comparative causation had been improperly submitted to the jury. The case was remanded for a new trial. Id. at 1546. Piper amended its answer to assert a defense that state common law was preempted by the Federal Aviation Act of 1958 and related regulations. The district court denied Piper's motion for summary judgment on that defense. Cleveland, 985 F.2d at 1440. The trial court also ruled that the subsequent trial would only involve issues of liability, the damages issues would not be retried, and Piper could not designate six witnesses who had not testified in the earlier trial. Id. Piper appealed these pre-trial rulings. Id.

The Tenth Circuit held the Federal Aviation Act does not preempt state common law regarding aircraft design and safety, and remanded the case for reconsideration of the trial court's decision to bar Piper from calling new witnesses at the re-trial of this case, ruling that the new trial should involve both issues of liability and damages. Cleveland, 985 F.2d at 1442, 1447-50.

Piper, along with amici curiae including the United States, the General Aviation Manufacturers Association, and the Aircraft Owners and Pilots Association, appealed the Tenth Circuit's ruling to the United States Supreme Court. The Supreme Court denied writ of certiorari on the matter. Cleveland, 114 S. Ct. at 291.

Datskow v. Teledyne Continental Motors Aircraft Prods., 826 F. Supp. 677 (W.D.N.Y. 1993); see Liability Reform for General Aviation: A Need at the Point of Crisis, GENERAL AVIATION MFR. ASS'N, at 8 [hereinafter Liability Reform]; see also Product Liability Case Settled Out of Court, AOPA PILOT, Feb. 1994, at 36.

Liability Reform, supra note 50, at 8.

Id.

Id.

Id.
ferring damages.\textsuperscript{55} The trial court reduced the award to $1.1 million, and the case was subsequently settled for $1.4 million.\textsuperscript{56}

C. \textit{Guarnere, Haper & Cannuli v. Cessna}\

A pilot lost control of a Cessna during takeoff and crashed.\textsuperscript{57} The plaintiffs filed suit alleging that the pilot’s seat slipped during takeoff.\textsuperscript{58} All physical evidence indicated that the seat did not slip and that the aircraft otherwise complied with all FAA requirements.\textsuperscript{59} The only evidence supporting the plaintiff’s position was the testimony of the surviving passenger who had lost all memory of the event until just days prior to trial.\textsuperscript{60} The jury concluded that Cessna defectively designed the aircraft and failed to provide adequate warnings. The jury awarded the plaintiffs $4 million in actual damages and $25 million in punitive damages.\textsuperscript{61}

D. \textit{Ridge v. Cessna Aircraft}\textsuperscript{62}

A non-instrument rated pilot was flying a high-performance Cessna 210 from North Carolina to Washington, D.C.\textsuperscript{63} The flight was the pilot’s first without an instructor in the Cessna 210.\textsuperscript{64} The pilot flew into instrument conditions and apparently lost control of the aircraft.\textsuperscript{65} The NTSB concluded the probable cause of the accident was the pilot’s inadvertent flight into instrument meteorologi-

\textsuperscript{55} Id.
\textsuperscript{56} Liability Reform, supra note 50, at 8.
\textsuperscript{57} Id. at 9.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. Liability Reform, supra note 50, at 8.
\textsuperscript{62} See Ridge v. Cessna Aircraft, No. 4:90 CV 143 (M.D.N.C.). A jury returned a verdict in early May 1994. As of November 1994, however, the court had not yet entered a judgment, and a number of post-trial motions were pending.
\textsuperscript{63} Jury Awards $5 Million in Suit, AOPA Pilot, July 1994, at 36.
\textsuperscript{64} AIRCRAFT OWNERS AND PILOTS ASSOCIATION AIR SAFETY FOUNDATION REPORT No. 88-2148.
\textsuperscript{65} Jury Awards $5 Million, supra note 63, at 36.
cal conditions while flying under visual flight rules. The pilot’s family filed suit against Cessna alleging that the tail of the plane had been improperly designed. A North Carolina jury awarded the plaintiffs $5 million.


A commercial operator of a twin-engine Mitsubishi MU-2 was transporting five passengers on a short trip between two airports in the Chicago metropolitan area when the pilot flew into icing conditions. The aircraft stalled and failed to recover. The NTSB determined the crash was caused by pilot error. The families of two passengers filed suit against the manufacturer and the operator of the aircraft, alleging that the manufacturer failed to adequately warn and provide operating instructions regarding the hazards of in-flight icing.

Following a two-month trial, the jury awarded the survivors of one passenger $55 million and the survivors of the other passenger $7.55 million. The jury apportioned the damages 35% to the manufacturer, Mitsubishi, and 65% to the aircraft’s operator.

F. Hill v. Piper

Piper received a favorable jury verdict after spending almost $1 million defending itself in two years of litigation stemming from a Super Cub which was crashed by a pilot who tested positive for cocaine use.
G. *Harper v. Elano Corp.*

A pilot flying a Cessna 152 from Tennessee to Louisiana on a clear day ran out of fuel and crashed.\(^75\) Three hours after the crash, the pilot’s blood alcohol level was 0.2 percent.\(^76\) Cessna and a number of component manufacturers were sued for $4.5 million.\(^77\) After four years of litigation, the parties settled the suit for $50,000.\(^78\)

H. *Fernandez v. Ford Motor Co.*

A Piper Navajo crash-landed on the northbound lanes of a California freeway. Hours after the crash, a motorist travelling on the southbound lanes slowed down to “rubberneck” at the crash scene and was rear-ended by another motorist.\(^79\) Piper was sued for creating an attractive nuisance.\(^80\)

III. THE INDUSTRY IS CRIPPLED

A. The State of General Aviation in the 1990s

By the 1990s, the American general aviation industry was on the verge of death. In 1992, American manufacturers produced only 510 single-engine aircraft.\(^81\) No Skyhawks were built; Cessna had determined the products liability environment was too hostile and stopped producing single-piston engine aircraft in 1986.\(^82\) Piper, another industry giant, was forced into bankruptcy by tort judgments.\(^83\) The

\(^75\) Id. at 9.
\(^76\) Id.
\(^77\) Id.
\(^78\) Id.
\(^79\) E. Glenn Parr, Address Before the National Commission to Ensure a Strong Competitive Airline Industry (June 4, 1993).
\(^80\) Id.
\(^82\) Meyer, *supra* note 3, at 1. Cessna Chairman and CEO, Russell W. Meyer, Jr., stated that “this unlimited exposure to litigation is the sole reason . . . that Cessna closed its single engine production lines in 1986, and it’s the sole reason those lines are still closed.” Id.
\(^83\) See *House Hearings*, *supra* note 4 (statement of Charles Suma, President and CEO, Piper Aircraft Corp.).
price for single-engine aircraft of the same general size and complexity of a Skyhawk exceeded $130,000 in 1994. The single largest cost component in such general aviation aircraft was the cost of products liability lawsuits.

While most suits were resolved in favor of manufacturers, the cost of defending such suits during the 1980s was tremendous. From 1976 to 1986, paid claims, defense costs, and expenses for three leading general aviation manufacturers rose from $24 million to $210 million a year.

In theory, products liability is designed to allocate the costs of accidents to insurers of product manufacturers and consumers of goods involved, rather than accident victims. In practice, insurers are generally no longer willing to write policies for manufacturers. Consumers cannot afford the cost of general aviation products that include "passed through" product liability costs, and claimants receive, by one estimate, less than seventeen percent of the money spent to defend and pay products liability claims.

Piston Airplanes in Production 1994, PRIVATE PILOT, May 1994, at 62-63. The least expensive American built, all metal, four-seat fixed gear aircraft in production in May 1994 was the Piper Warrior II with a base price of $128,800. The only other aircraft produced in this country were two more powerful (and more expensive) versions of the Warrior and the American General Tiger, which had a base price of $139,400. Id. at 62-63.

Parr, supra note 79.

Martin, supra note 1, at 484-85. At the request of the House Aviation Subcommittee of the Public Works and Transportation Committee, Beech Aircraft analyzed 203 lawsuits filed during a four-year period in the mid-1980s regarding general aviation accidents. All the accidents involved in the study were investigated by the NTSB, the FAA, or both. These investigations concluded pilot error was responsible for 118 of the 203 accidents. Maintenance and weather accounted for another 43 of the accidents. The investigations indicated that none of the 203 accidents were caused by design or manufacturing defects. Nevertheless, the average amount claimed in each of these lawsuits was $10 million, and the average cost to Beech was $530,000 per accident. Id. at 485-86.

Epstein, supra note 8, at 646-48. Epstein sharply criticizes the theoretical founders of products liability law for naively assuming that private insurance would always be available to manufacturers to shoulder the burden of losses allocated through products liability. This assumption fails to consider the consequences that may result from the gradual uninsurability of certain products. "Today we have enough experience with products liability to know that the legal rules can make certain types of risks uninsurable and hence certain types of products unmarketable." Id. at 648.
B. INSURANCE IS GENERALLY UNAVAILABLE TO MANUFACTURERS

Insurers have left the industry en masse. In the early 1970s, the first few major punitive damages awards, combined with a sharp increase in passenger air traffic, created a perception of increased aviation risk among insurers that coincided with an increased demand for aviation coverage.88 Premiums were set high, and when expected losses did not immediately occur, insurers made significant profits.89

In the meantime, the "new tort law" emerged in other segments of the economy such as medical malpractice.90 Aviation insurance was perceived as a relatively low risk market and many insurers entered the market.91 Competition grew for available premiums.92

While this competition drove insurance premiums down, jury verdicts and defense costs started their upward spiral.93 The premiums collected were insufficient to cover expenses and losses incurred in fast-growing products liability suits.94

In 1985, the world insurance market began to withdraw products liability coverage for the American general aviation industry.95 As one Lloyd's aviation underwriter stated, "[w]e are quite prepared to insure the risks of aviation, but not the risks of the American legal system."96 By 1987, Piper was entirely uninsured, Cessna was uninsured for the first $100 million of annual losses and defense costs, and Beech was self-insured for the first $50 million in losses and defense costs annually.97

88 Parr, supra note 79.
89 Id.
90 Id.
91 Id.
92 Id.
93 Parr, supra note 79.
94 Id.
95 Martin, supra note 1, at 483.
96 Id. at 483-84.
97 Id. at 484. By 1987, the major manufacturers calculated their costs for products liability per general aviation product unit ranged from $70,000 to $100,000. Id.
C. THE MARKET CAN NO LONGER SUPPORT THE COSTS OF PRODUCTS LIABILITY

Once the insurance industry left general aviation, the only remaining source of risk sharing was the general aviation consumer. Fueled by mounting products liability losses, increases in general aviation product prices far outstripped inflation.\(^9\)

Each attempt to pass along the escalating litigation costs to consumers pushes the price of general aviation products further out of the reach of consumers. Increased litigation costs regarding previously manufactured products are recovered by manufacturers through increasing new aircraft prices.\(^9\) Ironically, because most consumers cannot afford or justify the increased costs of new aircraft, they increasingly rely on previously manufactured products.\(^9\)

While it may have been feasible for consumers to pay their share of products liability insurance when the industry was producing over 10,000 single-engine aircraft per year, consumers cannot conceivably bear the entire weight of ever-increasing products liability losses and defense costs spread among less than 600 single-engine aircraft produced annually.

Some commentators have suggested the central function of products liability is to compensate victims.\(^10\) Neither current tort liability schemes, nor proposed alternative

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\(^9\) See Thomas G. Donlan, *Falling from the Sky: Unlimited Liability Claims Destroy an American Industry*, BARRON'S, Feb. 21, 1994, at 10. In the last 20 years, consumer prices have tripled, car prices have quadrupled, personal technology prices have drastically fallen, and general aviation prices have increased eight to ten times. *Id.*

\(^9\) Martin, *supra* note 1, at 483.

\(^10\) *Id.*

Arlen, *supra* note 13, at 1116-17. Based on the conclusion of Professor Rabin (his alternative compensation system is critiqued by Professor Arlen) that the central function of products liability is to compensate victims, Professor Arlen concludes that such compensation is "best viewed as a mandatory insurance policy because manufacturers pass their expected liability costs on to consumers in the form of higher product prices." *Id.* at 1117.
compensation schemes, fulfill this victim compensation role as effectively as first-party insurance.\textsuperscript{102}

Furthermore, the lengthy duration between the manufacture of a product and the manifestation of a product defect through resulting injury degrades the ability of products liability to serve as a conduit for victim compensation.\textsuperscript{103} Commentators theorize that if the time between manufacturing and manifestation of the liability becomes too great, manufacturers will be unable to estimate their product’s liability costs and incorporate such costs into the price of the product.\textsuperscript{104} Therefore, manufacturers will be unable to pass along costs for liability of used products to consumers of new products.\textsuperscript{105} This theory precisely describes the situation in which general aviation manufacturers currently find themselves. Not only has products liability failed to effectively compensate victims of general aviation accidents, it has also failed to deter unnecessary risk or encourage safety improvement: two goals of the tort system.

\textbf{D. Products Liability Slowed General Aviation Safety Improvement}

One of the primary arguments made in favor of products liability is that such tort innovations promote product safety.\textsuperscript{106} Specifically, some commentators consider one of

\textsuperscript{102} Id. Professor Arlen suggests that first-party insurance, as a solution to product related injury, is a more equitable solution than the existing tort scheme or the alternative compensation scheme proposed by Professor Rabin because it does "not favor victims of product-related injuries over other victims, and . . . because the administrative costs of first-party insurance are considerably lower than the administrative costs of a compensation system." Id.

\textsuperscript{103} Id. at 1119.

\textsuperscript{104} Id.

\textsuperscript{105} Id. Professor Arlen compares the dilemma to a system of first-party insurance where insurance providers need only look at a consumer’s potential risks in a given policy year to calculate premiums, and need not concern themselves with potential latent liability in previously manufactured products. Id.

\textsuperscript{106} See Schwartz, supra note 18, at 1354. Dean Schwartz suggests that limiting liability for punitive damages in cases involving regulated products may remove an important incentive for product safety. Id. See also Martin, supra note 1, at 492.

If enforcement of strict liability through civil litigation against the manufacturers of general aviation airplanes will indeed effectively deter 'accident-causing behavior,' through resort to innovation and
the most important aspects of the tort system to be the prospect of tort liability as an incentive for manufacturers to obtain and reveal information about a product's risks. Economic analysis, however, suggests that deterring risk is not a valid concern of products liability law because market forces will ensure both that manufacturers use optimal care in production and that the production level is efficient.

Between 1950 and 1959, the number of fatal general aviation accidents declined by 1.6 to 3.5 fatal accidents per 100,000 flight hours. Modern products liability had not yet been developed during this period. Between 1959 and 1969, when only a handful of products liability cases had surfaced, the fatal accident rate dropped by another .95 to 2.55 fatal accidents per 100,000 flight hours. Between 1969 and 1979, when products liability began gaining acceptance, the fatal accident rate dropped another .92 to 1.63 per 100,000 flight hours. Once products liability became firmly established in the 1980s, the fatal accident rate declined by only .23 per 100,000 flight hours.

Since 1980, designers have abandoned a number of safety-related general aviation improvements out of fear of the products liability exposure their introduction to the market would create. Engineers and managers, who would otherwise assist in new product development, have

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107 Arlen, supra note 13, at 1120-26.
108 Id. at 1116.
109 Martin, supra note 1, at 493.
110 Id.
111 Id.
112 Id.
113 Id.
114 See The General Aviation Revitalization Act of 1993: Hearings on H.R. 3087 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation, 103d Cong., 1st Sess. (1993) (statement of Frederick B. Sontag). Sontag, President of Unison Industries Inc., a manufacturer of ignition components for light aircraft, testified that Unison scrapped an advanced electronic ignition project for light aircraft because the company was afraid of the liability risk. Id.; see also Parr, supra note 79, at 4. New general aviation products, which have not been introduced due to
increasingly assisted in the defense of products liability lawsuits, or have been laid off as production dropped.115

IV. PROPOSALS FOR REFORM

A. The Statute of Repose

On August 17, 1994, President Clinton signed an eighteen-year national statute of repose for general aviation products.116 A statute of repose sets a time limit for filing suit regarding a product after the product is manufactured.117 This is contrasted with a statute of limitations, which sets a time limit for filing suit after an injury has occurred.118

The statute of repose will be especially beneficial to general aviation manufacturers due to the nature of their products. Unlike cars or appliances, airplanes are routinely in use thirty or forty years after they are manufactured.119

products liability fears, include flight training aircraft, heads-up display for critical flight instruments, and engines that improve fuel and weight efficiencies. Id.

115 See Martin, supra note 1, at 482. By 1977, engineers and managers for Beech, Cessna, and Piper were increasingly involved in defending their respective employers in product liability lawsuits. Id. at 482; Parr, supra note 79, at 3. Company engineering experts are diverted from new products design to participate in the litigation process, including researching document files, giving depositions, and testifying in court. Id.; Meyer, supra note 3, at 2. Between 1965 and 1982, Cessna invested $20-$25 million each year in research and development. Cessna halted piston engine research and development in 1986 but has since spent $20-$25 million each year defending products liability cases. Id.

116 See The Revitalization Act, supra note 21. The full text of the Act appears as Appendix 1 to this article.

117 Id.; see also Parr, supra note 79, at 21-23.

118 See BLACK'S LAW DICTIONARY 927 (6th ed. 1990). A statute of limitation declares that no suit shall be maintained on a cause of action unless the suit is brought within a specified period of time after the right of action accrues. Id.

119 Martin, supra note 1, at 486-88. Those who formulated strict products liability law failed to account for the distinction between products purchased and used as capital items with a long service life and those products purchased as consumables, with a relatively short life. General aviation aircraft are capital items with a long service life.

Airplanes are complex, expensive high-performance machines designed for the markets into which they are sold, which means that the better, more durable, and reliable the design and construction of a plane are, the more likely it will be a success in the marketplace and the longer it will last once it gets there.

Id. at 487.
1992, the average age of general aviation aircraft in use in the United States was 25.6 years. While an airplane generates no more income for its manufacturer after its initial sale, the airplane presented a practically unlimited products liability risk until destroyed, prior to enactment of the statute of repose. Thus, a Piper Cub manufactured in 1939 presented Piper with virtually the same degree of products liability risk as a brand new plane. Even if the market could support the potential costs of products liability for previously manufactured products, such costs would be virtually impossible to quantify. A virtually limitless "products liability tail" presented an unacceptable risk to most manufacturers, insurers, and lenders.

The current statute of repose provides that civil tort actions arising from general aviation aircraft accidents against

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120 General Aviation Mfr. Ass'n, supra note 81, at 11.
121 Martin, supra note 1, at 487.

With enough units in service in the United States for a sufficient number of years, the annual risk-cost of those units, which can be covered only by additions to the price of new airplanes currently coming down the production line, will at some point put the manufacturer in the position of having to price its products out of the market. The fewer units the manufacturer can sell at product liability-inflated prices, the more it must add to the price of each unit it does sell to cover the risk-cost of the units in service.

Id.

122 See, e.g., Arlen, supra note 13, at 1119. The long lag time between the payment of a products liability premium and the time when the risk is realized may "sever the link between the product price and the insurance provided to such an extent that the products liability insurance market will not be viable." Id.

123 See Parr, supra note 79, at 13-14. Insurance costs depend largely on underwriters' ability to evaluate the risks they insure. For general aviation manufacturers, insurance costs for a particular policy year have been a factor of the size of the fleet built up over the life of the manufacturer (the manufacturers' "products liability tail"). Such costs were not related to the type, nature, or number of products sold in a policy year. Given the longevity of the average general aviation aircraft, it is easy to see how the difficulty in quantifying such a long-term risk led most insurers to leave the general aviation products liability market in the 1980s. Similarly, general aviation manufacturers realized that their company's assets had little or no marketability because any buyer would have to assume the company's products liability tail, which may exceed the value of the company. Likewise, lenders shied away from general aviation manufacturers because of the enormous latent liability presented by the company's products liability tail. "Potential investors in a general aviation manufacturer must consider the likelihood of a collision between a 747 full of neurosurgeons and an airplane built by that manufacturer." Id.
a manufacturer are barred eighteen years after the date of the product’s delivery. The Act defines general aviation aircraft as any aircraft with a seating capacity of fewer than twenty persons which has been certified by the FAA and which was not engaged in scheduled passenger carrying activity at the time of the accident. The repose period is restarted for any new component added to a previously manufactured product. Thus, if a new engine is installed in a twenty-year-old aircraft, the engine manufacturer cannot avail itself of the statute of repose until the engine has been in service for eighteen years.

The statute of repose provides exceptions for instances where a manufacturer is shown to have knowingly withheld relevant and material information that was required to be disclosed to the FAA, and such concealment is causally related to the harm suffered by the plaintiff. The Act also provides exceptions to the statute of repose for passengers on medical or emergency evacuation flights, injury to persons or property on the ground as a result of an aircraft accident, and for actions brought under an otherwise enforceable written warranty. The Act explicitly supersedes any state law to the extent such law permits tort actions regarding the type of accidents to which the statute of repose applies after the expiration of the repose period. The Act trims the products liability tail to a manageable length. Logically if an airplane has operated safely for eighteen years, the airplane was not defectively designed or manufactured.

124 See The Revitalization Act, supra note 21.
125 Id. § 2(c).
126 Id. § 2(a)(2).
127 Id. § 2(b)(1).
128 Id. §§ 2(b)(2)-(4).
129 Id. § 2(d).
130 See Parr, supra note 79, at 21-22. The statute of repose is designed to “free manufacturers from one of their chief burdens: the threat of eternal, open-ended liability for products which long ago passed from their control.” Id.
131 See Donlan, supra note 98, at 10. By the time most general aviation aircraft are 15 years old they have had at least three major engine overhauls and have accumulated 6,000 hours of flying time. “The theory of the statute of repose is that such use ought to demonstrate the safety of the basic design.” Id.
By putting some limit on the risk of liability created by a given product, the statute's proponents hope to resurrect the general aviation industry. Indeed, Cessna's chairman stated that, based on the passage of the statute of repose alone, Cessna will reopen light plane production lines and, in the first year of renewed manufacturing, will build 2,000 single-engine planes, including the venerable Skyhawk.

Plaintiffs can be expected to challenge the constitutionality of the statute of repose, as they have challenged other examples of tort reform. Several states have passed statutes of repose in various fields. Injured parties have challenged the constitutional validity of state statutes of repose on a number of occasions. Many of these challenges have been based on the state and federal constitutional guarantees of due process, equal protection, and access to

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132 See Meyer, supra note 3, at 7 ("Congressional passage of the statute of repose for general aviation aircraft would be the single most important stimulant for the entire general aviation industry.").

133 See Collins, Cessna Boss Talks About the Future, FLYING MAGAZINE, Aug. 1994, at 82-83. Cessna Chairman Russell Meyer stated that Cessna was committed to restart production of piston engine aircraft upon passage of the statute of repose. Cessna will build no less than 2,000 single-piston engine aircraft per year. Meyer estimates such production would include 800 to 1,200 Cessna 172 Skyhawks, 400 to 500 Cessna 182 Skylanes, and 400 to 500 Cessna 206 Stationairs. Id. at 83.

134 See, e.g., ARIZ. REV. STAT. ANN § 12-551 (1991) (stating no products liability action can be commenced and prosecuted if the cause of action accrues more than 12 years after the product was first sold for consumption); COLO. REV. STAT. § 52-577a (1994) (holding no products liability claim may be brought against any party later than 10 years from the date the party last parted with possession of the product); GA. CODE ANN. 99-3-71 (West 1994) (stating no products liability claim may be brought against a manufacturer after 10 years of sale of the product, but does not bar claims of willful, reckless, and wanton disregard for life and property); ILL. REV. STAT. CH. 735 §§ 5/13-214 (1984) (holding no action based upon tort, contract, or otherwise may be brought after 10 years from delivery date to initial user); N.C. GEN. STAT. § 1-52 (1994) (action based on product liability barred after 6 years from sale for initial use or consumption); TEX. CIV. PRO. & REM. CODE ANN. §§ 16.008-.009 (Vernon 1978) (no action against architects, engineers, or others who build improvements to new property may be brought after 10 years).

the courts. Generally, state courts have upheld statutes of repose as constitutional.

B. Federal Preemption

Congress specifically mandated that the FAA regulate the design, manufacture, maintenance, and operation of all aircraft in the United States. The FAA has set strict standards to ensure compliance with its congressional mandate. Indeed, the design and manufacture of all classes of airplanes are among the most closely regulated of all American industries. Safety is the primary objective of this regulatory scheme. Manufacturers spend millions of dollars ensuring that their products comply with these regulations.

Despite the obvious national interest in regulating airborne commerce and ensuring the safety of air travel, the widely varying common law and statutory tort schemes of the fifty states have had a crushing impact on the design and manufacture of general aviation products. This im-

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137 See generally note 136.

138 See 49 U.S.C. §§ 1348, 1421; see also Martin, supra note 1, at 488.

139 See Martin, supra note 1, at 488; see also 14 C.F.R. §§ 23, 33, 35 (1994).

140 Martin, supra note 1, at 488.

141 See 49 U.S.C. §§ 1348, 1421.

142 See Martin, supra note 1, at 488.

143 See Parr, supra note 79, at 18-19. "General aviation products are designed, manufactured, operated and maintained in accordance with uniform federal standards, but product liability is determined by the unique procedural and substantive legal rules of the fifty states, the District of Columbia and the federal courts." Id. at 18; see also Kenneth P. Quinn, Address at the Lawyer Pilot Bar Association Annual meeting (Aug. 23, 1991) (copy on file with the authors). Quinn, chief counsel for the FAA, remarked that "while general aviation remains strong, it has been buffeted by severe turbulence whose source is a civil justice system that is spinning out of control." Id.
pact clearly thwarts the federal statutory and regulatory scheme to promote safe air travel.\footnote{Parr, supra note 79, at 8-9, \textit{citing} Brief for United States of America as amicus curiae at 1-2, Cleveland v. Piper Aircraft Corp., No. 91-2065 (10th Cir. 1992) (opinion of the court reported at 985 F.2d 1438). "Air commerce...cannot remain safe and continue to grow if every plane that rises into the airways is subjected to a multitude of different—and potentially conflicting—state standards of care." \textit{Id.}}

It has been suggested in both legislative and judicial forums is that existing laws and regulations concerning aviation should preempt state tort law in the area.\footnote{See \textit{Cleveland}, 985 F.2d at 1441-47. The Tenth Circuit rejected the preemption arguments that Piper and the United States made in \textit{Cleveland}. \textit{Id.} \textit{See also} Public Health Trust of Dade County v. Lake Aircraft, Inc., 992 F.2d 291, 292-95 (11th Cir. 1993) (following the Tenth Circuit rejection of preemption argument on \textit{Cleveland}).} This approach to tort reform would be similar to the federal preemption of state tort law concerning employee group insurance and retirement plans by ERISA.\footnote{See also \textit{General Aviation Accident Liability Standards Act of 1993}, H.R. 67, 103d Cong., 1st Sess. (1993). The General Aviation Accident Liability Standards Act of 1993 would have superseded any state law regarding recovery for harm arising out of a general aviation accident to the extent that the Act established a rule of law or procedure applicable to such a claim. \textit{Id.}}

\section*{C. Airworthiness Directive Incompliance Defense}

The airworthiness directive is one of the methods that the FAA uses to ensure the safety of aircraft long after they are initially manufactured.\footnote{See Employee Retirement Income Security Act, 29 U.S.C. \textsection 1144(a)-(b) (1988); Pilot Life Ins. Co. \textit{v.} Dedeaux, 481 U.S. 41, 57 (1987) (stating ERISA preempts state common law actions based on bad faith by an insurance company); Hermann Hosp. \textit{v.} MEBA Medical & Benefits Plan, 845 F.2d 1286, 1290 (5th Cir. 1988) (holding ERISA preempts all state law claims that relate to any employee benefit plan.)} If the FAA determines that a potential safety problem arising from a component of a certain type of aircraft exists, the FAA can issue an airworthiness directive to the owners and mechanics who maintain such aircraft describing the potential problem, indicating how to detect the problem, and suggesting a method for remedying the problem.\footnote{See, e.g., \textit{Clarke}, supra note 26, at 97. When an unforeseen problem arises in a particular make or model of aircraft following the manufacturing process, the FAA can issue airworthiness directives with requirements for inspection, service, repair, and occasionally the replacement of affected components to remedy the problem. \textit{Id.}}
Depending on venue, it is currently of little or no consequence in a products liability action that the owner of an aircraft failed to comply with an airworthiness directive.\textsuperscript{149} At least one unsuccessful general aviation products liability bill proposed that the failure to comply with an airworthiness directive should constitute a defense or bar to a subsequent products liability suit against the manufacturer.\textsuperscript{150}

For example, if the FAA issued an airworthiness directive indicating that the landing gear of a certain type of aircraft developed cracks after five thousand hours of use, then indicated how to detect the problem, and suggested how to remedy the situation, and the owner of such an aircraft failed to have his aircraft inspected and repaired in accordance with the airworthiness directive, the manufacturers of the aircraft could assert such a failure to comply as a defense to a products liability action following an accident caused by the problem.

\textbf{D. Comparative Fault}

The concept of comparative fault developed contemporaneously with the products liability explosion.\textsuperscript{151} The theory behind comparative fault is that damages should be awarded based on one's degree of fault in causing damages, as compared with others who have similarly caused the same damages.\textsuperscript{152} Thus, the payment of damages awarded is allocated among liable defendants based on their respective degrees of fault, and such damages are reduced in pro-

\textsuperscript{149} See Parr, supra note 79, at 16. Courts in many states instruct juries that a pilot's negligence is irrelevant in a strict liability action because strict products liability is determined without regard to fault. Id.


\textsuperscript{151} See WILLIAM L. PROSSER ET AL., TORTS 576 n.1 (8th ed. 1988). By the mid-1960s, only six states had adopted some form of comparative negligence. Between 1965 and 1986, however, an additional 36 states adopted some form of comparative fault. Id.

\textsuperscript{152} See Prosser, supra note 151, at 577-84 (discussing various systems of comparative fault and problems associated with such systems); BLACK'S LAW DICTIONARY 989-93 (6th ed. 1990).
portion to the plaintiff's own degree of fault. Many states, however, do not allow consideration of a plaintiff's actions in causing his or her own damages where liability is based on strict products liability. The theory behind such practice is that strict products liability is liability based solely on the nature of a product without regard to fault.

In practice, however, the failure to consider a plaintiff's conduct leads to clearly inequitable results. In Cleveland v. Piper the pilot of a Super Cub and his mechanic made significant alterations to the Cub's seating, which surely could not have been foreseen by Piper, and then attempted an ill-advised take-off over a van that was intentionally parked in the middle of the runway by the airport owner. All of these actions were clearly direct causes of the damage resulting from the crash. Because the plaintiff sued Piper under a strict products liability theory, however, the jury could only consider the actions of Piper and the pilot in assessing liability for "crashworthiness" negligence.

Approximately eighty-five percent of general aviation accidents are caused, at least in part, by pilot error. If manufacturers were uniformly able to present evidence of such

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153 Id.

154 See Prosser, supra note 151, at 783 n.6. The various comparative fault systems adopted by the states, either judicially or legislatively, were confined to negligence. Arkansas was the first state to expand comparative negligence to comparative fault and specifically apply the concept of comparative fault to strict products liability cases. Id. As of 1986, 30 states applied comparative fault to products liability cases. Id.

155 See, e.g., Parr, supra note 79, at 16. "The courts reason that strict liability is a means of compensating persons injured by defective products regardless of whether the manufacturer was negligent; therefore, it is equally unnecessary to consider the negligence of the plaintiff". Id.

156 See Cleveland, 890 F.2d at 1546.

157 Id. at 1542.

158 Id. at 1574. The Tenth Circuit found the trial court's failure to allow consideration of the fault of the driver of the van and the mechanic, who removed the Super Cub's seat and replaced it with the wooden bench and camera mount, constituted error and remanded the case for a retrial in which the culpability of each tortfeasor involved would be compared. Id. at 1556.

159 See Parr, supra note 79, at figure 3. Pilot error caused or contributed to 84.7% of general aviation accidents from 1983-1987. In 1988, the figure rose to 85.1% Id.
error in products liability suits, the exposure presented by such suits could be significantly reduced.

E. PUNITIVE DAMAGES

Perhaps the greatest threat posed to American industry by "the new tort law" is the threat of punitive damages. By definition, such damages do not compensate a plaintiff for damages caused by a defendant or a defendant's product, but instead are intended to punish and make an example of a defendant for certain types of aggravated conduct. While the United States Supreme Court has indicated that there are constitutional limits to such damages, these limits have yet to be defined. As a result of such

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TORT REFORM

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160 See Schwartz, supra note 18, at 1357-58 (1993). Tort reform proponents cite punitive damages as a central problem in the American tort system. Demands for punitive damages are perceived to be routine, and awards of punitive damages appear to have drastically increased over the last decade. Id.

Tort reform critics respond by merely denying the legitimacy of such concerns. Instead, such champions of punitive damages maintain that "punitive damage awards are indeed rare in frequency and moderate in amount." See Burrows, supra note 13, at 442.

As suggested by the general counsel of the Aircraft Owners and Pilots Association:

[i]f the manufacturers perceive a problem and withdraw from the manufacture of aviation products, if new entrants are deterred from the marketplace because of a perceived problem, if insurance companies are unwilling to write coverages or must charge premiums too expensive for the manufacturers because of a perceived problem, then it is not important whether the problem is real. The perception is real. And the unavailability of aviation products is real.

Yodice, supra note 24.

161 See, e.g., Shores, supra note 11, at 70. "Punitive damages are necessary as a civil form of punishment because they serve as a method of punishing behavior that society condemns ... ." Id.

162 See TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2720-24 (1993). In TXO Prod. Corp., the Court acknowledged that the Due Process Clause of the Fourteenth Amendment imposes substantive limits on punitive damages. Id. at 2718. The Court indicated, however, that it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable to fit every case." Id. at 2720 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)). The Court instead indicated that factors such as a general concern for reasonableness, the relationship of punitive damages to actual damages, and the potential harm that might result from the defendant's conduct should be considered in determining the constitutionality of a punitive damage award. Id. at 2720-22.

See also Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994). The Court found Oregon's appellate scheme unconstitutional because it only allowed an appellate
limitless exposure, products liability lawsuits present a wholly unpredictable risk to industry, a lottery-like windfall to victims and survivors of accidents who are awarded such damages, and a tremendous economic incentive to plaintiffs’ attorneys to strive for punitive damages in any given case. Legal commentators have proposed various methods of restricting the inequitable effect of punitive damages, some of which have been adopted at the state level. Any of these punitive damage reform concepts would offer invaluable breathing room to the ailing general aviation industry.

1. Limiting Punitive Damages

One of the most common punitive damage reform proposals is to place a limit on recoverable punitive damages. A number of states have experimented with such limits. Punitive damage limits can be either a fixed court to review an award of punitive damages if no evidence existed to support the award. Id. at 2341. The Court noted that “[p]unitive damages pose an acute danger of arbitrary deprivation of property.” Id. at 2340. Specifically, the Court stated that the imposition of punitive damages “is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment.” Id. at 2342.

163 See Parr, supra note 79, at 14. “A lender of working capital may be impressed with the manufacturer’s order book… but there is no guarantee that a $60 million liability expense will not occur in any one case.” Id.

164 See, e.g., Shores, supra note 11, at 89-90. Judicial and societal concerns regarding the windfall effect of punitive damages appear in cases reported as early as 1877. Id. at 89.

165 See Burrows, supra note 13, at 446. Punitive damage proponents contend that “[w]ithout the incentive of punitive damages, the ‘emotional and financial stress’ of suing may prevent many tort victims from bringing suit.” Id.; see also Schwartz, supra note 18, at 1354-55. Punitive damage proponents also contend that any limitation on the availability of punitive damages (such as those proposed for general aviation aircraft) would adversely affect plaintiffs’ ability to obtain settlements because the availability of punitive damages, even in cases in which they are unlikely to be awarded, gives plaintiffs additional clout to negotiate settlements. Id.

166 See Shores, supra note 11, at 85-87 (discussing various methods that states have employed to limit the availability of punitive damages).

167 Id.; COLO. REV. STAT. ANN. § 13-21-102 (West 1989) (stating that punitive damages are limited to amount equal to actual damages, however, court has discretion to award up to three times actual damages in certain cases); FLA. STAT. ANN. ch. 768.73 (Harrison Supp. 1994) (holding that punitive damage awards are presumptively limited to three times actual damages); TEX. CIV. PRAC. & REM. CODE ANN. § 41.001-.008 (Vernon Supp. 1994) (stating exemplary damages are limited to the greater of four times actual damages or $200,000 in cases involving fraud or gross negligence).
amount of damages recoverable, an amount fixed as a ratio of actual damages awarded, or some combination of these formulae.\textsuperscript{168}

Some states have tried more novel methods to limit punitive damage awards. Kansas passed legislation limiting punitive damages in medical malpractice cases to the lesser of twenty-five percent of the defendants' highest gross annual income during the five years preceding the tort, or three million dollars.\textsuperscript{169} Georgia passed a law limiting punitive damages to the first plaintiff who brought suit against a given defendant for a particular wrongful act.\textsuperscript{170}

General limits on punitive damage awards have been criticized as an inefficient means of deterrence.\textsuperscript{171} Such generalized caps fail to consider the particular circumstances of individual cases.\textsuperscript{172} Thus, a general limitation on punitive damages may allow exceedingly harsh awards in some cases, while only permitting relatively insignificant awards in others.\textsuperscript{173}

2. Redirecting Punitive Damages

Punitive damage redirection would give all or part of punitive damages awarded to the state.\textsuperscript{174} The theory behind this proposal is since punitive damages are, by definition, not intended to compensate a plaintiff for any actual loss, a plaintiff would not be deprived of any property rights by

\textsuperscript{168} See Shores, supra note 11, at 85-87.
\textsuperscript{169} Id. at 86-87. See KAN. STAT. ANN. § 60-3402 (Supp. 1994). Kansas' punitive damage limitation was held unconstitutional in Kansas Malpractice Victims Coalition v. Bell, 757 P.2d 251 (Kan. 1988).
\textsuperscript{171} See Shores, supra note 11, at 87.
\textsuperscript{172} Id.; See also TXO Prod. Corp., 113 S. Ct. at 2721-22. (stating that constitutional review of punitive damage award should not concentrate entirely on relationship between actual and punitive damages).
\textsuperscript{173} Id.
\textsuperscript{174} See generally Burrows, supra note 13. By 1992, at least nine states enacted "state extraction statutes" mandating that varying portions of punitive damage awards be awarded to the state or a subdivision of the state. Id. at 458 n.6.
By redirecting punitive damages, the risk of an unjustified windfall is reduced and the economic incentive to overevaluate a case and overstate a defendant's potential liability is removed. Since a plaintiff would not personally benefit from a punitive damage award, in theory, plaintiffs and plaintiffs' attorneys would only seek such an award out of sincere indignation at an aggravated wrong, as opposed to personal financial gain.

It has also been suggested that trial judges could use their inherent power to redirect punitive damage awards to public or charitable funds that they deem appropriate, even without legislation specifically directing them to do so.
Theoretically, plaintiffs would have no basis to complain of such an order because constitutional rights would not be implicated.\(^{178}\)

3. **Barring Punitive Damages After Showing of Regulatory Compliance**

Some commentators and legislators have drawn a distinction between most negligence and strict products liability claims and those that involve products that are subject to federal regulation and approval.\(^{179}\) One proposal is to limit or bar punitive damages in cases involving heavily regulated products. The rationale behind a regulatory compliance punitive damage ban is that stringent regulatory programs, such as those applied to drug and aircraft manufacturers, fulfill the goals of punitive damages by assessing punishment where appropriate, and deterring noncompliance. Thus, subsequent punitive damage assessments are redundant.\(^{180}\) Where manufacturers are subject to punishment and deterrence through both regulatory schemes and the threat of common law punitive damages, the result can be “overdeterrence” by which manufacturers are discouraged from producing any products.\(^{181}\) While a regulatory compliance punitive damage ban was incorporated in at least one comprehensive federal products liability reform bill,\(^{182}\) the measure was not enacted.

4. **Eliminating Punitive Damages**

The most drastic of punitive damage reform concepts is the complete elimination of punitive damages. While the elimination of punitive damages might constitute the most popular tort reform proposal among manufacturers, con-

\(^{178}\) See id. at 91. But see supra notes 134-35.

\(^{179}\) See Schwartz, supra note 18, at 1336-38.

\(^{180}\) Id. at 1337.

\(^{181}\) Id.

\(^{182}\) See Product Liability Fairness Act, S. 640, 102d Cong., 1st Sess. (1991); see also Schwartz, supra note 18, at 1336-38.
gressional passage of such a drastic measure is not politically feasible.\(^{183}\)

**F. DEGREES OF PROOF**

As American tort law evolved, plaintiffs were required to prove their cases by a preponderance of credible evidence in order to establish liability.\(^{184}\) One partial solution to the inequities created by recent tort trends would be to increase the standard of proof necessary to establish liability for punitive damages or strict liability.\(^{185}\) A plaintiff seeking to establish the liability of a general aviation manufacturer under strict products liability or the award of punitive damages might be required to prove his or her case by clear and convincing evidence as opposed to the mere preponderance of evidence necessary to establish negligence.\(^{186}\)

\(^{183}\) As of 1992, New Hampshire, Louisiana, and Nebraska had legislatively eliminated punitive damage awards. See N.H. REV. STAT. ANN. § 507:16 (Supp. 1991); Ricard v. State, 390 So. 2d 882, 885 (La. 1980), overruled by Booze v. City of Alexandria, 637 So. 2d 91 (La. 1994); Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989); see also Shores, supra note 11, at 87-88. The vociferous criticism and general failure of far less drastic federal tort reform measures suggest that a punitive damage ban would be politically inviable. Furthermore, most legal commentators agree on the general benefit of the punishment and deterrence goals of punitive damages, and instead disagree on the most equitable methods for their implementation.

\(^{184}\) See, e.g., BLACK'S LAW DICTIONARY 1182 (6th ed. 1990).

\(^{185}\) Alabama, California, Georgia, Minnesota, Montana, and Oregon have adopted the clear and convincing standard of evidence required to prove entitlement to punitive damages. ALA. CODE § 6-11-20 (Supp. 1994); CAL. CIV. CODE § 3294 (West Supp. 1994); GA. CODE ANN. § 51-12-5.1 (Michie Supp. 1994); MINN. STAT. ANN. § 549.20(1) (West Supp. 1994); MONT. CODE ANN. § 27-1-221(5) (1991); Oberg, 114 S. Ct. at 2333. Florida and Oklahoma have adopted modified clear and convincing standard requirements. FLA. STAT. ANN. ch. 768.73 (Harrison Supp. 1994); OKLA. STAT. ANN. tit. 23, § 9 (West 1987). Colorado has adopted a "beyond a reasonable doubt" burden of proof regarding punitive damages. COLO. REV. STAT. ANN. § 13-25-127(2) (West 1989). See also Shores, supra note 11, at 88.

G. Attorney's Fees

1. Contingency Fees

After punitive damages, contingency fee contracts are perhaps the most often criticized component of American tort law.\(^{187}\) Until recently, contingency attorney fee contracts were considered unethical.\(^{188}\) Indeed, most other industrialized nations do not allow contingency contracts.\(^{189}\) On the one hand, the contingency fee contract empowers a plaintiff who could not otherwise afford legal representation to obtain such representation based on the strength of his or her lawsuit.\(^{190}\) On the other hand, contingency fee contracts clearly give a plaintiff's attorney a personal financial interest in the outcome of such actions.\(^{191}\) The more money that can be squeezed out of any given case from every available source, the more money a plaintiff's attorney will recover.

The most drastic reform of contingency fee contracts would be to eliminate such arrangements. Once again, such a measure would likely be politically unfeasible and potentially unconstitutional. More reasonable reform concepts might include reducing allowable contingency fee percentages, restricting contingency fee recovery to a percentage of compensatory damages awarded, or limiting

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\(^{187}\) See, e.g., Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813 (1989) ("Contingent fees for attorneys traditionally have been the subject of derision. Critics have long complained that contingency contracts stir up litigation . . . over-compensate counsel and produce sharp practices by plaintiffs' lawyers . . . .")


\(^{189}\) Id.

\(^{190}\) Jay, *supra* note 187, at 814. "Studies by economists demonstrate that 'a substantial number of low and middle-income plaintiffs would be deterred from filing even meritorious claims in the absence of contingent fees . . . .'" Id. (citing P. Danzon, *CONTINGENT FEES FOR PERSONAL INJURY LITIGATION* 39 (1980)); see also Birnholz, *supra* note 188, at 953. The justification for contingency fees is that they allow those who lack the means to pay a lawyer's hourly fees access to the courts. Thus, even the poorest litigants may obtain legal representation. Id.

\(^{191}\) See Jay, *supra* note 187 ("A long held belief about contingent fees is that they provide plaintiffs' lawyers with an incentive to file frivolous claims and to employ sharp practices in processing lawsuits."). Id. at 878.
plaintiffs' attorneys to an hourly fee in cases that are settled within a short period after suit is filed.\textsuperscript{192}

2. Defense Fees

While plaintiffs attorneys' contingency fees may draw the lion's share of attention from tort reform proponents, the general aviation industry might benefit as much or more from reformation of the way in which defense fees are paid.\textsuperscript{193} While much of the increase in attorneys' fees and litigation costs paid by general aviation manufacturers is attributable to both the increased number and the increased risk of products liability suits, the attorney fee arrangements themselves will likely be subject to close scrutiny as the industry struggles to revitalize itself.

Over the last four to five years, many industries have attempted to check their escalating litigation expenditures.\textsuperscript{194} Defense firms face mounting pressure to reduce billing rates, reduce the number of attorneys who work on a given case, provide more detailed accounting for fees billed, and to bear a greater share of costs such as clerical support and photocopying. Many industries, including the general aviation industry, may need to turn to law firms who are able to provide such modified billing arrangements in order to reduce overall losses attributable to litigation.

H. Targeting the Frivolous Suit

In many respects general aviation has been harmed more by having to defend patently frivolous lawsuits in which the plaintiff ultimately recovers nothing than by the relatively

\textsuperscript{192} See, Birnholz, \textit{supra} note 188, at 979-83. \textit{See also} Susman, \textit{supra} note 176, at 8. Susman explains that commercial plaintiffs routinely negotiate modified contingency fee contracts that lessen the likelihood of attorney windfall in instances of early settlement and suggests that the plaintiff's bar might improve its public image by making such allowance for any client, regardless of bargaining power. \textit{Id.}

\textsuperscript{193} See \textit{Liability Reform, supra} note 50, at 4 (noting the excessive costs aircraft manufacturers have been forced to pay for legal defense). Insured and uninsured costs associated with defending products liability cases account for a large portion of the skyrocketing products liability burden borne by the general aviation industry.

few cases in which plaintiffs are awarded large recoveries. Some tort reform concepts are designed to allow more efficient resolution of patently frivolous claims, such as those previously cited examples wherein crashes were caused by pilots under the influence of drugs or alcohol.

For example, one common suggestion for coping with the costs of defending frivolous lawsuits is to award reasonable attorneys' fees to the prevailing party. In theory, the party who insists on drawing a meritless lawsuit out over several years before taking it before a jury would bear the costs of such a decision. In practice, however, such a mechanism would probably fail. Absent a favorable verdict, the average plaintiff is not capable of paying his or her own attorneys' fees, and cannot reasonably be expected to pay the hundreds of thousands of dollars routinely expended in defense of products liability suits.

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195 See, e.g., Martin, supra note 1, at 482-83. Beech conducted a study of insurance and defense costs during a 58-month period during the mid-1970s. This study revealed that, of the $18 million Beech spent insuring and defending against products liability claims, approximately 16.6% of the amount spent was actually paid to claimants. Beech obtained favorable verdicts in 80% of the cases brought to trial. The tort litigation system produced "an extravagant award in some aviation cases, a reasonable award in a few cases, and no recovery at all in most cases." Id.

196 See Goerdt, supra note 14, at 16. In February 1992, Vice President Dan Quayle's office released the Civil Justice Reform Model State Amendments, which embodied a number of tort reform proposals including the loser pays attorneys' fee rule. As included in the model amendments, this rule requires the non-prevailing party to pay the attorneys' fees of the prevailing party, which may not exceed their own attorneys' fees, and can be limited by the judge if the amount of fees is deemed unjust. The amendment would require all attorneys to keep accurate hourly records of efforts on any given case.

197 Id.

198 Id. Many commentators express concern that plaintiffs would generally be deterred from filing lawsuits if there is a chance they will have to pay their opponent's fees. Some commentators have suggested that the loser pays rule effectively raises the burden of proof placed on plaintiffs because plaintiffs might only be willing to proceed with a complaint if they have clear and convincing evidence of liability.

Such reasoning is compelling, but it is also analogous to the position in which many defendants currently find themselves. It should be no surprise that many defendants are unwilling to go to trial to vindicate themselves in a meritless lawsuit where there is a chance that punitive damages will be imposed against them. Instead, defendants and their insurers are more likely to pay to settle meritless claims in the absence of clear and convincing evidence exculpating the given defendant.
General aviation manufacturers might also benefit from reforming procedures that make it difficult to obtain relief from frivolous suits as a matter of law prior to spending inordinate amounts of money on pretrial discovery and a jury trial.

I. MANDATORY INSURANCE

Among segments of the general aviation community, the most controversial suggestion for tort reform is the requirement of mandatory insurance.\(^\text{199}\) Quite frequently, pilots and mechanics are either underinsured or uninsured.\(^\text{200}\) When such individuals are involved in general aviation accidents, the only remaining "pockets" to which plaintiffs may look are those of the manufacturers.\(^\text{201}\)

Thus, in accidents plainly caused by pilot error or improper maintenance, plaintiffs may go to great lengths to place liability on manufacturers in hope of obtaining a recovery.\(^\text{202}\) Some manufacturers have suggested that if each pilot and mechanic license holder were required to maintain minimum levels of insurance, as most motorists are required to do, the incentive for dragging manufacturers into lawsuits regarding accidents obviously caused by pilots or mechanics might gradually diminish.\(^\text{203}\) Other segments of the general aviation community, however, contend that

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\(^{199}\) See, e.g., Parr, supra note 79, at 25-31.

\(^{200}\) Id. at 29. A number of cases exist where a plane crashed because of improper maintenance performed by uninsured mechanics. Id.

\(^{201}\) Id. at 26. Eighty-five percent of aircraft accidents relate to pilot error while 42.6% of aircraft accidents related to aircraft systems are the result of improper or inadequate maintenance. Id. If plaintiffs could be paid by clearly liable parties, they would have a reduced incentive to pursue products liability claims against manufacturers. Id.

\(^{202}\) Id. at 29. The theory and existence of liability may be secondary to placing an insured defendant at risk of a jury trial. Id.

\(^{203}\) Id. at 25-31. Glenn Parr, General Counsel for Piper Aircraft, suggests that mandatory insurance would "deepen the pockets of those responsible for the vast majority of aviation related injuries: negligent pilots and mechanics." Id. at 26. Parr predicts that "a reasonable level of mandatory liability insurance will greatly reduce the number of frivolous or nuisance cases against general aviation manufacturers which, regardless of their merit or the amount of provable damages, are expensive to defend and insure against." Id. at 28.
such a requirement would serve only to increase the skyrocketing costs of involvement in general aviation and provide further fuel to a perceived plaintiff’s feeding frenzy.\textsuperscript{204}

V. CONCLUSION

Tort judgments currently threaten many sectors of the American economy, yet a consensus on any meaningful comprehensive tort reform may be difficult to achieve in the near future. The general aviation industry presents a unique opportunity to experiment with various tort reform concepts and objectively evaluate how successful each will be. Effective tort reform concepts may then be expanded to benefit greater portions of the economy and, if decisive action is taken quickly, the general aviation industry might be saved in the process.

\textsuperscript{204} See Parr, \textit{supra} note 79, at 29-31. Parr notes that the Aircraft Owners and Pilots Association has reacted negatively to the mandatory insurance proposal. Much of the overwhelming support for tort reform found among general aviation consumers may be attributable to the incredible products liability pass through costs reflected in virtually every expense related to participation in general aviation. While mandatory insurance may reverse this trend and eventually alleviate some of these passed through costs, it is not surprising that many general aviation consumers might view mandatory insurance as just one more cost that renders the overall expense of general aviation prohibitive.
SEC. #1. SHORT TITLE.

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

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

(a) IN GENERAL — Except as provided in subsection (b), no civil action for damages or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred—

(1) after the applicable limitation period beginning on—
   (A) the date of delivery of the aircraft to its first purchase or lessee, if delivered directly from the manufacturer, or
   (B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft, or

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

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

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

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

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

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

(c) GENERAL AVIATION AIRCRAFT DEFINED — For the purposes of this Act, the term "general aviation aircraft" means any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations as defined under regulations in effect under the Federal Aviation Act of 1958 (49 U.S.C. App. 1301 et seq.) at the time of the accident.

(d) RELATIONSHIP TO OTHER LAWS — This section supersedes any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action established by subsection (a).

SEC. #3. OTHER DEFINITIONS.

For purposes of this Act—

(1) the term "aircraft" has the meaning given such term in section 101(5) of the Federal Aviation Act of 1958 (49 U.S.C. 1301(5));

(2) the term "airworthiness certificate" means an airworthiness certificate issued under section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(C)) or under any predecessor Federal statutes;
(3) the term "limitation period" means 18 years with respect to general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft; and

(4) the term "type certificate" means a type certificate issued under section 603(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(a)) or under any predecessor Federal statute.

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

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

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