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The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry

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THE GENERAL AVIATION REVITALIZATION ACT:
HOW RATIONAL CIVIL JUSTICE REFORM
REVITALIZED AN INDUSTRY

VICTOR E. SCHWARTZ*
LEAH LORBER**

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INTRODUCTION

THE GENERAL AVIATION Revitalization Act of 1994 ("GARA")\(^1\) established an 18-year statute of repose for law-

\(^1\) Many people contributed to the effort to enact the General Aviation Revitalization Act of 1994, which, as this article will show, helped preserve the general aviation industry in the United States. The following are among them. George
suits against manufacturers of general aviation aircraft and component parts.2 Passed as an effort to revive the ailing general aviation aircraft industry, GARA was hailed as a "job-creating and job-restoring measure."3 It has fulfilled its promise. In the past seven years, the general aviation aircraft industry has briskly rebounded – and many credit GARA for that result.

Opponents of the bill, however, argued prior to its passage that the bill was unnecessary, and that it would deprive people injured in general aviation aircraft accidents of their right to seek compensation. Since the enactment of GARA, plaintiffs have offered creative arguments to avoid the application of the repose period in their cases.4

For the most part, courts have recognized the need for GARA and they have interpreted GARA’s provisions to further Congressional intent. Some courts, however, have limited the application of GARA. Such rulings, if carried to the extreme, will undo much of the good accomplished by GARA.

This article provides an overview of the history and purpose of GARA. It shows the accomplishments of the legislation. It analyzes GARA’s provisions and the key case law that has construed it. It demonstrates why the law is constitutional. Finally, the article provides a foundation for future interpretations of GARA.

I. A BRIEF HISTORY OF GENERAL AVIATION

General aviation is all aviation other than commercial and military aviation. General aviation aircraft range from small, single-engine planes to mid-size turboprops to the larger turbofans capable from flying from New York to Tokyo. These planes are

Underhill, a pilot and successful businessman in Louisville, Kentucky, inspired the concept behind GARA. Many public servants helped enact GARA, but special efforts were made by then-Kansas Representative Dan Glickman, Utah Representative James Hansen, and Senators Nancy Kassebaum and John McCain. Frank Hunger, Assistant Attorney General for the Civil Division at the Department of Justice, understood the severity of the problem and the need for a fair and balanced legislative solution. His support helped persuade President Clinton to sign GARA into law.


3 See President’s Signing Statement, 30 WEEKLY COMP. PRES. DOC. 1678 (Aug. 22, 1994), reprinted in 1994 U.S.C.C.A.N. 1654 [hereinafter “President’s Signing Statement”].

used for business and recreation. They are used by federal, state and local governments for activities ranging from emergency medical evacuations to border patrols to firefighting. They are used by individuals and businesses, colleges and universities, and other interests to reach the more than 5,000 small and rural communities in the United States that are not served by commercial airlines.

Since the time of the Wright Brothers, the United States has dominated nearly every aspect of aviation, including general aviation manufacturing. Industry pioneers like Walter and Olive Ann Beech, Clyde Cessna, William Piper, and Bill Lear built major companies. World War II produced a number of highly trained pilots, aircraft mechanics, and aerospace engineers, who built “a multitude of single- and multi-engine light piston aircraft” in their “backyard garages, small town factories, and major manufacturers’ plants.” Ex-army air corps personnel provided aircraft maintenance, fuel services, sales support, and pilot training. With the resultant surge in interest in general aviation
during the 1960s and 1970s, "the 'Big Three' [manufacturers] 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." As interest in general aviation rose, its safety increased. The number of fatal general aviation aircraft accidents dropped 700 percent between the end of World War II and 1994. The general aviation accident rate itself dropped by 30 percent between 1981 and 1994.

By the late 1970s, the general aviation industry in the United States was at its high point. Twenty-nine aircraft manufacturers produced general aviation aircraft, and the industry reported revenues of more than $2 billion a year. General aviation and its related industries contributed more than $40 billion annually to the U.S. economy and employed more than 540,000 people.

But by the end of the 1980s, the general aviation industry was in economic trouble. There was a serious and "precipitous" decline in the manufacture and sale of general aviation aircraft by U.S. companies. One cause was the increase in the price of a plane. This, in turn, was fueled by the tremendous increase in the cost of the industry’s liability insurance. General aviation aircraft shipments by U.S. manufacturers dropped from 18,000 aircraft in 1978 to 928 aircraft in 1994. The decline was even more significant for single engine piston aircraft: 14,000 aircraft built in 1978 to 555 aircraft built in 1993. Along with the loss of production came the loss of over 100,000 jobs in general avia-

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14 See GAO General Aviation Report, *supra* note 5.

15 See McAllister, *supra* note 9, at 305-06.

16 See H.R. REP. No. 103-525, pt. 2, at 1646 (1994); see also McAllister, *supra* note 9, at 306-07.


tion manufacturing and related industries. In 1978, the industry manufactured 18,000 general aviation aircraft and employed 6,000 workers. In 1992, the industry manufactured only 900 general aviation aircraft and employed only 1,000 workers.

This decline in general aviation manufacturing also worsened the United States' position in international trade. Historically, at least 30 percent of the general aviation aircraft produced in the United States had been exported. In 1980, the United States exported $120 million surplus in single engine piston aircraft, but that surplus declined to a mere $5 million in 1992. In 1980, there were 29 U.S. manufacturers of general aviation aircraft and 15 foreign manufacturers. By 1992, the numbers had switched: there were 29 foreign manufacturers, and only 9 U.S. manufacturers.

II. A BRIEF HISTORY OF GARA

A. IDENTIFYING THE PROBLEM

By the mid-1980s, Congress had launched efforts to provide relief for domestic manufacturers of general aviation aircraft. Congressional hearings found that the biggest factor in the in-

19 See id.; see also John H. Boswell & George Andrew Coats, Saving the General Aviation Industry: Putting Tort Reform to the Test, 60 J. AIR L. & COM. 533, 574 n.3 (1995) (citing Russell W. Meyer, Statute of Repose—Key to Industry Future, in GENERAL AVIATION MFG. ASS’N INDUS. REV.: 1994 OUTLOOK AND AGENDA 1 (Feb. 9, 1994)).

20 140 CONG. REC. S2995-01, S2996 (daily ed. March 16, 1994) (statement of Sen. Hutchison). Cessna closed its single engine aircraft production lines in 1986 based solely on a perceived unlimited exposure to litigation. See Meyer, supra note 19, at 1. Piper Aircraft, one of the leading manufacturers of general aviation aircraft since the 1930s, experienced several decades of growth through the 1970s—selling more than 5,000 aircraft annually by the late 1970s. But throughout the 1980s, Piper’s sales plummeted as the general aviation industry suffered. “By 1990, the Company was selling less than 1/10th the number of aircraft it had sold during the previous 10 years.” Review of Revisions in Small Aircraft Liability Laws: Statement before the Senate Subcomm. on Consumer Affairs, Foreign Commerce & Tourism of the Senate Comm. on Commerce, Science and Transp., 105th Cong. (1997) (statement of Paul A. Newman, Chief Financial Officer, The New Piper Aircraft, Inc.) [hereinafter “Newman Testimony”]. In July 1991, Piper filed for Chapter 11 reorganization and stayed there for four years. It laid off virtually its entire workforce. Id.


22 Oberstar Statement, supra note 18.

23 Id.
Industry's decline was the skyrocketing cost of products liability. A fundamental contribution to this escalating cost was the so-called "long tail" of liability. Tens of thousands of aircraft had been sold in the 1940s, 1950s, 1960s and 1970s. But by the mid-1980s, fewer than a thousand planes were sold each year. The cost of those planes had to cover an ever-growing liability exposure that arose from planes sold in the distant and very distant past. Executives from the general aviation industry testified that relief from the "long tail" of liability "would revitalize the industry and result in an increase in jobs, enable manufacturers to spend more on research and development, and enhance manufacturers' ability to compete with foreign companies."

The hearings demonstrated that high product liability costs were driving manufacturers out of business. For example, in 1986, Cessna, the world's largest producer of piston-powered aircraft, closed its piston engine lines because of the high liability costs. Between 1965 and 1982, Cessna invested between $20 million and $25 million each year in research and development. Cessna halted piston engine research in 1986 but spent $20 million to $25 million each year thereafter defending products liability cases. In other words, it spent about $160 million over 8 years to defend lawsuits involving aircraft as much as 47 years old.

At the request of the House Aviation Subcommittee, Beech Aircraft Corporation conducted a study of airplane crashes in one four-year period. Of 203 crashes, all of which were investigated by the National Transportation Safety Board (NTSB) or the Federal Aviation Administration (FAA), not one was attributable to a design or manufacturing defect. Yet the average claim was $10 million, and the manufacturer was forced

24 Newman Testimony, supra note 20.
25 Bolen Testimony, supra note 8.
26 See Newman Testimony, supra note 20. For example, by 1987 the major manufacturers calculated that their costs for products liability per general aviation product unit ranged from $70,000 to $100,000. See Martin, supra note 8, at 483; see also GAO General Aviation Report, supra note 5, at 18 (discussing the rise in lawsuits against the general aviation industry after the introduction of the strict liability doctrine).
28 Boswell & Coats, supra note 19, at 574 n.115 (citing Meyer, supra note 19, at 2).
29 Id.
to spend an average of $530,000 defending each accident.31 What government investigators established as "zero-defect performance"32 ended up costing Beech over $100 million in legal fees over four years.33

This kind of potential liability made it difficult for these companies to afford insurance. In 1985, insurers began to withdraw product liability coverage for general aviation manufacturers.34 "We are quite prepared to insure the risks of aviation, but not the risks of the American legal system," one prominent Lloyd's aviation underwriter said.35 By 1987, Piper was "entirely uninsured" for its product liability exposure, Cessna was uninsured for the first $100 million annual aggregate loss, and Beech Aircraft was self-insured for losses and defense costs up to $50 million a year.36

After the insurance industry stopped writing insurance for general aviation manufacturers, the manufacturers' only remaining method of paying these claims was to increase product prices for consumers.37 During the Senate debate on GARA, Sen. Hutchison of Texas said that the cost of product liability is "directly reflected in the price of the product; Beech Aircraft estimates that the costs of litigation added $70,000 to the cost of each new aircraft."38 The chairman of Cessna estimated that the cost of liability insurance on an airplane that sold for $85,000 was between $40,000 and $50,000, and that covering the cost of liability had become the highest single expense of the airplane.39 This cost was passed on to consumers in the form of

31 See Martin, supra note 8, at 483-84; Clinger Statement, supra note 12; Bolen Testimony, supra note 8.
32 See A Need at the Point of Crisis, supra note 7, at 4; Martin, supra note 8, at 483-84.
33 See Martin, supra note 8, at 483-84; Clinger Statement, supra note 12; Bolen Testimony, supra note 8.
34 Kister, supra note 13, at 110-11; Boswell & Coats, supra note 19, at 549.
35 Boswell & Coats, supra note 19, at 549 (citing Martin, supra note 8, at 483-84); Kister, supra note 13, at 111 (same).
36 See Martin, supra note 8, at 483-84. Although products liability was not the only reason Piper Aircraft went into bankruptcy in the early 1990s—some argued it was severely overstaffed—the uninsured posture the company assumed due to the cost of liability insurance rendered the company unfundable through traditional financing sources. Suma Outlines Plans for New Models, New Technology from the New Piper Aircraft, WKLY. BUS. AVIATION, Aug. 7, 1995, at 55.
37 See Boswell & Coats, supra note 19, at 550.
38 140 CONG. REC. S2995, S2996 (daily ed. March 15, 1994).
39 See supra note 13, at 112 (citing David J. Moffitt, The Implications of Tort Reform for General Aviation, 10 J. AIR & SPACE L. 8, at n.6 (1995)).
higher prices. The increase in prices of new aircraft deterred some consumers from buying at all and caused other consumers to turn to less expensive used aircraft.\textsuperscript{40} The decline in sales further increased the prices that suppliers had to charge to stay in business, creating a vicious cycle.\textsuperscript{41}

The American Association of Trial Lawyers (ATLA) was the primary opponent to general aviation tort reform.\textsuperscript{42} ATLA testified that a number of factors unrelated to tort liability contributed to the sales decline. The identified factors included tax law changes, including elimination of the investment tax credit and imposition of a 10 percent luxury tax (since repealed); increased industry emphasis on more profitable private jets; competition from unassembled “kit” versions of piston-engine aircraft; availability of high quality used aircraft; widely available commercial flights; and a decline in trained pilots.\textsuperscript{43} ATLA also said that the existing aircraft were of too high a quality, thus contributing to lengthy, durable and reliable service lives.\textsuperscript{44} ATLA argued that litigation threats encouraged manufacturers to emphasize safety in the design, testing and manufacturing process, and that reform merely would reduce costs to the industry by wrongfully taking money from deserving plaintiffs.\textsuperscript{45}

\textsuperscript{40} Barron’s reported an amazing example of the increased price: “A small Beechcraft aimed at the private recreational market listed for $26,550 in 1974. Today, Beech’s smallest plane is a little bigger than the ’74 model, but it lists for $255,800.”\textnormal{Thomas G. Donlan, Falling from the Sky: Unlimited Liability Claims Destroy an American Industry, BARRON’S, Feb. 21, 1994, at 10.}

\textsuperscript{41} See Martin, supra note 8, at 483. The number of pilot licenses and the number of hours flown in general aviation declined steadily between 1980 and 1994. For example, the number of student pilot licenses decreased more than one third, from 150,000 in 1980 to 96,000 in 1994. GAO General Aviation Report, supra note 5, at 5.


\textsuperscript{44} Id.; H.R. REP. No. 103-525, pt. 2.

\textsuperscript{45} See Limiting Liability for Small Aircrafts: Hearing on H.R. 3087 and S. 1458 Before the Economic and Commercial Law SubComm. of the House Judiciary Comm., 103d Cong. (1994) (statement of Charles T. Hvass, Jr.); Boswell & Coats, supra note 19, at 552 (discussing the sharp decline in the number of fatal general aviation accidents per 100,000 flight hours between 1950 and 1969, despite the fact that modern products liability had not yet been developed or gained wide acceptance); Kuhse, supra note 43, at 24. Kuhse noted that while factors such as fuel price increases, airline deregulation and tax law changes appeared to contribute to the
Other factors cited as contributing to a decline in general aviation included oversaturation of the market when more than 14,000 single-engine planes were built in 1978, combined with the generally poor economic conditions of the early 1980s.\textsuperscript{46} Experts generally agreed, however, that the dramatic rise in costs due to product liability exposure and related manufacturer product insurance premiums were a significant cause of the industry’s decline.\textsuperscript{47}

In 1993, five years after Congress first attempted to address the industry problem, the National Commission to Ensure a Strong Competitive Airline Industry studied the decline in the general aviation industry. The Commission found that “although the U.S. remains a world leader in production and sale of business jets, production of light piston aircraft has been reduced to a trickle by the enormous ongoing cost of open-ended product liability.”\textsuperscript{48} The Commission noted that: “Many factors are at play, but the added costs of liability insurance forced prices up, causing sharply increased costs for personal and short-range business flying.”\textsuperscript{49} This finding by an objective body helped move GARA forward in Congress.

\subsection*{B. Finding a Solution}

Some states had enacted legislative solutions for problems caused by excessive tort liability in general, “but they were not universal, and the inconsistencies from state to state caused

\begin{itemize}
\item availability of ‘build it yourself’ kit aircraft (the homebuilt ‘experimental’ aircraft demanded mechanical and construction skills beyond the ability of most pilots plus required thousands of hours of ‘free time’ labor); demand for used aircraft (simple economics would indicate that as the prices for new aircraft shot up, the demand for lower priced used aircraft would also increase); [and a] shortage of trained pilots (does a shortage of trained pilots cause a lack of demand for low end single-engine training aircraft or does the high cost of new aircraft cause a shortage of trained pilots?).
\end{itemize}


\textsuperscript{47} See \textit{id.} at 193; Kister, \textit{supra} note 13, at 111; GAO General Aviation Report, \textit{supra} note 5, at 24-27.


\textsuperscript{49} \textit{Id.}
The need for a uniform approach called out for a federal legislative solution. Members of Congress from Kansas, the headquarters of many general aviation aircraft manufacturers, spearheaded the effort at federal aviation tort reform, particularly Sen. Nancy Kassebaum (R-Kan.) and Rep. Dan Glickman (D-Kan.), Rep. James Hansen (R-Utah), and Sen. John McCain (R-Ariz.) also played a critical role.

Most members of Congress recognized that there was a legitimate jurisdictional basis for federal legislation because the federal government heavily regulates all aspects of the general aviation industry "from cradle to grave." General aviation aircraft must meet rigid standards set by the Federal Aviation Administration. Before any aircraft flies for the first time, it must be inspected and certified as airworthy by the FAA. If it is to be produced in any number, the aircraft must meet a further set of FAA-prescribed criteria.

The initial proposals for aviation industry liability reform covered many tort issues. As originally introduced by Sen. Kassebaum and approved by the Senate Commerce Committee in 1986, general aviation reform would have done a number of things. It would have: (1) created a single body of nationwide substantive law for aviation liability, including uniform standards of negligence; (2) limited punitive damages; (3) modified comparative negligence; (4) altered the rules of evidence in general aviation cases to explicitly provide that plaintiffs cannot present evidence of subsequent remedial measures; (5) abolished joint and several liability; (6) created a two-year federal statute of limitations for bringing liability actions; and (7) al-


53 See Shea, supra note 42, at 750-55 (discussing the scope and history of federal regulation of the general aviation industry); GAO General Aviation Report, supra note 5, at 18-21 (same).

54 In the years prior to GARA, Congress considered a variety of bills that dealt with tort reform, in general, and product liability reform, in general. These bills were not passed, the votes splitting mainly along party lines. See Oliver & Jones, supra note 50, at 246.
allowed automatic removal of cases to federal courts as well as a statute of repose (originally sought to be 12 years). This comprehensive approach did not prove to be politically viable.

While various legislative proposals garnered support from large groups of legislators, "the bills invariably died in committee, usually in the House Judiciary Committee, which during this time was chaired by Rep. [Jack] Brooks (D-Tex.), a strong opponent of tort reform."

In 1993, counsel to the General Aviation Manufacturers Association (GAMA) suggested that a broader approach could not be successful and asked GAMA's president to select one issue that would be the most important to GAMA's members. The president selected a statute of repose, which would address the long-tail liability problem and substantially reduce insurance risks for GAMA members. As a result, GAMA's Congressional supporters introduced a bill with a single provision for a 15-year statute of repose. The new bill gained significantly more political support than prior legislative efforts. To garner the consensus necessary to obtain clearance for consideration and approval in the Senate, the bill was further modified to extend the statute of repose period to 18 years. Exceptions were added to exempt cases involving misrepresentations to the FAA and written warranties.


56 See, e.g., S. REP. NO. 101-303, at 2 (1990) (the Senate Judiciary Committee issued an adverse report on general aviation legislation, concluding, inter alia, that “[t]he General Aviation Accident Liability Standards Act [S. 640] should not be passed by the Senate and enacted into law. The bill has not been proven to be necessary and would represent an unwise policy decision on the part of the Senate, if adopted. Further, a number of the specific substantive provisions of the bill are so problematic that the entire bill is fatally flawed.

57 See Oliver & Jones, supra note 50, at 246.

58 See id. at 246-47.

59 Instead of the uniform 18-year statute of repose imposed by the 1994 Act, an amendment introduced by Rep. Rick Boucher (R-Va.) proposed a sliding scale, three-pronged approach. See 140 CONG. REC. H4998-02, H5000 (daily ed. June 27, 1994). For piston-powered aircraft, the amendment provided a repose period of 15 years; for turboprop-powered aircraft, the repose period would have been 18 years; and for jet-powered and other remaining general aviation aircraft, the repose period would have been 22 years. Id.

60 The House version of the legislation further clarified that it would only apply to limit suits brought against general aviation manufacturers in their capacity as manufacturers.
GARA's supporters emphasized to Congress that if the federal statute of repose passed, it would likely spur general aviation production and create new jobs. Russ Meyer, Chairman of Cessna Aircraft, promised that "Cessna would open a new piston-engine manufacturing facility and resume piston-engine production if GARA was passed." Moreover, all aspects of the general aviation industry supported GARA.

Aircraft owners and their trade association, the Aircraft Owners and Pilots Association (AOPA), were key players in the political support for the bill. AOPA's members, the pilots, were the potential plaintiffs if there were an airplane accident resulting in injury or death. AOPA's membership was in effect a "consumer group" who would lose existing legal rights if the bill were enacted. When ATLA argued that the bill was "anti-consumer," AOPA's members said otherwise. The combination of AOPA's support, the bill's narrow approach, and its packaging as a "jobs bill" gave GARA a much greater chance of passage than earlier, more comprehensive proposals.

Still, the bill appeared to be stuck in the House Judiciary Committee until certain House members invoked rarely used parliamentary procedures that essentially forced Chairman Brooks to allow the bill to be reported out of his committee. The bill was passed overwhelmingly by the House. The Senate, with a 91-8 vote, had already passed a nearly identical bill.

On the Senate floor, proponents rejected newly proposed changes, except to allow claims brought by people injured on the ground by a plane. Proponents accepted the "not on the plane" exception for two reasons. First, people who might be injured on the ground were not in AOPA, the group of pilots that had accepted the liability limitations in the bill. Second,

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61 See Oliver & Jones, supra note 50, at 247.
62 See H.R. Rep. No. 103-525 pt. 1, at 3; H.R. Rep. No. 103-525, pt. 2, at 5-6. GARA had a broad base of support within the general aviation industry, drawing praise from the General Aviation Manufacturers Association, Aircraft Owners and Pilots Association, the Experimental Aircraft Association, the International Association of Machinists, the Helicopter Association International, the National Business Aircraft Association, and the National Air Transportation Association. Opponents to the legislation were the American Trial Lawyers' Association and consumer organizations like Citizen Action and Public Citizen. See McNatt & England, supra note 50, at 326-27.
63 See Oliver & Jones, supra note 50, at 247.
64 See id.
65 See H.R. Rep. No. 103-525, pt. 1, at 2; President's Signing Statement, supra note 3, at 1678.
the number of claims brought by persons on the ground was likely to be very few in number, so this exception would not greatly affect the impact of the bill's liability limit action. The differences between the House and Senate bills were quickly smoothed out in the conference committee.\textsuperscript{66}

The Administration reviewed the legislation. ATLA had provided very strong (and early) opposition to the GARA bill, and the Administration had, in general, been opposed to tort reform. GARA supporters had a lucky break, however, when the White House sent the bill to the Department of Justice for its review. The bill ended up on the desk of Frank Hunger, Assistant Attorney General for the Civil Division of the Department of Justice. Mr. Hunger was a long-time pilot and understood how and why excessive liability had devastated the aviation industry. He recommended that President Clinton sign the bill. The President did so on August 17, 1994.

\textbf{III. THE SUCCESS OF GARA}

By the time GARA was enacted, the general aviation industry had experienced a 95 percent decline in production and a loss of more than 100,000 jobs during the preceding decade. Since the passage of GARA, general aviation production lines have opened and expanded.\textsuperscript{67} More than 25,000 manufacturing jobs have been created.\textsuperscript{68}Thousands of additional jobs have been created in other segments of the general aviation industry and the industries that support it.\textsuperscript{69} Jane F. Garvey, Administrator of the Federal Aviation Administration, said: “Thanks in large part to the General Aviation Revitalization Act, the general aviation industry is now in better shape than it has been in more than a decade.”\textsuperscript{70} The United States General Accounting Office reported in 2001 that GARA was “the most significant contributor” to a rise in general aviation manufacturing.\textsuperscript{71}

\begin{itemize}
\item \textsuperscript{66}See Oliver & Jones, supra note 50, at 247.
\item \textsuperscript{67}See General Aviation Manufacturers Association, Five Year Results: A Report to the President and Congress on the General Aviation Revitalization Act (1999) [hereinafter “Five Year Results”].
\item \textsuperscript{68}Id.
\item \textsuperscript{69}Id.; see also GAO General Aviation Report, supra note 5, at 65 (stating that in 1998, general aviation generated $64.5 billion in economic activity at the national level).
\item \textsuperscript{70}Five Year Results, supra note 67.
\item \textsuperscript{71}See GAO General Aviation Report, supra note 5, at 6. In addition to GARA, experts attributed the growth in manufacturing indicators and less-strong growth in other indicators to the strong economy and the popularity of a new type of
\end{itemize}
General aviation's contribution to the national economy has grown in the past decade. In 1998, general aviation generated about $64.5 billion in total economic activity at the national level, an increase of $26.5 billion from the 1988 level of $38 billion. Since the enactment of GARA, revenues from the export of general aviation aircraft have more than doubled, boosting the U.S. economy and the balance of trade. As its president promised Congress, Cessna resumed manufacture of single-engine piston aircraft after GARA was enacted. Cessna constructed a new production facility in Independence, Kansas, and began delivery of the new aircraft in early 1997. Cessna alone has shipped 3,000 units since it reopened its single-engine piston production lines in 1996. Similarly, Charles M. Suma, president and chief executive officer of The New Piper Aircraft, Inc., said: "There is not one single company, government agency or individual that knows the significance of GARA more than The New Piper Aircraft, Inc... we are living proof. We are The New Piper because of GARA and its limiting effect on the enormous product liability tail." With regard to the general aviation aircraft industry as a whole, annual shipments of new aircraft tripled between 1994 and 2000, from 928 to 2,816.

Investment in research and development by general aviation companies has grown by more than 150 percent since GARA was passed. Gary Burrell, president of Garmin International, Inc., said: "GARA has been a catalyst to encourage companies such as GARMIN to invest in general aviation." Opponents of the GARA bill suspected that its enactment would mean that the new planes would not be safe. Exactly the opposite result has occurred. For example, Unison Industries has developed at least five new safety products since GARA was enacted. "None of aircraft ownership called fractional ownership, in which individuals or companies purchase a share in an aircraft for their occasional use. See GAO General Aviation Report, supra note 5, at 4, 6.

72 See id. at 13 (citing WILBUR SMITH ASSOCIATES & APPLIED MANAGEMENT SOLUTIONS, INC., The Economic Impact Of Civil Aviation On The U.S. Economy – 2000 (Mar. 2000) (prepared for FAA and MCA Research Corp.) and WILBUR SMITH ASSOCIATES, The Economic Impact Of Civil Aviation On The U.S. Economy (June 1989)).

73 GAO General Aviation Report, supra note 5, at 19.

74 See id. at 28.


76 See GAO General Aviation Report, supra note 5, at 4.

77 See id. at 28.

78 Five Year Results, supra note 67.
our new developments would have been done without it," said President Frederick B. Sontag.  

General aviation flying activity indicators such as hours flown and number of pilot licenses also rose after the enactment of GARA.  

Robert Baker, vice chairman of American Airlines, Inc., said, "The commercial airline industry draws the majority of its pilots from general aviation. We need a healthy general aviation industry producing pilots." At the same time, the safety of general aviation has been improving. The total number of accidents declined from 3,233 in 1982 to 1,989 in 1998—a decrease of 41 percent—while the accident rate fell from about 10 to about 7 accidents for every 100,000 flight hours.  

IV. WHAT DOES GARA DO?  

GARA is elegant in its simplicity. Simply put, it is "a classic statute of repose." Under GARA, a person can sue the manufacturer of a general aviation aircraft for injuries that occur anytime in the 18 years after the date that the plane is placed into the stream of commerce. If an accident occurs one day before the GARA period runs, an action will be possible and will be governed by the usual statute of limitations. If it occurs on the day after the GARA period runs, no action is possible.  

This represents a policy judgment by Congress that the aircraft is considered to be not defective or not negligently designed as a matter of law if it has been in successful use for almost two decades before the accident. If a general aviation aircraft has flown safely for 18 years and is involved in an acci-  

—  

79 Id. Sontag testified before Congress in 1993 that Unison scrapped an advanced electronic ignition project for light aircraft because the company was concerned about the liability risk. 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 & Transp., 103d Cong. (1993) (statement of Frederick B. Sontag, President of Unison Industries).  

80 See GAO General Aviation Report, supra note 5, at 4, 33.  

81 See Five Year Results, supra note 67.  

82 See GAO General Aviation Report, supra note 5, at 5.  

83 Lyon v. Agusta S.P.A., 252 F.3d 1078, 1084 (9th Cir. 2001).  

84 A statute of repose is different from a statute of limitations. A statute of limitations provides a set time after the injury or discovery of the injury for a lawsuit to be filed. Some so-called statutes of repose measure their time periods from the date of delivery of the product (or occurrence of the act) to the time of the filing of the lawsuit, rather than the time of the accident when the injury occurred. Such statutes often appear in conjunction with statutes of limitation and are hybrids between repose and limitation statutes.  

85 Lyon, 252 F.3d at 1084.
dent after this period, it is highly likely that the cause of that accident was not related to the aircraft's warnings or design. Rather, the highly probable causes are pilot error, improper modification or maintenance by fixed-based operators (such as repair and service personnel), weather, or other causes. A study by the General Accounting Office found that more than two-thirds of general aviation accidents between 1994 and 1998 were caused by pilot error, including mistakes related to procedure, skill, and judgment. Mechanical failures were involved in 13 percent of the fatal accidents and 25 percent of the nonfatal accidents. The remaining accidents were due to other factors such as misdirections from air traffic control.

Congress recognized that components of general aviation aircraft are from time to time replaced, and therefore GARA provides an 18-year "rolling statute of repose" for new or replacement parts. Under this provision, the repose period for claims based on injuries relating to the new part begins running on the date the replacement or addition is completed, while claims for injuries based on the rest of the aircraft are subject to the original statute of repose.

GARA includes four exceptions to the statute of repose. First is an exception for fraud. This exception applies where the manufacturer knowingly misrepresented, withheld or concealed certain information during the regulatory process. The next two exceptions focus on potential plaintiffs who did not make the decision to ride on the aircraft: the "medical emergency" exception and the "not aboard the aircraft" exception. Finally, Congress created the "warranty" exception in recognition of the fact that a manufacturer and a purchaser of a general aviation aircraft may wish to negotiate a longer warranty. GARA's statute of repose provides meaningful national protection. It preempts state law to the extent state law provides for a longer

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86 The statute of repose approach was particularly appropriate for addressing the general aviation industry's downturn. 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." Donlan, supra note 40, at 10.

87 See GAO General Aviation Report, supra note 5, at 8, 53-55.

88 See id.

89 See id.

90 GARA, § 2(b).
period of repose, but does not displace a state statute of repose that provides for a shorter period.91

V. WHO CANInvoke GARA?

The protection provided by GARA is limited to manufacturers of general aviation aircraft and their component parts. Therefore, in order to invoke the statute of repose, defendants must meet certain threshold requirements set forth in the statute. They must be manufacturers of general aviation aircraft or their component parts, and, at the time of the accident, the aircraft must not have been engaged in "scheduled passenger-carrying operations." Defendants who satisfy these requirements should plead GARA as an affirmative defense.92

A. Who is a "Manufacturer"?

GARA can be asserted only by manufacturers of general aviation aircraft or component parts, not by other entities.93 To date, courts have rejected attempts by plaintiffs to narrowly define "manufacturer" as the original manufacturer and thus narrowly restrict the application of the statute of repose. As a result, successors-in-interest to the original manufacturer have been allowed to raise the GARA defense,94 as have agents of the manufacturer.95 Arguably, other entities that satisfy state law definitions of "manufacturer" may be able to raise the defense as well.96

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91 Id. § 2(d).
92 In Tucker v. Hiller Aviation, No. CV 752984 (Cal. Super. Ct., Santa Clara Cty., May 2, 2000), the court denied Textron Lycoming’s motion for summary judgment based on GARA because the defendant failed to raise the GARA defense in its Answer. The defendant alleged only that the case was barred by the statute of limitations.
93 GARA § 2(a).
96 In Kennedy v. Bell Helicopter Textron Inc., No. C98-5579RJB (W.D. Wash. Feb. 14, 2000), the court looked to state law in determining that Bell was the manufacturer of the military surplus helicopter at issue. Bell had originally manufactured the helicopter for the Navy. Id. at 9 (holding that “[a]pplying the law set forth in Issue 2, above [RCW 7.72.010(1) and (2)], the record is clear that Bell is the manufacturer of the helicopter at issue here.”).
1. Successor Manufacturers

Plaintiffs have argued that only the actual manufacturer of the allegedly defective product or part can assert the GARA defense, not "successor manufacturers," such as companies that bought out a manufacturer's product lines. This argument has met with little success. Courts have allowed successor defendants to rely on GARA. Judges have acknowledged that GARA will be eviscerated if its protections are not extended to the successors of the actual manufacturers. This result is consistent with the statute's legislative history, which shows that Congress knew the aviation industry was going through a series of mergers and acquisitions and chose not to exempt successors from the reach of GARA. This result is also consistent with state court decisions applying statutes of repose to bar claims against successor manufacturers when the claim against the original manufacturer is barred.

In deciding whether a defendant should be considered to be a "manufacturer," courts have looked to whether that defendant has to comply with FAA regulations imposing duties on the manufacturer. This is reasonable, as GARA incorporates FAA regula-

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97 See, e.g., Burroughs, 93 Cal. Rptr. 2d 124; Mason v. Saddler, No. LACV 032793, at 4.
98 For example, Sen. Hollings, a principal opponent to GARA, argued that the "industry is doing extremely well." 140 CONG. REC. S2438-02 (1994). By way of example, he stated that "Cessna has been bought out by Textron. . . . Beech Aircraft, Raytheon bought it . . . ." Id. Similarly, David Katzman, a leading plaintiffs' aviation attorney, testified before the House Public Works Committee: "Cessna is owned by Textron. It was recently sold to Textron, I believe, by General Dynamics for something to the tune of $100 million." General Aviation Revitalization Act of 1993: Hearing Before the Subcomm. on Aviation of the House Comm. on Public Works & Transp., 103d Cong. 70 (1993).
tions throughout its statutory scheme. For example, GARA explicitly incorporates FAA regulations in determining what is a general aviation aircraft. Moreover, one of the GARA exceptions involves instances where a manufacturer has knowingly misrepresented or concealed from the FAA "required information" relating to "obligations with respect to continuing airworthiness" of an aircraft. The application of this exception requires a court to determine whether a given defendant had the obligation to comply with relevant FAA regulations.

Therefore, in Burroughs, the plaintiffs alleged that a malfunctioning 25-year-old carburetor caused the airplane crash. They sued an aircraft parts manufacturer that did not manufacture or sell the carburetor model at issue. The defendant had merely acquired the carburetor product line from its predecessor, which in turn had acquired the product line from the actual manufacturer. The California appellate court ruled that the defendant-successor was a "manufacturer" for purposes of GARA, and upheld the trial court's grant of summary judgment. The court explained that although the defendant did not actually manufacture the carburetor, it had taken over the manufacturer's regulatory responsibilities for the product line at issue. The court said:

GARA contains an implicit recognition that as a matter of federal law, by virtue of the extensive rules and regulations governing the aviation industry, a successor manufacturer steps into the shoes of the predecessor with regard to the duties of reporting defects . . . The federal regulatory scheme contemplates that at all times there will be a designated OEM [original equipment manufacturer] for an aircraft part or component, burdened with the reporting duties and responsibilities as to that particular product.

Because the defendant-successor had become the entity responsible for issuing maintenance manuals and bulletins and fulfilling the manufacturer's obligations for continued airworthiness, the court said, "[i]n the eyes of the FAA, [the defendant-successor] was the 'new manufacturer' of the . . . carburetor."

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100 See GARA, § 2(c).
101 See id. § 2 (b) (1).
102 Burroughs, 93 Cal. Rptr. 2d at 124.
103 Id. at 133.
104 Id.
105 Id.
The court also rejected plaintiffs' argument that the rules of successor liability under California law applied and allowed the claim. The court refused to interpret GARA by reference to state law: "Because of the preemptive reach of GARA...California law relating to successor liability does not govern if it would allow a claim otherwise barred by GARA." Otherwise, the court said, GARA would be subject to the vagaries of differing state statutes and the uniform protection created by the Act would be nullified.

2. Agents of Manufacturers

In Butler v. Bell Helicopter Textron Inc., plaintiffs filed suit for injuries arising out of a helicopter crash allegedly caused by a defective tail rotor yoke assembly. The "retirement life" of the helicopter's tail rotor yoke was increased during the repose period from 4,000 hours to 5,000 hours. Because of this change, a 4,000-hour yoke that had been retired from use was tested and reinstalled on the helicopter one year before the accident. In addition to suing the helicopter manufacturer, plaintiffs sued an individual and a company that tested the yoke to determine whether to extend its useful life. Drawing an analogy to the Burroughs court's use of GARA to bar claims against a successor manufacturer, the Butler court rejected the plaintiff's arguments that these two defendants were not entitled to rely on GARA because they did not manufacture the helicopter involved in the accident. The Butler court explained: "[I]n acting with regard to providing for testing the yoke for the purpose of possibly extending its retirement life, they were performing acts as agents for [the manufacturer]. Had [the manufacturer] done the work itself, such conduct would constitute performance of functions as a manufacturer."

3. Distributors, Sellers, Lessors

GARA does not explicitly include general aviation aircraft distributors, sellers and lessors, but, under state law, such entities may be able to assert all defenses available to the manufacturer,
including GARA.\textsuperscript{110} (This assumes that the defendants also can establish they are acting in the capacity of a manufacturer, as required by the statute.\textsuperscript{111}) Some states may include all entities in the chain of distribution in their definition of manufacturer for products liability purposes. For example, the term "manufacturer" is defined under the California Business and Professions Code to include any "distributor of a manufacturer who sells, transfers, or exchanges an appliance to or with a retailer."\textsuperscript{112} Defendants meeting that definition could argue that GARA protections apply to them as well. Moreover, a number of states also have their own statutes of repose that may be asserted by non-manufacturers in the chain of distribution.\textsuperscript{113} Similarly, non-OEM rebuilders and overhaulers who rebuild component parts such as engines and thus return them to their original specifications may be treated in some states as manufacturers for purposes of strict liability law.\textsuperscript{114} Most states do not recognize strict liability claims filed against defendants who merely performed repairs, but they do recognize strict liability claims against dealers.\textsuperscript{115}

4. Manufacturer Acting in its Capacity as a Manufacturer

GARA applies only if the lawsuit is brought against a manufacturer in its capacity as a manufacturer.\textsuperscript{116} The House Judiciary Committee Report explained that this "is intended to ensure that parties who happen to be manufacturers of an aircraft or a component part are not immunized from liability they may be subject to in some other capacity."\textsuperscript{117} Increasingly, manufacturers are becoming involved in certain maintenance programs re-


\textsuperscript{111} See \textit{supra} note 93.

\textsuperscript{112} \textit{Cal. Bus. \\& Prof. Code} § 22410(b) (West 1987).

\textsuperscript{113} See \textit{supra} note 110, at 397; see also \textit{supra} note 50, at 327-42 (listing state statutes of repose in effect at the time GARA passed).

\textsuperscript{114} See Anderson v. Olmstead Util. Equip. Inc., 573 N.E.2d 626, 629 (Ohio 1991) (stating "strict liability applies with equal force to a commercial entity engaged in remanufacturing or rebuilding a defective product"); Michalko v. Cooke Color \\& Chem. Corp., 451 A.2d 179, 182 (N.J. 1982) (stating that a party who "undertakes to rebuild part of a machine in accordance with the specifications of the owner" can be held strictly liable).

\textsuperscript{115} Some have argued that GARA prevents dealers from spreading their damages to manufacturers through joint and several liability. See \textit{supra} note 13, at 114-15; Hedrick, \textit{supra} note 110 at 404 n.94 (listing jurisdictions).

\textsuperscript{116} \textit{GARA} § 2(a).

lated to their own aircraft, and many component part manufacturers offer overhaul and rebuilding services.\textsuperscript{118} Congress recognized this, explaining that, under GARA, "[f]or example, in the event a party who happened to be a manufacturer committed some negligent act as a mechanic of an aircraft or as a pilot, and such act was a proximate cause of an accident, the victims would not be barred from bringing a civil suit for damages against that party in its capacity as a mechanic."\textsuperscript{119}

In \textit{Burroughs}, the court rejected the plaintiffs' argument that their claim was based on Precision's allegedly negligent service, maintenance, and repair of the carburetor.\textsuperscript{120} The court acknowledged that "if the manufacturer committed a negligent act repairing or servicing an aircraft or as a pilot, and such act was the proximate cause of an accident, the victims would not be barred from bringing suit against the manufacturer acting in a capacity other than as a manufacturer."\textsuperscript{121} The court observed, however, that plaintiffs' pleadings and arguments focused on Precision's role and duties as a manufacturer. The court's review of the record found no evidence that Precision ever acted in any capacity other than as a manufacturer carrying out its obligations to ensure airworthiness.\textsuperscript{122}

In \textit{Mason v. Saddler}, the plaintiff sought to avoid GARA by characterizing Schweizer, a defendant (a successor to the original helicopter manufacturer), as a "maintenance support entity."\textsuperscript{123} The plaintiff argued that the crash was proximately caused by Schweizer's negligent failure to include certain information in its maintenance support materials. The Iowa state court found that Schweizer was a manufacturer entitled to assert the GARA defense because Schweizer had assumed the duties of the manufacturer of the helicopter when it acquired the type certificate for the aircraft from the original manufacturer.\textsuperscript{124} The court rejected plaintiff's argument that the rolling statute of repose did not bar his claims for failure to warn. The court cited a line of cases holding that claims for failure to warn of a design flaw are subject to a statute of repose in the same way

\begin{itemize}
  \item \textsuperscript{118} See \textit{Aviation Wk. & Space Tech.}, Mar. 11, 1996, at 44-53.
  \item \textsuperscript{119} H. R. Rep. No. 103-525, pt. 2, at 7.
  \item \textsuperscript{120} \textit{Burroughs}, 93 Cal. Rptr. 2d at 124.
  \item \textsuperscript{121} \textit{Id.} at 131.
  \item \textsuperscript{122} \textit{Id.}
  \item \textsuperscript{123} \textit{Mason v. Saddler}, No. LACV 032793, at 4.
  \item \textsuperscript{124} \textit{Id.} at 6.
\end{itemize}
that claims for the design flaw would be.\textsuperscript{125} The case is currently on appeal.\textsuperscript{126} In another case, \textit{Schneider v. Cessna Aircraft Co.},\textsuperscript{127} the court simply stated that service manuals "are issued ‘in the capacity as a manufacturer’ because a manufacturer’s provision of maintenance and repair manuals is part of the duty to warn as a manufacturer. Any other interpretation would circumvent GARA providing a back door to sue for a design flaw."\textsuperscript{128} We agree that these decisions find support in the legislative purpose of GARA.

**B. WHAT IS A "GENERAL AVIATION AIRCRAFT"?**

Only general aviation aircraft are subject to GARA. The statute defines general aviation aircraft as:

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...at the time of the accident.\textsuperscript{129}

\begin{enumerate}
\item **Type and Airworthiness Certificates**

One commentator has noted that GARA can be applicable to a particular aircraft so long as a type or airworthiness certificate was \textit{originally} issued by the FAA – even if the certificate is suspended or revoked.\textsuperscript{130} This appears clear from the statutory language and, according to the commentator, by the fact that the manufacturer does not keep control over the continuing airworthiness of its aircraft after it is delivered to another party.\textsuperscript{131}

\end{enumerate}

\textsuperscript{125} \textit{Id}. at 9; \textit{see infra} note 234 and accompanying text.

\textsuperscript{126} \textit{Mason v. Schweizer Aircraft Corp.}, No. 00-1231 (Iowa 2000).


\textsuperscript{128} \textit{Id}. at 3; \textit{see also Alter v. Bell Helicopter Textron, Inc.}, 944 F. Supp. 531, 541 n.5 (S.D. Tex 1996) (stating that under applicable state law and Section 324A of the Restatement (Second) of Torts, "the provision of maintenance and repair instructions is not a separate and discreet post-sale undertaking creating a separate cause of action, but rather part of the manufacturer’s duty to warn").

\textsuperscript{129} GARA, §2(c).

\textsuperscript{130} \textit{See Hedrick, supra} note 110, at 390. Hedrick, now an aviation law practitioner in Washington state, provides a thorough analysis of GARA’s definitional provisions in his article. Hedrick, \textit{supra} note 110, at 388-93.

\textsuperscript{131} \textit{See Hedrick, supra} note 110, at 390.
Type certificates are issued for aircraft, aircraft engines, propellers and certain other parts once the FAA has approved the "design, specifications, and manufacturing process" and determined that each submitted part "is properly designed and manufactured, performs properly, and meets the regulations and minimum standards prescribed.” Manufacturers have the responsibility to make sure the parts at issue fully comply with the type certificate.

Airworthiness certificates are issued for an aircraft when the FAA “finds that the aircraft conforms to its type certificate and, after inspection, is in condition for safe operation.” They are issued “upon request from an aircraft’s registered owner, who is typically the manufacturer before the initial sale of the aircraft.”

2. Maximum Seating Capacity

At the time the original airworthiness or type certificate was issued, the aircraft must have had a maximum seating capacity of fewer than 20 passengers. This information is usually included in the type certificate documentation. Pilots and flight crew are not considered to be “passengers” under federal aviation regulations.


The regulations in effect at the time of the accident in question establish whether or not the aircraft was engaged in “scheduled passenger-carrying operations” when the accident took place. The court in Reynolds v. Textron, Inc. looked to Part 135

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133 Hedrick, supra note 110, at 390.
135 See Hedrick, supra note 110, at 390.
137 Hedrick, supra note 110, at 390.
138 See GARA, § (2)(c).
139 See Hedrick, supra note 110, at 391-92.
140 “Passenger seating configuration” means: “[T]he total number of seats for which the aircraft is type certificated that can be made available for passenger use aboard a flight and includes that seat in certain airplanes which may be used by a representative of the Administrator to conduct flight checks but is available for revenue purposes on other occasions.” 14 C.F.R. § 129.25(a)(3) (1996).
141 GARA § (2)(c).
of the Code of Federal Regulations, which defines the term as “passenger-carrying operations that are conducted in accordance with a published schedule[,] which covers at least five round trips per week on at least one route between two or more points, includes dates or times (or both), and is openly advertised or otherwise made readily available to the general public.”

VI. HOW DOES GARA WORK?

A. TRIGGER OF 18-YEAR REPOSE PERIOD

GARA's 18-year repose period begins to run either upon the date of delivery of the aircraft to its first purchaser or lessee if it comes directly from the manufacturer, or on the date of first delivery to a person engaged in the business of selling or leasing such aircraft. The repose period on replacement or additional parts begins to run on the date the replacement or addition is completed.

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144 GARA § 2(a)(1). See, e.g., Reynolds, Findings of Fact, at 9 (“Here, the original Lycoming engine and its component parts were installed in an aircraft in 1968 that was delivered to its first purchaser in 1969 or 1970, more than 18 years before the accident. Accordingly, GARA precludes claims against Textron Lycoming relating to the original engine and its components.”); Allseimer v. Bell Helicopter Textron Inc., 919 F. Supp. 340, 342 (E.D. Cal. 1996) (finding that GARA bars claims where the defendant provided “undisputed evidence” that the helicopter, the gearbox, and the components of the gearbox that purportedly caused a crash all were more than 18 years old at the time of the crash); Carr v. United Technologies Corp., No. CIV 152495 (Cal. Super. Ct., Ventura Cty., Aug. 30, 1996) (finding that claims against aircraft and component part manufacturers are barred by GARA where the plane was delivered and the engines were installed more than 18 years before an accident); Barkley v. Textron Lycoming, Inc., Case No. 34031 (Cal. Super. Ct. Stanislaus Cty., Sept. 18, 1996) (finding that GARA bars claims where the aircraft was delivered to the first non-broker customer more than 18 years prior to the accident at issue). A pro-plaintiff commentator has argued that, despite the clear federal statutory language, the “date of delivery” should be determined under state law. Some states use the date that a product was first used for its intended purpose as the triggering date for statutes of repose, see, e.g., COLO. REV. STAT. § 13-80-107 (2001), while other states use the date on which the manufacturer relinquished its control of the product, see CONN. GEN. STAT. § 52-577a (2001).

145 GARA § 2(a)(2); see Reynolds, Findings of Fact, at 9 (“GARA § 2(a)(2) prescribes a separate 18-year limitation period for new replacement parts and
Determining the start date for the statute of repose should be a straightforward process. Courts in one state, though, had clouded the issue when dealing with accidents involving surplus military aircraft—especially helicopters.

Military aircraft typically are manufactured for direct sale to the military. When the military is done with them, the Defense Department sells them into the civilian market as surplus. These surplus aircraft are very low priced, and they are often used for tasks involving repeated heavy lifts (such as logging) for which they were not designed.\footnote{See Brian Rettman, Impact of Surplus Military Helicopters, Rotor, Winter 1997-98, at 34.} As a result, surplus military helicopters have a much higher accident rate than those experienced in general by turbine helicopters.\footnote{See id. (reporting that the accident rate for UH-1s in military service is 1.7 accidents per 100,000 flying hours, while the accident rate for surplus UH-1s is 26 accidents per 100,000 flying hours).} Even though the aircraft are being used in jobs for which they were not designed, the original aircraft manufacturer may be sued if the aircraft crashes.

When a military aircraft is being used by the military, it may not meet GARA’s definition of a “general aviation aircraft.” Recall that in order to be a “general aviation aircraft” under GARA, the aircraft must have been issued a “type certificate” or an “airworthiness certificate” by the Federal Aviation Administration.\footnote{GARA § 2(c).} But military aircraft are not required to have FAA-issued type certificates. The FAA certification requirement kicks in when the Defense Department sells its used aircraft into the civilian market. Once the aircraft is FAA-certified, it qualifies as a general aviation aircraft under GARA (assuming the rest of the statutory requirements are met).

GARA’s express language requires that for the statute of repose to apply, the aircraft must be a general aviation aircraft at the time of the “accident.”\footnote{GARA § 2(a).} Section 2(a) states that “no civil action for damages . . . arising out of an accident involving a general aviation aircraft may be brought” if the repose period has elapsed.\footnote{Id. (emphasis added).} If an aircraft is a general aviation aircraft at the time of the accident, the 18-year statute of repose should start to run at the time of its initial delivery—regardless of whether the air-

components that begins to run on the date of the completion of the replacement.”).
craft "started life" as a military aircraft or a civilian aircraft. GARA does not contain any provision that disqualifies former military aircraft from GARA or that delays commencement of the statute of repose until a type certificate has been obtained from the FAA. The statute does not require the aircraft to meet the definition of a general aviation aircraft when it is delivered to its first purchaser. This approach carries out the statutory language and reflects the understanding of both GARA's proponents and opponents that the statute of repose would cover military aircraft.151

While this seems straightforward, some lower courts in Washington state ruled that the repose period for surplus military aircraft starts to run only once the used aircraft is sold into the civilian market.152 This can take place many years after the aircraft was initially delivered to its first purchaser, the military. The United States Court of Appeals for the Ninth Circuit resolved this hotly contested issue in Kennedy v. Bell Helicopter Textron, Inc.153 In Kennedy, the Ninth Circuit ruled that the repose

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151 During Senate floor debates on the bill that proposed a 15-year repose period and eventually became GARA, Sen. Heflin (one of the principal opponents of GARA) stated: "It would appear to me that this bill might not have as much opposition if it was limited to piston-powered aircraft. But included in it are jets, helicopters, military planes, . . ." 140 CONG. REC. S2452-02 (1994). Sen. Kas- senbaum (the principal sponsor of GARA in the Senate) stated that the repose period, "when you have gone without a manufacturing or design defect, applies the same to piston-powered or jet-powered. I think that whether it is in the military or civilian, if you have flown a plane for 15 years and there has not been a defect, then clearly the plane is going to survive." Id. She also rejected the argument that military aircraft should not be protected by GARA on the ground that they are not kept in adequate repair. She said: "I think that the military is going to keep their planes in good repair. They are constantly being flown. During any stress tests, if they show a part needs to be replaced, it will be replaced, and a new 15-year statute of repose would go into effect." Id.

152 See, e.g., Kennedy v. Bell Helicopter Textron, Inc., No. C98-5579RJB, at 7-8 (rejecting a GARA defense on the ground that the trigger date for the repose period is when a surplus aircraft is delivered to the civilian market); Worman v. Bell Helicopter Textron, Inc., No. 98-2-01377-7 (Thurston Cty. Super.Ct., Mar. 3, 2000) (same).

153 Kennedy v. Bell Helicopter Textron, Inc, 283 F.3d 1107 (9th Cir. 2002). See also Butler, No. BC 206780, at 4 (noting in dicta that a former military helicopter that crashed during a municipal emergency rescue mission "was first sold and delivered [to the Los Angeles Fire Department] 22 years before the accident"). For further discussion of this issue, see Robert F. Hedrick, Are Surplus Military Aircraft and Parts Afforded GARA Protection?, 13-SUM AIR & SPACE LAW 10-14 (1998) (presenting arguments as to why GARA should not apply to claims involving surplus military aircraft); Frederick C. Schafrick, Caselaw Developments under the General Aviation Revitalization Act of 1994: The First Five Years, The 1999 Aviation Litigation Seminar, Aviation and Space Law Comm. of the Tort and Insurance
period begins to run when the aircraft is *initially* delivered to the military—not when it is eventually sold into the civilian market.

In *Kennedy v. Bell Helicopter Textron, Inc.*, a surplus military helicopter crashed during logging operations. The crash occurred 26 years after the helicopter was delivered to the military—but only 11 years after it was sold to a civilian business. The federal district court denied the defendant's motion for summary judgment under GARA, ruling that the statute of repose had not yet run. The lower court said the statute of repose could only be triggered once the aircraft is designated a general aviation aircraft, i.e., when the helicopter is sold into the civilian market and receives its first type and airworthiness certificates. Because only 11 years had passed between the FAA-certification of the surplus helicopter at issue and the accident, the court said, GARA did not bar the lawsuit.

The Ninth Circuit rejected the district court's approach. After finding that appeal of the GARA ruling was appropriate at this stage of the lawsuit, the Ninth Circuit ruled that the "plain language" of GARA required that the repose period is triggered by the initial delivery of the aircraft, even if the aircraft cannot be considered a general aviation aircraft at that time.

As the Ninth Circuit explained, the statute provides that the limitation period starts running from "the date of delivery of the aircraft to its first purchaser..." Section 3(1) of GARA defines the meaning of the term "aircraft" as used in GARA as broader than the term "general aviation aircraft." GARA pro-

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155 Id. at 7-8. The status of the defendant asserting the GARA defense, Bell Helicopter, was also contested. Bell urged that it was not a product seller or manufacturer under Washington state law. See Defendant-Appellant's Brief, at 36, Kennedy v. Bell Helicopter Textron, Inc., 283 F. 3d 1107 (9th Cir. 2002) (No. 00-35240).
157 Id.
158 See Kennedy, 283 F.3d at 1110-11 (stating that appellate jurisdiction exists for review of GARA ruling under the collateral order doctrine; GARA ruling was conclusive, resolved an important question "completely separate" from the merits, and was effectively unreviewable on appeal from a final judgment in the underlying case because the manufacturer would irrevocably lose its statutory right not to stand trial).
159 Id. at 1112.
160 Id. at 1111 (quoting GARA § 2(a)(1)(A)).
vides explicitly that “aircraft has the meaning given such term in section 40102(a) (6) of Title 49, United States Code . . .” That provision defines “aircraft” as “any contrivance invented, used, or designed to navigate, or fly in, the air.” 49 U.S.C. § 40102(a) (6). Further, the Ninth Circuit explained that an aircraft cannot fulfill GARA’s definition of general aviation aircraft at the time of delivery because one requirement of the definition is that it “was not, at the time of the accident, engaged in scheduled passenger-carrying operations.” Instead, the GARA definition can only be satisfied once the accident has occurred and the other requirements are met.

One of the fundamental principles of GARA is that when an aircraft operates without incident for 18 years, its proven record suggests that there is no product defect. Congress wanted to shield manufacturers from costly litigation when the aircraft had a lengthy track record of safety. The Ninth Circuit’s opinion in Kennedy helps further this public policy goal.

B. Trigger of “Rolling” Statute of Repose for Replacement Parts

GARA provides for a “rolling” statute of repose with regard to replacement parts. When a new part is added to the aircraft, or replaces an old part, the statute of repose starts all over again with regard to that part. As one court said, “[s]ince almost every major component of the aircraft will be replaced over its lifetime, the 'rolling' aspect of the statute of repose was intended to provide that victims and their families would have recourse against the manufacturer of the new component part in the event of a defect in the new part causing an accident.”

If the additional or replacement part is a used part, though, the statute of limitations with regard to that used part should continue to run. Rep. Glickman, one of GARA’s original sponsors, explained during the House debate that “a used propeller which has 3 years left on its applicable limitation period would

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161 Id. (quoting GARA § 3(1)).
162 Id.
163 See Flores v. Ram Aircraft Corp., No. 96-1507-CIV (S.D. Fla. Sept. 2, 2000) (denying summary judgment on GARA grounds where defendant failed to address plaintiff’s claims that a defective component part that contributed to the accident was added to the engine during an overhaul within the repose period, even though defendant had uncontroverted evidence the engine itself was delivered more than 18 years before case was filed).
164 Burroughs, 93 Cal. Rptr. 2d at 131-32.
still have only 3 years, if installed in its used condition on a different airplane.\textsuperscript{165} In \textit{Butler}, the court refused to re-start the repose period where the used part that allegedly caused the accident was added to the plane one year before the accident.\textsuperscript{166} The part’s retirement life had been extended and the part was reinstalled. The court stated that this “cannot be considered the installation of a new part because it is the precise opposite of that.”\textsuperscript{167}

When the rolling statute of repose provision is triggered, suit is authorized only against the manufacturer of the replacement part, not against the manufacturers of the airframe or other components.\textsuperscript{168} In \textit{Campbell v. Parker-Hannifin Corp.},\textsuperscript{169} the plaintiffs argued that the replacement of component parts during the repose period triggered a new time frame that was applicable not only to the component part manufacturers but also to the plane’s manufacturer.\textsuperscript{170} The court disagreed, relying on the legislative history that provided: “Since the bill provides for a ‘rolling’ statute of repose, victims and their families will have recourse against new component part manufacturers for a part installed subsequent to delivery in the event of a crash attributable to a structural defect or similar flaw in a new component part.”\textsuperscript{171} The Court’s decision reflects both the letter of and public policy behind GARA.

C. Exceptions to GARA

GARA provides four exceptions to the statute of repose: the fraud exception, the medical emergency exception, the not aboard the aircraft exception, and the written warranty exception. The latter three exceptions are relatively straightforward.

\textsuperscript{165} 140 Cong. Rec. H4998-02 (1994).
\textsuperscript{166} Butler, No. BC 206780, at 9.
\textsuperscript{167} Id.
\textsuperscript{168} See H. R. Rep. No. 103-525, pt. 2.
\textsuperscript{170} See id. at 209.
\textsuperscript{171} Id. (quoting H. R. Rep. No. 103-525, pt. 2 (emphasis in original)). See also Davenport v. Precision Airmotive, No. SC-041-139, at 3 (Cal. Super. Ct., L.A. Cty. Feb. 21, 1997) (granting summary judgment despite plaintiff’s argument that defendant Textron-Lycoming could not assert GARA because it did not manufacture the allegedly defective components at issue, and stating that “no reason is advanced why Textron-Lycoming should remain in the case . . . . There is nothing . . . to indicate that these [allegedly defective] components were manufactured by Textron-Lycoming.”).
1. Medical Emergency Exception

The medical emergency exception is designed to provide additional protection to certain people who had no choice about being on the aircraft, such as accident victims being airlifted to a hospital for emergency treatment. While the statutory language says "medical or other emergency," GARA's legislative history makes clear that its purpose was to protect medical emergency patients. Still, given the plain language of the statute, it is likely that a person having been rescued from a flood or similar emergency could invoke the exception.

Pilots, flight engineers, and flight navigators are considered "flight crew" and thus cannot invoke the medical emergency exception. Some commentators have argued that paramedics on a MedEvac aircraft should be able to invoke the exception along with the patients. The public policy behind the law suggests that this exception is limited to those who are aboard the helicopter for receiving treatment, not those who are aboard for providing treatment, since the provision is intended to apply to people who did not freely choose to fly aboard the aircraft. A California trial court understood this public policy when it applied GARA in a case that arose out of a crash of a Los Angeles Fire Department helicopter carrying an accident victim. The court explicitly noted that GARA's medical emergency exception applied to the claims of the accident victim, but granted summary judgment to the defendant with regard to claims by the paramedics as well as the flight crew.

2. "Not on the Plane" Exception

Like the "medical emergency" exception, the "not on the plane" exception is intended to exempt people who did not choose to board the aircraft. Recall that a key aspect for passage of the bill was support by owners and operators of private planes. Under this exception, if a defective aircraft crashes into another and injures passengers on the second aircraft, or if it crashes and injures people on the ground, those persons not on the defective plane are exempt from the statute of repose.

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173 See Hedrick, supra note 110, at 405-12; Anton, supra note 11, at 794.
174 Buller, No. BC 206780, at 2.
175 Id.
3. Warranty Exception

The warranty exception is intended to recognize those situations where the manufacturer and the buyer negotiate a longer safety warranty than the 18-year statute of repose. The legislative history of GARA states that "in the event a manufacturer desires to specifically warrant the safety of its product for a period of time beyond the applicable statute of repose, the courts would honour the manufacturer's written warranty." The few plaintiffs who have raised this exception have generally been unsuccessful because they failed to show that a specific warranty existed.177

4. Fraud Exception

The fraud exception has been the most litigated. A key justification for the federal government's involvement with GARA and its protections is its "cradle to grave" oversight of the aviation industry. The aviation industry is heavily regulated by the federal government through the FAA certification process. In light of this comprehensive regulation, open-ended civil liability exposure for general aviation manufacturers was seen as a redundant and heavy-handed use of the judicial system as a deterrent to the manufacture of unsafe airplanes.179 As two commentators have noted:

[t]he FAA's comprehensive requirements of airworthiness and type certification of each aircraft were determined by Congress to provide sufficient safeguards, particularly with 18 years of exposure to private, civil liability. Thus, the underlying premise of the fraud exception is that the protections afforded by GARA are not to be taken away from a manufacturer unless it can be clearly shown to have abused the FAA's airworthiness and type certification process.180

177 See, e.g., Schneider, No. 542343, at 3 (finding that the plaintiff failed to carry its burden of proving a written warranty existed); Davenport, No. SC-041-139, at 3 (finding that the plaintiff failed to establish the existence of a written warranty); Alter, 944 F. Supp. at 538 (stating that the plaintiff alleged an express or implied breach of warranty but dismissing the case on GARA grounds).
178 Oliver & Jones, supra note 50, at 246.
180 Oliver & Jones, supra note 50, at 253.
a. Substance of the Fraud Exception

The procedural requirements for the issuance of type certificates and airworthiness certificates are set forth in Part 21 of FAR. Manufacturers who hold type certificates have a continuing duty to report to the FAA all part failures, malfunctions and defects they determine have resulted or may result in certain occurrences listed in the FAR.181 This information must be reported in order to obtain continuing airworthiness.182 This reporting requirement is intended to allow the FAA to ensure that aircraft problems are satisfactorily resolved.

To trigger the fraud exception, the manufacturer must have "knowingly" misrepresented, withheld, or concealed a certain type of information.183 Not all information relating to the aircraft will implicate the fraud exception. Instead, the fraud exception may be triggered only where the information at issue is: "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."184

b. What is the Appropriate Standard of Intent?

GARA states that the fraud exception applies where the manufacturer has "knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information."185

Plaintiffs are required to establish the requisite level of the manufacturer's intent in order to invoke this exception. Some have sought to make an issue of whether the word "knowingly" in the exception modifies "concealed" and "withheld" as well as "misrepresented." One commentator has suggested otherwise, stating that "[i]t is important to note that knowingly only precedes and, thus, only applies to misrepresentation, and not to the concealment or withholding of information."186 The commentator then argues that proof of the mere negligent withhold-

181 14 C.F.R. § 21.3(a) (listing types of occurrences).
182 Id. at § 21.1.
183 GARA, § 2(b)(1).
184 Id.
185 Id.
186 See Hedrick, supra note 110, at 409.
ing or concealment of information should be enough to trigger the fraud exception.\textsuperscript{187}

The language chosen by the drafters and the legislative purpose of GARA strongly suggests that proof of \textit{scienter} is required as to all three types of fraudulent acts.\textsuperscript{188} Unlike the verb "to misrepresent," the verbs "to conceal" and "to withhold" both require the actor to be acting at least with knowledge, if not with intent. In including this exception, Congress sought to address three different situations where a manufacturer could fraudulently make use of the repose period by ensuring the FAA has misinformation about a particular problem: first, by affirmatively misrepresenting the information; second, by withholding the information, thereby providing misinformation by omission; and finally, by concealing the information to knowingly provide misinformation by omission where the information has been affirmatively requested. This has been the approach of courts addressing this exception.\textsuperscript{189}

c. What Acts Constitute Fraud?

Courts considering the fraud exception have generally "got ten it right" and interpreted the exception in line with its legislative purpose. Under these cases, the fraud exception is triggered only where the particular defendant knowingly misrepresented or failed to report information required by statute or requested by the FAA about the aircraft or the component part at issue, \textit{and} where the alleged misrepresentation or failure to report information was both material and causally related to the accident.

Courts have refused to apply the fraud exception where a defendant was not legally required to provide the FAA with the information at issue. This sensible approach is consistent with the statutory language. For example, in \textit{Cartman v. Textron Hedrick, supra} note 110, at 409. "That is an argument we have faced. \ldots I can report to you that in Michigan, those judges who have faced that argument or similar arguments have found it not to be very persuasive, but that is an indication of the kinds of things that the courts are being asked to look at in order to avoid the application of GARA." Humphrey, \textit{supra} note 4, at 176.

\textsuperscript{187} Statutes are to be interpreted to give effect to congressional intent. \textit{See} Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30 (1983).

\textsuperscript{188} \textit{See}, e.g., \textit{Rickert v. Mitsubishi Heavy Indus. Inc.}, 923 F. Supp. 1453, 1456 (D. Wyo. 1996) (applying the knowledge requirement to all three prongs of the fraud exception) [hereinafter "\textit{Rickert I}"].
Lycoming Reciprocating Engine Division, the federal district court was “unwilling to infer a duty under [the fraud exception] requiring defendants to volunteer information which 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 directly by the defendant to the FAA.” In this case, the pilot of a small plane sued for injuries sustained in a crash allegedly caused by the installation of a faulty composite carburetor float manufactured by Rogers Corporation. The plaintiff alleged that another defendant had made misrepresentations to the FAA about design and manufacturing defects in the float. The plaintiff did not explicitly assert that Rogers Corporation knew about the alleged misrepresentations, but did suggest that Rogers was aware of the alleged defects. The court granted Roger Corporation’s motion for summary judgment, refusing to apply the fraud exception “merely because a defendant has not informed the FAA about either possible safety concerns regarding a part or possible misrepresentations by other parties.”

Similarly, in Butler, a state court properly refused to apply the fraud exception where a manufacturer had not reported accidents regarding the corresponding military version of the aircraft at issue. The court explained that there was no evidence that the manufacturer was required to do so. The plaintiffs principally argued that by failing to report such accidents, the manufacturer violated an FAA regulation requiring manufacturers who hold type certificates to report “any failure” in an aircraft. The court disagreed. It found that manufacturers of military aircraft are not required to obtain type certificates and that therefore the regulation did not establish mandatory reporting requirements for military aircraft. The court found

191 Id. at *3.
192 Id.
193 Butler, No. BC 206780, at 7-8.
194 Id.
195 In 1989 and 1996, the years relevant to the case, FAR § 21.3 stated that “(a) the holder of a Type Certificate, . . . , including a Parts Manufacturer Approval (PMA), . . . shall report any failure, malfunction, or defect in any product, part, process, or article manufactured by it that it determines has resulted in any of the occurrences listed in paragraph (c) if this section.”
196 Butler, No. BC 206780, at 7-8. An affidavit submitted by Bell stated that military aircraft are typically "purpose-built" to military procurement specifica-
that plaintiffs had introduced no evidence showing that manufacturers of military aircraft actually reported such failures to the FAA under that regulation. The court said:

Plaintiffs' argument that the literal or plain meaning of 2.13 covers "any failure" is not persuasive against the apparent actual practice of the FAA and the manufacturers. An agency's rules and regulations must be read in the context of the agency's jurisdiction. The "plain meaning" guideline should not be followed so as to interpret a rule as having expanded the scope of the issuing agency's jurisdiction.

In Campbell v. Parker-Hannifan Corp., the court correctly ruled that the fraud exception did not apply where the manufacturer did not report problems with the component part that caused the accident where the problems had arisen in regard to a different model plane. Campbell arose out of a crash that occurred after the failure of vacuum pumps in the aircraft's flight instruments. Plaintiffs challenged the court's grant of summary judgment under GARA to Cessna, the plane's manufacturer. The plaintiffs claimed that Cessna had concealed knowledge about safety issues with the vacuum pumps, citing a National Transportation Safety Board ("NTSB") report based on information from the FAA that discussed vacuum pump accidents in a different model of Cessna plane, the 210N, and recommended that the FAA conduct further studies and issue directives about the vacuum pumps in the Cessna 210N model aircraft. The court noted that while the report noted concern by the FAA and NTSB about the failure rate of the vacuum pumps, this concern related to the failure rate in the 210N model plane, not the 310 model involved in the crash. The court observed that the detailed review by the NTSB and the recommendations made to the FAA for further study "tend to defeat, not support, claims of misrepresentation and concealment by Cessna" and that plain-

197 Id. at 8.
198 Id.
200 Id. at 208. The Butler court similarly ruled that a manufacturer's failure to report problems with a part in the corresponding military version of a helicopter was irrelevant. Butler, No. BC 206780, at 8 ("Nondisclosure of the military failures was irrelevant.").
tiffs failed to raise "any reasonable inference of knowing misrepresentation or concealment on the part of Cessna." \(^{201}\)

d. Pleading the Fraud Exception

Congress required plaintiffs seeking to invoke the fraud exemption to plead with "specificity" the facts supporting the fraud claim. Only a handful of courts have elaborated on the contours of this pleading standard, but it is an "obvious analog" to Federal Rule of Civil Procedure 9(b), which requires parties to plead fraud with particularity. \(^{202}\) "This requirement is important because it immediately puts the burden on the claimant to affirmatively set forth the facts supporting each allegation." \(^{203}\)

This heightened pleading standard is intended to prevent plaintiffs from pleading general claims about very old aircraft that either are not supported by facts or are frivolous. \(^{204}\) Without this key requirement, plaintiff's counsel could make general allegations of fraud and maintain a lawsuit long enough to embroil the defendant in expensive and burdensome discovery with the goal of forcing a settlement. \(^{205}\) As two commentators explained, "[W]ithout this initial gatekeeping device, GARA is at risk of being ineffective, since it is specifically designed to guard against this very kind of litigation tactic." \(^{206}\)

Other commentators, though, have argued that this strict pleading requirement raises a procedural problem: claimants may not have access to information that the manufacturer has and thus cannot satisfy the requirement. \(^{207}\) As a result, claimants may need to perform limited discovery in order to determine whether such facts exist. \(^{208}\) Courts generally have been willing to allow plaintiffs to conduct limited discovery or file an amended complaint to address problems with defective plead-

\(^{201}\) Campbell, 82 Cal. Rptr. 2d. at 210.
\(^{202}\) Richert I, 923 F. Supp. at 1456.
\(^{203}\) Hedrick, supra note 110, at 405-06.
\(^{204}\) See Hedrick, supra note 110, at 406.
\(^{205}\) Humphrey, supra note 4, at 175-76.
\(^{206}\) Oliver & Jones, supra note 50, at 253.
\(^{207}\) See Hedrick, supra note 110, at 406.
\(^{208}\) Charles Hvass, former chairman of ATLA's aviation section, said defendants would still face aggressive discovery: "We are going to be in the files of the FAA and filing pretrial discovery requests - or actually presuit discovery requests under . . . Federal Rule 29, which allows you to go forward and get discovery before trial." Charles T. Hvass, Esq., Remarks, General Aviation Revitalization Act Panel Discussion, 63 J. AIR L. & COM. 169, 181 (1997).
At least one defendant has argued that these procedural "helps" for plaintiff's counsel are unnecessary because ethical provisions require attorneys to be knowledgeable about evidentiary support for allegations or factual contentions in their papers.  

In *Rickert v. Mitsubishi Heavy Industries Ltd.*, the plaintiff argued that the manufacturer fraudulently concealed information about problems with the plane that led to the crash. The federal district court held that "GARA requires more than innuendo and inference; it demands 'specificity.'" The court identified the elements requiring specificity in pleading as: "(1) knowledge; (2) misrepresentation, concealment, or withholding of required information to the FAA; (3) materiality and relevance; and (4) a causal relationship between the harm and the accident." The *Rickert* court granted the defendant's motion to dismiss on the ground that the plaintiffs' evidence was merely "differences of opinion concerning design issues" that were "dress[ed] up" as "misrepresentations and concealments."

In *Wright v. Bond-Air, Ltd.*, the state trial court rejected the defendant's motion to dismiss, finding that the plaintiff ade-
quately pled her state law cause of action despite GARA’s heightened pleading standard. The court explained:

Defendant argues that Plaintiff’s complaint failed to plead knowledge and misrepresentation with the requisite specificity, but merely pleads conclusions. A review of the complaint reveals that Plaintiff has pled both knowledge and misrepresentation with the requisite specificity, see paragraphs 17(b), (e), (f) and (g). Plaintiff alleges, for example, in [17] (f) and (g) that Cessna submitted to the FAA a series of reports which it knew at the time the reports were submitted did not accurately and adequately reflect the flight handling qualities and characteristics, maintenance requirements and vacuum air delivery system... Cessna knew that it had made material misrepresentations to the FAA. Plaintiff has adequately alleged the elements required by Rickett.

VII. GARA BARS CLAIMS FOR POST-SALE FAILURE TO WARN

A. Post-Sale Duty to Warn

Plaintiffs have sought to avoid application of the statute of repose by arguing that post-sale failure to warn claims should not be barred by GARA. They argue that a manufacturer has a continuing post-sale duty to warn of alleged hazards involving the plane, a duty that continues up until the time of an accident.

Courts have generally rejected this approach. They have noted that allowing such claims to proceed would eviscerate the protections afforded by GARA, since practically every claim could be recharacterized as a breach of the post-sale duty to warn. Accordingly, courts have rejected plaintiffs’ efforts to evade GARA with post-sale failure to warn claims. The United States Court of Appeals for the Ninth Circuit took this approach...

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216 Id. at 15.
217 See, e.g., Campbell, 82 Cal. Rptr. 2d at 202. In this case, plaintiffs argued that Cessna knew or should have known of safety problems with replacement vacuum pumps manufactured by another company, which allegedly caused a plan to crash. Plaintiffs claimed that “Cessna knew or should have known that the parts would not work and failed to issue any warning to aircraft owners or to the FAA.” Id. at 209. The court rejected this argument, stating that “the GARA limitation period may not be circumvented simply by labeling the claim as one for failure to warn. Appellants are still attempting to hold Cessna liable for actions connected with its role as manufacturer.” Id. at 210.
in *Lyon v. Agusta S.P.A.*,\(^{218}\) when it rejected the plaintiffs’ post-sale failure to warn claim. The Ninth Circuit stated that if the alleged failure to warn re-started the 18-year repose period, “GARA would have little value to manufacturers because the plaintiff could always argue that an 18-year period commenced if the manufacturer did nothing at all, while simultaneously arguing that if the manufacturer did do something that, too, would start a new 18-year period running.”\(^ {219}\)

A California state appeals court also ruled that the plaintiffs could not proceed on a theory of breach of the independent duty to warn. In *Burroughs v. Precision Airmotive Corp.*,\(^ {220}\) the court rejected the plaintiffs’ argument that the defendant, a general aviation aircraft parts manufacturer whose predecessor had purchased the product line from the original manufacturer, was liable for failure to warn. The plaintiffs had argued that the successor had established an ongoing relationship with the purchasers of the carburetor, from which it derived an economic benefit. Plaintiffs said the successor knew about defects in the carburetor and therefore had a duty to warn those customers of the defects. The court refused to accept this argument, explaining that California had not adopted this theory of liability, and the court did not wish to do so in the circumstances of this case:

> Precision’s duties and obligations concerning this product, including a continuing duty to warn, were imposed on it by federal law. Imposing a separate and independent duty based on general principles of tort law would not only be superfluous in light of the federal statutory scheme regulating and overseeing the duties of manufacturers in the general aviation industry, but would also directly conflict with that statutory scheme.\(^ {221}\)

A federal district court in the Ninth Circuit reached a different conclusion. In *Kennedy v. Bell Helicopter Textron Inc.*,\(^ {222}\) the

\(^{218}\) *Lyon*, 252 F.3d at 1078.

\(^{219}\) Id. at 1088; see also *Reynolds, Findings of Fact*, at 8 (stating that “[t]o accept plaintiffs’ argument that a new cause of action arises every time there is an overhaul at which the accused part arguably might have been replaced would render a statute of repose largely meaningless” and where the accused part itself is protected by the statute of repose, the statute of repose cannot be circumvented by recouping the claim as a ‘failure to warn’ claim or, as plaintiffs do here, a claim that the allegedly defective part should have been replaced together with other parts (which is simply a failure to warn claim under another guise.).)


\(^{221}\) *Burroughs*, 93 Cal. Rptr. 2d at 136.

United States District Court for the Western District of Washington ruled that Washington state law "clearly provides that a manufacturer may be subject to liability for the failure to warn of design defects in its products" and therefore that Bell had a post-sale duty to warn of design defects. The court ruled that it was for the jury to determine whether Bell breached that duty as well as whether the helicopter had a design defect that proximately caused the accident and plaintiffs' damages. The Kennedy court's ruling was unwise, as this approach undermines the legislative purpose of GARA.

B. CLAIMS BASED ON AIRCRAFT MANUALS

Plaintiffs have focused on various flight and service manuals in attempts to get around GARA. Most of the cases are a variant on attempts to claim breach of a post-sale duty to warn. Courts have recognized these as attempts to circumvent the statute of repose by providing a "back door" to sue for the design flaw — ostensibly not for the design flaw itself, but for the failure of the manuals to adequately correct the flaw.

Under this approach, plaintiffs argue that revisions to flight or maintenance manuals trigger the rolling limitations period for claims involving new parts. This argument is patterned after a pre-GARA state court case, *Driver v. Burlington Aviation Inc.*, in which a court accepted the view that an instruction manual rather than the aircraft was the defective product at issue. In *Driver*, the plaintiffs alleged that incorrect information in the manual about carburetor icing and slow-flight characteristics led to the crash of an airplane. Plaintiffs argued the North Carolina statute of repose did not apply to their claims based on the information manual, because the information manual was sold separately. The North Carolina court said that if the information manual were sold within the repose period, the claim would not be precluded. That is because the manual, *and not the aircraft*, was the defective product that created the plaintiffs' cause of action.

\[228\] *Id.* at 8 (citing RCW § 7.72.030(1)(c)).

\[229\] *Id.* at 9.


\[232\] See *Anton*, supra note 11, at 803.

\[233\] *Driver*, 430 S.E.2d at 483.
Federal courts have rejected this approach. In one of the first cases to interpret GARA, Alter v. Bell Helicopter Textron, Inc., the defendants argued that the plaintiffs had fraudulently joined one defendant, Bell Helicopter, in order to defeat removal. The defendants said that as a matter of law, GARA prevented any possibility of recovery by the plaintiffs against Bell, and therefore that Bell's presence in the lawsuit did not defeat removal. The plaintiff argued that GARA did not apply because the aircraft accident was proximately caused by misleading instructions in a maintenance manual. It was alleged that the manual failed to warn of the propensity of an aircraft part to fail prematurely and to prescribe proper inspection procedures to detect this design flaw. The plaintiff took the position that a 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" under Section 2(a)(2) of GARA. There was no evidence as to when the allegedly misleading instructions first appeared. Instead, the plaintiff argued that since the manual as a whole was revised twice a year, the statute of repose was restarted after each such revision. The plaintiff said, "By refusing to apply the statute of repose under these circumstances, courts will ensure that defendants don't take lightly their obligation to incorporate new information as the manuals are republished."

The Alter court rejected this argument. The court relied on a number of non-GARA statute of repose cases holding that manufacturers' maintenance and repair manuals are not a "separate" product or component upon which plaintiffs may base a claim to avoid a repose statute. Rather than constituting a

229 See, e.g., Butler, No. BC 206780, at 9 (after increasing part's retirement life from 4,000 hours to 5,000 hours, "the resultant change in the maintenance manual for the helicopter cannot be viewed as the installation of a new part in the helicopter. The inspection tool and the maintenance manual are not parts of the aircraft. The court cannot turn the meaning of words on their head in order to preserve plaintiffs' claims against the Bell parties.").

230 Alter, 944 F. Supp. at 531.

231 See id. at 537.

232 See id. at 538.

233 Id. at 537.

234 See, e.g., Alexander v. Beech Aircraft Corp., 952 F.2d 1215 (10th Cir. 1991). In Alexander, a non-GARA case, a plane crashed after running out of fuel. The plaintiffs argued that the operator handbook issued by the defendant manufacturer was defective because it overstated the amount of usable fuel in the aircraft. The defendant manufacturer argued that the handbook was a "replacement
“replacement part,” the court said, the manual simply would be 
“part of the evidence proffered by plaintiffs which bears on a 
failure to warn theory” against the defendant. The Alter court 
said that these cases showed that a manufacturer’s provision of 
maintenance and repair manuals was part of its duty to warn as a 
maker, not a separate and discrete post-sale undertaking creating a separate cause of action. Otherwise,

[t]he result would be the evisceration of the statute of repose. 
If a plaintiff is precluded by the statute of repose from suing for 
a design flaw in a product, the plaintiff must also be precluded 
from suing for a failure to correct the design flaw, whether that 
failure be in the inadequacy of the text of a subsequently issued 
owner’s manual or in repair guidelines subsequently sent to 
mechanics:

The Alter court rejected the failure to warn claims based on 
the allegedly misleading inspection manual. It ruled that GARA 
barred the plaintiffs’ manufacturing defect claims. In an-
other case arising out of the same incident, the court followed 
the lead in Alter and granted the defense motion for summary 

part” under the statute of repose which, like the similar GARA provisions, trig-
gered a new repose period. The Tenth Circuit held that an operator handbook 
was not a “replacement part,” but merely “part of the evidence proffered by plain-
tiffs which bears on a failure to warn theory” against the defendant. Id. at 1220. 
Other state statute of repose cases cited in Alter include Schamel v. Textron-
Lycoming, 1F.3d 655, 657 (7th Cir. 1993) (Indiana statute of repose bars action 
for failure to warn of alleged latent product defect; issuance of service manuals 
and other sources of service information was not a separate and discrete post-sale 
undertaking because such information is “generally necessary to satisfy the manu-
facturer’s duty to warn”); Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1135 
(6th Cir. 1986) (Tennessee statute of repose bars claim for failure to warn; in-
struction manual cannot be considered a separate “product” issued within the 
 limitation period); Butchkosky v. Enstrom Helicopter Corp., 855 F. Supp. 1251, 1257 
(S.D. Fla. 1993) (Florida statute of repose bars claims for helicopter repairs de-
spite plaintiff’s argument that because repairs were done according to the manu-
facturers’ instruction manual, and the manual was issued within the repose 
period, the claim was still viable).

235 Alter, 944 F. Supp. at 538 (citing Alexander, 952 F.2d at 1220).
236 Alter, 944 F. Supp. at 540-41 & n.5.
237 Id. at 539 (quoting Butchkosky, 855 F. Supp. at 1255) (emphasis added by 
Alter court).
238 Id. at 541. The court similarly rejected plaintiff's breach of warranty claim. 
The court noted that under Texas law, a plaintiff can predicate a products liabil-
ity action on a breach of warranty under the Uniform Commercial Code. How-
ever, the court said, an operating manual does not constitute "goods" within the 
meaning of the U.C.C. Therefore, GARA precludes a state law claim for breach 
of warranty because Bell's maintenance manual is not a good, but rather part of 
its duty to warn. Id. at 539 n.4.
judgment on GARA grounds. Pro-plaintiff commentators have criticized *Alter* as presenting a catch-22 situation from a policy standpoint:

On the one hand, as long as manufacturers are protected under GARA with regard to updating their aircraft manuals, they have a complete incentive to do so without the concern of additional liability exposure. Yet, on the other hand, it is difficult to distinguish between the triggering of a new statute of repose for a new part that is required by the manufacturer to be replaced for safety reasons, and no new triggering date when the manufacturer changes or revises its maintenance manual to make the aircraft safer for flight.

In *Alter*, the court noted that the plaintiffs claimed both the existence of a design defect and, essentially, failure to warn of that defect. The court stated that plaintiffs’ theory “is that a specific component failed because of defective design – a propensity to prematurely fatigue and fail – and test, and that the manual described an inspection procedure which did not correct the design flaw or allow it to be detected . . . [T]he suit for failure of the manuals to correct a design flaw is precluded by the statute of repose that bars a suit for the design flaw.”

In *Caldwell v. Enstrom Helicopter Corp.*, plaintiffs filed suit against a helicopter manufacturer after a crash. The pilot had planned the trip not knowing that the last two gallons of gasoline in the helicopter’s fuel tanks could not be used. The helicopter was within 10 minutes of its destination when the usable fuel ran out and the plane crashed. Plaintiffs did not argue that the fuel tanks were defective—they “conceded that the fuel tanks themselves were in good working order.” Instead, plaintiffs alleged the helicopter’s flight manual was defective because it did not include an FAA-required warning that the last two gallons of gasoline in the fuel tank would not burn. They argued

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239 See Shen Li v. Bell Helicopter Textron Inc., No. 4:96-CV-116-E (June 7, 1996) (granting defense motion for summary judgment on GARA ground); Schneider, No. 542343, at 3 (granting defense motion for summary judgment on ground that plaintiff’s failure to warn claims based on alleged shortcomings in service manuals, saying that allowing these claims "would circumvent GARA providing a back door to sue for a design flaw.").


242 *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d at 1115, 1157 (9th Cir. 2000).

243 See id. at 1156.

244 See id. at 1156-57.
that while the helicopter was 23 years old, their claim fell within GARA's "rolling" feature, because the flight manual had been revised several times in the past 18 years and thus was a new "system . . . or other part" of the helicopter within the meaning of the rolling provision. The Ninth Circuit reversed the district court's ruling that a revised manual, as a matter of law, can never fall within GARA's rolling provision.

Instead, the Ninth Circuit ruled, an aircraft flight manual is a "part of the aircraft" and, under certain circumstances, can fall within GARA's rolling provision. Unlike other manufacturer publications, flight manuals are required by the FAA to accompany each aircraft and must contain "information that is necessary for safe operation because of design, operating, or handling characteristics." Moreover, the Ninth Circuit explained, the missing warning that was allegedly the cause of the accident at issue was required by the FAA to be included in the flight manual: "The manual specifically must include information about a gas tank's unusable fuel supply, if the unusable portion exceeds one gallon or five percent of the tank capacity." The court concluded that, in light of those federal requirements, "There is no room to assert that a helicopter manufacturer's [flight] manual is a separate product."

Even though a flight manual may be considered a part of the aircraft, the Caldwell court ruled that a revision of the flight manual does not circumvent the rolling GARA provision unless the change itself caused the injury. The court explained this ruling:

Just as the installation of a new rotor blade does not start the 18-year period of repose anew for purposes of an action for damages due to a faulty fuel system, a revision to any part of the manual except that which describes the fuel system would be irrelevant here. Furthermore, mere cosmetic changes (like changing the manual's typeface) do not revive the statute of repose.

245 Id. at 1157.
246 See id. (citing 14 C.F.R. 27.1581(a)(2)).
247 Id. (citing 14 C.F.R. 27.1585(e)).
248 Id. The court further explained: "[A] flight manual is an integral part of the general aviation aircraft product that a manufacturer sells. It is not a separate, general instructional guide (like a book on how to ski), but instead is detailed and particular to the aircraft to which it pertains. The manual is the "part" of the aircraft that contains the instructions that are necessary to operate the aircraft and is not separate from it." Id.
In sum, if Defendant substantively altered, or deleted, a warning about the fuel system from the manual within the last 18 years, and it is alleged that the revision or omission is the proximate cause of the accident, then GARA does not bar the action.\textsuperscript{249}

Moreover, it is important to note that under \textit{Caldwell}, the manufacturer's failure to add the relevant warning to the manual during the revision process was \textit{not} enough to restart the statute of repose. Indeed, that would be tantamount to allowing GARA to be avoided by an alleged breach of a continuing duty to warn. Instead, plaintiffs were required to prove \textit{both} that the manufacturer substantively altered or deleted an existing warning about the alleged problem during the repose period, and that the revision or omission proximately caused the accident.\textsuperscript{250}

Subsequently, in \textit{Lyon v. Agusta S.P.A.},\textsuperscript{251} the Ninth Circuit emphasized the limits of its holding in \textit{Caldwell}. In \textit{Lyon}, the plaintiffs argued that the 18-year repose period was re-started once the manufacturer discovered a problem with the aircraft, which subsequently caused the accident.\textsuperscript{252} Plaintiffs said that the manufacturer's failure to warn about the newly perceived problem amounted "to something like replacement of a component part" because it breached an alleged continuing duty to upgrade and warn.\textsuperscript{253} The Ninth Circuit disagreed, saying: "Were that so, GARA would have little value to manufacturers because the plaintiff could always argue that an 18-year period commenced if the manufacturer did nothing at all, while simultaneously arguing that if the manufacturer did do something that, too, would start a new 18-year period running. That is not the law."\textsuperscript{254} The Ninth Circuit reemphasized the distinction it drew between the revision or deletion of a relevant warning already in a flight manual, and post-sale failure to warn.\textsuperscript{255} "What we alluded to there, we reify here: a failure to warn is decidedly not the same as replacing a component part with a new one," the Ninth Circuit said. "It does not allow the [plaintiffs] to bypass the GARA bar."\textsuperscript{256}

\begin{flushleft}
\textsuperscript{249} \textit{Id.} at 1158 (emphasis added).
\textsuperscript{250} \textit{Id.}
\textsuperscript{251} \textit{Id.}
\textsuperscript{252} \textit{Id.} at 1078.
\textsuperscript{253} \textit{Id.} at 1088.
\textsuperscript{254} \textit{Id.} (citation omitted).
\textsuperscript{255} \textit{Id.}
\textsuperscript{256} \textit{Id.} (citation omitted).
\end{flushleft}
Thus, Caldwell and Lyon establish a high standard for plaintiffs to satisfy when seeking to avoid GARA with an argument based on the revision of manuals during the repose period. First, plaintiffs must establish that the manual at issue is required by the FAA and thus is a “part” of the aircraft. Second, plaintiffs must establish that the manufacturer “substantially altered or deleted” an existing warning about the relevant problem with the aircraft at some point during the repose period. Third, plaintiffs must establish that the alteration or deletion of that warning was the proximate cause of the accident. This high standard is consistent with the language and legislative purpose of GARA.

VIII. PROCEDURAL ISSUES

A. DOES GARA CREATE FEDERAL JURISDICTION?

To date, courts have uniformly held that GARA does not create a basis for federal court jurisdiction. In Wright v. Bond-Air, Ltd., defendants sought to remove the case to federal court, arguing that GARA provided a sufficient federal interest for it to do so. Defendants conceded that the plaintiff’s case arose under state law. But they also argued that although the complaint did not reference GARA, the plaintiff had “artfully pleaded” facts supporting GARA’s knowing misrepresentation exception—thus creating a federal condition precedent to be satisfied. Defendants further contended that plaintiff’s artful pleading did not conceal the fact that their complaint presented a federal question sufficient to confer federal jurisdiction.

The court disagreed, stating that under the well-pleaded complaint rule, jurisdiction is determined from the face of the complaint, not from a defense or allegations in the complaint that anticipate a defense. While the court acknowledged that two exceptions to that rule exist, it said neither were met. First, it said, defendants did not rely upon the “complete preemption” exception, which provides for federal jurisdiction when the state law upon which the complaint is based has been totally preempted by federal law. Next, it said, defendants failed to establish that the plaintiff’s state law cause of action presented a

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258 Id. at 302.
259 Id. at 302-03.
260 Id. at 302.
261 Id. at 302-03.
substantial federal question that would support a finding that the case arises under federal law.\textsuperscript{262} The court said that GARA did not create a federal cause of action or preempt state substantive product liability law.\textsuperscript{263} Instead, the court said, "GARA creates a national statute of repose and serves a gatekeeping function for Plaintiff's state law action. GARA is narrowly drafted to preempt only state law statutes of limitation or statutes of repose that would permit lawsuits beyond GARA's 18 year limitation period in circumstances where its exceptions do not apply."\textsuperscript{264} The mere fact that GARA requires the consideration of FAA regulations did not raise a sufficiently substantial federal issue, since FAA regulations do not preempt traditional state law claims for negligence and do not provide for a private right of action for violations of FAA regulations.\textsuperscript{265} Thus, the court said, consideration of the federal issue "is not sufficiently substantial to confer federal question jurisdiction under 28 U.S.C. § 1331."\textsuperscript{266}

In \textit{Alter}, the defendants argued that the federal court had subject matter jurisdiction over the case, which alleged state law claims, because "GARA completely preempts state law." The court decided the jurisdiction issue on another ground and declined to consider this issue.\textsuperscript{267} The \textit{Alter} defendants also argued that joinder of the defendant with the GARA defense was fraudulently done in order to defeat federal court jurisdiction. In that case, the joinder of Bell Helicopter, a Texas-headquartered defendant, ostensibly prevented removal under diversity jurisdiction from Texas state court under 28 U.S.C. § 1441(b). Defendants successfully argued, though, that GARA plainly barred suit against Bell and joinder of Bell was fraudulent.\textsuperscript{268} The court denied plaintiffs' motion to remand and instead dismissed the claims against the defendant manufacturers on the basis of GARA.\textsuperscript{269}

\begin{itemize}
\item \textsuperscript{262} \textit{Wright}, 930 F. Supp. at 303.
\item \textsuperscript{263} \textit{Id.} at 302.
\item \textsuperscript{264} \textit{Id.}
\item \textsuperscript{265} \textit{Id.} at 304.
\item \textsuperscript{266} \textit{Id.} at 305.
\item \textsuperscript{267} \textit{Alter}, 944 F. Supp. at 541.
\item \textsuperscript{268} See \textit{id.}
\item \textsuperscript{269} \textit{Id.}
\end{itemize}
B. BURDEN OF PROOF ISSUES

Once the defendant comes forward with evidence that the accused aircraft or part was more than 18 years old, the burden of proof should shift to the plaintiff to come forward as to why the case should not be dismissed under GARA. The plaintiff should have to identify the part alleged to have caused the accident, which is part of its burden of proving its case in chief under tort law, and show evidence that it was installed as a new replacement part on aircraft less than 18 years before.

In Reynolds v. Textron Inc., a case arising out of the alleged failure of cylinder hold-nuts on an aircraft, the court emphasized that plaintiffs had the burden of proving that the rolling repose period was applicable in their case. The court said this was true for two reasons:

First, defendant . . . met its initial burden of proving the absence of genuine factual issues and its entitlement to judgment. Thereafter, the burden shifted to plaintiffs as the non-moving party to demonstrate a "genuine issue for trial." Second, GARA s (2)(a)(2) places the burden on plaintiffs invoking the separate limitation period for new replacement parts to adduce evidence that a new replacement part had been installed less than 18 years before the accident.

The court then considered plaintiffs' evidence, including affidavits and engine log and repair records, and ruled that the plaintiffs had submitted no credible evidence showing the installation of nuts made by the defendant on the engine. "The most plaintiffs have shown is the possibility that cylinder hold-down nuts might have been replaced with other nuts of unknown age and origin, at some unknown time. Such evidence, even if assumed true, both does not meet plaintiff's burden of proof and is too speculative to defeat summary judgment on a statute of repose."272

270 Reynolds, Findings of Fact, at 10.
271 Id.
272 Id. at 14; see also Barkley v. Textron Lycoming, Inc., Case No. 34031 (Cal. Super. Ct. Stanislaus Cty., Sept. 18, 1996) (plaintiff's claim that the repose period was re-triggered by installation of defendant-manufactured component parts during the 18-year repose period "is meaningless absent evidence that such parts were manufactured fewer than 18 years before the accident [sic]"); accord Flores, No. 96-1507-CIV (acknowledging plaintiff has burden of establishing the applicability of the rolling statute of repose, but denying defense motion for summary judgment where defendant failed to rebut plaintiff's allegation that a defective airplane component was added during an overhaul within the repose period).
Some courts, however, have put the burden on defendants. In *Victoria v. Bell Helicopter Textron, Inc.*, both parties agreed that the aircraft was manufactured more than 18 years prior to the crash. The court said that in order to prevail on its motion for summary judgment under GARA, the defendant was required to prove that none of the component parts of the airplane contributing to the cause of the crash was less than 18 years old. The court said, "Placing the burden of proof on defendant to establish its right to rely on GARA is consistent with federal law, under which prescription is an affirmative defense. Moreover, the burden is more equitably placed on defendant, since it more readily has the records that would establish whether parts manufactured by it might have been placed on the subject aircraft." The court’s reasoning was erroneous.

First, the *Victoria* court made a material mistake of fact when it said its ruling was justified because the manufacturer has the maintenance records for a plane. Instead, the FAA requires the owner or operator to keep those records. As a result, the plaintiff, not the defendant, is more likely to have ready access to that information. Second, the court improperly flipped the burden of proof of causation onto the defendant – who in *Victoria* was required to prove that the crash was not caused by any component part less than 18 years old – rather than the plaintiff. The *Victoria* court miscited *Altseimer* as support for this ruling. The *Altseimer* court granted summary judgment where the defendant "provided undisputed evidence" that the aircraft and part in question were more than 18 years old at the time of the crash. The fact that the defendant provided "undisputed evidence" on an issue does not mean the defendant is required to bear the burden of proof on that issue. It simply means that the plaintiffs failed to present competent evidence on that issue and raise a material question of fact sufficient to defeat summary judgment.

Similarly, in *Glover v. American Resource Corp.*, the court denied a summary judgment motion on GARA grounds brought by General Electric, the manufacturer of the aircraft engine, even though the two engines were more than 18 years old at the time of the crash. The court ruled that "General Electric has

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274 *Id.* at 3 (citations omitted).
not shown that it did not replace or add a part which was defective . . . General Electric has this initial burden in order to show that the period of repose in GARA bars this action." The court said that even though the plaintiffs did not raise the replacement part issue in their complaints, General Electric had the burden on this issue because "the present statute specifically addresses the issue of defective replacement parts. Thus, General Electric needed to show that the defective replacement provision did not apply in order to meet its burden of showing the action is barred by the Act." The court rejected defendants' argument that it had no initial burden on the issue of new or added parts because plaintiffs did not allege in their complaints that parts replaced or added within the past 18 years caused the crash. The court said:

This is not a case where plaintiffs are raising any new issue or theory of liability. They have all alleged that the engines were defectively designed, manufactured, etc. It is not a new issue or theory to say that a replaced or added part might be defective, as opposed to an original part, particularly since General Electric itself states in its reply brief that "component parts are constantly being replaced."

The court said that General Electric admitted performing what it termed ordinary and routine maintenance on the engines during the repose period, and that "[t]he fact that General Electric did not recondition or overhaul the engines and performed only routine maintenance does not raise the reasonable inference that it did not replace any part which might have caused the crash." We believe that the courts ruling is not supported by the spirit and black letter of GARA. Defendant showed his aircraft in question was over eighteen years old. Once that showing is made, the plaintiff should be required to show why the statute of repose was inapplicable.

C. GARA APPLIES TO ACTIONS OCCURRING IN FOREIGN COUNTRIES

Plaintiffs have tried to evade GARA by arguing that it applies only to domestic accidents. The only federal court to address

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277 Id. at 10.
278 Id. at 6.
279 Id. at 7 (citation and footnote omitted). The court also noted that three complaints alleged that General Electric "‘modified’ the aircraft, and four others alleged that General Electric was negligent in ‘other activit[ies].’" Id. at 7.
280 Id. at 4.
this specific issue disagreed, ruling in *Alter v. Bell Helicopter Textron, Inc.*\(^{281}\) that GARA applies to civil actions regardless of where the accident occurred. Other courts have implicitly ruled that GARA applies to extraterritorial accidents, addressing the application of GARA to claims arising out of such accidents without discussing the issue.\(^{282}\) In *Alter*, survivor-plaintiffs filed two separate wrongful death products liability actions in Texas state court arising out of a helicopter crash in Israel. The plaintiffs argued that GARA was inapplicable because legislation of Congress is meant to apply only within the territorial jurisdiction of the United States, unless a contrary intent appears in the statute. The plaintiffs relied on a United States Supreme Court case, *Smith v. United States*,\(^{283}\) which held that the Federal Tort Claims Act does not waive the United States' sovereign immunity for tort claims arising in Antarctica. The *Alter* court distinguished *Smith*, noting that it involved a statute that created a cause of action.\(^{284}\) In contrast, the court said, GARA eliminates certain claims against aircraft and component manufacturers.\(^{285}\) The court explained that: "Plaintiff's interpretation of GARA would have the anomalous effect of preventing litigants from bringing an action in the United States while allowing litigants to bring the same action in the United States if the accident occurred abroad."\(^{286}\)

**IX. GARA IS CLEARLY CONSTITUTIONAL**

GARA's constitutionality as well as its application has been challenged.\(^{287}\) Constitutional challenges may fall into two broad

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\(^{282}\) See, e.g., *Flores*, Case No. 96-1507-CIV (considering whether GARA's rolling statute of repose bars plaintiffs' claims arising out of airplane crash in Bolivia); *Glover v. American Resource Corp.*, No. 160673 (Cal. Super. Ct. Marin Cty., Sept. 13, 1996) (discussing application of GARA to claims arising out of airplane crash in Argentina); *Campbell*, 82 Cal. Rptr. 2d at 202 (applying GARA to claims arising out of airplane crash in Australia).


\(^{284}\) *Alter*, 944 F. Supp. at 541.

\(^{285}\) *Id.*

\(^{286}\) *Id.*

categories: first, whether GARA is a legitimate exercise of Congressional authority, and, second, whether GARA is constitutional with regard to accidents that occurred before its enactment, both in suits filed before and in suits filed after its enactment date.

Interestingly, the first issue, that of the constitutionality of Congress's enactment of GARA, has been rarely litigated and few opinions discuss the issue. The second issue—that of GARA's retroactivity—has been more thoroughly litigated. Given that seven years have passed since the statute was enacted and the applicable statutes of limitations on pre-GARA accidents most likely have run, case law on the issue is important only with respect to federal liability reform.

A. GARA WAS ENACTED UNDER CONGRESS' ARTICLE I AUTHORITY

It is clear that GARA is a legitimate exercise of Congressional power. Congress enacted GARA under its Commerce Clause authority, based on its concerns about the potential effects of products liability suits on interstate economic activity. The Supremacy Clause requires state courts to apply it. One commentator, apparently conceding these points, has suggested that GARA interferes with individual constitutional rights and may be subject to challenge under due process and equal protection provisions. Still, this commentator conceded that under the "rational relation" test, GARA is probably constitutionally sound. Future efforts to challenge GARA's constitutionality should prove unsuccessful. We will show why.

1. Commerce Clause

The Commerce Clause of the United States Constitution establishes the power of Congress "To regulate Commerce . . . among the several States . . ." Under this Clause, Congress is empowered to regulate three broad categories of activity: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons or things in

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288 See Anton, supra note 11, at 801-803.
289 Anton, supra note 11, at 803.
290 U.S. CONST., art. 1, § 8, cl. 3.
terstate commerce, even if the threat to be addressed arises from intrastate commerce, and (3) intrastate economic activities that substantially affect interstate commerce.\footnote{See United States v. Morrison, 529 U.S. 598, 608-09 (2000); United States v. Lopez, 514 U.S. 549, 558-59 (1995).} Congress must have a rational basis to find that the regulated activity affects interstate commerce, and select a means of regulation that is reasonable and appropriate to achieve that end.\footnote{See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 276 (1981); Atlanta Motel v. United States, 379 U.S. 241, 262 (1964).}

The Supreme Court has ruled that while local activity may not have a substantial effect on interstate commerce when considered in isolation, it may have a substantial effect on interstate commerce when considered in the aggregate. In \textit{Wickard v. Filburn},\footnote{Wickard v. Filburn, 317 U.S. 111 (1942).} the Court upheld Congress’s regulation of the consumption of homegrown wheat because of its aggregate economic effect on the interstate wheat market. The Court explained that, “even if [the] activity [is] local and though it may not be regarded as commerce, it may still... be reached by Congress if it exerts a substantial economic effect on interstate commerce.”\footnote{Id. at 125.} The Court also concluded that Congress may regulate activity “irrespective of whether [the] effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’”\footnote{Id.; see also Hodel, 452 U.S. at 277 (“Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States.”).} Excessive litigation affects interstate commerce through high damages awards, lack of uniformity and unpredictability under state law, which add to the price of products, discourage innovation, and hamper the competitiveness of American businesses.\footnote{See S. Rep. No. 105-32, at 2-12 (1997) (accompanying Product Liability Reform Act of 1997). The Association of Trial Lawyers of America has dubbed these “dubious contentions.” See Jeffery White, \textit{Does Products Bill Collide With Tenth Amendment}, \textit{Trial}, Nov. 1997, at 32 (using GARA as example of questionable federal imposition of federal rules on state courts to be used in determining civil disputes).} Indeed, the Brookings Institution found that of all the segments of the U.S. economy adversely affected by the tort litigation explosion in the 1980s, the general aviation segment was hit the hardest.\footnote{See Martin, \textit{supra} note 8, at 478-99. For examples of excessive and often frivolous litigation, see Boswell & Coats, \textit{supra} note 18, at 542-47.}
Congress made clear that GARA was enacted to address the foundering general aviation industry. Congress found that an "important factor in the decline of general aviation manufacturing has been the industry's product liability costs, which [had] increased from $24 million in 1978 to more than $200 million a year in recent years."\textsuperscript{298} Significantly, Congress found that this increase in liability costs had \textit{not} occurred because aircraft had become less safe; on the contrary, aviation accident rates had been going down while liability costs were skyrocketing.\textsuperscript{299}

Congress found that because "[n]early all defects are discovered during the early years of an aircraft's life," "[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."\textsuperscript{300} This is particularly true in view of the fact that "[a]ircraft design and manufacture are regulated by [the] FAA, which has the responsibility for ordering corrective action if a defect is revealed after an aircraft design is approved."\textsuperscript{301} Nonetheless, many suits against the manufacturers of older aircraft had been brought in the expectation that "the manufacturers will settle to avoid the expense of litigation."\textsuperscript{302} Congress explained that "[m]anufacturers incur substantial expense from these cases. Beech Aircraft testified that the average cost of litigation was $500,000 per case, even though Beech was generally successful in defending the case."\textsuperscript{303} Further support for GARA came from the Presidential Commission on the aircraft industry which recommended a federal statute of repose as a shot in the arm for the general aviation industry.\textsuperscript{304}

Congress clearly had a rational basis for enacting GARA. Evidence showed that overwhelming tort liability was decimating the industry, with both interstate and international ramifications.\textsuperscript{305} The enactment of the statute of repose was a legitimate

\textsuperscript{298} H.R. Rep. No. 103-525, pt. 1, at 3.
\textsuperscript{299} Congress reported that in 1978, there were 12 general aviation accidents per 100,000 hours, with 1,276 fatalities. In 1993, the rates had declined to 6.8 accidents per 100,000, with 715 fatalities. Id. at 3. In fact, the drafter of the report wrote, "NTSB data shows that only 1% of general aviation accidents are caused by design or manufacturing defects." Id. at 4.
\textsuperscript{300} Id.
\textsuperscript{301} Id.
\textsuperscript{302} Id.
\textsuperscript{303} Id.
\textsuperscript{304} See President's Signing Statement, supra note 3, at 1678. See also discussion at supra note 61.
exercise of Congress's authority under the Commerce Clause to regulate activities that substantially affect interstate commerce.\textsuperscript{306}

2. Supremacy Clause

With Congressional authority to enact GARA clearly established under the Commerce Clause, the Supremacy Clause applies to bar challenges against GARA based on a conflict with a state law that would allow a lawsuit to be filed more than 18 years after delivery of the aircraft. (As discussed, GARA explicitly provides for the application of state statutes of repose that are shorter than the upper time limit established by GARA.) The Supremacy Clause of the United States Constitution establishes that laws made by Congress in the exercise of its authority are the "supreme Law of the Land."\textsuperscript{307} If Congress decides that an issue is important enough to the well-being of Americans to deserve nationwide legislation and acts within its authority to develop such legislation, "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."\textsuperscript{308} To the extent the various states have substantive liability laws addressing the same field as laws enacted by Congress, the state laws are preempted and state courts must enforce the federal laws.\textsuperscript{309}

\textsuperscript{306} See, e.g., \textit{Lopez}, 514 U.S. at 559-61; cf. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978) (it was reasonable under Due Process Clause to enact liability limitation for purpose of revitalizing an industry).

\textsuperscript{307} U.S. Const., art. VI, cl. 2.

\textsuperscript{308} Id.

B. CHALLENGES TO GARA’S CONSTITUTIONALITY

1. Tenth Amendment Challenge

GARA has been subject to a states’ rights challenge under the Tenth Amendment to the United States – a “mirror image” of the Supremacy Clause question. The Tenth Amendment provides that: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Historically, the Supreme Court has recognized Congress’s “extraordinary power” to enact legislation and has been reluctant to invoke the Tenth Amendment to limit that authority. The Court has explained that “[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States.” For example, the fact that Congress has traditionally deferred in large measure to state regulation of the insurance industry, for example, does not mean that Congress must continue to do so; Congress does not invade areas reserved to the states by the Tenth Amendment “simply because it exercises its authority . . . in a manner that displaces the States’ exercise of their police powers.”

The only significant federalism restraints on exercise of the commerce power are that state regulatory processes may not be “commandeered” for federal purposes, thereby insulating Congress from political accountability, and that state executive officials cannot be required to administer or enforce federal regulatory programs. In New York v. United States, the Supreme Court of the United States struck down a provision of federal legislation which directed the states to regulate the disposition of nuclear waste produced by the states. The Court ruled that Congress may directly require or prohibit certain acts, but that it lacked “the power directly to compel the States to

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310 See New York v. United States, 505 U.S. 144, 156 (1992) (inquiries into application of Congress' Article I powers and Tenth Amendment are “mirror images” of each other).

311 U.S. CONST., amend. X.

312 See Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (discussing how the Supremacy Clause is the textual authority granting the federal government power over the states in the U.S. system of federalism); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-20 (2d ed. 1988).

313 Hodel, 452 U.S. at 291 (upholding federal regulations of surface mining despite traditional state role in regulating land use).

314 New York v. United States, 505 U.S. at 166.
require or prohibit those acts.” The Court noted that the Commerce Clause “authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.” The Court drew a sharp distinction between permissible federal legislation that directs state courts to enforce federal laws and unconstitutional legislation, such as the Waste Policy Act, that directs state officials to create and enforce a congressionally mandated regulatory scheme. The Court further stated:

Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal “direction” of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate.

The Tenth Amendment also prevents Congress from requiring state executives to administer or enforce federal regulatory programs. In Printz v. United States, the Court invalidated a portion of the 1993 Brady Handgun Violence Prevention Act amendments to the Gun Control Act of 1968 (“Brady Act”). The Brady Act required the Attorney General to establish a national system for instant background checks on prospective handgun purchasers and commanded the “chief law enforcement officer” of each local jurisdiction to conduct the background checks and perform related tasks until the national system became operative. The Court said that while federal statutes imposing obligations on state courts were legitimate, their legitimacy did not imply that Congress could impose obligations on state executives. The Court wrote:

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315 Id. The Court discussed two methods Congress could use to urge State adoption of a legislative program consistent with federal interests:

First, under Congress’ spending power, Congress may attach conditions on the receipt of federal funds. . . . Second, where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.

Id. at 167. If states decline to participate in a federal scheme, Congress may not force them to do so. Instead, to have its way, Congress must preempt state law and regulate directly. Id. at 176.

316 Id. at 178-79.

317 Id. (emphasis added).


320 See Printz, 521 U.S. at 907-08.
We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State’s officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policy-making is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.\(^3\)

These cases do not support the contention that GARA is unconstitutional. The decisions make it clear that Congress cannot compel state legislatures or executives to participate in a federal regulatory or administrative scheme, but they suggest no constitutional prohibition against legislation that asks state courts to enforce a federal liability law. To the contrary, they expressly distinguish state court enforcement of federal laws from federal laws commanding state legislatures to legislate or requiring state executive officials to administer a federal regulatory scheme. State courts have always been and continue to be obligated to honor such legislation.\(^2\)

In contrast to the provisions examined by the Supreme Court in *Printz* and *New York*, the GARA statute of repose is self-executing by its express terms. Nothing in GARA requires a state legislature to enact any law or a state administrative official to implement federal law. Thus, GARA does not compel the states or state officers to enact and enforce a federal regulatory scheme. Rather, GARA is a matter of substantive federal law addressing the scope of recovery of plaintiffs in certain actions. As such, state courts are bound to apply this law.

A Michigan court recognized these legal principles in *Hinkle v. Riley Aviation*.\(^3\) In this case, the plaintiff challenged GARA on a number of constitutional grounds, focusing primarily on an alleged Tenth Amendment violation. She argued that Congress “commandeered” the legislative processes of the states and

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\(^3\) See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111 Harv. L. Rev. 2180, 2185-86 (1998) (indicating that the *Printz* and *New York* decisions set forth a “clear-cut rule against federal ‘commandeering’ of state legislative or executive officials,” but do not alter the responsibility of state courts to enforce federal laws).

offended principles of dual sovereignty by compelling state officials to implement or enforce GARA.\footnote{Brief in Support of Plaintiff's Motion for Partial Summary Disposition at 8-21, Hinkle v. Riley Aviation (Mich. Cir. Ct., Branch Cty. October 16, 1998) (No. 96-03161 NP) [hereinafter "Hinkle Plaintiff's Brief"].} Interestingly, she only indirectly suggested that Congress lacked authority to enact GARA on the basis that no interstate commerce is involved.\footnote{See id. at 10 n.13 (arguing GARA is guised "as an economic revitalization of a failing market"); see also id. (GARA "appeared to invoke Congress' power to regulate interstate commerce as the basis therefor").} With no discussion, the court denied plaintiff's motion for summary judgment rejecting plaintiff's Tenth Amendment challenge.\footnote{Order re: Plaintiff's Motion for Partial Summary Disposition Re: the Constitutionality of the General Aviation Revitalization Act of 1994 at 1, Hinkle v. Riley Aviation, No. 96-03161 NP (Mich. Cir. Ct. Branch Cty., Mar. 21, 1999).}

2. *Fifth Amendment Challenges*

Given that GARA was enacted under Congress's Commerce Clause power, plaintiffs may seek to attempt to establish an abridgment of their individual rights under the Due Process or Equal Protection Clause of the Fifth Amendment.\footnote{Anton, supra note 11, at 801-803. In Schneider, the court, with little discussion, rejected the plaintiff's argument that application of GARA to her claims violated her due process rights. Schneider, No. 542343, at 3.} Such attempts should be unsuccessful.

a. *Due Process Clause Challenge*

The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty or property without due process of law. . . ." GARA does not violate due process guarantees, because plaintiffs do not have a property interest in a common law cause of action against manufacturers of general aviation aircraft and their parts. The United States Supreme Court has stated that "[o]ur cases have clearly established that a person has no property, no vested interest, in any rule of common law."\footnote{Id. (internal quotations and citations omitted); Duke Power, 438 U.S. at 88 n.32. If a plaintiff has an *identified* property right in statutorily created rights, procedural limits cannot be placed on them without appropriate procedures befitting the nature of that right. Logan v. Zimmerman Brush Co., 455 U.S. 422, 428-33 (1982). That is not the case here.} Thus, the "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the com-
mon law, to attain a permissible legislative object”\(^{329}\) “despite the fact that ‘otherwise settled expectations’ may be upset thereby.”\(^{330}\) The Supreme Court has noted that “statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.”\(^{331}\) Moreover, state statutes of repose have consistently been upheld under the Federal Constitution.\(^{332}\) Indeed, in *Lyon v. Agusta S.P.A.*,\(^{333}\) the United States Court of Appeals for the Ninth Circuit rejected a plaintiff’s claim that her substantive due process rights were violated by depriving her of her cause of action. The court explained that “[w]e have squarely held that although a cause of action is a

\(^{329}\) Duke Power, 438 U.S. at 88 n.32 (quoting Silver v. Silver, 280 U.S. 117, 122 (1929)).

\(^{330}\) Id. (quoting *Turner Elkhorn*, 428 U.S. at 16).


\(^{332}\) See *Koch v. Shell Oil Co.*, 52 F.3d 878 (10th Cir. 1995) (upholding Kansas statute of repose on product liability actions against, *inter alia*, federal and state due process and equal protection challenges); *Eaton v. Jarvis Prods. Corp.*, 965 F.2d 922 (10th Cir. 1992) (upholding Colorado repose statute concerning product liability actions on state and federal due process and equal protection grounds); *Harris v. Black Clawson Co.*, 961 F.2d 547 (5th Cir. 1992) (upholding Louisiana repose statute concerning defective design or construction actions on unspecified constitutional grounds); *Alexander*, 952 F.2d at 1215 (upholding Indiana repose statute concerning product liability actions on state and federal due process and equal protection grounds); *Lourdes High School, Inc. v. Sheffield Brick & Tile Co.*, 870 F.2d 443 (8th Cir. 1989) (upholding Minnesota repose statute barring actions for real property damage from challenge on federal due process grounds); *Oliveras-Salas v. Puerto Rico Highway Auth.*, 884 F.2d 1532 (1st Cir. 1989) (upholding Puerto Rico repose statute concerning defective design or construction actions on unspecified constitutional grounds); *Eddings v. Volkswagenwerk, A.G.*, 835 F.2d 1369 (11th Cir. 1988) (upholding Florida repose statute concerning product liability actions on federal due process and equal protection grounds); *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548 (3d Cir. 1985) (upholding Pennsylvania repose statute barring wrongful death actions against federal due process and equal protection challenge); *Wayne v. TVA*, 730 F.2d 392 (5th Cir. 1984) (upholding Tennessee repose statute concerning product liability actions on federal due process and equal protection grounds); *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 141 (6th Cir. 1983) (upholding Tennessee products liability statute of repose against claim it violated due process; “An injury in the nature of a tort which occurs after a specified limitation period . . . does not give rise to due process protection.”); *Jewson v. Mayo Clinic*, 691 F.2d 405 (8th Cir. 1982) (upholding Minnesota repose statute concerning malpractice actions on federal due process and equal protection grounds).

\(^{333}\) *Lyon v. Agusta S.P.A.*, 252 F.3d 1078 (9th Cir. 2001).
'species of property, a party’s property right in any cause of action does not vest until a final unreviewable judgment is obtained.'

Even assuming that plaintiffs have a property interest in a cause of action, the legislative balancing of interests reached by Congress in GARA must be accorded the traditional presumption of constitutionality that is generally given to economic regulation. Congress acted neither arbitrarily nor irrationally in enacting GARA; therefore the federal statute of repose must be upheld.

Under the Due Process Clause, economic regulations like GARA’s statute of repose represent a “legislative effort to structure and accommodate the ‘burdens and benefits of economic life.’”

Put another way, the test of due process is whether Congress acted with a “legitimate legislative purpose furthered by rational means,” and “legislation is not unconstitutional because it upsets even settled expectations.” GARA’s statute of repose “emerges as a classic example of economic legislation” that must be upheld against a due process challenge because its purpose is to “remove economic impediments in order to stimulate the private development” of an industry.

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334 Id. at 1086 (quoting Grimes v. Huff, 876 F.2d 738, 743-44 (9th Cir. 1989)).
335 Assuming the courts continue to apply the lenient ‘rational basis test,’ plaintiffs challenging federal tort reforms under the Fifth Amendment will be placed in the difficult posture of overcoming the asserted legislative justifications. This is a standard claimants have been unable to meet in Supreme Court cases such as Usery and Duke Power.” Apelbaum & Ryder, supra note 277, at 644.
337 Duke Power, 438 U.S. at 83 (quoting Turner Elkhorn, 428 U.S. at 15). It is well established that such legislative acts “come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.” (internal quotations omitted).
338 Ramein, 503 U.S. at 191 (internal quotations omitted).
340 Duke Power, 438 U.S. at 83. Although as a formal matter in New York Central and Duke Power the Supreme Court reserved the question of whether such a quid pro quo is necessary for compliance with due process and equal protection, there is a significant degree of dicta skeptical of such a requirement. See Apelbaum & Ryder, supra note 277, at 647-48 (citing cases). Apelbaum & Ryder write that in Duke Power, for example, before finding that the Price-Anderson Act provided an adequate quid pro quo, the Court noted, “It is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonably just substitute for the common-law or state tort law remedies it replaces.” Id. (quoting Duke Power at 88). Even if such a quid pro quo were required, these authors argue, a likely argument could be made that GARA provides necessary benefits to society.
Congress chose the 18-year time limitation to "strike a fair balance" by protecting manufacturers from the "long tail" of liability where their products have proved trustworthy in the long term, while at the same time protecting injured parties' reasonable rights to recovery. Congress observed that liability costs had increased despite improvements in the industry's safety record, and reported National Transportation Safety Board statistics indicating that only one percent of general aviation accidents are caused by design or manufacturing defects. Congress concluded that this legislation "can make a major contribution to reversing the decline in general aviation aircraft manufacturing. "Freed from excessive liability costs, manufacturers will be able to sell aircraft at lower prices. Relief from most of the "tail" of liability for previously manufactured aircraft will "enable the manufacturers to spend more on research and development and enhance our manufacturers' ability to compete with foreign companies." In view of Congress's considered analysis of the decline in the general aviation industry and its cause, the statute of repose is a reasonable exercise of Congressional authority that is rationally related to its objective to stimulate the general aviation industry.

b. Equal Protection Challenge

GARA also survives scrutiny under the equal protection component of the Fifth Amendment. Economic legislation like GARA does not employ suspect classifications or impinge on fundamental rights; therefore it can withstand an equal protec-

generally, if not to the impaired claimants directly. Id. at 646. This contention was accepted by the California Supreme Court in holding that state's medical malpractice reforms against constitutional challenge. Fein v. Permanente Med. Group, 695 P.2d 665 (Cal. 1985). The California court stated, "even if due process principles required some 'quid pro quo' to support the statute, it would be difficult to say that the preservation of a viable medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs." Id. at 681 n.18. Justice White dissented from plaintiff's appeal of Fein, finding there was a clear split concerning the constitutionality of damage limitations in medical malpractice cases, noting, "[o]ne of the reasons for the division among the state courts is [the quid pro quo] question left unresolved by this Court in Duke Power. . . ." See Fein, 474 U.S. at 894 (White J., dissenting).

341 H.R. REP. No. 103-525, pt. 1, at 3.
342 S. REP. No. 103-202, at 3; H.R. REP. No. 103-525, pt. at 1, 3.
343 See id. at 2 (accidents per hours flown cut in half in fifteen-year period).
344 See id. at 3.
345 Id. at 4.
tion challenge "if there is any reasonably conceived state of facts that could provide a rational basis for the classification."\(^\text{346}\) Economic legislation comes with a presumption of rationality,\(^\text{347}\) and under the rational basis test, "those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it."\(^\text{348}\) If the classification created by economic legislation results in some inequality, it will nevertheless be upheld if it has a reasonable basis.\(^\text{349}\) State law statutes of repose regularly have been upheld against equal protection challenges under the United States Constitution.\(^\text{350}\)

Congress had a rational basis to apply a statute of repose to general aviation plaintiffs without similarly regulating commercial airline plaintiffs. Similarly, it had a rational basis to bar claims against manufacturers of older general aviation aircraft without barring claims against manufacturers of older commercial aviation aircraft or against maintenance operations.\(^\text{351}\) As we have discussed, the record before Congress showed that general aviation manufacturing had suffered a profound decline in part due to the filing of unjustified tort suits. There is no record showing a comparable decline in commercial aviation manufacturing as a result of product liability litigation. The fact that Congress chooses to regulate in one area, but not others, does


\(^{347}\) Hodel, 452 U.S. at 331 ("Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate government purpose."). Rational basis analysis, an approach and principle designed to provide substantial deference to the legislative body, provides a standard which generally yields a conclusion validating the legislation under consideration. See Stephen J. Werber, A National Product Liability Statute of Repose – Let's Not, 64 Tenn. L. Rev. 763, 768 (1997) [hereinafter “Werber”].

\(^{348}\) Beach Communications, 508 U.S. at 314.


\(^{350}\) See, e.g., Schamel, 1 F.3d at 655; Eaton, 965 F.2d at 922; Harris, 961 F.2d at 547; Dinh v. Rust Int'l Corp., 974 F.2d 500 (4th Cir. 1992); Alexander, 952 F.2d at 1215; Cournoyer v. Massachusetts Bay Transp. Auth., 744 F.2d 208 (1st Cir. 1984) (upholding Massachusetts repose statute concerning defective design or construction actions against federal equal protection challenge); Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir. 1984) (upholding North Carolina statute of repose against equal protection challenge); Pitts v. Unarco Indus., Inc., 712 F.2d 276 (7th Cir. 1983).

\(^{351}\) See Werber, supra note 337, at 771 (making similar argument with regards to national products liability repose statute).
not render a statutory classification irrational. Accordingly, it was reasonable for Congress to limit GARA’s application to that portion of the aviation industry that had been stunted by product liability litigation.

In *Lyon*, the plaintiffs argued that their equal protection rights were violated because Congress chose to exempt lawsuits pending on the date of GARA’s enactment from the statute of repose, while applying GARA to claims that arose before its enactment, but had not yet been filed. The court rejected this argument, stating that: “In truth, what seems to gall the Survivors most is that other victims of the accident in question here had already filed their actions.” Relying on precedent, the Ninth Circuit explained that Congress could legitimately limit its concerns to people who “had legitimately and indisputably relied on the state of the law prior” to the enactment of GARA. The Court stated: “These individuals will suffer the most concrete injury because they have expended significant time and effort to bring their action, not to mention substantial funds for attorney’s fees and court costs.”

3. Guarantee Clause Challenge

In *Hinkle v. Riley Aviation*, the plaintiff challenged GARA as violative of the Guarantee Clause of the United States Constitution. The Guarantee Clause provides that “[t]he United States shall guarantee to every State in the Union a Republican Form of Government...” In most of the cases in which the Supreme Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the “political question” doctrine. Based on the separation of pow-

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352 See *Dandridge*, 397 U.S. at 486-87 (stating that “the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all); *Eaton*, 965 F.2d at 930 (upholding state statute of repose against equal protection challenge on *Dandridge* rationale).
353 *Lyon*, 252 F.3d at 1087.
354 Id. at 1087-88 (quoting *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1573-74 (9th Cir. 1993) (finding it is not unusual for Congress to draw distinctions between claims that are already part of a commenced civil action and those which are possible but have not yet been filed)).
ers doctrine, the political question doctrine provides that courts cannot consider controversies that revolve around policy choices and value determinations that are constitutionally committed to the legislative or executive branch. But even when the Supreme Court recently "indulg[ed] the assumption that the Guarantee Clause provides a basis upon which a State or its subdivisions may sue to enjoin the enforcement of a federal statute," the Court concluded plaintiff had not made out a claim. The Court noted that:

[T]he protection afforded states by the guarantee clause does not prevent Congress from pre-empting areas of substantive state law. The guarantee clause grants states a measure of autonomy over their governmental processes; it does not promise them sovereignty over any aspect of private behavior. This ability of Congress to override state substantive authority through the supremacy clause—while preserving the autonomy of state governmental processes under guarantee clause—assures a proper balance between national power and state independence.

In *Hinkle*, the plaintiff argued that GARA "infringes upon State sovereignty" because GARA "does not offer the state of Michigan any choice." But that conclusion would apply to all federal laws that preempt conflicting state laws, with equal force. The preemption of state laws by validly enacted federal statutes, of course, flows from the Supremacy Clause and in no way infringes upon the guarantee of republican government. In enacting GARA, Congress did not interfere with power properly

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358 *See* Japan Whaling Ass'n v. Am. Cetacean Soc., 478 U.S. 221 (1986). Dismissal of claims for nonjusticiability under the political question doctrine is proper only if there is 1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; 2) a lack of judicially discoverable issue and manageable standards for resolving it; 3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; 4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; 5) an unusual need for unquestioning adherence to a political decision already made; or 6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *See*, e.g., United States v. Munoz-Flores, 495 U.S. 385 (1990); INS v. Chadha, 462 U.S. 919 (1983), *Baker*, 369 U.S. at 186. If a case does not present any of these characteristics, which are essential to a finding that the case raises a political question, the case is justiciable. *Munoz-Flores*, 495 U.S. at 385.

359 *New York v. United States*, 505 U.S. at 185-86 (emphasis added).

360 Id.
exercised by the states, or with state legislative or administrative machinery.

4. "Open Courts" and First Amendment Challenges

Some have argued that GARA denies plaintiffs a "fundamental right" to free access to the courts, as it "locks the courtroom doors" before a tort litigant may open them.\(^{361}\) To the extent any such "free access to the courts" claim is based on state constitution "open courts" or "right to remedy" provisions,\(^{362}\) whatever these provisions may mean in state constitutions, they cannot restrict the power of Congress;\(^{363}\) the United States Constitution lacks an "open court" or "right to remedy" clause and these ambiguous "rights" will not be read into that document.

The First Amendment's petition clause has been found to protect a citizen's right of access to governmental mechanisms for the redress of grievances, including the right of access to the courts for that purpose.\(^{364}\) These cases establish that potential plaintiffs must be able to realize whatever right of access to the courts they may have, i.e., through claims having a basis in the law, or a "legally protected injury,"\(^{365}\) and that government can-

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\(^{361}\) Hinkle Plaintiff's Brief, supra note 327, at 24-25.


\(^{363}\) U.S. CONST. art. VI, cl. 2; Nash, 389 U.S. at 293-40.


\(^{365}\) Bill Johnson's, 461 U.S. at 743-44.
not burden the exercise of those existing rights.\textsuperscript{366} Nothing in these cases, however, requires the government to create a cause of action or prevent Congress from eliminating a tort cause of action. A plaintiff “cannot claim that [s]he has been denied access to court simply because the . . . legislature has restricted a particular cause of action in a way that makes it unavailable to [her]. Such an approach confuses ‘access’ with ‘success,’ and [plaintiff] is not entitled to the latter.”\textsuperscript{367}

Complaints about GARA’s statute of repose are not based on a denial of any procedural right to go to court, they are based on a substantive denial of a claim. That is not the denial of a plaintiff’s right to seek judicial relief. “The concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the court’s processes to vindicate such rights as he may have, as opposed to the extent to which rights actually are extended to protect or compensate him.”\textsuperscript{368}

GARA validly preempts state law and limits tort claims to those that can be filed prior to the expiration of an 18-year period. Accordingly, plaintiffs have no legally cognizable interest protected from encumbrance under the First Amendment.

C. CONSTITUTIONAL CHALLENGE TO GARA’S APPLICATION TO PRE-ENACTMENT ACCIDENTS

For a period after GARA was enacted some plaintiffs argued that it was unconstitutional to apply GARA to accidents that occurred before it was enacted. Such challenges are fading, because, for the most part, limitations statutes have run on claims arising prior to the Act’s 1994 effective date. These cases have relevance, however, to show that the courts have supported the legislative purpose underlying GARA. The cases also have rele-

\textsuperscript{366} See Sure-Tan, Inc. v. NLRB, 467 U.S. 883 897 (1984) (stating that \textit{Bill Johnson}’s was not applicable because the plaintiff had not suffered a “legally protected injury” and the plaintiff had no “judicially cognizable interest” in procuring enforcement of immigration laws); \textit{Filippo}, 30 F.3d at 442 (stating that the “petition clause imposes on the United States an obligation to have at least some channel open for those who seek redress for perceived grievances,” but it is required to recognize as a petition whatever communication is so characterized by protestor); Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548, 554-555 (3d Cir. 1985) (stating that “there is no absolute unlimited constitutional right of access to courts”; only reasonable right of access required).

\textsuperscript{367} Bowman v. Niagara Machine & Tool Works, Inc., 832 F.2d 1052, 1054 (7th Cir. 1987).

\textsuperscript{368} Id.
vance as a guide to Congress if and when it enacts tort reform legislation in the future.

In *Rixon v. Smith*, for example, the plaintiffs filed suit after the effective date of GARA, based on an aircraft accident that occurred prior to the Act's effective date. They challenged the constitutionality of the application of GARA to pre-enactment accidents on the ground that it violated their individual due process rights. The federal court disagreed, upheld the Act as constitutional, and granted the defense motion for summary judgment. The district court adopted the opinion of the magistrate judge, which stated that statutes with retroactive impact are constitutional if they meet the due process "rational basis" test: "Judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." The magistrate found that GARA's purpose was to "strike a fair balance by providing some certainty to manufacturers . . . while [at the same time] preserving [a] victims' right to bring suit for compensation . . ." As a direct effect of GARA, "manufacturers are protected from defending ageless claims which are costly to investigate and litigate and Plaintiffs, on the other hand, are extended a large window of time during which an injured party can properly investigate and commence claims which appear to be meritorious." The court found that GARA's retroactive application was based on rational reasoning and upheld the statute as constitutional.

Similarly, in *Reynolds v. Textron, Inc.*, plaintiffs argued that their due process rights would be violated by the application of GARA to claims arising out of a crash that occurred three days after GARA was enacted. The court found that GARA is a legislative act "adjusting the burdens and benefits of economic life," and that therefore the statute would be presumed to be constitutional unless Congress acted in an arbitrary and irra-

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370 See id.
371 See id. at 5 (citing H.R. REP. No. 103-525, pt. 2, at 6).
372 Id. at 6.
373 Id. The magistrate court further stated that the retroactive application of GARA did not deprive plaintiffs of any property rights in violation of the Fifth Amendment, since property rights in civil actions do not vest until judgment is entered. Id.; see also Schneider, No. 542343, at 3 (granting the defense motion for summary judgment and rejecting a challenge to the retroactive application of GARA based on due process grounds with little discussion).
374 Reynolds, Findings of Fact, at 4-5.
tional manner. The court examined Congress's purpose in enacting GARA, found that the statute was reasonably related to a legitimate congressional purpose and met the rational basis test for constitutionality. The court said GARA expressly applied to accidents occurring prior to its date of enactment: "Congress drew a bright line between actions filed on the date of enactment, and actions not so filed."

Conversely, In Handley v. Wilbur-Ellis Co., a California state trial court refused to apply GARA retroactively. GARA was enacted about seven weeks after the aircraft accident at issue. The court acknowledged that "the Act makes clear that it is indeed retroactive," but nevertheless ruled that GARA could not be constitutionally applied to the plaintiff's claim because to do so would work a "manifest injustice." The Handley court relied on a California state appeals court case, Aronson v. Superior Court, to support its decision limiting the application of GARA. The Aronson case dealt with a dispute involving a retrospective application of a shortened limitations period and stated that a party nonetheless has a reasonable time to avail himself of a remedy before the statute cuts off that right. "If the time left to file suit is reasonable, no such constitutional violation occurs, and the statute is applied as enacted, the Aronson court wrote, "If no time is left, or only an unreasonably short time remains, then the statute cannot be applied at all." The Handley trial court ruled that the seven-week period between the accident and the enactment of GARA was "an unreasonably short time to be able to analyze and thereafter perfect the remedy, all of which assumes that the plaintiff sought counsel within days after the acci-

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575 Id.
576 Id. at 5-7.
577 Id. at 7. See also Cartman, 1996 WL 316575 at *2 (stating that the amended complaint against a manufacturer of defective component post does not "relate back" under Fed. R. Civ. Pro. 15(c) so as to avoid GARA); Alter, 944 F. Supp. at 531; Altseimer, 919 F. Supp. at 340, 342-43 (stating that GARA bars claims that arose before its enactment: "Although harsh, such a result is consistent with the purpose of GARA to: 'establish a Federal statute of repose to protect general aviation manufacturers from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years.'"); Rickert I, 923 F. Supp. at 1453.
579 Id. at 5.
581 Id. at 287, quoted in Handley, at 4-5.
dent.

Assuming that *Aronson* was correctly decided, the California trial court misapplied it: seven weeks is not an “unreasonably short time” to file a lawsuit.

The *Handley* trial court further erred by confusing the law governing limitations with that governing repose. As the United States Court of Appeals for the Ninth Circuit explained in *Lyon* when it rejected a similar procedural due process challenge to using GARA to bar pre-enactment accidents:

The focus of a statute of repose is entirely different from the focus of a statute of limitations. The latter bars a plaintiff from proceeding because he has slept on his rights, or otherwise been inattentive. Therefore, it is manifestly unjust to tell somebody that he has X years to file an action, and then shorten the time in midstream. However, a statute of repose proceeds on the basis that it is unfair to make somebody defend an action long after something was done or some product was sold. It declares that nobody should be liable at all after a certain amount of time has passed, and that it is unjust to allow an action to proceed after that . . . While an injured party might feel aggrieved by the fact that no action can be brought, repose is a choice that the legislature is free to make.

Like the *Reynolds* and *Rixon* courts, the *Lyon* court found GARA to be constitutional when applied to pre-enactment accidents. In *Lyon*, the Ninth Circuit considered a substantive due process challenge and an equal protection challenge to the retroactive application of GARA, as well as the procedural due process challenge. The court rejected the substantive due process challenge on the ground that plaintiffs had no vested property right in their cause of action.

The court also rejected the equal protection argument, which was based on the fact that other claimants who had filed suit based on the same accident before GARA was enacted could proceed with their claims while the *Lyon* plaintiffs could not. The Court ruled that it was “not irrational” for Congress to exempt plaintiffs who already had filed suit from the GARA repose period, since “[t]hese individuals will suffer the most concrete injury because they have expended significant time and effort to bring their action, not to mention substantial funds for attorney’s fees and court costs.”

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382 *Handley*, at 5.
383 *Lyon*, 252 F.3d at 1087.
384 *Id.* at 1086.
385 *Id.* at 1087-88 (citation omitted).
X. CONCLUSION

GARA is now over seven years old. It has revived an industry, general aviation, which was near extinction. It has produced over 25,000 well-paying jobs. Of equal importance is the fact that the planes manufactured since GARA are the safest in history. Manufacturers of safety equipment who had shied away from allowing their use on planes because of the specter of unlimited liability now sell this equipment and improve it. Most courts have respected the black letter and social policy that supports GARA. We put forth this article to help assure that they will do so in the future.
Comments