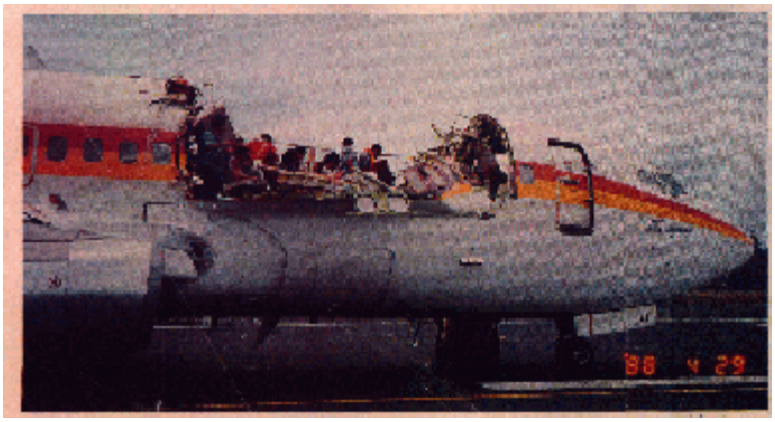
CHAPTER FOUR PRODUCT LIABILITY



Strict Liability for Defective Products

One theory of liability on which a products liability action may be based is "strict products liability." Under the doctrine of strict products liability, a person engaged in the business of designing, manufacturing, distributing, or supplying a product is strictly liable in tort when he, she, or it places a product on the market knowing that it is to be used without inspection for defects, and the product proves to have a defect that causes personal injury, death, or property damage to foreseeable users, consumers, or bystanders.

Strict products liability differs from negligence in that it eliminates the necessity of proving that the supplier of the product was negligent. It focuses not on the conduct of the supplier, but on the product itself, and holds the supplier liable if the product was defective. Thus, in order to establish a cause of action for strict products liability there is no necessity to show duty or breach of duty but only that the product contained a defect and that the defect proximately caused the plaintiff's injuries.

The purpose of strict products liability is to insure that the costs of injuries resulting from defective products are borne by those who put the defective products on the market rather than by the injured persons who are powerless to protect themselves. Additional purposes include: (1) to provide a "short cut" to liability where negligence may be present but is difficult to prove; (2) to provide an economic incentive for improved product safety; (3) to induce the reallocation of resources toward safer products; and (4) to spread the risk of loss among all who use the product.

Although liability under the doctrine of strict products liability may be quite broad, strict liability does not equate with absolute liability. That is, under strict liability the manufacturer does not become the insurer of product user's safety. Also, there is no strict liability when the product is fit to be sold and reasonably safe for use but has inherent dangers that no human skill or knowledge has yet been able to eliminate.

The persons entitled to recover under the doctrine of strict products liability include purchasers, consumers, users, and bystanders injured by a defective product. In short, strict products liability extends to any person as to whom an injury from a defective product is reasonably foreseeable.

Although the range of persons who are entitled to recover under strict products liability is quite broad, not everyone who is injured by a defective product is entitled to recover under the theory. For example, under certain circumstances a commercial plaintiff may not rely on the doctrine of strict products liability to recover its losses. Thus, strict products liability does not apply as between parties who deal in a commercial setting from positions of relatively equal economic strength, bargain the specifications of the product, and negotiate concerning the risk of loss from defects in the product.

This does not mean, however, that a person injured by a defective product is precluded from recovering under strict products liability merely because he, she, or it is a commercial customer. Strict products liability operates in favor of any person or entity, corporate or otherwise, having no significant bargaining power respecting the manufacturing process and which is most likely to be its victim. It is only when the commercial customer is able to negotiate from a position of relatively equal economic strength that strict products liability will be unavailable.

Not everyone who sells or otherwise transfers a defective product will be subject to strict products liability. For example, strict products liability does not apply to an occasional seller who is not engaged in the business of selling the particular product as a part of his or her business to a person who designs or manufactures a product for his or her own use rather than for sale to the general public, even though he or she sells an extra one of the products to a neighbor or to a similar business. Strict products liability also does not apply to dealers in used goods, including sellers and lessors of used goods. Even commercial dealers who are in the day_to_day business of selling used goods are not subject to strict products liability.

On the other hand, strict products liability does apply where a seller or lessor of used goods makes extensive modifications to or reconditions the goods prior to selling or leasing them. In that situation the seller or lessor will be treated as a manufacturer and will be held liable accordingly.

Strict products liability is also unavailable where the person injured by a defective product is an employee of the manufacturer or seller of the defective product. In that situation, workers' compensation is the injured person's sole and exclusive remedy. An exception is made where the employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person and the product is then provided for the employee's use by a third person.

Retailers can be liable with manufacturers for defective products. Although it does not affect the retailer's liability to the injured party, there is often an indemnity contract between the retailers and the manufacturers. Equitable indemnity exists where the retailer or wholesaler is merely "passively" involved in the chain of commerce of the product, and not "active" in the manufacture or design of the product.

In short, a consumer injured by a defective product may sue any business entity in the chain of production and marketing, from the original manufacturer down through the distributor and wholesaler to the retailer, and the liability of all the defendants is joint and several. Moreover, the extent of a defendant's liability is determined by the defendant's participation in the marketing enterprise by which the product is sold to the public, not the defendant's particular legal relationship with the manufacturer.

The Federal Tort Claims Act does not authorize a cause of action against the federal government for damage based on strict liability, such as with a sonic boom. Laird v Nelms (1972) 406 US 797, 32 L Ed 2d 499, 92 S Ct 1899 reh den 409 US 902, 34 L Ed 2d 165, 93 S Ct 95 (suggesting that causes of action for negligence or common law trespass may exist).

TYPES OF DEFECTS

The term "defect" as utilized in the strict products liability context is neither self_defining nor susceptible to a single definition. There are, however, three types of defects that will support the imposition of strict products liability. Those defects are: (1) manufacturing defects; (2) design defects; and (3) defects based on a lack of adequate warnings or instructions as to the proper use of the product.

Manufacturing Defect

A manufacturing defect results from a flaw in the manufacturing process that causes a product to differ from the manufacturer's intended result or from other ostensibly identical units of the same product line. That is, when a product comes off the assembly line in a substandard condition it has incurred a manufacturing defect. A manufacturing defect results from a flaw in the manufacturing process and is readily identifiable because a product with a manufacturing defect differs from the manufacturer's intended result or from other ostensibly identical units of the same product line.

Strict products liability law can be applied to the defective design or manufacture of an aircraft. Fagerquist v Western Sun Aviation, Inc. (1987, 4th Dist) 191 Cal App 3d 709, 236 Cal Rptr 633 (defectively manufactured engine cylinder and defectively designed engine); McGee v Cessna Aircraft Co. (1983, 4th Dist) 139 Cal App 3d 179, 188 Cal Rptr 542 (reviewing aircraft crashworthiness cases); Browne v McDonnell Douglas Corp. (1980, ND Cal) 504 F Supp 514 (defective cockpit design);

Design Defects

A design defect is to be distinguished from a manufacturing defect. A design defect is a defect that arises from some aspect of the design or plan of the product that makes the product unsafe. A design defect cannot be identified by simply comparing the injury_producing product with the manufacturer's plans or with other units of the same product line, since by definition the plans and all other manufactured units will reflect the same design. Thus, rather than applying any sort of deviation_from_the_norm test in determining whether a product is defective in design for strict products liability purposes, two alternative tests have been developed based on the expectations of the consumer and the risks and benefits associated with the challenged design. A product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. This test reflects a warranty analysis and is based on the theory that when a manufacturer places a product on the market, a representation is impliedly made that the product is safe for the tasks it was designed to accomplish. In determining whether a product's safety satisfies the expectations of an ordinary consumer, the jury is to consider the expectations of a hypothetical reasonable consumer rather than the expectations of the injured plaintiff.

In order to establish liability under the consumer expectation test, the plaintiff has the burden of proving by a preponderance of the evidence all the facts necessary to show (1) the defendant's connection with the product, such as manufacturer, distributor, or seller; (2) that the design of the product that injured the plaintiff was the same as the design of the product when it left the defendant's possession; (3) that the product failed to perform as safely as an ordinary consumer of that product would expect; (4) that the design of the product was a proximate cause of the plaintiff's injuries; (5) that the product was used in a manner reasonably foreseeable by the defendant; and (6) the nature and extent of the plaintiff's injuries.

A product may also be found defective in design even if it satisfies ordinary consumer expectations if, through hindsight, the jury determines that the product's design embodies "excessive preventable danger," or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of the design. Thus, the risk/benefit test is an alternative test designed to aid the injured party in establishing the existence of a design defect. It is necessary because in many situations the consumer will not know what to expect from the product in that he or she will have no idea how safe the product could have been made. Under the risk/benefit test, the plaintiff must establish a prima facie case of causation. That is, evidence must be adduced which would permit a jury to find that a design feature of the product was a proximate cause of the plaintiff's injury. Once the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden of proof then shifts to the defendant to prove, in light of relevant factors, that the product was not defective. The factors that a jury may consider in determining whether a product is defective under the risk/benefit test include, among others, (1) the gravity of the danger posed by the challenged design; (2) the likelihood that the danger would occur; (3) the mechanical feasibility of a safer alternative design; (4) the financial cost of an improved design; and (5) the adverse consequences to the product and to the consumer that would result from an alternative design. Thus, under the risk/benefit test the plaintiff does not have the burden of showing that the risks involved in the design outweigh its benefits or that a reasonable alternative design was feasible. Rather, the plaintiff need show only that the injury was proximately caused by the product's design. The defendant must then justify the design based on the factors just discussed.

Defective Warnings

In addition to manufacturing and design defects, a product may be defective as a result of a failure to provide adequate warnings regarding the product's use. Indeed, a product may be found defective as a result of a failure to warn, even though the product itself was flawlessly designed and manufactured. Thus, a manufacturer or supplier of a product is required to warn of any dangerous propensities in the product or in its use that the manufacturer or supplier knows or should know about and which the user of the product would not ordinarily discover. Moreover, the duty to warn extends not only to dangers inherent in the product itself but also to dangers that arise as a result of defects in the product. There is no duty to warn, however, as to a use that is not reasonably foreseeable or as to a dangerous propensity that is either obvious or known to the injured person at the time the product is used. Moreover, a manufacturer or distributor is required only to warn of dangers that were either known or scientifically knowable at the time of manufacture or distribution of the product, and evidence of the state of the art may be introduced on the issue of the defendant's knowledge of the danger.

To be legally sufficient to relieve a manufacturer or seller of liability for failure to warn, the instructions or warnings must sufficiently alert the user to the possibility of danger. Occasionally, the adequacy of a warning may be decided by the court as a matter of law based on the evidence presented. In most cases, however, the adequacy of a warning is a question of fact to be decided by the jury. Whether the absence of a warning makes a product defective depends on several factors, including: (1) the normal expectations of the consumer as to how the product will perform; (2) the degrees of simplicity or complication in the operation or use of the product; (3) the nature and magnitude of the danger to which the user is exposed; (4) the likelihood of injury; and (5) the feasibility and beneficial effect of including a warning.

In Stevens v Cessna Aircraft Co. (1981, 2nd Dist) 115 Cal App 3d 431, 170 Cal Rptr 925, CCH Prod Liab Rep P 8897 the manufacturer of a small airplane was not required to warn passengers as to load capacity of aircraft, because the pilot had been warned in owner's manual and because it would have been impossible to convey such warning to passengers.

Strict liability principles can apply even when the product itself is not physically dangerous, but becomes dangerous because it provides incomplete or misleading information. See, for example, Fluor Corp. v Jeppesen & Co. (1985, 2nd Dist) 170 Cal App 3d 468, 216 Cal Rptr 68 (defect in airport instrument approach chart)

2nd Impact Cases

The "crashworthiness" doctrine relates to responsibility for postcrash injuries (so_called "second collision" injuries) resulting from a design defect which had no causal relation to the "first" accident. Under the doctrine, a manufacturer must evaluate the crashworthiness of its product and take reasonable and practicable steps to forestall particular crash injuries and mitigate the seriousness of others. The crashworthiness doctrine is based on the recognition that although a collision may not be the normal or intended use of a motor vehicle, vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products. In short, the design and manufacture of products should not be carried out in an industrial vacuum but with recognition of the realities of their everyday use. The crashworthiness doctrine has also been applied to a strict products liability cause of action against the manufacturer of a private aircraft. McGee v Cessna Aircraft Co. (1978, 4th Dist) 82 Cal App 3d 1005, 147 Cal Rptr 694]

Successor Liability

Sometimes a company that has been acquired by or merged with another company can be held liable for earlier manufactured products. The successor company will be held liable for injuries caused by its predecessor's defective products where the successor continues the output of the predecessor's line of products and (1) in acquiring the predecessor's business, the successor played some role in curtailing or destroying the plaintiff's remedies against the predecessor; (2) the successor has the ability to assume the original entity's risk spreading role; and (3) it is fair to require the successor to assume a responsibility for defective products that was a burden necessarily attached to the original entity's good will being enjoyed by the successor in the continued operation of the business. Successor liability has also been imposed where a successor manufacturer bought a going business, including its goodwill; continued the business at the same location under the same fictitious name as its predecessor; and was in the same position as its predecessor to spread the costs of injuries among its current customers.

Punitive Damages

Punitive damages are generally recoverable in a strict products liability action where (1) the defendant placed the product on the market in conscious disregard of the safety of consumers and others; and (2) the defendant was aware of the probable dangerous consequences of its conduct and deliberately failed to avoid those consequences.

PRODUCT NEGLIGENCE

An additional theory of liability on which a products liability action may be based is negligence. Strict products liability has largely superseded negligence as a basis for imposing liability for a product_caused injury, a plaintiff is not required to choose between strict products liability or negligence as a theory of recovery. Rather, he or she may proceed under both theories and where the evidence supports each theory as a basis for liability the plaintiff is entitled to instructions on each.

A cause of action based on negligence differs from a cause of action based on strict products liability in that a strict products liability cause of action is concerned with the condition of the injury_causing product (that is, whether it contains a defect) while a negligence cause of action is concerned with the reasonableness of the defendant's conduct. Thus, as in any other negligence action the plaintiff has the burden of proving that (1) the defendant had a duty to use care; (2) that the defendant breached that duty; and (3) that the breach was the proximate or legal cause of the resulting injury.

A duty to use due care may be imposed by statute, contract, or otherwise. If the extent of a duty is not defined by statute or contract, the court must consider several factors in determining whether a duty exists. Those factors include: (1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise with resulting liability for breach; (7) and the availability, cost, and prevalence of insurance for the risk involved.

Generally, suppliers of products are under a duty to exercise reasonable care in supplying the products to others for their use.

WARRANTIES

Contractual

The law recognizes the following express warranties by a seller:
(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise;
(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods will conform to the description; and
(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

The traditional method of creating an express warranty is for the seller to explicitly state that it "warrants" or "guarantees" the particular product involved. However, it is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee," or even that he or she have a specific intention to make a warranty. For example, express warranties have been held to arise from statements contained in advertising brochures disseminated to the consuming public in order to induce sales, advertisements, product labels and instruction booklets, and purchase orders. Moreover, the fact that a warranty is not stated in a written memorandum does not mean it is not part of the contract of sale. For example, an express warranty may arise from oral representations by a sales person as to the product's quality.

Not every statement will constitute an express warranty, however. An affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. However, statements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller's opinion. Factors that tend to indicate that a statement is an opinion statement include: (1) a lack of specificity in the statement made; (2) the statement is made in an equivocal manner; and (3) the statement reveals that the goods are experimental in nature. In an action alleging the breach of an express warranty, a buyer need not prove that he or she relied on the warranty in entering into the agreement, or even that it was a dominant factor inducing the agreement. All that is required under the law is that the warranty involved became a part of the basis of the bargain, or merely a factor or consideration inducing the buyer to enter the bargain. Moreover, a warranty statement made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest at all on the representation.

Because an express warranty is created by the express words or conduct of a seller, an attempt by the seller to disclaim an express warranty after creating it is essentially contradictory. Thus, any words or conduct attempting to disclaim an express warranty will be strictly construed against the person who has both warranted a particular fact to be true and then attempted to disclaim the warranty. Additionally, words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit the warranty must be construed wherever reasonable as consistent with each other; but any negation or limitation is inoperative to the extent that a consistent construction is unreasonable.

Implied

A warranty that the goods will be merchantable is implied in a contract for their sale if the seller is a merchant with respect to the goods of that kind. To be merchantable, the goods must, at the very least:

(a) Pass without objection in the trade under the contract description;
(b) In the case of fungible goods, be of fair average quality;
(c) Be fit for the ordinary purposes for which goods of that type are used;
(d) Run, within the variances permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved;
(e) Be adequately contained, packaged, and labeled; and
(f) Conform to the promises or affirmations of fact made on the container or label, if any.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods will be fit for that purpose.

In addition to the implied warranties of merchantability and fitness for a particular purpose, other implied warranties, unless excluded or modified, may arise from a course of dealing or trade usage. The implied warranties of merchantability and fitness for a particular purpose may be excluded or modified. To exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and in the case of a writing must be conspicuous. To exclude or modify any implied warranty of fitness, the exclusion must be written and conspicuous.

Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. When the buyer before entering into the contract has examined the goods or a sample or model as fully as desired, or has refused to examine the goods, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to the buyer.

Whether a person is entitled to sue for a breach of warranty depends on whether privity is required, which depends, in turn, on the type of warranty involved. Privity is not a requirement for actions based on an express warranty. That is, any person to whom an express warranty has been directed may recover damages for injuries resulting from a breach of the warranty without a showing of privity. Privity, however, remains a requirement for actions based on an implied warranty of merchantability and an implied warranty of fitness, with certain limited exceptions. Those exceptions are where the product is food, a food container, or drugs. Privity is also not required where the injured person is a member of the purchaser's family, or an employee of the purchaser.

When there has been a breach of warranty, the buyer must notify the seller of the breach within a reasonable time after the breach was discovered or should have been discovered. Otherwise, the buyer will be barred from any remedy.

Product Liability Jury Instructions

At the conclusion of the evidentiary portion of a trial, the judge will instruct the jury on the law that applies in product liability cases as follows:

> The manufacturer of an article is liable for injuries legally caused by a defect in design or manufacture of the article which existed when the article left

possession of the defendants, provided that the injury resulted from a use of the article that was reasonably foreseeable by the defendants.

The manufacturer of a product is liable for injuries a legal cause of which was a defect in its manufacture which existed when it left possession of defendants, provided that the injury resulted from a use of the product that was reasonably foreseeable by the defendants.

A defect in the manufacture of a product exists if the product differs from the manufacturer's intended result or if the product differs from apparently identical products from the same manufacturer.

The manufacturer of a product is liable for injuries legally caused by a defect in its design which existed when it left the possession of the provided that they resulted from a use of the product that was reasonably foreseeable by the manufacturer.

A product is defective in design: 1) if it fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or 2) if there is a risk of danger inherent in the design which outweighs the benefits of that design.

In determining whether the benefits of the design outweigh such risks you may consider, among other things, the gravity of the danger posed by the design, the likelihood that such danger would cause damage, the mechanical feasibility of a safer alternate design at the time of manufacture, the financial cost of an improved design, and the adverse consequences to the product and the consumer that would result from an alternate design.

The manufacturer or seller of a product is not liable for injuries or death legally caused by a defect in its design, which existed when the product left the possession of the manufacturer or seller, if:

1. The product is inherently unsafe and the product is known to be unsafe by the ordinary consumer, who has the ordinary knowledge common to the community, and who consumes the product; and
2. The product is a common consumer product intended for personal consumption.

A product is defective if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not be readily recognized by the ordinary user of the product and the manufacturer fails to give adequate warning of such danger.

A manufacturer has a duty to provide an adequate warning to the user on how to use the product if a reasonably foreseeable use of the product involves a substantial danger that would not be readily recognized by the ordinary user.

A manufacturer has a duty to provide an adequate warning to the consumer of a product of potential risks or side effects which are known, or in the exercise of reasonable care should have been known, which may follow the foreseeable use of the product.

Comparative fault is negligence on the part of a plaintiff which combining with the negligence of a defendant or combining with a defect in a product contributes as a legal cause in bringing about the injury.

Comparative fault, if any, on the part of plaintiff does not bar recovery by the plaintiff against the defendant but the total amount of damages to which plaintiff would otherwise be entitled shall be reduced by the percentage that

plaintiff's comparative fault contributed as a legal cause of his injury.

If the buyer before making the purchase has examined the product as fully as desired or has refused to make such examination when demanded by seller, there is no implied warranty from the seller as to defects which a reasonable examination ought in the circumstances to have revealed. The examination or refusal to examine will not, however, relieve the seller from liability for defects which could not have been discovered by a reasonable inspection.

If you find that a legal cause of plaintiff's injury was a defect in the manufacture or a defect in design of the product and that the comparative fault of the plaintiff was also a legal cause of said injury, you will determine the amount of damages to be awarded by you as follows:

First: You will determine the total amount of damages to which the plaintiff would be entitled under the court's instructions if plaintiff had not been comparatively at fault.

Second: You will determine what percentage of the combined legal causes of plaintiff's injury is attributable to plaintiff's comparative fault and what percentage of such combined proximate causes is attributable to the defective product.

Third: You will then reduce the total amount of plaintiff's damages by the percentage that plaintiff's comparative fault contributed as a legal cause to his injury.

Fourth: The resulting amount, after making such reduction, will be the amount of your verdict.

CASE #1

BRACISCO v. BEECH AIRCRAFT CORP.
(1984) 159 Cal.App.3d 1101, 206 Cal.Rptr. 431

OPINION

Plaintiffs, surviving wife and children of decedent Eugene Bracisco, appeal from a judgment entered on a jury verdict in favor of defendant Beech Aircraft Corporation in a wrongful death action.

Facts

This action arose from the death of Eugene Bracisco while piloting a Beechcraft C_35 Model Bonanza airplane. The accident occurred when Bracisco's plane crashed into a tree near his home on a flight from Hayward to Middletown on December 23, 1972. Bracisco's widow and children (plaintiffs) brought the instant wrongful death action alleging negligence and strict liability in tort against the plane's manufacturer, Beech Aircraft Corporation (Beech), its subsidiary Beechcraft West, Richard H. Dederian, owner of "Flight Care" airplane maintenance facility, and Shell Oil Company, supplier of the plane's gasoline.

The case proceeded to trial by jury. At the close of plaintiffs' case the trial court granted Shell Oil Company's motion for nonsuit. At the completion of the trial, the jury returned a verdict in favor of each of the remaining defendants, specifically finding Beech was not

negligent or strictly liable for Bracisco's death. Plaintiffs appeal solely from the judgment entered in favor of Beech on the strict liability claim which was premised on the charge the plane was defectively designed.

Evidence introduced at trial can be summarized as follows: Bracisco worked in San Francisco and would fly home to Middletown on the weekends. It was his custom, upon arriving in Middletown, to circle the valley where his house was located before landing at the local airport. On the day of the accident several witnesses saw and heard Bracisco's plane before it crashed. Bracisco's plane approached the valley in a descending left turn. There was conflicting testimony regarding whether or not the plane's engine was fully audible during Bracisco's descent. Some witnesses testified they could hear the engine, but it was running slow, decelerating. One of these witnesses testified there was a sudden surge of engine power split seconds before the crash. At least one eyewitness testified the plane's engine was clearly audible at full power during its descent.

Expert testimony regarding the cause of the crash was also in conflict. Plaintiffs' expert testified the accident occurred as a result of "unporting" of the left fuel tank during the plane's descending left turn, resulting in a loss of engine power. "Unporting" occurs when the plane's nose is allowed to drop below the horizon and the fuel sloshes forward in the tank and away from the fuel line port or pickup outlet leading to the engine. The resulting diminishing fuel supply causes the engine to slow down, idle and eventually stop. Under this theory, Bracisco struggled during his descent to get fuel back to the engine but succeeded in doing so only moments before impact. Plaintiffs claimed "unporting" occurred due to defective design of the plane's fuel tanks. They also claimed Beech was aware the unporting problem rendered the plane unsafe, but failed to give adequate instructions, directions or warnings in this regard.

Beech's experts opined the cause of the crash was an "accelerated stall" from which Bracisco was unable to recover. A "stall" in aeronautical terms refers to a situation where a plane moves too slowly to maintain adequate lift on the wings so that the plane begins to fall rather than fly or glide. An "accelerated stall" occurs when as the result of a sharp turn, centrifugal force makes the plane "heavier" and the minimum speed needed to keep the wings lifted is increased. Failing to maintain the needed speed under the circumstances resulted in the crash. Beech's position was that the crash was not caused by defective design but by Bracisco's error in piloting the plane.

In instructing the jury, the trial court gave a modified version of BAJI No. 2.60 2 regarding plaintiffs' and defendants' burden of proof for each of the alleged strict liability and negligence claims. This instruction was followed by a modified version of BAJI No. 9.00.5 defining design defect, 3 and by plaintiffs' special instruction No. 22 4 providing a product is defective if warnings are required in order to make it safe and these are not given.

Plaintiffs' principal contention on appeal is that the version of BAJI No. 2.60 which the court gave the jury erroneously stated plaintiffs' burden of proof regarding defective design under Barker v. Lull Engineering Co. (1978) 20 Cal.3d 413, 432 [143 Cal.Rptr. 225, 573 P.2d 443, 96 A.L.R.3d 1. They claim this error was prejudicial and requires reversal in light of the instruction's misleading effect, Beech's counsel's reliance upon it in his closing argument, and the fact there was a great degree of conflict in the evidence regarding defective design. We find this contention meritorious.

Discussion

Our Supreme Court in Barker v. Lull Engineering Co., supra., 20 Cal.3d 413, held a product may be found defective in design under either of two alternative tests: "First, ... if the plaintiff establishes that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Second, ... if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design."

In the present case, the version of BAJI No. 2.60 given to the jury listed seven issues which plaintiffs had the burden of establishing by a preponderance of the evidence. It also stated defendant Beech had the burden to show the benefits of the challenged design outweighed its concomitant risks. More importantly, it did not, however, specify that not all of the seven listed elements need be proven by the plaintiffs in order to establish a prima facie case of defective design. 6 It also failed to specify under what circumstances the burden shifts to defendant to show the benefits inherent in the defective design outweigh its risks. Although BAJI No. 2.60 abstractly listed each party's burden of proof, it failed to put the listed issues into perspective under Barker's alternative defective design tests. This failure to correctly allocate the prescribed burdens rendered the given instructions erroneous and misleading. The instruction given by the court imposed upon plaintiffs a burden of proof on the issues more onerous than that which they were otherwise required to meet.

We must now determine whether this instructional error was prejudicial. Error is considered prejudicial "[w]here it seems probable that the jury's verdict may have been based on the erroneous instruction ...." Whether "the probable effect of the instruction has been to mislead the jury ... depends on all the circumstances of the case, including the evidence and the other instructions given."

"While there is no precise formula for measuring the effect of an erroneous instruction, a number of factors are considered in measuring prejudice: (1) the degree of conflict in the evidence on critical issues [citations]; (2) whether respondent's argument to the jury may have contributed to the instruction's misleading effect; (3) whether the jury requested a rereading of the erroneous instruction or of related evidence; (4) the closeness of the jury's verdict; and (5) the effect of other instructions in remedying the error."

Mindful of these principles we proceed to review the case at bar. Initially we note the evidence introduced at trial was particularly conflicting on the determinative issues necessary to prove defective design: whether the plane failed to satisfy ordinary consumer expectations as to safety in its intended or reasonably foreseeable operation; whether safety instructions or warnings regarding the alleged defectively designed fuel tank were required, and if so whether they were given; and whether the alleged defective design was the proximate cause of the crash. In this context we note that although the jury was given a special verdict, only one of these theories of defective design (whether defective design was the proximate cause of decedent's death) was presented to it. 7 It is impossible to estimate how the jury would have resolved the other defective design issues had it been properly instructed on the burden of proof law and specifically asked to resolve them. In such circumstances the court "'should not speculate upon the basis of the verdict.'"

We next note Beech's counsel's closing argument intensified the detrimental potential of the erroneous instruction. Counsel not only read to the jury the portion of the improper instruction pertaining to plaintiff's burden of proving the seven listed issues (see fn. 2, ante), but structured his whole closing argument around these issues referring to them cumulatively without mentioning Banker's alternative defective design tests. 8 In light of this argument and the giving of modified BAJI 2.60, it is very probable the jury could have been misled into believing plaintiffs could not establish a case of defective design unless each one of the seven listed issues had been proven by a preponderance of the evidence. As aptly noted in Moreno v. Fey Manufacturing Corp. (1983) 149 Cal.App.3d 23, 27_28 [196 Cal.Rptr. 487], "[a]ll instructions to the jury are important, so that careful and conscientious jurors can apply the proper law to the facts they find to have been proven. However, few instructions are of greater importance than that which informs the jury which party bears the burden of proof on the issues in dispute."

We lastly look at the effect of other instructions in curing the error. Modified BAJI No. 9.00.5 correctly instructed the jurors on Barker's alternative tests (see fn. 2, ante), and plaintiffs' special instruction No. 22 correctly defined defective design in terms of failure to give required safety warnings (see fn. 3, ante). While these instructions correctly stated the law, they did not cure the error, since they did not address the issue of plaintiffs' burden of proof. Furthermore, to the extent these instructions could be interpreted to refer to plaintiffs' burden of proof, they presented the jury with inconsistent and confusing statements of the law vis_a_vis modified BAJI No. 2.60. We cannot assume the jury ignored modified BAJI No. 2.60 and based its defective design verdict solely on these other correct statements of the law. "'The prejudicial effect of a misstatement of an important principle of law cannot easily be overcome by another declaration contradicting it. The jury are bound (and so instructed) to accept the court's instructions as correct statements of the law .... They are likely to be confused and misled by the conflicting statements, and it is not easy to determine which charge controlled their determination.'"

In light of these factors and our examination of the entire record, we conclude the probable effect of the erroneous instruction was to mislead the jury. Accordingly, we conclude the error was prejudicial and the judgment should be reversed on the strict liability cause of action.

Judgment in favor of defendant Beech Aircraft Corporation on the strict liability cause of action is reversed.

Poch, Acting P. J., and Travis, J., concurred.

A petition for a rehearing was denied October 10, 1984, and respondents's petition for a hearing by the Supreme Court was denied December 12, 1984.

FOOTNOTE 1. Only the introductory section, the facts section and part II of the Discussion are certified for publication.

FOOTNOTE 2. BAJI No. 2.60 as modified provided with respect to the strict liability claim: "In this action, in the claim against defendant Beech Aircraft Corporation that the product in question was defective, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: 1. That the manufacturer of the product in question was Beech Aircraft Corporation. That the product failed to perform as safely as an ordinary consumer of the product would expect. 3. That instructions, directions or warnings were required in order to render the product safe, when used in a manner reasonable [sic]

foreseeable and if required, that there was a failure to give such instructions, directions or warnings. 4. That the defect in design existed when the product left the defendant's possession. 5. That the design of the product was a proximate cause of the death of the decedent. 6. That the product was used in a manner reasonably foreseeable by the defendants. 7. The nature and extent of plaintiffs damages. The defendant Beech Aircraft Corporation has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issue: 1. That in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design."

FOOTNOTE 3. BAJI No. 9.00.5 as modified provided the following: "The Manufacturer of a product is liable for the death of a decedent a proximate cause of which was a defect in its design which existed when it left possession of defendant provided that the death of the decedent resulted from a use of the product that was reasonably foreseeable by the defendant. A product is defective in design: (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused the death of the decedent and the defendant fails to prove, in light of the relevant factors, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. In determining whether the benefits of the design outweigh such risks you may consider, among other things, the gravity of the danger posed by the design, the likelihood that such danger would cause damage, the mechanical feasibility of a safer alternate design at the time of manufacture, the financial cost of the improved design, and the adverse consequence to the product and the consumer that would result from an alternate design."

FOOTNOTE 4. Plaintiffs' special instruction No. 22 reads as follows: "A product is also defective in design if a product reasonably requires instructions, directions or warnings in order to render the product safe when used in a manner reasonably foreseeable and there is a failure to give such instructions, directions or warnings."

FOOTNOTE 6. For example, the instruction's language could reasonably mislead the jurors into believing that unless each one of the listed issues had been proven by a preponderance, plaintiffs had not carried their burden to show defective design. Yet under Barker plaintiff must show the product either failed to satisfy ordinary consumer expectations as to safety in its intended or reasonably foreseeable operation or that the product's design proximately caused the injury, but not both.

FOOTNOTE 7. The only special verdict issue dealing with defective design was the following: "Issue No. 1. Was there a defect in design of the product involved in this case when it left the possession of the defendant Beech Aircraft Corporation which was a proximate cause of the death of the decedent when it was being used in a manner reasonably foreseeable by said defendant?"

FOOTNOTE 8. The combined misleading effect of Beech's closing argument and the erroneous instruction was acknowledged by the trial court during chambers discussions held after Beech's closing argument but before the jury was instructed.

Limitations on Product Liability

After years of intensive lobbying by GAMA (Gen. Aviation Manufacturer's Assoc.) for reform in this area of the law, in 1994 Congress passed the General Aviation Recovery Act (GARA). The following is an article that discussed the history, features and implications of this major aviation legislation.

The General Aviation Revitalization Act of 1994 (GARA)

Reprinted with permission from the April 1997 issue of *The Aviation Quarterly*. To be cited as [1996_97] TAQ 209_272, Part 4, April 1997, at 245.

Abstract

This article describes America's General Aviation Revitalization Act of 1994 (GARA) and discusses briefly its political history and intent. The bulk of the article discusses the operative features of the statute and analyzes the early case law interpreting and applying it. Finally, the article offers some opinions on whether GARA is achieving its intended purpose, and provides a prognosis on what its continued effect on the American general aviation industry is likely to be.

Discussion

The General Aviation Revitalization Act of 1994, also commonly known as "GARA,"[1] is an 18_year statute of repose that was passed by the United States Congress and signed into law by

President Clinton on August 17, 1994, at which time it became effective immediately. GARA's intent was to revitalize America's general aviation manufacturing industry, which had been crippled by litigation costs caused by the state of American product liability jurisprudence.

As a result of the staggering proliferation of product liability lawsuits against general aviation manufacturers, the industry suffered an unprecedented decline from its peak years in the late 1970s to its low point in the early 1990s. Deliveries from American general aviation aircraft manufacturers declined from approximately 18,000 in 1978 to about 900 in 1992. Within that same time frame, there was a drop in the number of U.S. general aviation airplane manufacturers from 29 to nine. Over 100,000 jobs in the American general aviation industry had also been lost from 1978 until GARA's passage. Moreover, the percentage of the U.S. aircraft deliveries consisting of the smaller, piston engine aircraft dropped from roughly 95 percent in 1978 to 61 percent in 1993.[2] The primary reason for the decline was the product liability crisis.

The status of American product liability law had degenerated to such a point that it was commonplace for manufacturers in the general aviation industry to be faced with lawsuit after lawsuit, claiming that their aircraft were defective even though they had been in successful service for 20, 30, 40 or more years before an accident occurred. While these lawsuits were usually "successfully" defended by the manufacturers (that is, successful in the sense of vindicating the product), the cost of litigating the cases was staggering.[3] Each consecutive "success" was therefore a hollow one. GARA was the culmination of nearly a decade of tort reform effort in Congress which was designed to provide some relief from the product liability crisis and allow the general aviation industry to rebound.

A Narrow Approach to the Successful Passage of GARA

Earlier efforts at legislative reform in Congress were much more ambitious and therefore less politically viable than the relatively narrow scope that GARA ultimately took. In the mid_1980s, general aviation manufacturers, largely through their trade group, the General Aviation Manufacturers' Association (GAMA), went to the United States Congress for help. Certain states had made varying attempts at tort reform to alleviate some of the problems the litigation crisis had caused, but they were not universal, and the inconsistencies from state to state caused more problems. Those state laws were also more general in scope, usually applying to all product liability matters.

The general aviation industry, however, is a unique industry, and was singularly positioned to need more specific and focused change. Unlike any other, the general aviation industry is heavily regulated by the federal government, in all aspects of its existence __ indeed, from "cradle to grave." It is for this reason that general aviation manufacturers and many of the legislators to whom they appealed considered that comprehensive, national tort reform for the general aviation industry was uniquely appropriate. Accordingly, the initial legislative proposals brought forth by GAMA and certain key legislators[4] were quite comprehensive, if not ambitious in scope. While containing statute of repose provisions similar to that which ultimately became GARA, the initial proposals also sought to create a single body of nationwide substantive law for general aviation product liability, including uniform negligence, strict liability and warranty standards, limits on punitive damages awards, abolition of joint and several liability between defendants (at least as to some forms of damages), and other various measures.

These efforts, however, proved not to be politically viable because of their comprehensive nature. Several proposals garnered significant support from large groups of legislators, but the bills invariably died in committee, usually in the House Judiciary committee, which during this time was chaired by Representative Brooks (D_Tex.), a strong opponent of tort reform. Finally, however, after many promising attempts which again ended in defeat, GAMA and the key supporters of the effort in Congress reassessed their strategy and expectations. It was ultimately decided to try a more narrow approach __ a bill with a single provision __ a statute of repose.

While it was less than initially hoped for, the bill would nevertheless give the industry a needed boost, and, being less aggressive and sweeping, it was far more politically viable than earlier efforts.

GARA's supporters also decided to emphasize to Congress that this proposal should be viewed as a "jobs bill," in that if passed, it would likely spur on a rebirth of general aviation production, particularly in smaller, piston_engine aircraft, and thus create numerous new jobs. Russ Meyer, Chairman of Cessna Aircraft, gave more substance to this approach by vowing that Cessna would open a new piston_engine manufacturing facility and resume piston_engine production if GARA were passed. The combination of this more narrow approach and packaging as a "jobs bill" gave GARA a much greater chance of passage than prior more comprehensive proposals. Nevertheless, the bill again found its way to Representative Brooks' House Judiciary Committee, and it appeared that it would die there again. Certain industrious congressmen, however, invoked some rarely used parliamentary procedures that essentially forced Representative Brooks to allow the bill to be reported out of his committee to be considered by the House as a whole.[5] Once reported to the House as a whole, the bill was passed overwhelmingly. The Senate had already passed a nearly identical version with significantly more ease, and the differences between the two bills were quickly smoothed out in the conference committee. Thereafter, the bill was sent to the President and was promptly signed into law.

GARA's Features

Simply put, GARA is an 18_year statute of repose. A statute of repose generally bars suit based on passage of time between the injection of a product into the stream of commerce and the time of the accident that caused the harm. This is not to be confused with a statute of limitation, which bars actions based on passage of time between the accrual of a cause of action and the filing of a lawsuit.[6] A statute of limitations is generally considered a matter of procedural law, whereas a statute of repose is generally considered a rule of substantive law in that it represents a public policy determination that a product is deemed not defective or negligently designed as a matter of law if it has been in successful use for a specified period of time before an accident.[7]

Unlike the prior, more comprehensive efforts at general aviation tort reform in Congress, GARA itself scarcely covers two pages of text. Notwithstanding its relatively short length, however, the application of GARA is not simple, given its various exceptions and features. Specifically, GARA's operative provision provides that:

> **(a) In General. ___ Except as provided in subsection (b), no civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred ___**
>
> **(1) after the applicable limitation period [18 years] beginning on ___**
>
> **(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or (B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft;**[8]
>
> *** * ***

To this point, the statute's terms are simple enough, although certain aspects of this part of the language are worthy of note. First, the Act applies only to "general aviation aircraft," which is a defined term in the Act and will be discussed *infra*. Second, the Act applies both to manufacturers of the entire aircraft and manufacturers of its component parts. Thus, it is intended to provide protection to the entire industry, but only against claims brought against manufacturers *in their capacity as manufacturers*. In other words, GARA is not intended to provide protection to a manufacturer which, for example, is operating the aircraft at the time of the accident and is sued

for negligent or improper operation, as distinct from a claim relating to a defect in design or manufacture of the aircraft.

Third, the term "no civil action" is important in that it makes clear that no action of any kind arising from a qualifying accident may be brought, whether couched in terms of negligence, strict liability or breach of warranty. This is so whether the claim is for design defect, manufacturing defect or failure to warn.[9] Fourth, it is important to note the operative distinction between GARA's statute of repose and those of many states. Many state statutes of repose measure the applicable limitation period from the time of first delivery of the product to the date of filing of the lawsuit[10], whereas GARA's measurement is between the date of first delivery and the date of the accident. Thus, the date of the filing of the lawsuit is of no significance to the 18_year test.

Indeed, the date of filing is only relevant in GARA cases where the accident itself occurred prior to August 17, 1994 (the date GARA was enacted) because pursuant to Section 4 of GARA, the Act became effective immediately upon signing, but it did not apply to *lawsuits already commenced as of its effective date*. In other words, if the accident occurred prior to August 17, 1994 but suit had not yet been commenced by that date, GARA would bar the suit for a plane that was more than 18 years old at the time of the accident (if no exceptions applied). On the other hand, if the accident occurred *and* the lawsuit had been commenced before GARA was enacted on August 17, 1994, GARA would not operate to bar the suit.

GARA's "Rolling" Feature

Following the basic operative language quoted above, GARA goes on to describe its next feature, which is known as a "rolling" statute of repose for replacement parts. Specifically, the relevant passage continues after Section 2(a)(1) and describes at Section 2(a)(2) how the repose period works for component parts added to or replaced in the plane after its initial manufacture. Specifically, GARA provides that a suit is barred pursuant to Section 2(a):

> **(2) with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury or damage, after the applicable limitation period [18 years] beginning on the date of completion of the replacement or addition.**[11]

This passage is intended to deal with the fact that certain components of general aviation aircraft are from time to time replaced with new or different parts. For example, it is not uncommon for engines to be replaced, and if a new engine is placed on an 18_year old airframe, a new 18_year statute of repose will apply to the replacement engine, whereas the statute of repose has already run and continues to bar suits on the remainder of the plane. If the plane crashes due to an alleged defect in the airframe, suit will be barred (absent proof of exceptions), but if the crash is due to a defect in the "new" engine, GARA would not bar that suit until the passage of another 18 years from the date of its installation.

By the same token, a 17_year old component may be removed from one plane and placed in a newer plane of, for example, 10 years of age. The statute of repose on the older component added to the newer plane will run in one year from the date of addition (or 18 years total from *its* first delivery), whereas the statute of repose on the rest of the plane will not run for another 8 years, when it becomes 18 years old. This feature provides some flexibility to the statute and strikes a balance between the policies of protecting consumers and giving manufacturers appropriate "repose" after an aircraft or replacement part reaches 18 years of age.

This rolling feature of GARA makes it important to determine exactly what it means for a part to be considered "new" for this purpose. Certain aircraft parts, including engines in particular, are routinely "overhauled," but a normal engine overhaul should not cause the engine itself to be considered "new," commencing a new 18_year statute of repose. Such a construction would be absurd and clearly contrary to the intent behind GARA. In fact, practically speaking, such a

construction would render GARA nonexistent as to engine manufacturers, since virtually all aircraft engines are scheduled to be overhauled more often than every 18 years. This issue was given a thoughtful analysis by a federal court applying Florida's state statute of repose, in which the district court held, and the 11th Circuit Court of Appeals affirmed, that a complete overhaul should not restart the repose period.[12]

If, however, a particular part or component is replaced with a truly "new" (or "newer") part, whether done as a part of an overhaul or not, that specific part should have a new or different repose period running from the date it was first installed. If a part is brand new upon installation, it should have another 18_year statutory period; but if it is a used part which is newer than the airframe, the statutory period would encompass the remaining time until *it* reaches 18 years of age. Before this inquiry would become relevant, of course, the plaintiff would have had to pinpoint the cause of the accident to the particular part that was replaced and which was still less than 18 years old at the time of the accident. This is required by language of the statute that the replacement part must "be alleged to have caused" plaintiff's damages. Absent that critical causal link the benefits to plaintiffs of GARA's rolling feature is irrelevant.

The burden of pinpointing the causally_related replacement part that is less than 18 years old clearly must rest with the plaintiff. The vast majority of early courts applying GARA recognize this, but one or two misguided trial courts have shown a reluctance to hold plaintiff to that burden, at least initially. Any shifting of the burden to a defendant to prove a negative, that is, to show that there was no part added to the plane within 18 years that caused the accident, is both illogical and inconsistent with the underlying premise of our legal system that the plaintiff must bear the ultimate burden of proof to show there was a defective part that caused the accident. Moreover, it is the owner/operator of the plane, not the manufacturer, who is charged by the FAA with the duty and responsibility to maintain meticulous records on what, when and where parts were added to his plane.[13] The manufacturer has no duty, or even practical ability, to know, gather or keep such information. The plaintiff therefore is in a better, if not the only position to come forward with the evidence necessary to invoke the "rolling" feature of GARA.

One situation where the issue of the "newness" of a part as it relates to the rolling feature of GARA will arise is when the part has been more than merely overhauled by the manufacturer, but instead has been reworked or rebuilt to the point of being considered "good as new." Many manufacturers have remanufacturing or rebuilding programs, and there are specific Federal Aviation Regulations (FARs) governing certain remanufactured or rebuilt aircraft parts and components.[14] Manufacturers should therefore be very careful in the way they manage and market used parts and components. Labeling and terminology may become important for different reasons, if a "remanufactured," "zero_timed" or "rebuilt" part would be considered by a court deciding a GARA motion to make it "new" such that the protection otherwise provided by GARA might evaporate. Beyond labeling and the nature and extent of the reworking of the part, other factors that courts are likely to consider will include whether the manufacturer actually retook possession of the part and whether and how it marketed and resold it to another consumer.[15]

General Aviation Aircraft Definition

As its title and operative language clearly indicate, GARA only applies to "general aviation aircraft." That term is common enough in the industry to seem fairly self_defining, but the Act provides a very specific definition to delineate which products are and are not within its scope. Specifically, GARA states that:

> **[T]he term "general aviation aircraft" means any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time the 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.[16]

The certification requirement and seating capacity criteria are self_explanatory and easy to apply. Nearly all aircraft are required to have type and airworthiness certificates, and the certificates themselves designate the seating capacity. The rest of the definition requires that the plane must not have been, at the time of the accident, engaged in "scheduled passenger_carrying operations" as defined in the federal aviation regulations (FARs) in effect at the time of the accident. This definition in the FARs, however, is not easy to find. The only place that term seems to appear in the FARs is tucked away within a Part 135 applicability section which states that "'Scheduled passenger_carrying operations' means 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."[17] This criteria is very specific, and sufficient investigation must be done to determine all the facts necessary to apply it. One should not be tempted to assume GARA does not apply merely because the operator was a commuter airline. This test, because of its very particular requirements, may provide that GARA's reach does cover accidents that initially might be expected to be outside the definition.

Preemption

GARA's 18_year repose period is intended to overlay the various state statutes of repose that might otherwise apply. GARA's preemption provision states that:

> **This section supersedes any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action established by subsection (a).**[18]

In other words, it preempts state law to the extent state law would provide for a longer period of repose, but does not displace any state statute of repose that would provide a shorter limitation period.

GARA's Exceptions

Once GARA's definitions are satisfied and the facts invoke the operative sections of the statute, it must be determined whether any of GARA's four exceptions apply. The exceptions appear in Section 2(b) and provide that Subsection (a) (the operative section discussed above) does not apply:

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

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

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

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

The Medical Emergency, Not Aboard the Aircraft and Written Warranty Exceptions

The latter three of the exceptions are quite straightforward; whether any of them are applicable should be readily apparent. The second exception, often simply termed the "medical emergency exception" is obviously intended to provide additional protection to a certain class of people who

had no choice whether to fly, or if so, on which aircraft, because of the medical emergency with which they were faced. While the terminology says "medical *or other* emergency," GARA's legislative history makes clear that the idea was to protect, for example, people being airlifted by air ambulance from a remote location to the nearest trauma center.

The third exception is intended to exempt from GARA those people who were on the ground when a plane crashed and injured them, or were in another aircraft and were injured when the allegedly defective aircraft collided with the plane in which they were riding. Again, the idea is to provide a narrow area of protection to people who had no choice but to come in contact with the allegedly defective product.

The fourth exception is merely intended to allow suits to proceed notwithstanding GARA in the rare instance where there is a written warranty that might extend beyond 18 years. This is simply a recognition that if the manufacturer and a buyer wish to negotiate such a long_lived written warranty, the law should respect that agreement, and GARA should not preclude an action based upon such warranty. GARA's legislative history provides that "in the event a manufacturer desires to specifically warrant the safety of its product for a period of time beyond the applicable statute of repose, the courts would honor the manufacturer's written warranty." [19]

The Fraud Exception

Obviously, the most significant exception, and indeed the area in which most of the litigation on GARA will arise, is the first exception, commonly known as the "fraud exception." It is a very carefully_worded exception, and has very strict and particular requirements. The premise, however, is simple. A key justification for GARA and the specific protection it provides to a single industry is based upon the unique nature of the aviation industry, in that it is heavily regulated by the federal government (i.e., the FAA) through the certification process.[20] Civil liability exposure for manufacturers in perpetuity (without a statute of repose) was seen as a redundant and oppressive use of the judicial system as a deterrent to the manufacture of unsafe airplanes.[21] The FAA's comprehensive requirements of airworthiness and type certification of each aircraft was 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.[22] Congress acknowledged the limited nature of the fraud exception and noted that "[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." [23]

Because GARA's operative provisions were not to be avoided easily, Congress required that plaintiffs be very specific in pleading facts to prove fraud on the FAA; allegations of mere conclusions are insufficient. To avoid GARA's bar to the claim, the plaintiff must initially plead "with specificity the **facts** necessary to prove" that the manufacturer, as a part of the type or airworthiness certification process, "**knowingly** misrepresented, * * * concealed or withheld" from the FAA "**required information**," that is "material and relevant" and that the specifically concealed information related to the part of the airplane that is alleged to have caused the crash.

The terminology of the exception obviously requires that a plaintiff come forward **at the outset** with **facts** proving that the manufacturer had specific knowledge of a particular defect (that caused the crash), and that it knowingly withheld that information from the FAA. The "required information" mentioned in GARA relates to the information a manufacturer is obligated to provide to the FAA as a part of the FAA's oversight process, which is outlined in the FARs. This could include, for example, specific test data that a manufacturer was required to acquire and provide to the FAA, which the manufacturer knew was false but nevertheless submitted to the FAA to obtain type certification, where the true data would show a defect (that later caused plaintiff's crash).

A plaintiff faces at least two hurdles in the fraud exception. Ultimately, he obviously must prove

the fraud, but first, even to raise the exception, he must plead the facts of the fraud in his initial complaint or petition with sufficient specificity. Otherwise, any plaintiff could generally allege that there must have been some fraud and use that unsupported allegation to stay in court long enough to engage in expensive and wasteful discovery in an attempt to gather the facts necessary to prove fraud. The burdensome nature of discovery (the most expensive aspect of aviation litigation) is a major tool used by plaintiffs as leverage to obtain settlements with manufacturers. Thus, without 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.

Since GARA is still relatively new legislation, however, its requirement to plead "with **specificity** the **facts** necessary to prove" fraud in order to avoid dismissal has not been widely litigated. One might initially be tempted to liken this requirement to the Fed. R. Civ. P. 9 general pleading requirement that "the circumstances of fraud or mistake shall be stated with **particularity**," a rule which has been more extensively litigated.[24] While both the "specificity" rule of the GARA fraud exception and the "particularity" requirement of Fed. R. Civ. P. 9 will ordinarily apply to a plaintiff's attempt to invoke the exception, they are each distinct and different standards. GARA's fraud exception is intentionally and substantially stricter than the particularity requirement of Rule 9.

GARA's fraud exception requires "fact pleading" as opposed to the "notice pleading" of only the "circumstances" of fraud in Fed. R. Civ. P. 9. This is a significant distinction because Rule 9's particularity requirement is often interpreted as not requiring "fact pleading." Fact pleading is a much stricter rule requiring the pleading of actual evidence.[25] GARA's fraud exception, in contrast to Rule 9, requires specific fact pleading.

For these reasons, it should be a rare case where a plaintiff can successfully raise and prevail upon the fraud exception. It will be rare when a manufacturer actually defrauds the FAA, and it will be that much more rare when any such fraud successfully concealed a defect that later caused a plaintiff's injuries more than 18 years after the aircraft was delivered to a purchaser.

As expected, however, plaintiffs have attempted to weaken GARA by overselling the fraud exception, but such efforts have almost universally met with no success. One argument made by plaintiffs has been that the exception does not require "knowing" conduct by the manufacturer, or, in other words, that the exception can be invoked if plaintiff merely shows a manufacturer innocently or unknowingly withheld certain information from the FAA. This argument is based upon the placement of the word "knowingly" in the exception at a distance from the words "concealed or withheld." This construction of the language, however, is illogical and inconsistent with the underlying premise of the exception. The terms "conceal" or "withhold" inherently require knowing conduct on the part of the person who allegedly concealed or withheld information. The terms' technical definitions also bear this out.[26] Both definitions require knowing conduct.

Early Fraud Exception Cases

This argument has also been specifically rejected by the first court to render a published opinion specifically on the fraud exception. In that case, *Rickert v. Mitsubishi Heavy Industries, Ltd.*[27], Wyoming federal district court Judge Brimmer granted summary judgment to defendant and rejected plaintiffs' multi_faceted efforts to invoke the fraud exception. In *Rickert I*, Judge Brimmer clearly holds that the word "knowingly" applies to misrepresentation, concealment and withholding. Specifically, he held that to avoid summary judgment for defendant, the plaintiff must show that a genuine issue of material fact exists concerning: "(1) knowledge; (2) misrepresentation, concealment, or withholding of required information from the FAA; (3) materiality and relevance; and (4) a causal relationship between the harm and the accident."[28]

Throughout the opinion in *Rickert I*, Judge Brimmer reminded the parties of the rigorous requirements of the fraud exception. He repeatedly pointed out the vast difference between

evidence of a difference of opinion, or even facts establishing actual defectiveness or negligence, and evidence of misrepresentation, concealment or withholding required and causally_related information from the FAA. Absent specific proof of the latter, even with an abundance of proof of the former, GARA will bar the claim.[29] In *Rickert I*, the plaintiff attempted to invoke the fraud exception using expert testimony, and certain other documentary evidence. The court took notice of all that was presented, and accepted it as true for purposes of the motion. Even with that, the court held that there were no specific facts indicating that Mitsubishi had misrepresented anything to, or withheld or concealed anything from, the FAA. The court held that a plaintiff "cannot avoid GARA's period of repose simply by dressing up her evidence * * * as 'misrepresentations' and 'concealments.' GARA requires more than innuendo and inference; it demands 'specificity.'"[30] As a result, Mitsubishi was granted summary judgment.

After that ruling, however, plaintiff was given a reprieve to rebrief certain issues because of discovery abuses by the defense. In the meantime, outside the formal discovery process, plaintiff obtained affidavits from two former Mitsubishi executives which stated, with specificity, that Mitsubishi had in fact defrauded the FAA with respect to tail icing testing done in conjunction with FAA certification requirements. Noting that plaintiff had finally realized that GARA had "altered the legal landscape,"[31] the court recognized that the affidavits, if true, raised genuine issues of material fact on the fraud exception because they very specifically told of direct fraud by Mitsubishi on the FAA, not surprisingly, in terms obviously tailored to meet the particular concerns expressed by the court in *Rickert I*. As a result, the summary judgment was vacated.

It should be noted, however, that after *Rickert II*, Mitsubishi took the affiants' depositions and effectively revealed that the disgruntled former employees had no evidence of specific facts misrepresented to, or concealed or withheld from, the FAA. Mitsubishi then filed a new motion for summary judgment, showing how the affiants all but fully recanted their affidavits. The case settled while the motion was pending.

Component Parts Manufacturers and the Fraud Exception

Another case of interest on the fraud exception slightly precedes the *Rickert* cases, but it was an unpublished opinion and is therefore less widely known. For component parts manufacturers, however, it may be a more important decision. In the case of *Cartman v. Textron Lycoming Reciprocating Eng. Div., et al.*[32], the Rogers Corporation, one of the defendants and the manufacturer of an allegedly defective carburetor float which allegedly caused the accident, was granted summary judgment over plaintiff's efforts to invoke the fraud exception.

While not completely evident from a mere review of the opinion without reading the briefs, this ruling essentially provides that where the defendant is a component part maker and the part at issue is over 18 years old, such a defendant is nearly incapable of violating the fraud exception of GARA, if that defendant is not involved directly in certifying the aircraft with the FAA. In other words, where the component part is merely incorporated into a larger group of parts (such as an engine), or into the aircraft as a whole, and the engine or airframe manufacturer is handling certification issues, it is practically impossible for the component manufacturer to have had the direct contact with the FAA necessary to have engaged in the fraud necessary to invoke the exception.

In a case where there is clear evidence of fraud on the component maker's part and proof that such fraud was transmitted on up to the FAA, perhaps the fraud exception could apply to such a defendant. The *Cartman* case, however, illustrates how much more difficult it will be for a plaintiff to invoke the fraud exception against component manufacturers.[33] For all fraud exception cases, however, the court in *Cartman* noted the difficulties in satisfying "the very particular requirements of the Act's" fraud exception.[34]

Other Early GARA Cases

As with any new legislation, the early cases interpreting the Act are critical to its long_term

application and value. As the two fraud exception cases discussed above illustrate, early case law on the most critical exception has been favorable and supportive of GARA's underlying purpose. Most of the other early cases are likewise encouraging.

Altseimer v. Bell Helicopter

The very first published case on GARA is the case of *Altseimer v. Bell Helicopter Textron, Inc.*[35] In its relatively short opinion, the *Altseimer* court granted defendants summary judgment motion against plaintiff's claims that Bell Helicopter had built a defective gearbox in the helicopter that crashed, and that Bell had failed to warn plaintiff regarding the alleged defect. This case is significant in that it put to rest, in the very first published judicial ruling, any question about whether the phrase "no civil action" in GARA's operative section was all_encompassing and included failure to warn cases. It clearly does, and the *Altseimer* court confirmed it.

Although the accident in *Altseimer* occurred before GARA's enactment, the court also upheld the effective date language of GARA and held that it nevertheless barred plaintiff's claims.[36] The court recognized the underlying policies of GARA and stated that its dismissal of the case, "although harsh, . . . is consistent with the purpose of GARA."[37]

Pollack and Lyon v. Agusta, S.P.A., et al.

Probably the first GARA ruling of any kind was handed down by Judge Consuelo B. Marshall in the consolidated case of *Pollack and Lyon v. Agusta, S.P.A., et al.*[38] The initial opinion was the first in a string of three GARA decisions made by this trial court, although none were ever published. In that case, plaintiffs were given three attempts to try to plead and argue their way around GARA. There were three separate amended complaints, three sets of motions to dismiss on GARA and three rulings. The first two were dismissals without prejudice and with leave to amend the pleadings to establish a causally_related part fewer than 18 years old, or to properly invoke an exception. While plaintiffs shifted their approach with each such attempt, they were ultimately unsuccessful, and on the third round of motions, the case was dismissed with prejudice.[39]

In the first round of briefing in *Pollack*, plaintiffs made constitutional arguments based on the fact that the accident occurred before GARA was enacted, and that its passage unconstitutionally denied them equal protection and took their purported cause of action from them without due process.[40] In considering the constitutionality arguments, the court noted that "GARA, as economic legislation, 'comes to the court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.'" [41] Plaintiffs had claimed they were entitled to a constitutional "grace period" within which to file their suit after GARA was passed. Noting, however, that pursuant to *Grimsey v. Huff*,[42] there is no constitutionally protectable, vested property right in a cause of action such as this until after judgment is entered, Judge Marshall dismissed plaintiffs' constitutional arguments and proceeded to the application of GARA itself.[43] The judge also denied plaintiffs' attempt to urge a tortured definition of "civil actions commenced" in GARA to suggest the case should be treated as if it had been filed before GARA was enacted.[44]

At oral argument on the first round of motions, the *Pollack and Lyon* plaintiffs implored the court to allow them time to amend their pleadings because they believed they could identify a causally_related part that had been installed within 18 years before the accident, so as to invoke GARA's "rolling" feature.[45] The second amended complaint, however, failed to identify any such part, and instead exhibited a change in approach. Apparently faced with no replacement part new enough to avoid GARA, plaintiffs argued they could avoid GARA by claiming there was a continuing failure to warn of defects in the aircraft, and that the failure to warn continued to occur beyond the relevant 18_year period.

There were also some vague references to the potential applicability of the fraud exception sprinkled throughout the second round of briefing, and at oral argument on the second motion to dismiss, plaintiffs claimed to have just uncovered some additional facts, and again convinced the

judge that if she were to grant the motion, she should again do so without prejudice, giving the plaintiff another opportunity to amend. On February 6, 1996, the judge did this in a short opinion with no substantive discussion.

The next amendment to the complaint, however, still contained no causally_related replacement part fewer than 18 years old, nor did it even seriously attempt to invoke the fraud exception. Rather, plaintiff attempted to be more specific with her failure to warn theory and her attempt to link that theory to GARA's "rolling" feature. Finally, after the third full round of briefing and arguments, Judge Marshall dismissed the case with prejudice, finding that all of plaintiff's various arguments failed, and specifically finding that GARA bars failure to warn cases.[46] No appeal was taken.

Maintenance and Service Manuals Not Considered Component Parts

Some plaintiffs have tried to circumvent GARA by shifting the argument away from the product or part itself and onto the service or maintenance manuals that go with the product. Accordingly, since such manuals are often updated with new information, plaintiffs have argued that the manuals themselves are defective or exhibit a continuing failure to warn, which is then argued to have occurred within the 18_year window. Courts faced with these arguments have appropriately dismissed them as contrary to GARA's intent and language.

Alter v. Bell Helicopter Textron, Inc.

In the case of *Alter v. Bell Helicopter Textron, Inc.*[47] ,Judge Rosenthal granted defendant's motion for summary judgment pursuant to GARA in a case based on an accident which occurred in Israel.[48] In that case, plaintiff had argued that while the main complaint with the aircraft was an allegedly defective compressor section of the engine that was more than 18 years old, the claim should survive GARA because of a continuing failure to warn about the defective nature of the part, and because the maintenance manuals regarding the part had been revised within 18 years before the accident such that GARA's "rolling" feature should apply. This, in essence, is the same as treating the maintenance manual itself, as opposed to the hardware of the aircraft, as a "new component part" for purposes of GARA. The *Alter* court, however, citing *Alexander v. Beech Aircraft Co.*,[49] rejected this argument and held that revisions to maintenance manuals cannot be considered a "new component, system, subassembly, or other part" for purposes of GARA's "rolling" feature.[50]

Schneider and Schmuel v. Cessna

Similarly, this approach was taken by the plaintiffs in the consolidated cases of *Schneider and Schmuel v. Cessna*.[51] Like the court in *Alter*, the *Schneider* court rejected any effort by plaintiff to characterize revisions to maintenance manuals as "new parts" for GARA's "rolling feature," or to allow the manuals to be used to generate a failure to warn claim outside GARA's reach. The court stated that such arguments "would circumvent GARA providing a back door to sue for a design flaw."[52] The *Schneider* court, citing *Pollock*, *Altseimer* and other cases, also rejected plaintiffs' due process arguments.[53]

Non_removability

Wright v. Bond_Air, Ltd., et al.

The case of *Wright v. Bond_Air, Ltd., et al.*[54] , shows that simply because GARA is a federal statute, it does not create a federal question of law sufficient to support removal of a state court case to federal court under 28 U.S.C. 1331 and 1441. In that case, the action was filed in state court in Michigan, and there were non_diverse parties such that removal under 28 U.S.C.1332 was not an option. Defendant Cessna attempted removal based on federal question jurisdiction, but the federal court remanded the case back to the state court, holding that the existence of GARA as a federal defense created by a federal statute in an otherwise state law case, does not raise enough of a "substantial" federal question to support jurisdiction and removal.[55]

There are two competing schools of thought on whether the proper motion for raising GARA is a motion to dismiss under Fed. R. Civ. P. 12 or a motion for summary judgment under Fed. R. Civ. P. 56.[56] Since plaintiff's initial pleading almost always fails to contain some of the necessary facts to invoke GARA (such as the time of delivery of the aircraft when new, certification information, and the like), facts outside the initial pleading must inevitably be brought before the court by the moving party. Thus, the motion technically should be for summary judgment.

Since many defendants will wish to file their GARA motions early in the case (so they can be dismissed before the expense of protracted discovery begins), they may be reluctant to file motions styled as being for summary judgment at the outset of the case, because most courts have well_established law that summary judgment motions are generally not granted until after completion of discovery. Such an early motion could be styled as a motion to dismiss under Fed. R. Civ. P. 12 with the expectation that it will be treated as one for summary judgment as provided in Fed. R. Civ. P. 12(b) if facts outside the pleadings are brought in. Once the court determines that a motion to dismiss is to be treated as one for summary judgment, however, the defendant is likely to nevertheless be confronted with the bias against granting such motions until after discovery is completed.

This procedural dilemma, however, should not ordinarily cause defendants to shy away from filing their GARA motions early. All of these tactical decisions are, of course, subject to the facts of the case and the various practices and traditions of the local court in which the case is pending, or the preferences of the particular judge drawn for the case or motion. While it may be seen as unusual for summary judgment to be granted at the outset of a case before much if any discovery is done, GARA is an unusual statute, and its clear mandate *should* be sufficient to overcome this procedural bias. This is why it is these authors' preference, again subject to case_by_case deviations depending on the local court, to file the motion as one for summary judgment and take any such procedural bias head_on with the strengths of GARA's mandate.

If, for example, in plaintiff's initial pleading the fraud exception is properly invoked (which should be rare), or if there appears to be a genuine issue about whether there was a causally_related part added to the aircraft within 18 years, some limited discovery will probably be inevitable before the motion can be decided. In such a case, manufacturers should strive to have the court place specific restrictions on the type and scope of discovery to be done, so that those points necessary to decide the GARA motion can be developed early. Otherwise, the allowance of unlimited discovery will defeat the very intent of GARA, which is to allow the manufacturer to get out of the litigation and avoid its draining expense and the accompanying leverage plaintiffs use to extract settlement money. Courts may need reminding that GARA should be used to let the manufacturers get back to doing what they are in the business to do: building aircraft and employing workers.

Another tactical issue which often arises in GARA motion practice is whether the manufacturer should, in his initial moving papers, attempt to argue away each of GARA's possible exceptions. One may be tempted to plug all possible holes in the opening brief, but experience has shown that many plaintiffs are still not aware of GARA, even up to the time when defendant's motion arrives. If that might be the case, holding off on detailed arguments *against* the exceptions might be prudent, because including them in the initial brief may tip plaintiffs off to arguments *for* the exceptions that they might not have otherwise considered, and it may telegraph what the manufacturer perceives as weaknesses in its own GARA case.

If it is clear from plaintiff's pleading, however, that he is aware of GARA and is actually attempting to plead to one of its exceptions (which will usually be most evident regarding the fraud exception), then it will probably be best to attack the exceptions in the defendant's opening brief. Moreover, if the court involved does not allow the moving party to file a reply brief to the opponent's response, it will be imperative to include all possible arguments in the opening brief.

Is the Industry Revitalized, and What Will GARA Continue to Bring?

There are numerous other GARA cases pending, and probably a few decisions about which the community watching GARA's development may not yet know. The continued evolution of case law on GARA is of great importance, but certainly the most important of the GARA cases, and those with the greatest impact, are those that are never filed because of GARA's existence. By almost all accounts, GARA is proving to be a success and a much_needed boost to the general aviation industry.

In July of 1996, Cessna made good on Chairman Russ Meyers' vow to resume piston engine aircraft production when it opened a new manufacturing facility in Independence, Kansas dedicated to single_engine aircraft production. In Wichita, Kansas, home of Raytheon Aircraft, Cessna and LearJet, general aviation production is up, and the manufacturers are having difficulty finding enough aircraft workers. As compared to the problem of the litigation crisis before GARA, this is certainly a more positive problem to have.

The portion of the active general aviation fleet as of late 1995 that was believed to be under GARA's umbrella is about 76%, not including aircraft registered outside the United States or aircraft no longer in existence.[57] Given the relative ages of the aircraft currently fewer than 18 years old, that percentage is expected to increase over the next several years, absent drastic increases in current production. As GARA bolsters current production, that number will likely drop somewhat and stabilize, but since aircraft tend to stay in operation over a long period of time, a substantial portion of the fleet should remain protected by GARA. Manufacturers have reported a marked decrease in the number of new litigation filings since GARA's enactment. Some opine that the decrease in new lawsuits since GARA is approximately 50%. Based on that alone, GARA seems to be a success, at least initially.

It is evident, however, that the plaintiff's bar is continuing to attack GARA on various grounds.[58] It is imperative, therefore, that current and future case law on GARA be appropriately handled to maximize the chance of consistent rulings on GARA nationwide upholding GARA's language and intent. GARA is off to a good start, but in judicial terms, it is still in its infancy. Thoughtful consideration of its underlying policies and the particulars of its language can help keep GARA growing into a consistent and established standard of appropriate repose for the general aviation manufacturing community.

APPENDIX

SECTION 1. SHORT TITLE.

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

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

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

(1) after the applicable limitation period beginning on__

(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or (B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or

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

(b) Exceptions.__Subsection (a) does not apply__

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

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

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

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

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

(c) General Aviation Aircraft Defined.__For the purposes of this Act, the term "general aviation aircraft" means any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger_carrying operations as defined under regulations in effect under the Federal Aviation Act of 1958 (48 U.S.C. App. 1301 et seq.) at the time of the accident.

(d) Relationship to Other Laws.__This section supersedes any State law to the extent that such law permits a civil action described in subsection (a) to be brought after the applicable limitation period for such civil action established by subsection (a).

Sec. 3. OTHER DEFINITIONS.

For purposes of this Act–

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

(2) the term "airworthiness certificate" means an airworthiness certificate issued under section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(c)) or under any predecessor Federal statute;

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

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

Sec. 4. EFFECTIVE DATE; APPLICATION OF ACT.

(a) Effective Date.__Except as provided in subsection (b), this Act shall take effect on the date of the enactment of this Act.

(b) Application of Act.__This Act shall not apply with respect to civil actions commenced before the date of the enactment of this Act.

49 U.S.C. 40101 (Note, 1994); Pub. L. 103_298, 108 Stat. 1552 (1994).