MAKING TIME OF THE ESSENCE: A SURVEY OF THE USE OF STATUTES OF REPOSE IN GENERAL AVIATION LITIGATION

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ABSTRACT

This thesis reviews the statutes of repose in force today in the United States and their influence on general aviation litigation. Chapter One will first consider the historical development of statutes of repose and the arguments for and against their use in products liability actions. Chapter One will then review the legislative history of the "General Aviation Revitalization Act of 1994" ("GARA") and identify the factors proffered for enacting a national statute of repose for the benefit of general aviation manufacturers. The remainder of this paper is intended to serve as a practitioner's guide by compiling and analyzing the various statutes of repose and the significant reported case law involving general aviation aircraft. Chapter Two will analyze the provisions of GARA and its related case law. Chapter Three will consist of an analysis of the individual state statutes of repose and their reported general aviation cases.

RÉSUMÉ

Cette thèse de maîtrise examine les lois de régissant la prescription aux États-Unis, lois qui éliminent tous recours en responsabilité contre les fabricants dans un certain délai après la mise en circulation de leurs produits. L'étude de ces lois démontre, entre autres, leur influence lors de procès en responsabilité des fabricants d'aéronefs.

Le chapitre un considére en premier lieu le développement historique des lois régissant la prescription, et les raisons justifiant leur application dans le cadre de procès en responsabilité du fait des produits defectueux. Ce chapitre analyse également l'histoire législative de la "General Aviation Revitalization Act of 1994" ("GARA"), et identifie les facteurs qui ont supporté la création d'une loi nationale favorisant les fabricants d'aéronefs. Les deux derniers chapitres tendent à servir de guide aux avocats pratiquant le droit aérospatial, ces sections compilant et analysant les differentes lois régissant la prescription de même que la jurisprudence concernant les aéronefs s'y rapportant. Ainsi, le chapitre 2 comporte une analyse des articles de la GARA et des décisions des tribunaux traitant de ces articles. Une analyse des lois régissant la prescription particulières à chacun des États americains, de même que de la jurisprudence pertinente, constitue le troisième et dernier chapitre de cette thèse.

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I. INTRODUCTION

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

Topsy-turvy land exists in the United States of America in various forms in 19 states and, for general aviation manufacturers, topsy-turvy land exists on a national basis.[2] Ranging from six to eighteen years or based on an analysis of the expiration of a product's useful safe life, statutes of repose bar lawsuits against product

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

[2]Due to the fact that the U.S. has both a national general aviation statute of repose as well as varied individual state law statutes of repose and due to the volume of general aviation lawsuits in the U.S., this paper is intended to serve, in part, as a practitioner's guide for confronting lawsuits with aged general aviation aircraft in the U.S. jurisdiction. Where pertinent, reference to the European Union's products liability statute of repose is made.

manufacturers based primarily on the simple passage of time. In general aviation products liability cases, therefore, time can be of the essence.

There are, and have been, however, legitimate questions regarding the equitable and practical impact of statutes of repose enacted in response to perceived litigation crises which seem to periodically, almost cyclically, arise.[3] Despite these well identified concerns, in response to the claim that the general aviation industry was being decimated by a litigation system gone awry, the United States Congress enacted a national statute of repose for the exclusive benefit of general aviation manufacturers.[4] This legislation was entitled The General Aviation Revitalization Act of 1994 (hereinafter "GARA").[5]

Chapter One of this paper will review on two levels the use of statutes of repose as a means of protecting manufacturers. On the macro level, this paper will consider the historical development of statutes of repose and the arguments for and against their use in

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[3]The series of claimed litigation crises to which time-based defenses were considered started in the late 1950s and early 1960s with architects and builders. (See infra note 6). The next "crisis" was in the field of general products liability which started, or at least was identified, in the late 1970s. This "crisis" lead to widespread tort reform on the state level. (See infra notes 6-11.) Significant to this paper, a general aviation litigation crisis was diagnosed in the mid to late 1980s. (passim.) Today, there are presently renewed efforts to enact national tort reform, including a general products liability fixed-period statute of repose. See Common Sense Product Liability Reform Act, H.R. 917, 104th Cong., 1st Sess. (1995).

[4]The manufacturers of general aviation aircraft components and systems also benefit from this legislation.

[5]49 U.S.C. 40101 (note) (1997).

products liability actions. On the micro level, the paper will review the legislative history of GARA and identify the considerations proffered for enacting a national statute of repose as a response to the general aviation crisis. Chapters Two and Three of this paper are intended to serve as a general aviation practitioner's guide. Because GARA and the varied state statutes of repose are now an integral part of the legal landscape for parties involved in general aviation litigation in the U.S., this paper will analyze each statute of repose in force today in that overall jurisdiction. As part of this comprehensive survey, the significant reported case law applying statutes of repose in general aviation lawsuits will be briefed, including all of the cases which have applied GARA. Accordingly, Chapter Two will analyze the provisions of GARA and the case law construing it. At the end of that chapter, the text of GARA will be set forth in full. Chapter Three will consist of a state-by-state analysis of the individual statutes of repose as well as the reported general aviation cases.

II. CHAPTER ONE - HOW GENERAL AVIATION MANUFACTURERS OBTAINED A NATIONAL STATUTE OF REPOSE.

A. MACRO ANALYSIS OF THE DEVELOPMENT OF STATUTES OF REPOSE

1. Overview

Starting in the 1970s,[6] a concern began to grow regarding the increasing number of products liability lawsuits and the size of the verdicts rendered in those cases.[7] It was not long before the overall litigation scene was characterized by some, particularly defendants and their advocates, as a "crisis" and demands for reform were heard.[8]

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[6]As early as the late 1950s and the early 1960s, architects and building contractors were alarmed by the demise of the privity requirement and the advent of delayed claims based on the concept of "notice" or "discovery." Legislative efforts on behalf of these groups lead to some of the earliest versions of statutes of repose. See U.S. Dep't of Commerce, Interagency Task Force on Products Liability, Product Liability: Final Report of the Legal Study - Volume V (1977) (hereinafter the "Task Force Report") (observing that elimination of privity and the greatly extended potential liability for architects and builders as the moving force for 31 jurisdictions to enact statutes of repose for the benefit of those who design or construct real estate) at V-9 to V-10; Baughman, "The Statute of Repose: Ohio Legislators Attempt to Lock the Courthouse Doors to Product-Injured Persons," 25 Cap. U.L. Rev. 671, 679 (1996); McGovern, "The Variety, Policy and Constitutionality of Product Liability Statutes of Repose," 30 Am. U.L. Rev. 579, 587 (1981).

[7]The concern was so great that the U.S. government commissioned a comprehensive study by an interagency Federal Task Force of the perceived product liability crisis. See Introduction to Modern Uniform Product Liability Act, reprinted at 44 Fed. Reg. 62,714 (1979) (setting forth the history of the Federal Task Force).

[8]Not infrequently, the "crisis" was cast in terms of an "insurance crisis" based on the cost and relative diminishing availability of products liability insurance.

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In addition to federally commissioned studies which lead to tort reform suggestions,[9] state legislatures actually enacted widespread tort reform in response to these crises.[10] As part of these tort reform efforts, as many as 21 states enacted a statute of repose in one form or another to be applied in products liability cases.[11]

2. STATUTES OF REPOSE - DEFINED

One commentator has observed that courts have imprecisely used as many as five different definitions for statutes of repose.[12] For this paper, two types of statutes

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See, e.g., U.S. Dep't of Commerce, Interagency Task Force on Product Liability, "Product Liability: Final Report of the Insurance Study 4-92" (1977); see also, Dworkin, "Federal Reform of Product Liability Law," 57 Tul. L. Rev. 602 n.12 (1983); Note, "The Evolution of Useful Safe Life Statutes in the Products Liability Reform Effort," 1989 Duke L.J. 1689 (1989).

[9]The Federal Task Force's analysis, supra note 6, lead to the promulgation of the Model Uniform Product Liability Act ("MUPLA"), which, as discussed infra notes 63 to 71, includes a useful safe life provision. 44 Fed. Reg. 62,714.

[10]It is reported that two-thirds of all states adopted some form of tort reform. Dworkin, supra note 8, at 604 & nn.10 & 12; Note, supra note 8, at 1700-01.

[11]See Dworkin, supra note 8, at 604.

[12]McGovern, supra note 6, at 582-87. (1) "In the most general sense, a statute of repose and a statute of limitation are identical - 'legislative enactments prescribe the periods within which actions may be brought.'" Id. at 582; (2) "A statute of repose is an act that promotes a policy of finality in legal relationships, and it can include any number of statutory devices that accomplish this purpose." Id. at 583; (3) "This definition suggests that a statute of repose is the portion of a statute of limitation that places a cap or outer limit on a statute that beings to run when a party discovers the existence of an injury or a
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of repose will be considered: "fixed-period statutes of repose" and "useful safe life statutes."

a. Fixed-Period Statutes of Repose

The definition of a "fixed-period statute of repose" is rather uncomplicated. For the purpose of this paper that term will refer to a time-based defense that is activated after the expiration of a statutorily prescribed period of time which runs from the date of the original sale or delivery of a product.[13]

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cause of action." Id.; (4) "The fourth definition holds that a statute of repose is distinct from a statute of limitation because it begins to run at a time unrelated to the traditional accrual of the cause of action." Id. at 584; and (5) "A fifth definition of 'statute of repose' has been found in the 'useful safe life' provisions of product liability statutes. These provisions indicate that a defendant may be relieved of liability upon proof that an allegedly defective product has been used beyond its useful safe life." Id. at 586 (internal citations and footnotes omitted).

[13]This definition is drawn, in part, from one court's explanation of the difference between a statute of limitations and statute of repose:

> Although the statute is titled as a statute of limitations we refer to it as a statute of repose. A statute of repose typically bars the right to bring an action after the lapse of specified period, unrelated to the time when the claim accrued. The bar instead is tied to an independent event, such as delivery of the product to a purchaser in the stream of commerce for a products liability statute. A statute of limitations generally bars the bringing of an action after the passage of a given period of time following the accrual of the claim.

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b. Useful Safe Life Statutes

"Useful safe life" statutes have been treated as a form of statute of repose.[14] However, unlike a fixed-period statute of repose, manufacturers benefit from the bar against lawsuits, not simply from the mere passage of a statutorily-defined measure of time, but by use of a product after the expiration of its useful safe life. As such, the trier-of-fact (i.e., the judicial branch) will determine the viability of a useful safe life defense on "case-by-case" basis, not the legislative branch through a statutorily "fixed" period.[15]

"Useful safe life" has been defined as the point at which the "natural deterioration," as opposed to a product defect, is likely to have caused the accident.[16] Useful safe life statutes have emerged from basic negligence principles, i.e., the premise that a product's age may be some indication that the product was not defective.[17]

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Alexander v. Beech Aircraft Corp., 952 F.2d 1215, 1218 n.2 (10th Cir. 1991).

The MUPLA, supra note 9, defines a statute of repose in contrast to a statute of limitations. "Statutes of repose differ from statutes of limitation in that they set a fixed limit after the time of the product's manufacture, sale, or delivery beyond which the product seller will be held liable." 44 Fed. Reg. at 62,734.

[14]McGovern, supra note 6, at 586; Note, supra note 8, at 1701 n.79; but see, Dworkin, supra note 8, at 610 (useful safe life statutes are "not true statutes of repose").

[15]Note, supra note 8, at 1721.

[16]Note, supra note 8, at 1719.

[17]Id.; This negligence connection is implicit in the (continued...)

Legislatures that enacted useful safe life statutes "reject[ed] the notion that a standard time limitation can adequately or equitably address the variance among products."[18] Even though the determination of when to apply this form of defense is less rigid than a fixed-period statute of repose, useful safe life statutes nevertheless still establish a point in time when manufacturers' liability is extinguished.[19]

Unlike with a fixed-period statute of repose, which is absolute, a useful safe life statute requires a factual determination of when the defense is triggered, i.e., when the useful safe life has expired.[20] Various methods of calculating this period have been offered.[21] For example, a jury could be instructed to make this

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Task Force's comments regarding useful safe life statutes to the effect that the "passage of time from the date of sale and prolonged use of the product serve important roles in determining the liability of manufacturers." Task Force Report, supra note 6, at V-21.

[18]Id. at 1721. The rationale being that a repose period appropriate for a paper kite may not be appropriate for a turbo-prop jet aircraft.

[19]Id.; McGovern, supra note 6, at 586.

[20]For example, a jury applying Kansas's useful safe life statute considers such factors as the amount of wear and tear, the effects of deterioration from natural causes, the manufacturer's representations, instructions or warnings regarding the product's useful safe life, and whether any modification or alteration occurred to the product after it left the possession or control of the manufacturer. Kan. Stat. Ann. § 60-3303(a)(1)(West 1982 & Supp. 1997), infra note 263.

[21]See discussions of various methods applied in various state useful safe life statutes of repose. Infra notes 257 to 285.

determination either based on the actual injury-producing product, based on an analysis of the product-line in general as manufactured by the defendant being sued, or based on all of the same product-types available in the marketplace from the industry as a whole.[22] Of the useful safe life statutes analyzed in Chapter Three of this paper, several identify specific criteria for making this determination, while the others leave the criteria to the discretion of the court and jury.[23]

3. THE USE OF STATUTES OF REPOSE

Commentators have recognized that the U.S. tort system has difficulty in dealing with "aging products."[24] However, identifying the pertinent issues and formulating a means by which to resolve the perceived problems have been addressed by many without reaching any real consensus.[25] As

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[22]Note, supra note 8, at 1725. If either of the latter two methods are used then a secondary question is raised, is the useful safe life measured against the "average" product life or against the "oldest possible or recorded" product life. Id.

[23]The statutes of Connecticut, Idaho, Kansas and Minnesota contain specific criteria. The statutes of Arkansas, Tennessee, and Washington provide only general, nondescript guidance.

[24]See, e.g., Note, "The Passage of Time: The Implications for Products Liability," 58 N.Y.U. L. Rev. 733 (1983).

[25]For instance all the law review articles and Task Force reports cited herein have struggled with these issues. Baughman, supra note 6; Dworkin, supra note 8; McGovern, supra note 6; Note, supra note 8 (noting that a computer data base search yielded over 60 articles with information regarding statutes of repose); see also, Schwartz, "The Road to Federal Product Liability Reform," 55 Md. L. Rev. 1363, 1366 (1996); Werber, "The Constitutional Dimension of a National Products Liability State of Repose," 40 Vill. L.

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noted above, although statutes of repose have been relatively frequently resorted to, there remains considerable controversy whether statutes of repose are an appropriate tort reform device.

> The typical analysis of product liability statutes of repose focuses on the policy questions of whether the benefits of encouraging diligence, eliminating potential abuses from stale claims, and fostering personal certainty offset the effects of denying certain plaintiffs a remedy at common law for injury from a product.[26]

The debate continues today; there have been products liability statutes of repose proposed in the most recent versions of the national tort reform considered by Congress.[27]

a. Factors For and Against Fixed-Period Statutes of Repose

Proponents of fixed-period statutes of repose assert that they will (a) help ameliorate the products liability tail;[28] (b) lead to lower insurance premiums and

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Rev. 985 (1995); Werber, "A Nation Product Liability Statute of Repose, Let's Not," 64 Tenn. L. Rev. 763 (1997).

[26]McGovern, supra note 6, at 588.

[27]See, e.g., Common Sense Product Liability Reform Act, H.R. 917, 104th Cong., 1st Sess. (1995); Schwartz, supra note 25 (for their inclusion); Werber, supra note 25 (opposing their inclusion).

[28]Dworkin, supra note 8, at 604 n.11; McGovern, supra note 6, at 593; Note, supra note 8, at 1705.

increased availability of insurance;[29] (c) address the evidentiary problems created by older products;[30] (d) address the present "state of the art" comparison problems;[31] and (e) allow manufacturers to act upon their "reasonable expectations" and in a more predictable marketplace.[32] On the other hand, one commentator summarized the criticism of statutes of repose as follows:

> (1) their inflexibility produces harsh and inefficient results; (2) there would be little, if any, reduction of insurance premiums; (3) the benefits resulting from an immediate solution are outweighed by the need for both a more deliberate evolution of product liability theory and coordination with other proposed reforms; and (4) equity would not be served."[33]

Indisputably, fixed-period statutes of repose are intended to bar future lawsuits based on the mere expiration of time. As such, statutes of repose snip off a product's "liability tail," because the length of time a manufacturer can be held liable for one of its products will no longer be

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[29]Task Force Report, supra note 6, at VII-22 to 23; McGovern, supra note 6, at 5; Note, supra note 8, at 1706.

[30]Note, supra note 8, at 1706.

[31]McGovern, supra note 6, at 5; Note, supra note 8, at 1707.

[32]Note, supra note 8, at 1707-08.

[33]McGovern, supra note 6, at 594-95 (citing Interagency Task Force on Product Liability, Final Report (1977), 44 Fed. Reg. 62,714 (1979) and Opinion Paper, 43 Fed. Reg. 40,438.

arguably limitless in duration.[34] The Federal Task Force recognized that "[l]imiting the duration of time for which a manufacturer could be liable for its products would undoubtedly reduce the number of claims."[35]

To advocates of statutes of repose, therefore, it appears that the simple reduction of the number of lawsuits

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[34]The term "products liability tail" is used to describe the open-ended nature of manufacturers' liability. Dworkin, supra note 8, at 604 n.11; McGovern, supra note 6, at 593; Note, supra note 8, at 1705 n.95.

[35]Task Force Report, supra note 6, at V-5. By comparison, the following was proffered as a partial explanation for the inclusion of a statute of repose in the European Communities' Product Liability Directive:

> Products wear out in the course of time. It therefore becomes more and more difficult to establish whether the defect causing the damage already existed at the time the article left the producer's production sphere or arose later through wear. New, more advanced products replace outdated ones. New safety standards lay down stricter requirements. Progress in science and technology makes it possible to acquire better knowledge as to whether products with many inherent risks are dangerous or harmless. For these reasons a limitation period of liability is necessary. It would be unreasonable to burden the producer beyond a certain period with an ever-increasing risk of damage.

"Proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products," E.C. Bull., Supp. 11/76 (Explanatory Memorandum, paragraph 28)(hereinafter "European Communities' Proposal for Approximation").

is a benefit of this legislation.[36] However, the Federal Task Force acknowledged that the "most serious problem" with a fixed-period statute of repose "is that certain claims which are indisputably meritorious would be barred before the injury occurred or even before the user purchased the product."[37] This comment was repeated in the analysis section annotating the MUPLA, to wit, "a fundamental problem with these statutes is that they may deprive a person injured by a product of the right to bring a claim based on a defective product before the injury has actually occurred."[38] Moreover, contrary to a fundamental tenet of products liability jurisprudence, statutes of repose do not spread the risk of loss; instead, the risk is focused solely on those injured after the repose period.[39]

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[36]However, a fixed-period statute of repose may be in actuality of limited consequence. "Studies indicate that 97% of all claims are brought within 10 years of the product's manufacture, leading to the conclusion that the typical statute of repose will bar at least 3% of all actions." Note, supra note 8, at 1706 n.100. It is difficult to assess whether barring three percent of the lawsuits will have a major impact on the "crisis."

[37]Task Force Report, supra note 6, at V-6.

[38]44 Fed. Reg. 62,733 (emphasis in the original). Congress has recently consider a national products liability statute of repose with repose period of 15 years. Schwartz, supra note 25, at 1373-74. By the terms of the proposed federal products liability legislation it is not preemptive of state law, and it does not cover general aviation aircraft because they were specifically excluded. H.R. Conf. Rep. No. 481, 104th Cong., 2d Sess., 106(b), at 9 (1996). If ultimately enacted, the new national products liability statute of repose would expressly leave in force the current 18 year repose for general aviation aircraft established by GARA.

[39]Note, supra note 8, at 1715.

Proponents of statutes of repose assert that, by fixing a date certain when liability exposure will cease, products liability insurance would become more available and at a lower cost.[40] The Federal Task Force further noted that statutes of repose will "eliminate much of the current uncertainty."[41] This "uncertainty" aggravated the problem with the availability and the cost of products liability insurance.[42] In this respect, the commentary accompanying the Model Uniform Products Liability Act ("MUPLA") is instructive. There it is identified the one of the advantages to fixed-period statutes of repose is that they "establish an actuarially certain date after which no liability can be assessed."[43]

In response, however, opponents of statutes of repose challenge the existence of an insurance crisis.[44]

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[40]Task Force Report, supra note 6, at V-5; Note, supra note 8, at 1705-06.

[41]Task Force Report, supra note 6, at V-5.

[42]Task Force Report, supra note 6, at V-5; McGovern, supra note 6, at 593; Note, supra note 8, at 1706.

[43]44 Fed. Reg. 62,733.

[44]Note, supra note 8, at 1711-12 (noting that products liability insurance rates rose in the same proportion as other lines of insurance); Further, the Federal Task Force observed:

> The limited available data show that insurers' apprehension about older products may be exaggerated. See "ISO Closed Claims Survey" at 105-09 (indicating that over 97 percent of product-related accidents occur within six years of the time the product was purchased and, in the capital goods area, 83.5 percent of all bodily injury

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Further, one commentator noted that the "worst of all possible worlds" could be created.[45] Because product liability insurance rates are typically set on a national basis and statutes of repose (until GARA) have only been enacted on a state level, a statute of repose could invidiously result in "a denial of recovery of persons injured by defective products without a decrease in the cost of product liability insurance."[46]

When the time between the manufacturer's sale of the product and a products liability trial is great, difficulties for the defendant manufacturer arise, including the availability of evidence to mount a defense and the standard by which the product will be judged defective or not.[47] With respect to the former concern, it has been noted that defendants are prejudiced in their efforts to prove their innocence after the passage of considerable time.[48] The Federal Task Force noted that the passage of time may

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accidents occur within ten years of manufacture).

44 Fed. Reg. 62,733.

[45]McGovern, supra note 6, at 595.

[46]Id. (emphasis added.)

[47]MUPLA, supra note 9, 44 Fed. Reg. at 62,733; McGovern, supra note 6, at 589.

[48]Note, supra note 8, at 1706 ("Records are lost, manufacturing plants are replaced, employees retire, and memories fade.") However, statutes of repose may create new evidentiary problems. As discussed below, the repose period in many statutes begins to run on the date of sale or delivery to the first end user. The burden to prove the date of sale is on the manufacturer. Therefore, careful records will need to be kept in order to prove that the repose period has expired.

"operate unfairly against a manufacturer by depriving him of the means by which to defend his product.[49]

These arguments fail to recognize, however, that before a defendant manufacturer even needs to introduce evidence in its defense, the burden of proof is on the plaintiff to prove the existence of a defect. Presumably, plaintiffs injured by aged products will be similarly situated as the manufacturer, i.e., prejudiced by the unavailability of necessary evidence.[50] Further, manufacturers of products with long lives should not be surprised by litigation at a distant time.[51] Additionally, manufacturers should be in the best position to preserve evidence.

The second problem for defendants with lawsuits filed after the elapse of considerable time is the standard by which their products are judged. As time passes, technology increases, and new and improved products are available to the consuming public. While this is a positive phenomenon, the same consuming public will be the individuals who form the jury that will assess the possible defective condition of older products. Thus, there is a

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[49]Task Force Report, supra note 6, at V-7.

[50]The Task Force did note that a plaintiff may have a difficult time proving that the defect existed at the time the product was manufactured when an injury occurs many years later. Task Force Report, supra note 6, at V-5.

[51]Another problem with fixed-period statutes of repose identified by the Task Force is in products where the defect may take years to be discover, such as pharmaceutical products. However, this does not appear to be a problem for general aviation products, particularly in light of the relatively lengthy 18 year repose period established by GARA.

risk that the jury will judge an older product by the then-existing state of the art, and not that which existed at the time of production and sale.[52] Opponents to statutes of repose have not specifically responded to this point. However, such concerns could likely be remedied by appropriate instructions to the jury and careful advocacy.

Similar to the insurance industry's assertion that predictability regarding future liability of products would promote more insurance availability and at a lower cost, manufacturers maintain that a benefit would arise from their being better able to assess future liability exposure.[53] Setting a fixed-period statute of repose would, it has been argued, allow the manufacturers to more accurately set the price of their products and/or outlay more money for research and development.[54] Another related argument in favor of statutes of repose is that the "readjustment of the equities removes manufacturer inhibitions regarding new

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[52]See, McGovern, supra note 6, at 589 ("In addition, a jury's natural tendency to employ hindsight makes it virtually impossible to ensure that a 1950s product is judged by 1950s standards."); Note, supra note 8, at 1707 ("Juries often are tempted to apply current industry standards and practices to the defendant's past manufacturing practices"); see also, European Communities' Proposal for Approximation, supra note 35, p. 19, para. 28 ("A limit to the period of liability is necessary above all to provide a well-balanced solution to the problem of 'development risks.' The producer can be liable in respect of defects which are discovered within a certain period of time as a result of progress in science and technology. An unlimited period of liability, however, would mean that the producer would have to bear an inordinately high risk particularly in this field.")

[53]McGovern, supra note 6, at 593; Note, supra note 8, at 1707-08.

[54]Note, supra note 8, at 1707-08.

product development and curtails concerns about competition in world markets."[55] In opposition, however, it has been asserted that by shortening the period of liability, statutes of repose eliminate a "powerful economic incentive for manufacturers to improve the long term quality and safety of their products."[56]

With respect to fixed-period statutes of repose, it has been asserted that they lack the flexibility to deal effectively with products of varying anticipated lives.[57] This is one of the justifications for enacting a useful safe life statute instead of fixed-period statute of repose.[58]

Other important considerations underlying the use of statutes of repose relate to "who should bear the risk of loss or harm and who should decide that question."[59] The development products liability law in the United States was

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[55]Baughman, supra note 6, at 679; Dworkin, supra note 8, at 65; McGovern, supra note 6, at 593.

[56]Note, supra note 8, at 1716. Interestingly, the corollary has been argued by those in favor of statutes of repose, particularly in the context of general aviation manufacturers. For instance, "[i]n 1988, Unison Industries scrapped a year's worth of research on a totally new electronic ignition system. The reason, as stated by Unison's President Rick Sontag, was not economic or technical . . . '*it was the potential liability risk.*' Today, [after the enactment of GARA] Unison's new electronic ignition is entering the market." Report to the President and Congress, "The Results of the General Aviation Revitalization Act," brochure distributed by the General Aviation Manufacturers Association. (Emphasis in original).

[57]Note, supra note 8, at 1714; but see, European Communities' Proposal for Approximation, supra note 35, p. 19, para. 28 (indicating that "[t]en years appeared appropriate as an average period").

[58]See infra notes 63 to 71.

[59]McGovern, supra note 6, at 592-93.

based in large part on the idea that the loss of the few is best borne by all who use the product type.[60] However, when the liability of a manufacturer is extinguished by the elapse of time, not because the product was found to be free from defect, the risk of loss has effectively shifted from the manufacturer to the individual consumers.[61] Further, a statute of repose removes the determination of who should bear the loss from the judiciary and places it with the legislature.[62]

4. USEFUL SAFE LIFE VS. FIXED-PERIOD STATUTES OF REPOSE

After extensive analysis, meetings with consumer groups, manufacturing representatives and insurance industry members, draft reports, public comments, and revisions, the Federal Task Force issued a Model Uniform Products Liability Act.[63] The Task Force opted not to recommend a fixed-period statute of repose, but instead it elected to recommend a hybrid form of a useful safe life statute which included a statute of repose element.[64] The Federal Task Force reasoned that most of the positive aspects of a fixed-period statute

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[60]See W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 4, at 24-25 (5th ed. 1984).

[61]See, McGovern, supra note 6, at 592-93. In fact, the risk of loss after the expiration of a repose period is not spread to all users, but only those individuals injured after the repose period. Note, supra note 8, at 1715.

[62]Note, supra note 8, at 1721.

[63]The history of MUPLA is set forth in the introductory comments of the Act itself as reprinted in 44 Fed. Reg. 62,714.

[64]Nine states have enacted MUPLA; however, these states have done so in a piecemeal fashion. Schwartz, supra note 25, at 1366.

of repose could be obtained by a modified form of the "useful safe life" approach.[65]

In the analysis section following the text of MUPLA, the following considerations are set forth which highlight the Federal Task Force's reasoning for recommending that a manufacturer only be given a presumption that it is entitled to the time bar defense after the expiration of ten years:

> First, the fact that a product has been used safely for a substantial period of time is some indication that it was not defective at the time of delivery. Second, if a product seller is not aware of a claim, the passing of time may make it extremely difficult to construct a good defense because of the obstacle of securing evidence. Although the burden of proof on the issue of defectiveness remains on the claimant under the Act, a jury, as a practical matter, may demand an explanation from a product seller when the claimant has suffered a severe injury. The third rationale is that persons ought to be allowed, as a matter of policy, to plan their affairs with a reasonable degree of certainty.[66]

Perhaps more telling is the analysis of how MUPLA accommodates the both foregoing concerns along with the following interests of the consuming public:

> On the other hand, consumers are justifiably concerned about the overly broad absolute cut-offs of their right to sue. This provision recognizes consumer concerns in three basic ways:

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[65]Task Force Report, supra note 6, at V-5.

[66]44 Fed. Reg. 62,734.

> (1) The term of the statute is ten years -- beyond the term enacted or proposed in a number of states.
>
> (2) The statute begins to run at the time of delivery, not the time of manufacture; and
>
> (3) The statute does not contain an absolute cut-off, but rather a presumption that the product has been used beyond its useful life.[67]

The compromised reached by the Federal Task Force was a hybrid useful safe life provision, which provides that a manufacturer can shield itself from potential liability if a product injury occurred after the expiration of the product's useful safe life.[68] If the injury occurs during the first ten years of product use, the manufacturer has the burden of proving by a "preponderance of the evidence" that the useful safe life had expired.[69] If, however, the injury occurs after the first ten years of product use, there is a presumption that the useful safe life has expired, which may only be overcome by "clear and convincing evidence" by the plaintiff.[70] The drafters of the MUPLA hoped that this hybrid model statute would "provide insurers and product sellers with some security against stale claims, while

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[67]44 Fed. Reg. 62,734.

[68]MUPLA, sec. 110 (44 Fed. Reg. 62,732).

[69]MUPLA sec. 110(A)(1). This is the useful safe life portion of the MUPLA.

[70]MUPLA sec. 110(B)(1). This is the statute of repose portion of the MUPLA.

preserving the claimant's right to obtain damages for injuries caused by defective products."[71]

B. MICRO ANALYSIS OF THE DEVELOPMENT OF GARA - A NATIONAL STATUTE OF REPOSE

1. Overview

Not surprisingly, when a litigation "crisis" descended upon the general aviation industry in the mid to late 1980s, comprehensive tort reform was again suggested as a cure.[72] After eight years of failed attempts to enact legislation to curb the impact of civil litigation on general aviation manufacturers, the United States Congress in 1994 finally reached a consensus and enacted a fixed-period statute of repose. GARA established an 18 year statute of repose in favor of general aviation manufacturers. As will be demonstrated, many of the arguments for and against the enactment of GARA are similar to those raised in response to the general products liability reform efforts discussed above.

2. The General Aviation Crisis

Starting in 1986, a concerted effort was made by lobbyists and a portion of the United States Congress to enact federal legislation for the benefit of general aviation manufacturers.[73] Even the earliest versions of the

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[71]44 Fed. Reg. 62,733 (analysis section).

[72]Interestingly, the need for special protection for manufacturers of general aviation products, particularly in the realm of products liability lawsuits, begs the question of whether the earlier products liability tort reforms from the 1970s and early 1980s were effective.

[73]Several law review articles, as part of their analysis of GARA, trace the history of these efforts at federal legislation. See, e.g., Hedrick, "A Close and Critical

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proposed legislation included a time-based defense - a fixed-period statute of repose.[74]

The supporters of these legislative efforts were concerned by the dramatic downward spiral in production and sales of new general aviation aircraft by domestic U.S. manufacturers. For several years in a row, Congressional hearings were held which were intended to highlight the bleak outlook for the general aviation industry and to relate these problems to a run away civil litigation system. For instance, Representative James L. Oberstar attributed, in relevant part, the marked drop in general aviation production (from over 17,000 aircraft in 1979 to only 2,600

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Analysis of the New General Aviation Revitalization Act," 62 J. Air L. & Com. 385 (1996); McAllister, "A 'Tail' of Liability Reform: General Aviation Revitalization Act of 1994 & The General Aviation Industry in the United States," 23 Transp. L.J. 301 (1995); McNatt & England, "The Push for Statutes of Repose in General Aviation," 23 Transp. L.J. 323 (1995); and Steggerda, "GARA's Achilles: The Problematic Application of the Knowing Misrepresentation Exception," 24 Transp. L.J. 191 (1997). Industry magazines have also kept close watch over this legislative progression. See, e.g., Phillips, E., "General Aviation Liability Reform Faces Fight in Congress," Av. Wk & Sp Tech., Jan. 4, 1988, p. 53; Phillips, E., "Debate Sharpens over General Aviation Product Liability Bill," Av. Wk & Sp Tech., Mar. 28, 1988, p. 77; and "Aircraft Firms in Tailspin; Defense Lawyer Sees a Way Out: Liability Reform," Business Week, May 25, 1992, p. 15.

[74]The first proposed legislation considered by the Senate in this regard was the "General Aviation Liability Standards Act of 1986." S. 2794, 99th Cong. 7 (1986)(proposing a twenty-year statute of repose). The House of Representatives' version was entitled the "General Aviation Tort Reform Act of 1986." H.R. 4142, 99th Cong. 2803 (1986)(proposing a twelve-year statute of repose).

aircraft in 1983) to the litigation crisis.[75] Perhaps capturing more concern from Congress were the estimates of over 100,000 lost general aviation-related jobs.[76] These dismal figures were offered in support of passing "special" statutory protections for the general aviation industry.[77]

As with the products liability crisis, proponents of tort reform for the general aviation industry noted the adverse impact of the increasing cost (and decreasing availability) of products liability insurance.[78] For example, in 1986, for one of the United States' largest general aviation manufacturers, its product liability insurance premium cost $55 million, or approximately $92,000.00 per aircraft sold.[79] By comparison, in 1983, that

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[75]General Aviation Revitalization Act of 1993: Hearings on H.R. 3087, Before the Subcomm. on Aviation of the House Comm. on Public Works and Transp., 103d Cong., 1st Sess. 12 (1993)(hereinafter "1993 Hearings").

[76]140 Cong. Rec. S2991, S2992 (daily ed. March, 16, 1994)(Stmt. of Sen. McCain).

[77]This protection is "special" in two regards. First, only 18 states at that time offered manufacturers the protection of a statute of repose. Second, no other industry, then or now, benefits from a federal statute of repose. The aviation industry, in general, however, has historically received "special" treatment, such as the limitation of liability under the Convention for the Unification of Certain Rules Relating to International Carriage by Air. 49 U.S.C. 40101 (note) (1997).

[78]See Tarry and Truitt, "Rhetoric and Reality: Tort Reform and The Uncertain Future of General Aviation," 61 J. Air L. & Com. 163, 179 (1995).

[79]Braham, J., "Crisis in the Clouds; Aircraft Makers Call for Liability Rescue," Industry Wk, July 21, 1986, p. 21. This cost per aircraft sold is a bit misleading because during this time period the number of aircraft sold plummeted. However, as noted infra, note 75, this decline (continued...)

manufacturer's product liability insurance costs were $7.3 million, or about $5,000.00 per aircraft sold.[80]

As with the product liability crisis, the general aviation industry's product liability tail has been identified as a significant problem.[81] In 1994, when the final version of GARA was being debated by Congress, it was reported that "the average piston-engine airplane [was] over 28 years old and . . . one-third of the [general aviation] fleet [was] over 33 years old . . ."[82] Clearly, the general

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in sales has also been identified as a basis justifying the enactment of the national statute of repose.

[80]Id.; The CEO of one of the U.S. general aviation manufacturers testified that they self-insured themselves for the first $30 million in losses and costs for each policy year. Testimony of R. Meyer, Jr., General Aviation Revitalization Act of 1994: Hearing on H.R. 3087 Before Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 103d Cong., 2nd Sess. at p. 135 (1994)(hereinafter "House Hearings").

[81]For example, Representative Dan Glickman, one of the primary supporters in Congress of the efforts on behalf of the general aviation industry, noted that, with respect to competition with foreign manufacturers, the domestic manufacturers were hindered by "the liability tail of tens of thousands of aircraft still in the marketplace which were built 30, 40, and 50 years ago." 140 Cong. Rec. H4998, H5001 (daily ed. June 27, 1994) (Statement of Rep. Glickman).

[82]140 Cong. Rec. S2991, S2993 (daily ed. Mar. 16, 1994)(Stmt. of Sen. Pressler); Note, "Aviation Products Liability as the Cause of the Decline in Small Aircraft Manufacturing: An Examination of Possible Solutions," 19 Am. J. Trial Advoc. 171, 181 (1995)(noting Cessna's President and CEO's comments that the still active 65,000 aircraft of their manufacture was creating a products liability "tail" problem); see also, Boswell and Coats, "Saving the General Aviation Industry: Putting Tort Reform to the Test," 60 J. of Air L. and Com. 533, 554 (1994-95)(noting that "a Piper
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aviation industry, based on the longevity of its product, confronts a uniquely long liability tail.

When considering the implications of a statute of repose on the general aviation industry, although the effect on future products is relevant, it is the immediate elimination of potential liability for products older than the repose period and the dramatic shortening of the duration of the liability exposure for existing products that may be of primary importance to a manufacturer. In 1980, it was reported that there were 29 U.S. manufacturers and 15 foreign manufacturers of general aviation aircraft marketing their products in the United States. However, by 1992, there remained only 9 U.S. manufacturers and the foreign manufacturers' presence grew to 29.[83] Proponents of GARA observed that the enactment of a statute of repose would instantly eliminate the products liability tail wagging the domestic manufacturers, which foreign competitors, who were relatively recent entrants to the U.S. market, did not confront.[84] Thus, a fixed-period statute of

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Cub manufactured in 1939 presented Piper with virtually the same degree of products liability risk as a brand new plane.. . . A virtually limitless 'products liability tail' presented an unacceptable risk to most manufacturers, insurers, and lenders." (Footnote omitted).

[83]See 1993 Hearings, supra note 75, (also repeated in the Statement of John Goglia, member of International Association of Machinists and Aerospace Workers, House Hearings, supra note 80, at 78).

[84]See Rep. Glickman statement, supra note 81; There was additional testimony at the 1994 Hearings before the House Subcommittee on Economic and Commercial Law indicating that U.S. general aviation manufacturers only faced a products liability dilemma in the United States and not in other parts of the world. It was specifically noted that Europe
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repose could dramatically improve U.S. manufacturer's competitiveness by removing this long (and large) tail of liability exposure. In other words, the enactment of a fixed-period statute of repose would overnight eliminate manufacturers' liability exposure on tens of thousands of older aircraft.

In light of the fact that the legislative efforts began in 1986, but did not succeed until 1994 (and that in a relatively watered down version in comparison to the early legislative initiatives) demonstrates that there was

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had already enacted a statute of repose and that Japan was about to. House Hearings, supra note 80, at 139 (Testimony of Russell W. Meyer, Jr., Chairman and CEO of Cessna Aircraft Company); see also 137 Cong. Rec. S3268 (daily ed. Feb. 3, 1991)(Stmt. of Sen. Kassebaum)(noting European Community's 10 year statute of repose).

In 1985, Council of the European Community adopted a uniform product liability directive that is the law in thirteen European countries. (See Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products," 28 O.J. Eur. Comm. 29 (No. L210) (1985). As noted above, this Directive included a 10 year statute of repose. (Article 9). Although members of Congress and other proponents of GARA pointed the European Union's 10 year statute of repose, these advocates failed to further advise that consumers, injured by a product of an age older than 10 years, could still proceed under the national laws of a Member State with jurisdiction over the case regardless of whether the Directive's repose period had expired. (Article 13 - "Claims in respect of injury or damage caused by defective articles based on grounds other than that provided for in this Directive shall not be affected.")

powerful opposition to GARA.[85] The primary opponent to GARA was the American Trial Lawyers Association.[86]

In response to claims that the industry was being driven into the ground by frivolous civil litigation, opponents to GARA claimed that, in fact, the industry was suffering for other reasons. Alternate explanations for the general aviation industry's hard times included:

> "(1) The struggling economy generally;
>
> (2) Airline deregulation which brought competition from regularly scheduled airlines that expanded into commuter service;
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> (3) The repeal of the investment tax credit;
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> (4) The imposition of the since-repealed luxury tax;
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> (5) A saturation of quality used aircraft and quality used parts on the market;
>
> (6) The economics and fluctuations of interest rates; and
>
> (7) Poor marketing strategies."[87]

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[85]For instance, earlier versions of the proposed tort reform on behalf of general aviation included not only a statute of repose (sometimes with a proposed repose period of shorter duration than actually enacted) but also contained other favorable defenses. See supra note 74; see also, Wells, "General Aviation Accident Liability Standards: Why the Fuss," 56 J. of Air L. and Com. 895 (1991) (analyzing the possible impact of the 1989 version of this proposed legislation).

[86]McAllister, supra note 73, at 309-10.

[87]Sanger, "Will the General Aviation Revitalization Act of 1994 Allow the Industry to Fly High Once Again?" 20 Okla. City U.L. Rev. 435, 441 n.36 (1995) (quoting Association of Trial Lawyers of America, "Warning: The General Aviation Liability Bill is Unfair to Consumers and

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Other explanations for the general aviation industry's plummeting performance included the increased use and availability of kit aircraft and soaring oil prices.[88] The high cost and relative difficulty in learning to fly and maintaining the necessary licensing have also been identified as possible causes for the decreased sales of general aviation aircraft.[89]

Interestingly, a useful life statute was not given much Congressional attention, at least by the time GARA was being considered in 1994. It was, however, raised:

> My problem with a statute of repose is that it is so definitive. If something happens 14 years, 364 days, if you have a 15-year statute of repose you have recourse against the manufacturer. If it happens 15 years one day, you don't. Can we predict that carefully, you know, the useful safe life of a product or what the manufacturer's participation in litigation should be?

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Victims (1994) (brochure outlining the ATLA's position on GARA); Along similar lines, Congress considered the statement of Charles T. Hvass, Jr., Esq., who identified the following possible, non-civil litigation based, causes for the general aviation industry's woes: poor general economy, decreased general demand for general aviation aircraft, too many aircraft and too few pilots, bad business decisions by the individual members of the general aviation industry, changes in the tax laws, and the general aviation industry's failure to reserve sufficient funds for future insurance needs. 1994 House Hearings, supra note 80, at 78-96.

[88]Moffit, "The Implications of Tort Reform for General Aviation: The General Aviation Revitalization Act of 1994," 1 Syracuse J. Legis. & Pol'y 215, 220 (1995).

[89]Note, supra note 82, at 184-85.

> The useful safe life approach seems to me to be something that could offer some merit here and could offer substantial protection to manufacturers.[90]

For eight years, the opponents of providing the general aviation manufacturers special litigation protection prevailed. However, GARA, an 18 year fixed-period statute of repose, was passed by Congress and it took immediate effect when, on August 17, 1994, it was signed by President William J. Clinton.[91]

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[90]House Hearings, supra note 80, at 27 (Statement of Rep. DeFazio)(Representative DeFazio represents the state of Oregon in the House of Representatives. Oregon has a fixed-period statute of repose with a 10 year repose period, infra note 238 et seq.) Representative DeFazio statement went on the describe a MUPLA-type useful safe life statute. Id.

[91]49 U.S.C. 1010 (note), GARA Sec. 4: "[T]his Act shall take effect on the date of the enactment of this Act."

II. CHAPTER TWO -- GENERAL AVIATION REVITALIZATION ACT

A. ANALYSIS OF GARA[92]

1. Who is Protected

GARA's protection is extended to (1) manufacturers of (2) general aviation aircraft.[93] The first consideration of who is statutorily protected turns on the term "manufacturers." Being limited to "manufacturers," GARA's protection is considerably more restricted than state statutes of repose. It is somewhat surprising that the drafters of this legislation did not specifically refer to the aircraft distributors, importers, or retail sellers or lessors. Generally, under U.S. products liability law, anyone in the chain of distribution of a product can be held liable for defects in that product.[94]

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[92]The full name of this act is the 'General Aviation Revitalization Act of 1994.' 49 U.S.C. 40101 (note), Section 1. Short Title.

[93]49 U.S.C. 40101 (note), Sec. 2(a). (Hereinafter statutory citations to GARA will be in the following format: "GARA Sec. ___.")

[94]At the option of a plaintiff, the plaintiff can sue the manufacturer, distributor or retailer, or any combination thereof, for a product defect. If plaintiff only sues the retailer, the retailer could in turn sue the distributor or the manufacturer for contribution and indemnity. GARA, as written, appears to allow claims against everyone in the chain of distribution except the manufacturer. Thus, if a retailer is sued for a product defect, it could be held liable, but it would be prevented from seeking indemnity from the manufacturer. One commentator has suggested that this may, however, simply become an issue of how the governing state tort law defines the term manufacturer. See Hedrick, supra note 73, at 396-98. However, the American Insurance Association has stated in a letter from its Associate Counsel to the Director of the Task Force:

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By comparison, state statutes typically define the beneficiaries of the statute of repose more clearly and expansively.[95] For example, in Kansas, the "useful safe life" presumption is extended to "product sellers."[96] A "product seller" is defined to include "any person or entity that is engaged in the business of selling products, whether

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> Our Subcommittee has noted . . . that unless a statute of limitations deals with rights of indemnity there will be but a slight reduction in the 'horror stories.' Indemnity accrues upon payment and a statute protecting the manufacturer from injured party suits will not protect from suits by intermediate sellers unless indemnity is also barred. It is relevant that capital goods, long lived goods, do go from hand to hand which tends to create a chain of indemnity rights unbroker by most of the statutes currently being reviewed.

Letter dated October 13, 1976 from Dennis R. Connolly, Associate Counsel of the American Insurance Association, to Professor Victor E. Schwartz, Project Director of the Interagency Task Force on Product Liability. Reprinted in Task Force Report, supra note 6, at p. V-17 n.37. Although, GARA will protect manufacturer's from indemnity claims, because it bars all civil actions, the foregoing comment appears to confirm that other parties within the chain of distribution will not be so fortunate. In other words, GARA may not actually reduce the number of lawsuits or the "horror stories," it may simply substitute one deep pocket for another.

[95]State statutes of repose typically address this issue in one of two ways. The most direct way is to specifically identify the parties entitled to assert the defense. The other method is to simply draft the statute so that it is a defense in products liability actions. Because other parties, in addition to manufacturers, are subject to products liability lawsuits, such other parties would thereby also benefit from this defense.

[96]Kan. Stat. Ann. § 60-3303.

the sale is for resale, or for use or consumption.. . . The term includes a manufacturer, wholesaler, distributor or retailer of the relevant product. . ."[97] In Tennessee, the statute of repose expressly provides protection to all entities within the chain of distribution by referring to both the "manufacturer or seller of a product."[98]

There appear to be two methods by which legislatures can define who is to receive the benefits of a statute of repose. One method is simply to list the types of parties so entitled, i.e., manufacturers, designers, distributors, retailers, etc.[99] GARA used this method, albeit very narrowly. The second method is to define the types of lawsuits in which the defense may be raised, such as products liability actions.[100] This method would thereby

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[97]Kan. Stat. Ann. § 60-3302(a).

[98]Tenn. Code Ann. § 29-28-103 (1980 & Supp. 1997).

[99]The state statutes which define or identify the types of entities entitled to assert the statute of repose defense are: Conn. Gen. Stat. § 52-577a (West 1991 & Supp. 1996)(product liability actions involving "product sellers" 52-577m); Colo. Rev. Stat. § 13-21-403(3)(1997)(presumption in suits involving "manufacturer or seller"); Idaho Code [6-1403] § 6-1303 (1998)(actions against "product sellers"); 735 Ill. Comp. Stat. 5/13-213 (West 1992 & Supp. 1998)(no product liability actions against the seller); Minn. Stat. § 604.03 (West 1988)(presumption allowed in actions against designer, manufacturer, distributor or seller); N.D. Cent. Code § 28-01.4-04 (Supp. 1997)("aviation manufacturer"); Wash Rev. Code § 7.72.060 ("product sellers").

[100]The state statutes which identify the type of lawsuits the statute of repose defense is available are: Ark. Code Ann. § 16-116-105 (Michie 1987)(contributory fault defense); Ind. Code Ann. § 33-1-1.5-5 (Michie 1992)("any product liability action . . ."); Ky. Rev. Stat. Ann. § 411-310 (Michie 1992)(same); Mich. Comp. Laws § 600.5805 (West 1987 & Supp. 1998) (same); Neb. Rev. Stat. Ann. §

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protect any potential defendant subject to being a party in a products liability action.

GARA does not appear to provide protection to anyone other than manufacturers. The legislative history appears to be silent on this issue, and, to date, there has been no judicial analysis of this point. If GARA only protects the manufacturers and not the other entities in the chain of distribution, GARA will not reduce the number of lawsuits, it will only change the parties involved and shift the liability exposure accordingly.[101]

There are some limits to the protection that GARA offers to manufacturers. For instance, manufacturers will only be protected when they are sued in their "capacity as a manufacturer."[102] In other words, if a manufacturer was the owner or lessor of the aircraft, it might be sued based on that status. Perhaps more likely, if a manufacturer also performs servicing or repairs on the aircraft, this role might provide a non-manufacturing basis for suing the manufacturer.

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25-224 (West 1995) (same); N.C. Gen. Stat. § 1-50(6)(1996) (defense in actions based on "defect or any failure in relation to a product"); and Or. Rev. Stat. § 30-905 (1997) (defense in product liability actions); but see, GA Code Ann. § 51-1-11 (1982 & Supp. 1998)(defense in product liability actions, but Georgia product liability statute only provides for lawsuits against manufacturers).

[101]It is difficult to predict how the courts will treat this issue. As noted in Chapter One, Section B, supra, the stated purposes for this legislation was to protect general aviation "manufacturers." However, exposing the other entities in the chain of distribution to liability, although not necessarily contrary to the legislative intent, seems nonsensical if, in fact, there really was the purported general aviation litigation crisis.

[102]GARA Sec. 2(a).

The second of element of who is protected by GARA is premised on the type of "aircraft" involved. In this regard, GARA is more clear than its first element. A general aviation aircraft, as defined by GARA, is an:[103]

1. Aircraft for which a type certificate or an airworthiness certificate has been issued by the FAA;[104]

2. Aircraft certified for a maximum seating capacity of less than 20 passengers; and

3. Aircraft not engaged in scheduled passenger-carrying operations at the time of the accident.[105]

In addition to manufacturers of the overall general aviation aircraft, GARA also provides protection to the manufacturers of "new component(s), system(s), subassembl(ies), or other part(s)" for general aviation aircraft.[106] The use of the qualifier "new" is noteworthy

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[103]GARA Sec. 2(c).

[104]A "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 any predecessor federal statute [49 U.S.C. 44704(a)(1997)]. GARA Sec. 3, (4). An "airworthiness certificate means a airworthiness certificate issued under section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(c) or any predecessor federal statute [49 U.S.C. 44704(c)(1997)]. GARA Sec. 3, (2).

[105]"Scheduled passenger-carrying operations" is defined as "holding out to the public on air transportation service for passengers from identified air terminals at a set time announced by timetable or schedule published in a newspaper, magazine, or other advertising medium." 14 CFR 108.3(e) (1997) and 14 CFR 129.25(a)(6).

[106]GARA Sec. 2(a).

because overhauled, reconditioned, or rebuilt parts are not infrequently used in the aviation industry.[107]

2. The Protection

GARA is a fixed-period statute of repose. Thus, the protection offered by GARA can be absolute: "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 . . ."[108] This prohibition against civil actions would bar actions regardless of what theory they were premised upon, i.e., negligence, strict liability, or warranty.[109]

If an accident occurs involving a general aviation aircraft, the aircraft and component manufacturers may not be sued for damages if the accident occurs after the "applicable limitation period." The limitation period for a new aircraft is 18 years from (a) delivery of the aircraft to its first purchaser or lessee, or (b) delivery to one

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[107]For the purpose of this paper, it is sufficient to identify that this may be an issue as to the application of GARA in certain cases. This issue may also complicate the calculation of the commencement and/or expiration of the repose period (i.e., running from the date of original manufacture or the date of reintroduction into the aircraft.)

[108]GARA Sec. 2(a). The protection offered by GARA is limited to civil actions for "damages." Accordingly, if a plaintiff were to seek equitable relief, such as an injunction, GARA would not offer the manufacturer a defense.

[109]One exception, as discussed more thoroughly below, is a suit based on a manufacturer's written warranty. GARA Sec. 2(b)(4). However, because the manufacturer presumably controls what written warranties it issues, this exception should not provide the basis for a lawsuit unless the manufacturer contemplated it.

engaged in the business of selling or leasing airplanes.[110] As such, the limitation period can begin to run even before the aircraft is first sold or leased to an end-user.[111]

In comparison to state statutes of repose,[112] GARA's eighteen-year period of repose is considerably longer in duration that the typical state laws. On average the state defenses are triggered after ten years, although the range is from five years to twelve years.[113] However, in

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[110]GARA Sec. 2(a)(1)(A) and (B).

[111]To help secure the benefit of this defense, manufacturers will need to maintain precise records of when they delivered each aircraft to purchasers and/or dealers. In light of the fact that such records will not be useful in this context until after 18 years, the manufacturer's document retention policy for these records should essentially be perpetual in duration.

[112]According to one commentator, "GARA is fundamentally different from all state statutes of repose. First, it is narrowly tailored to relate only to general aviation aircraft. Second, it is a federal statute with nationwide application to an industry that is already highly regulated by the federal government. Third, GARA addresses a problem that Congress has explicitly acknowledged as resulting from suits of little merit being filed against manufacturers." Sanger, supra note 87, at 447.

[113]Ark. Code Ann. § 16-116-105 (defense available upon expiration of useful safe life); Colo. Rev. Stat. Ann. § 13-80-107 (same, but presumption that useful safe life expired after ten years); Conn. Gen. Stat. § 52-577a (same); Ga. Code Ann. § 51-1-11 (1982 & Supp. 1998)(ten year repose period); Idaho Code [6-1403] § 6-1303 (defense available upon the expiration of useful safe life, but presumption that useful safe life expired after ten years); 735 Ill. Comp. Stat. 5/13-213 (repose period runs ten or twelve subject to circumstances); Ind. Code Ann. § 33-1-1.5-5 (ten year repose period); Kan. Stat. Ann. § 60-3033 (defense available upon the expiration of useful safe life, but presumption that useful safe life expired after ten years); Ky. Rev. Stat. Ann. § 411-310 (presumption created five to

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light of the durability of general aviation aircraft, the 18 year repose period may be appropriate.[114]

With respect to components, systems, subassemblies, and other parts (hereinafter collectively referred to as "components"), the limitation period is also 18 years. This period begins to run when a component either replaces original equipment or from when a component is added to the original aircraft as new equipment.[115] For manufacturers of components that are replaced periodically throughout the lifetime of an aircraft, the repose period will restart each time such a replacement occurs and thereby expose the component manufacturer to continuing potential liability in an aircraft, including those aircraft with more than eighteen years in service.

Considering that one of the underlying principles justifying a statute of repose is that, prior to the expiration of the repose period, design defects will likely have manifested themselves, it probably would have been appropriate for the drafters of GARA to have limited the

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(...continued)
eight years subject to circumstances); Mich. Comp. Laws § 600.5805 (defense trigger after ten years); Minn. Stat. § 604.03 (defense available after expiration of useful safe life); Neb. Rev. Stat. § 25-224; N.C. Gen. Stat. § 1-50(6) (six year repose period). Or. Rev. Stat. § 30-905 (eight year repose period); Tenn. Code. Ann. § 29-28-103 (ten year repose period); and Wash Rev. Code § 7.72.060 (defense available upon the expiration of useful safe life, but presumption that useful safe life expired after twelve years).

[114]See supra note 81, "the average piston-engine airplane [was] over 28 years old and . . . one-third of the [general aviation] fleet [was] over 33 years old . . ." 140 Cong. Rec. at S2993.

[115]GARA Sec. 2(a)(2).

circumstances under which repose period could be restarted for replacement parts. The Illinois statute of repose provides a good statutory model for addressing this issue. The Illinois statute of repose provides that a component part manufacturer will not be allowed to avail itself of the time bar if the product was altered, modified, or changed and, in relevant part, (1) the action is brought against the seller making the change, (2) the action with brought with 10 years of the change, and (3) the injury was caused by a change having "the effect of introducing into the use of the product unit, by reason of defective materials or workmanship, a hazard not existing prior to such change."[116] In other words, the repose period will not restart against a component part manufacturer for merely replacing an original part with a replacement part of the same design. As such, the component part manufacturer would only be exposed to liability for manufacturing defects.

Additionally, the Illinois statute also includes a provision that squarely addresses the issue of replacement parts:

> Replacement of a component part of a product unit with a substitute part having the same formula or design as the original part shall not be deemed a sale, lease or delivery of possession or an alteration, modification or change for the purpose of permitting commencement of a product liability action based on any theory or doctrine to recover for injury or damage claimed to have resulted from the formula or design of such product unit or of the substitute part when such action would otherwise be barred according to the

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[116]735 Ill. Comp. Stat. 5/13-213(c)(1)-(3)(West 1992 & Supp. 1998).

provisions of the subsection (b) of this Section.[117]

The inclusion of this provision, or one similar, in GARA would have been consistent with its legislative intent and would likely have had the desirous effect of reducing the amount of litigation on the issue of when a component part manufacturer can be liable.[118]

3. When Does GARA Not Apply?

The protection offered to manufacturers by GARA does not apply in four situations.

The first exception is when the manufacturer knowingly misrepresented, concealed or withheld material information from the FAA, which should have been disclosed, regarding the certification, airworthiness, performance, maintenance, or operation of the aircraft or one of its components.[119] In addition to proving that a misrepresentation occurred, the plaintiff must also prove that the misrepresentation was causally related to his loss.

Further, to attempt to take advantage of this exception, a plaintiff must plead the specific facts

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[117]735 Ill. Comp. Stat. 5/13-213(e).

[118]GARA also provides that the repose limitation only applies to components when they are alleged to have been the cause of death, injury, or damage. At first this language may appear to be superfluous because a manufacturer of a product should not be liable for damages unless that product was a legal or proximate cause of the loss. However, this language may be interpreted as a "compartmentalization" of the restarting of the repose period. When one adds a new component, it does not restart the repose period for the entire aircraft or any of the other components, only the specific replacement part and only if that part is later alleged to have caused the injury. GARA Sec. 2(a)(2).

[119]GARA Sec. 2(b)(1); for a comprehensive review of this exception see Steggerda, supra note 73.

necessary to prove the alleged concealment or misrepresentation. This "specific" pleading requirement is not typically required in products liability cases. Normally, notice pleading is sufficient.[120] The "specific" pleading requirement will compel plaintiffs to perform considerable pre-lawsuit investigation and preparation.

The second exception is when the injury or death is to a passenger on board the aircraft for the purpose of receiving treatment for a "medical or other emergency."[121] This exception was likely included because such passengers would presumably have little ability to select the aircraft or evaluate the risks involved therewith.[122]

The third exception addresses the situation wherein the person killed or injured was not on board the aircraft at the time of the accident.[123] This exception would include losses to people and things on the ground, and losses arising from mid-air collisions between two aircraft. Similar to the analysis underlying the second exception, this third exception appears intended to protect the rights and interests of individuals who did not chose to ride in or operate a particular aircraft.

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[120]For instance, in federal actions, the complainant need only set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2), Federal Rules of Civil Procedure.

[121]GARA Sec. 2(b)(2).

[122]Note that this exception does not apply to the flight crew on such flights, who would in advance of their use of the aircraft have had an opportunity to learn the age of the aircraft, and, presumably, make an informed decision regarding same.

[123]GARA Sec. 2(b)(3).

The fourth exception is for claims brought under a written warranty by a manufacturer.[124] Under U.S. law, a manufacturer is generally entitled to dictate the terms of its written warranties, including a warranty's duration, provided that the terms are not unconscionable or against public policy.[125] Therefore, for a written warranty to be actionable after eighteen years, in all likelihood, the manufacturer likely intentionally provided for that contingency.[126]

4. GARA's Relationship to Other Laws.

The GARA statute of repose supersedes any state law which would permit an action to be brought after the eighteen-year period.[127] This is a fundamental principle of federal supremacy as established by the Constitution of the United States.[128]

Nothing within GARA prohibits a state from enacting or enforcing statute of repose with a shorter limitations period. Accordingly, the statutes of repose in all of the states discussed in Chapter Three remain in force and unchanged by the enactment of GARA.

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[124]GARA Sec. 2(b)(4).

[125]See, e.g., Uniform Commercial Code, § 2-316.

[126]Another important and related issue is whether a contractual indemnification provision flowing from a manufacturer to its product distributors or retailers would be enforceable after the expiration of the repose period. While there is an exception for written warranties, it is unclear whether the exception for express warranties will apply to a contractual indemnity clause.

[127]GARA Sec. (2)(d).

[128]U.S. Const. art. VI, cl. 2. ("Supremacy Clause").

5. Effective Date.

GARA was enacted on August 17, 1994. GARA indicates that its takes effect on its enactment date, meaning that it would apply to any aviation accident which meets the foregoing criteria.[129] However, GARA will not be applied in civil litigation already pending on the enactment date.[130]

B. TEXT OF GARA

General Aviation Revitalization Act of 1994, Act Aug. 17, 1994, P.L. 103-298, @ 1-4, 108 Stat. 1552; Nov. 20, 1997, P.L. 105-102, @ 3(e), 111 Stat. 2215, provides:

> Section 1. Short title. This Act may be cited as the 'General Aviation Revitalization Act of 1994'.
>
> Section 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

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[129]GARA Sec. 4(a).

[130]GARA Sec. 4(b).

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 Part A of subtitle VII of title 49, United States Code [49 USCS @@ 40101 et seq.], at the time of the accident.

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

Section 3. Other definitions. "For purposes of this Act--

(1) the term 'aircraft' has the meaning given such term in section 40102(a)(6) of title 49, United States Code;

(2) the term 'airworthiness certificate' means an airworthiness certificate issued under section 44704(c)(1) of title 49, United States Code, 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 44704(a) of title 49, United States Code, or under any predecessor Federal statute.

Section 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.

C. GARA -- AS APPLIED BY THE COURTS

The following is a chronological case-by-case analysis of the six cases in which GARA was raised by the manufacturer. As the reader will note, GARA has only been partially successful in shielding general aviation manufacturers from liability. The number of cases which have considered GARA is seemingly quite low, particularly in light of the purported litigation crisis that had descended upon the general aviation industry and the number of "aged" aircraft in service.

Further, as will be discussed below, it is somewhat surprising that none of these early cases raised constitutional challenges to GARA. In three of the six cases, the defendant manufacturers were granted summary judgment. In those three cases, one would have expected the plaintiffs' attorneys to raise every conceivable argument to keep the lawsuits viable for their respective clients.[131]

1. Cartman v. Textron Lycoming

The first case that applied GARA was Cartman v. Textron Lycoming Reciprocating Engine Div.[132] That case was commenced on June 1, 1994 (prior to GARA's enactment). It was a products liability action in which the plaintiff

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[131]Although the majority of state statutes of repose that were held to be unconstitutional were founded on uniquely state constitutional grounds, i.e., open access to courts or personal injury remedy (see supra notes 314 to 354), several courts have held these types of statutes violated due process and equal protection provisions.

[132]1996 U.S. Dist. LEXIS 20189 (E.D. Mich. Feb. 27, 1996).

asserted that the subject airplane crashed because of a faulty carburetor float installed on June 3, 1966. The date of the accident, more than 26 years after the component's installation, was October 16, 1992. Factually important, on March 22, 1995 (subsequent to GARA's enactment), the plaintiff filed an amended complaint adding Rogers Corporation as a defendant and alleging that Rogers Corporation manufactured the carburetor float at issue. Rogers Corporation sought summary judgment based on GARA.

The Cartman court started its analysis with a review of GARA's statutory terms. The court noted that GARA, Section 4, provided that the terms of that Act only applied to "civil actions commenced on or after August 17, 1994."[133]

As noted above, the initial complaint was filed before the effective date of GARA. However, the component manufacturer was brought into the case based on an amended complaint filed after the effective date. Therefore, the threshold issue was whether the amended complaint "related back" to the initial filing date or whether, as to Rogers Corporation, the lawsuit was deemed commenced on the filing of the amended complaint, i.e., after GARA's effective date.[134] Rule 15 of the Federal Rules of Civil Procedures provides the requirements for a subsequent filing to be treated as being filed earlier or "relating back."[135] The

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[133]1996 U.S. Dist. LEXIS 20189, *6.

[134]Id. at *6 - *7.

[135]The court indicated that each of the following four elements needed to be satisfied for the amended complaint to relate back to the original complaint's filing date:

(1) the basic claim must have arisen out

(continued...)

court analyzed the four elements and concluded that the amended complaint against Rogers Corporation did not relate back and that, accordingly, GARA applied to the lawsuit against that defendant.[136] In this regard, the court observed that the subject component was added to the aircraft more than 18 years before the accident.[137] As such, unless one of the four exceptions applied, plaintiff's claim against Rogers Corporation would be time barred.

The plaintiff in Cartman also claimed that the defendant, "with respect to a type certification or airworthiness certificate for, or obligations with respect to continuing airworthiness of" the composite float, "knowingly misrepresented to the Federal Aviation Administration, or concealed or withheld from the Federal Aviation Administration, required information that is

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(...continued)

> of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Id. (citing Simmons v. S. Cent. Skyworker's, Inc., 936 F.2d 268, 270 (6th Cir. 1991) (quoting Schiavone v. Fortune, 477 U.S. 21, 29 (1986)).

[136]Id. The court noted that Sixth Circuit, the appellate circuit in which the Eastern District of Michigan is seated, had previously professed that "the somewhat arbitrary nature of limitations periods is both acceptable and inevitable." Simmons, supra note 135.

[137]Id. at *8 - *9.

material and relevant to the performance or the maintenance or operation of" the composite float.[138] After reviewing plaintiff's proffered evidence on this point, the court held that the evidence did not satisfy GARA's "very particular requirements" and that GARA did not create a duty on a manufacturer to provide the FAA with information regarding "the alleged problems with the [carburetor] float."[139] The court granted Rogers Corporation motion for summary judgment and, thereby, becoming the first aviation manufacturer shielded by GARA from possibility liability based simply the age of the component part in question.[140]

2. Altseimer v. Bell Helicopter Textron[141]

The second case to address GARA was filed on May 23, 1995, seeking recovery for personal injuries, property damage, and economic losses allegedly arising out of a

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[138] Id. at *9 (GARA, sec. 2(b)(1).

[139] Id. at 11.

[140] It is unclear why the plaintiff's counsel did not challenge the application of GARA in this case on constitutional grounds. GARA Sec. 4 provides that GARA should be applied to civil actions commenced on or after the enactment date. As such, there were cases which had not been filed, yet the accident had already occurred. For those cases (such as Cartman and Altseimer), as soon as the accident occurred their causes of action accrued. Therefore, the operation of GARA's bar deprived the plaintiffs of remedy for an existing injury. Although the constitutional challenges to GARA may not be strong (because the U.S. Supreme Court has observed that a party does not have a "vested property interest" is any rule of the common law. see, e.g., Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)), the few plaintiffs caught in this limited time period may have influenced courts to recognize the relative unfairness of barring the claims of those claimants already injured at the time GARA was enacted.

[141] 919 F. Supp. 340 (E.D. Cal. 1996).

helicopter accident. The plaintiffs claimed that Bell Helicopter Textron, the only named defendant, "designed, manufactured, assembled, tested, fabricated, produced, sold, or otherwise placed in the stream of commerce" a defective helicopter and a defective gearbox.[142]

After confirming that the defendant's evidence established that both the helicopter and the subject component were more than 18 years old, the court held that GARA effectively preempts plaintiffs' action.[143] The court observed that this seemingly "harsh" result was nevertheless consistent with the purpose of GARA, which was to:

> establish a Federal statute of repose to protect general aviation manufacturers from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years. A statute of repose is

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[142] Id. at 341.

[143] Id. at 342. The plaintiff challenged the admissibility of the manufacturer's evidence on this point. However, the court found that the declaration an individual employed for 30 years with the manufacturer in a capacity to be able to determine the production dates of the helicopter and parts to be admissible. This challenge does demonstrate one way a plaintiff will attempt to attack the application of GARA. The production dates for individual general aviation aircraft and component parts will be crucial for applying GARA. Perhaps, because the aviation industry is already so heavily regulated , this will not be a problem; however, manufacturers will be well served to implement a system for documenting this evidence, both for its future products and, perhaps more importantly, for the existing fleet. (An interesting issue is created by the preservation of records for aged aircraft. Arguably in jurisdictions with "useful safe life" statutes, a jury might find it interestingly for a manufacturer to argue, on one hand, that the aircraft was beyond its useful safe life, while, on the other hand, maintaining records regarding the same aircraft. Although not necessarily probative, its a small fact that might influence a jury.

> a legal recognition that, after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible for an accident or injury occurring after that much time has elapsed.[144]

The court also quickly dispensed with the plaintiffs' argument that GARA did not apply because the accident occurred before GARA's enactment. As in Cartman, supra, the court simply relied on the GARA, Sec. 4, which clearly provides that GARA applies to all actions commenced after its enactment date.[145] In the second case to raise GARA as a defense the defendant once again prevailed.

3. Rickert v. Mitsubishi Heavy Indus.[146]

The third reported case to consider GARA was Rickert v. Mitsubishi Heavy Indus. (hereinafter "Rickert I"). Rickert I resulted in a judgment in favor of the manufacturer. However, in the fifth reported case,[147] the court reversed itself and the plaintiff was allowed to go forward in an effort to prove a case of misrepresentation and product liability. Despite its subsequent reversal, the analysis in Rickert I will be instructive in future cases and, therefore, will be briefed herein.

The court initially observed that GARA "is one of those increasingly rare statutes whose purpose is evident

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[144]Id. (quoting 140 Cong. Rec. H4998, H4999 (daily ed. July 27, 1994)(statement of Rep. Fish)).

[145]The same constitutional argument could have been raised in this case as suggested supra note 140.

[146]923 F. Supp. 1453 (D. Wyo. 1996).

[147]Rickert v. Mitsubishi Heavy Indus., 929 F. Supp. 380 (D. Wyo. 1996)(discussed infra note 168 et seq.)

from both its title and operation."[148] GARA, a statute of repose, was passed in order to protect "general aviation manufacturers from the uncertainties and costs associated with 'long tail' liability."[149]

The Rickert I court summarized GARA as follows:

> Simply put, GARA shields aircraft manufacturers and aircraft component part manufacturers from liability lawsuits that arise more than 18 years after the manufacture of a plane or a part involved in an accident.. . . GARA applies to all 'general aviation aircraft,' which the Act defines as any aircraft: (1) for which the FAA has issued a type or airworthiness certificate: (2) that carriers fewer than 20 people; and (3) which is not engaged in passenger carrying operations at the time of the accident.. . . There are four exceptions to GARA's 18 year statute of limitations. This period of repose does not apply to cases in which: (1) the manufacturer knowingly misrepresents or conceals certain safety information to or from the FAA; (2) the claimant was a passenger for purposes of receiving medical or emergency treatment; (3) the claimant who suffers harm was not aboard the aircraft at the time of accident; and (4) the claimant's cause of action is based on the manufacturer's written warranties.[150]

The court, after reviewing the facts, concluded that unless one of the four exceptions applied, GARA would

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[148]923 F. Supp. at 1454.

[149]Id.

[150]Id. at 1455.

preempt plaintiff's claims against defendant Mitsubishi.[151] The exception raised by plaintiff in this case was denominated by the court as the "knowing misrepresentation" exception.[152] That exception states that GARA offers no repose:

> if the claimant pleads with specificity the facts necessary to prove, and proves, that the manufacturer with respect to a type 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 [FAA], or concealed or withheld from the [FAA], 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[.] [153]

Rickert I was the first court to articulate the fact that this exception contains two standards: a "pleading standard" and a "judgment standard."[154] The court explained,

> the pleading standard is an obvious analog to Federal Rule of Civil Procedure 9(b), which requires that parties plead fraud 'with particularity.' Under GARA, the

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[151]The relevant facts were that the subject aircraft, MU-2B-35, was a "general aviation" aircraft and that, with a manufacture date of April 1972 and accident date of April 6, 1993, the aircraft was more than 18 years old. Id. at 1455-56.

[152]Id. at 1456.

[153]Id. (quoting GARA, sec. 2(b)(1)).

[154]Id.

> plaintiff must plead the following matters 'with specificity': (1) knowledge; (2) misrepresentation, concealment, or withholding of required information to the FAA; (3) materiality and relevance; and (4) a causal relationship between the harm and the accident.[155]

The Court reasoned that, because the case had progressed so far in discovery, if the facts warranted, the plaintiff would be allowed to amend her complaint so as to correct any deficiencies in the pleadings.[156]

The court then explained the "judgment" standard. Unless a party can prove the "presence of a genuine issue of material fact concerning: (1) knowledge; (2) misrepresentation, concealment, or withholding of required information to the FAA; (3) materiality and relevance; and (4) a causal relationship between the harm and the accident," judgment should be granted in favor of the defendant.[157] The court then proceeded to consider plaintiff's evidence of "knowing misrepresentation."

The plaintiff produced two types of evidence in an effort to raise a genuine issue of fact: (a) expert reports and (b) the "Vinton letters." With respect to the expert reports, the court reviewed each contention raised therein

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[155]Id.; Federal Rule 9(b) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

[156]Id.; The court seems to imply that if the motion had been brought earlier in the case, i.e., closer to the original filing of the complaint, the "pleading standard" may have presented a more difficult obstacle to plaintiff.

[157]Id.

and concluded that there was no evidence of "knowing misrepresentation."[158]

The court next considered the so-called "Vinton letters." The Vinton letters apparently were a series of letters between the manufacturer's president and its U.S. subsidiary's general counsel. The court's summary of these letters reflect that Mr. Vinton believed that icing was a possible cause of several accidents, whereas Mitsubishi's president, Mr. Nakagawa, did not believe those contentions. For the purpose of a motion for summary judgment, the court was required to except Mr. Vinton's statements as true. Nevertheless, even if the court concluded that these statements demonstrated negligent or reckless conduct on the part of the manufacturer, the court held that such conduct did not constitute "knowingly misrepresent[ing] anything to, or conceal[ing] anything from, the FAA.[159] Although such evidence would be extremely interesting to a jury, if it was asked to consider traditional products liability issues, GARA's shield keeps such cases from a jury, unless, as attempted in this case, the plaintiff can prove some specific act of knowing misrepresentation. To wit, the court concluded:

> The terms 'misrepresentation' and 'concealment' are not infinitely malleable. Rickert cannot avoid GARA's period of repose simply by dressing up her evidence (most of which would be relevant to and probative of the issues

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[158] Id. at 1457-60. "At most, [the expert's] opinions (accepted as true) cause the Court to conclude that Mitsubishi was negligent, perhaps even grossly negligent, when it designed and manufactured the MU-2. Gross negligence is not, however, a knowing misrepresentation." Id. at 1460.

[159] Id. 1461-62.

> of negligence and strict liability) as 'misrepresentations' and 'concealments.' GARA requires more than innuendo and inference; it demands 'specificity.' Rickert has not met GARA's demand in this case.[160]

Thus, at least for a short period of time, the aviation manufacturer kept this case away for a jury. However, Rickert II, briefed below, will provide the first, and only, example of a plaintiff successfully circumventing the bar of GARA.

4. Alter v. Bell Helicopter Textron[161]

The fourth case to address GARA issues was Alter v. Bell Helicopter Textron. That case arose from November 24, 1993, accident in which Ilan Alter and Abraham Gad were killed in a crash of a Bell 206 helicopter near Beit-Kama, Israel. Two wrongful death lawsuits were commenced in the Texas state district courts by the decedents' representatives: one on August 31, 1995, and the other on November 20, 1995. Both lawsuits raised traditional products liability issues regarding the helicopter and an allegation of negligence with respect to the maintenance manuals for the helicopter.

The defendants in Alter removed the two original cases from the state court to the United States District Court for the Eastern District of Texas. Those two cases were then consolidated. The plaintiffs filed motions to remand their respective cases back to the state court. During the course of the federal court's resolution of the

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[160]Id. at 1462; but see, Rickert II, infra.

[161]944 F. Supp. 531 (S.D. Tex. 1996).

motions to remand, the court considered and applied GARA to grant the defendants' cross-motions for summary judgment.

Although the plaintiffs apparently conceded that the helicopter and engine were older than the 18 year repose period, the plaintiffs argued that GARA did not preclude recovery against the helicopter manufacturer under Texas law for defective marketing or failure to warn. Plaintiffs asserted that the manufacturer issued maintenance manuals twice a year since the original manufacture of the helicopter which contained a misleading statement that proximately caused the helicopter crash. In this respect, the plaintiffs relied on the Israeli government investigation report of the accident, which stated:

> The manufacturer's instruction relating to the inspection of the engine compressor staton vanes erosion, during the periodical checks, was drafted in a misleading manner, which brought up the understanding that thickness had to be checked at the outer end rather than at the root of the vane.[162]

Perhaps significantly, however, there was no evidence regarding <u>when</u> the critical language first appeared in the manual.

Plaintiffs asserted that GARA does not preclude the claims regarding the maintenance manuals because the manuals are covered under section 2(a)(2) of GARA, which provides that the eighteen-year repose period must be applied separately to "any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which

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[162] <u>Id.</u> at 537.

was added to, the aircraft. .. ."[163] Thus, it was the plaintiffs' contention that the manual revision was a "new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft."[164]

The Alter court concluded that the manual was not a replacement part covered by GARA, Sec. 2(a)(2), because GARA requires that a replacement "component, system, subassembly, or other part" must replace a "component, system, . . . or other part" "originally in" or "added to" the aircraft. Under these facts, the manual was not a "part" "originally in" or "added to" the aircraft. The court thereby concluded that the manual revisions were not a replacement "component, system, subassembly, or other part" that restarted the limitations period under section 2(a)(2).[165]

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[163]Id. at 538.

[164]Id. The court noted that there was no controlling precedent on point in Texas or the Fifth Circuit. However, the court was persuaded by the analysis emanating from the Tenth Circuit in the case Alexander v. Beech Aircraft Co., 952 F.2d 1215 (10th Cir. 1991)(considering Indiana's statute of repose)(supra note 206.)

[165]Id. The court observed that its analysis was consistent with other court's treatment of this issue based on state statutes of repose. See, e.g., Schamel v. Textron-Lycoming, 1 F.3d 655, 657 (7th Cir. 1993)[infra note 215]; Alexander v. Beech Aircraft Co., 952 F.2d 1215, 1220-21 (10th Cir. 1991)[infra note 206]; Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1135 (6th Cir. 1986); Butchkosky v. Enstrom Helicopter Corp., 855 F. Supp. 1251, 1257 (S.D. Fla. 1993), aff'd, 66 F.3d 341 (11th Cir. 1995)[infra note 340]; but see, Driver v. Burlington Aviation, 110 N.C. App. 519, 430 S.E.2d 476 (1993)[infra note 226](However, the Alter court neatly distinguished this case on several factual grounds.)

The plaintiffs also asserted that GARA does not apply to accidents that occur in a foreign country.[166] In rejecting this argument the court observed that plaintiffs' "interpretation of GARA would have the anomalous effect of preventing litigants from bringing an action in the United States for an accident occurring in the United States while allowing litigants to bring the same action in the United States if the accident occurred abroad."[167]

Having concluded that the manual was not a new or replacement component so as to restart the repose period, the court granted the defendants' summary judgment. Accordingly, when the court entered judgment in the manufacturers' favor on June 13, 1996, in each of the first four reported cases in which GARA was raised, the manufacturers prevailed. However, as discussed immediately below, the manufacturer's winning record was about to change.

5. Rickert v. Mitsubishi Heavy Indus.[168]

As discussed above, in Rickert I the manufacturer prevailed because the plaintiff could not produce sufficient evidence of a "knowing misrepresentation" to serve as an exception to the bar created by GARA. However, in relevant part, plaintiff requested additional discovery to meet this burden, which the court granted.[169] After the completion of

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[166]944 F. Supp. at 541 (plaintiffs relying on Smith v. United States, 507 U.S. 197 (1993)).

[167]Id.

[168]929 F. Supp. 380 (D. Wyo. 1996)("Rickert II").

[169]Id. at 381. In support of its ruling, the court remarked that it was aware that the manufacturer had been "less than forthcoming with its discovery responses."

that additional discovery the court invited supplemental briefs on the summary judgment issues.

> This Court's earlier order obviously served as a wake-up call for Rickert. She apparently now realizes that GARA has altered the legal landscape for aviation product liability lawsuits, and that she cannot withstand a GARA-based motion for summary judgment simply by creating a genuine issue of material fact concerning Mitsubishi's negligence or strict liability. Rickert now understands that she must produce some evidence showing that Mitsubishi knowingly misrepresented something to, or concealed something from, the FAA concerning the MU-2's performance and handling.[170]

During the 30 day window of additional discovery the plaintiff was able to obtain the affidavits of two former Mitsubishi employees. These employees provided declarations which constituted evidence sufficient for the court to conclude that there was a genuine issue of fact whether the manufacturer had "knowingly misrepresented" facts to the FAA. As such, the court reversed its prior ruling and reinstated the plaintiff's case.

In the concluding remarks in its opinion, the court observed:

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

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[170] Id.

* * *

> Rickert's task, therefore, is two-fold. She must satisfy GARA's knowing misrepresentation exception, and then prove her product liability claims. Her opportunity to do so will arrive on October 15, 1996 [the trial date].[171]

If one were keeping score with respect to the manufacturer's success, the tally is 3 to 1 in favor of the manufacturers.

6. Wright v. Bond-Air, Ltd.[172]

The last reported case to consider GARA is Wright v. Bond-Air, Ltd. That action arose out of a February 5, 1995 airplane accident that killed the pilot of a twin engine Model 310L aircraft manufactured and sold by Cessna in October 1967. Plaintiff's wrongful death and product liability lawsuit was filed in state court, and the

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[171]Based on this statement, the likely jury verdict form would have included the threshold question for the jury to answer: "Did Mitsubishi knowingly misrepresent information to the FAA?" If the jury's response was in the affirmative, they would have been instructed to continue their deliberations regarding the products liability issues. If, however, their response was in the negative, they would have been instructed to cease their deliberations and to return a verdict in a favor of the defendant. The contents and structure of the jury verdict form will be an important procedural issue in future cases.

Upon review of the court's docket for the Rickert case, it appears that the case was dismissed on November 20, 1996, prior to trial and prior even to the filing of the proposed jury instructions and verdict form. A consensual dismissal at that stage of the case generally indicates that the case was settled. In fact, in that case, this fact was confirmed by the docket entry on September 26, 1996, wherein it is noted that plaintiff's counsel gave verbal notice of settlement to the court.

[172]930 F. Supp. 300 (E.D. Mich. 1996).

defendants removed the case to the United States District Court for the Eastern District of Michigan. However, unlike the case in Alter, supra, the Wright court ruled that it lacked subject matter jurisdiction, and that it was therefore obligated to remand the case back to the state court.[173]

The potential significance of the Wright case is the court's holding that GARA does not create a "federal question" for the purpose of conferring subject matter jurisdiction in a federal court. The court cited a United States Supreme Court decision which emphasized that "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction."[174] The court further reasoned that federal question jurisdiction exists only where the federal issue raised in a state cause of action is "substantial."[175]

In support of the argument for subject matter jurisdiction, the manufacturing defendants argued that a substantial federal question existed in that case because there is a federal condition precedent in GARA that

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[173]In Alter, in relevant part, the defendants claimed that there was diversity of citizenship between the parties, which gave rise to subject matter jurisdiction for the federal court and a basis for removal. Although Textron was a Texas resident, which could have destroyed the diversity basis of jurisdiction, because the court concluded that GARA eliminated any chance that plaintiffs could prevail against Textron, Textron presence in the case, for jurisdictional purposes, was deemed a "fraudulent joinder" and, thus, the court had subject matter jurisdiction. 944 F. Supp. at 541.

[174]930 F. Supp. at 303-304 (quoting Merrell Dow Pharms. v. Thompson, 478 U.S. 804, 813 (1986)).

[175]Id. at 304.

plaintiff must both plead and prove.[176] Further, the failure to plead or present the requisite elements will prevent a court from recognizing the remaining aspects of a plaintiff's case.[177] The court concluded, however, that GARA was "narrowly drafted to preempt only state law statutes of limitation or repose that would permit lawsuits beyond GARA's 18 year limitation period in circumstances where its exceptions do not apply."[178] Accordingly, the court remanded this case back the state court, where presumably the state court would evaluate whether plaintiff's complaint pleaded a viable cause of action in light of GARA's 18-year time bar.

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[176]Id. at 304; i.e., the four exceptions to GARA, Sec. 2(b)91) - (4).

[177]Id.; In other words, if a plaintiff fails to establish a viable exception, none of a plaintiff's causes of action will be allowed because GARA bars all "civil actions."

[178]Id. at 305.

IV. CHAPTER THREE -- STATE STATUTES OF REPOSE

A. CONSTITUTIONALLY VIABLE STATUTES OF REPOSE

1. FIXED-PERIOD OF REPOSE

a. Georgia

Georgia's statute of repose bars product liability lawsuits after "ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury."[179] However, as initially enacted, this statute did not bar suits sounding in negligence.[180] The Georgia legislature amended the statute of repose effective on July 1, 1987, to close that gap in protection to product manufacturers.[181]

Georgia's statute does not bar suits wherein it is alleged that the manufacturer's conduct "manifest[ed] a willful, reckless, or wanton disregard for life or property."[182]

Aviation manufacturers should be cognizant of the provision in the Georgia statute of repose which provides: "Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from

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[179]Ga. Code Ann. § 51-1-11(b)(2) (Michie 1982 & Supp. 1998).

[180]See Appendix to Hatcher v. Allied Prods. Corp., 796 F.2d 1427 (11th Cir. 1986)(Georgia Supreme Court answering three certified questions from the Eleventh Circuit.)

[181]Ga. Code Ann. § 51-1-11(c); This legislative amendment came soon after a Georgia Supreme Court decision which clarified this apparent gap in the protection afforded manufacturers.

[182]Id.; That exception in the statute of repose's coverage is very similar to a punitive damage standard. This exception may create a sufficient question of fact to preclude manufacturers from extricating themselves from lawsuits by motion for summary judgment.

use of a product once that danger becomes known to the manufacturer."[183] As such, unless the claim is completely novel, one should anticipate that the counsel for plaintiffs will attempt to present claims based on an alleged breach of a post-sale duty to warn.[184]

Georgia's statute of repose has been applied in one reported aviation case.[185] That case arose from the August 29, 1990, crash of a USAF C-5A aircraft killing thirteen of the seventeen servicemen abroad the aircraft. The aircraft and its systems were designed and manufactured in 1971. The design of a key component was modified in 1981. The modification kits were installed by the Air Force commencing in 1981.

Technically, because the United States Court Appeals for the Fifth Circuit affirmed the trial court's grant of summary judgment on grounds other than the statute of repose, the Fifth Circuit's analysis of Georgia's statute of repose is *dicta*. The Fifth Circuit based its decision on the government contractor defense. Nevertheless, the Fifth Circuit's comments are instructive for possible future applications of the Georgia statute of repose in general aviation cases.

The Fifth Circuit approved of the trial court's application of the Texas choice-of-law rules and its holding

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[183]Ga. Code Ann. § 51-1-11(c).

[184]The United States Supreme Court has even cautioned of the danger of "semantic ploy[s]" when considering claims based on a failure to warn by observing that virtually any intentional tort claim could be redrafted so as to present a claim for the failure to warn. See Saudi Arabia v. Nelson, 507 U.S. 349, 363, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993).

[185]Perez v. Lockheed Corp., 81 F.3d 570 (5th Cir.), amended by, 88 F.3d 340 (5th Cir. 1996).

that Georgia's substantive law governed the dispute. Part of that substantive law was Georgia's statute of repose.[186] Based on the ten-year statute of repose, the trial court granted summary in favor of the defendants as to plaintiffs' product liability claims.[187] The trail court granted the summary judgment even though there had been a product modification within the repose period. The trial court reasoned: "Modifications that change the original design can restart the tolling of the statute of repose, but the modifications in this case did not change the original design of the circuit and therefore the statute of repose did not restart."[188]

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[186]Although statutes of repose are frequently characterized as a form of statutes of limitation, a major distinction between statutes of repose and statutes of limitation is the fact that statutes of repose are treated as substantive law and statutes of limitation are treated as procedural law. As a procedural law, the statute of limitation of the jurisdiction in which the court is located will typically be applied to the case, regardless of where the accident occurred or where the parties reside. A statute of repose, on the other hand, can be "imported" from other jurisdictions, if the choice-of-law analysis so dictates.

In the Task Force's final report, supra note 6, the commentators considered statutes of repose to be a form of statute of limitations (see also supra note 12, discussing the five definitions of statutes of repose). Based on this premise, the commentators projected that a national products liability statute of repose might also be treated as procedural in nature, "so that state law might not be affected by [such] a federal statute." (Task Force Report, supra note 6, at V-5.) However, with respect to GARA, the statute of repose is clearly intended to be substantive and to have a direct and preemptive effect on state law. GARA sec. 2(d).

[187]Id. at 574.

[188]Id. at 574, n5 (citing Butchkosky v. Enstrom

(continued...)

However, on appeal, the Fifth Circuit held that the trial court had erroneously granted summary judgment on the failure to warn claims based of the statute of repose.[189] The Fifth Circuit noted that the Georgia Legislature "carefully excluded the failure to warn causes of action from the statute of repose" under circumstances when the manufacturer had actual or constructive knowledge of the danger.[190] Therefore, had the Fifth Circuit not granted judgment to the defendants based on the government contractors defense, plaintiff would have had a viable claim against the manufacturer based on the post-sale warnings exception.

b. Illinois

The time bar offered under the Illinois statute of repose, based on the circumstances, is triggered either at twelve years (measured "from the date of first sale, lease or delivery of possession by a seller") or at ten years (measured "from the date of first sale, lease or delivery or possession to its initial user, consumer, or other non-seller"), whichever expires earlier.[191] Like the initial version of the Georgia statute of repose, this defense did not apply to claims based on negligence, as opposed to

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(...continued)
Helicopter Corp., supra note 165, at 1257(which held that a modification must change the original design of a critical component that is alleged to have caused the injury). This appears to be the opposite result that would occur under GARA.

[189]Id. at 574, n6.

[190]Id. (citations omitted).

[191]735 Ill. Comp. Stat. 5/13-213 (West 1992 & Supp. 1998).

strict products liability. However, effective March 9, 1995, and prospectively applied only, the Illinois Legislature closed that relatively significant gap in protection by amending the legislation.[192]

As will be discussed below, like GARA, the Illinois statute of repose has a provision that addresses products which are altered, modified, or changed.[193] However, unlike GARA, the Illinois statute seems better reasoned and provides significant guidance on its application in products liability actions against component part manufacturers.[194]

Under the Illinois statute of repose there is no time bar available if the subject product was altered, modified, or changed and, in relevant part, (1) the action is brought against the seller making the change, (2) the action with brought with 10 years of the change, and (3) the injury was caused by a change having "the effect of introducing into the use of the product unit, by reason of defective materials or workmanship, a hazard not existing prior to such change."[195] Thus, the mere replacement of an old part with new part of the same design as the original part does not serve to recommence the repose period, unless the new part contained a manufacturing defect.

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[192]The 1995 Amendment by P.A. 89-7, § 15.

[193]735 Ill. Comp. Stat. 5/13-213(c).

[194]As discussed above, GARA rather ambiguously provides that, with respect to component parts, actions are barred 18 years after the completion of the replacement or addition. (See supra notes 106 and 107.)

[195]735 Ill. Comp. Stat. 5/13-213(c)(1)-(3).

The Illinois statute goes even further in its clarification of this issue. There is an additional provision which addresses the issue of replacement parts:

> Replacement of a component part of a product unit with a substitute part having the same formula or design as the original part shall not be deemed a sale, lease or delivery of possession or an alteration, modification or change for the purpose of permitting commencement of a product liability action based on any theory or doctrine to recover for injury or damage claimed to have resulted from the formula or design of such product unit or of the substitute part when such action would otherwise be barred according to the provisions of the subsection (b) of this Section.[196]

No reported aviation cases were located which applied Illinois's version of the statute of repose. Nevertheless, based on the clarity of this statute, the rights of both the claimant and manufacturer should be readily discernible in the event of a loss governed by the laws of Illinois.

c. Indiana

Indiana has a straightforward ten-year statute of repose.[197] The repose period commences "upon the delivery of the product to the initial user or consumer."[198] However, to ensure that an individual will have a minimum of two years within which to bring an action after being injured, the statute contains a unique feature. It provides that "if the

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[196]735 Ill. Comp. Stat. 5/13-213(e).

[197]Ind. Code Ann. § 33-1-1.5-5 (Michie 1992).

[198]Id.

cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commence at any time within two (2) years after the cause of action accrues."[199]

The Indiana statute of repose has received considerable treatment by varied courts. The Supreme Court of Indiana,[200] the Tenth Circuit Court of Appeals,[201] and the Seventh Circuit Court of Appeals[202] have each analyzed the Indiana statute of repose in connection with aviation cases.

Reviewing these cases in chronological order, the first of the aviation cases to consider Indiana's statute of repose was Dague v. Piper Aircraft Corp.[203] The Dague case arose from the crash of a Piper Pawnee aircraft manufactured and placed into the stream of commerce in 1965. The accident occurred in July 1978. The decedent died from his injuries in September 1978. The Indiana Supreme Court was called upon to answer questions certified to it by the United States Court of Appeals for the Seventh Circuit. In addition to determining that statute of repose did not

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[199]Id.; For example, if the injury occurred nine years after the initial delivery, the lawsuit could be commenced any time within the next two years, i.e., up until the eleventh year post-delivery.

[200]Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981).

[201]Alexander v. Beech Aircraft Corp., 952 F.2d 1215 (10th Cir. 1991).

[202]Schamel v. Textron-Lycoming, 1 F.3d 655 (7th Cir. 1993).

[203]Dague v. Piper Aircraft Corp., 418 N.E.2d 207 (Ind. 1981).

violate Indiana's Constitution,[204] the Indiana Supreme Court clarified the issue of when the two-year statute of limitations could expand the ten-year statute of repose. The court concluded that only when an accident occurs between the eighth and tenth years after a product has been placed into the stream of commerce would the two-year statute of limitations expand the repose period.[205] In other words, if the accident occurred after the tenth year, there is no longer a products liability cause of action available to the plaintiff.

In the Tenth Circuit, the Alexander case arose out of a February 18, 1984, accident of a rented 1967 A23A Beechcraft Musketeer which ran out of gas and crashed.[206] Beech was granted summary judgment based on Indiana's statute of repose. However, on appeal the plaintiffs raised several challenges. First, plaintiffs argued that the Pilot/Operator Manual or Handbook was a replacement part and that it was defective. However, the court ruled that the manual was not a replacement part.[207] The court indicated that plaintiffs were essentially raising a failure to warn claim about a condition that existed at the time of the

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[204]According to the Indiana Supreme Court, the statute of repose violated neither the "open courts" provision (Ind. Const. art. I, 12) nor the "one-subject" requirement (Ind. Const. art. IV, 19).

[205]Dague, 418 N.E.2d at 210.

[206]Alexander v. Beech Aircraft Corp., 952 F.2d 1215 (10th Cir. 1991).

[207]Id. at 1219-20.

original manufacture. Thus, that claim was governed by the statute of repose and the summary judgement was proper.[208]

Plaintiffs' second argument was that, based on public policy reasons, Indiana's statute of repose should not be applied in that case. The subject lawsuit was filed with the U.S. District Court in Kansas, where Beech had its primary place of business. After conducting a choice-of-law analysis, the trial court applied Indiana's law. However, as noted by the plaintiffs, a court seated in one jurisdiction may refuse to apply the laws from another jurisdiction if the application of that law would violate public policy of the forum state.[209] Kansas does not have a fixed-period statute of repose. Instead, it has a "useful life" type statute, such that the defense creates a rebuttable presumption, not necessarily an automatic time bar.[210] Additionally, the Kansas statute has an exception whereby if the seller misrepresents facts about the product or conceals information about it so as to cause harm to the plaintiff, the time bar will not operate. However, after a thorough analysis of the Kansas statute and the underlying public policy, the Alexander court concluded that the absence of the misrepresentation exception in the Indiana

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[208]If these facts were applied to the Georgia statute of repose, a different result would likely have occurred because of that state's exception based on failure to warn claims.

[209]Alexander, 952 F.2d at 1220-21 (citations omitted).

[210] Kan. Stat. Ann. § 60-3303; see discussion of Kansas statute, supra note 263, et seq.

statute would not be an affronted to Kansas's public policy.[211]

The Plaintiffs' third argument was that Indiana's statute of repose was unconstitutional under both the U.S. and Indiana constitutions:

> Plaintiffs claim that the statute violates equal protection and due process principles by arbitrarily denying the right of free access to the court system and by destroying the remedy before a plaintiff's cause of action arose.[212]

With respect to the challenge premised on the Indiana Constitution, the Alexander court noted that those issues had been resolved in Dague v. Piper.[213] With respect to United States Constitution challenge:

> In Pitts, the Seventh Circuit responded to an argument that the ten-year statute of limitation in the Indiana Product Liability Act was unconstitutional as being violative of due process and equal protection principles. The Seventh Circuit stated that an unaccrued cause of action is not property right protected by the Fourteenth Amendment, and thus '[t]he Indiana legislature could, if it wanted, do away entirely with wrongful death actions beginning tomorrow'. . . The court reasoned that the lessening of the risk of loss to manufacturers was a legitimate

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[211]Alexander, 952 F.2d at 1223-24

[212]952 F.2d at 1224; The United States Supreme Court, although not specifically addressing the due process issue, has recognized that legislatures possess the power to modify or abolish common law rights of action. Silver v. Silver, 280 U.S. 117 (1929); see also, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

[213]Id. citing Dague, supra, 418 N.E.2d at 213).

> legislative purpose which should not be contravened by the courts.[214]

In conclusion, the court affirmed the summary judgment in favor of Beech.

The third aviation case arose from an accident occurring on January 5, 1988.[215] In that accident, Jerry Schamel was killed when his 1959 Piper Comanche crashed. The decedent's wife sued Textron-Lycoming claiming that the engine and connecting rods that it manufactured were defective. Defendant was granted summary judgment on the grounds that Indiana's statute of repose barred the action.

Plaintiff attempted to circumvent the time bar of the statute of repose by claiming that her lawsuit also raised a non-product liability claim. However, the court held that plaintiff's claim based on Section 324A of the Restatement (Second) of Torts was covered by Indiana's statute of repose:[216]

> The provision of service manuals and other sources of service information is not a separate and discrete, post-sale undertaking pursuant to sec. 324A; rather, such information is generally necessary to satisfy the manufacturer's duty to warn.[217]

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[214]Id. at 1225 (quoting Pitts v. Unarco Indus., Inc., 712 F.2d 276, 279-80 (7th Cir. 1983).

[215]Schamel v. Textron-Lycoming, 1 F.3d 655 (7th Cir. 1993).

[216]Restatement Section 324A provides that when a person either gratuitously or for consideration provides services to another, that person must exercise reasonable care or risk liability for their conduct.

[217]Schamel, supra note 215, at 657.

d. Nebraska

Nebraska has a ten year statute of repose.[218] Subject to a few exceptions, which are not likely to be found in an aviation case, a product liability action in Nebraska must be "commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption."[219] The Nebraska statute of repose has been applied in one aviation reported case.

That case arose from the August 26, 1989, crash in Mexicali, Mexico.[220] The subject aircraft rented by Ross, who was a California resident. As a result of the crash, Ross sustained a severe brain injury. Other passengers in Ross's aircraft apparently timely commenced lawsuits and eventually settled with the manufacturer, Beech Aircraft Corp. Ross, however, delayed filing his lawsuit. When he did ultimately file suit in California, it was dismissed based on California's one-year personal injury statute of limitations. Subsequently, by invoking diversity jurisdiction, Ross filed suit in U.S. District Court in Nebraska. Nebraska has a four year statute of limitations.[221]

In response to the complaint, Beech sought to assert Nebraska's ten-year statute of repose, which shields a manufacturer from liability for injuries occurring ten years after an allegedly defective product was first sold to

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[218]Neb. Rev. Stat. § 25-224 (1995).

[219]Id.

[220]Ross v. Beech Aircraft Corp., 1997 U.S. App. LEXIS 20985 (8th Cir. filed Aug. 7, 1997)

[221]Neb. Rev. Stat. § 25-224(1).

a consumer.[222] However, Ross argued the defense should not be available to Beech because it failed to raise the defense in its original answer, i.e., waiver. The Magistrate Judge allowed Beech to amend its answer and to raise the statute of repose as a defense.[223] Thereafter, Beech moved for summary judgment on the basis of the statute of repose, on which it prevailed.

On appeal to Eighth Circuit, the plaintiff raised three issues: (1) California substantive law applies, not Nebraska; (2) the lower court improperly allowed Beech to assert the statute of repose; and (3) Beech's republication of the Pilot Operating Handbook renewed the ten year repose period. The Appellate Court, without elaboration, adopted the District Court's opinion and affirmed the lower court's granting of summary judgment in favor of Beech.[224]

e. North Carolina

Although labeled a statute of limitations, North Carolina has a statute of repose in effect. In fact, it is one of the most severe due to the short duration of the repose period:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than **six** years after the date of

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[222]1997 U.S. App. LEXIS 20985, *2; Neb. Rev. Stat. § 25-224(2).

[223]Id.; (the U.S. District Court adopted the Magistrate's recommendation).

[224]1997 U.S. App. LEXIS 20985, *7.

initial purchase for use or consumption.[225]

There are two reported aviation-related cases in which the North Carolina statute of repose has been applied.[226] In the first case, the plaintiff was a passenger is a Cessna 152, originally sold by the manufacturer in 1978. The accident occurred in 1989. The trial court granted Cessna's motion to dismiss, in relevant part, based on the statute of repose. On appeal, the North Carolina Court of Appeals reversed the trial court's decision and remanded the case for further trial court proceedings.

The standard of review of an appeal of a motion to dismiss is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. . ."[227] If plaintiff's only claim related to claim of a defect in the subject aircraft, the appellate court acknowledged it would have affirmed the trial court's decision based on the aforementioned standard of review. However, the plaintiff's claim also included an alleged defect in an "Information Manual," which was allegedly sold independently to the pilot at a subsequent point in time. The North Carolina Court of Appeals found that this manual was a separate product, i.e., not a component part of the

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[225]N.C. Gen. Stat. § 1-50(6)(1996)(emphasis added).

[226]There is also a case that refused to apply N.C. General Statute § 1-50(6) as a statute of limitations for a breach of warranty claim in a general aviation case. Smith v. Cessna Aircraft Co., 571 F. Supp. 433 (M.D.N.C. 1983)(citing Bernick v. Jurden, 306 N.C. 435, 446-47, 293 S.E.2d 405 (1982)).

[227]Driver v. Burlington Aviation, 110 N.C. App. 519, 524, 430 S.E.2d 476, 480 (1993).

aircraft.[228] The court concluded that until the trial court was presented competent evidence of when the Informational Manual was provided to plaintiff, it could not dismiss the action based on North Carolina's six-year statute of repose.[229]

In the second case, a lawsuit was filed in Mississippi arising from a crash in North Carolina.[230] The Mississippi court conducted a choice-of-law analysis, and applied North Carolina's substantive laws to the tort claims because North Carolina was the state with the most substantial relationship to the claims and the parties.[231] Because North Carolina courts had concluded that its statute of repose is a substantive law, Mississippi court dismissed the plaintiffs' tort claims based on North Carolina's six-year statute of repose.

In that lawsuit, the plaintiff also raised a breach of warranty claim. With respect to that claim, based on the choice-of-law analysis, the court held that the laws of Massachusetts were to be applied.[232] However, Massachusetts, like most jurisdictions, treat statutes of limitations as procedural laws. Therefore, the Mississippi court, as the forum court, applied Mississippi's statute of limitations. Interestingly, in effect, Mississippi's statute of limitations acted like a statute of repose. Under Mississippi law, an action for breach of warranty, which

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[228] Id., 110 N.C. App. at 528-29, 430 S.E.2d at 482-83.

[229] Id.

[230] Crouch v. General Elec. Co., 699 F. Supp. 585 (S.D. Miss. 1998).

[231] Id. at 589-90.

[232] Id. at 593.

sounds in contract, must be brought within six years of the accrual of the action. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery of the product is made, except where a warranty explicitly extends to future performance of the goods.[233] Accordingly, plaintiff's breach of warranty claim was dismissed as well.

f. Ohio

Ohio has enacted the most recent statute of repose. In 1996, the Ohio legislature enacted a 15 year statute of repose.[234] As with other statutes of repose, there are exceptions to its use in cases where there was fraud by the manufacturer or an express warranty of a longer duration than 15 years.[235] If the injury-causing event occurs near the end of the repose period, a provision expands to the repose period by the length of the applicable statute of limitations.[236] The inclusion of this saving clause may protect this new statute of repose from the constitutional challenge that previously was successful against an earlier Ohio statute of repose.[237] There were no report aviation-related cases construing this recent statute of repose.

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[233]Id. (applying Miss. Code Ann. § 75-2-725 (1981)).

[234]Ohio Rev. Code § 2305.10 (Anderson 1997).

[235]Ohio Rev. Code § 305.10(C)(2)-(3).

[236]Ohio Rev. Code § 2305.10(C)(4).

[237]Baughman, supra note 6, at 693 n.187.

g. Oregon

Oregon has two statutes of repose which may be applicable in a products liability action. Oregon has an eight-year statute of repose which bars claims eight years after the date on which the product was first purchased for use or consumption."[238] Additionally, Oregon has a statute of repose which provides:

> In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained.[239]

In an aviation-based case, the Oregon Supreme Court has provided guidance as to when to apply these two statutes.[240]

Erickson was "a negligence action resulting from a 1981 accident allegedly caused by a manufacturer's advice given in 1977 involving a product purchased in 1971."[241] The aviation manufacturer, United Technologies, argued that the eight-year products liability statute of repose should govern this action and barred Erickson's claims. The Oregon Court of Appeals agreed. However, on further appeal, the Oregon Supreme Court did not agree. The Oregon Supreme Court reasoned that the products liability statute of repose "applies only to acts, omissions or conditions existing or occurring before or at the 'date on which the product was

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[238]Or. Rev. Stat. § 30.905 (1997).

[239]Or. Rev. Stat. § 12.115(1).

[240]Erickson Air-Crane Co. v. United Technologies Corp., 303 Or. 281, 735 P.2d 614, amended on recons. , 303 Or. 452, 736 P.2d 1023 (1987).

[241]Id., 303 Or. at 284, 735 P.2d at 615.

first purchased for use or consumption.'"[242] The negligence statute of repose, on the other hand, governs "[a]cts or omissions occurring after that date."[243] Accordingly, the Oregon Supreme Court concluded that because Erickson's claims were premised on alleged misinformation provided by the aviation manufacturer several years after the initial purchase, the negligence statute of repose applied, not the products liability statute of repose. As such, Erickson's claims were not time-barred.

In another reported aviation case, the Oregon statute of repose was juxtaposed to the Washington useful safe life statute.[244] In Frosty, the decedent, an Oregon resident, was killed in a helicopter accident in the state of Washington. Plaintiffs contended that Washington law should govern and that their action was not time-barred. The court, however, disagreed on both counts.

The Court noted that Oregon has a statute of repose with an eight year limitation[245] and that Washington has a "useful life" statute.[246] After completing a choice-of-law analysis, the court applied Oregon's statute of repose and granted judgment in favor of the defendant.[247]

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[242]Id., 303 Or. at 286, 735 P.2d at 616.

[243]Id.

[244]Frosty v. Textron, Inc., 891 F. Supp. 551 (D. Or. 1995).

[245]Id. at 556 (O.R.S. § 30.905).

[246]Id. (W.R.C. § 7.72.060(1)(a)).

[247]Id. at 555-58. Although the court applied Oregon law, it did conduct an analysis under Washington law to demonstrate that the same result would have been reached. However, to reach the same result, the court had to overcome

(continued...)

h. Tennessee

The Tennessee legislature enacted a ten-year statute of repose running from the date on which the product was first purchased for use or consumption.[248] The statute also requires that an action be brought within one year after the expiration of the "anticipated life" of the product. At first blush, "anticipated life" may seem like "useful life." However, the statutory definition of "anticipated life" will likely foreclose its use in aviation cases.[249]

This statute has been applied in one reported aviation related case.[250] That case arose from the following facts. In 1984, Dr. Lunceford, a South Carolina resident, purchased a used Cessna airplane in South Carolina from a

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(...continued)
plaintiffs' expert testimony on the issue of "useful safe life." It did so by rejecting the Plaintiffs' expert testimony for failing the standard for expert testimony set forth in Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993). According to the court, the experts offered unsupported, anecdotal testimony, not based on scientific or engineering testing or principles. Because what constitutes "useful safe life" seems to be quite subjective, this high evidentiary hurdle may thwart much of the expert evidence offered on this issue in other cases.

[248]Tenn. Code Ann. § 29-28-103 (1980 & Supp. 1997).

[249]"'Anticipated life.' The anticipated life of a product shall be determined by the expiration date placed on the product by the manufacturer when required by law but shall not commence until the date the product was first purchased for use or consumption." Tenn. Code Ann. § 29-28-102(1). This provision seems tailored more towards food or pharmaceutical products. Further, the expiration date is not simply a warranty cutoff date, but a date "required by law."

[250]Thornton v. Cessna Aircraft Co., 886 F.2d 85 (4th Cir. 1989).

South Carolina business. The aircraft was manufactured in Kansas in 1972. On January 16, 1985, Dr. Lunceford flew the aircraft from South Carolina to Ohio. The next day, on his return flight, the aircraft crashed in Tennessee and he was killed. A lawsuit was commenced in South Carolina raising claims for negligence, breach of implied warranty, and strict liability.

The defendant filed a motion for summary judgment based on the Tennessee statute of repose. To apply that statute the trial court, which was seated in South Carolina, first conducted a choice-of-law analysis. With respect to the tort claims, the court concluded that Tennessee law applied. The appellate court agreed with the trial court's choice-of-law analysis. As such, it was proper for the trial court to apply Tennessee's statute of repose, because it is a substantive law.

> Statutes of limitation . . are primarily instruments of public policy and of court management, and do not confer upon defendants any right to be free from liability, although this may be their effect. . . In contrast, . . ., statutes of repose serve primarily to relieve potential defendants from anxiety over liability for acts committed long ago. Statutes of repose make the filing of suit within a specified time a substantive part of plaintiff's cause of action.[251]

In challenging the choice-of-law conclusion, the plaintiff argued that the sole fact that the crashed occurred in Tennessee was not a sufficient contact to apply its law. However, the Fourth Circuit noted that the U.S.

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[251] Id. at 88 (quoting Goad v. Celotex Corp., 831 F.2d 508, 510-11 (4th Cir. 1987).

Supreme Court has applied the laws of the state that was the situs of an airplane crash on the basis of such a single choice-of-law contact.[252]

On appeal, the plaintiff also challenged, inter alia, the application of Tennessee's statute of repose on public policy grounds. The plaintiff claimed that, because South Carolina did not have a statute of repose and because South Carolina favors open access to courts, the trial court should not have applied the Tennessee statute of repose in that case. However, the appellate court concluded that Tennessee's statute of repose is not a novel legal theory which radically departs from the settled substantive law of South Carolina.[253]

The defendant cross-appealed the trial court's denial of its motion for summary judgment with respect to the warranty claim. The Fourth Circuit concluded that, under South Carolina law, breach of warranty claims are governed by a different choice-of-law analysis. For tort claims, courts apply a *lex loci delicti* analysis. Whereas, for warranty claims, courts look to the most significant contacts. Under that analysis, South Carolina law applied to the warranty claim. Cessna asserted that the warranty claim should be subsumed by the tort claims, but the court rejected that argument.[254] On remand to the trial court, the plaintiff was allowed to proceed on the warranty claim.

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[252]Id. at 89 (citing Richards v. United States, 369 U.S. 1 (1962)).

[253]Id.

[254]Id. at 89-90.

The Tennessee statute of repose was also applied in another aviation case.[255] That case involved an aircraft engine manufactured in 1959 and remanufactured and sold for use in 1963. As in many aviation cases, the tricky issue was not the application of the controlling law, but the determination of whose law applied.[256] In Bramblett, the Tennessee appellate court upheld the trial court's selection and application of Tennessee law and the Tennessee statute of repose.

2. USEFUL SAFE LIFE

a. Idaho

Idaho has a two-tiered time-based statute which effects the potential liability of manufacturers. The first tier is a defense offered to product sellers which will exonerate them from liability if the manufacturer can prove that the harm occurred after the after the "useful safe life" of the product.[257] The phrase "useful safe life" is defined as "begin[ning] at the time of delivery of the product and extend[ing] for the time during which the product would normally be likely to perform or be stored in a safe manner."[258]

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[255]Bramblett v. Avco Corp., 1994 Tenn. App. LEXIS 178 (1994).

[256]That point is particularly true in Bramblett, wherein the choice-of-law analysis applied by Tennessee courts changed during the pendency of the case. 1994 Tenn. App. LEXIS 178, *3 (changing from the doctrine of *lex loci delicti* to that of the "most significant relationship" principles enunciated in The Restatement (Second) of Conflicts of Law.)

[257]Idaho Code [6-1403] § 6-1303(1)(1998).

[258]Idaho Code [6-1403] § 6-1303(1)(a).

The second tier is designated a statute of repose.[259] However, it is not an absolute time bar, but a defense based on a presumption that after ten years a product has exceeded its "useful safe life." The burden to overcome this presumption is placed on the claimant, who must present "clear and convincing" evidence that the "useful safe life" has not expired.[260]

A manufacturer's or product seller's express warranty will defeat application of either tier of these time-based defenses.[261] As with many other statutes of repose, a manufacturer will not be able to protect itself if allegations of intentional misrepresentation or fraudulent concealment are proven.[262]

No aviation related cases were located that applied Idaho's two-tiered defense.

b. Kansas

Kansas has a "useful safe life" statute[263] nearly identical to the two-tiered protection found in Idaho.[264] The first level of protection is that a manufacturer can shield itself from liability if it proves by a preponderance of evidence that the injury occurred during use after the

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[259]Idaho Code [6-1403] § 6-1303(2).

[260]Idaho Code [6-1403] § 6-1303(2)(a). It is interesting to contrast the burden placed on the claimant after ten years (clear and convincing evidence) with that placed on product sellers during the first ten years (preponderance of evidence). The evidentiary burden on a product seller is significantly less than on the claimant.

[261]Idaho Code [6-1403] § 6-1303(1)(b) & (2)(b)(1).

[262]Idaho Code [6-1403] § 6-1303(2)(b)(2).

[263]Kan. Stat. Ann. § 60-3303 (West 1982 & Supp. 1997).

[264]See supra note 257, et seq.

"useful safe life" of the product.[265] The Kansas statute also provides examples of evidence that is "especially probative" in determining whether a product's useful safe life has expired:

> (A) The amount of wear and tear to which the product has been subjected;
>
> (B) the effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;
>
> (C) the normal practices of the user, similar users and the product seller with respect to the circumstances, frequency and purposes of the product's use, and with respect to repairs, renewals and replacements;
>
> (D) any representations, instructions or warnings made by the product seller concerning proper maintenance, storage and use of the product or the expected useful safe life of the product; and
>
> (E) any modification or alteration of the product by the suer or a third party.[266]

The second tier, again as in Idaho, is reached once the product reaches ten years after the time of delivery. At that point, the burdens not only reverse, but escalate against the claimant. The party injured by a product of more than ten years of age must prove by "clear and convincing" evidence that the injury actually occurred during the useful safe life of the product.[267]

As with nearly every statute of repose, the defense does not apply when the manufacturer issues an express warranty of duration greater than ten years or when

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[265]Kan. Stat. Ann. § 60-3303(a)(1).

[266]Id.

[267]Kan. Stat. Ann. § 60-3303(b)(1).

the manufacturer makes an intentional misrepresentation or fraudulently conceals information. No aviation cases were located in which this statute was applied.[268]

c. **Minnesota**

Minnesota has a unique statute, based both on its statutory language and its judicial treatment.[269] It is a "useful life" statute and very similar to the first prong of the statutes in Kansas and Idaho. Under Minnesota's scheme, "it is a defense to a claim against a designer, manufacturer, distributor or seller of the product, or a part thereof, that the injury was sustained following the expiration of the ordinary useful life of the product."[270] Unlike the useful life statutes in Kansas and Idaho, however, the burden does not switch to the claimant to prove the corollary of the foregoing after a fixed-period. Minnesota's statute, similar to the one in Kansas, does provide a laundry list of considerations regarding what to consider when evaluating useful life.[271]

Although the statutory language indicates that it provides a defense to the manufacturer, the Minnesota Supreme Court has determined that this statute is not a

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[268]But see, Alexander v. Beech Aircraft Corp., 952 F.2d 1215 (10th Cir. 1991), which, although applying Indiana law, discusses the Kansas statute in the context of an aviation case.

[269]Model Uniform Product Liability Act, supra note 9, incorporated a useful safe life provision which was derived from the Minnesota statute. 44 Fed. Reg. 62,733.

[270]Minn. Stat. § 604.03 (West 1988).

[271]Minn. Stat. § 604.03, Subd. 2.

statute of repose.[272] That court held that the Minnesota statute merely provided a comparative fault defense, and not a statute of repose-like time bar.[273] As such, that court allowed to stand what might otherwise be deemed an inconsistent verdict. In the underlying case, the jury concluded that the product's useful safe life had expired and also concluded that the manufacturer was negligent. Apparently, if a product never had a "useful safe life" (i.e., it was defective from its inception) or if the manufacturer is aware of a problem but fails to adequately warn the users, under Minnesota's interpretation of the useful life statute, a manufacturer may still be held proportionally liable. There were no reported aviation cases applying this statute.

d. North Dakota

North Dakota products liability statute of repose was declared unconstitutional in 1986 by the North Dakota Supreme Court:

> While there certainly can be legislatively created classifications which bear a close correspondence to the legislative goals, . . . we can discern no such close correspondence between the classification created by [the statute of repose], and the stated legislative goals as would justify the unequal treatment wrought by this statute. . . . Accordingly, we conclude that [North Dakota's statute of repose] violates Article I, § 21, [state equal protection

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[272] Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988).

[273] Id. at 832.

> provision] of the North Dakota Constitution.[274]

Interestingly, a few years later the North Dakota legislature enacted a new statute of repose virtually identical to the one found unconstitutional. That statute of repose provides that "there may be no recovery of damages in a products liability action unless the injury, death, or property damage occurs within ten years of the date of initial purchase for use or consumption, or within eleven years of the date of manufacture of a product.[275] Arguably, the new statute contains the same constitutional infirmities as the previous statute, but, to date, it has not been challenged.

The North Dakota legislature has also created a special chapter of laws solely for aviation manufacturers.[276] The time-based defense offered exclusively to aviation manufacturers is a "useful safe life" provision:

> 1. An aviation manufacturer may not be held liable in a product liability action if the defendant establishes that the harm was caused after the period of useful safe life of the aircraft or aircraft component had expired. The useful safe life of an aircraft or aircraft component may be measured in units of time or in other units that accurately gauge the useful safe life of a product.
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> 2. In a claim for relief that involves injury more than ten years after the date of first delivery of the aircraft or aircraft component to the first user, purchaser, or

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[274] Hanson v. Williams County, 389 N.W.2d 319, 328 (N.D. 1986) (citations omitted).

[275] N.D. Cent. Code § 28-01.3-08 (Supp. 1997).

[276] N.D. Cent. Code § 28-01.4 (Supp. 1997) et seq.

lessee, a disputable presumption arises that the harm was caused after the useful safe life had expired. The presumption may only be rebutted by clear and convincing evidence. If the aviation manufacturer or seller expressly warrants that its product can be utilized safely for a period longer than ten years, the period of repose is extended according to the warranty or promise.

3. With respect to any aircraft component that replaced another product originally in, or which was added to, the aircraft, and which is alleged to have caused the claimant's damages, no claim for damages may be made after the useful safe life of the component, the period stated in the warranty, or ten years after manufacture of the component, whichever is later.

4. A product liability action may not be brought more than two years after the time the claimant discovered, or in the exercise of due diligence should have discovered, the harm and cause of the action.[277]

In North Dakota, therefore, aviation manufacturers specifically benefit from a standard "useful safe life" statute. Although this type of statute is less definitive than a fixed-period statute of repose, in light of the fact that the North Dakota Supreme Court previously found a fixed-period statute of repose extremely harsh and, in fact, unconstitutional,[278] it is more likely that the aviation manufacturers' useful safe life statute will withstand the eventual constitutional challenge.

The North Dakota legislature also offered aviation manufacturers additional significant defenses: one for

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[277]N.D. Cent. Code § 28-01.4-04.

[278]Hanson, supra, 389 N.W.2d at 328.

compliance with federal standards[279] and the other for "state-of-the-art.[280]

e. Washington

Washington has enacted a "useful safe life" type statute, which provides that "a product seller shall not be subject to liability to a claimant for harm under this chapter if the product seller proves by a preponderance of the evidence that the harm was caused after the product's 'useful safe life' had expired."[281] The burden shifts to the claimant twelve years after the delivery of the product.[282] In other words, a presumption is created that the injury

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[279]N.D. Cent. Code § 28-01.4-02 (creating a "disputable presumption that a product is free from an defect").

[280] "An aviation manufacturer or seller of aircraft or aircraft components may not be held liable for any personal injury, death, or damage to property sustained as a result of an alleged defect in a state-of-the-art product. An aircraft or aircraft component is presumed to be a state-of-the-art product if the plaintiff cannot show by a preponderance of the evidence that a safer aircraft or aircraft component was on the market at the time of manufacture. No evidence of subsequent design or modification of an aircraft or aircraft component is admissible to prove that an aircraft or aircraft component is not a state-of-the-art product. The state-of-the-art comparisons must be made to products with similar-intended utility. The trier of the fact shall consider the defense that the designer's choice averted greater peril for a large subclass of intended users and shall consider the economic viability of the component or product."

N.D. Cent. Code § 28-01.4-03.

[281]Wash. Rev. Code § 7.72.060 (West 1992).

[282]Wash. Rev. Code § 7.72.060(2).

occurred after product's "useful safe life" has expired if the injury occurred more than twelve years after delivery.

Unlike similar "useful safe life" statutes in other states, in Washington, the claimant can rebut the presumption by a preponderance of the evidence, i.e, not the higher standard of clear and convincing evidence.[283] However, as with other similar statutes, there are exceptions to its application for intentional misrepresentations or concealment of facts or based on an express warranty.[284] Although no reported aviation cases apply this statutory scheme, it was carefully reviewed by a court applying Oregon law when that court conducted a choice-of-law analysis regarding the application of either Oregon or Washington law.[285]

3. UNIQUE OR HYBRID STATUTES

a. Arkansas

In 1979, Arkansas enacted a statutory defense that merits identification in this article because, although it does not operate as a time bar to a lawsuit, it does use an element of time in a manner which might enure to the benefit of a general aviation manufacturer.[286] This statutory defense provides:

> (c) Use of a product beyond its anticipated life by a consumer where the consumer knew or should have known the anticipated life of the product may be considered as evidence of fault on the part of the consumer.

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[283] Id.

[284] Wash. Rev. Code § 7.72.060(1)(b)(i) and (ii).

[285] See Frosty v. Textron, Inc., 891 F. Supp. 551 (D. Or. 1995) (discussed supra note 244).

[286] Ark. Code Ann. § 16-116-105 (Michie 1987).

Despite being available for nearly twenty years, no aviation case law was located that applied this statutory defense.

b. Colorado

The Colorado legislature considered, but never enacted, a very aviation manufacturer-friendly bill entitled the Colorado Aviation Manufacturers Act ("CAMA").[287] Drafted around the same time the U.S. Congress was considering GARA, CAMA would have drastically limited the liability exposure of manufacturers of aircraft and aircraft components.

After identifying a series of federal regulations which place the ultimate responsibility of the aircraft on aircraft pilot and/or owner,[288] CAMA would have provided that "[a] purchaser, user, or passenger of an aircraft or aircraft component assumes the risk involved in the use of the aircraft or aircraft component"[289] and that the assumption of risk would have operated as "a complete bar to suit."[290] For claims of nonowners, nonusers, and nonpassengers, CAMA appears to have required that any claims against the aviation manufacturer be brought within two years of the product's manufacturer.[291] Moreover, the available total damages in such suits would have been limited to $250,000.00.[292] CAMA was fraught with ambiguities and may have been destined for serious constitutional

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[287]1994 CO H.B. 1182, 59th Colo. Gen. Assembly, 2d Sess.

[288]Id. at 13-21-602(E)(I)-(V).

[289]Id. at 13-21-604(a).

[290]Id. at 13-21-604(B).

[291]Id. at 13-21-607(a).

[292]Id. at 13-21-607(B).

challenges.[293] In any event, CAMA never made it through the Colorado legislature.

Without CAMA, general aviation manufacturers find a only a relatively hospitable venue in Colorado. Although Colorado has a statute of repose, it is limited to "manufacturing equipment."[294]

An aviation manufacturer might, however, benefit from the statute that creates of a rebuttable presumption in favor of a manufacturer ten years after a product is first used or sold.[295] Although not a statute of repose, an aviation manufacturer could assert a Colorado statutory presumption as a possible defense in litigation. The rebuttable presumptions cover the three primary areas of a possible products liability claim (i.e, product defect, manufacturer negligence, and warnings). The three rebuttable presumptions are that (1) the subject product was not defective, (2) the product manufacturer was not negligent, and (3) the warnings were proper and adequate.[296]

When one considers the possible broad scope of protection that might have been available to aviation manufacturers had CAMA been enacted, one would expect to find a history of numerous general aviation suits in Colorado. However, no cases were located in which the products liability presumptions were applied in an aviation

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[293]McNatt, supra note 73, at 331.

[294]Colo. Rev. Stat. § 13-80-107 (1987). "Manufacturing equipment" is defined as equipment used in the operation or process of producing a new product, article, substance, or commodity . . ." Colo. Rev. Stat. § 13-80-107(2).

[295]Colo. Rev. Stat. § 13-21-403. The statute of repose portion of the Model Uniform Product Liability Act contains the same rebuttal presumption provision.

[296]Colo. Rev. Stat.§ 13-21-403(3).

case. Although in the legislative declaration of CAMA emphasized the "unreasonable liability burdens imposed on manufacturers,"[297] perhaps the truer intent of that proposed legislation was to attract the aviation manufacturing industry to Colorado.[298]

c. Connecticut

Connecticut has a hybrid statute of repose.[299] For claimant whose injuries are job-related, i.e., covered by worker's compensation insurance, the statute of repose has a standard application -- product liability claims are barred ten years after the defendant "last parted with possession or control of the product."[300] However, for everyone else, protection of the statute of repose is only available if the claimant is unable to prove that the harm occurred during the "useful safe life of the product."[301]

The statute of repose provides the following guidance for determining whether a product's useful safe life has expired:

> the trier of fact may consider among other factors: (1) The effect on the product of wear and tear or deterioration from natural causes; (2) the effect of climatic and other local conditions in which the product was used; (3) the policy of the user and similar users as to repairs, renewals and replacements; (4) representations, instructions and warnings made by the

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[297]1994 CO H.B. 1182, 59th Colo. Gen. Assembly, 2d Sess. at 13-21-602(B).

[298]Id. at 13-21-602(G)-(I).

[299]Conn. Gen. Stat. § 52-577a (West 1991 & Supp. 1996).

[300]Conn. Gen. Stat. § 52-577a(a).

[301]Conn. Gen. Stat. § 52-577a(c).

> product seller about the useful safe life of the product; and (5) any modification or alteration of the product by a user or third party.[302]

If the claimant cannot prove that the harm occurred during the useful safe life, the claimant may nevertheless still have a cause of action if based on an intentional misrepresentation or fraudulent concealment which was the proximate cause of the injury or based on an express warranty.[303]

Two aviation-related cases have cited to Connecticut's statute of repose. The first, Malerba v. Cessna Aircraft Co., did not address the specific application of the statute of repose. Instead, that case considered whether Connecticut's overall product liability statutory scheme abrogated common law indemnity actions.[304] The court ruled that it did not.

The second case, Nicholson v. United Technologies Corp., did directly consider issues related to the statute of repose.[305] In Nicholson, the plaintiff was injured while working on a helicopter landing gear manufactured by United Technologies. United Technologies filed a motion for summary judgment, which the court denied on two grounds. The standard of review for a motion for summary judgment is such that the motion should be denied if there exists a genuine issue of material fact. The plaintiff in Nicholson identified two such issues. One genuine issue was whether

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[302] Id.

[303] Conn. Gen. Stat. § 52-577a(d).

[304] 210 Conn. 189, 554 a.2d 287 (1989).

[305] 697 F. Supp. 598 (D. Conn. 1988).

or not United Technologies had "possession or control" over the subject product within the ten year repose period.[306] The other genuine issue of material fact was the question of whether the harm occurred during the "useful safe life" of the product.[307] This issue was established simply by the plaintiff documenting that he was not entitled to worker's compensation benefits.

d. Kentucky

Kentucky technically does not have a statute of repose. It does, however, have a time-based defense:

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death, or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.[308]

No reported aviation cases have applied this section since its enactment in 1978.

e. Michigan

Like Arkansas and Kentucky, Michigan does not have true statute of repose in products liability cases. In the Michigan statute setting forth the various statutes of limitations, the following subtle defense is found.

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[306] Id. at 600. Plaintiff's evidence was more than that of a single service call and a courtesy safety check, which had been previously held insufficient to establish a genuine issue of material fact regarding this element. Daily v. New Britain Mach. Co., 200 Conn. 562, 512 a.2d 893 (1986).

[307] Id. at 601.

[308] Ky. Rev. Stat. Ann. § 411.310 (Michie 1992).

> The period of limitations is 3 years for a products liability action. However, in the case of a product which has been in use for not less than 10 years, the plaintiff, in proving a prima facie case, shall be required to do so without the benefit of any presumption.[309]

In addition to not locating reported case law, no case was located in which the pre-ten year products liability presumptions were identified.

f. Texas

Texas has a products liability statute of repose, but it is only for the benefit of manufacturer's of "manufacturing equipment."[310] Shortly prior to the enactment of GARA, the Texas legislature considered a statute of repose specifically enuring to the benefit of the general aviation industry.[311] This legislation was to have provided a twenty-five year statute of repose period.[312] With the subsequent enactment GARA, the proposed Texas law would have been rendered moot, because it directly conflicted with GARA's shorter eighteen year repose period.[313]

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[309]Mich. Comp. Laws § 600.5805 (West 1987 & Supp. 1998).

[310]Tex. Civ. Prac. & Rem. Code Ann. § 16.012 (West Supp. 1998).

[311]H.B. 1343, 73d Leg., 1st Sess. (1993).

[312]Id. at section 16.013(2)(B).

[313]GARA supersedes any state law which would permit an action to be brought after the 18-year period. GARA Sec. (2)(d).

B. STATUTES NO LONGER CONSTITUTIONAL[314]

1. FIXED-PERIOD STATUTES OF REPOSE

a. Alabama

Alabama enacted a ten-year statute of repose[315] in 1979 with the following stated purpose:

> The legislature finds that product liability actions and litigation has risen in recent years. The legislature further finds that these increases are having an impact upon consumer prices, and upon the availability, cost and use of product liability insurance, thus, affecting the availability of compensation for injured consumers. Therefore, it is the intent of the legislature to provide a comprehensive time framework for the commencement and maintenance of all product liability actions brought in this state.[316]

In accordance with Alabama's statute of repose, a plaintiff was required to commence a product liability action[317] against the original seller within ten years after

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[314]Although the following state statutes have either been held to be unconstitutional or have been repealed by the governing state legislative body, these statutes merit review due to their possible value as precedence for cases in other jurisdictions with similar statutes or for cases governed by GARA.

[315]Ala. Code § 6-5-502 (1993).

[316]Ala. Code § 6-5-500 (1993).

[317]A "product liability action" was defined to include "(a) negligence, (b) innocent or negligent misrepresentation, (c) the manufacturer's liability doctrine, (d) the Alabama extended manufacturer's liability doctrine, (e) breach of any implied warranty, and (f) breach of any oral express warranty and no other." Ala. Code § 6-5-501(2)

the manufactured product was first put to use.[318] The repose period did not begin to run if the consumer was distributor or another manufacturer intending to use the product as a component in one of its own products.[319]

In 1982, however, just three years after enactment, the statute of repose was found to be violative of the Alabama State Constitution.[320] The Alabama Supreme Court found that the statute of repose violated Article I, 13, which guarantees Alabama citizens that "for each injury a remedy by due process of law must exist."

During those three years, no reported cases were located in which a general aviation manufacturer sought to use this statute of repose. Interestingly, however, the Alabama Supreme Court did recognize that aviation products were one of the few products likely benefit from a statute of repose due to their long life.[321]

b. Arizona

In 1978, Arizona enacted a modified twelve-year statute of repose.[322] After the expiration of the repose period, suits for strict products liability were barred. However, claims based on negligence and express warranty were still permitted. Pursuant to Arizona's statute, the

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[318]Ala. Code § 6-5-502(c).

[319]Id.

[320]Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982).

[321]416 So. 2d at 1002 (citing an Alabama Insurance Services Office study which found "that only 2.7 percent of products involved in products liability actions were purchased more than six years prior to the injury-causing event.")

[322]Ariz. Rev. Stat. Ann. § 12-551 (West 1992).

repose period began to run where the product was "first sold for use or consumption."[323]

Subsequently, this statute of repose was held be unconstitutional because it abrogated Arizona's state constitutional right to recover damages for injuries.[324] There are three reported cases in which general aviation manufacturers claimed that the product liability actions should be barred based on Arizona statute of repose and each reached different conclusions.

In the earliest case, it is unclear what ultimately became of the action against the manufacturer.[325] The Wert case was originally filed in the United States District Court, District of Arizona. However, it was later transferred to the United States District Court, Eastern District of Missouri, after the court granted a motion based on *forum non conveniens* principles.[326]

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[323]Id.

[324]Hazine v. Montgomery Elevator Co., 176 Ariz. 340, 861 P.2d 625 (1993). This was the second occasion for the Arizona Supreme Court to consider the constitutionality of this statute of repose. On the first occasion, that Court concluded that the statute passed constitutional muster. Bryant v. Continental Conveyor & Equip. Co., 156 Ariz. 193, 751 P.2d 509 (1988). However, in Bryant the vote was only three to two in favor of constitutionality, and one of the three votes was from an appellate level judge sitting by designation. In Hazine, with a newly constituted state Supreme Court panel, the vote was four to one against constitutionality.

[325]Wert v. McDonnel Douglas Corp., 634 F. Supp. 401 (E.D. Mo. 1986).

[326]The transferee court was nevertheless required to apply the law that would have been applied in the transferring court's venue. Id. at 412 (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 243 n8, 102 S. Ct. 252, 70 L.Ed.2d 419 (1981).

After conducting a choice-of-law analysis, the Wert court concluded that Arizona's state law would apply to this incident, and this would include the then existing statute of repose. Having reached that conclusion, the court nevertheless declined to grant the defendant aviation manufacturer's motion to dismiss based on the statute of repose. The court reasoned that the case was in its infancy and that there were allegations that there had been post-sale repairs and/or modifications to the subject F-C4 Phantom Fighter which might warrant tolling or restarting the repose period.[327] Thus, the court provided the parties additional time to conduct fact discovery to more fully develop those issues.

In another case, the manufacturer successfully applied the Arizona statute of repose to bar a product liability case against it which involved a nineteen year of aircraft.[328] Of course, the manufacturer benefitted because that case was decided while the statute of repose was still deemed constitutional.

In the third case, also commenced while the statute of repose was considered constitutional, but which was still pending at the time of the Arizona Supreme Court's subsequent finding of unconstitutionality, the manufacturer did not benefit from the statute of repose.[329]

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[327]Id., 614 F. Supp. at 406-07. Based on similar reasoning, the court declined to consider at that time the plaintiffs' challenge to the constitutionality of Arizona's statute of repose. Id. at 407.

[328]Carr v. Beech Aircraft Corp., 758 F. Supp. 1330 (D. Ariz. 1991).

[329]Davis v. Cessna Aircraft Corp., 182 Ariz. 26, 893 P.2d 26 (Ct. App. 1994) (holding the Arizona Supreme Court's (continued...)

c. Florida

Florida's statute of repose has had a very interesting history.[330] Unfortunately, as will be demonstrated in several general aviation cases discussed below, plaintiffs and defendants alike were buffeted by the swirling winds of uncertainty as to the application of this statute.

Florida's original twelve-year statute of repose was found to be unconstitutional in a 1980 by the Florida Supreme Court.[331] Thereafter, the Florida Supreme Court reconsidered the issue and reached a different conclusion, to wit, that the statute of repose was constitutional.[332] Although the Florida Supreme Court definitively resolved the constitutionality question, the Florida legislature in 1986

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decision regarding the constitutionality of the statute of repose applied retroactively.) Due to the retroactive application, Cessna lost the benefit of an earlier holding that barred a claim for strict products liability based on alleged modifications to the aircrafts written materials, including repair directives, additions to the owner's manual, and a placard on procedures for restarting a stalled engine. 168 Ariz. 301, 812 P.2d 1119 (Ariz. Ct. App. 1991), summ. judgment granted, 182 Ariz. 26, 893 P.2d 26 (Ct. App. 1994)

[330]Fla. Stat. Ann. § 95.031 (West 1982)(Amended by 1986 Fla. Laws ch. 86-272, deleting product liability statute of repose).

[331]Battilla v. Allis Chalmers Mfg. Co., 392 So. 2d 874 (Fla. 1980)(superseded by statute).

[332]Pullam v. Cincinnati, Inc., 476 So. 2d 657, 659 (Fla. 1985); appeal dismissed, 475 U.S. 1114, 106 S. Ct. 1626, 90 L.Ed.2d 174 (1986).

repealed the statute of repose for products liability actions.[333]

In Spellissy v. United Technologies Corp., the Eleventh Circuit upheld the trial court's grant of summary judgment based on Florida's statute of repose.[334] In relevant part, the defendant aircraft manufacturer, General Dynamics, sought summary judgment because the aircraft in question was more than 12 years old at the time of the accident. At the time of the accident, April 30, 1983, the Florida statute of repose was still legislatively enacted, but deemed unconstitutional by the Florida Supreme Court. During the pendency of the case, however, the Florida Supreme Court reversed its unconstitutionality finding. Even still, subsequent to that reversal, and also during the pendency of this case, the Florida legislature repealed the statute of repose. The Spellissy Court, a federal appellate court, without any elaboration, simply relied on Florida Supreme Court decision Melendez v. Dreis and Krump Mfg. Co. (which involved an identically situated plaintiff) and concluded that the plaintiff's claim was barred as against General Dynamics.[335]

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[333]1986 Fla. Laws ch. 86-272.

[334]837 F.2d 967, 975 (11th Cir. 1988)

[335]Id. (citing Melendez, supra, 515 So. 2d 735 (Fla. 1987)(concluding that identically situated plaintiff was barred because a legislative statutory repeal is prospective only (unless expressly provided for otherwise) and a Florida Supreme Court decision to overrule a prior decision is retrospective and prospective (unless expressly provided to be prospective only); see also, Wallis v. The Grumman Corp., 515 So. 2d 1276 (Fla. 1987)(reaching the same conclusion). The Wallis Court also held that a failure to warn claim does survive longer than the repose period. The court reasoned that, because a duty to warn is founded on the design and

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Inconsistently, however, the plaintiffs in another lawsuit were allowed to pursue their claims against the manufacturer because a Florida Appellate Court refused to retroactively revive the statute of repose.[336] That case arose from the 1983 crash of a 1972 Cessna. The plaintiffs commenced their lawsuit in 1985. However, during the time period between the accident and the commencement of the lawsuit, the statute of repose period elapsed and the Florida Supreme Court revive the statute of repose. The plaintiffs claimed that they relied on the Florida Supreme Court's Battilla holding (i.e., the statute of repose was unconstitutional) to their detriment. The Appellate Court allowed plaintiffs' claim to stand because the majority of that court believed that an exception to the general rule of retroactive application of Supreme Court decisions applied:

> To this rule, however, there is a certain well-recognized exception that where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision retrospective operation.[337]

(...continued)
manufacture of a product and because causes of action based on the design and manufacture of a product are extinguished after the expiration of the repose period, there can be no continuing duty to warn of a defect. Id. at 1277.

[336]National Ins. Underwriters v. Cessna Aircraft Inc., 522 So. 2d 53 (Fla. Ct. App. 1988).

[337]Id. at 54 (quoting Florida Forest & Park Service v. Strickland, 154 Fla. 472, 18 So. 2d 251 (1944). This holding is still difficult of reconcile with Spellissy and Melendez. Further, as noted by the dissent, the stated exception applies to "property or contract" rights, not to
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In a third aviation case in which Florida's statute of repose was at issue, the question presented to the Appellate Court was whether a wrongful death action brought within two years of the death could be maintained against a manufacturer even though the statute of repose period had expired.[338] There had been Florida legal authority which indicated that if an accident resulting in a death occurred before the running of the statute of repose, an action against a manufacturer would be timely if commenced within two years of the death, even if the twelve-year repose period had elapse in the interim.[339] However, the plaintiff in Kirchner was not allowed to proceed against the manufacturer because at the time of the accident/death, the statute of repose had already expired. In other words, had the decedent survived his claim would have also been time-barred.

In another case, not mired down with issues of retroactivity and prospectivity, a United States District Court applied Florida's statute of repose to the facts of a helicopter crash.[340] In that matter, the decedent's representative argued that Florida's twelve-year statute of repose should not bar a claim against the manufacturer. Apparently, the helicopter was repaired by a third-party within the repose period in accordance with the

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tort causes of actions. Id. at 56 (Cowart, J., dissenting).

[338]Kirchner v. Aviall, Inc., 513 So. 2d 1273 (1987).

[339]See, e.g., Phlieger v. Nissan Motor Co., Ltd., 487 So. 2d 1096 (Fla. Dist. Ct. App. 1986), approved, 508 So. 2d 713 (Fla. 1987).

[340]Butchkosky v. Enstrom Helicopter Corp, 855 F. Supp. 1251 (S.D. Fla. 1993), aff'd, 66 F.3d 341 (11th Cir. 1995).

manufacturers' instruction manual. Further, that manual was issued by the manufacturer within the repose period. However, the Butchkosky Court held that the statute of repose barred the claims:

> To hold that [the manufacturer] should be liable because its manuals issued within the period of repose did not provide an adequate means of correcting the design flaw of the critical component, would be to circumvent the statute of repose by providing a back door to sue for the design flaw -- ostensibly not for the design flaw itself, but for the failure of the manuals to adequately correct the flaw. The result would be the evisceration of the statute of repose. If a plaintiff is precluded by the statute of repose from suing for a design flaw in a product, the plaintiff must also be precluded from suing for a failure to correct the design flaw, whether that failure be in the inadequacy of the text of a subsequently issued owner's manual or in repair guidelines subsequently sent to mechanics.[341]

Accordingly, the Butchkosky Court concluded that, because the written instructions did not constitute a product, their issuance during the repose period did not recommence the running of the statute of repose.

In a lawsuit arising out of an August 1989 crash of a 23 year old Cessna A 185E, the Florida Appellate Court affirmed the trial court's granting of summary judgment in favor of the defendant.[342] However, in response to the plaintiff's motion for reconsideration, the appellate court

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[341] Id. at 1255.

[342] Cassoutt v. Cessna Aircraft Co., 660 So. 2d 277 (Fla. Dist. Ct. App.), modified, 1995 Fla. App. LEXIS 3562 (1995).

modified its holding and instructed the trial court to allow the plaintiff to amend his complaint. Plaintiff's complaint initially alleged that the aircraft, as a whole, was defective. Apparently, subsequent to the expiration of the twelve-year statute of repose, the subject aircraft underwent a modification in which a component part (a seat rail) was added and which possibly had a role in the cause of the accident. The appellate court's modified ruling allowed the plaintiff to allege that the component part was a separate "complete product" in and of itself, and thereby a legal basis for a cause of action against Cessna not barred by the statute of repose.[343]

d. New Hampshire

New Hampshire enacted a twelve year statute of repose in 1978.[344] However, in 1983, the New Hampshire Supreme Court concluded that the statute of repose was unconstitutional.[345] The court determined that this statute neither "reasonably nor substantially" related to the stated legislative goal of controlling products liability insurance rates.[346] No reported aviation cases were located.

e. Rhode Island

The Rhode Island Supreme Court concluded that its ten-year statute of repose was unconstitutional because it

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[343]Cassoutt v. Cessna Aircraft Co., 660 So. 2d 277 (Fla. Dist. Ct. App.), modified, 1995 Fla. App. LEXIS 3562 (1995)

[344]N.H. Rev. Stat. Ann. § 507-D:2 (1997).

[345]Heath v. Sears, Roebuck & Co., 123 N.H. 512, 464 a.2d 288 (1983).

[346]Id., 123 N.H. at 525, 464 a.2d at 295.

violated its citizen's right to access to court.[347] The statute, which remains on the books, provided that an action for the recovery of damages for personal injury . . . shall be commenced within ten (10) years after the date the product was first purchased for use or consumption."[348]

f. South Dakota

Unlike most states that enacted statutes of repose which were later overturned by constitutional challenges in the courts, the South Dakota legislature enacted a statute of repose in 1978, only to repeal it in 1985.[349] Prior to repeal, South Dakota had one of the more drastic repose periods, "the cause of action shall be barred if it accrues more than six years after the date of the delivery of the completed product to its first purchaser. . ."[350]

g. Utah

The Utah Supreme Court ruled that the Utah statute of repose was unconstitutional in a general aviation case involving the crash of a twenty-three year of aircraft.[351] The Utah product liability statute of repose provided:

> No action shall be brought for the recovery of damages for personal injury, death or damage to property more than six years after the date of initial purchase for use or consumption, or ten

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[347]Kennedy v. Cumberland Eng'g Co., 471 A.2d 195 (R.I. 1984).

[348]R.I. Gen. Laws 9-1-13 (1997).

[349]S.D. Codified Laws 15-2-12.1 (1984) (repealed by SL 1985, ch 157 § 2.)

[350]Id.

[351]Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah), amended, 1985 Utah LEXIS 1003 (1985).

> years after the date of manufacture of a product, . . .[352]

However, as stated, the Utah Supreme Court ruled that this violated the constitutional right of an injured party to an open court.[353] The Utah Supreme Court also concluded the statute of repose violated the plaintiff's constitutional right to seek redress for a wrongful death.[354] In response to this holding, the Utah legislature repealed the act in 1989.[355]

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[352]Utah Code Ann. § 78-15-3 (1988).

[353]Utah Const. Art. I, sec. 11. The Berry court stated that the statute of repose "does not reasonably and substantially advance the stated purpose of the statute ... and whatever beneficial effects may accrue from the statute of repose do not justify the denial of the rights protected by Article I, section 11." Id., 717 P.2d at 683. (citations omitted).

[354]Utah Const. Art. XVI, sec. 5.

[355]1989 Utah Laws. ch. 119 § 1. One facet of the Berry court's analysis begs the question whether the same court applying the same analysis would have upheld the constitutionality of a "useful safe life" type statute. Id., at 681 (noting that "the six- and ten-year periods [were] arbitrary because they apply to all kinds of products, irrespective of their useful life.") However, the Utah legislature, after repealing the original version, did not enact this alternative model.

V. CONCLUSION

As the case authorities in Chapters Two and Three suggest, practitioners handling cases with aged general aviation aircraft will need to thoroughly develop, *inter alia*, the factual record regarding when, where, and how the specific product was introduced into the stream of commerce, when and what components were replaced, and when and if the manufacturer had any non-manufacturing involvement with the subject aircraft after it was in service. Further, due to the relative length of GARA and the varied types of state statutes of repose, the case authorities also indicate that careful analysis of choice-of-law issues may be of critical importance to the final resolution of the case. The success of the prosecution and/or defense of a general aviation case involving an aircraft less than 18 years old may well depend on the existence, duration, and application of a state statute of repose or a useful safe life statute as part of the controlling substantive law. The compilation and analysis of the individual statutes of repose set forth above, along with the general aviation case law (which frequently included a choice-of-law analysis), may serve as an excellent starting point for the practitioner's research for resolving these critical issues.

With respect to the impact of GARA, with its enactment time became of the essence for the general aviation industry on a national level. Subject to a few discrete exceptions, 18 years post-initial aircraft delivery for sale or lease, a general aviation manufacturer should be free from liability exposure for its product. However, only time will tell whether or not the purported litigation

crisis that descended upon the general aviation industry has been alleviated by GARA.

GARA, as drafted, appears to leave everyone in the chain of distribution (aside from the manufacturer) at risk for tort liability for older aircraft. Accordingly, GARA may in effect only substitute who is to be the targeted defendant and not ease the number of lawsuits or the costs associated therewith. Further, for manufacturers whose components are used in general aviation aircraft, GARA appears to only provide relief if the specific component is as durable as the overall aircraft and such component is not periodically replaced over the lifetime of the aircraft. With a component's replacement comes the recommencing of the repose period and the associated continued risk of tort liability. Therefore, GARA my not provide much relief to component manufacturers. As an aside, it will be interesting to monitor whether replacement parts for older aircraft become harder to locate (i.e., manufacturers stop producing them to avoid potential liability) or such parts become significantly more expensive in order to defray the costs associated with the future liability exposure.

Commentators, industry analysts, and statistics indicate that the general aviation industry received a tremendous boost by the enactment of GARA and thereby attained one of the stated goals -- to revitalize general aviation manufacturing in the United States. If, however, the entities through whom the manufacturers sell or lease their products are inundated with lawsuits or if component manufacturers merely become "replacement" defendants for the overall manufacturer, then the possible benefits effectuated by GARA may prove to be of little moment.

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