
AIRCRAFT BUILDERS COUNCIL, INC. LAW REPORT

NTSB AVIATION ACCIDENT INVESTIGATION PROCEDURES

*Mark Pilon
New York*

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*Aghavni V. Kasparian
Stephanie N. Brie
Los Angeles*

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*Darrell M. Padgette
Los Angeles*

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*Courtney M. Poel
Los Angeles*



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TABLE OF CONTENTS

NTSB AVIATION ACCIDENT INVESTIGATION PROCEDURES	Page 1
BRINGING PREEMPTION BACK TO AVIATION CLAIMS IN CALIFORNIA	Page 10
CALIFORNIA ADOPTS THE “SOPHISTICATED USER” DEFENSE BY PLACING A LABEL ON ALREADY EXISTING LEGAL PRINCIPLES	Page 16
HOW OLD PARTS ARE MADE “NEW” AND TRIGGER THE GARA ROLLING PROVISION	Page 24

NTSB AVIATION ACCIDENT INVESTIGATION PROCEDURES

By
Mark Pilon

The National Transportation Safety Board (NTSB) was established in 1967 as an agency of the Department of Transportation (DOT), charged primarily with the responsibility of investigating civil aviation accidents. The NTSB is comprised of five Board Members, each appointed by the President and confirmed by the Senate for a five-year term.

Following Congress' passage of the Independent Safety Board Act of 1975, the NTSB became an independent agency, thereby severing all organizational ties with the DOT and promoting greater objectivity in accident investigations. The nature of the NTSB's aviation accident investigation is to "determine the facts, conditions, and circumstances relating to an accident ... and the probable cause thereof. These results are then used to ascertain measures that would best tend to prevent similar accidents."¹ The investigations are purely fact-finding in nature and are not intended to assess the rights and liabilities of any party.² The NTSB derives its statutory authority for its function and operations from Chapter 11 of Title 49 of the United States Code. The rules of the board are codified under Chapter VII of Title 49 of the Code of Federal Regulations.

Pursuant to these statutory provisions, the NTSB was granted a broad range of powers, which include, but are not limited to: (1) priority status of its investigation over other investigations conducted by other government bodies³; (2) the power to enter, upon written notice, the location and/or wreckage of an accident to perform anything necessary to conduct the investigation or to inspect any record, process, facility, etc. or to question anyone with knowledge relevant to the investigation⁴; (3) final decisions regarding testing, testing parameters, and by whom testing is

¹ 49 CFR § 831.4

² Id.

³ 49 U.S.C. § 1131(a)(2)(A); 49 CFR § 831.5

⁴ 49 U.S.C. § 1134 (a)(1) & (2); 49 CFR § 831.9(a)

conducted⁵; and (4) the power to hire outside experts and/or consultants, approve transactions necessary to carry out the investigation, make use of the services, facilities, etc. of other federal government organizations, appoint advisory committees as needed, among other things.⁶

The NTSB's involvement in domestic aviation accident investigations will vary depending on the nature of the incident. Although the NTSB retains final authority to issue probable cause findings, pursuant to 14 CFR § 831.2(a)(2), the NTSB will relegate to the FAA the investigation of accidents

involving rotorcraft, aerial application, amateur-built aircraft, restricted category aircraft, and all fixed-wing aircraft which have a certificated maximum gross takeoff weight of 12,500 pounds or less except:

- (1) Accidents in which fatal injuries have occurred to an occupant of such aircraft, but shall include accidents involving fatalities incurred as a result of aerial application operations, amateur-built aircraft operations, or restricted category aircraft operations.
- (2) Accidents involving aircraft operated in accordance with the provisions of Part 135 of the Federal Air Regulations ...
- (3) Accidents involving aircraft operated by an air carrier authorized by certificate of public convenience and necessity to engage in air transportation.
- (4) Accidents involving midair collisions.⁷

⁵ 49 U.S.C. § 1134(d)

⁶ 49 U.S.C. § 1113(b)(1)(A)-(I)

⁷ See Appendix to 49 CFR § 800

In cases involving accidents other than those of the type described above, the NTSB maintains several regional offices throughout the country. Said offices are required to notify the NTSB's Communications Center (the centralized operation that coordinates the accident investigation process) of any major aviation accident, which involves (1) air carriers, commuter, or air taxi operations, (2) public figures or officials with widespread recognition or prominence, (3) fatal midair collisions or collisions involving air traffic control, or (4) matters of potentially high public interest.⁸ The NTSB regional office with jurisdiction (i.e., in whose area of concern the accident occurred) will dispatch an investigator to establish NTSB jurisdiction over the accident scene and coordinate preliminary efforts until relieved by the designated Investigator-in-Charge (IIC) and the "Go Team"⁹ (see below). For aviation accidents other than those relegated to the FAA and those classified as major aviation accidents, such as incidents involving general aviation fixed-wing aircraft, the regional NTSB office and a local IIC will lead the investigation in a manner similar to that described below, though the investigative team will not be as large or divided into several working groups.

In the event of the occurrence of a major aviation accident, upon being notified by its regional office, the NTSB will assemble a "Go Team", lead by an IIC and comprised of several individuals with various specialties. These specialties can include air traffic control, operations, meteorology, human performance, structures, systems, powerplants, maintenance records, survival factors, aircraft performance, cockpit voice recorders, flight data recorders, and metallurgy.¹⁰ Each specialist is assigned as a chairman of an investigative group (Group Chairman), conducting an investigation relating to that individual's particular specialty, as part of the investigation as a whole. In addition, a Board Member

⁸ NTSB Aviation Investigation Manual—Major Team Investigations § 2.2

⁹ Id. §§ 2.2.1, 2.2.2

¹⁰ Id. § 1.1

will typically be assigned to the investigation to act as the NTSB's spokesperson.

As part of its investigation, the IIC selects parties to join in the investigation. Said parties consist of “those persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident ... and who can provide suitable qualified technical personnel ... to assist in the investigation.”¹¹ However, no party involved in the investigation may be represented “by any person who also represents claimants or insurers.”¹²

The NTSB will include “organizations that can provide the necessary technical assistance to the investigation”, which will normally consist of the aircraft operator and aircraft, systems, and powerplant manufacturers.¹³ The FAA also participates in the investigation, assisting the NTSB and determining whether immediate regulatory action is required to avoid further incidents.¹⁴ Lastly, the NTSB can request the assistance of other agencies or organization, such as the local police and firefighters, the National Guard, the FBI, the Federal Emergency Management Agency (FEMA), and the Red Cross.¹⁵

Any party to the investigation is required to sign the “Statement of Party Representatives” form, acknowledging their status as a party and allowing said individual or organization to participate in meetings and receive all the documents and materials generated throughout the investigation.¹⁶

Each party selected to the investigation team will designate a party coordinator—an individual who will function as the IIC's primary point of contact for that party. The NTSB

¹¹ 49 CFR § 831.11(a)(1)

¹² Id. §831.11(a)(3)

¹³ Id. § 2.4.1

¹⁴ See 49 CFR § 931.11; see also 49 U.S.C. § 1132

¹⁵ Id.

¹⁶ NTSB Aviation Investigation Manual—Major Team Investigations § 3.6.2

requires that “this individual have sufficient authority within the party’s organization to be able to make decisions without a great deal of consultation with his/her supervisors [and] must be available to the IIC at all times during the investigation.”¹⁷ The party coordinators will then suggest key personnel from their organizations to assist in the investigation, which are ultimately selected by the IIC and Group Chairmen.

Once the Go Team is selected and arrives on the scene, NTSB procedures dictate that all on scene activities cease, unless search and recovery efforts are under way, at which time an NTSB representative will remain on the scene to monitor such efforts.¹⁸ The IIC “is the senior person on-scene and all investigative activity at the site is under his/her control.”¹⁹

The IIC is first tasked with holding an organizational meeting, at which time parties to the investigation are introduced, the facts of the incident are reviewed, specialties are assigned, and operating procedures are explained.²⁰ Subsequently, the Group Chairmen hold a meeting amongst the individuals/parties assigned to their groups to discuss strategy and procedure, and to explain to participants that “for all matters related to the accident and investigation, the [participants’] primary responsibility is their working group ... — not to their respective organization.”²¹

Following initial coordination and organization, and prior to the investigative team being permitted to enter the site, the wreckage and surrounding area must be assessed for risks in order to determine the “hazards at the accident site and safety resources available to the investigative staff.”²² The NTSB assumes no responsibility for any injuries sustained by members of the

¹⁷ Id. § 3.2.1

¹⁸ Id. § 3.2

¹⁹ Id. § 3.5

²⁰ Id. § 3.2

²¹ Id. § 3.6

²² Id. § 3.3

investigative team nor for the provision of any protective safety equipment.²³

Each Group Chairman is tasked with compiling “field notes” which document the day-to-day activities and findings of the working groups. In the end, each working group will submit one final set of field notes, prepared in accordance with NTSB procedure, and signed by each member of the working group, indicating their concurrence in the findings, or including the reasons for any particular member’s dissent.²⁴ Once the on-scene investigation is completed, field notes are submitted to the IIC for approval. Once approved, the information contained in the notes is to be shared with all parties “unless it is proprietary in nature or there is other concern for the dissemination of sensitive material.”²⁵ A working group will not be dismissed until the field notes are approved by the IIC and distributed. Once dismissed, a working group may be reassembled for “follow-up activities” “such as witness/crew interviews, maintenance records reviews, flight testing simulations, or the testing/teardown of powerplants, instruments, and system components”, which are also documented by additional field notes.²⁶

During the on-site investigation, the IIC conducts daily progress meetings to “disseminate information obtained during the day’s activities and to discuss plans for subsequent investigative activities.”²⁷ When the discussions of the progress meeting uncover new information or facts, said meeting is typically followed by a press briefing, to be held by the present Board Member, or in his/her absence, the IIC.

In addition to the above, the IIC is also responsible for (1) briefing the NTSB on any recent findings and the investigation’s

²³ Id.

²⁴ Id. § 3.6.1

²⁵ Id. § 3.6.1

²⁶ Id.

²⁷ Id. § 3.7

progress; (2) conducting staff meetings with NTSB personnel (e.g., Group Chairmen) to discuss issues amongst themselves, to coordinate further activities, or to convey instructions from the NTSB; (3) meeting with party coordinators to discuss the investigation, procedures, findings, etc.; (4) resolving conflicts among the working groups or members of a group; and (5) inspecting the accident at least twice per day and providing necessary supervision and assistance.²⁸

Once the majority of the on-site activities have been completed and little new information can be obtained from further on-site investigation, the IIC will set a final progress meeting to conclude the on-site activities, discuss proposed follow-up activities, and share the approved field notes to group members.²⁹

The release of the wreckage occurs once the IIC and the NTSB have determined that it is no longer required. This is done in two parts, using NTSB form 6120.15. First, the NTSB will release the wreckage minus any parts or components it deems require further examination.³⁰ Then, once these parts or components have been examined, they also will be released. Whenever the NTSB releases the wreckage or any parts thereof, the recipient must sign the 6120.15 form to acknowledge receipt.

Once the on-site investigation is concluded, the IIC must then organize a work planning meeting to plan future activities with the Group Chairmen. The IIC will continue to coordinate said activities until the active working groups have completed and submitted their factual reports, which are based on the aforementioned field notes and the subsequent activities conducted after the conclusion of the on-site investigation. The factual reports can, but are not required to, include comments from individual group members. Pursuant to 49 CFR § 831.6, when preparing said

²⁸ Id. §§ 3.10.1 to 3.10.4

²⁹ Id. § 3.11

³⁰ Id. § 3.12

reports, Group Chairmen are required to “honor [a] party’s request to withhold disclosure” of “trade secrets”, when the material has been identified as such or the “staff has substantial reason to believe it is a trade secret or confidential commercial information.”³¹

The Group Chairmen must then supplement the factual report with an analysis report, which evaluates the “facts documented by the group ... and state[s] the principal findings and their relevance to the probable cause of the accident.”³² The analysis report is for internal NTSB use only. The analysis reports are eventually used by the IIC in drafting the NTSB’s final accident report.

The final step in the fact-finding process of the investigation is the Technical Review, by which parties to the investigation conduct a final review of the material, including the Group Chairmen’s factual reports, and raise any concerns regarding the fact-finding process.³³ The Technical Review is typically held immediately following the conclusion of the fact-finding process (e.g., once the Group Chairmen have submitted their factual reports) or upon conclusions of public hearings, if any. During the Review, the Group Chairmen discuss their respective investigative activities, and the party coordinators are permitted to ask questions regarding the material presented as well as “suggest additional avenues of investigation or to submit additional factual information for inclusion into the public docket to ensure that the information is considered by the [NTSB].”³⁴

The next step in the process involves the IIC convening a report planning meeting, with the goal of harmonizing the views of the participants with regards to “major issues to be discussed in the report, recommendation topics, the thrust of the probable cause,

³¹ Id. § 4.4

³² Id.

³³ Id. § 4.9

³⁴ Id. See also 49 CFR § 831.14(a)

and remaining deadlines.”³⁵ The outcome of this meeting is then distributed to all participants.

The last step in the investigative process is drafting and approving the final report. The final report is drafted from the factual and analysis reports submitted by the Group Chairmen and must follow the format set out in ICAO Annex 13.³⁶ The draft report is first circulated amongst the Group Chairmen, which often results in several redrafts. Once this is completed, the revised report is then sent to the NTSB directors for review, which culminates in the Director’s Review. Following the Director’s Review, the report is then revised accordingly, to address any issues or concerns raised. Subsequently, the report is submitted to the Board Members as the Notation Draft, which will include “the principal issues of the investigation and...unresolved areas of staff disagreement.”³⁷ The report is approved upon the conclusion of a public Board Meeting, in which the Board, after questioning the IIC or other members of the investigative team and reviewing the information and material presented, chooses to “adopt the report in its entirety, adopt the report with changes discussed during the meeting, or require further investigation or rewriting before approving the report.”³⁸ Once the Board Members have an opportunity discuss the report, they vote on the report’s “findings, recommendations, and the probable cause(s) of the accident.”³⁹ If approved, any dissenting opinions may also be incorporated into the report. Once a report has been adopted by the Board Members, it is released, and the supporting documentation is sealed and placed in storage for one year following the adoption of the report.

³⁵ Id. § 4.11

³⁶ Id. §§ 4.12.1, 4.12.2

³⁷ Id. § 4.12.2

³⁸ Id. § 4.13

³⁹ Id.

**BRINGING PREEMPTION BACK TO AVIATION
CLAIMS IN CALIFORNIA**

By
Aghavni V. Kasparian
Stephanie N. Brie

While recent developments in aviation litigation concerning federal preemption are proving to be advantageous for aircraft and component part manufacturers sued in California, the same may not necessarily be said for service providers in the field of aviation. California courts have shown an increasing willingness to bar state common law claims, such as negligence and strict liability, where a manufacturer is in compliance with federal air safety regulations. Indicative of this emerging trend is a recent Ninth Circuit decision in which the Court held that the Federal Aviation Act of 1958 (Act) preempted the field of aviation safety, and prevented the plaintiff from recovering for personal injury based on state law causes of action where there was no violation of the Act. Conversely, the application of preemption to bar state law claims against aviation companies who provide services to airline passengers is unsettled and currently on appeal in the Ninth Circuit.

Congress' power to preempt state law arises from the Supremacy Clause of the U.S. Constitution. Although states have the sovereign power to enact and enforce laws within the federal system, Congress can choose to prevent states from regulating in certain areas under the power granted to it by the Supremacy Clause. In the area of public health and safety, which is traditionally a concern of the states rather than Congress, the Supreme Court has declared that it will presume that Congress does not intend to preempt state law unless it makes its intent to do so "clear and manifest."¹ Congress' intent to preempt state law may

¹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

be expressly stated in a federal statute or may be implied where a federal law so thoroughly occupies a field as to leave no room for the states to supplement it.

The benchmark case in which the Supreme Court held that a federal regulatory statute could preempt state common law tort claims in addition to state and local statutes is *Cippollone v. Liggett Group, Inc.*² The Supreme Court held that the Federal Cigarette Labeling and Advertising Act expressly preempted state law failure to warn claims against tobacco companies. Particularly relevant is the Supreme Court's position, as expressed in *Cippollone*, that common law tort doctrines can have the same coercive impact in the area of health and safety as statutes and ordinances, and thus are equally subject to preemption by Congress. The Supreme Court noted that a federal statute does not have to specifically mention tort remedies in order to preempt them, but rather can make its intent to preempt "clear and manifest" through general language.

PREEMPTION IN THE CONTEXT OF AIR SAFETY

In the field of air safety, one of the first courts to analyze the Act under the Supremacy Clause was the Third Circuit in *Abdullah v. American Airlines, Inc.*³ The Court looked to the legislative history of the Act, and similar federal air safety regulations, and concluded that Congress intended to preempt state law. Congress enacted the Act and accompanying legislation as a response to a series of fatal air crashes involving aircraft operating under disparate flight rules, and concluded that the creation of a single, uniform system of regulation was vital to air safety. The Third Circuit stated that the Act thus establishes "complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, jurisdictions."

² 505 U.S. 504 (1992).

³ 181 F.3d 363 (3d Cir. 1999).

In 2007, the Ninth Circuit in *Montalvo v. Spirit Airlines*⁴ adopted the Third Circuit's broad approach to preemption in air safety cases. The Ninth Circuit held that "federal law generally establishes the applicable standards of care in the field of aviation safety."

The plaintiffs in *Montalvo* filed suit against an airline under California common law negligence for failure to warn of the dangers of deep vein thrombosis (DVT). The district court dismissed this claim on preemption grounds, holding that the aviation safety regulations set forth under the Act impliedly preempt state law standards of care. The Ninth Circuit affirmed on appeal, agreeing with the trial court that Congress intended to have a single, uniform system for regulating aviation safety, especially given the fact that air transportation is a national operation. Since there was no federal requirement that airlines warn passengers of the risk of developing DVT, the court concluded that the plaintiffs' state law claims failed as a matter of law.

This holding from *Montalvo* was clarified in a California case decided this year.⁵ In that case, the California Court of Appeal explained that the Ninth Circuit's ruling in *Montalvo* is that the Act preempts the field of air safety, meaning that "a state may not expand the federal standards by imposing a common law duty of care." Although federal law sets the standards for aviation safety, the court explained that state law causes of action may be invoked where the violation of the federal standards for aviation safety results in personal injury or death.

Other circuits have also recently adopted a broad approach to federal preemption in the field of air safety and have held that federal aviation standards preempt any duty imposed by state law. As an example, the Sixth Circuit decided a product

⁴ 508 F.3d 464 (9th Cir. 2007).

⁵ *Booth v. Santa Barbara Biplanes*, 158 Cal. App. 4th 1173 (Cal. Ct. App. 2d 2008).

liability case arising from a helicopter accident and relied on *Abdullah* in holding that the plaintiffs' state law failure to warn claim was preempted by the Act.⁶

PREEMPTION OF AVIATION "SERVICE"-RELATED CLAIMS

Contrary to claims involving air safety, application of preemption in the context of claims arising from negligent "service" in connection with air travel—that is, cases that involve claims relating to service under the federal Airline Deregulation Act (ADA) of 1978—is less certain. The ADA provides in part that "a state ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a *price, route, or service* of an air carrier that may provide air transportation under this subpart." (Emphasis added.) Although the language of the ADA appears to manifest an intent to preempt certain state law claims, courts have long debated the meaning of "service" in this context. In *Charas v. Trans World Airlines*,⁷ the Ninth Circuit interpreted the term narrowly, holding that "service" refers only to "the prices, schedules, origins and destinations" and not to "an airline's provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities."

In a different context, the Supreme Court in *Rowe v. New Hampshire Motor Transport Association* adopted a broader definition of the term "service" in interpreting a federal deregulation act related to motor carriers (a statute modeled after the ADA).⁸ The Court held that a state statute requiring tobacco retailers to verify the age of a tobacco delivery recipient was related to "service," and was thus preempted by federal law. In so holding, the Court expanded the definition of "service" beyond simply prices and schedules.

⁶ *Greene v. B.F. Goodrich Avionics Sys.*, 409 F.3d 784 (6th Cir. 2005).

⁷ 160 F.3d 1259 (9th Cir. 1998).

⁸ 128 S.Ct. 989 (2008).

In the recent case of *Air Transport Association of America v. Cuomo*, the Second Circuit relied on this broad interpretation of the term “service” from *Rowe* and concluded that the ADA preempted New York state legislation which affirmatively required “airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays.”⁹

In an unpublished case decided this year—*Hanni v. American Airlines*¹⁰—a lower federal court in California attempted to reconcile the broader definition of “service” from *Rowe* and *Cuomo* with the earlier Ninth Circuit definition from *Charas*. The California lower federal court distinguished *Charas*, which involved state common law claims by injured passengers seeking compensation for past tortious conduct, from *Rowe* and *Cuomo*, which involved challenges to state statutes creating affirmative requirements. The court concluded that “[a]ffirmative regulations restricting how a carrier does business will by definition result in a ‘direct substitution of [the state’s] governmental commands for competitive market forces.’ ... In contrast, allowing individuals to recover for injuries suffered does not create any such regulation.” In *Hanni*, only plaintiff’s claims related to compensation for lodging, meals, substitute transportation, and similar expenses due to a flight delay were affirmatively regulated by state statute whereas her claims for false imprisonment, intentional infliction of emotional distress, and negligence were all based on state common law. The court held that only plaintiff’s claims for compensation based on a state statute were preempted by the ADA. This case is currently on appeal in the Ninth Circuit.

Thus, in the context of “service”-related aviation claims in California, the ADA will preempt a plaintiff’s claims under a state statute that attempts to regulate “service,” as defined more broadly under *Rowe* and *Cuomo*. However, it remains to be seen whether

⁹ 520 F.3d 218 (2nd Cir. 2008).

¹⁰ Slip copy, 2008 WL 1885794 (N.D. Cal. Apr. 25, 2008) (unpublished decision) (appeal filed on Aug. 13, 2008).

the Ninth Circuit will adopt the Supreme Court's broader definition of "service" and preempt plaintiff's claims relating to "service" that are based on state common law.

THE FUTURE OF PREEMPTION

The court's application of preemption may be diverging depending on the type of aviation claim. On the one hand, the courts' new-found readiness to apply federal preemption in air safety cases bodes well for manufacturers defending aviation claims. Although federal preemption has long existed as a defense *in theory*, these recent court decisions indicate a growing trend to apply federal preemption *in practice* to bar state law claims in air safety litigation. However, due to the limited number of aviation cases involving preemption, the factual scenarios under which preemption will apply remain to be seen.

On the other hand, application of preemption to "service"-related claims to bar state common law claims is uncertain. The days ahead will hopefully bring an end to state law claims in California so long as aviation companies are in full compliance with federal air safety regulations and the ADA.

**CALIFORNIA ADOPTS THE
“SOPHISTICATED USER” DEFENSE BY
PLACING A LABEL ON ALREADY
EXISTING LEGAL PRINCIPLES**

By
Darrell M. Padgette

ABSTRACT

Manufacturers may be held liable in negligence and in strict products liability for inadequate warnings or a failure to warn.¹ However, the sophisticated user defense insulates manufacturers from liability for such claims when (1) an injured end user knew of the product’s dangers; or when (2) an intermediate purchaser (i.e., a sophisticated user) knew or should have known about the product dangers, even though the ultimate user did not. As such, the sophisticated user defense acts as an exception to a manufacturer’s general duty to warn. On April 3, 2008 the California Supreme Court unanimously adopted the “sophisticated user” defense to negligence and strict product liability causes of action.²

INTRODUCTION

Due to the glut of product liability lawsuits having the potential to bankrupt companies, and out of an abundance of caution to head off litigation, it appears that manufacturers’ warnings are reaching new levels of absurdity in recent times.

These days, consumers are warned to remove their children from baby strollers before folding the stroller, they are being warned not to use toilet brushes for personal hygiene, that hairdryers should not be used while sleeping, that an Ipod Shuffle©

¹ *Anderson v. Owens-Corning Fiberglas Corp.* (1991), 53 Cal.3d 987, 1002.

² *Johnson v. American Standard, Inc.* (2008), 43 Cal.4th 56.

should not be eaten or that a fishing lure (with three steel hooks) is harmful if swallowed. Warnings are even given to those who by implication must be blind and/or illiterate, as one warning states: “If you do not understand or cannot read all directions, cautions and warnings, do not use this product.” A good plaintiff’s lawyer could have a field day with this “catch-all” warning which arguably couldn’t be read or understood by the target audience of those who cannot read or understand.

While there are many more examples of the absurd, the point is that society has been struggling to strike a balance between social responsibility and personal accountability. The recent California Supreme Court ruling is one small step in the right direction toward personal accountability, particularly relating to persons of special expertise.

THE EVOLUTION OF CALIFORNIA’S SOPHISTICATED USER
DOCTRINE

1. A Manufacturer’s General Duty to Warn

For negligent failure to warn claims, a plaintiff must prove “that a manufacturer...did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about”.³ In contrast, a strict liability plaintiff need only prove “that the [manufacturer] did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution.”⁴ The difference being that in strict liability, the standard of care and/or the reasonableness of a manufacturer’s conduct is immaterial to liability for failure to

³ *Anderson supra*, 53 Cal.3d at 1002.

⁴ *Id.*

warn.⁵ In either case, a manufacturer's duty to warn continues so long as the product remains in use.⁶

The purpose of the warning requirement has been to inform consumers of a product's danger thereby allowing consumers the choice to either not use the product at all or to use the product in a manner that minimizes the degree of risk.⁷ "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required to prevent the use of a product from becoming unreasonably dangerous. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective."⁸

The sophisticated user defense evolved as a natural outgrowth of the failure to warn framework of § 388 of the Restatement (Second) of Torts and the "obvious danger rule".⁹ Section 388, entitled "Chattel Known to Be Dangerous for Intended Use", provides:

"One who supplies directly or through a third person a chattel for another to use is subject to liability to those

⁵ *Id.* at 1002-1003. The *Anderson* court used the following example to illustrate this distinction: "a reasonably prudent manufacturer might reasonably decide that the risk of harm was such as not to require a warning as, for example, if the manufacturer's own testing showed a result contrary to that of others in the scientific community. Such a manufacturer might escape liability under negligence principles. In contrast, under strict liability principles the manufacturer has no such leeway; the manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product." *Anderson, supra*, 53 Cal.3d at 1003.

⁶ *Valentine v. Baxter Healthcare Corp.* (1999), 68 Cal.App.4th 1467, 1482.

⁷ *Anderson supra*, 53 Cal.3d at 1003, citing *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121, 129-130 (9th Cir. 1968) (describing the need for warnings to provide consumers with a "true choice").

⁸ *Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987), 192 Cal.App.3d 1143, 1151.

⁹ *Johnson supra*, 43 Cal.4th at 65.

whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) **has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition**, and

(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.”¹⁰
(Emphasis added.)

Of significance, § 388(b) *supra* does not focus on the injured consumer’s *actual* knowledge of dangers. Rather, it focuses on the manufacturer’s reasonable expectations of what the ultimate consumer *should already know about a given product’s risk*. The Restatement’s Comment k to § 388(b) *supra* explains this point and consequently narrows the range of warnings that need be given.

2. No Duty to Warn of That Which Common Sense Dictates

Comment k to § 388(b) *supra*, entitled “When warning of defects [is]unnecessary”, provides in pertinent part:

“One who supplies a chattel to others to use for any purpose is under a duty to exercise reasonable care to inform them of its dangerous character in so far as it is known to him..., if, but only if, he has no reason to expect that those for whose use the chattel is supplied will

¹⁰ Restatement (Second) of Torts, § 388 (1965).

discover its condition and realize the danger involved... However, the condition, although readily observable, may be one which only persons of special experience would realize to be dangerous. In such case, if the supplier...has no reason to believe that those who use it will have such *special experience...*, he is required to inform them of the risk of which he himself knows and which he has no reason to suppose that they will realize.” (Emphasis added.)

Given the foregoing, various courts around the United States have interpreted § 388(b) to mean that “if the manufacturer reasonably believes the user will know or should know about a given product’s risk, the manufacturer need not warn that user of that risk”.¹¹

Of greater significance, Comment k introduces the concept of persons with “special experience”. However, nothing further is defined, discussed or applied in § 388 with respect to these persons.

3. No Duty to Warn of Obvious Dangers

Aside from common sense, the “obvious danger rule”, as the name implies, insulates manufacturers from negligent and strict liability failure to warn claims for dangers, or the potentiality of which, are generally known and recognized.¹² “No one needs notice of that which he already knows.”¹³

¹¹ *Johnson supra*, 43 Cal.4th at 66.

¹² *Bojorquez v. House of Toys, Inc.* (1976), 62 Cal.App.3d 930, 933.

¹³ *Johnson supra*, 43 Cal.4th at 65, citing *Billiar v. Minnesota Mining and Mfg. Co.*, 623 F.2d 240, 243 (2nd Cir.1980).

Examples of obvious dangers for which no warnings need be given include: bows and arrows¹⁴, pellet guns¹⁵ and slingshots.¹⁶ “Slingshots have been used as toys and weapons since Old Testament times... Ever since David slew Goliath young and old alike have known that slingshots can be dangerous and deadly.”¹⁷

4. The Sophisticated User Defense Emerges in California

The “sophisticated user” doctrine in essence, is the merger of § 388 (and persons of “special experience”) with the obvious danger rule discussed above. After combining these two doctrines, the result is known as the “sophisticated user defense”. The rationale being that a manufacturer supplies a product to a particular class of persons or professionals who are presumed to be knowledgeable and experienced in handling and/or using the product. Because of this special experience, the manufacturer will rely upon the sophisticated user to disseminate information concerning potential dangers of the product to the ultimate users of the product. As such, the manufacturer is relieved of the duty to warn.

Consequently, “under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware”.¹⁸ Just as manufacturers need not warn ordinary consumers about dangers that are generally known, manufacturers need not warn members of a trade or profession (sophisticated users) about dangers that are generally known to that trade or profession.¹⁹ This is the embodiment of the sophisticated user doctrine.

¹⁴ *Morris v. Toy Box* (1962), 204 Cal.App.2d 468, 472.

¹⁵ *Holmes v. JC Penny Co.* (1982), 133 Cal.App.3d 216, 220.

¹⁶ *Bojorquez supra*, 62 Cal.App.3d at 933.

¹⁷ *Id.*

¹⁸ *Johnson supra*, 43 Cal.4th at 65.

¹⁹ *Id.* at 67.

The incipient case in California applied the sophisticated user defense to preclude an HVAC technician from asserting failure to warn claims regarding R-22 exposure against an air conditioning equipment manufacturer, because it was widely known among HVAC technicians that R-22, when heated, can decompose into noxious byproducts.²⁰ Although the sophisticated user defense is particularly suitable to employment-related injury cases, there has been some extension of this doctrine to other applications. For example, the defense absolved an aircraft manufacturer of failure to warn claims brought by an airline (sophisticated user) concerning alleged defects in the aircraft's aural warning system, the associated circuit breaker and the flight director.²¹ Implicit in the court's decision was that the airline was a sophisticated user of the airplane, and as such, needed no warning.

HOW THE "SOPHISTICATED USER" DEFENSE OPERATES IN CALIFORNIA

The sophisticated user defense in California operates under three parameters. First, a "should have known" standard is imposed on all sophisticated users. Second, the defense applies to both negligence and strict liability actions. Third, the determination of "user sophistication" will be made from objective general predictions of knowledge shared by the user population group.

1. A "Should Have Known" Standard Applies

The relevant inquiry focuses on what the plaintiff *knew, or should have known*, about the danger giving rise to injury.²² (Emphasis added.) Under this objective inquiry, if a product's hazards were generally known to a user's trade or profession, it matters not that the user himself was ignorant as to those

²⁰ *Id.* at 74.

²¹ *In re Air Crash Disaster*, 86 F.3d 498, 521-522 (6th Cir.1996).

²² *Johnson supra*, 43 Cal.4th at 71.

dangers.²³ This standard disregards the hardship that may be faced by some users who were actually unaware of the dangers, through misreading their training manuals, failing to study properly, forgetting what they were taught or otherwise.²⁴

2. The Defense is Applicable to Negligence and Strict Liability Claims

This prong is self-explanatory. In California, the sophisticated user defense will operate to defeat product defect claims based on both negligence and on strict liability.²⁵

3. “User Sophistication” is Measured Objectively

As noted by the Court, “the sophisticated user defense will always be employed when a sophisticated user should have, but did not, know of the risk. Otherwise, the issue would be actual knowledge and causation.”²⁶ User sophistication is determined by what is known to the general population of sophisticated users, not by what is known or not known to the injured individual.²⁷ Similarly, the sophisticated user’s knowledge of risk is measured from the time of plaintiff’s injury, not from the date the product was manufactured.²⁸

CONCLUSION

Given the foregoing, California’s adoption of the sophisticated user defense is more or less a merger and labeling of already existing legal principles. In as much as ordinary consumers need no warnings about dangers of which they *should know*, sophisticated users need no warnings about dangers of which, based on their specialized knowledge and experience, *should know*.

²³ *Id.* (“Under the ‘should have known’ standard there will be some users who were actually unaware of the dangers.”)

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 74.

²⁷ *Id.*

²⁸ *Id.*

**HOW OLD PARTS ARE MADE “NEW” AND
TRIGGER THE GARA ROLLING
PROVISION**

By
Courtney M. Poel

The General Aviation Revitalization Act (“GARA”) is a statute of repose that precludes liability arising from claimed defects in an aircraft or its component parts if the accident occurs more than 18 years after the date of delivery of the aircraft. 49 U.S.C. § 40101, note (2004). This statute is an advantageous weapon in the aviation defendants’ arsenal. However, there are several provisions of GARA that plaintiffs regularly assert to test the boundaries of the statute’s protection.

The rolling provision of GARA is one such provision. It states with regard to component parts, that the 18-year period begins anew with respect to any “new” component part, which “replaced” another component originally in the aircraft, or which was added to the aircraft, if such component part is alleged to have caused the accident in question. 49 U.S.C. 40101, note, § 2(a)(2).

Plaintiffs try to expand the application and scope of the rolling provision by asserting the provision in cases with unique fact patterns.¹ However, the case law interpreting the application of the rolling provision indicates there is a spectrum of analysis with two clearly defined ends. New replacement parts are situated at one end of this spectrum, triggering the rolling provision and restarting the statutory period as to the new part. *See Hiser v. Bell Helicopter Textron, Inc.*, 111 Cal. App. 4th 640 (Cal. Ct. App. 2003). Conversely, overhauled parts are located at the other end of the

¹ One area where plaintiffs have achieved success in broadening the application and scope of the GARA’s rolling provision is through the application of the provision to revisions and newly drafted sections of the aircraft’s flight manual. *See Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155, 1158 (9th Cir. 2000).

spectrum, exempt from the application of the rolling provision and safely within the protection of GARA. See *Robinson v. Hartzell Propeller Inc.*, 326 F. Supp. 2d 631 (E.D. Pa. 2004). The danger lies somewhere in the middle. A recent unpublished opinion by the California Court of Appeal threatens to narrow the scope of GARA's protection by applying the rolling provision to an old part, which the court deemed "redesigned" through a new safety process. *Slate v. United Technologies Corporation*, 2008 Cal. App. Unpub. LEXIS 5777 (Cal. Ct. App. July 18, 2008).² This is an important case to monitor based on the potential for this decision to expand the application of the rolling provision into new overhaul processes.

GARA'S ROLLING PROVISION

The plain language of the rolling provision clearly applies to a newly manufactured part, which either replaces an existing part or is added to the aircraft.

The court in *Hiser v. Bell Helicopter Textron, Inc.*, 111 Cal. App. 4th 640, 649-651 (Cal. Ct. App. 2003), performed an extensive analysis of the statutory language of GARA's rolling provision. The *Hiser* court determined that the correct interpretation of the statute is found in the language itself and noted that the "parallel construction of the statute makes clear the new limitation period begins when a new system replaces an old system, a new component part replaces an old component, etc." In *Campbell v. Parker-Hannifin Corp.*, 69 Cal. App. 4th 1534, 1546 (Cal. Ct. App. 1999), the court interpreted the legislative intent of GARA as allowing a rolling statute of repose that will provide victims "recourse *against new component part manufacturers.*" (quoting from the House Judiciary Committee Report).

² As of the writing of this article, it is our understanding that Sikorsky has petitioned the California Supreme Court for review of this decision.

The GARA rolling provision does not directly address old or used component parts. The plain language of the statute and the emphasis placed on the term ‘new’ by courts analyzing the statutory language of the rolling provision suggests the statute was intended to apply only to newly manufactured replacement parts. Furthermore, the case law preceding the *Slate* decision is largely consistent with this analysis.

NEW COMPONENT PARTS TRIGGER GARA’S ROLLING PROVISION

In *Hiser*, a helicopter involved in a fire suppression mission crashed, allegedly due to a failure in the fuel transfer system. Prior to this crash, the defendant manufacturer issued a series of Technical Bulletins pertaining to this fuel flow system, including one introducing a new design of the fuel flow switches. This Technical Bulletin also offered a kit for sale, which included new parts to replace the original fuel flow switches.

The plaintiff alleged that these fuel flow switches were defectively designed and failed to alert the pilot of the low fuel condition. The fuel transfer system was an original part to the aircraft, which met the 18-year period for the GARA statute. However, the original fuel flow switches were replaced with the new switches from the Technical Bulletin kit within the 18-year statutory period.

The plaintiff argued that the replacement of new fuel flow switches restarted the GARA statute as to the entire fuel flow system. The court rejected plaintiff’s argument and held that the GARA rolling provision only applied to the newly replaced parts, the fuel flow switches, which were deemed to be defectively designed. The courts’ application of the rolling provision clearly distinguished the component parts from the entire system and narrowly applied the rolling provision to the design of the new parts, which replaced the old parts of the system.

OVERHAULED PARTS ARE EXEMPT FROM GARA'S ROLLING
PROVISION

In stark contrast to the application of the rolling provision to new component parts, courts have consistently held that the overhaul of an old component part does not trigger the rolling provision of GARA as to the manufacturer of the overhauled part.

In *Robinson*, the plaintiffs argued that the overhaul of the aircraft propeller essentially restored the propeller to a new part and triggered the rolling provision of GARA. The court determined that the plain language of the statute conflicted with the plaintiffs' argument because the rolling provision called for the replacement of the original part with a new, as opposed to overhauled part.

The *Robinson* court rejected the plaintiffs' argument, stating that "if every time a critical component was overhauled, or even replaced, the statute of repose began anew thus permitting an individual to sue for a design flaw, then the manufacturer of the aircraft would never be afforded the protection of the statute of repose." *Id.* at 663 (citing *Butchkosky v. Enstrom Helicopter Corp.*, 855 F. Supp. 1251 (S.D. Fla. 1993)). The *Robinson* court recognized that the application of the GARA's rolling provision to an overhauled part cut firmly against the policy rationale of GARA and would "effectively eviscerate" the statute of repose.

Other courts interpreting the application of the rolling provision to overhauled parts have followed *Robinson* and similarly held that an overhauled part is not a 'new' part and does not restart the statutory period under the rolling provision of GARA.³

³ See *Brewer v. Dodson Aviation*, 2006 U.S. Dist. LEXIS 81528 *26-27 (W.D. Wash. November 7, 2006) (determining that the overhaul of a component part does not restart the GARA statute as to the manufacturer/designer of the component part, but may restart the GARA statute as to the entity that performed the overhaul); see also *Willett v. Cessna Aircraft Company*, 851 N.E.2d 626, 635 (Ill. App. Ct. 2006); *LaHaye v. Galvin Flying Service, Inc.*, 144 Fed.Appx. 631, 633 (9th Cir. 2005) (unpublished) (determining that the overhaul of a component part does not restart the GARA statute as to the entity that designed the component part.)

AN OLD PART IS ‘REDESIGNED’ THROUGH A NEW PROCESS AND
TRIGGERS GARA’S ROLLING PROVISION

The above case law interpreting the application of GARA’s rolling provision clearly places new replacement parts at one end of the spectrum, triggering the rolling provision and starting the statute anew. At the other end of this spectrum, overhauled parts are excluded from the rolling provision and afforded the full protection of the GARA statute. However, there is a dangerous middle ground recently explored in an unpublished decision by the California Court of Appeal.

This court’s decision overturned the trial court’s granting of defendant United Technologies Corporation and Sikorsky Aircraft Corporation’s (collectively “Sikorsky”) GARA motion for summary judgment. *Slate*, 2008 Cal. App. Unpub. LEXIS 5777 *1 (Cal. Ct. App., July 18, 2008). The court determined that a component part (that was at least forty years old) was redesigned and made ‘new’ for purposes of the GARA rolling provision. The old part achieved this newly designed status through the application of a machining process designed to strengthen the part pursuant to a safety bulletin issued by Sikorsky.

This case arose from the crash of a Sikorsky S58ET. The plaintiff pilot was performing external load operations placing air conditioning units on the roof of a school. The plaintiffs alleged that a defective input bevel pinion (“IBP”) in the intermediate gearbox (“IGB”) caused the loss of tail rotor thrust, and the resulting crash.⁴

The facts of this case are complicated by the age of the subject helicopter and its component parts, and the lack of

⁴ However, the plaintiff admitted that slightly before the crash the IGB warning light illuminated. The plaintiff landed, removed the chip plug, identified the collection of a metallic substance (designed to warn the pilot of a potential failure), wiped the metallic substance off the chip plug, reinserted the plug and continued with his scheduled flight operations.

available evidence due to the subject helicopter's original use by the CIA as part of its covert Air America Operations in Southeast Asia during the Vietnam War. However, the following facts are known and undisputed. Sikorsky manufactured the subject helicopter in 1962. Sikorsky also designed the subject IBP in the 1950s. Fenn Manufacturing made the subject IBP in the 1960s, which was the last time that Fenn manufactured this specific type of IBP.⁵ In 1984, Sikorsky issued an Alert Service Bulletin recommending the shot peening of any replacement IBPs, whether the part was new or used.⁶ *9. Finally in 1991, the owner of the subject helicopter installed the subject IBP, which had been shot peened in accordance with Sikorsky's safety bulletin. However, there was conflicting evidence as to whether the subject IBP was a new or used part prior to its being shot peened.

The court reversed the lower court's grant of summary judgment and held that Sikorsky's "directive that replacement IBPs be shot peened before being placed in service constituted a redesign of the IBP..." which triggered the GARA's rolling provision and restarted the statute as to the replacement IBP. The court rejected the defendant's arguments that the aircraft's delivery date, the original design of the IBP, and the issuance of the alert service bulletin all occurred well outside the GARA's 18-year period. Instead, the court focused solely on the new machining process applied to the subject IBP, which the court determined constituted a redesign. As the "newly designed" part was installed

⁵ Fenn was brought in late to this litigation. Shortly after the trial court's granting of Sikorsky's GARA motion for summary judgment, Fenn negotiated a nominal good faith settlement agreement with the plaintiffs barring any third party claims by Sikorsky.

⁶ Shot peening "is a process for treating metal parts by controlled high-speed impact of many balls (shot). It is used mainly to increase the resistance of the metal parts against fatigue..." *Slate*, 2008 Cal. App. Unpub. LEXIS 5777 at *2 n. 1 (quoting Fuchs, Shot Peening (1986) Mechanical Engineers' Handbook, p. 941 § 32.1.)

on the subject aircraft within GARA's 18 year window, Sikorsky lost GARA protection.

The court supported its holding through an analysis of *Hiser*. The facts of *Hiser* are similar in a few respects because in both cases the defendant issued a safety bulletin, which called for the replacement of a component part. *See Hiser supra*. However, the *Slate* court does not identify the foremost distinguishing factor in *Hiser*, which is that the replacement parts were actually new parts. A newly designed part removed from a manufacturer-supplier kit is not necessarily comparable to a forty-year old part subjected to a new machining process.

The *Slate* court's decision treads dangerously in the middle ground of the GARA's rolling provision and threatens to narrow the scope of the GARA's protection. The *Slate* court does not provide future courts with guidelines for determining when a new process will be considered a redesign of an old part for purposes of triggering the rolling provision of GARA.

Furthermore, the *Slate* court does not address, or attempt to distinguish the facts of *Slate* and the process of shot peening from prior case law precluding liability for manufacturers and designers of overhauled parts. The failure of the court to distinguish *Slate* from these prior cases creates some uncertainty, which plaintiffs will likely use to expand the application of the rolling provision to newly applied overhaul processes. It is not a far reach for plaintiffs to argue based on *Slate* that new overhaul procedures, developed through advanced technology or machinery, constitute a redesign of the overhauled part, and are thus subject to GARA's rolling provision exception.

LOOKING FORWARD

The *Slate* case is an unpublished decision and does not create precedent that other courts in California must follow. However, California Supreme Court review may result in a published opinion. Also, this case is a good gauge of how courts in

California are applying GARA and the rolling provision. Furthermore, plaintiffs' attorneys will exploit this decision and will likely attempt to find cases where they can assert this argument in the future, including expanding the decision to apply to new processes in overhaul cases. The *Slate* case highlights the dangerous middle ground in the spectrum of cases applying the GARA rolling provision and provides a roadmap as to the direction plaintiffs may travel in the future when attempting to defeat a GARA motion.

