GARA DOING ITS JOB

By:
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In the early 1990′s, the lead counsel of a general aviation aircraft manufacturer made the following statement while tort reform legislation was being proposed around the country: ″Our job as lawyers is to put ourselves out of business." Today, while there is still ongoing litigation in the general aviation products liability arena, his statement is proving to be true as there has been a significant drop in cases involving older aircraft, resulting in lawyers occupying their time in other areas. This has come about as a direct result of the General Aviation Revitalization Act of 1994, commonly referred to as "GARA″ found at 49 US Code 40101. The statute passed by Congress bars civil actions, for injury and property damages, arising out of an accident involving a general aviation aircraft or component system therein, that was delivered eighteen years before the action was brought. If a plaintiff commenced suit today, the aircraft would have to have been manufactured in 1985 or later and, as most of the existing general aviation fleet was manufactured prior to that date, the potential number of cases that can go forward against general aviation aircraft manufacturers and component manufacturers has been significantly reduced. In the nine years since its passage, the constitutionality of the Act has been upheld and the wording of the statute′s definitions and exceptions have been tested, for the most part, unsuccessfully by the plaintiffs to date. In the last two years, there have been a few significant decisions, which will be outlined below.

GARA is a classic statute of repose; it is not a statute of limitations. It bars actions being brought eighteen years after delivery of the aircraft or component, not just eighteen years before the date of the accident. This language was upheld in the case of *Lyon v. Augusta SPA*, 252 F.3d 1078 (9th Circuit, 2001), cert denied 534 US 1079, 15,1 L.Ed. 2d.694, 122 S.Ct. 809 (2002). The *Lyon* case involved the death of three individuals on November 26, 1993, in the crash of a Marcatti Model F-260 aircraft in Santa Monica, California. The aircraft had originally been delivered by Marcatti in December of 1970 in Belgium. The decedents' survivors brought wrongful-death actions against Marcatti and its parent corporation, August SPA, on November 15, 1994. GARA′s effective date was August 17, 1994, and the defendant manufacturers moved to dismiss the lawsuit on various grounds including that it was barred by GARA. The District Court granted the motion and the 9th Circuit Court of Appeals affirmed. The plaintiffs argued that GARA was: (1) unconstitutional; and (2) could not be applied retroactively. The 9th Circuit found that the legislative history and wording of the Act was clear in its intent to bar claims after eighteen years from delivery of the aircraft. The Court noted various Supreme Court decisions that allowed retroactive legislation, and while the normal presumption is for a statute not to be retroactive, in light of the language contained in GARA, it was clear that Congress intended the statute to apply to accidents that occurred prior to its enactment. Plaintiffs also claimed GARA was unconstitutional, claiming it was a statute of limitations that could not be shortened to eliminate plaintiff's ability to file an action. The Court found that GARA was not a statute of limitations, it was a statute of repose, which Congress is fully empowered to enact. The purpose of GARA was to protect the party from defending a lawsuit long after the product was sold and the Court noted that ″while an injured party may feel aggrieved that no action can be brought, repose is a choice the Legislature is free to make." The Court noted that Congress did, in fact,

protect those actions that had already been filed prior to GARA and interestingly, other actions arising out of the same accident that had been filed prior to the effective date, were allowed to proceed.

In another case decided by the 9th Circuit Court of Appeals, *Estate of Kennedy v. Bell Helicopter Textron*, 283 Fed. 3rd 1107 (9th Cir. 2002), the Court held that the date of the first delivery of the aircraft in question was the starting point of GARA's time period, regardless of who it was delivered to. On November 5, 1996, a Bell Helicopter Textron, Model TH-1L "Huey", broke up in mid-air and crashed, killing the pilot Robin Kennedy. The helicopter was first delivered to the U.S. Navy in 1970. In 1984, the helicopter was sold as military surplus and received type certification and an airworthiness certificate in 1986 by the FAA. A wrongful-death action was commenced by the Estate of Kennedy and Bell Helicopter moved to dismiss under GARA. The plaintiff argued that the date the helicopter received its first type certification, for civilian use, was the date it first became a general aviation aircraft for the purposes of statute. The District Court agreed and Bell appealed. The 9th Circuit reversed finding that GARA's statute of repose begins to run on the date the aircraft was first delivered to a customer, even if it was not being used as a general aviation aircraft at the time.

In its decision the Court noted that the statute states at (1)(A) "the date of delivery of the aircraft to its first purchaser or leasee, if delivered directly from the manufacturer." It is silent as to the status of the recipient of the aircraft. The term "aircraft" is defined broadly as "any contrivance invented, used or designated to navigate or fly in the air." See GARA Section 3(1) (cross-referencing 49 USC 40102 (a)(6)). The Court found that under GARA, an aircraft cannot fulfill the statute's definition of a "general aviation aircraft" until an accident occurs. Section 2(c) states "general aviation aircraft" means any aircraft for which a type certificate or an airworthiness certificate has been issued by the FAA for an aircraft with a maximum seating capacity of fewer than twenty people and not, being used in scheduled passenger carrying operations at the time of the accident.[1]

The issue of whether the purchaser of an aircraft type certificate, who is not the original manufacturer, receives the benefit of GARA was decided by the Supreme Court of Iowa in the case of *Mason v. Schweizer Aircraft Corp.*, 653 N.W. 2nd 543 (Iowa 2002). On August 19, 1996, Kevin Mason, a police officer, was seriously injured when a Model 269A helicopter, originally manufactured by Hughes Tool Company, crashed. The helicopter was originally sold to the U.S. Army in 1968. Hughes held the original type certificate for the Model 269A, that was eventually acquired by Schweizer Aircraft in 1986. Schweizer never manufactured the Model 269A helicopter, but it did make a Model C and D and published maintenance support materials for the 269A, including updates. Schweizer moved to dismiss the Complaint under GARA claiming the aircraft was delivered more than eighteen years before the action was commenced. The plaintiff

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[1] This was an interlocutory appeal, which is rarely permitted in Federal Courts. The 9th Circuit, however, found jurisdiction as GARA creates an explicit statutory right not to stand trial and allowed the appeal under the Collateral Order Doctrine. Contrarily, the Delaware Supreme Court rejected an appeal that had been certified to it by the lower court that had rejected the GARA defense. See *Fairchild Aircraft v. Michaud* 2002 WL 63157.

argued that Schweizer was not the manufacturer of the helicopter within the meaning of GARA. The Plaintiff also claimed the action was brought under the reinstatement of Torts 324A, liability to a 3rd person for negligent performance of an undertaking based on Schweizer's providing maintenance materials to the owner that omitted pertinent information that they claimed contributed to causing the accident. The lower court held Schweizer, by virtue of its purchase of the type certificate, was the successor in interest of the original manufacturer and entitled to protection under GARA as a manufacturer and the plaintiff appealed.

The Supreme Court of Iowa first rejected plaintiff's claims that the defendant was not a successor manufacturer under Iowa law. The Court then found that Congress intended GARA to apply as a Federal Act, which preempted state law, and that Schweizer was a manufacturer within the meeting of the statute, regardless the theory of the stated causes of action. By acquiring the type certificate of the Model 269 product line, Schweizer had stepped into the shoes of the original manufacturer and was entitled to the protection of the eighteen year statute of repose. The Court further held that plaintiff's failure to warn allegations were also barred under GARA as it found Schweizer was issuing updates in its role as a manufacturer. The Court noted that as a successor manufacturer, it had taken over the duties and obligations of the original manufacturer as to that product, which is also protected from liability for such claims. To invoke the "rolling" provision of GARA, any revision of the manual would have to directly relate to the alleged cause of the crash, citing to *Caldwell v. Enstrom Helicopter*, 230 F.3d.1155 (9th Cir. 2000).

The manufacturer was not always successful in GARA litigation. One of the exceptions to GARA is that it does not apply if the manufacturer withholds material information from the Federal Aviation Administration. See Sec. 2(b). The California Appeals of Court addressed this provision in *Butler v. Bell Helicopter Textron*, 109 Cal. App. 4th 1073, 135 Cal. Rptr. 2nd 762 (2003). This case arose out of the March 23, 1998 crash of a Bell 205 A-1 due to the failure of the helicopter's tail rotor yoke at 4,117 hours of operation. Two survivors and the estates of four others, who died, sued Bell Helicopter in California state court. The Model 205A-1 was originally delivered to the Los Angeles Fire Department on March 12, 1976, 22 years before the accident and the tail rotor yoke was the original equipment on the aircraft. The lower court granted summary judgment in favor of Bell, based on GARA, and the plaintiffs appealed. The Appeals Court reversed and remanded the case finding that the "fraud" exception to GARA applied to the facts in this case.

Exception (b)(1) states GARA does not apply -

> "If the claimant pleads with specificity, the facts necessary to prove, and proves, that the manufacturer with respect to a 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 of 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;″

The Court in *Butler* found that Bell knowingly did not inform the FAA of tail rotor yoke failures on its military Model 205A-1 helicopters. Apparently, Bell engineers knew there had been at least 5 accidents in which the tail rotor yoke had failed prior to 1989, each involving an in-flight fatigue failure after less than 2,400 hours of use. Bell further knew that these failures were not caused by the military nature of the helicopter operation, but by static overload, which would occur regardless of whether the aircraft was involved in civil or military use. In 1989 Bell increased the retirement life of the yoke from 4,000 to 5,000 flight hours. The Court found that under FAA Part 21.3, Bell had an affirmative duty to report the failures that occurred on the military aircraft despite Bell's argument that the military failures did not have to be reported to the FAA. As this information related directly to the alleged failure in the Butler Helicopter, the Court reversed and remanded the case for trial.

The alleged "parts" of the aircraft which are subject to GARA was recently decided in unreported decision in the case *Sandra L. La Haye v. Galvan Flying Service, Inc.*, pending in the U.S. States District Court for the Western District of Washington, No. C01-0982L, where the Court granted partial summary judgment for Israeli Aircraft Industries. The case involved the crash of a West Wind 1124A on December 12, 1999, killing all on board. The aircraft was delivered more than eighteen years before the accident and the defendant moved for summary judgment. The plaintiff first argued to the Court that GARA was not applicable to foreign manufacturers, like IAI, but the Court found there was no language in the statute to preclude protection under GARA for foreign manufacturers, citing to *Leon v. Augusta, S.P.A.* Supra. The plaintiff further argued that IAI had supplied improved parts to the trim actuator system that it alleged caused the crash and this triggered a new eighteen-year period. The Court found that while new parts had been added to the "system″ at overhaul, the specific alleged design defect, of requiring a mechanic to remove the dust cover before inserting the tie rod through the jackscrew eyelets, had not been changed since the original manufacture. The Court found the allegedly defective design of the trim actuator had been in the market place for more than eighteen years and accordingly, all claims arising out of the alleged defect are barred by GARA. Plaintiffs also argued that the fraud exception applied in this case. However, the Court found no evidence that IAI had determined that a broken or misplaced tie rod could cause the trim actuator to disengage from the horizontal stabilizer and that reports from a customer that it could, did not rise to an inference of knowing misrepresentation or knowing concealment of information that was required by the FAA, under Section 21.3.

It is apparent that the Courts are continuing to support GARA and dismiss cases against manufacturers of aircraft and component manufacturers where the aircraft and component are over eighteen years from original delivery. Modifications to trigger the "rolling" aspect of the statute require the plaintiff to specifically identify the defective part or design and show that it was altered in such a way to trigger a new eighteen-year period to commence. Further, to have the fraud exception enforced, there must be clear evidence that required information was knowingly not provided to the FAA and that that information must be directly related to the alleged cause of the accident. Decisions such as these, have and will reduce the number of cases involving eighteen-year old aircraft and their components and hopefully, this will aid in stabilizing industry through less cost of litigation.