Air & Transportation Law Reporter

International Air & Transportation Safety Bar Association

photo by
Greg Reigel

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President's Message

by
Marc Warren

I am honored to serve as your President and look forward to building on the great work done by my predecessor, Jim Waldon. Jim and his team of officers, Board members, and regional vice presidents did a super job and put our Association on the path for even greater prominence and value to our membership. Your new leadership is moving out to sustain that progress and is committed to making the Association the premier professional group for attorneys who have a practice or interest in aviation and aerospace law.

To that end, we will refine and reinvigorate regional events, identify ways to recruit and retain a broad and diverse cross-section of members, particularly including young members, and implement initiatives to offer additional value to our membership as a whole. Look for announcements on regional events in future newsletters. We all should be proud of IATSBA and enthusiastic about recruiting new members. At the risk of stating the mathematically obvious, if each member recruited one additional member, we would double in size – and enrich the fabric and influence of our Association.

I want to take the opportunity to recognize Lin Modestino, who was the FAA liaison to the Association and a long-time member of the Board. Lin recently retired from the FAA and deserves our thanks for her service to the Association and to the Nation. She is an accomplished attorney and pilot, a dedicated public servant, and a good friend to all who knew her. A.L. Haizlip, counsel for the FAA Registry and Central Region, will assume Lin's spot on the Board. Congratulations to A.L., and congratulations also to Jonathan Hoffman, the new regional vice president for the Northwest Mountain Region, and to Jim Gilman, the new regional vice president for the Southwest Region.

Please mark your calendars for our 2019 annual meeting, to be held in Pensacola, Florida from Tuesday, November 5, to Friday November 8.

I hope that everyone has a wonderful summer.

MARC WARREN is a partner and co-chair of the Aviation and Aerospace practice group at Jenner & Block, LLP. Prior to joining Jenner & Block, Marc chaired the Aviation practice group at Crowell & Moring, LLP. He served as acting chief counsel, deputy chief counsel, and deputy chief counsel for operations of the Federal Aviation Administration (FAA). Before joining the FAA, he retired after 26 years of service in U.S. Army Judge Advocate General's Corps.

INSIDE THIS ISSUE

Editor's Column

by
Greg Reigel

Welcome to the summer edition of the International Air and Transportation Safety Bar Association's Reporter. As I type this article by the side of the pool with a cocktail – just kidding – I'm sitting in my office just like most of you. But it is summer here in Texas, and I know the pool and a cocktail will be waiting for me when I am finished. And, of course, the heat! But fortunately, unlike the East Coast as of late, it's a dry-kind-of-heat here in the Dallas-Ft. Worth area, and I can live with that.

Also, by the time you receive this edition another fantastic EAA Airventure will be in the hangar! I'm looking forward to my annual pilgrimage to the Mecca of general aviation and know I will get the chance to see and spend time with some of our members at the event. If you have never been, Airventure is certainly an event that, in my humble opinion, should be on every pilot's and aviation enthusiast's bucket-list. And it is a great way to re-charge your aviation battery!

And now, we have a lot to share with you in this edition of the Reporter. Our recent annual conference in Washington, D.C. was a resounding success. The presentations were informative and engaging. We really appreciate our speakers' willingness to share their knowledge with our attendees.

And, of course, the networking and social events were a great opportunity to reconnect with old friends and colleagues and make new friends and acquaintances. I personally enjoyed meeting the newest NTSB administrative law judge, John Schumacher (who is replacing the late Judge Geraghty in Circuit III), as well as the Board's new general counsel, Kathleen Silbaugh. We look forward to working with both in the future and hopefully seeing them at future IATSBA events.

GREG REIGEL

Editor's Column

...continued

This edition of the Reporter also includes several articles I know you will want to read. First, our newly-elected President, Marc Warren, explains the IATSBA leadership's plans to increase our membership and to once again hold regional events, in addition to our annual conference (which, by the way, will next be held from November 5-8, 2019 in Pensacola, Florida – make sure you mark your calendar now). Marc also highlights some of the recent leadership changes that have occurred at IATSBA.

We also have an interesting article on statutes of repose written by former IATSBA president Gary Halbert and fellow Holland and Knight attorneys Sean Barry and Stosh Silivos, and which was presented at our most recent conference. Another IATSBA past-president, Justin Green, discusses the impact "the right pilot" can have in an aircraft emergency to avert or minimize a tragedy. And finally, John Van Geffen and Pablo Perez discuss the recent 2017 tax bill and how some of the provisions have influenced the values of business aircraft.

Once again, I want to personally thank each contributor for sharing his or her article with us in this issue. It certainly makes my job easier, and it increases the value of an IATSBA membership to each of our readers. But, once this edition of the Reporter is published, another edition will be in the works. If you would like to submit an article that would be of interest or useful to our members, or if you have an announcement, news, a press release or an event you would like to share with other IATSBA members, please send me the details so we can include your information in the Reporter.

I hope you enjoy this edition of the Reporter.

GREG REIGEL is a partner with the law firm of Shackelford, Bowen, McKinley and Norton, LLP in Dallas, Texas. He has more than two decades of experience working with airlines, charter companies, fixed base operators, airports, repair stations, pilots, mechanics, and other aviation businesses in aircraft purchase and sale transactions, regulatory compliance including hazmat and drug and alcohol testing, contract negotiation, airport grant assurances, airport leasing, aircraft related agreements, wet leasing, dry leasing, FAA certificate and civil penalty actions and general aviation and business law matters. Greg also has extensive experience teaching the next generation of aviation and legal professionals including in such courses as aviation law, aviation transactions, aviation security, business law and trial advocacy. Greg holds a commercial pilot certificate (single-engine land, single-sea and multi-engine land) with an instrument rating.

Statutes of Repose

by
Sean P. Barry,
Stosh M. Silivos,
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A USEFUL TOOL FOR DEFENDING AIRCRAFT MANUFACTURERS

SEAN P. BARRY

STOSH M. SILIVOS

GARY L. HALBERT

Introduction

When litigating an aviation product-liability case, the prudent practitioner should determine at an early stage whether a statute of repose may apply to bar a plaintiff's claims. These statutes can be a powerful tool used to defend aircraft and parts manufacturers because their products are normally built to last many years, and, then, are often maintained for many decades longer as vintage or recreational aircraft. If done correctly, educating opposing counsel and the court about an applicable statute of repose may help to reduce significantly the manufacturer's discovery burdens and overall exposure. A statute of repose, which is likely to increase the standards for pleading and proving plaintiff's case and can support a strong early dispositive motion, could precipitate an early reasonable settlement or even an outright voluntary dismissal to avoid expending resources on pre-trial disclosures and motion practice.

This article is intended to provide the practitioner with a background of the General Aviation Revitalization Act of 1994 ("GARA"),[2] which applies to general aviation aircraft and certain business jets, as well as some examples of other state-specific statutes of repose. It begins with a general discussion of statutes of repose, then moves into discussing GARA, its application, and its exceptions. After, it focuses on state-specific statutes which may apply even where GARA does not, such as when the 18-year limitation period has not yet run, and we then address some choice-of-law issues that could arise. Finally, the article ends with some practical considerations an attorney may want to consider when litigating a case with an applicable statute of repose.

I. Statutes of Repose Generally

Litigators are well-versed in statutes of limitations as these guide

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2 General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (1994) (codified as amended at 49 U.S.C. § 40101 note) ("GARA").

day-to-day decisions regarding when and where to file suit and whether to answer or move to dismiss. Statutes of repose, however, are not the same. Unlike a statute of limitations, which creates a safeguard against delinquent suits, statutes of repose give rise to a right not to stand trial. The differences between a statute of repose and a statute of limitation was succinctly explained by the United States Court of Appeals for the Ninth Circuit in *Lyon v. Agusta S.P.A.*:

> The focus of a statute of repose is entirely different from the focus of a statute of limitations. The latter bars a plaintiff from proceeding because he has slept on his rights, or otherwise been inattentive. . . . However, a statute of repose proceeds on the basis that it is unfair to make somebody defend an action long after something was done or some product was sold. It declares that nobody should be liable at all after a certain amount of time has passed, and that it is unjust to allow an action to proceed after that. In this case, for example, there was an attempt to sue the manufacturer for the allegedly defective design of a part of an aircraft that had been in service for some 23 years after it was first sold. While an injured party might feel aggrieved by the fact that no action can be brought, repose is a choice that the legislature is free to make.[3]

In order to protect certain "manufacturers from the long tail of products-liability lawsuits" that follow their products into the marketplace, the United States Congress and many state legislative bodies have enacted statutes of repose.[4] Thus, these statutes are the codification of a public policy recognizing that a manufacturer should not be held legally responsible for an accident or injury occurring after a lengthy period of time during which the product has performed safely.[5]

Generally speaking, statutes of repose are intended to strike a balance between shielding manufacturers from long-term liability and the astronomical litigation and discovery expenses associated with defending aviation-related product liability cases on one hand and protecting victim's rights on the other.[6] Thus, there are often specific prerequisites to unlocking their protections, varying repose periods (often a decade or more), and statutory exceptions whereby a claim may still proceed. Even if a claim survives the statute of repose, plaintiff must still prove their product-liability claim. If applicable, statutes of repose have the potential to resolve complex products

3 *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001).
4 *Tillman v. Raytheon Co.*, 430 S.W.3d 698, 702 (Ark. 2013) (citing *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084 (9th Cir. 2001)).
5 *Alter v. Bell Helicopter Textron, Inc.*, 944 F. Supp. 531, 542 (S.D. Tex. 1996); *Altseimer v. Bell Helicopter Textron Inc.*, 919 F. Supp. 340, 342 (E.D. Cal. 1996).
6 *Burroughs v. Precision Airmotive Corp.*, 78 Cal. App. 4th 681, 689-691 (Cal. Ct. App. 2000).

liability cases before trial and even materially limit discovery.

II. General Aviation Revitalization Act of 1994

GARA "creates an explicit right not to stand trial."[7] Congress enacted GARA in the 1990s to revitalize the general aviation industry following a decline in the manufacture and sale of general aviation aircraft by U.S. companies.[8] The purpose was to expand protection to manufacturers based upon conduct related to their responsibility as the original manufacturer of the aircraft.[9] Congress looked extensively at the high litigation costs placed on aircraft manufacturers as a direct result of the long life of aircraft despite the low likelihood that accidents were actually caused by product defects.[10] Specifically, a review of National Transportation Safety Board (NTSB) data revealed that only roughly one percent of general aviation accidents were caused by design or manufacturing defects.[11] To avoid the significant defense costs of defending these matters, suits were often settled even where there was no legitimate claim of liability against the manufacturer of a product that had been safely performing for more than a decade.[12] Indeed, a manufacturer testified that the average cost to defend a case was roughly half a million dollars (in 1994 dollars) even though they were generally successful in defending the substantive claims.[13] "Adding to the problem was the fact that as an aircraft aged, it was likely to have had several owners, gone through modifications, and had major maintenance problems—all making it more difficult to determine whether the manufacturer or some other person was responsible for a defect."[14]

The documented legislative history confirms that GARA was enacted with the belief that manufacturers would "be able to sell aircraft at lower prices" with an enhanced ability to compete with foreign companies once "[f]reed from the excessive liability costs."[15] According to the Pennsylvania Supreme Court, GARA's statute of repose was "crafted meaningfully to relieve the aviation industry of the burden of long-tail liability."[16]

GARA's legislative intent is important.[17] Many cases analyze the congressional intent in detail when deciding GARA cases.[18] Thus, a prudent practitioner should not look only to the text of the statute, but should also consider the rationale for its enactment.

7 *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1110 (9th Cir. 2002).
8 *Burton v. Twin Commander Aircraft LLC*, 254 P.3d 778, 782 (Wash. 2011) (en banc).
9 *Fletcher v. Cessna Aircraft Co.*, 991 A.2d 859, 864 (N.J. Super. Ct. App. Div. 2010).
10 *Burton v. Twin Commander Aircraft LLC*, 254 P.3d 778, 782 (Wash. 2011) (en banc).
11 H.R. REP., 103-525(I), p. 2.
12 *Id.*
13 *Id.*
14 *Burton v. Twin Commander Aircraft LLC*, 254 P.3d 778, 782 (Wash. 2011) (en banc).
15 H.R. REP., 103-525(I).
16 *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 436 (Pa. 2006).
17 *U.S. Aviation Underwriters Inc. v. Nabtesco Corp.*, 697 F.3d 1092, 1098-01 (9th Cir. 2012).
18 *Estate of Grochowske v. Romey*, 813 N.W.2d 687, 695 (Wis. Ct. App. 2012).

The controlling provision of GARA provides, in relevant part:

> 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 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.[19]

GARA defines the applicable limitation period as 18 years "with respect to general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft."[20] At least in theory, by that point, it is far more likely the accident was caused by some factor other than a design or manufacturing defect. "By establishing an 18-year time bar, GARA implicitly acknowledges that any design or manufacturing defect not prevented or identified by the FAA by then should, in most instances, have manifested itself."[21] Finally, GARA preempts state law to the extent such law would allow actions to be brought after the applicable limitation period.[22]

A. *Application*

GARA's statute of repose applies to civil actions against general aviation aircraft and certain business jet manufacturers, in their capacity as manufacturers, for damages for

19 GARA § 2
20 GARA § 3.
21 *Moore v. Hawker Beechcraft Corp., C.A.* No. N09C–12–010 MMJ, 2011 WL 6400670, at *2 (Del. Super. Ct. Dec. 15, 2011).
22 *Wright v. Bond-Air, Ltd.*, 930 F. Supp. 300, 303 (E.D. Mich. 1996); *Tillman v. Raytheon Co.*, 430 S.W.3d 698, 703 (Ark. 2013).

death, injury, or damage to property arising out of an accident involving the manufacturer's aircraft after the expiration of the 18-year limitation period. It is the movant's burden to show that GARA applies.[23]

GARA defines "general aviation aircraft" as (1) "any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration," (2) "which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers," and (3) "which was not, at the time of the accident, engaged in scheduled passenger-carrying operations." Thus, GARA applies to general aviation as well as certain business jets provided that their maximum seating capacity is 19 or less and the aircraft was not engaged in scheduled passenger-carrying operations. "[S]cheduled passenger-carrying operations"[24] is intended to reference parts 121 (applies to regularly scheduled airlines) and 125 (applies to aircraft with a larger payload or with capacity for 20 or more passengers) of title 14 of the Code of Federal Regulations.[25] Type certificate information can generally be located on the FAA's public website.[26]

While the test for application is fairly straight forward, there may be some room for dispute regarding whether a specific activity is being conducted "in [the defendant's] capacity as a manufacturer." Whether a specific defendant fits within the meaning of "manufacturer" for purposes of GARA is a question of law.[27] The majority position is that the phrase "capacity as a manufacturer" should be interpreted broadly and that almost all activities are encompassed.[28] In Estate of Grochowske v. Romey, the Court of Appeals of Wisconsin rejected the argument that publishing updated manuals for subscription costs was outside the capacity of a manufacturer unless expressly requested to do so by the Federal Aviation Administration (FAA), and held that such manuals were "published by the manufacturer, in its capacity as a manufacturer, in fulfillment of its obligation to provide appropriate warnings and maintenance information about its product."[29] GARA also has been found to apply to type certificate holders, holders of a part manufacturer approval (PMA), and assignees of and successors-in-interest to original equipment manufacturers (OEMs).[30] Even an independent contractor taking on manufacturer's

23 *Moore v. Hawker Beechcraft Corp.*, C.A. No. N09C–12–010 MMJ, 2011 WL 6400670, at *3 (Del. Super. Ct. Dec. 15, 2011); *South Side Trust and Savings Bank of Peoria v. Mitsubishi Heavy Indus., Ltd.*, 927 N.E.2d 179, 193 (Ill. App. Ct. 2010); *Willett v. Cessna Aircraft Co.*, 851 N.E.2d 626, 635 (Ill. App. Ct. 2006)); *Agape Flights, Inc. v. Covington Aircraft Engines, Inc.*, No. CIV–09–492–FHS, 2011 WL 2560281, at *3 (E.D. Okla. June 28, 2011).

24 GARA § 2(c).

25 H.R. REP. 103-525(II), p. 6.; 14 C.F.R. Parts 121, 125.

26 Regulatory and Guidance Library

27 *Snider v. Sterling Airways, Inc.*, No. 13-Ccv-2949, 2017 WL 2813223, at *4 (E.D. Pa. June 29, 2017).

28 *Fletcher v. Cessna Aircraft Co.*, 991 A.2d 859, 864 (N.J. Super. Ct. App. Div. 2010).

29 *Estate of Grochowske v. Romey*, 813 N.W.2d 687, 695 (Wis. Ct. App. 2012).

30 *Burton v. Twin Commander Aircraft LLC*, 254 P.3d 778, 782 (Wash. 2011) (en banc); *Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543, 548–49 (Iowa 2002); *Burroughs v. Precision Air-motive Corp.*, 78 Cal. App. 4th 681, 689-691 (Cal. Ct. App. 2000).

duties under a type certificate has been held to be entitled to GARA's protection.[31] Certain activities that may not be protected would be claims against a manufacturer arising from negligent maintenance to the extent the claim was focused solely on the quality of the maintenance conducted and not related to the maintenance manual or other prescriptive guidance from the manufacturer.

B. *Exceptions*

In the event that movant shows that GARA applies, the burden shifts to plaintiff to show an exception applies[32] GARA contains four limited exceptions:

> (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.[33]

A practitioner should be aware of the exceptions that require the plaintiff to state which part or system caused the accident. This, of course, can be used as a shield by defendants to force plaintiffs to disclose their theory of liability at an early stage. Using this information, discovery could be limited to only the relevant parts or systems (i.e., those alleged to have caused the accident), which can

31 *South Side Trust & Savings Bank of Peoria v. Mitsubishi Heavy Indus., Ltd.*, 927 N.E.2d 179, 192-93 (Ill. App. Ct. 2010).

32 *Agape Flights, Inc. v. Covington Aircraft Engines, Inc.*, No. CIV–09–492–FHS, 2011 WL 2560281, at *5 (E.D. Okla. June 28, 2011).

33 GARA §§ 2(b)(1)-(4).

save significant amounts in pre-trial discovery expenses.

i. "Knowing Misrepresentation" Exception

GARA's "knowing misrepresentation" exception is commonly used in an attempt to avoid GARA's protections. The exception itself, however, is extremely challenging to plead as well as prove. This exception requires the plaintiff not only to identify the part or system that caused the accident, but to allege, *inter alia*, that the defendant failed to provide necessary information regarding such part or system to the FAA. The plain language of GARA's "knowing misrepresentation" exception requires that a plaintiff plead with specificity that: (1) the manufacturer had actual or constructive knowledge of information relevant to FAA-type certificate or continuing-airworthiness obligations; (2) the manufacturer knowingly misrepresented, concealed, or withheld the information from the FAA; (3) the information was required by the FAA; (4) the required information was material and relevant to the performance, maintenance, or operation of the aircraft; and (5) the knowing misrepresentation, concealment, or withholding was causally related to the harm suffered.[34]

It should be noted that some courts have distilled the statutory language into a test that includes only three or four elements instead of the five listed above, but the general idea is that multiple elements must all be satisfied. Not only must the plaintiff allege all factors to be able to succeed on its claims, numerous courts have held that this exception must be pled with specificity, like pleading fraud under Rule 9 of the Federal Rules of Civil Procedure. Thus, there may be a strong argument for a motion to dismiss if the plaintiff was unaware of GARA's implications at the time of filing and refuses to amend.[35] In *Tillman v. Raytheon Co.*, the Supreme Court of Arkansas held that the complaint's conclusory statements "clearly failed to plead sufficient specific facts to invoke GARA's fraud exception."[36]

ii. "Medical Emergency" Exception

Recently, the United States District Court for the Southern District of Florida in *Theobald v. Piper Aircraft, Inc.* analyzed this issue and determined that the "medical emergency" exception did not apply to allow claims by individuals who were returning from a cancer treatment at the time of the accident.[37] The court distinguished between flights for medical emergencies (such as emergency air medical transportation flights) and flights related to medical treatments (such as customary travel that happened to be to or from a medical services provider), and held that GARA applied only to the former. After finding that the deceased "were

34 *Clark v. PHI, Inc.*, 2012 WL 3065429, *5 (E.D. La. 2012).

35 *Intact Insurance Company v. Piper Aircraft Corporation Irrevocable Trust*, No. 15-24792-cv, 2017 WL 3328170 (S.D. Fla. Aug. 3, 2017) (granting motion for judgment on the pleadings because claims were barred by GARA).

36 *Tillman v. Raytheon Co.*, 430 S.W.3d 698, 705 (Ark. 2013).

37 *Theobald v. Piper Aircraft, Inc.*, No. 2:16-cv-14373, 2018 WL 1571187 (S.D. Fla. Mar. 30, 2018).

not on the aircraft because of a medical emergency; rather they were on the aircraft after [one of the deceased] had sought medical treatment," the court held that the "medical emergency" exception did not apply.

iii. "Not Aboard" Exception

This exception could apply only where a person not aboard the aircraft was harmed during an accident. It could arise where an individual on the ground was injured during a crash.

iv. Written Warranties Exception

To qualify for this exception, there must be a written warranty from the defendant.[38] Many attempts to expand this limited exception have been rejected: it does not apply to the claims for breach of implied warranties.[39] Courts have similarly rejected arguments that the airworthiness certificate provides some sort of written warranty by the manufacturer.[40]

v. The "Rolling Provision" or "New Part Exception"

Even if the subject aircraft, as a whole, was manufactured more than 18 years before an accident, the inquiry does not end there. The final "exception," which is often referred to as the "rolling provision" or "new part exception" is often alleged in GARA cases. This provision resets the limitation period for certain new parts placed on the aircraft, but only with respect to the replaced part or system. As a result, based on the long life of an aircraft, it is likely that there are multiple, distinct statutes of repose running with different start times (e.g., the limitation period for the power plant began to run from the date of delivery to the first purchaser of the aircraft, but the limitation period for the carburetor restarted when it was replaced 15 years after the original date of delivery).

If a new part or replacement part was placed on the aircraft within 18 years from the date of the accident, the "new part exception" may apply, but only if the new part caused the accident. In order to trigger this exception, a plaintiff must: (1) identify the new part; (2) demonstrate that the part was placed on the subject aircraft within 18 years of the accident; (3) establish that the replacement part was defective and caused plaintiff's injuries; and (4) establish that the defendant manufactured or sold the new part.[41] Although not technically an exception, GARA's rolling provision provides for a second statute of repose begin to run with respect to a specific part, not the entire aircraft, on "the date of completion of the replacement or addition" of a new part "which is alleged to have caused [...] death, injury, or damage."[42] Some courts have found

38 *Agape Flights, Inc. v. Covington Aircraft Engines, Inc.*, No. CIV–09–492–FHS, 2011 WL 2560281, at *3 (E.D. Okla. June 28, 2011).
39 *Bianco v. Cessna Aircraft Co.*, No. 1 CA–CV 03–0647, 2004 WL 3185847, at *7 (Ariz. Ct. App. Oct. 19, 2004).
40 *Moore v. Hawker Beechcraft Corp.*, C.A. No. N09C–12–010 MMJ, 2011 WL 6400670, at *2 (Del. Super. Ct. Dec. 15, 2011).
41 *See Moore v. Hawker Beechcraft Corp.*, C.A. No. N09C–12–010 MMJ, 2011 WL 6400670, at *8 (Del. Super. Ct. Dec. 15, 2011); *see also South Side Trust & Sav. Bank of Peoria v. Mitsubishi Heavy Indus., Ltd.*, 927 N.E.2d 179, 192-93 (Ill. App. Ct. 2010).
42 GARA § (2)(a)(2).

that plaintiffs must plead facts sufficient to trigger the "rolling provision."[43]

The definition of "parts" for purposes of GARA is not limited to physical parts, components, and systems on the aircraft. Many courts have found that flight manuals are "parts" for purposes of GARA.[44] The United States Court of Appeals for the Ninth Circuit noted that:

> In other words, a flight manual is an integral part of the general aviation aircraft product that a manufacturer sells. It is not a separate, general instructional guide (like a book on how to ski), but instead is detailed and particular to the aircraft to which it pertains. The manual is the "part" of the aircraft that contains the instructions that are necessary to operate the aircraft and is not separate from it. It fits comfortably within the terminology and scope of GARA's rolling provision.[45]

Maintenance and repair manuals are generally not considered a "part" of the aircraft.[46] Thus, affirmative revisions in flight manuals that are directly related to the cause of the accident may invoke an exception.[47] A plaintiff, however, may not simply rely on the fact that a manual was updated where there was no substantive change in the relevant section(s).[48]

Furthermore, the majority position is that GARA's "limitation period may not be circumvented simply by labeling the claim as one for failure to warn."[49] The Ninth Circuit has held that allowing these types of failure to warn claims would defeat the essential and express purpose of GARA to the extent that GARA would have "little value to manufacturers" because the failure to warn claim would allow the 18-year period to restart both if the manufacturer did something and if the manufacturer did nothing.[50] The Sixth Circuit similarly held that GARA barred claims for failure to warn about latent defects.[51] As a general rule, plaintiffs may not simply artfully plead a design defect claim into a failure to warn claim to defeat GARA.

An attorney may want to coordinate with his or her client to review the aircraft maintenance records to determine what parts, if any, were replaced within the limitations period and determine whether such parts might be sufficiently connected to the alleged cause(s) of the accident. It is also helpful to conduct an in-depth review of the maintenance records and manuals to determine whether

43 *Crouch v. Teledyne Cont'l Motors, Inc.*, 833 F. Supp. 2d 1331, 1335 (S.D. Ala. 2011).
44 *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155, 1157 (9th Cir. 2000).
45 *Id.*
46 *Alter v. Bell Helicopter Textron, Inc.*, 944 F. Supp. 531, 538 (S.D. Tex. 1996).
47 *Tillman v. Raytheon Co.*, 430 S.W.3d 698, 707-08 (Ark. 2013).
48 *Id.*
49 *Campbell v. Parker-Hannifin Corp.*, 82 Cal. Rptr. 2d 202, 210 (Cal. Ct. App. 1999).
50 *Lyon v. Agusta S.P.A.*, 252 F.3d 1078 (9th Cir. 2001).
51 *Crouch v. Honeywell Int'l, Inc.*, 720 F.3d 333, 342 (6th Cir. 2013).

there have been significant revisions. Evidence of revisions to relevant portions of certain aircraft manuals or replaced parts or systems connected to plaintiff's theory of the case should be identified early. In Snider v. Sterling Airways, Inc., the United States District Court for the Eastern District of Pennsylvania considered the GARA issue at multiple stages (Rule 56 motion for summary judgment[52]; Rule 50(b) motion for judgment as a matter of law[53]; Rule 59 motion to alter or amend the judgment[54]), holding in each instance that plaintiff's claims were not barred per se. In sum, the court held that the GARA period of repose did not bar plaintiff's recovery because there was sufficient evidence to infer that the alleged part that caused the accident was replaced within 18 years prior to the crash. Many courts are wary to dispose of a claim where there is even remote evidence that a GARA exception may apply and are likely to provide plaintiff at least some discovery regarding articulated exceptions.[55] The goal of the defense attorney is often to keep the discovery as limited as possible to the relevant issues. Doing so will require a strong understanding of GARA as well as the operation of the subject aircraft or relevant systems. It generally makes sense to inform the court of these issues as early as possible to avoid full-blown discovery before a GARA motion for summary judgment can be made, particularly where it may have been possible to limit discovery in first instance to the GARA issues.

52 *Snider v. Sterling Airways, Inc.*, No. 13-cv-2949, 2016 WL 9774504, at *1 n.1 (E.D. Pa. Aug. 24, 2016).
53 *Snider v. Sterling Airways, Inc.*, No. 13-cv-2949, 2017 WL 2813223 (E.D. Pa. June 29, 2017).
54 *Snider v. Sterling Airways, Inc.*, No. 13-cv-2949, 2017 WL 6336596 (E.D. Pa. Sept. 5, 2017).
55 *LeBlanc v. Panther Helicopters, Inc.*, No. 14-1617, 2016 WL 1161274 (E.D. La. Mar. 23, 2016).

III. State Statutes of Repose

In addition to GARA, a number of states have general product liability statutes of repose that may be relevant in aviation accident cases. These statutes vary among states, but there are two main types—"time-certain" statutes and "useful-life" statutes.

Although GARA preempts state law to the extent such law would allow actions to be brought after the applicable limitation period,[56] it does not preempt statutes of repose to the extent such law would bar a claim. Thus, even if GARA applies to an action, it is often worth considering whether other statutes of repose may apply as well. This is because each statute is crafted with specific interests to protect and somewhat different public policy considerations. As such, there may be certain gaps in protection that could be exploited by a knowledgeable plaintiff. For example, product-liability claims based on a failure-to-warn theory are generally barred by GARA, but may be exempted from a state statute of repose. But GARA has certain exceptions of its own. And the limitation period in GARA's statute of repose (18 years) is longer than many other state statutes (average around 10 years, but as short as 6 to 7 years in some states). Considering these potential gaps, a defense attorney in a GARA case may try to buttress the

56 *Wright v. Bond-Air, Ltd.*, 930 F. Supp. 300, 303 (E.D. Mich. 1996); Tillman v. Raytheon Co., 430 S.W.3d 698, 703 (Ark. 2013).

repose statutes with other defenses available to him or her in order to dismiss successfully the entire multi-count product-liability complaint, which often includes failure-to-warn claims in addition to strict liability, design defect, negligence, and other claims.

A. Time-Certain Statutes

Time-certain product liability statutes of repose are currently in force in approximately 13 states.[57] Like GARA, these statutes terminate a plaintiff's right to sue after a definite number of years—typically ten to twelve years. The start date for the repose period differs between states, but it is typically the date of manufacture, first purchase, or first use.

In a few states, these statutes are an absolute bar to asserting any product liability claims.[58] More commonly, however, the statutes provide exceptions based on the defendant's conduct, the nature of the product or defect, or the type of damages. For example, several state statutes of repose specify that the limitation is inapplicable if the defendant intentionally misrepresented or fraudulently concealed material information about the product.[59] Other examples include exceptions for (i) injuries due to hidden defects,[60] (ii) claims related to asbestos, tobacco, silicone implants, or products which cause disease or birth defect,[61] and (iii) claims "arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property."[62] For its part, Nebraska's 10-year statute of repose applies only to products manufactured inside Nebraska.[63]

57 See Colo. Rev. Stat. Ann. § 13-80-107 (applies only to manufacturing equipment); Fla. Stat. Ann. § 95.031; Ga. Code Ann. § 51-1-11; 735 Ill. Comp. Stat. Ann. 5/13-213; Ind. Code Ann. § 34-20-3-1; Iowa Code Ann. § 614.1; Neb. Rev. Stat. Ann. § 25-224; N.C. Gen. Stat. Ann. § 1-46.1; Ohio Rev. Code Ann. § 2305.10; Or. Rev. Stat. Ann. § 30.905; Tenn. Code Ann. § 29-28-103; Tex. Civ. Prac. & Rem. Code Ann. § 16.012; Wis. Stat. Ann. § 895.047. The Florida statute (Fla. Stat. Ann. § 95.031) uses language similar to a useful-life statute, but, in most instances, operates more akin to a time-certain statute—it bars actions commenced more than 12 years after delivery of the product if the product has a useful life of 10 years or less, but provides that, subject to certain exceptions (notably including "aircraft used in commercial or contract carrying of passengers or freight"), products are conclusively presumed to have an expected useful life of 10 years or less. Kentucky has a statute that is sometimes described as a time-certain statute of repose (Ky. Rev. Stat. Ann. § 411.310), but the statute simply establishes a rebuttable presumption (which can be overcome by a mere preponderance of evidence) that a product is not defective if the injury occurred after a specified time period. At least five other states (Alabama, Arizona, New Hampshire, North Dakota, and Rhode Island) had time-certain statutes of repose that were struck down on state constitutional grounds.

58 *See, e.g.*, N.C. Gen. Stat. Ann. § 1-46.1; Or. Rev. Stat. Ann. § 30.905; see also Ga. Code Ann. § 51-1-11 (absolute bar to strict product liability claims).

59 *See, e.g.*, Colo. Rev. Stat. Ann. § 13-80-107; Iowa Code Ann. § 614.1.

60 *See, e.g.*, Colo. Rev. Stat. Ann. § 13-80-107.

61 *See, e.g.*, Iowa Code Ann. § 614.1(2A)(b) (asbestos, tobacco, and other specified product types); Neb. Rev. Stat. Ann. § 25-224(2)(a), (5) (asbestos); Tenn. Code Ann. § 29-28-103 (asbestos and silicone gel breast implants); Ga. Code Ann. § 51-1-11(c) (products which cause disease or birth defect).

62 Ga. Code Ann. § 51-1-11(c). In Georgia, this exception applies only to negligence—not strict liability—claims. *Id.*

63 Neb. Rev. Stat. Ann. § 25-224(2)(a). The Nebraska statute provides that, for products manufactured outside Nebraska, actions must be commenced "within the time allowed by the applicable statute of repose, if any, of the state or

The theories of liability covered by the statutes also differ between states. For instance, North Carolina's statute applies to all products liability actions regardless of theory,[64] Georgia's statute does not apply to post-sale failure to warn claims,[65] and Wisconsin's statute applies only to actions brought under a theory of strict liability.[66] Moreover, some state statutes of repose apply to indemnification and contribution claims,[67] while others explicitly do not.[68]

B. Useful-Life Statutes

Useful-life statutes—a very weak form of product liability statutes of repose[69]—are in force in approximately six states.[70] Generally, a useful-life statute bars product liability actions where the harm occurred after the product's "useful life" or "useful safe life" has expired. While a product's useful life is a question of fact, these statutes typically (though not always) create a rebuttable presumption that a product's useful life expires after a specified number of years. For example, Washington's useful life statute provides: "If the harm was caused more than twelve years after the time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may be only be rebutted by a preponderance of the evidence."[71]

Where useful-life statutes do create a presumption, they invariably contain exceptions. For instance, the period of repose may be extended if the product seller warrants that the product may be utilized for some longer period.[72] Other potential limitations are similar to those found in time-limited statutes, including exceptions for the product seller's intentional misrepresentation or fraudulent

country where the product was manufactured, but in no event less than ten years." *Id*.

64 N.C. Gen. Stat. Ann. § 1-46.1

65 Ga. Code Ann. § 51-1-11(c) ("Nothing contained in this subsection shall relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer.").

66 Wis. Stat. Ann. § 895.047.

67 *See, e.g., Thompson v. Walters*, 565 N.E.2d 1385, 1386 (Ill. App. 1991) (holding that Illinois statute of repose applies to contribution actions).

68 Iowa Code Ann. § 614.1(2A)(a); Neb. Rev. Stat. Ann. § 25-224.

69 Indeed, its open to debate whether these statutes are technically even statutes of repose.

70 *See* Conn. Gen. Stat. Ann. § 52-577a; Idaho Code Ann. § 6-1403; Kan. Stat. Ann. § 60-3303; Minn. Stat. Ann. § 604.03; Tenn. Code Ann. § 29-28-103; Wash. Rev. Code Ann. § 7.72.060. Note that the Tennessee statute (Tenn. Code Ann. § 29-28-103) includes both a time-certain limitation (10 years) and a useful-life limitation (1 year after the expectation of the anticipated life of the product)—whichever period is shorter governs. The Connecticut statute (Conn. Gen. Stat. Ann. § 52-577a) uses language similar to time-certain statutes, but it operates as a useful-life statute—it bars actions commenced after 10 years from the date the party last parted with possession or control of the product, *unless* a claimant can prove that the harm occurred during the useful safe life of the product.

71 Wash. Rev. Code Ann. § 7.72.060(2); *see also* Kan. Stat. Ann. § 60-3303(b)(1) ("In claims that involve harm caused more than 10 years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence."). *But see, e.g,* Minn. Stat. Ann. § 604.03 (providing for a useful-life defense, but not creating a presumption that the useful life has expired after a set number of years).

72 *See* Conn. Gen. Stat. Ann. § 52-577a(d); Idaho Code Ann. § 6-1403(2)(b)(1); Kan. Stat. Ann. § 60-3303(b)(2)(A); Wash. Rev. Code Ann. § 7.72.060(b)(i).

concealment of product information,[73] asbestos claims,[74] and latent defects.[75]

C.Choice-of-Law Considerations

Given the variety of approaches to product liability statutes of repose, choice of law is sure to be an important consideration. Unfortunately, there is no universal rule; rather, the determination of which law governs for statute of repose purposes depends on the forum state's choice of law rules or borrowing statute.

Traditionally, forum states apply their own "procedural" rules even if another state's law governs the parties' "substantive" rights. However, while statutes of limitations (which merely limit the time for bringing claims after they have accrued) are traditionally considered procedural, courts are split on whether statutes of repose (which, at least in the archetypical time-certain form, extinguish claims altogether) are procedural or substantive.[76] Typically, the forum state applies its own law to determine whether a statute of repose is procedural or substantive,[77] although there is limited authority for the proposition that a forum state is bound by another state's characterization of its own statute of repose.[78]

Assuming that a court does not deem the statute of repose procedural, it will apply the forum state's choice of law regime to determine whether a particular state's statute of repose governs. For example, a court may analyze which state has the closest relationship to the issue under a "most significant relationship" test,[79] or it may simply apply the law of the state where the tort occurred under a *lex loci delicti* approach.[80] Regardless of the choice of law regime, the public policy exception—under which courts will refuse to apply a foreign law that is contrary to the strong public policy of the forum—could potentially be

73 *See* Conn. Gen. Stat. Ann. § 52-577a(d); Idaho Code Ann. § 6-1403(2)(b)(2); Kan. Stat. Ann. § 60-3303(b)(2)(B); Wash. Rev. Code Ann. § 7.72.060(b)(ii).

74 *See* Conn. Gen. Stat. Ann. § 52-577a(e).

75 *See* Idaho Code Ann. § 6-1403(2)(b)(2).

76 *Compare Bagnell v. Ford Motor Co*., 297 Ga. App. 835, 837 (2009) (holding that statutes of repose are procedural/remedial in nature) *with Boudreau v. Baughman*, 322 N.C. 331 (1988) ("We hold that statutes of repose are treated as substantive provisions for choice of law purposes.") *with Baxter v. Strum, Ruger & Co., Inc*., 230 Conn. 335, 346-47 (1994) (holding that statutes of repose are neither substantive nor procedural per se for choice of law purposes, but that the characterization depends on the nature of the underlying right and whether it existed at common law or was newly created by statute).

77 *See Tanges v. Heidelberg N. Am., Inc*., 93 N.Y. 2d 48, 54 (1999) ("Because New York is the forum state, we must look to New York choice of law rules to determine whether the nature and effect of [Connecticut's statute of repose] is procedural or substantive."); *Boudreau*, 322 N.C. at 339 ("The question of what is procedure and what is substance is determined by the law of the forum state.").

78 *See Walls v. General Motors, Inc*., 906 F.2d 143, 146 (1990) ("The courts of Oregon . . . hold its statute of repose to be substantive, so Mississippi is bound to apply it.").

79 *Cf. Cosme v. Whitin Mach. Works, Inc.*, 417 Mass. 643 (1994) (applying Massachusetts' functional choice of law approach to determine that Connecticut's statute of repose should not govern because Massachusetts had a more significant relationship to the parties and occurrence).

80 *See e.g., Bramblett v. Nick Carter's Aircraft Engines, Inc*., No. 294, 1991 WL 12284, at *5 (Tenn. Ct. App. 1991) (concluding that Kentucky's statute of repose should govern pursuant to *lex loci delicti*).

relevant. It should be noted, however, that plaintiffs seeking to avoid the application of foreign statutes of repose based on the public policy exception have not traditionally prevailed, even in states where the local statute of repose was struck down as unconstitutional under the state constitution.[81]

Borrowing statutes provide another wrinkle to the choice of law analysis. Barrowing statutes are the legislative exception to the rule that a forum state applies its own statute of limitations, but there is some authority that a statute of repose may be borrowed from another state pursuant to a borrowing statute. For example, in *Gilcrease v. Tesoro Petroleum Corp*., the Texas Court of Appeals held that Alaska's 10-year statute of repose (which does not apply to defective products) applied under Texas's borrowing statute, which "demonstrated a clear intent [by the legislature] to prevent forum shopping."[82] Thus, although there is contrary authority,[83] another issue to consider when analyzing choice of law for statute of repose issues is whether the forum state's borrowing statute may affect the analysis.

Conclusion

When litigating a GARA case, it may be beneficial to have an early conference with opposing counsel and to notify the Court as soon as possible via motion, application, or conference in accordance with the local rules. Getting ahead of these issues before setting a discovery schedule can be helpful because there are strong arguments that discovery should be narrowly tailored to first address GARA's application and whether any of its limited exceptions apply.

As any product-liability litigator understands, discovery in a complex, product-liability case involving an aircraft consists of: significant electronically stored information (ESI), which often contains highly sensitive and proprietary documents and data; significant third-party discovery,

81 *See Terrell v. Damon Motor Coach Corp*., Nos. 6:12-cv-02390, 6:12-cv-02395, 2013 WL 6145534, at *6 (N.D. Ala. Nov. 20, 2013) ("Therefore, even though *Lankford* stands for the proposition that the Alabama legislature cannot pass a law like the Tennessee statute of repose, neither it nor any other Alabama precedent suggests that Alabama courts would not apply a sister state's statute of repose."); *see also Alexander v. Beech Aircraft Corp*., 952 F.2d 1215, 1223 (10th Cir. 1991) ("We cannot agree with plaintiff's argument that Kansas public policy bars the application of the Indiana statute of repose."); *Rogers v. Lee*, 414 S.C. 225, 235 (2015) ("We cannot say the public policy of this state would be violated by application of North Carolina's statute of repose in this matter."); *Bramblett*, 1991 WL 12284, at *5 ("We conclude that the differences between the Kentucky law and Tennessee law are not such as to invoke the public policy exception to the doctrine of *lex loci*."). *But see Rosenthal v. Bridgestone/Firestone, Inc*., 217 F. App'x. 498, 501 (6th Cir. 2007) (determining that application of the North Carolina statute of repose was not "clearly dictated" because, inter alia, there was a question as to whether the statute of repose violated Ohio's public policy embodied in the Ohio constitution's open courts provision).

82 *Gilcrease v. Tesoro Petroleum Corp* ., 70 S.W.3d 265, 269 (Tex. App. Ct. 2001); *see also Wenke v. Gehl Co*., 274 Wis. 2d 220, 271 (2004) (holding that Wisconsin's borrowing statute pertained equally to foreign statutes of repose).

83 *Rice v. Dow Chem Co*., 124 Wash. 2d 205, 212 ("We hold that statutes of repose do not fall under the statute of limitations borrowing statute ..., but instead may raise a conflict of substantive law.").

Statutes of Repose

...continued

including collection of information from federal, and sometimes state, agencies; and fact and expert witnesses. Unfortunately, aviation accidents also often involve serious, if not fatal, injuries. Thus, the cost of defense coupled with risk of a high jury verdict generally inflate settlement discussions. Statutes of repose can help to reduce these risks. There are compelling arguments, based on GARA's legislative history and the express language in the statute, that discovery and motion practice should initially be narrowed to only the issues relevant to GARA (i.e., its application and exceptions). Additionally, at least with respect to the knowing misrepresentation exception, there is authority to support a heightened pleading standard. Thus, these types of claims may be subject to pre-answer (and pre-disclosure) motions to dismiss. It is not uncommon for defendants to press plaintiffs to amend their complaint to fit within the GARA framework, in order to limit the issues and lock plaintiffs into a theory of the case that the parties may meaningfully contest before incurring the costs of extensive discovery.

As discussed above, statutes of repose vary by limitation period (after which time the right not to stand trial is earned), how to toll or restart the limitation period, types of products covered, and exceptions. State statutes of repose are typically shorter than GARA's statute of repose and often are not limited by the same exceptions. Thus, these statutes may constitute a defense in aviation accident cases even where GARA is unavailable.

The statutes vary widely between states, however, and complicated choice-of-law issues may arise, so a practitioner must be diligent in analyzing these issues thoroughly on a case-by-case basis.

The Right Pilot

by:
Justin T. Green

WHAT A DIFFERENCE THE RIGHT PILOT MAKES

On Tuesday morning, April 17, Southwest Airlines Flight 1380 suffered a catastrophic engine failure that seriously damaged the airplane's wing and fuselage. The flight crew, faced with a sudden and difficult emergency, performed well under dire circumstances, preventing mass casualties. Sadly, one life was lost, and the National Transportation Safety Board (NTSB) investigation will likely identify ways that the tragedy could have been avoided.

After the accident the Federal Aviation Administration (FAA) finally mandated emergency inspections of the model engine prompted by a similar engine failure in another Southwest jet in 2016. But the Flight 1380 emergency could have been much worse were it not for the fact that the airplane was commanded by its highly-trained and capable Captain Tammie Jo Shults. Her and her co-pilot's competence prevented further loss of life and saved Southwest many millions of dollars. The event illustrates how the investment that airlines make in their pilots can pay off and that being penny wise in cutting investment in pilots may prove to be pound foolish.

Captain Shults was one of the U.S. Navy's first female fighter pilots. (I attended Naval Flight School around the same time as she, and there were only a small number of female flight students -- I don't recall a single female flight instructor.) It's not easy to get into Naval Flight School; the program is demanding, and many candidates fail out. To qualify for Jets, Captain Shults had to do a lot more than just pass, she had to ace primary flight training. To fly Fighters, she had to be the best of the best. Captain Shults proved that she had the right stuff long before she ever flew for an airline.

Captain Shults' experience compares well to Captain Chesley Sullenberger and, as he did in safely landing USAir Flight 1549 on the Hudson River in 2009, she not only saved many lives, she also saved her airline and its insurer many millions of dollars in liability claims and business losses. Faced not only with the sudden loss of her aircraft's engine, but a damaged airplane with a compromised wing, Shults and her co-pilot Darren Ellisor, a former U.S. Air Force pilot, were able to regain control of the airplane and to fly a safe emergency approach and landing into Philadelphia.

Airline executives must learn that the investment in recruiting and retaining experienced and capable pilots like Captain Shults is money well spent. Too often pilots are seen as fungible — that one licensed pilot is as good as another. This is unquestionably

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a false notion, as demonstrated by two recent aviation disasters in the U.S.

In 2006 Comair Flight 5191 crashed when the pilots mistakenly taxied to and attempted to take off from the wrong runway, which was far too short to permit a safe takeoff. In 2009 Continental Airlines (Colgan) Flight 3407 crashed when the pilots allowed the airplane's airspeed to slow to the edge of stall, and then completely mishandled the emergency that they created. The Comair and Colgan pilots flew for regional airlines, where the pay and benefits is very low and, as a result, the pilots are far less experienced than pilots who fly for major airlines. Whatever money these airlines likely saved on compensating their pilots was probably lost after the accidents. My firm represented the families of victims from both crashes. Indeed, these two airlines paid a heavy price as a result of these accidents.

In commercial aviation, about 70% of fatal accidents are related to human error. See Allianz Global's Global Aviation Safety Study. Technological advances have greatly improved aviation safety, but when something goes wrong a modern airplane's automatic systems will often kick off and hand the airplane back to its pilots. The safety of a commercial airplane still depends heavily on the skill of its pilots.

There is now an ongoing pilot shortage throughout the airline industry. While several factors at play may be causing this shortage, the heart of this dangerous situation is that becoming a professional pilot is not nearly as attractive today as it once was. Over the past two decades, pilots have been stripped of their pensions and squeezed in pay and in myriad other ways. Not surprisingly, the most experienced and capable pilots have, on the whole, gravitated to airlines that most value their pilots; those airlines will continue to be safer than the airlines that undervalue pilots. Captain Shults, like Captain Sullenberger before her, has powerfully taught us how important it is to have the right pilot in command of an airplane, particularly when faced with sudden emergencies. This lesson should resonate with the airlines and at the FAA.

The New Tax Bill & Aircraft Values

by:
Pablo Perez, Accredited Senior Appraiser
& John T. Van Geffen, Esq.,
Avialex Law Group,LLP

PABLO PEREZ

JOHN T. VAN GEFFEN

It is difficult, if not impossible, to isolate the exact impact of the new tax bill on aircraft values. Many concurrent factors may have an impact on aircraft values—e.g., the economy, regulatory environment and inventory, to name a few. However, we can observe what has been going on in the market since enactment of the "Tax Cuts and Jobs Act of 2017" (Pub.L.115-97).

How was the pre-owned business aviation market doing before the tax changes?

Excessive enthusiasm with the economy before the subprime crisis was certainly a factor in manufacturers flooding the market with new aircraft. Since the crisis, OEMs reduced the general production, but the number of new models has increased. We also have new competitors such as Honda and Pilatus entering the business jet market. The accumulated oversupply is still present in the pre-owned aircraft market. These factors have driven down prices for the pre-owned market, permitting buyers to acquire quality aircraft at a considerably lower prices.

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This tendency may change given the new tax law. We already have some information about changes in aircraft values, but before we look at that, we want to summarize the tax changes affecting the industry.

What are the tax changes that will impact business aviation?

As reported by the Congressional Budget Office (CBO), high net wealth individuals, pass-through entities and corporations should benefit immediately. While the current number of tax brackets have been retained, each has been reduced, and for those operating an entity with pass-through income, a new 20% deduction has been created for business income.

For aircraft owners the savings under the new law are even better. The current bonus depreciation has been amended to provide for 100% expensing of the cost of new and pre-owned aircraft (up from 50%) acquired and placed in service, provided it is the taxpayer's first use of the aircraft. Previously, bonus depreciation was only available on new equipment purchases.

Unfortunately, for those who previously used Rev. Code §1031 'like-kind' exchanges (usually for upgrading into larger or longer range aircraft) taxpayers will no longer have the ability to defer taxable gains on the sale of aircraft. In theory, the enhanced depreciation discussed above should

The New Tax Bill and Aircraft Values

continued

offset the repeal of like-kind exchanges for aircraft.

Additionally, changes have been made to travel expense deductions, and the Federal Transportation Excise Tax (FET) has finally been clarified (owner flights on managed aircraft are not subject to FET but are subject to non-commercial fuel tax).

Note, for those using aircraft for both business and pleasure, please ensure you speak with your CPA about maximizing the first year bonus depreciation to ensure non-business guests do not result in disallowances.

What is going on with aircraft values in 2018?

AMSTAT, Aircraft Valuation Tool Report, released in early April 2018, indicates a recent uptick in business aircraft values. According to this report, the average estimated values for four of the five major business aircraft segments have risen since the start of Q4 2017.

Business aircraft values	17-Oct	18-Feb	Variation
Heavy jet segment	$14.1M	$15.2M	7.80%
Medium jet segment	$3.1M	$3.1M	0.40%
Super-mid jet segment	$5.7M	7.0M	23.70%
Light jet segment	$2.3M	$2.4M	6.90%
Turboprop segment	$2.2M	$2.6M	18.80%

Source: AMSTAT

According to Andrew Young, AMSTAT General Manager, "the increase in estimated values reflects recent increases in market demand and a tightening market with fewer options for buyers."

The National Aircraft Resale Association (NARA) believes that tax reform is driving aircraft values. "While political and economic developments around the world can influence the market, now is a great time to buy an aircraft before prices increase," said NARA Chairman, Brian Proctor. He notes that used aircraft in excellent condition are selling at a faster pace than in years past.

"Our NARA-certified brokers have recognized a change in the marketplace just in the first few months of 2018 since the U.S. tax reform was enacted," Proctor said. "The market is generating more activity and demand and that is likely to increase as the economy continues to heat up, interest rates rise, and most indicators point to a general economic upturn."

What is the tendency for the rest of 2018?

The 100% expensing rule is an excellent incentive for aircraft owners to step up to a high quality aircraft. Also, the decrease in the federal income tax rate should be a good incentive for companies and wealthy individuals to buy an aircraft for the first time because they can redirect money savings from taxes to buy an aircraft.

If buyers take advantage of the new tax benefits during the rest of the year by accelerating the purchase of pre-owned aircraft, very soon aircraft will start selling faster and the oversupply should start decreasing. As a consequence, pre-owned aircraft values should rise slowly in 2018 (given all other factors affecting aircraft values remain stable).

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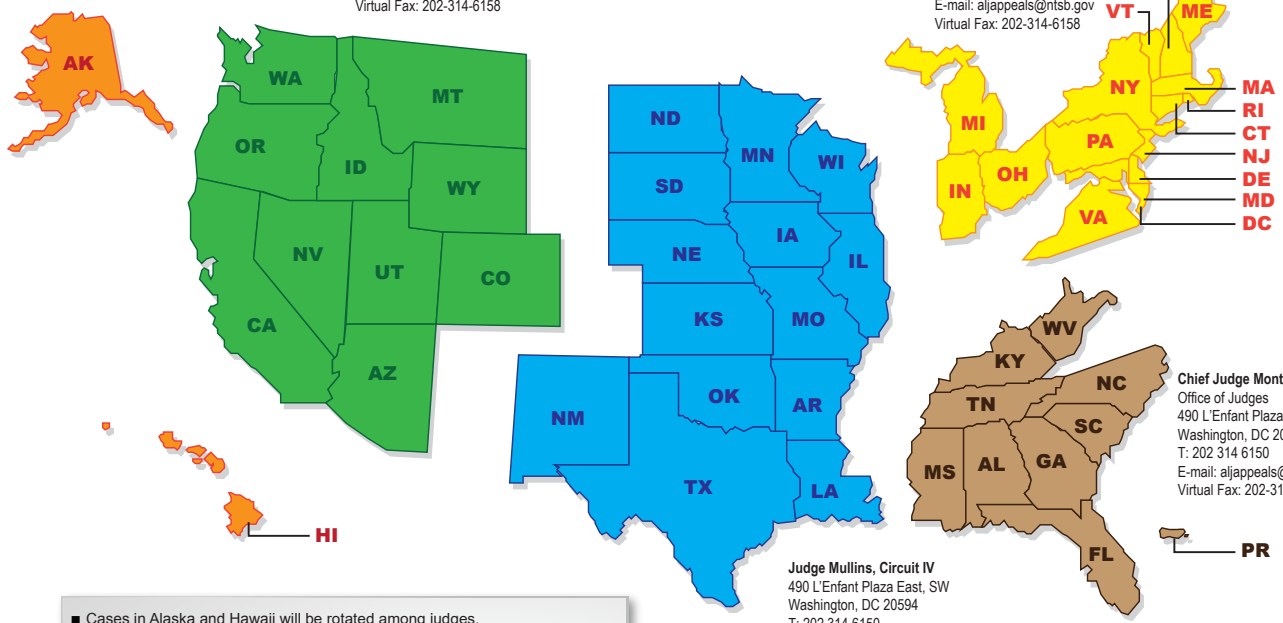

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