

FILED
MAY 11 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

83030-4

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

Case No. 83030-4

2009 MAY 11 A 9:23

BY RONALD R. CARPENTER

SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

TWIN COMMANDER AIRCRAFT, L.L.C., formerly known and doing
business as TWIN COMMANDER AIRCRAFT CORPORATION,
Petitioner

v.

KENNETH C. BURTON, as Personal Representative of the ESTATE OF
ULISES DESPOSORIOS SANTIAGO, and on behalf of ERIKA
BARAJASA VASQUEZ, VIRGINIA DESPOSORIO BARAJAS,
ULISES DESPOSORIOS BARAJAS, TEOFILO UVALDO
DESPOSORIOS CABRERA, and IRENE SANTIAGO NAVA,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF
MARCELINO GONZALEZ ALCANTARA, and on behalf of ROSARIO
FLORES ALVARADO, EDUARDO GONZALEZ FLORES, DANIEL
GONZALEZ FLORES and CHRISTIAN NANYELI GONZALEZ
FLORES,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF
JUAN GALINDO HERRERA, and on behalf of REBECA ESCAMILLA
MAGALLANES, ERICK GALINDO ESCAMILLA and LILLIAN ITZE
GALINDO ESCAMILLA,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF
PABLO LOZADA LEGORRETA, and on behalf of MARIA DE
LOURDES ESQUIVEL AVALOS, GERSON FABRICIO LOZADA
ESQUIVEL, DIANA PAOLA LOZADA ESQUIVEL and PRISCILLA
LOZADA ESQUIVEL,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF
CESAR GABRIEL MAYA, and on behalf of STEPHANIE
GUADALUPE MAYA TRIUJEQUE and DIEGO HANNIEL MAYA
TRIUJEQUE,

KENNETH C. BURTON, as Personal Representative of the ESTATE OF
JESUS ARCINIEGA NIETO, and on behalf of ANGELICA

ORIGINAL

Answer to Petition for Review

MARGARITA ARIZMENDI GUADARRAMA, ESTEFANIA
ARCINIEGA ARIZMENDI, JOSE FRANCISCO ARCINIEGA PEREZ
and CONSUELO NIETO TAPIA, and

KENNETH C. BURTON, as Personal Representative of the ESTATE OF
MARIANELA ELIZARDI RIOS, and on behalf of MARIANELA AIDA
QUEZADA ELIZARDI and AIDA MAGDALENA RIOS DE
ELIZARDI, Respondents

RESPONDENTS' ANSWER TO TWIN COMMANDER'S
PETITION FOR REVIEW AND CROSS-PETITION
FOR REVIEW OF ADDITIONAL ISSUES

Gene S. Hagood, SBT 08698400
Thomas W. Bingham, WSBA 7575
Attorneys for Petitioners

Gene S. Hagood
Hagood, Neumann &
Huckeba, LLP
1520 E. Highway 6
Alvin, Texas 77511
Telephone: 281-331-5757
firm@hnhlawyers.com

Thomas W. Bingham
Krutch, Lindell, Bingham,
Jones & Petrie, P.S.
1420 Fifth Ave., Suite 3150
Seattle, Washington 98101
Telephone: 206-682-1505
twb@krutchlindell.com

TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF RESPONDENT AND CROSS-PETITIONER	1
II. COURT OF APPEALS' DECISION	1
III. ISSUES PRESENTED FOR REVIEW	1
A. BURTON AS RESPONDENT	
1. Whether TCAC Established Its Status as a GARA "Manufacturer" GARA § (2)(B)(1).	1
2. Whether Burton's Evidence Raised Fact Issues That TCAC Knowingly Misrepresented Or Concealed Or Withheld Required Information To The FAA That Is Causally Related To The Harm. GARA § (2)(B)(1).	1
B. BURTON AS CROSS-PETITIONER	2
1. Whether SB235, Amending The Aircraft's Maintenance Manual, Alleged To Be The Defective Product, Published Within 13 Months Of The Crash, Was A "New Component ... Or Other Part ... Which Was Added To The Aircraft" Triggering GARA's "Rolling Provision" Exception. GARA § (2)(A)(2).	2
2. Whether The Misrepresentations By Gulfstream, The Original Manufacturer At The Time The Aircraft Was Type-Certificated Under Its DOA Authority,	

TABLE OF CONTENTS
(continued)

	Tolled GARA's 18-Year Repose Period As To TCAC.	2
IV.	STATEMENT OF THE CASE	2
V.	ARGUMENT	3
A.	WHY TCAC'S PETITION SHOULD BE DENIED	3
1.	Twin Commander Failed To Prove, As a Matter Of Law, That It Is a GARA Manufacturer. GARA § (2)(b)(1).	3
2.	Burton Raised Fact Issues Under GARA's Misrepresentation or Concealment or Withholding Exception With Evidence That The Information Known By Twin Commander When It Sought And Obtained FAA Approval To Publish SB235 Was Indisputably Greater And Substantively Different From What TCAC Actually Divulged To The FAA.GARA § (2)(b)(1).	6
B.	ARGUMENT WHY CROSS-PETITIONER'S REVIEW SHOULD BE ACCEPTED	14
1.	Type Certificate Holder's Service Publications Must Be Considered "Parts" Or "Systems" Under GARA To Avoid Legal Inconsistency And Manifest Injustice.	14
2.	The Original Manufacturer's	

	Misrepresentation To The FAA At The Time Of Its Original Type Certification Of The Model Aircraft That All Flight Flutter Testing Was Performed Invoked GARA's Misrepresentation, Concealment Exception As To Any Subsequent Manufacturer Or Type Certificate Holder	18
VI.	CONCLUSION	20
VII.	APPENDIX	A1

TABLE OF AUTHORITIES

CASES

<i>Blum v. Stenson</i> , 465 U.S. 886 (1984)	6
<i>Burroughs v. Precision Airmotive Corp.</i> , 78 Cal. App. 4 th 681 (2000)	5
<i>Butler v. Bell Helicopter Textron</i> , (2003) 109 Cal.App.4th 1073	7, 8, 10
<i>Caldwell v. Enstrom Helicopter Corp.</i> , 230 F.3d 1155 (9th Cir. 2000)	16, 17
<i>Driver v. Burlington Aviation, Inc.</i> , 110 N.C. App. 591, 430 S.E.2d 476 (N.C. Ct. App. 1993)	18
<i>Hasler Aviation, LLC v. Aircenter, Inc.</i> , 2007 WL 2263171 (E.D. Tenn. 2007)	4
<i>Holliday v. Extex</i> , 457 F.Supp. 2d 1112 (D. Hawaii 2006)	18
<i>Lyon v. Agusta S.p.A.</i> 252 F.3d 1078 (9th Cir. 2001)	17
<i>Mason v. Schweizer Aircraft Corp.</i> , 653 N.W.2d 543 (Iowa 2002)	5, 17
<i>Michaud v. Fairchild</i> , 2001 Del. Supr. LEXIS 482 (2001)	5
<i>Robinson v. Hartzell Propeller, Inc.</i> , 326 F.Supp.2d 631 (D. Pa. 2004)	7, 10
<i>Sepich v. Department of Labor and Industries</i> , 75 Wash.2d 312, 450 P.2d 940 (Wash., Feb. 13, 1969) (No. 39382)	11
<i>Sheesley v. Cessna Aircraft Co.</i> , 2006 WL 1084103 (S.D.S. 2006)	4, 5
<i>United States v. Varig Airlines</i> , 467 U.S. 797 (1984)	19

STATUTES

Civil Aviation Regulations § 3.159	7
Civil Aviation Regulations § 3.311	7
Title 14 CFR Part 21	4, 19
GARA § 2(a)	3
GARA § (2)(b)(1)	3, 6

I. IDENTITY OF RESPONDENT AND CROSS-PETITIONER

Burton, as Personal Representative of the 7 Decedents' Estates ("Burton"), is (1) **Respondent** to Twin Commander's ("TCAC") Petition for Review and (2) **Cross-Petitioner** asking the Supreme Court to accept limited review of the Court of Appeals' decision that terminates review only on two issues (1) whether TCAC's Service Bulletin 235 (SB235), amending the accident aircraft's maintenance manual, triggered GARA's "rolling provision" exception and (2) whether the misrepresentations by Gulfstream, the original manufacturer, at the time the aircraft was type-certificated under its DOA authority tolled GARA's 18-year repose period as to TCAC.

II. COURT OF APPEALS' DECISION

Burton seeks review of the portions of the February 9, 2009 published decision of the Court of Appeals, Division I ("Decision") that affirmed the trial court. TCAC's motion for reconsideration was denied on March 11, 2009. A copy of the decision is in the Appendix at pages A1-A22. A copy of the order denying TCAC's motion for reconsideration is in the Appendix at page 23.

III. ISSUES PRESENTED FOR REVIEW

A. BURTON AS RESPONDENT

1. Whether TCAC established its status as a GARA "manufacturer". GARA § (2)(b)(1).
2. Whether Burton's evidence raised fact issues that TCAC

knowingly misrepresented or concealed or withheld required information to the FAA that is causally related to the harm. GARA § (2)(b)(1).

B. BURTON AS CROSS-PETITIONER

1. Whether SB235, amending the aircraft's maintenance manual, alleged to be the defective product, published within 13 months of the crash, was a "new component . . . or other part . . . which was added to the aircraft" triggering GARA's "rolling provision" exception. GARA § (2)(a)(2).

2. Whether the misrepresentations by Gulfstream, the original manufacturer at the time the aircraft was type-certificated under its DOA authority, tolled GARA's 18-year repose period as to TCAC.

IV. STATEMENT OF THE CASE

TCAC's Statement of the Case is essentially accurate except for the following corrections and additions:

TCAC has never manufactured an aircraft. (CP 1185) It contracts with outside "vendors"/ "suppliers" and subcontractors to design and manufacture parts including the very replacement rudder tip incident to SB235 at issue in this case. (*e.g.* CP 2195-97)

After 2 recent in-flight rudder related break-ups of its aircraft in Georgia and Texas, TCAC submitted Form 8110-3 to the FAA requesting approval to publish SB235 represented to be a fix for that model aircrafts' rudder problems. However, it improperly certified compliance with applicable regulatory requirements, failing to provide the FAA with all the

FAR and GARA “required information”. (CP 3806) After FAA approval, the SB235-recommended inspection was accomplished on the accident aircraft and returned to service. Six months later, on May 2, 2004, it crashed killing all 7 on board. (CP 1799-1808, 1909, 1910, 1914, 1921, 1927, 1948, 1952 and 1967) The Mexican investigation team determined that the improper inspection called for in SB235 was insufficient and the crash resulted from loss of its rudder. (CP 1806, 1808) Burton’s allegations against TCAC are consistent with these findings.

V. ARGUMENT

A. **WHY TCAC’S PETITION SHOULD BE DENIED.**

Burton assures the Court that the GARA sky is not falling – the Court of Appeals’ decision that TCAC failed in its proof will not “eviscerate” GARA or “orphan” aircraft to junkyards!

1. TCAC Failed To Prove, As a Matter Of Law, That It Is a GARA Manufacturer. GARA § (2)(b)(1).

Because GARA’s protection is afforded only to an aircraft manufacturer in that capacity (GARA § 2(a)), TCAC had the burden to prove manufacturer status. Burton, based on then existing and cited case law, contended that TCAC had not met its burden to prove GARA manufacturer status. TCAC provided no responsive evidence. The Court of Appeals concluded factually that “TCAC has not established it is a successor manufacturer” and based on that “inadequa[cy]”, “we must remand” (App. at p. 16). Now, on fear-based arguments, TCAC seeks to

have this Court by-pass established procedure and correct its lack of evidentiary support with a first-in-the-nation judicial proclamation that a type-certificate holder is *ipso facto* a GARA manufacturer. Neither GARA, its legislative history nor case law support such a short-cut.

TCAC incorrectly suggests it has legal (FAR) authority to produce aircraft based solely upon its type-certificate holder status. Per 14 CFR Part 21, subpart F, that privilege expired six months after the FAA's original Type-Certificate was issued to Gulfstream.¹ For Twin Commander to legally resume aircraft production, it must acquire a valid Production Certificate issued under 14 CFR Part 21, subpart G, but it has not.

TCAC continues its erroneous assertion, without authority, that "all published cases" on this issue have elevated a type certificate holder to a GARA manufacturer. (Pet. p 11)² In 2006 (before its Summary Judgment was filed), however, the *Sheesley* court, confirmed later by the *Hasler*³ court, summed it up holding that "a type-certificate holder is not always considered a manufacturer under GARA." *Sheesley v. Cessna Aircraft Co.*, 2006 WL 1084103 (S.D.S. 2006); *Hasler Aviation, LLC v.*

¹ See, http://www.faa.gov/aircraft/air_cert/production_approvals/prod_cert/; and http://www.faa.gov/aircraft/air_cert/production_approvals/prod_under_tc/ for a "plain English" description of these requirements provided by the FAA on their website.

² In the Court of Appeals, TCAC also inaccurately contended "uniformly," "not surprisingly," "unremarkable proposition," "unanimous case law" that "all courts faced with this or similar issues have reached the same conclusion."

³ The *Hasler* opinion also made it clear that, whether/when "a type-certificate holder and a manufacturer are synonymous" has not been answered in this formulation. *Id.*

Aircenter, Inc., 2007 WL 2263171 (E.D. Tenn. 2007). Per *Sheesley*:

The Court finds that Congress meant what it said – the [rolling] provision rolls the repose period for a claim against a manufacturer of a defective part. If Congress intended to roll the provision for the holder of the type-certificate covering the part, it could have said so because Congress understood the type-certification application process when it adopted GARA. *Sheesley* pp. *20-*23.

The two cases primarily relied upon by TCAC below actually establish the first of the two-prong analysis necessary for GARA manufacturer status: *Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543 (Iowa 2002) and *Burroughs v. Precision Airmotive Corp.*, 78 Cal.App. 4th 681 (2000). Recognizing no statutory definition for the term “manufacturer”, these courts required defendants to prove they were “aviation manufacturers” under GARA. In *Mason* (at 548), it was critical that the manufacturer was “engaged in producing current models of the aircraft at issue here.” In *Burroughs*, Precision continued to manufacture carburetors for use in the aviation industry. The courts thus found Schweizer and Precision GARA successor manufacturers. Here, TCAC offered no evidence that it was an aviation manufacturer. In fact, it admits to never manufacturing an aircraft and using contractors and their subcontractors as the manufacturers of any needed parts.

The second prong is found in *Michaud v. Fairchild*, 2001 Del. Supr. LEXIS 482 (2001), where the successor corporation simply acquired in bankruptcy the assets and type-certificates to a particular line of aircraft, but not the tail of liability. Thus the successor Type Certificate holder was

not entitled to GARA protection, not having acquired the liabilities of the original manufacturer. Here, TCAC offered no evidence it acquired the liabilities of Gulfstream.

Further, as the Court of Appeals observed, under federal rules of statutory construction, where a term is not defined in a statute, courts “look first at the statutory language then to the legislative history”

Blum v. Stenson, 465 U.S. 886, 896 (1984). But here,

[TCAC] does not engage in an analysis of the statutory language, legislative history or pertinent federal regulations to determine whether a type certificate holder that does not actually manufacture general aviation aircraft is the “manufacturer of the aircraft” under GARA. (p. 15)

There was no such analysis provided because none exists. Under established summary judgment standards, the Court of Appeals reversed and remanded – nothing new or exotic.

2. Burton Raised Fact Issues Under GARA’s Misrepresentation or Concealment or Withholding Exception With Evidence That The Information Known By TCAC When It Sought And Obtained FAA Approval To Publish SB235 Was Indisputably Greater And Substantively Different From What TCAC Actually Divulged To The FAA. GARA § (2)(b)(1).

The Court should reject TCAC’s consistent misrepresentation that GARA’s exception requires a showing of “fraud” (Pet. pp ii, 2, 6, 14-16, 18-20); the word “fraud” is never mentioned in GARA. Per GARA § (2)(b)(1), the issue is whether TCAC complied with the regulatory requirements of disclosing the required information to the FAA, not whether it had “depraved intent” to commit fraud.

Contrary to TCAC's protests, the two e-mails (and memos) from Jeff Cousins, TCAC's V.P. (later its president) (CP 4374-4376) are anything but "innocuous" (Pet. p 15); they (and his memos) tell us exactly what TCAC knew and didn't know and what they did and didn't do relative to the core issue - the regulatory (FARs) and legal (GARA) requirements to provide the "required information" to the FAA.

The "required information" that must not be knowingly misrepresented or concealed or withheld from the FAA has been defined to include information under a statute, regulation, case, in response to a direct inquiry from the FAA, or to correct information previously supplied directly by the manufacturer to the FAA. *Butler v. Bell Helicopter, Textron, supra* at 1083, n.17. Per *Robinson v. Hartzell Propeller, Inc.*, 326 F.Supp.2d 631, 658 (D. Pa. 2004), the manufacturer has an "affirmative duty . . . to report a defect or a design problem . . ." and is "not suppose to wait for the FAA to identify a problem. To the contrary, [it] had a responsibility to identify any problems, investigate the problems and report a solution to the problems to the FAA." Prior similar failures also constitute FAR and GARA "required information" per *Butler* (5 identical yoke failures on military helicopters) and *Robinson* (2 reports of same mid-blade propeller model failures along with disputed others). The Civil Aviation Regulations (predecessor to the FARs and the authority under which the accident model aircraft was manufactured and type-certificated, "CAR") §§ 3.159 and 3.311 require type-certification

demonstration by manufacturers that aircraft are free from flutter and excessive vibration on tail and control surfaces verified by testing to critical flight characteristics. (CP 1034, 1126-1144) The type-certificate holder and/or manufacturer is responsible to “fully advise the FAA of a [safety of flight] problem and to conduct all inspections and tests necessary to determine that the aircraft complies with its FAA approved type design and airworthiness requirements. (14 CFR § 21.3, 21.31 and 21.33) (CP 1121-1122) If any of this information previously provided to the FAA proves incorrect, per *Butler*, the information must be corrected. The overriding consideration in these FAA reporting requirements is to “promote safe flight of civil aircraft” and provide its service “with the highest possible degree of safety and the public interest.” “Safety permeates the whole [FAA]”. (*Butler* at p. 1084).

TCAC’s April 17, 2003 Form 8110-3 submission to the FAA was the vehicle by which all the “required information” was to be provided to the FAA (CP 4783-4854) and where TCAC minimized the serious, endemic structural problems with its aircrafts’ rudders to which it had internally confessed and admitted *via* the Cousins e-mails (and memos) by referring only to the two recent Georgia and Texas rudder related in-flight break-ups. TCAC withheld or concealed from the FAA the following facts Burton discovered it knew *via* these internal documents: the rudder damage in a 1992 Denver rudder related in-flight break-up of the same model aircraft was the “same”/“identical”; there were “4 known cases (and

possibly more)” similar failures; that Geoffrey Pence, TCAC’s “Customer Service Manager” with no proven engineering expertise had the responsibility to “investigat[e] all the break-ups we have records of”, but TCAC’s self-described “intensive review” involved asking only “4 TCAC Service Centers to inspect the rudder caps . . .”; and only “7” aircraft (of a fleet of several thousand) were inspected; resulting in reports of cracking and deterioration of the rudder tips, upper rudder assembly and numerous “cracked lower horizontal stabilator [sic] ribs”; failures were 2” above the upper rudder hinge but below the cap and rib; its investigation did not determine a cause but ruled out the cap as the primary cause; and ironically it acknowledged that these parts deserve more attention during inspection and maintenance. (CP 4354-4357, 2198-2199, 1336-1338, 4858-5233). Despite these admissions, SB235 only called for a one-time close visual inspection of just some of the upper portions of the rudder, no inspection of the “lower horizontal stabilator [sic] ribs” or 2” above the upper rudder hinge but below the cap and rib, no removal of or looking under the paint or dye penetrant testing, and replacement of the cap (that was not the cause of the problem). If no damage was found, put the plane back together and return to service without recurrent inspections. Importantly, TCAC confirmed that “The service bulletin represents the position of [TCAC] regarding this issue. It was written by extremely competent and experience people . . . and issued only after careful review of the facts at hand. (CP 4374-4376)

TCAC's own documents establish actual knowledge of its unfulfilled responsibilities – use “extremely competent and experienced people” to conduct an “intensive review”/”careful review of the facts at hand” – all inspections and tests necessary to determine the cause and report a correct solution to the FAA for this safety of flight problem. TCAC accepted its responsibilities to the “owners, passengers and the FAA to see that these critical components were inspected . . .”. (CP 4374-4376) Burton's experts did the investigation and analysis that TCAC should have done, determining that this model aircraft suffers from a systemic, pervasive flutter problem (excessive vibration in flight that can tear the aircraft apart) with the tail of the aircraft that began at the time it was type certified by Gulfstream in 1979, (CP 1010-1038, 1126-1144) and manifested by the 1992 Denver Air “same”/”similar” crash and “4 known cases (and possible more)” all withheld from the FAA.

Butler v. Bell Helicopter Textron, (2003) 109 Cal.App.4th 1073, 1083, n.25, holds that the “knowingly” standard applies only to “misrepresented” and not “concealed” or “withheld”.⁴ While recognizing that the issue of intent is “particularly inappropriate for resolution by summary judgment” because evaluating state of mind often requires the drawing of inferences from the conduct of parties about which reasonable persons might differ, (*Robinson* p. 652-53) the families have provided

⁴ Full disclosure – it has also been held that “knowing” applies equally to concealment and withholding. Sheesley, *supra*, at *8.

sufficient evidence that TCAC knowingly misrepresented or concealed or withheld information from the FAA (*infra*) thus raising fact issues that TCAC knew its responsibility to divulge “required information” known to it to the FAA but failed to do so.

TCAC complains that two of Burton’s experts, Donham and Twa, are neither qualified nor may give opinions concerning TCAC’s vice-president’s admissions in the April, 2003 e-mails referenced above. Interestingly, TCAC does not contest what the factual evidence is or what it means; rather, who says it. Regardless, this information coupled with the expertise that comes from an adult lifetime of education, training and experience, provides the Court with a rare and deep look into the internal corporate issues in this case.

First, any objections to the qualifications, foundation or opinions of an expert must be made at the trial court level, not for the first time on appeal, or they are waived. *Sepich v. Department of Labor and Industries*, 75 Wash.2d 312 (Wash. 1969). TCAC made no such objections in the trial court or to the Court of Appeals; rather for the first time and only in this Court. Waiver applies. At best for TCAC, any error is harmless. *State v. Alden*, 73 Wash.2d. 360 (1968).

Second, recognizing that there are limitations to what experts may testify, neither Twa⁵ nor Donham overstepped permissible legal

⁵ Burton recognizes the trial court’s statement that he was not going to grant TCAC’s Motion to Strike Twa’s declaration or disregard/delete everything he had to say about FARs because it is such a highly technical area “even though it’s legal” and that he would

boundaries. These men are highly qualified and nationally recognized experts in their fields. Their skills were honed in the halls of real, functioning aircraft manufacturing corporations. They were not testifying as to some ethereal corporate intent; rather, that which their expertise based on education, training and experience, allows them to say - the evidence clearly indicates that TCAC received information that should have been disclosed to the FAA, but wasn't.

Third, Burton should not be criticized (or punished) for finding and presenting the law and evidence so compelling that it is possible for persons, whether expert or non-expert, to arrive at the conclusion that TCAC had knowledge, at the highest levels, of information required to be disclosed to the FAA but knowingly failed to do so. Witness: Did TCAC know everything it wrote in the e-mails and memos? Yes – from TCAC's own documents and V.P. Was TCAC charged with knowledge of the law obligating it to disclose the "required information" to the FAA? Yes – we are all charged with knowledge of the law, especially in the area in which

disregard the legal opinions and conclusions about people's mental state or the reporting requirements under 14 CFR 21.3. (Trial Court Oral Argument Tr. pp 20-21) His refusal to sustain the objection and statement that he would not consider that may be substantive or a semantic technicality, however, no objection was made to Donham's declaration, and the legal requirements of § 21.3 were before the court. Because of the ambiguity of the trial court's statements, it is unclear whether the Court of Appeal's one sentence reference to Twa's declaration incorporates that portion of Twa's declaration that the trial court himself was not going to disregard or would disregard. Regardless, the Court of Appeals had before it all the case law, statutory law and regulations describing what the "required information" encompassed and Donham's declaration to provide sufficient foundation to likewise confirm that information about the 1992 crash in the context of the 2002 and 2003 crashes need be disclosed.

we work. Was the information TCAC knew “required information”? Yes – all the concealed or withheld information fits well within the definition of “required information”. Was this known required information disclosed to the FAA? No – again from TCAC’s own documents and confirmed through the FAA. This evidence and the inferences to be reasonably drawn from them are to be accepted as true and thus, are sufficient, to raise fact issues defeating summary judgment.

Fourth, TCAC argues that, under *Rickert II*,⁶ to invoke its “fraud” issue, Burton must come forward with declarations from employees rather than experts. (Pet. p. 16) Neither GARA, its legislative history, regulations nor any case, including *Rickert II*, so holds. Even if this incorrect interpretation was adopted, TCAC overlooked the fact that Jeff Cousins was TCAC’s vice president and president when he wrote the e-mails and memos establishing what TCAC knew, thought and did incident to SB235.

Again, TCAC’s fear-based argument of evisceration of GARA should be rejected. Burton simply has sufficient evidence to be afforded the protection of GARA’s exception - placed in the statute to promote an “element of fairness” within GARA, ensuring that during the repose period, GARA does not incentivize manufacturers to hide known defects or other information required to be submitted to the FAA. (*House*

⁶ *Rickert v. Mitsubishi Heavy Indus., Ltd.*, 929 F.Supp. 380 (D. Wyo. 1996).

Committee on Public Works and Transportation, H.R. Rep. No. 103-525, Part 2 at 6; Senator Pressler's explanation as reported in Steggerda, (24 Transp. L.J. 191).⁷

B. ARGUMENT WHY CROSS-PETITIONER'S REVIEW SHOULD BE ACCEPTED.

Burton respectfully requests that the Supreme Court review these additional issues. There is no controlling case law in this state regarding any of the issues and the decisions involve issues of substantial public interest that should be determined by the Court.

1. Type Certificate Holder's Service Publications Must be Considered "Parts" or "Systems" Under the GARA "Rolling Provision" to Avoid Legal Inconsistency and Manifest Injustice.

Burton recognizes there is authority on both sides of this issue, however, the authority on Burton's side is more persuasive.

Burton's amended complaint clearly alleges SB235 as the defective product that amended the aircraft's maintenance manual and published 13 months before the crash. SB235 was intended by TCAC to publish a procedure to prevent further rudder failures on its aircraft. Because it failed to do so, SB235 is defective and reliance upon it created the hazard complained of – rudder failure causing the crash. Had it not been defective, compliance would have prevented the crash. Because both

⁷ Senator Metzenbaum also reasoned that without the knowing misrepresentation exception "there would be complete immunity from private suits after the statutory period, if a manufacturer learned of a defect or other problem, it could simply sit on the information and hope that an accident does not occur within the time frame." *Id.*

service publications like SB235 and revisions to maintenance manuals are mandatory under the FARs to promote safety of flight, it is irreconcilable that the law would sanction preemptive GARA immunity for the negligent publication of required safety information that causes an accident thereby eliminating accountability and promoting incentive to act irresponsibly. (*supra*, n. 7). Immunity should not be granted solely because a recently issued defective service publication involves an aircraft over 18 years old. It is inconsistent to insist that there is no obligation to provide this information non-negligently. The stated foundation for GARA's immunity from the long-tail of liability was because, as the manufacturers claimed, for those aircraft and component parts in service beyond the repose period, "any design or manufacturing defect not prevented or identified by the Federal regulatory process by then should, in most instances, have manifested itself." (*supra* fn. 7 and text, citing GARA, HR. No. 103-525(11) at 1648). Thus, GARA's foundation presumes appropriate identification and prevention, exactly what the FAA requires service publications and (revised) maintenance manuals to accomplish. Any failure to properly identify and prevent should therefore invoke GARA's "rolling" provision because the foundation for GARA immunity is lacking.

FAR §21.24(a)(2)(iii), "Instructions for Continued Airworthiness" (*e.g.*, Maintenance Manuals, Parts Manuals, and Inspection criteria and intervals) requires aircraft to be maintained in accordance with FAR

§21.50(b) which also requires these instructions to be delivered “to the owner of each type of aircraft . . .” per § 23.1529. The regulations leave room only for the possibility of alternate methods for compliance and TCAC failed to provide evidence that the accident aircraft met any of those qualifying requirements Without proper maintenance instructions and maintenance per these instructions, aircraft may not be Type Certificated, its airworthiness cannot be maintained and, therefore, it simply cannot fly. It is a mandatory part of the aircraft.

In *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155, 1157-1158 (9th Cir. 2000), the Ninth Circuit, the highest court in the United States to decide this issue, held that a “revised aircraft manual is considered a “new part” or “informational system” for GARA’s “rolling” provision because it contains instructions necessary to operate the aircraft. As in *Caldwell*, Burton has not alleged that the aircraft was defective or a manufacturer’s failure to warn; rather that the cause of this accident was the defective SB 235. The *Caldwell* revised "aircraft" manual at issue was a "flight" manual; here it is a "maintenance" manual. Both are indisputably "manuals" that are part of the aircraft and not "separate" products. A bulletin (SB 235) that revises a maintenance manual is directly comparable to a bulletin that revises a flight manual. It is a part or system of the aircraft that contains the legal instructions necessary to fly

the airplane. In fact, each maintenance manual has a part number just as every other part of an aircraft. Maintenance manuals include subsequent service publications (bulletins), which revise the maintenance manual. (CP 676-680) Just as an aircraft must be flown consistent with the flight manual, to remain airworthy it must be maintained in compliance with its maintenance manuals. From the manufacturer's point of view, service bulletins are mandatory in order to ensure the operational safety of the aircraft. (CP 691-699). Note therefore the General Instruction section of the accident aircraft's Maintenance Manual that specifically prescribes, "Check the applicability of all . . . Service Publications issued by Twin Commander Aircraft Corporation Check the applicability of publications for all installed equipment and ensure all relevant instructions are noted for compliance." (CP 676-680).

In *Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543, 552 (Iowa 2002), the court acknowledged that "Courts are divided on whether manuals are a 'part' subject to the rolling provision of GARA." In *Caldwell supra*, the court stated that "a component, system, subassembly, or other part under GARA need not be hardware but may also be a writing" and a revised aircraft manual does fall within GARA's rolling provision. Also, in *Lyon v. Agusta S.p.A.* 252 F.3d 1078 (9th Cir. 2001) that court stated that "a part need not be hardware; it might actually be

something like a “revised aircraft manual.” Further, the Court in *Holliday v. Extex*, 457 F.Supp. 2d 1112, 1118 (D. Hawaii 2006) stated that “[u]nlike a hard part, a manual cannot be changed without issuing a new writing whether it be a new page or new book. In that sense, a ‘revised’ manual requires [it be considered] a ‘new’ part.” In *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 591, 430 S.E.2d 476, 483 (N.C. Ct. App. 1993) the court found that a North Carolina statute of repose would not bar action if the manual caused the injury and was sold to the plaintiffs within the applicable period stating: “if defendants substantively altered, or deleted, a warning about the fuel system from the manual within the last 18 years, and it is alleged that the revision or omission is the proximate cause of the accident, then GARA does not bar the action.” *Id.* at 1158.

2. The Original Manufacturer’s Misrepresentation To The FAA At The Time Of Its Original Type Certification Of The Accident Model Aircraft That All Flight Flutter Testing Was Performed Invoked GARA’s Misrepresentation, Concealment Exception As To Any Subsequent Manufacturer Or Type Certificate Holder

This issue was raised below, but the Court of Appeals did not address this issue in light of their ruling on the applicability of the misrepresentation/concealment/ withholding exception. (*See* p 16, fn 15) Burton requests the Supreme Court address this additional issue if discretionary review is accepted. This is an issue of first impression.

If a manufacturer proves to the FAA it is trustworthy, competent and has the resources to regulate itself, it can become a holder under the

FAA's Delegation Option Authority (DOA) program. 14 C.F.R. §§21.39, 21.277 and FAA Order 8100.9A Par. 5-10 and Ch. 7. The manufacturer is then, with restrictions, "authorized by the FAA to conduct type, production and airworthiness certification functions in accordance with 14 C.F.R. part 21, subpart J" (Order 8100.9A, par. 1-10m). The DOA manufacturer must submit to the FAA a statement certifying that the design article satisfies the airworthiness standards. (*Id.*)

The FAA then reviews the submitted package, verifies the findings were complete, notifies the DOA holder, and approves and issues the airworthiness limitations, Type Certificate and data sheet. The DOA manufacturer only certifies to the FAA its "design article" passed and that the data is placed in the manufacturer's file. The FAA can then approve the certification and issue a type-certificate. As confirmed in *United States v. Varig Airlines*, 467 U.S. 797, 815 (1984), at best this certification is audited by the FAA by "spot-checking"; but even then, rarely so.

TCAC's documents' distribution pages (the original Gulfstream certification documents) do not reveal distribution to the FAA, nor do any records reveal any review by the FAA. More importantly, it was misrepresented to the FAA at the time of applying for Type Certification of the accident model aircraft that all flight flutter testing had been performed when it had not. (CP 1009-38; 1126-44) TCAC never corrected this misinformation. Burton provided responsive summary judgment evidence that the crash at issue was directly related to the

original manufacturer's failure to perform the necessary flight flutter testing of the model aircraft, and subsequently to TCAC's failure to perform flight flutter testing at the time it applied for FAA approval of SB235. This meets the nexus requirement of the GARA misrepresentation, concealment, withholding exception.

VI. CONCLUSION

Burton, as Respondent, requests that the Court refuse to accept review of the two Court of Appeals' holdings TCAC claims to be in error in part V of its Petition and affirm the Court of Appeals on those issues. Further, as Cross-Petitioner, requests that the Court accept review of the one Court of Appeals' holding that Burton claims to be in error and the one issue the Court of Appeals did not rule on, both contained in part V B. in Burton's answer and reverse the Court of Appeals on these issues alone.

Respectfully submitted this 8th day of MAY, 2009.

KRUTCH, LINDELL, BINGHAM,
JONES & PETRIE, P.S.

HAGOOD, NEUMANN &
HUCKEBA, L.L.P.

By: 
Thomas W. Bingham
WSBA #7575
1420 Fifth Avenue, Suite 1350
Seattle, WA 98101
Telephone: 206-682-1505

By: 
Gene S. Hagood
SBT 08698400
1520 E. Highway 6
Alvin, TX 77511
Telephone: 281-331-5757

CERTIFICATE OF SERVICE

The undersigned certifies that on this the 8th day of May,
2009, a true and correct copy of this document was served on each of the
parties below as follows:

Mr. Clark Reed Nichols
Ms. Mary Gaston
Perkins Coie
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099



Thomas W. Bingham

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KENNETH C. BURTON, as Personal)
Representative of the ESTATE OF ULISES)
DESPOSORIOS SANTIAGO, and on behalf)
of ERIKA BARAJASA VASQUEZ, VIRGINIA)
DESPOSORIOS BARAJAS, ULISES)
DESPOSORIOS BARAJAS, TEOFILO)
UVALDO DESPOSORIOS CABRERA, and)
IRENE SANTIAGO NAVA,)

No. 60163-6-1

KENNETH C. BURTON, as Personal)
Representative of the ESTATE OF)
MARCELINO GONZALEZ ALCANTARA, and)
on behalf of ROSARIO FLORES)
ALVARADO, EDUARDO GONZALEZ)
FLORES, DANIEL GONZALEZ FLORES and)
CHRISTIAN NANYELI GONZALEZ FLORES,)

PUBLISHED OPINION

KENNETH C. BURTON, as Personal)
Representative of the ESTATE OF JUAN)
GALINDO HERRERA, and on behalf of)
REBECA ESCAMILLA MAGALLANES,)
ERICK GALINDO ESCAMILLA and LILLIAN)
ITZE GALINDO ESCAMILLA,)

KENNETH C. BURTON, as Personal)
Representative of the ESTATE OF PABLO)
LOZADA LEGORRETA, and on behalf of)
MARIA DE LOURDES ESQUIVEL AVALOS,)
GERSON FABRIC10 LOZADA ESQUIVEL,)
DIANA PAOLA LOZADA ESQUIVEL and)
PRISCILLA LOZADA ESQUIVEL,)

KENNETH C. BURTON, as Personal)
Representative of the ESTATE OF CESAR)
GABRIEL MAYA, and on behalf of)
STEPHANIE GUADALUPE MAYA)
TRIUJEQUE and DIEGO HANNIEL MAYA)

FILED: February 9, 2009

No. 60163-6-1/2

TRIUJEQUE,)
)
KENNETH C. BURTON, as Personal)
Representative of the ESTATE OF JESUS)
ARCINIEGA NIETO, and on behalf of)
ANGELICA MARGARITA ARIZMENDI)
GUADARRAMA, ESTEFANIA ARCINIEGA)
ARIZMENDI, JOSE FRANCISCO)
ARCINIEGA PEREZ and CONSUELO NIETO)
TAPIA, and)
)
KENNETH C. BURTON, as Personal)
Representative of the ESTATE OF)
MARIANELA ELIZARDI RIOS, and on behalf)
of MARIANELA AIDA QUEZADA ELIZARDI)
and AIDA MAGDALENA RIOS DE ELIZARDI,)
)
Appellants,)
)
v.)
)
TWIN COMMANDER AIRCRAFT, LLC,)
)
Respondent.)

SCHINDLER, C.J.—In May 2004, a Twin Commander Model 690C twin engine airplane crashed, killing all seven people aboard. The personal representative of the decedents' estates, Kenneth C. Burton, filed wrongful death actions against Twin Commander Aircraft, LLC, as the current type certificate holder of the Twin Commander Model 690C aircraft. The "General Aviation Revitalization Act of 1994" (GARA)¹ bars civil actions against "the manufacturer of the aircraft" or the manufacturer of "any new component, system, or other part of the aircraft" 18 years after delivery to the first purchaser or the date of completion of the replacement or addition. GARA § 2(a). However, GARA provides a new 18-year time limitation period for any new component,

¹ Pub. L. No. 103-298, 108 Stat. 1552 (1994), as amended by Pub. L. 105-102, 111 Stat. 2204 (1997); (codified at 49 U.S.C. § 40101, note) (1997)).

No. 60163-6-I/3

system, or other part that replaced or added to the aircraft and allegedly caused the accident, known as the "rolling provision." GARA 2(a)(2). There are also several exceptions to the statute of repose, including where the manufacturer knowingly misrepresented, or concealed, or withheld required information from the FAA that is material and relevant to the operation of the aircraft and is causally related to the accident.

In the wrongful death lawsuits against Twin Commander, Burton alleged that the "Alert Service Bulletin Upper Rudder Structural Inspection" (SB 235) that was issued by Twin Commander in April 2003, was the defective part that caused the crash. Burton also alleged that in obtaining approval of the Service Bulletin, Twin Commander knowingly misrepresented, or concealed, or withheld information concerning the structural integrity of the rudder system to the FAA. Twin Commander filed a motion for summary judgment dismissal arguing that as a matter of law, SB 235 was not a new "part" that triggered the rolling provision under GARA. Twin Commander also argued there was no evidence that it knowingly misrepresented, or concealed, or withheld material information from the Federal Aviation Administration (FAA). The trial court granted the motion for summary judgment and dismissed the wrongful death lawsuits against Twin Commander.

We conclude the court did not err in ruling that SB 235 is not a new component, system, or part of the aircraft under the rolling provision of GARA. However, because the record does not permit a reasoned determination of whether Twin Commander is the "manufacturer of the aircraft" under GARA, and there are material issues of fact about

No. 60163-6-1/4

whether Twin Commander knowingly misrepresented, or concealed, or withheld material information from the FAA, we reverse and remand for further proceedings.

FACTS

Gulfstream American Corporation was the original manufacturer of the Model 690A, 690B, and 690C, aircraft. In 1979, the Federal Aviation Administration (FAA) issued a type certificate authorizing Gulfstream to manufacture the Model 690C dual engine turbo prop airplane. By issuing the type certificate, the FAA approved the aircraft design and certified that the design complied with safety standards and met FAA regulations.²

In 1981, Gulfstream sold a Model 690C dual engine turbo prop airplane, serial number 11678, to a Venezuelan purchaser. In 2004, the airplane was owned by an agency of the Mexican government, Procuraduria General de la Republica (PGR).

In 1989, Twin Commander Aircraft, LLC, (Twin Commander) acquired the type certificate from Gulfstream for the Model 690A, 690B, and 690C aircraft. Even though the type certificate authorizes Twin Commander to manufacture the aircraft, there is no dispute that Twin Commander did not continue to manufacture the aircraft.³ As the type certificate holder, Twin Commander is required to provide ongoing support to the aircraft and report information to the FAA that could result in a risk to flight safety.⁴

In November 2002, the rudder system of a Model 690B failed while in flight and the plane made an emergency landing in Texas. The rear structure of the airplane was

² See generally, 14 C.F.R. § 21.11 – 21.55 (2006).

³ See, 14 C.F.R. §§ 21.3, 21.6(a), 21.45, 21.50, 21.7, 25.1529.

⁴ See, 14 C.F.R. § 21.3, 21.7, 21.50, 25.1529.

No. 60163-6-1/5

damaged and the fiberglass rudder cap and upper rudder rib were missing. In March 2003, another Model 690B aircraft crashed in Georgia after experiencing an in-flight breakup when the rudder cap separated from the rudder.

In response to these two accidents, Twin Commander sought and obtained FAA approval on April 18, 2003 to issue "Alert Service Bulletin No. 235, Upper Rudder Structural Inspection" (SB 235) for Twin Commander Models 685, 690, 690A, 690B, 690C, 690D, 695, 695A and 695B. SB 235 required a one-time close visual inspection of the rudder cap, top rudder rib, and forward rudder spar "[w]ithin 25 hours or 90 days, whichever comes first." The rudder caps for the Model 690A and Model 690B aircraft are a fiberglass composite. The rudder cap for the Model 690C is aluminum.

SB 235 describes the two accidents in 2002 and 2003 that involved the Twin Commander Model 690B as the "Reason for Publication." SB 235 also states that field reports indicated unusual wear on the composite rudder tips.

On May 2, 2004, the Twin Commander Model 690C aircraft owned by PGR crashed near Aqua Caliente, Mexico. All seven PGR employees were killed. According to the report by the Mexican authorities, aviation technicians inspected the aircraft in compliance with SB 235 in July and again in October 2003. The accident investigation by the Mexican government determined that the rudder came loose in flight, causing loss of control of the aircraft. The report concludes that SB 235 was inadequate.

On April 29, 2005, the personal representative for the estates of the seven crash victims, Kenneth C. Burton, filed wrongful death lawsuits against Twin Commander.⁵ Burton asserted that "The rudder tip and rudder assembly separated from the aircraft

⁵ The wrongful death lawsuits were consolidated for pretrial proceedings.

No. 60163-6-1/6

causing the pilot . . . to lose control” of the aircraft. Burton claimed that SB 235 was the defective product that caused the accident. Burton alleged causes of action for product liability, negligence, failure to disclose and concealing information to the Federal Aviation Administration (FAA), strict products liability, and failure to warn. In the amended complaint, Burton deleted the failure to warn claim and specifically asserted that “. . . all [of] these causes of action relate solely and only to Service Bulletin 235. Plaintiffs do not now allege any cause of action based on defective design, manufacture, marketing, assembly or otherwise of the aircraft in question nor do Plaintiffs state a claim for failure to warn.” The amended complaint also sets forth factual allegations to support the claim that Twin Commander “knowingly misrepresented to the FAA or concealed or withheld from the FAA required information” regarding problems with the rudder system that were causally related to the 2004 crash. In addition, Burton alleged that in obtaining certification from the FAA for the Model 690, the testing for rudder problems was inadequate and the rudder problems were not disclosed.

Twin Commander filed a motion for summary judgment dismissal based on the federal statute of repose under GARA. GARA bars actions against the manufacturer of the aircraft if the accident occurred 18 years after delivery to the first purchaser. GARA § 2(a). GARA also contains a “rolling provision” that starts the statute of repose anew with respect to “any new component, system, subassembly, or other part which replaced . . . or which was added to the aircraft, and which is allegedly to have caused such death, injury or damage . . .” of the accident. GARA § 2(a). The GARA statute of repose does not apply to certain exceptions, including those claims related to the manufacturer’s knowingly misrepresentation to the FAA of material information related to the cause of

No. 60163-6-1/7

the accident. GARA § 2(b). Twin Commander argued that the rolling provision was not implicated by SB 235 and there was no evidence that it knowingly misrepresented material information to the FAA.

In opposition, Burton argued that as a matter of law the rolling provision applied because SB 235 was a part of the maintenance manual, which is a “part” of the aircraft. Burton also submitted expert testimony to argue that there were material issues of fact as to whether the knowing misrepresentation, or concealment, or withholding exception under GARA applied.

The trial court granted Twin Commander’s motion for summary judgment on the grounds that “there are no material issues of fact in dispute as to the applicability of the GARA statute of repose and as to whether Plaintiffs’ claims fall under one of the statutory exceptions to the GARA statute of repose” Burton appeals.

ANALYSIS

Burton argues that as a matter of law the rolling provision of GARA applies because SB 235 is a new component, system, or part that amended the aircraft maintenance manual, which is “part” of the aircraft. In the alternative, Burton argues there are material issues of fact about whether Twin Commander is “the manufacturer of the aircraft” under GARA and whether Twin Commander knowingly misrepresented, or concealed, or withheld material information about the rudder system defects for Model 690C from the FAA.

Standard of Review

The court reviews summary judgment de novo. Mountain Park Homeowners Ass’n, Inc. v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). The moving party

No. 60163-6-1/8

under CR 56 bears the initial burden to demonstrate the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A defendant requesting summary judgment must do more than simply deny liability. Hash by Hash v. Children's Orthopedic Hospital & Medical Center, 110 Wn.2d 912, 757 P.2d 507 (1988). "At the very least, to support a motion for summary judgment the moving party is required to set out its version of the facts and allege that there is no genuine issue as to the facts as set out." Hash, 110 Wn.2d at 916. As noted in White v. Kent Medical Center, Inc., 61 Wn. App. 163, 810 P.2d 4 (1991), "[i]t is difficult to prove a negative, and in some circumstances the only way that the moving party will be able to show that there is no material issue of fact is by way of reply to the responding party's citations to the record." White, 61 Wn. App. at 170-71. Once the moving party meets its initial burden, the burden then shifts to the nonmoving party to set forth specific facts showing a genuine issue of material fact exists for trial.⁶ The court must consider the evidence and the reasonable inferences therefrom in a light most favorable to the nonmoving party.

GARA

Congress enacted GARA in 1994 to limit "the long tail of liability" imposed on manufacturers of general aviation aircraft. Lyon v. Agusta S.P.A., 252 F.3d 1078, 1084 (9th Cir. 2001). "It is apparent that Congress was deeply concerned about the enormous product liability costs that our tort system had imposed upon manufacturers of general aviation aircraft." Lyon, 252 F.3d at 1084. GARA "creates an explicit

⁶ We reject Burton's argument that Twin Commander did not meet its initial burden on summary judgment on the question of whether the misrepresentation exception under GARA applied.

No. 60163-6-1/9

statutory right not to stand trial.” Estate of Kennedy v. Bell Helicopter Textron, Inc., 283 F.3d 1107, 1110 (9th Cir. 2002). GARA is a mandatory statute of repose that bars lawsuits against the manufacturer of the aircraft or the manufacturer of any new component or, system, or other part of the aircraft from accidents that occurred more than 18 years after the initial transfer of the aircraft. GARA §§ 2(a), 3(3). GARA also “supersedes any State law to the extent that such law permits a civil action” GARA § 2(d).

GARA provides in pertinent 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

Section 3. OTHER DEFINITIONS.

For the purpose of this Act—

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

GARA § 2(a), 3(3).

GARA contains a “rolling provision” that restarts the 18-year limitation period against the manufacturer of any new or replacement part. The rolling provision provides:

No. 60163-6-1/10

(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.

GARA § 2(a)(2).

GARA also sets forth four exceptions where the 18-year statute of repose does not apply. One exception provides that the statute of repose does not apply if the manufacturer knowingly misrepresented or concealed or withheld from the FAA material information that was causally related to the accident.

(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 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;

GARA § 2(b)(1).

Here, there is no dispute that the May 2004 accident occurred more than 18 years after Gulfstream first delivered the aircraft in 1981. There is also no dispute that Twin Commander acquired the type certificate from Gulfstream in 1989 and made no changes to the rudder system for the Model 690 series.

GARA §2(a)(2): New Part

Burton claims that as a matter of law, the rolling provision of GARA applies to Twin Commander as the manufacturer of a new component, system, or part. Burton

No. 60163-6-1/11

contends SB 235 is a new component, system or part that amends the maintenance manual, which is "part" of the aircraft.

Burton relies on Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155 (9th Cir. 2000), to argue that the maintenance manual is "part" of the aircraft. In Caldwell, because the revised flight manual did not include a warning that the last two gallons of fuel could not be used, the helicopter ran out of fuel and crashed. The fuel system was designed so the last two gallons of gas could not be used. The flight manual has been revised within the 18-year statute of repose. The plaintiffs alleged that the revised flight manual lacked any warning about the two gallons of unusable fuel.

The Ninth Circuit held that a revised helicopter flight manual could be considered a "new part" or a "defective system" of the aircraft under the rolling provision of GARA because the revised flight manual was an integral part of the helicopter that allegedly caused the accident. Caldwell, 230 F.3d at 1157-58. The Court concluded that "if Defendants substantially altered or deleted, a warning about the fuel system from the manual within the last 18 years, and it is alleged that the revision or omission is the proximate cause of the accident, then GARA does not bar the action." Caldwell, 230 F.3d at 1158. In reaching this conclusion, the Court cited and relied on the federal regulations that require the flight manual to be onboard the aircraft, that the flight manual must contain the "information that is necessary for the safe operation because of design operation or handling characteristics," and that a flight manual is not a general instructional guide "but instead is detailed and particular to the aircraft to which it pertains." The Court in Caldwell also cited federal regulations that specifically require

No. 60163-6-1/12

the flight manual to contain information about a gas tank and usable fuel supply.

Caldwell, 230 F.3d at 1157 (citing 14 C.F.R. 27.1581(a)(2)).

There is no dispute that Twin Commander issued SB 235 in April 2003, 13 months before the accident in May 2004. Burton contends that because SB 235 is a revision to the maintenance manual, like a flight manual it is "part" of the aircraft. We agree with the reasoning in Colgan Air, Inc. v. Raytheon Aircraft Co., 507 F.3d 270 (4th Cir. 2007), that a maintenance manual "is not sufficiently similar to a flight manual" and is not a "part" of the aircraft for purposes of the rolling provision under GARA.

Unlike a flight manual that is used by the pilot and is necessary to operate the aircraft, a maintenance manual is used by the mechanic and "outline[s] procedures for the troubleshooting and repair of the aircraft." Emery v. McDonnell Douglas Corp., 148 F.3d 347, 351 (4th Cir. 1998). Unlike the federal regulations that require the flight manual to be onboard the aircraft, Burton cites no requirement that the maintenance manual must be onboard.⁷ And unlike a flight manual, a maintenance manual as well as a service bulletin are used on and apply to different aircraft models.⁸

Burton cites to on 14 C.F.R. § 43.13(a) which provides that:

Each person performing maintenance, alteration, or preventative maintenance on an aircraft, engine, propeller, or appliance shall use the methods, techniques, and practices prescribed in the current manufacturer's maintenance manual or Instructions for

⁷ Burton's citation to the federal regulations only relates to the requirement that the manufacturer provide a maintenance manual to the owner of the aircraft. 14 C.F.R. §21.50(b) ("The holder of . . . the type certificate or supplemental type certificate for an aircraft . . . shall furnish at least one set of complete Instructions for Continued Airworthiness, to the owner of each type aircraft . . . upon its delivery").

⁸ Here, there is no dispute that SB 235 applied to a number of different models including Model 690A, 690B, and 690C, 690D, 695, 695A, and 695B.

No. 60163-6-I/13

Continued Airworthiness prepared by its manufacturer, or other methods, techniques, and practices acceptable to the [FAA]⁹

But as the Court noted in Colgan, "Recognizing that a maintenance manual is an acceptable means of compliance, it is not the sole means by which an operator may obtain airworthiness." Colgan, 507 F.3d at 277.

Lastly, issuing a service bulletin is not a separate undertaking. There is no dispute that Twin Commander had an ongoing duty to provide information related to the safety of the aircraft.¹⁰

Moreover, while Burton asserts SB 235 was the defective product that caused the crash, Burton's allegations support a claim for a failure to warn, not a defect in the maintenance manual.¹¹ Unlike the plaintiffs in Caldwell, Burton does not allege the aircraft was in "good working order." Caldwell, 230 F.3d at 1156. Burton alleges that the airplane's rudder tip and rudder assembly separated from the aircraft causing the pilot to lose control and SB 235 did not adequately address or correct the defect in the rudder system. As the Ninth Circuit later explained in Lyon, a revision to a flight manual is different from a failure to warn. "What we alluded to there (in Caldwell), we reify here: a failure to warn is decidedly not the same as replacing a component part with a new one." Lyon, 252 F.3d at 1088.

⁹ Emphasis in the original.

¹⁰ In contract, an Airworthiness Directive is a legally enforceable rule that the FAA issues when it determines a potentially unsafe condition exists. According to Burton's expert witness, Donald E. Sommer, an Airworthiness Certificate is a mandatory alteration.

¹¹ In the original complaint, Burton alleged "Twin Commander negligently and carelessly failed to provide adequate notice to owners and operators of Twin Commander aircraft of the problems with the rudder assemblies on said aircraft, and the correct steps to detect, correct, and avoid an in-flight problem with said rudder assemblies."

No. 60163-6-1/14

In Alter v. Bell Helicopter Textron, Inc., 944 F.Supp. 531, 541 (S.D. Tex. 1996), the court concluded that the "manufacturers' maintenance and repair manuals are not a 'separate' product or component upon which plaintiffs may base a claim to avoid a repose statute." Alter, 944 F.Supp. at 538. The Alter court rejected the plaintiff's attempt to avoid the GARA time bar by arguing that the manual was defective, concluding that "the suit for a failure of the manuals to correct a design flaw is precluded by the statute of repose that bars a suit for the design flaw." Alter, 944 F.Supp. at 540.

In Robinson v. Hartzell Propeller Inc., 326 F. Supp. 2d 631 (E.D. Pa. 2004), plaintiffs sought to avoid the GARA statute of repose by alleging that a recently issued maintenance manual failed to adequately address problems with an aircraft over 18 years old. The plaintiffs' expert testified that "the inspection procedures in the overhaul manual were 'defective' because they 'were inadequate to detect the pitting on the surface of the blade that led to the fatigue failure and blade separation.'" Robinson, 326 F.Supp.2d at 662. The court concluded that the plaintiffs' true claim was for a failure to warn of the defective blade and the manual did not cause the plane crash.

To hold that [the defendant] should be liable because its manuals issued within the period of repose did not provide an adequate means of correcting the design flaw of the critical component, would be to circumvent the statute of repose by providing a back door to sue for the design flaw-ostensibly not for the design flaw itself; but for the failure of the manuals to adequately correct the flaw. The result would be the evisceration of the statute of repose.

Id. at 661 (citing Alter, 944 F. Supp. at 539-40).¹²

We reject Burton's argument that as a matter of law, the rolling provision under GARA applies to SB 235, and affirm the trial court.

¹² Emphasis in the original.

No. 60163-6-1/15

The Manufacturer of the Aircraft

If Twin Commander is not the manufacturer of a new part for purposes of the rolling provision, Burton contends that Twin Commander is not “the manufacturer of the aircraft,” entitled to protection under GARA. It is undisputed that Twin Commander is the type certificate holder for Model 690C. Citing Burroughs v. Precision Airmotive Corp., 78 Cal.App.4th 681, 93 Cal.Rptr.2d 124 (2000), and Mason v. Schweizer Aircraft Corp., 653 N.W.2d 543 (Iowa 2002), Twin Commander asserts that as the type certificate holder, it is the manufacturer under GARA.¹³ Burton argues that Twin Commander has not met its burden of showing that it is the “manufacturer of the aircraft” under GARA.

It is undisputed that GARA does not define “manufacturer.” GARA defines “general aviation aircraft” as

[A]ny aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations as defined under regulations in effect under Part A of subtitle VII of title 49, United States Code [49 USCS §§ 40101 et seq.], at the time of the accident. GARA § 2(c).

Under federal rules of statutory construction, where a term is not defined in the statute, courts “look first to the statutory language and then to the legislative history” Blum v. Stenson, 465 U.S. 886, 896, 104 S. Ct. 1541 (1984). Twin Commander does not engage in an analysis of the statutory language, legislative history, or pertinent

¹³ At the beginning of the hearing on the motion for summary judgment, the court granted Twin Commander’s motion to file an overlength reply brief but allowed Burton to file a surreply. Burton first raised the issue of whether Twin Commander was the manufacturer of aircraft under GARA in the surreply brief. Even though the court told Twin Commander, “If there’s some compelling issue on which Twin Commander feels to weigh in, you can seek permission to do that very specifically with respect to one issue” In response to the surreply, Twin Commander did not do so.

No. 60163-6-I/16

federal regulations to determine whether a type certificate holder that does not actually manufacture general aviation aircraft is the “manufacturer of the aircraft” under GARA.

Burroughs and Mason are also not helpful in making this determination. In Burroughs and Mason, the type certificate holder was clearly the successor manufacturer. In both cases, the type certificate holder began manufacturing the product line after acquiring the type certificate. Burroughs, 78 Cal. App.4th at 684-5, 692. (“Although Precision did not actually manufacture the particular carburetor in this case, it is a manufacturer of general aviation aircraft parts, including carburetors”); Mason, 653 N.W.2d at 545 (“Although Schweizer has never manufactured a model 269A helicopter, it has made 269C and 269D series helicopters under the type certificate purchased from McDonnell Douglas.”).

Unlike in Burroughs and Mason, Twin Commander has not established it is a successor manufacturer. Twin Commander states that it “has never manufactured any aircraft”—including the model 690 series and the record is unclear to what extent Twin Commander assumed the assets and liabilities of the original manufacturer Gulfstream.¹⁴ Because the record is inadequate to determine whether Twin Commander is the “manufacturer of the aircraft” entitled to protection under GARA, we must remand.¹⁵

¹⁴ Twin Commander also cites an unpublished case, Hasler Aviation, LLC v. Aircenter, Inc., 2007 WL 2263171 (E.D. Tenn. 2007), in which a district court concluded that Twin Commander is a manufacturer under GARA. But the Hasler court did not analyze whether Congress intended to extend GARA protection to type certificate holders that do not manufacture aircraft. Burton’s reliance on another unpublished case, Michaud v. Fairchild Aircraft Inc., 2001 WL 34083885 (Del. Super. 2001), is also unpersuasive. Unlike in Michaud, Twin Commander did not acquire the type certificate during bankruptcy proceedings and was given no disclaimer of liability.

¹⁵ Consequently, we need not consider Burton’s argument related to Twin Commander’s status under the FAA’s Delegation Option Authority.

No. 60163-6-1/17

GARA § 2(B): Knowing Misrepresentative or Concealment, or Withholding Exception

Even if Twin Commander is the manufacturer of the aircraft for purposes of GARA, Burton contends there are material issues of fact about whether Twin Commander knowingly misrepresented, or concealed, or withheld material information from the FAA concerning structural problems or defects with the Model 690C rudder system.

The statute of repose under GARA does not apply if the plaintiff pleads with specificity the facts necessary to prove that the manufacturer with respect to the type certificate knowingly misrepresented, or concealed, or withheld required material and relevant information to the performance, maintenance or operation of the aircraft that is causally related to the accident. GARA 2(b)(1). To establish the knowing misrepresentation or concealment or withholding exception, the plaintiff must show (1) knowing misrepresentation, or concealment, or withholding of material and relevant information, (2) that the manufacturer is required to give the FAA, (3) that is casually related to the accident. Robinson, 326 F.Supp.2d 631, 647 (E.D.Pa. 2004).

Burton contends that in obtaining approval of SB 235, Twin Commander knew but failed to disclose or withheld from the FAA material and relevant information about recurring structural problems with the rudder assembly and the lower horizontal stabilizer rib.

On April 17, 2003, Twin Commander submitted a "Statement of Compliance with the Federal Aviation Regulations" for SB 235. In the Statement of Compliance, Twin Commander's Designated Engineering Representative certified that SB 235 complied with the federal regulations. On April 18, 2003, the FAA approved issuance of SB 235.

No. 60163-6-1/18

SB 235 requires a one-time close visual inspection of the rudder tip, top rudder rib, and forward rudder spar for damage. If damage is observed, SB 235 recommends replacement of the rudder tip. SB 235 identifies the "Reason for Publication" as the two accidents that occurred in 2002 and 2003.

2.3 In two recent events involving Twin Commander 690B aircraft the fiberglass composite rudder tip appears to have departed the aircraft in flight. In one event, the aircraft landed safely; in the second event, the aircraft was lost. Neither rudder cap has been located, nor has a determination been made as to the cause of either event.

2.4 Reports from the field indicate that some composite rudder tips have sustained unusual wear of the leading edge (erosion, pitting and cracking) which could result in an overall weakening of the attendant structural assembly. Reports from the field also indicate evidence of cracking in welds and fasteners holes of some aluminum rudder tips. In addition, Twin Commander has received reports of some aluminum rudder tips. In addition, Twin Commander has received reports of fiberglass or aluminum repairs affecting the balancing of the rudder being accomplished without the required adjustment to the mass balance in accordance with the aircraft Maintenance Manual paragraph on Control Surface Balancing.

Citing two Twin Commander emails dated April 4 and April 21, 2003, Burton argues that as in Butler v. Bell Helicopter Textron, Inc., 109 Cal. App. 4th 1073 (2003), and Robinson, there are material issues of fact about whether Twin Commander knowingly misrepresented, or concealed, or withheld required relevant and material information from the FAA.

In Butler, a civilian helicopter crashed killing four passengers and injuring two others. The plaintiffs alleged the helicopter crash was caused by the failure of the tail rotor yoke. There was evidence that the manufacturer withheld information from the FAA about military helicopters accidents that were caused by the failure of identical tail rotor yokes. Citing the federal regulations, the court held that the manufacturer had a

No. 60163-6-1/19

duty to "report any failure, malfunction, or defect in any product . . ." and did not do so. Butler, 109 Cal. App. 4th at 1083 (quoting 14 C.F.R. § 21.3(a)).

In Robinson, the plaintiffs alleged that the manufacturer, Hartzell, concealed a design defect in a propeller and misrepresented the cause of the crash. Robinson, 326 F.Supp.2d at 636. The court denied Hartzell's motion for summary judgment because the plaintiffs presented evidence showing Hartzell told the FAA that stress tests results were "approximately the allowable value," but a graph Hartzell gave the FAA showed that the result exceeded the allowable value. Robinson, 326 F.Supp.2d at 638. The court rejected Hartzell's argument that because it had previously provided the FAA with the graph, "the FAA would have been able to make this determination itself" because the type certificate holder has a duty to report any failures, defects, or malfunctions of the aircraft to the F.A.A. Robinson, 326 F.Supp.2d at 649.

As in Butler and Robinson, Burton contends the April 4 and April 21 emails from Jeff Cousins, Twin Commander's Vice President/General Manager, create material issues of fact about whether the misrepresentation or concealment exception under GARA applies. We agree.

According to Burton's expert, Robert Donham, the failure of the rudder system resulted in flutter instability causing the May 2004 crash. Donham points to statements made in the April 4 and April 21 emails as evidence that Twin Commander misrepresented or concealed the extent of the structural problems with the rudder system and withheld critical information from the FAA about the rudder system.

Donham contends the April 4 email shows Twin Commander knew but did not disclose that the structural damage in the 1992 accident was "identical" to the 2002 and

No. 60163-6-1/20

2003 accidents cited in SB 235. According to Donham, the seriousness of the problem would have been evident if Twin Commander had disclosed that the accidents were related. The April 4 email provides in pertinent part:

[A]ll the breakups we have records of and the 1992 accident of the Casper Air Service 840 (metal rudder cap) going into Denver has tearing of the rudder identical to the two recent incidents. BUT the cap for the aircraft WAS recovered and is in one piece. The failure was below the cap and rib. The vertical spar failed in a twisting force 2 inches above the upper rudder hinge. The significance of this is that the rudder has the same appearance of the two current ones. The other significant fact is that extensive analysis was done on the Casper rudder and it failed well above design.¹⁶

Donham also points out that the April 4 email that shows Twin Commander knew the structural failure of the rudder system was not simply related to the rudder cap. The email states that "we have no evidence to point to the cap as the primary cause of the problem." Donham also points to statements in the April 4 email that the structural failure was "2 inches above the upper rudder hinge" and "the failure was below the cap and rib" to show Twin Commander knew the problem was not limited to the rudder cap.

Another expert, William R. Twa, testified that Twin Commander had an obligation to disclose to the FAA the information about the 1992 crash in the context of the 2002 and 2003 accidents in order to conduct the necessary tests and inspections. Although there is no dispute that Twin Commander reported the 1992 Denver accident at the time, there is no evidence that Twin Commander did so in relation to the 2002 and 2003 accidents. Under 14 C.F.R. § 21.3, Twin Commander had a duty to report "any failure, malfunction, or defect" with the rudder system. As in Robinson, even if Twin Commander previously reported the 1992 accident, there is no evidence that Twin

¹⁶ Emphasis added.

No. 60163-6-1/21

Commander informed the FAA that the "tearing of the rudder" in 1992 was identical to the recent accidents in 2002 and 2003.¹⁷

Donham also cites the April 21 email as further support for the conclusion that Twin Commander knew but did not disclose the full extent of the problem with the rudder system. The April 21 email discusses reports from service centers that were received after issuing SB 235:

Last week was enlightening for us all as reports came in from Service Centers[.] We not only have 22 rubber horn caps on order, we have numerous reports of defective heating elements, cracked lower horizontal stabilizer ribs, cracked upper rudder ribs, and a defective forward rudder spar. It has become apparent that this part of the aircraft deserves more attention during inspections and ongoing maintenance.¹⁸

In Donham's opinion, the reports of cracked lower horizontal stabilizer ribs presents evidence of structural rudder system problems that result in flutter instability. "I have again reviewed the documentation Twin Commander provided to the FAA for approval of Service Bulletin 235. Twin Commander did not advise the FAA that its Service Center were reporting numerous cracked lower horizontal [stabilizer] . . . ribs." Donham further states that this information shows that "while recognizing that on-going maintenance was required for this problem, Twin Commander knowingly misrepresented and withheld this information from the FAA, submitting Alert Service Bulletin 235 that did not require any recurrent inspection, testing or repair, only a one time visual inspection." Viewing the evidence in the light most favorable to the nonmoving party, we conclude there are

¹⁷ Under 14 C.F.R. § 21.3, there is an exception for reposing failures, malfunctions or defects previously reported to the FAA.

¹⁸ Emphasis added.

No. 60163-6-1/22

material issues of fact about whether Twin Commander knowingly misrepresented, or concealed, or withheld relevant and material information from the FAA in obtaining approval of SB 235.¹⁹

We affirm in part, reverse in part, and remand for further proceedings.

Schindler, CT

WE CONCUR:

Jau, J.

Cox, J.

¹⁹ On the other hand, we reject Burton's argument that the failure to conduct proper tests of the Model 690C when obtaining certification from the FAA or the failure to investigate previous crashes creates a material issue of fact. In Rickert v. Mitsubishi Heavy Indus., Ltd., 923 F.Supp. 1453 (D. Wyo. 1996), the plaintiff claimed Mitsubishi concealed the fact that design defects made its planes likely to crash in icy conditions. The court ruled that evidence that the wrong tests were performed, that the planes had a higher accident rate than similar planes, and that some employees believed the problem was due to design defects was inadequate to defeat summary judgment. Rickert, 923 F.Supp. at 1457-62. The court rejected the argument that the plaintiff's expert's "belief that the [aircraft] fails to meet regulatory criteria" or "differences of opinion and mistakes amount to misrepresentations." Rickert, 923 F.Supp. at 1458-59. Here, there is no dispute that each of the accidents were reported to the FAA. And as in Rickert, disagreement over what tests should have been performed or the cause of the crash, does not establish knowing misrepresentation. Rickert, 923 F. Supp. at 1461.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

KENNETH C. BURTON, ET AL.,)
) No. 60163-6-1
) Appellant,)
))
) v.)
) ORDER DENYING
TWIN COMMANDER AIRCRAFT, LLC,) RESPONDENT'S MOTION FOR
) RECONSIDERATION
) Respondent.)
_____)

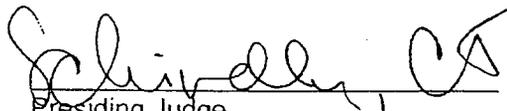
Respondent, Twin Commander Aircraft LLC filed a motion for reconsideration of the opinion filed March 9, 2009 and the panel has determined that the motions should be denied

Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is denied.

DATED this 11th day of March, 2009.

FOR THE PANEL:


Presiding Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAR 11 PM 3:41

transmit to Congress a report on the results of the study."

[Enactment of this note by Pub.L. 106-181 applicable only to fiscal years beginning after September 30, 1999, see section 3 of Pub.L. 106-181, set out as a note under section 106 of this title.]

Aircraft Cabin Air Quality Research Program

Pub.L. 103-305, Title III, § 304, Aug. 23, 1994, 108 Stat. 1591, provided that:

"(a) **Establishment.**—The Administrator [of the Federal Aviation Administration], in consultation with the heads of other appropriate Federal agencies, shall establish a research program to determine—

"(1) what, if any, aircraft cabin air conditions, including pressure altitude systems, on flights within the United States are harmful to the health of airline passengers and crew, as indicated by physical symptoms such as headaches, nausea, fatigue, and lightheadedness; and

"(2) the risk of airline passengers and crew contracting infectious diseases during flight.

"(b) **Contract with Center for Disease Control.**—In carrying out the research program established under subsection (a), the Administrator and the heads of the other appropriate Federal agencies shall contract with the Center for Disease Control [now Centers for Disease Control and Prevention] and other appropriate agencies to carry out any studies necessary to meet the goals of the program set forth in subsection (c).

"(c) **Goals.**—The goals of the research program established under subsection (a) shall be—

"(1) to determine what, if any, cabin air conditions currently exist on domestic aircraft used for flights within the United States that could be harmful to the health of airline passengers and crew, as indicated by physical symptoms such as headaches, nausea, fatigue, and lightheadedness, and including the risk of infection by bacteria and viruses;

"(2) to determine to what extent, changes in, cabin air pressure, temperature, rate of cabin air circulation, the quantity of fresh air per occupant, and humidity on current domestic aircraft would reduce or eliminate the risk of

illness or discomfort to airline passengers and crew; and

"(3) to establish a long-term research program to examine potential health problems to airline passengers and crew that may arise in an airplane cabin on a flight within the United States because of cabin air quality as a result of the conditions and changes described in paragraphs (1) and (2).

"(d) **Participation.**—In carrying out the research program established under subsection (a), the Administrator shall encourage participation in the program by representatives of aircraft manufacturers, air carriers, aviation employee organizations, airline passengers, and academia.

"(e) **Report.**—(1) Within six months after the date of enactment of this Act [Aug. 23, 1994], the Administrator shall submit to the Congress a plan for implementation of the research program established under subsection (a).

"(2) The Administrator shall annually submit to the Congress a report on the progress made during the year for which the report is submitted toward meeting the goals set forth in subsection (c).

"(f) **Authorization of appropriations.**—Of amounts authorized to be appropriated for fiscal years 1995 and 1996 under section 48102(a) of title 49, United States Code, as amended by section 302 of this title, there are authorized to be appropriated for fiscal years 1995 and 1996, respectively; such sums as may be necessary to carry out this section."

Applicability of Pub.L. 104-264

Except as otherwise specifically provided, Pub.L. 104-264 and the amendments made by Pub.L. 104-264 applicable only to fiscal years beginning after Sept. 30, 1996, and not to be construed as affecting funds made available for a fiscal year ending before Oct. 1, 1996, see section 3 of Pub.L. 104-264, set out as a note under section 106 of this title.

General Aviation Revitalization Act of 1994

Pub.L. 103-298, Aug. 17, 1994, 108 Stat. 1552, as amended Pub.L. 105-102, § 3(e), Nov. 20, 1997, 111 Stat. 2216, provided that:

"Section 1. **Short title.**

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

"Sec. 2. Time limitations on civil actions against aircraft manufacturers.

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

"(1) after the applicable limitation period beginning on—

"(A) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

"(B) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or

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

"(b) Exceptions.—Subsection (a) does not apply—

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

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

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

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

"(c) General aviation aircraft defined.—For the purposes of this Act, the term 'general aviation aircraft' means any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the Federal Aviation Administration, which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations as defined under regulations in effect under part A of subtitle VII of title 49, United States Code [49 U.S.C.A. § 40101 et seq.], at the time of the accident.

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

"Sec. 3. Other definitions.

"For purposes of this Act—

"(1) the term 'aircraft' has the meaning given such term in section 40102(a)(6) of Title 49, United States Code [49 U.S.C.A. § 40102(a)(6)];

"(2) the term 'airworthiness certificate' means an airworthiness certificate issued under section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. 1423(c)) [see 49 U.S.C.A. § 44704(c)(1)] or under any predecessor Federal statute;

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

"(4) the term 'type certificate' means a type certificate issued under section 44704(a) of Title 49, United States Code [49 U.S.C.A. § 44704(a)], or under any predecessor Federal statute.

"Sec. 4. Effective date; application of Act.

"(a) Effective date.—Except as provided in subsection (b), this Act shall take

effect on the date of the enactment of this Act [Aug. 17, 1994].

"(b) Application of Act.—This Act shall not apply with respect to civil actions commenced before the date of the enactment of this Act [Aug. 17, 1994]."

Independent Assessment of FAA Financial Requirements; Establishment of National Civil Aviation Review Commission

Pub.L. 104-264, Title II, § 274, Oct. 9, 1996, 110 Stat. 3240, as amended Pub.L. 106-181, Title III, § 307(c)(3), Apr. 5, 2000, 114 Stat. 126, provided that:

"(a) Independent assessment.—

"(1) Initiation.—Not later than 30 days after the date of the enactment of this Act [Oct. 9, 1996], the Administrator shall contract with an entity independent of the Administration and the Department of Transportation to conduct a complete independent assessment of the financial requirements of the Administration through the year 2002.

"(2) Assessment criteria.—The Administrator shall provide to the independent entity estimates of the financial requirements of the Administration for the period described in paragraph (1), using as a base the fiscal year 1997 appropriation levels established by Congress. The independent assessment shall be based on an objective analysis of agency funding needs.

"(3) Certain factors to be taken into account.—The independent assessment shall take into account all relevant factors, including—

"(A) anticipated air traffic forecasts;

"(B) other workload measures;

"(C) estimated productivity gains, if any, which contribute to budgetary requirements;

"(D) the need for programs; and

"(E) the need to provide for continued improvements in all facets of aviation safety, along with operational improvements in air traffic control.

"(4) Cost allocation.—The independent assessment shall also assess the costs to the Administration occasioned by the provision of services to each segment of the aviation system.

"(5) Deadline.—The independent assessment shall be completed no later than 90 days after the contract is awarded, and shall be submitted to the Commission established under subsection (b), the Secretary, the Secretary of the Treasury, the Committee on Commerce, Science, and Transportation and the Committee on Finance of the Senate, and the Committee on Transportation and Infrastructure and the Committee on Ways and Means of the House of Representatives.

"(b) National Civil Aviation Review Commission.—

"(1) Establishment.—There is established a commission to be known as the National Civil Aviation Review Commission (hereinafter in this section referred to as the 'Commission').

"(2) Membership.—The Commission shall consist of 21 members to be appointed as follows:

"(A) 13 members to be appointed by the Secretary, in consultation with the Secretary of the Treasury, from among individuals who have expertise in the aviation industry and who are able, collectively, to represent a balanced view of the issues important to general aviation, major air carriers, air cargo carriers, regional air carriers, business aviation, airports aircraft manufacturers, the financial community, aviation industry workers, and airline passengers. At least one member appointed under this subparagraph shall have detailed knowledge of the congressional budgetary process.

"(B) Two members appointed by the Speaker of the House of Representatives.

"(C) Two members appointed by the minority leader of the House of Representatives.

"(D) Two members appointed by the majority leader of the Senate.

"(E) Two members appointed by the minority leader of the Senate.

"(3) Task forces.—The Commission shall establish an aviation funding task force and an aviation safety task force to carry out the responsibilities of the Commission under this subsection.

"(4) First meeting.—The Commission may conduct its first meeting at