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**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,**

**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 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,

**Petition for REVIEW**  
**ORIGINAL**

v.

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

**Petitioner.**

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TWIN COMMANDER'S PETITION FOR REVIEW

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Clark R. Nichols, WSBA No. 8662  
CNichols@perkinscoie.com  
Mary P. Gaston, WSBA No. 27258  
MGaston@perkinscoie.com  
Rebecca S. Engrav, WSBA No. 33275  
REnggrav@perkinscoie.com  
PERKINS COIE LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

Attorneys for Petitioner  
Twin Commander Aircraft LLC

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## **I. IDENTITY OF PETITIONER**

Twin Commander Aircraft LLC (“Twin Commander”) asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

## **II. COURT OF APPEALS DECISION**

Twin Commander seeks review of the portions of the February 9, 2009 published decision of the Court of Appeals, Division I, (“Decision”) that remanded and reversed the trial court. Twin Commander’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 Twin Commander’s motion for reconsideration is in the Appendix at page A23.

## **III. ISSUES PRESENTED FOR REVIEW**

1. Whether a holder of a type certificate issued by the Federal Aviation Administration (“FAA”) for an aircraft is a “manufacturer” under the statute of repose in the General Aviation Revitalization Act of 1994 (“GARA”), 49 U.S.C. § 40101, note. (A copy of GARA is in the Appendix at pages A24-A26.)

2. Whether Twin Commander is entitled to summary judgment on the applicability of GARA’s fraud exception when the only evidence relied on by the Court of Appeals to show that Twin Commander knew but failed to disclose information to the FAA is the opinions of

experts who were not qualified to opine on corporate knowledge or intent; the information that Twin Commander allegedly failed to disclose is not “required information” under GARA; and there is no evidence of a causal link between the information allegedly withheld and the accident.

#### IV. STATEMENT OF THE CASE

##### A. Relevant Federal Aviation Law

This appeal involves the applicability of GARA, a federal statute of repose, to claims brought against the aircraft’s type certificate holder that arise out of an aircraft accident. Under GARA, 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 a “general aviation aircraft”<sup>1</sup> more than 18 years after the aircraft was first delivered (or, if the accident was caused by a component part, more than 18 years after the component part was installed or replaced). GARA §§ 2(a), (c), 3. GARA preempts any state law to the contrary. *Id.* § 2(d). GARA’s statute of repose does not apply if the claimant pleads with specificity and proves that the manufacturer engaged in fraud in the course of required communications with the FAA, and that such fraud was causally related to the accident. *Id.* § 2(b)(1).

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<sup>1</sup> A “general aviation aircraft” is an aircraft for which the FAA has issued a type certificate or airworthiness certificate, which seats fewer than 20 passengers, and which was not engaged in scheduled passenger-carrying operations. GARA § 2(c).

A “type certificate” is an approval issued by the FAA to a manufacturer that signifies that the design of a model of aircraft meets federal safety and airworthiness standards. 49 U.S.C. § 44704. Only the type certificate holder may manufacture that model of aircraft. 14 C.F.R. §§ 21.45, 21.133, 21.163. Federal law imposes extensive, ongoing duties on type certificate holders to support the fleet of the approved aircraft after sale. *See, e.g.*, 14 C.F.R. §§ 21.3 (requiring type certificate holder to report certain failures, malfunctions, and defects), 21.50 (requiring type certificate holder to furnish Instructions for Continued Airworthiness for the certificated aircraft), 21.99 (requiring type certificate holder to work with FAA to correct safety issues), 25.1529 (requiring type certificate holder to prepare Instructions for Continued Airworthiness that comply with regulations and meet FAA approval), 25, App. H.

**B. Facts**

These consolidated actions involve an aircraft accident that occurred in 2004 near Aguascalientes, Mexico. (*See* CP 217 (Am. Compl. ¶¶ 9, 10).) The general aviation aircraft involved in the accident was a Twin Commander Model 690C. The accident aircraft was manufactured by Gulfstream American Corporation and sold to its first purchaser in 1981, more than twenty years before the accident. (CP 4402-05.)

In 1989, Twin Commander acquired the type certificate for Twin Commander Model 690C aircraft. (CP 217 (Am. Compl. ¶ 6); 1185.) Twin Commander has never manufactured any Model 690C aircraft, or any other entire aircraft. (CP 1185.) Rather, this model aircraft was discontinued from production in the mid 1980s, prior to Twin Commander's acquisition of the type certificate. (CP 1185.) As the type certificate holder, however, Twin Commander engineers, designs, manufactures, and sells replacement parts for, and provides continued airworthiness support and service information for, the fleet of Twin Commander aircraft. (CP 216, 511, 594, 598, 619, 2196-97, 3784-85, 3790-91, 3793-3800, 3863, 3915-19, 3924-27, 4391, 4393-94, 4396.)

**C. Burton's Claims**

In this lawsuit, plaintiff Kenneth Burton, the personal representative of the estates of the victims of the accident, alleges that the rudder tip and rudder assembly on the accident aircraft separated from the aircraft in flight, making the aircraft impossible to control and causing the accident. (CP 218 (Am. Compl. ¶ 11).) Burton sued Twin Commander as the aircraft's manufacturer. (CP 216 (Am. Compl. ¶ 4).) Burton's claims sound in negligence and strict products liability under the Washington Product Liability Act, Chap. 7.72 RCW. (CP 221 (Am. Compl. ¶ 22).)

Burton does not allege that either the rudder or the aircraft was a defective product. Instead, Burton claims that a service publication for this model aircraft issued by Twin Commander—“Alert Service Bulletin 235”—constitutes the defective “product” giving rise to the claims. (CP 221-222 (Am. Compl. ¶¶ 22, 23).) Twin Commander voluntarily issued Alert Service Bulletin 235 in 2003 immediately after a different aircraft accident. (CP 3807.) The bulletin called for a fleetwide inspection of the rudders of various models of aircraft, including Model 690C, to determine if there were any endemic problems with the rudder tips. (CP 3807-15.)

**D. Trial Court Judgment**

Twin Commander moved for summary judgment on the ground that Burton’s claims had expired by operation of law under GARA’s 18-year statute of repose. After extensive briefing and oral argument, the trial court ruled that Twin Commander was entitled to judgment in its favor as a matter of law. (CP 5383-86.)

**E. Court of Appeals Decision**

Burton appealed. The Court of Appeals affirmed in part and remanded and reversed in part. (Decision at 22.) The Court of Appeals agreed with Twin Commander that Alert Service Bulletin 235 is not a replacement part that restarts GARA’s 18-year period of repose. However, the Court of Appeals opined that the record is inadequate to

determine whether Twin Commander is a “manufacturer” entitled to GARA’s protection, and thus remanded on that issue. (Decision at 16.) And, while rejecting the majority of Burton’s theory of fraud on the FAA, the Court of Appeals concluded that there are triable issues of fact regarding whether Twin Commander disclosed to the FAA certain information and so reversed on the applicability of GARA’s fraud exception. (*Id.* at 19-22.) These latter two holdings are in error.

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**A. Whether a Successor Type Certificate Holder Is a GARA “Manufacturer” Is of Substantial Public Interest.**

Notwithstanding that Twin Commander holds the FAA type certificate for this model aircraft and was sued as the manufacturer, the Court of Appeals concluded that the record does not allow it to determine that Twin Commander is a “manufacturer” entitled to GARA’s protection. This decision is in error and, if left uncorrected, will have far-reaching consequences for the aviation industry. Therefore, whether a successor type certificate holder for an aircraft is a “manufacturer” under GARA is an “issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4).

**1. The Court of Appeals’ Decision Eviscerates GARA.**

Congress enacted GARA to address serious concerns regarding “the enormous product liability costs” our tort system had imposed on the

general aviation industry. *See Lyon v. Agusta S.p.A.*, 252 F.3d 1078, 1084 (9th Cir. 2001). The industry made aircraft that lasted, and could still be flown, for decades. *See* H.R. Rep. No. 103-525, pt. 1, at 2 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1638, 1639 (aircraft operable when 30, 40, 50 years old). But the long tail of liability associated with such aircraft created decades of potential liability, and resulting litigation costs, for aviation manufacturers. *Id.* Liability for old aircraft and litigation costs were crippling the industry. *Id.* Congress sought to ameliorate these effects by providing “some certainty” to the industry in the hope that it would spur the development of jobs. H.R. Rep. No. 103-525, pt. 2 (1994), at 6-7, *as reprinted in* 1994 U.S.C.C.A.N. 1644, 1648.

Congress reasoned that cutting off liability at 18 years would not adversely impact the public for two reasons. Congress relied upon studies indicating that “nearly all defects are discovered during the early years of an aircraft’s life” and only a small percentage of accidents are caused by design or manufacturing defects. H.R. Rep. No. 103-525, pt. 1, at 3; *see also id.* at 6. Further, Congress understood that products in the aviation industry are highly regulated by the FAA to ensure safety “to a degree not comparable to any other [industry].” *Id.* at 4.

Given GARA’s purpose, it makes absolutely no sense to conclude—as the Court of Appeals has done here—that when the original

manufacturer would be protected from suit due to the passage of time, liability can be recreated for a subsequent holder of the type certificate if the type certificate is transferred. *See Burroughs v. Precision Airmotive Corp.*, 78 Cal. App. 4th 681, 93 Cal. Rptr. 2d 124, 132 (2000) (“The central objective of GARA would be materially undermined if its protection did not apply to a successor to the manufacturer who, as part of its ongoing business, acquired a product line *long after the particular product had been discontinued* and years after the statute of repose had run as to the original manufacturer.”) (emphasis added); *see also Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543, 548-49 (Iowa 2002).

A significant number of type certificates are now held by a company other than the original manufacturer of the aircraft. Therefore, any decision that, like the decision of the Court of Appeals in this case, effectively makes GARA unavailable for these type certificate holders concerns a question of “substantial public interest.” RAP 13.4(b)(4).

**2. The Court of Appeals’ Decision Will Encourage Type Certificates to Be Orphaned Rather Than Transferred.**

Maintaining adequate safety for the aging fleet of general aviation aircraft is a significant concern for the FAA and is accomplished through cooperation between the FAA and type certificate holders. As of 2006, the average general aviation aircraft was 35 years old. 71 Fed. Reg. 4632 (Jan. 27, 2006). In 2002, the average general aviation aircraft will be

almost 50 years old. *Id.* Many of these models of planes are no longer in production. It is the type certificate holder that provides ongoing airworthiness support—such as issuing maintenance publications, designing replacement parts when necessary, and informing the fleet of safety concerns—for such aircraft. 14 C.F.R. §§ 21.3, 21.50, 21.99, 25.1529, 25, App. H.

If the type certificate for an out-of-production aircraft is simply “orphaned,” there is no one to provide ongoing airworthiness support. *See* 71 Fed. Reg. 52255 (Sept. 1, 2006) (describing maintenance difficulty when type certificate holder cannot be located); Filippo de Florio, *Airworthiness: an Introduction to Aircraft Certification* 97 (2002) (“[When] the [type certificate] holder disappears or is no longer able to cope with his or her responsibilities . . . serious problems could arise for the relevant aircraft that remain, so to speak, ‘orphans.’”). This is a highly undesirable outcome from the point of view of public safety. It is much preferable, from a safety and policy perspective, for the type certificate to be transferred to a new holder (like Twin Commander in the present case) that will provide ongoing airworthiness support.

The Court of Appeals’ decision, however, creates a significant disincentive for the transfer of type certificates. Why would anyone acquire a type certificate for an older, out-of-production model if the mere

transfer of the type certificate—*not* any culpable act or omission by a tortfeasor—breaths new life into claims that, as against the original manufacturer, were long ago extinguished by operation of GARA? But if type certificates are not transferred, older aircraft—precisely those in most need of airworthiness support—will be left unsupported. These policy concerns are of “substantial public interest.” RAP 13.4(b)(4).

**3. The Court of Appeals’ Decision Conflicts with Numerous Decisions from Across the Country.**

The Court of Appeals set forth two reasons for its decision to remand the question of Twin Commander’s manufacturer status: (1) Twin Commander does not manufacture aircraft; and (2) the record does not indicate to what extent Twin Commander contractually assumed the assets and liabilities of Gulfstream, the original holder of the type certificate. (Decision at 15-16.) Neither reason is availing, and the Court of Appeals’ decision renders Washington an outlier and in sharp conflict with numerous courts from across the country.

**a. A Successor Type Certificate Holder Is a “Manufacturer” Under GARA Because It Provides Airworthiness Support.**

The Court of Appeals’ first reason for denying manufacturer status, that Twin Commander does not manufacture entire aircraft, is irrelevant. For purposes of GARA’s protection from suit, a type certificate holder steps into the shoes of the original manufacturer *because under federal*

*law the type certificate holder has the airworthiness responsibilities of the original manufacturer.*

Indeed, all published cases to consider the question have held that the holder of an FAA manufacturing approval such as a type certificate steps into the original manufacturer's shoes for purposes of GARA protection because of these federally imposed duties. For example, in *Burroughs*, the defendant held an FAA-issued parts manufacturer approval<sup>2</sup> to make a line of carburetors it had acquired, but it did not make the carburetor involved in the accident. 93 Cal. Rptr. 2d at 133. Nonetheless, the court held that the defendant was a manufacturer under GARA because it was subject to the reporting and airworthiness duties of the original manufacturer under federal law. *Id.* ("To the extent that Precision, as the OEM for the Marvel-Schebler product[,] assumed and carried out the duties of the previous OEMs, we believe it is entitled to the protection of the statute of repose applying to claims against manufacturers based on a breach of those duties."); *see also Mason*, 653 N.W.2d at 549; *Pridgen v. Parker Hannifin Corp.*, 588 Pa. 405, 905 A.2d 422, 435-36 (2006).

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<sup>2</sup> The duties of a holder of a parts manufacturer approval are not in all respects co-extensive with the duties of a holder of a type certificate for an aircraft, but for purposes of determining manufacturer status under GARA the two concepts are analogous.

The Court of Appeals entirely failed to discuss or apply the operative analysis of these cases. Instead, the Court of Appeals purported to distinguish *Burroughs* and *Mason* on the ground that the defendants in those cases manufactured other products. (Decision at 15-16.) The distinction is not valid and is in error. Just like those defendants, Twin Commander manufactures other aviation products. It engineers, designs, manufactures, and sells replacement parts for Twin Commander aircraft. (CP 216, 511, 594, 598, 619, 2196-97, 3784-85, 3790-91, 3793-3800, 3863, 3915-19, 3924-27, 4391, 4393-94, 4396.) But more fundamentally, Twin Commander also performs the other functions of the original manufacturer/type certificate holder—it provides airworthiness service publications and maintenance support for Twin Commander aircraft. (*Id.*) Indeed, providing replacement parts and airworthiness support is at the heart of Burton's lawsuit. (*E.g.*, CP 221-22 (Am. Compl. ¶¶ 22, 23).) In addition, by virtue of its holding the type certificate, Twin Commander is federally authorized to manufacture Model 690C aircraft and is the only entity that could do so. 14 C.F.R. §§ 21.45, 21.133, 21.163.<sup>3</sup>

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<sup>3</sup> Also, there is no logical reason why a defendant's status under GARA with respect to a particular product or aircraft should turn on what *other* products the defendant may or may not manufacture and support.

**b. GARA Does Not Turn on Contractual Assumption of Liabilities Under State Law.**

The Court of Appeals' second reason for denying manufacturer status, lack of evidence in the record regarding to what extent Twin Commander contractually assumed Gulfstream's liabilities, also is irrelevant. If courts were to determine whether a type certificate holder is a "manufacturer" under GARA by looking to provisions in the parties' contracts regarding assumption of assets and liabilities, they would be forced to interpret those terms under state law. But GARA is a federal statute. As such, its applicability does not depend on state law. *See Mason*, 653 N.W.2d at 549. Not only is that true generally for federal statutes, but GARA expressly preempts state law, thus indicating that Congress did *not* want whether a manufacturer could be sued to be subject to state-by-state variation. *See* GARA § 2(d); *Mason*, 653 N.W.2d at 549 ("We find nothing in GARA to indicate that the liability of a successor manufacturer depends on where the suit is filed. . . . [I]t would be contrary to Congress's intent to revitalize the entire industry to have application of the protective statute of repose vary from state to state. . . ."); *Burroughs*, 93 Cal. Rptr. 2d at 132-33.<sup>4</sup>

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<sup>4</sup> The Court of Appeals' decision regarding manufacturer status is in error for other reasons as well. It improperly placed the burden of proof regarding manufacturer status on Twin Commander; overlooked Burton's concessions below that Twin Commander is a manufacturer under GARA; and incorrectly concluded that Twin Commander had a

**B. The Court of Appeals' Decision Regarding GARA's Fraud Exception Conflicts with Prior Washington Decisions and Concerns an Issue of Substantial Public Interest.**

Below and before the Court of Appeals, Burton argued that a whole host of supposed facts and evidence established that Twin Commander engaged in fraud in the course of required communications with the FAA, rendering GARA's statute of repose inapplicable. *See* GARA § 2(b)(1). Most of this "evidence," however, was at best relevant to negligence, not fraud. The Court of Appeals correctly rejected nearly all of Burton's arguments. (Decision at 22 n.19.) However, the Court of Appeals concluded—based solely on *Burton's experts' interpretation of* two emails from Twin Commander's vice president—that triable issues of fact exist as to whether Twin Commander failed to disclose the information in the emails to the FAA. (*Id.* at 19-22.) This conclusion is in error for several reasons, and the error is of such import that this Court should review the Court of Appeals' decision.

**1. The Court of Appeals' Reliance on Expert Opinions Conflicts with Prior Washington Supreme Court and Court of Appeals Decisions.**

The Court of Appeals' reliance on expert testimony as evidence of what Twin Commander (allegedly) knew but did not disclose to the FAA

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chance to respond to Burton's manufacturer argument in the trial court, which was raised for the first time in a surreply to which Twin Commander was not allowed to respond, *see* Trial Court Oral Argument Tr. 72:15-73:2 (changing original ruling that Twin Commander could reply to the surreply and instead allowing Twin Commander to brief only delegation option authority, or "DOA").

flatly conflicts with prior Washington cases regarding the proper scope and use of expert testimony. *See* RAP 13.4(b)(1), (2).

The Court of Appeals' entire analysis of the two innocuous emails, and explanation for its conclusion regarding those emails, rests not on the emails themselves, but on the opinions of two of Burton's experts, Robert Donham and William Twa, concerning the emails. (Decision at 19-22.) At most, Mr. Donham and Mr. Twa were qualified (if at all) to opine on issues related to the cause of the accident—scientific, technical information outside the ken of the jury. (CP 701-08, 1011-12.) Yet the Court of Appeals' fraud decision rests entirely on the experts' opinions on a different subject, *corporate knowledge and intent*. (Decision at 19, 20 (“Donham also points out that the April 4 email that shows Twin Commander knew . . .”), 21 (“Donham also cites the April 21 email as further support for the conclusion that Twin Commander knew . . .”).)

First, it is well-established in Washington that a duly qualified “expert must stay within the area of his expertise.” *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 102, 882 P.2d 703 (1994). What Twin Commander knew and whether it did or did not disclose that knowledge to the FAA is *not* technical, scientific information within the scope of the experts' expertise. *See Tacoma & E. Lumber Co. v. A. B. Field & Co.*, 100 Wash. 79, 89, 170 P. 360 (1918) (“The questions

called for answers on the part of the witnesses by which they would *characterize the motive and conduct* of [an inspector of lath prior to shipping]. They were not experts in this line; this was not a question of fact upon which they were specially qualified to speak.”) (emphasis added); *see also Rickert v. Mitsubishi Heavy Indus., LTD.*, 923 F. Supp. 1453, 1458 (D. Wyo. 1996); *Rickert v. Mitsubishi Heavy Indus., LTD.*, 929 F. Supp. 380, 383 (D. Wyo. 1996) (allowing GARA fraud issue to go to the jury only after plaintiff came forward with declarations *from employees* rather than experts).

Second, “the underlying principles of an expert’s opinion [must] be generally accepted by the scientific community.” *State v. Fitzgerald*, 29 Wn. App. 652, 659, 694 P.2d 1117 (1985). Expert opinions of state of mind are inadmissible when the expert relies simply on drawing his or her own inferences from ordinary facts, rather than any specialized information or methods. *E.g., State v. Farr-Lenzini*, 93 Wn. App. 453, 461, 970 P.2d 313 (1999) (in prosecution for eluding police, officer not qualified to testify “as an expert on the driver’s state of mind” when there was no evidence that officer “had the specialized training or experience necessary to recognize the difference between a distracted speeding driver and an eluding driver”). Mr. Donham provides no scientific or specialized methodology by which he assessed the evidence and determined what

Twin Commander allegedly “knew” but “knowingly misrepresented” and “did not disclose.” *See Robinson v. Hartzell Propeller Inc.*, 326 F. Supp. 2d 631, 648 (E.D. Pa. 2004) (excluding Mr. Twa’s opinion that the defendant “intentionally misled” the FAA and that the defendant “knew” certain facts because “intent is not a proper subject for expert testimony”) (internal quotation marks and citation omitted).

Third, knowledge and intent are well within the ken of the ordinary juror, and if an expert is allowed to testify on such matters, the expert invades the province of the jury. *E.g., Fettig v. Dep’t of Soc. & Health Servs.*, 49 Wn. App. 466, 477, 744 P.2d 349 (1987) (“expert may not usurp the factfinder’s function by determining the credibility of the witness”); *Twidwell v. Davidson*, 54 Wn.2d 75, 85, 338 P.2d 326 (1959) (error for police officer to state whether accident could have occurred as claimed by one party because “by telling [the jury] which version of the accident was more worthy of belief, [the officer] was permitted to perform the function of the jury, who were the sole judges of the credibility of the witnesses”).<sup>5</sup>

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<sup>5</sup> The Court of Appeals’ reliance on expert opinions was error for other reasons as well. The Court of Appeals relied on Mr. Twa’s opinion as to what Twin Commander was obligated by law to report to the FAA. (*See* Decision at 20 (“Twa[] testified that Twin Commander had an obligation to disclose to the FAA . . .”).) But the trial court properly excluded Mr. Twa’s opinions on these legal requirements, and Burton did not appeal that ruling. (Trial Court Oral Argument Tr. 21:4-23; *see also* CP 5236.) In addition, the experts were not parties to any of the conversations between Twin Commander and FAA

**2. The Court of Appeals' Decision Concerns an Issue of Substantial Public Interest.**

The applicability of the fraud exception in this case is also an “issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4).

As described above, Congress carefully balanced competing policy interests and, in GARA, enacted a statute to *extinguish* claims involving old aircraft except in very limited circumstances. Not only was Congress concerned with the costs of judgments, but Congress also wanted to eliminate the litigation costs of defending such suits—as Twin Commander has been wrongly forced to do in this case. *See* H.R. Rep. No. 103-525, pt. 1, at 2. This policy objective has been interpreted as important enough to warrant interlocutory, collateral order review of GARA decisions. *See Pridgen*, 905 A.2d at 433.

With this goal in mind, it is evident that GARA’s fraud exception must be interpreted and applied exactly as stated in GARA, so that the exception does not swallow the rule. The fraud exception is not a generic exception for fraud in connection with anything ever done by the manufacturer. It (1) must be pled and proved with specificity; (2) applies

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representatives, nor were they attendees at any of the meetings that occurred between Twin Commander and the FAA. The experts thus have absolutely no foundation to “know” what Twin Commander and the FAA may or may not have discussed in the multiple conversations and meetings after the 2003 accident.

only to communications between the manufacturer and the FAA regarding a type certificate, an airworthiness certificate, or ongoing airworthiness of an aircraft or part; (3) requires knowing misrepresentation or concealment or withholding; (4) of “required information”; (5) that is material and relevant to the performance or maintenance of the aircraft or part; and (6) is “causally related” to the alleged harm. GARA § 2(b)(1). Here, not only does Burton’s showing fail the first and third elements, as described above, but also the information that the Court of Appeals says Twin Commander failed to disclose to the FAA is *not* “required information” and Twin Commander had no duty to disclose it—the Court of Appeals did not even cite any law or regulation that so required. Similarly, Burton put forward *no* evidence to show a causal connection.

To hold, as the Court of Appeals has done, that a plaintiff can avoid GARA’s bar to suit simply by proffering an expert who is willing to opine that the company “knew” and “failed to disclose” information inferred from two innocuous emails guts GARA and makes a mockery of GARA’s protection. No other jurisdiction allows the GARA fraud exception to proceed to trial on such paltry evidence. *E.g.*, *Rickert I*, 923 F. Supp. at 1458; *Rickert II*, 929 F. Supp. at 383. If the Court of Appeals’ decision is not corrected, could a defendant ever obtain a pretrial dismissal under GARA? In all practical respects the decision makes a pretrial

dismissal under GARA simply unavailable for defendants, but this result eviscerates Congress's considered judgment that manufacturers should not have to defend and stand trial, with the resulting litigation costs, for suits involving old aircraft.

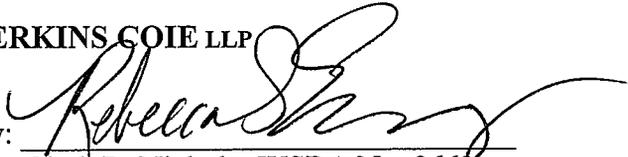
Thus, the fraud exception ruling in this case presents a question of substantial public interest. RAP 13.4(b)(4) .

## VI. CONCLUSION

This Court should accept review for the reasons indicated in Part V and should reverse the portions of the Court of Appeals decision that remanded on the issue of manufacturer status and reversed on the applicability of GARA's fraud exception. The Court should direct the Court of Appeals to affirm the trial court in full.

DATED: April 10, 2009

**PERKINS COIE LLP**

By: 

Clark R. Nichols, WSBA No. 8662

CNichols@perkinscoie.com

Mary P. Gaston, WSBA No. 27258

MGaston@perkinscoie.com

Rebecca S. Engrav, WSBA No. 33275

REngrav@perkinscoie.com

1201 Third Avenue, Suite 4800

Seattle, WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

Attorneys for Petitioner  
Twin Commander Aircraft LLC

25702-0109/LEGAL15615293.1

**CERTIFICATE OF SERVICE**

I certify that, on April 10, 2009, I served Twin Commander's

Petition for Review on the following counsel of record:

Via Hand Delivery

Thomas W. Bingham  
Krutch, Lindell, Bingham, Jones & Petrie, P.S.  
1420 Fifth Avenue, Suite 3150  
Seattle, WA 98101-3079  
*Attorney for Appellants*

Via U.S. Mail, First Class, Pre-Paid Postage

Gene Hagood  
Hagood & Neumann, LLP  
1520 E. Highway 6  
Alvin, TX 77511  
*Attorney for Appellants*

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 APR 10 PM 3:44

DATED: April 10, 2009

PERKINS COIE LLP

By:   
Carol J. McPherson

25702-0109/LEGAL15615293.1

# 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

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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)<sup>1</sup> 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,

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<sup>1</sup> 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)).

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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

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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.<sup>2</sup>

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.<sup>3</sup> 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.<sup>4</sup>

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

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

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

<sup>4</sup> See, 14 C.F.R. § 21.3, 21.7, 21.50, 25.1529.

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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.<sup>5</sup> Burton asserted that "The rudder tip and rudder assembly separated from the aircraft

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<sup>5</sup> The wrongful death lawsuits were consolidated for pretrial proceedings.

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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

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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

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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.<sup>6</sup> 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

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<sup>6</sup> 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.

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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:

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(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

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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

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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.<sup>7</sup> And unlike a flight manual, a maintenance manual as well as a service bulletin are used on and apply to different aircraft models.<sup>8</sup>

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

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<sup>7</sup> 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").

<sup>8</sup> 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.

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

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.<sup>10</sup>

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.<sup>11</sup> 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.

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<sup>9</sup> Emphasis in the original.

<sup>10</sup> 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.

<sup>11</sup> 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.”

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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).<sup>12</sup>

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.

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<sup>12</sup> Emphasis in the original.

No. 60163-6-I/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.<sup>13</sup> 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

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<sup>13</sup> 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.

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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.<sup>14</sup> Because the record is inadequate to determine whether Twin Commander is the “manufacturer of the aircraft” entitled to protection under GARA, we must remand.<sup>15</sup>

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<sup>14</sup> 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.

<sup>15</sup> 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.

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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

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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

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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.<sup>16</sup>

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

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<sup>16</sup> Emphasis added.

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Commander informed the FAA that the "tearing of the rudder" in 1992 was identical to the recent accidents in 2002 and 2003.<sup>17</sup>

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.<sup>18</sup>

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

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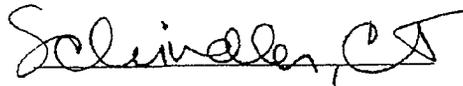
<sup>17</sup> Under 14 C.F.R. § 21.3, there is an exception for reposing failures, malfunctions or defects previously reported to the FAA.

<sup>18</sup> Emphasis added.

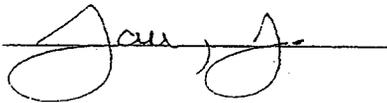
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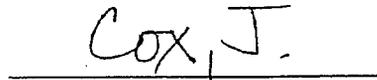
material issues of fact about whether Twin Commander knowingly misrepresented, or concealed, or withheld relevant and material information from the FAA in obtaining approval of SB 235.<sup>19</sup>

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



WE CONCUR:





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<sup>19</sup> 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.        )  
\_\_\_\_\_ )

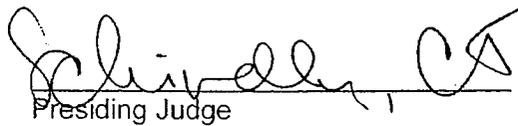
Respondent, Twin Commander Aircraft LLC filed a motion for reconsideration of the opinion filed March 9, 2009 and the panel has determined that the motions should be denied

Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is denied.

DATED this 11<sup>th</sup> day of March, 2009.

FOR THE PANEL:

  
Presiding Judge

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STATE OF WASHINGTON  
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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 as