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A TRIO OF CASES EXAMINING COLLATERAL REVIEW AND THE GENERAL AVIATION REVITALIZATION ACT

Shelley A. Ewalt
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BY SHELLEY A. EWALT

I. Introduction

The American general aviation industry once was one of the great manufacturing wonders of the world. It produced 35,000 aircraft in 1946 to fight World War II. After the war, general aviation continued to be popular; in 1978 nearly 18,000 general aviation aircraft were built. Between 1978 and 1994 however, general aviation manufacturing shrank to less than a tenth of its former self. The corporate offspring of the three venerable originators of American general aviation manufacturing, Clyde Cessna, William Piper, and Walter Beech, had become nearly unrecognizable by the late 1980s. Cessna no longer manufactured single-engine aircraft; Piper was in bankruptcy, and Beech had closed much of its piston manufacturing line. In the early 1990s, prospects for the U.S. general aviation industry were grim.

Several factors led to the decline, but liability costs received the greatest amount of attention. General aviation aircraft prices had begun increasing sharply in the 1970s and 1980s; yet the price increases were not commensurate with new technology or safety advances. The manufacturers blamed the increasing

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2 “General aviation” refers to all civil aircraft not flown by commercial airlines or the military. It includes everything from single-engine aircraft to multi-engine business jets that are used for instruction, recreation, sight-seeing, business, fire-fighting, agricultural applications and medical evacuation missions. In 2001, the total fleet of general aviation aircraft consisted of 218,000 active aircraft with an average age of about twenty-seven years. General Aviation: Status of the Industry, Related Infrastructure, and Safety Issues, GAO-01-916 at 2, General Aviation Accounting Office, Aug. 2001 [hereinafter GAO Aviation Report 2001].
3 At its height in the post World War II era, in 1978, 17,811 general aviation aircraft were manufactured. Beginning in 1980, the number precipitously declined, until it fell below 1,000 units manufactured each year in 1992, 1993, and 1994. Gama Databook 2005, supra note 1.
prices in large part on increases in the industry's liability costs.\textsuperscript{7} Predictably, demand and orders dropped off. The theory of strict liability was given a boost by a 1963 decision of the California Supreme Court holding manufacturers liable for products found to be defective or dangerous without requiring proof of negligence.\textsuperscript{8} The new strict liability standard gave rise to an increasing number of product liability actions against aircraft manufacturers.

In the 1970s and 1980s, general aircraft manufacturers landed on the losing end of multiple, high-profile aircraft crash lawsuits. Some aircraft manufacturers were self-insured, and the industry as a whole found itself with escalating liability costs.\textsuperscript{9} The manufacturers estimated that their paid claims and out-of-pocket defense expenses grew from $24 million in 1976 to $210 million in 1986.\textsuperscript{10} In 1987, Beech, Piper, and Cessna estimated their liability expenses ranged from $70,000 to $100,000 per aircraft.\textsuperscript{11} According to the manufacturers, insurers increased premiums for product liability insurance or dropped out of the business entirely in response to the large number of lawsuits and large damage awards.\textsuperscript{12} The decreasing number of aircraft produced each year, combined with increasing liability costs, drove the individual per aircraft insurance cost higher than the actual production cost in some cases.\textsuperscript{13} The unsurprising result was that production fell 94 percent, and jobs fell 65 percent, between 1978 and 1988.\textsuperscript{14}

The manufacturers' chief complaint was that strict liability and out-of-control litigation led to financial responsibility for accidents which were not caused by manufacturing defects. The manufacturers emphasized that a study of 203 accidents that generated litigation revealed that none of the accidents were


\textsuperscript{10} GAO Aviation Report 2001, supra note 2 at 26.

\textsuperscript{11} Id.


\textsuperscript{13} See generally GAO Aviation Report 2001, supra note 2.

\textsuperscript{14} Id. at 18.
judged by the National Transportation Safety Board (NTSB) to be caused by a design or manufacturing defect.\textsuperscript{15}

Factors other than “long-tail” liability\textsuperscript{16} contributed to the downturn of the general aviation industry. Since World War II, general aviation has been a heavily cyclical business; the 18,000 aircraft built in 1978 marked a production a high point which some commentators pointed out made the market seriously over-supplied. In addition, tax investment benefits to ownership of small aircraft dried up. High quality, economical kit aircraft became available.\textsuperscript{17} A final, devastating blow came in 1991 when Congress enacted a ten percent luxury tax on aircraft, applicable to general aviation aircraft in excess of $250,000.\textsuperscript{18} Although the tax exempted aircraft used for business purposes and generated little tax revenue, it received enormous press, contributing even further to rising aircraft prices, general negative perception, and decreased demand.\textsuperscript{19}

By 1994, a united and clear-voiced industry clamored for relief and promised jobs if relief was granted. The economic interest argument rang loudly in a Congress anxious to reinvigorate the devastated

\textsuperscript{15}Beech Aircraft studied 203 accidents at the request of the House Aviation Subcommittee of the Public Works and Transportation Committee. The average claim per lawsuit was $10 million; the suits cost Beech an average of $530,000 per aircraft to defend. John H. Boswell & George Andrew Coats, Saving the General Aviation Industry: Putting Tort Reform to the Test, 60 J. AIR L. & COM. 533, 574 n. 86 (1995) [hereinafter Boswell & Coats, Saving General Aviation] (quoting Martin, INDUSTRY UNDER SIEGE, supra note 12). It is important to note that NTSB factual accident investigation reports are admissible at trial; however NTSB probable cause reports are not admissible. Congress expressly limited the admissibility of probable cause reports with 49 U.S.C. § 1154(b), “[n]o part of a report of the [NTSB], related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.” See Sheesely v. Cessna Aircraft Co., 2006 U.S. Dist. LEXIS 27133 (S.D. S.D. 2006) [hereinafter Sheesely v. Cessna]. This limitation protects the credibility and independence of the NTSB.

\textsuperscript{16}The term "long-tail" liability comes from the shape of a graph drawn with the value of claims paid on the vertical axis and years since delivery on the horizontal axis. When properly maintained, aircraft have a nearly indefinite lifespan. Thus, the "tail" of the graph extends practically indefinitely, meaning that a non-negligent manufacturer may be held liable under strict liability principles decades after production and delivery of the aircraft. See Michael M. Martin, A Statute of Repose for Product Liability Claims, 50 FORDHAM L. REV. 745, 746-47, n. 13 (1982). A statute of repose has the effect of cutting off the tail of liability on the graph.

\textsuperscript{17}GAO Aviation Report 2001, supra note 2 at 24.

\textsuperscript{18}See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, S 11,211, 104 Stat. 1388 (1990) (codified at 26 U.S.C. S 4003) (also taxed were other "luxuries," such as boats, cars, and jewelry over a specified value).

\textsuperscript{19}The luxury tax likely contributed to President H. W. Bush's loss to President Clinton in the 1992 presidential election. In his acceptance speech at the 1988 Republican National Convention, Bush had loudly proclaimed “read my lips, no new taxes.” He later acquiesced in signing the Omnibus Budget Act of 1990 that included taxes on luxury automobiles, aircraft, boats, and jewelry among other taxes. PETER B. LEVY, ENCYCLOPEDIA OF THE REAGAN-BUSH YEARS 260-61 (1996). The U.S. luxury yachting manufacturing industry was devastated by the tax, and has never rebounded to the extent that the aviation industry has rebounded.
industry, and to be seen by voters as creating jobs by removing legal liability obstacles. A veritable alphabet soup of manufacturers and industry trade groups cooperated in the legislation.20

Relief came in the form of the General Aviation Revitalization Act of 1994 (GARA).21 The General Aviation Manufacturing Association (GAMA), the manufacturers, and politicians from heavily affected states, such as Kansas, cooperated in drafting the legislation and shepherding it through to passage. President Clinton signed the legislation into law in 1994,22 and the industry quickly responded. Cessna Aircraft followed through on its promise by breaking ground on a new single engine production facility in Kansas in response to liability limitation.23 From a low of 1,132 units produced in 1994, aircraft production tripled to 3,580 units in 2005.24 Revenue similarly grew from $3.74 billion in 1994 to $15.14 billion in 2005.25

The factors that brought GARA into being, and the resulting effect on the general aviation industry over the past twelve years are well discussed in a number of articles. Most GARA litigation over the past twelve years has centered on technical interpretations that are specific to general aviation and to the wording of the statute. Once decided, these technical interpretations have been generally accepted by other courts and have been seldom re-litigated. This article looks at three cases that confronted a unique procedural aspect of GARA. The three cases considered here differ from substantive interpretive GARA cases in that they focus not on technical meanings, but on the strength of protections intended by the enactors of GARA, but not delineated in the text. While considerations of pre-trial summary judgment motions seldom make for riveting

20 McNatt & England, *Push for Statutes of Repose*, supra, note 9 at 326-27. Supporters included the General Aviation Manufacturers Association (GAMA), Aircraft Owners and Pilots Association, the Experimental Aircraft Association, the International Association of Machinists, the Helicopter Association International, the National Business Aircraft Association, and the National Air Transportation Association. The only opposition came from the American Trial Lawyers’ Association (ATLA) and consumer organizations like Citizen Action and Public Citizen.


24 GAMA Databook 2005, supra note 1 at 6.

25 *Id.* In 2005, a total of thirteen aircraft manufacturers based in the United States made and delivered 2,857 general aviation aircraft, valued at over eight billion dollars. Of the total value, nearly thirty percent was exported to other countries. *Id.* at 13-14, 17. Interestingly, this growth was achieved without a decrease in individual aircraft prices. Between 1994 and 1999, the average price of a new piston aircraft rose from $162,000 to $220,000, a twenty-five percent increase in constant dollars. GAO Aviation Report 2001, supra note 2 at 4. A potential reason for the price increase is that general aviation aircraft were substantially under-priced and over-supplied in the early 1970s. A second reason is that manufacturers began building new safety and technology features into the aircraft.
reading, these three cases discussed here show courts struggling with whether to allow defendants two opportunities to clear the summary judgment threshold. This requires the courts to weigh the legislative intent underlying GARA with the protective bounds of the collateral order doctrine.

In the first case considered by this article, *Kennedy v. Bell Helicopter*, the Ninth Circuit held that an aircraft manufacturer had a right to collateral review of a previously-denied summary judgment motion under GARA. The decision analogized GARA’s statute of repose to statutory immunity from suit. It effectively allowed the manufacturer a re-hearing of the substantive merits of their summary judgment motion. In the second case, *Robinson v. Hartzell*, the Third Circuit disagreed with the Ninth Circuit reasoning and held that GARA did not qualify for review under the collateral review doctrine. The Court equated GARA with a statute of limitations rather than total immunity from suit. Finally, in *Pridgen v. Parker Hannifin*, the Pennsylvania Supreme Court acknowledged both the Ninth and Third Circuit decisions before ultimately agreeing with the reasoning in *Kennedy*. The divergent holdings points to the likelihood of continuing challenges to whether GARA should be afforded collateral review. The strength of the economic argument that brought GARA into being provides ample support to courts that choose to follow the Ninth Circuit and Pennsylvania decisions. However, courts that are dedicated to protecting the boundaries of the collateral order doctrine will see granting review to GARA summary judgment motions as an impermissible expansion of the collateral order doctrine.

II. The General Aviation Revitalization Act

How did a single piece of legislation create such a dramatic turnaround for the general aviation industry? GARA created a statute of repose\(^\text{26}\) by limiting the liability of general aviation manufacturers to

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\(^{26}\) In *Lamb v. Volkswagenwer Aktiengesellschaft*, the court explained the effect of a statute of repose, A statute of repose terminates the right to bring an action after the lapse of a specified period. The right to bring the action is foreclosed when the event giving rise to the cause of action does not transpire within this interval. . . . Simply stated, a statute of repose is triggered once the product is delivered to its first purchaser. If an injury results from the product after the authorized period has elapsed the victim is without recourse to the manufacturer of the product. *Lamb v. Volkswagenwer Aktiengesellschaft*, 631 F. Supp. 1144, 1147 (S.D. Fla. 1986).

However, courts and commentators are divided on the meaning and interpretation of statutes of repose. In some cases, they have been generalized as a form of a statute of limitation; in other cases, they have been characterized as creating immunity from suit. See Francis McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. U. L. REV. 579, 582-586 (1981) (setting forth five definitions of statutes of repose) [hereinafter McGovern, *Statutes of Repose*].
the first eighteen years after delivery of a general aviation aircraft to buyer. 27 This addressed the main concern of the manufacturers - "long tail" liability - which had made them liable for aircraft decades after they were made. It applied to manufacturers of general aviation aircraft, 28 to makers of individual aircraft components, and to the manufacturers of engines and airframes. 29 In effect, GARA prevents civil litigation against the parties eighteen years after delivery.

The essential elements of the law are straightforward. Section (a)(1)(A)-(B) limits the liability of the manufacturer to the first eighteen years beginning from the date of delivery. Section (a)(2) creates rolling liability that restarts the period of liability for the supplier of a replacement component, system, or part that is installed on the aircraft. 30 For example, when a carburetor is replaced on an aircraft, the carburetor’s manufacturer is liable for an eighteen-year period following installation, but only for accidents shown to be caused by the carburetor. 31 Since nearly every major component of an aircraft will be replaced over its

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27 GARA 49 U.S.C. § 41010, et. seq.,
   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.

28 A "general aviation aircraft" is defined in GARA as an aircraft which receives a type certificate or airworthiness certificate from the Federal Aviation Administrator, and when that certificate is issued, has a maximum seating capacity of fewer than eighteen passengers and is not, at the time of the accident, engaged in schedule passenger-carrying operations. GARA § 2(c).

29 In 2005, a total of thirteen aircraft manufacturers based in the United States made and delivered 2,857 general aviation aircraft, valued at over eight billion dollars. Of the total value, nearly thirty percent was exported to other countries. GAMA Databook 2005, supra note 1 at 13-14, 17.

30 See GARA, supra note 27.

31 Since the initial enactment of GARA, courts have clarified that replacement of a single component which is part of a larger system does not trigger a new time period of the liability for the entire system. For example, by replacing a fuel filter the party does not restart the clock for the entire fuel system. See Hinkle v. Cessna Aircraft Co., 2004 Mich. App. LEXIS 2894, (Mich. Ct. App., 2004); see also Hiser v. Bell Helicopter Textron Inc., 111 Cal. App. 4th 640 (Cal. Ct. App. 2003).
lifetime, the rolling liability provision provides plaintiffs with continuing recourse against manufacturers in the event a replacement part causes an accident.\textsuperscript{32}

Manufacturers can lose GARA protection under specific exceptions written into the statute. When a manufacturer

knowingly misrepresented . . . 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\textsuperscript{33}

The wording of the statute requires more than mere negligence of design to justify a cause of action\textsuperscript{34} In order to prevent GARA’s protective umbrella from attaching, claimants must plead facts that establish either that GARA does not apply or that their claim falls within one of the exceptions.

The language of GARA is short, but its effects have been far-reaching. The clarity of the text makes the initial claim pleading stage particularly important. The courts have clarified that eighteen year timeframe begins when the aircraft is first delivered, even if the first delivery was not to a general aviation customer.\textsuperscript{35}

Additionally, plaintiffs must specifically allege misrepresentation, concealment, or withholding in order to invoke GARA’s exceptions. Thus, the statute is designed to make it easy to determine at the commencement of litigation whether a plaintiff may pursue a claim, or whether the eighteen year statute of repose bars the claim. Determining whether a claim moves forward is therefore particularly suited to determination in a


\textsuperscript{33} GARA, 49 U.S.C. § 41010(b)(1):

(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;

\textsuperscript{34} Sheesely v. Cessna, 2006 DSD at 28.

\textsuperscript{35} See Kennedy v. Bell Helicopter Textron, Inc., 283 F.3d 1107 (9th Cir. 2002).
summary judgment motion. This is exactly what GARA’s promoters had in mind: clarity and control of when liability did and did not exist.36

By using a classic statute of repose, GARA addressed the manufacturers' primary goal of avoiding of indefinite liability. Since aircraft have a nearly unlimited lifespan when cared for properly, some commentators believe that the real effect of GARA is to shift responsibility from the initial aircraft manufacturers to manufacturers of replacement components. This assertion can be countered by demonstrating that the original manufacturer often also makes the replacement parts and thus remains liable if the part proves to be defective within eighteen years of delivery. GARA truncates the liability "tail" to eighteen years beyond original manufacture or after installation of replacement components. In the first eight years after GARA's enactment, a variety of cases resolved important points of GARA's coverage and the technical details inherent to aircraft litigation.37 By creating a defined period of liability, the manufacturers, suppliers, and their insurers are better able to pin down the price of potential liability costs.

After GARA's enactment in 1994, the general aviation industry began a long steady climb back to economic health. Although many commentators have pointed out that the industry's return was also fostered by an excellent economic climate, by technological advances in aircraft design, and by a strong market for American corporate aircraft, it is generally acknowledged that GARA was primarily responsible for the revitalization.38

In 2002, the aircraft manufacturers gained an additional protection not likely foreseen by GARA’s promoters and legislators. In *Kennedy v. Bell Helicopter*, the Ninth Circuit held that an aircraft

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37 Burroughs v. Precision Airmotive Corp., 78 Cal. App. 4th 681, 93 Cal. Rptr. 2d 124, 125 (2000) (defendant who acquired product line of carburetor from an original manufacturer stood in shoes of manufacturer and received protection from GARA); Caldwell v. Enstrom Helicopter Corp., 230 F.3d 1155, 1156-57 (9th Cir. 2000) (revised flight manual held to be new "system . . . or other part[,]" allowing plaintiff to proceed with claim); Lyon v. Augusta S.P.A., 252 F.3d 1078 (9th Cir. 2001) (GARA applied retroactively to an accident that occurred prior to GARA's passage, where the suit was filed after enactment of GARA; Altseimer v. Bell Helicopter Textron Inc., 919 F. Supp. 340, (E.D. Cal. 1996) (GARA expressly stated that it did not apply to actions "commenced" prior to enactment. The court construed this clause to mean it was applicable to actions commenced after enactment.).

38 For a detailed discussion of the economic forces contributing to general aviation's decline, the enactment of GARA, and its after-effects, see Schwartz & Lorber, *Rational Civil Justice*, supra note 5; see also McAllister, *A "Tail" of Liability Reform*, supra note 7. The GAO 2001 report on the status of general aviation credits GARA with primary responsibility for returning the industry to economic health. See generally GAO Aviation Report 2001, supra note 2.
manufacturer's requested summary judgment motion denied at the trial court level could be immediately appealed under the collateral order doctrine. In most cases, the denial of a summary judgment motion does not qualify as a final order because, far from ending the litigation, it is an order allowing the litigation to proceed. The Ninth Circuit decision permitted, for the first time, collateral review of an interlocutory motion in the context of a GARA case.

III. The Collateral Review Doctrine

The collateral order doctrine is an exception to the general rule that only final decisions of the court may be appealed. A final decision, or order, is normally not deemed to occur "until there has been a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." The purpose of the final order doctrine is to prevent piecemeal appeals, to limit interruptions to the litigation process, and to further judicial efficiency by limiting the judicial docket.

The final order doctrine recognizes the deference that appellate courts owe to the trial court as the judicial body responsible for developing the facts and identifying the legal issues. While the final order doctrine is codified in federal law, the statutes do not define the meaning of “final order.” The absence of a statutory definition has left the meaning of final order and the collateral order doctrine to develop through a patchwork of federal and state court decisions.

39 Kennedy v. Bell, 283 F.3d at 1112.
41 Kennedy v. Bell, 283 F.3d at 1112 (first instance of decision granting collateral review over summary judgment in the broader context of product liability suits).
43 Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 430 (1985) (the final decision rule prevents litigation interruptions by "piecemeal appellate review of trial court decisions which do not terminate the litigation").
46 State of California v. Harvier, 700 F.2d 1217, 1219 (9th Cir. 1983), cert. denied, 464 U.S. 820 (1983) (rather than being mere formality, final judgments rule embodies substantive policy that legal issues initially should be developed before district courts).
The Supreme Court, in *Cohen v. Beneficial Industrial Loan Corp.*, determined that certain types of court orders were immediately appealable, even though the litigation had not reached a final conclusion.\footnote{Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).} These intermediate, appealable decisions became known as “collateral” decisions. The collateral order doctrine, reaffirmed and explained by the Supreme Court in *Digital Equip. Corp. v. Desktop Direct, Inc.*,\footnote{Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 865 (1994) (upholding and explaining the federal collateral order doctrine first established in *Cohen*) [hereinafter Digital v. Desktop Direct and Digital].} called for a “practical construction” of the final decision rule, establishing “a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system nonetheless be treated as final.”\footnote{Digital v. Desktop Direct, 511 U.S. at 865.} The court explained the three elements of the collateral order doctrine as “[1] decisions that are conclusive, [2] that resolve important questions completely separate from the merits, and [3] that would render such important questions effectively unreviewable on appeal from a final judgment in the underlying action.”\footnote{Id. at 867.}


The statute [citing 28 U.S.C. § 1291] recognizes that rules that permit too many interlocutory appeals can cause harm. An interlocutory appeal can make it more difficult for trial judges to do their basic job—supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.

. . . [S]ometimes interlocutory appellate review has important countervailing benefits. In certain cases, it may avoid injustice by quickly correcting a trial court's error. It can simplify, or more appropriately direct, the future course of litigation. And, it can thereby reduce the burdens of future proceedings, perhaps freeing a party from those burdens entirely.\footnote{Id. at 307.}

*Johnson* concerned a civil rights action brought by a diabetic person against five police officers for using excessive force to arrest him for public drunkenness when in fact, he was having an insulin seizure.\footnote{Id. at 304.} Three of the officers claimed "qualified immunity" as public officials, and moved for summary judgment, based on a defense of lack of evidence.\footnote{Id.} When the district court denied their motion, the officers immediately
appealed. The Seventh Circuit refused to hear their appeal because the underlying summary judgment order did not constitute a final order.\textsuperscript{54}

Recognizing a circuit split on the underlying question considered by the Seventh Circuit - whether "evidence insufficiency" claims made by the officers claiming "qualified immunity" constituted an appealable order - the Supreme Court granted certiorari.\textsuperscript{55} The Court reiterated and explained the three \textit{Cohen} factors. The first element – decisions that are conclusive – meant "that appellate review is likely needed to avoid . . . harm."\textsuperscript{56} The second element – separability – meant "that review now is less likely to force the appellate court to consider approximately the same matter more than once."\textsuperscript{57} The final element - effectively unreviewable - meant that "failure to review immediately may well cause significant harm."\textsuperscript{58}

The Court found that the lower court ruling on the sufficiency of evidence did not satisfy the three elements.\textsuperscript{59} Although the officers' ultimate defense rested on "qualified immunity," the Court found the evidence insufficiency claim to be intertwined too closely to the underlying case.\textsuperscript{60} A claim of immunity, the Court found, even if intertwined with the merits, could raise a significantly different issue, thus qualifying for collateral review.\textsuperscript{61} It distinguished between orders focused significantly on whether or not genuine issues of fact existed from the purely legal principles of whether qualified immunity was applicable. A variety of legal issues have been found to qualify for review under the collateral order doctrine. Immunity claims, such as qualified immunity in \textit{Johnson}, as well as sovereign immunity, have been held to qualify.\textsuperscript{62} Defendants in criminal trials have successfully argued this point to secure review of substantive and procedural issues.\textsuperscript{63}

\begin{itemize}
\item \textsuperscript{54} \textit{Id.} at 308.
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Johnson}, 515 U.S. at 311.
\item \textsuperscript{57} \textit{Id.} (emphasis in original).
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.} at 313.
\item \textsuperscript{60} \textit{Id.} at 314.
\item \textsuperscript{61} \textit{Johnson}, 515 U.S. at 314.
\item \textsuperscript{62} \textit{See id.}; Otey v. Marshall, 121 F.3d 1150 (8th Cir. 1997) (denial of summary judgment motion based on qualified immunity is appealable collateral order if it resolves dispute concerning issue of law); Faccricelli v. Holbrook, 215 F.3d 241 (2nd Cir. 2000) (Eleventh Amendment sovereign immunity); Transatlantic Shiffahrtskontor GMBH v. Shanghai Foreign Trade Corp., 204 F.3d 384 (2nd Cir. 2000), cert. denied, 121 S. Ct. 1227 (2001) (sovereign immunity).
\item \textsuperscript{63} \textit{See Abney v. United States}, 431 U.S. 651 (1977) (double jeopardy); Stack v. Boyle, 342 U.S. 1 (1951) (reduction of bail).
\end{itemize}
Generally, the collateral order doctrine has not been employed in products liability actions, but the Ninth Circuit held in 2002 that the underlying nature of GARA – as a statute of repose – made it like an immunity case that should be afforded collateral review. However, in 2006 the Third Circuit rejected the Ninth Circuit reasoning and held that a denial of a summary judgment defense motion in a GARA case did not qualify for review under the collateral review doctrine. The opposite conclusions reached by the Ninth and Third Circuits flow from their incommensurate methodologies for interpreting the statute. Shortly after the Third Circuit decision, the Pennsylvania Supreme Court, issued a third GARA collateral review decision that attempted to navigate between the reasoning of the Circuit Courts. Ultimately, the Pennsylvania Supreme Court sided with the Ninth Circuit reasoning, holding that GARA could be reviewed under the collateral order doctrine. Consequently, there is a lively debate in the courts about the use of the collateral order doctrine in aircraft product liability cases, and also regarding the intended strength of GARA's protective statute of repose. While the Pennsylvania Supreme Court decision clarifies points made by the Ninth and Third Circuits, its decision also adds substantial detail by focusing on the difficulties inherent in aircraft crash litigation due to the inherent intertwining of facts and law.

These competing interpretations of the same statute are likely to fuel continuing uncertainty as other jurisdictions consider this issue. This circuit split opens the broad question whether GARA should qualify for collateral review, but it is putting the question too broadly to ask whether GARA as a whole qualifies for collateral review. GARA litigation cases encompass principles of law that are nearly always intertwined with underlying facts. This leads to an inevitable conflict between those courts that view GARA as a grant of immunity and those courts that view the intertwining of fact and law as precluding a traditional narrowness of the collateral order doctrine.


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64 See Robinson v. Hartzell, 454 F.3d 163.
Eight years after the passage of GARA, the Ninth Circuit was confronted with a novel defense maneuver. The accident leading to the dispute involved a TH-1L helicopter,\(^{66}\) popularly known as a “Huey,” originally delivered to the U.S. Navy in 1970.\(^{67}\) The accident occurred in 1996, twenty-six years after its delivery to the military, when it broke apart in mid-air and crashed.\(^{68}\) The NTSB determined the probable cause of the accident as

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\text{[f]} \text{atigue failure of the vertical stabilizer spar cap and subsequent loss of the rotorcraft’s vertical stabilizer. Factors include inadequate inspection or trouble-shooting of the aircraft tail cone and vertical stabilizer at and after the time sheet-metal skins were stop-drilled and rivets were replaced, and repetitive cycles associated with helicopter logging operations.}^{69}\]

In other words, a structural failure in a key component – the tail boom - caused the helicopter to break apart in mid-flight. The twenty-six year span between delivery and accident was clearly long enough to qualify for GARA’s protective statute of repose. However, an interesting technical definition of “aircraft” put the age of the helicopter into question.

The aircraft was delivered to the Navy in 1970; the Navy sold the Huey as military surplus in 1984.\(^{70}\) Aircraft delivered to the U.S. military have neither a type certificate nor an airworthiness certificate.\(^{71}\) They are classified as “public aircraft,” and defined under the Code as “used only for the United States Government.”\(^{72}\) Thus, the helicopter did not acquire a type certificate or airworthiness certificate until 1984 when it was transferred to civilian service. As the crash occurred in 1996, only twelve years had elapsed between the time the aircraft acquired its type certificate and the crash.

At trial, both parties made cross-motions for summary judgment. Defendant Bell Helicopter's motion argued that GARA barred the claim because the accident occurred twenty-six years after original

\(^{66}\) Helicopters are considered aircraft for GARA purposes. GARA’s eighteen-year limitation period refers to general aviation aircraft, meaning “any aircraft for which a type certificate or an airworthiness certificate has been issued by the Administrator of the [FAA].” See GARA § 2(c).

\(^{67}\) Kennedy v. Bell, 283 F.3d at 1112.

\(^{68}\) Kennedy, at 1109.


\(^{70}\) Kennedy v. Bell, 283 F.3d at 1111. Military aircraft (with certain exceptions, such as fighter aircraft) are commonly sold as surplus to the civilian market.

\(^{71}\) Id. at 1112.

\(^{72}\) Id.; see 49 U.S.C. § 40102(a)(37).
delivery. The district court rejected the GARA defense. It based its holding on state product liability law, holding that under Washington product liability law, the manufacturer had an ongoing duty to warn of design defects. It then proceeded to find that genuine issues of material fact existed as to whether the defendant did in fact warn, and whether the design defect proximately caused the crash. This ruling allowed the suit to go forward.

The defendant appealed. Even though the ruling did not qualify under the traditional definition of a final order, the defendant argued that appellate review should be granted under the collateral order doctrine. A three-judge panel of the Ninth Circuit granted review. It acknowledged the Supreme Court's characterization, in Digital Equip. Corp., of the collateral order doctrine as a narrow exception that should never "swallow the general rule" of a single appeal. However, the court found that Bell Helicopter met the stringent circumstances set forth by Cohen and Digital Equip. Corp. In short order, the court found that the first two elements of the collateral order doctrine were satisfied,

In the present case it is clear that the first two factors are met. The district court's order is conclusive, and, like qualified immunity accorded to government officials, the applicability of the GARA statute of repose is an important question which is resolved completely separate from the merits of the litigation.

As to the third element, the court held "that the GARA statute of repose meets the third condition as well because it creates an explicit statutory right not to stand trial which would be irretrievably lost should Bell Helicopter be forced to defend itself in a full trial." The court equated the statute of repose to an explicit right “not to stand trial,” and bolstered its argument by quoting directly from the statutory language, “no civil action . . . may be brought . . . if the accident occurred – (1) after the applicable limitation period . . . .”

\[\text{Id. at 1109.}\]
\[\text{Id.}\]
\[\text{Kennedy, at 1110; see Midland Asphalt Corp., 489 U.S. 794, 798 (1989).}\]
\[\text{Id.}\]
\[\text{Id. at 1110.}\]
\[\text{Id.}\]
\[\text{Id. (emphasis added).}\]
\[\text{Id. (emphasis added).}\]
\[\text{Kennedy, 283 F.3d at 1110 (citing GARA §2(a)).}\]

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In dissent, Judge Paez stated that the majority’s decision “impermissibly expand[ed] the collateral order doctrine.” He did not see in GARA an essential "right to be free from the burdens of trial or that the defense would be irretrievably lost absent an immediate appeal." First, he disagreed with the majority's comparison of the statute of repose with qualified immunity that would result in a right to be free from trial. Judge Paez concluded that GARA was more like a statute of limitations than a right to immunity from suit. Statutes of limitations, as his dissent noted, had uniformly been held not to create immunity from suit. He felt that the defendant did not satisfy the third Cohen condition, that the appealed-from order must be "effectively unreviewable on appeal from final judgment." Judge Paez pointed out the effect of the decision was to give general aviation manufacturers the additional and unforeseen tool of piecemeal litigation to slow litigation.

The majority did not discuss the Johnson case which explained that unreviewable meant that a failure to review immediately may cause significant harm. At first reading, Johnson's clarification supports the majority's holding. A party defending a complex aircraft crash suit will bear incredible costs in time and money, and it is precisely the function of GARA to shield manufacturers from these costs unless an exception is met. However, the problem is that the very nature of aircraft crash litigation - fact-intensive, discovery-dependent, time-consuming, and complex – makes it necessary to determine GARA and its exceptions on a case-by-case basis. Case-by-case scenarios are specifically rejected by the Supreme Court's collateral review methodology. "[T]he issue of appealability under the [final order doctrine] is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a 'particular injustice[e]' averted. . . ."

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82 Kennedy, at 1113 (Paez, J., dissenting).
83 Id.
84 Id. at 1114 (citing United States v. Rossman, 940 F.2d 535 (9th Cir. 1991); United States v. Garib-Bazain, 222 F.3d 17, 18 (1st Cir. 2000); United States v. Weiss, 7 F.3d 1088, 1090 (2d Cir. 1993); Powers v. Southland Corp., 4 F.3d 223, 232 (3d Cir. 1993); United States v. Pi, 174 F.3d 745, 750 (6th Cir. 1999)). It is worth noting that except for Powers v. Southland Corp., the cases that Judge Paez cited to were all criminal cases. The collateral order doctrine is seldom used in non-criminal cases.
85 Id. at 1113.
86 Id.
87 Digital, 511 U.S. at 868 (emphasis added).
In the final analysis, the *Kennedy* court made a sensible interpretation that GARA’s eighteen-year statute of repose was meant to begin rolling when the aircraft was initially put into service. The court held that the fact that an aircraft initially began in government service, and therefore did not receive an FAA type certificate, should not delay the start of GARA’s protections. In this respect, the substantive holding is in line with what the promoters and legislators envisioned. However, in achieving this result, the court expanded the collateral review doctrine beyond what the Supreme Court intended in *Cohen, Digital Equip. Corp.*, and *Johnson*.

**B. Robinson v. Hartzell – The Third Circuit Rejects Collateral Review of GARA**

In August 1999, two accidents that occurred only two weeks apart gave rise to litigation concerned with collateral review of GARA. The first accident, *Pridgen v. Parker Hannifin*, led to a case in the Pennsylvania state court system, and was appealed to the Pennsylvania Supreme Court. The second accident, *Robinson v. Hartzell*, led to litigation in the federal district of Pennsylvania, and was eventually appealed to the Third Circuit.

The events of the *Robinson* accident of August 15, 1999, are described in the NTSB factual report:

> the pilot reported that about 20 minutes into the flight, he heard a loud bang, then saw an object go by the windshield. The airplane started to shake so badly that the door popped open, and oil appeared on the windshield. The pilot had difficulty reaching the mixture to shut the engine down; however, after engine shutdown, the shaking ceased, and the pilot performed the forced landing [on] a hilly field.\(^{88}\)

In the course of the forced landing, the pilot and passenger were seriously injured. The passenger “suffered a broken back, breast bone, and left foot, while [the pilot] fractured his spine, rendering him a paraplegic.”\(^ {89}\) The NTSB stated the probable cause of the accident as “[p]ropeller blade separation, resulting from fatigue cracking initiated by intergranular corrosion. A factor was the lack of propeller blade corrosion inspection


\(^{89}\) *Robinson*, 454 F.3d at 165.
requirements.”90 In other words, the propeller broke apart in-flight, and the pilot's actions were not found to be the cause of the accident.

The plaintiffs in Robinson brought their case under the misrepresentation exception of GARA. They asserted that the defendant made material misrepresentations in obtaining the type certificate for the propeller that broke apart inflight.91 The defendants moved for summary judgment, alleging that GARA barred the claim since the accident occurred more than eighteen years after delivery, and that the exception did not apply. The trial court rejected the defendant's motion and the district court affirmed. Citing Kennedy for the right to collateral review, the defendant appealed, and the case was heard by the Third Circuit.

The Third Circuit held the defendant’s appeal did not qualify for review under the collateral order doctrine. Referencing Judge Paez's dissent from Kennedy,92 as well as other Third Circuit cases, the court expressed its reasoning with four primary points.93 First, it equated the interests protected by GARA to a statute of limitations rather than a grant of qualified immunity,94 concluding that the Ninth Circuit incorrectly characterized GARA's statute of repose as immunity from suit. It found the statutory language, "no civil action . . . may be brought," to be similar to the statutory language in the federal default statute of limitations.95 While acknowledging differences between statutes of limitations and statutes of repose, the court concluded that the purpose underlying both is to “protect private parties from liability on stale claims.”96

Second, the court distinguished the use of collateral review in other immunities cases that involved immunity for public officials, since those decisions are grounded in the public policy of ensuring that public

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91 Robinson, at 165. A key component, such as a propeller, receives a separate type certificate from the FAA.
92 Id. at 173-74.
93 Id.
94 Id. at 173. Compare the language of GARA, "no civil action . . . may be brought," with 28 U.S.C. § 1658(a), setting forth the statute of limitations, "a civil action . . . may not be commenced . . . ."
95 Robinson, 454 F.3d at 173. However, there is much literature distinguishing between statutes of repose and a statute of limitation in regard to product liability actions. Professor Francis McGovern explains that "analytical difficulties" are encountered unless the meaning of a statute of repose is clear. He sets forth five definitions comparing and contrasting statutes of limitations with statutes of repose. See McGovern, Statutes of Repose, supra note 27 at 582-586.
officials "are not deterred from vigorously carrying out" their duties.\textsuperscript{97} Finding no clear statutory immunity from suit in GARA’s text, the court concluded that there was no correlating public policy rationale to grant immunity to a private defendant.\textsuperscript{98} Third, the court found that GARA was not a statute of pure immunity, as evidenced by the existence of the exceptions within the statute.\textsuperscript{99} Noting that the misrepresentation exception renders GARA completely inapplicable to a case, the court found that no comparable exceptions existed in the law governing public official immunity.\textsuperscript{100}

Finally, the Third Circuit harmonized its decision with \textit{Kennedy} by distinguishing the present case as involving a question of GARA’s law intertwined with a decision on the merits.\textsuperscript{101} The lower court had found a genuine question of fact as to whether the defendants had misrepresented or concealed material information concerning the certification of the propeller, whereas the \textit{Kennedy} court had faced the purely legal issue of what date triggered the GARA limitations period.\textsuperscript{102} The court noted that even if GARA envisioned a form of qualified immunity, the application of a statute of repose was unavoidably intertwined with a decision on the merits, yielding a factual dispute over the cause of action.\textsuperscript{103} Referencing the \textit{Cohen} factors, the court suggested the intertwining issues of law and fact failed the second factor – separability - and thus did not qualify for review.\textsuperscript{104}

The Third Circuit did not specifically state whether the first and third \textit{Cohen} factors – a decision that is conclusive and is effectively unreviewable upon appeal – were met. Nevertheless, it implied that a decision based on GARA could qualify for collateral review when it involved only a issue of law. Technically, the holding did not reject \textit{Kennedy} outright. However, the reasoning strongly suggests that the Ninth Circuit’s comparison of the statute of repose to immunity from suit was incorrect and would not support the third \textit{Cohen} prong of a decision unreviewable upon appeal.\textsuperscript{105}

\textsuperscript{97} Robinson, 454 F.3d at 173.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 173-74.
\textsuperscript{102} Robinson, at 174 (citing \textit{Kennedy}).
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 173-74.
\textsuperscript{105} Id. at 172.
C.  *Pridgen v. Parker Hannifin* – The Pennsylvania Supreme Court Upholds Collateral Review of GARA

When the Third Circuit issued its decision in *Robinson*, the Pennsylvania Supreme Court was still considering the appeal in *Pridgen*. The accident giving rise to this litigation occurred when a fifty-three year old airline transport-rated pilot,\(^{106}\) was returning from Oshkosh, Wisconsin to his home in a Piper aircraft that carried four friends.\(^{107}\) The group stopped to refuel at Youngstown Airport, near North Lima, Ohio. After refueling, the aircraft departed. The NTSB factual report recorded the statement of the employee who refueled the Piper. While the aircraft was still on the ground, “the tail was almost touching the ground, and that the airplane ‘was nose high.’” After it took off, the airplane "was having a hard time climbing out, and [it] was hanging on the prop and mushing its way out. I saw [it] take off, make a 180-degree turn to enter the downwind, and lost sight of him.”\(^{108}\) Another witness who observed the Piper stated it "just couldn't get any elevation . . . Just before going down [it] was banking left."\(^{109}\) The aircraft hit the ground in a cornfield about one-half statute mile from the airport.\(^{110}\) Four of the five people onboard were killed; the fifth was seriously injured, but survived the accident.

The immediate post-accident investigation by the NTSB focused on weight and loading of the aircraft. The group’s luggage, stored in the forward and aft baggage compartments, had shifted upon impact, and the NTSB was unable to determine its exact original location.\(^{111}\) However, the NTSB did determine that regardless of the exact location of the baggage, the total weight of the aircraft was 3,390 pounds compared to a maximum allowable gross weight of 3,400 pounds.\(^{112}\) The loading of the aircraft was similarly near maximum allowable parameters. The NTSB calculated the center of gravity to be between 94.4 and 95.2

\(^{106}\) For pilots, there is no higher rating granted by the Federal Aviation Administration. An airline transport pilot (ATP) may act as pilot-in-command of an aircraft in air carrier service. The rating is held by less than 25% of all licensed pilots. *GAMA Databook 2005*, supra note 1 at 30.
\(^{108}\) Id.
\(^{109}\) Id.
\(^{110}\) Id.
\(^{111}\) Id.
\(^{112}\) Id.
inches aft of datum,\textsuperscript{113} depending upon the precise location of the luggage. The aircraft's type certificated design allowed for a range between 91.4 to 95.5.\textsuperscript{114} Thus, in regards of both weight and balance, the aircraft was within the operating parameters, but not by much. An aircraft operating so close to the edge of its design weight and balance parameters would have required the pilot to maintain precise control of his airspeed and pitch. The NTSB concluded the probable cause of the accident was, “[t]he pilot's loss of control of the airplane during a turn. Factors include the pilot's failure maintain sufficient airspeed, and his failure to maintain the airplane in proper trim.”\textsuperscript{115} Thus, unlike in Robinson, the NTSB concluded that the pilot's actions were a cause of the accident.

_Pridgen’s_ complex procedural history may have played a role in the ultimate outcome. The plaintiff's suit was based on two claims: first, that an engine defect caused the crash, and secondly, that defendants made material misrepresentations in obtaining the original type certificate. Defendant's summary judgment motion argued that more than eighteen years had elapsed since installation of the engine, and thus, that the claim was barred by GARA.\textsuperscript{116} Additionally, defendants argued that they did not manufacture or supply any of the allegedly defective parts which were replaced on the aircraft within eighteen years prior to the accident.\textsuperscript{117} Similar to both _Kennedy_ and _Robinson_, the defendants in _Pridgen_ moved for summary judgment based on a GARA as a bar to the plaintiffs' claims. The trial court denied the summary judgment motion. Citing _Kennedy_, the defendants appealed under the collateral order doctrine.

In response, the plaintiffs argued that although the defendant did not manufacture or supply the parts in question, the defendant held the type certificate\textsuperscript{118} for the model of engine on the aircraft, supplied

\textsuperscript{113} The “datum” is a reference point used to create guidelines for loading an aircraft. Every aircraft is designed to be loaded within a particular distance from the datum in order to properly balance the aircraft in flight.


\textsuperscript{117} Id.

\textsuperscript{118} “Type Certificate” refers to authorization issued by the Federal Aviation Administration allowing for manufacture of a specific design of aircraft, engine, or component. A type certificate is issued after an applicant presents relevant information, including drawings, specifications, and flight performance data, showing airworthiness. See 49 U.S.C. § 44704; 14 C.F.R. §§ 21.11 – 21.55.
specifications for installation and replacement, and marketed such parts.\textsuperscript{119} Being the holder of the type certificate, plaintiffs argued, meant GARA did not protect the defendants because of the underlying design defect claim.\textsuperscript{120} The plaintiffs also maintained their misrepresentation claim.\textsuperscript{121}

The court ruled in favor of the plaintiffs on both claims. Citing Pennsylvania’s collateral order doctrine\textsuperscript{122} and \textit{Kennedy}, the defendants again appealed. As required by Pennsylvania’s rules of appellate procedure,\textsuperscript{123} the trial court filed its opinion setting forth the reasons for its holding, but rather than giving substantive reasons for denial of defendant’s motion, the court cited the procedural principle that the order did not qualify as a collateral order with a right of appeal.\textsuperscript{124} The court stated “the collateral order doctrine should be narrowly construed to avoid undermining the general rule authorizing appellate review of only final orders, and to prevent litigation from being delayed by piecemeal review of trial court decisions[,]”\textsuperscript{125} and held that the defendants did not satisfy the three elements of Pennsylvania's collateral order rule. Thus, the court focused on the preclusive effects of the collateral review doctrine and not on the merits of the motion. This later proved to be a major point of frustration for the Pennsylvania Supreme Court in its review of the case as it remanded the case several times to determine the lower courts’ reasoning on the merits.

\textsuperscript{119} It is common practice for a manufacturer to purchase another manufacturer, a specific aircraft model, or a particular line of components. The purchasing manufacturer becomes the holder of the "type certificate" in the transaction, even though it did not manufacture the components made prior to the purchase. The concept is akin to one who holds a patent in that the patent right can be sold or transferred.

\textsuperscript{120} \textit{Pridgen}, at 425-26.

\textsuperscript{121} \textit{Pridgen}, at 426.

\textsuperscript{122} Rule 313 reads, in full:

(a) General rule. An appeal may be taken as of right from a collateral order of an administrative agency or lower court.

(b) Definition. A collateral order is an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.

Rule 313 was promulgated by the Pennsylvania Appellate Court Procedural Rules Committee in 1992; the committee cited to Pennsylvania and federal cases and stated the rule to be “a codification of existing case law with respect to collateral orders.” 77 PA. BAR ASSN. QUARTERLY 145, 150 (2006), (citing \textit{Pugar v. Greco}, 394 A.2d 542, 545 (1978), and \textit{Cohen}).

\textsuperscript{123} Pa.R.A.P. § 1925(a) reads:

General rule. Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, . . .


\textsuperscript{125} \textit{Pridgen}, at 427.
Pennsylvania's appellate court, the Superior Court, granted and heard defendant's discretionary appeal, but ultimately affirmed the trial court.\textsuperscript{126} Defendants sought a second discretionary appeal, this time to the Pennsylvania Supreme Court, which granted the appeal and then remanded to the Superior Court to determine whether the collateral order doctrine applied.\textsuperscript{127} The Superior Court answered that it had already considered and rejected the collateral order doctrine, and once again quashed the appeal.\textsuperscript{128} The Pennsylvania Supreme Court granted defendant's third discretionary appeal and remanded again to both lower courts to supply supporting rationale for their decisions.\textsuperscript{129}

The Superior Court considered the defendant’s argument that GARA barred plaintiff appellees’ underlying claims, and acknowledged \textit{Kennedy}'s holding that a denial of GARA’s protections could be appealed under the collateral order doctrine. Ultimately, the Superior Court again agreed with the trial court, referencing the judicial interest in maintaining a narrow interpretation of the collateral order doctrine.\textsuperscript{130} It distinguished its decision from the \textit{Kennedy} court’s conclusion that a “decision on the ultimate merits disposed of all claims and all parties in the case.”\textsuperscript{131} It also rejected \textit{Kennedy}'s basic premise, that “GARA entails an essential right not to stand trial.”\textsuperscript{132}

The trial court cited several factors for dismissal. First, the court held that as the holder of the type certificate for the engine design, the defendants fell within GARA’s rolling provision of liability for replacement parts.\textsuperscript{133} Secondly, referencing tort principles, the court found that the plaintiff's design defect claim precluded GARA protection. The court stated that “GARA only protects manufacturers in their capacity as manufacturers.”\textsuperscript{134} In other words, GARA did not protect manufacturers in a design role. The trial court also stated that an “entity that distributes a product manufactured by another as his own should be

\textsuperscript{126} \textit{Id.} at 428.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.} (ordering a second remand to the appellate court and a third remand to the trial court).
\textsuperscript{130} \textit{Pridgen}, at 428.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} "If plaintiffs can prove these parts caused the engine to malfunction, as Plaintiffs’ experts opine, then GARA would not bar their causes of action against the Defendants. The ‘rolling aspect of GARA’ would apply establishing a new 18 year period for each new part.” \textit{Pridgen}, at 429.
\textsuperscript{134} \textit{Id.}
subject to liability as though it were the manufacturer.”135 Next, the court found a factual dispute issue over the age of the replacement engine parts.136 Finally, the court noted the plaintiffs’ request for additional time for discovery pursuant to the misrepresentation, concealment, and withholding exceptions. The court had previously deferred a ruling on the discovery motion due to its summary judgment dismissal.137

After three remands, the Pennsylvania Supreme Court took the case under consideration. The defendants argued that the lower court erred by concluding that holding the type certificate for engine design made that manufacturer liable for parts whether or not it actually manufactured the parts in question. The lower court’s basis for interpreting GARA in this manner was unclear. The Supreme Court immediately grasped the interpretive relevance, noting that a different interpretation would dispose of the plaintiff’s substantive arguments.138 In presenting their arguments before the court, both the plaintiff and defendants stipulated their agreement with the Supreme Court’s reasoning in Johnson v. Jones,139 that a trial court’s finding of a genuine issue of material fact would not meet the requirements of the federal collateral order doctrine. They agreed that Pennsylvania’s collateral order rule140 was consistent with Johnson.141

The court considered the three elements of collateral order doctrine: separability, importance, and irreparable loss. As to separability, the court "adopted a practical analysis recognizing that some potential interrelationship between merits issues and the question sought to be raised in the interlocutory appeal is tolerable.”142 Citing to Third Circuit cases and Johnson v. Jones,143 the court reiterated that,

a claim is sufficiently separately from the underlying issues for purposes of collateral order review if it "is conceptually distinct from the merits of plaintiffs claim," that is, where even if "practically intertwined with the merits, [it] nonetheless raises a question that is significantly different from the questions underlying plaintiff’s claim on the merits."144

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135 *Id. See also* Restatement (Second) of Torts § 400 (1965).
136 *Pridgen*, at 429.
137 *Id.*
138 *Id.* at 429-30.
141 *Pridgen*, at 430.
142 *Pridgen*, at 433.
143 *Id.; see* Melvin v. Doe, 836 A.2d 42, 46 (Pa. 2003) (citing *In re Ford Motor Co.*, 110 F.3d 954, 958 (3rd Cir. 1997)).
144 *Id.*
The court concluded that whether the rolling provision applied to manufacturers who held a type certificate, but did not manufacture the parts, was wholly separate from the plaintiff's underlying claim.\footnote{Pridgen, at 433.}

As to the second element – importance - the court acknowledged the political and economic forces that brought GARA into existence.\footnote{Id.} The court relied heavily on legislative history to support its conclusion that the “terms of GARA”\footnote{Id.} and economic revitalization of the industry satisfied the "importance" element. The court did not refer specifically to the statutory language of GARA, or quote directly from the statute. Rather, it noted the “federal interests underpinning GARA . . . justify[ing] the intervention of appellate courts in product liability cases in furtherance of the policy of cost control.”\footnote{Id.} The court acknowledged plaintiff’s argument that other issues qualifying for collateral review focused on constitutional immunities and entitlements, but it found the defendant’s “federal interest” argument more persuasive.\footnote{Id.}

As to the final element - irreparable loss - the court focused on the financial cost borne by the defendants in defending a complex product liability action.\footnote{Pridgen, at 433.} It agreed that the federal legislation meant to “contain such costs in the public interest.”\footnote{Id.} The opinion suggests that public interest is served by cost containment and puts heavy weight on what it sees as GARA's balance between “public, industry and individual interests.”\footnote{Id.}

Consequently, the court agreed with the defendants and held that the GARA summary judgment order should be afforded interlocutory appeal because it satisfied the three elements of the collateral order doctrine. Having determined this legal question, the court then considered the merits of the issue: whether GARA’s rolling provision extended liability to manufacturers who held type certificates.\footnote{Id. at 434.}

Continuing to rely heavily on legislative history, the court addressed the role that a type certificate held relative to the manufacturing process and found that a type certificate was “an essential pre-requisite to

\footnotesize{\textsuperscript{145} Pridgen, at 433.} \textsuperscript{146} Id. \textsuperscript{147} Id. \textsuperscript{148} Id. \textsuperscript{149} Id. \textsuperscript{150} Pridgen, at 433. \textsuperscript{151} Id. \textsuperscript{152} Id. \textsuperscript{153} Id. at 434.}
manufacture in the aviation industry.”154 Finding a type certificate to be a necessary element of manufacturing, the court reasoned that GARA’s liability exemption to a manufacturer “in its capacity as a manufacturer,” applied to all holders of type certificates.155 The court found support for its conclusion in the legislative history, noting that a manufacturer did not receive an entirely “free pass” as a result of their status as a manufacturer.156 Plaintiffs could still bring a civil action if a manufacturer committed a negligent act in another role, such as in piloting, or performing maintenance.157 The court concluded that the types of liabilities that would naturally arise from type certification were the activities envisioned and protected by GARA’s statute of repose.158 Returning to the purpose of GARA, the court stated “it would wholly undermine the general period of repose if original manufacturers were excepted from claims relief for replacement parts under the rolling provision by virtue of that status alone.”159 Because it was undisputed that the defendants did not manufacture, or supply the replacement parts in question, GARA’s rolling provision did not apply.160

Even though the court had considered the merits, it remanded the case for a fourth time for a factual determination as to whether there remained a material fact in dispute on the misrepresentation, concealment, and withholding exceptions.161 Ironically, it stated “judicial efficiency” as its reason for retaining the case and considering the merits after the third remand, but given that a fourth remand was envisioned all along, it seems more realistic that the court wished to ensure that the trial court did no err on the question of the legal significance of the type certificate for rolling liability.

154 Id. at 435.
155 Pridgen, at 435 (citing GARA § 2(a)).
157 Id. at 435.
158 Id.
159 Id. at 436.
160 Id. at 437.
161 Pridgen, at 437 (ordering a fourth remand to the trial court to develop the record on the plaintiff’s misrepresentation claim).
The Pennsylvania Supreme Court's reasoning accepted the basic Ninth Circuit premise that a statute of repose is akin to immunity, effectively satisfying the third Cohen prong of a decision unreviewable on the merits. The Pennsylvania decision focused on a purely legal question – whether being the holder of a type certificate created rolling liability – and resolved this question. In that regard, the Pennsylvania decision is consistent with the Third Circuit's holding that collateral review is reserved for legal issues, and it inappropriate for legal issues that are intertwined with factual issues. The Pennsylvania court's decision came down shortly after Robinson; it acknowledged, but disagreed with Robinson. However the Pennsylvania court's remand to the trial court might indicate a subtle acceptance of Robinson. If Pennsylvania had first required the trial court to develop the record on whether a factual dispute existed on the misrepresentation claim, the entire Pennsylvania Supreme Court proceeding could have been avoided. In this regard, it seems the Pennsylvania Supreme Court's primary purpose was to correct the trial court's erroneous interpretation of GARA on the liability of type certificates holders. While it achieved a sensible legal interpretation, getting there through the collateral order doctrine directly conflicts with the Third Circuit, and is in tension with the Supreme Court's holdings in Digital and Johnson. Thus, this case might pose problems for Pennsylvania courts in the future.

IV. Kennedy, Robinson, and Pridgen – Can the Decisions Be Harmonized?

This trio of GARA collateral review cases reveals very different interpretations of the collateral order doctrine. The differing outcomes are not all that surprising, given the uniqueness of GARA. GARA's primary purpose – economic revitalization of an industry – is indicated in the title. The importance of economic revitalization was repeated over and over in the testimony by GARA supporters and in other legislative history. It was enacted at a time of significant perception that trial lawyers were out of control and were responsible for unfair liability judgments. Opposition to GARA by ATLA barely registered in the legislative history. Although other economic forces likely contributed to general aviation's downturn after 1978, the general aviation manufacturers and trade groups successfully narrowed the issue to purely one of

162 Id. at 434.
163 The American Trial Lawyers Association (ATLA) has since changed its name to the American Association for Justice. See generally http://www.atla.org/.
liability from unfair litigation. Any court wishing to find in favor of granting collateral review will find substantial quote-worthy legislative history to support its holding. 164

The Ninth Circuit holding in Kennedy strengthens GARA's protections in favor of the aircraft manufacturers. By analogizing GARA protection to the immunity cases that qualified for collateral review, the court found that the irreparable loss prong was satisfied. Of course, individual plaintiffs cannot compete with the comparison to public official immunity that the Ninth Circuit analogized to GARA because no individual plaintiff can claim an economic interest equal to an entire industry. Whereas the manufacturers successfully claimed protected status under the "revitalization" purpose of GARA, there is no balancing language in favor of plaintiffs. The lack of balancing language, coupled with overwhelmingly one-sided legislative history gave the Ninth Circuit the justification necessary to find in favor of the manufacturers.

Although the Third Circuit in Robinson goes to pains not to reject the Ninth Circuit explicitly, it plainly disagrees with the reasoning. There is nothing to suggest that the Robinson court actually was influenced by the fact that a catastrophic mechanical failure caused the accident, but having a mechanical cause certainly distinguished the Robinson accident from the types of accidents that led to the onerous amounts of litigation that resulted in GARA.

The Third Circuit reasoning protects the bounds of the collateral review doctrine, but leaves open the possibility that an erroneous legal interpretation of GARA could qualify for review in certain circumstances. 165 However, its rejection of the Kennedy immunity arguments sets a high standard for collateral review and the court never describes the circumstances that could qualify under all three prongs of Cohen. Arguably, its approach treats plaintiffs and defendants fairly by limiting GARA's full force primarily to issues of law.

The Pennsylvania Supreme Court asserted that its decision accorded with both the Robinson and Kennedy decisions. While it acknowledges that it affords more weight to Congressional intent to "ameliorate

164 Pridgen directly quotes six times from legislative history sources in support its decision, see Pridgen, at 429-36, whereas the Robinson court does not quote at all from the legislative history of GARA.
165 Robinson, at 173-74.
litigation costs,"\textsuperscript{166} than did the Third Circuit, it relies on the Third Circuit's suggestion that purely legal interpretations of GARA might properly qualify for collateral review.\textsuperscript{167} Because the Third Circuit found a material issue in dispute lay at the center of \textit{Robinson}, the Pennsylvania Supreme Court was able to distinguish \textit{Pridgen} as entailing a "pure legal interpretation of GARA."

This trio of cases suggests that collateral review was applied with awareness of the facts of the cases and their underlying merits. The difficulty with this approach is that the Supreme Court has explicitly stated that collateral review is to be afforded for classes of cases, and not for fact-specific litigation.\textsuperscript{168} In \textit{Digital}, the Supreme Court rejected a private defendant's broad defense argument based on "the right not to stand trial."\textsuperscript{169} It specifically distinguished the difference between immunity granted to public officials and the position of a private party. The Court went as far as concluding that "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye."\textsuperscript{170} The Court explained that an immediate appeal of right under § 1291 would occur only when there was an "explicit statutory or constitutional guarantee that trial will not occur."\textsuperscript{171}

Because of GARA, the general aircraft manufacturers can claim greater protections than those due to a product manufacturer in virtually any other industry. Even though they can't sensibly lay claim to constitutional immunity, GARA's text, purpose and voluminous legislative history elevates the general aircraft manufacturers above other product liability defendants. The result is that they fall somewhere between a constitutionally-protected entity and typical manufacturers, even though the statutory text says nothing about creating statutory immunity beyond accepted trial practices existing at the time of enactment.

Where does the trio of cases leave litigants? The diverging case law will create continued uncertainty. Manufacturers will most certainly appeal adverse summary judgment motions. In jurisdictions that have not definitively established whether a right to collateral appeal exists, the litigation process will be surely lengthened. In the Ninth Circuit and in Pennsylvania, the manufacturers' established right to collateral

\textsuperscript{166} \textit{Pridgen}, at 434.
\textsuperscript{167} \textit{Id.}
\textsuperscript{168} \textit{Digital}, 511 U.S. at 868.
\textsuperscript{169} \textit{Id.} at 871.
\textsuperscript{170} \textit{Id.} at 873 (referencing the final order doctrine codified in § 1291.)
\textsuperscript{171} \textit{Id.} at 874 (quoting \textit{Midland Asphalt}, 489 U.S. at 801).
review establishes a procedural hurdle for plaintiffs. As long as courts lack the ability to reject collateral review on jurisdictional grounds, manufacturers will certainly exploit their new-found power to slow the process of litigation, which is already lengthy. At the very least, the appeal process will increase the amount of time spent getting a case to trial. It may give plaintiff's counsel pause in preparing claims before trial, and will further emphasize the discovery phase in order to sufficiently develop fact-based claims. Combined with the complexity of aircraft accident cases, the prospect of collateral review will make a daunting process even more intimidating to plaintiffs.

What effect does the trio of decisions have on the courts? Courts should be extremely careful with denials of a manufacturer's summary judgment motion, anticipating that they will likely have to examine and supply substantive reasoning for their decisions. At the very least, trial courts should review the substantive issues rather than simply denying summary judgment, and intermediate appellate courts should look beyond the jurisdictional grounds to find that the collateral order doctrine does not apply. As seen in the Pennsylvania case, a trial court cannot simply dismiss a defendant’s summary judgment motion and move on. A trial court must be prepared to explain why the substantive merits of each dispute do not deserve collateral review. In defense of the trial court, the Pennsylvania Supreme Court leap-frogged it in *Pridgen* when it granted discretionary review before the trial court had ruled on the misrepresentation exception.\(^\text{172}\)

Would the U.S. Supreme Court consider GARA to be an "explicit statutory" right not to stand trial? The *Digital* standard is high, and the Third Circuit has clearly held that GARA does not meet that standard. However, the manufacturers' argument that Congress enacted a form of broad immunity for an entire economic industry differentiates it from the individual private litigants discussed in *Digital*. Whether the Circuit split could qualify for review by the Supreme Court likely depends on whether the collateral order doctrine migrates to other product liability areas where there are less specific legislative protections. As it stands, today GARA is uniquely distinguished from product liability lawsuits in general. Non-aviation

\(^{172}\) The Pennsylvania Supreme Court later granted reargument to allow the parties to argue the substantive issues. It then upheld its prevision decision, although it reiterated that the plaintiffs could still argue and prove their misrepresentation claim before the common pleas court. *See Pridgen v. Parker Hannifin Corp.*, 2007 WL 528053 (Pa. 2007).
manufacturers do not have the benefit of such industry-specific protections and are unlikely to be successful in claiming a right to collateral review.

V. Conclusion

In the early 1990s, the turnaround of the U.S. general aviation industry was not a foregone conclusion. GARA has been hailed as “an unqualified success” by the general aviation manufacturers and their supporters. GAMA reported that more than 25,000 jobs were created between enactment of GARA and 1999. Based on the number of aircraft produced, number of jobs created, and revenue growth, GARA has fulfilled the hopes of its backers and the legislators. A GAO report in 2001 reported that GARA was "the most significant contributor" to the revitalization of the general aircraft industry.

Using collateral review, the Kennedy and Pridgen courts were able to correct what appeared to be erroneous interpretations of technical aspects of GARA. In Kennedy, this kept the manufacturer Bell Helicopter from having to withstand a full trial, saving it the expense and time of having to wait for a final order before appealing. In Pridgen, it is not yet known whether a full trial will occur, since the trial court has not yet ruled on the misrepresentation claim. Pridgen's circuitous trips up and down the Pennsylvania court system hardly achieve the judicial goal of prompt and certain justice, and the Supreme Court's attempt to harmonize the differences between Kennedy and Robinson achieved little clarity. The inability to reach consensus points to the difficulty that future litigants and courts face in determining whether GARA should qualify for collateral review.

Revitalization of general aviation was already well underway prior to Kennedy and Pridgen. Although the industry's growth was temporarily slowed by the terrorist attacks in 2001, growth since then has continued at a steady pace. The extra protection afforded to the aircraft manufacturers by allowing collateral review of summary judgment decisions as a result of the Kennedy and Pridgen decisions might be thought unnecessary for revitalization. The primary purpose of this unique piece of legislation – economic

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173 “GARA is a tiny, three-page bill that has generated research, investment and jobs. It is an unqualified success[,]” (quoting Ed Bolen, President & CEO, National Business Aviation Association). See http://www.gama.aero/resources/productLiability/index.php.
175 Id. at 6.
restitution – was achieved through its clearly written statute of repose. Though the Ninth Circuit and the Pennsylvania Supreme Court were heavily influenced by the economic argument underlying GARA, there will continue to be courts, such as the Third Circuit, that find GARA neither qualifies for collateral review, nor needs it in order to fulfill the intended protections of the statute.