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*Et Resurrexit: GARA and the Trio of Cases on Collateral Review*

Shelley A. Ewalt

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I. INTRODUCTION

The American general aviation industry once was one of the great manufacturing wonders of the world. It spooled up and built 35,000 aircraft in 1946 to fight World War II. After the war, general aviation continued to be popular; in 1978, nearly 18,000 gen-
eral 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.

Several factors led to the decline, but liability costs received the greatest amount of attention. General aviation aircraft prices began increasing sharply in the 1970s and 1980s, but the price increases were not commensurate with new technology or safety advances. The manufacturers blamed the increasing prices in large part on increases in the industry’s liability costs. Predictably, demand and orders dropped off. Driving the increase in the volume and cost of litigation was the theory of strict liability.

In the 1970s and 1980s, general aircraft manufacturers landed on the losing end of multiple high-profile aircraft crash lawsuits. Because some of the aircraft manufacturers were self-insured, they bore the entire cost of liability. The industry as a whole found itself with rapidly escalating liability costs. The manufacturers’ claims paid and out-of-pocket defense expenses grew from

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. Id.
8. 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. See Greenman v. Yuba Power Prods., Inc., 377 P.2d 897 (Cal. 1963) (adopting strict liability in product liability cases). The new strict liability standard gave rise to an increasing number of product liability actions against aircraft manufacturers. McAllister, supra note 7, at 305-07.
$24,000,000 in 1976 to $210,000,000 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} As a result, insurers either increased premiums for product liability insurance or dropped out of the business entirely.\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} Unsurprisingly, production fell ninety-four percent and jobs fell sixty-five percent between 1978 and 1988.\textsuperscript{14}

The manufacturers complained that strict liability and out-of-control litigation led to their financial responsibility for accidents that were not caused by manufacturing defects. They pointed to a study of 203 accidents generating litigation that revealed that none of the accidents studied were judged by the National Transportation Safety Board (NTSB) to be caused by a design or manufacturing defect.\textsuperscript{15}

\textsuperscript{10} GAO AVIATION REPORT 2001, supra note 1, at 26.
\textsuperscript{11} Id.
\textsuperscript{13} See generally GAO AVIATION REPORT 2001, supra note 1.
\textsuperscript{14} Id. at 18.
\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. Beech paid 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, 548 n.86 (1995) (quoting Martin, supra note 12, at 484-85). 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) (2000): “[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.” Sheesley v. Cessna Aircraft Co., 2006 U.S. Dist. LEXIS 27133, at *112 (D.S.D. 2006) (citing 49 U.S.C. § 1154(b) (2000)). This limitation protects the credibility and independence of the NTSB.
However, factors other than “long-tail” liability likely contributed to the downturn of the general aviation industry. After World War II, general aviation was a highly cyclical business; the 18,000 aircraft built in 1978 marked a high point in production that seriously over-supplied the market, according to some commentators. Tax investment benefits to ownership of small aircraft dried up. In addition, high quality, economical kit aircraft became available. The final devastating blow came in 1991, when Congress enacted a ten percent luxury tax on general aviation aircraft costing in excess of $250,000. Although the tax exempted aircraft used for business purposes and generated little actual tax revenue, it received enormous press; contributed even further to rising aircraft prices, and created a generally negative perception of aircraft ownership, further resulting in decreased demand.

By 1994, a united and clear-voiced general aviation 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 industry and to remove legal liability obstacles that hindered job creation. A veritable alphabet soup of

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 n.13 (1982). A statute of repose has the effect of cutting off the tail of liability on the graph. Id.

17. See Tarry & Truitt, supra note 5.


manufacturers and industry trade groups cooperated in the legislation.22

Relief came in the form of the General Aviation Revitalization Act of 1994 (GARA).23 The General Aviation Manufacturing Association (GAMA), the manufacturers, and politicians from heavily affected states such as Kansas, worked together in drafting the legislation and shepherding it through to passage. President Clinton signed the legislation into law in 1994, and the industry quickly responded. Cessna Aircraft followed through on its promise to break ground on a new single-engine production facility in Kansas.24 From a low of 1,132 units produced in 1994, aircraft production tripled to 3,580 units in 2005.25 General aviation manufacturing revenue similarly grew from $3.74 billion in 1994 to $15.14 billion in 2005.26

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.27 Most GARA litigation over this time has centered on technical interpretations 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

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22. McNatt & England, 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 Association of Trial Lawyers of America (ATLA) and consumer organizations like Citizen Action and Public Citizen. See Rodriguez, supra note 12, at 587.


26. Id. In 2005, a total of thirteen aircraft manufacturers based in the United States made and delivered 2,857 general aviation aircraft. Of the total value, nearly thirty percent was exported to other countries. Id. at 13-15. 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 1, at 4. A potential reason for the price increase is that general aviation aircraft were substantially under-priced as a result of the over-supply of product in the early 1970s. Another reason is that manufacturers began building new safety and technology features into the aircraft, such as GPS navigation and other modern electronic aids.

27. See Tarry & Truitt, supra note 5; Schwartz & Lorber, supra note 5; McAllister, supra note 7; Rodriguez, supra note 12; Martin, supra note 12; Boswell & Coates, supra note 15; Robert F. Hedrick, A Close and Critical Analysis of the New General Aviation Revitalization Act, 62 J. AIR L. & COM. 385 (1996).
at three cases that confronted a unique aspect of GARA. These cases 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 reading, these three cases show courts struggling with whether to allow defendants a second chance to clear the summary judgment threshold. To resolve the issue, the courts weighed the legislative intent underlying GARA against the protective bounds of the collateral order doctrine.

In the first case examined by this article, *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, the Ninth Circuit held that an aircraft manufacturer had a right to collateral review of a previously denied summary judgment motion under GARA.\(^\text{28}\) The decision analogized GARA's statute of repose to statutory immunity from suit.\(^\text{29}\) It effectively allowed the manufacturer a re-hearing of the substantive merits of a denied summary judgment motion.

In the second case, *Robinson v. Hartzell Propeller, Inc.*, the Third Circuit disagreed with the Ninth Circuit's reasoning and held that GARA did not qualify for review under the collateral review doctrine.\(^\text{30}\) The court equated GARA with a statute of limitations rather than total immunity from suit.\(^\text{31}\)

Finally, in *Pridgen v. Parker Hannifin Corp.*, the Pennsylvania Supreme Court acknowledged both the Ninth and Third Circuit decisions before ultimately agreeing with the reasoning in *Kennedy*.\(^\text{32}\) The divergent holdings point to the likelihood of continuing challenges as to whether GARA should be afforded collateral review. The strength of the economic revitalization argument that brought GARA into being gives ample support to courts that choose to follow the Ninth Circuit and Pennsylvania decisions. However, courts dedicated to protecting the boundaries of the collateral order doctrine will consider the granting of review to GARA summary judgment motions an impermissible expansion of the collateral order doctrine.

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28. 283 F.3d 1107 (9th Cir. 2002).
30. 454 F.3d 163, 168 (3d Cir. 2006).
32. 905 A.2d 422 (Pa. 2006).
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 by limiting the liability of general aviation manufacturers to the first eighteen years after delivery of a general aviation aircraft to the buyer. This addressed the main concern of the manufacturers—"long tail" liability, which had made

33. 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.

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). For a general discussion of statutes of repose in regards to product liability law, see generally David. G. Owen, Special Defenses in Modern Products Liability Law, 70 MO. L. REV. 1 (2005).

34. 49 U.S.C. § 40101 note (2000). The statute provides in pertinent part:

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.

SEC. 3. OTHER DEFINITIONS.

For purposes 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 . . . .

Id.

35. McAllister, supra note 7, at 306.
them liable for aircraft decades after they were made. GARA's statute of repose applied to manufacturers of general aviation aircraft,\textsuperscript{36} to makers of individual aircraft components, and to the manufacturers of engines and airframes.\textsuperscript{37} In effect, GARA prevents civil litigation against the aircraft manufacturer eighteen years after delivery.

The essential elements of the law are straightforward. Section 2(a)(1) limits the liability of the manufacturer to the first eighteen years beginning from the date of delivery.\textsuperscript{38} Section 2(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.\textsuperscript{39} 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.\textsuperscript{40} Since nearly every major component of an aircraft is replaced over its lifetime, the rolling liability provision provides plaintiffs with continuing recourse against manufacturers in the event a replacement part causes an accident.\textsuperscript{41}

Manufacturers can lose their GARA protections under specific exceptions written into the statute. For example, GARA's statute of repose does not apply when a manufacturer "knowingly misrepresented . . . or concealed or withheld from the Federal Aviation

\textsuperscript{36} 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 scheduled passenger-carrying operations. GARA § 2(c). "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 (2000 & Supp. V 2005); 14 C.F.R. §§ 21.11 – 21.55 (2007).

\textsuperscript{37} 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, nearly thirty percent was exported to other countries. GAMA DATABOOK 2005, supra note 2, at 13-14, 17.

\textsuperscript{38} GARA § 2(a)(1).

\textsuperscript{39} Id. § 2(a)(2).

\textsuperscript{40} 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 period of 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); Hiser v. Bell Helicopter Textron Inc., 4 Cal. Rptr. 3d 249 (Cal. Ct. App. 2003).

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."\(^{42}\)

The wording of the statute requires more than mere negligence of design to justify a cause of action.\(^{43}\) 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 ramifications have been far-reaching. The clarity of the text makes the initial claim-pleading stage particularly important. Courts have declared that the eighteen-year timeframe begins when the aircraft is first delivered, even if the first delivery was not to a general aviation customer.\(^{44}\) 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 adjudication on a summary judgment motion. This is exactly what GARA's promoters had in mind: certainty as to liability.\(^{45}\)

By using a classic statute of repose, GARA addressed the manufacturers' primary goal of foreclosing indefinite liability. Since aircraft have a nearly unlimited lifespan when cared for properly,

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42. GARA § 2(b)(1). The full text of that subsection is as follows:

(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.[]

Id.


44. See Estate of Kennedy v. Bell Helicopter Textron, Inc., 283 F.3d 1107 (9th Cir. 2002) (holding first delivery to U.S. military starts the clock running on GARA).

45. For a detailed review of the legislative history and discussions pursuant to GARA's enactment, see McNatt & England, supra note 9; Schwartz & Lorber, supra note 5; Tarry & Truitt, supra note 5.
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some commentators believe that the real effect of GARA is to shift responsibility from the initial aircraft manufacturers to manufacturers of replacement components. The counter-argument is that the original manufacturer often makes the replacement parts and thus remains liable if the part proves to be defective within eighteen years of delivery. In the first eight years after GARA's enactment, a variety of cases resolved important points of GARA's coverage and technical details inherent to aircraft litigation.46 By creating a defined period of liability, the manufacturers, suppliers, and their insurers were 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.47

In 2002, the aircraft manufacturers gained an additional protection not likely foreseen by GARA's promoters and legislators. In Estate of Kennedy v. Bell Helicopter Textron, Inc., the Ninth Circuit held that an aircraft manufacturer's summary judgment motion, denied at the trial court level, could be immediately appealed under the collateral order doctrine.48 In most cases, the denial of a summary judgment motion does not qualify as a final decision because, far from ending the litigation, it is an order allowing the litigation to proceed.49 The Ninth Circuit decision permitted, for

46. E.g., 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); 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); 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.); Burroughs, 93 Cal. Rptr. 2d at 125 (defendant who acquired product line of carburetor from an original manufacturer stood in shoes of manufacturer and received protection from GARA).

47. For a detailed discussion of the economic forces contributing to general aviation's decline, the enactment of GARA, and its resurrection, see Schwartz & Lorber, supra note 5; McAllister, supra note 7. The GAO's 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 1.

48. Kennedy, 283 F.3d at 1112.

the first time, collateral review of an interlocutory motion in the context of a GARA case.\textsuperscript{50}

### 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.\textsuperscript{51} A final decision, or order,\textsuperscript{52} 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."\textsuperscript{53} The purpose of the final decision rule is to prevent piecemeal appeals,\textsuperscript{54} to limit interruptions to the litigation process,\textsuperscript{55} and to further judicial efficiency by limiting the judicial docket.\textsuperscript{56} The final decision rule recognizes the deference that an appellate court owes to the trial court as the judicial body responsible for developing the facts and identifying the legal issues.\textsuperscript{57} While the final decision rule is codified in federal law, the statutes do not define the meaning of "final decision." The absence of a statutory definition has left the meaning of final decision and the collateral order doctrine to develop through a patchwork of federal and state court decisions.

The United States 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

\textsuperscript{50} Kennedy, 283 F.3d at 1112 (granting, for the first time, collateral review over summary judgment in the broader context of product liability suits).

\textsuperscript{51} The "final decision rule," or "final judgment rule," is codified at 28 U.S.C. § 1291 (2000) and provides in pertinent part: "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." \textit{Id}.

\textsuperscript{52} Rule 313 and Pennsylvania courts use the phrase "final order" to indicate final court orders. Various other federal courts use the phrases "final order" and "final decision" interchangeably to refer to the same concept. For the sake of consistency, "final decision" is used throughout this article. Functionally, there is no different between Pennsylvania's use of "final order" and other courts' use of "final decision." See generally PA. R. APP. P. 313; Melvin v. Doe, 836 A.2d 42 (Pa. 2003); Robinson, 454 F.3d 163.

\textsuperscript{53} Midland Asphalt Corp. v. United States, 489 U.S. 794, 798 (1989).

\textsuperscript{54} 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.").


\textsuperscript{57} California v. Harvier, 700 F.2d 1217, 1219 (9th Cir. 1983) (Rather than being a mere formality, the final judgment rule embodies a substantive policy that legal issues initially should be developed before district courts.).
reached a final conclusion. These intermediate, appealable decisions became known as "collateral" decisions. The collateral order doctrine, reaffirmed and explained by the Supreme Court in Digital Equipment Corp. v. Desktop Direct, Inc., 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." 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."

In Johnson v. Jones, the Supreme Court weighed the pros and cons of granting collateral review over nonfinal decisions:

[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.

... Sometimes 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.

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

60. Digital Equip. Corp., 511 U.S. at 865.
61. Id. at 867.
insulin seizure.\textsuperscript{63} Three of the officers claimed "qualified immunity" as public officials and moved for summary judgment based on a defense of lack of evidence.\textsuperscript{64} 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 decision.\textsuperscript{65}

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{66} The Court reiterated and explained the three Cohen factors. The first element—decisions that are conclusive—meant "that appellate review is likely needed to avoid . . . harm."\textsuperscript{67} The second element—separability—meant "that review now is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once . . . ."\textsuperscript{68} The final element—effective unreviewability—meant that "failure to review immediately may well cause significant harm."\textsuperscript{69}

The Court found that the lower court ruling on the sufficiency of evidence did not satisfy the three elements.\textsuperscript{70} Although the officers' ultimate defense rested on "qualified immunity," the Court found the underlying evidence insufficiency claim to be intertwined too closely to the underlying case, thus failing the second Cohen test.\textsuperscript{71} However, a claim of immunity, the Court acknowledged, even when intertwined with the merits, could raise a significantly different issue, thus qualifying for collateral review.\textsuperscript{72} It distinguished between final decisions focused significantly on whether or not genuine issues of fact existed from the purely legal principle of whether qualified immunity was available.

A variety of legal issues have been found to qualify for review under the collateral order doctrine. Immunity claims, such as qualified immunity in Johnson, as well as sovereign immunity,
have been held to qualify.\textsuperscript{73} Defendants in criminal trials have successfully argued this point to obtain review of substantive and procedural issues.\textsuperscript{74}

Generally, the collateral order doctrine has not been employed in products liability actions, but the Ninth Circuit determined in 2002 that the underlying nature of GARA—as a statute of repose—made any claim brought under its provisions similar to an immunity case, thus allowing for collateral review.\textsuperscript{75} In 2006, the Third Circuit rejected the Ninth Circuit's reasoning and held that a denial of a defendant's summary judgment motion in a GARA case did not qualify for review under the collateral review doctrine.\textsuperscript{76} The opposite conclusions reached by the Ninth and Third Circuits flow from their different approaches to statutory interpretation. 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 two circuit courts.\textsuperscript{77} Ultimately, the Pennsylvania Supreme Court sided with the Ninth Circuit's reasoning, holding that GARA could be reviewed under the collateral order doctrine.\textsuperscript{78}

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. The Pennsylvania Supreme Court decision weaves between the reasoning of the two circuit courts while also adding substantial detail by focusing on the difficulties inherent in aircraft crash litigation due to the intertwining of facts and law.

These competing interpretations of the same statute are likely to fuel uncertainty as other jurisdictions consider this issue. The circuit split asks 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.

\begin{footnotesize}
\begin{enumerate}
\item[73.] See Johnson, 515 U.S. at 314; Farricielli v. Holbrook, 215 F.3d 241 (2d Cir. 2000) (discussing Eleventh Amendment sovereign immunity); Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp., 204 F.3d 384 (2d Cir. 2000) (discussing sovereign immunity under Foreign Sovereign Immunity Act); Otey v. Marshall, 121 F.3d 1150 (8th Cir. 1997) (holding that denial of summary judgment motion based on qualified immunity is an appealable collateral order if it resolves dispute concerning issue of law).
\item[74.] See, e.g., Abney v. United States, 431 U.S. 651 (1977) (double jeopardy); Stack v. Boyle, 342 U.S. 1 (1951) (reduction of bail).
\item[75.] Estate of Kennedy v. Bell Helicopter Textron, Inc., 283 F.3d 1107, 1110 (9th Cir. 2002).
\item[76.] Robinson v. Hartzell Propeller, Inc., 454 F.3d 163, 172-74 (3d Cir. 2006).
\item[77.] See Pridgen v. Parker Hannifin Corp., 905 A.2d 422 (Pa. 2006), adhered to on reargument, 916 A.2d 619 (Pa. 2007).
\item[78.] Pridgen, 905 A.2d at 434.
\end{enumerate}
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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 that view the intertwining of fact and law as precluding a traditional narrowness of the collateral order doctrine.


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,\(^79\) popularly known as a “Huey,” originally delivered to the U.S. Navy in 1970.\(^80\) The accident occurred in 1996, twenty-six years after the helicopter’s delivery to the military, when it broke apart in mid-air and crashed.\(^81\) The NTSB determined the probable cause of the accident as

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\text{[fatigue failure of the vertical stabilizer spar cap and subsequent loss of the rotocraft'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.}^82
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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.\(^83\) Aircraft delivered to the

\(^{79}\) Helicopters are considered aircraft for GARA purposes. GARA § 2(c), 49 U.S.C. § 40101 note (2000). 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].” Id.

\(^{80}\) Kennedy, 283 F.3d at 1112.

\(^{81}\) Id. at 1109.


\(^{83}\) Kennedy, 283 F.3d at 1111. Military aircraft (with certain exceptions such as fighter aircraft) are commonly sold as surplus to the civilian market.
U.S. military have neither a type certificate nor an airworthiness certificate. They are classified as "public aircraft," and defined under the Code as "used only for the United States Government." Thus, the helicopter did not acquire a type certificate or airworthiness certificate until 1984 when it was transferred to civilian service. Since 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 argued that GARA barred the claim because the accident occurred twenty-six years after original delivery. The district court rejected the GARA defense. It based its holding on state product liability law, holding that under Washington state product liability law, the manufacturer had an ongoing duty to warn of design defects. The court 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.

Bell Helicopter appealed. Even though the ruling did not qualify under the traditional definition of a final decision, Bell argued that appellate review should be granted under the collateral order doctrine. A three-judge panel of the Ninth Circuit granted review. It acknowledged that, in Digital Equipment Corp., the Supreme Court characterized 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 Equipment Corp. In short order, the court found that the first two elements of the collateral order doctrine were satisfied:

84. Id. at 1112.
86. Kennedy, 283 F.3d at 1112.
87. See id.
88. Id. at 1109.
89. Id.
90. Id.
91. Kennedy, 283 F.3d at 1109.
92. Id.
93. Id.
94. Id. at 1110.
95. Id.
96. Kennedy, 283 F.3d at 1110.
97. Id.
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.\textsuperscript{98}

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."\textsuperscript{99} In equating the statute of repose to an explicit right "not to stand trial," the court offered as support the language of the statute stating that "no civil action . . . may be brought . . . if the accident occurred—(1) after the applicable limitation period . . . ."\textsuperscript{100}

In dissent, Judge Paez stated that the majority's decision "impermissibly expand[ed] the collateral order doctrine."\textsuperscript{101} 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."\textsuperscript{102} First, he disagreed with the majority's comparison of the statute of repose to qualified immunity that would result in a right to be free from trial.\textsuperscript{103} Judge Paez concluded that GARA was more like a statute of limitations than a right to immunity from suit.\textsuperscript{104} Statutes of limitations, as his dissent noted, had uniformly been held not to create immunity from suit.\textsuperscript{105} He also stated that the defendant did not satisfy the third Cohen condition—that the appealed-from order must be "effectively unreviewable on appeal from final judgment."\textsuperscript{106} Judge Paez pointed out that the effect of the decision was to give general

\textsuperscript{98.} Id. (emphasis added).
\textsuperscript{99.} Id. (emphasis added).
\textsuperscript{100.} Id. (citing GARA §2(a)).
\textsuperscript{101.} Kennedy, 283 F.3d at 1113 (Paez, J., dissenting).
\textsuperscript{102.} Id.
\textsuperscript{103.} Id.
\textsuperscript{104.} Id.
\textsuperscript{105.} Id. at 1114 & n.2 (citing United States v. Garib-Bazain, 222 F.3d 17, 18 (1st Cir. 2000); United States v. Pi, 174 F.3d 745, 750 (6th Cir. 1999); 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. Rossman, 940 F.2d 535 (9th Cir. 1991)). 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.
\textsuperscript{106.} Kennedy, 283 F.3d at 1112-13 (Paez, J., dissenting)}
aviation manufacturers the additional and unforeseen tool of piecemeal litigation to slow litigation.107

The two-judge majority did not discuss Johnson, which explained that unreviewable meant that a failure to review immediately may cause significant harm. At first reading, Johnson supports the majority's holding. A defendant in a complex aircraft crash suit will bear large 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's applicability 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 decision rule] 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 averted . . . ."108

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 initially receive an FAA type certificate, should not delay the start of GARA's protections.109 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 Equipment 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 led to a case in the Pennsylvania state court system, Pridgen v. Parker Hannifin Corp.,110 and was appealed to the Pennsylvania Supreme Court. The second accident

107. Id.
109. Kennedy, 283 F.3d at 1112 (majority opinion).
110. 905 A.2d 422 (Pa. 2006).
led to litigation in the United States District Court for the Eastern District of Pennsylvania, *Robinson v. Hartzell Propeller, Inc.*, 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:

"[T]he 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."

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." 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 requirements." 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 in-flight. The defendant 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 district court rejected the defendant's motion. Citing *Kennedy* for the

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111. 454 F.3d 163 (3d Cir. 2006).
113. *Robinson*, 454 F.3d at 165.
115. *Robinson*, 454 F.3d at 165. A key component, such as a propeller, receives a separate type certificate from the FAA.
116. *Id.* at 167.
117. *Id.*
right to collateral review, the defendant appealed, and the case was heard by the Third Circuit.\textsuperscript{118}

The Third Circuit held that the defendant's appeal did not qualify for review under the collateral order doctrine.\textsuperscript{119} Referencing Judge Paez's dissent from \textit{Kennedy},\textsuperscript{120} as well as other Third Circuit cases, the court expressed its reasoning in four primary points.\textsuperscript{121} First, it equated the interests protected by GARA to a statute of limitations rather than a grant of qualified immunity,\textsuperscript{122} concluding that the Ninth Circuit incorrectly characterized GARA's statute of repose as immunity from suit.\textsuperscript{123} 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.\textsuperscript{124} 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."\textsuperscript{125}

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 officials "are not deterred from vigorously carrying out" their duties.\textsuperscript{126} 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{127}

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{128} Noting that the misrepresentation exception renders

\textsuperscript{118} Id. at 167-68, 172.

\textsuperscript{119} Id. at 173-74.

\textsuperscript{120} Robinson, 454 F.3d at 172-73 (citing \textit{Kennedy}, 283 F.3d at 1114-15 (Paez, J., dissenting)).

\textsuperscript{121} Id. at 173-74.

\textsuperscript{122} Id. at 172-73.

\textsuperscript{123} Id. at 172.

\textsuperscript{124} Id. Compare GARA § 2(a), 49 U.S.C. § 40101 note (2000) ("no civil action . . . may be brought") with 28 U.S.C. § 1658(a) (2000) (setting forth the statute of limitations and stating: "a civil action . . . may not be commenced . . . ").

\textsuperscript{125} Robinson, 454 F.3d at 173. However, there is much literature distinguishing between statutes of repose and statutes 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. See McGovern, \textit{supra} note 33, at 582. He sets forth five definitions comparing and contrasting statutes of limitation with statutes of repose. \textit{Id.} at 582-86.

\textsuperscript{126} Robinson, 454 F.3d at 173.

\textsuperscript{127} Id.

\textsuperscript{128} Id.
GARA completely inapplicable to a case, the court found that no comparable exceptions existed in the law governing public official immunity.\footnote{Id.} 

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.\footnote{Id. at 173-74.} 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.\footnote{Robinson, 454 F.3d at 174 (citing \textit{Kennedy}, 283 F.3d 1107).} 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.\footnote{Id. at 173-74.} Referencing the \textit{Cohen} factors, the court suggested the intertwining issues of law and fact failed the second factor—\textit{separability}—and thus did not qualify for review.\footnote{Id. at 172.}

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 \textit{could} qualify for collateral review when it involved only an 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 not reviewable upon appeal.\footnote{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 twenty-five percent of all licensed pilots. GAMA DATABOOK 2005, \textit{supra} note 2, at 30.  

C. Pridgen v. Parker Hannifin – \textit{The Pennsylvania Supreme Court Upholds Collateral Review of GARA}

When the Third Circuit issued its decision in \textit{Robinson}, the Pennsylvania Supreme Court was still considering the appeal in \textit{Pridgen}. The accident giving rise to this litigation occurred when a fifty-three year old airline transport-rated pilot\footnote{Id. at 173-74.} was returning
from Oshkosh, Wisconsin to his home in a Piper aircraft that carried four friends. 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... 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." Another witness who observed the Piper stated it "just couldn't get any elevation... Just before going down [it] was banking left." The aircraft hit the ground in a cornfield about one-half statute mile from the airport. 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, so the NTSB was unable to determine its exact original location. 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. 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 inches aft of datum, depending upon the precise location of the luggage. The aircraft's type certificated design allowed for a range between 91.4 and 95.5. Thus, with regards to 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

137. Id.
138. Id.
139. Id.
140. Id. at 1a.
142. Id. at 1b.
143. Id.
144. 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.
145. NTSB, FACTUAL REPORT, No. NYC99FA187, supra note 136, at 1b.
control of 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." Thus, unlike 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 second, that defendants Textron, Inc. and AVCO Corp. had made material misrepresentations in obtaining the original type certificate. Defendants’ summary judgment motions argued that more than eighteen years had elapsed since installation of the engine and, thus, that the claim was barred by GARA. Additionally, the 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. The trial court denied the defendant’s summary judgment motions. Citing *Kennedy*, the defendants appealed under the collateral order doctrine.

In response, the plaintiffs argued that although the defendants did not manufacture or supply the parts in question, the defendants held the type certificate for the model of engine on the aircraft, supplied specifications for installation and replacement, and marketed such parts. Being the holder of the type certificate, the plaintiffs argued, meant GARA did not protect the defendants because of the underlying design defect claim. The plaintiffs also maintained their misrepresentation claim.

147. *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 425 (Pa. 2006), adhered to on reargument, 916 A.2d 619 (Pa. 2007). The opinions of the Court of Common Pleas and Superior Court in *Pridgen* were not published; therefore, all references are to the opinion of the Pennsylvania Supreme Court.
149. *Id.*
150. *Id.* at 426.
151. *Id.* at 426-27.
152. *Id.* at 425-26. For an explanation of "type certificates," see *supra* note 36.
153. *Pridgen*, 905 A.2d at 425-26. It is common practice for a manufacturer to purchase another manufacturer, a specific aircraft model, or simply 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.
154. *Id.*
155. *Id.* at 426.
The trial court again ruled in favor of the plaintiffs on both claims. Citing Pennsylvania’s collateral order doctrine and Kennedy, the defendants appealed to the appellate level. As required by Pennsylvania’s Rules of Appellate Procedure, the trial court filed its opinion setting forth the reasons for its holding, but rather than giving substantive reasons for its denial of the defendants’ motions, the court cited the procedural principle that the order did not qualify as a collateral order with a right of appeal. The court stated “the collateral order doctrine should be narrowly construed to avoid undermining the general rule authorizing appellate review of only final decisions, and to prevent litigation from being delayed by piecemeal review of trial court decisions[.]” 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.

The Pennsylvania Superior Court granted and heard defendant’s discretionary appeal, but ultimately affirmed the trial court. 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

156. Id.
157. Rule 313 of the Pennsylvania Rules of Appellate Procedure 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.

PA. R. APP. P. 313. 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. B. ASS’N. Q. 145, 150 (2006) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949); Pugar v. Greco, 394 A.2d 542, 545 (1978)).

158. Pridgen, 905 A.2d at 426.
159. Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure reads in pertinent part: “Upon receipt of the notice of appeal, the judge who entered the order giving rise to the notice of appeal, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief opinion of the reasons for the order . . . .” PA. R. APP. P. 1925(a).
160. Pridgen, 905 A.2d at 426.
161. Id. at 427.
162. Id. at 428.
whether the collateral order doctrine applied. The Superior Court answered that it had already considered and rejected the collateral order doctrine, and once again quashed the appeal. The Pennsylvania Supreme Court granted defendant's third discretionary appeal and remanded again to both lower courts to supply supporting rationale for their decisions.

The Superior Court considered the defendants' argument that GARA barred the plaintiff-appellees' underlying claims, and acknowledged 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. It distinguished its decision from the Kennedy court's conclusion that a "decision on the ultimate merits disposed of all claims and all parties in the case." It also rejected Kennedy's basic premise, that "GARA entails an essential right not to stand trial."

The trial court cited several factors for dismissal. First, it 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. Second, 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." 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 subject to liability as though it were the manufacturer." Next, the court found a factual dispute issue over the age of the replacement engine parts. Finally, the court noted the plaintiffs' request for additional time for discovery pursuant to the misrepresentation, concealment, and withholding.

163. *Id.*
164. *Id.*
165. *Pridgen*, 905 A.2d at 428 (noting a second remand to the appellate court and a third remand to the trial court).
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 429. "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." *Id.*
171. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 400 (1965)).
172. *Id.*
exceptions. The court had previously deferred a ruling on the discovery motion due to its summary judgment dismissal.

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. In presenting their arguments before the court, both the plaintiff and defendants stipulated their agreement with the United States Supreme Court's reasoning in Johnson v. Jones, 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 rule was consistent with Johnson.

The court considered the three elements of the 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." Citing to Third Circuit cases and Johnson, the court reiterated that

a claim is sufficiently separate from the underlying issues for purposes of collateral order review if it "is conceptually distinct from the merits of plaintiffs [sic] 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."

The court concluded that whether the rolling provision applied to manufacturers who held a type certificate, but did not manufac-

173. Id.
174. Id.
175. See Pridgen, 905 A.2d at 433.
176. Id. at 429-30.
178. PA. R. APP. P. 313.
179. Pridgen, 905 A.2d at 430.
180. Id. at 433.
181. Id. (quoting Johnson, 515 U.S. at 314, and citing Melvin v. Doe, 836 A.2d 42, 46 (Pa. 2003), and In re Ford Motor Co., 110 F.3d 954, 958 (3d Cir. 1997)).
ture the parts, was wholly separate from the plaintiff’s underlying claim.\textsuperscript{182}

As to the second element—importance—the court acknowledged the political and economic forces that brought GARA into existence.\textsuperscript{183} The court relied heavily on legislative history to support its conclusion that the “terms of GARA”\textsuperscript{184} 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.”\textsuperscript{185} The court acknowledged the plaintiff’s argument that other issues qualifying for collateral review focused on constitutional immunities and entitlements, but it found the defendants’ “federal interest” argument more persuasive.\textsuperscript{186}

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.\textsuperscript{187} It agreed that the federal legislation meant to “contain such costs in the public interest.”\textsuperscript{188} The court’s holding suggests that public interest is served by cost containment and gives substantial deference to GARA’s balance between “public, industry and individual interests.”\textsuperscript{189}

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.\textsuperscript{190} 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.\textsuperscript{191}

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 manufacture in the aviation industry.”\textsuperscript{192}

\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Pridgen, 905 A.2d at 433.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\textsuperscript{188} Id.
\textsuperscript{189} Pridgen, 905 A.2d at 433.
\textsuperscript{190} Id. at 434.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 435.
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.\(^\text{193}\) 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.\(^\text{194}\) Plaintiffs could still bring a civil action if a manufacturer committed a negligent act in another role, such as piloting or maintenance.\(^\text{195}\) 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.\(^\text{196}\) 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 [sic] for replacement parts under the rolling provision by virtue of that status alone."\(^\text{197}\) Because it was undisputed that the defendants did not manufacture or supply the replacement parts in question, GARA's rolling provision did not apply.\(^\text{198}\)

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.\(^\text{199}\) 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 not err

\(^{193}\) Id. (citing GARA § 2(a)).


The ["in its capacity as a manufacturer"] limitation is intended to insure that parties who happen to be manufacturers of an aircraft or a component part are not immunized from liability they may be subject to in some other capacity. For example, in the event a party who happened to be a manufacturer committed some negligent act as a mechanic of an aircraft or as a pilot, and such act was a proximate cause of an accident, the victims would not be barred from bringing a civil suit for damages against that party in its capacity as a mechanic.

\(^{195}\) Id.

\(^{196}\) Id.

\(^{197}\) Id. at 436.

\(^{198}\) Id. at 437.

\(^{199}\) Pridgen, 905 A.2d at 437 (ordering a fourth remand to the trial court to develop the record on the plaintiff's misrepresentation claim).
on the question of the legal significance of the type certificate for rolling liability.

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 not reviewable 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, not for legal issues intertwined with factual elements. While acknowledging Robinson, the Pennsylvania court’s decision ostensibly broke with its reasoning.200

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 certificate holders. While it achieved a sensible legal interpretation, the case directly conflicts with the Third Circuit by getting there through the collateral order doctrine. Thus, because of its apparent departure from the Supreme Court’s holdings in Digital Equipment Corp. and Johnson, Pridgen 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 obvious from 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 when trial lawyers were viewed as out of control and responsible for unfair liability judgments. Opposition to GARA by the

200. Id. at 434.
Association of Trial Lawyers of America barely registered in the legislative history.\textsuperscript{201} 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 one purely of 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.\textsuperscript{202}

The Ninth Circuit holding in \textit{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 \textit{irreparable loss} prong was satisfied. Of course, individual plaintiffs cannot dislodge the GARA comparison to public official immunity because no individual plaintiff can claim an economic interest equal to that of 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 \textit{Robinson} took pains not to reject the Ninth Circuit explicitly, it plainly disagreed with that court's reasoning. There is nothing to suggest that the \textit{Robinson} court actually was influenced by the fact that a catastrophic mechanical failure caused the accident, but the presence of a mechanical defect certainly distinguished the \textit{Robinson} accident from the types of accidents that led to the onerous amounts of litigation prior to GARA.

The Third Circuit's 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.\textsuperscript{203} However, its rejection of the \textit{Kennedy} immunity arguments sets a high standard for collateral review, and the court never describes the circumstances that would meet all three prongs of \textit{Cohen}. Arguably, its approach treats plaintiffs

\begin{footnotesize}
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\item \textsuperscript{201} The Association of Trial Lawyers of America has since changed its name to the American Association for Justice. See http://www.atla.org/about/index.aspx.
\item \textsuperscript{202} \textit{Pridgen} directly quotes six times from legislative history sources in support of its decision, see \textit{Pridgen}, 905 A.2d at 429-36, whereas the \textit{Robinson} court does not quote at all from the legislative history of GARA.
\item \textsuperscript{203} \textit{Robinson v. Hartzell Propeller, Inc.}, 454 F.3d 163, 173-74 (3d Cir. 2006).
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\end{footnotesize}
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.\textsuperscript{204} While it acknowledged that it afforded more weight to Congressional intent to "ameliorate litigation costs"\textsuperscript{205} than did the Third Circuit, the court relied on the Third Circuit's suggestion that purely legal interpretations of GARA might properly qualify for collateral review.\textsuperscript{206} Because the Third Circuit found a material issue in dispute in Robinson, the Pennsylvania Supreme Court was able to distinguish 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 United States Supreme Court has explicitly stated that collateral review is to be afforded for classes of cases, and not for fact-specific litigation.\textsuperscript{207} In Digital Equipment Corp., the Supreme Court rejected a private defendant's broad defense argument based on "the right not to stand trial."\textsuperscript{208} It specifically distinguished between immunity granted to public officials and the position of a private party. The Court went as far as concluding that "[28 U.S.C.] § 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye."\textsuperscript{209} 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{210}

Because of GARA, the general aircraft manufacturers can claim greater protections than those afforded to a product manufacturer in virtually any other industry. Even though they cannot sensibly lay claim to constitutional immunity, the general aircraft manufacturers are in a far better position than other product liability defendants due to GARA's text, purpose, and voluminous legislative history. The result is that they fall somewhere between constitutionally protected entities and typical manufacturers, even

\textsuperscript{204} Pridgen, 905 A.2d at 434 n.14, 428.
\textsuperscript{205} Id. at 434 n.14.
\textsuperscript{206} Id.
\textsuperscript{208} Digital Equip. Corp., 511 U.S. at 871.
\textsuperscript{209} Id. at 873 (referencing the final decision rule codified at 28 U.S.C. § 1291).
\textsuperscript{210} Id. at 874 (quoting Midland Asphalt Corp. v. United States, 489 U.S. 794, 801 (1989)).
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 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 will the trio of decisions have on the courts? Courts should be extremely careful with denials of manufacturers' summary judgment motions, 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.211

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 held that GARA does not meet that

211. The Pennsylvania Supreme Court later granted reargument to allow the parties to argue the substantive issues. See Pridgen v. Parker Hannifin Corp., 916 A.2d 619 (Pa. 2007). 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 id.
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 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.\textsuperscript{212} GAMA reported that more than 25,000 jobs were created between the enactment of GARA and 1999.\textsuperscript{213} Based on the number of aircraft produced, the 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.\textsuperscript{214}

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 decision 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 Pennsylvania 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 will face in determining whether GARA should qualify for collateral review.

\textsuperscript{212} See http://www.gama.aero/resources/productLiability/index.php (“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).
\textsuperscript{213} GAO AVIATION REPORT 2001, supra note 1, at 28.
\textsuperscript{214} Id. at 6.
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 revitalization—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.