GARA's Achilles: The Problematic Application of the Knowing Misrepresentation Exception

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TABLE OF CONTENTS

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I. INTRODUCTION

Two years have passed since President Clinton signed the General Aviation Revitalization Act of 1994 (GARA)[1] into law.[2] Until very recently, the popular question regarding GARA's eighteen-year statute of repose was whether it would produce some resurgence in the aircraft manufacturing industry.[3] Today, that question has changed form and now asks whether the undisputed revitalization of the industry[4] can be directly[5] linked to GARA. The debate over this question surely will rage

1. 49 U.S.C. § 40101 note (1994).

2. President Clinton signed GARA into law on August 17, 1994, making a brief statement at the signing ceremony. *See* President William J. Clinton's Statement to Congress Upon Signing S. 1458, 103d Cong. (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638, 1654 [hereinafter President's Remarks].

3. Past discussions considered the *projected* effect of GARA on the general aircraft industry. This dialogue has taken place in Congress, *see, e.g.*, 140 CONG. REC. H4999 (daily ed. June 27, 1994) (statement of Rep. Oberstar) ("Mr. Speaker, this day may well be known as the day in which the liberation of general aviation aircraft manufacturing began."), in the academic journals, *see, e.g.*, Timothy S. McAllister, *A "Tail" of Liability Reform: General Aviation Revitalization Act of 1994 & the General Aviation Industry in the United States*, 23 TRANSP. L.J. 301, 321 (1995) ("Far from signaling a rebirth of the general aviation industry . . . , GARA places the . . . industry in a more precarious position."), and among the business community, *see, e.g.*, 1994 U.S.C.C.A.N. 1646 (statement of Mr. Russell Meyer, Jr., CEO of Cessna Aircraft Company, Before the Subcommittee on Economic and Commercial Law on May 12, 1994) (pledging that Cessna would reenter the single-piston engine aircraft manufacturing business "the day [GARA] is enacted").

4. There have been many signs of industry resurgence. The most notable was Cessna's opening of a state-of-the-art single-engine aircraft assembly plant in Independence, Kansas, on July 3, 1996. *Cessna Aircraft*, WKLY. BUS. AVIATION, July 1, 1996, at 1. Another example is the revitalization of Maule Air, a family-owned aircraft manufacturer, which had been driven into bankruptcy in the early 1980s after dropping liability coverage due to the excessive costs that the coverage added to its airplanes. Since 1993, however, the orders for Maule Air aircraft have continually increased. Sig Christenson, *Family-Owned Aircraft Manufacturer Flyin' High in Moultrie*, FLA. TIMES-UNION (JACKSONVILLE), June 2, 1996, at B3. Piper has been revitalized, as well. In 1978, Piper manufactured nearly 6,000 aircraft. The liability cost for the average airplane was about $1,000. By 1985, the company was producing only about 500 airplanes per year, with a liability cost of over $70,000 per airplane. Today, "Piper's four cavernous hangars buzz with the sounds of productivity once again. The New Piper Aircraft Co . . . exists today thanks to product liability reform in Washington." Henry Payne, *Getting Off the Ground; Liability Reform Gives Lift to Battered Aircraft Industry*, ROCKY MTN. NEWS, Mar. 31, 1996, at 53A.

5. Whether one believes GARA has single-handedly revitalized the industry largely depends on one's views on the reasons for the industry's demise. Many have argued that several factors, in addition to increased liability costs, may be responsible for this downfall. *See* David Moffitt, *The Implications of Tort Reform For General Aviation: The General Aviation Revitalization Act of 1994*, 1 SYRACUSE J. LEGIS. & POL'Y 215, 220 (1995) (suggesting that several factors probably contributed to the industry's demise, such as tax burdens, the increased use and availa-

on for years, even though some already have declared GARA victorious.[6]

The issue which likely raises more concern to the practicing bar is not whether GARA created more jobs,[7] increased the number of student pilots who take up flying each year,[8] made single-engine aircraft affordable to those of average income, or single-handedly rescued Cessna and Piper from the dead. Rather, the aviation litigation bar is concerned about, at least between the hours of nine and five,[9] GARA's practical effect on aviation litigation. Until now, discussions about GARA's anticipated effect on the litigation of aviation cases have been qualified discussions; these predictions have been limited by the absence of case law interpreting the statute. Such limits on the discussion are dissolving, though, as the first courts have begun to grapple with the effect of GARA's repose mandate on real, not hypothetical, aviation cases.[10] The

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bility of kit aircraft, oil prices, airline deregulation, the industry's movement toward jet aircraft, and the long life of the product, resulting in the availability of older, cheaper alternatives to new aircraft). For instance, one academic notes that excessive manufacturers' liability expenses may not have been the sole cause of the industry's demise, and, therefore, GARA's preclusion of a portion of that liability may not be the cause of the industry's resurgence. Professor Michael D. Green of the University of Iowa College of Law points to the absence of start-up aviation manufacturing companies in recent years as an indication that liability costs, alone, may not have been responsible for the degeneration of the general manufacturing industry. Professor Green argues that if liability costs were the real culprit, then one might have expected that new businesses, unsaddled with these costs, would have entered and then dominated the market in recent years. Interview with Michael D. Green, Professor of Law at the University of Iowa College of Law, in Iowa City, Iowa (Aug. 26, 1996).

6. As with many arguments, though, the message is quite inseparable from the messenger. One recent "messenger" from the Senate has already announced GARA's victory, yet did so within the context of his arguments in support of the Common Sense Product Liability Legal Reform Act of 1996. *See* 142 CONG. REC. S2341-05 (daily ed. Mar. 20, 1996) (statement of Sen. Groton). The message was that the "broader legislation"—i.e., the new Reform Act—will have an even more "magnificently positive impact on the general aviation industry" than did GARA, whose statute of repose created Cessna and Piper's rebirth, and the resurgence in jobs throughout the industry. *Id.*

7. The House report from the Committee on Public Works and Transportation lists the creation of jobs as one of the primary (projected) benefits of GARA. *See* H.R. REP. NO. 103-525 pt. 1, at 4 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638.

8. Industry analysts often view the number of student pilot starts as illustrative of industry growth. *See, e.g., General Aviation Act of 1993: Hearings Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation*, 103d Cong. 25 (1993) [hereinafter *1993 Hearings*] (statement of Mr. Stimpson, describing a 61% reduction in the number of student pilots in recent years).

9. That is not to suggest that aviation attorneys are not interested, on a personal level, in the revitalization of the industry. Indeed, the love of flight is, in many cases, common ground among the aviation bar. For the many who "moonlight" as private pilots, the thought of purchasing a new Cessna right off the assembly line in Independence, Kansas surely is accompanied by visions of a full tank of gas, smooth air, and VFR to the moon.

10. As of September, 1996, courts have written at least six decisions concerning GARA, one of which is unreported. This Article explores the effect of five of these decisions: Alter v.

time has arrived for this dialogue to step forward from the speculative.[11]

This Article focuses on the issues emerging in the first group of GARA cases. After describing GARA in Part II, this Article turns to the aviation cases interpreting this eighteen-year statute of repose. In Part III.A, the Article deals with GARA's preemptive provision, which states that GARA preempts state law that would otherwise permit the product liability action. Part III.B addresses GARA's applicability provision and asks whether GARA applies to cases accruing before, but filed after, GARA's effective date. Part III.C summarizes the first decision holding that GARA, alone, cannot confer federal question jurisdiction.

The final issue, discussed in Part III.D, concerns GARA's "knowing misrepresentation" exception, which bars GARA's repose protection if the manufacturer misrepresented required safety information to the FAA. Because the knowing misrepresentation exception, if satisfied, provides a complete bar to the application of GARA's repose mandate, the exception's importance to both the plaintiff and defense bar is evident. Part III.D analyzes and critiques the decisions that clearly struggled with, and ultimately misapplied, this problematic exception.

Finally, Part IV discusses whether the first round of judicial interpretations weakened GARA in any way. This part concludes that these cases have not weakened GARA, per se, but have highlighted the weaknesses inherent in the statute as written. Part IV argues that GARA's Achilles is the problematic application of the knowing misrepresentation exception and that this exception may ultimately undermine GARA's long-term ability to achieve its stated purpose. Further, the Washington policy-makers responsible for the exception's inclusion in the statute largely did not consider the exception's potential to add massive drag to the eighteen-year statute of repose. This Article concludes that Congress should re-address the knowing misrepresentation exception.

Bell Helicopter Textron Inc., 944 F. Supp. 531 (S.D. Tex. 1996); Altseimer v. Bell Helicopter Textron Inc., 919 F. Supp. 340 (E.D. Cal. 1996); Wright v. Bond-Air, Ltd., 930 F. Supp. 300 (E.D. Mich. 1996); Cartman v. Textron Lycoming Reciprocating Engine Div., No. 94-CV-72582-DT, 1996 WL 316575 (E.D. Mich. Feb. 27, 1996); Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert II), 929 F. Supp. 380 (D. Wyo. 1996); Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert I), 923 F. Supp. 1453 (D. Wyo. 1996). The sixth decision, Pollack v. Agusta, is an unpublished opinion in which the court held GARA constitutional. This decision will not be discussed in this article due to its relative unimportance in litigating future GARA cases.

11. On June 28, 1996, the Aviation Litigation Section of the ABA sponsored a seminar in New York City, at which Edward W. Stimpson, President of the General Aviation Manufacturers' Association (GAMA), was scheduled to discuss the emerging body of GARA case law. Although Mr. Stimpson could not attend due to a late conflict, his prepared remarks, presented by Mr. Ed Bolin of GAMA, discussed the importance of the new body of emerging case law. Clearly, the discussion has now changed forms. *See* Edward W. Stimpson, Remarks Before the American Bar Association Section of Litigation, Second Annual Seminar on Aviation Litigation (June 28, 1996), New York, New York (on file with author).

II. GARA THE STATUTE

The General Aviation Revitalization Act of 1994 seeks to revitalize the general aviation industry by "limit[ing] excessive product liability costs."[12] By establishing a federal eighteen-year statute of repose, Congress sought to "protect general aviation manufacturers from long-term liability in those instances where a product has been in operation for a considerable number of years."[13] Under GARA, "no civil action . . . arising out of an accident involving a general aviation aircraft[14] may be brought against the manufacturer of the aircraft [or the component-part manufacturer] . . . if the accident occur[s]" more than eighteen years after the date of delivery of the aircraft, or after the replacement of an old component with a new component.[15] This period of repose "supersedes any State law to the extent that such law permits . . . [these] civil action[s]."[16] GARA became effective immediately upon its passage on August 17, 1994, and is not applicable "to civil actions commenced before the date of the enactment."[17]

GARA's repose period is not applicable in four explicit situations. First, under section 2(b)(2), GARA's eighteen-year repose period does not apply "if the person for whose injury or death the claim is being made [was] a passenger for purposes of receiving treatment for a medical or other emergency."[18] GARA also is not applicable where "the person . . . was not aboard the aircraft at the time of the accident . . . or to an action brought under written warranty enforceable under law but for the operation of [the] Act."[19] Finally, GARA does not bar an action involving an aircraft or its components which are greater than eighteen years old when the claimant proves that the manufacturer knowingly misrepresented, withheld, or concealed from the Federal Aviation Administration (FAA) required information that is material and relevant to the performance, maintenance, or operation of the aircraft or its components, and where it is shown that the misrepresentation was "causally related" to the harm

12. H.R. REP. NO. 103-525 pt. 1, at 1 (1994). The report notes that "[l]iability costs have been increasing even though the industry safety record has been improving." *Id.* at 2. Moreover, the Committee recognized that one manufacturer, Beech Aircraft, had incurred an average liability cost of $500,000 per case, "even though Beech was generally successful in defen[se]." *Id.* at 3. The report attributed much of the industry's demise to excessive product liability costs. *Id.* at 4.

13. 140 CONG. REC. H4998-99 (daily ed. June 27, 1994) (statement of Rep. Fish).

14. GARA defines "general aviation aircraft" as those "for which a type certificate or an airworthiness certificate has been issued," and also those having a maximum seating capacity of less than 20 passengers. 49 U.S.C. § 40101 note § 2(c) (1994).

15. *Id.* § 2(a).

16. *Id.* § 2(d).

17. *Id.* § 4(b).

18. *Id.* § 2(b)(2).

19. *Id.* §§ 2(b)(3)-(4).

suffered.[20]

III. The Issues Emerging in GARA's Wake

A. The Preemption Provision and Proof of Product Age

The United States District Court for the Eastern District of California recently considered the effect of GARA's section 2(d), which states that GARA "supersedes any State law to the extent that such law permits" a product liability claim.[21] In *Altseimer v. Bell Helicopter Textron Inc.*,[22] the court considered whether GARA precluded a personal injury suit stemming from a helicopter crash in which the helicopter was greater than eighteen years old.[23] Granting the defendant's motion for summary judgment,[24] the court held that GARA "effectively preempt[ed] the plaintiffs' action."[25] Although the court recognized the "harsh" result of precluding the suit, the court found GARA's purpose supported such an outcome.[26]

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20. GARA's "knowing misrepresentation" exception states in full:

> (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. § 2(b)(1).

21. *Id.* § 2(d).

22. 919 F. Supp. 340 (E.D. Cal. 1996).

23. *Id.* at 342. The complaint alleged the defective condition of both the helicopter and the 42 degree gearbox, which performs an important stability and control function in flight. *Id.* at 341. The court found that Bell had provided "undisputed evidence that the helicopter and [the] gearbox . . . were more than 18 years old at the time of the crash." *Id.* at 342. The court also found undisputed evidence that a component part of the gearbox, the pinion gear, was greater than 18 years old. *Id.*

24. Bell argued for summary judgment on two grounds. The court addressed only the first, which asserted that GARA does, in fact, prohibit lawsuits concerning aviation products that are greater than 18 years old. The court did not reach the second argument, which claimed that the "destruction and rebuild of the . . . helicopter, on at least two occasions by unrelated entities, terminated any liability of Bell as manufacturer of the accident aircraft." *Id.* at 341.

25. *Id.* at 342.

26. The court quoted Rep. Fish, who had supported GARA in its congressional battle. Rep. Fish described both the purpose of, and one rationale for, the statute of repose:

> [The purpose of GARA is to] establish a Federal statute of repose to protect general aviation manufacturers from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years. A statute of repose is a legal recognition that, after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible for an accident or injury occurring after that much time has elapsed.

140 Cong. Rec. H4998-99 (daily ed. June 27, 1994) (statement of Rep. Fish).

The *Altseimer* opinion is notable for several reasons. First, the court clearly indicates that if a defendant presents "undisputed" evidence that the defective product at issue is, in fact, greater than eighteen years old, then GARA applies with full force and precludes the suit in the absence of criteria satisfying one of GARA's four exceptions. The court did not waiver from GARA's strict application, despite recognizing the "harsh" result which would follow.

Second, the *Altseimer* case indicates that GARA is not applicable unless *every* component which allegedly causes the accident is greater than eighteen years old. In *Altseimer*, the defendant proved not only that the pinion gear box was greater than eighteen years old, but also that the pinion gear, a component of the gearbox, was greater than eighteen years old. In addition, *Altseimer* likewise highlights GARA's "rolling" repose feature; if *any* of the components at issue are less than eighteen years old (even though the aircraft itself is greater than eighteen years old), GARA will not automatically preclude the suit. The action would then proceed on the issue of the newer component's defectiveness, since the repose clock restarts when old components are replaced with new ones.[27]

The importance of GARA's "rolling" provision to the litigation bar is evident. To the plaintiff's bar, it places a premium on causation theories that incorporate replacement components into the causation chain. To the defense, the provision highlights the importance of accurate business record-keeping. The age of an aircraft and all of its component parts are now critical factors in aviation cases, and businesses should now devise systems for infinite-duration record-keeping. To the extent feasible,[28] businesses should also begin reconstructing their "ancient" records, the importance of which is now undisputed.[29]

Finally, *Altseimer* highlights GARA's *strict* application to cases involving products of the requisite age and forecasts the important question

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27. This section states that GARA precludes the suit if:

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

49 U.S.C. § 40101 note § 2(a)(2) (1994).

28. The process of resurrecting documentary proof of the age of all aviation products that the manufacturer believes are still the sources of potential liability can be a demanding task. This is especially apparent when tracing the product through the corporate history of mergers, acquisitions, product line assumptions and other predecessor/successor circumstances.

29. Because the age of the product at issue in a given case traditionally had less effect on liability, a manufacturer's record-keeping—e.g., manufacturing, sales, and delivery dates— perhaps was not as detailed as it now must be in the wake of GARA. The new repose period clearly invalidates any notion that these records lose their value after a given number of years. A quick look to the sky often reminds us of the durability of the American aviation product.

to the defense bar: Specifically, what type of evidence will prove product age? In *Altseimer*, the court addressed the plaintiffs' objection to a declaration by one of Bell's employees.[30] The plaintiffs argued that the employee lacked the requisite personal knowledge to declare that the products had been in use for greater than eighteen years. The employee was the Chief of the Product Assurance Parts Integrity and, in that position, was responsible for "maintaining production records."[31]

In overruling the plaintiffs' objection, the court held that the employee's declaration was, in fact, based upon personal knowledge.[32] However, the court did not state what type of documents were discussed in the declaration, or the types of documents offered as separate evidence. Thus, although the *Altseimer* court held that the products were greater than eighteen years old for the purposes of defendant's motion for summary judgment, the opinion provides little explanation as to what type of factual proof—e.g., business records, statements—would "undisputedly" show no genuine issue of material fact.[33] Although other GARA cases do not add much to the analysis,[34] one recent case illustrates how simply the issue is resolved when accurate and detailed records are presented in support of the product's age.[35]

B. The Applicability Provision

GARA's applicability provision states that the date of enactment, August 17, 1994, is the effective date of the Act.[36] Section 4(b) states that GARA "shall not apply with respect to civil actions commenced[37] before the date of enactment."[38] In *Altseimer*,[39] the court considered whether section 4(b) makes GARA applicable to all actions commenced *after* that

30. *Altseimer*, 919 F. Supp. at 342 n.3.

31. *Id.*

32. *Id.* (stating the "[p]laintiffs' objection . . . is wholly without merit").

33. *Id.* at 341 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

34. *See, e.g.*, Cartman v. Textron Lycoming Reciprocating Engine Div., No. 94-CV-72582-DT, 1996 WL 316575, at *3 (E.D. Mich. Feb. 27, 1996) (finding an Airworthiness Directive record sufficient to show that the composite float at issue was, in fact, installed on the plaintiff's plane in 1966); *see also* Rickert v. Mitsubishi Heavy Indus., Ltd., 923 F. Supp. 1453, 1456 (D. Wyo. 1996) (stating that the defendant "first sold the MU-2B at issue here in April of 1972," approximately 21 years before the accident).

35. See Alter v. Bell Helicopter Textron, Inc., 944 F. Supp 531 (S.D. Tex. 1996), wherein the plaintiff admitted that both the helicopter and the compressor section were greater than 18 years old, after facing detailed records from the defendant—e.g., manufacturing dates, serial numbers, delivery dates, etc.—covering both products.

36. 49 U.S.C. § 40101 note § (4)(a) (1994).

37. The court noted that under both federal and state law, an action is commenced when a complaint is filed. *Altseimer*, 919 F. Supp. at 342 (*citing* Fed. R. Civ. P. 3 and Cal. Civ. Proc. Code § 350 (West 1996)).

38. 49 U.S.C. § 40101 note § (4)(b).

39. 919 F. Supp. 340.

date.[40]

In *Altseimer*, the action accrued prior to August 17, 1994, but the plaintiffs did not file the complaint until May 23, 1995.[41] The United States District Court for the Eastern District of California rejected plaintiffs' argument that GARA should not apply because the action accrued prior to the effective date.[42] The court held that because the "plaintiffs' complaint was filed after the enactment of GARA, their claims [were] unambiguously subjected to GARA's preemptive provisions."[43]

At the time the plaintiffs wrote their reply brief to the defendant's motion for summary judgment, no reported case had interpreted GARA's applicability provision.[44] As such, it is not unexpected that the plaintiffs made the "commenced equals accrued" argument. However, it seems doubtful that this argument would achieve future success due to the relatively clear meaning of the term "commenced" when used in the "Applicability" section of the statute. Notably, this argument does not seem to have been made in any of the other GARA cases.[45]

The United States District Court for the Eastern District of Michigan also interpreted GARA's applicability provision. In *Cartman v. Textron Lycoming Reciprocating Engine Div.*,[46] the action accrued and the original complaint was filed prior to GARA's enactment. Clearly, GARA did not preclude this action. However, the plaintiff attempted to add a defendant through an amended complaint served on Mar. 22, 1995, seven months after GARA's enactment.[47] The plaintiff argued that the amended complaint related back to the date of the original complaint.[48]

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40. *Id.* at 342.

41. *Id.*

42. *Id.* The argument effectively suggests that the meaning of the term "commenced" in GARA is not necessarily identical to the term's meaning in the civil procedure context.

43. *Id.*

44. In fact, the only case to precede *Altseimer* was Cartman v. Textron Lycoming Reciprocating Engine Div., No. 94-CV-72582-DT, 1996 WL 316575 (E.D. Mich. Feb. 27, 1996).

45. For instance, in *Cartman*, the plaintiff filed an amended complaint after August 17, 1994, although the original complaint was filed prior to the date of GARA's enactment. *Cartman*, 1996 WL 316575, at *2. The plaintiff in that case argued that the amended complaint related back to the original complaint's filing date. *Id.* The plaintiff did not argue (or the court merely did not address the argument) that the amended complaint was not covered by GARA because the action actually accrued prior to GARA's passage date, an argument similar to the one asserted by the plaintiff in *Altseimer*. *Id.* Similarly, in *Rickert I*, the action accrued prior to GARA's adoption, but evidently, the claim was filed after that date. Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert I), 923 F. Supp. 1453 (D. Wyo. 1996). The court did not address whether the accrual date is the appropriate date to test against GARA's requirement that the action must commence prior to GARA's date of enactment, most likely because the plaintiff did not make the argument. *Id.*

46. 1996 WL 316575.

47. *Id.* at *2.

48. *Id.*

The court disagreed.[49] Applying the four requirements of Rule 15(c) of the Federal Rules of Civil Procedure,[50] the court noted that the plaintiff argued only that the complaints arose out of the same occurrence.[51] Stating that the only evidence of notice to the new defendant was the subpoena date of March 22, 1995, the court found that the amended complaint did not relate back. Thus, the court treated the amended complaint as a separate claim, holding that GARA precluded the product liability claim against the new defendant.[52]

Cartman is important to current, ongoing litigation. For claims brought prior to GARA—those that are not precluded by GARA—but in which discovery is still proceeding, GARA now erects a serious barrier to the addition of defendants through an amended complaint. *Cartman* clearly supports the proposition that, unless it can be demonstrated that the amended complaint relates back to the original, the amended complaint will stand as a separate entity and will be subjected to GARA's strict repose mandate.

C. GARA as a Source of Federal Question Jurisdiction

Theories of liability in most product liability cases are based on a state's substantive law. Whether that theory is strict liability, negligence, warranty, or misrepresentation, state law, not federal law, is the source of those doctrines. Of course, state causes of action can fall within federal jurisdiction if the action "arises under" federal law,[53] thereby conferring subject matter jurisdiction to the federal courts. One way federal subject matter jurisdiction can be proven is to demonstrate that "the vindication of a right under state law necessarily turn[s] on some construction of federal law."[54] This demonstration was at issue in *Wright v. Bond-Air, Ltd.*[55]

On February 5, 1995, James Wright was piloting a twin-engine Cessna 310L when a fatal crash occurred.[56] The plaintiff's complaint, brought in state court by the deceased's personal representative, asserted

49. *Id.* at *3.

50. Under Rule 15, an amended complaint which adds a new party can relate back to the original complaint if 1) the basic claim arose out of the conduct outlined in the original complaint, 2) the new party received notice that it would not be prejudiced by it in its defense, 3) the party knew, or should have known, that "but for a mistake concerning identity, the action would have been brought against it," and 4) requirements #2 and #3 were fulfilled prior to the expiration of the applicable period. *Id.* at *2 (*citing* Fed. R. Civ. P. 15(c)). *See also* Simmons v. South Cent. Skyworker's, Inc., 936 F.2d 268, 270 (6th Cir. 1991).

51. *Cartman*, 1996 WL 316575, at *3.

52. *Id.*

53. *See* 28 U.S.C. § 1331 (1994).

54. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1986) (*citing* Franchise Tax Board v. Construction Laborers Vacation Trust et al., 463 U.S. 1, 9 (1983)).

55. 930 F. Supp. 300 (E.D. Mich. 1996).

56. *Id.* at 301.

product liability theories in negligence and warranty.[57] The defendants removed the case to the United States District Court for the Eastern District of Michigan, asserting that the case arose under federal law.[58] The plaintiff moved to remand the case to state court for lack of subject matter jurisdiction.[59] The court granted the motion, holding that GARA does not create a federal cause of action.[60]

The court based its decision almost exclusively on the reasoning articulated by the Supreme Court in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*.[61] In so doing, the court rejected two arguments asserted by the defendants. First, the court rejected defendants' notion that a "strong federal interest [exists] in assuring the federal act is given uniform interpretation and that federal review is the best way to accomplish this goal."[62] The court noted that the Supreme Court rejected the same argument in *Merrell Dow* and stated that a federal court still retains the authority to review federal issues mitigated in state causes of action.[63]

The defendants' second argument, more interestingly, was that under the "artful pleading" exception to the well-pleaded complaint rule,[64] the plaintiff had disguised the federal nature of the state law claim. The defendants pointed out that the complaint, although it did not mention GARA,[65] alleged facts[66] attempting to satisfy GARA's "knowing misrepresentation" exception.[67] The defendants argued that whether the exception is satisfied remains substantially a federal question because the exception creates a "federal condition precedent that [p]laintiff must necessarily plead and prove. Without such proof, a court cannot recognize

57. *Id.*

58. *Id.*

59. *Id.* at 301-02.

60. *Id.* at 302 ("The federal issue presented in Plaintiff's state law cause of action is not sufficiently substantial as to confer federal question jurisdiction under 28 U.S.C. § 1331.").

61. *Id.* at 303-04 (*citing* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 809-13 (1986)).

62. *Wright*, 930 F. Supp. at 304.

63. *Id.*

64. *Id.* at 302. Generally, the well-pleaded complaint rule requires that the face of the complaint determine the jurisdiction of the claim. However, if the state law is totally preempted—exception number one which the defendants did not argue—or if the complaint is really based on federal law but pled in an "artful" manner that disguises that fact, then the cause of action may be removed to federal court under 28 U.S.C. § 1441(b) (1994).

65. Although the plaintiff was certainly not required to plead under GARA in the complaint, it was prudent to assert the exception's requirement, anticipating GARA's potentially fatal effect on the cause of action.

66. Specifically, the complaint alleged violations of FAA regulations. *Wright*, 930 F. Supp. at 305.

67. *See supra* part II (explaining that GARA is not applicable if one of GARA's four exceptions can be demonstrated, one of which applies if the defendant "knowingly misrepresents" to the FAA important safety information).

that [p]laintiff's state law cause of action has accrued and cannot permit her state-law tort claims to be litigated."[68] The court reframed the defendants' argument as follows: "Specifically, Plaintiff must allege and prove that Defendants, in connection with the Federal Aviation Administration ('FAA')'s certification process, which is defined exclusively by federal law in federal aviation regulations (FARs or CFRs), knowingly misrepresented, concealed, or withheld 'required information' from the FAA."[69]

The United States District Court for the Eastern District of Michigan rejected that argument.[70] The court first noted that it could not "ignore the fact that GARA does not create a federal cause of action. Rather, GARA is a statute of repose and merely serves a gatekeeping function."[71] The court then turned to the legislative history, stating that Congress did not intend to "create a body of federal common law" and that GARA does not preempt a state's substantive law.[72] Instead, the court stated that "GARA is narrowly drafted to preempt only state law statutes of limitation or repose that would permit lawsuits beyond GARA's eighteen-year limitation period."[73] Addressing defendants' knowing misrepresentation argument, the court stated that "the mere fact that GARA requires consideration of FAA regulations, does not raise a sufficiently substantial federal issue so as to confer federal question jurisdiction."[74]

The court's holding that GARA, in itself, does not confer federal question jurisdiction under 28 U.S.C. § 1331 is a well-reasoned decision. Although the *Wright* case appears to be the only GARA case thus far that, due to an obvious lack of diversity, is proceeding in state court, it is likely that future cases, which otherwise have no basis for federal jurisdiction, will suffer a similar fate. However, while it is clear that GARA does not create a federal cause of action, the defendants' second argument concerning the knowing misrepresentation exception was intriguing and, perhaps, has the best chance—albeit a small chance—at success in future cases. Because many battles over GARA's application likely will be

68. *Wright*, 930 F. Supp. at 304.
69. *Id.* at 304-05.
70. *Id.* at 305.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* The court's rejection of the argument rested upon its prior decision in Margolis v. United Airlines, Inc., 811 F. Supp. 318 (E.D. Mich. 1993), where the court held that the "Federal Aviation Act of 1958 . . . does not preempt traditional state law claims for negligence and does not provide for private right of actions for violations of FAA regulations." Thus, the court concluded that "[p]laintiff's complaint alleging violations of FAA regulations in an attempt to invoke a GARA exception, when Congress has determined that there should be no private federal cause of action under GARA and when Congress has not provided a private federal remedy for FAA violations, does not state a claim 'arising under' federal law." *Wright*, 930 F. Supp. at 305.

fought within the knowing misrepresentation exception,[75] and because one of the critical questions under the exception concerns a manufacturer's explicit duties under the Federal Aviation Regulations (FAR), the importance of federal law to the success—i.e., the very existence—of a state cause of action coming under GARA is undisputed. Clearly, a cause of action will survive GARA's mandate if the defendant manufacturer fails to perform its duties under the FAR and the plaintiff proves the other requirements of the knowing misrepresentation exception.[76]

The manufacturer's duties are those explicitly and implicitly defined in the FAR and other federal sources. As such, it is the interpretation of federal regulations that will, in many cases, determine if the cause of action will continue. Thus, although it is quite correct to say that GARA does not create a federal cause of action,[77] it must be recognized that the federal questions associated with GARA's knowing misrepresentation exception stand singularly capable of sustaining a suit that otherwise would be summarily dismissed. Therefore, it is likely that in the lion's share of future cases, the very existence of the cause of action will primarily depend on the interpretation of federal law. As such, one can at least appreciate the argument that in cases where GARA applies, "the vindication of a right under state law necessarily turn[s] on some construction of federal law."[78] Nevertheless, one will never be able to escape the conclusion that GARA, in all its glory, simply does not create a federal cause of action and, therefore, one would expect the *Wright* holding to be followed.

D. The Knowing Misrepresentation Exception

GARA provides an exception to the eighteen-year repose period if the manufacturer knowingly misrepresented, withheld or concealed from the FAA "required information that is material and relevant to the performance or the maintenance or operation of [the] aircraft."[79] The required information is the information relevant to obtaining a type certificate or an airworthiness certificate and the continuing obligations of the certificate holders to maintain such certificates.[80] Moreover, the exception only applies if the manufacturer's conduct is "causally related

75. *See infra* part IV (explaining the importance of the knowing misrepresentation exception).

76. *See generally supra* part II and *infra* part III.D.

77. The *Alter* court agreed with this statement, contrasting in its opinion "statutes which *create* a cause of action . . . and GARA [which] . . . *eliminates* certain claims." Alter v. Bell Helicopter Textron, Inc., 944 F. Supp. 531, 541 (S.D. Tex. 1996) (emphasis added).

78. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1986). One other plaintiff has made the argument. *See Alter*, 944 F. Supp. at 541 n.6 (failing to reach the issue).

79. 49 U.S.C. § 40101 note § 2(b)(1) (1994).

80. *Id.*

to the harm which the claimant allegedly suffered."[81] Further, the exception mandates that the claimant "plead[ ] with *specificity* the facts necessary to prove, and proves" that the manufacturer committed such conduct.[82] The remainder of this section explores the first two judicial interpretations of the exception, which addressed the provision in the context of summary judgment motions.

1. The Cartman *and* Rickert *Courts' Application of the Exception*

In *Cartman v. Textron Lycoming Reciprocating Engine Div.*,[83] the court rejected the plaintiff's claim that the defendant "knowingly misrepresented, concealed and withheld information regarding the safety of the composite float to and from the FAA."[84] In support of its assertion, the plaintiff proffered a memorandum written by a person that the court unilluminatingly identified as a "representative" of the defendant corporation. The plaintiff argued that the memorandum "misrepresented to the FAA that auto fuel, rather than known design and manufacturing defects, accounted for the composite float's propensity to cause unexpected engine failure."[85] The plaintiff "never explicitly assert[ed]" that the defendant had knowledge of the memorandum, but did assert that the "defendant was aware of the alleged design and manufacturing defects in the float."[86]

In granting defendant's motion for summary judgment, the court added meaning to the knowing misrepresentation exception. First, the court declared that the "period . . . is not waived merely because a defendant has not informed the FAA about either possible safety concerns regarding a part or possible misrepresentation by other parties."[87] Second, the court suggested that the exception consists of alternative tiers of requirements, broad and specific, either of which could support the applicability of the exception.[88] The court explained that a "specific" requirement is a misrepresentation or concealment of information "with respect to a type or airworthiness certificate."[89] The "broad" requirement, the requirement indicated by the "broadest language in the exception," is satisfied when the plaintiff offers proof that the manufacturer violated its obligations to submit to the FAA information with respect to the continuing airworthiness of the component part.

81. *Id.*
82. *Id.* (emphasis added).
83. No. 94-CV-72582-DT, 1996 WL 316575 (E.D. Mich. Feb. 27, 1996).
84. *Id.* at *3.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* (stating that the plaintiff had produced no such evidence).

The *Cartman* court outlined a third aspect of the knowing misrepresentation exception. The court made clear that the plaintiff must show, via a statute, case or regulation, that the manufacturer had an affirmative duty to provide the information to the FAA. Thus, due to the "narrow wording" of the exception, the court stated that it would not infer such a duty to "volunteer information which is (1) not required by statute or regulation, (2) not in response to a direct inquiry by the FAA, or (3) not necessary to correct information previously supplied directly by the defendant to the FAA."[90]

Under this interpretation, the court found the evidence insufficient to meet the "very particular requirements of the Act's 'knowing misrepresentation or concealment' exception to the limitations period."[91] The court stated that the plaintiff had "failed to identify any statute, regulation, or case suggesting that defendant had an affirmative duty under . . . [the exception] to provide to the FAA information about the alleged problems with the float."[92] As such, the court held that the "plaintiff is not excepted from the Act's period of limitations"[93] and granted the defendant's motion for summary judgment.

The second case to interpret and apply the knowing misrepresentation exception was *Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert I)*,[94] which involved the crash of a Mitsubishi MU-2B-35-J twin-engine aircraft. Descending on an IFR approach to the Casper Airport with a ceiling of 400 feet, the airplane crashed into a tall ridge eight miles from the airport. The widow of the pilot brought a wrongful death action against the aircraft manufacturer, alleging negligence and strict liability. The plaintiff theorized that icing caused the tragic accident.

The court granted the defendant's motion for summary judgment, holding that GARA barred the claim since the aircraft was greater than eighteen years old and because the plaintiff's evidence did not meet the requirements of the knowing misrepresentation exception.[95] However, after dismissing the claim, the court reopened discovery for 30 days.[96] During this period, the plaintiff obtained "highly probative evidence," and the court ordered the parties to file supplemental summary judgment briefs.[97] Assessing the plaintiff's new evidence in *Rickert II*, the court

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at *4.
94. 923 F. Supp. 1453 (D. Wyo. 1996).
95. *Id.* at 1462.
96. *See* Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert II), 929 F. Supp. 380, 381 (D. Wyo. 1996) (explaining that the court granted plaintiff's motion to reconsider based on the allegation that defendant "stonewalled her discovery efforts").
97. *Id.*

reversed its earlier grant of summary judgment.[98]

The remainder of this section first explores the standards of the exception, as promulgated by the *Rickert* court. The section then examines the plaintiff's evidence which, in *Rickert I*, unsuccessfully withstood defendant's motion for summary judgment, as well as the evidence which satisfied the knowing misrepresentation exception in *Rickert II*. Further, this section critiques the *Rickert* court's analysis and illustratively reevaluates some of the evidence under a more careful analysis. Finally, this part concludes that the knowing misrepresentation exception is not as "formidable" as the *Rickert* court asserts.

The *Rickert I* court began its analysis by emphasizing the procedural context of the case.[99] First, the court pointed out that GARA's knowing misrepresentation exception contains both a pleading and a judgment standard. While Rule 9(b) of the Federal Rules of Civil Procedure requires that fraud be pled with "particularity," GARA states that the knowing misrepresentation exception must be pled with "specificity," indicating a more detailed pleading standard. The court phrased the requisite showing when the pleading and the judgment standards are properly read together: "[T]he plaintiff must plead the following matters 'with specificity': (1) knowledge; (2) misrepresentation, concealment, or withholding of required information to the FAA; (3) materiality and relevance; and (4) a causal relationship between the harm and the accident."[100]

Next, the court noted that although the defendant characterized the motion as one for summary judgment, at least part of its motion—the part that challenged the adequacy of the plaintiff's pleadings—was actually a Rule 12(b)(6) motion to dismiss for failure to state a claim or a 12(c) motion for judgment on the pleadings. "Regardless of the motion's classification," the court continued, the motion will not be granted if, "now that discovery is nearly complete, Rickert can produce facts sufficient to create a genuine issue of fact under GARA's 'knowing misrepresentation' exception."[101] Thus, the court treated the motion in its totality as one for summary judgment.

After confronting the procedural aspects of the exception, the United States District Court for the District of Wyoming assessed the sufficiency of primarily[102] two types of evidence: The expert reports and

98. *Id.* at 384.

99. 923 F. Supp. at 1456.

100. *Id.*

101. *Id.*

102. Of secondary reliance to the plaintiff were several items, none of which persuaded the court, after it "canvassed" the evidence in its entirety, that there was a genuine issue of material fact that Mitsubishi knowingly misrepresented to the FAA. *Id.* First, the court rejected MU-2

the so-called "Vinton letters."[103] In *Rickert I*, the evidence failed to meet the exception's standards at the summary judgment stage. Examining this evidence in great detail provides the necessary ground-work for contrasting the *Rickert* court's understanding of the exception with the author's, described below. If the aviation bar is currently wondering what type of evidence will put their case in, or keep it out of, the hands of a jury, it should not base its decision solely on the *Rickert* decision.

The first evidence the *Rickert I* court considered was the expert opinion[104] of Dr. Kennedy, who in his first affidavit explained that Mitsubishi made three misrepresentations. First, Dr. Kennedy asserted that Mitsubishi "misrepresented to the FAA [the aspects of the MU-2's de-icing system] in terms of the design of the de-ice system used on the aerodynamic surfaces of the aircraft."[105] The court viewed the assertion as merely a conclusion with little explanation. For instance, the expert did not explain "whether Mitsubishi represented to the FAA that it used one design but in fact used another, or whether it represented to the FAA that the deicing system had design characteristics that it did not in fact have."[106] Further, the expert's mentioning of the design reports did not clarify the matter, failing to explain which design reports were the basis of the misrepresentation. Finally, the court found that the expert's assertion that the de-ice boots did not extend far enough along the chord to provide icing protection to the control surfaces was simply a statement of fact or opinion, not concrete proof of Mitsubishi's misrepresentation.[107]

Dr. Kennedy's amended disclosure statement similarly failed to

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accident statistics (with corresponding analysis of the relatively high rate of accidents) as probative of a misrepresentation, stating that although the evidence could be helpful at trial, it does not demonstrate that Mitsubishi misrepresented anything to the FAA. *Id.* at 1462. The second item also did not show that the manufacturer violated the knowing misrepresentation exception. *Id.* This item was an AOPA Pilot magazine article which, in reviewing the MU-2, concluded that the MU-2 is a dangerous, albeit a high performance, aircraft. *Id.* Third, the court held that a Texas state court's listing of MU-2 crashes that were, according to the Texas court, caused by aircraft icing did not show that "Mitsubishi deceived the FAA in any way." *Id.* Lastly, the court rejected many pieces of evidence for not providing any factual support to the plaintiff's assertion of a knowing misrepresentation. *Id.* These items were: 1) a regulation from the CFR regarding a manufacturer's duty to report failures; 2) a copy of the plaintiff's amended complaint; and 3) a copy of supplemental interrogatory responses. *Id.*

103. *Id.* at 1457. "Although Rickert's response to Mitsubishi's motion also discusse[d] the allegations in her complaint and her interrogatory responses," the court stated that it would not consider the pleadings for the purposes of a summary judgment motion. *Id.*

104. With no explanation of Dr. Kennedy's background, the court stated that Dr. Kennedy "undoubtedly qualifies as an expert under Rule 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1992) . . . possess[ing] both the education and experience necessary to pass judgment on aeronautical matters." *Rickert I*, 923 F. Supp. at 1457.

105. *Rickert I*, 923 F. Supp. at 1457.

106. *Id.*

107. *Id.*

prove, with specificity, a misrepresentation by Mitsubishi. The expert's statement that the FAA approved the MU-2 for flight into known icing conditions, even though Mitsubishi had never tested the MU-2 in that regime, was insufficient to show a misrepresentation. The court held that the assertion did not explain how the defendant misrepresented.[108] Similarly, the court rejected the assertion that the defendant misrepresented to the FAA the true aerodynamic properties of the MU-2 because the deicing testing was conducted with an airfoil which was dissimilar to the actual airfoils found on the MU-2.[109] The court, assuming the defendant had, in fact, used the "antiquated" airfoil, again explained that Mitsubishi, in doing so, had not lied to the FAA as to which airfoil it used. Even if the airfoil was improperly used, the court stated that such conduct would be a "mistake, not a misrepresentation."[110] In sum, the court concluded that all of the expert's assertions were incapable of proving a genuine issue of material fact as to whether the defendant knowingly misrepresented: "Nothing that Kennedy says in his report concerning deicing leads this court to conclude that Mitsubishi represented something to the FAA that it knew to be untrue or that it made any representations to the FAA with the intent to deceive."[111]

The second set of Dr. Kennedy's assertions concerned Mitsubishi's design decisions regarding the controllability of the MU-2 aircraft.[112] Evidently, the expert had argued that the defendant had emphasized aircraft performance over aircraft safety in the controllability design process. Further, the expert argued that these design decisions "w[ere] never explained in the [FAA's] certification process."[113] The court rejected the argument, holding that although the opinions might be highly relevant on the question of negligence or strict liability design claims, they did not address the issue of whether Mitsubishi deceived the FAA.[114] Importantly, the court "commonsensical[ly]" recognized that "there appear[ed] to be an inverse relationship between performance and safety with respect to all modes of transportation, whether it be an aircraft, a car, a motorcycle, or a boat. The faster something goes, the more dangerous it

108. For example, did the defendant tell the FAA that the flights were performed when in actuality they were not? *Id.*

109. *Id.* at 1458.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* The expert also stated that, in his opinion, "the aircraft fails to meet CAR 3.106 Controllability." *Id.* In Dr. Kennedy's amended disclosure statement, he continued this argument, which explored the adequacy of Mitsubishi's design choices with respect to many parameters, such as wing loading, design comparisons between the MU-2 and other aircraft, as well as the safety tradeoff between high cruise speeds and landing speeds. *Id.* at 1458-59.

114. *Id.* at 1459.

is."[115] Further, the court stated that it could find no "statute or regulation that requires aircraft manufacturers to notify the FAA every time they make design decisions that to some degree place performance over safety."[116] The court concluded that Dr. Kennedy's apparent disagreement with Mitsubishi's design choices regarding performance/safety tradeoffs did not support a claim for knowing misrepresentation under GARA.[117]

The final set of knowing misrepresentation claims made by the plaintiff's expert involved "misrepresentations" of three design characteristics of the MU-2. Dr. Kennedy's first "design" misrepresentation concerned the choice of airfoils on the MU-2 and the conducting of flight tests. Dr. Kennedy stated that the MU-2's airfoil choice was a design defect, to which the court responded that even if the "airfoils are unstable, this understanding is a fact, not a misrepresentation."[118] Next, Dr. Kennedy claimed that Mitsubishi did not document flight tests into icing conditions. The failure of Dr. Kennedy to connect this "fact" to another statement that would suggest that Mitsubishi then told the FAA that the tests were, in fact, performed left Kennedy's argument weightless in the face of a requirement to show a misrepresentation. Without the requisite linkage, the court concluded that "Mitsubishi's failure to perform such tests and its failure to understand these design issues do not constitute knowing misrepresentations to the FAA."[119]

Dr. Kennedy's next set of "design misrepresentations" involved the assertion that the MU-2 did not have an ice detection system, and as such, was defectively designed. Claiming that Mitsubishi did not meet its "obligations" when it offered an ice detection system as an option on MU-2 aircraft, but failed to include the system on every aircraft, plaintiff's ex-

115. *Id.* at 1458.

116. *Id.* The court commented in a footnote that "[g]iven the nature of aircraft design—which is a process that constantly involves the trade-off between performance and safety with respect to most components—the Court doubts that such a regulation would be either feasible or workable." *Id.*

117. *Id.* at 1459. The court rejected Kennedy's final controllability argument, which first suggested that the National Transportation Safety Board (NTSB)'s ordering of a "special certification review" of the MU-2 was due to the NTSB's "suspicions that the MU-2's accident rate might be design-related." *Id.* After noting that Dr. Kennedy failed to state that the NTSB ultimately gave Mitsubishi a "clean bill of health," the court stated that the expert "fail[ed] to link the NTSB's review to any alleged misrepresentations or omissions." *Id.* Dr. Kennedy also relied on two magazine articles noting the relatively high accident rates of the MU-2 and concluding that MU-2 pilots should possess a great amount of skill. *Id.* The court rejected this line of argument as well, stating that even if these assertions are true, and the MU-2 has relatively low controllability, these are merely differences of opinion as to the MU-2's proper design, and do not support the assertion that Mitsubishi knowingly made misrepresentations to the FAA regarding the controllability characteristics of the MU-2. *Id.*

118. *Id.*

119. *Id.* at 1460.

pert stated that this was proof that Mitsubishi recognized that there was a problem.[120] The court, again, rejected the argument.[121]

Dr. Kennedy's final assertions involved Mitsubishi's design decision to use spoilers for roll control. Kennedy asserted not only that the spoilers do not act effectively as control surfaces, but also that this "design defect" has tremendous ill-effects during an MU-2's flight into icing regimes. The court concluded, in the same summary fashion, that these assertions were not indicative of a misrepresentation by the manufacturer.

The court summarized its reasons for rejecting all of the plaintiff's theories of misrepresentations, advanced by Dr. Kennedy, as follows:

> In the end, there is nothing . . . [in either disclosure statement] which causes this court to conclude that Mitsubishi knowingly misrepresented anything to, or knowingly concealed anything from, the FAA. Although Kennedy attempts to garb his opinions in the GARA-eluding guise of "misrepresentation," the Court sees his opinions for what they essentially are: differences of opinion concerning design issues. At most, Kennedy's opinions (accepted as true) cause the Court to conclude that Mitsubishi was negligent, perhaps even grossly negligent, when it designed and manufactured the MU-2. Gross negligence is not, however, a knowing misrepresentation.[122]

The *Rickert I* court also interpreted GARA's knowing misrepresentation exception in light of the plaintiff's proffered[123] letters between Mitsubishi's former[124] general counsel, Mr. Vinton, and its president. Three letters were from the president of Mitsubishi. The letter dated March 12, 1990 reminded the former general counsel that Mitsubishi had a history of cooperation with the agencies charged with the investigation and prevention of aircraft mishaps and requested that Mr. Vinton provide any information which might assist the investigation.[125] In the second letter, the president again sought Mr. Vinton's knowledge of any alleged concealment of information which would be relevant to any accident, or information that would link such an accident to a defect in a Mitsubishi product.[126] The third letter, dated May 7, 1990, stated that Mitsubishi

120. *Id.*

121. *Id.* The court stated that these statements do not mean, "and Kennedy has not said, that Mitsubishi misrepresented [or concealed] anything about ice detection systems to the FAA." *Id.*

122. *Id.* (footnote omitted).

123. The evidence consisted of five letters, and although the plaintiff did not explain the relevance of the letters, the court evaluated them as being proffered to satisfy the knowing misrepresentation exception. *Id.*

124. Mr. Vinton was no longer serving as Mitsubishi's general counsel when the correspondence took place. *Id.*

125. *Id.* at 1461.

126. *Id.*

would not change the MU-2 design until it could be shown that the accidents could be causally linked to the design.[127] This third letter adds insight to the reason why Mitsubishi's president was concerned about Mr. Vinton's opinion. In the letter, the president informed the former general counsel that counsel's theory that airframe icing was the cause of the accidents was not supported by the evidence.

The *Rickert I* court found the letters inconclusive. The court could not "find anything in [them] which suggest[ed] that Mitsubishi misrepresented anything to . . . the FAA."[128] Further, even though the last letter indicated to the court Mr. Vinton's concern[129] that icing was the cause of the MU-2's poor accident rating, the court nevertheless held that "this vague indication d[id] not lead to the conclusion . . . that Mitsubishi knowingly misrepresented."[130]

Mr. Vinton's two response letters to his former employer were similarly rejected by the court as inconclusive evidence of Mitsubishi's misconduct under GARA. In the first letter, Mr. Vinton accused the president of preoccupation with product liability claims, rather than the MU-2's safety. Moreover, Mr. Vinton stated that he would make his best effort to ensure that the MU-2's "problem . . . [would] receive[ ] the attention it deserves," after accusing the president of not investigating accident theories suggested to him.[131] In the second letter, dated May 24, 1990, Mr. Vinton enclosed a letter[132] written by a former MU-2 test pilot[133] in which the pilot "earnestly recommend[ed]" that the MU-2's FAA certification for operations into regimes of known icing be withdrawn until further testing was performed. Mr. Vinton, in conclusion, accused Mitsubishi of being uninterested in exploring the theory that icing was causing the MU-2 accidents.

Like the letters *from* Mitsubishi's president, the court held that the letters *to* the president did not demonstrate with "specificity" that Mitsubishi knowingly misrepresented. The court reasoned that the letters simply did not create a genuine issue of material fact in this regard even though the letters could support the conclusion that "Mitsubishi has, with respect to the design and performance of the MU-2, been obstinate, short-sighted, negligent, and perhaps reckless."[134] The *Rickert I* court

127. *Id.*

128. *Id.*

129. According to the court, Mr. Vinton was willing to "approach the appropriate regulatory agencies." *Id.*

130. *Id.*

131. *Id.*

132. The letter was published in AVIATION INT'L NEWS. *Id.*

133. The test pilot had flown the MU-2 during French, German, and Italian flight certification. *Id.*

134. *Id.*

concluded:

> The terms "misrepresentation" and "concealment" are not infinitely malleable. Rickert cannot avoid GARA's period of repose simply by dressing up her evidence (most of which would be relevant to and probative of the issues of negligence and strict liability) as "misrepresentations" and "concealments." GARA requires more than innuendo and inference; it demands "specificity."[135]

After the court granted Mitsubishi's motion for summary judgment, the plaintiff filed a motion to reconsider, arguing that the defendant had "stonewalled" her discovery efforts.[136] The court found the plaintiff's argument persuasive. Thus, three weeks after granting defendant's motion for summary judgment, the court granted plaintiff's motion to stay the judgment and permitted additional discovery.[137]

After noting the effect of its "wake-up call" to the plaintiff in its *Rickert I* decision,[138] the court in *Rickert II* assessed the sufficiency of plaintiff's new evidence. The court found that the new evidence, if true, would indeed satisfy GARA's knowing misrepresentation exception. The evidence consisted of affidavits from two former employees of defendant, Mitsubishi.

Mr. McGregor, the former Director of Flight Operations at Mitsub-

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135. *Id.* at 1462.

136. Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert II), 929 F. Supp. 380, 381 (D. Wyo. 1996). The plaintiff had also re-argued the merits of the summary judgment motion, which the court found "singularly unpersuasive." *Id.*

137. The court in *Rickert II* explained that it permitted the additional discovery "[b]ecause [it] knew that Mitsubishi had in fact been less than forthcoming with its discovery responses." *Id.* The actual order is attached to the *Rickert II* opinion as Appendix A. In the order, the court addressed several arguments. First, the court rejected the plaintiff's argument that the court considered only whether Mitsubishi "misrepresented" or "concealed," but failed to consider whether the defendant "withheld" information from the FAA. The court explained that it, in fact, considered all three types of conduct, as required by the statute, but as a practical matter, stated that it could "discern little difference between 'concealing' something and 'withholding' something." *Id.* at 384. Second, the court reiterated its view that 14 C.F.R § 21.3 (1996) [FAR] does not require manufacturers to report all design opinions to the FAA. Such an interpretation would "gut GARA," according to the court. *Id.* at 384. *See infra* part IV (explaining the knowing misrepresentation's potential to "gut GARA"). Moving to the discovery conduct issue, the court agreed with the plaintiff that Mitsubishi's conduct had been "abysmal," and ordered "limited additional discovery." In the *Rickert II* opinion, the court dismissed defendant's arguments which sought to exclude the additionally discovered evidence as being untimely, and beyond the limits of the discovery specifically authorized by the court. However, the court stated that it was not "willing to uphold finality at the expense of truth," and that its earlier order authorizing specific discovery did not prohibit the plaintiff from conducting further discovery not involving defendant's involvement. *Id.* at 381.

138. According to the court, this wake-up call caused the plaintiff to realize that "GARA has altered the legal landscape for aviation product liability suits," and that merely creating issues of material fact as to the defendant's negligence or strict liability will not suffice in response to the defendant's motion for summary judgment. *Id.* at 381.

ishi, submitted the first affidavit. Mr. McGregor, who had logged more than 3400 flight hours in the MU-2, stated that he and other employees attributed most of the MU-2's accidents to icing problems. The court found this statement, like those proffered in *Rickert I*, unresponsive to the knowing misrepresentation issue. However, the court found the next four statements sufficient to withstand the summary judgment motion, creating a genuine issue of material fact as to whether Mitsubishi knowingly misrepresented under GARA:

> (1) That this problem was virtually kept within the company and neither seriously investigated nor disclosed to the public or the [FAA]. . . ;
> (2) That even after the [FAA's] . . . Special Certification Review, we only tested the short-body aircraft when we knew that the long body aircraft was the problem. . . ;
> (3) [That] [w]e withheld serious limitations to safety of flight in icing conditions from the FAA and the public; [and]
> (4) [That] Mitsubishi continues to maintain an office in Texas which I believe is used primarily to defend liability and conceal the icing problem.[139]

The court did not categorize these statements into those that were sufficient, and those that were not. The court merely stated that if the statements are true, the plaintiff "will be able to prove that Mitsubishi misrepresented certain things about the MU-2 to the FAA, and that it withheld certain information concerning the MU-2 from the FAA."[140]

The second affidavit was submitted by Mr. Cole, a former Vice President of Mitsubishi, and provided similar statements. In Mr. Cole's twelve years of employment, he investigated many MU-2 crashes and logged over 1500 flight hours in the MU-2. In the affidavit, Mr. Cole offered three statements which, if true, would satisfy GARA's exception:

> (1) The problem of horizontal (tail) plane icing on long body MU-2 aircraft was secretly maintained within Mitsubishi, and never properly investigated or disclosed to the public or the [FAA];
> (2) [That Mitsubishi and its president] actively covered-up the [icing] problem . . . on the long body MU-2 aircraft, and withheld and concealed this information from the FAA before, during and after the Special Certification Review; and
> (3) [That] during the . . . Review, Mitsubishi only tested the short body aircraft when its upper level management clearly knew that it was the long body aircraft which had a dangerous loss of control problem due to . . . icing.[141]

The court, repeating verbatim its approval of the McGregor affidavit, stated that if Mr. Cole's statements are likewise true, the plaintiff "will be

139. *Id.* at 382.
140. *Id.* The court used identical language in approving the Cole affidavit.
141. *Id.*

able to prove that Mitsubishi misrepresented certain things about the MU-2 to the FAA, and that it withheld certain information concerning the MU-2 from the FAA." Summarily rejecting the defendant's challenges to both affidavits,[142] the court reversed its prior summary judgment.

2. *The Proper Analysis under the Knowing Misrepresentation Exception*

Examining both *Rickert* opinions, one tends to be persuaded by the court that there is a very bright line between evidence that satisfies the knowing misrepresentation exception and evidence that does not. However, the argument below suggests, perhaps, that the line is not so bright and, more important, that the barrier is not so formidable. The basis of the argument is that the *Rickert* court blended two distinct requirements into its second criteria of the knowing misrepresentation exception, which led to an erroneous analysis.

As noted, the *Rickert* court stated that the knowing misrepresentation exception is satisfied if a claimant can prove the following with "specificity": "(1) knowledge; (2) misrepresentation, concealment, or withholding of required information; (3) materiality and relevance; and (4) a causal relationship between the harm and the accident."[143] Importantly, whether a manufacturer misrepresents should be a distinct question from whether the information misrepresented was, in fact, required information. Although the court's grouping of these distinct questions into one requirement seems unimportant at first glance, the effect of that grouping was that the court glossed over one critical aspect of the exception. Specifically, the court failed to appropriately define "required information" in the exception. Moreover, the court on some occasions blended the applicable conduct—i.e., misrepresentation, concealment, and withholding—which is explicitly separated in the statute.[144] Blending

142. The defendant attacked the affidavits on several grounds, suggesting that: 1) the former employees had no personal knowledge; 2) the former employees offered contradictory opinions; 3) Mr. Cole and Mr. McGregor's allegations were "vague" and "unsubstantiated"; 4) the statements contradicted deposition testimony of these former employees in prior MU-2 litigation; 5) the statements were "speculative and factually erroneous"; and 6) the statements were self-serving and "full of hearsay." The court dismissed the arguments as merely "pok[ing] factual and credibility holes (however large) in McGregor's and Cole's testimony," anticipating the upcoming trial: "If all of these things are true, then the stage should be set for explosive and devastating cross-examinations. Yet, at this juncture of the litigation, the Court cannot share Mitsubishi's opinions about the . . . affidavits." *Id.* at 383.

143. Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert I), 923 F. Supp. 1453, 1456 (D. Wyo. 1996).

144. In fact, the plaintiff accused the court of something similar. Specifically, the plaintiff asserted that the court considered only whether Mitsubishi "misrepresented" or "concealed," but failed to consider if Mitsubishi "withheld." The court dismissed the argument, stating that it

all of these distinct requirements into one part of its four-part test, the court performed an incorrect analysis. More importantly, in doing so the court actually set the knowing misrepresentation hurdle at an artificially "formidable" height.

Under a more careful analysis, the second part of the *Rickert* test must be further separated. Thus, the proper analysis would ask whether the claimant can prove: (1) knowledge; (2) misrepresentation, concealment, or withholding; (3) required information; (4) materiality and relevance; and (5) causation. With this division, a court will be less likely to gloss over the third requirement. Under this approach, a court must first ask whether the information which is asserted to have been misrepresented, withheld, or concealed is required information. Logically, one simply cannot discuss whether something is misrepresented until one identifies the "something." GARA defines "required information" as the information concerning a "type certificate or airworthiness certificate for, or obligations with respect to the continuing airworthiness of, an aircraft or a component."[145] Once the court determines that the information is required, the court must ask, as distinct questions, whether the required information was either misrepresented, concealed or withheld. Although the *Rickert* court likely believed that it, in fact, performed this very analysis,[146] a reexamination of some of the evidence shows that another court could, under a more careful analysis, reach a different conclusion than the *Rickert* court.

For instance, the Dr. Kennedy affidavit in *Rickert I* presented many pieces of evidence which, under this five-part test, could satisfy the exception.[147] Kennedy's de-icing representations are illustrative.[148] Dr. Kennedy's theory was that icing had caused much of the MU-2's well-documented poor safety record.[149] The first question under a careful

considered all three forms of conduct, notwithstanding the fact that it could "discern little difference between 'concealing' something and 'withholding' something." *See* Order Granting Motion to Stay Judgment and Permit Discovery, *Rickert II,* 929 F. Supp. at 384.

145. 49 U.S.C. § 40101 note § (2)(b)(1) (1994).

146. *See Rickert I,* 923 F. Supp. at 1458 (indicating that the court had combed the appropriate statutes and regulations to determine the FAA's mandatory reporting requirements).

147. The evidence in *Rickert I* consisted of expert reports and correspondence between Mitsubishi's president and its former general counsel. The reports asserted de-icing misrepresentations, controllability misrepresentations, and design misrepresentations. *Id.* at 1457-62. For a detailed analysis of the evidence, along with the court's reasons for finding the evidence insufficient under the knowing misrepresentation exception, see *supra* notes 94-140 and accompanying text.

148. The de-ice representations are presented for illustration because these assertions are probably the least likely to satisfy the exception's standards.

149. *See generally Rickert I,* 923 F. Supp. at 1457-60 (addressing the plaintiff's proffered expert affidavit detailing Mitsubishi's alleged misrepresentations concerning the design of the MU-2 for flight into icing conditions).

analysis is whether a holder of a type certificate under the FAR has a duty to report information concerning a defectively designed aircraft. FAR part 21 (Certification Procedures for Products and Parts) prescribes the "[p]rocedural requirements for the issue of type certificates and changes to those certificates . . . [as well as] the issue of airworthiness certificates."[150] In section 21.3 (Reporting of Failures, Malfunctions, and Defects), the FAR states that a holder of a type certificate "shall report any failure, malfunction, or defect in any product . . . manufactured by it that it determines has resulted" in occurrences listed in 21.3(c).[151] One of these occurrences, listed in part 21.3(c)(11), is "[a]ny structural or flight control system malfunction, defect, or failure which causes an interference with normal control of the aircraft or which derogates the flying qualities."[152] Arguably, a poor design of a de-ice system—e.g., the size and position of the de-ice boots, the airfoil choice, etc.—could reasonably fall within this definition. Thus, an icing design system defect would be a "structural or flight control system . . . defect" which interferes with normal control of the aircraft, derogating flying qualities of the aircraft.[153] Assume for now that the icing design was, in fact, a defect in the MU-2, that Mitsubishi had determined that it was a defect, and that this defect was, therefore, "required information" under GARA. The next question under the five-part test is whether any of the required information was misrepresented, withheld or concealed.

In Kennedy's amended disclosure statement, he asserts that Mitsubishi never tested the MU-2 in actual icing conditions when the FAA authorized MU-2 flight into this dangerous regime.[154] The *Rickert I* court rejected this evidence, stating that the assertion was not indicative of a misrepresentation or a concealment: "Kennedy nowhere states that Mitsubishi told the FAA it conducted such flights, but actually did not, and nowhere alleges that Mitsubishi concealed from the FAA its failure to conduct such flights. Moreover, if the FAA required actual flights into known icing conditions, it certainly could have asked for such flights."[155] The court is correct that this evidence probably does not prove a misrepresentation. However, the court similarly states that it is also not a concealment because Mitsubishi did not conceal its failure to engage in actual icing flight tests. This analysis, in glossing over the "required information" aspect of its second requirement, misidentified the information of which the statute demands disclosure.

150. 14 C.F.R. § 21.1(a)(1) (1996).
151. *Id.* § 21.3(a).
152. *Id.* § 21.3(c)(11).
153. *Id.*
154. *Rickert I*, 923 F. Supp. at 1457.
155. *Id.* at 1458.

The court erroneously viewed the flight tests as the required information. However, the required information is not the lack of performance of a flight test. Rather, the required information is the icing design defect that causes the MU-2 to suffer control degradations in icing regimes. That is not to say that the flight tests are not important to the analysis. In fact, these flight tests are critical to the analysis, but in a different capacity: The refusal to flight test the MU-2 in icing regimes could be proffered as *proof* of the concealment, not the required information itself. The argument is that Mitsubishi concealed the icing defects in the MU-2 from the FAA by choosing not to conduct flight tests into actual icing conditions. Under this analysis, *Rickert*'s second requirement, that the defendant misrepresented, withheld or concealed required information, would be satisfied. Or, under the five-part test outlined above, this icing evidence from *Rickert I* satisfies part two.

The court's statement that the FAA did not, but could have, asked for flights into known icing regimes[156] is somewhat deceptive and misunderstands the nature of the FAA's reporting system. The FAA cannot monitor every design decision and later-discovered malfunction associated with every aircraft flying today. As such, the FAA instituted affirmative duties to report known safety problems, such as those listed in FAR § 21.3. This places the responsibility to bring to light known safety concerns on the party that has the best opportunity to discover the deficiencies. If potential safety defects are properly reported, then it is true that the FAA can ask for flights into known icing regimes. However, the FAA cannot ask for more extensive examinations of a problem that it does not know exists because a manufacturer withheld or concealed the required information. Thus, to say that the FAA did not require flights into known icing conditions may miss the point. The FAA may well have required the MU-2 to conduct flight tests into actual icing conditions had the manufacturer accurately and timely reported the known defect.

The evidence involving the airfoil choice also could satisfy part two of the five-part test. Dr. Kennedy theorized that Mitsubishi's use of the Joukowski airfoil in its icing calculations was conduct that satisfied GARA's knowing misrepresentation exception.[157] Kennedy asserted that this airfoil was not representative of the airfoils on the MU-2, suggesting that Mitsubishi used an airfoil design that was more friendly to the icing calculations than the actual MU-2 airfoil design.[158] Again, the court rejected the expert's assertion that the airfoil choice evidenced a misrepresentation. That much is correct. However, like the court's con-

156. *Id.*
157. *Id.*
158. *Id.*

clusion regarding the icing flight tests, the court held that the airfoil choice was also not a concealment: "[T]his does not mean . . . that Mitsubishi concealed from the FAA the fact that it used the Joukowski airfoil in its calculations."[159]

Under a more careful application of the exception's standards, the fact that Mitsubishi used the Joukowski airfoil is potential *proof* of a concealment, not the required information that is the *subject* of the concealment. The required information is the alleged fact that the MU-2's icing design was defective. Thus, although the *Rickert* court held that this piece of evidence did not satisfy the *Rickert*'s second requirement—i.e., that the manufacturer concealed required information—another court could reasonably reach the opposite conclusion if it clarifies what information is required before considering the separate elements of withholdings, concealments and misrepresentations. In that regard, a court might find that the icing problem was the "required information" and that Mitsubishi's use of an "antiquated," non-similar airfoil for its calculations was a concealment of the problem. Similar flaws permeate the *Rickert* court's rejection of the evidence that was proffered to show both controllability and design misrepresentations.[160]

The heart of the difference between *Rickert*'s "soft" analysis and the "careful," five-part test performed above is largely based on a disagreement as to the breadth of a manufacturer's explicit duties to report safety information under the FAR. That is, if one broadly interprets the range of "required information" in the exception, one can find a concealment or withholding quite easily. Conversely, if one views the FAR's disclosure duties as quite narrow, like the *Rickert* court, then the concealment or withholding aspect of the exception loses its force; there simply may be nothing to conceal or withhold. Under this latter interpretation, it is very easy to gloss over the "required information" requirement, as *Rickert* demonstrated. The *Rickert* court's narrow view is readily apparent in its order granting the plaintiff's motion to stay the first summary judgment and to permit additional discovery:

> As Rickert would have it, Mitsubishi has an obligation—under Federal Aviation Regulation § 21.3—to report these differences of opinion to the FAA. This regulation cannot and does not require aircraft manufacturers to notify the FAA every time that an engineer, a pilot, or a civilian writes that a particular aircraft should have been designed differently or that it is flawed. Were that the rule, aircraft manufacturers would spend most of their time reporting to the FAA and the FAA would be buried in reports noting differences in opinion concerning aircraft design and aircraft failure. *More impor-*

159. *Id.*

160. *See id.* at 1458-60 (finding that none of plaintiff's proffered evidence satisfies the knowing misrepresentation exception's requirements).

> *tantly, Rickert's understanding of Mitsubishi's obligations under FAR § 21.3 would effectively gut GARA. . . . [T]he failure to report would constitute a "withholding" . . . [which], in turn, would satisfy . . . GARA's exceptions and allow parties to bring suits 20, 30, or 40 years after the manufacture of an aircraft.* . . . That is not the law, and neither GARA nor FAR § 21.3 produce such an absurd result.[161]

Clearly, the proper line to be drawn when interpreting duties under the FAR was evident to the *Rickert* court. However, one must agree that an affirmative reporting duty under FAR does arise somewhere between a passing opinion by a casual observer that the MU-2 icing characteristics are relatively weak and the situation in which planes are dropping out of the clouds. The proper interpretation of the FAR part 21, however, leads to the conclusion that a court should take *neither* a broad *nor* narrow view. Under the FAR, the scope of the duties are defined in a specific manner, having little to do with the court's general opinion as to whether a particularly broad interpretation would "gut GARA."[162] The scope of the duties under the FAR is measured and defined by the *actual knowledge* of the type certificate holder: A manufacturer must only report those *defects* that the manufacturer has *determined* to cause the situations in part 21(c).[163]

Thus, the critical factual aspect under the knowing misrepresentation exception is not whether the evidence is illustrative of a misrepresentation, concealment, or withholding. Rather, the critical question—and the first question—concerns the type of information that a holder of a type certificate is required to report to the FAA. When one looks to the regulations, it is apparent that such a holder is not required to report a defect until it has *determined*—i.e., has knowledge of and believes—that a defect has caused one of the problems in FAR part 21.3(c).[164] In *Rickert*, that meant asking whether Mitsubishi knew that the poor icing characteristics were causing the MU-2 mishaps. If the answer to that question is yes, or at the summary judgment stage the answer was that there was a genuine issue of material fact as to whether that answer was yes, then, and only then, would one ask whether there is evidence showing that a manufacturer misrepresented, concealed, or withheld information about the defect.

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161. Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert II), 929 F. Supp. 380, 384-85 (D. Wyo. 1996) (emphasis added).

162. *Id.* at 384.

163. *See* 14 C.F.R. § 21.3 (1996) ("The holder of a Type Certificate . . . shall report any defect in any product, part, or article manufactured by it that has left its quality control system and that it determines could result in any of the occurrences listed in paragraph (c) . . . .").

164. This, in turn, begs the question: What is a defect? For further discussion of this problematic aspect of the knowing misrepresentation exception, see *infra* part IV.

Although the *Rickert I* court never reached the knowledge issue,[165] the plaintiff proffered evidence which arguably could have satisfied the requirement. Of course, it is relatively clear that the icing evidence—the airfoil choice, the lack of performance of flight tests—does not, alone, demonstrate Mitsubishi's knowledge of icing defects in the MU-2. However, perhaps similarly obvious is the notion that the Vinton letters, which the *Rickert I* court dismissed as non-misrepresentations,[166] could potentially satisfy the FAR's knowledge requirement. Specifically, the correspondence between Mitsubishi's president and its former general counsel potentially creates a genuine issue of material fact as to whether the president of Mitsubishi, and therefore Mitsubishi itself, had determined that the MU-2 suffered from an icing defect.[167] As noted above, Mr. Vinton in the correspondence accuses the president of failing to "look into the [icing] theory" presented to him, and then threatens the president by ensuring him that the "[icing] problem with the long-body MU-2" will get the attention it deserves.[168] Although these statements do not prove a misrepresentation or concealment, they arguably could demonstrate Mitsubishi's knowledge of the MU-2's icing defect, which in turn makes the icing defect "required information" under GARA. Under this interpretation, parts two and three of the five-part test would be satisfied.

Next, the court must ask whether the claimant *knowingly* engaged in the applicable conduct—part one of the five-part test. In the present circumstances, where the scope of the duties under the FAR are determined by the knowledge of the certificate holder, the knowledge requirement of part one will be identical (or nearly identical) to the knowledge requirement within the required information determination of part three. In most cases, then, a finding that the certificate holder had determined that a defect was causing the flight degradations will have two effects. First, it will mean that the defect is now "required information" under part three. Second, it will likely show that in cases where there is proof of a misrepresentation, concealment, or withholding, that such was done so *know-*

165. *Rickert I*, 923 F. Supp. at 1457-61. In fact, throughout the court's entire discussion of "The Alleged De-Icing Misrepresentations," the court at only one point mentions the knowledge requirement: "Nothing that Kennedy says in his report . . . leads this Court to conclude that Mitsubishi represented something to the FAA that it *knew to be untrue* or that it made any representations to the FAA with the intent to deceive." *Id.* at 1457-58 (emphasis added).

166. *Id.* at 1461-62 ("[T]he court cannot conclude that Vinton's letters show anything other than that Mitsubishi has, with respect to the design and performance of the MU-2, been obstinant, short-sighted, negligent, and perhaps reckless. Again, however, this does not mean that Mitsubishi knowingly misrepresented anything to, or concealed anything from, the FAA.").

167. The FAR's choice of the word "defect" is problematic. *See* 14 C.F.R. § 21.3(a); *see also infra* part IV.

168. *Rickert I*, 923 F. Supp. at 1461.

ingly—part one of the five-part test. In the present case, the Vinton letters could have that dual effect.

Nevertheless, the "knowingly" requirement of part one must stand distinct from the knowledge requirement of the "required information" part of the test. In many cases, required information may be defined with little regard for a holder's knowledge. For instance, if the FAA ordered Mitsubishi to report the results of MU-2 icing flight tests, then these results would be the "required information" under GARA, and it would make no difference whether Mitsubishi had determined that the MU-2's icing characteristics were defective. Thus, the five-part test should remain five parts, even though in many circumstances the finding of "required information" will necessarily depend on a finding of certificate holder knowledge, which, in turn, will satisfy part one of the formal, five-part test.

By applying a more formal analysis, this section of the article sought to show that *Rickert* was asking the wrong questions and that another court, utilizing the five-part test, could have drawn a different evidentiary line than the *Rickert* court. More important, under the formal analysis outlined above, another court could have set a much lower evidentiary standard for the knowing misrepresentation exception. Perhaps the proper line, primarily dependent upon an "actual knowledge" standard as a talisman of "required information," is not so bright. Nevertheless, today, in the absence of further interpretations, the *Rickert* hurdle does seem to be quite "formidable," albeit artificially so.[169]

IV. GARA's Achilles

A. The Problematic Application of the Knowing Misrepresentation Exception

At first glance, the initial decisions interpreting GARA did so with unwavering attention to the literal meaning of the statute and an impressive commitment to the policies behind the Act. The cases held that GARA applied even if the cause of action accrued before the effective

169. The *Cartman* opinion may suffer from the same analysis flaws, but that analysis is difficult to evaluate because of the brevity with which the court both restated and analyzed the evidence presented in that case. Notably, though, the court's statement that it would not infer a manufacturer's duty to "volunteer information which is . . . not required by statute or regulation" does seem to evince a misunderstanding of the nature of the FAA's system. Nevertheless, in concluding that the manufacturer did not have a duty to volunteer information about the composite float, the court never pointed out the critical aspect of the FAR—i.e., that information becomes required when the manufacturer *determines* a product is defective. *See generally* Cartman v. Textron Lycoming Reciprocating Engine Div., No. 94-CV-72582-DT, 1996 WL 316575, at *3 (E.D. Mich. Feb. 27, 1996); *supra* part III.D.1.

date of the statute,[170] that GARA preempted state law,[171] and that the knowing misrepresentation exception "erect[ed] a formidable first hurdle."[172] Moreover, an influential observer recently declared that the GARA case law had been very true to the statute.[173] Indeed, it looked as though GARA had not been weakened in the first series of decisions.

However, whether GARA had been weakened is a question that, at least to some degree, presupposes that GARA was strong to begin with. After all, GARA's purpose is to *preclude* product liability actions, with limited exceptions, against aviation manufacturers when the product has been in service for many years.[174] GARA was developed as a response to the "serious decline" in the general aviation industry, an "important cause" of which was "the tremendous increase in the industry's liability insurance costs."[175] The statute was justifiable on the theory that "after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold a manufacturer legally responsible . . . after that much time has elapsed."[176] To fight the important problem of exploding liability costs, GARA was intended to cut off the "tail" of liability. GARA, at least on its muscular face, was intended to perform that task smoothly and efficiently.

After examining the case law emerging in GARA's wake, this author holds a less optimistic view of GARA's ability to accomplish its purpose. This view, however, is a by-product of the choice of measuring sticks: GARA's strength should be measured at the summary judgment stage. For GARA to be truly effective, it must possess the ability to substantially preclude liability costs, which means an early "out" for a defendant, assuming the plaintiff brings the action. If GARA's goal is to "unbridle" the general aviation manufacturers from liability costs, then GARA must apply quickly and decisively. If an aviation case in which GARA is an issue goes to trial, significant liability costs are incurred, even if GARA precludes the action in the end. In those cases, GARA has done very little in the way of "unbridled" liability protection. Similarly, if massive discovery efforts are necessary to even reach the summary judgment stage, then substantial liability costs likewise are incurred. In both cases,

170. *See supra* part III.A (discussing GARA's applicability provision).

171. *See supra* part III.B (discussing GARA's preemptive provision).

172. Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert II), 929 F. Supp. 380, 383 (D. Wyo. 1996). *See supra* part III.D (discussing GARA's knowing misrepresentation exception).

173. *See* Edward W. Stimpson, President, General Aviation Manufacturers' Association, Remarks Before the American Bar Association Section of Litigation, Second Annual Seminar on Aviation Litigation (June 28, 1996) New York, New York (on file with author) ("Most encouraging is how the courts have interpreted GARA.").

174. *See generally* H.R. REP. NO. 103-525, pt. 1 (1994).

175. *Id.*

176. 140 CONG. REC. H4998-99 (daily ed. June 27, 1994) (statement of Rep. Fish).

a settlement becomes a realistic option for manufacturers—and in most circumstances, a cost-saving one. The result is that manufacturers will likely continue settling many of these cases, even though GARA arguably should have quickly precluded the suit. In sum, if extensive discovery efforts are necessary to the determination at the summary judgment stage as to whether GARA applies, or if there are factual issues within GARA about which a plaintiff is quite capable of demonstrating a genuine issue of material fact, then GARA is not as strong as once believed.

The GARA cases have not weakened the Act, but they have clearly demonstrated GARA's Achilles—the very difficult issues within the knowing misrepresentation exception.[177] These issues will be litigated in nearly all future cases falling under GARA's repose mandate.[178] Although the primary issue under the *Rickert* facts was whether Mitsubishi had knowledge of the icing "defect" of the MU-2, the exception contains other factual issues of equal difficulty. For instance, the exception also requires the claimant to prove that the misrepresentation was causally related to the accident. Clearly, these are the very issues at the heart of the plaintiff's claims. Thus, adjudicating the merits of the knowing misrepresentation exception will involve factual issues as difficult and extensive as those at the heart of the case. Litigating these issues is a discovery-intensive, and therefore costly, endeavor. In many cases, just reaching the summary judgment stage will be expensive. But as this Article in Part III.D concluded, even the evidence obtained within a limited discovery period, as in *Rickert I*, could potentially withstand a summary judgment motion under a reasonable interpretation of the knowing misrepresentation exception. In that regard, the exception's hurdle is not as "formidable" as most believe.[179] And with an even longer discovery period, the *Rickert II* plaintiff easily satisfied the exception even under the

177. Of course, there are factual issues in GARA's other exceptions. However, the factual issues in the application of the "medical emergency" and "non-passenger" exceptions are relatively easy to resolve. *See supra* part II (listing GARA's four exceptions). Further, the presence or absence of a written warranty is likewise simply adjudicated. As such, these issues do not possess the same ability as the issues inherent in the knowing misrepresentation exception to create a genuine issue of fact, and therefore, do not possess the same potential to undermine GARA's ability to achieve its lofty purposes.

178. The assumption here is that the manufacturer's knowing misrepresentation will become an issue—most likely *the* issue—in nearly every GARA case. Some commentators predicted that the exception's "substantive hurdles" would prevent plaintiffs from circumventing the Act. *See* Leonard E. Nagi, General Aviation Revitalization Act of 1994 (1994) (unpublished manuscript on file with author) ("While [the exception] . . . would appear to be an invitation to circumvent the Act . . . ."). This author believes, however, that: 1) the exception's hurdles are not so high, and 2) as such, they will not provide enough incentive for plaintiffs to not attempt to "circumvent the Act."

179. *See generally supra* part III.D (concluding that the *Rickert* court's knowing misrepresentation hurdle was artificially high).

Rickert court's rather narrow interpretation.[180]

Unfortunately, the factual issues within the knowing misrepresentation exception are only half of the problem. And perhaps they are the "easy" half when considering that the resolution of these issues is what courts generally do. To ask a fact-finder whether a defect caused an accident is a question that is, at least, familiar. Conversely, asking a court to define "required information" based on the FAR or other authority is asking it to navigate virgin skies. Under the FAR, whether the information concealed is "required information" is a question of two parts: Did the manufacturer *determine* that there is a *defect*? Part III.D assumed, *arguendo*, that the icing design of the MU-2 was a *defect* under the FAR in order to concentrate on the very difficult factual issue of whether the manufacturer had *determined* that there was a defect. Unfortunately, this aspect of the test does not even become a factual issue until the court defines a "malfunction, defect, or failure" under the FAR. Just as a court cannot determine whether a manufacturer *misrepresented* until it defines *required information*, a court also cannot determine whether a manufacturer *determined* that there was a *defect* until "defect" is defined.

To properly apply the knowing misrepresentation exception, a court will have to define "required information." In cases asserting duties under FAR part 21, this assessment will likewise require a court to determine whether a manufacturer *determined* that a *defect* existed. The term "defect" in the FAR could have many meanings. A court could define "defect" very narrowly, such as by an Airworthiness Directive (AD). Under this approach, only if the FAA has issued an AD would the problem be a defect. This, in turn, would de-emphasize the factual finding of manufacturer *knowledge* of the defect. In fact, a court could reasonably infer constructive knowledge on the knowledge issue. Alternatively, a court might define "defect" very broadly, such as by an aircraft "problem." This approach would emphasize the factual issue of manufacturer knowledge—i.e., had the manufacturer *determined* that there was a "problem." A court could also interpret defect in a manner consistent with product liability law, which would produce new problems.

The "broad" view is the one the *Rickert* court tried to avoid. The *Rickert* court's narrow interpretation of manufacturer reporting duties under the FAR is implicitly based on a narrow interpretation of "defect." Because the court made a general assumption that the icing problem was not "required information," it never truly considered the questions that Congress has implicitly asked courts to resolve. When courts begin to

180. Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert II), 929 F. Supp. 380, 383 (D. Wyo. 1996). *See generally supra* part III.D (discussing the *Rickert* court's narrow interpretation of the exception).

squarely address these issues, however, it is likely that some courts will take the broader view, finding much room for manufacturer misconduct in the FAR. In doing so, the courts will expand the applicability of the knowing misrepresentation exception. Depending on the number of courts that adopt the broader approach, the knowing misrepresentation exception, in totally barring application of the eighteen-year statute of repose, stands ready to swallow the rule. Unfortunately, there is little congressional guidance to help avoid this unfortunate result.

Turning to the legislative history of GARA, this Article in the next section shows that Congress offered little justification for the knowing misrepresentation exception and, more importantly, showed little recognition of the difficult questions—both factual and policy-based—that it was implicitly asking courts to decide. Moreover, the history evinces little congressional regard for the exception's potential to undermine GARA's ability to substantially preclude liability costs associated with aircraft and products greater than eighteen years old. Instead, the legislative history indicates that the exception was born of a political compromise in the Senate.

B. The Legislative History

Congress began considering the imposition of a time limitation on aviation manufacturer liability nearly ten years prior to GARA's enactment in 1994.[181] In its first appearance, a twelve-year statute of repose was one aspect of the never-enacted "General Aviation Tort Reform Act of 1986," which sought to accomplish larger goals, including the establishment of uniform liability standards and the elimination of joint and several liability.[182] The statute of repose, in a twenty-year form, also appeared in the Senate's first attempt at reform, entitled the "General Aviation Accident Liability Standards Act of 1986."[183] Notably, neither

181. *See, e.g., Aviation Product Liability: The Effect on Technology Application: Hearing Before the Subcomm. on Transportation, Aviation, and Materials of the Comm. on Science and Technology*, 99th Cong. 5 (1985) (statement of Milton R. Copulos, Senior Analyst, the Heritage Foundation) ("Now there are a few simple things we can look at that might help this, one of which is called a statute of repose. One should not be held eternally liable for a product.").

182. H.R. 4142, 99th Cong. § 2803 (1986) (providing for a 12-year statute of repose with an exception in the case of an express warranty). *See also Hearings on H.R. 4142: Aviation Tort Reform Before the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 99th Cong. 98 (1986) (statement of Robert L. Habush, President, Association of Trial Lawyers of America) ("[A] statute of repose for 12 years would exclude maybe 80% of the general aviation planes in existence, and that's why I suggest 20 years is a much fairer figure in the Senate.").

183. S. 2794, 99th Cong. § 7 (1986) (providing for a 20-year statute of repose in addition to promulgating uniform standards for liability arising out of general aviation aircraft accidents).

of the early reform efforts contained any exceptions to the statute of repose similar to the knowing misrepresentation exception.

In 1987, the reform effort continued, but with new names and bill numbers. In the House, the aviation reform effort was entitled the "General Aviation Standards Act of 1987,"[184] and in the Senate, the "General Aviation Accident Liability Standards Act of 1987."[185] For the next several years, the statute of repose appeared in one form or another within these larger aviation reform packages.[186] However, a statute of repose, as a separate reform effort, began to take shape in the 103d Congress.

In September of 1993, Senator Kassebaum introduced the "General Aviation Revitalization Act of 1993."[187] This bill consisted solely of a fifteen-year time limitation on liability and contained no exceptions to the repose mandate.[188] In the House, Mr. Glickman introduced an identical bill.[189] Thus, in 1993, roughly eight years after the initiation of the aviation reform effort, an identical fifteen-year statute of repose bill was introduced in both houses of Congress. Because the knowing misrepresentation exception had no existence to this point, the hearings on the earlier bills contain little relevant discussion regarding manufacturer misconduct and its relation to a statute of repose. Unfortunately, the final stages of GARA's legislative journey contain similar deficits in relevant dialogue.

In the 103d Congress, the Senate acted first, passing the "General Aviation Revitalization Act of 1994" on Mar. 16, 1994 by a margin of 91 to 8.[190] This version of GARA consisted of an eighteen-year statute of repose, with three exceptions,[191] including the knowing misrepresentation exception.[192] However, the bill reported out of the Senate Committee on Commerce, Science, and Transportation five months earlier consisted of the original fifteen-year repose period with no exceptions.[193] Not surprisingly, then, neither the Senate report nor the hearing testi-

184. H.R. 2238, 100th Cong. § 724 (1987) (providing for a 12-year statute of repose with an exception in the case of an express warranty).

185. S. 473, 100th Cong. § 7 (1987) (providing for a "rolling" 20-year statute of repose with no exceptions).

186. *See, e.g.*, H.R. 1307, 101st Cong. (1989); S. 640, 101st Cong. (1987); S. 645, 102d Cong. (1991).

187. S. 1458, 103d Cong. (1993).

188. *Id.* § (a)(1).

189. H.R. 3087, 103d Cong. (1993).

190. 140 CONG. REC. S3009 (daily ed. Mar. 16, 1994).

191. *Id.* This version, S. 1458, contained no exception for the case of an express written warranty. *Id.*

192. S. 1458, 103d Cong. § (b)(1) (1993).

193. *See* S. REP. NO. 103-202, at 6-7 (1993).

mony provides justification for the exception.[194] In fact, the Senate Committee expressly recognized the comprehensive effect of the fifteen-year statute of repose, stating that "[t]he Committee is aware that the manufacturers of most of the aircraft produced [over fifteen years earlier] would no longer be liable for the design or manufacture of those 17,811 aircraft."[195] Nevertheless, the bill passed by the Senate in March of 1994 differed from the earlier bill, containing the knowing misrepresentation exception and consisting of an eighteen-year, not a fifteen-year, repose period. On the Senate floor, the justifications for the exception were provided, first, by Senator Pressler:

> [Product liability reform] is a very tricky issue. We must protect the ability of the little guy to be able to hire a law firm on a contingency basis and sue the big guy, otherwise the little guy will not have a chance. At the same time, we must ensure that all of our products and services are not being priced out of the market. The point is, under this piece of [modified] legislation the little guy can still sue when it is appropriate. We must always protect the right of people to receive justice under our legal system. . . . [In this modified bill], provisions have been incorporated that would provide exemptions [from the 18-year statute of repose] . . . under certain limited conditions, such as failure by the manufacturer to be forthright with the FAA during the certification process. I believe even with these exemptions, the overall goal of this liability reform initiative is reached. That is, to give those negligently injured by an airplane manufacturer legal recourse commensurate with a level more appropriate to the industry.[196]

Senator Metzenbaum[197] provided additional insight to the justifications for the knowing misrepresentation exception, stating that without the knowing misrepresentation exception, the bill would create an incentive for manufacturers to misrepresent to the FAA. The Senator reasoned: "Because there would be complete immunity from private suits after the statutory period, if a manufacturer learned of a defect or other problem, it could simply sit on the information and hope that an accident does not occur within the time frame. Frankly, in my view, . . . regulatory penalties [are not enough]."[198] Senator Metzenbaum also noted the existence of "procedural and substantive hurdles [within the exception] that will be difficult for victims to overcome in many, if not most

194. *See generally id.*; *Aviation Competition and Safety Issues: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce, Science, and Transportation*, 103d Cong. (1993).

195. S. REP. NO. 103-202, at 1 n.1 (1993).

196. 140 CONG. REC. S2993-94 (daily ed. Mar. 16, 1994) (statement of Sen. Pressler).

197. This Senator seems to be responsible for the addition of the exception. *See id.* at S2995 (statement of Sen. Metzenbaum) ("Now, the modified bill that I have worked out with the distinguished Senator from Kansas. . . .").

198. *Id.*

cases."[199] Senator Metzenbaum concluded that he would vote for the bill, "not because [he thought] it [was] the right bill, but because [he thought] it [was] just as well to pass it."[200] The Senator recognized that the legislation would be sent over to the House "where they can give it more attention and look at it more fully than we have on the floor of the Senate."[201] Unfortunately, that did not occur.

The Senate dialogue indicates that the knowing misrepresentation exception was added despite little public discussion, yet also suggests that its addition was a necessary precondition to GARA's passage in the Senate. Thus, as is usually the case in politics, the justifications for the exception were not as important as the political reasons for adding it to the bill. It looks as though the bill in its unaltered form would have had difficulty passing the Senate. Moreover, it is notable that not one Senator who spoke in favor of the bill on March 16, 1994 indicated her disapproval of the added exception, perhaps providing further indication that compromise, at least in GARA's terms, meant that GARA would simply not exist without the knowing misrepresentation exception. Under this theory, the view held by GARA's proponents was most likely either that the addition of the exception would probably not appreciably undermine the effect of the statute, or that the exception would undermine the Act to some degree, but that a "little" GARA was better than "no" GARA.

GARA's passage through the House is similarly void of evidence showing that the knowing misrepresentation exception was thoroughly analyzed. In October 1993, the House Subcommittee on Aviation called hearings on H.R. 3087, consisting of a fifteen-year statute of repose with no exceptions.[202] At the hearing, there were some limited discussions regarding the principles of a knowing misrepresentation exception, despite the fact that the hearings were conducted prior to the addition of the exception to the Senate version, and that the citizens testifying before the committee were largely proponents of the measure. Although the American Trial Lawyers Association did not attend the hearings,[203] one trial attorney, Mr. David Katzman, testified and presented arguments in favor of a knowing misrepresentation exception.[204]

199. *Id.* One important procedural hurdle in this Senate version, which never made it to the final version of GARA, was the requirement that the claimant prove the applicable conduct by clear and convincing evidence. *See id.* at S3009.

200. *Id.* at S2995.

201. *Id.*

202. *See 1993 Hearings, supra* note 8, at VII, 2-4 (memorandum from Committee's Aviation Staff). This bill was identical to the Senate Bill, S. 1458, later modified and passed by the Senate in March of 1994.

203. *Id.* at XVII (memorandum from the Committee's Aviation Staff) ("The Association of Trial Lawyers of America was notified of the hearing but decided against testifying.").

204. *Id.* at 68-77 (testimony of Mr. David Ian Katzman).

Mr. Katzman suggested that many airplanes flying today have known defects and that under GARA, the manufacturer would get immunity in suits involving many of the airplanes.[205] The first example that Mr. Katzman listed was the Cessna 411 which, he argued, has been flying for years with a known defect (loss of rudder control during single engine flight): "Were you to enact this legislation in its present form, you would simply be handing Cessna immunity for a product defect that it knows exists."[206] Noting that "there is no provision [in the bill] for concealment, . . . [and that] it does happen," Mr. Katzman suggested that GARA should have exceptions for two cases—concealment and prior knowledge.[207]

Apparently intrigued by Mr. Katzman's views, the Chairman of the Subcommittee, Mr. Oberstar, asked the earlier panel, consisting of strong proponents of the legislation, to respond to the concealment argument.[208] Mr. Meyer, Chairman and CEO of Cessna Aircraft Co., responded by calling it "a typical unsubstantiated comment by a trial lawyer to imply that a manufacturer who lives as we should in a highly regulatory environment . . . would or could try to hide some defect in an airplane over a fifteen-year period." Mr. Meyer concluded that the accusation "[was] without any substantiation and [that such a concealment] is impossible."[209] Mr. Stimpson, representing the General Aviation Manufacturers Association, also responded to Mr. Katzman's testimony, noting that manufacturers are under strict duties to report known defects to the FAA.[210] Finally, Mr. Meyer also suggested that the addition of a concealment exception would produce "a lot of litigation over something that is irrelevant."[211] This brief acknowledgment of the "cost" of the exception is unique to the exception's legislative history. Although the debate continued among the Committee members, it failed to further address Mr. Meyer's concern that such an exception would produce additional litigation. In fact, one committee member seemed to be operating under a different assumption.

Mr. DeFazio, responding to Mr. Meyer's suggestion that it would be

205. *Id.* at 69.

206. *Id.* at 70. Mr. Katzman listed other examples, such as the Cessna 210, the Turbo 210, the V-tail Bonanza, and the Lear 23. *See id.*

207. *Id.* at 74. "Prior knowledge would be . . . if Cessna today has knowledge of . . . bladder tanks in the fuel system that accumulate water and cause engine stoppage. . . . If those tanks are out there and they know about them today and they haven't solved the problem, that is prior knowledge." *Id.*

208. *Id.* at 35 (statement of Mr. Oberstar).

209. *Id.* (statement of Mr. Meyer).

210. *Id.* at 36. Mr. Stimpson also provided a written response at a later time that clearly outlined a manufacturer's duties under 14 C.F.R § 21.3(a) (1996) [FAR] to report known defects to the FAA. *Id.* at 40.

211. *See 1993 Hearings, supra* note 8, at 44 (statement of Mr. Meyer).

impossible for a manufacturer to conceal in the heavily-regulated industry, theorized that the addition of the exception, in effect, could not hurt:

> [T]he point is that you are saying that [concealment] couldn't happen; and if it can't happen, why don't we specify it. And if it does happen, then the fifteen year statute of repose doesn't apply. And then that would help you with bad actors .... You can't say it could never happen with any and every manufacturer out there; and so why not accommodate it since you are not going to violate it.[212]

Mr. DeFazio's views evidently were persuasive[213] to the Aviation Subcommittee and, ultimately, the Public Works and Transportation Committee members. When the Committee reported the bill on May 24, 1994, GARA consisted of an eighteen-year statute of repose with an exception for knowing misrepresentations.[214] The Committee report, though, does little to clarify the purpose of the provision, other than to say that it was added as a "fairness" element.[215]

By May, 1994, when the House Subcommittee on Economic Law of the Committee on the Judiciary held its hearings,[216] perhaps the fate of the knowing misrepresentation exception already had been sealed. At these last GARA hearings, there were considerable attacks on the legislation by its opponents.[217] Every opponent directly or indirectly argued for the necessity of a knowing misrepresentation exception to GARA[218] within their general arguments that a statute of repose would create an unsafe aviation environment.[219] Not surprisingly, the Committee of the Judiciary reported a bill that also contained the knowing misrepresentation exception.[220] Similar to the report from the Committee on Public Works and Transportation, the report provides little explanation for the

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212. *Id.* at 44-45 (statement of Mr. DeFazio).

213. This is not meant to suggest that there were no other influences at work here. For instance, by the time the Committee reported the bill, nearly eight months after the hearings, the Senate had already added the exception to its version. Thus, perhaps it was already becoming apparent to GARA supporters that early compromises would be required to avoid the result of the earlier aviation reform efforts.

214. *See* H.R. REP. No. 103-525, pt. 1, at 4-5 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1638, 1641. Notably, the knowing misrepresentation exception, as written in this version, required the claimant to prove the conduct by clear and convincing evidence. *Id.* at 4.

215. *Id.* at 3 ("Another element of fairness in the reported bill . . . [is that it] provides that the statute of repose does not apply if the manufacturer knows of a defect and fails to comply with its obligation to report the defect to the FAA.").

216. *General Aviation Revitalization Act of 1993: Hearing on H.R. 3087 Before the Subcomm. on Economic and Commercial Law of the Comm. on the Judiciary*, 103d Cong. (1994).

217. *See generally id.* at 75-131.

218. For example, a trial attorney, Mr. Hvass, showed a tape of a Cessna 411 crashing in the desert during single-engine testing, arguing that "those airplanes are still out there," and despite the known defect, Cessna would have no liability under GARA. *Id.* at 76-77.

219. *See, e.g., id.* at 76 ("The real inherent problem with the bill . . . is safety.").

220. *See* H.R. REP. No. 103-525, pt. 2, at 7-9 (1994).

addition of the exception.[221] When the House passed a compromise bill on June 27, 1994, the dialogue on the floor of the House mostly involved the final resolution of the length of the period of repose, and not the misrepresentation exception.[222] Two months later, the President signed GARA into law, hailing the "limited [reform] measure" as one that would create thousands of jobs, yet one that would also "preserve the legal rights of passengers and pilots."[223]

The legislative history of GARA shows that the addition of the knowing misrepresentation exception was not based on a thoroughly analyzed legislative policy decision. Throughout the thousands of pages of legislative history concerning the aviation reform movement, only a few pages were devoted to discussions of an exception to the statute of repose. This is not surprising, though, when considering that all but one of the congressional hearings were called to discuss bills that did not contain a knowing misrepresentation exception. Not until the final hearing of the House Subcommittee on Economic and Commercial Law, on May 12, 1994, was the exception included in any discussed legislation.[224] Further, the discussions which ultimately led to the addition of the exception in the Senate bill were conducted in a non-public setting between Senators Kassebaum and Metzenbaum.[225] The result is that prior to the Senate passage of S. 1458, which contained the exception, there was little reason to debate the justifications for, the issues within, and the potential effects of the knowing misrepresentation exception. Moreover, after the Senate passage of S. 1458, it looked as though GARA would not pass without the exception, correspondingly resulting in the further lack of incentive to discuss the effects of the exception during its final stages in the House.

C. The Need for Further Discussion

This Article does not intend to identify the ultimate solutions to the inherent problems within the knowing misrepresentation exception. To do so, without extensive study of the relevant issues, would be dishonest. For instance, to summarily suggest that the exception should be stripped from the statute without a close analysis of whether it is possible for an

221. *See Id.* at 6 ("The legislation attempts to strike a fair balance by providing some certainty to manufacturers, which will spur the development of new jobs, while preserving victims' right to bring suit . . . in certain particularly compelling circumstances.").

222. *See* 140 Cong. Rec. H4998-5005 (daily ed. June 27, 1994) (discussing the justifications for the reform effort and the differences between a fifteen and eighteen-year version).

223. *See supra* note 2. The President did not mention the misrepresentation exception to the eighteen-year statute of repose. *Id.*

224. *See* 140 Cong. Rec. S3009 (daily ed. Mar. 16, 1994) (passing a modified S. 1458 containing a knowing misrepresentation exception).

225. *See supra* note 197 and accompanying text (describing the behind-the-scenes compromise between Senators Metzenbaum and Kassebaum).

aviation manufacturer to successfully conceal a known defect in today's regulatory environment is to engage in politics.[226] Conversely, to support the exception and its problematic application in a blind recognition that it helps the "little guy" is to do the same.[227] Nevertheless, during the process of identifying the exception's difficulties, this Article has identified many of the issues that should serve as the starting point for further discussion, which should begin immediately. In future discussions, both Washington policy-makers and interested parties should consider three aspects of the knowing misrepresentation exception.

First, policy-makers should empirically assess the truth of the premises upon which the exception is based. The primary premise of the knowing misrepresentation exception appears to be that it is not only possible for a manufacturer to successfully conceal a product defect for eighteen years, but that this defect will not present itself to the public on its own. Although one could argue that Congress implicitly believed that defects could, in fact, go undiscovered for eighteen years simply by pointing to the exception's addition to the statute, the comments made by Mr. DeFazio stand ready to diffuse such a suggestion.[228] After assessing this premise, if it is discovered that such a concealment is extremely rare, or even impossible, then perhaps the exception's inclusion in GARA should be reconsidered. The alternative finding would support the opposite conclusion. However, this assessment is not an easy one, and it necessarily implicates the second topic in the future discussions.

Second, policy-makers should seek ways to ease the burden of litigating the issue of "required information" under the FAR. As shown above, for courts to determine whether the information is required, they must also define "defect" as used in the FAR, which can only be regarded as a policy decision. Assuming the exception cannot exist without the linkage to the FAA's requirements, perhaps Congress could add an amendment to GARA consisting of a congressional understanding of the standard, or by creating a system of judicial referral to agency rulings on whether the information is required.

Currently, neither the statute nor the legislative history provides any insight as to how this term should be defined. For instance, should "defect" be determined with reference to FAA Airworthiness Directives, a

226. *See supra* notes 208-09 (summarizing Mr. Meyer's argument that concealment is absolutely impossible in today's highly-regulated environment). Statistics show that "[n]early all defects are discovered during the early years of an aircraft's life." *See* H.R. REP. NO. 103-525, pt. 1, at 3 (1994).

227. *See supra* note 196 and accompanying text (quoting Sen. Pressler's rationale for the exception).

228. *See supra* note 212 (statement by Mr. DeFazio suggesting that even if the concealment couldn't happen, there would be no harm in adding the exception to GARA).

prior jury verdict, or something else? Moreover, without a working definition of "defect," it is even impossible to assess the primary premise of the exception—that it is possible for a manufacturer to conceal a "defect" in the highly-regulatory environment. In fact, both sides of the reform movement have presented evidence purporting to address the justifications for the exception. For instance, the aircraft manufacturers produced FAA statistics showing that most defects are discovered very early in an aircraft's life,[229] suggesting that the exception is unnecessary. The plaintiff's bar, on the other hand, linked the "defect" determination to a prior verdict for plaintiff on the defectiveness issue.[230] Clearly, there is much to resolve regarding the difficult task of defining a "defect" under the "required information" aspect of the exception.

One solution to the "required information" indeterminacy problem under the FAR may be an amendment to GARA adding a definition of "defect" to the knowing misrepresentation exception. This new definition, based upon evidence presented at a hearing on this issue alone, would take the courts out of this policy-maker role. More important, it would also save many plaintiffs and defendants much time and expense litigating an issue to which, in theory, they should already know the answer. Further, the definition addition to the exception might prevent courts from broadly interpreting the "required information" standard and, therefore, completely "gutting" GARA. Without further guidance, the exception is poised to swallow the rule. An amendment defining "defect" could prevent that result.

Finally, future discussions should balance the justifications of the exception against its drag on the overall effect of the eighteen-year statute of repose. Over the next few years, the cost of the knowing misrepresentation exception will be readily determinable. This Article suggests that the dollar figure will be significant, due to the difficult, factual and policy-based issues within the knowing misrepresentation exception and the exception's natural tendency to draw plaintiffs to its umbrella. This cost should be balanced against the purpose of GARA, which is to substantially preclude the liability costs associated with that portion of the aviation fleet that is greater than eighteen years old. Because roughly 70% of registered aircraft are older than eighteen years,[231] GARA's implicit pur-

229. Roughly 80% of all FAA Airworthiness Directives, issued to correct defects in products, are issued within the first four years after the issuance of an airworthiness certificate. *See General Aviation Standards Act of 1989: Hearing on H.R. 1307 Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation*, 101st Cong. 41 (1989) (prepared reply of Mr. Stimpson). Further, 95% of the Airworthiness Directives are issued within 8 years. *Id.*

230. *See supra* notes 205-07 (describing Mr. Katzman's comments regarding aircraft with known defects).

231. *See 1993 Hearings, supra* note 8, at XII (memorandum from Committee's Aviation Staff).

pose is to preclude roughly 70% of the liability costs of the segment of the market covered by GARA. But that can only be achieved if no claims are filed, which is unlikely, especially if courts broadly construe the knowing misrepresentation exception. When the data is accumulated and studied, perhaps it will show that GARA, in practice, saved the manufacturers only 60% instead of 70%, of their litigation costs. Or perhaps the effects of adding the exception will be even more devastating, saving only 30-40%. Further, the data may show that only one out of two hundred manufacturers was found to have engaged in the applicable conduct under the exception.

Confronted with the actual figures, Congress will face the policy question it has avoided to this point: Is the cost of GARA's Achilles justifiable? By simply stating that the exception was added as a measure of "fairness" with no further description,[232] Congress has not yet answered that question. Without further guidance, the knowing misrepresentation exception's costs could potentially be greater than its savings. In the end, perhaps GARA will be just another unfulfilled legislative promise to remedy the "exploding" liability costs in the aviation manufacturing industry, with the litigants and the courts picking up the pieces.

V. Conclusion

This Article suggests that GARA is not the strict repose mandate it purports to be.[233] Although the case law appeared to evince the strength of GARA,[234] it actually highlighted GARA's weakness in the real practice of litigation.[235] Although one could reasonably argue that *Rickert*[236] actually strengthened GARA by erecting an artificially high barrier, section III.D responded that the *Rickert* court performed an erroneous analysis in an effort to not "gut GARA."[237] Under a more formal analysis,[238] perhaps the knowing misrepresentation hurdle is not so "formidable" and, correspondingly, the statute is not so strong.

GARA's Achilles is its inability to smoothly preclude, at the summary judgment stage, causes of action involving products of the requisite age due to the difficult factual and policy-based issues within the knowing

232. *See generally* 49 U.S.C. § 40101 note (1994); *supra* notes 215, 221 and accompanying text.

233. *See supra* part IV.A.

234. *See supra* parts III.A-D.

235. *See supra* part III.D.2.

236. Rickert v. Mitsubishi Heavy Indus., Ltd. (Rickert I), 923 F. Supp. 1453 (D. Wyo. 1996).

237. *See supra* part III.D (examining the foundation—the interpretation of the FAR—of the *Rickert* court's interpretation of the knowing misrepresentation exception).

238. *See supra* notes 143-45 and accompanying text (explaining the proper analysis under the knowing misrepresentation exception).

misrepresentation exception.[239] Litigating the difficult factual issues will be extremely costly to the parties. More problematic, the results will be highly unpredictable because the exception's application necessarily implicates a difficult definition problem within the FAR, one that can only be characterized as a policy question.[240] Unfortunately, GARA's legislative history provides little assistance to the courts in making the elusive interpretation.[241] Both of these, in turn, are likely to sustain the current incentives for settlements.[242] The net result is that the knowing misrepresentation exception stands poised to swallow GARA's "strict" eighteen-year repose mandate.[243] This Article, in identifying GARA's Achilles, concludes that the policy-makers who unknowingly created the weakness should engage in further discussion of the problematic exception,[244] and perhaps consider an amendment to the strict repose mandate called GARA.[245]

239. *See supra* part IV.A.
240. *See supra* parts IV.A and IV.C.
241. *See supra* part IV.B.
242. *See supra* part IV.A.
243. *Id.*
244. *See supra* part IV.C.
245. *Id.*