WHY NON-FINAL GARA DENIALS DESERVE CERTIORARI REVIEW: "WHEN YOUR MONEY IS GONE, THAT IS PERMANENT, IRREPARABLE DAMAGE TO YOU"[1]*

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The General Aviation Revitalization Act[2] (GARA) defense is an important litigation tool for a manufacturer of general aviation aircraft or aircraft component parts. President Clinton signed GARA into law in 1994 and in doing so created a nationwide statute of repose that bars any civil suits against aircraft and component manufacturers that arise from accidents occurring more than eighteen years after the date the aircraft was delivered to its first owner.[3] As the name so aptly implies, its

1. Chris W. Altenbernd & Jamie Marcario, *Certiorari Review of Nonfinal Orders: Does One Size Really Fit All? Part I*, 86 Fla. B.J. 21, 23 (Feb. 2012).

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2. 49 U.S.C. § 40101 (2006).

3. *Id.* at §§ 2(a), 3(3). Generally speaking, in contrast to a statute of limitation, GARA, as a statute of repose, bars any cause of action after the specified time measured from the initial sale of the product, rather than establishing the time period within which the action must be brought after the cause of action accrued. *Id.* Component parts in successful service for eighteen years are conclusively deemed to be non-defective and cannot be the basis for any action, thus giving the relevant manufacturers appropriate "repose" from any further liability related to the component parts. *Id.*

purpose—both then and now—is to revitalize the aviation industry.[4]

The general aviation industry experienced a severe decline during the fifteen years preceding GARA.[5] "[A]nnual sales of all general aviation aircraft fell from approximately 18,000 to 928."[6] While the number of sales each year was falling, "the number of suits against aircraft manufacturers greatly increased."[7] "The tens of thousands of aircraft" and component parts manufactured since the 1940s that were still in service created what was described as a "'long tail of liability' for the industry."[8] Airplane manufacturers were frequently targeted for suit, even for planes that had been in service for decades.[9]

"[T]he long tail of liability . . . made it increasingly difficult for general aviation manufacturers to secure liability insurance. . . . [T]he major manufacturers had no alternative but to self-insure"[10] with devastating effects. Recognizing the impact that the decline of the industry was having on the United States economy—including the significant job loss and trade imbalances with foreign companies not facing the same issues—the Legislature decided to create a statute of repose.[11] It determined that it should impose, "in this exceptional instance, a very limited [f]ederal preemption of [s]tate law,"[12] and in doing so, protect general aviation manufacturers from the high expense of an often times successful defense of a products liability case.[13]

Despite Congress' intent to protect aviation manufacturers from the extraordinary costs of litigation, the application of GARA has not always matched its purpose. For example, appel-

4. President Clinton believed that signing GARA into law would revitalize the aviation industry and create jobs. William J. Clinton, *Statement upon Signing the General Aviation Revitalization Act of 1994*, 30 Wkly. Comp. Pres. Docs. 1678 (Aug. 17, 1994).

5. James F. Rodriguez, Student Author, *Tort Reform & GARA: Is Repose Incompatible with Safety?* 47 Ariz. L. Rev. 577, 578 (2005).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 579–580.

11. *Id.* at 580–581.

12. H. Comm. on the Jud., *General Aviation and Revitalization Act of 1994*, H.R. Rpt. 103-525(II) at 4 (June 24, 1994).

13. H. Comm. on Pub. Works & Transp., *General Aviation and Revitalization Act of 1994*, H.R. Rpt. 103-525(I) at 3 (May 24, 1994). "[E]ven though a claimant is unlikely to be successful in a lawsuit against the manufacturer of an aircraft [that] is more than [eighteen] years old, these suits are frequently filed." *Id.*

late courts have denied aviation manufacturers' petition for writ of certiorari from an order denying dismissal based on GARA, which essentially robs a manufacturer of any hope of avoiding costly litigation.[14] Although the Authors propose that such a result is contrary to GARA's purpose, courts in America are split on whether GARA's protection provides a basis for an interlocutory appeal in such circumstances.[15]

In 2010, the First District Court of Appeal became the first Florida appellate court to tackle the issue of whether to grant certiorari stemming from a GARA denial.[16] It ultimately denied the defendant manufacturer's petition because it found that a denial of summary judgment based on GARA did not constitute "immediate harm of the type that GARA was enacted to prevent that cannot be remedied on appeal."[17]

This rationale cannot be easily reconciled with the explicit purpose of GARA—namely, to prevent manufacturers from having to expend money in defending products that were over eighteen years old at the time the cause of action arose.[18] If there can be no immediate appeal of a denial of a GARA-based dismissal, the purpose of GARA is lost because the money GARA intends to save manufacturers will have been spent in litigation costs before the denial can be brought up for appellate review. Conversely, if the defense of the product is successful at the trial court level, there will be no need to raise the GARA denial for an appeal, but again, the manufacturer will first have to endure costly litigation.

This Article explains GARA's purpose and history and discusses why certiorari review for GARA denials is in harmony with GARA's purpose. Part I explains the history, purpose, and policy behind GARA, concluding that GARA's legislative history demonstrates that the primary focus of the Act was to relieve

14. *E.g. Robinson v. Hartzell Propeller, Inc.*, 454 F.3d 163, 174 (3d Cir. 2006).

15. *See e.g. id.* (declining to permit interlocutory appeal of a trial court's rejection of GARA's applicability); *Est. of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1111 (9th Cir. 2002) (concluding that an appeal from a GARA denial "falls within the collateral order doctrine" and thus grants an appellate court jurisdiction over the appeal); *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 433 (Pa. 2006) (holding that the "substantial cost" incurred in defending GARA-based litigation "comprises a sufficient loss [under the collateral order doctrine] to support allowing interlocutory appellate review as of right").

16. *Avco Corp. v. Neff*, 30 So. 3d 597, 602 (Fla. 1st Dist. App. 2010).

17. *Id.* at 604.

18. *See* H.R. Rpt. 103-525(I) at 1 (noting that GARA was "designed to limit excessive product liability costs" by establishing an eighteen-year statute of repose for civil actions stemming from accidents involving general aviation aircraft).

general aviation aircraft manufacturers of unnecessary defense costs. Part II briefly outlines how GARA works when it is applied to an aircraft or component part manufacturer. Part III details the three major cases leading up to the *Avco Corp. v. Neff*[19] decision. Part IV details the ruling and rationale of the First District Court of Appeal's decision in *Neff*. Finally, Part V explains why granting writs of certiorari for non-final orders denying a GARA dismissal constitutes a rational review policy.

I. HISTORY, PURPOSE, AND POLICY BEHIND GARA

The general aviation industry[20] is a widely overlooked, yet important, component of the United States' air transportation system and economy. Most of the nation's perception of the general aviation industry focuses on cargo and commercial passenger airlines.[21] Just as important, however, is the general aviation industry, which boasts the majority of aviation operations outside of commercial and military flight.[22] In fact, in 2001, general aviation accounted for three out of four takeoffs and landings and "[ninety-six] percent of all civilian aircraft."[23]

The general aviation industry was not always this successful, and in the late 1980s, the general aviation manufacturing industry bordered on extinction.[24] This was a striking decline from the industry's heyday during World War II and the years that followed. In 1946, the general aviation manufacturing industry built

19. 30 So. 3d 597.

20. "General aviation . . . is defined as all aviation other than military and commercial airlines." Gen. Aviation Mfrs. Ass'n, *What is GA?* http://www.gama.aero/what-ga (accessed Apr. 5, 2013). "Its tens of thousands of aircraft include corporate jets, medical-evacuation helicopters, and airplanes owned by recreational fliers and hobbyists. Three out of every four takeoffs and landings in the United States belong to general aviation flights." U.S. Gen. Acctg. Off., GAO-01-916, *General Aviation: Status of the Industry, Related Infrastructure, and Safety Issues* 2 (Aug. 2001) (available at http://www.gao.gov/assets/160/157174.pdf) [hereinafter GAO Report 2001].

21. GAO Report 2001, *supra* n. 20, at 10.

22. *Id.* In fact, the public's attention to general aviation usually results from an accident involving a celebrity or other well-known individual, such as the tragic 1999 aircraft crash that took John F. Kennedy, Jr.'s life. *Id.*

23. *Id.*

24. By the late 1980s, three general aviation manufacturing giants were struggling—the companies of aviation superstars Clyde Cessna, William Piper, and Walter Beech. Shelley A. Ewalt, *Et Resurrexit: GARA and the Trio of Cases on Collateral Review*, 46 Duq. L. Rev. 177, 178 (2008). "Cessna no longer manufactured single-engine aircraft, Piper was in bankruptcy, and Beech had closed much of its piston manufacturing line." *Id.*

35,000 aircraft to fight in the war.[25] Following the war, the industry continued to improve until its peak at the end of the 1970s.[26] At that time, there were twenty-nine aircraft manufacturers producing general aviation aircraft, and the industry boasted over two billion dollars in revenues yearly.[27] The effect on the economy was substantial, as general aviation and its related industries employed over 540,000 people and contributed upwards of forty billion dollars to the United States economy annually.[28]

From 1978 to 1994, however, the industry plummeted and "shrank to less than a tenth of its former self."[29] Pilot activity, flying hours, and aircraft production had fallen drastically.[30] The most spectacular decrease occurred in the manufacturing industry, as general aviation aircraft shipments by manufacturers fell from 18,000 to 928 over those sixteen years.[31] A likely correlation to this manufacturing decline was that the number of Americans employed in this industry fell sixty-five percent, which put thousands of individuals out of work.[32]

Experts attributed this decline to economic downturn and lifestyle changes that diminished public interest in flight.[33] The factor that received the most attention as a reason for the decline

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25. *Id.* at 177.

26. Victor E. Schwartz & Leah Lorber, *The General Aviation Revitalization Act: How Rational Civil Justice Reform Revitalized an Industry*, 67 J. Air L. & Com. 1269, 1273 (2002).

27. *Id.*

28. *Id.*

29. Ewalt, *supra* n. 24, at 178.

30. GAO Report 2001, *supra* n. 20, at 4.

31. *Id.* "The piston-engine segment of the industry was hardest hit, experiencing a decline in sales from approximately 14,000 to 555." Rodriguez, *supra* n. 5, at 578. Coupled with this decline in sales, jobs across the country declined by more than 100,000 in general aviation manufacturing and related industries. H.R. Rpt. 103-525(I) at 2. "In 1978, the industry manufactured 18,000 general aviation aircraft and employed 6,000 workers. In 1992, the industry manufactured only 900 general aviation aircraft and employed only 1,000 workers." Schwartz & Lorber, *supra* n. 26, at 1274 (footnote omitted).

32. GAO Report 2001, *supra* n. 20, at 5. During this time, most, if not all, of the indicators of general aviation manufacturing were on the decline. *Id.* In conjunction with the steep decline in manufacturers' shipments of aircraft and employment rate,

> [t]he size of the active general aviation fleet dropped by one[ ]quarter between 1980 and 1994, from about 200,000 aircraft to about 150,000. The number of pilot licenses and the number of hours flown in general aviation also declined steadily between 1980 and 1994. For example, the number of student pilot licenses decreased more than one third, from 150,000 in 1980 to 96,000 in 1994.

Id.

33. *Id.* at 4.

in the industry was the high costs associated with liability issues.[34] As the annual sales of general aviation aircraft continued to decline, the number of suits against aircraft manufacturers significantly increased.[35] The product liability costs skyrocketed "from twenty-four million dollars in 1978 to more than [two hundred] million [dollars] in 1992."[36] What is most remarkable is that the manufacturers were targeted for suit even for planes that had been in service since the 1940s.[37] The lawsuits that spawned from accidents involving the tens of thousands of aircraft manufactured since the 1940s created a "'long tail of liability'" for the general aviation industry.[38] These exorbitant liability costs are credited as the greatest contribution to the overall decline in the general aviation industry during this time frame.[39]

As a result of this "long tail of liability," it became progressively difficult for general aviation manufacturers to secure product liability insurance.[40] This forced major manufacturers to

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34. *Id.* Critics of GARA's enactment argued before the House Judiciary Committee "that there [were] a number of factors, wholly unrelated to liability, that [were] to blame for the industry's sales decline." H.R. Rpt. 103-525(II) at 5. Critics pointed to such factors as:

> (i) elimination of the investment tax credit and imposition of a [ten] percent luxury tax (repealed last year), (ii) increased industry emphasis on more profitable private jets, (iii) competition from unassembled 'kit' versions of piston-engine aircraft, high quality used aircraft, and widely available commercial flights, and (iv) a decline in trained pilots.

Id.

35. Rodriguez, *supra* n. 5, at 578.

36. *Id.* at 578–579 (footnote omitted).

37. *Id.* at 578.

38. *Id.*; *see also* 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, 311 (1995) (noting that "the 1994 House Committee on the Judiciary report on the Bill makes clear that GARA's goal is to cut off the product liability tail for general aviation manufacturers of aircraft and component parts after eighteen years").

39. *See e.g.* Rodriguez, *supra* n. 5, at 579–580 (discussing how the liability tail was the sole reason that Cessna halted its single-engine aircraft production). "Cessna, Piper, and Beech[, together with] their primary trade association, GAMA, [deserve credit for] doing a superlative job of creating the impression of an industry under siege by out-of-control litigation." Ewalt, *supra* n. 24, at 178 n. 5. In fact, Russell Meyer, Jr., Cessna's CEO, testified at the House Judiciary Committee's hearing and "described a general aviation industry that was in a state of precipitous economic decline." H.R. Rpt. 103-525(II) at 5. During that hearing, Cessna's CEO stated that if GARA were adopted, Cessna would, on that very day, once again begin manufacturing single-piston aircraft, which he suggested would create at least 25,000 jobs in five years. *Id.*

40. Rodriguez, *supra* n. 5, at 579. As one insurance underwriter said, "'We are quite prepared to insure the risks of aviation, but not the risks of the American legal system.'" *Id.* (quoting Robert Martin, *General Aviation Manufacturing: An Industry under Siege*, in

self-insure, which had crippling consequences for these manufacturers.[41] For example, "Cessna Aircraft Company was the world's largest piston-powered aircraft manufacturer" from the 1960s to the mid-1980s.[42] Then, in 1986, Cessna ceased manufacturing general aviation aircraft.[43] Despite the fact that Cessna did not produce a single-piston-engine airplane for the next eight years, Cessna spent almost $25,000,000 in defense costs alone.[44] For those manufacturers who still continued to produce general aviation aircraft, the self-insurance costs of defense alone added $70,000 to $100,000 to the price of each new airplane.[45] Foreign companies, however, were not faced with these same issues, which led to trade imbalances between the United States manufacturers and their foreign competition.[46]

In 1994, Congress recognized the impact that the decline of the industry was having on the United States economy, including the significant job loss and trade imbalances with foreign companies, and enacted GARA, a federal statute of repose that the aviation industry has dubbed "the most significant tort reform the general aviation community has seen."[47] In passing GARA, Con-

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The Liability Maze: The Impact of Liability Law on Safety and Innovation 478, 483–484 (Peter H. Huber & Robert E. Litan eds., Brookings Inst'n Press 1991)).

41. *Id.* at 579–580.

42. *Id.* at 579.

43. *Id.*

44. *Id.* The Congressional Record of GARA makes clear that Congress took note of these exorbitant costs. The Record states in part:

> [E]ven though a claimant is unlikely to be successful with a lawsuit against the manufacturer of an older aircraft, these suits are frequently filed. Manufacturers incur substantial expenses in defending or settling the cases.
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> Beech Aircraft spent over $100 million in legal fees over four years to defend itself from 203 product liability lawsuits. This, despite the fact that in none of those cases did the National Transportation Safety board find Beeches' Aircraft to be defective. These added costs have forced many manufacturers to curtail production and have forced many potential aircraft purchasers completely out of the market.

140 Cong. Rec. H4997, H5000 (daily ed. June 27, 1994).

45. Rodriguez, *supra* n. 5, at 580.

46. *Id.*

47. Gen. Aviation Mfrs. Ass'n, *supra* n. 20; *see* Rodriguez, *supra* n. 5, at 580–581 (discussing Congress' approach to resolving general aviation industry's liability concerns). In creating this statute of repose, the 1994 House Committee on the Judiciary report was cautious not to create procedural and judicial confusion. H.R. Rpt. 103-525(II) at 4. The Committee explained that it was treading carefully in choosing to preempt state liability law and noted that in prior years, a number of state legislatures had enacted legislation intending to "limit perceived abuses in their own systems of tort law." *Id.* For example, states had enacted legislation limiting noneconomic damages, removed or changed joint

gress' goal was to "boost the industry by placing limitations on product liability lawsuits against aircraft manufacturers."[48] By limiting those liability costs, Congress aimed to revitalize the general aviation industry and breathe new life into the economy without any significant costs created by the government.[49]

The legislative history behind GARA[50] reflects Congress' concern over the negative impact from

> the enormous product liability costs that our tort system had imposed upon manufacturers of general aviation aircraft. It believed that manufacturers were being driven to the wall because, among other things, of the long tail of liability attached to those aircraft, which could be used for decades after they were first manufactured and sold.[51]

Congress found that there had been a significant decline in the manufacture and sale of general aviation aircraft and aircraft parts in the United States.[52] Congress recognized that "[a]n important cause of this decline has been the tremendous increase in the industry's liability insurance costs."[53] This cost increase posed "a serious threat to the position of the United States manufacturers versus their foreign competitors."[54]

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and several liability and the collateral source rule, limited attorneys' contingent fees, and required periodic payments of future damages. *Id.* The Committee also explained that a number of states had enacted statutes of repose. *Id.* Mindful of these state reforms, the Committee explained that it chose to extend a very limited federal preemption of state law in the context of general aviation liability. *Id.*

48. GAO Report 2001, *supra* n. 20, at 2.

49. *Id.* at 3. Russell Meyer, Jr., Cessna's CEO, testified at the House Judiciary Committee's hearing that enacting GARA would help create more than 25,000 jobs in five years without any cost to the government. H.R. Rpt. 103-525(II) at 5.

50. Courts considering motions for summary judgment under GARA have found "that it is appropriate to consider [c]ongressional purposes and GARA's legislative history in interpreting this remedial legislation." *Pridgen v. Parker Hannifin Corp.*, 916 A.2d 619, 622 (Pa. 2007).

51. *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084 (9th Cir. 2001); *U.S. Aviation Underwriters Inc. v. Nabtesco Corp.*, 697 F.3d 1092, 1098 (9th Cir. 2012) (noting that "Congress made plain that the statute of repose was designed to protect manufacturers of aircraft and of component parts alike"). "Indeed, every [c]ongressional report in the legislative record expresses this intent." *Id.*

52. H.R. Rpt. 103-525(I) at 1; H.R. Rpt. 103-525(II) at 5; Sen. Comm. on Com., Sci. & Transp., *General Aviation Revitalization Act of 1993*, Sen. Rpt. 103-202 at 1–4 (Nov. 20, 1993).

53. H.R. Rpt. 103-525(I) at 1.

54. *Id.* at 2.

The 1994 House Judiciary Committee noted that general aviation is unique because it is exclusively, and thoroughly, regulated by the federal government.[55] The Federal Aviation Authority (FAA) must certify planes, manufacturers, mechanics, and even pilots.[56] Given that extensive regulation, the Committee explained that any design or manufacturing defects that do exist are quickly discovered, and corrective action is ordered.[57] Congress learned in hearings that nearly all manufacturing defects are discovered in the "early years of an aircraft's life."[58] Congress particularly took issue with the fact "that only [one] percent of general aviation accidents [were] caused by design or manufacturing defects,"[59] yet manufacturers endured lawsuits based on these alleged defects for decades.[60]

Congress concluded that the most effective means for accomplishing the desired revitalization was to protect the manufacturers from specious litigation on aging aircraft.[61] Most aircraft and aircraft-component defects are discovered within the first few years of their manufacture; therefore, Congress found that "[i]t is extremely unlikely that there will be a valid basis for a suit against the manufacturer of an aircraft that is more than [eighteen] years old."[62] As such, Congress enacted GARA to deter litigants from filing lawsuits with an extortionist expectation that "the manufacturers will settle to avoid the expense of litigation."[63]

The House Judiciary Committee confirmed that GARA

> makes clear that, once a general aviation aircraft or component part crosses the specified age threshold, . . . the possibility of any act or omission on the part of its manufacturer in its capacity as a manufacturer—including any defect in the air-

55. H.R. Rpt. 103-525(II) at 5.

56. *Id.*

57. H.R. Rpt. 103-525(I) at 3.

58. 140 Cong. Rec. at H5000. "Design and manufacture are regulated by the FAA, which will order corrective action where defects are revealed. The regulatory system has been very effective." *Id.*

59. *Id.* (citing data by the National Transportation Safety Board).

60. *See id.* at H4999 (discussing how manufacturers have defended lawsuits, for example, regarding forty-seven-year-old aircraft).

61. H.R. Rpt. 103-525(I) at 3.

62. *Id.*

63. *Id.* In support of this conclusion, the Committee on Public Works and Transportation explained that "[m]anufacturers incur substantial expense from these cases. Beech Aircraft testified that the average cost of litigation was $500,000 per case, even though Beech was generally successful in defending the case." *Id.*

> craft or component part—ceases to be material or admissible in any civil action . . . .[64]

Thus, GARA effectively "create[d] a national statute of repose and serves a gatekeeping function" with respect to specious state law actions involving aging aircraft.[65] Given those findings, the Legislature determined that it should impose, "in this exceptional instance, a very limited [f]ederal preemption of [s]tate law."[66]

II. THE GENERAL AVIATION REVITALIZATION ACT OF 1994

GARA provides an eighteen-year federal statute of repose on civil actions for death, injury, or damage to property, relating to general aviation aircraft and their component parts.[67] As detailed in Sections 2(a)(1) and 2(a)(2) of GARA, there are two different trigger dates for GARA's eighteen-year statute of repose. The first trigger date is the date the aircraft is delivered to its first purchaser or lessee, or an entity engaged in selling or leasing aircraft.[68]

Recently, in *United States Aviation Underwriters Inc. v. Nabtesco Corp.*,[69] the Ninth Circuit Court of Appeals delivered a huge victory to the aviation industry when the court construed the first trigger date described in Section 2(a)(1)(A).[70] *Nabtesco* was a subrogation action in which United States Aviation Underwriters Incorporated (USAU) charged that the aircraft accident at issue had "resulted from a defective component part, an actuator, manufactured by Nabtesco."[71] The district court granted summary

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64. H.R. Rpt. 103-525(II) at 6–7.

65. *Wright v. Bond-Air, Ltd.*, 930 F. Supp. 300, 302 (E.D. Mich. 1996).

66. H.R. Rpt. 103-525(II) at 4.

67. In pertinent part, GARA states that

> [e]xcept as provided in subsection (b), no civil action for damages for death or injury to persons or damage to property arising out of an accident involving a general aviation aircraft may be brought against the manufacturer of the aircraft or the manufacturer of any new component, system, subassembly, or other part of the aircraft, in its capacity as a manufacturer if the accident occurred—
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> (1) after the applicable limitation period . . . .

GARA § 2(a). The "limitation period" is defined as "[eighteen] years with respect to general aviation aircraft and the components, systems, subassemblies, and other parts of such aircraft." *Id.* at § 3(3).

68. *Id.* at § 2(a)(1).

69. 697 F.3d 1092.

70. *Id.* at 1094.

71. *Id.*

judgment to Nabtesco, finding that GARA's eighteen-year statute of repose barred USAU's action.[72] On appeal, USAU argued that GARA's "statute of repose ran not from the delivery date of the aircraft in which the actuator was installed originally, but rather the delivery date of the aircraft that experienced the accident."[73] The court disagreed, holding that the statue of repose began ticking when the "date that the component part, along with the aircraft in which it was installed originally, was delivered to its first purchaser."[74] In so holding, the court engaged in a thorough analysis of the object and policy of the statute, recognizing that "Congress enacted GARA because it was 'deeply concerned about the enormous product liability costs suffered by manufacturers.'"[75]

Separately, GARA's second trigger date, commonly referred to as the "'rolling trigger date,' occurs when a new component, which is alleged to have caused the accident, replaces an existing component of the aircraft or is added to the plane."[76] In sum, this

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72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1097 (quoting *Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 951 (9th Cir. 2008)). Interestingly, the *Nabtesco* plaintiff was United States Aviation Underwriters Inc., an aviation insurance company that remains a "leading provider of insurance to all segments of the aviation and aerospace industry." U.S. Aircraft Ins. Group, https://www.usau.com/ (accessed Apr. 5, 2013). It remains a mystery then why USAU argued in *Nabtesco* that the statute of repose found in GARA ran from the delivery date of the aircraft that experienced the accident rather than the delivery date of the aircraft in which the actuator was installed originally. *See Nabtesco*, 697 F.3d at 1096 (detailing USAU's argument). While this argument certainly served USAU's interests in the subrogation context in *Nabtesco*, if successful, this argument would have undercut the GARA defense in countless other cases in which USAU is the insurer.

76. *Nabtesco*, 697 F.3d at 1096. "Since almost every major component of the aircraft will be replaced over its lifetime, the 'rolling' aspect of the statute of repose was intended to provide that victims and their families would have recourse against the manufacturer of the new component part . . . ." *Robinson v. Hartzell Propeller Inc.*, 326 F. Supp. 2d 631, 663 (E.D. Pa. 2004) (quoting *Burroughs v. Precision Airmotive Corp.*, 93 Cal. Rptr. 2d 124, 132 (Cal. App. 4th 2000)) (internal quotation marks omitted). Mere overhaul or merely removing a part for maintenance and returning that part onto the aircraft, however, is not sufficient to toll GARA:

> A holding that would toll the statute of repose on a product on account of an overhaul of a critical component of that product would effectively eviscerate the statute of repose as it applied to many types of products. For example, aircraft are required by statute to be routinely overhauled, and certain critical parts must be repaired or replaced on a regular basis. If every time a critical component was overhauled, or even replaced, the statute of repose began anew, thus permitting an individual to sue for a design flaw, then the manufacturer of the aircraft would never be afforded the protection of the statute of repose.

trigger provision permits claims against manufacturers of new or replacement parts, components, or subassemblies added to the aircraft within eighteen years before the accident.[77] Thus, if a new or replacement part is installed on an aircraft within the original eighteen-year period of repose, the repose period 'rolls' and begins again as to the manufacturer of that newly installed part, if the accident at issue was caused by that part.[78]

In addition, GARA has four major exceptions.[79] The statute of repose does not apply in cases in which: (1) the manufacturer misrepresents specific safety information to the FAA; (2) the plaintiff was a passenger in the aircraft for purposes of receiving medical or emergency treatment; (3) the plaintiff was not aboard the aircraft; and (4) actions are brought pursuant to the manufacturer's written warranties.[80]

After GARA was enacted, the general aviation industry rebounded. Russ Meyer, Chairman Emeritus of Cessna Aircraft Company, stated that "[b]y placing a practical limit on product

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Id. (quoting *Butchkosky v. Enstrom Helicopter Corp.*, 855 F. Supp. 1251, 1255 (S.D. Fla. 1993) (applying the Florida Statute of Repose in analogous circumstances)). Where GARA's rolling provision does apply, it "only restarts the repose period for claims against the manufacturer of a new [or replacement] part that actually caused the crash." *Sheesley v. Cessna Aircraft Co.*, 2006 WL 1084103 at *4 (D.S.D. Apr. 20, 2006).

77. GARA § 2(a)(2). In *Estate of Grochowske v. Romey*, the Court of Appeals of Wisconsin agreed with a growing number of courts and concluded that GARA's statute of repose bars both an action based on a design flaw in a component and an action for failure to warn of, or provide proper instructions to remedy, that flaw. 813 N.W.2d 687, 700 (Wis. App. Dist. II 2012). Accordingly, the court concluded that GARA's eighteen-year statute of repose applied to the plaintiff's claims based on the component maintenance manual. *Id.*

78. *See e.g. Campbell v. Parker-Hannifin Corp.*, 82 Cal. Rptr. 2d 202, 209–210 (Cal. App. 1st Dist. 1999) (discussing GARA's replacement part provision in light of GARA's "rolling" nature). For the rolling feature to apply, a plaintiff must: (1) identify a new or replacement part that was placed on the subject aircraft within eighteen years before the accident; (2) direct his or her claims at that part's manufacturer; and (3) establish that the replacement part caused his or her injury. GARA at § 2(a)(2).

79. Once the defendant makes an initial showing of proof that GARA bars the action, the burden then shifts to the plaintiff to provide evidence that one of the exceptions applies. *Cassoutt v. Cessna Aircraft Co.*, 660 So. 2d 277, 280 (Fla. 1st Dist. App. 1995).

80. GARA § 2(b)(1)–(4). The first exception, known as the "fraud exception," can make GARA inapplicable if the plaintiff "pleads with specificity the facts necessary to prove," and actually proves, that the defendant defrauded the FAA regarding the airworthiness certificate procedures of the identified part or component of the aircraft that allegedly caused the accident. *Id.* at § (2)(b)(1). Courts that have addressed this exception have noted that it has "very particular requirements," *Cartman v. Textron Lycoming Reciprocating Engine Division*, 1996 WL 316575 at *3 (E.D. Mich. Feb. 27, 1996), and that it requires clear pleading and proof of facts amounting to fraud on the FAA, not just disagreements on alternative designs. *See Rickert v. Mitsubishi Heavy Indus., Ltd.*, 929 F. Supp. 380, 381 (D. Wyo. 1996) (holding that a genuine issue of material fact precluded summary judgment).

liability exposure, Congress literally brought the light aircraft industry back to life."[81] Experts agree that this decline in general aviation reversed in the years following GARA's enactment.[82] The manufacturing of general aviation aircraft has shown a marked increase.[83] New aircraft shipments tripled from 1994 to 2000, going from 928 to 2,816.[84] In addition, the number of products liability cases has dwindled, and manufacturing of piston aircraft has increased nearly fourfold between 1994 and 2000.[85] Experts attribute the upward trends in general aviation post-GARA to a reduction in the "manufacturers' liability concerns, leading to a rebound in the manufacturing industry."[86]

III. CASES LEADING UP TO NEFF

While interlocutory review of a GARA order was an issue of first impression in Florida's state courts prior to the *Neff* decision, other jurisdictions had previously recognized the need for immediate review.

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81. Gen. Aviation Mfrs. Ass'n, *supra* n. 20 (internal quotation marks omitted). Other executives have made similar comments. Ed Bolen, President and CEO of the National Business Aviation Association, stated: "GARA is a tiny, three-page bill that has generated research, investment[,] and jobs. It is an unqualified success." *Id.* Chuck Suma, President and CEO of The New Piper Aircraft, Inc., stated: "If not for GARA, there is some question as to whether general aviation would be the thriving industry it is today." *Id.* Phil Boyer, President of the Aircraft Owners and Pilots Association, stated: "Pilots have benefited from the increased production of piston aircraft from existing companies that stayed the course[ ] and new entrants to the marketplace." *Id.* Alan Klapmeier, President and CEO of Cirrus Design Corporation, stated: "GARA was an important first step to help our industry." *Id.*

82. GAO Report 2001, *supra* n. 20, at 4.

83. *Id.*

84. *Id.* Aircraft prices, however, did not fall in the years after GARA. *Id.* The average price of a new piston aircraft, for example, "increased from $162,000 in 1994 to $220,000 in 1999, an increase of [twenty-five] percent in constant dollars." *Id.*

> In addition to GARA, experts attributed the growth in manufacturing indicators and less-strong growth in other indicators to a number of factors with mixed implications, including the popularity of a new type of aircraft ownership called fractional ownership, the strong economy, the continued high price of aircraft, and the same lifestyle changes that contributed to the pre-GARA slump.

Id.

85. *Id.* at 6. The GAO experts have "rated GARA as the most significant contributor" to the rise in general aviation manufacturing. *Id.* Other factors contributing to the rise include the development of fractional ownership plans for business aircraft and the national economy's growth. *Id.*

86. *Id.* at 4.

A. *Estate of Kennedy v. Bell Helicopter Textron, Inc.*[87] Establishes That the Denial of a GARA Summary Judgment Motion Is a Reviewable Collateral Order

In *Estate of Kennedy*, the Ninth Circuit Court of Appeals established the use of collateral review of GARA denials.[88] In 2002, eight years after GARA's passage, the Ninth Circuit was confronted with a then-novel defense argument. The litigation in *Estate of Kennedy* stemmed from the crash of a TH-1L helicopter[89] in Washington state.[90] The helicopter was a Navy surplus rotor craft, which was originally manufactured by Bell Helicopter (Bell) and delivered to the United States Navy in 1970.[91] At the time of the accident, Robin Grant Kennedy was using the helicopter for aerial logging[92] and had been using the aircraft for heavy log lifting for the previous eighteen months.[93] Midair, the helicopter came apart when Kennedy tried to initiate a log lift cycle from a hover, which caused the vertical stabilizer to separate from the aircraft and caused the aircraft to crash.[94] Kennedy was killed in the accident, which was later determined to be the result of a structural failure "caused by a fatigue crack that developed in a component of the tail boom known as the left forward vertical fin

87. 283 F.3d 1107.

88. *Id.* at 1110–1111 (concluding that "[a]n appeal from an adverse decision of the district court by a party claiming GARA protection falls within the collateral order doctrine, and we therefore have jurisdiction to consider [such an] appeal").

89. Under GARA, helicopters are considered "aircraft" subject to the statute of repose. GARA § 2(c).

90. 283 F.3d at 1109.

91. *Id.* at 1111.

92. Aerial logging is "[t]he removal of logs from a timber harvest area by helicopter, which allows access to previously inaccessible sites but causes less environmental damage because fewer access roads need to be built." Oxford Ref., *Overview, Aerial Logging, Quick Reference*, http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095353713 (accessed Apr. 5, 2013).

93. Accident Rpt. No. NYC99FA187 (Nat'l Transp. Safety Bd., Dec. 4, 2000) (available at http://www.ntsb.gov/aviationquery/brief.aspx?ev_id=20001212X19611&key=1).

94. *Id.* The National Transportation Safety Board (NTSB) determined the probable cause of the accident as:

> Fatigue failure of the vertical stabilizer spar cap and subsequent loss of the rotorcraft's vertical stabilizer. Factors include inadequate inspection or trouble-shooting of the aircraft tail cone and vertical stabilizer at and after the time sheet-metal skins were stop-drilled and rivets were replaced, and repetitive cycles associated with helicopter logging operations.

Id.

spar."[95] At the time the helicopter was involved in the crash, it had been twenty-six years since the helicopter was first delivered to the military.[96]

Kennedy's estate brought a wrongful death action. The parties filed cross motions for summary judgment, with Bell arguing it was entitled to summary judgment pursuant to GARA because the accident occurred twenty-six years after the original delivery.[97] The plaintiff, however, contended that "GARA's eighteen-year period did not begin to run until 1986, when the helicopter was first type certified and received its first airworthiness certificate."[98] The district court agreed with the plaintiff and denied summary judgment to Bell.

Even though the decision of the district court was not final, Bell filed a notice of appeal challenging the summary judgment order. Bell argued that appellate jurisdiction existed for the GARA statute of repose claim under the collateral order doctrine.[99] In order for an appeal to fall in the narrow class of appealable collateral orders, under the federal standard, "a district court decision must be conclusive, resolve important questions completely separate from the merits, and render such important questions effectively unreviewable on appeal from a final judgment in the underlying action."[100] The Ninth Circuit easily determined that the first two factors were met, straightforwardly finding the order conclusive and that the applicability of GARA's statute of repose was an important question that is resolved completely separate from the litigation's merits.[101] In so doing, the

95. *Est. of Kennedy*, 283 F.3d at 1109.

96. *Id.* at 1112.

97. *Id.*

98. *Id.* Since the helicopter "began its service as a military aircraft, it was not at that time a general aviation aircraft." *Id.* Instead, it was a "public aircraft" under 49 U.S.C. Section 40102(a)(41), which defines "public aircraft" as those, among other things, that are "used only for the United States Government," until it received its type and airworthiness certificates. *Id.* at 1112 (citing to 49 U.S.C. § 40102(a)(41) (2012)). Based on this technicality, the plaintiff argued that the period of repose only begins to run on military surplus aircraft at the time when they "become" general aviation aircraft. *Id.* The Ninth Circuit disagreed, reasoning that the plain language of GARA supported Bell's position that the limitations period began when the aircraft was initially delivered. *Id.*

99. *Id.* at 1110. The collateral order doctrine establishes "'a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system[,] nonetheless be treated as final.'" *Id.* (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)).

100. *Id.*

101. *Id.*

court likened the GARA issue to the issue of qualified immunity afforded to government officials, which is an immunity that also receives statutory protections.[102] The court went on to address the third requirement, ruling that even under a "stringent approach"[103] to the collateral review doctrine, "the GARA statute of repose meets the third condition . . . because it creates an explicit statutory right not to stand trial[,] which would be irretrievably lost should Bell Helicopter be forced to defend itself in a full trial."[104]

In doing so, the court acknowledged that Congress' intent was to "lift[ ] the requirement that manufacturers abide the *possibility of litigation* for the indefinite future when they sell an airplane."[105] The majority rejected the plaintiff's argument that the statute of repose was more akin to a statute of limitations.[106] The court thus likened the statute of repose to the right not to be tried, reasoning:

> It is clear that an essential aspect of the GARA statute of repose is the right to be free from the burdens of trial. An appeal from an adverse decision of the district court by a party claiming GARA protection falls within the collateral order doctrine, and we therefore have jurisdiction to consider Bell Helicopter's appeal.[107]

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102. *Id.* Federal courts have held that parties can immediately appeal certain decisions that impede important constitutional or statutory provisions or a competing public policy rationale. The courts have likened these rights to a right to complete immunity from suit and as such, have allowed immediate appeals from non-final orders affecting those rights. *See e.g. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (noting that an entity's appeal of a denial of qualified immunity under the Eleventh Amendment was immediately appealable); *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (holding that a criminal defendant's appeal of a denial of a motion to dismiss an indictment premised on the Constitution's Speech and Debate Clause was immediately appealable); *Abney v. United States*, 431 U.S. 651, 662 (1977) (concluding that a criminal defendant's appeal of a denial of a motion to dismiss on the grounds that an indictment violated double jeopardy protections was immediately appealable).

103. The court in *Estate of Kennedy* cited and respected the Supreme Court's direction in *Digital Equipment Corp.*, in which the Court characterized the collateral order doctrine as a narrow exception that should "'never be allowed to swallow the general rule that a party is entitled to a single appeal to be deferred until final judgment has entered, in which claims of district court error at any stage of the litigation may be ventilated.'" 283 F.3d at 1110 (quoting 511 U.S. at 868).

104. *Id.*

105. *Id.* at 1110–1111 (emphasis in original).

106. *Id.* at 1111.

107. *Id.*

One judge dissented from the opinion, arguing that the majority's decision "impermissibly expand[ed] the collateral order doctrine."[108] Judge Paez argued that the statute of repose language in GARA, which states "no civil action . . . may be brought," was akin to the language used in the federal statute of limitations found at 28 U.S.C. Section 1658.[109] Judge Paez thus reasoned that by using this language, Congress meant to confer in GARA only a defense to liability, "not immunity from suit and a collateral appeal right."[110]

B. *Robinson v. Hartzell Propeller, Inc.*[111] Rejects Collateral Review of GARA

In *Robinson*, in an issue of first impression,[112] the Third Circuit held that the district court's denial of summary judgment based on GARA did "not fall under the collateral order doctrine."[113] In *Robinson*, Hartzell manufactured the aluminum propeller at issue on August 8, 1974, which was twenty-five years prior to the incident at issue.[114] The propeller was installed in a Mooney M20E aircraft that Wendy and Michael Robinson later purchased.[115] During a flight on August 15, 1999, the helicopter's propeller fractured, and the aircraft crashed, severely injuring Mrs. Robinson and paralyzing Mr. Robinson.[116] The Robinsons sued Hartzell, alleging theories of negligence and products liability.[117]

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108. *Id.* at 1113 (Paez, J., dissenting).

109. *Id.* at 1115 (emphasis omitted) (quoting GARA § 2(a)) (internal quotation marks omitted). 28 U.S.C. Section 1658 (2006) provides time limits for the commencement of civil actions that arise under Acts of Congress.

110. *Id.*

111. 454 F.3d 163.

112. The Third Circuit had never before decided "whether an order denying summary judgment on a statute of repose defense qualifie[d] as a collateral order under *Cohen* and its progeny." *Id.* at 169 (referring to *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)).

113. *Id.* at 165.

114. *Id.*

115. *Id.*

116. *Id.* "[T]here ha[d] been approximately forty prior blade failures involving the same propeller/engine combinations as the one at issue" in *Robinson*. *Id.* at 167. The Robinsons argued that Hartzell had previously "blamed other factors—particularly pilot error—instead of disclosing" to the FAA the existence of the propeller/vibration engine problem. *Id.*

117. *Id.* at 165.

After discovery, Hartzell moved for summary judgment, arguing that GARA's statute of repose barred the suit.[118] The Robinsons sought to avoid a GARA dismissal and argued that they could bring their suit under an exception to GARA based on several alleged material misrepresentations made by Hartzell during the type certificate process for the propeller at issue.[119] The district court agreed and denied Hartzell's motion based on a material issue of fact as to whether the GARA exception applied.[120] Hartzell immediately appealed, urging the Third Circuit "to reach the merits of the [d]istrict [c]ourt's decision under the collateral [review] doctrine."[121]

On appeal, the Third Circuit first noted that its jurisdiction as an appellate court over a district court's final order stemmed from 28 U.S.C. Section 1291.[122] The court then explained the longstanding principle that the "denial of a motion for summary judgment does not qualify as a final order" entitled to immediate review because it is a decision that merely permits litigation to continue, not a decision that finally decides a case.[123] The court then described how in *Cohen v. Beneficial Industrial Loan Corp.*,[124] the United States Supreme Court instructed that

> [Section] 1291 is to be given a "practical rather than a technical construction," and that there is a "small class" of non-final orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[125]

The court then cited the three requirements for collateral review of a non-final order—that "the order: (1) conclusively determines a disputed legal question[;] (2) resolves an important issue"

118. *Id.* at 167.
119. *Id.* at 165. The plaintiffs were trying to take advantage of the exception found in GARA § 2(b)(1).
120. *Id.* at 167.
121. *Id.* at 167–168.
122. *Id.* at 168.
123. *Id.* (citing *Hamilton v. Leavy*, 322 F.3d 776, 782 (3d Cir. 2003)).
124. 337 U.S. 541.
125. *Robinson*, 454 F.3d at 168 (quoting *Cohen*, 337 U.S. at 546).

entirely separate from the merits; "and (3) is effectively unreviewable on appeal from a final judgment."[126]

The Third Circuit explained that case-by-case considerations were immaterial to its analysis, as

> the issue of appealability under [Section] 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a "particular injustic[e]" averted by prompt appellate court litigation.[127]

The court then stated, perhaps fatally to Hartzell's appeal, that "simply characterizing a right as an irreparable entitlement not to stand trial is insufficient for an appeal to fall under the collateral order doctrine."[128] The court said that in cases in which "the collateral order doctrine is applied, the interest at stake is so important that it is comparable to an immunity from suit that cannot be remedied unless immediate appellate review is taken."[129] Canvassing Supreme Court cases, the court said that the determination of whether an order fell within the collateral order doctrine often hinged on "whether the claimed right sought to be protected was characterized as a right to immunity from suit or a defense to liability."[130]

The court then looked to *Estate of Kennedy*, identifying with Judge Paez's dissent that characterized GARA's statute of repose as a defense to liability, rather than immunity from suit.[131] Agreeing with Judge Paez, the court listed "four primary reasons why the [d]istrict [c]ourt's ruling denying application of the GARA statute of repose should not be appealable under the collateral order doctrine."[132] "First, the interest protected by a statute of repose *is much more similar* to a statute of limitations than to a grant of qualified immunity."[133] Second, the court found "a clear difference between an immunity granted to a public official" (a denial of which is immediately appealable) "and an immunity granted to a private defendant" because the policy rationale of ensuring "that public officials are not deterred from vigorously carrying out the discretionary functions of their office" is not present with private defendants.[134] Third, the court explained that

126. *Id.*

127. *Id.* (second alteration in original) (quoting *Digital Equip. Corp.*, 511 U.S. at 868) (internal quotation marks omitted).

"the GARA statute of repose *is not* a pure immunity because it contains exceptions under which immunity does not attach."[135]

Finally, the court distinguished *Estate of Kennedy* and stated that even if the "statute of repose is the functional equivalent of a decision on qualified immunity, the *Cohen* factors militate against recognizing appellate jurisdiction because the applicability of the statute of repose is intertwined with a decision on the merits."[136] In the court's view, the Ninth Circuit in *Estate of Kennedy* had been faced "with a legal issue: which of two undisputed dates triggered the running of the GARA limitations period."[137] In *Robinson*, however, the district court found a factual dispute regarding the applicability of the GARA Section 2 exception.[138] The court reasoned that the difference was significant because the determination of whether Hartzell misrepresented information to the FAA was "relevant to the underlying merits of the claim" and as to whether the GARA Section 2 exception applied.[139] Accordingly, the court declined to exercise jurisdiction over Hartzell's appeal partially "because the issue [was] not separable from the merits."[140] Noticeably lacking from the court's opinion in *Robinson* is any discussion of the congressional history and policies underlying GARA.

C. *Pridgen v. Parker Hannifin Corp.*[141] Allows Immediate Review of GARA Orders

In *Pridgen*, the Pennsylvania Supreme Court acknowledged the need for immediate review of GARA orders.[142] The consolidated civil actions that gave rise to the appeals stemmed from a

128. *Id.*
129. *Id.* at 169.
130. *Id.* at 171.
131. *Id.* at 172–173 (citing *Est. of Kennedy*, 283 F.3d at 1115 (Paez, J., dissenting)).
132. *Id.* at 173.
133. *Id.* (emphasis added).
134. *Id.*
135. *Id.* (emphasis added).
136. *Id.* at 173–174.
137. *Id.* at 174.
138. *Id.*
139. *Id.*
140. *Id.*
141. 905 A.2d 422.
142. *Id.* at 433–434.

1999 aviation accident in which a thirty-one-year-old Piper PA-32-260 aircraft crashed, killing several people and severely injuring another.[143] The National Transportation Safety Board (NTSB) determined that the probable cause of the accident was "[t]he pilot's loss of control of the airplane during a turn."[144] Nonetheless, the crash victims' representatives and/or estates filed suit against, *inter alia*, Textron Lycoming Reciprocating Engine Division, Textron, Inc., and Avco Corporation.[145] The complaints alleged claims of breach of express and implied warranties, negligence, and strict liability.[146]

In the trial court, the plaintiffs admitted that the original engine assembly was installed on the aircraft more than eighteen years prior to the accident.[147] Instead, they alleged that the crash was caused by aircraft parts—specifically engine and fuel system components—that were overhauled and replaced within eighteen years of the accident.[148] Further, the plaintiffs alleged that the defendants "had knowledge of the alleged defects and engaged in intentional misrepresentation, concealment, and withholding relative to them."[149] When the defendants moved for summary judgment based on GARA, the plaintiffs argued that the aircraft's replacement parts "were installed on the aircraft within eighteen years of the accident."[150] As a result, these replacement parts were sufficient to implicate the rolling provision and push back the starting date for GARA purposes.[151] The plaintiffs also argued that a dispute over material facts existed as to "the application of GARA's misrepresentation, concealment, and withholding exception[s]."[152]

The trial court denied the defendant's motions without a written opinion, and the defendants immediately appealed, invok-

143. *Id.* at 425; Associated Press, *Small Plane Crashes in Ohio; Four Dead*, Savannah Morning News A7 (Aug. 2, 1999).

144. Accident Rpt. No. NYC99FA187 (Nat'l Transp. Safety Bd., Dec 4. 2000) (available at http://www.ntsb.gov/aviationquery/brief.aspx?ev_id=20001212X19611&key=1).

145. *Pridgen*, 905 A.2d at 425.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 426.

151. *Id.*

152. *Id.*

ing Pennsylvania's collateral order doctrine.[153] The Superior Court quashed the appeals and found that the collateral order doctrine did not apply, and the defendants again appealed.[154] Finally, in the Supreme Court of Pennsylvania, the aircraft engine manufacturers acquired reprieve.[155]

The Court considered the three elements of the collateral order doctrine: separability, importance, and irreparable loss.[156] Regarding separability, the Court "adopted a practical analysis recognizing that some potential interrelationship between merits issues and the question sought to be raised in the interlocutory appeal is tolerable."[157] The Court then cited the United States Supreme Court's decision in *Johnson v. Jones*,[158] which held "that a claim is sufficiently separate from the underlying issues for purposes of collateral order review if it 'is conceptually distinct from the merits of plaintiff['s] claim.'"[159] This means that even if the claim is practically entwined with the merits, the claim is distinct if it "raises a question that is significantly different from the questions underlying plaintiff's claim on the merits."[160] With that framework in mind, the Court found that "the application of the rolling provision to the original manufacturer and type certificate holder is both conceptually and factually distinct from the merits of [the] underlying product liability causes of action."[161]

The Court next addressed the importance prong. Looking to GARA's legislative history and express terms, the Court acknowledged Congress' concern for the exposure of general aviation manufacturers to both liability and related litigation costs.[162] Thus, the Court found that the federal interests expressed in GARA were significant enough to justify appellate court interven-

153. *Id.* Pennsylvania's collateral order doctrine is found in its Rule of Appellate Procedure 313. Pa. R. App. P. 313(b). The criteria for a collateral order in Pennsylvania are: (1) the right asserted must be "separable from and collateral to the main cause of action; (2) the right involved [must be] too important to be denied review; and (3) the question presented is such that if review is postponed until final judgment in the case, the claimed right will be irreparably lost." *Pugar v. Greco*, 394 A.2d 542, 545 (Pa. 1978).

154. *Pridgen*, 905 A.2d at 427.

155. *Id.* at 437.

156. *Id.* at 433.

157. *Id.*

158. 515 U.S. 304 (1995).

159. *Pridgen*, 905 A.2d at 433 (quoting *Johnson*, 515 U.S. at 314).

160. *Id.* (quoting *Johnson*, 515 U.S. at 314).

161. *Id.*

162. *Id.*

tion in these product liability cases.[163] Similarly, when the Court considered the element of irreparable loss, the Court determined that the significant cost that the defendants would "incur in defending this complex litigation at a trial on the merits comprise[d] a sufficient loss to support allowing interlocutory appellate review as of right, in light of the clear federal policy to contain such costs in the public interest."[164] Therefore, the Court held that the collateral order doctrine applied to the appeals and reversed.[165]

IV. AVCO CORP. v. NEFF*: THE FIRST GARA INTERLOCUTORY APPEAL IN FLORIDA*

On March 10, 2010, the First District Court of Appeal issued *Avco Corp. v. Neff*, an opinion considering whether an appellate court should exercise jurisdiction to review a non-final order denying a manufacturer's GARA defense.[166] Agreeing with Judge Paez's *Estate of Kennedy* dissent and the Third Circuit's *Robinson* decision, the court found that GARA's statue of response is more akin to a statute of limitation than immunity from suit.[167]

In *Neff*, the plaintiffs filed a wrongful death suit for damages arising out of a 2004 aviation crash that killed the pilot and three others on board.[168] The plaintiffs sued the manufacturer of the engine and the manufacturer of the carburetor installed on the accident aircraft, alleging that the carburetor "was defectively

163. *Id.*

164. *Id.* The Court was not concerned that its holding would be extended to other statutes of repose. *Id.* The Court found that Congress had created in GARA a freedom-from-tort-claims interest that the Court believed prevailed over the State interest in curtailing piecemeal appellate review in the limited context of GARA. *Id.*

165. *Id.* at 434. In a rare move, the Court then proceeded to address the case on the merits rather than remand it for the fourth time. *Id.* The Court concluded that

> [T]he common pleas court erred in holding that the rolling provision of GARA exempts Appellees' claims from the general rule affording repose by virtue of Appellants' status as original manufacturer, type certificate holder, and/or designer, with regard to alleged defects associated with replacement parts that they did not manufacture or supply.

Id. at 437.

166. 30 So. 3d at 602.

167. *Id.* at 604.

168. *Id.* at 599. The aircraft was a private Cessna R182 that crashed shortly after take-off. *Id.*

designed and caused the crash."[169] The complaint further invoked the GARA misrepresentation exception, alleging that the engine manufacturer and carburetor manufacturer knew the carburetor design could fail while in flight but withheld such information from the FAA and the general public.[170]

The manufacturing defendants filed a motion for summary judgment on the basis of GARA's eighteen-year statute of repose and Florida's twelve-year statute of repose in Section 95.031(2)(b).[171] Avco Corp., the engine manufacturer, claimed it did not manufacture anything for the aircraft at issue since the aircraft was delivered to its first purchaser in 1981.[172] Precision Airmotive, Corp., the carburetor manufacturer, argued that it had not installed any replacement part and that no evidence identified *who* had manufactured the replacement parts used in the 1992 carburetor overhaul.[173] In response, the plaintiffs argued that the defendants "caused" the manufacture of the replacement part (a carburetor float) that was installed on the accident carburetor in 1992 due to the defendants' mandated design specifications.[174] The plaintiffs also alleged that defendants concealed evidence of the carburetor float's defects from the FAA.[175] As a result, the plaintiffs claimed that summary judgment should be

169. *Id.* Under FAA regulations, an engine manufacturer can be held liable for defects in the carburetor by virtue of being the type certificate holder of the engine. *See generally* 14 C.F.R. §§ 21.11–21.55 (giving requirements for eligibility and issuance of a type certificate).

170. *Neff*, 30 So. at 599. Specifically, the plaintiffs claimed "that the carburetor had incompatible metals that caused a wearing of parts, which, in turn, caused the float to stick and resulted in the engine receiving an improper fuel/air mixture." *Id.*

171. *Id.* at 600 (citing Fla. Stat. § 95.031(2)(b) (2003)). Florida's statute of repose operates similarly to GARA, but it is not aviation specific. *See* Fla. Stat. § 95.031(2)(b) (prohibiting products liability actions "caused by a *product*" twelve years after the product has been delivered to its original purchaser) (emphasis added). Any manufacturer of any product can raise the defense if it meets the statute's requirements. *Id.* With provisions making it even more strict than GARA, Section 95.031 does not contain a "rolling" statute but instead creates a blanket prohibition against the filing of a lawsuit once the product reaches twelve years of age—that prohibition applies even if that product has been overhauled or components were replaced. *Butchkosky*, 855 F. Supp. at 1254–1256. It is only when the product has been reacquired by the manufacturer and has been completely refurbished prior to being resold to new customers that Section 95.031's provisions reset. *See id.* at 1254–1255 (discussing how the plaintiff cited cases wherein Section 95.031 did not apply because the manufacturer had reacquired and refurbished the part and then resold that part to a new customer, which was not the case in plaintiff's suit).

172. *Neff*, 30 So. 3d at 600.

173. *Id.*

174. *Id.*

175. *Id.*

denied based on GARA's rolling provision and misrepresentation exception, respectively.[176]

The trial court denied summary judgment for the defendants, finding that there were issues of material fact regarding whether the defendants "caused" the manufacture of the replacement carburetor float or misrepresented design defects to the FAA.[177] Defendants subsequently filed petitions for writ of certiorari, claiming that the trial court erred in denying summary judgment based on GARA and the Florida statute of repose.[178] Defendants argued that GARA's rolling provision could only be triggered against the actual manufacturer of the replacement part and not against a party who "caused" it to be manufactured by way of design specifications, as plaintiffs claimed.[179] Defendants also argued that plaintiffs "failed to specifically plead or present any evidence that [defendants] fraudulently misrepresented" any information to the FAA regarding the carburetor design.[180]

In determining whether to grant review, the appellate court first looked at whether the defendants had shown irreparable

176. *Id.* While the issue presented by the defendants' petitions related to a legal statute of repose, and not the question of ultimate liability, the facts of this case fall squarely within the legislative findings accompanying GARA. As quoted previously, the Legislature determined, "It is very unlikely that there would be a valid basis for a suit against the manufacturer of an aircraft more than [fifteen] years old. Nearly all defects are discovered, we have learned in our hearings, during the early years of an aircraft's life." 140 Cong. Rec. at H4998. In this case, the plaintiffs claimed that the aircraft's carburetor was defective in its design. *Neff*, 30 So. 3d at 599. However, from the 1981 manufacture date through the 1992 overhaul, the carburetor worked without issue. *Id.* at 600. Likewise, the carburetor operated without issue for another twelve years after the maintenance facility replaced portions of the carburetor with components alleged to have been manufactured by Precision Airmotive, Inc. *Id.* at 599. As noted above by the Legislature, it is very unlikely that there would be a valid basis for a claim of defective design related to an engine component that operated normally for twenty-three years and accumulated 3,190.3 operating hours. 140 Cong. Rec. at H4998.

177. *Neff*, 30 So. 3d at 601.

178. *Id.*

179. *Id.* Counsel for plaintiffs had previously presented slight variations of this "caused to be manufactured" argument to numerous courts across the country, and courts have uniformly rejected it. *See e.g. Sheesley*, 2006 WL 1084103 at *8 (noting that "Congress meant what it said—the provision rolls the repose period for a claim against the manufacturer of a defective part"); *Pridgen*, 916 A.2d at 621 (holding that the trial court "erred in holding that a rolling provision exempts [plaintiffs'] claims from GARA repose by virtue of [defendant's] status as original manufacturer, type certificate holder, and/or designer, with regard to alleged defects associated with replacement parts that they did not physically manufacture or supply").

180. *Neff*, 30 So. 3d at 601.

harm.[181] The court explained that it had previously found that incurring litigation expenses does not constitute irreparable harm.[182] The court recognized, however, that certiorari review of a non-final order is appropriate when a statute provides immunity from suit.[183] The defendants claimed that GARA's purpose was to shield manufacturers from costly litigation and provide statutory immunity from suit if a defendant could meet the statute's requirements.[184] The plaintiffs countered that GARA is essentially an affirmative defense and that any alleged erroneous denial of that defense can be remedied on appeal.[185]

The court began a review of prior GARA opinions with the acknowledgement that Congress was "deeply concerned" about the costs of litigation endured by manufacturers of general aviation aircraft.[186] It then continued with a discussion of the three prior cases that ruled on whether an appellate court should grant certiorari review of a GARA denial.[187] The first case, both in chronology and sequence in the discussion, is *Estate of Kennedy*. The court stated that the Ninth Circuit in *Estate of Kennedy* believed that GARA was a statute of repose, not a statute of limitations, and as such was analogous to a qualified immunity defense because "'it creates an explicit statutory right not to stand trial which would be irretrievably lost should [the manufacturer] be forced to defend itself in a full trial.'"[188] The court also noted, however, that the dissent in *Estate of Kennedy* found instead that "GARA closely paralleled the text of many statutes of limitations, and . . . that in enacting GARA, Congress only intended to cut the

181. *Id.* The Florida Constitution provides appellate courts with jurisdiction to issue writs of certiorari. Fla. Const. art. 5, § 4(b); *see also* Fla. R. App. P. 9.030(b)(2)(A) (providing district courts with certiorari jurisdiction to review "non-final orders of lower tribunals other than as prescribed by [R]ule 9.130"). That review is appropriate if: (1) the order constitutes "a departure from the essential requirements of law"; and (2) it would cause material harm that cannot be adequately remedied by plenary appeal. *Neff*, 30 So. 3d at 601; *Taylor v. TGI Friday's, Inc.*, 16 So. 3d 312, 313 (Fla. 1st Dist. App. 2009) (finding that showing irreparable harm is a threshold issue and must be determined before the court can analyze the other elements needed to obtain certiorari relief).

182. *Neff*, 30 So. 3d at 601.

183. *Id.*

184. *Id.* at 601–602.

185. *Id.* at 602.

186. *Id.* (quoting *Lyon*, 252 F.3d at 1084).

187. *Id.* at 602–603.

188. *Id.* at 602 (quoting *Est. of Kennedy*, 283 F.3d at 1110) (alteration in original).

'infinite-*liability* tail' for general aviation manufacturers, not provide immunity."[189]

The court next reviewed the Third Circuit's opinion in *Robinson*, which agreed with the dissent in *Estate of Kennedy*.[190] Finally, the court looked at the Pennsylvania Supreme Court case *Pridgen*, which came to a consistent holding with the Ninth Circuit's decision *Estate of Kennedy*.[191]

Left with conflicting caselaw on the subject—two opinions in favor of certiorari review and one opposed—the court began its own, albeit very brief, analysis of the issue.[192] In two paragraphs, the court explained that GARA is more like a statute of limitations than immunity from suit, which makes GARA an affirmative defense.[193] It reasoned that "[t]he repose period is not absolute, and it appears from the legislative history that the statute was enacted to protect manufacturers from the 'infinite liability-tail' of product liability suits rather than to protect them from the burdens of discovery and trial."[194] The court further stated that other Florida cases supported the court's conclusion that statutes of repose can be been treated like statutes of limitation or affirmative defenses.[195]

V. "WHEN YOUR MONEY IS GONE, THAT IS PERMANENT, IRREPARABLE DAMAGE TO YOU"[196]

Ultimately, the *Neff* court denied defendants' petitions for certiorari review and found that "incur[ring] litigation expenses is normally not enough to meet the irreparable harm test."[197] Judge

189. *Id.* (quoting *Est. of Kennedy*, 283 F.3d at 1115) (emphasis in original).

190. *Id.* at 603 (assessing *Robinson*). For a detailed discussion of *Estate of Kennedy*, please see *supra* Part III(A).

191. *Neff*, 30 So. 3d at 603 (analyzing *Pridgen*). The court explained that *Pridgen* distinguished itself from *Robinson* because the denial of summary judgment in *Pridgen* dealt with a dispute regarding the rolling provision. *Id.* The trial court in *Pridgen* had yet to make a determination regarding the misrepresentation exception at the time of appeal. *Id.* at 603–604.

192. *Id.* at 604.

193. *Id.*

194. *Id.*

195. *Id.*

196. Altenbernd & Marcario, *supra* n. 1, at 23.

197. *Neff*, 30 So. 3d at 601.

Altenbernd[198] and his co-author Jamie Marcario reviewed *Neff* and the First District Court of Appeal's reasoning in their article *Certiorari Review of Nonfinal Orders: Does One Size Really Fit All? Part I.*[199] In this article, the authors questioned the court's denial of certiorari based on the "it's only money" rationale and described the difficulties aviation manufacturers face as a result of certiorari denials:

> When you cannot get your money back at the end of the case if it is reversed on direct appeal, this rule only makes sense if it's not your money. When your money is gone, that is permanent, irreparable damage to you. Obviously, depending on the timing, nature, and size of the litigation expense, policy reasons dictate that an appellate court should not reach down into a pending case to prevent monetary losses, but the "it's only money" reason to avoid certiorari review does not help create a rational review policy.[200]

In *Neff*, the defendants moved for summary judgment based upon the fact that it manufactured the engine and component parts at issue in 1981—twenty-three years before the subject accident.[201] The lower court denied that motion and consequently ordered defendants to continue with their defense of the suit despite GARA's protections.[202] The First District Court of Appeal found that the denial of a summary judgment motion does not create irreparable harm because the ultimate merits decision may be corrected on plenary appeal.[203] The court, however, did not give proper weight to the unique policy concerns underpinning GARA that make aviation cases different.

As quoted above, the Legislature's concern was not with ultimate liability but instead was with a manufacturer being compelled to defend itself in a lawsuit, even if the manufacturer prevails.[204] Accordingly, the harm created by the trial court's order in *Neff* cannot be corrected on plenary appeal because it is

198. Judge Chris W. Altenbernd sits on the Second District Court of Appeal. Fla. 2d Dist. Ct. of App., *Judge Chris Altenbernd*, http://www.2dca.org/judges/bio/altenbernd.shtml (accessed Apr. 5, 2013).

199. Altenbernd & Marcario, *supra* n. 1, at 21.

200. *Id.* at 23.

201. *See Neff*, 30 So. 3d at 599–600 (noting that the accident took place in 2004).

202. *Id.* at 601.

203. *Id.* at 604.

204. 140 Cong. Rec. at H5000.

the excessive cost of defending aviation lawsuits that led to the enactment of GARA.[205] Thus, forcing defendants to complete their defense of the litigation before permitting defendants to seek review eviscerates GARA's protections.[206] It was the "long tail" defense costs that led to the decline of the aviation industry in the late 1980s, and it is those same defense costs that caused direct and irreparable harm to the defendants in *Neff*.[207]

While the First District agreed in *Neff* that GARA was enacted to protect manufacturers from the "infinite liability-tail," it nevertheless found that GARA was not designed to protect manufacturers from the costs of discovery and trial.[208] In coming to this conclusion, the court failed to see that the danger in the "infinite liability-tail" for manufacturers is the cost of litigating, not the fear of a verdict.[209]

While interlocutory review of a GARA order was an issue of first impression in Florida's state courts, other jurisdictions have recognized the need for immediate review. For example, in *Estate of Kennedy*, the Ninth Circuit Court of Appeals held that the denial of a GARA summary judgment motion was a reviewable collateral order.[210] In doing so, the court acknowledged that Congress' intent was to "'lift[ ] the requirement that manufacturers abide the *possibility of litigation* for the indefinite future when they sell an airplane.'"[211] It thus reasoned,

> It is clear that an essential aspect of the GARA statute of repose is the right to be free from the burdens of trial. An appeal from an adverse decision of the district court by a party

205. *See id.* (discussing how tort litigation against aircraft manufacturers had all but ended the general aviation industry, which necessitated GARA). Beech Aircraft, for example, spent more than one hundred million dollars in legal fees in four years to defend itself from product liability lawsuits. *Id.*

206. *See id.* (explaining that GARA was narrowly crafted to limit manufacturers' liability exposure).

207. *See Neff*, 30 So. 3d at 601–602 (noting petitioners' belief that GARA's purpose "was to shield manufacturers from costly litigation, which is precisely the harm that [petitioners would] suffer without immediate review of the trial court's denial of their motions for summary judgment").

208. *Id.* at 604.

209. During the drafting of GARA, Congress found that many of the aviation industry's biggest manufacturers were ultimately successful on the merits of the cases brought against them but suffered due to the overwhelming costs of litigation. 140 Cong. Rec. at H5003.

210. 283 F. 3d at 1111.

211. *Id.* at 1110–1111 (emphasis in original) (quoting *Lyon*, 252 F.3d at 1089).

> claiming GARA protection falls within the collateral order doctrine, and we therefore have jurisdiction to consider Bell Helicopter's appeal.[212]

The Pennsylvania Supreme Court has similarly acknowledged the need for immediate review of GARA orders.[213] The Court reasoned,

> [I]t seems clear under the terms of GARA, as well as from its developed legislative history, that Congress was concerned with exposure of covered aviation manufactures to both liability in damages and associated litigation costs. . . . Similarly, with regard to the element of irreparable loss, we conclude that the substantial cost that Appellants will incur in defending this complex litigation at a trial on the merits comprises a sufficient loss to support allowing interlocutory appellate review as of right, in light of the clear federal policy to contain such costs in the public interest.[214]

GARA's express terms further demonstrate that it is actually a prohibition against suit and not merely one against liability. For example, Section (2)(d) of the Act states, "This section supersedes any State law to the extent that such law *permits a civil action described in subsection (a) to be brought* after the applicable limitation period."[215] Thus, it is the lawsuit itself that is prohibited and not just the potential for ultimate liability.

Moreover, Florida courts have recognized a variety of situations where compelled participation in litigation constitutes irreparable harm.[216] As a general rule, those situations all involve a public policy determination that compelling someone to defend a suit would be detrimental to society as a whole. For example,

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212. *Id.* at 1111.

213. *Pridgen*, 905 A.2d at 433–434.

214. *Id.* at 433. Other courts have made similar findings. *See e.g. Blazevska*, 522 F.3d at 951 (stating that "[t]he statute acts not just as an affirmative defense, but instead 'creates an explicit statutory right not to stand trial'") (quoting *Est. of Kennedy*, 283 F.3d at 1110); *Blazevska v. Raytheon Aircraft Co.*, 2006 WL 1310455 at *5 (N.D. Cal. May 12, 2006) (determining that "if [GARA] can be construed to 'regulate' any 'conduct[,'] it must be construed to regulate litigation against manufacturers of airplanes"); *Rixon v. Smith*, 1997 WL 33484010 at *3 (W.D. Pa. Feb. 4, 1997) (noting that "as a direct effect of GARA, manufacturers are protected from defending ageless claims which are costly to investigate and litigate").

215. GARA § 2(d) (emphasis added).

216. *E.g. C. Fla. Reg'l Hosp. v. Hill*, 721 So. 2d 404, 405 (Fla. 5th Dist. App. 1998).

Florida courts have uniformly recognized the availability of certiorari review in cases where the medical malpractice pre-suit notice requirements of Chapter 766 have not been met.[217] As the court in *Central Florida Regional Hospital v. Hill*[218] explained,

> interlocutory review is necessary to promote the statutory purpose of the Medical Malpractice Reform Act to encourage settlement. To require that the malpractice action be fully litigated without resort to pre[-]suit procedures before review would frustrate that purpose and the resulting harm could not be remedied on appeal.[219]

Accordingly, when a defendant has been ordered to participate in a lawsuit despite noncompliance with the statute, that interlocutory order is subject to certiorari review since "[t]he statutes requiring pre[-]suit notice and screening 'cannot be meaningfully enforced post[-]judgment because the purpose of the pre[-]suit screening is to avoid the filing of the lawsuit in the first instance.'"[220]

Likewise, Florida has determined that government officials have immunity from lawsuits concerning their official acts.[221] As explained by the Florida Supreme Court in *Tucker v. Resha*,[222] that immunity exists because "society as a whole also pays the 'social costs' of 'the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office.'"[223] Accordingly, if an official is denied that immunity through an interlocutory order, that order is immediately reviewable because it "is effectively unreviewable on appeal from a final judgment, as the public official cannot be 're-immunized' if erroneously required to stand trial or face the other burdens of litigation."[224]

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217. *Id.*

218. 721 So. 2d 404.

219. *Id.* at 405.

220. *GalenCare, Inc. v. Mosley*, 59 So. 3d 138, 140 (Fla. 2d Dist. App. 2011) (quoting *Fassy v. Crowley*, 884 So. 2d 359, 363 (Fla. 2d Dist. App. 2004)); *see also Pearlstein v. Malunney*, 500 So. 2d 585, 587 (Fla. 2d Dist. App. 1986) (acknowledging that the purposes of these cost-saving pre-suit procedures would be thwarted, and the appellate remedy would serve "no useful purpose").

221. *Tucker v. Resha*, 648 So. 2d 1187, 1189 (Fla. 1994).

222. 648 So. 2d 1187.

223. *Id.* at 1190 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

224. *Id.* at 1189 (internal citation omitted).

GARA presents the same type of situation. The excessive cost of defending product liability suits led to the decline of the aviation industry, not the rarely existing ultimate liability for damages.[225] That decline was detrimental to the country as a whole, as it directly resulted in job loss and to trade imbalances with other nations.[226] Accordingly, Congress determined that manufacturers should be free from the costs of that litigation, and it thus enacted GARA.[227] The protections that GARA provides to aviation manufacturers—and in the view of the Congress, to the nation as a whole—would be thwarted if Florida courts did not exercise certiorari review.[228] Simply stated, a plenary appeal would be inadequate to correct the error of subjecting manufacturing defendants to the very suits that GARA was intended to prevent, and thus there is irreparable harm.

VI. CONCLUSION

The Legislature's concern in enacting GARA was not with ultimate liability but instead was with a manufacturer being compelled to defend itself in a lawsuit, even if the manufacturer prevails.[229] The excessive cost of defending aviation lawsuits led to the enactment of GARA, and the protections provided by that legislation are eviscerated by decisions like *Neff* where manufacturers are forced complete their defense of complex and exceptionally costly litigation before they can seek review. These "long tail" defense costs led to the decline of the aviation industry in the late 1980s, and those same defense costs cause the direct and irreparable harm necessary for certiorari review.

225. Rodriguez, *supra* n. 5, at 580 (noting that the cost of defending product liability suits added between seventy and one hundred thousand dollars to the cost of a new airplane, forcing companies like Cessna to close their single-engine production lines).

226. *Id.*

227. *Id.*

228. *See* 140 Cong. Rec. at H4998 (discussing the economic importance of the general aviation industry).

229. *Id.*