AIRCRAFT BUILDERS COUNCIL
LAW REPORT

TEXAS TUGS THE LEGAL REINS: A DISCUSSION OF THE TEXAS SUPREME COURT'S RECENT PERSONAL JURISDICTION DECISION

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NASA REAUTHORIZATION ACT 2024: REDEFINING THE ROLE OF THE CIVILIAN SPACE SECTOR

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STATUTES OF REPOSE AND THE RIGHT NOT TO LITIGATE: THE GARA DEBATE IN *BYRD V. AVCO*

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The ABC Underwriters, as part of their comprehensive insurance plan, have requested Fitzpatrick, Hunt & Pagano, LLP to prepare periodic reports on topics of interest to the members. Three articles appear in this Law Report relating to various aspects of products liability law.

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Texas Tugs the Legal Reins: A Discussion of the Texas Supreme Court's Recent Personal Jurisdiction Decision

By: Ralph Pagano and Michael Oliver

This article discusses the recent decision from the Texas Supreme Court, BRP-Rotax GmbH & Co. KG v. Shaik, 68 Tex. Sup. Ct. J. 1276 (2025), reaffirming Texas' commitment to the "stream-of-commerce-plus" standard for determining personal jurisdiction. This article discusses impact and a potential reckoning for personal jurisdiction jurisprudence across the country.

Introduction

For those of you who have been reading these annual law reports for a few years now you are well aware of the importance of Personal Jurisdiction in Aviation Law with the topic having been addressed in 2018, 2021 and 2023. Personal jurisdiction has long been a frontline issue in aviation product liability litigation, and the related jurisprudence continues to evolve. It determines where manufacturers may be sued, how litigation unfolds, and ultimately, who bears the risk when accidents occur. For the aviation industry, particularly original equipment manufacturers (OEMs), suppliers, and their insurers, jurisdiction is not an in the clouds abstract concept but a critical part of assessing and mitigating risk.

In December of 2024 a case handled by FitzHunt went before the Texas Supreme Court on this exact issue in *BRP-Rotax GmbH v. Shaik*. The Texas Supreme Court issued its decision on June 20, 2025 addressing the reach of Texas Courts over a foreign aircraft engine manufacturer. *BRP-Rotax GmbH & Co. KG v. Shaik*, 68 Tex. Sup. Ct. J. 1276 (2025). The unanimous decision, which overturned the trial court's and appellate court's finding of jurisdiction over the manufacturer and the accompanying concurrence, sends important signals about the trajectory of personal jurisdiction law and how it will shape litigation strategy for aviation stakeholders going forward.

Background

A. Personal Jurisdiction

Personal jurisdiction is the hook that pulls a party into a case. It refers to the

power that a court has to make a decision regarding the party being sued in a case.[1] Before a court can exercise its power over a party, the U.S. Constitution requires that the party have certain minimum contacts with the forum in which the court sits.[2] So, if the plaintiff sues a defendant, that defendant can object to the suit by arguing that the court does not have personal jurisdiction over the defendant.[3] The seminal case in personal jurisdiction jurisprudence is *International Shoe v Washington*, 326 US 310 (1945) in which the United States Supreme Court established that a party can be subject to the jurisdiction of a state if it has "Minimum Contacts" with that state. Since then it has been a jigsaw puzzle of different test and standards applied by each state and the federal courts.[4]

These Standards can have different impact for the different parties. California[5], New Jersey[6] and Illinois[7] follow approaches more aligned with the U.S. Supreme Court's fractured rulings in *Asahi*[8] and *Nicastro*[9]. Whereas, New York applies a hybrid test, often looking to ongoing commercial relationships.[10] The relevant standard in Texas State Courts is "Stream-of-commerce-plus" which dictates that the "defendant's act of placing a product into the stream of commerce does not establish purposeful availment unless there is 'additional conduct' evincing 'an intent or purpose to serve the market in the forum State'".[11]

B. *BRP-Rotax GmbH & Co. KG v. Shaik*

BRP-Rotax GmbH & Co. KG v. Shaik arose from an accident in Addison, Texas, when a Piper Light Sport Aircraft lost engine power during takeoff and crashed.[12] The plaintiffs, Texas residents, sued multiple parties, including BRP-Rotax GmbH & Co. KG, (Hereinafter "BRP-Rotax"), an Austrian company that designed and manufactured the engine.[13]

At the trial court and on appeal, the plaintiffs argued that BRP-Rotax intentionally placed its products into the 'stream of commerce' with knowledge

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[1] *Personal Jurisdiction*, Black's Law Dictionary (21st ed. 2025).
[2] U.S. CONST. amend. V and U.S. Const. amend. XIV, § 1
[3] Fed. R. Civ. Pro. §12(b)(2)
[4] Compare *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 105 (1987) with in *Ford Motor Co. v. Montana Eighth Judicial District,* 592 U.S. 351 (2021).
[5] *Bombardier Recreational Products, Inc. v. Dow Chemical Canada ULC* (2013) 216 Cal.App.4th 591
[6] *Dutch Run-Mays Draft, LLC v. Wolf Block, LLP,* 450 N.J. Super. 590, 604, 164 A.3d 435, 443 (App. Div. 2017)
[7] *Russell v. SNFA*, 2013 IL 113909, 370 Ill. Dec. 12, 987 N.E.2d 778
[8] *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 105 (1987)
[9] *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011)
[10] *Aybar v. Aybar*, 37 N.Y.3d 274, 282, 177 N.E. 3d 1257, 1259 (N.Y. 2021)
[11] *Lg Chem Am. v. Morgan*, 670 S.W.3d 341, 347 (Tex. 2023)
[12] *BRP-Rotax GmbH & Co. KG v. Shaik*, 68 Tex. Sup. Ct. J. 1276 (2025)
[13] Id.

they would be sold in Texas.[14] The lower courts agreed, finding that BRP-Rotax's distribution arrangements and presence of service centers in the United States supported jurisdiction.[15]

But the Texas Supreme Court reversed, holding that BRP-Rotax had not purposefully availed itself of the Texas market and therefore could not be sued there.[16]

The Unanimous Opinion

In its opinion the Texas Supreme Court reaffirmed previous Texas Supreme Court precedent and applied the "stream-of-commerce-plus" standard.[17] This test "requires a defendant to *specifically target* Texas" and clarifies that "it is not enough that a defendant may foresee some of its products' eventually arriving [in Texas].".[18] Put differently, a foreign manufacturer is only subject to jurisdiction if it takes deliberate steps to target Texas—not merely because its products foreseeably end up there.

In addition to the reaffirmation of the "stream-of-commerce-plus" standard there were three additional key takeaways from the opinion. First, distribution through independent intermediaries was not enough to assert personal jurisdiction. BRP-Rotax sold its engines to a Bahamian distributor, Kodiak Research Ltd. ("Kodiak"), which in turn sold through sub-distributors in Florida. Because the Court found no evidence that BRP-Rotax itself directed or controlled distribution into Texas there was no Personal Jurisdiction under the "stream-of-commerce-plus" standard. [19]

The second takeaway is that absent manufacturer control, Service centers do not create personal jurisdiction. Plaintiffs pointed to a repair center in Bulverde, Texas known as "Texas Rotax," as evidence of purposeful availment. The Court concluded that because this was established by Kodiak and not BRP-Rotax, and that BRP-Rotax did not direct its location or operations, there was no Personal Jurisdiction. [20]

Finally, the third takeaway is that a web presence and English-language manuals are insufficient to establish personal jurisdiction under the "stream-of-

[14] Id.
[15] Id.
[16] Id.
[17] *BRP-Rotax GmbH & Co. KG v. Shaik*, 68 Tex. Sup. Ct. J. 1276 (2025)
[18] Id.
[19] Id.
[20] Id.

commerce-plus" standard.[21] The Court rejected the idea that a website accessible in Texas, or technical documents written in English, demonstrated intent to target Texas. The Court pointed to multiple sources recognizing "English as the international language of aviation" and not unique to Texas.[22]

All these takeaways and the Courts reaffirmation of the "stream-of-commerce-plus" standard. emphasize the bright line rule: foreseeability of Texas sales does not equal personal jurisdiction. To bring a claim against a foreign manufacturer in a Texas court, plaintiffs must show intentional, Texas-specific conduct.

The Concurring Opinion

Perhaps the most interesting part of the decision was the concurring opinion from Justice Busby, joined by Justice Devine, calling into question the foundation of modern personal jurisdiction law.

The Concurrence argues that the U.S. Supreme Court's fairness-based framework of "fair play and substantial justice" as outlined in *International Shoe Co. v. Washington,* 326 US 310 (1945) has produced decades of confusion, inconsistent outcomes, and costly forum fights. Specifically in a state like Texas where there is a drastically different approach taken by the state and federal courts.[23] Texas state courts apply the stricter 'stream-of-commerce-plus' standard, while federal courts in Texas apply the looser 'pure stream-of-commerce' standard.[24] As a result, the very same facts could support jurisdiction in federal court but not in state court.

The concurrence urged the U.S. Supreme Court to return to sovereignty, or text-based limits on jurisdiction meaning that the analysis should be limited to the explicit language of the statute and not interpretation. The concurrence argues that the current fairness standard is unpredictable and incentivizes forum shopping.

Implications for Aviation Manufacturers

While this case held the *status quo* there are a handful of implications for aviation companies and their insurers moving forward.

First, as the Court drew a firm line between independent distributors and direct manufacturer action there is a renewed importance on the structure of distribution networks. Foreign Manufacturers can limit jurisdictional exposure by maintaining

[21] Id.
[22] *Brp-Rotax GmbH & Co. KG v. Shaik*, 68 Tex. Sup. Ct. J. 1276 (2025)
[23] *Brp-Rotax GmbH & Co. KG v. Shaik*, 68 Tex. Sup. Ct. J. 1276 (2025)
[24] Id.

genuine independence between themselves and U.S. distributors. Similarly, while Plaintiffs may continue to argue that warranty or service centers show targeting of Texas, carefully drafting agreements, placing responsibility with distributors rather than the OEM can be a critical in the jurisdictional analysis for claims brought in Texas.

Next, given the difference in personal jurisdiction standard highlighted in the concurrence, Plaintiffs may prefer federal court when litigating against out of state (or foreign) defendants to take advantage of the more lenient standard so Defendants will need to weigh removal strategies carefully, as the forum could determine the jurisdictional outcome.

Looking Forward

The *BRP-Rotax* decision cannot be taken in isolation and just viewed in the Texas sphere, it must be viewed in context of the broader national dialogue. There is a stirring discussion on foreseeability vs. targeting. Courts are increasingly unwilling to equate awareness of nationwide distribution with purposeful targeting of a state.

Similarly, the concurrence highlighted its judicial skepticism of the *International Shoe* case. Both Justice Busby, who authored the concurrence and federal judges[25] have expressed doubts about the durability of the fairness-based approach. With mounting criticism and inconsistent standards across jurisdictions, the Supreme Court may be forced to revisit the personal jurisdiction doctrine yet again, possibly returning to a more sovereignty-based, predictable rule.

For aviation, where components travel through intricate global supply chains, such a shift could meaningfully limit plaintiffs' forum choices and have an impact on litigation exposure across the industry.

Conclusion

BRP-Rotax is a defense-side victory that strengthens the ability of foreign aviation manufacturers to avoid being dragged into Texas courts without direct, purposeful targeting of the state. But the concurrence makes clear that deeper doctrinal tensions remain.

For aviation manufacturers, suppliers, and insurers, the lessons are twofold: manage distribution and service arrangements carefully to avoid creating

[25] e.g., Justice Gorsuch in *Ford Motor Co. v. Montana Eighth Judicial District,* 592 U.S. 351 (2021)

jurisdictional hooks and stay alert to doctrinal change. The concurring opinion's critique of *International Shoe* signals that the tide may be turning. If the U.S. Supreme Court redefines the test, the landscape of aviation product liability could shift dramatically.

In a field where litigation risk travels as globally as the products themselves, understanding and anticipating these jurisdictional currents is no longer optional, it is central to strategy.

FACT-FINDING, NOT FINGER-POINTING: THE NTSB'S LEGAL MANDATE - THE NTSB WON'T PLAY THE BLAME GAME, UNDERSTANDING THE NTSB'S MANDATE

*By Thomas R. Pantino and David J. Heider**

This article explores the National Transportation Safety Board's (NTSB) statutory authority, procedures, and the limitations placed on its investigative findings in subsequent civil litigation. Prompted by public misconceptions driven by media portrayals like the film "Sully", the article clarifies that the NTSB's mission is to improve safety, not assign fault. It further analyzes the regulatory framework governing Investigative Hearings, the party system, and evidentiary rules surrounding the admissibility of reports and testimony. The goal is to better inform practitioners, manufacturers, and litigants of their rights and responsibilities during an NTSB investigation.

Introduction

The 2016 film *Sully: Miracle on the Hudson*, starring Tom Hanks, is a biographical drama depicting the heroic actions taken by Captain Chesley "Sully" Sullenberger and his co-pilot in safely ditching their disabled Airbus A320 in the Hudson River shortly after takeoff from LaGuardia Airport in New York. The movie opens with the accident flight, but much of the narrative focuses on the National Transportation Safety Board ("NTSB") investigation and culminates in a highly dramatized adversarial hearing, where NTSB Board members question the choices Sullenberger made, and seemingly try to blame him for the accident. Although this portrayal adds tension and cinematic drama, it misrepresents the true nature of an NTSB investigation and hearing.[1]

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[1] "There is no question that the film's version of the inquiry veers from the official record in both tone and substance, and depicts the investigators as departing from standard protocol in airline accident inquiries. The NTSB released a statement saying the agency regretted that the filmmakers had not asked them to review the movie for accuracy." Michael Cieply, *'Sully' Is Latest Historical Film to Prompt Off-Screen Drama*, N.Y. Times, Sept. 9, 2016.

Aerospace manufacturers and designers build systems and components for an unforgiving environment. Despite the advances in technology, over 3,400 fatal and 12,000 non-fatal aviation accidents have occurred in the United States since 2015.[2] No matter how well-designed a product may be, there is a significant risk that an accident will occur once the product enters the stream of commerce. Therefore, aerospace companies must thoroughly understand the safety and legal obligations that may arise following an accident involving one of their products.

Unfortunately, Hollywood portrayals like *Sully* have contributed to confusion and misunderstanding of the NTSB's role in accident investigations and Investigative Hearings. This article aims to clarify the role of the NTSB, what the Investigative Hearing is, and, just as importantly, what it is not, as well as the rights and responsibilities companies have when dealing with an active NTSB investigation. A clear understanding of the NTSB's process before an accident occurs enables companies to create internal protocols in advance. Doing so can streamline the flow of information, reduce reliance on outside counsel during time-sensitive moments, and, in some cases, even help save lives.

The NTSB

Congress established the NTSB as an independent agency[3] under the Department of Transportation ("DOT") in 1967 as part of the Department of Transportation Act.[4] In an effort to totally separate the NTSB from the DOT's operational and regulatory responsibilities and to allow the agency to operate completely independently, Congress reestablished the NTSB as a separate entity in 1974.[5] The NTSB's primary mission is to

[2] National Transp. Safety Bd., Monthly Accident and Incident Dashboard, NTSB.gov, https://www.ntsb.gov/safety/data/Pages/monthly-dashboard.aspx (last visited July 22, 2025).
[3] Agencies headed by persons the President cannot remove at will are generally called *independent agencies*. Congress creates independent agencies – usually headed by multi-member boards – to shield directors from political pressure and allow them to make policy decisions with which the President may disagree. However, the Supreme Court has indicated presidential removal restrictions may be unconstitutional. *See Trump v. Wilcox,* No. 24A966, 605 U.S. ___, at 1 (U.S. May 22, 2025). This topic is outside the scope of this report, but worth following as it will impact how federal agencies operate in the future.
[4] National Transp. Safety Bd., *History of the NTSB*, https://www.ntsb.gov/about/history/pages/default.aspx (last visited July 22, 2025).
[5] *See* Independent Safety Board Act of 1974, 49 U.S.C. § 1111

promote transportation safety.[6] To accomplish its goal, the NTSB is responsible for the investigation, determination of facts, conditions, and circumstances, and ultimately the cause/probable cause of all accidents involving civil aircraft, certain public aircraft, as well as certain highway, railroad, pipeline, and marine accidents.[7] The agency does not function as a regulatory or adjudicatory body, meaning it does not enforce safety regulations or adjudicate liability claims. The NTSB is led by a board ("The Board") of five members appointed to five-year terms by the President with the advice and consent of the Senate.[8] The Board oversees more than 400 employees, many of whom are on call 24/7, year-round, to respond to transportation accidents worldwide.[9]

A. Jurisdiction Over Investigations

With safety improvement as the backdrop for the NTSB's role, the agency's jurisdiction over aviation crash investigations within the United States and its territories is broad. Outside of suspected criminal actions, the NTSB has priority over every other investigation conducted by Federal agencies.[10] As such, the NTSB has the first right to access any wreckage, information and resources, and to conduct witness interviews it deems pertinent to an accident investigation.[11] Other agencies may conduct independent investigations, and information must be shared between the agencies to prevent duplication of effort. However, no other Federal agency can participate in the NTSB's probable cause determination.[12]

B. The Party System

The NTSB always retains control of accident investigations, but with more than 2,000 aviation accidents a year, it would be impossible for an agency of just 400 employees to investigate each accident.[13] Federal regulations allow the NTSB to designate "parties" in an investigation to

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[6] *See* 49 C.F.R. § 800.3
[7] *Id.*
[8] *See* 49 C.F.R. § 800.2
[9] NTSB, *History supra* note 4.
[10] 49 C.F.R. § 831.5
[11] *Id.*
[12] *Id.*
[13] National Transp. Safety Bd., *The NTSB's Party System in Aviation Accident Investigations*, NTSB.gov, https://www.ntsb.gov/investigations/process/Pages/partysystem.aspx (last visited July 22, 2025).

ensure each accident is sufficiently investigated.[14] A party to the investigation may be any federal, state, or local government agency, as well as any organization whose employees, activities, or products were involved in the accident and can provide suitable, qualified technical personnel to assist.[15] However, no party representative may "occupy a legal position or be a person who also represents claimants or insurers."[16] While parties do not participate in writing the final NTSB report, they are invited to submit their proposed findings of cause and any safety recommendations, which then become a part of the public docket.[17]

The party system employed by the NTSB allows manufacturers to leverage the intricate knowledge of their engineers, designers, maintenance supervisors, and other employees who have working knowledge of the particular aircraft or component involved in the investigation.[18] A manufacturer does not have to participate as a party to the investigation. However, active participation as a party allows first-hand knowledge of any structural or design defects discovered, the ability to suggest bits of evidence that the NTSB may overlook, and even advocate that another entity, such as the pilot, air traffic control, ground crew, etc., is culpable.

Accident Investigations

Accident investigations are a core responsibility of the NTSB, as their findings guide safety recommendations intended to prevent future accidents.[19] Since its inception, the NTSB has investigated more than 153,000 aviation accidents and issued more than 15,500 safety recommendations, with over 82 percent being implemented.[20] Because NTSB investigations are fact-finding proceedings with no adverse parties, they are not subject to the Administrative Procedure Act.[21]

[14] 49 C.F.R. § 831.11
[15] *Id.*
[16] 49 C.F.R. § 831.11(b)(1)
[17] NTSB, *The Party System* supra note 13.
[18] 2 Kreindler, Aviation Accident Law § 19.01 (Matthew Bender)
[19] 49 C.F.R. § 831.4
[20] NTSB, *History supra* note 4.
[21] 49 C.F.R. § 831.4(c). The Administrative Procedure Act (APA), enacted in 1946, governs the process by which federal administrative agencies develop and issue regulations. It establishes procedures for rulemaking, adjudication, and judicial review of agency actions. *See* 5 U.S.C. §§ 551–559, 701–706.

Every accident the NTSB investigates is unique regarding scope and specific items investigated. But the NTSB follows a standardized investigative process to ensure comprehensive and consistent reporting.

The first step in an accident investigation is the decision to launch.[22] After being notified of a transportation accident, the NTSB conducts a preliminary assessment to determine the appropriate level of response, using a classification system ranging from Class 1 (most serious) to Class 4 (least serious).[23]

The next step of an investigation is fact gathering.[24] Fact gathering can occur on and off scene, either by an NTSB "Go Team" who travels to the site, or through a designated party, depending on the investigation classification level.[25] A Go Team consists of an Investigator-in-Charge ("IIC") as well as specialists responsible for a clearly defined portion of the accident investigation (e.g., powerplants, air traffic control, weather, human performance, etc.).[26] A Board member may also be on scene for major accident investigations (Class 1) to act as an official spokesperson.[27] Part of the fact-gathering process may include an Investigative Hearing (more on this to follow).

The next step in the investigative process is analysis. NTSB specialists evaluate the collected information to reconstruct the sequence of events and determine the accident's probable cause.[28] At this phase a draft report is written and approved by a delegated authority or reviewed at a public Board meeting. Once approved, the report is released to the

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[22] National Transp. Safety Bd., *Investigations: How the NTSB Works*, NTSB, https://www.ntsb.gov/investigations/process/Pages/default.aspx (last visited July 23, 2025).
[23] Nat'l Transp. Safety Bd., *Accident/Incident Classification Criteria*, https://www.ntsb.gov/about/organization/AS/Pages/aviation-classification.aspx (last visited July 23, 2025). While the NTSB retains authority to investigate all civil aviation accidents within the United States, the NTSB prioritizes the level of response needed for every accident due to limited resources. Accidents with already known or similar causes that are unlikely to produce new safety information are deprioritized in favor of accidents that may result in safety recommendations.
[24] NTSB, *Investigations supra* note 22.
[25] *Id.*
[26] Nat'l Transp. Safety Bd., The Investigative Process: The NTSB Go Team, https://www.ntsb.gov/investigations/process/Pages/goteam.aspx (last visited July 23, 2025).
[27] *Id.*
[28] NTSB, *Investigations supra* note 22.

public. The NTSB may make safety recommendations to regulatory agencies, manufacturers, and companies based on the report's findings.[29]

The investigation process is not completely linear, and phases may overlap based on the circumstances. Though timelines can vary significantly, most investigations take between 12 and 24 months to complete.[30]

Investigative Hearing

As previously mentioned, part of the fact-gathering process may include an Investigative Hearing. Investigative hearings occur at the discretion of The Board and are reserved for large aviation accidents or accidents that generate significant public interest.[31] Unlike the hearing in *Sully*, the hearing is purely a non-adversarial fact-finding proceeding.[32] Part of the purpose of the hearing is to create a full public record of the facts, conditions, and circumstances of the accident.

Hearings may be conducted in person, virtually, or occasionally in the field near the accident site.[33] In preparation, the NTSB designates parties who can offer relevant perspectives on issues related to the accident.[34] Before the public hearing, a pre-hearing conference is held to allow each party to contribute input on their area of expertise, helping to shape the scope of the hearing. Following this, the NTSB identifies individuals or organizational representatives as hearing witnesses if they possess information that has not yet been uncovered, requires clarification, or warrants public examination.[35] The hearing officer may issue subpoenas to compel witness attendance, testimony, or the production of documents.[36] Notably, claimants and their attorneys are excluded from participating as parties in the hearing.[37]

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[29] *Id.*
[30] *Id.*
[31] Bender, *Aviation Accident Law supra* note 18.
[32] *Id.*
[33] National Transp. Safety Bd., Investigative Hearings, NTSB, https://www.ntsb.gov/investigations/process/Pages/investigativehearings.aspx (last visited July 23, 2025).
[34] *Id.*
[35] *Id.*
[36] Bender, *Aviation Accident Law supra* note 18.
[37] *Id.*

At the hearing, the designated hearing officer will administer oaths to witnesses before their testimony. Questioning will then come from NTSB technical experts, The Board, or parties to the investigation.[38] While civil litigants and their counsel can attend the hearing, no one else is permitted to ask questions to witnesses. Finally, during the hearing, exhibits may be introduced. Exhibits may include reports, photographs, transcripts of flight crew conversation, maintenance records, or any other evidence that The Board determines is necessary in determining the cause of the accident.[39]

After the hearing concludes, The Board will issue an Accident Report containing factual determinations and a probable cause conclusion.[40] Importantly, the NTSB is statutorily barred from assigning fault or blame for an accident.[41] The objective of the report is to determine the cause of the accident in order to issue safety recommendations to mitigate similar accidents. All documents produced during the investigation and hearing become part of the public record and may be obtained for a nominal fee from the NTSB.[42]

B. Admissibility of NTSB Reports and Testimony from Hearings in Civil Proceedings

Aviation accident litigants often seek to have NTSB work products admitted into evidence.[43] However, with the purpose of accident investigations being safety improvements, there are several hurdles litigants need to overcome to use the NTSB's work in their civil suit. Most significantly, 49 C.F.R. § 835.2 states, "[N]o part of a Board accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports." However, the regulation goes on to state that The Board does not object to

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] "NTSB investigations are fact-finding proceedings with no adverse parties. The investigative proceedings . . . are not conducted for the purpose of determining the rights, liabilities, or blame of any person or entity, as they are not adjudicatory proceedings" 49 CFR 831.4(c)
[42] Bender, Aviation Accident Law *supra* note 18.
[43] *Id.*

using the factual accident report in civil litigation.[44] This can sometimes lead to disputes over what is factual in the NTSB report.

Additionally, testimony given by witnesses at an Investigative Hearing is inadmissible due to rules on hearsay.[45] The rules of evidence generally bar admission of testimony from *ex parte* hearings and investigations.[46] However, no rule bars litigants from adducing similar testimony during trial. While NTSB and FAA accident investigators may be forced to testify in civil litigation, their testimony is limited to matters of fact and cannot include opinions or conclusions. Yet the limitation of factual testimony does not extend to non-NTSB employees, such as experts and airline employees who participated in an investigation.

Conclusion

The NTSB plays a critical role in improving aviation safety. Unlike the Hollywood portrayal, the NTSB is not concerned with assigning fault but rather improving aviation safety. For The Board to thoroughly conduct its work, it must have the independence and statutory authority to lead accident investigations. With just over four hundred employees, the NTSB cannot conduct every investigation alone. The NTSB can leverage outside expertise and efficiently manage its caseload by incorporating various parties into the investigation.

Additionally, since the overall goal of the NTSB is safety improvement, it may hold Investigative Hearings for the public to view the accident investigation process when it deems it important. Investigative Hearings are not to assign fault, but rather to have factual evidence presented in a public forum. Witnesses at Investigative Hearings are solely to help the NTSB determine the probable cause of the accident and are not being examined to assign blame. Most of the work product that results from an NTSB investigation is barred from civil litigation to encourage open and honest safety conversations. Generally, work product that provides facts is allowed to be used as evidence in civil litigation, but any testimony used at an Investigative Hearing in

[44] 49 C.F.R. § 835.2
[45] 2 Kreindler, Aviation Accident Law § 19.03 (Matthew Bender)
[46] *See Universal Airline, Inc. v. Eastern Airlines, Inc.*, 188 F.2d 993, 1000 (D.C. Cir. 1951).

determining those facts is barred due to hearsay and Federal Regulation. Therefore, parties and witnesses to NTSB investigations can work with the NTSB without constant fear that their work will later be used against them in a civil suit. The goal is the continual improvement of aviation safety.

STATUTES OF REPOSE AND THE RIGHT NOT TO LITIGATE: THE GARA DEBATE IN *BYRD V. AVCO*

*By: Ralph Pagano and Valerie Carter**

INTRODUCTION

"We are quite prepared to insure the risks of aviation, but not the risks of the American legal system."[1] So declared a Lloyds of London underwriter, capturing the turbulent climate facing general aviation manufacturers in the decades leading up to the 1994 passage of the General Aviation Revitalization Act (GARA)." Russ Meyer, former CEO of Cessna Aircraft and seminal figure in the passage of GARA reflected on its impact, stating "The escalating and incalculable cost of product liability essentially killed the production of single-engine propeller aircrafts."[2] In the years prior to GARA's enactment, manufacturers struggled under the burden of the 'long tail of liability,' stretching back to airplanes built prior to the 1940s. Manufacturers were routinely subject to litigation involving aircraft that had been in operation for decades, which "made it increasingly difficult for general aviation manufacturers to secure liability insurance for design or product defects."[3] The major manufacturers had no alternative but to self-insure, exacerbating financial strain and pervading detrimental declines throughout the general aviation industry.[4]

The following discussion reviews GARA's legislative history, focusing on a recurring issue that has significantly weakened the defense's effectiveness across federal and state courts: manufacturers' inability to immediately appeal pre-final judgment rulings that deny GARA protection, thereby avoiding trial altogether. This article examines the pending North

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[1] *See* Jamie Francesca Rodriguez, *Tort Reform & GARA: Is Repose Incompatible with Safety?*, 47 Ariz. L. Rev. 579 (2005).

[2] *See* Kerry Lynch, *Remembering GARA 30 Years Later: The Law That Changed the Trajectory*, AINonline (Aug. 1, 2024), https://www.ainonline.com/aviation-news/business-aviation/2024-08-01/remembering-gara-30-years-later-law-changed-trajectory

[3] *See* Jamie Francesca Rodriguez, *Tort Reform & GARA: Is Repose Incompatible with Safety?*, 47 Ariz. L. Rev. 579 (2005).

[4] *See* Petra L. Justice & Erica T. Healey, *Why Non-Final GARA Denials Deserve Certiorari Review: "When Your Money Is Gone, That Is Permanent, Irreparable Damage to You"*, 42 Stetson L. Rev.

Carolina Supreme Court case, *Byrd v. Avco*, to analyze the competing arguments on both sides of this critical procedural question. Manufacturers must be mindful not only of GARA's potential limitations, but also of pending cases like *Byrd* where courts invite amicus briefs from industry stakeholders. This presents strategic opportunities to help shape evolving precedent that could impact litigation strategy across jurisdictions and the general aviation industry's overall stability.

GARA-IMMUNITY

a. GARA's Purpose

The Act, as its title suggests, was created to revitalize this failing general aviation industry. Specifically, GARA established a statute of repose barring civil suits against aircraft manufacturers arising from accidents occurring over eighteen years from the date the aircraft was delivered to its first owner.[5] Congress intended for this legislation to protect aviation manufacturers from the extraordinary costs of litigation. As former Representative Dan Glickman—who championed the bill in the House—remarked, GARA was "…a symbol that the trial lawyers didn't have a monopoly on all legislative items affecting product liability.[6]" The statute imposes a limited federal preemption of state products liability laws, protecting the general aviation manufacturers from the high expense of an often-successful defense of a products liability case.[7] Since its passage, the GARA defense, often referred to as "GARA Immunity," has become a lethal litigation tool for manufacturers of general aviation aircrafts and aircraft component parts.[8]

GARA is not without limits. The statute includes clearly defined exceptions that allow certain claims to proceed despite the 18-year bar. A significant exception applies if a manufacturer knowingly misrepresented, concealed, or withheld information from the FAA that was required for certification or related to the aircraft's maintenance or operation, and that information is causally linked to the injury, the claim is not barred.[9]

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[5] General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552.
[6] *See* Kerry Lynch, *Remembering GARA 30 Years Later: The Law That Changed the Trajectory*, AINonline (Aug. 1, 2024), https://www.ainonline.com/aviation-news/business-aviation/2024-08-01/remembering-gara-30-years-later-law-changed-trajectory
[7] *See id*.
[8] *See* Petra L. Justice & Erica T. Healey, *Why Non-Final GARA Denials Deserve Certiorari Review: "When Your Money Is Gone, That Is Permanent, Irreparable Damage to You"*, 42 Stetson L. Rev.
[9] General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552.

Other exceptions include: (1) claims based on a written warranty; (2) injuries to individuals who were not aboard the aircraft at the time of the accident; and (3) injuries to passengers aboard aircraft used for emergency medical transport. Furthermore, if the accident occurred due to a new part, system, or subassembly installed or replaced within the 18-year period, the statute of repose applies from the date of installation or replacement.

These exceptions offer plaintiffs narrow pathways to circumvent GARA's powerful bar to litigation. Still, plaintiffs bear the burden of proof to successfully invoke an exception and pierce GARA's protective shield. When courts apply these exceptions and allow claims to proceed despite GARA's 18-year bar, manufacturers who disagree with the legal reasoning face a critical procedural dilemma: whether they can immediately appeal the adverse ruling or must endure the full costs of trial before obtaining appellate review.

b. GARA's Issues

While GARA was enacted with the goal of protecting manufacturers and revitalizing the industry, its application has at times strayed from that purpose.[10] Although GARA is uniform federal substantive law, the state procedural laws governing how state courts handle appeals of GARA-based decisions vary by jurisdiction. [11] A procedural catch-22 arises when courts deny manufacturers' motions for dismissal of orders rejecting GARA-based defenses**.** In such cases, manufacturers are essentially forced to proceed with litigation, incurring the costs and time burdens GARA was intended to prevent.[12]

For example, when a manufacturer moves for summary judgment under GARA's statute of repose and the trial court denies the motion (correctly or not), the manufacturer may seek immediate appeal. If the appellate court declines the appeal to review the denial until a final judgment is rendered, the manufacturer must then endure full litigation, even where GARA may ultimately bar the claim in the end. Ironically, even if GARA ultimately protects the manufacturer at trial or on final appeal, they've already incurred the substantial litigation costs that GARA

[10] *Why Non-Final GARA Denials Deserve Certiorari Review: "When Your Money Is Gone, That Is Permanent, Irreparable Damage to You"*, 42 Stetson L. Rev.
[11] *See* Petra L. Justice & Erica T. Healey, *Why Non-Final GARA Denials Deserve Certiorari Review: "When Your Money Is Gone, That Is Permanent, Irreparable Damage to You"*, 42 Stetson L. Rev.
[12] *See id.*

was enacted to eliminate, nullifying GARA's prophylactic effect.

One such case, *Byrd v. Avco*, is currently pending before the North Carolina Supreme Court.[13] The central question is whether the denial of GARA's statute of repose defense is immediately appealable under the substantial-right doctrine. As a general rule, only final judgments are appealable. An interlocutory appeal—an appeal taken before final judgment—asks an appellate court to review a trial court's ruling on a specific issue mid-case. The appellate court's acceptance of the appeal is often discretionary (varying from jurisdiction to jurisdiction and also between state and federal court). If the appeal is accepted, it essentially puts a halt on the case until the particular issue is resolved. The substantial-rights doctrine, is an exception to the final judgment rule in North Carolina, permitting interlocutory appeal where a substantial right would be lost absent immediate review.

As previously noted, state procedural law governs interlocutory appeals in state courts. Some states utilize the collateral order doctrine, a federal doctrine, which maintains a different standard than substantial right doctrine.[14] The collateral order doctrine allows immediate appeals, despite final judgment, of district court decisions that are conclusive, resolve important questions completely separate from the merits, and would render such important questions effectively unreviewable on appeal from final judgment in the underlying action.[15] Both doctrines are designed to protect certain rights that would be effectively lost if a party had to wait until final judgment.

Byrd v. Avco may shed new light into how North Carolina approaches the substantial rights doctrine, as it will force the North Carolina Supreme Court to determine whether manufacturers can bypass costly trial proceedings when GARA should provide immediate protection.

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[13] *Byrd v. Avco Corp.*, No. P24-630, at 4 (N.C. filed Oct. 15, 2024) (petition for writ of supersedeas and motion for temporary stay).

[14] *See* Petra L. Justice & Erica T. Healey, *Why Non-Final GARA Denials Deserve Certiorari Review: "When Your Money Is Gone, That Is Permanent, Irreparable Damage to You"*, 42 Stetson L. Rev.

[15] *See* Carter Boisvert, Ninth Circuit Holds the General Aviation Revitalization Act is Immediately Appealable under the Collateral Order Doctrine: Estate of Kennedy v. Bell Helicopter Textron, Inc., 68 J. AIR L. & COM. 631 (2003).

BYRD V. AVCO

a. Procedural History and Background

In 2015, a single-engine Piper PA-32R-300, equipped with a Lycoming IO-540-K1G5D engine crashed shortly after takeoff in Georgia, killing all three passengers on aboard, and the pilot, Greg Byrd, who held a commercial pilot's license and instrument rating.[16] The flight originated at Peachtree DeKalb Airport under an instrument flight plan.[17] Just as the aircraft departed the runway, it began to experience a loss of engine power.[18] This caused the aircraft to lose speed and be unable to climb.[19] Air Traffic Control radioed Byrd, and he reported that he was having some trouble climbing. He subsequently radioed "we're going down here" and attempted to land his aircraft on the highway. The aircraft erupted into flames upon colliding with a barrier.

In 2017, the Plaintiffs' estates brought suit in North Carolina state court against Avco Corporation and Lycoming Engines, alleging a negligent failure to warn about defects in a 1978 aircraft engine.[20] In 2021, the Defendants moved for summary judgment, asserting the GARA defense because the part was manufactured over forty years prior to the crash.[21]

The Plaintiffs invoked GARA's misrepresentation exception, which applies if a manufacturer knowingly withheld required safety information from the FAA. The trial court denied summary judgment in 2022, finding that Plaintiffs had raised a triable issue of fact as to whether Avco failed to inform the FAA about service reports related to engine difficulty.[22] Therefore, the trial court judge found that this was an issue for a jury to decide.[23]

After a Daubert hearing challenged the admissibility of Plaintiffs' expert, the trial court appeared to reconsider its earlier ruling. While it agreed that

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[16] *See id*.
[17] *See id*. at 4.
[18] *See id*. at 23.
[19] *See id*. at 24.
[20] *See* Byrd v. Avco Corp., No. 270P24, at 31 (N.C. filed) (response to petition for writ of supersedeas); Byrd v. Avco Corp., No. P24-630, at 5 (N.C. filed Oct. 15, 2024) (petition for writ of supersedeas and motion for temporary stay).
[21] *See* Byrd v. Avco Corp., No. 270P24, at 1 (N.C. filed)(new brief of defendants-appellants).
[22] *See* Byrd v. Avco Corp., No. P24-630, at 7 (N.C. filed Oct. 15, 2024) (petition for writ of supersedeas and motion for temporary stay).
[23] *See* Byrd v. Avco Corp., No. 270P24, at 4 (N.C. filed) (response to petition for writ of supersedeas).

some of the allegedly withheld information had, in fact, already been submitted to the FAA by others, the judge still found unresolved factual questions involving different potential reporting obligations. Therefore, the court ultimately declined to dismiss the case.

The Defendants filed a Motion For Reconsideration, which the court denied in early 2024.[24] At this point, the Defendants attempted to appeal the denial of its Motion to Reconsider arguing that GARA's protections should apply as a matter of law. Plaintiffs alternatively argued that the Defendants did not appeal the trial court's summary judgment ruling in a timely manner.[25] Plaintiffs argue this is evidenced by the trial originally being set for 2022, yet it was ultimately delayed, and the Defendants did nothing to appeal the trial court's ruling for two years. Therefore, the Plaintiff's argue that the timeframe to appeal has run out because the reconsideration motion did not restart the clock.

The trial court sided with Plaintiffs, stating the appeal was not from a final judgment and disregarded the notice of appeal.[26] Avco then sought emergency relief—known as *supersedeas*—to halt the trial while its GARA-based appeal was considered. The North Carolina Court of Appeals denied the request, but the North Carolina Supreme Court granted *supersedeas* relief, temporarily pausing the trial.[27]

The Defendants now argue that the Court of Appeals wrongfully dismissed its appeal, despite the fact that GARA should provide immediate protection from prolonged litigation.[28] According to the Defendants, the trial court improperly shifted its legal basis for rejecting summary judgment. The cert petition to the North Carolina Supreme Court having been granted, the question is now whether an order denying a statute of repose defense is immediately appealable under the substantial rights doctrine.[29]

Defendant's Argument

The Defendants, Avco and Lycoming, argue that the trial court's denial of their defense under GARA is immediately appealable because it affects

[24] See Byrd v. Avco Corp., No. 270PA24, at 34 (N.C. filed May 21, 2025) (new brief of defendants-appellants).
[25] *See id*. at 7.
[26] *See id*. at 8.
[27] *See id*. at 10.
[28] *See* i*d*. at 12.
[29] *See id*. at 1.

a substantial right.[30] As mentioned, under North Carolina's substantial rights doctrine, interlocutory orders may be appealed when the ruling "affects a substantial right" that will be lost absent immediate appellate review.[31] Defendants argue that a statute of repose, unlike a statute of limitations, promises immunity from the burdens of litigation itself, not just judgment.[32] Once the burden of trial has been imposed, "the right is effectively lost because no later reversal can refund years of discovery, expert witness expenses, or the burden of trying a case that Congress said should never proceed."[33]

The core of Defendants' argument rests on the legislative history and congressional intent behind GARA. Defendants point to the Supremacy Clause as the Constitutional basis for their argument that Congress's clear judgment is binding on the states.[34] In their view, Congress enacted GARA solely to avoid the skyrocketing litigation costs that were crippling U.S. aircraft manufacturers; a clear sign that avoiding trial is the right being protected. The appellant's brief posits: "It's the cost of litigation, not of paying judgments, that decimated the aviation industry and led to GARA. That motivating concern can be protected only with the right to an immediate appeal."[35]

To reinforce their position, the Defendants echo congressional voices at the time of GARA's passage, which explained that "most manufacturers ultimately prevail, but the victories are pyrrhic due to the exorbitant cost of litigating to a final judgment."[36]

The Defendants analogize GARA to a statutory immunity from suit. They bolster their argument with federal cases such as *Estate of Kennedy v. Bell Helicopter Textron, Inc*., where the court recognized that GARA is more than simply a statute of limitations because it provides manufacturers the right not to stand trial at all.[37] Therefore, the Defendants reason that

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[30] *See id*. at 25.
[31] *See* N.C. Gen. Stat. statute 7A-27; NC Gen State 1-277.
[32] See *id.* at 35.
[33] *See id.*
[34] *See Byrd*, No. 270PA24, at 32.
[35] *See id*.
[36] *See id*.
[37] *See id*. at 30.

GARA provides a substantive protection akin to statutory immunity, not merely a *procedural* limitation.[38]

Plaintiffs' Arguments

The Plaintiffs' central contention is less focused on GARA itself and more on the procedural impropriety of Defendants' appeal. They argue that the Defendants are merely repackaging a second bite at the apple under the guise of an interlocutory appeal to delay trial further.[39] Plaintiffs believe that the Defendants chose to sidestep a direct rebuttal and engage instead with a "straw-man argument that Plaintiffs never made."

The Plaintiffs emphasize that there is no substantial right under GARA not to stand trial and that if Congress had intended that right, it would have said so and it didn't.[40] The Plaintiffs contest the Defendants' portrayal of GARA as an immunity statute, emphasizing that it is instead a fact-driven affirmative defense, not a jurisdictional bar. They argue that the right not to stand trial under GARA does not exist in any controlling precedent and therefore the Defendants are seeking to rewrite settled appellate procedures and statutory intent.

To reinforce their interpretation of GARA, the Plaintiffs cite House and Senate reports delineating the statute's legislative origins. Plaintiffs deeply contest the Defendant's portrayal of GARA as an "immunity" statute, arguing alternatively that it is an affirmative defense, not a jurisdictional bar.[41] They describe the congressional intent as "a careful [] balancing of the competing interests of aviation manufacturers and accident victims."[42] Contrary to the defendants' characterization, the Plaintiffs portray GARA's history as more victim-oriented, rather than a wholesale grant of immunity to aircraft manufacturers. They emphasize early legislative proposals had indeed sought to give manufacturers sweeping protections, but Congress rejected such expansive proposals.[43]

Plaintiffs further point to the key exceptions including Misrepresentation and the Rolling Provision and explained Congress's goal was to reduce

[38] *See id*. at 31.
[39] *See* Byrd v. Avco Corp., No. 270PA24, at 38 (N.C. filed June 24, 2025) (plaintiffs-appellees' new brief).
[40] *See id.* at 4.
[41] *See id* at 31
[42] *See id*. at 6.
[43] *See id*. at 8.

excessive litigation costs "while treating aircraft operators and passengers fairly,"[44] particularly when manufacturers allegedly concealed defects from the FAA. Factually, Plaintiffs assert that Defendants abused their obligation to report and correct defects, and that allowing them to avoid jury scrutiny contradicts the Congressional intent.[45]

The Plaintiffs argue that the Defendants' "substantial right" argument is plainly inconsistent with both federal case law and nearly 25 years of North Carolina appellate precedent to the contrary.[46] The Plaintiffs further remind the court that the appellant has the burden of showing that the order appealed from affects a substantial right, and they do not find that the Defendants have met such a burden.[47] They also argue that the case law the Defendants rely on in their brief is misinterpreted. The argue that the case law does not supports the contention that GARA gives general aviation manufacturers a right not to stand trial.

Plaintiffs also cite prior adverse appellate case law involving Avco itself. Particularly, citing a case where the court denied interlocutory appeals of pretrial orders that rejected summary judgment of GARA, holding that denying the application of a statute of repose simply do not implicate the same public policy concerns as a denial of absolute immunity.[48] Thus, Plaintiffs argue that the defense fails on both legal and precedential grounds, representing a strategic misuse of the appellate process that should be outright rejected.

CONCLUSION

GARA was enacted to shield general aviation manufacturers from the crushing burden of endless litigation and to revitalize a struggling industry. Yet over time, its effectiveness has been undermined by inconsistent procedural treatment in the courts.

The pending decision in *Byrd v. Avco* illustrates this erosion. If courts deny manufacturers the ability to immediately appeal adverse GARA

[44] *See id*. at 8.
[45] *See id*. at 39.
[46] *See id.* 29.
[47] *See id* at 28.
[48] See id. at 30.

rulings, they risk nullifying the very protection Congress intended—forcing defendants to bear the high cost of litigation even when GARA should bar the suit entirely.

The outcome in *Byrd* may have the capacity to shape how courts treat GARA going forward by establishing important precedent. *Byrd* underscores the importance of procedural clarity in preserving the statute's purpose. Manufacturers must remain vigilant—not only about GARA's legal boundaries, but also about opportunities to influence precedent through strategic amicus engagement. Ultimately, the future strength of GARA lies in ensuring courts honor its protective intent through consistent and meaningful procedural enforcement.