



Aviation Liability: Reflections and Predictions

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Presented By:



Mark Dombroff

Chair, Aviation Practice

703.248.7002

mdombroff@foxrothschild.com



Mark McKinnon

Partner, Aviation Practice

202.794.1214

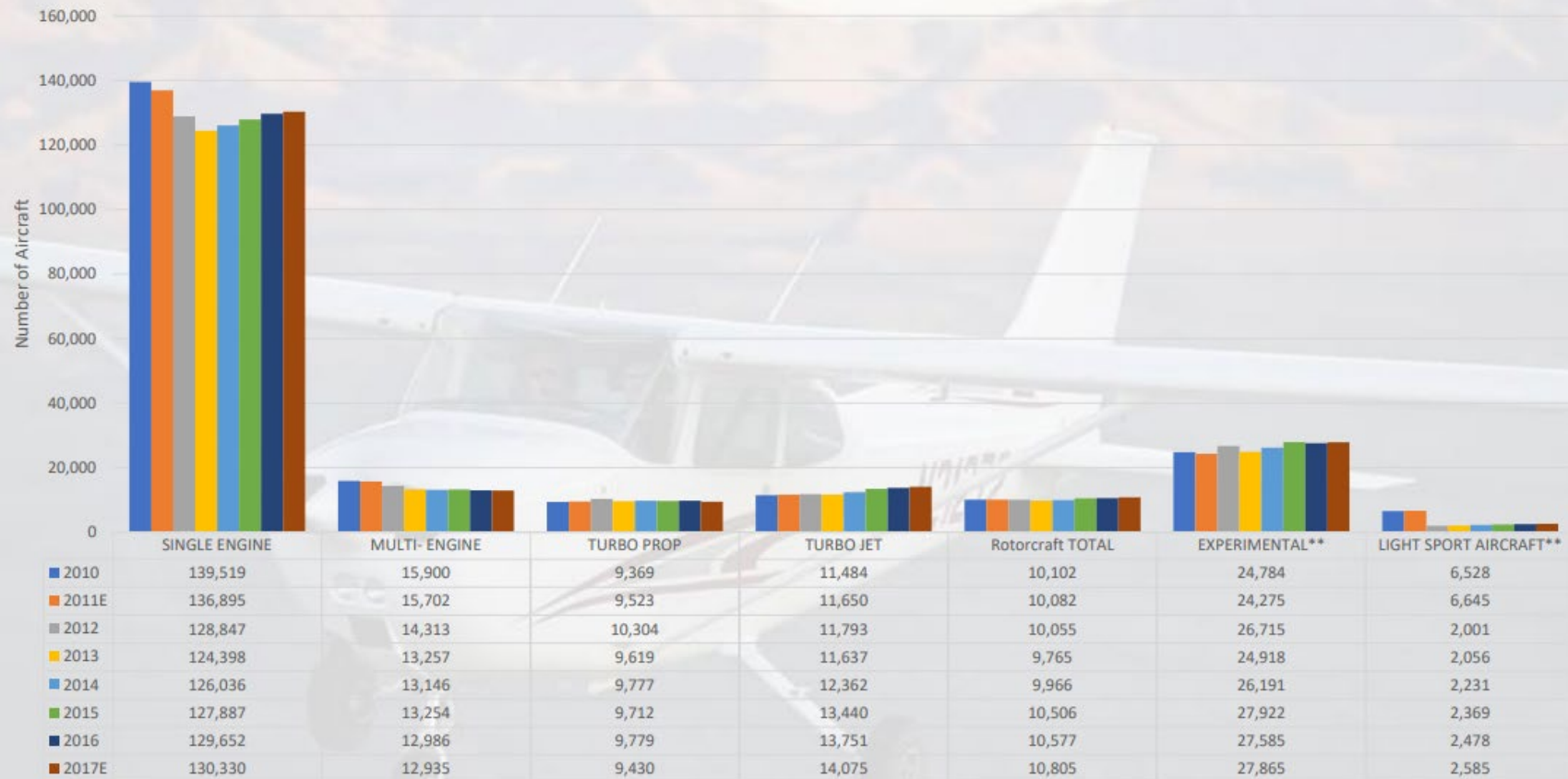
mmckinnon@foxrothschild.com

GARA – State of the Industry

- General Aviation Revitalization Act of 1994
- Product liability claims were crippling small aircraft manufacturers
- General aviation aircraft production peaked in the 1970s
- Between 1978 and 1988, airplane sales had fallen 95 percent, with industry employment down 65 percent
 - Cessna had stopped making single-engine piston airplanes
 - Piper Aircraft Company was in bankruptcy
 - Beech Aircraft was mostly shut down

GARA

Active Aircraft 2010 to 2017



* Source: 2001-2010, 2012-2016, FAA General Aviation and Air Taxi Activity (and Avionics) Surveys.

**Experimental Light-sport category that was previously shown under Sport Aircraft is moved under Experimental Aircraft category, starting in 2012.

Note: An active aircraft is one that has a current registration and was flown at least one hour during the calendar year.

GARA

- Insurance was not the answer to cover the losses
 - 1979 - Industry insurance premium was \$24 million covering 14,000 aircraft delivered
 - 1993 – Industry insurance premium was \$200 million, with only 950 aircraft delivered
- GARA is a statute of repose
- Supersedes state law
- Applies to manufacturers of aircraft carrying fewer than 20 passengers, and associated aircraft parts
- Acts as a liability shield for death, personal injury and property damage claims for products that are 18 years old or older at the time of the accident
- Bars both strict liability and negligence claims

GARA – Statute of Limitations v. Statute of Repose

- Statutes of Limitation
 - Bars claims that accrue a set time after a negligent or intentional tortious act
 - Statutes of limitation can be tolled
 - Equitable tolling
 - Fraudulent concealment
- Statutes of Repose
 - Bars claims that occur a set time after the manufacture of the product

GARA – Exceptions

- **Misrepresentation** – No defense if the defendant knowingly misrepresents or conceals required information that is material and relevant and causally related to the harm plaintiffs suffered
 - Can include failing to report or conceal safety issues from FAA
- **Clock restarting** – Parts and systems can have their own statute of repose
 - Addition of new part that that fail
 - Significant changes in manuals or instruction promulgated after original manufacture within the 18-year period
- Written warranty that extends time to sue

GARA – Exceptions

- **Rebuild and overhaul** – Argument that rebuilding a complex part such as a magneto is not a maintenance procedure, but is more akin to a manufacture, and GARA can apply if the part meets the manufacturers tolerances. Mainly a factual issue involving the work done and parts in question.
- **Manuals** – Generally a manufacturer is acting in that capacity and maintenance and other manuals can be covered by GARA. Is it a required manual or guidance?

DBA – What is it?

- Defense Base Act – 42 U.S.C. Sec. 1651.
- Passed just before US entry into WWII to deal with issues created by Lend Lease Act
- Foreign sovereignty led to problems regarding employer liability and the costs being passed on to the United States
- Essentially extends the provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA – 33 USC Sec. 901) to persons working on certain government contracts
- U.S. Department of Labor benefit Review Board adjudicates DBA benefit determinations

DBA Claims 2001 - 2023

COUNTRY	SUM(NLT)	SUM(CO)	SUM(LT)	SUM(LTC)	SUM(DEA)	SUM(OT)	SUM(TOTAL)
Iraq	47797	547	69	30710	1748		80949
Afghanistan	36998	153	43	27928	1855		67093
Nation Pending	11836	59	45	5568	99		17663
Kuwait	7172	252	14	5384	127		12949
United States of America (the)	3446		18	3559	42		7070
Marshall Islands (the)	1288			1172	20		2486
Qatar	624			1142	23		1797
Puerto Rico	708			970	9		1690
Germany	722	13		588	12		1338
United Arab Emirates (the)	435			418	15		874
Djibouti	598			224			833
Antarctica	588			157			746
Japan	332			229	15		579
Colombia	291	9		196	20		516
Bosnia and Herzegovina	127	9		359	13		508
Jordan	245			212	40		503
Korea (the Republic of)	280			162	12		455
Uganda	86			361			453
Saudi Arabia	181			234	27		444
Cuba	150			184			343
Bahamas (the)	166			173			341
Pakistan	131			160	43		334
Macedonia (the former Yugoslav Republic of)	171			148			324
Syrian Arab Republic	109			190	14		314
Bahrain	160			125			288
United Kingdom of Great Britain and Northern Ireland (the)	146			120	8		276
Israel	152			112			269
Somalia	133			112	11		257
Honduras	141			103			247

NLT = no lost time

LTO = lost time | 3 days or less

LT4 = lost time 4 days or more

DEA = death

COP = salary continuation

DBA – Who does it cover?

- At any military, air, or naval base acquired after January 1, 1940, by the U.S. from any foreign government
- Upon any lands occupied or used by the U.S. for military or naval purposes outside the continental United States (including the U.S. Naval Operating Base, Guantanamo Bay, Cuba; and the Canal Zone)
- Upon any public work outside the continental U.S. if the employee is engaged in employment from a contractor or any subcontractor with the U.S. (excludes contracts simply supplying materials for the project)
- Every contract must have a provision requiring that, before commencing performance, DBA insurance coverage is obtained
- The coverage must be in full force and effect during the contract

DBA – Who does it cover?

- Federal contracts include any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States)
- Applies to contracts covered by the Mutual Security Act of 1954
- Applies to American employer providing welfare or similar services for the benefit of the Armed Forces pursuant to appropriate authorization by the Secretary of Defense
- Also covers injuries occurring to any such employee during transportation to or from his place of employment, where the employer or the United States provides the transportation or the cost thereof

DBA – What Protection Does it Offer

- Protection given is similar to state workers compensation claims
 - No Fault coverage, exclusive remedy
- Employees rights to recovery are limited to the DBA insurance
- Bars all claims for injury, wrongful death and survival
- Unlike state worker compensation laws, the purpose of the act is the protection of the United States
- Congress made specific findings that purpose of the law was to protect U.S. Treasury and prevent excessive costs from being passed on or paid indirectly by the United States

DBA – Exceptions

- DBA coverage must be in place prior to the start of performance
- Any lapse in coverage can forfeit the protection
- If the coverage is not obtained in a timely manner, there is still an argument that this requirement is not jurisdictional and the DBA still applies, so long as there is insurance that covers the loss
- DBA protection can flow down/up between contractors/subcontractors and subordinate contractors and subcontractors, but the protection can be jeopardized if the contracts do not contain the required provision or if DBA coverage not secured
- If the language is missing, there is still an argument that this requirement is to ensure uniformity but does not void the protection so long as the coverage exists

Government Contractor Defense (GCD)

- Outgrowth of sovereign immunity doctrine
- FTCA only waives the United States' sovereign immunity as to torts committed by an "employee of the Government" leaving contractors exposed.
- Modern doctrine has its origins in *Boyle v. United Technologies*, 487 U.S. 500
- Although originated in the context of military equipment design contracts, many jurisdictions to apply it to non-military contracts so long as the Boyle factors are met:
 - Prevents tort claims for property damage, injury, wrongful death and survival

GCD – Based on Federal Preemption

- **Express preemption** – Congress has passed a specific statute:
 - Airline Deregulation Act of 1978 (ADA) expressly preempts states from enacting or enforcing laws “related to a price, route, or service of an air carrier”
- **Implied Preemption** – Claim touches on an area of uniquely Federal interests that would be frustrated
 - Government Contractor Defense
- **Conflict Preemption** – Compliance with state and local law is impossible
 - Compliance with Federal Aviation Regulations and State Tort law standards

GCD – Based on Federal Preemption

- Because it is based on the sovereign immunity of the Federal Government, the claim must be based on a federal decision or the use of federal discretion
- The federal act must be made “knowingly”
- The private entity seeking the protection must have advised the federal entity of all the potential risks from the choice it is making
- The federal entity has made the decision that the risk is justified to meet a federal purpose
- Can permit a cause of action to be removed from state to federal court

GCD – Boyle Elements

- State law which imposes liability for design defects in military equipment is displaced where:
 - a) the United States approved reasonably precise specifications;
 - b) the equipment conformed to those specifications; and
 - c) the supplier warned the United States about dangers in the use of the equipment known to the supplier but not to the United States

GCD – Scope

- The defense can be applied to:
 - Design-defect
 - Failure to warn, but can apply to other types of products liability claims as well
 - Service Contracts – Such as a helicopter maintenance contract (reasonably precise procedures/standards established, conformance with the procedures, disclosure of the risks
 - Subcontracts

GCD – Exceptions

- Manufacturing defects
 - The defense is generally inapplicable
 - The way the Plaintiff frames is complaint is not dispositive
 - Split on whether manufacturing defects can be shielded where the combatant activities exception would apply, i.e. sophisticated weaponry used in combat with a known failure rate
- Failure to disclose or hide risk information from the government
- Groundwork to established the elements should be laid as part of the contracting and performance process and not established ad hoc after an accident or incident.
- “Rubber Stamp” v. “Back and Forth”

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