IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CLEMENCE MICHAUD, individually, and as Personal Representative of the Estate of Jean Provencher, Deceased, and LYNE-STRICKER-BOULANGER, individually, as mother and natural guardian of GINGER STRICKER, a minor, and as Personal Representative of the Estate of Walter Stricker, Deceased, and HANSULRICH STRICKER, Sr., Plaintiffs, v. FAIRCHILD AIRCRAFT INCORPORATED, FAIRCHILD DORNIER CORPORATION, THE B.F. GOODRICH COMPANY, and B.F. GOODRICH AEROSPACE COMPONENT OVERHAUL & REPAIR, INC., Defendants.	:	Civil Action No. 00C-06-156 SCD

Defendant Fairchild Aircraft Incorporated's Motion to Dismiss - DENIED

Argued: November 5, 2001
Decided: November 16, 2001

M E M O R A N D U M O P I N I O N

Facts

This lawsuit arises out of the crash of an SA226, TC Metroliner II airplane that caught fire shortly after takeoff and crashed during an attempted emergency landing at Mirabel International Airport near Montreal, Quebec, Canada, on June 18, 1998. Everyone on board died. The plaintiffs are the wives and personal representatives of the estates of the deceased pilot and co-pilot. At the time of the crash, the aircraft was

equipped with BF Goodrich aircraft landing gear wheel brake assemblies. Plaintiffs allege that the brake assemblies overheated, which caused an explosion in the airplane, which resulted in the crash.

The allegation as to Fairchild Aircraft Incorporated ("FAI") is that the Airplane Flight Manual ("AFM"), to which the pilots referred when the **Wheelwell and Wing Overheat Warning Light** illuminated, did not adequately inform the pilots of the possibility of a brake fire.[1]

FAI's Arguments

FAI has filed this motion to dismiss, pursuant to Superior Court Civil Rule 12(b)(6), which will be treated as a motion for summary judgment. Two arguments are advanced: First, FAI is entitled to the protection of the General Aviation Revitalization Act of 1994 ("GARA"),[2] a statute of repose, which bars this claim. Second, plaintiffs do not state a cause of action against FAI as FAI was not the manufacturer of the airplane involved in the accident in question - merely the entity which acquired the assets of the manufacturer, pursuant to an order of bankruptcy - and no jurisdiction whose laws might apply to this claim has adopted a theory of liability for a successor corporation's post-sale failure to warn.

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[1] The AFM as it existed at the time of the crash said: STEADY LIGHT (indicates wheelwell or air conditioning duct overheat); the AFM was revised as a result of the crash to read: STEADY LIGHT (indicates brake fire, wheelwell or air conditioning duct overheat) (emphasis added).
[2] 49 U.S.C. § 4010.

Standard of Review

A grant of summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[3] This Court must consider all facts in the light most favorable to the non-moving party.[4]

Application of GARA

GARA established a "statute of repose to protect general aviation manufacturers from long-term liability in those instances where a particular aircraft has been in operation for a considerable number of years. A statute of repose is a legal recognition that, after an extended period of time, a product has demonstrated its safety and quality, and that it is not reasonable to hold manufacturer legally responsible for an accident or injury occurring after that much time has elapsed."[5] The legislative history of GARA indicates that it was passed in response to a serious and "precipitous" decline in the manufacture and sale of general aviation aircraft by United States companies.[6] "In essence, the bill acknowledges that, for those general aviation aircraft and component parts in service beyond the statute of repose, any design or manufacturing defect not prevented or identified by the Federal regulatory process by then should, in most instances, have manifested itself."[7]

GARA provides:

> [N]o civil action for damages for death . . . arising out of an accident involving a general aviation aircraft may be brought against the **manufacturer** of the aircraft . . . in its

[3] *Emmons v. Hartford Underwriters Ins. Co.,* Del. Supr., 697 A.2d 742, 744-45 (1997).
[4] *National Union Fire Ins. Co. v. Fisher,* Del. Supr., 692 A.2d 892, 895 (1997).
[5] *Burroughs v. Precision Airmotive Corp.,* Cal. Ct. App., 93 Cal.Rptr.2d 124, 130 (2000) (quoting 140 Cong.Rec. H4998, H4999 (Daily ed. July 27, 1994)).
[6] *Id.* at 131 (citing GARA, H.R. No. 103-525(II), 103d Cong., 2d sess. (1994), p. 1646).
[7] *Id.* (citing GARA, H.R. No. 103-525(II) at 1648).

> capacity as a manufacturer if the accident occurred . . . after the applicable limitation period . . . .[8]

A "general aviation aircraft" means "any aircraft for which type certificate or airworthiness certificate has been issued . . . which, at the time such certificate was originally issued, had a maximum seating capacity of fewer than 20 passengers, and which was not, at the time of the accident, engaged in scheduled passenger-carrying operations . . . ."[9]

The aircraft in question was built and delivered in 1977. The applicable limitations period under GARA is 18 years. Thus, the 1998 accident is well beyond the 18-year retroactive statute of repose.

The analysis begins with the question of whether FAI is the manufacturer of the aircraft. "Manufacturer" is not defined in GARA and GARA does not specifically include successor manufacturers within the protection of the statute.[10] "Absent a clearly expressed legislative intention to the contrary, the language of the statute must ordinarily be regarded as conclusive."[11] It is uncontested that the manufacturer of the aircraft was Swearingen Aviation Corporation, later named Fairchild Aircraft Corporation.[12] In August 1990, Fairchild Acquisition, Inc., later renamed FAI, purchased certain assets of the Fairchild Aircraft Corporation from its trustee in bankruptcy. The Asset Purchase Agreement ("APA") provides that FAI is not liable for the torts of Swearingen and has no liability for any defects in aircraft manufactured by Swearingen.[13] The disclaimer of

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[8] 49 U.S.C. § 4010 (2)(a) (emphasis added); 49 U.S.C. § 4010 (2)(a)(1).
[9] 49 U.S.C. § 4010 (2)(c).
[10] *Burroughs,* 93 Cal.Rptr.2d at 131.
[11] *Smith v. Fidelity Consumer Discount Co.,* 898 F.2d 907, 909 (3d Cir. 1990) (citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980)).
[12] Motion Transcript at 9 (November 5, 2001).
[13] APA; Jack D. Morgan Affadavit, FAI'S Reply Brief at Exhibit A.

liability specifically included "any failure or alleged failure to warn of any hazard, defect or alleged hazard or alleged defect, of a product (including any parts of components) manufactured in whole or in part by seller or . . . incorporated by seller in a product manufactured by seller . . ." by FAI.[14]

FAI's GARA argument relies on *Burroughs v. Precision Airmotive Corp.*[15] *Burroughs* involved a claim arising from the crash of a small aircraft manufactured by a predecessor corporation. The Court reasoned that, "[a]lthough [successor] did not actually manufacture the particular carburetor in this case, it is a manufacturer of general aviation aircraft parts, including carburetors, and it took over the manufacturer's responsibilities for the [predecessor] product line."[16] Furthermore, the Court stated that, "Precision (successor which took over manufacturing responsibilities) is . . . precisely the type of entity GARA was designed to protect from the long tail of liability."[17] "The central objective of GARA would be materially undermined if its protection did not apply to a successor to the manufacturer who, as part of its ongoing business, acquired a product line long after the particular product has been discontinued and years after the statute of repose had run as to the original manufacturer."[18]

Burroughs is readily distinguishable from the case at bar. Here, there is no continuity of business. FAI did not take over the responsibilities of the predecessor corporation; it simply acquired its assets. Therefore, FAI is not the type of entity GARA was designed to protect. Moreover, the central objective of GARA will not be materially undermined by not applying GARA protection to FAI as FAI did not acquire the

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[14] APA ¶ 1.04 (b)(ii), p. 13.
[15] *Burroughs,* 93 Cal.Rptr.2d 124.
[16] *Id* at 132.
[17] *Id.*

manufacturer's liabilities. FAI's mere acquisition of assets, without continuing to manufacture, deprives it of the benefits of GARA.[19]

Post-Sale Duty to Warn

FAI argues that the plaintiffs fail to state a cause of action because none of the jurisdictions whose law could be applied to this action, Delaware, Texas, or Canada, recognizes a post-sale duty to warn of a defect in a product.[20] The choice of law discussion was not fully developed in the briefs of the parties. This decision does not resolve that issue.

The previously referenced APA also included "[a]ll assets of an intellectual property nature, including . . . trade manuals, instructions, service bulletins, technical manuals . . ."[21] and "all type certificates, certificates of airworthiness, applications therefor and supplements thereto . . . and certificates issued by the FAA [Federal Aviation Administration] or other governmental unit."[22] As type certificate holder, FAI had the exclusive control of amendments to the AFM.[23] FAI may initiate the process of amending by application to the FAA, or the FAA can direct it. The history of FAI indicates that both processes have been followed.

In 1991 FAI made a revision to the FAA Approved AFM to correct editorial errors and to change the Cold Weather Operation information. In 1994, the AFM was amended to add notes concerning the battery overheat warning system.[24] As a result of

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[18] *Id.*
[19] Motion Transcript at 87 (November 5, 2001).
[20] David J. Marchitelli, J.D., *Liability of Successor Corporation for Injury or Damage Caused by Product Issued by Predecessor, Based on Successor's Independent Duty to Warn Third Party of Danger or Defect*, 92 ALR5th 227 (2001).
[21] APA ¶ 1.01(g), p. 9
[22] APA ¶ 1.01 (n), p. 10.
[23] Motion Transcript at 40 (November 5, 2001).
[24] Plaintiffs' Appendix, Exhibit 7, p. ix.

the incident in question, Transport Canada issued a report dated November 15, 1998, which states:

> Research following a recent fatal accident at Mirabel has revealed a risk that overheated brakes in Metroliner aircraft can potentially result in a fire and/or explosion in the wheel well. The identification of this risk is supported by a number of reported wheel well fire occurrences. This research has also identified that information in the *Aircraft Flight Manual* (AFM) may be misleading in assisting flight crew to correctly diagnose the presence of a brake overheat or wheel well fire.[25]

Following that report, the NTSB issued recommendations to the FAA. Among them was a change to the AFM to "expand the description of the wing and wheel well overheat annunciator panel warning light . . . to note that [an illumination of the light] may indicate a brake or wheel well fire . . . ."[26] The NTSB explained the decision by stating: "In this accident, immediate extension of the landing gear might have prevented failure of the left wing. The AFM emergency procedure to address the illumination of the wheel well and wing overheat warning light assumes that the cause is an air conditioning duct overheat and does not consider the consequences of a wheel well fire and the loss of hydraulic pressure or other airplane systems. For example, the procedure calls for shutting down the engine on the affected side of the airplane, which would be appropriate for an air conditioning duct overheat or a bleed air leak but unnecessary for a brake fire."[27] Subsequently, the AFM was modified to include a reference to "a brake/tire fire and tire explosion."[28]

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[25] http://www.tc.gc.ca/aviation/commerce/advisory/engnsn/ac0146r_e.htm.
[26] Plaintiffs' Appendix, Exhibit 2, NTSB Safety Recommendation A-98-113 through –118 at p. 5.
[27] Plaintiffs' Appendix, Exhibit 2, NTSB Safety Recommendation at pp. 5-6
[28] Plaintiffs' Appendix, Exhibit 7, p. III-11.

Plaintiffs argue that FAI's liability rests on two theories; simple negligence, the breach of a duty of reasonable care,[29] and Section 13 of the *Restatement (Third) of Torts, Products Liability.*[30]

I do not find that FAI is immune from liability because the manual was written by the manufacturer of the aircraft and not changed, or required to be changed prior to the accident in question. A duty of ordinary care arises from ownership of the type

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[29] *Graham v. Pittsburgh Corning Corp*, Del. Super, 593 A.2d 567, 571 (1990), cited with approval in *Brower v. Metal Industries*, Del. Supr., 719 A.2d 941, 946 (1998).

[30] Section 13 of the *Restatement (Third) of Torts: Product Liability* provides:

Liability of Successor for Harm Caused by
Successor's Own Post-Sale Failure to Warn

(a) A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity, whether or not liable under the rule stated in § 12, is subject to liability for harm to persons or property caused by the successor's failure to warn of a risk created by a product sold or distributed by the predecessor if:

(1) the successor undertakes or agrees to provide services for maintenance or repair of the product or enters into a similar relationship with purchasers of the predecessor's products giving rise to actual or potential economic advantage to the successor, and

(2) a reasonable person in the position of the successor would provide a warning.

(b) A reasonable person in the position of the successor would provide a warning if:

(1) the successor knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can be reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

certificate.[31] FAI's conduct will be measured by what it knew or should have known from the time it acquired the type certificate and thereafter.

The allegations in the complaint and the documents provided in the course of these proceedings are sufficient to create a factual issue, at this stage of the proceedings, regarding the negligence of FAI. The question of whether or not the successor liability provision of the *Restatement (Third) of Torts* will ultimately be applied to this case must await another day, and a fully developed record. Accordingly, the motion for summary judgment is DENIED.

IT IS SO ORDERED.

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Judge Susan C. Del Pesco

Original to Prothonotary
xc: Robert Jacobs, Esquire
Anthony G. Flynn, Esquire
J. Michael Johnson, Esquire

[31] Motion Transcript at 99-100 (November 5, 2001).