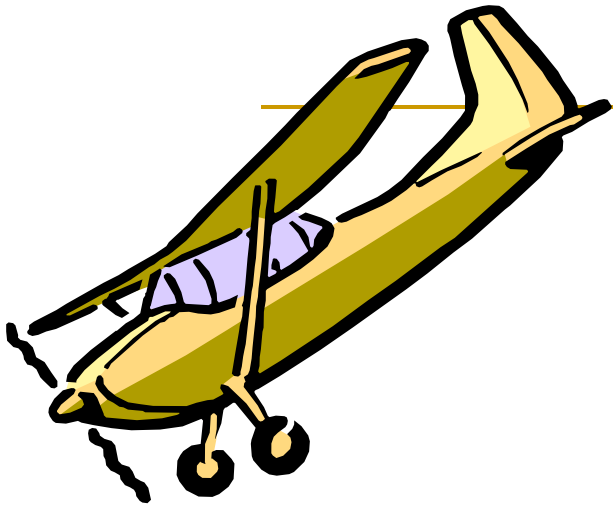

Liability & Asset Protection for Aviators



EAA AirVenture Oshkosh

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Your Speakers

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Goals

- To provide a sketch of the *legal landscape* you are operating in whenever you own, operate or otherwise affect the flight of an aircraft; and
- To review basic *risk management tools* for aviators, including *entity formation*, *insurance*, and *asset protection measures*.

Why...?

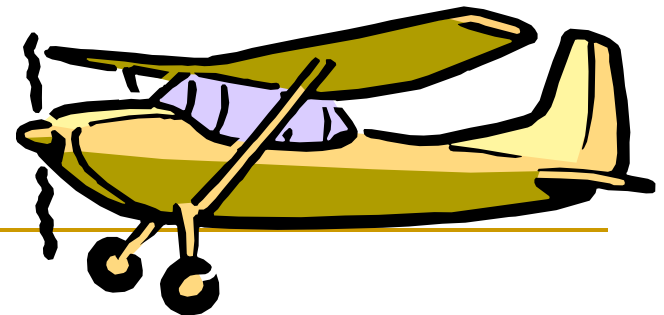
- To *depress* you...?
- To *scare* you...?
- **NO!** We are here to help you manage the *legal* risks posed by the aviation side of your life, and maybe make you a *safer pilot* in the process.

Legal Landscape

Applicable Bodies of Law:

- State “Tort” Law
 - specifically, negligence law
 - Standard = “reasonable care” / “reasonably prudent person”

- . . . & to a lesser extent: Federal Law
 - FARs = “law?”



Anatomy of an Aviation Negligence Lawsuit

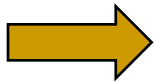
Plaintiff Must Prove *Each* of the Following:

- Defendant's involvement was such that he/she had a **duty** to prevent harm to others;
- Defendant **breached** that duty by failure to use reasonable care/act like a reasonably prudent person; and
- Defendant's breach **injured** (caused damage to) the plaintiff

Anatomy of an Aviation Negligence Lawsuit (cont.)

If plaintiff can prove all of the elements...

The amount of the judgment is bound only by how much financial damage the plaintiff can prove !!!



High wage earner plaintiff = high damages

Low wage earner plaintiff = low damages

Fun Air Crash Litigation Trivia!

- Question: If I can prove to the jury that I diligently complied with all FARs, will I win the lawsuit?
- Answer: No! (The jurors are the experts on what pilots should do, not the FAA)
- Question: If the NTSB Report completely vindicates me, am I off the hook in the lawsuit?
- Answer: No! (The jurors are the experts on what happened, not the trained accident investigator)
- Question? As a pilot or owner, is GARA my friend?
- Answer: No! GARA means that if you are killed due to a defect in an older aircraft, your family has no recourse, *and* you are a bigger target because of it.

Fun Air Crash Litigation Trivia (cont.)

- Question: If I am killed or injured due to a defect in the design of a military aircraft, can I or my family sue the manufacturer of that aircraft?
- Answer: No. Defense contractors are immune from suit under the “government contractor’s defense” if they built the aircraft to the military’s specifications.
- Question: If the aircraft I own is involved in an accident, am I liable because I am the owner?
- Answer: No. I can only be liable for what I do negligently. Simply owning an aircraft that has an accident, with no negligence on the owner’s part, generally does not create liability.

Fun Air Crash Litigation Trivia (cont.)

- Question: If a military pilot is killed due to negligence on the part of his/her superiors or the DoD generally, can his/her family sue the government?
- Answer: No. Under the 'Feres Doctrine,' servicemembers and their families cannot sue the government for accidents occurring in the line of duty.
- Question: If I live in Illinois and keep my aircraft in Illinois, does that mean that Illinois law will apply to a lawsuit against me?
- Answer: No. Under so-called 'Choice of Law' doctrine, virtually any state's law could apply to your liability and the amount you must pay in damages, depending on all of the circumstances of the accident.

Fun Air Crash Litigation Trivia (cont.)

- Question: If my “Experimental Aircraft” is involved in an accident and my passenger is injured, I will win the lawsuit because the passenger “assumed the risk” of injury.
- Answer: Maybe. But will require a lot more warning than the “**EXPERIMENTAL AIRCRAFT**” designation on the side of the plane.

An Illustration

- Scenario:
 - Pilot Ray of Joe's Charter Service Inc., flying passengers in 1980 Beechcraft Bonanza leased from Owner and maintained by Mechanic Lenny of Sal's Aircraft Repair Partners.
 - During approach in IMC conditions and while being given extensive vectoring from ATC, Pilot Ray is twice observed deviating from assigned altitude and heading and has to be given corrections.
 - Shortly after the second correction, the Bonanza enters into a spin and crashes, killing all on board. Witnesses report to the NTSB investigator that they heard the engine sputter.
-

Illustration (cont.)

- NTSB Investigation:
 - Pilot Ray's medical was expired by one month
 - Bonanza's tail section was found approx. 100 yards from main wreckage
 - Mechanic Lenny of Sal's Aircraft Repair Partners had overhauled engine 10 engine hours previous but at the direction of Owner did not comply with a Beech Mandatory Service Bulletin
 - NTSB Probable Cause: *Pilot Ray became disoriented under IMC conditions and lost attitude control of aircraft, possibly contributed to by use of over-the-counter cold medications*

Illustration (cont.)

- Defendants:
 - ❑ Pilot Ray/Joe's Charter Service, Inc.?
 - ❑ Mechanic Lenny/Sal's Aircraft Repair Partners?
 - ❑ Owner?
 - ❑ Beechcraft (Raytheon)?



Illustration (cont.)

- The End Result: ***Judgment for Plaintiffs—
\$10 million***

Jury's allocation of fault:

- 10%: Pilot Ray
(→ Joe's Charter Service, Inc.)
- 45%: Mechanic Lenny
(→ Sal's Aircraft Repair Partners)
- 45%: Owner

NOTE: *Joint and Several* Liability—Plaintiff can come after any one of the above to satisfy the *entire judgment!*

What Can You Do?

...Create a Risk Management

Layers of a Risk Management Program:

- First: *Safety* (ie prevent the accident);
- Second: Prevent the *lawsuit*,
 - Good post-accident public relations, sensitivity
 - Waivers/releases of liability?
 - “Just say no” to the 40 year-old orthopedic surgeon?
- Third: Prevent *you personally* from being exposed to the lawsuit (ie entity formation);
- Fourth: Protect yourself from *defense costs and judgment* (ie **liability insurance**); and
- Fifth: Protect your personal assets from being tapped to satisfy the judgment (ie “asset protection”)

The Importance of the Legal Entity

- ❑ “Joe” of Joe’s Charter Service, Inc. was protected from individual (personal) liability for pilot Ray’s negligence because his company was a *corporation*.
- ❑ In contrast, “Sal” of Sal’s Aircraft Repair Partnership is *not* protected and his personal assets can be attached to satisfy the judgment against the partnership.
- ❑ If pilot Ray was acting as his own corporation or LLC, would that protect his personal assets? *Probably not*—the corporate/LLC structure protects you from the negligence of others in the corporation/LLC, not from your own direct negligence. Same for mechanic Lenny.

Partnerships

- Definitions
 - General
 - Limited
- Benefits/Risks



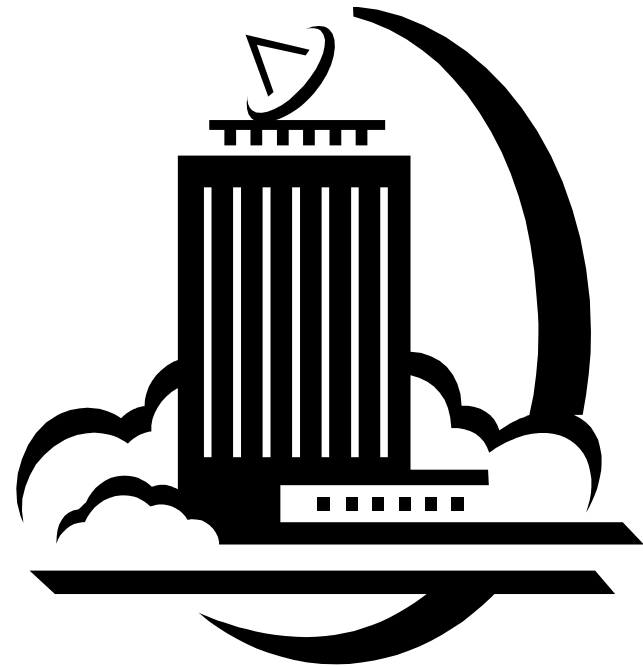
Corporations

- Definitions (Close / S / Class C / Professional)
- Benefits/Risks
- Piercing the corporate veil



Limited Liability Companies

- Definition
- Benefits/Risks



Aviation Insurance

- Trends
- Coverage Issues
- Duty of Good Faith –
- Risks of Inadequate Insurance



Asset Protection Measures

***Once a judgment has been
entered against you personally,
WHAT ASSETS CAN BE
REACHED?***

Asset Protection Measures (cont.)

- Selecting the Appropriate Set of Techniques
 - Basic Estate Planning Techniques with Asset Protection Benefits
 - Outright Gifts, Gifts to Irrevocable Spendthrift Trust, Charitable Trusts (Lead or Remainder), Qualified Personal Residence Trust (QPRTs), Intervivos Irrevocable Trusts with Spendthrift Clauses, Bypass (Exemption) and Marital (QTIP) Trusts with Spendthrift Clauses, Disclaimers (P.C. 283), Limited Powers of Appointment, Qualified Retirement Plans and IRA's

Asset Protection Measures (cont.)

- Selecting the Appropriate Set of Techniques (Cont.)
 - Core Domestic Asset Protection Techniques
 - Fictitious Name Holding Vehicles, Lease Not Buy, Leveraging Down of Values, Prenuptial Agreement, Corporate Holding of Assets, Community Property Division, Multiple Legal Entities, Homestead for Family Residence, Exemption for Wages, Exemption for Annuity Contracts, Exemption for Private Retirement Plans

Asset Protection Measures (cont.)

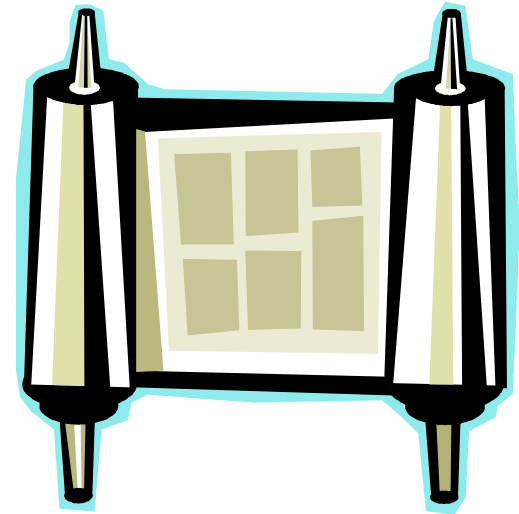
- Selecting the Appropriate Set of Techniques (Cont.)
 - Major Financial Planning Techniques with Asset Protection Benefits
 - Tenancies by the Entirety for Property in a Qualified Jurisdiction, Family Limited Partnership, Limited Liability Company, Alaska, Delaware or Nevada Protection Trust, Wyoming or South Dakota Dynasty Trust, Redomiciliation to a Major Exemption State, Foreign Irrevocable Trust, Civil Law Foundation, Nevis Single Member LLC

Use of Trusts

- Spendthrift Trusts
- Self-Settled Domestic Trusts
- Alaska Qualified Trusts
- Foreign Asset Protection Trusts

Use of Exemptions

- Varies state by state



Contractual Techniques

- Limitation on Damages
- ADR – Arbitration
- Third party Indemnity
- Postnuptial Agreement
- Prenuptial Agreement

Basic Limitations on Asset Protection Planning

- Federal criminal statutes
- State criminal statutes
- Rights of creditors under state law
- Remedies for creditors under state law
- Fraudulent transfers under state law
- Fraudulent conveyances under federal bankruptcy law

Summary and Evaluation

- Overcoming the Limitations of the Fraudulent Transfer Act
- Benefits of Exemption Planning
- Overlooked Contractual Techniques
- Overrated Protection of Legal Entities
- Future of Integrated Planning
- Viability of the Domestic Asset Protection Trust



QUESTIONS AND ANSWERS