Recently TEAM Aircraft company declared bankruptcy. TEAM has been in business for over 10 years, and was a successful and well-respected manufacturer of ultralights and experimental airplanes. The company manufactured the famous "Airbike," along with several other products, including the "Hi-Max," "Mini-MAX," and the "V-Max."

Why did TEAM declare bankruptcy? Because they won a lawsuit. That's right, TEAM won. The company was held NOT liable for the injuries sustained by a pilot flying a TEAM aircraft. But the cost of litigation was so expensive that it bankrupted the company.

Legal expenses have been noted as one of the leading factors in the demise of general aviation in the United States. For example, lawsuits lead to the bankruptcy of Piper Aircraft.

Only with the congressional enactment of the General Aviation Revitalization Act of 1995, which partially limits a manufacturer's liability, has general aviation begun to make a tentative comeback. Thanks to passage of the Act, Cessna has begun building the Cessna 172 again.

Until recently, ultralight manufacturers have been somewhat insulated from the disastrous suits which plague general aviation. One of the main reasons is that the companies were not making enough profit to be worth suing. A potential defendant is not an attractive target, if he doesn't have a deep pocket full of money.

Unfortunately, as ultralight and experimental manufacturers have become more successful, they now have more exposure to litigation. This development should be of great concern to all pilots and manufacturers.

A suit against one defendant affects everyone, because it encourages other plaintiffs to sue. Your favorite manufacturer could be next. It's not inconceivable that other companies could be driven out of existence due to legal expenses.

Even if a company were never sued, the price of its aircraft could rise substantially to cover potential liability suits. It's estimated that as much as 20 percent of the cost of a general aviation airplane is attributed to the manufacturer's legal costs.

Last June, I attended a seminar in Las Vegas presented by attorney David Tedder. The subject was the various ways to protect your assets from lawsuits. Mr. Tedder is one of the foremost attorneys in the United States specializing in international trusts, international banking, estate and income tax reduction, and asset protection.

Mr. Tedder is not a lawyer who helps shady characters "hide" their assets, nor does he rely on secrecy.

All of his asset protection techniques are aboveboard, well documented, and comply with IRS requirements. Best of all, the techniques have been tested in court, and they work.

The various means of asset protection range from basic arbitration clauses, to the utilizations of trusts, limited liability companies, and offshore entities. More exotic techniques include foreign security trusts, domestic non-grantor trusts, private annuities, family limited partnerships, and foreign bank accounts. These are the same techniques that are used by the wealthiest families in the United States. Even our nation's most famous corporations protect themselves in this manner.

The reason these methods are used by virtually every multi-millionare in the country, and not the rest of us, is partially due to the cost, and partially due to the fact that the techniques are not widely advertised. It takes much the same effort for an attorney to evaluate a client's needs and set up the appropriate protection plan for a moderately wealthy client as it does for an extremely wealthy client. Therefore, most asset protection specialists cater mainly to the very wealthy, who seek out the attorney by references from their fellow millionaire associates.

The field is so specialized that there are relatively few attorneys who practice in this area. Not only does the attorney have to be an expert in tax law, he must keep up with the multitude of daily changes in national and international banking laws, international trade agreements, trust and security laws, corporate law, pension plans, annuities, foundations, and liability litigation.

Furthermore, an attorney who practices in asset protection and tax planning must be willing to travel. Mr. Tedder is constantly on the go, traveling to the Caribbean, Europe, North America, and throughout the US to his various offices. He has accumulated more than three million frequent flyer miles with Delta Airlines.

In his "spare" time he gives seminars, such as the one I attended in Las Vegas, which lasted three days for $800. During the seminar I discussed TEAM's demise with Mr. Tedder. He quickly realized the predicament that all manufactures will face if these lawsuits proliferate. He also recognized that he would be able to develop a whole new field of clients if he were to offer his expertise to light aircraft manufacturers, and even to individual pilots.

After I convinced Mr. Tedder that liability and asset protection was greatly needed by the ultralight community, and an untapped resource for clients, he agreed to host a seminar similar to the one in Las Vegas, but shorter, and less expensive. The seminar would be open to all persons in the field of light aviation: pilots, instructors, aircraft owners, ultralight associations, aviation insurance companies, and especially manufacturers.

Since Mr. Tedder's main office is in Orlando, Florida, it would be ideal to hold such a seminar at the next Sun 'n Fun airshow in Lakeland, which is only 60 miles from Orlando. In view of the fact that the attendees would most likely not be multi-millionaires, Mr. Tedder will offer the seminar at a substantially reduced price.

Since the next Sun 'n Fun airshow is not until April 2000, Mr. Tedder would even be willing to host a special seminar at an earlier time if there were sufficient demand. For those who prefer to attend one of Mr. Tedder's regularly scheduled seminars, you may contact his office for a list of impending dates.

In my opinion, the information that Mr. Tedder presented in Las Vegas last June was invaluable. After showing him a couple of magazine articles about the demise of TEAM, Mr. Tedder surmised that very likely TEAM could have avoided their catastrophic legal expenses if they had only insulated themselves by spending a few thousand dollars in asset protection. An example of a very effective and valuable protection document is presented at the end of this article.

Everyone knows that his assets may be appropriated by a plaintiff who wins a liability suit. But few people are aware how vulnerable their assets are to other forms of seizure.

The current United States "asset forfeiture" laws allow for the confiscation of your property by law enforcement officials if it is suspected that your property might have been connected to an illegal drug transaction. The owner of the property need not have been involved in the transaction, or even aware that it was taking place.

If your ultralight is available for rent, do you know for sure that your renter will not land in some remote area to score a stash? If he's caught, your ultralight is history.

A manufacturer can have his entire factory and inventory seized if his employees are caught dealing drugs on the premises.

A landlady in San Diego had her business bank account frozen when she was accused of fostering sexual discrimination in her apartment complex as a result of one of her employees filing a discrimination suit against another employee. And the two employees were both male!

Mr. Tedder's many examples of bizarre asset losses would be almost amusing if they were not so pathetic.

He described another case in which a gas station polluted adjoining property for years without recrimination. The gas station then sold the land and shutdown. Several years later, the EPA fined the new owner for the pollution, and ordered him to clean up the land at a cost of millions of dollars. When he failed to comply, due to lack of funds, the government confiscated the land, which still stands vacant to this day.

Manufacturers, are you susceptible to the claim of pollution? Do you have a fuel tank on your premises? You're in trouble if it ever leaks. Do you paint your airplanes? Does any paint get into the atmosphere? How do you dispose of your engine oil? Your cleaning solvent?

You could be inadvertently violating an EPA law without even knowing it, until they show up for an unannounced inspection.

The same horror stories apply to suddenly discovered "wetlands" on your real estate. The list goes on and on.

But there are ways to protect your assets from these draconian measures inflicted by the government, creditors, or plaintiffs. David Tedder can explain what the remedies are, and the cost of implementing them. In many cases the costs are not prohibitively expensive, somewhere between $2,500 and $10,000 for a relatively straight-forward asset protection plan.

One vehicle for preservation of your personal assets is a limited liability company (LLC), which has the tax advantages of a partnership, with the personal liability protection provided by a corporation. In a traditional partnership, you are personally and individually liable for your partner's errors. But if your business entity is an LLC, only the partnership entity (the LLC) is liable, not the partners individually. In his seminar, Mr. Tedder discusses LLCs in detail.

A few paragraphs above, I mentioned that TEAM might have mitigated their legal costs by utilizing a simple legal device. You may have assumed that I was referring to the well-known "waiver of liability" form which is prevalent throughout the industry. Almost everyone has seen the form with statements something like the following: "The buyer agrees that he will assume all liability for the construction and operation of (name of aircraft), and that the manufacturer shall not be liable for any claim against it for negligence in construction or design, or for any claim against it for lack of airworthiness of said aircraft."

There is a similar waiver of liability clause which a student may be requested to sign before receiving instruction. The following statement is typical of the Student Pilot Release Form used by ultralight organizations:

I, (name of student), understand that ultralight flying is a potentially dangerous activity that may result in injury or death.

I freely and voluntarily assume all risks associated with ultralight flight. I, and my heirs, promise to hold (name of pilot or ultralight school) harmless and blameless for any injury, death, or property damage that may result from my ultralight flying and from any ultralight instruction that I may receive.

I understand that I am solely responsible for my safety and that I am solely responsible for obtaining a thorough understanding of all information, and procedures necessary to ensure a safe flight.

Signed: _____

Although the above stipulations are better than nothing, they are not completely effective. As a general rule, the courts do not favor a waiver of liability, and often look for an excuse to hold it invalid, such as holding that the signatory didn't really understand what rights he was giving up, or that the language was too obtuse.

In some states, the courts or the legislature has proclaimed that a waiver of liability is "against public policy." Other courts have held that the print was too small in comparison to other proclamations on the document, such as how much fun it is to fly. *(Note: a waiver of liability should always be a stand-alone document. Don't incorporate the waiver with other material, such as advertising, a record of flight time, a discount coupon, etc.)*

Even if a waiver of liability is iron-clad, it generally only binds the person who signed it. If the signatory is killed, it is usually not binding against his heirs (despite language to the contrary in the sample above). That's because the heirs have their own separate "cause of action" against the defendant for loss of consortium, loss of support, emotional distress, and other legalisms.

What, then, is the secret mantra that is effective as a barrier against excessive legal defense costs? The answer is a "Binding Arbitration Agreement."

What's so special about the Binding Arbitration Agreement?

First, unlike the waiver of liability, which is NOT favored by the courts, arbitration agreements ARE favored.

Courts don't like the waivers because the victim gives up his right to sue for his injuries. In some minds, this is fundamentally unfair. Furthermore, if the injured party doesn't get compensated by the defendant, then in many cases the state will end up caring for the victim through welfare or Medicare. As you can imagine, most bureaucrats would rather have a manufacturer pay for the plaintiff's injuries than have him paid from the state's coffers.

Secondly, arbitration agreements are actually a good deal for the state, because they reduce the case load in the clogged court system. They also eliminate the state's costs of conducting a civil trial: expenses for a judge, jury, bailiff, clerk of the court, stenographer, and the other costs of litigation.

Third, under a binding arbitration agreement, the plaintiff has not given up a right to recover for his injuries. All he has done is substitute the means by which he will recover; that is, through arbitration instead of by a jury trial. So an arbitration agreement does not strike the courts as being fundamentally unfair, as do the waivers of liability.

Why is the arbitration agreement a good deal for the manufacturer? In order to understand why, a little background information on our legal system is required.

The American legal system is unique in several respects. One unique feature is the trial by jury. In many

countries, trials are presided over by a single judge or panel of judges, aided by technical experts.

Almost everyone agrees that the American jury system serves us well when it comes to criminal trials. But many legal commentators believe that in today's complicated technological world a "jury of your peers" is not equipped to analyze and adjudicate sophisticated technical cases which are out of their expertise.

It's been said that a "jury of your peers" is a group of people who were not clever enough to get out of jury duty. If this is true, then how can such unsophisticated people adjudicate a complicated aviation case?

Whether or not you agree that the jury system is appropriate for technical civil cases, there is no doubt that a trial involving aviation issues is the paradigm example of a jury ill-equipped to appreciate the factors involved. In most cases, not one pilot is a member of the jury.

The parties' lawyers are tasked with "educating" the jury about things they've never experienced. How can a land-lubber understand that a crosswind landing technique involves a crab on approach to a slip on short final to a cross-controlled touchdown? To non-pilots, a "stall" is when your automobile engine quits, and you pull to the side of the road.

You can't blame the jury for not comprehending these things; it's simply outside their realm of experience—like trying to explain colors to a blind person. But do you want these people to be the ones who are judging if you were negligent in the construction or operation of your airplane?

Another drawback of the jury system in civil trials is that numerous studies show that in many cases, especially complicated ones, the jury simply decides the issue on emotional grounds, such as which side has the better dressed lawyer, or which side has the most attractive person involved. Even more frequently, an emotional jury will find some reason, any reason at all, to rule in favor of a sympathetic plaintiff. Who can help but feel sorry for the paraplegic accident victim sitting in a wheelchair, or the grieving widow with kids to support? The jury's rationalization is, "Well, the manufacturer must be rich, or have insurance, and this poor widow has to have something to live on, so we'll rule against the manufacturer."

To add insult to injury (no pun intended), not only do these ill-equipped, poorly informed jury members have the power to decide the case emotionally in favor of the plaintiff, but they can tack on millions of additional dollars in "punitive damages" against the defendant.

The rationale of punitive damages is to "punish" the defendant for bad behavior, such as engaging in a cover-up of known defects. But juries often impose punitive damages just because they don't like the defendant. Perhaps the manufacturer's president was arrogant on the witness stand, or the defendant's lawyer was particularly condescending to the jury.

Another unsettling feature about juries is that they are so unpredictable. Probably no two juries would rule the same on two aviation cases with identical facts. If just one persuasive member of the jury hates airplanes, the outcome can be much different from a jury which has an aeronautical engineer on it.

A plaintiff's lawyer will use the capricious nature of the jury to blackmail a blameless defendant into agreeing to a settlement because "you never know what the jury will do." Insurance companies are particularly prone to "cut their losses," and agree to a known sum rather than risk an unknown liability. All defendants are tempted to settle for a sum, which appears to be not much greater than what the defensive legal fees would be.

Besides the deficiencies of the jury system, there is another unique feature of American jurisprudence which exacerbates legal costs: contingency fees. In most countries, the plaintiff must pay for his lawyer by the hour, just as the defendants must do in the United States.

But in the US, a lawyer is allowed to take a case "for free." That is, the plaintiff is not charged unless he prevails in the lawsuit. Many scholars believe that this leads many plaintiffs with a weak case to file suit, since he's not paying anything up front. The lawyer is willing to accept a weak case because, for minimum cost and effort, he can initiate a suit which will immediately cost the defendant thousands of dollars to defend. The defendant is extorted into a settlement just to curtail his legal fees.

Another negative feature about a civil trial, as compared to arbitration, is that a civil trial is open to the public. The manufacturer may be forced to reveal proprietary information. The plaintiff can threaten to expose whatever negative features he can find about the defendant, such as any complaints by past customers. Just the fact that the defendant has been sued in and of itself can cause bad publicity and a loss of business.

With these facts in mind about American jurisprudence, one can readily see the advantages of arbitration over litigation:

1. The cost of arbitration is historically 90% less than litigation. The case is concluded in a matter of months, rather than years. The case cannot be appealed, so the losing party can't threaten to prolong the case and increase the costs by indicating that he'll appeal.

2. The proceeding is not open to the public. The case does not establish a precedent for future trials. Without knowledge of the suit, other plaintiffs are not encouraged to file copycat lawsuits.

3. The case is decided by neutral, rational, aviation-knowledgeable individuals, less likely to be swayed by emotion.

4. Unlike a waiver of liability, the signator's consent to arbitration is binding on his heirs.

5. The defendant is not susceptible to punitive damages.

6. The courts favor arbitration agreements and are less likely to void them.

And now for the crux of this article, which hopefully will make it worthwhile for the reader to have persisted this far, the Arbitration Agreement (courtesy of David Tedder and adapted for aviation by Jon Thornburgh):

BINDING ARBITRATION AGREEMENT

In consideration of the timely and cost effective resolution of any controversy between the parties named below — all controversies, disputes, or legal actions relating in any manner whatsoever regarding the purchase, design, construction, operation (including flight accidents), airworthiness, warranty, suitability of flight or any other factor concerning the ultralight or aircraft named below—shall be submitted to binding arbitration before the American Arbitration Association.

The parties agree to waive their rights to a jury trial, punitive damages, tort damages, attorney's fees, costs of litigation, or any legal action in the civil courts or public judicial system of any State. The parties waive their right to a jury trial for any claims or counter claims, and waive the right to appeal the decision of the Arbitrators.

The parties agree that the Arbitrators shall consist of three or more persons, knowledgeable in the practical and technical aspects of the design, manufacturing, and flight operation of the type of aircraft which is the subject to this Agreement. If the dispute in controversy is the result of an aircraft accident, at least one of the Arbitrators shall be a licensed Federal Aviation Administration pilot or an ultralight instructor, if the aircraft involved in the accident was an ultralight.

The cost of Arbitration will be shared equally by each party.

The parties agree that the Arbitration site shall be _____, and the decision shall be based on applicable Federal law and the laws of the State of_____.

This Agreement shall be binding on the heirs, assigns, beneficiaries, successors in interest, and all persons or entities with any relationship whatsoever with either party.

If any party, including those named in the paragraph above, disputes the validity of this Binding Arbitration Agreement or contests the decision made by the Arbitrators, the contesting party shall post a bond to cover the projected costs of the other party. If the contesting party does not prevail, the other party shall be fully reimbursed for all costs.

If any provision of this Arbitration Agreement is held invalid, that invalidity shall not affect the other provisions of the Agreement.

Signed: _____

Manufacturer, Dealer, Flight Instructor, Aircraft Owner or other: _____

(check which applies)

Signed: _____

Buyer, Builder, Pilot, Flight Instructor,

Student, Passenger, or other: _____

(check which applies)

Date: _____

If you are a manufacturer, dealer, airport proprietor, flight school mechanic, flight instructor, pilot, student, aircraft importer, airshow performer, kit builder, buyer, or any other person who could benefit from personal asset protection and less exposure to liability lawsuits, you are encouraged to contact attorney David Tedder for more information, or to express your desire that he hold a seminar for the aviation community.

The procedure for manufacturers to take advantage of "captive insurance companies" will also be discussed at Mr. Tedder's seminars. Although not widely known, approximately 30 percent of the insurance industry is "captive insurance," particularly high-risk clientele such as anesthetists.

A captive insurance company is one in which the insured persons are able at some point in time to participate in reserves which have not been used for claims. The premiums are collected from the insured, and a portion of the premiums (approximately 25 percent) are distributed to a "reinsurance company," such as Lloyds of London, AIG, General Reinsurance, or Swiss Reinsurance. The reinsurance company ensures the captive insurance company will be able to meet its payout obligations in the event of catastrophic losses.

In order to take advantage of favorable insurance and tax laws, the captive insurance company is normally established as a foreign corporation, traditionally in Bermuda. The fact that the captive insurance company is incorporated in a foreign jurisdiction does not prevent it from doing business within the United States.

The salient feature about a captive insurance company is that the insured persons can participate in establishing their own premium rates, deductibles, and criteria for insurance. They can also provide for insurance which is otherwise unavailable, such as hull insurance for trikes, and product liability

insurance for manufacturers.

What is particularly attractive about captive insurance is the very real possibility that the company will make a profit from the premiums collected and invested. The profit is returned to the insured persons sometime in the future, and is often sufficient to cover the cost of the premiums.

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