POSSIBLE SAFE HARBORS
PARTIAL DISASSEMBLY, DEREGISTRATION, INCORPORATION, AND THE GENERAL AVIATION REVITALIZATION ACT (GARA)

This is a continuation of a series of articles discussing steps that an amateur builder can take to minimize the possibility of litigation when selling an aircraft. In that vein, this article will discuss several means of possible protection, such as partial disassembly, deregistration, incorporation, and the impact of the General Aviation Revitalization Act.

Partial Disassembly

Before discussing the effects of partial disassembly, it would be helpful to review the legal theories which make up the general body of "product liability" law. The doctrines which will be discussed are generalized and are not specific to any particular state. There may be some differences among states but the broad concepts, which will be discussed in general terms, will generally apply. Differences in the factual circumstances for each case may also affect the application of the law.
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The area of tort law commonly referred to as products liability generally consists of three independent legal theories: strict liability, warranty, and negligence. Strict liability is a concept that reduces the evidentiary proof an injured party must have against a seller for damages caused by defective product. Under the doctrine of strict liability, a seller is liable if it sells any product in a defective condition unreasonably dangerous to a user or consumer of the products. In order for strict liability to apply, the sellers must be engaged in the business of selling such products and the product must reach the user or consumer without substantial change in the condition that it is sold. Since in most cases, the seller of an amateur built aircraft will not engage in the business of selling aircraft, then strict liability should not apply. However, if an amateur builder built has a number of aircraft which were sold or was found to have actually built the aircraft being sold for the purpose of sale, then it is conceivable that a court could find that the sale was within the scope of strict liability. Also, if an individual was in the business of selling aircraft and then in addition sold his own amateur built aircraft, the sale might come within the strict liability doctrine.

There are three basic warranties within products liability. These are express, implied warranty of merchantability, and implied warranty of fitness for a particular purpose. Any of these warranties can be either written or oral. The only difference between written and oral is to the difficulty of proof as to the existence or extent of the warranty. Express warranties are any affirmation of fact or promise made by a seller to the buyer relating to the product, which becomes part of the basis of the bargain that the goods will conform to that promise. There need not be any special words used to create an express warranty, such as warrant or guarantee. Generally, a statement of the seller's opinion as to the quality and value of the product may be given without creating express warranty obligations. The question becomes what statements of the seller have under the circumstances become part of the basis of the bargain. This can become an area of difficulty if the seller is not somewhat careful in the manner in which the aircraft is marketed.

An implied warranty is the warranty which is imposed by law. It arises from the nature of the transaction or the relative situation or circumstances of the parties. There are two implied warranties: the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. The implied warranty of merchantability applies only to merchants of products of the type in the involved transaction. Thus, a seller of an amateur built aircraft would normally not be concerned with such an implied warranty of merchantability.

Unlike the merchantability warranty, an implied warranty of fitness for specific purpose does not require that the seller be a merchant in the goods of the type. This warranty arises when a buyer relies on the seller's skill, judgment and experience to furnish him with a product that will answer his particular purpose. The mere fact of knowledge by the seller of the purpose for which the buyer wants the article is not sufficient to show reliance by the buyer on the skill, judgment or experience of the seller so as to sustain an implied warranty of fitness. This warranty, however, may be expressly disclaimed with written words such as "as is," or "with all fault." Again, this is a warranty that can be avoided by care in marketing or selling the aircraft.

Finally, under the product liabilities doctrines, we are left with the basic theory of negligence. The elements of a negligence claim are the existence of a duty on the part of the defendant to protect plaintiff from injury, the failure of the defendant to perform that duty, and an injury to the plaintiff caused by the defendant's failure to perform that duty. In the sale of an amateur built aircraft, there is a legal duty from the seller to the buyer. For this article, we also assume amateur built aircraft caused damage to the plaintiff. Thus, the issue remaining is whether or not the seller of an amateur built aircraft breached the duty to the buyer. With the exception of professionals who may come under a higher standard of care, the law requires individuals to exercise a reasonable degree of care in their dealings. If the amateur builder uses reasonable care in the construction of the aircraft, then there would be no negligence. The difficulty arises, however, because the determination of whether or not an individual used reasonable care is generally a question of fact to be decided by a jury.

Viewing these concepts under product liability in the context of the advantages of partially disassembling an amateur built aircraft prior to sale, one can quickly see that such disassembly could reduce the potential for liability to some degree. The potential liability for assembly of the components or parts which were eventually disassembled would be greatly reduced or eliminated. The builder, however, would still be subject to claims for negligence with respect to the assembly of other subsections of the aircraft. The only way the builder could totally avoid the possibility of negligence would be to disassemble the aircraft to the level from which he received it from the kit builder. Even then, however, if it were found that parts had been damaged in the initial assembly or disassembly, then, theoretically, there could still be liability if the builder had not used reasonable care. The bright side, however, is that negligence is more difficult concept to prove than either strict liability or warranty.

GENERAL AVIATION REVITALIZATION ACT

There has been much discussion about the General Aviation Revitalization Act of 1994

(GARA), which was enacted to revitalize the general aviation industry by protecting manufacturers from liability lawsuits arising out of accidents involving general aviation aircraft or component parts more than 18 years old. GARA establishes an 18 year statute of repose. A statute of repose bars a lawsuit after a number of years after the defendant has acted in some way, such as designing or manufacturing a product. This statute applies even if the period, in this case eighteen years, ends before the plaintiff suffers any injury. This differs from a statute of limitations, which is a set period of time limiting a legal action after a particular claim or injury arises.

GARA provides a rolling 18 year statute of repose, which means that over the life span of an aircraft, each time a component part is replaced, the time period for that part only begins again. There are four exceptions to GARA which are not germane to this article. They are generally misrepresentations in the certificate of the aircraft; the instances when the claim is being made by a passenger receiving treatment for medical or other emergency, a claim by a person not aboard the aircraft at the time of the action, or an action brought under a written warranty enforceable under law. GARA applies to any aircraft for which a type certificate or an air worthiness certificate has been issued that has a maximum of fewer than 20 passengers and was not engaged in scheduled passenger carrying operations. These preceding provisions of GARA are not generally in question with respect to the amateur built aircraft. The major issue of concern for the amateur builder is the beginning of the time of the limitation period, which is defined as:

(a) the date of delivery of the aircraft to its first purchaser or lessee, if delivered directly from the manufacturer; or

(b) the date of first delivery of the aircraft to a person engaged in the business of selling or leasing such aircraft; or

Since the time limits under GARA commence on the date of delivery of the aircraft to its first purchaser or lessee or from the date of the first delivery of the aircraft to the person engaged in the business of selling or leasing such aircraft, there is question as to whether or not GARA would even apply to an amateur built aircraft before it is sold for the first time. No cases discussing such a question have been identified. There are indications, however, that GARA will not protect an amateur builder. Since GARA is a statute of repose -- which totally extinguishes a claimant's rights rather than merely setting a time in which the rights must be brought as with a statute of limitations -- then the courts have held that the statute of repose must be strictly construed. Such strict construction would hold that the statute of repose begins to run from "the date of delivery" not the date of assembly or manufacture. In a similar vein, courts generally hold that if a statute is not ambiguous the statutory language must be followed by the court. If a statute is found to be ambiguous, then the court may look to the legislative intent in enacting the statute. Legislative history on GARA indicates that the bill was "developed in response to a serious decline in the manufacture and sale of general aviation aircraft by United States companies." House Report No. 303-525(i), May 24, 1994. This intent is obviously further manifested by the name of the bill as the General Aviation Revitalization Act. In light of these doctrines of statutory constriction, it is very possible that a court would find GARA inapplicable to the first sale of an amateur built aircraft.

Therefore, although there has apparently been no finding or determination yet as to the application of GARA with respect to amateur built aircraft, it would certainly not be wise to count on its availability. If, however, one wanted to plan far enough ahead, perhaps after they built their home built aircraft, they can set up a separate corporation and sell and deliver the aircraft to that corporation. Then, 18 years later, they may have a GARA defense.

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