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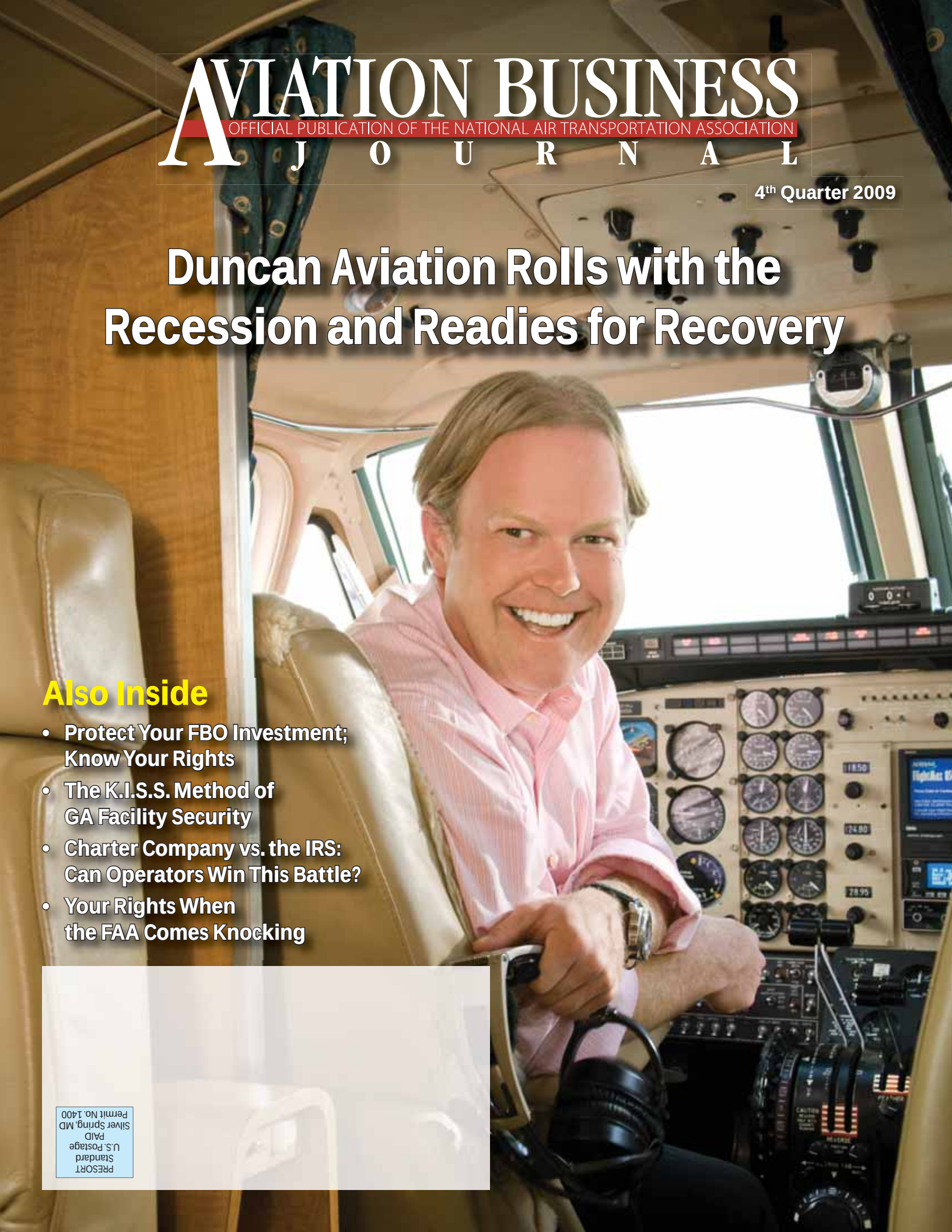

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Protect Your FBO Investment; Know Your Rights

By Leonard Kirsch, Esq., and Mike France

Owning and operating an FBO can often leave a person feeling alone on an island left to fend for themselves against threats to the viability of their operation. These threats can come from local government or even airport management. FBO owners and operators must understand that they have many legal rights and remedies and several means to protect these rights and seek these remedies. FBO owners that fully understand their rights can better protect their investments, ensure their customers receive quality services at reasonable rates, and protect the flying public.

The FBO Lease

The FBO lease provides FBOs with a first level of protection from unfair and improper demands, unexpected costs and fees, and interference with day-to-day business activities. Because leases are both contracts and grants of real property rights, an FBO lease provides FBO owners both contract and property rights. These rights allow FBOs to seek enforcement of written terms and conditions and, where there is ambiguity, to obtain state court interpretations of these ambiguous terms and conditions in accordance with common law (legal principles based on precedent set by prior court cases) methods of interpreting contracts.

The main difference between a lease and a contract is that a lease grants exclusive possession to the tenant and provides certain property rights that protect a tenant's financial investment. Under common law property law, a party cannot lose its rights in property without compensation. For example, if an FBO's property interest is condemned or if its property is otherwise taken, the airport sponsor must compensate the owner.

Key provisions of an FBO lease that owners should be aware of include:

1. Term of the lease,
2. Provisions for extending the term (often tied to investment of additional capital into the facility),
3. Rent,
4. Provisions for rent increases,
   a. Usually the most preferential method involves 5-year incremental increases based on appraisals of similar airport properties,
   b. The least preferential is often an annual CPI increase that over time results in a compound increase in rental rates,
5. Aeronautical services the FBO is required and entitled to provide,
6. Future capital investment requirements,
7. Rights to assign the lease or sublease the property, and
8. Insurance and indemnification requirements.

No matter the airport, FBO leases are usually similar in form. Some are more comprehensive and more favorable to the airport sponsor, others are shorter and clearer, and some are fairer to the FBO owner. When first entering into or negotiating an extension of an FBO lease, remember that the lease is always negotiable. The most effective way to negotiate favorable changes is to educate the airport sponsor about terms and conditions offered by

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other airports, especially nearby airports (because airports compete for revenues and passengers).

Minimum Standards

Occasionally an FBO may be threatened by the appearance of on-airport or through-the-fence operators that are allowed by the airport sponsor to provide similar services without being required to meet the same standards as the existing FBOs. Standards that new operators may not be required to meet can include similar investments in facilities or land lease and service quality or availability. FBOs can receive a measure of protection from this type of activity by enforcement of an airport's minimum standards.

The FAA, in Advisory Circular (AC) No. 150/5190-7, dated August 28, 2006, suggests that airport sponsors establish reasonable minimum standards that are relevant to their proposed aeronautical activity with the goal of protecting the level and quality of services offered to the public. The FAA points out that once the airport sponsor has established minimum standards, it should apply them objectively and uniformly to all similarly situated on-airport aeronautical service providers and notes that the failure to do so may result in a violation of the prohibition against exclusive rights and/or a finding of unjust economic discrimination for imposing unreasonable terms and conditions for airport use.

Many airport sponsors include their minimum standards in their FBO leases. While minimum standards implemented in this manner can be effective, they also render the airport sponsor vulnerable to the challenges of prospective aeronautical service providers on the grounds that the minimum standards are too restrictive.

The FAA objective in recommending the development of minimum standards is to promote safety, protect airport users from unlicensed and unauthorized products and services, maintain and enhance the availability of adequate services for all airport users, promote the orderly development of airport land, and ensure efficiency of operations.

FBOs wishing to begin operations at an airport also receive protection from the effective use of minimum standards. Any use of minimum standards to protect the interests of an individual business operation (such as existing service provider) may be interpreted as the grant of an exclusive right, therefore a potential violation of the airport sponsor's grant assurances and the FAA's policy on exclusive rights. The FAA's position is that "when the airport sponsor imposes reasonable and not unjustly discriminatory minimum standards for airport operations through the use of reasonable minimum standards, the FAA generally will not find the airport sponsor in violation of the federal obligations."

Many airport sponsors include their minimum standards in their FBO leases. While minimum standards implemented in this manner can be effective, they also render the airport sponsor vulnerable to the challenges of prospective aeronautical service providers on the grounds that the minimum standards are too restrictive. For this reason, the FAA encourages airport sponsors to update and publish their minimum standards periodically.

Grant/Sponsor Assurances

The least known but perhaps strongest protection for FBOs is found in the Grant/Sponsor Assurances. The intent of Congress in passing the first enabling legislation governing airport funding in 1938 (and in adopting revised statutory methods in 1958 and again in 1982) was to improve safety and efficiency by, among other things, promoting competition among aeronautical users.

The statutory law behind the assurances is contained primarily in Section 511 (a) of the Airport and Airway Improvement Act of 1982, 49 USC 47107 (a), also referred to as Section 308 (a) of the Federal Aviation Act of 1982. The key language is, "The Secretary of Transportation may approve a project grant only if the Secretary receives written assurances...that (1) the airport will be available for public use on reasonable conditions without unjust discrimination and...(4) a person providing, or intending to provide, aeronautical services to the public will not be given an exclusive right to use the airport...."

In order to promote competition, the FAA requires airports receiving federal funds to agree to these "grant" or "sponsor assurances," which, among other things, prohibit any party from obtaining or maintaining an exclusive right to perform services at an airport and require sponsors (airports) to not unjustly discriminate against aeronautical users of an airport.

Regarding exclusive rights, the assurances require

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the airport sponsor to, "permit no exclusive right for the use of the airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, the providing of the services at an airport by a single fixed-based operator shall not be construed as an exclusive right if both of the following apply:

1. It would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and
2. If allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport.

It further agrees that it will not, either directly or indirectly, grant or permit any person, firm, or corporation the exclusive right at the airport to conduct any aeronautical activities, including, but not limited to, charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, parts, and any other activities including the sale of aircraft which, because of their direct relationship to the operation of aircraft, can be regarded as an aeronautical activity, and that it will terminate any exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under Title 49, United States Code."

The assurances also require airport sponsors to practice economic nondiscrimination:

"In any agreement, contract, lease, or other arrangement under which a right or privilege at the airport is granted to any person, firm, or corporation to conduct or to engage in any aeronautical activity for furnishing services to the public at the airport, the sponsor will insert and enforce provisions requiring the contractor to:

1. Furnish services on a reasonable, and not unjustly discriminatory, basis to all users thereof, and
2. Charge reasonable, and not unjustly discriminatory, prices for each unit or service, provided that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates or other similar types of price reductions to volume purchasers.

Each fixed-based operator at the airport shall be subject to the same rates, fees, rentals, and charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport and utilizing the same or similar facilities....

The sponsor may establish such reasonable, and not unjustly discriminatory, conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the airport...."

FAA Publications

Perhaps the most useful guide to understanding the Assurances is the "Airports Compliance Manual," revised this year and published by the FAA under Order 5190.6B. The manual contains guidance for FAA inspectors on compliance with sponsor assurances and can be an excellent tool for FBO owners in determining if airport actions comply with the assurances.

In January 2007, the FAA published AC 150/5190-6, providing additional guidance on exclusive rights. This AC provides basic information pertaining to the FAA's prohibition on the granting of exclusive rights at federally obligated airports. The prohibition on the granting of exclusive rights is one of the obligations assumed by the airport sponsors of public airports that have accepted federal assistance, either in the form of grants or property conveyances. This AC provides guidance on how an airport sponsor can comply with the statutory prohibition on the granting of exclusive rights.

Too Many FBOs?

Efforts to persuade an airport sponsor to deny entry to a new FBO competitor begin and usually end with an economic argument based on fuel volumes. While Section 23 of the FAA's Sponsor Assurances prohibits the grant of an exclusive right, the prohibition does not apply if both of the following conditions apply:

1. It would be unreasonably costly, burdensome, or impractical for more than one fixed-based operator to provide such services, and
2. It would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and the airport.

A recent NATA article, "How Many FBOs Are Enough?" discusses guidelines for evaluating airport competition. The article states, "(T)he FAA is often quoted as saying, 'Every FBO has the right to go broke.'" This does not imply that the airport sponsor must lease land and/or approve improvements to an FBO that will, based upon the sponsor's due

diligence analysis, most likely be unsuccessful, as in being unable to fulfill the company's lease obligations. (For a copy of the full article, send an email to lkirsch@mklawnyc.com.)

The airport sponsor may also deny FBO status to aspiring entrants for reasons of safety and efficiency. A denial decided on safety issues must be based on evidence demonstrating that airport safety will be compromised if the applicant is allowed to engage in the proposed aeronautical activity. But the FAA is the final authority in determining what, in fact, constitutes a compromise of safety.

An airport sponsor can also deny FBO status to an additional company if there is insufficient space at an airport. However, the incumbent FBO may expand as needed, even if its growth ultimately results in the occupancy of all available space. But an exclusive rights violation can occur through the use of leases where, for example, all the available airport land and/or facilities suitable for aeronautical activities are leased to a single aeronautical service provider who cannot put it into productive use within a reasonable period, thereby denying other qualified parties the opportunity to compete to be an aeronautical service provider at the airport.

Part 13 and Part 16 Complaints

In addition to relying on state rather than federal courts to enforce contract and property rights contained in an FBO lease, the Part 13 and Part 16 processes provide the means to challenge an airport sponsor on issues arising out of the Sponsor Assurances (as well as certain other regulatory issues).

If the airport sponsor refuses to resolve an issue to a party's satisfaction, the next step is to seek assistance from a regional airport certification and compliance inspector at an FAA Regional Office.

The next step in the administrative process is for the aggrieved party to file a Part 13 complaint. The complaint can be in the form of a letter to the Airport Certification and Compliance Inspector or Regional FAA Director. The airport sponsor is then given 30 days to file a written answer. At this point, the regional office may seek legal clarification from the local FAA counsel or, more likely, the FAA counsel in Washington, D.C. Meetings and hearings are sometimes set, and the local office, if unable to negotiate a compromise, may issue an informal decision. Such Part 13 decisions may be issued in either letter or case decision format.

Part 13 decisions are only advisory because there is no penalty if a party refuses to follow the decision. The non-prevailing party in such administrative actions does not have a judicial right to appeal the Part 13 decision but does have the option of filing a formal request for redress in the form of a complaint under 14 CFR 16, aka a Part 16 complaint.

A Part 16 complaint is filed with the FAA offices in Washington D.C. If the complaint is not dismissed for procedural or jurisdictional reasons, a hearing officer (usually an attorney from the FAA) is appointed. Hearings may be held, or upon agreement of the parties, the matter can be decided based on papers submitted by each side. An enforceable decision is usually rendered within 120 days. The decision in a Part 16 complaint may be appealed to the assistant administrator of the FAA, who then issues a final order. Finally, the non-prevailing party may appeal the final order to the local U.S. Circuit Court of Appeals.

It is important for FBO operators to remember that they are not alone in fighting to maintain their operations. A wealth of resources and options are available when threats appear. All FBO operators are encouraged to realize and understand their rights when dealing with an airport sponsor.