Understand bizjet purchase contracts

Buyers and sellers count on commonly used purchase-contract language to protect them. Whether it really will depends on exactly what an agreement says and how courts interpret it.

by Jeff Wieand

It's easy to see why most business jets are sold on what's known as an "as is, where is" basis. They can break down, require costly repairs, and be involved in incidents resulting in damage to the aircraft, passengers, and other people and property. If you're selling your jet, you don't expect to be responsible for issues like this if they happen after closing; you expect to pass that responsibility to the buyer along with title to the aircraft.

The first seller of an airplane—the manufacturer—has an advantage here. In response to concerns that zealous plaintiffs' lawyers were endangering general aircraft production by holding manufacturers "strictly liable" for damages caused by defects, Congress passed the General Aviation Revitalization Act of 1994. Under the Act, the airframer is essentially off the hook 18 years after the aircraft was first delivered, assuming it did not engage in certain kinds of bad acts, such as fraudulent misrepresentations about the aircraft's capabilities. This is true even if the manufacturer's original customer no longer owns the aircraft. As a result, a subsequent buyer's attorneys may look to another seller: the previous owner who sold it to their client.

But sellers have lawyers too, and they invariably provide in the purchase agreement that the aircraft is delivered to the buyer at closing "as is, where is," a magic phrase that's supposed to ward off post-closing liabilities. The phrase absorbs added talismanic power by being typed in ALL CAPS.

Though the "as is, where is" phrase is widely used, its suitability for a business jet sale is strained, since aircraft purchase agreements almost always indicate exactly where the aircraft will be delivered and the closing will take place. But attorneys are typically loath to alter the magic phrase and insist that the "where is" language be included, anyway.

"As is, where is" likely has plenty of company in the

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purchase agreement. Although sellers' attorneys will rarely tolerate any contractual representations or warranties regarding the aircraft post-closing (which the attorney may want the contract to disclaim even when there aren't any), contract law and the Uniform Commercial Code provide certain "implied warranties," such as the warranty of merchantability, which can apply even though the contract doesn't invoke them. Implied warranties are generally eliminated only if the contract disclaims them by name. Further, as there are lots of kinds of damages, including lost profits and punitive damages, a seller's counsel will want to disclaim as many of these as possible. The result can add up to a couple of pages of cumbersome boilerplate, which some seller attorneys want to restate in the warranty bill of sale and/or delivery receipt.

Is all this verbiage effective? Two recent cases show how complicated the answer can be. In the first case, *Luig v. North Bay Enterprises*, the plaintiff sold a Bell helicopter to the defendant. After the sale, it emerged that, because of modifications

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made to the engine prior to closing, the airworthiness certificate no longer showed the correct aircraft type and was thus invalid. When the buyer complained, the plaintiff/seller sought a court judgment that he had complied with the purchase agreement terms in delivering the helicopter to the defendant. He argued that the contract, which required the buyer to accept the aircraft "as is, where is," was intended to waive all warranties as to the helicopter's post-closing condition. However, like almost all aircraft purchase agreements, the contract also required the seller to deliver the helicopter in airworthy condition.

After examining the agreement, the Federal District Court in Texas concluded that the "as is" clause successfully excluded all implied warranties, such as merchantability. But the court also decided that the contract contained a warranty by the seller that the aircraft would be delivered in airworthy condition and that the "as is" clause was insufficient to exclude that warranty. The court's reasoning was a form of the rule of construction that "the specific trumps the general." The "as is" clause was deemed too general to disclaim the specific airworthiness warranty.

Two months later, a Federal District Court in Tennessee considered a similar issue. In this case, after operating a Citation jet for almost two years, the purchaser discovered during a scheduled airframe inspection at a Cessna service center that holes had been drilled through a structural spar as part of an interior reconfiguration by a previous owner. It was no great surprise when Cessna determined that the holes rendered the aircraft unairworthy.

The unseemly facts of the sale as reported by the court are interesting, as unbeknownst to buyer and seller, the buyer's pilot and a maintenance technician working on the airplane conspired to structure the sale as a "back-to-back," netting them $200,000 in a $2.1 million transaction. However, this sordid tale did little to stimulate the court's sympathy for the buyer, who had not only purchased an aircraft that couldn't fly, but was apparently swindled in the process. Unfortunately, though aspects of the court's reasoning are difficult to follow, its conclusion is clear: despite language in the contract that the seller "shall deliver the Aircraft from the Pre-Purchase Inspection… in Airworthy Condition," the court determined that, to the extent "in Airworthy Condition" conflicts with the "as is, where is" clause and other warranty disclaimers in the contract, "the disclaimers control."

The lesson from these cases is that representatives of both buyer and seller must take great care in drafting the purchase agreement. The seller should not assume that, simply by including an "as is, where is" clause, it has eliminated the potential for post-closing liabilities. (The Texas court noted that "the mere use of the two words 'as is' has never been held to automatically bar an action on an express warranty.") Similarly, the buyer should not assume that requirements that the aircraft be airworthy at closing will provide a cause of action against the seller if this later proves false.

In the cases discussed above, the courts tried to provide a detailed, nuanced reading of the purchase agreement, stating that the contract must be construed to ascertain and give effect to the intention of the parties. This may include consideration of whether "airworthy condition" is intended as a delivery condition, a covenant, an objective of the prepurchase evaluation, a representation, or a warranty. BJT

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