Avoid Fine-Print Surprises in Contracts

Poor contract may lead to a legal bind

By Thomas H. Chappell

Our modern day world has become so litigious that it is literally revolutionizing the way business is done in the western world.

Yes, the western world. Although the legal system in England and Western Europe has not evolved, or should I say deteriorated, to the degree that it has in the United States, lawsuits and contract law are far more pronounced there than ever before. The idea that no one is accountable for their actions and can avoid taking responsibility for them has become the prevailing rule in today's business world.

Therefore, as an insurance consumer you must not only be well versed on the coverages you can purchase from your insurance underwriter, but you must also become intimately acquainted with contracts, hold harmless agreements, indemnification agreements, and waivers of liability.

The demand for underwriter approval of contracts and the requests for additional insured certificates are at an all time high. The numerous questions I receive from clients and friends and their requests for intervention seem almost desperate at times.

So frequent are these requests and discussions that the underwriting community seems to be losing patience with the general aviation service organizations that initiate this effort.

Whether it is a landlord, a fixed base operation, a maintenance facility, an aircraft manufacturer, or any other service provider, it is the underwriter's view that many businesses are trying to avoid their inherent responsibilities by requiring an aircraft owner's insurance policy to pick them up as an additional insured. They further add insult when they request that the underwriter waive any rights of recovery against them (subrogation) should they damage their client's aircraft. The view from the insurance world is they are trying to get free insurance.

Obviously there are exceptions to every rule. I have one client that virtually "adopts" his customers once he agrees to sell him an aircraft. He assists with transition training, pilot services, scheduling maintenance, recurrent training, and general ownership issues. Many of these services are given free. No charge. The goal is a safe operation and a pleasant ownership experience. In such cases, when explained to the underwriters, they are very willing to accommodate both the client and the service organization with necessary certificates of insurance.

The other side to the story is the service organizations are under pervasive threat from legal action that adequate limits of liability are virtually impossible to obtain or too expensive to afford. This leads to a Mexican standoff and so we are back to what was once referred to as "the right of might."

Contractually Speaking

Every contract has a purpose. It can be simply to define an agreement for the makers with no hidden intent. Each party accepts their responsibility and recognizes their obligations. In an ideal world this is the way business should be conducted.

Unfortunately, the current legal atmosphere ensures parties will go to great lengths to find a way to absolve themselves of any responsibility and pass it off to the other party or parties to the contract. This, in fact, has worked in some cases because the competing party was either completely naïve, lazy or intimidated. Some contracts are devious.

An attorney can slip in some language hoping the other party will not see or understand its entire meaning. The real victim, the "easy mark," is the businessman that tries to save a little money by negotiating his own deal without professional advice. Frequently, I see aviation business owners and managers who plagiarize wording they have seen in other contracts in order to piece together a makeshift new agreement, rather than seek the advice of their own attorney.

First, when negotiating a contract, begin by assuming that no contract is "fair and balanced." As with any competition there is a winner and a loser. If you are to win this competition, this contractual game, you must take every contract seriously and consult your "contract management team," your attorney, your insurance agent or broker, and be prepared to study the document yourself.

Every year you will confront numerous contracts as an aircraft owner, a service provider, an FBO, an aircraft manufacturer, an aircraft parts manufacturer, or an airport authority. No one escapes. You can just sign them and hope nothing happens (the ostrich approach) or you can meet these challenges head-on with your eyes open.

Might of the Landlord

As a part of a lease, some airport authorities require FBOs or other airport tenants, including individual aircraft owners, to sign an indemnification agreement. In most of these agreements, the tenant is required to save and hold the authority harmless from any and all liability. Now comes the good plot twist: Must the tenant hold them harmless "from any and all liability arising out of the operations of the tenant" or "from any and all liability?"

If the hold harmless agreement is restricted to the operations of the tenant, this is a fair requirement. If the hold harmless is from any and all liability, then this it seems overly broad and a bit devious. Does this happen often? You bet it does. In fact, unless you have been paying very close attention, you may have signed one of these very broad agreements yourself.

“OK, so what’s the big deal?, ” you might ask. “My insurance will pay any liability loss I might have, right?” Don’t be too sure your insurance company would come to the rescue.

If you have assumed liability by contract that you might not otherwise have, did not purchase contractual liability insurance, and did not obtain the approval of your underwriter for the contract, you may find no coverage offered. The following typical policy wording is worth reading: “We won’t cover any liability you assume under a contract or agreement …” This big deal could leave your personal or corporate assets exposed to first dollar defense or settlement.

Of course, if an FBO must sign such a rigid agreement, you can rest assured that the same requirements will be passed down to its tenants and hangar customers. And, signing such an agreement can open the aircraft owner up to some real difficulty as well.

If, for example, the airport authority is responsible for the maintenance of the runways, ramps, lights, parking lots and grass areas but, due to poor maintenance, an aircraft owner taxis his aircraft into a pothole on the access ramp and shears off his nose gear, then who pays?

The airport authority has a contract from the FBO holding it harmless from any and all liability. True FBOs usually have no responsibility for the maintenance of airport common areas. But, in signing a contract with the “any and all liability” wording, the FBO could now be assuming liability that it was never intended to have. The aircraft owner is a base customer and has signed a contract holding the FBO as well as the airport authority harmless from “any and all liability.” Now, the accident was plainly caused by the negligence of the airport authority because of its poor maintenance of the ramp areas. Appropriately, the aircraft owner turns the claim in to his aircraft insurance company only to find that his policy contains an exclusion stating that: “you promise not to do anything that will take away our right (the insurance company’s) to collect for damages caused by others.” Who’s on the hook now?

In addition, many policies will include a government entity as an additional insured if it is necessary to gain access to the airport.

The policy wording says, “We won’t cover any liability you assume under a contract or agreement other than an airport contract you sign with a governmental body so you may use an airport.” Although this has been very broadly interpreted, it is my opinion that there is a difference in use of the airport and the ability of the base customer to rent hangar space. Depending upon the interpretation of policy wording in the above example, the tenant may find himself in a legal battle in which no one but the attorneys will win. ✈