

Contract

Buying and Selling a Used Airplane: What You Don't Know Can Hurt You

by SCOTT WILLIAMS, ESQ.

Many of us have had the privilege of buying a brand-new airplane from Cirrus Aircraft or other manufacturers. That legal process is well established by the manufacturer; just sign their 168-page form, and the airplane is all yours. But what forms should you sign (or not sign) when buying a used airplane? What critical clauses should be included or avoided? Most importantly, *who* should draft, or at least review, what you sign?

To say that every buyer or seller should retain the services of an aviation attorney would be a self-serving statement, but I'll make it anyway. It would be one thing if you were buying a \$15,000 used Cessna 152, but with most used Cirrus' in the \$150,000 to \$750,000 range, it really doesn't make sense not to. I'm frequently asked by COPA members to review purchase or sales contracts that were drafted by others, and I'm still amazed by some of the dangerous language I find out there.

Sellers: Limit Your Liability

Sellers have two simple objectives when selling an airplane: 1) Get the money; and 2) Never hear from the buyer again. Or dare I include, subsequent buyers? To help avoid any lingering liability, sellers should have this essential (or very similar) language in every sales contract:

"Except as provided otherwise in this agreement, this Aircraft is sold 'as is.' There are no warranties, either express or implied with respect to merchantability or fitness for a particular purpose applicable to the Aircraft or any installed equipment. Buyer alone is responsible for ensuring a safe and legal operation of this aircraft."

Even though the basic rule of *caveat emptor* (let the buyer beware) usually prevails, it's better to be safe than sorry. As

a seller's attorney, I still recommend disclosing any known defects, and answering truthfully any questions about the aircraft's known damage history. Having said that, there is one buyer's question that no seller should ever attempt to answer: ***"Is this aircraft airworthy?"*** The answer to this question is simple: ***"Ask your mechanic when he does the pre-buy inspection."*** The last thing any seller should represent (either orally or in writing) is that their aircraft is "airworthy," as this has a distinct legal meaning that could create a legal representation which will come back to haunt him/her. Millions of dollars in litigation have been spent on buy-sells gone wrong over what the term "airworthy" means.

With regard to a pre-buy inspection, a seller's biggest fear is: What might the buyer's mechanic find? More importantly, if the buyer doesn't like the inspection results and walks from the sale, what happens next? When a mechanic starts tearing apart an airplane for the inspection, it legally grounds the airplane until it is returned to service by a mechanic's signature. What if the mechanic discovers an airworthiness issue and won't sign it off for a return flight home? For the seller's protection, there should be a restoration clause, something to the effect of: ***"If Buyer elects not to proceed with the sale for any reason, Buyer is responsible for restoring the aircraft to its pre-inspection condition at the ____ (Seller's) airport" within ____ days of the commencement of the inspection."*** Without this clause, the seller may have to go hire his own mechanic at some unknown airport just to get the bird home.

Other critical language that every seller needs is an integration clause; something to the effect of:

"This Agreement constitutes the entire understanding among the parties hereto with respect

to the subject matter hereof and supersedes any prior agreements or understandings, written or oral, with respect thereto. No statements, promises, or inducements made by any party (or their agents) to this Agreement, which are not contained in this written contract shall be valid or binding."

Granted, this clause won't completely protect a seller from a claim of fraudulent concealment, but at the very least, it gives cover to a buyer's claim: "But the seller promised me the plane was..."

Buyers: Keep the Seller Honest

When purchasing a used aircraft, buyers should seek certain reasonable representations from the seller to ensure some semblance of transparency in the transaction. For this reason, I prefer a couple of key clauses when representing buyers:

"Seller represents that all airframe, engine, and propeller logbooks are true and correct to the best of Seller's knowledge,"; and **"Seller has fully disclosed all defects known to Seller that would render this Aircraft to be unsafe or unairworthy."** Let's face it, not every mechanic is going to catch a bent wing-spar on pre-buy inspection. If the Seller knows, make him disclose it.

As for the pre-buy inspection itself, a buyer should never be required to use the seller's mechanic, and furthermore, should not use any mechanic who has worked on the aircraft before. Such a mechanic would have an inherent conflict of interest to inspect his own prior work, and not surprisingly, will be reluctant to report his own mistakes. Buyers should be free to use any mechanic of their choice for the inspection, including one that is a reasonable distance from the aircraft's home base.

For reasons I cannot comprehend, I still see some buyers paying a deposit directly to a seller. Never! All aircraft transactions should use a reputable aviation escrow company to handle all funds, including FAA sale documents and a thorough title and records search.

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What happens if there is a dispute?

Unlike used car transactions in which the buyer and seller are reasonably close to each other, many aircraft buy-sells are hundreds (or thousands) of miles apart. If one party has a dispute, where shall it be heard? The general rule is that a lawsuit must be filed in the defendant's home court, which might be cost prohibitive for the other party. To streamline things and provide a level playing field, an arbitration clause with this basic language is helpful:

"All disputes concerning this Agreement and the sale of the aircraft shall be decided by arbitration, in accordance with the commercial arbitration rules of any alternative dispute resolution service agreed upon by the parties. All parties shall initially advance an equal share of the costs of arbitration (excluding each parties' own attorneys' fees), with the arbitrator awarding all costs (including attorney fees) to the prevailing party. The decision of the arbitrator shall be rendered within thirty (30) days after the submission of all evidence from all parties to the arbitrator for decision, and shall be binding upon the parties. If necessary, a judgment upon the decision rendered by the arbitrator may be entered in any court chosen by the prevailing party. All mediations or arbitrations shall take place in _____ (county, state) unless otherwise agreed to, and shall be held telephonically upon the request of any party. Nothing in this section shall prohibit any party from seeking injunctive relief from any court to preserve the status quo pending arbitration.

While arbitrations are not free, the ability to appear telephonically takes away the distance barrier when the initiating party is far away. To keep things neutral, the county and state of the escrow service is a fair compromise.

Brokers: They are not all the same

There are certain reputable brokers who specialize in Cirrus aircraft, are active within COPA, and provide a high level of professionalism to the entire transaction. However, there are still many lesser known brokers who insist that everyone uses that broker's own forms, which often contain very dangerous language: ***"In the event of any dispute, both the buyer and seller shall indemnify the broker from any claims made by any other party."*** Seriously? What if the broker was the one who caused the problem? While I respect any business that seeks to limit its exposure to liability, these clauses should never be agreed to. If the broker won't take it out, find another one.

Buying and selling a used aircraft is never simple, and buyers and sellers alike should watch for certain legal landmines in their contracts. ☺

Scott Williams, Esq. is an aviation attorney representing buyers and sellers in aircraft transactions, and provides FAA certificate enforcement defense to all pilots. He has owned his 2006 SR20 since new, and is currently serving on the COPA Board of Directors as secretary.

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