Bankruptcy and Accommodations of Tenants’ and Users’ Financial Problems

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Overview

- How did we get here?
- Background legal (and practical) principles
- Issue spotting accommodation issues
- Bankruptcy and preparation
- Returning to normal
Pandemic-induced financial distress

COVID-19 has had cascading impacts on the entire air travel industry.

The full impact has not yet been realized…
Background Legal Principles

Grant Assurances
Existing Contracts
Local Law and Governance
Public Finance
Bankruptcy
Grant Assurance 24, *Fee and Rental Structure* and Policy Regarding Establishment of Airport Rates and Charges

- Airport must “maintain a fee and rental structure for the facilities and services at the airport which will make the airport as self-sustaining as possible under the circumstances existing at the particular airport, taking into account such factors as the volume of traffic and economy of collection.”

- “[M]arket conditions may not permit an airport proprietor to establish fees that are sufficiently high to recover aeronautical costs and sufficiently low to attract and retain commercial aeronautical services.”
Grant Assurance 25, *Airport Revenues*, and the *Policy and Procedures Concerning the Use of Airport Revenue*

- Generally prohibits “[u]se of land by the sponsor for aeronautical purposes rent-free or for nominal rental rates.”
- Airport must “receive **fair market value** for the provision of **nonaeronautical** facilities and services, **to the extent practicable considering the circumstances at the airport**.”
- “If market conditions or demand for air service do not permit the airport to be financially self-sustaining, the airport proprietor should establish **long-term goals and targets to make the airport as financially self-sustaining as possible**.”
Grant Assurance 22, *Economic Nondiscrimination*

Airport must be available for use **on reasonable terms and without unjust discrimination to all types, kinds and classes of aeronautical activities**, including commercial aeronautical activities offering services to the public at the airport.
Background Legal Principles: Existing Contracts

- Existing provisions regarding relief
  - MAG abatement
  - Force majeure
  - Calculations of rates and charges

- Amendment or memorialization of relief

- Interpretations of contract can establish course of conduct
Background Legal Principles: Local Law and Governance

- Who decides whether relief is necessary?
- Who has authority to defer obligations?
- Who has authority to adopt relief?
- Who decides when to end relief?
- How does this impact existing agreements?
Background Legal Principles: Public Finance Law and Bankruptcy

- Bond Ordinances/Official Statements
- Banking Law
- Funding Limitations
- Bankruptcy Law
Knowing Your Role (and Everyone Else’s)

- Political pressure to accommodate (or not)
- Interconnectedness of airport finance and relief packages; the Aviation Ecosystem
Issue-Spotting Accommodation Issues

Aeronautical v. Non-Aeronautical Types of Tenants/Users Types of Accommodation/Relief Grant Assurance Implications Quid Pro Quo Financial Implications Disclosure Funding Limitations
Threshold Accommodation Questions

- Are you *required* to accommodate a tenants’ financial problems?

- *Should* you accommodate a tenants’ financial problems?
  - Puts “partnership” to the test

- This panel is about how (and how not) to accommodate tenants, if you choose to do so
Aeronautical and Non-Aeronautical Users
Types of Tenants/Agreements

- RACs
- Concessions
- Airlines
- FBOs
- Cats & Dogs
Types of Relief Available

- Direct subsidies
- Waivers/abatements versus deferrals
  - Implications for future bankruptcy: potential for disgorgement; rejection damages; more later!
  - Impact upon airport finances (short- and medium-term)
- Contributions to airline cost centers (indirect airline impact?)
- Deferring capital programs or O&M expenses
- Other creative requests (i.e., loans)
March 28, 2020, *Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations*

- "Airports have **flexibility to defer** the collection of rents and/or fees if the circumstances warrant. The terms and interest rates applied should be reasonable and applied fairly to similarly situated businesses. Deferral of rental payments and or fees, if adequately justified, is not likely to violate FAA’s grant assurances. A primary goal of the statutory sustainability principle is to keep the airport solvent to ensure that the airport can remain open and operate safely."

- "In general, there is **no authority that would allow an airport to waive landing fees and terminal rents**; any such request should be discussed with FAA’s Office of Airports."
April 4, 2020, Information for Airport Sponsors Considering COVID-19 Restrictions or Accommodations

- “A decision to abate rent ... is a local decision.”
- Tied to the changed circumstances.
- Sponsors are encouraged to consult with all affected parties and implement a consensus approach if possible.
- Must be reasonable under the circumstances and reflect “the decline in fair market value, loss of services, and/or changes to volume of traffic and economy of collection.”
- “In cases where bond restrictions or other conditions may prevent airports from offering rent abatements, the deferrals of rents and/or fees may be possible.”
Temporary rent abatement and minimum annual guarantee waivers for tenants, as referenced in the April 4, 2020 FAA Office of Airports Guidance, Information for Airport Sponsors on Considering COVID-19 Restrictions or Accommodations, are tools that sponsors can use to assist businesses. Rent deferrals, rather than abatements, and unjustified hurdles for consideration of relief are not as supportive of the “we are all in this together” approach sponsors should take during this public health emergency.

We encourage sponsors to use available tools to mitigate adverse impacts on large and small businesses to ensure the airport community emerges from these trying times stronger than ever.

Sincerely,

D. Kirk Shaffer
Associate Administrator, Office of Airports

John P. Benison
Assistant Administrator, Office of Civil Rights

June 22, 2020
FAA’s Evolution of Thinking Regarding Grant Assurance Implications
Quid Pro Quo?

What conditions are appropriate to place on relief or accommodation?

- Memorialize accommodations and a return to normal (or the plan to do so)
- Update FAA required provisions or other nagging issues?
- Require payment of arrears?
- Impose reporting obligations?
- Require workforce retention/benefit provisions?
- Subordinate to changes in law?
Points to ponder...

How will Airport cover the cost of providing the relief...

- Reserves
- CARES Act funds
- Other federal/state programs
- Subsidization from general fund

...And how will that effect Airport finances going forward

- Downstream consequences on rate base recovery
- Impact on rate base
- Involving FAs and bond counsel – restructuring debt may be important
What are airlines asking for?
- O&M and Capital budget reductions
- Deferral or abatement of landings fees and rents
- Don’t defer or abate non-aeronautical rates and charges
- Giving back space / preferential gate use requirements
- Modify rates and charges to break even – no accumulation of revenues
- Extension of existing agreements w/o renegotiation
- Refund of PFCs
Airline Relief, Specifically

- March 2020
- October 2020
- ???
Airline Incentive Programs

- May undertake new importance, and require new interpretations
- What is “new service” now?
  - Airport destination not currently served
  - New nonstop service
  - New entrant carriers
  - Increased frequency of flights to a specific destination
Bankruptcy: Preparing for the Inevitable?

Purpose/Lifecycle of a Bankruptcy
Preparing for the Process
The Automatic Stay
First Day Motions
Proofs of Claim
General Overview

- Purpose of Bankruptcy
- Types of Bankruptcies
- Lifecycle of Bankruptcy
  - Filing
  - Pre- and Post-Petition Divide
  - Special Mention - Administrative Priority
  - Assumption/Rejection
  - Claims Processing
How to Prepare for Bankruptcies

- Keep accounts current
  - Minimize pre-petition arrears
  - CFCs/PFCs
- Contract security
- Insurance coverage
- Survey agreements
- Internal bankruptcy inquiries
- Assemble team
The Automatic Stay

- **STOP** billing pre-petition amounts due
- **STOP** calculating interest
- **STOP** applying pre-petition credits
Preference and Course of Business

- 90-day look back period on payments that may be disgorged
- Debtors must continue in the ordinary course of business / administrative priority
- Changes to the “ordinary course of business” require court approval
Bankruptcy- Practical Items To Consider

- Bankruptcy Principle: Keep the good, dump the bad

- What could that mean at your airport?
  - Gates?
  - Exclusive use space?
  - Hangars?
  - Crew base?
  - RACs?
  - Concessions?

- Bankruptcy implications

In preparing for battle I have always found that plans are useless, but planning is indispensable.

Dwight D. Eisenhower
Returning to “Normal”

Right-sizing Operations
Mitigating Claims
Financial Self-Sustainability
Revisiting “Boilerplate”
Returning to Normal

- Air Service & Terminal Space
- Concessions
- Limitations on Liability
- Debt Service Payments
Revisiting “Boilerplate”

- MAG adjustment triggers
- Force majeure
- Residual methodologies
Wrap-Up / Q & A