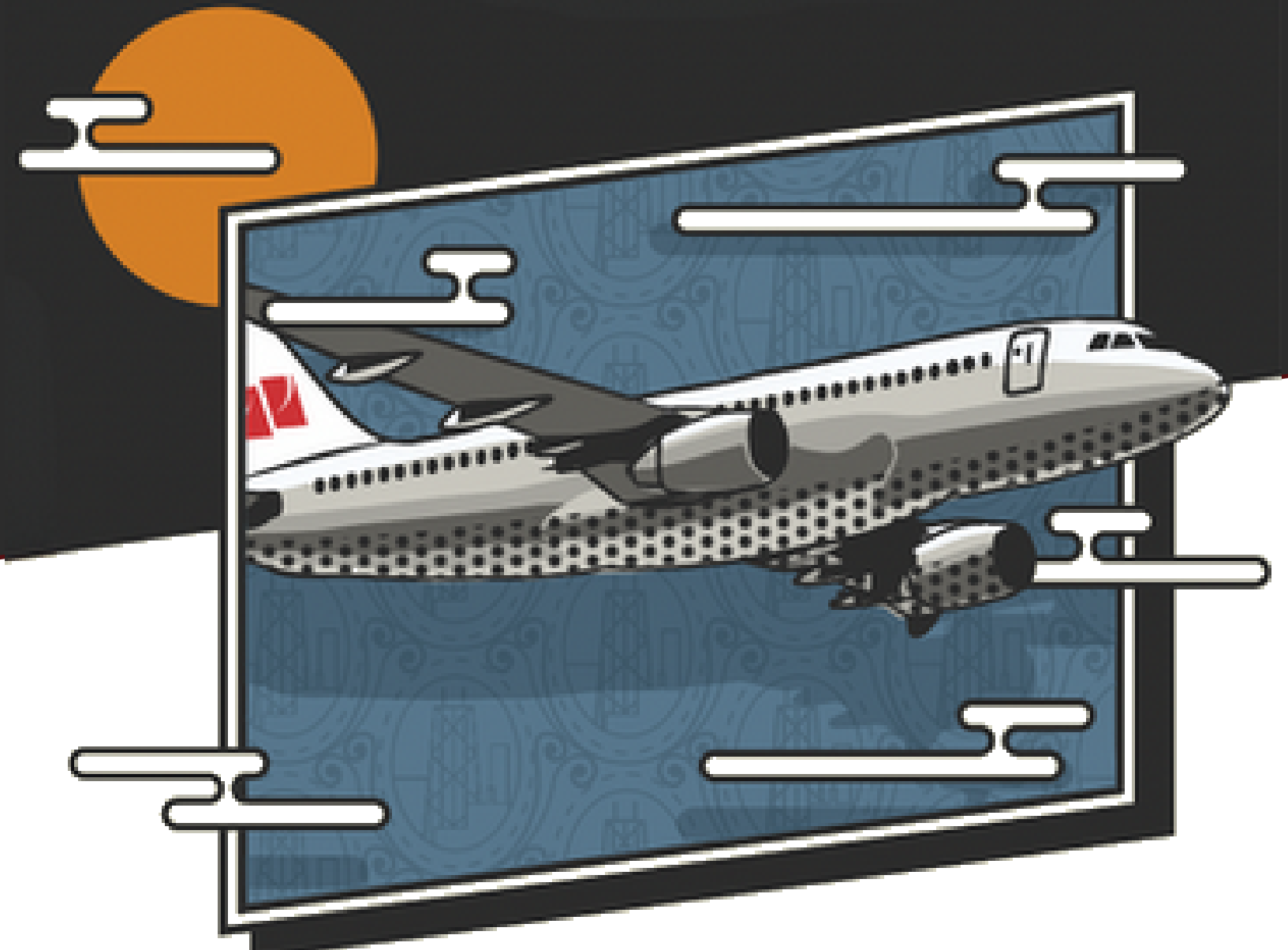




40th Annual  
Airport Law Workshop



Session 21

# Working with Financially Distressed and Problem Tenants

# Speakers

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**Eric Pilsk**



Partner  
Kaplan Kirsch

**Eric Smith**



Partner  
Kaplan Kirsch

# Introduction

## Session overview

How to anticipate and deal with those who may keep you up at night worrying.

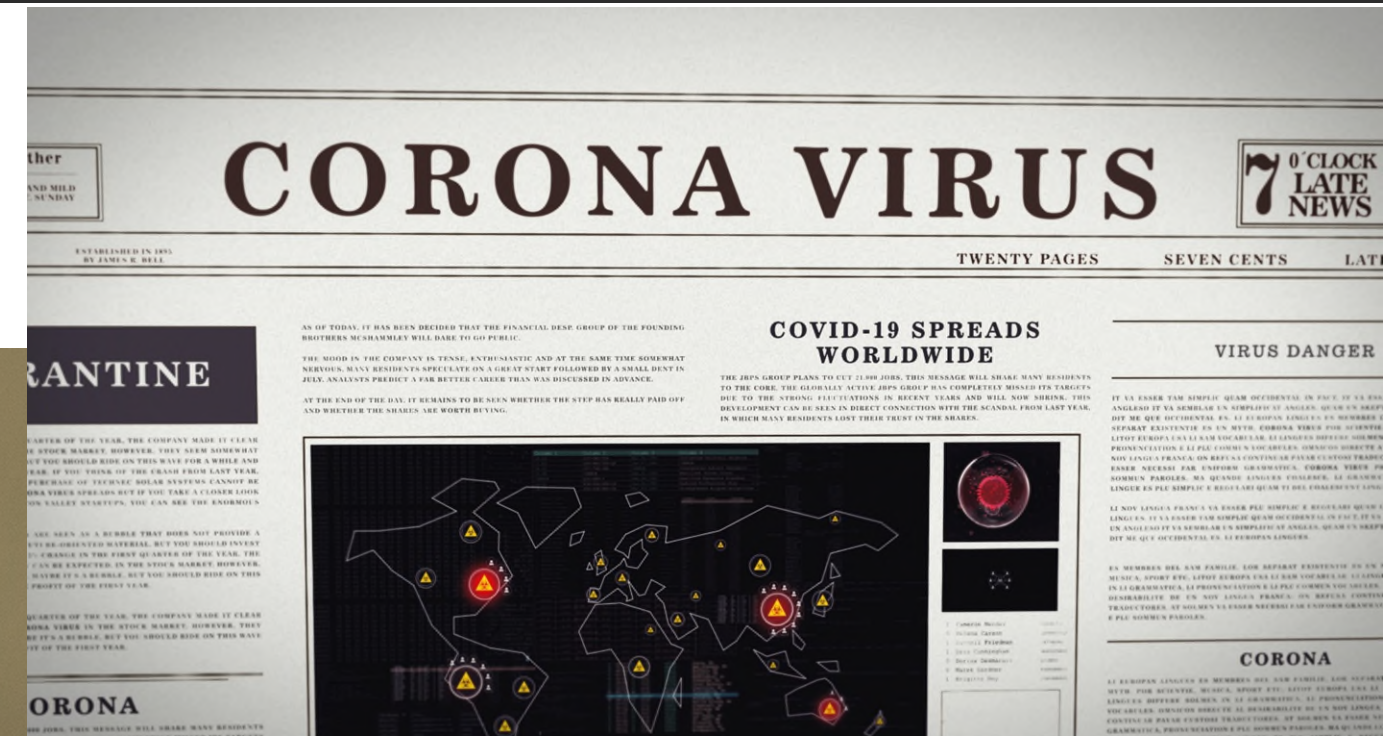
- ✓ Financial concerns and risk mitigation
- ✓ Problem tenants **or** “cornucopia of fun”



Being an airport operator would be great but for those pesky tenants



# Ah, the memories...



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# US AIRLINE INDUSTRY WHAT CAN WE COUNT ON?

- Will always be volatile and unpredictable
- No good deed goes unpunished



# Storm clouds are forming

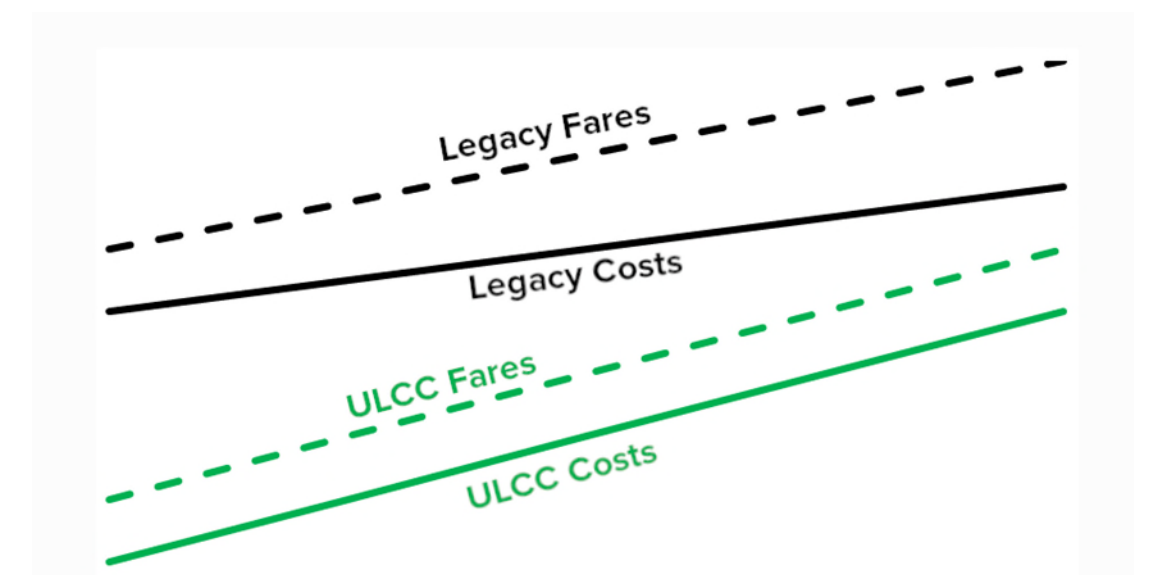
Airlines facing difficult challenges

Post-COVID developments:

Over-capacity and commoditization of leisure seats

Future capacity constraints ?

Pilots, aircraft and labor costs



**Spirit Airlines settles with Pratt & Whitney affiliate**

# Odds are....

Economists have predicted....

Real challenges exist for carriers in coming years

Sale and lease-back exercises

New EAS service

Airline "burn rate"





# Stakeholders and risk

It is not just airlines

Concessions

Food and beverage

Retail

RACs

Other

Development partners

??

Non-aeronautical non-terminal



# Stakeholders and risk



## Clear to Cease Operations

Dear Jason Perlow,

At 11:00 p.m. PST today, Clear will cease operations. Clear's parent company, Verified Identity Pass, Inc. has been unable to negotiate an agreement with its senior creditor to continue operations.

After today, Clear lanes will be unavailable.

Sincerely,

Clear Customer Support



Home Agents

## aha! Airlines Update

As of August 22, 2022, aha! Airlines, powered by ExpressJet, has filed for protection under Chapter 11 of the US bankruptcy code and ceased all flight operations. We regret that a combination of market and economic conditions lead us to take this action.

### What Aha! Customers Need to Know

Customers should contact their credit card company for a refund on tickets purchased for travel after August 23, 2022.

Unfortunately, we are unable to assist with alternative travel arrangements.

### We apologize for the inconvenience.

#### Refunds:

Customers who paid by credit card and do not receive substitute transportation should file a claim with their credit card company. Write to your credit card company at the address listed on your monthly statement for disputing a charge. (This might not be the address where you send your payment.) State your account number. Enclose a photocopy of the ticket, itinerary or receipt if possible, or indicate the price of the transportation and the date it was purchased. If the transportation was partially used, identify the used and unused segments. State that ExpressJet Airlines is in bankruptcy and has ceased operations, that you will not receive the services that you charged to your account, and

# Types of risk

Financial collapse can take several forms

Bankruptcy

Default without seeking protection

ABCs

The key toss





# Financial risk



Disclaimer

Not going to make you into  
bankruptcy/workout lawyers today

Less than basics

Issue spotting/working knowledge as  
goal

# Financial risk

## Bankruptcy



- 2 relevant flavors –  
Chapter 11 & 7
- Automatic stay common  
to both

# Financial risk

## Bankruptcy basics

- 1st day orders and cash collateral
- Passenger Facility Charges
- Customer Facility Charges
- Security deposits, letters of credit, performance bonds
- Assumption or rejection of airport agreements
- Damages from rejection – real estate lease or not?
- Assumption and cure
- Proofs of claim



# Financial risk

ABCs (generally)

- Assignment for the benefit of creditors
- State-based structure
  - Varies widely among states
- No automatic stay
- Trustee selected by company and creditor(s)
- Flexible and allows for creative solutions
- No automatic stay!



# The key toss

- The uncontrolled burn
- Where your documentation counts the most
- What security did you require?
- Rights to FF&E

# Financial risk

## Default

- Smoke but no fire... yet
- Same issues
- No good deed goes unpunished
- Nice airports finish last...and who's dumb idea was that?



# Financial risk

Risk mitigation starts with a good contract

- *Force majeure*
- Security for performance
- Default language
- Self-help



# SELECTED POTENTIAL CHALLENGES

AKA crazy headaches we've addressed



cornucopia of fun – airport style



# **We love *all* our airport tenants ... but**

*Some tenants want what they want*

*Some tenants are more special than others*

*Some tenants push the boundaries ... All of them*

*Which leads to .....*





# Difficult tenant issues

Tenants don't cause compliance problems ...  
airport sponsors do

- Tenants have no grant obligations to the FAA
- Only sponsor is responsible for compliance
- There is no "jerk" exception to grant obligations



# Difficult tenant issues

The compliance bind

Make airport available to aeronautical users (GA 22)

v.

Keep airport safe for all users (GA 19; GA 22(i))

v.

Control flight operations (49 U.S.C. §40103)

v.

Not unjustly discriminate among aeronautical users (GA 22)

v.

Maintain control over airport (GA 5)

v.

Not unreasonably limit access (GA 22)

# Difficult tenant issues

## Land lease challenges

### What They Want:

- New entrant wants a specific site or terms
- Current tenant does not want competition
- Leasehold mortgage

### Why they may not be able to get it:

- Not entitled to preferred site or terms  
BMI Salvage Corp. v. Miami-Dade Cnty., FAA Dckt. 16-05-16  
Santa Monica Airport Ass'n v. City of Santa Monica, FAA Dckt. 16-99-21
- No exclusive right – GA 23
- Maintain sponsor control: GA 5

# Difficult tenant issues

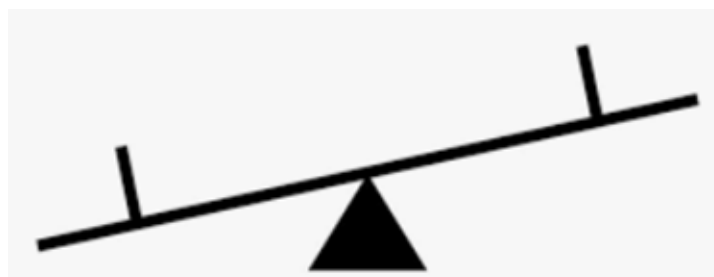
## Land lease issues

### Tenant Issue:

- Limited available facilities/space
- Vague, incomplete or unrealistic plans
- Tenant has a history of breaches, litigation, or harmful conduct

### Sponsor Position:

- Not entitled to develop land to suit  
Santa Monica Airport Ass'n v. City of Santa Monica, FAA Dckt. 16-99-21
- May require specific plans  
Mansfield Heliflight, Inc. v. City of Burlington, FAA Dckt. 16-14-06
- Not required to lease  
Ashton v. City of Concord, FAA Dckt. 16-02-01  
Skydive Monroe v. City of Monroe, FAA Dckt. 16-06-02





# Difficult tenant issues

## Land lease enforcement

### Typical enforcement issues

- Lease/ordinance v. GA obligations
- Disparate treatment of similar violations
- Termination = denial of access

### Sponsor obligations

- FAA will not decide dispute based on contract or state law issues
- *Timberview v. Okaloosa County*, FAA Dckt. 16-21-14
- No unjust discrimination. GA 22
- May terminate for breach BUT, not if pretextual and or immaterial
  - *Timberview; HTX Helicopters v. RIAC*, FAA Dckt. 16-21-10

# Difficult tenant issues

Land lease issues – paper yourself!

## Master Plan and ALP

- No land banking

## Minimum Standards and Rules and Regulations

- Define tenant/user review procedures

## Form leases/licenses

- Beware MFN clauses

## Leasing policy/rates and charges

- Hangar waiting list



# Difficult tenant issues

## Planning ahead

### Document everything

- Keep log of issues
- Send emails or letters
- Follow-up
- Consider video cameras

Be consistent and document differences

Be reasonable but firm

The image shows a graphic of a 'LOG BOOK'. It features a dark blue header with the text 'LOG BOOK' in white, bold, uppercase letters. Below the header is a white grid with a thin black border. The grid has 10 columns and 20 rows. The first row is slightly wider than the others, suggesting it might be for a title or date. The grid is set against a dark blue background with a vertical red bar on the left side.

# Difficult tenant issues

## Aeronautical activities

### Tenant Issue:

Skydive drop zone

Safety and operational concerns

Reasonable terms

### Sponsor Position:

Skydiving is an aeronautical activity  
AC 5190-6

Sponsor may establish rules for safety,  
locate drop zone, but FAA is final  
arbiter of airport safety

Compliance Manual ¶ 14.3

Luther Kurtz v. City of Casa Grande, FAA Dckt. 16-16-01

Obtainable insurance. Indemnity...

Garlic City v. Santa Clara, FAA Dckt. 16-11-06



# Difficult tenant issues

## Aeronautical activities

### Community Concerns:

Noise

Safety

Growth

### Sponsor Position:

GA 7 is not a community veto

Martyn v. Port of Anacortes, FAA Dckt. 16-02-03

Noise restrictions are subject to ANCA  
and GA 22

Compliance Manual Chap. 14

FAA has exclusive jurisdiction over  
aircraft in flight 49 U.S.C. §40103

Sponsor may not limit development to  
address concerns over growth

Martyn

# Difficult tenant issues

Aeronautical activities – protect yourself

## Minimum Standards and Rules and Regulations

- Define tenant review procedures
- Define standards for specific types of users
- Confirm commercially obtainable terms

## Avoid pretext challenges

- Develop and apply uniform procedures and rules
- Keep issues separate
- Involve ADO and FSDO to address safety and noise concerns
- Educate public on sponsor obligations



# Difficult tenant issues

Enforcement against aeronautical users

## Typical enforcement issues

Missing drop zone

Interfering with other users

Abusing airfield privileges

Unsafe activities

## Sponsor obligations

Can enforce leases, Rules and Regulations, Minimum Standards, and laws

*Skydive Myrtle Beach v. Horry County,*  
FAA Dckt. 16-14-05

Can address airport safety, subject to FAA final say

Compliance Manual Chap. 14

May not enforce aviation regulations

*Dakota Territory Tours v. Yavapai County,*  
FAA Dckt. 16-17-18

# Difficult tenant issues

Enforcement against aeronautical users – planning ahead

Document everything

- Keep log of issues
- Send emails or letters
- Follow-up
- Consider video cameras

Consult with Tower, ADO, FSDO

Be consistent and document differences

Be reasonable but firm





# Difficult tenant issues - summary

- Establish clear rules
  - Rules and Regulations
  - Minimum Standards
  - Lease/permit terms
- Document everything
  - Non-compliance
  - Communications
  - Unique facts

- Take enforcement action
- Be consistent
- Consult with ADO and FSDO on safety issues
- Beware of pretextual enforcement action

# RESOURCES

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## Desk Reference:

- Chapter 4: Minimum Standards and Rules and Regulations
- Chapter 8: Aircraft Operating and Access Restrictions
- Chapter 18: Master Planning and Airport Layout Plans
- Chapter 23: Bankruptcy and Distressed Tenants

## Bankruptcy Code:

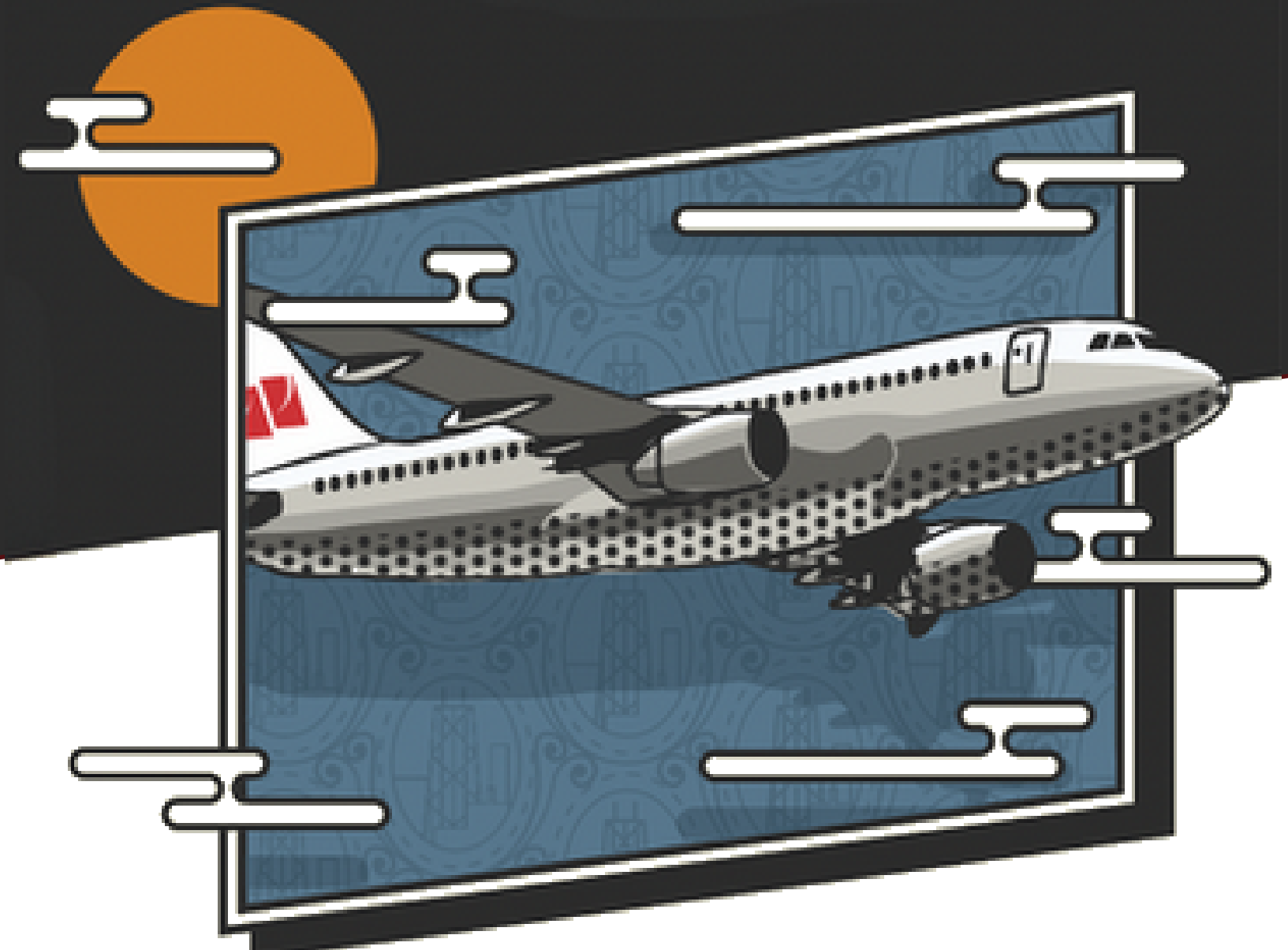
- **11 U.S.C. 101 et seq**

## Airport Compliance Manual:

- Chapter 6: Rights and Powers and Good Title
- Chapter 8: Exclusive Rights
- Chapter 9: Unjust Discrimination
- Chapter 10: Reasonable Commercial Minimum Standards
- Chapter 12: Review of Aeronautical Lease Agreements
- Chapter 13: Airport Noise and Access Restrictions
- Chapter 14: Restrictions Based on Safety and Efficiency



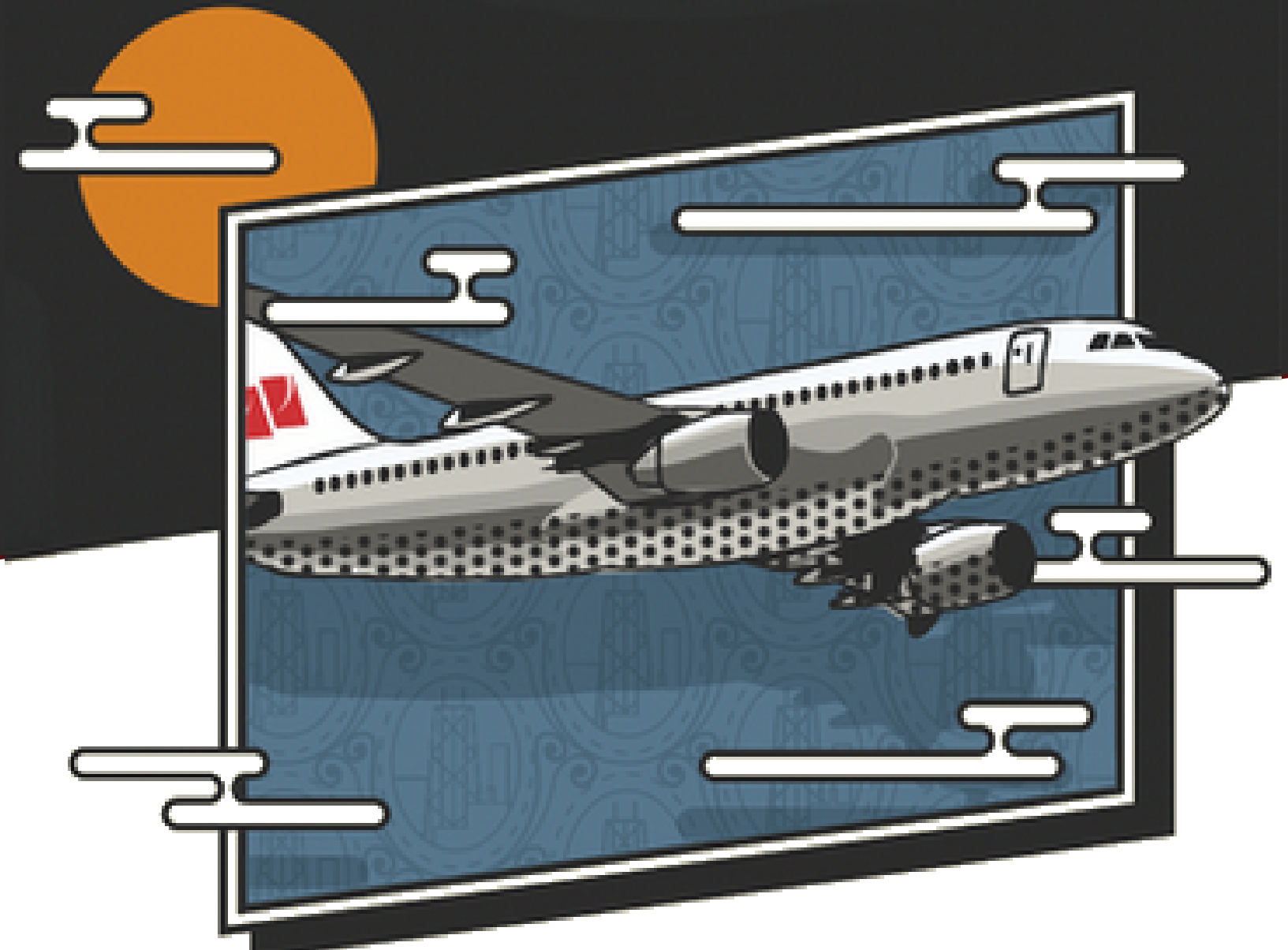
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# QUESTIONS?



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THANK YOU!