

# Is your fractional provider going under?

*Here's how to protect yourself when you sense trouble.*



JOHN T. LEWIS

It's your worst nightmare as a fractional owner. Your provider isn't performing and rumors are swirling that it may not be able to continue operating. You face the prospect that all the benefits you've counted on will evaporate, leaving you...who knows where?

Unlikely? Yes. Unheard of? No. No industry has a zero-percent failure rate and, with new fractional programs sprouting almost daily as well as some large providers under stress, you have to consider this possibility.

If you pay attention, you can see the telltale signs.

- Is your provider taking longer and longer to repurchase shares (a sign of cash-flow problems)?
- Is service suffering because of staffing shortages?
- Are key personnel leaving and being replaced by people with less experience?

- Is the appearance and cleanliness of the aircraft beginning to suffer (a sign that management is cutting corners or delaying payments to vendors)?
- Are you overhearing complaints from pilots and other employees?
- Is the provider offering concessions and making promises to current or prospective owners that seem too good to be true?

A "Yes" answer to any of these questions may mean you have a problem.

What should you do? Go directly to the provider's senior managers and get their written and signed answers to pointed questions like these:

- Is the company paying its bills as they come due?
- Is it in default to any of its owners, employees or vendors?
- Is it repurchasing shares in a timely manner or has it started telling owners that it can't repur-

chase shares until it is able to resell them?

- Is it in default with respect to any credit lines or other financing?
- Is it involved in any lawsuits and, if so, why?
- Are all its aircraft airworthy? (A provider in distress may scavenge its fleet for parts in order to keep some aircraft flying without having to purchase replacement equipment.)
- Have all sales and excise taxes paid to the provider by the owners as part of their operating expenses been transferred to the appropriate authorities? (If not, the owners may be liable for some or all of these amounts, even though they already paid the provider.)

You also may want to speak with a couple of the company's vendors. Ask the FBO (fixed-base operator) that you normally use whether the provider is in good standing. Ask the insurance carrier whether your aircraft is fully covered. Ask the FAA whether complaints about the provider have increased.

If you don't get satisfactory

## An Ounce of Prevention

### Contract Negotiation Tips

Negotiate these contract provisions to help improve your position if the worst happens with your fractional provider:

- A default provision that in case of insolvency or bankruptcy gives you the right to require the provider to repurchase your share on an expedited basis and without payment of any remarketing fee.
- A uniform provision in all its contracts empowering a majority of owners of an aircraft to take possession and force its sale in the event of an insolvency or bankruptcy of the provider.
- A provision requiring that, upon request, senior management will certify in writing that your aircraft is airworthy, fully insured and otherwise in the condition required by the contracts, and that no unpermitted liens have been filed against it.
- A provision requiring that, upon request, senior management will certify in writing that the company is current in payments to all vendors; is in good standing with respect to lines of credit and other financing; is in compliance with all legal and regulatory requirements relating to its operations; and is not subject to any pending or threatened litigation.

-J.B.

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answers or if information you gather bears out your concerns, you should think about exercising your right to sell your share back to the provider—the sooner the better, because even if the provider defaults in its obligation to buy back your share, you'll likely be much better off moving quickly so you can file a lawsuit and get a judgment against the company.

Once you've done that, there will be no dispute as to the amount or validity of your claim and you'll be able to secure your judgment against assets of the provider—a much-preferred position to be in if bankruptcy results.

Obtaining a judgment can be a fairly long process even if the provider doesn't dispute your claim. If you need quicker results and the provider will go along, perhaps to buy it time to work out its difficulties, you may benefit by obtaining a promissory note from the company for the amount you're owed. That will strengthen your position—at least, there will be no dispute as to the amount and your claim will earn interest as well.

If you get the sense that the company is failing and that management can no longer be trusted, you may have to consider taking action to force the provider into bankruptcy. To do so, you'll need to join forces with other creditors who have claims against the company. You can obtain the names of other owners of your aircraft by searching under the tail number at [www.faa.gov](http://www.faa.gov). To be sure, you should consult a bankruptcy at-

torney before pursuing an involuntary bankruptcy against the provider as there certainly will be pros and cons for you in taking this step.

In a bankruptcy, what will happen to your aircraft? Contrary to what you might expect, it may

not be easy to join with other owners to take possession of the aircraft and sell it. That's because in your contract you've probably given up the right to force a "partition and sale." Further, unpaid vendors may have filed liens against the aircraft that will be

paid before the owners receive any proceeds from a sale.

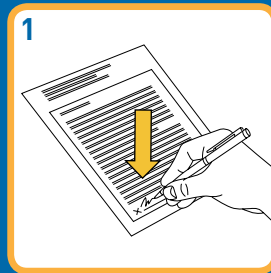
If you find yourself having to work through these issues, you'll want to hire an attorney who can help you do so quickly and aggressively. There are likely to be dozens of creditors,

if not more, in the same position as you—or worse. Emotions will run high and, in the end, it's likely that no one will emerge unscathed. Nevertheless, with the right counsel and the proper approach, you'll be able to make the best of a bad situation. □

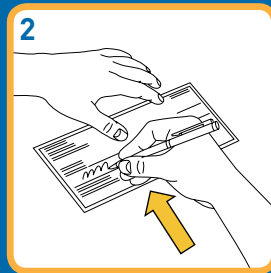
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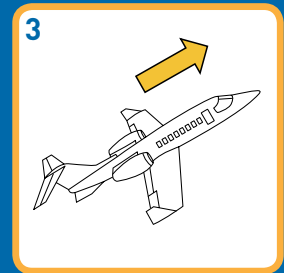
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