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Help Yourself

By Don Mitchell

You leased an aircraft or engine and the lessee hasn't paid in weeks, or months. Promises to pay and various payment plans yield little if any benefit. The lessee uses the equipment for free as its value continues to decline. You *need* to take action.

Litigation is an option, but with bankruptcy, or worse, liquidation looming, more urgent action is required. Plus, once debtor proceedings are started you can't act without relief from the automatic stay. Another option is *self help*.


In the U.S., the Uniform Commercial Code (UCC)¹ permits a lessor, without judicial process, to repossess leased equipment or, without removal, make the equipment unusable, provided no breach of the peace occurs. In practice, exercising this remedy without breaching the peace presents the biggest challenge.

Unfortunately, there is no uniform definition of "breach of the peace." It is determined by the law of the state where the self help remedy is exercised. New York common law defines it as, "*a disturbance of public order by an act of violence or by an act likely to produce violence, or which, by consternation and alarm, disturbs the peace and quiet of the community.*" Repossession by force, constructive force or intimidation will cause a breach of the peace whether the lessor is acting alone, through an agent or contractor or in concert with a law enforcement officer. Consensual repossession won't. Breaking a lock or cutting a chain securing the location where the equipment is located will. Using a key won't. Repossession with or without the debtor's knowledge won't, but if they put up a fuss, it may. Unauthorized entry may not cause a breach of the peace, but if entry is forced, it will.² Whether a breach of the peace actually occurs is determined by the facts of each case and perhaps not until the remedy is actually exercised.

Given the size of aviation equipment, can self help ever practically be done without breaching the peace? Yes, particularly where the lessor takes constructive possession by making the equipment unusable. For example, the lessor can remove the engine EEC/ECU or take possession of records. The lessor can take possession of its equipment at a third-party facility where the risk of confrontation may be reduced. The facility may cooperate if they take the lessor's action as an indication of its customer's future viability. In all cases, a lessor should plan its course of action with counsel to

preserve the element of surprise and to avoid conflict. This includes monitoring the lessee and knowing where the equipment is located and scheduled to be located during the lease term.

Given the risks involved, *should* a lessor exercise self help? Yes, but only after considering the following: Is the lessor entitled to possession under its lease and the UCC? Is it the "best" option available in light of the risks? Does the lease provide liability waivers and damage releases to protect the lessor from claims by the lessee? Does the lessor have possession of the equipment records so that it may be sold or re-leased? Is the equipment installed in/on an airframe or a stand, and what are the competing interests involved? What is the condition of the equipment, and is it better left with the lessee? What impact will repossession have on the lessee's viability?

Self help is a powerful tool given to creditors. It provides an expedited resolution without costly and time-consuming litigation. But given the risks involved and the potential liability that may ensue, self help is best reserved as the final arrow in the lessor's quiver. 

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¹ The UCC was created to establish uniform commercial laws among the 50 United States and has been adopted in all 50 states. The uniform text is not law and only becomes so when enacted by a state into law. Individual states may not enact the UCC in its entirety (Louisiana did not adopt Article 2A- Leases) and may deviate from the official text. However, in order to carry out the intent of the act, most of the states have adopted the UCC in its official form and in its entirety. Still, the laws of each state must be examined independently as differences in implementation and interpretation exist. This article refers to the UCC generally and as adopted in the states of New York and Georgia and case law of those states interpreting the relevant provisions of the UCC as adopted in those states.

² Each of these scenarios was examined by various courts in the context of determining whether a breach of the peace occurred under the UCC.

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