



# Has Your Charter Company Been Damaged by a Competitor Cutting Corners?

By Alison L. Squiccimarro

**C**onducting charter operations legally is expensive. You incur tremendous costs to comply with the Federal Aviation Regulations. You meet the rigorous record keeping requirements, meet stricter maintenance standards, implement pilot training and drug and alcohol testing programs, and maintain the requisite insurance required by Part 135. You manage your business consistent with the applicable regulations and guidance at a significant added cost as compared to operating under Part 91. You may at some point find yourself competing against an operator who is less educated and/or less concerned about following the applicable regulations and who engages in what amounts to illegal charter. Being forced to compete without a level playing field is frustrating at a minimum. It is even more frustrating when you lose a long-time client or customer to another

operator willing to cut corners, offering your hard-earned customers a better price. Then, multiply that loss of customer deal after deal.

What are your options when you are forced to compete with an operator engaging in illegal charter? You can report the illegal charter operator to the Federal Aviation Administration (FAA) by calling the illegal charter hotline and you can also seek assistance from industry organizations such as NATA's recently formed Illegal Charter Task Force. If you are lucky, you may have a loyal customer who brings the competition to your attention and allows you an opportunity to educate the customer on the reasoning for the cost discrepancy and demonstrate why they are better off with you. While those options may help to combat illegal charter and prevent against it going forward, neither option provides you a remedy to stop the immediate

threat and/or compensate you for the business loss you sustained.

The purpose of this article is to (1) educate you on a potential third option that could allow you to restrain the illegal charter operator from stealing your business and/or recoup the business loss you sustained; and, (2) guide you on collecting evidence to support your claims and presenting same to counsel for evaluation.

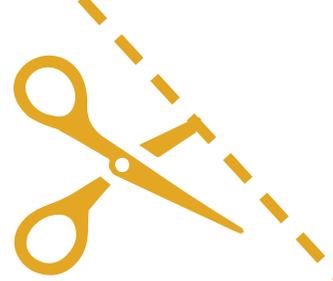
## **CIVIL LAW CLAIMS TO COMBAT ILLEGAL CHARTER**

Do you have a civil law claim against a competitor threatening your business by engaging in illegal charter? The short answer is: possibly. To answer the question accurately requires a careful analysis of where you can obtain jurisdiction and what law will apply to the claim. Depending on the circumstances and jurisdiction, you may have a claim

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for either tortious interference with business/contractual relations and/or deceptive and unfair trade practices.

## Claims for Tortious Interference with Business/Contractual Relations

Tortious interference with business/contractual relations is a type of tort where a third party intentionally acts to cause one party in a business relationship or contract to violate the contract or disrupt the business relations with the other. Whether such a claim is available to you is determined by the specific facts of your case and whether the courts in a particular jurisdiction recognize the cause of action based upon the facts presented. Tortious interference with a contract requires that a valid contract exist between you and your customer and the customer breached it because of interference by a third party. Tortious interference with contract claims are often difficult because it requires that your customer actually breach the contract with you. Tortious interference with business relations is sometimes referred to as tortious interference with business expectancy. This type of claim does not require an enforceable contract with the customer that is lost because of third party interference. Thus, you are not required to prove that your customer breached the contract.

Generally, a claim for tortious interference with business/contractual relations provides a remedy for a party who has been wronged when a competitor directly seeks to solicit business away through encouragement, threats or coercion. New York, New Jersey and Connecticut, like many other jurisdictions, allow both types of claims but require a

heightened evidentiary standard and/or require a showing of more culpable conduct for claims of tortious interference with business expectancy. In layman's terms, a business seeking to assert such a claim in the absence of a contract must show more than the fact that a competitor solicited away business. They must show that the competitor committed an impropriety in the course of soliciting the customer. Generally, the following factors are considered in determining whether the alleged interference is actionable: (1) nature of the competitor's conduct; (2) competitor's motive; (3) interests of the business that is alleging interference; (4) interest sought to be advanced by the competitor; (5) social interests in protecting against the action; (6) proximity or remoteness of the competitor's conduct to the interference; and (7) the relationship between the parties. A Part 135 operator who loses a customer to a competitor who then operates the charter through illegal means may have a tortious interference with business relations claim against the illegal charter operator. The likelihood of such a claim succeeding would be enhanced if you could show additional facts, such as providing examples that the illegal charter operator engaged in one or more of the following: specifically targeting your customers, poaching your employees, publishing derogatory statements about your business or employees, or engaging in corporate espionage.

## Deceptive/Unfair Trade Practices

Statutes prohibiting deceptive and unfair trade practices exist in all 50 states. The statutes, however, vary widely from state to state. Thus,

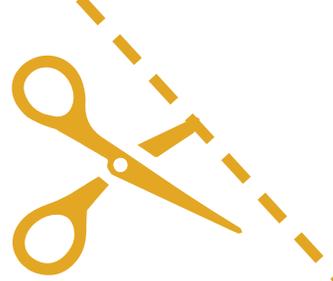
conduct that is deemed deceptive and unfair under one statute may not meet the definition of deceptive and unfair conduct under another state statute. Generally, the statutes are designed to prohibit and prevent deceptive, fraudulent and/or unethical business practices. Some states, like Connecticut, do not provide a cause of action unless you can demonstrate that the unfair trade practices are part of a general business practice. Under such statutes like Connecticut's, an isolated incident would not be sufficient to give rise to a claim. In short, you would be required to demonstrate multiple instances of such wrongful conduct. It would also be beneficial to show that other lawfully operating charter operators are experiencing the same loss of business to the illegal operator. Examples of conduct that may violate an unfair trade practices statute include: taking advantage of customers, false advertising, misrepresentation, and/or conduct designed to mislead the consumer.

The remedies afforded under the statutes vary. Some states allow for private rights of action to customers and/or competitors, while other states do not. Of the states allowing for private rights of action, the remedies available for violation of the statute similarly vary from state to state. More specifically, whether compensatory damages, punitive damages and attorneys' fees are recoverable varies depending upon the state. It is worth evaluating your specific facts to determine whether you can make an unfair trade practices claim and/or whether you can

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assert your claim in a jurisdiction that recognizes such claims because, depending on the jurisdiction, you may be able to seek punitive damages which, by nature, are intended to deter wrongful conduct. When a competitor offering illegal charter solicits your customers with false promises and misrepresents that nature of the services offered, it may give rise to a claim of unfair trade practices.

## Remedies Available to Address the Claims

Just as the claims available in each state vary, so do the remedies that are used to address the claims. The most favorable jurisdictions may allow you to seek both equitable and legal remedies simultaneously. Equitable remedies are ones that are designed to prevent the harm from continuing, and legal remedies are designed to compensate you for the loss sustained. The most favorable jurisdictions are those that allow you to seek a preliminary remedy while your case is pending. Some states, for example, allow a commercial party to seek a prejudgment remedy. A prejudgment remedy is “any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendants of his property prior to final judgment.”<sup>1</sup>

If a court were to grant you a prejudgment remedy, it could effectively preclude the party whom you are asserting a claim against from access to the property or from removing the property from the jurisdiction,

pending a hearing and/or final disposition of your case. If you were to seek a prejudgment remedy against your competitor who is threatening your business by offering illegal charter, that would surely get their attention and thwart the competitive advantage they had secured by engaging in illegal charter. Although not as accessible as states allowing prejudgment remedies, many other jurisdictions, including New York and New Jersey, allow you to seek to attach property or obtain a temporary restraining order upon filing a claim for either tortious interference with contractual/business relations or unfair trade practices.

Depending upon the nature of your claim and the jurisdiction you assert it in, you may also have a claim for monetary damages. Monetary damages come in several forms. First are compensatory damages, which are designed to compensate you for the monetary loss you sustained as a result of the wrongful conduct. Next are punitive damages, which are awarded to punish and deter wrongful conduct. Lastly, you may be able to recoup your attorneys’ fees. As a general rule, all litigants are required to bear their own attorneys’ fees. This is commonly referred to as the American Rule. Notwithstanding that, in some jurisdictions, attorneys’ fees may be recouped in connection with unfair trade practices claims. While you may have a claim that would allow you compensation for your business losses, actually recouping those losses will depend on whether you prevail on your claims and obtain a judgment against the illegal charter operator. Even if you obtain a judgment against

the illegal charter operator, you may not necessarily be able to collect on that judgment. Whether you can collect on a judgment will depend on whether the illegal charter operator has the funds and assets necessary to pay the judgment. Rather than pay the judgment, they may simply file bankruptcy. In the event of a bankruptcy, you may only be able to recoup a small portion of the judgment.

## WHAT SHOULD YOU DO IF YOU THINK YOU HAVE A CLAIM AGAINST A COMPETITOR FOR DAMAGES ASSOCIATED WITH THEIR ILLEGAL CHARTER?

If you think you have a claim against a competitor engaged in illegal charter and seek to either stop the harms from continuing or to obtain compensation for the harms, you should take these three steps. First, collect evidence showing that your competitor was engaged in illegal charter. Second, you must amass the proof needed to show that your business was harmed as a result of the illegal charter. Third, discuss your claims and evidence with trusted counsel.

## How to Collect Evidence that Your Competitor Engaged in Illegal Charter

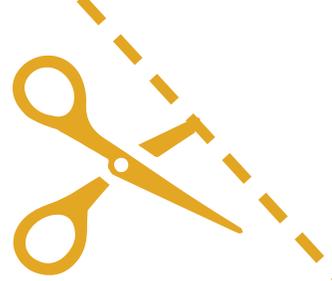
Identify who is threatening your business. Specifically, you should identify the entity and/or the persons involved. There is a wealth of information publicly available in this regard. Is the operator a tenant at a municipal airport? If so, perhaps you can identify the detailed entity

<sup>1</sup> *General Elec. Capital Corp. of Puerto Rico v. Rizvi*, 113 Conn. App. 673, 971 A.2d 41 (2009).

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information by a simple records request to the municipality. Do you know the N-number of the aircraft being used for illegal charter? With that information alone, you can identify the owner of the aircraft by searching the FAA's aircraft records database. You may also be able to obtain publicly-filed records relating to that aircraft including leases. Once you have identified the entity and/or persons involved, you should determine where they are doing business and/or are registered to do business. This information is critical to determining the jurisdiction in which you may be able to assert a claim.

## Collecting Proof that You Sustained a Business Loss

What evidence do you have showing you lost business or are about to lose business to an illegal charter operator? In a perfect world, you would have a contract with a long-time charter client for a trip you have performed countless times— along with an email from the client advising you that it is cancelling the upcoming charter because it has decided to go with "Competitor X." You know Competitor X does not have a Part 135 certificate and you have long suspected Competitor X of illegal charter.

Few cases have perfect evidence. Instead, you may have a fact pattern comprised of circumstantial evidence. For example, you may have a long-time customer who routinely booked charter trips each Wednesday afternoon from destination A to destination B. Suddenly and without explanation, the long-time customer stops hiring you. You do some investigation and learn that the competitor, who does not have a Part 135 certificate, starts

flying every Wednesday between destination A to destination B. This may be enough evidence to show that you are losing business to an illegal charter operator. Another scenario, your long-time customer stops booking charter with you and subsequently you see your former customer's van pulling up to the corner-cutting illegal competitor's aircraft. It is important to save all the documents, photos and video you have to support your claim and present it to your trusted counsel.

If you seek to recoup compensatory damages for business losses, you will be required to share the documents and evidence during the course of discovery. After you assert a claim, the party against whom you filed suit will be entitled to discovery. This may be concerning to you because you want to make sure that this sensitive information does not fall into the hands of your competitor. Thus, you may need to ask the Court for a protective order for your most sensitive data and information. Assuming the Court agrees, a protective order may preclude your sensitive and confidential data from being shared with the illegal charter operator's employees or in-house counsel and, further, have the persons with access to such sensitive materials and information enter into confidentiality agreements. Notwithstanding those remedies, you will invariably be confronted with the prospect of disclosing materials and information that you would prefer not to share.

## CONCLUSION

If you believe that you have claims for tortious interference with business/contractual relations and/or

unfair trade practices, you should take the evidence you have to support your claim to your trusted counsel and present it to them to evaluate and advise whether you can state a claim, in what jurisdiction and the likelihood of success.

When you meet with counsel, you should be prepared to discuss your motivations for wanting to pursue the claims. Specifically, are you primarily motivated by the possibility of restraining and thwarting the threat to your business caused by the illegal charter operator, or are you motivated by the prospect of recouping damages for the business losses you have sustained? If counsel does not address it, you should inquire whether your expectations for the lawsuit are reasonable. Lastly, you should be prepared to discuss the budget available for pursuing the claims. Discussing those topics will allow you and your counsel to evaluate your claims and your budget and determine what a win looks like to you. Armed with that critical information, your counsel can advise you as to the most pragmatic and cost-effective strategy that gives you the best chance of success. **A**



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