

INSURING AND DEFENDING PUBLIC ENTITIES

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-and-
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Alan L. Farkas

Alan Farkas has been successfully litigating complex, high profile aviation and commercial matters for more than 20 years. He also advises corporations, pilots, airports, and municipalities on regulatory and statutory compliance, formation and organization and liability protection.

In the courtroom, Alan defends clients against claims of negligence, breach of warranty, premises liability and product liability related most often to personal injuries, death or property damage. His clients run the full spectrum of aviation players: home built aircraft to airlines; MROs to OEMs; FBOs to Airports; and drone operators to ATPs.

Alan co-chairs the Aerospace practice group of SmithAmundsen in Chicago. He also serves as the Chairman of the FAA Legal Advisory Council. Alan received his J.D. from the Washington University School of Law and his B.A. from the University of Denver.



Michael Calhoun

Michael Calhoun is a Managing Director and leader of the Midwest region for Aon's Aviation Practice Group. He has over 30+ years' experience as Aviation Insurance professional specializing in production, negotiation, placement, and servicing of a wide spectrum of aviation risks throughout the USA. Michael's areas of expertise include Airframe and Major Component Manufacturers, Maintenance Repair and Overhaul facilities, Corporate and Commercial Charter Operators, Flight Schools and Airports.

After graduation from Knox College and completing additional course studies at Northwestern University, he began his career as an Insurance Broker in 1981. Michael's industry involvement includes US Broker Representative to the Aircraft Builders Council, membership and participation in several airframe-specific owners associations, and past coordinator for Aviation sessions at RIMS. Michael recently received the 2017 Risk & Insurance® Power Broker® Award.



Outline

- Public Use Aircraft
 - Unique Rules
 - Unique Missions
- Airports
 - Various Roles: landlord, developer, general contractor, operator
 - Contracts and risk shifting provisions
 - Immunities
- Odd and Emerging Issues
 - Moonlighting police officers, cyber risks, etc.
- The insurance guy will discuss policy language and concerns
- The lawyer will discuss claims and defenses

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PUBLIC USE AIRCRAFT: The Basics

- Question – what are the requirements to pilot, maintain, and operate this aircraft?



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What are Public Aircraft?

- Public Aircraft Operations (PAO) are regulated through the statutory definitions of what qualifies for PAO. If applicable, then the operators must comply with the "general operating rules" for aircraft using the national airspace system, but, "other civil certification and safety oversight regulations do not apply."
- "Accordingly, most aspects of PAO are not subject to FAA oversight."

Source: FAA Advisory Circular, "Public Aircraft Operations," No. 00-1.1A, February 12, 2014



What about these?

- Part 43 – maintenance, preventative maintenance, rebuilding, alterations, inspections;
- FAR 61.5 – pilot certification and medical requirements
- FAR 91.7 – aircraft airworthiness standards
- FAR 91.15 – dropping objects
- FAR 91.17 – crewmembers' alcohol and drug use
- FAR 91.103 – preflight requirements
- FAR 91.167 – fuel requirements for IFR flights

Source: NTSB Safety Study, Public Aircraft Safety, October 23, 2001, PB2001-917004, Appendix A



What are Public Aircraft?

- Owned by a government entity and operated BY ANY PERSON for crew training, equipment development, or demonstration;
- Owned or leased for 90+ days and operated by a government entity; or
- Owned or operated or chartered to the armed forces to provide transportation or commercial air service within the United States,
 - Including contractual arrangements with civilian contractors.

Source: 49 U.S.C. § 40125 (Qualifications for Public Aircraft Status) and 49 U.S.C. § 40102 (a)(41) ("public aircraft" definition).



Civilian Involvement in PAO

- PAO are often performed by civilian contractors. The government entity provides a written declaration to the local FSDO and the government entity becomes responsible for oversight (No FAA Enforcement/Cert. Actions).
- The level of government requirements and/or oversight may vary depending upon the level of sophistication, familiarity with the equipment, and/or reliance upon the vendor.
- Unless mandated by the government entity, the vendor may deviate from the standards of the type certificate or manufacturers' maintenance requirements.
 - Challenge – manuals written in Russian, Czech, etc.
- A conformity inspection will be required to resume operations under an FAA airworthiness certificate.
- Source: FAA Advisory Circular, "Public Aircraft Operations," No. 00-1.1A, February 12, 2014



Underwriting Concerns in PAO

- Pilot qualifications
- Pilot workload
- Unique training requirements
 - Type of Aircraft
 - Mission-specific
- Navigational aids
 - Night Vision
 - Enhanced Vision
 - Artificial Vision
- Mission Profile
- Auxiliary equipment
- Payload
- Airworthiness Certificate
- Employees vs Contractor
 - Pilots / Passengers
- Potential Third Party BI/PD exposure
- Contract provisions –
 - Hold Harmless (physical damage)
 - Indemnifications (liability)
 - Limitation(s) of Liability



Helpful PAO Endorsements

- Pilot Clause
 - "As approved by..."
 - as broad as reasonably available
- Use Clause
 - "As required by..."
 - otherwise unrestricted
- War Risks
 - Note restricted or excluded territories (LSW555) and/or over-flight limitations
- TRIA ? Required ?
- Defense Base Act
 - Operations / employees on military bases
- Contractual Liability
 - Blanket
 - Approved contracts
- Additional Insureds
 - Who
 - To what extent
 - Endorsed vs "as required"
- Physical Damage to Government Aircraft / Equipment
 - Foreign
 - USA



PAO Claims



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Hawk Accident at Yuma, Az 3/11/15

- Aircraft was operated under PAO under Air Force contract to conduct training exercises;
- Pilot rotated early and aircraft stalled;
- During abort, it struck a USMC truck on the side of the USMC controlled runway (no construction NOTAMS);
- Trim settings were contrary to manufacturer recommendations – condition was exasperated by external fuel tanks and practice ordnance in bomb racks;
- DOD deferred oversight to FAA, but under PAO, FAA oversight ended with initial airworthiness certification;
- Pilot survived – truck driver killed.

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Quest Kodiak Accident, Anchorage, AK 9/30/2012 (Seaplane)

- Botched water landing on final leg of wildlife survey op., wing struck on touchdown, aircraft cartwheeled
- “Because the Federal Aviation Administration (FAA) has no statutory authority to regulate PAOs, the agency’s training program was not subject to civil aircraft requirements... [The] flight training program revealed that it did not include curriculums, events, or testing and checking procedures. No written maneuvers and procedures guide with acceptable performance standards had been developed. As a result, no standardization existed within the pilot group, and tribal knowledge and experimentation were accepted as part of the organization’s culture. Multiple checklists existed for the airplane, and pilots were allowed to use whichever checklist they preferred. The agency did not, nor was it required to, incorporate best practices and industry standards into its training program...”

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Organizational Failures are Plentiful

- Aerospatiale SA-319B non-fatal accident on 12/14/05 at Escalante, UT, operated by BLM, attributed to poor training for ground resonance response and systemic, organizational maintenance failures;
- 2013 Helicopter crash during search and rescue in Talkeetna, Alaska with 3 fatalities; probable cause includes, "Alaska Department of Public Safety's punitive culture and inadequate safety management...."
- "Public aircraft operators, working with the aviation industry, must nurture a strong safety culture and rely on each other to do the right thing because, 'frankly...most of the time nobody is watching,' National Transportation Safety Board Chairman Deborah Hersman, speaking during a two-day forum on public aircraft safety...."



Government Contractor Defense?

- *Boyle v. United Technologies Corporation*, 487 U.S. 500 (1988) – Supreme Court recognizes defense for products built to spec. (helicopter)
- Is this what you requested? (1943 Curtiss XP-55)



What about Drones?

- According to FAA guidance, available options:
 - Part 107 (55 lbs., 400 ft., line of sight)
 - Certificate of Authorization, or Waiver
- PAO should not require any registration, but not tested



Insuring Airports – Unique Scenarios

An Airport has two limited access highways leading to it. One is a lengthy "Access Road" which has always been a part of the airport CGL placement. The other is a lengthy "Toll Road" that acts as a "tributary" to a major interstate highway.

In order to help finance a new shuttle train system, the toll road was placed under the auspices of the Airport Authority so toll revenues could help pay for the train system construction.

The insurer agreed to include the toll road, including the toll booths, extending miles beyond the geographic boundaries of the airport as well as providing Excess coverage for the auto exposures under the CGL program.

An Airport Authority decided to conduct a 5K Walk / 10K Run promotional event on the airport, including runways and taxiways. The airport would be closed to air traffic for the event.

While not overly concerned with the exposure the event represented, the underwriter's first questions were:

- 1) What are the post-event clean-up procedures and who will be conducting – the Airport or a third party service provider?
- 2) Who will be providing first aid / assistance?
- 3) Will water / food / alcohol be served?
- 4) How do I register?




Insuring Airports – Unique Scenarios

Maintenance-crew workers allowed a man to board – and operate – a tram while conducting a routine pre-dawn maintenance test run.

The tram is normally automated, but the individual was allowed operate it manually.

When the individual took his hand off the controls it activated an automatic kill switch.

The sudden stop sent him hurtling through the windshield, he fell 15 feet below to the pavement and was fatally injured.



An airplane parked on a taxiway was hit by a Corvette involved in a drag race at the airport. The plane was occupied by a student pilot and instructor engaged in night instruction.

A tenant at the airport invited some friends out to the field for a party in the hangar, and decided that a little nighttime drag racing would be a good idea.

The Corvette was racing against a Porsche when the accident occurred. The Corvette hit the left landing gear of the aircraft.

No one was injured, and the drivers of the cars were cited for reckless driving by local police.





Contracts and Risk Shifting

- Airline Use Agreements
- Tenant Use Agreements
- Vendor / service providers
- Construction Wrap-up / OCIP's
- Certificates of Insurance
 - Additional Insured
 - Insurance as Primary
 - Severability of Interests / Cross Liability
- Indemnification
- Hold Harmless
- Limitations of Liability
 - Consequential Loss
 - Punitive / exemplary damages
 - Diminution of Value




Airport Claims and Defenses

- Lexington – Comair crash
 - Average Settlement = \$5.9M
 - One case award = \$7.1M
 - Principle defendants
 - Comair – pilots took off from wrong runway
 - US Gov't (FAA) – only one controller, cleared aircraft for take-off, no special clearance required to cross shorter runway
 - Lexington Airport – alleged poor and improper signage during construction project
 - Comair and US Gov't agreed to share 78% / 22% respectively
 - Kentucky Supreme court ruled Airport can't be held liable – sovereign immunity
- Worker Injury Verdict
 - Ramp agent driving tug lost control when steering system locked and brakes failed
 - Pinned/crushed between tug & cargo loader; Severed spine and nerve damage paralyzed legs and right arm
 - Claimed Airport failed to provide a safe working environment - allowed excessive clutter to accumulate in ramp area
 - 7-year process - State court system
 - Superior Court judge dismissed Airport ruling it only functions as a landlord;
 - State Supreme Court sent case back to Superior court for jury trial;
 - Jury Awarded \$40M, assigning
 - 18.7 % to each of 4 Airlines
 - 25% to Airport
 - 0.2% to worker

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Airport Claims and Defenses

The failure in March 2015 of a Geosynthetically reinforced runway extension at Charleston W.Va.'s Yeager International Airport has triggered a lengthy dispute among the airport's insurance carrier, the designer, and contractor over the liability for damages, currently estimated at \$16 million to \$26 million.

The highest geotechnically reinforced slope in the U.S. (upon completion in 2008) collapsed on March 12, 2015 forcing the evacuation of over 100 residents. Several homes down slope were destroyed and a creek flooded.



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Applicable Immunities

- Short notice or statute of limitations;
- Qualified Immunity vs. Absolute Immunity;
- Lack of Notice;
- Caps;
- Failure to Supervise;
- Adhering to Legislative Plan or Design;
- Discretionary Acts;
- 11th Amendment and local venue; and
- Punitive Damages.

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The Morphing Cop

(E) Airline's obligation to defend and indemnify past officers, employees, and agents of the City shall apply to such persons only for claims, suits, demands, actions, liability, loss, damages, judgments, or fines arising from events, occurrences, and circumstances during which said officers, employees, and agents held their office or position with the City.

- June, 2016, Baltimore, Maryland, Police face \$20M suit for shoplifter chased into pond and drowned by "mall cops";
- December, 2016, Chicago, police sued by bar patron beaten by "bar security";
- Off duty cops at home?



The Morphing Cop

- Officers of an Airport K-9 patrol unit are able to keep their patrol dogs at home.
- Concern centered around an incident involving the patrol dog while not at the airport.
- "Airport operations" includes, but is not limited to, the ownership or care custody or control of police dogs by you and your use of such dogs on and off the "airport", including in the care and quartering of such dogs off the "airport".




Cyber Risks

- Exposures for airports generally start with network design and ownership. In most cases, the airport itself doesn't own the businesses that operate at that airport and has no network connectivity to them. So the airlines and the stores all operate on their own data platforms, and the airport has no ties and doesn't touch that exposure.
- This isn't always true for a parking lot. Payment systems used for parking are more typically owned / operated by or on behalf of the airport. If outsourced to a third party, the vendor simply pays a fee to the airport.
- One example for IT security evaluation -
 - A major international hub airport has nearly 100 different systems and over 5 million total records
 - Airlines from all over the world can connect to the systems to change reservations etc.
 - The airport system is linked to the County system which houses records on every employee in the county as well as historical employees



Cyber Risks

- *Shore v. Johnson & Bell*, 16-cv-4363, ND IL –
 - First suit against a law firm for data breach;
 - Alleges that Johnson & Bell's failure to use state of the art systems exposed the client's data to hackers; and
 - Seeks class action status for all clients falsely assured of systems' integrity.
- Question – Do Insurers need to demand IT certification from defense counsel?
 - Insurance is available – but too little too late?



ABA begins offering cyber liability insurance to lawyers, law firms of all sizes

CHICAGO, Feb. 28, 2017 – The American Bar Association has expanded its insurance offerings to include cyber insurance, adding a willful and wanton line of insurance to its coverage that already included life, disability, dental, vision and travel insurance for law firms.




Emergency Response

- Asiana Flight 214 clipped a seawall on approach to San Francisco and burst into flames on the runway on July 6, 2013.
- Three teenage girls died and 180 others passengers and crew were injured.
- Two of the fatalities were sitting in the tail section of the plane, which snapped off when it hit the seawall.
- The third was run over by two rescue vehicles while she lay injured and covered in foam on the runway. The coroner determined the girl's death was caused by the rescue vehicles.
- The parents dropped their lawsuit against the city after reaching a confidential settlement arrangement.






Emergency Response

- Liability for delayed EMT/Paramedic service?
 - What is local immunity for emergency care?
 - Is failure to have an emergency response plan a willful and wanton breach?
 - What about failure to bring to the "right" trauma center?






Oh, and there's this...

Lawsuit Claims American Airlines Workers Use Water Cooler Jugs To Ferry "Blue Juice" To Airplane Toilets

By The Associated Press | Updated on September 24, 2015

Photos from the lawsuit. On the left, a worker fills a jug with blue juice using a hose that should be hooked into the bottom of the plane. Right, a worker dumps blue juice in an airplane lavatory.

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and this...

VIDEOS: Russian man drives into airport, says he did it for love

By The Associated Press | Updated December 27th, 2016

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What did we learn?

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