A Primer on Defense of Airports

By Jeffrey F. Clement

Defending an airport involves carefully considering a wide variety of issues—many of which are moving targets.

When an aircraft accident occurs, common defendants include the airline, aircraft operator, and/or aircraft maintenance provider. A less frequent target is the airport where the flight originated, or the airport where the flight was scheduled to land.

The purpose of this article is to identify some of the common issues that arise in defending airports from personal injury claims. While not exhaustive, the intent of this article is to provide a jumping-off point for preparing to defend an airport.

Overview of Airports in the U.S. Aviation System

In the most general sense, airports in the United States can be divided into two categories:
(1) Part 139 airports; and (2) non-Part 139 airports, meaning "general aviation airports."

Part 139 airports are airports that must be certified by the Federal Aviation Administration (FAA) under Part 139 of the Federal Aviation Regulations (FARs). 14 C.F.R. part 139. An airport must have Part 139 certification if it serves scheduled and unscheduled aircraft with more than thirty seats, or if it serves scheduled air carrier operations with more than nine seats but less than thirty-one seats. These airports are granted an airport operating certificate by the FAA pursuant to the authority granted to the FAA in 49 U.S.C. §44706. The FAA also divides Part 139 airports into four classes: I, II, III, and IV, depending on the level and type of scheduled operations served at the airport. For example, Class I airports have more stringent Part 139 requirements than the other classes.

All other airports that do not require such certification are usually considered non-Part 139 airports and are often referred to as "general aviation airports." Part 139 does not apply to general aviation airports. However, many operators of general aviation airports will accept federal grant funds, most often through the Airport and Airways Improvement Act of 1982, 49 USC §47101, *et. seq.*, commonly referred to as the "Airport Improvement Act" (AIP). Airports accepting AIP funds must agree to certain contractual obligations and contractual grant assur-

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ances. Those contractual grant assurances are designed to require the airport operator to maintain and operate the airport safely and in accordance with specified conditions. The FAA ensures that airport owners comply with these contractual obligations through its Airport Compliance Program. Therefore, general aviation operators that receive AIP funds are indirectly regulated by the FAA through ordinary contract principles.

Key Evidence to Gather

In preparing to defend the airport, counsel should first obtain all relevant information regarding the airport and any regulatory or advisory materials applicable to the specific facts of the incident.

Part 139 airports must prepare an airport certification manual (ACM) that details how the airport operator will comply with the requirements of Part 139 of the FARs. Topics that may be addressed in the ACM include, but are not limited to, procedures for paved and unpaved surfaces, marking, lighting and signs, snow and ice control, ground vehicle operations, fire inspections, obstructions, and wildlife hazard management. Request a copy of the ACM in effect at the time of the incident to determine if it contains any provisions relevant to the facts of the accident.

Another document to obtain is the FAA Chart Supplements (formerly known as the "Airport/Facility Directory") for the airport that was in effect at the time of the incident. The Chart Supplement is designed to provide pilots with comprehensive information regarding all open-to-the-public airports. It may include airport diagrams, runway information, navigational data (NAVAIDs), and operational procedures. It may also contain certain warnings regarding hazards and obstructions. This information is relevant because, as part of a pilot's pre-flight planning under FAR section 91.103, the pilot in command is required to become familiar with all available information concerning that flight. Consulting the Chart Supplements for the airport would certainly qualify as available information that a pilot should review before beginning a flight. *See FAA Aeronautical Information Manual* §9-1-4(d). If the pilot failed to obtain the applicable information, this could be used to demonstrate negligence on the part of the pilot.

Furthermore, defense counsel should review the Series 150 FAA Advisory Circulars (ACs) relating to airport projects. The ACs contain a host of guidance and recommendations relating to airport compliance with Part 139. The ACs, by their very nature, are generally advisory in nature and are not binding. However, some ACs will indicate that they are mandatory for Part 139 airports. Additionally, compliance with certain ACs is mandatory for airport construction projects when the airport receives AIP funds.

Air traffic control towers are not operated by the airports. They are operated by the FAA or a private company under contract with the FAA (contract towers). Thus, the FAA will have custody of any applicable tower recordings or radar data. A Freedom of Information Act (FOIA) request should be made to the FAA as soon as possible for such data. Tower recordings are retained for a minimum of forty-five days, unless the FAA has determined to retain them for a longer period of time in accordance with its internal orders. As a result, if tower recordings are potentially relevant to your case, make a FOIA request for the recordings within forty-five days of the accident to prevent them from being destroyed.

Governmental Immunity

One aspect that distinguishes airports from other defendants is that most airports are operated by governmental entities. Therefore, it is possible that your airport (or the activity at issue in the complaint) is subject to some form of governmental immunity.

Under the Eleventh Amendment to the United States Constitution, a state government is immune from tort suits under the doctrine of sovereign immunity, unless the state waives that immunity. Yet, airports are often run at the local government level (city, county, joint city /county board, or some other subdivision of the state). Most states have governmental tort liability acts, which establish the parameters for liability against such governmental entities.

In preparing your defense, a practitioner should carefully review the governmental tort liability acts of the state where the airport is located and any case law that has applied these acts to airports. Some states have separate acts for claims against the state versus claims against political subdivisions. Each state act is different, and the level of immunity provided varies widely, depending on jurisdiction. However, common topics that are addressed by these acts are (1) immunity for discretionary functions (i.e., those involving the exercise of some policy determination); (2) whether the procurement of insurance operates as a waiver of immunity; (3) whether written notice of a claim is required prior to suit; (4) shortened statutes of limitations or statutes of repose for filing suit; and (5) damage caps.

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For example, in Georgia, the focus of the immunity act is the distinction between discretionary acts and proprietary acts. Discretionary acts, which involve making policy decisions, are immune from suit. G.A. Code Ann. §50-21(24)(2). Conversely, proprietary acts or commercial activities are not subject to any immunity. Courts in Georgia, as in many other jurisdictions, follow the trend of finding the operation and maintenance of an airport to be a proprietary and commercial function and not subject to immunity. *Stryker v. City of Atlanta*, 738 F. Supp. 1423, 1426 (N.D. Ga. 1990) (finding the operation of the airport a commercial function, due to the existence of commercial leases at the airport).

A completely different scheme applies in Arkansas. Arkansas does not distin-

guish between discretionary and proprietary acts. *Loge v. United States*, 494 F. Supp. 883, 889 (W.D. Ark. 1980). Rather, airports operated by the state and local governmental entities in Arkansas are generally immune from tort liability, except to the extent that the airport or its employees are covered by liability insurance. Therefore, the primary issue in Arkansas is whether the loss is covered by insurance. If the loss is not covered by insurance, there is immunity. *City of Caddo Valley v. George*, 9 S.W. 3d 481, 485 (Ark. 2000).

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Standard of Care

In tort lawsuits against an airport, plaintiffs' attorneys will allege the airport breached the standard of care owed by airports. That raises the question of what that standard of care is.

Common Law Versus the FARs

Generally, it could be argued that common law standards of care may apply. For example, the airport could arguably have a duty of care under state common law to its business invitees. Additionally, in a slip-and-fall accident, the airport, as the owner or possessor of the property, may have a duty of care under premises liability theories.

That being said, depending on the nature of the accident, the FARs may establish the standard of care that applies to the airport. Many provisions of Part 139 are nonspecific and simply address which items must be included in the airport's ACM. However, Part 139 of the FARs does contain some specific regulations relating to paved areas, unpaved areas, safety areas, obstructions, and snow and ice control. If the airport breached the FAR governing its operation, this may equate to evidence of negligence, or negligence per se, depending on the jurisdiction.

Moreover, the FARs may also provide a defense to the airport. For example, if the airport followed Part 139 and/or the ACM approved by the FAA, it could be argued that this preempts any state standards of care and precludes a plaintiff from arguing the airport had a duty to take any additional, different, or greater action.

Aviation practitioners are well aware of the significant split in authority across the United States interpreting whether the Federal Aviation Act impliedly preempts state law on various issues of aviation safety. Results also widely depend on the nature of the claims. Some courts have held the Federal Aviation Act impliedly preempts the "entire field of aviation safety," based on its pervasive regulations. *See, e.g., Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 368 (3d Cir. 1999); *Aldana v. Air East Airways, Inc.*, 477 F. Supp. 2d 489 (D. Conn. 2007); *Shupert v. Continental Airlines, Inc.*, 2004 U.S. Dist. Lexis 6214 (S.D.N.Y. 2004); *Curtin v. Port Authority*, 183 F. Supp. 2d 664 (S.D.N.Y. 2002); *Greene v. B.F. Goodrich Avionics System, Inc.*, 409 F.3d 784 (6th Cir. 2005); *Montalvo v. Continental Airlines, Co.*, 2007 U.S. Dist. Lexis 23252 (9th Cir. 2007).

Other courts have allowed claims to be pursued under state common law standards of care for negligence and strict product liability claims. *See, e.g., Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701 (3rd Cir. 2018); *Monroe v. Cessna Aircraft Company*, 417 F. Supp. 2d 824 (E.D. Tex. 2006); *Cleveland v. Piper Aircraft Corp.*, 417 F. Supp. 2d 824 (10th Cir. 1993); *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001). A full analysis of these decisions is beyond the scope of this article.

Putting aside the split in authority, most of these decisions involve claims against product manufacturers and airlines. There are few legal decisions addressing federal preemption as it relates to claims against an airport. Further, the vast majority of preemption cases involving airports are not tort or personal injury actions and do not concern an airport's duties under any specific FAR. Rather, these cases involve the validity of local zoning regulations, runway regulations, or flight restrictions. *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973) (holding the Federal Aviation Act impliedly preempted and invalidated a local curfew for flights into a local airport); *Blue Sky Entertainment, Inc. v. Ranch Parachute Club, Ltd.*, 711 F. Supp. 678 (N.D.N.Y. 1989) (allowing a local licensing requirement, but invalidating a parachute-jumping prohibition and landing pattern regulation under the doctrine of preemption); *Price v. Charter Township of Fenton*, 909 F. Supp. 498 (E.D. Mich. 1995) (invalidating and preempting local regulation regarding the frequency of flights); *Northeast Phoenix Homeowners' Association v. Scottsdale Municipal Airport*, 130 Ariz. 487 (Ariz. Ct. App. 1981) (invalidating a noise injunction against an airport); *City of Cleveland, Ohio v. City of Brook Park, Ohio*, 893 F. Supp. 742 (N.D. Ohio. 1995) (finding no preemption of a local regulation regarding placement of runways or construction permits); *Tweed-New Haven Airport Auth. v. Tong*, 2019 U.S. App. Lexis 20264 (2nd Cir. 2019) (finding Connecticut's runway statute was preempted because the Federal Aviation Act impliedly preempted the entire field of aviation safety).

At least one federal court found "field preemption" in a tort claim against an airport. *See McMahon Helicopter Services, Inc. v. United States*, 2006 U.S. Dist. Lexis 51819 (E.D. Mich. 2006). *McMahon* involved a negligence claim against an airport under the Michigan common law standard of care for an alleged failure to remove an obstruction—in this case, a light pole. The court acknowledged that the FAA regulates aviation traffic and airport facilities. *Id.* at *8. The court stated that Part 77 contained certain safety obligations on airports relating to obstructions to navigable space. *Id.* The court also held that Part 77 contained the standard of care for the subject light pole. *Id.* at *26. The court acknowledged that the Sixth Circuit had determined that the Federal Aviation Act preempts local law regarding aircraft safety, navigable airspace, and noise control. The court held that where a federal law establishes a standard of care involving aircraft safety, navigable airspace, and noise control, state law standards of care are preempted because Congress has "preempted the field." *Id.* Since the airport complied with the Part 77 obligation for the claimed obstruction, it was entitled to summary judgment. *Id.* at *27. Therefore, *McMahon* stands for the proposition that standards of care placed on an airport under the FARs can potentially preempt all state or territo-

rial common law standards. Yet, as indicated, courts have not reached a consensus on federal preemption under the Federal Aviation Act.

Advisory Circulars

As mentioned previously, there are a host of ACs relating to airport operation and construction projects. In addition to the FARs, a plaintiff may point to the ACs as establishing evidence of the standard of care. Many courts have held that certified pilots are charged with knowledge of the ACs that apply to their flying activities, and the ACs constitute "evidence of the standard of care" for pilots. *First of America Bank-Central v. United States*, 639 F. Supp. 446 (W.D. Mich. 1986); *Associated Aviation Underwriters v. United States*, 462 F. Supp. 674, 680 (N.D. Tex. 1978); *Muncie Aviation v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1181 (5th Cir. 1975); *In re N-500L Cases*, 691 F.2d 15, 28 (1st Cir. 1982); *Turner v. United States*, 736 F. Supp. 2d 980, 1001–02 (M.D. N.C. 2010); *Sexton v. United States*, 132 F. Supp. 2d 967, 976 (M.D. Fla. 2000); *Zinn v. United States*, 835 F. Supp. 2d 1280, 1322–23 (S.D. Fla. 2011). Compliance or noncompliance with such customs found the AC, though not conclusive on the issue of negligence, is one of the factors the trier of fact may consider in applying the standard of care. *Muncie Aviation*, 519 F.2d at 1180–81.

The same could be argued as to claims against airports. At least two courts have found that ACs constitute "evidence" of the standard of care applicable to airports. In *Reliant Airlines v. Broome County*, 1997 U.S. App. Lexis 19237 (2nd Cir. 1997), the plaintiff landed in freezing rain at the defendant airport and rolled off the end of the runway and down a berm, resulting in serious injuries to the pilot. During the trial, the trial court allowed the jury to hear evidence of FAA AC 150-5200/30, relating to maintenance of the runways during bad weather. The trial court also permitted testimony from the plaintiff's aviation expert that the airport failed to conform to said AC as it did not perform recommended friction testing at roughly one-hour intervals in bad weather. *Id.* at *4, 9. On appeal, the Second Circuit Court of Appeals found the AC was properly admitted into evidence to aid the jury in formulating a standard of care to assess negligence. The court noted the trial judge properly instructed the jury that the AC may be considered as "some evidence of negligence, along with other evidence in the case." *Id.* at *9.

In *Sierra Pacific Holdings, Inc. v. County of Ventura*, 204 Cal. App. 4th 509 (Cal. Ct. App. 2012), the plaintiff aircraft operator made an emergency landing at the defendant airport, proceeded past the end of the runway before running over a barrier contained with a runway protection zone, and flipped over in a field. The aircraft sustained property damage. *Id.* at 513. Relying on state law standards of care, the plaintiff alleged the airport was negligent in placing the barrier within the runway protection zone. The plaintiff further alleged this negligent act caused the pilots to hop over the barrier, losing vital time to stop the aircraft. The defendant airport argued that FAA AC 150/5300-13, which relates to airport design, permitted the placement of the barrier. The defendant airport also argued the AC preempted the plaintiff's state law claims. The court in *Sierra* held the AC did not have preemptive effect because it was, by its own terms, "not mandatory," except for projects funded with federal grant monies through the AIP. The record was devoid of any evidence that the runway protection zone was constructed with federal funds. *Sierra*, 204 Cal. App. 4th at 517. Therefore, the AC was not mandatory or preemptive. *Id.*

Nevertheless, the *Sierra* court held the AC, although not conclusive or preemptive on the issue of negligence, could be considered by the jury as evidence of the standard of care. *Sierra*, 204 Cal. App. 4th at 517. Thus, the court found the AC could still play an important role in the litigation as an evidentiary guide.

It is interesting that the *Sierra* court decided that had the airport received AIP funds, the AC would have been mandatory (and arguably preemptive). As mentioned, airports receiving AIP funds must agree to certain contractual grant assurances. Courts have held that such contractual grant assurances do not create a private right of action or allow members of the public to seek to enforce the agreements. *Santa Monica Airport Assoc. v. Santa Monica*, 481 F. Supp. 927, 946 (C.D. Cal. 1979); *Akron v. Castle Aviation, Inc.*, 1993 Ohio App. Lexis 2993, *4–5 (Ohio Ct. App. 1993); *Pollnow v. Hinson*, 1999 U.S. App. Lexis 1233 (7th Cir. 1999). Even so, that would not preclude a plaintiff from arguing an airport was required to comply with an AC if the AC states that it is mandatory for projects funded under the AIP.

Indemnification and Insurance Rights

Airports will occasionally be sued for personal injuries arising out of the unsafe practices or operations of tenants, or fixed-based operators, operating at the airport. In defending such claims, you should carefully review the airport's agreements with its tenants, the fixed-based operators, and determine if indemnification and insurance provisions exist in favor of the airport. In many instances, there will be a basis to tender the defense to the tenant or its insurance carrier. This also will provide the airport with potential bases to file contribution or indemnification claims against the tenant.

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Conclusion

As demonstrated above, defending an airport involves carefully considering a wide variety of regulatory issues and federal and state legal issues. Because the courts continue to generate conflicting decisions (e.g., preemption, grant assurances), many of the issues identified above are moving targets. The scope of potential defenses is staggering, given that an airport operator is a mere premises owner and operator. With proper research and investigation, counsel can use these numerous arrows in the quiver to defend an airport effectively. FD