



# LEGAL LIABILITY ISSUES FOR PORT SECURITY DIRECTORS

AAPA Port Security Seminar  
July 21, 2011

Presented By

**Raymond B. Biagini**

[rbiagini@mckennalong.com](mailto:rbiagini@mckennalong.com)

**McKenna Long  
& Aldridge<sup>LLP</sup>**  
Attorneys at Law

# ◀ **FIRST, THE BAD NEWS**

- We Live In America; Anyone Can Get Sued

## ◀ **NOW, THE GOOD NEWS**

- It Is Relatively Rare for Individual Employees To Be Sued In Tort In Their Personal Capacity
- But, If You Are sued Personally, The Law Offers Certain Protections

## ◀ KEY PROTECTIONS FOR INDIVIDUALS SUED IN TORT

- **BASIC PRINCIPLE:** To The Extent The Port Authority Itself Enjoys Immunity From Tort Suits, An Employee “**Derives**” Same Immunity Unless His Acts Are **Manifestly** Outside The Scope Of Work Or Official Responsibilities Or Were With **Malicious Purpose**, In Bad Faith Or In A Wanton Or Reckless Manner

- **The First Question is:** Does Your Particular Port Authority Employer Enjoy Full Immunity, Partial Immunity, No Immunity From Tort?
- Check Local Listing – statutes, by-laws, caselaw. E.g., Port Authority of NY/NJ; Private Ports (Port of Texas City)

– **The Second Question is:** Even If My Port Authority Employer’s Immunity Is “**Uncertain,**” Can I still Avoid Liability If I Get Sued?

- Using “**Belt And Suspenders**” Approach, Employee Should **Affirmatively** Ensure His Employment Contract Contains Some Or All Of The Following Written Clauses
  - Employer’s Duty to Defend and Indemnify
  - Right to Choose Your Own Individual Legal Counsel

- Cooperation Clause for Timely Access to Witnesses and Documents
- “Substitution” or Sole Employer Remedy Provision

# ◀ IN ADDITION, THE SAFETY ACT CAN MITIGATE OR ELIMINATE TORT LIABILITY FOR YOUR EMPLOYER AND YOU FOLLOWING ACTS OF TERRORISM

- As Part of the Homeland Security Act of 2002, U.S. Congress Passed the **SAFETY Act**

- The SAFETY Act is **Landmark** Legislation, **Eliminating** or Minimizing Tort Liability for Sellers or Providers of Anti-Terror Technology (ATT) Approved By The U.S. Department of Homeland Security (DHS) Should Suits Arise in the U.S. After An Act of Terrorism

- The Definition of “**Anti-Terror Technologies**” is **Broadly** Applied by DHS, Including Hardware and **Services**, Training, Vulnerability Assessments, Systems Integration, etc. Such Technology or Services Must Have a **Material** Anti-Terror Purpose

- The SAFETY Act States That Following An Act Of Terror, The **Only** Appropriate Entity To Sue Is The Holder Of The SAFETY Act Award – That's **Good News** For Individual Employees

- **CERTIFICATION** – The **Highest** Form Of Protection
  - Presumption that seller/provider of ATT is **immediately dismissed** from the suit unless **clear and convincing** evidence that seller acted fraudulently or with willful misconduct in submitting data to DHS during application process; **no punitives**; suit can be filed only in federal court; any liability **capped** at agreed upon limit, usually your **terror insurance** coverage limits

- **DESIGNATION** – Includes All Of The Above **Except** Presumption Of Immediate Dismissal
- Importantly, these Certification and Designation protections also apply to seller/provider's subs, vendors, distributors and **CUSTOMERS**, including the U.S. **Port Authorities** and **Foreign Customers**, commercial or governmental, deploying SAFETY Act approved technologies

- Protections will apply even if, in DHS' view, the act of terror occurs **outside the United States** so long as the “**harm,**” including financial harm, is to persons, property or entities in the United States
- Coverage usually awarded for **5 years** from date of decision. However, DHS has also awarded SAFETY Act protections to apply **retroactively** to **past deployments** of substantially equivalent ATT
- To obtain these tort protections, it is **CRUCIAL** that you demonstrate to DHS the “**PROVEN EFFECTIVENESS**” of your ATT

- Major U.S. **Homeland Security** Procurements are Incorporating the SAFETY Act into Their Terms and Conditions, i.e., **ASP; SBI; C&B** 3rd Party Validation Pilot Program; Port of LA/Long Beach’s **Cargo Security** RFP; Metropolitan Washington Airports Authority’s RFP for the **Registered Traveler** Program. Even **Local Government** Procurements are Incorporating SAFETY Act into RFP’s, e.g., “**Crisis Management**” Contracts for School Districts.

**OBTAINING SAFETY ACT  
COVERAGE - - THE PORT  
AUTHORITY MUST  
APPLY FOR IT!**

# RECENT BREAKTHROUGH SAFETY ACT AWARD FOR AIRPORT BOARD, A PUBLIC ENTITY

- Our Firm Assists **Kenton County Airport Board** In Obtaining “First of Its Kind” SAFETY Act Award on June 28, 2011.
- The Board Runs The Cincinnati/Northern Kentucky Airport

- The Board Obtained **Certification Coverage** For, Among Other Things:
  - Its **security management plan**, including physical and electronic security tools and procedures
  - Its **operations and training procedures** for its airport police and rescue and firefighting personnel

- Its operation procedures for its **Emergency Operations Center**
- Its **selection** and **integration** of technical physical and technical security systems and procedures
- Its **maintenance procedures** for its physical and technical security measures
- Its airport **security plans**

- This Significant Award Reflects That DHS Considers The SAFETY Act An Important Tort Risk Mitigation Tool For **First Responders** Like Airports Even Though They May Already Have Some Level of Sovereign Immunity

# EXAMPLES OF OTHER ATT PROVIDERS WHO ALREADY OBTAINED SAFETY ACT COVERAGE IN RELEVANT MARKETS

- Our Firm Has Obtained SAFETY Act Coverage for More Entities (U.S. and Foreign) Than Anyone in the U.S., Including in the Following **Markets**

## Ports and Borders

- **Northrop Grumman's** Systems Engineering Design and Integration Services Used in Inspection and Detection of Cargo
- **Washington Group's** Cargo Inspection Services
- **SAIC's** VACIS Cargo Inspection System

## Airports

- **Siemens’** Checked Baggage Inspection System
- **The Wackenhut Corporation’s** Consulting, Risk Management and Physical Security Services
- **Verified Identity Pass’** Biometrically Secured, Airport Identification and Access System Under the Registered Traveler Program

## Transit Systems

- **Michael Stapleton Associates'** X-ray Screening, Bomb and Hazardous Materials Detection System
- **Raytheon's** Perimeter Intrusion Detection System
- **Northrop Grumman's** Secure Broadband Wireless Communications Infrastructure for Connecting Devices to Databases and Command and Control Structures

- **THE TAKEAWAYS** -- Encourage Your Port Authority Employer To
  - Obtain SAFETY Act Coverage for Its Anti-Terror **Security Planning** and **Decisionmaking Procedures** and **Processes**, e.g., Port Authority of NY/NJ SAFETY Act Coverage for Tunnel Erosion Protection Project; Kenton County's Coverage for Its Airport Security Systems and Plans

- Include In **RFPs** for Anti-Terror Products or Services a Clause Requiring Vendors to Have SAFETY Act Coverage for Such Technologies, e.g., Port of LA/Long Beach Cargo Security RFP; Metropolitan Washington Airports Authority RFP for Registered Traveler Program
- Encourage Its **Vendors** and **Suppliers** to Obtain SAFETY Act Coverage for the Anti-Terror Products and Services Sold to the Ports

- **CONCLUSION** – Employees Of Port Authorities Can Lessen Or Eliminate Their Tort Exposure Liability By **Proactively** Building In Key Provisions Into Their Employment Agreements And Assisting Their Employer In Obtaining The **Port's** Own **SAFETY** Act Coverage

This “**Layered**” Approach Should Dramatically Reduce Or Eliminate Your Individual Exposure As Well As Your Employer’s