

The Safety Act: A Synopsis
Timothy R. Ward, B.A.^{a1}

“The private sector needs to own homeland security.”

- Alfonso Martinez-Fonts¹

Introduction

After 9-11 countless plaintiffs initiated tort-based lawsuits seeking damages from numerous non-terrorist related defendants, including airplane manufacturers, airlines, airport security companies, airport operators, and the operators and owners of the World Trade Center.² The defendants consolidated their cases to *In re September 11 Litigation, Litigation*, 280 F. Supp. 2d 279, and moved to dismiss the action arguing they did not owe a duty to protect plaintiffs from terrorists, and in the alternative if they did owe a duty, the 9-11 terrorist attacks on the Twin Towers were “so extraordinary and unforeseeable as to constitute an intervening and superseding cause,” more than sufficient to break the causal link between the defendants and any potential liability.³

The court rejected the no-duty argument by the defendants stating that “we live in the vicinity of busy airports, and work in tall office towers and depend on others to protect us from the willful desires of terrorists to do us harm. Some of those on whom we depend for protection are ... private companies.”⁴ *In re September 11 Litigation* tendered notice to corporate America regarding the extent of potential liability arising from future terrorist incidents.

The Safety Act

As part of the Homeland Security Act of 2002, Public Law 107-296, Congress enacted several liability protections for providers of Anti-Terrorism Technologies (ATT). The Safety Act provides incentives for the development and deployment of anti-terrorism technologies by creating a system of “risk management” and a system of “litigation management.”⁵ The purpose of the Act is to ensure the threat of liability does not deter potential manufacturers or Sellers of anti-terrorism technologies from developing and

^{a1} Timothy Ward earned his bachelor of arts degree from the University of Washington in 2001 and is currently a Juris Doctor Candidate at St. Mary’s School of Law located in San Antonio, Texas. He is working as a Research Fellow in Legal Issues for the Center for Terrorism Law under the auspice of which he drafted this synopsis.

¹ Alfonso Martinez-Fonts is the special assistant to the Secretary of Homeland Security for the private sector. He delivered this passage not to minimize the government’s role in Homeland Security but to emphasize that the private sector and the government must work together. See A.J. Carter, *The Ticker*, NEWSDAY, Feb. 9, 2004, at A25.

² Craig Holman & Kara Daniels, *An Evolving Law on Terror Risks With Businesses Facing Liability Issues, Congress Has Enacted The Safety Act to Reduce Potentially Crippling Claims*, THE NATIONAL LAW JOURNAL Vol. 26 No.16, (Dec. 15, 2003).

³ *In re September 11 Litigation*, 280 F. Supp. 2d 279 at 301.

⁴ *Id.* at 309.

⁵ *Homeland Safety Security Act*, available at <http://www.safetyact.gov> (last visited Mar.9, 2004).

commercializing technologies that could significantly reduce the risks or mitigate the effects of large-scale terrorist events.⁶

The Act thus creates certain liability limitations for “claims arising out of, relating to, or resulting from an act of terrorism,” where qualified anti-terrorism technologies have been deployed.⁷ However, the Act does not limit liability for harms caused by anti-terrorism technologies when no act of terrorism has occurred.⁸

Scope of Technologies

Homeland Security recognizes the universe of technologies that can be deployed against terrorism includes far more than physical products.⁹ Therefore, the defense of the homeland will require deployment of a broad range of technologies including services, software, and other forms of intellectual property. Qualified anti-terrorism technologies have been very broadly defined to include “any qualifying product, equipment, service (including support services), device, or technology (including information technology)” the Secretary, as an exercise of discretion and judgment, determines to merit designation under the statutory criteria.¹⁰

Limited Liability

The Safety Act creates a system of risk and litigation management designed to ensure the threat of liability does not deter potential manufacturers or sellers of anti-terrorism technologies from developing and commercializing technologies that could save lives.¹¹

The Department of Homeland Security has recently released the Safety Act interim rule providing different levels of protection for eligible sellers of technologies.¹²

- Level One: Triggered when DHS designates the technology as “*Qualified Antiterrorism Technology*.” This designation affords several litigation reforms or benefits to seller in suits relating to an act of terrorism involving the technology such as:
 - One cause of action that can be brought only in federal court;
 - Bar on punitive damages and prejudgment interest against the seller;
 - Limiting liability for any non-economic damage;

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, 6 Fed. Reg. 59684, Oct. 16, 2003 [hereinafter Safety Act].

- Crediting seller for any collateral-source compensation received by the plaintiff(s);
- Capping the sellers overall liability at the amount of required insurance, which is required by the seller to obtain.¹³

DHS adopts the above provisions of the Safety Act to mean an injured plaintiff is limited only one federal cause of action for loss of property, personal injury, or death when a claim relates to the deployment of the sellers “Qualified Antiterrorism Technology,” and such cause of action may be brought only against the seller.¹⁴

- Level Two: Triggered when DHS certifies the technology as an “*Approved Product for Homeland Security*.” Such certified technologies affords the following benefits to the seller:
 - Shield the seller via rebuttable presumption that the government-contractor defense applies;
 - Presumption is overcome only when the plaintiff proves that the seller acted fraudulently or with willful misconduct in applying for the certification.¹⁵

Indemnity v. Limited Liability

If your technology is approved under the Safety Act it does not mean you are indemnified against liability. The Safety Act authorizes the Secretary to limit the liability of sellers of qualified anti-terrorism technologies to the amount of insurance coverage they are required to maintain and protect other entities in the supply and distribution chains.¹⁶ This is distinct from indemnification, which involves defending against claims brought against others and satisfying any resulting liability.

Insurance Requirement

Qualified anti-terrorism technologies are required to carry liability insurance in an amount determined by the Under Secretary for Science and Technology. The amount of liability insurance required for each technology may vary, and the Under Secretary certifies the amount of insurance required. Your approval as a qualified anti-terrorism technology may be terminated if you do not submit an annual certification of insurance.¹⁷

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The government-contractor defense is a legal doctrine allowing certain government contractors to assert a government-immunity type defense against tort actions involving products with designs approved by the government.

¹⁶ *Homeland Safety Security Act*, available at <http://www.safetyact.gov> (last visited Mar.9, 2004).

¹⁷ *Id.*

Marketplace Influences

Recent debate concerning the Safety Act has uncovered two potential issues relating to the influence the Safety Act will have on the market of anti-terrorist technologies.¹⁸ First, keeping in mind, that under the DHS interpretation of the Safety Act, only the seller of qualified anti-terrorism technologies may be sued for claims relating to an act of terrorism involving the technology. A buyer faced with the risk of unknown liability in the event of a terrorist attack, will obviously purchase the qualified technology over competing technology without the same legal protection.¹⁹

Second, despite official DHS statements to the contrary, many experts feel, that since the use of “Safety Act approval to advertise a product is not prohibited by the safety act, a designation and certification likely will be perceived by the market as DHS “seals of approval.”²⁰

Certification and Designation

If you are a Seller of a potential anti-terrorism technology and wish to be awarded Safety Act protections, you must formally apply to the Department using the forms provided by DHS, furnish the entire requisite supporting data and information, and successfully demonstrate compliance with the Act’s specific criteria. DHS will perform a comprehensive evaluation to determine your eligibility for Safety Act Designation or Certification.

To receive certification and/or designation from DHS applications must provide extensive information including “scientific studies and other types of corroborative evidence that demonstrate the technology has substantial utility and effectiveness” as an anti-terrorism technology, and “studies demonstrating that the technology performs as intended.”²¹

Businesses seeking to maximize liability and risk management benefits of the DHS designations and certifications must make a “persuasive and defensible case” that the Safety Act protections are necessary.²² Experts encourage applicants seeking to maximize the available protections should follow these guidelines:

- Organize the Safety Act application into teams (product engineers, business managers, accountants, legal counsel, etc);
- Review and be familiar with the Safety Act Interim Rule, application kit and applicable forms;

¹⁸ Holman & Daniels, *An Evolving Law on Terror Risks With Businesses Facing Liability Issues, Congress Has Enacted The Safety Act to Reduce Potentially Crippling Claims*, THE NATIONAL LAW JOURNAL Vol. 26 No.16, (Dec. 15, 2003).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Homeland Safety Security Act*, available at <http://www.safetyact.gov> (last visited Mar.9, 2004).

²² Safety Act Interim Rule, 68 Fed. Reg. 59684, at 59689.

- Identify anti-terrorism technologies for possible Safety Act designation and certification;
- Compile all necessary technical, financial technologies may be relevant to any federal, state or local procurements and whether expedited review by DHS may be available;
- Review the application to ensure the information provided imparts a persuasive case for design and or certification.²³

Conclusion

As noted by the court in *In re September 11 Litigation*, we live in a complex technological society and the increasing sophistication of the threats facing our nation indicate the private sector play a significant role in defending the homeland against such threats.²⁴ Additionally, DHS Secretary Tom Ridge has stated defending the homeland is a national effort that will require a sustained and coordinated effort by governmental and private partners.²⁵

Liability and insurance costs together with other obstacles have hindered the level of private sector participation. The Safety Act and the benefits it confers on eligible sellers and their customers help businesses to direct their focus from threats of tort liability against the company to threats by terrorist against the nation.

Suggested Readings and Cited Sources:

1. www.safetyact.gov
 - a. This site is an invaluable tool for anyone wishing to obtain information on the Safety Act and was used extensively by the author in creating this synopsis.
2. Subtitle G of the Homeland Security Act of 2002 (The Safety Act), 6 U.S.C.A. §441 to 444 (Pub.L. 107-296, §861 to 865, Nov. 25, 2002, Stat. 2135)
 - a. Referred to as the “Safety Act.”
3. Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002, 6 Fed. Reg. 59684 (Oct. 16, 2003).
 - a. Referred to as the “Safety Act Interim Rules.”

²³ Holman & Daniels, *An Evolving Law on Terror Risks With Businesses Facing Liability Issues, Congress Has Enacted The Safety Act to Reduce Potentially Crippling Claims*, THE NATIONAL LAW JOURNAL Vol. 26 No.16, (Dec. 15, 2003).

²⁴ *In re September 11 Litigation*, 280 F. Supp. 2d 279.

²⁵ See Ralph Shrader & James Woolsey, *Businesses Must be Involved in Security Planning*, THE FINANCIAL TIMES, Jan. 16, 2004, at 15; Dena Bunis & Bill Rams, *Vast Security Plan Begins: Operation Liberty is the Most Comprehensive Homeland-Operation Program Ever*, THE ORANGE COUNTY REGISTER, March 19, 2003, at A3.

4. Craig Holman & Kara Daniels, *An Evolving Law on Terror Risks With Businesses Facing Liability Issues, Congress Has Enacted The Safety Act to Reduce Potentially Crippling Claims*, THE NATIONAL LAW JOURNAL Vol. 26 No.16 (Dec 15, 2003).
5. Bruce Shirk, David Hammond, Jennifer E. Gartner, *Limitations on Government Contractor Liability After Sept. 11: Emerging Issues in the Context of Homeland Security*, ANDREWS GOVERNMENT CONTRACT LITIGATION REPORTER, Aug. 14, 2003.
6. Department of Homeland Security SAFETY Act Application Kit, October 2003.
7. *In re September 11 Litigation*, 280 F. Supp. 2d 279.