



Alliance of the Ports of Canada, the Caribbean,  
Latin America and the United States

# Understanding and Fully Utilizing the Benefits of the SAFETY Act

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# Pre-9/11 Lawsuits

- *Port Authority of New York and New Jersey v. Arcadian*, plaintiffs brought claims against the fertilizer manufacturers for:
  - negligence for failing to design, manufacture and sell a less detonable product;
  - products liability design defect because the fertilizer was unreasonably dangerous and defective; and
  - failure to warn.
- Court dismissed claims, holding that was not reasonably foreseeable that the terrorists in these cases would have used the fertilizer to make bombs:
  - *No jury could reasonably conclude that one accidental explosion 50 years ago, one terrorist act in this country almost 30 years ago, and scattered terrorist incidents throughout the world over the course of the last 30 years would make an incident like the World Trade Center bombing anything more than a remote or theoretical possibility.*

# Pre-9/11 suits

- *Gaines-Tabb v. ICI Explosives, USA, Inc.*
  - Claims of negligence and strict liability against the manufacturers of the fertilizer used by Timothy McVeigh and Terry Nichols to create the bombs.
  - Court here also found that the fertilizer manufacturers had no duty to the plaintiffs to prevent them from harm, that the products themselves were not unreasonably dangerous and defective, and that the **intervening actions of the terrorists destroyed any proximate cause argument that the plaintiffs might have had.**

# Suits arising out 9/11

- Claims filed against Port Authorities, security companies, Boeing and others. (280 F.Supp.2d 279).
- Defendants sought dismissal, saying no duty to plaintiffs existed and defendants could not have reasonably anticipated the actions of the terrorist.
- Court found that the terrorists actions were reasonably foreseeable, and a duty was owed to the plaintiffs.
- The danger of a plane crashing as a result of a hijacking was “the very risk that Boeing should reasonably have foreseen.”
- Uh oh ....



# The Realities Post 9/11



- Existing risk mitigation tools not always available or preferable
  - Industry Standards/Self Regulation
  - Threat of increased regulation at all levels of government
  - Increased standard of care
- Insurance for damages arising out of terrorist acts was **expensive** and coverage **uncertain**

# Why the SAFETY Act?

- NYC and surrounding areas suffered **tens of billions** in losses
- Because of the continued threat of lawsuits, vendors were refusing to perform security work
- Families who didn't sue received **\$2.1 Million** on average in compensation, while that did sue received **\$5 Million** on average



# Congress Responds

- “Support Anti-Terrorism By Fostering Effective Technologies Act”
- Part of the Homeland Security Act of 2002
- **Eliminates** or minimizes tort liability for sellers of DHS-approved Anti-Terror Technology (ATT) should suits arise after an act of **terrorism**
  - SAFETY Act protections can be obtained only by submitting an application to DHS
  - Protections apply even if approved technologies are sold to **commercial** customers or if act of terror occurs **abroad** so long as US interests implicated (i.e., economic losses)

# “Act of terrorism”

- What is an “act of terrorism”?
  - (i) is unlawful;
  - (ii) causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel in or outside the United States; and
  - (iii) uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.
- Definition is read to include events that impact the United States





# SAFETY Act: Designation vs. Certification

- Two levels of protection under the SAFETY Act, Designation and Certification
- Under “Designation”:
  - Claims may only be filed in Federal court
  - Damages are capped at a level set by DHS
  - Bar on punitive damages and prejudgment interest
  - Reduction of the plaintiff’s recovery by amounts that the plaintiff received from “collateral sources” (i.e. insurance benefits)

# SAFETY Act: Designation vs. Certification

- Under “Certification” sellers also receive a presumption of immediate dismissal
- In both circumstances claims against **CUSTOMERS** are **to be immediately dismissed**



# What Does DHS Evaluate?

- DHS will evaluate:
  - Prior anti-terror deployments
  - Availability for immediate deployment
  - Existence of unquantifiable third-party risks
  - Likelihood of not deploying it without SAFETY Act coverage
  - Scientific studies supporting efficacy
  - Any other relevant factor DHS wants to consider

# What is DHS really looking for?

- What are you seeking coverage for?
- How does it work/how is it provided?
- How do you know it works?
- How will you make sure it continues to work?
- Can you show your product/service is repeatable (e.g. documented policies and procedures)?
- Is it safe?

# What Do Applicants Think About?

- Consider the following issues:
  - Is the technology or service actually deployed or close to being deployed?
  - Is there documentation on the product/service works and how it will be provided?
  - What documentation exists on its efficacy?
  - Is the seller worried about liability?
- You have to have a “real” product or service with documentation to have a “real” application.



# Anticipated Application Cycle Time



- Drafting of an application takes anywhere from 150 to 200 hours
- Typical DHS review time:
  - 30 days for “completeness” check
  - 90 days review
  - 120 days typical review time
  - Science & Technology Under Secretary may issue a 45 day review extension, and they can occur

# The DHS Decision

- If DHS provides SAFETY Act coverage to an Applicant, the written decision will address:
  - the **definition** of the covered technology
  - the **duration** of the coverage
  - whether **prior deployments** are covered
  - whether additional **insurance** must be obtained and if so, how much
- Applicants may refile an unsuccessful application

# Recent SAFETY Act trends

- DHS is requiring more information when an application is being submitted than in the past
- DHS is actively looking to expand the types of companies submitting applications (owners of critical and iconic facilities)
- DHS wants more applications from large and small companies
- Congress continues to support the process

# Who Will Plaintiffs Recover From?

- Terrorists?
  - The widow of murdered journalist Daniel Pearl has withdrawn a lawsuit seeking damages against al-Qaida, a dozen reputed terrorists and Pakistan's largest bank. [L]awyers noted that the defendants in the case had not answered the lawsuit filed in July.
- State sponsors?
  - Beirut Bombing: A Federal judge ordered Iran to pay \$2.65 billion to relatives of the 241 American military people killed in a 1983 bombing in Lebanon and to 26 survivors of the attack, a ruling that is likely to remain **symbolic**. How the nearly 1,000 plaintiffs can recover the damages is unclear, since Iran is estranged from the U.S., has denied responsibility for the attack, *and did not even respond to the lawsuit.*
- That leaves security providers and property owners ....

# I'm a Port Authority – Why Should I Care?

## Port Authority Found Negligent in 1993 Bombing April, 2008

**The New York Times**  
nytimes.com

**New York Supreme Court upholds decision finding the Port Authority of New York and New Jersey liable for the 1993 World Trade Center bombing. The Court found that the Port Authority was aware of the threat, and was required to take reasonable mitigation steps.**





# Port Authority Decision

- Court sustained the verdict against the PA by finding that “notice” of potential terrorist attacks was the appropriate standard to apply.
  - “Notice” occurs when a defendant knew or “should have known” that a terrorist attack was possible.
- If on notice, must take “reasonable” mitigation steps:
  - “Reasonable” mitigation steps could be ones that previously were considered “burdensome,” and could involve circumstances where even the most stringent of mitigation measures suggested in the course of a vulnerability assessment would be considered “reasonable”.
- Owners now face a very difficult liability situation.

# Ports, Vendors, and the SAFETY Act

- Why should ports and their security vendors care about liability?
- Ports are heavily regulated entities (MTSA, CFATS, TWIC, etc.)
  - The terror-related security threat to ports is obvious and “known”
- Compliance with safety and security requirements will automatically exempt us from tort liability, right?
  - NO!!!
  - Compliance with safety and security requirements can be considered in a liability determination, but it generally does not bar liability
  - This is especially true where a “reasonable” person would have taken additional precautions
- Remember – many claims against Port Authorities have succeeded already

# So How Do You Manage Liability?

- Port authorities should file SAFETY Act applications:
  - Security services, including
    - Physical security
    - Screening operations
- Port authority vendors should:
  - Apply for SAFETY Act protections immediately
  - Market approvals to customers
- Port authorities should also weave SAFETY Act into procurements:
  - Require vendors hold or apply for SAFETY Act protections
  - Plenty of technologies and services you need to buy are already covered by the SAFETY Act
- The SAFETY Act is the best and possibly only way to manage liability in the post 9/11 environment



# Procurements and the SAFETY Act

- Numerous procurements are now being tied to SAFETY Act approval, including:
  - Airports requiring companies to be SAFETY Act approved in order to bid on Registered Traveler Program
  - Shopping centers mandating that security guard vendors be SAFETY Act approved
- Universe of customers demanding SAFETY Act approval is expanding (chemical companies, sports teams)

# Example of a Procurement Tied to the SAFETY Act



Los Angeles World Airports

*“The system implemented will be required to be designated and certified as Qualified Anti-terrorist Technology pursuant to the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (U.S. Safety Act, 6 U.S.C.441-444).”*



# Remember ... Litigation WILL HAPPEN

- Families who sued after 9/11 were not motivated by money
- Litigants said the 9/11 Compensation Fund was “hush money”
  - “People were being paid off not to go to court”
- Litigation was viewed as a way to get accountability
  - “What I’m looking for is justice ... someone held accountable ... there are people who did not do their job”
- If they could do it again, more people would sue
  - “I felt ‘dirty’ after taking the money”
- The legal bills? Hundreds of millions of dollars ...

## Questions or comments?



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