Slowly But Surely: The Fall and Rise of the SAFETY Act

By Nathan Brooks

In nearly all of America's most challenging endeavors—from World War II to the Space Race—the government has put a premium on marshaling the unparalleled resources of America's private sector. And the U.S. government did so with good reason: no country in the world can produce results as innovative or efficient as those spit out by our nation's capitalist machine. It stands to reason, then, that in defending the United States from a future terrorist attack, the United States will depend heavily on the private sector to develop the tools needed to counter terrorism as well as the remedies.

Unfortunately, whereas American ingenuity is known the world over, many believe that another well-known American practice hampers the private sector's ability to contribute to the war on terror: the lawsuit. Who will try to develop an incredibly complex countermeasure, the argument goes, when he or she faces a multimillion dollar lawsuit if the countermeasure fails? With this question in mind, in 2002, Congress passed the Support Antiterrorism by Fostering Effective Technologies (SAFETY) Act, codified at 6 U.S.C. § 441 et seq. The idea behind the act was simple: to encourage the development of counterterrorism technology by making it harder to sue those working to make innovations in this area.

It is not surprising that significant controversy has erupted as a result of this seemingly simple statute. Some have attacked the SAFETY Act for being too weak, whereas critics on the other side argue that the act is merely a Trojan horse that hides the business-friendly armies of tort reform. This article explores the purpose of the SAFETY Act itself along with its basic provisions and discusses some of the initial bumps in the road to implementation as well as the methods used to address these problems.

Tort Liability in the Wake of 9/11

Like so many other things, the American tort landscape looked dramatically different in the wake of the terrorist attacks of Sept. 11, 2001. While Congress struggled for a legislative answer to the question of how to provide for the victims and their families, the courts tried to formulate a judicial remedy. In the 9/11 tort action, defendants—ranging from airports to port authorities—believed that the sheer improbability of the attacks on the World Trade Center and the Pentagon precluded a finding that the private sector had a duty to prepare for such attacks. The federal district court disagreed, and the message to the private sector appeared clear: 9/11 taught us that we all must be on guard for a large-scale terrorist attack, and this lesson would not be lost on judges presiding over tort actions.

Adding to the problem was the insurance industry's reaction to 9/11. Insurance payouts related to the terrorist attacks have been estimated at $40 billion to $50 billion; as a result, the costs of many large-scale policies skyrocketed. Commentators often point out, for example, that Milwaukee's Miller Park Stadium saw its property and casualty insurance costs rise from $225,000 in 2001 to $250,000,000 in 2002.

If companies that are not regularly engaged in the business of protecting the public from terrorism could be subject to crippling liability and prohibitive insurance costs, one can only imagine the risks associated with products and services directly aimed at ensuring homeland security. At least that's how the argument goes, and the number of potential plaintiffs in a terrorist-related tort action reaches to the tens of millions.

Those who argued against the passage of the SAFETY Act could point to the exponential growth of the homeland security industry in the wake of 9/11. It seemed plausible to assume that, even though the risk associated with terrorist-related tort liability would no doubt discourage some in the private sector, such risks could be absorbed in prices for sought-after products and services designed to ensure homeland security. In short, market forces would be more than sufficient to solve the problem.

In the end, Congress chose the "tort reform light" solution embodied in the SAFETY Act. The drafters of the act chose an incentive-based methodology to ensure that the shelves of the homeland security marketplace will be stocked for years to come.

Overview of the SAFETY Act

The key to the SAFETY Act is the designation or certification of a product or service as a "qualified antiterrorism technology" (QATT) by the Department of Homeland Security (DHS). This designation triggers the act's protections, foremost being that lawsuits involving QATT and stemming from "acts of terrorism" must be brought in federal court. Not only are QATT purveyors protected from the litigant-friendly county courthouse, however, but they are also provided significant substantive protections as to the claims themselves.

One of the most important protections afforded to QATT-designated defendants is a rebuttable presumption in favor of the government contractor defense, which the SAFETY Act essentially codified. Faced with this defense, the plaintiff must prove that the defendant obtained QATT certification from the DHS fraudulently (this issue is discussed further below). In addition to overcoming this significant hurdle, the plaintiff is not allowed to recover punitive damages. Moreover, noneconomic damages are available only in the event of physical harm, and even in those cases, damages are awarded only in proportion to the defendant's percentage of culpability. So, for example, if the terrorist is found to be 80 percent liable for the harm that was done, the plaintiff can recover only 20 percent of the damages from the QATT-designated defendant.

The SAFETY Act requires sellers to show financial stability by purchasing liability insurance in amounts specified by the DHS. Significantly, however, damage awards in the aforementioned actions cannot exceed the limits of the required liability insurance coverage. The idea, clearly, is that QATT sellers must prepare for potential liability, but insurance should not be a means to circumvent the act's protections.

The SAFETY Act itself is relatively straightforward at first glance: for the nuts and bolts of obtaining certification under the SAFETY Act, one must look to the DHS regulations. The department's history with the act has been uneven at best, as the government is struggling to encourage the participation of the private sector. Under the final implementing regulations that were finally issued in 2006, the DHS grants either "designation" or "certification" status to qualified applicants. Those seeking one of these SAFETY Act protections must complete a comprehensive application kit that describes the technology, applicable insurance, and the need for coverage.

Essentially, "designation" confers all the benefits described above, with the exception of the government contractor defense. "Certification," then, allows for a rebuttable presumption in favor of this defense, which allows the holder protection under the government's sovereign immunity.

Slow Response and Hard Questions

As noted above, the SAFETY Act has generated significant discussion as well as some controversy. And yet, somehow, the act is massively underused and relatively unknown— the Department of Homeland Security has approved QATT certification of only approximately 150 services or technologies so far. Anecdotal evidence abounds as to the lack of interest in pursuing the benefits provided by the act. One commentator, for instance, described a visit to a government security conference a couple years ago that had 10,000 attendees, but the panel discussion on the SAFETY Act only drew two people.

Much of the initial lack of interest can be traced to the onerous application process first used by the DHS. Under the interim rules issued in 2003, for example, the SAFETY Act application kit required a huge amount of information—much more than was necessary. In 2005–2006, however, the DHS began streamlining the application process, which culminated in the issuance of the final rules on June

8, 2006. Even though the number of organizations taking advantage of the Act remains small, participation has significantly increased since the DHS began refining the application process.

Another initial problem with the SAFETY Act was the length of time it took the DHS to process applications. This delay was particularly troubling for organizations pursuing government procurement opportunities that required SAFETY Act status. The DHS was able to process only a handful of applications a year after the original application kit was issued, which caused many in the homeland security industry to lose interest. Again, the DHS has learned from its mistakes and improved processing times considerably, even implementing a pre-qualification process whereby government entities seeking products or services can request initial determinations of QATT status. In addition, the DHS has allowed for block approval of particular types of technologies or services. Despite these positive changes, however, the "bureaucratic black hole" label attached to the certification process has been hard to shake.

It also appears that lawyers—particularly corporate counsels—played a significant role in the private sector's lukewarm response to the SAFETY Act. Put simply, in the eyes of many attorneys, the act itself left too many open question, and the DHS—which at the time was overwhelmed by responsibilities related to Hurricane Katrina—was slow to offer clarifying interpretations. Would the protections provided by the act, for example, extend to "acts of terrorism" originating outside our borders? Are customers and other downstream users of QATT protected?

In issuing its final rules, the DHS clarified some of the act's muddier provisions, explaining that only the initial seller of QATT can be sued with respect to an "act of terrorism," while customers, subcontractors, and the like cannot be subject to tort liability for these products or services. In addition, the DHS found no justification for a geographical limitation of the act's coverage. Still, questions as to scope and coverage linger, and one is left to wonder if the interpretations offered by the DHS—particularly those that are related to downstream users—will stand up in court.

The Department of Homeland Security attempted to address an extremely confusing issue when it offered guidance as to post-designation modifications to QATT. Any product or service, particularly in a capitalist economy, undergoes periodic changes and improvements to keep pace with competition and changing needs. With respect to the SAFETY Act, however, one must ask at what point changes to QATT result in a loss of QATT status. In typical fashion, the DHS's interim rule gave rise to more questions than answers in that any "significant modification" required prior notice or coverage would be terminated (dating back to the time of the modification). Of course, because no one knew exactly what constituted a "significant modification," it appeared that *any* change could trigger this requirement.

In 2006, the DHS removed the automatic revocation of status with respect to significant changes, although organizations are still required to notify the department when such changes occur. As to what constitutes a "significant change," unfortunately this question will likely go without a clear answer for a long time. Whenever the DHS attempts to bring clarity to this issue, things only get murkier; for example, in 2006, the DHS declared that a significant modification is anything that "causes the QATT no longer to be within the scope of the Designation or Certification." That's not a circular definition, is it?

One of the more interesting questions surrounding the act's protections is the government contractor defense provision. Before the SAFETY Act was passed, this defense was entirely a product of judicial decisions; as such, the shape and contours the government contractor defense have changed significantly since the leading 1988 Supreme Court opinion in *Boyle v. United Technologies Corp*. And the defense's application will continue to change through later interpretations, independent of the SAFETY Act, naturally leading many to question which government contractor defense the SAFETY Act codified—the constantly evolving defense or the version that existed when the act was passed. The DHS has sided with the latter interpretation, although much more guidance is needed on the specifics of the relationship between QATT designation and the government contractor defense.

The Future of the SAFETY Act

Many commentators continue to paint a bleak picture of the SAFETY Act's outlook, making the mistaken assumption that past errors guarantee future failure. And, as noted above, there is still plenty of work to be done in clarifying and streamlining the designation/certification process. In truth, however, the act finally appears to be taking hold as originally intended. Whereas, in the past, the DHS was often the lone cheerleader pushing the benefits of designation and certification, large private-sector entities are now joining in, creating a trickle-down effect for vast portions of the American business community.

As anyone in the procurement game can attest, in order to go after and maintain prime government contracts more and more large corporations are requiring subcontractors to pursue SAFETY Act status. Consequently, within the next five to 10 years, SAFETY Act certification may very well become a prerequisite for getting chips at the increasingly profitable homeland security table. Civitas, an investment group that monitors the homeland security industry, pegs the current market at $55 billion and estimates that it will grow to $518 billion by 2015.

The SAFETY Act has had its share of problems, to be sure. A vague statute and an overburdened federal bureaucracy have not served this promising idea well. Regardless, the promise of homeland security riches will likely do for the SAFETY Act what an ineffective homeland security infrastructure, on its own, never could do. **TFL**

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