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THE SAFETY ACT, TERRORISM, AND THE NATIONAL FOOTBALL LEAGUE

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"What I find objectionable, however, fatally so, is that the SAFETY Act was never the subject of any hearing, was never considered by a committee in either chamber . . . ."

-Senator John McCain at Senate deliberations on the Homeland Security Act, November 19, 2002[1]

I. INTRODUCTION

The Support Anti-Terrorism by Fostering Effective Technologies Act (SAFETY Act) incentivizes companies to make and commercialize anti-terrorist products by offering liability protection.[2] The SAFETY Act was folded into the congressionally passed Homeland Security Act of 2002.[3] Signed

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[1] 107 CONG. REC. 150, 11,430 (2002).

[2] Support Anti-Terrorism by Fostering Effective Technologies Act, 6 U.S.C.A. § 442 (2016).

[3] Homeland Security Act of 2002, Pub. L. No. 107–296, 2002, U.S.C.C.A.N. (116 Stat.) 2135, 2238 (codified at 6 U.S.C.A. § 101 (2002)).

into law by President George W. Bush on November 25, 2002,[4] the Homeland Security Act of 2002 established the Department of Homeland Security (DHS), the Directorate for Information Analysis and Infrastructure Protection, the Critical Infrastructure Information Act of 2002, the Cyber Security Enhancement Act of 2002, and the SAFETY Act.[5]

In 2009, the National Football League (NFL) gained liability protection against lawsuits stemming from a terrorist attack at an NFL stadium through an accreditation offered by the SAFETY Act.[6] The NFL has the highest accreditation level, "Designation and Certification,"[7] while the National Basketball Association (NBA) has "Designation," and Major League Baseball (MLB) has "Development Testing and Evaluation" (DT&E).[8] This accreditation is an important liability protection which "makes it impossible to sue a company after a terrorist attack for standard negligence."[9] If a ticket-holding spectator brings in "an explosive device in a purse that wasn't detected during standard bag inspection by entrance guards" and a terror attack occurs, the league, including the entrance guards, cannot be held liable.[10]

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[4] *President Bush Signs Homeland Security Act*, THE WHITE HOUSE (Nov. 25, 2002), https://georgewbush-whitehouse.archives.gov/news/releases/2002/11/20021125-6.html.

[5] Support Anti-Terrorism by Fostering Effective Technologies Act, 6 U.S.C.A. §§ 441–444 (2016).

[6] Thomas Frank, *NFL Exempt from Terrorism Lawsuits*, USA TODAY (Mar. 9, 2009, 9:40 PM), http://usatoday30.usatoday.com/news/nation/2009-03-09-safety-act_N.htm.

[7] The terms "Designation and Certification" have also been stated as "Certification," the terms have been used interchangeably this way in DHS SAFETY Act literature.

[8] David Broughton, *Lambeau Field Latest to Get DHS Designation,* STREET & SMITH'S SPORTS BUS. J. (May 16, 2016), http://www.sportsbusinessdaily.com/Journal/Issues/2016/05/16/Facilities/Lambeau-DHS.aspx.

[9] Bob Sullivan, *Yankees Win Protection Against Terrorism -- But What Did You Lose?*, NBCNEWS.COM (Aug. 21, 2012, 3:43 AM), http://redtape.nbcnews.com/_news/2012/08/21/13381431-yankees-win-protection-against-terrorism-but-what-did-you-lose?lite.

[10] *Id.*

Administered by the Secretary of the DHS, Office of SAFETY Act Implementation (OSAI) within the Directorate of Science and Technology,[11] the SAFETY Act aims to encourage the commercialization of anti-terrorism technology for public use by providing product liability protection to the manufacturer.[12] This protection "ensure[s] that the threat of liability does not deter potential manufacturers or sellers of antiterrorism technologies from developing, deploying, and commercializing technologies that could save lives."[13]

Under the SAFETY Act, the term "technology" is broadly defined to include any product, equipment, device, technology, and services such as design, consulting, engineering, software development as well as "threat assessments, vulnerability studies, and other analyses relevant to homeland security."[14] The SAFETY Act authorizes the DHS Secretary[15] to designate the aforementioned varieties of technologies as anti-terrorism technologies under a risk management system,[16] which provides legal liability protections to manufacturers and sellers of technologies against claims arising out of an Act of Terrorism.[17] Lockheed Martin, Bank of America, IBM, Boeing, Accenture, Raytheon and Unisys are some of the companies with technologies that have received SAFETY Act accreditation.[18]

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[11] 6 C.F.R. § 25.2 (2006).
[12] *See* 6 U.S.C. § 442 (2002).
[13] 6 C.F.R. § 25.
[14] *Safety Act Webinar: What is the SAFETY Act and How Do You Apply?*, DEPT. OF HOMELAND SEC. 6 (Feb. 11, 2015), https://www.safetyact.gov/jsp/refdoc/samsRefDocSearch.do [hereinafter *SAFETY Act Webinar*].
[15] 6 C.F.R. § 25.3 (2006) ("All of the Secretary's responsibilities, powers, and functions under the SAFETY Act, except the authority to declare that an act is an Act of Terrorism for purposes of section 865(2) of the SAFETY Act, may be exercised by the Under Secretary for Science and Technology of the Department of Homeland Security or the Under Secretary's designees.").
[16] Homeland Security Act of 2002, Pub. L. No. 107–296, 2002, U.S.C.C.A.N. (116 Stat.) 2135, 2238 (codified at 6 U.S.C.A. § 101 (2002)).
[17] *SAFETY Act Webinar*, *supra* note 14.
[18] *SAFETY Act 101 Briefing: The Support Anti-terrorism By Fostering*

This paper explores the SAFETY Act and how the NFL qualified for its liability protection. Part II explains the SAFETY Act's background, statutory and regulatory history, regulatory requirements and application process. Part III examines the accreditation of the NFL and other professional sports teams and leagues. Part IV addresses the worst-case scenario, Part V discusses possible implications, and Part VI concludes.

II. THE SAFETY ACT

A. BACKGROUND

When the Homeland Security Act of 2002[19] was first introduced by Congressman Dick Armey in the House of Representatives on June 24, 2002, it did not contain the SAFETY Act.[20] Rather, it appeared in the July 24 version of the Bill without identifying sponsorship.[21] In examining the chronology and proposed legislation, the SAFETY Act had apparently been added to the Bill by the House between June 24 and July 24, 2002.[22]

Effective Technologies (SAFETY) Act of 2002, DEPT. OF HOMELAND SEC., https://www.safetyact.gov/jsp/refdoc/samsRefDocView.do?action=ViewAttachment&refDocGroupName=Reference%20Documents&refDocTitle=SAFETY%20Act%20101%20Briefing&attachmentName=SAFETY%20Act%20101%20Briefing.pdf.

[19] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

[20] H.R. REP. NO. 107-5005 (2002).

[21] SELECT COMM. ON HOMELAND SEC., H.R. DOC. NO. 107-5005, at Title VII, Subtitle F (2002).

[22] *See* H.R. REP. NO. 107-609, at 118 (2d Sess. 2002). The SAFETY Act was not in the original June 24th Bill as introduced in the House of Representatives, nor did it appear in the House's July 17th hearings before the Select Committee on Homeland Security. *The Homeland Security Act of 2002, Day 3: Hearing Before the Select Comm. on Homeland Sec.*, 107th Cong. (2002); H.R. REP. NO. 107-5005 (2002). It first appeared in the Select Committee's July 24th version of the Bill. H.R. REP. NO. 107-609, at 174 (2002). The House's report along with the Minority and Dissenting Views also of July 24th included the SAFETY Act and the vote to remove it. H.R. REP. NO. 107-609 (2d Sess. 2002). It went to the Senate July 26, 2002. *H.R. 5005 (107th): Homeland Security Act of 2002*, GOVTRACK, https://www.govtrack.us/congress/votes/107-2002/h367 (last visited Mar. 3, 2017).

The recorded committee votes held on July 19 were in the House's Select Committee on Homeland Security Minority Report of July 24, 2002.[23] A vote was held for an amendment which would have struck the SAFETY Act from the Bill, but it was narrowly rejected 5-4.[24] On July 26, 2002, the House passed the Homeland Security Act with the SAFETY Act included by a vote of 295-132, sending it to the Senate.[25]

The Senate did not begin deliberating the Bill until after August 2002.[26] On November 19, 2002, the Senate held lively discussions about the addition of the SAFETY Act which had not been the subject of any hearings.[27] Senator Patrick Leahy argued, "the bill provides liability protections for companies at the expense of consumers. This unprecedented executive authority to unilaterally immunize corporations from accountability for their products is irresponsible and endangers the consumers and our military service men and women."[28] Senator Kennedy declared, "[t]his provision has nothing to do with bioterrorism preparedness or homeland security—and everything to do with rewarding a large contributor to the Republican Party."[29] Senator Lieberman asserted that it gives the Department "broad authority to designate certain technologies as so-called 'qualified antiterrorism technologies.' [Its] granting of this designation—which appears to be unilateral, and probably not subject to review by anyone . . . ."[30]

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[23] H.R. REP. NO. 107-609, at 68–72 (2d Sess. 2002).
[24] *Id.* at 70–71.
[25] *H.R. 5005 (107th): Homeland Security Act of 2002*, GOVTRACK, https://www.govtrack.us/congress/votes/107-2002/h367 (last visited Mar. 3, 2017).
[26] HAROLD C. RELYEA, CONG. RESEARCH SERV., RL31751, HOMELAND SEC.: DEP'T ORGANIZATION AND MGMT. — IMPLEMENTATION PHASE (2005).
[27] *See* 148 CONG. REC. (daily ed. Nov. 19, 2002).
[28] *Id.* at S11427 (statement of Sen. Leahy).
[29] *Id.* at S11419 (statement of Sen. Kennedy).
[30] *Id.* at S11362 (statement of Sen. Lieberman).

Senators Lieberman and Daschle introduced amendment 4953 to have the SAFETY Act struck from the Bill,[31] but it was closely rejected with a 52-47 vote.[32] The Senate then passed the Homeland Security Act with the SAFETY Act included, with a 90-9 vote.[33]

The legislative history of the SAFETY Act reveals its support was divided; a possible indication that if it was not couched into the Homeland Security Act it may not have passed at all.[34]

While the SAFETY Act was signed into law in 2002, DHS published its first proposed rules for implementation on July 11, 2003.[35] An interim rule governing implementation of the SAFETY Act was promulgated on October 16, 2003, making certain changes to the proposed rules but retaining its interpretation.[36] DHS subsequently published protocols for implementation and activated the program.[37]

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[31] *See id.* at S11358 ("Daschle (for Lieberman) Amendment No. 4911 (to Amendment No. 4901), to provide that certain provisions of the Act shall not take effect. Daschle (for Lieberman) Amendment No. 4953 (to Amendment No. 4911), of a perfecting nature.").
[32] 148 CONG. REC. (daily ed. Nov. 19, 2002), at S11371.
[33] Homeland Security Act of 2002, Pub. L. No. 107–296, 2002, U.S.C.C.A.N. (116 Stat.) 2135, 2238 (codified at 6 U.S.C.A. § 101 (2002)).
[34] SELECT COMM. ON HOMELAND SEC., H.R. DOC. NO. 107-5005, at S11363 (2002). (statement of John Breaux, Senator, Louisiana: "What has happened in the course of this process is interesting but not unusual. The House loaded up the homeland security bill with a whole bunch of things that were concocted in the middle of the night and not the subject of any hearings or not brought through the normal committee process and not voted on by the House and not voted on by any committee in the Senate and not passed by the Senate. But, lo and behold, all of these provisions are now attached to the bill, and the House announced that they are going out of town, and take it or leave it.").
[35] Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 68 Fed. Reg. 41420 (proposed July 11, 2003) (to be codified at 6 C.F.R. pt. 25).
[36] *Id.* 68 Fed. Reg. 59684 (Interim rule published October 16, 2003).
[37] 6 C.F.R. §25 (2006).

The program started slow with just six technologies receiving protections during its first year and a half (October, 2003 to February, 2005), but an additional sixty-eight technologies received protections from March, 2005 to June, 2006. [38] After the first three years, the procedures for administering the program needed improvements and DHS incorporated comments and suggestions in the final rule to do so. [39] On June 8, 2006, the final rule (6 CFR 25) for implementing Subtitle G of Title VIII of the Homeland Security Act of 2002, Public Law 107-296 was issued, effective July 10, 2006.[40]

B. PROCESS

Under the SAFETY Act, an entity with a potential anti-terrorism technology can apply for Designation (the first level which can be attained) or apply simultaneously for the highest level of Designation and Certification.[41] A technology that is untested but promising can apply and receive limited protection during trial tests under Developmental Testing & Evaluation (DT&E) designation.[42] Designation and certification are valid and effective for five to eight years.[43] If an application is denied, the entity may reapply at any time by resubmitting a full application.[44] Once approved, the technology is deemed to be a Qualified Anti-Terrorism Technology (QATT) [45] and the

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[38] 71 Fed. Reg. 33148 (I)(A) (proposed June 8, 2006) (to be codified at 6 C.F.R. pt. 25).
[39] 71 Fed. Reg. 33151 (II); 6 C.F.R. § 25 (2006).
[40] 6 C.F.R. § 25.2 (2006).
[41] *Id.* §§ 25.6, 25.9 (2006).
[42] 6 C.F.R. § 25.4(f) (2016).
[43] 6 C.F.R. §§ 25.6(f), 25.9(f)(2) (2016).
[44] *SAFETY Act Frequently Asked Questions*, DEP'T OF HOMELAND SEC., https://www.safetyact.gov/jsp/faq/samsFAQSearch.do?action=SearchFAQForPublic (follow the "NEXT PAGE" hyperlink until "Q: What if my first application is denied?" is displayed) (last visited Mar. 3, 2017).
[45] 6 C.F.R. § 25.2 (2016). (''Qualified Anti-Terrorism Technology'' or ''QATT'' means any Technology (including information technology) designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a

"seller"[46] receives liability protection against claims filed in United States courts rising out of, relating to, or resulting from an Act of Terrorism when their technologies have been deployed. However, the SAFETY Act protections apply only when an Act of Terrorism has occurred.[47]

Additionally, a SAFETY Act accreditation is not required to sell anti-terrorism technologies, but is a promotional seal of recommendation (red, blue or green[48]) with liability protection, which places the technology on an "Approved Technologies"[49] list, much like a well insured service provider on Angie's List.[50]

One of the earliest technologies to receive SAFETY Act Certification was Northrop Grumman's *Biological Detection System (BDS)* which was "designed to screen mail for the presence of anthrax spores as it is processed on automated mail sorting equipment in mailrooms."[51]

Designation has been issued pursuant to this part.)

[46] *Id.* (Seller: "The term 'Seller' means any person, firm, or other entity that sells or otherwise provides Qualified Anti-Terrorism Technology to any customer(s) and to whom or to which (as appropriate) a Designation and/or Certification has been issued under this Part (unless the context requires otherwise.").

[47] 6 U.S.C. § 442 (2012); 6 C.F.R. §§ 25.7 (2016). Both the statute and the regulations condition the limited liability protections afforded to Sellers to claims "arising out of, relating to, or resulting from an Act of Terrorism." 6 C.F.R. § 25.7 (2016).

[48] *See Approved Technologies*, DEP'T OF HOMELAND SEC., https://www.safetyact.gov/jsp/award/samsApprovedAwards.do?action=SearchApprovedAwardsPublic (last visited Mar. 3, 2017) (signaling a Certification with a red mark, a Designation with a blue mark, and a DT&E with a green mark).

[49] *Id.*

[50] ANGIE'S LIST, https://www.angieslist.com/how-it-works.htm (last visited Mar. 3, 2017) ("Verified reviews and ratings in hundreds of categories help you find the best companies to help you complete your projects.").

[51] *Approved Technologies, supra* note 48 (using the "SORT ORDER" menu to arrange the approved technologies by "Ascending" and pressing search to find Northrop Grumman's technology). Northrop Grumman's Biological Detection System (BDS) was approved in June 2004. *Id.*

While the term "Secretary" is used frequently throughout the regulations, there is an important distinction between the roles and responsibilities of the Secretary of DHS and the "Secretary" that is the Under Secretary for Science and Technology of DHS.[52] The Under Secretary has, by delegation, all of the DHS Secretary's "responsibilities, powers, and functions under the SAFETY Act, except the authority to declare that an act is an Act of Terrorism."[53]

The term ''Act of Terrorism'' means any act determined to have met the following requirements or such other requirements as defined and specified by the DHS Secretary:[54]

1. Is unlawful;
2. Causes harm, including financial harm, to a person, property, or entity, in the United States . . . ; and
3. 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.[55]

C. QUALIFIED ANTI-TERRORISM TECHNOLOGIES (QATT)

A QATT is any technology (including information technology) which is designed, developed, modified, or procured specifically for preventing, detecting, identifying, or deterring an Act of Terrorism or limiting the harm from such act.[56] Designating a QATT is based on criteria, but can be exercised at

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[52] 6 C.F.R. § 25.3 (2006) ("Delegation. All of the Secretary's responsibilities, powers, and functions under the SAFETY Act, except the authority to declare that an act is an Act of Terrorism for purposes of section 865(2) of the SAFETY Act, may be exercised by the Under Secretary for Science and Technology of the Department of Homeland Security or the Under Secretary's designees.").
[53] *Id.*
[54] *Id.*
[55] *Id.* § 25.2.
[56] *Id.*

the discretion and judgement of the DHS Secretary.[57] Moreover, applicants do not have to meet all of the criteria – the Secretary may consider other factors depending on the technology and its use.[58] The following criteria are utilized in evaluating technology to receive SAFETY Act Designation:

1. Prior United States Government use or demonstrated substantial utility and effectiveness.
2. Availability of the technology for immediate deployment in public and private settings.
3. Existence of extraordinarily large or extraordinarily unquantifiable potential third party liability risk exposure to the Seller or other provider of such anti-terrorism technology.
4. Substantial likelihood that such anti-terrorism technology will not be deployed unless protections under the system of risk management provided under this subtitle are extended.
5. Magnitude of risk exposure to the public if such anti-terrorism technology is not deployed.
6. Evaluation of all scientific studies that can be feasibly conducted in order to assess the capability of the Technology to substantially reduce risks of harm.
7. Anti-terrorism technology that would be effective in facilitating the defense against acts of terrorism, including technologies that prevent, defeat or respond to such acts.
8. A determination made by Federal, State, or local officials that the technology is appropriate for the purpose of preventing, detecting, identifying or deterring acts of

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[57] *Id.* § 25.4.
[58] *Id.*

terrorism or limiting the harm such acts might otherwise cause.

9. Any other factor that the Under Secretary may consider to be relevant to the determination or to the homeland security of the United States.[59]

D. PROTECTIONS

Once DHS confers SAFETY Act Designation, protections include a bar against punitive damages, a bar against interest on claims during pre-judgment, a limitation on non-economic damages, a cap on third-party liability, proportional liability with respect to the responsibility of the seller, restriction of liability claims as only against the seller,[60] and exclusive jurisdiction in federal court.[61] These claim protections also apply to downstream users of the QATT.[62]

Meeting the Designation criteria is the prerequisite for attaining SAFETY Act Certification, the highest level of protection.[63] In addition to the Designation criteria, DHS must also find that the technology "will perform as intended, conforms to the Seller's specifications, and is safe for use as intended."[64] Certification confers all the Designation protections, and allows a seller to assert the government contractor defense for claims arising from Acts of Terrorism.[65] Hence, technology with a SAFETY Act Certification is "entitled to a presumption of dismissal from a cause of action brought against a Seller,"[66] arising from an Act of Terrorism when QATT was deployed. The government contractor defense is a substantial barrier for any claim and can only be overcome by "clear and convincing

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[59] *Id.* § 25.4(b)(1)(ix).
[60] *Id.* § 25.7(a)–(b)(2), (d).
[61] 6 U.S.C. § 442(a)(2) (2012).
[62] *See* 6 C.F.R. § 25.7(d) (2016).
[63] *See id.* § 25.8.
[64] *Id.* § 25.8(a).
[65] *See id.* § 25.8(c).
[66] *Id.*

evidence," showing that the seller acted fraudulently when submitting their SAFETY Act application to DHS.[67]

The Government Contractor Defense

The government contractor defense "is a judicially created affirmative defense"[68] that arose from the U.S. Supreme Court's decision in *Boyle v. United Technologies Corp.*[69] The case involved the death of a Marine helicopter pilot who drowned when his helicopter crashed in the ocean.[70] The deceased Marine's father filed a product liability suit against the government contracted manufacturer of the helicopter for defective design of the escape hatch.[71]

The U.S. Supreme Court determined a defense contractor manufacturing a military product in accordance with precise government specifications may not be held liable for claims resulting from use of the manufactured product.[72] In the 5–4 decision against Boyle, with the majority opinion crafted by Justice Scalia,[73] the Court ruled that a government contractor can claim the government contractor defense under the following three conditions:[74]

1. the United States approved reasonably precise specifications;
2. the equipment conformed to those specifications, and;
3. the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.[75]

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[67] *Id.* § 25.8(b).
[68] Alison M. Levin, *The SAFETY Act of 2003: Implications for the Government Contractor Defense,* 34 PUB. CONT. L. J. 175, 184 (2004).
[69] 487 U.S. 500, 512 (1988).
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*

These three conditions have since been applied to similar cases utilizing the government contractor defense.[76] While originally the government contractor defense related to "contracts entered into directly with the federal government to provide goods that furthered the military's conducting of the national defense,"[77] the SAFETY Act applies it to non-military situations[78] where the "government is not a party at all to any transaction involving the technology."[79]

The SAFETY Act's final rules express DHS's interpretation of how the government contractor defense should be applied.[80] Starting with the analysis,[81] DHS states the SAFETY Act "creates a rebuttable presumption that the government contractor defense applies" to QATT approved by the DHS Secretary and the seller of a QATT cannot be held liable for "design defects or failure to warn claims," unless there is evidence that the seller acted fraudulently during the application process.[82]

DHS further states that while the government contractor defense is a judicially-created doctrine, section 863's explicit terms supersede the requirements in the case law for the application of the defense.[83] In effect, DHS is stating the 2002 SAFETY Act's *Litigation Management* and *Government Contractor Defense*[84] terms, *replaces* the three conditions set

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[76] Edward Richards, *The Government Contractor Defense*, LSU L. CTR. (Apr. 19, 2009), http://biotech.law.lsu.edu/map/TheGovernment ContractorDefense.html

[77] JOE D. WHITLEY & LYNNE K. ZUSMAN, AM. B. ASS'N, HOMELAND SECURITY: LEGAL AND POLICY ISSUES 171 (2009).

[78] *Id.* at 174.

[79] *Id.*

[80] 6 C.F.R. § 25.2 (2006).

[81] *Id.* at § 25.2(1).

[82] *Id.*

[83] *See generally Rules and Regulations*, BPSIGLOBAL.COM, http://www.bpsiglobal.com/SafetyActFinalRule-highlight.pdf (last visited Apr. 11, 2017).

[84] *Compare* 6 U.S.C. § 442(d)(1) (2012), *with* Boyle v. United Techs. Corp., 487 U.S. 5000, 512–13 (1988) (comparing the differing language between Boyle v. United Techs. Corp. and the Act).

forth in *Boyle*. However, in a following paragraph, DHS adopts[85] the government contractor defense from judicial case law from 1988's *Boyle* only through the 2002 enactment of the SAFETY Act,[86] which is based on the three conditions as established in *Boyle*. This is a confusing contradiction to the previous statement, which claimed section 863 replaces the government contractor defense case law.[87] This contradiction was previously pointed out in Levin's[88] 2004 analysis of the government contractor defense and the SAFETY Act:[89]

> [T]his statement that the SAFETY Act intended to incorporate the existing case law may contradict the earlier statement that the Act is supposed to supplant the case law. Taken alone, this statement could cause significant problems for courts and frustrate the purpose of the SAFETY Act entirely.[90]

The application of the government contractor defense could be more detailed in the regulations[91] contained in *Establishing Applicability of the Government Contractor Defense*,[92] however, it contains only three sentences. The first states the Under Secretary is responsible for approving anti-terrorism technology for it to be covered against claims under the government contractor defense if it is deployed during an Act of Terrorism.[93] The second sentence states that the Certification of a technology is the only thing required to have a presumption of dismissal of

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[85] Regulations Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act), 71 Fed. Reg. 33,147, 33,150 (Jun. 8, 2006).
[86] *See id.*
[87] *See id.*
[88] Levin, *supra* note 68, at 188.
[89] 6 C.F.R. § 25, Regulations Implementing the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (the SAFETY Act); Proposed Rules, 68 Fed. Reg., No. 133 (Jul. 11, 2003).
[90] Levin, *supra* note 68, at 188.
[91] 6 C.F.R. § 25.8 (2016).
[92] 6 C.F.R. § 25.8(c) (2006).
[93] *Id.*

legal action against a seller.[94] The third sentence states: "[t]his presumption of dismissal is based upon the statutory government contractor defense conferred by the SAFETY Act."[95]

DHS's interpretation of what the statutory government contractor defense the SAFETY Act provides is confusing. It could be the three conditions judicially established in *Boyle* or it could be those three federal rules. Given the ambiguity, it will likely be left to the courts to decide and "the courts will likely continue to have different interpretations of the scope of SAFETY Act protection afforded to Sellers." [96] With the potentially varying interpretations, "there will likely be no uniform national application of SAFETY Act protections in the event they are tested following a terrorist attack."[97]

In returning to *Boyle's* three conditions for the government contractor defense, how would the *NFL Best Practices for Stadium Security* meet them? Considering the first condition of U.S. approved specifications, the NFL's technology does not have to be designed to government specifications.[98] Subsequently, condition two, conforming to specifications are determined by the seller, the NFL. The third condition involves the seller informing the government of vulnerabilities or dangers of its technology.

E. SELLER OBLIGATIONS

While the SAFETY Act provides extensive liability protections, it stipulates that the seller obtain liability insurance "to satisfy otherwise compensable third-party claims,"[99] in the amount of the specified liability cap certified by the Secretary.[100] Further, DHS may not require any type of insurance that is not available on the world market, or that would unreasonably distort the sales price of the seller's anti-terrorism technology.[101] Should

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[94] *Id.*
[95] *Id.*
[96] Levin, *supra* note 68, at 188.
[97] WHITLEY & ZUSMAN, *supra* note 77, at 173.
[98] 6 C.F.R. §§ 25.6, 25.9 (2006).
[99] *Id.* § 25.5(a).
[100] *Id.* § 25.5(b).
[101] *Id.* § 25.5(b)(2).

the seller fail to provide the required insurance certifications or provide a false certification, DHS may terminate a Designation.[102]

Clearly, the SAFETY Act is a valuable carrot to encourage companies to develop and deploy commercialized technologies to defend against an Act of Terrorism. As of January 2015, a total of 724 technologies received a SAFETY Act Designation or Certification.[103]

III. THE NATIONAL FOOTBALL LEAGUE

DHS was researching the dire potentialities of a terror attack on a sports stadium as early as 2004 when the Homeland Security Council created "Planning Scenarios."[104] One of those scenarios, Scenario 12, was an explosives attack inside a sports arena that hypothetically left 100 fatalities and 450 hospitalizations.[105] This might explain how the SAFETY Act provisions could be useful to sports stadiums and arenas, which totals 112 venues between the NFL, MLS, MLB, NBA, and NHL.[106]

How the NFL qualifies as a "seller" of QATT under the SAFETY Act is explained in the 2014 DHS document expressly designed for stadium and arena operators: *SAFETY Act Webinar: Building SAFETY Act Applications for Event, Arena, and Stadium Security*.[107] In it, DHS states, "[t]he SAFETY Act

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[102] *Id.* § 25.5(h).
[103] *SAFETY Act Webinar*, *supra* note 14.
[104] David Howe, *Planning Scenarios Executive Summaries*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/security/library/report/2004/hsc-planning-scenarios-jul04.htm (last visited Mar. 5, 2017) (The July 2004 planning scenario was "[c]reated for use in National, Federal, State, and Local Homeland Security Preparedness Activities.").
[105] *Id.* at Scenario 12.
[106] Randy Beers, *DHS Hosts Sports Leagues Conference and Table-Top Exercise*, U.S. DEP'T OF HOMELAND SEC. (Apr. 28, 2010, 3:35 PM), https://www.dhs.gov/blog/2010/04/28/dhs-hosts-sports-leagues-conference-and-table-top-exercise.
[107] SAFETY ACT WEBINAR: BUILDING SAFETY ACT APPLICATIONS FOR EVENT, ARENA, AND STADIUM SECURITY, U.S. DEP'T OF HOMELAND SEC., https://www.safetyact.gov/jsp/external/readContent.do?contentPath=sams%5Crefdoc%5C2014_April_24_SA

applies to a broad range of technologies, including a range of security services. Event, arena, and stadium security is a complex, multilayered group of technologies including policies, plans, personnel, and physical defenses."[108]

The NFL was the first sports league to receive DHS SAFETY Act accreditation, receiving the five-year Designation and Certification in December 2008.[109] The league reportedly received the Certification based on their nine-page "set of guidelines for stadium security management designed to deter and defend against terrorist attacks at sports stadiums" titled *NFL Best Practices for Stadium Security.*[110] For the Certification of their technology, *NFL Best Practices for Stadium Security*, the NFL qualifies for the government contractor defense.[111]

The guidelines, "developed shortly after 9/11, include digital security cameras in stadiums, quick searches on entering spectators and barriers that keep cars and trucks 100 feet from a stadium."[112] In a 2009 interview, then NFL security chief. Milt Ahlerich, stated the benefit to the NFL is, "fairly obvious," and, "[a]n attack from a terrorist organization could put us out of business."[113]

A search of the NFL's and DHS's websites revealed no public availability of the NFL's security guidelines, likely because submitted materials are considered confidential and are exempt from Freedom of Information Act (FOIA) requests.[114] However, a search did produce several DHS guides related to the NFL's stadium and security technology: an *Evacuation Planning*

FETY%20Act%20Webinar%20Stadium%20Security.pdf&contentType=application/pdf (last visited Mar. 5, 2017).

[108] *Id.* at 6.

[109] David Broughton, *Comerica Park Earns Safety Act Designation*, STREET & SMITH'S SPORTS BUS. J. (Oct. 5, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/10/05/Facilities/Safety-Act-Comerica.aspx.

[110] *Id.*

[111] *See id.* (noting that Comerica Park earned the relevant Safety Act designation and that the NFL has equal or greater qualifications).

[112] Frank, *supra* note 6.

[113] *Id.*

[114] *See* 6 C.F.R. § 25.10 (2016).

Guide for Stadiums,[115] the *Protective Measures Guide for the U.S. Outdoor Venues Industry*,[116] and a *Sports Venue Bag Search Procedures Guide*,[117] the latter of which listed the NFL's *Best Practices for Stadium Security* as a reference document.[118]

The NFL subsequently renewed their SAFETY Act accreditation in 2013,[119] The NFL's SAFETY Act Designation and Certification describes their technology:

> November 14, 2013 - The National Football League provides National Football League ("NFL") Best Practices for Stadium Security (the "Technology"). The Technology is a set of guidelines for football stadium security management designed to deter and defend against terrorist attacks at sports stadiums. It includes standards for non-game day operations, game day operations, and threat assessments and emergency plans. The Technology also includes the NFL's Stadium Security Evaluation and Compliance Program, the hiring, vetting, qualifications, and training of the personnel used to provide the programs and services. The Technology does not include each NFL club's or stadium owner's or operator's implementation of the Technology. This Designation and Certification will expire on November 30, 2018.[120]

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[115] *Evacuation Planning Guide for Stadiums*, U.S. DEP'T OF HOMELAND SEC. (2008), https://www.hsdl.org/?view&did=30626.
[116] *Protective Measures Guide for the U.S. Outdoor Venues Industry*, U.S. DEP'T OF HOMELAND SEC. (June 2011), https://info.publicintelligence.net/DHS-OutdoorVenues.pdf.
[117] *Sports Venue Bag Search Procedures Guide: Commercial Facilities Sector Specific Agency*, U.S. DEP'T OF HOMELAND SEC. (May 2012), https://www.dhs.gov/sites/default/files/publications/sports-venue-bag-search-guide-508.pdf.
[118] *Id.* at 17.
[119] *See National Football League*, U.S. DEP'T OF HOMELAND SEC. SAFETY ACT (Nov. 14, 2013), https://www.safetyact.gov (follow "Approved Technologies" hyperlink; then "Search NFL" hyperlink).
[120] *Id.*

As previously noted, the NFL received their Designation and Certification on December 18, 2008, renewing it on November 14, 2013; it is due to expire November 30, 2018.[121] The NFL's technology was speculated to be only for Super Bowls, however, HOK, a company that ran Super Bowl XLI in Miami, Florida, [122] had SAFETY Act Designation for the event.

Other sports teams, stadiums, and leagues can be found on the Approved Technology list, however, of the 724 technologies on it, only 15 of them belong to a professional sports league or venue.[123] All of their listings define their "Technology" as a security plan.

NFL teams with accreditations include the New York Giants' and New York Jets' shared stadium, the New Meadowlands Stadium Company, [124] the Arizona Cardinals' University of Phoenix Stadium,[125] the Washington Redskins'

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[121] *Id.*

[122] *DHS Safety Act Approvals*, U.S. DEP'T OF HOMELAND SEC. SAFETY ACT 23 (June 23, 2011), http://safetyactconsultants.com/yahoo_site_admin/assets/docs/SAFETY_Act_Approvals_as_of_12-23-2011.356103211.pdf.

[123] *See generally Approved Technologies,* U.S. DEP'T OF HOMELAND SEC. SAFETY ACT, https://www.safetyact.gov/jsp/award/samsApprovedAwards.do?action=SearchApprovedAwardsPublic (last visited Feb. 25, 2017).

[124] *New Meadowlands Stadium Company, LLC*, U.S. DEP'T OF HOMELAND SEC. SAFETY ACT (Dec. 20, 2013), https://www.safetyact.gov/jsp/award/samsApprovedAwards.do?action=SearchApprovedAwardsPublic (search keyword field for "meadowlands"). The New York Giants and New York Jets' shared stadium, the New Meadowlands Stadium Company, LLC received their Designation and Certification December 20, 2013, for the MetLife Stadium Security Program (the "Technology"). Their technology also states the technology applies during non-game days as well, and during special events. Their accreditation expires January 31, 2019. *Id.*

[125] *Arizona Sports and Tourism Authority ("AZSTA")*, U.S. DEP'T OF HOMELAND SEC. SAFETY ACT (Dec. 17, 2014), https://www.safetyact.gov/jsp/award/samsApprovedAwards.do?action=SearchApprovedAwardsPublic (search keyword field for "Arizona"). The Arizona Cardinal's home, run by the Arizona Sports and Tourism Authority (AZSTA) received their Designation and Certification on December 17, 2014, based on the University of Phoenix (UoPS)

FedEx Field (WFI Stadium Inc.),[126] the Green Bay Packers' Lambeau Field,[127] and the San Francisco Forty Niners' Levi's Stadium.[128] Additionally, there are other NFL teams reportedly in the process of applying, including the Buffalo Bills, Cleveland Browns, and the Tennessee Titans.[129]

IV. DISCUSSION

While it has yet to be tested in court,[130] the SAFETY Act incentivized the NFL and others to create a security plan, the "technology." Perhaps DHS has offered liability immunity for a

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Stadium Security Program. It is "performed in accordance with the NFL Best Practices for Stadium Security." *Id.* Their Designation and Certification expires on January 31, 2020. *Id.*

[126] *WFI Stadium, Inc.*, U.S. DEP'T OF HOMELAND SEC. SAFETY ACT (Feb. 18, 2015), https://www.safetyact.gov/jsp/award/samsApprovedAwards.do?action=SearchApprovedAwardsPublic (search keyword field for "fedex"). The Washington Redskin's FedEx Field (WFI Stadium Inc.) received Designation on February 18, 2015. WFI provides the FedExField Security Program, and it will expire on March 31, 2020. *Id.*

[127] *Id.* The Green Bay Packers' Lambeau Field received Designation and Certification in April 2016 through May 2021. The Green Bay Packers, Inc. provides Lambeau Field Security Program, which is "the Applicant's implementation of the National Football League's Best Practices for Stadium Security . . . ." *Id.*

[128] The San Francisco Forty Niners Stadium Management Company LLC, the Santa Clara Stadium Authority, and the City of Santa Clara provide Levi's® Stadium Security Program (the "Technology"). They received their Designation June 2016 and it expires on June 30, 2021. The Forty Niners Levi's® Stadium Security Program: "The Technology is a comprehensive, integrated security program comprised of security policies and procedures, physical and electronic security equipment, tools, emergency planning processes and procedures, and properly trained personnel. The Technology, a 24-hour/7-days per week security program, is deployed during National Football League (NFL) events and Special Events (concerts, Non-NFL sporting events, functions and entertainment events) and Non-Event Days." *Id.*

[129] Broughton, *supra* note 8.

[130] Steve Ragan, *SAFETY Act Liability Shield Starts Showing Cracks,* CSO ONLINE (May 6, 2015, 3:30 PM), http://www.csoonline.com/article/2919609/advanced-persistent-threats/safety-act-liability-shield-starts-showing-cracks.html.

potential terrorist attack on a stadium, making it nearly impossible for consumer spectators to sue for standard negligence[131] because it is well aware of the potential disaster a terrorist attack in an NFL stadium could cause. In August 2008, DHS funded a study that simulated the impact of a bio-terrorist attack at a sports stadium and estimated the economic loss to $62 to $73 billion.[132] The study called for 7,000 lives lost and 20,000 illnesses, "followed by the reduced demand for sports stadium visits."[133] The study went on to explain the fallout,

> We assume that any professional sports games would be cancelled for one month after the hypothetical biological attack on an NFL stadium, which translates to about an eight percent reduction in annual attendance at professional sports games. We expect that a significant proportion of sports fans would avoid attending sports games even after the professional sports league resumes play.[134]

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[131] Sullivan, *supra* note 9.

[132] Bumsoo Lee et al., *Simulating the Economic Impacts of a Hypothetical Bio-Terrorist Attack: A Sports Stadium Case*, CREATE HOMELAND SEC. CTR. (2008), http://research.create.usc.edu/cgi/viewcontent.cgi?article=1137&context=published_papers.

[133] *Id*. at 5. The analysis was based on the scenario that terrorists release a bio agent in a stadium where an NFL game is playing for an attendance of 75,000 spectators. The analysis states:

> A desktop analysis using Hazard Prediction and Assessment Capability (HPAC) employing notional biological agents, urban density and weather conditions predicted a range of potential consequences. This economic scenario models an attack in which 20,000 illnesses and 7,000 casualties occur among the attendees. In this scenario, the bio agent would contaminate a neighboring area of 5.5 km2 and would cause an additional 11,000 illnesses and 3,600 deaths.

Id.

[134] *Id.* at 9.

With this knowledge, DHS may decide that an incident was an Act of Terrorism whether or not it actually was, in order to protect and possibly save the NFL over the rights of 75,000 spectators.[135]

An anti-terrorism technology such as the *NFL Best Practices for Stadium Security* may do little to save lives or protect spectators from an act of terrorism.[136] Specifically, an incident occurred during a televised Monday Night Football game on November 3, 2015, at the Carolina Panthers' Bank of America Stadium in Charlotte, North Carolina.[137] Two spectators used ropes and climbing gear to lower themselves from upper deck seats to hang a large banner.[138] They were arrested and charged with "trespassing, resisting arrest and dropping an object at a sporting event."[139] The spectators entered with purchased tickets,[140] went through security at the gate, and somehow managed to enter with climbing gear.[141] Security firm ASIS

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[135] *See id.* at 5.

[136] *See* Polly Mosendz, *Protesters Arrested for Rappelling Into Bank of America Stadium During NFL Game*, NEWSWEEK (Nov. 3, 2015, 9:18 AM), http://www.newsweek.com/fracking-protesters-arrested-propelling-bank-america-stadium-during-monday-389990 (describing an incident where spectators were able to smuggle rappelling gear into the stadium despite anti-terrorism technologies).

[137] *Id*.

[138] *Id.*

[139] *Id.*

[140] David Perlmutt, Cleve Wootson Jr. & Mark Washburn, *Carolina Panthers Pouring Over Tapes for Clues to Monday Night Football Protesters Breach,* THE CHARLOTTE OBSERVER (Nov. 5, 2015, 7:15 PM), http://www.charlotteobserver.com/news/local/article43301241.html#storylink=cpy.

[141] *Id.* The four purchased tickets to the game through the NFL Ticket Exchange, one stated the four entered the stadium with other fans and went through security, and was checked with a handheld metal detector. Photographs showed they were dressed in baggy clothes, hoodies, rain ponchos and hats. A spectator observed, "[t]hey had this whole system ready . . . it took them literally 20 seconds to stand up and rappel off the top . . . [i]t happened so fast, they just took everybody by surprise. No one knew what to do." Below in section 339, Danielle Wilson of Charlotte caught something in the corner of her eye and glanced up. Two spectators behind her decided to leave, Wilson said. "I heard them say, 'Maybe this is some kind of terrorist

International wrote that the NFL's "prohibited items list for stadiums" made no mention of rope or climbing gear, but that "most do include that the stadium has the right to prohibit any items they consider a security risk."[142]

Had there been injuries and DHS deemed it an Act of Terrorism, the injured spectators would have no legal recourse[143] against the seller-NFL or stadium, because of their SAFETY Act protections, even if they were negligent.

V. IMPLICATIONS

In order to get anti-terrorism technology to the commercial market quickly and to potentially save lives, the SAFETY Act allows many products to qualify as a technology, [144] and for many companies to have liability protections as a seller. [145] However, based on its poorly articulated interpretation of the government contractor defense,[146] the SAFETY Act remains unclear as to whether it can deliver the substantial liability protections it promotes. The SAFETY Act attempts to remain consistent with *Boyle* and to supplant it. This duplicity "may leave Sellers questioning the certainty of their liability protections under the SAFETY Act" until they are defined in court. [147]

More importantly, it remains to be seen if SAFETY Act approved anti-terrorism technology will work as intended. During a live Monday Night Football broadcast, the NFL's SAFETY Act anti-terrorism technology was proven a spectacular failure.[148] Yet despite its failure, had the incident been an actual Act of Terrorism, the NFL would not be liable to injured spectators.

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situation.' That thought entered my mind once or twice."

[142] Nancy Serot & Thomas K. Zink, *Securing the Fan Experience*, ASIS INT'L: SEC. MGMT. (Feb. 9, 2015), https://sm.asisonline.org/Pages/Securing-the-Fan-Experience.aspx.

[143] 6 C.F.R. § 25.7(d) (2017).

[144] Sullivan, *supra* note 9.

[145] *See* 6 C.F.R. § 25.7 (2017).

[146] *See* Levin, *supra* note 68, at 194.

[147] *See* Levin, *supra* note 68, at 188.

[148] Mosendz, *supra* note 138.

The NFL's anti-terrorism technology failure raises the issue of whether or not a security plan should qualify as an anti-terrorism technology and receive liability protection since it is a method, not a service or a product for sale. The common elements in both the SAFETY Act and the judicially established government contractor defense is a seller, a buyer, a product and a sale. The SAFETY Act advocates for the seller, the company making the technology (product), and mentions the buyer and their protections downstream as well.[149] Regarding the sale of a technology, the SAFETY Act states the "presumption of the government contractor defense shall apply regardless of whether the claim against the Seller arises from a *sale* of the product to Federal Government or non-Federal Government customers."[150] Loosely interpreted, the government contractor defense is contingent upon a sale.

This begs the question: is the NFL selling its technology? NFL football spectators are probably not receiving a nine-page security plan with their ticket. With a security plan for a technology, without a sale, it is debatable how the NFL qualifies as a seller under the SAFETY Act, and subsequently, how they would qualify for the government contractor defense.

VI. CONCLUSION

The SAFETY Act is an incentive for companies that make technology by removing the hindrance of product liability in getting it to market for life saving use.[151] But was the intent of the law to also "protect ballparks and give them a get-out-of-jail-free card, as long as they didn't lie . . . during the approval process"?[152]

Given the potential consequences,[153] with 112 combined venues used by the professional sports leagues, it is surprising that so few have applied for the "the mother of all liability waivers,"[154] offered by the SAFETY Act. It may be that in a legal contest its ambiguous language and divided congressional

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[149] *See* 6 C.F.R. § 25.7 (2006).
[150] 6 C.F.R. § 25.8(b) (2006).
[151] Levin, *supra* note 68, at 177.
[152] Sullivan, *supra* note 9.
[153] Lee, *supra* note 134, at 5.
[154] Sullivan, *supra* note 9.

intent may send the courts to consider all relevant case law, making its advertised liability protections tenuous. As for spectators of NFL football games, the SAFETY Act may just be another axiomatic waiver on the back of their ticket they're unaware they were sold.[155]

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[155] *Sullivan*, *supra* note 9.