

## Yankees win protection against terrorism -- but what did you lose?

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*Ray Stubblebine / Reuters file New York Yankees captain Derek Jeter, left, watches as the U.S. Air Force Thunderbirds fly in formation over Yankee Stadium on Saturday.*

Yankee fans root for a first-place team and usually watch their heroes win when they visit the new Yankee Stadium in New York. But fans of the Bronx Bombers have recently lost something too, something many sports fans around the country will probably lose soon: the right to sue the team for damages if there's a terrorist attack. Meanwhile, another team can claim victory every time the Yankees take the field -- tort reform advocates.

In July, Yankee Stadium became the first sports facility to earn the coveted federal "Safety Act" designation. That means the facility has passed a battery of tests and won approval from the Department of Homeland Security, so the

Yankees have been granted a wide-ranging immunity from future lawsuits that might stem from terrorist attacks.

Dozens of defense companies have been named to the Safety Act approved list since DHS started handing out the designation in 2004. But Yankees Stadium is the first of what is expected to be many sports venues whose operators will then be immune from standard lawsuits that might be filed by future victims of terrorist attacks. (The National Football League was placed on the Safety Act list in 2008, but the designation was vague and probably only applies to the Super Bowl, experts say.)

Supporters say the Safety Act gives strong incentives for firms to raise their security standards, and encourages innovation. Opponents say it unfairly terminates a basic consumer right, makes people less safe and serves as an under-the-radar version of tort reform. As evidence, opponents point out that the Safety Act framework is being copied for many other legislative initiatives, including the failed effort to pass a comprehensive Cybersecurity Bill this year.

It's the mother of all liability waivers, says George Washington University law Professor Ellen Zavian, an expert in sports law. But the question is, do fans know about it?

"There's waivers on ticket stubs ... but I haven't seen any waivers that state, 'Oh by the way ... we can waive (liability) for terrorism attacks.'" Zavian said. "How did this get under the radar? Are people really supportive of that? I think attendees should know what they are waiving when they enter a facility, and I don't think they do."

The Safety Act (SAFETY is actually an acronym for "Support Anti-Terrorism by Fostering Effective Technologies") was passed as part of the legislation that created the Department of Homeland Security in

2002. And that's part of the problem, argues John Bowman, director of federal relations for the American Association for Justice.

"Clearly this was done in haste after 9/11," he said. "It was a fear-driven time. There was dramatic tort reform. It's fair to say these tort reformers took advantage of that moment. ... We disagree with the way the law is structured. We think it's not very helpful for fans if something happened."

The law would clearly be helpful to the Yankees if something happened. A report by the European Organisation for Security, which is helping the European Union consider similar terrorism-related tort reform, says that \$40 billion in private claims was paid out by insurers in the wake of 9/11, with billions more in claims still unsettled. The Safety Act would prevent many such lawsuits after a future 9/11-style attack.

'A marketing edge'

But the law does much more than offer the civil equivalent of a get-out-of-jail-free card, supporters argue. Bob Karl, who operates SafetyActConsultants.com and has helped dozens of companies achieve certification, says liability protection is absolutely essential for companies deploying newfangled anti-terrorism technologies. Companies are concerned that with each new gadget they deploy, they incur new liability, he said.

Karl gave the example of a company that had invented a new radioactivity detector for cargo containers on ships. Selling the detectors would be, initially, a tiny \$10 million annual business for the multibillion-dollar company, but the firm feared that if something went wrong with its product, victims could sue for the entirety of the firm's value. It makes no sense for companies to take on risk like that, and the firm didn't start selling its detectors until it achieved Safety Act designation, he said. He declined to name the firm.

"It's very real concern, and Congress had that concern when it passed the law," he said.

With Safety Act protection, companies can afford to deploy unproven or newer technologies, knowing their risks are lower, he said. That makes everyone safer.

Also, he insisted, the Office of Safety Act Implementation, which grants the certification, has very high standards, and firms become safer merely by taking on the process.

"The fear is there would be some kind of double-secret handshake and they would just hand these things out. ... Well, that's not how it happens," he said. Many applications take years before they achieve final approvals. "I had one application recently that was 5,000 pages long," Karl said.

Meanwhile, Safety Act designation can give smaller companies, "a marketing edge," he said. "It's kind of like a Good Housekeeping seal of approval."

But even Karl agrees that the Safety Act was "tort reform at a very high level." Safety Act designation makes it impossible to sue a company after a terrorist attack for standard negligence – a ticket-holder bringing in an explosive device in a purse that wasn't detected during standard bag inspection by entrance guards, for instance. But it also grants a host of other legal rights. Victims who wish to pursue legal action after a terrorist attack can only do so in federal court; joint and several liability (in which any involved party can be liable for an entire disaster) is eliminated, which reduces firms' exposure; and there is a ban on punitive damages on interest accumulation related to any potential judgment. Victims cannot sue for negligence; the only way to pierce Safety Act immunity is to prove fraud during the application process, or actual malice by the company.

Another concern expressed by opponents is that the definition of a terrorist attack is left vague by the law – essentially, a terrorist attack is anything the Department of Homeland Security calls a terrorist attack, which could include domestic terrorism, such as the Oklahoma City bombing in 1995 or even the recent Aurora, Colo., mass shooting.

One likely outcome of Safety Act protections could be lower insurance premiums for companies involved, thanks to caps on costs that could arise from a terrorist attack.

Bradley Shear, a civil litigation attorney and opponent of the Safety Act, said he didn't understand what was in it for fans.

"I think this is well intentioned, but can it equally protect businesses and the average consumer?" he said. "In return for the liability shield, what is the public getting? Are Yankees tickets going to be cheaper because they've been able to obtain Safety Act (designation)? Will the cost of a hot dog or a beer be any less?"

Or, as another opponent of the legislation said, has it just created a new consulting industry that earns millions helping companies navigate the Safety Act application process? A quick search of Google shows there is indeed a thriving industry in Safety Act consulting.

David McWhorter, a consultant at Catalyst Partners in Washington D.C., which helped the Yankees with its Safety Act application, said critics have a misunderstanding of the approval process. Most companies are forced to raise their insurance coverage by the Office of Safety Act implementation, he said, adding that he couldn't think of a single case where firms were allowed to reduce their coverage. And insurance firms aren't yet offering security firms the equivalent of a "good driver discount," either.

In other words, they're not getting Safety Act coverage to save money today, he says. They do it because they become safer through the process, and because they want cost certainty.

"It's important for a facility to get a pre-emptive cap on liability," he said. "For any venue that has met the Safety Act standards, patrons can feel assured they are among the best of the best when comes to security. It's a win-win for the public and for that venue."

McWhorter said when companies approach him for help with their application, he generally spends a lot of time consulting on how to improve the firm's security guard hiring and training processes. He also helps companies set up "red team" exercises -- mock attacks -- to prepare them for the rigorous Homeland Security evaluation.

"It's not inexpensive to provide security to a venue that holds 10,000 to 60,000 people," he said. "You have to consider hiring, training, exercises, cameras, alarms, mass notification systems, definition of the command structure, metal detectors, the auditing process, and so on."

### Sticking out like a sore thumb

Browsing the list of Safety Act designated technologies on the Department of Homeland Security's website, visitors see a list of both familiar and unfamiliar names: ADT Security, Unisys and Securitas are listed alongside Massachusetts-based Ahura Scientific, for example. Many of the approved technologies are what you might expect: In March, American Science & Engineering got approval for X-Ray inspection systems; the aforementioned Ahura – which recently changed its name to Thermo Scientific -- lists handheld devices that

identity chemicals using "Raman spectroscopy."

On such a list, the Yankees stick out a bit like a sore thumb.

"New York Yankees d/b/a The New York Yankees Baseball Club provides The New York Yankees Security Program," the Safety Act office announcement says. "The Technology is a comprehensive integrated security system, which is comprised of physical and electronic security measures, tools and procedures designed to detect, deter, prevent, respond to and mitigate Acts of Terrorism at Yankee Stadium during Game Day, Non-Game Day (In-Season), Non-Season and Special Events."

One of these things is not like the other, complains Bowman.

"When you look at the law -- it's for makers and suppliers of technology," he said. "That was their intent, not to protect ballparks and give them a get-out-of-jail-free card, as long as they didn't lie ... during the approval process."

The Yankees did not respond to a request for comment.

McWhorter says that sports venues are good candidates for Safety Act protection because they host major events that attract attention, and need incentives to go "above and beyond" standard levels of security.

"Yankee Stadium is not unlike the Cincinnati airport, the Stock Exchange, the NFL, or Super Bowl venues, all of which have received Safety Act protection," he said. "The regulations for the Safety Act are very clear that the (Department of Homeland Security) secretary has great flexibility in approving applications. Nevertheless, one criterion is, to paraphrase, 'To get Safety Act protection, you must demonstrate the need for Safety Act protection.' ... The Safety Act incentivizes activities like vulnerability assessments and security upgrades, whereas without it some people might simply ignore threats in order to avoid any culpability."

Bowman said he didn't have a fundamental disagreement with the notion of encouraging invention of terrorism-fighting technologies, but feared that the Yankees designation proves the Safety Act is now casting a far wider net than originally intended. That's not a mistake, he thinks: Tort reformers try to gain more ground each time Congress takes up an industry issues or security issues, he said.

"We see this over and over in what we do. The first thing industry asks for are liability protections," he said, citing this year's cybersecurity bill as an example. "But if they are not accountable, they aren't responsible and no one is ultimately safe."

Karl, the Safety Act consultant, said he believes the Safety Act does make America safer, as all manner of security improvements are a standard part of the application process. He expects many more sports teams to apply -- and to receive -- Safety Act designation in the coming months and years, and he plans to pitch sports teams and facilities with his consulting services.

"The law is definitely working the way it's intended to," he said. "The Safety Act protects technologies that deter or respond to or mitigate a terrorist attack. ... That makes us all safer."

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