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MGM's Fight for SAFETY Act Protection Paused

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IN THE DEADLIEST SHOOTING IN U.S. history, Stephen Paddock on Oct. 1, 2017, killed 58 people and wounded hundreds from his perch within the Mandalay Bay hotel, owned by MGM Resorts International. Following the tragedy, MGM faced lawsuits from hundreds of victims. In an aggressive move, MGM sued the victims and their families, seeking a declaratory judgment that the victims' potential claims against the casino giant are barred by an obscure federal law. MGM, however, has apparently reconsidered its public litigation strategy and has agreed to suspend the cases in favor of private mediation.

MGM's pre-emptive defense is based on a never-before litigated federal law—the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002, or SAFETY Act. The act was passed following the Sept. 11, 2001, terrorist attacks, and provides legal protections to companies that develop cutting-edge anti-terrorism technologies—including both physical and cybersecurity technologies—after the companies pass a rigorous certification process



administered by the U.S. Department of Homeland Security.

The SAFETY Act provides a damages cap and permits only a single federal cause of action when a qualified product or service is involved in an act of terrorism. The act also precludes punitive damages, prejudgment interest and joint and several liability for non-economic damages. If a company receives DHS designation, it is required to maintain liability insurance, but the company's liability is capped at the amount of insurance

coverage obtained and agreed to by DHS.

DHS has certified technologies ranging from, for example, infrastructure for enhanced air traffic management and security to comprehensive corporate policies and procedures to secure digital networks from cybersecurity intrusions.

Although the SAFETY Act has been on the books for years, it remains untested in court. By deciding to mediate the MGM cases, the parties seek to avoid litigating difficult

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issues of first impression that would set the only judicial precedent under the SAFETY Act.

The agreement to seek mediation comes after the federal Judicial Panel on Multidistrict Litigation denied MGM's request to consolidate the 13 federal suits regarding the shooting—nine declaratory judgment actions brought by MGM and four individual negligence actions naming MGM as a defendant—that are pending. MGM and four of the victims also fought over whether the plaintiffs' individual negligence cases should be moved from Nevada state court to federal court. While the questions raised by these procedural motions might become moot as a result of the mediation, they nonetheless foreshadow issues in future SAFETY Act litigation.

EXCLUSIVE FEDERAL JURISDICTION

As a threshold question in the removal argument, the court pressed MGM's lawyers on whether litigation under the SAFETY Act must be in federal court. The text of the SAFETY Act provides for original and exclusive federal jurisdiction for claims "arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the seller."

During the argument, the court focused on the applicability of this

provision with MGM's counsel, not only seeking to identify evidence that each of the jurisdictional elements was satisfied, but also parsing the requirements for coverage of the act's substantive protections—such as whether MGM's contractor had the requisite liability insurance—to determine whether the court had jurisdiction.

WHO GETS THE ACT'S BENEFITS?

The act describes liability protection and litigation management benefits arising from "claims for injuries that are proximately caused by sellers that provide qualified anti-terrorism technology." The regulations promulgated by DHS provide that "such cause of action may be brought only against the seller of the qualified anti-terrorism technology and may not be brought against the buyers, the buyers' contractors, or downstream users of the technology, the seller's suppliers or contractors, or any other person or entity." MGM's litigation position is that the statute itself allows for its protections to extend beyond the technology's "sellers," so long as the relevant injuries were proximately caused by the seller.

The court explored this liability question in depth, including whether DHS—and its regulations—would be entitled to *Chevron* deference in interpreting the act. Generally, under *Chevron U.S.A. v. Natural Resources Defense Council*, 468 U.S. 837 (1984), courts defer to an agency's regulatory interpretation of an ambiguous

statute so long as the interpretation is not unreasonable. The court indicated it would give deference to the agency's definition of an act of terrorism but was uncertain whether deference would be appropriate in "simply interpreting statutory language whether or not there's preemption or not or what the claims are."

DECLARATION THAT SHOOTING WAS AN ACT OF TERRORISM

Finally, the parties sparred over whether MGM could use the act as a shield without a formal declaration by the DHS secretary that the 2017 shooting was an "act of terrorism." The DHS secretary has the legal authority to determine whether an incident was an "act of terrorism" for purposes of the act. In July 2018, DHS issued a statement acknowledging that the DHS secretary has not determined whether the Mandalay Bay shooting qualifies as such.

For now, these questions will remain unanswered. But because of the act's sweeping protections—especially in an age of increased cyberattacks—these issues will remain pertinent for any organization seeking the law's protection regardless of the outcome of the MGM mediation.

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