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*MaryJo Smart**

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I. INTRODUCTION

When bullets started to rain down from the 32nd floor of the Mandalay Bay

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Resort and Casino into a crowd of 22,000 concertgoers, hysteria ensued.[1] From 1,200 feet away, the Route 91 Harvest Festival crowd did not immediately realize they were hearing gunfire, but rather just assumed the loud popping sound was from a firework.[2] Little did the crowd know it was witnessing what some news outlets would call the "deadliest mass shooting in modern American history."[3] Concertgoers trampled each other as they attempted to escape from the open concert grounds.[4] Some concertgoers jumped walls, others climbed over cars, but they all were running for their lives as they tried to escape the falling bullets.[5] For 11 minutes, gambler-turned-gunman Stephen Paddock fired down into the crowd, carrying out his plan of attack with an arsenal of weapons.[6] In preparation for his attack, Paddock stockpiled a total of 24 guns in two separate rooms, which were brought through the hotel in 21 suitcases over the course of about 6 days.[7] Paddock killed 58 people and injured more than 850 before taking his own life.[8]

In the United States, litigation often follows such a shocking event.[9] However, in this situation, instead of a typically-structured lawsuit where victims seek redress for their injuries by suing the culpable party, MGM Resorts International, hereafter MGM, filed suit against the *victims* of the attack.[10] In a typically-structured lawsuit, MGM likely would be a defendant because it owns both the hotel where Paddock took cover and the grounds where the shooting

1. Dan Hernandez, *'It Was Hysteria. People Were Trampled': Panic as Las Vegas Gunman Opened Fire*, THE GUARDIAN (Oct. 2, 2017), https://www.theguardian.com/us-news/2017/oct/02/las-vegas-shooting-hysteria-witnesses (on file with *The University of Pacific Law Review*); Gil Kaufman, *Detailed Timeline of Las Vegas Route 91 Shooting Emerges*, BILLBOARD (Oct. 5, 2017), https://www.billboard.com/articles/news/7989241/las-vegas-shooting-timeline-route-91 (on file with *The University of Pacific Law Review*).

2. Gil Kaufman, *supra* note 1.

3. Huchinson et al., *The Anatomy of the Las Vegas Mass Shooting, The Deadliest in Modern U.S. History*, ABC NEWS (Dec. 23, 2018), https://abcnews.go.com/US/anatomy-las-vegas-mass-shooting-deadliest-modern-us/story?id=59797324 (on file with *The University of Pacific Law Review*).

4. Dan Hernandez, *supra* note 1.

5. *Id.*

6. Tom Winter et al., *Las Vegas Shooter Stephen Paddock Wired $100,000 to Philippines Last Week*, NBC NEWS (Oct. 3, 2017), https://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-shooter-wired-100-000-philippines-last-week-n807141(on file with *The University of Pacific Law Review*); Associated Press, *Las Vegas, Country Music Mark One Year Since Route 91 Mass Shooting: 'Tragedy of Grand Scale'*, BILLBOARD (Oct. 1, 2018),
https://www.billboard.com/articles/columns/country/8477586/route-91-las-vegas-country-music-mark-one-year-anniversary-mass-shooting (on file with *The University of Pacific Law Review*).

7. Huchinson et al., *supra* note 3.

8. *Id.*

9. *See e.g.*, Benjamin Weiser, *Family and United Airlines Settle Last 9/11 Wrongful-Death Lawsuit*, N.Y. TIMES (Sept. 18, 2011), https://www.nytimes.com/2011/09/20/nyregion/last-911-wrongful-death-suit-is-settled.html (on file with *The University of Pacific Law Review*) (discussing the eighty-five lawsuits arising from the terrorist attacks on September 11th, 2001).

10. *See* Complaint for Declaratory Relief at 1, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018) (listing the plaintiffs in the complaint as: MGM Resorts International, Mandalay Resort Group, Mandalay Bay, LLC, Mandalay Corporation, MGM Resorts Festival Grounds, LLC, and MGM Resorts Venue Management, LLC).

took place.[11] Instead, MGM became the plaintiff when it sought a declaratory judgment in order to shield itself from any liability arising from the attack.[12]

MGM relies on the applicability of the federal SAFETY Act of 2002.[13] The SAFETY Act of 2002 became law shortly after the terrorist attacks on September 11th, 2001.[14] The Act limits liability arising from terrorist attacks to only anti-terrorism technology providers, and protects the party who contracted with a federally recognized security provider, or a down-stream buyer.[15] Through its use of this narrow federal statute with no prior litigation history, MGM flipped the standard litigation structure in order to control potential lawsuits against it and determine where and when victims of the Route 91 attack can seek redress.[16]

This Comment uses the facts of the Route 91 shooting and subsequent litigation tactics as a framework for exploring: 1) whether the SAFETY Act, a federal statute designed to limit damages resulting from international terrorism and protect the airline industry, applies in this case; and 2) whether this statute is being used as a tactic for the defense bar to take control of litigation and prevent victims from deciding where and when to sue.[17] In light of these issues, this Comment also discusses the currently available methods to resolve mass tort litigation, and Congress' failure to enact an all-encompassing solution to the complexities of mass tort litigation.[18]

Part II of this Comment provides background information about the Route 91 Harvest Festival shooting.[19] Part III discusses the ensuing litigation and parties' theories.[20] Part IV provides a brief synopsis of the SAFETY Act of 2002.[21] In Part V, this Comment argues that MGM's use of the SAFETY Act is improper because it expands the Act's purpose beyond what the enacting Congress intended.[22] Part VI raises the question of whether MGM is using the SAFETY Act as a bill of peace, or tactic to take advantage of litigation, and forum shop for federal court.[23] Part VII argues the SAFETY Act should not be applied in this

11. Chris Morris, *Here's Why MGM Is Suing the Las Vegas Shooting Victims*, FORTUNE (July 17, 2018), http://fortune.com/2018/07/17/mgm-sues-las-vegas-shooting-victims/http://fortune.com/2018/07/17/mgm-sues-las-vegas-shooting-victims/ (on file with *The University of the Pacific Law Review*).

12. *Id.*

13. Complaint for Declaratory Relief, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018).

14. Homeland Security Act of 2002, 6 U.S.C.A. §§ 441–44 (West 2002); CONGRESSIONAL RECORD, Proceedings and Debates of the 107th Congress, Extensions of Remarks, at E2079 (Nov. 13, 2002) (on file with *The University of the Pacific Law Review*) (discussing Mr. Armey's remarks in support of the SAFETY Act of 2002).

15. *Infra* Part IV.

16. *Infra* Part II.

17. *Infra* Parts IV–V.

18. *Infra* Part VI.

19. *Infra* Part II.

20. *Infra* Part III.

21. *Infra* Part IV.

22. *Infra* Part V.

23. *Infra* Part VI.

case because it would expand the purpose of statute beyond what Congress intended.[24]

II. THE ROUTE 91 HARVEST FESTIVAL SHOOTING

On September 25, 2017, Stephen Paddock drove from his Mesquite, Nevada home, 74 miles outside of Las Vegas, and checked into the Mandalay Bay Resort & Casino.[25] Later, he reserved an adjoining suite under his girlfriend's name, who was in the Philippines at the time, and wired her $100,000.[26] MGM considered the 64-year-old "former accountant and realtor, who had once amassed a $2.1 million fortune," a high roller and gave him VIP treatment upon arrival.[27] Over several trips back and forth from his home to the Mandalay Bay, Paddock stockpiled a total of 21 weapon-filled suitcases.[28] MGM's security video showed Paddock using both guest and service elevators during his stay, occasionally even being accompanied by hotel staff.[29]

At 10:05 p.m. on October 1st, Paddock began his attack on the crowd below by breaking the window of his room.[30] As police and hotel staff responded to the attack, they were greeted with gunfire.[31] Police subsequently noticed the room service carts that Paddock asked to be left in his room were rigged with "a small surveillance camera hidden under a plate and pointed down the hallway at them;" therefore, stopping him would be more difficult.[32] Once police were able to enter the room, they found Paddock dead with more than "1,000 spent gun shell cases and an arsenal of weapons."[33] They also found over 5,000 unused rounds of ammunition.[34] Paddock's intentions had "gone unnoticed by hotel staff members who had gone in and out of his room."[35] As a result, all that stood between him and his title as the man behind the "largest mass shooting in modern American history" were two glass windows.[36]

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24. *Infra* Part VII.

25. Huchinson et al., *supra* note 3.

26. Winter et al., *supra* note 6.

27. *Id.*

28. Huchinson et al., *supra* note 3.

29. Vivian Yee, *Video Shows Las Vegas Gunman Gambling, Eating Alone and Filling His Suite with Guns*, N.Y. TIMES (Mar. 22, 2018), https://www.nytimes.com/2018/03/22/us/las-vegas-shooting-stephen-paddock.html (on file with *The University of Pacific Law Review*).

30. Huchinson et al., *supra* note 3.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Jose A. Del Real & Jonah Engel Bromwich, *Stephen Paddock, Las Vegas Suspect, was a Gambler Who Drew Little Attention*, N.Y. TIMES (Oct. 2, 2017), https://www.nytimes.com/2017/10/02/us/stephen-paddock-vegas-shooter.html (on file with *The University of Pacific Law Review*).

36. Kaufman, *supra* note 1.

III. ENSUING LITIGATION

Ordinarily, victims of such an attack would sue the perpetrator for damages; however, because wrongdoers are often insolvent, victims look for deep pocket defendants.[37] In this situation, some victims of Paddock's attack followed the typical path of litigation and became plaintiffs seeking redress for their injuries based on tort law.[38] In their lawsuits, the victims alleged the hotel operator and the hotel owner "fail[ed] to properly monitor Paddock's activities, train staff members and employ adequate security measures."[39]

Specifically, one victim alleged the hotel was "negligent or grossly negligent" because it did not take adequate precautions to prevent Paddock from amassing so many weapons in his room, and "employees were not adequately trained to notice and report suspicious activity."[40] Another complaint alleged that MGM breached its duty by failing to "properly surveil people coming and going," "monitor with a closed-circuit television," respond or act once a hotel security guard was shot six minutes prior to Paddock's attack on the concertgoers, and notice Paddock's surveillance set up outside of his room.[41]

Other victims alleged "Live Nation was negligent for failing to provide adequate exits and properly train staff for an emergency."[42] Again, these initial lawsuits were based on the typical structure of tort litigation where injured plaintiffs are the masters of their own cases.[43] However, all the victims dismissed their cases, signaling their intent to refile and collaborate with other victims.[44]

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37. *See* Anna Almendrala, *Some Las Vegas Shooting Victims May Get Shut Out of Donated Funds*, HUFFPOST (Dec. 13, 2017), https://www.huffingtonpost.com/entry/las-vegas-victims-donation-compensation_us_5a2f6581e4b046175432d088 (on file with *The University of Pacific Law Review*) ("The hard truth is that in many instances, there isn't a negligent party that's capable of paying out those monies . . . [c]ertainly the shooter is both criminally and negligently responsible for the death, but the shooter's estate is not going to have money to compensate hundreds of people."); Patricia Mazzei, *Parkland Victims' Families Sue, Claiming Negligence in Mass Shooting*, N.Y. TIMES (Apr. 10, 2019), https://www.nytimes.com/2019/04/10/us/parkland-lawsuits-safety.html (on file with *The University of Pacific Law Review*) (discussing the twenty-two lawsuits filed against the police department and school district on behalf of victims of a mass shooting in Parkland, Florida).

38. Tina Bellon, *Hundreds of Las Vegas Shooting Victims File Lawsuits in California Court*, THOMSON REUTERS (Nov. 20, 2017), https://www.reuters.com/article/us-lasvegas-shooting-lawsuit/hundreds-of-las-vegas-shooting-victims-file-lawsuits-in-california-court-idUSKBN1DK2OX?feedType=RSS&feedName=topNews (on file with *The University of Pacific Law Review*).

39. *Id.*

40. Kate Taylor, *A 21-year-old Who Was Shot in the Chest During the Las Vegas Shooting Is Suing the Mandalay Bay Hotel*, BUS. INSIDER (Oct. 11, 2017), https://www.businessinsider.com/las-vegas-victim-lawsuit-2017-10 (on file with *The University of Pacific Law Review*).

41. Complaint, Paige Gasper v. MGM, No. A-17-762858-C (Nev. Dist. Ct. 2017).

42. Tina Bellon, *supra* note 38.

43. *See* Simpson v. Alaska State Comm'n for Human Rights, 608 F.2d 1171, 1174 (9th Cir. 1979) ("A plaintiff ordinarily is free to decide who shall be parties to his lawsuit.").

44. Mark Berman, *Mandalay Bay Hotel Owner Files Lawsuits Against Las Vegas Massacre Victims, Saying It Has 'No Liability of Any Kind,'* THE WASHINGTON POST (July 17, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/07/17/mandalay-bay-hotel-owner-files-lawsuits-against-las-vegas-massacre-victims-saying-it-has-no-liability-of-any-kind/?utm_term=.09d893f2d37f (on file

Then, on July 13, 2018, MGM became the plaintiff and filed a declaratory judgment action against some of the victims of the attack.[45] In these actions, MGM used the federal SAFETY Act of 2002 to file federal lawsuits in Nevada, California, Arizona, Utah, Texas, New York, and Alaska.[46] MGM argues the federal SAFETY Act applies in this case because not only did Paddock's actions constitute a terrorist attack under the Act, but MGM also hired a federally certified technology company, the Contemporary Services Corporation ("CSC"), to provide security at the Route 91 grounds.[47] MGM alleges the Act applies to all of the Defendants' potential claims arising from the incident, and the Act precludes "any finding of liability against the Plaintiffs for any claim for injuries arising out of or related to Paddock's mass attack."[48] In fact, the Plaintiffs allege that they have no liability of any kind arising from the attack.[49]

In its complaint, MGM ignores any argument that it was negligent due to its failure to regulate security at the hotel leading up to Paddock's attack.[50] Instead, MGM argues that the victims' potential injuries could only be "because Paddock fired from his window *and* because they remained in the line of fire at the concert," rather than their injuries being a result of MGM's negligence at the hotel grounds.[51] MGM states that "such claims implicate security at the concert–and may result in loss to CSC."[52] Therefore, to escape liability through the SAFETY Act, MGM alleges in its complaint that the only party who should be liable is the provider of the anti-terrorism technology.[53]

Also, MGM claims the Act creates an exclusively federal cause of action, and it is the "exclusive claim available in such circumstances."[54] Therefore, because: 1) MGM retained Contemporary CSC to provide security at the Route 91 Festival, and 2) the alleged injuries resulted from security failures at the

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45. Complaint for Declaratory Relief at 1 & 51, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018).

46. Jason Tashea, *MGM Resorts Uses an Obscure Law to Sue Las Vegas Mass Shooting Victims*, ABA J. (July 17, 2018), http://www.abajournal.com/news/article/mgm_resorts_uses_an_obscure_law_to_sue_las_vegas_mass_shooting_victims/ (on file with *The University of Pacific Law Review*); Benson & Bingham, *MGM Resorts' Move to Preemptively Sue Shooting Victims Under the SAFETY Act* (Aug. 2, 2018), https://www.bensonbingham.com/blog/mgm-moves-to-sue-shooting-victims-safety-act (on file with *The University of the Pacific Law Review*).

47. Complaint for Declaratory Relief at 6, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018).

48. *Id.* at 55.

49. *Id.*

50. *See generally* Complaint for Declaratory Relief, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018)).

51. *Id.* at 51.

52. *Id.* at 51.

53. *Id.* at 52.

54. *Id.* at 7.

concert, "for example security training, emergency response, evacuation, and adequacy of egress,"[55] the SAFETY Act governs *all* actions and CSC should be the party liable for any damages.[56] MGM claims the law shields it because it is either a buyer or down-stream user of the technology that caused injury.[57] For clarification, MGM is arguing that because the SAFETY Act applies, it should not be liable for any injury at all.[58]

If a court were to follow MGM's theory and grant declaratory relief, injured victims would be preempted from filing their own lawsuits in a manner prefer because the SAFETY Act would provide the exclusive claim available.[59] For example, victims could not sue MGM for its negligent conduct at its own hotel grounds because the SAFETY Act allegedly removes MGM from liability all together.[60] This would be the case even when the technology services at the concert, which are claimed to fall within the technologies described in the SAFETY Act, have nothing to do with the victims' theory for negligence stemming from conduct at the hotel itself.[61] Therefore, it is apparent that MGM's use of the Act is an attempt to eliminate its liability, and take total control over the victims' ability to file lawsuits where, when, and on what theory they choose.[62]

IV. THE SAFETY ACT OF 2002

In response to the terrorist attacks on September 11, 2001, Congress passed the Homeland Security Act of 2002.[63] This act consolidated 22 agencies and bureaus and established the Department of Homeland Security ("DHS").[64] For example, some of these agencies are the Federal Emergency Management Agency (FEMA), Transportation Security Agency ("TSA"), and Customs and Border Patrol ("CBP").[65] According to the U.S. Senate Committee on Homeland Security and Governmental Affairs, these agencies all work together in order to fulfill DHS' mandate "to protect the homeland from the myriad threats that we

55. *Id.* at 6.

56. MGM's Opp'n to Defs.' Motion to Dismiss Pls.' Complaint Seeking Declaratory Relief, MGM v. Carlos Acosta, No. 2:18-cv-01288-APG-PAL (D. Nev. 2018).

57. Complaint for Declaratory Relief at 7, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018).

58. *Id.* at 55.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. U.S. Senate Committee on Homeland Security and Governmental Affairs, https://www.hsgac.senate.gov/issues/homeland-security (last visited Aug. 4, 2019) (on file with *The University of the Pacific Law Review*).

64. *Id.*

65. *Id.*

face on our borders, at our ports, online and more."[66]

The Homeland Security Act contains many subsections; the SAFETY Act is one of the shorter sections within the Act.[67] The SAFETY Act designates the Secretary of the Department of Homeland Security as the party responsible for the administration of the Act, the determination of which anti-terrorism technologies qualify for protection, and whether an attack qualifies as a terrorist attack.[68] For example, the Secretary determines when anti-terrorism technologies qualify for protection based on criteria within the Act.[69] This includes situations where there is an "extraordinarily large or unquantifiable potential third party liability risk to the [s]eller or provider" of technology, and when there is a "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."[70] The Secretary has "broad discretion in determining whether to designate a particular technology as a Qualified Anti-Terrorism Technology."[71]

Further, the Act creates an exclusively federal cause of action for claims arising out of an act of terrorism when: (1) qualified anti-terrorism technologies have been deployed in defense of the attack, and (2) the claims may result in loss to the seller, which may be any entity or person that sells qualified anti-terrorism technology).[72] Once a party files a lawsuit under the SAFETY Act, a rebuttable presumption exists that the government contractor's defense applies.[73] A party may overcome this presumption by providing evidence that the "seller acted fraudulently or with willful misconduct in submitting information to the Secretary during the course of the Secretary's" determination of the technology's qualification under the Act.[74] The government contractor defense offers protections to companies in situations where they complied with a federal government contract, but normally would be subject to liability without it.[75] If the Act were applicable in this case, the government contractor's defense would apply to whichever parties contracted with the federal government to provide services.[76] Since CSC was the technology certified by the Secretary to provide

66. *Id.*

67. Homeland Security Act of 2002, 6 U.S.C.A. §§ 441–44 (West 2002).

68. Homeland Security Act of 2002, 6 U.S.C.A. § 441 (West 2002).

69. *Id.*

70. *Id.*

71. 71 Fed. Reg. 110, 33147, 33148 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25).

72. Homeland Security Act of 2002, 6 U.S.C.A. § 442 (West 2002).

73. *Id.*

74. *Id.*

75. Brian Coleman & Jennifer Moore, *Government Contractor Defense: Military and Non-Military Applications*, AM. BAR ASS'N (Sept. 12, 2016), https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2016/gvt-contractor-defense-military-non-military-applications/ (on file with *The University of the Pacific Law Review*).

76. *See e.g.*, *Boyle v. United Technologies Corporation*, 487 U.S. 500, 502, 505 (1988) (discussing the

and sell anti-terrorism technologies, the government contractor's defense likely would apply to it.[77]

Therefore, if the SAFETY Act were to apply in this case and the Secretary determines Paddock's attack was a terrorist attack, the victims would be forced to litigate in the federal court MGM chose and face limited options in who they could seek redress from, likely only CSC.[78]

V. WAS THE SAFETY ACT INTENDED TO BE USED THIS WAY?

Based on an analysis of the statutory construction of the SAFETY Act of 2002, Congress did not intend for potential defendants to use the Act to flip traditional litigation structure and shield themselves from all liability in situations like the Mandalay Bay shooting.[79] Part A discusses how MGM could argue it is not liable for injuries resulting from the failures of CSC, but the text of the statute does not provide MGM with protection against claims alleging negligence distinct from CSC's negligence.[80] Part B argues that MGM's use of the Act in this manner extends beyond Congress' purpose in enacting the Act: to limit liability and prevent manufacturers from ceasing to create anti-terrorism technology.[81] Lastly, Part C discusses the legislative history behind the Act, and argues the Act was intended to protect the airline industry from crippling liability as a result of terrorism, not shield major corporations from all negligence unrelated to anti-terrorism technologies.[82]

A. The Text of the Statute

The Secretary of the Department of Homeland Security possesses the power to determine what the term "act of terrorism" means based on the criteria listed in the Act.[83] The Act defines "terrorism" as any act that is:

(i) "unlawful, (ii) causes 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

government contractor's defense in association with United Technologies Corporation, who had a contract to manufacture helicopters for the government).

77. Complaint for Declaratory Relief at 46, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018) ("CSC's security services were certified by the Secretary of Homeland Security under the SAFETY Act.").

78. Homeland Security Act of 2002, 6 U.S.C.A. § 442 (West 2002).

79. *Infra* Parts A–C.

80. *Infra* Part A.

81. *Infra* Part B.

82. *Infra* Part C.

83. Homeland Security Act of 2002, 6 U.S.C.A. § 441 (West 2002).

destruction, injury or other loss to citizens or institutions of the United States."[84]

The Act's broad definition could encompass the Route 91 attack because Paddock's attack was unlawful, it caused harm by killing 58 people in the United States, and used weapons, specifically assault style rifles, designed to cause injury to citizens of the United States.[85]

However, the Act states that there is a federal cause of action when the anti-terrorism technology, in this case security systems from CSC, were "deployed in defense against such act and such claims result or may result in loss to the [s]eller."[86] The seller as stated in the Act is "[a]ny person or entity that sells or otherwise provides a qualified anti-terrorism technology."[87] Further, the Act states that "such claims shall be brought only for claims for injuries that are proximately caused by sellers that provide qualified anti-terrorism technology to Federal and non-Federal government customers."[88]

Therefore, even if the Secretary of the Department of Homeland Security finds the security system that CSC provided qualifies as anti-terrorism technology, and Paddock's attack qualify as an act of terrorism, the SAFETY Act applies to protect the seller from loss due to claims against them for injuries proximately created by the technology, not a third party.[89] Therefore, the SAFETY Act of 2002 likely does not apply to protect MGM from claims arising out of its negligence at the hotel grounds but could apply to protect MGM and CSC from liability arising out of CSC's negligence at the concert grounds.[90]

B. The Purpose of the Statute

If the court finds that MGM qualifies for protection as a seller, applying the Act in this situation would exceed the purpose for enacting the Act.[91] Congress enacted the SAFETY Act of 2002 in response to the terrorist attacks of September 11th.[92] The "purpose of the Act is to ensure that the threat of liability does not deter potential manufacturers or sellers of anti-terrorism technologies from developing, deploying, and commercializing technologies that could save lives."[93] In the Route 91 case, MGM's lawsuit against the victims is to prevent its

84. Homeland Security Act of 2002, 6 U.S.C.A. § 444 (West 2002).

85. James Abundis, *How Far Was the Las Vegas Shooter from the Concert?*, BOSTON GLOBE (Oct. 2, 2017), https://www.bostonglobe.com/news/nation/2017/10/02/look-how-far-las-vegas-shooter-was-from-concert/RH1IbGWenXPuSGg84YfqXN/story.html (on file with *The University of the Pacific Law Review*).

86. Homeland Security Act of 2002, 6 U.S.C.A. § 442 (West 2002).

87. Homeland Security Act of 2002, 6 U.S.C.A. § 443 (West 2002).

88. *Id.*

89. *Id.*

90. *Id.*

91. Comm. on Governmental Affairs, United States Senate, 107th Congress 2d Sess. 107–75 (2002).

92. *Id.*

93. 71 Fed. Reg. 110, 33147, 33148 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25).

own liability, not the seller of the anti-terrorism technology.[94] Allowing MGM to use the SAFETY Act to limit its liability does not fit within the purpose of the Act because it does not harm nor deter technology manufacturers or sellers from providing technology based on MGM's liability.[95] If the seller of the anti-terrorism technology is not a member of the litigation and finding liability on behalf of another does not deter the seller from developing or deploying technologies, then the Act should be inapplicable to the Route 91 case because application would not further the Act's purpose.[96]

C. The Legislative History of the Statute

In the wake of September 11th, lawmakers and policy experts realized "the threats to [national] security [were] no longer the same threats as we faced immediately after World War II," and establishing the Department of Homeland Security would address these national security threats.[97] President George W. Bush recognized a hundred different government agencies [had] some responsibilities for homeland security," but no one had the ultimate accountability that was needed.[98] The early committee reports from the Homeland Security Act state that prior to September 11th there was a "rising threat of international terrorism on U.S. soil," and the National Commission on Terrorism "warned that international terrorists were increasingly seeking to inflict mass casualties, both overseas and within the United States."[99]

Initially, the proposed solution was that a "new department would provide new leadership on a range of homeland threats, including terrorism, by consolidating a range of federal agencies and programs responsible for border security, critical infrastructure protection, and emergency preparedness and response."[100] The Homeland Security Act specifically created the Transportation Security Administration (TSA) to combat attacks similar to the terrorist attacks that spurred this legislation.[101] The SAFETY Act followed and logically limited liability running to security providers.[102]

House majority leader Richard Armey supported the enactment of the

94. Complaint for Declaratory Relief, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018).

95. 71 Fed. Reg. 110, 33147, 33148 (June 8, 2006) (to be codified at 6 C.F.R. pt. 25).

96. *See* Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 WASH. & LEE L. REV. 1019, 1020 ("Public torts provide a mechanism that will encourage persons to take account of all the costs posed by *their* activities and, therefore, to invest efficiently in safety.") (emphasis added). However, MGM is not the party producing or selling the technology; therefore, its liability should be unrelated to the deterrence felt by CSC.

97. Comm. on Governmental Affairs, United States Senate, 107th Congress 2d Sess. 107–75 (2002).

98. *Id.*

99. *Id.*

100. *Id.*

101. H. REP. NO. 107–609, pt. 1 (2002).

102. *Id.*

SAFETY Act because it could ensure important technologies can be made available to help protect our cities, schools, hospitals, nuclear power plants, bridges, dams, and other critical areas."[103] Further, he stated that "[w]e must not allow the litigation fallout from one act of terrorism to bankrupt a company that otherwise could have developed technology that could prevent another act of terrorism."[104] He further stated the SAFETY Act was "modeled after a similar provision in the Air Transportation Safety and System Stabilization Act."[105]

House majority leader Armey's statements show what members of Congress were considering at the time of enactment.[106] Although he stated it was Congress' "hope and intent that the Secretary will use the necessary latitude to make this list [of technologies] as broad and inclusive as possible," this Act's purpose was to "insure that the maximum amount of protective technology and services become available."[107] However, Paddock's attack was likely not what legislators and Congress had in mind when it enacted the Homeland Security Act, unless there was a relation between CSC's security technology and the injuries.[108] In fact, federal Judge Boulware "questioned how Contemporary Services Corporation's services extended beyond people showing up and donning t-shirts," and "want[ed] a CSC representative deposed as well as an MGM Festival Grounds representative familiar with the agreement between the companies."[109] It is unknown whether CSC provided any security that was designed to protect citizens, but failed.[110] However, if it did not, the Act should not apply because CSC's technology is not the protective technology Congress had in mind when enacting the SAFETY Act of 2002.[111]

Further, the threats discussed related to, although were not limited to, foreign international terrorists committing a mass terrorist attack on United States soil or against the United States.[112] The "lone wolf attacker" who killed 58 people in Las

103. 107 RECORDCONG. REC. 11, 161 (2002) (discussing Mr. Armey's remarks in support of the SAFETY Act of 2002).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Dana Gentry, *Judge Wants Details on Route 91 Security Firm*, NEV. CURRENT (Sept. 21, 2018), https://www.nevadacurrent.com/blog/judge-wants-details-on-route-91-security-firm/ (on file with *The University of the Pacific Law Review*).

109. *Id.*

110. *See* Complaint for Declaratory Relief at 1, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018) (failing to discuss the details of CSC's security services).

111. *See* U.S. Senate Committee on Homeland Security & Governmental Affairs, *9-11 Commission, Homeland Security, and Intelligence Reform*, https://www.hsgac.senate.gov/issues/9-11-commission (on file with *The University of the Pacific Law Review*) (discussing Senator Lieberman and McCain's attempt to "prevent a catastrophic attack from happening again" by passing the Homeland Security Act in 2002 as a result of the attacks on September 11th, 2001).

112. 107 CONG. REC. 11,161 (2002) (discussing Mr. Armey's remarks in support of the SAFETY Act of 2002).

Vegas is likely not similar enough to the international terrorist attack on September 11th to support the application of the SAFETY Act.[113] The Homeland Security Act was passed in response to an attack on the airline industry and it created the TSA for protection against those types of attacks.[114] The SAFETY Act followed within the Homeland Security Act and specifically limited liability to sellers of anti-terrorism technologies.[115] These provisions work together to show that Congress' purpose was to shield anti-terrorism technology providers from the potential liability from terrorist attacks, and to prevent the subsequent disincentivizing effect of that liability on their willingness to provide the technology that would now be required under the Homeland Security Act.[116]

However, MGM bases its argument on language in the *Regulations Implementing the Support Anti-terrorism by Fostering Effective Technologies Act of 2002*.[117] Here, the Department of Homeland Security provided more clarification as to who is affected by the Act.[118] The Department stated that a "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, downstream users of the qualified anti-terrorism technology, the seller's suppliers or contractors, or any other person or entity."[119] It again stated that "it is clear that the seller is the only appropriate defendant in this exclusive Federal cause of action."[120] The Department elaborated by acknowledging that when enacting the Act, "Congress balanced the need to provide recovery to plaintiffs against the need to ensure adequate deployment of anti-terrorism technologies by creating a cause of action that provides a certain level of recovery against sellers, while at the same time protecting others in the supply chain."[121]

Although this language seems as though it would prevent victims from suing MGM as a buyer or downstream user of the technology, it is still unclear what claims would be made against MGM.[122] If victims are not making claims related to the technology that CSC provided, MGM cannot argue that it is shielded by the SAFETY Act of 2002.[123] Therefore, the traditional structure of litigation should take place and the victims should be allowed to make their cases alleging

113. Chris Baynes, *Las Vegas Shooting: Police Believe Lone Gunman Was Responsible for Mass Shooting on Casino Strip*, INDEPENDENT (Oct. 2, 2017), https://www.independent.co.uk/news/world/americas/las-vegas-shooting-latest-gunman-mandalay-bay-casino-live-music-show-festival-nevada-a7977776.html (on file with *The University of the Pacific Law Review*).

114. H. Rep. No. 107–609, pt. 1 (2002) (on file with *The University of the Pacific Law Review*).

115. *Id.*

116. *Id.*

117. 71 Fed. Reg. 110 (2006) (on file with *The University of the Pacific Law Review*).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Supra* Part III.

123. 71 Fed. Reg. 110 (2006) (on file with *The University of the Pacific Law Review*).

the negligence of their choice.[124]

The text of the statute, the purpose of the statute, and the legislative history surrounding the Homeland Security Act of 2002 all show that the Route 91 shooting was not the type of situation Congress imagined protecting against when enacting the SAFETY Act of 2002.[125] MGM should not be able to sue victims under its support.[126]

VI. IS MGM USING THE SAFETY ACT AS A BILL OF PEACE?

The heart of MGM's argument is that the SAFETY Act applies and shields MGM from litigation simply because it hired CSC to provide security services, and CSC should be the only party liable under the language of the Act.[127] However, the potential claims from victims are unknown because they have not all filed suits.[128] In fact, some filed lawsuits directly alleging it was MGM's negligence, rather than CSC's, that lead to injuries.[129] Therefore, should MGM be allowed to shield itself from liability by suing the victims before the victims file lawsuits for their specific grievances?[130]

MGM is attempting to take control of the litigation and determine where and how the lawsuit takes place.[131] This is not the traditional structure of tort litigation; the purpose of the traditional structure is to "provide relief to injured parties for harms caused by others" and "to impose liability on parties responsible for the harm."[132] Typically, modern "tort suits…begin with the plaintiff's allegation that the defendant wronged her by breaching a duty not to injure her."[133] However, in this case, MGM has sued the victims, who likely would have a claim against them, before they even alleged MGM's specific wrongdoing.[134] Even if the language in the Act and the legislative history are debatable, a court should not allow MGM to move forward using this Act because this would be a drastic change in traditional law, and Congress has yet to

124. *Supra* Part III.

125. *Supra* Part V.

126. *Supra* Part V.

127. Complaint for Declaratory Relief, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018)

128. *Id.*

129. Taylor, *supra* note 40.

130. *Supra* Part III.

131. *Supra* Part III.

132. Cornell Law School, *Legal Information Institute*, https://www.law.cornell.edu/wex/tort (on file with *The University of the Pacific Law Review*).

133. Jules Coleman et al., *Theories of the Common Law of Torts*, STAN. ENCYCLOPEDIA OF PHILOSOPHY (Winter 2015 ed.), https://plato.stanford.edu/archives/win2015/entries/tort-theories/ (on file with *The University of the Pacific Law Review*).

134. *Supra* Part III.

enact a tool that would allow this kind of action by a potential defendant.[135] If, when passing the SAFETY Act, Congress intended to allow companies like MGM to flip traditional tort litigation and become the controller of lawsuits, it would have done so clearly.[136]

First, subsection A defines a bill of peace.[137] Next, subsection B discusses case law as examples where the ordinary defendants attempted to take control of litigation through interpleader actions.[138] Lastly, subsection C discusses other methods Congress has adopted to create a solution to mass tort litigation.[139]

A. What is a "Bill of Peace?"

A bill of peace is an equitable device used to aggregate claims of "questions of law or fact which would otherwise be tried over and over" and determines a result "once for all in a single proceeding."[140] Proponents for bills of peace argue that the "avoidance of multiplicity of suits saves the parties from needless expense and vexation, economizes the time of judges and jurymen, and frees the dockets for the affairs of other litigants."[141] A bill of peace involves "several persons (conveniently called the multitude) on one side of a controversy, and one person (whom we may call the adversary) on the other side."[142] Typically, "each member of the multitude threatens litigation with the adversary, and these parallel litigations involve one or more common questions of law or fact, or both."[143]

Concerns about using a bill of peace as a solution to mass tort litigation involve "effects on rights to trial by jury, impacts on individual claimants' choices of venue, potential trial problems from the degree of relatedness of claims that would be involved, possible delay, and whether a bill-of-peace proceeding could be adequately dispositive given individual issues."[144] However, defendants of mass tort litigation want to avoid extensive litigation because "litigating a multitude of claims over a wide geographic area may force [them to settle]."[145] Therefore, defendants try to "simplify their task by having claims

135. *Infra* Sections VI.A–C.

136. *See* 58 Cal. Jur. 3d *Statutes* § 127 (Westlaw 2019) (defining the statutory construction rule expressio unius, "the rule assumes that just as every word of a statute must be presumed to have been used for a purpose, every word excluded from a statute must be presumed to have been excluded for a purpose").

137. *Infra* Section VI.A.

138. *Infra* Section VI.B.

139. *Infra* Section VI.C.

140. Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932).

141. *Id.*

142. *Id.*

143. *Id.*

144. Thomas D. Rowe, Jr., *A Distant Mirror: The Bill of Peace in Early American Mass Torts and Its Implications for Modern Class Actions*, 39 ARIZ. L. REV. 711, 716 (1997).

145. Note, *Procedural Devices for Simplifying Litigation Stemming from A Mass Tort*, 63 YALE L.J. 493, 494 (1954).

consolidated."[146] Although defendants may want to create a bill of peace and deal with all litigation at once, Congress has never enacted a bill of peace.[147] American case authority requires more than an existing multiplicity of suits to try to use a bill of peace.[148] Courts have "deemed it unfair to require a litigant to have contested in a single complex suit a right which is personal to him alone."[149] Therefore, courts only recognize a bill of peace as proper when "multiplicity exists *and* when 'common interest' or 'general interest' binds the multiple parties together."[150]

MGM's consolidation of victims in the Route 91 appears to be an attempt to create a bill of peace.[151] However, MGM has not provided evidence to prove there is the necessary privity between the members of the multitude–the victims.[152] Proving privity requires that "all of the multiple litigants would be indispensable or necessary parties to any action brought by any one of them," and "seldom can damage actions springing from a mass tort satisfy such stringent criteria.[153] In the Route 91 case, any one of the individual victims could bring a lawsuit against MGM for its negligence without needing the other injured parties in order to obtain a ruling.[154] Therefore, MGM's attempt to create a bill of peace would likely not hold up in court based on the elements of a bill of peace, which require that all of the multitude litigants are necessary to any action that any one of them bring. Even if it could meet all the elements for an equitable bill of peace in theory, again Congress has not enacted a statute recognizing a bill of peace, so it is unlikely it would do so through a federal statute without stating it explicitly.[155]

B. Interpleader as an Attempt to Take Control of Litigation

In the 1960's, in several suits, members of the insurance industry attempted to take control of litigation as well.[156] In these cases, they used the tool of

146. Note, *supra* note 145.

147. *See* Thomas D. Rowe, Jr., *supra* note 144 (discussing a bill of peace as a common law theory rather than a codified federal statute).

148. Note, *supra* note 145.

149. *Id.*

150. *Id.*

151. *See* Complaint for Declaratory Relief, MGM v. Carlos Acosta, No. 2:18-cv-01288 (D. Nev. July 13, 2018) (consolidating the victims into one action and seeking declaratory judgment for no liability).

152. *See Id.* (failing to allege any theory involving necessary privity between the victims).

153. Note, *supra* note 142.

154. *See, e.g.*, Complaint Paige Gasper v. MGM, No. A-17-762858-C (Nev. Dist. Ct. 2017) (filing suit without any other victim attached as a party in the litigation).

155. *See* Thomas D. Rowe, Jr., *supra* note 144 (discussing a bill of peace as a common law theory rather than a codified federal statute).

156. *See generally*, Pan Am. Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960) (discussing an insurance company's use of interpleader to join injured parties in one action); State Farm Fire & Cas. Co. v.

interpleader– "a procedural device designed to settle conflicting claims to property usually . . . held by a non-claimant without exposing the possessor to multiple or inconsistent judgments."[157] In each case, courts were careful to conduct fact specific analyses when allowing defendants to flip litigation in this way because it could take decisions away from victims.[158]

For example, in *Pan American Fire & Casualty Company v. Revere*, the court found the defendant was able to use interpleader to join all potential claimants of an insurance policy.[159] *Pan Am.* involved a highway accident that occurred when a tractor collided with a school bus and caused an additional two car pile-up.[160] Four people were killed and an additional 23 were injured.[161] The tractor's liability insurer brought the interpleader action alleging that the injured victims brought multiple claims and asked the court to direct the plaintiffs in those actions to assert their claims in this action.[162] The court reasoned "[t]he function of interpleader is to rescue a debtor from undue harassment when there are several claims made against the same fund."[163]

The court also mentioned the plaintiff insurance company had no interest in the limited pool of money available to victims.[164] Further, if it were the defendant in multiple lawsuits, not only would it incur costs exceeding the $100,000 policy limit and its contractual obligation, but also an early plaintiff might take the entire pot, leaving the others with no recovery.[165] The court also explicitly mentioned "the victims of the automobile accident should not be enjoined from suing at law before a jury," which indicates the court still intended plaintiffs to control their lawsuits in some manner, even if limited to one court proceeding.[166] In conclusion, the court held the insurance company should not be subject to multiple liability when the aggregate exceeds the insurance policy limits, so the use of interpleader–which allowed the defendant to control some elements of the litigation–was an appropriate tool in this case.[167]

In *State Farm Fire & Casualty Co. v. Tashire*, the Supreme Court found an insurance company exceeded the power granted to it under the federal

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Tashire, 386 U.S. 523 (1967) (limiting an insurance company's use of interpleader).

157. Donald Doernberg, *What's Wrong with This Picture?: Rule Interpleader, the Anti-Injunction Act, In Personam Jurisdiction, and M.C. Escher*, 67 U. COLO. L. REV. 551, 552 (1996).

158. *See generally*, Pan Am. Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960) (discussing an insurance company's use of interpleader to join injured parties in one action); State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) (limiting an insurance company's use of interpleader).

159. 188 F. Supp. 474, 486 (E.D. La. 1960).

160. *Id.* at 476.

161. *Id.*

162. *Id.*

163. *Id.* at 480.

164. *Id.* at 476.

165. *Id.* at 476.

166. *Id.* at 483.

167. *Id.* at 476.

interpleader statute by attempting to take control of the litigation against it.[168] *State Farm* involved a car accident between a Greyhound bus and a pickup truck that resulted in two deaths and over thirty injuries.[169] Four injured plaintiffs brought suit against Greyhound, the bus driver, the truck driver, and the truck owner in California state court.[170] However, before these cases went to trial, State Farm brought an interpleader action in the United States District Court for the District of Oregon seeking to require all claimants to establish their claims in a single proceeding and bring no other action.[171] Although the court determined that State Farm properly used the interpleader statute, the court found using interpleader to grant an order enjoining prosecution of unrelated lawsuits and to extend protection to the alleged tortfeasor–State Farm's insured–was inappropriate.[172] The court found the "mere existence" of a limited insurance fund, made relevant through interpleader, did not allow for control over the litigation beyond the needs for an orderly result.[173]

The Court reasoned the interpleader device was never intended to be a solution to mass tort litigation, nor an "all-purpose bill of peace."[174] If Congress did intend this use of interpleader, then Congress would have been clearer about making sure that disinterested parties could not "strip truly interested parties of substantial rights—such as the right to choose the forum in which to establish their claims."[175] The Court found no legislative support for the theory that a modern federal interpleader is capable of "sweeping dozens of lawsuits out of the various state and federal courts in which they were brought and into a single interpleader proceeding."[176] In fact, only two reported cases allowed a federal interpleader court to take control of the underlying litigation against alleged tortfeasors.[177] Therefore, because Congress never intended interpleader to serve as a bill of peace in multi-party litigation, State Farm could not use the interpleader statute to enjoin claimants from filing suits in forums they prefer.[178]

Whether these cases proved to be successful for insurance companies is not essential to the argument because either way, win or lose, interpleader is a recognized tool that is available to control litigation in a reasonable manner, and Congress and state legislatures have recognized it.[179]

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168. 386 U.S. 523, 535 (1967).
169. *Id.*
170. *Id.*
171. *Id.* at 525–27.
172. *Id.* at 534.
173. *Id.* at 533–34.
174. *Id.* (internal quotation marks omitted).
175. *Id.* at 535–36.
176. *Id.* at 536.
177. *Id.*
178. *Id.* at 537.
179. *See generally*, Pan Am. Fire & Cas. Co. v. Revere, 188 F. Supp. 474 (E.D. La. 1960) (discussing an

C. Other Attempts to Create a Solution to Mass Tort Litigation

Congress has made other efforts to provide an economically feasible and equitable solution to mass tort litigation through creating multiforum, multiparty jurisdiction, recognizing class actions, and creating multidistrict litigation panels.[180] In creating these solutions, Congress has been extremely hesitant to change the typical litigation structure.[181]

Part one describes the federal statute that provides consolidation of mass tort litigation in specific instances.[182] Part two describes Rule 23 of the Federal Rules of Civil Procedure and the structure of class actions.[183] Lastly, part three discusses multidistrict litigation as an option in mass tort litigation.[184]

1. Multiparty, Multiforum Jurisdiction

In the late 1970's, Congress began to consider how it could provide a solution for multiforum, mass tort litigation.[185] Congress went through many steps before enacting section 1369 of the U.S. Code.[186] Prior proposals allowed for a lower minimum damages requirement of $75,000, rather than the $150,000 minimum currently enacted, and a lower minimum deaths requirement of 25, rather than 75.[187] Congress also eliminated the choice of law rules within prior proposals and provided a new exception to the minimum diversity rule.[188] These changes are evidence of Congress' intent to narrow the cases in which section 1369 would apply by creating a tighter federal statute for multiparty litigation.[189] The limited scope of those changes indicate Congress' continued reluctance to provide a sweeping solution to mass tort litigation that would limit plaintiffs' freedom to remain in control of their case and choose when and where to sue.[190]

The current enactment of section 1369 states, "district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural

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insurance company's use of interpleader to join injured parties in one action); State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967) (limiting an insurance company's use of interpleader).

180. *Infra* Sections VI.C.1–3

181. *Id.*

182. *Infra* Section VI.C.1.

183. *Infra* Section VI.C.2.

184. *Infra* Section VI.C.3.

185. Thomas Reavley & Jerome Wesevich, *Choice of Law Under the Multiparty Multiforum Trial Jurisdiction Act of 2002*, REGENT UNIV. L. REV. 157, 167–68 (2004).

186. *Id.* at 167–72.

187. CRS Report for Congress, Multiparty, Multiforum Trial Jurisdiction Act of 2002, P.L. 107-273 (2002).

188. *Id.*

189. *Id.*

190. *See generally* CRS Report for Congress, *supra* note 188 (explaining the changes that Congress made to prior proposals before enacting the Act).

persons have died in the accident at a discrete location" if any two of the defendants are from different states.[191] The term accident means "a sudden accident, or a natural event culminating in an accident."[192] Further, "any person with a claim arising from the accident described . . . shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter."[193]

Although the Route 91 case likely would not qualify because 58 people died and the majority of all plaintiffs and defendants are citizens of the same state, it is evident from the enactment of this federal statute that: (1) Congress is capable of providing a solution to mass torts in certain situations, and (2) Congress is clear when it does so.[194]

2. Federal Rules of Civil Procedure–Rule 23

Rule 23 of the Federal Rules of Civil Procedure governs modern class-action procedure.[195] A class action can be created "if the 'court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'"[196] Advocates of using Rule 23 see a potential solution to mass tort litigation because "[c]ombining the aggregation power of the Rule 23 joinder mechanism with settlement procedures could substantially facilitate the disposition of multiple actions, eliminating troublesome choice-of-law issues and reducing transaction costs."[197]

Rule 23 currently leaves open the option for plaintiffs to create class actions in mass tort situations–"the small opening for class-action treatment of certain well-qualified mass-tort cases should remain."[198] Through its enactment of Rule 23, Congress has expressed its view that plaintiffs should be in charge of their own litigation and has provided another solution to mass tort actions.[199]

191. 28 U.S.C.A. § 1369 (Westlaw current through P.L. 116-5).

192. *Id.*

193. *Id.*

194. *See* 28 U.S.C.A. § 1369 (Westlaw current through P.L. 116-5) (enacting a federal statute to express Congress' intent to provide a specific solution for mass tort litigation).

195. John K. Rabiej, *The Making of Class Action Rule 23-What Were We Thinking?*, 24 MISS. C. L. REV. 323, 323–24 (2005).

196. *Id.* at 325.

197. *Id.* at 342.

198. *Id.* at 343.

199. *See* FED. R. CIV. P. 23 (Westlaw 2019) (enacting a federal rule of civil procedure to express Congress' intent to provide a specific solution for mass tort litigation).

3. Multidistrict Litigation

Multidistrict litigation ("MDL") allows for coordinated or consolidated pretrial proceedings that may be transferred to any district "when civil actions involving one or more common questions of fact are pending in different districts."[200] Litigants have polarized views when it comes to multidistrict litigation, with plaintiffs generally preferring to "litigate in state court and defendants prefer[ring] to litigate in federal court."[201] However, the judicial panel determines transfers on the basis of "convenience of parties and witnesses," and in order to promote "just and efficient conduct of such actions."[202]

When enacting the multidistrict litigation statute, Congress created another potential avenue for mass tort litigation.[203] In fact, MGM used this avenue in the Route 91 case when it moved to transfer and centralize the case to a single district court.[204] This shows parties can use Congress' alternative avenue; however, MGM's motion to transfer to a single district court under the multidistrict litigation statute was denied by the panel of judges.[205] MGM attempted to centralize 13 actions that were pending in 8 different districts through a motion to centralize pre-trial proceedings in one California MDL proceeding.[206]

The MDL panel reasoned that "merely to avoid different federal courts having to decide the same issues is, by itself usually not sufficient to justify . . . centralization."[207] The court further reasoned because there were a "minimal number of actions" at issue, the actions were mostly coordinated together, and a "significant overlap of counsel" existed, "voluntary cooperation and coordination" was feasible.[208] Therefore, MGM's attempt to use an MDL forum failed because the underlying policy behind MDLs was not apparent, that being "minimiz[ing] the potential for duplicative discovery and inconsistent pretrial rulings."[209]

In summary, the common law and Congress have recognized potential solutions to help organize mass tort litigation and provide efficiency for the courts and litigants: interpleader, section 1369, class actions, and multidistrict

200. 28 U.S.C.A. § 1407 (Westlaw current through P.L. 116-5).

201. Danielle Oakley, *Is Multidistrict Litigation a Just and Efficient Consolidation Technique? Using Diet Drug Litigation as a Model to Answer This Question*, 6 NEV. L.J. 494, 494–95 (2006).

202. 28 U.S.C.A. § 1407 (Westlaw current through P.L. 116-5).

203. *See* 28 U.S.C.A. § 1407 (Westlaw current through P.L. 116-5) (enacting a federal statute to express Congress' intent to provide a specific solution for mass tort litigation).

204. *In Re Route 91 Harvest Festival Shootings in Las Vegas, Nevada*, 347 F.Supp.3d 1355 MDL No. 2864 (Oct. 3, 2018).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1358.

litigation forums.[210] Congress has not however enacted a bill of peace as a solution for mass torts; therefore, MGM's attempt to make one as a solution to shield itself from liability is outside of its legally recognizable options as a potential defendant.[211]

VII. CONCLUSION

Congress spoke clearly when it enacted the SAFETY Act of 2002.[212] Further, the text, purpose, and legislative history reveal that allowing MGM to use the SAFETY Act to shield itself from liability would expand the Act's scope beyond the enacting Congress intended.[213] Further, Congress did not intend for the SAFETY Act to provide potentially liable victims a bar to liability for unknown negligence, or at the very least, negligence unrelated to the anti-terrorism technology.[214] Lastly, MGM is unable to use the SAFETY Act of 2002 because the Secretary of the Department of Homeland Security has not defined the Route 91 Harvest Festival Shooting as a terrorist attack, nor has she established CSC provided anti-terrorism technology under the Act's requirements.[215]

Congress has implemented other potential solutions to mass tort litigation, for example, U.S. code section 1369, multidistrict litigation, and class actions.[216] Therefore, those are the available tools for the Route 91 litigation, and using the SAFETY Act to take control of litigation and forum shop for defense-friendly federal judges is improper.[217] If Congress intended to enact a bill of peace or a sweeping rule to limit mass-tort damages through its enactment of the SAFETY Act, it would have done so deliberately and would have been clear about its purpose.[218] Congress' lack of action in creating a bill of peace or something similar, and its hesitation in allowing defendants to control litigation, further support Congress' intent regarding the SAFETY Act.[219] Regardless if a court

210. *Supra* Part VI.

211. *Id.*

212. *Supra* Part V.

213. *Id.*

214. *Id.*

215. Dep't of Homeland Sec., SAFETY ACT, https://www.safetyact.gov/ (on file with *The University of Pacific Law Review*) (stating on the SAFETY Act's website that as to whether the Route 91 Festival shooting was a terrorist attack, "[t]o date, the Secretary of Homeland Security has not made any such determination regarding the Route 91 Harvest Festival mass shooting.").

216. *Supra* Sections VI.C.1–3.

217. Gillian Brassil, *MGM Sues More than 1,000 Victims of Las Vegas Shooting, Denying Liability for the Massacre*, CNBC (July 17, 2018), https://www.cnbc.com/2018/07/17/mgm-resorts-files-suit-against-more-than-1000-route-91-victims.html (on file with *The University of Pacific Law Review*) (citing the statement made by the Route 91 victims' attorney arguing that MGM's lawsuit in federal court is a "blatant display of judge shopping.")

218. *Supra* Section VI.A.

219. *Supra* Part VI.

finds MGM negligent, injured victims should be able to file their own lawsuits addressing their grievances, have a court of law hear their claims, and be the masters of their own cases.[220]

220. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, YALE L.J. (2005) (discussing Locke's view that "victims of wrongs possess a natural right to reparations from wrongdoers, and that government, as custodian of individuals' rights, owes it to them to provide a law of reparations.")