

Connecticut Power And Energy Society How Do We Get Prepared?

Emergency Management and Continuity Planning – The Developing Legal Issues

March 2013



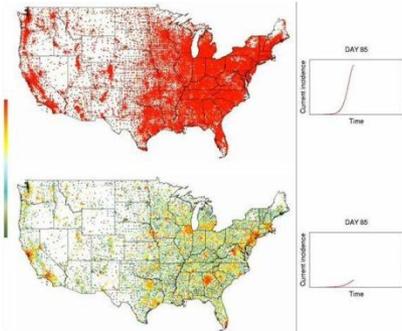
Preface

- **This presentation is intended to facilitate a discussion of the issues presented and does not constitute legal advice. Any questions regarding specific legal issues should be reviewed with a lawyer engaged by you for that purpose.**
- **Copies of the presentation outline are available in the meeting materials. Please excuse the level of detail of some slides in the presentation; additional detail is provided to make the copies more useful for future reference.**
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Discussion Topics

- **Risks and Consequences**
- **Government “Guidance”**
- **Liability Standards Cases**
- **Minimizing Liability**
- **Planning Considerations**





Potential Risks

– Paint the Picture of Risk



- Public Health Emergencies (perceived or real, reactions of government and individuals)
- Accidents (spills, fires, explosions, etc.)
- Intentional Harm (terrorism, vandalism, etc.)
- Natural Events (hurricanes, floods, ice storms, etc.)
- Technology Events (Equipment failures)



What Do We Mean by “Consequences”

- Think: “Exposures”
 - Personal Injury / Property Damage Liability
 - Regulatory Liability
 - Corporate Asset Injury
 - Physical Asset Injury
 - Financial Injury
 - Reputation Injury
 - Investor Confidence Injury

- Question:
 - What Standards Must be Met to Minimize these Exposures?

Potential Sources of Standards for Emergency and Continuity Planning and Response



Post 9/11: A Decade of Changing Expectations ?

- Consider: Popular expectation changes lead to legal expectation changes
 - Common Law (court decision) changes to tort standards
 - In Re: September 11 Litigation
 - Legislative/Regulatory Changes
 - Targeted new standards for some risks (e.g. Chemical Facility Anti-terrorism Standards)
 - Congressional statements on the appropriate private party standard of care
 - Wealth of government “guidance” information

Government Action Affecting General Emergency Management/Continuity Planning Standards

- **NFPA 1600 – Voluntary “National Preparedness Std.”**
 - *9/11 Commission Recommendation: We endorse the American National Standards Institute’s recommended standard for private preparedness. . . . We believe that compliance with the standard should define the **standard of care** owed by a company to its employees and the public for legal purposes.*
 - 2004 “Sense of Congress” – DHS should promote adoption of voluntary national preparedness standards such as NFPA 1600 (See, Intelligence Reform and Terrorism Prevention Act 2004)
- **DHS – June 2010**
 - Adopts Standards for Voluntary Private Sector Preparedness Accreditation and Certification Program
 - NFPA 1600
 - ASIS SPC.1-2009 - Organizational Resilience Standard
 - British Standard BS 25999 - Business Continuity Management
- **See also, ISO – 2012 : ISO 22301- Societal Security – Business Continuity Management System Requirements**

Common Law Theories of Liability – Negligence

- **Negligence Elements: Injury to Persons or Property**
 - Defendant owed a duty of care to injured party (legal question)
 - In Re September 11 Litigation:
 - Finds: A duty to protect against terrorist acts exists
 - Failure to take reasonable steps to carry out duty (negligence)
 - What is reasonableness standard today ?
 - Consider: 9/11 Commission statement, Sense of Congress 2004 , DHS Adopts Preparedness Certification standards, wealth of available government guidance on preparedness
 - Negligence was actual cause of injury
 - Negligence was proximate cause of injury (sig. relationship)
 - Unforeseeable third party criminal acts may break causal connection
 - What is foreseeable today?
 - Health Emergencies, Accidents, Intentional Acts, Natural Disasters, Technology Failures
 - WTC 1998 litigation – foreseeability not even in contention (**1998**)

Special Liability Considerations for Certain Plaintiff Groups

- **Employees**
 - Workers Compensation Limitations
 - But Recall: 9/11 Commission: “We believe that compliance with the [NFPA] standard should define the standard of care owed by a company to its employees and the public for legal purposes.”
- **Customers**
 - Is this a non-compensable “general duty”?
 - Plaintiffs with significant claims may argue outside general duty
 - Addressed by PURA in rate and shareholder allocations?
- **Shareholders (economic injury)**
 - Loss of revenue – regulatory action/inability to continue operations
 - Loss of stock value/reputation – if unaddressed foreseeable risk

Interplay of Regulatory & Industry Standards

- **NFPA 1600 & Other Continuity Planning Standards**
 - (NFPA 1600 § 4.5.1 (2010)– comply with law, policies and industry codes of practice)
 - Consider:
 - RCRA contingency plans
 - EPCRA documentation
 - OSHA general duty standard/emergency action plan std.
 - CAA § 112(r) measures
 - TSCA – PCB management
 - Will you have complied with NFPA if you don't comply with other laws?
- **Consider how standards may be interrelated**
- **9/11 Commission–Intel.ReformAct2004–NFPA–regulations–industry codes**

“Guidance”: Risk Management Principles, Training and Exercises

- **Critical Infrastructure Partnership Advisory Council Annual Report (DHS 2011) - Goals include:**
 - **Use sound risk management principles to implement physical and cyber measures that enhance preparedness, security and resilience**
 - **Partner to conduct comprehensive emergency, disaster, and business continuity training and exercises to enhance reliability and emergency response**

A “New” Liability Theory?

- Negligent Failure to Plan

- Is there a duty to plan for protection of employees, business visitors, shareholders, and customers?
- Supporting arguments:
 - Based on new foreseeability of risks - terror attacks or other events at your operations or elsewhere that may cause interruption of business or injury to persons or property
 - Vulnerabilities of modern interconnectedness and reliance upon others to conduct your operations
 - You may be best positioned to evaluate the risks, prevent or mitigate the potential damage and bear the costs of prevention
 - Best positioned party is assigned the duty to mitigate



Exposures = Planning and Implementation

- ***Katrina - Hospital Case***
 - Plaintiff patients and visitors trapped for days without power and supplies
 - Claims of failure to prepare and respond to foreseeable disaster
 - Inadequate auxiliary power
 - Maintenance staff prior warnings
 - \$25 MM settlement
- ***So. Cal. Edison – Review***
 - 2011 windstorm outages
 - Panel found company misclassified event class
 - No “incident commander”
 - Didn’t follow plan procedures
 - Inadequate supplies
 - No recent test of plans
 - Previous after action reviews failed to implement “lessons learned” (“training failure?”)
 - How is your follow-through record?

Minimizing Failure to Plan Liability

- Managing Your Emergency & Continuity Plan

- **Perform periodic reviews of risk assessment, business impact analysis, and mitigation measures**
- **Amend the plans appropriately to address:**
 - facility-specific changes in personnel, operations, and equipment
 - changing regulations and other standards
 - drill experiences and real world events (yours or others)
- **Audit and document efforts – remember, the individuals who have done the planning, conducted drills, researched adopted improvements, etc. over the years may retire, leave, etc. (Knowledge transfer can be critical)**

Minimizing Failure to Plan Liability

- Other Considerations to Address the Standard of Care

- **The Plan Development Process**
 - Board Involvement (document it)
 - Board protection
 - Board confirms the corporate priority and supports needed resources
- **The Plan Implementation Process**
 - Follow the Plan as Best you Can
 - Don't blindly follow (e.g. a situation not covered by plan)
 - Don't fail to follow plan due to ignorance or complacency
 - Think of your plan as a future trial exhibit
 - Will it have a positive or negative impact on jurors?

Issues to Consider:

- **Numerous legal/financial/public policy/corporate citizenship reasons for emergency planning**
- **Questions to ask yourself:**
 - Have we taken appropriate steps to address risks?
 - Do we have appropriate plans?
 - Are we confident personnel are effectively trained and would implement the plan as needed?
 - Have we involved all the right internal and external parties in planning?
 - Have we documented our planning and implementation efforts?