

Business Continuity Planning Legal Landscape:

Protecting Your Company and Employees and Shielding Your Directors and Officers from Liability

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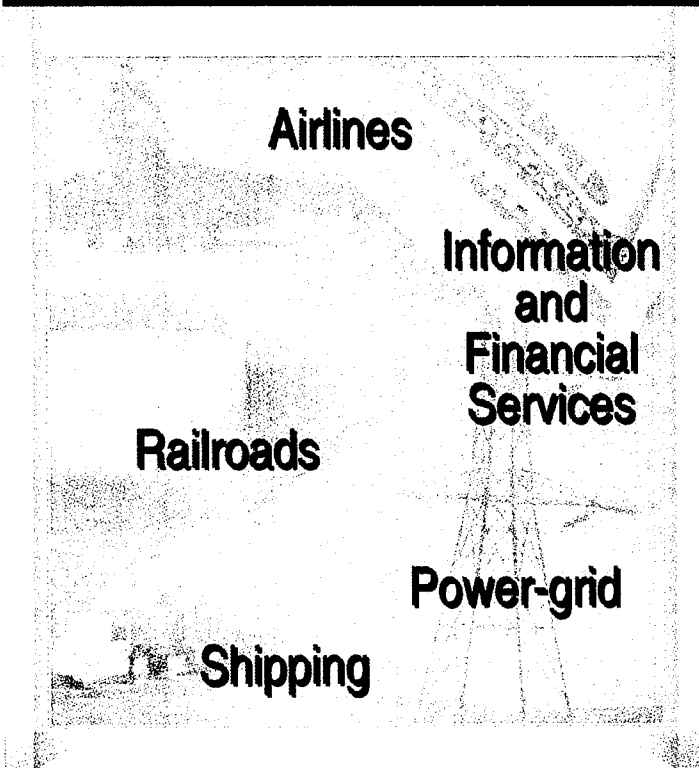
Business Continuity Programs (BCP)



- BCP is an effort to ensure that the capability exists to continue essential business functions across a wide range of all-hazard emergencies
- Emergency planning is an integral part of any successful business plan
- OSHA requires that most businesses with ten or more employees have a written emergency plan
- A well-designed BCP will enhance internal credibility (with employees) and external credibility and good will (with stockholders, customers, suppliers, and the community at large)

BCP Planning

The Role of the Private Sector



- The private sector has more than 85% ownership and control of the nation's critical infrastructure
- Language from The 9/11 Commission Report highlights the increased responsibility on the private-sector as a result of the 9/11 attacks

BCP Planning

The Role of the Private Sector



- The 9/11 Commission Report categorized private-sector civilians as the “first” first responders during the 9/11 attacks and emphasized civilian preparedness as private-sector civilians are likely to be the first responders in any future catastrophes. The Commission concluded:

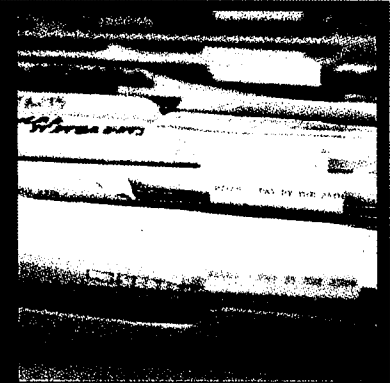
- “The Lesson of 9/11 for civilians and first responders can be stated simply: in the new age of terror, they -- we -- are the primary targets. The losses America suffered that day demonstrated both the gravity of the terrorist threat and the commensurate need to prepare ourselves to meet it. The first responders of today live in a world transformed by the attacks on 9/11. Because no one believes that every conceivable form of attack can be prevented, civilians and first responders will again find themselves on the front lines. We must plan for that eventuality. A rededication to preparedness is perhaps the best way to honor the memories of those we lost that day”

Legal Framework



- NFPA 1600
- National Infrastructure Protection Plan ("NIPP")
- National Strategy for Pandemic Influenza
- Ready Business Campaign
- Sarbanes-Oxley, Sections 404 and 409
- *In re Caremark International Inc. Derivative Litigation*
- *In re September 11 Litigation*

NFPA 1600



- It establishes an all hazards common set of criteria for disaster management, emergency management, and business continuity programs
- The NFPA 1600 was prepared by the Technical Committee on Disaster Management, comprised of a working group of experts, and acted on by the National Fire Protection Association
- The NFPA 1600 was endorsed by the American National Standards Institute, The 9/11 Commission and the U.S. Department of Homeland Security
- The NFPA 1600 is a benchmark for both public and private programs

NFPA 1600



A Business Continuity Program as defined in NFPA 1600:

“An ongoing process supported by senior management and funded to ensure that the necessary steps are taken to identify the impact of potential losses, maintain viable recovery strategies, recovery plans, and continuity of services.”

Sarbanes-Oxley Act of 2002 (SOX)

- *New accountability* - CEO and CFO must sign off on quarterly and annual financial statements
- *Personal liability* - attaches to such affirmations
- *SOX Section 404* - each annual report to include a management report of the company's internal control over financial reporting
- *SOX Section 409* - issuers must disclose to the public, on a real time basis, changes in their financial condition or operations
- *Business continuity plan* - integral to a company's compliance with the regulatory requirements of both the SEC and Sarbanes-Oxley

Sarbanes-Oxley Act of 2002 (SOX)

- *SOX Section 302* - a company's CEO and CFO must certify:
 - Periodic reports
 - Documents and appropriate plans and procedures are in place
 - Books and financial controls and systems are in order
- In order to make such a certification, a CEO and CFO must be confident that reasonable efforts have been taken to ensure that their mission critical functions will continue in the event a disaster occurs
- At a minimum, a CEO and CFO's direct participation in a business continuity plan will help to ensure that those senior managers have the requisite information needed to comply with Sarbanes-Oxley and SEC regulations, which will in turn reduce the potential for personal liability

Duty of Care



- Senior managers and members of boards of directors have an affirmative obligation to take an active role in a company's contingency and COOP programs
- The CEO is ultimately responsible for a business' security culture and policies
- In the event of disruption, continuity of operations is not optional. To the contrary, the duties of the company's directors and officers are often heightened and tested

Duty of Care

In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del.Ch. 1996)

- *Caremark* contemplated the directors of Caremark's alleged breach of their duty of care
- Chancellor Allen held that a "director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards"

Duty of Care

In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del.Ch. 1996)



- Caremark pled guilty and paid approximately \$250 million in civil and criminal fines
- Part of the duty of care that a CEO and Board of Directors owes to shareholders and others is to take an active role in contingency planning and to guarantee as little disruption to business practices as possible

Duty of Care, Foreseeability



- *In re September 11 Litigation*, 280 F.Supp.2d 279 (S.D.N.Y. 2003)
- Judge Hellerstein concluded that the use of airplanes as suicidal weapons to destroy buildings and murder thousands was within the class of foreseeable hazards and accordingly, denied the Aviation Defendants' motion to dismiss the claims of the ground victims

Duty of Care, Foreseeability

- In a post-9/11, post-Hurricane Katrina and Avian-Influenza threatened world, the category of unforeseeable risks becomes narrower every day
- Therefore, corporate leaders (including but not limited to the CEO, General Counsel, the Chief Security Officer and members of the Board of Directors) must now support continuity of operations planning and take an active and deliberative role in the frequent and regular exercising of the plans

Liability Protection

- NFPA 1600
- Sarbanes-Oxley
- NIPP
- National Strategy
for Pandemic
Influenza
- *In re Caremark
International Inc.
Derivative Litigation*
- *In re September 11
Litigation*

Duty of Care

Director and Officer Liability