



# Proceedings of the National Roundtable on the Legal Case for Preparedness

October 19, 2006

## DISCUSSION DRAFT

### I. Executive Summary

This document presents a summary of the proceedings of the National Roundtable on the Legal Case for Preparedness organized by the International Center for Enterprise Preparedness (InterCEP) at New York University. Representatives of a variety of stakeholder perspectives participated in a discussion that focused on the following key themes:

- The primary rationale for corporations to undertake emergency preparedness efforts should be to ensure life safety and continuity of business operations in the event of a crisis.
- In addition, corporations are vulnerable to significant legal liability if they do not undertake prudent emergency preparedness efforts in advance of a crisis.
  - Sources of possible legal liability include common law negligence, statutory and regulatory requirements, and contractual obligations.
  - Implementing and documenting a corporate preparedness program that reflects industry best practices may provide an affirmative defense to liability claims after a crisis.
- Given their unique position in the corporate structure, corporate general counsel can readily promote preparedness in a diversity of areas including but not limited to crisis communication plans, human resource policies, supply and distribution relationships, corporate governance and risk management.
- Certain obstacles that can inhibit the implementation of preparedness programs in organizations were discussed and potential solutions advanced.
  - It was noted that there can be an unwillingness to undertake risk assessments by a corporation since these assessments may be subject to legal discovery after an event and be used against the corporation as evidence of the foreseeability of the hazard.
    - State legislatures could consider the establishment of a “self-evaluative privilege” which could protect information gathered during risk assessments providing that corporations reviewed risks and addressed them based upon a prudent cost-benefit analysis or similar prioritization method.
    - The U.S. Federal Rules of Evidence could be amended to make risk assessment information inadmissible as evidence at a trial.

- Individual privacy rights can appear to conflict with the corporation's duty of care in preparing for and responding to such threats as pandemic flu.
  - Both legislative and regulatory measures should be considered in this regard.
- Structural divisions within the organization can inhibit the development of a holistic, enterprise-wide, all-hazards preparedness program. These divisions include both functional departments and business units. Furthermore, the responsibility of overall risk management may be dispersed across such functions as disaster recovery, security, business continuity, and others.
  - General counsel could champion the development of holistic risk management and preparedness programs on the basis of good corporate governance and fiduciary responsibility
- Concerns about resulting liability may cause corporations to be reluctant to assist other private sector and public sector entities in the event of crisis since the Good Samaritan Laws generally do not cover corporations.
  - State legislatures could extend existing Good Samaritan laws to cover corporations as well as individuals.
- Preparedness is often not a high priority for corporate leadership. Contributing factors include the stock market focus and consequent executive focus on short term financial results (e.g., quarterly and annual reporting). This tends to push the consideration of the long-term benefits of all-hazards preparedness off the leadership agenda.
  - Investors and their proxies (e.g., rating agencies) need to evaluate corporate preparedness as an important factor in assuring both short-term as well as long-term revenue streams.
- The financial benefits of preparedness are not compelling to all corporations.
  - Given corporate concerns about litigation, Congress could consider legislation establishing a "legal safe harbor" to protect corporations from legal liability claims in the aftermath of a crisis providing that they undertook prudent preparedness efforts, for example if they voluntarily conformed with the preparedness standard, NFPA 1600.
- Additional research and attention within the legal community should be focused on companies that have already begun to 'do the right thing.'

## II. Context

### *The Topic: The Legal Case for Preparedness*

Businesses face an increasingly dynamic operational risk environment that includes extreme events of natural as well as man-made origin. Corporations that are insufficiently prepared for crisis may face significant legal liability once a crisis has occurred based upon obligations to customers, regulators, investors, the general public and others. In addition to common law tort claims, corporations may also be found liable for lack of adequate emergency preparedness in cases involving contractual and regulatory obligations (e.g., EPCRA, OSHA, etc.).

InterCEP's research suggests that while such legal risks may provide an incentive for corporate preparedness, there are many issues relevant to the legal rationale for preparedness efforts that remain unresolved. What standards, guidelines and industry

practices should be referenced in a determination of what constitutes ‘duty of reasonable care’ with respect to corporate preparedness? What should firms do to mitigate their operational risks? How should a firm’s operational risk mitigation efforts be documented in order to demonstrate fulfillment of duty? These along with other issues will need to be addressed by corporate general counsel as they focus on the legal risks associated with extreme events. A comprehensive legal strategy should optimally inform specific preparedness efforts.

### *The Roundtable Format & Participants*

InterCEP organized and facilitated the National Roundtable on the Legal Case for Preparedness as an off-the-record, not-for attribution dialogue in which participants were encouraged to speak openly and candidly about their experience and insights. InterCEP provided all participants in advance with a white paper (“The Legal Case for Preparedness”, Bill Raisch, Matt Statler & Denis Binder). The Center solicited participant comments and feedback prior to the roundtable event in order to develop a discussion agenda that reflected the issues they considered most relevant. The participants were deliberately selected by InterCEP to represent a variety of stakeholder perspectives, including: corporate litigators, in-house counsel for major multinational firms, risk management advisory firms, prominent foundations, general counsel for city and state emergency management agencies, academic researchers, and the Private Sector Office of the US Department of Homeland Security.

### III. Roundtable Proceedings

At the roundtable event, InterCEP prompted participants to consider the following general questions:

- 1) Do corporations have a common law duty to provide reasonable care – i.e., by undertaking emergency preparedness efforts – to all parties foreseeably injured in the event of a crisis?
- 2) Should specific preparedness activities be documented as part of an affirmative defense strategy in anticipation of post-crisis litigation? If so, how?
- 3) What is the business value of conformance with existing, voluntary standards for organizational preparedness?
- 4) Is there a need for a legislation to create a safe harbor; to establish an evaluative privilege to cover risk assessments; or to expand the application of Good Samaritan Laws to encompass corporations?
- 5) What other strategies and initiatives are needed?

The discussion that took place in response to these questions can be summarized thematically as follows:

- **The primary motivation for corporations to develop a preparedness program should be to ensure life safety and continuity of business operations in the event of a crisis.** Roundtable participants were careful to note that for a corporation the potential risk of legal liability pales in comparison to the risks pertaining to its employees and its capacity to conduct operations following a disaster. In this sense, the incentive for businesses to undertake preparedness efforts in order to avoid litigation appears as only one factor among many. A considerable amount of discussion during the roundtable addressed the broader question of whether it is ultimately more appropriate to develop “carrot” or “stick” incentives for businesses to prepare with a clear acknowledgement of the overriding importance of employee safety and the continuity of business operations. And yet, as one participant noted, the fear of litigation has motivated organizations to take action in similar areas (such

as the installation of rubber flooring on playgrounds). Thus even though participants agreed that leaders would be well-advised to make strategic investments in preparedness in view of life safety and the resilience and long-term viability of the organization, most acknowledged that the threat of possible litigation remains a significant motivating factor.

- **Corporations are vulnerable to significant legal liability if they do not undertake appropriate emergency preparedness efforts in advance of a crisis.** In an era of globalization, the expanding geographic footprint of an organization means that it becomes subject to an increasing array of operational risks. These risks include everything from natural disasters such as hurricanes and earthquakes, to the prospect of an avian flu pandemic, to large-scale accidents due to human error, to man-made threats including terrorist attacks. In this context, corporations seek to manage risk in a variety of ways including by transferring it through using financial instruments such as insurance, accepting it and mitigating it by implementing preparedness measures designed to protect the life safety of its employees and ensure the continuity of business following a crisis event. Roundtable participants generally agreed that whenever a business is impacted by a crisis, not only must it respond and recover from the event itself, but it may additionally have to deal with post-crisis litigation asserting the corporation's lack of sufficient preparedness.
- **Sources of possible legal liability include common law negligence, statutory and regulatory requirements, and contractual obligations.** Roundtable participants generally agreed that the basic common law standard of negligence could be seen to apply to cases in which a corporation has reputedly failed to plan and prepare sufficiently for a disaster. While acknowledging the findings the InterCEP White Paper on "The Legal Case for Preparedness" as fundamental, the participants generally agreed with the conclusions. While injuries to employees of the organization would generally be covered under Workers' Compensation Insurance provisions, negligence tort claims may also be brought by other plaintiffs including customers, suppliers, visitors, neighbors, and others associated with the organization. Additionally, corporations may have statutory or regulatory obligations that must be fulfilled that create potential post-crisis liability. For example, firms operating in critical infrastructure industries such as finance, energy or transportation may be required to maintain specific levels of crisis mitigation, response and recovery capabilities. Firms whose business operations involve hazardous materials are often similarly obligated to take specific measures designed to ensure employee and environmental safety. Finally, during or after a major crisis, a corporation's standing, contractual obligations to clients, supply chain partners, etc. may still hold, and the invocation of force majeure as a defense may not be sufficient to prevent successful liability litigation.

In many of these instances especially those based on tort negligence, ultimate liability would likely hinge upon whether the corporation had, in the course of its crisis planning, response and recovery, met the standard of reasonable care appropriate to the situation. While there may be no court opinions that specifically establish a precedent for "negligent failure to plan," one roundtable participant stated that many tort negligence decisions in common law could be interpreted as a failure to plan. Regulatory and legislative references which may also suggest form and contents of an organization's emergency plan include the OSHA Standard reflected in 29 CFR 1910.38 as well as in the Emergency Planning and Community Right-to-Know Act (EPCRA) which outline planning requirements for certain organizations. Several roundtable participants suggested that Sarbanes-Oxley legislation may be interpreted to require organizations to undertake significant emergency preparedness efforts as a matter of good governance.

- **Corporations can most effectively mitigate the impact of crisis including the risk of legal liability by identifying and adopting preparedness best practices.** Some major corporations have already developed “all-hazards” preparedness programs designed to ensure employee safety and business continuity following a major event. All-hazards programs reflect a focus on the core functions that are common to responding to most types of emergencies. Such plans can be augmented to add focus on specific risks and vertical industries. Roundtable participants generally agreed that corporations can mitigate the risk of legal liability most effectively by having an all-hazards preparedness program that is integrated into their operations and exercised frequently. The development and implementation of this plan should be well-documented, and ideally the plan should be demonstrably in conformance with accepted practice and standards. Participants emphasized that the greatest protection against liability was an effective strategy for disaster preparedness, response and recovery, championed by senior leadership and integrated into the daily activities of all employees.
- **Corporate general counsel can readily provide an enterprise-wide perspective in corporate preparedness.** The corporate general counsel enjoys a distinct firm-wide perspective and can be a most effective actor in promoting corporate preparedness. Several examples were discussed. Roundtable participants all recognized that anytime a corporation experiences a major crisis event, communications are vital to ensure effective response and recovery. Thus a primary role for corporate general counsel is to develop crisis communications strategies that clearly define who is in charge of communication; what kinds of information can and should be communicated; who should receive what information; how that information should be gathered and distributed; and when various stages of the communications plan should unfold.

Another primary role for corporate general counsel is to ensure that the corporate human resources policies concerning employee leave, salaries and benefits, relocation etc. are appropriately defined and communicated in advance of a crisis. A great deal of the discussion about human resources policies focused on the scenario in which a pandemic flu breaks out and employees are forced to remain absent from the workplace for periods of time ranging from six weeks to six months or more. According to one participant, these policies should be articulated in language that can be understood “by everyone from the CEO to the janitor.”

Furthermore, general counsel can play a significant role in ensuring that a corporation’s value chain is resilient in the event of a major disaster. For example, relationships with supply and distribution partners should be subjected to scrutiny to determine the conditions in which either party can appeal to force majeure as a reason for non-compliance. And beyond a focus on contracts, participants suggested that general counsel can promote organizational resilience as a matter of good governance, shareholder responsibility, and corporate social responsibility.

- **Participation of general counsel in preparedness efforts can additionally help lay the groundwork for an affirmative defense against possible litigation.** While the operational risks associated with natural and man-made disasters are handled differently by different firms, roundtable participants emphasized that generally, business continuity and emergency preparedness planning efforts can benefit from legal involvement and oversight. Such involvement and oversight can provide insight into appropriate documentation and communications strategies and promote conformance with appropriate standards and compliance with relevant laws and authorities and reflective of best practices. Moreover, general counsel can, according to one participant, help ensure that all communications regarding

preparedness are appropriately worded. Such execution and documentation can help corporations to lay the groundwork for an affirmative defense far in advance of any litigation.

- **Certain obstacles that can inhibit the implementation of preparedness programs in organizations were discussed and potential solutions advanced.** While participants indicated that general counsel can play a significant role in the promotion of corporate preparedness best practices, they acknowledged that a number of obstacles hinder the development and implementation of preparedness. Several of these obstacles were discussed as were potential strategies to address them.
  - **It was noted that there can be an unwillingness to undertake risk assessments by a corporation since these assessments may be subject to legal discovery after an event and be used against the corporation as evidence of the foreseeability of the hazard.** It was discussed that many organizations are hesitant to undertake the comprehensive risk assessments that form the basis of any preparedness strategy because they believe that the assessment findings may be subject to subsequent legal discovery in the event of potential litigation pursued in the aftermath of a disaster. An example cited was the litigation pertaining to the 1993 World Trade Center bombing in which the identification of certain risks was argued as evidence of foreseeability. Furthermore, it was argued that the Port Authority (owner of the World Trade Center) subsequently decided not to address adequately the identified threats and the court held that the Port Authority was liable for damages to injured parties. This issue pertaining to risk-related information additionally impacts the general counsels themselves, who according to roundtable participants may also be held liable for not fulfilling fiduciary responsibility by withholding or not acting on that information. Potential strategies to address this issue included:
    - **State legislatures could consider the establishment of a “self-evaluative privilege” which could protect information gathered during risk assessments perhaps with a provision that corporations reviewed risks and addressed them based upon a prudent cost-benefit analysis or similar prioritization method.** Participants also discussed how legislators could establish a self-evaluative privilege to protect information gathered during risk assessments. Such a privilege would minimize the risk of liability and remove it as an obstacle for firms to ‘turn over the rock’ and identify and analyze in greater depth the risks that confront their operations. There was a diversity of opinion as to how well such a privilege would function. For example, one participant stated that if a corporation were to invoke such a privilege, the impression among the jurors would be that there was in fact something to hide. One participant noted that the U.S. Senate does not honor any kind of privilege, and another participant stated that in cases going before the Securities and Exchange Commission as well as the U.S. Department of Justice, there was generally a waiver of privilege. On the other hand, another participant cited provisions in the Clean Air Act and the Homeland Security Act that respectively allow environmental violations and critical infrastructure vulnerabilities to be shared with the government without fear of prosecution or discovery.
    - **The U.S. Federal Rules of Evidence could be amended to make risk assessment information inadmissible as evidence at a trial.** An initiative suggested by one participant was the amendment of the Federal Rules of Evidence to exclude risk assessment information. One

clear analogy suggested was the rule of evidence which bars introduction of settlement offers at trial. Reportedly that rule encourages parties to discuss settlement without fearing that the discussions would be introduced into evidence at trial as admission of liability. Other similar rules bar admission of evidence of subsequent remedial efforts to encourage parties to fix problems as soon as possible.

- **Individual privacy rights can appear to conflict with the corporation's duty of care in preparing for and responding to such threats as pandemic flu.** Another obstacle inhibiting the implementation of preparedness efforts is the apparent conflict between individual rights and the corporation's duty of care. Roundtable participants discussed at length the challenge faced by corporations seeking to prepare for an outbreak of pandemic flu while simultaneously complying with privacy regulations and American with Disabilities Act requirements. Potential strategies to address this issue included:
  - **Both legislative and regulatory measures should be considered in this regard.** Emergency powers and modifications of public health laws as well as model corporate policies need to be addressed, perhaps in conjunction with the work at the University of North Carolina referenced in this report.
  
- **Structural divisions within the organization can inhibit the development of a holistic, enterprise-wide, all-hazards preparedness program. These divisions include both functional departments and business units. Furthermore, the responsibility of overall risk management may be dispersed across such functions as disaster recovery, security, business continuity, and others.** Another obstacle identified during the roundtable discussion was that structural divisions within the organization can prevent the development of a holistic, all-hazards preparedness program. As one participant noted, legal risks may be dealt with by the legal department, reputation risks may be dealt with by the public relations department, business continuity risks may be dealt with by the information technology department, and so on. While these various departments have been set up to take exclusive ownership of distinct functions in the normal course of operations, a major disaster can cut completely across the business. In such scenarios, the coordination of key functional areas and the interface between key decision-makers rapidly takes on greater importance. Thus while a holistic, enterprise-wide risk management approach may be supported by senior management in principle, in practice many firms have not taken sufficient steps to implement it because of existing structural divisions and the inter-personal, political tensions that sometimes correspond to them. Potential strategies to address this issue included:
  - **General counsel could champion the development of holistic risk management** and preparedness programs on the basis of good corporate governance and fiduciary responsibility
  
- **Concerns about resulting liability may cause corporations to be reluctant to assist other private sector and public sector entities in the event of crisis since the Good Samaritan Laws generally do not cover corporations.** Potential strategies to address this issue included:
  - **State legislatures could extend existing Good Samaritan laws to cover corporations as well as individuals.** Participants noted that

Good Samaritan laws that currently exist in all states protect private individuals who seek to help others in need but they do not apply to corporations. One participant reported on legislative initiatives, currently underway in two U.S. states, to extend these laws to cover corporations as well as individuals. These initiatives have been supported by state health agencies confronting the challenge of distributing antiviral drugs in a pandemic outbreak, and are seeking to enlist the support of major employers to potentially assist in distribution should the need arise. It was reported that as the laws currently stand, if a corporation were to distribute antiviral drugs to its employees and their family members, and if one of those individuals were to be injured, then the corporation would have no protection from liability. Revision of these laws would therefore encourage corporations not only to engage with public health officials in pandemic planning, but additionally in any other crisis as well to extend its resources to the community at all stages of disaster preparedness, response and recovery without the concern of legal liability.

At the University of North Carolina, Gene Matthews, retired Legal Advisor to the Centers for Disease Control and Prevention in Atlanta, Edward Baker, Director of the North Carolina Institute for Public Health, and colleagues are currently developing policy and legislative templates in two areas: common sick leave policies and “Good Samaritan” liability protections for business and non-profit entities. These templates will identify the key legal issues and policy alternatives and will hopefully serve as concise roadmaps of the issues, options, and policy choices and will help improve business and public health preparedness. The project is being funded by the Alfred P. Sloan Foundation.

- **Preparedness is often not a high priority for corporate leadership. Contributing factors include the stock market focus and consequent executive focus on short term financial results (e.g., quarterly and annual reporting). This tends to push the consideration of the long-term benefits of all-hazards preparedness off the leadership agenda.** Roundtable participants acknowledged an issue that surfaces repeatedly in InterCEP’s ongoing research efforts: senior management often perceives a low probability of emergencies occurring and consequently places little priority on preparedness efforts. Given the pressure placed on CEO’s to focus on short-term financial performance, longer-term benefits of all-hazards preparedness frequently receive little focus. According to roundtable participants, C-level executives need to understand that even though the likelihood of any one event may be low, if the many different risks confronting a corporation are aggregated, it is likely that some crisis of one form or another will occur on a regular basis. And given the likely impact of such crises on corporate performance and valuation, the importance of all-hazards preparedness is too great to ignore. Potential strategies to address this issue included:
  - **Investors and their proxies (e.g., rating agencies) need to evaluate corporate preparedness as an important factor in assuring both short-term as well as long-term revenue streams.** This could provide significant market based incentives in support of preparedness. A non-market based proposal offered by a roundtable participant was an amendment by the United States Sentencing Commission of the federal sentencing guidelines requiring that the efficacy and robustness of preparedness strategies undertaken by the organization be a factor considered in indictments of organizational leaders following a crisis event.

- **Fiduciary responsibility of both senior management and the board of directors may be a factor.** It was suggested that fiduciary responsibility required board and senior management involvement in the oversight of the development and implementation of preparedness practices in organizations. Participants noted that general counsels could very effectively champion the development of holistic risk management and preparedness programs as a matter of fiduciary responsibility. Participants discussed two different structures that would support the fulfillment of that responsibility, including 1) a risk committee that includes representatives of various functions and reports to the board and 2) the establishment of a single risk-related function, with a 'chief risk officer' who holds overall responsibility for financial as well as operational risks and serves on the management committee.
- **The financial benefits and other motivations to prepare are not necessarily compelling to all corporations.**
  - **Given corporate concerns about litigation, Congress could consider legislation establishing a “legal safe harbor” to protect corporations from legal liability claims in the aftermath of a crisis providing that they undertook prudent preparedness efforts, for example, if they voluntarily conformed with the preparedness standard, NFPA 1600.** Congress could consider legislation establishing a safe harbor to protect corporations from liability (or significantly reducing it) in the aftermath of emergencies. Such a safe harbor could be dependent upon a corporation undertaking a preparedness program in conformity with a designated voluntary standard for preparedness, such as NFPA 1600. The benefit of such legislation would be to encourage corporations to engage in disaster preparedness, response and recovery activities in order to mitigate or fully avoid the risk of tort claims brought by plaintiffs injured in a potential crisis. Some participants however expressed doubt that there would be sufficient political will to forward such legislation, especially in a milieu of public distrust of corporate leadership following recent scandals.
  - **Additional research and attention should be focused on opinion leader companies that have already made preparedness a priority.** Overall, roundtable participants were compelled by the examples of corporations that have seen the value of all-hazards preparedness for both short-term and long-term corporate sustainability and taken appropriate steps to integrate preparedness into daily business operations. However, it was noted that truly exemplary organizations remain few and far between. Participants expressed concern that the vast majority of corporations, from the Fortune 100 to the bulk of small-to medium-sized firms, have not made preparedness a priority. In this light, there was a consensus among participants that additional research and attention should be focused on those organizations that have already begun to 'do the right thing,' in hopes that in highlighting their efforts other organizations would follow their lead.

#### **IV. InterCEP's Ongoing Activity**

The U.S. Department of Homeland Security provided the foundational funding for establishment of the International Center for Enterprise Preparedness (InterCEP) at New York University.. InterCEP is the world's first research and educational center dedicated to private sector preparedness.

This initiative to further advance legal and other incentives for corporate preparedness has been funded by the Alfred P. Sloan Foundation. It is founded upon earlier work with the 9-11 Commission and reflects ongoing participation from representatives from a diversity of leading corporations and external counsels.

InterCEP welcomes readers of this document to provide comments as well as to submit relevant and important reference materials related to this topic. Furthermore, we welcome suggestions of any additional stakeholders that should be included in this discussion as it evolves in the future.