

Facing Legal Liability in the Face of Terrorism & Disaster

The American business community must protect itself from being sued by plaintiffs under civil law following a terrorist attack or emergency situation. The bad news is that only a few large corporate firms are constantly reevaluating the nature of risks for their organizations. Organizations must constantly review procedures to prevent increased liabilities when a crisis emerges down the road. This huge legal issue is looming for the American small or medium size business community. A business such as a small vendor company or business office may not have considered the full potential for risks and legal consequences. It is also probable that they have done little or no emergency or business continuity planning. The reality is that the potential for your business to be sued, because of a legal complication, is high, as America faces more terrorist and environmental hazards in the near future.

Businesses today face a greater potential for claims of negligence lawsuits due to the failure of a business to protect people from harm and provide services to customers. Regardless of their nature or size, businesses are now held to a legal standard to prepare for and to mitigate the effects of any crisis regardless of size or magnitude. For large corporate firms, failure to address concerns could mean a disruption of profit and services. For a small or medium size business organization, not understanding the foreseeability of a crisis could be a “go-out-of-business” strategy.

It is important to clarify that in a business context, we must address the word that scares businesses but is loved by attorneys, namely liability. Liability as a word that carries with it, in a legal context, the words damages and harm. Damages and harm extend beyond just personal injuries that can happen to employees or customers at a given business location. Damages and harm must be understood additionally as the failure to receive or transfer goods, provide services, and/or failure to perform or be productive in pursuing the set purpose of a business organization. In the context of a terrorist attack or natural disaster such as a hurricane, harm and damage is going to occur. The question becomes who is going to pay to restore a party to their original state under State (not sure if a capital S is appropriate here other than as a differentiator) or Federal law.

In simplified terms, a business cannot be liable for harm and damages unless there is a breach of some legal duty. In the 21st century, every business is liable when there is a failure to provide appropriate precautions to mitigate the impact of a terrorist attack or catastrophic emergency that results in liability issues for your business – especially if there have been similar events, warnings, or threats. While such a standard seems daunting in its wording and complex in its nature, it is rather simple. Every business has a duty to mitigate danger or to prevent additional harm after a terrorist attack or when an emergency situation is a *foreseeable risk*.

The difficult part for some businesses to grasp is that the concept of foreseeability is no longer a warm legal blanket of protection. In the past, a business could argue that new and creative terrorist attacks or unusual secondary damage from natural disasters offered a degree of protection under the law since they were unforeseeable. Today, a terrorist incident anywhere in the United States has been determined to be a foreseeable risk. Any type of natural disaster prone to the region of the country such as a tornados or hurricanes that happened with some degree of regularity or frequency is considered foreseeable risk that legally must be addressed by a business.

Additionally, living in a major city or near a major potential target such as a power plant makes an attack foreseeable, regardless of the fact that an attack or incident has never occurred in that area. Ask yourself the next time you walk into a small clothing store or a restaurant near a high risk or target area, if you think that business has considered their legal pitfalls. I once spoke to a pizza parlor owner in a Wal-Mart shopping plaza and asked him what he would do if a terrorist incident affected the entire shopping complex which was located on Long Island. He made a point of saying that since Wal-Mart is a bigger company, they would have to lead the response to any incident and subsequent solution, and ultimately he would follow their lead. That can be fatal thinking especially when you are assuming a larger business nearby will be responsible for anything that goes wrong just because their patrons take up more space in the parking lot. Chances are that small or medium businesses haven't considered the nature of terrorism, but if something does occur, they are depending on the larger business to provide some shelter or possibly take the brunt of any plaintiff's lawsuits that might follow.

Also consider that while small or medium businesses may have considered emergency procedures for a hurricane or tornado, often they have not gone the extra step and figured out how to contractually mitigate with suppliers or customers under civil law if a

secondary problem caused by a natural disaster arises. Many small or medium businesses have superficially addressed if their physical plant has no electricity or has flooded significantly, but how about addressing a situation when you cannot have employees show up for work and you cannot send/receive goods due to major delays because a tornado has dropped broken 18 wheel trucks on every major highway in the area? It is interesting that many small business owners, even those who operate through websites on their own or through sites such as eBay are now learning the hard way about disruption of services and shipping due to secondary problems as a result of natural disasters.

In terms of foreseeability of liability, the concept of the law of proportional damages can add to another burdensome legal problem and make it much worse. The law of proportional damages is a concept in civil law that breaks down the damages in a case based on the level of fault for each party. This concept is often used in tort/personal injury cases such as a car accident but can be applied to businesses. To give you an idea how such a concept works, we must look to one of the first cases of the law of proportional damages and terrorism, although it is a government organization being sued not a small or medium business.

In terms of paying damages as a result of the 1993 World Trade Center bombing, liability was determined by the court in a very surprising way for the Port Authority. 68% of liability was handed to Port Authority vs. 32% to the actual terrorists. The reason for this was that security consultants had warned the Port Authority that the World Trade Center garage was vulnerable to attack by terrorist bombers prior to the event occurring. Since 1993 and 2001, American governmental organizations and all forms of businesses small and large can possibly share a portion of the damages when sued even without consultants telling them that they are facing major legal liabilities.

Going back to the Wal-Mart/pizza parlor example, imagine that an incident occurs in the area of the shopping plaza parking lot and people sue Wal-Mart as a result of being hurt in that area. The lawsuit could continue for years on end and with extreme legal expenses that could result in the pizza parlor being brought into the lawsuit at some point in time and a possible determination of liability for the pizza parlor along with Wal-Mart. While Wal-Mart may be found liable to a larger degree, if the pizza parlor is found to be just 5-10% liable for the total amount of damages, the damages that would have to be paid could be in the hundreds of thousands of dollars. Such damages could put an organization such as the pizza parlor out of business. Even if the pizza parlor is able to mount a good defense over a few years to prevent major liability being found by a court, the expensive legal fees for fighting a suit successfully against plaintiffs could turn into a pyrrhic victory, especially when a lawsuit could have been prevented or stopped in its early stages. Also while a lawsuit is pending, future business opportunities may be damaged since organizations tend not to make business deals when one of the parties is being sued. Additionally, mitigating damages such as the image and reputation of the business in the public eye, are also vulnerable and may not be considered until the damage is irreversibly done.

The mindset for all business organizations today is to be vigilant and proactive. Proactive measures includes training for employees on what to do and what not to do in case of a terrorist attack on in case of other types of emergencies. Whenever you hear of a news report that is relevant to your organization, you should consider having a meeting, discussing or determining if you can increase your legal protection. In increasing legal protection, you do not always need to run to a lawyer. As a business professional, you often can take steps on your own to protect your business. Keep in mind, as a business you should consider the standard of care in your industry as well as a finding out how other business in your area are prepared for terrorism/natural disasters. If you get sued at a later date, you do not want to discover you fell below the standards set by other businesses of a similar nature.

NOTE: The Spy-Ops top 100 terrorist target list for the U.S. is an excellent way to determine if you might be at risk.

Additionally, as part of your business continuity planning (BCP), consider the role of lower level employees in identifying difficulties and/or problems that may occur after a crisis emerges. Often the people at the ground level of an organization can think of scenarios that upper management may not even consider.

Examine the interior and exterior designs of your building. Common sense can go a long way, and if your business is located in an area being discussed as a target for attack in the newspapers, how does your building design (inside and out) create or mitigate risks?

Finally, the use of better technology, policies/procedures, and communications should be discussed not just in terms of effectiveness but from a legal standard:

“...but/for this piece of equipment, policy, or communication, etc. – would people be hurt or the business unable to make profit if a situation arises?”

Conclusion: Ultimately every business must consider terrorist and natural disaster threats as having the potential to increase liability. While you may not need to seek an attorney for every difficulty you face, it never hurts to think like an attorney as part of your business planning.

Spy-Ops Top 100 Terrorist Targets

ECONOMIC TARGETS

Oil Pipelines
Banks
Financial Institutions
Gas Stations
Oil Companies (UNOCAL Oil and other companies Bush owns or has stock in)
Car Companies (Ford, General Motors, Chrysler)
Oil Tankers
Fort Knox
The Wheat Belt
Important Bridges
New York Harbor
The Lincoln Tunnel
The Holland Tunnel
Post Offices
UPS /FedEx
Empire State Building
The New World Trade Centre (once completed)
Wall Street
New York Stock Exchange
New York Power Grid (a Pinch or EMP bomb)
Power Lines
Coal Power Plants
Nuclear Power Plants
Chemical Companies

POLITICAL TARGETS

George W. Bush
Dick Cheney
The First Lady
Mrs. Cheney
The Bush Family
The Reagan Family
The Cheney Family
US Embassies
US Consulates

Saudi Arabian Embassy in Washington
British Embassy in Washington
Polish Embassy in Washington
Japanese Embassy in Washington
Governor of Texas
Governor of Florida
The Statue of Liberty
Washington DC Convention Centers
The White House
Air Force One
The Lincoln Memorial
Camp David
The Smithsonian Institute in Washington
The Washington Monument
Oil Pipelines
Banks
Financial Institutions
Gas Stations
Oil Companies (UNOCAL Oil and other companies Bush owns or has stock in)
Car Companies (Ford, General Motors, Chrysler)
Oil Tankers
Fort Knox
The Wheat Belt
Important bridges
New York Harbor
The Lincoln Tunnel

TOURISM TARGETS

Museums (especially military museums)
Walt Disney World
Disneyland
Theme parks
Grand Central Station
The New York Subway
The Chicago Subway
The Los Angeles Subway
New York Airports
L.A. Airports
Train Stations
Ferries –including the Statue of Liberty Ferry.
Airport Control Towers

Opera Theatres
Expensive Restaurants
Expensive Hotels
New York Hotels
Washington Hotels
Las Vegas Hotels
Los Angeles Hotels
Houston Hotels
Dallas Hotels
New York City on New Years Eve
Cruise Ships
Ski Resorts
Golf Clubs
Tennis Championships
Casinos
Boxing matches
Academy Awards
Restaurants that are Popular with Celebrities

EDUCATIONAL TARGETS

Universities
Private Schools
Summer Camps for the Rich
School Buses
Harvard
Princeton
Yale (George W. Bush's University)
M.I.T.

ECOLOGICAL TARGETS

The Wheat Belt
Forests
Cattle
National Parks (Yellowstone, etc)
Hoover Dam
Dams
Garbage Dumps

MILITARY TARGETS

Fort Knox
Military Bases
NASA
The Pentagon
The International Space Station



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