Standards: Sword or Shield in Corporate Liability?

In a world of risk, can standards mitigate legal liability?

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About InterCEP

• World’s First Academic Research Center Dedicated to Private Sector Preparedness & Corporate Resilience

• The Alfred P. Sloan Foundation Funds InterCEP Research on Incentives for Business Preparedness
  – insurance, rating agency, mitigating legal liability, supply chain, corporate governance

• Research Focus on the Linkage of “What” & “Why” of private sector resilience
Standards as Sword

- All additional points made earlier
- Litany of requirements that show up deficiencies
- Additional attack points for trial lawyers
- Nascent regulations
- Take away “wiggle room” (we can’t do everything).
Standards as Shield

• Conformity with a “consensus-based” standard which represents good practice at any point in time can inform “the standard of care” owed by the corporation

• Compliance can provide a strong foundation for an affirmative defense against tort liability
Standards as Shield

- We endorse the American National Standards Institute's recommended standard for private preparedness [NFPA 1600]. … 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.
  - Federal 9-11 Commission Final Report
Standards as Shield

- Can add specificity to otherwise open-ended responsibility
  - Specificity can help answer the question of: “how much is enough?”
  - Can add realistic balance to the discussion
- Especially if the standard involves a risk assessment element and cost-benefit analysis (as does NFPA 1600)
Lessons for SDO’s

• There is real value in substantiating your consensus-based and transparent development process

• Your standards may help inform the standard of care and thus compliance with them may mitigate liability for your users

• Consider promoting this to your users
Lessons for Corporations / Users of Standards

• Look to compliance with consensus-based standards as part of enterprise risk management and liability mitigation goals
• Proactively, use standards to inform your planning and operations
• Document your conformity where appropriate to facilitate an affirmative defense to future liability
A Developing Story

• “Implementing Recommendations of the 9/11 Commission Act of 2007” - Public Law 110-53. [Title IX, Section 524]
Voluntary Corporate Preparedness Certification Program

• Will establish a certification program for private sector preparedness
• Will be based on one or more preparedness standards. NFPA 1600 is example.
• Will be voluntary.
• Offers an opportunity to link preparedness to benefits in
  – Mitigating legal liability
  – Insurance
  – Rating agency acknowledgement
  – Supply chain management
  – Overall corporate resiliency.
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