

Prevent the Event

**Planning For The Event:
Avoiding the Adverse Consequences of Failing to
Prepare for an Emergency**

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A. Why is planning important?

1. Required in order to fulfill applicable corporate obligations.
2. Required to comply with regulatory standards.
3. Required to minimize potential liability to third-parties.
4. Required to survive the event.

B. The Board of Directors has an affirmative obligation to ensure that the corporation is adequately prepared to respond to emergencies and/or terrorist threats.

1. In In Re Caremark, 698 A.2d 959, 970 (Del. Ch. 1996), the Court held that a Board of Directors had an affirmative obligation to ensure that the compliance procedures of its subordinates were adequate. Specifically, the Court determined that:
 - A Board is required to exercise its good faith judgment that the corporation's information and reporting system is, in concept and design, adequate to assure the Board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations.
 - A failure to ensure that the corporation's information and reporting system is adequate may render a director liable for losses caused by non-compliance with applicable legal standards.

2. What impact does the Caremark decision have on emergency planning?
 - Officers and directors of a company owe a duty to the corporation to be vigilant and to exercise ordinary and reasonable care to preserve the corporate property.
 - Even if there is no statutory requirement to have an emergency plan (and often there are statutory requirements) the fiduciary duty imposed on officers and directors obligates them to ensure that the company is adequately prepared to respond to emergency situations.
 - A failure to adequately plan to preserve the corporation's assets can subject officers and directors to personal liability based on a breach of their fiduciary standards.

3. Implementing the Caremark Standard:

- Establish an in-house corporate crisis management team.
- Ensure that the company has established a crisis response plan.
- It may be helpful to obtain outside expert advice concerning the best way to structure an appropriate crisis management team and/or crisis response plan, in order to invoke the safe harbor provisions afforded Boards which rely in good faith upon advice from an expert.
- Ensure that a framework is in place to enable the crisis management team to report regularly to the Board or an appropriate member of the Board concerning the company's level of emergency preparedness.
- Ensure that the company's insurance policies provide an adequate level of risk protection.
- Ensure that the company has an environmental management system in place that is adequate to ensure the company's compliance with environmental health and safety regulations.

C. What have companies done to minimize the risks and/or respond to the threat of an environmental event?

1. Compliance with statutory obligations, including:
 - CAA §112(r) Risk Management Plans.
 - OSHA Emergency Action Plans, including for the Process Safety Management of Highly Hazardous Chemicals.
 - EPCRA §§302, 311, 312, 313 Reporting.
 - DOT Requirements.
 - RCRA Waste Management Standards.

2. Compliance with voluntary programs or standards, including:
 - Implementation of ISO 14000 standards.
 - Other environmental compliance and management systems and/or programs such as Responsible Care™ Program.
 - Corporate and facility compliance audits.
 - Industry standards/guidelines.

3. Consideration of company specific risks when evaluating compliance with statutory and voluntary obligations:
 - Customer product use.
 - Transporters.
 - Suppliers.
 - Availability of detailed information concerning facility chemical usage and storage on the Internet.

D. Impact of September 11, 2001 Attacks.

1. Prior to September 11, 2001:
 - Most companies had a system in place for responding to emergencies, and perhaps even a plan for responding to an emergency as serious as a terrorist incident.
2. After September 11, however, the obligations facing many companies have been altered due to the heightened nature of the risk facing these companies.

E. Heightened Obligations Following the Terrorist Attacks of September 11, 2001.

1. Following September 11, companies need to reevaluate their state of preparedness for emergency and/or terrorist incidents.
 - Companies are now on notice that the possibility of a terrorist incident is a real threat.

2. An effective mechanism to accomplish this reevaluation is to implement audits that focus on the company's overall emergency response plan, each individual facility's state of preparedness, and the potential impact on each company "asset" of an emergency.
 - The company should consider use of counsel (inside or outside) to enable it to avail itself of all applicable privileges.
 - The company should evaluate federal and state audit privileges and policies to ensure that it can avail itself of the protections afforded by these statutes and policies, if instances of non-compliance with regulatory obligations are discovered.
 - Special attention should be paid to newly acquired facilities, managers, and EHS and security personnel. Regardless of the sophistication of any emergency plan, the plan is only as good as its weakest link.

F. Satisfaction of Corporate Obligations Following September 11, 2001.

1. The obligation on a corporate board is to ensure that the company's information and reporting system is adequate to assure that the company has taken appropriate precautions in light of the risks facing the company.
2. In light of the events of September 11, 2001, corporate boards need to:
 - Ensure that the corporation has reexamined its level of preparedness to respond to an emergency situation and/or terrorist incident.
 - Ensure that there is ongoing review of existing insurance policies, so that each facility has insurance coverage appropriate to the particular risks facing the company.

- Consider whether additional public disclosure concerning specific risks is now required in light of the events of September 11.
 - ❖ Although general risks that could apply to any company probably need not be disclosed, for companies in certain industries (i.e., chemical production or defense industries), it may be advisable to address the potential increased risks following the attacks in upcoming 10-Ks.
 - ❖ The SEC has not, as yet, provided additional guidelines to companies concerning September 11 disclosure.

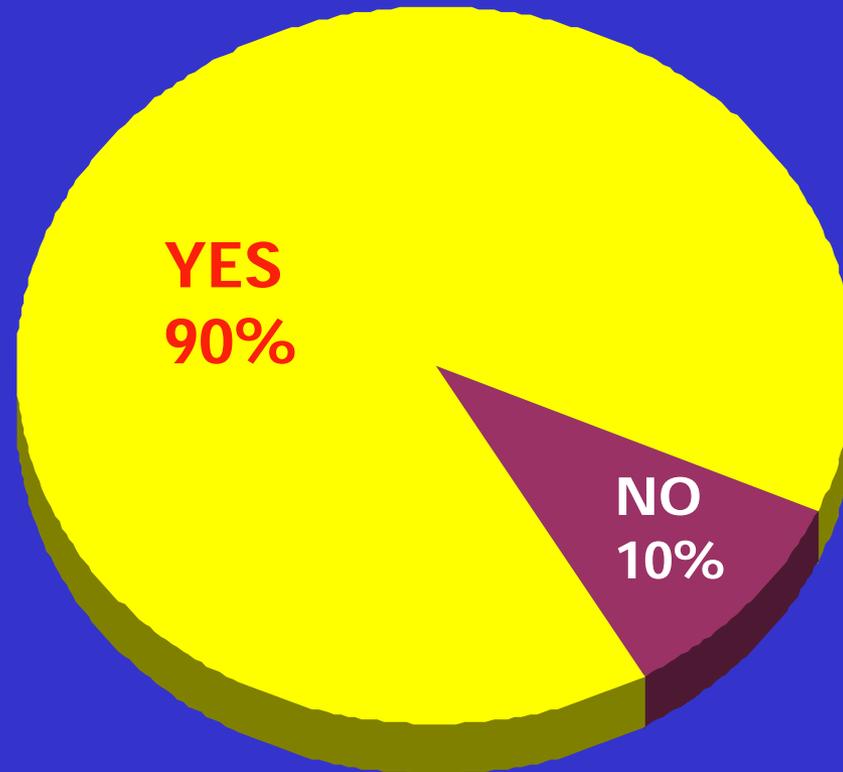
3. Companies should reevaluate regulatory obligations.
 - Companies must review and revise if necessary:
 - ❖ CAA §112(r) Risk Management Plans.
 - ❖ Other statutorily required emergency response plans.
 - Companies should also reevaluate the amounts and types of chemicals used at each facility to determine whether modifications can be made so as to reduce the overall risk that the facility faces as well as to reduce or eliminate EPCRA reporting.
 - ❖ This action could minimize the facility-specific information available on the Internet.

4. Companies should reassess Internet vulnerability.
 - Another important component of reassessing a company's overall emergency preparedness is examining the information available on the Internet.
 - USEPA has retracted some of the information concerning worst case disaster scenarios that was available on the Internet.
 - However, companies must still carefully evaluate the information currently available on the Internet:
 - ❖ Information made available by the company should be reviewed to ensure that it does not disclose sensitive information.
 - ❖ Information made available by third-party sources must be reviewed to ensure that facilities are adequately prepared to respond to any increased threats that the availability of this information may pose.

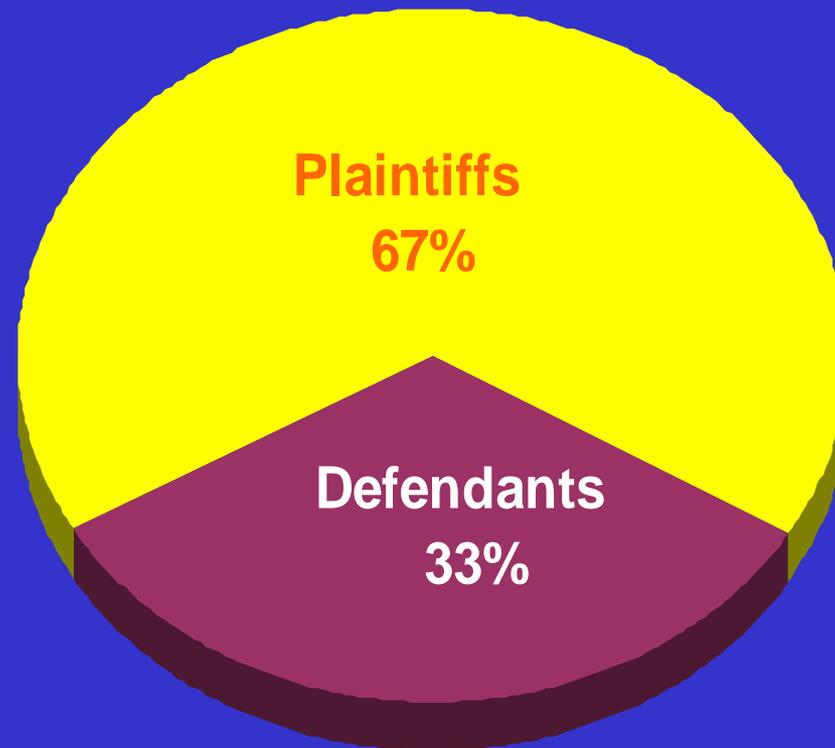
5. Companies should reevaluate compliance with voluntary programs, industry guidelines, and industry standards.
 - Companies must carefully review all voluntary standards, codes, and plans to ensure that the obligations imposed by these voluntary programs are being fully complied with.
 - Often, these voluntary programs have the effect of raising the regulatory bar such that a company's failure to adhere to these standards may subject the facility to liability that might not otherwise attach.

- Risks of failing to adhere to voluntarily imposed codes and standards.
 - ❖ The Plaintiffs' bar will rely on these codes and standards to establish a higher standard of care than may have existed had these standards not been adopted.
 - ❖ How do the courts treat these standards?

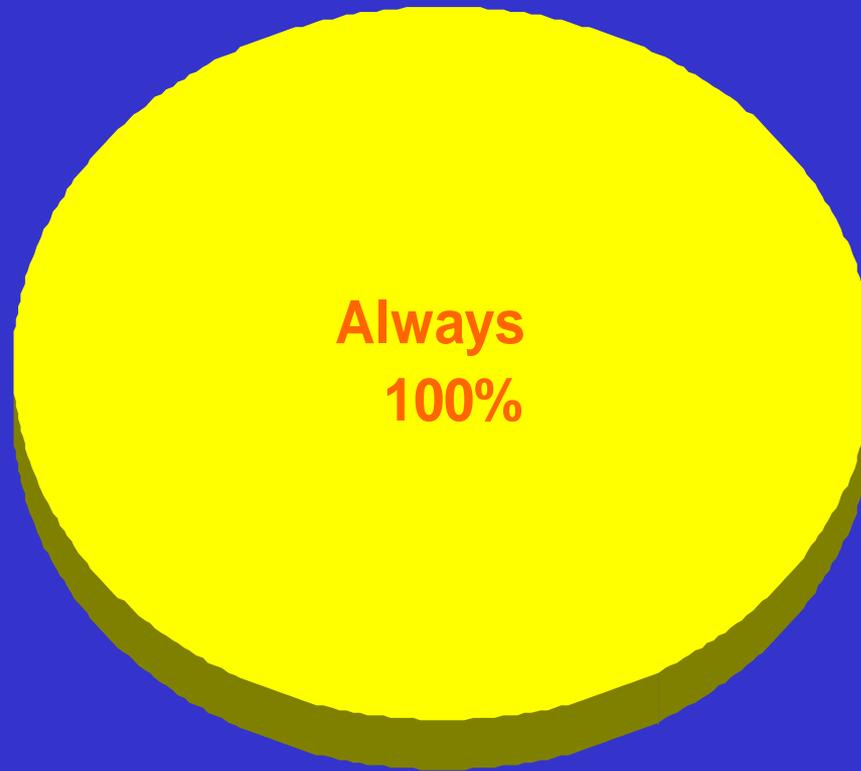
Are Voluntary Guidelines Admissible?



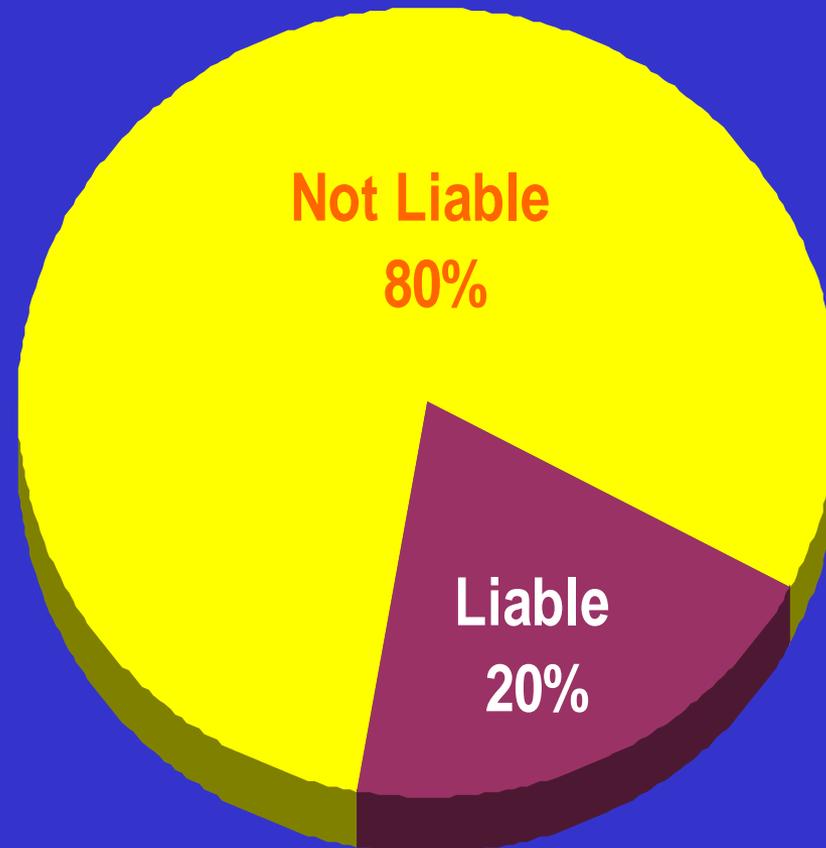
Who Seeks to Admit Voluntary Guidelines?



When are Defendants Liable for Noncompliance?



How Often Are Defendants Found Liable When They Comply?



Conclusion

- ▶ Following September 11, 2001, companies are obligated to review and reevaluate the preparedness of each company "asset" to respond to an emergency or terrorist incident.
- ▶ This review and reevaluation must include an examination of compliance with applicable regulatory and voluntary compliance codes and standards.
- ▶ Corporate Boards have affirmative obligations to ensure that this review and reevaluation is undertaken appropriately.
- ▶ While companies may not be able to avoid an emergency, by adequately planning for an emergency, companies should be able to minimize the adverse consequences of an emergency.