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Be Prepared—Managing Catastrophic Risks in Franchise Systems

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The events of September 11, 2001, were the most dramatic and violent terrorist attacks ever in the United States, but they were hardly the first such incidents domestically or abroad. The bombings at the World Trade Center in 1993, the Atlanta Olympics in 1996, and the Oklahoma City federal building in 1995 demonstrated America's vulnerability to terrorists. Many parts of the world, including the United States, have suffered chemical and biological attacks, airplane hijackings, shootings, and other terrorist incidents.[1]

All businesses need to focus on risk management for terrorism and other potential disasters. Because franchising developed as a particularly American business form,[2] and many franchise systems are among the most prominent consumer brands, those systems are potential targets of choice for terrorists. The size, number of personnel, and magnitude of activity in franchise systems make them susceptible to other kinds of crises as well. Thus, franchisors and franchisees should be especially vigilant about catastrophic risk management.

The process of developing a disaster management program starts with identifying potential risks that a system may confront. Today, this process requires a broader view of risks than ever before. Typical plans address safety of workers and customers, identify ways to help avoid crises in the first place, and establish step-by-step responses when disasters occur.

This article discusses these and other aspects of a catastrophic risk management program and other components, including safety training and audits; practice and implementation drills; steps to protect company data; risk management components in recruiting personnel; planning for sudden closures; the role of contract force majeure clauses; the prudent use of liability and casualty insurance to reduce the impacts of crises; and succession procedures in case key personnel become unavailable.

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Terrorism and Other Crises Today

The World Trade Center attacks demonstrated that government properties are not the only terrorist targets. Prominent business centers, which include franchises, are potential objectives for those bent on striking American interests and icons.[3] Bombings of American franchises and kidnapping of franchisor executives are examples of assaults waged on American interests.[4] For example, in October 2001, a KFC restaurant was destroyed in Indonesia to protest the United States's bombing of Afghanistan.[5] In 1992, McDonald's closed fifty-seven outlets in Taiwan following explosions in two separate restaurants.[6]

Today, anything American and any popular or important location at home or abroad are potential terrorist targets. Franchised businesses are especially vulnerable because they are usually American,[7] advertising tends to make them well known, and the nature of franchising results in many locations. This means that terrorists have repeated opportunities to see and think of franchised brands as targets of choice, and when these franchises are attacked, people across the United States are familiar with the brand involved.

Recent events spurred governments at all levels to increase dramatically preparedness for domestic terrorism. Franchise systems must similarly heighten preparation for these risks. With potential attackers seeking to disrupt the American way of life, preparation not only enables a franchised business to survive, but also contributes to the preservation of freedom for an entire society.

Nor is terrorism the only potential disaster that threatens franchised businesses or their customers and workers. Tainted food at quick-service restaurants,[8] crimes against customers, news media exposure of employee misconduct, filing of lawsuits, or announcements of government investigations—any of these can permanently tarnish a brand name and reputation, demoralize employees, discourage customers, and bring lasting harm to a franchised business.

Thinking the Unthinkable

One of the lessons of September 11 is that preparations for a franchise system must encompass not only dangers that are common risks in a civilized society, but also threats that previously were outside our frame of reference. In short,

franchise management must try to think of and prepare for the unthinkable.[9]

Each business must permit itself to contemplate, articulate, and plan for contingencies that previously would have been beyond reason. These include covert time bombs, suicide bombings, bioterrorism, chemical attacks, hostage taking, poisoning of food and water, shooting, and any other imaginable violent crime.

The unthinkable also extends beyond crimes of violence. Corporate identity theft, computer sabotage, anonymous infringement,[10] and spreading of false information and rumors[11] are examples of other modern threats to a business generally. Management of a franchise system will be able to identify other previously unthinkable threats to which the particular business is especially susceptible.[12]

Protection from What, for What

Identifying threats to a franchise system, or to a franchisee, is the first step. The key goals of preparation are to prevent the unthinkable from happening, if possible, and to reduce the impact when it does. After identifying events that may occur, a franchise business's logical next step is to set priorities in planning for and protecting against those hazards. Planning includes a range of elements, among them (a) identifying steps to reduce the risk of an attack or other incident; (b) developing step-by-step instructions telling personnel what to do in the event of a crisis; (c) training and drilling of those steps; (d) managing risk through casualty, liability, and interruption insurance; and (e) making use of risk management provisions in franchise agreements and in agreements with suppliers, customers, and others.

Adopting Disaster Management Goals and Priorities

In a society that places the highest value on life and health, the principal goal of any plan for reacting to an actual disaster must be to protect the safety of customers and employees and to arrange for immediate attention and first aid in the event of physical danger.[13] Regardless of the type of franchise involved, an important element of a system's or location's disaster plan is to reduce risks of injuries and to provide first aid and medical care for anyone who may be hurt.

After this objective, a range of alternative goals is possible in planning and preparing for disaster. A company's priorities will include determining how its resources are allocated and the contours of the disaster plan itself.[14] Among a wide range of possible objectives are:

- Helping personnel recognize signs of an impending incident. For example, an alert employee who identifies an explosive device near a franchised business premises and contacts authorities may help avoid a tragedy.
- Providing personnel and others with a valid sense of confidence that the system has a plan in place to avoid, address, and reduce the impact of disastrous incidents.
- Reducing panic and providing step-by-step guidelines for personnel to follow in the event of a crisis.
- Keeping the system operating by avoiding or reducing the duration of any closure. Continuing operations may be critical to the system's survival.
- Continuing to provide goods and services to customers who need them. Patients may depend on services and products of a pharmacy or home health care franchise. A real estate franchise could have property transfers in escrow. A hotel may have guests. Any franchise may have customers who depend continuously on its goods and services.
- Making resources of the business available to help employees, customers, and members of the community who are in need.
- Preserving goodwill of the brand and avoiding tarnishment by association with a negative event. The franchisor and its franchisees share an interest in preserving the reputation of the brand.
- Avoiding loss of income to owners.
- Avoiding loss of or injury to property. Different kinds of incidents may pose a direct threat of injury to tangible property, and a crisis management plan may therefore have, as an objective, the preservation of property.
- Avoiding liability to others. Injuries caused by a disaster may extend beyond damage to the business itself. Employees, customers, and affected neighbors may be hurt by the incident or its aftermath, and may believe that duties were breached. Incident planning could therefore include the goal of performing all legal duties for the purpose of reducing or avoiding unnecessary liability exposures.[15]
- For a franchisor, maintaining the confidence of its franchisees to preserve the operation of the franchise system. The franchisor's crisis management plan may therefore include a component for this purpose.
- For a franchisee, maintaining consumer confidence.
- Facilitating communication among company leaders and personnel.

With priorities set, a disaster plan can be developed that instructs personnel in what steps to take to achieve the established goals.

Disaster Plan Training, Practices, and Drills

Most adults recall fire and other safety drills from elementary, middle, and high school. The armed services, fire fighters, police, and ambulance personnel devote a large portion of their time and energy to training and drilling for emergencies. Drills have the benefits of familiarizing personnel with steps to be taken if a plan must be invoked and uncovering weaknesses in the plan that need to be revised. Franchisors should require drilling of their emergency plans and recommend that their franchisees do the same.

There are various ways to conduct a drill. One is to construct a mock incident. This may involve alerting personnel in advance that a drill will be conducted to test implementation of the plan. Other ways may include scheduling a drill during a weekend retreat or a special meeting for the purpose of practicing implementation of the plan; setting aside part of a particular meeting for this purpose; designating a specific region, location, or locations that will be test sites, possibly during or immediately after regular business hours; or

announcing that a practice run of a disaster plan will be conducted but waiting until the practice itself to identify the location or people who will be targeted.

Other Facets of a Disaster Management Plan

Other components of a franchise system's disaster management plan may include security training;[16] safety audits; casualty, liability, and interruption insurance; and use of risk management provisions in contracts with suppliers, vendors, franchisees/franchisors, customers, and others.

Safety Audits

Safety audits have long involved examination of a company's premises and equipment, as well as circumstances that could affect customer and employee safety. The audit could include such basic matters as interior and outside lighting, use of hazardous equipment, and conditions in parking facilities or elsewhere that could expose customers to harm.[17] Safety audits may also include analysis of company operating procedures to identify critical process points that create risks of accidents.

A franchised business must continuously make sure that its products, services, and premises are safe. Operating methods must be reviewed to make sure that they avoid unnecessary risks to customers and employees. Business premises should continue to be kept well lit, clean, clear of debris, and protected by adequate security measures. Products should meet or exceed industry safety standards. Consultation with trade associations, insurers, and safety testing organizations[18] can help a company identify and assure compliance with industry standards.

Today, safety audits must increasingly include examination of utilities and utility sources such as water, air conditioning and ventilation, electricity, and other areas that may be vulnerable as host sites for biological or chemical attacks. The nature of an audit will depend on the type of business involved. For example, restaurants must be vigilant about the safety of food that they serve while hotels must focus on security of their lodgings.

Some safety features that may need to be considered at any business could include separating personnel from the public by locked reception areas and entryways, implementing procedures to secure doors and windows, using setbacks and and other design barriers to reduce exposure to explosives, using bullet- and explosive-resistant glass and doors to protect against firearms, and protecting ventilation systems to reduce the risks of biological and chemical attacks.

Data Protection

Preparation and planning to reduce the impact of a disaster (or crime) may require arrangements to protect company, as well as customer, data. These arrangements may include reexamining and improving backup procedures, duplicating computerized and documentary data, and storing duplicates at remote sites. This element of a risk management program may also involve periodic drills and tests to make sure that duplicated, stored data is recoverable if the need ever arises.

The company should also make backup copies of key

Disaster Plan Checklist

Here is a possible framework for a crisis management plan:

- ❑ **Explain why the system is adopting the plan.** This may involve a message from senior management to franchisees, or from the owner to employees, discussing today's environment and explaining why the company considers it important to adopt a plan.
- ❑ **List the kinds of incidents** that the plan addresses. This portion of the plan should state frankly the range of incidents that can occur and that the company must be vigilant to prevent and to respond to. It may also note the impossibility of identifying and addressing every evil event that might occur.
- ❑ **Define an emergency.** This part of the plan provides guidance to company personnel on what incidents rise to the level of an emergency requiring invocation of the plan, and what routine occurrences are not to be considered emergencies. For example, a single disgruntled customer is an important matter that requires attention but would not justify invoking an overall emergency plan. However, an incident involving a mob or a customer wielding a weapon would qualify as an emergency under any reasonable definition and would justify calling for the aid of professional security and law enforcement.
- ❑ **Discuss steps that personnel should take** to reduce disaster risks. As an example, the plan could provide guidance on how to reduce the risk of violence, attacks, bombs, and the like. The plan may focus on the use of fencing and lighting, locking doors and windows and otherwise controlling access to premises, and being alert to strangers and strange packages. Use of security guards, monitoring, electronic access controls, security-oriented architectural designs, and more restrictive employee recruitment policies are additional measures that particular companies might choose.
- ❑ **Identify who will take charge** until management can be assembled to make decisions and give directions. A temporary succession needs to be in place in case the principal executive is unavailable, and those in line to act in a more senior officer's capacity must be aware of their temporary responsibilities.
- ❑ **Instruct personnel about whom to contact** if they suspect that a disaster has occurred that could trigger the plan. The particular response depends on the kind of emergency. Some, like violence or other crimes, require calling the police first. Others, like utility failure, computer virus, or government-

ordered closure, require calls to senior management. Other steps that depend on the nature of the emergency are securing the location, deciding whether to keep staff on duty or send them home, alerting off-duty personnel and instructing them about what to do, and knowing whom to contact for more information.

- ❑ **Respond to immediate disaster or danger.** Typically, this is an evacuation plan implemented for fires, bomb threats, or other immediate threats to the physical safety of people at the company's premises. A company may designate particular employees to coordinate the evacuation. This need not be any more complex than typical fire drill procedures for leaving the premises and making sure that everyone is accounted for.
- ❑ **Provide steps for communication** among personnel. These can include a central phone with a recording used to disseminate emergency information or sharing information via the company's Internet website, e-mail, or phone tree. In some potential disasters electronic communication may not work. Plans may be needed for establishing message trees or relays among company personnel.
- ❑ **Remind personnel to follow the directions** of police officers, fire personnel, emergency medical technicians, and other authorities. People become afraid in times of crisis and danger.
- ❑ **Provide step-by-step instructions** on what each employee should do in the event of a disaster, e.g., where they should go, whom they should help, and/or what assets they should secure. This part of the plan will likely be different for senior management and rank-and-file personnel.
- ❑ **Create a contact list** with information on law enforcement, health and safety officials, and company personnel, as well as authorization with regard to who may modify or countermand the plan.
- ❑ **Distribute the plan.** The emergency response plan must be provided to appropriate company personnel. Distribution as a routine memo that many personnel may not read, or may read and discard, could be insufficient. To improve usage and dissemination, the plan could be repeated on the company's website, in an area for employees. Some companies may choose to reduce key portions of their emergency response plan to wallet- or purse-size cards that can be carried by personnel at all times. The plan could become part of the system's operating manual as well.

computer software needed to conduct the franchise system's operations and the copies should be stored remotely. If a company's computers are located onsite, it may even be necessary to purchase and store redundant equipment offsite, for use in an emergency or following a disaster. Arrangements should be made for access to source codes in the event that the software provider cannot be reached or becomes unavailable. This may include third-party source code escrow or onsite source code lockbox arrangements.[19]

First Aid and Safety Training

A risk management plan may include first aid and safety training. This training can include various first aid methods, cardiopulmonary resuscitation, and other emergency safety training for managers and potentially all personnel. A safety component could be included as part of the franchisor's training program, or could be provided as an additional training option.

Review Recruiting Policies

It is no longer too farfetched to screen for individuals who may be or become a threat to the security and safety of a company. In addition to skills at a task, prospective employees should be screened for the likelihood that they may engage in industrial espionage, theft of secrets, sabotage, or the like. A number of organizations provide methods, systems, and validated standardized tests to evaluate these propensities among job candidates and current personnel.[20]

Security

A safety program may include security elements such as security guards or periodic patrols, camera monitoring, increased restrictions on access to premises, and other arrangements for response in the event of a security breach or dangerous incident. A business may wish to restrict acccess to internal company offices by friends, family, and vendors.[21]

Plan for Sudden Closure

Terrorism or other increasingly violent or dangerous incidents may result in more frequent temporary closures occurring on short notice. Franchised businesses need to have plans to minimize disruption caused by sudden evacuation and closure. For example, food service businesses need to have evacuation plans and need to plan for storage of their perishable inventory. Product sales businesses must be able to evacuate, store valuable inventory, and secure their premises to reduce the risk of vandalism during an evacuation. Service businesses need to make arrangements to continue functioning from other locations if evacuation of the main premises is required.

To minimize disruption to customers, a franchised business needs to have plans in place to explain the circumstances to customers and maintain continuity so that customers will not automatically be lost to competitors.

It has long been a maxim that companies should have multiple sources for key supplies. The increased risk of disruption to supplier chains makes it increasingly important to have multiple sources of supplies for key products and services.[22]

Force Majeure Clauses

The higher risk of catastrophic incidents has brought renewed attention to force majeure clauses. These provisions are commonly included in contracts to suspend or excuse performance in the face of certain events. The clauses have normally been applied when a supervening event beyond the control of either party interferes with the ability to perform.[23] Depending on the language of the clause, the obligation to perform may be suspended throughout the duration of the force majeure event or may lead to the termination of the contract altogether if performance becomes impossible.

To invoke a force majeure clause, a nonperforming party must establish that the excusing circumstance actually prevented performance, was contemplated by the agreement, and was not reasonably within the control of that party.[24] The goal of force majeure clauses is to allocate risk, provide predictability, and alert the parties when performance may be excused.[25]

Many force majeure clauses contain a list of events and a general catchall provision. The list of events includes Acts of God, such as tornados, earthquakes, lightning, floods, fires, and unusually severe weather conditions, and human-created problems that can cause severe hardship for a party such as strikes, lockouts, wars, explosions, and government acts.[26] Reported decisions concerning force majeure clauses in franchise disputes indicate that parties have not often considered the threat of terrorism in drafting the clauses.[27]

By now, it is obvious that terrorism should be included in a force majeure clause. Indeed, the clause could have its most important impact in a terrorist incident. Conversely, failure to include a particular category of incident in a force majeure clause, or failure to include such a clause in a contract, may lead a court to refuse to excuse a party even for a disruption that it could not control.[28] Today, there is increased risk that terrorism would be considered foreseeable, and therefore failure or delay in performance due to a terrorist incident may not be excused unless specifically identified in the force majeure clause.

A franchisor should have force majeure clauses in its agreements with franchisees and with major suppliers to excuse delay in performance because of a force majeure event. Similarly, a franchisee should include these clauses in contracts with suppliers and customers. [29]

Insurance

Insurance is another important tool that must be considered in any comprehensive risk management plan. Consultation with an insurance broker can help a franchisor or franchisee prepare for risks of disruptive incidents. Additionally, since the expertise of insurance companies is managing and spreading risks, consultation with insurers provides useful information about the kinds of risks to which a business is most vulnerable.

A disaster management program should at least review and consider obtaining and maintaining:

- Property and casualty insurance.
- Business interruption insurance that provides coverage for the loss of income to a business if its operations are interrupted due to an incident.
- General liability insurance that provides coverage for claims made against a business, such as claims by customers for injuries that they suffer due to a terrorist or other incident.
- Workers compensation insurance for employees.
- Health and medical insurance programs.

The principal importance of these policies is to reduce or manage a company's disruptions, losses, and liabilities. In addition, the process of applying for these policies, and undergoing the insurance company's review in the application process, will provide information to help a company manage and reduce its exposure to these risks. Having policies such as medical and workers compensation insurance in place helps assure adequate medical care for workers and others who may be directly affected by an incident.

Also, it is obviously important to ensure that the policies do not have exclusions for the important risks such as crime, war, or terrorism, or that steps are taken to provide other insurance coverage for excluded matters.

Entity Management

A business attentive to risk management must provide for continuity of entity management in the event of disaster. Most likely, this includes transition provisions in the entity's charter documents[30] and agreements among shareholders, owners, and partners.[31] These provisions should:

- Authorize an executive or interim executive committee to act and make decisions in an emergency, until the full board of directors, management committee, or other group can be assembled to make decisions.
- Establish a procedure for filling vacancies, temporarily or permanently, if any significant part of the company's management becomes unavailable due to a disaster or other incident.
- Provide guidelines for renewing or evaluating company policies to reduce the risk of an incident that devastates management. For example, some companies have policies that prohibit more than two company executives or multiple members of the board of directors from traveling together on the same airplane. Heightened security may be needed at corporate board or management meetings, and consideration may be given to greater confidentiality about the location and timing of meetings.

Conclusion

The tragedies of September 11 and their aftermath reminded everyone of the need to pay even more attention to matters of security and safety. Terrorism, accidents, tragedies, and other disasters cannot all be prevented. Franchisors and franchisees should adopt disaster management programs to reduce the risks of these events and to limit their effect after the unavoidable happens. This means identifying a broad range of risks, setting priorities to deal with catastrophic events, and developing and implementing comprehensive plans. Preparation for the unthinkable is key to coping with a disaster when it happens.

Endnotes

1. *See, e.g.*, Tracy Wilkinson, *18 Die, Scores Hurt by Suicide Blast in Tel Aviv*, L.A. TIMES, June 2, 2001, at A1; Charlotte Saikowski, *Combating Terrorism*, CHRISTIAN SCIENCE MONITOR, June 26, 1985, at 1; Edward Cody, *World Cup: Terrorism Is a Concern*, WASH. POST, May 19, 1986, at C6; Robert L. Jackson, *Islamic Militants Given Life Terms in NY Bombing*, L.A. TIMES, May 25, 1994, at A1; Brian Jenkins, *Perspective on Terrorism . . . Nerve Gas Attack in Tokyo Should Be Seen as an Aberration*, L.A. TIMES, Mar. 25, 1995, at B7.

2. *See, e.g.*, David Gurnick & Steve Vieux, *Case History of the American Business Franchise*, 24 OKLA. CITY U. LAW REV. 37, 42–47 (describing development of franchising in America).

3. *See, e.g.*, Edward Wright, *Potential Threats Make Travel Riskier Worldwide for Americans*, L.A. TIMES, Oct. 28, 2001, at L8 (military attacks may result in strong anti-American sentiment and retaliatory actions against U.S. citizens and interests throughout the world; symbols of American capitalism abroad may be targeted for attack).

4. Kathy Marks, *Air Strikes on Afghanistan: Demonstrations: Protestors Take to Streets Across the Islamic World*, INDEPENDENT (London), Oct. 13, 2001; Jay Solomon, *How Mr. Bambang Markets Big Macs in Muslim Indonesia*, WALL ST. J., Oct. 26, 2001, at 1. In August 2001, a terrorist suicide bomber killed fifteen people at a Jerusalem franchise of the New York-based Sbarro system. Greer Cashman, *Jerusalem Sbarro Set to Reopen Today*, JERUSALEM POST, Sept. 12, 2001, at 6. McDonald's restaurants have repeatedly been bombing targets. *See, e.g.*, Anne Swardson, *Worker Killed in Bombing at French McDonald's*, WASH. POST, Apr. 20, 2000, at A1; Chicago Tribune Wires, *9 McDonald's in Taiwan Reopen After Bomb Attacks*, CHICAGO TRIB., May 4, 1992, at 4. With regard to kidnapping of franchisor executives, *see* Houston Chronicle News Services, *U.S. Oilman, 5 Others Freed*, HOUSTON CHRON., Nov. 28, 1997, at A35.

5. *See* Marks, *supra* note 4; Spencer, *Indonesia's President Maintains Support for War Against Terror, Despite Protests*, The Associated Press, Oct. 12, 2001.

6. *See* Chicago Tribune Wires, *supra* note 4.

7. *See* Gurnick & Vieux, *supra* note 2, at 42–47.

8. Joby Warrick, *An Outbreak Waiting to Happen*, WASH. POST, Apr. 9, 2001, at A1 (discussing Sizzler and Jack-in-the-Box e-coli contaminations).

9. John Goldman & David Zucchino, *After the Attack; The Devastation*, L.A. TIMES, Sept. 20, 2001, at A1. *See, e.g.*, Shawn Young & Dennis K. Berman, *Trade Center Attack Shows Vulnerability of Telecom Network*, WALL ST. J., Oct. 19, 2001, at 1.

10. *See, e.g.*, Columbia Ins. Co. v. SeesCandy.com, 185 F.R.D. 573 (N.D. Cal. 1999) (claims against pseudoanonymous defendants for trademark and copyright infringement).

11. *See, e.g.*, Global Telemedia Int'l v. Doe 1, 132 F. Supp. 2d 1261 (C.D. Cal. 2001) (dismissing Internet libel action against anonymous defendants); Dendrite Int'l, Inc. v. John Doe 3, 775 A.2d 746 (N.J. Super. Ct. App. Div. 2001) (quashing subpoena seeking information on anonymous, allegedly libelous Internet postings).

12. For example, a food service franchise may be more susceptible to crimes involving poisoning. A hotel franchise may have greater exposure to bioterrorism perpetrated through the ventilation system. A franchised pharmacy may face a particular risk of intentional contamination of medicines. A child care franchise system may face particular exposure to hostage taking and other horrific crimes that target young children.

13. Apart from the moral values reflected by this priority, many courts have also held that both franchisors and franchisees have a legal duty to protect customers and employees from foreseeable harm. *See, e.g.*, Crinkley v. Holiday Inns, Inc., 844 F.2d 156 (4th Cir. 1988) (franchisor and franchisee both liable when injuries to guests were foreseeable and security inadequate); Meyers v. Ramada Hotel Operating Co., 833 F.2d 1521 (11th Cir. 1987) (rape victim raised genuine fact issue on foreseeability of attack); Springtree Prop. v. Hammond, 692 So. 2d 164 (Fla. 1997) (franchisor and franchisee breached duty of care to plaintiff, struck by vehicle, by failing to erect bumpers, guard rails, or warning signs); Martin v. McDonald's Corp., 572 N.W.2d 1073 (Ill. Ct. App.1991) (franchisor had duty to provide security and protection to plaintiffs); Walkoviak v. Hilton Hotels, 580 S.W.2d 623, 627 (Tex. App. 1989) (fact question whether hotel was reasonable in providing security for guests when plaintiff was beaten, stabbed, and robbed in parking lot); Cohen v. Southland Corp., 203 Cal. Rptr. 572, 579–80 (Cal. Ct. App. 1984) (in claim by a robbery victim franchisor did not conclusively establish fulfilling minimal duty of care).

14. For a discussion of crisis management in franchising, *see* Coldwell, Cowan, & Morency, *Dealing with System Change in a High Tech World: Early Tremors, Early Warning*, 24 ABA Forum on Franchising P1, 7–11 (2001).

15. For example, a franchised business planning for disaster could be cognizant of the duty to protect against wrongful acts of others who threaten the safety of customers. *Cohen*, 203 Cal. Rptr. at 572 (franchisor was potentially liable for failure to protect customers from robbery). *See also* Martin v. Armstrong World Indus., No. 95–2849 (JBS), 2000 U.S. Dist. LEXIS 5857 (D.N.J. 2000) (claim for personal injuries from hazardous chemical exposure during cleanup after fire at chemical storage vault); Ahrens v. Superior Court, 243 Cal. Rptr. 420 (Cal. Ct. App. 1988) (utility potentially liable for misrepresenting information on testing, cleaning, and decontamination efforts following transformer disaster).

16. A franchisor that provides a security program must make sure that it is complete and sufficient. *See, e.g.*, Decker v. Domino's Pizza, 655 N.E.2d 515 (Ill. Ct. App. 1994) (by employing security consultants, setting up security hotline, conducting training on robbery prevention, and requiring corporate and franchised stores to use case management system and time-delay safe, franchisor undertook duty to protect personnel and customers); *Martin*, 572 N.W.2d at 1073 (no common law duty to protect against third-party criminal act, but by undertaking to provide security measures, franchisor undertook duty to do so competently).

17. Business owners and, in some instances, franchisors have been exposed to liability for dangerous conditions exposing customers and employees to harm. *See, e.g.*, Crinkley v. Holiday Inns, Inc., 844 F.2d 156 (4th Cir. 1988) (foreseeability of crime in hotel neighborhood made franchisor liable); Papastathis v. Southland Corp., 723 P.2d 97 (Ariz. 1986); *Cohen*, 203 Cal. Rptr. at 572.

18. Underwriters Laboratories, for example. *Cf.* Haberer v. Radio Shack, 555 N.W. 2d 606, 610 (S.D. 1996) (referencing Underwriters Laboratories's testing standards).

19. In a third-party source code escrow, the computer source code is stored with a neutral escrow, pursuant to a three-party agreement between the source code owner/licensor, the licensee, and the third-party escrow. In a two-party lockbox arrangement, the source code is stored at the licensee's facilities in a sealed or locked box that can be unsealed or unlocked only by the licensor. However, in an emergency, the lockbox can be broken open by the licensee (similar to a fire extinguisher stored behind a locked window with a notice stating "in emergency, break glass").

20. *See, e.g.*, Ass'n of Mexican-Am. Educators v. California, 231 F.3d 572 (9th Cir. 2000) (standardized preemployment screening test did not violate civil rights laws); Manns v. Fieldcrest Cannon, Inc., No. 4:96-CV0057, 1999 U.S. Dist. LEXIS 21872 (W.D. Va. 1999) (standardized employment screening test was validated and did not evidence unlawful discrimination).

21. In the wake of the September 11, 2001, incidents and later anthrax attacks, entertainment studios, building management companies, and others implemented more restrictive access and identification policies. *See, e.g.*, Claude Brodesser, *U Security in Dog House*, DAILY VARIETY, Oct. 26, 2001 (All of Hollywood's movie studios have beefed up security since Sept. 11, sparing no expense to add concrete barricades, armed guards, x-ray machines, and explosives-sniffing dogs.).

22. For example, it was reported that the main telephone company switch for much of New York was at a single location across from the World Trade Center. *See* Young & Berman, *supra* note 9, at 1. Now companies are assessing whether to have multiple sources for telephone

services. *See also* Smith, *Morgan Stanley Plans a Backup Trading Floor, Just in Case*, WALL ST. J., Oct. 30, 2001, at C1 (discussing brokerage firm's plan to establish separate trading floor to reduce risk of disruption in event of incident affecting its headquarters's trading floor).

23. John R. Paulus & Dirk Meeuwig, *Force Majeure—Beyond Boilerplate*, 37 ALBERTA L. REV. 302, 303 (July 1999); Jennifer Bund, *Note and Comment: Force Majeure Clauses: Drafting Advice for the CISG Practitioner*, 17 J.L. & COM. 381, 399 (Spring 1998); P.J.M. Declercq, *Modern Analysis of Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 227–250 (Fall 1995).

24. Millers Cove Energy Co. v. Moore, 62 F.3d 155, 156 (6th Cir. 1995) (citing U.S. v. PanHandle Eastern Corp., 693 F.Supp. 88, 96 (D. Del. 1988)); Perlman v. Pioneer Ltd. Partnership, 918 F.2d 1244 , 1248 n.5 (5th Cir. 1990); Nisho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc., 729 F.2d 1530, 1539 (5th Cir. 1984); Harris Corp. v. Nat'l Iranian Radio & Tel., 691 F.2d 1344, 1347 n.5 (11th Cir. 1982).

25. *See* Kodiak 1981 Drilling Partnership v. Delhi Gas Pipeline Corp., 736 S.W.2d 715, 718 (Tex. App. 1987); Bund, *supra* note 23, at 381, 383, 399 (goal of force majeure clauses is to allocate and manage risks of everyday life).

26. Decelercq, *supra* note 23, at 213, 233.

27. *See, e.g.*, Wooten Enter., Inc. v. Subaru of Am., 134 F. Supp. 2d 698, 705 (D. Md. 2001) (force majeure provision); Hodges v. BP Exploration & Oil, C 95–02215 JLQ(BZ), 1997 U.S. Dist. LEXIS 15199 (N.D. Cal. 1997).

28. *See, e.g.*, Connecticut Nat'l Bank v. TWA, 762 F. Supp. 76 (S.D.N.Y. 1991) (refusing to excuse airline's failure to make note payments despite disruption caused by Persian Gulf War and resulting decrease in travel due to fear of terrorism; held that threats of war and terrorism were foreseeable and airline could have negotiated a force majeure clause).

29. A comprehensive force majeure clause in a franchise agreement would read as follows:

> Neither Franchisee nor Franchisor shall be liable for loss or damage or deemed to be in breach of this Agreement if a failure or delay in performance results from (1) transportation shortage, inadequate supply or unavailability from manufacturers or suppliers of equipment, merchandise, supplies, labor, material or energy, or the voluntary surrender of the right to acquire or use any of the foregoing in order to accommodate or comply with any order, request, regulation, recommendation or instruction of any federal, state or municipal government or any department or agency thereof; (2) compliance with any law, ruling, order, regulation, requirement or instruction of any federal, state or municipal government or any department or agency thereof; (3) Act of God; (4) fire, strike, embargo, war, terrorism, riot, hurricane, tornado, earthquake; or (5) other similar event or cause beyond the control of the party whose performance was prevented or delayed thereby. Any delay resulting from any of these causes shall extend the time for performance or excuse performance, as may be reasonable, except that the causes shall not excuse payments of amounts owed at the time of the occurrence or payment of any amount due thereafter. A party seeking relief under this clause shall as soon as practicable notify the other party of its inability to perform under this clause. Ground for relief shall take effect from the time of the impediment, or if notice is not promptly given, from the time of notice.

30. Articles of incorporation, bylaws, LLC operating agreement, partnership agreement, or similar documents.

31. Emergency corporation statutes in Delaware and Virginia, as well as the Model Corporations Act, provide that an emergency exists if a quorum of the board of directors cannot readily be convened due to a "catastrophic event." Under Ohio law, an emergency exists when the governor proclaims that an attack on the United States or other disaster caused an emergency for corporations. In several states that follow the Delaware, Virginia, and Model Act, an event may trigger an emergency corporation statute regardless of whether a public official declared an emergency. In states without an emergency law, corporations can address corporate governance issues by adoption of bylaws that are not otherwise inconsistent with the law or corporate charter. *See, e.g.*, 8 DEL. CODE § 110 (2000); VA. CODE ANN. § 13.1–628 (2001); OHIO REV. CODE ANN. §§ 1701.01, 3901.27.