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The devil is in the details

THE ADMISSIBILITY OF COMPLIANCE OR NON-COMPLIANCE WITH INDUSTRY CUSTOMS/ STANDARDS OR GOVERNMENT STANDARDS IN A DESIGN-DEFECT CASE

In design-defect cases, defendant manufacturers and plaintiffs are frequently confronted with the issue of whether a product's design complied with industry customs/standards or government standards, and further, whether the alleged compliance or non-compliance is admissible evidence.

Regardless of the party who is submitting the evidence, the answer often depends on the purpose for which the evidence is being offered. But, as pointed out by one California Supreme Court Justice: "As a statement of principle, this conclusion is unassailable, if a bit opaque. The devil is in the details." The aim of this article is to address when a defendant manufacturer or plaintiff can introduce evidence in a design-defect case that a product complied or failed to comply with industry customs, industry standards, or government safety standards.

Although not addressed in this article, it is important for counsel to be prepared to support or counter any legitimate objections to these customs or standards evidence based on failing to lay a foundation for such evidence, the methodology or testing may amount to inadmissible hearsay, or the probative value may be outweighed by the danger of unfair prejudice.

Are industry customs or standards admissible in products liability design-defect cases?

Industry custom-and-practice evidence often refers to design evidence within the relevant industry. This is different from what is referred to as "state of the art" evidence, which addresses what can be done under the current state of technology. In other words, industry custom is the prevailing use of technology and state of the art evidence is the best technology reasonably available at any given time.

Industry custom-and-practice evidence often comes from industry standards circulated by trade organizations or associations that are made up of manufacturers or other various entities. Industry custom-and-practice evidence may also come from an expert or manufacturer who states that something is done by nobody or by everybody in a specific industry. For example, evidence that no manufacturers in the motor vehicle industry use a certain type of steering technology or evidence that all manufacturers use that type of steering technology.

There are many trade organizations and associations that can provide customs or standards evidence for certain types of products. Examples of commonly known trade associations are the Associated Society of Mechanical Engineers (ASME) and the Associated Society for Testing and Materials (ASTM). There are also many lesser-known trade associations. For instance, we have handled defective-design cases against manufacturers

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of portable generators when the manufacturers did not include an automatic CO shut-off sensor for when too much carbon monoxide is accumulating in a specific area.

In these cases, we learned that many manufacturers of portable generators are members of the Portable Generator Manufacturers Association (PGMA). Additionally, the American National Standards Institute (ANSI) oversaw the development of PGMA's standards, which included the safety features requiring CO shut-off technology. In opposing one defendant's summary judgment motion, we presented evidence of ANSI PGMA research and standards as evidence of a design defect.

There is also Underwriter Laboratories (UL), which is an organization that performs testing of products and makes determinations as to safe operation for those products. The United States Consumer Product Safety Commission (CPSC) is an agency of the United States government and seeks to protect the public against unreasonable risks of injury associated with consumer products. (15 U.S. Code § 2051(b)(1).) CPSC also works to develop voluntary and mandatory safety standards. (15 U.S. Code § 2051(b)(3).)

In California, the admissibility of compliance with industry customs or standards from these organizations and trade associations in a products liability action depends on the purpose for which the evidence is offered. The admissibility of evidence about a manufacturer's compliance or non-compliance with industry customs or standards may also vary depending on the types of theories under which liability for a product defect is sought. (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 424; citing *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 566.)

As a general principal, California courts have held that, even when admissible, evidence of industry customs and practices is not dispositive because "perhaps the entire industry has 'unduly lagged' in adopting feasible safety technologies." (*Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 36.) In other words, regardless of the legal theory, evidence of whether a product conforms with industry standards is not admissible when used by a manufacturer to show that they acted reasonably and, therefore, cannot be held liable.

Negligence theory

Industry customs or standards may be admissible under a negligence theory to show whether a manufacturer exercised due care. In negligence cases, the issue of whether a manufacturer exercised due care is at issue and, as such, a jury should take into account what a manufacturer may or may not have considered in its design approach as shown by industry standards. Again, a manufacturer's compliance with regulations or trade custom "does not necessarily eliminate negligence but instead simply constitutes evidence for jury consideration with other facts and circumstances." (*Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1830-1831.)

Alternately, in strict-liability product-defect cases, the product is at issue and whether a manufacturer exercised due care is not relevant. This does not mean, however, that industry customs or standards are categorically inadmissible under a strict-liability design-defect theory. In strict liability, the admissibility will, in large part, turn on the test used for design defects. As a practical matter, it is common for plaintiffs to include a negligence claim in their complaint, but drop the claim before the start of trial. The reason for this is to give the plaintiff the opportunity to exclude certain pieces of evidence that may demonstrate the defendant's conformance with certain industry standards or testing.

Strict products liability: Design defect

Many have argued that the admission of industry customs and standards would eliminate the difference between negligence and strict liability. This is based on the fact that in negligence claims we look to the manufacturer's conduct, and in strict products liability claims we focus "not on the conduct of the manufacturer but on the product itself, and hold[] the manufacturer liable if the product was defective." (*Brown v. Superior Court* (1988) 44 Cal.3d 1049.) The American Association of Justice has stated that "the conduct of the manufacturer should not be judged by reference to other manufacturers; it is the product which must be judged as either sufficient or deficient."

As we will see, California cases agree or disagree depending on which design defect test is used. There are two ways to prove a design defect: (1) the consumer-expectations test, or (2) the risk-utility test.

Consumer-expectations test

The consumer-expectations test asks whether a product's design is defective because the product did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way. (See CACI No. 1203 for all elements.) Under the consumer-expectations test, evidence of industry customs or standards is irrelevant because the issue is only whether the product fails to perform as an ordinary consumer would expect.

In *Howard v. Omni Hotels Management Corp.*, *supra*, 203 Cal.App.4th at p. 410, the plaintiff was a guest at the Omni Hotel when he slipped and fell in the bathtub. The plaintiff filed a suit against the manufacturer of the bathtub alleging that the bathtub was defective because the coating did not comply with "applicable standards." The defendant manufacturer filed a motion for summary judgment along with a supporting declaration from one of their engineers showing that the bathtub was in compliance with the ASTM and ASME standards. The plaintiff's expert agreed with the manufacturer's engineer that the bathtub complied with industry standards. After the court granted the manufacturer's motion for summary judgment, the plaintiff appealed,

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arguing that he had presented sufficient evidence from which a trier of fact could have found the defendant manufacturer liable under negligence or strict product liability theories, utilizing a consumer expectations test.

The Court of Appeal reversed, holding that when "applying the consumer expectations test, the safety expectations of the general public are at issue, not safety regulations of an industry or government agency." (*Id*. at p. 424.) Under the consumer-expectations test, the plaintiff is limited in the amount of expert testimony he can present because this test "is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design." (*Ibid*., quoting *Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 567.)

Therefore, when the safety of a product is within common knowledge, expert witnesses cannot be used to demonstrate what an ordinary consumer should expect. "Use of expert testimony for that purpose would invade the jury's function, and would invite circumvention of the rule that the risks and benefits of a challenged design must be carefully balanced whenever the issue of design defect goes beyond the common experience of the product's users." (*Soule*, *supra*, 8 Cal.4th at p. 567.)

In fact, it is reversible error to admit such evidence under the consumer-expectations test. (*Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 545, judgment vacated on other grounds and cause remanded.)

In situations where a plaintiff knows that the defense will try to admit into evidence that the manufacturer met certain industry customs or safety standards, the plaintiff may consider using the consumer-expectations test as their only basis for liability. The plaintiff can then argue that under California law it is a reversible error to admit industry customs or safety standards under a consumer expectations test given that the issue is not whether the manufacturer exercised reasonable care, but rather whether the product failed to perform as the ordinary consumer would expect.

Conversely, if the plaintiff tries to put certain industry customs or standards at issue, this may very well open the door to allow the defendant manufacturer to show compliance with certain industry standards. As a Maxim of Jurisprudence states, "[h]e who takes the benefit must beat the burden."

Risk-utility test

Under the risk-utility test, the plaintiff must prove that (1) the defendant manufactured, distributed, or sold the product; (2) the plaintiff was harmed; and (3) the product's design was a substantial factor in causing the harm. (See CACI No. 1204.) If the plaintiff establishes these three elements, the burden of proof then shifts to the defendant to prove that the benefits of the product's design outweigh the risks. The relevant factors a jury may consider in weighing the risks and benefits are commonly known as the *Barker* factors from the seminal case *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413. The factors include the following: (a) the gravity of the potential harm resulting from the use of the product; (b) the likelihood that this harm would occur; (c) the feasibility of an alternative safer design at the time of manufacture; (d) the cost of an alternative design; and (e) the disadvantages of an alternative design. "Other relevant factors" may also be considered.

Evidence of industry customs or standards is potentially relevant and admissible under the risk-utility test. Here, courts have held that, unlike under the consumer expectation test, "the issue of design defect cannot be fairly resolved by standardless reference to the 'expectations' or an 'ordinary consumer.'" (*Howard*, *supra*, 203 Cal.App.4th at p. 426.) Nevertheless, courts have all stressed that "while industry custom and practice evidence is not categorically inadmissible, neither is it categorically admissible; its admissibility will depend on application of the ordinary rules of evidence in the circumstances of the case." (*Kim v. Toyota Motor Corp.*, *supra*, 6 Cal.5th 21.)

There are several reasons for admissibility of industry customs or standards under the risk-utility test. In this analysis, the jury is forced to assess technical issues such as gravity of potential harm, likelihood of harm, and feasibility and cost of alternative designs. In these cases, expert testimony is essential to help the jury. A plaintiff may try to use this evidence to show that the defendant failed to implement a safety feature that was or was not standard in the industry. When "the manufacturer or supplier knows of, or has reason to know of, greater dangers [above and despite its compliance with regulations]," the manufacturer may still be liable. (*Hassan v. Ford Motor Co.* (1982) 32 Cal.3d 388, 407.) For a defendant, although evidence of compliance with industry standards is not a complete defense, it can be taken into account in the balancing process of the risk-utility test.

In *Kim*, *supra*, 6 Cal.5th 21, the plaintiffs were injured after losing control of their Toyota Tundra pickup truck. The plaintiffs alleged that the truck was defective because its standard configuration did not include a safety feature known as vehicle stability control ("VSC"). During trial, the defendant manufacturer presented evidence that no vehicle manufacturer at the time had a VSC as standard equipment in pickup trucks.

After the jury returned a verdict for the defense, the plaintiff appealed on the basis that the trial court erred in denying their motion in limine to exclude custom and practice evidence. The issue before the court regarded the admissibility of evidence of industry custom and practice when a plaintiff claims a design defect under the risk-utility test. There, the California Supreme Court held that the industry custom and practice evidence was admissible to shed light on the

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appropriate inquiry under the risk-utility test. (*Id*. at. p. 38.)

The Court further stated that such industry custom and practice evidence may be relevant in a strict product liability design-defect case "because it illuminates 'the relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs.'" (*Id*. at. p. 35; quoting *Barker v. Lull Engineering Co.*, *supra*, 20 Cal.3d at p. 418.)

Under *Kim*, a defendant can present evidence that a particular safety feature is not standard in the industry. Similarly, a plaintiff can also legitimately seek to present evidence that a manufacturer has not utilized a safety device that is an industry standard.

The *Kim* court, however, was quick to point out that the probative value of such evidence will "vary from case to case, and in some cases the relationship between the industry design practices and the *Barker* factors may sufficiently attenuated to warrant exclusion of the evidence." (*Id*. at. pp. 35-36.) Counsel must keep in mind that the devil is in the details in admitting evidence of industry customs and standards in design defect cases even under the risk-utility test.

Are governmental safety standards admissible in products liability design-defect cases?

Government agencies often create safety standards that manufacturers of certain products must follow. As mentioned previously, the CPSC is an agency of the United States government and works to develop voluntary and mandatory safety standards. (15 U.S. Code § 2051(b)(3).) The United States National Highway Traffic Safety Administration (NHTSA) also issues safety standards to implement laws from Congress. In 1966, the United States began developing the federal motor vehicle safety standards, which are a series of safety standards for motor vehicles. The purpose of the standards is to ensure that vehicles that are manufactured and sold are reasonably safe. The Federal Aviation Administration (FAA) is another example of a government agency that sets a wide range of standards and regulations. This all to say that there are many federal agencies creating standards on a wide range of products society uses on a daily basis.

A plaintiff may generally raise the issue of a failure of a defendant manufacturer to comply with a government statute. In a negligence action, a plaintiff may even raise a theory of negligence per se – despite a government agency certifying that a manufacturer met the applicable safety standards. (See Evid. Code, § 669.) In *Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, the appellate court upheld the trial court's decision to award a negligence per se jury instruction. Yet, even if the plaintiff fails to prove the defendant manufacturer violated a statute, the plaintiff can still bring other products liability actions to show the product was defective.

Alternately, at times, defense may present evidence of compliance with a government standard or testing. California courts have commonly held, however, that compliance with federal safety standards, such as the ones discussed above, does not preclude liability. In *Elsworth v. Beech Aircraft Corp.*, *supra*, 37 Cal.3d at p. 547, a plane manufacturer's compliance with FAA regulations did not preclude a jury from finding the manufacturer liable for a design defect. In *Buccery v. General Motors Corp.* (1976) 60 Cal.App.3d 533, the plaintiff alleged that a motor vehicle was defective because it did not have a padded head restraint. (*Id*. at 537.) The plaintiff's expert on cross-examination testified that the federal safety standard requiring head restraints did not apply to the subject vehicle. The trial court granted the defendant's motion for nonsuit holding that General Motors complied with the safety standards required for pickup trucks. (*Id*. at 539.) The Court of Appeal reversed, holding that compliance with federal motor vehicle safety standards did not preclude liability based on a product defect.

While a defendant's compliance with statutory requirements is usually not a defense, "the minimum standard prescribed by legislation or regulation may be accepted by trier of fact, or the court as matter of law, as sufficient for the occasion, where evidence shows no unusual circumstances but only the ordinary situation intended by a statute or administrative rule." (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539.)

It is important to point out that the causes of action in *Ramirez* were all premised on the theory of failure to warn, yet it is still informative. There, the California Supreme Court held that state and federal law do not require warnings in any language but English, and a manufacturer may not be held liable in tort for failing to label a nonprescription drug with warnings in a language other than English.

To allow for the admission of compliance with government-issued safety standards or testing in a design-defect case, courts will often require that a proper limiting instruction be provided. For instance, in *Hansen v. Sunnyside Prod.* (1997) 55 Cal.App.4th 1497, 1520, the plaintiff had three theories of liability: (1) design defect under the consumer expectations test; (2) design defect under the risk-utility test; and (3) failure to give adequate warning of a known or knowable substantial danger. The court held that evidence demonstrating compliance with government-issued safety standards was admissible. The court also approved a jury instruction stating: "You have heard certain evidence that [the] defendant . . . has complied with government standards or guidelines regarding labeling its product. Compliance with governmental standards or regulations does not preclude imposition of liability for a defective product. It is merely to be considered by you as some evidence on the issue of adequacy of warnings as I will otherwise instruct you."

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It is worth pointing out that in a punitive-damages case, there is often a broader standard for the admissibility of both government and industry standards. This can pose a risk-reward scenario for the plaintiff requiring careful strategic considerations.

The admissibility of evidence regarding a manufacturer's compliance or non-compliance with government standards should not be confused with an agency's failure to take action or commence a proceeding with respect to the safety of a consumer product. For instance, under federal law, "[t]he failure of the [CPSC] to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible in evidence in litigation at common law or under State statutory law relating to such consumer product." (15 U.S.C.A. § 2074.)

Although not addressed in this article, counsel should become familiar with the case law surrounding federal preemption. The basis of federal preemption is found in Article IV of the United States Constitution and provides that federal law "shall be the supreme law of the law; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." When a federal agency has created safety standards for a product, it is important to become familiar with those federal regulations or standards and the case law addressing the application of federal preemption as a potential defense.

Conclusion

A jury's ability to hear evidence of whether a manufacturer complied or failed to comply with industry customs/standards or governmental standards could have a drastic impact on a design-defect case. When handling design-defect cases, it is critical to think strategically about the theories of liability and what evidence is admissible under those theories of liability. As we have seen, certain evidence may be admissible under the risk-utility test for design defects, but inadmissible under the consumer expectations test. It is also important to know what trade organizations and government agencies are involved in assessing the product at issue and thoroughly reviewing those standards. In determining admissibility in design defect cases, the devil is in the details.

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