



From A to Veck:
Standardization and the Law

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Tort Law Implications of Voluntary Standards Activities: Cell Phone Litigation

Jameson B. Carroll
King & Spalding LLP

AGENDA

- Outline federal regulatory scheme regarding radio frequency (“RF”) radiation and cellular telephones
- Provide an overview of ongoing litigation involving wireless handheld cellular telephones
- Explain why ANSI and other standards developing organizations (“SDO”) are being sued



What is Radio Frequency Radiation?

- Radio frequency (“RF”) refers to the portion of the electromagnetic spectrum in which electromagnetic waves can be generated by alternating current fed to an antenna
- RF emissions provide radio communications by carrying the signal from a transmitter to a receiver
- Specific Absorption Rate (“SAR”) measures RF exposure from a wireless phone



Federal Regulation of Cell Phone Emissions

- FCC adopted standards for RF exposure from wireless service facilities in 1985 based in part on C95 standard (published by ANSI)
- In 1996, as directed by Congress, FCC set revised RF emissions standards, including standards for all wireless telephones, based in part on revised version of ANSI/IEEE C95 standards
- FCC consulted with FDA in evaluating available science and developing federal standards
- FDA's involvement was due to authority to regulate radiation emitting products pursuant to the Electronic Product Radiation Control Act



Claims Made Against SDOs

- Negligence
- Strict Liability
- Breach of Warranty
- Alternative Liability



Tort Litigation Involving Cell Phones

- First wave of lawsuits against cell manufacturers began in early 1990s
- Plaintiffs alleged wireless telephones should have been accompanied by warnings they might be unsafe
- Two categories of cases pending:
 - “Headset” cases
 - Personal Injury cases



Headset v. Personal Injury Cases

“Headset” Cases

- Plaintiffs allege defendants knew or should have known that wireless phone use exposes them to RF that causes “biological effects” and a “risk to human health”
- Plaintiffs have brought class action lawsuits in various states
- Plaintiffs are seeking headsets or reimbursement for purchase price of a headset because they allege headsets prevent these “biological impacts”

Personal Injury Cases

- Six cases brought by same counsel now pending in D.C. Superior Court
- Plaintiffs allege they suffer from brain cancer as a result of wireless phone use and that federal SAR safety standard is inadequate to protect human health
- Plaintiffs claim defendants have manipulated scientific research about the health effects of RF emissions



Allegations concerning ANSI and other SDOs

- Defendants have allegedly manipulated scientific research about health effects of RF emissions
- Defendants have allegedly misled standards-setting bodies
- Defendants allegedly tried to deceive federal agencies
- Defendants allegedly conspired to defraud consumers with respect to cell phone safety
- Defendants were allegedly negligent in design, manufacture, testing, quality control, advertising, distribution of cell phones, and further negligent in warnings and instructions for use
- Plaintiffs assert SAR testing methods are inaccurate, unreliable, and be easily manipulated: federal SAR standard is inadequate to protect human health



Hurdles for Plaintiffs

- Plaintiffs in all cases acknowledge defendants' phones comply with all FCC safety standards
- Several state and federal courts have validated FCC's conclusions, finding no scientific basis for wireless RF health effects
- Issue being litigated at outset of both the headset and personal injury cases is whether plaintiffs' claims are preempted by federal law



Status of Pending Cases

“Headset” Cases

- Federal District Court found plaintiffs’ claims were preempted by federal law
- Fourth Circuit reversed, remanding four cases to state court and finding no preemption in case in which jurisdiction was proper
- Defendants have petitioned U.S. Supreme Court to review the decision
- ANSI and IEEE are filing “friend of the Court” briefs in support of petitioners

Personal Injury Cases

- Defendants filed motion to dismiss cases on grounds of federal preemption
- Motion will be argued this fall in D.C. Superior Court
- Plaintiffs urge the Court to consider the Fourth Circuit’s decision
- U.S. Supreme Court decision on petition in “headset” cases may influence outcome

