

ANSI Legal Issues Forum – Tort Liability
October 17, 2007

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Zuckerman Spaeder LLP presents

Voluntary Standards Plaintiff's Perspective

I. Overview

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A. Valuable Tool For Plaintiff's Lawyer

B. Many Uses

- 1. Screening**
- 2. Standard of Care**
- 3. Experts**
- 4. Proof of Specific Theories**

C. Representative Experience

- 1. National Electric Code (National Fire Protection Association)**
- 2. Gas Transmission and Distribution Systems (American Society of Mechanical Engineers)**
- 3. Bad Faith Insurance Practices (National Association of Insurance Commissioners)**



II. Screening

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- A. Intake Is The Key To A Plaintiff's Practice**
- B. Subject Matter Is Often Unfamiliar**
- C. Industry Standards Assist In Evaluating Cases**
- D. Example – AMSE B31.8, Section 851.43**
 - 1. Cracked high pressure natural gas pipeline that explode and killed a worker**
 - 2. Contractor had repaired line with a bolt-on leak clamp**
 - 3. Standard required a cut out and replacement, if feasible, and permitted use of a clamp only if a corrosion hole**
- E. With Responsible Plaintiff's Counsel Voluntary Standards Should Encourage The Right Cases Being Pursued**



III. Uses In Litigation

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A. Standard Of Care

1. Expected to meet the industry's voluntary standards

2. Natural Gas Pipeline Explosion

- Pipeline leaked two times before it ruptured and killed the gas company's employee
- Lawsuit against the gas company (the employer) and the contractor that had "repaired" the line the two times it had leaked
- Clamping the line, and not cutting out the bad section of pipe, violated the AMSE standard
- No defense to the plaintiff's negligence claim



III. Uses In Litigation

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- 3. Contracts often adopt voluntary standards**
- 4. Contractor often agrees to meet federal and state safety regulations, voluntary standards, and the company's internal procedures**
- 5. Contractor, in pipeline explosion, violated the voluntary standards that it agreed to meet**



III. Uses In Litigation

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B. Experts

1. **Voluntary standards provide objective, accepted basis for opinion of plaintiff's expert; not based solely on training, education and experience**
2. **Testimony on violation of legal regulations can be excluded as a legal conclusion, whereas violation of industry standard is almost always permissible**
 - States prohibit unfair trade practices by statute
 - Insurance company must settle claim if liability reasonably clear
 - Experts are not permitted to opine that defendant violated the law
 - Expert permitted to testify to violation of industry standard
3. **Limits Defense Expert**



III. Uses In Litigation

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C. Proof Of Special Claims

- 1. Certain claims require proof of well-accepted industry standards**
- 2. Example – exception to worker’s compensation bar for “deliberate intent”**



III. Uses In Litigation

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3. WV Code 23-4-C provides:

- (2) The immunity from suit ,, may be lost only if the employer or person against whom liability is asserted acted with "deliberate intention". This requirement may be satisfied only if:
 - (A) [A] specific unsafe working condition existed in the workplace ...;
 - (B) [T]he employer, prior to the injury, had actual knowledge of the existence of the specific unsafe working condition ...;
 - (C) [T]he specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, ..., or of a commonly accepted and well-known safety standard within the industry or business of the employer, as demonstrated by competent evidence of written standards or guidelines



III. Uses In Litigation

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4. Cases – Established Violation Of Well Accepted Safety Standards

- Natural Gas Pipeline Explosion – Claim Against Employer
 - Dispute over applicability of federal safety regulations
 - Satisfied statute by proving violation of AMSE standards
- Electrocution in coal preparation plant
 - Worker using a cord-connected impact wrench in wet area
 - Miswired extension cord, and lack of grounding, caused electrocution
 - Comment to Section 250-45 of NEC provided: “Cord-Connected portable tools ... are not intended to be used in damp, wet, or conductive locations, unless they are grounded, supplied by an isolation transformer, or protected by an approved system of double insulation”



III. Uses In Litigation

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5. Failure To Train Or Require Compliance With Voluntary Standards

- Negligence not to train employees to meet voluntary standards
- Negligence not to require employees to comply with voluntary standards
- Provides the plaintiff with alternative theory of liability

6. Defective Product



III. Uses In Litigation

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D. Proof Of Knowledge For Punitive Damages

- 1. Company Should Know Voluntary Standards**
- 2. Disregard Of Voluntary Standards Known To Company, Or Failure To Assure Compliance With Voluntary Standards, Could Establish The Bad Intent For Punitive Damages**



IV. Conclusion

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A. Useful Tool For Plaintiff's Lawyer

B. Protects Industry From Frivolous Claims, If Standards Set At Correct Level

- 1. If bar too high, then they will easily be violated**
- 2. If bar too low, then plaintiff can argue that standards are only a minimum test**
- 3. Important to calibrate properly**

C. But When The Standards Are Violated The Claim Is Easier To Prove And More Difficult To Defend