TORT LIABILITY
IN THE STANDARDS WORLD

2007 ANSI Legal Issues Forum

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The Risk of Tort Liability for Product Certification Organizations

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Twin Poles of Product Certification Risk

1. Product certification denied because of non-compliance with pertinent listing standards:
   - Manufacturer of allegedly "innovative" product sues PCO asserting antitrust, unfair trade practices and related claims. See, e.g., *Solahart Industries Pty. Ltd. v. IAPMO*, 1996 U.S. Dist. Lexis 19875 (S.D. Cal. 1996) (summary judgment in favor of product certifier), aff'd 1998 U.S. App. Lexis 5480 (9th Cir. 1998).
2. Product certification granted:
   - Where the listed product causes harm, and it bore the logo of PCO, PCO can be sued for negligence. *FNS Mortgage Service Corp. v. Pacific General Group, Inc.*, 24 Cal. App. 4th 1564 (1994).

Key Distinctions

1. Promulgation of standards versus product certification:
   - In *FNS Mortgage v. Pacific General*, the owner of an apartment complex sued a plumbing trade association for negligence after using defective pipe that met the requirements of the association. The appellate court found that the association owed the plaintiff a duty because the plumbing association not only promoted standards, but also listed and certified specific plumbing products.
   - In *Commerce & Industry Insurance Co. v. Grinnell Corp.*, the NFPA did not list, inspect, certify or approve any products or materials for compliance with its standards. It merely set forth safety standards to be used as minimum guidelines that third parties may or may not choose to adopt, modify or reject. Thus NFPA had no control over whether or which jurisdictions adopted its voluntary standards. 1999 U.S. Dist. Lexis 11269 (E.D. La. 1999).

Key Distinctions

2. Control of product manufacturing
   a. Control. See, e.g., *FNS Mortgage*:
      – Internal memo indicated that IAPMO was aware of defective pipe being listed; subsequent inspection confirmed that pipe was being made using inferior material and did not meet IAPMO minimum specifications. IAPMO put a hold on pipe and told manufacturer to destroy pipe or remove the logo.
   b. No control. See, e.g., *Beasock v. Dioguardi Enterprises, Inc.*, 130 Misc. 2d 25, 494 N.Y.S. Supp. 2d 974 (1985):
      – TRA neither mandated nor monitored the use of its standards by any manufacturer; yearbook contained disclaimer that information about products was advisory only and reader's use of information was within his or her discretion. "It would be unreasonable to impose a duty of control upon TRA solely by virtue of its limited function of publishing dimensional specifications for interchangeability purposes, and then only after such specifications have been accepted by the industry at large."

Theories of Liability for Trademark Licensors

- Trademarks registered in the U.S. enjoy legally enforceable protection against infringement under the Lanham Act. The consideration for this protection is the licensor's assumption of a legal duty to exercise control over the quality of goods sold under its mark.

- This principle has led to the development of two theories of liability – the "enterprise theory" and the "apparent manufacturer doctrine."

Theories of Liability for Trademark Licensors (cont.)

- Under the enterprise theory of liability, non-manufacturing trademark licensors who exercise "substantial control" over the manufacture or sale of licensed goods are deemed the "functional equivalent" of the manufacturer and subjected to strict liability for any design, manufacturing or warning defects that render the product "defective" and "unreasonably dangerous" under §402A of the Restatement (Second) of Torts.
- Trademark licensors also face negligence-based products liability under the apparent manufacturer doctrine of the Restatement (Second) of Torts §400, which provides that "one who puts out as his own product a [good] manufactured by another is subject to the same liability as though he were its manufacturer."

Source: Wallace and Alcasabas, "Trademark Licensor Liability for Defective Products under U.S. Law," Law.com (May 16, 2007).

Trademark License as Product Endorsement

- Dr. Phil licensed his name and likeness to sell Shape Up! diet products and became defendant in class action false advertising law suit
  - Ads for diet pills included claims that pills "contain scientifically researched levels of ingredients that can help you change your behavior to take control of your weight" and "support your weight loss program by helping promote fat metabolism and increasing the ability to burn calories"
- Dr. Phil reportedly settled for $10.5 million

Liability of PCO Is Potentially Greater Than A Mere Trademark Licensor

- Restatement (Second) of Torts §324A (1965)

  One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Application of Liability Theories to PCOs

- *Hempstead v. General Fire Extinguisher Corp.*, 269 F. Supp. 109 (D. Del. 1967) (UL mark):

  Local fire prevention code authorized public officials to rely upon the services of Underwriters to determine the suitability of a particular type of fire extinguisher. Thus Underwriters' approval of the fire extinguisher was unquestionably of aid to the plaintiff in selling the extinguisher that exploded. Court observed that because of Underwriters' testing and listing services, "it is straining at words to say Underwriters does not approve the design of a product. The design may originate with the manufacturer, but when Underwriters lists it, it thereby tacitly impresses its approval upon the design."

Application of Liability Theories to PCOs (cont.)

- *Hanberry v. Hearst Corp*., 276 Cal. App. 2d 680 (1969) (Good Housekeeping magazine's seal of approval):
  - Implicit in the seal and certification is the representation that the magazine publisher has taken reasonable steps to make an independent examination of the product, with some degree of expertise, and found it satisfactory. Since the very purpose of the seal and certification is to induce consumers to purchase endorsed products, it is foreseeable that certain consumers will do so, relying upon the magazine's representations.
  - "Having voluntarily involved itself in the marketing process, having in effect loaned its reputation to promote and induce the sale of a given product, the question arises whether Hearst can escape liability for injury which results when the product is defective. In voluntarily assuming this business relationship, we think Hearst has placed itself in the position where public policy imposes upon it the duty to use ordinary care in the issuance of its seal and certification so that members of the public who rely on its endorsement are not unreasonably exposed to the risk of harm."

Application of Liability Theories to PCOs (cont.)

- *FNS Mortgage Service Corp. v. Pacific General Group, Inc.*, 24 Cal. App. 1564 (1994) (IAPMO logo) – the touchstone of control:

  The court examined the closeness of the connection between IAPMO's conduct and the damage suffered. "IAPMO claims that it did not manufacture the substandard pipe, or have the power to prevent Centaur from doing so; nor did IAPMO affix the UPC logo to the substandard pipe. Therefore it claims it did not cause the plaintiff's damage. That is not the case. If IAPMO delists the product it will not be installed. If IAPMO should have delisted the substandard pipe here in issue and negligently failed to do so, its conduct was a cause of the damage suffered."

Cases since *FNS Mortgage*

- *Bailey v. Edward Hines Lumber Co.*, 308 Ill. App.3d 58 (1999) – disagreement with public policy rationale of *FNS*:

  "We think public policy provides more support to the trade association than the *FNS Mortgage* court was willing to give. As the *Meyers* court said: 'Such organizations serve many laudable purposes in our society. They contribute to the specific industry by way of sponsoring educational activities, and assisting in marketing, maintaining governmental relations, researching, establishing public relations, standardization and specification within the industry, gathering statistical data and responding to consumer needs and interests. Furthermore, trade associations often serve to assist the government in areas that it does not regulate.' (citation omitted). Public policy alone might not be reason enough to reject a duty to care in this case, but it does become part of the legal mix that leads us to that conclusion."

Cases since *FNS Mortgage*

- *Dekens v. Underwriters Laboratories, Inc.*, 107 Cal. App. 4th 1177 (2003)

  Suit against heirs of deceased appliance repairman who died from asbestosis, alleged to have been contracted as result of being exposed to asbestos while repairing appliances. Key factor distinguishing *FNS* is that UL did testing only as to fire, electrical hazards and the like; no certifications as to existence or non-existence of asbestos. No liability based on *scope* of testing and certification.

Cases since *FNS Mortgage*

- *Factory Mutual Ins. Group v. Bobst Group*, 319 F. Supp. 2d 880 (N.D. Ill. 2004) – court finds claim is sufficiently pleaded against product certifier:

  "Bobst alleges that Factory Mutual Research Corporation assumed such a duty when it inspected samples of the gas vapor concentration analyzers used in the press. Taking Bobst's allegations as true, Factory Mutual was in the business of certifying parts for use in presses and other equipment. It claims that third parties relied on these certifications and believed that the parts were safe to use. In fact, Bobst alleges that for that very reason, Factory Mutual urged Control Instruments and Bobst to use the certified parts in the press – certified parts were more likely to be safe than others."

Cases since *FNS Mortgage*

- *Brothers Holdings v. Total Containment, Inc.*, 2006 U.S. Dist. Lexis 78532 (W.D. La. 2006)

  "This court cannot conclude that UL had absolutely no duty to perform its tests with reasonable care or create and/or formulate tests on standards of engineering conduct set by ASTM and API. Brookshire Brothers has presented summary judgment evidence to raise a genuine issue of material fact for trial as to whether UL's conduct of not performing the immersion testing was below the ordinary standard of care. Whether or not UL's conduct was reasonable is for a jury to decide."

Risk Minimization

- Liability insurance – availability? Is the negligent granting of a product certification an “accident” or “occurrence” for liability insurance purposes?
- Indemnity from manufacturer – economic value? PCO may be “deep pocket” for damage claims.
- Reduction of licensor control over manufacturing – inconsistent with trademark owner’s obligations to police its mark; in addition, voluntary reduction in control may support finding of negligence.
- Requiring manufacturer to maintain a sufficient level of liability insurance for product claims as a condition of listing.
- Requiring that manufacturer’s liability carrier provide coverage to PCO as additional named insured.

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