



# PRODUCT LIABILITY LITIGATION

MEETING ONE COUNTRY'S STANDARDS CAN PROMPT SUITS IN ANOTHER

by Sheila T. Kerwin

**T**oday's globalizing market place can bring great opportunity to product manufacturers, but unfortunately it can also add great complexity. The different—and sometimes more stringent—product standards required by non-U.S. countries can adversely affect product protection here in the United States, because plaintiffs' attorneys can use these discrepancies to their advantage in litigation against product manufacturers. American companies

seeking to gain a larger market share by adapting their products for use in other countries may end up paying serious prices when the plaintiff's bar use the different international designs and standards to make a case. It's imperative, therefore, that manufacturers who sell in other countries understand those countries' standards in detail and make good safety decisions in all venues.

### Overview of Product Liability Law

A manufacturer has a duty to design defect-free products. Legally, a product is deemed defective if the manufacturer could reasonably foresee that it could cause injury. In product litigation, the focus of the manufacturer's defense is to ensure a jury understands that the manufacturer is thoughtful and takes steps to create safe products.

This is accomplished by showing reasonableness throughout the "life of a product," which refers to the design, manufacturing, sale, and post-sale phases of the product life cycle. The manufacturer wants to be able to show concern about safety at each of these phases.

- **Design Phase**—When developing a product, a manufacturer must consider the DESIGN, GUARD, WARN hierarchy. This means that any hazard in a product must be designed out of the product if at all possible. If the hazard cannot be designed out of the product, then the product must be guarded to prevent interaction with the hazard. Finally, if the hazard cannot be guarded, then the product must warn of the danger. Safe design evidence that a jury will review includes the product manual, warning markings, manufacturer's engineering documents, what similar companies are doing, and compliance with industry standards.
- **Manufacturing Phase**—Product safety during the manufacturing process can be illustrated by the manufacturer's quality control

## Case Histories...

Three examples in which varying international standards created litigation complications for manufacturers

### 1. CASE HISTORY

#### ***Sale of pool heaters in Canada affects stricter standards regarding blocked-vent switches***

Both the Canadian Standards Association and the American Gas Association have standards for the design of pool heaters. Interestingly, the Canadian standard was stricter regarding safety devices on these heaters in the past. Specifically, the CSA standard required a blocked-vent switch to be on pool heaters that are sold in Canada. At the same time, the AGA standard did not require such a blocked-vent safety switch to be installed on pool heaters sold in the U.S.

A pool heater manufacturer sold heaters to both Canada and the U.S. The company, being very familiar with the applicable standards, designed the pool heaters sold to Canada with a blocked-vent switch and heaters sold in the U.S. without blocked-vent switches. Litigation was pursued in the U.S. where a plaintiff claimed there should have been a blocked-vent switch on the unit. The manufacturer argued that such a device was not required under the AGA standard and it wouldn't have made a difference anyway. The plaintiff was unable to convince the court to admit the Canadian standard as evidence of a safer way to design the product. A defense verdict was achieved in the case.

### 2. CASE HISTORY

#### ***Circular saw manufacturer encountered different standards in U.S. and Europe on requirement of a kerf guide***

Standards relating to circular saws in the U.S. do not require saws to be sold with a "kerf guide," which guards the area that has already been cut with the saw in the event the saw kicks back towards the operator holding the material to be cut. In Europe, the kerf, or area that has been cut, is required to be guarded with a plastic guide. In the event of a kick back, the guide will be pinched and not the operator.

In a case venued in the U.S., plaintiff's counsel attempted to admit the European standard relating to kerf guarding. The court allowed the evidence claiming it was relevant to alternative design theories. A jury found liability in the case.

### 3. CASE HISTORY

#### ***Boiler explosion in Mexico calls product manual into question***

A boiler manufacturer sold boilers both in the U.S. and Mexico. In the U.S., the applicable American National Standards Institute (ANSI) standards required certain warnings regarding the risk of explosion, but there are no similar standards in Mexico. The manufacturer sold to Mexico through a Mexican distributor who was contractually obligated to provide the relevant safety manuals. Since there are no relevant Mexican standards requiring specific warnings on explosions, the manual did not contain the same language that the manuals used in the U.S. contained.

After a significant explosion in Mexico, the plaintiff's counsel succeeded in having the case venued in the United States. The manuals used with the product obviously did not comply with the ANSI warnings required in the U.S. The manufacturer fought hard to have the case transferred back to Mexico, to no avail. Moreover, the defendant was unsuccessful in getting Mexican law or standards to apply to the case. As a result, the case settled for more money than it was worth.

documents—both its own as well as incoming and outgoing QC documents from suppliers and from distributors who purchase the product.

- **Sale and Post Sale Phase**—The manufacturer should also ensure it is selling to qualified vendors who know how to safely install the product. Most states now

## Three Tips for Manufacturers Who Sell to Multiple Countries

1. Manufacturers need to understand the standards for all countries in which they sell products. More importantly, they need to understand that the standards in any country are only “minimal standards” and might want to have internal safety policies exceeding those standards. A jury will be looking for evidence that the manufacturer was considering safety and going beyond the minimal standards as evidence of the manufacturer’s intentions.
2. When a manufacturer sells into other countries with differing standards that relate to its products, the best policy is to design the product for all countries the same and to the highest standard. In that case, the plaintiff’s bar will not be able to use the fact that the product differs depending on what standard applies. Moreover, the manufacturer can use the highest standards as a sword and not a shield to aggressively defend itself in litigation. In such situations, evidence that the company is concerned about safety can be developed in any country.
3. Finally, if the manufacturer has designed products differently for multiple countries as a result of varying standards, manufacturers should defend lawsuits with an eye toward transferring those cases to the country with the lowest industry standards. Again, knowledge of all the relevant international standards is critical to defend product liability litigation.

impose post-sale duties which require the manufacturer to stay on top of the state of the art for safety and perform recalls or retrofits of products that are no longer safe.

### Relevance of Industry Standards in Litigation

The most prevalent claims in product liability litigation relate to improper or negligent designs. One of the main ways a manufacturer can defend itself in such litigation is to show a jury that it complied with industry standards, so it is critical that a manufacturer know and adhere to the industry standards that apply to its products.

Compliance with industry standards is strong evidence that the manufacturer is concerned about safety, but it alone is not enough. A manufacturer must understand that compliance with industry standards is only a minimum expectation and that the manufacturer can go beyond the minimum standards to create products even safer than required. A manufacturer should be prepared for plaintiff’s counsel to argue that even if the product is in compliance with an industry standard, the manufacturer

could/should have done more to create a safer product.

### Effect of Different International Standards on Products Cases

Non-U.S. countries also have industry and governmental standards that require compliance, and while there has been some effort to harmonize these differing standards (for example the ISO and IEC standards across Europe and other member countries), many countries are not as coordinated. Moreover, there are additional standards beyond ISO that can create difficulty for manufacturers. For example, while Canada and Mexico are members of ISO they can have differing standards from the U.S., and manufacturers who sell products in these countries must understand the implications should litigation transpire.

U.S. courts have wide discretion to admit safety standards as evidence. If a product is designed, manufactured, or sold in the U.S., a court in this country would typically admit American standards, finding them relevant.

Whether or not another country’s standards would be found admissible, however, is far less predictable. The manufacturer would want to make a

strategic decision on whether admission of the standards would be helpful to the defense of a product liability action. Such a decision can be highly dependent on case details. Suppose the case is pending in the U.S.

In some instances, particularly if the manufacturer complies with an even higher standard in another country, the manufacturer should seek to have the foreign standard admitted, arguing that it shows the extreme safety consciousness of the manufacturer.

In other instances, such as if the plaintiff were trying to argue for compliance with another country’s higher standard to which the manufacturer does not comply, the manufacturer might argue that the other country’s standard is not relevant to products manufactured for sale in the U.S.

The risk in either situation is that if the other country’s higher standard is admitted, it could be very damaging evidence to a jury that the manufacturer does not really care about product safety but is only complying with the most minimal standards. A battle may ensue as to what constitutes the current, generally accepted state of the art regarding safe design for the product in question.

### The Bottom Line

It’s common for manufacturers to produce different versions of a product for different national markets, each version complying with the standards of a country. Manufacturers need to keep an ever-watchful eye towards how another country’s standards can affect any litigation, ensuring they request the court either limit or include another country’s standards, whichever will be helpful to the defense of the product.

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