

ABYC NEWS

The Newsletter for American Boat & Yacht Council Members



THIRD-PARTY CERTIFICATION: A LEGAL PERSPECTIVE

Some boat builders utilize generally accepted building practices but choose not use the ABYC standards. Still other boat builders utilize generally accepted building practices along with the ABYC standards and yet fail to take what may be the most important last step. That step is to have their boats NMMA Boat and Yacht certified!

The NMMA board of directors recently passed a resolution that requires that all NMMA member boat manufacturers have their boats NMMA certified using ABYC standards by year 2007. NMMA certification inspectors will work with boat manufacturers to help them build their product to ABYC standards and provide third-party verification that the boats are built to those standards.

Several sound reasons exist to have boats NMMA certified, including better engineering, quality assurance, insurance rates and marketing, but did you know... there are legal reasons as well? Certification may help a boat manufacturer defeat a product liability claim, in some cases, by showing the boat is not defective. Theories of liability and evidentiary uses for third

party certification are discussed below.

Theories of Manufacturer Liability

There are several theories of manufacturer liability for defective products including negligence, misrepresentation, breach of warranty and strict liability. By way of background, strict liability as a theory of tort liability was developed, in part, to deal with injuries caused by defective products. The doctrine has its genesis in implied warranty cases. Many public policy reasons exist for the doctrine but the most cited is to insure the cost of injury from a defective product is borne by the manufacturer that puts the product on the market rather than by the injured party. In most jurisdictions, a plaintiff in a strict liability action must prove: 1) that the defendant sold the product in the course of its business; 2) the product was then in a "defective condition unreasonably dangerous;" 3) the product was used a manner that was reasonably anticipated and 4) the plaintiff was damaged as a direct result of the defective condition that existed at the time the product was sold. A "defective condition" is one not contemplated by the ultimate

consumer that would be unreasonably dangerous to him. A "defective condition" may be a manufacturing defect, a design defect or a failure to warn.

In a traditional negligence case, due care absolves the defendant of liability. But under a theory of strict liability, exercise of due care by a manufacturer does not relieve it of liability. The plaintiff need not prove that a manufacturer was negligent, nor does he need to show that the manufacturer knew of the product's defective condition for the doctrine to apply. The plaintiff need only show that the product itself was defective and unreasonably dangerous when placed into the stream of commerce. Therefore, the focus is on the product itself rather than the manufacturer's conduct. That is not to say that the manufacturer is without defenses in a strict liability claim. Among other defenses, a manufacturer may show that the product was not defective, that the product's alleged danger was obvious, that the plaintiff misused the product, the product had deteriorated or was beyond its useful safe life or

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that the product had unavoidable dangers. NMMA certification using ABYC standards is useful to show a product is not defective and, in some instances, that the product had been misused.

Evidence That the Product Is Not Defective

As mentioned above, a product must be defective and in unreasonably dangerous condition for a plaintiff to prevail in a strict liability claim. Most courts hold that compliance with industry standards is relevant and admissible because it helps to define what the ultimate consumer should expect. The ordinary consumer, in most cases, expects a product that complies with industry standard. Compliance with industry standards is especially relevant in design defect cases because a jury cannot identify a design defect simply by looking at a manufacturer's plan or by comparing it with other units of the same product line. Usually a jury will consider industry standards to determine if the product was designed according to those industry standards when considering whether the design was defective. While certification of compliance is good evidence of a non-defective product, it is not conclusive proof. Courts have concluded that the industry as a whole may have been derelict in failing to adopt precautionary procedures dictated by ordinary prudence. However, this is unlikely considering ABYC standards that are created by committee and undergo intense scrutiny before being implemented. By complying with ABYC standards, an NMMA-certified manufacturer can show not only that its product complies with industry standard but also that the standards are created by a consensus of members that are experts in the areas of regulations, accident investigation, marine insurance and marine surveying, as well as the design and manufacturing of such products. One court has explicitly agreed with this argument writing, "Industry standards are written by individuals considered by their peers in the industry, academia and research to be especially knowledgeable in a particular technical specialty. These standards contain their collective expert wisdom. The committees who prepare the standards are as respected in their fields as the American Law Institute....is in ours. Their collective opinion is at least as valuable as any individual expert witness'. Of course, these industry standards would not be conclusive, but their relevance and competence is clear." Considering this view, the need to become NMMA certified is clear.

Evidence of compliance with industry standards can also be used to determine the feasibility of alternative, safer designs. Many times a plaintiff, in design defect cases, will attempt to show that a product is defective and unreasonably dangerous by introducing evidence that the

product could have been implemented with a safer, feasible alternative design. A manufacturer can rebut this argument by showing that industry standards did not require such a design, or that the proposed design conflicts with accepted industry standards. More often than not, a proposed safer alternative feasible design does not meet industry standards in one way or another.

Plaintiffs may also submit evidence of industry "custom" to prove a liability claim. Industry custom is usually introduced to show the reasonableness of the defendant's conduct. As mentioned above, this would be relevant in a negligence claim for example but should not be introduced under a strict liability theory. For example, using the industry custom, a plaintiff may argue that all boat manufacturers use teak wood on walkways as a non skid surface and failure to follow this alleged industry custom means the boat is defective and unreasonably dangerous if a person slips off the boat and drowns. This alleged custom can be trumped by relying on ABYC standards that generally call for a non-skid surface, but not necessarily the use of teakwood.

Punitive Damages

Finally, compliance with industry standards can be used to refute a claim for punitive damages. Here, the manufacturer's conduct is relevant to the equation. In general, to prevail on a punitive damages claim, the plaintiff must show that the defendant either acted intentionally or with reckless disregard for the safety of others to prevail. Punitive damages are designed to deter and punish a manufacturer for this type conduct. Punitive damages are different from compensatory damages, which serves the purpose of compensating a plaintiff for his loss. With the level of culpability required to make a finding for punitive damages in mind, compliance with industry standards can be used to show that a defendant's conduct was in compliance with other manufacturers in the industry. Compliance or attempts to comply show good will and regard for public safety that can be used to refute the argument that the manufacturer acted with willful or reckless disregard.

In today's litigious waters, a boat manufacturer's best personal flotation device may just be the NMMA Boat and Yacht Certification.

Many thanks to Casey Housley for his must-read contribution to the ABYCNews. Casey is an attorney with Armstrong Teasdale LLP in Kansas City, MO. He specializes in defending product liability cases and is licensed in Kansas, Missouri and Oklahoma.