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Earlier this year, Argentum filed an application with the American National Standards Institute (ANSI) to become an accredited standards developer. According to its application, Argentum seeks to develop standards for “senior living, including independent living, assisted living, memory care, and continuing care communities.” This memorandum addresses three topic areas relevant to Argentum’s effort: (1) examples of instances where ANSI-approved standards were used in asserting claims for money damages against defendants in civil litigation; (2) examples of instances where a private entity involved in the development of standards faced liability for money damages arising from those standards; and (3) a brief discussion of why accreditation standards issued by the Commission on Accreditation of Rehabilitation Facilities (CARF) and such things as the National Quality Award Program of the American Health Care Association and National Center for Assisted Living (AHCA/NCAL) do not raise the same level of potential liability as ANSI-approved standards.

## **I. EXAMPLES OF THE USE OF ANSI-APPROVED STANDARDS IN LITIGATION**

### **A. *Norman v. Ogallala Pub. Sch. Dist.*, 609 N.W.2d 338 (Neb. 2000)**

A high school student participating in a welding class was burned when his cotton-flannel shirt caught fire. The student’s parents asserted a negligence claim against the school district and the teacher supervising the welding class, claiming that the defendants were negligent by not requiring students to wear protective gear and by not training students regarding the use of protective gear.

At trial, the parents presented testimony regarding two ANSI-approved standards developed by the American Welding Society. The first ANSI standard stated that “[c]otton clothing, if used for protection, *should* be chemically treated to reduce its combustibility.” (Emphasis added.) The second ANSI standard stated that “[p]ersons exposed to welding hazards *shall* be trained in the use of, and understand the reasons for, protective clothing and equipment.” (Emphasis added.) Despite the first ANSI standard’s use of the word “should” instead of “shall,” the trial court held that the first ANSI standard carried “an expression of duty or obligation” that could be used by the jury in determining whether the defendants were negligent. The jury ultimately ruled in favor of the parents and awarded them approximately \$350,000 in damages.

The Supreme Court of Nebraska affirmed the jury verdict. In doing so, the appellate court rejected the defendants’ reliance on the first ANSI standard’s use of the word “should” instead of “shall,” stating:

The school claims that because the wearing of chemically treated cotton is not “mandatory” under [the first ANSI standard], the school did not breach its duty of care by allowing [the student] to wear an untreated cotton-flannel shirt. However, this standard is applicable to anyone performing welding, and while it may not be “mandatory” for all welders to wear chemically treated cotton, the [trial] court noted that students who are learning to weld need to be provided with as much protection as possible. The standard of care in this case is that of ordinary negligence, or what a reasonable person would or would not do under similar circumstances. . . . Advisory safety standards, such as the ANSI standard, may represent a consensus of what a reasonable person in a particular industry would do, and therefore may be helpful to the trier of fact in deciding whether the standard of care has been met. . . . [The first ANSI standard] clearly expresses a recommendation that cotton clothing be

chemically treated if it is used for protection. The school did not follow that recommendation, which may be considered as evidence of negligence.

**B. *Hansen v. Abrasive Eng'g & Mfg.*, 856 P.2d 625 (Or. 1993)**

The plaintiff was operating a sanding machine manufactured by the defendant when the plaintiff's glove became caught in the sanding machine, which then sanded off most of the plaintiff's hand inside the glove. The plaintiff sued the machine's manufacturer, asserting that his injuries were caused by the defendant's negligence in failing to incorporate machine safety features consistent with advisory standards approved by ANSI. The trial court permitted the plaintiff to present the jury with evidence regarding the ANSI standards in order to establish whether the defendant failed to meet the applicable standard of care.

The Supreme Court of Oregon ultimately affirmed the trial court's decision permitting the plaintiff to present the ANSI standards as evidence, explaining:

Defendant argues that, because the ANSI standards are purely advisory and not binding on anyone, they are not relevant. Plaintiff responds that, although such standards are advisory, they provide some evidence of whether defendant's conduct met the applicable standard of care. . . . Because advisory safety standards that are adopted by nongovernmental entities such as ANSI may represent a consensus regarding what a reasonable person in a particular industry would do, they may be helpful to the trier of fact in deciding whether the defendant has met the standard of care due. . . . Although violation of an industry custom does not constitute negligence *per se*, it may be shown in order to establish whether a party has met a standard of care to which the party is required to conform.

**C. *Kent Village v. Smith*, 657 A.2d 330 (Md. Ct. Spec. App. 1995)**

A young child was playing on top of a refuse bin located in her apartment complex. The refuse bin fell over on the child, rendering her a paraplegic. The plaintiff sued various parties for negligence, including the apartment complex's owner and the refuse bin's owner. At trial, the plaintiff presented an ANSI-approved standard addressing the stability of refuse bins as evidence of the standard of care. The jury ruled in favor of the plaintiff, and the trial court entered a final judgment awarding her over \$12 million.

Maryland's intermediate appellate court affirmed the use of the ANSI standard, explaining:

ANSI adopted a standard for the stability of refuse bins . . . . Groups such as the National Safety Council, the Environmental Protection Agency, the American Society of Mechanical Engineers, the American Public Works Association, the Waste Equipment Manufacturers' Institute, the National Solid Wastes Management Association, municipal governments, labor organizations, and companies and organizations from the insurance and waste disposal industries participated in the development of the standard. The Consumer Product Safety Commission regulation adopted a year later incorporated a number of the performance requirements stated in [the standard], but to the extent that the ANSI standard was not incorporated into the Commission's rule, it remains a voluntary standard.

. . .

[T]he fact that the Standard has not been officially adopted as a regulation by the State or the county [does not] destroy its relevance as articulating a standard of care, the violation of which may be regarded as evidence of negligence. [I]ncreasingly, upon the establishment of a sufficient foundation, courts have permitted the introduction of voluntary safety codes and standards, such as those promulgated by ANSI, as evidence of applicable standards and have regarded the violation of such standards, where relevant to the factual circumstances of the case, as evidence of negligence. . . . [W]e now hold that, where relevant to the case and upon a proper evidentiary foundation, safety standards promulgated by organizations such as ANSI may be admitted to show an accepted standard of care, the violation of which may be regarded as evidence of negligence.

*See also Alsip v. Louisville Ladder, Inc.*, No. 1:09-cv-01987, 2010 WL 2560031, at \*2 n.5 (D. Md. June 2, 2010) (citing *Kent Village* with approval and finding that ANSI-approved standards “may constitute relevant evidence in regard to the standard of care in a particular case”).

**D. *Sawyer v. Dreis & Krump Mfg. Co.*, 493 N.E.2d 920 (N.Y. 1986)**

An employee’s hand was crushed by the mechanical press on which he was working. The employee sued the manufacturer of the mechanical press. The manufacturer, in turn, claimed that the employee’s employer had been negligent in failing to provide the employee with adequate safety precautions. As evidence of what precautions were required by the applicable standard of care, the manufacturer presented certain ANSI-approved standards. The trial court eventually entered a substantial verdict in favor of the employee.

New York State’s highest court—the New York Court of Appeals—eventually held that the use of ANSI standards as evidence in negligence actions was appropriate with certain limitations, explaining:

[The manufacturer’s] counsel introduced [the ANSI standards] into evidence at the trial and questioned several witnesses extensively about matters contained in [them], contending that they established the custom and usage in the industry and placed certain responsibilities on the employer to provide guards to the machine and safety tools to be used by the employee during operation of the press brake. Counsel for the [employer] requested the [trial] court . . . to charge [the jury] that the requirements set forth in the ANSI booklet were only some evidence of negligence. The [trial] court denied the request and failed to give any instruction at all on the subject.

The ANSI requirements were properly admitted and could be considered by the jury as some evidence of negligence if it first found that the standards set forth in the booklet represented the general custom or usage in the industry. But even if the jury so found, the standards were not conclusive on the subject of negligence and the jury should have been instructed that they were not conclusive but were to be considered with all the other facts and circumstances of the case in determining whether [the employer’s] conduct was reasonable.

*See also Bradley v. HWA 1290 III LLC*, 111 N.E.2d 322 (N.Y. 2018) (confirming the continued viability of *Sawyer*’s ANSI-related holding).

**E. *Egede-Nissen v. Crystal Mountain, Inc.*, 584 P.2d 432 (Wash. Ct. App. 1978)**

A group of tourists went to a ski resort operated on public land in order to have a picnic. Although it was the offseason and the ski resort was closed, one of the resort's chairlifts was functioning. No attendant was present, and evidence indicated that the chairlift was not cordoned off and that no warning signs were present. One of the tourists slipped while boarding the chairlift and eventually fell from the chairlift, suffering serious injuries. In the injured tourist's negligence action against the ski resort operator, the trial court granted the injured tourist's request to instruct the jury regarding certain ANSI-approved standards, one of which stated that an attendant should be present at each chairlift loading area when chairlifts were in operation.

The Washington State Court of Appeals held that the ANSI-approved standards could be used as evidence of negligence on the part of the ski resort operator even though the ANSI-approved standards had not been incorporated by state regulations and even though the ANSI-approved standards were designed to serve as voluntary guidelines for the ski industry. "The ANSI code appears to be at least somewhat probative on the question of whether [the ski resort operator] breached its duty to [the injured tourist]," the appellate court concluded. "[W]e see no barrier in [the injured tourist's] using [the ski resort operator's] failure to comply with ANSI standards as evidence of negligence."

**F. *Walker v. JTM Equip., Inc.*, No. 2:15-cv-00060 (D. Wyo. Feb. 18, 2018)**

A refinery employee fell while climbing a stairway on a storage tank. The stairway's manufacturer had not included a horizontal midrail or closely spaced vertical balusters. The employee claimed that such design features would have prevented his fall. In his negligence action against the stairway manufacturer, the employee sought to introduce certain ANSI-approved standards for workplace stairs. The stairway manufacturer objected, citing the fact that the ANSI-approved standards were directed to employers, not manufacturers of products used in the workplace.

The United States District Court for the District of Wyoming ruled that the employee could present the jury with evidence of the ANSI-approved standards even though the standards were not directed to manufacturers. Such standards, the district court concluded, constituted "some evidence of the industry standard in the design of safe stairways even though [the manufacturer] was never [the employee's] employer."

**II. EXAMPLES OF LEGAL CLAIMS ASSERTED AGAINST PRIVATE STANDARDS DEVELOPERS**

**A. *Meneely v. S.R. Smith, Inc.*, 5 P.3d 49 (Wash. Ct. App. 2000)**

A trade group headquartered in Alexandria, Virginia, the National Spa and Pool Institute (NSPI) published voluntary safety standards for the swimming-pool industry. A teenager in Washington State dove from a diving board into a pool allegedly constructed according to NSPI standards. The teenager's head struck the bottom of the pool, breaking his neck and paralyzing him from the neck down. The teenager and his parents sued NSPI and the manufacturer of the diving board, among others. The trial court held that NSPI owed the teenager a duty of care in formulating its safety standards and a duty to warn him

about the risk of injury. The jury found that NSPI breached the foregoing duties and that NSPI should pay the plaintiffs over \$6 million as a result of its alleged negligence.

The Washington State Court of Appeals affirmed the jury verdict. “By promulgating industry wide safety standards that pool and board manufacturers relied upon,” the appellate court concluded, “NSPI voluntarily assumed the duty to warn [the teenager] and other divers of the risk posed by this type of [diving] board on [the type of pool at issue]. It failed to exercise reasonable care in performing that duty, when it did not change the standard after it knew that studies showed the pool and board combination was dangerous for certain divers.”

After the Supreme Court of Washington declined to review the appellate court’s decision, NSPI filed for bankruptcy protection a second time—having previously done so a few years earlier following similar jury verdicts in cases throughout the country. A *Washington Post* article reported on ANSI’s second bankruptcy filing and included certain notable quotations from both NSPI and ANSI representatives:

“These lawsuits are essentially due to an allegation that our standards were somehow the cause of those accidents,” [an attorney for NSPI] said. “We deny those claims. We hope to resolve those lawsuits without litigation. But even a lawsuit that’s frivolous has its costs. This [bankruptcy] gives us a little breathing room.”

...

Washington area trade associations, many of which set standards for their members, are watching the NSPI situation closely, fearing they could face similar problems. Most of the organizations promulgate standards both to ward off state or federal regulation as well as to encourage workplace and consumer safety and compatibility for different kinds of products or equipment.

...

Stacy Leistner, a spokesman for [ANSI], which has accredited 280 professional societies and trade groups such as the NSPI to set product standards for their organizations, said the Meneely case “has raised a lot of concerns, pervasive concern among organizations that put their name on voluntary standards as well as the individuals who serve on the standards-writing committees.”

Kenneth Bredemeier, *Pool Group Sued Over Standards*, Wash. Post, Sept. 4, 2002, at E1.

**B. *Snyder v. Am. Ass’n of Blood Banks*, 676 A.2d 1036 (N.J. 1996)**

The plaintiff became infected with the HIV virus after receiving a blood transfusion during surgery at a local hospital. The blood in question had been provided to the hospital by a local blood center. The local blood center, in turn, was a member of the American Association of Blood Banks (AABB), which issued standards for its member blood banks. The plaintiff asserted negligence claims against the hospital, the blood bank, and the AABB, among others. All of the defendants other than the AABB settled with the plaintiff or were otherwise dismissed from the case. The central issue at trial was whether the AABB had

breached a duty of care to the plaintiff. Following two months of testimony, the jury found that the AABB had been negligent in not recommending that its member blood banks more thoroughly investigate prospective blood donors before accepting their donations. The jury determined that the AABB should pay the plaintiff over \$400,000 as a result of its negligence.

The Supreme Court of New Jersey eventually affirmed the jury verdict. “By words and conduct, the AABB invited blood banks, hospitals, and patients to rely on the AABB’s recommended procedures. The AABB set the standards for voluntary blood banks. At all relevant times, it exerted considerable influence over the practices and procedures over its member banks, including [the local blood bank at issue].”

### **III. WHAT MAKES ANSI-APPROVED STANDARDS MORE RISKY THAN OTHER PRIVATE STANDARDS OR QUALITY AWARDS**

Nearly every activity in American life carries with it some form of legal risk. Therefore, an organization can only mitigate such risk given the relative ease with which plaintiffs can assert novel legal theories without having to incur significant financial risk themselves. *Compare, e.g., Hanberry v. Hearst Corp.*, 276 Cal. App. 2d 680, 688 (1969) (holding that the publisher of *Good Housekeeping* could be held liable for negligent representation to a consumer who purchased shoes bearing the *Good Housekeeping* seal of approval and who was subsequently injured while wearing the defective shoes), *with Levay v. AARP, Inc.*, No. 2:17-cv-09041, 2019 WL 2108124, at \*5 (C.D. Cal. May 14, 2019) (distinguishing *Good Housekeeping* seal of approval decision and dismissing putative class action brought on behalf of AARP members who alleged that AARP engaged in deceptive trade practices by endorsing certain insurance products that were not, in fact, the “best for seniors” as claimed by AARP).

Some who are generally supportive of Argentum’s effort to become an ANSI-approved standards developer have pointed to such things as CARF’s accreditation standards and AHCA/NCAL’s National Quality Award Program as evidence that the potential legal risks associated with Argentum’s effort are overblown. That is incorrect for at least three reasons.

First, as outlined above, there is significant legal precedent for using ANSI-approved standards as a means to establish liability for money damages. In contrast, there is little evidence of plaintiff’s lawyers using CARF accreditation standards and, to our knowledge, no such evidence with respect to AHCA/NCAL’s National Quality Award Program.

Second, as reflected in the case examples provided above, ANSI-approved standards typically use specific language that makes them conducive to being introduced as evidence of the standard of care and the breach thereof when a defendant’s conduct does not comply with the ANSI-approved standard at issue. In contrast, CARF’s accreditation standards are written in fairly broad terms, which makes it difficult for plaintiff’s lawyers to argue that CARF accreditation standards establish the standard of care. (Certain state statutes or regulations also incorporate CARF accreditation standards by reference, which arguably gives CARF some level of quasi-governmental immunity for its standards-creation activities in certain jurisdictions.) As for AHCA/NCAL’s National Quality Award Program, it is based on the generally worded, process-driven Baldrige Performance Excellence Framework that does not lend itself to being used as evidence of the standard of care.



Third, ANSI-approved standards are often used against members of an industry even if they have not agreed to abide by those standards. In contrast, those that seek CARF accreditation and/or to participate in AHCA/NCAL's National Quality Award Program have made a knowing, voluntary decision to do so.

Accordingly, on the spectrum of legal risk, the development of ANSI-approved standards is more dangerous—both for those in the industry targeted by the standards and for those who participate in the development of such standards.