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Know Your Burden: Statutes, Violations and *per se* Negligence

Life in this country is largely held together with a patchwork network of regulations, administrative codes and statutes governing everything from how far apart power outlets must be in a residential home, to how fast you can drive in a school zone, to how often a sidewalk must be cleared of snow and ice. In litigation involving allegations of negligence, whether an applicable code or regulation has been violated may have enormous consequences for the outcome of the case, because in certain situations the violation of the statute, regulation or industry standard will be considered negligence *per se*. In effect, the statute or regulation replaces the common law "reasonable man" standard of care, and a plaintiff need only establish a violation of the statute or regulation to win the day. While there are some general rules that are basically the same across most jurisdictions, the impact of proof of a code or rule violation depends on your jurisdiction.

In New York, and in many other jurisdictions, statutes enacted by state legislatures are treated differently than local ordinances or regulations promulgated by government agencies or industry groups. The violation of a state statute will be considered *per se* negligence if the statute was enacted to protect a class of persons, the injury is the type contemplated by the statute, and the defendant violated the statute and by doing so proximately caused the injury. (*See e.g. Elliott v City of N.Y.*, 95 NY2d 730, 733 [2001].) In contrast, "violation of a municipal ordinance" or other administrative regulation "constitutes only evidence of negligence," and proof of a violation is not enough to establish negligence *per se*. (*Id.*)

What this means as a practical matter, is that in New York (and those states following the New York rule) proof of a violation of an administrative standard or rule – for example, an Occupational Safety and Health Administration (OSHA) standard, or a standard governing best practices in a certain field or industry – will *never* be enough to establish, *per se*, the negligence of the party in violation of the standard. While American National Standards Institute (ANSI) and similar requirements are "properly admitted" and can be "considered by the jury as some evidence of negligence," the standards are "not conclusive on the subject of negligence" and must be "considered with all the other facts and circumstances of the case in determining" whether the violating party is negligent. (S*awyer v Dreis & Krump Mfg. Co.*, 67 NY2d 328 [1986].)

In contrast, Florida and a number of southern and western states do not treat state statutes any differently from local rules and regulations, and in those states the violation of a building code or other local administrative regulation may be considered as *per se* evidence of negligence. (*See e.g. Brown v S. Broward Hosp. Dist.*, 402 So. 2d 58, 60 [Fla Dist. Ct. App. 1981].) The cases applying this stricter standard typically deal with vehicle and traffic violations, or violations of a building code that result in injurious accidents, but there is nothing in the reasoning of those decisions to limit the scope of the doctrine to traffic laws and building codes. (*See e.g. Giambra v Kelsey*, 338 Mont. 19, 36-37; *Federated Mut. Ins. Co. v. Hardin*, 67 N.C. App. 487, 489 [1984].)

Regardless of the jurisdiction, defense counsel should be alert to the opportunity to use *compliance* with a statute, rule or

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regulation as a shield to liability. Just as the violation of a statute, rule or regulation may be enough, in certain circumstances, to establish negligence as a matter of law, so too may proof of compliance with a statute or regulation be sufficient to establish that a defendant acted reasonably and without negligence. (*See e.g. Norris v Excel Industries, Inc.*, 139 F Supp 3d 742 [WD Virginia 2015] [proof of compliance with ANSI standard sufficient basis to grant defendant summary judgment]; *Heer v Costco Wholesale Corp.*, 589 Fed Appx 854 [10th Circ. 2014].) Even in those situations and jurisdictions where compliance with an industry standard or administrative regulation is not dispositive, evidence of a defendant's compliance with such standards is admissible and relevant to show that a defendant acted reasonably under the circumstances.

In sum, proof of a violation of, or compliance with, a state statute, industry standard or administrative regulation will almost always be admissible as some proof on the question or negligence, and in many jurisdictions such proof may be dispositive and establish negligence *per se*. Therefore, it is incumbent on defense counsel in negligence cases to be aware of all potentially relevant statutes, standards and regulations, and be ready to meet the proof that a client violated a standard, or better yet be prepared to present evidence of compliance with a statute or regulation as a shield against liability.