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Osha Evidence in Federal Court Products Liability Actions: Too Prejudicial to be Admissible to Prove a Machine's Safety or Defect, or Simply Additional Evidence for the Fact Finder?

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**OSHA EVIDENCE IN FEDERAL COURT
PRODUCTS LIABILITY ACTIONS: TOO
PREJUDICIAL TO BE ADMISSIBLE TO PROVE
A MACHINE'S SAFETY OR DEFECT, OR
SIMPLY ADDITIONAL EVIDENCE FOR THE
FACT FINDER? ***

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INTRODUCTION

In 1970, Congress passed the Occupational Safety and Health Act ("OSHA").¹ Through the promulgation of safety standards by the Secretary of Labor, the act "require[s] all employers to take all feasible steps to avoid industrial accidents."² Despite its focus on the employer's duty to safeguard the workplace,³ OSHA

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1. 29 U.S.C. §§ 651-78 (1988).

2. *General Dynamics Corp. v. Occupational Safety & Health Review Comm'n.*, 599 F.2d 453, 464 (1st Cir. 1979). The court held that where a shipyard worker was killed by falling material, sufficient evidence of inadequate safety training existed to attach liability to the employer, and rejected the employer's argument that adequacy of training should be measured against an industry-wide standard, because "such a standard would allow an entire industry to avoid liability." *Id.* The specific purposes of OSHA are enumerated at 29 U.S.C. §§ 651(b)(1)-(13) (1988).

3. *See Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1160 ("Like other safety statutes, OSHA is to be construed broadly in favor of ensuring workplace safety."), *reh'g denied*, (3d Cir. 1992). The court stated that "The Occupational Safety and Health Act was enacted in 1970 in response to an alarming epidemic of industrial injuries and deaths." *Id.*

has had an impact on products liability litigation as litigants have used, or attempted to use, evidence of compliance or non-compliance with OSHA standards to prove a machine's safety or defectiveness.⁴ This article discusses the admissibility of OSHA compliance or non-compliance in federal court products liability cases, and considers how proposed revisions to 402A of the Restatement (Second) of Torts⁵ may impact on the state of the law.

Section 653(b)(4) of OSHA contains a saving clause regarding OSHA's applicability, providing:

Nothing in this chapter shall be construed to supersede or in any manner affect any work[er's] compensation law or to enlarge or diminish or affect in any other manner the common law or

4. See *McHargue v. Stokes Div. of Pennwalt Corp.*, 912 F.2d 394, 396-97 (10th Cir. 1990) (defendant manufacturer allowed to introduce OSHA evidence for the limited purpose of cross examining plaintiff's expert witness with respect to the Occupational Safety and Health Act to show that OSHA regulations recognized ANSI standards); *Bailey v. V & O Press Co.*, 770 F.2d 601, 609 (6th Cir. 1985) (defendant manufacturer commented on OSHA regulations which placed the duty to guard against injury on the employer, and the court held that it was reversible error to fail to give limiting instruction regarding OSHA evidence); *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 133-34 (8th Cir. 1985) (defendant manufacturer successfully introduced OSHA evidence to rebut plaintiff's contentions that defendant failed to warn and to rebut plaintiff's alternative design argument); *Sundbom v. Erik Riebling Co.*, No. 89 Civ. 4660 (JSM), 1990 WL 128920, at *2 (S.D.N.Y. August 28, 1990) (mem.) (during discovery defendant manufacturer successfully produced a letter stating that the guard on the machine in question complied with OSHA standards).

5. RESTATEMENT (SECOND) OF TORTS § 402A (1965). Section 402A provides in pertinent part:

Special Liability of Seller of Product for Physical Harm to User or Consumer

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Id.

statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.⁶

In ordinary negligence actions, this saving clause has been construed to mean merely that in enacting OSHA, Congress did not intend to confer upon injured employees a private right of action⁷ that would bypass state worker's compensation laws, which are typically the only form of redress available to an injured employee *vis-à-vis* his or her employer.⁸

The admissibility of OSHA standards as evidence of a machine's safety or defect is governed by Rule 403 of the Federal

6. 29 U.S.C. § 653(b)(4) (1988).

7. *See* *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 263-68 (1st Cir. 1985). The Court of Appeals reversed a defense verdict in a Federal Employers Liability Act ("FELA") action, 45 U.S.C. § 51 (1988), in part because the trial court denied plaintiff's instruction that an OSHA violation could support a claim of negligence *per se*, holding that FELA allowed the doctrine of negligence *per se* to be predicated on an OSHA violation. With respect to whether OSHA violations can constitute negligence *per se* so as to preclude contributory negligence in FELA actions, the circuits are divided. *See, e.g.*, *Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1162 (OSHA violation not negligence *per se* in FELA action), *reh'g denied*, (3d Cir. 1992); *Albrecht v. Baltimore & Ohio R.R. Co.*, 808 F.2d 329, 332-33 (4th Cir. 1987) (reiterating that OSHA violation was not negligence *per se* in FELA action).

8. Absent special circumstances, an employee injured on the job may recover from her employer only those damages provided for in the applicable worker's compensation laws. *See, e.g.*, N.Y. WORK. COMP. LAW § 11 (McKinney 1992) ("The liability of an employer . . . shall be exclusive and in place of any other liability whatsoever, to such employee . . ."); *see also* *Posey v. Tennessee Valley Auth.*, 93 F.2d 726, 727-28 (5th Cir. 1937) (holding that United States Employees' Compensation Act is the only remedy generally available to United States employees); *In re Spencer Kellogg & Sons*, 52 F.2d 129 (2d Cir. 1931) (holding that a representative of a deceased employee could not bring an action for wrongful death against employer as the contractual status to compensation was the sole remedy available), *rev'd on other grounds sub nom.*, *The Linseed King*, 285 U.S. 502 (1932); *Matheny v. Edwards Ice Mach. & Supply Co.*, 39 F.2d 70, 73 (9th Cir.) (holding that where an accident occurred in a plant and all parties were of a single employer, worker's compensation was awarded in lieu of all other remedies), *cert. denied*, 281 U.S. 765 (1930).

Rules of Evidence.⁹ The rule weighs the probative value of the proffered evidence against the danger of unfair prejudice which may result from its admission.¹⁰ If the evidence is allowed, the objectant will likely be entitled to a limiting instruction guiding the jury as to the limited purpose for which the OSHA regulation may be considered.¹¹

9. FED. R. EVID. 403. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

10. FED. R. EVID. 403. *See* Libby v. Griffith Design & Equip. Co., Civ. No. 88-0282-P 1991 WL 185178 (D. Me., June 19, 1990). "Pursuant to Federal Rule 403, Plaintiff may . . . have to prove that the probative value of the [OSHA] evidence is not outweighed by its potential prejudicial effect." *Id.* at *3-*4; *see also* Smith v. Eaton Corp., 456 F. Supp. 505, 507 (E.D. Tenn. 1976), *aff'd*, 578 F.2d 1381 (6th Cir. 1978). The court stated:

considering *arguendo* that the aforementioned [OSHA] standards provide relevant evidence on the issue mentioned, its probative value is substantially outweighed by the danger of unfair prejudice to the plaintiff, a confusion of the strict liability in tort issue, and the consequent misleading of the jurors, whose principal attention might be diverted thereby from the real issue *Id.*; Sprankle v. Bower Ammonia & Chem. Co., 824 F.2d 409, 417 (5th Cir. 1987) (finding that Rule 403 determinations are "often inextricably bound with the facts of a particular case and thus will not be disturbed on appeal absent a showing of 'clear abuse . . . ,' " and that "even if the district court's exclusion of the evidence was erroneous, the error would not require reversal unless it adversely affected the substantial rights of the complaining party." (quoting Shipp v. General Motors Corp., 750 F.2d 418, 427 (5th Cir. 1985))).

11. *See* FED. R. EVID. 105. Rule 105 provides: "When evidence which is admissible as to one party for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." *See also* Johnson v. Niagara Mach. & Tool Works, 666 F.2d 1223, 1226 (8th Cir. 1981) (holding that where district court "expressly instructed the jury that the OSHA regulation was applicable only to [the employer] . . ." and not to defendant manufacturer the district court's cautionary instructions prevented a false issue of fact from being injected into the trial); *but see* Cook v. Navistar Int'l Transp. Corp., 940 F.2d 207 (7th Cir. 1991) (holding that where court was unable to formulate an adequate limiting instruction evidence of safety regulation was properly excluded); *see also* Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.), cert. denied, 285 U.S. 556 (1932). Regarding the effectiveness of limiting instructions, Judge Learned Hand explained:

Thus, in the Fourth Circuit, 29 U.S.C. section 653(b)(4) does not preclude the admission of an OSHA regulation into evidence by charging the jury that the regulation may be considered as "one more piece of evidence on the issue of negligence."¹² Indeed, the First Circuit has gone even further, holding that an OSHA violation could support a finding of negligence *per se*.¹³ However, the use of evidence of compliance or non-compliance with OSHA regulations in federal court products liability actions

[Evidence] gets before the jury, and the less they are told about the grounds for its admission, or what they shall do with it, the more likely they are to use it sensibly. The subject seems to gather mist which discussion serves only to thicken, and which we can scarcely hope to dissipate by anything further we can add.

Id.; see *contra* 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN ON EVIDENCE, ¶ 105 [01], at 105-10 (1993):

[If the point which the disputed evidence is to prove] can just as well be proven by other evidence, or if the evidence is of but slight weight or importance upon the point, the trial judge might well be justified in excluding it entirely, because of its prejudicial and dangerous character as to other points This would emphatically be true where there is good reason for believing that the real objective for which the evidence is offered is not to prove the point for which it is ostensibly offered and is competent, but is to get before the jury declarations as to other points, to prove which evidence is incompetent.

Id. (quoting *Adkins v. Brett*, 193 P. 251, 254 (Cal. 1920)).

12. *Albrecht v. Baltimore & Ohio R.R.*, 808 F.2d 329, 332 (4th Cir. 1987) (holding that no reversible error was committed when district court read OSHA regulations to jury as evidence on issue of negligence in a FELA action). Other circuits have held similarly. See *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991) (OSHA standards relevant in common law negligence actions), *cert. denied*, 112 S. Ct. 993 (1992); *Melerine v. Avondale Shipyards, Inc.* 659 F.2d 706, 707 (5th Cir. 1981) (holding that while OSHA regulation did not establish negligence *per se* against party who was not plaintiff's employer it could be used as evidence of negligence which could be either accepted or rejected by trier of fact); *Provenza v. American Export Lines, Inc.*, 324 F.2d 660, 665-66 (4th Cir. 1963) (holding that where longshoreman was injured while loading ship trial court erred in not granting plaintiff's request that Safety and Health Regulation for Longshoring, 29 C.F.R. § 91, be read to jury as evidence of ship owner's negligence), *cert. denied*, 376 U.S. 952 (1964).

13. See *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 266-67 (1st Cir. 1985).

has not received universal approval. Perhaps this is because evidence of compliance or non-compliance with an OSHA regulation may improperly suggest to a jury that an employer's OSHA duty to provide a safe machine precludes a manufacturer's duty to manufacture a safe machine.¹⁴

As will be shown, in products liability actions in federal court, the Second,¹⁵ Third,¹⁶ Fifth,¹⁷ Tenth,¹⁸ Eleventh,¹⁹ and D.C. Circuits²⁰ have allowed OSHA evidence. The First,²¹ Fourth,²²

14. See *Murphy v. L & J Press Corp.*, 558 F.2d 407, 412 (8th Cir. 1977) (finding lower court erred in introducing OSHA regulations as doing so created a false issue of who had the duty to guard), *modified*, 577 F.2d 27, *and cert. denied*, 434 U.S. 1025 (1978); *but see McKinnon v. Skil Corp.*, 638 F.2d 270, 275-76 (1st Cir. 1981) (stating that OSHA standards were not admissible in an action against a manufacturer because such standards apply solely to employers).

15. See *Cappellini v. McCabe Powers Body Co.*, 713 F.2d 1, 4-5 (2d Cir. 1983) (plaintiff's failure to comply with OSHA regulation admissible to show contributory negligence); *Sundbom v. Erik Riebling Co.*, 1990 U.S. Dist. LEXIS 11297, at *1-*2 (S.D.N.Y. 1990) (holding that manufacturers and distributors may introduce evidence of compliance with OSHA standards in common law negligence actions).

16. See *Tees v. Bliss*, No. 82-710 (E.D. Pa., July 1, 1985) (stating that a court may allow references to industrial safety codes, including OSHA regulations, in products liability actions), *aff'd*, 786 F.2d 1148 (3d Cir. 1986); *Bunn v. Caterpillar Tractor Co.*, 415 F. Supp. 286, 292 (W.D. Pa. 1976) (holding that jury could consider OSHA regulations in determining the liability of a manufacturer for defective design), *aff'd*, 556 F.2d 564 (3d Cir.), *cert. denied*, 434 U.S. 875 (1977).

17. See *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018 (5th Cir. 1979) (defendant allowed to admit evidence of compliance with OSHA standards in products liability action).

18. See *McHargue v. Stokes Div. of Pennwalt Corp.*, 912 F.2d 394, 396 (10th Cir. 1990) (holding that a reference to OSHA in order to enhance credibility of another safety standard was permissible).

19. See *White v. W.G.M. Safety Corp.*, 707 F. Supp. 544, 547 n.4 (S.D. Ga. 1988) (stating that OSHA violations are admissible as evidence of negligence on the part of an employer), *aff'd*, 891 F.2d 906 (11th Cir. 1989).

20. See *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988) (admitting OSHA regulations to show that manufacturer was aware of product dangers).

21. See *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991) (OSHA standards relevant in common law negligence actions), *cert. denied*, 112 S. Ct. 993 (1992); *McKinnon v. Skil Corp.*, 638 F.2d 270 (1st Cir. 1981). The

Sixth²³, and Eighth Circuits²⁴ have both allowed and excluded such evidence, and the Seventh²⁵ and Ninth Circuits²⁶ have not directly addressed the issue. Where OSHA evidence has been allowed, such evidence has been used for a variety of reasons.²⁷

McKinnon court explained that safety standards may be admitted to prove negligence in product liability actions but OSHA standards are not admissible in consumer product liability cases against manufacturer. *Id.* at 274-75

22. *See Smiley v. Economy Forms Corp.*, 846 F.2d 73 (Table), 1988 WL 46283, **1 (4th Cir. 1988) ("Because OSHA standards are applicable only to employers, they are irrelevant to the liability of defendants, the manufacturer and lessor of the [dangerous equipment] . . . "); *Horne v. Owens Corning Fiberglass Corp.*, 1993 U.S. App. LEXIS 2194, *10-11 (4th Cir. 1993) (admitting OSHA regulations as state-of-the-art evidence, as well as relevant to industry standards); *Albrecht v. Baltimore & Ohio R. Co.*, 808 F.2d 329 (4th Cir. 1987) (FELA case which held that OSHA regulations provide evidence regarding the standard of care required of employers in negligence actions).

23. *See Bailey v. V & O Press Co.*, 770 F.2d 601, 608-09 (6th Cir. 1985) (holding that OSHA standards could not be used by defendant-manufacturer to prove that employer had duty to guard unless limiting instruction was given); *Minichello v. United States Indus., Inc.*, 756 F.2d 26, 29 (6th Cir. 1985). The court explained that evidence may not be admitted to show that a product does not violate OSHA standards because the Occupational Safety & Health Act states that it is not intended to have an effect on the civil standard of liability, and is applicable only to employers but court cautioned that OSHA may be relevant in other instances to product liability cases. *Id.* at 29.

24. *See Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 133-34 (8th Cir. 1985) (defendant introduced OSHA regulation to rebut plaintiff's failure to warn claim); *Murphy v. L & J Press Corp.*, 558 F.2d 407 (8th Cir. 1977) (admission of OSHA evidence offered by manufacturer constituted reversible error as it created false issue of who had duty to guard), *modified*, 577 F.2d 27, and *cert. denied*, 434 U.S. 1025 (1978).

25. *See Tragarz v. Keene Corp.*, 980 F.2d 411, 416 (7th Cir. 1992) (plaintiff introduced evidence of OSHA regulations concerning asbestos-related lung cancer); *Elberg v. Mobil Oil Corp.*, 967 F.2d 1146, 1151 (7th Cir. 1992) (while finding for defendant in longshoreman's admiralty action against vessel owner trial court properly considered OSHA regulation requiring employer to guard hatches).

26. *See Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1106-07 (9th Cir. 1991) (exclusion of OSHA regulations offered by manufacturer to prove that employee was contributorily negligent was harmless as jury had already reached that same conclusion based upon other evidence).

27. *See, e.g.,* *McHargue v. Stokes Div. of Pennwalt Corp.*, 912 F.2d 394, 396-97 (10th Cir. 1990) (admitting references to OSHA in attempting to

EXCLUSION OF OSHA EVIDENCE IN PRODUCTS LIABILITY ACTIONS

Although the limitation in 29 U.S.C. section 653(b)(4) was not discussed, one of the earlier cases excluding OSHA evidence in a products liability action was *Murphy v. L & J Press Corp.*²⁸ There, the plaintiff was injured on the defendant's punch press, which he claimed was defectively designed because the press lacked a guard at the point of operation.²⁹ At trial, which ended in a defendant's verdict, the manufacturer introduced an OSHA regulation and a similar American National Standards Institute ("ANSI") regulation, both indicating that the employer had a duty to guard the point of operation.³⁰ On appeal, the Eighth Circuit concluded that the OSHA and ANSI regulations were prejudicial to the plaintiff because they injected a false issue into the case of *who* had the duty to guard (the employer or manufacturer), as opposed to whether the manufacturer *could have guarded* the point of operation.³¹ Stated another way, just be-

further the credibility of another safety standard); *White v. W.G.M. Safety Corp.*, 707 F. Supp. 544, 547-48 (S.D. Ga. 1988), *aff'd*, 891 F.2d 906 (11th Cir. 1989) (reiterating that OSHA evidence may be admitted as evidence of employer's negligence); *Bunn v. Caterpillar Tractor Co.*, 415 F. Supp. 286, 292-93 (W.D. Pa. 1976) (allowing evidence of OSHA standards in considering whether product design was unreasonably dangerous), *aff'd*, 556 F.2d 564 (3d Cir.), *cert. denied*, 434 U.S. 875 (1977).

28. 558 F.2d 407 (8th Cir. 1977), *modified*, 577 F.2d 27, and *cert. denied*, 434 U.S. 1025 (1978).

29. *Murphy*, 558 F.2d at 408.

30. *Id.* at 409.

31. *Id.* at 412. The Eighth Circuit ruled:

Counsel [for defendant] first led the jury down a blind alley by stating the ANSI and OSHA materials were "[his] evidence of . . . who has the duty to guard." This injected a false issue of fact into the proceedings, i.e., who *should* guard as opposed to *could* . . . [the defendant] guard The United States District Court has nothing to do with OSHA enforcement proceedings - they come to the United States Court of Appeals for review from the Occupational Safety and Health Review Commission. What we do

cause the employer had a duty to guard the point of operation does not imply that the manufacturer would not have a similar duty.

The Sixth Circuit reached a similar result, excluding evidence of OSHA compliance to establish a product's safety in *Minichello v. United States Industries, Inc.*³² This result was reached even though the manufacturer in this case merely attempted to show that the machine was *within* OSHA regulations, not that the burden of guarding would be shifted to the employer.³³ In *Minichello*, plaintiff, a die worker at a Ford Motor Company plant, was required to stand on a spotting press, which had no guardrail but stood approximately thirty-two inches above the plant floor.³⁴ After plaintiff fell and sustained various injuries, he brought a products liability action against the manufacturer of the unguarded platform.³⁵ At trial, plaintiff's safety engineer testified regarding the alleged dangerousness of a platform without a guardrail.³⁶ Defendant then cross-examined the engineer about the platform's compliance with OSHA regulations, which required employers to guard only platforms of 4 feet or higher above the floor.³⁷ After the jury returned a defendant's verdict,

find is that the introduction of the ANSI code and OSHA regulations so seriously altered the course of the trial that the central issue of "feasibility" was lost and the improper issue of "who had the duty to guard" was tried.

Id. (citations omitted).

32. 756 F.2d 26 (6th Cir. 1985).

33. *Id.* at 29.

34. *Id.* at 28.

35. *Id.* Plaintiffs actually sued U.S. Industries, Inc. which was the successor in interest to the manufacturer, CMC Clearing, and at trial withdrew claims of negligence and breach of express warranty, and proceeded only under theories of strict liability and breach of implied warranty. *Id.* at 28. Interestingly, the *Minichello* court did not completely close the door on use of OSHA evidence: "We do not mean to suggest that OSHA regulations can never be relevant in a product liability case, but OSHA regulations can never provide a basis for liability because Congress has specified that they should not." *Id.* at 29.

36. *Id.*

37. *Id.* at 28-29. See 29 C.F.R. § 1910.23(c)(1) (1992), which provides, in relevant part: "Every open sided . . . platform 4 feet or more above adjacent

plaintiff appealed on various grounds, including the manufacturer's introduction of the machine's OSHA compliance on cross-examination to establish that the lack of a guardrail was not an unreasonable defect.³⁸ Of course, it is entirely possible that, while an employer may not have a duty to guard a particular feature, such as a platform under 4 feet, a manufacturer is not necessarily relieved of the responsibility to protect against that particular danger.³⁹

On appeal, the manufacturer argued that the OSHA regulation was introduced on cross-examination for the "limited purpose" of testing and comparing the engineer's opinion on the machine's dangerousness without a guardrail with the content of an OSHA (and an ANSI) regulation which, stated that the platform need not be guarded.⁴⁰ However, as the jury was not told of the "limited purpose" of the OSHA evidence, consideration of such evidence was unrestricted and thus prejudicial enough to wrongly tip the balance in defendant's favor.⁴¹

Reversing and remanding for a new trial, the United States Court of Appeals for the Sixth Circuit focused on the saving clause in 29 U.S.C. section 653(b)(4), reasoning that:

If knowledge of the [OSHA] regulations leads the trier of fact to find a product [not] defective, the effect is to impermissibly alter the civil standard of liability We do not mean to suggest that OSHA regulations can never be relevant in a product liability case, but OSHA regulations can never provide a basis for liability because Congress has specified [in 29 U.S.C. section 653(b)(4)] that they should not.⁴²

The Sixth Circuit reasserted its antipathy to using OSHA evidence to prove a product's safety in *Bailey v. V & O Press Co.*⁴³ In *Bailey*, an employee was injured on a punch press, which

floor . . . shall be guarded by a standard railing . . . on all sides except where there is [an] entrance " *Id.*

38. *Minichello*, 756 F.2d at 28-29.

39. See *infra* notes 51-53 and accompanying text.

40. *Minichello*, 756 F.2d at 29.

41. *Id.* at 29-30.

42. *Id.* at 29.

43. 770 F.2d 601 (6th Cir. 1985).

plaintiff claimed was defective because the press did not have a guard at the point of operation, where his fingers were severed.⁴⁴ The manufacturer, over plaintiff's objection, made references during its opening statement and in its direct case to OSHA regulations which placed the burden of guarding the point of operation on the employer, similar to the defendant's strategy in *Murphy*.⁴⁵ While the manufacturer's initial use of the OSHA regulations may have been relevant to plaintiff's negligence claim, the jury decided the strict liability claim.⁴⁶ In reversing, the Sixth Circuit concluded that because the jury did not receive a limiting instruction on the use of OSHA evidence in products liability cases, "the jury was free to consider the testimony [regarding the OSHA and ANSI regulations which placed responsibility for guarding upon the employer] as demonstrating the non-defectiveness of the product, as proscribed in *Minichello*."⁴⁷

Manufacturers do not necessarily want OSHA evidence introduced to prove a machine's safety; manufacturers may want to exclude OSHA regulations offered by the plaintiff to prove a machine's defectiveness. In *McKinnon v. Skil Corp.*,⁴⁸ for example, a consumer argued, among other things, that the lower blade guard on a portable electric saw failed to properly return and cover the blade, thereby injuring his foot when he placed the saw on the floor.⁴⁹ After a defendant's verdict, plaintiff appealed the trial court's exclusion of an OSHA regulation that required saws to have properly functioning lower blade guards.⁵⁰ Noting that the employment (covered by OSHA) and the consumer (not covered by OSHA) contexts "are not that fungible,"⁵¹ the Court of

44. *Id.* at 602-03.

45. *Id.* at 603. In *Murphy*, the defendant-manufacturer attempted to introduce OSHA evidence indicating that the employer had the duty to guard the point of operation. See *supra* notes 28-32 and accompanying text.

46. 770 F.2d at 608-09.

47. *Id.* at 609.

48. 638 F.2d 270 (1st Cir. 1981).

49. *Id.* at 272.

50. See *id.* at 274 n.5. 29 C.F.R. § 1910.243 provides, in pertinent part: "When the tool is withdrawn from the work, the lower guard shall automatically and instantly return to covering position." *Id.*

51. *McKinnon*, 638 F.2d at 275.

Appeals for the First Circuit upheld the exclusion of the OSHA regulation because "OSHA regulations cannot automatically be used as evidence of industry practice or of the standard of care to be exercised by a reasonable person in a consumer product liability case."⁵² As the court stated, OSHA "may impose a standard of conduct upon employers greater than that which would be considered reasonable in the [portable saw] industry."⁵³ However, the court noted that this opinion must be read narrowly to exclude OSHA evidence to establish the manufacturer's standard of care, only in products liability cases concerning a product designed for consumer, not industrial use.⁵⁴

OSHA EVIDENCE ALLOWED

Other circuit courts, and district courts within them, have permitted OSHA evidence in products liability actions.⁵⁵ In *Sundbom v. Erik Riebling Co.*,⁵⁶ the plaintiff claimed that he was injured by a defective industrial "shaper." The defendant-manufacturer, during discovery, produced a letter from the New York

52. *Id.*

53. *Id.*

54. *Id.* at 275-76 n.8. The court expressed no opinion on whether OSHA evidence would be admissible in a products liability action against a manufacturer of a machine designed for *industrial* use. *See also* Hagans v. Oliver Mach. Co., 576 F.2d 97 (5th Cir. 1978). In *Hagans*, the Fifth Circuit reversed the district court's finding that a table saw with a removable blade guard had an unreasonably dangerous design defect, allowing defendant to introduce evidence of industry and national safety standards in the process. The court noted that "[a] product is unreasonably dangerous if its utility does not outweigh the magnitude of the danger inhering in its introduction into commerce." *Id.* at 99. The court found that the table saw exceeded industry safety standards and practices, and noted that the guard had to be removed to complete many common tasks, such as cutting a sheet of 4' x 8' plywood. *Id.* at 100.

55. *See supra* notes 15-20 and accompanying text.

56. No. 89 Civ. 4660 (JSM), 1990 WL 128920 (S.D.N.Y. Aug. 28, 1990) (mem.). In *Sundbom*, the author of this article served as co-counsel to plaintiff, along with Kenneth Warner and Paul Hanly of New York City.

State Department of Labor ("DOL")⁵⁷ stating that the guard on the shaper in question complied with OSHA regulations.⁵⁸ Anticipating that the defendant-manufacturer would attempt to use the letter at trial to prove the machine's safety, plaintiff sought an *in limine* ruling to exclude the letter, citing *Minichello* and other cases.⁵⁹ The district court declined to follow *Minichello*, and allowed the manufacturer to introduce the DOL letter as evidence of the machine's compliance with OSHA standards.⁶⁰ In rejecting *Minichello*, and allowing the OSHA evidence, the *Sundbom* court adopted the "majority position on this issue"⁶¹ and cited as controlling the Second Circuit's decision in *Cappellini v. McCabe Powers Body Co.*⁶² In *Cappellini*, the plaintiff was injured when he fell from an allegedly defective hydraulic bucket.⁶³ The defendant-manufacturer argued, and the Second Circuit agreed, that plaintiff's failure to follow OSHA regulations, which required that he be attached to the lift with a "body belt,"⁶⁴ was "some evidence"⁶⁵ of negligence for the jury, which, under the then applicable doctrine of contributory negligence, could have completely barred recovery.⁶⁶ In *Sundbom*, Judge Martin concluded

57. The letter was written pursuant to 29 C.F.R. § 1908.1 (1992), which requires that OSHA "utilize State personnel to provide consultative services to employers" to insure "places of employment which are safe and healthful." 29 C.F.R. § 1908.1(a).

58. *Sundbom v. Erik Riebling Co.*, No. 89 Civ. 4660 (JSM), 1990 WL 128920, at *1 (S.D.N.Y. Aug. 28, 1990) (mem.).

59. *Id.*

60. *Id.* at *1-*2. Nevertheless, the jury returned a verdict for the plaintiff because, according to a questionnaire completed by the jury, one of the alleged defects (inadequate operator's manual) was not covered by the DOL's reference to OSHA compliance.

61. *Id.* at *1.

62. 713 F.2d 1 (2d Cir. 1983).

63. *Id.* at 2-3.

64. *Id.* at 4.

65. *Id.* at 5 (quoting *Schumer v. Caplin*, 241 N.Y. 346, 351, 150 N.E. 139, 140 (1925) (holding that violation of a rule promulgated by state agency which did not have force of law failed to establish negligence *per se*)).

66. See N.Y. CIV. PRAC. L. & R. 1411 (McKinney 1976). New York adopted the doctrine of comparative negligence in 1975. The manufacturer in *Cappellini* unsuccessfully argued that plaintiff's OSHA violation was

that "the fact that the regulations were used in . . . [*Cappellini* by the manufacturer to prove the plaintiff's contributory negligence] in the context of an alleged violation, rather than in the context of alleged compliance, is a distinction without a difference."⁶⁷

Other circuits have reached similar results, permitting OSHA evidence in products liability actions in an even more definitive manner than in *Cappellini*, where the manufacturer offered the OSHA evidence to prove the plaintiff's contributory negligence.⁶⁸ In the Fifth Circuit case of *Hagans v. Oliver Machinery Co.*,⁶⁹ the plaintiff obtained a jury verdict in a products liability action against the manufacturer of an industrial saw, whose guard the plaintiff had removed, arguing that the manufacturer should have designed the guard "as an unremovable safety feature."⁷⁰ In reversing, the Fifth Circuit found no evidence to support the jury's verdict, and without discussing *any* cases either excluding or including OSHA evidence, noted that "defendant's saw . . . was shown [by the manufacturer] to comport with current OSHA safety standards."⁷¹

negligence *per se*, which should have barred recovery. *Id.* at 5. The Second Circuit, as noted, held that the OSHA violation was only "some evidence" of negligence for the jury to take into consideration. *Id.* Interestingly, the Ninth Circuit encountered the same issue in *Cooper v. Firestone Tire & Rubber Co.*, 945 F.2d 1103, 1106 (9th Cir. 1991) in which a manufacturer appealed a lower court's exclusion of an OSHA regulation which the manufacturer had intended to use to establish a product user's contributory negligence. However, citing *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 269 (1st Cir. 1985), the *Cooper* court ruled that the error, if any, was harmless because the jury had before it other evidence of plaintiff's negligence. *Cooper*, 945 F.2d at 1106-07.

67. *Sundbom v. Erik Riebling Co.*, No. 89 Civ. 4660 (JSM), 1990 WL 128920, at *1 (S.D.N.Y. Aug. 28, 1990) (mem.).

68. *Cappellini*, 713 F.2d at 4-5.

69. 576 F.2d 97 (5th Cir. 1978).

70. *Id.* at 100.

71. *Id.* at 103. William S. Sessions, former head of the Federal Bureau of Investigation, served as the trial court judge. While the Fifth Circuit allows OSHA evidence, a manufacturer's compliance with an OSHA regulation(s) does not necessarily exonerate the manufacturer in a products liability case. See *Porter v. American Optical Corp.*, 641 F.2d 1128, 1140 (5th Cir.), *cert. denied sub. nom.*, *Aetna Casualty & Surety Co. v. Porter*, 454 U.S. 1109 (1981), in which the Fifth Circuit reaffirmed the principle that a

Similarly, in *Dixon v. International Harvester Co.*,⁷² the Fifth Circuit, at a minimum, tolerated plaintiff's use of OSHA evidence to prove the defectiveness of a crawler tractor cab.⁷³ At trial, the plaintiff argued that the OSHA standard required the cab to be completely enclosed, contrary to the design of defendant's cab.⁷⁴ After the trial court set aside the jury's verdict, plaintiff, among others, appealed.⁷⁵ The Fifth Circuit concluded that, even though OSHA evidence should only be used to provide the standard of care exacted of employers, any error was harmless because a similar ANSI standard was admissible.⁷⁶ In other words, the improper admission of evidence that is merely cumulative is a harmless error.⁷⁷ Interestingly, the Fifth Circuit did not even mention *Minichello*, which reached the diametrically opposite result.⁷⁸

In *McHargue v. Stokes Division of Pennwalt Corp.*,⁷⁹ the Tenth Circuit Court of Appeals upheld a manufacturer's introduction of OSHA evidence for the limited purpose of cross-examining plaintiff's expert witness.⁸⁰ The plaintiff was injured on a plastic molding machine which, according to the defendant-manufacturer, complied with ANSI standards.⁸¹ To counteract this evidence, the plaintiff, through his expert, characterized the

manufacturer's compliance with a government standard (a respirator conforming to standards of, among others, the Bureau of Mines) is not necessarily enough to protect a manufacturer in a design defect case if plaintiff produces overwhelming evidence of such defect. *Id.* at 1140-41 (citing *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018 (5th Cir. 1979) (jury found ladder unreasonably defective despite evidence of compliance with OSHA and industry standards)).

72. 754 F.2d 573 (5th Cir. 1985).

73. *Id.* at 580.

74. *Id.* at 581.

75. *Id.* at 579.

76. *Id.* at 582.

77. *See id.* at 581-82.

78. *Dixon* was decided on March 7, 1985, and *Minichello* was decided on February 27, 1985, perhaps explaining the lack of any reference in *Minichello* to *Dixon*.

79. 912 F.2d 394 (10th Cir. 1990).

80. *McHargue*, 912 F.2d at 396-97.

81. *See id.* at 395-96.

ANSI standards as “nothing more than a minimum consensus standard.”⁸² The manufacturer then attempted to refute the expert’s testimony by asking whether or not OSHA recognized any national consensus standards other than ANSI.⁸³ After a defendant’s verdict, plaintiff appealed, arguing that the cross-examination violated the proscription of 29 U.S.C. section 653(b)(4), as articulated in *Minichello*.⁸⁴ In affirming, the Tenth Circuit noted that the defendant-manufacturer did not introduce a specific OSHA regulation to prove the product’s safety. Rather, the manufacturer properly used the OSHA evidence on cross-examination to re-establish the credibility of the ANSI standards, which plaintiff had attacked.⁸⁵

The Fourth Circuit similarly approved the use of OSHA evidence. In *Spangler v. Kranco, Inc.*,⁸⁶ the defendant, in accordance with the customer’s specifications, manufactured a crane without a warning device to indicate that the crane was in motion.⁸⁷ Without discussing any of the anti-OSHA evidence case law, the Fourth Circuit affirmed the district court’s dismissal because the crane had been manufactured in accordance with the customer’s reasonable specifications, and because the parties conceded that OSHA did not require a warning device under such circumstances.⁸⁸

Even if a court were to conclude that evidence of OSHA compliance or non-compliance was not relevant to a design defect claim against a manufacturer, OSHA evidence may be admitted for other purposes, such as to show the negligence of another party or non-party, provided that a limiting instruction is given.⁸⁹

82. *Id.* at 396.

83. *Id.* at 396-97.

84. *Id.* at 396-97. *See Minichello*, 756 F.2d at 29 (stating that OSHA regulations are not admissible in evaluating whether a product is unreasonably dangerous because the act specifically states that it is not to affect civil liability).

85. *See McHargue*, 912 F.2d at 396-97.

86. 481 F.2d 373 (4th Cir. 1973).

87. *Id.* at 374.

88. *Id.* at 375.

89. *See supra* note 11.

For example, in *Johnson v. Niagara Machine & Tool Works*,⁹⁰ the plaintiff was injured on the defendant-manufacturer's punch press, which did not have a guard at the point of operation.⁹¹ After a defense verdict on the design defect claim, plaintiff appealed the admission of an OSHA regulation that directed employers, not manufacturers, to provide point of operation guards on punch presses.⁹² The Eighth Circuit affirmed, noting that the district court properly instructed the jury that the OSHA regulation "was applicable only to [the employer] and not applicable to [the manufacturer]."⁹³

Although at first blush, *Johnson* appears to conflict with the Eighth Circuit's earlier conclusion in *Murphy*,⁹⁴ the court distinguished the cases.⁹⁵ The court noted that the trial judge's cautionary instruction in *Johnson* prevented a "false issue" from being injected into the case by advising the jury that the OSHA regulation could only be considered on the issue of the non-party employer's negligence.⁹⁶

Finally, in *McNeal v. Hi-Lo Powered Scaffolding, Inc.*,⁹⁷ a window washer sued a manufacturer of "U-Clips" used to secure wire cables on the scaffolding from which he fell.⁹⁸ At trial, plaintiff presented evidence that the backward application of such clips diminished their holding power, and that the manufacturer failed to warn of the danger of such backward application.⁹⁹ Although the jury returned a verdict for plaintiff, the trial judge granted judgment notwithstanding the verdict for the manufac-

90. 666 F.2d 1223 (8th Cir. 1981).

91. *Id.* at 1224-25.

92. *Id.* at 1225-26.

93. *Id.* at 1226. The jury accordingly found the non-party employer 100% responsible. *Id.* at 1225.

94. *See supra* notes 28-32 and accompanying text.

95. *Johnson*, 666 F.2d at 1226.

96. *Id.* at 1226. No such limiting instruction was given in *Murphy*, apparently because there was no issue of negligence of plaintiff's non-party employer. *See Murphy*, 558 F.2d 407, 412 (8th Cir. 1977), *modified*, 577 F.2d 27, and *cert. denied*, 434 U.S. 1025 (1978).

97. 836 F.2d 637 (D.C. Cir. 1988).

98. *Id.* at 638.

99. *Id.* at 641.

turer.¹⁰⁰ On appeal, the District of Columbia Circuit noted that an ANSI standard, as incorporated by a later OSHA regulation, actually prohibits the use of such clips.¹⁰¹ The court reversed and remanded,¹⁰² concluding that, “[g]iven the foregoing, [including the OSHA regulation], a reasonable juror could have concluded that Crosby [the manufacturer of the clip] was fully aware of the danger presented by the backward application of U-Clips.”¹⁰³ Although in the context of a failure to warn theory, the District of Columbia Circuit clearly had no problem in applying to a manufacturer an OSHA regulation applicable only to employers.

THE EFFECT OF PROPOSED REVISIONS TO SECTION 402A ON THE ADMISSIBILITY OF OSHA EVIDENCE

While some would argue that OSHA regulations are too prejudicial to be admissible in an action against a manufacturer, proposed revisions to section 402A of the Restatement (Second) of Torts may greatly increase the probative value of evidence of compliance or non-compliance with OSHA regulations.¹⁰⁴ As has

100. *Id.* at 638.

101. *Id.* at 642.

102. *Id.* at 647.

103. *Id.* at 642.

104. See generally James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1514 (1992). The authors suggested the following revisions:

402A. Special Liability of One Who Sells a Defective Product

- (1) One who sells any product in a defective condition is subject to liability for harm to persons or property proximately caused by the product defect if the seller is engaged in the business of selling such a product.
- (2) The rule stated in Subsection (1) applies in the case of a claim based on a
 - (a) manufacturing defect even though the seller exercised all possible care in the preparation and marketing of the product; or
 - (b) design defect only if the foreseeable risks of harm presented by the product, when and as marketed, could have been reduced

been shown, some courts have allowed evidence of compliance or non-compliance with OSHA regulations to show that a product is "unreasonably dangerous."¹⁰⁵ In other instances, the regulations have been admitted for a limited purpose, such as to shift responsibility to a non-party employer,¹⁰⁶ or to bolster the credibility of other evidence.¹⁰⁷ Proposed changes to section 402A, if enacted by the American Law Institute, may allow manufacturers to raise OSHA evidence as an affirmative defense in products liability actions which contain warning defect claims.¹⁰⁸ Similarly, plaintiffs may have a greater chance of getting OSHA evidence in under the proposed formulation dealing with design defects.¹⁰⁹

The proposed revision distinguishes between design defects and warning defects. The section applicable to design defects contains

at reasonable cost by the seller's adoption of a safer design;
or

- (c) warning defect only if the seller failed to provide reasonable instructions or warnings about nonobvious product-related dangers that were known, or should have been known, to the seller.

Id.

105. *See, e.g.,* Bunn v. Caterpillar Tractor Co., 415 F. Supp. 286, 292-93 (W.D. Pa. 1976) (allowing the jury to consider OSHA regulations in a case against a manufacturer for design defect), *aff'd*, 556 F.2d 564 (3d Cir.), *cert. denied*, 434 U.S. 875 (1977).

106. *See* Murphy, *supra* notes 28-31 and accompanying text; Bailey, *supra* notes 43-47 and accompanying text; Johnson, *supra* notes 90-96 and accompanying text.

107. *See, e.g.,* McHargue v. Stokes Div. of Pennwalt Corp., 912 F.2d 394, 396-97 (10th Cir. 1990) (allowing OSHA standards to be admitted in order to enhance the credibility of an ANSI standard).

108. Perhaps evidence of compliance with OSHA could be introduced to demonstrate that the seller did not know and should not have known about product-related dangers that were nonobvious to the consumer. If OSHA regulations did not require warnings, it could be argued that the seller should have been no more aware of the danger than the consumer. *See* Henderson & Twerski, *supra* note 104, at 1514 (proposing revisions to § 402A regarding warnings).

109. Liability can only be attached when it is demonstrated that the defendant could have utilized a "safer, cost-effective design" that would have prevented the plaintiff's harm. Henderson & Twerski, *supra* note 104, at 1520. Consequently, OSHA standards may be admissible to demonstrate that the regulation called for such a "safer, cost-effective design."

a risk-utility balancing provision, stating that manufacturers will be liable for foreseeable risks of harm only if a safer product could have been made "at a reasonable cost by the seller's adoption of a safer design."¹¹⁰ OSHA evidence, while not applicable to manufacturers, would likely have a higher probative value under this formulation.¹¹¹ Plaintiffs could claim that a safer design could be adopted by the manufacturer at a reasonable cost, if an OSHA regulation required employers to guard against the harm by providing a point of operation guard, or similar device. However, the manufacturer could argue just as easily that OSHA regulations "impose a standard of conduct upon employers greater than that which would be considered reasonable in the industry."¹¹² On the other hand, forcing the manufacturer to guard against the harm may reduce the cost of the machine to the employer in the long run.

As for failure to warn claims, the proposed revision requires that the dangers which the manufacturer did not warn against be "nonobvious" risks, "that were known, or should have been known to the seller."¹¹³ Evidence of OSHA regulations concerning the alleged failure to warn would cut deeply into a plaintiff's claim that a particular danger was nonobvious. Similarly, plaintiffs could rebut a manufacturer's contention that a particular danger was unknown by introducing an OSHA regulation that required guarding against the danger in question. A more difficult question concerns whether a manufacturer could raise the absence of any regulation pertaining to the danger to show that it should not have known of a particular risk of harm. At any rate, an ar-

110. Henderson & Twerski, *supra* note 104, at 1514.

111. OSHA evidence could be used to demonstrate that a safer alternative is available at a reasonable cost. This can be done with limiting instructions. *Cf.* Johnson v. Niagara Mach. & Tool Works, 666 F.2d 1223, 1226 (8th Cir. 1981) (employing limiting instructions in introducing OSHA standards to prevent false issues from being injected into the trial) and in accordance with FED. R. EVID. 105, *see supra* note 11.

112. McKinnon v. Skil Corp., 638 F.2d 270, 275 (1st Cir. 1981) (stating that OSHA standards could not "automatically" be employed to demonstrate reasonable standards).

113. Henderson & Twerski, *supra* note 104, at 1517 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (2)(c)).

gument aimed at excluding the OSHA evidence on the basis that its probative value is substantially outweighed by the danger of unfair prejudice loses force, because the probative value has been greatly increased.¹¹⁴

Certainly, the argument that admission of OSHA evidence creates an inference that the burden of guarding against the danger properly lies with the employer still addresses valid concerns.¹¹⁵ The presumption of admissibility under Federal Rule of Evidence 403,¹¹⁶ however, would weigh in favor of increased acceptance of OSHA evidence due to the obvious increase in the probative value of such evidence under the proposed formulation. Therefore, it is likely that OSHA regulations, and other parallel provisions, will be used increasingly to prove that safer designs exist at a reasonable cost, and conversely, that dangers were obvious, or "knowable" to manufacturers in warning defect cases.¹¹⁷

CONCLUSION

Clearly in a products liability case in federal court, the circuits are anything but unanimous regarding the admissibility of OSHA evidence. In *Minichello* and *Bailey*, the Sixth Circuit held that a manufacturer's attempt to prove a machine's safety through use of OSHA evidence was sufficiently improper to justify a new trial,¹¹⁸ and in *McKinnon*, the First Circuit approved the exclu-

114. *Contra* *Murphy v. L & J Press Corp.*, 558 F.2d 407, 411 (8th Cir. 1977), *modified*, 577 F.2d 27, and *cert. denied*, 434 U.S. 1025 (1978) (finding that OSHA regulations were more prejudicial than probative).

115. *Contra* *Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223, 1226 (8th Cir. 1981) (stating that OSHA regulations were properly introduced because they were relevant to the employer's negligence despite the fact that the manufacturer, not the employer, was the defendant).

116. FED. R. EVID. 403. *See supra* note 9.

117. *Henderson & Twerski*, *supra* note 104, at 1514 (proposed provisions to § 402A (2)(b) and (2)(c) refer respectively to such design defect and warning defect theories).

118. *See supra* notes 32-47 and accompanying text.

sion of a manufacturer's proffered OSHA evidence.¹¹⁹ Conversely, OSHA evidence was allowed by the Second Circuit in *Cappellini*, the Fourth in *Spangler*, the Fifth in *Hagans* and *Dixon*, the Tenth in *McHargue* and the District of Columbia Circuit in *McNeal*. In *Cappellini* and *McHargue*, however, the OSHA evidence was allowed for the limited purposes of proving a plaintiff's contributory negligence, and cross-examination of an expert witness, respectively.¹²⁰ Finally, the Eight Circuit, in *Johnson* and *Murphy*, respectively, has both allowed OSHA evidence for a limited purpose¹²¹ and excluded it when such evidence could have unfairly misled the jury regarding a product's defect.¹²²

The absolute exclusion adopted in such cases as *Minichello* may not be justified despite the saving clause in section 653 (b)(4). After all, in that clause, Congress was merely manifesting its intent that OSHA does not afford an injured worker a private right of action against his or her employer, thereby circumventing state worker's compensation laws which were designed as the exclusive remedy for such injured workers.¹²³ It is difficult to imagine that Congress inserted that clause in anticipation of attempts by litigants to prove through the use of evidence of OSHA compliance or non-compliance a machine's safety, or lack thereof. Surely, with proper cautionary instructions, it should not be difficult for a jury in a products liability action to comprehend that an OSHA regulation is not binding on a manufacturer, and a machine's compliance or non-compliance with an OSHA regulation is merely *one* factor for it to consider in assessing whether a machine is defective or not.

In any event, a products liability practitioner, whether representing a plaintiff or defendant, should be prepared to provide the trial court with relevant case law on the admissibility of OSHA-related evidence. If the trial court does not adopt the absolute approach in *Minichello* and allows the OSHA evidence, the

119. See *supra* notes 48-54 and accompanying text.

120. See *supra* notes 62-66 & 79-85 and accompanying text.

121. See *Johnson*, 666 F.2d at 1226.

122. See *Murphy*, 558 F.2d at 412.

123. See *supra* note 8 and accompanying text.

objectant is entitled to a limiting instruction, as was, for example, approved in *Johnson*, or *Bunn*, so that the jury is aware that evidence of OSHA compliance or non-compliance applies only to employers, that a manufacturer need not necessarily comply with OSHA, and that if it does (or does not) that is only *a factor* for the jury in assessing a product's safety. Notwithstanding the prohibition in *Minichello* and other cases, the question of whether OSHA evidence is admissible in a products liability context, or any other context, is an evidentiary one. Therefore, the mere fact that OSHA applies to employers should not imply that, with appropriate instructions, OSHA-related evidence may *never* be relevant on the issue of the safety of a given product.

