

Industry Standards As a Source Of Liability For Trade Associations and Association Members

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I. INTRODUCTION

There is something characteristically American about a trade association. Trade associations embody our natural tendency, as a nation, to advance the common good in association with one another, as a community of interest. Under the umbrella of the trade association, natural competitors join forces to advance worthwhile goals and to learn from one another by sharing information. By communicating in the forum of the trade association, industries routinely provide themselves and the public with a wide array of beneficial services. Trade associations gather important information; they conduct and coordinate research and testing; they sponsor educational programs and facilitate communication with the public; they give member companies a stronger and more effective voice in legislative, regulatory and judicial arenas; and they often develop industry “standards” which provide guidelines or requirements for the activities of members to help minimize various risks and to foster public confidence.

Increasingly, however, these cooperative efforts are providing the plaintiffs’ bar with new opportunities to advance damage claims against businesses. Collaborative standard-setting can be fraught with difficulty both for associations and their member companies. Standards developed by collaborating competitors may run afoul of the antitrust laws unless their procompetitive effects are substantial. Standards developed through trade associations could also create or enhance liability in tort for the member company or for the association itself. An accepted industry standard generally reflects the collective knowledge of the industry with respect to a product or activity. An industry-created standard may be offered by a plaintiff as a “standard of care” that should have been followed by a member company or it may be used to demonstrate the defective nature of a member company’s product. A standard which is developed by an association for the good of the public and for the guidance of member companies could also be offered as evidence of negligence on the part of the association itself, giving plaintiffs a theory to sue the association as well as the member company.

The National Spa & Pool Institute Is Driven to Bankruptcy

In cases where recompense is sought for wrongful death, personal injury or property damage, the plaintiff must demonstrate that the person or entity he claims is responsible owed some form of duty to the plaintiff and failed to carry it out. Where there is an economic relationship between the injured and the defendant, such as a

contract or the purchase of a product or service, the requisite “duty” is easily demonstrated. But, until recently, courts considering the merits of a damages suit against a trade association for negligent standards have had difficulty defining the duty which the association might owe to a claimant, particularly when the trade association had no way to force its members to comply with its standards. This difficulty has to a great degree been overcome, as seen in the trend of recent decisions. Indeed, this was dramatically illustrated during the final week of August 2002 when the National Spa and Pool Institute (“NSPI”) filed for Chapter 11 bankruptcy protection to avoid having to defend several claims that its standards were the cause of severe injuries.

NSPI is a trade association which represents the manufacturers and retailers of swimming pools and swimming pool equipment. As a service to members and to the public, NSPI had published voluntary safety standards for the swimming pool industry. These standards had been in existence since 1959 and were reviewed and revised during the intervening years. Increasingly, however, these standards have become a basis for litigation against NSPI. Ten years ago, the outcome in these cases could have gone either way. The risk today is greater. NSPI is seeking bankruptcy protection, at least in part, to protect itself against a series of recent suits for damages which focus, with greater prospects for success, on the adequacy of those safety standards. The nature of the cases against NSPI is discussed below. First, however, it will be useful to discuss the way in which industry standards may be used against a trade association’s member companies because this sort of evidence is far more common.

II. EVIDENCE OF INDUSTRY STANDARDS IS OFTEN HIGHLY PROBATIVE IN DEFINING A STANDARD OF CARE FOR MEMBER COMPANY DEFENDANTS

Once a plaintiff has satisfied his burden to prove that the defendant owed him a duty, the plaintiff must prove that the defendant was negligent and that his negligence caused the damage.

Negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation in order to protect others against unreasonable risk of harm. Determination of the appropriate standard of care is an issue of law. In general, a “reasonable person” standard of care is applied. Whether a defendant has met that standard of care is an issue of fact to be determined by the jury. Because “standards” that are adopted by associations or other nongovernmental entities may represent a consensus regarding what a reasonable person in a particular industry would do, such standards may be helpful to the trier of fact in deciding whether the defendant has met the standard of care that is due in a particular situation. *Hansen v. Abrasive Engineering and Manufacturing, Inc*, 856 P.2d 625, 628 (Sup. Ct. Or. 1993).

Evidence of industry standards, customs and practices is “often highly probative when defining a standard of care.” 57A Am.Jur.2d *Negligence* § 185 (2002). Such evidence may be relevant and admissible to aid the trier of fact in determining the standard of care in a negligence action “even though the standards have not been imposed by statute or promulgated by a regulatory body and therefore do not have the force of law.” *Ruffiner v. Material Serv. Corp.*, 506 N.E.2d 581, 584 (1987); *Elledge v. Richland/Lexington School District Five*, 534 S.E.2d 289, 291 (Ct. App. S.C. 2000). Indeed, proof of a general custom and usage may be admissible “even where an ordinance prescribes certain minimum safety requirements which the custom exceeds.” *Duncan v. Corbetta*, 178 A.D.2d 459, 577 N.Y.S.2d 129 (1991).

Violation of an industry standard does not constitute negligence *per se*, as the violation of a statute or regulation might. See *St. Louis-San Francisco Railway Company v. White*, 369 So.2d 1007, 1010 (Dist. Ct. App. Fla, 1979). However, violation of an industry standard (or failure to follow one) may be offered as evidence in establishing whether a party has met a standard of care to which the party, in the exercise of due care, should have conformed. A threshold issue in the analysis is whether, if the standard is not required by law, failure to comply with a purely voluntary standard can be regarded as evidence of failure to exercise “due care.” What duty to third parties arises from a failure to adhere to such a voluntary standard?

A. The Example of Responsible Care®

Trade associations often take great care to protect their members against the possibility that an industry standard would be held against them. Responsible Care® is a good example. Responsible Care® is described by the American Chemistry Council (“ACC,” formerly the Chemical Manufacturers Association (“CMA”)) as a “performance improvement initiative . . . built around progressive principles and flexible management practices which allows Members and Partners to tailor the initiative to most effectively meet their needs.” ACC Members and Partners pledge to manage their businesses according to ten guiding principles. These include prompt reporting of chemical-related health and environmental hazards; counseling customers on the safe use, transportation, and disposal of chemicals; operating facilities in a way that protects health, safety and the environment; working with others to resolve problems created by past handling of hazardous substances; conducting and supporting research of the health, safety and environmental effects of products and processes; and participating in the creation of responsible laws and regulations.

To assist in achieving the commitment reflected in the guiding principles, Responsible Care® offers six codes of management practice which focus on community awareness and emergency response, pollution prevention, process safety, distribution, employee health and safety, and product stewardship. Members and Partners must participate in Responsible Care and must make continuous progress in attaining the goals of each code. However, the codes are offered only as general guidance. They reflect a recognition that “each company must use its own independent judgment and discretion to implement the codes successfully. Each company has been granted the

flexibility to develop systems unique to that company – systems that best fit its management structure, its product lines, its location, and other factors unique to the company.” The member company must decide what steps to take to implement the management practice. “There are no ‘right’ answers as to what must be done.” See ACC “What Is Responsible Care®?” Each company has the responsibility to develop a process or system that works for that company. What may work for one company, may not work for another.

B. “Painting With a Broad Brush”

The approach has, so far, been successful. To the extent that courts have addressed the issue, they have not found Responsible Care® to be a “standard”. In *Lescs v. The Dow Chemical Co.*, 1999 U.S. App. LEXIS 475 (unpublished opinion, 4th Cir., Jan. 14, 1999), plaintiff argued that the ACC’s Responsible Care,® as described in an association progress report for 1995-96, reflected standards with which defendant failed to comply. The court found, however, that the various “standards,” including “produce chemicals that can be used safely, . . . make health, safety and environmental considerations a priority” in planning, promptly “report chemical-related health and environmental hazards,” were too general to constitute substantive standards. “To put it mildly, this language paints with a broad brush.” The court concluded that “plaintiff’s obligation [is] to demonstrate . . . that the defendant breached a recognizable standard.” The “CMA Report reveals little in the way of recognizable standards.”

Similarly, in *Robbins v. Eastman Chemical Co.*, 912 F. Supp. 1476 (N.D. Ala, 1995), plaintiff introduced “a number of documents relating to the CMA Responsible Care® Program adopted by Eastman” as evidence “that there is an industry standard requiring Eastman to off-load the product in a non-negligent and non-wanton manner.” As the court understood the evidence, CMA had “initiated a program pursuant to which its members, including Eastman, agreed to undertake a program designed to evaluate and minimize any risks associated with the handling, use, and storage of Eastman’s products.” After review of the materials, the court concluded that “[n]one of the evidence . . . contained in the CMA material imposes a duty on Eastman to ensure that a particular method or technique is used. . . . The documents simply show that Eastman (and other manufacturers who are members of the CMA) is studying a wide array of safety and health-related factors concerning their products.” 912 F. Supp. at 1493. Moreover, while some of the documents did include procedures for unloading the product, the documents also included an introduction “cautioning the customer to use the information only as guidance.” Customers should determine for themselves the appropriate procedures and were referred to federal and state regulations for guidance in developing adequate handling procedures.

C. Offering General Guidance

Thus, in developing rules of thumb for an association to follow, it is probably useful for the association to stress to its members and in its descriptive literature, where appropriate, that the association's voluntary standards are offered as *general guidance* only. Each member company must still use its own independent judgment and discretion to implement the program successfully and to develop the specific systems that best fit its management structure, product lines, location, and other factors that are unique to the company. It would also help if the association's voluntary standards made clear that they are not a substitute for applicable laws and regulations, nor do they alter or enhance the obligation of member companies to fully comply with federal, state and local law.

Although it may seem to be merely a question of semantics, it is probably also useful to avoid language that suggests "protection" or even "performance" standards as opposed to "management standards." Indeed, avoiding the word "standards," in favor of terms such as "guidelines" or "principles," is preferable. Associations may also want to consider disclaimer language stating that their guidelines are not intended to create new legal liabilities or expand existing rights or obligations, or otherwise affect the legal position of any member company.

These suggestions provide no assurance against a successful claim for damages. They are intended to underscore the need for caution in the development of industry standards – a need to which most associations already are keenly sensitive.

III. **DEVELOPMENT OF INDUSTRY STANDARDS BY A TRADE ASSOCIATION MAY ALSO GIVE RISE TO A DUTY OF CARE FOR WHICH THE ASSOCIATION WILL BE HELD ACCOUNTABLE**

The NSPI situation illustrates a different set of issues from those related to the use of an association's standards to define a standard of care that may be imposed on a member company. In the case of NSPI, it is the trade association itself that is being sued, and the implications are significant for both the association and its members.

A. The Meneely Case

As noted above, NSPI published voluntary safety standards for the swimming pool industry. Among other things, the standards set minimum dimensions for what was known as a Type II Pool. The standards also designated the use of a particular type of jump board with the Type II Pool. A label affixed to that diving board stated that it was designed for use with NSPI Type II Pools. Several organizations were openly critical of this pool/diving board combination, including a consultant who was hired by NSPI and which reported in 1974 that it was not possible to rely on the slowing effect of the water

to ensure that the diver would not impact the bottom of the pool at dangerous velocities. NSPI's own diving board subcommittee reported that the "primary protective mechanism" was the action of the diver rather than the slowing effects of the water. Nevertheless, because there had been very few reports of diver injuries, NSPI decided not to change the standard. NSPI reasoned that there were few injuries because divers must be using their hands and arms to steer up as soon as they entered the water. Instead of changing the standard, NSPI published a brochure which recommended a "steering up" technique and arranged for the brochure to be distributed with members' products.

In 1991, 16-year old Shawn Meneely dove from an NSPI-approved jump board into an NSPI Type II Pool and broke his neck. The trial court held that NSPI owed Mr. Meneely and other consumers a duty of care in formulating its safety standards and was obligated to warn them about any known risk of injury. On appeal, the issue was whether a trade association such as NSPI owes a duty of care to the ultimate consumer. The Supreme Court of Washington answered in the affirmative. *Meneely v. S.R. Smith, Inc.*, 101 Wash.App. 845, 5 P.3d 49 (Wash. 2000).

B. Does the Trade Association Owe a Duty of Care?

The central question in the *Meneely* case was one that other courts had avoided: can an association's knowledge and conduct establish a duty that is owed to the ultimate consumer? The *Meneely* court analyzed the issue by using the well-established "voluntary rescue" doctrine.

A long-standing concept of liability, the "voluntary rescue doctrine" states that, in certain circumstances, a person may be liable in negligence if he or she gratuitously assumes a duty to act on behalf of another and fails to act with due care in performing that duty. *Id.* at 55. One who undertakes to render aid or to warn a person in danger must exercise reasonable care in that effort. If the rescuer does not exercise reasonable care and thereby increases the risk of harm to the other person, the rescuer is liable for damages. *Id.* Accordingly, the Washington Supreme Court credited evidence that NSPI had assumed the responsibilities of the pool and board manufacturers and retailers for setting safety standards. The court also noted that NSPI had instructed its members to affix labels to their products stating that diving equipment must meet NSPI standards. Consequently, the court held:

By promulgating industry wide standards that pool and board manufacturers relied upon, NSPI voluntarily assumed the duty to warn Mr. Meneely and other divers of the risk posed by this type of board on a Type II pool. 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.

5 P.3d at 57.

C. The “Voluntary Undertaking Doctrine” in Other Jurisdictions

Other courts have employed the “voluntary undertaking” doctrine as it is reflected in *Restatement (Second) of Torts* §324A¹ to assess the liability of trade associations. Two of these cases were discussed by the *Meneely* court because they show how other jurisdictions have come down on both sides of the issue of whether a trade association owes a duty of care to the ultimate consumer. Both cases also involved NSPI as defendant.

In *Meyers v. Donnatacci*, 220 N.J.Super 73, 531 A.2d 398 (1987), plaintiff, who was injured when he dove into the shallow end of a pool, sued NSPI on the theory that the association had held itself out as an expert on pool safety standards, and that it was foreseeable that persons would be injured if NSPI did not exercise reasonable care in carrying out this function. The court disagreed, finding that NSPI had not undertaken the duty of warning consumers about the danger of shallow water diving. While NSPI conducted research and promulgated standards for swimming pools, the court found that it did not “specifically undertake” a duty to consumers. *Id.* at 406. Since NSPI could not force its members to comply with its standards, it did not assume its members’ duties to the consumer. Moreover, the court noted that “foreseeability. . . frequently involves questions of policy.” *Id.* at 403. The court was clearly influenced by the fact that trade associations “serve many laudable purposes in our society.” Whether a duty exists “is ultimately a question of fairness.” *Id.* at 404.

However, in *King v. National Spa & Pool Institute, Inc.*, 570 So.2d 612 (Ala. 1990), as in *Meneely*, the situation involved a board prescribed by NSPI for the particular pool dimensions. The court noted that the ultimate test of the duty to use due care “is found in the foreseeability that harm may result if care is not exercised.” 570 So.2d at 615. NSPI’s voluntary undertaking to promulgate minimum safety design standards “made it foreseeable that harm might result to the consumer if it did not exercise due care.” *Id.* at 616. The court concluded that the fact that the standards promulgated by the trade association are based on the voluntary consensus of the members, or that the trade association does not specifically control the actions of its members, does not absolve the trade association from the duty to exercise reasonable care when it undertakes to promulgate standards for the “needs of consumers.” *Id.* at 618.

¹ *Restatement (Second) Torts* §324A states: “One who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking if: (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.” The *Meneely* court noted that this section of the *Restatement* has not yet been adopted by a Washington court.

D. Considering the Breadth of the Association's Undertaking

In some instances, the mere dominance of the trade association over a particular industry may be a significant factor in finding liability. That was the situation in *Snyder v. American Association of Blood Banks*, 676 A.2d 1036 (N.J. 1996). While the decision of the New Jersey Supreme Court in this case does not mention the *Restatement (Second) of Torts* or the “voluntary undertaking doctrine,” the analysis is similar. The court found that a trade association of voluntary blood banks, that set standards for voluntary blood banks, owed a duty of care to transfusion recipients. Relevant factors reviewed by the court were the foreseeability of injury, the nature of the risk posed by defendant's conduct, the relationship of the parties (the absence of a contractual or special relationship was not dispositive), and the impact on the public of the imposition of a duty of care. *Id.* at 1048. The risk that blood transfusions can transmit AIDS was severe. It was also foreseeable. “The foreseeability, not the conclusiveness, of harm suffices to give rise to a duty of care.” *Id.* at 1049.

The court noted that society had not thrust upon this trade association the responsibility for the safety of blood products. The association “sought and cultivated that responsibility.” *Id.* For years, the association had dominated the establishment of standards for the blood-banking industry. “By words and conduct, the [association] invited blood banks, hospitals, and patients to rely on the association's recommended procedures. . . . At all relevant times, it exerted considerable influence over the practice and procedures of its member banks.” *Id.* Thus, the breadth of the association's undertaking may be an important consideration in defining the duty of care.

E. The Potential for Industry-Wide Liability

It is worth noting that the involvement of a trade association could also potentially assist plaintiffs in employing more expansive theories of liability against individual companies when the actual tortfeasor cannot be proven. Although courts have tended to be restrictive in their application of these theories, they do carry the potential for compounding the risk to a trade association and its members by imputing the association's knowledge to its member companies.

For example, “enterprise” or industry-wide liability is based on joint control of the risk throughout a particular industry. The theory of enterprise liability was first articulated in the blasting caps case of *Hall v. E.I. DuPont de Nemours & Co.*, 345 F.Supp. 353, 376-78 (E.D.N.Y. 1972). There, the court found that “enterprise liability” or collective liability exists when (a) a small number of manufacturers produced the injury-causing product; (b) the defendants had joint knowledge of the risks inherent in the product and possessed a joint capacity to reduce the risks; and (c) each delegated the responsibility to set safety standards to a trade association, which failed to reduce the risk. *Id.* at 378. Jurisdictions are split as to whether to employ this theory of joint liability, even with restrictions. See *City of Philadelphia v. Lead Industries Association, Inc.*, 994 F.2d 112, 129 (3rd Cir. 1993). Plaintiff usually has the burden of proving that a

defendant's negligence was the proximate cause of the injury. For some jurisdictions, a theory of enterprise liability represents too radical a shift away from the fundamental principle that "the mere existence of negligence and the occurrence of injury are insufficient to impose liability on anyone." *Id.* at 123. A plaintiff "must establish that a particular product of a defendant manufacturer caused [the] injury." *Id.* Nevertheless, other potentially applicable theories in cases where it is difficult or impossible to identify who causes an injury include "market-share liability,"² "alternative liability,"³ and "concert of action."⁴

The existence of trade association standards can further these expansive theories of liability. Although courts have tended to be somewhat restrictive in their application of these theories, joint liability has traditionally been imposed on multiple defendants who exercise actual collective control over a particular risk-creating product or activity. As the *Hall* court stressed, individual manufacturers of blasting caps had delegated the duty of monitoring safety to their trade association. It was unlikely that an individual manufacturers would collect information about the nation-wide incidence and circumstances of accidents. Indeed, it was "entirely reasonable that the manufacturers should delegate this function to a jointly-sponsored and jointly-financed association." 345 F.Supp. at 378. This delegation of responsibility could provide the basis upon which a court might join the trade association as a defendant and impute the trade association's knowledge to the members companies. Courts might also be more receptive to the theory of enterprise liability where it can be shown that the trade association helped to develop common marketing strategies.

² Under the theory of market share liability, tortious manufacturers who produce a fungible and unidentifiable product that injures a plaintiff are, essentially, held liable in proportion to their respective market shares. See *Sindell v. Abbott Laboratories*, 607 P.2d 924, cert. denied 449 U.S. 912 (1980). Factors considered include (a) the reasoning that, as between innocent plaintiffs and negligent defendants, the negligent parties should be held liable, (b) advances in science and the creation of fungible goods whose source cannot be traced, (c) the financial ability of the defendants to bear the costs, and (d) the fact that manufacturers are in a better position to prevent defective products from reaching the consumer. *Smith v. Cutter Biological, Inc.* 823 P.2d 717, 725 (Haw. 1991).

³ "Alternative liability" merely holds that all tortfeasors who are unable to exculpate themselves are jointly and severally liable. 994 F.2d at 127. The plaintiff must prove that all defendants acted tortiously and that the harm resulted from the conduct of one of them. All responsible parties must be joined. 832 P.2d at 725.

⁴ This theory derives from the criminal law concept of aiding and abetting. . 832 P.2d at 726. The defendants' joint plan is the basis for the cause of action. To withstand a summary judgment motion for failure to state a cause of action, plaintiffs must allege that defendants were jointly engaged in tortious activity as a result of which the plaintiff was harmed. *Abel v. Eli Lilly & Co.*, 343 N.W.2d 164, 176, cert. denied 469 U.S. 833 (1984). "If plaintiffs can establish that all defendants acted tortiously pursuant to a common design, they will all be held liable." *Id.*

The existence of industry-wide standards or practices could thus support a finding of joint control of risk and shift the burden of disproving causation to the association and its member companies. Indeed, for some courts, imposing something like a market share liability on manufacturers has the added benefit of providing incentives for companies to produce safer products and affixed clear warnings of potential harmful effects. *Sindell v. Abbot Lab.*, 26 Cal.3d 588, 607 P.2d 924, 936, cert. denied, 449 U.S. 912 (1980).

F. Be Cautious and Attentive in Taking On Responsibility

The suggestion was made in Part II of this paper that the trade association can help minimize the risk that its standard-setting will be admissible as evidence against its member companies by promoting its standards as “general guidance” which must be supplemented by a member company’s exercise of independent judgment and discretion. To some extent, this approach will also help avoid the situation in which the trade association itself is joined as a defendant. However, it is not always possible to be sufficiently “general” in providing these kinds of services to member companies. Where an association’s membership base is large and diverse, guidance or standards must, of necessity, be somewhat general. But where the number of member companies is small and where the product or service is “fungible,” it may be more difficult to simply “guide” members in the exercise of their own discretion. More may be expected of the association. Economics may dictate that more be delegated to the trade association.

In such situations it is essential that the trade association and its members clearly define the association’s role and responsibility with respect to common practices and standards. In delegating any responsibility to the trade association, members companies need to be sufficiently sensitive to the possibility that, in the litigious atmosphere of the twenty-first century, the trade association itself could be sued and that, by that route, the potential liability of member companies could be enhanced. Delegations of responsibility should be limited, if not to what is absolutely necessary, at least to what has been carefully considered and analyzed.

For its part, the trade association should avoid the aggressive, even gratuitous, assumption of responsibility for the safety and environmental obligations of its members. It is true that trade associations were developed, first and foremost, to be of service to their member companies and they have been diligent and innovative in finding ways to fill those needs. Indeed, it may be difficult to forgo certain opportunities to relieve their members of burdens and perplexities. But times are changing. Every transfer of responsibility needs to be analyzed in light of its potential for creating a duty of care to third parties. Moreover, the association needs to understand that, once assumed, the responsibility will require constant attention. This may involve enhanced information gathering and monitoring and an ability to respond rapidly to changed circumstances. The “foreseeability of harm” must be the watchword, as it already is for the member company who, being legally regarded as an expert on the safety of its own product, has a “continuous duty to warn” of any risks in connection with that product.

See *Mason v. Texaco, Inc.*, 741 F.Supp. 1472 (D.Kan. 1990), *rev'd on other grounds*, 948 F.2d 1546 (10th Cir. 1991).

In the end, it may not be possible to fully ensure against the possibility that the trade association will be successfully sued. As the *Hall* court stated, “the imposition of joint liability on the trade association and its members should in no way be interpreted as ‘punishment’ for the establishment of industry-wide institutions. Such liability would represent rather the law’s traditional function of reviewing the risk and cost decisions inherent in industry-wide safety practices, whether organized or unorganized.” 345 F.Supp. at 378.⁵

IV. CONCLUSION

In developing industry standards and guidelines, trade associations have generally been careful to consider the potential for liability against their members companies. The recent trend in cases suggests that the trade association itself may be found to have created, by its activities on behalf of member companies and for the public good, a duty of care to third parties. Clearly, trade associations are no longer insulated against judicial scrutiny. What they know and how they undertake certain initiatives will be more and more open to examination and could well create an independent duty to consumers.

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⁵ At the very least, an association that sets voluntary standards may want to increase its liability insurance limits to recognize the risk that it might be found liable in a NSPI-like case.