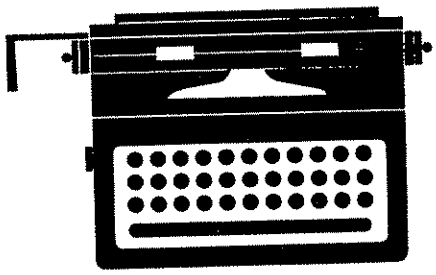

Conning the IADC Newsletters

Recognizing that a wide range of practical and helpful material appears in the newsletters prepared by committees of the International Association of Defense Counsel, this department highlights interesting topics covered in recent newsletters and presents excerpts from them.

A Primer on Utilizing the Internet in Litigation Practice

Writing in the September issue of the Toxic and Hazardous Substances Committee newsletter, Quentin F. Urquhart Jr. of Montgomery, Barnett, Brown, Read, Hammond & Mintz, New Orleans, described the Internet and the information available on it. He has updated that article and expanded it to general litigation:

The Internet was created originally as a safeguard for the communications and information assets of the United States in the event of nuclear war. A computer network was designed in which each computer could transmit and receive information independently and thus, in the event that half the system was knocked out, the surviving components still could communicate with each other. For the first 25 years or so of its existence, the Internet operated as a resource known primarily only to government researchers and academics. However, with the explosion of personal computers and the vast improvements in communications technology, the number of Internet information providers and users has grown at an exponential rate.

World Wide Web basics

Although there are many different facets of the Internet, the greatest area of growth has been in that segment referred to as the World Wide Web (WWW). In fact, the creation of the WWW is probably largely responsible for the meteoric increase in Internet use.

What is the World Wide Web? As with all aspects of the Internet, the simple answer is information and lots of it. However, what sets the WWW apart is the way in which that information is presented to the user. Unlike other segments of the Internet, which are primarily text based, the WWW offers a graphical environment in which a user simply points and clicks a mouse to access additional information. Anything that can be reduced to words, pictures or sound can be put on the WWW so that others may view and retrieve it.

However, perhaps even more significant is the fact that the WWW offers the user an almost instantaneous capability to move from one area of the WWW to another through the use of hyper-text links. Hypertext links can be either text, icons or photos. When such a link is text based, the relevant words are usually highlighted in a color different from the remaining text. You know that you have found a hypertext link when the mouse arrow changes to a hand. These links offer instant doorways

to other WWW sites. By simply pointing and clicking on them, users can be transported from a site in Peoria to Paris within seconds.

What is a World Wide Web site? It is simply a location on the Web where a person or company has posted information that can be accessed. These sites are found through the use of a universal resource locator, called a URL. For example, Cable News Network maintains a Web site with a URL of: `http://www.cnn.com`. (Most URLs for WWW sites begin with "`http://www.`" From this point forward the prefix will not be given unless it differs.)

The CNN site, as are most sites on the WWW, is set up in a basic way. It begins with a "home page," which is similar to a table of contents to the remaining pages within the site. If you wanted to read the sports stories of the day, you would point and click on the word "Sports," and this would immediately transport you to the sports section. In turn, that section will give you a list of sports stories from which you can choose. Again, by simply pointing and clicking on a particular story, its text would be called up on the screen for you to read (with any accompanying photos). Once you were finished reading that story, the site gives you the option of either returning to the sports section page or to the home page.

In order to access the WWW, you need a properly equipped computer with a modem and a subscription with an Internet service provider. You also need a Web browser (software to access the Web), such as Netscape, Mosaic, or Microsoft Internet Explorer. The technical aspects of gaining access to the Web are beyond the scope of this article but you should not be intimidated by them. Virtually every computer that is sold today has built into it the power and software you need to start "surfing the Web" in just a few minutes.

WWW search engines

Perhaps the most important sites on the WWW today are the search engines. These are Web sites that gather information on other Web sites and then index those sites by keyword. You use these sites in much the same way as Lexis or Westlaw. You simply type in a keyword, the site conducts a search and then displays a list of the Web sites that match your inquiry. Simply pointing and clicking on those sites transports you to them.

There are literally hundreds of different search engines available on the Internet. My two favorite search engines are: Yahoo (`yahoo.com`) and Alta Vista (`altavista.digital.com`). I ordinarily use Yahoo as a starting point because usually it will pull up a good number of sites without overwhelming you. Yahoo also offers a number of major directories that can help to focus your search. For example, Yahoo maintains a general "Health" directory, which includes a sub-directory devoted to "multiple chemical sensitivity." This sub-directory contains a listing of sites specifically related to that topic.

If Yahoo does not pull up a large number of sites, it will automatically default to Alta Vista. This is a superfast and incredibly powerful search engine. In my experience, it will usually pull up the largest number of sites of any search engine. For example, a search using the key words "silicone implants" turned up only two sites in Yahoo but more than 11,000 in Alta Vista. Because it is so powerful, Alta Vista also gives you a number of advanced search options so that you can limit your search by using connectors such as AND, OR or NEAR and/or by date.

Other search engines include: Web Crawler (`webcrawler.com`), Infoseek (`infoseek.com`), Excite (`excite.com`), Magellan (`searcher.mckinley.com`), and Lycos (`lycos.com`). Because different search engines will bring up different sites, it is probably a good idea to try several per search. There are now a number of Web sites that link different search engines together at a single location or combine

various search engines for even more powerful searches. These include Search.com (search.com), Meta Highway 61 (highway61.com) and All-In-One Search Page (albany.net/allinone).

Putting search engines to work

There are a number of significant ways that WWW search engines can be put to use in litigation. Some of these might not seem obvious at first, but, as you will see, the results can be very surprising.

Your client

One of the first places to start in using the WWW is with your own client. Why? Every Fortune 500 company probably has some type of presence on the WWW today. Millions of other companies, both public and private, also maintain Web sites. Because this information is in the public domain and thus accessible to your opponent, you need to know what is out there. Depending on the complexity of the information being provided, company Web sites can be as small as a single page or can run into the hundreds of pages. You should thoroughly familiarize yourself with your client's Web site so that you will know what information has already become "public."

Companies often put product information into their Web sites. Because most Web sites are put together by the people on the marketing side of the company, representations may have been made about the product in the site that are different from those contained in other company literature. Many company Web sites appear to be designed to attract new investors and may espouse the company's historical good rate of return. Plaintiff's counsel might attempt to use that information at trial to portray the company as worshipping the "almighty dollar." This could be especially true if there are not other pages in the site referencing the company's commitment to making products that are "safe and beneficial." You should determine how frequently the information posted in your client's Web site changes and routinely review the site.

Web sites can play a significant role in pretrial discovery. Your client may be required to produce its Web site postings during specified time periods. It is also essential that you familiarize company employees with the information contained in the company Web site so that they are not caught off-guard by its content at deposition or trial.

Be aware that your client's own Web site will likely not be the only place on the WWW that contains information about it. Other financial or business information sites may have compiled a great deal of information on your client and made it accessible through the Web. Trade and consumer advocacy groups may have posted information about your client. This means that you should use the WWW search engines to review all relevant information about your client, not just the information that it has made available.

Your opponent

Martindale-Hubbell is now accessible through the WWW at martindale.com. This allows you direct access to the information contained in the multi-volume directory without having to page through those heavy books. The Insurance Law List also maintains a site on the Internet at ins.lawnt.com. This site allows access to more than 5,500 law firms engaged primarily in the insurance defense practice.

Many individual lawyers and law firms also maintain sites on the Web. These range from the simplistic to very complex. Most firm Web sites provide general information on the firm and its practice areas. They usually also provide more detailed information on individual attorneys than what is typically found in Martindale-Hubbell. Some sites also contain postings of firm newsletters, which can be very helpful in gauging the quality of your opponent.

Some firms and lawyers even have developed Web sites devoted to specific areas

of the law. For example, a lawyer in California has developed a site to keep clients up to speed on developments concerning Proposition 65, California's Safe Drinking Water and Toxic Enforcement Act. (http://members.aol.com/calprop65). Another plaintiff-oriented firm has developed an entire "consumer law site," which contains information on breast implants, toxic exposures, and general product liability claims. (http://seamless.com/alexander.law). Another attorney has developed an excellent site devoted to copyright and trademark law. (kuesterlaw.com).

The product

The WWW can be an extremely powerful tool in developing information on particular products. You can use the WWW to search for general information on lead paint, pesticides, herbicides, silicone implants, asbestos and a host of other products. It also can be used to find specific information on the particular product involved in the litigation or its active ingredient.

For example, if you were defending a chemical company whose product contains the active ingredient Heptachlor, the use of WWW search engines will disclose a large number of Web sites (more than 500 in Alta Vista) that are cross-referenced to this keyword. Included are sites maintained by the U.S. Department of Agriculture, the Environmental Protection Agency, as well as a variety of trade groups. Also listed are a number of university sites containing medical journal articles or abstracts related to the potential adverse health effects associated with the use of Heptachlor.

The illness or disease

The WWW is also extremely helpful in developing information relating to particular illnesses or diseases. For example, assume that you are defending a case in which the plaintiff, a lifelong asthmatic, alleges that he developed reactive airways disease as a result of his exposure to your client's product. He alleges that his disease developed after a long term exposure to low levels of the product applied during the course of ordinary pest control applications.

The entry of "reactive airways disease" into WWW search engines would disclose a large number of sites, including one that contains an article setting forth the protocol for making a formal diagnosis. (trimaris.com/~ussw/legal/asthma). The article reveals that in order to diagnose reactive airways disease: (1) there must be an absence of previously documented breathing problems; (2) the symptoms must manifest themselves after a single incident of exposure; and (3) the exposure to the smoke, fume or vapor was in a high concentration and had irritant qualities. Having this type of information in hand obviously is very helpful before taking the deposition of the plaintiff or his treating physician.

You also can search for information in general medical fields. For example, if you needed information in the rheumatology field, a good starting point would be the Web site of the American College of Rheumatology (rheumatology.org). In this site you would find information about this discipline, the current position papers of the college and information about upcoming conferences. Other medical fields offer these types of sites as well.

Expert witnesses

Many expert witnesses now maintain Web sites designed to espouse their own qualifications and expertise. This information can be very helpful in cross-examination of the expert. For example, a recent search for information on a well-known plaintiff's expert in the silicone and toxic tort field revealed that he is apparently closely associated with the United Silicone Survivors of the World, an organization antagonistic to silicone implant manufacturers. (trimaris.com/~ussw).

Legal information

Although it is unlikely that the WWW

will totally replace Lexis or Westlaw, it may come awfully close to doing so. At present you can access decisions of the U.S. Supreme Court (supct.law.cornell.edu/supct) and recent decisions of the U.S. courts of appeals (11.georgetown.edu:80/Fed-Ct). You can search the entire United States Code (law.house.gov/usc.htm) and the Code of Federal Regulations (law.house.gov.cfr.htm). The National Law Journal (ljx.com) and Court TV (courttv.com) maintain excellent law-related sites that are updated daily and contain a number of good links to other legal sites.

There also are an expanding number of "independent" legal research related sites on the Internet. These include Findlaw (findlaw.com), Counsel Quest (home.earthlink.net/~parajuris/CounselQuest), the Internet Legal Resource Guide (ilrg.com) and LawRunner (lawrunner.com). Another site of significance is the LOIS Law Library (pita.com). This site offers access to recent decisions of the U.S. Supreme Court, all the federal courts of appeal, state jurisprudence, federal and state statutes, and other legal information.

LOIS predicts that it will have all state law libraries on-line in the near future. But now, however, LOIS does not have access to the federal district court opinions. Because LOIS is a for-profit Internet site, it charges a flat fee for its use. This means that you will need to obtain an access code from LOIS in order to be able to use its databases. However, the cost of LOIS is significantly less than with other on-line services.

Organizations such as the American Bar Association (abanet.org), the Defense Research Institute (dri.org) and the American Trial Lawyers Association (atlanet.org) also maintain Web sites with links to other law-related sites.

Government information

There is an incredible wealth of information available from virtually every branch and agency of the federal government on the WWW. State and local governments are getting into the act as well.

Sites of interest include Gateway to Federal Government (fedworld.gov), the Environmental Protection Agency (epa.gov), the United States Geologic Survey (usgs.gov), the U.S. House of Representatives (house.gov) and Senate (senate.gov), the Department of the Interior (info.er.usgs.gov/doi/doi.html), the Library of Congress (lcweb.loc.gov) and the Executive Branch (whitehouse.gov).

There also is an excellent Web page within the White House site that allows instant access to a number of other independent agencies within the federal government, including the CIA, the Consumer Products Safety Commission, the FDIC, the FTC, NASA, NEA, NSA, the NRC, the FCC, the NRC, and the Smithsonian Institution. (whitehouse.gov/WH/independent_agencies/html/independent_links.html).

Put WWW to use

This is a brief introduction to the ways in which the World Wide Web can be put to use in litigation. It is certainly not intended to be all inclusive, and I welcome input from other IADC members on how they have put the Internet to use in their practices.

Write, telephone or e-mail me: Quentin F. Uruhart Jr., Montgomery, Barnett, Brown, Read, Hammond & Mintz, L.L.P., 3200 Energy Centre, 1100 Poydras St., New Orleans, LA 70163-3200. Telephone: (504) 585-3200. E-mail: qurquhart@mbbrhm-law.com

Changes in UK Funding: More Litigation?

Writing in the December issue of the Pharmaceutical, Medical Device and Biotechnology Committee newsletter, Sarah L. Croft, a solicitor in the London office of Shook, Hardy and Bacon and Stephen E.

Scheve of the Houston office of the firm, discuss what effects the new conditional fee system in England will have:

A major difference between civil litigation in England and the U.S. has been the fact that historically contingency fees were not available in England. This changed in July 1995 when a version of contingency fees was introduced, known as "conditional fees." The Courts and Legal Services Act 1990 gave the Lord Chancellor powers to introduce regulations under which conditional fees would operate. These regulations were contained in the form of two statutory instruments, Conditional Fee Agreements Order 1995, S.I. 1995 No. 1674, and Conditional Fee Regulations 1995, No. 1675.

Although there had been pressure for some years to allow some kind of "no win, no fee" arrangement between solicitors and their clients, this had been resisted. Opponents' fears included an increase in frivolous claims, high damages awards and conflicts of interest between lawyers and their clients.

Funding before conditional fees

In order to appreciate the changes engendered by the introduction of conditional fees, it is helpful to know how litigation traditionally has been funded in England. Of central importance is the fact that in England, unlike the United States, the "loser pays" rule applies; that is, the party who loses the case usually pays the winner's legal costs. Thus, an unsuccessful defendant in a personal injury case would be ordered to pay damages and probably the plaintiff's legal costs, as well as paying its own lawyers. In most civil litigation in England, unlike in the United States, the level of damages awarded is decided by a judge, not a jury, so the tendency is for damages to be lower.

Before the introduction of conditional fees, as far as personal injury cases were concerned, plaintiffs often applied for legal aid to fund their claims. Legal aid is the system whereby the government pays the individual's legal costs. The applicant must pass a means test, and the claim is subjected to a merits test involving a cost against benefit analysis. The legally aided party may have to make a contribution to the cost of the legal aid. Almost all large multiparty actions have involved groups of plaintiffs, the vast majority of which were legally aided. If a defendant is successful against legally aided opposition, it may not recover its costs, because a costs order typically will not be enforced without leave of court and the legally aided party is likely to be impecunious.

A driving force behind the introduction of conditional fees was the concern of plaintiffs' lawyers and consumer groups that some plaintiffs who failed the means test for legal aid did not bring claims because they could not afford to pay their own lawyers, or risk losing and paying the other side's costs too.

What are conditional fees?

Conditional fee agreements can be entered into at present in only a relatively few types of cases. However, these categories include personal injury claims, and there have been indications that other categories will be added.

Conditional fees are contingent in the sense that if the client wins the litigation, the solicitor will get paid, but if the client loses, he will not. Conditional fees are not the same, however, as contingency fees in the United States. If the party in a conditional fee case wins, the solicitor's fees usually are paid at a basic hourly rate, which is based on the firm's normal billing rates. The Law Society, the body that represents solicitors, has developed a model conditional fee agreement, and it is the terms of this agreement that are referred to here.

The party is responsible for paying any disbursements incurred during the case. The agreement also will contain a provision that a success fee is paid if the case is won. The success fee is a percentage of the

solicitor's normal costs, not a proportion of the damages recovered, as would be the case in the United States. The level of the success fee depends inversely on the merits of the case; that is, the more likely it is that the case will be won, the lower the success fee. The success fee is limited to a maximum of a 100 percent uplift on the basic rate.

In practice, under the loser pays rule, a party winning its case under a conditional fee agreement will recover its basic costs and disbursements from the losing party. The successful party will not pay these sums from damages recovered. The success fee, however, is not paid by the loser; in reality this does come out of the damages. It is recommended by the Law Society that there should be a cap of 25 percent on the amount that can be recovered from the damages, but this is not a mandatory requirement.

Losers under a conditional fee agreement will not have to pay their own legal costs, but they may be liable for the winner's costs. This problem has been circumvented by the establishment of insurance schemes that provide coverage for the possible liability for the opposing party's costs. The main scheme is that developed by the Law Society in conjunction with insurance companies, which is called "Accident Line Protect." Payment of a one-off premium of around £85 (approximately US$110) will buy coverage of approximately £100,000 (US$130,000).

However, the insurance schemes developed typically exclude certain types of litigation, including medical negligence, pharmaceutical or tobacco cases (on which see below). Also, as insurers and solicitors become more experienced in assessing risk under conditional fee agreements, insurance for these cases may be made available.

Conditional fees in practice

The figures for the first year of the availability of conditional fee agreements reveal a steady, but not spectacular, take-up rate. It has been reported that 1,100 policies have been taken out under the one insurance scheme during the first year and that the number taken out each month is gradually increasing. (Fiona Bowden, "Improving Conditions," *Law Society Gazette*, Nov. 27, 1996. The figures relate to the Accident Line Protect.) The figures suggest that claims are being brought where otherwise they would not have been, although there has not been an explosion of litigation as predicted by some.

Aside from a natural fear of the unknown, one reason for the relatively slow uptake may be the changes that solicitors are required to make to their everyday practice in order to manage conditional fees. This might involve, for example, the appointment of a risk assessment manager, as solicitors will be unaccustomed to assessing risk in the context of conditional fee arrangements. Getting it wrong could obviously have serious financial implications for the firm. Also, of course, the areas in which conditional fee agreements can be used are limited both by the legislation and by the coverage the insurance companies are prepared to provide.

Other problems with conditional fee agreements relate to payments by the solicitor to third parties—for example, consultants and experts. Some agreements may provide for the payment of disbursements as the case progresses. Where this is not the case, it may not be possible for the solicitor to pay an expert until the end of the case. Clearly not all experts will accept such a delay, and solicitors may have to consider funding experts from their own pockets.

Barristers are normally instructed and thus paid by the solicitor, not by the client. They can be involved throughout a case, and, as with experts, there may be payment problems, unless the barrister is also prepared to enter into a conditional fee agreement with the solicitor. Not all barristers are prepared to do this.

Further, plaintiffs' lawyers may have been frustrated in marketing conditional

fee agreements to the public as the U.K. Advertising Standards Authority (ASA) upheld a complaint that conditional fees could not properly be called "no win, no fee" agreements on the basis that a party under a conditional fee agreement may have to pay the winners costs unless insured. (See *ASA Monthly Report No. 63*, August 1996.)

Insurance coverage for the possible liability for the other side's costs is not obligatory. Instances have been reported where cases have been brought under a conditional fee agreement without insurance being in place. Thus, lack of coverage is not a bar to claims being made in pharmaceutical or other cases.

Conditional fees in the future

In July 1996, the Lord Chancellor, Lord Mackay of Clashfern, announced in "Striking a Balance" the government's proposals for the reform of legal aid, the aim of which seems to be to reduce the amount spent on the legal aid system. In his report, the Lord Chancellor stated his intention to widen the categories of claims in which conditional fees can be used. His department is monitoring the uptake of conditional fee agreements so as to allow a decision to be made on any extension of their availability.

Plaintiffs' lawyers also are hopeful that the insurance schemes will be extended to cover the areas currently excluded including pharmaceutical claims.

Standards-setting Organizations Face Liability Issues

Writing in the newsletter of the Advocacy, Practice and Procedure Committee, Alexander J. Drago of the New York office of Porzio, Bromberg & Newman discusses when a standards-setting organization may be liable to third parties:

Whether standards-setting organizations may be liable to third parties injured by the products or services of those who adhere to their standards is answered differently depending on such diverse factors as jurisdiction, whether the injury is commercial or physical, and the degree of control exercised by the organization over its members. This marked difference is well illustrated by three decisions addressing the responsibility of the National Spa Pool Institute (NSPI) for injuries arising from the use of pools complying with its guidelines.

The NSPI is a non-profit, voluntary trade association composed of several hundred representatives from swimming pool manufacturers, maintenance firms, distributors, officials from public health and safety sectors, the American Red Cross, YM and YWCA groups, the International Association of Plumbing and Mechanical Officials and a number of coaches, physicians and teachers involved in swimming and aquatics. It performs research, conducts surveys, disseminates results and promulgates standards for the construction and design of residential in-ground swimming pools. It lacks any real power to force members to comply with its recommended standards, and the most severe sanction at its disposal was is expulsion from the association.

In *King v. National Spa and Pool Institute*, 570 So.2d 612 (Ala. 1990), the Supreme Court of Alabama was confronted by the following question of first impression: "What duty, if any, does a manufacturer's trade association owe to a consumer to prevent injuries caused by the product of a manufacturer who is a member of that trade association?"

The plaintiff's intestate in King was rendered a quadriplegic following a dive into an inground swimming pool and later died. Evidence presented at trial court showed that the swimming pool met the NSPI's "Suggested Minimum Standards for Residential Swimming Pools" and was of the size, shape and dimensions that the trade association prescribed for allowing the type of diving board that had been installed. The plaintiff's theory of liability against the NSPI was that the standards that allowed the placement of a diving

board in this particular size pool created an unreasonable risk of harm.

In holding that the NSPI was under a legal duty to exercise due care in promulgating the standards in question, the court relied on "well-settled" Alabama law that one who undertakes to perform a duty not otherwise required is thereafter charged with the duty of acting with due care. The court cited Section 342A of the Restatement (Second) of Torts in further support of this position:

> 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 the reliance of the other or the third person upon the undertaking.

Although the *King* court conceded that the plaintiff's intestate neither knew of nor relied on the NSPI's standards when he dived into the pool, it determined that if the manufacturer or installer of the pool did rely on NSPI standards, the trade association could be held liable under the principles of Section 324A(b) and/or (c). The court concluded that the NSPI was under a legal duty to exercise due care in promulgating standards. In particular, the court emphasized that the NSPI's voluntary undertaking to promulgate and disseminate minimum safety design standards to its members for the purpose of influencing their design and construction practices made it foreseeable that harm might result to the consumer if it did not exercise due care.

An Ohio appellate court reached a similar result, finding that organizations responsible for promulgating impact attenuation standards for helmets to be used in certain high school and college athletic contests could be held to have a legal duty of care to athletes under the Section 324A. *See Wissel v. Ohio High School Athletic Association,* 605 N.E.2d 458 (Ohio App. 1992).

How about commercial damages?

Significantly, jurisdictions inclined to hold a trade association responsible for negligent promulgation of standards may refuse to do so where the injury is commercial or economic, as opposed to physical. In a decision from the Connecticut Supreme Court, a standards-setting organization was found to owe no cognizable duty to third parties for commercial loss as a result of its promulgation and publication of standards. *Waters v. Autuori,* 676 A.2d 357 (Conn. 1996). The standards at issue were those promulgated by the American Institute of Certified Public Accountants (AICPA). The plaintiff alleged that certain opinions rendered by certified public accountants and incorporated into marketing materials allegedly relied on by plaintiff in connection with an investment in a failed limited partnership were made in accordance with what the plaintiff claimed were negligently promulgated standards of the AICPA.

The trial court emphasized the lack of privity between the plaintiff and the AICPA and found that the group owed no duty to the plaintiff. The supreme court distinguished the King case and Section 324A by asserting that the principles espoused therein were confined to situations involving "physical harm," not commercial loss."

NSPI gets off the hook

Amazingly, when confronted with factual situations remarkably similar to that in *King,* trial courts in New York and New Jersey declined to hold the NSPI responsible. In both *Howard v. Poseidon Pools Inc.*, 506 N.Y.S.2d 523 (Sup.Ct. Allegany Cty. 1986), and *Meyers v. Donnatacci,* 531 A.2d 398 (N.J.Super. 1987), plaintiffs were

rendered quadriplegics as a result of diving accidents in in-ground pools, yet actions against the NSPI were not permitted.

In *Howard*, the court determined that the plaintiffs had raised four theories of potential liability by which the NSPI could be held liable—negligent misrepresentation, strict product liability, breach of warranty, and negligence.

The negligent misrepresentation claim was found to be deficient because of the failure to allege that the injured plaintiff relied on the information supplied by the NSPI. In addition, this theory was found inadequate since the plaintiffs failed to allege that they were encompassed within a group that the NSPI could be charged with having reasonably contemplated would have relied on the representations. While the court conceded that the negligent imparting of information on which others might rely and act on may be actionable, it emphasized that the party seeking redress must be a member of the class of persons who could reasonably be anticipated to rely on and take action on the erroneous statement.

The strict products liability cause of action was found to be deficient on the ground that such causes of actions may be brought only against manufacturers, wholesalers, distributors, retailers, makers of component parts, and processors of materials for product-related injury or damage. The NSPI, as a certifier of swimming pool equipment, was found to not fall into any of these categories.

The breach of warranty cause of action was found to be deficient for the same reasons the products liability action was not sustainable.

Finally, the negligence action against was dismissed in light of the court's finding that no duty was owed by the NSPI to the injured plaintiff. Great emphasis was placed on the fact that the NSPI did not have the duty or authority to control the manufacturers who produced the swimming pool at which the plaintiff was injured.

New York joins

The same principle was applied in *Beasock v. Dioguardi Enterprises Inc.*, 494 N.Y.S.2d 974 (Sup.Ct. Monroe Cty. 1985), in which the New York court refused to hold a trade association liable for the wrongful death of a man who was injured while inflating a tire mistakenly mounted on the wrong size rim. The trade association had published advisory guidelines establishing the matching of tires to rims. Adherence to the standards was entirely within the control and discretion of the association's members.

The plaintiff asserted three causes of action against the association sounding in strict products liability, breach of warranty, and negligence, alleging that the trade association failed to control the manufacturing of the injury-producing product and also failed to give appropriate warning. The court concluded that the trade association lacked the duty or authority to control the manufacturer and found no duty to exist under any theory raised by the plaintiff.

In the *Meyers* case, the New Jersey Superior Court posed the question of whether the NSPI owed a duty of care, or assumed a duty not otherwise owed, to any user of a product manufactured or designed, or both, by members of the NSPI. Citing *Howard* and *Beasock,* the court reiterated the significance of the lack of authority and control that the NSPI exerted over its members. The court observed that the NSPI neither mandated nor monitored the use of the standards by any manufacturer, and that the use of its information was within the discretion and control of the member. Citing *Beasock,* the court stated: "Where one does not commit the injury producing act directly, responsibility for its consequences requires, at the very least, a relationship with the tort feasor sufficient to exercise control over the culpable conduct."

When there is control

New Jersey courts are willing to hold standards-setting trade associations liable for physical injuries to third parties when

the organization exercises significant or quasi-governmental control over its members. In *Snyder v. American Association of Blood Banks,* 659 A.2d 482 (N.J.Super. 1995), the Appellate Division of the Superior Court affirmed that the American Association of Blood Banks (AABB) could be liable under a negligence theory for the transfusion of contaminated blood.

The AABB is an association of local and regional blood banks whose purposes, among others, is to foster the exchange of ideas and information relating to blood banks and transfusion services, to promote standards of performance and service by blood banks, to function as a clearing house for the exchange of blood, to encourage development of blood banks, and to plan for cooperation among members at times of disaster. Unlike the NSPI, the AABB affirmatively inspects and accredits its members' facilities, and some states actually defer entirely to AABB inspection and accreditation. Moreover, the AABB exercises substantial control over the adequacy and integrity of the blood supply and is directly involved in formulating industry policy.

The court determined that the AABB's role in prescribing procedures and policies for the conduct of voluntary blood banks was quasi-governmental. It emphasized that the AABB adopted standards and made recommendations with the intent and expectation that members would follow them and retained power to impose punitive measures on members that flouted the guidelines. In this light, and in consideration of the nature and degree of risk and public policy concerns related to the AABB's methods of operation, the court concluded that the AABB was reasonably chargeable with a duty of care owed to blood recipients whose life and health depended on the reasonableness of its actions.

In certain jurisdictions, liability may be found to attach to standards-setting organizations for personal injuries to third party consumers of organization members' products irrespective of the limited degree of control that the organization wields over its members. This result is premised on a broad interpretation of the Restatement's Section 324A. In those states, it would appear that standards-setting organizations can do little, short of refraining from any engaging in any activity in the subject state altogether, to avoid liability.

Question unresolved

Unresolved is the question whether the jurisdictions governed by Section 342A would absolve standards-setting organizations when only commercial or economic loss is suffered. If the *Waters* case is construed as a reliable guide, those jurisdictions would appear unlikely to extend liability in such circumstances. Certainly, jurisdictions that decline to find actionable claims to be stated by plaintiffs alleging physical injuries would not be likely to permit analogous actions where the claimed injury is merely economic or commercial.

In jurisdictions like New Jersey, standards-setting organizations would be wise to heed the lessons of *Meyers* and *Snyder,* in which the degree of control the organization wields over its members is given almost paramount importance in determining whether there is liability.