Like most professional associations, the National Recreation and Park Association (NRPA) has promulgated standards to guide its membership in such areas as park maintenance, professional certification, and university accreditation. On several occasions, I have been asked the following question regarding the legal ramifications of these professional standards on NRPA: “If such standards prove to be unreasonable when implemented by an NRPA member, and someone is injured as a result, could NRPA be liable to the injured party for negligence?” The Meyers case described herein provides some insight into the analysis a court is likely to apply in addressing this issue.

CONTROL AND FORESEEABILITY IMPOSE DUTY

In the case of Meyers v. Donnatacci, 220 NJ.Super. 73, 531 A2d 398 (1987), plaintiff Richard Meyers was injured while attending a barbecue and swim party at the home of defendants Michael and Donna Donnatacci. On August 18, 1984, Meyers was rendered a quadriplegic when he dove into the shallow end of an in-ground swimming pool at the Donnatacci residence. In addition to the Donnataccis, Meyers sued the manufacturer and the distributor/installer of the swimming pool. Meyers also sued the National Spa and Pool Institute (NSPI), the trade association of which the manufacturer and distributor/installer were members.

NSPI argued that "it owed no legally recognized duty to Meyers." The issue before the court was, therefore, "whether a trade association owes a duty of care or assumes a duty not otherwise owed to any user of a product manufactured and/or designed by members of that association." The court provided the following description of NSPI:

NSPI is a non-profit corporation organized in 1956.... NSPI is not a manufacturer, fabricator, designer, builder, supplier, installer or wholesale or retail seller of swimming pools or pool equipment. NSPI is a voluntary trade association comprised of several hundred representatives from swimming pool manufacturers, maintenance firms, distributors, officials from the public health and safety sector, the American Red Cross, YM and YWCA groups, the International Association of Plumbing and Mechanical Officials and a number of coaches, physicians and teachers who are involved in swimming and aquatics....

In an effort to keep the [NSPI] membership apprised of each other's ideas and thoughts, a consensus was taken directed at compiling a set of minimum standards for construction and design of residential in-ground swimming pools. The process of
promulgating standards was voluntary and the results reflected consensus of those who chose to respond. Those whose comments and suggestions were solicited for the standards included not only the members of NSPI but industry and public officials and organizations including but not limited to the American Red Cross, Consumer Products Safety Commission, the National Environmental Health Association, the YM and YWCA. Suggestions and comments were submitted to NSPI's Technical Counsel who subdivided the task among various subcommittees. The final revision was presented to the Technical Counsel who adopted the standards.

As noted by the court, these NSPI standards entitled "Suggested Minimum Standards for Residential Swimming Pools" were issued in 1974.

To develop the standards, drafts were circulated to the NSPI membership and industry and public officials to solicit their comments. Scheduled meetings were arranged for those solicited to give them an opportunity to participate in developing the Standards. The cover page of the Standards states a compliance date of January 1, 1974. The Appendix to the Standards states, among other things, that the "safety of swimming pools extends beyond design and construction standards and includes many other elements among which are the provision of ancillary facilities and equipment, the restriction or prohibition of selected activities of swimmers and bathers, and various operational and maintenance procedures...."

NSPI had no power to enforce Compliance .... Members agreed [in the NSPI Code of Ethics] to design or build in a manner compatible in every respect with public health and safety, and to comply with all applicable laws, ordinances or regulations .... Neither admission nor continued membership was premised upon compliance with promulgated consensus standards.

Meyers was injured in a swimming pool manufactured and installed in 1979. Consequently, the 1973 standards were in effect at the time of the accident in August 1984. The swimming pool contained no warnings against diving into the shallow water and had a mosaic patterned liner.

Meyers argued that "NSPI was aware of the correlation between shallow water diving and spinal cord injuries as early as 1974." Given this knowledge, Meyers contended that NSPI was negligence because it "failed to take action to prevent such harm." In addition, Meyers maintained that NSPI had "assumed the duties of its members to acquire and disseminate pool safety information including the information it had acquired by virtue of its studies." Further, Meyers alleged that NSPI members had "relied upon NSPI's standards, thus foregoing their own research, resulting in [his] severe personal injuries."

In light of these allegations, the court had to decide "whether a trade association which performs
research, conducts surveys and disseminates the results owes a duty to a consumer who is injured using a product manufactured and/or installed by one of its members." The court defined negligence liability as follows:

Negligence is the lack of due diligence or care. Actionable negligence, or negligence which is legally recognized and from which liability will arise, consists of various essential elements including the disregard or violation of a legal duty. This disregard or violation must then be the proximate result of injuries to the person to whom the duty is owed. Thus, actionable negligence is sometimes said to be the failure to exercise the care which an ordinary person would employ under the existing and surrounding circumstances in the discharge of that duty. The prerequisite for imposition of liability upon a party is the existence of a legally recognized duty. This is determined by whether or not the risk or event to be guarded against is reasonably within the range of apprehension of injury to another person. [Citations omitted.]

Given this definition of negligence liability, the specific question before the court was, therefore, "whether NSPI, a trade organization, owed Meyers a duty, the breach of which may subject the organization to damages for the resulting injuries."

Meyers acknowledged that "there was no special relationship between himself and the trade association." Meyers, however, argued that "NSPI had a duty to use reasonable care in the development, accrual and dissemination of swimming pool information." Specifically, Meyers contended that "NSPI held itself out to its members and the general public as an expert in the area of safety standards in swimming pools." Further, Meyers maintained that it was foreseeable that he would be injured if NSPI failed to use reasonable care in its operations. " According to Meyers, this foreseeable risk of injury to the general public, "imposed upon NSPI a legal duty" of reasonable care.

The court rejected this argument. In the opinion of the court, NSPI, as a trade association, owed "no duty to the general public who may use products manufactured and/or installed by its members."

...There was no special relationship existing between Meyers and NSPI. In fact, Meyers stated in answers to interrogatories that he had never received any information from NSPI. Furthermore, the crucial element of foreseeability is lacking.... Foreseeability is not solely a mere matter of logic, since anything is foreseeable, but frequently involves questions of policy as well ....

Foreseeability, alone, without more cannot determine the existence of a duty .... [M]ore is needed, "more" being the value judgment based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care .... [W]hether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the
parties, the nature of the risk, and the public interest in the proposed solution.

Under the circumstances of this case, the court refused to impose a duty of reasonable care upon NSPI to protect Meyers from injury. To do so would, in the opinion of the court, “amount to raising NSPI to the status of a rule-making body which the facts clearly show is unwarrantable and legally unsupportable.”

According to Meyers, the minutes of various NSPI committee meetings established the foreseeable risk of injury. Specifically, NSPI had considered and rejected standards requiring depth markings and visible identification of the deep portions of the swimming pools in an effort to help decrease the number of pool accidents. The court disagreed.

The October 1974 committee report merely confirmed that these areas should be further researched. There is no indication in any of these facts that NSPI could foresee that Meyers would be injured as he was. Foreseeability is lacking here. Conduct is tested by whether a reasonably prudent person would recognize and foresee an unreasonable risk of harm to others.

The fact that the report may have contained information that there is a relationship between an individual’s physical build, his velocity when entering the water and the drag time of the body underwater does not translate, as Meyers would have the court believe, into foreseeability that Meyers would be injured if the information was not made public. This is an unreasonable proposition.

Further, the court noted that "NSPI did not have the duty or authority to control the manufacturers" who produced the swimming pool. Absent such control, the court found NSPI could not be held responsible for the negligence of the manufacturer.

[A] duty to prevent such negligence should not be imposed on one who doesn't control the tortfeasor [i.e., the negligent party]. [A]lthough it is reasonable to require one person to be responsible for the negligent conduct of another in some instances, it is unreasonable to impose that duty where the realities of every day experience show us that regardless of the measures taken, there is little expectation, that the one made responsible could prevent the negligent conduct....

The association neither mandated nor monitored the use of the standards by any manufacturer. The information published was advisory and use thereof was within the discretion and control of the individual user. Where one does not commit the injury producing act directly, responsibility for its consequences requires, at the very least, a relationship with the tortfeasor sufficient to exercise control over the culpable conduct.
NSPI did not create or establish dimensional designs or construction standards for swimming pools. Any compliance date established for the standards were merely an effort to have conformity among those who chose to adopt the standards. There is no evidence presented to show that NSPI controlled the operations of its members or that if NSPI ceased its operations or discontinued providing the consensus standards that its membership would stop production.

As a result, the court concluded that "NSPI did not owe Meyers a duty of care" under the circumstances of this case.

Under the circumstances of this case, Meyers also argued that liability could be based upon section 324A of the Restatement of Torts (an authoritative treatise on the law of torts). This section provided as follows:

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.

Specifically, Meyers noted that NSPI had researched "swimming pool design and diving accidents and injuries" and had issued standards and provided "information to its members and the general public." In addition, Meyers contended that "NSPI had evidence that mosaic patterned liners inhibit accurate perception of the water's depth." In so doing, Meyers contended that NSPI had assumed the duty of care owed to Meyers by the manufacturer and installer. Further, Meyers argued as follows that NSPI "induced the manufacturer and installer to rely upon its research and recommendations as providing adequate safety information":

NSPI, through a structured system of committees and retention of independent contractors, undertook to develop and promulgate design, construction and safety procedures, undertook to warn the public and the industry of potential hazards of improper pool use, collected information as to injuries caused by the designs of swimming pool products. While charging members a fee, it has thrust itself into the purvue of § 324A. By virtue of its assumed duties and the fact that it had information available to it that spinal cord injuries were resulting from head-first dives into shallow water, NSPI had a duty to exercise reasonable care in dealing with this information.

As a result, Meyers concluded that "NSPI failed to exercise reasonable care which resulted in an increased risk of harm to him."
Under the particular circumstances of this case, the court found that Meyers had failed to establish liability under section 324A(b), i.e., undertaken a duty owned by NSPI members to Meyers.

Meyers would have. the court believe that the membership dues served as a fee for research and preparation of the industry standards. This, however, is not how the court views this. All organizations have membership fees ....

The fees do not transform NSPI into a research organization which impliedly contracted to perform its members' duties to the public. On the contrary, NSPI maintained a forum for its members, a situation where they could have group solidarity. It did not undertake the duty to warn consumers or its membership of the danger of shallow water diving or the danger presented by certain pool liners. NSPI never assumed any of its members' duties and the court will not construe any of its actions as such an assumption. Although NSPI rendered services to its members by providing a forum, NSPI did not assume the danger of shallow diving which it recognized as necessary for the protection of a third party.

Similarly, the court found that "any activities of NSPI did not increase the risk of harm to Meyers within the meaning of § 324A(a)."

The only increased risk Meyers can assert is an argument that a level of risk (such as a pool without warning signs or a deceptive liner exists) increases the risk of injury to Meyers over time. In reality, the risk to Meyers was an attempt to executive a shallow dive. There was noting NSPI did or failed to do which increased the risk to Meyers. There is no evidence that NSPI recommended any changes, suppressed any information, or failed to recommend any changes which in any way increased the risk to Meyers. The hazard of shallow water diving existed independently of any acts on the part of NSPI. There is no evidence that the risk increased. At most, NSPI's alleged conduct merely existing risk, an inadequate basis upon which to impose liability under section 324(a). [Citations omitted.]

In addition, the court found that "any assertion that the manufacturer and installer herein relied upon NSPI to promulgate safety standards is without merit."

Although the court recognizes that the standards were stated to be minimum design and construction standards, safety was part of its overview. This, however, is not fatal to NSPI's argument. All members, including the manufacturer and installer, were aware of the proceedings undertaken to arrive at these standards. Any assertion that these members relied upon the results is incongruous. The members knew the result was the
voluntary consensus of fellow members. Furthermore, the Appendix [of the standards] states, among other things: "One of the basic considerations upon which these design and construction standards are founded is safety. However, safety of swimming pools extends beyond design and construction standards and includes many other elements among which are the provision of ancillary facilities and equipment, the restriction or prohibition of selected activities and bathers, and various operational and maintenance procedures...." There was noting that NSPI did or failed to do which induced its members to forego their responsibilities to the consumer.

As a result, the court concluded that Meyers had "failed to establish NSPI's liability under §324A(c)" (i.e., inducing reliance by Meyers or the manufacturer/installer on the NSPI standards). The court, therefore, held that NSPI did not owe Meyers a duty of care under the circumstances of this case. Consequently, the court granted a summary judgment in favor of defendant NSPI.