TRADE ASSOCIATIONS
IN THE TORT SPOTLIGHT:
LEGAL RIGHTS AND DEFENSES

by

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Washington Legal Foundation
Critical Legal Issues
Working Paper Series No. 97
February 2000

Washington Legal Foundation
on the World Wide Web at
http://www.wlf.org

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Trade associations play a vital role in the development of public policy. They are often the principal means through which an industry or business group makes its views known to legislatures, regulatory agencies, the courts, and the public. Indeed, courts have recognized that trade associations—like their counterparts in the not-for-profit sectors—serve as channels through which “the people” combine their voices to exercise their First Amendment right to “petition the Government for a redress of grievances.” Trade associations also perform important functions in developing standards to guide the activities of industry members, and in sponsoring research relating to the products or services industry members provide.

1 See, e.g., National Indus. Sand Ass’n v. Gibson, 897 S.W.2d 769, 774 (Tex. 1995) (activity of trade association to organize industry campaign to influence federal regulation of silica sand is protected under First Amendment); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (activity by civil rights organization similarly protected by First Amendment).
For many years, trade associations faced only one significant legal worry—the risk that their activities would give rise to antitrust claims. Because they are, by definition, a mechanism for joint action by industry competitors, trade associations invite scrutiny for price-setting and other unlawful collective activity. Several of the earliest Department of Justice enforcement actions under the Sherman Act involved claims that trade association activities constituted unlawful conspiracies in restraint of trade.\(^2\) In one four-year period in the early 1940s, the Justice Department brought 130 antitrust cases against trade associations, including 72 criminal actions.\(^3\)

Over the years, the U.S. Supreme Court has clarified the line between legitimate collaboration and unlawful conspiracy in the antitrust context.\(^4\) Trade associations, in turn, have implemented more vigorous self-policing on

\(^2\) See e.g., Eastern States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600 (1914) (conspiratorial refusal to deal); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (price fixing); Sugar Inst., Inc. v. United States, 297 U.S. 553 (1936) (price fixing).


competition matters.\textsuperscript{5} As a result, trade association activity in the modern era no longer carries so heavy a burden of suspicion or legal risk as it did in earlier times from an antitrust standpoint. \textsuperscript{6}

Unfortunately, just when you might have thought it was safe to go back in the water, trade associations have begun to encounter a new, and potentially more threatening, set of legal concerns: The personal-injury plaintiffs' bar now has them in its sights.

Over the last two decades, as tort law has become increasingly hospitable to product liability claims, including "mass tort" claims, trade associations have become a target of plaintiffs' lawyers seeking to take on

\textsuperscript{5} See, e.g., Webster, G.D. and Herold, A.L., American Society of Association Executives, \textit{ANTITRUST GUIDE FOR ASSOCIATION EXECUTIVES} \textsuperscript{7} (2d ed. 1979) ("The avoidance of collusive practices by members of a trade or profession which affect prices, fees or the ability of others to compete is a major goal of the antitrust laws. This requires that particular attention be paid to the activities of associations, and in turn that associations monitor their own activities to be sure that anticompetitive effects do not result.").

\textsuperscript{6} See, e.g., \textit{In re: Citric Acid Litig.}, 1999-2 Trade Cas. [CCH] ¶ 72,641 at 85,759 (9\textsuperscript{th} Cir. 1999) ("Gathering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action. As the Supreme Court has recognized, however, trade associations often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry and promoting demand for products and services. See, e.g., \textit{Maple Flooring Mfrs. Ass’n v. United States}, 268 U.S. 563, 567 (1925).”); see also \textit{Consolidated Metal Prods. Inc. v. American Petroleum Inst.}, 846 F.2d 284, 293-94 (5\textsuperscript{th} Cir. 1988) ("A trade association by its nature involves collective action by competitors. Nonetheless, a trade association is not by its nature a ‘walking conspiracy,’ its every denial of some benefit amounting to an unreasonable restraint of trade.” (Footnote omitted.))
not simply individual companies but entire industries. In litigation involving products ranging from asbestos, lead-based paint, and chemicals to medical devices, alcoholic beverages, tobacco, blood products, guns, swimming pools, and now possibly health maintenance organizations, plaintiffs' lawyers have begun to focus on trade association activities in litigation invoking health concerns.

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7 E.g., In re: Asbestos Sch. Litig., 46 F.3d 1284 (3d Cir. 1994).
16 See, e.g., David Segal and Amy Goldstein, Tobacco Lawyers Aim at HMOs; Slew of Suits Expected to Test Law Protecting Managed Care, WASH. POST, Oct. 1, 1999, at E1.
As an outgrowth of the explosion of product liability litigation, this legal assault on trade associations should come as no surprise. The very feature that makes trade associations draw antitrust scrutiny—their identity as instruments of joint action—also makes them attractive targets for plaintiffs' lawyers seeking to spin tales of industry conspiracies to harm the public health. As a consequence, the courts are being asked once again to draw lines between the legitimate role that trade associations can play in the formulation of public policy, and problematic conduct that can sometimes occur in the trade association context.

This WORKING PAPER will survey some of the more recent court decisions that have examined trade association activities on health and safety issues in connection with product liability and toxic tort litigation. These activities fall into four distinct (though frequently overlapping) areas—lobbying and issue advocacy, promotional activities, sponsorship of health and safety research, and standard setting.

This review of the cases reveals that allegations of fraud and other industry-wide wrongdoing, relating to core trade association activities, are easy to assert and difficult to refute. The squeeze trade associations face is painful: Trade associations may attract claims more readily than their members, because they are more tantalizing targets, especially in cases
involving claims of industry-wide conspiracy. Yet courts are unlikely to afford association activities any special protections. As long as the law permits claims to be brought against individual companies, trade associations face the risk of "claims squared." This WORKING PAPER will suggest steps that trade associations can take, if not to minimize the risk of claims, then at least to reduce the risk of liability.

I. LOBBYING AND ISSUE ADVOCACY

Efforts to influence government action and public opinion lie at the heart of the activities protected by the First Amendment. Efforts to influence government action and public opinion lie at the heart of the activities protected by the First Amendment. Lower courts in product liability and toxic tort cases have confirmed that the First Amendment protects the right of companies acting through their trade associations to mount a robust industry defense of the safety of their products before government bodies. As one court explained in rejecting a plaintiff’s attack against an association’s “taking a particular view in a

scientific debate” for self-interested purposes: “Not only do these actions not constitute torts, they are protected by the First Amendment.” Indeed, in the seminal Noerr case, the Supreme Court held that even ethically questionable lobbying techniques employed by a trade association could not be attacked on antitrust grounds.

In the health and safety context, the main question is whether a plaintiff can overcome a First-Amendment-based defense, and hold a trade association and its members subject to product liability or toxic tort claims,

18 Senart, 597 F. Supp. at 506. See also National Indus. Sand Ass’n, supra note 1, 897 S.W.2d at 774 (product liability challenge to trade association’s lobbying efforts related to safety issues in the sandblasting industry; court held that “petitioning the government for redress on matters of concern to a party is a freedom protected by the Bill of Rights in the federal constitution”); Asbestos School Litig., supra note 7, 46 F.3d at 1287, 1294 (in response to assertion that a company’s membership in a trade association involved with “lobbying and public education” on use of asbestos in building materials amounted to participation in a conspiracy to commit a tort, court ruled that “Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection”).

19 365 U.S. at 140-41. See also, Cipollone v. Liggett Group Inc., 668 F. Supp. 408, 410 (D.N.J. 1987) (in context of ruling on motion in limine, court observes that “[t]he claim of furnishing false and misleading information to Congress, if true, although unethical and reprehensible, is entitled to protection as political speech.”). But see California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) (misrepresentations “condoned in the political arena, are not immunized when used in the adjudicatory process”); Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) (“in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations”). See also, e.g., Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056 (9th Cir. 1998) (alleged misrepresentations made to Washington State Department of Health), cert. denied, 119 S. Ct. 1031 (1999); In re Warfarin Sodium Antitrust Litig., 1999-1 Trade Cas. (CCH) ¶ 72,457 (D. Del. 1998) (allegedly fraudulent adverse drug event reports submitted to State administrative agencies).
based solely on the plaintiff’s disagreement with positions the association is
taking on the underlying science in presentations to the government, or in
communications to the public. If what is fundamentally a disagreement over
the science can support a finding that the public positions taken by a trade
association or its members are not only “wrong” (in the plaintiff’s opinion)
but also thereby “fraudulent” or “deceptive,” the rights of speech and
petition would be seriously eroded.

There is little law in this area. The nearest precedent is probably
Senart (supra note 9), in which the district court stated that “taking a
particular view in a scientific debate” and “trying to retain a regulatory
standard which defendants preferred” were “protected by the First
Amendment.” 597 F. Supp. at 506 (citing Noerr). There also is pertinent
language in Kottle (supra note 19), in which the Ninth Circuit imposed a
"heightened pleading standard" in cases where the plaintiff "seeks damages
. . . for conduct which is prima facie protected by the First Amendment."20

20  146 F.3d at 1063 (quoting Franchise Realty Interstate Corp. v. San Francisco Local
Joint Executive Bd. of Culinary Workers, 542 F.2d 1076, 1082 (9th Cir. 1976)); see also
overcome Noerr defense based on alleged misrepresentations contained in defendant's
petition to United States International Trade Commission, plaintiff required to demonstrate
"that there was absolutely no objective merit" to the petition), cert. denied, ___ S. Ct. ___,
The degree of protection afforded positions concerning science taken by a trade association or its members may be influenced by developments in the Supreme Court's commercial speech doctrine.\textsuperscript{21} The Court has held that the protection afforded speech under the First Amendment does not depend on the identity of the speaker.\textsuperscript{22} Yet the Court has also held that "commercial speech" is subject to greater regulation than "noncommercial speech."\textsuperscript{23} The line between the two types of speech is not always easy to draw and, ultimately, may not even be coherent.\textsuperscript{24}


\textsuperscript{23} See, e.g., Central Hudson, supra, 447 U.S. at 562-63 ("[t]he Constitution ... accords a lesser protection to commercial speech than to other constitutionally guaranteed expression").

\textsuperscript{24} Two cases, decided by the Supreme Court on the same day, indicate a murky dividing line between commercial and non-commercial speech. In Central Hudson, supra, 447 U.S. 557, the Court invalidated as overbroad a regulation of the New York Public Service Commission which banned all of the electric utility's advertising that promoted the use of electricity. In so doing, the Court characterized the utility's advertising as commercial speech, or "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. In Consolidated Edison Co. of New York v. Public Serv. Comm’n of New York, 447 U.S. 530 (1980), the Court invalidated a regulation which prohibited public utilities from inserting into monthly bills statements expressing the benefits of nuclear power. However, in contrast to its analysis in Central Hudson, the Court in Consolidated Edison afforded the utility's statements full protection under the First Amendment. 447 U.S. at 533-34; 544. Several years later, in Bolger v. Youngs Drug

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An individual's or a magazine's opinion about what the science shows about a product certainly would be afforded generous First Amendment protection, but it cannot automatically be assumed that a company's or trade association's opinions about what the science shows—whether voiced to government bodies or to the public—would be afforded the same degree of First Amendment protection. For if a company's opinions about science

Prods. Corp., 463 U.S. 60, 66-67 (1983), the Court addressed the alleged distinction between commercial and non-commercial speech. Looking to three factors, the Court held that informational pamphlets on contraceptives were commercial speech because they were conceded to be advertisements, referred to specific products, and were mailed with an economic motivation. While the Court noted that none of these factors individually would cause the pamphlets to be commercial speech, the combination thereof "provides strong support for the ... conclusion that the informational pamphlets are ... commercial speech," regardless of the fact that the pamphlets contained discussions of important public issues. 463 U.S. at 67-68. In recent years, members of the Court have questioned the alleged distinction between commercial and non-commercial speech. See, e.g., Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring in the judgment) ("the borders of the commercial speech category are not nearly as clear as the Court has assumed").


26 For example, in National Comm’n on Egg Nutrition v. Federal Trade Comm’n, 570 F.2d 157, 160-61 (7th Cir. 1977), the Seventh Circuit sustained a portion of an FTC order which directed the trade association National Commission on Egg Nutrition ("NCEN") and its advertising agency to cease and desist from disseminating advertisements stating that there is no scientific evidence that eating eggs increases the risk of heart and circulatory disease. Although the NCEN presented experts who questioned the link between cardiovascular disease and consumption of eggs, many other experts had proclaimed such a link to exist. Therefore, the court held that the NCEN's "opinion" that no scientific evidence proved a link was false. It should be noted, however, that a government agency's arbitrary interpretation of what constitutes scientific evidence may fall short of constitutional requirements. See Pearson v. Shalala, 164 F.3d 650, 660-61 (D.C. Cir.

(continued on next page)
can be regulated by legislative and regulatory bodies as commercial speech, might they not be held to be actionable in judicial proceedings under theories of tort liability? Whatever the evolution of the law in this area, it is likely that the opinions of a trade association regarding science will be afforded neither more nor less protection than the opinions of its members.

II. PROMOTIONAL ACTIVITIES

Trade associations typically espouse the common positions of their members not only to government bodies but also to the public at large. Such appeals can take many forms ranging from promoting the products of an entire industry in "generic" advertising campaigns, such as the campaigns exhorting people to consume more beef, more California raisins, more orange juice, or more milk, to more focused marketing tools such as seminars to

1999) (holding invalid FDA regulation requiring significant scientific agreement of validity of health claim before allowing claim to be included on label of dietary supplement because FDA had neither defined "significant scientific agreement" nor established guiding principles for the agency's interpretation of the regulation), reh'g en banc denied, 172 F.3d 72 (D.C. Cir. 1999).


28 The courts have rejected claims that generic advertising programs for California fruits and beef, funded by government-mandated assessments on growers and ranchers, violate

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educate physicians on the use of a particular medical device,\textsuperscript{29} or coordinated promotional campaigns to persuade consumers to increase their use of products that use a particular ingredient (e.g., lead-based house paint).\textsuperscript{30}

Faced with a trade association that plays an active role in coordinating or disseminating advertising material for the promotion of its members’ products, courts tend to place the association in the product-maker’s shoes, treating these communications as "commercial speech."\textsuperscript{31} Courts have not discerned, and are unlikely to discern, a basis for according such communications a greater degree of protection simply because they are made by a trade association.

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\textsuperscript{30} See, e.g., Santiago v. Sherwin Williams Co., 3 F.3d 546, 548 (1st Cir. 1993).

\textsuperscript{31} See, e.g., City of New York v. Lead Indus. Ass’n, 597 N.Y.S.2d 698, 700-01 (N.Y. App. Div. 1993) (“Liability attaches equally to the trade association in its own right, and to all those who continued their membership without protest.”) (citations omitted).
\end{flushright}
In Orthopedic Bone Screw Prods. Liab. Litig., supra note 10, for example, several trade associations were accused of making misrepresentations about the uses of a medical device at seminars presented to physicians. The associations argued that such seminars were "teaching events" and that in participating in the seminars they were "engaged in 'core free speech' and that such speech cannot be the basis for civil liability because it is protected by the First Amendment." Finding that the seminars and related informational pamphlets had distinct commercial elements, however, and crediting allegations in the complaint that the seminars were "sales events," the court rejected the association’s argument that its seminars were subject to heightened protection, noting that "commercial speech that is false, deceptive, or misleading is not protected by the First Amendment."


33 Id. at * 47 - * 48. The court based its holding in part on the liberal pleading standards applicable to motions to dismiss filed pursuant to Rule 12, F.R. Civ. P., and indicated that a different outcome might occur if the evidence were ultimately to "demonstrate that the purpose of the [seminar] events was medical discussion, and not a sales pitch." Id. at * 48. See also National Comm’n on Egg Nutrition, 570 F.2d at 163 (holding that the First Amendment did not stand in the way of an FTC remedial order governing representations in advertisements placed by egg industry trade association, and that the Supreme Court’s pronouncements on commercial speech "were not intended to be narrowly limited to the mere proposal of a particular commercial transaction but extend to false claims as to the harmlessness of the advertiser’s product asserted for the purpose of persuading members of the reading public to buy the product").
As a result, as suggested earlier, a trade association’s defenses in product liability or toxic tort litigation involving promotional activities may ultimately turn on the truth and accuracy of statements made in such campaigns as well as other factors that apply in suits against manufacturers, including proximate cause\textsuperscript{34} and claimed support for allegations of reliance and detriment that typically are key elements of the plaintiff’s burden of proof for fraud claims asserted under state law.\textsuperscript{35} Trade associations wishing to minimize the risk of liability, and possibly claims, in connection with product promotional activities should be very conservative in the factual representations they make about the health and safety issues and forthrightly acknowledge troublesome questions or facts. This is not only sound as a matter of legal self-protection but will pay dividends in public trust.

\textsuperscript{34} See, e.g., Orthopedic Bone Screw Prods. Liab. Litig., supra note 10 at * 34 (motion to dismiss conspiracy claims denied because "[a] reasonable jury could infer that material facts were knowingly withheld from doctors who were ignorant of those facts and who attended those seminars."); Santiago, supra note 30 (complaint dismissed due to plaintiff’s failure to allege how promotional campaign resulted in lead-based paint being applied to plaintiff’s house).

\textsuperscript{35} See, e.g., Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 171 (5\textsuperscript{th} Cir. 1996) (affirming grant of summary judgment dismissing claims against tobacco trade associations because "evidence that Allgood relied upon the alleged misrepresentations, an essential element of both affirmative fraud and fraudulent concealment, is insufficient as a matter of law.").
III. SPONSORSHIP OF RESEARCH

Trade associations frequently facilitate their members’ efforts to sponsor scientific research into the health effects or other safety characteristics of products and of chemicals and other materials used to make products. Managed correctly, such research can make important contributions to scientific knowledge and further the goal of making products safer. Care must be taken, however, to provide no basis for allegations, such as those leveled most prominently at the tobacco industry, that industry-sponsored research is "nothing but a hoax created for public relations purposes..." 36 Nor have such allegations been confined to the tobacco industry. Similar claims by product liability and toxic tort plaintiffs' lawyers have proliferated in challenges to the credibility of research conducted under the aegis of trade associations in cases involving blood

36 Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1491 (D.N.J. 1988) [subsequent history?]. See also Rogers, 761 S.W.2d at 792 (denying motion for summary judgment in face of allegations that, although tobacco industry trade associations had as their stated purpose “aiding and assisting research in tobacco use and its relationship to health and also to make available to public factual information on that subject,” the associations in fact attempted to suppress scientific findings on the adverse health effects of smoking and, “If this suppression was not possible, then the two organizations acted to challenge the reports and to dilute and diminish their influence.”).
products, chemicals and medical devices. Here, again, the courts have afforded no special legal privilege or protection to associations that are sued as a result of their willingness to sponsor or facilitate scientific research.

In In re: Factor VIII or IX Blood Products Litigation, for example, the National Hemophilia Foundation ("NHF") was sued for negligence based on its dissemination of information to hemophiliacs about the safety of blood products in the early 1980s, a period when the HIV virus and the AIDS epidemic were beginning to spread throughout the hemophiliac community. The plaintiffs alleged that "the NHF made false, incorrect and misleading statements regarding the safety of factor concentrates manufactured and distributed by the other defendants in this litigation." In response to NHF's argument that the First Amendment protected its information-disseminating activities from tort liability, the court indicated that the First Amendment would prevent NHF from being held strictly liable for its statements,


40 25 F. Supp. 2d at 840 (footnote omitted).

41 Id. at 840 (footnote omitted).
apparently on the ground that the risk of such liability would unduly chill expression, but does not protect NHF from liability on a negligence theory:

The situation would be entirely different if plaintiffs were seeking to impose strict liability upon the NHF for its communications. In that event, the First Amendment would surely be implicated and we would be persuaded by the NHF's argument that there must be open and candid public debate on all medical issues and that the courts should not inhibit nonprofit organizations from contributing to that debate. But the argument is not apposite to negligence liability. In seeking to avoid liability altogether, even for negligent conduct, the NHF simply fails to recognize the interests protected by negligence law (in general or in this particular case) or the need to balance those interests against the values of free speech.\textsuperscript{42}

The traditional litigation maxim — easy to allege, difficult to disprove — thus remains an unpleasant but undeniable fact of life for trade associations that are accused of engaging in negligent or misleading research.

Certainly there are safeguards that can be employed to reduce the risk of tort liability. Industry-sponsored research is frequently performed by scientists of great repute, subjected to peer review, and conducted under rules that require publication or other public dissemination regardless of

\textsuperscript{42} Id. at 846.
outcome. However, none of these factors, either alone or in combination, will guarantee immunity from litigation under the current state of the law. Again, caution — and forthrightness — is the best protection.

IV. STANDARD SETTING

It has long been clear that trade associations that engage in standard setting to insure product safety are potentially subject to liability if the resulting standards prove to be deficient. Although not subject to liability directly, because they do not themselves manufacture the products in question, associations that engage in standard setting, especially on matters of product safety, have been held to have voluntarily undertaken a duty to help protect consumers from safety hazards pursuant to “good Samaritan” principles enshrined in the Restatement of Torts § 324A.43 The seminal case

43 The Restatement (Second) of Torts § 324A (1966) 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 undertakes to perform a duty owed by the other to the third person, or

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is King v. National Spa & Pool Institute, Inc., 570 So.2d 612 (Ala. 1990), rev’d on other grounds, 578 So.2d 1285 (Ala. 1991), in which an industry association set standards governing the type of diving board that can be safely used in conjunction with swimming pools of various depths and sizes. The court held that the trade association voluntarily undertook a duty to exercise due care in promulgating safety standards and was accordingly potentially liable for injuries resulting from deficiencies in the standard.

In the years following the King decision, the courts have generally applied its holding to situations where the standard setting organization exercised some degree of “control” over the design decisions of manufacturers whose products were ostensibly subject to the standards. On the other hand, some courts have held standard-setting trade associations potentially liable in tort without applying a strict "control" test, 

"(c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

44 See, e.g., Sizemore v. Georgia-Pacific Corporation, 1996 WL 498410 at * 4 (D.S.C. Mar. 8, 1996) (dismissing tort claims against standard-setting trade association in the plywood industry based upon finding that the association "has no control or authority over the design, manufacturing, distribution or sales activities of its member companies or other entities); Beasock v. Dioguardi Enters., Inc., 130 Misc. 2d 25, 31, 494 N.Y.S. 2d 974, 979 (1985) (dismissing claims against tire trade association found to have "neither the duty nor the authority to control what the manufacturers produced").
where the association's method of publicizing its standards,\(^{45}\) or the patterns of government or market reaction to the standards,\(^{46}\) make it foreseeable that the standards will in fact be followed in the market. Of course plaintiffs wishing to assert product liability or toxic tort claims against standard-setting associations must also satisfy the fundamental elements of their causes of action, including proximate cause and reliance.\(^{47}\)

\(^{45}\) See, e.g., Prudential Property and Cas. Ins. Co. v. American Plywood Ass'n, 1994 WL 463527 at * 3 (S.D. Fla. Aug. 3, 1994) (Report and Recommendation of U.S. Magistrate Judge) (“As noted above, building code officials and legislators rely on the information provided by APA in adopting standards. In its literature, APA maintains that its 'research center is the most sophisticated facility for basic plywood research and testing in the world.'”)

\(^{46}\) See, e.g., Weigand v. University Hosp. of New York Univ. Med. Ctr., 172 Misc. 2d 716, 723, 659 N.Y.S. 2d 395, 399 (1997) (denying motion to dismiss tort claims against American Association of Blood Banks based on finding that "the care used in establishing [AABB's] industry standards has tremendous impact on the manner in which blood is collected and tested. It is equally clear that the relationship between a standard-setting industry association and the ultimate recipient of a transfusion, although not a direct relationship, is one in which the conduct of the industry association may have a direct effect on the recipient, e.g., if the industry association negligently sets inadequate standards for blood collection and screening and those standards are followed by a member blood bank, resulting in the collection and transfusion of tainted blood, it is the recipient of the blood transfusion who will be damaged, not the blood bank.")

\(^{47}\) See, e.g., Sizemore, supra n. 44 at * 8 (dismissing tort claims against standard-setting body based on undisputed evidence "that plaintiffs did not rely upon any publication or other activity on the part of HPVA, nor were they even aware that HPVA existed prior to suffering their injuries."); Collins v. American Optometric Ass'n, 693 F.2d 636, 639, 641-42 (7th Cir. 1982) (plaintiff alleging injury from inadequate diagnoses by optometrists included claims against association that issued standards for optometrist qualification; claims against association dismissed for failure of proof of causation and reliance).
CONCLUSION

In today's legal environment, trade associations face significant litigation risks in the product liability and toxic tort arenas, offering plaintiffs' lawyers tailor-made targets for allegations of malevolent conspiracy. So long as tort law permits claims to be asserted, and liability to be imposed, on their members, trade associations remain at risk. It cannot be assumed that courts will afford full First Amendment protection to trade associations and their members for public statements concerning product safety and health issues; instead, courts may deem such statements to be subject to regulation as "commercial speech," or as giving rise to liability on a negligence theory. The law in this area is evolving but still relatively sparse. There are isolated suggestions in a handful of judicial rulings that some courts may be willing to fashion and apply standards of liability intended to encourage association participation in efforts to improve the safety performance of their members' products, while at the same time fostering responsibility in claims made about those products. This is an area where legislative solutions may become necessary, especially if the tactics of the personal-injury plaintiffs' bar cause trade associations and their members to shy away from health and safety research and to withdraw from involvement
in public policy debates. In both of these areas, trade associations have a vital role to play.

\[\text{48} \] Possible analogues for such legislation, albeit ones providing protection from antitrust rather than tort liability, include the Year 2000 Information And Readiness Disclosure Act, Pub. L. No. 105-271, 112 Stat. 2386 (1998), which provides a temporary antitrust exemption for collaborative conduct designed to "correct or avoid a failure of year 2000 processing in a computer system", among other things; and the Television Program Improvement Act of 1990, Pub. L. No. 101-650, 104 Stat. 5127, 47 U.S.C. § 303c, which provides an exemption from the antitrust laws for joint discussions among companies in the television industry to develop voluntary guidelines "designed to alleviate the negative impact of violence in telecast material." 47 U.S.C. 303c(c).