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## *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.:*

Sandra P. Greenblatt

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# ***American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.: Vicarious Liability Equalizes the Treatment of Business Enterprises and Nonprofit Associations Under Antitrust Laws***

I. INTRODUCTION .....	741
II. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. V. HYDROLEVEL CORP. ....	744
III. APPARENT AUTHORITY: ADAPTING THE COMMON LAW TO CONGRESSIONAL INTENT .....	751
IV. THE APPLICATION OF THE ANTITRUST LAWS TO TRADE ASSOCIATIONS AND OTHER NONPROFIT ORGANIZATIONS .....	759
A. <i>The Antitrust Laws and Professional Organizations</i> .....	760
B. <i>The Antitrust Laws and Trade Associations</i> .....	763
V. CONCLUSION .....	767

## I. INTRODUCTION

The antitrust laws are designed to increase consumer welfare by ensuring that free competition is the rule of the marketplace.<sup>1</sup> Enacted by Congress in 1890 in response to rising public concern over abuses by large corporate giants,<sup>2</sup> the Sherman Act<sup>3</sup> prohibits restraints of trade<sup>4</sup> and acts that monopolize industry.<sup>5</sup> Congress did not mean for the language of the statute to be interpreted literally, because all business contracts in some way restrain or limit trade. Instead, Congress intended the courts to give shape to the Act by drawing on common law traditions,<sup>6</sup> thereby invalidating only those actions that unreasonably restrain trade. Since the pas-

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1. Baxter, *Placing the Burger Court in Historical Perspective*, 47 ANTITRUST L.J. 803 (1978).

2. *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911).

3. Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)). Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *Id.* § 1.

4. *Id.*

5. *Id.* § 2. Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty . . ." *Id.*

6. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978); see 21 CONG. REC. 2456, 2456 (1890) (comments of Senator Sherman) the Senator noted that the Act "does not announce a new principle of law, but applies old and well recognized principles of the common law." *Id.*

sage of the antitrust laws, Congress has left the definition of antitrust violations to the courts. Congress limited its own activity to creating exceptions to the Sherman Act for particular industries<sup>7</sup> and to adding remedies for civil violations of the antitrust laws.<sup>8</sup> The Supreme Court, in interpreting the Act, has emphasized a particular restraint's impact on competition as opposed to the reasonableness of the motives behind the restraint.<sup>9</sup>

The legislative history of the Sherman Act clearly reveals that the Act was directed toward business activities. Antitrust violations are commercial offenses and are the result of the desire to enhance profits.<sup>10</sup> Nevertheless, as a result of Congress delegating to the courts the responsibility of interpreting the Act, the Sherman Act's emphasis has changed from punishing the abuses by corporate giants<sup>11</sup> to the broader goal of maintaining free competition by eliminating any activities that have a potential for restraining trade.<sup>12</sup> In the process, courts have subjected to the constraints and prohibitions of the antitrust laws entities not traditionally considered to affect "trade or commerce."<sup>13</sup> In doing so, the courts have shown a willingness to apply a less rigid fault standard to determine whether or not such entities violated antitrust laws.<sup>14</sup>

One such nonprofit-oriented enterprise, the trade association, has always walked a fine line in regard to the antitrust laws, because it is by its nature a combination formed to serve the interests of a particular industry.<sup>15</sup> A trade association is a nonprofit

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7. See, McCarran-Ferguson Act, 15 U.S.C. §§ 1012-1013 (1982) (insurance); Norris-LaGuardia Act, 29 U.S.C. § 106 (1982) (labor unions); Co-operative Marketing Associations (Capper-Volstead) Act, 7 U.S.C. §§ 291, 292 (1982) (agriculture).

8. Clayton Act § 4, 15 U.S.C. § 15 (1982). Section 4 provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *Id.* § 4.

9. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 638; see *supra* text accompanying notes 192-94.

10. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

11. See *Standard Oil Co. v. United States*, 221 U.S. at 50.

12. See *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (maximum fee agreement among physicians is a *per se* violation of Sherman Act because of anticompetitive potential).

13. See *supra* note 3; see also *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (sale of professional legal services subject to Section 1 of Sherman Act); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (professional code of ethics banning competitive bidding violates Section 1 of Sherman Act).

14. *Goldfarb v. Virginia State Bar*, 421 U.S. at 788 n.17.

15. See G. LAMB & C. SHIELDS, *TRADE ASSOCIATION LAW AND PRACTICE* (1971) [hereinaf-

organization whose members are employed by business firms, usually competitors within a particular industry, that have mutual economic interests.<sup>16</sup> While rife with opportunities for antitrust violations, such as price-fixing or boycotts, the legitimate activities of a trade association, which include the dissemination of trade information, the encouragement of product standardization (i.e., standard-setting), and industry self-regulation, can serve to decrease consumer cost, increase profits of producers, and thereby promote and intensify competition. The Supreme Court of the United States has approved the creation of product standards as beneficial to both industry and consumers,<sup>17</sup> but has emphasized the need for reasonable standards and the institution of procedural safeguards by the association to prevent the arbitrary use of standards to restrain competition.<sup>18</sup> The Court has consistently held that even the most laudable self-regulation efforts by trade or professional associations are superceded by the antitrust laws' purpose of protecting free competition.<sup>19</sup>

The recent six-to-three decision of the Supreme Court in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,<sup>20</sup> is consistent with the trend in case law which holds non-profit trade and professional associations liable for anticompetitive activities. At the same time, *Hydrolevel* takes the trend one step further because the Court does not base liability on an anticompetitive policy decision actively adopted by the association. Instead, the Court, for the first time, applies the common law doctrine of vicarious liability to an antitrust action. In particular the *Hydrolevel* Court applies the apparent authority theory of agency law to an antitrust scenario.

Apparent authority is defined in the Restatement Second of Agency as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."<sup>21</sup> *Hydrolevel* holds that a nonprofit standard-setting association is civilly liable under Section 1 of the

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ter cited as TRADE ASS'N].

16. *Id.* at 4.

17. *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

18. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); see also *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

19. *Fashion Originator's Guild of Am. v. FTC*, 312 U.S. 457 (1941).

20. 456 U.S. 556 (1982), *aff'g* 635 F.2d 118 (2d Cir. 1980).

21. RESTATEMENT (SECOND) OF AGENCY § 8 (1957) [hereinafter cited as RESTATEMENT].

Sherman Act<sup>22</sup> for the fraudulent acts of its volunteer members committed within the scope of their apparent authority. The Court reasoned that by cloaking its volunteers with the authority of the organization, the powerful association permitted them to affect the destiny of businesses and gave them the power to frustrate competition in violation of the antitrust laws.<sup>23</sup>

This case comment examines whether or not the application of the apparent authority theory of agency law, which creates a standard of strict vicarious liability, is consistent with the congressional intent of the antitrust laws. After a review of the unique factual setting that led to *Hydrolevel*, the significance of the Court's decision is analyzed in light of the development of both agency and antitrust law. This comment also discusses the implications of the decision for trade associations and other nonprofit organizations.

## II. AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. v. HYDROLEVEL CORP.

The litigation that led to the United States Supreme Court's decision in *Hydrolevel* resulted from the fraudulent activities of two senior volunteers of the American Society of Mechanical Engineers, Inc. (ASME), who used their positions in the standard-setting organization to issue a purposely misleading interpretation of an industry code to benefit their private employer by destroying a competitor, the Hydrolevel Corporation (Hydrolevel).

ASME is one of the oldest and largest nonprofit scientific and technical societies in the United States, with more than 90 thousand members from all fields of mechanical engineering, and an annual operating budget of over 12 million dollars.<sup>24</sup> ASME was organized to promote the use of mechanical engineering, and one

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22. See *supra* note 3.

23. 456 U.S. at 570-71.

24. *Id.* at 559; see also Brief of Plaintiff—Appellee—Cross Appellant at 6 n. 13, *Hydrolevel Corp. v. American Soc'y of Mechanical Engr's, Inc.*, 635 F.2d 118 (2d Cir. 1980) [hereinafter cited as Brief for Appellee]. Appellee notes that although a nonprofit corporation:

ASME had net income for [the] fiscal year 1978 of \$2,353,513 which resulted from \$14,390,362 of gross income with \$12,036,849 of operating expenses. . . . Sixty-one percent (61%) of its revenues, but only 39% of its expenses, come from the publication of its Standards and Codes and its "Certification Program." Moreover, the ASME investment portfolio was valued by its accountants at \$15,247,602.

Brief for Appellee at 6 n.3.

of its principal activities is the promulgation and publication of over 400 codes and standards for the industry.<sup>25</sup> Although the codes are only advisory, they have had a powerful influence in the industry as a result of their incorporation, by reference, into local, state, and federal regulations, as well as the laws of all of the Canadian provinces.<sup>26</sup> As the Court noted, a manufacturer whose product does not satisfy the applicable ASME code is at a major disadvantage in the marketplace.<sup>27</sup>

Although it employs a full-time staff to handle administrative duties, the writing, revising, and interpreting of ASME's codes is done through a system of committees and subcommittees consisting of more than 10,000 volunteers from industry and government.<sup>28</sup> These volunteers serve as individuals and not as representatives of their private employers. Nevertheless, because many of the employers have a commercial interest in the industry, and therefore the codes, they reward the volunteers by paying their salaries and expenses while they engage in ASME committee work.<sup>29</sup>

The code involved in the current litigation is the Boiler and Pressure Vessel Code. Section IV of the code establishes the standard for components of heating boilers, including "low-water fuel cutoffs."<sup>30</sup> For several decades, McDonnell and Miller (M&M) dominated the market for low-water fuel cutoffs, maintaining from 70 to 85 percent of the market.<sup>31</sup> In 1971, M&M was acquired by International Telephone and Telegraph (ITT).<sup>32</sup> An M&M Vice-President, John James, was the vice-chairman of the ASME subcommittee of the Boiler and Pressure Vessel Committee that

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25. 456 U.S. at 559; Brief for Defendant—Appellant—Cross Appellee at 3, *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc.*, 635 F.2d 118 (2d Cir. 1980) [hereinafter cited as Brief for Appellant]. 456 U.S. at 554.

26. 456 U.S. at 559.

27. *Id.*

28. 635 F.2d at 121.

29. Brief for Appellee, *supra* note 24; see also 456 U.S. at 571 n.8.

30. If the water inside a boiler drops below a level that is sufficient to moderate the boiler's temperature, the boiler will "dry fire" and can explode. A low-water fuel cut off cuts off fuel to the boiler, and thus stops it, when the water reaches a certain low point. To ensure that the cut off operates before the water reaches a dangerously low level, Paragraph HG-605 of Section IV of the [Boiler and Pressure Vessel] Code required that each boiler "have an automatic low-water fuel cut-off so located as to automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water-gauge glass" attached to the outside of the boiler.

635 F.2d at 121.

31. *Id.*

32. *Id.* at 122 n.2.

drafted, revised, and interpreted Section IV.<sup>33</sup> The subcommittee's chairman was T.R. Hardin, an executive vice president of Hartford, another ITT subsidiary, which is the nation's leading underwriter of boiler insurance.<sup>34</sup>

In 1965, Hydrolevel entered the market as a new company with a single product—a low-water fuel cutoff device that incorporated a time-delay feature.<sup>35</sup> Although it operated at a loss for the first six years and never achieved more than a one percent share of the market,<sup>36</sup> in 1971, Hydrolevel attracted a major customer. The Brooklyn Union Gas Company switched to Hydrolevel's time-delay probe after using the M&M float for many years.<sup>37</sup>

Upon learning of the loss of its major customer, Hardin and James met with other M&M executives to plan an attack.<sup>38</sup> It was decided that a letter should be sent to ASME inquiring whether a fuel cutoff with a time-delay device satisfied the requirement of Section IV of the ASME code.<sup>39</sup> James and Hardin drafted a letter designed to elicit a negative response, and mailed it under the name of an M&M executive to W. Bradford Hoyt, a full-time ASME employee and secretary of the Boiler and Pressure Vessel Committee. Following routine ASME procedures,<sup>40</sup> Hoyt referred

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33. 456 U.S. at 560.

34. 635 F.2d at 121-22.

35. M&M's fuel cutoff is a floating bulb that falls with the boiler's water level.

When the level reaches the critical point, the bulb causes a switch to cut off the boiler's fuel supply. Hydrolevel's product, in contrast, was an immovable probe inserted in the side of the boiler; when the water level dropped below the probe, the fuel supply was interrupted. Because water in a boiler surges and bubbles, the level intermittently would seem to fall slightly below the probe even though the overall level remained safe. To prevent premature fuel cutoff because of these intermittent fluctuations, Hydrolevel's probe included a time delay that allowed the boiler to operate for a brief period after the water level dropped beneath the probe.

456 U.S. at 560 n.1.

36. 635 F.2d at 129.

37. *Id.* at 121.

38. 456 U.S. at 560-61.

39. *Id.* at 561; see Brief for Appellee, *supra* note 24 at 12. At the trial, it was conceded that although Hydrolevel was never mentioned by name, the participants understood they were referring to Hydrolevel's product, since it was the only one incorporating a time-delay device.

40. 635 F.2d at 122. Section 8 of the Boiler & Pressure Vessel Committee Procedure provided for answers to public inquiries by several methods: section 8.01—form letters; section 8.02—referral by the secretary to the chairman of the proper subcommittee. The chairman under section 8.02 could either refer the inquiry to the entire subcommittee or treat it as an "unofficial communication" and outline the response himself to be sent by the secretary. *Id.*

the letter to Hardin, who prepared a response.<sup>41</sup> ASME's procedures thus allowed Hardin, one of the authors of the letter, to prepare the association's unofficial response.<sup>42</sup> The letter to M&M, signed by Hoyt without a review for accuracy and mailed on ASME stationery, incorporated verbatim Hardin's prepared response, which predictably condemned fuel cutoffs with a time-delay feature.<sup>43</sup> As intended, M&M successfully used the ASME letter to discourage customers from buying Hydrolevel's product. The letter was incorporated into M&M's brochures and distributed by its salesmen to customers. Thus, through its executive's participation in ASME, M&M was able to thwart its competitor's challenge,<sup>44</sup> a clear violation of the antitrust laws.

After several months Hydrolevel learned of ASME's letter. Its president informed Hoyt that the letter had seriously impaired Hydrolevel's sales and demanded that ASME issue a correction.<sup>45</sup> Instead of issuing an immediate correction, ASME placed the request on the agenda for the next Boiler and Pressure Vessel Committee and Subcommittee meetings over a month away.<sup>46</sup> The subcommittee, now chaired by M&M's vice president, John James, recommended that ASME issue a reply to Hydrolevel, that confirmed the intent of the original letter, but did not condemn Hydrolevel's product.<sup>47</sup> The committee accepted the recommendation<sup>48</sup> and issued a letter that included a warning paragraph sug-

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41. 456 U.S. at 561.

42. *Id.* Hardin knew that he could draft a response to a "public inquiry without referring it to the entire subcommittee if he treated it as an 'unofficial communication.'" *Id.*

43. The letter in pertinent part stated:

A low-water fuel cut-off is considered strictly as a safety device and not as some kind of an operating control. Assuming that the water gage glass is located in accordance with the requirements of Par. HG-602(b), it is the intent of Par. HG-605(a) that the low-water fuel cut-off operate immediately and positively when the boiler water level falls to the lowest visible part of the water gage glass.

There are many and varied designs of heating boilers. If a time delay feature were incorporated in a low-water fuel cut-off, there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period.

456 U.S. at 561-62. The Second Circuit noted that the second paragraph did not follow from the first. 635 F.2d at 122.

44. 456 U.S. at 562.

45. *Id.*

46. *Id.* at 563.

47. *Id.*

48. The reply letter from ASME to Hydrolevel advised that there was: "no intent in Section IV to prohibit the use of low water fuel cutoffs having time delays in order to meet the requirements of Par. HG-605(a). This paragraph relates itself to Par. HG-602(b) which specifically delineates the location of the lowest visible part of the water gage glass." *Id.*



gested by James.<sup>49</sup>

Hydrolevel continued to experience market resistance. Two years later, ASME opened an investigation into the matter<sup>50</sup> in response to a Wall Street Journal article<sup>51</sup> about Hydrolevel's predicament.

The ASME internal investigation never revealed James' involvement, which became known only after his testimony before a Senate subcommittee a year later.<sup>52</sup> Within a few months of the revelation, Hydrolevel filed suit against ITT, ASME, and Hartford, in the United States District Court for the Eastern District of New York, alleging violations of Sections 1 and 2<sup>53</sup> of the Sherman Act.<sup>54</sup> Before trial, Hydrolevel sold all of its assets for \$86,000 salvage value.<sup>55</sup> M&M and Hartford settled for \$725,000 and \$75,000 respectively.<sup>56</sup> At trial, the jury returned a verdict against ASME for \$3,300,000. The judge reduced the verdict by the \$800,000 settlement amount before trebling the damages pursuant to Section 4 of the Clayton Act<sup>57</sup> for a total judgment of \$7,500,000 against the nonprofit professional association.<sup>58</sup>

ASME was found civilly liable as a co-conspirator in violation of the antitrust laws.<sup>59</sup> In its jury instructions, ASME proposed that it could be found liable only if it had ratified the acts of its agents, James and Hardin, or if they had acted to benefit ASME.<sup>60</sup>

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49. James' suggested warning, which was incorporated into the letter, was as follows: "If a means for retarding control action is incorporated in a low-water fuel cutoff, the termination of the retard function must operate to cutoff [sic] the fuel supply before the boiler water level falls below the visible part of the water gage glass." *Id.*

50. *Id.* at 563-64.

51. Meyer, *Knocking the Competition: How Rival's Use of Industry Code Report Created Problems for a Tiny Company*, Wall St. J., July 9, 1974, at 44, col. 1.

52. 456 U.S. at 564; see *Voluntary Industrial Standards: Hearings Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 186-99 (1975) (statement of John W. James of M&M).

53. See *supra* notes 3 and 5.

54. 456 U.S. at 564. The Second Circuit and the Supreme Court treated the case as a Section 1 violation. The Section 2 monopoly charge was not pursued after M&M and Hartford settled.

55. 635 F.2d at 124.

56. *Id.*

57. 15 U.S.C. § 15 (1982).

58. 635 F.2d at 124. In addition to reducing the verdict, the judge denied attorney's fees to Hydrolevel. Hydrolevel appealed this judgment to the Second Circuit Court of Appeals, which reversed and remanded for a new trial on the issue of damages and attorney's fees. The Second Circuit found the award to be grossly excessive. See *id.* at 129-30. The issue of damages was not before the Supreme Court in this case. 456 U.S. at 565 n.4.

59. 635 F.2d at 124-25.

60. *Id.* at 124. Ratification is a judicially created doctrine based on justice that results from consent (express or implied), acts, acquiescence, or failure to repudiate the unautho-

These theories required a higher standard of proof than the apparent authority theory later propounded by the court of appeals and the Supreme Court. The trial judge refused Hydrolevel's instruction that would have established ASME's liability if its agents acted within the scope of their apparent authority.<sup>61</sup> ASME's principal defense was that Hydrolevel's losses were due to an inferior product and poor sales promotion rather than the ASME misrepresentation.<sup>62</sup> The jury disagreed and found that ASME had violated the antitrust laws by ratifying the acts of its volunteers.<sup>63</sup>

On appeal to the Court of Appeals for the Second Circuit, ASME argued that there was insufficient evidence to justify the verdict.<sup>64</sup> The court of appeals did not determine the sufficiency of the evidence; instead, it held that the district court erred in refusing Hydrolevel's instruction embodying the apparent authority theory of agency law.<sup>65</sup> Concluding that the jury had found for Hydrolevel based on a charge that was more favorable to ASME than the law requires, the Second Circuit affirmed the district court judgment on liability.<sup>66</sup> Thus, although ASME had no knowledge of and received no benefit from the fraudulent act that resulted in the antitrust violation, it was found to be a co-conspirator based solely on a vicarious liability theory. The Second Circuit reasoned that imposing liability on ASME would induce a principal to take greater care to prevent misconduct by agents who occupy sensitive positions on which an industry may rely.<sup>67</sup> Hence, the court placed a duty on the trade association "to be aware of and guard against the temptations . . . afforded by inherent conflicts of interests,"<sup>68</sup> because it recognized that the "misuse of quasi-official standards" by such agents could "so easily injure competitors."<sup>69</sup>

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rized acts of the agent. See SEAVEY, HANDBOOK OF THE LAW OF AGENCY §§ 32, 37 (1964).

61. 635 F.2d at 124.

62. *Id.*

63. *Id.*

64. *Id.* at 125. ASME also contended on appeal that the court admitted prejudicial evidence, that Hydrolevel's counsel's summation was grossly emotional and improper, and that there was insufficient evidence to support the damage award. Hydrolevel cross-claimed that the court erred both in deducting the amount of the settlements prior to trebling the damage award and in failing to award attorney's fees. The Second Circuit found no reversible error on ASME's additional contentions but reversed and remanded for a new trial on the issue of damages. *Id.* at 128. Further discussion of these issues is outside the scope of this case comment.

65. *Id.* at 125.

66. *Id.* at 127.

67. *Id.*

68. *Id.* at 126.

69. *Id.* at 125.

The Supreme Court granted certiorari to decide whether a nonprofit standard-setting organization could be held liable under the antitrust laws for the acts of agents committed within the scope of their apparent authority.<sup>70</sup> Writing for the majority, Justice Blackmun affirmed the judgment of the Second Circuit, finding that the apparent authority theory is consistent with the antitrust laws' central purpose of encouraging competition.<sup>71</sup> Although Chief Justice Burger concurred in the result on the ground that ASME had ratified the acts of its agents by not disavowing their conduct,<sup>72</sup> he disagreed with the majority's decision to discard the theory on which the jury had based ASME's liability. He stated that the majority went "out of bounds"<sup>73</sup> in applying the apparent authority theory and warned that "no general rule can appropriately be drawn from the Court's holding."<sup>74</sup>

Justice Powell wrote a strong dissenting opinion in which Justices Rehnquist and White joined. The dissent stated that the Court's application of apparent authority in an antitrust action was equivalent to an expansive rule of strict vicarious liability, which when applied to a nonprofit organization, is "inconsistent with the weight of precedent and the intent of Congress, unsupported by the rules of agency law . . . , and irrelevant to the achievement of the goals of the antitrust laws."<sup>75</sup>

The *Hydrolevel* decision is the first application of the theory of apparent authority in an antitrust case. Since nonprofit associations have traditionally enjoyed more favorable treatment under the antitrust laws than have commercial enterprises, the involvement of a nonprofit association makes *Hydrolevel* significantly more controversial. Nonetheless, an examination of both agency and antitrust law, and the areas in which they overlap, will show that the Court's decision in *Hydrolevel* is consistent with other recent decisions. There is a continuing trend in caselaw to eliminate the deferential treatment previously afforded nonprofit organizations under the antitrust laws and to apply a single stringent fault standard to determine the liability of all industries and trade and professional associations in order to fulfill the congressional mandate for the protection of a free competitive market.

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70. 456 U.S. at 558-59.

71. *Id.* at 559.

72. *Id.* at 578 (Burger, C.J., concurring).

73. *Id.* at 579 (Burger, C.J., concurring).

74. *Id.* at 578 (Burger, C.J., concurring).

75. *Id.* at 579 (Powell, J., dissenting).

### III. APPARENT AUTHORITY: ADAPTING THE COMMON LAW TO CONGRESSIONAL INTENT

An analysis of the arguments made by ASME and the dissent in *Hydrolevel* against the application of basic agency law theories of liability to an antitrust scenario shows that the majority in *Hydrolevel* was correct in rejecting these arguments and in adopting the apparent authority theory.

Justice Powell, in his dissenting opinion, argued that the Court had rejected the apparent authority rationale in past antitrust cases,<sup>76</sup> citing *United States v. Hilton Hotels Corp.*,<sup>77</sup> where the court required that an agent intend to benefit the corporation before a principal could be held liable under the antitrust laws for the tortious acts of its agent.<sup>78</sup> Nevertheless, *Hilton Hotels* and the other cases cited by ASME and the dissent to dispute the applicability of the apparent authority theory furnish dubious precedent. They involved criminal prosecution rather than civil antitrust liability, and traditionally the Court has taken a different approach to civil and criminal antitrust violations. Because criminal liability under the antitrust laws involves stricter sanctions than civil liability, the Court has been reluctant to apply a broad fault standard to establish criminal liability and has construed the Sherman Act strictly with respect to criminal violations, cautioning against the imposition of strict liability.<sup>79</sup> While criminal liability includes intent as a requisite element, a civil violation of the antitrust laws may be established by proof of either an unlawful intent or an anticompetitive effect, thus permitting liability to attach to "unintentional antitrust violations."<sup>80</sup> This "broader" standard, applied by the Court to cases of civil antitrust liability such as *Hydrolevel*, suggests the dissent incorrectly relies on criminal antitrust cases as precedent to support its rejection of the apparent authority theory.

ASME also argued that in *Coronado Coal Co. v. United Mine Workers*<sup>81</sup> the Court had rejected the apparent authority theory as

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76. *Id.* at 582 n.6. (Powell, J., dissenting).

77. 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

78. *Id.* at 1006 n.4.

79. *United States v. United States Gypsum Co.*, 438 U.S. 422, 442 n.18 (1978). The legislative history reveals that when passing the Sherman Act, Congress was aware of the distinction between civil and criminal penalties and intended the former to be applied liberally and the latter strictly. *Id.* at 443 n.19. The extension of the common law doctrine of apparent authority to a civil antitrust violation such as the one in *Hydrolevel* is therefore not inconsistent with the congressional intent of the antitrust laws.

80. *Id.* at 436 n.13.

81. 268 U.S. 295 (1925).

an insufficient ground on which to establish antitrust liability for a voluntary membership organization. The Court in *Coronado* held that since an international union did not sanction or ratify a strike started by a local union, it could not be liable: "[I]t must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association."<sup>82</sup> ASME relied on *Coronado* for the proposition that actual authority or ratification, rather than apparent authority, is necessary for a finding of civil antitrust liability.<sup>83</sup>

The Court in *Hydrolevel* noted that *Coronado* was not controlling because of the specific distinguishing language in *Coronado*: "Here it is not a question of . . . holding out an appearance of authority on which some third person acts."<sup>84</sup> The facts in *Hydrolevel* clearly show that the interpretations of the ASME Code made by its volunteers, James and Hardin, were relied on by potential customers to the detriment of Hydrolevel, thus placing *Hydrolevel* squarely within the *Coronado* exception. Additionally, the Court in *Coronado* faced a case involving labor unions, which Congress specifically exempted from antitrust liability not long thereafter<sup>85</sup> because of the inherent conflict between labor activities and the prohibitions of the antitrust laws.

The ratification theory advanced by ASME and the dissent was discussed and discarded by another federal court in favor of apparent authority in a case bearing many similarities to *Hydrolevel*. In *Johns Hopkins University v. Hutton*,<sup>86</sup> a broker, entrusted with the general authority to make statements in soliciting purchasers for oil production payments, made material misrepresentations without the knowledge of his principal on which a customer was induced to detrimentally rely. The court held the principal liable despite its claim that the Securities Acts of 1933 and 1934 limited liability under the common law apparent author-

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82. *Id.* at 304.

83. Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 12, *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc.*, 635 F.2d 118 (2d Cir. 1980) [hereinafter cited as Petition for Certiorari].

84. 268 U.S. at 304-05; *Hydrolevel*, 456 U.S. at 573 n.12.

85. In 1932, recognizing the conflict between congressionally supported labor activities and the Sherman Act, Congress passed the Norris-LaGuardia Act to exempt labor unions from the antitrust laws. See *supra* note 7.

86. 297 F. Supp. 1165 (D.C. Md. 1968), *aff'd in part, rev'd in part*, 422 F.2d 1124 (4th Cir. 1970), *cert. denied*, 416 U.S. 916 (1974).

ity agency doctrine:<sup>87</sup> "A contrary conclusion would in effect give blessing to a hear-no-evil, see-no-evil approach by partners of a brokerage house which is hardly in keeping with the remedial purposes of the '33 Act—purposes which the Congress and the courts have steadily stressed from 1933 to date."<sup>88</sup> The court in *Johns Hopkins* found that a construction of the Securities Act basing liability on ratification would allow partners in a brokerage house to close their eyes to the fraud of their agents, thus leaving investors with less protection than was intended by Congress.<sup>89</sup> The district court found that the Securities Act did not lessen the duties and responsibilities imposed by the common law upon employers for the fraudulent conduct of their employees.<sup>90</sup>

Congress also intended for the courts to rely on the common law to give meaning and content to the Sherman Act.<sup>91</sup> Based on the broad remedial purposes intended to be served by both the antitrust laws<sup>92</sup> and the securities laws, the language of the *Johns Hopkins* court gives added support to the Supreme Court's extension of apparent authority to an antitrust action. Thus, although apparent authority had not been applied previously to an antitrust violation, both the Second Circuit and the Supreme Court in *Hydrolevel* focused on the application of this common law theory of agency law as "the settled rule in the federal system"<sup>93</sup> due to its application in areas such as federal tax liability and federal securities fraud.<sup>94</sup>

Although in agreement with the majority's reliance on the common law, Justice Powell argued that the Court was bound to apply the common law in existence at the time of the passage of the Sherman Act, which recognized that charitable organizations were not liable for the torts of their agents.<sup>95</sup> There are two flaws in this argument. First, ASME's powerful economic status as a professional association is distinguishable from a charitable organization. Second, the Court has held that while Victorian common law may be relevant in interpreting the Sherman Act, the reach of

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87. *Id.* at 1211-12.

88. *Id.* at 1212.

89. *Id.* at 1213.

90. *Id.* at 1213 n.29.

91. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

92. 456 U.S. at 569 n.6.

93. 456 U.S. at 567.

94. *Id.* at 568; *see also* *Dark v. United States*, 641 F.2d 805 (9th Cir. 1981); *Holloway v. Howerdd*, 536 F.2d 690 (6th Cir. 1976).

95. 456 U.S. at 587 (Powell, J., dissenting).

the Act has expanded along with the expanding notions of modern common law and congressional power.<sup>96</sup>

By applying the doctrine of apparent authority to establish antitrust liability of a nonprofit organization, the Court strikes into new territory. The liability of the principal under the apparent authority theory is based on "business expediency."<sup>97</sup> Therefore, it is no surprise that the Court relied on cases involving profit-making entities<sup>98</sup> to support acceptance of its application of this theory. The fact that ASME is a nonprofit professional organization, rather than a charitable or other eleemosynary organization, makes the Court's position more defensible in view of the specific references in the legislative history of the Sherman Act that evidence Congress's intent not to include charitable organizations within the purview of the statute.<sup>99</sup>

The Court makes the transition from the business sector to the arena of nonprofit professional and trade associations by saying that it finds the apparent authority theory to be consistent both with the congressional intent behind the antitrust laws to encourage competition,<sup>100</sup> and with the Court's mandate that the Act be given a broad remedial effect.<sup>101</sup> The majority recognized ASME's ability to wield great power in the economy through its codes and standards: "ASME can be said to be 'in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce.'"<sup>102</sup> Recognizing that a standard-setting organization such as ASME is "rife with opportunities for anticompetitive activity,"<sup>103</sup> the Court found that ASME has a duty to implement "meaningful safeguards"<sup>104</sup> against conflicts of

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96. *Id.* at 569 n.6; see also *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 743 n.2 (1976).

97. RESTATEMENT, *supra* note 21, at § 262 comment a.

98. See, e.g., *Standard Sur. & Casualty Co. v. Plantsville Nat'l Bank*, 158 F.2d 422 (2d Cir. 1946), *cert. denied*, 331 U.S. 812 (1947) (bank liable for cashier's misrepresentations within scope of apparent authority); *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757 (2d Cir. 1946).

99. 456 U.S. at 585-86 (Powell, J., dissenting). "I do not see any reason for putting in temperance societies any more than churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce." *Id.* (quoting 21 CONG. REC. 2658 (1890) (comments of Senator Sherman)).

100. *Id.* at 570.

101. *Id.* at 573 n.11.

102. *Id.* at 570 (quoting *Fashion Originator's Guild of Am. v. FTC*, 312 U.S. 457, 465 (1941) (Court used antitrust laws to attack self-regulation by trade associations)).

103. 456 U.S. at 571.

104. *Id.* at 572.

interest in order to deter its volunteers from anticompetitive practices. By imposing civil liability on ASME for the antitrust violations of its agents acting with apparent authority, the Court predicted that a powerful incentive would exist for ASME to take steps to avoid similar violations in the future.<sup>105</sup> Accepting the ratification theory advanced by ASME would, according to the Court, enhance the likelihood that the Society would be used for anticompetitive ends by encouraging ASME to do as little as possible to oversee its agents.<sup>106</sup>

In addition to the ratification theory and nonprofit organization arguments advanced by ASME and the dissent against the imposition of civil antitrust liability based on the apparent authority theory, ASME also argued that under normal principles of agency law, it could not be held liable for the acts of disloyal volunteer members unless those members intended to benefit the organization by their acts.<sup>107</sup> The court of appeals acknowledged this to be the general rule for conventional torts<sup>108</sup> but held that antitrust violations more closely resemble the torts of defamation,<sup>109</sup> interference with business relations,<sup>110</sup> misrepresentation,<sup>111</sup> and fraud.<sup>112</sup> The Supreme Court also adopted this view.<sup>113</sup> With intentional torts, a principal is subject to liability for acts committed by an agent acting with apparent authority although the principal is entirely innocent, has received no benefit from the transaction, and the agent acted solely for his own purpose.<sup>114</sup>

The Supreme Court first adopted the doctrine of apparent authority to hold a principal liable for the fraudulent acts of his agent when there was no intent to benefit the principal in *Gleason v. Seaboard Railway*,<sup>115</sup> a decision which is still followed. *Gleason* involved a railway employee who, purely for his own selfish mo-

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105. *Id.* at 576 n.15. ASME now issues a publication, available through subscription, containing all written inquiries and interpretations. The interpretations receive close scrutiny through the publication process.

106. *Id.* at 573.

107. Petition for Writ of Certiorari, *supra* note 83, at 9.

108. 635 F.2d at 125; *see* RESTATEMENT, *supra* note 21, at §§ 235, 236(b).

109. 635 F.2d at 125; *see* RESTATEMENT, *supra* note 21, at § 247.

110. 635 F.2d at 125; *see* RESTATEMENT, *supra* note 21, at § 248.

111. 635 F.2d at 125; *see* RESTATEMENT, *supra* note 21, at § 257.

112. 635 F.2d at 125; *see* RESTATEMENT, *supra* note 21, at §§ 261, 262. The Supreme Court affirmed the conclusion that this antitrust violation was analogous to certain intentional torts. 456 U.S. at 565-66.

113. *Id.* at 566-67.

114. RESTATEMENT, *supra* note 21, §§ 257, 261.

115. 278 U.S. 349, 357 (1929).



tives, defrauded a customer on a bill of lading. The Court disregarded the general rule which at that time required an intent to benefit the principal<sup>116</sup> and held the railway company liable for its agent's fraud.<sup>117</sup>

The Court's decision in *Gleason* may be justified on the ground that because a third person has no way of knowing that the agent is acting for his own purposes, and is entitled to rely on the truthfulness of the statements of the agent acting within his apparent authority, it is reasonable to require the principal, rather than the third person, to bear the risk of a deceitful agent. This reasoning is similarly advanced by the Restatement (Second) of Agency:

Liability is based upon the fact that the agent's position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.<sup>118</sup>

The Supreme Court in *Hydrolevel* stated that the effectiveness of ASME's codes and interpretations is based on the fact that the statements of its agents carry with them the assurance that persons in the affected industries can reasonably rely on their apparent trustworthiness.<sup>119</sup> The Court thus concluded that the apparent authority theory benefits a trade association as well as serving as a potential sword for third party victims.

The factual situation in *Hydrolevel* brought ASME under the "sword" of apparent authority when ASME admitted that James and Hardin were authorized to provide "neutral and accurate interpretations of an ASME code."<sup>120</sup> Under established agency law, an agent's misrepresentation is considered to be apparently authorized if third persons reasonably believe that the agent is authorized to make the representation.<sup>121</sup>

ASME's argument that it was not liable as a principal since James and Hardin were in fact acting as agents not of the association but of their private employers,<sup>122</sup> is also invalidated by traditional agency law. Although the general rule is that a person cannot be an agent of two principals where the agent's duties may

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116. *Friedlander v. Texas & Pacific Ry.*, 130 U.S. 416 (1889).

117. 278 U.S. at 357.

118. RESTATEMENT, *supra* note 21, at § 261 comment a.

119. 456 U.S. at 567.

120. Brief for Appellant, *supra* note 25, at 17.

121. RESTATEMENT, *supra* note 21, at § 257 comment a.

122. Brief for Appellant, *supra* note 25, at 17.

conflict,<sup>123</sup> a principal who has full knowledge of an agent's potential conflict of interest and accepts the agent into his service waives the protection of the general rule.<sup>124</sup> ASME's structure is based on the use of volunteers<sup>125</sup> from industry to promulgate and interpret the valuable standards and codes that govern the same industry that provides the volunteers. Because ASME accepted the services of James and Hardin while aware of the existence of a conflict of interest, the association is estopped from relying on this general rule of agency law to avoid liability for a volunteer's use of ASME as a vehicle for serving the interests of his private employer.

In its final argument to avoid antitrust liability, ASME asserted that treble damages,<sup>126</sup> which accompany civil antitrust violations, are inconsistent with the common law theory of apparent authority. In asserting treble damages based on the theory of apparent authority as applied to a nonprofit organization, the Court faced its greatest difficulty and made its weakest argument.<sup>127</sup> Here, antitrust and agency law conflict because traditional agency law does not impose punitive treble damages on the basis of apparent authority.<sup>128</sup> The Court tried to discount the punitive nature of treble damages by stressing the remedial and deterrent purposes of the remedy.<sup>129</sup> Justice Powell pointed out in his dissent, however, that the Court itself had only recently characterized treble damages as punitive: "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct."<sup>130</sup> As a defense to the dissent's argument that apparent authority cannot be the basis for a punitive damage award, the Court cited the Restatement (Second) of Agency Section 217C comment c, which states that the general rule against imposing punitive damages "does not apply to the interpretation of special statutes such as

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123. P. MECHEM, *OUTLINES OF THE LAW OF AGENCY* § 501 (4th ed. 1952).

124. *Id.* § 502.

125. The fact that James and Hardin were volunteers, as distinguished from paid employees, does not affect the application of the common law agency theories. *RESTATEMENT*, *supra* note 21, at § 225.

126. Clayton Act § 4, 15 U.S.C. § 15 (1982).

127. The dissent notes that a nonprofit organization cannot reduce the burden of a treble damage award by deducting it as a business expense. 456 U.S. at 593 n.19 (Powell, J., dissenting).

128. *RESTATEMENT*, *supra* note 21, at § 217C (1957). *See also* *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101 (1893) (requiring the principal's participation, approval or ratification).

129. 456 U.S. at 575-76.

130. *Id.* at 583 (Powell, J., dissenting) (quoting *Texas Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981)).

those giving triple damages, as to which no statement is made."<sup>131</sup>

At this point, a look at the legislative intent behind Section 4 of the Clayton Act is helpful.<sup>132</sup> Congress created treble damages to encourage private litigants to bring suits to enforce the antitrust laws.<sup>133</sup> Congress recognized that the costs of such litigation were high and that the government with its limited resources would be unable to reach all antitrust violations.<sup>134</sup> In addition, Congress believed that treble damages would deter antitrust violations by making private suits an ever-present threat.<sup>135</sup> Commentators have argued that the deterrent effect is excessive when applied to violations not involving specific intent.<sup>136</sup> This argument is especially applicable to the facts in *Hydrolevel* where treble damages resulted from a vicarious liability theory.

The application of Section 4 of the Clayton Act and its mandated treble damages remedy is particularly unjust and burdensome when applied to a nonprofit organization, such as ASME, as a result of vicarious liability. Although the Court points out that ASME derived some fees and benefits from its Codes,<sup>137</sup> it did not profit financially from the antitrust violation of its volunteers in the same manner as would the congressionally targeted commercial antitrust violator who is in competition with the injured business. Moreover, the financial burden of a treble damages award against a nonprofit organization could have the socially undesirable effect of reducing the public services offered by organizations such as ASME.

Despite the drawbacks of the treble damages remedy, in a recent decision the Court noted the difference between its power to define antitrust violations and its power to fashion relief.<sup>138</sup> While the Court has power over the former, the latter is administered by statute so that the treble damages award must be imposed as long as a violation of Section 4 of the Clayton Act exists. The Court was unwilling to let the damages issue stand in the way of its expanded

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131. 456 U.S. at 576; see RESTATEMENT, *supra* note 21, at § 217C comment c.

132. See *supra* note 8.

133. *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 HARV. L. REV. 1566 (1967).

134. *Id.* at 1567.

135. Gillam, *A Defense Viewpoint*, 8 Sw. U. L. REV. 560 (1976) (part of an antitrust symposium of the effectiveness of the private treble damages action as an antitrust enforcement mechanism).

136. *Id.*

137. 456 U.S. at 576; see *supra* note 24 for an account of ASME's financial resources.

138. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 630.

definition of antitrust liability, but the opinion in *Hydrolevel* may be a signal to Congress that it is time to amend Section 4 of the Clayton Act to allow the courts discretion in tailoring penalties for civil antitrust violations according to the culpability of the violator.<sup>139</sup>

#### IV. THE APPLICATION OF THE ANTITRUST LAWS TO TRADE ASSOCIATIONS AND OTHER NONPROFIT ORGANIZATIONS

The primary objection to the Court's expansion of civil antitrust liability to include acts committed by agents within the scope of their apparent authority, as expressed by Justice Powell in his dissent, is that the Court chose a case involving a nonprofit association in which to propound its new theory.<sup>140</sup> Citing legislative history to show that Senator Sherman intended his Act to be directed at "anticompetitive *business* activity and not at voluntary associations,"<sup>141</sup> the dissent predicts doom for all nonprofit organizations under the new *Hydrolevel* doctrine.

Because the *Hydrolevel* Court refers to ASME as a "nonprofit membership corporation,"<sup>142</sup> an "extragovernmental agency,"<sup>143</sup> a "standard-setting organization,"<sup>144</sup> a "society,"<sup>145</sup> an "association,"<sup>146</sup> and a "trade association,"<sup>147</sup> an examination of the application of the antitrust laws to "organizations like ASME"<sup>148</sup> is needed to gain a perspective on the scope of *Hydrolevel*.

The above classifications may be grouped into two major categories: 1) nonprofit professional organizations; and, 2) trade associations. Traditionally, the treatment of the two under the antitrust laws has differed. Over time, however, the distinction between the two categories of nonprofit organizations has blurred in the case law. Today, the Court appears willing to scrutinize the activities of both categories of nonprofit organizations as if they were business enterprises.

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139. See, *supra* note 133, at 1569; see also *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 n.17 (1975).

140. 456 U.S. at 584 (Powell, J., dissenting).

141. *Id.* at 585-86; see 21 CONG. REC. 2562 (1890).

142. 456 U.S. at 558.

143. *Id.* at 570.

144. *Id.* at 571.

145. *Id.* at 558.

146. *Id.* at 573 n.11.

147. 635 F.2d at 126.

148. 456 U.S. at 578.

### A. *The Antitrust Laws and Professional Organizations*

The Sherman Act emphasizes "trade or commerce,"<sup>149</sup> but its application to the learned professions has been unclear. As early as 1943, the Court stated in *American Medical Association v. United States*,<sup>150</sup> that the occupation of physician-conspirators was immaterial if the purpose and effect of the conspiracy was the obstruction and restraint of the competitor's business. Nonetheless, professional activities have until recently enjoyed de facto exemption from the antitrust laws.<sup>151</sup> In *Goldfarb v. Virginia State Bar*<sup>152</sup> the Court laid to rest the idea of a professional exemption from the antitrust laws. *Goldfarb* involved a challenge to a minimum fee schedule adopted by the local bar association for the practicing lawyers in the region. The Court held the plan to be an unreasonable restraint on commerce in violation of Section 1 of the Sherman Act, and stated:

It is no disparagement of the practice of law as a profession to acknowledge that it [affects commerce] . . . . In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.<sup>153</sup>

In a now famous footnote,<sup>154</sup> however, the Court left the door

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149. Sherman Act § 1, 15 U.S.C. § 1 (1982).

150. 317 U.S. 519, 528 (1943) (professional association of independent medical practitioners liable for conspiring to restrain members from practicing or affiliating with prepaid medical plan in an effort to destroy the plan).

151. See Havighurst, *A Comment: The Antitrust Challenge to Professionalism*, 41 Md. L. Rev. 30 (1981). It is unclear whether professional activities escaped antitrust liability by virtue of their non-business orientation because the judiciary deemed the impact of professional activities on interstate commerce insufficient to impose liability under the Sherman Act. See *supra* note 3; *United States v. Oregon State Medical Soc'y*, 343 U.S. 326 (1952); *Wolf v. Jane Phillips Episcopal Mem. Medical Center*, 513 F.2d 684 (10th Cir. 1975) (both cases held the defendants' activities to be wholly intrastate). But cf. *Hospital Bldg. Co. v. Trustees of Rex Hosp. Co.*, 425 U.S. 738 (1976); *Zamiri v. William Beaumont Hosp.* 430 F. Supp. 875 (E.D. Mich. 1977) (both cases found sufficient interstate contacts to satisfy the jurisdictional requirement of the Sherman Act).

152. 421 U.S. at 787.

153. *Id.* at 788.

154. *Id.* at 788 n.17. The Court stated:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

open to judicial application of a less stringent antitrust standard to the profession's activities. Justice Powell, in his dissenting opinion in *Hydrolevel*, argued that this less stringent standard counsels against the adoption of an expansive theory of agency law that increases the antitrust liability of nonprofit organizations and thus jeopardizes the public services offered by those organizations.<sup>155</sup>

Where social or political motives rather than economic interests are involved, courts have applied a less stringent standard to traditionally prohibited anticompetitive behavior, thus protecting many nonprofit organizations from the expensive antitrust liability that the dissenters in *Hydrolevel* feared would become prevalent.<sup>156</sup> In *Missouri v. National Organization for Women*,<sup>157</sup> the Eighth Circuit held that the convention boycott of the states that had not ratified the Equal Rights Amendment did not constitute an antitrust violation. Although the court recognized the commercial impact of the loss of convention business to the states, it held the political nature and subject matter of the boycott, namely, to influence legislative action, to be outside the scope of the Sherman Act, which was aimed at "competitive activities by competitors with some self-enhancement motivation."<sup>158</sup>

Despite the language of the *Goldfarb* footnote, subsequent decisions of the Supreme Court fail to show any deference to economically oriented activities of professional organizations. In *National Society of Professional Engineers v. United States*,<sup>159</sup> the Court focused on the anticompetitive effect of the activity and invalidated a ban on competitive bidding contained in the Society's code of ethics for professional engineers. The Society's argument that the ban insured ethical behavior and inured to the public benefit by preventing inferior quality work,<sup>160</sup> purposes seemingly within the scope of the *Goldfarb* exception, was seen by the Court as a "frontal assault on the basic policy of the Sherman Act."<sup>161</sup>

The recent decision by the Supreme Court in *Arizona v. Maricopa County Medical Society*<sup>162</sup> also reveals that any difference that may exist between professional organizations and other business entities under the antitrust laws is disappearing. In a plurality

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155. 456 U.S. at 586 (Powell, J., dissenting).

156. *Id.* at 578-79 (Powell, J., dissenting).

157. 620 F.2d 1301 (8th Cir. 1980).

158. *Id.* at 1309; see *Fashion Originator's Guild of Am. v. FTC*, 312 U.S. 457 (1941).

159. 435 U.S. 679 (1978).

160. *Id.* at 693-94.

161. *Id.* at 695.

162. 457 U.S. 332 (1982).

opinion, the *Maricopa* Court held that an agreement among physicians comprising a professional foundation that set maximum fees to be charged for health services provided to policyholders of specified insurance plans to be a *per se*<sup>163</sup> price-fixing violation of Section 1 of the Sherman Act.<sup>164</sup> The dissent in *Maricopa* noted that the plan foreclosed no competition<sup>165</sup> and effected substantial procompetitive economies to the benefit of consumers,<sup>166</sup> factors the dissent claimed should have been considered by the Court in a rule-of-reason approach to evaluating the unreasonableness of the restraint by the health care professionals.

*Maricopa* explicitly applies the unequivocal *per se* rule to professionals for the first time,<sup>167</sup> just as *Hydrolevel* represents the first application of the apparent authority theory. The Court expressed concerns in *Maricopa* resembling those of the majority in *Hydrolevel*. The *Maricopa* Court was disturbed that the physicians themselves were determining the fees for the plan,<sup>168</sup> a concern similar to the conflict of interest problem present in *Hydrolevel*.<sup>169</sup> Looking for less restrictive alternatives, the Court rejected the argument that it was less efficient for the insurance companies, rather than the doctors, to set the fees,<sup>170</sup> much as it rejected the argument that ASME could not safeguard against the unauthorized acts of its volunteers.<sup>171</sup> Both cases suggest that the

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163. The courts use two different analyses in determining the validity of restraints under the antitrust laws. The Rule of Reason analysis is the one most often applied. Under this analysis, the reasonableness of the restraint is examined in light of the nature and effect of the restraint, its history and purpose, as well as the facts peculiar to the business or industry, and the condition of the business or industry before and after the restraint. The alternative to the Rule is a summary *per se* rule applied to restraints that are deemed unreasonable, despite any professed legitimate purpose, because, by their nature and necessary effect, they are so plainly anticompetitive that no study of the industry is needed. Generally, the professions have been afforded treatment under the Rule of Reason. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (rule of reason analysis); *Standard Oil Co. v. United States*, 221 U.S. 1, 65-67 (1911) (same); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (Court used *per se* rule); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (same); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (rule of reason analysis in professional setting); see also Drexel, *The Antitrust Implications of the Denial of Hospital Staff Privileges*, 36 U. MIAMI L. REV. 207, 214 (1982).

164. *Maricopa*, 457 U.S. at 335.

165. *Id.* at 360 (Burger, C.J., Powell & Rehnquist, J.J., dissenting).

166. *Id.* at 361.

167. *National Soc'y of Professional Eng'rs* is sometimes referred to as a "*per se*" case, 457 U.S. at 363, but the Court avoided the use of the term in its opinion. See 435 U.S. at 679.

168. *Maricopa*, 457 U.S. at 352.

169. *Hydrolevel*, 456 U.S. at 556.

170. *Maricopa*, 457 U.S. at 353.

171. 456 U.S. at 574 n.13; see also *Petition for Writ of Certiorari*, *supra* note 83, at 24.

Court views the actual or potential harmful economic impact of the activity as outweighing any public service benefit that may result from an organization's anticompetitive behavior.

### B. *The Antitrust Laws and Trade Associations*

Although ASME characterizes itself as a "non-profit voluntary professional association"<sup>172</sup> and denies being a "true trade association,"<sup>173</sup> the Second Circuit and the Supreme Court in their *Hydrolevel* opinions treat the two interchangeably.<sup>174</sup> This suggests that any previous distinction between the types of organizations is no longer viable under antitrust analysis.<sup>175</sup> As mentioned earlier, a trade association is a nonprofit organization whose members are business firms, usually competitors, with mutual economic interests.<sup>176</sup> ASME denies being a trade association since its members are from government, academia, insurance organizations, and industry, and its interests are scientific and technical rather than economic.<sup>177</sup> Practically, however, ASME may be considered a trade association because it represents the interests of a single industry, namely, mechanical engineering. In any event, whether ASME is called a trade association or a professional organization is irrelevant, because voluntary professional associations, when they deal with economic problems, are subject to the antitrust laws,<sup>178</sup> as are trade associations. Although differing in membership or purpose from true trade associations, professional associations also serve the business community and encounter operational problems similar to those of trade associations.<sup>179</sup>

Since their inception, trade associations have been considered both to operate purely for the anticompetitive selfish interests of their members and to make a unique and indispensable contribution to American economic life.<sup>180</sup> A trade association's primary function is to provide its members with information that enables them to operate more efficiently and effectively.<sup>181</sup> Associations

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172. Petitioner's Brief at 34, *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) [hereinafter Petitioner's Brief].

173. *Id.* at 38; see *supra* text accompanying note 16.

174. 456 U.S. at 571; 635 F.2d at 126.

175. See *supra* text accompanying notes 159-66.

176. TRADE ASS'N, *supra* note 15, at 3.

177. Petitioner's Brief, *supra* note, 172 at 34.

178. See *supra* text accompanying note 153.

179. TRADE ASS'N, *supra* note 15, at 4.

180. *Id.*

181. *Id.* at 3.



also play an important role in improving an industry's position in the economy, through governmental activities and the development of industry standards. In addition, modern trade associations are expanding into public service programs such as consumer education and pollution control.<sup>182</sup> The gap between trade and professional associations has narrowed as trade associations become more public service oriented and professional organizations enjoy heightened economic influence.

Despite the inherent danger of anticompetitive activity in trade associations, the Supreme Court acknowledged in *Maple Flooring Manufacturers Association v. United States*,<sup>183</sup> that not all trade association activity is anticompetitive. The Supreme Court held in *Maple Flooring* that the mere dissemination of statistical information by trade associations among competitors was not a violation of the antitrust laws, so long as individual data was not disclosed.<sup>184</sup> The Court also approved industry standards, such as those promulgated by ASME, as being beneficial to both industry and consumers<sup>185</sup> when not used for anticompetitive ends.

While recognizing that not all trade association activity is anticompetitive by nature, the Court emphasized in *Hydrolevel* that there is a need for trade associations to have guidelines and safeguards to prevent their members from developing industry standards arbitrarily or from purposely benefitting a private employer by restricting competition. In *Silver v. New York Stock Exchange*,<sup>186</sup> the Court held that even the laudable function of industry self-regulation could not justify anticompetitive actions without affording the injured party notice and an opportunity to be heard.<sup>187</sup> The Court reasoned that procedural safeguards would lessen anticompetitive behavior and that because of the enormous economic power wielded by the Exchange, it was essential that the highest ethical standards prevail.<sup>188</sup> This reasoning was adopted by the Court in *Hydrolevel*, where Justice Blackmun stated:

By holding ASME liable under the antitrust laws for the antitrust violations of its agents committed with apparent authority, we recognize the important role of ASME and its agents in the

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182. *Id.*

183. 268 U.S. 563 (1925).

184. *Id.* at 586.

185. *See id.* at 584.

186. 373 U.S. 341 (1963).

187. *Id.* at 361.

188. *Id.* at 363.

economy, and we help to ensure that standard-setting organizations will act with care when they permit their agents to speak for them.<sup>189</sup>

The Court viewed the association, rather than the individual conspirators, as the party best able to implement precautionary measures to avoid future anticompetitive activity.<sup>190</sup>

In *Hydrolevel*, the power and influence wielded by ASME through its codes and standards led the Court to equate ASME with an "extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce."<sup>191</sup> The Court's rationale is consistent with the proposition that trade regulation by extragovernmental bodies may violate the antitrust laws even when used to protect the members of an industry. In *Fashion Originator's Guild of America v. FTC*,<sup>192</sup> a trade association for dress manufacturers sought to suppress competition from those who copied their designs and then sold at lower prices, by refusing to sell to retailers who sold copied garments. The Court held that the manufacturer's concerted refusal to sell constituted an unfair method of competition.<sup>193</sup> *Fashion Originator's* discourages a trade association's use of anticompetitive coercive methods in the administration of its industrial standard programs and certification, irrespective of whether the methods affect a competitor directly or affect a competitor's customers. Moreover, good intentions "to regulate an industry in the interest of its participants or of the public" will not excuse an infraction of the antitrust laws.<sup>194</sup> The Court has also held that the fact that the injured competitor is a single small business will not lessen the liability of the antitrust violator.<sup>195</sup>

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189. 456 U.S. at 577.

190. *Id.* at 576.

191. *Id.* at 570 (quoting *Fashion Originator's Guild of Am. v. FTC*, 312 U.S. at 465).

192. 312 U.S. at 457.

193. *Id.* at 464.

194. *TRADE ASS'N*, *supra* note 15, at 148.

195. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). In *Klor's*, the Supreme Court pointed out that:

[Anticompetitive activity] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.

*Id.* at 213 (footnotes omitted). Thus, even though Hydrolevel Corporation never captured more than one percent of the market, its destruction, resulting from the misleading interpretation of the ASME code, entitled it to treble damages against the association. See *supra* text accompanying note 36.

In addition to avoiding any direct effort to curb competition through the use of boycotts or promotional campaigns,<sup>196</sup> trade associations must be careful that standards or certification programs are administered fairly and not used passively to exclude competitors from the market.<sup>197</sup> Exclusion may occur because of public or industry resistance to products that are adjudged not to comply with the industry codes or standards.<sup>198</sup> Such noncompliance can result, as seen in *Hydrolevel*, in the destruction of a competitor and antitrust liability for the association.

Allegations similar to those raised by the plaintiff in *Hydrolevel* were before the Supreme Court in *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*<sup>199</sup> Although the Court did not deal with the substantive issues,<sup>200</sup> the language of the opinion indicated that the Court was satisfied that the alleged acts<sup>201</sup> "effectuate the plan and purpose of [an] unlawful combination and conspiracy"<sup>202</sup> and thus, clearly demonstrate "one type of trade restraint and public harm the Sherman Act forbids."<sup>203</sup> *Radiant Burners* implicitly warns standard-setting associations that the objectivity of an association's acts, the validity of those acts, and the conflicts of interest arising from potential competitors' involvement in the standard-setting programs are factors that will be considered in a court's finding of antitrust liability. This warning became reality in *Hydrolevel* where ASME's failure to guard against

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196. TRADE ASS'N, *supra* note 15, at 90; Fashion Originator's Guild of Am. v. FTC, 312 U.S. at 457; Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

197. *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 273 F.2d 196 (7th Cir. 1959), *rev'd per curiam*, 364 U.S. 656 (1961).

198. TRADE ASS'N, *supra* note 15, at 90.

199. 364 U.S. 656 (1961).

200. *Id.* at 656. The Court held only that the district court had erred in dismissing the claim for failure to state a cause of action. No further opinions were reported following the Supreme Court's reversal. Plaintiff's claim was settled by an agreement among the defendants to modify the applicable product standard. See TRADE ASS'N, *supra* note 15, at 91.

201. A manufacturer of a gas burner had submitted its product to the American Gas Association's certification program several times, but the Association never approved it. 273 F.2d at 199. Since the product was not "AGA approved," utilities refused to provide gas for it or authorize retailers to sell it. The plaintiff alleged in his complaint: (1) that the association's tests were "not based on valid, unvarying, objective standards"; (2) that decisions on which products pass the tests were "arbitrarily and capriciously" made; and (3) that standards were influenced by manufacturers who competed with plaintiff and sat on the committees that decided whether product approval would be granted. *Id.* at 198. Plaintiff also alleged that the Association and utilities circulated "false and misleading reports that equipment not AGA approved is unsafe," inducing purchasers not to buy such products. *Id.* at 199.

202. 364 U.S. at 659.

203. *Id.* (quoting *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. at 210).

conflicts of interest of its volunteers resulted in liability.

The conflict of interest issue is most difficult for standard-setting organizations to confront, as seen in *Hydrolevel*, because standards must be developed by those who are most knowledgeable about an industry and its problems.<sup>204</sup> Invariably, these individuals are employed in the private sector so that there is always a great potential for a conflict of interest situation to arise. On the other hand, the development of industry standards will be severely hindered if courts are to view a corporate executive's participation alone in the setting of industry standards as a sign of unacceptable subjectivity. Although supportive of standard-setting programs,<sup>205</sup> the Court has been consistent in the message it has sent to trade and other standard-setting organizations in decisions like *Silver*, *Radiant Burners*, and now *Hydrolevel*. The great economic power wielded by such organizations must be tempered by adequate internal policies and procedures to prevent the misuse of that power and the destructive, anticompetitive results that can occur. These results are outlawed by Congress in the Sherman Act, and will not be tolerated by the Court.

## V. CONCLUSION

The Supreme Court in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, for the first time, applied the apparent authority theory of agency law to an antitrust action. The Court held a nonprofit professional association civilly liable for the fraudulent acts of its volunteer members. An examination of the case law reveals that this extension of vicarious liability is consistent with both common law agency concepts and the legislative intent behind the antitrust laws to protect a free, competitive market.

The more lenient standard traditionally applied to nonprofit organizations under the antitrust laws has been narrowed by the Court to the point of near extinction, except for limited applicability to situations of a political or social nature. Where a nonprofit professional organization has sufficient power to affect our national economy, the Court is more willing to categorize its activities as falling under the "trade or commerce" proviso of the Act,<sup>206</sup> rather than under the charitable organization exclusion of the antitrust

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204. TRADE ASS'N, *supra* note 15, at 92-93.

205. See *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. at 563.

206. Sherman Act § 1, 15 U.S.C. § 1 (1982).

laws.<sup>207</sup> By scrutinizing the activities of the modern nonprofit professional organization according to the standards of antitrust liability that are applied to other powerful commercial entities, the Court acts consistently with Congress's intent in enacting the Sherman Act. In doing so, the Court imposes a duty on nonprofit professional and trade organizations to implement procedural safeguards to eliminate the possibility of abuses of power that are prohibited by the antitrust laws.

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207. See *supra* note 99 for comments by Senator Sherman regarding organizations not intended to be within the scope of the antitrust laws.