ANTITRUST—AGENCY—APPARENT AUTHORITY LIABILITY THEORY APPLICABLE IN ANTITRUST SUIT AGAINST NONPROFIT, TAX-EXEMPT, STANDARD-SETTING ORGANIZATION—*American Society of Mechanical Engineers v. Hydrolevel Corp.*, 102 S. Ct. 1935 (1982).

In *American Society of Mechanical Engineers v. Hydrolevel Corp. (ASME v. Hydrolevel)*,[1] the Supreme Court, in imposing antitrust liability,[2] examined the applicability of the apparent authority doctrine of agency law to antitrust litigation.[3] The common-law doctrine of apparent authority holds a principal accountable for "[t]hat authority which, though not actually granted, the principal knowingly permits his agent to exercise, or which he holds him out as possessing,"[4] and is justified today primarily as a rule of allocation of risk.[5] Antitrust laws statutorily declare unlawful, private restraints of trade and competition in interstate and foreign commerce.[6] Aimed at maintaining a competitive business economy, this objective is achieved primarily through sweeping provisions[7] and the threat of treble damage liability.[8]

The merger of these two legal concepts created a dilemma for the Court in *ASME v. Hydrolevel*, especially in light of the unusual

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[1] 102 S. Ct. 1935 (1982).

[2] The antitrust statutes include, *inter alia*, the Sherman Act, 15 U.S.C. §§ 1-7 (1976), and the Clayton Act, *id.* §§ 12-27 (1976 & Supp. IV 1980). Civil and criminal antitrust actions can be brought under these statutes by the Department of Justice and the Federal Trade Commission while private suits can be instituted by injured parties. J. VAN CISE, THE FEDERAL ANTITRUST LAWS 41 (3d ed. 1975). Criminal actions and civil suits differ in the mode of enforcement and in the sanctions or damages imposed. *Id.* at 41-48. In addition, a criminal antitrust conviction, unlike civil liability, requires proof of intent to violate the antitrust laws. *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978). *See generally* Handler, *Antitrust—1978*, 78 COLUM. L. REV. 1363, 1400-02 (1978); Note, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979).

[3] Apparent authority is defined 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." RESTATEMENT (SECOND) OF AGENCY § 8 (1957).

[4] BALLENTINE'S LAW DICTIONARY 81 (3d ed. 1969).

[5] W. PROSSER, LAW OF TORTS § 69, at 459 (4th ed. 1971).

[6] *See* 21 CONG. REC. 2456 (1890) (primary intent of antitrust laws is "to declare unlawful trusts and combinations in restraint of trade and production"); J. VAN CISE, *supra* note 2, at 7. Actually, prior to the passage of the Sherman Act in the latter part of the 19th century, trade monopolies were encouraged in this country. *See* Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954).

[7] J. VAN CISE, *supra* note 2, at 5.

[8] Under § 4 of the Clayton Act, a jury determination as to damages is automatically trebled to arrive at the actual judgment of damages in antitrust suits. 15 U.S.C. § 15 (1976). This section provides in pertinent part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the

defendant in the case—a nonprofit, tax-exempt, standard-setting organization.[9] American Society of Mechanical Engineers (ASME), which has been in existence since 1881,[10] has over 90,000 members from various disciplines.[11] Although the majority of members are volunteers, a full-time staff administers the organization.[12] One of ASME's most important functions is the promulgation, publication, and interpretation of over 400 separate codes and standards for the engineering industry.[13] The bulk of this work is performed by ASME members who are also employed by the very companies that must abide by these codes.[14] The Boiler and Pressure Vessel Code is ASME's most widely known publication.[15] The responsibility of formulating, interpreting, and revising this code is delegated to a Boiler and Pressure Vessel Committee.[16] This committee in turn authorizes a subcommittee to respond to public inquiries concerning the code.[17]

In the early 1970's, the vice-chairman of the subcommittee handling boiler low-water fuel cutoffs, John W. James, was also vice

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United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. The objective behind this large monetary award is compensation for injured plaintiffs and deterrence of future violations through the encouragement of private suits. Bernard, *On Judgments And Settlements In Antitrust Litigation: When Should Damages Be Trebled?*, 56 ST. JOHN'S L. REV. 1, 5 n.9 (1981).

[9] The terms organization, association, and society are used interchangeably throughout this Note.

[10] Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1368 (1978).

[11] 102 S. Ct. at 1938. These disciplines include industry, academia, insurance, and government. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 120 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982). The society also conducts educational and research programs and publishes a national engineering magazine. 102 S. Ct. at 1938.

[12] 102 S. Ct. at 1938.

[13] *Id.* ASME is only one of many standard-setting organizations whose codes cover all phases of modern society. Hamilton, *supra* note 10, at 1331. It has been estimated that between 20,000 and 60,000 plus standards are actually in use. *Id.* at 1332. Standards established by nongovernmental agencies are voluntary unless adopted or incorporated by reference by governmental action. *Id.* at 1331 n. 91. These standards are developed through an intricate procedure which generally requires public notice, opportunity to comment, and participation from various groups and different interests. *Id.* at 1331.

[14] Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 121 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982). The ASME volunteers participate in the organization as individuals, not as representatives of their employers. *Id.*

[15] Hamilton, *supra* note 10, at 1340. Forty-six states and all but one Canadian province have adopted the Boiler and Pressure Vessel Code. 102 S. Ct. at 1938-39.

[16] 102 S. Ct. at 1939.

[17] *Id.* It has been estimated that ASME responds to approximately 30,000 public inquiries each year concerning the interpretation of a particular standard. Perry, *Antitrust Ruling Chills Standards Setting*, SPECTRUM, Aug. 1982, at 52.

president of McDonnell & Miller, Inc.[18] (M&M), the dominant marketer of low-water fuel cutoffs.[19] When Hydrolevel Corporation (Hydrolevel), a rival corporation, convinced one of M&M's major customers to change to Hydrolevel's time delay probe,[20] James, other M&M officials, and James L. Hardin, the chairman of the same ASME subcommittee, met to formulate a plan in response to Hydrolevel's competitive threat.[21] Consequently, a letter was drafted by James and Hardin, signed by an M&M vice president, and mailed to the Boiler and Pressure Vessel Committee.[22] The letter, carefully designed to elicit a negative response, inquired if a fuel cutoff with a time delay satisfied ASME code requirements.[23]

In accordance with ASME procedures, the inquiry was referred to Hardin.[24] By treating it as an "unofficial communication," Hardin could draft a response without the necessity of a committee referral.[25] Hardin's response, written in a manner designed to imply that Hydrolevel's device was unacceptable under ASME codes, was subsequently signed by the secretary of the committee and mailed out on ASME stationery.[26] M&M utilized this response to discredit the safety of

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[18] 102 S. Ct. at 1939.

[19] *Id.* One of the many sections of ASME's Boiler and Pressure Vessel Code deals with standards for various components of heating boilers, including low-water fuel cutoffs. *Id.* Paragraph HG-605 of § IV of the code specifically provides that each boiler "shall have an automatic low-water fuel cutoff so located as to automatically cutoff the fuel supply when the surface of the water falls to the lowest visible part of the water gauge glass." *Id.* The purpose of this regulation is the prevention of dry firing or explosion of boilers which can occur if certain minimum water levels are not maintained. *Id.* "M&M's fuel cutoff is a floating bulb that falls with the boiler's water level" and causes a switch to cut off the fuel supply when the water level reaches a critical point. *Id.* at 1939 n.1.

[20] Hydrolevel's fuel cutoff device consisted of an immovable probe inserted into the side of the boiler. *Id.* The electric current was complete and the fuel flowed as long as water covered the electrode in the probe. A time delay element allowed fuel to flow for an additional 60 to 90 seconds to account for false low water level readings caused by boiling water bubbles surging inside the boiler. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 121 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982). Fuel would always be cut off, however, before the boiler could dry fire and explode. *Id.*

[21] 102 S. Ct. at 1939. Hardin was also executive vice president of Hartford Steam Boiler Inspection and Insurance Company (Hartford) the country's leading boiler insurance underwriter. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 122 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982). International Telephone and Telegraph Corporation (IT&T) owned a controlling interest in Hartford. *Id.* at 122 n. 2; *see also infra* note 43.

[22] 102 S. Ct. at 1939. This letter was sent to W. Bradford Hoyt, a full-time ASME officer. *Id.*

[23] *Id.*

[24] *Id.* For an outline of these ASME procedures, see Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 122 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982).

[25] 102 S. Ct. at 1939-40.

[26] *Id.* at 1940. The response contained two inconsistent paragraphs which led to the misleading conclusion that a time delay probe was not in accordance with ASME's code standards. *See*

Hydrolevel's probe to prospective fuel cutoff customers.[27] As a result, Hydrolevel was no longer able to effectively compete in the fuel cutoff market.[28]

Over nine months later Hydrolevel learned of the existence of the damaging letter and demanded a written correction of Hardin's response.[29] After subcommittee[30] and committee review, an "official communication" in the form of a retraction letter was sent to Hydrolevel.[31] This retraction letter purported to eliminate any implication that the prior letter intended to condemn time delays in fuel cutoffs[32] and ratified the remainder of the unofficial response.[33] Nevertheless, Hydrolevel was unable to withstand the adverse market pressure and eventually sold all of its assets for salvage value.[34]

In 1974 Hydrolevel's downfall was the focus of a sympathetic article appearing in the *Wall Street Journal*.[35] Because the article questioned James' participation in the matter,[36] ASME's Professional Practice Committee conducted an in-house investigation.[37] The committee ultimately found that all members had acted properly.[38] Unfortunately all of the facts were not exposed until 1975 when Senate subcommittee hearings revealed that James had in fact helped in drafting the original inquiry and subsequently destroyed all correspondence between himself and Hardin.[39] As a result, ASME reo-

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Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 122-23 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982).

[27] 102 S. Ct. at 1940. In fact, M&M salesmen were specifically instructed to tell potential customers that Hydrolevel's probe failed to satisfy ASME safety codes. *Id.*

[28] *See id.*

[29] *Id.*

[30] James was now the chairman of the subcommittee. *Id.* He stepped down from the chair, however, during discussions of the Hydrolevel incident. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 123 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982).

[31] 102 S. Ct. at 1940-41.

[32] *Id.*

[33] *Id.*

[34] Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 124 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982).

[35] *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. The article stated that the company still continued to suffer market resistance to its product because of the mistaken belief that its device violated ASME code standards. *Id.*

[36] *Id.* James' actual authorization of the inquiry was not revealed in the article. 102 S. Ct. at 1941.

[37] 102 S. Ct. at 1941.

[38] *Id.*

[39] Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 124 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982); *see also Voluntary Industrial Standards: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 171-99 (1975) (testimony of John W. James).

pened its committee investigation,[40] and Hydrolevel filed suit in the United States District Court for the Eastern District of New York.[41] Hydrolevel named three defendants in the suit: ASME, Hartford Steam Boiler Inspection and Insurance Company (Hartford), and International Telephone and Telegraph Corporation (IT&T),[42] alleging that each had violated sections one and two of the Sherman Act.[43] Prior to trial, Hydrolevel settled with IT&T and Hartford.[44] At the conclusion of the parties' presentations, the district court judge refused to charge the jury on apparent authority[45] and instead instructed them that liability could only be found if ASME ratified its agents' actions or if the agents "had acted to advance ASME's interest."[46] On this basis the jury found ASME liable for conspiracy to restrain trade in the boiler low-water fuel cutoff market.[47]

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[40] Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 124 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982).

[41] 102 S. Ct. at 1941. On the advice of ASME counsel, the committee suspended its investigation pending the outcome of the Hydrolevel suit. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 124 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982).

[42] 102 S. Ct. at 1941. IT&T had acquired M&M in December of 1971. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 122 n.2 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982).

[43] 102 S. Ct. at 1941. Section 1 of the Sherman Act provides in pertinent part:

> 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. . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1976).

Section 2 of the Sherman Act 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 of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Id. § 2 (1976).

Originally, Hydrolevel claimed ASME was also liable for trade libel, tortious interference with business relations, and violation of New York's Donnelly Act, N.Y. GEN. BUS. LAW § 340 (McKinney 1968). Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 126 n.5 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982). Hydrolevel, with court approval, abandoned these state law claims prior to trial. *Id.*

[44] Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 124 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982). IT&T settled for $725,000; Hartford settled for $75,000. *Id.*

[45] *Id.* This charge had been requested by Hydrolevel. *Id.*

[46] *Id.*

[47] *Id.* at 124-25. The same jury also found that Hydrolevel had suffered damages of 3.3 million dollars. *Id.* The trial judge, however, deducted the $800,000 settlement sum and trebled

ASME appealed the liability issue to the Court of Appeals for the Second Circuit[48] which, relying on a different theory, affirmed the liability portion of the trial court's holding.[49] The court went beyond the lower court's narrow jury instructions defining the scope of liability and found antitrust liability under the apparent authority doctrine.[50] The Supreme Court of the United States granted ASME's petition for certiorari on the issue of liability, noting that "an important issue concerning the scope of the antitrust laws was presented."[51] Affirming the court of appeals' decision, the Supreme Court held that ASME, a nonprofit, tax-exempt, standard-setting organization, was liable under the antitrust laws for the actions of its agents committed with apparent authority.[52]

Prior to *ASME v. Hydrolevel* neither the circuit courts nor the Supreme Court had adopted the apparent authority doctrine as a liability theory in an antitrust context,[53] though broad language dealing with this issue is contained in several cases, primarily in dicta.[54] Traditionally, under the antitrust laws a principal's liability for the acts of its agents has been imposed premised on the theories of actual

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the remainder to arrive at a 7.5 million dollar damage judgment. *Id.* He did not award attorney's fees. *Id.*

[48] *Id.* at 124. Hydrolevel cross-appealed from the trial judge's deduction of the $800,000 prior to trebling and his refusal to award attorney's fees. *Id.* Under § 4 of the Clayton Act, recovery in a private antitrust suit includes a "reasonable attorney's fee." 15 U.S.C. § 15 (1976).

[49] Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 635 F.2d 118, 124 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982). The appellate court reversed the judgment as to damages and remanded for a new trial. *Id.* at 128. The panel concluded that the trial judge had erred in deducting the settlements prior to trebling and in not granting attorney's fees. *Id.* at 128-29. They also decided, however, that the damage estimates were excessive and required recalculation. *Id.* at 129. The court held that liability should be limited to the period prior to ASME's retraction letter. *Id.* at 130.

[50] *Id.* at 127.

[51] 102 S. Ct. at 1942; *see* American Soc'y of Mechanical Eng'rs. v. Hydrolevel Corp., 452 U.S. 937 (1981). On the same day a cross-petition for certiorari was filed by Hydrolevel on the damages issue but the Supreme Court denied review on this issue after affirming ASME's liability. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., 102 S. Ct. 2267 (1982). The damage issue is currently undergoing reconsideration at the district court level in New York. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs., No. CV75-1360 (E.D.N.Y. 1982).

[52] 102 S. Ct. at 1948. The Supreme Court denied rehearing. American Soc'y of Mechanical Eng'rs. v. Hydrolevel Corp., 102 S. Ct. 3502 (1982).

[53] *See* 102 S. Ct. at 1944 n.7.

[54] *See infra* notes 57-77 and accompanying text. Most of the language refers to corporations prosecuted for antitrust violations committed by corporate agents while ASME v. Hydrolevel concerns a civil suit against a nonprofit organization. For the relevant distinction between criminal and civil cases, see *supra* note 2.

authority[55] and ratification,[56] while liability generally has not been imposed premised on the theory of apparent authority.

This distinction is illustrated in *United Mine Workers v. Coronado Coal Co.*,[57] wherein the Court was specifically asked to decide if an international union had "initiated, participated in or ratified" the anticompetitive acts of a local district union organization thereby subjecting itself to antitrust liability.[58] The antitrust inquiry focused upon a local strike which had been called by the district organization of the union.[59] Coronado argued that although this was a local strike, because the national body possessed authority to discipline district organizations and discretionary authority to adopt and fund local strikes, a duty was thrust upon it to supervise and control all strikes of which it was aware.[60] The Court stated, however, that this was not an international union strike since the strike had not been approved by the international board[61] and refused to extend liability holding that a corporation is liable only for the wrongs committed by its agents which are within the scope of the principal's business.[62] Accordingly, the Court held that vicarious liability in this context could only be premised on actual authority granted to the agent.[63] Several years

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[55] Actual authority is that authority which the principal in fact gives the agent by the terms of their contract or agreement. G. FRIDMAN, THE LAW OF AGENCY 89-90 (4th ed. 1976). This authority is usually either express, i.e., "specifically created and limited by the terms of the agreement or contract which gives rise to the agency relationship" or implied, i.e., inferred from the nature of the business but subject to the consent of the principal—a necessary part of the authority. *Id.* at 90-91. Actual authority can also fit into a third category—usual or customary authority, i.e., that which a person possessing knowledge of the business in which the agent is dealing would expect an agent to have and to which the principal consents. *Id.* at 91. Apparent authority does not require consent on the part of the principal. *Id.* at 92; *see supra* text accompanying note 4.

[56] "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." RESTATEMENT (SECOND) OF AGENCY § 82 (1957).

[57] 259 U.S. 344 (1922).

[58] *Id.* at 393.

[59] *Id.* The strikers were violent, injuring several miners, destroying property, and eventually causing the mine to shut down permanently. *Id.*

[60] *Id.* at 395.

[61] *Id.* at 393. Although the President of the national body had heard about the strike and subsequently reported it to the international board, the Court determined that the international union had not ratified the strike. *Id.* at 393-94.

[62] *Id.* at 395.

[63] *See id.* The Court rebutted Coronado's argument that liability should be imposed on the international union because "the District was doing the work of the International and carrying out its policies," observing that the international in its agreement with the district specifically denied responsibility unless it was expressly assumed. *Id.*

later, the Supreme Court again reviewed *Coronado Coal*.[64] After referring to language from its earlier opinion,[65] the Court reaffirmed its previous holding that in order to impose antitrust liability on the international union actual authority had to exist between the principal and agent.[66]

Relying on the reasoning of the Supreme Court in the *Coronado Coal* cases, the Eighth Circuit court in *Truck Drivers' Local 421 v. United States*[67] refused to apply apparent authority to find the local union liable under the antitrust laws for price fixing by its milkmen's division.[68] The court found that the Supreme Court's holdings in the *Coronado Coal* cases had foreclosed utilization of apparent authority as a theory of liability in antitrust litigation and, therefore, confined itself to finding liability on a showing of actual authority.[69]

Almost two decades later the Sixth Circuit court in *Continental Baking Co. v. United States*[70] reviewed a criminal prosecution for conspiracy to fix prices of bakery goods in violation of the Sherman Act. The court examined language in previous cases and extracted a "common denominator" in antitrust corporate agency cases.[71] The court stated that when corporate agents have "broad express authority," hold responsible positions, and commit criminal acts related to performance of corporate duties, courts have deemed corporate principals to have authorized the agents' criminal acts and held the principal guilty for those acts.[72]

In *United States v. American Radiator & Standard Sanitary Corp.*,[73] the Third Circuit court upheld the conviction of a corporation for the price fixing activities of its agent. Despite the defendant's

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[64] Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925). *Coronado Coal I* on remand resulted in a directed verdict and judgment for the defendants which was affirmed by the circuit court. *Id.* at 297. That decision was subsequently appealed to the Supreme Court. *Id.*

[65] *See id.* at 304-05.

[66] *Id.* at 304.

[67] 128 F.2d 227 (8th Cir. 1942).

[68] *Id.* at 235-36. In addressing the agency issue, the court stated: "To bind the union in a situation such as this, actual and authorized agency was necessary; mere apparent agency would not be sufficient to take the matter to the jury, unless the circumstances were so strong as competently to support an inference of actual authority." *Id.* at 235.

[69] *Id.* at 236. *But see* Mile Branch Coal Co. v. United Mine Workers, 266 F.2d 919, 921-22 (D.C. Cir. 1959) (refusing to follow *Coronado Coal* agency liability principle because of existence of contractual basis for authority).

[70] 281 F.2d 137 (6th Cir. 1960).

[71] *Id.* at 149.

[72] *Id.* The court refused to permit Continental to claim that its agents were only authorized to act legally and thus it should not have to answer for violations of the law which inure to its benefit. *Id.* at 150.

[73] 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

objections on appeal, the court found that the jury instructions had properly indicated that corporate liability could be found when "the agent acted 'on behalf of the corporation and within the scope of his employment or his apparent authority.' "[74] The court equated acts done within the scope of employment with acts done on behalf of a corporation.[75] Therefore, a corporation can be liable for its agent's acts when the agent commits antitrust violations with an intent to benefit the corporation.[76]

Based on the preceding cases, no precise rule can be drawn concerning liability under the apparent authority doctrine as applied to antitrust laws. No court had extensively examined the principle of apparent authority in the corporate setting and the propriety of utilizing it to impose liability for antitrust violations.[77] This task, undertaken by the Supreme Court in *ASME v. Hydrolevel*, was complicated by three aspects of the case: a civil, as opposed to criminal, antitrust action,[78] a nonprofit organization principal,[79] and a volunteer agent who neither intended to, nor did benefit the principal.[80]

Justice Blackmun, writing for the majority,[81] began his analysis by focusing on the agency law principle of apparent authority as applied to torts which are analogous to the antitrust violations committed by ASME's agents.[82] He identified the common-law apparent authority rule which imposes liability upon a principal for its agents' tortious acts performed within the scope of the ordinary course of business and relied upon by third parties.[83] The Court observed that

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[74] *Id.* at 205.

[75] *See id.* at 204.

[76] United States v. Hilton Hotels Corp., 467 F.2d 1000, 1006-07 & n.4 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *accord* United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978); *cf. Hilton Hotels*, 467 F.2d at 1006 ("[b]ecause of the nature of Sherman Act offenses and the context in which they normally occur, the factors that militate against allowing a corporation to disown the criminal acts of its agents apply with special force to Sherman Act violations").

[77] Although lower courts had mentioned apparent authority as a liability theory, *see, e.g.*, United States v. Continental Group, Inc., 603 F.2d 444, 468 n.5 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *American Radiator*, 433 F.2d at 204-05; *Continental Baking Co.*, 281 F.2d at 150-51, there exists no detailed discussion of this theory. *See* ASME v. Hydrolevel, 102 S. Ct. at 1944 n.7.

[78] *See supra* notes 2 & 54.

[79] *But cf.* United States v. Montana State Food Distribution Ass'n, 271 F. Supp. 403, 405 (D. Mont. 1967) (not error for Government to rely on cases involving corporations organized for profit when defendant is nonprofit corporation).

[80] See *supra* notes 74-76 and accompanying text.

[81] Justices Brennan, Marshall, Stevens, and O'Connor joined the majority opinion.

[82] 102 S. Ct. at 1942.

[83] *Id.*; *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) (principal liable for agent's fraud); Rutherford v. Rideout Bank, 11 Cal. 2d 479, 80 P.2d 978 (1938) (principal liable for agent's misrepresenta-

apparent authority liability arises partially because agents' actions carry the weight of the principal's reputation.[84] This relationship between the agents' actions and the principal's reputation was illustrated by the majority within the context of this case. The Court pointed out that ASME's code interpretation, devised by individual members of the organization, had economically damaged Hydrolevel because ASME was well respected in the business community.[85] The Court reasoned that liability premised on apparent authority comported with the underlying principles of the antitrust laws—the promotion of free and unfettered competition.[86] Using the facts of the case to illustrate this compatability, the Court stated that ASME's agents possessed the power to restrain competition because ASME could influence the economy through the use of its codes.[87] By apparently cloaking its agents with authority which carried the weight of the organization's reputation, ASME had given its agents the very tools to restrain competition.[88] Furthermore, the Court observed, the nature of ASME as a standard-setting organization created opportunities for anticompetitive activity because ASME volunteers often were employed by corporations regulated by ASME codes. ASME, there-

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tions); RESTATEMENT (SECOND) OF AGENCY § 248 & comment b (1957) (principal liable for agent's tortious interference with business relations of third person); *id.* §§ 247, 254 (principal liable for agent's defamatory statements). *See generally* W. SEAVEY, LAW OF AGENCY § 92 (1964).

The Court dismissed the dissent's reliance on agency law from the late nineteenth century, *see infra* notes 109-14 and accompanying text, stating that the early law was in disarray and that some treatises and state cases of that era supported holding principals liable for agents' torts which were analogous to the violations committed by ASME's agents. 102 S. Ct. at 1943 n.6; *see, e.g.*, McCord v. Western Union Tel. Co., 39 Minn. 181, 185, 39 N.W. 315, 317 (1888) (principal liable for agent's fraud committed solely for his personal benefit); Bank of Batavia v. New York, L.E. & W.R. Co., 106 N.Y. 195, 12 N.E. 433 (1887) (principal liable for agent's fraudulent issuance of bills of lading); E. HUFFCUT, THE LAW OF AGENCY §§ 155, 157 (2d ed. 1901). Furthermore, the Court maintained that the broad, remedial effect of the antitrust laws, *see* Pfizer, Inc. v. Government of India, 434 U.S. 308, 312-13 (1978), and the congressional intent to promote enhanced competition, *see* National Soc'y of Professional Eng'rs., 435 U.S. 679 (1978); United States v. Topco Assocs., 405 U.S. 596 (1972), superseded the strict adoption and application of common-law principles in defining the scope of the antitrust laws. 102 S. Ct. at 1943 n.6; *see* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968); *see also* Reiter v. Sonotone Corp., 442 U.S. 330 (1979).

[84] 102 S. Ct. at 1942; *see* RESTATEMENT (SECOND) OF AGENCY § 247 comment c (1957).

[85] 102 S. Ct. at 1942.

[86] *See* United States v. Topco Assocs., 405 U.S. 596, 610 (1972) (freedom to compete is guaranteed by antitrust laws); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963) ("competition is our fundamental national economic policy"). *See generally* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. OF L. & ECON. 7 (1966).

[87] 102 S. Ct. at 1944. The majority stated that "the force of ASME's reputation is so great that M&M was able to use that one 'unofficial' response to injure seriously the business of [Hydrolevel]." *Id.*

[88] *Id.* at 1945.

fore, had created a situation whereby an agent could utilize the power derived from ASME to harm his employer's competitors through use of ASME codes.[89]

The Court determined that the underlying principles behind the antitrust laws would be furthered by granting plaintiffs a right to sue as broad as the common-law right in analogous torts.[90] Finally, the Court maintained that the imposition of civil liability upon principals would aid in deterring anticompetitive practices because principals in general, and ASME specifically, are in the best position to take steps to assure that agents do not utilize a principal's reputation to interfere with competition.[91] Imposing antitrust liability upon ASME would be added assurance that standard-setting organizations will take the necessary steps to curtail the potential anticompetitive acts of its agents.[92]

Justice Blackmun then compared the effect of imposing liability premised on this apparent authority rule with the effect of imposing liability premised on ratification or presence of an intent to benefit one's principal—the two alternative approaches of agency liability utilized by the district court.[93] The Court stated that liability premised on ratification would have an anticompetitive effect because ASME would be able to avoid antitrust liability by refusing to ratify any agent's conduct, thus in effect enhancing the likelihood of agents using ASME's reputation to thwart competition.[94] The Court continued that intent to benefit one's principal was "simply irrelevant to the purposes of the antitrust laws" since the anticompetitive effect of

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[89] *Id.* Justice Blackmun indicated that this problem existed partly because ASME had no effective safeguards against misuse of its code interpretations by members. *Id.*

[90] *Id.*; *cf.* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) (refusing to permit common-law doctrine of *in pari delicto* as defense in private antitrust action). This statement was qualified by the majority with the addition of the phrase "absent indications that the antitrust laws are not intended to reach so far." 102 S. Ct. at 1945.

The Court stated that "[t]he apparent authority rule has long been the settled rule in the federal system." *Id.* at 1943 (citing Ricketts v. Pennsylvania R. Co., 153 F.2d 757, 759 (2d Cir. 1946)); *see* Gleason v. Seaboard Ry., 278 U.S. 349, 357 (1929) (principal liable for fraudulent acts of its agents committed with apparent authority despite lack of intent to benefit principal); *see also* 102 S. Ct. at 1943 (cases cited therein).

[91] 102 S. Ct. at 1945-46.

[92] *Id.* The Court recognized that although antitrust violations committed by agents could be deterred by imposing liability on the agents, deterrence would best be achieved by holding principals liable. This, the Court determined, would pressure organizations to ensure that its agents do not violate the antitrust laws. *Id.*; *see* United States v. A&P Trucking Co., 358 U.S. 121, 126 (1958).

[93] 102 S. Ct. at 1946. The Court dismissed ASME's contention that the *Coronado Coal* cases foreclosed the imposition of civil antitrust liability based on apparent authority. *Id.* at 1946 n.12. Justice Blackmun quoted language from the opinions indicating that the apparent authority issue was not before the Court and that, in general, principals are responsible for wrongs of agents committed in the usual course of business. *Id.*

[94] *Id.* at 1946.

agents' actions would be the same with or without an intent to benefit.[95]

The Court rejected ASME's attempt to characterize mandatory treble damages in antitrust suits as punitive thus negating its argument that antitrust liability should not be premised on apparent authority since courts traditionally have been reluctant to impose punitive damages under apparent authority theories.[96] Justice Blackmun recognized two separate purposes of treble damages: one—admittedly punitive, the other—deterrent.[97] Since the overriding purposes of awarding treble damages are deterring future antitrust violations, establishing a remedy for victims,[98] and counter-balancing the burden of maintaining a private action,[99] Justice Blackmun concluded that the principles underlying both agency and antitrust laws were fulfilled in awarding treble damages against ASME.[100]

Finally, the Court determined that ASME's status as a nonprofit organization was insufficient to protect it from treble damage liability.[101] The majority discredited any reliance on this status observing that (1) ASME derives substantial benefits such as prestige and fees from its codes; (2) absent the existence of ASME's codes and the method of their administration, this violation would not have occurred; and, (3) ASME is in the best position to take precautions to prevent future violations.[102] The Court stated that these factors make it "not unfitting that ASME be liable for the damages arising from [antitrust] violations."[103]

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[95] *Id.*

[96] *Id.* at 1947. Courts are not in accord concerning the applicability of punitive damages upon a principal when its agent acts with apparent authority. A minority of courts does not impose punitive damages when an agent has acted with apparent authority. *See, e.g.*, Lake Shore & M.S.R. Co. v. Prentice, 147 U.S. 101 (1893); United States v. Ridglea State Bank, 357 F.2d 495 (5th Cir. 1966); *accord* RESTATEMENT (SECOND) OF TORTS § 909 (1979). The majority of courts, however, has imposed punitive damages upon a principal even in the absence of approval or ratification. *See* W. PROSSER, *supra* note 5, § 2, at 12 & n.93. *See generally id.*; Note, *Exemplary Damages Against Corporations*, 30 GEO. L. J. 294 (1942); Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees*, 70 YALE L.J. 1291 (1961).

[97] 102 S. Ct. at 1947; *see* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981).

[98] 102 S. Ct. at 1947; *see* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977).

[99] 102 S. Ct. at 1947; *see* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 496 n.10 (1977).

[100] 102 S. Ct. at 1947.

[101] *Id.* Nonprofit organizations are not exempt from the antitrust laws. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Associated Press v. United States, 326 U.S. 1 (1945).

[102] 102 S. Ct. at 1947.

[103] *Id.* Chief Justice Burger concurred in the result but found antitrust liability based on the jury's finding that ASME had ratified or adopted the conduct of its agents. *Id.* at 1948-49

In dissenting, Justice Powell characterized the majority's holding as an "expansive rule of strict liability" which is inapplicable to nonprofit organizations.[104] He directed his criticism of the majority's holding towards four areas: (1) the lack of consideration granted ASME as a nonprofit organization;[105] (2) the failure to cite any cases applying apparent authority in antitrust suits;[106] (3) the summary disposal of the punitive damage issue;[107] and, (4) the lack of need for a new agency theory in antitrust.[108]

Justice Powell pointed out the lack of support for imposing antitrust liability through apparent authority by examining the intent of

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(Burger, C.J., concurring). He regarded the majority's holding on apparent authority as unessential to finding antitrust liability, and therefore, pure dicta. *Id.* at 1948 note * (Burger, C.J., concurring).

[104] *Id.* at 1949 (Powell, J., dissenting). Justice Powell summarized the majority's holding stating that it was "inconsistent with the weight of precedent and the intent of Congress, unsupported by the rules of agency law that the Court purports to apply, and irrelevent to the achievement of the goals of the antitrust laws." *Id.*

[105] *Id.* at 1949-50 (Powell, J., dissenting). Justice Powell admitted that although nonprofit organizations are subject to antitrust regulations, Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975), supported treating professional organizations in a manner different from commercial enterprises. 102 S. Ct. at 1949-50 (Powell, J., dissenting). In light of *Goldfarb*, Justice Powell found surprising the majority's promulgation of "an expansive rule of antitrust liability not heretofore applied by it to a commercial enterprise much less to a nonprofit organization." *Id.* at 1950 (Powell, J., dissenting).

[106] 102 S. Ct. at 1950 (Powell, J., dissenting). Justice Powell noted that there exists judicial hesitation to impose liability based on apparent authority. *See id.* at 1950 & n.6 (Powell, J., dissenting). Specifically, Justice Powell interpreted the failure of the Supreme Court in the *Coronado Coal* cases to utilize apparent authority principles to impose liability as an indication of rejection of the theory in antitrust suits. *Id.* at 1950; *accord Truck Drivers' Local 421*, 128 F.2d at 235.

Justice Powell also noted that "in the context of commercial enterprises, the Courts of Appeals . . . [have] reject[ed] antitrust liability upon mere apparent authority" especially when no intent to benefit the plaintiff is shown. 102 S. Ct. at 1950 & n.6 (Powell, J., dissenting); *see* United States v. Cadillac Overall Supply Co., 568 F.2d 1078 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *American Radiator*, 433 F.2d at 204-05. *A fortiori*, nonprofit, professional organizations should not be liable for antitrust violations committed by its agents within the scope of their apparent authority. *See* 102 S. Ct. at 1950 (Powell, J., dissenting).

[107] 102 S. Ct. at 1951 (Powell, J., dissenting). Justice Powell concentrated on the punitive nature of treble damages and found that since ASME had gained nothing from the antitrust violations of its agents, it should not be punished. 102 S. Ct. at 1951 (Powell, J., dissenting). He thus distinguished *Continental Baking Co.* and United States v. Continental Group, Inc., 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980), the only two cases upon which the majority relied in imposing punitive damages premised on apparent authority, and maintained that each involved antitrust acts which inured to the principal's benefit. 102 S. Ct. at 1951 & n.8 (Powell, J., dissenting).

[108] 102 S. Ct. at 1951-52 (Powell, J., dissenting). Justice Powell's point is compelling in light of the jury's finding that ASME was liable under the traditional agency theories of ratification or authorization. *See supra* notes 45-47 and accompanying text. He noted that ASME was not sued or found liable on an apparent authority theory. Rather, the Second Circuit court utilized the apparent authority theory, although it had not been briefed by either party, to impose antitrust liability on ASME. *See* 102 S. Ct. at 1951 & n.8 (Powell, J., dissenting).

Congress as evidenced by the legislative history of the Sherman Act.[109] The dissent observed that while the legislative history did not support granting nonprofit organizations total exemption from liability, it did counsel against expansion of the existing agency rules to impose liability on these organizations.[110] The dissent maintained that when the Sherman Act was passed the agency laws provided that nonprofit organizations were not liable for the torts of their agents.[111] Further, Justice Powell maintained that the courts were uncertain as to the applicability of apparent authority without an intent to benefit the principal[112] and emphasized "that *punitive* damages are not awarded against a principal for the acts of an agent acting only with apparent authority and without any intention of benefitting the principal."[113] Justice Powell, therefore, suggested that agency principles did not evidence congressional intent to impose liability on nonprofit organizations premised upon apparent authority.[114]

Continuing his criticism of the majority opinion, Justice Powell objected to the "single-minded approach" adopted by the Court which used any agency principle that "widens the net of antitrust enforcement and liability."[115] The dissent found this approach to be contrary to the Court's tendency in recent antitrust decisions towards a consideration of the fairness and appropriateness of an antitrust enforcement rule as well as its potential for deterrence.[116] Justice

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[109] 102 S. Ct. at 1952 (Powell, J., dissenting); *see* Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) (absent express establishment of right of action in antitrust laws, in determining whether cause of action exists, focus should be on intent of Congress as evidenced by legislative history, "identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief").

[110] 102 S. Ct. at 1952 (Powell, J., dissenting); *see* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940) (Sherman Act intended to prevent restraints on free competition in business and commercial transactions); 21 CONG. REC. 2562, 2658 (1890) (remarks of Sen. Sherman) (bill directed at anticompetitive business activity and not at voluntary associations).

[111] 102 S. Ct. at 1953 (Powell, J., dissenting); *cf.* E. HUFFCUT, *supra* note 83, § 257 ("a public corporation, entity, person, or charity, is not ordinarily liable for the torts of officers or servants").

[112] 102 S. Ct. at 1953-54 & n.13 (Powell, J., dissenting).

[113] *Id.* at 1954 (Powell, J., dissenting). In rejecting ASME's punitive damages argument, the majority did not analogize between antitrust violations and similar torts as it had done in applying the apparent authority theory in determining liability. Justice Blackmun had limited his reasoning to a discussion of the purposes of the antitrust laws and found them to be consistent with permitting punitive damages. *See supra* notes 96-100 and accompanying text. Justice Powell, however, in addressing the punitive damages issue, continued the tort analogy which had been used by the majority and stated that the majority of federal courts does not impose liability and thus punitive damages upon principals in malicious tort situations. 102 S. Ct. at 1953 n.13 (Powell, J., dissenting).

[114] 102 S. Ct. at 1954 (Powell, J., dissenting).

[115] *Id.*

[116] *Id.* at 1954-55 (Powell, J., dissenting); *see, e.g.*, United States v. United States Gypsum Co., 438 U.S. 422 (1978) (refusing to assume that Congress intended to create strict liability

Powell disagreed with the Court's assertion that encouraging plaintiffs to bring actions against nonprofit organizations would further effective antitrust enforcement.[117] Moreover, he feared that these organizations would be unable to adequately protect themselves from liability under the majority rule.[118] He cautioned that this could result in serious injustice, overdeterrence, and the eventual discontinuance of private activity by voluntary associations which benefits the public.[119] Justice Powell concluded by criticizing the majority for not delineating the nonprofit associations to which its decision applied.[120]

The majority admitted that its holding established no "outer boundaries of the antitrust liability of standard-setting organizations for the actions of their agents committed with apparent authority," but postulated that the apparent authority rule would encourage principals to oversee and supervise their agents thus hindering agents in similar organizations from restraining competition.[121] By not providing definite guidelines on the scope of the apparent authority rule, the Court has made it difficult for those who must abide by the holding to implement it. The true effect of the apparent authority rule established by the Court will ultimately depend upon two factors: the procedures adopted by organizations to combat liability and the application of the rule in future cases.

Concerning the former, no organization appears to have halted the standard-setting process but some are withholding codes until liability insurance is obtained.[122] While standard-setting organizations do not share many of the dissent's beliefs concerning the adverse effects of the majority's rule, most agree that it is impossible to fully insulate against apparent authority liability because an agent who is sufficiently determined will evade any supervisory regulation established.[123]

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antitrust crime, despite potential for deterrence); Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) (refusing to widen class of potential antitrust plaintiffs, despite potential for ensuring greater effectiveness of antitrust laws).

[117] 102 S. Ct. at 1955 (Powell, J., dissenting). Justice Powell thought it anomalous that the antitrust laws, supposedly geared towards encouraging competition, had been used to impose liability on ASME, a noncompetitor, when the true competition had been between M&M and Hydrolevel. *Id.*

[118] *Id.* at 1955 n.17 (Powell, J., dissenting).

[119] *Id.* at 1957 (Powell, J., dissenting).

[120] *Id.*

[121] *See id.* at 1948.

[122] Perry, *supra* note 17, at 54; *see, e.g., id.* (American Society of Civil Engineers revitalized standard-setting program in 1980 after approximately century of dormancy but is withholding publication until covered by liability insurance).

[123] *See id.*; N.Y. Times, June 1, 1982, at D1, col. 4.

Several organizations already have instituted, or are in the process of instituting, protective procedures to prevent antitrust violations.[124] ASME has begun publishing interpretations of its codes and has considered eliminating telephone answers to code interpretation inquiries.[125] Other organizations have required that written interpretations be developed by representative groups,[126] or that each informal opinion include a statement that the interpretations are not those of the society.[127] Additional procedures which can help reduce potential agent misconduct include: (1) limiting access to the letterhead and stationery; (2) publishing lists of those authorized to speak for the society; (3) instituting a logging system to monitor who had handled various inquiries; and, (4) establishing procedures to allow divergent code interpretations to be presented. Although far from inclusive, these procedures can serve as guidelines for the numerous standard-setting organizations throughout the country. While these internal policy changes may impede the standard-setting process, delay answers to individual questions of interpretation, and discourage some from volunteering their services, they may also result in more careful and accurate interpretations and discourage agent misconduct.[128]

The rule, therefore, appears to have had the effect desired by the Court. Nevertheless, the Court's failure to delineate the rule's outer boundaries creates the possibility that the rule will be taken to its extreme. As Justice Powell expressed in his dissent, had an ASME volunteer pilfered ASME stationery and supplied it to M&M, ASME could have been held liable for an antitrust violation under the majority rule.[129] Additionally, it is unclear to whom the apparent authority rule applies. There has been speculation whether the rule extends beyond standard-setting organizations and includes professional, charitable, educational, or religious associations.[130] More definite guidelines should have been articulated to prevent questions such as

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[124] *See infra* notes 125-27 and accompanying text. In recognition of the potential impact of the apparent authority liability rule, standard-setting organizations began corrective procedures prior to the Supreme Court's decision in ASME v. Hydrolevel. Perry, *supra* note 17, at 54.

[125] 102 S. Ct. at 1947 n.15; *see also* Perry, *supra* note 17, at 54. ASME has undergone major organizational revisions to protect itself from similar mishaps since the litigation commenced, but is reluctant to frustrate the public's need for immediate technical information by discontinuing telephone inquiries. *Id.*

[126] This procedure was adopted by the Institute of Electrical and Electronics Engineers when the ASME suit was in its early stages. Perry, *supra* note 17, at 54.

[127] *Id.* The National Fire Protection Association (NFPA) requires "that each informal opinion include a statement that it is not the opinion of the NFPA or its committees." *Id.* (quoting statement of Richard E. Stevens, NFPA's vice president and chief engineer).

[128] *See* Appleson, *Errant Volunteers Put Associations in Peril*, 68 A.B.A. J. 796 (1982).

[129] 102 S. Ct. at 1956 (Powell, J., dissenting).

[130] *See id.* at 1957 (Powell, J., dissenting); Perry, *supra* note 17, at 54.

these from arising. Instead, these questions will have to be answered through application of the rule in future cases.

The ramifications of the apparent authority rule cannot be predicted until courts shape the outer boundaries of the rule. In shaping the boundaries, courts must take cognizance of the purposes of the antitrust laws and the function and status of nonprofit organizations in society. Until a realistic balance between these two concerns is achieved and consequently the boundaries of the apparent authority rule are properly defined, nonprofit organizations can only act circumspectly and hope that the line eventually drawn by the courts is not a version of the "strict liability rule" feared by Justice Powell.[131]

The Court's holding is also problematic because in finding antitrust liability premised on the apparent authority rule, it was required to impose treble damages pursuant to section 4 of the Clayton Act.[132] Considering the facts of *ASME v. Hydrolevel*, imposition of this mandatory remedy may effectuate inequitable results. In *ASME v. Hydrolevel* the majority focused on the goals of the antitrust laws and refused to consider any potentially mitigating factors, placing no significance on ASME's nonprofit status, societal contributions, or the fact that there was no intent to benefit ASME when its agents violated the antitrust laws. In essence, Justice Blackmun myopically deferred to the goals of the antitrust laws in holding ASME liable.[133] Conversely, the dissent questioned the propriety of imposing liability premised on apparent authority primarily because of these same factors.[134] By blindly focusing on the goals of the antitrust laws and attaching no countervailing weight to these factors, the majority has ignored the function and significance of nonprofit professional organizations. Nearly four hundred nonprofit professional associations set standards in their respective industries.[135] In addition, as the primary

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[131] See *supra* note 104 and accompanying text.

[132] *See supra* note 8.

[133] Under § 1 of the Sherman Act, a "contract, combination . . . , or conspiracy . . . in restraint of trade" is necessary before antitrust liability can be imposed. 15 U.S.C. § 1 (1976); *see* United States v. Container Corp. of America, 393 U.S. 333 (1969); Albrecht v. Herald Co., 390 U.S. 145 (1968); Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). In ASME v. Hydrolevel, Justice Blackmun, in finding antitrust liability, may have overlooked this fundamental prerequisite to liability. The dissent maintained that the majority had oversimplified the case stating that "[t]he intersection of the law of agency and vicarious liability with the law of conspiracy makes this a complicated case." 102 S. Ct. at 1956 n.18 (Powell, J., dissenting). Justice Powell noted that the majority never indicated "who conspired with whom" and that ASME, which had not engineered or participated in the conspiracy was "as much a victim of this conspiracy as Hydrolevel." *Id.*

[134] *See* 102 S. Ct. at 1954-57 (Powell, J., dissenting).

[135] Young, *Supreme Court Report*, 68 A.B.A. J. 846 (1982).

source of code standards in the United States, voluntary professional groups specifically design many of their codes for incorporation by reference into governmental agencies' regulations and standards.[136] The importance of their contribution to society is exemplified by the government's continuing reliance on codes formulated and maintained by nonprofit standard-setting organizations.[137] These factors, despite the general flexibility of the antitrust laws,[138] did not permit the Court to mold an appropriate remedy since the antitrust laws do not permit mitigating factors to be considered in shaping a remedy for antitrust violative conduct.[139]

An appropriate remedy can be fashioned by recognizing that the antitrust laws need not always be applied in the same way,[140] and consequently permitting mitigating factors to be considered in determining damage awards in antitrust actions against nonprofit, professional organizations. At various times since the inception of the mandatory treble damage remedy, it has been suggested that imposition of treble damages be made discretionary.[141] By substituting a discretion-

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[136] Hamilton, *supra* note 10, at 1333, 1338.

[137] *See* N.Y. Times, *supra* note 123, at D1, col. 4. *See generally* Hamilton, *supra* note 10 (examining relationship between governmental and nongovernmental health and safety standards).

[138] *See* J. VAN CISE, *supra* note 2, at 5-7 (antitrust provisions are designed to be both substantively and procedurally flexible to assure most effective enforcement of antitrust laws); *cf.* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977) (inherent flexibility in permitting "factfinder [to weigh] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition"); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (under rule of reason, court looks to particular facts and circumstances of each case to determine whether restraint of trade is reasonable and comports with public policy of antitrust laws). *See generally* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 63-66 (1977).

[139] *Cf.* National Soc'y of Professional Eng'rs. v. United States, 435 U.S. 679, 692 (1978) ("purpose of the [rule of reason] analysis is to form a judgment about the competitive significance of a restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry"). *But see infra* note 141. *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965).

[140] *See* Community Communications Co. v. City of Boulder, 102 S. Ct. 835, 843 n.20 (1982) (implying that substantive antitrust law may differ depending on the identity of the defendant) (relying on City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978)); *see also* Klitzke, *Antitrust Liability of Municipal Corporations: The Per Se Rule vs. The Rule of Reason—A Reasonable Compromise*, 1980 ARIZ. ST. L.J. 253 (unique nature of municipal corporations precludes identical treatment for private parties and municipal corporations); *cf.* United States v. United States Gypsum Co., 438 U.S. 422 (1978) (recognizing inherent difference between criminal and civil Sherman Act actions); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975) (intimating that certain features of profession may require removal of particular practices from purview of Sherman Act).

[141] The original bill introduced to the Senate by Senator Sherman provided for double damages in civil antitrust suits. E. KINTER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 63-64 (1978). Moreover, support for the abolishment of mandatory

ary determination by the trial judge, ranging from actual to treble damages, for mandatory treble damages when an innocent rather than wilful violator has been found liable under the antitrust laws,[142] inequities will be less frequent. This approach will prevent harsh penalties from being imposed on nonculpable violators while maintaining the deterrent effect of treble damage liability against wilful violators of the laws.[143] Thus, mitigating factors would play a significant role in the determination of damages in situations in which deterrence was not a relevant concern.

The facts of *ASME v. Hydrolevel* illustrate how permitting discretion in awarding treble damages could have achieved an equitable result by simultaneously considering mitigating factors and the antitrust objectives. A volunteer member of ASME, a nonprofit organization which makes substantial contributions to society through its standard-setting codes, utilized ASME's procedures as a tool to violate the antitrust laws. While no benefit inured to ASME as a result of this violation, it would not have occurred absent ASME's reputation and organizational structure. Therefore, ASME and society would not benefit from the deterrent effect of treble damages. Awarding actual or double damages to Hydrolevel would have both compensated Hydrolevel and motivated ASME to take steps to minimize the chances of future antitrust violations through its organizational procedures. Thus, antitrust goals would have been achieved and an unnecessarily harsh imposition of damages would have been avoided.

In the past courts have utilized discretion to adapt the broad prohibitions of the antitrust statutes to the realities of the economy.[144] Use of this judicial discretion, however, is not permitted when antitrust liability has been found because of the mandatory treble damage

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treble damages or the reduction of damages to a single or double amount in private civil antitrust actions has emerged over the years. *See* H.R. 4597, 83d Cong., 1st Sess. (1953); 1955 ATT'Y GENERAL'S NAT'L COMM. TO STUDY THE ANTITRUST LAWS 378 (reprinted 1981) [hereinafter cited as ATT'Y GENERAL'S REPORT]; *see also* Bernard, *The Actions of the Antitrust Plaintiff: Law, Policy and a Modest Proposal*, 16 DUQ. L. REV. 307, 329 n.85 (quoting ABA ANTITRUST SECTION, MONOGRAPH NO. 1, MERGERS AND THE PRIVATE ANTITRUST SUIT: THE PRIVATE ENFORCEMENT OF SECTION VII OF THE CLAYTON ACT POLICY AND LAW 104 (1977) (statement of Prof. Donald Turner)); *cf.* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 317a(1) (1978) (equitable antitrust remedy only for antitrust violations by state and state subdivisions); Areeda, *Antitrust Immunity for 'State Action' After* Lafayette, 95 HARV. L. REV. 435, 455 (1981) ("[A]ntitrust liability does not necessarily call for a damage remedy"); Note, *Antitrust Treble Damages as Applied to Local Government Entities: Does the Punishment Fit the Defendant*, 1980 ARIZ. ST. L.J. 411 (inappropriateness of holding municipalities liable for treble damages). *See generally* K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 81-96 (1976).

[142] *See* ATT'Y GENERAL'S REPORT, *supra* note 141, at 379.

[143] *See id.*

[144] *See supra* note 138 and accompanying text.

provision of the Clayton Act. For a solution to the problem, therefore, we are forced to look to Congress.[145] An inspection of the competing considerations reveals the need to formulate a statutory change so that the antitrust laws can be more fairly and effectively enforced.[146] Had the Court in *ASME v. Hydrolevel* possessed a statutory alternative, it could have formulated a remedy which effectively deterred future antitrust violations without inequitably imposing treble damages.

Catherine A. Carr

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[145] Congress has recognized countervailing factors in certain areas which require special antitrust consideration and accordingly has granted partial or total exemptions from the antitrust laws in these areas. *See* A. NEALE & D. GOYDER, THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA 5 (3d ed. 1980) (exemptions for labor, agriculture, insurance, banking and securities, public utilities, and transport); *see also* L. SULLIVAN, *supra* note 138, §§ 235-239; *cf.* Parker v. Brown, 317 U.S. 341, 35-52 (1943) (judicial recognition of congressional intent to exempt "state action" from purview of antitrust laws). The state action exemption may become increasingly important in light of ASME v. Hydrolevel. Although state governments have been reluctant to become involved in the standard-setting process, ASME v. Hydrolevel may stimulate state governments to engage in the standard-setting process because of their antitrust exemption. For a discussion of the state action doctrine, see Areeda, *supra* note 141.

[146] A suggested amendment to § 4 of the Clayton Act which would effectively balance the competing concerns is:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover in a wilful violation threefold the damages by him sustained, or shall recover in any other violation those damages deemed equitable by the trial judge in addition to the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1976 & Supp. IV 1980) (underscored portion added by author).