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Civil Antitrust Liability Based on Apparent Authority: American Society of Mechanical Egineers v. Hydrolevel Corp.

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Civil Antitrust Liability Based on Apparent Authority: *American Society of Mechanical Engineers v. Hydrolevel Corp.*

To prove a violation of section 1 of the Sherman Act, a plaintiff must demonstrate that a defendant participated in a contract, combination, or conspiracy in restraint of trade.[1] Nonprofit and trade associations indisputably fall within the potential scope of the Sherman Act.[2] In *American Society of Mechanical Engineers v. Hydrolevel Corp.*,[3] the United States Supreme Court held that a nonprofit, standard-setting organization is civilly liable under the antitrust laws for the antitrust violation of its agent committed with apparent authority, "even though the organization never ratified, authorized, or derived any benefit whatsoever from the fraudulent activity of the agent and even though the agent acted solely for his private employer's gain."[4] While the Court had previously applied apparent authority to find a principal liable for the fraud of his agent,[5] it had not done so in an antitrust context.

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1. "Every contract, combination . . . or conspiracy, in restraint of trade . . . is declared to be illegal." 15 U.S.C. § 1 (1976).

2. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961). The Sherman Act applies to "every person." 15 U.S.C. §§ 1, 2 (1976). Because of the "expansive remedial purpose" of the Sherman Act, Pfizer, Inc. v. Government of India, 434 U.S. 308, 313 (1978), it is reasonable that noncompetitive associations should be subject to the antitrust laws in light of the great economic power they wield over competitors. For example, in *Goldfarb* the Supreme Court found that the Sherman Act applied to a state bar association to the extent it was involved in setting minimum fees for legal services. The Court did suggest that under some circumstances it might find a limited immunity if antitrust liability preempted the benefits of the association's public service:

> 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 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 a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

Id. at 788 n.17.

3. 102 S. Ct. 1935 (1982).

4. *Id.* at 1949 (Powell, J., dissenting).

5. Gleason v. Seaboard Air Line Ry., 278 U.S. 349 (1929).

Justice Powell's dissent characterized the majority opinion as imposing "strict liability."[6] Although this term does not appear in the majority opinion, a first reading might suggest that *Hydrolevel* is indeed a case of strict liability. Read in its factual setting, however, it is not a strict liability case. Rather, *Hydrolevel* imposes liability on a principal for the antitrust violations of its agents, committed with apparent authority, only when the principal has breached a duty owed to the injured third party. In this case the breach of duty arose from the principal's failure to supervise and control its agents.

I. THE *Hydrolevel* CASE

The American Society of Mechanical Engineers (ASME), embracing more than 90,000 members, publishes over 400 codes of mechanical engineering standards.[7] Since the government adopts these codes by reference, their influence pervades the industry.[8] ASME's Boiler and Pressure Vessel Code sets standards for "low water fuel cutoffs," which are responsible for shutting off boilers if their water coolant level falls below a prescribed mark.

In 1971, Hydrolevel Corporation introduced a new variety of low water fuel cutoff into the market. McDonnell & Miller, Inc. (M&M), the dominant producer of low water fuel cutoffs, responded quickly to the competition. On behalf of his company, an M&M vice president, John W. James, met covertly with T. R. Hardin, an officer of Hartford Steam Boiler Inspection and Insurance Company (Hartford).[9] Hardin and James, who served respectively as chairman and vice chairman of the ASME subcommittee charged with interpreting the Boiler and Pressure Vessel Code, drafted a letter to their subcommittee discussing the Hydrolevel mechanism's compliance with the Boiler Code. The letter was sent over the signature of an M&M official and was designed to produce a negative appraisal of Hydrolevel's

6. 102 S. Ct. at 1949 (Powell, J., dissenting).

7. 102 S. Ct. at 1938.

8. The number of national standards is surprisingly large. In 1964, nearly 14,000 standards operated nationally, 3,000 requiring annual revision. Wachtel, *Products Standards and Certification Programs*, 13 ANTITRUST BULL. 1, 6 (1968).

9. "Hardin was an Executive Vice President of Hartford Steam Boiler Inspection and Insurance Company. A controlling interest in Hartford was owned by International Telephone and Telegraph Corporation, which acquired M&M within the year." 102 S. Ct. at 1939 n.2.

fuel cutoff.[10] Upon receipt of the letter at ASME, Hardin drafted a response, over the signature of the secretary of the subcommittee, concluding that Hydrolevel's fuel cutoff system failed to meet the Code.[11] Hardin, in effect, had answered his own letter of inquiry.

M&M, in turn, used the letter to discourage Hydrolevel's prospective customers. When Hydrolevel eventually learned of the ASME letter, it demanded that ASME correct the interpretation. On June 9, 1972, ASME replied to Hydrolevel's demand by a letter that "confirmed the intent" of Hardin's interpretation of the Code, although with vague qualifications.[12] Shortly thereafter, the Wall Street Journal published a sympathetic account of Hydrolevel's problems with ASME and M&M and suggested that M&M had used a "marketing ploy" to hurt Hydrolevel.[13]

On August 23, 1975, Hydrolevel brought suit in federal court against ASME, M&M,[14] and Hartford.[15] Before trial, M&M settled with Hydrolevel for $725,000, and Hartford settled for $75,000. At trial, Hydrolevel requested the court to instruct the jury that it should hold ASME liable if its agents were found to have acted within their apparent authority, even if not for ASME's benefit. Instead, the trial judge instructed the jury that ASME was liable for its agents' acts only if "(1) ASME ratified those acts or (2) the agents had acted to advance ASME's interests."[16] He then charged the jury:

> If the officers or agents act[ed] on behalf of interests adverse to the corporation or acted for their own economic benefit or the

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10. *Id.* at 1939.

11. *Id.* at 1939-40. Since the letters were both signed by others, there was no ostensible evidence of impropriety. Hence, a major criticism of ASME was its negligence in permitting Hardin and James to hold positions when this produced a conflict of interest by allowing Hardin to respond "unofficially" to inquiries without a hearing by the entire subcommittee. *Id.* at 1940, 1945.

During this period, a top M&M executive wrote a memo lauding James' ability to "legislate" in favor of M&M products, which was "a major reason for the continued success at M&M." Brief for Respondent at 2-3, *Hydrolevel*, 102 S. Ct. 1935 (1982). In this light, conflict of interest problems are especially apparent.

12. 102 S. Ct. at 1941. A self-investigation by ASME concluded that all ASME officials had acted properly and that James should be commended for his actions. Subsequently, James confessed his role before a Senate subcommittee. *Id.*

13. Wall St. J., July 9, 1974, at 36, col. 1.

14. *See supra* note 9.

15. 102 S. Ct. at 1941.

16. Hydrolevel v. American Soc'y of Mechanical Eng'rs, 635 F.2d 118, 124 (2d Cir. 1980).

> benefit of another person or corporation, and this action was not ratified or adopted by the defendant [ASME], their misconduct cannot be considered that of the corporation with which they are associated.[17]

The jury nevertheless found ASME liable for the acts of its agents.

ASME appealed from the verdict, asserting that the evidence did not support the jury's finding.[18] Rather than review the adequacy of the evidence, the Court of Appeals for the Second Circuit found ASME liable on the apparent authority of its agents, although they did not act for ASME's benefit. Without citing supporting case law, the court reasoned that agency principles applicable to defamation, interference with business relations, misrepresentation, and fraud should also apply to antitrust situations.[19] The court felt that ASME's liability was especially appropriate because ASME had breached a duty to supervise its agents, whom it knew to be laboring under "inherent conflicts of interest."[20] Consequently, the Second Circuit affirmed the jury's verdict of ASME's liability under section 1 of the Sherman Act because "the jury found for Hydrolevel on a charge that was more favorable to the defendant than the law requires."[21]

The United States Supreme Court affirmed the reasoning of the Second Circuit by a narrow majority.[22] The Court held that a nonprofit standard-setting organization is civilly liable under the antitrust laws for its agents' antitrust violations committed with apparent authority, although the actions only benefitted

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17. 102 S. Ct. at 1941.

18. ASME and Hydrolevel both appealed on the measure of damages. The trial judge subtracted from the jury verdict the amounts Hydrolevel recovered from Hartford and M&M, then tripled that figure for a judgment of $7.5 million. Hydrolevel v. American Soc'y of Mechanical Eng'rs, 635 F.2d 118, 124 (2d Cir. 1980). This issue is pending in a cross-petition for certiorari, No. 80-1771, filed April 22, 1981. 102 S. Ct. at 1942 n.4.

19. Hydrolevel v. American Soc'y of Mechanical Eng'rs, 635 F.2d 118, 126 (2d Cir. 1980).

20. *Id.* at 125, 126.

21. *Id.* at 127.

22. The 6-3 decision belies the bare majority supporting the court of appeals' rationale. Chief Justice Warren Burger in his concurring opinion noted that the district court had found that ASME had "ratified or adopted" its agent's actions. Hence, predicating liability on apparent authority, a theory the jury did not consider, was "out of bounds," making the subsequent appellate decisions "dictum not essential to support the result reached." 102 S. Ct. at 1948 n.* (Burger, C.J., concurring).

the agents' private employers.[23] Justice Blackmun based his majority opinion on two principal policy considerations. First, the antitrust laws should apply to standard-setting organizations because they wield great power in the economy, although admittedly they are not competitors. Second, antitrust liability founded on apparent authority will "help to ensure that standard-setting organizations will act with care when they permit their agents to speak for them."[24] The Court rejected a rule that would have imposed liability only if a defendant ratified his agents' acts because it would discourage agent supervision. Like the Second Circuit, the Supreme Court found ASME's failure to exercise care in the supervision of its agents a fitting rationale for ASME's liability for its agents' violations.[25] That the acts do not benefit the principal is irrelevant, reasoned the Court, because the antitrust laws are designed to prevent "repugnant" anticompetitive practices regardless of the intended beneficiary.[26]

Justice Powell's dissent, which Justices White and Rehnquist joined, criticized the Court for creating "an expansive rule of strict liability," unsupported by precedent in either antitrust or agency law, a rule "irrelevant to the achievement of the goals of the antitrust laws."[27] The dissent also reproved the Court for failing to address the complex "intersection of the law of agency and vicarious liability with the law of conspiracy."[28]

II. ANALYSIS

In *Hydrolevel,* the Supreme Court applied the doctrine of apparent authority to hold ASME liable for an antitrust conspiracy of its agents which had not benefitted ASME—even though some benefit to the principal has generally been required to bring an agent's act within the scope of his employment. The Court's holding is supported by legislative intent, by economic policy considerations, and by analysis of "apparent authority." It is also narrowly drawn to impose liability, not on a faultless principal, but only on principals who fail in their duty to control

23. 102 S. Ct. 1935 *passim.*

24. *Id.* at 1948.

25. *See infra* note 49.

26. 102 S. Ct. at 1946.

27. *Id.* at 1949 (Powell, J., dissenting).

28. *Id.* at 1956 n.18 (Powell, J., dissenting). Interestingly enough, except for noting the problem, the dissent also failed to analyze the implications of vicarious liability as a basis of conspiracy.

and supervise their agents.

Applying the common-law principle of apparent authority to antitrust violations is consistent both with the Sherman Act's legislative intent to supplement the antitrust laws with common-law principles and with the Act's purpose of promoting competition. An economic analysis further supports the Court's decision to hold ASME liable for its agents' antitrust violations when the principal, at a small cost, might have prevented its agents' costly antitrust violation. ASME's influence over industry created a duty to ensure against antitcompetitive uses of its quasi-legislative power. Because ASME was at fault in failing to discharge this duty, *Hydrolevel* should not be considered a strict liability case.

A. Legislative Intent

The Supreme Court was acting consistently with the Sherman Act's intent to encourage competition when it created a federal common-law rule of apparent authority in antitrust. The Second Circuit's application of apparent authority to antitrust law had presented an important question to the Supreme Court. That question was whether section 1 of the Sherman Act may be supplemented by common-law agency theories, particularly apparent authority, or whether the antitrust statutory scheme was exclusive, preempting the application of expansive agency principles. During its 1981 Term, the Supreme Court faced a similar issue in *Texas Industries v. Radcliff-Materials.*[29]

The issue in *Texas Industries* was whether to fashion a federal common-law rule of contribution among joint tortfeasors in antitrust. In deciding not to create a federal common-law rule of contribution, the Court was persuaded by two factors. First, the Sherman Act's legislative history clearly indicated that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."[30] Recognizing that there was no common-law right to contribution, the Court perceived the legislative branch as the appropriate forum to create a contribution rule.[31] Second, the decision to formulate such a rule also depended on whether the rule would "advance or im-

29. 451 U.S. 630 (1981).

30. *Id.* at 643 (quoting from National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978)).

31. *Id.* at 647 (citing Diamond v. Chakrabarty, 447 U.S. 303, 317 (1980)).

pair the objectives of the antitrust laws."[32] The Court recognized the "complexity of the issues" and the "vigorous arguments"[33] on either side and left the issue for the legislature to resolve.

In *Hydrolevel,* the Court used a similar two-step anslysis, yet with a different result. First, the Court observed that, unlike the rule of contribution, apparent authority was a well-recognized common-law principle.[34] Second, after noting that treble damage liability would deter antitrust violations and compensate victims,[35] the Supreme Court held that "the apparent authority theory is consistent with the congressional intent [behind the antitrust laws] to encourage competition."[36] Both the Supreme Court and the Second Circuit justified this novel application of apparent authority by analogizing it to the accepted application of agency law to business torts, defamation, and fraud.[37]

The dissent, however, argued that ASME's treble damage liability would not advance antitrust objectives:

> Perhaps ASME will attempt to protect itself by ceasing to respond to inquiries concerning its codes. That hardly would contribute either to antitrust enforcement or to the public welfare. . . .
>
> . . . ASME industry standard-setting can have a significant potential for consumer benefit: for example, its boiler safety information can be expensive if consumers are forced to gain it only by their own experience or by the creation of another bureaucracy. The Court's policy discussion takes no account of this potential cost.[38]

The majority, on the other hand, emphasized the potential misuse of ASME's regulatory powers, rather than the regulatory burden ASME lifts from the government's shoulders:

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32. *Id.* at 635.
33. *Id.* at 638.
34. 102 S. Ct. at 1943.
35. *Id.* at 1947.
36. *Id.* at 1944.
37. *Id.* at 1942; 635 F.2d at 125. The Supreme Court remarked:
> [A] principal is liable for an agent's misrepresentations that cause pecuniary loss to a third party, when the agent acts within his apparent authority. . . . Also, if an agent is guilty of defamation, the principal is liable so long as the agent was apparently authorized to make the defamatory statement. . . . Finally, a principal is responsible if an agent acting with apparent authority tortiously injures the business relations of a third party.

102 S. Ct. at 1942.
38. 102 S. Ct. at 1956 (Powell, J., dissenting).

> ASME can be said to be "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." . . . When it cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace.
>
> . . . .
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> Furthermore, a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity.[39]

Consequently, when ASME assumed its great regulatory responsibility, it also assumed an equivalent duty[40] to police itself against abuses of its authority.

On a more fundamental level, the above passages indicate a disagreement between the majority and dissent as to ASME's ability to prevent abuses of its authority. The dissent labeled the majority's holding as one of strict liability, asserting that ASME could not have protected itself from its agents' conduct.[41] The majority pointed out, however, that in response to the suit filed against them, ASME had implemented a procedure to prevent future abuses of its authority. ASME began publishing the written inquiries it receives on its codes, as well as its replies. This allows ASME to reconsider its interpretations before damage is done because the affected parties may read ASME's interpretations and make timely objections. This procedural change limits the opportunity of agents to use their positions for personal gain.[42]

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39. 102 S. Ct. at 1944-45. On its 100th birthday, ASME commissoned Bruce Sinclair to write A CENTENNIAL HISTORY OF THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, 1880-1980 (1980), which admitted an historical tendency of manufacturers to abuse their employees' positions at ASME. Brief for Respondent at 42, *Hydrolevel*, 102 S. Ct. 1935 (1982). Mr. Sinclair writes: "But the fact that in America a direct connection to industry continued to be an active element in the formulation of standards meant not only that the code was vulnerable to attack on the grounds of self-interest, but also that it was sometimes guilty of the charge." *Id.* at 44 (quoting B. SINCLAIR, A CENTENNIAL HISTORY OF THE AMERICAN SOCIETY OF PROFESSIONAL ENGINEERS).

40. Oral Argument (Respondent) at 20: "[T]wo principles . . . are basic to agency law . . . . Those two principles are duty and responsibility. Those that assume a great responsibility should have a correspondingly great duty . . . ."

41. 102 S. Ct. at 1955 n.17 (Powell, J., dissenting).

42. Inasmuch as an interpretation of a code can be as important as the code itself, the new procedure ASME employs seems geared to meet the procedural due process requirements set out in Silver v. New York Stock Exch., 373 U.S. 341, 361-67 (1963). While *Hydrolevel* does not mandate notice and hearing procedures on interpretations of standards, these procedures nevertheless are effective self-policing measures against agents' improprieties. *See generally* Wachtel, *Products Standards and Certification Programs*, 13 ANTITRUST BULL. 1 (1968); Comment, *Trade Association Exclusionary Prac-*

B. *Economic Policy Considerations*

An economic "efficiency" analysis of vicarious liability supports the Court's holding and suggests the following approach to determine whether a principal should be liable for the acts of its agents.[43] If the cost of monitoring its agents' acts is low, a principal may logically be held vicariously liable for failure to prevent the agents' unauthorized act.[44] For example, the cost to ASME of giving notice of its code interpretations to affected parties, thereby preventing an agent from misusing his authority, seems small in contrast to the millions of dollars in damages Hydrolevel suffered. Of course, the corollary to this theory is that when the principal cannot effectively or reasonably prevent its agents' wrongful acts, it should not be held vicariously liable.[45] Applied to *Hydrolevel,* this analysis supports the Court's imposition of liability and defuses the dissent's strict liability criticism by placing liability within reasonable bounds.

Contrary to the dissent's accusation,[46] the Court did not impose strict liability on ASME,[47] for at least two reasons. First, the Court stated that the facts did not involve a good faith interpretation of an ASME code.[48] Second, and more important, the Court did not describe ASME as a faultless principal, but repeatedly referred to ASME's failure to exercise reasonable

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tices: An Affirmative Role for the Rule of Reason, 66 COLUM. L. REV. 1486, 1504-05, 1508-10 (1966). "As an aid to judicial enforcement . . . on the activities of trade associations, the courts have frequently required these groups to give notice and a hearing to parties affected by the exclusionary practices . . . . The *Silver* opinion apparently establishes similar procedural safeguards as a requirement of the federal antitrust laws." *Id.* at 1508.

43. *See* Note, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency,* 91 YALE L.J. 168 (1981). This note explores in depth the contrast between traditional theories of vicarious liability and a theory of vicarious liability designed to maximize social utility.

44. In contrast, if the principal lacked the ability to monitor the agent's precautionary behavior at all, or without incurring unreasonably high costs, then the activity was agent-monitored or reasonably close to agent-monitored. Because vicarious liability may undermine efficiency in such activities, the efficient legal rule is unclear. Thus, there is some justification for declining to hold the principal liable for the agent's torts.

Id. at 191.

45. *Id.*

46. 102 S. Ct. at 1949 (Powell, J., dissenting).

47. There is strict liability when "neither care nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save defendant." BLACK'S LAW DICTIONARY 1591 (rev. 4th ed. 1968).

48. 102 S. Ct. at 1948.

precautions.[49] The Court viewed ASME as a principal which could have prevented its agents' self-serving abuse of authority by instituting improved supervisory procedures. Thus, the Court imposed liability on the principal for its agents' fraudulent conduct, even though the principal could not have detected the fraud under its old procedure. Conservatively interpreted, the Court's opinion would hold the principal liable for the antitrust violations of its agents acting for their own purposes only if the principal has failed to take adequate precautionary measures. This is not strict liability.[50]

The dissent's suggestion that the Court's holding would create liability even "if an ASME building employee pilfered ASME stationary and supplied it to McDonnell & Miller"[51] is contrary to the limits inherent in the majority's rationale. In the dissent's hypothetical, ASME has not placed the building employee in a high position where ASME must foresee and prevent conflicts of interest and where ASME's authority is easily misused. Indeed, the building employee is not an agent who has apparent authority to act for ASME. Hardin and James, on the other hand, were both high level officials charged with interpreting ASME's codes. Under the facts of *Hydrolevel,* for a principal to be held vicariously liable for his agent's fraud under the Sherman Act, he must have been able to prevent or monitor his agent's actions.

In short, when a principal like ASME has both influence in the industry and a method of preventing an agent's malfeasance, it should be liable in antitrust if it fails to safeguard against abuses of its authority. Such a policy both encourages a principal to take all feasible precautions and provides it with a defense if no safeguards could have prevented its agent's misconduct.

C. Apparent Authority as a Basis for Antitrust Liability

The Court in *Hydrolevel* used apparent authority to hold ASME liable for its agents' conspiracy, although ASME itself

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49. "Since the antitrust violation in this case could not have occurred without ASME's codes and ASME's method of administrating them, it is not unfitting that ASME be liable for the damages arising from that violation." *Id.* at 1947. "By holding ASME liable . . . we help to ensure that [ASME] . . . will act with *care* when they permit their agents to speak for them." *Id.* at 1948 (emphasis added).

50. *See supra* note 47.

51. 102 S. Ct. at 1956 (Powell, J., dissenting).

had not consented to the conspiracy. In applying apparent authority, the Court erased the traditional requirement that, to be imputed to the principal, an agent's act must benefit his principal. Applying apparent authority despite lack of consent and lack of benefit might suggest strict liability: holding the principal liable regardless of fault. However, the Court emphasized that in *Hydrolevel* ASME was liable for having failed to prevent the misuse of its authority.

In *Hydrolevel* ASME was not a conspirator under the Sherman Act. ASME did not commit the antitrust violations through its agents, thereby becoming a conspirator; rather, ASME was held liable for the conspiracy of its agents because the agents were able to clothe themselves, for their own purposes, with their principal's apparent authority. This distinction is important when dealing with a conspiracy. When an agent operates under implied or actual authority, the agent binds the principal. Yet when a third party reasonably relies to his detriment on an agent's apparent authority, it is the third party's reliance which binds the principal, as if the principal had actually consented to the act.

Not recognizing this distinction, the dissent aptly wondered "who conspired with whom."[52] James and Hardin were not conspiring for ASME, which had not consented to the act, but for their private employers, who had consented. Were it otherwise, one person, such as Hardin, who acted for both his private employer and ASME, could create a multiparty conspiracy. In fact, Hartford and M&M were the conspirators, having conspired through their agents, Hardin and James. ASME was held liable only because "it cloak[ed] its subcommittee officials with the authority of its reputation,"[53] permitting the officials to use their apparent authority for their own illegal purposes.

The common law defines apparent authority 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."[54] A principal who looses his agent upon the world should account for his agent's actions executed under the guise of the principal's authority.[55] At the heart of the concept

52. *Id.* at 1956 n.18 (Powell, J., dissenting).
53. *Id.* at 1944.
54. RESTATEMENT (SECOND) OF AGENCY § 8 (1957).
55. F. MECHEM, MECHEM OUTLINES AGENCY § 102 (4th ed. 1952).

of apparent authority is reliance. While traditionally the plaintiff had to show his own reliance, courts now generally require only reliance by *someone,* which reliance redounds to the plaintiff's detriment.[56] In the instant case, Hydrolevel's customers had relied on ASME's letter to Hydrolevel's detriment.[57]

Federal courts have ruled in the past that an agent's antitrust violations or conventional torts can be imputed to his principal only if the agent's acts fall within his "scope of employment."[58] It is the agent's actual or intended benefit to the principal that draws the unauthorized act within the scope of the agent's employment.[59] Clearly, under this rationale for vicarious liability, James' and Hardin's actions were not within their scope of "employment,"[60] because they had no intent to benefit ASME, and ASME in fact received no benefit. Hence, ASME

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56. *See* Sennott v. Rodman & Renshaw, 474 F.2d 32, 38 (7th Cir.), *cert. denied,* 414 U.S. 926 (1973); RESTATEMENT, *supra* note 54, § 265 comment a.

57. Hydrolevel v. American Soc'y of Mechanical Eng'rs, 635 F.2d 118, 123 (2d Cir. 1980).

58. *See* United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3d Cir. 1970), *cert. denied,* 401 U.S. 948 (1971) (antitrust liability of the agent "was motivated at least in part by a desire to serve [his principal], and thus [the agent was] acting in the course of his employment").

In Standard Oil Co. of Tex. v. United States, 307 F.2d 120 (5th Cir. 1962), the court stated that:

> [W]hile benefit is not essential in terms of result, the purpose to benefit the corporation is decisive in terms of equating the agent's action with that of the corporation. For it is an elementary principal of agency that "an act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed." Restatement of the Law of Agency (2d) § 235.

Id. at 128. The court then cited comment a of RESTATEMENT (SECOND) § 235, which reads:

> The rule stated in this Section applies although the servant would be authorized to do the very act done if it were done for the purpose of serving the master, and although outwardly the act appears to be done on the master's account. It is the state of the servant's mind which is material. Its external manifestations are important only as evidence. Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master.

RESTATEMENT (SECOND) OF AGENCY § 235 comment a (1957).

In addition to these two circuits, the Court of Appeals for the Ninth Circuit, in United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), an antitrust case based on an agent's unauthorized acts, wrote that a "purpose to benefit the corporation is necessary to bring the agent's act within the scope of his employment." *Id.* at 1006 n.4.

59. *See supra* note 58.

60. "The word 'employment' means the subject matter as to which the master and servant relation exists." RESTATEMENT (SECOND) OF AGENCY § 228 comment a (1957). The term "employment" encompasses James' and Hardin's apparently volunteer work. 102 S. Ct. at 1939.

would not have been liable under this rule.

Rather than follow this "benefit to the principal" rule which federal appellate courts have adopted,[61] the Supreme Court revived its 1929 decision of *Gleason v. Seaboard Air Line Railway*[62] and applied it to antitrust law. In *Gleason,* the defendant railway company's agent created a scheme to defraud his principal's customers. The principal required the agent to notify customers of the arrival of freight shipments and to receive payment before turning over the freight. The agent in *Gleason* forged a notification form indicating the arrival of a customer's shipment and then pocketed the customer's $10,000 payment.[63] Admitting that "formal logic" might censure the holding,[64] the Supreme Court decided nevertheless to impose liability on the principal for the fraud of the agent, although no benefit accrued to the principal.[65]

While the Court's use of *Gleason* could be interpreted as coverting *Hydrolevel* into a case of strict liability, the *Hydrolevel* facts require a more reasonable interpretation. The Court imposed antitrust liability on ASME not merely to provide another deep pocket for plaintiffs,[66] but "to ensure that standard-setting organizations will act with care when they permit their agents to speak for them."[67] An interpretation of *Hydrolevel* which requires a showing of the principal's failure to prevent its agents' wrongful acts more accurately reflects the Court's concern than would a strict liability interpretation. A strict liability reading of *Hydrolevel* would impose treble damage antitrust liability even when the principal could not possibly have prevented its agent's wrongful act.

Indeed, Justice Blackmun countered the dissent's argument that such organizations cannot prevent these abuses, and therefore should not be liable, by noting "that ASME and other such organizations can react to potential antitrust liability by making their associations less subject to fraudulent manipulation."[68]

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61. *See supra* note 58.

62. 278 U.S. 349 (1929).

63. *Id.* at 352-53.

64. *Id.* at 356. "But few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Id.*

65. *Id.* at 357.

66. 102 S. Ct. at 1946 n.13.

67. *Id.* at 1948.

68. *Id.* at 1946 n.13.

Hence, the Court tacitly recognized that strict liability would make little sense if ASME were unable to prevent future antitrust violations. For this reason, *Hydrolevel* is more accurately interpreted as requiring, as a prerequisite to liability, a showing that the principal could have prevented its agent's acts than as requiring liability regardless of fault.

Hydrolevel does not articulate a precise standard by which a principal can exculpate himself from liability. Yet the facts in *Hydrolevel* suggest one or two possible standards. Both the court of appeals[69] and the Supreme Court[70] impliedly based their decisions on ASME's failure to provide adequate procedural safeguards against James' and Hardin's type of misconduct. The court of appeals wrote:

> In a variety of contexts, trade associations are obligated to take suitable precautions to avoid antitrust violations. . . . [T]here is a corresponding *duty* to be aware of and guard against the temptations thus afforded by inherent conflicts of interest. Absent some internal review procedures, no individual should be empowered to rule dispositively on the fitness of a competitor's product. *When an organization has placed a person in a position to do what Hardin did, without any check or supervision, it must bear the consequences.*[71]

This language does not describe a faultless principal, but a principal who might have escaped liability had it provided for adequate "check or supervision" of its officials. Hence, supplying Hardin and James with unsupervised power constituted ASME's "unintentional participation"[72] in the antitrust violation.

The question is then whether ASME's failure to provide safeguards against misuse of its authority can be characterized as negligent or lacking in good faith. The Supreme Court stated that the facts did not raise the issue of good faith.[73] Yet ASME's failure to discharge its "duty to guard against the misuse of" its influence[74] suggests a negligence standard. Neither the Supreme Court nor the Second Circuit defined the scope of this duty, but ASME probably had a duty both to fashion reasonable stan-

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69. Hydrolevel v. American Soc'y of Mechanical Eng'rs, 635 F.2d 118, 126 (2d Cir. 1980).

70. *See supra* note 49.

71. 635 F.2d at 126 (emphasis added).

72. *Id.* at 131.

73. 102 S. Ct. at 1948.

74. 635 F.2d at 126.

dards that could not be employed to exclude competitors and to make adequate provision for notice, hearings, and review.[75] This duty might be best analyzed as a fiduciary duty arising from the public trust in ASME's quasi-legislative statutes.[76] When ASME breached this duty, it subjected itself to the possibility of liability.

III. CONCLUSION

In *American Society of Mechanical Engineers v. Hydrolevel*, the United States Supreme Court held a nonprofit standard-setting association civilly liable under the Sherman Act for its agents' anticompetitive acts, although the association did not authorize, ratify, or derive any benefit from these acts. The unanswered question[77] posed by *Hydrolevel* is whether an association is to be held strictly liable for its agent's act committed with apparent authority when the principal could not have controlled the agent or prevented the act. This Case Note concludes that *Hydrolevel* is not a case in strict liability and that a principal should be held liable for its agent's act committed with apparent authority only when the principal has breached a duty to control and supervise its agent.

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75. Lane, *Trade and Professional Associations: Ethics and Standards*, 46 ANTITRUST L.J. 653, 654 (1977).

76. *See generally* Rogers & Young, *Public Office as a Public Trust: A Suggestion That Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard*, 63 GEO. L.J. 1025 (1975).

77. The majority was careful to restrict its holding to the *Hydrolevel* facts: "We need not delineate today the outer boundaries of antitrust liability of standard-setting organizations for the actions of their agents committed with apparent authority." 102 S. Ct. at 1948.