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Note

Apparent Authority in Antitrust Law and Ruminations on a New Antitrust Theory: The Implications of *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*

INTRODUCTION

The antitrust liability of principals for the unauthorized and anticompetitive conduct of their agents rests on a seemingly straightforward application of traditional agency theory. The recent Supreme Court decision in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*[1] declared that a principal will be subjected to antitrust liability for the unauthorized conduct of an agent acting within its "apparent authority."[2] Although this "newly-developed"[3] apparent authority standard is easily understood and applied, its appropriateness in antitrust law is questionable. In formulating this standard, the *Hydrolevel* majority placed undue emphasis on the need for a simple and convenient judicial test, without full consideration of the possible implications.

This Note argues that the *Hydrolevel* standard is overly simplistic and inappropriate. As an alternative, the Note articulates a comprehensive and systematic test for determining the antitrust liability of a principal for the unauthorized and anticompetitive conduct of its agents. Section I discusses agency theory in the common law and its applicability to antitrust law. Section II describes how courts have applied these agency principles to antitrust law and discusses the recent changes brought about by the *Hydrolevel* decision. Section III critically analyzes the Supreme Court's injection, in *Hydrolevel*, of an

1. 456 U.S. 556 (1982).
2. *Id.* at 565-66. The Court defined 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." *Id.* at 566 n.5 (quoting RESTATEMENT (SECOND) OF AGENCY § 8 (1957)).
3. *Hydrolevel*, 456 U.S. at 578 (Powell, J., joined by White and Rehnquist, J.J., dissenting).

apparent authority standard of liability into the antitrust law. Section IV proposes a systematic approach for determining the antitrust liability of a principal for the unauthorized conduct of its agent.

I. GENERAL PRINCIPLES: AGENCY THEORY IN THE COMMON LAW AND ITS APPLICABILITY TO THE ANTITRUST LAW

A. PRINCIPLES OF LAW CONCERNING THE AUTHORITY OF AN AGENT

Under agency theory, a principal is bound by the conduct of its agent that the principal actually authorized.[4] Actual authority refers to the agent's power to act within the scope of the principal's manifested consent—the power to carry out whatever the principal has expressly or impliedly engaged the agent to accomplish.[5] Thus, an agent's actual authority may stem from the principal's express instructions to the agent, or it may be implied from words or other conduct between the principal and the agent.[6]

In addition, a principal is bound by the conduct of its agent undertaken pursuant to apparent authority from the principal.[7] Apparent authority results when a principal manifests to a third party that another party is the principal's agent.[8] Apparent authority is created as to a third party by written or spoken words or by any other conduct of the principal that reasonably causes the third party to believe that the principal consents to the agent's conduct.[9] Therefore, to bind a principal under apparent authority, the third party dealing with the agent must prove that the principal created the appearance of authority.[10]

Although it is now well established that a principal is liable

4. *See* RESTATEMENT (SECOND) OF AGENCY § 140 (1957). For example, the authority to "sell my automobile" is express as to the conveyance of title, but a question remains whether there is implied authority to receive a check in payment, or to deliver the car without receiving the price. *See id.* § 7 comment c.

5. *See id.* § 7 & comments.

6. *See id. See also id.* § 26 (actual authority may be impliedly conferred where the principal's conduct causes the agent to believe that it is acting on the principal's account); *id.* § 34 (authorization interpreted in light of custom and usage).

7. *Id.* § 140(b).

8. *See id.* § 8.

9. *See* Grummitt v. Sturgeon Bay Winter Sports Club, 197 F. Supp. 455, 458-59 (E.D. Wis. 1961), *aff'd,* 304 F.2d 98 (7th Cir. 1962); Reynolds Offset Co. v. Summer, 5 N.J. Super. 542, 558-59, 156 A.2d 737, 746 (1959); RESTATEMENT (SECOND) OF AGENCY § 8 (1957).

10. *See* RESTATEMENT (SECOND) OF AGENCY § 8 comment a (1957). *See also*

for the torts of an agent acting with apparent authority,[11] courts struggled originally with situations where the agent took advantage of its position to perpetrate a fraud for its own benefit in violation of its duty to the principal. In such instances, although the agent acted outside the scope of its actual authority,[12] it may have acted in the apparent course of employment, thereby deceiving a third party. Thus, courts were forced to determine which of two innocent parties, the principal or the defrauded third party, should suffer the loss. Originally, the Supreme Court, in *Friedlander v. Texas & Pacific Railway*,[13] held that an employer was not liable for the fraud of its agent where the employer derived no benefit from the agent's conduct.[14] The Court, however, later overruled *Friedlander* in *Gleason v. Seaboard Air Line Railway*.[15] In *Gleason*, an employee sought to enrich himself by defrauding a customer of the employer through a forged bill of lading. The Court held that a principal is liable for the fraudulent representations of an agent acting within the scope of its apparent authority even though the agent acts with a secret purpose to procure a benefit without the knowledge or consent of the principal.[16] The Court concluded that such a rule was necessary to ensure reasonable protection for third parties who deal with agents.[17]

Nelson v. New Hampshire Fire Ins. Co., 163 F.2d 586, 589 (9th Cir. 1959); *Grummitt*, 197 F. Supp. at 458-59; RESTATEMENT (SECOND) OF AGENCY § 27 (1957).

11. *See generally* W. SEAVEY, LAW OF AGENCY §§ 91, 92 (1964) (principal liable for torts made possible by agent's apparent authority as well as for agent's apparently authorized misrepresentations).

12. The RESTATEMENT (SECOND) OF AGENCY § 235 (1957) provides: "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." The comments to § 235 indicate that intent is the crucial factor. *See id.* comment a. *See also id.* § 282(1); *infra* note 18 and accompanying text.

13. 130 U.S. 416 (1889).

14. *Id.* at 426. In *Friedlander*, a railroad company's station agent issued bills of lading for fictitious goods. *Id.* at 423.

15. 278 U.S. 349 (1929).

16. *Id.* at 352-53, 357.

17. *Id.* at 356-57. The Court's conclusion is further supported by the third party's reliance interest in such situations:

> A person relying upon the appearance of agency knows that the apparent agent is not authorized to act except for the benefit of the principal. This is something, however, which he normally cannot ascertain and something, therefore, for which it is rational to require the principal . . . to bear the risk. . . . It is . . . for the ultimate interest of persons employing agents, as well as for the benefit of the public, that persons dealing with agents should be able to rely upon apparently true statements by agents who are purporting to act and are apparently acting in the interests of the principal.

RESTATEMENT (SECOND) OF AGENCY § 262 comment a (1957).

Moreover, holding the principal liable may serve to deter similar future

Despite *Gleason*'s express holding that a principal is liable for the harm resulting from an agent's unauthorized conduct, in particular situations courts have refused to impute an agent's knowledge to a principal, indicating that the application of apparent authority is not an absolute rule.[18]

As *Gleason* illustrates, courts have often used the term "apparent authority" to describe any situation in which a principal is bound by the unauthorized conduct of its agent. Consistent with section 8A of the *Restatement (Second) of Agency*,[19] however, some courts now recognize the "inherent" power of an agent to subject its principal to liability even absent express, implied, or apparent authority, or elements of estoppel.[20] Under the inherent power theory, a principal is bound by an agent's conduct merely by virtue of the agency relation-

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conduct by encouraging the principal to exercise greater care in selecting agents. *See* American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 577-78 (1982).

18. *See, e.g.,* Duplex Envelope Co. v. Denominational Envelope Co., 80 F.2d 179 (4th Cir. 1935) (defendant not charged with knowledge that agent was using defendant's premises to infringe plaintiff's patent where agent was acting for another company). *See also* W. SEAVEY, *supra* note 11, § 102(G). Professor Seavey states that "[t]he clearest case for denying the principal's liability is that in which there has been collusion between the other party to a transaction and the agent." *Id.* Seavey argues that the test should be "whether the defendant has violated a duty to the other party by the conduct of any agent for whom he was responsible." *Id.*

19. An agent's "[i]nherent agency power . . . is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent." RESTATEMENT (SECOND) OF AGENCY § 8A (1957). *See* W. SEAVEY, *supra* note 11, § 8(F) (citing cases). *See also* Watteau v. Fenwick, [1893] 1 Q.B. 346, 348-49.

20. Authority by estoppel is actually not an agency theory. Rather, it is an equitable device employed to prevent a principal who has misled a third party from profiting thereby. The doctrine is invoked when a principal intentionally or negligently causes or allows a third party to believe that the principal's agent has authority to do something that the agent is not actually authorized to do, and the third party detrimentally relies on the resulting misperception. *See, e.g.,* Hoddeson v. Koos Bros., 47 N.J. Super. 224, 233, 135 A.2d 702, 707 (1957) (defendant liable for actions of imposter posing as a salesperson in defendant's furniture store); RESTATEMENT (SECOND) OF AGENCY § 8B (1957).

Authority by estoppel resembles apparent authority to the extent that it is based on a principal's manifestations to, or withholding of information from, third parties. Under apparent authority theory, however, both the principal and the third party are contractually bound. In contrast, under the doctrine of authority by estoppel only the losses of the third party are protected. The doctrine creates no reciprocal rights in the principal. *See id.* § 8B comment b.

In most cases this distinction is academic because courts tend to treat cases of apparent authority and estoppel interchangeably. *See* W. SEAVEY, *supra* note 11, § 8(E). This is particularly true where a principal makes actual representations to third parties. For a case involving only estoppel, see Metropolitan Club, Inc. v. Hopper, McGaw & Co., 153 Md. 666, 139 A. 554 (1927).

ship[21] because an agent is deemed to possess certain inherent powers totally independent of any particular grant of authority from the principal.[22] Inherent powers, which include all powers that a third party would reasonably suppose the agent to have, are recognized only when necessary to protect third parties with whom the agent has dealt.[23] Thus, as between an innocent principal and an innocent third party, inherent agency power theory requires that the loss be borne by the principal, who allowed the agent to assume authority, even if the agent flagrantly abused that authority.[24] One commentator described this rule as follows:

> [T]he equities of the situation . . . seem to favor the contracting third party if [that party] knows of, or has reason to know of, no irregularity in the [agent's] authority. Although the basic elements of apparent authority may be absent, the [principal] should nonetheless bear the responsibility for placing the particular [agent] in a position where he could purport to represent the [principal].[25]

Courts rarely use the term inherent agency power.[26] Rather, they improperly use apparent authority theory to analyze fact situations that should have been considered under an inherent agency power theory.[27]

B. THE APPLICABILITY OF COMMON LAW AGENCY THEORY TO THE ANTITRUST LAW

The general objective of the antitrust law is the maintenance of competition.[28] As the language of the Sherman Act

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21. *See* RESTATEMENT (SECOND) OF AGENCY § 140(c) (1957); *supra* note 19.
22. RESTATEMENT (SECOND) OF AGENCY § 8A (1957).
23. *See id.*
24. *See id.* comment a.
25. Note, *Inherent Power as a Basis of a Corporate Officer's Authority to Contract,* 57 COLUM. L. REV. 868, 886 (1957).
26. Seavey found only two cases in which courts used inherent authority theory. W. SEAVEY, *supra* note 11, § 8(F) (citing Cote Bros. v. Granite Lake Realty Corp., 105 N.H. 111, 193 A.2d 884 (1963); Holman-Baker Co. v. Pre-Design, Inc., 104 N.H. 116, 179 A.2d 454 (1962)). Seavey also noted discussions of inherent authority in the following law review articles: Mearns, *Vicarious Liability for Agency Contracts,* 48 VA. L. REV. 50 (1962); Note, *supra* note 25.
27. *See* RESTATEMENT (SECOND) OF AGENCY § 8A comment b (1957). In Kidd v. Thomas Edison, Inc., 239 F. 405 (S.D.N.Y.), *aff'd,* 242 F. 923 (2d Cir. 1917), Judge Learned Hand noted that the term apparent authority may be at least somewhat misleading in cases in which the party dealing with the agent relies solely on the agent's statement that the agent's conduct is authorized, when in fact the conduct is outside the scope of employment. *Id.* at 407.
28. The first three sections of the Sherman Act contain the substantive provisions of the antitrust law. The legislative history and case law construing the Act indicate that maintenance of competition is the primary goal of the antitrust law. *See, e.g.,* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 338 (1963); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); Standard Oil Co.

reveals,[29] Congress designed the Act to encompass all conduct in restraint of trade.[30] The Act sets forth a broad framework for the achievement of a competitive marketplace and does not purport to specify the conduct that falls within its reach.[31] Although Congress could have enacted a more comprehensive

v. United States, 221 U.S. 1, 56-58 (1911). *See also* H. THORELLI, THE FEDERAL ANTITRUST POLICY 12 (1954); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 783-84 (1965).

29. 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 to be declared illegal." 15 U.S.C. § 1 (1982). Section 2 of the Sherman Act provides sanctions for three distinct offenses—monopolization, attempted monopolization, and combination or conspiracy to monopolize any part of the interstate or foreign commerce of the United States. 15 U.S.C. § 2 (1982).

30. In 1914, Congress enacted the Clayton Act to remedy certain perceived weaknesses in the existing law. *See* Clayton Act, ch. 323, 38 Stat. 730, 730 (1914) (current version at 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (1982)) (Clayton Act adopted "to supplement existing laws against unlawful restraints and monopolies and for other purposes"). *See generally* S. REP. No. 597, 63d Cong., 2d Sess. 8 (1914) ("while the Sherman law is the foundation stone of our [antitrust] policy . . . additional legislation is necessary"); 1 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 2.03(1) (1983) (discussion of factors contributing to view that new legislation was necessary).

As finally enacted, the Clayton Act supplemented the Sherman Act by: (1) expanding its venue provisions by adding the words "or has an agent," Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15 (1982)); (2) allowing final judgments of antitrust violations in government cases to serve as prima facie evidence of violations in subsequent private actions arising from the same set of facts, *id.* § 5, 38 Stat. at 731 (current version at 15 U.S.C. § 16 (1982)); and (3) providing for tolling of the statute of limitations in private actions during the pendency of government actions, *id.* (current version at 15 U.S.C. § 16(i) (1982)). The Clayton Act also enumerated additional unlawful acts and practices, *e.g.*, *id.* § 7, 38 Stat. at 731-32 (current version at 15 U.S.C. § 18 (1982)), and provided for injunctive relief, *e.g.*, *id.* § 16, 38 Stat. at 737 (current version at 15 U.S.C. § 26 (1982)). Moreover, the Act clarified Congress's intent that nonprofit labor and agricultural organizations engaged in lawful activities not be subject to the unlawful combination and conspiracy provisions of the antitrust law. *See id.* § 6, 38 Stat. at 731 (current version at 15 U.S.C. § 17 (1982)).

The Clayton Act provision for treble damages superseded a provision of the Sherman Act to the same effect. *Id.* § 4, 38 Stat. at 731 (current version at 15 U.S.C. § 15 (1982)). The language of § 4 of the Clayton Act was drawn directly from § 7 of the Sherman Act which provided:

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890), *repealed by* Act of July 7, 1955, ch. 283, § 3, 69 Stat. 282, 283.

31. The Sherman Act does not proscribe specific conduct. Rather, it is framed in terms of the general harm that Congress sought to prevent. *See supra* note 29. In interpreting the Act, the Supreme Court has compared its

and detailed statute, codification of the general rules and principles of the common law presented a more practical solution. Indeed, much of the Sherman Act's language derives directly from common law.[32] Courts generally recognize that section 1 of the Sherman Act, because it is essentially an exposition of common law doctrines of restraint of trade, must be interpreted in light of the common law.[33]

The primary rule of construction in many Sherman Act cases, the rule of reason,[34] is a direct outgrowth of common law

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"generality and adaptability . . . to that found to be desirable in constitutional provisions." Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933).

32. For example, the terms "restraint of trade," "attempt to monopolize," and "monopolization" derive, at least in their rudimentary meaning, from pre-Sherman Act, Anglo-American common law. *See* Standard Oil Co. v. United States, 221 U.S. 1, 50-59 (1911). *See also* United States v. American Tobacco Co., 221 U.S. 106, 179-80 (1911).

33. *See, e.g.,* United States v. Greater Kansas City Chapter Nat'l Elec. Contractors Ass'n, 82 F. Supp. 147, 149 (W.D. Mo. 1949). Senator Sherman noted that his bill was worded broadly in order to give courts wide latitude to interpret the law so as to avert the evils that Congress sought to prevent. 21 CONG. REC. 2460 (1890).

The flexibility inherent in this "common law" approach has enabled courts to apply the Sherman Act to a broad spectrum of business conduct, including schemes not envisioned by the sponsors of the Act. Although the Sherman Act was adopted primarily in response to the pernicious activities of the classic trusts, such as the Standard Oil trust, the tobacco trust, and the sugar trust, nothing in the legislative history indicates that Congress intended that the Act be applied solely to such trusts. The Sherman Act subsequently has been applied to a number of business schemes and organizations, including: trade associations, *see, e.g.,* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); medical regulatory associations, *see, e.g.,* Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982); and learned professions, *see, e.g.,* National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

34. The rule of reason, rooted in the common law, was first applied to Sherman Act analysis in Standard Oil Co. v. United States, 221 U.S. 1 (1911). In *Standard Oil*, the Court decided that the Act, although seemingly absolute on its face, proscribed only unreasonable restraints of trade. *Id.* at 63-68. The Court elaborated on the rule in Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). *See infra* note 36. For illustrations of the Court's current approach, see National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); United States v. Citizens & S. Nat'l Bank, 422 U.S. 86 (1975). Under a rule of reason inquiry, courts do not focus on the reasonableness of a defendant's intentions, the prices fixed, or the promotion of competition in particular circumstances. Rather, courts consider a defendant's acts in light of surrounding circumstances in order to determine whether the acts are "unreasonably restrictive of competitive conditions." *National Soc'y of Professional Eng'rs,* 435 U.S. at 690. For a general discussion of the rule of reason, see Adams, *The "Rule of Reason": Workable Competition or Workable Monopoly?,* 63 YALE L.J. 348, 348-61 (1954); Bork, *supra* note 28; Handler, *The Judicial Architects of the Rule of Reason,* 5 A.B.A. SEC. ANTITRUST 21 (1957).

As a corollary to the rule of reason, certain practices are deemed per se unreasonable when judicial experience has shown them to be inherently anticompetitive and without redeeming virtues. Under the per se rule, courts do not principles and policies.[35] Under the rule of reason, all relevant factors in a particular case are scrutinized in order to weigh the relative significance of the competition suppressed against any offsetting procompetitive consequences or purposes.[36] No fixed formula has emerged because slightly differing circumstances may justify opposite conclusions as to whether a certain activity constitutes a restraint of trade.[37] Thus, the common law

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inquire into the business purpose or the effect of the practice. In Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), Justice Black offered the following justification for this truncated inquiry:

> This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Id. at 5.

A variety of practices have been labeled as per se violations. *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (market divisions); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (group boycotts); International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangements); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (horizontal price fixing).

35. *See* A. STICKELLS, LEGAL CONTROL OF BUSINESS PRACTICES 12-13 (1965).

36. The classic formulation of the rule of reason is:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (Brandeis, J.).

The Supreme Court has stated that it is a broad rule of proof, not a narrow theory of agency, that is appropriate under the rule of reason approach: "[T]he character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." United States v. Patten, 226 U.S. 525, 544 (1913). *See also* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962); American Tobacco Co. v. United States, 147 F.2d 93, 106 (6th Cir. 1944), *aff'd*, 328 U.S. 781 (1946).

37. Courts apply the rule of reason to industry standardization programs of trade associations for claims other than outright collusion and price fixing. *See, e.g.*, Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925) (rule of reason applied to standardization association). *See generally* Stocking, *The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities*, 21 U. CHI. L. REV. 527 (1954) (thorough review of the leading cases).

For an example of divergent results produced under the rule of reason in connection with trade associations, compare Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925) (trade association not engaged in unlawful recontributes flexibility to the interpretation of the Sherman Act.[38]

Agency principles were not well developed when the Sherman Act was enacted. The dissenters in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* noted that "under the laws of agency as known to the Congress that passed the Sherman Act it was far from clear . . . that a principal could be held liable for the deliberate torts of his agent."[39] According to an 1889 treatise: "While . . . it is well settled that the principal is liable for the negligent act of his agent, committed in the course of his employment, it has been held in many cases, that he is not liable for the agent's willful or malicious act."[40] Indeed, the *Hydrolevel* majority read *Friedlander v.*

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straint of commerce) with American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (trade association engaged in unlawful restraint of commerce).

38. Congress intended to allow federal courts to develop governing principles of law, in the common law tradition, with regard to the substantive violations of the Sherman Act. In United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956), the Supreme Court declared:

> Judicial construction of antitrust legislation has generally been left unchanged by Congress. This is true of the Rule of Reason. While it is fair to say that the Rule is imprecise, its application in Sherman Act litigation, as directed against enhancement of price or throttling of competition, has given a workable content to antitrust legislation. . . . It was judicially declared a proper interpretation of the Sherman Act in 1911 . . . .

Id. at 386-87 (footnote omitted).

In Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Supreme Court noted that the common law regarding restraints of trade was dominated by

> the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations [and this fear] led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions.

Id. at 58. *See also* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-46 (1980).

39. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 587 (1982).

40. F. MECHEM, A TREATISE ON THE LAW OF AGENCY § 740 (1889) (footnote omitted). Mechem elaborated on the rule as follows:

> The tendency of modern cases, however, is to attach less importance to the intention of the agent and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be that the principal is responsible for the wilful or malicious acts of his agent, if they are done in the course of his employment and within the scope of his authority; but that the principal is not liable for such acts, unless previously expressly authorized, or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own.

Texas & Pacific Railway,[41] decided in 1889, as holding that "an employer [is] not liable for the fraud of his agent, when the employer could derive no benefit from the agent's fraud."[42] Thus, it is evident that an apparent authority rule of liability is inconsistent with the principles of agency law in effect at the time Congress passed the Sherman Act[43] and that Congress could not have specifically intended to incorporate such a rule into the antitrust law. Any application of apparent or inherent authority principles to the antitrust law necessarily involves the incorporation of common law principles developed since the passage of the Sherman Act.

II. APPARENT AUTHORITY IN ANTITRUST LAW

A. APPLICATION OF APPARENT AUTHORITY BY THE FEDERAL COURTS: THE EARLY CASES—A RULE OF BENEFIT AND/OR RATIFICATION

Federal courts in a wide variety of non-antitrust contexts generally accept a rule favoring imposition of liability upon a principal for the intentional misdeeds of an agent acting with apparent authority.[44] Despite the difficulty in justifying the application of such agency principles in Sherman Act analysis, a number of federal courts have implicitly addressed the issue of whether apparent authority is an appropriate standard under the antitrust law. No court, however, has expressly held the ap-

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Id. (footnotes omitted).

41. 130 U.S. 416 (1889).

42. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 566, 567 (1982). *See also id.* at 588 (Powell, J., joined by White and Rehnquist, J.J., dissenting).

43. Further, as the *Hydrolevel* dissenters noted,

> no principle of agency law was more firmly established in 1890—or now for that matter—than 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. Indeed, this Court went further, holding more generally that 'punitive or vindictive damages, or smart money, [are] not to be allowed as against the principal, unless the principal participated in the wrongful act of the agent.'

Id. at 588-89 (quoting Lake Shore & Mich. S. Ry. v. Prentice, 147 U.S. 101, 114 (1893)).

44. *See Hydrolevel*, 456 U.S. at 568 (citing Dark v. United States, 641 F.2d 805 (9th Cir. 1981) (federal tax liability); National Acceptance Co. v. Coal Producers Ass'n, 604 F.2d 540 (7th Cir. 1979) (common law fraud); Holloway v. Howerdd, 536 F.2d 690 (6th Cir. 1976) (federal securities fraud); United States v. Sanchez, 521 F.2d 244 (5th Cir. 1975) (bail bond fraud), *cert. denied*, 429 U.S. 817 (1976); Gilmore v. Constitution Life Ins. Co., 502 F.2d 1344 (10th Cir. 1974) (common law fraud); Kerbs v. Fall River Indus., Inc., 502 F.2d 731 (10th Cir. 1974) (federal securities fraud)).

parent authority theory of liability applicable in an antitrust context.

The Supreme Court considered this issue in *United Mine Workers v. Coronado Coal Co.*,[45] in which the Coronado Coal Company sued a labor union under the Sherman Act alleging concerted activity having an anticompetitive effect on the company's business. Although *Coronado* is cited primarily for the proposition that an unincorporated labor union is subject to suit in federal court,[46] the Court also considered "whether the [union] was shown by any substantial evidence to have initiated, participated in or ratified the interference with plaintiffs' business."[47] In its first hearing of the case, *Coronado I* , the Court concluded that, absent actual authority or ratification, a union is not responsible under the antitrust law for the tortious conduct of its members:

> A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* of the corporation. But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against an unincorporated organization like this. Here it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency which the constitutions of the two bodies settle conclusively. If the International body had interfered or if it had assumed liability by ratification, different questions would have arisen.[48]

After a retrial, at which the plaintiffs introduced further evidence showing that the president of the union had directly encouraged the acts complained of, the case again came before the Supreme Court. In *Coronado II*,[49] the Court remarked that although such evidence might have sufficed to impose personal liability on the labor officials involved, it was not sufficient to impose liability on the union. The Court explicitly held that "it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association."[50]

Lower federal courts have also considered the issue of

45. 259 U.S. 344 (1922), *aff'd in part, rev'd in part on reh'g,* 268 U.S. 295 (1924).

46. In *Coronado I*, the Court held that unincorporated associations are subject to suit under the antitrust laws but that the evidence of the UMW's participation in the conspiracy and the wrongs done was not sufficient to go to the jury. *See id.* at 392-96.

47. *Id.* at 393.

48. *Id.* at 395.

49. Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925).

50. *Id.* at 304.

whether apparent authority is the proper standard for determining the liability of principals under the antitrust law. The issue was first addressed by the federal District Court for the District of Maryland in *Arthur v. Kraft-Phenix Cheese Corp.*[51] The court dismissed an antitrust action brought against a corporate defendant on the ground that the complaint failed to demonstrate the corporation's liability. The court found that an employee's conduct that was not intended to benefit the corporation could not be attributed to the corporation. Discussing the applicability of apparent authority in an antitrust context, the court stated:

> If [the defendant's agents] had improper personal motives and combined to carry them out through the medium of the defendant corporation to the prejudice of the plaintiff, it is conceivable that a common law tort suit might lie against them; but it is difficult to see how that would constitute either restraint of trade or monopoly of trade on the part of the defendant corporation.[52]

In *Truck Drivers' Local 421, International Brotherhood of Teamsters v. United States*,[53] the Court of Appeals for the Eighth Circuit considered the propriety of an apparent authority instruction in a case involving an alleged conspiracy to maintain retail milk prices in violation of the Sherman Act. Relying on *Coronado II*, the court held that in order to render a union criminally liable under the Sherman Act for the activities of its members, "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."[54]

In *Continental Baking Co. v. United States*,[55] however, the Court of Appeals for the Sixth Circuit held a corporation legally bound by the unauthorized conduct and statements of its agents done or made within the scope of their express or apparent authority.[56] Notwithstanding *Coronado II*, the court held that a corporation is liable for the criminal conduct of an officer or agent of the corporation acting pursuant to broad express authority who holds a position of responsibility if the conduct is related to the corporation's business and to the per-

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51. 26 F. Supp. 824 (D. Md. 1937).
52. *Id.* at 830.
53. 128 F.2d 227 (8th Cir. 1942).
54. *Id.* at 235. The Eighth Circuit further stated that it was necessary to show clearly " 'that what was done was done by [the union's] agents in accordance with their fundamental agreement of association.' " *Id.* at 236 (quoting Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 304 (1925)).
55. 281 F.2d 137 (6th Cir. 1960).
56. *Id.* at 150.

formance of the authorized duties of the officer or agent. Although expressly approving a broad apparent authority instruction, the court arguably sought to limit the scope of the instruction by requiring that a corporation must "answer for [an agent's] violations of law which inure to the corporation's benefit."[57]

Similarly, in *United States v. American Radiator & Standard Sanitary Corp.*,[58] the Third Circuit concluded that a corporate defendant was criminally liable under federal antitrust law for an employee's criminal conduct because the employee was "motivated at least in part by a desire to serve [the corporation]."[59]

Finally, the Ninth Circuit, in *United States v. Hilton Hotels Corp.*,[60] addressed this issue in a criminal antitrust action brought under section 1 of the Sherman Act. *Hilton Hotels* involved a business association, comprised in part of hotel operators and hotel supply companies, which was formed to attract conventions to Portland, Oregon. The association was financed by contributions from its members. To aid in collecting these contributions, hotel members of the association gave preferential treatment to suppliers who contributed to the fund. The Hilton Hotel's managing officer testified that he specifically told his purchasing agent not to participate in the boycott of noncontributing suppliers.[61] The purchasing agent nevertheless violated these instructions "because of anger and personal pique toward the individual representing the supplier."[62] The court held, *inter alia*, that since the hotel's purchasing agent was authorized to buy all of the hotel's supplies and exercised complete authority as to their source, the hotel was criminally liable under the Sherman Act for the purchasing agent's conduct. The court further held that where an agent intends to benefit the principal, the principal may be liable even if it did

57. *Id.* The *Continental* court also stated: "There is evidence in the record which would justify a determination that their superiors, in fact, adopted and ratified the acts of the depot managers. If this were so the corporation would be responsible for such acts, even if they originated in excess of the employee's authority." *Id.* at 149.

58. 433 F.2d 174 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).

59. *Id.* at 204. *See also* United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir.) ("the actions of the [defendant's] agents were taken for the purpose of benefiting the corporation"), *cert. denied*, 437 U.S. 903 (1978).

60. 467 F.2d 1000 (9th Cir. 1972), *cert. denied sub nom.*, 409 U.S. 1125 (1973).

61. *Id.* at 1004.

62. *Id.*

not actually benefit from its agent's conduct. The court observed that

> [w]ith such important public interests at stake, it is reasonable to assume that Congress intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.[63]

The court, however, went on to limit its holding by noting that although such an expansive rule of liability is justified in a case involving a commercial enterprise, because the Sherman Act is "primarily concerned with the activities of business entities,"[64] a corporation would not be liable if the agent had intended to benefit only itself or another because "[a] purpose to benefit the corporation is necessary to bring the agent's acts within the scope of its employment."[65] In sum, the court stated:

> Violations of the Sherman Act are a likely consequence of the pressure to maximize profits that is commonly imposed by corporate owners upon managing agents and, in turn, upon lesser employees. . . .
>
> [I]dentification of the particular agents responsible for a Sherman Act violation is especially difficult, and their conviction and punishment is peculiarly ineffective as a deterrent. At the same time, conviction and punishment of the business entity itself is likely to be both appropriate and effective.[66]

B. A New Rule of Liability Under the Antitrust Law: *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*

The Supreme Court, in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,[67] examined the appropriateness of an apparent authority standard to resolve the issue of conspiratorial intent under the Sherman Act. In *Hydrolevel*, a

63. *Id.* at 1005 (citing United States v. A & P Trucking Co., 358 U.S. 121, 126 (1958); United States v. Armour & Co., 168 F.2d 342, 344 (3d Cir. 1948); United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir.), *cert. denied*, 328 U.S. 869 (1946); Regan v. Kroger Grocery & Baking Co., 386 Ill. 284, 303-05, 54 N.E.2d 210, 219-20 (1944); Note, *Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 Geo. L.J. 547, 558 (1962) [hereinafter cited as Note, *Corporate Criminal Liability*]; Note, *Criminal Liability of Corporations for Acts of Their Agents*, 60 Harv. L. Rev. 283, 285-86, 289 (1946) [hereinafter cited as Note, *Criminal Liability of Corporations*]).

64. *Hilton Hotels*, 467 F.2d at 1004. The court buttressed this assertion by noting that "[t]he statute is directed against 'restraint upon commercial competition in the marketing of goods or services.'" *Id.* at 1004-05 (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940)).

65. *Hilton Hotels*, 467 F.2d at 1006 n.4.

66. *Id.* at 1006.

67. 456 U.S. 556 (1982).

conflict of interest arose when two volunteer members of the American Society of Mechanical Engineers (ASME)[68] were required to interpret boiler standards that affected Hydrolevel, a competitor of the volunteers' employers. The volunteers intentionally used their positions in the ASME standards program[69] to drive Hydrolevel out of the boiler fuel cut-off valve business, thereby ensuring that their employers would remain dominant in that market.[70] The Supreme Court affirmed the Second Cir-

68. ASME is a private, nonprofit, technical and scientific society established for the purpose of enhancing the use of mechanical engineering in the public interest. It draws its more than 100,000 members from industry, academic, government, insurer, and consumer groups. The organization conducts educational and research programs, publishes a national magazine and a number of research journals devoted to mechanical engineering, and, most important to the *Hydrolevel* controversy, issues and renders interpretations on over 400 ASME codes and standards designed to improve public safety and promote uniformity. The codes and standards are written, revised, and interpreted by over 10,000 ASME volunteers. The codes, although merely advisory, have a powerful economic influence, many being incorporated by reference in federal regulations and state and local laws. *See id.* at 559.

69. William Curran describes the pervasive impact of trade standards as follows:

> Trade product standards are an area of our economy familiar to few consumers. Yet, as is often the case with such backwaters of corporate activity, trade standards have an enormous impact on our lives. Some 20,000 trade standards at least partly determine the safety, availability, and price of products ranging from household gas stoves to nuclear reactors. For consumers, trade product standards determine such things as the length of shoelaces; width of auto tires; ingredients of house paint; specifications of lawn mowers; sizes of door frames; and design of child car seats.

Curran, *Industrial Standards, Antitrust, and the Logic of Public Action: An Historical Search for a Rational Public Policy,* 17 DUQ. L. REV. 717, 717 n.4 (1978).

70. McDonnell & Miller (M & M), for decades the dominant producer of low-water boiler fuel cut-off valves, sent a letter to ASME inquiring whether a low-water fuel cut-off valve with a time delay, which was similar to Hydrolevel's product, met the requirements of ¶HG-605 of section IV of ASME's Boiler and Pressure Vessel (BPV) Code. "Volunteers" T.R. Hardin and John W. James, chairperson and vice chairperson, respectively, of ASME's section IV subcommittee, cooperated in drafting the M & M letter, which was designed to elicit a negative response. At the time, M & M employed James as vice president in charge of research; Hardin was an executive vice president of Hartford Steam Boiler Inspection and Insurance Company, the country's leading underwriter of boiler insurance. In accordance with ASME's standard procedure, Hardin drafted ASME's response. The secretary of the BPV committee, W. Bradford Hoyt, adopted and signed this "unofficial" response and sent it to M & M on ASME stationery.

The ASME response began with an analysis of the purpose of the BPV Code language at issue and concluded that under the circumstances described in M & M's inquiry, "there would be no positive assurance that the boiler water level would not fall to a dangerous point during a time delay period." *Hydrolevel,* 446 U.S. at 562. M & M effectively used this interpretation to stifle the competitive threat posed by Hydrolevel.

Nine months later, in response to a complaint by Hydrolevel, ASME issued cuit's civil antitrust liability judgment,[71] agreeing that conspiratorial intent could be attributed to ASME from the unauthorized and collusive exclusionary interpretations of the two volunteers, because the volunteers were agents acting under apparent authority. The Court imputed the agents' intent to ASME even though the agents were motivated solely by private interests. The Court expressly refused to adopt the district court's view[72] that ASME could be held liable only if it had ratified its agents' conduct or if the agents had acted in pursuit

a new communication expressly countering Hardin's false statements and flatly asserting that the Code was not intended "to prohibit the use . . . of time delays." *Id.* at 563. Despite this retraction, Hydrolevel's product continued to meet substantial market resistance.

This series of events formed the basis of Hydrolevel's antitrust action. The action was originally commenced against three defendants, including ASME, alleging conspiracy to restrain trade and to monopolize in violation of § 1 and § 2 of the Sherman Act. *See supra* note 29.

Prior to trial, Hydrolevel settled with M & M and Hartford Steam Boiler Inspection and Insurance Company for $725,000 and $75,000, respectively. *See* Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc., 635 F.2d 118, 124 (2d Cir. 1981), *aff'd,* 456 U.S. 556 (1982).

71. *Hydrolevel,* 456 U.S. at 578. Before the Second Circuit, the parties disputed the sufficiency of evidence to support a verdict based on the district court's instruction. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc., 635 F.2d 118, 125 (2d Cir. 1981), *aff'd,* 456 U.S. 556 (1982). The Second Circuit, without addressing this issue, found that because the district court had delivered "a charge that was more favorable to the defendant than the law requires," *id.* at 127, ASME could be held liable if its agents acted within the scope of their apparent authority. *Id.* at 124, 127. *See infra* note 73.

72. The majority explicitly found that the district court's instruction was inconsistent with the purposes of the antitrust law. The Court reasoned that a ratification rule "would actually enhance the likelihood that the Society's reputation would be used for anticompetitive ends." *Hydrolevel,* 456 U.S. at 573. Similarly, the Court rejected an intent to benefit requirement noting that organizations such as ASME should be encouraged to eliminate all anticompetitive practices, "especially [the conduct of agents] who use their positions in ASME solely for their own benefit or the benefit of their employers." *Id.* at 574. Moreover, the Court argued that such a requirement would effectively insulate ASME from liability to the extent that it remained ignorant of its agents' conduct. *Id.* at 573.

The Court also summarily rejected two additional arguments advanced by ASME to avoid liability. First, the majority held that case law indicating a hesitancy on the part of courts to impose punitive damages under traditional agency law is inapposite in instances where a special statute providing for treble damages exists. *Id.* at 575-76 (citing RESTATEMENT (SECOND) OF AGENCY § 217 comment c (1957)).

Second, the Court concluded that ASME's status as a nonprofit organization did not insulate it from liability since "it is beyond debate that nonprofit organizations can be held liable under the antitrust laws." *Hydrolevel,* 456 U.S. at 576. Commentators generally agree with this view. *See generally* Lane, *Trade and Professional Associations: Ethics and Standards,* 46 ANTITRUST L.J. 653 (1977) (discussing activity of trade associations in developing product or ethical standards); Note, *Antitrust and Non-Profit Entities,* 94 HARV. L. REV. 802 (1981) (suggesting a framework for application of antitrust law to nonprofit or-of ASME's interests,[73] even though the jury found ASME liable under this standard.[74] Instead, the Supreme Court held that a principal "may be held liable [under the antitrust law] for the acts of [its] agents 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."[75]

The *Hydrolevel* majority[76] reasoned that its new standard was proper since the application of general agency principles to the antitrust law was not inconsistent with congressional intent that the Sherman Act foster competition. To overcome the dearth of authority under the antitrust law for holding a principal liable under apparent authority theory,[77] the majority relied exclusively on the general agency principle that "principals are liable when their agents act with apparent authority."[78] Justice Blackmun, writing for the majority, found that in order to promote business expediency and to protect the integrity of ASME's codes, liability must attach under an apparent author-

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ganizations). The *Hydrolevel* dissent also accepted this view. *See Hydrolevel,* 456 U.S. at 580.

73. Hydrolevel requested that the trial court instruct the jury that ASME could be held liable under the antitrust law for its agent's conduct if the agents had acted within the scope of their apparent authority. The district court, however, rejected this approach and instead, at ASME's suggestion, charged the jury that ASME could be held liable only if it had ratified its agent's conduct or if the agents had acted in pursuit of ASME's interests. The jury returned a verdict for Hydrolevel in the amount of $3.3 million. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc., 635 F.2d 118, 124 (2d Cir. 1981), *aff'd,* 456 U.S. 556 (1982).

The Court of Appeals for the Second Circuit affirmed the judgment on liability, but concluded that the district court's instructions did not accurately reflect agency and antitrust law. The Second Circuit concluded that ASME should be held liable if its agents acted within the scope of their apparent authority. The court remanded the case after finding that the district court miscalculated Hydrolevel's damages. *Id.* at 128. The district court opinion by Judge Weinstein is unpublished. The case came before the Supreme Court on a writ of certiorari.

74. *Hydrolevel,* 456 U.S. at 573.

75. *Id.* at 579 (Powell, J., joined by White and Rehnquist, J.J., dissenting). After finding that ASME had violated the Sherman Act under its new rule of liability, the Court proceeded to assess treble damages. *See supra* note 30.

76. Justice Blackmun delivered the opinion of the Court, in which Justices Brennan, Marshall, Stevens, and O'Connor joined. Chief Justice Burger filed an opinion concurring in the judgment.

Justice Powell, joined by Justices White and Rehnquist, dissented, strongly criticizing the majority's "unprecedented theory of antitrust liability," *Hydrolevel,* 456 U.S. at 578, disputing the majority's authorities, and criticizing their reasoning. *See infra* notes 84, 86, 92, 93, 96, 109.

77. *See Hydrolevel,* 456 U.S. at 570 n.7.

78. *Id.* at 565-66.

ity theory.[79] Noting that in the past the Court had refused to constrict antitrust rights of action by resort to common law barriers,[80] and that Congress intended that " 'the private action will be an ever-present threat' to deter antitrust violations,"[81] Justice Blackmun found no inconsistency between apparent authority theory and the intent behind the antitrust law of encouraging competition. Justice Blackmun reasoned that a rule imposing liability most faithfully adhered to the congressional intent of fostering competition[82] because ASME's interpretations of its standards might " 'result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country,' as well as entire segments of an industry."[83]

The Court expressly declined to limit the boundaries of the antitrust liability of an organization for conduct of an agent acting under apparent authority. The Court concluded its opinion by stating: "We thus make it less likely that competitive challengers like Hydrolevel will be hindered by agents of organizations like ASME in the future."[84]

III. AN ANALYSIS OF *HYDROLEVEL*: THE APPROPRIATENESS OF APPARENT AUTHORITY IN ANTITRUST LAW

The *Hydrolevel* decision exemplifies the inappropriateness of the apparent authority standard for measuring a principal's

79. *Id.* at 567. The Court noted that the apparent authority theory was well established in the federal system in a wide variety of areas. *See* cases cited *supra* note 44. The Court further asserted that "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." *Hydrolevel*, 456 U.S. at 568 (quoting Gleason v. Seaboard Air Line Ry., 278 U.S. 349, 356 (1929)).

80. *Hydrolevel*, 456 U.S. at 569.

81. *Id.* (quoting Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968)).

82. *Hydrolevel*, 456 U.S. at 572-73.

83. *Id.* at 570 (quoting H.R. REP. No. 1981, 90th Cong., 2d Sess. 75 (1968)). *But see infra* note 86. The Court buttressed this assertion by illustrating the great power wielded by ASME and the great potential for anticompetitive activity arising from the influence of ASME's codes and standards. *Hydrolevel*, 456 U.S. at 571. Specifically, the Court stated that holding ASME liable would promote competition because "[o]nly ASME can take systematic steps to make [anticompetitive activity] on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps." *Id.* at 572.

84. *Hydrolevel*, 456 U.S. at 578. The dissent condemned the Court for imposing treble damage liability without regard for the potential costs, and for failing to delineate the limits of its decision. *See id.* at 593-94.

antitrust liability for its agent's unauthorized conduct. The Court's expansive rule of liability is unwarranted in light of the nature of standard-setting organizations[85] and the public benefits these organizations provide.[86] Although ASME was prop-

85. The procedure for responding to requests for interpretation, clarification, or guidance concerning the technical requirements or language of a standard must be distinguished from the procedure for certifying that a specific product complies with the relevant standards. The Second Circuit failed to comprehend this distinction, declaring: "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." Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, Inc., 635 F.2d 118, 126 (2d Cir. 1981), *aff'd*, 456 U.S. 556 (1982). Although the Supreme Court apparently was cognizant of this distinction, the majority seemingly overestimated ASME's power to affect the destinies of businesses or to frustrate competition. *See supra* text accompanying note 83. A formal certification process is normally handled by an independent body, such as a testing laboratory, rather than by the body responsible for the development of standards. The certification process allows manufacturers to attest that their products satisfy the applicable standards. For an overview of the certification process, see Howe & Badger, *The Antitrust Challenge to Non-Profit Certification Organizations: Conflicts of Interest and a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, 60 WASH. U.L.Q. 357, 362-74 (1982). It would be illogical for officials of the related companies using boiler fuel cut-off valves to contend that they lacked knowledge of this distinction. Most of these officials would understand that the "mischievous" interpretation resulted from a request for guidance rather than from a request for certification that Hydrolevel's valves complied with ASME's standards. The impact of ASME's interpretation should have been tempered in light of this important distinction between regulation and technical advice. Although recognition of this distinction does not implicate the Court's findings regarding the anticompetitive effects of ASME's conduct, it does place in question the Court's perception that an expansive rule of liability was necessary to control such a powerful organization. *See Hydrolevel*, 456 U.S. at 570.

86. Subjecting standard-setting organizations to an increased risk of antitrust treble damages liability raises a number of serious public policy issues. Organizations such as ASME provide numerous economic benefits for the public which the *Hydrolevel* majority failed to consider. Such programs facilitate market entry by: expediting the process of consumer acceptance of new products; reducing consumer prices by promotion of production cost efficiencies; increasing quality control; maximizing well-informed purchasing decisions; promoting product interchangeability; serving as a channel for spreading product innovation; deterring frivolous product differentiation; maximizing competition; and providing an opportunity and a role for the effective expression of public interest. For a detailed discussion of how such programs promote these ends as well as others, see Howe & Badger, *supra* note 85, at 376-81.

Subjecting standard-setting organizations to treble damages liability is inappropriate because it will have a chilling effect on the beneficial activities enumerated above. Moreover, in holding ASME liable the Court apparently ignored the purpose of the antitrust law—to prevent businesses from engaging in anticompetitive practices. *See* United States v. Hilton Hotel Corp., 467 F.2d 1000, 1004 (9th Cir. 1972), *cert. denied sub nom.*, 409 U.S. 1125 (1973). *See also supra* text accompanying notes 60-66. Although the effect of the *Hydrolevel* majority's rule may be minimal, under the loosely defined concept of apparent authority, nonprofit organizations will potentially be subject to innumerable anerly held accountable in *Hydrolevel*,[87] because it effectively

titrust suits. Under the Court's new rule, standard-setting organizations may even be susceptible to suits by industries attempting to rid themselves of the burdens imposed by these organizations. The commitment of time and resources necessary to install additional procedures and to litigate claims of anticompetitive practices will undoubtedly affect the activities of these organizations. *See, e.g.,* Brief *Amicus Curiae* of the Institute of Building Sciences in Support of the Petition for Certiorari at 7-8, American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (twenty-two amicus briefs filed by other standard-setting organizations also made this point). The liability standard adopted by the Court requires standard-setting organizations to take such additional measures by effectively making them insurers of all the acts of their volunteer committee members. Budgetary and organizational constraints, however, preclude the kind of pervasive supervision necessary to minimize the risk of antitrust liability. Furthermore, it is unlikely that additional review procedures, no matter how well conceived, can effectively combat the situation where volunteers actively conspire to deceive an organization to the benefit of their employer. *See Hydrolevel,* 456 U.S. at 591-92 n.17 (Powell, J., joined by White and Rehnquist, J.J., dissenting). Thus, by imposing a significantly greater antitrust risk, the Court undermines the usefulness of standard-setting organizations. Concomitantly, the Court discourages participation in such organizations because a more stringent standard of liability increases the likelihood that participants will be drawn into antitrust conspiracies.

Although the *Hydrolevel* majority adequately described the position of the *Restatement (Second) of Agency* with respect to the application of agency principles when treble damages are at issue under a federal statute, *see supra* note 72, the *Hydrolevel* facts illustrate the necessity of an exemption from or limitation to these principles.

In the event of a total retreat from the field of standard setting by private organizations, government assumption of these tasks is not a promising prospect. The government's ability to attract a comparable number of persons of the same level of competence is questionable. Even if the government could attract such employees, the cost to society would be significantly increased. Government participation in the development of standards promises additional "red tape," and consequently, additional cost to industry, and ultimately to consumers. This result appears anomalous in light of the current trend toward reducing the impact of regulation on industry.

87. Requiring organizations such as ASME to account for the conduct of their agents will induce greater care by principals to prevent misconduct by agents occupying especially sensitive or responsible positions. At the very least, the possibility of civil liability will have a prophylactic effect since such organizations will be compelled to take systematic steps to guarantee the propriety of their agents' conduct. In this respect, it is difficult to refute the Court's assertion that imposing liability on organizations such as ASME will benefit the public by promoting business expediency and by giving reasonable protection to third parties dealing with agents. *See* Howe & Badger, *supra* note 85, at 388-90 (describing internal safeguards that may be implemented by standard-setting or certification organizations). As the *Hydrolevel* majority noted, ASME was in the best position to protect against future misinterpretations of its codes. *Hydrolevel,* 456 U.S. at 576. Indeed, the Court observed that ASME had already initiated new procedures to protect against future antitrust liability. *Id.* at 576-77 n.15. More sophisticated control mechanisms, however, are not talismanic. Although pervasive review procedures may prevent mistakes made in good faith on behalf of an organization, no safeguards can completely protect against fraud or disloyalty. For example, in *Hydrolevel*, absent either credible grounds to suspect that the original M & M request was contrived, or

ratified its agents' conduct,[88] the Court could have accomplished this result[89] by employing a much narrower holding.[90] With a narrower holding the Court could have achieved a result consistent with general agency principles and furthered antitrust enforcement while avoiding the horrors the majority perceived in such a rule.[91]

By approving an apparent authority criterion, the *Hydrolevel* Court adopted an exceptional standard that has no logical or practical application to the antitrust law. The main shortcoming is that such an apparent authority/vicarious liability standard creates a strict liability standard of conspiratorial intent under the antitrust law.[92] Such an approach is clearly improper.[93] Imposing liability for unintentional participation in an antitrust conspiracy is inconsistent with accepted principles of antitrust law. Courts in civil and criminal antitrust actions consistently have held that in order to establish a conspiracy the evidence must permit an inference that the alleged conspir-

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knowledge of the complicity of the ASME subcommittee, no set of procedural safeguards would have prevented the conspirators' deceptive scheme.

88. *See infra* notes 144-46 and accompanying text.

89. The Court's conclusion on the issue of liability is particularly appropriate in the context of standard-setting organizations. Such organizations are rife with opportunities for anticompetitive activities since potential conflicts of interests are an innate characteristic of organizations that draw their volunteers from the industries that they regulate. *See* Howe & Badger, *supra* note 85, at 373. It is apparent that less-than-altruistic "volunteers" could attempt to improperly use such an organization and its reputation as a means to protect or advance the economic interests of their employers. Thus, a rule imposing liability is commendable. In the context of both general business organizations and standard-setting organizations, principals must be encouraged to monitor and to control the "power" their agents possess. A rule imposing treble damages liability based upon negligence, however, seems to subvert this motivation. *See supra* note 86.

90. *See infra* notes 112-36 and accompanying text. *See also supra* note 84.

91. *See infra* notes 125-36 and accompanying text.

92. The distinction between strict and vicarious liability is critical. Strict liability requires proof that the defendant engaged in the necessary acts or omissions without regard to the defendant's *mens rea*. Vicarious liability, in contrast, requires proof of the defendant's *mens rea*, without regard to whether the defendant personally engaged in the necessary acts or omissions.

In light of this distinction, it is evident that the *Hydrolevel* Court applied a per se standard of strict liability to ASME. *See supra* note 72. This approach is inconsistent with the long-established principle that standard-setting activities are to be scrutinized under the more permissive rule of reason standard. *See supra* note 37.

The *Hydrolevel* minority argued that the expansive rule of "strict liability" proclaimed by the Court 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 irrelevant to the achievement of the goals of the antitrust laws." *Hydrolevel*, 456 U.S. at 579.

93. *See Hydrolevel*, 456 U.S. at 584-89.

ators had "a unity of purpose or a common design and understanding, or a meeting of the minds."[94] Although the volunteers in *Hydrolevel* acted solely for the benefit of their employers and against the interest of ASME, the adoption of an apparent authority standard compelled the Court to find conspiratorial intent on the part of ASME. In addition to subverting accepted tenets of antitrust law, the Court invites advancements in the law of antitrust conspiracy that may stifle fair combinations that do not restrain trade—a result that is antithetical to the objectives of the antitrust law.[95]

The apparent authority theory is also inconsistent with the purposes of civil liability under the antitrust law, which extend well beyond the mere compensation of victims, as demonstrated by the Clayton Act's provision for treble damages. Courts have repeatedly recognized three additional purposes served by the treble damages provision: (1) to halt existing violations by encouraging private enforcement; (2) to punish past violations; and (3) to deter future violations.[96] Because civil

94. Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980) (quoting American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)). The Supreme Court has expressly held that intent is a necessary element of a criminal antitrust violation. United States v. United States Gypsum Co., 438 U.S. 422, 435 (1978). It is essential that a defendant's state of mind or intent be conclusively established "by evidence and inferences drawn therefrom." *Id.* Thus, the Court has previously been unwilling to construe the Sherman Act as mandating a regime of strict liablility criminal offenses. The *Gypsum* Court, however, went on to state that "a civil violation can be established by proof of either an unlawful purpose or an anticompetitive effect." *Id.* at 436 n.13 (citing United States v. Container Corp. of Am., 393 U.S. 333 (1969)). The Court, however, emphasized the limited nature of this principle: "In a conspiracy, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. *Our discussion here focuses only on the second type of intent.*" *Id.* at 443 n.20 (emphasis added) (citation omitted). Indeed, *Gypsum* clearly involved a naked agreement. Similarly, *Container Corp.* involved an express agreement among competitors to exchange information on prices. *See* United States v. Container Corp. of Am., 393 U.S. 333 (1969). *Hydrolevel*, in contrast, involved the sufficiency of evidence of intent in the context of a *conspiracy*. Thus, *Gypsum* provides no support for a conclusion that participation in an antitrust conspiracy can be based exclusively on the unauthorized, disloyal conduct of agents who intend to benefit only themselves or a third party. *See* Wirtz, *Purpose and Effect in Sherman Act Conspiracies,* 57 WASH. L. REV. 1, 45 (1981). *See also* Note, *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 1000 n.611 (1958) (courts fail to distinguish between civil and criminal cases in discussing liability for antitrust conspiracy).

95. For example, the apparent authority standard threatens the existence of standard-setting organizations. *See supra* notes 85-86 and accompanying text. The rule of reason, however, permits reasonable combinations in restraint of trade. *See supra* notes 33-36 and accompanying text.

96. *Hydrolevel,* 456 U.S. at 575. The *Hydrolevel* dissent noted that "[t]he

antitrust actions serve essentially the same purposes as criminal actions, civil actions have the same intent requirement.[97] A civil antitrust violation involves more than a normal civil tort action; it is clearly inappropriate to use an apparent authority theory in civil antitrust actions. Agency doctrines were developed solely to determine which party bears the loss resulting from an agent's fraud, and concomitantly, to compensate the victim.[98]

Furthermore, the *Hydrolevel* decision is impractical. The Court failed to address the question of how an organization can ever avoid a finding of conspiratorial intent based on an agent's unauthorized conduct. The decision injects uncertainty into the management of a business organization, for no guidance is given except the vague mandate to provide appropriate safeguards.[99] Also, in light of the threat of a treble damages award in civil antitrust actions, application of the *Hydrolevel* approach to an organization that has merely been negligent in failing to stop a renegade agent's unauthorized conduct creates a substantial danger of overdeterrence.[100] This can only be considered a tragic and confusing development for all business organizations.

After erroneously concluding that apparent authority the-

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very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." *Id.* at 583 (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981)).

97. *See supra* note 94.

98. *See supra* notes 4-27 and accompanying text. Moreover, punitive damages normally are not predicated on an apparent authority holding. Even in the antitrust context, which the *Restatement (Second) of Agency* treats as an exception, *see supra* note 72 and accompanying text, courts previously used apparent authority as a basis for treble damages only when they found benefit or ratification. *See supra* notes 45-66 and accompanying text. Because benefit or ratification is no longer a required element of apparent authority in civil antitrust actions, however, the continued vitality of the *Restatement* view is questionable in this context.

99. *See Hydrolevel*, 456 U.S. at 572.

100. There is no right to contribution among antitrust wrongdoers. In Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981), the Court concluded that Congress neither expressly nor implicitly intended to create a right to contribution and that the federal courts were not empowered to fashion such a federal common law rule. Specifically, the Court stated:

> The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers. The absence of any reference to contribution in the legislative history or of any possibility that Congress was concerned with softening the blow on joint wrongdoers in this setting makes examination of other factors unnecessary.

Id. at 639-40 (citations omitted). *See also Hydrolevel*, 456 U.S. at 593 n.19 (Powell, J., joined by White and Rehnquist, J.J., dissenting) (nonprofit organizations cannot deduct treble-damages liability as business expense).

ory is appropriate in an antitrust context, the Court compounded its error by misapplying the theory. Regardless of the propriety of applying apparent authority principles to antitrust law,[101] the ASME volunteers in *Hydrolevel* acted in an unauthorized manner,[102] thus precluding liability based on a proper application of apparent authority doctrine.[103] The requisite conduct whereby a principal creates apparent authority is noticeably absent without a requirement of ratification by the principal at or near the time of the unauthorized conduct.[104] The facts presented in *Hydrolevel* were more conducive to analysis under an inherent agency power theory.[105] Under such an analysis, ASME would be required to answer for the conduct of its volunteers because that conduct fell within the powers inherent in ASME's grant of authority.[106] By predicating its new rule on an improper foundation, the Court adds disorder to confusion. Even if the inherent agency power theory had been applied, however, the question persists whether treble damages are appropriate, that is, whether such liability is consistent with the rationale behind an inherent agency power doctrine.[107]

Moreover, regardless of the propriety of the Court's new rule, the decision to develop it in the factual context presented in *Hydrolevel* was unfortunate. Subsequent courts may easily avoid this rule, in an attempt to escape the assessment of treble damages, by noting that the jury originally found ASME liable on a narrow benefit/ratification theory. As Chief Justice Burger's concurrence implies, future courts may regard as dictum the opinions of the court of appeals and the Supreme Court.[108]

Finally, the majority's failure to discuss decisions that ap-

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101. *See supra* notes 39-44 and accompanying text.

102. *See supra* note 89 and accompanying text.

103. *See supra* notes 7-10 and accompanying text.

104. *Id.*

105. *See supra* notes 19-27 and accompanying text. Whether liability would be appropriate under such an analysis, however, is questionable. *See infra* notes 123-28 and accompanying text.

106. *See infra* notes 123-28 and accompanying text.

107. *See infra* notes 123-28, 144-47, and accompanying text.

108. Chief Justice Burger advocated affirmation based upon the district court's theory of liability. *See supra* note 72 and accompanying text. Burger noted that

> the Court of Appeals did not rest on the narrow ratification theory underlying the District Court judgment, but instead reached out to decide that petitioner is liable for the acts of its members if those acts are found to be within their apparent authority: the jury never found liability on that theory and the Court of Appeals went 'out of bounds.' I

pear to reject antitrust liability based on "apparent authority" is troublesome.[109] In a footnote, the majority disingenuously stated that "a fair reading of those cases . . . reveals that they did not directly discuss the merits of an apparent authority theory of antitrust liability."[110] Such cursory treatment, however, was unwarranted and of questionable validity.[111] In a decision announcing a far-reaching new theory of antitrust liability, a thorough discussion of those cases purporting to consider the appropriateness of apparent authority in an antitrust context is essential to the integrity of the Court's decision. At the very least, such a discussion would better define the circumstances in which the new rule should be applied. The following proposal is designed to answer many of the questions remaining after *Hydrolevel* and to thus inject certainty and reason into the determination of a principal's liability under the antitrust law for the unauthorized conduct of an agent.

IV. AN ALTERNATIVE TO AN APPARENT AUTHORITY STANDARD IN ANTITRUST LAW

The Supreme Court, in *Hydrolevel*, overlooked many alter-

> regard that aspect of the Court of Appeals' opinion today as dictum not essential to support the result reached.

Hydrolevel, 456 U.S. at 578-79 n.*.

109. Justice Powell's dissent directed attention to the majority's failure to point to any antitrust case in which a court had held the apparent authority theory of liability applicable, or in which a principal had been subject to treble-damages liability as a result of the conduct of an agent acting without any intention of benefiting its principal. *Hydrolevel*, 456 U.S. at 581. Powell found this to be a major flaw, because the Court had, on previous occasions, refused to impose antitrust liability in the absence of clear evidence showing ratification or actual authority. *Id.* (citing Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925); United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922)). Powell also noted that in the context of commercial enterprises, "the Courts of Appeals that have considered the matter appear to reject antitrust liability upon mere apparent authority." *Id.* at 581-82 (citing United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1006 (9th Cir. 1972), *cert. denied sub nom.*, 409 U.S. 1125 (1973); United States v. American Radiator & Sanitary Corp., 433 F.2d 174, 204 (3d Cir. 1970), *cert. denied*, 401 U.S. 948 (1971)).

110. *Hydrolevel*, 456 U.S. at 570 n.7.

111. The majority implied that Truck Drivers' Local 421, Int'l Bhd. of Teamsters v. United States, 128 F.2d 227 (8th Cir. 1942), addressed the merits of the application of apparent authority theory in antitrust law. *Hydrolevel*, 456 U.S. at 570 n.7. The majority, however, rejected the minority's interpretation of *Hilton Hotels*, *Continental Baking*, *American Radiator*, and *Cadillac Overall Supply*, asserting that a "fair reading" of these cases revealed that an apparent authority theory of antitrust liability had not been passed upon. *See supra* notes 51-64 and accompanying text.

native, narrow holdings,[112] choosing instead to proclaim an expansive rule of liability that is inappropriate in antitrust law. This Note recommends a possible modification in the standard for determining a principal's liability for an agent's unauthorized and anticompetitive conduct. This alternative is more practical and more compatible with accepted tenets of antitrust law than the apparent authority approach espoused in *Hydrolevel*.[113] The proposal is not a radical innovation; rather, it is a coherent application of existing theories of liability. The three-pronged test set out below achieves a flexible and rational approach and results in just determinations while avoiding the broad rule of liability established in *Hydrolevel*.

The three-pronged test involves a sequence of questions; each question must be answered in the negative for the principal to avoid liability. The questions may be summarized as follows: (1) Did the agent have inherent authority?; (2) Did the principal benefit from or ratify the agent's conduct?; and (3) Was the principal negligent in controlling the agent's conduct?

A. PRELIMINARY CONSIDERATIONS

Two preliminary considerations must be addressed in each case before applying the proposed test. These considerations involve situational variations that require modification or limitation of the test.

The first consideration involves the distinction between civil and criminal actions. Although the proposed test is primarily intended to be applied in civil antitrust suits, it is easily adaptable to criminal actions. In adapting the test, however, three principles of vicarious criminal liability need to be taken into account.[114] The first is the penalty to be assessed. To the extent that vicarious liability is justified under the antitrust law, it should not be used to bring about the type of moral condemnation inherent in a sentence of imprisonment.[115] Second,

112. *Hydrolevel*, 456 U.S. at 573.

113. *See supra* notes 28-38 and accompanying text.

114. A basic tenet of Anglo-American criminal justice is that criminal sanctions are inappropriate absent personal fault on the part of the accused. The continued vitality of this fundamental restraint on the use of criminal sanctions is threatened by a rule that uniformly imposes vicarious liability on a principal for all the criminal conduct of its agents. *See generally* Note, *Corporate Criminal Liability*, *supra* note 63 (discussing criminal liability of corporations for conduct of their agents); Note, *Criminal Liability of Corporations*, *supra* note 63 (same).

115. On the other hand, imposition of a fine is consistent with the rationale behind vicarious criminal liability. Vicarious liability is imposed because of the

vicarious criminal liability should be limited to situations where the agent who performs or participates in the criminal activity is sufficiently high in the principal's organizational hierarchy to make it reasonable to assume that the agent's conduct reflects the policy of the principal.[116] Finally, as is universally accepted and required in cases of vicarious corporate criminal liability,[117] "the criminal [conduct must be] directly related to the performance of the duties which the agent . . . has the broad authority to perform."[118] In addition, the conduct must be committed with the "intention to perform it as a part of or incident to a service on account of which [the agent] is employed."[119] Criminal liability under this test is not predicated on the principal receiving an actual benefit from the agent's criminal conduct.[120] Acts undertaken solely to advance the agent's own interests or the interests of parties other than the employer, however, should not subject a principal to criminal liability.[121]

The second preliminary consideration involves the agent's actual authority to engage in the conduct in question. Although this consideration may appear superfluous, it is important to point out that the proposed test is applicable only when the agent acts without actual authority. In the presence of actual authority, liability should attach as a result of the direct agency relationship.[122]

B. THE THREE-PRONGED TEST

The three-pronged test's first component, generically entitled "inherent authority," is an approach foreshadowed by the

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nature and inherent danger of certain business activities and the difficulties of establishing actual fault in the operation of such businesses. A fine, unlike imprisonment, is a proper penalty for a business enterprise. *See generally* Sayre, *Criminal Responsibility for the Acts of Another,* 43 HARV. L. REV. 689 (1930) (discussing vicarious criminal liability).

116. *See, e.g.,* People v. Canadian Fur Trappers' Corp., 248 N.Y. 159, 161 N.E. 455 (1928); Note, *Corporate Criminal Liability, supra* note 63 (discussing cases); Note, *Criminal Liability of Corporations, supra* note 63 (same).

117. MODEL PENAL CODE § 2.07(1) (Proposed Official Draft 1962).

118. Continental Baking Co. v. United States, 281 F.2d 137, 149 (6th Cir. 1960).

119. RESTATEMENT (SECOND) OF AGENCY § 235 (1957).

120. *See, e.g.,* United States v. Empire Packing Co., 174 F.2d 16, 20 (7th Cir.), *cert. denied,* 337 U.S. 959 (1949); Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir.), *cert. denied,* 326 U.S. 734 (1945).

121. *See, e.g.,* Standard Oil Co. v. United States, 307 F.2d 120, 128 (5th Cir. 1962).

122. *See* RESTATEMENT (SECOND) OF AGENCY § 140 (1957).

Sixth Circuit in *Continental Baking Co. v. United States*.[123] In *Continental Baking*, the court analyzed several criminal cases in which corporations were held responsible for the conduct of their officers—authorized and unauthorized—and found a "common denominator."[124] Each of the cases shared three attributes: (1) the officer or agent of the corporation had broad express authority; (2) the officer or agent had committed a criminal act related to the corporate business; and (3) the criminal act was related to the performance of duties that the officer or agent had broad authority to perform.[125] The court concluded that a corporation that employs a person with broad authority commensurate with responsibility cannot contend that the person was authorized to act only legally.[126] Borrowing from this principle, the inherent authority standard imposes civil liability upon principals for the illegal conduct of "high managerial agents" related to the principal's business even without the principal's knowledge, ratification, or benefit.

The extent of such liability must be circumscribed by the nature of the agent's position and the extent of actual authority the position entails. In this regard, the following definition of high managerial agent should provide guidance: A high managerial agent is any agent of a principal having duties of such responsibility that the agent's conduct may be fairly assumed to represent the policy of the corporation or principal.[127] This definition includes, but is not limited to, corporate officers.[128] The definition, however, is not as broad as it appears. In defining high managerial agents, courts should look to the rationale for imposing liability on principals for the conduct of such agents; a high managerial agent's responsibilities are so broad that it would be extremely difficult for third parties dealing with such agents to discern their true authority.

If the answer to the first prong is negative, courts should determine whether liability is justified under the second prong—benefit/ratification. This prong derives from antitrust cases suggesting that an organization is liable for the unauthor-

123. 281 F.2d 137 (6th Cir. 1960). *See supra* notes 55-57 and accompanying text.

124. *Continental Baking Co.*, 281 F.2d at 149.

125. *Id.*

126. *Id.* at 150.

127. *Cf.* MODEL PENAL CODE § 2.07(1)(c) (Proposed Official Draft 1962) (corporation liable for offense committed by "high managerial agent acting in behalf of the corporation within the scope of his office or employment").

128. For example, the president, vice president, treasurer, and secretary would be considered high managerial agents, but this list is not exclusive.

ized conduct of an agent if it ratified the agent's conduct or if the agent's conduct was in pursuit of the organization's interest.[129] Case law supports imposition of a rebuttable presumption of benefit/ratification,[130] but the existence of factors such as due diligence in the maintenance of safeguards or net financial detriment to the organization should be held sufficient to overcome the presumption. The benefit/ratification standard comports with the common notion of conspiratorial intent under the Sherman Act[131] and has worked well in practice.[132] Moreover, it prevents imposition of treble damages where an agent has circumvented an organization's well-conceived safeguards.[133]

Finally, the third prong of the test prevents a principal from avoiding liability solely by claiming ignorance of an agent's conduct. By using a negligence standard, imposing a duty to provide sufficient safeguards, and focusing on compensatory rather than punitive damages, courts can complement the preceding two prongs of the test. As a complementary theory based in common law, the third prong does not entail expansive new rules that occasion significant departures from prior case law.[134] Rather, it serves to fill a "loophole." Imposing compensatory damages for simple negligence liability avoids the horrors that the *Hydrolevel* majority sought to avoid;[135] under the third prong, ASME could not have avoided all liability by remaining ignorant of its agents' fraud.[136] Thus, the third prong of the proposed test avoids the harshness of treble damages where a defendant was only "negligently conspiratorial." Moreover, by employing this "gap-filler" courts can accomplish the twin goals of compensating injured plain-

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129. *See supra* notes 44-66 and accompanying text.

130. *See, e.g.,* United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied sub nom.,* 409 U.S. 1125 (1973); *supra* notes 60-66 and accompanying text. *See also* Continental Baking Co. v. United States, 281 F.2d 137 (6th Cir. 1960); *supra* notes 55-57 and accompanying text.

131. *See supra* note 94 and accompanying text. *See generally* Whiting, *Antitrust and the Corporate Executive,* 47 VA. L. REV. 929, 933-35 (1961) (discussing conspiratorial liability for antitrust violations); Note, *supra* note 94 (thorough discussion of criminal conspiracy).

132. *See supra* notes 44-66 and accompanying text. Indeed, the jury in *Hydrolevel* found ASME liable under such an instruction. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 564-65 (1982).

133. *See supra* note 87.

134. *See* Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824, 830 (D. Md. 1937); *supra* text accompanying notes 51-52.

135. *Hydrolevel,* 456 U.S. at 573.

136. *See infra* notes 144-47 and accompanying text.

tiffs and providing organizations with an incentive to implement safeguards.

C. Application of the Three-Pronged Test

Three hypothetical situations, with facts drawn from the *Hilton Hotels*[137] and *Hydrolevel* cases, illustrate the operation of the three-pronged test.

A variation of the facts in *Hilton Hotels* illustrates the application of the first prong. As noted above, in *Hilton Hotels*,[138] notwithstanding the principal's explicit instructions to the contrary, a purchasing agent boycotted suppliers who did not contribute to a Portland convention association.[139] For purposes of illustrating the first prong, however, it will be assumed that the area manager of the hotel boycotted suppliers contrary to a resolution of Hilton's board of directors. Given these facts, it would be reasonable to presume that the manager's actions represented the policy of the Portland Hilton, even though the manager acted outside the scope of his or her actual authority and acted exclusively for personal benefit. If, as assumed here, the area manager was one of the highest ranking officers at the Portland Hilton, the high managerial agent requirement would be met. Moreover, given the broad express authority vested in the office of area manager, it would be extremely difficult for any third person to ascertain the manager's actual authority to represent company policy with respect to the boycott. Consequently, the company should be required to respond for its manager's actions notwithstanding the board's contrary resolution, the board's failure to ratify the agent's action, or the agent's subjective intent to benefit only himself or herself.

Applying the three-pronged test to the facts actually presented in *Hilton Hotels*, it would be difficult to conclude that the purchasing agent was a high managerial agent whose actions represented the policy of the corporation.[140] Although the purchasing agent was authorized to buy all the hotel's supplies and exercised complete authority as to their source, this indicates, at most, the agent's power to determine the company's narrow policies concerning procurement of supplies, not the

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

138. *See supra* notes 60-66 and accompanying text.

139. *Hilton Hotels*, 467 F.2d at 1002.

140. The holding in *Hilton Hotels* comports with the criminal limitation of the proposed three-pronged test. *See supra* notes 114-21 and accompanying text.

agent's authority to determine the policy regarding participation in a boycott.[141] The company's policy regarding the hotel's participation in a boycott could be ascertained from statements or conduct of high ranking officials specifically empowered to state the company's policy; it is fallacious, however, to assert that a third party would rely on the purchasing agent's conduct as indicative of company policy with respect to boycotts.[142] Because no "high managerial agent" is involved, the first component is negated, and evaluation under the second prong of the test is necessary. This prong prompts an inquiry into any benefit to, or ratification by, the principal. The principal in *Hilton Hotels* apparently did not ratify the purchasing agent's conduct since the manager of Hilton's Portland hotel expressly instructed the agent not to participate in the boycott.[143] A purpose to benefit the corporation, however, is plausible because the intended effect of the association's boycott was to increase convention business. Indeed, given the evidentiary presumption of intent to benefit the principal and the absence of evidence of safeguards commensurate with the risk of unauthorized conduct by an agent, and of resultant financial detriment to the principal, the principal would be liable under the second prong of the proposed test. This result is justifiable in that it would stimulate efforts to ensure an agent's adherence to the law; even if the corporation did not actually receive the benefit, it should be responsible for prevention because the agent intended that the corporation benefit.

The facts presented in *Hydrolevel* illustrate the third prong of the proposed test and demonstrate that the district court reached a correct and rational determination. The first prong of the test is inapplicable because the volunteer workers were not high managerial agents. It is unlikely that the volunteer agents' unofficial determination of acceptability, drafted solely by these agents, would be properly considered a declaration of

141. Although the decision to participate in the boycott arguably was within the agent's authority to determine the source of supplies, the purpose of the boycott—to force financial support of the Portland convention association—was clearly a policy matter beyond the authority of the purchasing agent.

142. This type of extension of the high managerial agent test is unwarranted. *See supra* text accompanying notes 127-28. If, however, the evidence in a particular case indicates that a principal has delegated official responsibilities to agents below the high managerial agent level, and this practice is commonly known, the court should not mechanically apply the test. Instead, the court should focus on the function delegated rather than on the agent's official position in the organizational hierarchy.

143. *Hilton Hotels,* 467 F.2d at 1004.

ASME's policy. Thus, the first prong inquiry yields a negative response.

The benefit/ratification prong appears to be the precise basis of the district court's decision in *Hydrolevel*.[144] Indeed, the jury found ASME liable under a benefit/ratification instruction.[145] The jury determination appears warranted since ASME did little to repudiate the conduct of its volunteer agents and in fact initially adopted the agents' response, which was distributed on ASME letterhead.[146]

Even if the jury had not found benefit to, or ratification by, the principal, ASME could still have been subjected to liability under the third prong. If ASME breached its duty to maintain adequate safeguards, as it appears it did because the evidence demonstrated the ready availability of procedures to protect against such improper conduct by volunteers,[147] the organization would be required to compensate any victims.

V. CONCLUSION

The Supreme Court, in *Hydrolevel*, established a rule of vicarious liability that, for all practical purposes, holds an organization strictly liable under the Sherman Act for the unauthorized conduct of its agents. This decision portends an enormous overload in litigation for both business and nonprofit organizations, which for years have relied upon well-founded and useful agency principles. Such time-honored principles should be abandoned only to the extent necessary to protect the general welfare. The Court, however, went far beyond this point. It considered neither the merits of its expansive new theory nor the potentially crippling effect of the treble damages sanction. The result advocated by the Court can be reached through less imposing methods. This Note proposes a flexible method for determining the antitrust liability of a principal for the unauthorized and anticompetitive conduct of its agents. But until the Court or Congress considers it appropriate to review the *Hydrolevel* standard, all organizations should be on notice that they are subject to treble damages liability under

144. *See* American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 564-65 (1982).

145. *See id.*

146. *Id.* at 561-64.

147. *See id.* at 576-77 n.15. This evidence would not be admissible in an action for negligence. *See* FED. R. EVID. 407. Nevertheless, since ASME had failed to implement any safeguards, the evidence would still support a verdict for the *Hydrolevel* plaintiff.

the Sherman Act for unintentional participation in the illegal and unauthorized conduct of their agents.

Philip T. Colton