NONPROFIT ASSOCIATIONS ARE SUBJECT TO ANTITRUST LIABILITY FOR THE ACTS OF THEIR AGENTS WITH APPARENT AUTHORITY

American Society of Mechanical Engineers v. Hydrolevel Corp., 102 S. Ct. 1935 (1982)

In *American Society of Mechanical Engineers v. Hydrolevel Corp.*,[1] the United States Supreme Court broadened the reach of the antitrust laws by applying the agency law doctrine of apparent authority[2] to hold a nonprofit association liable under the Sherman Act[3] for the unauthorized anticompetitive acts of its members.[4]

The American Society of Mechanical Engineers (ASME) is a voluntary membership association that promulgates codes and standards for the engineering industry.[5] Respondent Hydrolevel brought suit against

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

2. "Apparent authority," as used in this Comment, refers to the agency theory under which a principal may be held liable for the unauthorized acts of its agents. Liability arises when the principal, through its manifestations, leads a third person to believe that the agent possesses actual authority. RESTATEMENT (SECOND) OF AGENCY § 8 comment a (1958) [hereinafter cited as RESTATEMENT]. The Restatement defines apparent authority as "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." *Id.* at § 8. The Restatement further provides that in the case of fraud by an agent with apparent authority the principal is subject to liability "although he is entirely innocent, has received no benefit from the transaction, and . . . although the agent acted solely for his own purposes." *Id.* at § 261 comment a. *See also id.* at § 27 (creation of apparent authority), § 257 (misrepresentations), § 261 (agent's position enables him to deceive), § 262 (agent acts for his own purposes). For a history and judicial interpretations of apparent authority, see *infra* notes 22-31 & 35-40 and accompanying text. *See generally* W. SEAVEY, HANDBOOK ON THE LAW OF AGENCY §§ 8, 92 (1964) (discussing Restatement definitions of apparent authority); W. SELL, SELL ON AGENCY §§ 35, 47 (1975) (describing various factual settings in which apparent authority may arise); Cook, *Agency by Estoppel,* 5 COLUM. L. REV. 36, 36-39 (1905) (general overview of common-law theory).

3. Sherman Act, 15 U.S.C. §§ 1-7 (1976).

4. 102 S. Ct. at 1948.

5. ASME has over 90,000 members drawn from all fields of mechanical engineering. Volunteers from industry and government serve on committees that respond to public inquiries about the proper interpretation of ASME codes. These codes, while only advisory, are very influential in the industry because federal regulations and the laws of most states have incorporated them by reference. Brief for the United States as Amicus Curiae at 2, American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 102 S. Ct. 1935 (1982). *See Voluntary Industry Standards: Hearings Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 94th Cong., 2d Sess. 186-99 (1975) [hereinafter cited as *Hearings*]; Green, Remarks at the National Board of Boiler and Pressure Vessel Inspectors' 48th General Meeting in Conjunction with the Boiler and Pressure Vessel Committee of ASME (Apr. 30, 1979), *reprinted in* 101 MECHANICAL ENG'G 106-09 (1979). For an overview of ASME and other standard-making organizations, see *Hearings, supra*;

ASME[6] alleging that members of the society had conspired, in violation of sections 1 and 2 of the Sherman Act,[7] to discredit a Hydrolevel product through misuse of ASME's safety standard interpretation process.[8] The district court instructed the jury[9] that ASME could be held liable only if it had ratified its agents' actions or if the agents had acted with actual authority and in pursuit of ASME's interests.[10] The jury, nevertheless, returned a verdict for Hydrolevel.[11]

On appeal, the Court of Appeals for the Second Circuit affirmed,[12] concluding that petitioner could be held liable if its agents had acted within the scope of their apparent authority.[13] The United States

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D. HEMENWAY, INDUSTRYWIDE VOLUNTARY PRODUCTS STANDARDS (1975); B. SINCLAIR, A CENTENNIAL HISTORY OF THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS: 1880-1980 (1980); Blecher, *Product Standards and Certification Programs,* 46 BROOKLYN L. REV. 223 (1980). For reactions of commentators and the standard setting industry to the *Hydrolevel* decision, see *infra* note 97.

6. Hydrolevel v. American Soc'y of Mechanical Eng'rs, No. 75C1360 (E.D.N.Y. filed Aug. 19, 1975), *aff'd,* 635 F.2d 118 (2d Cir. 1980), *aff'd,* 102 S. Ct. 1935 (1982).

7. Section 1 provides in part: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Section 2 provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony . . . ." *Id.* § 2. For a discussion of the Sherman Act, see *infra* notes 16-20.

8. Complaint for Hydrolevel at 20, Hydrolevel v. American Soc'y of Mechanical Eng'rs, No. 75C1360 (E.D.N.Y. filed Aug. 19, 1975), *aff'd,* 635 F.2d 118 (2d Cir. 1980), *aff'd,* 102 S. Ct. 1935 (1982). Respondent Hydrolevel alleged that officers of a rival manufacturer, acting with apparent authority of the Society, used their positions as chairmen of an ASME committee to interpret the code as excluding Respondent's product. *See* Brief for Petitioner at 2-12, American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 102 S. Ct. 1935 (1982) (detailed discussion of events leading to *Hydrolevel* lawsuit).

9. The district court rejected Respondent's requested instruction that ASME could be held liable under the antitrust laws for its agents' conduct if the agents acted with apparent authority. 102 S. Ct. at 1941.

10. For judicial interpretations of actual authority, see *infra* note 34.

11. 102 S. Ct. at 1941. The district court instructed the jury that

> [i]f the officers or agents act on behalf of interests adverse to the corporation or acted for their own economic benefit or the benefit of another corporation, and this action was not ratified or adopted by the defendant, their misconduct cannot be considered that of the corporation with which they are associated.

Id.

12. 635 F.2d 118 (1980).

13. *Id.* The issue on appeal was the sufficiency of the evidence to support a verdict based on the district court's instructions. *Id.* at 125. The court of appeals concluded that ASME could be held liable if its agents acted with apparent authority. Therefore, since the district court's charge was "more favorable to the defendant than the law requires," the court of appeals affirmed. *Id.* at 127.

Supreme Court granted certiorari,[14] affirmed, and *held*: A nonprofit membership association is civilly liable under the antitrust laws for the unauthorized anticompetitive activities of its agents acting within the scope of their apparent authority.[15]

In 1890 Congress passed the Sherman Act in response to concentrations of economic power that were threatening to suppress the competitive market. While the primary purpose of the Sherman Act was to eliminate anticompetitive activity,[16] Congress included a section providing for a private cause of action[17] as a means of affording a remedy to the victims of antitrust violations,[18] and as an additional deterrent[19]

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14. 452 U.S. 937 (1981).

15. 102 S. Ct. at 1948.

16. *See* 21 CONG. REC. 2457 (1890). Senator Sherman, the sponsor of the Sherman Act, stated that the aim of the antitrust laws was to "check and prevent the great body of illegal combinations . . . that threaten business, property and trade of the people." *Id.* In Apex Hosiery v. Leader, 310 U.S. 469 (1940), the Supreme Court explained the purpose of the antitrust laws: "The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services . . . ." *Id.* at 493. In Standard Oil Co. v. United States, 221 U.S. 1 (1911), the Supreme Court explained that the "vast accumulations of wealth in the hands of corporations and individuals . . . [leads to a fear that] their power had been and would be exerted to oppress individuals and injure the public generally." *Id.* at 50. *See also* Community Communications Co. v. Boulder, 102 S. Ct. 835, 843 (1982) ("long-standing Congressional commitment to the policy of free markets and open competition"); Pfizer, Inc. v. Government of India, 435 U.S. 308, 314 (1978) ("foremost concern was the . . . protection of Americans"); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) ("overriding public policy in favor of competition"). *See generally* 2 P. AREEDA & D. TURNER, ANTITRUST LAW § 401 (1978) (purpose of antitrust laws); Bork, *Legislative Intent and Policy of the Sherman Act,* 9 J. LAW. & ECON. 7, 14-21 (1967) (same); 60 WASH. U.L.Q. 249, 250 n.7 (1982) (same).

17. Sherman Act § 7, 26 Stat. 210 (1890), *superseded by* Clayton Act, ch. 323, § 4, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 15 (1976)). *See* H.R. REP. No. 627, 63 Cong., 2d Sess. 14 (1914) (Clayton Act extended the remedy under section 7 of the Sherman Act to persons injured by virtue of any antitrust violation). *See also* 21 CONG. REC. 2461 (1890) (Senator Sherman's statement that the private action was designed to remedy the "great wrongs to the people").

Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), provides in pertinent part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a resonable attorney's fee." *See generally* 2 P. AREEDA & D. TURNER, *supra* note 16, at § 331(b) (general overview of private action); Bork, *supra* note 16, at 18-21 (purposes of private action); Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business,* 80 HARV. L. REV. 1566, 1566 (1967) (overview of the development of the private action and its effectiveness) [hereinafter cited as Note, *Private Treble Damage*]; Note, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit,* 61 YALE L.J. 1010, 1060 (1952) (statistical information) [hereinafter cited as Note, *Antitrust Enforcement*].

18. *See* 21 CONG. REC. 1767-68 (1890) (statement of Senator George that the private action

and punitive[20] measure.

The Supreme Court has long recognized that a corporation may be held liable for treble damages under the Sherman Act for the authorized activities of its agents.[21] *Hydrolevel*, however, is the first case in which the Court has addressed the antitrust liability of a corporation for the wrongs committed by its agents with apparent authority.[22]

The doctrine of apparent authority[23] originated in English common-

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conceived of primarily as a remedy for "[t]he people of the United States as individuals"). In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), the Supreme Court stated that "the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy." *Id.* at 485-86 (footnote omitted). *See also* Blue Shield v. McCready, 102 S. Ct. 2540, 2545 (1982) ("Congress sought . . . to provide ample compensation to the victims of antitrust violations."). *See generally* 2 P. AREEDA & D. TURNER, *supra* note 16, at § 331(b) (overview of private action); Note, *Private Treble Damage, supra* note 17, at 1566-71 (effectiveness of private action as compensatory measure); Note, *Antitrust Enforcement, supra* note 17, at 1043 (same).

19. *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968). The Supreme Court emphasized the role of private actions in deterring anticompetitive activity: "The purposes of the antitrust laws are best served by insuring that the private action will be a constant threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Id. See also* Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (private suits provide a "significant supplement to the limited resources available . . . [for] . . . deterring violations"); Pfizer, Inc. v. Government of India, 434 U.S. 308, 314 (1978) (purpose of private action is "to deter"). *See generally* 2 P. AREEDA & D. TURNER, *supra* note 16, at § 331(b) (deterrent features of private treble damages); Note, *Private Treble Damage, supra* note 17, at 1566-68 (development of private action as a deterrent device).

20. *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 649 (1981) ("[t]he very idea of treble damages reveals an intent to punish . . . ."). *See also* Bruces Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947) ("retribution"); Lyons v. Westinghouse Elec. Corp., 222 F.2d 184, 189 (2d Cir.) ("two thirds of the recovery is not remedial and inevitably presupposes a punitive purpose"), *cert. denied,* 350 U.S. 825 (1955); Bigelow v. R.K.O. Radio Pictures, Inc., 150 F.2d 877, 883 (7th Cir. 1945) (treble damages a "penalty"), *rev'd on other grounds,* 327 U.S. 251 (1946); Hansen Packing Co. v. Armour & Co., 16 F. Supp. 784, 788 (S.D.N.Y. 1936) ("symbol of punishment"). *See generally* 2 P. AREEDA & D. TURNER, *supra* note 16, at § 311(a) (private action as punitive measure); Note, *Private Treble Damage, supra* note 17, at 1567 (same).

21. *See* United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344, 395 (1922).

22. Only two circuits have ruled on the issue. *Compare* Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, 635 F.2d 118, 127 (2d Cir. 1980) (holding that treble damages may be imposed on a corporate defendant for the acts of its agents with apparent authority, committed entirely for the agents' benefit), *aff'd,* 102 S. Ct. 1935 (1982) *with* Truck Drivers Local No. 421 v. United States, 128 F.2d 227, 236 (8th Cir. 1942) (proof of actual authority required in order to impose punitive damages on a corporation for the acts of its agents). Other circuits have addressed the application of apparent authority to the antitrust laws but have not resolved the issue. *See infra* note 35.

23. *See supra* note 2.

law agency theory.[24] Early American cases recognized the doctrine as a basis for holding a corporation liable for the unauthorized conduct of its agents. In those cases in which the acts had been committed within the scope of apparent authority, but purely for the agent's benefit, however, there was a sharp conflict of authority as to the liability of the principal.[25] One group of cases followed the English rule[26] that the principal is never liable under such circumstances.[27] Other cases held that the intent of the agent was not a significant factor.[28]

In *Friedlander v. Texas & Pacific Railway*,[29] decided one year before the passage of the Sherman Act, the Supreme Court adopted the English rule.[30] The Court concluded that an employer could only be held

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24. *See* E. HUFFCUTT, THE LAW OF AGENCY 203 (2d ed. 1907). The basic rule was articulated in Reynell v. Lewis, 153 Eng. Rep. 954, 958-59 (1846):

> [A]gency may be created by the immediate act of the part, that is by really giving the authority to the agent, . . . or it may be created by the representation by the defendant to the plaintiff . . . that such relation exists. . . .
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> . . . This representation may be made directly to the plaintiff or made publicly, so that it may be inferred to have reached him, and may be made by words or by conduct.

Id. at 958. *See, e.g.,* Edmunds v. Bushell & Jones, 1 L.R.-Q.B. 97 (1865); Smith v. M'Guire, 157 Eng. Rep. 589 (1858); Freeman v. Cooke, 154 Eng. Rep. 652 (1848); Hatch v. Trayes, 52 Rev. Rep. 482 (1840); Whitehead v. Tuckett, 13 Rev. Rep. 509 (1812); Pickering v. Busk, 13 Rev. Rep. 364 (1812).

25. Essentially, the conflict stemmed from differing views on who should bear the risk for an agent's dishonesty. *Compare* McCord v. Western Union Tel. Co., 39 Minn. 181, 39 N.W. 315 (1880) (principal who places an agent in a position that enables him to deceive bears the risk that the agent will use his position to the detriment of the principal and innocent third parties) *with* National Bank of Commerce v. Chicago R.R., 44 Minn. 224, 46 N.W. 342 (1890) (principal bears the risk of its agent's dishonesty only when the conduct is authorized or intended to benefit the principal).

26. In Barwick v. English Joint Stock Bank, 2 L.R.-Ex. 259 (1866), the leading English case adopting this view, the court stated that "the master is answerable for every such wrong of the servant or agent as is committed in the course of the service, and for the master's benefit. . . ." *Id.* at 265. *See also* Houldsworth v. City of Glasgow Bank, 5 App. Cas. 317 (1880); British Mutual Banking Co. v. Charnwood Forest Ry., 18 Q.B.D. 714 (1887). *See generally* E. HUFFCUTT, *supra* note 24, at 202 (analysis of the English rule and a compilation of cases).

27. *See, e.g.,* Harris, Irby & Vose v. Allied Compress Co., 6 F.2d 7 (5th Cir. 1925); American Sur. Co. v. Pauly, 72 F. 470 (2d Cir. 1896). For a compilation of cases, see E. HUFFCUTT, *supra* note 24, at 202-03.

28. The leading American case adopting this view was Bank of Batavia v. New York, L.E. & W. Ry., 106 N.Y. 195, 12 N.E. 433 (1887), in which the court explained the rationale behind its holding: "[W]here the principal has clothed his agent with power to do an act . . . a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice." *Id.* at 199, 12 N.E. at 433-34. *See generally* E. HUFFCUTT, *supra* note 24, at 206 (analysis of American rule and compilation of cases).

29. 130 U.S. 416 (1889).

30. *See supra* note 26 and accompanying text.

liable for the fraudulent misrepresentations of its employee if the employer derived a benefit from the agent's fraud.[31]

The Supreme Court did not have an opportunity to address the applicability of the apparent authority theory to the antitrust laws until 1922. In *United Mine Workers of America v. Coronado Coal Co.*,[32] a case involving an unauthorized strike by a local union, the issue concerned the liability of the international union for the anticompetitive activities of the local.[33] The Court did not reach the apparent authority issue, but viewed the case as involving only a question of actual authority.[34] The Court noted that the constitutions of both the local and in-

31. 130 U.S. at 425. *Friedlander* involved the fraudulent conduct of an employee of a railroad company. The agent acted for his own benefit, and the employer was unaware of the conduct. The Court in *Friedlander* refused to hold the railroad liable, stating that "[t]he company, which derived and could derive no benefit from the unauthorized and fraudulent act, cannot be made responsible." *Id.*

In Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101 (1893), the Supreme Court reached a similar conclusion in holding that agency theory could not be invoked to impose punitive damages on a principal in the absence of the principal's participation, approval, or ratification, unless the principal derived a benefit from the agent's acts. *Id.* at 107. For examples of recent judicial interpretations of *Lake Shore,* see Bankers Life Ins. Co. v. Scurlock Oil Co., 447 F.2d 997, 1004-05 (5th Cir. 1971) (no liability under apparent authority theory when there are "punitive consequences"); Asphault-Industries, Inc. v. Commissioner, 384 F.2d 229, 235 (3d Cir. 1967) (corporation cannot be held liable for civil remedy that is designed to "punish and deter"); Standard Oil Co. v. United States, 307 F.2d 120, 128 (5th Cir. 1962) (corporation may be prosecuted under "Hot Oil Act" only if its agent acted to benefit the corporation). *But see* Kelite Prods., Inc. v. Binzel, 224 F.2d 131, 144 (5th Cir. 1955) (punitive damages may be assessed against a corporation "regardless of actual authority or ratification"); Mayo Hotel Co. v. Danciger, 143 Okla. 196, 200, 288 P. 309, 313 (1930) (corporation liable for punitive damages for acts of agents because "legal malice of the servant is the legal malice of the corporation"). *See generally* W. PROSSER, THE LAW OF TORTS 12 (4th ed. 1971) (general discussion and compilation of cases).

32. 259 U.S. 344 (1922).

33. The strike was declared by the president of the local union without the authorization of the International Board. When striking members of the local destroyed valuable mining properties belonging to the Coronado Coal Company, the company brought suit against the International Union alleging a conspiracy to restrain trade in violation of § 1 of the Sherman Act. 259 U.S. at 349-50. For the text of § 1 of the Sherman Act, see *supra* note 7.

34. 259 U.S. at 395. In cases of "actual authority," the emphasis is on the manisfestations of the principal to the agent rather than to third parties, as in cases of apparent authority. *See* RESTATEMENT, *supra* note 2, at §§ 7, 236. The Restatement defines actual authority as "the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal's manifestations of consent to him." *Id.* at § 7. The Restatement further provides that consent may be either "express" or "implied" from the conduct of the principal. *Id.* at § 7 comment c. In addition, an agent's conduct is within his "actual authority" if it is "sufficiently similar" to authorized activities. New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 493 (1909). *See* United States v. A & P Trucking Co., 358 U.S. 121 (1958); Standard Oil Co. v. United States, 307 F.2d 120 (5th Cir. 1962); United States v. Armour & Co., 168 F.2d 342 (3d Cir. 1947); Egan v. United States, 137 F.2d 369 (8th Cir.), *cert. denied,* 320 U.S. 788 (1943); Berry-

ternational unions expressly forbade strikes without the sanction of the International Board. These provisions, the Court said, constituted a "specific stipulation" that the local assumed all responsibility for unauthorized strikes.[35]

Seven years later, the apparent authority issue again came before the Court in *Gleason v. Seaboard Air Line Railway*,[36] a case involving common-law fraud. Overruling *Friedlander*,[37] the Court held that the lia-

hill v. Ellett, 64 F.2d 253 (10th Cir. 1933); Coblentz v. Riskin, 74 Nev. 53, 322 P.2d 905 (1958); McDorman v. Goodell, 69 S.W.2d 428 (Tex. Civ. App. 1934); Weil McClain Co. v. Maryland Casualty Co., 217 Wis. 126, 258 N.W. 175 (1935). *See generally* 10 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS 492 (1970) (general discussion of actual authority); W. SEAVEY, *supra* note 2, at § 8 (discussion of judicial interpretations of actual authority and compilation of cases).

35. 259 U.S. at 395. The Court stated: "Here is not a question of contract or of holding out an appearance of actual authority on which some third person acts. It is a mere question of actual agency which the constitutions of the two bodies settle conclusively." *Id. See* Truck Drivers Local No. 421 v. United States, 128 F.2d 227, 235 (8th Cir. 1942) (analyzing the Court's opinion in United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1922)).

The case came before the Court on retrial three years later. *See* Coronado Coal Co. v. United Mine Workers of Am., 268 U.S. 295 (1925). The Court reaffirmed its earlier position, again without clearly addressing the applicability of apparent authority theory to the antitrust laws. The Court stressed 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." *Id.* at 305.

Only one circuit other than the Second Circuit has ruled on the applicability of apparent authority theory to the antitrust laws, relying on the *Coronado* decisions. *See* Truck Drivers Local No. 421 v. United States, 128 F.2d 227, 235 (8th Cir. 1942) (to hold a principal liable "actual and authorized agency was necessary; mere apparent agency would not be sufficient"). *But see* Mile Branch Coal Co. v. United Mine Workers of Am., 266 F.2d 919, 921-22 (1959) (stating that the *Coronado* cases did not address the issue of apparent authority). Other courts have approved the apparent authority theory as a basis for antitrust liability, but have done so on the basis of evidence that the agent acted for the principal's benefit. *See* United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir.) (apparent authority allowed as basis for corporation's liability where agents acted with "purpose of benefiting the corporation"), *cert. denied,* 437 U.S. 903 (1978); United States v. Hilton Hotels, 467 F.2d 1000, 1004 (9th Cir. 1972) (approving jury instruction that principal can be held liable under apparent authority theory when the agent acted "in the corporation's behalf"), *cert. denied sub nom.* Western Int'l Hotels v. United States, 409 U.S. 1125 (1973); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 205 (3d Cir. 1970) (approving jury instruction that principal is liable under apparent authority theory when agent acted "on behalf of the corporation"), *cert. denied,* 401 U.S. 948 (1971); Continental Baking Co. v. United States, 281 F.2d 137, 150 (6th Cir. 1960) (stating that corporation is liable, under apparent authority theory for its agent's violations "which inure to the corporation's benefit"). *But see* Arthur v. Kraft-Phenix Cheese Corp., 26 F. Supp. 824, 830 (D. Md. 1937) (rejecting apparent authority theory as a basis for antitrust liability where the corporation's agents had "improper personal motives").

36. 278 U.S. 349 (1929).

37. *Id.* at 353. *See supra* note 29 and accompanying text.

bility of a principal for the fraudulent misrepresentations of its agents is not dependent upon a benefit inuring to the principal.[38] Since *Gleason*, courts have applied its rationale in cases arising under both the common law[39] and federal regulations.[40] In spite of *Gleason*, however, most courts that have addressed the apparent authority issue under the antitrust laws have based their decisions to some degree on a finding that the principal benefitted from its agent's conduct.[41]

The line of cases dealing with apparent authority is not the only relevant strand of precedent involved in *American Society of Mechanical Engineers v. Hydrolevel Corp.*[42] Because ASME is a nonprofit associa-

38. 278 U.S. at 356. The Court emphasized the importance of its decision: "[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Id.* at 356. *See generally* F. POLLOCK, TORTS 67-68 (1887); J. SALMOND, JURISPRUDENCE 381 (2d ed. 1907).

39. *See In re* Koeneck & Sons, Inc., 605 F.2d 310, 312-13 (7th Cir. 1979) (fraud); National Acceptance Co. of Am. v. Coal Producers Ass'n, 604 F.2d 540, 542-43 (7th Cir. 1979) (same); United States v. Sanchez, 521 F.2d 244, 246 (5th Cir. 1975) (fraud), *cert. denied,* 429 U.S. 817 (1976); Gilmore v. Constitutional Life Ins. Co. of Am., 502 F.2d 1344, 1350-51 (10th Cir. 1974) (fraud); Employers Liab. Assurance Corp. v. L.J. Marcotte Ins. Agency, 314 F.2d 470, 476-78 (8th Cir. 1963) (misrepresentation); Bowman v. Home Life Ins. Co. of Am., 243 F.2d 331, 334 (3d Cir. 1957) (assault); Adams-Mitchel Co. v. Cambridge Distrib. Co., 189 F.2d 913, 917 (2d Cir. 1951) (action for contract rescission based on unauthorized representations); Standard Sur. & Casualty Co. v. Plantsville Nat'l Bank, 158 F.2d 422, 424 (2d Cir. 1946) (misrepresentation), *cert. denied,* 331 U.S. 812 (1947). *But see* Ruidoso Racing Ass'n v. Commissioner, 476 F.2d 502, 505-06 (10th Cir. 1973) (civil tax suit requiring that agent act in behalf of the corporation and that the corporation benefit from the agent's conduct); Hooper-Holmes Bureau, Inc. v. Bunn, 161 F.2d 102, 104 (5th Cir. 1947) (statement made by servant for his own benefit does not subject corporation to liability for defamation). *See generally* RESTATEMENT, *supra* note 2, at § 257 (principal liable for misrepresentations of agent with apparent authority, although agent does not intend to serve the principal), §§ 261-62 (principal liable for misrepresentation of agent with apparent authority although principal is entirely innocent, has received no benefit, and the agent acted solely for his own purposes); W. SEAVEY, *supra* note 2, at § 92 (discussion of *Gleason*).

40. *See* Dark v. United States, 641 F.2d 805, 807 (9th Cir. 1981) (federal tax fraud); Holloway v. Howerdd, 536 F.2d 690, 696 (6th Cir. 1976) (securities fraud); Kerb v. Fall River Indus., 502 F.2d 731, 741 (10th Cir. 1974) (same); SEC v. First Sec. Co., 463 F.2d 981, 985 (7th Cir.) (same), *cert. denied,* 409 U.S. 880 (1972); Carroll v. First Nat'l Bank, 413 F.2d 353, 358 (7th Cir. 1969) (same); Henderson v. Croom, 403 F. Supp. 668, 670-71 (N.D. Ala. 1975) (same). *But see In re* Investor's Funding Corp., [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 97,696, at 98,654 (S.D.N.Y. Nov. 19, 1980) (no liability under Securities and Exchange Act if agent acts adverse to principal's interests); Oman v. United States, 179 F.2d 738, 741 (10th Cir. 1949) (Federal Tort Claims Act requires that agent intend to benefit principal); Moscarelli v. Stamm, 288 F. Supp. 453, 460-61 (E.D.N.Y. 1968) (under securities laws agent must have purpose to serve master). *See generally* RESTATEMENT, *supra* note 2, at §§ 257, 261, 262; 10 W. FLETCHER, *supra* note 34, § 4886, at 400-01 (rev. ed. 1978) (liability of corporations for acts of agents for fraud and deceit under federal law).

41. *See supra* note 35.

42. 102 S. Ct. 1935 (1982).

tion, it is necessary to examine the treatment of such associations under the antitrust laws in order to realize the full import of the *Hydrolevel* decision.

The Supreme Court first addressed the applicability of the antitrust laws to nonprofit organizations in *Chicago Board of Trade v. United States*,[43] a case involving alleged anticompetitive activities by a trade association.[44] The Court, applying a "rule of reason"[45] standard, examined the purpose and effect of the alleged restraint and determined that the association's practices were reasonable because they actually improved market conditions.[46] In view of this finding, the Court held that the association had not violated the Sherman Act.[47]

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43. 246 U.S. 231 (1918).

44. The practice in question was a "call" rule adopted by the Board. The "call" was a session at the end of each trading day at which members set the next day's prices. The "call" rule forbade members from purchasing commodities overnight at any price other than that set by the Board. *Id.* at 236-37.

45. *Id.* at 238. Essentially, the rule of reason requires that all the facts in a particular case be weighed to determine the actual anticompetitive effect. As Justice Brandeis explained: "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." *Id.* Justice Brandeis went on to formulate the appropriate test:

> [A] 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.

Id. See United States v. American Tobacco Co., 221 U.S. 106, 178-80 (1911); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). For discussions of the rule of reason standard, see R. BORK, THE ANTITRUST PARADOX 330, 341-47, 356 (1978); L. SULLIVAN, HANDBOOK ON THE LAW OF ANTITRUST 175-82 (1977); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 74 YALE L.J. 775, 783-84 (1965); Raymond, *The Standard Oil and Tobacco Cases,* 25 HARV. L. REV. 31, 37 (1911).

46. 246 U.S. at 240-41. The Court found that smaller companies, which did not have the resources to trade on a 24-hour basis were being edged out of the market by a small group of powerful warehouse traders. The "call" rule prevented the warehousers from using this advantage to gain a monopoly of the market. *Id.*

47. *Id.* at 241. For examples of how courts have applied the antitrust laws to other trade associations, see Maple Flooring Ass'n v. United States, 268 U.S. 563 (1925); Arizona v. Maricopa County Medical Soc'y, 643 F.2d 553 (9th Cir. 1980); Boddicker v. Arizona State Dental Ass'n, 549 F.2d 626 (9th Cir.), *cert. denied,* 434 U.S. 825 (1977); National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965); Milk & Ice Cream Can Inst. v. FTC, 152 F.2d 478 (7th Cir. 1946); Structural Laminates, Inc. v. Douglas Fir Plywood Ass'n, 261 F. Supp. 154 (D. Or. 1966), *aff'd,* 399 F.2d 155 (9th Cir. 1968), *cert. denied,* 393 U.S. 1024 (1969). *See generally* 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*

Chicago Board of Trade[48] established that nonprofit associations are subject to the antitrust laws.[49] In addition, the decision suggested that in the case of nonprofit associations, restraints of trade are often merely incidental to legitimate economic goals and, as such, should be viewed differently from the activities of profit-making organizations.[50]

The Supreme Court reaffirmed the unique status of nonprofit associations in *Apex Hosiery Co. v. Leader*.[51] In *Apex*, members of a labor union took possession of the Apex Hosiery plant during a strike and refused to dispatch merchandise that was ready for shipment. In an opinion that suggested the beginning of a trend toward antitrust exemption for nonprofit associations,[52] the Court held that the union had not violated the Sherman Act.[53]

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and Efficiency, 60 WASH. U.L.Q. 357, 360-61, 374 (1982) (tracing the history of the rule of reason as applied to trade associations).

48. 246 U.S. 231 (1918).

49. *See also* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (upholding a Sherman Act complaint against the American Gas Association); Associated Press v. United States, 326 U.S. 1 (1945) (upholding Sherman Act complaint against nonprofit membership association); American Medical Ass'n v. United States, 317 U.S. 519 (1943) (upholding Sherman Act complaint against voluntary medical association).

Although the original Sherman Act contained no exemption for nonprofit organizations, Congress subsequently provided for exemptions in particular areas. *See* Nonprofit Institutions Act, ch. 283, 52 Stat. 446 (1938) (current version at 15 U.S.C. § 13c (1976)) (amended the Robinson-Patman Act to exempt supply purchases by nonprofit educational facilities, libraries, churches, hospitals and charitable institutions from price discrimination attack); McCarran-Furguson Act, ch. 20 § 2(b), 59 Stat. 33 (1945) (current version at 15 U.S.C. § 1012(b) (1976)) (includes certain nonprofit organizations within the "business of insurance" exemption of the antitrust laws). *See generally* Note, *Antitrust and Non-Profits,* 94 HARV. L. REV. 802, 806 (1981) (discussion of specific statutory exemptions of nonprofit organizations under antitrust laws).

50. 246 U.S. at 238. Nonprofit organizations do not receive preferential treatment when they have authorized activities that are deliberately and blatantly anticompetitive. *See, e.g.,* Fashion Originator's Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941) (members of guild purposely boycotted and declined to sell products to certain competing retailers); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (lumber dealer association members exchanged statistical and price information with "prime purpose" to raise and fix prices).

51. 310 U.S. 469 (1940).

52. *See, e.g.,* Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, 432 F.2d 650, 654 (D.C. Cir.) ("The proscriptions of the Sherman Act were tailored . . . for the business world") (quoting Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 141 (1961)), *cert. denied,* 400 U.S. 965 (1970); Jones v. NCAA, 392 F. Supp. 295, 303 (D. Mass. 1975) (antitrust laws "aimed primarily at combinations with commercial objectives").

53. 310 U.S. at 513. The Court explained that its holding was consistent with congressional intent: "The end sought [by the Sherman Act] was the prevention of restraints to free competition in business and commercial transactions . . . ." *Id.* at 493. *See also* 21 CONG. REC. 2562 (1890). Senator Sherman explained the reach of his proposed antitrust bill: "The bill does not interfere in

Two recent decisions, *Goldfarb v. Virginia State Bar*[54] and *National Society of Professional Engineers v. United States*,[55] lend uncertainty to the question of the scope of the antitrust liability of nonprofit organizations under the antitrust laws. In *Goldfarb*,[56] Chief Justice Burger, writing for a unanimous court, rejected the state bar association's argument that competition is "inconsistent with the practice of professions" because there is no goal to enhance profits.[57] The Chief Justice acknowledged that public service and other noneconomic goals distinguish professional associations from businesses concerned with the maximization of profits, but held that these goals do not insulate the bar association from the reach of the Sherman Act.[58]

In *National Society of Professional Engineers*,[59] the Supreme Court further blurred the distinction between nonprofit organizations and businesses. The case involved a ban on competitive bidding by engineers. The Society argued that the practice promoted public safety because competitive bidding often produces inferior products and workmanship.[60] The Court rejected this argument and held that, in applying the rule of reason standard, it could consider only the effect

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the slightest degree with voluntary associations. . . . They are not business combinations. They do not deal with contracts, agreements, etc. They have no connection with them." *Id.*

54. 421 U.S. 773 (1975).

55. 435 U.S. 679 (1978).

56. *Goldfarb* involved fee control activities by a state bar association. In a commercial setting fee control is considered to be a per se violation of the Sherman Act. Other per se violations include horizontal price fixing, vertical price maintenance, group boycotts, tying arrangements, and horizontal market division. For a discussion of each violation and a compilation of cases, see E. KINTER, FEDERAL ANTITRUST LAW § 8.3 (1980); L. SULLIVAN, *supra* note 45, at §§ 67, 70-72, 84-85.

57. 421 U.S. at 786-87.

58. *Id.* at 787. In a footnote, however, the Chief Justice stressed that nonprofit organizations should still be treated differently from commercial enterprises:

> It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

Id. at 788 n.17. The *Goldfarb* decision has caused much concern among commentators. *See* Note, *The Antitrust Liability of Professional Associations after* Goldfarb*: Reformulating the Learned Professions Exemption in the Lower Courts,* 1977 DUKE L.J. 1047, 1051; Note, *The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act,* 11 U. MICH. J.L. REF. 387, 393-94 (1978); Comment, *The End of Fee Schedules: The Sherman Act Applies to Lawyers Also,* 30 U. MIAMI L. REV. 464, 474-75 (1976).

59. 435 U.S. 679 (1978).

60. *Id.* at 685, 687.

on competition.[61]

In *American Society of Mechanical Engineers v. Hydrolevel Corp.*,[62] the Supreme Court finally had occasion to clarify the extent to which agency theory applies to nonprofit organizations in the context of the antitrust laws. By a six-to-three vote[63] the Court held that a nonprofit standard-making association may be held liable for treble damages for violations of the Sherman Act by its agents acting with apparent authority, even when those agents acted in furtherance of their personal interests.[64]

Justice Blackmun, writing for the majority, began his analysis with an examination of the apparent authority doctrine.[65] After considering both the Restatement (Second) of Agency[66] and several decisions of the federal courts,[67] he concluded that, in torts analogous to the antitrust violations alleged in *Hydrolevel*, a principal may be held liable for the unauthorized conduct of its agents, even when the agents act solely for their own benefit.[68] Justice Blackmun argued that such a rule, which emphasizes the protection of the person relying on the apparent authority of the agent, would best serve both ASME and the public who rely on its codes.[69]

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61. *Id.* at 687-92. Justice Stevens, writing for the majority, acknowledged that the Society's argument was not without merit but, noting that the ban prevented customers from making price comparisons, stated: "[T]he purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest. . . . " *Id.* at 692.

In a concurring opinion, Justice Blackmun agreed with the judgment but expressed concern over the majority's restriction of the rule of reason as applied to nonprofit organizations. Justice Blackmun argued that "the decision in *Goldfarb* . . . properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self regulation," and that it did not leave "enough elbow room for realistic application of the Sherman Act to professional services." 435 U.S. at 699-701 (Blackmun, J., concurring) (citations omitted).

62. 102 S. Ct. 1935 (1982).

63. Justice Blackmun wrote the majority opinion in which Justices Brennan, Marshall, O'Connor, and Stevens joined. Justice Powell filed a dissenting opinion in which Justices White and Rehnquist joined. Chief Justice Burger submitted a separate opinion in which he concurred with the majority's result but disagreed with its reasoning.

64. *Id.* at 1948.

65. *Id.* at 1942-43. *See supra* notes 2 & 24-28 and accompanying text.

66. *See supra* note 2.

67. Justice Blackmun relied heavily on Gleason v. Seaboard Air Line Ry., 278 U.S. 349 (1929). *See supra* notes 36-38 and accompanying text. He emphasized that *Gleason* had been followed in a "wide variety" of cases. 102 S. Ct. at 1943. For cases following *Gleason*, see *supra* notes 39-40.

68. 102 S. Ct. at 1943.

69. *Id.* at 1942-43. Justice Blackmun emphasized that ASME's system of codes and stan-

Justice Blackmun then turned to the legislative history of the antitrust laws.[70] He concluded that the apparent authority theory is consistent with the congressional intent to encourage competition.[71] Justice Blackmun argued that the powerful influence of ASME's code throughout the nation, and the great potential for conflicts of interest within the Society, could result in a frustration of competition.[72] A rule which imposes strict liability on organizations such as ASME, he reasoned, would encourage them to take steps to prevent abuse by their agents.[73]

Finally, Justice Blackmun concluded that although treble damages are intended in part as a punitive measure,[74] they also serve the congressional purpose of deterring future antitrust violations[75] and provide a remedy for the victims of anticompetitive activity.[76] Justice Blackmun argued that the great deterrent and compensatory value of an apparent authority theory of antitrust liability[77] would therefore far outweigh the possible injustices of imposing punitive damages on a

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dards could be effective only if third parties could rely upon the statements of its agents, and stated that business expediency—the desire that third persons should be given reasonable protection in dealing with agents—would be served by an apparent authority theory. *Id.* (citing RESTATEMENT, *supra* note 2, at § 262 comment a).

70. 102 S. Ct. at 1944. *See supra* notes 16-20 and accompanying text.

71. *Id.* at 1944-45. Justice Blackmun argued that when ASME "cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace." *Id.* at 1944.

72. *Id.* at 1944-45. Justice Blackmun quoted from H.R. REP. No. 1981, 90th Cong., 2d Sess. 75 (1968). *See Hearings, supra* note 5 (Congress had determined that "so-called voluntary standards . . . may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country").

73. 102 S. Ct. at 1945. Justice Blackmun reasoned that "pressure [will be] brought on [the organization] to see to it that [its] agents abide by the law." *Id.* (citing United States v. A & P Trucking Co., 358 U.S. 121, 126 (1958)). *See also* 102 S. Ct. at 1946 n.13, 1947 n.15 (Justice Blackmun pointed out that ASME had already instituted new procedures specifically in response to this suit).

74. *Id.* at 1947. *See supra* note 20.

75. 102 S. Ct. at 1947. The Court cited Pfizer, Inc. v. Government of India, 434 U.S. 308 (1978), and Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), as ample authority for the proposition that the principal purpose of the antitrust private cause of action is to deter anticompetitive conduct.

76. *See supra* note 18.

77. 102 S. Ct. at 1946-47. Relying on Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) and Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), *see supra* note 18, the court concluded that the application of apparent authority to impose treble damages furthered the congressional intent to deter violations and compensate victims. 102 S. Ct. at 1947.

nonprofit association[78] for the acts of its agents.[79]

Chief Justice Burger concurred in the judgment but disagreed with the Court's reasoning.[80] The Chief Justice stated that the Court should have affirmed the judgment on the basis of the jury's finding that ASME had ratified its agent's conduct.[81]

Justice Powell, in his dissenting opinion,[82] argued that the majority's approach was "unprecedented" and would impose a "potentially crippling" burden on nonprofit organizations.[83] He stated that the apparent authority theory had rarely been relied on in an antitrust case, or in any case involving punitive damages, and he accused the majority of "making new law."[84] Justice Powell expressed particular concern over the majority's use of the apparent authority theory to impose liability on a nonprofit association when the association derived no benefit from its agent's conduct.[85]

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78. Relying on Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), and Associated Press v. United States, 326 U.S. 1 (1945), the Court asserted that nonprofit organizations are subject to the antitrust laws. *See supra* note 49. Justice Blackmun argued that imposing treble damages on ASME was appropriate because the antitrust violation would not have taken place without ASME's codes and its methods of administering them. 102 S. Ct. at 1947-48. In addition, Justice Blackmun dismissed United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1922) and Coronado Coal Co. v. United Mine Workers of Am., 268 U.S. 295 (1925), relied on by Petitioners, *see supra* notes 32-35 and accompanying text, stating that the *Coronado* decisions did not address the apparent authority issue. 102 S. Ct. at 1946 n.12.

79. 102 S. Ct. at 1947. The majority argued that the Court departed from the trend of late nineteenth century decisions when it issued Lake Shore & M.S. Ry. v. Prentice, 147 U.S. 101 (1893), and that a "majority of courts" have held corporations liable for punitive damages for the unauthorized acts of their agents. 102 S. Ct. at 1947 n.14. *See supra* note 31.

80. 102 S. Ct. at 1948 (Burger, C.J., concurring).

81. *Id.* at 1948-49. *See supra* note 11.

82. 102 S. Ct. at 1949 (Powell, J., dissenting).

83. *Id.* Justice Powell wrote of the majority opinion: "[S]uch an expansive rule of strict liability, at least as applied to nonprofit organizations, is inconsistent with the weight of precedent and the intent of Congress, unsupported by the rules of agency law . . . and irrelevant to the achievement of the goals of the antitrust laws." *Id.* at 1949.

84. *Id.* at 1950. Justice Powell viewed United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344 (1921), and Coronado Coal Co. v. United Mine Workers of Am., 268 U.S. 295 (1925), *see supra* notes 32-35 and accompanying text, as rejecting the application of apparent authority theory to the antitrust laws. 102 S. Ct. at 1950. Justice Powell cited a number of circuit court cases in support of his conclusion. *Id.* at 1950 n.6. Cases cited by Justice Powell include Truck Drivers Local No. 421 v. United States, 128 F.2d 227 (8th Cir. 1942), and United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied sub nom.* Western Int'l Hotels v. United States, 409 U.S. 1125 (1973), *see supra* note 35.

85. 102 S. Ct. at 1953-54. Justice Powell relied heavily on *Lake Shore & M.S. Ry. v. Prentice*, *see supra* note 31, in support of his conclusion that apparent authority is inappropriate in a case involving punitive damages. 102 S. Ct. at 1951, 1954.

Justice Powell also criticized the majority's decision as being directly contrary to the intent of Congress in enacting the antitrust laws.[86] He argued that while nonprofit associations are not exempt from liability,[87] the Court has recognized that the antitrust laws are not applied to these associations in the same way that they are applied to profit-making organizations.[88] In addition, Justice Powell argued that at the time Congress passed the Sherman Act traditional agency law rejected the apparent authority theory when the principal derived no benefit from its agent's conduct.[89]

Finally, Justice Powell expressed concern that the majority's application of the "expansive" agency theory to nonprofit associations would lead to "serious injustices" and "overdeterrence."[90] He argued that nonprofit organizations provide a valuable public service to consumers.[91] Because it would be virtually impossible for an organization like ASME to protect itself from liability,[92] the majority's standard could jeopardize the effectiveness, if not the very existence, of all public service organizations.[93]

The decision in *Hydrolevel* is an example of a case in which the Supreme Court, while intelligently deciding the case before it, set a potentially dangerous precedent by failing to delineate the outer boundaries of its holding. On the facts of this particular case the Court's analysis is sound and produces a just result.[94] The blanket imposition of liability on nonprofit associations for all unauthorized activities of

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86. 102 S. Ct. at 1952. Justice Powell pointed to the Supreme Court's opinion in Apex Hosiery v. Leader, 310 U.S. 469 (1940), *see supra* notes 51-53, and the remarks of Senator Sherman during passage of the Sherman Act, *see supra* note 53, as evidence that the antitrust laws are aimed at commercial enterprises and not nonprofit organizations. 102 S. Ct. at 1952.

87. 102 S. Ct. at 1949. *See supra* note 49 and accompanying text.

88. 102 S. Ct. at 1949. Justice Powell cited Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975), in support of his conclusion. 102 S. Ct. at 1949-50.

89. 102 S. Ct. at 1953-54. Justice Powell relied on Friedlander v. Texas & Pac. Ry., 130 U.S. 416 (1889). *See supra* note 31.

90. 102 S. Ct. at 1956.

91. *Id.* at 1957.

92. *Id.* at 1956 & n.19. Justice Powell expressed concern that organizations like ASME would cease to provide services for fear of exposing themselves to antitrust liability. *Id.* at 1956. For reactions to the *Hydrolevel* decision by commentators who echo Justice Powell's concerns, see *infra* note 97. *But see* 102 S. Ct. at 1946 n.13 & 1947 n.15; *supra* note 73.

93. 102 S. Ct. at 1957. Justice Powell summarized his criticism of the majority's decision: "[I]t appears to be so concerned with imposing liability that it puts at risk much of the beneficial private activity of the voluntary associations of our country." *Id.*

94. This conclusion is supported by the jury's finding that ASME had ratified its agent's conduct. *See supra* notes 11 & 81.

their voluntary members, however, is inconsistent with the law of agency[95] and the antitrust laws,[96] and may have a disastrous effect on the standard-setting industry as well as on other nonprofit organizations.[97]

The majority's analysis of the apparent authority doctrine is, for the most part, well-reasoned. The Court's prior holding in *Gleason*[98] and subsequent decisions in the lower federal courts[99] provide ample authority for applying apparent authority theory to hold a corporation liable for the conduct of its agents who act solely for their own benefit.[100]

In addition, although the circuits that have addressed the issue of apparent authority in the context of the antitrust laws have based their decision in part on the fact that the corporation benefited from its agent's conduct,[101] corporate benefit should not be a necessary condition for antitrust liability.[102] As Justice Blackmun noted,[103] the imposition of liability on a corporation for the unauthorized conduct of its agents, regardless of the agent's motives, would encourage the corporation to take steps to prevent abuse by its agents, and thus deter future violations.[104] In addition, such a rule would better serve the congressional purpose of compensating the victims of antitrust violations,[105] by placing the risk of employee dishonesty on the corporation rather than on innocent third parties.[106]

The defect in the Court's analysis is its failure to fully define the limitations of the apparent authority theory. Apparent authority, by definition, applies only when the principal has been negligent to some

95. *See supra* notes 34-39 and accompanying text.

96. *See supra* notes 16-20 and accompanying text.

97. *See supra* note 92. For reactions of commentators and standard setting associations to the *Hydrolevel* decision, see Howe & Badger, *supra* note 47, at 359, 386; *Perspectives: Technical Societies Tighten Standard Setting,* 2 HIGH TECH. Sept.-Oct. 1982, at 91; *News Spectra: Standard Groups Held Liable for Volunteers' Actions,* PHOTONICS SPECTRA 18 (July 1982); Katch & Davidow, *"ASME" Brings Major Problems for Nonprofit Groups,* Legal Times, May 31, 1982, at 13, col. 1.

98. *See supra* notes 36-38 and accompanying text.

99. *See supra* notes 39-40 and accompanying text.

100. *Id. See supra* note 4.

101. *See supra* note 35.

102. *See supra* notes 16-20 and accompanying text.

103. 102 S. Ct. 1935, 1946 (1982).

104. *Id.*

105. *See supra* note 18 and accompanying text.

106. This result would also be consistent with the view of the Restatement. *See supra* note 2.

extent, either through its manifestations to third parties that the agent has actual authority,[107] or by placing the agent in a position in which he is able to deceive.[108]

Because the Court failed to delineate the outer boundaries of its holding,[109] the opinion can be read to suggest that a principal is strictly liable for all unauthorized acts of its agents, regardless of steps taken by the principal to prevent abuse.[110] Such a holding has questionable deterrent value because no action taken by a principal to prevent illegal conduct by its agents will completely insulate the principal from liability.[111] The Court would have been wiser to impose a standard under which a principal could avoid antitrust liability upon a showing that it used all reasonable means to prevent abuse. The use of a "reasonableness" standard would also serve the congressional purposes of deterrence[112] and compensation of victims.[113] More importantly, the rule would limit the imposition of treble damages to those cases in which the principal was to some extent at fault, thus more effectively serving the punitive purposes of the antitrust laws.[114]

The broadness of the Court's holding is particularly unfounded in the context of nonprofit organizations.[115] The legislative history of the antitrust laws[116] and subsequent decisions of the Court[117] demonstrate that the antitrust laws are aimed primarily at the anticompetitive activities of commercial enterprises. While nonprofit associations are not exempt from antitrust liability,[118] the Court has consistently emphasized that the antitrust laws need not be applied to nonprofit associations to the same extent that they are applied to commercial organizations.[119] The Court's decision to extend its broad apparent authority standard to

107. *See supra* note 2.

108. *Id. See also* RESTATEMENT, *supra* note 2, at § 261 (liability imposed on principal who "puts a[n] . . . agent in a position which enables the agent . . . to commit a fraud . . .")

109. 102 S. Ct. at 1948.

110. *Id.* at 1955 n.17 (Powell, J., dissenting).

111. *See supra* note 92.

112. *See supra* note 19 and accompanying text.

113. *See supra* note 18 and accompanying text.

114. *See supra* note 20 and accompanying text.

115. *See* 102 S. Ct. at 1949 (Powell, J., dissenting).

116. *See supra* notes 16-17.

117. *See supra* notes 43-53 and accompanying text.

118. *See supra* note 49 and accompanying text.

119. *See supra* notes 43-61 and accompanying text.

nonprofit associations has effectively eliminated this distinction,[120] and could lead to disastrous consequences.[121] As the dissent noted, fear of antitrust liability could seriously undermine the effectiveness not only of standard-setting associations, but of all nonprofit organizations, and might well deprive the American people of valuable public services.[122]

Although it is too early to evaluate the impact of the *Hydrolevel* decision on the standard-setting associations and other nonprofit organizations, the Court, in its zeal to extend the apparent authority doctrine, may well be risking the welfare of the very public it seeks to protect.[123]

K.O.B.

120. Justice Blackmun's holding is particularly surprising in light of his concurring opinion in *National Society of Professional Engineers. See supra* note 61.

121. *See supra* note 92-93.

122. *See* 102 S. Ct. at 1956-57 (Powell, J., dissenting).

123. *Id.*