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Apparent Authority and Antitrust Liability: An Incompatible Combination? American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation

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Apparent Authority and Antitrust Liability: An Incompatible Combination? American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation

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Abstract

A “new vicarious antitrust liability doctrine”¹ has emerged from a recent Supreme Court decision² that combines the agency concept of apparent authority with civil antitrust liability.³

KEYWORDS: antitrust, mechanical, society

Apparent Authority and Antitrust Liability: An Incompatible Combination? *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corporation*

Introduction

A “new vicarious antitrust liability doctrine”¹ has emerged from a recent Supreme Court decision² that combines the agency concept of apparent authority with civil antitrust liability.³ *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* for the first time,⁴ permits an agent acting against the interests of his principal but with apparent authority⁵ to subject the principal to antitrust law’s punitive treble damages.⁶ Even outside the antitrust arena, punitive damages

1. 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, 361 (1982).

2. *American Soc’y of Mechanical Eng’rs v. Hydrolevel Corp.*, 102 S. Ct. 1935 (1982).

3. See generally Appleson, *Errant Volunteers Put Associations In Peril*, 68 A.B.A. J. 796 (1982).

4. 102 S. Ct. at 1950 (Powell, J., dissenting).

5. “Apparent authority is 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 manifestation to such third persons.” RESTATEMENT (SECOND) OF AGENCY § 8 (1957).

For other definitions of apparent authority see W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* §§ 8D, 18B, 22 (1964); H. REUSHLIN & W. GREGORY, *HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP* § 23 (1979); *infra* notes 54-57 and accompanying text.

6. The Clayton Act § 4, 15 U.S.C. 15 (1976) provides for treble damages in Sherman Act § 1 and other antitrust violations and is as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the

were not imposed when apparent agency served as the basis of the principal's liability.⁷ On its journey to this land of expanded antitrust liability, the High Court picked up an unsuspecting passenger.⁸ A nonprofit organization fell victim to these untried extremes of agency and antitrust liability, and for the first time was hit with the sanction of treble damages.⁹

In *Hydrolevel*, the distension of these areas of liability was discreetly masked in Justice Blackmun's majority opinion but partially unveiled by Justice Powell in a vigorous dissent.¹⁰ This comment examines *Hydrolevel's* unclear path of vicarious antitrust liability and the Court's explication of the principles involved in its decision.

American Society of Mechanical Engineers v. Hydrolevel Corp.

Background

The American Society of Mechanical Engineers (ASME) is one of the oldest and largest scientific societies in the United States.¹¹ It is a nonprofit, tax-exempt¹² organization with more than "90,000 members drawn from all fields of mechanical engineering."¹³ ASME's primary

cost of suit, including a reasonable attorney's fee.

7. See *infra* notes 79-87 and accompanying text.

8. See generally Young, *Court Widens Treble Damage Liability For Non-Profit Societies*, 68 A.B.A. J. 846 (1982).

9. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), allowed the application of antitrust laws to nonprofit organizations but *Goldfarb* called for flexibility in imposing sanctions on such organizations. *Id.* at 788 n.17. *Hydrolevel* is the first case imposing the treble damages sanction upon a nonprofit entity. 102 S. Ct. at 1949 n.2, 1950.

10. In the 6-3 decision five justices supported the expansion of antitrust liability in an apparent agency context. Chief Justice Burger rejected the majorities' new vicarious liability approach but concurred in the judgment by utilizing the agency doctrine of ratification. 102 S. Ct. at 1948. The ratification doctrine imposes liability on the principal only after he expressly or impliedly condones the agent's activities. *Id.* Justices White and Rehnquist joined in the dissent. *Id.* at 1949.

11. For a general historical overview of ASME see B. SINCLAIR, *A CENTENNIAL HISTORY OF THE AMERICAN SOCIETY OF MECHANICAL ENGINEERS, 1880 - 1980* (Univ. of Toronto Press 1980).

12. I.R.C. § 501(c)(3) (1954) - As a "corporation . . . or foundation organized and operated exclusively for religious, charitable, scientific testing for public safety, literary, or educational purposes. . . ."

13. 102 S. Ct. at 1938.

function is drafting, publishing and interpreting more than 400 separate codes for the industry.¹⁴ Thousands of ASME volunteers participate on the committees and subcommittees overseeing this process.¹⁵ Two ASME volunteers, acting against the organization's interests, fraudulently interpreted a single provision in an 18,000 page code¹⁶ and thereby subjected ASME to antitrust law's treble damages and a \$7.5 million verdict at trial.¹⁷

One of the volunteers, John James, served as vice-chairman of the ASME subcommittee responsible for drafting and interpreting the code section governing fuel safety devices in boilers. James concurrently served as vice-president of McDonnell and Miller¹⁸ (M&M), the dominant force in the fuel safety device market for more than fifty years.¹⁹ The other ASME volunteer, Subcommittee Chairman T. R. Hardin, was executive vice-president of Hartford Steam Boiler Inspection and Insurance Company, the nation's leading underwriter of boiler insurance.²⁰

14. In theory ASME codes are merely advisory and not binding on anyone. However, in practice the codes are highly influential and a manufacturer whose product cannot satisfy the applicable ASME code is at a great disadvantage in the marketplace. 102 S. Ct. at 1938.

ASME codes are incorporated by reference into regulations on the federal, state and local levels and in all but one of the provinces of Canada. *Id.*

15. *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, 635 F.2d 118, 121 (2d Cir. 1980), *aff'd*, 102 S. Ct. 1935 (1982).

16. ASME's Boiler and Pressure Vessel Code was the subject of the *Hydrolevel* litigation. ASME receives 20,000 - 30,000 inquiries a year seeking its interpretation. 102 S. Ct. at 1949.

17. The District Court's finding of liability was affirmed, but a new trial for damages was ordered by the circuit court because the method utilized for assessing and trebling damages was incorrect. 635 F.2d at 128.

18. It was common for ASME committee members to be employed by business entities directly affected by the ASME codes. The conflicts of interest that arose did not serve as a pretext for ASME's liability in *Hydrolevel*. Arguably, they could.

19. M & M annually controlled more than 85% of the \$10 million market for boiler fuel safety devices. Meyer, *Knocking the Competition — How Rivals' Use of "Industry Code" Report Created Problems for a Tiny Company*, Wall St. J., July 9, 1974, at 36, col. 1.

20. Plaintiff's First Amended Antitrust Complaint at 3, *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, No. 75 Civ. 1360 (E.D.N.Y. December 4, 1978).

International Telephone and Telegraph (ITT)²¹ purchased M&M in 1971. ITT acquired a controlling interest in Hartford Steam in 1970.²² Capitalizing on their positions as chairman and vice-chairman of the ASME boiler subcommittee, ITT's agents, Hardin and James, without ASME's knowledge or possible benefit, conspired to destroy M&M/ITT's newest competitor, the Hydrolevel Corporation.

ASME's procedure for dealing with public inquiries regarding the ASME codes granted a high level of discretion to highly placed officials such as Hardin and James.²³ Hardin as subcommittee chairman had the authority to personally interpret the ASME code in response to a public inquiry merely by terming the response an "unofficial communication."²⁴ The "unofficial" response then bypassed full subcommittee review and was mailed out to the inquiring party.²⁵ This ASME procedure served as the mechanism by which ITT and its agents, Hardin and James, were able to ruin the Hydrolevel Corporation.²⁶

Soon after Hydrolevel lured a major customer away from M&M, James, other M&M officials and Hardin met to plan a course of action. The ASME committeemen drafted a letter for M&M asking ASME if Hydrolevel's new fuel safety device with a time delay satisfied the Boiler Code.²⁷ After receiving the inquiry, ASME referred it to sub-

21. "ITT is a diversified company with subsidiaries and divisions located throughout the United States and the world." When this suit arose ITT had annual sales in excess of \$5 billion. *Id.*

22. In 1970, ITT acquired 99% of the outstanding stock in Hartford Fire Insurance Corp., a Connecticut corporation which owned approximately 11% of the outstanding common stock in Hartford Steam. *Id.*

23. 102 S. Ct. at 1939, 1940.

24. *Id.*

25. *Id.*

26. The ease with which an ASME agent could manipulate this procedure to accomplish bad faith objectives suggests the direct fault of ASME for failing to guard against such misconduct. However, instead of simply premising ASME's liability on some fault of the organization, the appellate court and the Supreme Court, for the first time, founded antitrust liability upon a no-fault apparent authority theory, i.e. even if ASME did everything possible to prevent misconduct by its officials and was blameless in its own right, liability would exist solely because of the agency status of the wrongdoers, which created the appearance of actual authority. *See supra* note 5.

27. 102 S. Ct. at 1939. Both M & M and Hydrolevel manufactured products that automatically cut off the fuel supply to the boiler before the water level became dangerously low. Hydrolevel's new device included a time-delay designed to prevent

committee chairman Hardin for a reply. Hardin and James then drafted a response to their own inquiry which cast doubt upon the safety of Hydrolevel's product.²⁸

As planned, M&M/ITT seized upon this fraudulent interpretation of the code to disparage Hydrolevel's product. M&M/ITT saturated the marketplace with anti-time-delay propaganda informing prospective purchasers that Hydrolevel's device failed to meet ASME standards.²⁹

Hydrolevel, although unaware of M&M/ITT's scheme, learned of the incorrect ASME code interpretation and demanded that ASME send corrections to those who received the faulty information.³⁰ Three months later ASME mailed Hydrolevel a letter that "confirmed the intent" of part of the faulty code interpretation letter but, in effect, admitted that the Hydrolevel product did not violate the code.³¹ Following an investigation into the faulty code interpretation, ASME, still believing in the good faith of Hardin and James' acts, concluded that its officials had acted properly.³² Ultimately, the ITT scheme against Hydrolevel was uncovered by a Senate subcommittee.³³ However, the aspersions cast upon the time-delay device by M&M/ITT were never fully extracted from the minds of a wary buying public.³⁴ Hydrolevel brought an antitrust action against M&M/ITT, Hartford Steam and ASME and in 1979 sold all assets except the lawsuit for a salvage price

premature fuel cut offs. The device allowed the fuel supply to continue for a short time when the overall water level was safe but occasionally fell below the minimum acceptable level because of surging water inside the boiler. *Id.* at 1939 n.1.

28. The reply letter said in part, "If a time delay feature were incorporated in a low water fuel cut-off, there would be no positive assurance that the boiler water would not fall to a dangerous point during a time delay period." 635 F.2d 122.

29. M & M included a copy of the fraudulent reply letter in a booklet entitled "The Opposition - Who They Are, How To Beat Them." The booklet, distributed to M & M salesmen, stated, "A time delay of any kind would very definitely be against the ASME code. . . . [T]his should definitely be brought to the attention of anyone considering the device. . . ." 635 F.2d at 123.

30. 102 S. Ct. at 1940.

31. ASME stated, "[T]here is no intent in Section IV to prohibit the use of low water fuel cut-offs having time delays. . . ." 635 F.2d 123.

32. 102 S. Ct. at 1941.

33. *Id.*

34. *See* Wall St. J., July 9, 1974, at 36, col. 1.

of \$86,000.

Action in the District Court

In 1979, a jury in federal district court held ASME liable for anti-trust damages of \$7.5 million, three times the actual damages suffered by Hydrolevel.³⁵ Hydrolevel requested a jury instruction permitting apparent authority as a basis of liability but the trial judge rejected such an approach.³⁶ Instead, since the scheme against Hydrolevel was outside the scope of employment of the ASME officials, the jury was told to find ASME liable only if the organization was at fault by ratifying or adopting as its own the misconduct of Hardin and James.³⁷ Judge Weinstein charged:

If 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 person or corporation, and this action was not ratified or adopted by the defendant, ASME, their misconduct cannot be con-

35. *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, No. 75 Civ. 1360 (E.D.N.Y. 1978). ASME was held liable under section 1 of the Sherman Antitrust Act, 15 U.S.C. § (1976).

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

See supra note 6, the Clayton Act § 4 allowing a private right of action for treble damages.

In stark contrast to the large trial court judgment assessed against ASME, the ITT owned instigators and beneficiaries of the scheme to destroy Hydrolevel, M & M and Hartford Steam, settled out of court for \$725,000 and \$75,000 respectively. 102 S. Ct. at 1945 n.1.

The Second Circuit Court of Appeals affirmed the trial court's imposition of liability against ASME but ordered a new trial on damages. 635 F.2d 118, 131.

36. 635 F.2d at 124. For definitions of apparent authority *see supra* note 5.

37. 102 S. Ct. at 1941. *See also id.* at 1948 (Burger, J., concurring).

sidered that of the corporation with which they are associated.³⁸

Based on this instruction, the jury found ASME at fault and therefore, liable for treble damages.

The Second Circuit and the Supreme Court Adopt a New Theory of Liability

To hold ASME liable, the appellate court and the Supreme Court needed only to affirm the jury's finding of liability which was based on traditional antitrust-agency concepts.³⁹ *Instead, both courts disregarded the jury finding of fault and imputed liability to ASME based on a new no fault vicarious antitrust liability doctrine.*⁴⁰ ASME was held to be a vicarious coconspirator to an unreasonable restraint of trade solely because the misconduct of ITT's agents appeared to be authorized by ASME.⁴¹

Justice Powell argues in the dissent that:

[T]he very facts of this case belie the necessity of simply *creating* a new theory of liability; the jury found ASME liable not upon a theory of apparent authority but upon the traditional basis of ratification or authorization. The apparent authority rationale was not even argued to the Second Circuit on appeal. The Second Circuit, and now this Court, reach out unnecessarily to embrace a dubious new doctrine. That the Court chooses the case of a nonprofit, tax-exempt organization to announce its new rule is particularly inappropriate.⁴²

The circuit court did not explain the benefit produced by the decision to promulgate this new vicarious antitrust liability doctrine when the defendant's liability was already decided on traditional antitrust

38. *Id.* at 1941.

39. *See id.* at 1951, 1955.

40. 635 F.2d at 124.

41. *Id.* at 127. "For ASME to be held liable, then, Hydrolevel had to demonstrate only that ASME's agents acted within their apparent authority when participating in the conspiracy; it did not have to demonstrate that they also acted to benefit ASME or that ASME later ratified their actions." *Id.* The court also characterized ASME's involvement in the scheme as "unintentional participation." *Id.* at 131.

42. 102 S. Ct. at 1951.

grounds. For potential antitrust defendants, “as well as ASME, the approach adopted by the Second Circuit [and the Supreme Court] can be viewed only as a tragic and confusing chapter in antitrust history.”⁴³

The Supreme Court Opinion

In affirming ASME’s liability for the unauthorized actions of the nonprofit organization’s agents, the Supreme Court, for the first time, holds that apparent authority can serve as an appropriate basis for imputing antitrust liability.⁴⁴ Justice Blackmun, writing for the Court, adheres to much of the Second Circuit’s logic and continually focuses upon the possible anticompetitive effects from standard-setting organizations such as ASME.⁴⁵

While *Hydrolevel* involves many agency and antitrust principles, the majority primarily emphasizes antitrust law’s purpose of deterring anticompetitive activities.⁴⁶ Arguably, in doing so, the Court fails to reconcile the new no fault doctrine with well-established rules of antitrust and agency law that disallow imputation of antitrust liability to a principal who is not at fault and does not stand to benefit from the agent’s misconduct.⁴⁷ Justice Blackmun partially concedes that his po-

43. *Howe & Badger*, *supra* note 1, at 387.

[T]he Second Circuit proceeded to adopt a vicarious antitrust liability principle and apparent authority agency standard by which it upheld the antitrust liability of ASME for the misconduct of its two members. This approach, however, was totally unrealistic because it completely begged the question of how, . . . ASME might have avoided a finding of conspiratorial intent. *Id.*

44. 102 S. Ct. at 1944, 1949, 1950.

45. *E.g.*, 102 S. Ct. at 1942 (“ASME wields great power in the nations economy. Its codes and standards influence the policies of numerous states and cities. . . . ASME permits its agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace.”) *Id.* at 1944; (“A standard-setting organization like ASME can be rife with opportunities for anticompetitive activity.”) *Id.* at 1945; (“The anticompetitive practices of ASME’s agents are repugnant to the antitrust laws. . . .”) *Id.* at 1946; (“ASME’s agents . . . are able to affect the lives of large numbers of people and the competitive fortunes of businesses throughout the country. . . . We thus make it less likely that competitive challenges like *Hydrolevel* will be hindered by agents or organizations like ASME in the future.”) *Id.* at 1948.

46. *Id.*

47. *See infra* notes 60-67 and accompanying text. The author does not assert

sition as to the use of apparent authority in antitrust actions is not supported by precedent.⁴⁸ However, he follows the lead of the circuit court by analogizing the antitrust action to a common law suit for fraud or misrepresentation where apparent authority is permitted as an exception to the conventional tort doctrine that disallows its use.⁴⁹

The Court quickly disposes of several other agency arguments by asserting that its decision will “help ensure that standard-setting organizations will act with care when permitting their agents to speak for them.”⁵⁰ However, *ASME’s lack of due care is not an issue under the apparent authority doctrine* and arguably the Court attempts to strengthen its argument by mixing the no fault apparent authority doctrine with a direct negligence or ratification theory requiring fault. Since the Court states that apparent authority is the basis of the decision, any acts tending toward ASME’s direct fault, ratification or actual authorization have no bearing on a finding of apparent authority because the crux of the doctrine is the *appearance of authority to third parties*.⁵¹

The expansiveness of the Court’s decision on vicarious antitrust liability is unclear as Justice Blackmun asserts, “We need not delineate today the outer boundaries of standard-setting organizations for the actions of their agents committed with apparent authority.”⁵²

In a forceful dissent, Justice Powell, joined by Justices White and

that ASME was faultless but only that the adoption of a no-fault apparent authority doctrine does not require consideration of the principal’s own wrongdoing and is an overly expansive addition to the antitrust laws. Under the apparent authority theory even the assumption that ASME was blameless in its own right requires the same finding of liability. Thus, there is no way for a principal to guard against a treble damages judgment when his agent intentionally violates the antitrust laws.

48. 102 S. Ct. at 1944 n.7 (“Evidently, in recent years no Court of Appeals other than the Second Circuit (in *Hydrolevel*) has directly decided whether a principal can be held liable for antitrust damages based on an apparent authority theory.”)

49. 102 S. Ct. at 1942. *See also* RESTATEMENT (SECOND) OF AGENCY §§ 257, 261, 262 (1957).

50. 102 S. Ct. at 1948.

51. *See supra* notes 54-57 and accompanying text. *See also* 102 S. Ct. at 1956 n.18 (“The Courts theory [of apparent authority] makes ratification by ASME irrelevant.”).

52. 102 S. Ct. at 1948.

Rehnquist,⁵³ sets forth the primary weaknesses of the majority opinion upon which this comment expounds: (1) apparent authority previously had no application in antitrust law, (2) even when applied outside of the antitrust area, apparent authority did not permit imputation of punitive damages to the principal, (3) the majority disregards the fact that the Sherman Act section 1 claim brought against ASME requires the defendant to engage in a conspiracy and (4) nonprofit organizations previously have not been subjected to antitrust law's treble damages.

Apparent Authority and Antitrust Liability: An Incompatible Combination

Apparent authority exists when an agent is not actually authorized to act for the principal, but a third party reasonably believes the agent acts with authority because the principal placed the agent in a position creating this appearance.⁵⁴ After the principal initially creates the appearance of authority, apparent authority becomes a no fault concept where the principal is liable even when the agent intentionally acts against the principal's interests.⁵⁵ However, since the apparent authority concept is based on the objective theory of contracts,⁵⁶ it is generally applicable only to contractual relationships and certain limited areas of tort, such as fraud and misrepresentation.⁵⁷ For conventional torts, the apparent authority doctrine has no application.⁵⁸ Since antitrust involves statutory law with actions brought neither in tort nor contract, a choice between the two theories of liability was required.

53. *Id.* at 1949.

54. This definition does not encompass the complete scope of apparent authority but rather is fitted to the situation in *Hydrolevel*. For complete definitions *see supra* note 5.

55. W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 57 (1964).

56. Cook, *Agency by Estoppel*, 5 COL. L. REV. 36 (1905), "[T]he thesis of the present article is that the liability in question is a true contractual liability, as well where the authority of the agent is only apparent as where it is real." *Id.* at 38. Compare H. REUSHLIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 23 (1979).

57. *See* RESTATEMENT (SECOND) OF AGENCY §§ 257, 261, 262 (1957).

58. The Second Circuit Court conceded that with conventional torts the principal is liable only if he is at fault or the agent acts within his scope of employment with an intent to benefit the principal. 635 F.2d at 125.

The issue before the courts in *Hydrolevel* thus became whether an anti-trust conspiracy to restrain trade should be analogized to either the conventional torts (disallowing apparent authority liability) or the fraud/misrepresentation type torts (permitting apparent authority liability) to justify adopting either's brand of vicarious liability, or whether the antitrust action deserves an entirely distinct theory of liability?⁵⁹

Prior to *Hydrolevel*, the Supreme Court and the lower federal courts considering the questions of vicarious antitrust liability, without exception, opted for the conventional tort-scope of employment-brand of liability where the agent's unauthorized acts are imputed to the principal only when the acts are done with an intent to benefit the principal.⁶⁰ These courts have rejected the possibility of expanding vicarious antitrust liability on an apparent authority basis either expressly or by implication.⁶¹ Had the Court remained on this established course, ASME's liability would rest on its own fault and not on unpreventable fraudulent conduct designed to benefit another.

59. The district court chose to apply the conventional tort theory and refused to allow ASME's liability on an apparent authority basis. *Id.* The circuit court admitted that a vicarious liability choice was required but Justice Blackmun in adopting the apparent authority theory failed to acknowledge the existence of the conventional tort brand of vicarious liability or the necessity of choosing between the theories. Since Hardin and James, the ASME agents, acted fraudulently and outside their scope of employment, the conventional tort theory would find ASME liable only if it was independently at fault, but the apparent authority theory holds the principal liable regardless of his own fault. *See supra* note 5; *see also* RESTATEMENT (SECOND) OF AGENCY §§ 257, 261, 262 (1957).

60. *See* 102 S. Ct. 1935, 1944 n.7, 1950 (dissent).

61. *See* *United States v. Hilton Hotels*, 467 F.2d 1000, 1006 n.4 (9th Cir. 1972), *cert. denied sub nom. Western Int'l Hotels Co. v. United States*, 409 U.S. 1125 (1973) (citing *Standard Oil Co. of Texas v. United States*, 307 F.2d 120, 128-29 (5th Cir. 1962)), ("A purpose to benefit the corporation is necessary . . ."); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204 (3d Cir. 1970); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1090 (5th Cir. 1978). *But cf.* *Continental Baking Co. v. United States* 281 F.2d 137, 150-51 (6th Cir. 1960); *United States v. Continental Group, Inc.*, 603 F.2d 444, 468 n.5 (3d Cir. 1979) (not mentioning apparent authority). *Compare Hydrolevel*, 102 S. Ct. at 1951 n.5.

Applying Apparent Authority to Antitrust Law: A Deviation From Precedent

In *United Mine Workers v. Coronado Coal*⁶² and *Coronado Coal v. United Mine Workers*⁶³ the Supreme Court reversed decisions holding an international union vicariously liable for a local union's conspiracy to restrain trade in violation of the Sherman Act. The president of the international union, with apparent authority but no actual authority, assured certain local union members of funds for their strike involvement and otherwise appeared to authorize the strike.⁶⁴ Chief Justice Taft, speaking for the Court, declared, "The president had no authority to order or ratify a local strike. [His actions show] sympathy with its purpose and a lack of respect for the law but [do] not imply or prove on his part any initiation or indicate a desire to ratify the transaction. . . ."⁶⁵

The Court in *Coronado Coal* and *United Mine Workers* followed the conventional tort basis of vicarious antitrust liability and rejected the nofault apparent authority approach. It stated:

[A] trades-union . . . might be held liable . . . but certainly 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.

A corporation is responsible for the wrongs committed by its agents in the course of its business *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.⁶⁶

In *Hydrolevel*, Justice Blackmun's opinion summarily disposes of the *Coronado Coal* and *United Mine Workers* precedent in a footnote by asserting that, "Those cases, however, are not controlling here. The Court [in *Coronado Coal v. United Mine Workers*] expressly pointed out: 'Here it is not a question . . . of holding out an appearance of

62. 259 U.S. 344 (1922).

63. 268 U.S. 295 (1925).

64. *Id.* at 300, 303.

65. *United Mine Workers v. Coronado Coal*, 259 U.S. at 394.

66. *Coronado Coal v. United Mine Workers*, 268 U.S. at 304 (emphasis added).

authority on which some third person acts.' ”⁶⁷

Justice Blackmun utilizes a single sentence from fifty pages of precedent to assert that the two cases are not a rejection of the apparent authority theory for antitrust litigation. The same interpretation of the two cases and of the single-sentence excerpt is not adopted by the dissent nor by federal courts citing the cases as precedent.⁶⁸ In rebutting Justice Blackmun’s claim, Justice Powell asserts, “The majority quotes this language but misses its point. The *United Mine Workers* Court well could have characterized the cases before it as involving an exercise of apparent authority by the local union or the national President; it refused to do so.”⁶⁹

*Truck Drivers Local No. 421 v. United States*⁷⁰ quotes extensively from *United Mine Workers* and *Coronado Coal*, including the excerpt challenged by the majority in *Hydrolevel*. *Truck Drivers* ruled that “to bind the union in an antitrust situation such as this,⁷¹ actual and authorized agency was necessary; *mere apparent authority would not be sufficient to take the matter to the jury . . .*”⁷²

In *United States v. Ridglea State Bank*,⁷³ the Fifth Circuit eliminate was faced with the same choice over vicarious liability as the Supreme Court in *Hydrolevel*; whether a principal’s liability for statutory punitive damages should extend to apparently authorized agents acting with no intent to benefit the principal, or whether the conventional tort-scope of employment-basis should serve as the standard. *Ridglea State Bank* involved a bank vice-president who fraudulently processed federally insured housing loans and subsequently shared the proceeds with the defaulting borrower.⁷⁴ The federal government sued the bank for

67. *Hydrolevel*, 102 S. Ct. at 1946 n.12.

68. See, e.g., *Truck Drivers Local No. 421 v. United States*, 128 F.2d 227, 235 (8th Cir. 1942).

69. 102 S. Ct. 1950 n.5 and accompanying text.

70. 128 F.2d 227 (8th Cir. 1942).

71. *Truck Drivers Local No. 421* involved a § 1 Sherman Act violation brought against the Teamsters Union and others. The defendants were convicted of conspiring to fix milk prices, but the decision was reversed by the Eighth Circuit holding that the acts of the separate union divisions and of the individual union officials could not be imputed to the entire organization unless actual authority or ratification were proved.

72. 128 F.2d at 235 (emphasis added).

73. 357 F.2d 495 (5th Cir. 1966).

74. *Id.* at 496-97.

the agents' fraud under the False Claims Act which imposed double damages upon violators.

The *Ridglea* court granted that a principal is generally liable for fraud or misrepresentation of an agent even when acting only with apparent authority.⁷⁵ The court recognized the vicarious liability choice before it and stated, "We find ourselves confronted with two rules on the imputation of an agent's fraudulent intent to his employer and a case which falls somewhere between the usual areas of the operation of the two rules."⁷⁶ By refusing to impute liability to the principal, the court chose to view the application of apparent authority to common law fraud⁷⁷ as inapplicable to a statutory punitive damages action. It stated, "All of these authorities concern civil actions to recover actual loss caused by the misrepresentation of an employee; not, as here, actions to recover forfeitures and double damages far in excess of actual loss."⁷⁸ *Ridglea's* logic for refusing to impose excessive statutory double damages becomes even more powerful when applied to an anti-trust action for treble damages.

Punitive Damages: An Unsound Extension

Hydrolevel also marks the unprecedented imputation of punitive damages to a principal liable under the apparent authority doctrine.⁷⁹ In permitting a treble damages judgment against ASME, the Court disregards rigidly defined punitive damages boundaries which require direct fault of the principal when his agent acts outside the scope of employment.⁸⁰ In *Hydrolevel*, the Court places the immense burden of punitive damages upon a principal who admittedly is not deserving of punishment.⁸¹ It is deep-rooted in the law that exemplary damages can

75. *Id.* at 499.

76. *Id.*

77. RESTATEMENT (SECOND) OF AGENCY § 257(d) (1937).

78. *Ridglea*, 357 F.2d 499. Justice Blackmun cited to *Ridglea* but made no attempt to distinguish the case.

79. 102 S. Ct. at 1950-51. "Nor does the Court cite a single decision in which the apparent authority theory of liability has been applied in a case involving treble or punitive damages and an agent who acts without any intention of benefiting the principal." *Id.* at 1950.

80. *Id.* at 1950-51.

81. The Second Circuit Court characterized ASME's involvement as "uninten-

be awarded only against one who has participated in the offense or wrong complained of,⁸² and are "not given against those liable, if at all, [merely] by reason of their relation to the wrongdoer. . . ."⁸³

The Supreme Court, in the 1893 landmark decision of *Lake Shore and Michigan Southern Railway Co. v. Prentice*,⁸⁴ held that "[a] principal . . . cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of the agent."⁸⁵ In following *Lake Shore* and refusing to assess punitive damages in an apparent agency situation, the court in *Ridglea State Bank*⁸⁶ expounded upon "the rule . . . that the knowledge or guilty intent of an agent, not acting with a purpose to benefit his employer, will not be imputed to the employer."⁸⁷ The *Hydrolevel* Court discarded this rule and found ASME liable even though ASME did not encourage or adopt the malevolent actions of its agents. ASME, in fact, was a victim of its agents' active deception and could not benefit from, nor guard against, conduct motivated by a desire to serve another.⁸⁸

In *Hydrolevel*, "the Court practically concedes that an apparent authority rule of liability has rarely, if ever, been used to impose punitive damages upon the principal."⁸⁹ Justice Blackmun "[r]ather than

tional participation." 635 F.2d at 131.

82. *Lake Shore & Michigan S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893); *Aetna Life Ins. Co. v. Brewer*, 56 App. D.C. 283, 12 F.2d 818 (1926); *Hogg v. Plant*, 145 Va. 175, 133 S.E. 759 (1926).

83. *Graham v. St. Charles St. R. Co.*, 47 La. Ann. 1656, 1657, 18 So. 707, 708 (La. 1895) (emphasis added). See generally 22 AM. JUR. 2d *Damages* §§ 255 (1965) ("Exemplary damages are not recoverable against a defendant who acts in good faith. . . .") *Id.* at § 255; (requiring the agent act within the scope of his employment) *Id.* at § 258.

84. 147 U.S. 101 (1893).

85. *Id.* at 107.

86. 357 F.2d 495 (5th Cir. 1966).

87. *Id.* at 500. See also Note, *Corporate Criminal Liability For Acts in Violation of Company Policy*, 50 GEO. L.J. 547, 560 n.64 (1962), "[P]unitive damages are penal in character and should be imposed in addition to compensatory damages only where the corporate management has acted with malice or recklessness." See also *Mercury Motor Express, Inc. v. Smith*, 393 So. 2d 545, 549 (Fla. 1981) ("Before an employer may be held vicariously liable for punitive damages under the doctrine of respondent superior, there must be some fault on his part.").

88. See 102 S. Ct. at 1955.

89. *Id.* at 1951.

contest this well-established rule of agency law . . . argues that *treble damages are not punitive* or, even if they are, the purpose of the anti-trust laws overrides the basic rule of the law of agency.”⁹⁰

Justice Blackmun’s position as to the purpose and effect of anti-trust treble damages is directly contra to earlier Supreme Court decisions, lower federal court rulings and the stance taken by the recognized commentators in the field.⁹¹ Justice Blackmun’s assertion that, “the antitrust private action *was created primarily as a remedy for the victims* of antitrust violations,”⁹² is diametrically opposed to the Supreme Court’s explication of the antitrust treble damages action in 1981. In *Texas Industries v. Radcliffe Materials, Inc.*, the Court ruled that, “*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.”⁹³ Justice Blackmun’s new interpretation of treble damages as non-punitive is flatly rejected by Professors Areeda and Turner as they state, “[W]hether or not compensatory damages ever punish, treble damages are indisputably punishment.”⁹⁴ Clearly, treble damages were “intended to be punitive in nature and deterrent in effect.”⁹⁵

The wisdom of imputing the punishment of treble damages under an apparent authority theory is also questionable in view of *Ridglea State Bank’s* rejection of apparent authority as a basis for imputing double damages; “What is important for the proper decision of this case is that the present action is not primarily one for the recovery of a loss caused by an employee, but is one which, if successful, *must result in a recovery wholly out of proportion to actual loss.*”⁹⁶

Furthermore, apparent authority and punitive treble damages become overtly incompatible concepts when the basis for apparent agency liability is reviewed. Apparent agency stems from the reasoning that although the principal and plaintiff are both innocent parties to the

90. *Id.* (emphasis added).

91. See *infra* notes 93-96 and accompanying text.

92. 102 S. Ct. at 1947 (emphasis added).

93. 451 U.S. 630, 639 (1981) (emphasis added).

94. 2 AREEDA & TURNER § 311(b) (1978) (“In addition, treble damages constitute punishment that is analogous in many ways to criminal sanctions.”). See generally K. ELZINGA, *THE ANTITRUST PENALTIES, A STUDY IN LAW AND ECONOMICS* (1977).

95. 1 H.A. TOULMIN, *ANTITRUST LAWS* § 20.5 (1949).

96. 357 F.2d at 500 (emphasis added).

action, the plaintiff should not bear the loss since the principal's initial relationship with the agent created the damaging situation.⁹⁷ It is anomalous, therefore, to subject the principal to three times the actual damages suffered when the injured party, as in *Hydrolevel*, has alternative avenues for redress by way of a tort action in state court.⁹⁸

Conspiracy in Restraint of Trade: Unidentified or Abandoned?

ASME's liability emanates from a conspiracy in restraint of trade in violation of the Sherman Act.⁹⁹ The Court analogizes this antitrust action to a common law suit for fraud or misrepresentation¹⁰⁰ but fails to recognize that the antitrust conspiracy requires a plurality of actors whereas the common law actions may be occasioned by a single perpetrator.¹⁰¹ It is rudimentary that one cannot conspire with oneself,¹⁰² but by finding ASME liable as a coconspirator with its own agents, the Court ignores this basic tenet of antitrust and conspiracy law. While it is clear that a business entity and its agents alone cannot constitute the requisite plurality of actors in a conspiracy because the principal is one

97. RESTATEMENT (SECOND) OF AGENCY §§ 8, 159 (1957).

98. *Hydrolevel* could have utilized the apparent authority doctrine in a state court tort action against ASME for fraud, misrepresentation, etc. to recover compensatory damages for its actual loss rather than treble damages from an antitrust claim. *Hydrolevel*, in fact, initiated its action in tort for trade libel and interference with business relations, but eventually abandoned the claims. 635 F.2d 126, n.5. Since *Hydrolevel* otherwise had the opportunity to seek redress, the Courts' autogenous theory of vicarious antitrust liability through apparent authority served no purpose other than that of increasing the damages amount.

99. 102 S. Ct. 1956.

100. *Id.* at 1942.

101. ATTORNEY GENERAL, REPORT OF THE NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 31 (1955).

102. 2 KINTNER, FEDERAL ANTITRUST LAW § 9.7 (1980); Welling, *Intra Corporate Plurality in Criminal Conspiracy Law* 33 HASTINGS L.J. 1151, 1158 (1982); Barndt, *Two Trees Or One? - The Problem of Intra-Enterprise Conspiracy*, 23 MONT. L. REV. 158, 180 (1962) (if there is only one active participant "[r]egardless of whether the action is brought against the corporation, the officer . . . or both, the only possible result upon grounds of both logic and precedent, is that a violation of the conspiracy portions of the Sherman Act cannot exist"). See generally Note, *Developments in the Law - Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959).

with the agent,¹⁰³ it is unsettled whether this fundamental precept of business enterprise is likewise applicable to a non-profit association.¹⁰⁴ However, if logically extended to associations, the rule makes ASME's relationship to its agents incapable of satisfying the plurality requirement of the Sherman Act, i.e. by definition, no conspiracy exists, thus making the restraint of trade not violative of Sherman Act section 1.¹⁰⁵

There is some authority holding that if the agent is outside his scope of employment, as in *Hydrolevel*, the rule is vitiated making the entity capable of conspiring with the agent.¹⁰⁶ But this theory, if applied, also shields ASME from liability because if "James and Hardin had sufficiently independent motivation to conspire with ASME, they could not *simultaneously and by the same act* cause ASME to conspire with them; otherwise, a single person acting alone could create a multi-party antitrust conspiracy."¹⁰⁷

The *Hydrolevel* Court failed to reconcile these rules of antitrust and conspiracy law, and in fact, did not address the conspiracy issue. As noted in the dissent, "The intersection of the law of agency and vicarious liability with the law of conspiracy makes this a complex case. Yet the Court does not recognize this complexity. Indeed, the Court never identifies who conspired with whom."¹⁰⁸

103. Welling *supra* note 102, at 1158-67; *See, e.g.,* Goldlaw, Inc. v. Shubert, 276 F.2d 614, 745 (3d Cir. 1960). Morton Bldgs. of Nebraska, Inc. v. Morton Bldgs., Inc., 531 F.2d 910 (8th Cir. 1976); Solomon v. Houston Corrugated Box Co., 526 F.2d 389 (5th Cir. 1976); Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953)

It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Id. at 914.

104. *See* 2 KINTNER, FEDERAL ANTITRUST LAWS § 9.16 (1980) (Kintner argues that this principle is not applicable to trade associations).

105. *See supra* note 103 and accompanying text.

106. H & B Equip. Co. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399-400 (4th Cir. 1974).

107. Reply Brief of Petitioner at 13, American Soc'y Mechanical Eng'rs v. Hydrolevel Corp., 102 S. Ct. 1935 (1982) (emphasis original).

108. *Hydrolevel*, 102 S. Ct. at 1956 n.18.

"[The Court] so expands the concept of vicarious liability as to leave little

Furthermore, liability for ASME, while only an “unintentional participant”¹⁰⁹ in an antitrust conspiracy, gives rise to the incongruous concept that ASME was a coconspirator without intent.¹¹⁰ However, this arguably illogical concept is not foreign to the laws of antitrust because it is a general rule “that a civil (antitrust) violation can be established by proof of either an unlawful purpose or an anticompetitive effect” (no intent).¹¹¹ Even so, this long established rule does not entirely vitiate the importance of the defendant’s intent in a civil antitrust action.¹¹² Even when civil liability is primarily based upon a mere anticompetitive effect, intent remains an important determinant.¹¹³ Arguably, then, if the antitrust defendant has no wrongful intent or knowledge of a possible anticompetitive effect, as the Second Circuit held in *Hydrolevel*,¹¹⁴ liability should be narrowly defined so as to exclude apparent authority as a basis¹¹⁵ for liability. More importantly,

content, in this case, to the requirement in § 1 of the Sherman Act that antitrust plaintiffs demonstrate a contract, combination or conspiracy. Did James — acting for ASME — conspire with Hardin — acting for M & M and Hartford Steam . . .? Or was it the other way around? Could it be said under the Court’s theory, that James conspired with himself — as a double agent — thereby committing both of his “principals” to an antitrust conspiracy?”

Id.

109. *Id.* at 1956 (quoting the Second Circuit Court, 635 F.2d at 131).

110. See Wirtz, *Purpose and Effect in Sherman Act Conspiracies*, 57 WASH. L. REV. 1, 45 (1981). See also Howe & Badger, *supra* note 1, at 361-62, 388; W. LAFAVE & A. SCOTT, CRIMINAL LAW 464-65 (1972) (“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.”) Compare Note, *Developments in the Law - Criminal Conspiracy*, 72 HARV. L. REV. 920, 1000-05 (1959).

111. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13 (1978); *United States v. Container Corp.*, 393 U.S. 333, 337 (1969); *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911); *Standard Oil Co. v. United States* 221 U.S. 1, 58 (1911).

112. *United States Gypsum Co.*, 438 U.S. at 436 n.13.

113. *Id.* (“[o]f course consideration of intent may play an important role in divining the actual nature and effect of the alleged anti-competitive conduct”). See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

114. See 635 F.2d at 131.

115. Howe & Badger, *supra* note 1, at 388 (“proof of apparent agency, simply should not be admissible”).

intent is clearly a significant factor in choosing the sanction to be imposed upon the antitrust violator,¹¹⁶ and defendants without a wrongful intent, such as ASME, should not be subject to punitive treble damages.¹¹⁷

In assessing the results of Justice Blackmun's refusal to deal with these important but unsettled areas of conspiracy and antitrust law, Justice Powell proclaims: "The Court simply opens new vistas in the law of conspiracy and vicarious liability, as well as in the imposition of the harsh penalty of punitive damages."¹¹⁸ "In view of this . . . one would not have expected the Court to take the occasion of this case to promulgate an expansive rule of antitrust liability not heretofore applied by it to a commercial enterprise much less to a nonprofit organization."¹¹⁹

Nonprofit Organizations: New Victims For Treble Damages

In holding ASME liable as a Sherman Act violator, the Supreme Court "[substantially broadens] the treble damages concept"¹²⁰ by applying the strict sanction to a nonprofit organization for the first time.¹²¹ In *Goldfarb v. Virginia State Bar*¹²² the Court ruled that non-

116. Wirtz, *supra* note 110, at 44-47.

117. The question thus arises whether the mere act of entering, without a wrongful purpose, into an agreement that proves to have anti-competitive effects, renders a party liable to the full range of Sherman Act sanctions, including treble damages and criminal punishment. It would be surprising if the answer were yes.

Id. at 45. See also Areeda, *Antitrust Immunity for State Action after Lafayette*, 95 HARV. L. REV. 435, 455 (1981) ("[A]ntitrust liability does not necessarily call for a damage remedy . . . [T]he Supreme Court may come to agree that antitrust liability may vary according to the remedies sought.").

118. 102 S. Ct. 1935, 1956. "[The Court] stretches the concept of vicarious liability beyond its rational limits to conceive of Hardin and James as conspiring on behalf of ASME when they acted . . . against the interests of ASME." *Id.* at 1936.

119. *Id.* at 1950.

120. Young, *Court Widens Treble Damage Liability for Nonprofit Societies*, 68 A.B.A. J. 846 (1982).

121. *Id.* See also 102 S. Ct. at 1935, 1949 n.2.

122. 421 U.S. 773 (1975). The *Goldfarb* Court ruled that a state bar association's practice of publishing a minimum fee schedule for attorneys constituted price-fixing in violation of the Sherman Act, and was an enjoined activity. *Id.*

profit associations were not entirely exempt from the antitrust laws.¹²³ However, in so doing the Court urged that such associations be allowed a different standard of liability than the typical commercial antitrust defendant. The *Goldfarb* Court ruled that:

It would be unrealistic to view [these associations] as interchangeable with other business activities, and automatically to apply . . . antitrust concepts which originated in other areas. The public service aspects 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.¹²⁴

Goldfarb's holding that noncommercial organizations are deserving of a narrower view with respect to potential antitrust liability was reiterated in *National Society of Professional Engineers v. United States*¹²⁵ where the Court upheld an injunction against a nonprofit society. The Court ruled that an appropriate antitrust remedy could be "fashioned" for the nonprofit defendant,¹²⁶ and stated that, "the standard . . . is whether the relief represents a *reasonable method of eliminating the consequences* of the illegal conduct."¹²⁷ Arguably, ASME's treble damages liability does not follow this standard and, at best, actual damages might have served as a more appropriate sanction.¹²⁸

Interestingly, the *National Society of Professional Engineer's* holding was supported by Justice Blackmun who stated in a concur-

Prior to *Goldfarb* it was generally assumed that professional associations like ASME, were exempt from the operations of antitrust laws. See *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 13-15 (4th Cir. 1974); Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW., 570, 571-92 (1975).

123. 421 U.S. at 787.

124. *Id.* at 788 n.17.

125. 435 U.S. 679 (1978) ("We adhere to the view expressed in *Goldfarb* that, by nature, professional services may differ significantly from other business services. . . ."). See generally Posner, *Information and Antitrust: Reflections on the Gypsum and Engineers Decisions*, 67 GEO. L.J. 1187 (1979); Note, *Rule of Reason, Per Se Rule and Professional Groups: National Society of Professional Engineers v. United States*, 20 B.C. L. REV. 716 (1979).

126. 435 U.S. at 697.

127. *Id.* (emphasis added).

128. See *supra* notes 114-17 and accompanying text.

rence, "In my view, 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."¹²⁹ Arguably, *Hydrolevel* sees this "flexibility" approach to nonprofit entities ignored as the majority disregards ASME's nonprofit status¹³⁰ and rigidly imposes treble damages. The Court states, "the fact that ASME is a nonprofit organization *does not weaken the force* of the antitrust . . . principles that indicate that ASME should be liable . . ."¹³¹

Even though ASME was not a business competitor of anyone,¹³² the Court, in finding the nonprofit organization liable, claims to follow the intent of Congress.¹³³ In fact, the Congressional author of the anti-trust act, Senator Sherman addressed the issue of extending liability under the act to noncommercial entities such as ASME. He stated, "[The act] does not interfere in the slightest degree with voluntary associations . . . to advance the interests of a particular trade or occupation. They are not business combinations. They do not deal with contracts, agreements, etc. They have no connection with them."¹³⁴ Clearly, "this legislative history . . . counsel[s] against adopting a new rule of agency law that extends the exposure of such [nonprofit] organizations to potentially destructive treble damage liability."¹³⁵

Conclusion

The Supreme Court's decision in *American Society of Mechanical Engineers v. Hydrolevel*¹³⁶ expands potential antitrust liability by rejecting four established principles of liability: (1) the apparent authority theory of the law of agency previously had no application in anti-

129. 435 U.S. at 699 (emphasis added).

130. 102 S. Ct. 1947 ("in addition, ASME contends it should not bear the risk of loss for antitrust violations committed by its agents acting with apparent authority because it is a nonprofit organization, not a business seeking profit. But it is beyond debate that nonprofit organizations can be held liable").

131. *Id.* at 1947-48 (emphasis added).

132. *Id.* at 1956.

133. *Id.* at 1943 n.6.

134. 21 CONG. REC. 2562 (1890).

135. 102 S. Ct. at 1952.

136. *Id.* at 1935.

trust law,¹³⁷ (2) when apparent authority was used outside the antitrust area, it disallowed imputation of punitive damages to the principal,¹³⁸ (3) a Sherman Act conspiracy to restrain trade generally required a plurality of actors¹³⁹ and (4) nonprofit organizations previously were free from the treble damages sanction for liability in antitrust.¹⁴⁰ *Hydrolevel* unnecessarily “launches on an uncharted course”¹⁴¹ by broadening antitrust liability, especially because ASME was already found responsible by the district court on traditional antitrust grounds.

James R. Palmer

137. *See supra* notes 54-78 and accompanying text.

138. *See supra* notes 79 - 98 and accompanying text.

139. *See supra* notes 99 - 119 and accompanying text.

140. *See supra* notes 120 - 135 and accompanying text.

141. 102 S. Ct. at 1951. (Powell, J., Dissent).