In the

ORIGINAL

Supreme Court of the United States

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.	)	
Petitioner	)	
v.	)	No. 80-1765
HYDROLEVEL CORPORATION	)	

Washington, D. C.

January 13, 1982

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ALDERSON REPORTING

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AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC.,

Petitioner,

v. No. 80-1765

HYDROLEVEL CORPORATION

Washington, D. C.

Wednesday, January 13, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 o'clock a.m.

APPEARANCES:

HAROLD R. TYLER, JR., ESQ., New York, New York; on behalf of the Petitioner.

CARL W. SCHWARZ, ESQ., Washington, D. C.; on behalf of the Respondent.

STEPHEN M. SHAPIRO, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; U. S. as amicus curiae.

C O N T E N T S

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments next in American Society of Mechanical Engineers against Hydrolevel Corporation.

You may proceed whenever you are ready, Mr. Tyler.

ORAL ARGUMENT OF HAROLD R. TYLER, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. TYLER: Mr. Chief Justice, may it please the Court, the petition of the American Society of Mechanical Engineers, which as you know is frequently referred to in the record as ASME, submits that this case casts up in simple terms the following issue, and that is the question of on what basis can the acts of two of the society's voluntary members of this non-profit, scientific and technical society be imputed to that society for purposes of establishing liability under the Sherman Act.

Now, the panel below answered this question substantially as follows, and I am really quoting in large measure from Page 19 of the joint appendix. The panel said, for ASME to be liable then, Hydrolevel, the plaintiff, had to demonstrate only that ASME's agents, that is, two voluntary members, acted within their apparent authority when participating in the conspiracy. It, Hydrolevel, did not have to demonstrate that they also acted in part to benefit ASME or that ASME ratified their activities.

We contend that this holding is incorrect, and that this Court should reverse the reasoning and judgment of liability entered by the court of appeals.

Now, the facts which set the stage for this relatively simply stated issue here in this Court --

QUESTION: On that point, might I ask you, Mr. Tyler, whether it isn't true that the trial court instructed on quite a different standard than apparent authority?

MR. TYLER: He certainly did, Justice O'Connor, and as a matter of fact --

QUESTION: You have no quarrel with the trial court's instructions or the results thereof?

MR. TYLER: No, we don't believe that we have any purpose or right to be quarreling with Judge Weinstein's instructions. That is correct.

QUESTION: And the court of appeals, however, did not review the record in terms of those instructions?

MR. TYLER: Essentially, that is correct. What happened in the --

QUESTION: But you want us to. If you ask us to reverse, we would -- if we agreed with you that the court of appeals' reasoning was wrong, the basis for his decision was wrong, in order to reverse, we would have to then review the record ourselves.

MR. TYLER: Well, I think that we would agree with

that, but what we are really urging is two things. We see two possibilities here, Justice White. One, we concede that you, if you agree with us, could reverse and remand this case for consideration under appropriate principles of law to the court of appeals.

QUESTION: Right.

MR. TYLER: We would like to persuade you, however, that if you look at the record, the facts are really very simple, and not really in contest, and that on the basis of those facts --

QUESTION: Yes, except that the jury found against you.

MR. TYLER: -- we claim that there is no --

QUESTION: Except that the jury found against you.

MR. TYLER: Indeed, we have to conceded that the jury found --

QUESTION: And so somebody would have to say that no reasonable juror could arrive at that position on the record.

MR. TYLER: We do contend that.

QUESTION: Yes, I know you do.

QUESTION: Mr. Tyler, don't you run the risk, if you ask us to look at the record -- say we agreed with your legal theory -- that we might look at it and say, yes, there is enough evidence here to support the jury finding, and

therefore affirm on a different basis? You only have one shot.

MR. TYLER: I understand that.

QUESTION: You are willing to take that risk.

MR. TYLER: But we claim that the sufficiency of evidence point here is very acute, and we stand on the proposition that if you look at the facts, there is no basis, whether we are talking about apparent authority, actual authority to hold this society, particularly when the agents were not working for the society when they did what they did to bring themselves into the conspiracy.

Let me just repeat these facts. I am sure you will recall most of them. The facts which set up the legal issues here really occurred in 1971. In March of that year, two long-time members of the society, one of them a man named James who then was the vice president of McDonald and Miller, which then and now was a major manufacturer and distributor of low water cutoff devices for pressure vessels and boilers, Hardin, who was the vice president of Hartford C. Boyler, a big insurance company, sat down in the Drape Hotel for dinner with some other officers of McDonald and Miller.

For our purposes, the principal subject of talking was how they could use the knowledge of Hardin and James to put a letter in in the normal course or what appeared to be

the normal course to the Boiler Pressure Vessel Committee of ASME and to get an answer which might help McDonald and Miller or M&M compete against Hydrolevel unfairly in the marketplace. Hydrolevel, as you will recall, at the time was a small company, had never had any commercial success, but had developed a so-called probe type of low water cutoff device for boilers, which incorporated a time principle.

As a result of that meeting in Chicago, a letter was prepared with the help of Hardin and James, signed by a man named Mitchell, a sales official of M&M, sent in what purported to be in the regular course to this committee of ASME.

It came into the hands of the secretary of the committee, a man named Hoyt, who in the regular course transmitted it to Hardin, who was then chairman of the relevant subcommittee of the Boiler and Pressure Vessel Committee.

It appears quite clear that Hardin had something to do, a great deal to do with the preparation of the response which went out to M&M on or about April 12th. Hydrolevel's counsel suggests that Hardin did this almost alone. That isn't quite true. It is true, however, that James, oddly enough, wasn't visible at that time, and hence it seems to us he can't be held to have had any apparent authority because he really wasn't visible.

In any case, the loaded letter got a loaded response. And after that, the record is perfectly clear that sales representatives of M&M went out into the marketplace and used this letter unfairly to depreciate, if you will, the Hydrolevel prop.

Now, I will stop there, although of course there are other facts in the record, and I am sure not only my opponents but perhaps myself will get to those, but these are really sufficient to set up the legal problem, because we contend that contrary to what the court of appeals held, these facts show that these two men, Hardin and James, or one of them, weren't acting to benefit the society at all. They quite clearly were acting to benefit another principal, McDonald and Miller.

Now, to step back a moment, you will remember in the court of appeals there were two issues of liability that Hydrolevel and ASME addressed. First, Hydrolevel contended that on these simple facts, Hardin and James appeared to be acting as members of the society, and therefore somehow they had actual authority to join this anticompetitive scheme. We argued to the contrary.

In addition to that, Hydrolevel said, look, if we are wrong about actual authority, later on, somehow, the society, with full awareness of what was going on, ratified what Hardin and James were up to. The court of appeals

didn't really confront either of those issues. They came to an apparent authority analysis of this case, as you know, and it is something which neither side did brief at all.

Now, very briefly, we contend that whether we are dealing with relevant, appropriate provisions of master and servant law or agency law, and furthermore, if you look at settled law on what it takes to have someone become a member of a combination or conspiracy in restraint of trade under the Sherman Act, the court of appeals analysis just doesn't hold water.

Now, you will recall that the court of appeals does refer to in its opinion a number of sections of the restatement of agency, which they say fit this case. It is interesting because those sections in the 240s, if you look in the table of contents of the restatement of agency, it is instructive to see that those are regarded by the draftsman as dealing with specific and limited torts of an agent, and thus permitting under certain circumstances tying in those agents, masters, or principals.

QUESTION: Mr. Tyler, can I interrupt you with one question that troubles me a little bit? I think the predicate of your argument is that Hardin did not benefit ASME at all when he answered the phoney letter of inquiry.

MR. TYLER: That's right. He --

QUESTION: Supposing the letter had not been a

phoney, but had been a routine inquiry, and he had answered it in a routine fashion. Would he then have benefitted ASME?

MR. TYLER: Well, I suppose that if he by some quirk had said something which was obviously not in keeping with ASME's rules, or in some other fashion obviously was designed on its face to help somebody in the marketplace unfairly compete with a competitor, but I don't see how --

QUESTION: Is the function of a person in his capacity of answering letters of inquiry, does that provide any benefit to his principal?

MR. TYLER: Well, in the sense --

QUESTION: Supposing it is an innocent letter, a routine inquiry, do you have a code that applies to cutoff valves. He writes back and says, yes, we do, the section number is so and so. Does that benefit --

MR. TYLER: Yes. That is fairly close to what Hydrolevel, I think, is arguing. My answer to that is, for purposes of establishing treble damages, particularly, under the antitrust laws, it cannot be said that he would be benefitting his principal, writing a letter which turned out to be unfair, incorrect, or whatever, used against --

QUESTION: In other words, does the question of whether he was benefitting his principal depend on the nature of the inquiry and the nature of the response?

MR. TYLER: If you look at Section 235 of the

restatement, it is quite clear that that deals with an agent who intends not to benefit the society, for example, in these circumstances, but somebody else. Taking your hypothetical, I suppose it could be said that there, he didn't intend to benefit anybody outside, and since he was doing his normal work as a volunteer, but that leaves out the point that you wouldn't have knowing involvement in an antitrust conspiracy.

QUESTION: Well, maybe the benefit is insufficient, but it seems to me that --

MR. TYLER: It is insufficient.

QUESTION: -- answering mail for a principal does provide at least the benefit of getting the letter off the desk and getting it answered.

MR. TYLER: I cannot deny that if that is all that happened, he would be performing in the normal course in his role at that time as chairman of this subcommittee, but I think that removes us from what we have got here, a suit for treble damages in which the pleadings and the arguments of the plaintiff were that Hydrolevel -- excuse me, ASME somehow became a knowing member of a Sherman Act conspiracy.

QUESTION: Well, Mr. Tyler, aren't you -- did you really want to make this jury speech here? It seems to me that your threshold submission is that this case should be judged on the basis that let's assume that there was no

benefit, that the court of appeals couldn't have cared less whether there was benefit or not, so we judge the case on the assumption there was no benefit for the principal.

MR. TYLER: There was no benefit for the principal.

QUESTION: Well, I know, but whether there was or not, the court of appeals didn't decide. They said, even if there is no benefit for the principal whatsoever, the principal is liable.

MR. TYLER: That's right. And we say --

QUESTION: That is what you want to --

MR. TYLER: We say that that --

QUESTION: You want us to reverse that.

MR. TYLER: Absolutely.

QUESTION: And so we don't have to get into an argument about whether there was or wasn't benefit, writing this letter.

MR. TYLER: Oh, yes, we do.

QUESTION: Well, I know, you --

MR. TYLER: Because the court of appeals put the issue up here, by saying --

QUESTION: No, they said even if there is no benefit, the principal is liable.

MR. TYLER: And we say that is wrong.

QUESTION: I know, but then you want us also to go on and say there was no benefit.

MR. TYLER: No, no, we are saying -- we don't ask you to do any more than agree with us that if you look at this record --

QUESTION: I thought, if the case comes here, the court of appeals said, even if there is no benefit, the principal is liable.

MR. TYLER: And the court of appeals is wrong.

QUESTION: All right, but you don't have to argue then whether the letter was a benefit or not. You just assume that it wasn't.

MR. TYLER: No, no, I was attempting to address Justice Stevens' hypothetical.

QUESTION: Well, I know, but he just picked you up on an argument that you were making that there was no benefit --

MR. TYLER: Fair enough.

QUESTION: -- which is irrelevant to your first submission.

MR. TYLER: No, it is not irrelevant. If you look at Section 235 --

QUESTION: Well, if you have to convince me that there was no benefit here in order to reverse the court of appeals decision in this case, you are going to have a lot of trouble.

MR. TYLER: All right. I will take that trouble on.

QUESTION: All right. Well, don't bother for now.

(General laughter.)

MR. TYLER: There was, in every situation that you can find discussing liability, Justice White, under the antitrust laws or any other case where a plaintiff is seeking more than compensatory damages, punitive damages, exemplary damages, there is no case by this Court or any lower federal court, including an antitrust case, that has ever allowed Sherman Act liability where an employer obviously didn't benefit if only because the agents were doing things like --

QUESTION: I can understand that argument. I can understand that argument.

MR. TYLER: All right, and we are saying, that is not here. We are saying that for a long period of time, ASME didn't even know what Hardin or James were up to, and whatever they did or didn't know, there was no benefit to ASME except this lawsuit, which is expensive --

QUESTION: The court of appeals said, even if there was no benefit, they are liable.

MR. TYLER: The court of appeals said a little more than that. The court of appeals said, they are responsible, that is, the society, because of the acts of these two men, even though they didn't know about them, and even though the society did not benefit, and that involves a very important

principle of law.

QUESTION: Mr. Tyler, you have cited a number of cases in support of your argument, including something called United States versus American Radiator and Standard Sanitary Corporation, in which we had denied cert. That was apparently an antitrust case.

MR. TYLER: Yes.

QUESTION: And the Court's opinion in that case spoke as follows: "A corporation is legally bound by the acts and statements of its agents done or made within the scope of their employment or their apparent authority."

MR. TYLER: Ah, yes.

QUESTION: And it goes on and says, "When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it." I didn't understand why you cited it.

MR. TYLER: Well, I will tell you why we cite it, because in that case, unlike this case, and there are a number of additional ones we cite of this type, Justice O'Connor, it was quite clear that the agents or employees were doing in an anticompetitive sense things that they thought would benefit their principal.

QUESTION: But certainly the language which I read you of the opinion would indicate that the court would not share your view.

MR. TYLER: Standing alone on that language, I understand you fully. But if you will analyze the case in its entirety, you will see, quite obviously, unlike here, the employer in question was in commerce, at least in the commerce subject of the case, and the employees were acting in the scope of their employment, doing the things they shouldn't have been doing under the antitrust laws.

We have no quarrel with that kind of holding. This presents quite a different case. Here is a society which by statute and as a practical matter is made up of about 100,000 individuals, now, not companies, not firms, and here were Hardin and James, sitting down and agreeing with a commercial organization, which is a competitor of Hydrolevel, we can do some things to skew the procedures of the society to help you in the marketplace.

That wasn't done to benefit the society. That is quite different from the case you cite, and others, Hilton Hotels and others, as you quite perceptively point out. We really discuss in large measure both sides here, a lot of these cases, but we say that it is important to keep this distinction in mind.

Let me turn to something else which the court of appeals did which standing alone the case is still a good case. You remember, they decided that this turned on something called the Gleason case, which was decided in the

late 1920s, and counsel for Hydrolevel, of course, understandably relies on that, and that was a case where, unlike here, the plaintiff was seeking to recover compensatory damages only against a common carrier, where the facts show very clearly that the agent was really faithless to his master.

And there, this Court held, and we do not quarrel with that holding, that for purposes of allocating risk of loss to a plaintiff like this, or put differently, to allow a plaintiff to be compensated, the principal would be charged even though he didn't know at the time what the agent was up to.

However, we say that this Court long ago recognized that distinction in a case which oddly enough was handed down by this Court two years after the Sherman Act was passed. It is a great case to read, not just because we think it supports us, but because it analyzes both themes or threads of authority in the law.

First, Mr. Justice Gray, writing for this Court, said, look, the law -- he discussed for the Court the evolution of common law in certain classes of cases where to allocate the risk of loss to somebody's damage, the courts would permit the imputation of liability for compensatory damages to such a plaintiff, where it was clear from the record that the principal didn't kwow what was going on, and

the agent seemed to be seeking to benefit himself and not the principal.

But then, the case facing this Court, and it is called, by the way, Lake Shore and Michigan Southern Railway versus Prentiss -- it is in our reply brief -- Mr. Justice Gray said, but there is another rule where a plaintiff goes further and seeks to get exemplary, deterrent, or punitive damages, and there the law is that that plaintiff will have to show that the principal of this agent benefitted from what he was up to.

Now, that seems to me to go back to what you raised, Justice White, and today, that case is followed consistently by the lower federal courts. It is the federal rule, we maintain.

Therefore, to sum all this up, we say that on the peculiar facts of this case, about which there is no dispute, here we have a plaintiff which admittedly had other remedies which it abandoned in the court below for suing ASME, for example, for what New York calls a prima facie tort, plaintiff now seeking to recover treble damages against this society, even though the plaintiff well knows that the society didn't have the requisite understanding of the Sherman Act cases to know that an anticompetitive scheme was going on, and received no benefit.

I notice my time is up save for rebuttal, and I

will sit down.

CHIEF JUSTICE BURGER: Very well, Mr. Tyler.

Mr. Schwarz.

ORAL ARGUMENT OF CARL W. SCHWARZ, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SCHWARZ: Thank you, Mr. Chief Justice, and may it please the Court, this appeal is from a jury verdict finding the defendant, ASME, liable for treble damages under both Sections 1 and 2 of the Sherman Act, a verdict rendered upon instructions from the trial judge that are not being challenged on appeal, as we have just heard.

Indeed, the jury's conclusion that the law was violated is also not being challenged, but is expressly conceded by the ASME.

The only issue before this court is whether the ASME, as a corporation, is to be held responsible under the doctrine of respondeat superior for the damage caused by that violation.

With the Court's indulgence, I would like to make two observations at the outset. First, there were two physical exhibits introduced at the trial, the two devices in question. We have brought them here so that the Court can see. This is the probe; this is the float. I need not go into the description of how they work. They are adequately covered in the briefs.

The second observation I would like to make at the outset involves one of the amicus curiae briefs that were filed on behalf of Hydrolevel. The brief of Adolph Ackerman, who is an ASME member, and one of the amicus curiae, developed in his brief, one which I highly recommend to the Court, that the ASME's presentation in this Court totally fails to address two principles that are basic to agency law, and that should be most important to every professional, and particularly the professional soceities that administer standards that have the force of law.

Those two principles are duty and responsibility. Those that assume a great responsibility should have a correspondingly great duty, not only to Hydrolevel for fair treatment, not only to the public at large for setting standards that promote competition and do not entrench monopolists, but to itself and its own members, as Mr. Ackerman points out.

I listened in vain to my brother's presentation and the words "duty" and "responsibility" were never mentioned.

The case as presented to the court of appeals involved only the question, as my brother has pointed out, whether there was sufficient evidence in the record to support the jury's conclusion that the ASME's agents were at least in part, at least in part, acting on behalf of or for the benefit of the ASME, or secondly, whether the ASME by

its subsequent acts and statements or failures to act ratified the unlawful activity.

The court of appeals found it unnecessary to reach these two questions, because it decided that a third principle of respondeat superior, that of apparent authority, had clearly been satisfied, and justified the imposition of liability.

I would like in my presentation first to explain why the decision of the court of appeals was correct, and then to demonstrate why there are two alternative grounds for affirmance, that of actual authority with intent to benefit and ratification, and I note in this respect that this is one point on which my brother and I are in full agreement, that these issues should be addressed by the Court. He said so. I say so. And I believe we are entitled to address them both under the questions presented under which this petition for certiorari was granted, which, if you care to look at them, at the front of the brief of my opponent, raise and involve the questions of actual authority and ratification, and under the doctrine of the two cases, Dandridge versus Williams and Dayton versus Brinkman, which permit, I believe, a respondent to urge affirmance on any ground, even though it is not specifically addressed, although in this case it is.

QUESTION: Even though you are undoubtedly entitled

to make that sort of a presentation, I take it you are not suggesting that the Court, if it disagrees with you and agrees with your opponent, wouldn't be free to send the case back to the Second Circuit for evaluation of those two points?

MR. SCHWARZ: Of course, Your Honor, it would be free to do so. I would suggest, with due respect, that it should not do so. I should think that after the case has been fully briefed on those issues, in this Court, has been argued, as we have just heard. The record is before this Court. I should think that conditions of judicial economy would require, and I would suggest with due respect indicate that those issues should be looked at and that the jury verdict should be affirmed and reinstated in all respects.

I will get to my --

QUESTION: Were you satisfied at the time with the instructions to the jury?

MR. SCHWARZ: Your Honor, we were not satisfied. We asked the district court judge to give an instruction on apparent authority that did not include a requirement of benefit.

QUESTION: And he turned it down?

MR. SCHWARZ: And he turned it down. Yes, sir.

QUESTION: You didn't appeal on that ground?

MR. SCHWARZ: We did not appeal on that ground.

QUESTION: No, because you won.

(General laughter.)

QUESTION: Which is not a bad result.

(General laughter.)

MR. SCHWARZ: Your Honor, on the ASME's challenge to the holding of the court of appeals with respect to the issue of apparent authority, it really is on two levels. First, it argues that because the doctrine of apparent authority does not require an intent to benefit, which all agree is the case, even though the ASME suggested a charge to the jury which the district court adopted to the contrary, that that doctrine should not be available in any antitrust case, and as a matter of fact, they argued that it should not be available in any case with even arguably punitive aspects.

It is, the argument goes, somehow unfair to punish the principal for acts of dishonest or disloyal agents where those acts were not intentionally authorized by or known to the principal, and where those acts were not intended to benefit the principal by the disloyal agent.

QUESTION: And whether they did or did not in fact benefit them? Is that a factor?

MR. SCHWARZ: Your Honor, with respect to the apparent agency issue, apparent authority issue, I think all agree now that the issue of benefit is not relevant.

Whether there was benefit or no benefit, the important thing, as the court of appeals pointed out at some length, is whether there was an aura of agency and authority imposed upon the agent by the principal which was relied upon by third parties to the detriment in this case of Hydrolevel.

Now, I submit that if this Court accepts that argument, it would be rejecting the very reasons for the existence and development of the law of respondeat superior. It would be overturning decades of settled law, and that law has never made any exceptions to the application of respondeat superior law or the law of agency to particular cases such as this.

QUESTION: How about the Lake Shore case, relied upon by your opponent?

MR. SCHWARZ: Your Honor, that Lake Shore case, with all due respect, says that a corporation cannot be assessed with damages that are punitive unless the president or general manager knew of in advance and approved those -- in that case, I believe, a conductor beat up a passenger -- those acts in advance. I suggest with all due respect that that case has not been followed. I suggest that in effect, that is the General Electric defense in the antitrust cases. Mr. Cordon didn't know what was going on. He didn't approve of it. I think that case is no longer being followed, in that respect.

QUESTION: There is a fair body of law, though, isn't there, in all fields that says that where you seek to assess either punitive or treble damages, you are held to a higher test than where you are merely talking about compensatory damages?

MR. SCHWARZ: Your Honor, I believe you may have reference to the Standard Oil of Texas case, which our opponets have made a great point of in their brief. I would like to distinguish that case and that line of cases in one respect. Those cases relied basically upon the assumption, or those cases that I am thinking of relied basically on the assumption that there has to be a specific intent involved in the very violation. In that case, for example, there was a statute at issue which required knowing and wilful violation of that statute.

In that case, the two disloyal and dishonest agents were stealing from the principal, and the court of appeals was faced with a situation where the government was arguing that the intent, the dishonest intent of the two employees that were stealing from the principal should be imputed to the principal for purposes of criminal prosecution of the principal.

In those circumstances, I have no quarrel with the holding of the court of appeals that that is not the result that should follow. Our case, on the other hand, is a

Sherman Act case. The Sherman Act, Sections 1 and 2 of the Sherman Act do not require a specific intent. The statute is violated as this Court has held so many times with an act that has the purpose or effect --

QUESTION: Mr. Schwarz, are you saying that the criminal prosecution would not lie against ASME on these facts?

MR. SCHWARZ: No, sir. I am not saying that. I suspect --

QUESTION: Then what is your distinction?

MR. SCHWARZ: Well, I want to point the Court's attention to the A&P Trucking case. In the United States versus A&P Trucking, this Court held, and that, I might point out, was also a criminal case, and this is why I do believe that the Lake Shore case, even though it has not been expressly overruled, is no longer valid, the A&P Trucking case said, and I quote, "It is elementary that such impersonal entities," referring to corporations, "can be guilty of 'knowing' or wilful violations of regulatory statutes through the doctrine of respondeat superior." That was a criminal case, Your Honor. I do suggest --

QUESTION: Was that before or after the Gypsum case that this court decided a few years ago?

MR. SCHWARZ: That was before.

QUESTION: Do you think in the antitrust context it

would survive Gypsum?

MR. SCHWARZ: Yes, sir, I do. I think Gypsum expressly stated basically the same concept. Now, the doctrine of apparent authority, like the law of agency as a whole, is really bottomed on one premise, and that is that a person who extends his power and influence by utilizing others to do his work should be responsible for the damage caused in the course of doing that work.

In an actual authority situation, the principal is bound by the exercise of authority he actually gives to the agent. In an apparent authority situation, the principal is bound by the exercise of authority he represents to the world that the agent has. The two are not mutually exclusive. An agent may and frequently does have both actual and apparent authority from the principal, and that, we submit, is exactly what is in this case.

Even the doctrine of inherent agency power, which we point out in our brief, requires no specific authority at all. In neither of those cases, actual or apparent authority, is the principal bound on a theory of negligence, except insofar as he has made a poor choice of agents. In both cases, the principal is bound by his own act of conferring actual or apparent authority.

Now, apparent authority is not, as the ASME would have this Court believe, an exception to the general rule of

respondeat superior. Fraud and the other torts that were mentioned by my brother during his presentation is no less a conventional tort than assault, and I submit that apparent authority is designed and has always been a part of the law of respondeat superior simply to take into account those types of torts where it can most commonly occur. That rule of apparent authority has been around as long as the Sherman Act.

If Congress had intended that corporations or non-profit associations were to be liable only for anticompetitive acts expressly authorized or ratified by the board of directors of a corporation, or intended to benefit the corporation, it could have easily done so. As a matter of fact, as the court of appeals pointed out, the fact that the antitrust laws are so basic to this country's economy makes it that much more important that the courts not remove any legal incentive for antitrust vigilence on behalf of industry.

The second level of the ASME's argument on apparent authority is that even if apparent authority is applied to other corporations, industrial corporations, it should be not available against non-profit corporations such as the ASME, because they are organized only to do good things for the public, and they should not have to bear the terrible financial risks that the antitrust laws impose.

I suggest that there is nothing in the legislative history of the antitrust laws to suggest that Congress intended any special treatment for any class of persons, and the definition of persons in the Sherman and the Clayton Acts clearly encompasses non-profit as well as even eleemosynary institutions such as churches and others.

I suggest that the opposite is true. It is more important to continue the apparent authority concept in effect against non-profit corporations because otherwise they would be exempt from the antitrust laws altogether. The proposition advanced by my opposition that everything done by the ASME is for the benefit of the public, and not for the benefit of the ASME, means that it could never be held responsible for any unlawful act except through an apparent authority concept or by direct ratification.

I would like to address one point that I think is important from the context of the brief of the other side. It is said frequently, what could we have done to avoid this? We have 10,000 people writing codes, 100,000 members. What could the ASME have done to avoid what happened to Hydrolevel?

The ASME suggests that it is being asked to pay astronomical damages for something caused by only two disloyal agents. I submit that very few basic changes in the way they do business would protect the ASME quite

nicely, and at the same time purge the organization of those volunteers like John James who are serving the ASME only because of the influence they can extract from it on behalf of their employers.

QUESTION: Is there anything novel about that, do you think, in voluntary organizations, whether it is the American Bar Association or the Society of Engineers?

MR. SCHWARZ: Your Honor, I am not familiar enough with all of the voluntary organizations in this country to give you an honest and accurate answer. I suggest that we are looking at the ASME. I realize that there are numerous other organizations that have filed amicus briefs, but that is a question, as we have pointed out in our brief, that is most appropriately addressed to Congress.

If there are hundreds of organizations out there that operate differently from the ASME, I suggest that they are in no danger. If there are hundreds out there that operate like the ASME, I would like to suggest that they are, unless they change.

QUESTION: Well, is it the question of whether the organization operates that way or that some people within those organizations operate that way?

MR. SCHWARZ: I would say the former, Mr. Chief Justice, because in this case --

QUESTION: So they must police the conduct of every

individual member of the organization?

MR. SCHWARZ: I suggest that they have to police the conduct of those individuals to whom they delegate codemaking responsibility that has the ability and the chance to put people out of business. Yes, Your Honor, I do. I think they should provide a public hearing, an opportunity for notice and comment for regulations that are put out like this interpretation. I think that was required by this Court's opinion in Silver. I think they should choose their agents better. They shouldn't put the fox in with the chickens, just like the ASME did in this case.

I think that certain and meaningful discipline for those who abuse the trust of the organization would deter such abuse in the future. I would like to point out that in this case John James to my knowledge to this very day has never been disciplined, and that the Court should note that ASME has defendd his activities right through the day the jury returned its verdict. It only began to call John James disloyal, perfidious, and dishonest after the jury found there was a violation of law.

They told the jury that that regulation was correct. They told the jury that it was issued in the normal course of their activities. Is it any wonder that --

QUESTION: You use the term regulation. You mean the letter, don't you?

MR. SCHWARZ: The letter. The interpretation.

QUESTION: And when you said earlier there should be notice and public comment before regulations are adopted, do you mean that before any letter is written, too?

MR. SCHWARZ: Any interpretation of a code.

QUESTION: Should be proceeded by notice and public hearing?

MR. SCHWARZ: Your Honor, I think the ASME --

QUESTION: They've got a lot of mail to answer, don't they?

MR. SCHWARZ: They have said -- they have said that there are 10,000 opportunities or inquiries every year. They have not told the court, but most of those are by telephone. That is in the record. Most of those --

QUESTION: Well, would you require a public hearing before a telephone call is answered?

MR. SCHWARZ: No, Your Honor. I would suggest that they are required by this Court's opinion in Silver to give due process, notice, opportunity to comment when a code that has the force of law is being interpreted and amended.

QUESTION: This is the simple change you say would solve this problem for the --

MR. SCHWARZ: I respectfully submit that if they had given Hydrolevel the opportunity and notice to comment on that letter before it went out, this case never would

have come up.

With all due respect, I would like to quickly go to the two alternative grounds before my time expires.

The record fully supports the verdict on the ground of actual authority with intent to benefit. The ASME's trial strategy, as I have just pointed out, treated the jury to a barrage of testimony and judicial admissions to the effect that the interpretation, the letter was accurate, proper, issued in full accordance with the ASME's procedures, and ASME stood by it.

In the face of those admissions, it would have been impossible for the jury not to have concluded that it was issued on behalf of and for the benefit of the ASME.

QUESTION: Mr. Schwarz, when you say fully supports the verdict you are talking about the verdict as to liability, not as to damages?

MR. SCHWARZ: Your Honor, yes, I am speaking of liability. The damage verdict of the jury was overturned by the court of appeals based upon their reading of the June 9th letter, which I would like to turn to right now.

QUESTION: But you didn't cross appeal from that?

MR. SCHWARZ: From the jury's verdict on damages?

QUESTION: No, from the Second Circuit's.

MR. SCHWARZ: No, Your Honor. Well, we did file a petition for certiorari, which is still pending before this

Court, number 1711, that addresses the damage question. The court of appeals' opinion on the subject of damages is closely interrelated with their opinion on the subject of liability through the vehicle of the June 9th, 1972, letter. The court of appeals said that that letter was a retraction of the original interpretation. We say it was an affirmance, it was an adoption, it was a ratification of that original letter. That June 9th letter was also written in part by John James. That June 9th letter never specifically said that the original letter was not correct. That June 9th letter closed with cautionary language that John James specifically said was a limitation on the ability of a company to have a time delay meet the code. And, that June 9th, 1972, letter was never sent to anyone except Hydrolevel. It corrected nothing.

I notice my time is up. Thank you.

CHIEF JUSTICE BURGER: Mr. Shapiro.

ORAL ARGUMENT OF STEPHEN M. SHAPIRO, ESQ.,
AS AMICUS CURIAE

MR. SHAPIRO: Thank you, Mr. Chief Justice, and may it please the Court, the United States contends that the court of appeals correctly upheld the jury's verdict imposing liability on ASME. I would like first to explain why the jury's verdict should be sustained, and then describe the serious adverse effects which would result from

acceptance of ASME's contrary theories.

As the briefs in the record in this case vividly demonstrate, private organizations which prescribe standards for products sold in interstate commerce have great power to improve economic performance and great power to inflict economic harm. Standardmaking activities can facilitate commerce by increasing consumer information and by promoting product safety. However, those activities also can deprive consumers of new and valuable products, and inflict serious injury on competitors, dangers which are heightened by conflicts of interest which often are present in codemaking bodies.

The code interpretation which caused the competitive harm in this case appears as the first appendix to the red brief filed by Hydrolevel. That interpretation bears the names of all of the officers of ASME' Boiler and Pressure Vessel Committee, is signed by the secretary of the committee, and expresses the views of the chairman of the concerned subcommittee on the intent of the ASME code.

The evidence at trial showed that the chairman of the subcommittee had expressly delegated authority to render code interpretations of this kind, and it is conceded that the interpretation was made pursuant to ASME's standard operating procedures. ASME persuaded the district court that it should not be held accountable for this document

unless the jury found that its agents intended to benefit ASME or that ASME ratified their actions, and after the judge charged the jury to that effect, ASME stated that the charge was wholly satisfactory.

Even under this instruction, which was drafted in large measure by ASME itself, the jury imposed liability.

As Hydrolevel's brief demonstrates in some detail --

QUESTION: You don't suggest that there was anything inappropriate about counsel for one of the parties drafting a proposed instruction, do you?

MR. SHAPIRO: Not at all, Your Honor. My point is simply that --

QUESTION: The judge accepted their version rather than some other version submitted.

MR. SHAPIRO: That is quite true, and even under their version of the law, they lost. That is the only point we wish to make, and that in addition, the record supports the inference that the jury reached that liability was appropriate under the standards. The record shows that ASME's subcommittee chairman believed he was acting in a way that served ASME's general safety objectives, even though he intentionally rendered an interpretation that was unduly restrictive of Hydrolevel's product.

Indeed, ASME stated in its answer to the complaint, and I quote, "The statements contained in the letter of

April 29, 1971, were made by ASME in furtherance of ASME's legitimate interest in the promulgation of safety standards." The jury also could infer that ASME's subsequent actions, including its commendation of its officers' conduct and its insistence throughout the entire trial that the letter was proper, demonstrated ratification or acquiescence on the part of ASME.

Although the judgment below can be sustained on the simple ground that ASME got the charge that it demanded but nonetheless lost under that charge, on a record containing substantial evidence in Hydrolevel's favor, we quite agree with the court of appeals that the charge was overly generous to ASME, and should not receive general endorsement. The charge fails to make clear the basic rule of agency law that a principal is bound by acts of agents who perform delegated functions even if they have a partial purpose to benefit some person other than their principal, in addition to a purpose to benefit the principal.

Any other rule would place undue obstacles in the path of government injunctions, cease and desist orders --

QUESTION: Mr. Shapiro, you seem to be arguing more in favor of an apparent authority proposition than the brief that you submitted appeared to. Are you taking a stronger position today on that?

MR. SHAPIRO: Our position is that there are three

alternative grounds that equally would support the judgment in favor of Hydrolevel.

QUESTION: Is it your position that apparent authority is sufficient for liability in this case?

MR. SHAPIRO: Yes, it is, Your Honor. It is indeed. We agree with the court of appeals that the doctrine of apparent authority is available in antitrust cases as in comparable tort suits. Apparent authority has been the basis for many jury charges in federal antitrust cases in the past, some of which are collected in the American Bar Association's volume entitled Jury Instructions in Criminal Antitrust Cases.

The apparent authority doctrine has been approved in antitrust cases by the Sixth, the Third, and the Second Circuits, and the --

QUESTION: Now, is there a difference in those approaches on whether it is an organization created for a profit, a conventional manufacturing institution, or an organization like this?

MR. SHAPIRO: The courts have never drawn any such line, and indeed this Court's decisions have held in many situations that the non-profit entity is subject to precisely the same rules as the profitmaking entity. Congress extended the prohibitions of the Sherman Act to every person, including non-profit associations, as this

Court has held in a long line of cases.

QUESTION: That wouldn't be necessarily the complete answer, would it?

MR. SHAPIRO: Your Honor is correct. None of the apparent authority cases in the antitrust area that we rely on dealt specifically with non-profit entities. That is quite correct, and I do acknowledge that point. However, this Court's decisions have treated non-profit entities on a par with other profitmaking entities in the past, and we think the same approach is appropriate here.

ASME nonetheless argues that codemaking bodies in the situation should be able to rely on a plea of unawareness. This, we submit, if accepted, would undermine the incentives that Congress created under the antitrust laws. If courts were to accept this plea, it would encourage codemaking bodies to look the other way in the face of the everpresent danger of anticompetitive behavior by officers with conflicts of interest.

Effective deterrence of anticompetitive behavior in organizations such as ASME is of crucial importance to the national economy. As the House Subcommittee on Small Business stated in its Report Number 1981, in the 90th Congress, Second Session, at Page 75, and I quote, "Private bodies for promulgating standards are performing what is essentially a governmental function. The standard may

result in economic prosperity or economic failure for a number of businesses of all sizes throughout the country."

If ASME wishes to take upon itself authority to render interpretations that have life or death importance for American businesses, it must also take responsibility for the actions of those persons to whom it commits codemaking power. It is clear enough that ASME is willing to take credit for the achievements of its codemaking officers, and to receive many millions of dollars annually from the sale of its codes.

QUESTION: Mr. Shapiro, is your argument directed solely to organizations such as this that promulgate standards? Suppose this society did not promulgate codes or standards. Would you be making the same argument?

MR. SHAPIRO: We believe that the same general principles of agency law apply regardless of the --

QUESTION: So your emphasis on that aspect of the case does not affect your basic position or limit it.

MR. SHAPIRO: It does not. It reflects our enforcement concern, however, with this category of case. There are 400 standardmaking bodies affecting products sold in interstate commerce, and our concern there is that the antitrust laws be enforced effectively to prevent restraints of trade which these entities can so easily impose.

QUESTION: And do you agree with your associate

that not only with respect to the issuance of a standard or code, but even with respect to giving of an opinion letter, that there should be due process hearing?

MR. SHAPIRO: This is our position, Your Honor. Under the Silver case, we believe it is mandated, and I would point out in this connection that ASME now has adopted a system that results in precisely what we are suggesting is required by the law, and I would give the Court the following citations. ASME Exhibit Volume 110, and the Court of Appeals Appendix, Pages 784 and 804. ASME now publishes requests for interpretation of this very kind, and it publishes the proposed response in a magazine which is entitled Boiler and Pressure Vessel Interpretation, and it sells that to subscribers in large quantities.

So, it is possible to give notice, so that affected persons may comment on proposed interpretations that would have the effect of driving a competitor out of business, as this case illustrates so vividly.

QUESTION: That wouldn't be a great defense, I don't suppose, if two people conspired, two of the officers conspired, and this is a tenable construction of the regulation which we will publish, or it is an untenable one but we will publish it anyway.

MR. SHAPIRO: You are quite correct. It is not a defense to have an antitrust compliance program, but it

provides substantial protection against the occurrence of cases like this.

QUESTION: It lets people know that they ought to start thinking about the antitrust laws.

MR. SHAPIRO: It does indeed, and if that procedure had been followed in this case, there never would have been a lawsuit of this kind. If notice had been given, and Hydrolevel had been given an opportunity to comment, all of this would have been brought to light, and this litigation never would have occurred. We submit that in these circumstances ASME cannot wash its hands of the work of its officers when that work inflicts substantial injury on innocent business firms.

We respectfully request that the decision of the court of appeals be affirmed. Thank you.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Tyler.

(Whereupon, at 11:59 o'clock a.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Tyler, you may resume.

ORAL ARGUMENT OF HAROLD R. TYLER, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. TYLER: Mr. Chief Justice, and may it please the Court, on rebuttal, let me make a few points. Let me return first of all to something which I think Justice White got into this morning, and I am not sure that I clearly answered him, and I think I should.

We concede that at the minimum, we are seeking to have this Court remand this case to the court of appeals to decide under what we regard as the appropriate rules of antitrust liability.

QUESTION: In which event, if we did just that, we wouldn't have to touch on whether or not there was a benefit to the company.

MR. TYLER: Well, I think you would have to touch upon it as a matter of law, but --

QUESTION: We would say that -- The court of appeals said that even if there was no benefit, that there was liability, and we would have to say that was wrong, if we agreed with you.

MR. TYLER: That's right, and as a matter of fact, that leads me to my second point, because as I understand Messrs. Schwarz and Shapiro, they continue to try to argue

that somehow we are seeking some sort of antitrust immunity or benefit that others do not have under the antitrust laws of the United States because this is a not for profit organization. That is not the case at all. We wish to simply see ASME governed by the rules that commercial organizations or individuals are governed by, and here, for example, what they continue to do is to say that we want you to somehow think that we are standing the rule of respondeat superior on its head. We are not.

It is very simple. Let me read you Section 235 in the first comment thereunder. It is right here. It has always been the law. "An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed. Comment. The rule stated in this section applies, although the servant would be authorized to do the very act done if it were done for the purpose of serving the master, and although outwardly the act appeared to be done on the master's account."

That puts it very neatly. In other words, we admit that these two men did these things apparently cloaked in their role as members, but that is what this rule is all about.

Let me turn to another point which I think is very important, and I think we can -- it is not really another

point, but it illustrates the perniciousness of this argument that somehow we should be bound in this kind of a case on these facts. Like I assume many of us here, I am a member of the bar association, the City Bar of New York. I am an officer. I am a member of the executive committee, and thus I would have power to go to, let's say, the ethics committee in that bar association, and because I wanted to serve my law firm, not the bar association, I saw a chance to diminish a competing firm which had a very juicy client if I could skew up an opinion of the ethics committee dealing with the behavior of that law firm.

I would think we would all agree, no one would want to say that the City Bar of the city of New York was liable for my faithless conduct. I wasn't acting for them. I was using their authority in a very real sense. I was masquerading using their trappings, their building, my role as an officer, and so on. But no one would think I -- I hope we would all agree -- that the city bar would be liable just because I did something awful.

QUESTION: When you say no one, do you include your people on the other side?

MR. TYLER: I hope they would agree. They are members of the bar association. Maybe not the City Bar of New York.

I turn to my third point. Mr. Schwarz is just

wrong when he says that Lake Shore and Michigan Southern Railway is no longer good law. As a matter of fact, the court of appeals panel in this case cited, albeit on a slightly different point, they cited a case which upholds Lake Shore, discusses it. It is the United States versus the Ridgely Bank case. Our own main brief and reply brief discuss other cases, including cases in the Second Circuit of very recent vintage, which recognize that 1892 decision by this Court is still good law.

Another point. I turn to this argument which Mr. Shapiro made here this morning -- the government brief I think also casts it up -- suggesting that ASME and similarly situated voluntary member societies have enormous power. I think he uses the phrase "economic power", or whatever kind of coercive power. Well, I don't want to say that ASME can go around recklessly avoiding its purposes and its duties to with whom it ever deals, but the fact is that the real power only comes to ASME's codes and standards when a government like Mr. Shapiro's and my federal government adopts those standards, or the states, or the provinces of Canada.

That is when the real coercive power. And this is an interesting thing in another way. If you will notice in the record, the joint appendix -- I think it appears at 79 -- of just what happened here, after Hydrolevel complained to ASME, after April of 1971, about this letter, which of

course, as you know, very importantly never mentioned Hydrolevel at all, Hydrolevel complained. There was a swift response, which again Mr. Schwarz tries to tell you never occurred and never does even now. It occurred right in this case. On May 4 and 5 of 1972, in St. Paul, Minnesota, for two days, all kinds of people came in and on the docket was the complaint of Hydrolevel.

Thereafter, contrary to what he insinuates even here today, the final June 9th, '72, letter was circularized to 300. He tries to suggest it is less, but the record is clear, 300 persons. But finally, if you will notice who was shown in the record to be in those meetings, it is very important to the government point, there were government people present. You will see on 79 what are called conference members. These are men clearly identified, and women, who are officials of state governments, who were there listening, and the reason, of course, is, these were regulatory officials whose states had adopted some form or another of a code or standard put forth by ASME.

So, it is just not so that ASME has been recklessly and indifferently careening around the landscape of America --

QUESTION: Mr. Tyler, if your legal theory is correct, you didn't have to hold that meeting at all.

MR. TYLER: That is why I didn't get into it

initially.

QUESTION: I just wonder why you got into it now.

MR. TYLER: I get the point.

(General laughter.)

QUESTION: I think your point has expired.

MR. TYLER: It has. Thank you very much.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:07 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

AMERICAN SOCIETY OF MECHANICAL ENGINEERS, INC. vs. HYDROLEVEL CORPORATION

No. 80-1765

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY Sharon Lynn Connelly