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"Professional Self-Regulation After the Hydrolevel Decision"

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On May 17, 1982, the U.S. Supreme Court ruled that the American Society of Mechanical Engineers (ASME), a voluntary professional engineering association, was liable for damages caused by the anti-competitive activities of some of its members involved in the society's standard setting process. One of ASME's sets of standards is the Boiler and Pressure Vessel Code which, among other things, promulgates standards for components of heating bollers. ASME routinely delegates responsibility for the interpretation, formulation and revision of the Code to a Committee which, in turn, authorizes various subcommittees to respond to inquiries on the Code.

In the 1960's, Hydrolevel Corporation developed a new version of low-water fuel cutoffs, devices that provent boiler explosions by cutting off the fuel supply before the water level in the boiler reaches a dangerously low point, which included a time delay mechanism. Two ASME subcommittee members were affiliated with the chief competitor of Hydrolevel and they used the Committee's review process to cause ASME to issue a misinterpretation of the Vessel Code to the competitive disadvantage of Hydrolevel. The two members prepared an informal opinion, eventually circulated on ASME letterhead by the association's staff, criticizing as unsafe fuel cutoffs with a time delay. The opinion was distributed by Hydrolevel's competitor to potential customers, and soon thereafter Hydrolevel was driven out of business. Hydrolevel filed an antitrust suit against several parties, all of whom settled prior to trial except for ASME.

In *ASME, Inc. v. Hydrolevel Corporation*, the Court considered it irrelevant whether the members acted to further ASME's own interests or whether ASME officially ratified the members' actions. ASME was held liable because its agents acted with the "apparent authority" of the association. The Court reasoned that if "ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future .. . . only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps.

The decision has had an unsettling effect on professional associations concerned about its implications for their self-regulatory activities. By applying the "apparent authority" theory to ASME's actions in this case, the Supreme Court effectively places any nonprofit organization under a strict liability rule for any standards it issues with the aid of persons who could abuse the process to further their own interest, whether or not the organization authorized or ratified the action. In a biting dissent, justice Lewis Powell argued that "such an expansive rule of strict liability, at least as applied to non-profit organizations, is inconsistent with the weight of precedent and the intent of congress. . and irrelevant to the achievement of the goals of the antitrust laws."

What does all this mean for professional associations? How can organizations engaged in standard setting-whether it involves products, ethics, accreditation and so on-conduct their activities in the public interest without incurring substantial risks precipitated by the actions of individual members? Consistent with PERSPECTIVES' interest in the ethical and policy issues affecting and affected by the professions, this issue presents a range of

responses to that latter question and, in doing so, offers further insight into the nolions of professional responsibility and self-regulation.

"The Supreme Court's Hydrolevel Decision Antitrust Liability of Non-Profit Organizations"

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In *ASME. Inc. v. Hydrolevel Corporation*,[1] the United States Supreme Court issued an historically momentous 6 to 3 decision that significantly broadens the potential antitrust hability of non-profit organizations, including trade and professional associations. The Court held that a professional association that sets product standards is strictly liable under the antitrust laws for acts of its agents when the acts are committed with the apparent authority of the association, even though the association's directors and staff neither authorize nor ratify the acts and even though the acts do not benefit the association. In applying the unprecedented "apparent authority" theory to anti-trust law for the first time, the Court stated that a rule that imposes liability on a non-profit standard-setting organization is consistent with the legislative intent that private rights of action under the antitrust laws be used effectively to deter antitrust violations. The Court found that an association is responsible for preventing antitrust violations through the misuse of its reputation by its agents, including members who are merely unpaid volunteers.

The Lower Court Decisions

When Hydrolevel learned of the role of the subcommittee in drafting the letter, it sought relief from ASME, which investigated, found no wrongdoing, and confirmed the challenged interpretation. Hydrolevel then filed suit against ASME and others, alleging violations of Sections 1 and 2 of the Sherman Act. Although the trial judge issued instructions that ASME could only be held liable if it had ratified its volunteer agents' actions or if the agents had acted in pursuit of ASME interests, the jury returned a verdict for Hydrolevel. The District Court entered a judgment against ASME for $7.5 million ($2.5 million in damages, automatically trebled under the antitrust laws). The United States Court of Appeals for the Second Circuit affirmed and held that ASME was liable because its volunteer agents had acted within the scope of their "apparent authority."[2] The Court of Appeals did reverse the damage award and returned it to the lower court for a new estimation.

The Supreme Court Decision

In as affirming the decision of the Court of Appeals, the Supreme Court sought to "insure that standard-setting organizations will act with care when they permit their agents to speak for them."[3] The Court repeatedly referred to the power that trade and professional associations have in affecting the entire economy of the country and noted that ASME was virtually "an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce."[4] The majority decision pointed out that associations are "rife with opportunities"[5] to violate the antitrust laws. The Court's principal concern was that ASME had failed to implement any meaningful safeguards that would prevent its reputation from being used to hinder competition in the marketplace. The Court noted that this antitrust violation could not have occurred without ASME's promulgation of product standards and the association's lax methods of administering them.

Three dissenters argued that the Court's holding adopts an "unprecedented theory of antitrust liability. . with undefined boundaries...."[6] They criticized what they viewed as a novel theory unsupported by law and unnecessary for the resolution of the case against ASME, since the theory was not used in the lower court to produce a jury verdict against ASME.

They particularly attacked the "strict liability" approach of assessing effectively punitive damages against a non-profit organization for the fraudulent activities of volunteer members that may not have been preventable by the exercise of any possible procedures of the association.

Analysis of the Supreme Court Decision

In reviewing the *Hydrolevel* decision from the point of view of those most affected-non-profit organizations, particularly trade and professional associations engaged in "self. regulation" activities, one must distinguish absolutely the *result* affirmed by the Supreme Court and the theory used in that affirmation.

Few would argue that there was no wrongdoing on the part of the

volunteers and possibly the lower staff of ASME who actually effected the fraudulent interpretation of the association's low-water boiler fuel cutoff valve standard to the detriment of Hydrolevel Corporation. But the theory used by the majority of the Supreme Court to affirm the lower court and appellate court result is another matter altogether. The Supreme Court itself was divided completely on the issue of how to substantiate 1egally the original result. The five member majority led by justice Blackman (plus a concurring Chief Justice Burger who did not accept the theory but did endorse the result) and the three-member minority led by Justice Powell, in their respective opinion and dissent agree on practically nothing in each other's legal approaches, even going to the extent of consistently raising and attacking one another's arguments in their footnotes. If ever there were a Supreme Court decision with no legal middle ground between the opinion and the dissent, it is the *Hydrolevel* decision. Under the circumstances, the decision is likely also to provoke further debate among those affected by the decision, as well as among lower federal courts which theoretically are bound to follow what was decided by the majority of the Supreme Court.

Without choosing between either the majority opinion or the minority dissent, several points of analysis can be noted for the benefit of organizations that would seek to understand the *Hydrolevel* theory, and most important, to avoid its application against them in future cases.

One aspect of the majority's opinion that is immediately apparent is that it represents a mustering of several more or less established principles of legal liability joined together for the first time by the Supreme Court in this case. With respect to each principle, the majority has been willing to extend or modify it to fit the circumstances of the case. First, of course, is the principle that a voluntary product standard issued by a non-profit association can be used to restrain competition by limiting entry to the market of innovative products and thereby effect an antitrust boycott in violation of Section 1 of the Sherman Act, which proscribes any "contract, combination or conspiracy in the restraint of trade."[7] While the Supreme Court has commended association standards-making activity as ordinarily pro-competitive,[8] it has also condemned an association's use of standards in a way that stifles innovation.[9] What is new in *Hydrolevel* is the explicit confirmation that not only the development of product standards, but also interpretation of them, can effect a boycott. This should hardly be considered surprising, however, as it was introduced in previous antitrust pronouncements by the Supreme Court and other authorities.

What makes *Hydrolevel* new and different is the issue of organizational responsibility for the anti-competitive use of a standard to boycott an innovative entry to the market. It was impossible to argue plausibly that the anti-competitive interpretation of an ASME standard did not occur-the interpretation was memorialized in correspondence using ASME letterhead. So the association argued instead that it was not responsible for that interpretation. At the original trial before the District Court, Hydrolevel attempted to advance the principle of "apparent authority" to attribute responsibility for the interpretation to ASME. The "apparent authority" doctrine is an ancient one in common law cases. It provides that a principal, such as an employer, can beheld liable for the wrongdoing of an agent, such as an employee, when the employee is acting in the ordinary course of employment and "appears" to be authorized by the employer. Many cases that have held principals responsible for the wrongdoing of agents under the "apparent authority" doctrine have required evidence that the principal later somehow approved or ratified the wrongdoing or at least benefited from it. In *Hydrolevel*, the lower court did require ratification by ASME of the anti-competitive standard as a condition of holding ASME responsible for the interpretation. The court so instructed the jury. The jury concluded the ASME had effectively ratified the interpretation.

Given the lower court finding of ratification by ASME, what occurred in the Supreme Court is curious. The majority held that a finding of ratification by ASME was unnecessary to hold the association responsible and went out of its way to adopt a sweeping and unrestricted principle of Liability. Until future Supreme Court cases narrow this broad interpretation of law, associations-particularly standards-setting organizations-will be required to increase their vigilance against any type of behavior on the part of association officers, staff or volunteers that could raise even the suspicion of anti-competitive activity. In short, associations should heed the advice given by the majority in reaching the

Hydrolevel decision: that associations themselves are in the beat position to prevent the misuse of their own influence and power over the marketplace.

Footnotes

1. 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed. 2d 330 (1982).
2. 635 F2d 118 (2d Cir. 1980).
3. 456 U.S. at 577-78.<
4. Id. at 570, quoting Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 957, 465 (1941).
5. 456 U.S. at 571.
6. Id. at 578. (Powell, J., joined by White, J. and Rehnquist, L. dissenting).
7. 15 U.S.C. §S (1978).
8. Maple Hearing Manufacturers Assoc. v. United States, 268 U.S. 563 (1925).
9. Radiant Burner. loc. v. Peoples Gas Light and Oahe Ca.. 364 U.S. 656 (SSel).

"Hydrolevel Decision as Applied to Antitrust Violations of Standards Making Organizations"

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In *ASME, Inc. v. Hydrolevel Corporation*, the Supreme Court ruled that ASME was liable for conspiring to restrain trade in violation of Section 1 of the Sherman Act, where two subcommittee officers, who were volunteers, caused ASME to issue a misinterpretation of a standard to the distinct competitive disadvantage of the plaintiff. The Court's decision received considerable comment in the national press-some of which, unfortunately, was inaccurate. II is not surprising, therefore, that the ruling has given rise to a certain amount of confusion in the voluntary standards community.

Arguments Before the Supreme Court

In its brief to the Supreme Court, ASME made a number of strong arguments-all of which were ultimately accepted by the dissenting justices. Among other things, it was urged that the decision of the Court of Appeals conflicted with existing judicial precedent as well as the policy sought to be effectuated by Congress when it enacted the Sherman Act. Further, ASME argued that the test enunciated by the lower court, which was akin to a vicarious liability theory, was particularly inappropriate in the context of a non-profit membership corporation being sued under a statute that provided for treble damages.

Despite the strength of the arguments advanced by ASME, a majority of the Supreme Court voted to affirm liability on the basis of the "apparent authority" rule articulated by the Court of Appeals. The majority opinion accepts in large part arguments that were made in a friend of the court brief jointly filed by the Department of Justice and the Federal Trade Commission in support of Hydrolevel.

The major theme running throughout the majority opinion is that it is neither inequitable nor unjust to hold ASME liable since ASME stands in the best position to prevent the objectionable conduct engaged in by its members. Perhaps more than anything else, it is this belief that seems to guide the Court to its ultimate resolution of the case.

The legal reasoning employed by the majority to reach this determination, however, is open to serious question. Initially, the majority credits the observation of the Court of Appeals that "under general rules of agency law, principals are liable when their agents act with apparent authority and commit torts analogous to the antitrust violation presented by this case." The apparent authority doctrine is premised, the majority notes, on the proposition that an agent's commission of fraud is facilitated when he seems to be acting in the ordinary course of the business entrusted to him by his principal. Stated slightly differently, the theory presumes that an agent's statements are given weight by a third party by virtue of the principal's reputation.

After exploring the policy underlying the apparent authority theory, the majority states that the theory has "long been the settled rule in the federal system" in a wide variety of areas. As the dissent points out, however. none of the cases cited y the majority on this point involves either the antitrust laws or non-profit membership corporations. Indeed, prior to the decision of the Court of Appeals in the present case, no such ruling existed.

Nevertheless, the majority continues on to conclude that application of the apparent authority theory in an antitrust context is proper and consistent with the intent of Congress, which in enacting the Sherman Act sought to encourage competition. But, as the dissent points out, an examination of the actual legislative history of the Sherman Act lends little support to the majority's conclusion. In fact, the

legislative history, as expressed by Senator Sherman himself, seems to "counsel against adopting anew rule of agency law that extends exposure of such [non-profit] organizations to potentially destructive treble damage liability."

The majority decision also points to deterrence as an additional reason for imposing liability under an apparent authority theory:

Only ASME can take systematic steps to make improper conduct on the part of its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps. Thus, a rule which imposes liability on the standard-setting organization which is best situated to prevent antitrust violations through the abuse of its reputation-is most faithful to the congressional intent that the private right of action deter antitrust violations.

Not surprisingly, the dissent views the matter rather differently:

Whatever the application of agency law in its traditional setting, application of the most expansive rules of liability in the context of antitrust treble damages and nonprofit, tax-exempt associations threatens serious injustice and over deterrence.

Assessing the Hydrolevel Ruling

It should be clear from the discussion above that there is considerable room for dis-agreement as to the correctness of the Supreme Court's decision. Nonetheless, there is no escaping the fact that the decision represents controlling law that is unlikely to change in the near future, absent some form of Congressional action. The immediate issue, therefore, is precisely what the decision means to those involved in the voluntary standards system. Will significant changes be required? Is the possibility of liability greatly increased? A careful reading of the *Hydrolevel* decision indicates that the answer to these and similar questions is "no," and that while certain changes in the existing operation of standards developers appear advisable, major revisions are unnecessary.

Initially, it must be recongised that the actual holding in *Hydrolevel* is a limited one that results from the particular circumstances involved in the case. Indeed, the majority opinion is careful to note that the Court was not reviewing or deciding a case in which a party was challenging "a good faith interpretation of an ASME code reasonably supported by health and safety considerations." Yet, it is precisely this situation which represents the rule in the voluntary standards community.

The fundamental lesson to be learned from *Hydrolevel* is that the concepts of consensus and due proteas utilized to develop end revise standards moat be extended to the area of standards interpretation. It is through adherence to these precepts that standards developers have sought succesfully, both in the past and today, to guard against the promulgation of anticompetitive standards that might give rise to antitrust liability. Significantly, there was no claim in *Hydrolevel* that the ASME Code was anticompetitive nor could there have been. Rather, it was the lack of procedures designed to assure consensus and due process in the context of interpretations that ultimately gave rise to the problem.

The problem in *Hydrolevel*, of course, was that two renegades, operating within the rules of the system, were able to work a significant anti-competitive effect. But the "renegade" problem is capable of solution-the solution lies in the promulgation of procedures that are designed to limit effectively the abilities of one bent on wrongdoing from being in a position to realize his objectives. Procedures of this type, long part of standards development, now must be extended to standards interpretation. If standards developers, and for that matter all non-profit membership organizations, take appropriate steps to delineate who has the authority to speak for them, and under what circumstances, the rule announced in *Hydrolevel* simply does not present a serious threat.

What has been said above should serve to make it clear that the possibility of personal liability for those who participate in voluntary standards has in no way been changed by the decision in *Hydrolevel*. The holding of the Court concerned the liability of the standards developing organization, not its members, and resolution of the case turned on the majority's view that applying en apparent authority theory will help to ensure that standard-setting organizations will act with care when they permit their agents to speak for them." Thus, the possibility of increased liability resulting from the *Hydrolevel* decision is borne solely by the standards developer, not its members, and, as discussed above, the implementation of

proper procedures concerning interpretations will assure that even that potential liability will remain very remote.

At the present time, many standards developers have already taken the steps necessary to formulate pro cedures designed to assure adequate review of standards interpretations. It is ANSI's recommendations that any organization that develops standards-if they do officially issue interpretations-should have a written procedure covering the issuance of interpretations. It is suggested that these procedures provide that only one staff person be authorized to issue interpretations and that this fact be printed on the standard itself. This will certainly help rid the organization of the apparent authority problem. It is further recommended that certain committee members be designated as an interpretations subcommittee to review the question and to draft the interpretation. Naturally no committee member with any possible conflict of interest should participate in the review of the question. In addition it would be advisable to publicize the interpretation by sending it to all members of the committee end by notifying all concerned parties. ANSI could, if requested, list the fact that the organization has issued an interpretation in the Standards Action newsletter that goes to over 10,000 people.

The *Hydrolevel* case is not really a standards antitrust case; it is not a certification antitrust case. It was a conspiracy of two renegades to use ASME for their own selfish purposes. There was never any authority and there never was any ratification by the principal. It was primarily an agency case with the Supreme Court stretching the law of agency to find apparent authority. It was an antitrust case where this type of apparent authority was never used. It called for treble damages, punitative damages, and for an apparent authority case, another first, and it called for the punishment of a non-profit 501 (c) (3) corporation, another first.

I submit it is not good law and in the years ahead its application will be severely limited by the Court in future cases. What it does tell those who work on voluntary standards is that we must be careful in our work to assure that our actions and decisions are carefully handled-that they represent a consensus position, such as that required by ANSI in its standards approval process.

"Professional Associations and the Regulation of Standard-setting"

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Recent public policy on standards and certification reflects both the high value placed on the voluntary standard setting system and serious concern that the system is being misused to exclude competitors and injure consumers. Disagreement has arisen over the means for remedying the anticompetitive consequences of some standard-setting activities.

When government intervenes in an open market, the choice of regulatory approach must be measured by the extent to which it creates incentives for compliance, the ease with which it can be administratively enforced and the costs it imposes. Critics of perceived excessive regulation argue that the government must be careful not to discourage productive standard setting activity or to impose costs without providing offsetting benefits.[1] However, the courts,[2] the justice Department,[3] administrative agencies,[4] and the Congress,[5] are taking a grave view of antitrust violations by all types of standards organizations.

In *ASME, Inc. v. Hydrolevel Corporation*, the Supreme Court affirmed that the ASME was liable for treble damages to Hydrolevel, intending that the fine would both compensate the small firm and serve as a deterrent "to insure that standard-setting organizations act with care . . .."

Many professional associations anticipated that the Supreme Court's decision would seriously hamper the voluntary standard-setting process. In the fifteen months since the decision, organizations have altered the process of setting standards to reduce their potential liability for damages, but the standard-setting system as a whole has continued without major incident.

Several federal agencies have recently taken positions on standard setting. The Federal Trade Commission staff has recommended a rule aimed et prohibiting and remedying the failure of standards developers to consider and decide complaints that their actions unreasonably restrain trade.[6] A new policy statement issued by the Office of Management and Budget (OMB) urges government agencies to rely on voluntary standards, both

domestic and international, whenever feasible.[7] The FTC is reviewing comments on its proposed rule to determine if the OMB regulation and the Supreme Court decision on *ASME v. Hydrolevel* have so improved the process of standard setting that the FTC rule may not be necessary.

Issues of Politics, Competition and Due Process

Examination of the recent history of industrial product standard-setting will serve two purposes: 1) it will demonstrate how policy on standard setting is subject to periodic readjustments due to political considerations, and 2) it may clarify the current public policy issues and their impacts on professional associations and similar organizations.

In the late 1960's a case against the Douglass Fir Plywood Association focused on the possibility that a trade association's standard setting group could use its authority to prevent a new competitor from entering the market, causing him to file for bankruptcy.[8] In 1974, the Federal Trade Commission began a probe of plastics manufacturers, charging that a standards committee of the Society of the Plastics Industry, Inc. had allowed a highly flammable foamed plastic to reach the market. The FTC initiated a broad scale inquiry into the development of standards and certification and concluded that "standards development and certification have the potential to, and have in certain instances led to, competitive and consumer injury."[9]

The American National Standards Institute and fifteen other organizations concerned with standards and certification sued the Federal Trade Commission in 1979, alleging that its rulemaking proceedings violated various constitutional and statutory rights.[10] Opposition to FTC rulemaking authority was carried into Congressional authorization hearings for the FTC. Strong organized lobbying by industry, professional and trade associations resulted in passage of the Federal Trade Commission Improvements Act of 1980.[11] By this Act, the Commission lost the authority to "develop or promulgate any trade rule or regulation with regard to the development and utilization of standards and certification activities.. ." The FTC, however, was able to continue its rulemaking over unfair methods of competition under another section of the FTC Act.[12]

The American Medical Association (AMA)has led a continuing effort to strip the FTC of its authority to regulate professional associations. The powerful medical lobby has sought to exempt physicians from federal review and only narrowly lost on this issue in the 1982 Congress. Professional associations have continued their fight against FTC authority in the 1983 Congress. The American Bar Association overwhelmingly approved a resolution at its annual meeting this past summer, urging Congress to bar the FTC from regulating lawyers.[13] However, consumer groups have so far succeeded in fending off the professional societies' campaign.

On another front, many of the standards organizations, including professional societies and trade associations, turned to the National Association of Manufacturers (NAM) in the spring of 1982 to organize a lobbying effort to revise aproposed OMB directive on "Federal Participation in the Development and Use of Voluntary Standards."[14] These groups found fault with clauses in the OMB circular which stipulated due process preconditions to federal participation in private standard setting activities. OMB was prepared to establish a uniform policy for all government agencies authorizing them to participate in the support standards activities of private sector organizations provided *they self-certify that they comply with stated due process and other basic criteria in carrying out those activities*. This would have meant some notice to the public or to all parties which might be affected. It also provided for a dispute resolution service to resolve complaints against voluntary standards organizations. However, the rule did not survive the Reagan Administration's regulatory review. Instead, a revised Circular A-119, closely reflecting the NAM lobby's position, became effective in March 1983. The Director of the Associations Department of the NAM said the group was generally pleased with the provisions:[15]

the due process criteria have been eliminated as well as the requirement thatvoluntary standards bodies adhere to those criteria as a prerequisite for federal participation, the provisions for the establishment of a voluntary dispute resolution service have been eliminated, in place of the due process requirements the circular cautions federal agencies to be aware of

laws end regulations which may be violated by agency participation on committees.

These revisions in the OMB rule place the burden on the plaintiff to demonstrate that he has been harmed and that his right to due process has been denied by the standards organization.

The FTC staff estimated that standards development organizations without procedures for handling substantive companies and those with procedures that are significantly restricted together produce over 80% of the privately developed standards in the United States.[16] In an effort to improve the complaint handling procedures of the standards organizations, the staff of the Federal Trade Commission recommended a rule that "declares it to be an unfair method of competition for standards developers to fail to consider and decide complaints that their standards unreasonably restrain trade." Since the Supreme Court decision in *ASME v. Hydrolevel* should encourage the development of adequate complaint handling systems by standards developers, the staff recommended a comment period to receive evidence on current complaint processing by standards organizations. The FTC does not speak in one voice on this issue, however.[17]

Despite disagreement on mechanisms for implementing policy, there is consensus in the Reagan Administration that the government should play an active role in preventing anti-competitive activity in the atandardsettfng business.The preferred approach at the FTC is case-bycase enforcement, including an examination of the benefits and costs of the challenged restraint on a specifically defined economic market. The revised OMB circular is a significant piece of an overall standard-setting policy,for it signals a shift from a broad focus on industry-wide regulation to localized enforcement of what is perceived as the relatively few instances of anticompetitive activity.

Implications for Professional Associations

Apprehension about the current regulatory climate is well-founded among professional associations. There is now legal precedent for holding an association liable for the acts of its members end individual members liable for their acts as members of the associations. New law is also being made, including some which relates to professional liability to third parties (See Note 2). Since the courts ere not an appropriate focus for organized lobbying, these precedents will be more difficult to change and potentially more coetly than FTC rules and OMB circulars.

Professional associations and certification organizations generally serve the business interests of their members and are organized for, among other things, the profit of those members. Like trade and industry groups, most professional associations are voluntary organizations supported by dues and contributions from members. These organizations have developed a broad array of standards for both industrial products and professional performance. Their standard-setting committees are composed of volunteers, many of whom are employed by major industrial firms which pay them for their participation on the committees. These volunteer committee members are usually assisted by staff members from the standard setting-association. Programs of professional societies have been held to constitute concerted joint action in restraint of trade. Unreasonable restraints resulting from standards set by such an organization could expose it to antitrust liability because it was a participant in a combination with industry members.

Law journal analysis and reports from association committees reflect the developing legal approach for professional associations anxious to protect themselves from antitrust violations such as were the bases for ASME v. Hydrolevel. Responding to the persistent criticism of complaint handling, prudentgroups in the standards industry ere focusing on improvements in the procedural due process provisions in their standard setting process.

Similarly, a committee of the American Bar Association, meeting in June 1983, wrestled with responses to *ASME v. Hydrolevel*. They heard reports on model rules de ned to protect committees which issue advisory ethics opinions. A past president of the Chicago Bar Association noted to the committee that the most vulnerable advisory opinions are those that have something to do with setting fees, that restrict an activity or suggest that a certain practice is unethical, or that restrain competition among lawyers.[18]

Many of the legal defenses once available to professional and trade associations have been eroded by

the courts. Professional and trade association activities which are perceived as price fixing, group boycott and other such violations under the guise of standards and ethical codes, are apt to be struck down by the courts. They may subject the actors and their employers to possible liability for compensatory damages and perhaps even punitive damages.

In another approach to coping with the present climate, the American Academy of Opthamology submitted its proposed ethics code to the Federal Trade Commission for review of possible violations of antitrust laws. In June 1983, the Association reported that the provisions of the code relating to clinical experiments, investigative procedures, delegation of services, postoperative care and communications to the public do not violate the FTC Act or other statutes enforced by the Commission.[19]

The necessity of stronger guarantees regarding the provisions for due process are not well received by some associations. The President of the AMA, in recent criticism of mandatory reportinglaws regarding physician discipline, termed the government's approach an attempt to legislate morality: "There is so much due process, my friends, that there is not much justice."[20]

The American Society of Association Executives also complained that several recent Supreme Court antitrust cases seriously inhibit association self-regulation programs. They specifically protested the *Hydrolevel* doctrine holding associations strictly liable for the actions of their agents and would like the criteria used for judging an ethics code to be broader than only the code's effect on competition.[21]

New developments in this area of the law continue to emerge. The New Jersey Supreme Court, in what may be a precedent-setting decision, has recently ruled that a professional can be held liable to non-cilent third parties for negligence.[22] The court essentially ruled that the law regulating professionals should become something akin to that requiring strict liability for products. The implications of the decision are that the court has eliminated the ability to make professional judgments, which by hindsight might be found wrong, but which should not be considered negligent or actionable.[23]

The Supreme Court decision in *Hydrolevel* has created additional problems for standards organizations relying on corporate employees. As many associations suggested in amicus briefs filed in the *Hydrolevel* case, volunteer misconduct cannot be controlled effectively. Full time staff will have to play a more central role in the development and interpretation of standards at a significant increase in cost. Funding of standards committees by business interests may present a serious potential for conflicts of interest and consequent antitrust violations. This may cause corporations to rethink their policy of funding the participation of their employees on these committees.

A decade ago economist Reuben A. Kassel considered self-regulation by the professions "on a par with having spiders run an orphanage for flies."[24] In the interim, a period of strong consumer activism, new interpretations of legal principles, and both congressional and agency attention to enlilruat violations, have motivated professional associations to improve their provisions for self-regulation. This trend is likely to continue.

Too much is at stake in the voluntary standard-setting system far all industry and professional associations to vacate the field as some of them predicted both before and after the *Hydrolevel* decision. A likely scenario is that the number of standard-setting organizations will decline and their work will be shifted to the small number of standard-setting groups which can afford to provide the necessary due process safeguards. Greater government involvement seems unlikely for reasons already stated. In addition, the revised OMB circular specifically encourages government adoption of industry standards.

In conclusion, it seems likely that the standard-setting associations will adapt to the current regulatory climate through a series of incremental changes in procedures. The system will emerge more responsive to the public interest.

Footnotes

1. Statment of Timothy Marts, Director, Bu, reau of Consumer Protection, Federal TradeCommision accompanying the Federal Staff Report on Standards and Certification, April 1, 1993.
2. ASME, Inc. v. Hydrolevel Corporation, 102 S.Ct. 1935 (1982) and related cases.

3. Letter from Ronald G. Carr, Acting Assistant Attorney General. Antitrust Division, U.S. Department of justice, June 22,1982 to Donald E. Sowle, Office of Management and Budget commenting on Revised OMB Circular A-119.
4. U.S. Federal Trade Commission. Bureau of Caasumer Protection Standards and Certification Final Staff Report, April 1983, p 339 ff. hereafter referred to as FTC Standards and Certification; OMB Circular Revised A-119.
5. The Congress began holding hearings voluntary Industrial Standards in 1975 which were preceded by reports issued by the House Select Committee on Small Businees in 1969 and by the Science Policy Research Division of the Library of Congress 1975.
6. See FTC Standards and Certification.
7. The policy was announced in OMB Circular lar A-119 revised (Federal Register pp. 49498, November 1, 1982).
8. Structural Laminates. Inc. v. Douglass Fir Plywood Association !261 F.Supp. 154.Ore. 19661 aff 'd per curiem, 399 F.2d 155 (9th Car. 1988) cart. denied, 393.
9. FTC Standards and Certification. P.1.
10. American National Standards Institute v. FTC_ civ. No. 79-1275 (D.D.C. 1979), titan May 9,1979. The case was dismissed by the Federal District Court for the l7i atrictof Columbia in February 19172.
11. P.L.96-252.
12. See H.R. Rep. No. 96-917, 98th Cong, 2d Sess. (1980) at 29.
13. Wall Street Journal, August 3, 1963.
14. National Journal, 9/28/91, pp 1717-1719.
15. Telephone conversetion with RicherdNor mans March 15, 1983.
16. FTC Standards and Certification.
17. Sea Ibid.. accompanied by statements of Bureau of Consumer Protection Director, Timothy Maria end Associate Director far service Industry Practices. Michael G. Moceley.
18. Richard W. Austin, remarks at session of American Bar Association's Ninth Annual Workshop on Lawyers' Professional Responsibility, June 9-11, 1983. 51 LW 2761.(6-21-83).
19. Professional Regulation News, lung 1983, p.3.
20. William Y. Riel. quoted in Professional Regulation News, April/May 1983, p.10.
21. Ibid., p 4
22. H. Rosenblum. Inc. v. Jack Adler, A-39/85 Untie 9. 1983.
23. Comments of General Counsel for Touche Rose and Go., the accounting firm which was the defendant in the case, as quoted in Professional Regulation News, June 1963.
24. Reuben A. Kessel, Essays in Applied Price Theory, ads. R.H. Cause and Merton H. Miller (Chicago: University of Chicago Press, 1980), p. 60.

"Announcements"

CONFERENCES: A conference on the Regulation of Hospital Privileges for Health Care Providers will be held in St. Louis, Missouri at the Chase Park Plaza Hotel on November 10-12, 1983. It will be sponsored by the American Society of Law & Medicine and the Center for Health Law Studies. St. Louis University School of Law. For further information contact this Center at 3700 Lindell Boulevard, St. Louis, MO 63108. Phone: (314)658-2777.

On November 17-19, 1983, the Seventeenth Symposium on Philosophy and Medicine, "Conflicts with Newborns: Saving Lives, Scarce Resources, and Euthanasia," will be held at Mercer University, Macon Georgia. For further information contact: Richard McMillan, M.D., Mercer Medical School, Macon, GA 31207.Phone(912)744-4045.

PUBLICATION: The Center for the Study of Science in Society is pleased to announce the second volume in its series of Working Papers. This volume, titled The Demarcation between Science and Pseudo-Science, is edited by Rachel Laudan and contains papers presented at the conference of that title held in 1982 at Virginia Polytechnic Institute and State University. To obtain a copy, send a check for $4.00 to the Center at Price House, Virginia Polytechic Institute and State University, Blacksburg, VA 24061.

GRANTS: The National Endowment for the Humanities announces that its program on Science, Technology, and Human Values program has a new name: Humanities, Science and Technology. Along with the name change, the program is broadening the range of topics it will support. Formal guidelines will be announced this fall, and the first deadline will be March 1, 1984. For more information, contact either DavidWright, Program Officer, or Eric T. juengst, Program Specialist; Humanities,

Science and Technology Program; Division of Research Programs; National Endowment for the Humanities; 1100 Pennsylvania Avenue, N.W.; Washington, D.C. 20506. Phone: (202) 786-0207.

PRIZE: Business & Professional Ethics Journal announces a $500 prize for the best paper from a student in a graduate or professional program. They will publish the winning entry. The deadline is January 15, 1984. You may contact this Journal at the Center for the Study of Values, University of Delaware, Newark, Delaware 19711.

The Center for the Study of Ethics in the Professions at the Illinois Institute of Technology was established in 1976 for the purpose of promoting education and scholarship relating to ethical end policy issues of the professions.

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