

Your Association Could Be Liable for the Anticompetitive Acts of Members

The Supreme Court recently held an association liable for the anticompetitive acts of its volunteer members. To protect your association from a similar misfortune, you should analyze your operating procedures and carefully monitor the activities of volunteers—particularly those involved in the standards-setting process.

IN A MAY 17 opinion, the Supreme Court upheld a lower court's ruling that the American Society of Mechanical Engineers, New York City, is liable for the anticompetitive acts of its members. By a vote of 6-3, the high court agreed that ASME was responsible for the actions of two volunteers who had conspired to disparage a competitor's product through misuse of the association's safety-standard interpretation process.

The result of this decision could affect associations for many years to come.

Facts surrounding case

The facts surrounding *Hydrolevel v. ASME* began in early 1975 when Hydrolevel Corporation charged that two volunteer members of ASME had conspired to misinterpret a section of the society's "Boiler and Pressure Vessel Code." The two volunteers, who were members of the standards-writing committee, decided that a boiler cut-off device invented by Hydrolevel did not meet ASME's voluntary standard.

These two members, who were also employees of large corporations that competed in the boiler cut-off market, arranged for the committee to

George D. Webster is general counsel to the American Society of Association Executives and a partner in Webster, Chamberlain & Bean, a Washington, D.C., law firm. He is the author of *The Law of Associations*.

issue a letter that negatively commented on the safety of Hydrolevel's device. This letter, Hydrolevel contended, impaired its attempt to market the cut-off.

Consequently, Hydrolevel filed a suit against the two companies and ASME on the grounds that the two volunteers had acted only to further their employers' interests. The companies both settled prior to the trial, but the case continued against ASME.

The U.S. District Court for the Eastern District of New York in February 1979 found ASME guilty of participating in a conspiracy to restrain trade under the Sherman Antitrust Act and ordered the association to pay Hydrolevel damages in the amount of \$7.5 million.

ASME appealed the decision to the

U.S. Court of Appeals for the Second Circuit. The appellate court upheld the lower court's decision on liability but reversed the lower court's decision on damages. It was the appellate court's decision regarding ASME's liability that was upheld by the Supreme Court.

Doctrine of apparent authority

In the Supreme Court, ASME's liability was based on the doctrine of apparent authority under the law of agency. The court decided that the volunteers had been given apparent authority by ASME to act on this standard, and the association was therefore liable for their acts.

The court awarded treble damages even though ASME never ratified, authorized, or derived any benefit from the activity of the two volunteers involved. Justice Powell dissented, saying: "In my view, such an expansive rule of strict liability, at least as applied to nonprofit organizations, is inconsistent with the weight of precedent and the intent of Congress, unsupported by the rules of agency law that the court purports to apply, and irrelevant to the achievement of the goals of the antitrust laws."

His argument against treble damages was to no avail. However, the case is not over yet. Since the court of appeals reversed the original \$7.5 million damage award as being "grossly excessive," ASME still has the right to a retrial on the issue of damages.

Could it happen again?

By integrating appropriate procedures into the standards-writing process, associations can probably prevent future application of the doctrine and ensure that the facts in this case do not arise again. If ASME had

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implemented publication and appeal procedures, the letter concerning Hydrolevel's cut-off device would not have been written.

According to a footnote in the court's opinion, ASME has since developed procedures to protect it from future "similar misadventures."

"Indeed, ASME has initiated procedures to protect against similar misadventures in the future. After its experience with the Hydrolevel affair, ASME began issuing a publication containing all written technical inquiries pertaining to codes and their interpretations, a publication available through subscription . . . Apparently, ASME now gives its interpretations close scrutiny through the publications process . . ."

New legal principle

The Hydrolevel case represents a new legal principle. Its immediate effect will make standards-making groups more public in their operation

because they have to be concerned about liability.

However, the court's decision should not deter volunteers from serving as members of the standards-making committees of properly insured associations. If insurance can cover potential liability, company representatives will probably still participate in the standards-making process because of the importance of standards to their products.

Various insurance brokers indicate that major companies are now considering a policy that might be needed to cover both associations and their volunteers from such situations, assuming that such a policy does not already exist.

There will undoubtedly be many efforts to apply the broad principle of this case to many other situations. For instance, there could be attempts to attribute liability to a nonprofit organization even if the organization is not a standards-making body and attempts to apply the principle of apparent authority to any act of an association's volunteer member.

To avoid this, associations must be more assiduous in controlling the activities of volunteers. Procedures should be instituted to give the as-

sociation's board of directors more authority in controlling the association's affairs. Any act by a volunteer should be reviewed by the board or some designated committee to make sure the principle of apparent authority is not extended.

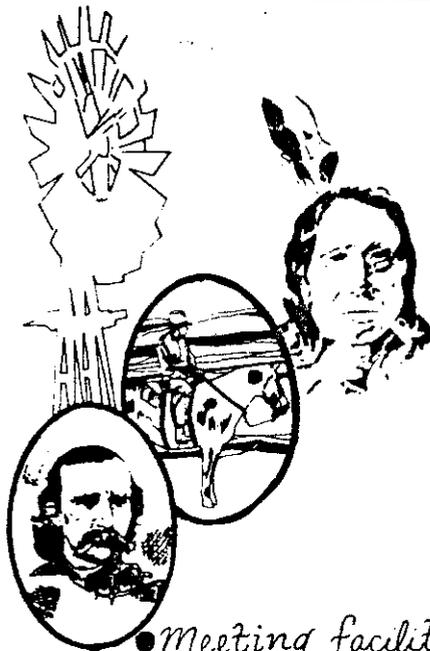
Associations should also carefully analyze their structures and operating procedures to make sure that volunteers and staff members do not abuse the association's position. Disclaimers should be considered and the use of association stationery, distribution of materials, and possible conflicts of interest should be monitored.

Facts are atypical

Most association executives are now aware of the Hydrolevel decision. Many have asked their lawyers for advice on how to best protect the association and its members from similar lawsuits.

It should be emphasized, however, that the facts in this case are atypical. If an association's board of directors is given adequate authority, it is highly improbable that these circumstances will ever arise again.

The set of circumstances surrounding the Hydrolevel case should not recur. ■



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