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Union Fiduciaries, Attorneys, and Conflicts of Interest

BY
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INTRODUCTION

Congress set a new course in labor law when it enacted the Labor Management Reporting and Disclosure Act of 1959.[1] The

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[1] 29 U.S.C. §§ 401-531 (1976) [hereinafter cited as the LMRDA]. The LMRDA represents a shift from the traditional attitude of avoiding statutory regulation of internal union affairs to a new policy of limited intervention. The immediate impetus for this change in national labor policy came from the investigations, reports, and recommendations of the Senate Select Committee on Improper Activities in the Labor-Management Field, popularly known as the McClellan Committee, which exposed flagrant corruption, undemocratic practices, and violations of public trust by union officials who had stolen, embezzled, or misused over $10,000,000 of union funds during a fifteen year period. *See Interim Report of the Select Committee on Improper Activities in the Labor or Management Field,* S. REP. No. 1417, 85th Cong., 2d Sess. 1 (1958); *Report of the Senate Committee on Improper Activities in the Labor-Management Field,* S. REP. No. 1417, 85th Cong., 2d Sess. (1958). *See also* Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 468-70 (1968).

The LMRDA also resulted from pressures of diverse interest groups, including labor law scholars, *see, e.g.,* Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs,* 44 ILL. L. REV. 425, 631 (1949); the American Civil Liberties Union, *see, e.g., ACLU "Trade Union Democracy" Bill: Hearings on Bills to Amend and Repeal the NLRA Before the House Committee on Education and Labor,* 93 CONG. REC. 3633-43, 80th Cong., 1st Sess. (1947); ACLU POLICY GUIDE, Policy #49(a) at 82, Policy #53(a) at 83-86 (1976), and employer groups like the National Association of Manufacturers and the United States Chamber of Commerce. The first two groups sought to improve labor organizations by imposing a measure of democracy, while the two employer associations sought to reduce the economic and political power of the unions. *See* St. Antoine, *Landrum-Griffin, 1965-1966: A Calculus of Democratic Values,* in PROCEEDINGS OF NEW YORK UNIVERSITY NINETEENTH ANNUAL NATIONAL CONFERENCE ON LABOR 35, 36 (1966). The McClellan Committee's finding of corruption, dictatorial practices, and racketeering in some unions furnished supporting data for all four groups. Given this diversity of philosophy among

LMRDA proclaims that the public has an interest in internal union affairs, that unions should be financially responsible and democratic, and that private suits by union members are usually the appropriate enforcement mechanism to protect the public interest. To accomplish these goals, the LMRDA provides a relatively comprehensive scheme to foster democracy and financial responsibility within unions. It also establishes minimum standards of ethical conduct and professional responsibility for union leaders.[2]

One of the most important yet elusive provisions of the Act is section 501 of title V, which imposes federal fiduciary duties upon union officials.[3] Since its adoption, section 501 has been a major concern to union leaders.[4] Opinions may differ as to the

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its chief protagonists, it is understandable that the statute is less than a perfect model of legislative draftsmanship. *See* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 852 (1960) [hereinafter cited as *Internal Affairs*]. Furthermore, as is often the case with labor legislation, the LMRDA contains calculated ambiguities reflecting the concurrent and often conflicting themes of union self-rule versus legal control. *See* Note, *Counsel Fees for Union Officers Under the Fiduciary Provision of Landrum-Griffin*, 73 YALE L.J. 443, 448-49 (1964) [hereinafter cited as *Counsel Fees*].

[2] The declaration of findings, purposes, and policy of the LMRDA states that "it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations." 29 U.S.C. § 401(a) (1976) (LMRDA § 2). *See* A. COX, LAW AND NATIONAL LABOR POLICY 92 (1960). Professor Cox has suggested that enactment of the LMRDA became inevitable when Congress, by enacting the Wagner Act, ch. 372, 49 Stat. 449 (1935), *as amended*, 29 U.S.C. §§ 151-168 (1976), granted majority unions the exclusive right to represent all employees in an appropriate bargaining unit. "The government which confers this power upon labor organizations has a duty to insure that the power is not abused." *Internal Affairs*, *supra* note 1, at 820. The Supreme Court has relied on this principle to interpret the Railway Labor Act, 45 U.S.C. §§ 151-188 (1975) and the Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified in scattered sections of 29 U.S.C.), as imposing on the exclusive bargaining representative a duty of serving fairly and impartially the interests of all employees in a craft or class, or in an appropriate bargaining unit. Syres v. Oil Workers Local 23, 350 U.S. 892 (1955); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). *See generally* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

[3] 29 U.S.C. § 501(a) (1976), set forth in note 10 *infra*.

[4] *See, e.g.*, Cox, *Role of Law in Preserving Union Democracy*, 47 VA. L. REV. 1 (1961); Magrath, *Democracy in Overalls: The Futile Quest for Union Democracy*, 12 INDUS. & LAB. REL. REV. 503 (1959); Sosnoff, *Financing Democratic Ferment and Revolt Within Labor Unions Through Court-Awarded*

possibility, desirability, and necessity of industrial democracy promoted by other sections of the LMRDA.[5] But it is difficult to take issue with the necessity and desirability of requiring union officials who administer the financial affairs of their organizations to comply with federal fiduciary obligations.

Union officials represent some 20,238,000 members,[6] and are the custodians of approximately $3,952,000,000 in unions assets.[7] It is also a fact that union members exhibit less than total confidence in their representatives.[8] To be sure, not all unions are

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Counsel Fees, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-FIRST ANNUAL NATIONAL CONFERENCE ON LABOR 359 (1968); Summers, *The Impact of Landrum-Griffin in State Courts*, in PROCEEDINGS OF NEW YORK UNIVERSITY THIRTEENTH ANNUAL NATIONAL CONFERENCE ON LABOR 333, 335 (1960); Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 YALE L.J. 407, 413-17 (1972); Summers, Book Review, 80 YALE L.J. 687 (1971) (reviewing D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY (1970)). Many union leaders have expressed concern that the fiduciary provisions of the LMRDA would preclude expenditures of union funds for legitimate economic and social aims that do not immediately promote the union's primary objectives. *See, e.g.*, 105 CONG. REC. 16387 (1959) (the fiduciary section of the LMRDA is one of its "most dangerous provisions"); note 70 *infra* (remarks of AFL-CIO President George Meany).

[5] *See* Lipset, *The Law and Trade Union Democracy*, 47 VA. L. REV. 1 (1961); Magrath, *supra* note 4; Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29 (1979).

[6] This figure represents membership of unions headquartered in the United States, those with members living in Canada and other countries, and single firm unions. U. S. Dep't of Labor, Press Release 79-605 (September 3, 1979).

[7] Letter from Mr. Carl Rolnick, Director, Office of Labor-Management Standards Enforcement, Labor-Management Services Administration, U.S. Dep't of Labor, to Florian Bartosic (Oct. 12, 1979) (copy on file at U.C. Davis Law Review office). These assets are within the exclusive control of union officials. Moreover, union trustees, together with management representatives, jointly administer welfare and pension plans with total assets of approximately $10,553,000,000. U.S. Dep't of Labor, Labor-Management Service Administration, WELFARE AND PENSION PLAN STATISTICS 1969, at 6, Table 2 (January, 1972).

[8] Twenty percent of families with union members disapproved of unions; 27% of the people in these families believe that no one should be permitted to strike. Furthermore, the number of decertification elections, called by employees who want to throw out the organizations that represent them, has increased nearly 200% in the last decade. Of the 902 such "decerts" in 1980, workers voted to reject their unions in 73% of the cases. TIME, Nov. 16, 1981, at 124-25. *See* Wash. Post, Nov. 13, 1972, § A, at 7, col. 1 (only 20% of union members expressed "a great deal of confidence" in leadership in a 1972 Harris Survey Poll).

financially secure from corrupt practices of their officers. If unions are to be fiscally sound and democratic, the fiduciary provision of the LMRDA must remain fully effective in protecting and encouraging honest and faithful union representation.

Commentators have examined the nature and scope of fiduciary duties, the procedural issues of section 501 lawsuits, and the efficacy of available remedies.[9] They have not sufficiently considered, however, the role of the fiduciary provision in regulating the right of unions to spend membership money to defend officers against threatened or pending litigation, even though union expenditures for such purposes have engendered the most significant litigation under the statute. This article examines the role and effectiveness of section 501 in regulating union fiduciaries, attorneys, and conflicts of interest in litigation against union officers. Three principal areas are analyzed: the use of union counsel or funds to provide legal representation for union officials, the role and representation of the union in section 501 litigation, and the award of attorney's fees and expenses to section 501 plaintiffs.

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[9] *See, e.g.*, Clark, *The Fiduciary Duties of Union Officials Under Section 501 of the LMRDA*, 52 MINN. L. REV. 437 (1967) [hereinafter cited as *Union Officials*]; Collins, *Some Additional Comments on the Fiduciary and Bonding Provisions of the LMRDA*, in PROCEEDINGS OF NEW YORK UNIVERSITY FOURTEENTH ANNUAL NATIONAL CONFERENCE ON LABOR 149 (1961); Dugan, *Fiduciary Obligations Under the New Act*, 48 GEO. L.J. 277 (1959) [hereinafter cited as *Fiduciary Obligations*]; Kratzke, *Fiduciary Obligations in the Internal Political Affairs of Labor Unions under Section 501(a) of the Labor-Management Reporting and Disclosure Act*, 18 B.C. INDUS. & COMM. L. REV. 1019 (1977); Leslie, *Federal Courts and Union Fiduciaries*, 76 COLUM. L. REV. 1314 (1976) [hereinafter cited as *Federal Courts*]; Ostrin, *Fiduciary Obligations of Union Officers: A Critical Analysis of Section 501*, in SYMPOSIUM ON LMRDA: THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 528 (R. Slovenko ed. 1961) [hereinafter cited as SYMPOSIUM]; Tarbutton, *The Fiduciary Responsibility of Officers of Labor Organizations Under Common Law and LMRDA*, in SYMPOSIUM, *supra*, at 513; Tyler, *Section 501(a) and the Proper Function of Unions*, in SYMPOSIUM, *supra*, at 542; Wollett, *Fiduciary Problems Under Landrum-Griffin*, in PROCEEDINGS OF NEW YORK UNIVERSITY THIRTEENTH ANNUAL NATIONAL CONFERENCE ON LABOR 267 (1960) [hereinafter cited as Wollett]; Comment, *The Fiduciary Duty Under Section 501 of the LMRDA*, 75 COLUM. L. REV. 1189 (1975) [hereinafter cited as *Fiduciary Duty*]; Comment, *Fiduciary Duties of Union Officers Under Section 501 of the LMRDA*, 37 LA. L. REV. 875 (1977); Note, *The Fiduciary Duty of Union Officers Under the LMRDA: A Guide to the Interpretation of Section 501*, 37 N.Y.U. L. REV. 486 (1962).

The article reviews the various contexts in which counsel fee issues involving union officials arise under the statute, and critically examines judicial treatment of those issues. In reviewing the relevant case law, the article will demonstrate how courts can implement existing union fiduciary law more effectively by using new modes of analysis, drawing appropriate analogies to corporate and other legal doctrines. Our study of counsel fee problems under section 501, however, has led us to conclude that the present statutory scheme of private enforcement is flawed and that, as a consequence, the fiduciary provisions of the LMRDA are ineffective. We therefore close our study with a proposal for law reform. Congress should provide for public administration and enforcement of section 501(a) of the LMRDA by creating an independent regulatory agency patterned after the National Labor Relations Board.

I. Section 501 and the Counsel Fee Problem

A. Background Analysis of Section 501

Section 501, *Fiduciary Responsibilities of Officers of Labor Organizations,* prescribes legal standards of conduct for union leaders.[10] The dominant legislative purpose of the section is to

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[10] LMRDA § 501(a) provides:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of duties declared in this section shall be void as against public policy.

29 U.S.C. § 501(a) (1976).

eliminate financial wrongdoing by requiring union representatives to "put their obligations to the union and its members ahead of any personal interest."[11] The precise boundaries of section 501 are difficult to divine from the legislative history.[12] Clearly, Congress was mainly concerned with the fiscal integrity of unions, avoiding conflicts of interest, and protecting the public interest in maintaining unions as effective institutions for collective bargaining purposes.

Section 501(a) promotes these goals by declaring that "officers, agents, shop stewards and other representatives occupy positions of trust in relation . . . to [their] labor organization and its members as a group."[13] Occupying positions of trust, these persons owe three specific fiduciary duties to the union and its members. They have a duty "to hold [union] money and property solely for the benefit of the organization and its members, to manage, invest and expend the same in accordance with its constitution and bylaws [and to] . . . refrain from dealing with [the] organization as an adverse party."[14] The scope of the duty owed by union officials must also take "into account the special problems and functions of the organization and its members."[15] In addition, section 501 declares void as against public

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[11] H.R. REP. No. 741, 86th Cong., 1st Sess. 81 (1959).

[12] *See Union Officials, supra* note 9, at 440-44.

[13] *See* 29 U.S.C. § 501(a) (1976), set forth in note 10 *supra*. The class of persons covered by § 501(a), "officer, agent, shop steward, or other representative" is defined broadly to include elected officials and key administrative personnel, whether elected or appointed, e.g., business agents, heads of departments or major units, and organizers who exercise substantial independent authority. It does not include salaried nonsupervisory professional staff, stenographic, and other service personnel. 29 U.S.C. § 402(q) (1976). *See generally* Rezler, *The Definitions of LMRDA*, in PROCEEDINGS OF NEW YORK UNIVERSITY THIRTEENTH ANNUAL NATIONAL CONFERENCE ON LABOR 268-69 (1960).

[14] 29 U.S.C. § 501(a) (1976), set forth in note 10 *supra*.

[15] *Id.* The phrase, "taking into account special problems and functions of a labor organization," makes explicit that the section follows the common law principle that the scope of the fiduciary duties imposed by the LMRDA must be defined in the context of the particular fiduciary relation. "Some fiduciary relationships are undoubtedly more intense than others. The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty." Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 541 (1949). Rep. Brademas expressed this principle during the House debates. *See* 105 CONG. REC. 6573 (1959). *See also* 105 CONG. REC. 14,989 (1959) (remarks of Sen. Morse).

There has been considerable disagreement concerning whether the scope of

policy general exculpatory provisions in union constitutions and bylaws, as well as specific exculpatory resolutions purporting to relieve union representatives of liability for breach of the statutory duties.[16]

The fiduciary obligations of section 501 are enforced through both civil and criminal actions. Section 501(b)[17] relies upon union members to perform a "policing function." It gives any union member standing to bring a fiduciary suit in federal or state court for damages, "an accounting or other appropriate re-

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the fiduciary obligations imposed by § 501(a) extends beyond financial matters. *See generally*, Soffer, *Collective Bargaining and Federal Regulations of Union Government*, in REGULATING UNION GOVERNMENT 91, 100-01 (1965). The source of the confusion stems from the inherent ambiguity of § 501(a), which "speaks broadly in one breath and narrowly in the next," Nelson v. Johnson, 212 F. Supp. 233, 240 (D. Minn.), *aff'd*, 325 F.2d 646 (8th Cir. 1963), and its conflicting legislative history. *Compare* Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964) *with* Pignotti v. Local 3, Sheet Metal Workers' Int'l Ass'n, 477 F.2d 825, 832-34 (8th Cir.), *cert. denied*, 414 U.S. 1067 (1973). The courts of appeal are split on the question. The majority view construes § 501(a) broadly to extend fiduciary obligations to nonfinancial matters. *See, e.g.*, Lodge 1380, BRAC v. Dennis, 625 F.2d 819 (9th Cir. 1980). The minority view would limit the section to fiscal matters. *See, e.g.*, Head v. BRAC, 512 F.2d 398 (2d Cir. 1975).

[16] 29 U.S.C. § 501(a) (1976), set forth in note 10 *supra*. For a discussion of the prohibition against exculpatory provisions and resolutions, and related matters, see notes 124-136 and accompanying text *infra*.

[17] Section 501(b) provides:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) . . . and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

29 U.S.C. § 501(b) (1976).

lief for the benefit of the labor organization."[18] A plaintiff thus brings the suit derivatively, as does a corporate shareholder, to enforce duties owed to all union members.[19] As in shareholder derivative suits,[20] plaintiffs must satisfy several conditions

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[18] *Id.* The phrase "other appropriate relief" gave rise to the issue whether a court could grant injunctive relief under § 501(b). In Nelson v. Johnson, 212 F. Supp. 233 (D. Minn.), *aff'd,* 325 F.2d 646 (8th Cir. 1963), the court held that it had the authority to grant such relief. 212 F. Supp. at 288. Most courts now recognize that § 501(b) provides for injunctive relief. *See, e.g.,* Highway Truck Drivers & Helpers Local 107 v. Cohen, 334 F.2d 378 (3d Cir.), *cert. denied,* 379 U.S. 921 (1964); Moschetta v. Cross, 241 F. Supp. 347 (D.D.C. 1961). The scant legislative history on the question of remedies lends some support to this position. *See* 105 CONG. REC. 19,766 (1959) (remarks of Sen. Goldwater). *See also* 3 A. SCOTT, THE LAW OF TRUSTS § 199.2 (3d ed. 1967) [hereinafter cited as A. SCOTT]; *Internal Affairs, supra* note 1, at 828. One commentator has suggested that under the "other appropriate relief" provision, "courts would have the right to remove the miscreant union official from office." *Fiduciary Obligations, supra* note 9, at 295; *accord,* Wollett, *supra* note 9. *See* A. SCOTT, *supra,* §§ 107-107.3. *But see Union Officials, supra* note 9, at 469-71; *Federal Courts, supra* note 9, at 1320; *Counsel Fees, supra* note 1, at 452.

[19] *See, e.g.,* Phillips v. Osborne, 403 F.2d 826, 831-32 (9th Cir. 1968); Nelson v. Johnson, 212 F. Supp. 233, 297-98 (D. Minn.), *aff'd,* 325 F.2d 646 (8th Cir. 1963). *See also Counsel Fees, supra* note 1, at 458. There are two distinguishing features of a shareholder derivative suit. First, the duty whose breach gives rise to the action is owed primarily to the corporation and only derivatively to the plaintiff-shareholder. Second, the plaintiff-shareholder sues in a representative capacity on behalf of all shareholders. *See generally* H. BALLANTINE, BALLANTINE ON CORPORATIONS 343-44 (rev. ed. 1946); W. CARY & M. EISENBERG CORPORATIONS 875-79 (5th unabridged ed. 1980) [hereinafter cited as W. CARY]. As courts and commentators have noted, § 501 expressly codifies these features by defining the fiduciary obligation "in relation to [the] . . . organization and its members as a group," 29 U.S.C. § 501(a) (1976), set forth in note 10 *supra,* and by permitting plaintiff-members to sue solely "for the benefit of the labor organization." *Id.* § 501(b), set forth in note 17 *supra.*

[20] Certain features of the shareholder derivative suit do not have a counterpart in § 501. FED. R. CIV. P. 23.1, for example, requires that plaintiff-shareholders own shares of the corporation at the time of the wrongdoing alleged in the derivative action. *See generally* Harbrecht, *The Contemporaneous Ownership Rule in Shareholders' Derivative Suits,* 25 U.C.L.A. L. REV. 1041 (1978). Although membership in the labor organization is a condition precedent to bringing a § 501 action, *see* note 21 *infra,* there is no requirement that the plaintiff be a member at the time of the fiduciary breach. Moreover, while the plaintiff in a shareholder derivative action is typically required to post a bond as security for expenses, *see* Note, *Security for Expenses in Shareholders' Derivative Suits: 23 Years' Experience,* 4 COLUM. J.L. & SOC. PROB. 50 (1968), there is no similar requirement under § 501.

before filing an action.[21] Plaintiffs must be members of the union,[22] and have requested its governing body to sue,[23] and the union must have failed to bring suit within a reasonable time.[24] Section 501 plaintiffs must also obtain leave of court to sue, which will be granted only "upon verified application and for good cause shown."[25] To provide incentive for invoking the private enforcement scheme, the trial court may, as in shareholder derivative actions, allot a "reasonable part of the recovery" for plaintiff's counsel fees and expenses.

Section 501(c) creates an extensive new federal crime of embezzlement.[26] The section provides that anyone "who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys . . . or other assets . . . shall be fined not more than $10,000 or imprisoned for not more than five years, or both."[27] Congress intended "to hold [union] officers and employees strictly responsible as fiduciaries for the union funds entrusted to them and this intention [was] not [to] be subverted by the use of indirect meth-

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[21] For a discussion of analogous conditions precedent to a shareholder derivative suit, see W. CARY, *supra* note 19, at 885-935; Dykstra, *The Revival of the Derivative Suit,* 116 U. PA. L. REV. 74 (1967); Comment, *The Demand and Standing Requirements in Stockholder Derivative Actions,* 44 U. CHI. L. REV. 168 (1976).

[22] *See, e.g.,* Phillips v. Osborne, 403 F.2d 826, 830 (9th Cir. 1968) (membership in a rival labor organization will deny plaintiff standing under § 501(b)); Erkins v. Bryan, 494 F. Supp. 732 (M.D. Ala. 1980) (decertification of union will deny former members standing to sue under § 501(b)).

[23] 29 U.S.C. § 501(b) (1976), set forth in note 17 *supra. See also* Horner v. Ferron, 362 F.2d 224, 231 (9th Cir. 1966). But "as in the case of a derivative suit, a demand is not always necessary." McNamara v. Johnston, 522 F.2d 1157, 1162 (7th Cir.), *cert. denied,* 425 U.S. 911 (1975).

[24] 29 U.S.C. § 501(b) (1976), set forth in note 17 *supra. See also Union Officials, supra* note 9, at 461-64.

[25] 29 U.S.C. § 501(b) (1976), set forth in note 17 *supra. See also* Phillips v. Osborne, 403 F.2d 826, 830 (9th Cir. 1968); Tucker v. Shaw, 378 F.2d 304 (2d Cir. 1967); Holdeman v. Sheldon, 311 F.2d 2, 3 (2d Cir. 1962); *Counsel Fees, supra* note 1, at 452-54.

[26] *See, e.g.,* United States v. Nell, 526 F.2d 1223, 1232 (5th Cir. 1976); United States v. Silverman, 430 F.2d 106, 126 (2d Cir. 1970). Section 501(c) resembles "many 'larceny-type' offenses in the criminal code, but goes beyond the common law offense of larceny and the old statutory crime of embezzlement because 'gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches.'" 430 F.2d at 126 (quoting Morissette v. United States, 342 U.S. 246, 271-72 (1952)).

[27] 29 U.S.C. § 501(c) (1976).

ods."[28] The purpose of the section is thus "to protect general union memberships from the corruption, however novel, of union officials."[29] While the quantum of proof is stricter and specific intent must be shown,[30] section 501(c) requires proof of some of the same elements that establish a civil violation.[31] The

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[28] United States v. Silverman, 430 F.2d 106, 113 (2d Cir. 1970) (citing United States v. Harrelson, 223 F. Supp. 869 (E.D. Mich. 1963)).

[29] United States v. Sullivan, 498 F.2d 146, 150 (1st Cir.), *cert. denied,* 419 U.S. 993 (1974).

[30] *See, e.g.,* United States v. Belt, 574 F.2d 1234, 1238 (5th Cir. 1978); United States v. Goad, 490 F.2d 1158, 1161 (8th Cir.), *cert. denied,* 417 U.S. 945 (1974); United States v. Dibrizzi, 393 F.2d 642, 645 (2d Cir. 1968); United States v. Hart, 417 F. Supp. 1314, 1322 (S.D. Iowa 1976).

[31] The fiduciary obligations defined in § 501(a) require union officers to hold the union's property solely for the benefit of the organization and to expend it only in accordance with the authority provided in the union's constitution, bylaws, and resolutions. 29 U.S.C. § 501(b) (1976), set forth in note 17 *supra.* Lack of union benefit and proper union authorization are therefore essential elements for establishing a civil violation under § 501(b). "Decisions finding violations of the criminal provision of § 501(c) have also emphasized the elements of appropriate union benefit and proper union authorization." United States v. Silverman, 430 F.2d 106, 114 (2d Cir. 1970).

There has been some confusion and disagreement, however, on the question of whether there can be a § 501(c) violation when it is established that there is fraudulent intent and proper authorization, but lack of benefit to the union. *See, e.g.,* United States v. Nell, 526 F.2d 1223, 1232 (5th Cir. 1976); United States v. Ottley, 509 F.2d 667, 671-72 (2d Cir. 1975); United States v. Goad, 490 F.2d 1158, 1163-65 (8th Cir.) *cert. denied,* 417 U.S. 945 (1974). The disagreement was spawned by the conflicting opinions which comprise the "majority" opinion in United States v. Silverman, 430 F.2d 106 (2d Cir. 1970). In *Silverman,* Judge Moore wrote the majority opinion affirming a conviction on certain counts of an indictment, but dissented on the counts relevant to the majority's affirmation of the conviction under § 501(c). In his dissenting segment, Judge Moore concluded that "a conviction under § 501(c) may be made out by a demonstration of a fraudulent intent to deprive the union of its funds and either a lack of bona fide authorization *or* an absence of benefit to the labor organization." 430 F.2d at 117 (emphasis added). In Judge Moore's view, "[C]ases may present themselves where a union benefit is present and yet the fact that the authorization was a sham or procured through fraud would make section 501(c) applicable." 430 F.2d at 114. In writing the majority opinion affirming the § 501(c) conviction, however, Judge Friendly considered it "doubtful whether a payment made in bona fide belief that it was for a union's benefit and that it had been authorized or would be ratified can ever be swept under 29 U.S.C. § 501(c) . . . ." 430 F.2d at 127. *See also* United States v. Ladmer, 429 F. Supp. 1231, 1240-41 (E.D.N.Y. 1977). Subsequent decisions have attempted to reconcile the differences separating Judges Moore and Friendly in *Silverman* by concluding that § 501(c) creates a crime whose ele-

civil and criminal provisions of section 501 thus complement one another.

B. The Counsel Fee Problem—Three Facets

The most difficult section 501 questions arise when a union spends its funds for legal representation of its officers. Ordinarily the counsel fee problem occurs when union officials or agents[32] look to the union treasury or counsel for assistance in their criminal or civil defense. The counsel fee question may also arise when a grand jury or legislative committee calls a union official to testify.[33] Counsel fee issues may be further complicated by the timing of the request—whether union help is sought before the underlying proceeding or the request is for reimbursement for legal expenses. Another frequent issue is the existence and legal effect of authorization for using union funds or counsel in accordance with the union's constitution, bylaws,

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ments vary depending on the presence or absence of proper authorization. *See, e.g.*, United States v. Goad, 490 F.2d at 1164; United States v. Bane, 583 F.2d 832, 834-35 (6th Cir. 1978), *cert. denied*, 438 U.S. 1127 (1979). In fact, the Second Circuit has interpreted its decision in *Silverman* as providing that Judge Moore's opinion states the law of the Circuit "where there is a lack of authorization for the expenditures," and Judge Friendly's opinion in *Silverman* states "[the] Circuit's view where there has been a sufficient authorization." United States v. Goad, 490 F.2d at 1164. Under this reading of *Silverman*, § 501(c) would require proof of the same elements to establish a civil violation, except the standard of proof would be higher, and specific intent would be required. *See, e.g.*, United States v. Ladmer, 429 F. Supp. at 1242. *See also* Morrissey v. Curran, 650 F.2d 1267, 1274 n.6 (2d Cir. 1981).

[32] Although § 501(a) imposes fiduciary obligations on only "officers, agents, shop stewards, and other representatives of a labor organization," 29 U.S.C. § 501(a) (1976), set forth in note 10 *supra*, the counsel fee problem could arise after the expenditure of union funds in defense of not only these representatives, but also of staff, employees, members and, for that matter, non-members. Query, for example, whether it would be lawful for a union to contribute to the defense fund of an indicted member of Congress who has been sympathetic over the years to the legislative objectives of the union?

Of course, only "officers, agents, shop stewards, and other representatives," *id.*, can be accountable for a fiduciary breach. *See* Wollett, *supra* note 9. The union itself cannot be sued as a fiduciary under § 501. *See* Head v. BRAC, 512 F.2d 398, 398 n.1 (2d Cir. 1975); Pignotti v. Local 3, Sheet Metal Workers' Int'l Ass'n, 477 F.2d 825 (8th Cir. 1973); Frantz v. Sheet Metal Workers Local 73, 470 F. Supp. 223, 226 (N.D. Ill. 1979); Brink v. DaLesio, 453 F. Supp. 272, 279 (D. Md. 1978); *aff'd in part, rev'd in part*, 108 L.R.R.M. 2982 (4th Cir. 1981).

[33] *See* notes 243-269 and accompanying text *infra*.

or membership resolutions.

However the issue materializes, union members may sue under section 501(b) to enjoin their officers from spending union funds or authorizing union counsel to defend an official, or to recover funds spent. The complaint normally alleges that the authorizing and disbursing officers have violated, or would violate, their fiduciary obligations under section 501(a) by making the expenditures. Typically, the defendants will urge that the interests of the union and the official coincide, and that to protect the union's institutional interests, the court should treat these costs as an ordinary and legitimate union expense.[34] The defendants may also seek to justify their action by relying on internal union law or a specific membership resolution authorizing the expenditures.[35]

That section 501 may preclude the use of union funds or counsel to assist in a legal proceeding is only one facet of the counsel fee problem. Counsel fee issues may appear even if the union denies its officials direct legal assistance. Although it may be precluded from actively defending its officers, a union may seek to intervene as a party-defendant to assert defenses that safeguard institutional interests.[36] Moreover, this will raise troublesome issues concerning the role and extent of union intervention permitted in the litigation.

The third facet of the counsel fee problem concerns the counsel fee expenses of plaintiffs in a section 501 suit. The LMRDA contains a financial inducement for plaintiff-members by providing for discretionary reimbursement of counsel fees and expenses.[37] In considering whether to award these fees, courts have been presented with complicated questions regarding the nature

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[34] *See, e.g.,* International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246 (D.D.C. 1965).

[35] *See, e.g.,* Brink v. DaLesio, 453 F. Supp. 272 (D. Md. 1978), *aff'd in part, rev'd in part,* 108 L.R.R.M. 2982 (4th Cir. 1981); Highway Truck Drivers & Helpers Local 107 v. Cohen, 182 F. Supp. 608 (E.D. Pa.), *aff'd,* 284 F.2d 162 (3d Cir. 1960), *cert. denied,* 365 U.S. 833 (1961).

[36] *See* notes 332-350 and accompanying text *infra.*

[37] The concluding sentence of § 501(b) reads:

> The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

29 U.S.C. § 501(b) (1976), set forth in note 17 *supra.*

of a plaintiff's recovery, the time for determining an award, and the method for computing "reasonable" attorney's fees.

II. Union Funds or Counsel for the Defense of Union Officials

The admonitions of section 501 offer only minimal guidance to determine whether using union resources to defend union officials is a breach of fiduciary duty. Section 501(a) states, for example, that union representatives have an obligation to spend union funds "in accordance with the union's constitution and bylaws and resolutions of the governing bodies adopted thereunder."[38]

Expenditures lacking the express or implied authorization of internal union law clearly violate the fiduciary provisions.[39] So too, expenditures specifically prohibited by internal union law or made for personal purposes violate section 501(a). Indeed, the section provides that a union representative must hold the union's money and property "solely for the benefit of the organization and its members" and refrain from "acquiring any pecuniary or personal interest which conflicts with the interests of such organization."[40] Although some cases may fit squarely within the statutory language, the section offers little guidance for resolving the counsel fee problem in hard cases.

Courts cannot resolve hard cases merely by consulting the elastic and somewhat conflicting language of section 501.[41] If a

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[38] 29 U.S.C. § 501(a) (1976), set forth in note 10 *supra*.

[39] An expenditure of union funds may violate section 501(a) either because it is specifically prohibited by internal union law or because it is made without the express or implied authority of a constitutional amendment, bylaw provision, or specific membership resolution. 29 U.S.C. § 501(a) (1976), set forth in note 10 *supra*. The hard cases arise where there is ambiguity in the grant of authority or where the union constitution and bylaws are silent on the matter in question. *See* notes 47-136 and accompanying text *infra*.

[40] 29 U.S.C. § 501(a) (1976), set forth in note 10 *supra*.

[41] The courts have had to search for standards because Congress provided no meaningful guidance when enacting the fiduciary provision, and no applicable body of federal law existed to fill the gap. Indeed, in 1958, Sen. Ervin criticized Sen. Smith's proposed fiduciary amendment to the original Kennedy-Ives Bill, 104 Cong. Rec. 11137 (1958), as containing only vague general language, which would create confusion because there was no applicable federal substantive trust law. *Id. See also Fiduciary Obligations, supra* note 9, at 284-85. And when the Kennedy-Ervin Bill, which became the LMRDA, was considered, Congress again recognized the paucity of judicial precedent. *See* the minority

constitutional amendment, bylaw provision, or a specific membership resolution authorizes the expenditure of funds to defend a union official, is the authorization a complete defense to an allegation of breach of fiduciary duty? If not, under what circumstances is a court justified in ignoring the authorization of the union's governing body? Should the presence or absence of personal gain be the controlling factor? If the underlying lawsuit impinges upon the union's institutional interests, should a court give effect to the authorization even though a personal benefit accrues to an official?

A. The Policies To Be Accommodated

A careful analysis of these questions must begin with an examination of applicable statutory policies. A primary reason to apply the fiduciary standards of section 501 to the counsel fee problem is to prevent the use of union office for personal gain. Using union funds for the personal benefit of officers infringes not only members' rights, but also threatens the union's ability to perform its collective bargaining responsibilities.[42] By insisting on the loyalty of union officers to their institution, section 501 protects the members' interests from financial wrongdoing. At a minimum, unions must have honest, loyal, and conscien-

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views accompanying S. REP. No. 187, 86th Cong., 1st Sess. 72 (1959).

[42] As Professor Cox admonished:

> It is important to maintain the unions' power. But the creation of institutions vested with power sufficient to fulfill their purposes also creates the danger that an institution may be erroneously supposed to have a value apart from its objectives, or may be used for the advantage of those who control it rather than for the benefit of those whom it was designed to serve. Public policy should minimize the danger without disabling the unions from performing their beneficent functions. The ability of labor organizations to bargain effectively with employers should not be impaired, for the union's ability to advance the welfare of their members depends more upon effective bargaining than upon the conduct of union affairs.

A. COX, LAW AND THE NATIONAL LABOR POLICY 87 (1960). *See also* United States v. Haverlick, 195 F. Supp. 331, 332 (N.D.N.Y. 1961); *Internal Affairs, supra* note 1; Summers, *American Legislation for Union Democracy,* 25 MOD. L. REV. 273 (1962).

More recently, the Supreme Court concluded that the need to protect the financial stability of unions as collective-bargaining agents was an important public policy reason for denying punitive damage awards in fair representation cases. *See* International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979).

tious management.

Another major policy embedded in section 501 is that fiduciary standards must be enforced in accordance with the democratic processes that Congress intended to foster by enacting the Labor Management Reporting and Disclosure Act. When Congress enacted the LMRDA, it sought to eliminate the corrupt and dishonest practices of certain union leaders that, if left unchecked, could have destroyed the very foundation of unions as institutions. Congress did not, however, grant the courts the authority to undermine union self-government, nor did it intend that the judiciary act as a roving commission to do justice.[43] Stability and effective administration necessary for union democracy require that union leaders possess the authority to act. Thus, if an official's activities are within the provisions of the union's constitution, bylaws, or resolutions and are necessary to protect and promote important union interests, courts should not interfere with internal union affairs under the guise of correcting fiduciary misconduct.[44] There must be union democracy as well as fiscal responsibility and official fidelity.

When it does intervene in union affairs, the judiciary must recognize the union's interest in assuring that talented members are not deterred from seeking union office and in protecting officers from harassing litigation. This recognition might lead a court to justify an authorized expenditure of union funds to defend a union official, even if the underlying litigation involves a seemingly personal matter.[45]

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[43] *See, e.g., Federal Courts, supra* note 9, at 1317.

[44] *Id.*

[45] 29 U.S.C. § 501(a) (1976), set forth in note 10 *supra,* expressly provides that the fiduciary obligations of union representatives are to be defined by "taking into account the special problems and functions of a labor organization."

This policy interest is well established in corporate law. Courts are careful not to fix an overly restrictive fiduciary standard on management because such a standard might impede free corporate enterprise. Indeed, this policy interest is the basis of the "business judgment" rule, a judicial doctrine that insulates management from liability if it acts honestly and with due care. *See* Olson Bros. v. Englehart, 42 Del. Ch. 368, 211 A.2d 610 (1965); Schlensky v. Wrigley, 95 Ill. App. 2d 173, 237 N.E.2d 776 (1968); Casey v. Woodruff, 49 N.Y.S.2d 625 (Sup. Ct. 1944). For a recent examination of the business judgment rule in the corporate context, see Arsht, *The Business Judgment Rule Revisited,* 8 HOFSTRA L. REV. 93 (1979). By analogy, fair interpretation of § 501(a) demands that courts recognize a "labor judgment" rule that protects union leaders from

Insisting upon officials' fidelity to the union, assuring fiscal integrity, minimizing interference with internal union affairs, and attracting qualified members to serve as leaders are the paramount policies of section 501. These policies accommodate and protect legitimate interests of the rank and file members as well as the collective interests of the institution.

These policies are not, however, the only criteria for applying the fiduciary provisions to the counsel fee problem. There is also an overriding public policy that must be recognized. The public has an interest in protecting the financial integrity of unions as quasi-public institutions for resolving industrial conflict.[46] To function effectively, unions must be fiscally viable and free of internal corruption. What is good for the membership and its officers may not be good for the union as an institution nor may it serve the greater interests of society. Certainly, it would neither benefit the union nor promote the public interest to accord members carte blanche to authorize spending union funds to defend officials charged with looting the union treasury. Nor would it be in the public interest to permit the union and its membership to determine the scope of the fiduciary obligations under the LMRDA.

B. The Role To Be Accorded Membership Authorizations

Because the LMRDA requires the validity of all official action to be based ultimately on some empowering authority, resolution of fiduciary duty questions will initially turn on the presence or absence of authorization. The oft-cited rule is that the expenditure of union funds must be properly authorized by internal union law.[47]

Authorizations, however, can raise thorny problems. The grant of authority may be ambiguous or the union constitution and

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destructive interference with labor decisions.

[46] *See, e.g.*, A. Cox, *supra* note 42, at 87 (1960).

[47] *See, e.g.*, Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972); Local 92, Int'l Ass'n of Bridge, S. & O.I. Workers v. Norris, 383 F.2d 735 (5th Cir. 1967). But a specific authorization for each union expenditure is not required because such a requirement would impose an unreasonable burden on the union. McNamara v. Johnston, 522 F.2d 1157, 1164 (7th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976). Of course, an expenditure will violate § 501, even if there has been proper authorization, if the authorization was for one purpose, and the expenditure was actually made for another. *See* United States v. Bane, 433 F. Supp. 1286, 1297 (E.D. Mich. 1977).

bylaws may be silent on the type of expenditure involved. When internal union law is ambiguous, a serious question arises whether a good faith, but erroneous, interpretation of a constitutional or bylaw provision would constitute, without more, a fiduciary breach.[48] While courts have been reluctant to interfere with a union's interpretation of its law,[49] they will intervene if the interpretation is unfair or unreasonable.[50]

If union law is silent or ambiguous, courts must also determine whether a union official may rely on union custom or past practice as a substitute for an explicit authorization. In *United States v. Hart*,[51] for example, union officials were charged with a criminal violation of section 501(c) for having disbursed union money to pay the legal fees, fines, and other costs of defending members against prosecutions for strike-related activities. The government claimed that the expenditures violated section 501(c) because they were made without proper authorization.[52] The defendant-officials argued that a membership resolution, passed unanimously almost two years before, had provided a "broad grant" of authority to make "customary" strike-related expenditures, and that these expenditures were in accordance with the union's custom.[53] In granting the defendants' motion to dismiss, the court concluded that it should uphold the defendants' interpretation of the resolution because it was "in accord with prior union custom."[54]

The *Hart* court based this holding on the principle that sec-

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[48] *Compare* Morrissey v. Curran, 423 F.2d 393 (2d Cir.), *cert. denied*, 399 U.S. 928 (1970) *with* Vestal v. Hoffa, 451 F.2d 706 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

[49] *See* Guarnaccia v. Kenin, 234 F. Supp. 429 (S.D.N.Y.), *aff'd sub nom.* Gurton v. Arons, 339 F.2d 371 (2d Cir. 1964).

[50] *See* Morrissey v. Curran, 650 F.2d 1267, 1278 (2d Cir. 1981); Vestal v. Hoffa, 451 F.2d 706, 709 (6th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

[51] 417 F. Supp. 1314 (S.D. Iowa 1976).

[52] *Id.* at 1317. The government also claimed that, even if the expenditures had been properly authorized, a conviction could well be premised upon a showing of "(1) fraudulent intent and (2) a 'lack of benefit' to the union." *Id.* In rejecting this argument, the court concluded that an expenditure that had been properly authorized should not give rise to criminal liability under § 501(c). *Id.* at 1321 (citing United States v. Ottley, 509 F.2d 667 (2d Cir. 1975)). The court also emphasized that the fund had not been expended for the personal use of the defendant. 417 F. Supp. at 1321. *See also* note 31 *supra*.

[53] United States v. Hart, 417 F. Supp. 1314, 1318 (S.D. Iowa 1976).

[54] *Id.* at 1321.

tion 501(c), as a criminal provision, must be strictly construed. The court's analysis of authorization is applicable to civil litigation under section 501. Indeed, in *Farrington v. Benjamin,*[55] a court concluded that union custom can substitute for an explicit authorization in a civil action if the custom does not itself conflict with the union's constitution or bylaws.[56] In determining whether an expenditure has been made with proper authorization, a court must examine not only the union's written law, but also its common law if the written law is silent or ambiguous.

Even when an expenditure is made pursuant to clear and explicit authorization, a claim may still allege defects in the authorization process.[57] For example, even though the membership voted in favor of a particular expenditure, authorization would not relieve officials from section 501(a) liability if the union approved the expenditure at a meeting held without proper notice,[58] with less than full disclosure of relevant and material facts,[59] or because of a material misrepresentation.[60] For that matter, there is a serious question concerning the validity of any authorization that is the product of arbitrary and unreasonable union procedures.[61]

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[55] 468 F. Supp. 343 (E.D. Mich. 1979).

[56] *Id.* at 350.

[57] *See, e.g.,* Brink v. DaLesio, 496 F. Supp. 1350, 1357-58 (D. Md. 1980), *aff'd in part, rev'd in part,* 108 L.R.R.M. 2982 (4th Cir. 1981); Brink v. DaLesio, 453 F. Supp. 272, 278 (D. Md. 1978), *aff'd in part, rev'd in part,* 108 L.R.R.M. 2982 (4th Cir. 1981). *See also* Rota v. Brotherhood of Ry., Airline & S.S. Clerks, 489 F.2d 998 (7th Cir.), *cert. denied,* 414 U.S. 1144 (1973).

[58] *See, e.g.,* Blanchard v. Johnson, 388 F. Supp. 208 (N.D. Ohio 1975), *modified,* 532 F.2d 1074 (6th Cir.), *cert. denied,* 429 U.S. 869 (1976). *See also* Coleman v. Brotherhood of Ry. & S.S. Clerks, 340 F.2d 206 (2d Cir. 1965).

[59] *See, e.g.,* Horner v. Ferron, 362 F.2d 224, 231 (9th Cir.), *cert. denied,* 385 U.S. 958 (1966); Brink v. DaLesio, 453 F. Supp. 272, 278 (D. Md. 1978), *aff'd in part, rev'd in part,* 108 L.R.R.M. 2982 (4th Cir. 1981). For an analogous rule in the corporate context, see Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

[60] *See, e.g.,* Cefalo v. Moffett, 333 F. Supp. 1283 (D.D.C.), *modified,* 449 F.2d 1193 (D.C. Cir. 1971), *on remand,* 79 L.R.R.M. 2740 (D.D.C. 1972), *aff'd sub nom.* Brennan v. District 50, Allied & Technical Workers, 499 F.2d 1051 (D.C. Cir. 1974).

[61] *See, e.g.,* McNamara v. Johnston, 522 F.2d 1157 (7th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976); Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964). *See also* Sertic v. Carpenters Dist. Council, 423 F.2d 515 (6th Cir. 1970). Although the courts require that democratic procedures be utilized in the authorization process, the union's authorization process need not "represent the epitome of representative democracy." Brink v. DaLesio, 496 F. Supp. 1350, 1363

The type of authorization may present other difficult issues. As a practical matter, a union can base an authorization on its national or international constitution, local bylaws, or a membership resolution. Problems may occur, however, if the authorization conflicts with another provision of the union's governing law. In *McNamara v. Johnston,*[62] a majority of the members of a UAW local adopted a resolution objecting to the use of dues money by the UAW Community Action Program (CAP) to support political causes. The UAW International Constitution, however, required all local unions to allocate a certain percentage of monthly dues to CAP. When officials of the UAW International contributed the required percentage of the Local's dues to CAP, Local members brought a fiduciary suit claiming that the expenditures violated the membership's resolution. In affirming the district court's dismissal of the action, the Seventh Circuit ruled that the Local's resolution was invalid in light of a UAW constitutional provision requiring the contributions. There was thus no breach of fiduciary duty, even though the Local membership had neither authorized nor objected to the particular expenditures.[63] As *McNamara* vividly illustrates, the search for authorization may require the courts to resolve sensitive internal conflicts in a union's governing law.[64]

(D. Md. 1980), *aff'd in part, rev'd in part,* 108 L.R.R.M. 2982 (4th Cir. 1981). Indeed, the Supreme Court has ruled that democratic procedures imposed by the LMRDA do not require direct representative union government, and that the union could, for example, lawfully decided to elect its officers "by delegates voting at a convention in accordance with the number of members they represent." Musicians Fed'n v. Wippstein, 379 U.S. 171, 181-82 (1964). Thus, the local membership could lawfully delegate the power of authorization to a local executive board, even though the delegation and subsequent authorization would not be the result of direct membership representation.

[62] 522 F.2d 1157 (7th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976). *See also* Gabauer v. Woodcock, 594 F.2d 662 (8th Cir.)(*en banc*), *cert. denied,* 444 U.S. 841 (1979).

[63] Section 501 was never intended to prohibit political contributions of a union when authorized by its governing law. McNamara v. Johnston, 522 F.2d 1157, 1165 (7th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976).

[64] In Morrissey v. Curran, 650 F.2d 1267 (2d Cir. 1981), however, the Second Circuit held that a court should not substitute its interpretation for that of the union so long as the "union's actions involve a reasonable interpretation of a contract" unless the expenditure made pursuant to that interpretation is "grossly excessive." *Id.* at 1278. *See* notes 219-235 and accompanying text *infra. See also* Note, *Determining Breach of Fiduciary Duty Under the Labor-Management Reporting and Disclosure Act:* Gabauer v. Woodcock, 93 HARV.

Finally, authorization under internal union law is only one standard for measuring the fiduciary conduct of union officials. Officials must use union money and property for the union's benefit, and avoid conflicts of interest. Consequently, courts must scrutinize union expenditures that accrue to the personal benefit of union officials, even when authorized.[65] The critical questions are whether an unambiguous authorization, express or implied, can insulate the acts of union officials from the reach of the fiduciary obligations of section 501 and, if not, whether a court can nullify the authorization enacted directly or indirectly through the union's democratic processes.

1. The Paucity and Ambiguity of Legislative History

The legislative history of the LMRDA is replete with statements that Congress did not intend section 501(a) to interfere with the right of unions to spend money in accordance with membership authorization.[66] The supplementary report of Rep-

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L. REV. 608 (1980).

[65] *See, e.g.*, Brink v. DaLesio, 453 F. Supp. 272, 278 (D. Md. 1978), *aff'd in part, rev'd in part*, 108 L.R.R.M. 2982 (4th Cir. 1981); Terrazas v. Fitzsimmons, 88 L.R.R.M. 2629, 2639 (C.D. Cal. 1974).

[66] When the Kennedy-Ives bill was reported out of committee in 1958, it did not contain fiduciary provisions, S. 3974, 85th Cong., 2d Sess., 104 CONG. REC. 10618-25 (1958), and a proposal for such a provision was defeated. 104 CONG. REC. 11135-37 (1958). Nor did the Kennedy-Ervin Bill of 1959 provide for the imposition of fiduciary duties on union officials; rather, it contemplated the voluntary adoption of codes of ethical practices by both unions and employer associations. S. 1555, 86th Cong., 1st Sess. §§ 401-404 (1959). The Senate eventually passed the Kennedy-Ervin bill with amendments providing fiduciary duties, 105 CONG. REC. 6523 (1959) (amendment sponsored by Sen. McClellan), and standing for members in state and federal courts. *Id.* at 6529, 6745. In the House, Rep. Elliott introduced H.R. 8342, containing fiduciary provisions that were adopted *in toto* in the Landrum-Griffin Bill, H.R. 8400, 86th Cong., 1st Sess., 105 CONG. REC. 15,859 (1959). *Id.* at 14,177 (1959), 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 687, 731-32 (1959).

In the Senate debates, the meaning of the fiduciary obligation was clarified in a colloquy between Sens. Kennedy, Ervin, McClellan, and Carroll:

> Mr. Kennedy: [T]he money must be expended in such a way as to safeguard the interest of the union, *in accordance with the way the members of the union may decide the money should be expended.*
> Mr. Ervin: That is correct.
> Mr. McClellan: That is correct.
> Mr. Kennedy: It is to prevent the misuse of union funds by a ma-

resentative Elliott, for example, explaining the meaning of the fiduciary provision eventually adopted by Congress as section 501, states that "[u]nion officers will not be guilty of breach of trust when their expenditures are within the authority conferred upon them either by the [union's] Constitution or bylaws or by a resolution of the Executive Board, convention or other appropriate governing body . . . ."[67]

Relying upon this legislative history, early commentators advocated a literal interpretation of the statute. The prevailing view was that courts should exonerate union officials from liability for any expenditure authorized by internal union law.[68] Professor Cox maintained that union officers are mere agents of the membership and that courts should not find officers in breach of their fiduciary duty for following the instructions of their principal.[69] The general legislative history supporting this view, how-

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> jority at a meeting when that majority must be only a very small minority of the membership. . . .
>
> Mr. McClellan: That is, generally, the object of the amendment . . . .
>
> Mr. Carroll: I am sure the Senator from Arkansas had no idea of taking away the rights of members of a union for democratic action such as *the right of members to give a grant of authority.* As I understand it, the whole purpose of the proposed legislation is to ensure members the right to vote and *the right to dictate the policy of the union.*

105 CONG. REC. 6526 (1959) (emphasis added).

[67] H.R. REP. No. 741, 86th Cong., 1st Sess. 81 (1959), *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2424, 2480.

[68] *See Internal Affairs, supra* note 1, at 828-29; Ostrin, *Fiduciary Obligations of Union Officers,* in SYMPOSIUM, *supra* note 9, at 561. *See also* McNamara v. Johnston, 360 F. Supp. 517 (N.D. Ill. 1973), *aff'd,* 522 F.2d 1157 (7th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976), in which the court observed:

> The fiduciary duty of union officers under § 501 is based on general agency principles. Union officers are viewed as agents for their principal, the membership. It necessarily follows that an agent cannot be in breach of duty when he is acting pursuant to the directions of his principal. To find a breach of duty when an officer disburses funds in accordance with the constitution and bylaws of his union would be contrary to the letter and spirit of § 501. It would inject judicial interventions into the policy-making process of a union.

360 F. Supp. at 524.

[69] *Internal Affairs, supra* note 1, at 827-29. This view was based on the fact that § 501 was drawn from the RESTATEMENT (SECOND) OF AGENCY, which generally provides that all true agents owe fiduciary obligations to their principals.

ever, was directed at allaying the concern of union leaders and their congressional supporters who feared that the fiduciary provisions might be used to invalidate legitimate union expenditures for social and political purposes.[70] There is no indication that Congress intended to establish authorization as a complete

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Internal Affairs, supra, at 827 n.40, 828. *See also* RESTATEMENT (SECOND) OF AGENCY §§ 387-398 (1958).

[70] George Meany, President of the AFL-CIO, properly expressed the legitimate concern of the labor movement:

> [T]he committee has proceeded to establish standards of fiduciary responsibility which could only lead to widespread confusion and the multiplicity of litigation.
>
> There are certain obvious similarities between the obligation for safe, honest administration of funds and property entrusted to the care of a union officer or employee to those obligations which bank or corporate officers owe their stockholders. The dissimilarities, however, are far more important, and it is these which the committee has ignored.
>
> The prime responsibility of the union officer is to advance the interest and welfare of the members. The prime concern of the banking official is to enhance the value of the property he holds in trust.
>
> A union does not exist for the purpose of making money. It exists as a mechanism through which its members can combine to promote their mutual improvement, both as employees and as members of society generally, and both materially and in other ways.
>
> One of our main objections is that the reach of this fiduciary concept as expressed in the bill is not determinable and the property [sic] of many union activities now considered as normal union functions is shrouded with the blanket of uncertainty and confusion.
>
> Under this provision, union officers may be hailed into court for making legitimate expenditures, such as charitable contributions, which have been approved by a majority of members. Unions ought not to be thus restricted in using their resources for the betterment of the whole community.

105 CONG. REC. A6402 (1959).

Sen. Morse, noting that § 501 is "one the bill's most dangerous provisions," was similarly concerned. 105 CONG. REC. 16387 (1959). Seeking to insure that § 501 would not be used as a vehicle to impair legitimate union objectives, Sen. John F. Kennedy observed, "The problems with which labor organizations are accustomed to deal are not limited to bread-and-butter unionism or to organization and collective bargaining alone, but encompass a broad spectrum of social objectives as the union may determine." 105 CONG. REC. 16,412 (1959). *See generally* D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 64-91 (1970).

defense to section 510 suits.[71]

In fact, the specific legislative history concerning the counsel fee problem is ambiguous and singularly unhelpful. Initially the Senate rejected a provision of its original version of the Kennedy-Ives bill, which would have specifically prohibited "both unions and employers from directly or indirectly paying or advancing the costs of defense, of any of their officers . . . who [are] indicted for . . . any violation of any provision of the Bill."[72] On the other hand, in subsequent deliberations,[73] the Senate also rejected an amendment by Senator McCarthy that would have specifically permitted "payments or advances for the defense [of union officers if] . . . duly authorized by the governing body of the labor union or by the employer, as the case may be."[74] While the legislative history indicates that deference should be given to union expenditures authorized by internal union law, no specific legislative guidance can be found on the precise issue of whether authorization is an absolute defense to a fiduciary suit.

Yet, there are persuasive reasons for believing that Congress must have intended limitations on union expenditures for the personal benefit of officers. Congress enacted section 501 and amended it primarily to curb the flagrant and widespread corruption among union officials discovered by the McClellan committee investigation.[75] The underlying purpose of the legislation thus militates against an interpretation that would "vest limitless spending power in union officials and . . . leave dissenting members powerless to halt abusive practices."[76] Congress also clearly intended to limit federal judicial intrusions into internal union affairs. This suggests that judicial intervention must be confined to the least restrictive alternatives that accomplish this statutory purpose.

2. The Search for a Limiting Principle: Public Policy

As is common with the enactment of any controversial legislation, courts have been forced to resolve the difficult questions

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[71] Morrissey v. Cohen, 650 F.2d 1267, 1272 (2d Cir. 1981).
[72] S. REP. No. 187, 86th Cong., 1st Sess. 42 (1959).
[73] *See* note 66 *supra*.
[74] 105 CONG. REC. 5994-97 (1959).
[75] *See* note 1 *supra*.
[76] Morrissey v. Curran, 650 F.2d 1267, 1272 (2d Cir. 1981).

left unanswered by Congress.[77] In the leading case of *Highway Truck Drivers and Helpers Local 107 v. Cohen (Cohen I),*[78] members brought a section 501 suit in federal court to enjoin the Local's governing officers from using union funds to defend themselves against state civil and criminal suits.[79] The plaintiffs also sought to enjoin the expenditure of union funds to defend against the section 501 suit.[80] The state cases charged the officers with a continuing conspiracy to cheat and defraud the union of large sums, conduct which, if proved, would be a gross breach of fiduciary duty in violation of the civil and criminal provisions of section 501.[81]

At a regular meeting soon after the filing of the state actions, a majority of the Local membership passed a resolution authorizing payment of the costs of the officers' defense.[82] *Cohen I* therefore presented the question of whether spending union funds to defend section 501 and related state litigation violated section 501(a), despite the express membership authorization. The defendant-officers argued that the court could not pass on the propriety of the resolution, and thus had to give the mem-

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[77] The judiciary has guided the growth and development of many crucial labor statutes. Title VII of the 1964 Civil Rights Act is a vivid example of how a creative judiciary has fashioned doctrine in the face of ambiguous statutory language and an amorphous legislative history to fulfill the promise of equal employment opportunity. *See, e.g.,* United Steel Workers v. Weber, 443 U.S. 193 (voluntary and reasonable affirmative plans do not illegally discriminate on the basis of race), *reh. denied,* 444 U.S. 889 (1979); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (statutory violation can be established by disparate impact as well as disparate treatment).

[78] 182 F. Supp. 608 (E.D. Pa.), *aff'd per curiam,* 284 F.2d 162 (3d Cir. 1960), *cert. denied,* 365 U.S. 833 (1961) [hereinafter cited as Cohen I].

[79] At the time of the hearing on the preliminary injunction, the union had paid, pursuant to membership resolution, approximately $25,000 to the attorneys representing the defendants. Cohen I, *supra* note 78, 182 F. Supp. at 616.

[80] Cohen I, *supra* note 78, 182 F. Supp. at 610.

[81] Plaintiffs had alleged in their complaint that the conduct charged in the state litigation constituted a civil violation of § 501. Cohen I, *supra* note 78, 182 F. Supp. at 610. The defendants failed to answer the complaint, and instead filed a motion to dismiss. In ruling on that motion, the court concluded that § 501 would not be retroactively applied to cover acts alleged to have occurred before the effective date of the statute. The court, however, did not dismiss the complaint, because of the counsel fee questions raised by plaintiff's motion for a preliminary injunction. 182 F. Supp. at 616.

[82] Cohen I, *supra* note 78, 182 F. Supp. at 616.

bers' authorization effect.[83] The district judge, however, granted the injunction, finding "a distinction between the merit of a resolution and its legality."[84] The membership resolution was invalidated because it authorized an expenditure beyond the powers of the Local under state law, and because it was contrary to LMRDA policies.

In finding that the membership resolution was "beyond the powers" of the Local under state law, the court analogized to corporate law and applied the *ultra vires* doctrine.[85] The *Cohen I* court acknowledged that courts have been more reluctant to interfere in the internal affairs of a union than in those of a corporation.[86] Nonetheless it concluded that the principle of majority rule was not "absolute," and that each union member had a

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[83] Cohen I, *supra* note 78, 182 F. Supp. at 617. In response to defendants' argument based on the congressional rejection of subsection 107(b) of the original Senate version of the Kennedy-Ives bill, *see* notes 72-74 and accompanying text *supra,* the court noted that the rejected prohibition against payment of counsel fees would have been much broader than the court's holding, and that the rejected provision was not a proposed amendment to the LMRDA, which was enacted as new legislation at a subsequent session of Congress. 182 F. Supp. at 621.

[84] Cohen I, *supra* note 78, 182 F. Supp. at 618.

[85] Cohen I, *supra* note 78, 182 F. Supp. at 618-20. The *ultra vires* doctrine of corporation law is based on the notion that corporate existence is defined and strictly limited by the grant of powers in the corporate charter. As Professors Cary and Eisenberg have explained:

> The classical theory of corporate existence assumed that a corporation was a fictitious person, endowed with life only in so far as the state had granted to it powers in its charter. Further, the early charters provided a very limited number of powers to the corporation. When a corporation attempted to act in an area outside of the scope allowed by its charter or statute, the question of the legal significance of its acts arose. The term "*ultra vires*" (beyond its power) as opposed to "*intra vires*" (within its power) was applied to such acts.

W. CARY, *supra* note 19, at 39. Today, most jurisdictions have statutory provisions that modify and limit the common law doctrine of *ultra vires* acts. *See* 7A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 3439 (rev. perm. ed. 1978). The doctrine has also declined in significance because modern corporate charters filed under general corporation acts are usually "drawn by the incorporators' attorneys and contain virtually every purpose and power they think desirable." W. CARY, *supra,* at 38. In fact, most *ultra vires* acts in corporate law today are "due to poor draftsmanship or counseling by the corporation's attorneys." *Id.* at 48.

[86] Cohen I, *supra* note 78, 182 F. Supp. at 618.

right to have the organization's assets disbursed solely for the purposes for which the union was organized.[87] The court thus found the membership's authority to act limited to the express and implied power conferred by the union's constitution.[88]

The court ruled alternatively that the authorization afforded no defense because "to allow a union officer to use the power and wealth of the very union which he is accused of pilfering, to defend himself against such charges, is totally inconsistent with Congress' effort [under the LMRDA] to eliminate the undesirable element which has been uncovered in the labor-management field."[89] A majority of the membership could not override the interests of "those members of Local 107 who placed honesty above material gain," nor could the membership "undermine the legitimate concerns of the millions of others in the labor move-

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[87] The court relied on common law theories establishing that the constitution and bylaws of a union constitute a compact between the membership and the union. This agreement gives each union member a property interest in the union's assets and a corresponding contract right requiring the majority to use the union's assets only for the purposes for which the union was organized. Cohen I, *supra* note 78, 182 F. Supp. at 618 (citing West Virginia Pulp & Paper Co. v. Lewis, 17 Misc. 2d 94, 191 N.Y.S.2d 303, *aff'd*, 8 A.D.2d 899, 187 N.Y.S.2d 1002 (1958); Williams v. Masters, Mates & Pilots of Am., 384 Pa. 413, 120 A.2d 896 (1956); Maloney v. UMW, 308 Pa. 251, 162 A. 225 (1932)). The "contract" and "property" theories, however, have been the subject of considerable criticism by courts and commentators. *See, e.g.*, Nelson v. Johnson, 212 F. Supp. 233, 271-73 (D. Minn. 1962), *aff'd*, 325 F.2d 646 (8th Cir. 1963); Parks v. International Bhd. of Elec. Workers, 203 F. Supp. 288, 305 (D. Md. 1962), *rev'd*, 314 F.2d 886 (4th Cir.), *aff'd*, 372 U.S. 976 (1963); Chafee, *The Internal Affairs of Associations not For Profit*, 43 HARV. L. REV. 993, 1003 (1930); Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 YALE L.J. 175, 180 (1960); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1051-54 (1951). The court's alternative rationale avoids this criticism by relying directly upon § 501 and the protection it affords individual union members against dishonest and unscrupulous union leaders.

[88] Cohen I, *supra* note 78, 182 F. Supp. at 619. While the court found the membership's authority to act limited by the union's constitution, it acknowledged that the powers expressed in the constitutional statement of objectives and purposes carried with it certain "ancillary" or "implied" powers reasonably necessary for the union to accomplish its stated goals. Thus, the question for determination was whether the expressed or implied powers necessary for achieving the union's aims and purposes gave it "a sufficient interest in the action to empower it to so act." 182 F. Supp. at 619.

[89] Cohen I, *supra* note 78, 182 F. Supp. at 620-21. *See also* Morrissey v. Curran, 482 F. Supp. 31 (S.D.N.Y. 1979).

ment whose cause would be seriously injured by such [action]."[90] The right of the membership to be represented by an honest and faithful bargaining representative free from conflicts of interest is so fundamental and important that it cannot be waived even by the membership itself.[91]

Because the court ostensibly based its *ultra vires* rationale upon the specific finding that Local 107 lacked sufficient constitutional authority to make the challenged expenditures, it seemingly followed that the membership might overcome the *ultra vires* problem by enacting a constitutional amendment expressly sanctioning the proposed action. In fact, after *Cohen I*, which had been affirmed on appeal,[92] the International Union, with

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[90] Cohen I, *supra* note 78, 182 F. Supp. at 621.

[91] Certain fundamental rights of employees cannot be waived by unions because they are at the "very heart" of the representation and bargaining provisions of the Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (codified in scattered sections of 29 U.S.C.). NLRB v. Magnavox Co., 415 U.S. 322 (1974). In *Magnavox*, an employer and union contractually agreed to waive the right of employees to object to a discriminatory and unlawful no-distribution rule promulgated by the employer. While acknowledging that a union can waive employee rights in the economic area in exchange for employer concessions, the Supreme Court held that a union may not waive employee rights involving the choice of a bargaining representative. *Id.* at 325. *Magnavox* can be read as holding that, when the right of employees to make a choice is at issue, the incumbent union has no legitimate interest to serve by perpetuating itself as the bargaining representative; whereas the waiver of this right, even if in furtherance of some union interest, would seriously conflict with the exercise of employee rights. Because employee solicitation and distribution on company premises are fundamental to the free selection of a bargaining representative, and because the union's interest in maintaining itself as a bargaining agent conflicts with important employee interests, the union may not bargain away the right. The existence of a conflict of interest thus precludes unions from waiving fundamental rights of employees.

The same rule should preclude the membership of a union from waiving the rights and interests protected by § 501. Certainly the right to honest and faithful bargaining representation is equally fundamental and important to the bargaining rights of employees. Moreover, as in *Magnavox*, the union must be denied the power to waive the fiduciary obligations of its officers by authorization. The union has no interest of its own to serve by insulating its officers from their duties as fiduciaries; rather, the waiver of such obligations would seriously undermine employee rights and impair the effectiveness of the union as a collective bargaining agent.

[92] Highway Truck Drivers & Helpers Local 107 v. Cohen, 284 F.2d 162 (3d Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). The case was remanded to the district court to determine the amount of union funds expended after the effective date of the statute and the issuance of the injunction. The court deter-

which Local 107 was affiliated, amended its constitution to authorize expenditures for the legal defense of union officials.[93] After the amendment, the plaintiffs again brought suit under section 501 to enjoin any expenditures.[94] The defendants, however, argued that the constitutional amendment validated the membership's resolution and thus "authorized" the proposed expenditures.

In *Cohen II,* the district court abandoned the *ultra vires* doctrine and relied exclusively on the alternative holding in *Cohen I.*[95] The court held that the constitutional amendment could not validate the resolution because both were inconsistent with the LMRDA policies. In affirming, the Third Circuit concluded that the amendment could not lawfully validate what was unlawful, and that even if the constitutional amendment had preceded the resolution of Local 107, the expenditure would still have violated section 501.[96] The acts of a union or a corporation that are contrary to public policy are "illegal," not merely *"ultra vires."*[97]

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mined that $24,921.41 had been wrongfully paid for counsel fees, enjoining the union from paying any salaries to the disbursing officers until they had reimbursed the union for that amount, or until a bond had been properly filed with the court. Highway Truck Drivers & Helpers Local 107 v. Cohen, 215 F. Supp. 938 (E.D. Pa. 1963), *aff'd,* 334 F.2d 378 (3d Cir.), *cert. denied,* 379 U.S. 921 (1964).

[93] The amendment of the international constitution "authorized payment of all legal expenses on behalf of officers accused in criminal proceedings or in civil suits if certain procedures are followed." Highway Truck Drivers & Helpers Local 107 v. Cohen, 215 F. Supp. 938, 940 (E.D. Pa. 1963), *aff'd,* 334 F.2d 378 (3d Cir.), *cert. denied,* 379 U.S. 921 (1964).

[94] Highway Truck Drivers & Helpers Local 107 v. Cohen, 215 F. Supp. 938 (E.D. Pa. 1963), *aff'd,* 334 F.2d 378 (3d Cir.), *cert. denied,* 379 U.S. 921 (1964) [hereinafter cited as Cohen II].

[95] The court observed:

> This clearly establishes the Act as the primary basis for prohibiting payment of defendants' attorney fees. Judge Clary [in Cohen I] was merely adding another string to his bow in holding payments to be *ultra vires.* Assuming that string was broken by the constitutional amendment, without any doubt the Act itself is sufficient reason for requiring defendant to repay the money in question.

Cohen II, *supra* note 94, 215 F. Supp. at 940.

[96] Cohen II, *supra* note 94, 334 F.2d 378.

[97] Once the appellate court determined that the payment of counsel fees in *Cohen* was contrary to the policies of the LMRDA, the *"ultra vires"* doctrine no longer applied.

> In other words, an illegal act or contract, defined as one expressly prohibited by the [corporate] charter or a general statute, or which

Therefore, even if the membership authorizes a union official to act, and the authorization advances the union's stated purposes or interests, the statute still can prohibit the official from acting if the action itself is contrary to public policy.[98]

> is immoral or against public policy, is *ultra vires* and also something more. It is illegal, not merely because it is *ultra vires*, or beyond the powers conferred upon the corporation, but, as in the case of an act of a natural person, because of its immorality, or its being contrary to public policy, or its being in violation of an express legislative prohibition. Such acts, strictly speaking . . . are not classified as *ultra vires*.

W. FLETCHER, *supra* note 85, § 3400, at 9. *See also* W. CARY, *supra* note 19, at 40.

[98] Cohen II, *supra* note 94, 334 F.2d at 381. Courts have applied the governing principle in both civil and criminal § 501 cases. In United States v. Boyle, 482 F.2d 755 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973), for example, the government charged United Mine Workers President W.A. (Tony) Boyle with criminal violations of both LMRDA § 501(c) and § 610 (reenacted with amendments as the Federal Election Campaign Act of 1971 and 1974, 2 U.S.C. § 441(b)), for having willfully transferred $5,000 from the union general treasury to its lobbying league. The UMW International Executive Board expressly ratified the transfer of funds two years after the transfer. 482 F.2d at 759. Having found the transfer unlawful under the Corrupt Practices Act, the court concluded that knowingly transferring union funds for an unlawful purpose constituted a violation of § 501(c), regardless of authorization or benefit. 482 F.2d at 764.

The District of Columbia Circuit decision in *Boyle* is manifestly sound. A contrary result would have frustrated the statutory provisions and policies of the Corrupt Practices Act. Unions must be accorded broad leeway to decide how to spend their money, but they may not spend it for a purpose that conflicts with federal law or policy. In this respect, *Boyle* is merely a variation of the public policy rationale.

Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963) illustrates how the public policy rationale has been extended in private § 501(a) actions. In *Johnson*, union members brought suit alleging that Local officials had breached their fiduciary obligations by refusing to disburse funds for counsel fees and other expenses that plaintiffs had incurred in a successful LMRDA Title I suit, invalidating certain union rules prohibiting the plaintiffs from running a slate of opposition candidates against the defendants, the incumbent officials. Although the Local membership had expressly authorized union payment of the plaintiff's legal fees and costs in the Title I suit, the International Brotherhood's Executive Board directed the defendant-officers not to pay, stating that the membership authorization was contrary to the "general policy of the Brotherhood," without citing any constitutional provision as authority for its directive. 325 F.2d at 649. The Eighth Circuit held that the defendant-officers had breached their fiduciary obligations in refusing to make the disbursements because they allowed "their personal feelings toward [plaintiffs in the Title I

3. Public Policy as a Decisional Standard—Determining the Proper Role for the Courts

If LMRDA policies limit union power to authorize counsel fee

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suit] to interfere with their duties as officers . . . and . . . thus assumed positions adverse to the interests of the local union . . . ." 325 F.2d at 653. Finding the officers' personal interest adverse to that of the membership, the court gave no effect to the policy directive of the international. *Id. See also* Morrissey v. Curran, 650 F.2d 1267, 1273-74 (2d Cir. 1981).

Perhaps the furthest extension of the public policy rationale is in Pignotti v. Local 3, Sheet Metal Workers, 477 F.2d 825 (8th Cir.), *cert. denied,* 414 U.S. 1067 (1973). In *Pignotti,* members of a local union brought a § 501 suit alleging that the president of the international union and other officers breached their fiduciary duties by forcing the local to participate in a national pension plan, contrary to the wishes of the membership. The district court found a fiduciary breach because the facts established that defendants "set out to obtain the participation of Local 3 in the National Plan, whether the majority of the Union wanted the plan or not," and because the defendants placed the local union under a trusteeship "to prevent any further action of the members toward implementing the vote to discontinue the Plan." 477 F.2d at 830.

Professor Leslie has argued that the courts in *Johnson* and *Pignotti* relied on undefined LMRDA policies in reaching their decisions, and that such results will lead to substantial federal court intrusions into internal union affairs. In his view, the courts should limit their intervention to cases where an officer has exceeded constitutional authority, or where the officer has obtained a financial or political benefit and no significant institutional interest is involved. *Federal Courts, supra* note 9, at 1326. We disagree with this analysis. An alternative reading of *Johnson* and *Pignotti* suggests that the courts were concerned with the potential for conflicts of interest, and the possibility of official self-dealing. In each case, the officials of the international union acted inconsistently with the interests of the majority of the local membership. Both the *Johnson* and *Pignotti* courts relied primarily on title I policies favoring union democracy, but that does not mean, as Professor Leslie suggests, that specific title V policies were not also impinged. Courts have long recognized that the purpose of allowing § 501 suits by union members is "to further union democracy and thereby prevent misuse of power of union leaders." Phillips v. Osborne, 403 F.2d 826, 827 (9th Cir. 1968). Moreover, while it is true that in *Pignotti* there was no specific evidence that the defendant-officials had sought personal gain, such a conclusion is apparent from the court's decision that the defendant-officers' personal interests were diametrically opposed to those of the membership of the local unions, thus creating the potential for a conflict of interest contrary to the fiduciary standard of § 501. Even if Professor Leslie is correct in his reading of the cases, courts should not reject the public policy rationale. Indeed, they have no other choice under the statute. Courts must intervene, even when significant institutional interests of the union are involved, if officials have acted contrary to internal union law or if actual or potential conflicts of interest would prevent them from complying with their fiduciary obligation. This is not merely a matter of philosophy concerning the

expenditures, under what circumstances will these policies be invoked? What makes a union's counsel fee expenditure unlawful under section 501? More fundamentally, what role should the courts play in resolving these questions?

It is important to recognize at the outset that the policies that may deny union members the power to authorize counsel fee expenditures can be confined to the limited purposes of section 501. Contrary to what one commentator has suggested, these policies do not depend "solely on the predilections of individual judges as to what is good or bad conduct by union officials."[99]

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role of the federal judiciary; the LMRDA and the fiduciary policies it created require court intervention.

[99] *Federal Courts, supra* note 9, at 1326. Professor Leslie has argued that the public policy rationale, *see* note 98 *supra*, is "troubling" because "it permits courts, under an expansive view of the fiduciary concept, to strike down union conduct that is not prohibited by the other, more specific, provisions of the Act." *Federal Courts, supra,* at 1326. He argues that because the public policy rationale is vague and undefined, federal judges are encouraged to indulge in subjective decision-making resulting in "substantial federal court intrusion into internal union affairs." *Id.* at 1330.

While it is true that the rationale of public policy can be the subject of abuse, *see* note 134 and accompanying text *infra,* courts should not ignore the public policy underpinnings of the statute or the public interest affected by their decisions. Indeed, Professor Leslie's criticism ignores the fact that § 501 and the LMRDA were specifically premised on the idea that the public has an interest in internal union affairs. As Professor Summers has explained:

> The first and most elementary premise [of the LMRDA] is that the public has an interest in the internal affairs of unions. The cherished myth that the way unions conduct their internal affairs is no one's business but their own has been destroyed; and the label of "private association" no longer serves as a "no admittance" sign to legal intervention. Not only is public filing of financial reports required, but the law affirmatively protects certain rights of membership, regulates elections, imposes qualifications for offices, and guards local autonomy. This premise did not spring fully armed from the mind of McClellan, for the public interest has long-growing roots reaching back at least to the Wagner Act of 1935 which gave unions the statutory authority of exclusive bargaining representatives. Having vested unions with such status, the public inevitably had an interest in their internal affairs, and the statute now articulately affirms that public interest.

Summers, *The Impact of Landrum-Griffin in State Courts,* in PROCEEDINGS OF NEW YORK UNIVERSITY THIRTEENTH ANNUAL NATIONAL CONFERENCE ON LABOR 333, 334 (1960). *See also* 29 U.S.C. § 401 (1959).

The general principle of open institutional government also supports the public policy rationale. This principle applies to corporations, and it is troub-

The court in *Cohen II*,[100] for example, denied the union power to defend officials charged with stealing union money, not because a judge thought the action was morally wrong, but because a union-supported defense created the potential for a conflict of interest antithetical to the officers' fiduciary obligations. The courts must normally exercise restraint when reviewing internal union affairs, but authorization cannot be used as a shield to protect the very conduct that prompted the legislation.[101]

Courts, of course, cannot abdicate their responsibility to promote statutory policies, nor can they refrain from creating substantive standards for determining whether authorized union expenditures violate section 501. To say that union officials are fiduciaries of the membership merely initiates the inquiry as to specific obligations.[102] To grant the federal courts jurisdiction to decide these questions requires them to develop a federal common law. Courts must therefore develop a body of fiduciary law under section 501 for the same reasons that courts have fashioned a substantive body of collective bargaining law under section 301 of the Taft-Hartley Act.[103]

The courts can look to other fiduciary contexts for assistance in developing a federal common law for union fiduciaries. When Congress enacted section 501, it intended to incorporate a large

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ling that the courts have not established a public policy rationale for federal regulation of the internal affairs of corporate management. Corporations, with their prodigious wealth and considerable political power, affect the public at least as much as unions. *See* note 8 *supra*. Indeed, there is a growing commentary critical of the modern corporation that favors legislative reforms designed to impose federal regulatory control over corporations. *See* R. NADER, M. GREEN & J. SELIGMAN, TAMING THE GIANT CORPORATION 132-40 (1976); Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 700-05 (1974); Schwartz, *Toward New Corporate Goals: Co-Existence with Society*, 60 GEO. L.J. 57, 70 (1971).

[100] Cohen II, *supra* note 94.

[101] Morrissey v. Curran, 650 F.2d 1267, 1273-74 (2d Cir. 1981).

[102] As Justice Frankfurter stated, "[T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry . . .," which requires one to ask, "What obligations does he owe as a fiduciary?" SEC v. Chenery Corp., 318 U.S. 80, 85-86 (1943).

[103] In Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957), the Supreme Court interpreted section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976), as not only granting jurisdiction in the federal courts over collective bargaining agreements, but also as vesting in the courts the power to develop a federal common law of labor-management relations within that jurisdiction. *See also* note 41 *supra*.

body of existing law applicable to trustees and a wide variety of agents.[104] The Restatement of Agency, the law of trusts, and analogous corporate doctrines should provide guidelines for judicial fashioning of fiduciary law under section 501.

There is always the danger that courts will use public policy as an excuse for unwarranted intrusion into the legitimate internal affairs of the union, and that judges will "strike down union conduct that is not prohibited by other, more specific provisions of the Act."[105] But this danger, to the extent it exists, can be minimized by requiring judges to examine critically the policies relevant to the counsel fee problem and to explain why the counsel fee expenditures of the union offend section 501.[106]

The authority of internal union law and the organizational interest represented by such authority can never be the sole determinant in resolving counsel fee problems. As the Supreme Court has admonished, "Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members."[107] At the very minimum, when the fiduciary policies of section 501 conflict with a union's interest, the courts have an obligation to give effect to the "aims and purposes" of section 501 in resolving the conflict.

4. Unanimous Authorizations and the Dominated Union Problem

There may be an exception to the principle that union authorization is not a complete defense to membership challenges under section 501. A court might uphold an authorization passed by unanimous vote of the membership. The reasoning in *Cohen II*[108] was that "a single union member" should not be victimized by the actions of an "unprincipled" or "unscrupulous" majority.[109] But in the case of a unanimous authorization, there is no

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[104] H.R. REP. No. 741, 86th Cong., 1st Sess. (1959). *See also* note 41 *supra*.

[105] *Federal Courts, supra* note 9, at 1326.

[106] *See* notes 187-331 and accompanying text *infra* (offering a structured approach for resolving counsel fee problems).

[107] United States v. White, 322 U.S. 694, 701 (1944). *See also* Highway & City Freight Drivers v. Gordon, 576 F.2d 1285 (8th Cir. 1978).

[108] Cohen II, *supra* note 94.

[109] Cohen I, *supra* note 78, 182 F. Supp. at 619; *accord*, Kerr v. Shanks, 466 F.2d 1271, 1276 n.3 (9th Cir. 1972) (one of the primary purposes of the LMRDA was to protect the minority members of the union from "an unscrupulous majority.") Significantly, the LMRDA provides that union officials owe

dissenting minority to protect. Moreover, if the membership has unanimously approved the action, it can be argued an individual member may be estopped from subsequently bringing suit to challenge the action taken.[110] Finally, the courts must always be cautious in striking down legitimate union expenditures that further the union's interest and the membership's desires.[111]

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a fiduciary duty to the union and its members, not to society at large. *See, e.g.*, 105 CONG. REC. 6523-28 (1959). Indeed, § 501(b) confers standing to sue only upon members. Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968).

[110] In Cohen I, for example, the district court found corporate case law persuasive in recognizing the right of shareholders to pay for the legal defense of officers charged with official misconduct, if the unanimous vote of the shareholders "authorized" the expenditure. Cohen I, *supra* note 78, 182 F. Supp. at 619 (citing Solimine v. Hollander, 129 N.J. Eq. 264, 19 A.2d 344 (1941); New York Dock Co. v. McCollom, 173 Misc. 106, 16 N.Y.S.2d 844 (1939); *In re* E.C. Warner Co., 232 Minn. 207, 45 N.W. 2d 388 (1950); Jesse v. Four-Wheel Drive Auto Co., 177 Wis. 627, 189 N.W. 276 (1922); *See* Washington, *Litigation Expenses of Corporate Directors in Stockholder's Suits*, 40 COLUM. L. REV. 431 (1940) [hereinafter cited as *Litigation Expenses*]; Comment, *Corporation Responsibility for Litigation Expenses of Management*, 40 CALIF. L. REV. 104 (1952). *See also* Ranes v. Office Employees Local 28, 317 F.2d 915, 917-18 (1963). It is true that power cannot be conferred upon a corporation merely by the consent of its stockholders, but when shareholders unanimously authorize an action, they are estopped from objecting on the ground that the action is beyond the power of the corporation. W. FLETCHER, *supra* note 85, § 3667 n. 1. Thus, in Jesse v. Four-Wheel Drive Auto Co., 177 Wis. 627, 189 N.W. 276 (1922), the Supreme Court of Wisconsin concluded that a corporation, by unanimous action of its shareholders, may dispose of its property as it wishes "so long as it does nothing against public policy." *Id.* at 628, 189 N.W. at 278.

[111] Although the association rights of the membership are not absolute and could never entirely shield the union's authorization from scrutiny under the LMRDA, courts must be mindful of the possible constitutional protections of legitimate union expenditures that reflect the unanimous expression of the membership. Labor organizations have traditionally been characterized as private voluntary associations. This status, along with the deep involvement of unions in the political and economic history of the United States, has moved the Supreme Court to accord unions and their legitimate activities a high position in the hierarchy of constitutional values. In upholding the constitutionality of the Wagner Act, 29 U.S.C. § 151-168 (1935), for example, the Supreme Court declared that the right of workers to organize and to act in concert was a "fundamental right." NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937). In Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964), the Supreme Court upheld the right of a union to refer members to union-selected attorneys against a challenge from the state bar, and concluded that "the Constitution protects the associational rights of the members of the union precisely as it does those of the NAACP." *Id.* at 8. The legislative history of § 501 also clearly establishes the congressional recognition of the consti-

Unanimous membership action will not always preclude a member from bringing a section 501 suit. For example, a member should not be estopped from challenging the underlying action if the resolution was enacted with less than full disclosure, or was procured by a material misrepresentation.[112] Nor would unanimous action at a secret or improperly noticed meeting serve as a bar against members not in attendance.[113] Further, a member who is present but fails to vote on a unanimously passed resolution should be permitted to sue under section 501, unless the member had a duty to register a dissent under the circumstances.[114] Thus, if a union official seeks to defend a charge of fiduciary wrongdoing on the ground that the challenged conduct was authorized by majority or unanimous membership action, the plaintiff-member should be granted standing to introduce evidence establishing that the authorization was not bona fide, but was rather a "mere sham."[115]

Even in the absence of fraud or irregularity, unanimous membership authorization could never overcome the fiduciary policies of section 501.[116] While courts should not examine the mer-

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tutional and political dimension of labor unions, and reveals the recognition and concern of potential constitutional questions lurking in the statute. *See* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2430-35. The LMRDA policy of limiting judicial intrusions into internal union affairs is itself a reflection of the potential constitutional limitations on federal regulation in this area. But as the Supreme Court, in Wirtz v. Hotel Employees, 391 U.S. 492 (1968), observed: "[T]he congressional concern to avoid unnecessary intervention was balanced against the policy expressed in the Act to protect the public interest . . . ." *Id.* at 496.

[112] *See* notes 57-59 *supra.*

[113] *See* notes 60-61 *supra.*

[114] Because members' silence may stem from a variety of reasons, ranging from fear of physical reprisal, through indifference, to agreement with the majority, their mere presence at a meeting should not be construed as indicating agreement with the action taken by the voting membership.

[115] In United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), Judge Moore concluded that "the degree of domination and control" exercised by the leadership of a union was relevant "to a determination of whether the authorization was a mere sham and whether the purpose was for a non-union benefit." *Id.* at 116-17. *Silverman* involved a criminal prosecution for embezzling funds under § 501(c), but the "mere sham" exception to the defense of authorization would be equally applicable to civil actions under § 501(b). *See also* note 29 *supra.*

[116] The Supreme Court, however, has expressly declined to decide whether a unanimous vote of union members would be a defense to an expenditure of union funds alleged to violate § 610 of the Federal Corrupt Practices Act of

its of each action authorized by the membership, they must decide the legality of disputed authorizations, even if unanimous. As the *Cohen I* court explained, "There is a distinction between the merit of a resolution and its legality. The latter question is peculiarly within the competence of a court to pass upon and cannot be abandoned finally to the organization."[117]

Nor can associational rights of the membership shield officers from the requirements of section 501. The Supreme Court has declared that "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute."[118] The membership's freedom to determine its own internal affairs must yield to the overriding public policies embodied in section 501.[119]

The problem of domination presents a related but distinguishable justification for subjecting unanimous authorizations to section 501 scrutiny.[120] Such authorizations may not truly reflect

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1970, 18 U.S.C. § 610 (1970)(current version at 2 U.S.C. § 441(b) (1976)). "[A]n indictment that alleges a contribution or expenditure from the general treasury of a union or corporation in connection with a federal election states an offense . . . . The unanimous vote of the union members or stockholders may at most (but we do not now decide) be a defense." Pipefitters v. United States, 407 U.S. 385, 415 n.28 (1972). *See also* United States v. Boyle, 482 F.2d 755, 762 n.18 (D.C. Cir.), *cert. denied,* 414 U.S. 1076 (1973).

[117] Cohen I, *supra* note 78, 182 F. Supp. at 618 (citing Gordon v. Tomei, 144 Pa. Super. 449, 19 A.2d 588 (1941); Maloney v. UMW, 308 Pa. 251, 162 A. 225 (1932)).

[118] California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)). A state may, therefore, regulate first amendment activity whenever substantial state interests or policies are implicated. United Transp. Union v. State Bar of Mich., 401 U.S. 576, 584 (1971); UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 222-24 (1967); Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964); NAACP v. Button, 371 U.S. 415, 444 (1963). The Supreme Court has also recognized that a state may regulate the practice of law to prevent a conflict of interest in legal representation, even though first amendment activity may be involved. *In re* Primus, 436 U.S. 412 (1978); UMW v. Illinois State Bar Ass'n, 389 U.S. at 224; NAACP v. Button, 371 U.S. at 443. *See also* Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896, 901 (1975), *aff'd per curiam,* 466 Pa. 187, 352 A.2d 11, *appeal dismissed, cert. denied,* 423 U.S. 1083 (1976).

[119] *See* NLRB v. Marine Workers Union, 391 U.S. 418 (1968) (A provision in the union's International Constitution restricting member's access to NLRB must yield to the overriding statutory policies favoring unimpeded access to the Board).

[120] In corporation law, for example, expenditures authorized by the corpo-

the will of the membership if the officials who would benefit from membership action dominate and control the organization.[121] Moreover, officials who benefit from a union expenditure through domination would themselves violate section 501 by procuring an expenditure of union funds for private benefit. To give effect to an authorization that is not the bona fide expression of the majority would undermine the LMRDA principle of union democracy and self-regulation. Thus, if the membership merely rubber stamps the directives of its officers, there is no reason for a court to defer to the membership. Although evidence that the membership has consistently voted in favor of proposals introduced by its leadership would be insufficient to substantiate a domination claim, the degree of control exercised by an official, combined with evidence of manipulation and deception in the authorization process, should support a finding that the union's authorization was a "mere sham."[122]

5. Authorization, Ratification, and Exculpation Distinguished

A union member who brings a section 501 suit may allege that the union's authorization of counsel fees is invalidated by the statutory prohibition against general exculpatory provisions or resolutions. Section 501(a) provides that general exculpatory provisions or resolutions that seek to relieve union officials of liability for a fiduciary breach "shall be void as against public policy."[123] Both the LMRDA and the common law have required

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rate board of directors can be set aside if the transaction was procured through the domination of an officer having an interest in the outcome of the transaction. *See, e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717, 916 (Del. 1971).

[121] The domination and control of union officials need not involve physical intimidation or financial coercion. It primarily arises from subtle pressures on the members of the unions to tender allegiance and remain faithful to the organization and its leaders. *See Federal Courts, supra* note 9, at 1327-30.

[122] In United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), Judge Moore noted that evidence of "one-man control of a labor organization" would be insufficient to establish that the union's authorization was "a sham or null and void or that it was passed for the private benefit of the union leader." He concluded, however, that a demonstration of one-man control, combined with "certain other facts" like "a striking lack of attention to the functioning of the union leadership by the executive committees and the membership" would be sufficient. *Id.* at 116-17.

[123] 29 U.S.C. § 501(a), set forth in note 10 *supra*.

the courts to make substantive distinctions among authorizations, ratifications, and general and specific exculpatory provisions or resolutions.

For example, in *Cohen I*,[124] plaintiffs contended that the membership resolution authorizing payment of counsel fees was prohibited as a "general exculpatory resolution" under section 501(a).[125] Rejecting this contention, the court distinguished between a resolution seeking to exculpate an official from liability and one that seeks merely to grant authority for the official's action: without this distinction, the " 'exculpatory' provision [would] be read as a mere 'catchall' phrase."[126] The *Cohen* resolution fell outside the exculpatory prohibition because it merely authorized disbursement of funds for the defendants' counsel fees without relieving them of their potential liability.[127]

The more troublesome cases involve membership ratifications that seek to provide retroactive approval of unauthorized official acts. Ratifications are problematic because they frequently attempt to validate prior conduct, thus appearing to relieve or exculpate union officials of potential section 501 liability.[128] The distinction between exculpation and ratification is often blurred, but courts have found the *Cohen II* analysis helpful.[129] A retro-

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[124] Cohen I, *supra* note 78.

[125] Cohen I, *supra* note 78, 182 F. Supp. at 617.

[126] Cohen I, *supra* note 78, 182 F. Supp. at 618.

[127] *See* Cohen I, *supra* note 78.

[128] For an example of the confusion that courts have encountered, see Morrissey v. Curran, 423 F.2d 393, 399 (2d Cir.), *cert. denied*, 399 U.S. 928 (1970); Brink v. DaLesio, 496 F. Supp. 1350 (D. Md. 1980), *aff'd in part, rev'd in part*, 108 L.R.R.M. 2982 (4th Cir. 1981). *See also Fiduciary Duty, supra* note 9, at 1200 n.63.

[129] In Cohen I, *supra* note 78, the district court held that the resolution of the local union authorizing the expenditure of counsel fees was invalid, not because it fell within the statutory ban against general exculpatory provisions, but because it was beyond the powers derived from the union constitution. Additionally, the court found the expenditure to be inconsistent with the aims and purposes of the LMRDA. Thereafter, the international union amended its constitution to authorize the counsel fee expenditures. In Cohen II, *supra* note 94, the district court held that, although the constitutional amendment did not fall within the exculpatory prohibition of the statute, it was still invalid because its inconsistency with the policies of the Act remained. As the Third Circuit explained:

> That abortive attempt to invalidate the illegal 1959 resolution could not of course in 1961 legitimatize the 1959 payments which have been held to have been wrongful. And the action of the Inter-

active authorization or ratification may escape exculpatory prohibitions and yet not be effective, if it seeks to validate a fiduciary breach. Again, the rationale stems from the recognition that "otherwise the provisions of section 501 would be completely emasculated if, every time a court, at the behest of complaining members of a union, found that the officers had breached their duties, the officers could find sanctuary by putting through a constitutional amendment or by-law retroactively to legitimatize their former derelictions of duty."[130]

In determining the effect and validity of the union's authorization, the *Cohen II* court also stressed the importance of giving effect to the union's institutional interests.[131] Under this analysis, an authorization serving an important union interest should not be ignored, unless it would subvert the policies of section 501.[132] A similar analysis, derived from the language of section 501[133] and the common law of fiduciary relationships,[134] justifies distinguishing between specific and general exculpatory provisions or resolutions.

Not even the strongest assertion of union interests could justify exculpating union officials from all section 501 liability.[135] Specific exculpations, however, limited to particular good faith actions, may be permitted under the LMRDA. These exceptions require a showing of an institutional interest supporting the ac-

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> national was just as inconsistent with Section 501 of the Labor Management Act as was the Local's ill conceived resolution.

Cohen II, *supra* note 94, 334 F.2d at 381. For application of the *Cohen* approach to the exculpatory-ratification distinction, see Kerr v. Shanks, 466 F.2d 1271, 1276 n.3 (9th Cir. 1972) (*dicta*); Morrissey v. Curran, 423 F.2d 393, 399 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970).

[130] Morrissey v. Curran, 423 F.2d 393, 399 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970).

[131] Cohen I, *supra* note 78, 182 F. Supp. at 619-20.

[132] *See* notes 99-109 and accompanying text *supra.*

[133] The statute specifically prohibits only "general" exculpatory provisions or resolutions. *See* note 10 *supra.* As Sen. Goldwater observed, the Act was expressly intended to ban only general exculpatory provisions to avoid "a constitutional question which is raised by the attempt to ban all exculpatory action made in the [Kennedy-Ervin bill]." 105 CONG. REC. 16,149, 16,489 (1959).

[134] *See, e.g.,* 3 A. SCOTT, *supra* note 18, § 222 (3d ed. 1967); Note, *Directory Trusts and the Exculpatory Clause,* 65 COLUM. L. REV. 138, 139-43 (1965). *See also Federal Courts, supra* note 9, at 1328-29.

[135] Such an attempt would clearly fall within the general exculpation prohibition of § 501. 29 U.S.C. § 501(a), set forth in note 10 *supra.*

tion.[136] On the other hand, a union cannot authorize, ratify, nor exculpate official action that conflicts with the policies of section 501. Thus, questions of authorization, ratification, and exculpation cannot be resolved in isolation from the relevant competing interests and policies.

C. A Structured Approach to Counsel Fee Problems Involving the Defense of Union Officers

The charges against the officials in the *Cohen* litigation[137] involved allegations that included gross and flagrant breaches of fiduciary duty. The charges of official wrongdoing were not frivolous, and there was no contention that the underlying lawsuits were brought to harass the union or its officials. What if, however, the underlying charges against an official do not involve the performance of a fiduciary duty? Further, what if the union claims that the underlying action is a "strike suit" brought to harass the union or coerce a settlement? If the union's internal law cannot always insulate officials from the fiduciary obligations of the statute, what are the permissible bounds for union action in protecting its officers against liability and the cost of defending litigation?[138]

The fact that the underlying action does not charge union officials with fiduciary misconduct does not, of course, render section 501 inapplicable. The statute specifically provides that union officials have the duty "to hold [the union's] money and property solely for the benefit of the organization . . . and to account to the organization for any profit received."[139] A union expenditure to defend officials against charges of nonpayment of child support or income tax evasion, for example, would thus violate section 501.

At the other extreme are cases involving conduct directly related to official duties and responsibilities. Examples of these

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[136] *See* notes 124-130 and accompanying text *supra*. Conversely, the court should not uphold even a specific exculpation if it would be contrary to union interests or would frustrate fiduciary responsibilities of the LMRDA.

[137] *See* Cohen II, *supra* note 94; Cohen I, *supra* note 78.

[138] In seeking a structured approach, our analysis will assume that the counsel fee expenditure has been authorized by the membership and the only question for consideration is whether the authorized expenditure of union funds itself constitutes a § 501 violation.

[139] 29 U.S.C. § 501(a), set forth in note 10 *supra*.

cases include suits against representatives for picket line violence, libel and slander during an organizing campaign, antitrust violations grounded on collective bargaining negotiations, and violations of the several LMRDA provisions. In these cases, the underlying litigation would threaten genuine interests, providing strong justification for upholding members' authorizations for a union-supported defense. If the rule were otherwise, conscientious officials would have to give such attention to the verification of the legality of proposed action that official decision-making would become a "ritual of regularity,"[140] and the union's basic objectives of organization and collective bargaining might not be fulfilled. A rule precluding a union-supported defense in these cases would also discourage qualified union members from undertaking leadership responsibilities, for fear of incurring crushing financial liabilities.[141]

The distinction between purely personal expenditures and those that represent genuine union interests, however, is less than clear. Within the extremes are the hybrid cases, where the charges against the union official seem personal, but may arguably involve valid union interests. A union, like a corporation, will always have an interest in shielding its officers from litigation and its costs, to induce qualified persons to serve as leaders. The benefit to the organization derives from encouraging qualified persons to become fiduciaries; it is "the advantage which comes of [sic] causing another to take over the cares of business in [the

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[140] Conard, *A Behavioral Analysis of Directors' Liability for Negligence*, 1972 DUKE L.J. 895, 904. In writing about the effect of liability for negligence on the bevavior of corporate directors, Professor Conard has argued that "the fear of liability may tend to degrade, rather than to elevate, the decisional processes of directors." *Id.* He concludes, however, that "the net gain resulting from an increased perception of liability threat is enigmatic," *id.* at 905, because the fear of liability may have two possible consequences: "Certainly, directors are trying harder to be diligent. Some directors certainly deliberate more carefully and reach sounder conclusions than they would if not threatened with liability; others certainly give increased attention to routines of verification which divert their attention from solving the company's problems toward a ritual of regularity." *Id.* Although Professor Conard was writing mainly about the behavioral effects of the fear of liability in the corporate context, the same behavioral patterns can be expected of union officials if they must personally incur the cost of defending litigation arising from the performance of union business.

[141] *See Federal Courts, supra* note 9, at 1318 (citing Conard, *supra* note 140, at 903).

beneficiaries'] place and stead . . . ."[142]

From the official's perspective, nearly everything that benefits the individual also benefits the organization. To use an example from the Second Circuit, the union official installing a home sauna at union expense might claim that the expenditure was for the union's benefit because saunas make officials feel healthier and thereby improve their leadership ability.[143] Although this expenditure would invariably be personal,[144] the nature of other union expenditures, particularly those for litigation expenses, is not so clear. In these hybrid cases, courts will face the most difficult counsel fee problems.

1. The Theoretical Foundation for a Structured Approach

The conceptual problem for the courts is to devise a structured approach for upholding union expenditures for counsel fees granted for genuine institutional interests, and to reject those involving solely personal interests or actual or potential conflicts of interest. The underlying analysis presents sensitive and perplexing questions concerning the nature of the union as an institution, the role of its officers as fiduciaries, and the function of the courts in administering external standards of fiduci-

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[142] *Litigation Expenses, supra* note 110, at 445. As Professor Bishop has also explained, "[T]he benefit to the corporation [for indemnifying officers against the cost of defending derivative actions] comes from inducing valuable executives to serve it by promising them protection against unjustified litigation. It is like paying them their salary. The benefit to the corporation is the same benefit it receives when it pays a salary." Bishop, *Indemnification of Corporate Directors, Officers and Employees,* 20 BUS. LAW. 833, 839 (1965) [hereinafter cited as *Indemnification*].

[143] United States v. Ottley, 509 F.2d 667, 671-72 (2d Cir. 1975) (§ 501(c) criminal action involving the unauthorized use of union funds for the personal expenses of the union's president). *See also* Brink v. DaLesio, 496 F. Supp. 1350 (D. Md. 1980), *aff'd in part, rev'd in part,* 108 L.R.R.M. 2982 (4th Cir. 1981).

[144] "Some expenditures are so clearly personal in nature that such a claim is scarcely credible." United States v. Ottley, 509 F.2d 667, 671-72 (2d Cir. 1975). In other cases, reasonable persons may disagree. *See, e.g.,* Brink v. DaLesio, 496 F. Supp. 1350, 1362-63 (D. Md. 1980) ("luxuriously appointed" Cadillac purchased by the union for the union's president held to be the "type of decision upon which reasonable men could disagree and which absent any showing of improper authorization, merits judicial deference."), *aff'd in part, rev'd in part,* 108 L.R.R.M. 2982 (1981). *See also* notes 220-235 and accompanying text *infra.*

ary conduct under section 501. Who is the union? Whose interests coincide with the union's interest? How should the courts resolve conflicting interests? These are the core issues posed by the counsel fee problem.

a. The Corporate Analogy

In the analogous context of corporate law,[145] officers and directors of the corporation expect and usually receive indemnification against liabilities and expenses incurred because of their service to the corporation. Corporate officers are exposed to considerable liability and litigation expense.[146] Corporate directors face the same perils, even though they may receive only a nominal salary for their services.[147] Rightly or wrongly, the director or officer is typically viewed in corporate circles as a "sitting duck for a shareholder or third party liability suit."[148] To protect officers and directors, corporate charters and bylaws often provide indemnification for counsel fees, legal expenses, and liabilities. Although the corporate law of indemnification has always been

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[145] The § 501 suit is patterned after the shareholder derivative aciton. Moreover, the right of the corporation to indemnify its officers and directors against liability and litigation expenses involves similar concerns. Thus, the analysis of labor counsel fee problems can be guided and enriched by relevant doctrines in corporation law. *See, e.g.*, W. CARY, *supra* note 19 at 952-70; W. KNEPPER, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS (3d ed. 1978); G. WASHINGTON & J. BISHOP, INDEMNIFYING THE CORPORATE EXECUTIVE (1963); *Indemnification, supra* note 142; Conard, *supra* note 140; Klink, Chalif, Bishop & Arsht, *Liabilities Which Can be Covered Under State Statutes and Corporate Bylaws*, 27 BUS. LAW. 109 (Special Issue 1972); Litigation Expenses, *supra* note 142; Comment, *Corporate Indemnification of Directors and Officers—The Expanding Scope of the Statutes*, 18 CATH. U.L. REV. 195 (1968); Note, *Indemnification of the Corporate Official for Fines and Expenses Resulting from Criminal Antitrust Litigation*, 50 GEO. L.J. 566 (1962); Note, *Indemnification of Directors: The Problems Posed by Federal Securities and Antitrust Legislation*, 76 HARV. L. REV. 1403 (1963) [hereinafter cited as *Indemnification of Directors*].

[146] A recent survey of the claims filed against corporate officers and directors indicates that the average damage award was $407,420 per successful claim, and the average estimated legal cost was $277,549 per claim. *1978 Wyatt Directors and Officers Liability Survey, cited in* W. KNEPPER, *supra* this note, at 670.

[147] *See, e.g., Litigation Expenses, supra* note 110, at 432.

[148] Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1078 (1968) [hereinafter cited as *Sitting Ducks*] (citing Wall St. J., March 21, 1968, at 6, col. 4.

murky,[149] there are some settled areas applicable to the counsel fee problem.

At common law, the courts uniformly held that corporations were forbidden from paying the counsel fees of officers and directors accused of fiduciary breaches until termination of the suit.[150] Moreover, the corporation could not indemnify if the officer or director was liable for breach of duty.[151] Officers and directors who had successfully defended the litigation, however, were entitled to reimbursement of their litigation expenses.[152] Courts thus required the corporation to remain neutral, producing fair play by preventing the corporation's financial power

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[149] *See* Bishop, *Current Status of Corporate Directors' Right to Indemnification,* 69 HARV. L. REV. 1057 (1956); *Litigation Expenses, supra* note 110.

[150] *See, e.g., In re* E.C. Warner Co., 232 Minn. 207, 210-11, 45 N.W.2d 388, 391 (1950); Solimine v. Hollander, 129 N.J. Eq. 264, 19 A.2d 344 (1941); *see also* G. WASHINGTON & J. BISHOP *supra* note 145, at 117-18; *Counsel Fees, supra* note 1, at 458-59.

[151] In Witherspoon v. Hornbein, 70 Colo. 1, 196 P. 865 (1921), for example, the plaintiffs brought a derivative action against directors and officers of the corporation for violating corporate duties. In finding the directors and officers responsible for their own defense costs, the court relied on ordinary equity principles and declared:

> Certainly wrongdoers in a suit in equity cannot ask in good conscience to be saved harmless from attorney's fees incurred in defense of their wrongful, unlawful conduct. It seems clear that the directors of the corporation who are responsible for the conditions which made the stockholders' suit necessary should bear the expenses of the attorneys employed by them to defend their own misdeeds in office, instead of the corporation.

Id. at 7, 196 P. at 866. *See also* Belcher v. Birmingham Trust Nat'l Bank, 348 F. Supp. 61, 154 (N.D. Ala. 1968).

[152] The right of a director or officer to indemnification from the corporation was not clearly apparent under the common law. *See, e.g.,* W. CARY *supra* note 19, at 960. Initially, the common law denied successful directors reimbursement unless they could establish that the defense conferred a benefit on the corporation. This view reached its apogee in New York Dock Co. v. McCollum, 173 Misc. 106, 16 N.Y.S.2d 844 (Sup. Ct. 1939), in which reimbursement was denied to directors who had successfully defended a derivative action because no direct benefit to the corporation had been established. *Id.* at 111, 16 N.Y.S. 2d at 849. The *McCollum* decision was responsible for a plethora of state indemnification statutes that permit the corporation to indemnify directors or officers who have been vindicated in derivative actions. *See, e.g.,* DEL. CODE tit. 8, § 145(b) (1967); N.Y. BUS. CORP. LAW § 2(a) (McKinney 1963). Even in those states that continue to rely on the common law, the trend has been in favor of reimbursement for the innocent director. *See, e.g.,* Cheek, *Control of Corporate Indemnification: A Proposed Statute,* 22 VAND. L. REV. 255, 260 (1969).

from overwhelming the plaintiff. *Cohen II*,[153] for example, is consistent with the common law corporate indemnification rule.

In developing corporate rules limiting the power of a corporation to indemnify officers against derivative actions, courts and commentators have also found labor cases relevant.[154] In their now classic treatise, *Indemnifying The Corporate Executive*,[155] Professors Washington and Bishop postulated that "A Big Labor union is not, of course, precisely the same thing as a Big Business corporation. Nevertheless for these purposes, it seems impossible to avoid the conclusion that the sauce which goes so admirably with the labor goose will do equally well for the business gander."[156] In fact, they advocated that reasoning in labor cases was "considerably more knowledgeable than that which has usually been applied in stockholders' derivative litigation [and] one may hope that it will prove influential in that area."[157]

The need to protect against conflicts of interest, the lack of genuine corporate interests, and the absence of a corporate benefit have led courts to restrict corporate indemnification in derivative actions.[158] The "treasuries of the corporation," like

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[153] Cohen II, *supra* note 94.

[154] *See, e.g.*, Belcher v. Birmingham Trust Nat'l Bank, 348 F. Supp. 61, 154 (N.D. Ala. 1968); G. WASHINGTON & J. BISHOP, *supra* note 145, at 43-45.

[155] G. WASHINGTON & J. BISHOP, *supra* note 145.

[156] *Id.* at 43-45.

[157] *Id.* (citing Milone v. English, 306 F.2d 814 (D.C. Cir. 1962)). *Milone* arose out of protracted litigation involving the attempt of certain dissident members who sought to enjoin the conducting of an international union convention and the election of officers. *See* English v. Cunningham, 269 F.2d 517 (D.C. Cir.), *cert. denied*, 361 U.S. 897 (1959). Plaintiff-members filed a motion to obtain union assistance for their counsel fees, to compel the defendant-officers to reimburse the union for counsel fees incurred in defending the suit, and to enjoin defendants' counsel from representing the union. 306 F.2d at 816. Plaintiffs also moved for an award of their attorney's fees. The plaintiffs claimed that their "suit was a derivative one on behalf of the International, . . . to protect it from the mismanagement and fraud of its officers, and that accordingly funds of the International could not validly be used to defend such officers." *Id.*

The D.C. Circuit concluded that the case was governed by the "general proposition" that the "funds of a union are not available to defend officers charged with wrongdoing which, if the charges were true, would be seriously detrimental to the union and its membership." *Id.* at 817. While the court explicitly based its decision on "equitable principles," it relied on Cohen I, *supra* note 78, and emphasized the fiduciary duties of union officers. 306 F.2d at 816.

[158] *See, e.g.*, ABA-ALI MODEL BUS. CORP. ACT § 5(a) (1969); G. WASHINGTON & J. BISHOP, *supra* note 145, at 73-74; *Indemnification, supra* note 142, at 840,

those of a union, should not be placed at the disposal of officials charged with fiduciary wrongdoing.[159] Thus, the *Cohen* cases[160] and their progeny have developed indemnification rules based on labor analogies. In developing such rules, however, corporate law now goes beyond the labor context.

Indeed, almost every state has enacted a statute establishing standards for allowing corporations to indemnify their officers for litigation expenses, attorneys' fees, judgments, fines, and the like.[161] Although these enactments vary widely in detail, there are common themes among the statutory schemes.[162] Most modern statutes, for instance, grant the corporation the right to indemnify when the officer has prevailed in the litigation.[163]

The various statutes also distinguish between third party actions and derivative actions brought on behalf of the corporation. In third party actions, the corporation can reimburse its officers for their litigation expenses, attorneys' fees, "judgments, fines and amounts paid in settlement" if they have acted in "good faith [and] in a manner reasonably believed to be in or

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844. *See generally Litigation Expenses, supra* note 110.

[159] Belcher v. Birmingham Trust Nat'l Bank, 348 F. Supp. 61, 154 (N.D. Ala. 1968) (citing Milone v. English, 306 F.2d 814 (D.C. Cir. 1962)).

[160] Cohen I, *supra* note 78; Cohen II, *supra* note 94.

[161] The statutes may be either exclusive or nonexclusive. An exclusive statute prohibits indemnification inconsistent with the statute. *E.g.,* CAL. CORP. CODE § 317(g) (West Cum. Supp. 1980); N.Y. BUS. CORP. LAW § 721 (McKinney Supp. 1980). A nonexclusive statute allows the corporation to indemnify beyond the boundaries of the statute. *E.g.,* ABA-ALI MODEL BUS. CORP. ACT. ANN. 2D § 5(f) (1977 Supp.); DEL. CODE tit. § 145(f) (1975 & 1980 Supp.). The courts, however, have taken an "extremely restrictive" view of corporate indemnification charters and bylaw provisions that go beyond what is allowed under nonexclusive statutes. *See* W. CARY, *supra,* note 19, at 961 (citing SEC v. Continental Growth Fund, Inc., FED. SEC. L. REP. (CCH) ¶ 91,437 (S.D.N.Y. 1964); Essential Enterprises Corp. v. Dorsey Corp. 40 Del. Ch. 343, 182 A.2d 647 (1962)).

[162] *See generally* W. CARY, *supra* note 19, at 960-65.

[163] The statutes vary, however, in providing standards for what constitutes "success" for indemnification purposes. The California statute, for example, provides that the officer or director must be "successful on the merits." CAL. CORP. CODE § 317(d) (West Cum. Supp. 1980). The New York statute in turn provides that the officer or director must be "wholly successful, on the merits or otherwise." N.Y. BUS. CORP. LAW § 724 (McKinney Supp. 1980). The courts have added further confusion by providing their own interpretations to these phrases. *See generally* W. CARY, *supra* note 19, at 961-62.

not opposed to the best interest of the corporation."[164] In derivative actions, the officer or director may be reimbursed only for those expenses that were reasonably incurred in defending or settling the action, but not where the officer has been adjudicated to have breached a duty to the corporation.[165]

Modern indemnification statutes are now more permissive in allowing the corporation to advance counsel fees and litigation expenses to officers who are defendants in third party and derivative actions.[166] However, any advancements must be repaid to the corporation if the officer or director is ultimately found not to be entitled to indemnification, or, where indemnification is granted, the officer is responsible to the corporation for any advance payments that may exceed the indemnification allowance.[167] These same statutes also require that any advancement or reimbursement be authorized by either a majority vote of a quorum of disinterested directors, or by independent legal counsel in a written opinion, or by the stockholders.[168] Courts will disallow any advancement or reimbursement if the authorizing entity was dominated by an interested officer or if there is evidence of overreaching or self-dealing.[169] Finally, even if a statute permits indemnification, the indemnification may be improper under federal law if it is held to violate the policy of the securities laws or other federal statutes.[170]

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[164] *See* ABA-ALI MODEL BUS. CORP. ACT ANN. 2D § 5(a). *See also* CAL. CORP. CODE § 317(b) (West Cum. Supp. 1980); DEL. CODE tit. 8, § 145(a) (1975 & 1980 Supp.); N.Y. BUS. CORP. LAW § 723(a) (McKinney Supp. 1980). In considering the type of third party action for which indemnification will be allowed, however, the New York statute states that indemnification is allowed only for "civil and criminal proceedings," while the Model Act and the Delaware and California statutes specifically mention a "threatened, pending or completed action or proceeding, whether civil, criminal, administrative or investigative. . . ."

[165] *See* ABA-ALI MODEL BUS. CORP. ACT ANN. 2D § 5(b); CAL. CORP. CODE § 317(c) (West Cum. Supp. 1980); DEL. CODE tit. 8, § 145(b) (1975 & 1980 Supp.); N.Y. BUS. CORP. LAW § 722(a) (McKinney Supp. 1980).

[166] *E.g.*, DEL. CODE ANN. tit. 8, § 145(e) (1975 & 1980 Supp.); N.Y. BUS. CORP. LAW. § 724(c) (McKinney Supp. 1980).

[167] *See* Hoffman, *The Status of Stockholders and Directors Under New York Corporation Law: A Comparative View*, 11 BUFFALO L. REV. 496, 581 (1962).

[168] *See, e.g.*, ABA-ALI MODEL BUS. CORP. ACT ANN. 2D § 5(d); DEL. CODE ANN. tit. 8 § 145(b) (1975 & 1980 Supp.).

[169] *See, e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971).

[170] *See* W. CARY, *supra* note 19, at 964-65. *See also* Globus v. Law Research

b. Adapting the Corporate Analogy to the Labor Context—Some Caveats

While analogies to corporate law may be warranted, courts must not indiscriminately apply corporate law precedent to union cases. Section 501(a) itself suggests that the courts must distinguish between the duties of corporate and union officers. The statute provides that the fiduciary duties of union officials must be interpreted in light of the "special problems and functions of labor organizations."[171] Corporate law precedent thus applies to the counsel fee problem only to the extent that unions and corporations have similar problems and functions.

Some have argued that a union is not like a corporation.[172] A union does not exist to make a profit; it is a voluntary association created for the improvement of its members. A business corporation seeks to maximize profits, whereas today's "business unionism" is concerned primarily with maximizing the workers' wages and improving other terms and conditions of employment.[173] Certainly, there are differences in the nature and scope

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Serv., Inc., 418 F.2d 1276 (2d Cir. 1969), *cert. denied,* 397 U.S. 913 (1970).

The Securities and Exchange Commission has consistently followed an administrative policy that indemnification for Securities Act liabilities of officers, directors, or controlling persons is violative of public policy. *See generally* Kroll, *Some Reflections on Indemnification Provisions and SEC Liability Insurance in the Light of* Barchris *and* Globus, 24 BUS. LAW. 681, 688-89 (1969).

[171] 29 U.S.C. § 501(a), set forth in note 10 *supra.*

[172] George Meany expressed this view in the LMRDA Legislative Committee hearings. *See* note 70 *supra.*

[173] The prevailing spirit of the American union movement is often summed up in the descriptive phrase "business unionism" . . . . The term business unionism should not be considered a term of derogation, and it does not mean that the union has the same goals as a profit business. Rather it means that the union is primarily, though not exclusively, engaged in advancing the interests of its members through seeking improvements in their own wages, hours, and working conditions, and is only secondarily concerned with broader programs of social reform.

A. REES, THE ECONOMICS OF TRADE UNIONS 2 (2d ed. 1977). A union is primarily concerned with improving the interests of individuals, unlike a corporation, which is concerned mainly with maximizing profits and the value of property; the union is composed mainly of people and a corporation is primarily a combination of property. As Professors Cox, Bok, and Gorman have explained:

> While a corporation is, in some senses, an aggregation of many individuals, it is to be distinguished from a labor organization partly on the ground that the law has always treated corporations as enti-

of specific fiduciary duties of union officials and corporate officers and directors.[174] While it is true that unions may not have the same goals as corporations, the problems and functions of union fiduciaries are similar to those of corporate fiduciaries. Thus, when it comes to administering the property of the organization, particularly the handling of the members' or shareholders' money, the concerns of the union and the corporation are similar.[175]

It can be argued, however, that a union and a corporation should be accorded different treatment because a labor organiza-

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> ties in their dealings with outsiders and partly on the ground that a corporation is primarily an aggregation of property rather than a combination of property owners.

A. COX, D. BOK, & R. GORMAN, LABOR LAW: CASES AND MATERIALS 3 (9th ed. 1980).

[174] The fiduciary relationships of union representatives and corporate officials are *sui generis*. The nature and scope of the authority exercised is different because the underlying relationship between the union and its representatives differs from that of the corporation and its officials. *See, e.g.*, Note, *Position of Corporate Director as Sui Generis*, 35 MINN. L. REV. 564 (1951). As fiduciaries, however, both union and corporate officials are subject to a general fiduciary principle of loyalty. As Professor Scott has explained:

> Some fiduciary relationships are undoubtedly more intense than others. The greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty. Thus, a trustee is under a stricter duty of loyalty than is an agent upon whom limited authority is conferred or a corporate director who can act only as a member of the board of directors or a promoter acting for investors in a new corporation. All of these, however, are fiduciaries and are subject to the fiduciary principle of loyalty, although not to the same extent.

Scott, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 541 (1949).

[175] The reason for imposing fiduciary duties upon officials of both corporations and unions is that there is a danger that these officials will not deal fairly with members. In discussing the problem of the "directors who do not direct," Professor Bishop has explained that "the only legal deterrent to such conduct, and perhaps the only substantial deterrent of any sort, is the fear of civil liability." *Sitting Ducks, supra* note 148, at 1093. There are, in other words, substantial policy reasons for limiting the power of the corporation to indemnify its officers against the liability for disloyal conduct. The danger posed by unlimited corporate indemnification is that it diminishes the fear of liability, destroying the only legal deterrent that shareholders have against fiduciary wrongdoing. The same dangers are posed by unlimited power of the union to provide its officers with a union-supported defense of charges of breach of duty. Analytically, the conceptual problems presented by corporate indemnification are not that different from those posed by the counsel fee problem.

tion, unlike a business corporation, enjoys derivative protection through its members' constitutional rights of association. The Supreme Court's decision in *First National Bank v. Bellotti,*[176] however, has blurred this distinction. In *Bellotti,* the Court invalidated a Massachusetts criminal statute prohibiting banking associations and business corporations from making political contributions or expenditures to influence voting on referendum questions not materially affecting the property, business, or assets of the corporation.[177] The Court held that the statute violated the first and fourteenth amendments because the state statute abridged first amendment expression. According to the majority, the "inherent worth" of first amendment expression "does not depend upon the identity of its source, whether corporation, association, union, or individual."[178] The Court thus ex-

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[176] 435 U.S. 765 (1978). *See also* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 570-71 (1980); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980).

[177] First Nat'l Bank v. Bellotti, 435 U.S. 765, 774 (1978). The Massachusetts statute in question prohibited corporations and banking associations from making financial contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." MASS. GEN. LAWS ANN. ch. 55, § 8 (West Cum. Supp. 1980).

Although Justice Powell in *Bellotti* emphasized the importance of protecting corporate speech on political matters, 435 U.S. at 777-78, the logic of his decision can be read as establishing the cognate principle that corporations, like labor unions, exercise rights of association that have constitutional dimensions. *See The Supreme Court, 1977 Term,* 92 HARV. L. REV. 57, 165-67 (1978). If the corporation enjoys first amendment rights, as *Bellotti* now recognizes, certainly those rights permit corporate shareholders to associate and to exercise political expression collectively. *Cf.* NAACP v. Button, 371 U.S. 415, 428-29 (1963); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961); Bates v. City of Little Rock, 361 U.S. 516, 522-23 (1960); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945). *See also The Supreme Court, 1977 Term, supra* this note, at 166. Freedom of speech embraces more than individual expression; it includes the right of the individual to join others in an effort to make their speech effective. *See* NAACP v. Button, 371 U.S. at 452 (Harlan, J., dissenting).

The Supreme Court recently concluded that the protection afforded corporate speech in *Bellotti* also protects political expressions of public utilities regulated by the states. *See* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 541 (1980).

[178] First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978). In writing the opinion of the Court, Justice Powell stated that "[t]he proper question . . . is not whether corporations 'have' First Amendment rights and, if so, whether they

pressly rejected the notion that a corporation must be treated differently than an individual or an association for first amendment purposes.

Bellotti does not teach that unions and corporations should be treated exactly alike for determining the scope of the organizations' right to protect officers against the risk of liability and the cost of defending litigation. The *Bellotti* Court merely held that corporate speech must be accorded some protection under the first amendment. The Court did not hold that the first amendment protection accorded corporate speech was coextensive with that of individuals or labor unions.[179] It remains open whether unions should enjoy greater first amendment protection because they have traditionally engaged in political activity.

By supporting social and welfare programs such as occupational safety and health, national health insurance, and the negative income tax, some trade unions and their leaders have acted as "a social conscience of the American economy."[180] Yet by advancing programs and issues that are unpopular with the economic and political status quo, labor leaders have been placed in legal jeopardy. American trade union leaders historically have been targets of political harassment and persecution.[181] Lengthy

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are coextensive with those of natural persons," but rather, "whether [the statute] abridges expression that the First Amendment was meant to protect." *Id.* at 776. In finding that the Massachusetts statute abridged first amendment expression, Justice Powell emphasized that the corporate expression at issue was "the type of speech indispensible to decision making in a democracy," *id.* at 777, and was "at the heart of the First Amendment's protection." *Id.* at 776. In a separate concurring opinion, Chief Justice Burger stressed that the statute posed the risk of impinging on the first amendment rights of large media conglomerates and the corporate press. *Id.* at 796 (Burger, C.J., concurring). Justice White, in a dissenting opinion joined by Justices Brennan and Marshall, acknowledged that corporations enjoy first amendment protection, but argued *inter alia* that such protection extends only to matters affecting the business of the corporation. *Id.* at 805-06 (White, J., dissenting). Only Justice Rehnquist, in a separate dissenting opinion, rejected the notion that the first amendment covers corporate expression. *Id.* at 824-27 (Rehnquist, J., dissenting).

[179] First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978).

[180] A. REES, *supra* note 173, at 202.

[181] *See, e.g.*, Staub v. City of Baxley, 355 U.S. 313 (1958); Watkins v. United States, 354 U.S. 178 (1957); Bridges v. United States, 346 U.S. 209 (1953); United States v. CIO, 335 U.S. 106 (1948); United States v. Petrillo, 332 U.S. 1 (1947); Bridges v. Wixon, 326 U.S. 135 (1945); Thomas v. Collins, 323 U.S. 516 (1945); Bridges v. California, 314 U.S. 252 (1941); United States v. Hutcheson, 312 U.S. 219 (1941); Thornhill v. Alabama, 310 U.S. 88 (1940); *In re* Debs, 158

litigation, with its high human and monetary costs, can be effective in diverting trade unionists from their legitimate activities. Such prosecutions may be viewed as political assaults upon both the union and the individual defendant. Serious first amendment concerns are thus implicated whenever the membership authorizes spending its funds to protect officials against the burden of litigation. Because corporate indemnification does not normally raise first amendment concerns, courts must be cautious in applying corporate analogies to the counsel fee problem.

The public interest presents another factor for imposing special fiduciary obligations on union officials. When Congress enacted the LMRDA, it expressly recognized that the public has an interest in the internal affairs of unions.[182] It decided, rightly or wrongly, that the public interest requires union officials to adhere to a federal fiduciary standard in handling the money and property of the organization. Congress has made no similar demand of corporate officials.[183] A possible explanation for this dif-

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U.S. 564 (1895); P. TAFT, THE A.F. OF L. FROM THE DEATH OF GOMPERS TO THE MERGER (1959); P. TAFT, THE A.F. OF L. IN THE TIME OF GOMPERS (1957).

[182] *See* Nelson v. Johnson, 212 F. Supp. 233, 261-62 (D. Minn. 1962), *aff'd*, 325 F.2d 646 (8th Cir. 1963). There are thus strong policy reasons for making corporate analogies when union officials are charged with fiduciary wrongdoing. The members' right of association cannot be asserted to protect officials from imposition of liability under § 501. The Supreme Court has declared that, "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 514 (1972) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)). A state may, therefore, regulate first amendment activity whenever substantial state interests or policies are implicated. United Transp. Union v. State Bar of Mich., 401 U.S. 576, 584-85 (1971); UMW v. Illinois State Bar Ass'n, 389 U.S. 217, 222-24 (1967); Brotherhood of R.R. Trainmen v. Virginia State Bar Ass'n, 377 U.S. 1, 6-8 (1964); NAACP v. Button, 371 U.S. 415, 438 (1963). The Supreme Court has also recognized that a state may regulate the practice of law to prevent conflicts of interest in legal representation, even though first amendment activity may be involved. *In re* Primus, 436 U.S. 412 (1978); UMW v. Illinois State Bar Ass'n, 389 U.S. at 223-24; NAACP v. Button, 371 U.S. at 443. *See also* Pirillo v. Takiff, 462 Pa. 511, 516, 341 A.2d 896, 901 (1975), *appeal dismissed, cert. denied*, 423 U.S. 1083 (1976).

[183] It is striking that corporations—unlike unions—are not governed by a general federal fiduciary statute. The financial power of unions is impressive, but it pales in contrast to corporate might. In 1970 the assets of American corporations exceeded $1,750,000,000,000, and American corporate shareholders numbered only 26,500,000. H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES (2d ed. 1970).

ferent treatment is that, unlike shareholders, union members who become dissatisfied with the conduct of the organization's leadership cannot sell their membership rights, nor can they easily change to another organization.[184] Moreover, while market forces can sometimes impose external checks on corporate managerial abuses, there is no similar restraint upon union membership.[185] Finally, corporate expenditures for counsel fees of officers are normally approved by a majority of directors sitting on the corporation's board. Unions, however, do not have an "outside" board of directors. Thus, in the case of a union, the

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There is no convincing explanation for the lack of a disclosure act similar to the LMRDA for business. Encouraging honest corporate management promotes the public interest, and should be accorded at least as much recognition as the federal statutory policies now promoting honest labor unions. Equally important is the policy of striking a fair balance between union and management. These policies would be advanced by imposing federal fiduciary obligations upon corporate management.

Courts now occasionally recognize rule 10b-5 actions for breach of management fiduciary duty. *See, e.g.,* Goldberg v. Mernidor, 567 F.2d 209 (2d Cir. 1977); Healy v. Catalyst Recovery of Pa., Inc., 463 F. Supp. 740 (W.D. Pa. 1979). The prevailing view, however, is that any breach of fiduciary duty is not within the intended range of rule 10b-5. *See* Campbell, Santa Fe Industries, Inc. v. Green: *An Analysis Two Years Later,* 30 ME. L. REV. 187 (1979); Sherrard, *Federal Judicial and Regulatory Responses to* Santa Fe Industries, Inc. v. Green, 35 WASH. & LEE L. REV. 695 (1978). This is the position taken by most courts. *See, e.g.,* Rodman v. The Grant Foundation, 608 F.2d 64 (2d Cir. 1979); Hundahl v. United Benefit Life Ins. Co., 465 F. Supp. 1349 (N.D. Tex. 1979). There is thus a definite need for Congress to enact a corporate fiduciary statute.

Congress took a step in this direction during its latest session, when New York Rep. Rosenthal introduced The Corporate Democracy Act, H.R. 7010, 96th Cong., 2d Sess. (1980). The Chief features of Rosenthal's bill include requirements that the country's 800 largest corporations appoint a majority of independent outside directors to their boards, assure that the directors will not derive personal profits by the use of their position in the corporation, and disclose environmental and safety information. *Id.*

[184] *See* Morrissey v. Curran, 650 F.2d 1267, 1273 (2d Cir. 1981).

> The existence of a marketplace for shares changes the fundamental relationship of the shareholder to the corporation. The ability to trade at any time provides the shareholder a flexibility comparable to the partner's right of dissolution. The degree of liquidity determines the importance of structural formalities in a corporation and of accountability from officers and directors.

Knauss, *Corporate Governance—A Moving Target,* 79 MICH. L.REV. 478, 481 (1981).

[185] Knauss, *supra* note 184, at 481.

officials who approve the counsel fee expenditure may be the very individuals who will be receiving payment, or the approving officials may be closely associated with or dominated by the defendants. Under these circumstances, there is therefore reason for greater judicial scrutiny of union counsel fee expenditures.[186] In applying corporate analogies to the counsel fee problem, courts must give special consideration to the unique policy reasons for imposing union fiduciary duties under federal law.

2. The Relevant Factors for Analysis

There are thus policies that both favor and oppose counsel fee expenditures of the union. Whether one policy predominates over the other depends upon the analysis of a number of interrelated factors.

a. Nature of the Underlying Action

The first factor is the nature of the underlying action brought against the union officer. Drawing from corporate indemnification statutes, courts should first make a distinction between actions brought by third parties and derivative actions brought on behalf of the union under section 501. Once the nature of the action has been classified, the courts' attention should turn to an examination of the charges alleged in the action.

As a general proposition, unions should be granted relatively more freedom to pay counsel fees of officers in defending third party actions, unless the defense would not be in the best interest of the union or the action involves a purely personal matter. The courts' inquiry should focus on whether the lawsuit involves activity within the official's representative capacity. In the corporate context, the corporation can only indemnify liability or expenses incurred by officers acting in their "representative," not "personal" capacity.[187] The distinction between these capacities is one basis for determining whether the underlying third party action impinges on corporate interests. A corporation will usually have a valid interest in defending officers against third party actions that challenge representative action. The same

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[186] Morrissey v. Curran, 650 F.2d 1267, 1274 (2d Cir. 1981).

[187] *See, e.g.*, Bishop, *Current Status of Corporate Directors' Right to Indemnification*, 69 HARV. L. REV. 1057, 1067-68 (1956); *Indemnification of Directors, supra* note 145, at 1403-04 (1963).

rule should apply to unions.[188]

Thus, if the underlying litigation is a third party action alleging conduct relating to the officials' representative capacity, courts should presume that the union has genuine interests that justify a union-supported defense. In *Frantz v. Sheet Metal Workers Local 73*,[189] for example, the union and its president had been indicted for aiding and abetting violations of the Sherman Antitrust Act.[190] Members of the Local brought a section 501 action against members of the Executive Board for disbursing union funds for the president's defense. The court took judicial notice of the indictment in the underlying antitrust action. It concluded that the union's president was "charged with acts done in his capacity as union agent and that the union's criminal liability, if any, is based on [his official] actions."[191] The court dismissed the section 501 suit, concluding that the criminal antitrust suit had "a direct and injurious impact upon the union, and [was] in reality directed at the union."[192]

A union should ordinarily be permitted to defend its officials against third party litigation involving representative duties. A contrary result would deter capable persons from serving in leadership positions. It would also distort the union's decision-making by inducing union leaders to be overly cautious in administering the daily affairs of the union. A presumption that genuine union interests are affected in such cases is thus warranted and, unless rebutted, should justify a union-supported defense of its officers. If the underlying action, however, concerns activity or conduct undertaken in the officer's personal capacity, the union would lack an interest in the officer's defense, and should not be permitted to pay the officer's defense costs.

If the officer is seeking counsel fees to defend a derivative sec-

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[188] It is true that the distinction between "representative" and "personal" capacity may not be easily applied. The line separating each type of action can be just as difficult to discern as the distinction between purely personal expenditures and those representing the pursuit of legitimate union interests. But the distinction is important, and it may serve to dispose quickly of cases in which the challenged conduct is clearly representative or personal by any reasonable standard.

[189] 470 F. Supp. 223 (N.D. Ill. 1979).

[190] 15 U.S.C. §§ 1-7 (1974).

[191] Frantz v. Sheet Metal Workers Local 73, 470 F. Supp. 223, 229 (N.D. Ill. 1979).

[192] *Id.*

tion 501 action, courts must exercise extreme caution in allowing the union to pay fees. Their analysis should begin with a consideration of the charges alleged against the officer. If the charges rest on the allegation of conduct that, if proved, would amount to fiscal wrongdoing, then courts should require the union to remain neutral and not advance the officer counsel fees until the action has been terminated.[193] Here, the applicable corporate analogy is in the common law, not in the permissive indemnification statutes,[194] which generally allow advancements in derivative actions.[195] The corporate indemnification statutes should not be followed because advancements to union fiduciaries accused of financial wrongdoing would violate the policies of section 501. The common law corporate indemnification rule is the better rule because it requires the organization to remain neutral until the underlying allegations of fiscal wrongdoing have been resolved.[196]

If the charges in a section 501 action allege that union officers have violated the statute by making a union expenditure in excess of their authority, courts should be more permissive in allowing advancements of counsel fees. Unions should assist officers in defending official interpretations of union law because of the union's interest in defending the validity of internal law.[197] A contrary rule would be simply unfair to union officials and deter honest and conscientious interpretation of official authority.

b. Vendettas and Strike Suits

Particularly troublesome cases concern litigation brought against union officers by third parties alleging non-representa-

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[193] Of course, once litigation is terminated, the issue is whether officers can be reimbursed for counsel fees and expenses they have incurred. *See* notes 272-315 and accompanying text *infra*.

[194] *See* notes 150-152 and accompanying text *supra*.

[195] Of course, even under the permissive provisions of state indemnification statutes, indemnification would be improper as a matter of federal law if it violated the policy of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78jj (1934), or some other federal statute. *See also* note 170 *supra*.

[196] *See* notes 332-350 and accompanying text *infra*.

[197] Indeed, the union should generally be allowed to reimburse the officers for expenses and counsel fees incurred in such cases, *see* text accompanying note 298 *infra*, and the union may intervene in the action to defend its own interest.

tive conduct. Even when the underlying action seems personal, the union may yet claim an interest in the action by arguing that the litigation is a vendetta, brought to harass union officials. Whether the underlying litigation is a vendetta or strike suit is a third factor for determining the validity of a fee expenditure.

Section 501 litigation challenging the right of the International Brotherhood of Teamsters to pay for the legal defense of James R. Hoffa illustrates the vendetta defense. Mr. Hoffa, the union's president, had been named as a defendant in three criminal actions brought by the United States Department of Justice in the early 1960s. In *International Brotherhood of Teamsters v. Hoffa*,[198] union members brought suit against the General Executive Board of the International Union, alleging that Board members had breached their fiduciary duties by spending union funds to defend Mr. Hoffa.[199] As in *Cohen II*,[200] the defendant-

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[198] 242 F. Supp. 246 (D.D.C. 1965).

[199] When the § 501 action was brought, Mr. Hoffa was or had been a defendant in three separate relevant criminal proceedings. In 1962, Hoffa was brought to trial in Nashville, Tennessee for a criminal violation of § 302 of the LMRDA. That trial, known as the "Test Fleet trial," ended in a hung jury. Thereafter, Hoffa and three of his associates were indicted and subsequently convicted in Chattanooga, Tennessee, for bribing certain members of the Test Fleet jury. United States v. Hoffa, Crim. No. 11989 (E.D. Tenn.), *aff'd*, 349 F.2d 20 (6th Cir. 1965), *aff'd*, 385 U.S. 293 (1966), *motion for new trial denied*, 245 F. Supp. 772 (E.D. Tenn.), *aff'd*, 376 F.2d 1020 (6th Cir.), *cert. denied*, 389 U.S. 859, *motion for new trial denied*, 247 F. Supp. 692 (E.D. Tenn.), *aff'd*, 382 F.2d 856 (6th Cir. 1967), *vacated and remanded sub nom.* Giordano v. United States, 394 U.S. 310 (1969), *motion for new trial denied*, 307 F. Supp. 1129 (E.D. Tenn. 1970), *aff'd*, 437 F.2d 11 (6th Cir.), *cert. denied*, 402 U.S. 988 (1971). Six weeks after Hoffa's conviction in Tennessee, he was tried on charges of conspiracy to defraud a union pension fund and of criminal mail fraud in Chicago. That trial resulted in a conviction that was affirmed on appeal. United States v. Hoffa, Crim. No. 63-CR-317 (N.D. Ill.), *aff'd*, 367 F.2d 698 (7th Cir. 1966), *vacated and remanded*, 387 U.S. 231 (1967), *judgment of conviction reinstated*, 273 F. Supp. 141 (N.D. Ill. 1967), *aff'd*, 402 F.2d 380 (7th Cir. 1968), *vacated and remanded sub nom.* Giordano v. United States, 394 U.S. 310 (1969), *judgment of conviction reinstated*, (N.D. Ill. 1969) (unpublished order), *aff'd*, 436 F.2d 1243 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971). From 1961, the union's expenditures in the various Hoffa cases included $359,500 for the Chattanooga case, $49,500 for Chicago, and $496,500 for other Hoffa cases. On the basis of those amounts, it was estimated that the plaintiffs' § 501 suit would save the union over $1 million. *See* Colpo v. Hoffa, 81 L.R.R.M. 2545, 2552 n.62 (D.D.C. 1971), *aff'd*, 81 L.R.R.M. 2560 (D.C. Cir. 1972).

[200] Cohen II, *supra* note 94.

officers argued that the 1961 amendment to the International Constitution had authorized the counsel fee payments.[201]

The applicability of *Cohen II* to *Hoffa* was never determined because the case was settled before trial.[202] In the litigation leading to the settlement, the defendants alleged that the actions against Mr. Hoffa resulted from a personal vendetta by United States Attorney General Robert F. Kennedy, who frequently had expressed his desire to see Mr. Hoffa imprisoned.[203] The Execu-

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[201] International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246, 251-52 (D.D.C. 1965). This was the same amendment that the District Court in Cohen II held to be inconsistent with the policies of the LMRDA. Cohen II, *supra* note 94. *See also* notes 92-95 and accompanying text *supra*.

[202] A settlement agreement was approved in Colpo v. Hoffa, Civ. No. 1154-64 (D.D.C. Dec. 6, 1968) (unpublished). Pertinent provisions of the agreement are reported in Colpo v. Hoffa, 81 L.R.R.M. 2546, 2547 nn.14-16 (D.D.C. 1971), *aff'd*, 81 L.R.R.M. 2560 (D.D.C. 1972). The union agreed that it would no longer pay the legal expenses of Mr. Hoffa or any other officer in defending personal criminal or civil actions. 81 L.R.R.M. at 2547 n.14. The agreement also prohibited future expenditures to defend any criminal or civil action alleging breach of fiduciary duty. *Id.* By the terms of the agreement, the individual defendants and their bonding companies agreed to reimburse the union for $100,000 of the amount spent defending Mr. Hoffa. *Id.* at 2547. Because of bonding contracts, only the defendants' bonding companies reimbursed the union for the monies spent defending Hoffa. For a discussion of how security bonds and insurance policies may violate public policy in analogous cases, see notes 317-319 and accompanying text *infra*.

[203] Because of his service as chief counsel during the McClellan Committee investigations, Robert F. Kennedy viewed Hoffa as representing a "conspiracy of evil" that threatened the public and the government itself. As he explained in his book THE ENEMY WITHIN:

> Quite literally, your life—the life of every person in the United States—is in the hands of Hoffa and his Teamsters.
>
> But though the great majority of Teamster officials and Teamsters members are honest, the Teamster Union under Hoffa is often not run as a bona fide union. As Mr. Hoffa operates it, theirs is a conspiracy of evil.

R. KENNEDY, THE ENEMY WITHIN 162 (1960). *See also* V. NOVASKY, KENNEDY JUSTICE 394-402 (1961); Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967); Jacobs, *Extracurricular Activities of the McClellan Committee*, 51 CALIF. L. REV. 296 (1963). The fact that Kennedy desired to see Hoffa behind bars is undeniable. When Kennedy became Attorney General, for example, he organized a special Justice Department team headed by Walter Sheridan, a former FBI agent and McClellan committee investigator, to investigate and prosecute labor union racketeers. The Sheridan team, however, soon became known as the "get Hoffa squad." *See, e.g.*, S. BRILL, THE TEAMSTERS 38-40 (1978); V. NOVASKY, *supra* this note, at 403. One member of the so-called "get Hoffa squad" has reportedly con-

tive Board argued that the union had important interests in protecting Mr. Hoffa from the "Kennedy vendetta" because his services might be lost if an inadequate defense led to his imprisonment. The Board further argued that such harassing litigation might also discourage other capable persons from assuming leadership positions in the union. From the Board's perspective, the litigation against Mr. Hoffa was a vendetta against the organization.[204] These arguments illustrate how a union could use the vendetta theory to show an interest in litigation against its officers.

Of course, true vendettas on the part of the government are

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ceded that the Sheridan team had a "vendetta" against Hoffa: "Sure we had a vendetta . . . but you have to understand how terrible this guy was . . . . We weren't Nazis . . . but I guess in this day and age I'd have problems if other people organized a squad like this specifically against some other guy or group." S. BRILL, *supra*, at 40. For a review of the Kennedy-Hoffa "feud," see *id.* at 34, 38-40, 78, 374-75; V. NOVASKY, *supra* this note, at 396-439. *See also* A. SCHLESINGER, JR., ROBERT KENNEDY AND HIS TIMES, 172-75, 303, 310 (1978).

Others have rejected the theory of a vendetta against Hoffa. These writers argue that the vigorous Hoffa investigations and prosecutions were reasonable exercises of prosecutorial discretion. *See, e.g.*, NEW REPUBLIC, March 9, 1968, at 33 (Letter from Jacob Tanzer); NEW YORK REVIEW OF BOOKS, Sept. 26, 1968, at 75 (LETTER FROM ADAM YARMOLINSKI).

[204] Although reasonable persons may differ on the validity of the vendetta claim in *Hoffa*, the theory for a vendetta justification has strong support in the legislative materials accompanying the LMRDA. One of the central purposes of the Act was to strengthen union democracy and self-government Indeed, the Senate Report accompanying the Act declares that "in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents." S. REP. No. 187, 86th Cong., 1st Sess. 7 (1959). *See also Union Officials, supra* note 9, at 481. The statement by the Independent Study Group sponsored by the Committee for Economic Development concerning the administration of the Act is also highly significant:

> The guarantees contained in the Law (LMRDA) are designed to improve and not to impede the effects of the functioning of trade unions and collective bargaining. The agencies and men administering these regulatory provisions can help by carrying out their task in a manner calculated not to interfere with the conduct of normal union business. *It is important that the law not be used as a device to harass union leaders.* Such a result would be doubly unfortunate, since it would play havoc with orderly relations with any union and in collective bargaining and it would tend to discourage good men from seeking union office.

INDEPENDENT STUDY GROUP, THE PUBLIC INTEREST IN NATIONAL LABOR POLICY 148-49 (Comm. for Econ. Dev. 1961) (emphasis added).

highly unlikely.[205] The normal presumption is that criminal prosecutions are undertaken in good faith to fulfill a public duty to bring violators to justice.[206] A defendant can overcome this heavy presumption only by establishing prima facie evidence that the government's prosecution has been invidious or brought in subjective bad faith.[207] In most cases, the government's prosecution will survive claims of bad faith and vendetta.

The vendetta theory can also apply, however, where the underlying action is by a union member with a grudge against the union or its leadership. Indeed, many section 501 cases are filed by politically motivated members who are more interested in harassing incumbent officers than in correcting fiduciary abuses.[208] To the extent that section 501 lawsuits are politically

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[205] *But see* United States v. Phillips, 108 L.R.R.M. 2678 (N.D. Ill. 1981) (officers of air traffic controllers' union granted the right to an evidentiary hearing to establish their claim that the government's prosecution for an illegal strike was invidious and brought in bad faith).

[206] *See id. See also* United States v. Saade, 652 F.2d 1126, 1135 (1st Cir. 1981); United States v. Falk, 479 F.2d 816, 820 (7th Cir. 1978).

[207] *See* United States v. Phillips, 108 L.R.R.M. 2678, 2679 (N.D. Ill. 1981). *See also* United States v. Saade, 652 F.2d 1126, 1135 (1st Cir. 1981); United States v. Heilman, 614 F.2d 1133, 1138 (7th Cir. 1980).

[208] *See* notes 143-145 and accompanying text *supra*. If a union is denied the power to pay its officers' legal expenses before the termination of the proceedings, the individual officer must pay them. Many, if not most, officers will lack sufficient funds. While an officer may seek reimbursement from the union for legal expenses after vindication, *see* note 298 and accompanying text *infra*, the right of reimbursement will not help the officer who cannot afford to defend litigation or pay an amount necessary for an "effective" defense.

Of course, a defendant-officer would be required to pay legal expenses only when the underlying action is brought under § 501, and then only if the charges allege fiscal wrongdoing. Moreover, even in cases where the defendant-officer is denied an advancement of expenses from the union, the officer might receive voluntary contributions from other officers, representatives, or members. They might be solicited for voluntary contributions to a defense fund. Because union money would not be involved, § 501 and its policies would not be implicated. There is, however, the danger that in a dominated union, officers might try to coerce the membership to make contributions for their defense. Of course, threats of physical or economic harm would raise issues of criminal extortion. *See generally* W. LaFave & A. Scott, Handbook on Criminal Law § 704 (1972). A union agent would violate the Taft-Hartley Act § 8(b)(2), 29 U.S.C. § 141 (1947), by inducing or encouraging an employer to adversely affect a member's employment status, and would arguably breach the duty of fair representation and commit an unfair labor practice by discriminating against members who refuse to make voluntary contributions. *See generally* Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); NLRB v. Mi-

inspired either by internal union political dissidents or, in the unlikely event, by the government, the union will have important institutional interests at stake. These interests justify the provision of union counsel or payment of the defendant-officials' counsel fees, at least to assert vendetta defenses.

Courts could use existing statutory authority to deter bad faith litigation filed by union members. Section 501(b), for example, provides that plaintiff-members must establish "good cause" and obtain leave of court to sue before commencing a civil action.[209] The requirement of good cause can thus serve as a

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randa Fuel Co., 326 F.2d 172 (2d Cir. 1963).

There is also the possibility that a union official might seek insurance or obtain a security bond to protect against the type of expenses for which the union cannot assume responsibility. In the corporate context, directors and officers frequently obtain liability insurance against liability and the cost of litigation. *See, e.g.*, W. FLETCHER, *supra* note 19, at 588. This practice, however, has raised the serious question whether a director or officer should be allowed to insure against a risk for which the corporation itself cannot provide indemnity. The weight of authority is that insurance in such cases would violate public policy and thus be void because it would lessen the deterrent effect of statutory obligations and remedies. *See, e.g., Sitting Ducks, supra* note 148, at 1087; Comment, *Corporate Indemnification of Directors and Officers—The Expanding Scope of the Statutes*, 18 CATH. U.L. REV. 195, 217 (1968); Note, *Public Policy and Directors' Liability Insurance*, 67 COLUM. L. REV. 716, 719 (1967). The public policy limitation can also be applied to limit the authority of the corporation to indemnify any expense or liability incurred because of the imposition of a sanction for violation of a duty imposed by a federal statute. *See* SEC v. Continental Growth Fund, FED. SEC. L. REP. (CCH) ¶ 91,437 (S.D.N.Y. 1964); Note, *Indemnification of Directors: The Problems Posed by Federal Securities and Antitrust Legislation*, 76 HARV. L. REV. 1403, 1408-09, 1412-22 (1963). This public policy limitation on the right to insure should also apply in the union context.

[209] "No . . . proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte." 29 U.S.C. § 501(b) (1976), set forth in note 17 *supra*. The "good cause" requirement has been construed as an elastic concept establishing a safeguard for the union against harassing and vexatious litigation brought without merit or good faith. Cohen I, *supra* note 78, 182 F. Supp. at 622 n.10. *See also* Tucker v. Shaw, 378 F.2d 304 (2d Cir. 1967); Horner v. Ferron, 362 F.2d 224, 228 (9th Cir.), *cert. denied*, 385 U.S. 958 (1966); Holdeman v. Sheldon, 204 F. Supp. 890, 895-96 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962). The good cause requirement must accommodate two competing policies: 1) good cause must not be too strictly construed or union members will not be able to enforce the fiduciary provisions; and 2) too liberal an interpretation of the requirement may result in subjecting union officials to unjustified and harassing litigation. *See* Dinko v. Wall, 531 F.2d 68, 75 (2d Cir. 1976).

protective filter against vendetta litigation. Although one view of the good cause requirement is that it requires, at a minimum, that the section 501 complaint "state a good cause of action on its face," courts have looked "somewhat beyond the complaint" when a genuine issue concerning good cause is raised.[210] This in turn permits defendant-officials, with the financial support of their union, to present extrinsic evidence for establishing a vendetta claim.[211]

The factual showing necessary to satisfy the good cause requirement should be no more than that required to defend against a motion for summary judgment. Arguably it should be much less, "since at the earlier stage a plaintiff has not yet had a chance for discovery and a defendant will still have the later protection of a summary judgment motion."[212] At a minimum, the plaintiff-member should have the initial burden of demonstrating "a reasonable likelihood of success" on the merits and a "reasonable ground for belief" in the existence of any material fact alleged in the section 501 complaint.[213] The burden should

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[210] Horner v. Ferron, 362 F.2d 224, 229 (9th Cir.), *cert. denied,* 385 U.S. 958 (1966).

[211] Section 501(b) does not establish any procedure for making good cause determinations. Appellate courts have recognized that district courts have considerable discretion in making this determination. The good cause determination can be *ex parte,* as the statute specifically authorizes. 29 U.S.C. § 501(b) (1976), set forth in note 17 *supra.* Appellate courts, however, have admonished that the better practice is to permit defendant-officials to demonstrate the lack of good cause by allowing them to intervene in the good cause hearing, or if the action has commenced, to permit the defendants to move to vacate the court's *ex parte* determination. *See* Dinko v. Wall, 531 F.2d 68 (2d Cir. 1976) (citing Levinson v. Perry, 71 L.R.R.M. 2554 (S.D.N.Y. 1969)); Schonfeld v. Rarbach, 61 L.R.R.M. 2043 (S.D.N.Y. 1965); Penuelas v. Moreno, 198 F. Supp. 441, 449 (S.D. Cal. 1961)).

[212] Dinko v. Wall, 531 F.2d 68, 75 (2d Cir. 1976).

[213] Early commentators suggested that "good cause" requires the plaintiff to establish "probable cause" or "reasonable likelihood" for the belief that the facts warrant the commencement of § 501 proceedings. *See Union Officials, supra* note 9, at 466 ("probable cause"); *Counsel Fees, supra* note 1, at 453 ("reasonable chance of success"). In drawing on these authorities, the Second Circuit has interpreted the good cause requirement to mean that the plaintiff must show a reasonable likelihood of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence. Dinko v. Wall, 531 F.2d 68, 75 (2d Cir. 1976). *See also* Tucker v. Shaw, 378 F.2d 304, 306-07 (2d Cir. 1967); Holdeman v. Sheldon, 311 F.2d 2, 3 (2d Cir. 1962).

then shift to the defendant-official to rebut the existence of good cause by a preponderance of evidence, or to substantiate a vendetta claim.[214] For these limited purposes, unions should be permitted to represent officers or finance their representation at a good cause hearing.

In ruling on vendetta claims, courts should first consider the strength of the factual support for the claim. A vendetta claim could be established by evidence of subjective bad faith or by objective evidence establishing a pattern of bad faith conduct. For example, a pattern of filing baseless, repetitive claims may be viewed as objective evidence of bad faith.[215] Other relevant factors would include the speculative nature of the union's interest, the cost of the counsel fees and the likelihood that the expenditure or its prohibition would jeopardize the administration of union business. The size and financial condition of the union would also be relevant to the court's determination.

When the union's alleged interest is only hypothetical, the factual support for the claim conjectural, or the counsel fee expenditure potentially significant,[216] courts should take a restrictive view of the vendetta claim. Conversely, when the facts show that the risk of harassment is real and would likely threaten valid union activities, courts should defer to the members' wishes to use their funds to defend union officers. Only where the vendetta claim is established should the courts sanction union expenditures to defend against allegations of fiscal wrongdoing by union fiduciaries.[217]

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[214] In Holdeman v. Sheldon, 311 F.2d 2 (2d Cir. 1962), the court held that the test for determining whether to prevent defendant officials from using union counsel is "whether the plaintiff has made a reasonable showing that he is likely to succeed, and whether the conduct of the defendants is in conflict with the interests of the union." *Id.* at 3. Our analysis follows *Holdeman* except in that it recognizes that once the plaintiff has established good cause for the action, the burden would shift to the defendant-officers to rebut the good cause showing or assert the vendetta defense.

[215] *See, e.g.,* California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[216] *See* notes 233-236 and accompanying text *infra.*

[217] The analysis of the vendetta theory and the good cause requirement of § 501(b) has assumed that the § 501 suit is a civil action. Section 501(b) and the good cause requirement only apply to civil actions, and do not cover criminal actions brought by the government. This does not mean, however, that our analysis is irrelevant to criminal actions brought under § 501(c). Indeed, to commence a criminal action under § 501(c), the government should establish

In many cases, the union will incur the cost of unjustified litigation precipitated by officers who assert spurious claims of vendetta. The union must incur these costs, however, to ensure due process to protect the organization and its officers from actual vendettas. Moreover, as Professor Cox has explained, "A hundred-fold increase in the volume of litigation would not harm the labor movement. One of the proper costs of coming-of-age is the risk of unjustified litigation; the risk of unwarranted suits is the price we pay for the assertion that every man will have his day in court."[218]

A union could reduce some of the risk of unjustified litigation by having independent counsel, untainted by possible domination of union officers, investigate the claim and determine if it has factual support. This would provide an unbiased opinion of the vendetta claim, so that the membership could make an informed decision on whether to authorize an expenditure for counsel fees. If independent counsel advises that there is insufficient evidence to substantiate the vendetta claim, then the union would be justified in refusing to assist its officers, and the courts should defer to the union's determination.

The courts could also utilize existing statutory provisions to deter attorneys from bringing unfounded and vexatious litigation. In 1980, Congress amended the federal code to allow federal courts to require attorneys to personally pay the costs and counsel fees created by their dilatory and vexatious conduct.[219]

"probable cause" for the action, which would require a demonstration akin to the good cause requirement in civil actions. *See* United States v. Phillips, 108 L.R.R.M. 2678 (N.D. Ill. 1981); note 205 *supra*. Thus, the analysis for evaluating a vendetta claim would be practically identical for civil and criminal actions.

[218] *Internal Affairs, supra* note 1, at 853. *See also* Aaron, *The Labor-Management Reporting and Disclosure Act of 1959,* 73 HARV. L. REV. 851, 895 (1960). Of course, courts have the inherent power to protect individuals from abusive and bad faith litigation. For example, a court could dismiss plaintiff's action with prejudice. Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962). In cases where there is evidence of bad faith, either in filing or conducting litigation, a court could tax defendants' attorney's fees against plaintiff or even against plaintiff's attorney, if it could be established that the attorney has willfully abused judicial processes. Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980). However, "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *Id.*

[219] 28 U.S.C. § 1927 (1980). *See* Roadway Express, Inc. v. Piper, 447 U.S.

This new statutory provision offers trial judges a particularly effective means for deterring the labor bar from aiding section 501 plaintiffs who attempt to harass union fiduciaries.

c. Reasonableness of the Amount

A third factor for courts to consider is the reasonableness of the amount of the officer's counsel fees. The Second Circuit recently decided an important case that illustrates this factor and its problems. In *Morrissey v. Curran,*[220] a union dissident, James Morrissey, brought a section 501 suit against Joseph Curran, former president of the National Maritime Union (NMU), and other union officials. The plaintiff alleged that the officials had breached their fiduciary duties by establishing and receiving, pursuant to membership authorization, improper payments and excessive compensation from the union. In upholding the district court's findings of fiduciary breach,[221] the Second Circuit rejected a defense of membership authorization, and adopted a new test for determining whether authorized union expenditures violate section 501; ". . . where a union officer personally benefits from union funds, a court in a section 501(b) suit may determine whether the payment, notwithstanding its authorization, is

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752, 766 (1980).

[220] 650 F.2d 1267 (2d Cir. 1981). The litigation was brought by James M. Morrissey and Ralph Ibrahim, members of the National Maritime Union. Morrissey has been an unsuccessful candidate for union office who has also remained a "perennial and highly vocal dissident" within and out of the NMU. Morrissey v. Curran, 356 F. Supp. 312 (S.D.N.Y. 1973). In addition to protesting at union meetings, Morrissey has published a paper, The Call, which has charged the NMU leadership with various improprieties and violations of trust. *Id.* Morrissey has been beaten up, hospitalized, and expelled from the union, allegedly for his repeated challenges to the NMU leadership. *See* Wall St. J., July 13, 1981, at 1, col. 1. He has also waged a legal battle against the NMU leadership by bringing a series of § 501 cases against former NMU president, Joseph Curran, and other past and present union officials. *See, e.g.,* Morrissey v. Curran, 483 F.2d 480 (2d Cir. 1973), *cert. denied,* 414 U.S. 1128 (1974); Morrissey v. Curran, 356 F. Supp. 312 (S.D.N.Y. 1973). *See also* notes 272-299 and accompanying text *infra.*

[221] The court affirmed the district court findings that the defendants had breached their fiduciary duties by authorizing and receiving extra salary payments in lieu of vacations already taken. Morrissey v. Curran, 650 F.2d 1267 1279-80 (2d Cir. 1981). The appellate court also affirmed the district court's order requiring an accounting of improper union payments for the personal domestic and foreign vacation travel expenses of officers. *Id.* at 1279-80, 1284-85.

so manifestly unreasonable as to evidence a breach of the fiduciary obligation imposed by Section 501(a)."[222]

In fashioning its test, the court considered fiduciary standards applicable to trustees and corporate directors who have authorized transactions where there is a conflict of interest or self-dealing. Both the law of trusts and of corporations recognize a presumption of overreaching whenever a trustee, director, or controlling stockholder has a material interest in the outcome of the transaction or has engaged in self-dealing.[223] The normal fiduciary standard for corporate directors, for example, is the business judgment rule, which presumes the reasonableness of the director's transactions.[224] An *intrinsic fairness rule* exception, however, will defeat defenses based upon business judgment whenever the director had a material interest in the outcome of the transaction or had engaged in self-dealing.[225] In such cases, the burden will fall on the director to prove that the authorized transaction was fair and reasonable.[226]

In *Morrissey*,[227] the defendants receiving the improper payments were the very persons who served on the union committee that fixed officers' salaries and benefits. The court concluded that this was a compelling justification for judicial scrutiny of the reasonableness of the transactions, making the applicable fiduciary standard "at least as rigorous as that undertaken when the fiduciary is a corporate director who has an interest in the challenged transactions."[228]

Although the union expenditure in *Morrissey* involved compensation for officers, the same fiduciary standard is applicable

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[222] *Id.* at 1273-74.

[223] *See* RESTATEMENT (SECOND) OF TRUSTS §§ 170, Comment w, and 216 (1959); H. BALLANTINE, BALLANTINE ON CORPORATIONS § 76, at 193 (rev. ed. 1946). *See also* Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93 (1979).

[224] *See, e.g.*, 3 A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1039 (rev. perm. ed. 1975). *See also* Knauss, *Corporate Governance—A Moving Target*, 79 MICH. L. REV. 478, 490 (1981).

[225] "Thus, where a director or controlling stockholder has a material personal interest in the outcome of a transaction or is engaged in self-dealing, it will fall to that individual to prove that the transaction he or she authorized is intrinsically fair to the corporation and its stockholders. . . . This has been denominated the intrinsic fairness rule." Arsht, *supra* note 223, at 115-16.

[226] *Id.*

[227] Morrissey v. Curran, 650 F.2d 1267 (2d Cir. 1981).

[228] *Id.*

in reviewing the reasonableness of *any* union expenditure resulting in a financial benefit to an officer including authorized union expenditures for counsel fees.

There are a number of important reasons, however, for rejecting an overly broad application of the *Morrissey* test. One problem is that the test may encourage judges to bootstrap a finding of fiduciary liability when determining the reasonableness of the union's expenditures. Under a literal reading of the Second Circuit's test, a judge would be permitted to consider the reasonableness of an authorized union expenditure whenever an "officer personally benefits from union funds." A union officer, however, will always personally benefit from receiving union funds for salary increases, bonuses, or counsel fees. Furthermore, it is not uncommon for an authorized union expenditure to personally benefit an officer and still serve legitimate and important union interests.[229] It is frequently difficult to discern a line separating purely personal expenditures from those representing genuine union interests. But, in hybrid cases, the line of separation is imperceptible.[230] As a consequence, judges would likely rely on their subjective notions of what is "manifestly unreasonable" in determining fiduciary liability under the *Morrissey* test.

Under the analogous corporate fiduciary standard, the mere fact that a corporate director personally benefits from a transaction does not always establish a presumption of overreaching, nor would it invariably require a court to consider the reasonableness of the transaction. While evidence of a director's self-dealing will normally render moot the business judgment rule, not every personal interest will have that effect.

> To remove business judgment as a defense, the director's "interest" in the transaction must be tantamount to self-dealing or the transaction must be one in which he or she personally receives some tangible benefit not received by the corporation itself or by all stockholders pro rata, for which personal benefit he or she does not personally give consideration of commensurate value.[231]

The potential for self-dealing, however, should not serve as an open invitation for federal judges to make broad inquiries into the reasonableness of officers' financial benefits. The Second Circuit apparently recognized this when it acknowledged that

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[229] *See* notes 142-144 and accompanying text *supra*.

[230] *Id.*

[231] Arsht, *supra* note 223, at 116.

"[s]ection 501 does not convert judges into paymasters for union officers. The fiduciary standards for union officers impose liability upon them when they approve their receipt of excessive benefits, significantly above a fair range of reasonableness."[232]

Unfortunately, the *Morrissey* court failed to provide any guidance for determining whether a particular authorized expenditure is "significantly above a fair range of reasonableness" or is otherwise "manifestly unreasonable." In the absence of meaningful standards, judges may therefore decide the reasonableness of officers' financial benefits solely on the basis of intuition colored by predilections concerning the legitimacy of the expenditure. The danger here is not merely that the *Morrissey* test will lead to unprincipled decision-making, which it may, but more significantly that it will justify substantial federal court intrusions into internal union affairs. By permitting federal judges to make abstract inquiries into the reasonableness of financial benefits, the *Morrissey* court may improperly grant district judges a license to interfere with and to restrict the financial decisions of the union's membership under the guise of policing fiduciary misconduct.

Once judicial scrutiny of an authorized union expenditure is warranted because of the potential taint of self-dealing, the burden should be on defendant-officers to establish the fairness of the expenditure.[233] In determining whether defendants satisfy that burden, the courts' inquiry should be strictly limited to considering specific relevant factors. In the corporate context, compensation paid to officers must bear some relationship to the market value of their services in proportion to their ability, service, and time devoted to the corporation.[234] Moreover, corporate officers and directors who fix their own salaries must consider the financial conditions of the corporation; they cannot give away corporate funds in the guise of compensation.[235] The same considerations should apply when courts decide whether an authorized union expenditure for officers' compensation is

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[232] Morrissey v. Curran, 650 F.2d 1275 (2d Cir. 1981).

[233] Courts should thus apply the corporate fiduciary standard for directors when reviewing self-interest transactions authorized by union officers. *See, e.g.*, Lewis v. S.L. & E., Inc., 629 F.2d 764, 769 (2d Cir. 1980).

[234] *See, e.g.*, Glenmore Distilleries Co. v. Sredman, 267 F. Supp. 915, 919 (E.D.N.Y. 1967).

[235] H. BALLANTINE, BALLANTINE ON CORPORATIONS § 76, at 192-93 (rev. ed. 1946).

reasonable. The inquiry should be limited to determining whether the expenditure bears a reasonable relationship to the value of services rendered to the union, and whether it is too extreme given the financial condition of the union's treasury. The normal presumption should be that the union's expenditures are reasonable.

The same principles should apply to authorized union expenditures for officers' counsel fees. Unless the fee expenditure can be invalidated under other factors, the expenditure should be presumed fair and reasonable. If, however, there is evidence of self-dealing by officers benefiting from the transaction, the presumption of fairness falls and the burden should be on the defendant-officers to establish that the expenditure is fair and reasonable. The defendant-officer can discharge this burden by proving by a preponderance of the evidence that the fee expenditure bears a reasonable relationship to the value of the attorney's services in light of his skill, expertise, and the nature, complexity, and duration of the litigation. Courts must also consider whether the fee expenditure is reasonable given the union's financial condition.

There may be cases where the dollar amount, in and of itself, determines whether an authorized union expenditure violates section 501. For example, assume that the union membership authorizes the creation of a million dollar defense fund from the union's treasury to defend officers from vendetta litigation, or authorizes a similar expenditure as a salary increase for its president. It would be contrary to the officers' duties as fiduciaries to make expenditures that would prevent the union from performing its collective bargaining obligations and discharging its duty of fair representation.[236] Even without considering whether the officer has engaged in self-dealing and the like, a court should invalidate such expenditures if they would dangerously deplete the union treasury and thereby render the union ineffectual as a collective bargaining agent.

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[236] Of course, it would be an extreme case where reasonableness of amount would be a determinative factor. In the case of an affluent union, there is little danger that the expenditure of union funds would adversely affect the performance of collective bargaining responsibilities. It is also unlikely that the membership of a small and financially weak union would authorize an expenditure from the union's treasury that would render the union ineffectual as a collective bargaining agent.

d. Public Policy and Deterrence

In seeking to accommodate the fiduciary obligations of section 501 and the rights of unions to defend officers against harassing litigation, courts should also consider a fourth factor—public policy and deterrence. A corporation cannot, any more than an individual, engage in conduct contrary to law or public policy.[237] The same principle applies to a union's counsel fee expenditures.

The threat of fiduciary liability is probably the most effective legal protection against dishonest and disloyal union officials.[238] A strong public policy thus favors maintaining the deterrent effect of the statute. Certainly it would be contrary to public policy to allow the membership to reimburse an officer for personal liability incurred in the unsuccessful defense of a section 501 suit.[239] Similarly, the public interest would be jeopardized by allowing the membership to advance its officers the cost of legal defense in a pending section 501 action alleging fiscal wrongdoing. Defendant-officers could rely upon the power and wealth of the union to attempt to defeat membership claims; consequently, they would have significantly less fear of fiduciary liability and the *in terrorem* effect of civil liability would be thwarted.[240] Moreover, it is the proceeding determining the mer-

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[237] *See, e.g.*, 6 W. FLETCHER, *supra* note 85, § 2491.

[238] The corporate rules limiting the power of the corporation to indemnify officers against fiduciary liability have been justified on the theory that the threat of fiduciary liability is the only real deterrent protecting the organization against unscrupulous officers and directors. *See Indemnification, supra* note 142, at 834. *See also* note 174 *supra*.

[239] *See Counsel Fees, supra* note 1, at 462-63. It would be perverse to allow the membership to put the union's money back into the pockets of the very individuals who have already spent or otherwise distributed union funds in violation of their fiduciary duties. *See* Morrissey v. Segal, 526 F.2d 121 (2d Cir. 1975), in which the court stated, "[I]n no case was it suggested that indemnification would be required or even proper after an adjudication that [defendant pension] trustees had breached their duty to the union." *Id.* at 127.

[240] *See generally* Globus v. Law Research Serv., Inc., 418 F.2d 1276, 1288 (2d Cir. 1970) (citing 3 L. LOSS, SECURITIES REGULATIONS 1831 (1978)). *See also* W. CARY, *supra* note 19, at 962-65; *Sitting Ducks, supra* note 148, at 1093. The rationale of public policy can be asserted to justify precluding the union from paying the litigation expenses or liability of officers in any civil or criminal action involving fiscal wrongdoing unrelated to the performance of union duties. It would, for example, be contrary to § 501 and public policy to permit union officers to use their union as a convenient source of funds to protect

its of the section 501 claim that creates the potential for self-dealing and conflict of interest.[241]

Thus, one touchstone for determining the suitability of a union-supported defense of officers is whether spending union funds would frustrate the policies served by imposing fiduciary liability. Indeed, denying a union-supported defense may itself be detrimental to union interest by forcing officers to be overly cautious or to avoid leadership responsibility altogether.[242] If officials face potential liability for making honest mistakes while acting as union representatives, persuasive policy reasons exist for permitting the union to underwrite the officer's defense. These policies favor union support either when suits are brought by a third party alleging wrongful union-related conduct, or when a defendant establishes a vendetta claim. Public policy normally prohibits counsel fee expenditures by unions when the underlying action is a pending section 501 suit involving fiscal wrongdoing, or when the underlying action alleges conduct unrelated to the representative capacity of the officer.

e. Stage of the Proceedings

The fifth factor affecting the validity of a fee expenditure is whether counsel fees are requested before any legal proceeding or after the litigation is terminated. For example, if union officials are subpoenaed to appear before a grand jury or a legislative committee, they may want the union to pay the legal expenses. If a union member brings a section 501 action to enjoin such expenditures, the court will confront the counsel fee problem before any action commences against the official. At the other extreme, officials may seek union reimbursement for legal expenses or for personal liability arising from a judgment or settlement.

(1) The Pre-Commencement Stage—Grand Jury and Legis-

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them from the threat of liability for purely personal conduct. Even if the imposition of liability is intended to merely shift the loss caused by careless or negligent conduct, or to impose liability without fault, the public arguably has an interest in preventing the defendant from tapping the union's treasury to pay the litigation expenses or liabilities of a purely personal obligation.

[241] *See* Milone v. English, 306 F.2d 814, 817 (D.D.C. 1962).

[242] *See* Conard, *supra* note 140, at 905.

lative Committee Investigations

The grand jury context illustrates the variety of counsel fee problems that arise before a legal action begins. Although there are no section 501 cases directly on point, there are analogous cases involving motions to disqualify union-supported counsel from representing multiple witnesses before a grand jury.[243]

In *Pirillo v. Takiff*,[244] a Pennsylvania grand jury was convened to investigate possible police corruption in the Philadelphia Police Department. The Fraternal Order of Police, a union representing members of the Philadelphia Police Department, publicly vowed to oppose "any form of cooperation by individual policemen with the Special Prosecutor's office and with the investigating grand jury."[245] Under a third-party fee arrangement, the union agreed to pay counsel fees for any police officer called to testify before the grand jury. The union then retained two attorneys to represent those police officers. The judge supervising the grand jury investigation disqualified the attorneys from representing the witnesses, and the Supreme Court of Pennsylvania affirmed.

In upholding the disqualification, the court emphasized the dangers of potential conflicts of interest created by the multiple representation and the fee arrangement.[246] The court found the potential conflicts of interest substantial: the union had interests that may have been adverse to individual witnesses,[247] and union officials had publicly acknowledged the organization's opposition

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[243] *See, e.g., In re* Special Feb. 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978); *In re* Taylor, 567 F.2d 1183 (2d Cir. 1977); *In re* Investigation Before Feb. 1977, Lynchburg Grand Jury, 563 F.2d 652 (4th Cir. 1977); *In re* Grand Jury Empaneled Jan. 21, 1975 (Joseph Curran), 536 F.2d 1009 (3d Cir. 1976); *In re* Investigation Before Apr. 1975 Grand Jury (Sol Z. Rosen), 531 F.2d 600 (D.D.C. 1976); *In re* Gopman, 531 F.2d 262 (5th Cir. 1976); *In re* Grand Jury, 446 F. Supp. 1132 (N.D. Tex. 1978); *In re* Grand Jury Investigation, 436 F. Supp. 818 (W.D. Pa. 1977), *aff'd*, 576 F.2d 1071 (3d Cir.), *cert. denied*, 439 U.S. 964 (1978); *In re* Grand Jury Proceedings, 428 F. Supp. 273 (E.D. Mich. 1976); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), *aff'd per curiam*, 466 Pa. 187, 352 A.2d 11, *appeal dismissed, cert. denied*, 423 U.S. 1083 (1976).

[244] 462 Pa. 511, 341 A.2d 896 (1975), *aff'd per curiam*, 466 Pa. 187, 352 A.2d 11, *appeal dismissed, cert. denied*, 423 U.S. 1083 (1976) [hereinafter cited as Pirillo v. Takiff].

[245] Pirillo v. Takiff, *supra* note 244, 462 Pa. 511 at 518, 341 A.2d at 899.

[246] Pirillo v. Takiff, *supra* note 244, 462 Pa. 511 at 524-29, 341 A.2d at 902-05.

[247] Pirillo v. Takiff, *supra* note 244, 462 Pa. 511 at 524, 341 A.2d at 899, 902.

to the grand jury investigation.[248] The attorneys' disqualification was thus necessary to protect the union and its members, as well as the public interest in the disclosure of crime.

Grand jury investigations also present section 501 issues.[249]

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[248] Pirillo v. Takiff, *supra* note 244, 462 Pa. 511 at 526-27, 341 A.2d at 904. As one commentator has observed: "[*Pirillo*] clearly implies that the representation of conflicting interests in furtherance of a stonewall defense is contrary to the attorney's obligation not to impede the administration of justice, and, therefore, that disqualification is warranted to protect the integrity of the grand jury investigation." Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 U.C.L.A. L. REV. 1, 14-15 (1979) [hereinafter cited as *Disqualification*].

[249] For a discussion of conflicts of interest problems arising from multiple representation of witnesses before a grand jury investigation, see *Disqualification, supra* note 248; Tague, *Multiple Representation of Targets and Witnesses During a Grand Jury Investigation*, 17 AM. CRIM. L. REV. 301 (1980) [hereinafter cited as *Grand Jury*]. For a discussion of analogous conflict of interest problems arising from multiple representation of the union and its officers, see notes 364-404 and accompanying text *infra*.

Multiple representation invariably creates potential conflicts of interest—there is always the possibility that the interest of individual clients will be adverse, creating conflicting loyalties for the attorney.

> Conflicts usually arise because one defendant implicates the other, one defendant's culpability is greater than that of the other, or one defendant's defense is inconsistent with that of the other. To say that some form of conflict will occur whenever counsel represents more than one defendant is probably not an exaggeration.

Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075, 1077 (1977) [hereinafter cited as *Criminal Cases*]. Moreover, the potential for conflicts also prompts serious questions of possible interference with the functioning of the grand jury and the integrity of its investigation. *See, e.g., Disqualification, supra* note 248, at 14-20, 22-26, 93-97; *Grand Jury, supra* this note, at 318-30. For a discussion of ethical questions arising from multiple representation under the ABA Code of Professional Responsibility, see *Disqualification, supra*, at 320-28. The potential conflict of interest from multiple representation may violate either the disciplinary rules of Canon 5 of the Code, which condemns conflicts of interest and requires that "[a] lawyer should exercise independent professional judgment on behalf of a client," or those of Canon 6 of the Code, which requires that "[a] lawyer should represent a client competently." ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANONS 5 & 6. It is well settled that the courts, as an incident to their supervisory authority over grand jury proceedings, have the power to discipline an attorney whose unethical conduct relates to the grand jury. *See Disqualification, supra*, at 17 n.77. There is disagreement, however, among the courts concerning the right of individual witnesses to waive potential conflict of interest in their legal representation. *Compare In re* Taylor, 567 F.2d 1183, 1191 (2d

Assume that section 501 applied to the union in *Pirillo*, and that the subject matter of the investigation concerned allegations of official corruption within the union.[250] The union's public opposition to the investigation, coupled with the fee arrangement, would arguably violate section 501 because the union would be seeking to frustrate an investigation of fiduciary wrongdoing. The union's activity would also impede the grand jury investigation, and reduce the deterrent effect of the statute by blocking disclosure of fiduciary wrongdoing.

In re Gopman[251] involved a federal grand jury investigation of possible LMRDA violations, including alleged embezzlement, failure to maintain records, and the destruction of union records.[252] The grand jury subpoenaed three union officials, requesting them to appear and to produce union records. Union-retained counsel represented the officials, who were not targets of the investigation. Having been advised of possible liability by counsel, the witnesses invoked the fifth amendment and refused to produce the requested records.[253] The government then moved to disqualify the union attorney from representing both the union and its officials, claiming a conflict of interest prevented the union from receiving effective counsel. The district court granted the government's motion, premising its order on the court's authority to regulate the conduct of attorneys practicing before it, and the Fifth Circuit Court of Appeals affirmed.[254]

The Fifth Circuit emphasized that the grand jury was investigating possible breaches of fiduciary duty by union officials. It found that the union's attorney had placed himself "in a situation where conflicting loyalties could affect his professional judg-

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Cir. 1977) (waiver permitted) *with In re* Grand Jury Proceedings, 428 F. Supp. 273, 278 (E.D. Mich. 1976) (witnesses cannot waive the right of the public to an effective functioning grand jury investigation). *See also Grand Jury, supra* this note, at 324.

[250] Section 501 could not have been raised in Pirillo v. Takiff, *supra* note 244, because the union represented public employees and was therefore not subject to LMRDA jurisdiction. *See* LMRDA §§ 3(e), (f), (j) 29 U.S.C. §§ 401-02 (1976). Common law fiduciary issues could have been raised, but were not.

[251] 531 F.2d 262 (5th Cir. 1976).

[252] *Id.* at 264.

[253] *Id.* at 264-65.

[254] *Id.*

ment."[255] This "conflict arose when, on the one hand, the interests of appellant's union clients pointed toward disclosure, but, on the other hand, appellant was advising the individual witnesses as to whether disclosure should be made."[256] As the court explained:

> [W]hen possible violations of [the LMRDA] are under investigation, it is evident that the affected union's interest will generally be in the fullest possible disclosure of pertinent records. Only if such disclosure is made can the unions be certain that possible problems affecting their rights under the Act are being thoroughly examined. For the same reason, in a normal case union counsel with his client's interests at heart would tend to favor a complete disclosure of such records. The trial court concluded that appellant could not aggressively and diligently pursue this goal while advising the union's own officials on whether to produce the records and what testimony, if any, to give regarding them.[257]

To permit unions to retain legal counsel for officials called to testify before a grand jury investigating possible fiduciary wrongdoing would present a potential conflict with section 501 policies. A union would be providing legal representation for persons who may have interests contrary to the organization's interest in the disclosure of official corruption. This would present the potential for the very conflict of interest that the Third Circuit found to be contrary to LMRDA policies in the *Cohen* litigation.[258]

Courts, however, must not indiscriminately apply section 501

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[255] *Id.* at 267.

[256] *Id.*

[257] *Id.* at 266.

[258] *See* notes 88-90 and accompanying text *supra*. The corporate indemnification statutes vary on the question of whether the corporation can indemnify before the commencement of a civil or criminal proceeding. In specifying the types of actions for which indemnification will be allowed, the New York statutes refer only to "civil and criminal proceedings," N.Y. BUS. CORP. LAW § 723(a) (McKinney Supp. 1980), while the Model Act and the California and Delaware statutes specifically refer to a "threatened, pending or completed action or proceeding, whether civil criminal, administrative or investigative." ABA-ALI MODEL BUS. CORP. ACT ANN. 2D § 5(a); CAL. CORP. CODE § 317(a) (West Cum. Supp. 1980); DEL. CODE tit. 8 § 145(a) (1975 & 1980 Supp.). Thus, a corporate officer in New York may not be indemnified against the expenses of preparing for and defending against an SEC investigation, *see* Johnston, *Corporate Indemnification and Liability Insurance for Officers and Directors*, 33 BUS. LAW. 1993, 1997 (1978), while corporate officers in Delaware and California can be indemnified for such expenses.

to preclude union representation of witnesses called to testify before a grand jury or legislative committee. Courts should permit unions to finance officials' legal representation if the investigation involves matters relating to the officers' representative capacity, or to genuine union interests. This, of course, assumes that the subject matter of the investigation is disclosed to the witnesses and the union before testimony is taken. If the subject matter of the investigation is not disclosed,[259] there is even greater reason for permitting the union to financially support the legal representation of officials called as witnesses. Genuine union interests may be implicated in the investigation, and it is the government that holds information necessary to determine the investigation's effects on union interests.

If the subject matter of the investigation is disclosed and it concerns possible section 501 violations, the potential for conflict with section 501 policies may justify prohibiting union representation of witnesses called before a grand jury or legislative committee. Because any conflict with section 501 policies is merely potential, however, there is reason to require assurances that the conflict will materialize before ordering the disqualification of union counsel. Whether a court should disqualify union representation in these situations requires careful consideration of several factors.

One highly relevant factor is whether a union provides legal assistance to a witness who is a *target* of a section 501 investigation.[260] Payment of counsel fees for a target would not of itself present a conflict,[261] but there is a reasonable likelihood that a conflict of interest may surface whenever the investigation has focused upon a particular official whose legal representation the union actively supports. Moreover, if a union provides representation for both target and non-target witnesses, or if the same

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[259] Indeed, the government does not always disclose the subject matter of the investigation or the identity of witnesses. "The grand jury operates in secrecy and secrecy is frequently a vital component of a successful investigation." *Grand Jury*, *supra* note 249, at 308. While the Department of Justice frequently informs a witness of the general subject matter of grand jury investigations, the Department will keep such matters secret if disclosure would adversely affect the investigation. *Id.* at 308 n.29 (citing UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, tit. 9, § 9-11-250 (1977)).

[260] *See Disqualification*, *supra* note 248, at 3-4. *But see Criminal Cases*, *supra* note 249, at 1107.

[261] *Criminal Cases*, *supra* note 249, at 1107.

attorney represents targeted officials and the union, the joint representation itself presents a potential conflict of interest among clients. This conflict will provide an independent basis to disqualify the joint representation.[262]

A target of a grand jury or legislative investigation, however, may be innocent, and the "target" may be the result of an overzealous or politically ambitious prosecutor. Thus, the simple fact that a witness is a target of an investigation of fiduciary wrongdoing should not, in itself, disqualify union representation under section 501.

On the other hand, if union officials publicly oppose cooperation with the investigation, as in *Pirillo*,[263] courts should disallow union representation. Disqualification may also be necessary if the union representation presents a stonewall defense to impede the investigation.[264] In these circumstances, a fee arrangement with the union would have a chilling effect on individual witnesses' cooperation with the investigation for the sole reason that cooperation would likely preclude further financial assistance from the union.[265] This impediment to the disclosure of fiduciary misconduct would violate the policies of the LMRDA.

Courts should, however, permit unions to provide legal assistance to officers to establish that a grand jury or legislative investigation is without merit. Likewise, unions should be able to finance counsel to prove a strike suit or that the investigation is a vendetta. Indeed, the vendetta theory of justification may be particularly credible in the context of a grand jury or legislative investigation.

Establishing "good cause" for section 501 litigation and determining the merits of a grand jury or legislative investigation are very different tasks. In a grand jury investigation, there is theoretically no need to worry about vendettas, because the investigation is instituted to discover the truth of allegations of wrongdoing. The truth-seeking process of the grand jury should

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[262] *See, e.g., Grand Jury, supra* note 249, at 312.

[263] Pirillo v. Takiff, *supra* note 244.

[264] For a discussion of the dangers of a stonewall defense of grand jury proceedings, see *Disqualification, supra* note 248, at 22-28.

[265] In Pirillo v. Takiff, *supra* note 244, the court observed that the "fee arrangement clearly has a chilling effect upon a police witness who is considering cooperation, since his access to F.O.P. paid counsel depends directly on his agreement not to cooperate." Pirillo v. Takiff, *supra* note 244, 462 Pa. 511 at 527, 341 A.2d at 904.

further union interests by promoting the discovery of possible fiduciary breaches. On the other hand, grand juries can be instruments of abuse, and legislative investigations can be instituted for harassment and other unworthy purposes. The McCarthy hearings in the 1950s established this proposition all too well. Moreover, union leaders have historically been targets of vendettas. These strong reasons ought to strike the balance in favor of permitting unions to pay counsel fees in grand jury or legislative investigations when asserting a claim of vendetta. Only when the witness is a target of a section 501 investigation that union officials openly opposed should a court deny claims of vendetta or strike suit, and preclude the union's payment.

Similarly, if the subject matter of the investigation is unrelated to the official's union duties or responsibilities, courts should not allow the union to pay the witnesses' counsel fees. *In re Grand Jury Proceedings*[266] involved union members called to testify before a special grand jury investigating possible federal criminal violations relating to the disappearance of James R. Hoffa. Union lawyers represented the witnesses called to testify.[267] In granting the government's motion to disqualify union representation of the witnesses, the district court concluded that the multiple representation would give rise to a conflict of interest.[268] The court further questioned the union's interest in the representation, observing that it was "hard pressed to find any justification for union representation of members that have come under grand jury scrutiny for possible criminal wrongdoing surrounding the disappearance of James R. Hoffa."[269]

If an underlying investigation is unrelated to official responsibilities, unions lack a sufficient interest to justify expenditures for the legal representation of witnesses. Any counsel fee arrangement between a union and witnesses would be solely for the personal benefit of witnesses. It would thus violate the fiduciary standards of section 501. It is always possible, however, that the investigation may, at some point, implicate union inter-

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[266] 428 F. Supp. 273 (E.D. Mich. 1976).

[267] *Id.* at 278.

[268] *Id.* at 277.

[269] *Id.* at 278. One could, of course, argue that there was a nexus between the grand jury investigations and the lawful activities of the Teamsters Union. The Hoffa disappearance sullied the Union's reputation, and new allegations or findings could have further adversely affected it.

ests. Courts should therefore exercise restraint when ruling on motions to disqualify union representation at the pre-commencement stage.

(2) The Post-Proceeding Stage—Reimbursement and Surcharge

Although courts may deny unions power to authorize expenditures to defend officers charged with violating fiduciary duties, it does not follow that a union should also be denied the right to reimburse an officer who has been vindicated. It is now settled that unions have the authority to adopt a constitutional amendment, bylaw, or membership resolution authorizing reimbursement of legal fees of union officers who have been vindicated on the merits.[270] Moreover, if a union officer is held liable on some section 501 charges while other actions are dismissed on the merits, reimbursement is available for that proportion of the attorney fees allocable to the dismissed charges.[271]

A union's authority to reimburse its officers for legal expenses must be distinguished from the right of union officers to compel reimbursement. If union officers are denied reimbursement for their legal expenses, there will be additional issues concerning whether the officers can be surcharged, or taxed for the plaintiff's litigation costs.

(A) Reimbursement for Legal Expenses of Officers

(i) Union Authority to Reimburse

Morrissey v. Curran, (Morrissey I)[272] also illustrates common problems arising when unions reimburse officers for legal expenses. James Morrissey and two other NMU members[273]

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[270] *See* Morrissey v. Curran, 650 F.2d 1267, 1277 (2d Cir. 1981); Morrissey v. Segal, 526 F.2d 121, 121-27 (2d Cir. 1975); Holdeman v. Sheldon, 311 F.2d 2, 3 (2d Cir. 1962); Cohen I, *supra* note 78.

[271] The fee would be allocated on the basis of the percentage of time attributed to successfully resisting the dismissed claims. *See* Morrissey v. Curran, 650 F.2d 1267, 1277 (2d Cir. 1981); Morrissey v. Segal, 526 F.2d 121 (2d Cir. 1975).

[272] Morrissey v. Curran, 423 F.2d 393 (2d Cir.), *cert. denied*, 399 U.S. 928 (1970). This litigation was but one of a series of actions Morrissey has brought against Joseph Curran and other union officers. *See* note 220 *supra*.

[273] These three plaintiffs had unsuccessfully attempted to obtain union office themselves on prior occasions. *See* Morrissey v. Shultz, 311 F. Supp. 744

brought a section 501 suit claiming that officers, employees, and trustees of the NMU officers' pension plan[274] had committed a fiduciary breach by amending the plan to provide benefits to non-officer employees in violation of the union constitution.[275] The defendant-officers contended that the constitution authorized them to determine salaries and to bargain collectively for all NMU staff employees, empowering them to provide pension benefits for non-officers.[276] In granting summary judgment for the plaintiffs, the district court scrutinized the union's constitution and concluded that it forbade inclusion of non-officers in the plan. The court thus reasoned that the defendants committed a fiduciary breach by authorizing plan disbursements to non-officers.[277] Shortly after the district court decision, the membership approved constitutional amendments that authorized the defendants to designate certain non-officers to be eligible for benefits under the officers' pension plan, and "to validate retroactively all pensions heretofore paid under the plan."[278] When

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(S.D.N.Y. 1970).

[274] The defendants included the president of the NMU, Joseph Curran; the NMU Secretary-Treasurer, Shannon Wall; the Assistant to the President, William Perry; and three trustees of the NMU Officers' Pension Plan, Martin Segal, Abraham E. Freedman, and Leon Karchmer. Morrissey v. Curran, 302 F. Supp. 32, 33 (S.D.N.Y. 1969), *aff'd in part, rev'd in part,* 423 F.2d 393 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970). Defendant-trustee Freedman served as both trustee and General Counsel of the NMU. Morrissey v. Curran, 351 F. Supp. 775, 778 (S.D.N.Y. 1972).

[275] The plaintiffs relied on Article 14 of the 1960 Constitution of the International Union, which deleted the word "employees" from the provision establishing the Officers' Pension Plan, and hence provided, "All officers shall be eligible for benefits under the [Pension Plan]." Morrissey v. Curran, 302 F. Supp. 32, 34 (S.D.N.Y. 1969), *aff'd in part, rev'd in part,* 423 F.2d 393 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970).

[276] Morrissey v. Curran, 302 F. Supp. 32, 34 (S.D.N.Y. 1969), *aff'd in part, rev'd in part,* 423 F.2d 393 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970).

[277] Morrissey v. Curran, 302 F. Supp. 32, 35 (S.D.N.Y. 1969), *aff'd in part, rev'd in part,* 423 F.2d 393 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970). The circuit court held that "the defendants should account for and repay pension funds accrued for and paid to non-elected union employees, [and] that the defendant trustees should be enjoined from paying out of the Officers' Pension Plan fund further benefits to non-officers and [that] the plaintiffs should recover costs and attorneys' fees." 423 F.2d at 396-97.

[278] Morrissey v. Curran, 423 F.2d 393, 397 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970). After the membership approved the amendments, the plaintiffs promptly filed motions in district court to declare the amendments invalid as exculpatory under § 501(a) and to enjoin their implementation. 423 F.2d at

the case reached the Second Circuit, the "major dispute" involved the validity of the constitutional amendments.[279] The appellate court, relying on the public policy rationale of *Cohen II*,[280] invalidated them.[281]

On remand to the district court, the parties stipulated that the invalid contributions to the fund amounted to $1,628,931 and that certain defendants, trustees of the fund, had authorized unlawful payments totaling $371,271 to five employees.[282] The largest payment was $222,200 to defendant William Perry, who had recently been discharged from his union position by NMU President Joseph Curran, also a defendant in the original action.[283] The court held a hearing to determine the liability, if any, of the three defendant-trustees for the nonrecoverable unlawful payments.[284] The district judge held that one of the defendant-trustees was personally liable for his "reckless behavior" in giving a legal opinion as counsel to the trustees who authorized improper pension payments.[285] The two other defendant-

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397. The district court denied these motions without opinion. *Id.*

The plaintiffs also filed a motion to enjoin defendants from being represented by union counsel and to require them to pay for their own representation. *Id.* The district court never ruled on this motion, and on remand from the Second Circuit, the court was instructed that the Circuit's "controlling cases on this point are Tucker v. Shaw, 378 F.2d 304 (2d Cir. 1967), and Holdeman v. Sheldon, 311 F.2d 2 (2d Cir. 1962), in which [the court] held that all that is necessary for enjoining of the defendants in a § 501 action is that the plaintiff make 'a reasonable showing that he is likely to succeed.' " 423 F.2d at 400.

[279] Morrissey v. Curran, 423 F.2d 393, 400 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970).

[280] *See* Cohen II, *supra* note 94.

[281] The court observed that the constitutional amendment in the *Cohen* litigation was invalidated both "because the local union authorized actions beyond its powers under the constitution, and because its effort to pay attorneys' fees for officers who had been derelict in their duties was inconsistent with the aims and purposes of the Labor Management Reporting and Disclosure Act." Morrissey v. Curran, 423 F.2d 393, 398-99 (2d Cir.), *cert. denied,* 399 U.S. 928 (1970). In agreeing with Cohen II, *supra* note 94, the court admonished that § 501 would be "completely emasculated" if after every time a court "found that the officers had breached their duties, the officers could find sanctuary by putting through a constitutional amendment or bylaw retroactively to legitimatize their former derelictions of duty." 423 F.2d at 399.

[282] *See* Morrissey v. Segal, 526 F.2d 121, 124 (2d Cir. 1975).

[283] *Id.* at 124-25.

[284] Morrissey v. Curran, 351 F. Supp. 775, 777 (S.D.N.Y. 1972).

[285] The district court held that trustee Freedman was subject to surcharge for the lump sum payment made to defendant Perry, a non-officer, showing "a

trustees were exonerated from personal liability. They had merely acted negligently in relying on "advice of counsel," and were protected by an exculpatory provision in the union's Pension Trust Agreement.[286]

The plaintiffs contended that the court should prevent the defendant-trustees from charging the union's pension fund for their attorneys' fees.[287] The question was "whether a trustee who is found to be negligent, but who has not willfully violated his duty or acted in bad faith, can charge his trust with attorneys' fees and disbursements incurred in his own defense."[288] The district judge held that the defendants would be personally responsible for that portion of their attorneys' fees attributable to their culpable conduct.[289]

The decision on counsel fees was also appealed, and in *Morrissey v. Segal*[290] the Second Circuit affirmed.[291] The appellate court emphasized that *Cohen II* merely requires that union officials charged with a fiduciary breach be denied counsel fees and other assistance from the union in advance of "a full determination on the merits."[292] The court observed that "in no case was it suggested that indemnification would be required or even

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reckless indifference to his duty as a trustee as well as the interests of his fellow trustees, who relied on his opinion [as counsel to the trustees and the NMU]." *Id.* at 783.

[286] *Id.* at 784. In its memorandum decision, the district court held that in negligently processing the lump sum payment to Perry, trustees Segal and Karchmer were at fault. *See* Morrissey v. Curran, 386 F. Supp. 167, 168 (S.D.N.Y. 1974). But the exculpatory provision in the Pension Trust Agreement relieved them from personal liability because they had acted on advice of counsel. Morrissey v. Curran, 351 F. Supp. 775, 784 (S.D.N.Y. 1972). The court held that this provision must be "strictly construed" and that it would not therefore relieve a trustee of liability for willful violation of his duty, but that the provision would protect trustees against liability resulting from negligence. *Id.* at 782.

[287] *See* Morrissey v. Curran, 386 F. Supp. 167 (S.D.N.Y. 1974).

[288] *Id.*

[289] *Id.*

[290] 526 F.2d 121 (2d Cir. 1975).

[291] The Second Circuit, however, modified the district court decision to permit the defendant-trustees to recover those fees in defending their behavior in the non-Perry payments because they had acted blamelessly and in good faith. The court also permitted defendant Freedman to recover counsel fees incurred in establishing that certain pension payments were valid. *Id.* at 128. *See also* Morrissey v. Curran, 650 F.2d 1267, 1277 (2d Cir. 1981).

[292] Morrissey v. Segal, 526 F.2d 121, 127 (2d Cir. 1975).

proper after an adjudication that trustees had breached their duty to the union."[293]

Under *Cohen* and trust law principles,[294] the court decided that the two trustees who escaped personal liability because of the exculpatory provision in the trust agreement could not be reimbursed for attorney fees causally related to their fault.[295] Union authority to reimburse was conditioned on the defendants' non-culpability for substantive violations of fiduciary duty. The trustees could thus be reimbursed for the costs of defending blameless behavior.[296]

The Second Circuit thus found that a union officer can technically violate section 501 by making a union expenditure pursuant to a good faith, but mistaken interpretation of authority.[297]

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[293] *Id.*

[294] [T]he trustee is not entitled to indemnity if the incurring of the expense became necessary because of his own fault. Thus if the trustee negligently permitted a third party to obtain possession of the trust property the expenses of the litigation which resulted must be borne by the trustee personally.

Id. at 126 (citing 3 A. SCOTT, *supra* note 18, § 245, at 2155). The citation to Scott is significant because it is cited as authority in the supplementary views appended to H.R. REP. No. 741 analyzing H.R. 8343, which "conforms exactly" to the Landrum-Griffin Bill insofar as Title V is concerned. *See* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2479-80.

[295] Morrissey v. Segal, 526 F.2d 121, 128 (2d Cir. 1975).

[296] *Id.* (citing 3 A. SCOTT, *supra* note 18, § 188.4, at 1535). The court also concluded that at least one trustee could recover counsel fees incurred in establishing that certain pension fund contributions were valid, because the defense ultimately saved the fund over $1,000,000. Morrissey v. Segal, 526 F.2d 121 (2d Cir. 1975). Although the defendant-trustee had a personal interest in the transaction, the court found it sufficient to deny reimbursement for expenses incurred in pursuing a good faith legal defense that benefited the union. *Id.* at 128 (citing 3 A. SCOTT, *supra*, § 188.4, at 1535).

[297] In Morrissey v. Curran, 423 F.2d 393 (2d Cir.), *cert. denied*, 399 U.S. 928 (1970), the Second Circuit held that union officers will violate § 501 whenever they authorize an expenditure of union funds pursuant to an erroneous and unreasonable interpretation of internal union law. The problem with the court's rule is that it imposes fiduciary liability for good faith but mistaken interpretations of internal union law. As Professor Leslie has observed, "The *Morrissey* rule, equating an act in excess of an officer's powers under the constitution (as interpreted by the court) with a fiduciary breach, imposes personal liability without fault." *Federal Courts, supra* note 9, at 1318. As an alternative, Professor Leslie proposes that § 501 liability should be imposed only when a union officer "acts contrary to a clear command or limitation in the constitution, bylaws, or resolutions of the membership, or when the officer has received a personal financial or political profit from an action taken pursuant

But unions can reimburse officers for legal expenses in such cases if the officers acted reasonably and in good faith. Indeed, because official interpretations of internal law may affect legitimate union interests, the membership should be allowed to defend the validity of official interpretations of internal law embodied in the union's constitution, bylaws, resolutions, decisions, and past practices.[298] To hold otherwise would impale union officers on the horns of a dilemma for acting or failing to act when

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to ambiguous authorization," or where "bad faith" has been shown. *Id.* at 1318-19.

There are, however, other alternatives the courts might consider. The courts could simply apply the common law rule of trusts and agency that requires a fiduciary to exercise no more than reasonable or prudent discretion in acting on behalf of the beneficiary. *See, e.g.*, RESTATEMENT (SECOND) OF AGENCY § 379 (1958); RESTATEMENT (SECOND) OF TRUSTS § 174 (1959). Indeed, the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. 93-406, 88 Stat. 829 (codified in scattered sections of 26, 29 U.S.C.) establishes a prudent person standard for imposing liability upon fiduciaries of pension funds. According to ERISA, a fiduciary must act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . ." 29 U.S.C. § 1104 (a)(1)(B) (1976). *See generally* Little & Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 VAND. L. REV. 1 (1977). A similar standard can be utilized for imposing § 501 liability. Thus, union officers who have made a reasonable, but mistaken, interpretation of union law would not commit a fiduciary breach. *See also* Morrissey v. Curran, 650 F.2d 1267, 1277-78 (2d Cir. 1981).

Of course, there is also the approach of reimbursement. *See* notes 300-315 and accompanying text *infra*. Courts can permit unions to reimburse officers for legal expenses and deny surcharges, when it has been judicially determined that the officer has acted in good faith and the violation of the statute is merely a technical one. Reimbursement under these circumstances will minimize the danger of unwarranted damage exposure for official action taken in good faith.

[298] *See generally* notes 332-350 and accompanying text *infra*. Union officials generally violate § 501 by expending union funds without the membership's approval, contrary to the union's constitution or bylaws, International Ass'n of Bridge, S. & O.I. Workers v. Norris, 383 F.2d 735 (5th Cir. 1967); by expending union funds in contravention of the union's constitution or bylaws, with or without membership approval, Morrissey v. Curran, 423 F.2d 393 (2d Cir.), *cert. denied*, 399 U.S. 928 (1970); or by failing to expend union funds when the expenditure has been authorized in accordance with the union's constitution and bylaws. *See* Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963). Officers who disburse or fail to disburse funds in violation of the union constitution are subject to intraunion discipline, and may be removed from union office. *See* Lamb v. Miller, 487 F. Supp. 1188 (D.D.C. 1980).

internal union law is unclear.

Courts must also consider whether an official has actually benefited the union by defending the underlying section 501 action. If legal action has directly or indirectly furthered the union's legitimate interest, courts should permit an official to recover legal costs. For example, if the domination of certain union leaders has resulted in expenditures violating section 501, other union officers who authorize the expenditures should not be liable for consequent legal expenses, if reasonable efforts on their part could not have prevented the expenditures.[299]

(ii) The Right To Compel Reimbursement

The question remains whether an officer, exonerated of fiduciary wrongdoing, has a right to compel reimbursement. Although the case law indicates that a union has the power to reimburse an official who is exonerated of fiduciary wrongdoing,[300] no case has recognized a right to compel reimbursement. The common law recognizes a right to compel reimbursement from a corporation, however, if an officer is exonerated on the merits,[301] and that rule is followed by most indemnification statutes.[302]

Strong policy reasons support an analogous right to mandatory reimbursement for union officials who have successfully defended a section 501 action.[303] A rule of mandatory reimbursement upon vindication of fiduciary wrongdoing would encourage union officials to litigate challenges to their official conduct, thus clearing the good name of the union and its leaders. A judicial finding of innocence resulting from these chal-

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[299] *See, e.g.,* Morrissey v. Curran, 482 F. Supp. 31, 61-62, (S.D.N.Y. 1979).

[300] *See* Morrissey v. Segal, 526 F.2d 121, 127 (2d Cir. 1975); Holdeman v. Sheldon, 311 F.2d 2, 3 (2d Cir. 1962); Cohen I, *supra* note 78.

[301] *See In re* E.C. Warner Co., 232 Minn. 207, 45 N.W.2d 388 (1950); Solimine v. Hollander, 129 N.J. Eq. 264, 19 A.2d 344 (1941). The major exception to the leading common law decisions on the right to be indemnified was New York Dock Co. v. McCollum, 173 Misc. 106, 16 N.Y.S.2d 84 (Sup. Ct. 1939), which was specifically repudiated by statute. *See* note 152 *supra.*

[302] The statutes provide an officer with a mandatory right to be indemnified in cases where the officer has been "successful on the merits." *See, e.g.,* MODEL BUS. CORP. ACT ANN. 2D § 5(c); CAL. CORP. CODE § 317(d) (West Cum. Supp. 1980); DEL. CODE tit. 8, § 145(c) (1975 & 1980 Supp.); N.Y. BUS. CORP. LAW § 724(a) (McKinney Supp. 1980). *See also* Note, *Indemnifying the Corporate Director for Litigation Expenses,* 28 PITT. L. REV. 114, 118-19 (1966).

[303] *Counsel Fees, supra* note 1, at 463.

lenges would benefit a union by bolstering the confidence of the rank and file and the public in the integrity and honesty of the union's leadership. Furthermore, imposing litigation expenses on vindicated officials would be contrary to the union's interest. It would deter members from assuming union office and encourage strike suits.[304]

The right to reimbursement should extend only to those cases where officers have been vindicated on the merits.[305] Mandatory reimbursement would therefore not be available if a defendant-officer successfully terminates a section 501 lawsuit through the use of technical defense maneuvers without a trial on the merits. Dismissal of a section 501 suit would leave unresolved allegations of fiduciary impropriety, and undermine confidence in the honesty and integrity of the union leadership. Also, because the action is terminated without trial, the financial burden on the officer is significantly less.

Conversely, asserting an effective technical defense may save the union the expense of reimbursement for a full trial on the merits, if the officer would have been vindicated. An absolute prohibition of reimbursement in such cases would penalize defense attorneys for raising valid defenses. Because of these conflicting results, reimbursement should be left to the discretion of the membership who will ultimately bear its cost, provided that union leaders have not dominated the membership[306] and there has been no evidence of fiduciary misconduct.

When the underlying section 501 action terminates by settlement agreement, mandatory reimbursement is unwarranted.[307]

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[304] *See id.* at 464.

[305] Most indemnification statutes provide for indemnification as a matter of right when the officer or director has been "successful" in the litigation. *See* note 301 *supra*. But there is considerable variation concerning what constitutes "success." *See* note 148 *supra*. Under some statutes, a director may have a right of indemnification for successfully terminating the action on a technicality or for being only partially successful. *See, e.g.*, Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138 (Del. Super. 1974). *But see* CAL. CORP. CODE § 317(d) (West Cum. Supp. 1980) (mandatory indemnification allowed only when the director or officer has been "successful on the merits"); N.Y. BUS. CORP. LAW § 724(a) (McKinney Supp. 1980) (a director has a right to be indemnified when he "has been *wholly* successful, on the merits or otherwise. . . .").

[306] Courts must therefore continue to exercise a supervisorial function to ensure that any authorization for reimbursement is bona fide and reflects the members' will.

[307] *See, e.g.*, Morrissey v. Curran, 482 F. Supp. 31, 42 (S.D.N.Y. 1979).

Reimbursement under these circumstances would discourage the public airing of alleged misconduct. Miscreant officials would have an improper incentive to settle because their attorney's fees, at least, would be paid by the union. Innocent defendant-officials, however, may indeed press for settlement to save the union litigation expenses. In addition, it is unlikely that a union dissident, risking reprisals for bringing a section 501 suit, would settle unless the charges were less than meritorious. For these reasons, unions should have the discretion to reimburse officers for the legal expenses of settlement.[308] Courts could always disallow the reimbursement and invalidate the settlement agreement if it were subsequently discovered that the settlement was procured through coercion or domination.

If union officers have successfully defended a nonfiduciary suit charging wrongful conduct unrelated to their union responsibilities, reimbursement would not be warranted. The officers' financial responsibility for defending the action would not impinge upon legitimate union interests. Officers, however, are in effect the alter-ego of the union, and would raise defenses ordinarily asserted by the organization. Furthermore, as an equitable matter, the litigation costs should be spread among those who benefit from the action.[309] Thus, if union officers successfully defend on the merits a third party action charging wrongful conduct involving representative duties, a policy of encouraging discretionary reimbursement should be followed. The defense benefits the membership and the union.

Even the *unsuccessful* defense of third party suits involving representative activity may warrant reimbursement for litigation expenses if the official can demonstrate that the litigation involved genuine union interests. In such instances, the representation of union interests benefits the organization. Advancing these interests would thus justify discretionary reimbursement, even where the defense failed.

Reimbursement for criminal or civil liabilities, or for fines arising from pleas of *nolo contendere,* or for settlement payments made after a finding of liability, may also be at issue. Section 503(b) of the LMRDA expressly prohibits a union or employer from "directly or indirectly . . . pay[ing] the fine of any officer or employee convicted of any willful violation" of the

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[308] *Id.*

[309] *Cf.* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

Act.[310] In other situations, courts consider the policies underlying the law imposing the liability, the clarity and stability of that law, and the nature and extent of the violation.

Antitrust laws, for example, have been applied to labor unions, and now regulate certain aspects of union-management relations having anticompetitive effects in a product market.[311] It can be argued that, even though genuine union interests would be affected,[312] unions should not be permitted to reimburse officers for liability resulting from civil antitrust violations. Reimbursement would undermine the deterrent effect of antitrust sanctions, and thus be inconsistent with the policies supporting market competition that underlie the enactment of the legislation.[313] On the other hand, application of the antitrust proscriptions to labor unions has been unprincipled and unpredictable.[314] Because damage awards are trebled in antitrust cases, it is unfair and contrary to union interests to deny discretionary reimbursement for non-willful violations.[315]

When the litigation concerns an officer's representative capacity, reimbursement should be discretionary in third party actions terminated without a determination of the merits, whether by settlement or by the successful assertion of a technical defense. As for payment made pursuant to a valid settlement agreement, discretionary reimbursement should be allowed if

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[310] 29 U.S.C. § 503(b) (1976).

[311] *See, e.g.*, Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616 (1975).

[312] *See* notes 193-197 and accompanying text *supra*.

[313] *Cf. Indemnification of Directors, supra* note 145, at 1413.

[314] *See* F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 184-91 (1977); Bartosic, *The Supreme Court, 1974 Term: The Allocation of Power in Deciding Labor Law Policy*, 62 VA. L. REV. 533, 591-99 (1976); St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603 (1976).

[315] In the unlikely event that a union official is guilty of a criminal violation of the antitrust laws, however, there are reasons to deny reimbursement. In criminal antitrust cases, willful intent is required to prove a violation. *See* United States v. United States Gypsum Co., 438 U.S. 422 (1978). The United States Department of Justice generally prosecutes only those cases where the law is reasonably clear and the violation is flagrant. *Id.* at 439 (citing REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 349 (1955)). Furthermore, the criminal penalty is intended to deter others from engaging in similar behavior; reimbursement would diminish the deterrent effect of the penalty and seriously frustrate the purpose of the sanction. *See Indemnification of Directors, supra* note 145, at 1413.

valid union interests are served by the settlement, and the court approves the agreement.

Within the extremes are the hybrid cases, where the litigation appears to be unrelated to union matters, but because of an allegation based on the vendetta theory, union interests may be involved. The expense of defending against harassing and vexatious litigation is a risk assumed by all union officers. It leads to a reasonable expectation of indemnification from the union. The union's interest in protecting its officers from this risk justifies discretionary reimbursement. Ordinarily the decision to reimburse officers in these cases should be left to the discretion of the members. Courts, however, must scrutinize all reimbursements to ensure that they reflect the will of the membership and do not interfere with the organization's primary functions. Thus, reimbursement should be permitted only for litigation expenses where harassment was probable and the amount reasonable in view of the union's assets.

(B) Surcharges

If union officers authorize counsel fee expenditures in violation of section 501, or make other improper union payments, and reimbursement is denied them, there may be a surcharge.[316] Both the LMRDA and its legislative history are silent on whether surcharge is a proper remedy for a section 501 violation. Commentators have ignored the question. There are, however, ample justifications for recognizing a surcharge remedy.

Section 501(b) contemplates that union members will seek "to recover damages or secure an accounting or *other appropriate relief*" as remedies for fiduciary breaches.[317] This provision has

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[316] Surcharge is defined as "[a]n overcharge; an exaction, impost or incumbrance beyond what is just and right, or beyond one's authority or power." BLACK'S LAW DICTIONARY 1292 (5th ed. 1979). In the law of fiduciaries, the term surcharge is "broadly applied to the order or decree of the court imposing liability on a fiduciary as a result of a successful exception to his cash or property account upon his intermediate or final accounting." Rowley & Toepfer, *Surcharging the Fiduciary*, 12 OHIO ST. L.J. 540, 540 (1951). It is similar to the damage remedy in tort law. *See* Moore, *A Rationalization of Trust Surcharge Cases*, 96 U. PA. L. REV. 647, 648 (1948). *See also* Niles, *A Contemporary View of Liability for Breach of Trust*, 114 TR. & EST. 12 (1975); Wellman, *Punitive Surcharges Against Disloyal Fiduciaries—Is* Rothko *Right?*, 77 MICH. L. REV. 95 (1978).

[317] *See* 29 U.S.C. § 501(b), set forth in note 17 *supra*.

been construed broadly to include appropriate remedies, not specifically mentioned, to secure enforcement of the statutory objectives of the LMRDA.[318] A surcharge remedy is thus justified whenever it is necessary to ensure statutory enforcement of fiduciary duties. Moreover, at common law, the surcharge remedy is appropriate for fiduciary breaches of trustees,[319] agents,[320] and corporate directors and officers.[321] There is no reason for reaching a contrary conclusion under section 501.

Only the Second Circuit has considered whether surcharge is a section 501 remedy. The *Morrissey I* court upheld a surcharge remedy against NMU pension trustees for acting in "reckless disregard" of their duties.[322] More recently, the Second Circuit upheld the use of a surcharge remedy against a dominant union officer who "knowingly" authorized improper salary payments.[323] The court justified its decision by an extensive survey of common law precedent,[324] finding the remedy necessary to curb fiduciary breaches.

Although surcharge may be an appropriate remedy under the statute, proper standards for its application remain in question. At common law, a trustee is subject to surcharge liability for negligently failing to exercise the requisite skill and care of an ordinary prudent person.[325] The Second Circuit concluded that a more limited standard should apply to union fiduciaries. The court held that surcharge liability is appropriate only when a union officer "knowingly" authorizes a misuse of union funds, suggesting that mere negligence would be insufficient for recovery.[326]

There are sound policy reasons for rejecting the negligence standard for surcharge liability of union fiduciaries. A negligence

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[318] *See, e.g.*, Nelson v. Johnson, 212 F. Supp. 233 (D. Minn.), *aff'd*, 325 F.2d 646 (8th Cir. 1963) (injunctive relief). *See also* note 18 *supra*.

[319] *See, e.g.*, G. BOGERT, TRUSTS AND TRUSTEES § 863, at 17 (2d ed. 1962); 2 A. SCOTT, supra note 18, § 176, at 1419.

[320] *See, e.g.*, Fulton Nat'l Bank v. Tate, 363 F.2d 562, 571 (5th Cir. 1966).

[321] *See, e.g.*, H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 255 (2d ed. 1970).

[322] Morrissey v. Curran, 483 F.2d 480 (2d Cir. 1973), *cert. denied*, 414 U.S. 1128 (1974). *See* notes 272-299 and accompanying text *supra*.

[323] Morrissey v. Curran, 650 F.2d 1267 (2d Cir. 1981). *See* notes 220-236 and accompanying text *supra*.

[324] *See* Morrissey v. Curran, 650 F.2d 1267, 1282 (2d Cir. 1981).

[325] 2 A. SCOTT, *supra* note 18, § 176, at 1410.

[326] Morrissey v. Curran, 650 F.2d 1267, 1282 (2d Cir. 1981).

standard might encourage unwarranted judicial interference in internal union affairs. Because the potential amount of surcharge liability is significant, conscientious union members may be deterred from seeking union office. Moreover, fear of potential liability may have a chilling effect on the union's leadership by restraining the exercise of official decision-making.[327]

If defendant-officers are personally liable for surcharges, questions concerning whether they can also be taxed for plaintiff's attorney's fees remain. The Second Circuit concluded that Congress adopted a theory of beneficial recovery in section 501(b), which would allow a court to award plaintiff's attorney's fees solely from the union treasury.[328] The LMRDA, however, does not specifically disallow assessing fees against individual defendants. Moreover, courts have long possessed the equitable power to award fees to a plaintiff when the defendant has acted vexatiously or in bad faith.[329] Nor does the assessment of counsel fees in such circumstances conflict with the American rule against fee-shifting.[330]

Courts should assess plaintiff's attorney fees against defendant-officers whenever the misuse of union funds is "unconscionable, fraudulent, willful or in bad faith or exceptional."[331] The fee award would effectuate statutory policies by curbing flagrant fiduciary abuses. If surcharge liability is imposed and there is no other recovery for the union, defendants should not

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[327] There are cases where negligence is so gross that it constitutes reckless disregard of a duty owed to another. Thus, if a union officer has acted in reckless disregard of internal union law, as in Morrissey v. Curran, 483 F.2d 480 (2d Cir. 1973), *cert. denied,* 414 U.S. 1128 (1974), or has knowingly made an improper disbursement of union funds, as in Morrissey v. Curran, 650 F.2d 1267 (2d Cir. 1981), surcharge liability would be appropriate. Surcharge would not be appropriate in § 501 cases, where either the defendant authorized a disbursement of union funds in good faith, or where union leaders dominated and controlled the disbursing officers. Morrissey v. Curran, 482 F. Supp. 31, 62 (S.D.N.Y. 1979).

[328] Morrissey v. Curran, 650 F.2d 1267, 1281 (2d Cir. 1981).

[329] Vaughan v. Atkinson, 369 U.S. 527, 530 (1962); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 164-65 (1939).

[330] In this type of case, "the underlying rationale for 'fee shifting' is . . . punitive and the essential element in triggering the award is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." Hall v. Cole, 412 U.S. 1, 5 (1973). *See also* Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1309 (2d Cir. 1973).

[331] *See* Taussig v. Wellington Fund, Inc., 187 F. Supp. 179, 222-23 (D. Del. 1960), *aff'd,* 313 F.2d 472 (3d Cir.), *cert. denied,* 374 U.S. 806 (1963).

be permitted to reduce their own liability by subtracting the cost of plaintiff's litigation from the surcharge. The membership should not have to bear the cost of correcting flagrant and willful violations of section 501. The cost should be placed on the persons responsible for the misuse of union funds.

III. The Role and Representation of the Union in Section 501 Litigation

To conclude that the union cannot supply defense funds or counsel in a given section 501 action brought against its officers does not mean that the union will be denied a role in the litigation. A court may preclude a union from shielding its officers from allegations of fiduciary wrongdoing, yet permit intervention as a party-defendant to assert defenses to safeguard institutional interests.

A. Union Intervention to Protect Institutional Interests

Ordinarily a corporation must remain passive in shareholder derivative actions if it has no discernible interest in the litigation.[332] When a litigation against officers or directors implicates corporate institutional interests, however, the corporation may actively defend its rights, interests, and prerogatives.[333] Corporate interests are invariably implicated whenever plaintiffs bring derivative actions to effect a "strike-suit" or otherwise to harass management.[334] Even when a plaintiff's motives are legitimate, corporate interests may be at stake if the suit's purpose is to appoint a corporate receiver,[335] to set aside a corporate reorganization,[336] or to enjoin performance of corporate business undertakings.[337] In such cases, the corporation, as beneficiary of the

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[332] *See, e.g.*, Herald Co. v. Bonfils, 315 F. Supp. 497 (D. Colo. 1970), *rev'd sub nom.* Herald Co. v. Seawell, 472 F.2d 1081 (10th Cir. 1972); Holden v. Construction Mach. Co., 202 N.W.2d 348 (Iowa 1972).

[333] *See, e.g.*, Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (1964); Pierce v. Wahl, 32 Del. Ch. 465, 86 A.2d 757 (1952); Blish v. Thompson Automatic Arms Corp., 30 Del. Ch. 538, 64 A.2d 581 (1948).

[334] *See, e.g.*, McClure v. Borne Chem. Co., 292 F.2d 824 (3d Cir. 1961).

[335] *See, e.g.*, Wolf v. Ackerman, 308 F. Supp. 1057 (S.D.N.Y. 1969); Geiman-Herthel Furniture Co. v. Geiman, 162 Kan. 48, 174 P.2d 117 (1946); Esposito v. Riverside Sand & Gravel Co., 287 Mass. 185, 191 N.E. 363 (1934).

[336] *See, e.g.*, Corey v. Independent Ice Co., 226 Mass. 391, 115 N.E. 488 (1917).

[337] *See, e.g.*, Kirby v. Schenck, 25 N.Y.S.2d 431 (Sup. Ct. 1941).

action, is entitled to intervene and to advocate independently its position to protect its institutional interests.

Similar union interests may justify limited intervention in a section 501 litigation. A union, like a corporation, represents collective interests of groups of members and individuals. Conflicts will inevitably occur between an individual and the collectivity, or between groups of members. The governing officers, as representatives, will thus have to reconcile these interests with those of the organization. The section 501 action may be but one battle in an ongoing war between factions competing for control of the union,[338] or it may contest the proper management of union affairs.[339] Alternatively, a minority faction may bring a section 501 action either to harass union leadership or to coerce it into accepting a minority position through "blackmail by litigation." In these situations, the union will usually have legitimate collective interests to represent and to defend, and a court should permit the union to intervene to advocate its position.

A union may also have a substantial interest in a section 501 action whenever the validity or interpretation of internal union law is questioned. In *International Brotherhood of Teamsters v. Hoffa*,[340] for example, the International Brotherhood of Teamsters, named as the party-plaintiff by individual members, moved to intervene by becoming a party defendant. Because an amendment to the union constitution had expressly authorized payment for the criminal defense of James R. Hoffa,[341] the union asserted that it was entitled to defend the validity of its internal law. While observing that "as a general proposition, a labor organization should be kept in a neutral role when it can demonstrate no interest in the litigation beyond a shielding of officials whose activities are under attack,"[342] the court recognized that more was at stake than merely protecting an officer. It reasoned that the International had a legitimate interest in defending the validity of its constitutional amendment and the construction given to it by its officers.[343]

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[338] *See, e.g.*, Cefalo v. Moffett, 449 F.2d 1193 (D.C. Cir. 1971).

[339] *See generally Counsel Fees, supra* note 1, at 459-60.

[340] 242 F. Supp. 246 (D.D.C. 1965). *See also* notes 197-203 and accompanying text *supra*.

[341] *See* note 243 *supra*.

[342] International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246, 253 (D.D.C. 1965).

[343] *Id.* at 246-55.

Similarly, in *McNamara v. Johnston*,[344] members of the United Auto Workers sued the union officers under section 501 for spending union funds for political and social purposes. The district court concluded that the suit was actually an attack on certain constitutional provisions that, at least implicitly, sanctioned the expenditures.[345] The court thus permitted the union to intervene and defend its basic institutional interest in the validity of the provisions and the expenditures.

The procedural nature of section 501 suits may impinge upon inherent institutional interests, warranting a limited union role in the litigation. For example, a court could permit a union to intervene in the early stages of litigation to argue that a plaintiff-member had failed to make the required demand to sue;[346] or that, pursuant to a demand, a union had undertaken reasonably sufficient corrective measures to remedy the alleged misconduct. The courts should also allow a union to intervene to establish that a complaint failed to state a cause of action, raised frivolous or patently meritless claims, or was otherwise lacking "good cause."[347] Moreover, because section 501(b) authorizes awarding attorney fees to successful plaintiffs, courts should allow unions to intervene in fee hearings to determine what expenses, if any, courts should award.[348]

Finally, in determining the bounds of the fiduciary duty imposed by federal law, section 501 expressly requires courts to take "into account the special problems and functions of a labor organization."[349] Obviously, unions are uniquely qualified to assist the judiciary in fulfilling this mandate.[350]

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[344] 55 F.R.D. 441 (N.D. Ill. 1972), *aff'd*, 522 F.2d 1157 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

[345] McNamara v. Johnston, 55 F.R.D. 441, 444 (N.D. Ill. 1972), *aff'd*, 522 F.2d 1157 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

[346] *See* notes 145-151 and accompanying text *supra*.

[347] *See* 22 U.S.C. § 501(b) (1976), set forth in note 17 *supra*.

[348] *See generally Counsel Fees, supra* note 1, at 459-60.

[349] *See* 29 U.S.C. § 501(a) (1976), set forth in note 10 *supra*.

[350] In many situations, courts should permit unions to advocate their positions on specific issues. In McNamara v. Johnston, 55 F.R.D. 441 (N.D. Ill. 1972), *aff'd*, 522 F.2d 1157 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), for instance, the court granted the United Auto Workers' motion to intervene in support of challenged political and social expenditures, reiterating that "the UAW Constitution is replete with provisions demonstrating that a major union objective is to engage in the American political arena in order to promote legislation beneficial to union members and to elect candidates sympathetic to

B. The Extent of Union Intervention

A blanket rejection of union intervention would be unsound, but union intervention may not always be warranted. Surely union officers charged with violating fiduciary responsibilities should not be permitted to overwhelm their opponents by indirectly using the power, resources, and prestige of the union.[351] Moreover, to permit the union to assert legal defenses on behalf of officers charged with fiduciary wrongdoing would be tantamount to representing the officers directly, and would thus present the very conflict of interest that section 501 proscribes.[352] Courts have attempted to reconcile the need for union representation with its potential dangers, by permitting union intervention as a party-defendant while restricting available defenses.

Courts will allow intervention only when legitimate union interests warranting independent representation are at stake.[353] Unions, like corporations in shareholder derivative actions, will be denied leave to intervene as party-defendants when they lack a discernible interest beyond protecting officers from liability for personal wrongdoing.[354] Even upon showing legitimate institutional interests, unions may not intervene if the parties can adequately protect union concerns.[355]

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union causes." 55 F.R.D. at 444.

[351] Holdeman v. Sheldon, 204 F. Supp. 890, 893 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962).

[352] Holdeman v. Sheldon, 204 F. Supp. 890, 893 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962). *See also* notes 98-110 and accompanying text *supra*.

[353] *See, e.g.*, Yablonski v. UMW, 448 F.2d 1175, 1180-82 (D.C. Cir. 1971); International Bhd. of Teamsters v. Hoffa, 52 Lab. Cas. ¶ 16,634 (D.D.C. 1965). *But see* Holdeman v. Sheldon, 204 F. Supp. 890 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962).

[354] *See Litigation Expenses, supra* note 142, at 438-39. *See also* Holdeman v. Sheldon, 204 F. Supp. 890 (S.D.N.Y.), *aff'd*, 311 F.2d 2 (2d Cir. 1962).

[355] Purcell v. Keane, 76 L.R.R.M. 2684 (E.D. Pa. 1969), *aff'd per curiam*, 438 F.2d 103 (3d Cir. 1971). FED. R. CIV. P. 24(a), of course, requires a showing that the interests of the applicant for intervention are not adequately represented by the existing parties. It provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

When intervention is permitted, the union will be restricted in its defenses. The intervenor-union may not advance purely factual defenses or any conventional defenses that would defeat recovery on the merits. These defenses do not protect institutional interests;[356] therefore, only the individual defendant-officers may assert them.[357]

C. Selection of Institutional Counsel

Who will determine a union's position in litigation and select counsel to pursue that position is a separate question from that of extent of intervention. It raises fundamental issues concerning the union as an institution—who is the union, and whom does union counsel represent? Is it the union membership, the governing executive board, the principal executive officers, or some or all of these groups?

Obviously, counsel retained to represent the union and to determine its legal position should have a strict and undivided allegiance to the needs, objectives, and best interests of the membership. The union, however, can only act through its lawfully elected officers and its properly appointed and authorized representatives. These representatives actually retain union counsel, and generally have the power to determine the nature of the client-counsel relationship. Because these representatives may be defendants in a section 501 suit, and have interests adverse to the organization, it may be exceedingly difficult for union counsel to serve the institutional needs of the membership. Subtle and complex questions will arise, concerning the constitutional

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Id. Cf. Trbovich v. UMW, 404 U.S. 528 (1972) (complainant entitled to intervene in LMRDA Title IV union action brought by Secretary of Labor to challenge validity of union election).

[356] *See* Yablonski v. UMW, 448 F.2d 1175, 1181 (D.C. Cir. 1971) (no legitimate union interest in raising defense of statute of limitations); Purcell v. Keane, 438 F.2d 103 (3d Cir. 1971) (motion to intervene *re* liability denied, but intervention might be granted as to claim for attorney fees if plaintiffs should be successful on merits).

[357] The union's interest in § 501 disputes may be simply in fair and impartial adjudication. Just as it should not advance the cost of defending the officers, the union should not, directly or indirectly, place its treasury and prestige on either side of the contest. Holdeman v. Sheldon, 204 F. Supp. 890 (S.D.N.Y.), *aff'd per curiam,* 311 F.2d 2 (2d Cir. 1962). The union should, however, be able to raise defenses that are *sui generis* to the § 501 action to protect institutional interests drawn into controversy.

locus of power within the organization, and the protection of membership interests that do not coincide with some or all of the union's governing officers. More specifically, when interests conflict, who is the union attorney's client?[358]

The court in *International Brotherhood of Teamsters v. Hoffa*[359] concluded that the selection of union counsel was clearly within the authority of the union's leadership. Because the plaintiffs in that case lacked authority to retain union counsel, the court allowed the union's elected officials to do so by default, even though these same officials were defendants in the lawsuit.[360]

The obvious difficulty with this approach is that it ignores the potential for abuse by the very persons who are alleged to have violated their positions of trust. To accord the defendant-officers unfettered discretion in selecting counsel for the union and consequently establishing its role in the litigation creates a conflict of interest in contravention of section 501(a). By abdicating its responsibility for selecting truly independent counsel, the court created the very real danger that the vital concerns of the union's membership would be frustrated, if not ignored.

In view of the critical role that the union and its counsel may play in the litigation, neither plaintiffs nor defendants should have an exclusive, unconditional right to select union counsel. If union counsel, however, is to advocate its legitimate institutional interests with undivided loyalty, courts must minimize the opportunity of accused officials to influence union counsel. Courts must, therefore, consider alternative methods for selecting union counsel.[361]

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[358] A related issue involves the ethical duty of union counsel to report to the executive board, the membership, or public authorities information disclosed to, or discovered by, counsel concerning unlawful conduct, committed or contemplated by union officers or other agents. *See* notes 319-322 and accompanying text *supra*. *See also What a Lawyer Owes His [Corporate] Client,* N.Y. Times, Dec. 17, 1978, § 3, at 1, col. 5.

[359] 52 Lab Cas. ¶ 16,634 (D.D.C. 1965).

[360] *Id.* at ¶ 23,519-20.

[361] The problems of dual representation are not unique to § 501 suits, but quite predictably have arisen in stockholder derivative actions in which individual defendants frequently make decisions about the corporation's course in the suit and selection of counsel. *See, e.g.,* Murphy v. Washington Am. League Base Ball Club, 324 F.2d 394, 397-98 (D.C. Cir. 1963); Lewis v. Shaffer Stores Co., 218 F. Supp. 238 (S.D.N.Y. 1963); Marco v. Dulles, 169 F. Supp. 622 (S.D.N.Y.), *appeal dismissed,* 268 F.2d 192 (2d Cir. 1959). *See also* Comment,

One approach is to permit only non-defendant union officers to select union counsel. This would have the advantage of minimizing judicial interference with union self-government. Most unions, however, function within a one-party, oligarchic, or one-person power structure. The potential for domination in these unions militates against a rule that would simply leave the selection decision to "unaffected" officers.

Another alternative, and perhaps the only effective selection method, is for the court to appoint counsel from a list containing attorneys acceptable to both the union's governing officers and the plaintiffs. Only in an extreme case, and then only after a preliminary showing of widespread corruption among the leadership, should a court directly appoint counsel.[362] Regardless of the selection process, courts must actively participate to insure that the chosen attorney owes no disqualifying allegiance to any defendant.

Courts must also monitor legal representation by insulating

Independent Representation for Corporate Defendants in Derivative Suits, 74 YALE L.J. 524 (1965) [hereinafter cited as *Derivative Suits*], from which the following analysis and recommendations concerning the selection and role of counsel have partially developed. Concerning the selection and dismissal of counsel, see *id.* at 535-36.

[362] Judicial intervention in the selection of counsel is not without its problems. As Professor Bishop has perceptively observed in discussing analogous problems in the corporate context:

> But I see very serious problems when the court tells the corporation, which means the management, which means the individual defendants, to go out and hire independent counsel. How independent can those counsel be when they have been hired by the individual defendants? Yet, they may be as conscientious and as ethical as can be, probably they will be, but they haven't got a client. Who are they going to talk to? Who can they ask for the business facts as to the real interest of the corporation? I don't know the answer to this one. It is a problem which you can kick around almost endlessly. One possible answer is to say that the court itself ought to review the decision of these independent counsel as to what the role of the corporation ought to be. But I do know this much, that I would not want to be in the shoes of those independent counsel without a client. It is a little bit like the fellow who is counsel for successful bidders in a public issue. He has been hired by the issuing corporation, but he hasn't got a client. There is nobody he can talk to as to what the interests of these unknown successful bidders are. These are extremely hard ethical problems. I don't have the answers.

Indemnification, supra note 142, at 837.

union counsel from influences that might lead them to compromise institutional interests. A presiding judge should closely scrutinize the relationship between union counsel and defense attorneys. Not only should caution be taken against collusion, in preparing pleadings, memoranda, or briefs, but also against more subtle forms of "cooperation," like coordination of strategy and tactics.

Restricting the power of union leadership to dismiss union counsel during litigation is also important. It would enhance the objectivity of counsel's analysis of the union's position in the litigation, and ensure counsel's fidelity. Finally, courts should grant petitions to dismiss counsel only upon a showing of good cause—for incompetence, negligence, or breach of the Code of Professional Responsibility.[363]

D. The Role of Union Counsel: Conflicts of Interest

Whenever a court permits a union to intervene in a section 501 suit, the potential for serious conflicts of interest exists. In defending officers, counsel may be required to assert defenses that are antithetic to the union's best interests. Thus, even if defendant-officers have retained their own counsel, the court should disqualify these attorneys from also representing the union.[364] In corporation law, it is universally recognized that there is always a possibility for conflict of interest when corporate attorneys seek to represent management in shareholder de-

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[363] *See* note 398 *infra*.

[364] The motion to disqualify counsel "is of an equitable nature. A party making such a motion should do so with reasonable promptness and diligence after the facts have become known to it." Marco v. Dulles, 169 F. Supp. 622, 632 (S.D.N.Y.), *appeal dismissed*, 268 F.2d 192 (2d Cir. 1959). *See* Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962). While the motion to disqualify may seek an order against the attorney's continued representation of either the union or the individual defendants, this discussion assumes the order disqualifies counsel from representing the union. This is in fact the way most disqualification orders read because, in all likelihood, the plaintiff who sought the order believed that the attorney who had represented individual officer-defendants was biased in their favor and that, therefore, the union would fare better with independent counsel. *See, e.g.*, International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246 (D.D.C. 1965) (counsel disqualified from representing union but continued to represent individual officer defendants); Milone v. English, 306 F.2d 814 (D.C. Cir. 1962). *But see* Vestal v. Hoffa, 80 L.R.R.M. 3120 (D.D.C. 1972) (counsel disqualified from representing individual officer defendants but continued to represent union).

rivative suits.[365] The emerging corporate law rule prohibits dual representation in derivative actions.[366] Corporate management is thus required to seek outside counsel for representation in the litigation. The same rule should apply to section 501 suits. Separate representation of the union is indispensable for a fair and objective evaluation of the union's institutional interests.[367] It is also crucial to vigorous advocacy, uncompromised by potentially inconsistent and divergent positions.[368] Moreover, a prohibition against dual representation is necessary to prevent the union's leadership from surreptitiously absorbing the cost of the officer's defense by manipulating the legal fees charged to the respective parties.[369]

The interests of the defendant-officers may, of course, occasionally coincide with those of the union. A unity of interests would not eliminate the dangers of future potential conflicts or a subsequent divergence of interests. Nor would a confluence of interests justify common representation, especially since defendant-officers initially determine the interest and position of the union.[370] A unity of interest at the initial stages of the lawsuit

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[365] *See Developments in the Law: Conflicts of Interest in the Legal Profession,* 94 HARV. L. REV. 1244, 1339 (1981) [hereinafter cited as *Conflicts of Interest*].

[366] *Id.* at 1340.

[367] Yablonski v. UMW, 448 F.2d 1175, 1179, 1182 (D.C. Cir.), *petition for further relief granted,* 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962); International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246, 256 (D.D.C. 1965).

[368] *See generally* Comment, *Union Counsel Disqualified From Representing Union Officers Charged With Breaches of Fiduciary Duty,* 43 N.Y.U. L. REV. 387, 387-92 (1968). *See also* Milone v. English, 306 F.2d 814 (D.C. Cir. 1962), in which the court observed:

> [C]ounsel who are chosen by and represent officers charged with the misconduct, and who also represent the union, are not able to guide the litigation in the best interest of the union because of the conflict in counsel's loyalties. In such a situation it would be incumbent upon counsel not to represent both the union and the officers.

Id. at 817.

[369] *Counsel Fees, supra* note 1, at 460.

[370] Defendant officers often view their own interests and those of the union as identical, and attempt to present a united defense through common counsel. *See, e.g.,* Yablonski v. UMW, 448 F.2d 1175 (D.C. Cir.), *petition for further relief granted,* 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246, 257

may, however, justify limited joint representation.[371] For example, it is proper for common counsel to represent the union and its officers to expose frivolous suits,[372] or to ascertain through discovery the exact nature of charges.[373] In a section 501 action, dual representation should be limited to these purposes.[374] Moreover, in the event that common defenses fail or, as the case unfolds, the interests of the officials conflict with those of the union, dual representation should terminate, and union counsel should assist in the prosecution of the case.[375]

For settlement negotiations, it is vital that the union have independent representation. Otherwise, plaintiff's counsel may be tempted to seek or accept a handsome fee from the defendants in exchange for a settlement that sacrifices the union's interests.[376] Apart from such grossly unethical motivation, the incen-

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(D.D.C. 1965). Tucker v. Shaw, 378 F.2d 304 (2d Cir. 1967) provides a good example of an effort to maintain a proper balance between the outsider-plaintiffs and the insider-defendants. The plaintiffs had moved to disqualify the union's regularly retained attorney from representing the defendant officers, even though the union was not a party to the action and the defendants were to pay their own separate fee to the attorney. In affirming the district court's disqualification order, the Second Circuit noted that the union attorney's "admitted familiarity with the facts involved in this litigation might unfairly tip the scales against the plaintiffs at the outset." *Id.* at 306. *Accord,* Holdeman v. Sheldon, 204 F. Supp. 890, 893 (S.D.N.Y.), *aff'd per curiam,* 311 F.2d 2 (2d Cir. 1962). *See* Comment, *supra* note 368 at 391-92.

[371] Opinions differ on whether corporation attorneys can represent management in the early stages of the litigation, in shareholder derivative actions. *See Conflicts of Interest, supra* note 365, at 1340.

[372] McNamara v. Johnston, 55 F.R.D. 441 (N.D. Ill. 1972), *aff'd,* 522 F.2d 1157 (7th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976). *Cf.* Lewis v. Shaffer Stores Co., 218 F. Supp. 238 (S.D.N.Y. 1963) (dual representation permitted in stockholder derivative suit found to be meritless). *See Derivative Suits, supra* note 361, at 525.

[373] Yablonski v. UMW, 448 F.2d 1175, 1177 (D.C. Cir.), *petition for further relief granted,* 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 906 (1972); Vestal v. Hoffa, 80 L.R.R.M. 3120, 3124-25 (D.D.C. 1972).

[374] Vestal v. Hoffa, 80 L.R.R.M. 3120, 3124-25 (D.D.C. 1972). On a closely related issue, the Second Circuit has ruled that the only requirement for an injunction against defendants in a § 501 action from retaining counsel with union funds is that "the plaintiff make 'a reasonable showing that he is likely to succeed.' " Morrissey v. Curran, 423 F.2d 393, 400 (2d Cir. 1970).

[375] International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246, 257 (D.D.C. 1965). *See also* Ratner v. Bakery & Confectionery Workers Union, 354 F.2d 504, 505-06 (D.C. Cir. 1965).

[376] *See Derivative Suits, supra* note 361, at 532. *See also* Sertic v. Cuyahoga

tive of plaintiff's counsel to seek the maximum recovery may also lag whenever counsel's effort in seeking to increase the union's recovery fails to result in an increase in court-awarded attorney fees.[377] Correspondingly, during settlement negotiations the individual defendants are interested in compromising the claim at the lowest cost possible. The situation obviously demands that separate counsel protect the union's interest in the fair resolution of the matter.

Unfortunately, the evils of conflicts of interest do not end with separate representation of the union and defendant-officers. Courts have emphasized a further requirement, that union representation be *"independent,"* but this vague qualification provides little guidance. A judicial definition must establish the conditions necessary to render union representation truly independent.

For example, the *Hoffa* court concluded that where "union officials are charged with breach of fiduciary duty, the organization is entitled to an evaluation and representation of its institutional interests by *independent* counsel, unencumbered by potentially conflicting obligations to any defendant officer."[378] The plaintiffs argued that only counsel with no previous connection to the union could be independent. The union maintained that its counsel need only be separate from counsel representing the individual defendants. Surprisingly, the court accepted the union's position.[379] It justified its decision on the ground that "[e]mployment of new outside counsel would certainly increase the International's financial burden, and may well deprive it of the values that come only from the experience and skill of counsel [already on retainer] in the highly specialized area wherein the problems here lie."[380] The goal of truly independent counsel was thus sacrificed for pragmatic considerations concerning

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Carpenters Dist. Council, 459 F.2d 579 (6th Cir. 1972).

[377] *See* Colpo v. Hoffa, 81 L.R.R.M. 2545 (D.D.C. 1971), *aff'd per curiam*, 81 L.R.R.M. 2560 (D.C. Cir. 1972); Yablonski v. UMW, 448 F.2d 1175 (D.C. Cir.), *petition for further relief granted*, 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Vestal v. Hoffa, 80 L.R.R.M. 3120 (D.D.C. 1972); International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246 (D.D.C. 1965). *See also Derivative Suits, supra* note 360, at 532.

[378] International Bhd. of Teamsters v. Hoffa, 242 F. Supp. 246, 256 (D.D.C. 1965) (emphasis added).

[379] 52 Lab. Cas. ¶¶ 23,516, 23,518 (D.D.C. 1965) (emphasis added).

[380] *Id.* at ¶ 23,519.

counsel's effectiveness and the union's financial burden.

A similar case is *Yablonski v. United Mine Workers.*[381] Yablonski and other union members had brought a section 501 suit against the union, then-president W. A. Boyle, and two other officers. The law firm that regularly represented the union filed answers and interrogatories on behalf of all defendants.[382] The same firm also represented both the union and the individual defendants in several related pending cases.[383] Shortly after the plaintiffs moved to disqualify the law firm, it withdrew as counsel for the individual defendants in the section 501 litigation. The firm remained, however, as counsel for the union in the suit, and continued to represent both the union and its officers in other cases. After reviewing the issues involved in the other suits, the District of Columbia Circuit found that the "strict fidelity" owed by the law firm to president Boyle would hinder it in adequately representing the union's true interest in

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[381] 448 F.2d 1175 (D.C. Cir.), *petition for further relief granted,* 454 F.2d 1036 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 906 (1972) [hereinafter cited as Yablonski v. UMW].

[382] The law firm represented all defendants for approximately the first six months of the suit, and the court expressly approved dual representation as necessary "to ascertain the exact nature of the lawsuit and [to] protect the interests of all defendants." Yablonski v. UMW, *supra* note 381, 448 F.2d at 1177.

[383] The § 501 suit was only one battle of the insurgents in the complex legal war to gain control of the union. The court noted four other cases in which the law firm was currently representing the union and/or its officers. Yablonski v. UMW, *supra* note 381, 448 F.2d at 1176. The first was the "reprisal case," in which Yablonski had sued the union for relieving him of certain union duties solely because of his decision to run against Boyle. On appeal, the same law firm represented both the union and Boyle. Yablonski v. UMW, 314 F. Supp. 616 (D.D.C. 1970), *rev'd & remanded,* 459 F.2d 1201 (D.C. Cir. 1972). In another case, the Yablonski slate had sued the union and individual officers for attorney's fees incurred in litigation involving the election. Again the firm represented the officers as well as the union. Yablonski v. UMW, 314 F. Supp. 616 (D.D.C. 1970), *rev'd & remanded,* 466 F.2d 424 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 918 (1973). Similarly, in a third group of cases—the "journal" and fair election cases—the firm represented the union and Boyle. Yablonski v. UMW, 305 F. Supp. 868, *clarified,* 305 F. Supp. 876 (D.D.C. 1969). Finally, in a suit brought by a group of retired miners alleging mismanagement of the UMW Welfare and Retirement Fund, the law firm represented both the union and Boyle, in his capacities as trustee of the fund, President of the UMW, and Director of the National Bank of Washington. Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971), 337 F. Supp. 296 (D.D.C. 1972).

the section 501 litigation.[384] The court decided that the objectives of the LMRDA required "*unquestionably independent new counsel*" to ensure that allegations of fiduciary misconduct are "determined in a context which is *as free as possible* from the *appearance of any potential for conflict of interest* in the representation of the union itself."[385]

The law firm promptly withdrew from the case entirely,[386] but the union's resident general counsel and his staff entered appearances on the union's behalf. In the resultant suit, the district court denied plaintiffs' motion to disqualify the resident counsel staff, and the issue was again taken to the District of Columbia Circuit. The circuit court strongly rebuked the lower court, calling the ruling "a grave departure from the terms of our prior mandate."[387] In concluding that the new counsel arrangement was no different from the previous one, the court pointedly emphasized:

> UMWA general counsel and three members of his staff are representing or have represented to some extent union officers who are accused of wrongdoing in this case. One staff member is the son of

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[384] Yablonski v. UMW, *supra* note 381, 448 F.2d at 1179.

[385] Yablonski v. UMW, *supra* note 381, 448 F.2d at 1179-80 (emphasis added).

[386] Had the plaintiffs moved to disqualify the firm from representing the union and had the firm, either voluntarily or by court order, withdrawn from representing the union in this and related matters, it most probably would have been permitted to continue its representation of the individual defendant-officers in all the cases, provided, of course, the defendants financed their own defense in the fiduciary cases. *But see* Tucker v. Shaw, 378 F.2d 304 (2d Cir. 1967).

[387] Yablonski v. UMW, 454 F.2d 1036, 1040 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). As these facts strongly suggest, the selection of union counsel frequently involves considerations other than legal ability. Nepotism could itself be a breach of fiduciary duty. Consider, for example, the attorneys involved in the United Mine Worker litigation. The insurgents were represented by the two sons of the late Joseph A. Yablonski, Sr., and the UMW house counsel staff included sons of two international officers. *See id.* Joseph A. Yablonski, Jr. then became the UMW General Counsel when the insurgents gained control of the union. Walter Reuther's nephew is a member of the UAW legal department.

Nepotism is so rampant in some unions that leadership is almost hereditary. In the recent past, international presidents of the Carpenters, Iron Workers, Painters, and Sheet Metal Workers unions succeeded their fathers. The Teamsters International president's son was appointed to succeed his father as vice-president of one of the union's most important locals. *Teamster Succeeded By His Son,* Wash. Post, Aug. 31, 1973, § A, at 14, col. 1.

> one of such officers, and another is the son of a nonparty officer whom the charges conceivably could implicate. Atop that, three of the five attorneys are themselves named in appellants' complaint as recipients of payments allegedly made by officers in breach of fiduciary duties.[388]

The appellate court observed that union house counsel should be permitted to represent a union in an appropriate case and that cordiality and normal exchanges between the union executive and the house counsel do not serve as grounds for a disqualification.[389] In an attempt to establish a general test for the requirement of "independent counsel," the court stated that the "*sine qua non* of independent representation is the absence of any duty to another that might detract from the full measure of loyalty to the welfare of the union."[390]

In *Weaver v. United Mine Workers*,[391] the District of Columbia Circuit faced for a third time the issue of who should represent the UMW. The court came full circle to the position of the appellate court in *Hoffa*.[392] It noted that its previous decisions barred union representation by counsel chosen by union officials only when the representation presented potential conflicts of interest. Observing that the leadership of the UMW had changed since the *Yablonski* litigation,[393] the court permitted the union to be represented by its house counsel.

In general, outside counsel would be more independent in representing union interests than would union counsel. While the union's house counsel is retained to represent the union, in reality his personal loyalties will more likely be aligned with the individual union officers who hired him.[394] On the other hand, a rigid requirement that unions must always retain new counsel would unfairly increase the cost of union representation. It

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[388] Yablonski v. UMW, 454 F.2d 1036, 1040 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

[389] Yablonski v. UMW, 454 F.2d 1036, 1040 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). *See also* International Bhd. of Teamsters v. Hoffa, 52 Lab. Cas. ¶ 16,634 at 23,518-19 (D.D.C. 1965).

[390] Yablonski v. UMW, 454 F.2d 1036, 1040 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

[391] 492 F.2d 580 (D.C. Cir. 1973).

[392] *See* notes 359-360, 381-390 and accompanying text *supra*.

[393] *See* notes 359-360 and accompanying text *supra*.

[394] The danger applies when the corporation relies on its in-house attorney for representation in shareholder derivative actions. *See Conflicts of Interest*, *supra* note 365, at 1341.

would also deny a union the benefit of existing counsel's expertise and unique familiarity with the union's constitution, rulings, and affairs. Retaining new counsel would further delay pending cases for the time necessary for new counsel to become familiar with the litigation and special problems of the union, and to prepare for consultation with union officials and for possible settlement negotiations.

These competing considerations can be reconciled by permitting unions to rely on inside counsel, unless such counsel could not render objective and unbiased representation. This would place the burden on the plaintiffs to file timely motions establishing the disqualifying circumstances. Courts should not require plaintiffs to present evidence of actual conflict of interest.[395] Rather, they should only require a showing of *potential* conflicting loyalties. Representation of the defendants in other related matters, evidence of nepotism, domination of counsel, or other similar allegiance of counsel to the defendants should ordinarily suffice to disqualify the union's regular counsel. A possible alternative resolution would be to require the union to retain outside counsel and to permit the union's house counsel to represent the defendant-officers. The question of who pays for the expenses of the representation would then be decided separately.[396]

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[395] Marketti v. Fitzsimmons, 373 F. Supp. 637 (N.D. Wis. 1974) illustrates the extent of plaintiff's burden in supporting a motion for disqualifying union counsel. Several Local members sued their international union, challenging the validity of a trusteeship imposed on the Local. The plaintiffs moved to disqualify the firm representing the International on the grounds that it had previously represented the Local. In granting the motion to disqualify, the court stated the relevant criteria for disqualification: "(1) The former representation, (2) a substantial relation between the subject matter of the former representation and the issues in the later lawsuit, and (3) the later adverse representation." *Id.* at 639. The possibility that the former client may have disclosed confidential information was also a factor. The court did not require actual disclosure because, "absent a clear waiver of objection to potential conflicts," the possibility of disclosure created a "taint of disloyalty" justifying disqualification. *Id.*

[396] This proposal is drawn from *Conflicts of Interest, supra* note 365, at 1341. The usual rule in shareholder derivative legislation is that the corporation can be represented by its in-house attorney, and the insider defendants must be represented by outside counsel. The authors of *Conflicts of Interest,* however, argue that "[t]he better rule is to require that outside counsel represent the corporation, while the corporate attorney represents the insider defendants; the question of expenses would be decided separately." *Id.* at 1341.

Counsel who initially represented both the union and the defendant-officers in a section 501 suit should be disqualified from subsequently representing either party, because of the possibility of disclosure of confidential information by one of the former clients. This "taint of disloyalty" and the potential conflict of interest constitute grounds for disqualification.[397] Courts should thus grant timely motions for disqualification, absent extenuating circumstances, even without showing that the former client has actually disclosed confidential information.

In establishing disqualification principles, courts have frequently cited the Code of Professional Responsibility.[398] Judicial and ethical considerations preclude counsel from representing "two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant."[399] The Code also admonishes that an attorney

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[397] On the basis of reported cases, it appears that a motion for this form of disqualification has not been filed in a § 501 suit. Generally, counsel have ceased to represent individual defendants, but have continued to represent unions. This raises a serious question concerning adequacy of the representation accorded the institutional interests of the union membership, and the competence of plaintiff's counsel.

[398] *See, e.g.*, Weaver v. UMW, 492 F.2d 580, 584 n.18 (D.C. Cir. 1973); Teamsters v. Hoffa, 242 F. Supp. 246, 257 (D.D.C. 1965).

[399] ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 5-14. The following canons, disciplinary rules, and ethical considerations are relevant:

> Canon 5.
> A lawyer should exercise independent professional judgement on behalf of a client.
> DR 5-105 Refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer.
> (A) A lawyer shall decline proffered employment if the exercise of his professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment . . . except to the extent permitted under DR 5-105(C).
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, . . . except to the extent permitted under DR 5-105(C).
> (C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such

"avoid even the appearance of professional impropriety" in rep-

representation on the exercise of his independent professional judgment on behalf of each.

DR 5-107 Avoiding Influence by Others Than the Client.

* * *

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.

EC 5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity, in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

Violation of these rules could subject an attorney to disciplinary proceedings.

In addition, a union attorney under certain circumstances could be held liable for breach of § 501. Resident or house counsel are "employees" of unions within the meaning of § 501(a). They and regularly retained "outside" counsel might also serve as general or special agents, or as representatives of unions in the negotiation and administration of collective agreements. Concerning the possible "professional and familial relationships . . . [and] individual involvements" of house counsel with union executives, see Yablonski v. UMW, 454

resentation, even though no actual impropriety or conflict of interest is likely to occur.[400] The underlying policy justification is that potential conflicts of interest in legal representation undermine the public trust essential for an effective legal system. The same policy mandates that an alleged breach of the fiduciary duty imposed by section 501 be adjudicated in a legal setting free of even the appearance of potential conflicts of interest.

Of course, the power to select and dismiss union attorneys must be restricted and subject to judicial approval. The relationship between union counsel and attorneys for individual defendants must be subject to close judicial scrutiny.[401] Furthermore, a union and its officials should provide full access to all relevant information in their possession to union counsel. This will enable counsel to render informed and competent opinions, and to represent effectively the union's interests. Moreover, because independent counsel should have no motive to harass the union or its officials and will act in good faith, requests for information should be presumed to be reasonable and relevant.[402]

Finally, courts should consider requiring union counsel to prepare a detailed memorandum concerning counsel's role in the litigation. The memorandum would set forth all relevant facts,

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F.2d 1036 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). Ironically, an attorney who represented the prevailing insurgents in the Mine Workers litigation was appointed the union's pension trustee. Wash. Post, Aug. 18, 1973, § A, at 4, col. 6. *See also* Morrissey v. Curran, 351 F. Supp. 775 (S.D.N.Y. 1972) (union general counsel also union pension plan trustee), *aff'd*, 483 F.2d 480 (2d Cir. 1973), *cert. denied*, 414 U.S. 1128 (1974). *Cf.* United States v. Capanegro, 576 F.2d 973, 977 (2d. Cir. 1978) (regularly retained union counsel held "person" within meaning of criminal provisions of § 501(c)); United States v. Provenzano, 334 F.2d 678, 682-83 (3d Cir.), *cert. denied*, 379 U.S. 947 (1964) (union business agent violated Hobbs Act, 18 U.S.C. § 1951 (1976) by coercing employer to pay legal fees to attorney who performed little, if any, service for employer).

Finally, an attorney is a fiduciary under common law agency principles and could be liable for breach of that duty by failing to act in the sole interest of his principal, namely the union as an institution rather than its unfaithful officers. *See* RESTATEMENT (SECOND) OF AGENCY §§ 387-394 (1958).

Concerning the professional responsibilities of union attorneys, see Kennedy, *Union Racketeering: The Responsibility of the Bar*, 44 A.B.A. J. 437 (1958); Rauh, *A Mission for the Bar Association*, Wash. Post, Aug. 1, 1973, § A, at 27, col. 1.

[400] ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 9.

[401] *See* notes 358-362 and accompanying text *supra*.

[402] *See Derivative Suits, supra* note 361, at 536-37.

the precise issues presented, the institutional interests involved, a statement of the applicable law, and recommendations concerning the union's role in the litigation without specifying particular legal positions the union might advance. In the event of a proposed settlement, union counsel should include a summary of the memorandum in the notice, which must be given to the rank and file members.[403] Union counsel would file the memorandum with the court, serve copies on all parties, and make copies available to any union member upon request.[404] This requirement would induce union counsel to be as objective as possible. It would further provide the membership and the public with a disinterested analysis of the litigation, as well as assurance that the union's institutional interests are being represented. It should also induce union counsel to present the union's role in the suit on legitimate organizational goals.

IV. Representation of Plaintiffs in Section 501 Litigation

To encourage members to enforce the fiduciary provisions of section 501, courts may award attorney's fees and litigation expenses to plaintiffs. The concluding sentence of section 501(b) reads:

> The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.[405]

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[403] *Id. See* J. Moore, Moore's Federal Practice, vol. 3B, ¶ 23.55 [Notice (c)(2)], at 23.439 (2d ed. 1978) [hereinafter cited as Moore's Federal Practice]. The discussion has been limited to the problems involved in the selection and role of counsel representing the union. Counsel for the plaintiff may also be disqualified if, for example, the union is a former client and the § 501 suit is substantially related to the subject matter of the previous representation. *See also* Richardson v. Hamilton Int'l Corp., 333 F. Supp. 1049 (E.D. Pa. 1971).

[404] *See Derivative Suits, supra* note 361, at 536-37.

[405] 29 U.S.C. § 501(b) (1976), set forth in note 17 *supra*. The only other express LMRDA provision for the award of attorney's fees is in § 501(c), covering suits by members for access to unions' books and records to verify Landrum-Griffin Title II reports filed by unions with the Secretary of Labor. *See, e.g.*, Fruit & Vegetable Packers & Warehousemen Local 760 v. Morley, 378 F.2d 738 (9th Cir. 1967); Allen v. Bridge S. & O.I. Workers Local 92, 47 L.R.R.M. 2214, 41 Lab. Cas. ¶ 16,697 (N.D. Ala. 1960).

The general American rule, which is contrary to that of most countries, is

A. Definition of "Recovery"

A literal reading of the phrase "a reasonable part of the recovery" in section 501(b) suggests that Congress intended to limit the award of attorney fees to cases in which a member's suit results in money damages, and to limit fees to a "reasonable part" of the fund created. Courts have rejected this literal interpretation, even though legislative history supports it.[406] Using a

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that absent statutory authorization, attorney's fees are not awarded to prevailing plaintiffs. In Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975), the Supreme Court, while rejecting the "private attorney general" basis for a fee award in the absence of express statutory provisions, reaffirmed the three traditional equitable exceptions to the American rule against "fee shifting": (1) the losing litigant has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, Bell v. School Bd. of Powhatan County, 321 F.2d 494 (4th Cir. 1963); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951); *see also* note 208 *supra;* (2) a class suit has resulted in the creation of a common fund that benefits all class members, Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939); Trustees v. Greenough, 105 U.S. 527 (1881); (3) "in vindicating . . . statutory policy, . . . [plaintiffs] have rendered a substantial service . . . and furnish[ed] a [common] benefit to all . . ." class members. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 719 (1967). Most cases falling under these exceptions are non-labor cases. In the labor field, however, attorney's fees have also been awarded on the *Mills* "common benefit" theory. *See, e.g.,* Hall v. Cole, 412 U.S. 1 (1973) (LMRDA title I, the union members' "Bill of Rights"); Brennan v. United Steelworkers, 554 F.2d 586 (3d Cir. 1977) (LMRDA title IV governing election of officers); McDonald v. Oliver, 525 F.2d 1217 (5th Cir.), *cert. denied,* 429 U.S. 817 (1976) (LMRDA title III regulating trusteeships); Yablonski v. UMW, 466 F.2d 424 (D.C. Cir. 1972) (LMRDA title IV governing election of officers); Sosnoff, *supra* note 4; Comment, *The Furtherance of Union Democracy: Providing for Counsel Fees in Labor Union Members' Bill of Rights Suits,* 31 U. PITT. L. REV. 643 (1970). *But see* Marshall v. Teamster Local 20, 108 L.R.R.M. 2423 (D. Ohio 1981). *See also* Harrison v. United Transp. Union, 530 F.2d 558, 562 (4th Cir. 1975), *cert. denied,* 425 U.S. 958 (1976) (Railway Labor Act duty of fair representation); Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974) (Taft-Hartley duty of fair representation), *rev'd in part on other grounds,* 514 F.2d 285 (2d Cir. 1975), *cert. denied,* 423 U.S. 892 (1976).

[406] See the legislative history of S. 3974, 85th Cong., 2d Sess. § 109(b), Sen. Ervin's amendment to the Kennedy-Ives bill, which was identical to the pertinent provision of § 501(b): 105 CONG. REC. 16,489 (1959) (remarks of Sen. Goldwater); 104 CONG. REC. 11,327 (1958) (remarks of Sen. Ervin); 104 CONG. REC. 11,328 (1958) (remarks of Sen. Javits). A commentator early suggested that, because Congress recognized the problem and did not broaden the language of § 501(b), recovery of attorney's fees was conditioned upon a money judgment. *See Fiduciary Obligations, supra* note 9, at 302.

rule of construction designed "to seek out the underlying rationale [of the Act] without placing great emphasis upon close construction of the words,"[407] courts have recognized that the purposes of the LMRDA are best achieved by awarding counsel fees whenever a union has benefited from a section 501 suit.[408]

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[407] Hall v. Cole, 412 U.S. 1, 11 n.17 (1973) (quoting *Internal Affairs, supra* note 1, at 852).

[408] *See* Kerr v. Shanks, 466 F.2d 1271, 1278 (9th Cir. 1972); Local 92, Int'l Ass'n of Bridge, S. & O.I. Workers v. Norris, 383 F.2d 735, 743 (5th Cir. 1967); Bakery & Confectionery Workers v. Ratner, 335 F.2d 691, 696 (D.C. Cir. 1964); Johnson v. Nelson, 325 F.2d 646, 653 (8th Cir. 1963); Retail Clerks Union Local 648 v. Retail Clerks Int'l Ass'n, 299 F. Supp. 1012, 1021-22 (D.D.C. 1969); Highway Truck Drivers & Helpers Local 107 v. Cohen, 220 F. Supp. 735, 737-38 (E.D. Pa. 1963). *See also* United Bhd. of Carpenters v. Brown, 343 F.2d 872 (10th Cir. 1965).

Before the enactment of § 501, union members who sued successfully in state courts recovered attorney's fees even though the litigation did not result in the creation of a monetary fund for the union. *See, e.g.*, Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal. App. 2d 327, 340-41, 208 P.2d 1009, 1017 (1st Dist. 1949); Walker v. Grand Int'l Bhd. of Locomotive Eng'rs., 186 Ga. 811, 199 S.E. 146 (1938); McLane v. Romano, 322 Ill. App. 700, 54 N.E.2d 715 (1944); Gilligan v. Moving Picture Mach. Operators, 135 N.J. Eq. 484, 39 A.2d 129 (1944); Fittipaldi v. Legassie, 218 A.D.2d 331, 338, 239 N.Y.S.2d 792, 799 (1963); Murray v. Kelly, 14 A.D.2d 528, 217 N.Y.S.2d 146, 147 (1961), *aff'd mem.*, 11 N.Y.2d 810, 182 N.E.2d 109, 18 N.Y.S.2d 493 (1962); Vaccaro v. Gentile, 138 N.Y.S.2d 872, 879 (Sup. Ct. 1955); O'Connor v. Harrington, 136 N.Y.S.2d 881 (Sup. Ct. 1954) (union treasury preserved). *But see* Francis v. Scott, 260 Ala. 595, 72 So. 2d 98 (1954); Kinane v. Fay, 111 N.J.L. 553, 168 A. 724 (1933). In Milone v. English, 306 F.2d 814 (D.C. Cir. 1962), a common law action, the District of Columbia Circuit ruled:

> It lies now within the sound discretion of the District Court, though it is under no legal compulsion to do so, to require the International to pay reasonable counsel fees to appellants' (members') counsel should the court find, *either or both*, that they have materially aided in the creation of a fund for the benefit of the International . . . *or* that they have benefited the International in other ways.

Id. at 819 (emphasis added). In a related context the Supreme Court has noted, "the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939). *Accord*, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). *Cf.* Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 COLUM. L. REV. 784, 799 (1939); Comment, *Attorneys' Fees in Shareholder Derivative Suits: The Substantial Benefit Rule Reexamined*, 60 CALIF. L. REV. 164 (1972); Note, *Shareholders Suits: Pecuniary Benefit Unnecessary for Counsel Fee Award*, 13 STAN. L. REV. 146

Cohen I was the first case to recognize that attorney's fees could be awarded in excess of the monetary fund generated by the litigation.[409] The court awarded attorney's fees of $38,000, even though the plaintiffs' suit actually recovered only $25,000. The court noted that Congress could not have intended to limit the word "recovery" in section 501(b) to money actually recovered. That interpretation would not have provided the incentive for prompt legal action to prevent unlawful expenditures by union officials. The court reasoned that recovery means "anything of value," including "the entire remedy effectuated and thus encompasses the total benefit conferred upon the Union through the efforts of counsel."[410] The litigation benefited the union by preventing a potential counsel fee expenditure of $72,000. The $38,000 fee award was not inordinate compared to the $72,000 the defendants would have spent from union funds but for plaintiffs' suit.[411]

(1960).

The requirement that plaintiff's litigation benefit the union as a prerequisite for the award of attorney's fees implies that the plaintiff must prevail on the merits of the § 501 allegations. Of course, the plaintiff could also prevail through a settlement agreement rather than through litigation. An award of attorney's fees would still be appropriate in such cases because the statute does not condition the award of fees on full litigation. All that is required is that there be a recovery for the union. Thus, if plaintiff's § 501 litigation terminates by settlement, the court should permit plaintiff to recover reasonable attorney's fees if the settlement results in a union benefit. The Supreme Court recently recognized a similar rule in civil rights litigation brought under 42 U.S.C. § 1983. *See* Maher v. Gagne, 448 U.S. 122, 123 (1980).

[409] Cohen I, *supra* note 78, 220 F. Supp. at 737.

[410] Cohen I, *supra* note 78, 220 F. Supp. at 737. Similarly rejecting a narrow interpretation of "recovery," the D.C. Circuit, in Bakery & Confectionery Workers v. Ratner, 335 F.2d 691 (D.C. Cir. 1964), held that § 501(b) is permissive. "It means no more than this: where a monetary recovery has in fact been achieved, that fund may constitute a source from which the trial judge 'may allot a reasonable part' for payment of counsel fees and disbursements." 335 F.2d at 696-97. Interestingly, the court suggested that, in addition to any monetary judgment, another "source" from which attorney's fees may be recovered would be an assessment of the membership. *Id.* at 696 n.12. The opinion does not address the question of how this assessment might be levied or otherwise imposed. Of course, the union's treasury would always be one source for attorney's fee awards benefiting the union.

[411] Similarly, in Local 72, Int'l Ass'n of Bridge, S. & O.I. Workers v. Norris, 383 F.2d 735 (5th Cir. 1967), the Fifth Circuit concluded that, even if the litigation does not result in a special fund, "[s]o long as the Union realizes some substantial benefit as a result of the litigation it stands liable for fees due the

The Ninth Circuit followed a similar approach in reversing a lower court holding that attorney's fees could only be paid from an actual monetary recovery.[412] Relying on the principle that "active representatives of a class should not be saddled with the expense of legal efforts to benefit the entire class," the court ruled that "equitable principles require that plaintiff be granted his litigation expenses from the union treasury."[413] In support of its decision, the court drew an analogy to the Supreme Court's decision in *Mills v. Electric Auto-Lite Co.*,[414] a shareholder derivative suit.

In *Mills*, the Supreme Court cited *Cohen I* in holding that successful plaintiffs in shareholder suits under section 14(a) of the Securities and Exchange Act[415] may be awarded attorney's fees, even in the absence of statutory authorization.[416] Reasoning

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specified persons who secured these benefits." *Id.* at 743. *Id.* The court's reliance on Milone v. English, 306 F.2d 814 (D.C. Cir. 1962), a common law decision, in construing statutory language is questionable. As in Bakery & Confectionery Workers v. Ratner, 335 F.2d 691 (D.C. Cir. 1964); *see* note 410 *supra*, however, the court seemed to rest its decision more on equitable principles than the statutory provision. *See* Local 72, Int'l Ass'n of Bridge, S. & O.I. Workers v. Norris 383 F.2d 735, 744 (5th Cir. 1967) (citing Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939)). It could be argued that when the union leader's wrongdoing is "unconscionable, fraudulent, willful, in bad faith or exceptional," courts may exercise their general equity powers to direct that the defendants pay plaintiffs' counsel fees and litigation expenses. Taussig v. Willington Fund, Inc., 187 F. Supp. 179, 222-23 (D. Del. 1960), *aff'd*, 313 F.2d 473 (3d Cir. 1963), *cert. denied*, 374 U.S. 806 (1963). *See, e.g.*, Vaughan v. Atkinson, 369 U.S. 527, 531 (1962); Kahan v. Rosenstiel, 424 F.2d 161, 167-79 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473, 481 (4th Cir. 1951); Gieselmann v. Stegeman, 470 S.W.2d 522 (Mo. 1971). *See generally* 6 MOORE'S FEDERAL PRACTICE, *supra* note 403, ¶ 54.77[2]. In this type of case, "the underlying rationale for 'fee shifting' is . . . punitive and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." Hall v. Cole, 412 U.S. 1, 5 (1973). *See also* note 331 *supra*.

[412] Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972).

[413] *Id.* at 1278.

[414] 396 U.S. 375 (1970) (citing Kerr v. Shanks, 466 F.2d 1271, 1278 (9th Cir. 1972)).

[415] 15 U.S.C. § 78n (1934).

[416] The Court stated the general rule that attorney's fees are not ordinarily recoverable, but applied the judicially created exception applicable to "therapeutic" class actions, on the theory that, otherwise, the non-contributing class members would be unjustly enriched at the plaintiff's expense. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392 (1970).

that equity is the basis for awarding attorney's fees,[417] the Court expressly approved the extension of fee shifting beyond the traditional common fund doctrine to situations where the lawsuit may never produce a monetary recovery from which the fees could be paid.[418]

In *Hall v. Cole*,[419] the Supreme Court held that the *Mills* rationale permitted the federal courts to award attorney's fees under title I of the LMRDA, which does not expressly authorize such awards. The Court concluded that the plaintiff-member, who had been unlawfully disciplined, was entitled to recover attorney's fees from the union because, in vindicating his rights, he had dispelled the chill cast on the rights of others. He had thus benefited the union membership as a whole, justifying fee shifting.

The *Mills* rationale applies *a fortiori* in section 501 suits. These actions are brought on behalf of a union to challenge conduct allegedly injurious to all members as beneficiaries of a successful suit.[420] In vindicating section 501 policies and remedying

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[417] The Court observed that lower courts had permitted reimbursement where the litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Id.* at 393 (citing Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939)).

[418] Mills v. Electric Auto-Lite Co., 396 U.S. 375, 378 (1970). The Court concluded:

> The stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders. Cf. *Bakery Workers Union v. Ratner*, 118 U.S. App. D.C. 269, 274, 335 F.2d 691, 696 (1964). . . . [P]rivate stockholders' actions of this sort "involve corporate therapeutics," and furnish a benefit to all shareholders by providing an important means of enforcement of the proxy statute. To award attorneys' fees in such a suit to a plaintiff who has succeeded in establishing a cause of action is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them and that would have had to pay them had it brought the suit.

Id. at 396-97 (footnotes omitted). The citation of *Ratner* suggests that the Court's discussion of shareholder suits under § 14(a) of the Securities and Exchange Act applies to actions by union members under LMRDA § 501.

[419] 412 U.S. 1 (1973).

[420] As the Supreme Court has stated concerning statutes providing for the award of reasonable fees, "[C]ongress has opted to rely heavily on private en-

past fiduciary violations, plaintiffs also serve a "therapeutic" function by minimizing, if not eliminating, the potential for future abuses of power by union officials. These lawsuits will thus benefit the union even in cases where the actual monetary recovery is minimal or nonexistant. Courts should therefore award attorney's fees to plaintiffs whenever the action has corrected the type of abuse that Congress designed section 501 to prohibit. The fee award would be assessed against the monetary fund generated by plaintiff's lawsuit, and if that fund were insufficient, the award would be assessed against the union's treasury.

B. Time for Determining the Fee Award

Parties may move for an award of attorney's fees when a section 501 suit has terminated in their favor on the merits.[421] The *Cohen*[422] court observed that it would also be "legally proper" to award fees when a motion for a new trial is denied. Observing that section 501(b) is addressed to "the trial judge," the court concluded that an award of fees may be proper, even though an appeal has been taken. The Supreme Court has held that plaintiffs can be entitled to an interim award of litigation expenses and reasonable attorney's fees[423] upon establishing their cause of action, even though relief has not been determined. The Court has refused, however, to decide whether plaintiffs may be

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forcement to implement public policy and to allow counsel fees so as to encourage private litigation." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 263 (1975). The award of plaintiffs counsel fees is thus an essential element in the enforcement scheme of the LMRDA. *But see* CONCLUSION: LAW REFORM—A LEGISLATIVE PROPOSAL *infra*.

[421] The union may, of course, render the issue moot simply by reimbursing the plaintiff for costs, including attorney's fees without regard to the amount of the judgment and in excess of what a court might decide is due. *See Counsel Fees, supra* note 1, at 468 n.120. If a § 501 suit is resolved through a settlement agreement, which includes the payment of plaintiff's attorney's fees, a court should be alerted to subject the terms of the settlement to the most careful scrutiny.

If more than one group of plaintiffs sues under § 501, it is incumbent upon the attorneys representing each group to establish their own right to fees from the union on the basis of the benefit, if any, their services conferred upon the union. Their right to recover is in no way dependent upon a showing of entitlement to fees by the attorneys for another group. Schmidt v. McCarthy, 369 F.2d 176 (D.C. Cir. 1966).

[422] Cohen II, *supra* note 94.

[423] Mills v. Electric Auto-Lite Co., 396 U.S. 375, 380-90 (1970).

awarded prospective expenses.[424]

As a general rule, costs should be awarded whenever a suit has benefited a union by correcting an abuse that section 501 was designed to prevent. Obviously, if a court-approved settlement[425] resolves the matter, plaintiffs should not be required to litigate through to judgment on the merits to receive a fee award. On the other hand, when a suit is terminated through plaintiff's unilateral action, counsel fees should not be awarded.

A plaintiff may even be entitled to legal fees without a lawsuit ever being filed. For example, in *Blau v. Rayette-Faberge, Inc.*,[426] a shareholder retained an attorney to determine whether the provisions of section 16(b) of the Securities Exchange Act entitled a corporation to recover short-swing profits.[427] The attorney's exhaustive investigation revealed that an officer-director of the corporation had profitably engaged in unlawful insider trading. Advising the corporation of the unlawful conduct, the attorney requested that it institute suit within 60 days to recover the short-swing profits, and stated that if the corporation did not, the shareholder would do so on behalf of the corporation. Within 60 days, the corporation notified the shareholder that the official had agreed to pay the company his profits from the transactions, and that no legal action was necessary. When the corporation refused to pay the shareholder's attorney's fees, the shareholder sued. The Second Circuit held that the shareholder should not be penalized for the attorney's diligence, but that reimbursement was proper only if the corporation had been inattentive to its rights.[428]

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[424] *Id.* at 390 n.13.

[425] *See, e.g.*, Milone v. English, 306 F.2d 814 (D.C. Cir. 1962) (common law action); Colpo v. Hoffa, 81 L.R.R.M. 2545 (D.D.C. 1971), *aff'd per curiam*, 81 L.R.R.M. 2560 (D.C. Cir. 1972). *See also* FED. R. CIV. P. 23(e); 3B MOORE'S FEDERAL PRACTICE, *supra* note 403, ¶ 23.80[1]-[4], at 23.503 to 23.525.

[426] 389 F.2d 469 (2d Cir. 1968).

[427] *See* 15 U.S.C. § 78p(b) (1976).

[428] Blau v. Rayette-Faberge, Inc., 389 F.2d 469, 473 (2d Cir. 1968) (relying upon Dottenheim v. Emerson Elec. Mfg. Co., 77 F. Supp. 306, 307 (E.D.N.Y. 1948)). *Accord*, Lewis v. Wells, 325 F. Supp. 382, 387 (S.D.N.Y. 1971). *See* Green v. Transitron Elec. Corp., 326 F.2d 492 (1st Cir. 1964) (stockholder is entitled to reasonable investigation fees if demand produces some real benefit to corporation without the necessity of litigation); Maggiore v. Bradford, 310 F.2d 519 (6th Cir. 1962) (fact that defendants, who were majority shareholders, rescinded transaction before litigation of its merits did not defeat plaintiff minority shareholders' right to attorneys' fees).

An analogy to section 501 suits is compelling. Expenses incurred by members investigating fiduciary misconduct should be reimbursed when union officials, stirred to action by the investigation, voluntarily correct the situation. Section 501(b) warrants recovery because the members' efforts promote the legislative aims of section 501, and benefit the labor union without expensive litigation.[429] On the other hand, courts should deny requests for investigation expenses when union officials exercising reasonable diligence would have uncovered and corrected the wrongdoing without the plaintiff's aid.

C. Computation of "Reasonable" Attorney's Fees

Section 501(b) expressly provides that a successful plaintiff-member may be awarded attorney's fees and compensated for any expenses "necessarily paid or incurred" by counsel in the litigation.[430] Determining the amount of expenses under the statute has given the courts little difficulty. The successful plaintiff is entitled to filing, witness, and process fees, the cost of depositions and trial manuscripts, and plaintiff's reasonable travel expenses to attend the defendants' depositions. In addition, accounting fees are recoverable if the plaintiffs need to retain accountants to examine the union's books and records.[431] Also re-

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[429] *See* Vaccaro v. Gentile, 138 N.Y.S.2d 872 (Sup. Ct. 1955) (attempt by union members to enjoin officers from mismanagement and commingling of union funds denied, but court awarded attorney's fees because action alerted union that various funds were being improperly treated as one); Grein v. Cavano, 61 Wash. 498, 379 P.2d 209 (1963) (common law action by members against union and officers for accounting and misappropriation of funds dismissed as moot, but court awarded attorney's fees because as a direct and proximate result of lawsuit, union corrected methods of bookkeeping, accounting, and handling of funds). *Cf.* Murray v. Kelly, 14 A.D. 2d 528, 217 N.Y.S.2d 146 (1961), *aff'd*, 10 N.Y.2d 969, 180 N.E.2d 64, 217 N.Y.S.2d 146 (1961) (dissenting opinion noting that majority awarded attorney's fees although record failed to establish that plaintiffs' efforts "proximately caused" benefits to union or that improvements would result in economic benefit to union; the merits of the dispute and the good faith of the parties were neither litigated nor conceded since the lawsuits were formally withdrawn by plaintiff). *See generally* FED. R. CIV. P. 54(d); 6 MOORE'S FEDERAL PRACTICE, supra note 403, ¶ 54.71 (statutory provisions for costs); *id.* ¶ 54.77[4] (depositions); *id.* ¶ 54.77[5] (witness fees); *id.* ¶ 54.77[7] (transcripts).

[430] 29 U.S.C. § 501(b) (1976), set forth in note 17 *supra*.

[431] Morrissey v. Curran, 336 F. Supp. 1107 (S.D.N.Y. 1972), *aff'd*, 483 F.2d 480 (2d Cir. 1973), *cert. denied*, 414 U.S. 1128 (1974); Norris v. Green, 317 F.

coverable are plaintiff's expenses and loss of income from consulting and attending court proceedings, if reasonable and incurred in good faith.[432] Plaintiffs may also recoup reasonable expenses incurred, but not recovered, in ancillary actions, like Title II suits,[433] if they demonstrate that these actions were "necessary" to successfully prosecute the section 501 claim.

Unlike litigation expenses, the determination of attorney's fee awards has presented courts with considerable difficulty. Trial courts have been given broad discretion in making this determination;[434] but, in exercising their discretion, courts have confronted competing policies and problems of massive proportions.

Present statutory policies favor private enforcement of section 501.[435] The amount of an award must therefore be adequate to promote the efforts of "private attorneys general," who vindicate statutory policies by seeking legal redress for fiduciary wrongdoing.[436] At the same time, the financial rewards for those involved

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Supp. 100, 102-03 (N.D. Ala. 1965), *aff'd sub nom.*, Local 192, Int'l Ass'n of Bridge, S. & O.I. Workers v. Norris, 383 F.2d 735 (5th Cir. 1967). Although LMRDA § 201(c), 29 U.S.C. § 501 (1976), authorizes the court, in its discretion, to award attorney's fees "and costs of the action," incurred by a member to examine the union's books and records, the Ninth Circuit has ruled that accountant's fees are not recoverable under that section. Fruit & Vegetable Packers Local 760 v. Morley, 378 F.2d 738, 746 (9th Cir. 1967). *Accord*, Richardson v. National Post Office Mail Handlers, 442 F. Supp. 188 (E.D. Va. 1978).

[432] Colpo v. Hoffa, 81 L.R.R.M. 2545, 2558 (D.D.C. 1971), *aff'd per curiam*, 81 L.R.R.M. 2560 (D.C. Cir. 1972).

[433] *See* note 438 *infra*.

[434] Ratner v. Bakery Workers Int'l Union, 354 F.2d 504, 506 (D.C. Cir. 1965). *See, e.g.*, Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974). *See also* Trustees v. Greenough, 105 U.S. 527 (1881). Of course, the plaintiff would have the burden of proving his entitlement to an award for attorney's fees, and the trial judge should keep plaintiff's burden in mind when determining the amount of the attorney's fee award.

[435] The LMRDA also provides criminal penalties for blatant violations of fiduciary obligations, 29 U.S.C. § 501(c) (1976), detailed financial reporting by unions and their officers and employees, *id.* §§ 431-432, and investigations by the Secretary of Labor to determine the commission of most LMRDA violations, including breach of fiduciary duties. *Id.* § 521.

[436] Congress has placed in the hands of union members the responsibility for holding union officials to their fiduciary obligations. In other contexts, courts have recognized that when a suit by a private citizen benefits a class and effectuates a strong congressional policy, the award of attorney's fees pursuant to express statutory authorization is part of the remedy for encouraging public-minded suits vindicating important social policies. The Supreme Court's observations in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)(*per*

in these suits must not be so large as to invite strike suits designed to harass a union, to promote the special interests of dissident groups, or to encourage attorney-initiated litigation.

In light of these competing policy considerations,[437] courts

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curiam), a suit to enjoin racial discrimination in public accommodations under Title II of Civil Rights Act of 1964, would equally apply to § 501 actions:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief. . . .

390 U.S. at 401-02 (footnotes omitted).

Attorney's fees are also awarded to successful parties under Title VII of the Civil Rights Act of 1964 pursuant to similar statutory authorization. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978); Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975). For a collection and discussion of these and other cases, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1277-1313 (1976); Derfner, *One Giant Step: The Civil Rights Attorney's Fees Awards Act of 1976,* 21 ST. LOUIS U.L.J. 441 (1977); Heinsz, *Attorney's Fees for Prevailing Title VII Defendants: Toward a Workable Standard,* 8 U. TOL. L. REV. 259 (1977). *See also* note 484 *infra.*

The Supreme Court recently extended the policy in favor of private enforcement of Title VII in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980). The Court, speaking through Justice Blackmun, held that a prevailing plaintiff in a Title VII action is entitled to attorney's fees incurred during state agency administrative proceedings. *New York Gaslight* is a crucial decision in the drive for equal employment opportunity. Under Title VII, a plaintiff must exhaust elaborate state and federal administrative proceedings before filing a claim in federal court. The *New York Gaslight* rule will prevent the administrative requirements from operating as a bar against valid employment discrimination claims.

[437] The court recognized these competing policies in Colpo v. Hoffa, 81 L.R.R.M. 2545 (D.D.C. 1971), *aff'd per curiam,* 81 L.R.R.M. 2560 (D.C. Cir. 1972), observing:

> The virtues of aggressive enforcement must also be balanced against other wholesome objectives: prevention of the labor equivalent of strike suits, maintenance of the bona fides of the suit and its aim as one primarily for the union's benefit, and moderated but fair fees for litigated terminations, particularly as an aid to fair settlements.

81 L.R.R.M. at 2551-52 (footnotes omitted). *See also* Morrissey v. Curran, 83 L.R.R.M. 2948, 2949 (S.D.N.Y. 1972), *aff'd,* 483 F.2d 480 (2d Cir. 1973), *cert. denied,* 414 U.S. 1128 (1974); 3B MOORE'S FEDERAL PRACTICE, *supra* note 403, ¶

have considered two basic approaches in computing reasonable attorney fees under section 501. One approach tailors the fee award to the individual attorney by considering such factors as time expended, experience and ability of counsel, customary fees charged for similar services, and any fee arrangement in the retainer agreement. The other approach involves a *quantum meruit* evaluation of the value of counsel services, determined by the benefits conferred on the union by the litigation.

Moschetta v. Cross[438] illustrates the difficulties of either approach. The district court held that officials of the Bakery & Confectionary Workers International Union had breached their section 501 fiduciary responsibilities by misappropriating union funds. The court further held that plaintiffs were entitled to an award of attorney's fees from the International Union for the "cost of services," determined by the retainer agreement between plaintiffs and their attorney. The court of appeals reversed, ruling that, although the fees in the retainer agreement were some evidence of the cost of counsel's services, they failed to reflect the value of the benefit given to the union by plaintiffs' suit.[439] The case was remanded to ascertain an award on a *quantum meruit* theory, with the guiding standard to be "one of reasonableness" based on the value of the benefits that the suit conferred on the union.[440]

On remand, the district court decided that, because the suit had purged the officers whose misconduct had discredited the

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23.1.25 at 23.1-152. But the court should not reduce an award of counsel fees simply because the member is motivated by the ambition to hold political office in the union. Yablonski v. UMW, 466 F.2d 424, 430-31 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 918 (1973), *cited with approval,* Hall v. Cole, 412 U.S. 1, 14 (1973). Similarly, the court should not consider the hope and expectation of plaintiffs' counsel to become union counsel in the event plaintiffs become the governing officers of the litigation. Dawson, *Lawyers and Involuntary Clients: Public Interest Litigation,* 88 HARV. L. REV. 849 (1975); Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fee Awards Act,* 80 COLUM. L. REV. 346 (1980).

[438] Unreported oral ruling and order (D.D.C.), *rev'd sub nom.* Bakery & Confectionery Workers Int'l Union v. Ratner, 355 F.2d 691 (D.C. Cir. 1964), *on remand,* Moschetta v. Cross, 241 F. Supp. 347 (D.D.C. 1964), *aff'd sub nom.* Ratner v. Bakery & Confectionery Workers Int'l Union, 354 F.2d 504 (D.C. Cir. 1965) [hereinafter cited as Moschetta v. Cross].

[439] Bakery & Confectionery Workers Int'l Union v. Ratner, 335 F.2d 691 (D.C. Cir. 1964).

[440] *Id.* at 696.

union, the benefit conferred by the action was "the reestablishment of the union as a reputable representative of its members."[441] The court found the most accurate measure of the value of membership in the rehabilitated union to be some "reasonable percentage" of the members' average annual dues. It then divined that 12.5% of that amount was a "reasonable and realistic measure"[442] of the *quantum meruit* value of the attorney's services. Without explaining the calculus of the 12.5% figure, the court noted the fee was within eight percentage points of that established in the retainer agreement.[443]

The undesirability of a percentage formula for determining fees under the "benefits conferred" approach is obvious when examined in the context of litigation challenging the use of Teamster funds to defend James R. Hoffa. *Colpo v. Hoffa*[444] dealt with the calculation of attorney fees after the parties had reached settlement in *International Brotherhood of Teamsters v. Hoffa*.[445] In the settlement agreement, the defendant-officers, who were bonded, agreed to repay $100,000 to the union and to refrain from using union funds for any further defense of Mr. Hoffa.[446] Plaintiffs' counsel urged that an appropriate award would be $1,600,000: 40% of the estimated savings of $1,000,000, plus 2% of the annual per capita dues of $30 million.[447]

The *Colpo* court concluded, however, that the percentage formula adopted by the *Moschetta* court was inappropriate because the aims and results of the two cases were different.[448] An-

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[441] Moschetta v. Cross, *supra* note 438, 241 F. Supp. at 349-50.

[442] Moschetta v. Cross, *supra* note 438, 241 F. Supp. at 351.

[443] The court professed to have redetermined the fee based on the "benefit conferred," but in fact used figures resulting in about the same amount as calculated under the retainer agreement. Because the appellate court had failed to provide a formula other than the amorphous standard of reasonableness, the district judge had only the retainer agreement to use as an objective standard for determining the amount of the award.

[444] 81 L.R.R.M. 2545 (D.D.C. 1971), *aff'd per curiam*, 81 L.R.R.M. 2560 (D.C. Cir. 1972).

[445] 242 F. Supp. 246 (D.D.C. 1965).

[446] *See* note 199 and accompanying text *supra*.

[447] The two percent figure was an estimate of the enhanced value of union membership conferred by encouraging democratic self-reform. *Id.*

[448] The court noted that the chief aim of the *Moschetta* suit was to rehabilitate the union by evicting its offending chief executive and restoring the union to the rank-and-file membership, whereas plaintiffs in *Colpo* sought recoupment of past, and prevention of future, union expenditures of a specific limited

other implicit reason was that it would have resulted in an excessive fee. Counsel for plaintiffs tacitly recognized this by requesting only 2% of the union's annual per capita taxes, rather than the 12.5% of *Moschetta*. The latter figure would have yielded an astronomical award of $3,750,000.[449]

In *Colpo*, the court implicitly recognized the futility of devising a formula for computing the value of the "benefit conferred." In exercising its equitable discretion, the court simply considered a number of relevant factors to determine the amount of the award, including the amount saved, the time and labor required, and the difficulty and novelty of the case.[450] By combining these factors, the court granted an award of $255,000, or an hourly fee of $85.[451] The factors used by the *Colpo* court to calculate the reasonable fee award are consistent with the standards recommended by the Code of Professional Responsibility,[452] and those applied by the federal courts in determining fee awards under other federal statutes.[453]

In *Johnson v. Georgia Highway Express, Inc.*,[454] the Fifth Circuit developed a set of analogous factors from the ABA standards for determining attorney fee awards in employment dis-

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kind. Colpo v. Hoffa, 81 L.R.R.M. 2545, 2555 (D.D.C. 1971), *aff'd per curiam*, 81 L.R.R.M. 2560 (D.C. Cir. 1972). Moreover, the fee award in *Moschetta* was premised on the tangible benefit of membership in a rehabilitated union rather than, as in *Colpo*, monetary recovery or saving by the union. *Id.* at 2556.

[449] *Id.* at 2555.

[450] *Id.* at 2550-51. All told, the court considered eleven elements to determine the award. These were: (1) the amount recovered or saved; (2) the time and labor required; (3) the difficulty and novelty of the case; (4) the skills required to perform legal representation adequately; (5) the experience, reputation, and ability of counsel; (6) the contingent nature of the fee or the risk of nonrecovery; (7) the time expended; (8) the stage at which the case was terminated; (9) the quality of representation; (10) the amount customarily charged or allowed in the same or similar services; and (11) the public interest in promoting vigorous enforcement of § 501 suits. *Id.*

[451] International Bhd. of Teamsters v. Hoffa, 81 L.R.R.M. 2545, 2557 n.116 (D.D.C. 1971), *aff'd per curiam*, 81 L.R.R.M. 2560 (D.C. Cir. 1972).

[452] ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 2-18, DISCIPLINARY RULE 2-106(B).

[453] *See, e.g.*, Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980); Johnson v. Georgia Highway Express Inc., 488 F.2d 714, 719 (5th Cir. 1974) (Title VII). *See also* Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*. 126 U. PA. L. REV. 281, 285-95 (1977) (criticizing this approach to fee setting).

[454] 488 F.2d 714 (5th Cir. 1974).

crimination cases.[455] District courts often use the "*Johnson*" factors to calculate awards, not only in Title VII cases, but also under other federal statutes, including the LMRDA.[456] The courts, however, have encountered problems with both the *Johnson* factors and alternative formulas.

District court judges have had difficulty applying the *Johnson* factors because the mere articulation of relevant factors, as in *Colpo,* is not helpful for determining a reasonable dollar amount in a particular case.[457] Without an analytical framework for weighing each factor, judges have no guidance for assessing the

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[455] The *Johnson* court set out twelve guidelines to determine fee awards: (1) the time spent and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases. *Id.* at 717-19.

[456] *See* Kerr v. Screen Extra Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976). Cases in which courts followed *Johnson* in awarding attorney's fees under other federal statutes include: Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980) (Antitrust Act); Marshall v. Edwards, 582 F.2d 927, 938 (5th Cir. 1978), *cert. denied,* 442 U.S. 909 (1979), *rev'g & remanding,* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (Voting Rights Act); Mitchell v. Scheepvaart Maatschappij Trans-Ocean, 579 F.2d 1274, 1281 n.10 (5th Cir. 1978) (Longshoreman's & Harbor Workers Compensation Act); Duval v. Midwest Auto City, Inc., 578 F.2d 721, 725 n.6 (8th Cir. 1978) (Motor Vehicle Information & Cost Savings Act); Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 (4th Cir.), *cert. denied,* 439 U.S. 934 (1978) (Truth in Lending Act); Walston v. School Bd., 566 F.2d 1201, 1204 (4th Cir. 1977) (Emergency School Aid Act); Cleverly v. Western Elec. Co., 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff'd,* 594 F.2d 638 (8th Cir. 1979) (Age Discrimination In Employment Act).

It is important to note that, for the trial court to award attorney's fees, it is now necessary for a statute to provide for attorney's fees under the specific action maintained. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). *See also* Comment, *Calculation of a Reasonable Award of Attorney's Fees Under the Attorney's Fees Awards Act of 1976,* 13 J. MAR. L. REV. 331 (1980).

[457] *See generally* Leubsdorf, *The Contingency Factor in Attorney Fee Awards,* 90 YALE L.J. 473, 478-82 (1981). The *Johnson* factors have been criticized by the courts. *See, e.g.,* Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980); Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980).

relative importance of each factor, or for deciding whether a given factor should be applied differently in different situations, or even applied at all.[458] What district court judges need is a formula for translating the relevant factors into fee awards.

Unfortunately, there are no easy formulas. The *en banc* decision of the District of Columbia Circuit in *Copeland v. Marshall*[459] illustrates the conceptual difficulties in devising a single formula for determining attorney's fee awards. In *Copeland,* the court agreed to review the standards applicable to a Title VII suit against the government.[460] A previous panel considering *Copeland* had applied a "cost-plus reasonable profit" formula, based on three distinct components: salary, overhead, and profit. The "cost-plus reasonable profit" formula was premised upon the view that the attorney's fee award should do no more than "return the actual out-of-pocket cost to the [law] firm for its attorneys' legal services and all overhead, plus a reasonable and controlled profit."[461]

A majority of the circuit judges, however, rejected the cost-plus formula in favor of a "market value" approach. This new formula was devised from the Third Circuit's decision in *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp. (Lindy I),*[462] and a successor case, *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp. (Lindy II).*[463] In *Lindy I,* the court theorized that the logical

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[458] *See* Copeland v. Marshall, No. 74-1822 slip. op. at 17 (D.C. Cir. Sept. 2, 1980).

[459] 641 F.2d 880 (D.C. Cir. 1980).

[460] A class suit, brought by women employed in the Directorate of Data Automation of the Department of Labor, had led to a finding that the Department had discriminated against the class in assignments, training performance evaluations, promotions, and other working conditions. *Id.* at 884-85.

Although the *Copeland* litigation involved special considerations because the defendant was the government, the court's analysis of methods for determining reasonable attorney's fees is applicable to cases involving both private and government defendants.

[461] *Id.* at 925 (Wilkey, J., dissenting).

[462] 487 F.2d 161 (3rd Cir. 1973). The attorney's fee award in *Lindy I* involved the settlement of antitrust litigation brought against a group of plumbing fixture manufacturers and their trade association for price-fixing. Plaintiff's counsel sought to recover fees under the equitable fund exception to the American rule against fee splitting, because the Clayton Act, 15 U.S.C. §§12-21 (1976), does not authorize an award of attorney's fees to plaintiffs who have settled.

[463] 540 F.2d 102 (3rd Cir. 1976)(*en banc*). *See also* Detroit v. Grinnel Corp.,

starting point in setting fees was the determination of a "lodestar fee." The lodestar was the product of a reasonable hourly rate[464] times the number of hours reasonably expended on the lawsuit.[465] Attorneys were required to document the number of hours reasonably expended on the lawsuit, so that the trial judge could segregate the type of work performed and ascertain the seniority of the lawyer performing it. At its discretion, the court eliminated unproductive hours spent on fruitless claims.[466]

Once the lodestar is established, it is adjusted to accommodate other factors necessary to reflect the full market value of an attorney's time. *Lindy II* explained these other factors. The first, "contingent nature of success," is determined when the suit is filed; this involves an *ad hoc* evaluation of the complexity of the litigation and the probability of success.[467] The lawyer is thus viewed as a risk-calculating entrepreneur, which gives the contingency factor an economic rationale.[468] Additional adjustments may be made for the "quality of the attorney's work" as reflected in his normal billing rate; there would be further adjustments if the representation is extraordinarily good or extremely bad.[469] The burden of justifying any adjustment should rest on the party seeking the adjustment.[470]

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495 F.2d 448 (2d Cir. 1974); Detroit v. Grinnel Corp., 575 F.2d 1093 (2d Cir. 1977). The Third Circuit's decisions in *Lindy I* and *II*, and those of the Second Circuit in the *Grinnel* litigation are frequently cited as the *Lindy-Grinnel* market or hourly-fee approach. Leubsdorf, *supra* note 457, at 478.

[464] The prevailing fees in the legal community for comparable work would determine the reasonable hourly rate, with consideration given to the attorney's reputation. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973).

[465] Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973).

[466] *Id.* at 169.

[467] Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3d Cir. 1976)(*en banc*). In following a market approach, risk is a negative factor that diminishes the "expected value" of plaintiff's lawsuit, and thus justifies payment of a "risk premium" to the lawyer who brings the suit. Copeland v. Marshall, 641 F.2d 880, 892-93 (D.C. Cir. 1980).

[468] Leubsdorf, *supra*, note 457 at 480-81.

[469] Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117-18 (3d Cir. 1976)(*en banc*).

[470] Copeland v. Marshall, 641 F.2d 880, 892-93 (D.C. Cir. 1980). The *Copeland* majority reasoned that only a market value approach to fee determination would result in an award that would fulfill the primary purpose of fee awards in Title VII cases "to encourage individuals injured by . . . discrimination to

Certainly, any fee-setting formula relying on the number of hours a lawyer expends on litigation is inadequate. In *Cohen*, for example, the court rejected this approach, remarking:

> [T]he work of a lawyer is not comparable to the work of an artisan such as a plumber, or a bricklayer, or the like, where the time clock is controlling. Many times the final and winning decision of the lawyer as to what should or should not be done is not made at his desk or in his library but when he is elsewhere. The conscientious lawyer's mind is never at rest but works on and on until he arrives at what he thinks should be done.[471]

Although the court obviously overestimates and exaggerates the skills and virtues of the average counsel in the real world, it correctly refused to rely exclusively upon an hourly rate.

The method for determining attorney fee awards must be administratively workable. The majority in *Copeland* explained the difficulties of applying a cost-plus formula.[472] District court judges would be faced with problems of "massive proportions" every time they attempted to determine "imputed salaries" of law firm partners, to allocate "overhead costs" of the firm to the particular litigation, or to calculate the incalculable "reasonable profit." The time spent in litigating these factors would ulti-

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seek judicial relief," *id.* at 889 n.14, and to deter discrimination. *Id.* at 889 n.13. The court assumed that only a fee based on market value would adequately compensate lawyers for the amount of work performed and act as an incentive for competent lawyers to vindicate Title VII rights. *Id.* at 893. The court rejected the cost-plus-reasonable profit formula because of the concomitant administrative burdens and because that formula was inconsistent with the purpose of Title VII attorney fee awards. Moreover, cost-plus awards would be insufficient to serve as an incentive for private enforcement of civil rights law. *Id.*

[471] Cohen II, *supra* note 94, 220 F. Supp. at 738. In computing the fee awarded, the *Cohen* court considered factors like the complexity of the litigation, "the responsibility of counsel . . . and the desired result of the client . . . ," and the fact that the case was "of first impression and required more than usual efforts and skill on the part of counsel." 220 F. Supp. at 738.

[472] As the majority explained:

> The problems associated with administering a "cost-plus" calculus are multifarious. How might a firm allocate its overhead costs to a particular piece of litigation? In what manner does one calculate the costs associated with the "imputed salaries" of firm partners? What is "reasonable" profit to be awarded? The necessity, under "cost-plus," of answering these and other questions creates the specter of a monumental inquiry on an issue wholly ancillary to the substance of the lawsuit.

Copeland v. Marshall, 641 F.2d 880, 896 (D.C. Cir. 1980).

mately increase the amount of the fee because the cost of litigating the issue itself is compensable.[473] Counsel seeking an award would also be subject to considerable discovery to document the "cost" of legal services rendered. A lawyer may thus think twice before undertaking section 501 litigation. Consequently, private enforcement may be less effective in vindicating statutory rights.

The market approach to fee setting, however, is not the answer to these problems. It, too, presents administrative difficulty of massive proportions. The fundamental flaw of the market value approach is that there is no market for judges to refer to in calculating contingency or other factors necessary to determine reasonable attorney's fees. This is certainly true when the defendant is the government.[474] It is also true in cases where judges are called upon to grant attorney's fees for a judicially new, uncertain, and undefined statutory cause of action. In the real market, lawyers and clients agree on a fee that allocates the risk of unsuccessful litigation. That accounts for a number of intangible factors, such as skill of counsel and the complexity of the case. In the absence of a market where buyers and sellers agree to pay bargained-for rates, courts can only guess what result would occur under the free play of market forces.[475] While retainer agreements and fee schedules might be used as substitutes, they are not reliable indicators for predicting how fees would actually be determined by market forces. It would indeed be a Herculean task to mimic market results when fees are statutorily determined and no market exists. Given the problems of the market approach to fee awards, courts may find it infinitely easier simply to set fees by intuition.

Moreover, in applying the *Lindy* market approach to section 501, the goal would not be to mimic the market, but rather to "reform it," by having judges calculate contingency factors that create sufficient incentives.[476] It is unlikely, however, that judges

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[473] *Id.*

[474] *Id.* at 913-14 (Wilkey, J., dissenting).

[475] The danger is that trial judges will overestimate the market value of the legal services rendered, thereby awarding excessive fees. In *Copeland,* for example, the litigation resulted in a back-pay award of $31,345. The legal fee requested by plaintiff's attorneys was $206,000, and the amount awarded by the district court was $160,000. This latter amount was approved by a majority of the D.C. Circuit, under its market value approach to fee setting. *Id.* at 911 (Wilkey, J., dissenting).

[476] *See* Leubsdorf, *supra* note 457, at 480-81. "Despite the talk of fair mar-

with crowded dockets would be willing and capable of calculating probabilistic factors that would create sufficient incentives. It is more likely that judges would merely give lip service to the market rationale and ultimately determine the size of the award on fairness grounds. The problem with this is that attorney fee awards may end up being either too large or too small such that fee awards may fail to provide proper incentives.[477] After all, the purpose for a fee award under section 501 is to provide sufficient incentives to encourage private enforcement, not to compensate the market value of lawyers' services.

In developing a method for determining attorney fees in section 501 cases, courts must consider that awards are contingent, and that they are a stimulus for the enforcement of fiduciary obligations, without which "many deserving cases of violations of LMRDA would not be prosecuted by objecting members of the union."[478] On the other hand, in passing upon the number of hours justifiably expended by counsel, courts must also guard against "overlawyering" to maximize fees.[479] *Kiser v. Miller*,[480] a

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ket value, then, the goal is not to replicate the market but to reform it, creating adequate but not excessive incentives." *Id.* at 481.

[477] *See e.g., id.* at 491-97.

[478] Morrissey v. Curran, 83 L.R.R.M. 2948 (S.D.N.Y. 1972), *aff'd*, 483 F.2d 480 (2d Cir. 1973), *cert. denied*, 414 U.S. 1128 (1974). Analogizing § 501(b) to § 16(b) of the Securities Exchange Act, 15 U.S.C. § 78(b) (1934), for instance, one court has concluded that "[s]ince in many cases such as this the possibility of recovering attorney's fees will provide the sole stimulus for . . . enforcement . . ., the allowance must not be too niggardly." 83 L.R.R.M. at 2950 (quoting Smolowe v. Delendo Corp., 136 F.2d 231, 241 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943)).

[479] Particularly troublesome areas are (1) conferences with clients, (2) consultation with specialized experts, like labor law teachers, to confirm the results of research or proposed strategy and tactics, (3) discovery, and (4) prolonged settlement negotiations.

A litigation tactic available to union counsel to evaluate the reasonableness of requested attorney's fees in preparation for hearing is discovery through depositions, FED. R. CIV. P. 30-31, and demands for the production of documents, FED. R. CIV. P. 34. Illustrative items are original time and billing sheets, documents that establish or tend to establish the customary fee for similar work, and any documents that relate to the attorneys' expectation at the outset of the litigation. A detailed listing would track all factors relevant to the determination of a reasonable fee and expenses. While this procedure would lead to more enlightened decision-making, in some cases it may be unnecessary, impractical, or too burdensome.

[480] 364 F. Supp. 1311 (D.D.C. 1973), *modified sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974).

class action against a union pension fund, illustrates the impropriety of a fee award that represented a windfall for lawyers. Without denying that reasonable fees provide attorneys with incentive to take suits benefiting the public, the court concluded that, "[a]fter counsel has been adequately compensated . . . no further incentive is needed."[481] The court aptly observed:

> To justify the contingent fee percentage in class actions on the grounds that the recovery is a "windfall" to the class, and, therefore, there should be a "windfall" award to the attorney is without logical merit. The initial premise is faulty, i.e., to say that the recovery, when prorated to its sub-subsistence sum of $1,800 per year, is windfall, is to disregard today's economic realities. Furthermore, the second premise implies a selfishness unbecoming to the legal profession. This thinking is all the more unacceptable when one remembers that the purpose of the suit was to restore the rights of a deprived class. In such circumstances, a sizeable diversion of the recovery for attorney's fees would merely constitute a substitution of one fiduciary wrongdoer with another.[482]

This statement is equally applicable to section 501 suits. Plaintiffs' counsel in *Colpo* certainly exhibited "unbecoming selfishness," for example, when they filed their motion for fees.

The fundamental lesson of the case law is that no single factor or formula will work for computing awards of reasonable counsel fees under subsection 501(b). Many formulas and theories can be found in a variety of contexts, each promising meaningful approaches to fee determination, but no formula or theory is workable. Rather than adopting a fixed formula, courts will likely continue to apply *quantum meruit* principles. In exercising equitable discretion, courts will consider the relevant factors and determine fee awards by *ad hoc* balancing of the policy of encouraging vigorous private enforcement against the unfairness and harm of excessive fees.[483] Unfortunately, fee awards will continue to be the result of unprincipled decision-making. No other result seems possible so long as private parties are relied

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[481] Kiser v. Miller, 364 F. Supp. 1311, 1316 (D.D.C. 1973), *modified sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974).

[482] Kiser v. Miller, 364 F. Supp. 1311, 1316 (D.D.C. 1973), *modified sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974).

[483] As the court stated in Gerstle v. Gamble-Skogmo, Inc., 366 F. Supp. 638 (E.D.N.Y. 1973), "each case depends upon its individual facts and frequently differs from others with respect to the importance to be attached to any particular element." *Id.* at 641.

upon as the primary enforcers of the statute.[484]

CONCLUSION: LAW REFORM—A LEGISLATIVE PROPOSAL

In Part II, the analysis of counsel fee problems involving the use of union funds or counsel in the defense of officers proceeded on the assumption that the propriety of a union-supported defense will ordinarily be litigated by a union member. But in reality a union member might never file a section 501 action. In most cases, the membership and their attorneys will lack sufficient financial incentive to sue. The award of fees compensates only plaintiff's attorney and the actual fee award will usually be small in relation to the amount actually recovered.[485] As a consequence, under-enforcement of the fiduciary provision can be expected.[486]

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[484] In his article on the award of reasonable attorney's fees, Professor Berger suggests as a "coherent analytic framework," the formula: hours justifiably expended, multiplied by the attorney's market rate, multiplied by the risk of nonrecovery. Berger, *supra* note 453, at 327. He would have the courts reject certain traditional factors, including the monetary amount involved in the litigation, results obtained, and the quality of the lawyer's work. This approach is attractive in several respects, especially in civil rights, consumer, environmental, and other *pro bono* cases. The application of this formula in § 501 suits, however, is questionable because it may not provide adequate incentive for vigorous competent private enforcement of LMRDA fiduciary obligations, which involve primarily financial matters. On the other hand, it may insufficiently inhibit unduly excessive awards payable not from the pockets of the wrongdoers but from the treasury of the union membership. Moreover, there would still be the difficult problem of determining risk of nonrecovery and allocating the burdens of risk between lawyer and client.

Finally, regardless of which method is selected for determining reasonable attorney's fees, public enforcement is, in our opinion, socially preferable because it avoids the administrative burdens of determining attorney's fee awards, and eliminates duplication in enforcement efforts. Public enforcement permits public officials to coordinate enforcement efforts, exploit economies of scale in information processing, and more effectively monitor costs and benefits necessary for optimizing the level of enforcement. *See generally* Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980).

[485] The deterrent effect of statutory fiduciary liability depends on the willingness of union members to bring suit. Attorney's fees awards should determine an individual member's incentive to sue, because any monetary recovery reverts to the union. *See Federal Courts, supra* note 9, at 1315.

[486] As Professors Posner and Scott recently observed in the corporate context:

> The deterrent effect of fiduciary liability rules depends largely on the award of attorney fees to plaintiff's counsel in a derivative suit

There is also the problem that a union membership may be dominated to the point that no member is willing to bring a section 501 suit to challenge activity of the leadership.[487] While union members may occasionally vote against leadership resolutions, it is highly unlikely they will be willing to bring suit against their leaders, with whom they must continue to live after they file the suit. Except for the political dissident, most union members would probably opt for the quiet, safe life rather than risk reprisal for suing under section 501.

Indeed, it is unlikely that a union's rank and file would be willing to risk reprisals by suing the union's leadership under section 501. Even those willing to assume such risks may very well sue for the wrong reasons.[488] Thus, the union rank and file cannot be relied on as agents for effective enforcement.[489]

> or class action. Judicial determination of the amount of such fees defines the incentive for members of the plaintiff's bar to invest in monitoring management—in investigating, acquiring information, pressing suit. Since the fee will be only a fraction, sometimes a small one, of the amount of any damage recovery, one can expect under-investment in enforcement of fiduciary rules.

R. POSNER & K. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION 110-11 (1980). *See also* notes 110-123 *supra*.

[487] *See* notes 110-123 and accompanying text *supra*.

[488] After all, one must remember that the parties must still live together after the lawsuit has terminated. In most cases, only the political dissident would risk reprisals in seeking to remedy the fiduciary breaches of the leadership. Most rank and file members would not be prepared to take the risks involved in bringing § 501 suits.

Of course, some union members are prepared to take on all kinds of risks to correct perceived fiduciary abuses of union officers. James M. Morrissey of the National Maritime Union may be such a person. Professor Summers is reported to have stated that dissidents like Morrissey, who are "indominable and indestructible, prepared to take on all kinds of risks," "keep the system from going completely sour." Wall St. J., July 13, 1981, at 6, col. 1. Morrissey was beaten, hospitalized, and expelled from the union allegedly for his challenges to the NMU's leadership. *Id.* On the other hand, Professor Leslie has suggested that Morrissey, and plaintiffs like him, are "disappointed union office-seekers whose primary interest is more likely to be the embarrassment of the incumbents in a political struggle than the restoration of the union treasury." *Federal Courts, supra* note 9, at 1316. While there is reason to believe that Morrissey was largely motivated to remedy fiduciary breaches committed by the NMU leadership, it is highly unlikely that there are a sufficient number of union members like Morrissey to ensure that "the system does not go completely sour."

[489] Congress could restructure § 501 to eliminate the dangers of bad faith

Even if members would litigate the propriety of a union supported defense of officers, they may be denied the opportunity because they are unaware of the expenditure. In practice, union members often have little opportunity to learn that officers have been supplied with union funds to defend litigation. For example, if members have granted a union executive board "full right and power" to fix terms and salaries of officers,[490] the union may provide legal assistance for its officers by increasing their salaries, or paying them bonuses. Of course, this power does not grant unlimited authority to fix unreasonable salaries. Section 501 limits the union's authority to fix officers' salaries and compensation, and the courts thus have a duty to determine if such expenditures are "overly generous or otherwise improper as to

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litigation. Congress could amend § 501 to allow recovery of attorney's fees by prevailing defendants when it has been demonstrated that the plaintiff's § 501 action was frivolous, unreasonable, and without foundation, even though it was not brought in subjective bad faith. A statutory analogy could be made to the civil rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988 (1976), which allows the award of attorney's fees to prevailing parties in suits to enforce civil rights statutes. Although both plaintiffs and defendants are eligible for the fee award under the statute, the Supreme Court has applied a double standard to prevailing defendants by permitting them to recover only if "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). *See also* H.R. REP. No. 1558, 94th Cong., 2d Sess. 6-7 (1976) (prevailing defendant in a Title VII case may receive attorney's fees "only if the action is vexatious, frivolous, or if the plaintiff has instituted it solely to embarrass or harrass the defendant."). The same rule should apply to any statutory change allowing prevailing defendants to recover their attorney's fees under § 501. However, because the problem of over-enforcement pales in comparison to the problem of under-enforcement, we caution against the adoption of any proposal that would allow the district courts to award attorney's fees to prevailing defendants in § 501 cases, where plaintiff's action was not brought in subjective bad faith. Moreover, even if attorney's fees were awarded only where subjective bad faith is demonstrated, procedural safeguards would be necessary to fairly ascertain motive and subjective bad faith, so as not to deter meritorious claims and justifiable requests for fees. *See* Comment, Nemeroff v. Abelson, *Bad Faith and Awards of Attorneys' Fees,* 128 U. PA. L. REV. 468 (1979).

In any event, the courts could use existing statutory provisions to punish plaintiffs' attorneys who bring bad faith litigation. In 1980, Congress amended 28 U.S.C. § 1927 to allow the federal courts to require plaintiffs' attorney to personally pay the costs and counsel fees caused by unreasonable and vexatious litigation brought in subjective bad faith.

[490] *See, e.g.,* Puma v. Brandenburg, 324 F. Supp. 536 (S.D.N.Y. 1971).

amount to a violation of trust."[491]

Although a union must not be allowed to escape by indirection the statute's fiduciary obligations,[492] there remains the serious problem of how the membership can learn that a fiduciary breach has occurred. If the union's executive board has exclusive authority to fix the salaries of its leaders, and if the union is not required to disclose financial information to the membership, it will be virtually impossible for individual members to challenge wrongful expenditures under section 501.[493]

If union members fail to bring suit, whether because of insufficient financial incentives, leadership domination, or ignorance, section 501 cannot fulfill the purposes that Congress intended, and therein lies a fundamental flaw in the private enforcement scheme established by Congress. Without section 501 suits, federal courts will be denied the opportunity to supervise the fiduciary obligations of union officials, a task essential to the well-being of both the union as an institution and society as a

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[491] *Id.* at 544. If salaries paid to union officers have not been duly authorized, if the expenditures violate internal union law, or if the compensation involved self-dealing, there would be violations of § 501. *See, e.g.,* Local 92, Int'l Ass'n of Bridge, S. & O. I. Workers v. Norris, 383 F.2d 735, 737 (5th Cir. 1967); Brink v. DaLesio, 496 F. Supp. 1350 (D. Md. 1980) *aff'd in part, rev'd in part,* 108 L.R.R.M. 2982 (1981).

[492] *Cf.* C. SUMMERS & H. WELLINGTON, LABOR LAW: CASES AND MATERIALS 1178, problem 3 (1968). "The members can vote their officers a higher salary or a bonus for past or future services and the courts can scarcely review the decision." *Id. But see* Puma v. Brandenburg, 324 F. Supp. 536 (S.D.N.Y. 1971).

[493] A similar problem exists under most corporate indemnification statutes. *See, e.g., Indemnification, supra* note 142, at 844. The typical corporate indemnification statue does not require the corporation to disclose indemnification to shareholders. Thus, there is the possibility that minority shareholders may not be able to challenge the propriety of indemnification because they are unaware that it has occurred. One solution to this problem is to require notification of indemnification to officers and employees. Under New York corporation law, for example, there is a statutory requirement that shareholders be given notice of any indemnification provided by the corporation. N.Y. Bus. Corp. Law § 726(c) (McKinney Supp. 1980). *See* Hoffman, *The Status of Shareholders and Directors Under New York's Corporation Law: A Comparative View,* 11 BUFFALO L. REV. 496, 583 (1962). A similar requirement could be imposed upon labor organizations, in addition to the further requirement by the Secretary of Labor that unions, their officers, and representatives file reports specifically detailing every indemnification, as well as any salary increase or bonus for that purposes. The Secretary has the power to impose the latter requirement under the provisions of LMRDA §§ 201(a), 202(a), and 208, 29 U.S.C. §§ 431(a), 432(a), 438 (1976).

whole. Consequently, the goal of honest, faithful union officials will never be fully realized.

In Part III, our study established that, in certain situations, the courts must permit unions to intervene and participate in section 501 litigation, to vindicate legitimate institutional interests. The need for this intervention arises from the fact that other parties to the action cannot be expected to impartially and adequately advocate the union's position. Further, the mechanism in section 501(b) for enforcing fiduciary obligations imposed by section 501(a) does not provide a means for representing the institutional interests of the union. Union intervention is thus necessary, and the parties and the courts become enmeshed in a bramblebush.

In Part IV, our study established and emphasized the difficulty, if not impossibility, that a court faces in seeking to strike a proper balance between the competing, conflicting policy considerations necessarily entailed in awarding reasonable fees to plaintiff's counsel. We concluded that there is no mystic formula to be found, and that consequently the courts will continue to award fees under nebulous equity principles. In all three respects, then, the major inadequacy of the fiduciary provisions of the LMRDA, with the exception of the limited criminal provisions of section 501(c),[494] is that reliance is placed exclusively on private enforcement.[495]

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[494] LMRDA § 501(c) provides:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

29 U.S.C. § 501(c) (1976). For a collection of cases brought under § 501(c), see various annual SUMMARY OF OPERATIONS AND COMPLIANCE, ENFORCEMENT AND REPORTING UNDER THE LABOR-MANAGEMENT REPORTING AND DICLOSURE ACT reports of the Department of Labor.

[495] Recently, lawyers and economists have examined the process by which law is enforced and the choice between public or private enforcement systems. *See* Becker & Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers,* 3 J. LEGAL STUD. 1 (1974); Landes & Posner, *The Private Enforcement of Law,* 4 J. LEGAL STUD. 1 (1975); Polinsky, *supra* note 484. *See also* R. POSNER, ECONOMIC ANALYSIS OF LAW, §§ 22.1-.2, at 461-74 (2d ed. 1977). Although the work in this area is theoretical and can be criticized because it is based upon restrictive and unrealistic assumptions, *see* Minda, *The Lawyer-Economist at Chicago: Richard A. Posner and the Economic Analysis of Law,*

The enforcement of other LMRDA provisions is not left solely

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39 OHIO ST. L.J. 439, 466-78 (1978), it does offer some important insights for making comparisons of public versus private enforcement of § 501.

Professors Becker and Stigler, for example, argue that a private enforcement system of law could be devised that would be as efficient and effective as optimum public enforcement. Becker & Stigler, *supra* this note. Under their proposal, private enforcers would be paid, if successful, a bounty for bringing suit that would amount to the proceeds of the suit, fine collected, or some fixed sum paid by the state. Subsequent commentators, however, have severely criticized the Becker-Stigler proposal. Professors Landes and Posner, for instance, argue that private enforcement, at least in those areas of the law where the cost of enforcing a claim is high relative to its value and where the probability of apprehension and conviction is low, is inadequate. They conclude that private enforcement in these areas of the law will result in underenforcement. Landes & Posner, *supra* this note, at 14-15. Professor Polinsky, on the other hand, maintains that both Becker & Stigler's, and Landes & Posner's studies were flawed because they relied upon the unrealistic assumption that the cost of enforcement was the same under private and public enforcement systems. Polinsky, *supra* note 484, at 106. According to Professor Polinsky, if the cost of enforcement is allowed to differ with the choice of the enforcement system, public enforcement is socially preferable to private enforcement and that regardless of enforcement costs, private enforcement leads to less enforcement than public. *Id.* at 107.

In § 501 litigation, we conclude that private enforcement of the fiduciary provision is more likely to result in underenforcement, not overenforcement, because there is a lack of meaningful incentives to encourage union members to bring suit. Of course, one possible solution to the problem of underenforcement of § 501 would be to devise a more effective reward or, as Landes & Posner define it, an optimum penalty system. This would raise the insurmountable problems previously discussed in regard to determining the proper method for calculating attorney's fee awards under the statute. *See* notes 430-484 and accompanying text *supra*. However, even if it were possible to devise optimum attorney's fee awards in § 501 suits, we would then expect private enforcement to give rise to the overenforcement problem discussed by Landes & Posner. This is because the probability of apprehension and conviction is low in the case of fiduciary abuses (most fiduciary abuses are concealable, which means that substantial resources must be devoted to enforcement), and because the cost of enforcement is high (the union member will frequently incur significant pecuniary and psychological costs relative to the value of the claim). As Landes & Posner predict, where the probability of apprehension and conviction is less than unity, and where the cost of enforcement is high, we would expect an optimum penalty to be set higher than the social costs of the illegal activity, and as a consequence, the penalty will likely emit the wrong signal to the private enforcer. Landes & Posner, *supra* this note, at 15. Too many resources would be devoted to enforcement relative to the social costs of the illegal activity, and therefore private enforcement would result in overenforcement. Under these circumstances, private enforcement would be less efficient than optimal public enforcement.

to private litigation; in these cases fiduciary problems hardly ever arise or are of minimal significance. For example, under Title IV of the LMRDA, which governs the election of union officers,[496] the exclusive remedy to challenge a complete election is to file a complaint with the Secretary of Labor.[497] The post-election statutory enforcement procedure under Title IV provides one alternative to the present system of private enforcement under section 501. By entrusting enforcement to the Secretary of

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[496] 29 U.S.C. §§ 481-483 (1976).

[497] LMRDA § 403 provides in relevant part, "[T]he remedy provided by [Title IV] for challenging an election already conducted shall be exclusive." 29 U.S.C. § 483 (1976). In Hodgson v. UMW, 81 L.R.R.M. 2588 (D.D.C. 1972), the Secretary of Labor had brought a Title IV action against the union for alleged election improprieties. The plaintiff-intervenor moved to disqualify the union's law firm on the ground that its representing the union president in other LMRDA actions created a conflict of interest. In denying the motion, even though a potential conflict of interest was arguably present, the court relied on two grounds: "the fact that the union's affairs [were] under the stewardship of the Secretary of Labor, who has been granted ample power to both protect the union's interest pending certification of the results of the new election and conduct an election free of infirmities;" and "the court's continuing jurisdiction pending the Secretary's certification of the results of the new election and the entry of the final decree." *Id.* at 2589. Because the Secretary of Labor was charged with protecting the union's interest implicated in the litigation, there was no need for independent counsel to represent the union and, therefore, no problem of eliminating conflict of interest.

The Trbovich v. UMW, 404 U.S. 528 (1972), the Supreme Court ruled that the union member who had filed the complaint with the Secretary of Labor was entitled to intervene in the Secretary's action, but that the intervention was limited to the claims of illegality that the Secretary had decided to litigate. *See generally Recent Development,* 1971 U. ILL. L.F. 745; Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse,* 81 YALE L.J. 407 (1972). Moreover, some appellate courts have held that such intervening union members may, in appropriate circumstances, recover attorney fees from the defendant union. *See, e.g.,* Brennan v. United Steelworkers, 554 F.2d 586, 599-608 (3d Cir. 1977), *cert. denied,* 435 U.S. 977 (1978); Usery v. Local Union No. 639, International Bhd. of Teamsters, 543 F.2d 369, 381-89 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1123 (1977). *But see* Brennan v. Connecticut State UAW Community Action Program Council, 60 F.R.D. 626 (D. Conn. 1974) (denial of fee award proper where union disclaimed illegal conduct in consent decree). The award of attorney's fees in these cases, however, is inconsistent with congressional intent to establish exclusive enforcement by the Secretary of Labor, and will lead to unnecessary fee awards which will increase the union's liability. *See* Malin, *Title IV of the Labor-Management Reporting and Disclosure Act—Should Intervening Plaintiffs Be Permitted to Recover Attorney's Fees?,* 48 U. CINN. L. REV. 345, 350-58 (1979).

Labor, who can adequately represent the institutional interests of unions, the statute would make union intervention unnecessary. This would further minimize, if not avoid, the host of conflict of interest problems that intervention presently entails.

An alternative section 501 procedure could be patterned on the dual enforcement mechanism of LMRDA Title II, which regulates trusteeships.[498] The validity of a trusteeship and other Title II issues may be raised either through a private suit filed by any member of the trustee subordinate body, or through suit filed by the Secretary of Labor upon complaint of a private party.[499] When the Secretary files suit in federal district court, its jurisdiction becomes exclusive, and its final judgment is *res judicata*.[500]

Both proposals are subject to serious criticisms. With respect to the Title II analogue, private enforcement within a dual sys-

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[498] *See* 29 U.S.C. §§ 461-464, 466 (1976 & Supp. III 1977).

[499] LMRDA § 304(a), 29 U.S.C. § 464(a) (1976). Early cases held that members were required to exhaust the administrative remedy with the Secretary before bringing private suits. *See, e.g.*, Flaherty v. McDonald, 183 F. Supp. 300, 306 (S.D. Cal. 1960); Cox v. Hutcheson, 204 F. Supp. 442, 446 (S.D. Ind. 1962); Rizzo v. Ammond, 182 F. Supp. 456, 472 (D.N.J. 1960). More recent precedents have unanimously repudiated the earlier decisions. *See, e.g.*, United Bhd. of Carpenters v. Brown, 343 F.2d 872, 880-81 (10th Cir. 1965); Parks v. IBEW, 314 F.2d 886, 924-25 (4th Cir. 1962), *cert. denied*, 372 U.S. 976 (1963); New Jersey County & Municipal Council No. 61 v. AFSCME, 80 L.R.R.M. 2942 (D.N.J. 1972), *rev'd on other grounds*, 478 F.2d 1156 (3d Cir.), *cert. denied*, 414 U.S. 975 (1973); Weihrauch v. International Union of Elec. Radio & Mach. Workers, 272 F. Supp. 472, 479 (D.N.J. 1967); Schonfeld v. Raftery, 271 F. Supp. 128, 144-45 (S.D.N.Y.), *aff'd*, 381 F.2d 446 (2d Cir. 1967).

[500] LMRDA § 306, 29 U.S.C. § 466 (1976).

Congress has also provided for both public and private enforcement of the fiduciary provisions of the Employee Retirement Income and Security Act of 1974 (ERISA), §§ 501-504, 29 U.S.C. §§ 1131-1134 (1976). Section 502(a)(2), 29 U.S.C. § 1132(A)(2) (1976), authorizes the Secretary of Labor, a participant, beneficiary, or fiduciary to bring a civil action under § 409, 29 U.S.C. § 1109 (1976), which imposes liability for breach of fiduciary duties. Sections 502(a)(3) and (a)(5), 29 U.S.C. §§ 1132(A)(3), (A)(5) (1976), authorize private suits by a participant, beneficiary, or fiduciary and public suits by the Secretary of Labor to enjoin any violation of fiduciary duty, and to seek equitable relief to redress any violation or to enforce the duty. Section 502(g), 29 U.S.C. § 1132(g) (1976), authorizes the court in its discretion to award a reasonable attorney's fee and costs to either party in any action by a participant, beneficiary, or fiduciary. 29 U.S.C. § 2003 (1976) imposes excise taxes on transactions prohibited by § 501, and criminal actions for theft or embezzlement from an employee benefit plan may be brought under 18 U.S.C. § 664 (1976).

tem would not obviate the intervention and attorney fee problems. It may also raise the possibility of over-enforcement. On the other hand, although there have been many private cases,[501] the Secretary of Labor has filed only four suits during the 20-year history of the LMRDA. One suit was concluded only after nine years and three months.[502] Thus,

> [t]here is no way of knowing or ascertaining how much of the . . . failure to enforce the title is attributable . . . to institutional conflicts that cast doubt upon the wisdom of placing responsibility for enforcing a statute against international union leaderships in the Department of Labor.[503]

With respect to the administration of Title IV, it has been alleged that "[t]oo often, union reformers have found the Department of Labor allied with union incumbents against their interest."[504] One need not agree with this allegation to realize that, even absent actual abuse, there is a real potential for conflicts of interest because of the position of the Secretary of Labor and the functions of the department.

> The Secretary is a political appointee removable at the will of the President; a large, and perhaps the principal, segment of his constituency must of necessity be union officials. The very same Secretary who asks a national labor leader for political support or cooperation in resolving a labor dispute may soon thereafter be reviewing the election of the same labor leader, or the elections of friends and allies in affiliated subordinate unions.[505]

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[501] For a collection of private title III cases, see the various annual SUMMARY OF OPERATIONS AND COMPLIANCE, ENFORCEMENT AND REPORTING UNDER THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT reports of the Department of Labor.

[502] UNITED STATES DEP'T OF LABOR, COMPLIANCE, ENFORCEMENT & REPORTING IN 1974 UNDER THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 10-12.

[503] Note, *Landrum-Griffin and the Trusteeship Imbroglio,* 71 YALE L.J. 1460, 1520-21 (1962).

[504] Dunlop v. Bachowski, 421 U.S. 560, 571 n.9 (1975) (quoting Brief for United Mine Workers of America as *Amicus Curiae* 3, Dunlap v. Bachowski *supra*).

[505] Bartosic, *supra* note 314, at 558-59 (1976). *See* Note, *Landrum-Griffin and the Trusteeship Imbroglio,* 71 YALE L.J. 1460, 1521 n.296.

The Secretary and Labor union officials work together on projects that have the avowed purpose of improving the President's political relations with organized labor. *See, e.g.,* Detroit Free Press, June 2, 1980, § C, at 10, col. 1. Obviously, this creates the opportunity for the development of loyalties and alliances that cast a cloud upon the Secretary's impartial enforcement of the LMRDA. Much of the difficulty stems from the fact that the Secretary can be

One can make the same point concerning the Secretary's enforcement of any LMRDA provision, including the fiduciary obligations imposed by section 501.

In addition, the General Accounting Office (GAO) has concluded recently that "the Labor Department is not adequately enforcing the federal laws which are supposed to protect union members from corrupt union practices by their officers. . . ."[506] Observing that the Labor Department enforcement of the LMRDA is limited to investigating complaints concerning officer elections, the GAO criticized the department's "apparent reliance on voluntary compliance and 'desk audits.' "[507] Finally, the experience under the Employees' Retirement Income Security Act of 1974 (ERISA),[508] which entrusts the Secretary of Labor

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removed at the will of the President. Understandably, this might make a Secretary reluctant to displease union leaders who are important to a President's political fortunes.

[506] *GAO Report on LMRDA and ERISA Enforcement,* 1978 LAB. REL. Y.B. (BNA) 353.

[507] *Id.* Other critics have also exposed the "passivity phenomenon," which can induce general paralysis of departments charged with enforcement functions. *See, e.g.,* Malone, *Criminal Abuses in the Administration of Private Welfare and Pension Plans: A Proposal for a National Enforcement Program,* 1976 S. ILL. U.L.J. 400. Jurisdiction over the LMRDA should not be vested in the NLRB if for no other reason than its mounting docket, which reached 52,943 cases during fiscal 1977. 42 NLRB ANN. REP. 1 (1977). Further, in 1978, Board Chairman Fanning estimated that its caseload would soon exceed 61,000 cases per year, increasing 7.6% in 1979, and reaching 70,000 by 1980 and 80,000 by 1982. 1978 LAB. REL. Y.B. (BNA) 199.

The administration of all federal labor laws, including the LMRDA, could be coordinated, integrated, and unified through the creation of an article III appellate labor court. *See* Bartosic, *Labor Law Reform—The NLRB and a Labor Court,* 4 GA. L. REV. 647, 666-671 (1970). *See generally* Friendly, *A Federal Court of Administrative Appeals?,* 74 CASE & COMMENT No. 2, at 23 (1969); Meador, *A Proposal for a New Federal Appellate Court,* 25 FED. BAR NEWS 279 (1978); Morris, *Procedural Reform in Labor Law—A Preliminary Paper,* 35 J. AIR L. & COMM. 537 (1969); Shutkin, *One Nation Indivisible—A Plea for a United States Court of Labor Relations,* 20 LAB. L.J. 94 (1969).

[508] Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified in scattered sections of 26, 29 U.S.C.). ERISA imposes fiduciary obligations on employee benefit plan officers, directors, and others who administer or render advice for a fee to covered plans. ERISA § 2003, 26 U.S.C. § 411 (Supp. II 1975). These fiduciaries are required to act in the interests of the plans' participants and beneficiaries in accordance with the documents covering the plan. *Id.* § 503. In addition, the fiduciary must act with the "care and skill, prudence and diligence," of a reasonable "prudent man acting in a like capacity." ERISA § 404(a)(1)(B), 29 U.S.C. § 1108(b)(8) (Supp. V 1975). *See also* note 297 *supra.* The Secretary of

with the responsibility of enforcing fiduciary obligations of union pension fund trustees, demonstrates that fiduciary enforcement by the Secretary and the Department of Labor has been inept, narrow, and totally inadequate.[509]

For these reasons, we submit that Congress should provide for public administration of the LMRDA by creating an independent regulatory agency, similar in structure to the National Labor Relations Board.[510] Public enforcement would relieve the courts of the "delicate, embarrassing and disturbing"[511] task of awarding attorney fees to successful complainants. Plaintiffs filing civil suits would instead engage the investigatory and prosecutorial services of the general counsel of the agency. Furthermore, the staff of the independent general counsel would impartially investigate alleged violations of section 501, and would vigorously pursue meritorious complaints. This would minimize union intervention and its consequent conflict of interest problems.[512]

Labor, participants, beneficiaries, or other fiduciaries are permitted to bring civil actions for violations of ERISA's fiduciary provisions. ERISA § 408(b)(8), 29 U.S.C. § 1108(b)(8) (Supp. V 1975).

[509] *See, e.g., Oversight Inquiry of the Department of Labor's Investigation of the Teamsters Central States Pension Fund: Report Made By Permanent Subcomm. on Investigations of the Committee of Governmental Affairs of the United States Senate,* S. REP. No. 997-177, 97th Cong., 1st Sess. (1981). The Committee's report concludes that the Department of Labor's recent investigation of possible fiduciary violations in the administration of the Teamsters Central Pension Fund was a total failure. *Id.* at 178-79. The report concludes, *inter alia,* that the Department of Labor was "inept, narrow, naive," and "was guided by a policy that interpreted the ERISA statute with tunnel vision." *Id.* The report further states that the Secretary of Labor has "ignored the spirit of the statute and made a mockery of Congress' primary purpose". *Id.* at 179.

[510] Congress could also entrust the independent regulatory agency with the responsibility of enforcing the fiduciary obligations of ERISA, *see* note 508 *supra,* which has heretofore been inadequately enforced by the Secretary of Labor. *See* note 509 *supra.*

[511] Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 569 (7th Cir. 1951), *cert. denied,* 342 U.S. 909 (1952). *See* City of Detroit v. Grinnell Corp., 495 F.2d 448, 469 (2d Cir. 1974).

[512] There remains the question of the composition, structure, and procedures of the new agency and the additional question of whether its decisions should be subject to existing judicial review or review by a newly created labor court. These matters have been explored in considerable detail elsewhere. *See, e.g.,* Bartosic, *supra* note 507, Friendly, *A Federal Court of Administrative Appeals?,* 74 CASE & COMMENT No. 2, at 23 (1969); Miller, *Toward an Improved Labor Judiciary,* 1972 LAB. REL. L.Y.B. 97; Morris, *Labor Court—a New Per-*

We realize that we propose more government regulation when, politically, this country is moving in the opposite direction. Some may even say that it is foolhardy to make proposals for additional federal regulation in the midst of "today's persistent cry for deregulation"[513] that now pervades the federal government. But our proposal has been made only after careful examination of the existing inadequacies of the private enforcement scheme of section 501. In sum, we believe that public enforcement is the only sensible way to bring about effective enforcement of the statutory objectives of section 501. We acknowledge that public regulation of trade unions is disagreeable and unfortunate. But as Professor Walter Gellhorn recently observed:

> Two centuries ago James Madison wrote in The Federalist: "If men were angels, no government would be necessary." At about the same time Edmund Burke observed that in governmental matters "the choice is often between the disagreeable and the intolerable." Disagreeable though it may at times be, regulation must continue unless you and I become angels—or are willing to revert to the intolerably cruel law of the jungle.[514]

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spective, in PROCEEDINGS OF THE NEW YORK UNIVERSITY TWENTY-FOURTH ANNUAL NATIONAL CONFERENCE ON LABOR 27 (1972); Morris, *Procedural Reform in Labor Law—A Preliminary Paper*, 35 J. AIR L. & COMM. 537 (1969); Shutkin, *One Nation Indivisible—A Plea for a United States Court of Labor Relations*, 20 LAB. L.J. 94 (1969).

[513] Gellhorne, *Deregulation: Delight or Delusion?*, 24 ST. LOUIS U.L.J. 469 (1980).

[514] *Id.* at 485.