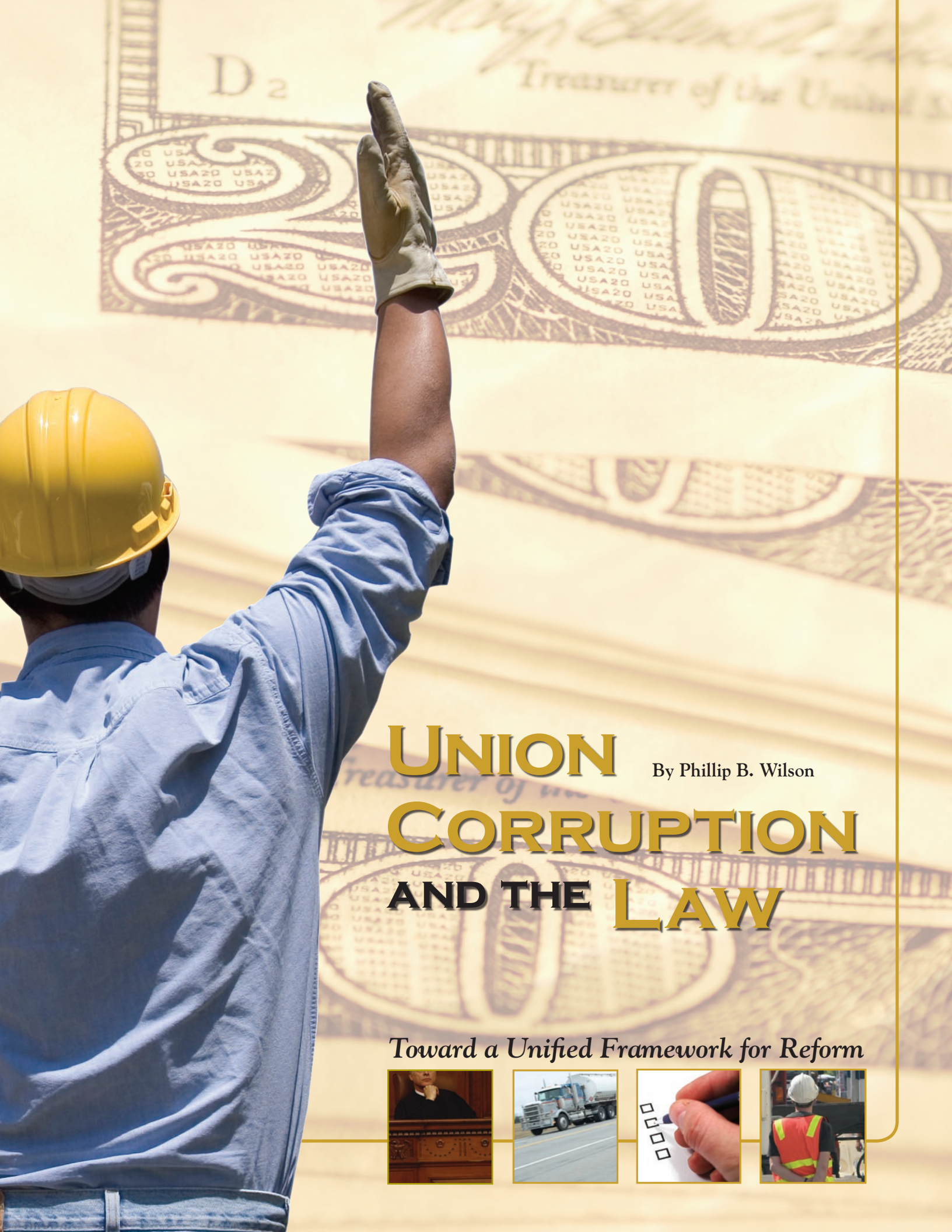

Union Corruption and the Law

By Phillip B. Wilson

Toward a Unified Framework for Reform

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Introduction

When John O'Rourke finally got to work the pickets were up again—this was the fifth time this month and it was getting old.[1] First there was that non-union drywall installer—that cost him three days. Now four guys were holding the picket signs that read, "J & J Trucking Unfair." The guys on the line didn't know what J & J was supposed to have done that was unfair or what the union was trying to get from J & J; they just knew to carry the signs and to call Tom Lowry if anyone crossed the line. Nobody did.

O'Rourke had a decision to make. Maybe J & J Trucking had done something to upset his business manager at Local 30, Joe Crosley. He knew Joe harbored a lot of grudges, so it might have been just another political vendetta Joe had with someone at J & J. But Joe had a lot of political issues with people, including John after he spoke out at last month's Local 30 meeting about the need for a change in leadership. So Joe might have called the strike just to show how tough he was and how much he had the local under control. In either case, John had no respect for his decision to picket, and no problems with J & J. Besides which, his ex-wife was crawling all over him about child support and it was going to be tough getting the rent paid this month if he didn't get in another solid week of work. After the whole succession of earlier phony walkouts, this one was the last straw. John just wanted to get the roof on this library, get paid, and get on with his life. Yeah, OK. Maybe he wanted to stick it to Joe a little, too. But he knew there was no real beef with J & J, so it wasn't like this was a real strike. He guessed that Joe couldn't do much to him over it, and other members might actually respect him for not toadying along. So, figuratively thumbing his nose at Joe, he shouldered his tools and crossed the line. It did not take him long to realize he had guessed wrong.

Indeed, from that moment on, John's life changed dramatically. Formerly a potential political rival for leadership of Local 30, John now became a "scab" and fair game for a whole host of intimidating, threatening and possibly illegal misconduct. He was refused referrals to jobs. He was visited on job sites and threatened. He ultimately was forced to resign both his employment and his union membership and look for work outside Local 30's jurisdiction. John O'Rourke's real infraction may have been little more than challenging a questionable decision by his union boss, but it left him at the mercy of his union's leadership, which happened to be that same boss. It eventually left him without a union or even the possibility of a good job in his own home town. His story is a vivid example of what can happen when a union member "crosses the line." But it also serves as an example of the corruption practiced by union bosses, of the abuse of public trust for private gain.

Corruption is a unique form of union malfeasance.[2] It assumes one of three forms:

- **Internally-directed corruption**. An individual in a position of power either misuses union money (e.g., embezzlement, theft, forgery), or mistreats members (e.g., denial of representational rights, misuse of hiring halls, rigging of elections) for personal gain. This type of corruption also can be exercised across organizational forms within the organization, for example, in separate welfare, training and pension funds within the same union.
- **Externally-directed corruption**. A union colludes with a legitimate outside entity—an employer, a contractor, a political office-holder—in the pursuit of power. Examples of this include bid-rigging, bribery, extortion, selling labor peace, hiring no-show or phantom workers, negotiating special contract terms for favored employers, pension fund abuse, kickbacks, mail fraud, money laundering, self-dealing, jury tampering and making illegal campaign contributions.
- **Racketeering**. A union engages in a variety of forms of corruption with the assistance of organized criminals. Unlike externally-directed corruption, in other words, the outside figures are not legitimate entities.

Some corrupt acts are punishable by criminal laws, most effectively in blatant cases. Others are best addressed through labor law and regulation, again of limited effectiveness except in the most blatant cases of financial misuse. The entire control structure is complex and uneven in application, reflecting the particular concerns that happened to occupy regulators during their sporadic bouts of regulation. In O'Rourke's case, not only would John have to fit any prosecution for corruption into one of these categories, he would then have to work it through some combination of overlapping state or federal tort laws and labor regulations. At least his job was firmly in the construction industry, so his situation was free from possible complications from the Railway Labor Act, but the rest would not be easy. The monograph will follow his progress, and also see how several other real cases followed alternative routes, all reaching different kinds of conclusions.

Monograph Outline

The monograph is divided into several parts. The first begins with an historical overview of anti-corruption law, including the complex jurisdiction and preemption issues that overlay almost all corruption cases today. Four cases representing the application of existing law are also described; one of them, John O'Rourke's, is already introduced.

Part two of the monograph details the body of statutory, regulatory, and common law, beginning with the basis of this country's modern labor law, the National Labor Relations Act of 1935, and continuing with the Labor Management Relations Act of 1947 (commonly known as the Taft-Hartley Act) and the Labor Management Reporting and Disclosure Act of 1959 (commonly known as LMRDA, or the Landrum-Griffin Act). It also covers other laws that can but do not necessarily apply to union corruption, most notably the Racketeering Influenced and Corrupt Organizations Act of 1970 (RICO) and the Employee Retirement Income Security Act of 1974 (ERISA), plus various federal and state statutory and common law prohibitions.

The third part of this monograph critiques the current framework. It argues that due to its historical evolution, the current legal framework is unwieldy. While a creative prosecutor no doubt can find a way to use the system, the same holds true for a creative defense lawyer. In other words, there is a systemic inconsistency that allows for arbitrary action on both sides of a given case.[3] Aggrieved parties must rely on either the limited prosecutorial resources of federal or state governments or the filing of an expensive private lawsuit. The result is expensive and time-consuming to the prosecution, defense and the general public,[4] even when a plaintiff's victim status is not in doubt.[5] Another related criticism is labor corruption, unique among the entire universe of employment-related law, has no administrative framework for prosecution of common corruption claims.[6] Therefore virtually all efforts to combat corruption today require the filing of an expensive lawsuit—itself a substantial barrier.[7]

The final section of the monograph is a set of recommendations that hopefully will streamline legal action, eliminating overlapping legal and geographic jurisdictions. It proposes a new system of handling corruption cases, building on existing arrangements but at the same time replacing the needless duplication that so often inhibits effective legal action. It provides as an Appendix a summary of the recommended changes, hopefully to serve as an easy reference guide.

I. Introduction to Anti-Corruption Law: Historical Development, Jurisdiction, Preemption and Representative Cases

1. Historical Development

Labor law in this country originated in common law—that is, torts, contracts and property law. On occasion it has relied on criminal law as well, using, for example, criminal statutes to punish misappropriation of money from a union trust fund or threatening the use of force against a dissident member. Yet there are real obstacles to attacking corruption using either body of law. First, it combats only basic types of corruption. Efforts to disenfranchise voters, kickback arrangements with employers and other more complex schemes often fail to meet the technical elements of simple crimes.[8] Second, barring the difficult-to-prove element of criminal conspiracy, these laws often reach only the lowest levels of an organization, leaving corrupt leadership intact. These laws cannot address the infringement of democratic rights of individual union members.

As unions became more powerful and the weaknesses of criminal law became more evident, new laws were enacted. The National Labor Relations Act of 1935 (NLRA), also known as the Wagner Act, outlined procedures regarding union certification and obligations of unions and companies during collective bargaining. Congress enacted the Hobbs Act in 1946 to combat labor racketeering by prohibiting the use of fear to induce persons to give up property effectuating interstate commerce. Federal laws also were enacted to prohibit embezzlement from employee benefit plans, mail or wire fraud, and other more complex schemes sometimes employed by corrupt unions.

But these laws did little to ensure the democratic accountability of unions or to combat high-level corruption schemes. The Supreme Court imposed a duty of fair representation on unions that utilized internal rules to discriminate against minorities or dissidents. Congress later enacted the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), further regulating the internal affairs of unions. This law provided, among other things, democratic protections for union members, open disclosure of union finances and a clear fiduciary duty on union leaders. Later Congress passed the Employee Retirement Income Security Act (ERISA), governing employee benefit plans, and the Racketeer Influenced and Corrupt Organizations Act (RICO), banning criminal conspiracies, providing additional avenues to attack union corruption schemes.

These various laws and regulations have evolved in a piecemeal process, with each phase intended to overcome the perceived weaknesses of the prior legal framework. The resulting interrelationship between these laws is complicated and creates a difficult legal terrain for prosecutors or union members to negotiate when attempting to hold leaders accountable for corruption. Union corruption cases therefore are complex, normally involving at least two federal statutes (often more) and attendant state law claims (either as separate actions or as predicates under RICO). Smart defense attorneys will argue to dismiss many or all of the claims on the basis of either lack of jurisdiction or preemption.

2. Jurisdiction and Preemption Complications

The first question a prosecutor or union member considering a union corruption case must decide is the appropriate jurisdiction. This decision is, of course, dictated by a judgment about which laws the corruption violated. State prosecutors focus on the state criminal laws, while federal prosecutors focus primarily on federal crimes, though at times may litigate state law in RICO cases. Union members sometimes can choose the venue, whether federal or state, in which they want to bring a claim. Yet at the same time, they are limited in the causes of action they may bring; with the exception of civil RICO claims, criminal actions may only be brought by the government. Additionally, most states do not have a version of LMRDA, which gives private rights of action to union members over fiduciary breaches or other violations. Thus outside of common law tort remedies, federal labor statutes are the most likely venue for civil litigants in corruption cases.

Further, these questions are not left exclusively up to the government or the individual union member bringing the claim. Under federal jurisdiction rules, a defendant in a state law claim that implicates federal questions is removable to federal court. This includes virtually any union corruption case other than a simple state prosecution for larceny, embezzlement or extortion. On the other hand, individual locals of some large unions, as well as a number of unions or union-like associations, are exempt from

federal jurisdiction if they remain within one state. In addition, some occupations are also expressly excluded from jurisdiction by the National Labor Relations Board, created by NLRA.[9] Therefore, these unions are, therefore, often also exempt from some of the federal statutory requirements, most notably LMRDA and LMRA.[10] They typically are not exempt from less labor-specific federal statues, such as RICO and the Hobbs Act, so long as the broad "interstate commerce" elements are proven under those laws. Other than basic state criminal prosecutions, however, federal court is where most criminal or civil corruption cases start.

Preemption questions, like the corruption cases that give rise to them, are also complex; they touch on basic principles of federalism. Inconsistencies abound, which makes them fruitful areas to litigate. The Supreme Court has held that federal law preempts state law and causes of action when the latter seeks to regulate activity protected or prohibited by Sections 7 and 8 of the NLRA,[11] or conduct Congress intended to be unregulated.[12] In *Garmon*, the Supreme Court held that when an activity is arguably protected or prohibited by the NLRA, the National Labor Relations Board has primary jurisdiction: States must yield to the exclusive primary competence of the board.[13] The NLRA reflects Congressional intent that the administration and regulation of the Nation's labor policy be vested in NLRB and remain free from state interference. When the exercise of state power over a particular area of activity threatens interference with federal industrial-relations policy, it becomes necessary to preclude states from acting.[14]

Internal remedies often must be exhausted before seeking redress in federal or state courts. This includes civil, criminal, and administrative laws, plus regulation, some of which overlap with each other. This interplay has an additional drawback in that it allows prosecutors to "pile on" multiple charges for the same offenses, while allowing defense attorneys to frustrate litigants through arguments centering on jurisdiction, preemption and other procedural aspects.

Finally, there are significant questions of agency in most union corruption schemes that raise issues over who to prosecute. Cases may be brought against either individuals or the unions representing them. The appropriate course of action depends on whether the acts of the individual or union local were known or ratified in advance and whether the guilty party is a regional, national, or international union, as opposed to the local.

3. Representative Cases

In order to fully appreciate the complexity of most union corruption schemes, and the related complexity of the lawsuits filed to combat them, it is necessary to put the law in context. The following discussion summarizes the four leading illustrative cases, including the previously introduced case of John O'Rourke. In each case, the plaintiff filed multiple charges under different laws.

a. Landry v. Air Line Pilots' Association[15]

Charles Huttinger had an unenviable job as lead union negotiator for an agreement between TACA International Airlines (TACA), an airline operated in Central America and the United States, and its pilots union, the Airline Pilots Association International, (ALPA), an AFL-CIO affiliate. After fighting TACA and the Republic of El Salvador for years, ALPA finally had to come to terms with the unfortunate truth: TACA was leaving the United States. Now the union had to win a decent severance package for its members.

Huttinger was worried about more than just his members, however. His own retirement would be jeopardized by the TACA shutdown. This put him in a vulnerable -- and corruptible -- position. The airline was willing to guarantee his personal retirement security if it could be absolved of all future liability for benefit packages it owed other TACA pilots. Huttinger, in effect, was asked to sell out his people. Unfortunately, the temptation proved to be too much.

TACA pilots were based in New Orleans. During the 1970s and 1980s the Republic of El Salvador pressured TACA to relocate its pilots to El Salvador. TACA pilots, represented by ALPA since 1968, objected to the move because that country's law prohibited union representation. But in the mid 1980s its government passed a new constitution that required all Salvadoran public service companies to base their operations in El Salvador. As a result, TACA announced its intention to immediately relocate its pilot base, thus unilaterally terminating its agreement with ALPA. The union received an injunction prohibiting the relocation. This action precipitated additional negotiations that culminated in a "Pilots Agreement" allowing relocation of the pilots, with the option of a severance package for those who chose not to relocate.

That's what brought a TACA pilot, Charles Huttinger, into the picture. He communicated on behalf of ALPA, urging TACA pilots to ratify the agreement. But the agreement that was ultimately achieved lacked a vote. It contained a variety of concessions related to the retirement fund that TACA pilots saw as disadvantageous.

After the smoke cleared, it had become clear that Huttinger pulled a fast one. In addition to absolving ALPA and TACA from pension liability, it also individually grandfathered Huttinger into a retirement and severance program to which the pilots alleged he was not entitled. They claimed the benefits he negotiated his own personal severance package, and at the union's expense. A class of TACA pilots subsequently brought a lawsuit against TACA, ALPA, and Huttinger as an individual.

The suit contained two claims. First, there had been a conspiracy in violation of RICO. The predicate acts were: violation of a Louisiana State law prohibiting extortion;[16] federal Hobbs Act extortion;[17] violation of Section 302 of the LMRA through illegal payments to labor officials;[18] mail and wire fraud involving three letters from Huttinger and ALPA to TACA pilots containing fraudulent statements; illegal retirement pay benefits sent by them to Huttinger through the mail;[19] and embezzlement from an employee benefit plan.[20] Second, the suit alleged breach of fiduciary duties under ERISA.

Here is a case well illustrating the complex nature of anti-corruption litigation. The fact pattern is relatively straightforward—a union official negotiated special benefits for himself in return for concessions that hurt members he was supposed to represent. However, since he received severance pay and retirement benefits paid by a legitimate employer (for which Huttinger clearly had the authority to negotiate), the pilots could not charge him with corrupt practice without first proving that these payments were both criminal acts and part of a conspiracy.

b. Cox v. Administrator of U.S. Steel and Carnegie[21]

Union members had received the good word: USX Corporation (USX)[22] was reopening the Fairfield Works. The steel mill had closed over a year earlier, resulting in the layoffs of 2,600 workers. Unfortunately, the United Steelworkers of America (USWA), agreed to significant concessions to get USX to reopen the mill. Many members thought the concessions were too steep, especially given the rumors about what happened at the bargaining table. Like the airline pilots in *Landry*, union workers began to suspect their representatives sold them out in exchange for personal benefits. Consequently, a number of laid-off employees sued USX, the USWA, and two of the latter's representatives, E.B. Rich and Thurmond Phillips, of District 36. The employees alleged that Rich and Phillips exchanged pension benefits for themselves and four other district members in exchange for unacceptable concessions. The pair allegedly stipulated that as a condition to any concessions, the "Fairfield Six," as they came to be known, be granted a special exception to qualify for the USX pension plan. These six individuals in fact were granted the exception after the concessions had been executed in 1983.

The employees filed a claim alleging an array of violations: breach of the common law duty of fair representation; violation of Section 301 of the Taft-Hartley Act;[23] illegal payment by an employer to an employee representative under Section 302(a)(1) of LMRA;[24] failure to bargain in good faith under NLRA;[25] breach of fiduciary duty under ERISA;[26] and various RICO violations,[27] using some of the same violations as predicate acts for the RICO charge. Again, here is a case that triggered a flurry of claims under law based on an act of violation of fiduciary responsibility. The class of laid-off employees pursued a number of distinct statutory and common law claims—but interestingly did not rely at all on the fiduciary duty or anti-embezzlement protections owed to union members under the Labor Management Reporting and Disclosure Act (LMRDA), which seems to have been the most directly-related violation.

c. United States v. Pecora[28]

Thomas Pecora, general manager of Federico Trucking Inc. (FTI), just looked at it as another cost of doing business with the Teamsters. He had already negotiated a sweetheart contract with another local, much to the chagrin of Local 863. And he needed Local 863 to back off from harassing his drivers. He talked with its business agent, James Paone. Paone in turn agreed to ignore FTI's sham subcontract and to refrain from claiming jurisdiction over FTI drivers -- provided the price was right.

The price was right and the deal was simple. Paone would leave FTI

alone if Pecora would put a certain minimum of phantom, "no-show" employees on its payroll. The paychecks would go straight to Paone. Over the next ten years, the company hired a succession of such "employees," with Paone pocketing about $235,000 in payments. In addition, at least one non-employee, Paone's sister, had been included as a beneficiary in a Teamster/FTI welfare fund, even though she was never employed by FTI.

As in the previous pair of examples, this was a case of union officials using their positions to cheat rank-and-file members. Assuming Local 863's jurisdictional claim was legitimate, its members lost the dues income and potential support and leverage the FTI drivers represented. Paone clearly had placed the welfare of himself and his family ahead of that of union members.

Unlike *Landry* and *Cox*, however, this case was litigated as a straightforward criminal prosecution. The federal government alleged that the no-show payments and improper pension contributions were violations of Sections 302(a) and (b) of the Taft-Hartley Act.[29] Section 302(a) prohibits certain payments by or on behalf of employers to labor organizations, their officers and employees, and Section 302(b) makes it illegal to ask for the payments prohibited by Section 302(a). The government further alleged that the conspiracy between Paone and Pecora violated RICO Sections 1962(c) and (d),[30] but even so, this case represented a typical and relatively forthright criminal prosecution for union corruption. Perhaps because of the simplicity, both Paone and Pecora were convicted.

d. O'Rourke v. Crosley[31]

John O'Rourke, as we have seen, was a member of Local 30 of United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, a union with a long history of corruption. O'Rourke had accepted employment at a construction site where an employer was being picketed in a sympathy strike imposed by Local 30. O'Rourke did not want to join the strike, and had the temerity to cross the picket line to go to work. Thereafter, he said, he was subjected to severe threats and intimidation. Local 30 proceeded to deny him legitimate referrals under its hiring hall rules to the point where he was forced to resign both employment and union membership. He then sued the local and two of its officers, business manager Joseph M. Crosley and business agent Thomas Lowry. He claimed violations of RICO;[32] Hobbs Act extortion;[33] breach of fiduciary duty under the Labor Management Reporting and Disclosure Act (LMRDA);[34] common law breach of duty; and violation of free speech rights under LMRDA.[35] Here once more is a rather simple case becoming a quagmire of litigation.

O'Rourke did not contend that union officials were personally enriched by the corruption scheme. Instead he claimed they were depriving him of his livelihood and his democratic rights in its quest to suppress union dissent. The union countered that this was an internal matter between union leadership and a rule-breaking member, and in any event had not violated O'Rourke's rights.

Each of these four cases represents an attempt by either government *(Pecora)*, an individual union member *(O'Rourke)*, or class of union members *(Landry* and *Cox)* to combat union corruption. Each case uses a variety of ways to attack corruption. Now the issue becomes how such cases can be applied in a setting of available remedies to plaintiffs. For it is not enough to win a case. At some point, the guilty parties must be made to compensate the victim(s).

The following is a detailed description of each of the major anti-corruption remedies available to plaintiffs, with reference, where possible, to the four representative cases. The analysis begins with a discussion of the core federal anti-corruption statute, the Landrum-Griffin Act of 1959 (LMRDA), as amended. It follows with an analysis of other major federal labor statutes, including LMRA, NLRA, and ERISA. Next it summarizes the federal criminal statutory remedies commonly argued in union corruption cases, most notably RICO and the Hobbs Act, and various federal common law remedies. Finally, it presents an overview of state statutory remedies.

II. The Legal Terrain
Federal Statutory Labor Law

LMRDA[36]

The statutory basis for addressing union corruption is the Labor Management Reporting and Disclosure Act ("LMRDA" or "Landrum-Griffin" hereafter), enacted almost fifty years ago. While other laws are used to prosecute union corruption, by far the most common vehicle is this statute. Congress enacted LMRDA in 1959, responding to growing concerns over corruption and other abuses of power by unions and companies alike.[37]

Its stated purpose was to "eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives."[38]

Landrum-Griffin was passed following hearings by the Senate Select Committee on Improper Activities in the Labor or Management Field, popularly known as the McClellan Committee, after its chairman, Senator John L. McClellan (D-Ark.). The committee did groundbreaking work. From 1957 to 1959, Senate investigators uncovered massive instances of racketeering in major unions. About two-thirds of the committee's attention was directed towards the International Brotherhood of Teamsters; the Bakery and Confectionary Workers, the Textile Workers, the Operating Engineers, and the Allied Industrial Workers unions also were the subjects of investigation.[39]

The televised McClellan Committee hearings gripped the nation, especially given that TV still was a relatively new medium and much of the coverage was live. Then-Teamsters President Dave Beck invoked the Fifth Amendment 65 times when confronted with evidence that he had directed over $320,000 in union funds for personal use.[40] At his trial in federal district court, Beck pleaded the Fifth 140 times, but was convicted on evidence leaked to the court by James R. ("Jimmy") Hoffa, then a Teamsters vice president and next in line for the union presidency.[41]

During the latter stages of the McClellan committee's existence, President Eisenhower proposed before Congress a "20-point program to eliminate irregular and improper conduct in labor-management relations" identified during the hearings.[42] There was considerable debate over the best way to address the abuses of union authority uncovered by the committee.[43] Supporters of reform argued that more federal oversight was the only way to uphold the principles of union democracy.[44] Opponents on the other hand contended that a tough new federal law would cause severe harm to organized labor.[45] The basic elements of the 20-point proposal made their way into Title II of the LMRDA,[46] overwhelmingly approved by Congress.[47]

Reps. Landrum and Griffin talking.

The Landrum-Griffin Act, named after Reps. Phil Landrum (D-Ga.) and Bob Griffin (R-Mich.), rested on the premise that the main responsibility for labor reform lay with the unions themselves. As such, it placed considerable burdens on internal enforcement, relying on open democratic process to ensure fairness and accountability.[48] Congress declared the purpose of the Act was to ensure that labor officials and employers who deal

with them adhere to the highest ethical standards. This, lawmakers argued, was essential to the free flow of commerce. LRMDA clarified the relationship between union officials and their respective members by preserving and ensuring democratic standards within unions; restricting by-laws and behavior that suppressed union democracy; and insuring full accountability of union officers to their members.

The new law seems a strong antidote to union corruption, yet some persons close to the situation felt more could be done. One such person was McClellan Committee Chief Counsel Robert F. Kennedy. In 1960 Kennedy published an account of the hearings, *The Enemy Within: The McClellan Committee's Crusade Against Jimmy Hoffa and Corrupt Labor Unions*. Kennedy, who later as Attorney General doggedly pursued Hoffa, strongly hinted enforcement of the new law might be a problem. "The Federal Government was not functioning efficiently if thousands of reports, filed each year, were never looked at—much less examined—and served only to take up space in government buildings," he wrote. No matter -- for now, LMRDA would have to do.

The Landrum-Griffin Act is organized into five titles:

- Title I contains the Bill of Rights for members of labor organizations; the right to enforce its provisions in Federal District Court through a civil action; the right to copies of their Collective Bargaining Agreement; and the obligation of labor organizations to inform its members concerning the provisions of the act.[49]
- Title II requires reporting by labor organizations, officers and employees of labor organizations and employers. It exempts attorney-client communications but requires the reports be made public information. It provides criminal penalties and civil enforcement rights by the Secretary of Labor.[50]
- Title III regulates the use of trusteeships and limits the purposes for which a trusteeship may be imposed by a labor organization. It requires semiannual reporting to the Secretary of Labor regarding any trusteeship, limits the voting rights and transfer of funds from any subordinate organization in trusteeship and gives the Secretary of Labor and any member of an organization under trusteeship the right to bring a civil action to enforce the requirements of Title III. Violation of these rules is also a crime.[51]
- Title IV regulates union elections, requiring they be held not less than every five years at the national level, and not less than every three years for local labor organizations. Representatives must be elected directly by secret ballot or indirectly by delegates chosen by secret ballot. Unions are required to allow a candidate to mail communications to members in a campaign within the union. Detailed safeguards to assure fair elections are also outlined. The use of dues money in elections is prohibited, and the Secretary of Labor has the right to remove an official elected in violation of the safeguards provided in Title IV.[52]
- Title V outlines the fiduciary responsibilities of officers and employees of labor organizations and gives members a private right of action to sue their union (including the right to recover costs and legal fees) if the union has refused or failed to sue to respond to a fiduciary breach. Title V requires bonding of union officials and employees who handle money or other property of the union. Unions are prohibited from making loans of over $2,000 to union officers or employees. Title V further prohibits individuals convicted of certain felonies from holding office or working, whether as an employee or consultant, for any union for a period of 13 years after their conviction. Embezzlement, conversion of union assets, or willful violations of the bonding, loan or debarment requirements is a crime punishable by a fine of not more than $10,000 or imprisonment of not more than five years, or both.[53]

The new legislation covered employers under the National Labor Relations Act and the Railway Labor Act.[54] The union corruption provisions in the Labor Management Relations Act (Taft-Hartley) had not been effective against a union covered by the Railway Labor Act.[55] With LMRDA, union members in these transportation-related industries could now protect their interests and rights to the same degree as members in other industries. Each of the titles will now be reviewed in detail.

Title I: Bill of Rights

Title I begins by outlining the Bill of Rights for members of labor organizations. These rights are critical to member self-policing. It provides the following core rights: equal rights and privileges within the labor organization;[56] freedom of speech and assembly;[57] representative elections to increase dues, initiation fees and

assessments;[58] the right to sue after reasonable procedures are exhausted;[59] and protection from fines, suspensions, expulsions and other disciplinary actions imposed without due process.[60] Section 101(b) provides that any constitution or bylaw provision inconsistent with Title I Bill of Rights is null and void.[61] Title I rights typically litigated in corruption cases are: the Section 101(a)(1) right to equal treatment; the Section 101(a)(2) right to free speech and assembly; and the Section 101(a)(5) due process protections.

Key among these rights is the Section 101(a)(2) right to free speech and assembly. The core principle of the LMRDA is that union members can self-police corruption if they have the right to campaign freely and vote out leadership that fails to meet its obligations to members.[62] These protections cover especially public dissent and formation of dissident groups within a union.[63]

Under Title I, unions still retain the ability to enforce "reasonable" rules of member responsibility to the union.[64] However, courts are reluctant to allow broad restrictions on speech.[65] Unions are allowed to adopt procedural rules to regulate member speech so that it does not interfere with the union's responsibilities to members.[66] There are a number of actions that give rise to a cause of action for infringement of free speech rights under Section 101(a)(2). These infringements include refusing to give a dissident member any job referrals and imposing discipline for lawful behavior, including removing a dissident from office.[67]

In *O'Rourke* the plaintiff alleged that he was subjected to verbal threats and retaliation from his union (refusing to refer him according to hiring hall procedures) because he exercised his right of protected speech under LMRDA Section 101(a)(2).[68] The defendant, Local 30, countered that *O'Rourke* failed to state a claim worthy of relief under Section 101. The union argued that it had not infringed on free-speech rights and the attendant right to participate in union affairs without retaliation. The union claimed O'Rourke was still allowed to exercise his rights, attend meetings, assemble freely, and express his views, arguments, and opinions.

The Court rejected this argument, stating that due to his views about the sympathy strike, O'Rourke was subjected to harassment and intimidation, forced to resign his job, denied referrals by the union and ultimately forced to withdraw from the union. Citing the Third Circuit's decision, *Brenner v Local 514, United Brotherhood of Carpenters and Joiners*,[69] the Court held that the manipulation of hiring hall procedures because of a member's exercise of rights under Section 101 was illegal even if O'Rourke had not complained about it.

Section 102 gives union members a cause of action for any infringement of Title I, enforceable in Federal District Court through civil action.[70] This broad provision gives union members the ability to enforce the Bill of Rights against their union. However, there are a number of legal issues with respect to coverage.

First, the language of the LMRDA covers "members." The act itself describes a "member" or "member in good standing" as "any person who has fulfilled the requirements for membership in such organization, and he neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and by-laws of such organization." This definition raises the question of whether, for example, an agency-fee payer or a represented non-fee paying employees is a "member" protected by the Act.[71]

Second, union members may be required to exhaust the internal appeal process before proceeding with an LMRDA claim under Title I. In *O'Rourke* the defendants argued that O'Rourke failed to exhaust internal remedies, and therefore his Section 101 and 501 claims should be dismissed.[72] The Court noted that Section 101 contains specific language requiring exhaustion of remedies.[73] However, the Court also noted that the exhaustion is not an absolute requirement under Section 101(a)(4) and is subject to judicial discretion.[74] The court ruled that such exhaustion is not jurisdictional, but instead is an affirmative defense; the union must persuade the Court that adequate intra-union remedies existed and that the plaintiff failed to exhaust them.[75]

The Court noted that the plaintiff is not required to exhaust internal remedies under the following conditions: (1) where the plaintiff would suffer irreparable harm; (2) where an inadequate or illusory appeal structure (or a structure dominated by individuals opposed to the plaintiff) would render pursuit of internal remedies futile; and (3) where the union's consistent position is contrary to that

advocated by the plaintiff such that an appeal would be futile.[76] Based on these requirements the Court held that O'Rourke was not required to satisfy internal remedies, finding that pursuit of such remedies would be futile and would not provide adequate relief for his alleged economic losses.[77]

Third and finally, Title I gives union members the right to copies of their Collective Bargaining Agreement[78] and requires unions to notify their members of the existence of the Act and their rights under it.[79] Notwithstanding this language, union members are not necessarily aware of these requirements, and in large measure because union officials are lax about meeting posting and notification requirements. Recently a federal circuit court ordered the International Association of Machinists to notify members of their rights under the LMRDA, rejecting the union's argument that a one-time notification issued in 1959 was sufficient to comply.[80]

Other decisions allege that the Teamsters and the International Brotherhood of Electrical Workers also failed to notify members under Section 105 (the court in each of those decisions denied requests for injunctive relief on procedural issues—namely, the failure to exhaust internal remedies in Section 101(a)(4)).[81] Such cases illustrate the willingness on the part of labor organizations to engage in protracted litigation rather than comply with federal notification requirements. While the Department of Labor has made some of this information more easily available to members on its website,[82] most members remain unaware that the information is available or, more importantly, that they even have a right to request the information.[83]

Title II: Financial Reports

Title II requires reporting by labor organizations, officers and employees of labor organizations and employers.[84] It also provides that the reports will be made public information.[85] Further it provides criminal penalties and civil enforcement rights by the Secretary of Labor.[86]

Relevant to union corruption cases, Title II requires unions to file financial reports with the Department of Labor on an annual basis.[87] Title II was intended to provide members with information about the finances and financial practices of their union to improve decision-making.[88] Lawmakers hoped that Title II, by deterring improper activities, would eliminate the need for further regulation.[89] Even AFL-CIO President George Meany supported the new requirements.[90]

The Department of Labor created the LM-2 form (along with the LM-3, LM-4 and Simplified Annual Report forms for smaller labor organizations) pursuant to Section 201(b) of LMRDA. The law specifically grants the Secretary of Labor the authority to enforce Title II, Section 210,[91] allowing the Secretary to bring a civil action for injunctive and other relief when founded on a belief "that any person has violated or is about to violate" Title II. The law, however, does not compel a union to allow inspection of records.[92] Nor does it provide for civil money damages or authorize the Secretary to bring an action on behalf of union members.

Union members are granted independent rights of action to compel enforcement of Title II. Union members may file for private enforcement under Section 201(c).[93] This right of action is limited to cases of inspection of its books for "just cause."[94] The union members' right of access to union books and records exempts attorney-client communications from inspection.[95] The law also provides for recovery of litigation costs and attorney fees.

Compliance with Title II reporting requirements. The Office of Labor-Management Standards (OLMS) is the agency that verifies compliance and provides compliance assistance.[96] OLMS is also required to verify reports and conduct audits to identify financial mismanagement and embezzlement by unions.[97]

Compliance audits remain relatively rare. In 1984 OLMS performed 1,583 audits, or about 5 percent of the approximately 30,500 universe of reports available for audit. In 2001 that number was down to 238 audits, or 0.8 percent of the reporting universe.[98] As of April 2002, ten of the largest unions in the United States had never once been audited in the 43-year history of the Landrum-Griffin Act.[99] To the extent that audits are conducted, they can and often do lead to prosecutions, mainly for theft or simple embezzlement of union funds.[100] Unfortunately, many unions fail to meet filing deadlines; a significant number fail to file at all. In fiscal year 1998 over 30 percent of the unions required to file either did so late or not at all. The combined noncompliance and late compliance rate in the following year was only a little better at 29 percent.[101] In fiscal 2000, the most recent for which figures are available, the rate was 34 percent.[102] The composite three-year rate for the largest unions was only somewhat better at around 20 percent.

Table 1—Reporting Experiences, Fiscal Years 1998–2000

Report Year 2000							
Form Type	Rec'd on Time*	6-14 days late	15-59 days late	60 or more days late	Not received to date	Total Filers	Percent Received late or never
LM-2	3,891	378	544	332	272	5,417	28.17%
LM-3	8,278	534	1,363	956	1,613	12,744	35.04%
LM-4	5,803	423	845	869	1,962	9,902	41.40%
Simplified	2,105	74	0	16	178	2,373	11.29%
Total	20,077	1,409	2,752	2,173	4,025	30,436	34.04%

Report Year 1999						
Form Type	Received on Time	15-59 days late	60 or more days late	Not received to date	Total Filers	Percent Received late or never
LM-2	4,722	469	222	20	5,433	13.09%
LM-3	10,146	1,553	977	186	12,862	21.12%
LM-4	7,079	1,847	460	830	10,216	30.71%
Simplified	50	2,246	0	137	2,433	97.94%
Total	21,997	6,115	1,659	1,173	30,944	28.91%

Report Year 1998						
Form Type	Received on Time	15-59 days late	60 or more days late	Not received to date	Total Filers	Percent Received late or never
LM-2	4,320	856	239	22	5,437	20.54%
LM-3	9,863	1,921	1,241	130	13,155	25.02%
LM-4	7,368	2,171	739	544	10,822	31.92%
Simplified	633	1,716	3	95	2,447	74.13%
Total	22,184	6,664	2,222	791	31,861	30.37%

In an August 15, 2001 letter to the House Committee on Education and the Workforce, the Department of Labor outlined the history of compliance, as shown in Table 1.[103] The DOL indicated the strong possibility that unions simply don't place a high priority on filing before the deadline. A ranking AFL-CIO official admitted as much in Congressional testimony the following April, stating that the federation's major organizations "can ill afford to do anything, let alone complete the required LMRDA forms."[104]

Recent Changes in the LM-2 Requirements. On October 3, 2003 the U.S. Department of Labor, responding to critics who argued that existing reporting rules were insufficient to ensure union transparency, issued final revised Landrum-Griffin reporting rules. The most visible and significant aspect of the new regulations was an expanded LM-2 form. Unions required to file an LM-2 -- redefined as those with at least $250,000 (up from $200,000) in annual receipts -- now had to account for expenditures in much greater detail. Highlights of the new regulations include:

- Electronic filing of the LM-2 form by to improve accuracy and speed up the disclosure of financial reports.
- Detailed financial reporting (itemized receipts and disbursements) for single transactions of $5,000 or more or for aggregate transactions to a single entity during the reporting year that total $5,000 or more.
- Reporting of all receipts and disbursements by the following functional categories: Representational Activities; Union Administration; Political Activities And Lobbying; Contributions, Gifts and Grants; General Overhead; and Other Receipts.
- Estimated time expenditures by union officers and employees in the functional categories.
- Detailed reporting of past due accounts payable and accounts receivable.

Labor Secretary Elaine Chao.

In its final rules, the Labor Department had taken steps to reduce the compliance burden, exempting more than 500 smaller unions from using the LM-2 form and protecting the privacy of individual members and their organizations. Significantly, the regulations did not require "forensic" reporting, including for example audit trails, information about pass-through and asset turnovers, consistent rules for depreciation or reconciliation of intra-union income streams.

Title III: Trusteeships

Title III regulates the uses of trusteeships, more specifically limiting the purposes for which a trusteeship may be imposed on or by a labor organization.[105] It requires semiannual reporting to the Secretary of Labor,[106] limits the voting rights and transfer of funds from any subordinate organization in trusteeship[107] and gives the Secretary of Labor, and any member of an organization under trusteeship, the right to bring a civil action to enforce Title III.[108] Violation of these rules is also a crime.[109]

A trusteeship, in its pure sense, is used by a parent union to assume control over one of its corrupt or inept subordinate bodies. Over the years the trusteeship has been used, with varying effectiveness, to root out corruption in unions.[110] However, it also has been a tool of corrupt union leaders themselves, bent on consolidating power and eliminating dissent. The McClellan Committee uncovered many abuses along this line.[111] Congress intended Title III to limit the use of the trusteeship to promote union integrity.

But more than four decades of experience has shown Title III to be of limited use for union members in combating corruption in their respective organizations. Unlike the affirmative rights granted to individual members in other sections of LMRDA, Title III rights have proven useful mainly for resolving internal power struggles among union leaders. Though an individual member is granted a private right of action to litigate these claims, his interests most often lie with local rather than national leadership.

Title III all too often has served as a political weapon to "keep locals in line" with the parent union, either forcing locals to enter into a collective bargaining agreement supported by the international,[112] refrain from striking,[113] or engage in coordinated bargaining.[114] In 1962 the Department of Labor issued a report (required under Section 305)[115] showing trusteeships were imposed to restore democracy or to combat corruption in only about 15 percent of all cases, and to force locals to comply with bargaining demands in 11 percent of all cases. In the remaining three-fourths of all instances, a union imposed a trusteeship to "carry out legitimate objects of the labor organization,"[116] a euphemism for imposing discipline, especially as a way of keeping dissenting locals in the fold. While courts generally prohibit the use of a trusteeship simply to prevent disaffiliation,[117] virtually every disaffiliation fact situation can be creatively pled to fit within one of the legitimate objects of a trusteeship.[118] That fact alone indicated the need to revise Title III to be in accordance with LMRDA's overriding purpose of promoting union democracy.

As currently drafted, Title III is a court-enforced method of punishing and superseding local dissent.[119] Current Teamsters General President James P. Hoffa, for one, frequently has employed it as political payback. The law should be revised to eliminate "performance of bargaining" or "legitimate objects" as valid purposes for trusteeships.[120] Unions may argue that deleting this language will prevent them from enforcing collective bargaining agreements or responsibilities upon their locals. But this problem can be resolved through unfair labor practice charges[121] or civil claims for breach of either the duty of fair representation or fiduciary duties. If a union's action does constitute corruption under LMRDA, it is valid grounds for imposing a trusteeship. Eliminating the "legitimate objects" clause would prevent a parent union from imposing a trusteeship in absence of reasons related to the Landrum-Griffin Act.

Title IV: Union Elections

Title IV requires union elections to be held for national and international labor organizations not less than every five years and requires that members or delegates be chosen by secret ballot.[122] It also requires locals to hold elections at least every three years.[123] Unions are required to allow a candidate to mail communications to members in a campaign.[124] The law also has extensive safeguards to assure fair elections.[125] Perhaps most significantly, it prohibits the use of dues money for election campaigns.[126] The Secretary of Labor has the authority to remove an official elected in violation of these safeguards.[127]

The protections in Title IV for fair elections and free speech form the cornerstone of LMRDA. Overall, the courts have upheld them, in the areas of exclusion based on qualifications,[128] campaign contributions,[129] and election conduct.[130] The one exception, arguably the most vital aspect of the voting process, is access to voting lists for the purpose of distributing literature.

Title IV provides candidates for union office a one-time right to inspect a list of members covered by collective bargaining agreements if they have union-shop provisions.[131] The inspection must occur during the 30 days before an election. The right expressly excludes any right to copy the voter list[132] or actual use of the voting list unless another candidate is provided use of the list.[133] The statute does require the union to comply with "reasonable" requests to distribute campaign communications, although the courts give unions leeway in declining to distribute communications from candidates so long as it is done in a non-discriminatory fashion.[134]

The complex rules regarding access and use of the voting list run counter to the Act's purpose of ensuring union democracy. They contain two critical problems. First, the statutory wording is too imprecise to be interpreted as being in accordance with Section 401(c). Second, in right-to-work states the right to access appears to be denied completely.[135] This means that in nearly half of the United States,[136] opposition candidates for union office are not entitled even to inspect voter lists.

Restrictions on the use of lists by bona fide candidates for union office are outdated and unnecessary. The

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rules are inconsistent with those of the National Labor Relations Act governing fair election conduct, which give unions access to a list of all eligible voters to use for literature distribution as well as physical visits.[137] Given computer technology, they seem especially out of date.

During Congressional debate, opponents of the right of full access to lists argued that employers or rival unions would abuse that right.[138] In this case the cure (one-time inspection) is clearly worse than the disease of potential misuse of the voting list. Candidates may have to rely on the very person they are running against to handle their campaign communications. Thus, although they have the legal right to nondiscriminatory treatment, often these candidates find their

literature is delayed or mailed to "dead" addresses.[139] The statute should be amended to provide the right to a copy of the voting list[140] and make misappropriation and/or use of that list for any purpose other than a bona fide union election a crime. Further, the right to voter lists should extend to all voting units covered by Title IV, including those in right-to-work states, a provision included to prevent potential misuse of voter lists by employers.[141] Unions in these jurisdictions are still required to refrain from discrimination with respect to the use of voter lists.[142]

Title V: Fiduciary Duties of Union Officers

Title V stipulates the fiduciary responsibilities of officers and employees of labor organizations.[143] It provides a private right of action for members to sue their union (including the right to recover costs and legal fees) if the union refuses or fails to sue in response to a fiduciary breach.[144] Title V also requires bonding of union officials and employees who handle money or other property of the union.[145] It prohibits unions from making loans of over $2,000 to union officers or employees.[146] Further, Title V prohibits individuals convicted of certain felonies from holding office or working (as an employee or consultant) for any union for at least 13 years after the date of conviction.[147] Embezzlement, conversion of union assets, or willful violations of the bonding, loan or debarment requirements is a crime punishable by a fine of not more than $10,000 or imprisonment of not more than five years, or both.[148]

The most commonly alleged breach in union corruption cases is violation of fiduciary obligations under Section 501, which imposes a wide range of responsibilities on union positions.[149] Although there is a split among the Circuit Courts of Appeal, the prevailing view is that Section 501 applies to things beyond union money and property, affirming many other official duties.[150] That is why Section 501 has been by far the most common criminal claim brought under the LMRDA.

Section 501(b) creates a duty to comply with the Constitution and by-laws of the union. The right of action under Section 501(b) is to enforce the general fiduciary duty and gives the union member the right "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization."[151] This clause also requires a union member to demand that his union sue any of its officials violating the constitution and by-laws prior if he is to proceed with a LMRDA claim. In some cases district courts have dismissed claims in absence of such proof of formal request.

In *O'Rourke*, the defendants argued that the plaintiff failed to exhaust his internal remedies, and therefore his Section 501 claims should be dismissed. The Court noted that while Section 501 does not contain any specific "exhaustion of internal procedures" requirement like under Section 101(a)(4), it does, in the form of 501(b), have a procedural "demand" requirement. Under the latter, there are "request" and "good cause" requirements. The union member first must request that the union "sue or recover damages or secure an accounting or other appropriate relief." Then, and only after the "labor organization or its governing board of officers refuse or fail" to take action, may a member initiate a suit on his own behalf.[152] Further, the statute states that "no such proceedings shall be brought except upon leave of the Court obtained upon verified application and for good cause shown."[153]

The Court noted the disagreement among circuits as to whether or not the "request" and "good cause" requirements are jurisdictional and thus may be cause for dismissal of a complaint.[154] The District Court in *O'Rourke* explained that the Third Circuit does not follow the strict reading of Section 501, but instead has incorporated the futility concepts applicable under Section 101(a)(4). Futility may serve as an exception to the "request" requirement in Section 501.[155] The Court held that O'Rourke should be given the opportunity to prove at trial that meeting the "request" requirement would have been futile and therefore should not have applied in this case. Further, the Court, citing *Sabolsky*,[156] held that a lack of formality in observing the "good cause" requirement was also not fatal to a claim. The Court held that the allegations made in the complaint were enough to satisfy the "good cause" application requirements of Section 501(b). [157] This is the proper view.

Section 501(c) prohibits embezzlement, theft, abstraction and conversion by union officers or persons employed by a union, creating a new statutory offense that can be violated several ways.[158] The new statutory crime goes beyond common-law larceny and previous statutory embezzlement,[159] punishing union officials who take union property[160] while knowing the union would have disapproved.[161] "Embezzlement" has been ruled coextensive with "conversion,"

and can be violated actively or passively.[162]

The key limitation to these prosecutions is the requirement of "specific fraudulent intent."[163] The Circuits differ notably on what is required to prove intent under Section 501(c). The first approach, used in the Sixth Circuit, is the "unauthorized conversion" theory, in which the government must prove the lack of a good-faith belief that the expenditure was for the legitimate "benefit of the union."[164] Prosecutors here must focus solely on what the defendant subjectively believed about the conversion. Issues about actual union authorization or benefit, while perhaps raising potential defenses to the element of specific fraudulent intent or subjective bad faith, are not required to prove the crime.

The second approach might is the "union authorization" doctrine, which is employed to some extent by most Circuit Courts of Appeal.[165] Here, the government must show that the defendant acted with knowledge that the appropriation was unauthorized or without the good faith belief that it was authorized. In these cases the government, in addition to proving the conversion elements, also must affirmatively prove a lack of union authorization as an element of the crime.[166] An additional hurdle to this approach, followed in the Second Circuit, also requires proof that the conversion did not benefit the union. Under this theory, the government must show that a defendant acted with the knowledge that the appropriation was unauthorized *and* without the good faith belief that the appropriation was for the union's benefit.[167] The government has the heightened burden to prove a lack of both union authorization and union benefit.

The third and final approach, used by the Third, Seventh, Eighth, Ninth, and D.C. Circuits, is the "totality of the circumstances." Here, a fact finder evaluates the evidence in light of all circumstances to determine whether the government has proven the requisite intent.[168] Union authorization and benefit, while serving as evidence of intent, are not required elements of proof.

The best approach for making unions accountable is the "totality of the circumstances" test. The government must prove only that an officer or employee of the union converted union property with fraudulent intent and eliminates the need to prove either the lack of union authorization or benefit. This is consistent with the common statutory and earlier common law approaches to proving embezzlement and conversion, respectively.[169] A "reckless disregard" of the interests of the union should be sufficient to find fraudulent intent to injure or defraud.[170] If the Supreme Court fails or refuses to grant certiorari to settle this circuit split in favor of this test, Congress should amend Section 501(c) to clarify that union benefit and authorization are not elements of the violation.[171]

This formulation eliminates the need for the prosecution to prove either lack of union authorization or benefit. A defendant can certainly raise facts regarding whether the alleged conversion was either authorized by the union (clearly probative with respect to the defendant's subjective intent) or intended to benefit the union (less probative with regard to intent, since the defendant could intend to profit both himself and the union using converted property). The current formulations, particularly the Second Circuit's that allows defendants to go free if their conversion fortuitously happens to benefit the union, create exceptions to the statutory crimes that are simply not in the text.

In *O'Rourke* the plaintiff alleged a Section 501 violation in response to threats and other actions of the defendants, union representatives Tom Lowry and Joe Crosley. The District Court found that while the fiduciary obligations of Section 501 are primarily financial, they also create a duty to "ensure the political rights" under Section 411 of all members.[172] The Court found that Lowry, as an agent of Local 30, failed to ensure O'Rourke's rights (he knew of the harassment suffered by the plaintiff but yet did nothing to remedy the situation) and worse, may have also directly violated those rights.

2. National Labor Relations Act[173]

Union corruption schemes often infringe on rights secured by the National Labor Relations Act. Section 7 of the NLRA protects the right of employees to self-organize; form, join or assist labor organizations; bargain collectively through chosen representatives; engage in protected concerted activities; and to refrain from these activities.[174] In 1947, the Labor Management Relations Act (Taft-Hartley) added Section 8(b) to NLRA, defining unfair labor practices for unions and providing boundaries for the abuse of these rights.[175]

Two unfair labor practices outlined in Section 8(b) are normally implicated in union corruption

schemes. Section 8(b)(1)(A) creates an unfair labor practice category for situations where a labor organization (or its agents) "restrain or coerce" employees in the "exercise of the rights guaranteed" in Section 7.[176] Section 8(b)(2), meanwhile, creates an unfair labor practice category for cases in which a labor organization or its agents cause or attempt to cause an employer either to: (1) discriminate against an employee to encourage or discourage membership in a labor organization; or (2) discriminate against an employee to whom membership in the union was denied or terminated for a reason other than failure to pay required dues and initiation fees.[177] In addition, the National Labor Relations Board also may recognize as an unfair labor practice under Section 8(b) the failure of a union to meet its duty of fair representation, implied by the conferral of exclusive bargaining status in Section 9.[178]

A union seeking to suppress dissent or eliminate a rival for union office may engage in actions that violate one or both of these provisions.[179] *In NLRB v. Aeronautical Industrial District Lodge No. 91*[180] Wayne Gilbert, a member of Machinists Local 707 and an employee at the Pratt & Whitney plant in North Haven, Connecticut, charged his international union, district lodge and local union with violating Section 8(b)(1).[181] Gilbert publicly criticized the leadership of Machinists Local 707 (alleging embezzlement, criminal activity and discriminatory treatment) in a leaflet distributed to members in December 1983. The union responded by filing intra-union charges, putting Gilbert on trial for those charges, and canceling his membership, making him ineligible to run for office. Things got even uglier from there. Gilbert filed an 8(b)(1)(A) charge against the union. The union, in turn, filed a civil lawsuit against Gilbert seeking damages and an injunction prohibiting Gilbert from "attending union meetings and harassing or intimidating union members." The lawsuit by the union was dismissed and the Union was ordered to reinstate Gilbert and allow him to run for office.[182] However, Local 707 continued to deny Gilbert the opportunity to run, now alleging that since he was no longer employed by Pratt & Whitney (he had been laid off and had waived reinstatement) he was ineligible to hold office under union bylaws. Gilbert later filed additional 8(b) charges alleging that the filing of the frivolous lawsuit and the refusal to allow him to run for office further violated his rights under the Act.

The Second Circuit ruled in favor of Gilbert on both counts, with the unions not even appealing the Board's order for Local 707 to reimburse Gilbert for legal fees. The Court found that the union's retaliatory action was the sole reason why Gilbert was ineligible for office. The court stated that the Act would be undermined if "a union could use, with impunity, its earlier retaliatory acts to engage in future retaliation by what would otherwise appear to be lawful conduct."[183] The Court ordered Gilbert reinstated to the position of Labor Representative for a period of 13 months (the time he would have been served had the union reinstated him as originally ordered), awarded for back pay, and allowed to run as an incumbent in the next election.

The board has varied in its interpretation of the ranges of acceptable conduct prohibited under Section 8(b). The NLRB originally limited unfair labor practices under 8(b)(1)(A) to claims of union violence and intimidation during organizing. [184] Such a narrow interpretation is of very limited use in deterring a union's retaliation against union dissidents and political opponents. In the mid- and late-1960s, NLRB moved somewhat away from this position, allowing union members to pursue 8(b)(1)(A) claims for disciplinary action imposed against those who filed charges with the Board before first exhausting internal union remedies.[185] This widened the ability of NLRB to address improper or unfair discipline under 8(b).

Later the Supreme Court, in *Scofield v. NLRB*,[186] suggested the following criteria to test whether a disciplinary action by a union is valid under 8(b)(1). It must: be properly adopted; reflect a legitimate union interest; impair no labor policy of Congress; be reasonably enforced; and allow union members to leave the union and thus escape the rule.[187] Ultimately the Board expanded its interpretation of 8(b)(1)(A) to include broad review of any internal discipline that impaired congressional labor policy, including LMRDA.[188] Later it reviewed trusteeship decisions and union dues increases specifically governed by LMRDA in the context of Section 8(b).[189]

In 2000 the NLRB scaled back this broad view, overruling *Graziano Construction* in a series of decisions beginning with *Scandia National Laboratories*. In Scandia, the Board ruled that a union only violates Section 8(b)(1)(A) where its conduct: impacts the employment relationship; impairs access to the Board's processes; pertains to

unacceptable methods of union coercion; or otherwise impairs policies embedded in the NLRA (as opposed to other labor laws).[190] The National Labor Relations Board's retreat unfortunately gave more leeway for union corruption. While the NLRB understandably is uncomfortable in the role of hall monitor for union internal disciplinary disputes, it necessarily plays a vital role in prevention union corruption. Despite its shortcomings, the NLRB is the government agency most closely in tune to the needs, challenges, and concerns of union members. Union members might not be schooled in law, but they know what an unfair labor practice is and that their union does not want one filed against it. They have seen grievances left languishing for months on the desks of shop stewards or business agents get sudden attention at the mention of a charge for "failure to represent." Limiting the scope of the right to sue under 8(b) is a step in the wrong direction. The board's role should be to determine whether the alleged conduct is contrary to the policies of the NLRA. Limiting the scope of inquiry in these cases is at cross purposes with the Act and discourages union members from utilizing the Board's resources to combat corruption.

The Section 8(b) cases illustrate the somewhat inconsistent and uncertain legal landscape that, unfortunately, is all too common with the NLRB's interpretation of the NLRA. For the plaintiff in a union corruption case, there are several factors to consider. The great advantage of going through the National Labor Relations Board is that it is free. Taxpayer-supported attorneys will represent a union member if they believe the Act was violated. With the exception of Department of Labor civil suits under LMRDA, every other route, save for a union's internal appeal process, requires the member to hire a lawyer. While fee awards and costs are sometimes available to prevailing plaintiffs in these cases,[191] these are speculative. Moreover, most attorneys want at least a retainer to bring the claim anyway.

On the other hand, there are at least four disadvantages to filing an NLRB claim. First, NLRB's powers are remedial. It will attempt (as imperfect as it can be sometimes) to make the union member whole, including reinstatement, back pay and other compensatory awards, but it cannot award punitive damages.[192] Second, the Board's role is to ensure that national labor policy is met, whether or not the union member enjoys an optimal outcome. The Board bases its decisions on the basis of what is good for national labor policy, not the individual union or the union member. Third, the findings of the NLRB could be binding in other litigation, and for this reason the plaintiff may want to choose to litigate in a different forum with more formalized discovery.[193] Fourth and finally, the National Labor Relations Board is made up of political appointees whose rulings often change with presidential administrations. This may result in confusing and contradictory policy.

Notwithstanding the disadvantages of using the NLRB, the Board's place as an arbiter of internal union democracy under Section 8(b) should be preeminent. Where corruption results in the infringement of Section 7 rights, national labor policy compels the Board to act irrespective of the validity of the union member's claims under LMRDA, Taft-Hartley other statutes. The Courts regularly deny preemption in these cases, leaving open the possibility of dual litigation over the same basic fact scenarios.[194] This is done in recognition that the Board has a unique and important role as statutory guide in setting national labor policy. It should not abdicate that role.

3. Labor Management Relations Act (Taft-Hartley Act)[195]

The Labor Management Relations Act (LMRA, or "Taft-Hartley") was the first attempt to "level the playing field" between labor and management after passage of the National Labor Relations Act of 1935. It substantially amended NLRA to include: the right to "refrain from any or all such [union] activities" outlined in Section 7 of the Act; the addition of union-originated unfair labor practices in Section 8(b); the recognition of employer free speech rights; and, specific approval of state right-to-work laws. It also added Section 9(f), requiring union financial reporting for the first time, later replaced by the Landrum-Griffin Act's Title II provisions. It also created two other key elements in the fight against union corruption, Sections 301 and 302.

Section 301 of LMRA provides jurisdiction to bring suits "for violation of contracts between an employer and a labor organization" in any federal district court.[196] Although the title of this section is "suits by and against labor organizations," union members are often the plaintiffs in these lawsuits and employers are legitimate parties and regular defendants. Many

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corruption claims are brought as "hybrid" Section 301/duty of fair representation cases, in which both the employer and the union must be named as defendants.[197]

In *Cox* a group of employees brought a Section 301 claim against USX for breach of contract.[198] They argued that USX breached its contract with the United Steelworkers by illegally changing its pension plan to give credit for time not employed at USX to the "Fairfield Six," thereby qualifying them for pensions. The company argued that this claim was without merit, and that the only legitimate complaint was with the union for "signing a bad contract." The Eleventh Circuit found that due to the fraudulent and improper conduct that led to the concessionary agreement, the contract was voidable at the option of the members. And since the contract could be voided, members were entitled to the reasonable value of the performance rendered; that is, to the value of the work the parties would have agreed upon had the union negotiators not violated their fiduciary duties to members.

Section 302(a) of the Taft-Hartley Act prohibits payments by or on behalf of employers to labor organizations, their officers and employees; Section 302(b) makes it illegal to ask for the payments prohibited by Section 302(a).[199] Violation of either section is a felony, punishable by a fine of up to $15,000 or imprisonment of up to 5 years or both (a misdemeanor punishable by a fine of up to $10,000 and/or imprisonment of up to one year if the amount taken is less than $1,000).[200] These payments typically come up in kickback schemes by unions and employers, whereby the union official accepts money in exchange for forgoing the rights of current or prospective union members. Violations of Section 302 are predicate acts under RICO.[201]

Litigation of Section 302 violations is relatively straightforward. The Attorney General must prove that the defendant: (1) is or could be a representative of employees in an industry affecting commerce; and (2) knowingly received money or gifts from the employer or its agent. Knowledge can be proven either by actual knowledge or proof that a reasonable person in the defendant's position would be aware that acceptance of such money was wrongful.[202]

In *Pecora*[203] the Third Circuit upheld convictions of defendants found guilty of Section 186 violations for accepting payments for no-show jobs. The defendants argued that they were not "representatives" of FTI employees, and therefore could not have violated Section 302(a) or Section 302(b) of the Taft-Hartley Act. The main argument was that the employees of FTI were primarily represented by Teamster Local 202, not Local 863, and therefore James Paone, the corrupt Local 863 business agent, did not meet the definition of "representative" under the statute.

The Court rejected this argument on several grounds. First, some FTI employees were represented by Local 863, and as such this negated the defendant's argument that these employees were merely paying dues to the union for the purpose of participating in its insurance program. Citing the Supreme Court decision, *United States v. Ryan*,[204] the Third Circuit held that the term "representative" was intended to be expansive and broad. It held that it was reasonable for the jury to conclude that Paone, as an official of Local of 863, represented the office employees because they were provided with welfare benefits through the union plan because of their membership in the Local.

Second, the driver employees of FTI were within the territorial jurisdiction of Local 863 because the purpose of the payoff scheme was to persuade Local 863 not to assert a claim to organize the FTI drivers. This, the court reasoned, implied that both the employer and Local 863 believed that the union had a colorable claim to the drivers.

Third, the court rejected the defendants' claim that because the payoff scheme was intended to *prevent* Local 863 from pursuing representation of employees, that there was no present intention to "admit to membership" employees, and thus no violation of Section 302(a)(2). The Court argued that since LMRDA had amended Section 302 to include the language "would admit to membership," the law was intended to close loopholes, not retain them.[205] The mere fact that the employees of FTI already were represented by another union did not alter the intent of Section 302. The Court held that the payoff scheme in *Pecora* was intended by the company to avoid a conflict with Local 863 and allow it to maintain its relationship with Local 202. Paying off a union official to ignore his duty to his union, therefore, was the very type of conduct Congress wanted to prohibit by amending Section 302.

The Taft-Hartley Act specifically exempts employers covered by the Railway Labor Act (RLA),[206] thus precluding its use in combating kickback schemes perpetrated by the latter union.[207] In *Landry*, the Fifth Circuit dismissed a RICO claim alleging a Section 302 predicate act against the airline carrier, TACA, and the pilot's union, ALPA. The court held that the basis for the Section 302 violation (that Huttinger illegally received severance and pension payments from TACA) occurred while TACA was an "employer" under the Railway Labor Act. And since TACA was exempt from Section 302, the payments could not have served as a predicate act under RICO. The pilots' argued that TACA converted to an LMRA "employer" once the individual pilots were terminated. The Court adopted the District Court's finding that TACA remained an RLA employer until well after the alleged RICO enterprise dissolved. The Court then dismissed this part of the RICO claim.

There is no logical basis for exempting RLA employers from coverage of § 302. Union members covered by the RLA have no similar right to fight direct payments between employers and RLA unions. They do not have the ability to include these corrupt actions in RICO claims.[208] The arguments for treating the transportation industry separately fall apart in considering acts of corruption. Thus § 185(b) should be amended to provide members of RLA unions the ability to enforce their contracts in federal court and to litigate direct payment schemes between union officials and companies as "hybrid" § 301 claims. Today these claims are reached, if at all, through either state criminal law or through duty of fair representation claims. This change will create consistency in how union (and company) corruption is attacked; it gives RLA-covered union members the tools they need to fight corruption in their unions.

4. Employee Retirement Income Security Act[209]

Congress passed the Employee Retirement Income Security Act (ERISA) in 1974 to set minimum standards for pension plans in private industry. ERISA specifies minimum participation rules and vesting requirements, and establishes certain responsibilities for plan fiduciaries. ERISA is a valuable tool for fighting union corruption centering on employee benefit, pension and welfare plans. Unfortunately the law regarding what constitutes breaches of

fiduciary responsibilities and who is liable for those breaches is unclear.[210] In this context, there are three central issues: (1) whether or not an ERISA plan exists; (2) whether or not a union official comes under the definition of a "fiduciary"; and (3) whether a remedy for a certain type of corruption is appropriate.

The first question is whether a "plan" even exists. For fiduciary responsibilities (and accompanying remedies) only apply to established benefit "plans."[211] The negotiations leading to the establishment of a plan or the discussions about whether or when to establish one do not necessarily create an ERISA fiduciary obligation.[212] Since a plan must be "established,"[213] the Court will ask whether a reasonable person, based on the circumstances, could determine if the plan intended: (1) benefits; (2) beneficiaries; (3) source(s) of financing; and (4) procedures for receiving benefits.[214] If the answer to all four is "yes," the plan falls under ERISA jurisdiction, and thus the law's fiduciary obligations apply.

In *Landry* the defendants ALPA, TACA and Huttinger argued that the "plan" was not established until April 1985, and that they had no fiduciary duties under ERISA before that time. The defendants supported this claim with a "Letter of Agreement" entered in February of 1982. The actual document creating the plan was not finalized until April of 1985. They argued that since the 1982 document did not specify benefits or required monthly company contributions, the four elements needed to establish a plan were not met. The Court reviewed both the Letter of Agreement and the 1985 plan document, which contained a provision making the plan retroactive to February 1, 1982. Based on this language the Court ruled that, even though the four elements required to "establish" the plan were not finalized until 1985, the plan -- and its fiduciary obligations -- came into being three years earlier.

The second issue is whether an individual is an ERISA fiduciary agent. For if he is not, he cannot be held liable.[215] A person's fiduciary status is not always connected to the plan itself. Such status applies to the person's activities.[216] ERISA defines an individual as a fiduciary to the extent he or she: (1) exercises discretionary authority or control over management of the plan or the disposition of its assets; (2) renders investment advice for compensation with respect to plan assets or property, or has the authority to do so; or (3) has any discretionary authority or responsibility over the administration of the plan.[217]

ERISA fiduciaries are prohibited from dealing with plan assets in their own interest.[218] The courts have construed the statute liberally to safeguard the interests of fund participants and beneficiaries.[219] In *Landry* a district court found that the 1985 plan document did not establish any authority in ALPA, TACA or Huttinger nor had they exercised authority. The Fifth Circuit disagreed. Initially the Court said that the focus should be on actual authority possessed or exercised, not just on titles or duties of the parties. The Court held that a genuine issue of fact existed with respect to: whether the defendants were responsible for a three-year delay in implementing the plan; whether they failed to disclose the plan benefits or the financial arrangements with TACA; and whether the parties colluded in allowing Huttinger to receive benefits to which he was not entitled. It found that any of these factors could lead to a finding of a breach of fiduciary duty.

The third key issue is determining the appropriate remedy, assuming, of course, that liability has been established. ERISA provides specific remedies for plan participants and beneficiaries. Actions may be brought to: recover benefits under the plan; enjoin actions in violation of ERISA or plan terms; and collect civil money penalties. Successful ERISA plaintiffs may be entitled to benefits improperly denied, along with pre-judgment interest and any consequential damages. Punitive damages and damages for mental anguish are not available under ERISA, though substantial statutory attorneys' fees and costs are allowed in breach of fiduciary duty actions. The Secretary of Labor also can collect civil penalties.

To reiterate, ERISA can be a useful tool in union corruption cases. The cases are often very complex and difficult to litigate, but the law's fiduciary duties are broad and sweeping. The courts, moreover, tend to interpret the statute very favorably to plan beneficiaries, giving plaintiffs a benefit of the doubt often absent from other statutory claims. Though limited in its ability to award damages, ERISA serves as an effective cause of action in any corruption scheme involving a union health or welfare plan.

Federal Crimes—RICO, Embezzlement, Mail Fraud, Hobbs Act, and the Internal Revenue Code[220]

1. Racketeer Influenced and Corrupt Organizations Act[221]

The Racketeer Influenced and Corrupt Organizations Act (RICO)

was created to prosecute organized crime syndicates. However, the statute has been effectively used in cases involving labor unions. Labor unions can satisfy the Act's broad definition of a "person" or an "enterprise" subject to the requirements of the statute.[222] There are a number of common union corruption schemes that can be litigated under the RICO statute. But it is helpful first to understand the nature of the law generally.

History of RICO. Congress enacted RICO in 1970 as Title 9 of the Organized Crime Control Act (OCCA).[223] The OCCA was enacted to "seek the eradication of organized crime in the United States by strengthening the legal tools and the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[224] The statute provided new tools to enable both the government and private citizens to combat organized crime's grip on business and labor organizations. Not surprisingly, the Senate version of the bill that later became OCCA was authored by Senator McClellan, whose hearings had led to passage of LMRDA over a decade earlier.[225] The OCCA had nearly unanimous support, passing in the Senate by a vote of 73-1.[226] The House version of the bill added a private right of action for persons injured by RICO-type activities.[227] President Nixon signed the law in October of 1970.

Jimmy Hoffa and Dave Beck.

RICO prohibits the following acts: (1) investing income obtained from a pattern of racketeering activity into interstate enterprises; (2) obtaining an interest in an enterprise operating in interstate commerce through a pattern of racketeering activity or collection of an unlawful debt; (3) conducting an enterprise's affairs through a pattern of racketeering activity; and (4) engaging in conspiracies to commit either of the first three offenses.[228] Suits may be brought by either the U.S. Attorney's Office or by private individuals.[229]

In order to prove a civil RICO violation, a prosecutor or individual plaintiff must prove the following: that a "person" as defined in RICO had engaged in at least one "prohibited activity"; that a minimum of two "predicate acts"[230] of racketeering activity occurred within ten years of each other; that the acts give rise to a "pattern of

racketeering activity"; and that the racket constituted an "enterprise." A number of federal and state crimes qualify as "racketeering activities."[231] The commission of any qualifies as a "predicate act" for purposes of proving a RICO violation. In basic form, a civil RICO claim must meet the minimum test: a person who engages in a pattern of racketeering activity connected to the acquisition, establishment, conduct, or control of an enterprise.[232]

RICO "Persons" and "Enterprises."

A claim under RICO first requires proof that a RICO "person" has violated the statute. The term "person" is broadly defined as "any individual or entity capable of holding a legal or beneficial interest in property," clearly covering individual union officials as well as unions.[233] The "person" must pose a "continuous threat" of engaging in acts of racketeering for RICO statutes to apply.[234] In addition to identifying a "person" who has engaged in predicate acts of "racketeering activity," and who poses a continuing threat, a RICO litigant also must prove that the person is associated with an "enterprise." An "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[235] The Supreme Court and several circuits have upheld this expansive definition to include virtually any group or association of entities, whether or not the individuals who own or control those entities are part of the RICO action.[236]

A RICO enterprise can be composed of any combination of corporations, individuals, partnerships or other legal entities. An enterprise that is not a legal entity also may be recognized if it qualifies as an "association-in-fact."[237] An association-in-fact enterprise must meet the following conditions: (1) an existence separate and apart from the pattern of racketeering; (2) an ongoing organization; and (3) a continuing unit characterized by hierarchical or consensual decision-making.[238] Continuity is critical; where the alleged enterprise exists for only a short period of time or for the limited purpose of engaging in the racketeering activity, courts have found that it does not qualify as an enterprise recognized under RICO.[239]

Proving that a RICO "person" and "enterprise" exist does not necessarily win the day. Some Circuits have ruled that for a violation of Section 1962(c) to have occurred, these two entities must be separate and distinct.[240] This complicated interplay between the RICO "person" and "enterprise" sometimes leads to creative legal pleading in an attempt make a particular set of racketeering activities fit into the RICO model. To illustrate, under Section 1962(a) a "person" engages in prohibited activity when he or she uses racketeering-derived income to invest in or establish an "enterprise."[241] Under Section 1962(b) a "person" must "acquire or maintain" interest or control over an "enterprise."[242] To violate Sections (a) or (b), the "person" and the "enterprise" can be the same entity. On the other hand, to violate Section 1962(c) the "person" must be "employed by or associated with" an enterprise. In this way, some courts argue, a person and the enterprise must be distinct and separate.[243]

In *Landry* the plaintiffs alleged three defendants violated RICO: ALPA (the union), Huttinger (the union's representative), and TACA (the employer). The plaintiffs proposed two theories for the RICO enterprise. The first was that ALPA was an enterprise. The second was an "association-in-fact" enterprise composed of Huttinger, ALPA and TACA. The Fifth Circuit addressed whether either of these enterprises was valid under RICO and, if so, which defendants could count as a "person" for purposes of proving a pattern of racketeering activity. It rejected the "association-in-fact" theory, since the goal of the enterprise, transferring pilots from New Orleans to El Salvador, was accomplished and the enterprise no longer existed. As such, the enterprise was no longer a continuous threat and the "association-in-fact" did not meet the RICO definition of a "person."[244]

The Fifth Circuit did find that ALPA was both an "enterprise" and a "person" under the statute. On this basis the Court held that ALPA was a proper defendant under the Section 1962(b) claim, since it required only the use of an "enterprise" by a "person." It dismissed the Section 1962(c) claim against ALPA due to the fact that the "person" and "enterprise" on this claim must be distinct.[245] It allowed the plaintiffs to continue their suit against the defendant Huttinger on both claims, since he was a RICO "person" but not part of the valid RICO "enterprise." TACA was dismissed from all the RICO claims because it was not alleged to pose a continuing threat and therefore was not a valid RICO "person."[246]

Another issue common to civil RICO litigation is when an "enterprise" is liable for the racketeering activities of its representatives. In Cox the United

Steelworkers argued that it should not be liable for the RICO acts of its representatives, since its negotiators were acting outside of the scope of their union-designated authority. The union claimed it was a RICO victim and that its enterprise was used as an instrumentality of its negotiators, not as a "person" under the statute.[247]

The Court rejected the notion that "victim" enterprises could never be found liable as defendant "persons" for the acts of their representatives.[248] Instead it held that the union negotiators E. B. Rich and Thurmond Phillips, through their actions, could create liability for the Steelworkers union, depending on what the union knew about their actions. Evidence that the union received notification about the changes to the USX pension plan (and the its international president's testimony that he felt union officials should continue to push the company on extending benefits to themselves) could show that the union ratified or at least looked the other way regarding the conduct of its negotiators. The Court concluded that because the union had failed to investigate allegations against Rich and Phillips or discipline the two until after their convictions, a reasonable jury would see the union as acquiescing in their violations.[249]

RICO "Pattern" of Racketeering Activity. In addition to establishing the "person" and "enterprise" elements, a RICO plaintiff also must establish a "pattern of racketeering activity." At minimum, the plaintiff must identify "at least two acts of racketeering activity" to meet the terms of the statute.[250] Two isolated acts do not constitute a pattern; it is "continuity plus relationship" which, combined, form a pattern cognizable under RICO.[251]

To prove the "relationship" element, the Supreme Court requires that predicate acts be related in one or more of the following ways: purpose, result, participants, victims, methods, or other distinguishing characteristics.[252] To prove the "continuity" element the plaintiff may show either closed- or open-ended continuity. Closed-ended continuity refers to a closed period of repeated conduct, typically over a significant period of time. Open-ended continuity, on the other hand, may extend over a much shorter period of time (weeks or months) but threaten future criminal conduct.[253]

In *Cox* the Eleventh Circuit held that a jury could find that each alleged unlawful pension payment to the "Fairfield Six" could be counted as a separate predicate act to prove a pattern of racketeering activity.[254] The defendants in Cox argued that the plaintiffs failed to provide evidence of a "pattern." They characterized the pension payments, even if improper or illegally negotiated, as simply one isolated instance. The Court disagreed, finding that each payment of pension benefits could be interpreted as a separate predicate act and therefore could be considered part of a pattern of racketeering activity.[255] Additionally, the Court in Cox found that the separate acts of requesting and bargaining for the special pension exceptions could also be considered separate predicate acts under RICO.[256]

In *Landry* the Court of Appeals concluded that a jury could find that the series of letters encouraging support of the "Pilot's Agreement," as well as the alleged illegal payments of severance and retirement pay benefits to Huttinger, constituted independent predicate acts of mail fraud.[257] Additionally, the Court believed that there was enough evidence to proceed to trial on the claim that the receipt of retirement benefits may have constituted a federal crime of embezzlement from an employee benefit plan.[258] Based on these factors the Fifth Circuit concluded that a "pattern of racketeering activity" had occurred under RICO.[259]

In *O'Rourke* a federal district court ruled at the summary judgment stage that the numerous incidents of intimidation and verbal abuse occurring over several weeks could be found by a jury to constitute a pattern of racketeering.[260] The defendants claimed that proof of a single Hobbs Act violation is not enough to prove a "pattern of racketeering activity" under RICO. They additionally argued that the short period of time over which the predicate acts were allegedly committed cannot satisfy the "pattern" requirement.

The Court held that while the alleged predicate acts occurred over a short period of time, the plaintiff also could meet the "pattern" requirement by demonstrating a threat of continuity.[261] The court believed a jury could find that the actions of the defendants exhibited "open-ended" continuity and could happen again either to the plaintiff or others. The Court also found that the plaintiff was capable of proving at trial that the alleged conduct is indicative of the way Local 30 conducts business. Thus, Local 30, as an enterprise, constituted a continuing threat of racketeering activity.[262]

Federal criminal statutes are another source of attacking union corruption. From the standpoint of the individual union member, these statutes are most useful in their relationship to the RICO statute.[263] Each of the following crimes, although an independently prosecutable offense by the Attorney General, qualifies as a predicate act under RICO. In addition, a RICO action may be brought in any federal district court by an individual union member or class of union members.[264]

2. Embezzlement from an Employee Benefit Plan

Embezzlement from an employee benefit plan is prohibited under 18 U.S.C. Section 664.[265] The elements required to prove this crime are: (1) conversion of assets to personal use; (2) ownership of trust of those assets in a "plan" subject to ERISA; and (3) specific fraudulent intent. The question of intent is complicated by history of litigation for embezzlement under Section 501(c).[266] At least one Circuit Court has held that to prove intent under a similar statute, the plaintiff must prove a "reckless disregard" for the interests of the protected fund.[267] Others argue, as under Section 501(c) jurisprudence, that in addition to proving fraudulent intent, the government also must prove that the union did not authorize and did not benefit from the conversion.[268]

The appropriate view regarding intent under Section 664, as under Section 501(c),[269] is that intent is proven when, after reviewing the "totality of the circumstances" surrounding the alleged conversion, the trier of fact is convinced that the defendant intended to injure or defraud the plan.[270] A "reckless disregard" of the interests of the plan should be sufficient to find intent to injure or defraud.[271]

As a RICO predicate act, Section 664 necessarily becomes an element in a civil RICO claim brought by union members under that statute.[272] In *Landry* the class of pilots alleged violation of Section 664 as a RICO predicate Act. The defendant Huttinger argued that the Section 664 claim could not stand due to the fact that the pilots had failed to prove "scienter," or wrongful intent to defraud, or that the receipt of funds by Huttinger was inconsistent with the fiduciary purposes of the plan. Without ruling on the standard of proof for fraudulent intent, the Fifth Circuit held that the pilots had stated issues of material fact with respect to Huttinger's fraudulent intent.[273] The Court then allowed the plaintiffs to proceed to trial on the issue.

An adjunct to the crimes of embezzlement, mail fraud and Hobbs Act violations is the federal common-law crime of "aiding and abetting." In *Cox* the Eleventh Circuit found that aiding and abetting embezzlement was a valid "predicate act" under RICO. In order to establish liability for aiding and abetting, the government (or plaintiff in a civil RICO action) must show that: (1) the defendant was aware of his own role in an overall improper activity at the time he provided the assistance; and (2) the defendant knowingly and substantially assisted the principal in the violation.[274] The advantage of proving an "aiding and abetting" claim is that knowledge can be shown by circumstantial evidence or reckless conduct.[275] Evidence that the union "knowingly tolerated" an embezzlement scheme is enough to support a claim of aiding and abetting, meaning that persons who were not principals in the scheme but nevertheless allowed it to proceed, can be included in the claim.[276]

3. Mail Fraud

Mail fraud,[277] a federal crime, is proven by establishing all four of the following elements: (1) a scheme or artifice to obtain money or property under false pretenses; (2) interstate or intrastate use of the mails to execute the scheme; (3) use of the mails to defraud on the part of the defendant connected with the scheme; and (4) actual injury to the business or property of the plaintiff.[278] Two types of schemes are prohibited: using the mails to pursue a scheme to defraud and receiving money or property through the mails pursuant to a scheme to defraud.[279] Mail fraud is also a predicate act under RICO.[280]

The pilots in *Landry* alleged that their retirement pension fund was defrauded by Huttinger, ALPA and TACA. They refer to three letters, two sent by Huttinger to the pilots discussing the negotiations and one sent by TACA announcing the agreement to move the pilots. These were letters used to pursue the pilot relocation scheme. They also alleged that the severance and pension payments mailed to Huttinger represented acts of receiving money through a scheme to defraud in violation of Section 1341. The Court held that the pilots should have had an opportunity to submit their claims to a trier of fact. It held that the four alleged uses of the mail could be found by a reasonable jury to violate Section 1341.

The property interest of union members has been broadly defined in the past to include the right of

union members to an "honestly administered" union.[281] The Supreme Court reversed this and other "intangible right" theories in mail fraud cases in its 1986 decision, *McNally v. United States*.[282] In *McNally*, the Supreme Court ruled that the phrases "scheme or artifice to defraud" and, "for obtaining money or property by means of false or fraudulent pretenses," should be read conjunctively; it held the scheme to defraud modifies "money or property," and does not independently confer rights.[283] This decision is unjustified, both as a matter of statutory construction and public policy.

As Justices Stevens and O'Connor noted in their dissent in *McNally*, the mail fraud statute clearly establishes three separate prohibitions: to defraud; to obtain money or property through false pretenses; and to transfer counterfeit articles through the mails. As the dissent states, "one can violate the second clause—obtaining money or property by false pretenses—even though one does not violate the third clause—counterfeiting."[284] As a matter of simple statutory construction, there is no justification to treat the first clause as anything but an independent violation of the Act.

Reading the statute to exclude protection of the right to expect an honestly administered union, perversely enough, promotes schemes to defraud members. In *United States v. Runnels*,[285] a case on appeal at the time *McNally* was decided, a union president was convicted of mail fraud for receiving payments from two attorneys in exchange for funneling workers' compensation claims to them. He received well over ten thousand dollars and, based on the scheme as outlined in the decision, perhaps more than $85,000.[286] His conviction of mail fraud, however, was overturned after *McNally*.

That led to a complex case that came to be known as *Runnels II*.[287] It is possible this money might have gone to union members in the form of lower legal fees, giving rise to a claim under an "economic benefit" theory.[288] However, it is speculative whether the personal benefit Runnels negotiated for himself was actually a foregone economic benefit due to union members; Runnels pled in response to the government's original complaint that, "if any money was taken, it was not money belonging to the union members."[289] It is ridiculous that the government should have to engage in such a tortured pleading process to make a simple claim: Runnels engaged in mail fraud by using the mails to further a scheme to enrich himself in breach of a fiduciary duty to his membership.

In *United States v. Boffa*, several defendants, including the president of Teamsters Local 326, conspired in a "labor-switch" scheme. The scheme resulted in the termination of truck drivers represented by two separate Teamster locals and their replacement by drivers represented by the Brotherhood of Railway and Airline Clerks, who demanded significantly lower wages and benefits. Based on the facts as described in appellate decisions,[290] the Teamster president received "payoffs" for his part of the scheme, namely the free use and ultimately below-market sale of a Lincoln Continental.[291]

Under the facts in *Boffa*, to prove the "economic benefit" theory suggested by the Sixth Circuit in *Runnels I*, the government (or a union member in a civil RICO action) would have to prove that the use or sale of the car deprived the members of some direct economic benefit. While the members clearly lost something of economic value (i.e. their employment, wages, benefits and pensions) in this case, it cannot realistically be argued that this scheme to defraud was intended to siphon off money or property that otherwise would obtain directly to the members, since the car in question neither physically belonged to nor was of any preexisting value to the membership. However, there is something wrong with a system that takes such a narrow view of "economic benefit." By similar construction, extorting tribute from a company official in exchange for labor peace would be more likely to be excused if it were based on fraudulent misrepresentation of the extortionist's power to mount an actual strike or break the peace in other ways.

Congress should take up the Court on its admonition to "speak more clearly than it has" by overruling *McNally's* protection the "intangible" rights of union members.[292] Lawmakers should delineate the three separate causes of action by numbering them. In this way it will be impossible to read the first two clauses as conjunctive and the second two disjunctive.[293] This change would clarify that stealing money from a union member, while perhaps more direct, is no less treasonable than malfeasance that deprives a union member of the full and fair efforts of his or her fiduciaries.

4. Hobbs Act

Congress enacted the Hobbs Act in 1946 to amend the Anti-

Racketeering Act of 1934. The law provides for sanctions against assault, extortion and other crimes involving physical violence that impede the flow of interstate commerce. It applies to a wide range of persons, especially union officials, employees and agents; in fact, the law was drafted in response to the 1942 Supreme Court ruling in *Local 807* that effectively gave New York City Teamsters the right to threaten and use violence if they could prove "bona fide" economic objectives.[294]

The primary elements of a Hobbs Act violation are: (1) the inducement of the victim to part with property; (2) the use of fear; and (3) a demonstrated effect on interstate commerce.[295] Hobbs Act extortion is a predicate act under RICO.[296]

The Court in *O'Rourke* found a Hobbs Act violation against the one of the defendants, Lowry, who allegedly engaged in threatening and intimidating actions that could constitute a Hobbs Act violation, and thus a predicate act for the plaintiff's RICO claim. But the Court also concluded that the other defendant, Crosley, was not present during the alleged incidents that served as the basis for the claim and thus did not participate directly in the extortionate activities. Thus, his behavior did not meet the three elements of a Hobbs Act violation.

The primary line of defense for Hobbs Act prosecutions is the "labor exception" created in the 1973 U.S. Supreme Court decision, *United States v. Enmons*.[297] The Court ruled in that case that the Hobbs Act does not apply to the use of force to achieve "legitimate labor ends."[298] Along with *Local 807*, this ruling stands as one of the worst of all labor decisions. The Supreme Court effectively provided defendants immunity from Hobbs Act prosecution so long as they can show their conduct, no matter how egregious,—in *United States v. Mulder*[299] one of the acts was murder —furthers a legitimate labor relations goal. At least there are limits to this doctrine. In *United States v. Debs* the defendant Debs, a union president, was convicted of soliciting others to assault another union member to induce him to drop a challenge to Debs for union office. Debs appealed, argued that the Supreme Court specifically found that campaigning in union elections is a "legitimate labor end" and likened his conduct to minor picket line violence, exempt under the exception in *Enmons*. The Sixth Circuit declined to extend *Enmons* beyond its own facts (i.e. outside of a strike over wages in the collective bargaining context), and found that his extortionate threats violated the Hobbs Act.[300]

Notwithstanding the Sixth Circuit's restraint, the boundaries of the "labor exception" are not well-defined. The Court argued that the union violence in *Enmons* was intended to pursue legitimate collective bargaining goals. In this case, acts in this Louisiana case included shooting high-powered rifles at company equipment and blowing up an electrical substation during a strike. The strikers here, the court argued, were to be considered apart from those who engage in "illegitimate" conduct, such as exacting personal payoffs and paying "wages" to phantom employees.[301] The Court stated, curiously, that "it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes."[302]

This line of reasoning is faulty. It is the *labor exception*, not the Hobbs Act, which forces federal courts to police the conduct of strikes. In order to determine whether a strike fits within the labor exception the court must determine whether the extortion is committed in pursuit of "legitimate labor ends." This necessarily requires the federal courts to review the underlying labor dispute and to decide whether or not it pursues these "legitimate" ends. More troubling, by imposing this requirement on district courts, it unnecessarily introduces preemption analysis into Hobbs Act litigation, further limiting the scope and usefulness of the Hobbs Act in preventing union corruption pursued through violence and extortion.

In a recently decided case, *Overnite Transportation v. International Brotherhood of Teamsters*,[303] the federal district court for the Western District of Tennessee found that a Hobbs Act claim against the Teamsters Union was, due to the *Enmons* labor exception inquiry, preempted by the NLRA. The Teamsters, who represented less than 15 percent of Overnite Transportation's drivers, engaged in a nationwide strike and coordinated campaign of labor unrest to force the company to settle a contract over represented drivers "on favorable terms" with the Teamsters.[304] In its complaint Overnite listed 221 separate criminal acts committed against the company and its employees by the Teamsters and its representatives. These included shooting at Overnite drivers and trucks; dropping bricks,

cinder blocks, boulders, and other objects at trucks; throwing rocks, bottle rockets, Molotov cocktails, and other objects at employees; assaulting employees; destroying and vandalizing property; displaying firearms; swerving and making sudden lane changes in front of drivers; and numerous verbal threats including: "I'm going to f***ing kill you, you're dead, you're dead"; "Get ready to meet the Teamsters, you tell all your boys were (sic) going to start beating you. You wanted it, you're going to get it"; and "You're going home in a bag you scab whore."[305] Overnite alleged violations of RICO, citing extortion under the Hobbs Act, as well as various other state crimes and common law actions.

The Teamsters of course alleged that their violence and intimidation were in pursuit of "legitimate labor ends" and, therefore, were not subject to the Hobbs Act. The District Court for the Western District of Tennessee agreed, finding that under *Enmons* it would have to evaluate whether the strike against Overnite was lawful before evaluating the Hobbs Act claim. Then, relying on preemption analysis, the court found that since the acts occurred during a potentially lawful labor dispute,[306] they fell within the jurisdiction of the NLRB.[307]

The Western District of Tennessee's decision was a consequence of the tortured reasoning of *Enmons*. At locations where the Teamsters were not certified to represent Overnite drivers, the question is simple; no "legitimate" labor dispute exists, since the Teamsters are not authorized bargaining agents for the employees, and the question is not one for the Board.[308] In locations where Overnite workers were represented by the Teamsters, the Court in *Overnite* could have, at a minimum, simply decided the issue, based if necessary on Board decisional law. Better yet, it should have followed the holding in a case that it cited, *Detroit Newspapers*, which held that assault and property destruction, even if conducted during an otherwise lawful labor dispute, are cognizable by the Hobbs Act and thus not subject to NLRB jurisdiction.

The Hobbs Act outlaws the use of "robbery" or "extortion" or the threat or use of force to obstruct commerce.[309] Whether the threat or use of force, violence or fear occurs during a strike for "legitimate" purposes is of no consequence. Congress, during its debates on the Act, specifically refused to adopt language exempting from Hobbs Act coverage "wages paid by a bona fide employer to a bona fide employee," and later seeking exemption for any activity found lawful under the NLRA and other labor laws; these proposed amendments were defeated.[310] As Justice William O. Douglas' dissent in *Enmons* notes, many of the "mischievous" or "low-level" acts of violence are subject to state prosecution.[311] What the dissent (and the majority) failed to acknowledge is that both "low-level" and "high-level" acts of violence are used in the pursuit of "legitimate" labor disputes, and many times go unprosecuted by state courts following the same line of reasoning as *Enmons*. In effect, when it comes to the picket line, boys will be boys. The very purpose of the Hobbs Act was to supersede this kind of thinking. Congress, in exercising the Federal Government's special interest in regulating unions, wanted to ensure that an independent federal right of action existed to combat the use of labor violence.

Congress should overrule *Enmons* based on Justice Douglas' dissent.[312] The statute should note specifically that any use of violence in the pursuit of the goals of organized labor, whether "legitimate" or not, is expressly against the goals of national labor policy. While parties in labor disputes may disagree over a variety of issues, using force, or the threat of it, should be expressly and without exception unlawful. The fear that an individual who engages in "garden variety" picket line violence will spend 20 years in prison is unfounded;[313] if the issue is simply that the punishment doesn't fit the crime, that punishment is within the discretion of the judge or could be outlined more clearly in the statute.

5. Internal Revenue Code

Violations of the Internal Revenue Code are sometimes useful in the prosecution of union corruption, especially in embezzlement, bribery, and kickback schemes. Defendants rarely report income received through these schemes. If two or more people are involved in the scheme, liability for conspiracy to commit tax fraud also occurs.

A recent case involving the use of tax fraud laws to combat union corruption is *United States v. Zichettello*.[314] From 1990 to 1996 the former President of the New York City Transit Police Benevolent Association, a disbarred lawyer who was the TPBA's former labor negotiator, and two of his partners, were charged with using the association as their virtual piggy bank. Zichitello's law firm received millions of dollars in legal fees from the TPBA in return for kickbacks. The defendants were charged with tax evasion[315] and conspiring to defraud the Internal Revenue Service in connection with the filing of false individual tax

returns by three TPBA officers.[316] Prosecutors also charged them with RICO conspiracy, relying on a number of mail fraud, wire fraud, and conspiracy predicates in connection with monthly bribes of approximately $1,800 and quarterly bribes of approximately $18,000. The defendants were found guilty after a jury trial on virtually all counts.

The use of tax laws also has been useful in attacking corruption in the Laborers International Union of North America (LIUNA), a union rife with corruption for many decades.[317] In February 2001, a Laborers pension official named John D. Abbott, ex-secretary-treasurer and business manager of the Laborers' District Council for Oregon, Idaho, and Wyoming, pled guilty to RICO and tax evasion charges in connection with union pension funds. Abbott accepted bribes from a Portland, Ore.-based investment firm, Capital Consultants, a money manager of union pension funds. He also understated his income on his 1997 tax return by $76,560. He was sentenced to two concurrent 15-month prison terms of 15 months, plus one year of probation.[318]

Even more significantly, LIUNA General President Arthur Coia, Jr., who was forced out of office in 1999, pled guilty in 2000 to mail fraud associated with a scheme to avoid paying taxes on three Ferarri sports cars he'd bought. Coia defrauded the State of Rhode Island and the Town of Barrington, R.I., of a combined roughly $100,000 in taxes. From 1991-1997 Coia, with the assistance of a car dealer who was a LIUNA vendor, purchased the Ferraris, which ranged in price from $215,000 to $1,050,000. Although banned from the union for life, Coia managed to avoid prison time and collects $335,000 annually as "president emeritus" of the union.[319]

Federal Common Law

1. Duty of Fair Representation

In addition to statutory unfair labor practice (ULP) remedies under the National Labor Relations Act, the Supreme Court also has found a common law duty of fair representation, implied from the statutory language of Section 9(a) of the NLRA.[320] The duty of fair representation predates the prohibition on unfair labor practices in Section 8(b) of the Taft-Hartley amendments to NLRA.[321] The doctrine originated in the context of racially-based employment discrimination cases in the years prior to enactment of the Civil Rights Act of 1964, Title VII of which outlaws race as a category for making an employment decision.[322]

The duty of fair representation is not limited to instances of intentional race discrimination by unions.[323] In *Vaca v. Sipes*[324] the Supreme Court concluded that the duty of fair representation is breached "when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." In the years following *Vaca*, confusion has developed over whether breach of the duty of fair representation requires intentional misconduct, negligence or gross negligence. [325] Most recently the Court has reiterated the broad duty outlined in *Vaca*, while refining the standard for "arbitrary conduct" somewhat. In *Air Line Pilots v. O'Neill*, the Court defined arbitrary conduct as that which, "in light of the legal landscapes at the time of the union's actions, the union's behavior is so outside a 'wide range of reasonableness' . . . as to be irrational."[326]

With respect to union corruption, the plaintiff must show that the union's conduct toward him, pursuant to *Vaca*, was: (1) discriminatory; (2) arbitrary; or (3) in bad faith. They are disjunctive—proving any one of the three is sufficient.[327] Discrimination is relatively straightforward; in addition to Title VII-protected classes it covers nonmembers[328] and internal union dissidents.[329] The union must enforce its established policies uniformly.[330]

Circuit courts are split as to the appropriate level of proof for showing a union acted in an "arbitrary" or "perfunctory" manner. The Ninth Circuit's formulation is most favorable to plaintiffs, finding a breach of the duty in cases where a defendant negligently fails to perform a "procedural or ministerial" task (as opposed to a task involving "union judgment," which requires proof of intent or bad faith).[331] Most Circuits apply what best could be called a "rational explanation" standard.[332] The Sixth Circuit's formulation is typical. Unlike the Ninth Circuit, a plaintiff only must show conduct "so arbitrary and unreasonable as to be beyond the realm of the rational."[333] Moreover, even an action of judgment (as opposed to a ministerial decision) violates the duty if motivated by bad faith, discriminatory animus or is "so arbitrary and unreasonable as to be beyond the realm of the rational."[334]

The Seventh Circuit adopted the strictest standard, originally requiring proof of intentional misconduct to prove a breach of the duty,[335] but now follows *O'Neill's* "forgiving" test, finding a breach where a union's

misconduct shows an "egregious disregard" for a union member's rights.[336] Finally, the Fourth and Eleventh Circuits each adopted "gross negligence" standards to prove a breach of the duty.[337] This view is also relatively consistent with the Supreme Court's formulation in *O'Neill*.

A showing of bad faith requires proof of fraud, deceit, dishonesty, intent, purpose, or motive.[338] A variety of affirmative acts by unions may result in a breach of the common law duty. For example, in *Cox* the plaintiffs argued that the union breached the common law duty of fair representation when the "Fairfield Six" bargained for improved pension benefits in exchange for contract concessions. In *O'Rourke* the alleged breach occurred in the discriminatory operation of the defendant union's hiring hall. Unions also can breach the common law duty by omission, for example, by knowingly failing to investigate or process grievances.[339]

Federal courts share concurrent jurisdiction with the NLRB in duty of fair representation cases.[340] The NLRB has found that a union's breach of the duty violates Section 8(b)(1)(A) or, if the union causes or attempts to cause an employer to take an action which breaches the duty, Section 8(b)(2).[341] At the same time, the Supreme Court's duty of fair representation predates the adoption of these sections of the NLRA; the Court in *Breininger* held that *Vaca v. Sipes* stands for the proposition that the *Garmon* preemption does not apply to DFR claims.[342] The Court in *Breininger* reasoned that independent federal jurisdiction exists due to the fact that the duty of fair representation is a "judicially evolved" right, implied from the NLRA's grant of exclusive representation to unions, and is an integral part of national labor policy not particularly within the expertise of the NLRB.[343] The duty of fair representation, while often enforced in Board decisions, does not mirror unfair labor practice liability.[344] Therefore the duty of the fair representation claim may be brought directly to federal district court, typically as part of a "hybrid" Section 301 claim or as a claim subject to federal jurisdiction for cases arising under an Act of Congress regulating commerce.[345]

In *O'Rourke v. Crosley* the defendants asked the Court to dismiss O'Rourke's claim for common law breach of duty of fair representation. They argued that the plaintiff failed to state a claim and that the claim, even if valid, was preempted by the NLRA. The U.S. District Court for the District of New Jersey dismissed both arguments. With respect to preemption, the Court found, as it did with RICO and LMRDA claims, that the actions alleged to have been taken by one defendant (Lowry), although possibly also unfair labor practices under the National Labor Relations Act, clearly also had breached of the union's duty of fair representation at common law. Citing *Breininger*,[346] the Third Circuit held that discrimination in hiring halls constitutes a common law breach of duty that is not preempted by the National Labor Relations Act.[347]

While proving breach of the common law duty of fair representation can be an effective tool in combating union corruption, it will not support a RICO action on its own. In *Cox* the plaintiffs also alleged a common law breach of the duty of fair representation. The Eleventh Circuit held in *Cox* that violation of a common law fiduciary duty is not a predicate Act under 18 U.S.C. Section 1961(1) and therefore cannot be considered RICO "racketeering activity."[348]

The duty of fair representation is an effective tool to attack union corruption. It gives plaintiffs access to federal courts to address egregious acts of discrimination or disregard of duty motivated by animus against political rivals or favoritism toward political supporters. It also provides broad-based remedies for misconduct.[349] The biggest problem is its overly broad definition of what constitutes a breach.

The Supreme Court should consider an additional refinement of the standard outlined in *O'Neill* to help clarify the burden of the parties in duty of fair representation cases. In cases of allegations of discrimination or bad faith (as opposed to arbitrary action), the Court should utilize the shifting burdens formulation used in civil rights discrimination litigation.[350] To state a valid claim for breach of duty of fair representation under this formulation, a plaintiff first must state a prima facie case of discrimination, bad faith or arbitrary action. That is, he must show that he was represented by the union. He then must prove that the union either: (a) acted against the plaintiff's interest; or (b) contributed to or failed to prevent an action against the plaintiff's interest. Additionally, he must prove the action taken either: (a) violated an express obligation of the union; (b) was inconsistent with action taken toward similarly situated individuals; or (c) resulted in tangible harm to the plaintiff.

If this burden is met, the defendant union shall be presumed to have

discriminated against, or acted arbitrarily or with bad faith, toward the plaintiff in violation of its duty of fair representation. The union at this point must show that a legitimate, nondiscriminatory explanation exists for the action challenged by the plaintiff. If the union succeeds in meeting this burden of proof, the presumption of discrimination, arbitrariness or bad faith drops. Now the plaintiff must either: (a) provide direct evidence of intentional discrimination or bad faith; or (b) show that the reason given by the union is merely a pretext for a discriminatory, arbitrary or bad faith motive. In the latter case, he must show that the union's action, in light of the law and circumstances at the time, was so unreasonable as to be considered irrational.

This formulation of the burden does three important things. First, it eases the initial burden of proof for plaintiffs. Plaintiffs should not have to plead with particularity all the facts necessary to prove that *every possible explanation* for the union's misconduct was "outside a wide range of reasonableness." Instead, under the proposed test the plaintiff must only dispute (after pleading a prima facie case of discriminatory, bad faith, or arbitrary conduct) the union's proffered reason for the action. This is not only more equitable, but also results in judicial economy, limiting pleadings to the actual reasons given by the union in defense of its actions.

The second advantage to this formulation, related to the first, is that it is more equitable. It places the burden of proof where it belongs -- on the union owing the duty. Union members are ill-equipped and often poorly situated to bring duty of fair representation cases. A plaintiff who has already lost his job, been denied assistance from the union, and is now looking for help from the court system, should not be required to identify and plead facts to establish that the union failed to meet the standard of *O'Neill*.[351] Instead, the union, who knows why it undertook certain actions, should be required to plead these facts in response to the *prima facie* case made by the plaintiff.

Finally, this formulation unifies the standard of proof in duty of fair representation cases. It eliminates the distinction between "judgmental" and "ministerial" decisions used in the Ninth Circuit, which found breaches of the duty of fair representation for mere negligence by the union. It also eliminates the requirement of intent, gross negligence, and other difficult burdens used in other circuits, uniformly applying the *O'Neill* formulation.

State Statutory Law

When not preempted by federal law,[352] state law claims also can be used to combat union corruption.[353] These claims may derive from state criminal, civil or common law statutes. There are several reasons to bring state law claims instead of (or in addition to) federal claims. First, public sector unions and their locals that represent police, fire, corrections, teachers, and other employees within a single state may not be covered by federal law;[354] state law provides the only recourse for members of such entities. Second, even where federal statutory remedies are invoked (especially in a RICO action), a union member may have good reason to believe that state "predicate acts" are easier to prove than corresponding federal ones.[355] Finally, plaintiffs may prefer a state forum, believing they are more likely to prevail there.

Corruption schemes are sometimes prosecuted as state crimes anyway. These prosecutions most often include claims for embezzlement;[356] conspiracy;[357] larceny or theft (also known as extortion or coercion);[358] forgery;[359] bribery;[360] and racketeering.[361] A recent major union corruption case litigated completely in state court provides a good example. American Federation of State, County and Municipal Employees (AFSCME) District Council 37 represented exclusively New York City employees. Therefore members of District Council 37 were not protected by the NLRA, LMRA, or LMRDA. The leadership of the District Council was found in 2000 and 2001 to have rigged contract votes and elections, and accepted nearly $6 million in kickbacks and other thefts. The far-reaching scheme, prosecuted by the Manhattan District Attorney's office, resulted in more than 30 convictions (including plea agreements) of union officials.[362]

Some states also impose administrative requirements on unions within their jurisdiction. State statutory requirements typically cover reporting and disclosure of financial information, although some go further in establishing fiduciary duties and other obligations. For example, the State of Alabama's labor relations code prohibits extortion by means of force, threats of violence, or any means of duress.[363] In addition, a union in that state with more than 25 members must file copies of its constitution, bylaws, and an annual financial report.[364] The union is prohibited from collecting union

dues, fees, assessments, fines, or other money during any time it is noncompliant.[365] Several other states, including Connecticut;[366] Florida;[367] Kansas;[368] Minnesota;[369] New York;[370] and South Dakota,[371] have similar reporting requirements.

Beyond reporting requirements, some states also provide additional rights to union members. In Florida, for example, union members are entitled to the "right of franchise," which enumerates several specific acts by unions that are unlawful, including: (1) infringement of the rights to free speech, assembly and right to file and discuss grievances; (2) striking without a majority vote of affected employees; and (3) coercion or intimidation of any employee, elected official, or their families.[372] These rights are similar to some of LMRDA's Bill of Rights. In addition, business agents in Florida must be licensed and fingerprinted.[373] Kansas has similar requirements.[374]

New York State also regulates the conduct of union officials. Section 180.25 of the New York Penal Law prohibits "bribe-receiving by a labor official."[375] In addition, the state's "Labor and Management Improper Practices Act"[376] also prohibits the following breaches of fiduciary duty by officers or agents of unions: (1) having or acquiring any pecuniary or personal interest which would conflict with the fiduciary obligation owed to the organization; (2) engaging in any business or financial transaction which conflicts with that fiduciary obligation; or (3) acting in any way which subordinates the interests of the organization to the officer or agent's own pecuniary or personal interests.[377] The New York law also enumerates seven prohibited transactions[378] and specifically eliminates the union benefit or union authorization defense to violations of the Act.[379]

There are, however, some real limitations to state law remedies. Indeed, those weaknesses were a major reason why Congress enacted the Landrum-Griffin Act in the first place. The law's legislative history lists a number of concerns that LMRDA was intended to correct, including inconsistency among jurisdictions[380] and lack of clear standards.[381] For labor organizations exempted from federal jurisdiction these problems still remain. For this reason it is suggested that a model state framework be created to help resolve some of these deficiencies.[382]

Jurisdiction and Preemption

Corruption litigation is frequently complicated by issues of technical jurisdiction, discussed more fully later in this monograph. They are powerful "gatekeeper" issues and many corruption cases stand or fall on whether the plaintiff can prove proper jurisdiction and that his or her claim is not preempted one of the panoply of remedies outlined throughout this monograph.

1. Jurisdiction

Litigants typically allege federal jurisdiction under 28 U.S.C., Sections 1331, 1337 and/or 29 U.S.C. Section 185 (Section 301 of the LMRA for breach of contract). Sections 1331 and 1337 each deal with "arising under" jurisdiction. Section 1331 gives federal courts jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States;[383] Section 1337 grants jurisdiction over civil actions arising under any Act of Congress regulating commerce.[384] These statutes do not themselves create a cause of action, but are "dependent upon an action arising under a separate federal law."[385] Therefore, Sections 1331 and 1337 do not provide jurisdiction unless a claim arises under another federal statute.[386]

Union members clearly have standing to bring a lawsuit under Section 501(b) of the LMRDA; there is, however, a Circuit Court split over whether a *union* can be a charging party. The plain language of the statute provides "members," as opposed to "labor organizations," a cause of action in federal court.[387] Yet many observers claim that Section 501(b) implies that a labor organization can sue its officials; they argue that finding otherwise renders the "request" requirement futile since a union could not, in any event, comply with the union member's request to pursue a claim for breach of fiduciary duty.[388] Two U.S. Appeals Courts have ruled on this issue -- one finding jurisdiction, the other denying it.[389] The Supreme Court has noted the split, but has yet to resolve it.[390]

In *United Transportation Union v. Anthony J. Bottalico*,[391] the Southern District of New York found that Section 501(b) did not provide an implied right of action for labor organizations. The Court in that case found that labor organizations cannot bring claims under Section 501(b). It thus sided with the courts that refused to find an implied right of action based on the Supreme Court's test in *Cort v. Ash*.[392] In *Bottalico*, the United Transportation Union had sued an officer or regional board for breach of fiduciary duty against its membership. The Court considered the Eleventh Circuit's decision in *Statham* and rejected its reasoning on two grounds.[393] First, the District Court dismissed the Eleventh Circuit's

"futility" argument, stating that labor organizations can still bring state law claims for breach of fiduciary duty. But the court here was shaky ground. Very few states provide a statutory right of action for breach of fiduciary duty by a union official, and even in those that do, its use is extremely limited.[394] Further, under *Garmon*, a corrupt union official most likely will convince a state court to dismiss any breach of fiduciary duty case on preemption grounds.[395]

Second, the Court dismissed the limited legislative history regarding the issue of the deficiency of state remedies as being unreliable. It is true that the legislative history is very limited regarding the rights of labor organizations. This is probably due more to myopia — legislators were acting on years of information about acts unions were perpetrating against members — than to any sense that unions had remedies available to them under state law. The historical context of the events leading up to passage of Landrum-Griffin is instructive. The LMRDA was a direct outgrowth of the view, based on massive evidence introduced at the McClellan committee hearings, that unions were not living up to their obligation to self-police and protect the democratic rights of members.[396] Against this backdrop it is unlikely that Congress intended to limit the ability of unions to protect their members from corruption in federal courts.

The Supreme Court should settle the Circuit split in favor of an implied right of action; barring this, Congress should amend Section 501(b) to specifically provide for actions by union members.[397] Notwithstanding the fact that the Courts disfavor implied rights under *Cort v. Ash*, the LMRDA was clearly enacted to protect not only union members, but also the labor organizations themselves from the corruption discovered during the McClellan investigations.[398] There are two ways to approach this issue. The first is to avoid the question of whether there is a separate right of action for labor organizations at all; the Court should simply find that a labor organization, in its representative capacity for members, has standing to bring an action on behalf of members under the statute. Further, any union official bringing the claim on behalf of the "labor organization" is undoubtedly a union member. They have standing in that capacity as well.

If the Court believes it must reach the implied remedy issue, unions should be granted an independent right of action under Section 501(b). Although poorly drafted, Section 501(b) states that labor organizations are expected to "sue or recover damages" to police corruption within the union. The drafting error is one of omission; there is no evidence in either the legislative history or the wording of the statute that Congress meant for these suits by labor organizations to occur *only* in state courts. There is clearly no evidence of intent to deny the remedy to labor organizations, and by contrast, ample evidence of intent to create one.[399] It is consistent with this clause to assume that Congress intended labor organizations, in addition to union members, to have the right to sue for relief from fiduciary breaches. Finally, Congress and the Courts have noted repeatedly a compelling federal interest in regulating unions and their activities;[400] neither intended this area to be left solely to the states.

2. Preemption

State labor regulations are preempted where the exercise of state power frustrates effective implementation of the NLRA.[401] The *Machinists* preemption prohibits states from acting in areas "Congress intended to be unregulated,"[402] thereby preserving "Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests."[403] Thus a state government may not alter the NLRA's balance of bargaining rights and the use of economic power.[404] When Congress seeks to exclusively occupy a field, as it did with LMRDA, it also preempts state laws regulating that field.[405]

Unfortunately, Congress does not always make clear when it intends to exclusively occupy a field. That creates further uncertainty in an already complicated litigation environment. The application of preemption rules in RICO cases is instructive. RICO was originally designed for expansive application by government prosecutors to the myriad complex schemes often employed by organized crime. However, it was not clear from the legislative history to what extent, if any, Congress intended application of RICO to labor-management disputes. The NLRA had been seen as the exclusive remedial scheme for dealing with labor law problems prior to RICO, and the question of whether employees who were deprived of NLRA rights by racketeering were intended to be compensated through the NLRA, RICO or both, was not discussed during the deliberations on RICO.

In criminal RICO cases, prosecutorial discretion can avoid some of the conflicts. If a prosecutor believes that the evidence points to more of a labor than a racketeering issue, he can simply decline to

prosecute.[406] Civil RICO cases are an entirely different matter. Such cases can be, and are, brought by employees, unions and employers, often in ways that circumvent or intentionally avoid the exclusive jurisdiction of the National Labor Relations Board.[407] There is every incentive to do this, for the civil RICO statute provides the possibility of treble damages, costs, and fees that are not available from the NLRB. Critics, mainly defendants, argue that allowing a civil RICO claim to remedy what also is an unfair labor practice under NLRA alters the delicate balance created by the law. Others argue that the NLRA is ill-equipped to deal with labor racketeering and that RICO fills that void, allowing the NLRB to deal with disputes primarily related to the labor relations environment while giving courts the leeway to deal with criminal racketeering activity separately.

The interplay between NLRA and other federal statutes did not begin with RICO. As discussed earlier, the 1973 Supreme Court decision in *United States v. Enmons* held that a Hobbs Act claim was preempted by the NLRA, creating now what is known as the "labor exception."[408] The Court held in *Enmons* that to determine if the use of force by strikers was "wrongful," the district court must determine whether the strike demands were lawful, thereby upsetting the labor-management regulatory scheme.[409]

Citing *Enmons*, the Second Circuit ruled in 1974 that a prosecution for violation of an 1870 civil rights statute was preempted by the National Labor Relations Act.[410] Section 241 provides criminal sanctions for conspiracies to deprive citizens of rights protected under the laws of the United States.[411] The court in *DeLaurentis* declined to allow a Section 241 prosecution for violations of the NLRA. Citing both Enmons as well as the act's legislative history, the court found that the NLRB's exclusive jurisdiction over NLRA violations prohibited prosecutions under other statutes.[412] Critical for analysis of RICO claims, however, the court in *DeLaurentis* noted that Congress on at least one occasion had provided non-NLRB civil remedies for violations of labor laws.[413]

Not all courts agree with the Second Circuit's potentially expansive reading of *Enmons*. In *United States v. Thordarson*,[414] the Ninth Circuit reversed a district court decision dismissing a RICO claim alleging violations of 18 U.S.C. Sections 844(i) and 1952 (Hobbs Act) as predicate acts, relying on *Enmons*. The Ninth Circuit held that RICO and other federal statutes did apply to violent acts during a labor dispute and read *Enmons* as removing from reach of the Hobbs Act "only the use of violence to secure legitimate collective bargaining objectives."[415]

RICO specifically includes violations of LMRA Section 186 and LMRDA Section 501 claims.[416] Therefore it is clear that, at least in some contexts, Congress understood that RICO claims would address labor law violations. In *O'Rourke v. Crosley* the defendants claimed that the RICO and Hobbs Act claims were preempted by the NLRA since the predicate act alleged by O'Rourke (refusal to provide job referrals to the plaintiff and subjecting him to verbal abuse) were violations of rights guaranteed under Section 7 of the NLRA and therefore were preempted by that statute. The Court found that the RICO claim was not preempted since rights under LMRDA are property interests that can be extorted under the Hobbs Act. Further, the court held that extortion as defined by LMRDA satisfies the predicate act requirement of a RICO claim. While the alleged conduct also may give rise to an unfair labor practice under Section 8 of NLRA, it also was a violation of LMRDA rights and therefore covered by RICO.[417]

In *United States v. Boffa*,[418] the Third Circuit used a different approach when squaring federal mail fraud statutes and RICO with the NLRA. The plaintiffs in this case alleged that a "labor switch" scheme perpetrated by a labor leasing company deprived them of their collective bargaining rights under NLRA, Section 7, and was perpetrated through the commission of mail fraud, a predicate act under RICO. The defendants argued that the "labor switch" scheme was, at most, an unfair labor practice and therefore was not a federal crime or predicate act under RICO.

The court analyzed the legislative history of NLRA as well as the timing of the passage of the two statutes in question. The court found that since NLRA was passed after the mail fraud statute, any mail fraud perpetrated to commit an unfair labor practice was within the exclusive jurisdiction of the NLRB and not prosecutable under the mail fraud statute. At the same time, the court found that the NLRA, enacted long before RICO, did not preclude any RICO claim that arose in the labor context. A jury could find that the defendant's "labor switch" scheme deprived employees of their contractual rights under their collective bargaining agreement. This type of injury is cognizable by

the mail fraud statute and does not require any interpretation of the NLRA (the only issue is whether the defendants intended, by their conduct, to induce the breach of the contract). Since this action, while also an unfair labor practice, does not require a jury to decide whether an unfair labor practice was committed, it is also a predicate act for the purposes of RICO liability. The Court found that since the claim did not require a decision under the NLRA, it was not preempted.[419]

The *Boffa* view reached the right result, but for the wrong reasons. Focused on whether Congress "impliedly overruled" the NLRA or the mail fraud statute sent the court down a confusing path, missing the core issue in these conflicts. Mail fraud is a crime that Congress and society rightfully want prosecuted no matter who commits it. Unless if there is a overwhelming reason to exempt union officials from the reach of the statute, that should be explicitly included as a defense.[420] Clearly there is no such reason.

Perpetrating mail fraud on union members by their elected officials either is a crime or it is not; *Boffa's* middle ground, preempting stand-alone mail fraud prosecutions while subjecting similar misconduct to penalty as a predicate act under RICO, is confusing. The decision effectively said that a union official's commission of mail fraud by himself is not a crime, but when committed in concert with an "enterprise" becomes one. This is not a coherent view.

The key is to balance the Congressional goal of a broad national labor policy administered and enforced through expert agencies (e.g., the NLRB or the Railway Labor Board) with the necessity of prosecuting criminal acts committed by union officials and their employees. Federal courts should decide the issue after taking judicial notice of Board rulings on the underlying labor question. This would preserve the government's interest in prosecuting the criminal acts while giving defendants the opportunity to argue that their actions do not violate national labor policy. This framework gives due deference to Board policy setting, while recognizing that the Board's "heightened expertise" in national labor policy does not necessarily translate into special expertise in evaluating decisional law.

The federal courts certainly have at least as much, if not considerably more, experience in sifting through legal opinions to interpret law as applied to fact situations. As federal courts are bound to follow state law on state claims when they are brought in a hybrid state/federal case (even if they would not rule the same way if reviewing the law *de novo*), they also can be bound to National Labor Relations Board case law when deciding whether a federally protected labor right is violated by mail fraud or other federal crime.

The Supreme Court recognizes the federal judiciary's expertise in deciding whether the individual rights of union members have been violated in its duty of fair-representation jurisprudence, even where the judiciary shares concurrent jurisdiction with the NLRB.[421] The Supreme Court specifically distinguishes the Board's expertise in its normal representation and collective bargaining cases from the expertise required to protect individual members' rights in duty of fair representation cases. This approach was followed in *A. Terzi Production v. Theatrical Protection Unit*, where the district court ruled on the underlying labor issue -- whether the union was authorized to represent employees -- in order to reach the question of whether Hobbs Act extortion occurred.[422] It should be applied not only to mail fraud, Hobbs Act and other federal crimes, but also to LMRDA and other labor law preemption cases.[423]

III. Summary of Current System's Weaknesses

This monograph introduced four recent cases of union corruption to illustrate how corruption is addressed -- what statutes the plaintiffs' attorneys and courts invoked and what remedies they pursued. Each case is representative of key weaknesses in the current system. What follows is a discussion of those weaknesses.

Cox v. Administrator, U.S. Steel & Carnegie

The primary problems with Cox are the conflicting remedies available to plaintiffs and the difficulty the plaintiffs had in remedying a conspiracy to breach the fiduciary duty owed to union members. The class of laid-off employees in Cox pursued a number of distinct statutory and common law claims—but curiously did not rely at all on the fiduciary-duty or anti-embezzlement protections owed to union members under LMRDA. One of the predicate acts alleged in the plaintiff's RICO claim was breach of common law fiduciary duty. The Eleventh Circuit Court ruled that this was not a valid predicate act, as it was not listed specifically under RICO.

One wonders why the workers did not pursue their claims by using LMRDA. A number of explanations are possible, none of them encouraging. One possibility, though unlikely, is that the plaintiffs' counsel was unaware of the remedies available under the act. More likely, the plaintiff's counsel may have believed that the LMRDA fiduciary duty claim added nothing to the common law claim, or at any rate was harder to prove. Even more likely still, and ominously, plaintiff's counsel may have feared that by raising the LMRDA claim it might also have raised complicated and potentially fatal preemption arguments to their RICO or NLRA claims. In either case, the conclusion is clear: *A unified set of legal remedies is superior to the current patchwork.*

Landry v. Air Line Pilots Association

Landry illustrates the conflicts inherent in a system primarily focused on criminal prosecution. As described in detail throughout the monograph, the corruption scheme in *Landry* was a relatively straightforward breach of fiduciary duty—a union negotiator traded personal benefits (severance pay and retirement benefits) for concessions on the part of the union members he represented. Although the class of pilots in *Landry* brought civil claims, they brought them under RICO. To prove their case, therefore, the pilots had to establish that the defendants were part of an "enterprise" and engaged in prohibited predicate acts. In this case, each alleged act violated criminal law.[424]

The employer in *Landry* (the airline TACA) was dismissed from all RICO claims since it did not pose a "continuing threat" and thereby was not a RICO "person." This is a weakness in the RICO formulation to attack current RICO enterprises. The laws contain no provision for compensating union members for damages inflicted by an enterprise that no longer poses a threat. Instead, the enforcement framework should disband enterprises organized to commit corrupt acts as well as compensate members for damages.

United States v. Pecora

The *Pecora* decision is the least troubling of the four illustrative cases, at least on its facts. It is a relatively straightforward prosecution of a no-show payment scheme under RICO. In the appeal, the defendants argued that the District Court erred in finding violations of the Taft-Hartley Act's Sections 302(a) and 302(b), prohibiting payments by employers to labor organizations and making it illegal to ask for such payments. The appeals court upheld the convictions of both defendants.

But *Pecora* also illustrates a potential problem. The District Court found that at the time union business agent James Paone accepted the no-show payments, he had a present intent to represent employees managed by Pecora. The Court wrestled with, but did not decide, whether it would find the defendants guilty if Paone had not had such an intention.[425]

The current framework is flawed also in that it allows companies to offer payments or other gifts to labor organizations and their leaders. A cozy relationship between company and union leadership characterized by payments or gifts to the latter should not be allowed. As under the current prohibition of employer domination of unions under the NLRA,[426] companies should be prohibited from making payments or offering gifts to unions that have any possibility of affecting the union leadership's execution of its fiduciary obligations. This should be so even where there is only an indefinite, future, or uncertain possibility that the union will attempt to represent employees of such companies.

O'Rourke v. Crosley

This case illustrates two weaknesses of the current system: (1) the various interlocking claims required to attack a relatively straightforward factual situation; and (2) the difficulty in holding union leadership responsible for corrupt actions taken by low-level personnel. John O'Rourke's claim was not complicated—the union refused to refer him to jobs out of the hiring hall because he publicly disagreed with union leadership over picketing activity supported by the union. But he was forced to claim numerous violations to prove misconduct, including violation of RICO; extortion in violation of the Hobbs Act; breach of fiduciary duty under LMRDA; common law breach of duty; and violation of his free speech rights under the LMRDA. Thus a straightforward claim required pleading a substantial number of violations and exposing the defendants to multiple charges for what was realistically the same offense. This created opportunities for the defendants to make numerous preemption arguments. Although the court in *O'Rourke* sided with the plaintiff on these preemption claims, it did not resolve the issues surrounding such claims. Consequently, other claimants in other jurisdictions may not be so lucky.

Further, the Court in *O'Rourke* found a Hobbs Act violation against one defendant, but not the other.

The Court found that the union's business manager, Joe Crosley, was not present during the alleged incidents that served as the basis for the claim. Since he was not alleged to have participated *directly* in the extortion, the court found that his omissions failed to meet the three elements of a Hobbs Act violation. This was in spite of the fact that the court was highly aware of the lengthy history of corruption and mob-related violence associated with the leadership of this union. The current legal framework typically reaches illegal activities of union leaders only through complex pleading requirements of a RICO conspiracy. It is difficult, and sometimes impossible, to prosecute union leaders complicit in the unlawful conduct of members.

IV. Conclusions

This monograph highlights an extensive number of criticisms of the current statutory framework for combating union corruption. The fundamental problem with the current system is that it has evolved in a piecemeal fashion. An inventory of the current system's blind spots ought to lead to several conclusions:

- *There is no consistent set of "minimum" core rights and expectations for union members in all jurisdictions*. The need for a unified set of protections should be evident; corruption is a national problem affecting unions in every industry and jurisdiction. An effective anti-corruption regime should apply to every jurisdiction in which unions have monopoly power to impose dues and other fees on employees. The rules should apply to all workers forced under "exclusive representation" provisions of NLRA, to abide by the rules and regulations negotiated by collective-bargaining agents, whether or not that employee chooses to join. Union corruption affects every employee in the bargaining unit—member, agency fee payer, or non-payer. Each class of worker should have a consistent set of rights, across jurisdictions, to enforce anti-corruption prohibitions.

- *There are no provisions for reasonably accessible enforcement rights for all members, or for alternative dispute resolution methods*. Labor corruption, unique among the entire universe of employment-related law, has no administrative framework for prosecution of common claims.[427] The power to enforce these concepts should not be left solely in the hands of government bureaucrats and prosecutors.[428] Furthermore, corruption cases are relatively expensive and difficult to prosecute; aggrieved members must rely on (limited) prosecutorial resources of federal or state governments or (expensive) private lawsuits.[429] Given these barriers, the current system probably fails to account for a great many acts of corruption. Union members should be afforded an easily initiated, streamlined and affordable method to attack corruption. Ideally, this would include civil penalties, enforced through informal administrative hearings, and alternative dispute resolution mechanisms that include mediation and arbitration. Union members should not be required to hire an attorney to redress their claims against their corrupt leaders.

- *There is no effective response to any of the three principal types of corruption--internally-directed, externally-directed and generalized*. This monograph illustrates that the current legal framework is uncoordinated and unwieldy. While a creative lawyer probably can state a claim to prosecute many common corruption schemes, a victory is far from given. There are numerous legal maneuvers a defendant can throw in the path to frustrate, and often defeat, the prosecution. This disjointed legal landscape is responsible for difficult jurisdiction and preemption hurdles, making it hard to state a claim that will survive summary judgment.[430] The current system should be revised to include straightforward causes of action for the three main types of union corruption and their common schemes.

Recommendations

The current anti-corruption system is in major need of reform. This monograph, toward that end, suggests numerous changes summarized in the Appendix. These changes respond to the core principles outlined above: a consistent set of "minimum" core rights and expectations for union members in all jurisdictions; reasonably accessible enforcement rights for all members, including alternative dispute resolution methods where possible; and effective responses.

Establish National minimum standards.

A reformed anti-corruption framework would create consistent minimum rights and expectations for union members in all jurisdictions. Some may argue, based on federalism principles, that such a framework would be an unconstitutional exercise of legislative power over the rights of unions who, by and large,

operate at the local level. The right to organize a union is protected in all United States jurisdictions through the grant of monopoly bargaining powers to a union that meets certain requirements, especially proof of majority status through an election or authorization cards. This enables union leadership, especially in non-Right to Work states, to collect dues, fees and other assessments from members and often non-members as well. Unions enjoy great power over workers through their grant of monopoly representation. Even in Right to Work states, dissenting workers are still "represented" by union officials who have limited incentive to protect their interests.

This grant of monopoly rights to some extent has insulated unions from accountability. And this in turn has increased the necessity for the federal government and the states to establish minimum enforceable standards. There is no legitimate reason to exclude unions in any industry or at any level from coverage. Even unions limited to a state or local scope are almost universally affiliated with national and international associations. Most locals within the American Federation of Teachers and AFSCME represent purely public-sector employees, and thus are exempt from federal protections and reporting requirements.[431] Today most states have no similar protections to LMRDA. Agency fee-payers in Right to Work states have even less protection, not qualifying for the protections afforded to members. Some union democracy protections appear to not apply at all in Right to Work states.[432]

The federalism concern is not without merit. For this reason, the basic framework should be seen as a set of floor standards beneath which no state can permit unions to operate. This gives states flexibility in much the way that they have it in regulating minimum wage and other workplace requirements. The Fair Labor Standards Act provides minimum-wage and maximum-hour standards that each state is allowed to modify.

Make enforcement rights more accessible.

An effective enforcement regime would include several methods of attacking union corruption. First, there is a criminal component through which prosecutors bring to bear maximum resources upon egregious cases. This is the area that functions most smoothly; the Department of Labor's Office of Labor-Management Standards has been effective in fighting the most common types of corruption, such as embezzlement.[433] Funding for investigations and prosecutions should be increased to curtail common and visible forms of corruption. However, there also should be a civil component capable of dispute resolution to corruption schemes such as kickbacks, no-shows, selling labor peace, and extortion. The McClellan Committee hearings of the late 50s concluded that in most cases union members, given the proper tools, could attack corruption effectively. Although the LMRDA did not directly provide those tools, the idea remains sound. An effective enforcement regime must rely on transparency and democracy to hold union leaders accountable.

Government agencies constantly are confronted with competing enforcement priorities. However well-intentioned, prosecutors or bureaucrats do not have the same stake in promoting union democracy that union members do. They typically learn of acts of corruption only after they have committed. Labor policy is better served by giving union members the ability to engage in preventive action.

The civil components of this regime can be modeled after the enforcement apparatus for employment discrimination cases. The Office of Labor-Management Standards should maintain its role as a clearinghouse for financial reporting information as well as auditing and investigating civil claims of misappropriation or election misconduct. But an administrative framework should be added to this. It should incorporate the following elements:

- Civil penalties should be authorized and administered by the Department of Labor. Administrative Law Judges would hear cases, and have the authority to levy fines, mandate relief and issue injunctions.
- Alternative dispute resolution mechanisms should be available to all parties, in nonbinding as well as binding arbitration.
- Claimants also should have the ability, given available resources, to opt out of the administrative framework by requesting a "right-to-sue" authorization and going directly to federal court.
- Criminal penalties, though no longer the main method of combating corruption, should remain a part of the framework. Its principle activity would be to impose trusteeships on unions where corruption is so prevalent as to preclude any possibility for member-initiated reform.

Such a framework keeps what works in the current system, but it shifts the burden of investigation and sanctions from the government to the unions themselves. While the need for prosecution no doubt will occur from time to time, particularly in cases of infiltration by organized criminals, the vast majority of cases would be handled either informal dispute resolution or formal administrative hearings. The result, hopefully, would be an increased number of enforcement actions, quicker resolution, and reduced legal expenses for unions and their members. Prosecutors in turn will find themselves with a lighter workload, and thus better able to focus resources on the difficult-to-prove corruption schemes. And by raising the likelihood of getting caught, in the long run, the result will be less corruption.

Respond effectively to all corruption.
The system must be effective in reaching internally-directed, externally-directed and generalized corruption. Many of the tools for combating corruption are already in place. Those combat internal corruption, such as embezzlement, assault, election-rigging and infringement of free speech, and should be able to respond to discrete, often one-time incidents, relying on information provided by members. The tools to fight external corruption must involve union members and employers alike, as the latter often are targets of extortion. However, because employers are often complicit in these schemes, viewing kickbacks and bribes as just another cost of doing business, union members typically lose out. Thus, they must have an independent right to prosecute. Generalized corruption should continue to be attacked through the use of imposed trusteeships upon offending unions and/or their district councils and locals.

The focus of effective reform, in other words, would not be so much on specific offenses as on the interplay between them. Such a reemphasis would reduce jurisdictional and preemption hurdles common to corruption cases. It also would require unions and companies to inform union members of the rights they need to identify and prosecute corruption.

Unify State Laws.
States must work together to create a unified, model code to combat union corruption. Widespread adoption of such a code might seem overly optimistic. Yet model codes, developed with the assistance of the National Conference of Commissioners on Uniform State Laws (NCCUSL), have had their share of successes in terms of state adoption.[434] The Uniform Trade Secrets Act, for example, has been adopted in some form in 44 states and the District of Columbia.[435] On the other hand, the Model Employment Termination Act, has yet to be adopted in any state.[436] One expects that organized labor will fight tenaciously to prevent adoption of corruption-related reform. Therefore states most likely will adopt model codes, if at all, one by one. And not all codes will wind up looking the same. A model code, after all, is a discussion point, not a mold. Hopefully, employers, unions and knowledgeable third-party observers can mediate the inevitable disagreements and agree to a law. The states most likely to act favorably are those with the greatest incidences of union corruption. Adoption at the federal level would require a groundswell of support within Congress rarely seen since the McClellan hearings nearly 50 years ago.

Now for the ultimate question: Will it work? That is, would a model code, once put into place, substantially mitigate corruption? Applying it to our four illustrative cases, there would seem good cause for optimism. The plaintiffs in *Cox* and *Landry*, for example, would not be forced to choose between pursuing narrow conspiracy charges (civil RICO charge) or the broader fiduciary duty owed under either federal common law, NLRA or LMRDA. A model code would simplify the plaintiff's case dramatically, since there would be only one fiduciary duty. Under a model code a union and company can work toward a unitary fiduciary obligation of a union to its members, eliminating preemption problems and simplifying litigation.

Union leadership would be more easily reachable under a model code, too, significantly increasing the input from individual members like John O'Rourke. In *O'Rourke* only the low-level business agent was reachable under the Hobbs Act and RICO. In contrast, a model code would give the plaintiff the standing to claim the existence of a conspiracy to extort property rights, in hiring hall operation and general management, using the basic concepts of *respondeat superior*. If the business manager knew or reasonably should have known of the extortion activities of his business agent, the business manager would be held liable. This is far superior to the uncertainty built into the present system. It would achieve more effectively the original goals of LMRDA, making union leadership accountable for worker activities.

A model code would prohibit employers from offering payments to unions that have the potential to affect their relationship with employees, thus clarifying issues raised in Pecora. Unions cannot ask for and companies cannot provide any benefits where there is the possibility the union could represent or persuade another union to represent employees of that company.

Additionally, a model code would make enforcement of each of these claims more simple and effective. Each plaintiff in these illustrative cases likely would have begun by bringing an administrative claim for relief. This would have led to quicker resolution. Thus, many more cases would potentially be resolved through mediation or arbitration.

Even cases requiring litigation would be less complicated, since difficult preemption maneuvers no longer would be needed. Burdens of proof clearly would favor the plaintiff in many cases, avoiding quick summary judgment victories for unions. Unions would have to prove they were executing their fiduciary obligations fairly. The structure of incentives also would change. Today the main incentive is for union leaders to encourage litigation and the expensive battle of attrition that all but the most aggrieved union members will simply not prosecute. Under a model code the union leader's chief incentive would be to resolve disputes quickly and informally. The cases that go to trial would be those in which the union believes its actions were legitimate.

Final Note

This monograph frequently has made the point that the current enforcement regime is unwieldy; that the tools of the LMRDA, though reasonably well-designed to combat internal corruption, cannot effectively deal with generalized and external corruption. External corruption is usually better reached through anti-extortion provisions in the Hobbs and Taft-Hartley Acts. Plaintiffs must rely on government prosecutors for these cases. Some externally directed corruption and almost all generalized corruption is prosecuted using the criminal conspiracy elements of RICO, without much attention to the potential union democracy tools of the LMRDA (the civil RICO trusteeship has been used with mixed effectiveness). As the tools needed for attacking each type of corruption differ, the enforcement regime must be flexible.

Corrupt union leaders currently are in a stronger position than individual union members. They regularly act with impunity, aware of the low likelihood of their being held accountable for their actions. A model code, if and when adopted, should dramatically improve the accountability of union leaders. The code would improve the ability of union members to police illegal acts of their representatives, providing a streamlined and inexpensive apparatus to root out and punish corruption. President Harry Truman once remarked, "One of the chief virtues of a democracy . . . is that its defects are always visible—and under democratic process can be pointed out and corrected."[437] The current complex legal landscape for combating union corruption undermines this virtue. Many defects are hidden from view, and even when identified, often may go uncorrected. The reforms outlined here, particularly the development of a model code to replace the overlapping system of laws and regulations, will enhance the operation of unions which, despite their many flaws, are self-correctable democracies.

End Notes

[a] The author would like to give special thanks to Carl Horowitz of the National Legal and Policy Center for his editorial assistance with the monograph. The text is much improved due to his careful and thorough editing. He made numerous suggestions that greatly improved the readability of the work. Any problems that remain are my own. Armand Thieblot and Christopher Mullins also commented on earlier drafts of the work.

[1] John O'Rourke is a plaintiff in a real lawsuit, although certain facts have been dramatized here. The monograph uses this and three other cases to represent the current legal framework. Those summaries may be found beginning *infra* at 6.

[2] For purposes of this monograph, corruption refers to actions taken by someone in a position of power, against the interest of his or her constituents, for the purpose of personal gain. In the context of unions, corrupt acts may be distinguished from illegal acts taken for the purpose of furthering the interests of constituents (i.e. picket line violence, illegal secondary boycotts, predatory organizing tactics, etc.)

[3] See Testimony of Paul Rosenzweig, Testimony Before the Subcommittee on Employer-Employee Relations & Subcommittee on Workforce Protections–Committee on Education and the Workforce U.S. House of Representatives (June 27, 2002) *in* http://edworkforce.house.gov/ hearings/ 107th/eer/lmrdatwo62702/ rosenzweig. htm (on file with author).

[4] Fees are sometimes available in these cases, but they still require an enormous amount of work due to their legal complexity, which unfortunately also reduces the chance of ultimate success. Needless to say, lawyers are not chasing down these claims.

[5] While generally true, there is the notable exception of the unfair labor practice charge for failure to meet the duty of fair representation under § 8(b) of the National Labor Relations Act (NLRA). This charge, handled administratively by the National Labor Relations Board (NLRB), is of somewhat limited usefulness due to the limited remedies available to the Board. *See infra* at 38.

[6] *See* Testimony of Paul Rosenzweig, Testimony Before the Subcommittee on Employer-Employee Relations & Subcommittee on Workforce Protections–Committee on Education and the Workforce U.S. House of Representatives (June 27, 2002) *in* http://edworkforce.house.gov/ hearings/ 107th/eer/lmrdatwo62702/ rosenzweig. htm (on file with author).

[7] Fees are sometimes available in these cases, but they still require an enormous amount of work due to their legal complexity, which unfortunately also reduces the chance of ultimate success. Needless to say, lawyers are not chasing down these claims.

[8] For example, the crimes that ultimately ended former Teamster President Ron Carey's career (who ironically was swept to power as a reformer pledged to root out corruption in the Teamsters) were perpetrated through a complex money-laundering scheme in which money from the Teamster's treasury was illegally funneled through a number of foundations, consulting firms and other agencies before ultimately ending up (after the removal of "handling" fees by accomplices) into Carey's reelection campaign war chest. *See* National Legal and Policy Center, Teamsters Money-Laundering Schemes (1998) (unpublished chart) *available at* http:// www.nlpc.org (on file with author).

[9] For example, the NLRB declines jurisdiction over horse racing and dog racing enterprises, *See* 38 C.F.R. 9507, and religious organizations, *See* Riverside Church, 309 NLRB 806 (1992).

[10] Unions that represent employees that are employed by state or local governments, for example, are expressly excluded from the jurisdiction of the National Labor Relations Act and therefore from the Labor Management Reporting and Disclosure Act. *See* 29 U.S.C. § 152(2) (NLRA definition of employer excludes from NLRA jurisdiction states and any political subdivisions of states); 29 U.S.C. § 142(3) (term "employer" under LMRA has same meaning as under NLRA).

[11] *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959).

[12] *Metropolitan Life Ins. v. Massachusetts*, 471 U.S. 724, 749 (1985).

[13] *See Garmon*, 359 U.S. at 244-46.

[14] *See* 359 U.S. at 243.

[15] *Landry v. Airline Pilots Association International*, AFL-CIO, 901 F.2d 404 (5th Cir. 1990) (*Landry* hereafter).

[16] The actual Louisiana statutory (or common law) prohibition was not pleaded in the original lawsuit and was not specifically addressed on appeal. *See Landry*, 901 F.2d at 426, n. 75 (5th Cir. 1990).

[17] 18 U.S.C. §1951 (2000).

[18] 29 U.S.C. §186 (2000).

[19] 18 U.S.C. §1341 (2000).

[20] 18 U.S.C. §664 (2000).

[21] *Cox v. Administrator United States Steel and Carnegie*, 17 F.3d 1386 (11th Cir. 1994) (*Cox* hereafter).

[22] USX formerly had been known as United States Steel. See *Cox* at 1392.

[23] 29 U.S.C. §185(a) (2000).

[24] 29 U.S.C. §186(a)(1).

[25] 29 U.S.C. §§ 151 et seq. (2000).

[26] 29 U.S.C. §§ 1001 et seq. (2000).

[27] 18 U.S.C. §§ 1961 et seq. (2000).

[28] *United States v. Pecora*, 798 F.2d 614 (3rd Cir. 1986), cert. denied 479 U.S. 1064 (1987) (*Pecora* hereafter).

[29] 29 U.S.C. §§186(a)-(b) (2000) (§§ 302(a)-(b) of the Taft-Hartley Act).

[30] 18 U.S.C. 1962(c)-(d) (2000).

[31] *O'Rourke v. Crosley*, 847 F.Supp. 1208 (D.N.J. 1994) (*O'Rourke* hereafter).

[32] 18 U.S.C. §§ 1961 et seq. (2000).

[33] 18 U.S.C. §1951 (2000).

[34] 29 U.S.C. § 501 (2000).

[35] 29 U.S.C. § 411 (2000).

[36] There are two excellent treatises and one powerful law review article that touch on various aspects of the law related to union corruption. Each of them focuses primarily on the LMRDA and the duty of fair representation. The most direct and comprehensive treatment is Professor Martin H. Malin's

text Individual Rights Within Unions. *See* Martin H. Malin, Individual Rights Within Unions (BNA Books 1988). In addition, the American Bar Association's Committee on Union Administration and Procedure recently published a text that, while geared more to those who run and administer unions, is a valuable resource on many of the legal issues regarding corruption. *See* William W. Osbourne, ed., Labor Union Law and Regulation (BNA Books 2003). Michael J. Nelson's law review article on union corruption for the George Mason Law Review in 2000, deals extensively with many of the themes discussed in this monograph. *See* Michael J. Nelson, *Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement*, 8 Geo.Mason L.R. 527 (2000). Cases and legal questions from these three texts regularly were points of departure for this research, particularly with respect to Titles I and III-V of the LMRDA (this monograph relied primarily on the author's earlier research and writing for questions related to Title II, especially Phillip B. Wilson, The Case for Reform of Union Reporting Laws, (2002)).

[37] For a general discussion of the political environment surrounding the enactment of the LMRDA See Michael J. Nelson, *supra*, n36 at 527,528-42; R.A. Lee, Eisenhower & Landrum-Griffin: A Study In Labor-Management Politics (1990); D. McLaughlin & A. Schoomaker, The Landrum-Griffin Act and Union Democracy (1979).

[38] LMRDA § 2(c), 29 U.S.C. §401(c) (1994).

[39] *See Malin, supra* n.36 at 34-37, for an excellent discussion of the hearings, investigations and debates leading up to the passage of the LMRDA. *See also* Nelson, *supra* n.36; Leroy S. Merrifield, Theodore J. St. Antoine & Charles B. Craver, Labor Relations Law Cases and Materials 37-38 (8th ed. 1989).

[40] AFL-CIO President George Meany barred any individual who pleaded the Fifth from holding union office, and took the extra step of kicking out the Teamsters in 1957, despite already having removed Beck. The Teamsters rejoined the labor federation in 1987.

[41] The committee also had dirt on Hoffa. Under Hoffa, the Teamsters loaned pension fund money to Detroit mobster Morris "Moe" Dalitz, who used it to build two Las Vegas hotels. Hoffa also allowed New York Lucchese crime family members Johnny Dio and Anthony "Tony Ducks" Corallo to set up six "paper locals," which had no members, only "officials" who were mob associates, in exchange for the phantom locals' support in union elections. The fake locals allowed Dio and Corallo to gain control of all New York City airport trucking. Hoffa beat back charges several times, but his luck ran out in March 1964, when he was convicted of jury tampering in a previous trial.

[42] *See* S.Doc. No. 86-10 (1959) reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 80-83 (1985).

[43] *See* 1 & 2 NLRB, Legislative History of the Labor Management Reporting and Disclosure Act of 1959 (1985).

[44] *See* George W. Bohlander & William B. Werther, Jr. The Labor-Management Reporting and Disclosure Act Revisited, 30 Lab.L.J. 582 (1979).

[45] Members of organized labor referred to the Act as the "killer bill." *See* id. Even more neutral observers believe that promulgation of detailed uniform standards imposed by the government could imperil the existence of the free trade union movement. See Gordon, *supra* note 8, 702-03.

[46] Solly Robbins, Union Reporting Requirements Under Title II, in Symposium on the Labor-Management Reporting and Disclosure Act of 1959 381 (Ralph Slovenko, ed. 1961).

[47] The bill was approved in what is believed to be the most lopsided votes ever on any major labor law legislation. Landrum-Griffin passed by a vote of 95 to 2 in the Senate and a vote of 352 to 52 in the House. *See* Statement of D. Cameron Findlay, Testimony Before The Subcommittee on Employer-Employee Relations Subcommittee on Workforce Protections Committee on Education and the Workforce U.S. House of Representatives (April 10, 2002) in http://edworkforce.house.gov/hearings/107th/wp/lmrda41002/Findlay.htm (on file with author).

[48] *See* Archibald Cox, et al. Labor Law Cases and Materials, 1041 (11th ed. 1991).

[49] *See* 29 U.S.C. §§ 411-415 (2000) (§§ 101-105 of the LMRDA).

[50] *See* 29 U.S.C. §§ 431-441 (2000) (§§ 201-211 of the LMRDA).

[51] *See* 29 U.S.C. §§ 461-466 (2000) (§§ 301-406 of the LMRDA).

[52] *See* 29 U.S.C. §§ 481-484 (2000) (§§ 401-404 of the LMRDA).

[53] *See* 29 U.S.C. §§ 501-504 (2000) (§§ 501-504 of the LMRDA).

[54] *See* 29 U.S.C. § 402(j) (§ 3(j) of the LMRDA).

[55] This distinction can be critical. In *Landry* the pilots had to convince the Fifth Circuit on appeal that TACA converted itself from RLA coverage to LMRA coverage to keep one of their alleged RICO predicate act claims (a violation of LMRA § 302) alive. *See Landry*, 901 F.2d at 427. Although they did not make the argument, under the facts alleged an LMRDA § 501(c) embezzlement claim clearly could have succeeded as a RICO predicate act, even with an RLA-covered employer. *See* 18 U.S.C. § 1961(1)(C).

[56] 29 U.S.C. §411(a)(1) (2000) (§ 101(a)(1) of the LMRDA);

[57] 29 U.S.C. §411(a)(2) (2000) (§ 101(a)(2) of the LMRDA).

[58] 29 U.S.C. §411(a)(3) (2000) (§ 101(a)(3) of the LMRDA).

[59] 29 U.S.C. §411(a)(4) (2000) (§ 101(a)(4) of the LMRDA).

[60] 29 U.S.C. §411(a)(5) (2000) (§ 101(a)(5) of the LMRDA).

[61] 29 U.S.C. §411(b) (2000) (§ 101(b) of the LMRDA).

[62] Senator McClellan, who offered the original amendment adding the Title I bill of rights, argued that, ". . . if you would give to the individual members of the unions the tools with which to do it, they would pretty well clean house themselves. . . . " *See* 2 NLRB,

Legislative History of the LMRDA at 1102.

[63] *See e.g. Sheet Metal Workers' International Assn. v. Lynn*, 488 U.S. 347 (1989) (unlawful for union president to terminate business representative for publicly speaking in opposition to proposed dues increase); *Ernest Tusino v. International Brotherhood of Teamsters and Ronald Carey*, 38 Fed. App. 91, 94-95; 2002 U.S. App. LEXIS 11227, **10-13 (2d Cir. 2002) (termination for support for dissident group is grounds for violation of Title I); *but see Finnegan v. Leu*, 456 U.S. 431, 440-41 (1982) (not unlawful to terminate supporters of opponent where an exercise of union patronage for confidential or policymaking positions).

[64] 29 U.S.C. § 411(a)(2) (2000).

[65] Disciplinary action for speech, even if libelous, is prohibited by § 101(a)(2) as privileged communication (forcing such claims to be litigated in court). *See Schermerhorn v. Local 100*, Transp. *Workers Union*, 91 F.3d 316, 324 (2nd Cir. 1996).

[66] Such rules, to be enforceable, must be an actual rule in a constitution or bylaw and not so overly broad in its wording and application as to chill § 101(a)(2) rights. *See Bishop v. Int'l Ass'n of Bridge*, 2004 U.S. Dist. LEXIS 3229, *12-16 (D.C. Cir. 2004); *Semancik v. United Mine Workers*, 466 F.2d 144, 152-54 (3rd Cir. 1972).

[67] *See O'Rourke v. Crosley*, 847 F.Supp. 1208 (D.N.J. 1994) (refusing dissident member job referral); Schermerhorn v. Local 100, Transp. Workers Union, 91 F.3d 316, 324 (2nd Cir. 1996) (internal union discipline); *Ruocchio v. United Transp. Union, Local 60*, 181 F.3d 376 (3rd Cir. 1999), cert. denied, 528 U.S. 1154 (2000) (removal from office).

[68] *O'Rourke*, 847 F.Supp. at 1211-12. O'Rourke also claimed that these retaliatory actions violated § 501 of the LMRDA.

[69] *Brenner v Local 514, United Brotherhood of Carpenters and Joiners*, 927 F.2d 1283, 1298 (3d Cir. 1991).

[70] 29 U.S.C. §412 (2000) (§ 102 of the LMRDA).

[71] 29 U.S.C. 402(o) (2000). An individual who is not a member of a unionized location is outside the definition of member and § 3(o). Since agency fee payers are not technically members (the Supreme Court states that nobody can be compelled to be a member of a union, *see Communications Workers v. Beck*, 487 U.S. 735 (1988)) they are probably not covered specifically within the words of the statute. At the same time, they are represented by the union and the union is paid a fee to represent them. For this reason they probably are covered by § 3(o). Employees who do not pay a fee to the union in a right-to-work state, however, are probably not covered. § 3(o) should be amended to clarify any confusion on this point.

[72] *O'Rourke*, 847 F.Supp. 1217-20.

[73] *See O'Rourke*, 847 F.Supp. at 1218.

[74] The court cited *Mallick v. International Brotherhood of Electrical Workers*, 644 F.2d 228 (3d Cir. 1981) and *Semancik v. United Mine Workers*, 466 F.2d 144 (3d Cir. 1972).

[75] *O'Rourke*, 847 F.Supp. at 1218; *Johnson v. General Motors*, 641 F.2d 1075, 1079 (2d Cir. 1981). In some Circuits, failure to exhaust internal remedies under 101(a)(4) can be fatal to the claim. *See Holmes v. Donovan*, 984 F.2d 732 (6th Cir. 1993).

[76] *O'Rourke*, 847 F.Supp. at 1218, citing *Semancik*, 466 F.2d at 150–51. Congress should amend § 101(a)(4) to codify that the "exhaustion of remedies" requirement is not jurisdictional..

[77] *O'Rourke*, 847 F.Supp. at 1218.

[78] 29 U.S.C. § 414 (2000) (§ 104 of the LMRDA).

[79] 29 U.S.C. §415 (2000) (§ 105 of the LMRDA) provides: "Every labor organization shall inform its members concerning the provisions of this Act."

[80] *See Thomas v. Grand Lodge, International Association of Machinists and Aerospace Workers*, 201 F.3d 517 (4th Cir. 2000).

[81] *See Boomer v. Schultz*, 239 F.Supp. 699 (E.D.Pa. 1965) (request for injunction against Teamsters local for failing to inform membership under § 105 denied on basis that members had not made formal request to union), *aff'd* 356 F.2d 984 (3d Cir. 1966); *Case v. International Brotherhood of Electrical Workers, Local Union No. 1547*, 438 F.Supp. 856 (D.C. Alaska 1977) (request for injunction against local union for failing to inform members under § 105 denied on basis that union members failed to exhaust internal union remedies first), *aff'd*, 587 F.2d 1379, *cert. denied*, 442 U.S. 944 (1979), *reh'g denied* 444 U.S. 889 (1979). As discussed previously, the 101(a)(4) requirement should be changed to prevent results like these. *See infra* at note 74.

[82] Today LM financial reports are available to union members and the public, at no charge, over the Internet. The reports are available at the Department of Labor's website, found at: http://unionreports.dol.gov/olmsWeb/docs /formspg.html (last accessed 3/13/2004). This gives any union member with access to the Internet the ability to review his or her labor organization's most recent financial report. This is an improvement. However, union constitutions, bylaws and labor contracts are not available on the website today. Making these documents available would dramatically improve access to the information by union members.

[83] Section 105 should be amended to require full dissemination of the constitution, bylaws, collective bargaining agreements and annual financial statements, enforceable through administrative fines and/or other penalties..

[84] 29 U.S.C. §431 (2000) requires reports of labor organizations; 29 U.S.C. § 432 (2000) requires reports of officers and employees of labor organizations.

[85] 29 U.S.C. §435 (2000) (§ 205 of LRMRDA).

[86] 29 U.S.C. § 439 (2000) (§ 209 of LMRDA) defines the following actions as crimes punishable by fines not more than $10,000 or imprisonment for not more than one year, or both: willful violation of the Title II reporting requirements; the making of a false statement or representation of a material fact, knowing it to be false; knowingly failing to disclose a material fact, in any document, report, or other information

required; and willfully making a false entry in or concealing, withholding, or destroying books, records, reports, or statements required to be kept. In addition, individuals who sign documents containing statements they know to be false are personally liable.

[87] 29 U.S.C. § 431(b) (1994) (§ 201(b) of the LMRDA). *See also* 29 U.S.C. §§203(a)-(b) (2000) (financial reporting requirements for employers and consultants).

[88] The Landrum-Griffin Act: Twenty Years of Federal Protection of Union Members' Rights 84 (Janice R. Bellace & Alan D. Berkowitz, eds. Labor Relations and Public Policy Series, No. 19, University of Pennsylvania, Wharton School Industrial Research Unit, 1979); *See also* S. Rep. No. 86-187 at 7 (1959), reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 403 (1985).

[89] Id.

[90] Meany testified before the House Labor Committee in June 1959 that, "We have been criticized for supporting these provisions. We recognize that they are far reaching and perhaps subject to abuse. Nevertheless, we think that they are necessary and that if the powers conferred are vigorously and properly used, the reporting requirements will make a major contribution towards the elimination of corruption and questionable practices." *See Robbins*, *supra* note 41, at 382.

[91] LMRDA § 210, 29 U.S.C. § 440, provides as follows: "Whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate. Any such civil action may be brought in the district court of the United States where the violation occurred or, at the option of the parties, in the United States District Court for the District of Columbia."

[92] Id.

[93] LMRDA § 201(c), 29 U.S.C. § 431 (c).

[94] 29 U.S.C. § 431 (c).

[95] 29 U.S.C. §434 (§ 204 of LMRDA).

[96] Id.

[97] Id.

[98] Id.

[99] Id.

[100] Approximately 280 enforcement actions were undertaken by OLMS during calendar 2003, mostly involving simple theft or embezzlement. <http://www.dol.gov/esa/regs/compliance/olms/enforce_actions.htm.>. About 15 enforcements were also undertaken concerning union democracy and suppression of dissent.

[101] *See* Statement of D. Cameron Findlay, Testimony Before the Subcommittee on Employer-Employee relations & Subcommittee on Workforce Protections, Committee on Education and the Workforce, U.S. House of Representatives (April 10, 2002) in <http://edwprkforce.house.gov/hearings/107th/wp/lmrda41002/Findlay.htm>.

[102] Id.

[103] *See* Letter of Deputy Assistant Secretary Don Todd, to House Committee on Education and the Workforce, 4-5 (August 15, 2001) (on file with author). Unions may select any 12-month period for their fiscal years. Local-, district-, and national- or international-level units of the same unions do not necessarily follow the same fiscal years. Therefore the financial reports filed with OLMS in any reporting (calendar) year are not coterminous. Some filed for 2000, for example, may cover operations for all of that year, but others may cover operations, some or most of which actually took place in a previous calendar year. The timeliness of filing must therefore be measured unit-by-unit.

[104] *See* Testimony of James B. Coppess, Testimony Before the Subcommittee on Employer-Employee Relations & Subcommittee on Workforce Protections – Committee on Education and the Workforce, U.S. House of Representatives (April 10, 2002) in http://edworkforce.house.gov/hearings/107th/wp/lmrda41002/coppess.htm (on file with author).

[105] 29 U.S.C. § 462 (LMRDA § 302).

[106] 29 U.S.C. § 461(a) (2000).

[107] 29 U.S.C. § 463(a) (2000).

[108] 29 U.S.C. § 464 (2000).

[109] Willful violations of either the reporting or unlawful acts provisions is punishable as a crime by a fine of not more than $10,000 or up to one year imprisonment, or both. See 29 U.S.C. §§ 461 (c)-(d), 463(b) (2000).

[110] For example, in late 2002 a massive $5 million embezzlement scheme perpetrated by the President and other top leaders of the Washington Teachers Union was discovered. In late-January 2003 the local union was put under trusteeship (many complained much too belatedly) by the American Federation of Teachers, the parent union. See Justin Blum and Craig Timburg, "D.C. Union Taken Over Parent Federation; Official Appointed To Run Operations," The Washington Post. Washington, D.C.: Jan 23, 2003, pg. B 04. *See also Transport Workers Union, Local 234 v. Transport Workers Union of America, AFL-CIO*, 131 F. Supp. 2d 659 (E.D. Pa. 2001) (trusteeship imposed for alleged financial malpractice, subversion of union democracy, and discord among plaintiff's executive board held valid); *Morris v. Hoffa*, 361 F.3d 177 (3rd Cir. 2004) (trusteeship validly imposed after discovery of financial impropriety, physical violence and intimidation of members); *International Bhd. of Teamsters v. Local Union No. 810*, 19 F.3d 786 (2d Cir. 1994) (temporary trusteeship imposed after discovery of financial improprieties); *Tam v. Rutledge*, 475 F.Supp. 559 (1979) (trusteeship validly imposed after discovery of financial irregularities, violation of Title IV voting procedures in union local); *but see International Bhd. of Teamsters, Local Union 107 v. International Bhd. of Teamsters*, 935 F. Supp. 599 (E.D. Penn. 1996) (emergency trusteeship invalid where allegations of financial and other alleged improprieties occurred several years earlier).

[111] The House and Senate Reports each stated, ". . . trusteeships have been used as a means of consolidating the power of corrupt union officers, plundering and dissipating the resources of local unions, and preventing the growth of

competing political elements within the organization." S.Rep. No. 187 86th Cong., 1st Sess. 17 (1959); H.R. Rep. No. 741, 86th Cong., 1st Sess. 13 (1959).

[112] *Hansen v. Guyette*, 636 F.Supp. 937, (D. Minn. 1986), *aff'd*, 814 F.2d 547 (8th Cir. 1987) (a famous strike of UFCW Local P-9 against Hormel in Austin, Minnesota; trusteeship by UFCW International union over its Local P-9 upheld, ending the strike against the wishes of Local P-9 members and imposing contract agreed to by international union).

[113] *See Jolly v. Gormon*, 428 F.2d 960 (5th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

[114] *See Argentine v. USW*, 287 F.3d 476 (6th Cir. 2002) (trusteeship imposed to force local union to agree to contract negotiated by international union; trusteeship ultimately held invalid due to procedural problems and free speech violations); Benda v. Machinists, 584 F.2d 308 (9th Cir. 1978) (invalidates trusteeship related to bargaining).

[115] 29 U.S.C. § 465 (2000).

[116] *See* U.S. Dep't. of Labor, Union Trusteeships: A Report to the Congress 55-72 (1962), cited in Malin, Individual Rights Within Unions at 182.

[117] *See International Brotherhood of Boilermakers, etc. v. Local Lodge 714, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO, et al.*, 845 F.2d 687 (7th Cir. 1988) (a union's "legitimate objects" in imposing a trusteeship do not include preventing the secession of its locals, unless one of the other purposes in the statute, for example, preventing disruption of collective bargaining, would be thwarted by the secession); *Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 584 F.2d 308, 317 (9th Cir. 1978) ("Union self-preservation, standing naked and alone, is not sufficient to justify imposition of a trusteeship").

[118] *See e.g. International Brotherhood of Boilermakers, etc. v. Local Lodge* 714, 845 F.2d 687 (7th Cir. 1988) (despite "inartful pleading," trusteeship may be valid where disaffiliation results in misappropriation of local union funds); *Progressive Mine Workers, Local 1972 v. Progressive Mine Workers*, 112 LRRM 2164 (D. Wyo. 1982) (trusteeship valid to prevent disaffiliation where it would impair international union's ability to effectively act as collective bargaining agent); *Executive Board Local 1302 v. United Brotherhood of Carpenters & Joiners*, 477 F.2d 612 (2d Cir. 1973) (same). A trusteeship is not the only weapon available to a union that wants to punish a local for, or prevent a local from, disaffiliating. *See Bernstein v. Nolan*, 135 L.R.R.M. 2591 (S.D.N.Y. 1990) (international union may legitimately revoke the charter of a local that attempts to disaffiliate or merge with another union).

[119] The use of the term "dissident" in this context is more than a little ironic. One must ask from what perspective can a local, acting under direction from its members, be considered a "dissident" when refusing to agree to demands of a usually indirectly appointed national or international union body.

[120] For example, eliminating the clause, "assuring the performance of collective bargaining agreements or other duties of a bargaining representative" prevents the use of the trusteeship power to force locals to follow parent union decisions with which the local membership does not agree.

[121] Section 8(b)(3) makes it an unfair labor practice for a union to refuse to bargain in good faith. Additionally, the exclusive bargaining provision of § 9 has been interpreted to create a duty of fair representation enforceable as an unfair labor practice under § 8(b)(1)(A). 29 U.S.C. §§ 158(b)(1)(A), 158(b)(3).

[122] *See* 29 U.S.C. §§ 481(a) (2000) (§ 401(a) of the LMRDA).

[123] 29 U.S.C. § 481(b) (§ 401(b) of the LMRDA).

[124] 29 U.S.C. § 481(c) (§ 401(c) of the LMRDA).

[125] See 29 U.S.C. §481(e) (2000) (§ 401(e) of the LMRDA). The election safeguards include: reasonable opportunity to nominate candidates; fair and uniform eligibility requirements; right to vote for or otherwise support the candidate(s) of his choice without reprisal; 15-day notice of election; right to vote; requirement to count and publish vote results; and preserve ballots and other records for one year.

[126] 29 U.S.C. § 481(g) (§ 401(g) of the LMRDA).

[127] 29 U.S.C. §§ 481(h), 482(a)-(d) (§ 401(h) and 402(a)-(d) of the LMRDA)..

[128] *See e.g. Chao v. Bremerton Metal Trades Council*, 294 F.3d 1114 (9th Cir. 2002) (eligibility restriction which prevented federal employee from participating in union election not necessarily reasonable); *Wirtz v. Hotel, Motel & Club Employees Union*, 391 U.S. 492 (1968) (bylaw that limited eligibility for union offices to those members who held or previously held offices unreasonable); *United Steelworkers of America v. Usery*, 429 U.S. 305 (1977) (meeting attendance requirement that disqualifies 96.5% of members unreasonable).

[129] *See e.g. Chao v. New Jersey Area Local Postal Workers Union*, 211 F. Supp. 2d 543 (D.N.J. 2002) (mailing supporting one candidate's position on dues increase while criticizing opponent and paid for by union unlawful); *Hodgson v. United Steelworkers of America*, 403 U.S. 333 (1971) (allowing use of union facilities to benefit incumbent unlawful); Reich v. Local 843, *Bottle Beer Drivers, Warehousemen, Bottlers & Helpers, Int'l Bhd. of Teamsters*, 869 F. Supp. 1142 (D.N.J. 1994) (issuing letter of response at union's expense and on union letterhead unlawful).

[130] *See Donovan v. Sailors' Union of Pacific*, 739 F.2d 1426 (9th Cir. 1984), *corrected* by 117 L.R.R.M. 2512, *cert. denied* 471 U.S. 1004 (1985) (three-year membership requirement to vote invalid); Reich v. District Lodge 720, *Int'l Ass'n of Machinists & Aerospace Workers*, 11 F.3d 1496 (9th Cir. 1993) (failure to keep membership list updated or to meet notice requirements; secret ballot requirement); *Donovan v. Local 41, International Brotherhood of Teamsters*, 598 F. Supp. 710 (W.D. Mo. 1984) (excessive distance required to travel to polling place, failure to

provide absentee ballots, although made in good faith and upon past practices, were so unfair and lacking in democratic principles that effect was to deny those members reasonable opportunity to vote); *Herman v. American Postal Workers Union*, 995 F. Supp. 1 (D.C. Dist. Col. 1997) (election null and void where union knew prior to mailing out ballots that candidate had been convicted of aggravated assault and sentenced to 15 years in jail because union, by leaving candidate on ballot, letting him win, and ultimately replacing him with union appointee, failed to provide adequate safeguards to insure fair election).

[131] *See* 29 U.S.C. § 481(c).

[132] *See McCafferty v. Local 254, SEIU*, 186 F.3d 52 (1st Cir. 1999) (distinguishing right of access to membership list from actual receipt of mailing labels); *Conley v. Aiello*, 276 F.Supp. 614, 616 (S.D.N.Y. 1967) (noting that legislative history of § 401(c) shows that a proposal providing for a right to copy membership lists was deleted in a Senate-House conference); *NLRB v. Carpenters Local 608, United Brotherhood of Carpenters & Joiners*, 811 F.2d 149, 154 (2d Cir. 1987), *cert. denied* 484 U.S. 817 (1987) (distinguishing right to keep membership records confidential in intra-union election context from information request in non-election context); *Conley v. United Steelworkers of America*, 549 F.2d 1122, 1125 n.4 (7th Cir. 1977) (distinguishing and rejecting defendant union's analogy between legitimate right to prohibit copying of membership lists and attempt to deny copying of financial records).

[133] *See Chao v. Local 54, Hotel Employees. & Rest. Employees Int'l Union*, 166 F. Supp. 2d 109 (D.N.J. 2001) (discriminatory use of member phone logs improper); *Marshall v. Local 933, United Automobile Workers*, 1980 U.S. Dist. LEXIS 11737, 104 L.R.R.M. 2102 (S.D. Ind. 1980) (discriminatory use of list of members who participate in union committees is improper); *Herman v. Local 50, SEIU*, 211 F. Supp. 2d 1111 (E.D. Mo. 2001) (discriminatory use of job site list is improper).

[134] 29 U.S.C. § 481(c). *See e.g. Donovan v. Metropolitan Dist. Council of Carpenters*, 797 F.2d 140 (3rd Cir. 1986) (union rule making mailing labels available to announced union office candidates 5 weeks before ballots mailed to members reasonable); but see *International Organization of Masters, Mates & Pilots v. Brown*, 498 U.S. 466 (1991) (union rule prohibiting pre-convention distribution of campaign literature is unreasonable); *Davenport v. Office & Professional Employees Int'l Union*, 1991 U.S. Dist. LEXIS 21075, 142 L.R.R.M. 2468 (E.D. Tenn. 1991) (union rule prohibiting pre-nomination distribution of campaign literature unreasonable, citing Brown).

[135] In right-to-work states, contract provisions requiring union membership or the paying of dues or fees as a condition of employment (commonly referred to as "union shop" or "union security" clauses) are unenforceable. Currently, there are 22 right-to-work states as of January 4, 2006.

[136] *Id.*

[137] *See Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966) (requirement that company provide complete list of eligible voters to union within 7 days of the direction of election); *North Macon Health Care Facility*, 315 N.L.R.B. 359 (1994) (employee list must be accurate and include full first and last names).

[138] *See* 105 Cong.Rec. 6728 (1959), 2 Leg. His. 1240-41 (debate between Senators Jarvis and McClellan). The House versions of the bill that later became the Landrum-Griffin Act each included the right to copy the membership list. The one-time inspection compromise was reached during the Conference Committee review of the House and Senate versions. *See Conley v. Aiello*, 276 F.Supp. 614, 616 (S.D.N.Y. 1967).

[139] *See Brock v. Local 471, Hotel, Motel & Restaurant Employees & Bartenders Union*, 706 F. Supp. 175 (N.D.N.Y 1989), *aff'd* 888 F.2d 125 (2d Cir. 1989) (one to two month delay in mailing; incumbent opponent responsible for delay); *Wirtz v. American Guild of Variety Artists*, 267 F. Supp. 527 (S.D.N.Y. 1967) (delay in mailing campaign literature until four days after ballots mailed unlawful); *Reich v. District Lodge 720, Int'l Ass'n of Machinists & Aerospace Workers*, 11 F.3d 1496 (9th Cir. 1993) (failure to keep membership list updated). *But see Huff v. International Union of Sec. Officers*, 1998 U.S. App. LEXIS 31835 (9th Cir. 1998) (three-week delay of communication mailing not unreasonable).

[140] The list should be provided in electronic form or, if not possible, as mailing labels to make it easy for candidates to distribute literature.

[141] *See* 105 Cong. Rec. 17827 (1959), 2 Leg. His. 1416 (argument of Senator Morse against the conference compromise).

[142] *See* 29 U.S.C. § 481(c) (2000). The more elegant solution is simply to make the misuse of a voting list by any person a crime.

[143] 29 U.S.C. § 501(a).

[144] 29 U.S.C. § 490(b) (§ 501(b) of the LMRDA).

[145] 29 U.S.C. § 502(a) (2000).

[146] 29 U.S.C. § 503(a) (2000).

[147] 29 U.S.C. § 504(a) (2000). The court is given some discretion to reduce this debarment period to not less than 3 years under special circumstances. See Id.

[148] 29 U.S.C. § 501(c) (2000). *See also* 29 U.S.C. §§ 502(b), 503(c) & 504(b) (2000).

[149] These positions are defined broadly to include, "elected officials and key administrative personnel, whether elected or appointed" under § 3(q) of the Landrum-Griffin Act.

[150] Federal Circuit Courts are split on the issue of whether § 501 mandates fiduciary responsibility only with respect to the money and property of the acquired union or whether the statute adopts broader common law notions of acting at all times in the union's, rather than the leadership's, best interests. Compare *Gurton v. Arons*, 339 F.2d 371 (2nd Cir. 1964) (applying narrow construction of § 501 and holding that it imposes fiduciary duties only with respect to the union's own money and property) with *Pignotti v. Local No. 3 Sheet Metal Workers' Int'l Ass'n*, 477 F.2d 825 (8th Cir. 1973) (holding that the fiduciary duties of

union officers under § 501 extend beyond just the safeguarding of the union's own funds and property). To summarize, the Second Circuit has held consistently that § 501 is limited to money and property related claims. The Third, Eighth and Ninth Circuits have adopted a broader view that the fiduciary obligations of § 501 cover any act adverse to the union or the members. The remaining Circuits have not explicitly adopted either view. For an excellent discussion of the split, along with related cites, *see* Osbourne, Jr., Labor Union Law and Regulation 147-159 (BNA Books 2003).

[151] 29 U.S.C. § 490(b).

[152] 29 U.S.C. 501(b).

[153] Id.

[154] Some Circuits have rejected the futility doctrine. *See Flaherty v. Warehouseman Garage & Service Station Employees' Local Union No. 334*, 574 F.2d 484, 487 (9th Cir. 1978); *Dinko v. Wall*, 531 F.2d 68, 73 (2d Cir. 1976); *Cassidy v. Horan*, 405 F.2d 230, 232 (2d Cir. 1968). The Fifth Circuit has not taken a position on the issue. *See Adams-Lundy v. Association of Professional Flight Attendants*, 844 F.2d 245, 250 n.26 (5th Cir. 1988). The Seventh Circuit agrees with the Third that a § 501(b) request need not be made if the request would have been futile. *See e.g. McNamara v. Johnston*, 522 F.2d 1157, 1163 (7th Cir. 1975) ("It is apparent that a demand for relief would have been futile . . . [and] plaintiffs' failure to make such a request is excused."), *cert. denied*, 425 U.S. 911 (1976).

[155] This was explicitly adopted in *Pawlak v. Greenawalt*, 464 F.Supp. 1265 (N.D.Pa. 1979) (citing the decision in *Sabolsky v. Budzanoski*, 457 F.2d 1245, 1252 (3d Cir. 1972)), finding that the "request" requirements in § 501 is similar to the "demand" requirement under § 411 and was therefore not mandatory.

[156] 457 F.2d at 1249-50 (citing *Horner v. Ferron*, 362 F.2d 224 (9th Cir. 1966) (allegations in the complaint are potentially sufficient to establish good cause). *See also Pawlak*, 464 F.Supp. at 1269; *Adams-Lundy*, 844 F.2d at 249-250.

[157] The requirements of § 501(b) should make clear that the "request" and "good cause" requirements are not jurisdictional.

[158] 29 U.S.C. §501(c) (2000).

[159] *See United States v. Silverman*, 430 F.2d 106 (2nd Cir. 1970), *modified*, 439 F.2d 1198 (2nd Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).

[160] Courts also have adopted a broad definition of union "property" in § 501 cases. *See e.g. UFCW Local 911 v. UFCW Int'l*, 301 F.3d 468 (6th Cir. 2002), reh'g denied 2002 U.S. App. LEXIS 26462 (6th Cir. 2002) (international union's decision to remove group of workers out of local's jurisdiction at direction of employer may have deprived local of property). This includes virtually any property except that which a union official earns in a private capacity; there no need to prove personal benefit from the misappropriation, all that is required is proof that the official deprived members of the use of property entrusted to him or her for the benefit of the union. *See* Malin at 329-331.

[161] *See United States v. Bane*, 583 F.2d 832 (1978) ("in enacting § 501 Congress imposed the broadest possible fiduciary duty upon union officers and employees"); *United States v. Harmon*, 339 F.2d 354 (6th Cir. 1964), *cert. denied*, 380 U.S. 944 (1965), *reh'g denied*, 380 U.S. 989 (1965) (language in §501(c) covers almost every kind of taking); *United States v. Sullivan*, 498 F.2d 146 (1st Cir. 1974), *cert. denied*, 419 U.S. 993 (1974) (§ 501(c) was meant "to protect general union memberships from the corruption, however novel, of union officials and employees.").

[162] *See* Id.

[163] For two interesting and (at no fault of their own) somewhat confusing summaries of the various intent standards for proving violations of § 501(c), *See* Malin at 332-335; Osbourne at 189-199.

[164] *See United States v. Gibson*, 675 F.2d 825, 828-29 (6th Cir.), *cert. denied*, 459 U.S. 972 (1982). The Fifth Circuit has on at least one occasion also stated that proof of authorization is unnecessary, at least in a case where proof of fraudulent intent is clear. *See United States v. Durnin*, 632 F.2d 1297, 1300 n.5 (5th Cir. 1980).

[165] This appears (it is not always clear) to be the standard used in the First (usually), Fourth, and Fifth (usually) Circuits. *See United States v. Sullivan*, 498 F.2d 146, 150 (1st Cir.), *cert. denied*, 419 U.S. 993 (1974); *United States v. Stockton*, 788 F.2d 210, 217 (4th Cir.), *cert. denied*, 479 U.S. 840 (1986); *United States v. Hammond*, 201 F.3d 346 (5th Cir. 1999).

[166] The Fourth Circuit has an interesting twist on this formulation, not allowing defendants to rely simply on proof that a union official approved their actions. Instead, the Court defines "union" broadly to mean the union membership. Facts related to hiding the conversion from the membership, or the membership's attempt to "undo" the conversion once they are aware of it, can prove lack of authorization. *See United States v. Stockton*, 788 F.2d 210, 217-218 (4th Cir. 1986).

[167] *See United States v. Nolan*, 136 F.3d 265, 269-70 (2d Cir. 1998), *cert. denied*, 524 U.S. 920 (1998); *United States v. Santiago*, 528 F.2d 1130, 1133-34 (2d Cir. 1976), *cert. denied*, 425 U.S. 972 (1976); *United States v. Ottley*, 509 F.2d 667 (2d Cir. 1975).

[168] *See United States v. Olivia*, 46 F.3d 320, 324 (3rd Cir. 1995); *United States v. Floyd*, 882 F.2d 235, 240 (7th Cir. 1989); *United States v. Vanderbergen*, 969 F.2d 338, 339 (7th Cir. Wis. 1992), *reh'g denied*, 1992 U.S. App. LEXIS 20681 (7th Cir. 1992); *United States v. Welch*, 728 F.2d 1113, 1119-20 (8th Cir. 1984); *United States v. Thordarson*, 646 F.2d 1323, 1334, 1336 (9th Cir.), *cert. denied*, 454 U.S. 1055 (1981); United States v. Lawton, 995 F.2d 290 (D.C. Cir. 1993) (union authorization not a defense for plainly unlawful conversion).

[169] Embezzlement is a statutory crime that did not exist at common law and was developed because a defendant who, as a fiduciary, converted lawfully received property, was not guilty of common law larceny at common law. See *United States v. Stockton*, 788 F.2d at 215, n.4 and accompanying text.

[170] *See e.g. United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983), *cert.*

denied, 464 U.S. 833 (1983) (reckless disregard of interests of fiduciary can be used to infer intent under banking fraud statutes); *United States v. Luxenberg*, 374 F.2d 241, 249 (6th Cir. 1967) (same); *Logsdon v. United States*, 253 F.2d 12 (6th Cir. 1958) (same).

[171] New York's statute contains excellent language in this regard, *see infra* at note 376 and accompanying text.

[172] *Semancik*, 466 F.2d at 155.

[173] 29 U.S.C. §§151-168 (2000) (NLRA hereafter).

[174] 29 U.S.C. § 157 (2000) (§ 7 of the NLRA) provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 158(a)(3) of this title."

[175] 29 U.S.C. §§ 141-167, 171-197. The LMRA (also known as the Taft-Hartley Act) was passed in 1947, over President Truman's veto, after a series of national strikes and investigation of abuses by unions under the NLRA. Critics of the Wagner Act offered the Taft-Hartley amendments which, among other things, added union unfair labor practices giving union members and companies the right to complain of misconduct by unions. *See* Archibald Cox, et al. Labor Law Cases and Materials, 92-97 (11th ed. 1991); Leroy S. Merrifield, Theodore J. St. Antoine & Charles B. Craver, Labor Relations Law Cases and Materials 35-36 (8th ed. 1989).

[176] 29 U.S.C. § 158(b)(1)(A) (2000).

[177] Dues and fees must be uniformly required of all members as a condition of employment to meet the exception. 29 U.S.C. §158(b)(2) (2000).

[178] The Supreme Court initially recognized the duty of fair representation before the existence of § 8(b). *See infra* at 99-107.

[179] *See e.g. Local Union No. 277, International Brotherhood of Painters and Allied Trades v. NLRB*, 717 F.2d 805, 812 (3rd Cir. 1983) (§ 8(b)(1)(A) violation occurred when union fined, expelled and refused to refer member through hiring hall due to publicizing claims of discrimination); *Local Union No. 277, International Brotherhood of Painters (Del E. Webb)*, 278 NLRB 169 (1986) (union violated §§ 8(b)(1)(A) and 8(b)(2) by causing employer to discharge employee over same issues); *Partin v. NLRB*, 356 F.2d 512 (5th Cir. 1966) (§ 8(b)(2) violated when union causes employer to terminate employee because of activity to expose mishandling of funds and affairs by union leadership).

[180] 934 F.2d 1288 (2nd Cir. 1991) (*Lodge 91* hereafter). The *Lodge 91* case is outlined in detail here because none of the illustrative cases allege unfair labor practices under § 8(b) of the NLRA; the closest analogy is the alleged breach of free speech rights under the LMRDA in *O'Rourke*.

[181] 29 U.S.C. §158(b)(1)(A). Gilbert was elected to be a Labor Representative, which made him an employee of the District Lodge 91 for a short time. Thus he also filed (and won) unfair labor practices under §§ 8(a)(1), (3) and (4) District Lodge 91 as employer. *See Lodge 91* at 1289.

[182] To give the reader some idea of the lengths to which a union will go to prevent dissent, Gilbert had to appeal to the Second Circuit to get an order enforcing the Board's original ruling. In 1987 the Second Circuit, not surprisingly, required that Local 707 reinstate Gilbert and allow him to run for office in *NLRB v. Local Lodge No. 202, International Association of Machinists and Aerospace Workers*, 817 F.2d 235 (2d Cir. 1987). Remember that the original leaflet to members regarding embezzlement and criminal activities in Local 707 was distributed in 1983.

[183] *Lodge 91*, 934 F.2d at 1296.

[184] *See NLRB v. Teamsters Local 639 (Curtis Bros., Inc.)*, 362 U.S. 274 (1960).

[185] *See Marine & Shipbuilding Workers*, 159 NLRB 1065 (1966); *NLRB v. Marine & Shipbuilding Workers*, 391 U.S. 418 (1968).

[186] 394 U.S. 423 (1969) (*Scofield* hereafter).

[187] *Scofield*, 394 U.S. at 430.

[188] *See Carpenter's Local 22 (Graziano Construction Co.)*, 195 NLRB No.1, overruled by *Office & Professional Employees Local 251*, 331 NLRB No. 193 (2000).

[189] *See Bricklayers (Daniel J. Titulaer)*, 306 NLRB 229, 233-35. Dues increase (§ 302) and trusteeship (§ 411(a)(3)) decisions are specifically governed by the LMRDA. The Board also developed the theory of "selective enforcement" of otherwise legitimate rules as violations of LMRDA § 101(a)(5), a theory that had not been upheld in other LMRDA 101(a)(5) litigation. *See Electrical Workers (IBEW) Local 1579 (Steven Stripling)*, 316 NLRB 710, 711-712 (1995); *Laborers Local 652 (Southern California Contractors Ass'n)*, 319 NLRB 694, 697-99 (1995), overruled by *Office & Professional Employees Local 251 (Scandia National Laboratories)*, 331 NLRB No. 193 (2000).

[190] *Office & Professional Employees Local 251 (Scandia National Laboratories)*, 31 NLRB 1417, 1418-19 (2000).

[191] Section 501(b) of the LMRDA is the only labor statute specifically authorizing an award of fees to a union member bringing a suit for breach of fiduciary duty. The LMRDA also provides for civil awards of "such relief (including injunctions) as may be appropriate." *See* 29 U.S.C. §§ 412, 440. Attorney fees are also available under a RICO civil claim. *See* 18 U.S.C. §§ 1964(c) (1994).

[192] Unfortunately, in many union corruption cases NLRA coverage is alleged by the defendant, not the plaintiff. This is due to the defendant's hope that a court will find that other, more serious claims (like RICO, where treble damages, fees and costs are available) are preempted. *See infra* at 73.

[193] Collateral estoppel, or issue preclusion, holds that when an issue of fact or law is litigated to a final judgment (and that issue of fact or law

is essential to the judgment) that the determination regarding that fact in the first case is conclusive in any future case between the same parties. NLRB cases can be binding in this way. *See Pygatt v. Painters' Local No. 277*, 763 F.Supp. 1301 (D.N.J. 1991). NLRB cases typically involve informal and less comprehensive discovery than in state or federal courts.

[194] Although no preemption argument was made in *Pygatt*, the court there rejected an argument for claim preclusion. Defendants argued that the factual situation that gave rise to unfair labor practice charges litigated in front of the NLRB could not also support a separate federal claim under the LMRDA. The court allowed the plaintiffs to proceed with their LMRDA free speech claims (binding the parties to the factual determinations made by the NLRB due to collateral estoppel) holding that they were "*separate and independent* causes of action that concern identical facts." *Pygatt*, 763 F.Supp. at 1308 (emphasis in original).

[195] Labor Management Relations Act of 1947, Pub. L. No. 101, 61 Stat. 136, 29 U.S.C. §§141-67, 171-97 (amended by LMRDA in 1959).

[196] 29 U.S.C. §185(a) (§ 301(a) of the Taft-Hartley Act).

[197] A "hybrid" claim will only stand if *both* the breach of contract claim and the duty of fair representation claim are proven–they are considered "inextricably interdependent" and stand or fall together. *See Teamster Local 391 v. Terry*, 494 U.S. 558, 564 (1990).

[198] Some may wonder why we should care about an employers' breach of contract in the context of union corruption. There are two answers. The first is practical; the only way to reach the issue of a contract breach under the LMRA is to sue the parties to that contract, the employer and the union. The second reason is that often the union's breach of its fiduciary duty only manifests itself by inducing the employer's breach of contract.

[199] 29 U.S.C. §§186(a)-(b) (§§ 302(a)-(b) of the Taft-Hartley Act).

[200] 29 U.S.C. §§186(d) (§ 302(d) of the Taft-Hartley Act).

[201] 18 U.S.C. §1961(1)(C).

[202] *See United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977).

[203] *United States v. Pecora*, 798 F.2d 614 (3rd Cir. 1986).

[204] 350 U.S. 299 (1956).

[205] The Senate Committee cited a decision *Ventimiglia v United States*, 242 F.2d 620 (4th Cir. 1957) as an example of the loophole that the amendments were designed to close. This case dealt with a payoff scheme where the union officer was paid to not organize or represent employees. The Court reversed the conviction of the union officer based on the fact that there was no present intention to represent employees nor was he technically a representative of any of the employees. The Legislative history makes clear that the amended language of § 302 was intended to overturn such a result.

[206] *See* 29 U.S.C. §§142(3), 152(2), (3); *See also United States v. Davidoff*, 359 F.Supp. 545, 547-48 (E.D.N.Y. 1973).

[207] RLA labor organizations are covered by RICO. However, they cannot commit either of the labor-specific predicate acts listed in 18 U.S.C. §1961(1)(C). RLA unions can commit the predicate acts of mail and wire fraud or § 664 embezzlement from an employee benefit plan. *See Landry*, 901 F.2d at 427-432.

[208] Today these claims are reached, if at all, if they are also part of a Hobbs Act extortion, mail fraud or embezzlement from an employee benefit fund. *See infra* at 84-98.

[209] 29 U.S.C. §§ 1001 et seq. (2000).

[210] *See* Buckley, ERISA Law Answer Book at 8-1 (4th Ed. 2003).

[211] 29 U.S.C. §§ 1101(a), 1003(a).

[212] *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

[213] 29 U.S.C. §§ 1002(1), 1002(2) both state that with respect to welfare (1002(1)) or pension (1002(2)) plans the Act means "any plan, fund or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization or by both. . . . " (emphasis added).

[214] *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982).

[215] *Beddall v. State St. Bank & Trust*, 1996 U.S. Dist. LEXIS 1844 (D.Mass. Feb. 14, 1996).

[216] *Johnston v. Paul Revere Life Ins. Co.*, 241 F.3d 623 (8th Cir. 2001); *Sommers Drug Stores, Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986), *reh'g denied*, 797 F.2d 977 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987).

[217] 29 U.S.C. §1002(21)(A). ERISA also prohibits convicted felons from serving in virtually any capacity, especially as a fiduciary (whether inside or outside the plan capacity of any employee benefit plan) for a period of 13 years after the conviction or the end of imprisonment whichever is later. 29 U.S.C. § 1111(a) (2000). Compare this to § 504(a) of the LMRDA, which also prohibits certain convicted felons of holding positions as officers or employees of a union for a period of 13 years from the conviction or end of the prison term. *See* note 143 and accompanying text.

[218] 29 U.S.C. §1106. *See Landry* at 422.

[219] *See Landry* at 417; *See also American Federation of Unions Local 102 Health and Welfare Fund v. Equitable Life Assurance Society of the United States*, 841 F.2d 658, 661 (5th Cir. 1988); *Donoavan v. Mercer*, 747 F.2d 304, 308 (5th Cir. 1984).

[220] The crime of "embezzlement from an employee benefit plan" is codified at 18 U.S.C. § 664; the crime of "mail fraud" is codified at 18 U.S.C. §1341; the Hobbs Act is codified at 18 U.S.C. §§1951 et seq.

[221] 18 U.S.C. §§1961-1968 (2000) (hereinafter RICO); *See also* 18 U.S.C. §1954 (federal crime of racketeering).

[222] 18 U.S.C. §1961(3).

[223] Pub.L.No. 91-452, 84 Stat. 922 (1970).

[224] Act Oct. 15, 1970, P.L. 91-452, § 1, 84 Stat. 922.

[225] *See* 116 Cong.Rec. 18,913-14.

[226] *See* 116 Cong.Rec. 18,952-72.

[227] *See* 18 U.S.C. §1964(c) (2000).

[228] 18 U.S.C. §1962 (2000).

[229] *See* 18 U.S.C. §1963 (2000) (violations of RICO are crimes punishable by fines and/or imprisonment); 18 U.S.C. §1964(c) (2000).

[230] A RICO "predicate act" is one of the enumerated acts or violations (each eligible for prosecution as a crime in its own right) defined as "racketeering activity" in 18 U.S.C. § 1961(1) (2000).

[231] 18 U.S.C. § 1961(1) (2000).

[232] *See Delta Truck and Tractor, Inc. v. The J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989) (*J.I. Case* hereafter).

[233] *See* 18U.S.C. §1961(3) (1994).

[234] *See Landry*, 901 F.2d at 425 (5th Cir.1990) citing *J.I. Case Co.*, 855 F.2d at 242. *See also H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) (to prove a pattern of racketeering activity, the prosecution or litigant must show that racketeering predicates were related and amounted to or posed a threat of continued criminal activity).

[235] 18 U.S.C. §1961(4) (1994).

[236] *See United States v. Turkette*, 452 U.S. 576, 580-81 (1981).

[237] *See United States v. Perholtz*, 842 F.2d 343, 353 (D.C. Cir. 1988) (individuals conducted racketeering through "association in-fact" enterprise comprised of individuals, corporations, and partnerships); *c.f. Landry* discussed *infra* at 47.

[238] *J.I. Case Co.*, 855 F.2d at 243.

[239] *See United States v. Turkette*, 452 U.S. 576, 583 (1981) (continuity a necessary attribute of association-in-fact enterprise).

[240] *See Landry*, 901 F.2d at 425; *Haroco v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 400 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985); *but see Cox*, 17 F.3d at 1398; *United States v. Hartley*, 678 F.2d 961, 986 (11th Cir. 1982).

[241] 18 U.S.C. § 1962(a) (2000).

[242] 18 U.S.C. § 1962(b) (2000).

[243] *See Landry*, 901 F.2d at 425.

[244] *Id.*

[245] *Id.* In *Cox* USX also argued that under 1962(c) that it could not be considered both an "enterprise" and a "person" under RICO. The Eleventh Circuit, unlike the Fifth Circuit in *Landry*, found that a company can be both a person and an enterprise under 1962(c), and kept USX as a RICO defendant. *See Cox*, 17 F.3d at 1398.

[246] *Landry*, 901 F.2d at 425.

[247] *See Cox*, 17 F.3d 1403.

[248] This issue is complicated by the fact that several Circuit Courts have acknowledged exceptions intended to square general vicarious or respondeat-superior liability principles to the "non-identity" principle under § 1962(c) of RICO. The Eleventh Circuit (which rejects non-identity) explained that most of the narrow exceptions granted in these cases stand only for the proposition that an "enterprise" should not be held liable for the actions of its representatives where it receives no benefit from the RICO violation. The exceptions do not apply if (as in *Cox*) other enterprises exist. *See Cox*, 17 F.3d at 1404-1406.

[249] *Id.* at 1407-1408.

[250] 18 U.S.C. 1961(5) (2000).

[251] *See H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (*H.J. Inc.* hereafter); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14 (1985); S.Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969).

[252] *See H.J. Inc.*, 492 U.S. at 240.

[253] *Id.* at 241-242.

[254] *See Cox*, 17 F.3d 1397.

[255] *Id.*

[256] *Id.* at 1398. *USX and the Steelworkers* also argued that the RICO claims should be dismissed for lack of causation. They stated that the plaintiffs could not prove that the concessions agreed to were in any way related to the special pension requests for the Fairfield Six. The Court held that proximate cause was shown and the RICO claim could stand if any part of the concessions were agreed to because of the desire of the union negotiators to convince the company to agree to their illegal pension requests that. *See Id.* at 1399-1403.

[257] *See Landry*, 901 F.2d at 428-430.

[258] 18 U.S.C. §664 (2000).

[259] The Fifth Circuit also followed the (at that time recently decided) Supreme Court decision in *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229 (1989).

[260] *See O'Rourke*, 847 F.Supp. 1208 (D.N.J. 1994).

261 The District Court for New Jersey also cited *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 242 (1989).

[262] This suggestion was more than speculation; it was made based on first-hand knowledge. This was not the first case the District Court for New Jersey had heard regarding the heavy-handed tactics of Local 30. In fact the Court dismissed a preemption argument in the *O'Rourke* decision by relying on a decision the Court recently entered in another RICO case filed against Local 30 alleging almost identical facts (noting Local 30's identical defense strategy in this case).

[263] Some may question whether it makes sense to have the separate crimes available outside the context of RICO. There is one critical reason it makes sense to keep the separate crimes intact. In cases where the relationship among co-conspirators is tenuous or the existence of an "enterprise" is hard to prove, the separate crime may be the only way to prosecute the individual defendants.

[264] 18 U.S.C. §1965 (2000).

[265] 18 U.S.C. § 664 (2000).

[266] *See supra* at 48.

[267] *See United States v. Luxenberg*, 374 F.2d 241, 249 (6th Cir. 1967). The Ninth Circuit commented on the merit of this formulation without formally ruling on the issue in *United States v. Andreen*, 628 F.2d 1236 (9th Cir. 1980).

[268] *See United States v. Andreen*, 628 F.2d 1236 (9th Cir. 1980) (proof of union benefit irrelevant in case where lack of authorization proven).

[269] *See supra* at note 171169 and accompanying text.

[270] *See United States v. Beverly*, 369 F.3d 516, 532 (6th Cir. 2004); *United States v. Luxenberg*, 374 F.2d 241, 249; *Morisette v. United States*, 342 U.S. 246 (1952).

[271] *See United States v. Krimsky*, 230 F.3d 855, 861 (6th Cir. 2000).

[272] 18 U.S.C. § 1961(1)(B) (2000).

[273] At the summary judgment stage the issue of standard of proof was not before the Court. They did favorably reference *United States v. Andreen, supra* at note 268267. *Landry*, 901 F.2d at 431.

[274] *See Cox* at 1410; *See also Schneberger v. Wheeler* 859 F.2d 1477, 1480 (11th Cir. 1988), *cert. denied*, 490 U.S. 1091 (1989); *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 94-95 (5th Cir. 1975).

[275] *Wheeler* at 96.

[276] *Cox* at 1410.

[277] 18 U.S.C. §1341 (2000).

[278] *See Landry*, 901 F.2d at 428; *but see United States v. Salvotore*, 110 F.3d 1131 (5th Cir. 1997) (not listing actual injury to plaintiff as an element).

[279] *See Landry*, 901 F.2d at 428.

[280] *See* 18 U.S.C. § 1961(1)(B) (2000).

[281] *See United States v. Boffa*, 688 F.2d 919 (3rd Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); but see *United States v. Runnels*, 877 F.2d 481 (6th Cir. 1989) (intangible rights theory overruled by Supreme Court).

[282] *See McNally v. United States*, 483 U.S. 350, 360 (1986) (*McNally* hereafter).

[283] *See McNally*, 483 U.S. at 360.

[284] *McNally*, 483 U.S. at 365, (Stevens, J. dissenting).

[285] *United States v. Runnels*, 877 F.2d 481 (6th Cir. 1989) (*Runnels II*) (intangible rights theory overruled by Supreme Court).

[286] *See United States v. Runnels*, 833 F.2d 1183 (6th Cir. 1987) (*Runnels I*).

[287] "It is unfortunate indeed that a conviction has to be reversed in a case in which the evidence so clearly established wrongful conduct on the part of the defendants." *Runnels II*, 877 F.2d at 481.

[288] The three-member panel of the Sixth Circuit deciding *Runnels I* came up with this theory in hopes of preventing the miscarriage of justice that ultimately occurred in *Runnels II*. *See Runnels I*, 833 F.2d at 1183, 1186, note 3. The Sixth Circuit later, in *United States v. Debs* had another opportunity to visit the holding in *McNally*. In that case the defendant argued that *McNally* stood for the proposition that the loss of the opportunity to, "nominate, vote, assemble, and speak" is only a deprivation of rights and not property under the Hobbs Act. The Court there distinguished *McNally*, arguing that it was decided on federalism grounds that do not apply in the labor context. Citing the longstanding federal interest in regulating labor unions and the importance of protecting the democratic rights of members in the "one-party government" characterized by most unions, it held that LMRDA rights are property rights under the Hobbs Act. *See United States v. Debs*, 949 F.2d 199, 201-02 (6th Cir. 1991).

[289] *Runnels II*, 877 F.2d at 483.

[290] *See also United States v. Sheeran*, 699 F.2d 112 (3rd Cir. 1983), *cert. denied*, 461 U.S. 931 (1983).

[291] This is the only "payoff" specifically described in either *Boffa* or *Sheeran*, although there may have been others. *See Boffa*, 688 F.2d at 924; *Sheeran*, 699 F.2d at 114.

[292] *McNally*, 483 U.S. at 360.

[293] Suggested language would read as follows: "Frauds and swindles. It is a violation of this Act for any person, having devised or intending to devise any: (1) scheme or artifice to defraud any person of any right, privilege, protection or fiduciary obligation provided under the laws of the United States; or (2) scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises for the purpose of executing such scheme or artifice or attempting so to do…" (remainder of Sec. 1341 unchanged).

[294] 18 U.S.C. §1951 (2000). *See United States v. Local 807, International Brotherhood of Teamsters, 118 F.2d 684 (2nd Cir. 1941), aff'd. 315 U.S. 521 (1942)*. The ruling virtually emasculated the 1934 anti-racketeering statutes.

[295] *See O'Rourke* at 1214; *See also* Local 560, 780 F.2d at 281.

[296] 18 U.S.C. § 1961(1)(B)(2000). *See United States v. Debs*, 949 F.2d 199, 200 (6th Cir. 1991).

[297] *United States v. Enmons*, 410 U.S. 396 (1973). *See e.g. United States v. Mulder*, 273 F.3d 91 (2001); *United States v. Debs*, 949 F.2d 199, 200 (6th Cir. 1991).

[298] *Enmons*, 410 U.S. at 401.

[299] *United States v. Mulder*, 273 F.3d 91 (2001).

[300] *See Debs*, 949 F.2d at 201.

[301] The court also used examples like simple assault, throwing a punch on a picket line or deflating tires on an employer's tires as examples of *legitimate* use of union violence. *Enmons*, 410 U.S. at 404-408.

[302] *Enmons*, 410 U.S. at 411.

[303] *Overnite Transportation v. International Brotherhood of Teamsters*, 168 F.Supp.2d 826 (W.D.Tenn. 2001) (*Overnite* hereafter).

[304] *Overnite*, 168 F.2d at 832-833.

[305] *Id.* at 834-35.

306 The NLRB, of course, was already deeply involved in the Teamsters' dispute with Overnite. *See e.g. Overnite Transp. Co. v. NLRB*, 280 F.3d 417, 421 (4th Cir. 2002) (noting that numerous proceedings before the NLRB regarding disputes between the Teamsters and Overnite were consolidated into "one massive proceeding"). However, Board remedies are limited and ill-equipped to deal with the violence and intimidation perpetrated by the Teamsters in this case (the reason for the Hobbs Act in the first place). *See e.g. Overnite Transp. Co. v. Int'l Bhd. of Teamsters*, 332 Ill. App. 3d 69, 81 (Ill. App. 1st Dist. 2002) (Wolfson, dissenting), appeal denied, *Overnite Transp. Co. v. Int'l Bhd. of Teamsters*, 201 Ill. 2d 574, (Ill. 2002), *cert. denied Overnite Transp. Co. v. Int'l Bhd. of Teamsters*, 538 U.S. 916 (2003) (in ruling that dismissed state law tort claims because of the NLRB's concurrent jurisdiction, Justice Wolfson argued in his dissent that the state law claims should be stayed pending the outcome of the NLRB case noting, "It could be the NLRB will do all that

should be done, but we cannot know that at this point").

[307] The Court relied on *Teamsters Local 372, Detroit Mailers Union Local 2040 v. Detroit Newspapers*, 956 F.Supp. 753, 758 (E.D.Mich. 1997) for its preemption analysis. It noted that Detroit Newspapers found that acts like "destruction of property, and physical assault" illegal without reference to federal labor laws and outside federal preemption, while holding that "garden variety" conduct accompanying labor disputes falls within the jurisdiction of the NLRB. Notwithstanding these observations (which still, under the *Enmons* exception to the Hobbs Act, require tortured analysis by district courts of what should be relatively straightforward criminal prosecutions) the court inexplicably found the hundreds of violent acts committed by the Teamsters here subject to the NLRB's jurisdiction.

[308] *See e.g. A. Terzi Production v. Theatrical Protection Unit*, 2 F.Supp.2d 485 (S.D.N.Y. 1998) (*Enmons* does not apply where union does not represent employees of employer); *C&W Construction Co. v. Brotherhood of Carpenters and Joiners of America, Local 745, AFL-CIO*, 687 F.Supp. 1453 (D.Haw. 1988) (same); *United States v. Quinn*, 514 F.2d 1250, 1259-60 (5th Cir. 1975) (same).

[309] 18 U.S.C. § 1951 (2000).

[310] *See Enmons*, 410 U.S. at 414-417 (Douglas J., dissenting).

[311] *Id.* at 418, note 17.

[312] Sec. 1951(2) should be amended to read as follows: "This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45, *provided however, that nothing in this section shall limit the prosecution of any action prohibited in this section, even where that action is in furtherance of an otherwise lawful purpose under this subsection*."

[313] *See Enmons*, 410 U.S. at 418, note 17 (Douglas J. dissenting) (federal prosecution for Hobbs Act violation for "mischievous" conduct during strike thrown out in *United States v. Caldes* 457 F.2d 74, 78 (9th Cir. 1972)).

[314] 208 F.3d 72 (2d Cir. 2000).

[315] This claim was filed under 26 U.S.C. § 7201 (2004).

[316] This claim alleged violation of 18 U.S.C. § 371 (2004).

[317] The National Legal and Policy Center, now based in Falls Church, Va., since 1998 has published the Union Corruption Update on a biweekly basis. This newsletter tracks union corruption cases nationwide. Updates are available via email or on their website at http://www.nlpc.org/olap.asp. There are literally hundreds of stories about LIUNA. *See* http://www.nlpc.org/artindx.asp#liuna.

[318] *See* National Legal and Policy Center, Union Corruption Update, http://www.nlpc.org/olap/UCU2/04_25_02.htm (visited March 20, 2004).

[319] *See* National Legal and Policy Center, Union Corruption Update, http://www.nlpc.org/olap/ucu2/03_03_01.htm (visited March 20, 2004).

[320] 29 U.S.C. §159(a) (2000), (§ 9(a) of the National Labor Relations Act).

[321] *See Breininger v. Sheet Metal Workers International Association Local Union No. 6*, 493 U.S. 67, 79 (1989).

[322] 42 U.S.C. §2000e et seq. (2000). *See e.g. Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944) (Railway Labor Act's grant of exclusive bargaining status to union requires union to fairly represent and not discriminate against a class of black locomotive firemen); on the same day the Supreme Court issued its opinion in *Steele* it also found the duty of fair representation in the NLRA's grant of exclusive bargaining status to unions under that Act. *See Wallace Corp. v. NLRB*, 323 U.S. 248 (1944).

[323] *See e.g. Wallace v. NLRB*, 323 U.S. 248 (1944) (discrimination against rival union membership); *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (seniority credit for military service).

[324] 386 U.S. 171, 192 (1967).

[325] Compare *Streetcar Employees v. Lockridge*, 403 U.S. 274 (1971) (duty violated when union engages in "deliberate and severely hostile and irrational treatment") with *IBEW v. Foust*, 442 U.S. 42 (1979) (four justices in concurrence find punitive damages not appropriate—but compensatory damages might be—for negligent or grossly negligent misconduct by union).

[326] 499 U.S. 65, 67 (1991).

[327] *See Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990), *cert. denied*, 500 U.S. 905 (1991). *See also* Osbourne, Jr., Labor Union Law and Regulation 289 (BNA Books 2003).

[328] *See Zimmerman v. French Int'l School*, 830 F.2d 1316 (4th Cir. 1987); *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332 (5th Cir. 1980).

[329] *See Breininger v. Sheet Metal Workers*, 493 U.S. 67 (1989); *Allen v. Allied Plant Maintenance Co.*, 881 F.2d 291, 295 (6th Cir. 1983) (leader of decertification effort); *Pitts v. Frito-Lay, Inc.*, 700 F.2d 330, 331 (6th Cir. 1983); *NLRB v. Pacific Coast Util. Serv., Inc.*, 638 F.2d 73, 74 (9th Cir. 1980); *NLRB v. Electrical Workers (IUE) Local 485*, 454 F.2d 17, 21-22 (2d Cir. 1972).

[330] *Nellis v. Air Line Pilots*, 815 F.Supp. 1522, 1533 (E.D. Va. 1993), *aff'd*, 15 F.3d 50 (4th Cir.), *cert. denied*, 513 U.S. 808 (1994).

[331] *See Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983); *but see Eichelberger v. NLRB*, 765 F.2d 851 (9th Cir. 1985) (holding in *Dutrisac* limited to cases where both the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim).

[332] Some version of this standard, most like the one adopted by the Supreme Court in *O'Neill*, has been articulated in the First, Second, Fifth, Sixth, Eighth, Tenth, and District of Columbia Circuits. *See* Malin at 360-368.

[333] *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994) (Teamsters breached duty of fair representation when they failed to call only eyewitness who could corroborate terminated member's—a political dissident who had accused the union of corruption—grievance defense.).

[334] *See Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d at 585; *See also Linton v. United Parcel Service*, 15 F.3d 1365,

1371-1373 (6th Cir. 1994) (refusal to appeal grievance because company's position was "intractable" and union believed appeal would be futile, even while admitting grievance had merit, violated duty of fair representation). *See also Alicea v. Suffield Poultry, Inc.*, 902 F.2d 125 (1st Cir. 1990) (breach of duty may be found where union arbitrarily or in bad faith asks group of workers to strike in sympathy with second group of workers it also represents, knowing that company is likely to terminate workers in first group); *Soto Segarra v. Sea-Land Service, Inc.*, 581 F.2d 291 (1st Cir. 1978) (finding breach of duty of fair representation in union's failure to respond to employee's repeated requests that the union investigate and process his discharge grievance); *Cruz v. Local Union No. 3 of the IBEW*, 34 F.3d 1148, 1153 (2d Cir. 1994) (failing to investigate whether layoff policy was applied appropriately, while not calculated to harm union members, may be so egregious or so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary); *Seymour v. Olin Corp.*, 666 F. 2d 202 (5th Cir. 1982) (union's failure to pursue grievance, because grievant would not discharge his attorney, was arbitrary and breach of fair-representation duty); *Beavers v. United Paperworkers Int'l Union, Local 1741*, 72 F.3d 97, 100 (8th Cir. 1995) (union violates duty where it delays processing of grievance for six-months); *Aguinaga v. United Food & Commercial Workers Int'l Union*, 993 F.2d 1463, 1470-71 (10th Cir. 1993) (union violates duty where it fails to prosecute employer's breach of bargaining agreement and waives rights of local membership in exchange for institutional benefits to union and where motivated by animus toward local union leadership); *Teamsters, Local 860 v. NLRB*, 652 F.2d 1022 (D.C. Cir. 1981) (union had duty to inform clerical unit employees that a seventy percent wage increase, which they had demanded and which was included in contract on which they were to vote, would result in employer's eliminating the entire unit). *But see Smith v. McDonnell Douglas Corp.*, 107 F.3d 605, 608-9 (8th Cir. 1997) (failure to investigate not so perfunctory as to violate duty of fair representation where claimant cannot show that additional investigation would help his cause).

[335] *See Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir.), *cert. denied*, 477 U.S. 908 (1986).

[336] *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171 (7th Cir. 1995), citing *Castelli v. Douglas Aircraft Co.*, 752 F.2d 1480, 1483 (9th Cir. 1985).

[337] *See Harris v. Schwerman Trucking Co.*, 668 F.2d 1204 (11th Cir. 1982); *Thompson v. ALCOA*, 276 F.3d 651, 656 n.5 (4th Cir. 2002) (no breach of duty unless union is 'grossly deficient' in its representation or 'recklessly disregards' member's rights); *Wyatt v. Interstate & Ocean Transp. Co.*, 623 F.2d 888, 890-91 (4th Cir. 1980) (same).

[338] *See e.g. Aguinaga v. United Food & Com. Workers Intern.*, 993 F.2d 1463, 1470-71 (10th Cir. 1993) (union's entering side agreement with employer to reopen plant non-union, waiver of members' rights, concealing of side agreement and filing and withdrawal of sham unfair labor practice charge supports jury verdict of breach of duty of fair representation); *Smith v. United Pacel Service, Inc.*, 96 F.3d 1066 (8th Cir. 1996) (to defeat summary judgment on claim union discriminated on basis of "rocking the political boat" and "running for political office" plaintiff must show evidence of fraud, deceitful action or dishonest conduct by union).

[339] In *Thomas v. United Parcel Service, Inc.*, 890 F.2d 909 (7th Cir. 1989), an active and visible supporter of a reform group within the Teamsters alleged that the union breached the duty of fair representation by failing to fully investigate his discharge grievance. Thomas claimed that his support for the Teamsters for a Democratic Union (buttressed by statistics showing that the Joint Grievance Committee was more than two times as likely to grant grievance petitions of "non-dissident" Teamster members) was the reason his grievance was not fully investigated or approved. *Id.* at 913. The Court noted that discrimination based on an employee's political views or dissident status constitutes a breach of the duty of fair representation. *Id.* at 923. It held that the union members of the Joint Grievance Committee owed a duty to the plaintiff to investigate his grievance notwithstanding his dissenting political views. *Id.*

[340] *See Breininger v. Sheet Metal Workers International Association Local Union No. 6*, 493 U.S. 67 (1989).

[341] *See Rubber Workers Local 12*, 150 NLRB 312 (1964), *enf'c'd*, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

[342] 493 U.S. at 74 ("In *Vaca v. Sipes* …we held that Garmon's preemption rule does not extend to suits alleging a breach of the duty of fair representation.").

[343] *Id.* at 74-78.

[344] *Id.* at 74 (citing Vaca's claim that the Board's unfair labor practice jurisdiction is "typically aimed at 'effectuating the policies of the federal labor laws, not [redressing] the wrong done the individual employee'"). *See Vaca v. Sipes*, 386 U.S. at 181-182.

[345] 28 U.S.C. § 1337(a); § 9(a) of the NLRA is the law cited for jurisdiction in these cases. Most duty of fair representation cases are brought as "hybrid" claims under § 301 of the LMRA (29 U.S.C. § 185), alleging both a breach of the duty of fair representation as well as breach of contract. *See Thomas*, 890 F.2d at 914. *See also supra* note 197196 and accompanying text regarding hybrid fair representation/§ 301 claims.

[346] *Breininger v. Sheet Metal Workers International Association Local Union No. 6*, 493 U.S. 67, 73-84 (1989); *See also Brenner v. United Bhd. of Carpenters & Joiners*, 927 F.2d 1283, 1288 (3d Cir. 1991).

[347] O'Rourke alleged that the union refused to refer him for employment, in violation of Local 30's rules and despite the employer's specific request that he be referred, and that such refusal was and motivated by the union's hostility toward him. *O'Rourke v. Crosley*, 847 F. Supp. 1208, 1216 (D.N.J. 1994).

[348] *See Cox*, 17 F.3d at 1408-9.

[349] Remedies provided under duty of fair representation cases brought in federal or state court can include injunctive

relief (renegotiation of contract provisions, arbitration of claims, reinstatement), compensatory damages (back pay, front pay, fringe benefits, emotional distress, pain and suffering, medical expenses), attorneys fees, prejudgment interest and costs. The NLRB does not award compensatory damages for emotional distress, pain and suffering or medical expenses, except as those might be paid under a company benefit plan wrongfully denied the plaintiff. The Board will, in extreme cases, revoke certification of a particularly egregious union. *See* Osbourne, Jr. at 395-411.

[350] *See McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under the McDonnel-Douglas/Burdine formulation, the plaintiff in a Title VII case must first state a prima facie case that the defendant made an employment decision that was motivated by a protected factor, creating the presumption that discrimination was the motive. Once established, the defendant must provide evidence that its employment decision was based on a legitimate, nondiscriminatory reason. The burden then shifts back to the plaintiff to prove that the defendant's proffered reasons were a pretext for discrimination and the initial presumption of discrimination drops out of the picture.

[351] *See Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991); *Garcia v. Zenith Electronics Corp.*, 58 F.3d 1171 (7th Cir. 1995).

[352] *See infra* at 117.

[353] The vast majority of union corruption cases are brought under federal law. In New York, for example, in the over four decades since the adoption of New York Labor Law § 723 (prohibiting certain financial transactions of union officials and passed in 1959) there are *only five* reported cases.

[354] *See* 29 U.S.C. § 152(2) (2000) (definition of "employer" under NLRA does not include "any State or political subdivision").

[355] In *Overnite* the Western District of Tennessee dismissed the plaintiff's Hobbs Act claims, which could have been fatal to its RICO claim. However, in addition to the Hobbs Act violation, *Overnite* also alleged several state law criminal claims, including attempted murder. The Court ruled that these claims could go forward as predicate acts under RICO. *See Overnite*, 168 F.Supp.2d at 850.

[356] *See e.g.* Cal Pen Code § 503 (Deering 2004) (embezzlement defined as "the fraudulent appropriation of property by a person to whom it has been entrusted") (for an example of a prosecution for a union embezzlement scheme under this statute, *see People v. Clancy*, 184 Cal.App.2d 403, 7 Cal.Rptr. 532 (1st Dist. 1960)); 21 Okl. St. § 1451 (2003) (embezzlement defined) (for an example of a prosecution for union embezzlement under this statute, *See Gibson v. State*, 328 P.2d 718 (Okla.Crim.App. 1958)).

[357] *See e.g.* Iowa Code § 732.1 (2003) (contracting to boycott or strike in sympathy) (prohibits unions from arranging or conspiring through strikes, violence, coercion or threats of force to force others into sympathy strike or boycott); Miss. Code Ann. § 97-23-41 (2004) (Preventing employment by force or violence; conspiracy) (prohibits conspiracy to use of force or violence in furtherance of labor dispute); *but see* 40 Okl. St. § 166 (2003) (conspiracy) (prohibits conviction for conspiracy if related to trade dispute between employer and employees that does not allege use of force or violence); *Lockett v. Constr. Trades Union A. F. of L.*, 207 Okla. 484, 250 P.2d 468 (Okla. 1952) (injunction properly denied where union picketing at building site with legitimate labor dispute, no force or violence was employed, and no secondary boycott was established).

[358] *See e.g.* Code of Ala. § 13A-6-25 (Michie 2003) (crime of coercion) (defines as unlawful for one to use force, threats or intimidation to prevent another from engaging in a lawful occupation; for example of use against union official, *see International Union, United Auto., Aircraft & Agricultural Implement Workers v. Russell*, 264 Ala. 456, 88 So. 2d 175 (1956), *aff'd*, 356 U.S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030 (1958); Code of Ala. §§ 13A-8-1, 13A-8-1(13)(j) (Michie 2003) (theft and related offenses) (§ (13)(j) defines "threat" to specifically include threats to "bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent"); Cal Pen Code § 518 (2004) (extortion) (for examples of extortion schemes by union officials reported under this statute, *see People v. Peppercorn*, 34 Cal. App.2d 603, 94 P.2d 80 (1939); *People v. Bolanos* 49 Cal.App.2d 308, 121 P.2d 753 (1942)); N.Y. Penal § 155.30 (2003) (grand larceny in the fourth degree) (for examples of extortion schemes by union officials reported under this statute, *see e.g. People v Lamm* 292 N.Y. 224, 54 N.E.2d 374 (1944); *Hornstein v Paramount Pictures, Inc.*, 22 Misc.2d 996, 37 N.Y.S.2d 404 (1942), *aff'd*, 266 App. Div. 659, 41 N.Y.S.2d 210 (1943), *aff'd* 292 N.Y. 468, 55 N.E.2d 740 (1944); *People v Squillante*, 12 Misc.2d 514, 173 N.Y.S.2d 749 (1958)).

[359] *See e.g.* M.C.L.S. § 750.263 (2004) (Michigan forgery and counterfeiting statute) (§ 750.263(7)(e) defines "person" who can commit forgery to include "union"); 21 Okla. St. § 1590 (2003) (officer or employee of corporation making false entries) (for example of union official prosecuted under this statute *see Collins v. State*, 70 Okla.Crim. 340, 106 P.2d 273 (Okla. 1940); *see also Gibson v. State*, 328 P.2d 718 (Okla.Crim.App. 1958) (reversing conviction of union president for embezzlement and remanding for trial on issue of forgery and larceny)).

[360] *See* Nev.Rev.Stat. § 614.140 (2004) (prohibits any "compensation, gratuity or reward" to labor representative intended to "influence him in respect to any of his acts, decisions or other duties" including inducement not to call a strike; a gross misdemeanor); N.Y. Penal § 180.15 (2003) (prohibits bribing a labor official by conferring, offering or agreeing to confer any benefit intended to influence a "labor official" in his official duties; a class D felony); Rev. Code Wash. § 49.44.020 (2004) (prohibits bribery of a labor representative; a gross misdemeanor).

[361] *See e.g.* Idaho Code § 18-7803 (2003) (racketeering) (definition of "enterprise"

specifically includes "labor unions"); N.J. Stat. § 5:12-125(3) (2004) (racketeering in casino industry) (defines racketeering to include "any act which is indictable under Title 29, United States Code, § 186 (relating to restrictions on payments and loans to labor organizations) or § 501(c)"); N.M. Stat. Ann. § 30-42-3 (2003) (racketeering) (§ 30-42-3(C) defines "enterprise" as "a sole proprietorship, partnership, corporation, business, labor union, association or other legal entity or a group of individuals associated in fact although not a legal entity and includes illicit as well as licit entities" (emphasis added)); Minn. Stat. § 609.902 (2003) (Minnesota RICO act) (prohibits conspiracy to violate a list of prohibited acts); Wis. Stat. § 946.82 (2003) (racketeering activity and continuing criminal enterprise) (includes, by reference, all activities considered racketeering activity under federal RICO, as well as enumerated Wisconsin crimes).

[362] *See e.g.* "Yet Another Guilty Plea in DC 37 Scandal in NYC," Union Corruption Update (National Legal and Policy Center, Falls Church, VA), Oct. 28, 2002; "Three More New York Bosses Indicted for Grand Larceny," Union Corruption Update (National Legal and Policy Center, Falls Church, VA), May 7, 2001; "Diop Gets Up to 11 Years, $1.4 Million Allegedly Taken," Union Corruption Update (National Legal and Policy Center, Falls Church, VA), Dec. 3, 2001.

[363] 15 Ala. Code §25-7-9 (Michie 1975 & Supp. 2003).

[364] 15 Ala. Code §25-7-5(a)-(b) (Michie 1975 & Supp. 2003).

[365] 15 Ala. Code §25-7-5(d) (Michie 1975 & Supp. 2003). The law, as a legitimate exercise of the state's police power, is not preempted by the Wagner Act and the reports are made available to the Governor for examination and are not available to the public. 15 Ala. Code §25-7-(c) (Michie 1975 & Supp. 2003). *See Alabama State Federation of Labor v. McAdory*, 246 Ala. 1 (Ala. Sup. Ct. 1944), *cert. denied*, 325 U.S. 450 (1945).

[366] Conn. Gen. Stat. Ann. ch. 559, §31-77 (West 2003) provides that Connecticut unions that are not subject to the LMRDA and who have at least 25 members in the state must file annual reports, which are available for inspection by union members. Unions are required to present the reports to members each year, and they are only maintained for two years. The state is authorized to audit the annual reports at the request of any union member and each failure to comply subjects union's financial officer a $25 fine.

[367] F.S.A. § 447.07 (2002 & Supp. 2004) requires unions in Florida to maintain accurate books that itemize "all receipts and expenditures for whatsoever purpose" and gives union members the right to inspect the records at reasonable times. The law specifically exempts employers covered by the Railway Labor Act (but not, curiously, the NLRA). *See* F.S.A. § 447.15.

[368] The Kansas Labor-Management Relations Act, K.S.A. §§44-805-806a (2000), requires unions with more than 100 members to file their constitution, bylaws and annual reports with the Secretary of State (this requirement is waived if the union files a federal LM report). Section 44-804 also requires licensing by business agents. Failure to comply with the law results in fines. The Kansas statute was challenged on preemption grounds and substantially held to be lawful in *Stapleton v. Mitchell*, 60 F.Supp. 51 (D.Kan. 1945).

[369] Minnesota has passed the Minnesota Labor Union Democracy Act. M.S.A. §§ 179.18-179.25 (West 1993 & Supp. 2004). In Minnesota unions that are not subject to the RLA are required to provide union members with a statement of receipts and disbursements on an annual basis. M.S.A. §179.21.

[370] The New York Labor and Management Improper Practices Act requires all unions to make available to members a copy of the financial report and to maintain accurate and detailed books and records conforming with generally accepted accounting principles and to preserve these books for five years. Officers are subject to fines and imprisonment for violations. N.Y. Labor Law §§726-728.

[371] South Dakota unions must file annual statements with the Secretary outlining salaries paid to officers and employees delineating expenditures. There is no provision in the law for disclosure or access to the forms or exemptions. S.D.C.L. § 60-9-6 (Michie 1993 & Supp. 2003).

[372] F.S.A. § 447.09 (2002 & Supp. 2004).

[373] F.S.A. § 447.04, 447.16 (2002 & Supp. 2004).

[374] *See* K.S.A. §§44-804-806a (2000).

[375] N.Y. Penal Law § 180.25 (McKinney 1999 & Supp. 2004). *See e.g. People v. Schepis*, 614 N.Y.S.2d 719 (A.D. 1 Dept. 1994) (defendant alleged to have received a bribe of $3,000 in exchange for "labor peace").

[376] N.Y. Labor Law §§ 720-732 (McKinney 1999 & Supp. 2004).

[377] N.Y. Labor Law § 722.

[378] N.Y. Labor Law §§ 723 (McKinney 1999 & Supp. 2004). As mentioned *supra* at note 350, there are few reported cases on this relatively expansive law, even though it has been on the book for over four decades. *See e.g. CC Lumber Company, Inc. v. Waterfront Commission*, 338 N.Y.S.2d 937 (Ct.App. 1972) (evidence that union official received loan to purchase golf and swimming club with employer breached fiduciary duty, compromised loyalty to members); *Ciccone v. Waterfront Commission*, 437 N.Y.S.2d 661 (Ct.App. 1981) (providing car to union official for personal use breached fiduciary duty, compromised loyalty to members).

[379] This preemptive clause regarding union benefit and authorization defenses is well-drafted and could be a model for a federal one. It reads: "The fact that conduct or acts of an officer or agent of a labor organization have not caused damage to such organization or any of its members, or have been ratified or acquiesced in by such organization or its members, shall not be relevant in determining whether such conduct or acts constitute a violation by such officer or agent of any of the obligations provided in section seven hundred twenty-two an in this section." N.Y. Labor Law § 723.

[380] One of the major concerns was the "no man's land" created where the NLRB declined to exercise jurisdiction and states

were preempted from acting. At the time the LMRDA was being debated only 12 states had any kind of labor relations law. *See* S.Rep. No. 187, 86th Cong., 1st Sess., reprinted in 1 NLRB, Legislative History of the Labor Management Reporting and Disclosure Act of 1959 at 421-23 (1985).

[381] Congress enacted the fiduciary provisions of § 501 because existing state law remedies for union officials' misconduct were inadequate. For example, the minority statement from the Senate report noted only one state had enacted a statute imposing fiduciary obligations on union officials and giving union members a right to sue. *See* Id. at 468.

[382] States should follow the same recommendations made throughout this monograph. The New York code is also a good starting point.

[383] 28 U.S.C. § 1331 (2000).

[384] 28 U.S.C. § 1337(a) (2000).

[385] *Int'l Bhd. of Boilermakers v. Freeman*, 683 F. Supp. 1190, 1193 (N.D. Ill. 1988).

[386] *See United Transp. Union v. Bottalico*, 120 F. Supp. 2d 407, 410-11 (S.D.N.Y. 2000).

[387] Section 501 provides: "When any officer . . . is alleged to have violated the duties declared in subsection (a) . . . such member may sue such officer . . . to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. §501 (2000) (emphasis added). *See Bottalico*, 120 F. Supp. 2d at 408.

[388] *Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers v. Statham*, 97 F.3d 1416, 1419 (11th Cir. 1996).

[389] Compare *Bldg. Material & Dump Truck Drivers, Local 420 v. Traweek*, 867 F.2d 500, 506-07 (9th Cir. 1989) (holding that unions cannot sue under § 501), with *Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers v. Statham*, 97 F.3d 1416 (11th Cir. 1996) (unions can sue under § 501).

[390] *See Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 374 n.16 (1990).

[391] 120 F. Supp.2d 407 (2000). None of the four representative cases highlighted in the monograph contain detailed discussion of jurisdiction questions.

[392] In *Cort v. Ash*, 422 U.S. 66 (1975), the court outlined several factors to determine whether a private remedy is implicit in a statute not expressly providing one. First, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law?

[393] *See Statham*, 97 F.3d 1416, 1419 (11th Cir. 1996); *see also McCullen and Local 1-S, Retail Wholesale and Department Store Union, RWDSU, UFCW, AFL-CIO v. Pascarella*, 2002 U.S. Dist. LEXIS 21854 (S.D.N.Y. 2002).

[394] New York, where this opinion was authored, is one of the few states that provides protection for breach of fiduciary duty. *See* N.Y. Labor Law §§ 722-723 (McKinney 1999 & Supp. 2004). As noted earlier, there are *only five* reported cases under this expansive statute, even though it has been on the books for over four decades.

[395] *See infra* at 117.

[396] *See* 29 U.S.C. §401(b) (2000) (LMRDA will "afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations"). While clearly focusing on the rights of union members, the Act presumes that it is the labor organizations who should be responsible for policing themselves in the first instance. This theme was repeated regularly in the legislative history.

[397] Sample language might read (new language in *italics*): "(b) 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, *or by any current or former leader of such labor organization, or by any parent or subsidiary labor organization*, such member *or labor organization* 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; *provided, however, that a member is not required to make any request of a labor organization under this subsection where that member reasonably believes that making such request will be futile, is unlikely to provide adequate relief, or where delay is likely to result in irreparable harm.* 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.

[398] This will also prevent dissident members of a union from having their rights extinguished if they later win leadership of the union. Compare *McCullen v. Pascarella*, 2002 U.S. Dist. LEXIS 21854 at *29-*30 (§ 501 claim does not have subject matter jurisdiction where labor organization originally filed claim even after a proper party union member later joins as plaintiff) with *Weaver v. United Mine Workers of America*, 160 U.S. App. D.C. 314, 492 F.2d 580 (D.C. Cir. 1973) (court has jurisdiction in § 501 claim originally brought by dissident union members even though labor organization realigned as plaintiff when dissident faction later won union leadership).

[399] *See Statham*, 97 F.3d 1416, 1419 (11th Cir. 1996).

[400] *See e.g. San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959); *International Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147-48 (1976).

[401] *International Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147-48 (1976). This formulation is commonly known as *Machinists* preemption, after the party in this Supreme Court decision, and will be referred to as such in the remainder of the monograph.

[402] *Metropolitan Life Ins. Co.*, 471 U.S. 724, 749.

[403] *Building & Constr. Trades Council v. Associated Builders and Contractors of Mass.*, 507 U.S. 218, 226 (1993) (internal quotes and citation omitted).

[404] *Id. See also Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (city conditioning renewal of employer's cab franchise on settlement of labor dispute preempted by NLRA, due to Congress' decision not to regulate use of economic weapons in labor disputes); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996) (no government official or entity can alter the delicate balance of bargaining and economic power that the NLRA establishes for any purpose).

[405] *See Building & Constr. Trades Council*, 507 U.S. at 224.

[406] *See* Note, "The Exclusive Jurisdiction of the NLRB as a Limitation on the Application of RICO to Labor Disputes," 76 Ky.L.J. 221 (1987-88).

[407] *See Sedima S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479 (1985). The Court in Sedima opened the floodgates to civil RICO actions by holding that RICO defendants did not have to be convicted of the "predicate acts" alleged to support the RICO action, and striking down the requirement previously imposed by the Second Circuit that the plaintiff's injury arise from a RICO-type violation and not simply from one of the predicate acts. *Id.* 496-7.

[408] *See Enmons*, 410 U.S. at 396-99.

[409] *Id.* at 400.

[410] 18 U.S.C. §241 provides: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having to exercise the same; . . . They shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . . " *See United States v. DeLaurentis*, 491 F.2d 208 (2d Cir. 1974).

[411] 18 U.S.C. §241 (2000).

[412] *DeLaurentis*, 491 F.2d at 211, 213.

[413] *See* 29 U.S.C.. §187 (provides for damages claims in federal district court for secondary boycotts in violation of 29 U.S.C. §158(b)(4)).

[414] 646 F.2d 1323 (9th Cir. 1980)

[415] At least one commentator finds this expansion problematic. *See* Note, "The Exclusive Jurisdiction of the NLRB as a Limitation on the Application of RICO to Labor Disputes," 76 Ky.L.J. 221 (1987-88) (*Thordarson* court makes mistake in looking to seriousness of the crime in evaluating whether Hobbs Act violation occurs; same problem which concerned Supreme Court in *Enmons*).

[416] 18 U.S.C.. § 1961(1)(C) (2000).

[417] *United States v. Local 560*, 780 F.2d 267, 280-82 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *Sullivan v. Crosley*, No.91-3335, 1992 WL 30966335, 1992 U.S. Dist. LEXIS 16168 (E.D.Pa. Oct. 20, 1992); *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 23 (1971).

[418] 688 F.2d 919 (3d Cir. 1982).

[419] Compare *Butcher's Union v. SDC Investment, Inc.*, 631 F.Supp. 1001 (E.D. Cal. 1986) (RICO claim for payments in violation of 29 U.S.C. § 186 valid since §186 specifically listed as predicate act; mail and wire fraud claims dismissed, since all other labor law violations remain in the exclusive jurisdiction of NLRB) with *Local 355, Hotel, Motel, Restaurant & High Rise Employees v. Pier 66 Co.*, 599 F.Supp. 761 (S.D. Fla. 1984) (claim for unlawful payments under § 302 of LMRA preempted by exclusive jurisdiction of NLRA where illegal payments are also unfair labor practices, notwithstanding that RICO also lists § 302 violations as predicate acts).

[420] Critics may argue that preempting criminal prosecutions does not leave union members without recourse; they can still bring failure to represent charges against corrupt union leadership. The fact that corrupt union leaders are so anxious to get cases out of federal court and into the NLRB illustrates the problem. The reason preemption is so vigorously argued by defendants is not due to federalism concerns—it is because the Board is more lenient on misconduct and its remedies, not being punitive, do not include fines or imprisonment.

[421] *See supra* at 104.

[422] *A. Terzi Production v. Theatrical Protection Unit*, 2 F.Supp.2d 485 (S.D.N.Y. 1998) (*Enmons* does not apply where union does not represent employees of employer); *see also C&W Construction Co. v. Brotherhood of Carpenters and Joiners of America, Local 745*, AFL-CIO, 687 F.Supp. 1453 (D.Haw. 1988) (same); *United States v. Quinn*, 514 F.2d 1250, 1259-60 (5th Cir. 1975) (same).

[423] The same preemption arguments are made in defense of § 411 and § 501 claims under the LMRDA. In *O'Rourke* the plaintiff alleged that the verbal threats and refusal to refer him according to hiring hall rules violated these LMRDA sections. The defendants argued that these claims should be dismissed as being preempted by the NLRA. The Court dismissed this argument as without merit, citing the holdings in Hardeman and Sullivan, stating that actions arising over alleged LMRDA violations are not preempted by the NLRA even where the underlying conduct may also be unfair labor practices. *See Hardeman*, 401 U.S. at 241, 91 S.Ct. at 615; Sullivan, 1992 WL 309635 at *7, 1992 U.S. Dist. LEXIS 16168 at *22.

[424] The class of pilots alleged violation of a Louisiana State law prohibiting extortion; federal Hobbs Act extortion; violation of § 302 of the LMRA (illegal payments to labor officials); mail and wire fraud; and the federal statutory

crime of embezzlement from an employee benefit plan. They also alleged breach of fiduciary duties under ERISA.

[425] The Third Circuit cites two cases on the issue of the required "nexus" that must exist between the union and the company before an illegal payment claim will stand. *See United States v. Sink*, 355 F.Supp. 1067 (E.D. Pa.), *aff'd* mem., 485 F.2d 683 (3rd Cir. 1973) (district court instructs jury that "indefinite, uncertain, future, vague possibility" of representing employees does not meet "would admit to membership" requirement of statute); *United States v. Cody*, 722 F.2d 1052 (2nd Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984) (no violation where, at time gifts were made, employer had no actual plans to employ potential members on project in union's jurisdiction and did not ever commence such a project).

[426] 29 U.S.C. §158(a)(2) (§ 8(a)(2) of the NLRA). The Department of Labor recently revised its interpretation of financial reporting requirements to require unions (and employers) to report substantially all payments made between the organizations for things like meals, room reimbursement, entertainment and other common exchanges. *See e.g.* Employer LM-10 (Employer Reports) Advisory at http://www.dol.gov/esa/regs/compliance/olms/lm10_advisory.htm; Notice of Proposed Rulemaking: Labor Organization and Employee Reports, 70 Fed. Reg. 51,165-51,225 (August 29, 2005) (to be codified at 29 C.F.R. 404).

[427] See Testimony of Paul Rosenzweig, Testimony Before The Subcommittee on Employer-Employee Relations & Subcommittee on Workforce Protections—Committee on Education and the Workforce U.S. House of Representatives (June 27, 2002) in http://edworkforce.house.gov/hearings/107th/eer/lmrdatwo62702/rosenzweig.htm (on file with author).

[428] Today the only administrative process for employees to prosecute corruption is an unfair labor practice charge for failure to meet the duty of fair representation under § 8(b) of the NLRA. This charge, handled administratively by the National Labor Relations Board, is not useful due to the delay and limited remedies available to the Board. *See supra* at 55.

[429] Fees are sometimes available in these cases, but they still require an enormous amount of work due to their legal complexity, which unfortunately also reduces the chance of ultimate success. Needless to say, lawyers are not chasing down these claims.

[430] In *Overnite*, just one of many examples in this monograph, hundreds of acts of violence and intimidation were thrown out on summary judgment due to the fact that they were arguably preempted by the NLRA (even though the NLRB has no effective remedy for these acts). *See supra* at 94-95.

[431] A good example of an exception is the Washington (D.C.) Teachers Union. Some of its covered employees worked for private-sector contractors, and thus had to file an LM-2 form. Teachers in Washington were able to reach the corruption scheme of their local union by threatening action against the national union, the American Federation of Teachers. Ideally, the teachers should have had a direct remedy against their local leadership.

[432] *See e.g. supra* at 48 (voting lists for internal elections).

[433] In FY 2004, the Office of Inspector General for the Department of Labor reported to Ccongress that it collected $36,368,273 for labor racketeering activities. *See* 51 Office of Inspector General, Department of Labor, *Semiannual Report to the Congress: October 1, 2003-March 31, 2003*, at 53 (2004); 52 Office of Inspector General, Department of Labor, *Semiannual Report to the Congress: April 1, 2004-September 30, 2003*, at 51 (2004).

[434] The Uniform Commercial Code has been universally adopted in all 50 states. Other model codes drafted with the assistance of the NCCUSL and adopted throughout the United States are the Uniform Partnership Act, the Uniform Child Custody Jurisdiction Act, and the Uniform Anatomical Gift Act. *See* http://www.uniformlawfoundation.org/ulf/DesktopDefault.aspx (last visited by author August 23, 2004). However, the NCCUSL has drafted over 250 model acts and only these four have been universally adopted; some model codes have not been adopted in even one jurisdiction.

[435] The Uniform Trade Secrets Act, developed as the result of efforts by the National Conference of Commissioners on Uniform State Laws and the intellectual property bar, has enjoyed considerable support nationally. *See* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utsa.asp (last visited by author August 23, 2004).

[436] *See* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-meta.asp (last visited by author on August 23, 2004).

[437] Harry S. Truman, Message to the Congress of the United States on Greece and Turkey (March 12, 1947) (transcript available at http://www.trumanlibrary.org/exhibit_documents/index.php? pagenumber=8&titleid=226&tldate=1947-03-12%20%20&collectionid=tdoc&PageID=1&groupid=3458).

Appendix—Summary of Model Code Recommended Changes

Issue (page number)	Code Section(s)	Recommended Change
Agency fee payers are not considered "members" under the LMRDA (p. 11).	29 USC 402(o) (Sec. 3(o) of LMRDA)	Amend 3(o) to make clear that "member" includes agency fee payers.
Some courts hold that exhaustion of remedies is jurisdictional under § 101(a)(4) (p. 11).	29 USC 401(a)(4) (Sec. 101(a)(4) of LMRDA)	Clarify that the "exhaustion of remedies" requirement is not jurisdictional.
Unions do not provide copies of constitution, bylaws, annual financial statements, collective bargaining agreements or notify members of rights under LMRDA (p. 12).	29 USC §§414-415 (Secs. 104-105 of LMRDA)	Amend Sec. 105 to require full dissemination of constitution, bylaws, annual financial statements, and collective bargaining agreements, and notify members of rights under LMRDA each year, enforceable through administrative fines and penalties.
LM-2 reporting requirements still do not uncover as much as they should (p. 12).	29 USC §§ 431-432 (Secs. 201-202 of LMRDA)	Require detailed reporting of smaller unions (same as on LM-2 form), separate pass-through and asset turnovers, reconcile intra-union income streams, create consistent rules for handling depreciation of assets, etc.
Title III trusteeships can be used to squash dissent in union locals (pp. 14–15).	29 USC 461 et seq. (Sec. 301 et seq. of LMRDA)	Eliminate "performance of bargaining agreements or other duties of a bargaining representative" as a valid reason for a trusteeship.
Title IV union election has complex rules for using voting list by candidates, appears to eliminate access to lists in right to work states (pp. 15–16).	29 USC 481 (Sec. 401 of LMRDA)	Amend Sec. 401 to allow all candidates for union office to copy voting list in any union covered by LMRDA, including those in right to work states, with criminal penalties for misappropriation or misuse of voting lists.
Some circuits require exhaustion of internal remedies as a jurisdictional requirement under Sec. 501 (pp. 16–17).	29 USC 501(b) (Sec. 501(b) of the LMRDA)	Clarify that exhaustion of remedies is not jurisdictional in Sec. 501 cases and that courts may either waive such requirements based on pleadings or, alternatively, require the plaintiff to exhaust remedies prior to continuing lawsuit (w/o prejudice).
Intent element of Sec. 501(c) is unclear (i.e. proof of "union authorization" and/or "union benefit" required in some jurisdictions) (p. 17).	29 USC 501(c) (Sec. 501(c) of LMRDA)	Clarify that intent is proven by totality of circumstances and that proof of union benefit or union authorization is not required to prove intent (although they may be persuasive facts).
NLRB scaled back scope of failure to represent cases it will consider in its *Scandia National Laboratories* decision and will now only enforce Sec. 8(b)(1)(A) where NLRA is violated (pp. 18–19).	29 USC 158(b)(1)(A) (Sec. 8(b)(1)(A) of NLRA)	NLRB should return to its holding in *Graziano Construction* and the U.S. Supreme Court holding in *Scofield v. NLRB* that Sec. 8(b)(1)(A) is violated when a union fails to uphold its duties under any labor law.

Issue (page number)	Code Section(s)	Recommended Change
Union officials have argued that there must be a present intention to represent employees before they can be found to violate Sec. 302 of the LMRDA. (pp. 20–21).	29 USC 186 (Sec. 302 of the LMRA)	Statute should define "representative" and "admit to membership" to include any union that either presently seeks to represent or could, at some point in the future, seek to represent employees, irrespective of whether that group of employees is currently represented by another union.
LMRA exempts employers covered by the Railway Labor Act. (p. 21).	29 USC 142(3), 152(2), (3)	Amend the definition of employer in LMRA to remove the exemption of employers covered by the RLA.
RICO defendants are sometimes dismissed on the basis that they cannot be both "persons" and an "enterprise" in the same case. (pp. 23–24).	18 USC 1962(c)	Amend RICO to clarify that, a RICO "person" and "enterprise" need not necessarily be separate and distinct entities.
RICO defendants sometimes argue that a series of actions only combine into one "act" under RICO and therefore do not constitute a pattern of racketeering activity. (pp. 24–25).	18 USC 1961(5)	Amend RICO to clarify that each incident giving rise to a predicate act is a separate "act" for purposes of proving "at least two acts of racketeering activity."
Intent element of the crime of embezzlement from an employee benefit plan is unclear (i.e. proof of "union authorization" and/or "union benefit" required in some jurisdictions) (pp. 26–27).	18 USC 664	Clarify that intent is proven by totality of circumstances and that proof of union benefit or union authorization is not required to prove intent (although they may be persuasive facts).
"Intangible right" property interest of union members (i.e. right to an "honestly administered" union) read out of mail fraud statute by Supreme Court in *McNally* (p. 27).	18 USC 1341	Amend Sec. 1341 to approve of "intangible right" cases, i.e. to clearly state that a scheme to defraud is a crime independent of whether money or property is obtained.
Acts which qualify as Hobbs Act extortion often go unpunished under "labor exception" created in *Enmons* decision (pp. 28–29).	18 USC 1951	Amend Sec. 1951 to clarify that extortionate actions, even if pursued while exercising rights under other laws, are never excepted from Hobbs Act protection.
Burden for proving breach of federal common law duty of fair representation unclear (varying standards of proof from negligence to actual intent) (pp. 30–32).	NA	Use shifting burden approach to prove breach of duty of fair representation similar to McDonnell Douglas formulation used in Title VII discrimination cases.
Circuit courts of appeal are split on whether a union has standing to bring a claim under the LMRDA (pp. 33–34).	29 USC 501(b)	Amend Section 501 to clearly state that a union has standing in LMRDA cases.

Issue (page number)	Code Section(s)	Recommended Change
Defendants often argue that the NLRA preempts criminal prosecution for crimes (pp. 34–36).	NA	Federal courts should rule against preemption arguments in criminal prosecutions of labor leaders, but can take judicial notice of NLRB rulings on labor law issues brought up in these prosecutions.
Current legal requirements are piecemeal and vary by jurisdiction—many states have no prohibitions on union corruption (pp. 38–41).	NA	Develop a model that: • Establishes a "floor" standard for union conduct; • Creates easily accessible administrative remedies; • Regulates the three major types of union corruption (internally-directed, externally-directed and generalized).

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