Fiduciary Duties of Union Officers Under Section 501 of the LMRDA

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In 1959 Congress enacted the Labor-Management Reporting and Disclosure Act as a result of congressional findings of widespread corruption, breaches of trust, and disregard of the individual rights of employees. The act provides union members with a general "bill of rights," election safeguards, trusteeship regulations, and places detailed financial reporting and disclosure requirements on unions, employers, and union officials. Additionally, in a subchapter entitled "Safeguards for Labor Organizations," the act provides for the continuing judicial supervision of individual union officers in section 501. This provision establishes the fiduciary obligations of union officers. The purpose of this comment is to examine the breadth of these fiduciary provisions as well as the procedural prerequisites to enforcing these obligations.

I. Breadth of Section 501's Duty

The Statute and Legislative History

Section 501(a) initially enunciates the general notion that "officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members

as a group. An enumeration of specific duties that these persons owe to the labor organization and its members follows. Specifically, the act requires:

(a) that these persons hold the organization's money and property solely for the benefit of the organization and its members;

(b) that these persons manage, invest, and expend the same in accordance with its constitution and by-laws, and any resolutions of the governing bodies adopted thereunder;

(c) that these persons refrain from dealing with the organization as an adverse party or in behalf of an adverse party in any matter connected with their duties;

(d) that these persons not hold or acquire any pecuniary or personal interest which conflicts with the interests of the organization;

(e) and that these persons account to the organization for any profit received by them in whatever capacity connected with business conducted by them on behalf of the organization.

Any general exculpatory resolution of a union governing body purporting to relieve these persons of liability for breaches of the enumerated duties is void as a matter of public policy. There is one caveat in section 501(a)—these duties are to be interpreted in light of the special problems and functions of a labor organization.

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Enactment of this provision was particularly important to organized labor because it feared that the courts would fail to distinguish between the duties of corporate directors (to make money) and those of union officials (to improve benefits for members). George Meany expressed that fear during the committee hearings: "The committee has approved provisions to which we take vigorous exception."

"Operating from a premise with which we certainly agree and which we have consistently supported, that union office is a sacred trust, the committee had proceeded to establish standards of fiduciary responsibility which could only lead to widespread confusion and the multiplicity of litigation."

There are certain obvious similarities between the obligation for safe, honest administration of funds and property entrusted to the care of a union officer or employee to those obligations which bank or corporate officers owe their stockholders. The dissimilarities, however, are far more important, and it is these which the committee has ignored.
Section 3(Q) of the LMRDA defines the persons subject to these duties in a broad fashion to include not only the officers and agents, but also any elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority).  

Section 3(Q) has not given courts many interpretive problems. Section 501(a) is much more troublesome because it initially imposes a broad duty and then defines specific obligations.

Considerable discussion and even disagreement by the commentators and courts exists as to the breadth of section 501(a). The question generally posed is whether the specific obligations enumerated in section 501(a) are exclusive or merely illustrative of the general fiduciary obligations of these persons who occupy positions of trust. Since the listing deals almost exclusively with fiscal matters, the question has been alternatively stated as whether the fiduciary duties of union officials extend to non-fiscal matters. There has been no definitive United States Supreme Court ruling interpreting the breadth of section 501(a). These questions should be answerable, however, by examining the legislative history of section 501 as well as the text itself.

Section 501 was taken totally from a bill introduced by Representative Elliot which was reported by the House Committee on Education and
Since there is no indication in the legislative history that any changes were intended by the House when it included the fiduciary provision of the Elliot Bill in the Landrum-Griffin Bill (which was ultimately enacted as section 501), the supplementary report on the Elliot Bill is critical to a proper understanding of the intended scope of the section. The report provides that the committee intended the fiduciary principle embodied in the bill to extend to all the activities of union officials and other union agents or representatives. Further, the report specifically negates the idea that the fiduciary principle would apply to union officials only in their handling of money or other property. Representative Elliot, the author of the provision, reiterated this broad view in a speech before the House in which he stated that the provision was a comprehensive statement of the fiduciary duties of union officers and would apply to such matters as collective bargaining and conducting daily union business.

20. "We affirm that the committee bill is broader and stronger than the provisions of S. 1555 which relate to fiduciary responsibilities. S. 1555 applied the fiduciary principle to union officials only in their handling of "money or other property" (see S. 1555, sec. 610), apparently leaving other questions to the common law of the several States. Although the common law covers the matter, we considered it important to write the fiduciary principle explicitly into Federal labor legislation. Accordingly, the committee bill extends the fiduciary principle to all the activities of union officials and other union agents or representatives." H.R. REP. No. 741, 86th Cong., 1st Sess. 81 (1959) (emphasis added).
21. Id.
22. "We wrote a comprehensive statement of the fiduciary duties of union officers. The assets of a labor union belong to the members. Union office is a position of trust to be used for the benefit of the members. In collective bargaining, and in conducting other business, union officers must put their fiduciary obligations ahead of their personal interest." 105 CONG. REC. 15,549 (1959). Despite this rather strong and clear enunciation of intended scope of section 501(a), at least one commentator has taken the position that it was fiscal wrongdoing, not administrative decision making which Congress intended to circumscribe. Note, Counsel Fees for Union Officers Under the Fiduciary Provision of Landrum-Griffin, 73 YALE L.J. 443 (1964).

The author supports his opinion by noting that Senator McClellan himself in proposing the fiduciary provision stated that its aim was to eliminate the serious misuses of funds, misappropriations, looting of union treasuries, etc. Reliance on Senator McClellan's statements is erroneous for several reasons. In the first place it was the Elliot Bill, not the McClellan Bill which was finally enacted—thereby making Senator McClellan's remarks irrelevant in assessing the Elliot Bill's intended scope. Further, the supplementary report of the Elliot Bill clearly stated that the provisions of the Elliot Bill were broader and stronger than S. 1555 [Senator McClellan's Bill] and that the duties extended to all the activities of union officials.

The fiduciary provision proposed by Senator McClellan and adopted by the Senate as part of S. 1555 declared that any person designated a union official **shall,
Further support for this view is the broad statutory language itself. The command to refrain from dealing with the union as an adverse party clearly should extend to nonfiscal matters. The broader view is also consonant with the underlying purpose of the LMRDA, which was to guarantee democratic functioning of internal union affairs.

Some commentators favor a restrictive approach to section 501 due to the danger of excessive judicial intervention into the internal affairs of unions. However, the procedural prerequisites to bring an action under 501(a) lessen that danger by providing for a judicial screening of claims before suit is allowed to be brought.

**Judicial Interpretation of Section 501(a)**

Most of the circuit courts of appeals which have considered the matter have concluded that section 501 imposes a broad fiduciary duty on union officials that extends beyond fiscal matters, although this view has not been accepted with unanimity. In fact, the first United States Court of Appeals to consider the matter decided that section 501 applied only to fiscal matters. The Second Circuit in *Gurton v. Arons* based its holding on the view that section 501 was not intended to be an omnibus provision under which union officials could be sued on any ground of misconduct.

with respect to any money or other property in his custody or possession by virtue of his position as such officer, agent, or representative, have a relationship of trust to any such labor organization and the members thereof . . . ." S. 1555, 86th Cong., 1st Sess. § 610 (1959).

For an extensive examination of the legislative history of the act, see Dugan, supra note 18.

23. See Dugan, supra note 18. In *Wirtz v. Hotel Employees*, 391 U.S. 492, 496 (1968), the Supreme Court criticized such a restrictive view with respect to a Title IV violation: "'[T]his emphasis overlooks the fact that the congressional concern to avoid unnecessary intervention was balanced against the policy expressed in the Act to protect the public interest . . . .' See also Note, 75 COLO. L. REV. 1189 (1975). The author states: "'The courts, in short, are to insure only that the union members themselves run the union.'" Id. at 1191.

24. See 29 U.S.C. § 501(b) (1970) (requires that leave of court must be obtained before the proceeding be brought; and requires good cause shown with a verified application).

25. 339 F. 2d 371 (2d Cir. 1964) (case dealt primarily with two controversial resolutions passed by the general membership, but declared void by International Executive Board; the plaintiffs were members asking that these resolutions be effectuated). See also Head v. Brotherhood of Ry. Clerks, 512 F.2d 398 (2d Cir. 1975); Yanity v. Benware, 376 F.2d 197, 201 (2d Cir.), cert. denied, 389 U.S. 874 (1967).

26. "A simple reading of that section shows that it applies to fiduciary responsibility with respect to money or property of the union and that it is not a catch-all provision under which union officials can be sued on any ground of misconduct.
The Second Circuit arrived at this position by erroneously examining the legislative history of the Senate version of section 501 (the McClellan bill) and not the legislative history of the Elliot Bill which was ultimately enacted.27

The majority position is the one taken by the Eighth Circuit in Johnson v. Nelson.28 There the court concluded that careful analysis of the whole act refutes the notion that the statute is narrow in its scope and is limited solely to pecuniary responsibilities or improper use of union funds.29

The Ninth Circuit has interpreted section 501 broadly by reasoning that the action complained of indirectly affected the fiscal matters of the union. For example, in Kerr v. Shanks30 the action complained of was the refusal to comply with the duty to hold a referendum and the indirect fiscal effect was that plaintiffs' salaries, which required authorization by referendum, remained unpaid. Using this approach, the court reached the same result as the Eighth Circuit's broad view, but this approach was rather circuitous. Clearly the enumerated fiduciary obligations are closely related to pecuniary matters, and a close nexus between the acts complained of and the union's fiscal matters will aid the courts in determining their role under section 501; but it is not necessary that there be a fiscal nexus for the court to take jurisdiction under section 501.

**Exculpatory Clauses**

Section 501(a) provides that any *general* exculpatory clause included in a union's constitution and by-laws or enacted as a resolution by any governing body of a union which purports to relieve the officials of with which the plaintiffs choose to charge them. If further corroboration for this position be needed it will be found in the legislative history and in the law review articles cited by Judge Tenney in his opinion in the district court." 339 F.2d at 375.

27. It is important to note that the Second Circuit stands alone in its narrow reading of section 501(a).

28. 325 F.2d 646 (8th Cir. 1963).

29. *Id.* at 649. This approach has been followed by a large majority of the circuit and district courts that have considered it. See Pignotti v. Local 3, Sheet Metal Workers Int'l Ass'n, 477 F.2d 825 (8th Cir. 1973); Sabolsky v. Budzanoski, 457 F.2d 1245 (3d Cir.), *cert. denied*, 409 U.S. 853 (1972); Cefalo v. Moffet, 449 F.2d 1193 (D.C. Cir. 1971); McCabe v. Electrical Workers Local 1377, 415 F.2d 92 (6th Cir. 1969); Parks v. IBEW, 203 F. Supp. 288 (D. Md. 1962), *aff'd*, 314 F.2d 886 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963).

liability for breaches of section 501 duties is invalid as a matter of public policy. Clearly the union could not adopt a provision in its constitution or by-laws which negated the applicability of section 501 to its officers. The issue becomes complicated when considering a resolution passed to excuse a particular breach of a very limited nature. The statutory language does not address this problem, but resort to the legislative history is helpful if not dispositive.

The House sponsors of the bill expressed the view that a resolution purporting to excuse a past breach of the fiduciary duties would be void.31 As to future actions, a union’s authorization of an officer to take some action such as investing union funds in bonds would relieve the officer from losses that occur at a later date, even if the investment later proved imprudent.32 However, even though a union could authorize an officer to make expenditures that would normally subject the officer to liability under section 501, it is clear that a union could not authorize a conflict of interest situation or pass a resolution allowing an officer to profit from his position as officer.33

The first case considering the exculpatory clause provision was Highway Truck Drivers v. Cohen.34 The union members had passed a resolution authorizing the use of union funds to pay counsel fees of the officers who were charged with embezzling union funds. The plaintiffs attacked the resolution as falling within the express prohibition of general exculpatory clauses in section 501(a). The court disallowed the payment on the grounds that the union’s constitution did not permit such expenditures.35

31. “The committee bill ... explicitly invalidates any general provision in a union constitution or bylaws purporting to excuse union officials from breaches of trust. The bill follows the well established distinction between conferring authority upon an agent or trustee, which is permissible and protects him against liability, and attempting to excuse breaches of trust, which is here made void as against public policy.” H.R. REP. NO. 741, 86th Cong., 1st Sess. 81 (1959). However, there are contrary views expressed in the legislative history by Senator Goldwater. In his analysis of the bill, the Senator observed that although union officers may not be excused for breaches of their fiduciary obligations by any general exculpatory clauses, they may be relieved “by specific exculpation.” 105 CONG. REC. 16,149 (1959).


33. The court would simply invalidate such action as contrary to federal labor policy as expressed in the LMRDA.


35. The court also felt that since the State of Pennsylvania had brought criminal charges against the officers, it would be against public policy to allow payment of counsel fees. Id. at 620.
The court, however, found that the payment was *not* within the prohibition of section 501(a) and distinguished it from a resolution purporting to relieve an officer of liability for breach of the duties declared in section 501(a).\(^{36}\) This seems to be a proper construction of the act and legislative history since the resolution merely authorized payment of the fees and did not absolve the defendants of their guilt.\(^{37}\)

In a recent Ninth Circuit case, *Kerr v. Shanks*,\(^ {38}\) the court considered, in dicta, an alleged retroactive authorization of a breach of section 501 by way of referendum passed by the membership. The court in fact found that the conduct of the officer in question was not approved or authorized by this particular referendum but stated that even if the referendum had included the issue in question and had been approved retroactively by the members, it would have been of no avail to the defendants.\(^ {39}\) The court reasoned that to allow such validations of breaches of fiduciary duties would emasculate the LMRDA and destroy any protection from the type of improper practices that the act was intended to prevent.\(^ {40}\) The court unequivocally stated that once a breach of section 501(a) has been established, the union is entitled to relief, irrespective of any tardy purported authorizations.\(^ {41}\) This approach, which helps to insure that members have a voice in the operation of the union, seems to be the one most consistent with the purposes of the LMRDA.\(^ {42}\) Submission of a fait-accompli to the

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36. *Id.* at 618.
37. The courts have strictly limited the right of unions to intercede on behalf of union officials in suits brought under section 501. For example, in *Holdeman v. Sheldon*, 204 F. Supp. 890 (S.D.N.Y. 1962), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962), the union’s motion to intervene was denied where the union had no interest independent of the defendant officers. Further, in the case of *Tucker v. Shaw*, 378 F.2d 304 (2d Cir. 1967), the Union’s counsel was disqualified from representing union officials even though the fees were to be paid by the defendant officers. The reason for such a rule is the potential conflict of interest that the attorney would face if he represented both the union and the union officials. *See, e.g.*, Teamsters v. Hoffa, 242 F. Supp. 246 (D. D.C. 1965).
38. 466 F.2d 1271 (9th Cir. 1972).
39. *Id.* at 1276 n.3.
40. "To permit such validations of officers’ breaches of fiduciary obligations would be inconsistent with the purposes of The Labor-Management Reporting and Disclosure Act, one of which is to protect union members, including a minority, from the improper practices of union management, or an unscrupulous majority of the membership." *Id.*
41. *Id.*
42. "The provision of § 501 would be completely emasculated if every time . . . the officers . . . breached their duties, they could put through a constitutional amendment . . . to legitimize their former derelictions . . . ." *Morrissey v. Curran*, 423 F.2d 393 (2d Cir.), *cert. denied*, 399 U.S. 928 (1970). In *Morrissey* the court
membership is hardly a substitute for prior discussion and therefore should be strictly scrutinized by the courts. 43

Some Applications of the Duty

Due to the broad fiduciary duties imposed on union officials by the act, the types of conduct that breach those duties range from simple situations, such as self-dealing, 44 to more complex situations, such as unprofitable investment of union funds. 45 For example, in Anderson v. Vestal 46 a breach occurred when a union official bought a car from the union at a deflated price. The court reasoned that the official was dealing with the union as an adverse party. 47 Also, unauthorized disbursements of union funds made to 48 or by 49 union officials are recoverable for the benefit of the union under section 501. 50 Moreover, as the court noted in Puma v. Brandenburg, 51 even the reasonableness of the salaries paid officials may be examined under section 501. Apparently political contributions will not be subject to scrutiny under section 501 if the union's constitution and by-laws authorize such expenditures. 52 This is so primarily because section 501 does not attempt to regulate or limit the purposes for which a union may spend money, but rather requires that any funds

upheld an exculpatory clause in a trust agreement relieving the trustees of liability when they make expenditures on the advice of counsel. This result has been legislatively overruled by the Employment Retirement Income Security Act of 1974. 29 U.S.C. §§ 1001-381, esp. § 1110(a) (Supp. 1974).

43. One commentator has suggested that the courts should differentiate these situations from those where the union had ratified certain acts. Horner v. Feron, 362 F.2d 224 (9th Cir.), cert. denied, 385 U.S. 958 (1966), and Head v. Brotherhood of Ry. Clerks, 378 F. Supp. 774 (W.D. N.Y. 1974), aff'd, 512 F.2d 398 (2d Cir. 1975), raised the possibility of ratification of allegedly unauthorized acts. However, it is submitted that ratification action should be strictly scrutinized by the courts in order to insure the ratification acts are not in fact within section 501's prohibition.

44. Self-dealing is gaining some financial advantage in the portion of trust one holds (e.g., where a business agent sells jobs to those not otherwise eligible to get them).

45. An example is where the union invests money in a particular business on the advice of its officers and without expert consultation.

46. 79 LRRM 2755 (M.D. Tenn. 1971).

47. Id. at 2758. Title II of the LMRDA is helpful in ferreting out these conflict of interest situations by requiring detailed reports of union officials under certain circumstances. LMRDA § 202(a), 29 U.S.C. § 432 (a) (1970).


50. A common example of this type of breach is unauthorized pension payments made by union officials. Cf. Morrissey v. Segal, 526 F.2d 121 (2d Cir. 1975).


52. McNamara v. Johnston, 522 F.2d 1157 (7th Cir. 1975).
A troublesome area is counsel fees for defendant officers in a section 501 suit. Generally the courts, as a matter of policy, denied these defendants the right to use union counsel or to have their own retained counsel paid out of union funds. The courts reason that to allow the officers to defend themselves by using the power and wealth of the very union assets which they are accused of pilfering would defeat the purposes for which the LMRDA was enacted. However, if a suit against a union official will have a direct and injurious effect on the union itself or is in reality directed against the union, the union has the power to lend its financial support to the officers for legal expenses. Another exception to the general rule is where the union officers successfully defend the section 501 allegations. Here the policies underlying the act permit reimbursement if authorized by the union constitution, by-laws or resolution. One recent case involving counsel fees had a peculiar twist. In Morrissey v. Segal, the officers had negligently paid pension fund money to an unauthorized recipient, but they did so on the advice of counsel. The union’s trust fund agreement

53. Id. In Pignotti v. Local No. 3, 477 F.2d 825 (8th Cir. 1973), the court held that union officials are the proper parties to interpret the union’s constitution, provided that the interpretations are fair and reasonable; however, the court noted that it would not hesitate to strike down conduct otherwise violative of section 501.

Similarly, Sabolsky v. Budzanoski, 457 F.2d 1245 (3d Cir. 1972), held that the union officials, not the courts, are to interpret union constitutions; however, unions have no "carte blanche" to act illegally under the guise of following the constitution or by-laws.

54. Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962): "As a general proposition we think funds of a union are not available to defend officers charged with wrongdoing which, if the charges were true, would be seriously detrimental to the union and its membership.... The treasury of a union is not at the disposal of its officers to bear the cost of their defense against charges of fraudulently depriving the members of their rights as members."

55. Cohen v. Highway Truck Drivers, 182 F. Supp. 608 (E.D. Pa.), aff’d, 284 F.2d 162 (3d Cir. 1960), cert. denied, 365 U.S. 833 (1961). The court added that even if a majority of the members had approved such a proposal, if the charges against the officers are proven, such proposal is void. Accord, Tucker v. Shaw, 378 F.2d 304 (2d Cir. 1967).

56. 182 F. Supp. at 620. For example, where one union has disaffiliated from another, and the officers of the new union are being sued to return funds, the direct effect on the new union is obvious.

57. Holdeman v. Sheldon, 311 F.2d 2, 3 (2d Cir. 1962).
58. Id.
59. 526 F.2d 121, 127 (2d Cir. 1975).
60. Id.
governing pension fund disbursements had a specific exculpatory clause relieving officers from personal liability where funds were disbursed on the advice of counsel.\textsuperscript{61} The court upheld the exculpatory clause, but denied the defendants reimbursement of attorney's fees\textsuperscript{62} a reasoning that since the legal expenses were causally related to their own misconduct, reimbursement would not be allowed.\textsuperscript{63}

\textit{Violation of Internal Political Rights}

The fiduciary obligation embodied in section 501 also protects members' internal political rights. This was clearly recognized in \textit{Semancik v. Mine Workers, District No. 5}\textsuperscript{64} which involved a permanent injunction against willful and repeated violations of members' rights of free speech (Title I of the LMRDA). There, the court expressed the general principle that "union officers . . . have a fiduciary duty under section 501 . . . to insure the internal political rights of all members of their organization."\textsuperscript{65} The court thus affirmed that there is a parallel breach of section 501 when the officers do not respect the other rights granted by the act and/or by Constitution. In these situations where the member has a direct remedy under two titles of the act, the finding of a section 501 violation is not superfluous because section 501(b) of the act (unlike the other sections) provides that the court may allow the successful plaintiff compensation for counsel fees. Another example of parallel breaches can be seen in \textit{Retail Clerks, Local 648 v. Retail Clerks International Association},\textsuperscript{66} where the court found violations of sections 101(a)(1) (dealing with equal rights of members) and 501 when insurgent candidates were fired from their union jobs immediately after losing an election.\textsuperscript{67}

The courts also seem to be using section 501(b) to enforce rights secured to members by the union constitution as well. Some examples of conduct that courts have found to be violative of section 501 are:

(a) Refusal to execute a membership resolution, even though the officials were relying on directives from the International;\textsuperscript{68}

\textsuperscript{61} Such an exculpatory clause would be invalid today under ERISA. 29 U.S.C. § 1002(14)(A) (Supp. 1976).
\textsuperscript{62} 526 F.2d at 127.
\textsuperscript{63} \textit{Id.} at 128. Similarly, the court noted that had the officers acted blamelessly or without fault, they would have been entitled to reimbursement.
\textsuperscript{64} 466 F.2d 144 (3d Cir. 1972).
\textsuperscript{65} \textit{Id.} at 155.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} Johnson v. Nelson, 325 F.2d 646 (8th Cir. 1963).
(b) Refusal to complete arrangements for a special convention to which the members were constitutionally entitled; 69
(c) Refusal to submit a member-initiated referendum to a vote; 70
(d) Failure to keep the members informed on matters that they must decide. 71

Often violations occur in the election area (Title IV of the LMRDA) which constitute a parallel breach of section 501. However, Congress has limited judicial intervention in this area by providing in Title IV that the Secretary of Labor has the exclusive power to enforce election guarantees. 72 The Supreme Court in Calhoon v. Harvey 73 affirmed the Secretary's exclusive power in this area. It is still theoretically possible, however, for a court to take jurisdiction under section 501(b) to remedy pre-election abuses.

**Problem Areas: Pensions and Collective Bargaining**

There has been considerable uncertainty whether the fiduciary duties imposed in section 501 extend to the administration of union welfare and pension plans, which are governed by section 502(a). 74 Primarily, the argument arises from the fact that the fiduciary provisions in the McClellan or Senate version of the bill provided that union officials have fiduciary responsibilities not only to their labor organization and the members thereof but also to any trust in which such organization is interested, 75 whereas the bill that was finally enacted simply provides that union officials occupy positions of trust in relation to such organization and its members. The argument made is that the failure to include the latter phrase indicates congressional intent to exclude welfare and pension plans. 76 This position is augmented by the inclusion of the phrase, "trust in which such organization is interested," in section 502(a) pertaining to bonding requirements. The argument assumes too much. 77 Nowhere in the legislative history are there any remarks to the effect that such funds were

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73. 379 U.S. 134 (1964).
75. The provisions of the McClellan bill were adopted by the Senate in the Kennedy-Ervin Bill. See S. 1555, 86th Cong., 1st Sess. § 610 (1959).
76. This is so because section 501 does not expressly extend its coverage to officials of a trust in which a labor organization is interested, as did its precursors.
77. Cf. Dugan, supra note 18, at 293-94.
intended to be excluded; on the contrary the legislative history is replete with statements which would indicate their inclusion.\textsuperscript{78} The courts have construed section 501 to cover pension and welfare plans.\textsuperscript{79} However, where the trustees of such funds are composed of union and employer personnel, the section 501 duty is applicable only to the union officials because the employer personnel normally occupy a position in labor-management relations adversary to the union.\textsuperscript{80} This limit does not hamper the union members' rights to see that the funds are properly managed. The Pension Reform Act of 1974 has to some extent superseded section 501 by providing detailed fiduciary provisions for all trustees of these funds,\textsuperscript{81} thereby insuring the proper management of the funds irrespective of whether the trustee is an employer representative or union official.

A more troublesome area is the applicability of section 501(a) to collective bargaining. Commentators have suggested that section 501(a) is applicable to the collective bargaining process.\textsuperscript{82} Initially it might be helpful to note that clearly the provisions of section 501 are applicable with respect to any secret profits or personal benefits received by a union official as a result of his collective bargaining activities since the act expressly provides that the official may not deal with the union as an adverse party.\textsuperscript{83}

\textsuperscript{78} For example, "The McClellan committee recommendations on regulation and control of union funds specifically stated that: 'Since union dues moneys, as well as health and welfare funds, are in actuality a trust, being held for the members of the union by their officers, the committee feels that attention should be given to placing certain restrictions on the use of these funds, such as are now imposed on banks and other institutions which act as repositories and administrators for trust funds.' " 105 CONG. REC. A8062 (1959) (emphasis added).


\textsuperscript{80} Tucker v. Shaw, 308 F. Supp. 1 (E.D.N.Y. 1970). "[S]ection 501(a) seems to be limited to those who are in some manner working for or connected with the labor organization, and not to those working on a board of trustees as coordinate representatives of a management which is usually in an 'adversary' position in labor-management relations." Id. at 6.


\textsuperscript{83} That notion is clearly discernible in the legislative history from Representative Elliot's remarks: "In collective bargaining, and in conducting other business,
There is little case law on the matter, but the few decisions discussing it have split. In *Schonfeld v. Rarback* the court found a breach of the fiduciary provisions of section 501 where the union officials had entered into a "sweetheart" contract with the employer. Nevertheless, the courts have shown a great reluctance to involve themselves in the more complex area of labor negotiations, primarily for two reasons:

1. The difficulty in determining whether a union bargaining decision was made as an honest policy choice or through unlawful collusion;

2. The difficulty of fashioning appropriate relief.

For example, in *Echols v. Cook* the union officials agreed to a cut in mileage pay for the members when faced with new competition to the union labor. The dissident members sought an injunction barring the defendant officers from purporting to act as their officers. The court reasoned (1) that what the plaintiffs were requesting was for the court to substitute its judgment for the judgment of the duly elected collective bargaining representatives; (2) that even if the union's position was unwise, this is not an issue for determination by the court; (3) that to comply with the disgruntled members' request would place the court in the position of a compulsory arbitrator; (4) that an NLRB-supervised election is available if the members wish to change their bargaining representatives. Similarly, in a recent decision, *Carr v. Learner*, the court held that a claim under section 501 that the union officers had failed to bargain in good faith with the employer over retirement benefits did not state a cause of action. The court concluded that section 501 simply does not union officers must put their fiduciary obligations ahead of their personal interests.

"The failure to recognize this familiar principle lies at the bottom of most of the wrongdoing uncovered by the Senate select committee. A man cannot faithfully serve two masters...."

"The committee bill ..., provides an effective remedy by which individual union members may recover ..., any secret profit which he has acquired through any abuse of his fiduciary position." 105 CONG. REC. 15,549 (1959).

84. 61 LRRM 2043 (S.D.N.Y. 1965).
85. Such collective bargaining contracts are those entered into by collusion of the employer and the union.
86. 61 LRRM 2043 (S.D.N.Y. 1965).
87. 56 LRRM 3030 (N.D. Ga. 1962).
88. *Id.* at 3032.
89. *Id.*
90. *Id.*
91. *Id.*
93. *Id.* at 104.
give the court plenary powers to review the bargaining decisions of union negotiators.⁹⁴ The court noted, as in Echols, that these claims should be brought to the NLRB, and if such allegations are true, the Board can find an unfair labor practice under section 8(d)⁹⁵ of the Labor Management Relations Act.⁹⁶

Apparently the courts are reluctant to infer illegal collusion and, moreover, will require substantial evidence before taking jurisdiction under section 501 to remedy collective bargaining problems. However, the guarantees contained in the LMRDA are designed to improve, not to impede, the effective function of trade unions and collective bargaining. As noted by an independent study group sponsored by the Committee for Economic Development:

It is important that this law not be used as a device to harass union leaders. Such a result would be doubly unfortunate, since it would play havoc with orderly relations within the union and in collective bargaining and it would tend to discourage good men from seeking union office.⁹⁷

A union official should not be liable for honest errors of judgment or even decisions which may be reasonably thought to be imprudent. It is important that the act insure democratic operation of unions, but in the process the act should not be construed to weaken or undermine their role as collective bargaining agents.

II. Enforcement of Section 501(a) Rights—Section 501(b)

Section 501(b)⁹⁸ of the LMRDA regulates the manner of presenting allegations of fiduciary breaches. The lawsuit envisioned under section

⁹⁴. Id. at 105.
⁹⁶. 410 F. Supp. at 105.
⁹⁸. 29 U.S.C. § 501(b) (1970) provides: "When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex
501(b) resembles a stockholders' derivative suit brought in the corporate context in that the conditions precedent to instituting a section 501(b) action are similar.\footnote{For example, there must be a demand for the union governing body or officials to take action, and the relief sought must be for the benefit of the labor organization. See, e.g., Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968). Note also the remarks of Representative Elliot: "Section 501(b) provides that if the union fails to bring suit upon the request of the member, the member may apply to any State or Federal court for leave to bring an action on behalf of the organization similar to a minority stockholder's suit against a corporation." 105 CONG. REC. 15,549 (1959).} Generally, section 501(b) provides that following an alleged violation of a section 501(a) duty, the dissenting union member\footnote{The case law is in agreement that a member of the labor organization must be the one who brings suit, \textit{i.e.}, not a member of another union. See, e.g., Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968).} must first make demand on the labor organization to sue to recover damages or secure an accounting or other appropriate relief.\footnote{Id. The writer's research revealed no cases where what is a reasonable time under section 501(b) was discussed. However, note that under Section 402(A)(2) three months is designated as the outside limit of a reasonable time requirement, in a section of the act dealing with election safeguards.} If the labor organization fails to do so within a reasonable time,\footnote{Id.} the member may sue, in either federal or state court, the union officials who have allegedly breached their duties.\footnote{Id.} However, in order to sue, leave of court must be obtained by verified application and for good cause shown.\footnote{Id.} These procedural prerequisites are designed to protect the union from undue harassment and vexatious litigation. Lastly, section 501(b) provides that the trial judge may allow successful plaintiffs compensation for litigation expenses including counsel fees.\footnote{Id.}

\textbf{Proper Parties}

The fiduciary duty is owed to the labor organization and its members as a group. Section 501(b) recognizes this rule by requiring that the relief sought be for the benefit of the labor organization.\footnote{29 U.S.C. § 501(b) (1970).} However, this does not preclude a member from using section 501 to remedy a personal wrong he has suffered at the hands of union officials. For example, in Johnson v. 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."
Nelson the court ordered union officials to deliver to the plaintiffs funds duly voted to them by the membership as reimbursement for their expenses in defending themselves against prior wrongfully brought union charges. The court reasoned that the vindication of the plaintiffs’ rights benefitted the organization by restoring integrity to the union’s internal democratic process.

Also, the courts do not allow section 501(b) actions to be brought by or against unions. Thus the act is strictly construed as allowing actions to be brought only by union members and only against “union officials” as that term is defined in the act. One court has reasoned that since the union may avail itself of state remedies directly, the union is not a proper plaintiff under section 501(b).

The interstitial area of disaffiliation or merger is troublesome. As noted earlier, the procedural prerequisites of section 501(b) are designed to protect the union from undue harassment and vexatious litigation. It is obvious these requirements serve no purpose when the old union is no longer in existence due to a disaffiliation or merger. Yet the courts have still required standing to sue (the member requirement), and have held that members of the new entity may not sue the officers of the old as such under section 501(b). It is submitted that in such cases the procedural requirements of section 501(b) are inapposite and should not be blindly applied without looking to the reason underlying the rule. However, irrespective of the loss of action under section 501(b), the former members still have a state court action to remedy their grievances.

107. 325 F.2d 646 (8th Cir. 1963).
108. Id. at 653.
109. Id.
113. See, e.g., Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968) (disaffiliation); Bruno v. Mundy, 127 N.J. Super. 84, 316 A.2d 474 (1973) (merger).
114. See, e.g., Phillips v. Osborne, 403 F.2d 826 (9th Cir. 1968).
115. This notion was suggested in the Phillips case. Later the plaintiff in Phillips brought a state court action in Washington to recover funds after there had been a disaffiliation. The defendants (former union officials) obtained an injunction from the federal district court in Washington on the basis of protecting or effectuating the
Demand

There has been considerable question whether the demand required to be made on the union officials is a necessary prerequisite for suit. The reason for the demand is to give the union a chance to make a good faith effort at remedying the situation. Ordinarily, a request is necessary or the proceedings will be dismissed. However, a few recent cases suggest that the demand need not be made if the request would be futile.

Some courts have treated the demand requirement as a matter of form. For example, in Cassidy v. Horan, the court held that a general demand directed to the union to return money spent against the union’s interest was insufficient since the officials were not asked to sue themselves. It is suggested that this position totally ignores the reason for the demand rule and is unduly technical. Fortunately this approach is not being followed, as illustrated by a recent case, Dinko v. Wall, where the court faced the issue of whether a letter to the union by a dissident member asking for an accounting was sufficient to meet the demand requirement. In holding that it was sufficient, the court noted that more often than not the union members are of limited education and are rarely represented by counsel when requesting action by the union.

Good Cause

Another procedural prerequisite to suit is the showing of good cause. Several interpretations of the phrase “good cause” have been suggested by the commentators. The legislative history indicates that the intended meaning of the phrase is probable cause. Probable cause is usually federal court’s earlier judgment. The Court of Appeals (Ninth Circuit) reversed, stating that the matter had never been litigated and that the court’s earlier ruling that the plaintiff had no standing to sue under 501(b) was not res judicata to the state court action. See id.

117. Hood v. Journeyman Barbers Union, 454 F.2d 1347 (7th Cir. 1972); McNamara v. Johnston, 522 F.2d 1157 (7th Cir. 1975).
118. 405 F.2d 230 (2d Cir. 1968).
119. Id.
120. 531 F.2d 68 (2d Cir. 1976).
121. Id. at 73.
122. See Clark, supra note 18.
123. This approach finds support in the legislative history in remarks made by Senator Javits, one of the sponsors of the bill that section 501(b) was taken from: “If the member is given leave to sue—in other words if he shows some probable cause—he may sue.” 105 Cong. Rec. 6529 (1959).
defined as a reasonable ground for belief in the existence of facts warranting the proceedings prayed for.\footnote{124} Good cause is and should be an elastic concept and is often used as a shorthand summary of the underlying policy reasons why a litigant should be able to attain a specified result. Here, there are two competing policies: (1) the supervision of union officials in the exercise of their fiduciary obligations; and (2) protection, through a preliminary screening mechanism, of the operations of unions against unjustified interference or harassment. Both of these policies can be best served if section 501(b) is construed to mean that the plaintiff must show a reasonable likelihood of success by demonstrating a reasonable basis for believing the material facts he has alleged.

Procedurally, the allegation of good cause can be made ex parte.\footnote{125} When considering the plaintiff’s allegations, the judge may look beyond the pleadings and consider testimony in order to determine whether good cause has been shown.\footnote{126} If defendants wish to contest that finding of good cause, courts allow them to move to vacate the order allowing suit.\footnote{127} This is a good practical way to allow the unions to protect themselves from harassing litigation.\footnote{128}

\footnote{124. \textit{Black’s Law Dictionary} 1365 (4th ed. 1951).}
\footnote{125. 29 U.S.C. § 501(b) (1970).}
\footnote{126. Horner v. Ferron, 362 F.2d 224 (9th Cir.), \textit{cert. denied}, 385 U.S. 958 (1966), where the court stated: “Thus if the defendant can establish, by undisputed affidavit, facts which demonstrate that the plaintiff is not a member of the defendant union, or that the action is outlawed by a statute of limitations, or that the action cannot succeed because of the application of the principles of \textit{res judicata} or collateral estoppel, or that plaintiff has not complied with some controlling condition precedent to the bringing of such a suit, then although these defects do not appear on the face of the complaint, they may warrant denial of the application.” \textit{Id.} at 229.}
\footnote{127. \textit{See, e.g.}, Dinko v. Wall, 531 F.2d 68 (2d Cir. 1976).}
\footnote{128. Also, it is not necessary that a union member exhaust all of his internal union remedies before bringing this action. \textit{See, e.g.}, Purcell v. Keane, 406 F.2d 1195 (3d Cir. 1969); Horner v. Ferron, 362 F.2d 224 (9th Cir.), \textit{cert. denied}, 385 U.S. 958 (1966); \textit{contra} Penuelas v. Moreno, 198 F. Supp. 441 (S.D. Cal. 1961).}
Counsel Fees and Litigation Expenses

As in most other fiduciary contexts, the act allows the judge to allot a "reasonable part of the recovery" to the plaintiffs for counsel fees and litigation expenses.129 Because of the term "recovery," there was initially confusion and discussion as to whether the plaintiffs had to receive a money judgment before this provision was operative.130 However, the courts have construed this section as meaning that any time a plaintiff is successful in proving a breach of the fiduciary duties, irrespective of whether he obtains a money judgment, injunction or other relief, the judge may allow such expenses.131 Such expenses are payable by the local union in whose benefit the judgment is had132 after a claim for such fees is made to the local union governing board.133 Not surprisingly, the courts have also held that it is not necessary that the local union be joined as a party before it is assessed for costs.134

Conclusion

The imposition of fiduciary obligations on union officials represents a landmark in federal labor legislation. After the findings of widespread corruption in the particular unions investigated by the McClellan Committee, it is clear that section 501 was sorely needed. Theoretically, the section gives the judiciary a tool with which it can fashion certain minimum ethical and legal standards by which the behavior of union leaders must be measured, and it provides the courts with authority and flexibility to insure that the rules imposing obligations or duties on union officials receive more than mere formal compliance.

Perhaps the most unfortunate aspect of section 501 is the inartful drafting of the act which leads to problems concerning its scope. Congress should have used more definitive language which would not be open to so many varying interpretations. It is important that union officials, attorneys, and, most importantly, lay members know exactly what the respec-

130. See Note, Counsel Fees for Union Officers under the Fiduciary Provision of Landrum-Griffin, 73 YALE L.J. 443 (1964).
131. See, e.g., Kerr v. Shanks, 466 F.2d 1271 (9th Cir. 1972).
133. See, e.g., Cassidy v. Horan, 405 F.2d 230 (2d Cir. 1968).
134. E.g., Local 92, Int'l Ass'n of Bridge Structural & Ornamental Iron Workers v. Norris, 383 F.2d 735 (5th Cir. 1967).
tive rights and duties of the parties are. Although there is not yet a great deal of case law under section 501, certain patterns are emerging that are consistent with the policies underlying the act, and the courts appear to be willing to use section 501 as a tool to insure democracy in the internal operations of unions.

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