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The Fiduciary Duties of Union Officials
Under Section 501 of the LMRDA†

R. Theodore Clark, Jr.*

I. INTRODUCTION

Congress enacted legislation dealing in a comprehensive manner with internal union affairs for the first time when it passed† the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).‡ Impetus for its passage was, to a very important extent, provided by the McClellan Committee's exposures of union abuses and malpractices.§ One of the Committee's overall findings was that union funds in excess of ten million dollars were either stolen, embezzled, or misused over a period of fifteen years by officials of the five unions investigated.¶ It is not too surprising, therefore, that provisions imposing fiduciary duties upon union officials were included in section 501 of the Act.¶

The author wishes to express his appreciation to Professor Russell A. Smith of the University of Michigan Law School for his assistance and advice in the preparation of this Article.

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‡29 U.S.C. §§ 401-531 (1964) [hereinafter cited as LMRDA].


§29 U.S.C. § 501 (1964). This section provides, in relevant part: (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitu-
Although sections 501(a) and (b) will be thoroughly discussed, it is advisable initially to summarize their provisions. Section 501(a) declares that union officials occupy positions of trust with respect to their unions. Taking into account the special problems and functions of a labor organization, that provision imposes a fiduciary duty on union officials in three specific instances. First, union officials are required to hold the union's assets solely for the benefit of the union and to invest, manage, and expend them in conformity with the union's constitution and bylaws and any resolutions passed thereunder. Second, such officials are required to refrain from dealing adversely with their union and from acquiring any interests of a pecuniary or personal nature which conflict with the interests of the union. Third, union officials are required to account for any profits received in connection with transactions conducted by them for the union. The last sentence of subsection (a) voids all exculpatory provisions in any union constitution, bylaw, or resolution which attempt to relieve union officials of the fiduciary duties imposed by the statute.

Section 501(b) provides for suits by union members to enforce the duties set out in subsection (a). Procedurally, the member must first request his union to sue. If the union refuses or fails to sue, the member may then bring suit after obtaining leave of a court "for good cause shown." Section 501(b) further provides that the court "may allot a reasonable part of the recovery in any action . . . 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."
Although the provisions of section 501 may seem clear at first blush, they contain a number of serious ambiguities. It is the purpose of this Article to discuss and attempt to resolve these ambiguities.

II. THE NATURE AND SCOPE OF THE FIDUCIARY DUTIES IMPOSED BY SECTION 501(a)

A. UNION OFFICIALS COVERED

Section 501(a) of the LMRDA imposes fiduciary duties upon "officers, agents, shop stewards, and other representatives" of unions. Section 3(q) of the Act7 defines the phrase "officers, agents, shop stewards, and other representatives" broadly to include not only the constitutional officers of a union, "but also anyone, regardless of title, or lack thereof, who performs duties commonly performed by constitutional officers or any member of an 'executive board' of a union."8 Undoubtedly, this broad definition is the main reason why there has not yet been any serious litigation on this point.9

6. Although this Article deals only with the civil aspects of the union official's fiduciary obligations under § 501, it should be noted that § 501(c) sets forth criminal sanctions against any union officer or employee "who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization . . . ." Duker, Fiduciary Responsibility of Union Officials, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 519, 526-27 (R. Slovenko ed. 1961) [hereinafter cited as SYMPOSIUM]; see generally Wollett, Fiduciary Problems Under Landrum-Griffin, 13 N.Y.U. ANN. C. ON FED. LABOR 267, 272-73 (1960).


8. Duker, supra note 6, at 519. Duker noted that § 3(q)’s meticulous recital of all possible categories of persons in power in unions . . . [was] motivated largely by the decision in NLRB v. Coca-Cola Bottling Co. of Louisville, Inc. [340 U.S. 264 (1956)], wherein it was held that the term ‘officers’ means ‘constitutional officers,’ that is, persons referred to in the union constitution as officers.


9. In Woody v. Sterling Aluminum Prods., Inc., 244 F. Supp. 84, 89 (E.D. Mo. 1965), aff’d on other grounds, 365 F.2d 448 (8th Cir. 1966), cert. denied, 386 U.S. 957 (1967), the court observed that the statute did not furnish a jurisdictional ground for actions against labor organizations and employers. See also Local 92, Iron Workers v. Norris, 66 L.R.R.M. 2297 (8th Cir. 1967) (local union not an indispensable
B. THE BREADTH OF THE FIDUCIARY DUTIES

There has been considerable discussion and disagreement about the breadth of the fiduciary obligations imposed upon union officials by section 501(a). The first sentence of the section declares, seemingly without qualification, that certain designated union officials occupy positions of trust, whereas the second sentence imposes only three specific obligations upon union officials. The question posed, therefore, is whether the broadly stated fiduciary duty imposed by the first sentence of section 501(a) is limited and qualified by the three specific obligations of the second sentence. Since these specific obligations deal almost exclusively with fiscal wrongdoing, the question may alternatively be stated as whether the fiduciary duties of union officials under the Act extend only to fiscal matters.

The legislative history points toward a broader construction. Section 501 of the LMRDA was taken in toto from the Elliott bill, the bill which was reported out by the House Committee on Education and Labor. 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 Elliott bill as part of the Landrum-Griffin bill which was ultimately enacted, the supplementary report accompanying the Elliott bill submitted by the author and four other representatives is extremely relevant. As to whether the fiduciary duty of a union official extends to nonfiscal matters, the supplementary report notes:

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.\textsuperscript{13}

The conclusion that the fiduciary provision finally enacted into law was intended by its authors to be given a broad construction is further supported by the following excerpt from a speech by Representative Elliott:

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.\textsuperscript{14}

Despite the relatively strong legislative history supporting a broad construction, one commentator has taken the position that “it was fiscal wrongdoing rather than administrative decision-making at which Congress aimed its sights . . . .”\textsuperscript{15} To support this conclusion, the commentator declared that “Senator McClellan himself, in proposing the fiduciary provision, stated that its aim would be to eliminate ‘the serious misuses of funds, misappropriations of funds, looting of union treasuries, and so forth . . . .’”\textsuperscript{16} An examination of the legislative history, however, clearly shows that such reliance on the views of Senator McClellan is misplaced.

In the first place, the fiduciary provision which was finally enacted into law was the one contained in the Elliott bill, not the one proposed by Senator McClellan.\textsuperscript{17} Consequently, Senator McClellan’s comments concerning his fiduciary provision are not relevant, while the comments of the sponsors of the Elliott bill are. The latter clearly stated that the fiduciary provisions in the Elliott bill were “broader and stronger than the provisions of S. 1555 [Senator McClellan’s provisions] which relate to fiduciary responsibilities,” and that the duties extended “to all the activities of union officials . . . .”\textsuperscript{18}


\textsuperscript{14} 105 CONG. REC. 15,549 (1959), LEG. HIST. 1059-60.

\textsuperscript{15} Counsel Fees 450.

\textsuperscript{16} Id.

\textsuperscript{17} 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, 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).

Further support for the position that section 501(a) applies to nonfiscal as well as fiscal matters can be found in the language of the statute itself. The second sentence of section 501(a), which supposedly refers only to fiscal wrongdoing, contains language which has been interpreted as imposing fiduciary duties of a nonfiscal nature. A union official is prohibited from dealing with the union "in behalf of an adverse party in any matter connected with his duties . . . ." Relying spe-

19. Conversely, it may be argued that the fiduciary duties set forth in § 501(a) relate solely to fiscal wrongdoing inasmuch as the provision for attorney's fees in § 501(b) speaks in terms of a "recovery." See Staff of Senate Comm. on Labor and Public Welfare, 86th Cong., 2d Sess., Section-by-Section Analysis of the Labor-Management Reporting and Disclosure Act of 1959, at 14 (Comm. Print 1959), Leg. Hist. 846. See generally text accompanying notes 168-83 infra.

20. In addition, it is arguable that the broad statement of the LMRDA's declaration of findings, purposes, and policy contained in § 2(b) supports the position that the fiduciary duties imposed by § 501(a) are not strictly monetary in nature. Section 2(b) reads as follows:

The Congress further finds, from the recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.


However, a strong counter-argument can be made. The Kennedy-Ervin bill which imposed no fiduciary duties upon union officials contained the same findings. S. 505, 86th Cong., 1st Sess. § 2(b) (1959). Senator Goldwater said that § 2 of the Kennedy-Ervin bill was a mere pious gesture, having no legal effect, providing no remedy for enforcement and designed to create the misleading public impression that the bill effectively placed union officials in the status of fiduciaries, a status which the public was demanding.


21. One commentator observed that "this prohibition . . . extends beyond money dealings; it can include collective bargaining dealings as well." Duker, supra note 6, at 521. See Rosen, The Individual Worker in Grievance Arbitration: Still Another Look at the Problem, 24 Mo. L. Rev. 233, 285 (1959); Developments in the Law—Judicial Control of Actions of Private Associations, 76 Harv. L. Rev. 983, 1003 n.51 (1963); see generally text accompanying notes 198-212 infra.
cifically on this provision, the court in *Schonfeld v. Rarback* held that section 501(a) was not strictly limited to monetary matters but extended to such matters as collusive collective bargaining agreements.

A majority of the courts have construed section 501(a) broadly. For instance, in *Nelson v. Johnson*, the court held that the president and treasurer of a local union violated their fiduciary duties when they refused to abide by a resolution passed by the local membership directing the payment of the attorney’s fees and costs incurred by the plaintiffs in an action under Title I of the LMRDA. While noting that section 501(a) “speaks broadly in one breath and narrowly in the next,” the court declared that it was “no parsimonious dole by Congress, to be in turn niggardly measured out by the Federal courts.” Accordingly, the court concluded that the fiduciary duties imposed upon union officials were “as broad as human experience in the labor field.” In affirming the decision, the Eighth Circuit stated that section 501(a) “imposes fiduciary responsibility in its broadest application and is not confined in its scope to union officials only in their handling of money and property affairs.”

The court in *Moschetta v. Cross* held that the members of a union’s executive board violated their fiduciary obligations under section 501(a) when they refused to hold a special convention which had been previously authorized in accordance with the union’s constitution. In *Parks v. IBEW*, the court declared that “the broad declaration in the first sentence of section 501(a)

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23. The value of this decision as precedent is subject to question inasmuch as the Second Circuit had previously held that § 501(a) is applicable only “with respect to the money and property of the union...” Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964).
25. 212 F. Supp. at 240.
26. Id. at 296.
27. Id. at 240.
emphasizes the nature of the officers' duty, which is not limited to pecuniary matters.\footnote{31} In addition, the Oregon Supreme Court upheld a trial court's decision that certain union officers violated their fiduciary obligations under section 501 where "there was evidence to support the charge of abuse of democratic processes in conducting the affairs of the union relating to election of officers . . . .\footnote{32}

On the other hand, the Second Circuit in \textit{Gurton v. Avrons}\footnote{33} held that the fiduciary duties embodied in section 501(a) did not extend beyond the handling of the union's money or property. The court said:

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 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.\footnote{34}

The only legislative history cited by the district court related to the debate on Senator McClellan's fiduciary provision which was subsequently passed by the Senate as part of S. 1555.\footnote{35} However, it was the considerably broader fiduciary provision contained in the Elliott bill rather than Senator McClellan's fiduciary provision which was finally enacted as part of the LMRDA. The reliance placed on this clearly inaccurate use of legislative history by the district court casts doubt on the Second Circuit's holding in \textit{Gurton}.

\begin{itemize}
  \item 203 F. Supp. at 295-96.
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\end{itemize}
C. THE "SPECIAL PROBLEMS AND FUNCTIONS" PROVISION

While section 501(a) imposes upon union officials a broad fiduciary duty, it also provides that "the special problems and functions of a labor organization" must be taken into account in applying that duty.\textsuperscript{36} Enactment of this provision was particularly important to organized labor since it feared that any fiduciary obligations which might be imposed upon union officers would not be interpreted to take into account the particular problems and purposes of modern unionism.\textsuperscript{37} The following statement by George Meany, President of the AFL-CIO, indicates the nature and extent of the concern felt by organized labor:

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 has proceeded to establish standards of fiduciary responsibility which could only lead to widespread confusion and the multiplicity of litigation.

There are certain obvious similarities between the obligation for safe, honest administration of funds and property entrusted to the care of a union officer or employee to those obligations which bank or corporate officers owe their stockholders. The dissimilarities, however, are far more important, and it is these which the committee has ignored.

The prime responsibility of the union officer is to advance the interest and welfare of the members. The prime concern of the banking official is to enhance the value of the property he holds in trust.

A union does not exist for the purpose of making money. It exists as a mechanism through which its members can combine to promote their mutual improvement, both as employees and as members of society generally, and both materially and in other ways.

One of our main objections is that the reach of this fiduciary concept as expressed in the bill is not determinable and the property [sic] of many union activities now considered as normal union functions is shrouded with the blanket of uncertainty and confusion.\textsuperscript{38}

Despite the fears of organized labor, it is clear that the fiduciary responsibilities of an administrator differ from those of a corporate director and that the fiduciary obligations of a union official differ from either those of an administrator or a corporate

\textsuperscript{36} The phrase "taking into account the special problems and functions of a labor organization" does not clearly indicate its referent. Although this phrase could be given a narrow construction and held to apply only to union officers, it seems more logical to say that it is directed at both union officers and the courts. See Counsel Fees 451 n.49.


\textsuperscript{38} 105 Cong. Rec. A6402 (1959), Leg. Hist. 1048.
director. Although some older cases fail to make this important
differentiation,39 substantially all modern cases distinguish be-
tween the duties imposed upon various types of fiduciaries. Sec-
tion 501(a)'s special problems and functions provision only makes
explicit what is already implicit. The legislative history con-

The supplementary views of those congressmen who spon-

sored the fiduciary provision which was subsequently enacted

include the following statement:

The general principles stated in the bill are familiar to the
courts, both State and Federal, and therefore incorporate a
large body of existing law applicable to trustees, and a wide
variety of agents. The detailed application of these fiduciary
principles to a particular trustee, officer, or agent has always
depended upon the character of the activity in which he was
engaged. They bear upon a family trustee somewhat differ-
ently than a corporate director, upon an attorney quite differ-
ently than a real estate agent. The bill wisely takes note of
the need to consider "the special problems and functions of a
labor organization" in applying fiduciary principles to their offi-
cers and agents.40

Thus, the purpose of the special problems and functions provi-
sion in section 501(a) is clear.41 It is an affirmative directive to
the courts to take into account the special characteristics of
unions when determining the fiduciary obligations of union of-

substantiation, see 105 CONG. REC. 17,900 (1959) (remarks of Senator
John Kennedy), LEG. HIST. 1075; 105 CONG. REC. A6573 (1959) (remarks
of Representative Brademas), LEG. HIST. 1051; 105 CONG. REC. 14,989-90
(1959) (remarks of Senator Morse), LEG. HIST. 1059.

41. The United States Chamber of Commerce, however, concluded
that "a major loophole . . . [was] created by limiting the fiduciary duty
to take into account the special problems and functions of a labor or-
organization." 105 CONG. REC. 14,274 (1959), LEG. HIST. 1049. Representa-
tive Brademas made a direct reply to this assertion:

The bill imposes upon labor union officials the responsibilities
of a fiduciary. The exact application of general fiduciary prin-
ciples always takes into account the nature of the enterprise.
A corporate director is not judged in exactly the same fashion
as a family trustee, but both are subject to the highest duty of
fiduciary responsibility. The bill establishes exactly the same
test for union officials.

105 CONG. REC. A6573 (1959), LEG. HIST. 1051. Accord, 105 CONG. REC.
14,989 (1959) (remarks of Senator Morse), LEG. HIST. 1059.

42. For a particularly interesting case which considered the func-
tion of an international president and his relation to the local union,
see Parks v. IBEW, 314 F.2d 886 (4th Cir.), cert. denied, 372 U.S. 976
D. The Extent to Which Section 501's Fiduciary Duties Are Affected by a Union's Constitution and Bylaws

Following the special problems and functions provision, the second sentence of section 501(a) declares that it is the duty of union officials
to hold its [the union's] money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder . . . . [Emphasis added.]

This provision allows unions to authorize expenditures in their constitutions and bylaws which would be plainly violative of section 501(a) if made without such authorization. For example, if a union official invests union funds in speculative common stock and there is no provision in the union's constitution and bylaws authorizing such investments, the official will surely be found to have violated his fiduciary obligations and, consequently, will be personally liable for any losses. However, if the union's constitution and bylaws specifically permit investments in speculative securities, then the union official can invest the union's funds in such securities without any fear of violating the fiduciary duties imposed by section 501(a).43

If a literal interpretation is given to this provision, no expenditures authorized by a union's constitution or bylaws can be the basis for a suit under section 501. Both Professors Smith44 and Cox45 have assumed this to be the correct interpretation. The latter observed that

An agent who follows the instructions of his principal is not guilty of a breach of fiduciary duties. Section 501 emphasizes the importance of giving careful attention to the constitutional provisions and resolutions of governing bodies, but where the union grants the necessary authority, no statutory restric-

(1963). Although the court did not specifically mention § 501, it held that the international president did not breach any fiduciary obligation, inter alia, by denying the local union the right to strike under the circumstances presented and by revoking the charter of the local union when it struck without authorization.

43. See Dugan, supra note 37, at 299-301.
44. What the act does require is that expenditures of union funds, as well as use of its other assets, be exclusively for purposes which are authorized by its constitution, bylaws, and any pertinent regulations of its governing body. The standard is the internal law of the union.


45. A. Cox, Law and the National Labor Policy 92 (1960); see Ostrin, Fiduciary Obligations of Union Officers: A Critical Analysis of Section 501, in Symposium 528, 533.
Although the legislative history appears to support this position, it is hard to believe that Congress actually intended a union's constitution and bylaws to stand as an absolute defense to any action under the Act challenging an expenditure made in conformity with such constitution and bylaws. It is not particularly surprising, therefore, that the courts and several commentators have taken the view that a union's constitution and bylaws are not a complete defense in actions contesting the validity of certain expenditures.

In *Highway Truck Drivers v. Cohen*, the question before the court was whether the plaintiff members could enjoin the use of union funds to pay the counsel fees of certain union officers who were charged with conspiracy to defraud the union in

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47. Union officers will not be guilty of breach of trust when their expenditures are within the authority conferred upon them either by the constitution and bylaws or by a resolution of the executive board, convention or other appropriate governing body (including a general meeting of the members) not in conflict with the constitution and bylaws.


The legislative history was by no means unanimous, as the following statement by Representative Barden, Chairman of the House Labor Committee, indicates:

> The purposes for which funds of a labor organization may be expended or invested will necessarily . . . be restricted and limited . . . regardless of any provisions in the constitution, by-laws or resolution of a labor organization . . .


the Pennsylvania state courts and with violating section 501 in a federal court. The defendants asserted that a resolution passed by the local union authorizing the use of union funds to pay for any counsel fees incurred by the officers made such expenditures valid and thus immune from attack under section 501.61

The court viewed the matter differently. In granting an injunction, it held that the resolution passed by the local membership was invalid on two grounds. First, the court held that the resolution was ultra vires in that it was "beyond the power of Local 107 to make."52 Second, the court ruled that passage of the resolution was no defense since the resolution was "inconsistent with the aims and purposes of the ... [LMRDA] and violates the spirit of the act."53 The court said, in effect, that even though an expenditure may be authorized by the union's constitution and bylaws, judicial scrutiny of the expenditure to ascertain whether it is consistent with the aims and purposes of the Act is not foreclosed.

This second ground was an alternative holding, but later decisions in related litigation indicate that it was the more important one. Thus, the district court in deciding another facet of this case some three years later observed that the LMRDA was "the primary basis for prohibiting payment of defendants' attorney fees."54 Moreover, the court noted that passage of a constitutional amendment allowing the use of the union's funds to pay the counsel fees of union officers charged with violating the law made no difference in the outcome.55 In any event, the decision in Cohen established an important precedent for the proposition that expenditures made pursuant to the constitution and bylaws of a union are not necessarily immune from judicial attack,56 even though a literal reading of the language of sec-

51. There is some legislative history which supports this proposition. Representative Brademas agreed with an assertion made by the United States Chamber of Commerce that the Act allowed a union to pay the costs of defending union officials charged with violating the Act, stating: "Union members will be free to decide whether they wish to pay these costs or not." 105 Cong. Rec. A6573 (1959), Leg. Hist. 1050.
52. 182 F. Supp. at 620.
53. Id.
55. 215 F. Supp. at 940-41.
tion 501(a) would seem to indicate otherwise. The desirability of this holding becomes apparent upon closer examination. 67

One of the abuses uncovered by the McClellan investigations was the political manipulation of some union treasuries by powerful and despotic union leaders. 68 Senator John Kennedy observed that "there is no doubt that a good many of the racketeers are able to dominate the unions in such a way that they can get money under almost any guise in order to defend themselves." 69 However, if all union expenditures made "in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder" are to be considered automatically nonviolative of section 501, then for all intents and purposes the union would have the "ability to shape the contours of its officers' fiduciary obligations." 60 It is doubtful that Congress intended such a result. While the legislative history definitely shows that unions are to have fairly autonomous control over the expenditure of their funds, 61 "it also discloses a congressional intent that judicial judgment should on some occasions supersede union decisions regardless of the internal mechanism by which those decisions were made." 62 Assuming, therefore, that judicial intervention in certain limited instances is not only desirable but also permissible under section 501, the question then is one of when such intervention should occur. It is submitted that judicial intervention should occur only in those rare instances where it is clear that union officials have obtained authorization for an expenditure of union funds which accrues to their own personal benefit, whether by amendment to the acts in accordance with a union's constitution, there can be no breach of fiduciary duties: "[T]he Local officers, rather than breaching any fiduciary obligations, are in fact acting in conformity with the Local's Constitution and the overriding AFM Constitution."


69. 105 CONG. REc. 6691 (1959), LEG. HIST. 1034.

60. Counsel Fees 448.

61. "Our language does not purport to regulate the expenditures or investments of a labor organization. Such decisions should be made by the members ...." H.R. REP. No. 741, 86th Cong., 1st Sess. 81 (1959). See note 38 supra; see also Calhoon v. Harvey, 379 U.S. 134, 140 (1964), where the Court noted that there was an underlying "general congressional policy to allow unions great latitude in resolving their own internal controversies. ...."

62. Counsel Fees 449.
union's constitution or bylaws or by membership resolution. Where the expenditure does not accrue to their own personal benefit, the authorization should protect union officials from any liability.63

E. GENERAL EXCUSATORY PROVISIONS

The last sentence of section 501(a) provides that any general exculpatory provision included in a union's constitution and bylaws or enacted as a resolution by a governing body of a union which purports "to relieve any such person [i.e., union official] of liability for breach of the duties declared by this section shall be void as against public policy."64 Thus, it is clear that a union could not, for example, enact a constitutional provision which provided that union officials have no fiduciary responsibilities with respect to any of the funds or assets of the union.65 However, it is not so clear that section 501(a)'s provision against exculpatory clauses bars a union from excusing particular breaches of the fiduciary duties set forth in section 501(a).66 For instance, the governing body of a union could pass a valid resolution purporting to absolve a union official from any personal liability for losses incurred by the improvident investment of union funds in second mortgages. Resort to the legislative history provides some help in dispelling the uncertainty on this question.

Senator Goldwater, in his analysis of the bill, observed that while union officers may not be excused from their fiduciary obligations "by any general exculpatory union provision or action, they may be relieved by a specific exculpation . . . ."67 The views of the House sponsors of section 501(a) militate against his view, however,

63. One commentator proposed the following solution:
[A]s fiduciary questions under section 501 acquire an increasingly political complexion—for example, where counsel fees are involved—it becomes appropriate for courts to take an increasingly firm hand over the course of union expenditures in order to provide maximum protection for the organization's fiscal well-being, even at the expense of disregarding the products of union democracy.
Id. at 452.
64. See generally Dugan, supra note 37, at 299-301; Ostrin, supra note 45, at 533-36.
66. Wollett, supra note 65, at 270.
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.

A reasonable application of this position expressed by the House sponsors would bar a union from relieving an official from liability since any attempt "to excuse breaches of trust" is said to be void. On the other hand, it seems clear from the above statement that a union could validly authorize the investment of its funds in second mortgages, and that if a union officer invested union funds pursuant to such an authorization, he could not at a later date be held responsible for any losses. From a policy standpoint, unions should not be allowed to excuse specific breaches by a union official of the duties imposed by section 501(a) after they have occurred, since powerful, even despotic, union leaders might be able to manipulate their unions into ex post facto authorization of such conduct. Thus, the views expressed by the sponsors of section 501 should be adopted in preference to the views of Senator Goldwater.

The only case to date which has considered the effect of the exculpatory clause provision is Highway Truck Drivers v. Cohen. There the plaintiffs were seeking to enjoin use of union funds to pay the counsel fees of defendant officers who were charged with violating section 501(c). In attacking the reso-

69. Dugan, supra note 37, at 300. Whereas a union can authorize an officer to make expenditures which would otherwise subject the officer to liability under § 501, it seems 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 an officer. Id. See text accompanying notes 58-62 supra.
72. See text accompanying notes 50-53 supra. The courts have strictly limited the right of unions to intercede on behalf of union officials in suits brought under § 501. See, e.g., Tucker v. Shaw, 378 F.2d 304 (2d Cir. 1967) (union's regularly retained counsel disqualified from representing union officials even though fees were to be paid by defendant officers); Teamsters v. Hoffa, 242 F. Supp. 246 (D.D.C. 1965) (potential conflict of interest disqualifies same attorney from representing both union and union officials); Holdeman v. Sheldon, 204
olution passed by the membership authorizing such an expendi-
ture, the plaintiffs asserted, *inter alia*, that it came "within the
express prohibition of § 501(a) against any 'general exculpatory
resolution.'"73 The court, however, held that the resolution was
not an exculpatory provision within the meaning of the Act,
reasoning as follows:

> We must distinguish between a resolution which purports to
authorize action which is beyond the power of the union to do
and for that reason in violation of § 501(a) when done by an
officer (such as the present Resolution) and a resolution which
purports to relieve an officer of liability for breach of the
duties declared in § 501(a).74

The court's conclusion is sound since the union by passing the
resolution attempted only to authorize the payment of the de-
fendant officers' legal fees; it did not attempt to absolve them of
their guilt. It seems clear, however, that the union could not
pass a resolution absolving the officials from any personal liabil-
ity to the union if they were subsequently found guilty.

### III. THE ROLE OF THE COURTS UNDER SECTION 501

#### A. In General

The question of the role of the courts in interpreting and
applying section 501(a) was raised shortly after passage of the
LMRDA in the leading case of *Highway Truck Drivers v. Cohen.*
After observing that section 501 "attempts to define in the broad-
est terms possible the duty which the new federal law imposes

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73. 182 F. Supp. at 617.
74. Id. at 618 (emphasis in the original).
upon a union official” and that “Congress made no attempt to ‘codify’ the law in this area,” the court stated:

It appears evident to us that they [Congress] intended the federal courts to fashion a new federal law in this area, in much the same way that the federal courts have fashioned a new substantive law of collective bargaining contracts under § 301(a) of the Taft-Hartley Act . . . . See Textile Workers Union of America v. Lincoln Mills, 1957, 353 U.S. 448, 77 S.Ct. 923, 1 L. Ed. 2d 972. In undertaking this task the federal courts will necessarily rely heavily upon the common law of the various states. Where that law is lacking or where it in any way conflicts with the policy expressed in our national labor laws, the latter will of course be our guide.

We turn then to Section 501, not expecting to find a detailed command or prohibition as to the particular act complained of, but rather to find a general guide which, properly developed, will lead us to an answer.

Although the Lincoln Mills case was not specifically referred to in the legislative history of section 501, the analogy is sound. Indeed, it finds some implied support in Senator Javits' statement that “[o]nce fiduciary responsibility is stated it will soak up all the common law, all the State law, and all the Federal law.” Hence, the role of the courts seems clear. As stated by one court, “in ascertaining the fiduciary duty imposed by section 501 it will be both necessary and desirable to examine closely the policy and purposes of L.M.R.D.A. and to rely with confidence on the applicable state decisions.” Consequently, it is important to ascertain the nature and extent of the fiduciary duties imposed upon union officials at common law.

B. THE FIDUCIARY DUTIES OF UNION OFFICIALS AT COMMON LAW

It is clear that union officials were considered fiduciaries at common law. Nevertheless, the state courts have been vague

75. 182 F. Supp. at 617.
77. Dugan, supra note 37, at 298.
in delineating the exact nature of the fiduciary duties which a union official owes to his union.\footnote{83} Sometimes the obligation imposed is said to spring from the union's constitution or by-laws.\footnote{84} In other instances, a union officer has been designated either a fiduciary\footnote{85} or a trustee.\footnote{86} Occasionally a court manages to utilize all of these theories in the same case.\footnote{87} As a consequence, the development of state law has been at best uneven, and the remedies available for seemingly clear breaches of fiduciary duties have been uncertain.\footnote{88} A review of several state cases illustrates this point.

In \textit{Schimmel v. Messing}\footnote{89} a testimonial banquet was given by a local union for two retiring business agents. Net proceeds of thirty thousand dollars were raised and presented to the two business agents for their own personal use. Although the court said it looked with disfavor “upon testimonial dinners being

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tendered in the name of a union for the pecuniary benefit of an individual guest of honor," it held that the funds collected were not union funds and that consequently there was no right to an accounting with respect to such funds, even though there was little doubt that the union officers were using their positions for financial gain. It is to be hoped that such decisions will not be forthcoming under section 501, particularly since that section expressly states that a union official has the affirmative duty "to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization."91

In Vaccaro v. Gentile92 the court admitted that the defendant officers had improperly commingled funds from the union's pension and welfare fund with the union's general funds. Nevertheless, an accounting was not granted, since the officers had apparently acted honestly and in good faith. One commentator noted:

It seems clear that the court was straining to protect officers who were apparently honest but unskilled in financial affairs; and had the court been committed to a view that union officers were to be regarded as trustees or fiduciaries, its task would have been much more difficult.93

It is rather doubtful whether such a result could be justified under section 501.

This brief but representative sampling indicates that courts, faced with the task of defining the scope and nature of the fidu-

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90. 117 N.Y.S.2d at 428-29.

The United States Chamber of Commerce in its analysis of § 501(a) stated that a "major loophole arises from the fact that no accountability is required for profits reaped by an official who uses his office (not union funds) to his personal advantage." 105 CONG. REC. 14,274 (1959), LEG. Hist. 1049. Representative Brademas responded directly to this assertion:

This is a complete misrepresentation. Section 501(a) explicitly requires union officials "to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization." The same section also forbids a union officer "from holding or acquiring any personal interest which conflicts with the interests of such organization . . . ."

ciary duties imposed by section 501, will find little real help in the state cases. This conclusion is further supported by the fact that there are surprisingly few state cases;\textsuperscript{94} and, even in those cases where relief has been granted, the facts usually show the grossest sort of misappropriation of union funds.\textsuperscript{95} It is evident that the courts will have to look elsewhere for assistance.

C. THE APPLICATION OF THE LAW OF FIDUCIARIES IN OTHER CONTEXTS

Professor Donald H. Wollett in an article on fiduciary problems under the Landrum-Griffin Act has noted the inadequacy of the common law as authority for defining the fiduciary responsibilities of union officials. As another source of rules applicable to these officers, he suggests the well developed doctrines in the areas of principal-agent, trustee-beneficiary, and director-corporation.\textsuperscript{96} His suggestion is a good one. There is substantial support in the legislative history for referring to other fields of law in developing substantive law under section 501.

The relevant House report declared that "[t]he general principles stated in the bill are familiar to the courts, both State and Federal, and therefore incorporate a large body of existing law applicable to trustees, and a wide variety of agents."\textsuperscript{97} In addition, Senator Goldwater attempted to remove any uncertainty as to the intended scope of the term fiduciary by introducing the following definitions into the \textit{Congressional Record}:

A fiduciary is a person whose relation to another is such that he is under a duty to act for the benefit of the other, as to matters within the scope of the relation. (Restatement of law trusts.)

"The term 'fiduciary' involves the idea of trust, confidence. It refers to the integrity—the fidelity—of the party trusted rather than his credit or ability. It contemplates good faith, rather than legal obligation, as the basis of the transaction." (Stoll v. King, N.Y. 8 How. Proc. 299.)

"Partners occupy toward each other, as to the partnership business, a fiduciary relation." (Bouvier.)

"Money is received in a fiduciary capacity when it does not become the absolute property of the one receiving it, but is received for a particular purpose, in which other persons than the one receiving it are interested." (265 F. 343.)\textsuperscript{98}

\textsuperscript{95} Dugan, supra note 83, at 279-80. See Wollett, supra note 65, at 276.
\textsuperscript{96} See Wollett, supra note 65, at 277.
\textsuperscript{98} 105 Cong. Rec. 6528 (1959), Lex. Hist. 1027.
Whatever use is made of this body of existing law must be qualified by the direction of section 501(a) to take into account the special problems and functions of a labor union.99

Not unexpectedly, the courts have made frequent reference to the law in analogous fiduciary situations in resolving cases arising under section 501. In Cohen the court, in deciding whether it was legal for a union to pay the attorneys' fees of defendant officers who were charged with looting the union's treasury, made the following comment: "[W]e feel that those cases involving the use of corporate funds to pay the defense of officers charged with misconduct in office are helpful.100 Similarly, in Nelson v. Johnson,101 the court looked to state precedent in shareholder derivative suits in determining whether plaintiffs were entitled to attorneys' fees incurred in prosecuting a successful action under Title I of the LMRDA.102 Accordingly, the body of fiduciary law developed in other situations, especially in the area of remedies, should be of considerable assistance to the courts in their arduous task of interpreting and applying the fiduciary provisions of the LMRDA.

D. THE FIDUCIARY STANDARDS WITHIN THE ACT ITSELF

Several provisions in the LMRDA itself should be quite helpful to the courts in ascertaining what fiduciary duties are imposed upon union officials. Title II103 requires most unions, union officers, and union employees to file fairly extensive financial reports with the Secretary of Labor. Criminal penalties are provided for failure to make such reports and for knowingly

99. See text accompanying notes 36-42 supra.
In Teamsters v. Wirtz, 346 F.2d 827 (D.C. Cir. 1965), the court held that institution of a § 501 suit does not deprive the Secretary of Labor from using his broad investigative and subpoena powers under the Act to aid the suing members to obtain information as to their union's financial affairs.
making false statements. In addition, section 205(b) provides that all such reports "shall be public information," and that "the Secretary shall by regulation make reasonable provision for the inspection and examination, on the request of any person, of the information and data contained in any report or other document filed with him . . ."104 Congress believed that if it provided union members with sufficient information about the union's financial affairs, they would be greatly aided in uncovering breaches of the fiduciary obligations imposed by section 501(a).105

Perhaps the most important provision in Title II is section 202(a) which requires union officers and union employees, except clerical or custodial employees, to file a report with respect to six possible conflict of interest situations.106 For example, section 202(a)(1) requires that any such officer or employee must disclose any interest or income, other than wages, which he, his spouse, or his minor child has received from an employer whose employees his union either represents or is actively seeking to represent. It seems evident that an officer who reports any such interest or income has violated the section 501(a) requirement against "holding or acquiring any pecuniary or personal interest which conflicts with the interests of" his union.


105. The relevant House of Representatives Report noted:
Section 501 of the committee bill provides that the officers, agents, shop stewards, and other representatives of labor organizations occupy positions of trust in relation to such organization and its members as a group.
The Government which vests in labor unions the power to act as exclusive bargaining representative must make certain that this power is exercised for the benefit of the employees whom the unions represent for purposes of collective bargaining and not for the personal profit and advantage of the officers and representatives of the union.
The committee bill attacks the problem by requiring officers and employees of unions to file reports with the Secretary of Labor disclosing to union members and the general public any investments or transactions in which their personal financial interests may conflict with their duties to the members.
H.R. Rep. No. 741, 86th Cong., 1st Sess. 11 (1959). See Stein, Union Finance and LMRDA, in REGULATING UNION GOVERNMENT 130, 145: "[T]he reporting provisions of Title II mean that it will be much easier than formerly to 'spot' wrongdoing on the part of union officials, and these provisions, therefore, play a central role in the legislative scheme." Since the reporting provisions of Title II deal exclusively with financial matters, it is also arguable that § 501 extends only to financial matters. But see text accompanying notes 10-35 supra.

Even if such interest or income is not received by the officer, but rather is received by his wife and/or minor child, section 202 (a) (1) still compels disclosure. Applying the section 202(a)(1) standard, it is arguable that this is also a violation of section 501(a), even though that section seemingly prohibits only the officer himself from acquiring or holding conflicting interests.107 Such a result is desirable, since the contrary result creates a gaping loophole for the evasion of the fiduciary obligations imposed by the Act.

Other provisions in the Act explicitly prohibit certain expenditures. For example, section 401(g) proscribes the use of union funds "to promote the candidacy of any person in an election subject to the provisions of" Title IV.108 Consequently, any union official who allows such an expenditure is surely guilty of a breach of his fiduciary duties. As a result, any union member can sue him to recover any sums thus spent. Another example is section 503(a)109 which forbids unions from making loans to any officer or employee in excess of two thousand dollars. Although this section provides only criminal penalties for any violation thereof, presumably a union member could sue on behalf of the union under section 501 to recover the amount of any loan made in excess of two thousand dollars.110

The courts, therefore, should not overlook the other provisions of the Act itself when trying to give meaning to the fiduciary obligations set forth in section 501(a). Indeed, the courts have a duty to take these provisions into consideration when construing section 501, since it is a well established principle of statutory construction that one section of an act is not to be construed and interpreted in isolation from the other sections of the act.111

107. One of the many abuses uncovered by the McClellan Committee's investigation of the Teamsters was the fact that Hoffa's wife shared profits of $125,000 from a company whose employees were represented by the Teamsters. S. Rep. No. 1417, 85th Cong., 2d Sess. 250 (1958). See Summers, supra note 91.


109. See Stein, supra note 105, at 146.


IV. THE ENFORCEMENT PROVISIONS OF SECTION 501(b)

A. IN GENERAL

The provisions of section 501(b) provide the legal means by which a union member can seek judicial enforcement of the fiduciary obligations set forth in subsection (a). The type of suit envisioned by section 501(b) has been likened to a stockholder's derivative suit in the corporate context. In both instances the suit is brought in a representative capacity, and any recovery is solely for the benefit of the organization. The conditions precedent to bringing a suit are also somewhat similar to those for a stockholder's derivative suit, in that a suit can be brought only after the organization has been requested to take some action and has either refused or failed to do so. However, despite its similarity to the stockholder's derivative suit and its apparent simplicity, section 501(b) has caused the courts considerable difficulty.

B. REQUIREMENT THAT PLAINTIFF FIRST ASK THE UNION TO ACT

The first sentence of section 501(b) provides, in part, that when any union official is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such . . . [official] in any district court of the United States or in any State court of competent jurisdiction . . . .

As one court has noted, the wording of section 501(b) "is not artful." The first sentence states that a union member may

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113. Nelson v. Johnson, 212 F. Supp. 233, 297 (D. Minn.), aff'd, 325 F.2d 646 (8th Cir. 1963). The following remarks of Representative Elliott are also relevant:
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.

bring suit for alleged violations of subsection (a) if the union has failed or refused "to sue or recover damages or secure an accounting or other appropriate relief . . . ." [Emphasis added.] The use of the word "or" following the words "to sue" is what causes difficulty. It is arguable that this provision means a union must either fail or refuse to bring suit or fail or refuse to take some other appropriate action. If, however, section 501(b) stated that a union member could sue if he made his request and the union failed or refused "to sue to recover damages, or secure an accounting or other appropriate relief . . . ." there would be little doubt that a union must bring suit in order to satisfy the requirements of section 501(b).

The bill reported by the House Committee on Education and Labor and the identical bills introduced by Representatives Landrum and Griffin did utilize the word "to" following the words "to sue." Moreover, the House sponsors of section 501 stated that a union member could bring an action "if the union refuses to sue . . . ." It is quite possible that a mistake was made in the printing of the bill as finally enacted and that the word "or" was mistakenly inserted in place of the word "to." Nothing in the legislative history indicates that this change in wording was the result of any conscious action by Congress.

The conclusion that a union must sue is further substantiated by congressional analyses of section 501(b). Representative Elliott, one of the sponsors of the section, observed that "[s]ection 501 (b) provides that if the union fails to bring suit upon the request of the member, the member may . . . bring an action . . . ." Senator Morse noted that "section 501 (b) authorizes an individual member, when these rules are violated and the union fails to sue, to bring a suit . . . ." Since the

115. H.R. 8342 (Elliott bill), H.R. 8400 (Landrum bill), H.R. 8401 (Griffin bill), 86th Cong., 1st Sess. § 501(b) (1959). Indeed, the engrossed copy of H.R. 8342 passed by the House contained the word "to" instead of the word "or." 105 CONG. REC. 15,888 (1959), LEG. HIST. 1066.


117. 105 CONG. REC. 15,549 (1959) (emphasis added), LEG. HIST. 1060.


The position that the union has to bring suit was echoed by some of the early commentators. Professor Cox, for example, said that a member could bring suit "whenever his union refuses to sue an officer or employee alleged to be guilty of a breach of fiduciary obligations." Cox, supra note 82, at 828 (emphasis added). Also instructive is an early analysis of § 501 by Arthur Goldberg, then General Counsel for the Industrial Union Department, AFL-CIO, wherein he stated that a
legislative history fully justifies the conclusion that the word "or" following the words "to sue" in the first sentence of section 501 (b) should be read as if it were the word "to," union members should be permitted to sue only if the union refuses or fails to institute court proceedings after being requested to do so.\textsuperscript{119} At least one court has so held.\textsuperscript{120}

After requesting the union to bring suit,\textsuperscript{121} a member may sue if the union fails or refuses to do so "within a reasonable time." Although the term "reasonable time" is not defined, the intent of Congress as to its meaning can be gleaned from the legislative history with respect to a similar provision in the Kennedy-Ervin bill.\textsuperscript{122} Section 109 (b) of that bill provided that upon the conviction of any union officer or employee for embezzlement or willful conversion of union funds a union member could bring suit to recover such funds, provided that "the labor organization or its governing board or officers refuse or fail to sue to recover such money or property or the value of

\textsuperscript{119} It seems implicit in the Act that if a union does institute suit, it must prosecute it with reasonable diligence. A sham suit should not preclude a union member from bringing a bona fide action. See Duker, 


\textsuperscript{121} The literal language of \textsection{} 501 (b) requires that the request to the union must be made by the suing member and not by somebody who is not a party to the action. At least two courts have adopted this view. Teamsters \textit{v. Hoffa}, 242 F. Supp. 246 (D.D.C. 1965); Persico \textit{v. Daley}, 239 F. Supp. 629 (S.D.N.Y. 1965). The House Committee Report supports this construction since it states that "the requesting member may sue ..." \textit{H.R. REP. No. 741, 86th Cong., 1st Sess. 44 (1959)}. See \textit{105 CONG. REC. 15,549 (1959)} (remarks of Representative Elliott), \textit{LEG. HIST. 1080}. \textit{But see Staff of Senate Comm. on Labor and Public Welfare, 86th Cong., 2d Sess., Section-by-Section Analysis of the Labor-Management Reporting and Disclosure Act of 1959}, at 14 (Comm. Print 1959), \textit{LEG. HIST. 846}.

As for the request itself, the Second Circuit has held that "this provision of the statute is mandatory and that its requirements cannot be met by anything short of an actual request. An allegation of the futility of such a request will not suffice." Coleman \textit{v. Railway & S.S. Clerks}, 340 F.2d 206, 208 (2d Cir. 1965). Accord, Teamsters \textit{v. Hoffa}, \textit{supra} at 249-50; Persico \textit{v. Daley}, \textit{supra} at 631; Penuelas \textit{v. Moreno}, 198 F. Supp. 441, 449 (S.D. Cal. 1961). \textit{But see 104 CONG. REC. 11,328 (1959)} (remarks of Senator Javits), \textit{LEG. HIST. 949}.

\textsuperscript{122} S. 505, 86th Cong., 1st Sess. \textsection{} 109 (b) (1959).
the same *within six calendar months* after being requested to do so by any member. . . .” Subsequently, Senator Javits introduced an amendment which, *inter alia*, reduced the period to four calendar months. Prior to its passage, Senator Javits stated:

> As the bill now reads, there is a provision for a 6 months' waiting period. I thought that was much too long, and I proposed 3 months. We are persuaded that the 4 months' provision is fair, because some of the union boards meet every quarter, and if we assume the major time lapse to be involved we ought to give an opportunity for the board to meet and for the member to decide whether to sue or not to sue.

Two interpretive guidelines emerge from these comments. First, the governing body of a union should be given sufficient time to consider a member's request at a regularly scheduled meeting. Second, the member should be given ample opportunity to deliberate on whether or not to bring suit. These two considerations should provide helpful guidance to the courts in their efforts to construe the term “reasonable time,” but it is to be expected that results will differ from case to case depending on the circumstances. As one commentator noted, “the urgency of the particular situation will probably control.” For example, where an injunction is sought to prevent a union official from making an allegedly illegal disbursement, the courts probably will allow the union considerably less time than where a member is suing to challenge a disbursement already made.

C. The “Good Cause” Requirement

The second sentence of section 501(b) provides that “no such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown,

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123. Id. (emphasis added).
124. 105 CONG. REC. 6529 (1959), LEG. HIST. 1028.
125. Id.
127. An additional purpose might have been intended here. Upon further consideration a union member might decide against rash action, and the waiting period would thus serve as a “cooling off” period.
which application may be made ex parte.”  “Good cause” is not defined by the Act, but there is fairly general agreement that this provision was “intended as a safeguard to the union against harassing and vexatious litigation brought without merit or good faith.”

Beyond this, however, there is no consensus as to the meaning and interpretation of the good cause provision.

At least three interpretations as to what constitutes good cause have been suggested. First, good cause might mean nothing more than that a union member has requested the union to sue and the union has either refused or failed to do so. Such an interpretation would, however, reduce the good cause requirement to a mere redundancy. Moreover, it is a cardinal rule of statutory construction that a statute should be interpreted, if possible, to give effect to all of its provisions. Second, the phrase might mean that the court should examine the union member’s complaint and then determine on its face whether it states a good cause of action. This interpretation would also render the good cause provision largely meaningless since a legally sufficient complaint could nearly always be drafted without much difficulty. The third suggested interpretation is by far the best: the court should, after a hearing if necessary, determine whether the plaintiff has made a showing of probable cause. Such an interpretation would give the good cause re-

129. Death of the union member filing the verified application does not revoke its validity. Horner v. Ferron, 362 F.2d 224, 227 (9th Cir.), cert. denied, 385 U.S. 958 (1966). Nor does death of the member filing the verified application abate the cause of action or render it moot where there are other plaintiffs to prosecute the action. Horner v. Ferron, supra.


131. Counsel Fees 452.


133. See F. McCaffrey, STATUTORY CONSTRUCTION 35 (1953).

134. Counsel Fees 453.

135. But see Dugan, supra note 126, at 302: “[T]he reasonable construction would seem to be that if the pleadings disclose a valid cause of action from the facts alleged, suit can be brought.” Accord, Katz & Friedman, Members’ Control Over Officers, Elections and Finances: Equitable Remedies and Modern Developments, 22 Ohio St. L.J. 97, 118 (1961). See also IBEW, Local 28 v. IBEW, 184 F. Supp. 649 (D. Md. 1960) (allegations of complaint constitute “good cause” where verified).

136. Counsel Fees 453. In Horner v. Ferron, 362 F.2d 224, 229 (9th Cir.), cert. denied, 385 U.S. 958 (1966), the court discussed what could
quirement meaning, and, in addition, would give unions some real protection against harassing and vexatious suits. The legislative history lends support to this interpretation.

An identical good cause provision was contained in the Kennedy–Ervin bill which was adopted by the Senate. In fact, it appears as if LMRDA's good cause provision was taken in toto from the Kennedy–Ervin bill. Consequently, the following comment made by Senator Javits, one of the sponsors of the good cause provision in the Kennedy–Ervin bill, is of particular importance: "If the member is given leave to sue—in other words, if he shows he complied with the statute and shows some probable cause—he may sue..." It is significant that Senator Javits used the phrase "some probable cause." Black's Law Dictionary defines "probable cause" as "a reasonable ground for belief in the existence of facts warranting the proceedings complained of." A similar definition should be given to the good cause provision in section 501(b).

In addition to these three interpretations of what consti-

be adduced at a hearing:

At such a hearing, if one is called, the court may, if it chooses, look somewhat beyond the complaint in determining whether the plaintiff has made the "good cause" showing required by section 501(b). 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 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.

However, we think it inappropriate to consider, at such a hearing, defenses which require the resolution of complex questions of law going to the substance of the case. Defenses of this kind should be appraised only on motion for summary judgment or after a trial. Defenses which necessitate the determination of a genuine issue of material fact, being beyond the scope of summary judgment procedure, are a fortiori, beyond the scope of a proceeding to determine whether a section 501(b) complaint may be filed. Defenses involving disputed questions of fact should be appraised only after a trial at which the parties and the court can have the benefit of a complete inquiry, assisted by such pre-trial discovery as may be undertaken.


The court also ruled that "pre-trial discovery is not available to a plaintiff suing under § 501(b), until after leave to file the complaint has been granted." Horner v. Ferron, supra at 229 n.6. But see note 103 supra.

138. 105 CONG. REC. 6529 (1959), LEG. HIST. 1028 (emphasis added).
tutes good cause, several courts have added a fourth. These courts hold that the good cause requirement contemplates reference to the exhaustion of internal remedies doctrine.\textsuperscript{140} In \textit{Penuelas v. Moreno},\textsuperscript{141} the court concluded "that the exhaustion of remedies provision of Section 101(a)(4) is a prerequisite to . . . federal jurisdiction under section 501(b) . . . ."\textsuperscript{142} The court noted that it was "apparent that all policies favoring the exhaustion prerequisite to Section 101 actions apply with equal force to suits instituted pursuant to Section 501(b)."\textsuperscript{143}

The holding in \textit{Penuelas} is questionable at best, and several courts have expressly rejected it. In \textit{Holdeman v. Sheldon}\textsuperscript{144} the court reasoned:

[T]he fact that Congress made specific reference to exhaustion of internal remedies under § 101(a)(4), . . . and adopted a different procedure under § 501(b), both sections being enacted at the same time as part of a comprehensive revision of the labor law, leads to the conclusion that the concept of first exhausting internal remedies was knowingly omitted.\textsuperscript{145}

In addition to section 101(a)(4), the court could have mentioned that Congress specifically provided in section 402(a)\textsuperscript{146} that a

\begin{footnotes}
145. 204 F. Supp. at 896.
146. 29 U.S.C. § 482(a) (1964). Section 402(a), in relevant part, provides:
A member of a labor organization—
(1) who has exhausted the remedies available under the
union member must comply with certain prescribed exhaustion of remedy requirements before filing a complaint with the Secretary of Labor alleging any violation of section 401. In any event, it is submitted that the court in Holdeman reached the correct result. To utilize the good cause provision in section 501(b), as the court in Penuelas did, and to say that the requirements of section 101(a)(4) are engrafted onto any suit brought under section 501(b) is contrary to both the language of the Act and sound statutory construction.  

The decision in Penuelas is also contrary to the position taken by many state courts prior to the enactment of the LMRDA. A typical case is Mooney v. Bartenders Union, Local No. 284, wherein the California Supreme Court observed:

[I]t is to the best interests of the union that any misuse of its funds be immediately revealed, and it would serve no useful purpose to require that the examination of the books [be] delayed until the member has followed the procedure required by the union in ordinary matters.

It has also been suggested that the requirement of demand and refusal upon the union, rather than the good cause provision, was intended as the statutory counterpart of the "exhaustion" doctrine in this area. However, it should not be assumed that because there is some provision in section 501(b) which resembles the exhaustion doctrine that the requirements of section 101(a)(4) are, perforce, engrafted onto that provision.

Finally, section 501(b) provides that application for leave of the court to sue may be made ex parte. Senator Goldwater

constitutions and bylaws of such organization and of any parent body, or
(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary.

147. In addition, it may be argued that suits brought under § 501(b) are analogous to stockholder derivative suits since relief is sought for the benefit of the labor organization. On the other hand, under Title I relief is sought by the individual union member on his own behalf. Since these are basic differences, it is difficult to see how section 101(a)(4)—applicable to suits brought under Title I—is likewise applicable to actions instituted under Title V.

148. 48 Cal. 2d 841, 313 P.2d 857 (1957).


150. ABA Section of Labor Relations Law, Report of Comm. on Union Administration and Procedure 123 n.97 (1962).
observed that an *ex parte* application was one which could be made “without notice to the union to appear in court and offer its defense.”[151] Since this statement accords with the usual judicial definition of the term,[152] it should be accepted as correct. Some questions have been raised, however, as to the advisability of granting *ex parte* applications.[153] One court, for example, after deciding that an *ex parte* order had been improperly issued, made the following comment: “After our experience with this case, we think the better practice will be to require an adversary proceeding before permitting an action under Section 501(b) to be filed.”[154] Certainly it would be far easier to detect harassing and unmeritorious suits if adversary proceedings were required. Although *ex parte* applications should be available in proper circumstances, courts should nevertheless be quite hesitant in granting them.

D. Remedies Envisioned by Section 501 (b)

Section 501(b) expressly provides that a union member after satisfying preliminary prerequisites to suit can sue “to recover damages or secure an accounting . . . .” These remedies need no explanation. Not so self-explanatory, however, is the further provision in section 501(b) which allows a plaintiff to sue for “other appropriate relief.” Does this phrase contemplate the granting of an injunction or a receivership? Or, assuming a serious breach of trust, does it encompass the removal of a union official from office? Unfortunately, the Act provides no easy answers.

The phrase “other appropriate relief” has been at issue in

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[151] 105 Cong. Rec. 19,766 (1959), Leg. Hist. 1079. Senator Goldwater said the words “verified application” as used in § 501(b) meant nothing more than “a sworn application.” *Id.*

[152] “A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to or contestation by, any person adversely affected.” H. Black, Law Dictionary 662 (4th ed. 1951).

[153] Cases which subsequently prove to have no merit are being submitted to the federal district judges, thus conveying the misleading impression to the membership and the public generally that there has been gross misconduct and dishonesty on the part of local union officers.

only one case. In Nelson v. Johnson the defendants claimed the phrase “did not . . . apply in any context save that involving money or property,” and therefore the court was precluded from granting an injunction against them. The court had no difficulty in finding authority for the issuance of an injunction in the law of trusts: “It is hornbook law that trustees can be enjoined both to do their duty and also to refrain from violating their duty.” The result reached by the court is correct. Although the question of remedies was given scant attention in the legislative history, Senator Goldwater observed that a union member could sue a union official “to recover damages or secure an accounting or other appropriate relief—including injunctive relief—for the benefit of the union.” Moreover, several courts have apparently assumed that there was no question as to the propriety of injunctions under section 501(b) since they have granted them.

Beyond injunctive relief, the question of whether a union official can be removed for breach of a fiduciary obligation is particularly troublesome. One commentator stated that the words “other appropriate relief” make it “clear that the courts . . . have the right to remove [a] . . . miscreant union official from office.” This view was based “on the line of cases where the courts have removed trustees from the administration of the conventional trust for improper conduct.” Another commentator challenged this position, noting that “it appears to ignore altogether the importance that democratic processes have in the union context and the complete absence of that factor in the area of conventional trusts.” The latter view is preferable, particularly since section 401(h) of the LMRDA provides a specific method whereby “an elected officer guilty of serious misconduct . . . may be removed . . .” However, where the

155. 212 F. Supp. 233 (D. Minn.), aff’d, 325 F.2d 646 (8th Cir. 1963).
156. 212 F. Supp. at 284.
157. Id. at 288. Professor Cox observed that “all the usual remedies for breach of trust are available.” Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 828 (1960).
158. 105 Cong. Rec. 19,766 (1959), Legislative History 1079 (emphasis added).
161. Id.
ERRING OFFICIAL IS NOT "AN ELECTED OFFICIAL" WITHIN THE MEANING OF SECTION 401(h), THE EQUITABLE REMEDY OF REMOVAL SHOULD BE AVAILABLE.164

There is some pre-LMRDA authority for the granting of receiverships.165 Assuming arguendo that receiverships come within the meaning of "other appropriate relief," the courts should grant this remedy sparingly and then only when the circumstances clearly dictate its use.166 In the union context, a receivership is a drastic remedy since it "suspends the union's bargaining power for the duration of the receivership period."167

E. PLAINTIFF'S RIGHT TO COUNSEL FEES

The last sentence of section 501(b) provides that the court

\[ \ldots \text{may allot a reasonable part of the recovery in any action} \]

under this subsection to pay the fees of counsel prosecuting this 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. [Emphasis added.]

It might seem that this subsection provides only for what courts have often done in other fiduciary contexts, that is, granting counsel fees to plaintiffs. The phrase which provides that such counsel fees be "a reasonable part of the recovery" has, however, created considerable difficulty. If this phrase is given its literal meaning, then some sort of monetary recovery by the union would be a condition precedent to any award of counsel fees. Such a construction would preclude awarding counsel fees in suits to enjoin improper disbursements or suits to pre-

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vent the commingling of union trust funds, both of which exemplify actions seeking nonmonetary relief which can be brought under section 501. Moreover, such a construction would be anomalous since the courts in other fiduciary contexts have awarded counsel fees even though no pecuniary benefit was received by the party on whose behalf the suit was brought\textsuperscript{168}. Indeed, there are several state cases in which union members have been awarded attorneys' fees where the benefit received was of a nonpecuniary nature\textsuperscript{169}. It does not appear, however, that Congress contemplated such a result under section 501(b)\textsuperscript{170}.

The provision in section 501(b) allowing attorneys' fees is identical to a provision proposed by Senator Ervin and later adopted by the Senate as part of the Kennedy-Ives bill\textsuperscript{171}. Although this bill was not passed by the House, the legislative history with respect to Senator Ervin's amendment is significant inasmuch as this provision was included verbatim in the final Senate\textsuperscript{172} and House\textsuperscript{173} versions of the LMRDA. After introducing his amendment, Senator Ervin said that it allowed a trial judge, "in the event of a recovery, . . . [to award] a reasonable portion of the recovery to be used to pay the fees of counsel representing the member of the union who brought the suit.


\textsuperscript{169} See, e.g., Vaccaro v. Gentile, 138 N.Y. S.2d 872, 879 (Sup. Ct. 1955), wherein the court stated:

The plaintiffs, by bringing this action, have managed to alert the Union to the fact that some of these trust funds have been dealt with as if they were part of the Union's general funds. They have, therefore, served a useful purpose. . . . Unquestionably, counsel for the plaintiffs should receive some compensation for their services. This should be paid from the general funds of the Union since the Union and its members will be the beneficiaries of this work.


\textsuperscript{171} S. 3974, 85th Cong., 2d Sess. § 109(b) (1958).


\textsuperscript{173} H.R. 8343 (Elliott bill), H.R. 8400 (Landrum bill), H.R. 8401 (Griffin bill), 86th Cong., 1st Sess. § 501(b) (1959).
Senator Javits analogized the provisions of the amendment to a shareholder's derivative suit: "The way in which such a stockholder can get counsel is that the amount recovered then becomes a fund out of which counsel may be paid . . . . Our colleague provides exactly that in the amendment." These comments clearly suggest that the awarding of counsel fees was to be conditioned upon a monetary recovery. The following remarks of Senator Goldwater indicate that this conclusion is equally applicable to section 501(b):

Both bills, however, condition the payment of costs of actions under the fiduciary provisions by the defendant upon "recovery" by the plaintiff. Since under the House bill the recovery of misused funds is not the only relief which may be appropriate under that provision, limitations on payments of costs of defense to instances in which there is a recovery may defeat one of the purposes of the provision, namely, to facilitate member actions to enforce the duties and responsibilities imposed by the bill. The use of the same language as in other comparable provisions . . . would avoid this problem.

Since there is no persuasive legislative history to the contrary, the argument that there must be a fund out of which to pay counsel fees assumes substantial credibility. Nevertheless, the courts thus far have been unanimous in concluding that the word "recovery" must be given an expansive interpretation so as to allow the granting of counsel fees in all cases where the union has been benefited, and not just in those cases where there has been a monetary recovery.

In *Highway Truck Drivers v. Cohen* the plaintiffs sought counsel fees and expenses after successfully obtaining an injunction against the use of union funds to pay the legal fees incurred by certain union officers who were charged with looting the

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176. This conclusion is further supported by the fact that the purpose of Senator Ervin's amendment was to allow any union member to sue a union officer who unlawfully embezzled union funds to recover such funds. See 104 Cong. Rec. 11,327 (1958) (remarks of Senator Ervin), Leg. Hist. 948; 105 Cong. Rec. 5494 (1959) (remarks of Senator Goldwater), Leg. Hist. 1003-04; 105 Cong. Rec. 6527 (1959) (remarks of Senator Javits), Leg. Hist. 1025.
177. 105 Cong. Rec. 16,489 (1959), Leg. Hist. 1069. But see H.R. Rep. No. 741, 86th Cong., 1st Sess. 82 (1959): "The bill authorizes a union member to bring an action against any official or agent who violates his fiduciary obligations . . . and such member may recover counsel fees and costs if he prevails."
union's treasury. The court in granting the plaintiffs' motion for counsel fees and costs said that Congress could not have intended the phrase "a reasonable part of the recovery" to apply only to a monetary recovery. "[O]therwise," the court noted, "what would be the inducement to the speedy prosecution of an action? An attorney should not be penalized for seeking a timely injunction under the Act in order to prevent large unlawful expenditures by the Union." To support its decision, the court broadly construed the term "recovery":

Most important, "recovery" in the common meaning of the term means more than money. It means anything of value, as when one says he "recovered" his overcoat which was stolen. Webster's New International Dictionary, 2d Edition, says that a "recovery" is a "Means of restoration, remedy, cure." Recovery, therefore, must include the entire remedy effectuated and thus encompasses the total benefit conferred upon the Union through the efforts of counsel.

The court held that the obtaining of the injunction was a "benefit in and of itself without regard to any specific monetary amount." It failed to mention, however, any of the legislative history discussed above.

The court in Bakery & Confectionery Workers v. Ratner, also apparently ignoring the legislative history, held that the phrase "a reasonable part of the recovery" was permissive in nature and meant only that "... where a monetary recovery has in fact been achieved, that fund may constitute a source from which the trial judge 'may allot a reasonable part' for the payment of counsel fees and disbursements." In Gilbert v. Hoisting & Portable Engineers, Local 701, the Oregon Supreme Court held that section 501(b) was "merely supplemental to state remedies," and that the court was "not bound by any limitation which that section imposes upon the allowance of attorneys' fees." The court then proceeded to award attorneys' fees,

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179. Id. at 737.
180. Id.
181. Id. at 738.
183. Id. at 697.
185. Id. at 137, 384 P.2d at 139. Actions brought under § 501 in state courts are removable to the appropriate federal district court. Clinton v. Hueston, 308 F.2d 908 (5th Cir. 1962). See Summers, Pre-emption and the Labor Reform Act—Dual Rights and Remedies, 22 Ohio St. L.J. 119, 151-52 (1961). Consequently, in Gilbert it is puzzling why the union did not remove the case to the federal district court.
noting that "the fact that no money or property . . . [was] involved . . . [did] not detract from the importance of the litigation." 186

While the result reached by the courts is desirable in terms of public policy, it is difficult to reconcile it with the legislative history and the literal working of section 501(b). Admittedly, the Supreme Court in construing the LMRDA amendments to section 8(b)(4) of the NLRA has dealt rather cavalierly with the Act's legislative history, saying "that it . . . [did] not reflect with requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites . . . ." 187 Perhaps the granting of counsel fees in cases where there has been no monetary recovery can be rationalized on the ground that the legislative history did not reflect with requisite clarity a congressional plan to proscribe such payments. Certainly such a result would be in accord with the overall aims and purposes of the LMRDA.

V. SOME ADDITIONAL PROBLEMS
A. SCOPE OF SECTION 501'S FIDUCIARY DUTIES: ADMINISTRATION OF UNION PENSION AND WELFARE PLANS

It is arguable that the fiduciary duties imposed upon union officials by section 501 are not applicable to the administration of union welfare and pension plans. 188 This rather astounding

where § 501(b) would have been applicable. But see Summers, The Impact of Landrum-Griffin in State Courts, 13 N.Y.U. ANN. CONF. ON LABOR 333, 352-54 (1960).
186. 237 Ore. at 138, 384 P.2d at 140. Subsequently, the court held that the plaintiff union members were also entitled to attorneys' fees for services rendered on appeal. Gilbert v. Hoisting & Portable Eng'rs, Local 701, 237 Ore. 130, 139, 390 P.2d 320, 325 (1964).

Recently the Department of Labor's Advisory Council on Employee Welfare and Pension Benefit Plans recommended the enactment of a federal law establishing fiduciary responsibility in the administration of welfare and pension plans. 64 LAB. REL. REP. 165 (1967).
The fiduciary provision proposed by Senator McClellan and adopted by the Senate as part of the Kennedy-Ervin bill provided that union officials not only had fiduciary responsibilities "to any such labor organization and the members thereof," but also to any "trust in which such organization is interested."\(^{190}\) Senator McClellan said that this provision covered "both pension and welfare funds."\(^{191}\) On the other hand, the fiduciary provision which was finally enacted into law provides that union officials shall "occupy positions of trust in relation to such organization and its members as a group." It does not state that there is a fiduciary obligation to any "trust in which such organization is interested." The argument can thus be made that the failure to include the latter phrase indicates an intent on the part of Congress to exclude welfare and pension funds from any protection under section 501. This argument is augmented by the fact that the phrase "trust in which such organization is interested" was included in section 502(a) which prescribes certain bonding requirements. This argument, however, assumes too much.

First, the term "money and property" as used in section 501 is broad enough to include trusts in which unions are interested.\(^{192}\) Second, the difference in terminology between sections 501(a) and 502(a) can be logically explained and justified when examined from a drafting viewpoint. One commentator has analyzed the difference as follows:

[T]he former [i.e., § 501(a)] recognizes the fiduciary obligations of union personnel only; the latter [i.e., § 502(a)] requires bonding for the handling of funds by both union personnel and all personnel of trusts in which unions are interested. It would not be possible to express the bonding requirement for all trust personnel, who may or may not represent or be selected by unions, without mentioning trusts separately in the legislation.\(^{193}\)

Third, there is no legislative history, other than the difference in wording, which in any way indicates that Congress in-
tended to exclude the administration of welfare and pension plans from section 501(a)'s fiduciary obligation provision. On the contrary, the legislative history strongly indicates that section 501, as finally enacted, does cover welfare and pension funds. The Chairman of the House Labor Committee, Representative Barden, in his analysis of section 501, made the following observation:

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.

This type of legislation, in the committee's opinion, would go a long way toward preventing wholesale misappropriation and misuse of union funds such as that disclosed by committee testimony.

Section 501 is intended to meet the needs, purposes, and objectives set forth in the McClellan committee recommendations which I have just quoted. The language of section 501 clearly and unmistakably carries out that intent. 194

Senator Goldwater made practically the same observation.195

Aside from the legislative history, it may be argued that Congress by enacting the Federal Welfare and Pension Plans Disclosure Act has dealt specifically with the subject and that section 501 of the LMRDA does not, therefore, apply to welfare and pension funds. But section 16(b) of the Welfare and Pension Plans Disclosure Act expressly provides that the requirements of the Act

shall not be held to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans. . . .196

This provision clearly indicates that the Welfare and Pension Plans Disclosure Act was not intended to be exclusive.197

197. See Note, The Fiduciary Duty of Union Officers Under the
B. The Effect of Section 501's Fiduciary Provisions Upon Collective Bargaining

Numerous commentators have noted that the fiduciary provisions contained in section 501(a) may be applicable to the collective bargaining process. Professor Wollett, for instance, observed that the words of section 501(a) "contain the seeds for doctrinal growth which may have an impact reaching beyond fiscal affairs of unions and touching the collective bargaining process." Since there has been no final resolution of this problem, it is felt in some quarters that union officers will be inhibited in carrying out their collective bargaining responsibilities by a fear of violating section 501. Whether this is true is, of course, open to conjecture. Nevertheless, this problem is of vital importance and any ambiguities should be set to rest as soon as possible.

Section 501(a) specifically requires union officials "to refrain from dealing with such organization [their union] as an adverse party or in behalf of an adverse party in any matter connected with his duties." The fiduciary duties imposed by section 501(a) should thus be fully applicable with respect to any secret profits or other personal benefits received by a union official as a result of his collective bargaining activities. That this was the intention of Congress seems clear from the comments of Representative Elliott, one of the principal sponsors of Title V:

... In collective bargaining, and in conducting other business, 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.\textsuperscript{201}

Not surprisingly, one court has held that a complaint alleging that certain union officials had “entered into ‘sweetheart’ contracts with employers . . .”\textsuperscript{202} stated a cause of action.

On the other hand, the applicability of section 501(a) is not quite so clear when the question concerns the allowable discretion of a union official in negotiating or administering a collective bargaining agreement.\textsuperscript{203} Suppose that a union officer improvidently called a costly strike. Would a union member have a valid cause of action under section 501 to recover the costs incurred by the strike?\textsuperscript{204} Assuming \textit{arguendo} that a union official has a fiduciary duty with respect to the calling of the strike, that duty is certainly quite different from the duty he would have with respect to the ordinary handling of union funds. In the

A “sweetheart” contract is a collective bargaining agreement entered into as a result of collusion between an employer and a union.
203. Both the courts and the National Labor Relations Board have imposed a duty of fair representation upon unions with respect to the negotiation and administration of collective bargaining agreements. Vaca v. Sipes, 386 U.S. 171 (1967); Humphrey v. Moore, 375 U.S. 335 (1964); Miranda Fuel Co., 140 N.L.R.B. 181 (1962), \textit{enforcement denied}, 326 F.2d 172 (2d Cir. 1963); Local 12, United Rubber Workers, 150 N.L.R.B. 312, \textit{enforcement granted}, 363 F.2d 12 (1966). It has been suggested that there is an overlap between § 501 and the judicially imposed duty of fair representation. \textit{See} Fleming, \textit{supra} note 198; Rosen, \textit{supra} note 198.
While the fair representation doctrine is closely related to the fiduciary concept embodied in § 501, that section should not be construed to extend to situations in which the fair representation doctrine is applicable. In this regard, it should be noted that a suit for breach of a union's duty of fair representation is directed against the union, whereas a suit under § 501 is brought against designated union officials. In the former situation the individual or group of individuals suing are seeking relief on their own behalf; in the latter situation the persons suing are seeking relief on behalf of the union. There may be factual situations, however, which give rise to both a suit for breach of a union's duty of fair representation and for breach of the fiduciary duties imposed by § 501. For example, if a union official arbitrarily refused to process the grievance of a discharged employee and in return received some monetary benefit from the employee's employer, the employee should be able not only to sue the union on his own behalf for breach of its duty of fair representation, but also to institute suit on behalf of the union to recover the benefit received by the union official.
latter situation the official’s duty would be analogous to that of
a trustee, that is, he would have an affirmative duty to exercise
reasonable care in the management and preservation of any funds
entrusted to him. The analogy to the duties of a trustee
breaks down in the strike situation, however. There a union offi-
cial should not be held to any higher standard of conduct than a
corporate officer is held to in the making of business decisions.
A union official “should not be liable for honest errors of judg-
ment or even decisions which may reasonably be thought to be
imprudent.” There remains a serious doubt as to section 501’s
applicability at all in the example given.

In Echols v. Cook the Teamsters Union agreed with an
employer who transported new cars that new competition from
railroad piggy-backing necessitated a lowering of transportation
costs. As a result, the union agreed to a three and one-half per
cent cut in mileage pay. Although this cut received majority
approval at a union meeting, the plaintiffs alleged that the de-
defendant officers violated section 501 by conspiring against them
and in favor of the employer. The plaintiffs sought, inter alia, an
injunction barring the defendant officers from purporting to act
as their collective bargaining representatives. The court denied
the requested injunction, stating:

What the plaintiffs . . . request this Court to do is to sub-
stitute its judgment for the judgment of the duly elected col-
lective bargaining representatives of the plaintiffs. Even if it
were to be admitted that the action of the Union here was
unwise, this is not an issue for determination by the Court.
For this Court to seek to determine whether or not the decision
made in this matter was wise would be for the Court to make
itself the collective bargaining representative. It would also
put the Court in the position of a compulsory arbitrator, where-
as the parties have never agreed that the Court could so act.
The court noted that the exclusive procedures of the NLRB were
available if a change in collective bargaining representatives was
sought.

The court in Echols reached the correct result. The legisla-
tive history indicates that Congress did not intend section 501 to
be generally applicable in the collective bargaining context,

207. Wollett, supra note 199, at 282. See Yanity v. Benware, 376 F.2d
197 (2d Cir. 1967) (allegation that union violated § 501 by inducing em-
ployees to strike dismissed).
209. Id. at 3032.
210. With respect to § 501’s fiduciary provisions, John L. Holcombe,
except where a union official has directly or indirectly received some benefit or favor because of his collective bargaining activities on behalf of the union. The relevant Senate report declared that "in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective bargaining agents."\(^{211}\)

In this regard, the courts would be well advised in construing section 501(a) to take into consideration the following statement made by the Independent Study Group sponsored by the Committee for Economic Development:

> The guarantees contained in the law [LMRDA] are designed to improve and not to impede the effective functioning of trade unions and collective bargaining. The agencies and men administering these regulatory provisions can help by carrying out their tasks in a manner calculated not to interfere with the conduct of normal union business. 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.\(^{212}\)

Accordingly, to expand the scope of section 501 to permit judicial scrutiny of the discretion allowable to union officials in collective negotiations would not only be unwise, but would also be contrary to the intent of Congress.

**VI. CONCLUSION**

The imposition of fiduciary duties upon union officials represents an important landmark in federal labor legislation. As one writer has noted, "[t]hey represent the judgment of Congress, which almost certainly will never be reversed, as to the minimum ethical and legal standards by which the behavior of union leaders must be measured."\(^ {213}\) It is unfortunate, however, that Congress in enacting such an important provision used language which is open to so many varying interpretations. Although the

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\(^{211}\) S. REP. No. 187, 86th Cong., 1st Sess. 7 (1959) (emphasis added).


process of "litigating elucidation"\textsuperscript{214} has resolved some of the uncertainties, the Supreme Court will undoubtedly have to resolve others, especially with respect to the breadth of the fiduciary duties imposed upon union officials.