NOTES AND COMMENTS

COUNSEL FEES FOR UNION OFFICERS UNDER THE FIDUCIARY PROVISION OF LANDRUM-GRIFFIN

AMID the heated controversy that seems inevitably to surround the passage of any labor legislation, section 501 [1] of the Labor-Management Reporting and Disclosure Act of 1959 [2] took some giant steps whose compass has yet to be measured.[3] It creates a federal right in union members to hold union officers and agents to broad fiduciary standards. Few suits have been initiated to enforce the right granted by section 501; and, hence, the courts have scarcely begun to devise and shape the substantive details of this broadly worded provision.[4] Some of its contours, however, have already taken shape.[5] Section 501 has, for example, provoked judicial consideration of the question whether a union officer or agent can, in harmony with his position of trust, make use of union money or employ union counsel [6] in his own behalf in

1. 73 Stat. 535 (1959), 29 U.S.C. § 501 (Supp. IV, 1963).

2. 73 Stat. 519 (1959), 29 U.S.C. §§ 401-531 (Supp. IV, 1963) [hereinafter cited as LMRDA].

3. For the background of section 501 and the controversy surrounding its passage, see Dugan, *Fiduciary Obligations Under the New Act*, 48 GEO. L. J. 227 (1959); Strauch, *The Fiduciary Duty of Union Officers under the LMRDA: A Guide to the Interpretation of Section 501*, 37 N.Y.U.L. REV. 486 (1962); Ostrin, *Fiduciary Obligations of Union Officers: A Critical Analysis of Section 501*, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 528, 530-34 (Slovenko ed. 1961) [hereinafter cited as SYMPOSIUM]. See generally NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 (1959).

4. Although the courts which have applied section 501 have conceded their need to rely upon state common law, they have nevertheless made it clear that the law of section 501, however it may evolve, is to be federal law, substantively fashioned by the federal courts to comport with the policies expressed in the national labor laws. See, *e.g.*, Highway Truck Drivers & Helpers v. Cohen, 182 F. Supp. 608, 617 (E.D. Pa.), *aff'd*, 284 F.2d 162 (3d Cir. 1960), *cert. denied*, 365 U.S. 833 (1961); Nelson v. Johnson, 212 F. Supp. 233, 241-42 (D. Minn. 1963). See also Wollett, *Fiduciary Problems under Landrum-Griffin*, 13 N.Y.U. ANN. CONF. ON LABOR 267, 273 (1960).

The courts and commentators alike view the judicial role in giving content to section 501 as being similar to that of the courts with respect to section 301 of the Taft-Hartley Act. See Katz, *Fiduciary Obligations of Union Officers Under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959*, 14 LAB. L.J. 542, 547 (1963); Wollett, *supra* at 273-74; Highway Truck Drivers & Helpers v. Cohen, *supra* at 617; Nelson v. Johnson, *supra* at 241-42.

5. In addition to the cases discussed in the text of this Comment, see Nelson v. Johnson, *supra* note 4; Holton v. McFarland, 215 F. Supp. 372 (D. Alaska 1963); Forline v. Helpers Local 42, 211 F. Supp. 315, 318-19 (E.D. Pa. 1962).

6. Throughout this Comment the phrase "counsel-fee issue" or some variant is intended to encompass both expenditure of union funds and use of union counsel. The latter, of course, is simply an indirect way of accomplishing the former. *Cf.* Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962); Holdeman v. Sheldon, 204 F. Supp. 890, 892-93 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962).

suits naming him as defendant. An analysis of the multiple facets of the counsel-fee problem may suggest the direction in which the courts are likely to move in the future disposition of section 501 cases.

The counsel-fee problem ordinarily arises in roughly the following manner: Upon the filing of a civil or criminal complaint naming a union officer as defendant, the officer, with or without authorization by some governing board, would engage counsel, draw upon the union treasury for the necessary retainer fee, and assure his lawyer that adequate union funds are available to pay for additional expenses. Or, the officer might direct regular union counsel to prepare and carry out his defense at the union's expense. Thereupon, alleging that the officer had breached his fiduciary duty by thus expending union funds—directly or indirectly—to defend himself, and that the union is unwilling to take corrective action,[7] a union member would bring suit under section 501 to compel the officer to restore the funds already expended and to restrain him from making further use of union resources. Where the conduct charged in the underlying suit against the officer is wholly unconnected with his official position—for example, speeding, failure to meet mortgage payments, or tax evasion—and the officer uses union resources on his own initiative, this conduct seems tantamount to a direct misappropriation and would, it appears safe to say, provide grounds for a successful charge of breach of fiduciary duty. On the other hand, where an officer seeks to use union resources in the defense of conduct connected with his official position or where some form of authorization has been given for a union-supported defense of unconnected conduct, more difficult problems are posed.

The range and complex interrelationship of these problems are dramatically suggested by a series of recent decisions involving a Philadelphia affiliate of the Teamsters Union. In state civil and criminal suits certain union officials had been charged with misappropriating large sums of the local's money.[8] The officers, apparently in accordance with a nearly unanimous membership resolution authorizing such action,[9] thereupon used their organization's funds to pay litigation expenses in the pending actions. In a series of cases, each denominated *Highway Truck Drivers & Helpers v. Cohen,* dissenting union members claimed the applicability of section 501 to this counsel-fee matter, and petitioned in

7. See text accompanying note 53 *infra.*

8. Proceedings in the civil suit appear in Highway Truck Drivers & Helpers v. Cohen, 405 Pa. 55, 172 A.2d 824 (1961); 409 Pa. 546, 187 A.2d 291 (1963). As of December 1963, almost four years after this action was begun, no decision on the merits had been rendered. In the criminal action, the defendants were ultimately convicted. See N.Y. Times, Oct. 23, 1963, p. 20, col. 6.

9. The membership of the union had, with a few dissenting votes, authorized the defendant officials to use union funds to bear the

> [l]egal costs of such actions . . . which are in reality not directed at our officers but are directed at us, the members of Local 107, our good contracts, our good wages and our good working conditions.

Highway Truck Drivers & Helpers v. Cohen, 182 F. Supp. 608, 616 (E.D. Pa.), *aff'd,* 284 F.2d 162 (3d Cir. 1960), *cert. denied,* 365 U.S. 833 (1961).

federal court for injunctive relief against further payment of union funds to aid in defense of the state suits,[10] for recovery from defendants of funds already expended by the union in their behalf,[11] and for reimbursement of plaintiff's counsel fees for the federal court actions.[12] The court in *Cohen,* over a period of some three and one-half years, granted almost entirely the plaintiff members' petitions. In doing so, however, it was forced—as other courts will likely be—to consider such extraordinarily difficult problems as the scope of a union officer's fiduciary duty, the relationship of union democracy to that duty, potential union intervention in an officer's trial, and reimbursement of both plaintiffs' and defendants' expenses at litigation's end.

SECTION 501

Overview: The LMRDA and Section 501

Solution of the various facets of the counsel-fee problem requires that section 501 be viewed initially within the broader tapestry of the LMRDA itself, for the substantive law of that section must be shaped in part by the general purposes of the act. Two principal strands, diverse in origin and purpose, entwine their way through the LMRDA, fraught with potential for conflict whose resolution has been left to the courts. Title I,[13] the broadly worded "Bill of Rights" for union members, and Title IV,[14] which deals with union elections, aim at the protection of democratic processes within the union;[15] frequent abuses of these processes, brought to light by the McClellan hearings,[16] motivated Congress to intervene in internal union affairs to protect the right of self-government for the rank-and-file.[17] At the same time, other congressional findings, those of numerous instances of "breach of trust . . . and other failures to observe high standards of responsibility and ethical conduct"[18] on the part of union leaders, provided the im-

10. 182 F. Supp. 608 (E.D. Pa.), *aff'd,* 284 F.2d 162 (3d Cir. 1960), *cert. denied,* 365 U.S. 833 (1961).

11. 215 F. Supp. 938 (E.D. Pa. 1963). Some $25,000 was involved. See also 219 F. Supp. 614 (E.D. Pa. 1963).

12. 220 F. Supp. 735 (E.D. Pa. 1963); see the concluding section of this Comment, entitled "Counsel Expenses for Plaintiffs."

13. Sections 101-05, 73 Stat. 522 (1959), 29 U.S.C. §§ 411-15 (Supp. IV, 1963).

14. Sections 401-03, 73 Stat. 532 (1959), 29 U.S.C. §§ 481-83 (Supp. IV, 1963).

15. See H.R. REP. No. 741, 86th Cong., 1st Sess. 7 (1959) [hereinafter cited as H.R. REP. No. 741]. See also Summers, *American Legislation for Union Democracy,* 25 MODERN L. REV. 273, 274-79 (1962).

16. See generally *Interim Report of the Select Committee on Improper Activities in the Labor or Management Field,* S. REP. No. 1417, 85th Cong., 2d Sess. (1958).

17. H.R. REP. No. 741, at 6-7, 78; S. REP. No. 187, 86th Cong., 1st Sess. 5-7 (1959). See Summers, *supra* note 15, at 279. State courts had long played a significant role in this area; see Summers, *The Law of Union Discipline: What the Courts Do in Fact,* 70 YALE L.J. 175 (1960).

18. Section 2(b), 73 Stat. 519 (1959), 29 U.S.C. § 401(b) (Supp. IV, 1963). *Cf.* JACOBS, OLD BEFORE ITS TIME: COLLECTIVE BARGAINING AT 28 (Center for the Study of Democratic Institutions) 30 (1963).

petus for the second strand of the act.[19] Legislation was passed to assure that those standards were met in the administration of the affairs of labor organizations. To achieve this goal, Congress sought to create an environment in which union members would themselves initiate corrective action.[20] Its first step was to require full disclosure of union financial and administrative activities, as well as similar activities of the officers, so that the membership would be in a position to take informed action.[21] Such was the objective of Title II.[22] Its second step was to establish as a rule of federal law [23] a fiduciary duty on the part of union officers and to assure that a judicial forum existed in which union members could either challenge the acts that they would learn about through the requisite disclosures or seek additional information upon which to base such a challenge. Section 501 [24] sought to achieve these latter

19. Title III seems to combine both strands in its treatment of trusteeships. Sections 301-06, 73 Stat. 530 (1959), 29 U.S.C. §§ 461-66 (Supp. IV, 1963). See H.R. REP. No. 741, at 13-15.

20. See S. REP. No. 187, *supra* note 17, at 23.

21. See *id.* at 8; H.R. REP. No. 741, at 8, 9.

22. Sections 201-10, 73 Stat. 524 (1959), 29 U.S.C. §§ 431-40 (Supp. IV, 1963). From this title, of course, comes the name of the Act. See Wollett, *supra* note 4, at 271-72.

23. See note 4 *supra*.

24. 73 Stat. 535 (1959), 29 U.S.C. § 501 (Supp. IV, 1963). 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 constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.
> (b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to

objectives. To the extent that its fiduciary standard requires particular modes of official conduct and thus potentially precludes certain democratically determined alternatives, the need for judicial reconciliation or adjustment of conflicting statutory policies assumes significant proportions.

Section 501(a): A Position of Trust

Existence of a fiduciary duty is unequivocally enunciated in section 501(a), which states that

> 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.[25]

Yet a court will find little in the express language of that section to aid it in determining whether any particular use of union resources by an officer in the defense of legal actions violates his responsibility. Two specific prohibitions appear in the statute.[26] First, the officer must "refrain from dealing with [the union] . . . as an adverse party . . . ." Since an officer's expenditure in his defense is not necessarily adverse to the union's interest, that phrase does not automatically answer the counsel-fee question. Second, the officer must refrain "from holding or acquiring any pecuniary or personal interest which conflicts with the interests of [the union]. . . ." This prohibition, relating to the realm of business transactions and investments, appears inapplicable to the counsel-fee problem, as does the further directive "to account to the organization for any profit received . . . in connection with transactions conducted . . . on behalf of the organization."

The remaining words in section 501(a) instruct the union officer

> to hold [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 by-laws and any resolutions of the governing bodies adopted thereunder. . . .

These words contain a possible ambiguity which might impede resolution of the counsel-fee issue. Did Congress intend to create alternative standards by which an officer must abide depending upon whether he is "holding" or "expending" union funds? Is a court, in other words, to evaluate an officer's custody of funds only in terms of benefit to the organization, and his disposition of those funds only in terms of the governing rules of the union? Nothing in the legislative history supports such a dichotomy, and there seems to be no sensible reason for imputing to Congress an intent to distinguish

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> 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.

25. See note 24 *supra*. The class of persons covered by this provision is much broader than the class included in the term "officer" as used in the Taft-Hartley Act; see Strauch, *supra* note 3 at 488 n.13.

26. See note 24 *supra* for the context of the phrases discussed in the text.

such duties.[27] A more reasonable interpretation of the clause is to read it as conferring legislative power upon the union to require adherence to standards more rigid than those set by federal fiduciary law itself or, conversely, to relax certain ordinary restraints upon the use of funds by a union fiduciary, where such relaxation can be justified in terms of the specific institutional needs of a labor organization.[28] Congress, it may be assumed, wanted the courts to assure that union officers and agents both held and expended union funds for the benefit of the organization, but in addition the legislators wanted union rules and other policy expressions by the membership to play an important role in judicial determination of the legality of a particular expenditure. The question of how the competing roles of membership and court are to be reconciled ultimately transcends the bounds of section 501, yet must be faced if the issues in a case such as *Cohen* are to be disposed of in a principled manner.

Union Autonomy versus Judicial Control

As even a cursory examination of the language of section 501(a) makes clear, the philosophy of the fiduciary provision, like that of the LMRDA itself, contains the dual themes of union self-rule and of externally imposed standards for official conduct—themes which may harmonize for a time but which when pressed to their limits must inevitably become irreconcilable. Simple questions under section 501, such as direct misappropriation by an officer for private gain, may not force the philosophical conflict into the open. But all of the potential questions are not simple, and at some point a court must face directly the profoundly difficult question of its role vis-à-vis the union under the fiduciary provision. An analogy to the shareholder's derivative action[29] suggests some of the conceptual problems with which the court must struggle in treating the counsel-fee problem. Just as the derivative action, when its logic is relentlessly pursued, leads to almost irresoluble questions of "corporateness," so does the action under section 501 raise subtle and complex questions about the institution of a union—problems which are only accentuated by the section's insistence that institutional features of labor organizations be considered in evolving their officers' fiduciary duties and that union constitutions and bylaws, and any resolutions of the governing bodies adopted thereunder, be likewise consulted.[30] Questions of fiduciary duty thus appear in part to turn upon matters of authority; nevertheless, it does not seem that "authorization" was intended to be an impervious defense under the act, for the groups or leaders upon whom constitutions and bylaws will most frequently devolve the power to authorize are just those with whose actions Congress was most concerned.[31] Even full membership votes

27. See Katz, *supra* note 4 at 548-59; Strauch, *supra* note 3 at 493 n.46. *But see* Duker, *Fiduciary Responsibility of Union Officers,* in SYMPOSIUM at 524.

28. For example, the union may vote to permit certain investments which ordinary fiduciary law would prohibit. See Wollett, *supra* note 4 at 282; Dugan, *supra* note 3 at 300.

29. See Wollett, *supra* note 4 at 268, 270.

30. See note 24 *supra.*

31. See 105 CONG. REC. 6524, 6525, 6526 (1959) (remarks of Senator McClellan).

may not be proof against suit under the LMRDA. By requiring a prospective plaintiff to request the union to take action against an allegedly delinquent officer,[32] Congress must have contemplated that a majority vote not to sue —in effect, or in form, a ratification of the officer's conduct—might be procured prior to a 501 suit. Yet such an action by the membership clearly does not defeat the union member's right to bring suit, and Congress regarded the individual plaintiffs in these actions, despite a membership decision not to act, as suing in the place of the union. Who is the union? This question seems inevitably to insinuate itself into an analysis of fiduciary responsibility.

It is clear that an officer must act for the benefit of his organization and in accordance with its internal rules, yet section 501 also makes it clear that an internal rule in the form of a *general* exculpatory provision cannot "authorize" a fiduciary breach [33] nor can "the union" prevent a member from suing to vindicate "its" interests despite a majority decision that such are not "its" interests. The crucial question for the court, as it attempts to discern its role, is whether—beyond the explicit restrictions of section 501—"the union" is unfettered in its ability to shape the contours of its officers' fiduciary obligations. Can the organization authorize or legitimize, before or after the event, a *particular* act by an official which would, but for the union's expression of policy, otherwise be a breach of duty? In short, to what extent is form to prevail; and if the court, in its administration of section 501, is not to be restricted by form alone, what are the limits of judicial reach?

Legislative Purpose: The Scope of Section 501(a)

Some answers to these difficult but unavoidable questions raised by the language of section 501 appear in the background of that provision. Although the legislative history indicates that decisions democratically arrived at are often to be honored, 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. Conceivably, the broad language of section 501(a)'s opening sentence, in which the "position of trust" is articulated, could justify a court in exerting almost boundless control over the conduct of union leaders.[34] Consider, for example, the union leader whose conduct leads the union into a violation of section 8(b)(4) of the NLRA, the secondary boycott provision, and thereby subjects his union to a suit for damages; certainly he has jeopardized the union's treasury. Or, what if an officer leads his union in a manner that is subsequently shown to have violated a no-strike provision in a collective bargaining agreement? Again, a damage action may expose the union's financial resources to substantial risk. However, to hold that such official conduct amounted to a violation of section 501's fiduciary obligation would severely

32. See text accompanying note 53 *infra*.

33. See note 24 *supra*.

34. See Wollett, *supra* note 4, at 279-81, 282-83, in which conflicting views on this matter seem to find expression.

inhibit union officers in their everyday administrative activities and, indeed, might potentially interfere with the officer's freedom to negotiate collective agreements.[35]

It is extremely doubtful that section 501 was designed to cut so momentous a swath. Indeed, a careful reading of the legislative history of the fiduciary provision suggests a far more restricted intent. Initially, it is important to recognize that section 501, in the eyes of Congress, was meant to reinforce the fiduciary relationship previously recognized in state law.[36] The fiduciary responsibilities of union leaders were said to be those "which the common law applies to all persons who undertake to act on behalf of others."[37] Hence, section 501 was meant "to incorporate a large body of existing law applicable to trustees, and a wide variety of agents."[38] The fundamental purpose of that provision, as it appears from the debates on its earlier equivalents, was to curtail the variety of threats to the fiscal integrity of unions brought to light by the McClellan hearings.[39] Senator McClellan himself, in proposing the fiduciary provision, stated that its aim would be to eliminate "the serious misuse of funds, misappropriation of funds, looting of union treasuries, and so forth . . ." that had plagued the union movement.[40] Other senators agreed that such a provision would force union officials to act responsibly with respect to union fiscal resources rather than "as though they had a proprietary interest in . . . [those resources]."[41] Subsequent committee reports reiterated the desire of a provoked Congress to insure that union officers would "put their obligations to the union and its members ahead of any personal interest."[42] Thus, it was fiscal wrongdoing rather than administrative decision-making at which Congress aimed its sights, and from

35. See *id.* at 282-83.

36. H.R. REP. No. 741, at 81. See Cox, *Internal Affairs of Labor Unions under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 827-29 (1960). The content of that state law is suggested in Strauch, *supra* note 3, at 489-93; and Dugan, *supra* note 3, at 279-83.

At the same time, Congress explicitly disavowed any intent either to reduce or limit the duties which might be imposed upon union officers by state laws or to curtail the rights and remedies of union members which those laws might provide. LMRDA § 603, 73 Stat. 540 (1959), 29 U.S.C. § 523 (Supp. IV, 1963). See Summers, *Pre-Emption and the Labor Reform Act — Dual Rights and Remedies*, 22 OHIO ST. L.J. 119, 140-41 (1961); Wollett, *supra* note 4, at 288-89.

37. H.R. REP. No. 741, at 81; 105 CONG. REC. 6524 (1959). See Strauch, *supra* note 3, at 489-93.

38. H.R. REP. No. 741, at 81. Prof. Cox points out that

> [t]he principles stated in section 501(a) were drawn from the *Restatement of Agency* in an effort to incorporate the whole body of common law precedents defining the fiduciary obligations of agents and trustees. . . .

Cox, *supra* note 36, at 828.

39. See generally 105 CONG. REC. 6523-30 (1959).

40. 105 CONG. REC. 6523 (1959). See *id.* at 6525, 6529.

41. 105 CONG. REC. 6523 (1959) (remarks of Senator Curtis).

42. H.R. REP. No. 741, at 81.

other fiduciary contexts would come models for the imposition of appropriate safeguards for union treasuries.

In seeking to protect the fiscal integrity of labor organizations, however, Congress disclaimed any purpose to regulate comprehensively the expenditures or investments of unions.[43] On the contrary, it recognized the desirability of minimizing interference with union choices as to the expenditure of funds.[44] Thus, although section 501(a) requires an officer to act for the benefit of the union in handling and expending its money, Congress continually reiterated its intention that the courts forbear from interposing their own notions of what expenditures are "good" or "bad," "beneficial" or "detrimental," for the union.[45] Other fiduciary contexts, specifically mentioned in the legislative history of section 501,[46] can offer by analogy more than substantive rules of behavior for persons occupying positions of trust. Activity of the courts themselves in those other contexts also provides an important guide for the judiciary in delineating its role in the application of section 501. Courts dealing with various types of fiduciaries have consistently refused to substitute their own judgments for those of the fiduciaries whose activities they supervise.[47] They have established outer limits of fiduciary discretion, but within those limits the courts will ordinarily refuse to find a breach of duty merely because the judge himself would have chosen a different course of action. The business-judgment rule in the corporate sphere is perhaps the most familiar example of this type of judicial reluctance to interfere.[48] The legislative background of section 501 compels the development of equivalent principles of restraint where the fiduciary administration of labor organizations is involved.

Analogy to other areas of fiduciary activity is not, however, the sole basis for restraint on the part of a judge who seeks to determine whether a breach of fiduciary duty has occurred. Section 501 itself contains the explicit caveat that the bounds of an officer's fiduciary duty are to be delineated only in light of "the special problems and functions of a labor organization."[49] Even

43. See *ibid.*; 105 CONG. REC. 17900 (1959) (remarks of Senator Kennedy). See also the dialogues between Senator McClellan, Senator Kennedy, and others. 105 CONG. REC. 6525-26 (1959).

44. The desire to protect certain educational, political and charitable expenditures was particularly evident. See 105 CONG. REC. 6525, 6526, 17872 (1959). See also Dugan, *supra* note 3, at 285-94.

45. *Cf.* 105 CONG. REC. 6525 (1959) (remarks of Senator McClellan).

46. See note 35 *supra* and accompanying text. See also 105 CONG. REC. 6529 (1959) (remarks of Senator Javits).

47. *E.g.*, Peach v. First Nat'l Bank, 247 Ala. 463, 25 So.2d 153 (1946); Perata v. Oakland Scavenger Co., 111 Cal. App. 2d 378, 387, 244 P.2d 940, 945 (1952).

48. See Perata v. Oakland Scavenger Co., *supra* note 47.

49. See note 24 *supra*. There is some ambiguity about this phrase: *Who* is to take into account the special problems and functions? Certainly it is incumbent upon the officer or agent to do so in order to make proper decisions. But the phrase seems no less a direction to the courts that, in shaping the content of the "position of trust" in the union context, institutional factors must be considered.

though, in one sense, that language does no more than state the general principle that a trustee's duties are always colored by "the character of the activity in which he is engaged,"[50] the caveat—taken together with the provision concerning the union constitution, bylaws, and resolutions—does seem to narrow the scope for judicial review of officer conduct in section 501 proceedings.

Broadly summarized, the legislative history of section 501 appears to establish that union policy expressions are not necessarily conclusive of the scope of an officer's fiduciary duty. Congress wished to give unions freedom to choose their own financial course yet feared the effects of political manipulation on union treasuries. Hence, as 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.

Section 501(b): Enforcement of Fiduciary Duties

Whatever conclusion is reached concerning the scope of section 501(a), Congress eased the enforcement of its provisions by making available both a federal and state forum [51] in which any member of an allegedly delinquent officer's union may sue for "appropriate relief."[52] Two preconditions to such a suit must be met. The first requirement is that the member must have requested the union to sue and, within a reasonable time, it must have refused or failed to do so.[53] The second and potentially far more significant prerequisite is that the prospective 501(b) plaintiff must obtain leave of court to sue [54] —leave which will be granted only upon a verified application and a showing of good cause. While the legislative history gives no hint as to what constitutes good cause, various interpretations may be suggested. "Good cause" may be taken to mean no more than that the union member has complied with the first precondition noted above. This interpretation, however, would

50. H.R. REP. No. 741, at 81. See Dugan, *supra* note 3, at 285-86, 290-92; Wollett, *supra* note 4, at 277.

51. See note 24 *supra*. It has been suggested that the existence of alternative forums may lead some plaintiffs to shop around unless a uniform body of federal law dealing with section 501 is evolved. See Wollett, *supra* note 4, at 287-88.

52. Section 501(b) specifies some types of relief—damages or an accounting—but gives no hint as to what other relief might be "appropriate." One commentator has suggested that in some cases "the courts would have the right to remove the miscreant union official from office." Dugan, *supra* note 3, at 295. This suggestion rests on an analogy to judicial action with respect to delinquent trustees, yet 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.

53. On the matter of what might constitute a "reasonable time," see Strauch, *supra* note 3, at 506-07; Wollett, *supra* note 4, at 270-71.

54. See Addison v. Grand Lodge of the Int'l Ass'n of Machinists, 318 F.2d 504, 508 (9th Cir. 1963).

reduce "good cause" to the status of a redundancy, which seems unreasonable in light of alternative readings.[55] Another interpretation of the phrase is that the court should scrutinize the proffered complaint in order to determine if it states a claim for relief, rather than leaving such a motion to the defendant. In view of the liberal federal standards of pleading, it seems doubtful that plaintiffs would find much difficulty in framing an adequate complaint. If "good cause" requires no more than neat draftsmanship on the part of plaintiffs' lawyers, it would seem to have little significance. A third interpretation appears more plausible: the court, upon receiving an application for leave to sue, should examine the proffered complaint to determine whether the prospective plaintiff has a reasonable chance of success if the suit is allowed to proceed.[56] A court at this preliminary stage might thus require the union member to allege in substantial detail the facts which he would show to prove the supposed breach of fiduciary duty. Or, indeed, the judge could exercise his discretion to order the plaintiffs to supply affidavits about the testimony to be offered, in order to determine what chance the prospective plaintiff has to prove his allegations, notwithstanding that, in themselves, those allegations present a colorable claim for relief.[57]

This last interpretation of the "good cause" provision is more consonant with the analogy, clearly within congressional view,[58] to shareholders' derivative actions in corporation law. Viewed overall, section 501 seems to give the union member the same kind of right to enforce obligations to the body of which he is a member as the shareholder possesses with respect to his corporation's officers. The suit may be brought only after an unsuccessful demand upon the union for action, and any remedy is obtained for the union [59] although the plaintiff may be entitled to reimbursement of counsel fees.[60] Seen from this perspective, the "good cause" provision seems analogous to the "security for expenses" provisions frequently wielded against corporate strike-suiters, both to discourage harassment of corporation officials and to minimize—if not eliminate—any loss to the corporation resulting from its indemnification of a vindicated officer or director.[61] Congress must have

55. See Penuelas v. Moreno, 198 F. Supp. 441, 444 (S.D. Cal. 1961).

56. Highway Truck Drivers & Helpers v. Cohen, 182 F. Supp. 608, 622 n.10 (E.D. Pa.), *aff'd*, 284 F.2d 162 (3d Cir. 1960), *cert. denied*, 365 U.S. 833 (1961), seems to adopt this analysis. See also Penuelas v. Moreno, *supra* note 55, at 447-49.

57. It might be, of course, that the prospective 501(b) plaintiff would contend that only through use of the federal discovery techniques, after the suit is brought, could he obtain adequate evidence to support his case. There is no reason, however, why a court could not find "good cause" in this situation where it felt that the plaintiff was not seeking to abuse either the discovery techniques or the vehicle of a section 501 suit.

58. See 105 CONG. REC. 6529 (1959) (remarks of Senator Javits).

59. Section 501(b) provides that any relief secured by the union member is "for the benefit of the labor organization." See note 24 *supra*.

60. See the section entitled "Counsel Fees for Plaintiffs" which concludes this Comment.

61. See BAKER & CARY, CASES ON CORPORATIONS 674-82 (3d ed. 1958).

recognized that section 501 actions could both provide a means for the harassment of officers—particularly if, as will be developed, the officer were required to meet legal expenses during the suit out of his own pocket—and constitute a drain on union financial resources because of indemnification requirements. Unlike the corporate strike-suiter, though, the litigious union member will probably have political goals in view: promotion of internal dissent rather than attainment of private fiscal gain through settlement. Because the threat of such vexatious lawsuits, together with the potential financial burdens of their defense, may not only interfere with union administration but also dissuade competent members from accepting positons of responsibility within their organization, the "good cause" provision may fulfill a significant role in the application of section 501.[62]

Proscription of Union Supported Defense

In the particular case of a section 501 challenge to the use of union resources by an officer in the defense of a legal action against him, a court will want to consider many factors in deciding whether a breach of fiduciary duty is involved. The process of judicial inquiry can be demonstrated by focusing upon a categorization of suits against an officer in terms of one of these factors—the nature of the underlying charge.

Where the officer attempts to defend with union resources conduct which, if proved, would amount to a breach of his fiduciary duty, he should be enjoined from putting those resources to such use, whether or not he was authorized to do so. In characterizing the underlying charge for these purposes, neither the form of the action nor the identity of the plaintiff in the underlying suit would be relevant; the indictment in a criminal prosecution, the complaint in a civil suit by a non-member of the union, and a rank-and-file complaint on behalf of the union would all be treated similarly. Strong reasons compel such proscription of the defendant officer's use of his organization's resources.

Congressional antagonism towards abuses of the fiscal integrity of labor organizations [63] suggests a stringent attitude toward officers accused of violating that integrity. Until it is shown that the officer's behavior cannot be characterized as a breach of duty, to allow him access to union funds for litigation purposes would subject the union to the risk of additional loss. Putting the union at such risk is inconsistent with the officer's fiduciary obligation and contravenes the legislative purpose to protect unions from

62. Although Congress might well have required the litigious union member to post bond at the time of bringing a 501 suit, this financial albatross would be quite burdensome in the union context, where prospective plaintiffs are likely to be relatively impecunious. The "good cause" provision may thus fulfill the same selecting-out function as an expense bond without subjecting union members who have substantial bases for section 501 suits to a security requirement which might effectively deny access to the federal or state forum.

63. See text accompanying notes 36-42 *supra*.

officers who abuse their positions of trust. Indeed, in a suit in which an officer is directly accused of lining his own pockets with union funds, to permit him to defend himself with additional resources may be tantamount to authorizing one final round of plunder.

In *Highway Truck Drivers & Helpers v. Cohen,*[64] outlined earlier, where nine rank-and-file members sued under section 501 to restrain the officers from using union funds in state court defenses and in the section 501 action itself,[65] the court granted the injunction, rejecting on two separate grounds the argument that a membership resolution barred it from giving such relief. First, the court held that the union membership did not have the power, under the local's constitution,[66] to pass the resolution in question.[67] Alternatively, the court held that the resolution was without effect because it was inconsistent with the aims and purposes of the Labor-Management Reporting and Disclosure Act, pointing to the incongruity in

> allow[ing] a union officer to use the power and wealth of the very union which he is accused of pilfering . . . to defend himself against such charges. . . .[68]

Cohen, of course, involved allegations of a conspiracy to cheat and defraud the union, a gross abuse of fiduciary responsibility. But in *Holdeman v. Shel-*

64. 182 F. Supp. 608 (E.D. Pa.), *aff'd,* 284 F.2d 162 (3d cir. 1960), *cert. denied,* 365 U.S. 833 (1961).

65. 182 F. Supp. at 616-17. The plaintiffs in this suit, as well as seeking an injunction against further expenditures, also alleged violations of § 501(a). The court held that § 501(a) was meant to apply prospectively only; it therefore ordered the plaintiffs to amend their complaint to state specific acts of misconduct which had occurred subsequent to the passage of the LMRDA (instead of alleging acts occurring before that time which supposedly were continuing at the time of the complaint). *Id.* at 622. It is not clear that the amendment was ever made.

66. Conceding that various ancillary powers might be implied from the stated objectives of the union, the court held that payment of legal expenses in the types of suits involved was not one of those powers.

> Being beyond the powers of the union as derived from its Constitution, it follows that a mere majority vote at a regular union meeting cannot authorize such expenditures.

182 F. Supp. at 620. The local's constitution was, in fact, that of the International Union (Teamsters). Local 107 had neither its own constitution nor its own bylaws. *Id.* at 619 n.7. See note 67 *infra.*

67. The first ground, absence of membership power, is of little importance to this discussion, for such an "oversight" on the union's part could easily be corrected. Indeed, the Teamsters—under whose governing rules the *Cohen* local was operating—have amended their constitution to expressly permit expenditures for the defense of an officer. Summers, *supra* note 15, at 297 n. 97. In the subsequent action to recover the $25,000 already spent, see note 11 *supra* and accompanying text, the defendants urged that the local's resolution had been validated by this amendment. The court viewed this change as irrelevant, in light of the fundamental conflict between such a resolution and the purposes of § 501. Highway Truck Divers & Helpers v. Cohen, 215 F. Supp. 938, 940 (E.D. Pa. 1963).

68. 182 F. Supp. at 620. See Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962).

don[69] a court was confronted with a situation where the conduct alleged, while technically a breach of duty, did not involve the extreme case of an officer's conversion of union resources to his own use. Two union officers in *Holdeman* were sued for violation of their section 501 fiduciary duty for allegedly having made unauthorized salary payments to two individuals who were not union employees. There was no contention that the defendants themselves had benefited from the alleged misallocation. When the union sought to intervene and, in effect, defend the officers, the plaintiff union member moved to enjoin such intervention.[70] The court granted the injunction, relying heavily upon the precedent and reasoning of *Cohen*.[71]

Though the situations in the *Cohen* and *Holdeman* cases might be distinguished on the ground that in *Cohen* the defendants' alleged misconduct was for their own benefit whereas in *Holdeman* it was not, this distinction ought not to lead to different results insofar as the use of union counsel or defense funds is concerned. The inherent inconsistency in permitting an officer to use union resources to defend alleged fiscal misconduct is undiminished. The purpose of Congress was to eliminate altogether breaches of fiduciary duty within the union sphere. Against that background, distinctions between minor improprieties and gross abuses of responsibility on the officer's part, based for example on the recipient of misallocated funds, have no warrant.[72]

It might be argued, however, that the risk of further losses to the union through the officer-defendant's use of union resources is matched by interests of the labor organization in avoiding the risks of harassment of its officers,[73] especially since such harassment might discourage capable men from assuming positions of responsibility.[74] The *Cohen* reasoning, which denied that the union could have any interest in defending its officers in such a case, derives much support, it is fair to say, from the facts there alleged. Yet, where the very involvement of fiduciary duties is less clear, or where the proportions of an alleged breach are less flagrant, it can be argued that the union does have a genuine interest—supported by congressional emphasis on union

69. 204 F. Supp. 890 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962).

70. The matter of union intervention is discussed at length in the section below entitled "Union Intervention."

71. Two other decisions likewise have relied on *Cohen* in enjoining the use of union funds or counsel to support the defense of officers' conduct. Moschetta v. Cross, 48 L.R.R.M. 2608 (D.D.C. 1961); Alvino v. Bakery Workers, 48 L.R.R.M. 2609 (D.D.C. 1961).

72. See Holdeman v. Sheldon, 204 F. Supp. 890, 894 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962). See also Nelson v. Johnson, 212 F. Supp. 233, 285, 296 (D. Minn. 1963).

73. See Note, 74 HARV. L. REV. 1667, 1670 (1961).

74. Prof. Cox suggests, however, that

> A hundred-fold increase in the volume of litigation would not harm the labor movement. One of the proper costs of coming-of-age is the risk of unjustified litigation; the risk of unwarranted suits is the price we pay for assurance that every man will have his day in court.

Cox, *supra* note 36, at 853. See also Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 895 (1960).

self-government—in striking for itself the balance between the risks of further financial loss and harassment. It should at least be permitted to make its decision by authorizing the payment of legal expenses. Professor Cox, for one, feels that the policies of the LMRDA support this conclusion. Noting that the principles of section 501(a) were drawn from the Restatement of Agency, he argues that an agent (officer) who follows the instructions of his principal (union) cannot be guilty of a breach of his fiduciary duty.[75] Any ambiguity about this conclusion, he asserts, is dispelled by the legislative history of section 501. For example, the House report states that

> union officers will not be guilty of a breach of trust when their expenditures are within the authority conferred upon them [by an appropriate governing rule or body].[76]

Yet, this line of argument is unpersuasive, even though the statute specifically speaks of an officer's conformity to the governing rules of his organization as one measure of his fiduciary duty. The Restatement view, constructed to deal with typical business situations, may not be transferable to the union context.[77] For one thing, while determination of an agent's authority is normally a routine problem in business situations, the validity or purport of union authorizations may frequently be questionable; indeed, as suggested earlier,[78] the potential difficulty in identifying "the union" for section 501 purposes may further cloud the authorization issue. The legislative history on which Professor Cox relies is at best ambivalent and seems on the whole to suggest that the union may authorize any officer conduct that it wishes *so long as* external fiduciary protections for the union are not thereby diminished.[79] As developed earlier, it seems inescapable that the judge, rather than the union, must finally be responsible for determining the bounds of those protections. The risk of compounding the injury to the union's financial resources would simply seem to be too great for the philosophy of membership self-rule to prevail.[80] Indeed, the final sentence of section 501,[81] forbidding effect to

75. Cox, *supra* note 36, at 827-29; Cox, LAW AND THE NATIONAL LABOR POLICY 91-93 (1960). See also Katz, *Fiduciary Obligations of Union Officers under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959*, 14 LAB. L. J. 542, 548-49 (1963).

76. H.R. REP. No. 741, at 81. Senator Kennedy, in his report from the conference committee on the LMRDA, repeated identical words to the Senate. 105 CONG. REC. 17900 (1959). But Representative Barden, chairman of the House Labor Committee, suggested that the union's constitution and bylaws are not to be solely determinative of the scope of an officer's fiduciary duty. 105 CONG. REC. 18153 (1959).

77. *Cf. In re* E. C. Warner Co., 232 Minn. 207, 213, 45 N.W.2d 388, 392-93 (1950).

78. See text accompanying notes 30-33 *supra*.

79. See text accompanying notes 33-42 *supra*.

80. See Wollett, *Fiduciary Problems under Landrum-Griffin*, 13 N.Y.U. ANN. CONF. ON LABOR 267, 279 (1960); Strauch, *The Fiduciary Duty of Union Officers under the LMRDA: A Guide to the Interpretation of Section 501*, 37 N.Y.U.L. REV. 486, 494-98 (1962).

81. For the exact wording of this provision, see note 24 *supra*. See Dugan, *Fiduciary Obligations under The New Act*, 48 GEO. L.J. 277, 299-301 (1959). For an excoriation

general exculpatory provisions or resolutions, indicates the direction in which Congress wished the courts to pull when confronted by a policy tug-of-war between fiduciary principles and union attempts at self-government. Moreover, the right of an individual union member to bring a 501 action against an officer despite union refusal to sue by membership vote also suggests that authorizations should not be binding on the court.[82]

However, even though Congress would appear to have opted for some risk of harassment where fiduciary breaches are involved, it must be remembered that section 501 itself contains a potentially significant safeguard against unfounded, purely diversionary suits insofar as it requires the judge to find "good cause" before granting leave to sue.[83] Moreover, the union may avoid much of the danger of insufficient incentive to run for office by following a policy of reimbursing its officers once they have been shown to be innocent, even though payment prior to vindication would be prohibited.[84]

Where a union member exercises his section 501 right in the face of a union refusal to sue, analogy also supports proscription of a union-supported defense. In the corporate, trust, estate, and other fields to which Congress directed the courts' attention in the legislative history of section 501, the courts have uniformly held that no allowance for counsel fees should be made to a fiduciary accused of breach of duty until the suit has been terminated; reimbursement, rather than provision of funds or counsel to help conduct the defense, is the only accepted approach.[85] This rule is based upon a desire

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of the provision, see Previant, *Have Titles I-VI of Landrum-Griffin Served the Stated Legislative Purpose?* 14 LAB. L.J. 28, 34-35 (1963).

82. It may be noted that the general thrust of congressional concern with internal union democracy centers largely around the protection of individual members' rights. Title I of the Act, in which the principal safeguards for union democracy appear, is evidence of such concern. There it is the individual member's right to nominate candidates, to vote, to attend meetings, to meet and assemble with his fellows, and to reasonably express his views that receives principal attention. See § 101, 73 Stat. 522 (1959), 29 U.S.C. § 411 (Supp. IV, 1963). Only with respect to union dues does this section give explicit attention to majority rule. Likewise, in Title IV, which imposes the requirement of periodic elections, most provisions are devoted to protection of the rights of the individual candidate. See § 401, 73 Stat. 532 (1959), 29 U.S.C. § 481 (Supp. IV, 1963). To be sure, protection of the member's rights amounts to protection of the group as well, but such safeguards for the individual nevertheless put very real limits upon the ability of a majority to tyrannize a minority. Majority rule may indeed be viable only when the dissenter is protected, but insofar as such protection is guaranteed, the absolute scope of majority action is restricted. The concern of Congress in this area may thus broadly be said to have focused more upon the individual's right to alter the structure of the organization than upon the organization's right to alter the framework of legal principles within which it operates. *But cf.* Sheridan v. United Bhd. of Carpenters, 306 F.2d 152 (3d Cir. 1962).

83. See text accompanying notes 54-62 *supra.*

84. This matter will be discussed below in detail in the section entitled "Reimbursement at Litigation's End."

85. See, *e.g.*, Solimine v. Hollander, 129 N.J. Eq. 264, 19 A.2d 344 (1941) (corporate director); Armstrong v. Boyd, 140 Ga. 710, 79 S.E. 780 (1913) (administrator).

to prevent the plaintiff from being overwhelmed by the vast resources that might otherwise be available to the defendant fiduciary.[86] In the context of a rank-and-file suit against an officer, maintenance of a rough equality in the parties' relative positions seems just as appropriate. Union officers and members alike are ordinarily men of modest means, and a substantial increase in the resources of one side may interfere with an effective inquiry into the defendant's guilt or innocence. For example, the defendant's ability to engage in dilatory tactics, such as extensive use of pre-trial examinations, will be greatly affected by the amount of funds available to him. It is, of course, equally true that the availability of additional funds to either side might permit a more extensive inquiry by counsel which otherwise could not be undertaken; thus would the judicial goal of evoking the factual truth be served. Indeed, inadequate funds, in an absolute as well as a relative sense, may affect the outcome of litigation. Nevertheless, it seems fair to conclude that Congress would prefer a solution that limited the total funds available for counsel fees in order to retain an equilibrium, rather than accepting one which ran the risk of disadvantaging a prospective rank-and-file plaintiff by assisting his adversary.[87]

Union Intervention

Beyond the avoidance of harassment of its leadership, a union may contend that it has significant interests which make imperative its participation in a suit against one of its officers. For example, where the underlying suit alleges that a particular investment by a union officer transgressed his fiduciary duty, the union may wish to argue that the bounds of that duty should be delineated in such a manner as to include investments of the type challenged, since that investment serves the organization's needs even though it might exceed the fiduciary discretion of an executor or institutional trustee. Or, indeed, a union might wish to appear in a suit against its officer in order to argue that the matter was being handled adequately through the union's internal procedures and that the court, therefore, ought not to exercise its jurisdiction. Further, the union may have a substantial interest in the in-

86. See Solimine v. Hollander, 129 N.J. Eq. 264, 266, 19 A.2d 344, 345 (1941); *In re* E. C. Warner Co., 232 Minn. 207, 210-11, 45 N.W.2d 388, 391 (1950).

87. Still another reason for granting injunctive relief against counsel-fee expenditures in cases involving an officer's defense against allegations of conduct which amounts to a breach of fiduciary duty is a wholly pragmatic one, noted in the *Cohen* litigation. 182 F. Supp. at 617 n.5. If union officers were permitted in such cases to expend organization funds for their defense and that defense were unsuccessful, the union presumably would have a right to recover those funds from the officer. Yet, realistically, the likelihood of such a recovery might be quite slim and the risk to the union's treasury great. To some extent, this danger may be obviated by the LMRDA's bonding requirements. Section 502, 73 Stat. 536 (1959), 29 U.S.C. § 502 (Supp. IV, 1963). However, the protection afforded by the bonding provisions is limited, for not all officers are required to be covered by such bonds. Moreover, the amount of the bond may be insufficient to cover the value of union resources employed by the officer in his defense, so that at least part of the counsel-fee outlay might be endangered.

terpretation of a union document, such as the constitution, which may necessarily be involved in the suit against its officer. In a broad sense, the union may seek to assure that proper attention is paid to its "special problems and functions" in such law suits.

Adequate representation of the union's institutional needs can be permitted, however, in a manner consistent with restrictions upon its defense of the allegedly delinquent officer. This can be accomplished, as a number of courts have recognized,[88] by permitting conditional intervention by the union in the suit against its officer. Such intervention would be limited to matters in which the union can demonstrate a plausible interest. Although a union might be permitted to argue, for example, that particular conduct of its officer, even if proved, should not be considered a breach of his fiduciary duty, it should not be permitted to dispute the factual allegations against its officer, for this latter aspect of the litigation cannot be said to touch and concern the institutional requirements of the organization. In *Holdeman v. Sheldon*,[89] discussed earlier, the president of the local was the plaintiff, two other officers were defendants, and "the union"—whoever that might be—sought to intervene and file a common answer on behalf of the defendants. Although the court failed to recognize the question of institutional identity, its reasoning on the intervention point was sound. It acknowledged that a labor organization may well have independent reasons for intervention but noted that in the case before it no such reasons had been shown.[90]

Where intervention is permitted, the importance of distinguishing between representation of the union's institutional interests and representation of the personal interests of the defendant requires that the union be represented by counsel independent of the defendant's attorneys.[91] This, as the *Holdeman* court noted,[92] would assure fair representation should the various interests diverge at some point in the litigation. Proscription of dual representation would also prevent the union from surreptitiously absorbing the cost of the officer's defense by a manipulation of the fees charged the respective parties.

Allowance of Union Supported Defense

Where an officer attempts to defend alleged conduct which, if proved, would constitute a breach of his fiduciary duty, proscription of a union supported defense, it has been contended, would appear most consistent with the legislative purposes which can be discerned in section 501. On the other hand, where the conduct involved in the underlying suit against an officer does not involve his fiduciary obligations, another result may be appropriate should

88. See Highway Truck Drivers & Helpers v. Cohen, 409 Pa. 546, 187 A.2d 291 (1963); Holdeman v. Sheldon, 204 F. Supp. 890, 892 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962).

89. 204 F. Supp. 890 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962).

90. 204 F. Supp. at 892-93.

91. *Cf.* Lewis v. Shaffer Stores Co., 218 F. Supp. 238 (S.D.N.Y. 1963).

92. 204 F. Supp. at 893. See Milone v. English, 306 F.2d 814, 817 (D.C. Cir. 1962).

a union member seek to prevent the officer from using the organization's resources to support his defense. Consider, for example, a suit by a member of the rank-and-file brought under section 102 of the LMRDA to vindicate the political rights accorded him by Title I, the "Bill of Rights."[93] Here, the member seeks a personal recovery or other relief on his own behalf, rather than for the benefit of the organization as a whole. Indeed, section 102 makes it clear that the action may be brought against the union as well as, or even instead of, its officer; effective relief for the plaintiff is likely to require that more than a single officer be named defendant.[94]

Although it is possible that problems of institutional identity may be raised here as well as where fiduciary matters are involved, Congress—by explicitly authorizing the establishment of "reasonable rules" for the conduct of meetings[95]—would seem to have tacitly acknowledged that union leaders can in this situation appropriately identify themselves as "the union." The "reasonable rules" provision, taken together with the personal nature of an individual member's lawsuit, suggest the marked difference in the relationship between a defendant officer and his union in the section 102 situation from that appearing in the fiduciary context examined earlier.

Given this difference, there would seem to be no basis for preventing the union, in accordance with its internal procedures, from assuming the financial burdens of its officer's defense. Since it cannot be said that the officer's conduct, if proved, would conflict with the union's interests as represented in a derivative fashion by an individual member and since the use of union resources to support the officer's defense would not increase any risk of financial loss as might be the case in a fiduciary suit, a union decision to devote its funds or counsel to such a purpose should be respected. Even the argument that the union member might be overwhelmed by the organization's resources is less forceful here, for the Act itself contemplates—and it seems quite likely—that the union might be a named defendant; the argument as to the relative financial resources of the parties, drawn from the corporate sphere, was meant to place the union in a neutral position[96]—a position perhaps wholly inappropriate in the section 102 suit. Where plaintiffs in lawsuits against union officers are not union members at all, the union's interest in defending both the scope of its officer-agent's capacity to act on its behalf and its treasury becomes potentially even stronger. Thus, an officer's use of union resources to support the defense of a suit against him based on conduct connected with official duties unrelated to fiduciary matters does not seem to

93. Sections 101-05, 73 Stat. 522 (1959), 29 U.S.C. §§ 411-15 (Supp. IV, 1963).

94. See, *e.g.*, the scope of the injunction in Vars v. International Bhd. of Boilermakers, 215 F. Supp. 943, 952 (D. Conn. 1963).

95. LMRDA § 101(a)(2), 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(2) (Supp. IV, 1963).

96. See *In re* E. C. Warner Co., 232 Minn. 207, 45 N.W.2d 388 (1950); Solimine v. Hollander, 129 N.J. Eq. 264, 19 A.2d 344 (1941).

constitute a breach of his fiduciary obligation and should not be enjoinable under section 501.

As the conduct that an officer seeks to defend with union resources tends to become more tangentially related to his official responsibilities, however, a court may become increasingly more concerned to assure that the expenditures on the officer's behalf have been authorized in a manner provided by the union's governmental structure. Thus, where the suit against the officer has been brought under section 102, for example, an executive board—unless explicitly prohibited—may well have implied authority to allocate union resources to the officer's defense, for the relationship of such a suit to the officer's non-fiduciary duties, and thus to matters in which the union has a clear interest, is evident. On the other hand, a court may be more reluctant to attribute to an executive board authority to use union resources to defend suits which appear to involve claims against the officer of a more personal nature. In the latter case, action by the executive board under a broadly worded bylaw, for example, might be a far more suspect basis for permitting the officer to use organization funds than a membership vote specifically provided for in the union constitution; the benefit to the union derived from such a use of its resources may be so speculative as to require the clearest evidence that the membership does indeed view the challenged expenditure as beneficial.[97] Even the membership itself may lack power, under the governing instruments of the union, to authorize a particular counsel-fee expenditure by a bare majority vote. Such, in fact, was the first ground upon which the *Cohen* court rested its injunction against further use of union funds in that case.[98]

Reimbursement at Litigation's End

Although a union officer may be prohibited from using union resources to defend lawsuits involving allegations of conduct which, if proved, would amount to a breach of his fiduciary duty, the question remains whether reimbursement of his expenses by the union should be permitted upon termination of those suits. In other fiduciary contexts, reimbursement for litigation expenses is not permitted where a defendant fiduciary has been found delinquent.[99] On the other hand, where the fiduciary has been vindicated on the

97. While the matter of proper authorization may be crucial in determining whether an officer can legally use union resources to defend himself, its relevance does not stop there. A question may also be raised concerning the fiduciary obligations of those who *authorize* the use of union resources. Where the authorization by, say, an executive board is improper in terms of the board's own authority, one facet of this question is presented. Another facet may be posed when the expenditure is authorized by the board in a procedurally regular manner but is based not upon considerations of the union's welfare but upon private interests of executive board members. In either case, have the members of the board violated their section 501 fiduciary obligations?

98. See note 66 *supra*.

99. See, *e.g.*, Wickersham v. Crittenden, 106 Cal. 329, 39 Pac. 603 (1895) (corporate officer); McInnes v. Goldthwaite, 94 N.H. 331, 337-38, 52 A.2d 795, 800 (1947) (executor); Bogle v. Bogle, 51 N.M. 474, 188 P.2d 181 (1947) (trustee); Cory Bros. v. United States, 51 F.2d 1010, 1013 (2d Cir. 1931) (agent).

merits, the courts often permit indemnification.[100] These principles seem no less appropriate within the union sphere. Where a union officer has been directly charged with a breach of fiduciary duty and found to have committed the breach, it would surely be inconsistent with that duty to allow him to be reimbursed with union funds; indeed, reimbursement would only compound the abuse proved in the original suit. For the vindicated officer, however, reimbursement from his union ought to be permitted. The demands of legislative policy which led to an injunction against the officer's use of resources concurrently with his defense have, upon termination of the litigation in the officer's favor, ceased to be relevant; and in the absence of such legislative guidance, there is no warrant for judicial interference with a union's decision to devote some of its resources to indemnification of one of its officials.

Mandatory Reimbursement upon Vindication

Beyond the question of the union's power to indemnify the vindicated officer lies the further question of the officer's right to *compel* reimbursement from the union. The limited number of decisions in other fiduciary contexts shows that the law has been less than consistent. Trustees,[101] receivers,[102] and probably executors and administrators [103] who have successfully defended themselves on the merits against charges of misconduct appear to have a right to reimbursement of their litigation expenses. As for agents, on the other hand, there appear to be no direct decisions on the matter, and at least one court has offered an *obiter dictum* to the effect that there is no right to reimbursement for the vindicated agent.[104] In the corporate context, the leading common law decisions suggest the existence of a right to compel reimbursement.[105] Statutory regulation of the reimbursement matter takes two principal forms: some statutes merely *permit* the corporation to indemnify a vindicated officer; others give the officer a *right* to reimbursement.[106]

The weight of decision suggests mandatory reimbursement for the vindicated fiduciary, and it is proposed that such a rule is also appropriate in the union context. In a section 501 action the officer has been placed in the position of defendant solely because of his unique relationship to the group of persons on whose behalf the suit was brought. Since the officer has been asked by the union, at least implicitly, to accept the special burdens of a

100. See, *e.g.*, Figge v. Bergenthal, 130 Wis. 594, 109 N.W. 581, 592 (1906) (corporate director); Loring v. Wise, 226 Mass. 231, 115 N.E. 302 (1917) (executor); Andrist v. First Trust Co., 194 Minn. 209, 260 N.W. 229 (1935) (trustee); Missouri & K. I. Ry. v. Edson, 224 Fed. 79 (8th Cir. 1915) (receiver). See also WASHINGTON & BISHOP, INDEMNIFYING THE CORPORATE EXECUTIVE ch. 5 (1963).

101. See, *e.g.*, Andrist v. First Trust Co., *supra* note 100.

102. Missouri & K. I. Ry. v. Edson, 224 Fed. 79 (8th Cir. 1915).

103. See, *e.g.*, Loring v. Wise, 226 Mass. 231, 115 N.E. 302 (1917).

104. Cory Bros. v. United States, 51 F.2d 1010, 1013 (2d Cir. 1931).

105. *In re* E. C. Warner Co., 232 Minn. 207, 45 N.W.2d 388 (1950); Solimine v. Hollander, 129 N.J. Eq. 264, 19 A.2d 344 (1941).

106. See WASHINGTON & BISHOP, *op. cit. supra* note 100, at 115.

fiduciary, which include that of demonstrating the integrity of his performance, it seems reasonable to require the union to bear the cost of a successful defense. But a rule of mandatory reimbursement is supported by more than consideration of fair distribution of fiduciary risks. Assured indemnification may encourage a union officer who believes himself innocent of any breach of duty to proceed with a full trial of the charges against him rather than settle to avoid the costs of litigation. Such a full-blown showing of innocence might well serve to bolster the confidence of the rank-and-file in the integrity of their leadership. Further, a guarantee of reimbursement for the innocent officer may discourage potential "strike suiters" whose weapon of personal financial harassment will thus have been blunted. Finally, there is a very pragmatic reason for compelling reimbursement. To subject union officers to the risks of not being able to recoup their expenses may have the effect of discouraging members from seeking leadership positions in their organization. Since an implicit LMRDA goal is the encouragement of competent and responsible union leadership, assured reimbursement seems consistent with congressional purposes.[107]

Discretionary Reimbursement upon Vindication

The suggested principle of mandatory reimbursement is intended to apply only where an officer has vindicated himself on the merits in a suit directly based upon allegations of breach of duty. Where the underlying action against the officer rested upon allegations of conduct which, if proved, would amount to a breach of fiduciary duty but the actual complaint was based on some other claim for relief—for example, a criminal prosecution for embezzlement —a different rule concerning reimbursement may be appropriate. In such cases the officer is not a defendant because of his special role as a fiduciary but rather as a result of the obligations imposed by the law upon all persons. The failure of the union to reimburse the officer puts no unusual burden on him, nor can it be said to be a basis for discouraging competent people to assume positions of union responsibility. More important, the officer's successful defense in such a suit has no res judicata implications as far as his civil integrity as a fiduciary is concerned.[108] The state's failure to prove its case in a prosecution for embezzlement may have rested upon its inability to sustain the special burden of proof in a criminal trial; this, however, does not preclude a successful showing of breach of duty in a civil trial. Moreover, in a suit not based directly on a charge of fiduciary delinquency, the factual matters to be proved might be, in part at least, distinct from those in a 501 suit, or the officer may be able to avail himself of defenses that would not be available in a suit charging him with a breach of fiduciary duty. In short, the officer's success in the non-fiduciary suit does not dispose of the charges that

107. Each of the foregoing rationales for mandatory reimbursement has been advanced in the corporate context, as well. See *In re* E. C. Warner Co., 232 Minn. 207, 45 N.W.2d 388 (1950). Rationales for reimbursement in other fiduciary contexts are noticeably absent from the decisions.

108. *Cf.* Carter v. Carter, 88 So.2d 153, 158-59 (Fla. 1956).

might be levied against him in a fiduciary suit, potential charges which were the basis for originally enjoining the use of union resources to support the officer's defense. Thus, insofar as those charges are in fact undisposed of, mandatory reimbursement of litigation expenses seems inappropriate.

This leaves open the question whether the union should have discretion to indemnify an officer who has been exonerated in a criminal prosecution of the type just discussed.[109] A multitude of relevant factors preclude an easy answer to this question. Certainly the suit against the officer brought into the open allegations of official conduct that would provide the grounds for a 501 suit. But if, given this notice, neither the union nor any individual member brings a section 501 action to test the officer's civil liability, a union decision to reimburse the acquitted defendant seems reasonable. While the possibility that a breach of fiduciary duty exists has not been wholly disposed of by the outcome of the criminal suit, the balance tilts strongly in the officer's favor. If, however, a union member has brought, or plans to bring within a reasonable time, a civil action against the officer, the balance shifts. The member may urge, in a section 501 suit to enjoin reimbursement of the officer's expenses in the criminal suit, that the proposed payment should be withheld at least until his civil suit directly testing the alleged delinquency of the officer has been adjudicated. The decision to grant the requested relief may turn on the question whether the proposed civil suit is any more than an attempt to harass the officer, for it could have been begun prior to the termination of the criminal action. Several factors may indicate that harassment is not the sole explanation for delay. These appear most clearly in the case where the same plaintiff who now seeks to halt reimbursement had earlier brought a successful 501 action to restrain the union from supporting the officer's defense. At that time the member, knowing, for example, that the officer was financially judgment-proof, might have seen no point in pressing the civil charges as long as the officer could not subject the organization to further fiscal damage. With the officer's success in the embezzlement suit and the consequent proposal to reimburse him, however, the danger of further loss to the union again becomes real in the eyes of the dissenting member. Such an argument might be an adequate basis for enjoining reimbursement until the civil suit is concluded, for thus will the congressional intent to give maximum protection to the union's fiscal integrity best be served.[110]

109. The same question is raised by a civil suit not directly based upon a charge of fiduciary delinquency but in which the alleged conduct of the officer, if proved, would amount to a breach of his fiduciary duty. A similar answer may be suggested.

110. Where the member who seeks to prevent reimbursement took no part in the prior action to restrain the officer from using union resources to defend himself, there may be somewhat stronger grounds for suspicion that harassment is the principal intent of the plaintiff's action. Nevertheless, it is submitted that even here the policy of section 501 to protect union fiscal integrity will best be served by giving the plaintiff a reasonable opportunity to bring a section 501 action, during which time the officer should be prohibited from receiving reimbursement of his prior litigation expenses from the union.

Reimbursement Absent a Decision on the Merits

Problems of reimbursement may also occur when the defendant officer successfully terminates the suit in a manner not involving the merits[111] of the claim against him.[112] For example, a dismissal for failure of the plaintiff to prosecute, for insufficiency of process, or for failure to exhaust internal union remedies[113] may end the suit.[114] In other fiduciary contexts this problem has not been dealt with in a comprehensive or articulate fashion. Common-law decisions in the corporate sphere indicate, however, that reimbursement is possible only where there is a decision on the merits.[115] Statutory regulation of indemnification is divergent and ambiguous; some decisions construing state corporation statutes limit reimbursement to situations involving a successful defense on the merits, while others take a less restrictive approach.[116]

Where labor unions are involved, the choice similarly is between prohibiting and permitting reimbursement of a successful officer-defendant.[117] Various

111. Where a suit is disposed of by summary judgment, reimbursement should be granted or denied according to the result, for such a disposition is equivalent to a judgment on the merits. Where a defendant officer succeeds in obtaining a dismissal of the complaint, by a federal court, for failure to state a claim for relief, see Holton v. McFarland, 215 F. Supp. 372 (D. Alaska 1963), he should be entitled to reimbursement, since the liberal federal rules for amendment of pleadings ordinarily make such a dismissal tantamount to a decision on the merits in favor of the defendant. See Highway Truck Drivers & Helpers v. Cohen, 182 F. Supp. 608, 622 (E.D. Pa.), *aff'd per curiam*, 284 F.2d 162 (3d Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

112. Both Highway Truck Drivers & Helpers v. Cohen, *supra* note 111, and Holdeman v. Sheldon, 204 F. Supp. 890 (S.D.N.Y.), *aff'd per curiam*, 311 F.2d 2 (2d Cir. 1962), suggest that actual vindication on the merits is a prerequisite to reimbursement. *Cohen* speaks of possible reimbursement where the officers have been "exonerated." 182 F. Supp. at 622. *Holdeman* would allow reimbursement where the defendants are "successful in proving the contentions which they have urged. . . ." (*i.e.*, their defense on the merits). 204 F. Supp. at 895. Similar remarks appear in another phase of the *Cohen* litigation. 215 F. Supp. 938, 941. (E.D. Pa. 1963). The Second Circuit, in affirming the lower court decision in *Holdeman*, appears to take a somewhat more liberal view. 311 F.2d at 3. However, the issue was before none of the courts, and the absence of any accompanying analysis of the question makes those various dicta inconclusive.

113. In Penuelas v. Moreno, 198 F. Supp. 441 (S.D. Cal. 1961) a section 501 action was dismissed essentially on this ground. In effect, the court read into section 501 the internal-remedies requirement of section 101(a)(4) of the LMRDA. 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(4) (Supp. IV, 1963). Holdeman v. Sheldon, *supra* note 112, was quite critical of the *Penuelas* holding and noted that section 501(b) provided its own conditions precedent for instituting a suit. 204 F. Supp. at 895-96. See text accompanying notes 53-54 *supra;* Strauch, *supra* note 80, at 506-07.

114. It would seem that there would be no statute-of-limitation defense available in a 501(b) suit. The LMRDA does not provide for any limitation of actions; nor, of course, is there a general federal statute of limitations. Since the enforcement of fiduciary duties is essentially an "equitable" action, no state statute of limitations would be applicable. See 2 MOORE, FEDERAL PRACTICE § 3.07[2] (2d ed. 1962).

115. See cases cited note 96 *supra.*

116. See Comment, *Indemnification of Management for Litigation Expenses*, 52 MICH. L. REV. 1023, 1038-40 (1954).

117. *Cf.* WASHINGTON & BISHOP, *op. cit. supra* note 100, at 104-06.

arguments support union discretion in this situation. In the first place, the multiple techniques which exist for avoiding full-scale litigation serve important policies of the legal system, and it seems inconsistent with those policies and with an adversary system which places the burden of proof upon the plaintiff to penalize an officer who makes use of an available technique for favorably terminating litigation. Moreover, to preclude reimbursement in this situation would give union members or others bent on harassment an excellent opportunity for succeeding in that aim. On the other hand, full-scale showings of innocence are certainly to be preferred and would be encouraged by prohibition of reimbursement in the absence of a decision on the merits. Although, on balance, the arguments in favor of union discretion seem persuasive, the courts ought not to abdicate altogether any supervisory responsibility. Just as a court should be particularly concerned—where an officer wishes to defend, with union resources, conduct only tangentially related to his official responsibilities—that expenditures on the officer's behalf have been authorized in a manner provided by the union's governmental structure, so should it require clear evidence that the union's internal rules permit reimbursement in the non-merits situation. This scrutiny of the union's decision-making process is particularly needful where the officer's success in the litigation rests on some technicality not attributable to a failure of effort on the part of the plaintiff.

Where the suit against an officer is terminated by settlement, however, discretionary indemnification seems inappropriate. Although it is possible that an officer may choose this route for ending a 501 suit against him merely to avoid the cost and annoyance of litigation rather than to escape more substantial expense resulting from a finding of liability, any payment of money or other behavioral concessions are for the union's benefit, not for the personal benefit of the plaintiff. If neither the "good cause" provision nor available means for disposing of groundless lawsuits can halt the plaintiff's suit in court, settlement out of court would seem to indicate some likelihood of actual guilt on the officer's part. It would seem strange to have the union accepting money from the officer and at the same time reimbursing him for the counsel expenses involved in making such a settlement.

In connection with the matter of settlement, one additional point should be made. Federal Rule 23, governing class actions, provides that such an action shall not be dismissed or compromised without the approval of the court. Since an action by a union member under section 501 is unquestionably an action on behalf of all of the union members, it should be governed by Rule 23 in the federal courts and by analogous provisions in the state courts.[118] The appropriateness of such a safeguard against collusive settlements or dismissals between the officer and a "friendly" plaintiff, in terms of the LMRDA's purposes to encourage union self-awareness and financial integrity, should be apparent.

118. *Cf.* Haiduk v. Atlantic Independent Union, 31 F.R.D. 241, 242 n.1 (E.D. Pa. 1962).

Counsel Expenses for Plaintiffs

This Comment has been mainly concerned with the counsel-fee expenses of union officers cast in the role of defendants. Yet the drama of litigation involves adversaries, and plaintiffs as well as defendants must pay their legal advisors. Therefore, this Comment will conclude with a brief look at the impact of section 501 on the plaintiff's side of the counsel-fee subject.

Congress has expressly given the courts an active role in determining the extent of plaintiffs' reimbursement for their counsel expenses in section 501 actions. The concluding sentence of section 501(b) states:

> The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily . . . incurred by him in connection with the litigation.[119]

Although the legislative history contains no explicit explanation for this provision, it seems clear that, having placed the initiative for achieving certain reforms squarely upon the individual union member, Congress wished to assure plaintiffs repayment of their counsel expenses.[120]

Courts, operating in other fiduciary contexts, frequently have the job of awarding counsel fees to plaintiffs.[121] Consequently, it might seem that this

119. See note 24 *supra* for the context of this provision.

120. There would seem to be no reason why a court should interfere with a union's own decision to repay plaintiff members for their counsel expenses, provided that decision does not conflict with a determination made by the court. For example, if the court allowed $500 and the union voted to increase that amount to $1000, there would be no conflict. Nor would there be if the court made no award at all, but the union chose to reimburse its members. On the other hand, if the court allowed $500 and the union voted to give nothing, that membership determination could not stand. Where the union's decision is permissible, its significance was underlined in Nelson v. Johnson, 212 F. Supp. 233 (D. Minn. 1963), a recent case under section 501. There the court held that a union officer violated his fiduciary duty by refusing to comply with a membership authorization to pay a plaintiff member's counsel expenses.

121. In those other areas success in the litigation is a prerequisite to reimbursement. See, *e.g.*, Forrester v. Boston & Mont. Consol. Copper & Silver Mining Co., 29 Mont. 397, 74 Pac. 1088 (1904) (corporation); *In re* Morton's Estate, 74 N.J. Eq. 797, 70 Atl. 680 (1908) (trust). Therefore, funds for plaintiff's counsel can be provided only by way of reimbursement and never prior to the trial by way of an allowance for prosecution of the action. The requirement of success means that generally only a plaintiff who has, as a result of his lawsuit, conferred some benefit upon the entity on whose behalf he has sued is entitled to reimbursement. While in most cases the benefit is the recovery from the delinquent fiduciary of misappropriated funds or monetary damages for other breach of duty, the courts have not insisted upon actual monetary benefit. In the corporate area, certainly, there are many cases in which benefits other than actual monetary recovery have resulted from a shareholder's derivative action, and an allowance for counsel fees has thereupon been made. See, *e.g.*, Bosch v. Meeker Co-op. Light & Power Ass'n, 257 Minn. 362, 101 N.W.2d 423 (1960). See also Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 Colum. L. Rev. 784, 799 (1939) and cases cited. The extent of reimbursement allowed is ordinarily within the discretion of the courts. *Id.* at 815, and cases cited.

statutory provision does little that is unique and that it presents no special problems. This would be true were it not for one phrase in the provision: that the award be "a reasonable part of the recovery." This statement appears to require a restoration of funds to the union as a condition precedent to the award of counsel fees to plaintiffs and to limit that award to the amount of the recovery.[122] Yet there are many benefits that might be conferred upon the union by section 501 suits which do not involve any monetary recovery —for example, suits to correct faulty record keeping[123] or to enjoin an officer from making improper disbursements. Both in other fiduciary contexts[124] and in actions by union members under state laws,[125] the courts have recognized such non-pecuniary benefits as a basis for awarding counsel-fees to successful plaintiffs.[126] Indeed, were this not the approach taken by

122. While the majority report of the House does not clarify this point, the supplementary views of certain committee members suggest that only a successful suit, and not actual monetary recovery as well, is the prerequisite for reimbursement. H.R. REP. No. 741, at 82. See Dugan, *supra* note 81, at 302.

123. See Murray v. Kelly, 14 App. Div. 2d 528, 217 N.Y.S.2d 146 (1961), *aff'd mem.*, 11 N.Y.2d 810, 182 N.E.2d 109 (1962).

124. See note 121 *supra.*

125. Among the various state cases treating this issue, two recent New York decisions explicitly reject the need for any monetary benefit:

> It is not essential, to justify the allowance of counsel fees . . . that the applicants prove the creation of a fund for the benefit of the [union] . . . through their efforts. It suffices that as a result of the litigation, various benefits were obtained for the members of the local, such as elimination of financial abuses and the correction of faulty keeping of records and accounts, the establishment of safeguards to promote fair elections, the replacement of the former officers by an International Trustee and other advantageous changes.

Murray v. Kelly, 14 App. Div. 2d 528, 217 N.Y.S. 2d 146, 147 (1961), *aff'd mem.*, 11 N.Y. 2d 810, 182 N.E.2d 109 (1962). See Fittipaldi v. Legassie, 18 App. Div. 2d 331, 338, 239 N.Y.S.2d 792, 799 (1963). See also Gilbert v. Hoisting & Portable Eng'rs, 384 P.2d 136 (Ore. 1963). Other state cases involve the protection of union funds from misapplication, but in none of them was there an actual monetary recovery. The courts spoke of *benefit* to a common fund, but not its *creation*, in awarding counsel fees to the plaintiffs. Grein v. Cavano, 379 P.2d 209 (Wash. 1963); McLane v. Romano, 322 Ill. App. 700, 54 N.E.2d 715 (1944); O'Connor v. Harrington, 136 N.Y.S.2d 881 (Sup. Ct. 1954), *modified*, 285 App. Div. 900, 138 N.Y.S.2d 1 (1955); Weber v. Marine Cooks' & Stewards' Ass'n, 93 Cal. App. 2d 327, 340-41, 208 P.2d 1009, 1017 (1949).

126. A recent federal case, involving a unique situation, took a stance similar to that adopted in the state decisions *supra* note 125. Milone v. English, 306 F.2d 814 (D.C. Cir. 1962), was part of the Teamster monitor litigation and involved a petition by some of the original plaintiffs for an award of counsel fees. The district court denied the petition on the ground that when the monitors were appointed, all need for representation of the class (the rank-and-file) by the plaintiffs had ended. The court of appeals rejected this reasoning and, remanding, said that the district court had discretion to award counsel fees if it found

> either or both, that [plaintiffs] . . . have materially aided in the creation of a fund for the benefit of the International . . . or that they have benefited the International in *other* ways.

Id. at 819 (Emphasis added).

the courts, there would be little incentive for union members to exercise their section 501 rights where money had not been improperly taken from the treasury by an officer or where the misappropriation was modest in scale. The denial of reimbursement for a plaintiff who, through quick action, secures an injunction against an improper disbursement would have the curious effect of penalizing him for his speed; had he waited until the misappropriation had been made and then sued to recover the funds, he could obtain counsel fees.

The interpretation of the problematical word "recovery" was presented in one of the concluding phases of the *Cohen* litigation, where the plaintiffs sought reimbursement of their counsel expenses.[127] Because of the possibility of such unfortunate effects as those suggested above, the court reasoned, Congress must not have intended the reimbursement provision to be narrowly read. "Recovery," argued the court, must therefore be given a scope broad enough to

> include the entire remedy effectuated and . . . [encompass] the total benefit conferred upon the Union through the efforts of counsel.[128]

Thus, the court held that the plaintiffs were entitled to counsel fees in excess of the $25,000 jury verdict actually obtained against the defendant officers, since their efforts in securing the earlier injunction had saved the union at least an additional $72,000 which the defendants would have paid out had the plaintiffs not brought their suit.[129]

Although the court was no doubt correct in suggesting as a broad proposition that the legislative purpose in section 501 compels an expansive reading of "recovery," it did fail to confront certain questions of timing which may bear upon interpretation of that troublesome word in the particular case of counsel-fee actions. If, through a plaintiff member's efforts, an injunction is obtained against the officer's use of union resources to defend himself, but the officer is subsequently vindicated on the merits and thus may receive either mandatory or discretionary reimbursement, has the plaintiff still effected a "recovery"? Similarly, what occurs if the plaintiff, as in *Cohen*, in addition to an injunction, obtains a judgment entitling his union to reimbursement of moneys already expended for counsel fees by the defendants, but these moneys may be remitted to defendants in the event of acquittal? To hold in either case that he has effected a recovery and, therefore, that he is entitled to an award of counsel fees, may mean that the union will have to pay both plaintiff's and defendant's expenses. On the other hand, to make a plaintiff's reimbursement contingent on the outcome of the underlying suit may severely undercut the incentive that section 501's expense provision might have provided. This conflict should be resolved in favor of plaintiffs' reimbursement, especially in light of the congressional purpose to encourage individual members to

127. Highway Truck Drivers & Helpers v. Cohen, 220 F. Supp. 735 (E.D. Pa. 1963).

128. *Id.* at 737.

129. The $72,000 estimate was based upon bills submitted to the defendants by their counsel. The court noted that the ultimate total might have reached $150,000. *Id* at 737, 738.

vindicate their organization's rights. Any reimbursement, of course, would cover only the reasonable costs of achieving the counsel-fee injunction and would not include other expenses of an unsuccessful 501 suit; judicial experience in awarding litigation expenses should be adequate proof against abuse by a partly successful, partly unsuccessful plaintiff.[130]

These arguments for payment of plaintiff's counsel-fees seem to apply *a fortiori* to situations where the underlying action is frustrated for reasons beyond plaintiff's control or where a settlement is obtained; the prevention of wasteful counsel-fee payments remains a tangible benefit to the union in which the plaintiff may fairly share. Where the suit terminates on account of plaintiff action, such as failure to prosecute or a settlement not meeting the standards of Rule 23,[131] signifying a cessation of the quest in behalf of the union, the same conclusion need not be reached. In sum, the court should focus upon the specific results in each 501 action, awarding counsel fees to the plaintiff where he appears to have contributed to the correcton of some abuse of fiduciary duty and measuring the reasonableness of such awards by benefit to the union rather than money recoveries. All that should appropriately be required is that the suit actually contribute to the correction of the abuse, even if the suit itself is ultimately dismissed because of voluntary compliance by the defendant officer.[132]

130. Although, where the underlying suit against an officer directly charges a breach of fiduciary duty, the successful officer's right to reimbursement may upon the present analysis mean a double expense for the union—the officer's costs plus some portion of the plaintiff's—congressional purpose in section 501 would appear to support this result, for it provides both maximum protection for responsible union leaders and maximum incentive for individual members to assert section 501 rights. Where the underlying suit does not directly charge a breach of fiduciary duty, any reimbursement for the successful officer would be in the union's discretion, and it could act with the knowledge that some of its resources would have to be allocated to the union member who had effected some relief on its behalf.

131. FED. R. CIV. P. 23.

132. See Grein v. Cavano, 379 P.2d 209 (Wash. 1963).