

**PREVENTIVE LAW FOR UNION CAMPAIGNS**  
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### I. INTRODUCTION

There are many technical legal doctrines which help to guide campaign activity along defensible avenues, but in the end the constitutional protection for truthful speech and, to a lesser degree, to petition the government for redress, are the most secure bulwarks.

The best way to respond to attacks on campaigns is to conduct the campaigns very well in the first place. The idea is to place the would-be attacker in the least-favorable terrain. Above all else, this means being scrupulous about accuracy.

A closely associated topic is how to respond to threats. Most of the time, attacks

on campaign tactics take the form of threats. A standard component of any response to a threat, oral or written, should be a request that the person making the threat identify any material in the union's communications that is considered to be factually inaccurate. There are two reasons. First, if the threatener does not respond, or remains only vaguely accusatory, then it will be more difficult to later sue. The target had the opportunity to mitigate any damage to itself by identifying inaccuracies when the union requested. Second, the request gives the union the opportunity to check its materials and make any corrections that may be necessary. As much as total accuracy is sought, it is not always achieved. The union should not only request correction but should promptly amend its materials whenever the target shows them to be even questionable as to truthfulness. Even if the original version was factually wrong, a prompt correction is likely to negate "malice."

Occasionally, there will be litigation. The worst thing a union can do in the face of a lawsuit that is not well-grounded is to pull in its horns. The lawsuit will then be successful regardless of what its official outcome may be. Every effort should be made to show that the suit will not accomplish its intended objective of stopping the campaign, but instead that getting rid of the lawsuit has itself become one of the prices for ending the campaign. It should be clear that the union should not merely repeat the tactic that has brought about the lawsuit, but should continue to vigorously push its campaign by developing new tactics to widen and intensify the conflicts.

Public-interest and environmental advocates have for many years been subjected to litigation retaliation for their efforts, so much so that the type of litigation has acquired a label and a well-known acronym: strategic lawsuits against public participation ("SLAPP"). Lawyers working these fields have developed the various litigation-based strategies for counteracting these attempts at intimidation. See Brecher, The Public Interest and Intimidation Suits: A New Approach, 28 Santa Clara L.Rev. 105 (1988); Parker, Common-Law and Statutory Solutions To The Problem Of SLAPPS, 26 L.A. L.Rev. 395 (1993). California has enacted a special statute, Cal. Code Civ. Proc. §425.16, for dealing with the SLAPP suit problem. It is essentially an early summary judgment approach, with both parties showing by affidavits (containing admissible evidence, Wilcox v. Superior Court (1994) 27 Cal.App.4th 809, modified, 28 Cal.App.4th 940c) whether there is a "probability that the plaintiff will prevail on the claim." If no such probability is found, the complaint is stricken and the defendant gets attorneys fees. It applies to union campaign speech. See, e.g., *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees*, 69 Cal.App.4th 1057 (1999).

There is also still room for unfair labor practice charges under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). After *BE&K Const. Co. v. NLRB*, 536 U.S. 516 (2002), an employer's lawsuit must not only be intended to retaliate against conduct protected by the National Labor Relations Act but also "objectively baseless" in the sense that no reasonable litigant could realistically expect success on merits.

## II. REVIEW OF SPECIFIC AVENUES OF LEGAL ATTACK

This section identifies various legal theories that have been invoked against campaign activity. Because of the number and variety, only a brief survey of the law in each area is attempted here. I only include what I regard to be the salient points for those engaged in campaign activity: those principles which should guide campaigners in the design of their tactics, and their lawyers in helping to create durable materials and to respond effectively to threats.

### A. Defamation

The most-used attack on campaign activity is defamation. Of course, unions enjoy a special measure of protection for speech occurring in the context of a labor dispute. Letter Carriers v. Austin, 418 U.S. 264 (1974) and Linn v. Plant Guard Workers, Local 114, 382 U.S. 912 (1966). These cases establish three, vitally important principles:

- (1) No true statement made in a labor dispute can be actionable in defamation. Austin 418 U.S. at 283-284.
- (2) If a statement is not true, it still is not actionable unless the New York Times v. Sullivan, 376 U.S. 254 (1964) standard is met (knowledge of falsity or reckless disregard for truth or falsity). Linn, 383 U.S. at 280.
- (3) "Malice" means the New York Times v. Sullivan standard. Liability cannot be imposed because of a false statement made by a union that is motivated by hatred, spite or ill will. Austin, 418 U.S. at 281.

The first principle may not appear that unusual or important. After all, it is commonly said that "truth is a defense" to defamation (although that is really the English view; in the United States, at least with respect to matters of public importance, falsity is an element of the offense for the plaintiff to prove, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-777 (1986)). There is particular usefulness, however, to the passage in Austin about true statements in labor disputes never being actionable. In Austin and Linn, the Court was substituting federal standards for state-law rules of decision. The court's statement about truth may be used to trump some other common-law rules besides "malice." A particularly obnoxious common-law doctrine concerns republication of libel. This doctrine, very rarely applied in the cases, holds that if a person quotes something such as the allegations of a complaint in a lawsuit, the person "republishes" those allegations and may be liable in defamation if they prove to be

untrue. Restatement, Second, Torts, §578, p. 212 (1977). There are common-law privileges, but they will apply only occasionally to what happens in the course of union campaigns. It has been held, for instance, that if the union's report of allegations made in a legal proceeding is fair and accurate, it is objectively true and therefore not actionable. *Sahara Gaming v. Culinary Workers Union, Local 226*, 984 P. 2d 164, 115 Nev. 212 (1999).

The second principle is very powerful. It means that a very high standard of proof is required of any plaintiff, without the need to demonstrate that the plaintiff is a "public figure," that the subject matter was "newsworthy," or that the union is part of the press, all of which would normally be required for the New York Times v. Sullivan standard to be invoked<sup>1</sup>. We also believe that because the court has unqualifiedly applied New York Times v. Sullivan to labor disputes, the full jurisprudence that has flowed from that case also applies. This contains some useful principles. For instance, failure to investigate the other side of a story does not in itself show malice. St. Amant v. Thompson, 390 U.S. 727, 731, 733 (1968). The use of "alleged" or "allegations" is a meaningful way to separate the original speaker from the republisher. Time, Inc. v. Pape, 401 U.S. 279, 289-292 (1971). The use of quotation marks or the indented form of quotations is also recognized to serve the same purpose. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 519 (1991).

The third principle, that liability cannot be imposed because of a union's hatred, spite or ill-will, helps reduce the chance of intrusion and wide-ranging discovery into a union's campaign and its purpose.

Despite the advantages in this legal framework, a union is ill-advised to

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<sup>1</sup>This principle should apply to variants of defamation. For example, the Nevada Attorney General threatened prosecution under NRS § 668.105 of union campaigners passing out handbills critical of a bank's financial performance. Section 668.105 provides:

Any person who willfully and maliciously makes, circulates or transmits to another or others any statement, rumor or suggestion, written, printed or by word of mouth, which is directly or by inference derogatory to the financial condition, or affects the solvency or financial standing of any bank, or who counsels, aids, procures or induces another to state, transmit or circulate any such statement or rumor is guilty of a gross misdemeanor, and upon conviction thereof shall be fined or imprisoned, or both, in the discretion of the court.

*Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614 (9th Cir. 1999).

deliberately take advantage of it. It is something to fall back on in case things go wrong. Having to defend a false statement will inevitably prove time-consuming and expensive. Exposure to the risks of a jury trial are substantial, since the author's state of mind will often be a disputed factual issue.

The right way to conduct a campaign is to stick strictly to the truth--the demonstrable truth. This will deter the filing of defamation actions and make those that are filed more quickly and cheaply disposed of, and give the union the opportunity to recover sanctions.

It is not easy to produce effective campaign materials that are also absolutely true. The review and advice of the union's counsel is an indispensable part of this aspect of the campaign process; even the most experienced writers still seek counsel. Many questions requiring considerable reflection and judgment are presented. What sources are reliable enough to use? Can information taken orally ever be relied upon? What steps must be taken to assess the reliability of a source? When can source material be paraphrased, and to what extent? How much editing of the material may be performed without distorting its meaning? How much of the context must be explained in order to avoid a misleading impression? What inferences, if any, may be safely drawn from the documented source material? How much rhetoric or editorializing (such as the use of adjectives and adverbs, or of headlines) is safe?<sup>2</sup> Are there any possible ricochet effects--that is, does the union's campaign literature make reference to a third person who might feel defamed even though he or she is not the union's target? This process is painstaking and not always enjoyable, but there is nothing better for a union campaign than having effective literature that is nevertheless safe from attack.

The same rigorous standards of truthfulness must be observed on websites as for any other medium of communication. Indeed, it should be clear that the most scrupulous level of attention should be given to these communications because they reach so far, not just into every jurisdiction in the United States but throughout many parts of the world. Most of the questions concerning jurisdiction, venue and choice of law about claims arising from website content are still matters of debate. It is not possible to understand fully the legal implications of the website material in every jurisdiction it may reach.

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<sup>2</sup> See, e.g., *Ruzicka Elec. and Sons, Inc. v. International Brotherhood of Electrical Workers Local 1*, 427 F.3d 511 (8th Cir. 2005). Union representatives did not engage in defamation when they gave a city employee pictures of a contractor's work that the representatives said they "thought was shoddy" and "felt" was "dangerous," "improper," and "not up to code." These were merely opinions and did not meet the standard for "actual malice" even if the statements were actually false, something the court questioned).

When global companies are attacked this way, there is the possibility for claims to be brought in very unfamiliar fora. Most attack websites so far have been aimed at domestic audiences and have been in English. It is likely that future generations of these sites will be aimed at audiences that are more international and will be translated into different languages. This will probably increase the possibility that claims will be brought in jurisdictions outside the United States.

The goal of making website content as accurate as possible is made more difficult by the problem of website aging. If a leaflet is true when it is passed out, there is no reason to believe that the distributor may be held liable for defamation if the accuracy of the information changes with the passage of time. A website remains in the control of its author, however, and is constantly accessible. With this comes the responsibility to keep it current. Older material must either be updated with new research or pulled. If this is not possible, the site should be taken down altogether. Adjusting to this reality is not easy. Union campaigners are used to completing the preparation and distribution of a communication and then moving on.

## B. Securities Laws

The most common form of union involvement in corporate governance is shareholder resolutions. Under Section 14 of the Securities Exchange Act of 1934, 12 U.S.C. §§78a et seq., the Securities and Exchange Commission has developed intricate rules concerning the shareholder resolution process. Briefly, any shareholder who has held at least \$2,000 worth of stock (or 1% of the stock) in the company for a year or more may submit a resolution. If the resolution is in the proper form and filed at the right time, then the company must include the resolution in management's proxy statement and provide an opportunity for shareholders to vote for or against it. A 500-word supporting statement by the shareholder must also be included. SEC Rule 14a-8, 17 CFR §240.14a-8.

There is a process for companies to obtain the advice of the staff of the Securities and Exchange Commission as to whether the company is obligated under the SEC rules to include a resolution and supporting statement in its materials. The company writes to the staff of the SEC Division of Corporation Finance and sets forth its reasons why it believes it should not be required to include the proposal. The staff's advice on this question will followed. The company's submission, called a request for a "no action" letter, is served on the proponent, who then has the opportunity to respond.

Requests for no action letters is the main way shareholder resolutions submitted by unions (and others) are attacked. Every proxy season, some resolutions are lost because



of technical failures. These include late filing of the resolution, not having the required ownership, or not producing evidence of the required ownership in a timely fashion after the company requests it. These attacks can be averted simply by knowledge of the rules and careful planning. As usual, waiting until the last minute to submit the resolution drastically increases the risk of error.

This is an appropriate point to bring up a related problem. In order to increase the chances for technical default, many companies have adopted bylaw provisions imposing procedural requirements that go beyond what is required in the SEC rules. It is wise--and generally easy--to have the proposal comply with both the SEC rules and the bylaws. This means, of course, getting the bylaws well in advance of the deadline for submission.

There is another variety of challenge to shareholder resolutions that is more difficult to deal with. The SEC rules contain a list of substantive grounds for exclusion. 17 CFR §240.14a-8(a)(4) and (c)(1)-(13).

One of the grounds for exclusion is (c)(4), allowing exclusion of a resolution submitted in furtherance of a personal grievance. The "personal grievance" submission to the SEC staff takes the form of an announcement that the union is engaged in what is described as a "corporate campaign" against the company. News clippings, correspondence and whatever other materials can be scraped together are assembled to show that the union is engaged in various non-traditional activities in pursuit of the alleged campaign. It is then asserted that the reason for the resolution is the campaign, with its underlying labor relations objective--a "personal grievance"--and not the ostensible purpose of the resolution. Very few of these attacks have succeeded, because they are unsupported. That is, the assertion is not supported by any evidence, even newspaper articles. The company's argument usually is reduced to an abstract syllogism: the union is engaged in a "corporate campaign"; the shareholder resolution occurs in the process of corporate governance; therefore, the resolution must be part of the campaign. Only very rarely has the SEC staff actually excluded a proposal on these grounds. Dow Jones, January 24, 1994; Core Industries, Inc., November 23, 1982. Those cases are highly distinguishable, because there was actual evidence of the union linking the submission of the proposal to collective bargaining. Compare Charles Schwab Corp. (Mar. 2, 2006); Cintas Corp. (July 6, 2005); Nabors Industries Ltd. (Apr. 4, 2005); Dresser Rand (Feb. 19, 2008); Host Marriott Corp. (March 18, 2002)(all denying exclusion where topic of union's stockholder proposal was unrelated to union's grievances and no comments made by union linking the two).

In addition to objections about the proposal itself, a company will often object to

the supporting statement. The objection is made on the grounds that it contains parts that are false or misleading. The objection can either be that various arguments made are themselves false or misleading, or that the statement as a whole is misleading because it fails to accurately disclose the union's involvement in it.

The issues raised are akin to defamation concerns, but different in important ways. The key concept is "materiality." SEC Rule 14a-9 provides:

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

According to the Supreme Court,

An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote . . . . Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.

TSC Industries, Inc. v. Northway, 426 U.S. 438, 449 (1976). Even substantially true statements in a proxy statement will violate Rule 14a-9 if they nevertheless have a tendency to mislead investors about material issues. On the other hand, even patently false statements do not violate the rule unless they are material--that is, that an investor would regard the information as being important in making a decision.

The strictures of Rule 14a-9 apply not only to supporting statements submitted to the company for inclusion in management's proxy statement, but also to any independent soliciting material a union or its members may send. Communications outside the company's proxy statement occur in a variety of ways. Shareholders are not confined to making proposals for inclusion in management's proxy statement. This is a favored method because it does not cost much and all the shareholders get the communication at

the company's expense. Sometimes, however, a shareholder is not eligible under SEC rules to submit proposals for inclusion in the company's materials. Then, a proposal may be submitted to the company pursuant to the requirements in the bylaws for proposals. When this happens, the supporting statement will not be in management's proxy, but the proposal itself will be. Supporters of the proposal may then conduct independent solicitations to gain support for the proposal.

Unions and their members also have been known to campaign against propositions put forward by management. Most prominently, this involves mergers. Most mergers have to be approved by the shareholders of the merging companies. Communications by a union or its members to encourage other shareholders to vote against the merger are also subject to Rule 14a-9.

Lastly, unions have been known to support insurgent candidates for the board of directors. As the law stands now, the fact of the insurgent candidacy must be disclosed by the company in its proxy statement, but the company is not required to include any statement in support of the candidate or even give shareholders the opportunity on the company's proxy card to vote for the insurgent. Chambers v. Briggs & Stratton, 863 F.Supp. 900 (E.D. Wisc. 1994). Therefore, an independent solicitation of proxies by the insurgent's supporters, including unions, is essential. Statements made are subject to Rule 14a-9.

Under the 1992 amendments to the SEC proxy regulations, shareholders may now send out communications to one another advocating how proxies should be cast without going through the SEC staff review process usually applicable to proxy solicitation materials, as long as the sender of the communication does not seek to actually obtain a proxy. 17 CFR §240.14a-2(b)(1). Nevertheless, Rule 14a-9 still applies. Id.

To make sure of compliance with the rule, the shareholder communications need first of all to be accurate. Beyond that, careful judgment is needed to determine what balancing information must be included in order to avoid misleading shareholders by omission. It is especially important to be fair about critical matters such as financial data. If an independent solicitation is being financed by a union, that fact must be disclosed. If investor advocacy materials are posted on a website, care must be taken to obey the rules of the Securities and Exchange Commission about communications to investors (shareholders, bondholders or limited partnership unit holders). This is particularly important if the site contains any powers for investors to execute, such as proxy cards.

C. LMRA §8(b)(4)/§303

In Edward J. De Bartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council, 485 U.S. 568 (1988)(*DeBartolo II*), the Supreme Court held that the secondary boycott provisions of the LMRA do not reach peaceful, truthful handbilling by unions even where the object is to put pressure on secondary employers who do not distribute the goods or services of the primary employer with which the Union is in dispute. The Court recognized that such conduct is protected by the First Amendment right of free speech and interpreted the secondary boycott provisions as not being intended to regulate such conduct, in order to avoid considering the very constitutionality of these provisions. Speech-based secondary tactics were already in widespread use before De Bartolo II was decided. See e.g., K-Mart 257 NLRB 86 (1981). Some federal courts, however, were getting in the way. They gave insufficient respect to First Amendment values and regarded secondary handbilling as coercive. They considered that the only exemption lay in the "publicity proviso" so that the targeted secondary had to be in a direct line of production and distribution with the primary. See Pet, Inc. v. NLRB, 641 F.2d 545 (8th Cir. 1981). De Bartolo freed unions from this constraining view. All secondaries are now fair game regardless of whether they stand in any direct relationship of producer and distributor.

This has given an increasing number of union campaigners the confidence to strike out in all directions, including directors, outside directors' home companies, capital sources, affiliated businesses, sister subsidiaries, businesses controlled by significant shareholders in the primary, charitable and educational institutions connected to officers, directors or shareholders, and many more entities. The message does not need to be about labor matters but can be about business problems. Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Intern. Union, 239 F.3d 172 (2nd Cir. 2001); Sheet Metal Workers, Local 15 v. NLRB (Brandon Regional Medical Center), 491 F.3d 429 (D.C. Cir. 2007). It is not necessary to identify the "primary" or describe the nature of the labor dispute. Plumbers Local 32 (Ramada Inn), 302 NLRB 919 (1991); Hospital and Service Employees Local 399 (Delta Airlines), 293 NLRB 602 at n.5 (1989).

The principles of *De Bartolo* are not confined to handbilling but extend to any form of "pure speech". Cintas Corp. v. UNITE HERE, 601 F. Supp. 2d 571 (SDNY), *affirmed* 2009 WL 4577027, 187 LRRM 2800 (2nd Cir. 2009)(website); Sheet Metal Workers, Local 15, supra (street theater); Honolulu Typographical Union No. 37, 167 NLRB 1030 (1967)(music). Even signs are not illegal when they are placed in public places well away from secondary's premises. Chicago Typographical Union No. 16 (Alden Press), 151 NLRB 1666 (1965).

Rat balloons are still a subject of controversy. *State v. DeAngelo*, 197 N.J. 478, 963 A.2d 1200, 185 LRRM 3057 (N.J. 2009) (rat balloon used against secondary is protected free speech). See *Tucker v. City of Fairfield, Ohio*, 398 F.3d 457 (6<sup>th</sup> Cir.), *certiorari den.* 546 U.S. 929 (2005) (rat balloon against primary employer, protected speech). But see *NLRB v. Local 3, IBEW*, 471 F.3d 399, 407-409 (2nd Cir. 2006) (“We decline to reach the legality of the inflatable rat balloon under all circumstances,” Local 3 prohibited only from “utilizing the inflatable rat balloon in connection with illegal secondary picketing”).

Banners have engendered much litigation but the NLRB’s attempts to stop it have foundered. See *Overstreet v. United Bhd. of Carpenters and Joiners of America, Local 1506*, 409 F.3d 1199 (9th Cir.2005) (enough question about protection of banner to deny 10l injunction); *Gold v. Mid-Atlantic Regional Council of Carpenters*, 407 F.Supp.2d 719 (D. Md. 2005)(same); *Overstreet v. United Bhd. of Carpenters and Joiners of America, Local 1506*, 2003 WL 23845186 (S.D. Cal. May 7, 2003)(same); *Benson v. United Broth. of Carpenters and Joiners, Locals 184 and 1498*, 337 F.Supp.2d 1275 (D. Ut. 2004)(same); *Kohn v. Southwest Regional Council of Carpenters*, 289 F.Supp.2d 1155, 1163 (C.D. Cal. 2003)(same). The NLRB has yet to decide whether banners and rat balloons at secondary locations are protected.

It would be wrong, however, to think that there are no limits now. The Board has held that where secondary handbilling and primary picketing occur together, the "coercive" effect of the picketing carries over to and infects the handbilling. Broadcast Employees, Local 31 (CBS, Inc.), 237 NLRB 1370 (1978); Operating Engineers, Local 39 v. Oak Construction, 226 NLRB 759 (1976). There is no reason to believe that this approach has been invalidated by DeBartolo II. After all, the court in De Bartolo II only did so much as it regarded as necessary to avoid the question of the constitutionality of the secondary boycott provisions. It only removed speech actually protected by the First Amendment from the ambit of these provisions. It therefore cannot be read expansively (in terms of means of communication, as opposed to subject matter) and its principle must be confined to forms of speech recognized to have First Amendment protection. Picketing is not in this category. It is said to be a mixture of physical conduct and speech, and therefore not "pure" or entitled to the full protection of the First Amendment. DeBartolo II, 485 U.S. at 580. The safest way to handle this problem is to make sure that the two forms of activity do not occur at the same place, and preferably not simultaneously in the same vicinity. In practice, this action does not impose much of a tactical problem.

The Board and courts have also shown hostility to attempts to replicate picketing under the guise of other forms of communication. Handbilling that causes a work stoppage is not immune. *Warsawsky & Company v. NLRB*, 182 F.3d 948, 952 (D.C. Cir. 1999). Sandwich boards are treated as picketing. *District Council 711, International Union of Painters*, 351 NLRB No. 72 at fn. 2 and p. 10 (2007). “Patterned” walking across an entrance while handbilling is considered “patrolling”, another “speech plus conduct” activity that may be prohibited under § 8(b)(4). *Laborers’ Eastern Regional Organizing Fund (The Ranches at Mount Sinai)*, 346 NLRB 1251 (2006). Music is protected but “banging racket” that unreasonably interfered with the conduct of ordinary business by the tenants of a building was enjoined in *Helmsley-Spear, Inc. v. Fishman*, 12 Misc.3d 1151(A), 2006 WL 1310654 (NY Sup. 2006).

Secondary communications may also be attacked if they are untruthful. See *Teamsters, Local 732 (Servair Maintenance)*, 229 NLRB 392 (1977). Consistent with its general approach to free speech questions, the Court in *De Bartolo II* conditioned exemption from the secondary boycott provisions of the NLRA on the truthfulness of the communications. On occasion, secondary boycott charges have been filed against secondary communications on the grounds that they contain false information. In one of these cases, the question may someday arise whether the *New York Times v. Sullivan* standard applies in § 8(b)(4) analysis. It should, because of the interest in protecting the “robust” debate in labor relations matters identified in *Austin*, 418 U.S. at 418. There is also the question of the importance of the falsehood. Trivial errors should not result in liability if the substance of the communication is true. Another way of putting this idea is that there should be no liability unless the part that is untrue is in itself actually injurious to the secondary.

Although threatening to withdraw bank accounts has been held to be protected, *CFM Associates, Inc. v. IBEW Local 269*, 2010 WL 772841 (N.J.Super.A.D. 2010), some forms of customer behavior may be subject to 8(b)(4). In *Pye v. Teamsters Local Union No. 122*, 61 F.3d 1013 (1st Cir. 1995), aff’g 875 F.Supp. 921 (ED MA 1995), the Court of Appeals upheld a Section 10(l) secondary boycott injunction based on a union’s “affinity group shopping” forays allegedly seeking to discourage retail stores from trading with a disputed beer distributor. The court highlighted the coercive nature of the large group shop-ins in which “union members descended, in droves and in concert, upon a designated retail establishment and engaged in multiple rounds of penny-ante purchasing, buying small, inexpensive items such as packs of chewing gum or bags of potato chips and paying for them (more often than not) with bills of large denomination.”

#### D. Intentional Interference With Contract/Prospective Economic Advantage

This tort cause of action is still often invoked. It springs naturally to the mind because the very essence of union campaign activities is to interrupt established and prospective economic relationships of the target.

Presently, the law is clear and favorable. This tort is preempted by federal law. Teamsters Local 20 v. Lester Morton Trucking Company, 377 U.S. 252 (1964); United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Even though these Supreme Court cases are growing old, the principle has been more recently reaffirmed by the courts of appeals. Beverly Hills Foodland, Inc. v. United Food & Commercial Workers, 39 F.3d 191, 195-196 (8th Cir. 1994); Lumber Production Industrial Workers v. Westcoast Industrial Relations Ass'n., 775 F.2d 1042, 1049 (9th Cir. 1985). The exception to the general rule of preemption is for violence. Mine Workers v. Gibbs, 383 U.S. at 729-735; C & W Construction Company v. Brotherhood of Carpenters & Joiners, Local 745, 687 F.Supp. 1453, 1472 (D Haw. 1988); Adolf Coors Co. v. Sickler, 608 F.Supp. 1417, 1422-1424 (C.D. Cal. 1985). The exception poses no hindrance to speech-based union campaign tactics.

Teamsters v. Morton and Mine Workers v. Gibbs were forerunners of the broader Machinists preemption doctrine. These earlier cases relied on a narrower source of preemption: LMRA §303. The Court found that Congress by enacting §8(b)(4) and §303 had occupied the field of regulating secondary pressures in labor disputes. This approach was greatly expanded in Machinists to encompass generally the non-violent, economic weapons used in labor disputes.

It also received an extension in NLRB v. Servette, Inc., 377 U.S. 46 (1964). In Teamsters v. Morton, it was held that a union could not be penalized for asking a company's suppliers or customers not to do business with it. In Servette, the court held that a union can do more than request: it can engage in handbilling of the customers or suppliers to induce them to stop. Note that the conclusion in Servette was founded on the proviso to Section 8(b)(4) for handbilling and other publicity directed at the distributors of a company's product or services. After De Bartolo II, supra, unions are no longer restricted in their handbilling activities by the scope allowed in the proviso. Instead, as long as only pure speech such as handbilling is involved, communications may be addressed to any secondary.

As we know, the Machinists doctrine appears to be expanding rather than contracting, as evidenced by Golden State I<sup>3</sup> and the cases following it. This may help

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<sup>3</sup>Golden State Transit Corp., 475 U.S. 608 (1986).

account for the continued acceptance of the rule in Teamsters v. Morton. It should also help reduce the chances that the rule will be cut back to protect only "traditional" union activities from state-law interference. Compare USS-POSCO Industries v. Contra Costa Building & Construction Trades Council, 31 F.3d 800 (9th Cir. 1994).

I expect we shall never have to resort to the First Amendment as a line of defense in this area, but I believe it is available in the event the preemption argument should fail. Certainly, no injunctive relief would be available to stop speech-based interferences with business. This would be an unconstitutional prior restraint of free speech. Organization For A Better Austin v. Keefe, 402 U.S. 415 (1971). As far as I know, the tort itself has never been tested against the right of free speech. If the Court means what it says about truthful speech never being the basis for liability, then this tort is of suspect constitutionality as applied to interferences that are accomplished merely by communications that are not otherwise illegal (e.g., threatening violence). The tort might be saved if it were limited to situations where an illegal act (breaching a contract) is advocated. Even so, its constitutionality would be questionable. See Brandenburg v. Ohio, 395 U.S. 444 (1969). Even this possibility would be avoided, however, if union tactical materials did not urge any course of action, but merely set forth accurate information for the recipient to do with as it pleases.

De Bartolo II has shown the way in this regard. The conduct there would clearly have been actionable as an intentional interference with contract or prospective economic advantage. The union passed out handbills urging that customers of a shopping mall not patronize any of the tenants of the mall because one of the tenants used a non-union construction company to remodel its premises. The court held that the NLRB could not find an 8(b)(4) violation in this conduct, because it was protected by the First Amendment right of free speech. 485 U.S. at 575-576. If such interference accomplished by means of free speech is immune from federal regulation, *a fortiori* it is immune from state regulation.

#### E. Trademark, Trade Name or Copyright Infringement

Trademark and trade name protection is given by the Lanham Act, 15 U.S. §§1111, et seq. Liability is imposed only where a party's action has created a likelihood of confusion as to the origins of "goods, services, or commercial activities." 15 U.S.C. §1125(a)(1). Under this basic rule, virtually everything we can conceive a union doing in the course of a campaign is not actionable. When a union uses a trade name or trademark in a boycott message, there is no reasonable chance that anyone would be so confused as to think the company was boycotting itself. See, e.g., Cintas Corp. v. UNITE HERE, 601



F. Supp. 2d 571 (S.D. NY), *affirmed* 2009 WL 4577027, 187 LRRM 2800 (2nd Cir. 2009); Senco Products, Inc. v. International Union of Electrical Workers, 311 F.Supp. 590, 591-92 (S.D. Ohio 1970).

That is true of every publication antagonistic to the owner of the name or mark. The First Amendment does not permit businesses to use federal trademark law to suppress criticism of the business; the trademark laws only prevent the destruction of a trademark's ability to associate the mark with the appropriate products or services. See, L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26, 31 (1st Cir. 1987); Smith v. Chanel, Inc., 402 F.2d 562, 565-66 (9th Cir. 1968). Constitutional protection for non-commercial editorial speech outweighs any incidental interest in preventing identification of a company by reference to its name and logo, *see, e.g., Cliff Notes v. Bantam Doubleday Dell Pub. Group*, 886 F.2d 490, 492-96 (2nd Cir. 1989), or a book or song title, *see, e.g., Sugar Busters LLC v. Brennan*, 177 F.3d 258, 269 & n. 7 (5th Cir. 1999) and *Park v. LaFace Records, Inc.*, 296 F.2d 437, 451-52 (6th Cir. 2003). Generally, the types of communications issued by unions are noncommercial speech. See, De Bartolo II, supra, 485 U.S. at 576.

The object of the law is to prevent someone other than the true owner of the name of mark from passing off its goods or services as those of the owner. About the only way this could occur in a labor dispute is if the union sold articles like T-shirts, caps or buttons with a union message including the name or mark. Even then, the chances of anyone believing that goods with hostile references to the company were produced by the company is virtually nil. As a precaution, however, it is advisable for the union to give away rather than sell these items.

The owner of a trademark or trade name thinking of suing a union for infringement in the course of a campaign faces difficult remedial problems. In federal court, injunctive relief is barred by the Norris-LaGuardia Act, 29 U.S.C. §§101 *et seq.* Marriott Corp. v. Great Am. Serv. Trades Council, 552 F.2d 176 (7th Cir. 1977); CNA Fin. Corp. v. Teamsters Local 743, 515 F.Supp. 942 (N.D. Ill. 1981); Senco Products, supra, 311 F.Supp. at 591-92.

Even more fundamentally, in the usual infringement action, the owner is seeking to stop the sale of goods or services that are misleadingly labeled. At best, this is commercial speech entitled to reduced constitutional protection. See Virginia Pharmacy Bd. v. Virginia Citizens Customer Council, Inc., 425 U.S. 748 (1976). The union, however, will not be selling anything. Its message will be a boycott or some other form of publicity. Such exercises of free speech may not be enjoined. "Prior restraints" of free

speech are unconstitutional. Organization For A Better Austin v. Keefe, *supra*. This is a very powerful doctrine which has prevailed even against assertions of national security. New York Times Co. v. U.S., 403 U.S. 713 (1971) (Pentagon Papers case).

Copyright issues also come up in the course of union campaigns. Sometimes it is because copyrighted material such as newspaper or magazine articles, or news broadcasts, are included in campaign materials. Other times, it is because some copyrighted work of a target company is being ridiculed.

In virtually all cases, the defense to a threat of suit for copyright infringement is reliance upon the "fair use" doctrine codified in 17 U.S.C. §107. Section 107 provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include--

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Although there are four tests, the key one is the degree of transformation involved. That is, how unlike is the new work to the thing that was borrowed. "The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against the finding of fair use." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994). Although the fact that a publication is commercial as opposed to nonprofit is a factor that tends to weigh against a finding of fair use, Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984), "the mere fact that a use is educational and not for profit does not insulate it from

a finding of infringement." Campbell v. Acuff-Rose, *supra*, 510 U.S. at 584.

Under the second statutory factor, there has been recognition that some works are "closer to the core of intended copyright protection than others," with works of fiction and imagination accorded core treatment and factual and news accounts entitled to less protection. Campbell v. Acuff-Rose, 510 U.S. at 586.

Under the third factor, the question is the relation between the portion used and the entirety of the copyrighted work. It is not simply a matter of quantity, but of quality and importance, too. Campbell v. Acuff-Rose, 510 U.S. at 587. Courts speak of whether a new work uses the "heart" of the copyrighted one.

The fourth factor is market analysis. The question is the extent of market harm caused by the alleged infringement:

When a commercial use amounts to a mere duplication of the entirety of an original, it clearly 'supersede[s] the objects,' [cit. om.], of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. [cit. om.]. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred.

Campbell v. Acuff-Rose, 510 U.S. at 591 . But the Court has cautioned that the only market harm that is relevant in copyright analysis is that which occurs from product substitution. Harm that flows from comment or criticism does not count. Campbell v. Acuff-Rose, 510 U.S. at 593.

The sum of these points is quite clear: when copyrighted things are used in union campaign materials, it is important to make sure that the degree of transformation is as great as possible. Also, just as in the case of trademark and trade name use, it is wise not to sell anything.

#### E. Blackmail, Extortion, Malicious Prosecution, Abuse of Process, and the "Sham" Exception to Noerr-Pennington

All these topics are grouped together because of what I perceive to be a common theme -- and problem -- running through them. In each case, something otherwise lawful is made unlawful because of its use to accomplish an ulterior purpose.

Extortion is a statutory crime in most jurisdictions. Blackmail is a popular name for a certain type of extortion (the threat to reveal embarrassing information) but is not actually a separate crime. Perkins, Criminal Law (2d ed. 1969), pp. 372-375. A typical definition of the crime is obtaining property from another, with consent, "induced by a wrongful use of force or fear." Cal. Penal Code §518. State courts have tended to hold that it is extortion if one threatens to reveal embarrassing information about another, even if the information is completely true and therefore not defamatory or otherwise unlawful to possess or publish. See, e.g., People v. Downey, 120 Ill. App.3d 456 (1983); People v. Fox, 157 Cal.App.2d 426 (1958). This has not been uniform, however. In People v. Schmitz, 7 Cal.App. 330 (1908), the court held that the threat used must be to commit some unlawful injury. Obviously, there are constitutional questions about this crime that have yet to be fully addressed.

Usually, extortion is thought to involve threats of physical injury to person or property, or of injury to reputation. However, threats of economic harm serve as the basis for violations of the Hobbs Act, 18 U.S.C. §1951. See United States v. Stodola, 953 F.2d 266 (7th Cir. 1992). This occurs even when the conduct standing alone without the attempt to get something of value in exchange for not doing it would be legal. Joseph v. Algemene Bank Nederland, N.V., 592 F.Supp. 141 (W.D. Pa. 1984). Of course, for now unions and their officers and members are protected against Hobbs Act prosecution when they are pursuing legitimate union objectives as opposed to personal enrichment. U.S. v. Enmons, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973).

Some states have accepted the idea that threats of economic harm can constitute extortion. If threats against union campaign activity are made using such rules of state extortion law, the best defense is Machinists preemption. (This assumes, naturally, that the conduct involved is non-violent.) The notion that threatening or exerting economic harm in order to get something of value may be extortion cannot be squared with the recognition under the National Labor Relations Act of the freedom to use economic weapons in order to get something of value -- substantive concessions from the other side. We must be aware, however, of a danger that the Machinists doctrine might be limited to so-called traditional labor activities, such as picketing, striking, handbilling, boycotting, etc. This idea was broached in USS-POSCO Industries v. Contra Costa Building & Construction Trades Council, supra, 31 F.3d at 809 (9th Cir. 1994) where the court stated:

Encouraging the use of unionized labor is an objective well within the legitimate interest of labor unions and, so long as this end is pursued by activities normally associated with labor disputes, there's a strong

presumption that the unions are protected from antitrust liability by the statutory labor exemption. (Emphasis added).

The Supreme Court has said, however, that the Machinists doctrine may have begun with consideration of "certain weapons of bargaining" but has been expanded beyond that. The Court stated:

Such analysis initially had been used to determine whether certain weapons of bargaining neither protected by §7 nor forbidden by §8(b) could be subject to state regulation. See, e.g., Belknap, Inc. v. Hale, *supra* (power to terminate replacements hired during a strike); Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) (concerted refusal to work overtime). It has been used more recently to determine the validity of state rules of general application that affect the right to bargain or to self-organization. See New York Telephone Co. v. New York Labor Dept., 440 U.S., at 539-540 (plurality opinion) (state unemployment compensation laws).

Metropolitan Insurance Co. v. Massachusetts, 471 U.S. 724, 749 n. 27 (1985).

There are three torts involving wrongful use of litigation: malicious prosecution (wrongfully inducing criminal proceedings); wrongful use of civil proceedings (frequently called "malicious prosecution" even though it is in the civil context); and abuse of process (using process such as summonses, warrants, writs of replevin or garnishment, etc., to accomplish ulterior objectives). In each case, the gravamen is misuse of state power. That is, invoking the power of the courts in a way that appears to be valid but in fact is a perversion of the intended purpose of the legal rights asserted. For instance, to be liable for malicious prosecution, "the proceedings must have been initiated primarily for a purpose other than that of bringing an offender to justice." Restatement, Second, Torts, §668, p. 438 (1977). Likewise, in the civil context, "to subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based." *Id.* §676, p. 462. The definition of abuse of process is the use of "legal process, whether criminal or civil, against another primarily to accomplish a purpose for which is not designed." *Id.*, §682, p. 474.

There is potential constitutional infirmity if these torts were taken too far. Perhaps in recognition of this, one of the elements now required universally in both the civil and criminal contexts is that the legal proceedings be terminated adversely to the person who

brought them, and they were not well-founded. In the criminal context, there must be "probable cause", defined as correctly or reasonably believing that certain acts have occurred and that they constitute the offense charged. *Id.*, §662, p. 423. Approximately the same probable cause is required in the civil context, *id.*, §675, p. 457, but the comments in the Restatement show a realization that much more latitude must be given to those who advance civil claims not previously recognized. *See especially* comment f. No reference is made to potential constitutional conflict, however.

Abuse of process is a different story altogether. Comment a to §682 of the Restatement states:

a. The gravamen of the misconduct for which the liability stated in this Section is imposed is not wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed under the rule stated in this Section.

I think this is highly questionable. It means that the First Amendment right to petition is confined to getting into court, which is an obsolete notion. *See Cal. Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510-511 (1972); *Kearney v. Foley & Lardner, LLP*, 590 F.3d 638, 645 (9th Cir. 2009); *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006). *See also BE&K, supra*, 536 U.S. at 531(*dictum*).

When attempts are made to apply these laws to speech-based campaign activities, a First Amendment defense should be asserted. The Supreme Court has stated repeatedly that true speech cannot be made the basis for liability. When an extortion or blackmail claim is brought based on actual conduct that is protected free speech (as opposed to threats of future action), the constitutional right of free speech should provide a complete defense. Otherwise, true, pure free speech could be punished based on the motives of the speaker. Threats constitute a more delicate question. Threats, even though they are speech, are frequently not protected. An example is threats of physical violence. However, if the threat is only to do something which itself is constitutionally protected, it is difficult to see how constitutional protection can be lost. Nevertheless, such reasoning

tends to remove the basic underpinnings of the concept of blackmail and so may be of limited viability.

Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) follows the same approach in the antitrust field, applied to legislative advocacy instead of litigation. Because of the First Amendment right to petition, citizens have the free right to seek legislation they desire, even when they do so in combination with competitors, and even when it is designed to harm competitors. There is an exception, however, for "sham" efforts. These are defined as:

...situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.

Noerr, 365 U.S. at 144.

The familiar pattern emerges. As long as the legislative lobbying is being used to accomplish its ostensible objectives, it is protected, but when it is being used to accomplish an unrelated purpose, it loses its constitutional protection. Of course, this does not mean that it is therefore illegal -- only that the Constitution does not provide a defense. In POSCO, the court suggested that at least one test for whether lobbying is "sham" is how successful it is. In that case, over half of the efforts made by the union were successful and the court reasoned that in these circumstances they could not be considered "sham". Id., 31 F.3d at 811. *See also Primetime 24 Joint Venture v. Nat. Broadcasting Co., Inc.*, 219 F.3d 92, 101 (2nd Cir. 2000). This view is disturbing because it suggests that the enormous consequences of having constitutional protection from antitrust liability removed may depend on the rate of success. On the other hand, this view is not surprising when one considers the emergence of success (or lack of it) as a key test under the malicious prosecution tort. It should not survive *BE&K Const. Co. v. NLRB*, 536 U.S. 516, 535-536 (2002), where the Court rejected the idea that whether petitioning activity is objectively baseless can be determined from its lack of success, but this approach seems hard for courts to resist in serial-litigation cases, *see Kaiser Foundation Health Plan, Inc. v. Abbott Laboratories, Inc.*, 552 F.3d 1033, 1045-1046 (9th Cir. 2009).

There are steps unions can take to avoid problems in this area. First, when a non-traditional activity is to be undertaken, including a traditional activity like handbilling or

picketing but with a non-traditional, non-labor message, prior threats or warnings should not be made in order to avoid any appearance of blackmail or extortion. Second, if unions institute litigation, or the variant of becoming involved in administrative processes, and the subject matter is not traditional labor issues, it is of great importance to choose matters with great care to reduce to the fullest extent possible the chance that any advocacy will be regarded as not well-founded, and to give the greatest possibility for success. A sound factual basis for the claim for an argument must exist, instead of a hunch or speculation about what facts may turn up. The legal theory should not be novel. Bringing multiple actions increases the danger that the “sham” exception was be considered. Finally, follow precautions about doing or saying anything that would give rise to a misimpression that litigation or administrative advocacy was being used to accomplish an ulterior objective.

#### F. Antitrust.

It is basic knowledge that labor groups such as unions may not combine with non-labor groups such as employers to suppress competition. United Mineworkers v. Pennington, 381 U.S. 367 (1965); Allen-Bradley Co. v. International Brotherhood of Electrical Workers , Local 3, 325 U.S. 797 (1945). Moreover, it is not only a violation of §8(e), but also an antitrust violation for a union to agree with a person who has no employees the union seeks to represent that the person will contract only with union-signatory employers. Connell Construction Company v. Plumbers and Steamfitters Local Union 100, 421 U.S. 616 (1974). See Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council, 670 F.2d 421 (3rd Cir.), *certiorari den.* 459 U.S. 916 (1982) (agreement not a *per se* violation; the rule of reason analysis applies).

These principles are very important for unions to observe while engaged in campaign activities. It is not uncommon for campaigns to be undertaken in order to protect market share and to perform on promises made at the bargaining table to "do something" about non-union competitors. Communications with some competitors about what the union plans to do with respect to others is inherently dangerous. The best rule is prophylactic: there should be no such conversations, no matter what form of labor action or what outcome was intended. The very lack of specificity in many of the union promises made in this context is a problem rather than a help. While some actions the union might take against a competitor, such as trying to organize its employees, are things which it might legally promise to other employers, there are other actions which might not be legal. When the union's statements about what it may do are vague, both the legal and illegal can be lumped together by antitrust plaintiffs. Because it cannot be denied that there was a conversation between the union and certain competitors about



what the union intended to do with respect to other competitors, the only issues are what was said and what was meant--prime material for avoiding summary judgment. At most, if conversations of this sort must take place, the union representatives should be very specific that what they are intending to do is organize employees and to bargain a collective bargaining agreement that will meet the needs of those employees.

It should be even more obvious that planned tactics against an employer should never be discussed with its competitors. This is most clearly true with respect to "non-traditional" campaign tactics. But I also believe that it applies to traditional ones. For instance, the union has the right to urge the customers of a store being boycotted to shop at other, union stores. Its protection would be questionable, however, if it received discount coupons or other customer inducements from the union stores to pass out to customers of the boycotted one. The same would be true, I believe, if the union store supported the boycott by advertising it to their customers; although in this case the conduct might be justified if it could be shown that the union stores' actions were based solely on knowledge in the public domain about the boycott, and was absolutely free from any communication between the stores and the union.

Unfortunately, even the statutory exemption for unilateral labor action may be questioned as it applies to innovative union campaign tactics. In POSCO, 800 F.3d at 809, the court expressed doubt whether the exemption applies to "non-traditional" union actions. In that case, the union engaged in a series of administrative actions based on zoning and land use law with the apparent purpose of driving a non-union competitor out of their jurisdiction.

The court did not offer any explanation for this limitation on the protected range of union actions. Given the fact that the statutory exemption arises from the extremely broad language of Section 6 of the Clayton Act, 15 U.S.C. §17 and Section 2 of the Norris-LaGuardia Act, 29 U.S.C. §102, it is difficult to see how there can be doctrinal substance to the court's thinking. Moreover, it is ironic to think that unions would be freer to engage in picketing and street demonstrations than in an entirely non-physical, pure-speech or "right to petition" activities such as publicity and administrative lobbying.

The best explanation for the court's approach in POSCO is a distaste--perhaps even a fear--of the advocacy of non-traditional tactics. It is possible, however, that what influenced the decision was the unions' anticompetitive motive. Instead of trying to organize the competition, they were trying to drive it out. This appears to be in total contradiction to the free-competition model the antitrust laws are designed to promote. I think unions would be well advised to avoid any misguided statements about having

motivation of this sort. [Carpenters Georgia case]

Even though federal antitrust jurisprudence has its rough spots, it is still much to be preferred over what might develop under the antitrust laws of the various states. It is fortunate that federal antitrust law as applied to union actions preempts state laws. Teamsters v. Oliver, 358 U.S. 283 (1959); Connell Construction Company v. Plumbers and Steamfitters Local Union 100, 421 U.S. 616 (1974). I should note, though, that once again POSCO has a kernel that could be very destructive if it grows. The idea that the statutory labor exemption does not protect "non-traditional" activities could be transformed into the view that state law is free to regulate such activities. This should not happen, even if the Ninth Circuit's nascent view about antitrust law holds sway. The preemptive effect of federal antitrust law in the labor area is based upon much more than just the existence of the statutory exemption.

In this area, the accommodation between Federal Labor and Antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves.

Connell Construction Company, 421 U.S. at 636.

#### G. RICO

Papers presented to previous conferences of union lawyers have dealt extensively with the law under the Racketeer Influenced and Corrupt Organizations statute ("RICO"), 18 U.S.C. §§1961, et seq. I will only discuss certain aspects of the law which I regard as being particularly important to union campaigns.

The RICO statute may be civilly enforced by anyone who suffers injury from the illegal conduct of the organization. 18 U.S.C. §1964. In order to be vulnerable to attack under RICO, an organization must commit at least two "predicate acts" in a ten year period. 18 U.S.C. §1961(5). 18 U.S.C. §1961(1) has a long list of what will serve as predicate offenses. Blackmail and extortion are in the list, and are given some treatment in Section II.F of this paper. Also on the list are wire fraud and mail fraud. These should be the most worrisome to union campaigners, since so much of their work depends on telephones and the mail.

Mail fraud is accomplished by any scheme or device to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, by use of the mails. 18 U.S.C. §1351. Wire fraud is expressed in the same terms, but the means used are "wire, radio, or television communication in interstate or foreign commerce." 18 U.S.C. §1843.

An example of something to worry about is the practice of telephoning or writing to get information using false identities or occupations. For instance, a researcher might obtain a copy of a brokerage house analyst's report on a stock issue in the guise of being a serious investor interested in the stock. Information such as this cannot be assumed to be valueless. It is not publicly available, it is considered by the firm to be proprietary, and it is used for private commercial purposes (i.e., distribution to present or prospective customers--real ones). In general, in this age, information must be regarded as valuable property. Inducing someone to give it up by means of false representations may be arguable wire fraud. Confidential information is property for the purposes of both statutes. *U.S. v. Keane*, 852 F.2d 199, 205 (7th Cir. 1988), *certiorari den.* 490 U.S. 1084 (1989) (mail fraud); *U.S. v. Louderman*, 576 F.2d 1383, 1386-1388 (9th Cir.), *certiorari den.* 439 U.S. 896 (1989) (wire fraud).

Another example is communicating in the name of fictitious organizations or ones that are nothing more than arms of the union. This is of particular concern when the recipients of the communications are asked to take actions of various sorts.

Many more examples could be given, but these should be enough to alert the reader that there are many unwelcome possibilities in this area. The best way to handle this problem is of course very simple: tell the truth, especially when using the mails, telephone lines or other means of communication in interstate commerce. Some may find this unduly constraining. There is no doubt that less information will be obtained by those who are frank about who they are. Some clever tactics may have to be foregone.