PEPPERDINE UNIVERSITY

Pepperdine Law Review

Volume 14 | Issue 3 Article 4

3-15-1987

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# The Evolving Doctrine of Union Liability For Health and Safety in the Workplace. Warning: Collective Bargaining Can Be Hazardous to Your Union's Health

Jeffrey S. Wohlner*†

## I. BACKGROUND AND OVERVIEW

In the last fifteen years, a body of law has developed under a theory that certain provisions in a collective bargaining agreement concerning safety enforcement and a union's responsibility thereunder create a legal obligation for the union to perform certain duties expected of it under such provisions. The degree and extent of those duties are the roots of the controversy and, hence, the subject of this article.

Many cases have been pled in terms of a common law negligence action against the union where it fails to perform a duty it undertook or fails to undertake a duty. These cases attempt to sever a common law claim of negligence from the duty of fair representation with respect to the functions of a union in labor agreements under the health and safety provisions.

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† I accept full responsibility for any and all inconsistencies in this article, as well as for all views and opinions expressed. Nevertheless, I would like to thank my Partner, Michael J. Shelley, for his invaluable editorial assistance in making the writing of this article possible.

The more accurate and better reasoned decisions have dealt with the cases in terms of a breach of the duty of fair representation which arises under federal law. A minority of decisions have held that the union's duty is that of due care under state tort law, instead of the duty of fair representation under federal law. On balance, the unions have prevailed in the majority of decisions.

This discussion will trace the theory from its embryonic stages through what presently may be a predictable stage. Along the way there will be mutations and deviations from this ordered pattern of development. Hopefully, the pronouncement from the United States Supreme Court in *Allis-Chalmers Corp. v. Lueck*[1] is the DNA particle needed to rid the system of mutations and make life develop somewhat easier for labor unions.

### *A. Allis-Chalmers Corp. v. Lueck*

In *Allis-Chalmers*, the Court issued what appeared to be a far-reaching decision linking tort claim liability with collective bargaining agreements and clarified the judicial analysis to be applied.

In that case, a United Auto Workers collective bargaining agreement had provided for a self-funded disability plan administered by Aetna Life Insurance. Benefits were to be provided for nonoccupational injuries. Further, the contract provided for a disability grievance procedure and binding arbitration.

After sustaining a nonoccupational injury, the employee filed a bad faith tort claim against the employer and Aetna in state court. The trial court determined that the matter was preempted by section 301 of the Taft-Hartley Act.[2] Following affirmation by the Wisconsin Court of Appeals,[3] the Wisconsin Supreme Court reversed, finding the matter to be a tort claim rather than a contract claim.[4]

When the matter reached the United States Supreme Court, Justice Blackmun, writing for a unanimous Court, held that:

> [W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of a collective bargaining agreement, that claim must either be treated as a [section] 301 claim or dismissed as preempted by federal labor-contract law. Here, respondent's claim should have been dismissed for failure to make use of the grievance procedure or as preempted by [section] 301. The right asserted by respondent is rooted in contract, and the bad-faith claim could have been pleaded as a contract claim under [section] 301. Unless fed-

1. 471 U.S. 202 (1985).

2. Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (1975) (generally providing that suits for violations of collective-bargaining agreements may be brought in federal district court).

3. Lueck v. Aetna Life Ins., 112 Wis. 2d 675, 333 N.W.2d 733 (1983), *rev'd*, 116 Wis. 2d 559, 342 N.W.2d 699 (1984), *cert. granted sub nom.* Allis-Chalmers Corp. v. Lueck, 469 U.S. 815 (1984), *rev'd*, 471 U.S. 202 (1985).

4. Lueck v. Aetna Life Ins., 116 Wis. 2d 559, 342 N.W.2d 699 (1984), *cert. granted sub nom.*, Allis-Chalmers Corp. v. Lueck, 469 U.S. 815 (1984), *rev'd*, 471 U.S. 202 (1985).

> eral law governs that claim, the meaning of the disability-benefit provisions of the collective-bargaining agreement would be subject to varying interpretations, and the congressional goal of a unified body of labor-contract law would be subverted. Preemption is also necessary to preserve the central role of arbitration in the resolution of labor disputes.[5]

Justice Blackmun observed that the issue before the Court was whether section 301 preempts a state-law tort action for bad faith delay in making disability-benefit payments due under a collective bargaining agreement.

Following a review of preemption and its purposes, the Court opined that the preemptive effect of section 301 "must extend beyond suits alleging contract violations. These policies require that 'the relationships created by [a collective bargaining] agreement' be defined by application of 'an evolving federal common law grounded in national labor policy . . . .' "[6]

In short, if a state law purports to define the scope or interpretation of a contract term, federal labor law preempts the state law. If state law were allowed to determine the meaning intended by the parties in adopting a particular phrase or term, the parties would be uncertain as to what they were binding themselves to when they created a right to collective benefits.

The Court made it clear, however, that not every dispute covering employment, or tangentially involving a portion of a labor contract, is preempted. "Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are preempted by those agreements . . . ."[7]

Thus, the question turns on whether the state tort is sufficiently independent of federal contract interpretation to avoid preemption. Such a decision is, in itself, a question of federal law. The test is whether the resolution of a state claim is *substantially dependent* upon the meaning of certain terms in a labor agreement. If so, the claim is to be treated as a section 301 action or be dismissed as preempted by federal law.

The Court had no trouble finding, among other things, that arbitration under the contract must be preserved. Failure to exhaust the established grievance machinery makes such a system ineffective and

5. *Allis-Chalmers*, 471 U.S. at 202-03. The quoted material is taken from the syllabus prepared by the Reporter of Decisions and constitutes no part of the opinion of the court.

6. *Id.* at 210-11.

7. *Id.* at 213.

undermines a central theme of federal labor law—that an arbitrator, not a court, has the responsibility to interpret a labor contract in the initial instance.

### *B. Michigan Mutual*[8] *and Hechler*[9]*—Preview*

Following *Allis-Chalmers*, two decisions were rendered which dealt with the issue of a union's duty of due care in the workplace. Both cases, emanating from the Sixth and Eleventh Circuits, respectively, raised the question of whether such a duty existed by reference to, and through an interpretation of, the collective bargaining agreements.

The decision in *Michigan Mutual Insurance Co. v. United Steelworkers of America*[10] followed the majority of cases holding that the state tort for alleged negligence by the union had been preempted by federal law because the tort of negligence arose out of, or was inextricably connected with, the collective bargaining agreement. Moreover, any duty which the union may have undertaken was not the duty of due care. The court held that the only duty a union had in that instance was fair representation by reason of being the statutory bargaining agent.

One month after *Michigan Mutual* was decided, the Eleventh Circuit permitted a state tort negligence claim against the union to proceed in state court in *Hechler v. International Brotherhood of Electrical Workers*.[11] In *Hechler*, the employee sued the union because her training by the union was negligent and resulted in a job-related injury. By merely looking at the nature of the complaint, the remedy sought, and the absence of a claim in federal labor law, the court held that the case was not preempted by federal law even though the case required that the collective bargaining agreement be interpreted in some fashion. In this instance, the court held that the subject matter was independent of the contract.

The United States Supreme Court reviewed the Eleventh Circuit's decision in *Hechler*.[12] In its decision, the Supreme Court reaffirmed *Allis-Chalmers*,[13] confirmed *Michigan Mutual*,[14] and vacated and remanded *Hechler*.[15]

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8. Michigan Mut. Ins. Co. v. United Steelworkers of Am., 774 F.2d 104 (6th Cir. 1985).

9. Hechler v. International Bhd. of Elec. Workers AFL-CIO, 772 F.2d 788, *reh'g denied*, 778 F.2d 793 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 1967 (1986).

10. 774 F.2d 104 (6th Cir. 1985).

11. *Hechler*, 772 F.2d at 788.

12. Hechler v. International Bhd. of Elec. Workers, 107 S. Ct. 2161 (May, 1987).

13. *Allis-Chalmers*, 471 U.S. 202.

14. *Michigan Mut. Ins.*, 774 F.2d 104.

15. *Hechler*, 107 S. Ct. at 2161.

The Court held that, where a state tort cause of action, which relies upon the breach of a collective bargaining agreement and an interpretation thereof, is not sufficiently independent of the agreement to permit the state action, it is preempted. Further, labor contract disputes require resolution by reference to federal common law.[16] Thus, the meaning given a contract phrase must be subject to uniform federal interpretation under the preemptive force of section 301[17] whether the question arises in the context of a suit for breach of contract or in a suit alleging liability in tort.

The Court reviewed the scope and development of preemption as set forth in *Allis-Chalmers*.[18] It noted that the courts have developed and defined the range of claims which fall within section 301.[19] But when the Court had the opportunity to significantly clarify exactly which claims will fall within section 301, it did not go far enough to affirm or deny the principles set forth in the lower court cases discussed below. The Court failed to flatly address and completely exhaust the issue of whether a union's duty of fair representation encompasses the duty of due care. The Court concluded that since the court of appeals held that the claim was preempted under federal labor law, it remanded the case for further review to determine whether the statute of limitations had run pursuant to *DelCostello v. Teamsters*.[20]

One caveat remains apparent. Indeed, *if* a union assumes the duty of due care, then allegations of negligence become more significant. In the last analysis, "questions of contract interpretation . . . underlie any finding of tort liability."[21]

It is with distinct purpose that *Hechler* and *Michigan Mutual* will not receive a full review and analysis until later in this paper. To reach such analysis, the author feels that a history of the cases preceding them should be reviewed so that a complete historical perspective can be attained.

16. *Id.* at 2164.
17. Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (1975).
18. *Id.* at 2170.
19. *Allis-Chalmers*, 471 U.S. at 218.
20. DelCostello v. Teamsters, 462 U.S. 151 (1983).
21. *Allis-Chalmers*, 471 U.S. at 218.

### C. *Case History*

#### 1. *Vaca v. Sipes*

At this juncture, a history of how this area developed is appropriate. However, any history must be prefaced by some comments relative to *Vaca v. Sipes*.[22]

In *Vaca*, the Court reasoned that, because a union was the exclusive bargaining agent, its duty was statutory. As such, this statutory duty carried with it the responsibility to represent fairly all persons in the bargaining unit. Indeed, the union's statutory obligation is to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct . . . ."[23]

After discussing the union's duty, the Court focused upon the preemption doctrine. Noting the need for the doctrine—to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to Congress—the Court developed language which would become the precursor to *Allis-Chalmers v. Lueck*:

> While these exceptions [state remedies] in no way undermine the vitality of the preemption rule where applicable, they demonstrate that the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the *nature of the particular interests* being asserted and *the effect upon the administration of national labor policies* of concurrent judicial and administrative remedies.[24]

#### 2. *Brough v. United Steelworkers of America*

Some fifteen years ago, the First Circuit Court of Appeals, in *Brough v. United Steelworkers of America*,[25] had an opportunity to examine "safety in the workplace" as it applied to unions.

Mr. Brough was injured while operating an allegedly faulty machine. Although he received workers' compensation benefits, he brought suit in state court against the union on the basis that the union negligently failed to discover a defect in the machine which resulted in the injury (a union safety committee was in existence at the time). Moreover, the complaint alleged that the union members were the employer's "safety advisors."

Once the matter was removed to federal court, Brough amended

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22. 386 U.S. 171 (1967).

23. *Id.* at 177.

24. *Id.* at 180 (emphasis added). In footnote nine, the Supreme Court noted, in what later would be crucial in *Allis-Chalmers* and *Michigan Mutual*, the existence of a grievance/arbitration procedure. If that procedure were not intended to be an exclusive remedy, then a suit for breach of contract would be proper without regard to exhaustion of internal procedures. *Id.* at 180 n.9 (citing Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-58 (1965)).

25. 437 F.2d 748 (1st Cir. 1971).

the complaint to include a second claim: a contractual breach of the union's duty of fair representation. In defense, the union argued the limitation of its duty under the Taft-Hartley Act was applicable, asserting that any duty owed was derived from federal law.[26]

The court granted summary judgment for the union, holding that, since the union was the exclusive bargaining agent for the employees, the only duty it owed was that of good faith representation. The duty did not encompass a general duty of due care.

The First Circuit's decision is not blessed with a more exhaustive analysis of the scope of the union's undertaking as a safety committee, or the extent of its duties, if any, to inspect, report, and/or rectify. Additionally, there is no mention of the arbitration clause and its scope. It seems clear that the First Circuit should have decided the federal question as it related to the negligence claim, or at least remanded the case back to the district court to make this determination.[27] Although faced with the authority of *Vaca v. Sipes*, the *Brough* court did not reach the question of the effect of this type of suit on national labor policy. It seemingly viewed the "nature of the particular interest" as strictly a common law negligence action without regard to the interplay of the collective bargaining agreement with federal labor policy.[28]

If the union owed no duty for a breach of fair representation as the exclusive bargaining agent, it should have followed that the tort claim was enmeshed in the contract claim. However, the *Brough* court felt the common law tort claim was a pendant claim. Exercising its discretion, the Court remanded the matter to the state court to decide the question of liability using federal law.[29]

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26. *Id.*

27. The Court reasoned that since the district court regarded both counts as being an allegation of the breach of the union's duty, and since the district court did *not* consider interpretation of state law necessary, the matter should return to the state forum. *Id.* at 749-50.

28. *Id.* at 750.

29. The negligence claim was founded on state law principles that an employer's safety advisors, regardless of their motivation or *contractual relationship*, are subject to liability if their machinery inspection negligently fails to discover a defect with a resultant injury. However, the First Circuit noted that whether such a rule would be applied by a state court to a union safety committee "is a difficult question." State law, argued the union, would be an intrusion into an area preempted by Congress. Once in state court, the union impleaded the company and ultimately a settlement was reached before trial. *Id.*

### 3. *Bryant v. International Union, United Mine Workers of America*

In *Bryant v. International Union, United Mine Workers of America*,[30] the Sixth Circuit had the next opportunity to pass on this subject.

Following a mine explosion which killed several employees, the estates of the deceased individuals brought suit in federal court against both the employer and the union. The complaint charged that since the collective bargaining agreement had incorporated the Federal Mine Safety Code, the company had obligated itself to conform to the Code's standards. The union, it charged, undertook a duty to enforce such compliance. The plaintiffs claimed that both parties had failed to perform their respective duties, thereby leading to a foreseeable result: the decedents were killed as a consequence of violations of the Mine Safety Code.[31] The union, the plaintiffs argued, did not make periodic inspections of the mine.[32]

The action was commenced as a section 301 suit, and the court viewed the complaint as one which sought damages for the union's breach of fair representation. In this case, the role undertaken by the union relating to safety was a permissive duty (the committee "may" inspect) rather than an affirmative obligation.[33]

By adopting the Mine Safety Code, the parties had agreed upon the use of federal inspectors to investigate safety problems. Thus, said the court, a violation would need to be discovered by an inspector for liability to attach, and since none was found, the union breached no duty. The union's liability could not be predicated solely on the fact that the union headed the safety committee.[34]

The court further held that the union did not have a financial responsibility due to a failure to compel correction of code violations, even where inspectors had reported violations.

> It would be a mistake of vast proportion to read every power granted the union by management as creating a corollary contract right in the employee as against the union. Such interpretation of collective bargaining agreements would simply deter unions from engaging in the unfettered give and take negotiations which lie at the heart of the collective bargaining agreement.[35]

In short, the Sixth Circuit found that the only duty which the union had was the obligation to fairly enforce the provisions of the collective bargaining agreement. With no knowledge of any code violation, there was no basis for finding a breach.

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30. 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).
31. *Id.* at 2 n.3.
32. *Id.* at 3.
33. *Id.*
34. *Id.*
35. *Id.* at 5.

With a word of sympathy to the plight of the bereaved families, the court tried to correct any misperceptions about their rights: "The answer . . . is not to pervert the collective bargaining process by reading into its instruments a liability which was never contemplated and duties which were never assumed in fact or in theory . . . ."[36]

It is interesting that *Brough* was not cited in the *Bryant* decision. In fact, *Brough* never reached the question of liability of the union safety committee, as that court viewed the nature of the pleading as being determinative, instead of considering the relationship of the collective bargaining agreement vis-a-vis the committee's duty to act.[37]

4. *Helton v. Hake*

A Missouri district court was the next to act in *Helton v. Hake*.[38] In 1973, Mr. Helton died from electrocution after coming into contact with a high tension power line. The surviving spouse and children filed suit in state court against the union.[39] It was alleged that a job steward, who was appointed by the international and local unions, had the responsibility to ensure that no work would be done in a certain area of the high tension lines until power was off or the safety of the bargaining unit had been secured. This steward allegedly failed to enforce the safety rule and, as an agent of the unions, all were now in the lawsuit.[40]

The unions removed the case to federal district court,[41] stating that the case against them was, in reality, a section 301 suit because the allegation was no more than a failure to fully and adequately enforce the collective bargaining agreement provisions pertaining to safety rules. Therefore, since an interpretation of the agreement was necessary, federal jurisdiction was available.

In a very questionable ruling, the district court remanded the matter to state court, based on a tortured analysis: since the complaint did nothing more than state an action in tort for wrongful death under state law, the court held that it did not fall within the jurisdiction of section 301.

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36. *Id.* at 5-6.

37. If that court had considered the negligence claim merely as a recharacterization of the federal claim, the entire case seemingly would have been dismissed.

38. 386 F. Supp. 1027 (W.D. Mo. 1974).

39. Other counts sought to hold the city liable pursuant to negligence theory.

40. *Helton*, 386 F. Supp. at 1028.

41. *Id.*

The court candidly acknowledged that a union member could sue the union for a redress of rights under the collective bargaining agreement if the union interfered with such rights. The union's interference with such rights would need to be shown to establish breach of the union's duty of fair representation irrespective of whether the claim was based on a collective bargaining agreement. Naturally, the standards under *Vaca v. Sipes*, and subsequent cases at that time were cited.[42]

However, the court then embarked upon rulings of questionable validity, holding that section 301(a) would support a suit to redress rights if the union interfered with *employer promises* in the collective bargaining agreement. However, whether section 301(a) would "support a suit by a union member against his union for failure of the union to honor rights conferred by *union promises* in the collective bargaining agreement . . . "[43] was a different issue.

Interestingly, the court quoted excerpts from a Ninth Circuit case in the next step of its analysis:

> While we have been unable to find any case for the proposition that section 301 will support a suit by a union member against his union for redress from union refusal to honor rights conferred on employees by union promises in the collective bargaining agreement, we are convinced that section 301 does confer such jurisdiction. The union's duty of fair representation is equally violated when it refuses arbitrarily and in bad faith to honor its obligations, under a collective bargaining agreement, which is designed to benefit its members.[44]

From there, the court made a quantum leap to justify remand to state court, claiming it did not have the jurisdiction under section 301. The court recognized that the complaint did not *allege* any breach by the union of its duty of fair representation, the complaint *alleged* only a negligent failure to perform a duty promised under the contract. Additionally, there were no *allegations* of arbitrary or bad faith actions by the union. Finally, there were no *allegations* of refusal by the union to honor its promises in the collective bargaining agreement. Thus, the court held that it was without jurisdiction under section 301.[45]

The court then analyzed whether the complaint could even be categorized as a suit for violation of contract. *Bryant* was distinguished because (1) in that case the agreement was held to contain a permissive duty as opposed to the affirmative duty in *Helton*; (2) Helton's

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42. *Id.* at 1029-30.

43. *Id.* at 1030. *See also* Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971); Humphrey v. Moore, 375 U.S. 335 (1964); Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

44. *Helton*, 386 F. Supp. at 1030.

45. *Id.* at 1030 (citing Buzzard v. Local Lodge 1040 Int'l Ass'n of Machinists and Aerospace Workers, 480 F.2d 35 (9th Cir. 1973); *contra* Verville v. International Ass'n of Machinists and Aerospace Workers, 520 F.2d 615 (6th Cir. 1975).

complaint alleged a negligent and careless enforcement of safety rules relating to work in the area of power lines; and (3) the *Bryant* court never addressed the question of jurisdiction.[46] Therefore, since the suit was "clearly" one brought in tort seeking recovery for wrongful death due to the union's negligence, the case could not remain in federal court.

What of the contract and its relationship to federal law? What of the *Bryant* court's concern about retardation of the national labor policy? The *Helton* court had no trouble answering these questions:

> That defendants' duty may have arisen under a contract does not in and of itself change the basic nature of this action, which is a suit in tort to recover damages for injuries sustained due to defendants' alleged negligence. . . .
>
> . . . .
>
> Merely because some interpretation of the contract appears to be necessary to the determination of the nature, scope or extent of the duty owed does not, in and of itself, categorize this cause as an action for violation of the contract so as to grant jurisdiction to this Court under section 301(a).[47]

As if it were wearing blinders, the court looked merely at the pleading (the nature of the action with no mention of fair representation), the relief sought, and the claimant bringing the action.[48]

What appears to have been discarded at this point was the language in *San Diego Building Trades Council v. Garmon*:[49]

> It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern. In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.[50]

In a last hurrah, the court stated that it would be wrong to grant jurisdiction under section 301 merely because some interpretation of a contract would be necessary, even if the alleged wrong were directly or indirectly related thereto.

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46. *Id.* The jurisdictional question was never addressed because the original suit was brought in federal court, alleging a section 301 action for breach of the collective bargaining agreement and a breach of fair representation.

47. *Id.*

48. "Plaintiffs are not praying for reinstatement or back wages, or for an improvement in working conditions. They are not employees or union members, but rather survivors bringing suit under the Missouri wrongful death law." *Id.* at 1034.

49. 359 U.S. 236 (1959).

50. *Id.* at 247.

5. *Higley v. Disston, Inc.*

In *Higley v. Disston, Inc.*,[51] Washington State had the opportunity to address the same issue. Suit was brought against the union because an employee/bargaining unit member was injured at his place of employment as a result of the union-management joint safety committee's alleged negligent failure to discover and correct the condition which led to the injury.[52]

Even though the case was brought in state court, that tribunal did not confine its analysis to the nature of the complaint. Determining that the applicable "duty" was one of fair representation, and that concurrent jurisdiction was present to decide the claim, the court applied substantive federal law.[53]

The Washington court held that, when the union attempted to improve the working and safety conditions of its members by introducing into the contract certain provisions dealing with safety, it did not assume a duty of liability toward its members to provide a safe workplace. Indeed, it could not be charged with a duty of reasonable care in making safety inspections.[54]

Concluding with a reference to *Bryant*, and no mention of *Helton*, the court gave proper deference to national labor policy, noting that to permit liability would discourage more effective standards in future contracts. Finding no breach, the matter was dismissed. It appears from the case that, while a fair representation breach may not have been pleaded as such, the court determined that it was applicable doctrine.

6. *House v. Mine Safety Appliance Co.*

Several months later, a similar suit was decided in favor of the union in *House v. Mine Safety Appliances Co.*[55] Following a mine accident, two companies sued the union seeking indemnification and contribution from an alleged right of union members to sue. Any right which these third-party plaintiffs had would rest upon the ability of the individual union member to maintain that right in the suit.

Again, the same argument recurred: the union undertook a duty to act as the accident prevention and safety enforcer under the collective bargaining agreement. The union was negligent in that it permitted unsafe conditions to exist by failing to exercise due care and by not providing a reasonably safe place for members to perform

51. 42 Lab. Rel. Ref. M. 2443 (Wash. Supp. 1976).

52. *Id.* at 2443-44.

53. *Id.* at 2444.

54. The decision does not delineate the extent to which the union participated in the safety program.

55. 417 F. Supp. 939 (D. Idaho 1976).

their duties. This claimed negligence was the proximate cause of the damages sustained by the employee.

There was no assertion that the union breached its duty of fair representation; rather, reliance was placed upon common law tort principles.[56] The assumed duty emerged from the collective bargaining agreement. Among other provisions, the safety committee was to advise the plant manager of problems, but not to handle grievances.[57]

The court found that any action for damages flowed from the contractual obligation undertaken by the union for the benefit of its members. "If liability could lie with the union under the common law, it would be because of negligent performance of a duty assumed and not a duty otherwise imposed by the common law. . . . [T]he duty is one arising under federal law, namely, the duty of fair representation."[58]

The court held that any lawsuit of this type, even if brought by an actual employee/member, would be a challenge to the enforcement, or lack thereof, of the collective bargaining agreement. This time, in a logical step, the court recognized the "inextricable connection" between the common law claim and the duty of fair representation when the cause of action arises from the contract.[59] Accordingly, it refused to sever responsibility for safety from other responsibilities which flowed from the duty of fair representation.

In short, the negligence theory for breach of an alleged safety duty was found to be embodied in the union's duty of fair representation. Alleging negligent performance of contractual duties was not sufficient to state a claim under federal law.[60]

To the *House* court, it made no difference that the agreement provided for a mandatory duty ("shall inspect") as opposed to the permissive duty in *Bryant*.[61] Liability would not automatically be imposed for personal injuries resulting from a breach of fair repre-

56. *Id.* at 941-42.
57. *Id.*
58. *Id.* at 942.
59. *Id.* at 943; *but cf.* Marshall v. International Longshoreman's 781, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962); Inglis v. Operating Eng'rs Local Union No. 12, 58 Cal. 2d 269, 373 P.2d 467, 23 Cal. Rptr. 403 (1962), *cited in* House v. Mine Safety Appliances Co., 417 F. Supp. 939 (D. Idaho 1976) (distinguished by the fact that the action in *House* followed from a contractual obligation affirmatively undertaken by the union while the California cases concerned actions in tort based upon intentional torts committed by union members).
60. *Id.* at 945.
61. *Bryant*, 417 F. Supp. at 944; "Every power granted to a union does not necessarily create a corollary contract right in the employee against his union." *Id.*

sentation. Hence, because the third-party plaintiffs did not rely upon a breach of fair representation, they did not state a claim upon which relief could be granted.[62]

The court also injected public policy into the discussion, noting that if unions were liable in these types of cases, there would be no negotiation on safety matters.[63] Further, an anomaly would result by imposing a variety of state tort concepts into a union's duty of fair representation because the standard of care required of unions would vary according to the different tort principles of each state. Thus, union liability would frustrate the precepts of uniformity developed under federal law.

The court also remarked on the traditional duty of employers to furnish a safe place of employment. To allow a sanction of legal liability to accompany a union's exercise of responsibility in safety matters, together with either loss shifting or sharing, would weaken the duty of the employer at the expense of the union and its members. Only the largest and most financially solvent unions might be able to absorb the loss.[64]

### 7. *Carollo v. Forty-Eight Insulation, Inc.*

In 1977, state courts in Pennsylvania lined up in the *Bryant* and *House* camps. In *Carollo v. Forty-Eight Insulation, Inc.*,[65] plaintiffs filed suit when they contracted an asbestos-related disease as a result of prolonged inhalation of the asbestos fibers. The complaint against the union charged that since health and safety are mandatory bargaining issues, a duty of fair representation arose whereby the union had a responsibility to search out the hazards (such as the possibility of injury by inhalation) so that they could be a subject of bargaining. Moreover, the complaint charged that the union should have warned members of the danger of disease or injury arising from the use or exposure to asbestos, and should have required the company to provide proper equipment.[66]

The issues before the court were: whether the union could be sub-

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62. The court stated that:

> It is established that as an exclusive bargaining representative, the union has a statutory duty fairly to represent all of its employees, both in its collective bargaining with the employer, and in its enforcement of the resulting agreement. . . . Here if union members had instituted suit it would be a challenge to the enforcement or lack of enforcement of the collective bargaining agreement. In the Ninth Circuit, a union breaches its duty of fair representation when its actions or inactions are either arbitrary, discriminatory or in bad faith.

*Id.* at 944 n.3 (citation omitted).

63. *House*, 417 F. Supp. at 944.

64. *Id.* at 946-47.

65. 252 Pa. Super. 422, 381 A.2d 990 (1977).

66. *Id.* at 426, 381 A.2d at 992.

ject to tort liabilities under state law; and whether such law represented a permissible state action, or whether it was an intrusion in an area preempted by federal law.

Following a recitation of *Vaca*, the court noted what Congress did *not* intend the duty to cover; namely, "Congress did not seek to make the union responsible for its members' working conditions."[67] The *Carollo* court concluded that an intrusion into an area preempted by federal law would result if the duty of fair representation were extended to include a duty to search out and take precautions.

8. *Gerace v. Johns-Manville Corp.*

In *Gerace v. Johns-Manville Corp.*,[68] the Pennsylvania court faced a situation where employees sued for injuries sustained as a result of handling and working with asbestos products manufactured, sold, and supplied by a company called Rockwool. That company joined the local and international unions as party defendants, claiming it was the company's negligence which was directly responsible for the injury/disease.

Rockwool's claims against the unions included allegations of failure to fulfill certain duties owed to members: (1) to guard and protect members' health and welfare; (2) to ensure that the employer observed existing health and safety regulations; (3) to warn the membership of the potential hazards of asbestos; and (4) to educate the membership concerning the potential hazards of asbestos.[69]

Rockwool's theory was simply that federal preemption did not pre-

67. *Id.* at 433, 381 A.2d at 995-96 (citing House v. Mine Safety Appliances Co., 417 F. Supp. 939 (D. Idaho 1976)); Bryant v. International Union, United Mine Workers of Am., 467 F.2d 1 (6th Cir. 1972).

A statement by Professor Archibald Cox which reflected the concern of the *House* court was also noted:

> If the effectuation of national labor policy requires exclusion of state procedures and remedies for conduct of a kind prohibited by national policy, *a fortiori*, the national policy must require the exclusion of state efforts to impose different substantive restrictions within the area of labor-management relations. *The application of different substantive rules through state tribunals would multiply the effects of divergencies in procedure, remedies, and interpretation of federal law.*

*Carollo*, 252 Pa. Super. at 434, 381 A.2d at 996 (quoting Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1345 (1972)) (emphasis added). Professor Cox's comment regarding remedies is of particular interest because one of the cornerstones of the decision in Hechler v. International Bhd. of Elec. Workers AFL-CIO, 772 F.2d 788, *reh'g denied*, 778 F.2d 793 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 1967 (1986) (relied upon remedy as a reason for the remand to state court).

68. 95 L.R.R.M. 3282 (Pa. Ct. C.P. 1977).

69. *Id.* at 3282-83.

clude the existence of a common law duty of due care founded on principles of state tort law. Moreover, it argued that the union's duty was larger than that defined by federal law; the union's duty encompassed Rockwool's claims, regardless of whether they might be part of the collective bargaining agreement. In short, Rockwool contended that the duty of due care is an *exception* to preemption and that liability should be shifted to the unions as a result.[70]

The court disposed of the case in quick fashion. It stated that the statutory duty of fair representation was the only duty which a union owes to its members. The court concluded, "We therefore must reject the attempt made here to graft a new obligation on the preexisting federally regulated scheme . . . ."[71]

### 9. *Hartsfield v. Seafarers International Union*

In *Hartsfield v. Seafarer's International Union*,[72] an Alabama federal district court was invited to extend the theory of tort liability to a union member on board a ship. In *Hartsfield*, a mentally unbalanced seaman caused the death of one Mr. Hartsfield while aboard a Coast Guard ship. His sister (personal representative of his children) brought suit against the Coast Guard because of its alleged negligence in failing to discover the assailant's mental condition.[73]

The plaintiff also brought a claim against the union based upon its act of providing the crew members. The plaintiff claimed that the duty to provide a competent crew was performed negligently since the assailant was included in the crew. The union, it was alleged, knew or should have known of the unstable and dangerous condition of this person and the consequent threat that his continued presence posed to fellow crew members.[74]

The Death on the High Seas Act and the General Maritime Law statutes were the touchstones of the complaint against the union. No wrongful act could be attributed to the union when the death occurred *on* the high seas or in territorial waters, said the court. It further recognized that a labor organization is not required to safeguard crew members from violence while at sea, and neither is a union in any position to supervise a crew member under such circumstances. Hence, the court concluded that that portion of the claim failed to state facts upon which relief could be granted.[75]

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70. *Id.* at 3283-84.
71. *Id.* at 3283.
72. 427 F. Supp. 264 (S.D. Ala. 1977).
73. *Id.* at 266.
74. *Id.*
75. *Id.* at 267. Liability was also denied on the basis that the plaintiff had judgment and satisfaction against a joint tortfeasor in an earlier action on the same facts and for the same injury. *See e.g.*, Sessions v. Johnson, 95 U.S. 347 (1877); McPherson v.

The plaintiff also tried to attach liability for the job referral, but that claim was rejected:

> The labor organization maintains no supervision over an individual who is referred by it to employment and is precluded by contract from interfering with the authority of the ship's offices. The union cannot guarantee that personal quarrels among seamen will not arise during a long voyage and result in sudden violence, injury, or death. . . .
>
> . . . .
>
> If unions are called upon to respond in tort for injuries to seamen, unions will in effect be given the duty of providing a safe and seaworthy vessel. Such a result would reverse the traditional relationship of the master to crew and would force unions to seek to control the conditions of employment while vessels are at sea. These results could not have been intended to flow from the Death on the High Seas Act.[76]

Although the union owed no obligation or duty under maritime law, it nevertheless did owe a duty toward crew members under labor laws. The court held that the union owed no duty of due care independent of its duty of fair representation which arose from federal labor law. No breach of the duty of fair representation was recognized in the union's alleged improper referral of the attacker.[77]

### 10. *Farmer v. General Refractories Co.*

In *Farmer v. General Refractories Co.*,[78] tort claims that alleged a union's inadequate protection of workplace, health and safety were determined to have posed a significant potential for interference with federal law.

The plaintiff Farmer contracted a disease from exposure to certain products manufactured by the company. After he sued the company, it joined the union as an additional defendant. In short, the union was charged with failing to protect its members from health hazards: it did not warn or inform them of the dangers of exposure to certain materials present at the job site; it failed to inform them of the ade-

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Amalgamated Sugar Co., 271 F.2d 809 (9th Cir. 1959); Eberle v. Sinclair Prairie Oil Co., 120 F.2d 746 (10th Cir. 1941).

76. *Hartsfield*, 427 F. Supp. at 269. The ship's officers, not the union, are required to prevent harm from occurring where they have reason to believe that such may happen. Further, "[n]egligent breach of the duty to protect the crew imposes liability upon the vessel and its owner." *Id.* *See also* Whitaker v. Blidberg-Rothchild Co., 195 F. Supp. 420 (E.D. Va. 1961), *aff'd*, 296 F.2d 554 (4th Cir. 1961).

77. *Id.* at 69-70. This is partly because a union has neither authority nor opportunity to monitor the activities of ship crews. Accordingly, if unions are to be held liable, they will in effect be given the duty of insuring a safe and seaworthy vessel to all its members.

78. 271 Pa. Super. 349, 413 A.2d 701 (1979).

quacy of wearing apparel and of safe methods of using the equipment.

The company argued that these "duties" were not within the duty of fair representation, but rather were of a nonrepresentional nature, and that the case was distinguishable from *Carollo*.[79] The court disagreed: "The allegations of misconduct in *Carollo* and here are substantially the same; the label attached is immaterial."[80] The court concluded that the union did not specifically assume the duties which Farmer alleged. Moreover, the duties were not presumed to be part of the duty of fair representation.

> To impose such a duty either as an extension of the duty of fair representation or as some type of common law duty would result in an unwarranted interference with the federal scheme for it would place upon the Local as part of the collective bargaining process a duty it had never assumed.[81]

The court concluded that a failure to search out hazards and take proper precautions was not, therefore, within the scope of a union's duty of fair representation.

### 11. *Brooks v. New Jersey Manufacturers Insurance Co.*

*Brooks v. New Jersey Manufacturers Insurance Co.*[82] was a state court decision which followed in the footsteps of *Bryant* and *House*. Mr. Brooks sustained an injury to his arm while working on a machine whose safety switch had been disconnected. After receiving workers' compensation benefits, he instituted a suit in state court charging the union with negligence in that the safety committee had a duty to report and remedy unsafe conditions in the plant. The safety committee consisted of union and management representatives. The purpose of the committee was to meet and make recommendations to the company which would then implement them at its discretion. There was no duty on behalf of the committee to inspect for hazardous conditions. Management had the sole responsibility for implementing the safety program, based on communications obtained about conditions on the plant floor from the committee.

The defendant insurance company would visit the plant roughly once a year and conduct an "eye ball" or "walk-through" tour with the assistant plant manager. The inspection was not a contractual obligation on the part of the insurer. Such inspection was not meant to constitute an undertaking on behalf of the plant or to determine or warrant that workplaces, machinery, or equipment were safe.

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79. 252 Pa. Super 422, 381 A.2d 990 (1977); *see also supra* note 65 and accompanying text.

80. 271 Pa. Super. at 354, 413 A.2d at 704 (1979).

81. *Id.* at 356-57, 413 A.2d at 705.

82. 170 N.J. Super. 20, 405 A.2d 466 (1979), *cert. denied*, 81 N.J. 803, 408 A.2d 806 (1979).

The essential allegations of the complaint were couched in common law negligence terms—the union had a safety committee which owed a duty to report any unsafe condition in the plant, and the committee failed to perform or negligently failed to perform that duty.

Summary judgment was granted in favor of the union at the trial court level. Upon reaching the higher state court, the result was the same. "[T]he issue is not whether the Local breached a duty owed to plaintiff; rather, as indicated, it is whether such breach, if there was one, would nevertheless entitle plaintiff to maintain this lawsuit against the Local."[83]

First and foremost, the court opined that any obligation which the Local may have had with regard to safety conditions existed solely by virtue of the labor contract—hence, a return to the "inextricably intertwined with the collective bargaining agreement"[84] rationale.

Since the plaintiffs relied upon an alleged common law tort committed by the union (negligent performance of a duty assumed by reason of the collective bargaining agreement), the state court held that the union's duty (limited with respect to plant safety) was properly classified as one of fair representation arising under federal law. It was then an easy step for the court to recognize that negligence did not constitute a breach of the fair representation duty.[85]

Finally, the court discussed the factual distinctions within the labor contract before it. Where the union appointed persons to the safety committee only for purposes of reporting conditions and making recommendations to the company, those acts did not create an obligation or duty which, even if breached, would give rise to an action for damages.[86] The court opted for the *Bryant* discussion of federal law, and the *House* rationale of the connection between the nature of the action and the labor agreement. It rejected *Helton*.[87]

### 12. *Dunbar v. United Steelworkers of America*

Let us again focus on the State of Idaho. This time the scenario is

83. *Id.* at 28, 405 A.2d at 469.

84. *Id.* at 33, 405 A.2d at 471.

85. The *Brooks* court cited Dente v. International Org. of Masters, Mates & P's Loc. 90, 92 F.2d 10 (9th Cir. 1973) *cert. denied*, 417 U.S. 910 (1974). Although the *Dente* case had been decided before *Helton*, the *Helton* court did not mention it.

86. *Brooks*, 170 N.J. Super. at 35, 405 A.2d at 473.

87. *Id.* The court distinguished *Helton* by noting that under these facts the union, through the shop steward, assumed an affirmative duty to ensure compliance of the work-safety rules. In the *Brooks* case no such duty was assumed by the union.

the state court system. In light of *House*, one wonders why the case was never removed to federal court.

*Dunbar v. United Steelworkers of America*[88] was another case involving a mine accident and a wrongful death suit against a union and also the state. Against the union, the claim alleged negligence by misrepresenting its safety concern and expertise, failing to develop an adequate safety program, and failing to inspect and enforce accident prevention clauses of the labor contract. The trial court held the claims were preempted by federal law.

In the Idaho Supreme Court, the union argued preemption under federal regulation of labor law and, further, that since the claims were really breaches of fair representation, the issues were within the primary jurisdiction of the National Labor Relations Board.

While both *House* and *Bryant* were noted, the court rejected each. *House* was not persuasive[89] and *Bryant* was distinguished because that language was permissive instead of mandatory ("shall inspect") as in the instant case.[90]

In language disturbing to unions, the court explained that the claims were not necessarily based upon the duty of fair representation, and that duty is not the only duty owed by a union to its members. Hence, the case fell within the narrow range of exceptions to preemption as found in *Farmer v. United Brotherhood of Carpenters & Joiners of America*.[91]

It appears the court looked only at the nature of the action:[92] "If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status any more than if its conduct brought death to a nonunion member."[93]

In taking one parting shot at preemption, it was determined that any federal interest was only peripheral at best. The interests protected by state wrongful death statutes were unrelated to those gov-

88. 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 466 U.S. 983 (1980).

89. *Id.* at 528, 602 P.2d at 26. The court held that, because the ruling in House was based upon "the very trial court decision which is the subject of this appeal," it is merely persuasive authority. *Id.*

90. *Id.* The court focused upon the fact that in *Bryant*, the collective bargaining agreement made inspection of the mine by the union voluntary rather than mandatory as was the case here.

91. 430 U.S. 290 (1977). However, it should be noted that each of the duties alleged to have been violated were well within the scope of the contract and not the "exceptions." *See id.* at 296-97.

92. This is substantiated by the concurring opinion which recognized the action as a "creature of state statutes, is of substantial local interest, and traditionally has been committed to the jurisdiction of the courts of the state." *Dunbar*, 100 Idaho at 546, 602 P.2d at 44-45 (Bakes, J., specially concurring in Part I).

93. *Id.* at 527, 602 P.2d at 25-26.

erned by federal law.[94] The NLRB would not recognize the wrongful death claims against the union.

Significantly, the *Dunbar* court failed to note a prior Idaho holding cited in *House* some years earlier.[95] In that case, *Rawson v. United Steelworkers of America*,[96] the union was sued for a mine disaster. There, the Idaho state court opined:

> However, in whatever forum this question is presented, that is, a claim of inadequate representation, the federal law would govern the disposition of the merits. Negligent performance of its contractual duties does not state a claim for breach of fair representation. Plaintiffs' complaint is grounded solely on recognized principles of tort law and the federal labor act does not recognize that responsibility of the union in its representative capacity.[97]

In any event, the *Dunbar* court looked at the pleadings and nature of the action. The matter was remanded to the state trial court.

### 13. *Globig v. Johns-Mansville Corp.*

In *Globig v. Johns-Mansville Corp.*,[98] there was another attempt to hold a union liable for negligence in asbestos-related illnesses. Here, the union was the subject of a third-party suit seeking contributions from the union because it breached its duty to disseminate information. Specifically, it failed to inform the employees of possible dangers linked to the material they were handling and the need to use inhalation devices. In addition, the union failed to conduct informational programs.

The matter, originally brought in state court under a common law negligence suit, was removed to federal court where the union asserted a preemption argument. Finding that the original plaintiffs, as union members, could not have sued the union under federal law, the court held that the third-party suit could not be maintained.[99] Allegations that a union may have negligently represented its members is insufficient to state a claim under federal law. In other words, com-

94. *Dunbar*, 100 Idaho at 528, 602 P.2d at 26.

95. *See House*, 417 F. Supp. at 947. In *House*, the court focused upon Idaho's Workmens' Compensation Law.

96. Case no. 17694 (First Judicial Dist., County of Shoshone, 1976). The Idaho Supreme Court reversed the lower court's ruling as to the fraud claim agianst the union and remanded the case.

97. *House*, 417 F. Supp. at 945 (quoting *Rawson*, Memorandum Decision & Order at 3).

98. 486 F. Supp. 735 (E.D. Wis. 1980).

99. *Id.* at 740. It relied upon *Dente* and *Brough*, to find that "the fact that a union may have negligently represented its members does not state a cause of action under federal law." *Id.*

mon law negligence under state law could not be utilized to accomplish what could not be attained under federal law.

The court determined that a union's responsibility to its members is neither a peripheral concern of federal labor policy nor a deeply rooted state interest which imposes a duty of care not existing under federal law.[100] Since the union's duty was governed by federal law, which does not recognize a common law duty of due care, the third-party complaint was dismissed. The relationships among labor unions, union members, and employers were generally recognized to be governed by federal law.[101]

### 14. *Bescoe v. Laborers' Union Local 334*

In *Bescoe v. Laborers' Union Local 334*,[102] the union referred workers to a company plant. One of the referrals was selected by the company as a foreman.[103] The foreman had immediate problems with his supervisor who threatened to fire him.[104] The union told the supervisor that he could not terminate the foreman, although, in actuality, the company's authority to terminate the employee did exist.[105] The union said it would "take care of" the foreman, implying that it would stop or curtail his outbursts.[106] The foreman later became embroiled in an altercation with another employee and severely injured him.[107]

Even though the union was successful in obtaining partial summary judgment on the issue of negligent referral, the jury subsequently rendered a verdict against the union and foreman on other grounds.[108] While no issue was raised on appeal as to the negligent referral, several issues were raised concerning preemption and, ultimately, whether the trial court had jurisdiction to entertain the action against the union.[109]

One of the claims the plaintiff asserted against the union involved the union's failure to insure and protect other workers on the job site once it was informed of the foreman's threats of violence and his actual conduct. This allegation was the only one the court held was not preempted and, thus, properly before the trial court.[110]

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100. *Id.* at 740-41.
101. *Id.* at 741. *See Farmer*, 430 U.S. at 295-301.
102. 98 Mich. App. 389, 295 N.W.2d 892 (1980).
103. *Id.* at 893.
104. *Id.* at 894.
105. *Id.*
106. *Id.* at 899.
107. *Id.* at 894.
108. *Id.* at 900 n.16.
109. *Id.* at 894.
110. *Id.* at 411, 295 N.W.2d at 902. It rested this ruling on state law, holding that the duty will be determined as a question of state law.

Plaintiff relied on a tort theory, arguing that the union undertook to perform a duty actually owed by the company to a third party and failed to exercise reasonable care which resulted in physical harm to the third party.[111] In other words, the union undertook at least partial performance of the company's duty to provide a safe workplace and it failed to exercise reasonable care toward the injured employee.

On a strict tort analysis, the court found no duty was undertaken on the part of the union. The company did not relinquish its right to terminate the foreman. Consequently, there was insufficient evidence to support a finding that the union had a duty to insure and protect the workers on the job site.

15. *Szatkowski v. Turner & Harrison, Inc.*

In 1982, there were decisions involving three district courts and one court of appeals including *Szatkowski v. Turner & Harrison, Inc.*[112] Originating in a New York state court, a complaint was filed charging that the union negligently inspected a work area, having assumed that duty pursuant to a collective bargaining agreement. The case was later removed to federal court.

The union asserted a preemption argument based on section 301, claiming that any duty owed arose out of the collective bargaining agreement.[113] In analyzing the argument, the court drew a distinction between questions involving subject-matter jurisdiction and those involving the existence of a valid claim upon which relief could be granted. Regardless of whether the duty arose from the contract, the performance of the duty may give rise to an action in tort and provide a basis for the claim against the union. Since the negligence action arose under state law, the federal court declined jurisdiction. The existence of a duty under federal law was irrelevant to the question of jurisdiction according to the court. If the common law were preempted by federal law, the only remedy would be in state court to dismiss for failure to state a claim upon which relief could be granted. This could only be done in state court because it had subject-matter jurisdiction. Remand was ordered to determine the nature of the claim.[114]

111. *Id.*
112. 109 L.R.R.M. 2609 (S.D.N.Y. 1982).
113. *Id.* The union defendants had sought to hold federal law applications under section 301(a) thereby precluding the state law claim.
114. The court, pursuant to 28 U.S.C. § 1447(c) remanded the case to the New York County Supreme Court. *Id.* at 2610.

The First Circuit Court of Appeals had an opportunity to address specifically the preemption-negligence issue. In *Condon v. Local 2944, United Steelworkers of America*,[115] employee Condon suffered severe burns while working as a welder. The original complaint was brought in state court containing counts predicated on a collective bargaining agreement. It was alleged that a safety committee was the agent of the Union which had the duty to monitor conditions, advise the company, inspect, and insure sufficient safety equipment.[116] A second count was based on a breach of contract.

After the matter was removed to district court, additional counts sounding in tort and contract were added. The allegations of breach of duty were based on state common law. The plaintiff's claimed that the Union had an implied duty of reasonable care which arose independent of the contract.

The court noted that, without the contract, there would be neither a union nor a safety committee.[117] Therefore, state law in this area operated under the auspices of the National Labor Relations Act and federal law. A union's duty (of fair representation) as the statutory bargaining agent does not include a duty of due care (as the phrase is used in tort) and mere negligence does not constitute a breach. Like *House*, the court concluded that, where the cause of action flowed from the contractual obligations undertaken by the union, the duty arose from, and was governed by, federal law.[118] "A union cannot be held liable for the negligent performance of a duty it assumed that arose inextricably, as here, from the safety and health provisions of a collective bargaining basement . . . ."[119]

The underlying policy consideration is the reluctance and, in some instances, a refusal to impose additional duties on unions for every provision concerning safety and health that a union is able to extract in negotiations. The suit was dismissed.

In *Mahoney v. Chicago Pneumatic Tool*,[120] an interesting situation was presented. First, it foreshadowed the basis of the Eleventh Circuit's fact pattern in *Hechler*, but decided in the opposite way. Second, it is a study in a foregone conclusion because even if the union's role was negligent, the union was protected by statutory immunity.

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115. 683 F.2d 590 (1st Cir. 1982).

116. *Id.* at 592.

117. *Id.* at 594. "The collective bargaining agreement cannot so casually be pushed aside. Without the collective bargaining agreement, there would be neither a local union nor a union safety committee." *Id.*

118. The court noted that it had found only one federal case that permitted a common-law negligence suit under these circumstances. *See* Helton v. Hake, 389 F. Supp. 1027 (W.D. Mo. 1974).

119. *Condon*, 683 F.2d at 595.

120. 111 L.R.R.M. 2839 (W.D. Mich. 1982).

However, it is worth analyzing the case, for it establishes an interesting dichotomy with *Hechler*.

Mahoney was injured while working on a die grinder. He sued the manufacturer of the tool,[121] which impleaded the union and others.[122] As a third-party plaintiff, the manufacturer alleged that the union was involved in the training of Mahoney, his subsequent supervision and monitoring of safety. Thus, it was alleged that the union's negligence caused or contributed to the injury.

The allegations are similar to the *Hechler* complaint: the union failed to train and test Mahoney adequately and properly, particularly in matters of safety, before certifying him as a journeyman. The union also allegedly failed to instruct him with regard to applicable regulations in the use of the equipment.

The manufacturer alleged that the union assumed a role in the training and monitoring of the workplace. This role carried with it the responsibilities and duties beyond that of fair representation.[123]

There was disagreement by the court. Merely because a union seeks to improve the competence of its members, in order to enhance their value to their employer, the union does not thereby assume a nonrepresentational role with additional legal duties and responsibilities. "The court finds that the Union's involvement with the setting up of an apprenticeship program with the employer and its efforts in the area of workplace safety are 'inextricably intertwined and embodied in the union's duty of fair representation . . . .' "[124] Since the negligent conduct was neither arbitrary nor in bad faith, the conduct was not sufficient to state a cause of action under federal labor law.[125]

The court borrowed a page from *Bryant* in echoing its concern about future situations. If a union were to be held liable because of its role in the establishment of an apprenticeship program, particularly where safety training is involved, it would discourage union ef-

121. Chicago Pneumatic Tool Company owned the brand name grinding tool which caused plaintiff's injuries. Shinano, Inc. was the manufacturer of the tool. *Id.*

122. Chicago Pneumatic Tool Company brought in the general contractor, plaintiff's employer, The International Brotherhood of Boiler-Makers, Blacksmith Iron Shipbuilders, Forgers, and Helpers, and Local 169. *Id.*

123. *Id.* at 2840.

124. *Id.* at 2840 (quoting House v. Mine Safety Appliances Co., 417 F. Supp. 939, 945 (D. Idaho 1976)).

125. Without more, ordinary negligence cannot establish a breach of the duty of fair representation. *See* Ruzicka v. General Motors Corp., 649 F.2d 1207 (6th Cir. 1981); Bazarre v. United Transp. Union, 429 F.2d 668 (3d Cir. 1970).

forts to promote workplace safety by increasing the competence of its members. Such a result would not aid the interests of the members, and it would be inconsistent with national labor policy.[126] No duties of a nonrepresentational nature were foisted upon the union. The case was dismissed.

Three months later, another decision following the *Condon* rationale was rendered in *Burgess v. Allendale Mutual Insurance Co.*[127] Mr. Burgess was seriously injured at work when his body was pulled through the rollers and inner parts of a paper machine. The complaint alleged that the union knew, or should have known, of the existence and maintenance of the unsafe practices and conditions; moreover, the union breached its duty of fair representation in allowing the practices and conditions to exist.

The portions of the collective bargaining agreement relevant to the case involved the general purpose clause which acknowledged the mutual interest of the employer and employees in using methods to further the safety and welfare of employees. The employees were expected to cooperate with management's efforts by complying with all safety rules. Dangerous conditions were to be reported immediately. Lastly, an employee could be disciplined for violating safety rules.

In this case, the duty of fair representation, according to plaintiffs, was defined to include the negotiation and enforcement of safe working conditions.[128]

The court reached a quick conclusion that negligence or poor judgment is insufficient to support a claim of fair representation. Persuaded by *Brough*, *Bryant*, and *House*, the court found no breach of fair representation on the issue of whether the union was responsible for negligent failure to conduct safety inspections.[129] The only duty owed as the exclusive bargaining agent was a duty of good faith representation, not a general duty of due care.

Finally, in reaffirming *Condon*, the court gave deference to the contract as the source of any duty: "[m]oreover, even if the agreement could be interpreted to impose a duty upon the union, the courts have refused to hold the union liable for failure to enforce this duty when it arose from the provisions of a collective bargaining agreement."[130] Yet, the lucid teachings of this language were ignored

126. *Mahoney*, 111 L.R.R.M. 2839, 2841 (W.D. Mich. 1982).

127. 111 L.R.R.M. 2997 (S.D. Ga. 1982).

128. This was based on the fact that the union "assumed by virtue of its actions in conducting safety inspections at Deerfield," a general duty of due care. *Id.* at 2998.

129. *Id.* at 2999.

130. *Id.* at 3000 (citing Condon v. Local 2944, United Steelworkers, 683 F.2d 590, 595 (1st Cir. 1982)).

by *Hechler* three years later.[131]

In *Preisler v. United Steelworkers of America*,[132] a wrongful death action was brought against the union seeking damages in both contract and tort when a wall collapsed on him at the plant. The collective bargaining agreement in effect at the time provided for a safety committee with the union acting "exclusively in an advisory capacity." Moreover, the union was able to negotiate language providing that it and its committee, officers, agents, etc. were not liable for work-related injuries, disabilities, or diseases which may be incurred.

Under the negligence theory, it was alleged that the union failed to exercise its duty of due care in not protecting the decedent from harm. Under the contract theory, it was alleged that the union breached an affirmative duty to provide a safe work environment.

In defense, the union argued concurrently that its federal duty of fair representation preempted a state common law duty of due care, and that the contract language precluded liability for the injury/death which occurred. In short, the union acted only in a representational capacity.

The court agreed. The union was committed, under the collective bargaining agreement, to a purely representative function. Hence, only the duty of fair representation controlled its conduct. Relying on *Condon*, the court held that the union cannot be liable for the negligent performance of a duty it assumed that arose inextricably from the safety provisions of the contract. The union's motion for summary judgment was granted.[133]

The union was partially relieved of liability in *Curran v. International Union, Oil, Chemical & Atomic Workers*.[134] After the plaintiff's hand was caught in a machine, it had to be amputated. A safety committee was already in existence as a result of the collective bargaining agreement.

Upon commencement of the suit, two theories were asserted against the union. The first alleged a state law negligence claim based on the union's breach of a duty to safeguard the plaintiff from unreasonable dangers. The second alleged a federal claim for the breach of fair representation.

On the first theory, the court found that the duty of fair represen-

131. *See generally*, Hechler v. International Bhd. of Elec. Workers, 772 F.2d 788 (1985).

132. N-83-159 (D. Conn. 1984).

133. *Id.*

134. 582 F. Supp. 420 (W.D.N.Y. 1984).

tation, because it was governed exclusively by federal law, did not include a duty of care.[135] In the absence of that type of duty, neither a breach nor a negligence claim could exist. The *Condon* and *House* rationales were acknowledged.

Key provisions of the collective bargaining agreement were reviewed in light of the safety committee's duty. In essence, there was no authority, power, or duty to make policy decisions regarding safety, as they were retained by the employer.

Based on the language of the contract, the committee's existence was not entirely optional.[136] However, the committee's role was not entirely dispositive because the issue before the court was whether a claim of negligence could be directed against the union based on circumstances arising from the union's obligations (duty of fair representation) under a collective bargaining agreement.[137] In deciding the issue, the court relied on *Condon v. Local 2944, United Steelworkers*, [138] which the *Curran* court deemed to be "strikingly similar" factually.[139] Based on *Condon*, the court held that the "alleged duty arose inextricably from the health and safety provisions of the agreement. The degree to which authority is exercised can do nothing to change the source from which that authority arose . . . ."[140]

The court concluded that the claim arose from facts and circumstances which "touch upon the union's bargaining duties only in a tangential way . . . ."[141] Thus, federal law would not be a bar.[142] *Farmer*-type exceptions[143] were discussed and rejected as inapplicable because the *Curran* court held that the claim in the *Farmer* case had little or nothing to do with the union's function as the exclusive

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135. *Id.* at 422. The court rejected the notion that a common-law negligence claim could be held against the union.

136. Section 159 of the Collective Bargaining Agreements provided for the creation of a Health and Safety Committee which would meet with the employer's representative to discuss health and safety matters. The court held that this arrangement was strictly advisory and therefore did not impose upon the union an alternative duty to inspect or otherwise ensure the safety of the working place. *Id.* at 423. *But see* Helton v. Hake, 386 F. Supp. 1027 (W.D. Mo. 1974).

137. *Id.*

138. 683 F.2d 590 (1st Cir. 1982). *Condon* involved a negligence claim brought against the union by one of its members for injuries suffered by the member when his shirt was ignited by sparks produced during the welding process. As in *Curran*, the *Condon* union had agreed in its collective bargaining agreement to provide reasonable safety measures. The court ruled that the alleged duty of due care arose, exclusively from the collective bargaining agreement, and "therefore arose from and was governed by federal law." *Id.* at 595.

139. *Curran*, 582 F. Supp. at 423.

140. *Id.*

141. *Id.* at 424.

142. *Id.*

143. In Special Adm'r. v. United Bhd. of Carpenters and Joiners of Am., Local 25, 430 U.S. 290 (1977), an exception was carved out for such intentional torts as infliction of severe emotional distress. *Id.* at 301-02.

bargaining representative for the members.[144] Further, in comparing the allegations and the unions' rights, functions, and duties under federal law to the contract, the *Curran* court found that the nexus was too close to permit the claim.[145]

However, the union was still faced with the second count of the federal claim.[146] A triable issue of fact remained because of the allegation by the plaintiff that the union carried out its duty relating to health and safety in an "arbitrary manner, exhibiting bad faith."[147] A sufficient showing was made that previous accidents had occurred similar to the one at issue.[148] Moreover, the court noted that safety meetings had been held prior to Curran's accident, wherein one topic of discussion was the safety of the machine.[149] No action was taken following the meeting, and thus the injury was not prevented.[150] Hence, the second count stood.[151]

### 16. *McColgan v. United Mine Workers of America*

In *McColgan v. United Mine Workers of America*,[152] an Illinois state court of appeals addressed the issue of whether a union owes a common law duty of due care which is not preempted by federal law. Mr. McColgan was injured when he was struck by a mine shuttle car. It was alleged that the union undertook to monitor and correct unsafe mine conditions. However, the union failed to install or cause to be installed certain safety devices, failed to warn its members, and failed to take remedial action. The suit claimed a duty of due care was imposed under the union's constitution, bylaws, and collective bargaining agreement.[153]

At most, according to the court, the union was under a duty to inspect and report safety violations of which it had actual knowledge.[154] The union's undertakings imposed no duty with respect to

144. *Curran*, 582 F. Supp. at 424.
145. *Id.*
146. *Id.*
147. *Curran*, 582 F. Supp. at 424.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. 124 Ill. App. 3d 825, 464 N.E.2d 1166 (1984), *cert. denied*, 470 U.S. 1051 (1985).
153. The union's constitution mentioned local safety committees and provided for annual committee meetings to resolve safety issues. Under the bylaws, the safety committee was responsible for maintaining safe conditions and enforcing safety provisions of the contract.
154. *Id.* at 828, 464 N.E.2d at 1168.

any negligent omissions.[155] Additionally, the court ruled that an inspection would not have discovered the facts upon which the claims rested.[156]

Turning to the preemption issue, the court noted that negligence is insufficient to state a claim for breach of the duty of fair representation; rather, using the Seventh Circuit's reasoning, the intentional misconduct standard must be alleged to sustain a claim based upon a union's discretionary duties.[157] The court summarized its position as follows:

> [t]he unions' decision to emphasize one unsafe condition over another, or to emphasize wages or hours over safety conditions in their dealings with employers, involves various and subtle assessments which defy enumeration and definition. Generally, unions have an incentive to work for the benefit of their members, thus protection from intentional misconduct should suffice.[158]

Therefore, to impose a duty to exercise discretion to persuade, negotiate, or pressure employers to use particular safety equipment would be an unwarranted intrusion into the collective bargaining process.

### 17. *Carroll v. United Steelworkers of America*

Next, the focus shifts west to Idaho. In *Carroll v. United Steelworkers of America*,[159] Michael Carroll was injured when a skip cage fell on him due to a defective hoist. He sued the union in state court alleging that the duty of due care (including the duty to have discovered the defect) was breached. The recurrent theme was played: the union undertook to act as an accident prevention enforcer under the collective bargaining agreement; it did so negligently; it did not develop an adequate program; it failed to inspect; and it failed to require safety devices to be used.

The state trial court, in finding for the union, could not impose a legal duty which would give rise to a cause of action in negligence.

When *Carroll* reached the Idaho Supreme Court, the plaintiff alleged three theories through which a duty was owed to him: (1) the

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155. The court stated:

> [P]laintiffs allege that the unions permitted members to work in an area with opaque pull through curtains, and it is true that defendants had the power to force the employer to withdraw workers from areas of power to impose liability upon the unions for permitting work in the presence of an unsafe condition. . . . A duty to withdraw workers from the presence of any unsafe condition would either close the mines or render the unions' insurers of mine accidents; we believe such an interpretation to be far out of proportion to the unions' undertaking.

*Id.* at 829, 464 N.E.2d at 1169.

156. *Id.* at 828, 464 N.E.2d at 1168.

157. *Id.* at 829, 464 N.E.2d at 1169 (relying on Graf v. Elgin, Joliet & E. Ry. Co., 697 F.2d 771 (7th Cir. 1983)).

158. *McColgan*, 124 Ill. App. 3d at 830, 464 N.E.2d at 1170.

159. 107 Idaho 717, 692 P.2d 361 (1984).

duty was created by contract,[160] (2) the duty arose by the union's conduct in the voluntary assumption thereof, and (3) the duty was established by state statute.[161]

The same justices who wrote and concurred in *Dunbar*[162] came to a different result in *Carroll.* Under Idaho state law, an alleged failure to perform a contractual obligation is not actionable in tort—a mere breach of the collective bargaining agreement did not rise to the level of a tort.[163] Therefore, the first theory was dismissed.[164] The court found no breach of duty apart from the nonperformance of a contract.[165]

As to the second theory (voluntary assumption of a duty), Carroll relied upon the "Good Samaritan" doctrine—one may assume a duty by voluntary conduct.[166] However, since the plaintiff's allegation averred a *failure* to take affirmative action by the defendant to protect him from harm, the court held that there was no "promise" upon which he could detrimentally rely.[167] Moreover, Carroll stated that he was not aware of the provisions of the bargaining agreement as they related to safety; hence, he could not rely on them.[168]

Furthermore, because the theory based upon the statutory obligation[169] was not raised until reaching the state supreme court, the court would not determine the issue.[170] In conclusion, the court held

160. The collective bargaining agreement required the employer to make reasonable provisions for safety. The union was to *assist* in securing cooperation of employees and *encourage* employees to cooperate with management in safety matters. There was a duty to inspect, discuss, and act on any findings, to review safety practices, and to make recommendations for elimination of safety hazards. "It is agreed that the . . . Committee acts hereunder exclusively in an advisory capacity to the Company." *Id.* at 721 n.1, 692 P.2d at 365 n.1.

161. The plaintiff alleged that the provision in Idaho's Minimum Safety Standards and Practices for Mining and Mineral Industry requiring management to make regular safety inspections was a law which created an independent duty.

162. *See supra* notes 88-97 and accompanying text.

163. In so concluding, the court cited Taylor v. Herbold, 94 Idaho 133, 483 P.2d 664, 669 (1971) (a contract to purchase potatoes was held insufficient to support an action sounding in tort, absent a law imposing liability independent of the contract); and Just's Inc. v. Arrington Constr. Co., 99 Idaho 462, 583 P.2d 997 (1978), which held that breach of a construction contract did not create a tort because it lacked "a wrongful invasion of an interest created by the law, not merely an invasion of interest created by the agreement of the parties." *Id.* at 467, 583 P.2d at 1003.

164. *Carroll*, 107 Idaho at 719, 692 P.2d at 363.

165. *Id.*

166. *Id.* at 720, 692 P.2d at 364.

167. *Id.*

168. *Id.*

169. *See supra* note 154.

170. The Idaho Minimum Safety Standards and Practices for Mining and Mineral

that the union had no duty which could give rise to a tort action under the (Idaho) common law or the collective bargaining agreement.

The anomaly between *Dunbar* and *Carroll* is difficult to justify. Both contracts contained language requiring a duty to inspect, report, and act. Each case involved a hazard which led to harm. Both cases raised the issue of whether the union had a duty to inspect, and whether this duty was breached. Preemption and the duty of fair representation were not raised in *Carroll*, but were raised in *Dunbar*.

The *Dunbar* court reasoned that the duty of fair representation is not the only duty which a union owed to its members if the union's unreasonable conduct results in the death of one of its members.[171] The union should not be excused from liability because of the legal fortuity of its organizational status.[172] The court found that the duty of fair representation did not displace those state-created duties which prohibit one from engaging in wrongful conduct resulting in harm to a person or property.[173]

As a secondary conclusion, it will be recalled that *Dunbar* rejected a preemption argument because the federal interest was "tangential and remote."[174] The court saw little potential for interference with the federal regulatory scheme.[175]

The same court in *Carroll*, reiterated its *Dunbar* ruling that there was no authority which insulated a union from its negligent and tortious conduct toward one of its members.[176] The *Carroll* court sought to distinguish the two matters on the basis that Carroll's case was not based upon a tort theory—Carroll claimed nonfeasance in the performance of a contractual duty. The allegation in *Dunbar* concerned the union's negligence in the undertaking of a collective bargaining duty.[177]

### 18. *Pockalny v. Elwell Parker Electric Co.*[178]

Back to New York, where an unmanned moving forklift struck Creighton Pockalny, causing serious and permanent injuries. An after-the-fact investigation revealed that certain directional controls had been improperly connected. The "deadman switch" had been disconnected; thus, the power was operative.

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Industry law provided for mandatory safety inspections to be made by a safety committee.

171. *Dunbar*, 100 Idaho at 527-28, 602 P.2d at 25-26.
172. *Id.* at 528, 602 P.2d at 26.
173. *Id.*
174. *Id.* at 529, 602 P.2d at 27.
175. *Id.*
176. *Carroll*, 107 Idaho at 717, 718, 692 P.2d at 361, 362-63.
177. *Id.* at 718-19, 692 P.2d at 363-64.
178. Pockalny v. Elwell Parker Elec. Co., 608 F. Supp. 570 (W.D.N.Y. 1985).

A collective bargaining agreement contained provisions regarding health and safety at the plant. A joint safety committee was under a duty to make bi-weekly inspections, meet and review safety conditions, and carry out other accident-related duties.

Pockalny's action commenced in state court but was removed to federal district court. Therein, he alleged that by reason of the collective bargaining agreement, the union assumed an affirmative duty to seek out and secure corrections of hazards to employees. By not complying with the contract, the union subjected Pockalny to unreasonable risks and injuries. Since Pockalny was a dues-paying member, the union also had a contractual duty to provide him with the same protection. Moreover, because the union failed to make a timely inspection and/or because the union made such inspection in a negligent manner, harm occurred.

Although a breach-of-duty allegation was not specifically alleged, Pockalny did allege that the union had undertaken duties above-and-beyond the duty of fair representation, and it would be inappropriate to determine the lawsuit with reference to the duty of fair representation. Simply put, the claims were premised upon state negligence law and therefore, the plaintiff contended the entire matter should be remanded to state court.

Certain documents connected with prior negotiations were the very basis of the negligence actions. These documents were encompassed in, and made part of, the collective bargaining agreement. The court quickly concluded that the plaintiff could not rely upon those documents to impute some form of due care upon the union, and then attempt to have the enforcement of the contract be determined by state law.[179] "Inasmuch as the . . . claims . . .flow from documents connected with the cba [collective bargaining agreement] negotiations and the parties' agreement to cooperate to maintain safety . . . the unions' obligations undertaken to benefit their members arise from and are governed by federal law . . . ."[180]

Even though the plaintiff did not allege a breach of fair representation, the court felt compelled to discuss the policy embodied in the fair representation doctrine and federal common law relating to negligence suits brought by members against their unions.[181] The court found the union to be the exclusive bargaining representative bound

179. *Id.* at 572-73.
180. *Id.* at 574-75.
181. *Id.* at 573-74.

by the duty of fair representation. It concluded that the duty of due care was not encompassed by the duty of fair representation.[182]

As in *Bryant v. International Union, United Mine Workers of America*,[183] federal labor policy carried weight with the court.[184] The court recognized that deleterious effects upon federal labor policy could occur if union members were permitted to pursue every privilege or right the union obtained in negotiations but did not exercise.[185]

This court also paid deference to the policy considerations set forth in *House v. Mine Safety Appliances Company*:[186]

> It has traditionally been the duty of employers to furnish a safe place of employment. . . . To permit a sanction of legal liability to accompany a union's exercise of responsibility in safety matters, together with either loss shifting or sharing, would weaken the duty of the employer at the expense of the union and its members. . . . Moreover, the result is readily apparent, if unions could be held liable in cases such as this—there would be *no* negotiation on safety matters. To impose liability on the union in a case such as this is against public policy and would seriously disrupt labor relations policy.[187]

### 19. *Michigan Mutual Insurance Co. v. United Steelworkers of America*

A safety/contract duty issue was decided by the Sixth Circuit in *Michigan Mutual Insurance Co. v. United Steelworkers of America*.[188] Two union members/employees of a steel company occupied an improvised shanty, located on company premises. Attempting to leave the shanty one day, both were injured and severely burned. One died. The surviving employee and the deceased's estate sued the insurance company, seeking damages for wrongful death and injuries. The estate and surviving employee received favorable jury verdicts. A settlement was later reached through which the insurance company would pay damages.

The union was never a party to the lawsuits or the settlement. However, Michigan Mutual thereafter sued the union in state court for contributions toward the settlement, alleging that the union was responsible for the injuries. It claimed that the union failed, as exclusive bargaining representative for the employees, to require removal from the plant of an allegedly hazardous condition—the shanty.

The case was removed to federal court where the complaint was

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182. *Id.*
183. 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).
184. *Pockalny*, 608 F. Supp. at 573-74.
185. *Id.*
186. 417 F. Supp. 939 (D. Idaho 1976).
187. *Pockalny*, 608 F. Supp. at 574 (citing *House*, 417 F. Supp. at 946-47) (emphasis added).
188. 774 F.2d 104 (6th Cir. 1985). *See supra* notes 10 and 11.

amended to include two independent claims. The first count contended that, pursuant to the collective bargaining agreement, the union agreed to perform safety services for its members. Further, it was argued that the union breached state tort law which imposed a duty to exercise reasonable care in performing these services, and that such negligence proximately caused the injuries. The second count alleged a breach of the union's duty under section 301 of the agreement to fairly represent its members. The second count was voluntarily dismissed with prejudice.

At the district court level, the court determined that federal labor law preempts state law when the duty which a labor union owes its members under a collective bargaining agreement is in issue. As such, the case was dismissed.

On appeal, the Sixth Circuit affirmed the district court's dismissal.[189] The insurance company claimed there was a duty of reasonable care in the execution of voluntarily assumed duties and that these duties survive and exist independently from, and alongside of, a union's duty of fair representation. The latter duty is breached by bad faith, arbitrary, or discriminatory conduct.

Relying upon *Allis-Chalmers Corp. v. Lueck*,[190] the Sixth Circuit noted that the relevant question was whether a determination of the existence and scope of the duty which the union allegedly breached is "substantially dependent" on an analysis of the terms of the collective bargaining agreement.[191] Since the insurance company claimed the union's duty to provide for safety services originated in the contract itself, the circuit court held that the district court properly dismissed the matter.[192]

Following *Allis-Chalmers*, the Sixth Circuit noted that when the resolution of a state-law claim is found to be substantially dependent upon an analysis of the contract terms, the claim has to be treated as a section 301 action or dismissed as being preempted under federal labor law.[193]

As a caveat, it also noted that *Allis-Chalmers* has limits.[194] For example, section 301 does not preempt all state regulation of the sub-

189. *Michigan Mut. Ins. Co.*, 774 F.2d at 106.
190. 471 U.S. 202 (1985).
191. *Michigan Mut. Ins. Co.*, 774 F.2d at 106.
192. *Id.*
193. *Id.*
194. *Id.*

stantive provisions of collective bargaining agreements.[195] Moreover, section 301 does not preempt lawsuits that assert rights created independent of contracts, but related to them in some fashion.[196]

### 20. *Hechler v. International Brotherhood of Electrical Workers*

The Eleventh Circuit Court of Appeals decided *Hechler v. International Brotherhood of Electrical Workers*.[197] Hechler was an electrical apprentice with Florida Power and Light, who was represented by the IBEW. In 1982, she was assigned to a job which, she alleged, was beyond the scope of her abilities and training. She sustained injuries while performing the assigned work.

Both the international and local unions were sued on the ground that they were negligent in failing to provide Hechler with proper training and a safe workplace. "In sum, plaintiff alleged that the union had a duty to ascertain that she had the essential training, background, education, and experience before being assigned to work in an inherently dangerous workplace such as an electrical substation, and that the union breached that duty."[198] The plaintiff's allegations that, under the collective bargaining agreement, the union had a contractual obligation to properly train her and that her injuries on the job resulted from the union's tortious breach of that obligation were the main thrust of her complaint.

The collective bargaining agreement between the parties contained several safety provisions.[199] First, the foreman or supervisor was strictly responsible for the enforcement of safety rules. Second, no employee was required to perform his/her duties which the foreman or supervisor would consider unsafe. Third, any question concerning qualifications to perform assignments would be taken to the Supervisor of Apprentice Training who would investigate and report the findings to the Apprenticeship Committee. And fourth, the decision of whether an apprentice was qualified to work on certain conductors would be made by the apprentice himself, the foreman supervising the apprentice, *and* the journeymen with whom the apprentice worked.

Two years after the injury, suit was brought in state court. The matter was removed to the district court which held that the duty owed to the plaintiff, in fact, emanated from the contract itself. The district court held that Hechler had not established the union's negligent activity as being beyond the scope of the employee/union fiduci-

195. *Id.*
196. *Id.*
197. 772 F.2d 788 (11th Cir. 1985).
198. *Id.* at 789-90.
199. *See id.* at 790 n.1, for the text of the collective bargaining agreement.

ary relationship or unrelated to the contract. Since the case was properly removed and based on federal labor law, the entire matter was dismissed under *DelCostello v. Teamsters*.[200]

The Eleventh Circuit entered the scene. Following a review of the preemption doctrine, the court began an unnecessary analysis of whether the gravamen of the complaint alleged either an unfair labor practice, a duty of fair representation claim, or a breach of contract under section 301.[201]

The court reasoned that since the complaint sounded in tort, even though a remedy under section 301 would be available (albeit not the full measure of compensatory damages under state law), there could be liability on common law negligence grounds for breach of a duty of care. This tort was not a product of the contract.[202] The court held that the tort claim existed without a contract, and neither section 301 nor the contract provided a remedy[203] despite the court's statements that the contract "may be of use in defining the scope of the duty owed . . . ."[204] Indeed, the plaintiff acknowledged the possibility of a remedy under section 301. She wanted compensatory damages and it certainly appears that the court was willing to help her.[205]

Noting that the duty of fair representation is designed to enforce the principle that a member not suffer invidious or hostile treatment, the court opined that such duty does not displace those duties created by state law which prohibit tortious conduct.[206] For example, negligent training and negligent assignment were now in the same class as libel, violent activity, and intentional infliction of emotional distress.[207]

> Likewise, it cannot be said that by failing expressly to protect or prohibit acts of negligence by unions, Congress intended to permit unions to engage in

200. 462 U.S. 151 (1983). In *DelCostello*, the Court decided the consolidated claims of two petitioners who alleged that their unions had breached their respective collective bargaining agreements. Both cases, while at the district court level, had been dismissed as untimely; both courts applied the federal statute of limitations of six months, rather than the longer state statute of limitations, contained in § 160(b). The United States Supreme Court affirmed. *DelCostello*, 462 U.S. at 155.

201. *Hechler*, 772 F.2d at 789-99.

202. *Id.* at 794.

203. *Id.*

204. *Id.* "That there may be some reference to a collective bargaining agreement would not automatically be conclusive that a negligence suit be interpreted as no more than a section 301 action and, thus, preempted." *Id.* at 795 (citing Helton v. Hake, 386 F. Supp. 1027 (W.D. Mo. 1974)).

205. *Hechler*, 772 F.2d at 794-99.

206. *Id.* at 796.

207. *Id.*

> negligent acts free of the scrutiny of state courts. Rather, it is far more likely that Congress "by silence indicate[d] a purpose to let state regulation be imposed . . . ."[208]

The court found the duty of fair representation had nothing to do with training for job safety.[209] Its justification was that the duty of fair representation concerns itself with arbitrary or discriminatory conduct toward individual members which is in violation of the union's statutory obligations inherent in its bargaining unit status.[210] There was no duty-of-fair-representation action according to the court because the complaint did not allege that the union failed to properly represent the plaintiff in a matter against the employer.[211]

If Hechler had refused to take the assignment, claiming she was not qualified, she could have been disciplined for insubordination or failing to follow a work rule. The union could have grieved the matter, raising the issue of whether her lack of qualifications was sufficient justification for refusing the assignment. Once into the arbitration arena, the entire matter might have been avoided.

The *Hechler* court decided, too quickly, intentionally or otherwise, to invoke state relief. Its analysis of federal labor policy was superficial. For example, it viewed the tort as one of state concern, being aware of no authority whereby a duty of fair representation displaces the state-created duty which prohibited one from engaging in tortious conduct resulting in injury or death.[212] That analysis, it seems, was too simplistic.

Florida would have a concern to protect its citizens from negligence in general, but this concern would not extend to protecting employees covered by an IBEW collective bargaining agreement when the alleged negligence arose out of the labor contract.[213] This was not a business contract which Florida law would govern. Here, the tort was not negligence in general, but a union's failure to provide a safe workplace and/or monitor training, all connected with, and arising out of, a collective bargaining agreement.

The mere fact that the contract may be used to define the scope of the union's duties should require a finding of preemption. If the parties are permitted to bargain about the assertedly tortious conduct, such a tort claim is firmly rooted in the expectations of the parties and must be evaluated under federal contract law.[214] If the parties can agree to waive or alter certain obligations or state law rights,

208. *Id.* (citations omitted).
209. *Id.* at 797.
210. *Id.*
211. *Id.*
212. *Id.* at 792-93.
213. *See Allis-Chalmers*, 105 S. Ct. at 1916; *see also* Local 926, International Union of Operating Engineers v. Jones, 460 U.S. 669, *on remand*, 306 S.E.2d 99 (1983).
214. *Allis-Chalmers*, 105 S. Ct. at 1912.

those obligations can be preempted.[215]

The contract in *Hechler* gave birth to the tort. The contract provided that the appellant was to be trained to perform work under the contract. She could have refused to do the required work, with arbitration as a remedy to any resulting discipline. Her claims are based on injuries sustained because she was not trained to do the work required under the contract. She alleged that the collective bargaining agreement placed a duty on the union to properly train her.[216]

It is difficult to understand how the tort could be independent of the contract.[217] If there were no contract, Hechler might never have worked at the facility or have been trained by the union. Any duty which the union owed was rooted in the contract. Liability, if any, should, therefore have been determined under federal law.

The *Hechler* court noted that the contract was not clear as to who bore the ultimate responsibility for worker training and safety.[218] This should have mandated that the interpretation be handled under federal law. Indeed, there should have been a return at that point to *Allis-Chalmers*' teachings: "Unless federal law governs that claim, the meaning of . . . [the] provisions of the labor agreement would be subject to varying interpretations, and [the] congressional goal of a unified federal body of labor-contract law would be subverted."[219]

In cases arising under a collective bargaining agreement, questions of contract interpretation underlie any finding of tort liability, regardless of whether a state court chooses to define the tort as "independent" of any contract question. The scope of the duty undertaken by the union should be ascertained from a consideration of the contract itself.[220] The duty, the breach, and the rights are so intertwined with the contract that it cannot be said that the *Hechler* facts are tangential or remote to the federal scheme.

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215. *Id. Cf.* Malone v. White Motor Corp., 435 U.S. 497, 504-05 (1978) (holding that nothing in the NLRA forecloses state regulation of bargaining on wages, hours, and working conditions).

216. *Hechler*, 772 F.2d at 796 n.3.

217. Compare Condon v. United Steelworkers, 683 F.2d 590, 595 (1st Cir. 1982), wherein the court refused to hold the union liable for negligent performance of a duty found to arise from the collective bargaining agreement. *Condon*'s facts are distinguishable because the case involved conditions of the workplace.

218. *Hechler*, 772 F.2d at 796 n.3.

219. *Allis-Chalmers*, 105 S. Ct. at 1916.

220. *See generally* ACF Indus., Inc. v. N.L.R.B., 641 F.2d 561 (8th Cir. 1981) (collective bargaining agreement contract must be interpreted as a whole). *But see* N.L.R.B. v. Keller-Crescent Co., 538 F.2d 1291 (7th Cir. 1976) (policy factors alter usual contract interpretation considerations in the area of collective bargaining agreements).

The court in *Allis-Chalmers* was aware of the "artful pleading" doctrine. It noted that nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract.[221] Thus, the whole purpose of section 301, and especially the arbitration process, could be threatened if the section did not preempt such claims.[222]

The *Hechler* decision is disturbing for reasons other than the fact that the court did not follow *Allis-Chalmers*. Some three years before *Hechler*, the same Eleventh Circuit court ruled on a matter involving a breach of fair representation.[223] Although the matter involved the quality of the union's representation during the grievance procedure, the court acknowledged the uniformity in circuit decisions that neither negligence on the part of a union nor a mistake in judgment is sufficient to support a claim that the union's arbitrary and perfunctory actions amounted to a breach of the duty of fair representation.[224] "Nothing less than a demonstration that the union acted with reckless disregard for the employee's rights or was grossly deficient in its conduct will suffice to establish such a claim . . . ."[225]

The *Hechler* court felt there could not be a duty of fair representation because that duty had nothing to do with training for job safety; rather, the duty dealt with conduct toward individual employees.[226] However, if the union were negligent toward the plaintiff in how it conducted her training, it follows that the duty it undertook arose out of the contract. If the training were negligent, then that duty was intertwined with an interpretation of the contract.

In *Miller v. United Airlines, Inc.*,[227] a case determined prior to *Hechler*, a California court of appeal had before it some ten causes of action, one of which was negligence. That court, determining the claims were tied to the collective bargaining agreement, held that the availability of damages under state law did not alter a federal preemption finding.[228] The *Hechler* court, it will be recalled, felt that a section 301 suit would not provide the full measure of damages available to the plaintiff.[229]

A year before *Hechler*, the Ninth Circuit, in *Olguin v. Inspiration Consolidated Copper Co.*,[230] noted the frequency with which plaintiffs attempted to avoid federal law by basing their complaints on state

221. *Allis-Chalmers*, 105 S. Ct. at 1915.
222. *Id.*
223. *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204 (11th Cir. 1982).
224. *Id.* at 1206.
225. *Id.* at 1206-07.
226. *Hechler*, 772 F.2d at 796.
227. 174 Cal. App. 3d 878, 220 Cal. Rptr. 684 (1985).
228. *Id.* at 889, 220 Cal. Rptr. at 689.
229. *Hechler*, 772 F.2d at 793.
230. 740 F.2d 1468 (9th Cir. 1984).

law in order to escape the exclusive remedy of the collective bargaining agreement. However, one may not avoid federal jurisdiction by omitting the essential federal law in the complaint or by casting in state law terms a claim that can be made only in federal law. "A complaint that is 'artfully pleaded' to avoid federal jurisdiction may be recharacterized as one arising under federal law. . . . In suits arising under collective bargaining agreements, the 'arising under' requirement of 28 U.S.C. [section] 1337 is supplemented by section 301 of the Labor-Management Relations Act . . . ."[231]

In determining whether a complaint is "artfully pleaded," a court is not bound to consider only the facts pleaded in the complaint.[232] Yet, *Hechler* only looked at the pleadings and the remedy sought.

Several years before *Hechler*, the Third Circuit viewed the remedy issue as it applied to section 301 suits.[233] It ruled that section 301 reaches not only to suits on labor contracts, but also to suits seeking remedies for violations of such contracts.[234] Section 301 should not be read narrowly. One must not look at the nature of the remedy sought for an alleged violation, but rather whether the remedy sought may require a court to interpret a collective bargaining agreement. Section 301 "has been construed to afford subject-matter jurisdiction for the *tort* of violating a duty of fair representation."[235] The court noted that it is not the label attached to the remedy (tort or contract) which is dispositive of the scope of federal common law.[236] With all the signposts illuminated for *Hechler*, the court took a wrong turn.

Subsequent to *Hechler*, cases have been decided with different variations upon the same theme. For example, in *Riley v. Tokola Offshore, Inc.*,[237] the union referred Mr. Riley to the job site. He, thereafter, sustained a heart attack, allegedly because the work was too strenuous. Riley filed suit seeking damages under the Jones Act.[238] The company filed a third party complaint against the union

231. *Id.* at 1472.

232. *See* Fristoe v. Richards, 615 F.2d 1209, 1212 (9th Cir. 1980) (removal allowed where cause of action apparent from allegations in plaintiff's complaint); *see also* Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1371 n.5 (9th Cir. 1984) (removal appropriate where federal cause of action stated on face of complaint).

233. Wilkes-Barre Pub. Co. v. Newspaper Guild, 647 F.2d 372 (3d Cir. 1981).

234. *Id.*

235. *Id.* at 380 (emphasis added).

236. *Id.*

237. 626 F. Supp. 616 (C.D. Cal. 1985).

238. 46 U.S.C. § 688 (1982).

for contribution and indemnification, asserting negligence in referring Riley to the job site.[239]

The company alleged that certain oral promises were breached, whereby the union had assured that all referred workers would be medically fit. In the previous negotiation, the subject of referrals had been a hotbed of discussion. Whether there was an oral promise, even after the union insisted on no medical prescreening, did not pique the court's interest. Under *Allis-Chalmers*, the court was foreclosed from enforcing a contract which modified or was dependent on an interpretation of the collective bargaining agreement.

Questions relating to what the parties agreed to in a labor agreement, and what legal consequences were intended to flow from that agreement, made little difference to the court since such resolutions must be determined by reference to uniform federal law—even if the questions arise in the context of a suit for breach of contract or a suit alleging liability in tort for negligent referral.[240] Any developments in the state law governing negligent referrals must defer to *Allis-Chalmers*. Even assuming there was a duty to prescreen, the tort of negligence is substantially, if not entirely, derived from the contract.[241] Whether, as argued by the company, there was a self-imposed duty on the union's part, such argument was categorized as "artful pleading".[242]

In addition to the tort claim, the company raised a *Farmer*-type exception to preemption, alleging that California had a substantial interest in regulating the conduct of negligent referral. The court determined otherwise: "The most telling proof that the state of California has no substantial interest in the claimed tort of 'negligent referral' is the fact that the parties could have waived any purported duty. They, in effect, agreed to just that in the CBA."[243]

State law tort causes of action, ranging from wrongful termination to intentional interference with economic advantage, were found to be preempted in *Evangelista v. Inlandboatment's Union of Pacific*.[244] Resolution of those claims was preempted because they hinged upon an interpretation of the collective bargaining agreement.[245] All claims were dependent thereon. In citing *Allis-Chalmers*, the Ninth Circuit echoed the same concern about the possibility of having individual contract terms being given different meanings under state and

239. *Cf. Hartsfield*, 427 F. Supp. at 264; *Bescoe*, 98 Mich. App. at 389, 295 N.W.2d at 892.

240. *Riley*, 626 F. Supp. at 618-19.

241. *Allis-Chalmers*, 105 S. Ct. at 1913.

242. *Id.*

243. *Riley*, 626 F. Supp. at 619.

244. 777 F.2d 1390 (9th Cir. 1985).

245. *Id.*

federal law. If that were done, a disruptive influence might effect the negotiation and administration of such agreements.[246]

The State of California was not to be denied its place in this area. In *Friday v. Hughes Aircraft Co.*,[247] Thomas Friday was terminated from Hughes Aircraft. Rather than filing a grievance under his collective bargaining agreement, he sued his employer in state court, alleging state causes of action (bad faith/wrongful termination and intentional infliction of emotional distress).

One of the allegations in Friday's complaint dealt with safety (reporting violations of hazardous waste), but since that matter was covered in the labor agreement, such tort claim was found to be "inextricably intertwined" with the collective bargaining agreement.[248]

The trial court granted the company's summary judgment motion because, *inter alia*, the matter was preempted. The state appellate court followed *Allis-Chalmers* in holding that those relationships created by collective bargaining agreements are to be defined by applying federal common law grounded in national labor policy.[249]

In a recent pronouncement covering this area, the Idaho Supreme Court in *Rawson v. United Steelworkers of America*,[250] followed its ruling in *Carroll*.[251] In *Rawson*, minor children and heirs of deceased miners sued the union as a result of the same disaster which gave rise to *Dunbar*.[252] On a theory of fraud, the plaintiffs sought to hold the union liable for false representations that it made and which were the proximate cause of the deaths. This fraud claim was dismissed, as there were no representations made by the union.[253]

On a theory of negligence, the plaintiffs alleged the existence of a collective bargaining agreement which gave rise to a duty on behalf of the union to insure safety. One of the alleged breaches was that

246. This concern did not move the *Hechler* court even though the contract "may be of some use in defining the scope of the duty owed." *Hechler*, 772 F.2d at 794. Since the scope of the duty would call for an interpretation of the contract, state law should be preempted according to *Allis-Chalmers*.

247. Friday v. Hughes Aircraft Co., 188 Cal. App. 3d. 117, 228 Cal. Rptr. 160 (1986) (review granted July 24, 1986).

248. *Id.* at 123, 225 Cal. Rptr. 164.

249. *Id.*

250. 111 Idaho 630, 726 P.2d 742 (1986).

251. Carroll v. United Steelworkers of Am., 107 Idaho at 717, 692 P.2d at 361.

252. Dunbar v. United Steelworkers of Am., 100 Idaho 523, 602 P.2d 21 (1979), *cert. denied*, 446 U.S. 983 (1980).

253. *Rawson*, 111 Idaho at 631, 726 P.2d at 745.

the union did not properly train the miners in the use of self-rescue devices (somewhat akin to *Hechler*).

The Idaho Supreme Court ruled against the union.[254] The court found the case to be distinguishable from its decision in *Carroll* on the grounds that, in *Carroll*, the union failed to affirmatively conduct safety inspections which allegedly amounted to active negligence.[255] In the instant case, however, the court noted that "the safety committee did inspect the mine and the miners allege *not* that the union members of the safety committee *failed* to inspect . . . ,"[256] but rather, the union improperly inspected the work area and failed to report obvious safety problems.[257] As the cause of action arose from the collective bargaining agreement, a tort action could be maintained therein. Hence, under Idaho law, a failure to perform a contractual obligation (nonfeasance) is not actionable in tort, whereas malfeasance may very well be actionable under *Rawson*.

The state trial court in *Rawson* invited the state supreme court to review its holding in *Dunbar* concerning preemption. The invitation was declined.[258] However, the dissent in *Rawson* commented on the issue and on *Allis-Chalmers*. In short, the dissenters distinguished *Rawson* because they did not see the need to interpret a contract. Rather, the plaintiffs were suing for breach of a duty to inspect and report unsafe conditions under the reasonable and prudent person standard.[259] The contractual provisions determined only the nature and scope of the union's duty. The duty of due care was key to the dissent, which applauded the correct analysis of the preemption issue as determined by *Hechler*.[260]

## CONCLUSION

Work accidents or deaths in the workplace are extremely unfortunate occurrences. Unions are in the business of protecting their bargaining-unit members and seeking better conditions for them. Yet,

254. *Id.* (at least to the negligence cause of action against the union).
255. *Rawson*, 111 Idaho at 634, 726 P.2d at 748.
256. *Id.*
257. *Id.*
258. *Id.* at 639, 726 P.2d at 752.
259. *Id.*
260. As one author has pointed out:

> Defendants often characterize section 301/DFR plaintiffs as paranoid. But if the latter's view of the labor-management world is a little distorted, it is no wonder. Employees who have been wronged by their employer and abandoned by their union usually become hostile, bitter, and emotionally upset. Their former allies . . . have turned against them. They tend to see union and management groups as a monolith, working together to defeat their objectives.

Paul H. Tobias, *The Plaintiff's Perception of Litigation*, in THE CHANGING LAW OF FAIR REPRESENTATION 130 (J. McKelvey ed. 1985).

unions find themselves as defendants in lawsuits for alleged failures of those very conditions they sought to protect on behalf of their members. Widows, children of the deceased, and families of the permanently injured breadwinner do not care about the complexities of, or reasoning behind, preemption or a uniform labor policy. They care about recompense because their loved ones have died or have suffered injury. Their sobering reality is that the paycheck is gone.[261]

What can unions do to continue to protect their members while protecting themselves? Upon a review of the applicable cases, it is apparent that any safety and health article in a collective bargaining agreement should include and reaffirm the principle that the employer retains exclusive responsibility to provide a safe and healthy workplace as well as safe conditions of employment.

It should also be spelled out that it is not the intention of the parties to diminish the employer's exclusive responsibility or to make the union and/or its officers, agents, or other representatives liable for an employee's job-related injury, illness, or death.

A union should not agree to any language whereby it assumes any of the employer's exclusive responsibilities to provide safety in the workplace. Irrespective of how broad the scope of the union's activities may be, its role should be no more than an advisory one.

Contract provisions should be included which empower workers to be able to refuse an assignment if there is a reasonable, good faith belief that there might be harm if the assignment were performed.

Possibly a side letter agreement might be feasible whereby an employer would agree to indemnify the union, should the latter be found liable for any occupationally-caused injury, illness, or death. This device could offset an employer's argument of indemnification. Liability insurance could be obtained covering the acts or omissions of the union or its officers, agents, or other representatives in administering or enforcing the contractual provisions covering safety. In any event, a union should never be a guarantor of safety or an insurer against workplace accidents or make any promises to protect workers in these situations.

Finally, in any publications which are distributed, unions should be careful in describing their responsibilities, duties, or roles with regard to workplace safety.

Unions cannot abandon their watchdog obligation to police and ad-

261. *Hechler*, 107 S. Ct. 2161, 2168 (1987).

minister the contract, especially when it encompasses safety for its members; otherwise, they are rendered politically and practically impotent. The way in which this is accomplished could prevent litigation.

It is apparent that the United States Supreme Court has rectified the problem caused by *Hechler*. However, it highlighted one caveat which was the downfall of the union's position in *Helton v. Hake*:[262] whether a union actually assumes a duty of care in the safety provisions of a collective bargaining agreement. A court would have to determine if there was an implied duty of care on the union, the nature and scope of that duty, and the extent of the union's duty to the particular responsibilities alleged in a complaint.[263]

In this author's opinion, a union should not assume the duty of care beyond its duty of fair representation. Action in a political arena is one thing—defending those actions is quite another.

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262. *Id. See Helton*, 386 F. Supp. 1027.
263. *Hechler*, 107 S. Ct. at 2168.