

# The Need for the Individual Labor Leader Endorsement to the Union Liability Policy

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## ISSUE

Whether the Landrum-Griffin Act, 29 U.S.C. § 401, *et seq.* (a/k/a the Labor-Management Reporting and Disclosure Act or “LMRDA”) prevents a union from defending and/or indemnifying union officers accused of or found guilty of intentional acts in violation of their duties under the 29 U.S.C. § 501 of the LMRDA.

## SHORT ANSWER

With the exception of one outlier case (*Tarantino v. Ford*, addressed below in section III.A.), the decisions are unanimous that a union may not fund the defense of a union officer in a section 501(b) case.

## DISCUSSION

A union cannot fund the defense of union officers in section 501(b) actions except in extraordinary circumstances. Although a union is permitted to reimburse union officers who are vindicated, it can also refuse to reimburse, for example, where union bylaws forbid such action. A union officer may, however, sue a union for state law claims based on a union’s refusal to reimburse the officer after the officer successfully defends him- or herself in a section 501(b) lawsuit. The rule is not applied in cases involving other provisions of the Landrum-Griffin Act.

## Analysis and Citations to Authority

### I. COVERAGE UNDER THE LMRDA

The term “Labor organization” is defined under the LMRDA and the Department of Labor’s regulations as:

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*a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.*  
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29. U.S.C. § 402(i); 29 C.F.R. § 401.9. Courts have held that “mixed” labor unions, consisting of private and public sector employees, are subject to the LMRDA.<sup>1</sup> *E.g., Wildberger v. Am. Fed’n of Gov’t Employees, AFL-CIO*, 86 F.3d 1188, 1192 (D.C. Cir. 1996) (collecting cases). Entities such as central labor councils are not subject to the LMRDA. *Kanawha Valley Labor Council, AFL-CIO v. Am. Fed’n of Labor & Cong. of Indus. Organizations*, 667 F.2d 436, 438 (4th Cir. 1981) (collecting cases). Generally, the LMRDA’s definition of “Labor Organization” is confined to entities which “must deal with an employer and act as the representatives of employees of an employer.” *Local 1498, Am. Fed’n of Gov’t Emp. v. Am. Fed’n of Gov’t Emp., AFL/CIO*, 522 F.2d 486, 490 (3d Cir. 1975).

### II. 29 U.S.C. § 501 DUTIES AND CAUSE OF ACTION

#### A. Section 501(a) Duties

Certain union officers are deemed to have a fiduciary responsibility to the union itself and its members. 29 U.S.C. § 501(a). These officers are expressly required to hold union money and property solely for the benefit of the union and its members, adhere to the union’s bylaws and constitution in spending money, and refrain from acting in a manner that conflicts with the interests of the labor union. *Id.*

These duties have been held to extend beyond matters related to union money and property in the Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits. *Chathas v. Local 134 Int’l Broth. of Elec. Workers*, 233 F.3d 508 (7th Cir. 2000) (“The statute also forbids union officers to obtain a personal interest adverse to the union”); *Pignotti v. Local No. 3 Sheet Metal Workers’ Int’l Ass’n*, 477 F.2d 825 (8th Cir. 1973) (holding that duties are not limited to those involving union money and property); *Stelling v Int’l Broth. of Elec. Workers*, 587 F.2d 1379 (9th Cir. 1978); *Bauman v. Bish*, 571 F. Supp. 1054 (N.D. W. Va. 1983) (duties include disclosure of information which is essential to decisions of union members); *Wade v. Teamsters Local 247*, 527 F. Supp. 1169 (E.D. Mich. 1981) (“flagrant denigration” of union members’ voting rights; failure to call required meetings); *Keck v. Employees Indep. Ass’n*, 387 F. Supp. 241 (E.D. Pa. 1974) (failure to obey union’s

constitutional mandate to submit referendum petition to members). However, the Second Circuit views section 501 as allowing an action under that provision only where a misuse of union property or money is alleged. *Head v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Emp.*, 512 F.2d 398 (2d Cir. 1975).

## **B. Section 501(b) Cause of Action**

Union members may bring suit against union officers who have allegedly breached their fiduciary responsibilities under section 501(a) if the member has requested that the union's governing board act to remedy the breach (by bringing suit against the breaching officer or seeking "other appropriate relief") and the governing board failed to act. 29 U.S.C. § 501(b). This cause of action is limited to section 501(a) violations, and is, on the face of the statute, actionable only by union members against union officers, but some courts have held that the union may bring a suit as an intervening plaintiff.<sup>2</sup> *Int'l Union, Sec., Police & Fire Professionals of Am. v. Faye*, 828 F.3d 969, 975 (D.C. Cir. 2016). The government does not have standing to sue under section 501, even for a breach of fiduciary duty under ERISA. *Brock v. Mazzola*, 794 F.2d 427 (9th Cir. 1989).

A union is typically not a defendant in an action under section 501(b). See, e.g., *Sabolsky v. Budzanoski*, 457 F.2d 1245, 1249 (3d Cir. 1972) (affirming dismissal of union as defendant but reversing dismissal of union officers); *Commer v. Am. Federation of State, Cty. and Mun. Employees*, 272 F. Supp. 2d 332 (S.D. N.Y. 2003) (holding LMRDA does not provide right of action against union). A union may be a defendant in a suit under section 412 (Title I of the LMRDA) actions, however.<sup>3</sup> The rules as to indemnification in section 412 actions differ from those in section 501 actions because the potential of alignment of union and union officers' interests in section 412 actions is greater. See *Mulligan v. Parker*, 805 F. Supp. 592 (N.D. Ill. 1992) (indemnification barred only if officers were likely acting *ultra vires*).

## **III. UNION OFFICERS' DEFENSE COSTS IN SECTION 501(B) ACTIONS**

### **A. Cases Holding Union Funds Not Available to Union Officers During Pendency of Section 501(b) Actions**

The following courts have held generally that the funds of a union are not available to defend union officers charged with violations of section 501(a) during the pendency of the suit: *Highway Truck Drivers v. Cohen*, 182 F. Supp. 608 (E.D. Pa. 1960), *aff'd*, 284 F.2d 162 (3d Cir. 1960); *Milone v. English*, 306 F.2d 814, 817 (D.C. Cir. 1962); *Colpo v. Hoffa*, 1971 WL 945 (D.D.C. 1968); *Alvino v. Bakery & Confectionary Workers*, 1961 U.S. Dist. Lexis 3944 (D.D.C. 1961); *Kerr v. Shanks*, 466 F.2d 1271, 1277 (9th Cir. 1972); *Morrissey v. Segal*, 526 F.2d 121, 128 (2d Cir. 1975); *McNamara v. Johnston*, 522 F.2d 1157, 1167 (7th Cir. 1975); *United States v. Local 1804-1, Int'l Longshoremen's Ass'n, AFL-CIO*, 732 F. Supp. 434, 438 (S.D.N.Y. 1990); *Mulligan v. Parker*, 805 F. Supp. 592, 594-95 (N.D. Ill. 1992); *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, AFL-CIO, 970 F.2d 1132, 1138 (2d Cir. 1992).

The only case authorizing the expenditure of union funds during the pendency of a section 501(b) action is *Tarantino v. Ford*, 2008 WL 11333072, \*3 (S.D. Fla. Apr. 2, 2008), *report and recommendation adopted*, 2008 WL 11333073 (S.D. Fla. Apr. 24, 2008). There, the plaintiff alleged that the defendant union president

was violating the LMRDA by accepting a car allowance provided for in the union's bylaws while also accepting reimbursement for mileage driven for union business, and for accepting eight hours of overtime pay which was also authorized by the union's bylaws. *Id.* at \*1–2. The plaintiff filed a motion for preliminary injunction to prevent the union from funding the union president's defense. *Id.* at \*2. The Court allowed the union to fund the officer's defense during the litigation because the plaintiff was unable to establish a likelihood of success on the merits of the claims, since the expenditures were expressly authorized by the union's constitution. *Id.* at \*4.<sup>4</sup>

## **B. Procedural Mechanism to Prevent Expenditure of Union Funds on Union Officer Defense in Section 501(b) Actions**

To prohibit a union from paying for the defense of its officers, a motion to enjoin a union from expending funds for such defense should be made, even though the union may not be a party to the action. *Tucker v. Shaw*, 269 F. Supp. 924, 925 (E.D.N.Y. 1966). If the union does not intend to pay for the legal defense, the injunction is mooted. *Id.* at 926, 928.

What is unclear is whether the standard to obtain a temporary injunction must be met, or whether the injunctive relief will be automatically granted if not moot. Where plaintiff has sought to enjoin union officers from using union counsel under annual retainer, the court set the standard as requiring a substantial showing that plaintiff "has a claim and is likely to succeed, and that the alleged conduct of defendants conflicts with the interests of the union." *Holdeman v. Sheldon*, 204 F. Supp. 890, 893 (S.D.N.Y. 1962). In restraining the union from intervening in the action, plaintiff had to show "that the relief requested is calculated to effect the congressional purpose of the statute, while not unduly injuring defendants and the potential intervenors in the event that the claims of the plaintiff are not sustained later." *Id.* Payment of legal defense was not an issue in *Holdeman* (since proposed counsel was on retainer), and was a moot point in *Tucker*. Later cases deal with the question as a matter of custom but seem to leave open the possibility that the standard for a preliminary injunction might, in some section 501(b) action, fail. *Mulligan v. Parker*, 805 F.Supp. 592, 594 (N.D. Ill. 1992).

In *Tarantino v. Ford*, 2008 WL 11333072, \*3 (S.D. Fla. Apr. 2, 2008), *report and recommendation adopted*, No. 07-20397-CIV, 2008 WL 11333073 (S.D. Fla. Apr. 24, 2008), the Court applied the preliminary injunction standard in evaluating whether the union should be enjoined from funding the officer's defense. That standard requires the plaintiff to establish the following elements: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will result unless the injunction issues; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that, if issued, the injunction would not be adverse to the public interest to be entitled to preliminary injunction prohibiting payment of union funds for union officer defense costs. There is thus authority supporting the argument that a union would be allowed to pay the expenses of defending its officers because the burden of obtaining a preliminary injunction has not been met.

## C. Reimbursement of Officers' Defense Costs from Union Funds Allowed When and If Case Is Resolved in Officers' Favor

### i. Decisions Applying This Rule

In *McNamara v. Johnston*, 522 F.2d 1157, 1167 (7th Cir. 1975), the Court stated that “[U]nion officials charged as defendants in suits of this (section 501) nature should retain independent counsel and bear the financial burden of their defense. Then, if they prevail, they may properly be reimbursed by the union for the costs of their legal defense.” Additionally, in *Koonce v. Gaier*, 320 F. Supp. 1321, 1323–24 (S.D.N.Y. 1971), the Court stated:

*no counsel fee for such representation shall be paid out of the Union treasury or charged to the Union pending the final determination of the issues in this case. If defendants' position is sustained, or even if it be found that their actions in refusing payment were based on reasonable judgment and were not inspired by bad faith, reimbursement may then be sought out of the Union treasury.*

See also *Milone v. English*, 306 F.2d 814, 817 n. 2(D.C. Cir. 1962) (recognizing in dicta that officers may be able to receive indemnification from the union “[w]here there is no substance to a charge of wrongdoing”); *Morrissey v. Segal*, 526 F.2d 121, 127 (2d Cir. 1975) (recognizing that union officers may be able to seek reimbursement of defense costs after merits of suit concluded); *Mulligan v. Parker*, 805 F. Supp. 592, 596 n. 4 (N.D. Ill. 1992) (“However, the policy of permitting the union to reimburse the officers for successful defense provides sufficient financial protection of the officers against such suits.”); *Hanahan v. Lucassen*, 764 F. Supp. 194, 197 (D.D.C. 1991) (“Union officials charged with misconduct generally are expected to bear the financial burden of their own defense. If they prevail, they are reimbursed for their costs.”)

The rationale behind this rule is that actions under Section 501(b) are not directed against the union itself, and the union concerned is generally not a party to the action. *Hanahan*, 764 F. Supp. at 195 (characterizing section 501 suit as a “derivative suit” on behalf of the union). The suit is against a union’s officer brought by a complaining union member. 29 U.S.C. § 501(b). Therefore, for the union to pay on an ongoing basis the attorneys representing the defendant union officers would conflict with the interest of the union, in its role as an instrument of its members, in seeing any mismanagement of its money and property remedied. See also *Yablonski v. United Mine Workers*, 448 F.2d 1175 (D.C. Cir. 1971) (*per curiam*) (analogizing union’s role to stockholder derivative suit); *Averhart v. Commc’ns Workers of Am.*, Case No. 10-6163, 2013 WL 1431701, \*3 (D.N.J. Apr. 9, 2013) (same).

Additionally, a union does not necessarily have an “institutional interest” in an outcome favorable to its officers in section 501(b) actions. *Yablonski*, 448 F.2d at 1180 (D.C. Cir. 1971) (*per curiam*). Arguably, section 501(b) suits are meant to determine the union’s institutional interest, therefore it is also for this reason that unions are barred from providing legal counsel for union officers in these cases. *Id.*; see also *Highway Truck Drivers*

*and Helpers Local 107 v. Cohen*, 182 F. Supp. 608, 620 (E.D. Pa. 1960) (“The only interest which [the union] (as an organization dedicated to the objectives stated in its Constitution) would appear to have in the civil and criminal actions against these officers is an interest (1) in not losing the services of their officers ... simply because someone wrongfully accuses them of misconduct, or (2) in not having men closely associated with their union (whose conduct somewhat reflects upon the union) convicted of serious wrongs when they are not in fact guilty of these wrongs, or (3) not having officers in their union accused of serious wrongs by antiunion people, simply because they are officers of a union.”); *United States v. Local 1804-1, Int’l Longshoremen’s Ass’n, AFL-CIO*, 732 F. Supp. 434, 435 (S.D.N.Y. 1990) (in RICO action against union officers, after finding that interests of union and officers were not aligned, the Court held: “In advance of a determination on the merits of the allegations in the Complaint, the Locals and the ILA should be prohibited from providing any financial support to the Officer Defendants for their individual defense.”).

Finally, in *Koonce*, 320 F. Supp. at 1322–23, the court found that even though the interests of the union and its officers were aligned (because the suit was for a failure to spend, rather than a expenditure in violation of fiduciary duties, the union would be benefited if defendants won) and that union counsel could represent the defendants, the Court nevertheless held that no attorneys’ fees should come from the union treasury.

## **ii. Rationale Behind Rule**

Prohibiting a union from indemnifying officers accused of violating the LMRDA is not required by the language of the Act, but rather is a judicially created rule. *Hanahan v. Lucassen*, 764 F. Supp. 194, 197 (D. D.C. 1991) (mem.) (“Nothing in § 501 or the entire Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*, expressly prohibits union fund payment for the defense of union officials in derivative suits.”). Three principles support the prohibition. First, a conflict of interest exists or may arise between union and its officers in LMRDA section 501(b) actions. A union may not pay to prevent its own benefit. *Cf. Holdeman v. Sheldon*, 204 F. Supp. 890, 892-93 (S.D.N.Y. 1962) (a union may not intervene on behalf of accused union officers because if conflict in interests arises, counsel cannot adequately protect union’s interest)

Second, the act of paying for the defense of union officers may be a misuse of union funds. *Kerr v. Shanks*, 466 F.2d 1271, 1277 (9th Cir. 1972) (restitution appropriate where union funds have been expended to defend union officers who have been found to breach their fiduciary duty). Third, as bluntly put by one court, “[t]o allow a union officer to use the power and wealth of the very union which he is accused of pilfering, to defend himself against such charges, is totally inconsistent with Congress’ effort to eliminate the undesirable element which has been uncovered in the labor-management field.” *Highway Truck Drivers v. Cohen*, 182 F. Supp. 608, 620 (E.D. Pa. 1960); *see also Holdeman*, 204 F. Supp. at 893 (union officer should not be allowed to overwhelm opponent with union resources).

## **D. Reimbursement of Defense Costs by Union Is Not Mandatory**

As the Second Circuit has made clear, reimbursement is not compulsory. *Doyle v. Turner*, 114 F.3d 371, 376-380 (2d Cir. 1997) (section 501 does not compel reimbursement of successful union officers by union if it is unwilling); *Toner v. United Bhd. of Carpenters*, 1999 WL 178784, \*1 (S.D.N.Y. Mar. 31, 1999) (citing *Doyle*

and declining to compel union to indemnify union officer's defense costs). Importantly, however, the Southern District of New York recognized that union officials may have state law claims against a union that refuses to reimburse officials' defense costs after successfully defending a section 501(b) claim. *Schepis v. Local Union No. 17, United Bhd. of Carpenters & Joiners of Am.*, 989 F. Supp. 511, 513 (S.D.N.Y. 1998).

#### **IV. DUAL REPRESENTATION OF UNION AND OFFICERS**

In *Vestal v. Hoffa*, 1972 WL 864 (D. D.C. 1972), the Teamsters intervened on its own behalf in a section 501(b) action against its officers. *Id.* Counsel for the union also represented the union officers. *Id.* Dual-representation was allowed for the sole purpose of determining whether the complaint did “in fact charge union officers with breach of fiduciary trust or other wrong doing which puts their [the officers] interests directly in conflict with those of the union.” *Id.* at \*13. Once the conflict was apparent, as determined from the complaint, counsel had to withdraw from representing either the union or the union's officers. *Id.* at \*14. The court specifically rejected the argument by the union that dual-representation should be allowed “for the purpose of testing the substance of the charge of wrong doing [sic] against the officers,” e.g., the discovery process. *Id.* at \*12; see also *Yablonski v. United Mine Workers of Am.*, 448 F.2d 1175 (D.C. Cir. 1971) (disqualifying the union officers' attorneys from representing the union because of the firm's concurrent representation of the officers in pending and related litigation).

#### **V. CONFLICT OF INTEREST WHERE INSURER BEARS THE BURDEN OF DEFENDING**

There is no authority supporting or refuting the proposition that union indemnification of its officers in LMRDA actions via insurance is prohibited. The cases above do not refer to the presence or absence of insurance coverage. However, in *Holdeman v. Sheldon*, 204 F. Supp. at 893, the court rejected as unpersuasive an argument that a lawyer on paid annual retainer would cost the union nothing. The leveling of the playing field between plaintiffs and defendants was cited as more important. *Id.* (“[A] person who is charged with a violation of his fiduciary responsibility to the union should not be given the opportunity to overwhelm his opponent by putting at his disposal the power and resources of the union.”).

The cases supporting the rule follow, though not explicitly, the law of trusts, particularly that a trustee is personally liable for maladministration of the trust estate. 3A Scott on Trusts § 245 (4th Ed. 2001). Generally, trustees may obtain personal liability insurance for torts committed in the administration of the trust, paying for the premiums from the trust estate. *Id.* § 264. However, this rule pertains to torts affecting third persons, not beneficiaries. Also, generally “[w]here the trustee employs an attorney for his individual benefit and not for that of the estate, he must pay the attorney out of his own pocket and is not entitled to reimbursement from the trust estate. So also if the trustee was at fault in causing the litigation, he must personally bear the expenses of the litigation.” *Id.* § 188.4.

## VI. CONCLUSION

With the exception of one outlier case (*Tarantino v. Ford*, addressed above in section III.A), the decisions are unanimous that a union may not fund the defense of a union officer in a section 501(b) case. Whether this rule will apply when the defense funds would come from an insurer is still an open question. However, based on the rationale behind the courts' decisions on this issue (i.e., that union officers should not be allowed to use the resources of a union he or she is accused of intentionally pilfering), it seems unlikely the analysis would change based on the fact that the funds come from an insurer. After all, an insurance policy is certainly a resource of a union. *Holdeman v. Sheldon*, 204 F. Supp. 890 (S.D.N.Y. 1962) (rejecting union official's use of union attorney as resource).

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1. Some courts have held that local unions are not subject to the LMRDA if the local consists of only public employees, even if the parent organization represents private sector employees. *Adams v. Am. Fed'n of State*, 167 F. Supp. 3d 730, 740 (D. Md. 2016).
2. There is considerable litigation over what, if any, prerequisites there are to filing suit under section 501(b), but a detailed discussion of those issues is beyond the scope of this white paper. See generally *O'Connor v. Freyman*, 1985 WL 121 (D.D.C. 1985) (holding that a union member must demand that the union bring an action before the union member can commence an action under section 501(b)).
3. These cases concern allegations that union officials used their positions to retaliate against plaintiffs for speaking out against those officers. 29 U.S.C. § 411; *Mulligan v. Parker*, 805 F. Supp. 592, 595 n. 5 (N.D. Ill. 1992).
4. This case is an outlier because the alleged violations of the LMRDA involved acts that were expressly authorized by the union's bylaws, which is not the typical case. Not surprisingly, the plaintiff was representing himself pro se which likely factored into the weakness of his position.



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