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THE CONFLICT SURROUNDING THE PRODUCER-DISTRIBUTOR RELATIONSHIP REQUIREMENT OF THE PUBLICITY PROVISO

In section 8(b)(4) of the National Labor Relations Act (Act),[1] Congress recognized a distinction between "primary" and "secondary" union activity.[2] Primary activity is conduct directly targeted at an employer who is a party to the labor dispute with the union.[3] Secondary activity is conduct that attempts to influence employers not party to the labor dispute.[4] Section 8(b)(4) of the Act allows primary activity directed at an employer involved in the labor dispute, but generally prohibits secondary activity.[5] Since 1959, the publicity proviso to section 8(b)(4) of the

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[1] 29 U.S.C. § 158(b)(4) (1976). Section 8(b)(4) of the National Labor Relations Act provides that it is an unfair labor practice for a labor union:

> (i) to engage in, or to induce or encourage any individual employed by any person . . . to engage in, a strike or a refusal in the course of his employment to . . . perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is
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> (B) forcing or requiring any person . . . to cease doing business with any other person. . . .

Id.

[2] *Id.*; *see* NLRB v. Servette, Inc., 377 U.S. 46, 50 (1964) (quoting Local 1976, Carpenter's Union v. NLRB, 357 U.S. 93, 98 (1958)). Congress sought to limit union pressure on neutral employers that had no direct dispute with the union by enacting § 8(b)(4). *See* NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760, 377 U.S. 58, 70-71 (1964); Note, *Picketing And Publicity Under Section 8(b)(4) of the LMRA*, 73 YALE L.J. 1265, 1265-66 (1964) [hereinafter cited as *Picketing*]; Comment, *Publicity Under Section 8(b)(4) of the Labor-Management Reporting And Disclosure Act*, 80 DICK. L. REV. 768, 768 (1976) [hereinafter cited as *Publicity*]. Section 8(b)(4) restricts only union activity that targets employers not party to the primary labor dispute. *See* 29 U.S.C. § 158(b)(4) (1976). The section does not prohibit primary activity by the union against the employer directly involved in the union's labor dispute. *See id.*

[3] *See* NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760, 377 U.S. 58, 80 (1964) (Harlan, J., dissenting). Strikes, boycotts, picketing, and other activities designed to bring pressure on an employer with whom a union has a dispute are forms of primary activity. *See* Comment, *Unions, Conglomerates, And Secondary Activity Under The NLRA*, 129 U. PA. L. REV. 221, 221 (1980) [hereinafter cited as *Unions*].

[4] *See* NLRB v. Fruit & Vegetable Packers & Warehouseman Local 760, 377 U.S. 58, 80 (1964) (Harlan, J., dissenting). Section 8(b)(4) prohibits union activity that is calculated to coerce companies not directly involved in the labor dispute to cease doing business with the employer involved in the union's labor dispute. *See* 29 U.S.C. § 158(b)(4) (1976). Section 8(b)(4) reinforces the public policy that employers not involved directly in a labor dispute should have protection from coercive secondary activity and suffer only the incidental pressure that the primary activity against another employer creates. *See* Engel, *Secondary Consumer Picketing—Following the Struck Product*, 52 VA. L. REV. 189, 229-30 (1966) [hereinafter cited as Engel].

[5] 29 U.S.C. § 158(b)(4) (1976). Section 8(b)(4) prohibits all union secondary activity, ex-

Act has exempted certain secondary union activity, other than picketing, from the section's prohibition against secondary activity.[6] The proviso allows publicity, other than picketing, for the purpose of advising the public that a secondary employer[7] distributes products that a primary employer[8] produces as long as the publicity does not induce any secondary employee to refuse to perform duties of employment.[9] The National Labor Relations Board (Board) and the federal courts have rejected a literal interpretation of the producer-distributor language of the publicity proviso.[10] The Board and the federal courts, however, have

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cept activity that the publicity proviso exempts from the section's prohibition. *Id.*; *see* note 2 *supra*; note 6 *infra*.

[6] 29 U.S.C. § 158(b)(4) (1976). The publicity proviso of § 8(b)(4) allows:

> publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are *produced* by an employer with whom the labor organization has a primary dispute and are *distributed* by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services.... (Emphasis added).

Id.

Congress enacted the publicity proviso to protect a union's freedom to appeal directly to the public and to avoid infringing on a union's freedom of speech. 105 CONG. REC. 16591 (1959); *see* NLRB v. Servette, Inc., 377 U.S. 46, 55 (1964); Edward J. DeBartolo Corp. v. NLRB, 662 F.2d 264, 270 n.4 (4th Cir. 1981), *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 12, 1982) (No. 81-1985). Congress clearly intended to allow truthful appeals by unions to consumers not to buy a manufacturer's goods. *See* Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 908, 48 L.R.R.M. 1429, 1432 (1961); 29 U.S.C. § 158(b)(4) (1976); 105 CONG. REC. 15906 (1959). The congressional sponsors of the publicity proviso wanted no prohibition on truthful appeals to consumers not to buy goods in situations in which the manufacturer of the goods is involved in a labor dispute. 105 CONG. REC. 15906 (1959). Some parts of the legislative history of the proviso arguably indicate that Congress sought to protect all union informational activity short of picketing, even though the language of the proviso limits the type of publicity exempted from the prohibition in § 8(b)(4). *See id.* at 16414; 29 U.S.C. § 158(b) (1976). Senator John F. Kennedy commented during congressional deliberations concerning the publicity proviso, a "union shall be free to conduct informational activity short of picketing." *See* 105 CONG. REC. 16414 (1959). Kennedy continued, stating that a "union can carry on all publicity short of having ambulatory picketing" at a secondary site. *Id.* at 17898-99. Kennedy, however, prefaced his comments with statements indicating that he was thinking of publicity in a manufacturer-retailer situation. *See id.*

[7] A secondary employer is an employer not involved directly in a labor dispute. *See Publicity*, *supra* note 2, at 768 n.1.

[8] A primary employer is the employer with whom a union has a labor dispute. *See* NLRB v. Servette, Inc., 377 U.S. 46, 52-53 (1964).

[9] 29 U.S.C. § 158(b)(4) (1976); *see* note 6 *supra*.

[10] *See, e.g.*, NLRB v. Servette, Inc., 377 U.S. 46, 55-56 (1964) (producer given broader meaning than manufacturer and processor); Edward W. DeBartolo Corp. v. NLRB, 662 F.2d 264, 269 (4th Cir. 1981) (language not read literally but broadly construed); Pet, Inc. v. NLRB, 641 F.2d 545, 548 (8th Cir. 1981) (producer given broader meaning than manufacturer or processor); Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 906-07, 48 L.R.R.M. 1429, 1432 (1961) (finding wholesaler producer of products distributed).

adopted potentially conflicting constructions of the producer-distributor requirement of the publicity proviso.[11]

In *Lohman Sales Co.*,[12] the National Labor Relations Board found that a striking union's distribution of handbills in front of stores carrying products Lohman, the primary employer, distributed was protected activity. The handbills advised customers of a strike with Lohman and requested that the public not purchase the products that Lohman distributed.[13] The Board found that Lohman, as a wholesale distributor, added labor in the form of capital, enterprise, and service to the product and, therefore, was a "producer" of goods distributed by the handbilled stores within the meaning of the publicity proviso.[14] The Board asserted that the proviso attaches no special importance to one form of labor over any other.[15] The Board consistently has applied the *Lohman* rationale in decisions interpreting the proviso and has extended the rationale to include within the scope of "producer" in the proviso any primary employer who performs a service for a secondary employer.[16]

The United States Supreme Court approved the Board's broad interpretation of the publicity proviso in *NLRB v. Servette, Inc.*[17] In *Servette*, the Court considered whether the publicity proviso protected union handbilling that urged a consumer boycott of retail stores carrying products Servette distributed.[18] The Court adopted *Lohman Sales*, holding that products "produced by an employer" include products

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[11] *Compare* Edward J. DeBartolo Corp. v. NLRB, 662 F.2d 264, 272 (4th Cir. 1981) (enforcing 252 N.L.R.B. 702, 106 L.R.R.M. 2310 (1980)) *with* Pet, Inc. v. NLRB, 641 F.2d 545, 549-50 (8th Cir. 1981) (denying enforcement of 244 N.L.R.B. 96, 102 L.R.R.M. 1046 (1979)).

[12] Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 48 L.R.R.M 1429 (1961); *see* Engel, *supra* note 4, at 223-24; *Publicity*, *supra* note 2, at 774-75; *Unions*, *supra* note 3, at 224.

[13] 132 N.L.R.B. at 902, 48 L.R.R.M. at 1430-33.

[14] *Id.* at 907, 48 L.R.R.M. at 1432. The National Labor Relations Board determined that the publicity proviso placed no special significance on an employer's position in the chain of production. *Id.* at 907, 48 L.R.R.M. at 1430-33. The Board found no evidence of congressional intent to permit publicity with respect to manufacturers of goods and not permit publicity with respect to wholesalers of goods. *Id.* at 908, 48 L.R.R.M. at 1430-33.

[15] *Id.* at 908, 48 L.R.R.M. at 132.

[16] *See, e.g.*, Local 712, IBEW (Golden Dawn Foods), 134 N.L.R.B. 812, 816, 49 L.R.R.M. 1220, 1221 (1961) (finding electrical and refrigeration services products within meaning of proviso); Local 73, Elec. Workers (Northwestern Constr., Inc.), 134 N.L.R.B. 498, 500, 49 L.R.R.M. 1181, 1182 (1961) (publicity directed at employer furnishing construction services protected by publicity proviso); Local 662, Radio & Television Eng'rs (Middle S. Broadcasting Co.), 133 N.L.R.B. 1698, 1705, 49 L.R.R.M. 1042, 1046 (1961) (finding radio station that added labor in services, enterprise, and capital to products is producer of products advertised); Plumbers & Pipefitters Local 142 (Shop-Rite Foods, Inc.), 133 N.L.R.B. 307, 308, 48 L.R.R.M. 1638, 1639 (1961) (finding refrigeration installation services "product" within meaning of proviso).

[17] 377 U.S. 46, 56 (1964). *See generally Picketing*, *supra* note 2, at 1270-73; *Publicity*, *supra* note 2, at 777-78; *Unions*, *supra* note 3, at 224.

[18] 377 U.S. at 55-56.

distributed by a wholesaler with whom the primary labor dispute exists.[19] The Court found nothing in the legislative history of the proviso to suggest that the publicity exemption was more narrow than the prohibition of section 8(b)(4) against secondary activity.[20] The Court's finding arguably implied that all informational activity that the section otherwise prohibited was protected.[21] The Court, however, further commented that Congress defined "produced" under the Fair Labor Standards Act (FLSA) as "produced, manufactured, mined, or in any other manner worked on. . . ."[22] The Court found that the FLSA definition of "produced" clearly encompassed a wholesaler of goods such as Servette and held that the publicity proviso protected the union publicity at issue.[23]

The National Labor Relations Board and the federal courts have failed to interpret the Supreme Court's *Servette* opinion uniformly.[24] Two recent circuit court decisions illustrate the divergent approaches of interpreting the producer-distributor requirement of the publicity proviso.[25] The Fourth Circuit adopted a broad construction of the proviso in *Edward J. DeBartolo Corp. v. NLRB*.[26] In conflict with the Fourth Circuit's

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[19] *Id.*

[20] *See id.* at 55.

[21] *See id.* Although the Supreme Court in *Servette* commented that nothing in the legislative history of the publicity proviso suggest that Congress intended to make the protection of the proviso narrower than the prohibition of § 8(b)(4), the Court's comment should be considered in conjunction with the facts and the other language of the *Servette* opinion. *See id.* The Supreme Court did not abandon wholly the producer-distributor requirement and thereby sanction all union publicity. *See id.* Instead, the Court considered the producer-distributor language of the publicity proviso and found that Servette, a wholesaler of goods, was a producer within the meaning of the proviso. *Id.* The Court's analysis in *Servette* reveals that the Court was broadening the normal interpretation of "producer," rather than holding that the proviso had no producer-distributor requirement. *See id. But see* Pet, Inc. v. NLRB, 641 F.2d at 550-51 (McMillan, J., dissenting) (reading *Servette* interpretation of publicity proviso as protecting any union publicity from prohibition of § 8(b)(4)(ii)(B)).

[22] 377 U.S. 46, 55 (1964) (construing 29 U.S.C. § 203(i) (1976)).

[23] *Id.* at 55-56. The Supreme Court in *Servette* stated that courts considering the FLSA definition of "produced" consistently have interpreted the definition to include wholesale distribution of goods. *Id.* The Court also found that such an interpretation was consistent with application of the term "production" in the War Labor Disputes Act. *Id.* at 56. Furthermore, the Court discounted the fact that Congress did not enact an alternative version of the proviso that read "produced or distributed" since Congress never debated or voted upon that version before approval of the enacted proviso. *See id.* at 56 n.15.

[24] *Compare* Edward J. DeBartolo Corp. v. NLRB, 662 F.2d 264, 266-72 (4th Cir. 1981) (enforcing 252 N.L.R.B. 702 (1980)) *and* United Steelworkers (Pet, Inc.), 244 N.L.R.B. 96 (1979) *with* Pet, Inc. v. NLRB, 641 F.2d 545, 549-50 (8th Cir. 1981). *See also* Great W. Broadcasting Corp. v. NLRB, 356 F.2d 431, 436 (9th Cir.) (radio station advertising products is producer of those products); *cert. denied*, 384 U.S. 1002 (1966); *Unions, supra* note 3, at 229-36.

[25] *See* Edward J. DeBartolo Corp. v. NLRB, 662 F.2d 264, 266-72 (4th Cir. 1981); Pet, Inc. v. NLRB, 641 F.2d 545, 549-50 (8th Cir. 1981).

[26] 662 F.2d 264, 268 (4th Cir. 1981).

approach is the more narrow construction that the Eighth Circuit adopted in *Pet, Inc. v. NLRB*.[27]

In *DeBartolo*, the Fourth Circuit refused to set aside an order of the Board that dismissed a complaint of the Board's General Counsel.[28] The complaint alleged that a union's handbilling urged a secondary boycott in violation of section 8(b)(4)(ii)(B) of the National Labor Relations Act.[29] The union handbilling at issue in *DeBartolo* urged a consumer boycott of all stores located in a shopping mall that the Edward J. DeBartolo Corporation operated.[30] The DeBartolo Corporation leased a store site in the mall to another corporation, the H. J. Wilson Company.[31] Wilson contracted with H. J. High Construction to build the store.[32] The union's dispute was with High.[33] DeBartolo alleged that the handbilling constituted coercion with the object of forcing DeBartolo to cease doing business with Wilson and, therefore, violated section 8(b)(4)(ii)(B) of the Act.[34] The Board dismissed the complaint after determining that the handbilling fell within the protection of the publicity proviso.[35] DeBartolo petitioned the Fourth Circuit to set aside the dismissal, contending that the publicity proviso should not protect the handbilling because the required producer-distributor relationship did not exist between High and DeBartolo, or between DeBartolo and the other stores at the mall.[36]

The Fourth Circuit upheld the Board's determination, ruling that the symbiotic relationship between DeBartolo and the mall tenants supported the conclusion of the Board that the High-DeBartolo and High-mall tenant relationships were that of producer and distributor.[37] The

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[27] 641 F.2d 545, 549-50 (8th Cir. 1981).

[28] 662 F.2d at 266.

[29] *Id.*

[30] *Id.* at 266-67.

[31] *Id.* at 266.

[32] *Id.* at 267.

[33] *Id.* at 266-67. The union in *DeBartolo*, the Florida Gulf Coast Building Trades Council, sought to publicize its discontent with High's payment of wages and benefits that the union felt inadequate. *Id.* The union did not picket but instead handed out handbills from late 1979 until early 1980 when a Florida court issued an injunction halting the handbilling. *Id.* at 267

[34] *Id.* at 267; *see* note 1 *supra*.

[35] 662 F.2d at 267; *see* text accompanying notes 3-6 *supra*.

[36] 662 F.2d at 266, 268. DeBartolo argued that the union's handbilling violated § 8(b)(4) of the National Labor Relations Act, not falling within the publicity proviso because the handbills were untruthful. *Id.* at 267. The Fourth Circuit rejected DeBartolo's assertion. *Id.* at 267-68.

[37] *Id.* at 269. The Fourth Circuit in *DeBartolo* concluded that the Board correctly interpreted the producer-distributor language of the publicity proviso as establishing a symbiotic relationship requirement. *See id.* The Board's novel interpretation of the proviso protects secondary publicity activity when the secondary party is in a mutually beneficial and interdependent relationship with the primary employer. *See id.* at 268-69. The Fourth Circuit deferred to the Board's interpretation of the proviso's protection and application to the

Board found High a producer of the Wilson store because High, by its labor, added value to the store.[38] The Board found High a producer of the mall enterprise because in building the Wilson store, High applied capital, enterprise, and service and thus, added value to the mall enterprise.[39] The Fourth Circuit asserted that the reasoning of the Board suggested that both DeBartolo and the mall's tenants were distributors of High's products.[40]

In upholding the Board's decision, the Fourth Circuit relied upon *Lohman Sales*, concluding that the term "produced" in the publicity proviso meant adding the value of labor to goods in the form of capital, enterprise, and service.[41] Relying on *Servette*, the court adopted an expansive interpretation of the proviso.[42] The court commented that liberal interpretation of the proviso especially was necessary in situations involving the construction industry because contractors literally do not produce and distribute products.[43] The court relied on several Board decisions that found contractors "producers" of the end product to which their services contributed.[44] The Fourth Circuit further asserted that the publicity proviso protected the handbilling at issue in *DeBartolo* even though no direct producer-distributor connection existed between the primary employer, High, and the handbilled employer, DeBartolo or the mall tenants.[45]

DeBartolo situation. *See id.* at 269. The Fourth Circuit determined that the Board's conclusions on the interpretation and application of the producer-distributor language were rational and consistent with the statute. *See id.* at 269 (citing NLRB v. Yeshiva Univ., 444 U.S. 672 (1980)).

[38] *Id.*

[39] *Id.*

[40] *Id.* The *DeBartolo* court reasoned that DeBartolo and the mall tenants distributed the Wilson store and its inventory by attracting business, maintaining common areas, and participating in joint advertising. *Id.* The court concluded that DeBartolo and the tenants distributed the mall enterprise simply by conducting business. *Id.*

[41] *Id. See also* Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 907, 48 L.R.R.M. 1429, 1432 (1961).

[42] 662 F.2d at 270 (citing NLRB v. Servette, Inc., 377 U.S. 46, 55 (1964)). The *DeBartolo* court recognized the broad interpretation of the proviso that the Ninth Circuit adopted in Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434 (9th Cir.) (finding television station advertising goods and services producer of those goods and services), *cert. denied*, 384 U.S. 1002 (1966). 662 F.2d at 270.

[43] 662 F.2d at 270.

[44] *Id.*; *see* Local 712, IBEW (Golden Dawn Foods), 134 N.L.R.B. 812, 816, 49 L.R.R.M. 1220, 1221 (1961) (electrical and refrigeration services products within meaning of proviso); Local 73, Elec. Workers (Northwestern Constr., Inc.), 134 N.L.R.B. 498, 500, 49 L.R.R.M. 1181, 1182 (1961) (publicity directed at employer furnishing construction services protected by publicity proviso); Plumbers & Pipefitters Local 142 (Shop-Rite Foods, Inc.), 133 N.L.R.B. 307, 308, 48 L.R.R.M. 1638, 1639 (1961) (refrigeration installation servicies "product" within meaning of proviso).

[45] 662 F.2d at 271. The Fourth Circuit cited the Board's decision in Local 54, Sheet Metal Workers (Sakowitz, Inc.), 174 N.L.R.B. 362, 70 L.R.R.M. 1215 (1969). 662 F.2d at 271. In *Sakowitz*, a union involved in a labor dispute with an air conditioning and heating installer distributed handbills advocating a consumer boycott of two companies that leased

In concluding that the handbilling in *DeBartolo* met the producer-distributor requirement of the publicity proviso, the Fourth Circuit expressly rejected the decision of the Eighth Circuit in *Pet, Inc. v. NLRB*.[46] In *Pet*, the Eighth Circuit reversed the Board's dismissal of a complaint which alleged that a union had conducted an illegal secondary boycott by distributing handbills and advertisements urging a boycott of all Pet Products.[47] The union conducting the publicity was involved in a primary dispute with Hussman, a wholly owned subsidiary of Pet.[48] The *Pet* court found that Hussmann's only relevant connection to the Pet products selected for boycott was through the corporate structure of Pet's conglomerate enterprise.[49] The court determined that Hussmann was essentially autonomous and an independent business entity.[50]

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stores using the installer's equipment and services. 174 N.L.R.B. at 362-63, 70 L.R.R.M. at 1216. The Board ruled that the publicity proviso of § 8(b)(4) protected the handbilling even though the only primary-secondary contact was through the leasing of premises using the primary's equipment. *Id.* at 362-64, 70 L.R.R.M. at 1217.

The Board ruled that the provision protected the publicity even if conducted at the secondary employer's stores not using the primary's equipment. *Id.* at 364, 70 L.R.R.M. at 1217. The Board found nothing in the legislative history or language of the publicity proviso indicating a geographic limitation on the scope of the proviso. *Id.* at 364, 70 L.R.R.M. at 1217. The Board in *Sakowitz* relied upon comments by Senator John F. Kennedy in the Congressional Record that the publicity proviso would protect mass media publicity. *Id.* at 364, 70 L.R.R.M. at 1217; *see* 105 CONG. REC. 16414 (1959), note 6 *supra*. The Board asserted that the absence of a geographic limitation on the scope of the publicity proviso was inherent in Congress' intended protection of radio and newspaper advertising. 174 N.L.R.B. at 364, 70 L.R.R.M. at 1217. Congress, however, left unanswered whether mass media advertising needed to target the secondary establishment where contact with the primary employer occurred. *See* 105 CONG. REC. 16414 (1959). The Board in *Sakowitz* determined that the publicity could target all locations where the secondary employer did business. 174 N.L.R.B. at 364, 70 L.R.R.M. at 1217.

[46] *See* 662 F.2d at 271-72 (rejecting holding in Pet, Inc. v. NLRB, 641 F.2d 545 (8th Cir. 1981)).

[47] 641 F.2d at 547, 550. *See generally Unions, supra* note 3, at 229-36.

[48] 641 F.2d at 546.

[49] *See id.* The Eighth Circuit apparently overlooked the fact that Hussmann had provided a division of Pet, 9-0-5 Stores, with refrigeration equipment. *See id.* at 547 n.2. The General Counsel for the Board and Pet did not assert that the union publicity targeting 9-0-5 Stores violated § 8(b)(4) because 9-0-5 Stores was a distributor of the Hussman refrigeration. *See id.*; United Steelworkers, 244 N.L.R.B. 96, 99 n.17, 102 L.R.R.M. 1046, 1048 n.17 (1979), *rev'd* Pet, Inc. v. NLRB, 641 F.2d 545 (1981). Arguably, both the Board and the Eighth Circuit committed error because neither considered the ramifications of the classification of 9-0-5 Stores as a distributor. If 9-0-5 Stores is a distributor of Hussmann refrigeration units, then the proviso would protect activity against Pet, also a distributor. *See* note 79 *infra* (discussion of ramifications of classifying 9-0-5 Stores as distributor of Hussmann refrigeration).

[50] *See* 641 F.2d at 546. The Board in *Pet* carefully considered the corporate structure of the Pet enterprise. *See id.* The Board found that Pet was divided into four groups, one of which was Hussmann, that operate as independent business entities. *Id.* The Board emphasized that the divisions exercised complete authority over labor-relations and employment policies. *Id.* Each division could enter into collective-bargaining agreements without the approval of Pet's corporate management. *Id.*

Reasoning that Hussmann was a producer of Pet products, the Board in *Pet* found that the publicity proviso protected the union publicity.[51] The Board characterized Hussmann as a producer because Hussmann applied capital, enterprise, and service to Pet.[52] The Eighth Circuit disagreed with the Board's characterization of Hussmann as a producer of Pet products.[53]

The Eighth Circuit asserted that in *Lohman Sales* and *Servette*, the Board correctly found the primary employer a producer because the primary had direct involvement with products that the secondary distributed.[54] The court found Hussmann's involvement with Pet's products highly attenuated.[55] The court distinguished *Servette*, commenting that *Servette* did not concern a case in which a subsidiary's products were unrelated to a secondary-parent corporation's products.[56] The court relied on the FLSA definition of "produced," as quoted in *Servette*, and determined that Hussmann did not work on any Pet products.[57] The

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[51] *Id.* at 547, 549.

[52] *Id.* at 549. The Board in *Pet* asserted that Hussmann contributed diversification, profits, and goodwill to its parent corporation. *Id.* The Board determined that the contributions made Hussmann a producer under the Supreme Court's interpretation of the term "producer" in *Servette*. *Id.*

[53] *Id.*

[54] *Id.* The Pet court cited the Ninth Circuit's decision in Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434 (9th Cir.), *cert. denied*, 384 U.S. 1002 (1966), for the proposition that "producer" requires direct involvement of the primary with the secondary's product. 641 F.2d at 549. In *Great Western Broadcasting Corp.*, the Ninth Circuit held that a television station was a producer of all products the station advertised. 356 F.2d at 436. The Ninth Circuit found, therefore, that union publicity urging firms not to advertise on the station was protected conduct under the publicity proviso. *Id.* The Ninth Circuit noted the analytical incongruity of regarding a television station as a producer of advertised products but determined that the *Servette* rationale considering distributors as producers should extend to advertisers. *Id.* The Ninth Circuit determined that *Servette* required reliance upon the proviso's legislative history and found no indication that Congress intended to differentiate between employers engaged in production and those providing services. *Id.*

The Eighth Circuit in *Pet* also noted the Board's decision in Local 662, Radio & Television Eng'rs. (Middle S. Broadcasting Co.), 133 N.L.R.B. 1698, 49 L.R.R.M. 1042 (1961). 641 F.2d at 549 n.3. In *Middle South Broadcasting Co.*, the Board applied the rationale that the Ninth Circuit later adopted in *Great Western Broadcasting Corp.* and found a radio station a producer of cars that the station advertised for an automobile dealer. 133 N.L.R.B. at 1705, 49 L.R.R.M. at 1043.

[55] 641 F.2d at 549. The *Pet* court found that if Pet were to sell Hussmann, its own manufacturing, distributing, and promotion of products would be unaffected. *Id.* The court determined that Hussmann was essentially independent from Pet. *Id.* Thus, Hussmann's independence from Pet let the court to find that no producer-distributor relationship existed between the two companies. *Id.*

[56] *Id.*

[57] *Id.* The *Pet* court commented that the Board's interpretation of "produced" in the instant case was at odds with any normal interpretation of the term. *Id.* The court, however, did accept a broader than literal interpretation of "produced," as flowing from *Lohman Sales*, *Servette*, and *Great Western Broadcasting*. *Id.* The court found that while "produced" does not require manufacture or a form of physical creation, the term does require some kind of work performed on a product of the secondary employer. *Id.*

court held that the publicity proviso could not protect the union activity because Hussmann in no way was a producer of the Pet products selected for boycott.[58]

Prior court and Board decisions, as well as legislative history, support the Eighth Circuit's interpretation of the publicity proviso.[59] According to the Board, the addition of labor is the prime requisite of a producer.[60] The Board has interpreted producer to mean one who has applied labor in the form of capital, enterprise, and service to a secondary employer's product.[61] The Board has ruled that the publicity proviso places no special importance on the type of labor that the primary employer performs on the product.[62] Thus, the Board's analysis of the publicity proviso supports a broad interpretation of produce that includes "abstract" forms of production such as distributing and advertising.[63] The analysis of the Board nevertheless traditionally has required some form of work by the primary upon the product offered by the secondary employer to the public for the primary's classification as a "producer" under the proviso.[64].

The Supreme Court in *Servette* followed the Board's original position that a producer must apply labor in some form to a secondary employer's product.[65] The Supreme Court's consideration of the meaning of producer in the publicity proviso demonstrates that the Court was not abandoning completely the producer-distributor requirement.[66] Even

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[58] *Id.*

[59] *See* NLRB v. Servette, Inc., 377 U.S. 46, 55 (1964); Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434, 436 (9th Cir. 1966); Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 907, 48 L.R.R.M. 1429, 1432 (1961); text accompanying notes 60-79 *infra.*

[60] Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 907, 48 L.R.R.M. 1429, 1432 (1961).

[61] *Id.*

[62] *Id.*

[63] *See* Local 662, Radio & Television Eng'rs. (Middle S. Broadcasting Co.), 133 N.L.R.B. 1698, 1705, 49 L.R.R.J. 1042, 1046 (1961); Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 907, 48 L.R.R.M. 1429, 1432 (1961).

[64] *See, e.g.*, Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434, 436 (1966) (television advertising services by primary); Local 54, Sheet Metal Workers (Sakowitz, Inc.), 174 N.L.R.B. 362, 362-64, 70 L.R.R.M. 1215, 1216-17 (1969) (air conditioning contractors services); Local 712, IBEW (Golden Dawn Foods), 134 N.L.R.B. 812, 816, 49 L.R.R.M. 1220, 1220 (1961) (finding electrical and refrigeration services products within meaning of proviso); Local 73, Elec. Workers (Northwestern Constr., Inc.), 134 N.L.R.B. 498, 500, 49 L.R.R.M. 1181, 1182 (1961) (publicity directed at employer furnishing construction services protected by proviso); Local 662, Radio & Television Eng'rs (Middle S. Broadcasting Co.), 133 N.L.R.B. 1698, 1705 49 L.R.R.M. 1042, 1046 (1961) (radio station advertising products "producer"); Plumbers & Pipefitters Local 142 (Shop-Rite Foods, Inc.), 133 N.L.R.B. 307, 308, 48 L.R.R.M. 1638, 1639 (1961) (refrigeration installation services "product" within meaning of proviso); Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 907, 48 L.R.R.M. 1429, 1432 (1961) (wholesale distribution services).

[65] *See* NLRB v. Servette, Inc., 377 U.S. 46, 55 (1964).

[66] *See id.*

though the Supreme Court commented that legislative history indicated that the publicity exemption was as broad as the prohibition of section 8(b)(4),[67] the Court's comment should be considered in conjunction with the Court's subsequent reliance on the FSLA, which defines "produced" as "produced . . . or in any other manner worked on. . . ."[68] Because the prohibition that section 8(b)(4) created places no special significance on the form of production that an employer utilizes,[69] dicta in the Supreme Court's *Servette* opinion arguably supports a broad interpretation of the producer-distributor requirement of the proviso that similarly places no special signifiance on the type of production the primary employer performs.[70] A broad interpretation of the producer-distributor requirement, however, does not remove the requirement from the proviso and, thereby, sanction all union publicity activity.[71] The Court simply extended "production," as used in the proviso, to include abstract kinds of work that a primary employer performs on a secondary's product.[72] The Supreme Court did not strike the producer-distributor requirement from the proviso.[73]

The Eighth Circuit in *Pet* found that the proviso offered the publicity no protection from the prohibition of section 8(b)(4) of the Act because no labor of Hussmann flowed through the Pet conglomerate enterprise into the products that Pet distributed to the public.[74] In *Pet*, the Board had found that the primary, Hussmann, was a producer of Pet products even though Hussmann's labor had no contact with Pet products.[75] The Board's attempt to rationalize the interpretation of "produce" that requires no contribution of labor was unconvincing since the Board's prior decision in *Lohman Sales* had emphasized that the addition of labor is a requisite ingredient of production.[76] Application of capital, enterprise, and service by Hussmann to the Pet enterprise without labor upon Pet's products was insufficient to constitute "production" under the *Lohman*

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[67] *See id.*

[68] *See id.* (construing 29 U.S.C. § 203(j) (1976)).

[69] *See* Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 907, 48 L.R.R.M. 1429, 1432 (1961) (construing prior version of 29 U.S.C. § 158(b)(4) (1976)).

[70] *See* NLRB v. Servette, Inc., 377 U.S. 46, 55 (1964). The Supreme Court found that the proviso would fall short of preserving a union's freedom to appeal to the public if the proviso applied only to situations in which a union's dispute was with a manufacturer or processor. *Id.* The court held that "producer" has a broader meaning than "manufacturer" or "processor". *Id.* at 56.

[71] *See id.* at 55. *But see* 641 F.2d at 550-52 (McMillian, J., dissenting). The dissent in *Pet* contended that *Servette* supported the protection of all union publicity by the proviso. *See id.*

[72] *See* NLRB v. Servette, Inc., 377 U.S. 46, 55-56 (1964).

[73] *See id.*

[74] *See* 641 F.2d at 549.

[75] *Id.*

[76] *See id.*; Local 537 Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 907, 48 L.R.R.M. 1429, 1432 (1961).

Sales interpretation of the publicity proviso.[77] Because *Servette* distilled the legislative history of the proviso and adopted the *Lohman* rationale, the Supreme Court implicity found that "production," as used in the proviso, required some labor by the primary employer upon the product that the secondary distributed.[78] In *Pet*, the Eighth Circuit correctly rejected the Board's virtual abandonment of the producer-distributor requirement of the publicity proviso since no labor of the primary employer, Hussmann, passed through the Pet corporate enterprise into the products that the secondary employer, Pet, distributed.[79]

In contrast to the Eighth Circuit's construction of the publicity proviso, the Fourth Circuit in *DeBartolo* interpreted the proviso simply to require a mutually beneficial relationship between the parties for the protection of publicity.[80] The mutually beneficial relationship requirement that the Fourth Circuit substituted for the producer-distributor relationship requirement of the statute represents a novel approach to interpretation of the proviso and extends protection of the proviso to publicity beyond the bounds of congressional intent.[81] In enacting the publicity proviso, Congress sought to protect union publicity from the prohibition against secondary activity only when a form of producer-distributor relationship existed between the union's primary employer

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[77] *See* NLRB v. Servette, Inc., 377 U.S. 46, 55 (1964); Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 907, 48 L.R.R.M. 1429, 1432 (1961); *see, e.g.*, Great W. Broadcasting Corp. v. NLRB, 356 F.2d 434, 436 (9th Cir. 1966) (television advertising services constitute labor); Local 54, Sheet Metal Workers (Sakowitz, Inc.), 174 N.L.R.B. 362, 363-64, 70 L.R.R.M. 1215, 1216-17 (1969) (air conditioning installation services form of labor).

[78] *See* NLRB v. Servette, Inc., 377 U.S. 46, 55 (1964); Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 907, 48 L.R.R.M. 1429, 1432 (1961).

[79] *See* 641 F.2d at 549. *See also Unions, supra* note 3, at 233-35.

The Board and the *Pet* court did not consider the significance of 9-0-5 Stores' use of Hussmann refrigeration units. *See* 641 F.2d at 547 n.2; note 49 *supra*. The use of the refrigeration units by a nonindependent division of Pet arguably made Pet a distributor of Hussmann products. *See* 641 F.2d at 547 n.2; note 49 *supra*. The flow of the labor of Hussmann, however, was not through the corporate enterprise structure; rather, Hussmann's product passed to 9-0-5 as a purchaser independent from Hussmann. *See* 641 F.2d at 547 n.2; note 49 *supra*.

Not recognizing the impact of Pet's use of the Hussmann refrigeration units, the Eighth Circuit in *Pet* also properly remanded the case for the Board to determine whether § 8(b)(4) nevertheless protected the publicity. *See* 641 F.2d at 547. Since Hussmann and Pet are in a parent-subsidiary relationship, the close relationship of the two possibly could justify classification of publicity directed at either as primary activity. The two companies potentially are not separate "persons" for purposes of § 8(b)(4). *See* 29 U.S.C. § 158(b)(4) (1976); note 1 *supra*. Section 8(b)(4) does not prohibit any publicity that is primary activity regardless of a producer-distributor relationship. *See* 29 U.S.C. § 158(b)(4) (1976); note 1 *supra*.

[80] *See* 662 F.2d at 269. The *DeBartolo* court found that the symbiotic relationship between DeBartolo and the tenants of the mall DeBartolo operated was a relationship sufficient to satisfy the proviso. *See id.*; text accompanying note 37 *supra*.

[81] *See* 662 F.2d at 269; notes 6 & 37 *supra*.

and the secondary employer that the publicity targeted.[82] The court's substitution of the "mutual benefit" requirement for the producer-distributor requirement of the publicity proviso is an unjustified judicial expansion of the scope of the proviso.[83] In enacting the proviso, Congress intended to protect only union appeals to the public that could influence secondary parties to exert pressure on the union's primary employer.[84] Congress did not intend to sanction all secondary publicity activity.[85] Congress apparently determined that confining the protection of publicity to situations in which the primary and secondary employer stand in a producer-distributor relationship most accurately fulfilled the purpose of the proviso.[86] The producer-distributor requirement of the publicity proviso was a legislative attempt to confine the protection of the proviso to situations in which Congress anticipated that the secondary employer could influence the primary employer.[87] By supplanting the producer-distributor requirement of the proviso with the "mutual benefit" requirement, the Fourth Circuit simply ignored the congressional intent and express terms of the proviso.[88]

Furthermore, the Fourth Circuit incorrectly characterized the mall tenants as distributors of High's products.[89] Under both *Lohman Sales* and *Servette*, some direct labor addition to the product that the secondary employer eventually distributed was required for the secondary employer's classification as a distributor of a primary employer's product.[90] DeBartolo was a distributor of High's products since High's construction labor added value to the mall enterprise that DeBartolo of-

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[82] *See* 29 U.S.C. § 158(b)(4) (1976); note 6 *supra.*

Congress limited the protection of the publicity proviso to producer-distributor relationships in order to safeguard a union's ability to influence a primary employer by exerting publicity pressure on users of the primary employer's product. *See* NLRB v. Servette, Inc., 377 U.S. 47, 55 (1964); Edward J. DeBartolo Corp. v. NLRB, 662 F.2d 264, 270 n.4 (4th Cir. 1981); note 6 *supra.* Congress simultaneously restricted economic injury of a labor dispute to parties in positions of significant influence. *See* note 6 *supra*; *cf.* NLRB v. Fruit & Vegetable Packers & Warehouseman Local 760, 377 U.S. 58, 93 (1964) (Harlan, J., dissenting) (Congress balancing right to publicize and limiting effects of communication); 371 U.S. 675, 692 (1951) (Congress shielding unoffending parties from controversies not their own). Parties in a producer-distributor relationship are situated so that pressure on the secondary employer potentially results in meaningful influence on the primary. Under the proviso, a union lawfully can apply pressure on the primary without subjecting parties who have no meaningful influence on the dispute to costs associated with the dispute.

[83] *See* 662 F.2d at 269.

[84] 105 CONG. REC. 17898 (1959), *cited in* NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760, 377 U.S. 58, 70 (1964) (proviso protects appeals to consumers since such appeals indirectly can pressure primary employers).

[85] *See* 29 U.S.C. § 158(b)(4) (1976); 105 CONG. REC. 17898 (1959).

[86] *See* 105 CONG. REC. 17898 (1959).

[87] *See id.*

[88] *See* 662 F.2d at 269; notes 37 & 40 *supra.*

[89] *See* 662 F.2d at 269.

[90] *See* NLRB v. Servette, Inc., 377 U.S. 46, 55 (1964); Local 537, Int'l Bhd. of Teamsters (Lohman Sales Co.), 132 N.L.R.B. 901, 907, 48 L.R.R.M. 1429, 1432 (1961).

fered to the public.[91] The mall tenants, in contrast, derived only incidental benefit from High's construction work.[92] Therefore, classification of the mall tenants as distributors of High's products was incorrect.

Though the Fourth Circuit erred in classifying the mall tenants as distributors of High's products, the court nevertheless correctly found that the publicity proviso protected the union handbilling at issue in *DeBartolo* from the prohibition of section 8(b)(4).[93] The handbilling did not describe the mall tenants' stores as distributors of High's product.[94] Instead, the handbilling identified the stores only in relation to the boycott against DeBartolo.[95] The stores formed the mall enterprise that DeBartolo distributed to the public.[96] Since DeBartolo also distributed the product of the primary employer, High,[97] the publicity proviso protected the handbilling that urged a total boycott of the secondary employer, DeBartolo, and the mall enterprise that DeBartolo distributed.[98]

When considering situations in which a secondary employer distributes an abstract product, such as the mall enterprise in *DeBartolo*, to the public, the courts and the Board should confine the protection of the publicity proviso to the extent that Congress intended when enacting the proviso.[99] The *Pet* and *DeBartolo* cases illustrate the susceptibility of the present language of the proviso to inconsistent construction and the propensity of court and Board opinions construing the language of the proviso to conflicting interpretations.[100] Inconsistent ap-

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[91] 662 F.2d at 269.

[92] *See id.* The *DeBartolo* court noted that the mall tenants help distribute the Wilson store and the store's inventory by attracting shoppers, helping maintain common areas, and participating in joint advertising with Wilson. *Id.* The court found that the mall tenants and DeBartolo distributed the mall enterprise and the goods sold through the enterprise simply by conducting business. *Id.*

[93] *See* 662 F.2d at 271.

[94] *See id.* at 269. The union handbilling in *DeBartolo* did not describe the mall tenants' stores as distributors of High's product. *See id.* at 266-67. Instead, the handbilling identified the stores only in relation to the boycott against DeBartolo. *See id.* The stores as a unit made up the DeBartolo mall enterprise and were products that DeBartolo distributed to the public. Publicity need not target only the secondary's product that flows from the primary employer. *See* NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760, 377 U.S. 58, 70 (1964). Rather, the publicity can appeal to the public to boycott the secondary business altogether. *See id.* Since the mall tenants' stores were products of DeBartolo, and DeBartolo also distributed a products of the primary employer, High, the publicity proviso protected the publicity urging a boycott of both DeBartolo and the tenant stores.

[95] *See* 662 F.2d at 271; note 94 *supra.*

[96] *See* 662 F.2d at 271.

[97] *See id.* at 272.

[98] *See id.* at 271-72.

[99] *See* 105 CONG. REC. 16591 (1959) (implying purpose of proviso to protect appeals to public for support in labor dispute).

[100] *Compare* Edward J. DeBartolo Corp. v. NLRB, 662 F.2d at 266, 272 (producer-distributor requirement of proviso satisfied) *with* Pet, Inc. v. NLRB, 641 F.2d at 546-47 (producer-distributor requirement of proviso not satisfied).

plication of the publicity proviso leaves unions unsure of their rights in disputes in which secondary publicity activity is a viable economic weapon in the union arsenal. Secondary employers find themselves in positions of insecurity when they become the target of union publicity. Congressional action clarifying the coverage of the publicity proviso's protection would help alleviate the confusion that unions and secondary employers face when exercising their rights in relation to the publicity proviso of section 8(b)(4). Congress should act to provide the Board and the courts with a manageable guide for determining which producer-distributor relationships deserve the protection of the proviso.

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