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# THE UNRECOGNIZED STATUTORY LABOR EXEMPTION FROM ANTITRUST AND PENSION FUND LEVERAGE AND ANTITRUST

W. MICHAEL KAISER\*

## INTRODUCTION

There exists a heretofore unrecognized statutory exemption from antitrust liability for labor unions. This exemption is contained in the language of section 303 of the Taft-Hartley Act<sup>1</sup> and covers at least union conduct governed by section 8(b)(4) of Taft-Hartley. That statutory exemption is the central thesis of this article. The exemption of labor unions from antitrust liability will be analyzed in the context of "Pension Fund Leverage."<sup>2</sup>

Pension fund leverage is the power organized labor has, or could acquire, from controlling the investment of collectively bargained employee pension funds. Employee pension funds constitute the single largest source of investment capital in the American economy and represent the world's largest identifiable source of private wealth. By 1995, pension fund trusts that are the product of collective bargaining will have assets approximating one and one-half trillion dollars.<sup>3</sup> In its broadest sense, pension fund leverage (hereinafter PFL) is the power or leverage that comes from the ownership of this capital. A narrower facet of that power is the ability to impose conditions upon the lending of money. Obviously, in the case of organized labor the conditions would be the acceptance of organizing and bargaining objectives by borrowers.

That there are antitrust implications seems equally obvious. What these implications are in the labor union PFL context is less obvious. PFL is subject to regulation as unfair labor practice under the Taft-Hartley Act. However, that statute also grants PFL explicit, albeit as yet unrecognized, immunity from antitrust liability.

## BACKGROUND

In a recent article,<sup>4</sup> your author examined the potential for labor to take

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1. Labor Management Relations (Taft-Hartley) Act of 1947, §§ 1-303, 29 U.S.C. §§ 141-187 (1976) [hereinafter cited as Taft-Hartley].

2. Kaiser, *Labor's New Weapon: Pension Fund Leverage*, 34 *RUTGERS L. REV.* 409 (1982) [hereinafter cited as *Pension Fund Leverage*]. The term "pension fund leverage" is my own.

3. United States Department of Labor, *A PRIVATE PENSION FORECASTING MODEL*, prepared for Office of Pension and Welfare Benefit Programs by ICF, Inc. at 100 (October 1979); see *Pension Fund Leverage*, *supra* note 2, at 416.

4. *Pension Fund Leverage*, *supra* note 2.

control of investment of those fund assets under the existing legal regulatory structure (ERISA<sup>5</sup> and Taft-Hartley), the methods of exercising PFL if control is obtained, and the legal consequences of that exercise.

Taking it as given that the union appointed trustees of pension funds can gain control of all or a significant portion of that one and one-half trillion dollars and its concomitant power,<sup>6</sup> we posit four paradigmatic methods of exercising PFL.<sup>7</sup> Each paradigm has historical precedent, that is, each has been tried at least once. Each will be measured against the antitrust laws.

The four paradigmatic methods of exercising PFL, which are referred to throughout by the names given here, are:

I. Leaning on Lenders<sup>8</sup>

- A. A bank officer at Brown Bank receives a telephone call from an official of A.B.C. Union threatening that if the bank's commercial loan department continues to lend to Green Corporation, the A.B.C. Union's pension trustees will cease to do business with the bank's trust department.
- B. A.B.C. and a number of other unions, or their trustees, acting in concert, give the same advice to Brown Bank.
- C. The union(s) make good their threat.

5. Employee Retirement Income Security Act of 1974, §§ 2-4082, 29 U.S.C. §§ 1001-1381 (1976) [hereinafter cited as ERISA].

6. See *Pension Fund Leverage*, *supra* note 2, at 412-15. There it is explained why and how pension funds are subject to potential union control. In addition, we can note how ERISA creates the possibility of designating particular duties to less than all trustees or any of them. ERISA § 402(c), 28 U.S.C. § 1102(c) (1976). Designation of investment decisions might relieve employer appointed trustees of possible liability. That, of course, makes designation easier to sell to employers.

7. *Pension Fund Leverage*, *supra* note 2, at 414-15. It is thought that reference to "Green" and A.B.C. make the examples more intelligible. Some scholars might argue that the use of paradigms is slippery, they being subject to manipulation in order to fit theory and too abstract to fit the real world. I do not doubt that my paradigms suffer to some extent from such flaws. Yet, the world cannot operate without some hope of good faith. On the use of paradigms in legal analysis, see Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 751 (1982).

8. *Leaning on Lenders*. It has been claimed by the Amalgamated Clothing and Textile Worker's Union (ACTWU) that they exerted sufficient pressure upon Manufacturers' Hanover Trust Company to force the removal of James P. Finley from the bank's Board of Directors. At that time, Mr. Finley was Chairman of the Board of J. P. Stevens, Inc. Stevens was then involved in the infamous labor battle with the ACTWU involving the unionization of Steven's southern mills. *Pension Fund Leverage*, *supra* note 2, at 412.

## II. Labor Lending<sup>9</sup>

Unions establish their own qualified fiduciaries to handle their pension funds. These fiduciaries lend only to unionized employers.

## III. Share Ownership<sup>10</sup>

- A. A.B.C. uses proxies from its and various other unions' pension fund holdings to elect one of its officers to the board of Green Corporation.
- B. Green proposes a new issue of shares of its common stock. Officials of A.B.C., or its trustees, advise Green that the trustees will dump a large block of Green shares on the market at the time of the offering unless Green accepts its bargaining demands.
- C. A.B.C.'s pension plan purchases Green shares to establish PFL.

## IV. Capital Boycotts<sup>11</sup>

- A. Organized labor prepares a list of corporate employers considered to be acceptable investments. No non-organized employer appears on the list.

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9. *Labor Lending*. The United Mine Workers pension fund once owned control of a major Washington D.C. Bank. *Id.* at 425. In 1927, as a reponse to feelings of antilabor prejudice, Union Labor Life Insurance Company was formed. ULLICO is a union owned insurance company whose capitalization is from pension fund investment. ULLICO follows a policy of only investing in prolabor companies. *Id.* at 413.

10. *Share Ownership*. The Teamsters were attempting to unionize Montgomery Ward, Inc. in 1954. Sewell Avery, Montgomery Ward chairman, was opposing this organizational attempt. At the same time, other shareholders began a proxy contest to replace Mr. Avery as company chairman. A purchase of 12,500 Ward shares was made by the Teamsters. These holdings, along with the holdings of sympathetic trucking firms and, more importantly, banks that held significant Teamster's deposits totaled over 100,000 shares. Mr. Avery now found the union's organization plan acceptable, as three weeks prior to the proxy vote he signed a collective bargaining agreement with the Teamsters. *Id.* at 413.

11. *Capital Boycotts*. In 1974, Duke Power Company was being struck by the United Mine Workers. The UMW was joined by fifty-nine national labor unions in an agreement not to invest their pension funds in Duke Power stock. Duke Power had to take its proposed five million dollar new stock offering off the market, and then it gave in to the UMW and signed an agreement. *Id.* at 413.

- B. Organized labor proposes a hit list of ten corporate employers which it views as having the worst anti-union histories and no pensions invest in those.
- C. Banks which do business with employers on the "hit" list are blacklisted as possible fiduciaries.

Would these uses of PFL give any real power? Addressing Share Ownership consider this: by my estimate, in 1995 collectively bargained pension funds will own twenty to thirty percent of all New York Stock Exchange listed stocks.<sup>12</sup> Thirty percent of the shares of giant IBM<sup>13</sup>—which is a favorite pension fund investment—could elect a majority of the board of directors, if coupled with any other sizable holdings.<sup>14</sup> IBM is in large measure not unionized.

### *The Regulation of PFL*

Essentially, the Employee's Retirement Income Security Act of 1974 (ERISA)<sup>15</sup> regulates how pension funds may be dealt with. The Taft-Hartley Act<sup>16</sup> regulates how unions may deal with employers and persons with whom employers have relations.

### *ERISA—Trust Law*

ERISA mandates that a pension fund trustee discharge his duties for the sole and exclusive benefit of the plan beneficiaries.<sup>17</sup> Consequently, the prior articles' analysis concluded that under ERISA any, and only, a use of assets on behalf of persons other than the trust beneficiaries is a violation of ERISA.<sup>18</sup> The improper use of pension fund assets includes any threat to use assets because a threat of use constitutes an actual use of the assets, for trust law purposes. Any use of assets for PFL is a violation of ERISA because it is a use on behalf of a union organization and bargaining objective, rather than on behalf of the beneficiaries of a specific trust.

As a result, all three variations of Leaning on Lenders violate ERISA. They each involve the use of pension plan assets by a union for leverage

12. *Pension Fund Leverage*, *supra* note 2, at 411. The figure given in text refers to collectively bargained pension funds.

13. International Business Machines, Inc.; 1981 gross income on sales, rentals, services, \$29,070,000,000 (source 1981 annual report).

14. Pension funds of northern governments, which might be labor's ally, constitute those sizeable holdings. See *Pension Fund Leverage*, *supra* note 2, at 427-29. Note that another thirty percent of IBM's stock will be held by pension funds without any institution or ideology that is likely to unify them in the use of their proxies.

15. See ERISA, *supra* note 5.

16. See Taft-Hartley, *supra* note 1.

17. See 29 U.S.C. § 1104 (1976).

18. *Pension Fund Leverage*, *supra* note 2, at 429. See *Blassie v. Kroger co.*, 545 F.2d 58 (8th Cir. 1965).

toward a particular union objective, rather than for the sole benefit of the trust beneficiaries. Labor furthers its objectives through the use of pension assets—a benefit to labor prohibited by ERISA.

Labor Lending, the direct lending by labor-controlled financial institutions, could involve patent conflict of interest.<sup>19</sup> A union is a party in interest when it (or the pension funds of the employees it represents) owns an interest in a bank or other lender through or in which it invests. Thus, neither the A.B.C. Union nor its pension trust could own a bank and invest pension funds through the bank. However, that violation can be easily avoided by the simple expedient of separating ownership of the bank from the leveraging union and placing it in a non-interested union.<sup>20</sup>

It also would be easy for that union owned bank to violate its fiduciary obligations by making loans motivated too little by concern for the interests of trust beneficiaries. That would not be inevitable, either. Owning a well run bank, perhaps the largest in the world, would certainly add economic strength to labor's arsenal.

Share Ownership variations B and C violate ERISA as well, since share ownership results in the use of assets on behalf of persons other than the trust beneficiaries. The union and its members would benefit by using the leverage power to force the acceptance of bargaining demands.

Share Ownership variation A (proxy concentration), however, is a special case. Concentration of proxies among unions may look like the use of assets for the benefit of others, an ERISA violation, but it is not and the reason is simple. Alone, the stock holdings of one pension fund have no voting value, thus, they are not an asset. They only become an asset when combined with enough other shares to elect directors or influence corporate policy. If a trustee violates his charge by giving value to that which has none, the law of trusts is standing on its head.<sup>21</sup>

Capital Boycott variation C violates ERISA for it, too, involves the use of assets. The assets of a pension are invested in a bank or not depending on whether the bank deals with certain employers. Persons other than the trust beneficiaries are benefited by the investments. That is, the union acquires the bank's acquiescence in the organizing objectives. Conversely, variations A and B do not violate ERISA because they do not involve the use of assets, as none are invested or plied for leverage.<sup>22</sup>

Enforcement or observance of fiduciary obligations might prevent those forms of PFL which are fiduciary violations. However, if fiduciary violations occur, ERISA not only does not provide the employer victim either a remedy

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19. See ERISA, § 1105.

20. See *infra* notes 108-112 and accompanying text.

21. Leibig, *You Can't Do That With My Money—A Search for Mandatory Social Responsibility in Pension Investments*, 6 J. PENSION PLAN & COMPLIANCE, 358, 362 n.70 (1980). There Roy A. Schotland arrived independently at the same conclusion as to passthrough of proxies.

22. See *Pension Fund Leverage*, *supra* note 2, at 429.

or standing to redress those violations, it explicitly denies both.<sup>23</sup> And well it should, because the overriding purpose of trust law is to protect the beneficiaries' interests, and thus its focus is internal to the trust.<sup>24</sup> ERISA's obligations, prohibitions, and sanctions are directed toward fiduciaries and parties in interest. Further, ERISA declares the trust a non-judicial (i.e. non-sueable) entity vis-a-vis the PFL victim.<sup>25</sup> Thus, the PFL victim's remedy, if one exists, is under labor or antitrust law.

### *Taft-Hartley—Labor Law*

The Taft-Hartley amendments to the National Labor Relations Act<sup>26</sup> regulate the conduct of unions toward employers and third persons. This statute encompasses the use of PFL where that use is a "secondary boycott." Taft-Hartley's section 8(b)(4)(ii)(B) provides that it is an unfair labor practice for a "labor organization or its agents . . . to threaten, coerce or restrain any person . . . where . . . an object thereof is forcing or requiring any person . . . to cease doing business with any other person." It makes secondary boycotts involving coercion unfair labor practices. Taft-Hartley outlaws coerced secondary boycotts because a third party is forced or required to cease doing business with someone.

The gravamen of a secondary boycott is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employee's demands.<sup>27</sup>

Such conduct is also unfair labor practice when its purpose is "forcing or

23. ERISA § 502(a)(3), (a)(5), (a)(6), and (d)(1), 29 U.S.C. § 1132(a)(3), (a)(5), (a)(6), and (d)(1) (1976). A civil action may be brought—

- (a)(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;
- (a)(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or
- (a)(6) by the Secretary to collect any civil penalty under subsection (i) of this section.
  - (1) An employee benefit plan may sue or be sued under this subchapter as an entity. . . .

These sections bar remedies against the trust by denying an employer victim of PFL standing to sue.

24. *Pension Fund Leverage*, *supra* note 2, at 434. However, there your author suggested ways in which a PFL victim might manipulate internal trust regulation and trustee obligations.

25. *Id.* at 422.

26. Taft-Hartley, *supra* note 1.

27. *International B'hd Electrical Workers, Local 501 v. NLRB*, 181 F.2d 34, 37 (2d Cir. 1950) (L. Hand, J.).

requiring any other employer to recognize a labor organization as the representative of his employees."<sup>28</sup>

Clearly, the use of economic force can constitute coercion.<sup>29</sup> In each variation of Leaning on Lenders, at least an attempt is made to coerce third party conduct. This coercion impacts on an employer in the form of a cessation by the third party (the bank) of doing business with the employer. The forcing of that cessation is the very purpose of Leaning on Lenders. Thus, section 8(b)(4) of Taft-Hartley<sup>30</sup> forbids each variation of Leaning on Lenders as an unfair labor practice.

We can note in passing that Labor Lending and Share Ownership are unrelated to the conduct that section 8(b)(4) describes. They are outside the ambit of section 8(b)(4)'s proscriptions because they do not involve coercion.<sup>31</sup> Basically, they do not involve the type of secondary conduct section 8(b)(4) was intended to regulate. As to them the statute is irrelevant.

Capital Boycott variation C violates section 8(b)(4) for it too involves the coercion or attempted coercion of persons to cease doing business with employers. Capital Boycotts variation A and B do not involve coercion and, consequently, are not proscribed by section 8(b)(4). However, section 8(b)(4) is not irrelevant to Capital Boycotts A and B.

It is important to note that any use of PFL that violates section 8(b)(4) is subject to the sanctions and remedies of Taft-Hartley.<sup>32</sup> More importantly, it is also protected from antitrust liability by an heretofore unrecognized immunity prescribed in Taft-Hartley. That statutory immunity is the central thesis of this article. It is essential to note that this antitrust protection exists whether the conduct described as unfair is undertaken in the context of a labor dispute or otherwise.<sup>33</sup> The fact that a union may be using secondary

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28. Taft-Hartley § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

(b) It shall be an unfair labor practice for a labor organization or its agents (4) . . . (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— . . . (B) forcing or requiring any person to cease using, selling, engaging, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, that nothing contained in this clause (B) shall be construed to make unlawful, any primary strike or primary picketing.

29. *Associated Gen. Contractors v. NLRB*, 514 F.2d 422 (9th Cir. 1975). The court there said, "when Congress used 'coerce' in Section 8(b)(4)(B) it . . . intended to reach any form of economic pressure of a compelling or restraining nature." *Id.* at 438. [Court's footnote omitted.]

30. Taft-Hartley § 8(b)(4)(ii)(B), 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

31. As suggested in the prior article, Share Ownership variation B could be viewed as secondary coercion. This does not seem to be an important problem for the reasons stated. *Pension Fund Leverage*, *supra* note 2, at 441.

32. See *infra* notes 37-39 and accompanying text.

33. *Associated General Contractors v. NLRB*, 514 F.2d 433, 438 (9th Cir. 1975); *NLRB v. Local 751 United Bhd. of Carpenters and Joiners*, 285 F.2d 633, 639 (9th Cir. 1960); Penello

boycott PFL, such as Leaning on Lenders, in support of some other union's goals, or even as a punitive weapon where no present labor dispute exists, does not render section 8(b)(4) sanctions and immunities inapplicable.

Where the neutral party voluntarily enters into a secondary boycott, such boycotts having been peacefully solicited by a labor union, there is no violation of law. This peaceful secondary activity is what I have described as "insulated conduct."<sup>34</sup> Insulated conduct is secondary activity not prohibited under section 8(b)(4), and that will not support an action for damages under Taft-Hartley's section 303.<sup>35</sup> Without recognizing any statutory exemption, the Supreme Court has said in regard to such conduct that this is the "type of conduct which Congress focused upon but did not proscribe when it enacted 303 . . . [which evidenced a] . . . congressional determination to leave this weapon of self-held available."<sup>36</sup> Leaving regulation of such conduct to market forces is its "insulation." Capital Boycotts variations A and B are peacefully solicited secondary boycotts.

In *Teamsters v. Morton*, the Supreme Court found that state law "has been displaced by section 303 in private damage actions based on peaceful union secondary activities."<sup>37</sup> Therefore, if the secondary activity that is not prohibited under section 8(b)(4) will not support an action for damages under section 303, and section 303 is the sole basis for recovery of damages for secondary activity, then the secondary activity is insulated from attack under state law and, we will see, to a certain extent under the antitrust laws. The Court in *Morton* did not have antitrust actions before it.

Section 303 is central to my analysis in three ways. First, it creates insulated conduct. Second, it provides the remedy of actual damages to one injured by an 8(b)(4) violation. That remedy permits neither equitable relief

v. International Longshoremen's Ass'n, 277 F. Supp. 164, 169 (D. Md. 1964) (collecting cases). See *National Woodworking Mfrs. Ass'n. v. NLRB*, 386 U.S. 612, 645 (1967) where the Court stated:

There need not be an actual dispute with the boycotted employer, . . . for the activity to fall within this category, so long as the tactical object of the agreement and its maintenance is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim. [Court's footnote omitted].

Cf. *Jacksonville Bulk Terminals Inc. v. International Longshoremen's Ass'n.*, 457 U.S. 702 (1982); *Houston Insulation Contractors Ass'n v. NLRB*, 357 F.2d 182 (5th Cir. 1966), where the court held that Union B engaged in prohibited secondary activity in coming to the assistance of Union A. At the same time, Union A's identical conduct was "primary" and protected. The court said: "We think the thrust of the Act, particularly § 8(b)(4), as set out in many secondary boycott cases is to require each union to restrict its economic coercion to its own labor disputes and not to use that weapon in aid of another union." 357 F.2d at 189. The court found this case, at that time, to be unique on this aspect. *Pension Fund Leverage*, *supra* note 2, at 439 note 152.

34. See discussion in *Pension Fund Leverage*, *supra* note 2, at 441-443.

35. Taft-Hartley § 303, 29 U.S.C. § 187 (1976).

36. Local 20, *Teamsters v. Morton*, 377 U.S. 252, 259 (1964).

37. *Id.* at 261.

nor punitive damages nor attorney's fees. It preempts state law remedies.<sup>38</sup> Injunctive relief may be obtained through a suit the NLRB is obliged to file, if the agency issues an unfair practice complaint.<sup>39</sup>

An employer victim of PFL, it is suggested, would rather have the treble damage remedy of antitrust. He is going to need it. Capital Boycotts, some form of Labor Lending, and Share Ownership concentration of proxies have survived ERISA and Taft-Hartley scrutiny intact. However, the third thing that section 303 does is to explicitly deny the employer PFL victim an antitrust remedy.

### *Labor Unions and Antitrust: The Section 303 Connection*

Subsection (a) of section 303 of Taft-Hartley provides:

(a) It shall be *unlawful, for the purpose of this section only*, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as unfair labor practice in section 158(b)(4) of this article.<sup>40</sup>

The analysis starts with this proposition: "If Parliament does not mean what it said, it must say so,"<sup>41</sup> and so must congress in this case. Section 303 made unlawful for labor law purposes any conduct prohibited to a labor organization under 8(b)(4). It made it not unlawful for other purposes. The language of section 303 is subject not only one interpretation as to antitrust liability for conduct governed by section 8(b)(4). There is no liability.

When Congress makes a remedy exclusive, it normally does not seek to affect the legality of the conduct for other purposes. Rather, Congress simply denies remedies. Here, Congress made the remedy for a section 303(a) violation exclusive. Furthermore, assuming that the logical equivalent of "not unlawful" is "lawful," the import of section 303 goes deeper. Congress addressed the more basic issue of legality instead of using the language of preemption.

38. *Pension Fund Leverage*, *supra* note 2, at 436.

39. Taft-Hartley § 10, 29 U.S.C. § 150(1) (1976). I explained the essentially discretionary nature of the NLRB's actions in *Pension Fund Leverage*, *supra* note 2, at 444.

40. Taft-Hartley § 8, 29 U.S.C. § 158 (1976) (emphasis added). *Id.* Subsection (b) of that section, of course, provides the single damage remedy discussed above, text at note 38.

41. Herbert, *UNCOMMON LAW* 192 (1936). See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). "The authority to construe a statute is fundamentally different from the authority . . . to provide a new remedy which Congress has not decided to adopt." *Id.* at 2070. In *Texas Industries*, the Court in a unanimous decision held that there was no right of contribution under the antitrust laws, because the remedies provided by the Sherman Act are quite specific and comprehensive and the right of contribution is not mentioned. "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Id.* at 2069 (quoting *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981)). This reasoning can be applied without difficulty to analysis of the section 303 exemption.

The legislative history<sup>42</sup> is scant but unequivocal. The section originally proposed by Senator Taft did not contain the language "for the purposes of this section only" (hereinafter the section 303 exemption language). Senator Pepper was fearful of the possibility of criminal conspiracy liability for labor unions and officials who engaged in secondary boycotts.<sup>43</sup> To forestall such a possibility, the quoted language was introduced.<sup>44</sup> Senator Taft first proposed adding the language "for purposes of this section,"<sup>45</sup> and the final word "only" was added to further mollify Senator Pepper's continued objections.<sup>46</sup> It is more than incidentally interesting<sup>47</sup> that Senator Taft believed that he was creating a remedy with section 303 where none existed.<sup>48</sup>

The argument might be made that the section 303 exemption language is limited to liability for criminal conspiracy. However, at minimum, that argument must reduce some part of either the labor law or antitrust statutes to absurdity for the following reasons.

First, the opening sentence of the Sherman Act<sup>49</sup> declares restraints of trade to be "illegal." It will take something more than mere legislative interpretation to hold conduct which is not unlawful for any purpose outside section 303 to be at the same time "illegal" for Sherman Act purposes. The Clayton Act's<sup>50</sup> connection to the section 303 exemption is more direct. Clayton used the term "unlawful."<sup>51</sup> Unless the terms "illegal" and "unlawful" have some wholly different meaning both between Clayton and Sherman and between the labor statutes and the antitrust laws, the interpretation presented here must prevail.

The second reason why this section 303 exemption analysis must prevail is based on the identity, or near identity of criminal and civil violations of the antitrust laws. That is, even assuming that the section 303 exemption was addressed only to criminal conspiracy liability, then it must also bar criminal liability under section 1 of the Sherman Act.<sup>52</sup> Yet the elements of criminal and civil liability are identical, with the exception that criminal liability has the additional requirement of scienter.<sup>53</sup>

A conclusion that section 303 exempts criminal liability and not civil liability, would result in findings of violation of the Sherman Act when an

42. See 93 CONG. REC. 4833-47, 4858-75 (1947).

43. *Id.* at 4858-59.

44. *Id.* at 4859-60.

45. *Id.* at 4859.

46. *Id.* at 4860.

47. One could argue that Senator Taft's understanding is conclusive, given his expressed desire to have unions subject to antitrust.

48. 93 CONG. REC. at 4860 (1947).

49. Sherman Act § 1, 15 U.S.C. § 1 (1976).

50. Clayton Act §§ 1-26, 15 U.S.C. 1227, 44 (1976).

51. *Id.* at §§ 13, 13(a), 14. The argument is further strengthened by the fact that the treble damage provision of antitrust is contained in 15 U.S.C. § 15 of the Clayton Act.

52. Sherman Act § 1, 15 U.S.C. § 1 (1976).

53. *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n.13, 443 (1978). See generally *Wirtz, Purpose and Effect in Sherman Act of Conspiracies*, 57 WASH. L. REV. 1 (1981).

unlawful purpose or anticompetitive effect is present, but no violation when an anticompetitive effect and criminal intent are present. Such findings would be inconsistent with the traditional interpretation of the statute.<sup>54</sup> They would require judicial revision of both the labor and the antitrust provisions because of the subsequent contradictions. Furthermore, this conclusion requires ignoring what Congress thought—that no other liability for damages existed, civil or criminal<sup>55</sup>—when it enacted section 303.

What is most remarkable about the section 303 exemption is that the federal courts have never directly addressed its meaning or scope. In *International Longshoreman's and Warehouseman's Union v. Juneau Spruce Corp.*,<sup>56</sup> the union argued that section 303 does not apply until the labor board has determined that an unfair labor practice has been committed. The court stated: "Rather the opposite seems to be true. For the jurisdictional disputes proscribed by Section 303 . . . are rendered unlawful 'for the purposes of this section only' thus setting apart for private redress, acts which might also be subject to the administrative process."<sup>57</sup> This is the only time that the meaning on section 303's exemption language has been discussed.

Whatever the meaning of *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*,<sup>58</sup> nothing in that case affects this exemption analysis. That case involved union picketing that compelled a general contractor to agree to subcontract mechanical work only to firms that were parties to the union's current collective bargaining agreement. The labor union conduct which the Supreme Court held to be outside the traditional labor antitrust exemption was not within the ambit of section 8(b)(4) or the remedy or immunity of section 303. Thus, the section 303 exemption was not triggered in that case.

Writing for a five member majority in *Connell*, Justice Powell ruled that a "hot cargo" agreement, which is an unfair labor practice under section 8(e) of Taft-Hartley,<sup>59</sup> could also be found to be in violation of section 1 of the Sherman Act. The agreement bound Connell, the general contractor, to deal only with subcontractors who had signed the collective bargaining agreement with the defendant plumbers. Such an agreement is a form of secondary boycott. It is not one, however, for which section 303 provides a

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54. *United States v. Container Corp.*, 393 U.S. 333 (1969); *supra* note 53.

55. 93 CONG. REC. 4833-47, 4858-75 (1947).

56. 342 U.S. 237 (1952).

57. *Id.* at 244.

58. 421 U.S. 616 (1975); *see infra*, note 81.

59. 29 U.S.C. § 158(e) (1976) provides in part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

remedy because such an agreement is regulated by section 8(e) and section 303 is limited to 8(b)(4) violations.

In fact, the Court in *Connell* came very close to explicit recognition of both this distinction and the section 303 exemption. Rejecting the argument that the labor law damages remedy was exclusive, Justice Powell stated:

This argument is grounded in the legislative history of the 1947 Taft-Hartley amendments. *Congress rejected attempts to regulate secondary activities by repealing the antitrust exemptions in the Clayton and Norris-LaGuardia Acts, and created special remedies under the labor law instead.*<sup>60</sup> It made secondary activities unfair labor practices under 8(b)(4), and drafted special provisions for preliminary injunctions at the suit of the NLRB and for recovery of actual damages in the district courts. . . . But whatever significance this legislative choice has for antitrust suits based on those secondary activities prohibited by 8(b)(4), it has no relevance to the question whether Congress meant to preclude antitrust suits based on the "hot-cargo" agreements that it outlawed in 1959. There is no legislative history in the 1959 Congress suggesting that labor-law remedies for 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRB.<sup>61</sup>

While the section 303 exemption is not affected by *Connell*, the section 303 exemption will have a profound impact on *Connell*, limiting its scope to section 8(e) violations. The limiting effect of the section 303 exemption will be discussed further below.<sup>62</sup>

*Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*<sup>63</sup> is also inconsistent with any reading of section 303 that does not recognize the explicit antitrust exemption therein. In *Morton*, the court held that "the provisions of section 303 mark the limits beyond which a Court, state or federal, may not go in awarding damages for a union's secondary activities[.]"<sup>64</sup> Therefore, secondary activity which violates section 8(b)(4) (e.g. Leaning on Lenders) is subject only to the section 303 remedy of damages. Furthermore, the court found that secondary activity which is within the ambit of section 8(b)(4) but does not involve coercion (e.g., the union's conduct in *Morton* and Capital Boycotts A and B), are left for regulation to the forces of the marketplace.<sup>65</sup> This activity constitutes insulated conduct.

As has been noted in the previous article:

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60. Query: is the word "instead" especially pregnant with the question: Instead by creating what? By creating the section 303 exemption.

61. 421 U.S. at 634. (Court's citations and footnotes omitted (emphasis added).

62. See *infra*, notes 66-69 and accompanying text.

63. 377 U.S. 252 (1964).

64. *Id.* at 257. The Court was not specifically addressing antitrust damages.

65. *Id.*

Voluntarily entered, though union solicited, secondary boycotts are insulated activity under the NLRA. The Court has ruled that they are an economic sanction the regulation of which is more properly left to the forces of the market. "Capital boycotts" variations A and B involve no coercion. They are voluntary refusals to do business, peacefully solicited of pension trustees who we may safely assume are willing to accommodate the union. It is not necessary that the union have a labor dispute, or that any union does, for section 8(b)(4), and the rule of *Morton* to apply. Peaceful secondary activities which do not violate section 8(b)(4), are to be left, for governance, to the forces of the marketplace. Coercion is a required element of a section 8(b)(4) violation. Other secondary conduct is insulated from judicial scrutiny. "Capital Boycotts" variations A and B are insulated secondary activity.<sup>66</sup>

There is a direct inconsistency between leaving conduct subject to market forces, and holding it subject to antitrust restrictions, especially in an area arguably within the scope of per se antitrust liability. Thus, unless *Connell* overruled *Morton*, the section 303 exemption analysis is intact. Instead, *Connell* reaffirmed *Morton*,<sup>67</sup> with its market forces analysis. Per se illegality, of course, would leave nothing to the regulation of market forces. The inconsistency of insulated conduct and antitrust liability is self-evident for conduct cannot be both lawful and unlawful at the same time. That inconsistency is fatal to the argument<sup>68</sup> that the peacefully solicited Capital Boycotts variations A and B, because they do not violate section 8(b)(4), are not protected by the section 303 exemption.

The section 303 express exemption posited is new. The courts have never plumbed the meaning of the section 303 exemption language. It is with great trepidation that one suggests that the federal courts reread the federal labor statutes. Nonetheless, that seems to be in order here.

#### *PFL Under Traditional Exemption Analysis*<sup>69</sup>

Your author must assume, for purposes of analysis, that he is the only observer who will see anything new in section 303. That raises the question: will any use of PFL be exempt under labor/antitrust exemption analysis as the law now stands, that is, without the injection of a section 303 exemption?

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66. *Pension Fund Leverage*, *supra* note 2, at 443.

67. 421 U.S. at 616. In *Connell*, Justice Powell followed *Morton* as controlling the issue of state preemption.

68. The employer plaintiff tried that argument in *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 258 (1964), with regard to the availability of state law remedies.

69. I do not intend a complete treatment of the traditional labor exemption analysis under the case law. Rather, I will only inquire to the extent necessary for the analysis of PFL, because the excellent article by Handler and Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 COLUM. L. REV. 459 (1981) has so to speak, preempted the field.

The reader should consider the nature of exemption. If the exemption question is answered affirmatively, the quality of a labor organization's conduct vis-a-vis standards of antitrust legality is moot. As the Supreme Court said in *United States v. Hutcheson*,<sup>70</sup> when union conduct is exempt: "The licit and illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." We will be able to conclude that, under traditional labor exemption analysis Capital Boycotts variations A and B are still exempt. We start from a pre-*Connell* perspective.

To Justice Frankfurter, the labor and antitrust laws were to be read as an interlacing and harmonizing text. What was permitted by the labor laws could not be prohibited by antitrust and, by a parity of reasoning, what was already forbidden by the labor statutes could not result in cumulative penalties under the Sherman Act.<sup>71</sup>

That approach eliminated contradictory as well as cumulative treatment of labor conduct. Conduct defined as an unfair labor practice was not subject to antitrust sanction. Taft-Hartley made the single damage remedy available.

Immunity from antitrust was not to be confused with antitrust impunity. If a union conspired with employers to aid those employers in restraining competition in the employer's market, the exemption is lost according to *Allen Bradley v. Local 3, IBEW*.<sup>72</sup> In that case, the electrical worker's union conspired with local manufacturers and contractors to exclude electrical products manufactured by anyone other than New York area producers who had contracts with the defendant union. The conspiracy was promoted by the use of hot cargo agreements.

It is clear that the conspiracy with the employer (non-labor) group is a required element of loss of exemption under the *Allen Bradley* rationale. As the Court stated "such an agreement standing alone would not have violated the Sherman Act."<sup>73</sup> Further, the conspiracy must be in aid of the restrictions in the employer's market.<sup>74</sup>

In *United Mine Workers v. Pennington*,<sup>75</sup> the Court held that a complaint, alleging a conspiracy between a union and a large employer to set wages so as to drive small employers out of the market, stated a cause of

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70. *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). After 1947, of course, the Taft-Hartley remedy was available.

71. Handler, *Changing Trends in Antitrust Doctrines*, 77 COLUM. L. REV. 979, 1023 (1977).

72. 325 U.S. 797, 809 (1945). See Handler and Zifchak, *supra* note 69, at 478-82.

73. 325 U.S. at 809.

74. See, e.g., *Bodine Produce, Inc. v. United Farm Workers Organizing Comm.*, 494 F.2d 541 (9th Cir. 1974); *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 896 (5th Cir. 1974); *Davis Pleating & Button Co. v. California Sportswear & Dress Ass'n*, 154 F. Supp. 864 (S.D. Calif. 1956).

75. 381 U.S. 657 (1965).

action.<sup>76</sup> While the conspiracy was the crux of the loss of the exemption, *Pennington* has been read by the lower courts to require predatory intent—actually forcing someone out of business—before the exemption is lost.<sup>77</sup> The conspiracy in any case was not protected by its use of wage agreements, a mandatory bargaining subject,<sup>78</sup> as the vehicle of market restriction.<sup>79</sup>

Speaking of labor's exemption in *Connell*, Justice Powell remarked:

The basic sources of organized labor exemption from Federal antitrust laws are §§ 6 and 20 of the Clayton Act . . . and the Norris-LaGuardia Act. . . . These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. See *United States v. Hutcheson*, 312 U.S. 219 (1941). They do not exempt concerted action or agreements between unions and nonlabor parties. *Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965). The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. . . . Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.<sup>80</sup>

In *Connell*, the Court relied on the combination with non-labor groups and the combination's control of entry into a market to find the agreement outside the labor antitrust exemption. This marks no great departure from the *Allen Bradley*, *Pennington* rationale. In short, the cases do not remove the antitrust exemption unless there is a combination with nonlabor groups, to control competition in a non-labor market in favor of the parties combined. Finally, in each of those cases, competitors would have been forced out of an entire identifiable market. It may even be fair to suggest that the agreement or conspiracy must have the direct effect of excluding competitors

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76. We shall see that it is not at all insignificant that the union's pension trust was dismissed from that action by the lower court. See *infra* notes 83-85 and accompanying text.

77. *Smitty Baker Coal Co. v. UMW*, 620 F.2d 416, 432 (4th Cir.), cert. denied, 449 U.S. 870 (1980); *Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc.*, 504 F.2d 895, 903 (5th Cir. 1974); *Associated Milk Dealers, Inc. v. Milk Driver's Local 753*, 422 F.2d 546, 554 (7th Cir. 1970). This gloss on *Pennington* may be viewed as having been questioned in *Federal Maritime Comm'n v. Pacific Maritime Ass'n*, 435 U.S. 40, 61 (1978).

78. Taft-Hartley § 8(d), 29 U.S.C. § 158(d) (1976).

79. *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) dealt with restriction on marketing hours contained in a collective bargaining agreement. The agreement was held exempt.

80. 421 U.S. at 621-623 (some citations and text omitted).

from a market. On the other hand, *Connell* casts doubt on a requirement of predatory intent.<sup>81</sup>

The questions thus presented are, do any variations of Leaning on Lenders of Capital Boycotts involve: 1) combinations with non-labor groups; which are 2) in aid of the market restrictive activities of the party combined with. Because there are no PFL antitrust cases, the answers must be drawn from these general principles. The answers are something of a mixed bag.

It is quite clear that combinations *of* labor unions do not satisfy the requirement of combinations *with* non-labor groups. That a union has no interest itself in the outcome of an organizing campaign is of no consequence to the labor exemption.<sup>82</sup> There is no distinction between Leaning on Lenders variations A and B which can be grounded upon the number of unions involved.

The really interesting questions are: first, is the pension trust a non-labor group; and second, does a conspiracy exist between union officials and the pension trust. Both questions will be answered in the negative.

A pension trust is not the kind of non-labor group that the courts have had in mind when positing the criteria for loss of the antitrust exemption. That is, a trust is only in the most narrow sense a competitor in the market for the lending of capital. More basically, a trust is—to the extent that union appointed trustees can control its investments—so much an extension of the union that it has to be outside the definition of “non-labor group.” Non-labor group refers to businessmen.

The point becomes clearer if we consider the possibility of finding a conspiracy between a union, acting through its officers, and a trust, acting through its trustees, whom we shall assume are the same persons. In order to find a conspiracy we must posit complete separate identities between one person acting in separate capacities. This schizophrenia, necessary to the finding of conspiracy, destroys the conspiracy. For all the trustee/officer

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81. See 421 U.S. at 623. The only real departure in *Connell* was the notion that a § 8(e) unfair labor practice could give rise to or even be an antitrust violation. As I noted previously, whatever the law ought to be on § 8(e), Justice Powell conceded that conduct which violated § 8(b) would be protected by the § 303 exemption. See *supra* text at notes 59-62. Handler and Zifchak characterized Justice Powell as conceding that a § 8(b)(4) violation would still be within the so-called nonstatutory exemption. See Handler and Zifchak, *supra* note 69, at 487. The § 303 exemption, discussed *supra*, is not a nonstatutory exemption. As Handler and Zifchak state:

Arguably the holding in *Connell* may be limited to the proposition that a hot cargo agreement, if constituting an unfair labor practice and if secured outside of a bargaining relationship, may be the basis of an antitrust suit. This is the construction put upon the decision by some of the lower courts. In that event *Connell* may be a vestigial curiosity rather than the sweeping ruling urged in *Conex*. See, e.g., *Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105 (9th Cir. 1979). Handler and Zifchak, *supra* note 69, at 489 n.174 (collecting cases).

Whatever else *Connell* means, it has had an unsettling and confusing effect in the lower courts. See Handler and Zifchak, *supra* note 69, at 491 n.180 (collecting cases).

82. *Bodine Produce, Inc. v. United Farm Workers Organizing Committee*, 494 F.2d 541, 557 (9th Cir. 1974).

need do is be sure that he is acting as a union officer when planning and implementing PFL. Or, if all PFL is deemed to violate the Sherman Act when engaged in by unions, trustee/officer can act only in his trustee capacity<sup>83</sup> and rely on the trust's substantive non-liability which will be discussed below. Beyond this, a finding of conspiracy would become "curiouser and curiouser."<sup>84</sup>

And even if a conspiracy is found, it is not for the requisite purpose of controlling competition in the market of the non-labor co-conspirator. If the trust is a competitor, it competes in the lending of capital at the "wholesale" level whereas any effect of PFL will be found to be effective at the "retail" borrowers' level—a different market. In fact, treatment of trusts as lenders, rather than investors, requires closing one's eyes to the real nature of things.

Finally, one must consider the ERISA mandated non-entity status of trusts in determining whether it is a non-labor group. ERISA provides that a trust may be sued as an entity only for the purposes provided in that Act.<sup>85</sup> The purposes provided do not include antitrust liability. The trust's otherwise non-entity status provides additional weight to the argument that the trust is not a non-labor group. The upshot of this analysis is that in order to remove PFL from the labor antitrust exemption, another non-labor group must be found, with whom the unions are acting in combination. Such a non-labor group exists in Capital Boycott variation C and in Leaning on Lenders variation C, and arguably also in variations A and B of Leaning on Lenders.

Variations C of both Leaning on Lenders and Capital Boycotts involve combinations with a non-labor group. It is not necessary that all parties to a conspiratorial combination be willing conspirators. That is, if a party is coerced into combination which would be an antitrust conspiracy if the coerced party had willingly complied, there is then sufficient combination to find an antitrust violation.<sup>86</sup> The attempts, and presumably at least occasional success in the variation Cs, at compelling bank participation will suffice to meet the *Allen Bradley* non-labor group combination requirement. Leaning on Lenders variations A and B suffer the same fault if an attempted combination is sufficient to find combination for *Allen Bradley*. There is significant authority for believing it will be held sufficient.<sup>87</sup>

Further, each of these PFL variations is intended to affect the market of the party combined with, and does so in part. Likewise, if predatory intent is required, each satisfies that requirement. In the final analysis, only Capital Boycotts A and B remain exempt under traditional antitrust exemption analysis.

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83. See *infra*, notes 91-102 and accompanying text.

84. LEWIS CARROLL, *THROUGH THE LOOKING GLASS*.

85. *Pension Fund Leverage*, *supra* note 1, at 420. ERISA, § 1132.

86. See generally *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). There the Court said that the initial compliance was sufficient to constitute "a combination . . . at least as of the day he unwillingly complied. . . ." *Id.* at 150 n.6.

87. *Klor's v. Broadway-Hale Stores*, 359 U.S. 207 (1959); *Atlantic Heel Co. v. Allied Heel Co.*, 284 F.2d 879 (1st Cir. 1960).

On this score, one point remains to be considered: can Capital Boycotts A or B be further protected by enshrining their use in a collective bargaining agreement? The analysis goes: First, *Connell* can be read, and has been read,<sup>88</sup> to apply only to matters outside the context of collectively bargained agreements; second, ERISA allows delegation of duties among trustees;<sup>89</sup> third, ERISA subjects are mandatory bargaining subjects;<sup>90</sup> and fourth, unions can bargain for the delegation of a veto power to union appointed trustees over investments. That veto is all that is required for a capital boycott. Thus, whatever shield the collective bargaining context provides to antitrust liability could be extended to Capital Boycotts A and B.

### *Antitrust Legality*

Should it be decided that PFL is outside the labor antitrust exemption, further inquiry is required as to the standard of antitrust legality. There are two familiar choices, conduct which is per se illegal and conduct which is judged by a rule of reason. Price fixing is the paradigm of per se illegality. It is a per se violation of section 1 of the Sherman Act.

It is often said that a rule of per se illegality is applied to group boycotts. As stated in *Klor's, Inc. v. Broadway-Hale Stores*: "Group boycotts or concerted refusals by traders to deal with other traders have long been held to be in the forbidden [per se] category."<sup>91</sup> A careful analysis shows that the Court in *Klor's* looked to the injury to free competition, the motivation of the defendant, and defendant's lack of other justification. In short, commercial motivation (or commercial effect) in undertaking the boycott activities has always been central to a finding of per se illegality. In *Klor's*, the Court said that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives."<sup>92</sup> Similarly, Justice Stone espoused the belief in *Apex Hosiery Co. v. Leader* that the Sherman Act is essentially inapplicable to non-commercially motivated restraints.<sup>93</sup>

That type of rationale was followed very recently in *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council*<sup>94</sup> which was a progeny of *Connell*. *Muko* involved antitrust liability for an agreement similar to the agreement in *Connell*. In *Muko*, the Third Circuit said:

88. Handler and Zifchak, *supra* note 69, at 489 n.174.

89. 29 U.S.C. § 1102(c)(3) (1976).

90. NLRB v. Amax Coal Co., 449 U.S. 1110 (1981); see *Allied Chem. and Alkali Workers Local 1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157 (1971).

91. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959).

92. *Id.* at 213 n.7 (citing *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940)).

93. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

94. 670 F.2d 421 (3d Cir. 1982).

Generally, the application of the *per se* rule has been limited to those "classic" boycotts in which a group of business competitors seeks to benefit economically by excluding other competitors from the marketplace. . . . [A] survey of the U.S. Supreme Court's group boycott decisions in which the *per se* rule was involved "confirms that it is attempts by competitors to exclude horizontal competitors which trigger the *per se* rule."<sup>95</sup>

The *Muko* court noted that its case was not one in which a competitor was attempting to cut a horizontal competitor out of the market. The agreement in question did not drive the alleged victim from the market; nor did it have that purpose. Significantly, the court looked to whatever procompetitive effect the agreement might have.<sup>96</sup>

Under a *rule of reason* it will be far easier to justify Capital Boycotts A and B than the other forms of PFL to which antitrust is relevant. The market impact in each type of Leaning on Lenders and capital Boycott C is direct. The motivation in some cases would be predatory and each might drive a victim from the market. Capital Boycotts A and B suffer from none of these anticompetitive traits.

Capital Boycotts and Labor Lending or perhaps just a more unified labor investment strategy might have procompetitive effects. Labor Lender's, for instance, would be operating from a different social perspective. Presumably that would result in some differences in lending (i.e. money use selling) policies. It is characteristic of oligopoly, and of course monopoly, that one who comes to purchase in such a market finds a single selling policy.

Consider the following analysis: A part of what ails the United States' economy is underfunding of research and development and other capital investments. This is a result of a fixation with short-term profit.<sup>97</sup> Labor uses as one<sup>98</sup> criterion for its investment the investee's own level of long-term development investment. Labor's insistence upon research and development investment might put United States industry back in competition with Japanese firms<sup>99</sup> which invest in their futures. Japanese companies do not lay off workers.<sup>100</sup> Turning American business away from its short term profit fixation would be a great social good.

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95. *Id.* at 429-30.

96. *Id.* at 432-33.

97. See generally: David, *Industrial Research in America: Challenge of a New Synthesis*, 209 SCIENCE 133 (1980); Mansfield, *Research and Development, Productivity, and Inflation*, 209 SCIENCE 1091 (1980); Riesz, *Revenge of the Marketing Concept*, 23 BUSINESS HORIZONS 49 (1980); Young, *To Revive Research and Development*, BUSINESS WEEK, Sept. 17, 1979 at 21; and *A Diminished Thrust from Innovation*, BUSINESS WEEK, June 30, 1980 at 60.

98. There are others, such as history of environmental responsibility, equal employment history, labor relations, etc.

99. See *An Erosion of Saving*, BUSINESS WEEK, June 30, 1980 at 61.

100. "You can't lay off people because of a recession. The recession is not the workers' fault. Management must sacrifice profit and share the pain." Akio Morita, founding partner Sony Corporation, Interview, PLAYBOY MAGAZINE, August 1982, at 69.

Further, Capital Boycotts based on other motivations besides acquisition of leverage in bargaining contexts may be immune from antitrust. Foremost among these other motivations, the boycott denies financing to business's alleged southern strategy,<sup>101</sup> which some might wish to analyze as an odious form of class exploitation. As such, the boycott approaches the kind of ideologically motivated boycott recently held to be beyond the reach of the Sherman Act in *Missouri v. National Organization of Women*.<sup>102</sup> While predictability is low, this rationale offers protection to at least some forms of Capital Boycotts.

#### CONCLUSION/MISCELLANEOUS

In the previous article, I discussed at length the trust's substantive non-liability.<sup>103</sup> In short, ERISA forecloses the possibility of bringing an antitrust action against the pension plan. Extracting treble damages from the assets of pensioners is abhorrent to the purposes of ERISA. Federal courts have uniformly dismissed pension funds as defendants in antitrust litigation.<sup>104</sup>

Liability of the pension plan under state antitrust laws is clearly precluded by ERISA's section 514.<sup>105</sup> Liability of unions under state antitrust laws was forbidden in *Connell*.<sup>106</sup> As my prior analysis and *Connell* make clear, the PFL game is going to be played entirely by federal rules.

There are two loose antitrust ends. First, the pass through of proxies could result in violation of section 8 of the Clayton Act.<sup>107</sup> That section forbids anyone from holding directorships on boards of competitors. The problem is amenable to the simple solution of using separate officials for directorships of competitors. The second loose end is of somewhat greater moment.

#### *Union Central Bank N.A.*

The other loose end is monopolization in the field of banking. Previously, I concluded that direct lending by labor could violate ERISA.<sup>108</sup> Clearly, a trustee cannot invest pension funds in a bank controlled by a party in interest (the plan-sponsoring union is a party in interest). The direct labor lending prohibition could be circumvented, if one union owned a bank solely as an

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101. See generally J. RIFKIN AND R. BARBER, *THE NORTH WILL RISE AGAIN* (1978) and *Pension Fund Leverage*, *supra* note 2, at 435.

102. *Missouri v. National Organization for Women*, 620 F.2d 1303 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980); cf. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

103. *Pension Fund Leverage*, *supra* note 2 at 432-35.

104. *UMW v. Pennington*, 325 F.2d 804 (1964), *rev'd on other grounds*, 381 U.S. 657 (1965); *Younce v. Miners Memorial Hospital Ass'n*, 161 F. Supp. 178 (W.D. Va. 1958).

105. 28 U.S.C. § 1145 (1976).

106. *Connell*, 421 U.S. at 635.

107. 15 U.S.C. § 19 (1976).

108. See *supra* notes 18-20 and accompanying text; *Pension Fund Leverage*, *supra* note 2, at 426-427.

investment. The union would not invest its pension funds in the bank, but the bank's trust department could accept pension funds from other unions. The bank's loan department would have a policy of promoting loans to pro-labor companies. The bank would provide clout without the prohibited direct leverage through use of assets. The banking industry monopolization problem is purely hypothetical at this point. Potential for success as a competitor is not grounds for exclusion of labor from the banking market.

The bank-holding union could buy the stock of a bank in the market or could start a new bank from the ground up. It takes only five or more natural persons to form the national banking association required for the incorporation of the bank.<sup>109</sup> The minimum amount of capital is a mere \$200,000.<sup>110</sup> In short, the requirements are hardly onerous. The name of this bank could be "Union Central Bank, N.A." Following the filing of the statutory prerequisites of incorporation, and provided the Comptroller of Currency approves the application, Union Central Bank would open its door for business.<sup>111</sup> In the working man's view, Union Central Bank would give new meaning to the term "full service" bank.

One final observation: If the conclusions that trustees are always free to refuse to make investments and that the trusts are free from antitrust liability are correct, unions may be wholly unnecessary or even undesirable participants in a national campaign to effectuate the use of PFL. If unions can be held accountable under antitrust for PFL use, it is time for some labor appointed trustees—*of course acting solely in their independent trustee capacities*—to form the "Conference of Union Trust Officials Fellowship Foundation,"<sup>112</sup> and get unions out of the PFL business.

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109. National Bank Act of 1864, § 5, 12 U.S.C. § 21 (1976). I am assuming the bank will be a national bank. The five people forming the association could be any five pro-labor people.

One of the glories of national banks status—from labor's point of view—is that a National Bank can be sued only in its domicile. 12 U.S.C. § 94. Thus, for example, labor would be able to have any antitrust actions against its bank litigated in the Southern District of New York.

110. *Id.* at § 51.

111. *Id.* at § 26.

112. *See supra*, notes 98-102 and accompanying text.

