UNION "CORPORATE CAMPAIGNS" AS BLACKMAIL: THE RICO BATTLE AT BAYOU STEEL

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I. INTRODUCTION

On October 29, 1997, Bayou Steel Corporation and the United Steelworkers of America (USWA) entered into a confidential settlement agreement ending the company's civil RICO lawsuit based on the Steelworkers' "corporate campaign."[1] The settlement was reached after the close of discovery, and just before Bayou Steel's deadline to respond to the Steelworkers' motion for summary judgment.[2] Accordingly, an actual judicial resolution of the issues raised in the litigation will have to wait for another case. A substantial amount was learned from this case, however, and some new trails were blazed. This paper examines the Steelworkers' war against Bayou Steel, analyzes the core legal issues raised and sharpened in the course of that dispute, and concludes that union corporate campaigns constitute actionable racketeering.

II. OVERVIEW OF FEDERAL RACKETEERING LAW

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, ("RICO") takes an organizational approach to penalizing unlawful conduct by reaching upstream from "street-level" conduct to the management and control levels of organizations. Specifically, RICO § 1962 (c) makes it unlawful for a "person" to "participate in the conduct of the affairs" of an "enterprise" through a "pattern" of "racketeering activity."[3] Some of RICO's elements are easier to grapple with than others. For example, a labor union clearly satisfies RICO's broad definition of a "person."[4] Similarly, as set out in detail *infra*, the tactics which

1. *See Bayou Steel, Steelworkers Settlement Complaints against Union, Company*, DAILY LAB. REP., Oct. 31, 1993, at A1; Corinna C. Petry, *Bayou, USW Agree; Two Sides Settle Rico, Labor Issues*, AM. METAL MKT., Oct. 31, 1997, at 12.

2. More than one year before the settlement, the parties had reached an agreement to end the Steelworkers' 42-month strike. *See Bayou Steel Corp., Steelworkers Bargain Six-Year Pact Ending 42-Month Strike*, DAILY LAB. REP. (BNA), Sept. 25, 1996, at A8; Corinna C. Petry, *Workers Return to Bayou (81 of 206 Ex-strikers Return to Bayou Steel Corp.)*, AM. METAL MKT., Nov. 8, 1996, at 2.

3. 18 U.S.C. § 1962(c) (1994).

4. *See* 18 U.S.C. § 1961(3) (1994) ("'[P]erson' includes any individual or entity capable of holding a legal or beneficial interest in property . . . .").

together comprise a corporate campaign constitute a "pattern" of activity.[5] Indeed, these elements were not disputed in Bayou Steel's RICO suit against the Steelworkers.[6] RICO's racketeering, participation, and enterprise elements, however, are relatively harder to understand and apply.

A. "Racketeering Activity" Means "Predicate Acts"

RICO defines racketeering activity according to an array of "predicate acts."[7] Among these are: (1) mail and wire fraud; (2) violations of the federal Travel Act; and (3) any act or threat involving extortion chargeable under state law that is punishable by imprisonment for more than one year.[8] Each of these potential predicate acts breaks down, in turn, according to its own elements. Mail and wire fraud, for example, each have two elements: (1) a scheme or artifice to defraud; and (2) use of the mail or wires.[9] Similarly, the Travel Act makes it unlawful to travel in interstate commerce with the intent to "promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity."[10] As set out in detail *infra*, a corporate campaign generally will involve use of the mail and wires, and interstate travel.

Perhaps the most interesting and significant of the predicate acts likely to be present in a corporate campaign is state law blackmail, which is a species of extortion.[11] Indeed, applying RICO to corporate campaigns comes down, in large measure, to understanding the crime of blackmail under state law, and recognizing that—legally speaking—corporate campaigns are, at

5. *See* 18 U.S.C. § 1961(5) (1994) ("'[P]attern' of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . .").

6. *See generally* Brief in Support of Defendants United Steelworkers of America's and Industrial Union Department's Motion for Summary Judgment, Bayou Steel v. United Steelworkers of America, No. 95-494-RRM, (D. Del. filed July 28, 1997), [hereinafter "Steelworkers' Summary Judgment Brief"].

7. *See* 18 U.S.C. § 1961(1) (1994) (specifically identifying "predicate acts" as any of a number of state and federal crimes including, among others, murder, kidnapping, extortion, bribery, mail fraud, and wire fraud).

8. *See id.*

9. *See* 18 U.S.C. § 1341 (1994) (mail fraud); 18 U.S.C. § 1343 (1994) (wire fraud).

10. 18 U.S.C. § 1952 (1994).

11. *See infra* notes 115-40, and accompanying text.

bottom, a pattern of blackmail.[12]

B. The "Enterprise" and "Participation" Elements of RICO

The "enterprise" and "participation" elements of RICO probably are the most difficult to conceptualize and apply. The statutory definition of "enterprise" is very broad, including "any union or group of individuals associated in fact although not a legal entity."[13] Accordingly, a RICO enterprise may include "virtually any de facto or de jure association."[14] An association of entities, therefore, with or without the individuals who own or control the entities, may together constitute a RICO enterprise.[15] Ultimately, a RICO enterprise may be comprised of any combination of individuals, corporations, or other entities.[16] Moreover, whether the evidence in a particular case establishes an enterprise is a question of fact for the jury to decide.[17]

RICO, however, also distinguishes between its "person" and "enterprise" elements. Indeed, a recurring issue in the RICO case law is whether the defendant-person and the alleged enterprise are really the same entity, versus being sufficiently distinct to

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12. *See infra* notes 141-42, and accompanying text.

13. 18 U.S.C. § 1961(4) (1994) ("'[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . ."). *See* United States v. Turkette, 452 U.S. 576, 580-81 (1981) ("There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact.").

14. Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 789 (3d Cir. 1984).

15. *See e.g.*, River City Mkts. v. Fleming Foods West, 960 F.2d 1458, 1461 (9th Cir. 1992) (dismissing for failure to plead association-in-fact enterprise was error where defendant entities associated in a business relationship akin to a joint venture); Fleischhauer v. Feltner, 879 F.2d 1290, 1297 (6th Cir. 1989) (determining that a jury had ample basis to find that five parties involved in association constituted a RICO enterprise where the enterprise consisted of three corporations, their owner, and an attorney who was an officer of each corporation); Battlefield Builders, Inc. v. Swango, 743 F.2d 1060, 1064 (4th Cir. 1984) (reversing dismissal of complaint where plaintiff alleged that three individuals formed a loose joint venture through which a pattern of extortion was conducted); Standard Chlorine of Delaware, Inc. v. Sinbaldi, 821 F. Supp. 232, 241, nn. 8 & 9. (D. Del. 1992) ("Standard pleads an 'association in fact' of two individuals, [AS] and [MS], and certain corporations some of which AS and MS had some interest in and some of which they did not.").

16. *See* United States v. Perholtz, 842 F.2d 343, 353 (D.C. Cir. 1988) (surveying authority from the Third, Fifth, Seventh, and Eleventh Circuits, and upholding jury's conviction of individuals who conducted racketeering through an association-in-fact enterprise comprised of individuals, corporations, and partnerships).

17. *See, e.g.*, Cullen v. Margiotta, 811 F.2d 698, 728-29 (2d Cir. 1987) (analyzing the court's interrogatories to jury seeking a determination as to the existence of a RICO enterprise based on various permutations of the defendant entities).

satisfy the RICO model.[18] For example, where a parent corporation and its wholly-owned subsidiary are alleged to be both a RICO person and enterprise, the distinctiveness requirement is not met.[19] In this instance courts reason that the subsidiary lacks an independent will and, therefore, as a practical matter, there is insufficient separateness between the person and enterprise.[20]

RICO § 1962 (c) also requires that the defendant-person "participate in the conduct of the affairs" of the enterprise.[21] As interpreted by the Supreme Court, this element requires that the RICO person must have participated in the operation or management of the enterprise.[22] For example, a corporation's outside auditors who do not make decisions for the company are not considered to participate in the conduct of its affairs within the meaning of RICO.[23] A sole proprietorship, however, can be an enterprise, even though the owner is the sole RICO person.[24] Therefore, for RICO to apply in a particular case, the defendant RICO persons must be separate, but not too separate, from the RICO enterprise.

This Article analyzes the direct RICO implications of the Steelworkers' corporate campaign against Bayou Steel. In the process, this Article also evaluates the sometimes potentially competing implications of federal labor policy, as well as the more general constitutional policies relating to free speech and the right to seek redress of grievances.

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18. *See* Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 262 (3d Cir. 1995) (reasoning that a RICO person must be distinct from the RICO enterprise). *See generally* B.F. Hirsch v. Enright Ref. Co., 751 F.2d 628, 633 (3d Cir. 1984) (discussing the distinctiveness requirement of 18 U.S.C. § 1962(c)).

19. *See* Brittingham v. Mobil Corp., 943 F.2d 297, 301 (3d Cir. 1991) (holding that a parent corporation, alleged to be a RICO person, ordinarily will not be sufficiently distinct from its wholly owned subsidiary for the subsidiary to constitute a RICO enterprise).

20. *See id.*

21. 18 U.S.C. § 1962(c) (1994).

22. *See* Reves v. Ernst & Young, 507 U.S. 170 (1993).

23. *See id.* at 185.

24. *See* United States v. Benny, 786 F.2d 1410, 1415 (9th Cir. 1986) (upholding conviction of sole proprietor where RICO "enterprise" was his proprietorship); McCullough v. Suter, 757 F.2d 142, 143 (2d Cir. 1985) ("Hence [plaintiffs] are entitled to recover damages under the RICO statute provided that a sole proprietorship can be an 'enterprise' with which the proprietor can be 'associated.' We think it can be.").

III. OVERVIEW OF THE STEEL "MINI-MILL" INDUSTRY

While major steel companies were closing facilities and downsizing during the last three decades, steel making "mini-mills" grew in size, number, and product mix.[25] Unlike traditional steel mills, mini-mills do not use ore as their primary production input. Rather, mini-mills recycle steel scrap and, accordingly, can be (and are) located in virtually every region of the country, with the largest concentration in the Southeast. Mini-steel companies initially were small concerns that focused on relatively basic products such as bars, flats, strips, and standard angles. Now, led by Nucor Corporation, the largest of the mini-mill companies,[26] several such concerns have advanced to produce sheet metal for automobiles. Indeed, mini-mill companies accounted for 46.4 percent of total United States steel production in 1997, and are expected to produce most of the industry's output by the turn of the century.[27] The automated nature of mini-mill steel production lends itself to round-the-clock operations with lean complements of managers and labor. Most mini-mills are non-union, especially those in the Southeast. Those that are unionized have contracts permitting considerable managerial flexibility, and personnel policies that emphasize strong employee-management communications and individualized worker treatment.

IV. THE STEELWORKERS' CORPORATE CAMPAIGN AGAINST BAYOU STEEL

A. Bayou Steel—Before the Strike

Bayou Steel is located in La Place, Louisiana, on the Mississippi River, about thirty-five miles northwest of New Orleans. The company was founded in 1981 as an American subsidiary of Voest-Alpine, Austria's state-owned steel company. Voest-

25. For a study of the development of the mini-steel industry from its inception to 1985, see DONALD F. BARNETT & ROBERT W. CRANDALL, BROOKINGS INSTITUTE, UP FROM THE ASHES - THE RISE OF THE STEEL MINIMILL (1986). For more current treatments, see Terrence P. Pare, *The Big Threat to Big Steel's Future*, FORTUNE, July 15, 1991, at 106; John Holusha, *A Flexing of Muscle in American Steel*, N.Y. TIMES, July 5, 1998, at 4BU.

26. Nucor Corporation had revenues of $4.2 billion in 1998, and ranked 374 on Fortune magazine's list of the 500 largest American companies. *See Fortune 5 Hundred Largest U.S. Corporations*, FORTUNE, Apr. 26, 1999, at F23.

27. *See* Holusha, *supra* note 25, at 4BU.

Alpine, however, had great difficulties in dealing with American workers, lost money, and sold the company in 1986 to RSR Corporation, which took it public.[28] Soon thereafter, Bayou Steel recognized the Steelworkers as the sole collective bargaining agent for its employees and adopted a six-year collective bargaining agreement.[29]

Unfortunately, Bayou Steel's productivity and profits remained substantially below its competitors because of the high cost of benefits and the absence of an incentive plan to stimulate productivity and reduce absenteeism.[30] Accordingly, when new contract negotiations began in January of 1993, the company sought reduced wages and benefits and a productivity-based incentive plan.[31] The Steelworkers demanded major wage increases and strongly opposed productivity-based pay. Negotiations broke down and, on March 21, 1993, the approximately three hundred members of Steelworkers' Local 9121 were directed to strike Bayou Steel, beginning the longest strike in Louisiana history.

In key respects, by August of 1993, Local 9121's traditional strike had simply failed.[32] At the start of the strike, temporary

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28. *See* John Schriefer, *The Battle of Bayou Steel*, NEW STEEL, June 1995, at 30. Bayou Steel's common stock trades on the American Stock Exchange (ticker BYX).

29. *See id.*

30. *See id.* at 31. In 1991, the one mini-mill without an incentive system that had high absenteeism was Bayou Steel. Incentive plans curb absenteeism and tardiness because they require near perfect attendance during a week if an incentive is to be paid. Since incentive pay can account for up to 50 percent of total wages received, this is a powerful curb on absenteeism *See* Herbert R. Northrup, *The Twelve-Hour Shift in the North American Mini-Steel Industry*, 12 J. LAB. RES. 261, 272-73 (1991).

31. . *See, e.g.*, Alan Sayre, *Bayou Steel Denies Out-of-state Hiring*, BATON ROUGE ADVOC., Aug. 6, 1993, at 5C ("The company claims its hourly wage workers averaged more than $43,000 in pay and benefits in 1992. It said it wanted to put savings from making employees pay a larger share of health insurance into an incentive plan that could earn workers up to $6,000 annually.").

32. *See* Drew Broach, *Strike Routine*, NEW ORLEANS TIMES-PICAYUNE, Aug. 14, 1993, at B7. Broach states:

> As the strike lumbers through the dog days of summer toward the five-month mark, the essentials for picketing Bayou Steel Corp. in La Place are these: Sunglasses, patience, a short-sleeved shirt, short pants, an extensive vocabulary of curse words and a raspy voice that sounds like sneakers crunching gravel. And a wristwatch. When one of the big trucks approaches from River Road to enter the steel mill, one of the half-dozen or so pickets outside the main gate quits jawboning, rises from a lawn chair, walks nonchalantly into the driveway, checks his watch and begins pacing. The trucks, for the most part, stop. A few steps this way, a few steps back. Check the watch. The truck's engine idles. Just inside the gate, a video camera remotely operated by a security guard records the scene. Pace. Idle. Record. Check the watch. At 90 seconds, the picket nonchalantly returns to his lawn

replacement workers were immediately hired[33] and, despite serious violence and threats,[34] approximately one-third of Local 9121's rank and file members crossed the picket line and returned to work.[35] Soon the company was producing at pre-strike levels.[36] Despite strike-related costs of $100,000 per month, Bayou Steel was operating profitably and carried a record backlog of orders.[37] In August of 1993, the Steelworkers acted.

B. The Steelworkers Launch the Corporate Campaign

For three brutal years—from August, 1993 through September, 1996—the Steelworkers waged an exhausting "corporate campaign" against Louisiana's only steel company.[38] Although

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chair and resumes jawboning. The truck lumbers through the gate and onto the scales, and the scene repeats itself.

Id.

33. *See* Sayre, *supra* note 31, at 5C ("Hank Vasquez, the company's vice president of human resources, said only four out-of-state workers were among the 200 hired since the strike began.").

34. *See, e.g., Striker's Serious Misconduct on Picket Line Warrants Discharge*, BNA Labor Relations Reporter: Analysis/News & Background Information, LRR-News, Sept. 29, 1997, 156 LRR 129 d17. The Labor Relations Reporter summarizes a post-strike arbitration ruling:

> The 52 segments of videotape the employer took of the grievant on the picket line are compelling evidence of his guilt, Baroni finds. Not only do they show him violating the court's guidelines for conducting the picketing, Baroni says; they also are replete with examples of threats and intimidation he used in his attempts to provoke drivers at the mill's main gate to get out of their vehicles and confront him. Given the repeated and extreme nature of the grievant's conduct, which included employing highly personal racial, sexual, and ethnic slurs, it was serious enough to warrant discharge, Baroni holds. After repeatedly examining the videotapes, Baroni discounts the grievant's assertion that many of the incidents were the result of provocation. Some of the incidents were totally unprovoked, Baroni notes, and when there was some provocation, the grievant's reactions were generally excessive and not always in proportion to it.

Id. The violence was capped by shots fired through the windows of the automobile of Henry ("Hank") Vasquez, Bayou Steel's chief labor negotiator, as he was driving home not far from the plant on the evening of February 15, 1995. Although Vasquez was not seriously hurt, he narrowly missed being killed. No one has been arrested for this act. *See Reward Goes up in Steel Dispute*, NEW ORLEANS TIMES-PICAYUNE, Aug. 12, 1995, at B3 ("Bayou Steel Corp. has increased its reward to $150,000 for information leading to the arrest and conviction of people involved in the Feb. 15 attack of its chief negotiator in a labor dispute with striking steelworkers").

35. *See* Mike Beirne, *Bayou Offering Reward after Shooting Incident*, AM. METAL MKT., Feb. 20, 1995, at 1 ("The plant has been operating with temporary replacement workers and more than 100 steelworkers who crossed the picket line.").

36. *See* Schriefer, *supra* note 28, at 34.

37. *See* Keith Darce, *Bayou Steel Rebounds*, NEW ORLEANS CITY BUS., Jan. 9-15, 1995, at 1.

38. *See* Statement of Uncontroverted Facts in Support of Defendants United Steelworkers of America's and Industrial Union Department's Motion for Summary Judgment, Bayou Steel Corp. v. United Steelworkers of America, No. 95-496-RRM, 1996

rumors had been circulating among the Steelworkers and Bayou Steel executives for several weeks before its formal announcement, the corporate campaign began in earnest with a press release and news conference held by the Steelworkers on August 2, 1993, in Kenner, Louisiana.[39] At the time of the Steelworkers' announcement, no one could have anticipated fully the impact on the legal landscape of the Steelworkers' corporate campaign, or Bayou Steel's subsequent civil racketeering lawsuit to combat it. Even with the full benefit of hindsight—after more than three years of corporate campaign activity, extensive legal briefing, discovery answers amounting to tens of thousands of pages of documents, and scores of depositions, both factual and expert—the Steelworkers' initial announcement launching the corporate campaign, perhaps as well as any other single piece of evidence, illustrates why union corporate campaigns constitute actionable racketeering.

C. Steelworkers Local 9121, on Strike for Forty-Two Months

When Steelworkers Local 9121 walked out of Bayou Steel on March 21, 1993, Bayou Steel immediately sought protection from the Saint John Parish Court and, on March 24, 1993, the company and the union entered into an agreed injunction to govern striker conduct and picket line organization.[40] For several reasons, this was one of the most significant judicial orders entered during the strike. First, although Local 9121 had never been on strike before, the United Steelworkers International ("the International") provided virtually no pre-strike training and, hence, threats, violence, and property destruction were extreme at the beginning of the strike. Moreover, Bayou Steel continued to operate its plant using temporary replacement workers and union members who crossed the picket line.[41] This created a substantial amount of genuine anger on the picket line, and tempers exploded.[42] The

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WL 76344 (D. Del. filed July 28, 1997) [hereinafter "Steelworkers' Facts"], ¶¶ 49-67, 74-215.

39. *See* Steelworkers' Facts, *supra* note 38, at ¶ 49. The Steelworkers' press release issued August 2, 1993 is reproduced in full at the Appendix.

40. *See* Steelworkers' Facts, *supra* note 38, at ¶¶ 30, 36.

41. *See* Steelworkers' Facts, *supra* note 38, at ¶ 34.

42. *See, e.g.*, Judgment, entered Oct. 8, 1993, Bayou Steel Corp. v. United Steelworkers of America (40th Judicial Dist., Parish of St. John the Baptist, LA) at 2 ("This Court takes seriously Mr. Walker's threats of physical violence. Mr. Walker advised the security guard that his bullet proof vest wouldn't protect him, that his head was wide open for a bullet wound .... Additionally, Mr. Walker advised the

agreed injunction gave Bayou Steel quantified standards against which striker conduct could be measured, which resulted in several orders for contempt during the strike.[43] Second, it gave Bayou Steel a benchmark against which striker misconduct could be measured effectively after the strike in disciplinary and termination arbitrations. Third, as discussed below in the section on union ratification of striker misconduct, the agreed injunction imposed a duty upon the Local and the International to control striker conduct, potentially making the union directly responsible, and liable, for individual striker's violence and threats.[44]

The Steelworkers and Bayou Steel will always disagree about whether, over the course of the entire forty-two month strike, the violence and threats were extreme, fairly typical, or relatively mild. Moreover, one can only ponder and surmise from conflicting evidence about the extent to which Local 9121 and the International actually or tacitly encouraged striker violence and threats. Some things are certain, however. First, Bayou Steel endured a significant amount of property damage—for instance flooded and spray-painted residences and flat tires—that it knew or believed was caused by strikers. Second, several of Bayou Steel's managers and replacement workers, and their family members, were threatened by strikers with murder, assault, rape, and property destruction.[45] Indeed, during the first weeks of the strike, the company was effectively under siege; managers and non-striking employees worked, ate, and slept on-site. The company's top managers were assigned personal body guards and electronic protection, which lasted throughout the strike and, in some cases, for many months after the strike ended. Third, significant physical improvements to Bayou Steel's plant had to

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individual who was attempting to exit the plant that he wanted his 'm[. . .] f[. . .]ing ass and he would get him if he found him at Walmart, Delchamps or K-Mart.' Mr. Walker simulated the use of a gun on two (2) occasions during this incident.").

43. *See id.* (holding Local 9121 and five strikers in contempt, ordering fines and jail time, but seemingly in all cases, this and future ones, substituting community service for more severe punishment).

44. *See infra* Part IV.D.

45. *See e.g.*, Judgment, entered May 4, 1994, Bayou Steel Corp. v. United Steelworkers of America (40th Judicial Dist., Parish of St. John the Baptist, LA), at 6 ("Paragraph 34 alleges that . . . Willie Walker intimidated and threatened Hank Vasquez [Bayou Steel's Vice President of Human Resources] with death threats. The Court finds that Willie Walker, by using his hands, mimicking the actions of a gun, did threaten to do physical harm to Hank Vasquez . . . and Orders [Willie Walker] to spend three (3) days in the Parish jail for his contempt.").

be made to maximize employee safety. Ingress and egress from Bayou Steel were completely reconfigured and fortified. Vulnerable windows were bullet proofed. Employees were given training and strict instructions on how to conduct themselves to minimize their risk of being harmed. Fourth, beginning on day one of the strike, Bayou Steel began video taping the picket line from multiple locations, and continued this practice throughout the forty-two months the strike lasted. Bayou Steel's videos tapes and corresponding custodial records accumulated into a significant archive of evidence that was successfully used in several contempt proceedings, disciplinary arbitrations, and depositions taken as part of the company's RICO suit.[46]

For this Article, striker misconduct—specifically violence, threats, and property destruction—is important primarily as it relates to Bayou Steel's RICO litigation. Thus, this Article is relatively less concerned with specific violence and threats, and relatively more concerned with the implications of such conduct in the legal context of racketeering. Nevertheless, it must be noted that the violence and threats experienced at Bayou Steel will have very long lasting effects in La Place, Louisiana.

D. AFL-CIO Encouragement of Corporate Campaigns

Before turning to a description of the Steelworker campaign against Bayou Steel, a word about changing AFL-CIO policy is in order. Prior to the current administration of President John Sweeney, corporate campaigns were the product of individual unions assisted by the Industrial Union Department (IUD). Sweeney has been a long-time advocate of such programs and utilized them during his prior tenure as President of the Service Employees International Union (SEIU). In the latter capacity in 1988, he sponsored and wrote the foreword to the SEIU's *Contract Campaign Manual,* a major portion of which is devoted to corporate campaigns and the related "inside game" tactics.[47] Since taking over the AFL-CIO presidency, Sweeney has established a corporate campaign organization directly under him, and abolished the IUD so that the Bayou Steel campaign may have been the last one in which the IUD played a role. Henceforth, the AFL-CIO is likely both to encourage and to be involved directly

46. *See supra* note 42.

47. For a description of inside game tactics, see Northrup, *infra* note 48.

in similar situations.

E. Overview and Chronology of the Corporate Campaign Against Bayou Steel

As indicated in the Steelworkers' announcement of August 2, 1993, and in the general literature on corporate campaigns, the core tactics in a corporate campaign involve getting the target company's outside interests involved in the union's dispute.[48] For example, all sizeable manufacturing corporations—and steel making is perhaps paradigmatic—are regulated by a plethora of federal, state, and local authorities. At the federal level these include the Securities and Exchange Commission, the Environmental Protection Agency, the Coast Guard, and the Occupational Safety and Health Administration of the Department of Labor, among others. Bayou Steel, as is typical, also is regulated at the state level by the Louisiana Board of Commerce and Industry and the Louisiana Department of Environmental Quality ("LDEQ"), among others. Although these agencies all play valid roles in modern industrial markets, each potentially can be misused.[49] When complaints are made to these agencies, mandatory processes are set in motion. Thus, for example, when a complaint is made by a union to a federal or state environmental agency that a particular company is violating

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48. *See* Herbert R. Northrup, *Union Corporate Campaigns and Inside Games As a Strike Form*, 19 EMP. REL. L.J. 507 (1994); CHARLES R. PERRY, UNION CORPORATE CAMPAIGNS, 4-5 (1987). The Industrial Union Department (IUD) claimed a "critical role" in the corporate campaign against Bayou Steel. *See* IUD NEWS, Oct./Nov., 1996, at 10 ("The IUD played a critical role in assisting the USWA with its coordinated [corporate] campaign against Bayou Steel."). It defines a corporate campaign as one which "[a]pplies pressure to many points of [corporate] vulnerability to convince the company to deal fairly and equitably [from the union's point of view] with the union.. . . It means vulnerabilities in all of the company's political and economic relationships —with other unions, shareholders, customers, creditors, and government agencies—to achieve union goals." *See* IUD, DEVELOPING NEW TACTICS: WINNING WITH COORDINATED CORPORATE CAMPAIGNS, 1 (1985).

49. *See* Herbert R. Northrup, *Corporate Campaigns: The Perversion of the Regulatory Process*, 17 J. LAB. RES. 345 (1996) [hereinafter Northrup, *Corporate Campaigns*]; Herbert R. Northrup & Augustus T. White, *Construction Union Use of Environmental Regulation to Win Jobs: Cases, Impact, and Legal Challenges*, 19 HARV. J.L. & PUB. POL'Y. 55 (1995); *see also* DAN LA BOTZ, A TROUBLEMAKER'S HANDBOOK, 127 (1997). La Botz states:

> Both public institutions and private companies are subject to all sorts of laws and regulations, from the Securities and Exchange Commission to the Occupational Safety and Health Act, from the Civil Rights Act to the local fire codes. *Every law or regulation is a potential net in which management can be snared and entangled.* A complaint to a regulatory agency can cause the company managerial time, public embarrassment, potential fines, and the costs of compliance. One well-placed phone call can do a lot of damage.

the environmental laws, complaint handling and investigative processes begin. As discussed below, this tactic, called "Regulatory Harassment"—a term coined in the Steelworkers' promotional literature[50]—exploits this dynamic, and snowballs the agencies' investigative processes with professionally-executed publicity to maximize on as many interlocking fronts as possible the distraction and compliance costs that must be borne by the target company. These processes, which can include unannounced major inspections, massive document requests, management interviews, permit and license delays, litigation, and so forth, always are distracting and expensive to defend. In addition to the agencies, there are also the courts which can be used for regulatory harassment.[51] Indeed, regulatory harassment was the hallmark of the Bayou Steel campaign[52] and, due to its clear effectiveness, is expected to constitute an even more fundamental corporate campaign tactic in the future.

According to the Steelworkers, the Bayou Steel campaign was operationally organized in four broad component parts: (1) a Corporate Part (focusing on banks and corporate directors); (2) an Environmental, Health, and Safety Part; (3) a Political Part (including both state and federal); and (4) a Public Relations Part.[53] Different team members—those referenced in the August 2, 1993 announcement —each brought specialized resources and expertise to the Bayou Steel campaign's various parts.[54] Conspicuously absent from the Steelworkers' model, however, was a part denoted "collective bargaining." Although

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Id. (emphasis in original).

50. *See* UNITED STEELWORKERS OF AMERICA, A UNION FOR THE 21ST CENTURY 7 (1995) [hereinafter "21st Century Pamphlet"].

51. *See infra* notes 60-63 and accompanying text, discussing the Steelworkers' lawsuits against Bayou Steel as shareholders; *see, e.g.*, Steelworkers' Facts, *supra* note 38, at ¶¶ 165-70.

52. The US Environmental Protection Agency (USEPA) and Louisiana Department of Environmental Quality (LDEQ), and on two occasions, the U.S. Coast Guard, conducted more than thirty inspections of Bayou Steel's facility between March 21, 1993 when the Union went on strike and December 6, 1995. In the first year of the strike alone, union complaints resulted in a 400 percent increase in inspections compared to previous years. *See* Declaration of Al Pulliam Pursuant to 28 U.S.C. § 1746, USPIRG v. Bayou Steel, No. 96-0432, (E.D. La. Filed Mar. 26, 1996). In addition to the NLRB, the corporate campaign involved complaints to: OSHA, USEPA, LDEQ, SEC, Tennessee Department of Environmental Conservation, Louisiana Board of Commerce and Industry, St. John's Parish Council, the Coast Guard, the School Board, and Louisiana Dept. of Transportation. *See* Steelworkers' Facts, *supra* note 38, at ¶ 63.

53. *See* Steelworkers' Facts, *supra* note 38, at ¶¶ 49-67.

54. *See id.*

viewing the Bayou Steel campaign in its component parts is essential to analyzing its impact and understanding its unlawfulness, the dynamics are best introduced from a chronological perspective.

1. Origins in Ravenswood Campaign

The corporate campaign against Bayou Steel did not begin in a vacuum. As suggested in the Steelworkers' August 2, 1993 announcement, the Bayou Steel campaign had its genesis in the Steelworkers' twenty-month campaign against Ravenswood Aluminum Corporation, Parkersburg, West Virginia. It was in the Ravenswood campaign—which resulted in a substantial ouster of management and the return to work of more than 1700 steelworkers—that many, if not most, of the major tactics used against Bayou Steel were developed and refined. Hence, understanding the Bayou Steel campaign requires periodic references to the Ravenswood campaign.[55]

The Ravenswood and Bayou Steel campaigns each began with a mustering of experts. The IUD joined the Bayou Steel campaign "team" to head up the Corporate Part. Washington, D.C.-based Fingerhut, Powers, Smith & Associates took the laboring oar in developing the Steelworkers' political communications and publicity. Disposal Safety, Inc., a Washington, D.C.-based environmental consulting firm, provided expertise for the Environmental Part. The International supervised and funded the corporate campaign, while members of Local 9121 performed much of the task-based work and put a human face on the union's cause. The rank and file members of Local 9121, as usual, also maintained a forty-two month picketing vigil at Bayou Steel in conjunction with the more sophisticated tactics of the corporate campaign.

At the Steelworkers' initial press conference on August 2, 1993, Richard Davis—a veteran of the Ravenswood campaign, then-Director of USWA District 36, and who later became an International Vice President during the Bayou Steel campaign—

55. The Steelworkers' campaigns against Marathon Oil (Division of USX Corporation), J.T. Ryerson & Son, Boston Gas Company, and Noranda Corporation also share similarities with the Bayou Steel campaign, although the Ravenswood campaign presents the most recognizable model.

stated that the union had the names of Bayou Steel's directors and planned to make contact immediately.[56] Steelworkers' Vice President George Becker, who became President of the International during the Bayou Steel campaign, said investigations into the board of directors would cover both personal and business aspects of their lives.[57] Becker admonished that during the Ravenswood campaign, the union chased members of the board of directors across five continents and twenty-two countries.[58] Further, he cautioned that Ravenswood had lost so much business that it was having difficulty regaining financial stability.[59] The stage for the Bayou Steel campaign was set.

2. Initial Director Engagement

As Davis and Becker had stated, one of the first tasks undertaken in the Bayou Steel campaign was the identification of Bayou Steel's directors.[60] By a letter dated October 12, 1993, Local 9121, together with the International, contacted Bayou Steel's directors, urged the directors to compel the company to resume collective bargaining, and made it clear that the corporate campaign would be both costly and personal.[61] The Steelworkers

56. *See* Brad Hoeschen, *Strike Turning Personal*, L'OBSERVATEUR, Aug. 4, 1993.

57. *See* Steelworkers' Facts, *supra* note 38, at ¶ 49.

58. *See id.*

59. This statement has been contradicted by members of the management at Ravenswood that were displaced by Steelworker pressure after the fugitive financier, Marc Rich, who was a one-third owner, withdrew his support from the management. We shall note later that the union claimed that several major firms withdrew their business from Ravenswood as a result of Steelworker pressure. In fact it appears that the only major company that did so was Stroh, the nation's sixth largest brewery. Members of the former management in interviews pointed out to Dr. Northrup that Ravenswood had four so-called "pot lines." One had been shut down by the original owner, Kaiser, about five years before the strike. As the strike neared, operating management shut down a second one because it doubted that it could obtain enough workers during the strike to operate three lines. Three weeks later, it found that replacements were available, and reopened this line; then, several weeks later it opened the fourth line as business and operations were going well. Major companies like Coca-Cola, Pepsi Cola, and others continued to do business with Ravenswood, and its rolling mill went full speed throughout the strike. If the Steelworkers claims were correct, the company might well have been required to shut down. After the strike ended, and the old ways of operating were reinstated, the new management returned to a labor force of 1,700, about one-third more than ran the plant during the strike. This could be the reason why financial stability was difficult to attain.

60. Because Bayou Steel is a publicly traded corporation on the American Stock Exchange (ticker BYX), identifying its directors and corporate history was a straightforward exercise.

61. *See* Letter from James Pepitone, USWA Staff Representative, and Ron Ferraro,

wrote:

> We regret that some in the company expect that it will easily be able to return to normal operations while it engages us—and our Union—in a broad, national struggle. A struggle that will bring to light every aspect of Bayou's operations and ownership, from environmental issues to it's [sic] current $44 million in property tax exemptions, and beyond. . . . These long and costly struggles, such as the ones our Union was forced to conduct against Ravenswood Aluminum Corporation last year and J.T. Ryerson & Son and the Boston Gas Company this year, could almost always be avoided were it not for management misjudgments made at the onset. . . . Nor, do we believe, that you would favor Bayou being the target [of] a long and intensive national corporate campaign which, inevitably, will be costly for your company. . . .[62]

The threat in the above-quoted statement is clear; unless the directors intervened in restarting collective bargaining, the company would face intensive and expensive regulatory harassment. As set out *infra*, this letter and the Steelworkers' initial announcement have legal significance. Moreover, as threatened in their initial announcement, the Steelworkers were, by October of 1993, reaching beyond the company's collective bargaining representatives to bring the force of outside interests to bear on the dispute.[63] The union's harassment of Bayou Steel's officers and directors continued throughout the corporate campaign.

3. The DSI Report: From Baton Rouge to Wall Street in Sixty Days

The first major environmental volley in the Bayou Steel campaign came on December 10, 1993 when Disposal Safety, with the Steelworkers, released and distributed the first in a series of reports entitled "Environmental Audit: Bayou Steel

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President Local 9121, to Albert P. Lospinoso, Director Bayou Steel Corp. 2 (Oct. 12, 1993) (on file with author).

62. *Id.*

63. *See* Steelworkers' Facts, *supra* note 38, at ¶ 50 ("The USWA's 'corporate campaign' was 'an effort to take the [USWA's] message beyond the picket line to the public, to the stockholders, to all the audiences that could help [USWA] to encourage the management of Bayou Steel to return to the bargaining table and negotiate a fair and equitable agreement.'").

Corporation" (the "DSI Report").[64] Indeed, the DSI Report became the centerpiece of the Environmental Part of the Bayou Steel campaign, and its usage illustrates well the compounding of informational dynamics that characterizes regulatory harassment.[65]

The DSI Report was announced with substantial fanfare, including professionally written press releases, and was distributed simultaneously to an array of potential Achilles heels.[66] There is no question that the DSI Report was highly critical of Bayou Steel's environmental compliance practices, as it was intended to be,[67] or that it employed a number of creative regulatory noncompliance theories to portray Bayou Steel as a serious environmental offender and an outlaw as a matter of corporate philosophy. Whether the DSI Report was mainly true or false, objective or slanted, or intentionally harmful or socially responsible, will forever remain points of disagreement between the Steelworkers and Bayou Steel. It is clear, however, that the DSI Report was commissioned by the Steelworkers and written by Disposal Safety to portray Bayou Steel in the worst environmental light possible in order to stir up a hornet's nest of trouble on as many fronts as possible, with environmental regulatory agencies being only the most obvious venues.

The first immediately effective use of the DSI Report occurred in connection with a meeting of the Louisiana Board of Commerce and Industry ("BCI") where certain of Bayou Steel's tax abatements were scheduled to be renewed. As the Steelworkers explained in connection with their motion for

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64. *See, e.g.*, Steelworkers' Facts, *supra* note 38, at ¶ 101.

65. DSI performed similar work for the Steelworkers in the Ravenswood campaign. *See* Bob Regan, *Ravenswood Facility Gets Pollution Check*, AM. METAL MKT., Apr. 10, 1992, at 2. Regan reports:

> Ravenswood Aluminum also charged the USW has been using what it described as 'essentially a one-man environmental consulting firm' in its 'propaganda campaign.' It identified this company as Disposal Safety Inc. Early in April the USW fired off a joint statement with Disposal Safety and other members of what was described as 'an environmental coalition to oppose waste permits for Ravenswood Aluminum,' citing environmental reports 'detailing serious, illegal pollution of the Ohio River by Ravenswood Aluminum.'

Id.

66. *See* Steelworkers' Facts, *supra* note 38, at ¶ 103 ("At various times, persons acting on behalf of USWA sent copies of the DSI Report to the EPA, LDEQ, BCI, other public officials in Louisiana, potential investors in a mortgage note offering by Bayou Steel, and members of the media.").

67. *See id.* at ¶ 99.

summary judgment, "On several occasions between 1993 and 1995, the USWA participated in efforts to persuade the Louisiana Board of Commerce and Industry not to renew tax abatements granted to Bayou Steel by the state of Louisiana, in an attempt to increase Bayou Steel's costs and impose economic pressure on Bayou Steel."[68] Pointing to the new DSI Report as an authoritative compliance audit by a highly-respected and independent environmental consulting firm, the Steelworkers appeared before BCI and argued that Bayou Steel should not be allowed to receive special tax treatment in light of its shameful environmental practices, and that the Board should withhold approving any tax deferrals until the Louisiana Department of Environmental Quality could determine whether the company was in compliance. The Steelworkers also accused Bayou Steel of hiring non-Louisiana workers. In light of the Steelworkers' accusations, BCI, a political body, had no real alternative except to postpone further action on the company's tax abatements until the Steelworkers' accusations could be checked out by the appropriate state agencies.[69]

Thus, the DSI Report had its desired initial effect. Further, BCI's prudence handed the Steelworkers a significant tactical opportunity which the Steelworkers seized upon to publicize that: (1) an "independent environmental audit" had found Bayou Steel to be engaged in a "pattern of non-compliance"; (2) the company was under environmental investigation by LDEQ; (3) due to LDEQ's investigation, Bayou Steel's tax deferrals had been postponed; and (4) the Steelworkers had performed an important public service by exposing Bayou Steel. But this was just the beginning. The Steelworkers' tactical maneuvering then moved on to the Securities and Exchange Commission and to Wall Street.

During the winter of 1993-94, Bayou Steel was exploring prospects in the credit markets of refinancing its mortgage bonds, and had submitted a prospectus for $75 million in mortgage notes to the SEC for registration.[70] The Steelworkers were quick

68. *Id.* at ¶ 146.

69. *See* Tom Guarisco, *Vote on Bayou Steel Tax Break Postponed*, BATON ROUGE ADVOC., Dec. 16, 1993, at E1 ("A vote on a controversial tax break request by Bayou Steel Corp. was postponed until the February meeting of the state Board of Commerce and Industry, but not before a union-financed environmental audit critical of the LaPlace company was presented to board members and the media.").

70. *See* Steelworkers' Facts, *supra* note 38, at ¶¶ 157-58.

to assert to the SEC that Bayou Steel's prospectus had a number of potentially material misstatements, including failure to disclose that its environmental practices were under investigation by LDEQ, that the company's preferential tax treatment had been delayed by BCI, and that the company was facing numerous unfair labor practice charges from the National Labor Relations Board (NLRB).[71] The Steelworkers acknowledged in their summary judgment papers that they intervened at the SEC to put economic pressure on Bayou Steel.[72]

It is important to note that, as with BCI, simply by raising these issues the Steelworkers were able to get the SEC's attention and the desired result. The underlying merits of the Steelworkers' allegations, or lack thereof, were actually of only tertiary importance. What mattered was that the company's disclosures in a $75 million bond prospectus had been challenged in a facially colorable fashion, thus prompting the SEC to seek explanations from the company as to why these matters either were or were not material to investors and, if they were material, how they might affect the company's ability to repay its notes. Thus, to engage the SEC's processes it was enough for the Steelworkers to assert to SEC that these omissions *might* be material.

Getting its issues into the SEC was a tremendous accomplishment for the Steelworkers. Moreover, the piggy-backing of apparent third-party credibility—under investigation by LDEQ, tax deferrals withheld by BCI based on an "independent environmental audit" and, in turn, the SEC's involvement — was truly remarkable.

During the SEC registration process, the Steelworkers were actively working to dissuade potential investors from buying Bayou Steel's mortgage notes. On February 7, 1998—the same day that Bayou Steel conducted its "road show" meeting with potential investors in New York—the union placed a tombstone advertisement in the Wall Street Journal relating to the mortgage notes stating:

> Bayou Steel Corporation: FINED. UNDER INVESTIGATION. CHARGED . . . . An independent

71. *See id.* at ¶ 162.

72. *See id.* at ¶ 164 ("The USWA communicated with the SEC and with potential mortgage note investors in order to put pressure on the company to negotiate a collective bargaining agreement with the USWA.").

> environmental audit found Bayou engaged in a '*pattern of non-compliance*' . . . . The USWA has launched a coordinated campaign against Bayou—similar to that used successfully against Ravenswood Aluminum Corporation between 1990 and 1992—in order to resolve a year-long unfair labor practice strike.[73]

Further, in what Reuters described as an "unprecedented tactic," the IUD sent a representative into the investor meeting to confront investors and distribute the DSI Report.[74] Reuters reported that after the IUD was escorted out of the investor meeting, "the union said it will make direct contact with institutional investors to provide them with copies of the audit."[75] Following the meeting, Gary Hubbard, the International's Communications Director, was quoted by Reuters as saying "that the union was trying to 'keep Bayou Steel from finding investors' for its debt deal," and stating that the union hoped the DSI Report would dissuade investors from buying Bayou Steel's notes, making it more expensive for Bayou Steel to issue debt.[76] Similarly, the IUD's Ed Keyser was quoted as stating "We think it's a bad investment because the plant has environmental problems."[77]

Bayou Steel's notes eventually were priced and sold.[78] To

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73. WALL ST. J., February 7, 1994, at C16.

74. *See* Adam Entous, REUTERS INFORMATION SERVICES, INC., Feb. 7, 1994; Mike Beirne, *Bayou Union Tries to Crash Investor Meeting*, AM. METAL MKT., Feb. 9, 1994, at 16.

75. Entous, *supra* note 72.

76. *Id.*

77. *Id.*

78. *See Despite Labor Dispute, Steel Manufacturer Brings Junk Deal*, BONDWEEK, Feb. 28, 1994 at 1. *Bondweek* reports:

> After a month-long delay engineered by the United Steelworkers of America and Local USWA 9121, a $ 75 million junk bond offering by Bayou Steel got the go-ahead from the Securities and Exchange Commission last week. Still, union officials were pleased by the success of their activities and plan to pursue similar tactics in future labor disputes, says Jim Valenti, USWA safety, health and environment specialist.
>
> Saying that SEC officials have limited resources at their disposal to investigate the accuracy of a company's prospectus, Valenti adds he sees unions playing a growing role in informing investors of potential risks in public offerings. Predicting Bayou ultimately will be forced to close down its Louisiana facility and will be unable to service the debt, Valenti told *Corporate Financing Week*, a sister publication, 'Many investors will take heed next time to what the unions have to say.
>
> The unions tried to scuttle the issue and in fact were successful in delaying it by complaining to the SEC that the prospectus did not spell out all of the risks to potential investors, say officials close to the situation . . . .
>
> The unions targeted the planned issue for negative publicity in order to

appreciate the impact Bayou Steel experienced from this first flurry of corporate campaign tactics, however, it must be remembered that the entire sequence—from the initial release of the DSI Report to the New York investor meeting—spanned only sixty days.

4. The RSR Connection

The next significant tactics used in the Bayou Steel campaign involved RSR Corporation and its principals. In the lexicon of securities law, Dallas-based RSR Corporation and Bayou Steel are "affiliates," that is, they share a common controlling shareholder, Howard M. Meyers.[79] Based on this, the Steelworkers "believed that pressure on RSR would help to cause Bayou Steel to change its attitude at the bargaining table."[80]

RSR's principal line of business is the recycling of used lead-acid batteries into lead ingots and basic lead products. Without broaching the environmental moralism debate, it will suffice here to observe that lead, which has been around as a useful material for centuries, is a dangerous product, although its toxicity was not recognized for many years. As a result, many, if not all, of the lead-related industrial facilities in the United States have their share of environmental clean up, compliance problems, and related litigation. Thus, it is easy to portray lead-related

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gain concessions in a year-long contract dispute centering on the company's environmental record and good-faith bargaining, says Ed Keyser, senior investment advisor with the USWA's industrial union department. Besides approaching the SEC, union officials stood outside of a road-show in New York and gave potential investors information packets on issues the unions wanted disclosed in the prospectus, Keyser notes. Packets were also mailed to many large high-yield funds, he adds.

Id.

79. The precise relationship between these companies is more complicated, but a detailed description of their ownership and governance structures is beyond the scope of this discussion. For present purposes, it will suffice to observe that Bayou Steel is not a subsidiary or sister company of any RSR-related company. Rather, the two are affiliated through common controlling shareholders. At various times the two have shared one or two directors (a consequence of stock ownership), and at one time shared a common general counsel. *See* Steelworkers' Facts, *supra* note 38, at ¶¶ 190-97.

80. Steelworkers' Facts, *supra* note 38, at ¶ 189. In important respects the Steelworkers' attack against RSR was a foible from its inception. Bayou Steel and RSR are separate companies and, therefore, their directors are duty-bound as fiduciaries to act separately in each company's best interests, regardless of the pain felt by the other. Thus, in dealing with the Steelworkers, Bayou Steel's directors, managers and collective bargaining representatives were duty bound and legally foreclosed from yielding to harm directed against RSR. The Steelworkers, it seems, either did not understand this corporate reality, or believed that Bayou Steel's directors could be compelled to place the interests of RSR above Bayou Steel's.

companies, including RSR Corporation, as environmental villains. The Steelworkers exploited this. By painting with a wide brush, the Steelworkers were able to portray RSR and Meyers in an environmentally unflattering light, and to extrapolate that Bayou Steel was part of an environmentally immoral corporate family.[81] In turn, lenders and others with financial ties to Bayou Steel were publicly portrayed as being culpable for supporting and perpetuating the immorality. The Steelworkers' environmental publicity against Bayou Steel and RSR was relentless.[82]

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81. On February 14, 1994, Disposal Safety released its report entitled "Waste Management Practices of RSR Corporation." *See* Letter from John J. Sheehan, the International's Legislative Director and Assistant to the President, to Carol Browner, Administrator USEPA (Feb. 18, 1998) (on file with author). Sheehan writes:

> We commissioned a detailed study of RSR's waste management practices and a comprehensive environmental audit of its affiliated company, Bayou Steel Corporation with whom we have an unfair labor practice dispute. These two reports are enclosed. Our consultants' investigation of this company shows it is an environmental outlaw.
>
> ....
>
> The United Steelworkers of America requests a coordinated multi-media enforcement effort, involving federal and state agencies, to bring this company into compliance with the law....
>
> ... We promise our support for vigorous action against this law-breaker.

Id. See also Edward Worden, *USW-funded Study Rips RSR's Environmental Record*, AM. METAL MKT., Feb. 21, 1994, at 16 ("An environmental report commissioned by the United Steelworkers union alleges that lead recycler RSR Corp. has managed to 'delay, obfuscate and ultimately evade its legal and financial responsibilities'. . . . The report was prepared by Disposal Safety Inc., Washington, described by the union as an independent company specializing in the analysis of toxic waste management practices.").

82. *See, e.g.*, Edward Worden, *Union Carries Fight with RSR to Europe*, AM. METAL MKT., May 3, 1994, at 7.

> A union spokesman in Pittsburgh said Friday 'our campaign is going to extend to Europe—we are going to chase this company and expose it for what it is.' Dallas-based RSR is 'the biggest and baddest of the secondary lead smelters in the world,' the spokesman, Gary Hubbard, communications director, said. But he conceded the union's crusade . . . is an attempt to improve the union's chances of getting a contract at Bayou Steel Co., La Place, La., which the USW struck a year ago.
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> ....
>
> Another tactic involved the posting of skull-and-cross-bones billboards in Aiken County, S.C., where RSR [sought] to build a new secondary smelter.

Id. See also Letter from James J. Valenti, the International's Health and Safety Specialist, to Mario Cuomo, Governor, New York 1 (Aug. 11, 1994) (on file with author) ("Our union has been conducting research into the environmental record of RSR Corporation, which operates the Revere Smelting and Refining Corp. lead smelter in Wallkill, New York, We have found that RSR/Revere has a very poor record of environmental compliance and clean-ups.").

V. LEGAL ANALYSIS

As noted above, Bayou Steel's RICO litigation was settled at the summary judgment stage. This, however, is as far as any RICO case based on a corporate campaign has ever progressed through the courts.[83] Accordingly, the legal analysis presented here is meant both to evaluate the case in light of its procedural posture, for example, by examining whether the case properly could have advanced to a jury trial, and also to consider the case in terms of a potential final judgment. As litigators know, successfully taking a case past the summary judgment threshold, so that evidence can then be presented to a jury, is itself legally significant and, therefore, merits analysis.[84]

The analysis set out below makes two important assumptions that are taken from the Steelworkers' summary judgment papers. First, it is assumed herein that the Bayou Steel campaign was conducted solely for the purpose of obtaining a collective bargaining agreement acceptable to the union.[85] That is, for purposes of analysis, it is assumed arguendo that the Steelworkers sought only legitimate collective bargaining objectives—for example, wages, hours, and working conditions—from the corporate campaign. Second, it is assumed

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83. *See* Order Denying Motion to Dismiss, Texas Air Corp. v. Airline Pilots Ass'n Int'l, No. 88-0804, 1989 WL 146414 (S.D. Fla. filed July 14, 1989) (denying dismissal in RICO action based on corporate campaign allegedly conducted to compel Texas Air to sell Eastern Airlines to unions. Thereafter, Eastern disappeared in bankruptcy). Other RICO cases based on corporate campaigns typically have stalled after briefing on motions to dismiss.

84. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

85. *See* Steelworkers' Facts, *supra* note 38, at ¶ 50 (quoting the deposition of International Vice President Davis,"The USWA's 'corporate campaign' was 'an effort to take the [USWA's] message beyond the picket line to the public, to the stockholders, to all the audiences that could help [USWA] to encourage the management of Bayou Steel to return to the bargaining table and negotiate a fair and equitable agreement."); Steelworkers' Facts, *supra* note 38, at ¶ 51 ("The sole purpose of the corporate campaign throughout the labor dispute was to exert pressure on Bayou to reach a collective bargaining agreement with USWA."); Steelworkers' Summary Judgment Brief, *supra* note 6, at 36 ("The record allows of no conclusion other than the obvious one—the objective of the union activities that are the subject of Bayou's complaint was to obtain a collective bargaining agreement.").

On the other hand, it is believed that an analysis could show that, since Bayou was one of the few unionized mini-steel plants in the Southeast, the Steelworkers might well have preferred initially to shut it down if an agreement satisfactory to the union's interest could not be achieved. When that proved impossible, Bayou became an embarrassment to the union, and it settled close to Bayou's terms. Here, of course, is not the place to discuss this issue in detail.

arguendo that the Steelworkers' publicity and complaints to various regulatory agencies and the public were entirely true.[86]

A. Labor Law Is Not The Appropriate Model For Analyzing Corporate Campaigns

It is axiomatic that a corporate campaign pits a union against an employer. Thus, it is tempting to look to labor law, which typically controls the allocation of rights and liabilities between employers and organized labor, for the applicable rules of conduct and corresponding sanctions. This perspective leads, in turn, to seeing corporate campaigns as potentially unfair labor practices under the National Labor Relations Act ("NLRA") and, accordingly, falling within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). Making the conceptual leap from the simple fact of a union-employer conflict to labor law and NLRB's exclusive jurisdiction, however, is neither necessary nor is it particularly illuminating in the context of corporate campaigns.

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86. *See* Steelworkers' Facts, *supra* note 38, at ¶ 65 ("No communications made on behalf of the USWA about Bayou Steel or its affiliates in the course of the labor dispute was deliberately false or misleading, and it was repeatedly emphasized by USWA representatives that accuracy in communications was critical in order that the campaign maintain its credibility with the various government agencies, many of which the USWA had ongoing investigations across the country."); *Id.* at ¶ 66 ("USWA representatives instructed that all complaints to government agencies had to be well-founded, specifically that all complaints had to be based in good faith on the best available information."); Steelworkers' Summary Judgment Brief, *supra* note 6 at 40 ("The undisputed facts demonstrate that the USWA did not communicate anything with intent to deceive. Without exception, the USWA representatives testified that they believed all of their assertions to be true when they made them and that they believed in good faith that their sources of information were accurate.").

In fact, many of the environmental charges, especially those made by Local 9121, did not stand the test of examination. After numerous unsupported allegations of environmental offenses, the Deputy Secretary of the Louisiana LDEQ reacted rather strongly. He wrote the Chairman of Local 9121's safety and environmental committee as follows:

> The numerous special inspections in response to your frequent unsupported allegations have not resulted in any findings of significant danger to the environment or human health, nor an emergency, nor the discovery of an abandoned hazardous waste site, nor any findings of significant violations of the Environmental Quality Act. This office can no longer reasonably believe your unsupported allegations against the above referenced facility.
>
> Submit significant, verifiable evidence to support your allegations against the above referenced facility, and this office will investigate in an appropriate manner.

Northrup, *Corporate Campaigns*, *supra* note 49, at 353-54 (quoting Letter from Filmore P. Bordelson, III, to Maurice Simoneaux, Chairman, Safety and Health, United Steelworkers, Local 9121 (November 17, 1994)).

Labor unions are not specially privileged by federal labor law, or any other source of law, to commit murder, arson, robbery, fraud, blackmail, or a host of other possible offenses—even in pursuit of legitimate collective bargaining objectives—without facing the very same legal sanctions that apply to everyone else. Thus the idea that disputes concerning the lawfulness or unlawfulness of corporate campaign activity must be resolved within the purview of NLRB actually is not well-founded. Moreover, corporate campaigns are by definition comprised of nontraditional tactics directed toward objectives that cannot be attained using traditional means such as elections, collective bargaining, and withholding labor *en masse*. In other words, corporate campaigns are intended by unions to take their disputes with employers outside the traditional labor law model for one simple reason: from the unions' perspective, the model embodied by labor law is inadequate for the unions' purposes. Accordingly, it is valid and worthwhile to analyze the lawfulness of corporate campaign tactics under non-labor laws and particularly under RICO.

B. Thinking Outside the Box of Federal Labor Law

On August 10, 1995, Bayou Steel filed suit against the United Steelworkers International, the IUD, and Local 9121, in the United States District Court for the District of Delaware, alleging that the corporate campaign violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968.[87] Venue was based on a shareholder suit in Delaware Chancery Court filed by the International as part of their corporate campaign.[88]

87. *See generally* Plaintiffs' Second Amended Complaint, Request for Injunctive Relief and Request for a Jury Trial, Bayou Steel Crop. v. United Steelworkers of America, No. 95-496-RRM, 1996 WL 76344 (D. Del. filed Oct. 10, 1998).

88. *See* United Steelworkers of America v. Bayou Steel Corp., Nos. 13817 and 13818 (Del. Ch. filed October 18, 1994); USWA News Release entitled "Steelworker Shareholders Sue Bayou Steel for Annual Meeting; Announce Plans to Offer Resolution Shaking Up Board," dated October 18, 1994. Such shareholder suits, when they are part of a corporate campaign, may be improper in courts of equity. *See* Carpenter v. Texas Air Corp., No. 7976, 1985 WL 11548 (Del.Ch. Apr. 18, 1985) (Plaintiffs, shareholders of Texas Air and members of the Airline Pilots' Association International Union, sought to inspect the list of stockholders of Texas Air, alleging that their purpose was to communicate with shareholders concerning issues related to the corporation's management and affairs, and to its relationship with Continental Airlines. The union was on strike against Continental. Texas Air refused to allow inspection of its shareholders list, alleging that plaintiffs' purpose for inspection was improper. The court of chancery, held that plaintiffs' request to inspect the stockholders list was not for a purpose reasonably related to their status as stockholders. The real party in

The complaint alleged securities fraud and an array of state law tort claims. After briefing and a hearing, Bayou Steel's RICO and state law tort claims survived the Steelworkers' motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). The analysis set out here, however, is directed less toward the theories of recovery as they were originally pleaded, and more toward the theories of liability that emerged from the parties' experience in discovery. This comports with the liberal amendment model of the Federal Rules of Civil Procedure.

1. Federal Labor Law Does Not Preempt Federal Racketeering Law

When state law overlaps with federal law, state law is generally preempted.[89] That is, state law can neither make lawful that which is unlawful under federal law, for example possession of narcotics. Nor can it prohibit that which is made lawful under federal law, for example federal civil rights. Thus, where state law overlaps and conflicts with federal labor law, state law is preempted and federal labor law alone controls.[90]

Where two federal statutes overlap, however, the state law preemption rule does not apply.[91] Where conduct is made

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interest is the pilots' union, who initiated the suit in order to put economic pressure on Continental. The court found this to be an improper purpose and, therefore, denied plaintiffs' request).

89. *See* Machinists v. Wisconsin Emp. Rel. Comm., 427 U.S. 132 (1976); Amalgamated Ass'n of St. Employees v. Lockridge, 403 U.S. 274 (1971); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

90. *See* cases cited *supra* note 87.

91. *See* Connell Constr. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616, 625 (1975) (federal antitrust law not preempted by labor law); *id.* at 635-36, n.17 ("In most cases a decision that state law is pre-empted leaves the parties with recourse only to the federal labor law, as enforced by the NLRB. But in cases like this one, where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies.") (citations omitted); Britt v. Grocers Supply Company, Inc., 978 F.2d 1441, 1449 (5th Cir. 1992) (holding that claims under the Age Discrimination Act are not preempted under federal labor law because each provides a separate remedy); Hood v. Smith's Transfer Corp., 762 F. Supp. 1274 (W.D. Ky.1991) (holding that preemption doctrine does not apply in situations where two federal statutes conflict.); *id.* at 1447 ("Additionally, we have held that claims under Title VII are not preempted by the NLRA."); *id.* at 1447, n.8 ("In *United States v. International Bhd. of Teamsters*, 948 F.2d 98 (2d Cir.1991), *vacated sub nom. Yellow Freight Systems, Inc. v. United States*, [506] U.S. [802], (1992), the Court determined that the district court was entitled to exercise jurisdiction over the parties pursuant to the All Writs Act, 28 U.S.C. § 1651 (1988), and was not preempted from that jurisdiction by the authority of the NLRB to determine issues concerning unfair labor practices under the NLRA."). *See also* Teamsters Local 372 v. Detroit Newspapers, 956 F. Supp. 753, 758 (E.D. Mich. 1997) ("RICO and the NLRA are independent of each other in virtually all respects, even though certain conduct by employers or by unions could fall within the

unlawful under several federal statutes, each statute generally can be enforced separately without preemption of the others.[92] Thus, for purposes of preemption analysis, when a labor union violates a federal non-labor statute, it does not matter that the same conduct arguably could also constitute an unfair labor practice. Accordingly, if a corporate campaign violates RICO, it is not an obstacle to the recovery of damages that the same conduct also constitutes unfair labor practices falling within the primary jurisdiction of the NLRB.

This analysis is strengthened by the decision in the *Palumbo Brothers* case.[93] Here the Seventh Circuit ruled, and the Supreme Court denied certiorari, in a case in which an indictment alleging RICO violations was brought against an employer premised upon mail and wire fraud acts. The court held that these acts, which also constituted unfair labor practices, were not preempted by the NLRA. According to the Seventh Circuit, "the indictment specifically charges the defendants with criminal violation of RICO, mail fraud, and ERISA, and the prosecution of those criminal violations interferes with neither the NLRB's jurisdiction nor conflicts with labor policy."[94] This ruling

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bounds of both statutes."); *id.* at 760-61 ("In the case at bar, however, many of the alleged predicate acts have no bearing whatsoever on the labor laws. They are unlawful without the need to be so defined by the federal labor laws."); *id.* at 764 ("Accordingly, this court finds that conduct alleged to violate the Michigan extortion statute can form the basis of a RICO predicate act."); Chicago District Council of Carpenters Pension Fund v. Ceiling Wall Sys., Inc., 915 F. Supp. 939, 943 (N.D. Ill. 1996) (finding that the NLRA does not preempt RICO claims based on activity arguably prohibited by the NLRA, namely, alleged use of the U.S. Mail in furtherance of a scheme to defraud employees of economic benefits created in a collective bargaining agreement); MHC, Inc. v. International Union, United Mine Workers of America, 685 F.Supp. 1370, 1376-77 (E.D. Ky. 1988) ("RICO should be read as limited by the exclusive jurisdiction of the NLRA only when the Court would be forced to determine whether some portion of the defendant's conduct violated labor law before a RICO predicate act would be established .... So long as the predicate acts exist independent of any unfair labor practice resolutions, the NLRB's exclusive jurisdiction is not violated since the Court will not be forced to interpret labor law except as a collateral matter .... This conclusion is consistent with the policies and purposes of both the NLRA and RICO.") (internal citations omitted).

92. *See e.g.*, United States v. Boffa, 688 F.2d 919, 931 (3rd Cir. 1982) ("[W]e decline to accept the proposition that the NLRA precludes the enforcement of a federal statute that independently proscribes that conduct as well."); O'Rourke v. Crosley, 847 F. Supp. 1208 (D.N.J. 1994) (holding that RICO claims were not preempted by Land Management and Reporting Act claims).

93. United States v. Palumbo Bros., Inc., 145 F.3d 850 (7th Cir. 1998); *cert. denied*, 119 S.Ct. 375 (1998). This analysis was contributed by Mark A. Carter, Esq. *See High Court Lets Stand Seventh Circuit Ruling That Indictment Not Preempted by Labor Law*, Daily Lab. Rep. (BNA) No 202, at AA-1 (Oct. 20, 1998).

94. *Palumbo Brothers*, 145 F.3d at 863.

demonstrates that state law preemption analysis is not applied to conflicting federal statutes.

In the *Mariah Boat* case[95] which followed *Palumbo*, the court refused to preempt an employer's civil RICO action based upon mail and wire fraud and obstruction of justice during an organizing campaign. The court held that the *Garmon* doctrine[96] preempts federal statutes when the underlying conduct is actionable only by virtue of the NLRA. As such, the Court concluded, "Civil RICO charges may survive *Garmon* preemption if the predicate acts are violative of federal law independent of the NLRA . . . . Although all of the underlying acts are arguably protected or prohibited by the NLRA, none of the predicate acts are premised on labor law alone."[97] This court also recognized that preemption is not applicable between multiple causes of action stemming from independent federal statutes.

Closely related to preemption and the NLRB's primary jurisdiction is the rule of *Bill Johnson's Restaurant v. NLRB*.[98] The consequences of *Bill Johnson's Restaurant* in the Bayou Steel RICO case present an object lesson for employers regarding what *not* to do in a civil RICO case based on a corporate campaign.

2. Summary of *Bill Johnson's Restaurant* Case[99]

In *Bill Johnson's Restaurant*, the Supreme Court determined whether, and under what circumstances, the NLRB could enjoin a state court lawsuit filed by an employer against employees, allegedly for exercising federally-protected labor rights.[100] The case grew out of the firing of a waitress, Helton, who had attempted to organize the restaurant's employees. The NLRB investigated her allegations of wrongful discharge, and issued an unfair labor practice complaint asserting violations of Section

95. Mariah Boat, Inc., v. Laborers Int'l Union of North America, 19 F. Supp.2d 893 (S.D. Ill. 1998).

96. For an explanation of the *Garmon* doctrine, see *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), holding that the NLRB has exclusive jurisdiction over actions arising under the NLRA.

97. *Mariah Boat*, 19 F. Supp.2d at 899.

98. 461 U.S. 731 (1983).

99. *See* Mark A. Carter, *The Use of "Bill Johnson's Restaurants" to Defend Labor Organizations in Suits Alleging Civil RICO Violations*, presented to American Bar Association, Labor and Employment Law Section, Antitrust, RICO & Labor Law Committee (1997).

100. *Bill Johnson's Restaurant*, 461 U.S. at 733.

8(a)(3) of the NLRA.[101] On the day the complaint was issued, Helton and several others picketed the restaurant calling for a boycott. Their picketing included distributing leaflets accusing the employer of making improper sexual advances and of having filthy restrooms.

The employer sued in state court alleging mass picketing, customer harassment, interference with public access to business, threats to public safety, and libel, and sought a temporary restraining order, preliminary and permanent injunctions, and compensatory and punitive damages. The state court refused to enjoin the leafletting, but otherwise temporarily restrained the picketers. After a hearing, however, the court denied the preliminary and permanent injunctions. Helton, in turn, filed additional charges with the NLRB alleging that the state court lawsuit itself constituted unlawful retaliation against her for filing her original charges, a violation of NLRA Section 8.

The NLRB issued a complaint. The Administrative Law Judge (ALJ) concluded after a trial that the state court civil suit was retaliatory and that it lacked a reasonable basis. The ALJ based his determination on the record and on his own assessment of the witnesses. On appeal, the NLRB adopted the ALJ's findings and initiated enforcement proceedings against the employer, including enjoining the state court lawsuit and compensation orders for Helton's litigation costs and expenses.

The Supreme Court vacated the NLRB's order, holding that its rule that a state law action must be prohibited if its purpose was to retaliate against the exercise of protected rights under the NLRA ran afoul of the First Amendment's guarantee of the right to seek redress.[102] The Supreme Court reasoned that state court actions by employers that (1) are motivated by retaliation; and (2) lack a reasonable basis, or are based on intentional falsehoods, or upon knowingly frivolous claims, are not protected under the First Amendment.[103] The Court also set out a procedural rule for the NLRB. Specifically, in assessing a retaliatory civil action, where the NLRB determines that "there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot . .

101. 29 U.S.C. § 158(a)(3) (1994).

102. *See Bill Johnson's Restaurant*, 461 U.S. at 743.

103. *See id.* at 742 (citing Linn v. Plant Guard Workers, 383 U.S. 53, 65 (1966)).

. be concluded that the suit should be enjoined."[104] Rather, upon finding that a genuine issue of material fact exists, the NLRB must proceed no further and must stay proceedings on the unfair labor practice charge until the civil action proceedings are concluded.[105] The Court reasoned that the NLRB should decide this issue with reference only to documentary evidence, but it did not rule out conducting a hearing to determine whether a case involves genuine issues of material fact or law.[106] Thus, ordinarily the NLRB should allow state legal issues to be decided by the state courts whenever there is "any realistic chance" that the employer's legal theory might be adopted.[107]

The Supreme Court concluded that where an employer ultimately prevails in its litigation, any related Section 158 charges must be dismissed. Where the employer does not prevail in the suit or withdraws it, however, the NLRB should proceed with the charge to determine whether it had a reasonable basis in light of its resolution.[108] If the complainant prevails on the charge, attorney's fees and other defense-related expenses can be awarded. Accordingly, the Court vacated the NLRB's order and remanded the case, holding that the ALJ should only have determined whether there existed a genuine issue of fact for decision in the civil trial, and should not have acted as a finder of fact.[109]

Thus, under the reasoning of *Bill Johnson's Restaurant*, it is appropriate for an employee who has been retaliated against for exercising protected labor rights by the filing of a civil lawsuit to file an unfair labor practice charge seeking costs and expenses incurred in connection with defending against the civil suit.

3. *Bayou Steel:* An Object Lesson in What *Not* to Do

The NLRB issued a complaint against Bayou Steel asserting that the company's RICO suit was filed in retaliation for the Steelworkers having filed unfair labor practice charges. Specifically, one of Bayou Steel's deposition witnesses, a vice president who testified pursuant to Rule 30(b)(6) of the Federal

104. *Id.* at 745.
105. *See id.* at 746.
106. *See id.* at 745, n.11.
107. *See id.* at 747.
108. *See id.*
109. *See id.* at 748-49.

Rules of Civil Procedure, stated that one of the reasons Bayou Steel filed its RICO action was to stop the Steelworkers from filing unfounded and frivolous complaints with regulatory agencies, including the NLRB. Even though this witness absolutely was mistaken regarding the NLRB,[110] his testimony, understandably, was sufficient for a complaint to issue, despite the company's efforts to correct the record. Although the NLRB did not enjoin Bayou Steel's lawsuit, and eventually dismissed its complaint, the deposition testimony set in motion a dynamic that exposed Bayou Steel to the possibility of an adverse judgment from the NLRB that could have required it to pay the Steelworkers' costs and attorney's fees incurred in defending against the company's RICO action.

This is an object lesson, however, because Bayou Steel's witness knew the company was not basing any part of its RICO suit on the union's charges to the NLRB. In early parts of his testimony he was, in fact, very clear on this point. He nevertheless inadvertently and incorrectly stated just the opposite in a later part of his testimony. Thus, no matter how well prepared a witness may be for examination, mistakes can happen. Accordingly, as a practitioners' note, (1) a company should never use RICO in retaliation for the filing of unfair labor practice charges; and (2) a company's witnesses always must be advised—clearly and repeatedly—about *Bill Johnson's Restaurant* and its implications.[111]

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110. In Bayou Steel's RICO complaint, references to the union's complaints to the NLRB are conspicuously absent. This was intentional. The filing of unfair labor practices charges not only is protected labor activity but, as explained *infra*, also is not blackmail as a matter of law. Therefore, in connection with its RICO case, Bayou Steel did not allege that the filing of unfair labor practice charges was actionable as regulatory harassment. Bayou Steel's witness was truthful in testifying that the company believed that many of the union's board filings were frivolous and, therefore, wanted that practice to end. But the witness was simply mistaken when he stated that one reason the company filed its RICO action was to stop that practice. *See* Letter from Frederick L. Cottrell III, Bayou Steel's Delaware Counsel, to Hon. Roderick R. McKelvie, D.Del. 1-2 (Nov. 8, 1996) ("Bayou Steel has not been seeking nor will it seek damages in this action for NLRB charges filed against Bayou Steel. Further, Bayou Steel wishes to make it clear to the Court and to the NLRB that it has not in the past, does not through this action and will not in the future seek to prevent persons from filing charges or complaints with the NLRB regarding Bayou Steel. Bayou Steel is prepared to reiterate this representation in the pretrial stipulation which will be filed in this case.").

111. Further, when a union pursues the route of *Bill Johnson's Restaurant*, it potentially complicates reaching a negotiated settlement. Under *Bill Johnson's Restaurant*, if an employer dismisses its civil action, the union may be entitled to an award of litigation costs and attorney's fees. Once a complaint is issued, however, the United States takes the role of plaintiff, and the union functionally becomes merely a

C. *Analysis of the Elements of RICO in the Context of a Corporate Campaign*

1. Two Views of Regulatory Harassment

These days, most companies have a fairly good understanding of what to expect from corporate campaigns.[112] Indeed, labor unions themselves have made it a point to assure that this is so because if a target company cannot form an expectation about its consequences, raising the specter of a corporate campaign will have little impact.[113]

As noted above, the hallmark of many corporate campaigns is regulatory harassment. In its most benign interpretation, regulatory harassment means a union going to agencies and courts for the purpose of "telling the truth" about a target company. Thus, from a collective bargaining perspective, the union's silence can be purchased, with the price being a collective bargaining agreement acceptable to the union.

In the Bayou Steel RICO litigation, the Steelworkers steadfastly asserted that the corporate campaign was intended only to obtain a collective bargaining agreement.[114] As the Steelworkers argued in their briefs, upon reaching a collective bargaining agreement the corporate campaign would cease.[115] Thus, from the Steelworkers' perspective, the corporate campaign was merely a form of "economic pressure" or "hard bargaining."[116] Bayou Steel

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witness. Hence, the union may not be able to non-suit its NLRB action, making global settlement a three-way problem.

112. *See* Northrup, *supra* note 48; Northrup, *Corporate Campaigns*, *supra* note 49.

113. *See supra* notes 46-48 and accompanying text.

114. *See* Steelworkers' Facts, *supra* note 38, at ¶ 50 (quoting the deposition of International Vice President Davis, "The USWA's 'corporate campaign' was 'an effort to take the [USWA's] message beyond the picket line to the public, to the stockholders, to all the audiences that could help [USWA] to encourage the management of Bayou Steel to return to the bargaining table and negotiate a fair and equitable agreement.'"); *id.* at ¶ 51 ("The sole purpose of the corporate campaign throughout the labor dispute was to exert pressure on Bayou to reach a collective bargaining agreement with USWA."); Steelworkers' Summary Judgment Brief, *supra* note 6, at 36 ("The record allows of no conclusion other than the obvious one—the objective of the union activities that are the subject of Bayou's complaint was to obtain a collective bargaining agreement.").

115. *See* Surreply Brief in Support of Motion of Defendants United Steelworkers of America and Industrial Union Department to Dismiss Complaint at 3, Bayou Steel v. United Steelworkers of America, No. 95-494-RRM, 1996 WL 76344 (filed Dec. 19, 1995) ("Although the Company chides defendants for 'declin[ing] to state to the Court that their objectionable conduct will cease if a new [labor] contract is signed,' Bayou's Answering Brief at 7 n. 24, defendants have no reluctance to state to this Court that *if a new labor contract is signed, the Corporate Campaign will cease.*") (emphasis in original).

116. *See, e.g.*, Steelworkers' Summary Judgment Brief, *supra* note 6, at 2-3, 17, and 49 (characterizing corporate campaign tactics as economic pressure).

held the view that having to purchase the Steelworkers' forbearance from regulatory harassment by acquiescing in the union's collective bargaining demands was not bargaining at all, but rather it was extortion.

The Steelworkers' characterization of corporate campaign tactics as "economic pressure" or "hard bargaining" has an initial appeal that suggests lawfulness. After all, a lawful strike is itself a form of economic pressure. Intuitively, however, something also seems very wrong with this notion. Indeed, it goes too far and includes too much. Not all forms of "economic pressure" are lawful. Bribery, arson, kidnapping, misappropriation, and blackmail, for example, are forms of "economic pressure," but nevertheless are crimes.

2. The Paradox of Blackmail: Two Lawful Acts Together Become Unlawful

Some threats are extortionate.[117] Indeed, it is easy to see the extortion inherent in threats to do violence or otherwise to destroy another's property.[118] Moreover, it is long settled that

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117. *See, e.g.*, LA. REV. STAT. ANN. §14:66 (West 1997):

> §66. Extortion
>
> Extortion is the communication of threats to another with the intention thereby to obtain anything of value or any acquittance, advantage, or immunity of any description. The following kinds of threats shall be sufficient to constitute extortion:
>
> (1) a threat to do any unlawful injury to the person or property of the individual threatened . . .;
>
> (2) a threat to accuse the individual threatened . . .;
>
> (3) a threat to expose or impute any deformity or disgrace to the individual threatened . . .;
>
> (4) a threat to expose any secret affecting the individual threatened . . .
>
> (5) a threat to do any other harm.

See also 18 U.S.C. § 873 (1994):

> Whoever, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined under this title or imprisoned not more than one year, or both.

118. *See* Illinois v. Holder, 456 N.E.2d 628 (Ill. App. Ct. 1983) (affirming a conviction where an employee representative threatened that unless employer signed collective bargaining agreement, drivers would strike and mixing drums on employer's already-filled cement trucks would not turn, causing the cement to harden, thus ruining the trucks). The court found that the representative's threat was intended to coerce the employer—"sign or face as an alternative, the consequences"—and rejected arguments that the threat was protected by the Constitution, and that threat was merely permissible economic pressure used as leverage to obtain a union contract. *Id.* at 631.

blackmail is a species of extortion.[119]

Unlike extortion based on threats to do unlawful acts, however, in blackmail, acts which are lawful in isolation combine to create a crime.[120] For example, generally it is not unlawful to accuse a person of a crime or regulatory infraction.[121] Also, it is not generally unlawful for a person to demand a legal right, such as payment on a valid debt, compensation for tort damages, or performance on a contract. However, when a person threatens to accuse another of a crime or infraction unless a debt is paid, tort damages are paid, or performance under a contract is rendered, that person commits blackmail.[122] In such cases the lawfulness of

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119. *See* United States v. Nardello, 393 U.S. 286 (1969) (reversing dismissal of indictments and holding that Pennsylvania law against blackmail is extortion within meaning of the Travel Act, 18 U.S.C. § 1952); United States v. Castillo, 965 F.2d 238, 241 (7th Cir. 1992) ("As the evidence unfolded at trial, it became clear that the first line of defense was hopeless. The 'transaction' was not the sale of a business. It was blackmail, a standard form of extortion."); United States v. Laudani, 134 F.2d 847, 851, n.1 (3rd Cir. 1943) (observing state law merger of the common law crimes of extortion and blackmail) (citing 22 AM.JUR. *Extortion and Blackmail* § 2, at 234-35); Greenspun v. Gandolfo, 320 P.2d 628, 630-31 (Nev. 1958) (holding that an arrest warrant reciting crime of blackmail was sufficient even though the applicable statute did not use that term). *See generally* 3 RONALD A. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE § 1396, at 795 (1957) ("In common parlance, the term 'blackmail' is equivalent to, and synonymous with, 'extortion,' within the nontechnical meaning of the term."). Blackmail was a crime at common law. *See* 1 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 641 (1948); A.H. Campbell, *The Anomalies of Blackmail*, 55 L.Q. REV. 382, 382 (1939). *See, e.g.*, Regina v. Woodward, 11 Mod. 137 (1707).

120. Commentators sometimes refer to this as the "paradox of blackmail." *See* James Lindgren, *Unraveling the Paradox of Blackmail*, 84 COLUM. L. REV. 670 (1984) (hereinafter "Lindgren"); Glanville L. Williams, *Blackmail*, 1954 CRIM. L. REV. 79, 163; Jeffrie G. Murphy, *Blackmail: A Preliminary Inquiry*, 63 MONIST 156, 156-57 (1980). As set out below, *infra* notes 130-137 and accompanying text, the key to recognizing and understanding the wrongfulness of blackmail lies in its triangular structure, that is, its involvement of third-parties' rights in the settlement of two-party disputes.

121. *See* Landry v. Daley, 280 F. Supp. 938, 962-63 (N.D. Ill.1968) (The private citizen "has the power to initiate criminal prosecution against another and the right to give information and testimony against another. He may make statements injurious to another's reputation, provided he does not commit defamation."), *rev'd on other grounds sub nom.* Boyle v. Landry, 401 U.S. 77 (1971); Regina v. Pollock, 2 W.L.R. 1145, 1156 (1966) ("If an offence [sic] of indecency, of whatever sort, has been committed, or if a person bona fide believes that such an offence [sic] has been committed, he has a duty to report it. To say, in such circumstances, that one is going to report it, without any intention of using the threat of reporting as a means to extort money or goods, is merely saying that one is going to fulfil [sic] a public duty and is not a criminal offence [sic]."). *See, e.g.*, 26 U.S.C. § 7623 (1994) (providing for payments by the Internal Revenue Service to informers); 33 U.S.C. § 1365(a) (1994) (citizen suit provision of the Clean Water Act); Public Interest Research Group of New Jersey, Inc. v. Windall, 51 F.3d 1179 (3rd Cir. 1995) (public interest group brought suit against Air Force under Clean Water Act); Faul v. Commissioner, 263 F.2d 645 (9th Cir. 1959) (reward to bookkeeper for gathering information showing employer's tax fraud).

122. *See* cases cited in note 210, *infra*.

the debt, the validity of the tort claim, and the right to performance under the contract are irrelevant to the blackmailer's guilt.[123] Likewise, it is irrelevant to a blackmailer's guilt whether the blackmail victim actually committed the crime or infraction the blackmailer threatened to expose.[124] When a blackmailer threatens to disclose damaging information about a victim to the public, the truth of the threatened disclosure is irrelevant to guilt.[125] Indeed, blackmail does not even require a preexisting relationship between the blackmailer and the victim.[126] Accordingly, it is blackmail for a person to threaten a winning auction bidder with a lawsuit contesting the procedures used in a sheriff's sale unless the successful bidder pays money, regardless of the merits of the threatened suit.[127]

Not every "threat" is blackmail, however, and there are many obvious examples.[128] When one "threatens" litigation on a claim

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123. *See* United States v. Coyle, 63 F.3d 1239, 1249 (3rd Cir. 1995) (conviction for blackmail affirmed. Blackmailer had agreed to "stonewall" FBI in exchange for victim's forbearance from interference with payment of money lawfully owed to him. "Coyle argues that the district court erred in denying his proposed instruction that he could not be convicted if he was entitled to the benefits he demanded .... However, what is made unlawful by the blackmail statute is Coyle's use of the offer not to report the fraudulent activity or not to cooperate with the authorities as leverage over Cusumano ... whether or not Coyle had a claim of right to the benefits. The blackmail statute thus reaches those who would evade their responsibility to inform the authorities about a violation of the law by exchanging the promise to forebear from giving such information for some benefit."); Idaho v. Adjustment Dept. Credit Bureau, Inc., 483 P.2d 687, 691 (Idaho 1971) (reversing trial court's dismissal of criminal indictment and holding, "Finally, the defendant asserts that there was a lawful debt due and owing it by [ ]the debtor, and that this is a defense to the crime charged here. With this contention we do not agree.").

124. *See* United States v. Hughes, 411 F.2d 461 (2nd Cir. 1969) (threat to expose homosexual for violating New York statute prohibiting sodomy unless money was paid); Connecticut v. Bassett, 200 A.2d 473 (Conn. 1964) (blackmailer, who entered proprietor's store on a Sunday, threatened to accuse proprietor of violating Sunday closing laws unless money was paid).

125. *See* United States v. Castillo, 965 F.2d 238, 241 (7th Cir. 1992) ("Whether the discreditable things were true or false is irrelevant .... Granted, blackmail with false information is less likely to succeed than if the information were true .... Still, there are occasional cases of blackmail with false dirt—enough of them that we know that this form of blackmail is just as criminal as the more common kind.").

126. *See* Salley v. United States, 306 F.2d 814 (D.C. Cir. 1962) (blackmailer threatened to tell victim's wife that victim had caused an extramarital pregnancy); People v. Goldstein, 191 P.2d 102 (Cal. Ct. App. 1948) (threat to expose extramarital affair unless money was paid).

127. *See* New Jersey v. Roth, 673 A.2d 285, 288 (N.J. Super. Ct. App. Div. 1996) (affirming blackmail conviction where *pro se* real estate dealer claimed he was merely "playing [economic] hardball" by threatening to file motion to set aside sheriff's sale on technical grounds) (bracketed text in original).

128. *See* LLOYD L. WEINREB, CRIMINAL LAW 421 (1980) ("All bargaining situations have in them an element of matched 'threats' to withhold what one has to offer ....");

unless money is paid, generally there is no blackmail.[129] When one "threatens" not to perform under a contract unless the terms of consideration are met, there similarly is no blackmail. And, indeed, when a labor union "threatens" to strike or file charges with the NLRB unless an acceptable collective bargaining agreement is reached, there is no blackmail. Thus, it is not obvious how courts distinguish lawful threats from unlawful ones.

The key to distinguishing blackmail from lawful hard bargaining lies in noting blackmail's distinctive triangular structure.[130] Characteristically, and invariably, blackmail involves not only a blackmailer and a victim, but third-party interests as well.[131] These third-party interests may be those of a person,[132] a discernible group,[133] the state,[134] the general public,[135] or combinations of these. In each instance, however, the blackmailer threatens to bring third parties into a dispute with the victim, unless the blackmailer's silence is purchased.[136] Thus, the

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Lindgren, *supra* note 120, at 701, n.162; Note, *A Rationale of the Law of Aggravated Theft*, 54 COLUM. L. REV. 84, 90-1 (1954) ("The striking of a legitimate bargain often involves the threat to inflict economic harm if agreement is not reached."). *See also* United States v. Kramer, 355 F.2d 891 (7th Cir. 1966) (contractor apparently threatened subcontractor that he would exercise his right to terminate the subcontract if the subcontractor did not have his men on the job on the following day; the subcontractor was prevented by a labor union official from supplying workers and lost the subcontract).

129. *See* Heights Community Congress v. Smythe, Cramer Co., 862 F. Supp. 204 (N.D. Ohio 1994) (holding that a citizen group's threat to file suit was not extortion under Ohio or federal law).

130. *See* Lindgren, *supra* note 120, at 672-73 ("Recognizing the triangular structure of the blackmail transaction makes clear the parasitic nature of the blackmailer's conduct. Once this structure is understood, it becomes easier to find in blackmail the kind of behavior that concerns the other theorists: immorality, invasiveness, and economic waste.").

131. *See id. See also*, 18 U.S.C. § 873 (1994) (defining blackmail, "Whoever, under a threat of informing, or as a consideration for not informing . . . ."); LA. REV. STAT. ANN. § 14:66 (West 1997) (defining extortion to include threats to "accuse" or "expose").

132. *See* case cited *supra* note 124.

133. *See, e.g.*, United States v. Stirone, 311 F.2d 277 (3rd Cir.1962) (union official threatened a businessman with the loss of a lucrative contract unless the union official received payoffs).

134. *See, e.g.*, Commonwealth v. Nevitt, 268 A.2d 121 (Pa. Super. Ct. 1970) (bail bondsman offered to secure the dismissal of a drunk-driving charge in return for a payoff).

135. *See, e.g.*, United States v. Margiotta, 688 F.2d 108 (2nd Cir.1982) (local Republican Party chairman threatened to withhold public contracts unless insurance firm agreed to kick-back scheme).

136. Reputational blackmail—where a blackmailer threatens to publicize embarrassing facts about his victim, although not accusations of unlawful conduct—is not different, even if nominally it appears that the blackmailer's threatened dispute only concerns the victim's interest in his own reputation. Here the blackmailer exploits the community he believes to be genuinely interested in the victim's reputation. Absent

hallmark of blackmail is a disjunction between the blackmailer's genuine interests and the genuine interests of the third parties whose leverage is used for the blackmailer's personal gain. Stated concisely, in blackmail the blackmailer threatens to exploit third-party interests to exert pressure—usually economic pressure—on the victim; that is, the blackmailer plays with someone else's "chip," and absent such third-party interests there is no blackmail.[137]

When the case law is read with this structure in mind, the courts' holdings form a logical and legally meaningful whole. Louisiana law—which applied in the Bayou Steel campaign—is in full accord.[138]

It is important to note that blackmail can be established based on an integrated continuum of conduct[139] and that there is no

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an interested community, the reputational blackmailer has nothing to sell. *Cf.* United States v. Pignatelli, 125 F.2d 643 (2nd Cir.) (threat to publish a book damaging reputation).

137. *See* United States v. Castillo, 965 F.2d 238, 241 (7th Cir. 1992) (citing Lindgren, *supra* note 120, and reasoning that without triangular exploitation of third-party rights there is no blackmail. "Had Grajeda [himself] taken the initiative in seeking to exchange money for forbearance to publish, this would not be a blackmail case."); Williams v. Grimm, No. 83-C-3779, 1986 WL 10071 (N.D. Ill. 1986) ("Although the concept of blackmail or extortion can be confusing, *see e.g.* Lindgren, the Court does not believe that the business negotiations in this case rise to the level of unlawful conduct. Plaintiff has cited no authority for the proposition that the extortion statutes apply to ordinary business disputes such as this. *Stamatiou v. U.S. Gypsum Co.*, 400 F.Supp. 431 (N.D.Ill.1975), *aff'd*, 534 F.2d 330 (7th Cir.1976), cited by plaintiff in support of his position, is wholly inapplicable. In *Stamatiou* Judge Marshall was applying the same Illinois statute at issue here, however, the facts were significantly different. There the 'extortionist' had threatened to withhold information with respect to another's legal claim.") (internal citations omitted).

138. *See* State v. Moore, 419 So. 2d 963 (La. 1982) (affirming extortion conviction of defendant, a police officer, who threatened to arrest a couple for obscenity unless the female had sex with him); Storey v. Stanton, 162 So. 649, 650 (La. 1935) (holding that it is not blackmail to assert one's own claims); Little v. First Nat'l Bank of Jefferson, 616 So. 2d 202, 202-03 (La. Ct. App. 1993) (affirming dismissal of petition and stating, "Further, demanding more money from the debtor than is owed does not, in and of itself, constitute extortion."); State v. Daniels, 628 So. 2d 63, 67 (La. Ct. App. 1993) (affirming conviction of defendant who threatened to cut off communication of information about the murder of victim's daughter unless the victim paid him $30,000 to $50,000); State v. Sharlhorne, 554 So. 2d 1317, 1323 (La. Ct. App. 1989) (sustaining a conviction of attempted extortion after the defendant told the victim that he had been "in jail or Angola", asked the victim for a "donation" of money, was "forceful", would not leave the victim's shop, told the victim "something might happen—people that give me money, things don't happen to their building," and the victim gave the defendant ten dollars); Campbell v. Parker, 209 So. 2d 337, 339 (La. Ct. App. 1968) ("But even if plaintiff did threaten defendant with suit in the event she defaulted in her payments on the note, such action is not unlawful, since he was informing defendant of his legal rights.").

139. *See* Wells v. NLRB, 361 F.2d 737, 743 (6th Cir. 1966) (reversing the NLRB, and reinstating the findings of the Examiner, the court reasoned, "The Board would dissect the entire program of Becka into separate events and would find each without

specific list of magic words that must be used to establish a blackmailer's threat.[140] Threats may be established from innuendo, suggestion, or from the totality of the circumstances under which the alleged threats are made, including the relations between parties.[141] Moreover, it is for the jury to decide the intent of an alleged blackmailer.[142] Thus, in Bayou Steel's RICO case, the jury would have been responsible for finding threats in the Steelworkers' overt words and actions, such as, for example, the announcement of the corporate campaign or in subsequent references to the Ravenswood campaign.

3. Corporate Campaigns Constitute State Law Blackmail

Threats to accuse another, or to expose any secret, or to do any other harm, in order to obtain value, constitute blackmail when the crime's characteristic triangular structure is present.[143] It is, of course, axiomatic that a corporate campaign pulls third-party interests into a labor dispute and, indeed, blackmail's characteristic triangular structure was overt in the Steelworkers' August 2, 1993 announcement. The Steelworkers' plans to involve third parties in the dispute with Bayou Steel was its central message. The object of the Bayou Steel corporate campaign was clear—the Steelworkers launched the Bayou Steel campaign to obtain a collective bargaining agreement with terms acceptable to the union. The element of threat was equally express—the corporate campaign would continue until a contract was agreed upon. Thus, the Steelworkers' silence—their forbearance from telling the "truth" about Bayou Steel—was for

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significance. Its attempt to excuse singly each act of conduct appears to us to be without substance. Viewing the record as a whole, we conclude that the evidence and the reasonable inferences to be drawn therefrom substantially support the findings and conclusions of the Examiner rather than the conclusions of the Board.").

140. *See* Pickens-Bond Constr. Co. v. United Bd. of Carpenters, Local 690, 586 F.2d 1234, 1241 (8th Cir. 1978) (a union's "intent is inferred from the nature of acts performed.").

141. *See* Carricarte v. State, 384 So. 2d 1261 (Fla. 1980) (holding that what constitutes improper coercion is an issue of fact to be determined in the context of the circumstances at issue, and vague, indirect and inferential coercion can constitute extortion); Matthews v. State, 363 So. 2d 1066, 1069 (Fla. 1978); Iozzi v. Maryland, 247 A.2d 758, 761-62 (Md. Ct. Spec. App. 1969) (holding that no precise words are necessary to constitute a threat and that the jury may find threats in innuendo or suggestion, may consider all of the circumstances under which alleged threats are made, including the relations between parties, and must decide what was intended by the alleged blackmailer).

142. *See Iozzi*, 247 A.2d at 762.

143. *See supra* notes 129-141 and accompanying text.

sale, and its price was an acceptable collective bargaining agreement. Technically, that is blackmail.

Even so, before going to a jury something more intuitive is needed to understand at a moral level why blackmail is a crime, particularly since it is not always apparent why this is so.[144] On the one hand, when one uses threats of physical force to compel some form of payment from a victim, it is intuitively easy to see the immorality of the threat. On the other hand, if one threatens to expose an unflattering truth about another, for example, to the authorities, a spouse, or the general public—unless that person repays the money he borrowed—it is less apparent why such a threat should constitute a crime. Similarly, in the preceding overview of the Bayou Steel campaign, and keeping the assumption that everything the Steelworkers said or planned to say about Bayou Steel was true, then arguably all the Steelworkers did was undertake to tell people—regulators, investors, and the public—a number of unflattering truths about Bayou Steel. Posed in this way, one is tempted to think that such truthful disclosures, and particularly a campaign of such disclosures, generally should be considered a good and lawful thing.

But this is a canard because the analogy thus far is not properly focused. Following the triangular structure that distinguishes blackmail from other forms of hard bargaining, one must look first to the relationship between the blackmail victim and the third party whose interests the blackmailer seeks to invoke. For example, suppose it is true that a particular company is not in compliance with the environmental laws, but that the regulators have not detected the noncompliance because the company has concealed the truth. The company, then, has engaged in a deceit or fraud against the regulators. When a blackmailer goes to the company and states that unless he is treated fairly he will tell the regulators the truth, he actually is offering to join the company in its deceit. In other words, blackmail works by expanding the scope of fraud and deceit, and only results in more truth being disclosed when it fails. Thus, the moral difference between blackmail and lawful hard bargaining, and what properly makes blackmail a crime, is that blackmail breeds fraud and deceit.

Accordingly, if it is true that the Steelworkers began and

144. *See generally* Richard A. Epstein, *Blackmail, Inc.*, 50 U. CHI. L. REV. 553 (1983).

intended to continue the Bayou Steel campaign to reach an acceptable collective bargaining agreement, then it follows, both technically and morally, that the corporate campaign was blackmail. Thus, blackmail—which is punishable by imprisonment for more than one year in all fifty states—generally passes muster as a predicate act of racketeering.

4. Federal Labor Law Does Not Preempt State Law Against Blackmail

State laws—potentially including state laws against blackmail—are preempted by federal labor law if the conduct complained of arguably falls within either the protections or proscriptions of the NLRA.[145] As shown below, however, federal labor law does not preempt blackmail by labor unions.

NLRA Section 157 confers certain rights on employees, but not expressly upon unions.[146] The protections extended to labor unions are derivative of employee rights and are limited to include only so much conduct as is necessary to assure that employees are able to exercise their labor rights.[147] Thus, in a case where a union representative seeks to assist employees in exercising their protected labor rights, such as the right to form a local union, the union enjoys a derivative right of reasonable access.[148] However, there is neither authority nor basis for a union to have any derivative rights either to assist employees in doing things that are unlawful, or for the union to itself engage in

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145. *See* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (precluding a state court from awarding damages under state law for activities subject to the NLRA).

146. 29 U.S.C. § 157 (1994) (enumerating rights of employees). *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) (observing the legal distinction between employee and union rights under federal labor law and stating, "By its plain terms, thus, the NLRA confers rights on *employees*, not on unions or their nonemployee organizers." The court held that an employer could bar the union from his property.) (emphasis in original).

147. *See Lechmere*, 502 U.S. at 537 ("*Babcock's* teaching is straightforward: § 7 simply does not protect nonemployee union organizers *except* in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels,' 351 U.S. at 112.") (emphasis in original) (internal citations omitted).

148. *See id.;* NLRB v. Tamiment, Inc., 451 F.2d 794, 799 (3rd Cir. 1971) ("It is only after union has made showing that it used reasonable efforts to utilize other available channels of communication off premises that board should proceed to consider total effectiveness of efforts and countervailing inconvenience and injury to employer having union organizers on premises and determine whether employer should be required to allow access to its premises for union representatives attempting to organize its workers.").

unlawful conduct for the benefit of employees where the same conduct would be unlawful if done by employees. Thus, NLRA Section 157 will not protect a union seeking access to an employer's property for purposes of assisting employees in violence. Nor will NLRA Section 157 protect union violence or other unlawful union conduct done to benefit employees. Accordingly, if corporate campaign tactics constitute blackmail—irrespective of the actor (employee or union)—then the derivative protections of NLRA Section 157 are not implicated. Hence, although labor unions conceive, plan, organize, and execute corporate campaigns for the ostensible benefit of employees, the protections of NLRA Section 157 are not implicated in a RICO action founded on unprotected predicate acts. To construe NLRA Section 157 any other way would confer absurd rights upon labor unions—for example, rights to commit arson, bribery, fraud, and blackmail—which simply are not protected employee rights.

NLRA Section 158(b) enumerates the classes of conduct that are proscribed as unfair labor practices by a union.[149] NLRA Section 158(b), however, does not grant unions any special rights of speech. Rather, NLRA Section 158(b) expressly removes expressions of a union's views and opinions from federal proscription as an unfair labor practice.[150] Thus, federal labor law neither arguably protects labor unions' speech, nor arguably proscribes their speech. Indeed, the fact that an employer cannot assert an unfair labor practice charge for injurious speech by a union assures that federal labor law does not preempt state blackmail law.[151]

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149. 29 U.S.C. § 158 (1994).

150. 29 U.S.C. § 158(c) (1994) ("The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.").

151. *See* Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 63 (1966) (holding that a suit for injury to reputation is not made available, or made unavailable, under the NLRA and, therefore, such suit is not preempted. Reasoning, "After all, the labor movement has grown up and must assume ordinary responsibilities."). Clearly, if the state law tort of defamation is not preempted, because it is at most merely collateral to labor law, then the felony crime of blackmail is not preempted. *See also* McCandless v. Trans Penn Wax Corp., 840 F. Supp. 371 (W.D. Pa. 1993) (holding that federal labor law did not preempt employees' claims for fraud and breach of contract arising from an employer's alleged breach of representations that led employees to vote in favor of decertification of their union, even though an unfair labor practice charge could be stated on the same facts, and remanding to state court); Pygatt v. Painters' Local No. 277, 763 F. Supp. 1301, 1312-13 (D.N.J. 1991) ("In light of the

5. The *Enmons* Defense Does Not Limit State Law

In *United States v. Enmons*,[152] the Supreme Court held that union violence used to secure legitimate labor objectives does not violate the federal extortion statute, the Hobbs Act.[153] Specifically, the Supreme Court reasoned that the Hobbs Act, which makes it a federal crime to obstruct interstate commerce by robbery or extortion, does not reach the use of violence to achieve legitimate union objectives because in that situation, there is no "wrongful" taking of the employer's property.[154] Thus, under *Enmons*, the Hobbs Act is not violated unless the alleged extortionist uses force or fear for a wrongful purpose.

It is tempting, at least initially, to read and apply *Enmons* as a general jurisprudence of extortion law. So applied, the *Enmons* case would provide unions with a solid defense to civil RICO actions based on state law blackmail so long as their goals remained legitimate labor objectives (such as wages, hours, and working conditions). This, however, actually would turn *Enmons* upside down.

In *Enmons*, the Supreme Court determined that union violence used to achieve a legitimate union objective—conduct which the Court acknowledged violated state law—should not be swept up into federal criminal law simply because of its effect on interstate commerce.[155] Thus, the Hobbs Act does not make a federal crime out of every punch thrown on a picket line. Rather, *Enmons* limited the reach of the Hobbs Act in light of state criminal law.[156] Moreover, in *Enmons* the Supreme Court clearly did not use the Hobbs Act to decriminalize conduct made unlawful under state law; rather, it expressly affirmed the district court's ruling that

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state's interest in prohibiting conduct that is inherently and 'deeply rooted in local feeling' about what fair people do to one another in pursuit of their livelihoods, the court finds that Brennan's conduct of encouraging Union members to harass Love is peripheral to the NLRA and, therefore, not preempted.").

152. 410 U.S. 396 (1973).

153. 18 U.S.C. § 1951 (1970) (amended 1994) ("the Hobbs Act") (making it a felony offense to obtain the property of another through the use of force or fear "in connection with or in relation to any act in any way or in any degree affecting trade or commerce.").

154. *See Enmons*, 410 U.S. at 401 ("The legislative framework of the Hobbs Act dispels any ambiguity in the wording of the statute and makes it clear that the Act does not apply to the use of force to achieve legitimate labor ends.").

155. *Enmons*, 410 U.S. at 408-10. *But see* 18 U.S.C. § 1951 (1970) (non-relevant sections amended in 1994) ("Whosoever in any way or degree obstructs, delays, or affects interstate commerce . . . by robbery or extortion . . . .").

156. 410 U.S. at 411-12.

the strike violence at issue was "undoubtedly punishable under [s]tate law."[157] Indeed, the *Enmons* Court concluded that in enacting the Hobbs Act, Congress did not change "the federal-state balance" by defining "as a federal crime conduct readily denounced as criminal by the [s]tates."[158] Rather, as the Court explained, the Hobbs Act was passed to remedy Congress's disapproval with one portion of the Supreme Court's prior opinion in *United States v. Local 807*,[159] which would have allowed labor unions to demand money, and use violence to get it, even though no work was to be performed.[160] The Hobbs Act, according to the Court, narrowly overruled that portion of *Local 807* and otherwise left the law unchanged.[161] As the Court stated in *Local 807* and reaffirmed in *Enmons*:

> The power of the state and local authorities to punish acts of violence is beyond question. It is not diminished or affected by the circumstance that the violence may be an outgrowth of a labor dispute. The use of violence disclosed by this record is plainly subject to the ordinary criminal law.[162]

Thus, using *Enmons* to legalize conduct made criminal under state law would turn *Enmons* upside down.

Using *Enmons* to limit state criminal law also would directly conflict with the Supreme Court's jurisprudence applying the Travel Act.[163] The Travel Act makes it a federal crime to cross state lines or to use interstate facilities to commit certain enumerated state and federal law crimes, one of which is state law extortion.[164] Thus, part of the Travel Act's basic foundation is state law crimes involving interstate travel. The Travel Act does not, however, list state law blackmail per se as one of its enumerated crimes. As a consequence, it was at one time arguable that the Travel Act's envelope included blackmail in those states with integrated extortion statutes—meaning statutes

157. *Id.* at 398. *See also id.* at 412 (Blackmun, J., concurring) ("This type of violence, as the Court points out, is subject to state criminal prosecution. That is where it must remain until the Congress acts otherwise in a manner far more clear than the language of the Hobbs Act.").

158. *Enmons*, 410 U.S. at 411 (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

159. 315 U.S. 521 (1942).

160. *See Enmons*, 410 U.S. at 402.

161. *See id.* at 402-07.

162. *Local 807*, 315 U.S. at 536.

163. 18 U.S.C. § 1952 (1994).

164. *Id.*

integrating common law extortion and blackmail into a single extortion statute, such as Louisiana—while not including blackmail in states, such as Pennsylvania, that punished common law extortion and blackmail under separate statutes. However, in *United States v. Nardello* the Supreme Court held that the Travel Act reaches state law blackmail regardless of whether a particular state criminalizes blackmail through its extortion statute, or through a separate blackmail statute, or even in some different statute all together.[165]

Like the Travel Act, RICO is based on enumerated state and federal law crimes, including state law extortion.[166] Thus, following *Nardello*, blackmail as it exists in state law logically must come within the RICO envelope of predicate acts. Indeed, the propriety of applying state law blackmail without a special federal gloss is aptly supported by the fact that violations of the Travel Act are also predicate acts under RICO.[167] Thus, applying the *Enmons* defense to state law blackmail would lead to the inconsistent result that in RICO cases, predicate acts of state law blackmail would be judged under federal law, whereas acts of state law blackmail that violate the Travel Act, and in turn constitute RICO predicate acts, would be judged according to state law.

To extend *Enmons* to limit state criminal law would also directly overrule a substantial body of state court jurisprudence. For example, in *State v. Moore*[168] the Louisiana Supreme Court was squarely confronted with the paradox of blackmail; two separately lawful acts combined through a threat to become a crime. Moore, a police officer, approached a parked vehicle on a secluded road. In the vehicle were two young adults having sex. Moore informed them that they were committing public obscenity, and that he would have to arrest them. In isolation this was a perfectly lawful act. Moore, however, also asked the woman to consent to having sex with him. In isolation this, too, was a lawful act, and not a "wrongful purpose." But Moore did not do these two lawful things in isolation. Rather, he combined

165. 393 U.S. 286 (1969) (reversing dismissal of indictments by United States District Court and holding that Pennsylvania law against blackmail is extortion within meaning of the Travel Act, 18 U.S.C. § 1952).

166. *See* 18 U.S.C. §§ 1961-62 (1994).

167. *Id.*

168. 419 So. 2d 963 (La. 1982).

them; he would not arrest the couple if the woman would consent to sex with him. Stated conversely, Moore threatened to arrest the couple—that is, to tell the truth about them—unless the woman consented to sex. Thus, Moore had a lawful objective, consensual sex, and only threatened to do a lawful act, arrest the couple.[169] The woman consented. After having intercourse, Moore told the couple they were free to go. Moore kept his promise to destroy his police report and tell no one about the couple's violations of the public obscenity law.[170]

Under the "wrongful purpose" prong of *Enmons*, Moore's conduct would not have been unlawful because his threat was only to do something lawful. But that is not how state extortion law works. Thus, the Louisiana Supreme Court affirmed Moore's conviction and his sentence of eleven years in prison at hard labor.[171]

Properly understood, *Enmons* thus limits the reach of the Hobbs Act. It is not a case of general extortion jurisprudence. The folly of extending *Enmons* "wrongful purpose" prong to state law blackmail can clearly be seen in Arthur L. Goodhart's *Essays in Jurisprudence and the Common Law*, which relates Sir Herbert Stephen's response, in a letter to *The Times* of London on April 26, 1928, to Lord Scrutton's argument in *Hardie & Lane, Ltd. v. Chilton* that one may demand property without committing any offense where "you have a legal right to do the thing which you threaten to do."[172]

> If this is really the test, some remarkable consequences follow. Suppose a man writes, "Unless you give me £100 I will show So-and-so your letter to Such-a-one", or "If you don't want me to prosecute you for the affair you know of, you must send me £100 by tomorrow's post." In each case the alternative to payment is something which the writer of the letter has "a legal right to do." In the latter case it might even be his legal duty to do it. I have known, I suppose, some dozens of cases where men have been sent to penal

169. Note the characteristic triangular structure of Moore's blackmail. The couple feared arrest and public embarrassment. Thus, the genuine interests Moore brought into play were the state's and the community of people having a reputational interest in the couple. *See supra* Part V.C.2.

170. *See id.* at 965-67. That Moore was on duty, versus a dinner break or off duty and on his way home, did not enter into the court's analysis. That Moore was in uniform mattered only in that this made his threat of arrest a credible threat. *Id.* at 967.

171. *Id.* at 969.

172. 2 K.B. 306, 319 (1928).

> servitude, sometimes for long terms, for sending letters exactly to the above effect. If Scrutton, L.J.'s view of the law is correct, they would all seem to have been wrongly convicted.[173]

In short, it is blackmail to threaten to expose the truth about a person unless that person conveys economic value.

6. The "Participation" and "Enterprise" Elements of RICO

Although no court has yet decided the precise issue (as set out below) in the context of corporate campaigns, there likely is to be sufficient distinctiveness between the defendant labor unions that fund, manage, and control a corporate campaign and the actual "team" that implements the campaign—which will typically be comprised of individuals and specialists from several distinct disciplines—to satisfy RICO's distinctiveness test.

a. The Corporate Campaign "Team" as a RICO Enterprise

On August 3, 1993, George Becker announced the Bayou Steel corporate campaign.[174] At the press conference, Becker stated that the same "team" previously used in the Ravenswood campaign would be brought together from Washington, D.C. and Pittsburgh to be used against Bayou Steel.[175] Thus, the corporate campaign "team" was at that time a discernible and identifiable entity, and it suited the Steelworkers' needs in connection with launching the corporate campaign for it to be so. The team, it was learned over the course of the Bayou Steel campaign, was comprised of individual actors from several sources, including the International; the IUD; Local 9121; Disposal Safety, Inc.; and Fingerhut, Powers, Smith & Associates.

These entities were not organized in a fashion analogous to a corporate parent-subsidiary relationship, particularly in the sense of ownership. Local 9121 is an autonomous labor union; the IUD was an autonomous department of AFL-CIO; and Disposal Safety, Inc. and Fingerhut Powers are independent corporations. These entities did not combine or merge into a single entity to conduct the Bayou Steel campaign, and their identities did not

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173. ARTHUR L. GOODHART, *Blackmail and Consideration in Contracts*, 44 L. Q. REV. 436, *reprinted in* ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 177-78 (1931).

174. *See supra* note 39 and accompanying text.

175. *See id.*

become subsumed into or synonymous with the Bayou Steel campaign. Rather, each remained autonomous and carried on its regular non-corporate campaign activities, and each contributed a part of its resources to the corporate campaign, delineated by specialization and expertise, according to the campaign's component parts. Further, each member participated in the corporate campaign voluntarily and could have withdrawn from the "team" at any time. Thus, the Bayou Steel campaign "team" was a discernible association-in-fact, was not identical to or owned by the RICO persons, and, therefore, a jury would have been sustained in finding that it constituted a RICO enterprise.[176] Moreover, the fact that the International, the IUD, Disposal Safety, Inc., and Fingerhut Powers previously combined their resources in the same ways to conduct the Ravenswood campaign establishes the Bayou Steel campaign "team" as a RICO enterprise as a matter of law.[177]

Conspicuously missing from the corporate campaign's list of component parts was one called collective bargaining. Indeed, this is because the corporate campaign team was not involved in collective bargaining. The team had its own people, methods, objectives, and decision structure, which did not include the International's collective bargaining negotiators.

At the summary judgment stage of the litigation, the Steelworkers argued that, as a matter of law, the corporate campaign "team" did not really exist but, rather, that the corporate campaign was merely the International acting through its employees and agents.[178] From this the Steelworkers invoked a line of Third Circuit cases—*B.F. Hirsch v. Enright Refining Co.*[179] and its progeny—to argue that the corporate campaign's tactics were merely the normal affairs of the International, conducted through its employees and agents, and that, therefore, the only RICO enterprise was really just the International and thus RICO's

176. *See* United States v. Perholtz, 842 F.2d 343, 353 (D.C. Cir. 1988) (surveying authority from the Third, Fifth, Seventh, and Eleventh Circuits, and upholding jury's conviction of individuals who conducted racketeering through an association-in-fact enterprise comprised of individuals, corporations, and partnerships).

177. *See* United States v. DeRosa, 670 F.2d 889, 896 (9th Cir. 1982) (upholding conviction of two narcotics dealers finding by virtue of their long association as narcotics dealers, a RICO enterprise was established).

178. *See* Steelworkers' Facts, *supra* note 38 at ¶ 58 ("The USWA was solely responsible for the management, direction and control with respect to tactics employed in the corporate campaign.").

179. 751 F.2d 628, 633 (3d Cir. 1984).

distinctiveness requirement could not be met.[180] Although this argument has some initial RICO appeal, it is not correct.

In *Enright* the Third Circuit held that a RICO "person" cannot be the same entity as the RICO "enterprise."[181] In *Brittingham v. Mobil Corp.* the court expanded on *Enright*'s distinctiveness rule, and held that a parent corporation, alleged to be a RICO person, ordinarily will not be sufficiently distinct from its wholly owned subsidiary for the subsidiary to constitute a RICO enterprise.[182] Subsequently, in *Lorenz v. CSX Corp.*, the Court held that alleging that a parent "directed its subsidiary's fraudulent acts does not satisfy the distinctiveness requirement" of *Brittingham*.[183] One year later, in *Gasoline Sales, Inc. v. Aero Oil Co.*, the Court held that for RICO purposes a parent corporation, as a RICO person, was insufficiently distinct from its two subsidiaries for the subsidiaries to constitute a distinct RICO enterprise, even if officers from both the parent and subsidiaries, as additional RICO persons, helped direct the subsidiaries' fraudulent acts[184]. Finally, in *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, the Third Circuit overruled a significant amount of its prior case law and brought its jurisprudence substantially into line with other circuits.[185] Specifically, the Court in *Jaguar* adopted the Seventh Circuit's analysis in *McCullough v. Suter*, and held that "when officers and/or employees operate and manage a legitimate corporation, and use it to conduct, through interstate commerce, a pattern of racketeering activity, those defendant persons are properly liable under [RICO]."[186] Thus, the Third Circuit's jurisprudence can fairly be summarized as follows: a RICO enterprise exists where any group is associated in fact, with the exception where a parent corporation (possibly with employees and agents who conduct the parent's normal affairs) is alleged to be a RICO person and the corporation's subsidiaries are alleged to constitute a RICO enterprise, where the distinctiveness rule of

180. *See* Steelworkers' Summary Judgment Brief, *supra* note 6, at 21-22. Third Circuit law was controlling in the Bayou Steel RICO litigation. The evolution of Third Circuit law is, however, generally instructive.

181. *See* Jaguar Cars, Inc. v. Royal Oaks Motor Car Co., 46 F.3d 258, 262 (3d. Cir. 1995) (discussing *Enright* and its progeny).

182. 943 F.2d 297 (3d Cir. 1991).

183. 1 F.3d 1406, 1412 (3d Cir. 1993).

184. 39 F.3d 70 (3rd Cir. 1994).

185. 46 F.3d at 262.

186. *Id.* at 269.

Enright does not apply.

At the heart of the *Enright* line's distinctiveness rule is a realistic understanding of modern industrial organization; that is, parent corporations control and direct their subsidiaries in the conduct of their normal affairs.[187] Those qualities were not present in the Bayou Steel corporate campaign. Obviously, the International is not a corporation, and it does not "own" Local 9121, the IUD, Disposal Safety, Inc., or Fingerhut Powers, as these all are separate and autonomous organizations. Thus, *Enright* is not analogous to parent-subsidiary corporate structure and, therefore, does not apply.

Further, the corporate campaign simply was not, on the facts, part of the International's normal affairs within the meaning of the Third Circuit's jurisprudence. Specifically, in the conduct of its "normal affairs" the International is the agent of Local 9121, and not the other way around. In their summary judgment brief, however, the Steelworkers cast Local 9121 as the agent of the International.[188] If in connection with the corporate campaign Local 9121 was the International's agent, then it follows that the corporate campaign was not part of the International's "normal affairs" and that, therefore, *Brittingham, Lorenz,* and *Gasoline Sales* do not apply. Moreover, for the Steelworkers to argue that the International was responsible for the conduct of the affairs of the corporate campaign team actually reduces the argument to admitting that the International is a properly named RICO person.

b. Participation in the Conduct of the Affairs of the Corporate Campaign Team Under *Reves*

In *Reves v. Ernst & Young,* the Supreme Court held that an accounting firm that was hired to audit a cooperative's records, and which reviewed a series of transactions and certified, allegedly improvidently, that the records fairly portrayed the

187. *See, e.g., Gasoline Sales,* 39 F.3d at 73 (explaining *Brittingham*'s parent-subsidiary distinctiveness rule: "[t]his is because we have interpreted corporate identity expansively, so that the actions of a corporation's agents conducting its normal affairs are constructively its own actions for Section 1962 (c) purposes.").

188. *See* Steelworkers' Summary Judgment Brief, *supra* note 6, at 31 ("As we have stressed, and as every witness for the defendants who was questioned on the matter explained, the Bayou Steel campaign was a USWA campaign and all of the activities that were encompassed by the campaign were under the control and supervision of USWA District Director, later Vice-President for Administration, Richard Davis.").

transactions, did not participate in the conduct of the affairs of the cooperative within the meaning of RICO.[189] Rather, to come within the reach of RICO, a person must participate in the operation or management of the enterprise itself.[190] RICO liability is not, however, limited to those with primary or formal responsibility for an enterprise's affairs.[191] Liability is not limited to upper management, but may extend to lower-rung participants under the direction of upper management.[192]

Based on *Reves*, the Steelworkers argued at summary judgement that only the International had management authority over the corporate campaign and that, therefore, the IUD and Local 9121, along with DSI, Fingerhut Powers, and any other agents of the International, were not viable RICO persons.[193]

There is no dispute that Richard Davis, Vice President of the International, had ultimate control of the Bayou Steel campaign.[194] As *Reves* makes clear, however, RICO reaches other significant persons than just an enterprise's top decisionmaker if they participate in its operation or management. In the Bayou Steel campaign, the IUD and Local 9121 actively participated in the operation of the corporate campaign. The IUD ran the corporate part, while Local 9121 supplied basic manpower for picketing the homes of directors and officers and complaining to agencies. Thus, unlike the auditors in *Reves* who merely improvidently gave the cooperative's transactions a clean bill of health, the IUD and Local 9121, along with the International, actively participated in the execution and operation of the corporate campaign. That is sufficient for *Reves*. Moreover, other corporate campaign actors, such as DSI and Fingerhut Powers, arguably were liable for conspiracy pursuant to RICO § 1962 (d).

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189. 507 U.S. 170, 186 (1993).

190. *See id.* at 183.

191. *See id.* at 179.

192. *See id.* at 184.

193. *See* Steelworkers' Summary Judgment Brief, *supra* note 6, at 22-26; Steelworkers' Facts, *supra* note 38, at ¶ 58.

194. *See* Steelworkers' Facts, *supra* note 38, at ¶ 58 ("USWA Vice-President for Administration Richard Davis assumed and exercised full responsibility for all aspects of the direction of the campaign."); Steelworkers' Summary Judgment Brief, *supra* note 6, at 7 ("The Bayou Steel corporate campaign was USWA's campaign. The USWA and only the USWA managed, controlled, supervised and directed all aspects of the campaign."); *Id.* at 21 ("The corporate campaign was USWA's campaign. USWA alone managed, directed and controlled the campaign."); *Id.* at 25 (Richard Davis "operated and managed all aspects of the USWA's corporate campaign that is at issue in this case.").

D. The First Amendment Does Not Protect Blackmail

1. Noerr-Pennington Issues

In their summary judgment brief, the Steelworkers argued that the *Noerr-Pennington* doctrine shields any allegations or complaints that were made to state and federal agencies and the courts.[195] That argument is not correct. As set out above, it is blackmail to threaten to accuse a person of a crime or regulatory infraction unless a tribute is paid.[196] The fact that the Steelworkers used government agencies as the venue for blackmail does not make it protected conduct.[197]

The *Noerr-Pennington* doctrine broadly protects persons seeking redress from government.[198] However, protection under this doctrine requires a genuine interest in the redress sought.[199] One may not exploit governmental processes merely "as a means

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195. *See* Steelworkers' Summary Judgment Brief, *supra* note 6, at 57, 60-61.

196. *See supra* notes 110-141 and accompanying text.

197. *See e.g.*, New Jersey v. Roth, 673 A.2d 285, 288 (N.J.Super. 1996) (affirming blackmail conviction where *pro se* real-estate dealer claimed he was merely "playing [economic] hardball" by threatening to file motion to set aside sheriff's sale on technical grounds) (bracketed text in original); State v. Harrington, 260 A.2d 692 (Vt. 1969) (veiled threat to make accusations of tax evasion and customs violations, as well as adultery, unless victim agreed to a divorce settlement is a crime); Connecticut v. Bassett, 200 A.2d 473 (Conn. 1964) (blackmailer convicted, who entered proprietor's store on a Sunday, threatened to accuse proprietor of violating Sunday closing laws unless money was paid); State v. McInnes, 153 So. 2d 854 (Fla.Dist.Ct.App.1963) (threat to expose tax evasion unless paid money sufficient to charge crime of extortion); Commonwealth v. Keenan, 184 A.2d 793 (Pa. Super. Ct. 1962) (affirming conviction based on threat, *inter alia*, to disclose damaging information to the I.R.S. unless paid money). *See also*, United States v. Coyle, 63 F.3d 1239, 1250 (3rd Cir. 1995) ("The blackmail statute thus reaches those who would evade their responsibility to inform the authorities about a violation of the law by exchanging the promise to forebear from giving such information for some benefit.").

198. *See* Professional Real Estate Investors v. Columbia Pictures, 508 U.S. 49, 56 (1993) ("Those who petition the government for redress are generally immune from antitrust liability." (citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961)). *See also Noerr*, 365 U.S. at 144 (extending protection to petitioning of administrative agencies and courts); *USS - POSCO Indus. v. Contra Costa County. Bldg. & Constr.*, 31 F.3d 800, 810 (9th Cir. 1994) (extending protection to legislative lobbying). The *Noerr-Pennington* doctrine began as a rule of statutory construction, it is now well-understood to embody the First Amendment's freedom to seek redress. *See* Landmarks Holding Corp. v. Bermant, 664 F.2d 891, 895 (2d Cir. 1981).

199. *See* City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 380 (1991); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."); *Noerr*, 365 U.S. at 144 (finding the Sherman Act was not violated where "[n]o one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices.").

of imposing cost and delay."[200] As the Supreme Court stated, "[t]he 'sham' exception to *Noerr-Pennington* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon."[201] Thus, "private action that is not genuinely aimed at procuring favorable government action" is considered a sham.[202]

An exception to *Noerr-Pennington* immunity is most likely to be found where multiple proceedings are involved.[203] Accordingly, sham is found in "repetitive lawsuits carrying the hallmark of insubstantial claims."[204] Repetition, however, is but one indicium of the exception, and other forms of reprehensible practice—particularly those which corrupt administrative or judicial processes—also will prove the exception.[205] Moreover, where an orchestrated plan to use governmental processes to cause expense and delay is shown, the fact that some of the claims made as part of the plan resulted in relief will not absolve the plan under *Noerr-Pennington*.[206] Further, an unlawful plan is not

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200. *Omni Outdoor*, 499 U.S. at 382.

201. *Id.* at 380 (emphasis in original) ("A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.").

202. *Columbia Pictures*, 508 U.S. at 58 (citing Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 n.4 (1988).

203. *See* United States v. Otter Tail Power Co., 360 F.Supp. 451 (1973) (finding exception to *Noerr-Pennington* immunity based on litigation timed and designed for anti-competitive purpose), *aff'd*, 417 U.S. 901 (1974) (subsequently cited with approval in *Columbia Pictures*, 508 U.S. at 58); Trucking Unlimited v. California Motor Transp. Co., 432 F.2d. 755 (9th Cir. 1970) (alleged "information campaign" involving a multiplicity of administrative and legal actions was not entitled to immunity under *Noerr-Pennington*), *aff'd, California Motor*, 404 U.S. 508 (1972).

204. Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973); *cf.* USS-POSCO Indus. v. Contra Costa County. Bldg. & Constr., 31 F.3d 800, 811 (9th Cir. 1994) (reconciling the Supreme Court's treatment of immunity where a single piece of litigation is challenged, as in *Columbia Pictures*, versus cases involving a "whole series of legal proceedings," as in *California Motor*).

205. *See California Motor*, 404 U.S. at 512-13 ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." Examples given by the court included: perjury of witnesses, fraud in obtaining patent, conspiracy with licensing authority, bribery of public purchasing agent); Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983) (finding exception to *Noerr-Pennington* immunity where administrative processes were used to cause expense and delay); Landmarks Holding Corp. v. Bermant, 664 F.2d 891, 894 - 96 (2d Cir. 1981) (finding abuse of judicial and administrative processes and holding that attempt to delay construction of competitor's shopping mall through orchestrated series of court and administrative actions not protected under *Noerr-Pennington*).

206. *See e.g., Columbia Pictures*, 508 U.S. at 73 (Stevens, J., concurring) ("Repetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused."); *Landmarks Holding Corp.*, 664 F.2d at 894, 896 (where orchestrated plan to initiate proceedings sought to cause expense and delay,

magically transformed into protected speech under *Noerr-Pennington* by invoking governmental processes to execute it.[207]

The exception also can apply where a single lawsuit is involved.[208] To establish the sham exception to *Noerr-Pennington* immunity in the special case of a single objectionable lawsuit, the plaintiff ordinarily must first prove the existence of objectively baseless claims, and then prove that subjectively the governmental process was used to impose costs and delay.[209] This is not a test of universal application, however, because it is limited to cases involving a single objectionable lawsuit that is not otherwise tainted.[210] A whole series of legal proceedings has far more serious implications than a single lawsuit.[211] Moreover,

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fact that some proceedings resulted in relief did not protect the plan under *Noerr-Pennington*).

207. *See Litton Systems*, 700 F.2d at 807 (in finding that *Noerr-Pennington* did not immunize an unlawful tariff plan, the court reasoned, "The decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC.").

208. *See e.g., Columbia Pictures*, 508 U.S. at 49; Manego v. Orleans Bd. of Trade, 598 F.Supp. 231, 238 (D. Mass 1984) ("Subsequent developments have held that this exception also applies to a single suit filed for an improper purpose, such as generating publicity unfavorable to a competitor." (citing Energy Conservation v. Heliodyne, 698 F.2d 386 (9th Cir. 1982)).

209. *See Columbia Pictures*, 508 U.S. at 60-61. Defendants' misrepresent this test as a strict rule of universal application, see Steelworkers' Summary Judgment Brief at 60-63, but it is not. *See Columbia Pictures*, 508 U.S. at 75 (Stevens, J., concurring) (observing that "objectively reasonable suits may still break the law.").

210. *See Columbia Pictures*, 508 U.S. at 67-75. The Steelworkers' view of *Noerr-Pennington*, which asserts an unabashedly broad reading of *Columbia Pictures*, would lead to absurd results. For example, consider a patent application based on intentional fraud. By assumption the applicant has both an objectively reasonable prospect of success, and a bona fide subjective interest in success. Using this reasoning, this fraud would be immunized under the First Amendment. That, however, is not the law. *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965) (a single instance of enforcing a fraudulently procured patent can violate the Sherman Act); Hydranautics v. Filmtec Corp., 70 F.3d 533 (9th Cir. 1995) (holding intentional fraud in securing a patent strips immunity from antitrust claims).

211. *See, e.g.*, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). *California Motor* concerned a threatened and executed "information campaign" by a consortium of trucking companies to procedurally exploit, to the fullest extent possible, a variety of both administrative and judicial proceedings to create barriers to entry in the trucking markets. See generally Trucking Unlimited v. California Motor Transport Co., 432 F.2d. 755 (9th Cir. 1970), where the District Court had dismissed the case, holding *Noerr*'s 'sham' exception inapplicable "because plaintiffs did not allege that the presentations defendants made to the agencies and the courts were in themselves false, misleading, or lacking in evidentiary or legal support." *Id.* at 762. On appeal the Ninth Circuit applied *Noerr*'s exception, reversed, and remanded the case for trial. *Id.* In reversing the District Court, the Ninth Circuit erroneously held that *Noerr*'s protections do not reach actions initiated before agencies and courts. *Id.* Nevertheless, the Supreme Court affirmed the Ninth Circuit's reversal of the District Court, stating "[a] pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused . . . . It is well settled that First Amendment protections are not

abuse of governmental processes simply is not the conduct *Noerr-Pennington* seeks to protect.[212] Thus, "the inquiry in such cases is prospective: were the legal filings made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for purposes of harassment?"[213] At bottom, the *Noerr-Pennington* cases share a common, unifying theme: "the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws."[214] Where this quality is absent, as is true for "Regulatory Harassment," *Noerr-Pennington*'s protections do not apply.[215]

The regulatory harassment of Bayou Steel was part of an intentional plan, not to raise and resolve bona fide issues, but rather to obtain a collective bargaining agreement. Therefore,

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immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor*, 404 U.S. at 513-14. Thus, the repetitive exploitation of administrative and judicial procedures was condemned. Subsequently, in *Columbia Pictures*, 508 U.S. at 58, the Supreme Court cited with approval its opinion in *California Motor* for the proposition that "a pattern of baseless, repetitive claims" is not immune under *Noerr*. Justice Stevens's concurrence, *id.* at 75, is especially instructive, "[r]epetitive filings, some successful and some unsuccessful, may support an inference that the process is being violated." *See also* Otter Tail Power Co. v. United States, 410 U.S. 366, 371 (characterizing procedural exploitation as "the weapon of litigation."); USS - POSCO Indus. v. Contra Costa County. Bldg. & Constr., 31 F.3d 800, 811 ("*California Motor Transport* thus recognized that the filing of a whole series of lawsuits and other legal actions without regard to the merits has far more serious implications than filing a single action, and can serve as a very effective restraint on trade.").

212. *See* Israel v. Baxter Lab., Inc., 466 F.2d 272, 278 (2d Cir. 1972) (a basic concern of the courts is the integrity of the regulatory process. "No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption.").

213. *USS-POSCO*, 31 F.3d at 810-11 (expressly reconciling the Supreme Court's *Noerr-Pennington* jurisprudence from *California Motor Transport Co.* and *Real Estate Investors*). The issue has also been posed in the converse: if defendants were enjoined from conspiring to submit false allegations to government agencies, would the former be deprived of any constitutional right to petition or participate in the governmental process? *See* Woods Exploration & Producing. Co. v. Aluminum Co. of America, 36 F.R.D. 107, 111-12 (S.D. Tex. 1963) (denying *Noerr* immunity where false mineral forecasts were filed with agency), *reasoning approved on appeal*, 438 F.2d 1286 (5th Cir. 1971) Reversing and remanding for an evidentiary trial, the court reasoned, "[f]or the political process to be effective there must be freedom of access, regardless of motive, to ensure the 'right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws.' (quoting Noerr) . . . Where these political considerations are absent the *Noerr* doctrine is inapplicable . . . . We think that the doctrine should not be extended unless the factors upon which *Noerr* rested are present and require the same result.") (internal citations omitted). *Id.* at 1296-97.

214. *Noerr*, 365 U.S. at 139.

215. *See generally Real Estate Investors*, 508 U.S. at 67-75 (Stevens, J., concurring) (surveying and analyzing the law).

even as an initial matter, the First Amendment is not implicated under *Noerr-Pennington*, or any other rule of immunity.[216] Moreover, it is of no consequence that the corporate campaign was executed by invoking a series of governmental processes.[217] The Steelworkers invoked these processes "not out of a genuine interest in redressing grievances, but as part of a pattern [and] practice of successive filings undertaken essentially for purposes of harassment[.]"[218] Therefore, *Noerr-Pennington* does not protect the Bayou Steel campaign.

2. General First Amendment Law Does Not Protect Blackmail

In their summary judgment brief, the Steelworkers also invoked several general First Amendment cases,[219] including *NAACP v. Claiborne Hardware Co.*,[220] which merit analysis. *Claiborne* arose after black citizens boycotted white merchants from 1966 to 1972 in Claiborne County, Mississippi seeking an end to racial segregation, institutionalized humiliation, and centuries of abuse.[221] White merchants of Claiborne County sued under state law to recover their economic losses from the boycott.[222] The Supreme Court found that "[t]he right of the [s]tates to regulate economic activity could not justify a complete

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216. *See* United States v. Quinn, 514 F.2d 1250, 1268 (5th Cir. 1975) ("It may categorically be stated that extortionate speech has no more constitutional protection than that uttered by a robber while ordering his victim to hand over the money, which [has] no protection at all.").

217. *See* Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 807 (2nd Cir. 1983) (fact that defendants' unlawful plan to maintain telephone network monopoly was executed through filings with agencies did not create First Amendment protections). Indeed, it can be the case that invoking governmental processes is a form of blackmail to expose the victim to the authorities. *See, e.g.*, State v. Harrington, 260 A.2d 692 (1969) (veiled threat to make accusations of tax evasion and customs violations, as well as adultery, unless victim agreed to a divorce settlement); State v. McInnes, 153 So. 2d 854 (Fla.Dist.Ct.App. 1963) (threat to expose tax evasion unless paid money); Commonwealth v. Keenan, 184 A.2d 793 (Pa. Super. Ct. 1962) (affirming conviction based on threat, *inter alia*, to disclose damaging information to the I.R.S. unless paid money).

218. *USS-POSCO*, 31 F.3d at 811.

219. *See* Steelworkers' Summary Judgment Brief, *supra* note 6, at 55-60.

220. 458 U.S. 886 (1982).

221. *Id.* at 914-32. Julia Johnson testified about her goals in the boycott as follows:

> There were some things I really wanted, and the things I wanted were the right to vote, the right to have a title—Mrs. or Mr. or whatever I am, and not uncle or aunt, boy or girl. . . . And if I wanted a job—a qualified job, I wanted to have the opportunity to be hired. Not hired because I'm black or white, but just hired.

Id. at 922, n. 62.

222. *See id.* at 889-93.

prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."[223] Although the *Claiborne* defendants intended to inflict economic injury on white merchants, their campaign was not motivated by a desire to get an economic contract, but by the aim of vindicating the fundamental rights of equality and freedom.[224] But obtaining a contract simply does not rise to the ideals sought by the *Claiborne* defendants—rights guaranteed by the Constitution itself. Moreover, the *Claiborne* defendants *genuinely* wanted what they demanded from government officials in Claiborne County, Mississippi.[225] In the Bayou Steel campaign, the Steelworkers did not genuinely desire the ends they nominally sought from the agencies and courts—SEC disclosures, changes in corporate governance, denials of tax breaks, and so forth—but merely sought a contract for wages, hours, and working conditions. Thus, *Claiborne* is inapposite and not analogous.

In contrast, however, purely economic interests have been analyzed under the First Amendment. In *Federal Trade Commission v. Superior Court Trial Lawyers Ass'n*, the Supreme Court unanimously reversed the Court of Appeals and held that a well-publicized boycott by District of Columbia lawyers who regularly represented indigents was not protected by the Constitution.[226] The lawyers had together agreed not to represent indigent criminal defendants in the District of Columbia Superior Court until the District of Columbia Government increased the lawyers' compensation.[227] The Court ruled first that the lawyers' unlawful boycott was not protected by *Noerr*, even though their objective was the enactment of socially beneficial legislation.[228]

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223. *Id.* at 914.

224. *See id.*

225. *See id.* at 912 ("Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens."). Thus, *Claiborne* stands for the proposition that the First Amendment applies with the greatest force where fundamental political rights are genuinely sought and alternative to speech is either "riot or revolution."

226. Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (Justice Stevens—who authored *Claiborne*—delivered the opinion of the Court. The Supreme Court was unanimous with respect to all matters pertinent to this case).

227. *See id.* at 412.

228. *See id.* at 424-25. ("But in the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation . . . . In *Noerr*, the desired legislation

The Court then determined that the lawyers were not protected by *Claiborne*. The Court observed that

> [t]hose who joined the *Claiborne Hardware* boycott sought no special advantage for themselves. They were black citizens in Port Gibson, Mississippi, who had been the victims of political, social, and economic discrimination for many years. They only sought the equal respect and equal treatment to which they were constitutionally entitled.[229]

With respect to the lawyers, the Court found that "[n]o matter how altruistic the motives of respondents may have been, it is undisputed that their immediate objective was to increase the price that they would be paid for their services."[230]

By analogy, the Steelworkers engaged in the corporate campaign solely for their own economic purposes and, therefore, under *Superior Court Trial Lawyers Ass'n* the corporate campaign was not protected by the First Amendment.

The Steelworkers also cited the Supreme Court's opinion in *De Bartolo Corp. v. Florida Gulf Coast Building & Construction*.[231] *De Bartolo* held only that the peaceful leafletting of consumers by a union—urging them not to patronize a firm until a non-union contractor to the firm promised to pay fair wages—was not an unfair labor practice.[232] The Court in no way condoned coercion, blackmail, threats, abuse of process, or any other conduct that is unlawful under state law. Nor did the Court even hint at a decision on the lawfulness of regulatory harassment.

E. Ratification of Violence, Threats of Violence, and Intimidation of Bayou Steel, its Officers, and Directors

Even though very few of Local 9121's members had ever been on a strike before, they were given virtually no pre-strike training in the lawful conduct of a strike. Moreover, although most of the

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would have created the restraint on the truckers' competition; in this case the emergency legislative response to the boycott put an end to the restraint.") (emphasis in original).

229. *Id.* at 426.

230. *Id.* at 427. "Respondents contend that, just as the Claiborne Hardware boycott sought to secure constitutional rights to equality and freedom, the lawyers' boycott sought to vindicate the Sixth Amendment rights of indigent defendants." *Id.* at 427 n.11 (This argument was rejected. Good intentions do not justify otherwise unlawful conduct within the meaning of the First Amendment.).

231. 485 U.S. 568 (1988). *See* Steelworkers' Summary Judgment Brief, *supra* note 6, at 56-59.

232. *See De Bartolo*, 485 U.S. at 570-71, 588. The Court did not reach the First Amendment questions that would be raised by a converse interpretation of labor laws.

especially serious incidents occurred in the first months of the strike, Bayou Steel endured for three and one-half years varying amounts of violence, threats, and the use of fear directed against its officers, employees, and its directors. Bayou Steel and the Steelworkers always will disagree about the seriousness of the striker's violence, intimidation, and property damage, but it is beyond any tenable dispute that this conduct was substantially unlawful, and that it had continuity and relationship to the strike and, in turn, the corporate campaign. From Bayou Steel's perspective, striker violence and the corporate campaign were cumulative, thus establishing a continuum of union conduct.

One highly intimidating tactic employed in both the Ravenswood and Bayou Steel corporate campaigns was the dramatic personalization of hostility directed toward executives and directors. For example, Bayou Steel's President, Jerry Pitts, was virtually a daily focus of picket line threats and hostility from the beginning of the strike. After the corporate campaign was launched, however, conduct directed at Pitts increased to include the erection of an unflattering billboard bearing his photograph near his home; protest parades through his suburban neighborhood that included strikers, their spouses, and their children; and recurring picketing in front of his home, including video-taping the family as they would come and go, and through windows. The company's chief financial officer suffered similar hostilities in his neighborhood. Strikers also traveled to Dallas, Texas to parade and picket in front of the home of Howard Meyers, Bayou Steel's chairman of the board. There were other examples of personalized harassment of directors and executives, but these few serve to illustrate the point that, from the perspective of Bayou Steel, these tactics were cumulative of picket line hostilities. Moreover, the off-picket line activities directed at Bayou Steel's executives and directors were part of the corporate campaign, as announced on August 2, 1993. As discussed below, whether based on the evidence or inferences that may be drawn from the evidence, and which the International, the IUD, and Local 9121 embraced and augmented, and thereby ratified, striker violence and intimidation present a question of fact to be decided by a jury.

1. The Legal Standard for Ratification

Pursuant to the Norris-La Guardia Act of 1932,[233] a union's ratification of striker violence, threats, and fear may be established by clear proof of their knowing tolerance of such conduct; that is, whether they intentionally drew upon the violence and threats for their force.[234] Although the clear proof standard requires more than the ordinary civil burden of persuasion, the standard does not require surmounting the criminal standard of beyond a reasonable doubt.[235] Accordingly, where a union is informed by a company of its members' unlawful conduct, and the union does not act affirmatively to investigate and curb further excesses, "a reasonable jury could conclude that the Union 'knowingly tolerated' the situation, and thereby ratified it."[236] No more is required to support a finding of ratification.[237] Further, where, as in Bayou Steel's case, a union is subject to a court-ordered injunction,[238] the lack of effective action by the union to curtail and repudiate misconduct by individual members can amount to "silent approbation and acquiescence in such activities and the objective of its offending members."[239] In such circumstances, oral admonitions to union members by a union officer, without also taking effective affirmative action to enforce those admonitions, are insufficient to absolve the union

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233. 29 U.S.C. § 106 (1994).

234. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 739 (1966) ("What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force.").

235. *See id.* at 737.

236. Cox v. Administrator United States Steel, 17 F.3d 1386, 1409 (11th Cir. 1994) ("In *Yellow Bus Lines, Inc. v. Local Union 639*, 883 F.2d 132, 136 (D.C.Cir.1989), *rev'd in part on other grounds*, 913 F.2d 948 (D.C.Cir.1990) (*en banc*), *cert. denied*, 501 U.S. 1222 (1991), a Union president received a letter from the president of a bus company which contained allegations that Union members had committed violent acts; there was no evidence 'to indicate that the union took action to investigate the allegations or to curb any excesses' of the strikers. The D.C. Circuit held that from the Union's 'apparent lack of concern with the violence brought to its attention, the jury plausibly could conclude that the [Union] 'knowingly tolerated' this state of affairs. No more is required to support a finding of ratification.' *Id.* The situation in this case is similar to that in *Yellow Bus Lines*, and we find the reasoning of that case to be persuasive .... From the Union's failure to act, a reasonable jury could conclude that the Union 'knowingly tolerated' the situation, and thereby ratified it.").

237. *See id.*

238. *See infra*, notes 245 and 250 and accompanying text.

239. NLRB v. Local 294, Int'l Bhd. Of Teamsters, 592 F.2d 921, 928 (6th Cir. 1979) (affirming and adopting Special Master's findings, citing NLRB v. Bulletin Co., 443 F.2d 863, 867 (3rd Cir. 1971)).

of responsibility for violations of the court's orders.[240] Finally, it is settled law that ratification is a question for the jury to decide upon proper instructions from the court.[241]

2. Application of the Standard: The Evidence Was Sufficient for a Jury to Find that the International, the IUD, and Local 9121 Ratified the Use of Violence, Threats, and Fear

Discovery in the Bayou Steel litigation adduced significant evidence that the International, the IUD, and Local 9121 ratified striker violence and intimidation as follows:

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240. *Id.* at 929.

241. *See* Altemose Constr. Co. v. Building & Constr. Trade Council of Philadelphia, 751 F.2d 653, 655-56 (3rd Cir. 1985) ("[O]n a Rule 56 motion we may not draw inferences or make findings. Thus even on issues of union authorization, participation in, or ratification of acts complained of, our role is to determine only whether such inferences are, under the evidence, logically permissible."). *See also* Kerry Coal Co. v. United Mine Workers of America, 488 F.Supp. 1080, 1085-86, n.1 (W.D. Pa. 1980)

The Special Interrogatories and Answers thereto were, in part, as follows:

> 14. Has Kerry Coal Company established by clear proof participation in or ratification of violent acts directed against the Kerry Coal Company with regard to its contractual or business relationships, which were a substantial factor in directly causing damage to the Kerry Coal Company, on the part of:
>
> a. United Mine Workers of America (International) Yes
>
> b. United Mine Workers of America District No. 5 Yes

aff'd, 637 F.2d 957 (3d Cir. 1980) ("The court instructed the jury that it must find by clear proof actual participation or actual authorization of violent acts . . . . Once the jury has been properly charged as to the governing standard of proof, our role in assessing the propriety of a judgment notwithstanding the verdict is no different in such a case than in any other."); Celotex Corp. v. United Steelworkers of America, 388 F.Supp. 1132, 1138 (E.D. Pa. 1974) ("Based on the evidence outlined above and other evidence presented at trial, the jury concluded that the plaintiff established by strict proof that the acts or statements which gave rise to the unauthorized work stoppage were actually authorized or subsequently ratified by the defendants."); Solar Fuel Co. v. United Mine Workers of America, 346 F.Supp. 789, 797 (W.D. Pa. 1972) ("They also claim that the defendant unions cannot be held responsible for unlawful acts of individual officers, members or agents except upon 'clear proof of actual participation in or actual authorization of such acts, or ratification of such acts after actual knowledge thereof.' 29 U.S.C. § 106, and that there was an absence of clear proof as required by this act to send the case to the jury. The court . . . painstakingly explained to the jury that with respect to liability of the labor unions the jury must find clear proof of the 'direction, authorization, participation in or ratification of such acts by the defendant as they are above explained'. The jury was further told that they could consider the presence of the organizers on the picket lines, their participation and instructions to pickets, their repudiation or lack of repudiation of alleged misconduct and disciplinary action taken or not taken against individuals. Clear proof was properly defined as 'clear, unequivocal and convincing proof'. It was differentiated from the requirement of proof beyond a reasonable doubt in criminal cases and it was explained to the jury that this standard of proof applied not only to the charges of violation of the antitrust laws but also to the claims under Pennsylvania law for destruction of property . . . . It appears that these instructions were in strict conformity with the requirements of *U.M.W. v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) and *Ramsey v. U.M.W.*, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971).").

• Local 9121's members were given virtually no pre-strike training, even though Local 9121 had never been on strike before, few of its members had any previous strike experience, and many members were in an obvious state of rage. Rather, Local 9121's President, Ron Ferraro, gave the members repeated assurances that everyone would get their jobs back after the strike.

• From the first hours of the strike, and continuing on a regular basis for three and one-half years, Bayou Steel informed Local 9121 and the International of unlawful conduct by strikers both on and off the picket line. Thus, there was no question that the union knew of the strikers' misconduct. Even so, the International left the conduct of the picket line to Local 9121.

• The International and Local 9121 were parties to a stipulated, state court injunction issued to protect Bayou Steel and the public safety. Even so, the injunction was repeatedly violated. Numerous strikers, and Local 9121 itself, were held in contempt of court during the strike.[242]

• Local 9121's President threatened Bayou Steel's managers on numerous occasions throughout the strike.

• Leaders from the International and Local 9121 were present before and during some of the most extreme incidents of picket line violence.

• The homes of managers were picketed for weeks, and in some cases for months, often when the targeted manager was away, while only his family members were home.

• The corporate campaign increased the level of public vilification directed at executives and directors. By doing so, the Steelworkers drew upon the strikers' intimidation and violence for its persuasive force.

• International Vice President Davis was aware of misconduct by Local 9121's president, but took no action to repudiate or curtail him. Rather, the International generally praised the job he was doing handling Local 9121 and, indeed, rather than repudiate his handling of Local 9121, Becker, as president of the International, suspended Local 9121's constitutionally required election of officers.

• Carl LaBorde, a picket captain, was found by an arbitrator to have engaged in "overly abusive and abrasive conduct."

242. *See supra* note 42 and accompanying text.

LaBorde

> violated the [injunctive] order's prohibition against 'threatening and intimidating' Company employees and agents/customers by his name calling, cursing and threats . . . . [LaBorde's] threats and intimidation went well beyond any reasonable notions of protected Union conduct, either on the picket line or in any setting, as those limits have been established by the NLRB, the courts and arbitrators.[243]

The local union and the International Union were well aware of LaBorde's conduct, yet they allowed him to serve as a picket captain in charge of observing and instructing others.

Whether these facts establish clear proof of knowing tolerance must be considered in light of the fact that the International and Local 9121 were subject to a state court injunction. Accordingly, Bayou Steel's burden of proof under the Norris-La Guardia Act was substantially lowered,[244] and it would have been appropriate for a jury to find that the lack of effective action by the International, the IUD, and Local 9121 to curtail and repudiate striker misconduct by individual members amounted to "silent approbation and acquiescence in such activities and the objective of its offending members."[245] Moreover, mere oral admonitions to Local 9121's members by union officers—admonitions that were not backed up with affirmative enforcement actions—are, as a matter of law, insufficient to absolve the union of responsibility for violations of the court's orders.[246] Whether these facts together establish by clear proof the International and Local 9121's knowing tolerance of violence is a question of fact for the jury to decide. Further, whether the evidence of the IUD's role in personalizing the vilification of Bayou Steel executives and directors shows that the IUD drew upon the force of local violence and threats similarly presents a question of fact for the jury.

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243. *See* Bayou Steel Corp. v. United States Steelworkers of America, Local 9121, 108 Lab. Arb. (BNA) 1153 (Aug. 20, 1997) (Baroni, Arb.).

244. *See* NLRB v. Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local No. 327, 592 F.2d 921, 928.

245. *Id.*

246. *See id.* at 929.

3. Analysis of Potentially Contrary Legal Authority

Not every threat or act of violence by an individual union member can be imputed to a union via ratification. Moreover, because the legal standard is "clear proof," vigilant evidence collection and record keeping regarding misconduct is essential to carrying the burden of "clear proof." Further, it is easy to find cases wherein clear proof of ratification was not established. Those cases, however, are not analogous to the Bayou Steel case.[247]

For example, ratification does not require express authorization of violence or other misconduct. Therefore, the Supreme Court's holding in *United Brotherhood of Carpenters v. United States*—that it was error to impute to a union the criminal acts of individuals without giving the jury an instruction embodying Section 6 of the Norris-La Guardia Act—is inapposite.[248] Rather, as set out above and as explained in *United Brotherhood of Carpenters*, where a union ratifies the unlawful conduct of its members, no showing of "authorization" is required.[249]

In *United Mine Workers of America v. Gibbs*,[250] the Supreme Court observed that the international union representative, immediately upon learning of two days of violence, went to the scene of the problem and took direct, affirmative, and successful steps to curtail further violence. Specifically, the international union dispatched its representative with "firm instructions to return to the scene, to assume control of the strike, to suppress violence, to limit the size of the picket line, and to assure that no other mines were affected."[251] This evidence, when weighed by the Court against the countervailing evidence which the Sixth Circuit had conceded was only "sketchy," was not sufficient to support a finding of clear proof as required by the Norris-La Guardia Act.[252] In the Bayou Steel case, the use of coercion was chronic, and there was no countervailing evidence that the

247. The cases discussed immediately, *infra*, are those cited by the Steelworkers' Summary Judgment Brief.

248. 330 U.S. 395 (1947).

249. *Id.* at 406-07 (for imputed liability to attach there must be clear proof that the members' conduct either was authorized or ratified).

250. 383 U.S. 715 (1966).

251. *Id.* at 739 (internal footnote omitted).

252. *See id.* at 741-42.

International, even after being informed repeatedly of the use of violence, threats, and fear, took any of the exculpating steps found to be significant by the Supreme Court in *Gibbs*. Indeed, the International conceded that it did nothing to curtail violence,[253] but rather praised Local 9121's president and suspended the local's elections.[254] Moreover, the factual basis for the Supreme Court's reasoning in *Gibbs* did not occur against the backdrop of a state court injunction—a fact that, as set out above, leads to a less restrictive analysis. The Supreme Court in *Gibbs* did state, however, that the proof requirements of the Norris-La Guardia Act can be satisfied by showing that the union drew upon member violence for its persuasive force.[255] As set out above, in the Bayou Steel case there was substantial evidence that the corporate campaign added to and augmented the intimidation and coercion of executives and directors and, therefore, drew upon their persuasive power. Furthermore, as the Supreme Court reasoned in *Gibbs*, where a local union has ratified the misconduct of its members, a less demanding standard of proof applies to the imputed liability of the international union.[256] In the Bayou Steel strike, the local union president and, indeed, the local union itself were held in contempt of court for improper conduct including threats.

In *Federal Prescription Service, Inc. v. Amalgamated Meat Cutters*,[257] the Eighth Circuit evaluated the scope of an international union's involvement in a strike marked with numerous threats and instances of property damage.[258] Although the court found that the local union was liable under the clear proof standard, the court found that the international's involvement in the strike was limited to the normal functions that occur during the progress of normal strikes, and not more.[259] Thus, *Federal Prescription* is clearly distinguishable from Bayou Steel's case because it did not involve a corporate campaign that was personally supervised by an international vice president.

253. *See supra* note 243.

254. *See supra* note 246.

255. *Gibbs*, 383 U.S. at 739.

256. *Id.* at 737 n.28.

257. 527 F.2d 269 (8th Cir. 1975).

258. *Id.* at 275 ("During the progress of this lengthy strike there was, it is clear, reprehensible conduct on the part of some union adherents.").

259. *See id.* at 276-77 (holding that routine payments of strike benefits was not ratification of member violence).

Similarly, in *Falls Stamping Co. v. International Union, UAW*,[260] and *United Steelworkers of America v. Lorain*,[261] the Sixth Circuit found that the international unions' performance of ordinary functions did not constitute clear proof of ratification of violence. These cases, however, also did not involve international union-led corporate campaigns and thus are not analogous to Bayou Steel's experience with the Steelworkers.

Taken together then, Bayou Steel was entitled to take its liability case to trial.

F. RICO Damages: Intuitive Hurdles, Statutory Mandates, and Optimal Damages Theory

RICO provides for the recovery of treble damages for harm to business and property.[262] Unfortunately, there is no case law, RICO or otherwise, setting out the rules for calculating blackmail-based civil damages.[263] Further, RICO is peculiar in that it permits the recovery of damages based on violations of state criminal laws against blackmail, which generally are sanctioned with fines and incarceration instead of civil damages. Accordingly, divining a theory of blackmail-based RICO damages requires reference to the general damages literature. Moreover, the process requires scaling certain conceptual obstacles.

For example, as part of the regulatory harassment of Bayou Steel, the Steelworkers complained to OSHA that Bayou Steel was in violation of various health and safety regulations.[264] As a consequence, a wall-to-wall inspection of Bayou Steel was conducted, which caused Bayou Steel to incur costs, including legal fees, to defend itself.[265] Although the vast majority of the Steelworkers' complaints did not result in any adverse findings by OSHA, some deficiencies were found, and Bayou Steel was

260. 744 F.2d 521 (6th Cir. 1984).

261. 616 F.2d 919 (6th Cir 1980).

262. 18 U.S.C. § 1964 (c) states in pertinent part, "Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, ..."

263. The Steelworkers, too, failed to broach any damages issues in their summary judgment papers.

264. *See* Northrup, *Corporate Campaigns*, *supra* note 49, at 350.

265. Legal defense costs are an important component of the costs intended to be imposed on a corporate campaign target. *See id. See also* LA BOTZ, *supra* note 49, at 127.

assessed a penalty. Absent the Steelworkers' corporate campaign, however, these costs would not have been incurred. From this example, three possible damages scenarios emerge.

First, in light of the partial merits of the Steelworkers' complaints to OSHA, one could argue that the union should pay no damages at all because its complaint was not groundless.[266] This theory is troubling, however, because it effectively would render meaningless blackmail's proscription against threats to tell the truth. Second, at the opposite end of the spectrum of possibilities, one could argue that the Steelworkers should pay damages based on the entirety of the costs Bayou Steel incurred, including reimbursement of fines and related legal costs. This theory imposes liability for truth-based blackmail, and compensates the blackmail victim for the blackmailer's intentional harm. This theory, however, is troubling precisely because it results in the Steelworkers reimbursing Bayou Steel's fines and related legal costs. That is, intuitively there seems to be something wrong with a damages rule requiring a person who brings infractions to the attention of regulators to reimburse the violator's fines and legal costs. Third, one could argue for a middle ground; that Bayou Steel's damages should be apportioned to reflect the costs incurred in defense of false allegations, as distinguished from true allegations.[267] Although this rule would exclude reimbursement of Bayou Steel's fines and related legal costs, this third rule is troubling because it opens a veritable Pandora's box of complex line drawing problems based on unknown parameters. For example, it requires determining whether damages should be limited to costs incurred in defense of only knowingly-made false allegations, or allegations based on unsubstantiated or unverified reports, or good faith but ultimately erroneous allegations, or only those allegations that resulted in final agency findings of violations, and so on. Tautologically, this third possible rule would not reach truth-based blackmail.

Thus, each damage theory has its appeal, and each has its problems. The legal scholarship on optimal damages and the RICO statute itself, however, together lead to the conclusion that

266. Such a rule would be similar to Rule 11 of the Federal Rules of Civil Procedure, or the *Noerr-Pennington* analysis for stand-alone cases articulated in *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993).

267. Such a rule would be similar to the equitable defense of unclean hands.

the second theory, requiring full damages, is the correct measure.

1. The Legal Scholarship on Optimal Damages

The legal scholarship on optimal damages theory is very well developed.[268] At the heart of this literature, two social objectives are optimized: deterrence and punishment.[269] Indeed, the basic theory adopted here is the standard theory upon which economically-oriented scholars widely agree.[270] Specifically, the

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268. *See generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) [hereinafter Polinsky & Shavell] (using economic tools to explore optimal damages theories); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 77-8 (1st ed. 1972); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982) (outlining legal theories behind imposing punitive damages); Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 ALA. L. REV. 1143 (1989); Darryl Biggar, *A Model of Punitive Damages in Tort*, 15 INT'L REV. L. & ECON. 1 (1995) (suggesting a possible efficiency justification for the main features of the law of punitive damages); James Boyd & Daniel E. Ingberman, *Noncompensatory Damages and Potential Insolvency*, 23 J. LEGAL STUD. 895 (1994) (discussing the optimal level of damages under strict liability when bankruptcy of the firm is a possibility; Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741 (1989) ; Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79 (1982) (using economics to analyze punitive damages); Richard Craswell, *Damage Multipliers in Market Relationships*, 25 J. LEGAL STUD. 463 (1996) (discussing the usage of damage multipliers in determining optimal sanctions); Andrew F. Daughety & Jennifer F. Reinganum, *Everybody Out of the Pool: Products Liability, Punitive Damages, and Competition*, 12 J.L. ECON. & ORG. 410 (1997); David Friedman, *An Economic Explanation of Punitive Damages*, 40 ALA. L. REV. 1125 (1989); Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3 (1990) (proposing a system of extracompensatory damages based solely on deterrence); David D. Haddock, Fred S. McChesney & Menahem Spiegel, *An Ordinary Economic Rationale for Extraordinary Legal Sanctions*, 78 CAL. L. REV. 1 (1990) (using a property rights analysis to determine optimal damages); Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385 (1987) (discussing punitive liability as an alternative to more traditional notiions of negligence and strict liability); Marcel Kahan & Bruce Tuckman, *Special Levies on Punitive Damages: Decoupling, Agency Problems, and Litigation Expenditures*, 15 INT'L REV. L. & ECON. 175 (1995) (analyzing the effects of levy statutes on litigation incentives and outcomes); William M. Landes & Richard A. Posner, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127 (1981); George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009 (1989) (discussing issues relating to the insurability of punitive damages awards); George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV. 123 (1982); Paul H. Rubin, and John E. Calfee & Mark F. Grady, *BMW v Gore: Mitigating The Punitive Economics of Punitive Damages*, 5 SUP. CT. ECON. REV. 179 (1997) (proposing the regulation of long-arm jurisdiction as a means of mitigating excessive punitive damages through the mechanics of federalism).

269. Deterrence and punishment are traditionally said to be the goals of punitive damages. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 266-67 (1981) ("Punitive damages . . . are . . . intended to . . . punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[Punitive damages] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.").

270. The theory of deterrence—the elaboration of the effect on rational actors of the

proper magnitude of damages is value of the harm caused, multiplied by a factor reflecting the probability of escaping liability.[271] This behavioral deterrence rule makes defendants pay on average for the net social harm actually done, and thus is thought to lead to socially desirable behavior in terms of people taking precautions and participating in socially worthwhile but risky activities.[272]

Part of the optimal damages analysis—specifically, divining the multiplier to be used to reflect the probability that wrongdoers might escape liability—is very straightforward in RICO analysis because Congress already has provided for treble damages and, therefore, the punitive component of the rule's objectives is fixed by the statute.[273] What remains, then, is to determine the correct measure of damages needed to deter blackmail-based racketeering, setting the probability that blackmailers cannot escape detection at one.[274]

Following the optimal damages literature, divining the correct

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possible imposition of sanctions for violations of law—was first articulated in detail in Jeremy Bentham, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM 365, 365-580 (John Bowring ed., 1962) (1838-43), and has been developed intensively in recent decades, stimulated largely by Gary S. Becker, *Crime and Punishment:* An Economic Approach, 76 J. POL. ECON. 169 (1968). This literature is synthesized and surveyed in R.A. CARR-HILL & N.H. STERN, CRIME, THE POLICE AND CRIMINAL STATISTICS: AN ANALYSIS OF OFFICIAL STATISTICS FOR ENGLAND AND WALES USING ECONOMETRIC METHODS (1979); William A. Luksetich & Michael D. White, *Crime and Public Policy* (1982); David J. Pyle, THE ECONOMICS OF CRIME AND LAW ENFORCEMENT (1983). Beginning with GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970), many writers have applied the general theory of deterrence to the subject of tort liability. For an integrated presentation of this literature, see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987), and STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

271. *See* Polinsky & Shavell, *supra* note 268, at 887, and sources cited therein.

272. *Id.* at 877-88.

273. *See, e.g.*, Kelco Disposal, Inc. v. Browning-Ferris Industries of Vermont, Inc., 845 F.2d 404, 411 (2d Cir. 1988) (reasoning in an antitrust case, "Where, as here, the prevailing party elects a remedy provided by state law [punitive damages], and thereby forgoes its treble damage award, it should forgo the entire remedy provided by federal law, including attorneys' fees. . . . Having turned its back on the federal remedy, Kelco must perforce lose the federal reward."), *aff'd*, Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989). *See also*, Jonathan Turley, *The RICO Lottery and the Gains Multiplication Approach: an Alternative Measurement of Damages under Civil RICO*, 33 VILL. L. REV. 239, 243 (1988) [hereinafter Turley, *The RICO Lottery*] ("In developing civil RICO's damages provisions, Congress relied heavily on the antitrust penalties contained in Section 4 of the Clayton Act, particularly the latter's treble damages provision.") (Citing 113 CONG. REC. 17,999 (1967) (statement of Sen. Hruska) (RICO takes readily from the antitrust laws); 115 CONG. REC. 6,995 (1969) (statement of ABA, Antitrust Sec.) (same)).

274. *See* Polinsky & Shavell, *supra* note 268 at 889 (observing that the correct punitive damages multiplier is the reciprocal the probability of a claim being brought). Here the punitive damages multiplier is fixed at one.

measure of blackmail-based racketeering requires that the focus of the rule must be on adjusting the behavior of would-be blackmailers through economic disincentives, and not on divining a measure that compensates blackmail victims.[275] That is, the goal of the optimal damages rule is to take away from the blackmailer an appropriate amount of money; specifically, the amount that will extinguish the blackmailer's economic incentive to commit blackmail. Thus, one must examine the kinds of conduct blackmail damages should deter.

As discussed above, it is blackmail to threaten to tell the truth unless a tribute is paid. Accordingly, if the object of the optimal blackmail damages rule is to deter all varieties of blackmail, the rule must deter threats to tell the truth. Thus, the second rule satisfies the optimal damages rule. It follows from the nature of blackmail itself, however, that the first and third possible damages rules suggested above, each of which would permit the use of truth as a defense to damages, cannot be optimal because they inherently fail to deter truth-based blackmail. The intuitive problem with the second rule, however—which would reimburse Bayou Steel's fines—yet remains. Thus, a choice must be made between optimal damages and allowing an "unclean hands" defense to blackmail damages.

2. Damages Implications from the RICO Statute

When criminal sanctions are imposed pursuant to RICO, liberty and money can be taken away. This is functionally and economically equivalent to assessing civil damages and then throwing the money into the sea. Paying full RICO damages to racketeering victims accomplishes the same level of deterrence on a dollar for dollar basis. Less racketeering deterrence will result, however, if an unclean hands defense to RICO damages is integrated into the damages rule. Thus, the issue comes down to determining how much blackmail Congress intended to deter under RICO.[276]

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275. *See generally* Polinsky & Shavell, *supra* note 268.

276. For example, Section 1 of the Sherman Act, 15 U.S.C. § 1, condemns "every contract, combination ... or conspiracy in restraint of trade." Despite the broad scope of this proscription, however, it is rudimentary antitrust jurisprudence that Congress did not intend to outlaw all contracts, even though all contracts restrain trade. See, e.g., Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 88-89 (1911) (only contracts that are an unreasonable restraint of trade are condemned). Accordingly, the analogous RICO inquiry could be posed as whether Congress sought to exclude

The consensus in the RICO commentary is that RICO's primary purpose is prosecutorial, and not compensatory.[277] Indeed, RICO is a *malum in se* statute which presupposes by fiat the absence of an efficient level of racketeering.[278] Although this view is not incapable of valid criticism, even critics of RICO's *malum in se* structure acknowledge that Congress crafted RICO to be first and foremost a penalty-maximizing statute,[279] and that by design it is unconcerned with who receives civil damages so long as violators' resources are duly depleted.[280] Thus, judges and practitioners do not have to be concerned with determining how much blackmail Congress wanted to deter under RICO; Congress condemned all of it. Moreover, the potential for strategic moral hazard—that Bayou Steel might intentionally violate regulations if it can recover its penalties and legal costs—is so highly attenuated that it falls outside the scope of practical and legal concern. Civil damages simply are not recoverable for ordinary blackmail, and thus the specter of strategic moral hazard does not arise unless one is somehow capable of inducing all the elements of a RICO case—that is, a full-blown corporate campaign.

Taken together then, (1) if the object of RICO is to deter all forms of blackmail, including threats to tell the truth, then the optimal damages rule is the correct rule; and (2) Congress intended for civil RICO to reach all forms of racketeering, including organized blackmail. Therefore, the second rule is the correct measure of blackmail damages in civil RICO actions.

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economically efficient (*e.g.*, socially beneficial) racketeering.

277. Turley, *The RICO Lottery, supra* note 291 at 250 ("The primary purpose of civil RICO is prosecutorial, not compensatory.") (footnote omitted).

278. *See Id.* at 268 ("The social costs of racketeering defy computation. Moreover, even if they were capable of calculation, the malum in se community standard presupposes the absence of an efficient level of racketeering.") (footnote omitted).

279. *See id.* at 252 ("RICO guarantees potential litigants attorney's fees, liberal venue and service of process provisions, and the ability to join a large number of defendants in an apparent effort to maximize the number of cases as well as the amount of damages.") (citations omitted.).

280. *See id.* ("Quite to the contrary, RICO is first and foremost a penalty-maximizing statute and is largely unconcerned with who gets the damages so long as the violator's resources are duly depleted.").

VI. SUMMARY AND CONCLUSIONS

A. Future Economics of Corporate Campaigns in the "Mini-Steel" Industry

The contract the International finally accepted in September of 1996, without submitting it to Local 9121 for a vote, strongly favored Bayou Steel. Local 9121's members received no base wage increases, the company's productivity-tied wage plan was adopted, and employee health care contributions were increased. Moreover, no back pay was paid to returning strikers, and a negotiated, company-deferential standard for arbitration of employment terminations based on striker misconduct was adopted.[281] As a result, none of Local 9121's officers returned to work after the strike; some officers' discharges were affirmed in arbitration,[282] and the rest were settled on money terms acceptable to Bayou Steel. Thus, from the union's perspective the strike and corporate campaign decidedly failed to accomplish any tangible objectives. Measured against this outcome, one must ask why the Steelworkers found it economically rational to throw the full weight of the International and the IUD—spending more than three years and approximately three million dollars—into the Bayou Steel fight?[283]

Two standard economic considerations seem to have driven the International's decision. First, union representation in the mini-mill industry, particularly in the Southeast, historically has been minimal. For example, the International's efforts during the 1970s to organize Florida Steel Corporation generally failed.[284]

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281. Discipline usually is reviewed under the "just cause" standard, which in practice allows arbitrators, NLRB, and courts to consider mitigating factors (such as an employee's length of service, prior work record, and whether the employer had a stated rule against the offensive conduct) in deciding whether to uphold challenged discipline. *See, e.g.*, NLRB v. Mueller Brass Co., 509 F.2d 704 (5th Cir. 1975); NLRB v. Soft Water Laundry, Inc., 346 F.2d 930 (5th Cir. 1965). Bayou Steel negotiated a disciplinary review standard that disallowed such factors (save provocation), and which provided instead that if certain enumerated offenses (for instance violence, destruction of property, threats, or intimidation) were shown, discipline would be upheld.

282. *See supra* note 34, sources cited therein, and accompanying text.

283. *See* Forms LM-2 for United Steelworkers of America, International, and Local 9121 for the years 1993-1996 (the unions spent approximately one million dollars per year funding the strike and corporate campaign against Bayou Steel).

284. *See generally* Florida Steel Corp. v. NLRB, 587 F.2d 735, 739 (5th Cir. 1979) ("In 1973 the Union commenced organizing campaigns at the Company's steel mills in Charlotte, North Carolina, and Jacksonville, Indiantown, and Tampa, Florida. The

Similarly, the International's efforts to compel union recognition at LTV, Inc.'s new mini-mill project in Decatur, Alabama, named LTV-Trico Steel, Inc., at the same time as the Bayou Steel strike generally was failing.[285] Thus, the apparent marginal value to the International of controlling even a small "toe-hold" mini-mill such as Bayou Steel was very high. Second, the Steelworkers' experience in the Ravenswood campaign generally was a source of optimism regarding the efficacy of corporate campaign tactics. Moreover, as compared to Ravenswood, Bayou Steel represented a fairly small target.[286] Thus, from the perspective of an *ex ante* rational decisionmaker, the decision to launch the corporate campaign—that is, the marginal value of controlling Bayou Steel net of the expected marginal cost of the corporate campaign—may have seemed economically rational. *Ex post*, however, the Steelworkers' experience in the Bayou Steel campaign fundamentally changed that calculus.

The difference between the two campaigns, we believe, lies in certain real economic differences between Bayou Steel and Ravenswood Aluminum. Ravenswood principally manufactured sheet aluminum for beverage cans, thus placing the company's products in close commercial proximity to genuine consumer goods, goods that were susceptible to consumer boycotts even

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Union campaign at the Tampa plant began in 1973. It resulted in a Board-conducted election on February 26, 1976. Although the Union lost that election by an overwhelming vote, it was subsequently set aside by the Board on October 14, 1976, because of objections filed by the Union, and a second election was ordered to be conducted at such time as is deemed appropriate by the Board's regional office."); Florida Steel Corp. v. NLRB, 586 F.2d 436, 437 (5th Cir. 1978) ("The Union began an organization campaign at the Tampa plant in 1973. . . . Union elections were held simultaneously in the Traffic Division, the Mill Division, and the Rebar Division of the Tampa plant in February, 1976. The Union lost the elections by an overwhelming vote of from three to five to one. The Union filed objections and the Board set aside the elections and ordered new elections held."). The Union, however, never won bargaining rights at these plants.

285. *See, e.g.*, Nancy Kelly, *USW chief points finger at LTV. (LTV-Trico venture questioned by United Steelworkers of America)*, AM. METAL MARKET, March 8, 1996, at 12 ("Frustrated by the plans of LTV-Trico Inc., Cleveland, to build a flatrolled steel mini-mill in Decatur, Ala., and manufacture product with nonunion labor, United Steelworkers union president George Becker used his time before the Congressional Steel Caucus yesterday to berate the company specifically and mini-mills in general."); Marcus Gleisser, *USW Protests Alabama LTV Plant*, THE PLAIN DEALER, August 6, 1995, at H5 ("LTV's position is Trico employees should have the right to decide on union representation and it would be illegal for LTV to force Trico to violate the right of their employees to choose whether they wish to be represented by a union.").

286. For example, Ravenswood had 1700 employees whom the operating management had permanently replaced, while Bayou had only 300 employees and used only temporary replacements.

though no significant amounts were successfully boycotted.[287] Bayou Steel's products—unfinished steel billets, standard channels, and angles—in contrast, are far removed from consumer brand choices and, therefore, not susceptible to consumer identification or boycotts. The Steelworkers also had an easy target—an American citizen who fled to Switzerland after being indicted in 1983 for tax evasion, racketeering, and oil deals with Iran, and who is considered one of the world's wealthiest individuals—in Marc Rich who controlled Ravenswood.[288] Bayou's controlling stockholder had no such disabilities, and despite being personally attacked, held firm throughout the ordeal. This, of course, implies that steel mini-mills are relatively corporate campaign resistant and that, accordingly, the mini-steel industry is relatively unlikely to experience further such campaigns. A dozen years ago, Perry's seminal book on corporate campaigns correctly called attention to the fact that corporate campaigns against companies making products directly for consumers were likely to be much more vulnerable to corporate campaigns than those producing products sold only to other producers and not easily distinguishable in the marketplace.[289] The Bayou Steel case illustrates the factual basis of Perry's analysis.

B. Legal Conclusions

In this country, no one can be forced to work against his or her will; that is, without an acceptable agreement. People also have the right to protest and to petition for the redress of grievances. Labor law further empowers employees to bargain collectively and, if an acceptable contract is not reached, to withdraw their

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287. For accounts based up Steelworker claims, see Sandra Livingston, *Up from the Ranks, New Steel Workers Chief Has Record of Successes*, THE PLAIN DEALER, March 1, 1994, at C1 ("The campaign was so successful that even Coca-Cola Co. and Miller Brewing Co. switched aluminum suppliers during the dispute."); Charles Jarvis & Ron Lewis, *RAC on Brink of 'Financial Ruin'*, Parkersburg News, May 5, 1992, 1992 WL 3152809 ("The union persuaded Anheuser-Busch, Miller Brewing and Stroh Brewery not to buy RAC aluminum sheet for cans."). In fact, we believe that only Stroh, the smallest of the companies involved, actually did drop Ravenswood as a supplier, as recounted in *supra* note 59.

288. *See* Ken Ward, Jr., *Aluminum Company Chief Praises Sale*, CHARLSTON GAZETTE, Apr. 13, 1994, 1994 WL 12839746 (Ravenswood's ousted chief executive, Emmett Boyle, "had denied Rich was involved with the company, but later said otherwise in court documents"); Stephen Franklin, *Steelworker's Victory an Ending Labor Likes*, CHI. TRIB, May 29, 1992, 1992 WL 4486498.

289. *See* Perry, UNION CORPORATE CAMPAIGNS, *supra* note 48.

labor *en masse*. Moreover, in connection with collective bargaining, when an employer or a labor union bargains "unfairly," labor law provides the substantive and procedural rules for obtaining a resolution. As disputes are decided, collective bargaining progresses toward a final result—either a contract or an impasse. Labor law does not function costlessly or instantly, however. Rather, it is imperfect, costly, and sometimes it seems exceedingly slow. Even so, it is the model that governs collective bargaining: offer, rejection, counteroffer, rejection, dispute, resolution, another offer, and so on until the process is completed.

A corporate campaign aimed at obtaining a contract is designed to win more from an employer than a union can achieve utilizing labor law processes alone. Otherwise, it serves no economically rational purpose. Indeed, it would be irrational for a union to spend its scarce resources on a campaign to obtain a result the same as, or inferior to, that which results from labor law processes. Stated differently, in a corporate campaign directed at getting a contract, unions seek wages, hours, and working conditions using means that are beyond what is contemplated by the labor law model.

Ordinarily, one may not use blackmail to obtain a contract. Indeed, the racketeering laws make it a federal crime to use organized extortion to force contracts (at least where interstate commerce is affected). In addition, although labor unions enjoy special privileges in our society, such as the right to bargain collectively, withdraw labor *en masse*, and to file unfair labor practice charges, nothing in the law specially empowers labor unions to use blackmail to obtain contracts with employers. Indeed, except within the special purview of labor law, unions are subject to the same general laws that apply to all citizens. Therefore, not to allow civil recovery under RICO for damages incurred as a consequence of union corporate campaigns would be tantamount to saying, as a matter of law, that labor unions, in addition to their special rights under federal labor law, also are specially privileged to commit organized blackmail in violation of state law to get contracts. This, of course, is not the law.

APPENDIX

Pr Newswire

Monday, August 2, 1993

STEELWORKERS ANNOUNCE CORPORATE CAMPAIGN TO FORCE BAYOU STEEL INTO MEANINGFUL NEGOTIATIONS

NEW ORLEANS, Aug. 2 /PRNewswire/—The United Steelworkers of America (USWA) announced today the beginning of a corporate campaign against the Bayou Steel Corp. (AMEX: BYX) intended to force the company to end its unfair labor practices, begin meaningful collective bargaining and halt a five-month work stoppage at its LaPlace, La., operations.

George Becker, USWA International vice-president for administration, told a news conference here that the corporate campaign is designed to bring pressure on the company from individuals and institutions with direct financial or other interest in its performance.

"Labor disputes are no longer restricted to the picket line," said Becker. "There are other players in our society who can have, and have had, significant influence in helping to resolve labor conflicts. We intend to inform them fully of the events here, and of Bayou management's outrageous conduct. We have every reason to believe they will want to get involved once they hear the facts."

Becker led the union's successful corporate campaign against the Ravenswood Aluminum Corp., which began in November 1990, and ended in victory for the union's members in June 1992. In that dispute, the union said Ravenswood Aluminum locked out 1,700 USWA members, hired scabs as permanent replacements and refused to negotiate. In the 20-month struggle that followed, the union said it succeeded in ousting company management, winning a new contract and returning its members to their jobs. The union has conducted similarly successful efforts against the Marathon Oil (NYSE: MRO) division of USX Corp. and the Noranda Corp., among others.

The same team that directed the USWA's campaign against Ravenswood is being brought here from the union's International headquarters in Pittsburgh and the AFL-CIO headquarters in Washington.

Local Union 9121, following a series of unfair labor practices by the company, struck on March 21, and the USWA filed a charge with the National Labor Relations Board alleging Bayou committed 22 violations of the National Labor Relations Act, the union said. The union also contends that the company's actions amount to a lockout under Louisiana law.

Among other things, the union charged that Bayou, after receiving notice of the local's intent to strike on March 19, submitted a retaliatory "final offer" on that day that was markedly inferior to the one the workers had rejected by a vote of 268-6 on March 18.

The union said the March 19 "final offer," clearly intended to punish the workers, was for a six-year contract that included an absolute ban on union activities on company time—a proposal that violates the National Labor Relations Act on its face; a $1 an hour cut in wages and benefits; huge employee contributions to health insurance premiums; a two-tier wage system; and an incomplete incentive plan that did not even contain rates. Incredibly, the company demanded the sole right to determine the ultimate contents of the incentive plan, and insisted that the plan be excluded from the grievance and arbitration process, the normal dispute settlement mechanism, the union said.

On March 20, the company made another "final offer" which contained a few contractual improvements, but attached a threat—if the employees did not accept the March 20 offer, the company would unilaterally implement its March 19 offer—another labor law violation, the union said.

Under auspices of federal mediators, the union and company have had several post-strike negotiating sessions, including one on May 13 during which Bayou management offered a "new" incentive plan proposal—consisting of a single sentence saying there would be such a plan in any contract eventually agreed to, and the terms would be decided by the company. This, too, violated the National Labor Relations Act, the union said. As with the previous proposal, this incentive plan would not be subject to the grievance procedure. If any doubt existed that the company was not interested in settling, it evaporated at that moment, the union said.

The two sides have not met in face-to-face negotiations since June 3.

"Given the company's unyielding and extreme positions, any impartial observer would have to conclude that Bayou management had no interest in reaching agreement," Richard

H. Davis, director of USWA District 36, told the news conference. "For its own reason—and we believe it was to get rid of the union—the company chose confrontation over compromise, forced our members into a corner and gave them no choice but to strike.

"Our goal from the beginning was to negotiate a contract that works to the advantage of both the workers and the company. That's the nature of collective bargaining. Bayou management elected not to bargain, so we have decided to take our case to Bayou investors, creditors, customers, the public and others. Bayou wouldn't listen to its workers. Maybe it will pay attention to these other interested parties.

"We're certain that the state of Louisiana and St. John the Baptist Parish, which have granted tax waivers in excess of $44 million, would not condone management's contemptible treatment of our members and their communities. We're equally certain that Bayou bondholders will be alarmed to learn they are at great financial risk because of management's business practices, and that government agencies and private groups will deplore its environmental practices."

Under terms of the previous six-year contract, which expired last Feb. 28, the workers wages rose only 69 cents—with a 15 cents an hour wage increase on March 1, 1987; and 18-cents an hour in cost-of-living adjustments in each of the final three years. During the same period, Bayou reported profits of $30 million and projected profits of $4 million this year.