

# NOTES

## LABOR UNION BANKRUPTCY\*

Labor relations is extra-legal and draws water only in part from the deep well of judicial experience. It is broader and is derived from the totality of the economic and social environment. As it adapts, adjusts and uses the resources of our society, it survives, and, as it fails to do so, the industrial society dependent upon it suffers. Ancient precepts suited to the needs of another age, therefore, cannot be strictured into the needs of the developing industrial society of this fast fading century.<sup>1</sup>

Society's image of the labor union as a powerful, economic force<sup>2</sup> initially creates doubt as to the likelihood of union bankruptcy. Even the more sophisticated observer finds local union liabilities inconsequential when compared to assets.<sup>3</sup> Conservative investments, motivated primarily by a desire to keep assets liquid in case of the need for payment of strike benefits, typically characterize union financial policies.<sup>4</sup> At least on the face of the balance sheet, bankruptcy is unlikely for the union that maintains customary financial practices.

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\* After this Note went to press, The Eighth Circuit held that a union was a "person" entitled to file a voluntary petition in bankruptcy. *Freight Drivers Local 600 v. Gordon Transps., Inc.*, 576 F.2d 1285 (8th Cir. 1978). The court's reasoning is in many respects similar to that contained herein.

1. Kaynard, Book Review, 37 *FORDHAM L. REV.* 502, 508 (1969).

2. "In many instances [unions] have become far more powerful than the employers with whom they do business. Today most observers would agree . . . 'the strongest unions . . . are the most powerful economic organizations which the country has ever seen.'" Goldberg, *AFL-CIO*, in *PROCEEDINGS OF THE EIGHTH ANNUAL MEETING, INDUSTRIAL RELATIONS RESEARCH ASSOCIATION* 45-46 (1956) (statement of general counsel of the United States Chamber of Commerce). See generally *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922); Bartell, *National Union Assets, 1959-1961*, 19 *INDUS. & LAB. REL. REV.* 80 (1965).

3. Applebaum, *Local Union Financial Structure: 1962-1966*, 22 *LAB. L.J.* 713, 718, 724 (1971). The author conducted a survey of Wisconsin locals and reported his findings in a series of articles. In an earlier piece, he asserted that the assets/liabilities ratio of the surveyed locals was approximately 20:1. Applebaum, *An Analysis of the Financial Structure of Local Labor Unions*, 16 *LAB. L.J.* 164, 173 (1965). See also Applebaum, *A Regional Analysis of Local Union Financial Structures*, 17 *LAB. L.J.* 353, 355, 360 (1966); Bartell, *supra* note 2.

4. Applebaum, *Financial Structure and Characteristics of Labor Organizations in a Metropolitan Area*, 15 *LAB. L.J.* 30, 40 (1964). The author notes that union securities investments are generally in the form of government issues. Aside from the greater degree of security in government obligations, unions refrain from corporate investments to avoid possible conflicts of interest. The unions feel bargaining with a corporation in which they invest is bargaining against itself;

Generalities,<sup>5</sup> however, do not reflect the risk of fiscal insolvency caused by the union's recently acquired legal status. Federal laws now expose the labor union to suit<sup>6</sup> and, consequently, to judgments that the otherwise financially sound organization may be unable to satisfy.<sup>7</sup> If the judgment creditor insists on diverting members' dues to satisfy his judgment, the union may be unable to operate effectively.<sup>8</sup> In this situation, a discharge in bankruptcy may be the union's only means of survival.<sup>9</sup>

The threshold question, and one of first impression, is whether the union is a "person" entitled to the benefits of bankruptcy.<sup>10</sup> Although Congress included the "unincorporated association" as a "person" amenable to adjudication,<sup>11</sup> both the case law construing the term and the union's unique legal and functional status necessitate closer scru-

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whereas, investing in a corporation with which they do not bargain may not be in the workers' best interests. *Id.*

5. There are unions and unions. We have locals, nationals, and federations; craft, industrial, and multi-craft or multi-industrial; conservative and radical; large and small; blue-collar and white-collar; democratic and dictatorial.

[D]ifferent conditions promote divergences in behavior and policy. Consequently, theorizing about unions is hampered by many variables and an abundance of variation.

Lester, *The Changing Nature of the Union*, in PROCEEDINGS OF NEW YORK UNIVERSITY THIRTEENTH ANNUAL CONFERENCE ON LABOR 19 (1960).

6. See notes 102-03 *infra* and accompanying text.

7. See, e.g., *Motor Carriers Council of St. Louis, Inc. v. Local 600, Teamsters Union*, 384 F. Supp. 214 (E.D. Mo. 1974), *aff'd per curiam*, 516 F.2d 316 (8th Cir. 1975).

8. Cf. Comment, *The Property Rights of Disaffiliating Local Unions in the Light of Public Policy*, 37 FORDHAM L. REV. 252, 259 (1969) (inability of local to function effectively on reversion of assets to international upon disaffiliation). See generally G.F. BLOOM & H.R. NORTHROP, *ECONOMICS OF LABOR RELATIONS* 119, 120 (1965): "Operating a union in modern American society is an expensive undertaking. Officer and employee salaries, office rent, traveling expenses, postage and other communication expenses, publicity, and legal and research activities are some of the daily routine expenses which must be met."

9. The Bankruptcy Act § 1(15), 11 U.S.C. § 1(15) (1970) reads: "'Discharge' shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this title."

10. The issue was recently resolved by the Eighth Circuit in *Freight Drivers Local 600 v. Gordon Transps., Inc.*, 576 F.2d 1285 (8th Cir. 1978), *rev'g In re Freight Drivers Local 600*, 432 F. Supp. 1326 (E.D. Mo. 1977). Local 600 filed a voluntary petition in bankruptcy after suffering judgments totaling approximately six million dollars in suits brought by more than 60 motor carriers injured by the union's breach of a no-strike clause in an existing collective bargaining agreement. The bankruptcy court's opinion noted that at least one other labor organization had filed a voluntary petition and obtained a discharge. But the bankruptcy was not challenged, and there was no reported decision in the case. *In re Freight Drivers Local 600*, No. 76-1517B, slip op. at 13 n.9 (E.D. Mo. Nov. 1, 1976) (noting *Carpenters Local 930*, No. 6-73-1062 (D. Minn. Oct. 6, 1975)), *rev'd*, 432 F. Supp. 1326 (E.D. Mo. 1977), *aff'd sub nom. Freight Drivers Local 600 v. Gordon Transps., Inc.*, 576 F. 2d 1285 (8th Cir. 1978).

11. See notes 21-26 *infra* and accompanying text.

tiny of the issue. Beyond the initial statutory interpretation, moreover, lies the inevitable conflict between two comprehensive legislative schemes, the Bankruptcy Act<sup>12</sup> and the National Labor Relations Act.<sup>13</sup>

This Note isolates, through several case analyses, the common characteristics of entities previously adjudicated as "unincorporated associations." The next section examines the union's personality, emphasizing those qualities which correspond to the bankruptcy criteria. Section III integrates the information discerned from the two prior sections, concluding that the union qualifies as a voluntary bankrupt, and discusses the major issues likely to arise from union bankruptcy.

### I. THE UNINCORPORATED ASSOCIATION IN BANKRUPTCY

The purpose of the Bankruptcy Act<sup>14</sup> is to stabilize the relationship between an insolvent, nonpaying, or fraudulent debtor and his creditors.<sup>15</sup> The Act provides voluntary<sup>16</sup> and involuntary<sup>17</sup> methods of adjudication. The honest debtor may discharge his indebtedness through a voluntary petition and secure "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt."<sup>18</sup> Creditors may bring involuntary petitions

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12. 11 U.S.C. §§ 1-1103 (1970).

13. 29 U.S.C. §§ 151-68 (1970).

14. For a discussion of the historical antecedents of American bankruptcy law and an analysis of the legislative debate preceding enactment, see C. WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* (1935); Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223 (1918).

15. See *In re Reiman*, 20 Fed. Cas. 490, 494 (1874). See also *United States v. Bekins*, 304 U.S. 27, 47 (1938); *Adair v. Bank of America Nat'l Trust & Sav. Ass'n*, 303 U.S. 350, 354 (1938); *Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. Ry.*, 294 U.S. 648, 669 (1935); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 184 (1902). See generally Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226 (1976); Glenn, *Essentials of Bankruptcy: Prevention of Fraud, and Control of Debtor*, 23 VA. L. REV. 373 (1937); Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1 (1940).

16. See generally 1 COLLIER ON BANKRUPTCY ¶ 4.03, at 579 (14th ed. 1974). A voluntary petition is a debtor's ex parte application which, upon filing, results in his automatic adjudication as a bankrupt. See Bankruptcy Act § 18(f), 11 U.S.C. § 41(f) (1970).

17. See generally 1 COLLIER ON BANKRUPTCY ¶ 4.14, at 608 (14th ed. 1974). Involuntary petitions are generally filed by creditors to protect their interests in the debtor's remaining assets. Because an involuntary petition must allege that the debtor committed an act of bankruptcy, see Bankruptcy Act § 3, 11 U.S.C. § 21 (1970), and, except for debtors who are natural persons, is limited to business entities, see notes 27-28 *infra* and accompanying text, it is a far less common means of adjudication. See D. COWANS, *BANKRUPTCY LAW AND PRACTICE* § 1051, at 583-84 (1963). This Note does not reach the question of whether a union is subject to involuntary bankruptcy.

18. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). See, e.g., *In re Aveni*, 458 F.2d 972 (6th Cir.), *cert. denied*, 409 U.S. 877 (1972); *Menier v. United States*, 405 F.2d 245 (5th Cir. 1968);

against qualifying debtors and thus enjoy the protection of a court supervised distribution of the debtor's property.<sup>19</sup> Post adjudication procedures are similar under both voluntary and involuntary petitions.<sup>20</sup>

Section 4(a) of the Bankruptcy Act entitles any "person," except four specified corporations, to file a voluntary petition in bankruptcy.<sup>21</sup> The statute<sup>22</sup> defines "person" to include "corporations"<sup>23</sup> which, in turn, is defined to include

all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, *unincorporated companies and associations*, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument.<sup>24</sup>

The statutory "corporation" is thus significantly broader than is ordinarily recognized<sup>25</sup> outside of bankruptcy court and judicial construction varies substantially with the factual and historical context of the organization.<sup>26</sup>

Hartman v. Utley, 335 F.2d 558 (9th Cir. 1964); Atlantic Coast Line R.R. v. St. Joe Paper Co., 216 F.2d 832 (5th Cir. 1954), *cert. denied*, 348 U.S. 963 (1955); State Fin. Co. v. Morrow, 216 F.2d 676 (10th Cir. 1954); *In re Pacific Automation Prods., Inc.*, 224 F. Supp. 995 (S.D. Cal. 1964); *In re Wesley Corp.*, 18 F. Supp. 347 (E.D. Ky. 1937).

19. See Wolfe, *The Bankruptcy Law and Its Economic Necessity*, 4 TEMP. L.Q. 218, 219-20 (1930).

20. D. COWANS, *BANKRUPTCY LAW AND PRACTICE* § 882, at 465 (1963).

21. Bankruptcy Act § 4(a), 11 U.S.C. 22(a) (1970) reads: "Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt."

22. Section 1 of the Bankruptcy Act, 11 U.S.C. § 1 (1970), defines words and phrases for the express purpose of use throughout the Act. See 1 COLLIER ON BANKRUPTCY ¶ 4.06, at 601 (14th ed. 1974).

23. Bankruptcy Act § 1(a)(23), 11 U.S.C. § 1(23) (1970) reads: "'Persons' shall include corporations, except where otherwise specified . . ." Even without the statutory definition as a guide, "persons" should be interpreted as including corporations because § 4(a) excludes certain corporations implying that corporations not within the excepted class are included. Further, only "natural persons" are subject to involuntary bankruptcy under § 4(b), 11 U.S.C. § 22(b) (1970), indicating a broader use of the word in § 4(a). See De Funiak, *Right of Unincorporated Companies or Associations to File Voluntary Petition in Bankruptcy*, A-1 CORP. REORG. 336 (1938).

24. Bankruptcy Act § 1(a)(8), 11 U.S.C. § 1(8) (1970) (emphasis added).

25. See Kresberg v. International Paper Co., 149 F.2d 911, 913 (2d Cir.), *cert. denied*, 326 U.S. 764 (1945); *In re Peer Manor Bldg. Corp.*, 143 F.2d 769, 771 (7th Cir.), *cert. denied*, 323 U.S. 757 (1944); Colin, *An Analysis of the 1926 Amendments to the Bankruptcy Act*, 26 COLUM. L. REV. 789, 790 (1926). *But see* E. WARREN, *CORPORATE ADVANTAGES WITHOUT INCORPORATION* 570 (1929).

26. Pope & Cottle Co. v. Fairbanks Realty Trust, 124 F.2d 132, 134 (1st Cir. 1941).

The class of debtors eligible for involuntary bankruptcy is more restricted than the class eligible for voluntary adjudication. Congress included specific limitations to protect the nonqualifying, *i.e.*, noncommercial, debtor from the social stigma which accompanies involuntary adjudication.<sup>27</sup> But spurious limitations have developed from an inartistic and awkward legislative history. Prior to 1926, section 4(b) permitted creditors to petition for the involuntary adjudication of “[a]ny natural person, . . . any unincorporated company, and any moneyed, business, or commercial corporation. . . .”<sup>28</sup> At that time, the “unincorporated company” was the only unincorporated entity included in the Act because “unincorporated companies and associations” were not within the original definition of “corporation and were, therefore, not persons at all.”<sup>29</sup> Section 4(b) “corporations” expressly required a business purpose<sup>30</sup> and some courts applied the same limitation to the “unincorporated company.”<sup>31</sup> *In re Tidewater Coal Exchange*<sup>32</sup> presented the question of whether Congress’ use of the word “company” in section 4(b) supported this implication.

The Tidewater Coal Exchange was established by individuals, corporations, and partnerships during the First World War to expedite the transfer of coal from rail to ship; it was unincorporated, had no capital, and expenses were paid entirely by the shippers.<sup>33</sup> It maintained a pool of coal, crediting members’ accounts when coal was received and debiting those accounts when coal was shipped on their consignment. The Exchange became insolvent when the pool did not contain enough coal to answer the claims of all members.<sup>34</sup> Creditors subsequently filed a petition to have the Exchange adjudicated bankrupt.

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27. Involuntary bankruptcy is often the creditor’s last resort, motivated primarily by a fear that either the debtor is dishonest or incapable of handling imminent financial difficulties. D. COWANS, *BANKRUPTCY LAW AND PRACTICE* § 1051, at 584 (1963).

28. Act of June 25, 1910, ch. 412, § 4(b), 36 Stat. 839.

29. See Act of July 1, 1898, ch. 541, § 1(a)(6), 30 Stat. 544; note 40 *infra* and accompanying text.

30. One commentator has suggested that Congress “thought that corporations which were unconcerned with money, business or commerce should not have their laudable activities disrupted by liquidation at the instance of pestiferous creditors.” Sovern, *Section 4 of the Bankruptcy Act: The Excluded Corporations*, 42 MINN. L. REV. 171, 232 (1957).

31. See, e.g., *In re Minnesota Ins. Underwriters*, 36 F.2d 371 (D. Minn. 1929); *Gallagher v. Hannigan*, 5 F.2d 171, 175 (1st Cir.), *cert. denied*, 269 U.S. 573 (1925) (business trust); *In re Order of Sparta*, 242 F. 235, 238 (3d Cir. 1917) (fraternal benefit association); *In re Parker*, 275 F. 868, 870 (N.D. Ill.), *rev’d*, 283 F. 404 (7th Cir. 1921) (business trust).

32. 274 F. 1008 (S.D.N.Y. 1921), *aff’d*, 280 F. 638 (2d Cir.), *cert. denied*, 259 U.S. 584 (1922).

33. 280 F. at 640-41.

34. 274 F. at 1009.

Objectors to the petition argued that the Exchange was not subject to involuntary adjudication because the term "company" in section 4(b) included only those associations organized for a business or profit-making purpose.<sup>35</sup> In the district court, Judge Learned Hand refused to reach the ultimate question because he believed the members' pursuit of commercial "advantages" was sufficient to satisfy any such implied limitation.<sup>36</sup> Hand also rejected arguments that an association must otherwise be recognized as a legal person to fall within the Act's "unincorporated company." The legal relations between the members themselves, or with respect to outsiders, he found irrelevant to the court's power to dispose of the debtor's assets through bankruptcy.<sup>37</sup>

On appeal, the Second Circuit adopted the same position, holding it sufficient that the Exchange was an association of individuals pursuing a common business objective, and finding it unnecessary to decide whether an unincorporated company without some commercial purpose could be adjudicated an involuntary bankrupt.<sup>38</sup> The court held that the Exchange possessed a corporate character not common to individuals or partnerships because it operated "under a control agreed to by all its members," and was capable of incurring debt although it was not organized for profit.<sup>39</sup>

Because only business entities were otherwise subject to involuntary petitions, it was not wholly irrational for courts to imply a business purpose requirement in the word "company." Yet the Act expressly required that only "corporations," and not "unincorporated compan[ies]," be "moneyed, business, or commercial" in purpose. The argument should have become moot when, in 1926, Congress responded to the courts' constructional dilemma by inserting the words "unincorporated companies and associations" in the Act's "corporation" definition.<sup>40</sup> Logic would have Congress including "association" in the

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35. *Id.* at 1010.

36. *Id.* at 1011.

37. [T]he relations between the members are one thing, and means of winding up the joint venture another. It needs no change in the legal relations between the members—internally among themselves, or collectively against outsiders—to give a court power to take over the joint assets . . . and finally to dissolve the association. Nor would that be outside the scope of . . . bankruptcy . . . .

*Id.* at 1010.

38. 280 F. at 643.

39. *Id.* Cf. *In re* South Shore Co-op. Ass'n, 4 F. Supp. 772, 773 (W.D.N.Y. 1933) (Bankruptcy Act says nothing about "profits" in connection with the requirements of "business" corporation).

40. Act of May 27, 1926, ch. 406, § 1, 44 Stat. 662. See 67 CONG. REC. 7675 (1926) (remarks

new definition to encompass nonbusiness entities. The unincorporated company or association thus became a possible voluntary or involuntary bankrupt as a statutory "corporation." If the proceedings were involuntary, the unincorporated "corporation," whether company or association, was required to have a "moneyed, business, or commercial" purpose.

Instead of alleviating the courts' constructional difficulties, however, the change in the "corporation" definition initially led to confusion in the involuntary context,<sup>41</sup> which later spread to voluntary proceedings and continues to plague even modern cases.<sup>42</sup> The "corporation," which then included "unincorporated companies and associations," expressly required a "moneyed, business, or commercial" purpose in order to be adjudged an involuntary bankrupt; the "unincorporated company" that remained within section 4(b) did not.<sup>43</sup> Because there was no clear difference between the terms, petitioners seeking the involuntary adjudication of noncommercial unincorporated organizations alleged that "unincorporated company" did not compel a business purpose.<sup>44</sup> Confronted with this anomalous result, courts fashioned questionable statutory analyses to hold, correctly, that only commercial organizations were subject to involuntary bankruptcy.<sup>45</sup> Although the Chandler Act<sup>46</sup> eliminated this difficulty by omitting the "unincorporated company" from section 4(b), courts were reluctant to digress from prior interpretation. *Stare decisis* compounded the problem as courts, relying solely on precedent, neglected to acknowledge

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of Rep. Michener); *Report of the Special Committee on Practice in Bankruptcy Matters*, 50 REP. A.B.A. 478, 481 (1925) ("There is at present doubt or uncertainty under judicial construction whether the existing definition of corporations includes unincorporated companies, associations and common-law trusts . . . which should be removed, as it is by the proposed amendment."). See also Luburger, *Improvements in the Bankruptcy Act and Its Administration*, 10 IOWA L. BULL. 209 (1925); Robinson, *The Scope and Effect of the 1926 Amendments to the Bankruptcy Act*, 12 CORNELL L.Q. 49 (1926).

41. The inclusion of "unincorporated companies and associations" was "likely to be more confusing than helpful" because of their amorphous legal status. See McLaughlin, *Amendment of the Bankruptcy Act*, 40 HARV. L. REV. 341, 355-65 (1927).

42. See notes 60-69 *infra* and accompanying text.

43. See text accompanying note 28 *supra*.

44. Cf. *In re Michigan Sanitarium & Benevolent Ass'n*, 20 F. Supp. 979 (E.D. Mich. 1937) (eleemosynary association); *In re William McKinley Lodge*, 4 F. Supp. 280 (S.D.N.Y. 1933) (masonic lodge); *In re Elmsford Country Club*, 50 F.2d 238 (S.D.N.Y. 1931) (golf club).

45. See, e.g., *In re Lloyds*, 43 F.2d 383 (N.D. Tex. 1930); *In re Minnesota Ins. Underwriters*, 36 F.2d 371 (D. Minn. 1929), noted in 30 COLUM. L. REV. 401 (1930).

46. Chandler Act of 1938, ch. 575, § 4(b), 52 Stat. 845 (current version at 11 U.S.C. § 4(b) (1970)). See *Republic Underwriters v. Ford*, 100 F.2d 511, 514 (5th Cir. 1938); 25 VA. L. REV. 731 (1939).

changes in the statute.<sup>47</sup>

In *In re Philadelphia Consistory*, the court, carefully examining the statutory scheme, distinguished involuntary proceedings and held that the absence of a business purpose did not bar voluntary adjudication.<sup>48</sup> The Consistory was an unincorporated fraternal association which gave financial aid and support to those of its members in need.<sup>49</sup> The petition in bankruptcy alleged that the Consistory's powers and privileges resembled those of a corporation:

It is an association of more than seven thousand men, has a common name; has a constitution and bylaws; it elects governing trustees; it has powers to own real estate and personal property, and does so own them, it has power to sue and be sued; it acts by its trustees, who are elected as a single body.<sup>50</sup>

Despite these corporate characteristics,<sup>51</sup> counsel seeking to dismiss the voluntary petition argued that the term "corporation," as used in the Act, related solely to organizations whose liability was limited to the capital subscribed<sup>52</sup> and contemplated, therefore, only business or commercial enterprises.<sup>53</sup>

The court's opinion emphasized the distinction between the Act's

47. One court disregarded the references to statutory definition altogether, see *In re Manufacturing Lumbermen's Underwriters*, 18 F. Supp. 114 (W.D. Mo. 1936), and was subsequently severely criticized. See *In re Philadelphia Consistory Sublime Princes Royal Secret 32° Ancient Accepted Scottish Rite*, 40 F. Supp. 645, 648 (E.D. Pa. 1941) (quoting 1 COLLIER ON BANKRUPTCY ¶ 4.06, at 601-02 (14th ed. 1974)).

In *Pope & Cottle Co. v. Fairbanks Realty Trust*, 124 F.2d 132, 136 (1st Cir. 1941), the court questioned whether the words "and associations" added anything to the phrase "unincorporated companies." The latter, the court noted, was limited to business enterprises. Beyond the context of an involuntary proceeding, this court's dicta is potentially damaging. See *Associated Cemetery Mgmt., Inc. v. Barnes*, 268 F.2d 97 (8th Cir. 1959); *In re Freight Drivers Local 600*, 432 F. Supp. 1326 (E.D. Mo. 1977), *rev'd sub nom. Freight Drivers Local 600 v. Gordon Transps., Inc.*, 576 F.2d 1285 (8th Cir. 1978); notes 61-70 *infra* and accompanying text.

48. 40 F. Supp. 645 (E.D. Pa. 1941), *aff'd per curiam*, 134 F.2d 333 (3d Cir. 1943).

49. *Id.* at 646.

50. *Id.*

51. See generally R. STEVENS, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS § 3, at 14 (2d ed. 1949).

52. Section 1(8) of the Bankruptcy Act, 11 U.S.C. § 1(8) (1970), defines "corporation" to include those "partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association . . ." (emphasis added). Unincorporated associations are also within the Act's definition, see text accompanying note 24 *supra*, but without qualification. Capital subscription, therefore, is meant only to distinguish this particular kind of partnership from those which do not afford partners limited liability, and for which the Act provides other methods of adjudication. See Bankruptcy Act §§ 5(a), (b), (c), 11 U.S.C. §§ 23(a), (b), (c) (1970).

53. 40 F. Supp. at 646-47.



section 4(a) voluntary, and section 4(b) involuntary, proceedings.<sup>54</sup> Only a "moneyed, business, or commercial corporation" was subject to involuntary adjudication; the nature of a voluntary petitioner such as the Consistory, however, was immaterial.<sup>55</sup> The court reasoned that the Consistory's character was indistinguishable from the country club,<sup>56</sup> fraternal lodge,<sup>57</sup> and eleemosynary association<sup>58</sup> previously held to be amenable to the Act, and denied the petition to dismiss the voluntary adjudication.<sup>59</sup>

What emerged from *In re Philadelphia Consistory* as a reasonable distinction between voluntary and involuntary "corporations" was blurred by the opinion in *Associated Cemetery Management, Inc. v. Barnes (ACMI)*.<sup>60</sup> A majority of the trustees of an employee profit sharing trust fund petitioned to have it adjudicated a voluntary bankrupt. Several other trustees objected, contending that the trust was not a "person" within the meaning of the Bankruptcy Act.<sup>61</sup> Because the trust specifically prohibited the issuance of "anything of present exchangeable value" and thus failed to satisfy the Act's business trust criteria,<sup>62</sup> petitioners resorted to adjudication as an "unincorporated

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54. The issue in the instant case has been obscured by the mistaken direction of attention on the part of counsel to the scope of section 4, sub. b rather than that of section 4, sub. a which is the pertinent and controlling section.

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There is a sharp line of demarcation between the scope of these two sections, because of the numerous qualifying provisions in section 4, sub. b which are absent in section 4, sub. a.

In short, certain "corporations" . . . which may file voluntary petitions, are excluded from the operation of involuntary proceedings.

*Id.* at 647-48.

55. *Id.*

56. *See In re Elmsford Country Club*, 50 F.2d 238 (S.D.N.Y. 1931).

57. *See In re Carthage Lodge 365, I.O.O.F.*, 230 F. 694 (N.D.N.Y. 1916). The Carthage Lodge was a fraternal benefit association of Odd Fellows organized under the laws of New York State. The statute enabled the lodge to enjoy the status of an entity that could hold and convey property, sue and be sued, and incur and be held liable for its debts. It had power to elect trustees, to manage its affairs, and to make rules and regulations governing the same. The court in *Philadelphia Consistory* recognized the similarities between the two associations in both purpose and status. 40 F. Supp. at 649-50.

58. *See In re Michigan Sanitarium & Benevolent Ass'n*, 20 F. Supp. 979 (E.D. Mich. 1937).

59. 40 F. Supp. at 650.

60. 268 F.2d 97 (8th Cir. 1959).

61. *Id.* at 98-99.

62. *Id.* at 101-02. Congress added Massachusetts or business trusts to the Act's "corporation" definition in the 1926 amendments. Act of May 27, 1926, ch. 406, § 1, 44 Stat. 662. *See* text accompanying note 24 *supra*. Congress was merely codifying what the courts had previously found to be implied. *See* 67 CONG. REC. 7675 (1926) (remarks of Rep. Michener). *See also* Gallagher v. Hannigan, 5 F.2d 171 (1st Cir.), *cert. denied*, 269 U.S. 573 (1925); *In re Parker*, 275 F.

association."<sup>63</sup> The court rejected this contention and found that the trust was not a "person" within the Act's definition because it was not a "moneyed, business, or commercial corporation."<sup>64</sup>

The court's reasoning is questionable in a number of respects. First, after noting that unincorporated entities were logically within the scope of section 4(a), the court defined "unincorporated associations" by using decisions that construed section 4(b). Courts, in these decisions, required both the characteristics of an unincorporated association and section 4(b)'s business purpose.<sup>65</sup> In *ACMI*, the court ignored *Philadelphia Consistory* and mistakenly required a showing of business purpose for the adjudication of any unincorporated association, including those within section 4(a). Second, in response to appellant's criticism of the court's misplaced reliance on precedent, the opinion purported to acknowledge the distinction between voluntary and involuntary bankrupts, but asserted nevertheless that it relied primarily on a case that did not limit its definition of an association to involuntary proceedings.<sup>66</sup> Finally, although the court observed that the trustees engaged in business, it refused to attribute their activities to the trust itself.<sup>67</sup>

*ACMI* may be correct on its facts. Congress arguably intended to exclude from bankruptcy any trust entity which did not issue certificates or other evidence of beneficial ownership to its members.<sup>68</sup>

868 (N.D. Ill.), *rev'd on other grounds*, 283 F. 404 (7th Cir. 1921); *In re Associated Trust*, 222 F. 1012 (D. Mass. 1914). See also Cook, *An Analysis of the Amendatory Bankruptcy Law of 1926*, 2 AM. BANKR. REV. 324, 324 (1926) (amendment "to include, beyond doubt, commercial or business trusts").

63. 268 F.2d at 102.

64. *Id.* at 104.

65. *Id.* at 102-03 (citing *Gallagher v. Hannigan*, 5 F.2d 171 (1st Cir.), *cert. denied*, 269 U.S. 573 (1925); *In re Minnesota Ins. Underwriters*, 36 F.2d 371 (D. Minn. 1929)).

66. *Id.* at 103-04. Did the court mean to suggest that the earlier opinion should have contemplated another court's subsequent misuse of its holding? The court's statutory misconstruction was not wholly unpredictable. The earlier case, *Pope & Cottle Co. v. Fairbanks Realty Trust*, 124 F.2d 132 (1st Cir. 1941), involved a trust entity similar to the employees' profit sharing trust at issue in *ACMI*. The *ACMI* court logically relied on *Pope & Cottle* to support its finding that the employees' trust was not a business trust because it failed to issue evidence of beneficial ownership. 268 F.2d at 102. But to the extent *ACMI* relied on *Pope & Cottle*'s involuntary proceedings to require a business purpose of voluntary petitioners, it should be overruled. See note 47 *supra*.

67. 268 F.2d at 104. Query whether directors' activities are attributable to the corporation. *Cf.* R. STEVENS, *supra* note 51, § 143, at 647 (directors act as "medium for the transaction of the ordinary corporate business"). The court's failure to determine whether the trust was a body endowed with "any of the powers and the privileges of private corporations not possessed by individuals or partnerships"—characteristics of the Act's "corporations"—was also questionable. See 108 U. PA. L. REV. 1218, 1221 (1960); text accompanying note 24 *supra*.

68. See REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES,

Because of a trust's peculiar characteristics and the potential difficulty of administering its bankrupt estate, this interpretation may be correct.<sup>69</sup> It does, moreover, provide the only rational basis for the court's otherwise spurious view of the "persons" entitled to voluntary adjudication.

From the holdings in *Tidewater* and *Philadelphia Consistory*, and by limiting *ACMI* to its facts, the nature of the unincorporated association entitled to the benefits of section 4(a) is cognizable. An entity eligible for voluntary bankruptcy maintains a concentration of managerial control, the power to own and convey property, the capacity to sue and be sued, and an ability to incur debts, all in its own name.<sup>70</sup> In the absence of these characteristics, courts hold members severally liable,<sup>71</sup> exposing personal assets to the group's creditors and requiring, if bankruptcy remains feasible, individual adjudications.

## II. THE LABOR UNION'S ENTITY STATUS

Although no one today would compare the labor union's effective powers with those of a fraternal order or church,<sup>72</sup> the common law equates their legal status by categorizing them as unincorporated associations.<sup>73</sup> The common law thus regards the labor organization as an aggregate of individuals,<sup>74</sup> and requires that all members be joined for

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H.R. Doc. No. 137 (Part II), 93d Cong., 1st Sess. 2, 7 (1973). Proposed Bankruptcy Act § 1-102(13) eliminates the present Act's requirement of evidence of beneficial ownership by including any "business trust" within the definition of a "corporation." The explanatory note, citing *Pope & Cottle*, indicates that courts are expected to "give heed to the canon of *ejusdem generis*."

69. See 108 U. PA. L. REV. 1218, 1223-24 nn.36-41 (1960).

70. See text accompanying notes 39, 50-51 *supra*.

71. See McLaughlin, *supra* note 41, at 357-58 (because the ultimate effect of bankruptcy is the distribution of assets among creditors, the liability of the individuals comprising the organization is of utmost importance).

72. See Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 610 (1959).

73. See Comment, *Unions as Juridical Persons*, 66 YALE L.J. 712, 713 (1957); 27 ORE. L. REV. 248 (1948). See generally A. LLOYD, UNINCORPORATED ASSOCIATIONS (1938). Although a friend of labor suggested incorporation as a means of enforcing union rights, see Brandeis, *The Incorporation of Trade Unions*, 15 GREEN BAG 11 (1902), union leaders believed the benefits were outweighed by the threat of constant litigation. See Roberts, *Labor Unions, Corporations—The Coronado Case*, 5 ILL. L.Q. 200, 200-01 (1923). This reluctance has been shared by other unincorporated associations. See R. MAITLAND, *Trust and Corporation*, in SELECTED ESSAYS 141, 205 (1936). See generally E. LIEBERMAN, UNIONS BEFORE THE BAR (1950) (historically, unions faced an unsympathetic judiciary and had few legal resources at their disposal).

74. Unions, because they are unincorporated associations, "are not persons, have no personality; they are bodies unincorporate, bodies—the thought is charmingly English—which are bodiless." See Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 407 (1916).

the union to sue or be sued.<sup>75</sup> The doctrine of estoppel,<sup>76</sup> or, in equity, the representative or class action initially allowed the courts to mitigate this common law joinder requirement.<sup>77</sup> Suability alone, however, did not afford the union the rights and duties enjoyed by other legal persons.<sup>78</sup> For example, a corporation is bound by an agent who acts within the scope of his employment,<sup>79</sup> whereas the union is bound only if each member has authorized the officer's action.<sup>80</sup> The union's current juridical status stems from state laws that place greater responsibility on unincorporated associations,<sup>81</sup> and from legislation specifically

75. *E.g.*, *Allis-Chalmers Co. v. Iron Molders' Union* 125, 150 F. 155 (E.D. Wis. 1906), *modified on other grounds*, 166 F. 45 (8th Cir. 1908); *American Steel & Wire Co. v. Wire Drawers' Unions 1 & 3*, 90 F. 598 (N.D. Ohio 1898); *Grand Int'l Bhd. of Locomotive Eng'rs v. Green*, 206 Ala. 196, 89 So. 435 (1921); *Baskins v. UMW*, 150 Ark. 398, 234 S.W. 464 (1921); *Johnston v. Albritton*, 101 Fla. 1285, 134 So. 563 (1931); *UMW v. Cromer*, 159 Ky. 605, 167 S.W. 891 (1914); *Forest City Mfg. Co. v. ILGWU*, 233 Mo. App. 935, 111 S.W.2d 934 (1938); *Mitch v. UMW*, 87 W. Va. 119, 104 S.E. 292 (1920). See S. WRIGHTINGTON, *THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS* 425 (2d ed. 1923); Chafee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993 (1930); Rice, *Collective Labor Agreements in American Law*, 44 HARV. L. REV. 572 (1931); Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383 (1924); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1051 (1951).

76. See, *e.g.*, *Fields v. United Bhd. of Carpenters*, 60 Ill. App. 258 (1895) (union held itself out as a corporation; contrary result would work undue hardship); *Nissen v. International Bhd. of Teamsters*, 229 Iowa 1028, 295 N.W. 858 (1941) (union which entered into contract for members estopped from denying status as against wrongfully expelled member); *Clark v. Grand Lodge of R.R. Trainmen*, 328 Mo. 1084, 43 S.W.2d 404 (1931) (contracting union estopped from denying contract obligations). See also *Forest City Mfg. Co. v. ILGWU Local 104*, 233 Mo. App. 935, 111 S.W.2d 934 (1938) (dictum) (if unincorporated association elects to do business as an entity, it may be estopped from subsequent denial).

77. In *UMW v. Coronado Coal Co.*, 259 U.S. 344 (1922), Chief Justice Taft, for the Court, stated:

[E]quitable procedure adopting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or be sued . . . and this has had its influence upon the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as [the UMW] has come to be recognized . . . .

*Id.* at 387. For a discussion of the *Coronado* case, see notes 83-91 *infra* and accompanying text.

78. See Forkosch, *The Legal Status and Suability of Labor Unions*, 28 TEMP. L.Q. 1, 1 (1954).

79. See R. STEVENS, *supra* note 51, §§ 164-65, at 767.

80. See, *e.g.*, *Martin v. Curran*, 303 N.Y. 276, 101 N.E.2d 683 (1951), noted in 37 CORNELL L.Q. 814 (1952).

81. The statutes are collected in Forkosch, *supra* note 78, at 7. The author notes that the lack of uniformity from state to state often leads to anomalous results. One state may allow suit for any purpose while a neighboring state may not; a third state may only permit suit to protect a union trademark while still another may allow suit against the entity but permit judgment satisfaction only against the members. *Id.* at 4.

designed to protect union organizational activities.<sup>82</sup>

In *United Mine Workers v. Coronado Coal Co.*,<sup>83</sup> the Supreme Court held the union liable in its own name for its agents' acts in the course of a violent strike.<sup>84</sup> Although treble damage liability was premised on the Sherman Act's application to "associations,"<sup>85</sup> Chief Justice Taft referred to the statute only to confirm the union's amenability to suit, which he rested on the independent ground<sup>86</sup> that recent legislation granting unions rights and duties, impliedly, if not explicitly, also made them legal persons.<sup>87</sup> The Chief Justice concluded that it would be anomalous to allow the entity to escape responsibility and to hold the members individually liable when, in fact, they had "voluntarily, and for the purpose of acquiring concentrated strength . . . , created a self-

82. The Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 17 (1970)), legalized labor unions and labor combinations. Other statutes gave unions the right to sue to enjoin infringement of the union label or trademark and made its wrongful use an offense. Some states also outlawed the unauthorized use of union cards or insignias. In addition, many states authorized a labor representative to appear at arbitration and before labor boards. These statutes are cited extensively in *UMW v. Coronado Coal Co.*, 259 U.S. 344, 386 n.1 (1922). See also Cole, *The Civil Suability, at Law, of Labor Unions*, 8 FORDHAM L. REV. 29, 32-33 nn.17-19 (1939).

83. 259 U.S. 344 (1922).

84. *Id.* at 391.

85. See Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210.

[Unions] are, as has been abundantly shown [by the statutes cited], associations existing under the laws of the United States, . . . and of the States of the Union. Congress was passing drastic legislation to remedy a threatening danger to the public welfare, and did not intend that any person or combinations of persons should escape its application. Their thought was especially directed against business associations and combinations that were unincorporated to do the things forbidden by the act, but they used language broad enough to include all associations which might violate its provisions . . . ; and this, of course, includes labor unions . . . .

259 U.S. at 392.

86. Compare Magill & Magill, *The Suability of Labor Unions*, 1 N.C.L. REV. 81, 84-86 (1922) (holding not based solely on the Sherman Act), with A. LLOYD, *supra* note 73, at 161-63 (holding rests on Sherman Act).

87. 259 U.S. at 391-92. See Comment, *supra* note 73, at 721. The Comment draws an analogy from English case law to support the conclusion that *Coronado* and its progeny should lead invariably to union entity recognition. In *Taff Vale Ry. v. Amalgamated Soc'y of Ry. Servants*, [1901] A.C. 426, the House of Lords implied, from the British Trade Union Act of 1871, 34 & 35 VICT. c.31, that the union could be sued in its registered name and be held liable for its agents' acts. Although the Act did not expressly so provide, it exempted unions from rules on restraint of trade, gave them express power to own property, and required registration. In *Bonsor v. Musicians' Union*, [1956] A.C. 104, the Lords disagreed on whether *Taff Vale* held that unions were juridical persons by virtue of the statute, or whether it authorized only certain characteristics of that status plus the procedural capability of suit. The author contends it is the former interpretation that is correct and was incorporated into *Coronado*. His conclusion, most importantly, is that these English courts recognized that unions were not inherently incapable of juridical personality and that statutes conferring rights and duties on unions necessarily imply otherwise.

acting body . . . ."<sup>88</sup>

Although *Coronado's* broad holding acknowledged the union's corporate nature,<sup>89</sup> the Court's reliance on statutory recognition cast doubt on its factual existence.<sup>90</sup> The decision consequently did not deter the states from continued reliance on the common law rule.<sup>91</sup> As labor attained greater economic power, the disparity between the union's legal and functional status became more evident.<sup>92</sup>

The Wagner Act<sup>93</sup> initially compounded the problems of union non-entity by proscribing unfair employer labor practices without restricting employee activities.<sup>94</sup> But the declared purpose of the Act, to encourage collective bargaining and to secure the benefits of group action for the individual employee,<sup>95</sup> compelled national recognition of the union entity. In *United States v. White*,<sup>96</sup> after noting that the Act acknowledged the union's distinct and separate existence, the Supreme Court held that a union official was prohibited from invoking the "personal" privilege against self-incrimination to withhold subpoenaed

88. 259 U.S. at 390-91.

89. See R. STEVENS, *supra* note 51, § 7, at 40-42 & n.72. But see *Busby v. Electric Utilities Employee Union*, 323 U.S. 72, 76 (1944) (Frankfurter, J., concurring), *on remand*, 147 F.2d 865, 867 (D.C. Cir. 1945); Dodd, *Dogma and Practice in the Law of Associations*, 42 HARV. L. REV. 977, 1002 (1929); Frankfurter, *The Coronado Case*, 31 NEW REPUBLIC 328, 329 (1922).

90. See Sturges, *supra* note 75, at 398. At first, it was believed that *Coronado* established a federal rule enabling all unincorporated associations to sue or be sued in their common name, *see, e.g.*, *Russell v. Central Labor Union*, 1 F.2d 412 (E.D. Ill. 1924), but a later Supreme Court decision refused to extend the holding as far. See *Moffatt Tunnel League v. United States*, 289 U.S. 113 (1933) (holding, in effect, that statutory recognition was necessary). In response to *Coronado*, Congress promulgated FED. R. CIV. P. 17(b) which codifies this limited applicability by allowing unincorporated associations to sue only to enforce a federal substantive right, unless otherwise authorized by state law. See 3A MOORE'S FEDERAL PRACTICE ¶ 17.25, at 853-61 (2d ed. 1948).

91. In spite of the common name by which the union calls itself, the common treasury out of which it finances its activities, the common officers by which it is governed—all of them at war with the common law notion . . . [the *Coronado* case] has been rejected in case after case . . . .

Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation*, 51 YALE L.J. 40, 42 (1941). See, *e.g.*, *District 21, UMW v. Bourland*, 169 Ark. 796, 803, 277 S.W. 546, 549 (1925).

92. See Cole, *supra* note 82, at 29.

93. National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1970)).

94. Many states reacted to the Wagner Act by enacting legislation designed to keep the unions under some control. See Dodd, *Some State Legislatures Go to War—On Labor Unions*, 29 IOWA L. REV. 148 (1944). One state went too far. See *AFL v. Reilly*, 113 Colo. 90, 155 P.2d 145 (1944) (Colorado statute requiring union incorporation held to be unconstitutional deprivation of freedom of speech and assembly), *noted in* 58 HARV. L. REV. 1256 (1945).

95. 29 U.S.C. § 151 (1970).

96. 322 U.S. 694 (1944).

union records.<sup>97</sup> The Court's opinion elaborated on the distinction between the organization and its members:

Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union. The union's existence in fact, and for some purposes in law, is as perpetual as that of any corporation, not being dependent upon the life of any member. It normally operates under its own constitution, rules and by-laws, which, in controversies between member and union, are often enforced by the courts. The union engages in a multitude of business and other official concerted activities, none of which can be said to be the private undertakings of all the members.<sup>98</sup>

Three years after *White*, Congress enacted the Taft-Hartley Act,<sup>99</sup> a comprehensive legislative package designed to remedy the deficiencies of earlier labor legislation<sup>100</sup> by distinguishing the rights and interests of employers, employees, and labor organizations.<sup>101</sup> Specifically, sections 301 and 303 permitted unions to sue and be sued by employers and other unions for violations of collective bargaining agreements and other acts of economic coercion.<sup>102</sup> For purposes of the Act, Congress held the union fully responsible for the acts of its agents, and provided

97. *Id.* at 704-05. After noting that the privilege is a purely personal one which cannot be utilized by or on behalf of any organization, *see, e.g.*, *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906), the Court stated:

The test . . . is whether one can fairly say under all the circumstances that a particular type or organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. . . . Labor unions . . . clearly meet that test.

322 U.S. at 701.

98. *Id.* at 701-02. *Coronado* and *White* are said to have eliminated the old common law nonentity rule. *See* *Marshall v. ILWU Local 6*, 57 Cal. 2d 781, 371 P.2d 987, 22 Cal. Rptr. 211 (1962). *See also* *Superior Engraving Co. v. NLRB*, 183 F.2d 783, 795 (7th Cir. 1950) ("[T]he entity of the [union] is as much separate and apart from the individual members as that of a corporation is from its stockholders."), *cert. denied*, 340 U.S. 930 (1951); *Kirkman v. Westchester Newspapers, Inc.*, 261 App. Div. 181, 24 N.Y.S.2d 860, *aff'd*, 287 N.Y. 373, 39 N.E.2d 919 (1941) (union recognized as an entity).

99. Labor Management Relations (Taft-Hartley) Act, ch. 120, §§ 1-503, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-97 (1970)).

100. *See, e.g.*, *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656, 661 (7th Cir. 1966), *rev'd on other grounds*, 388 U.S. 175 (1967); *Worthington Pump & Machinery Corp. v. Douds*, 97 F. Supp. 656, 660 (S.D.N.Y. 1951); *United Packing House Workers v. Wilson & Co.*, 80 F. Supp. 563, 568 (N.D. Ill. 1948).

101. 29 U.S.C. § 141 (1970).

102. *Id.* §§ 185, 187.

that money judgments would be enforceable only against the entity and its assets, not those of its members.<sup>103</sup>

Although Congress intended to personify the union as a jural entity,<sup>104</sup> the scope of union suability under Taft-Hartley was limited<sup>105</sup> to the enforcement of collective bargaining agreements. Regulation of the union's internal affairs remained the province of largely inadequate state laws.<sup>106</sup> Despite the union's power to formulate and enforce the rights and duties of those it represented,<sup>107</sup> Congress made no attempt to ensure its accountability. Officers' fiduciary responsibilities, without an enforcement mechanism, were insufficient to guarantee a democratic union, sensitive to the needs of minority members.<sup>108</sup> While thus recognizing and protecting the employees' welfare during union organizational drives,<sup>109</sup> Taft-Hartley perpetuated the illusory identity of union management and membership interests.

The Landrum-Griffin Act,<sup>110</sup> enacted in 1959, removed any vestiges of doubt regarding the union's independence from its members. Every section of the Act acknowledged the labor organization's autonomous,

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103. *Id.* § 185(b).

104. *See* 93 CONG. REC. 7537 (1946) (remarks of Sen. Taft): "There is no reason in the world why a union should not have the same responsibility that a corporation has . . ." *See* *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 485 (1957) (appendix to opinion of Frankfurter, J., dissenting); *Donnelly v. United Fruit Co.*, 40 N.J. 61, 190 A.2d 825 (1963). *Lincoln Mills* has been interpreted as authorizing the courts to fashion a federal common law to govern suits under the National Labor Relations Act. *See* *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

105. Forkosch, *supra* note 78, at 6. Section 302, 29 U.S.C. § 185 (1970) provides for suit for violation of a collective bargaining agreement. Section 303, 29 U.S.C. § 187 (1970) allows suit to be brought for damages arising out of union unfair labor practices as proscribed in § 8(b)(4), 29 U.S.C. § 158(b)(4) (1970). The union cannot be sued under the Act for any other reason.

106. *See* notes 107-08 *infra*.

107. The Wagner Act, § 9, 29 U.S.C. § 159(a)(1976), imposed the principle of majority rule on labor relations by giving the elected union the exclusive right to negotiate for all employees in the bargaining unit. *See* *Steele v. Louisville & Nash. R.R.*, 323 U.S. 192, 202 (1944) ("Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body . . ."); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 829-31 (1960); Kahn-Freund, *Trade Union Democracy and the Law*, 22 OHIO ST. L.J. 4, 7 (1961).

108. *See* Cox, *The Role of Law in Preserving Union Democracy*, 72 HARV. L. REV. 609, 610 (1959).

109. Employees' rights under § 7 of the Wagner Act were explicit only for the purpose of joining a union and engaging in collective bargaining. Taft-Hartley amended § 7 and gave employees the right to refrain from union activities if they so desired.

110. Labor-Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401-531 (1970)).



institutional nature.<sup>111</sup> An employee bill of rights established guidelines for internal union democracy, including guarantees of equality, freedom of speech and assembly, and due process in the course of union imposed discipline.<sup>112</sup> The Act required every union to adopt a constitution and bylaws<sup>113</sup> and voided any provision so adopted that was inconsistent with the Act itself.<sup>114</sup> Prescribed election procedures manifested the importance of employee free choice;<sup>115</sup> an officer's fiduciary duty, which ran to the entity and not to individuals,<sup>116</sup> required full disclosure of any financial interest in, or derived from, a business whose employees were represented by the same union.<sup>117</sup> The Act permitted a union member to sue, on behalf of the organization, any officer for any breach of the statutory fiduciary obligations.<sup>118</sup> Finally, the Secretary of Labor had the authority to enforce or anticipate violations of the Act's provisions through civil suit.<sup>119</sup>

Although the Act's overall significance should not be underestimated,<sup>120</sup> its importance for purposes of this discussion lies in its definitive recognition of a union personality. The labor organization is a creature of democracy,<sup>121</sup> permitting workers to unite in their efforts to confront management on employment issues. This collective strength

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111. *See, e.g.*, 29 U.S.C. §§ 401, 402(d), 411, 415 (1970).

112. *Id.* § 411.

113. *Id.* § 431(a).

114. *Id.* § 411(b).

115. *Id.* § 481. This section establishes maximum terms of office, requires secret ballots, and prohibits discrimination in favor of or against any candidate. The Secretary of Labor is authorized to promulgate rules and regulations with regard to removal of officers if the union constitution or bylaws do not provide adequate procedures.

116. *Id.* § 501. *See Clark, The Fiduciary Duties of Union Officials Under Section 501 of the LMRDA*, 52 MINN. L. REV. 437 (1967).

117. 29 U.S.C. § 432 (1970). The disclosure provisions are extensive, but exempt from coverage any bona fide investment in a security registered in accordance with federal law.

118. *Id.* § 501(b). This section has been compared to the right of a shareholder to bring a derivative action against the corporate directors. *See Wollett, Fiduciary Problems Under Landrum-Griffin*, in PROCEEDINGS OF NEW YORK UNIVERSITY THIRTEENTH ANNUAL CONFERENCE ON LABOR 267, 268 (1960). *But see Kahn-Freund, supra* note 107, at 5-6.

119. 29 U.S.C. § 440 (1970) gives the Secretary authority to bring an action against a person who has violated or is about to violate any of the disclosure provisions. 29 U.S.C. § 482 (1970) permits the Secretary to seek court enforcement of election procedures upon the complaint of any member. Other provisions include similar enforcement mechanisms.

120. *See Aaron, The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851 (1960); Clark, *supra* note 116; Cox, *supra* note 107; Hickey, *The Bill of Rights of Union Members*, 48 GEO. L.J. 226 (1959); Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 VA. L. REV. 195 (1960); Wollett, *supra* note 118.

121. *See Aaron & Komaroff, Statutory Regulation of Internal Union Affairs—I*, 44 ILL. L. REV. 425, 431 (1949).

places unparalleled economic leverage in the union which, if misused, will have an adverse effect on millions of represented workers and, consequently, on the entire nation. The maintenance of internal union democracy, guaranteeing the rights of all workers, is necessary for the sustenance of democracy itself.<sup>122</sup> It is appropriate, therefore, for Congress to distinguish the individual employee from the powerful organizational entity.

### III. THE UNION IN BANKRUPTCY

Under the Bankruptcy Act, "unincorporated association" is not limited or equivalent to the term "corporation," but is included in the Act's definition as a body having *any* of the powers and privileges of a typical corporation.<sup>123</sup> The statute does not otherwise prescribe the requisite characteristics of an association. There is reason to assume, therefore, that Congress, in the 1926 amendment, adopted the term's common law definition.

In *Coronado Coal*, only four years earlier, the Supreme Court held that unions were "associations" within the Sherman Act's use of the term.<sup>124</sup> Although it is uncertain whether Congress was aware of the potential for union bankruptcy, legislators arguably recognized that judicial constriction of "unincorporated association" after *Coronado* would include unions so that further expression was unnecessary. Admittedly, unlike other legislation during the same period,<sup>125</sup> the Bankruptcy Act did not specifically include labor organizations.<sup>126</sup> Congress nonetheless defined the "persons" entitled to the Act's benefits in

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122. See Kahn-Freund, *supra* note 107, at 6.

123. See notes 21-26 *supra* and accompanying text.

124. 259 U.S. 344, 392 (1922). See notes 83-88 *supra* and accompanying text.

125. See, e.g., Clayton Act, ch. 323, § 6, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 17 (1970)); statutes noted in *Coronado Coal*, 259 U.S. at 386 n.1; Forkosch, *supra* note 78, at 7.

In *In re Freight Drivers Local 600*, 432 F. Supp. 1326 (E.D. Mo. 1977), *rev'd sub nom.* *Freight Drivers Local 600 v. Gordon Transps., Inc.*, 576 F.2d 1285 (8th Cir. 1978), Judge Wangelin noted that, historically, union legislation often generated "loud political controversy." He found the absence of such political debate "convincing evidence" that the 1926 amendments to the Bankruptcy Act, see note 40 *supra* and accompanying text, were not intended to apply to labor organizations. 432 F. Supp. at 1329. The logic underlying this conclusion is questionable; it is more appropriate to discern congressional unawareness of the potential for union bankruptcy.

126. Judge Wangelin inferred from the lack of express union inclusion, support for his finding that Congress did not consider unions "persons" under the Act. *Id.* at 1328. He acknowledged, however, that the same reasoning might be applied to bring unions within the Act because Congress specifically excluded certain other entities from the Act. *Id.* at 1328 n.6.

broad, inclusive language,<sup>127</sup> drafting only in specific terms to exclude certain entities from its coverage;<sup>128</sup> unions were not specifically excluded.

The Act includes “unincorporated associations” because they possess corporate characteristics not common to individuals or partnerships; unions, as a result of extensive federal legislation, share many of those characteristics.<sup>129</sup> Federal law authorizes the union to sue and be sued, enter into contracts, own and convey property, and incur debts. Rank and file members elect officers who, like corporate managers, have the power to effectively bind the organization. Government and industry negotiate with union representatives to establish employment agreements, reflecting both public and private sector recognition of the entity’s united strength. Administrative scrutiny of union officers acknowledges the separation of managerial control from rank and file and ensures employees’ rights in internal union activities. That they are *sui generis*, and resemble corporations in their methods of operation and use of power, is no longer questionable.<sup>130</sup>

Even if the union possesses the requisite corporate characteristics, *ACMI*, if not limited to its facts, requires that an association maintain a business purpose to be eligible for voluntary bankruptcy.<sup>131</sup> Although *Philadelphia Consistory* correctly held that the nature of the “person” in voluntary, unlike involuntary, proceedings was immaterial,<sup>132</sup> *ACMI* neglected this distinction. Labor unions fulfill the business purpose requirement if, like the Tidewater Coal Exchange, they are orga-

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127. “The five comprehensive classes of bodies, groups and businesses enumerated in the clause [defining corporations] cover practically the whole range of private activities and enterprises, except those carried on by individuals as such and partnerships other than the specified type.” 1 COLLIER ON BANKRUPTCY ¶ 1.08, at 62 (14th ed. 1974).

128. Congress excluded “municipal, railroad, insurance or banking” corporations, *see* note 21 *supra*, because they were already subject to extensive state regulation. *See* *Israel-British Bank (London) Ltd. v. FDIC*, 536 F.2d 509, 513-14 (2d Cir.), *cert. denied*, 429 U.S. 978 (1976); *Sovern*, *supra* note 30, at 172-82. Unions, as this Note indicates, were inadequately regulated under state law.

129. In these days when associations of . . . workmen, . . . acting as a unit under a constitution and by-laws, electing officers and controlling large funds, perform practically all the functions of a corporate entity and exercise a power for good or ill far beyond that of individuals, there is every reason why Congress, . . . should be presumed to have brought them within the reach of civil process.

Brief of *Amici Curiae*, *UMW v. Coronado Coal Co.*, 259 U.S. 344, 379 (1922).

130. *Oil Workers Int’l Union v. Superior Court*, 103 Cal. App. 2d 512, 571, 230 P.2d 71, 106 (1951).

131. *See* notes 60-69 *supra* and accompanying text.

132. *See* notes 48-59 *supra* and accompanying text.

nized to provide members with commercial advantages.<sup>133</sup> There is admittedly no capital subscription or certificates evidencing beneficial ownership, but the Act does not qualify the "unincorporated association" as it does the partnership or trust.<sup>134</sup> In *Tidewater*, the court held that the Exchange's pursuit of business objectives satisfied any implied business qualification; profit motive, for example, was unnecessary.<sup>135</sup> Labor unions thus satisfy *ACMI's* implied commercial restriction because they are in the business of collective bargaining for the benefit of their members.<sup>136</sup>

"Unincorporated associations" are entitled to the benefits of the Bankruptcy Act. Courts construe the term broadly to include any group of persons pursuing a common enterprise with sufficient corporate traits to distinguish the association from a partnership.<sup>137</sup> Labor unions are typically unincorporated associations consisting of individuals organized to collectively bargain with their employers. The common law anomaly of the union nonentity cannot survive modern realities<sup>138</sup> or the Act's inclusive provisions.<sup>139</sup> The labor union is a "corporation" and, therefore, a "person" entitled to the benefits of bankruptcy.

Although unions may be entitled to the Bankruptcy Act's benefits, postadjudication procedures may interfere with employee and union rights and obligations under the federal labor laws. Irreconcilable differences may indicate that bankruptcy is inappropriate even if the

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133. See notes 32-39 *supra* and accompanying text.

134. See text accompanying note 24 *supra*.

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

136. *McNally v. Reynolds*, 7 F. Supp. 112 (W.D. Wash. 1934). By establishing a business purpose for the union, the court in *McNally* brought the union within the term "corporation," which required, for the statute in issue, a commercial basis.

137. See, e.g., *Hecht v. Malley*, 265 U.S. 144, 157 (1924); *Penrod Drilling Co. v. Johnson*, 414 F.2d 1217, 1222 (5th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970); *Local 4076, United Steelworkers v. United Steelworkers of America*, 327 F. Supp. 1400, 1403 (W.D. Pa. 1971); *Yonce v. Miners Memorial Hosp. Ass'n*, 161 F. Supp. 178, 186 (W.D. Va. 1958).

138. *Marshall v. ILWU, Local 6*, 57 Cal. 2d 781, 783-84, 371 P.2d 987, 989, 22 Cal. Rptr. 211, 213 (1962) ("When these concepts [of nonentity status] are transferred . . . [to] labor unions . . . reality is apt to be sacrificed to theoretical formalism."). See *Chavez v. Sargent*, 52 Cal. 2d 162, 193, 339 P.2d 801, 820 (1959) ("[N]o more can the rank and file individual workmen conduct the business of a union than can the rank and file voters of a nation or state conduct its governmental and business affairs."). See also *Forkosch, supra* note 78, at 28-29; *Lester, supra* note 5, at 23; *Sturges, supra* note 75, at 404-05.

139. [O]n its face the Act indicates an intention to treat as a legal entity whatever association may be treated as an entity in business contemplation, and that its apparent purpose is to . . . overreach all technical barriers to adjudication in bankruptcy arising out of the conceptions of legal entities or personalities.

*McLaughlin, supra* note 41, at 363.

union will not otherwise survive. On the other hand, anticipating some of the problems which arise from union bankruptcy tends to support their eligibility. Courts, however, must proceed with little guidance from Congress as to which policy should prevail.<sup>140</sup>

The societal interest in full employment may limit the bankruptcy trustee's power to renounce a union's burdensome executory contracts. After adjudication, creditors appoint a trustee to conserve and manage the property of the bankrupt estate.<sup>141</sup> The Bankruptcy Act permits the trustee taking title to the bankrupt's property to reject executory contracts that are onerous or worthless to the estate.<sup>142</sup> In the bankruptcy of an employer who is party to an executory collective bargaining agreement, labor and bankruptcy laws are virtually irreconcilable.<sup>143</sup> An insolvent employer should not necessarily maintain a full working force or meet salary and benefit obligations when to do so would further diminish the bankrupt estate. Industrial stability and full employment, however, may deserve precedence over creditors' rights. Because of this equitable imbalance, courts permit the trustee of a bankrupt employer to reject collective bargaining agreements, but require him to show proper motivation, financial disability, and the benefits of cancellation.<sup>144</sup> The trustee of a bankrupt union cannot meet this burden;

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140. The National Labor Relations Act contains some references to bankruptcy. 29 U.S.C. § 165 (1970) provides for the labor law to prevail over the Bankruptcy Act's provision dealing with the rights of employees to organize a debtor company, 11 U.S.C. § 672 (1970). In addition, the Act is specifically applicable to trustees in bankruptcy. 29 U.S.C. § 152(1) (1970).

141. Bankruptcy Act §§ 44(a), 47, 11 U.S.C. §§ 72(a), 75 (1970).

142. Bankruptcy Act § 70(b), 11 U.S.C. § 110(b) (1970). See Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439 (1973); *Part II*, 58 MINN. L. REV. 479 (1974). The headnote to Part II defines an executory contract as "one under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." *Id.* See, e.g., *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581 (1916); *Sunflower Oil Co. v. Wilson*, 142 U.S. 313 (1892); *Sparhawk v. Yerkes*, 142 U.S. 1 (1891); *In re Lathrap*, 61 F.2d 37 (9th Cir. 1932); *Watson v. Merrill*, 136 F. 359 (8th Cir. 1905).

143. Whether the Bankruptcy Act contemplates the rejection of collective bargaining agreements has not been fully resolved. See Note, *Rejection of Collective Bargaining Agreements in Chapter XI Arrangement Proceedings*, 17 B. C. IND. & COMM. L. REV. 192, 207-09 (1976).

144. See, e.g., *Local 455, Int'l Assoc. of Iron Workers v. Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975); *Local 2746, United Bhd. of Carpenters v. Turney Wood Prods., Inc.*, 289 F. Supp. 143 (W.D. Ark. 1968); *In re Klaber Bros., Inc.*, 173 F. Supp. 83 (S.D.N.Y. 1959). See LaPenna, *Bankruptcy and the Collective Bargaining Agreement*, in PROCEEDINGS OF NEW YORK UNIVERSITY TWENTY-NINTH ANNUAL CONFERENCE ON LABOR 169 (1976); Comment, *Rejection of Collective Bargaining Agreements by Trustees in Bankruptcy*, 81 DICK. L. REV. 64 (1976); Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 NOTRE DAME LAW. 819 (1976); 28 VAND. L. REV. 1374 (1975); 22 WAYNE L. REV. 165 (1975).

the agreement neither imposes any financial obligation on the union nor would rejection benefit the estate. On the contrary, the union's strength lies in its ability to continue serving its members, and maintaining the contract assures employment stability.

The collective bargaining agreement's value to the estate may not be an issue nor may the trustee exercise his option to reject if the contract requires performance that is so "personal" to the bankrupt union that it cannot be delegated to the trustee.<sup>145</sup> The National Labor Relations Act guarantees employees the right to "bargain collectively through representatives of their own choice."<sup>146</sup> Through free elections, employees choose the union they believe will best represent their interests in contract negotiations and in their subsequent relations with the employer. The collective bargaining agreement is a manifestation of this choice and obligates the union to perform services which in effect require the "personal" skill of the employees' chosen representative. The trustee, therefore, cannot fulfill the union's collective bargaining responsibilities nor would the labor laws permit him to do so.<sup>147</sup> Title to the contract, consequently, will not vest in the trustee because his substituted performance does not adequately fulfill the bankrupt union's duty to perform.<sup>148</sup>

If the union remains in its representative capacity under the collective bargaining agreement, the trustee may assert a right to future dues, perhaps the union's major asset,<sup>149</sup> because he takes title to all of the debtor's property including rights in action.<sup>150</sup> The employee's obliga-

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145. See, e.g., *In re Miller*, 101 F.2d 323 (6th Cir. 1939); *In re Leibowitz*, 93 F.2d 333 (3d Cir. 1937), cert. denied, 303 U.S. 652 (1938); *In re Coleman*, 87 F.2d 753 (2d Cir. 1937); *In re Myers*, 208 F. 407 (7th Cir. 1913).

146. National Labor Relations Act § 7, 29 U.S.C. § 157 (1970).

147. *Id.* § 8, 29 U.S.C. § 158 (1970) prohibits interference with rights guaranteed in § 7, 29 U.S.C. § 157 (1970), including employee free choice in the selection of a bargaining representative.

148. A contract which cannot be assigned or transferred will not pass to the trustee. See Bankruptcy Act § 70(a)(5), 11 U.S.C. § 110(a)(5) (1970). A "personal" contract cannot be assigned because the other contracting party cannot be required to accept a substituted performance. See Countryman, *The Use of State Law in Bankruptcy Cases (Part I)*, 47 N.Y.U.L. Rev. 407, 463-64 (1972). The other party may consent to the trustee's performance, but, where a collective bargaining agreement is in issue, the validity of performance by anyone other than the employees' elected representative is doubtful.

149. See P. TAFT, *THE STRUCTURE AND GOVERNMENT OF LABOR UNIONS* 65 (1954).

150. Bankruptcy Act § 70(a)(6), 11 U.S.C. § 110(a)(6) (1970). See, e.g., *Tuffy v. Nichols*, 120 F.2d 906 (2d Cir.), cert. denied, 314 U.S. 660 (1941); *Lockhart v. Garden City Bank & Trust Co.*, 116 F.2d 658 (2d Cir. 1940); *In re Irving Electrical Supply Co.*, 41 F. Supp. 16 (S.D.N.Y. 1941), *aff'd sub nom. Vogel v. Mohawk Elec. Sales Co.*, 126 F.2d 759 (2d Cir. 1942).

tion to pay dues, however, arises from the union's continuous fulfillment of its representative responsibilities. It is not, as the trustee would assert, a vested right that accrues to the union as consideration for its successful negotiation of the collective bargaining agreement. It is more closely analogous to wages or fees for future services which do not pass to the trustee because the bankrupt acquires them after adjudication.<sup>151</sup> Without future dues income, moreover, the union's fresh start would be unsuccessful, contravening both bankruptcy and labor law policies. On the other hand, construing the trustee's power to avoid interference with union functions would not disrupt bankruptcy procedures and, at the same time, would preserve employee rights. Thus, the practical effects of adjudication, by denying the trustee title to the collective bargaining agreement or future dues, support the propriety of union bankruptcy.

When courts determine that unions are "persons" under the Bankruptcy Act, attention will focus on whether the local or the international is the appropriate entity.<sup>152</sup> Local unions typically derive their existence solely from the international constitution.<sup>153</sup> Although statutes conferring entity status on labor organizations—for purposes of suit, to elect officers, to enter into contracts—do not differentiate between the parent-international and the local,<sup>154</sup> union constitutions severely limit local autonomy. The local may hold property in its own name only for the purpose of effecting the international's objectives; if the local voluntarily dissolves, all property reverts to the international.<sup>155</sup> Local mismanagement is sufficient reason for the international to insert a trustee to operate the local's affairs or initiate its dissolution.<sup>156</sup> But just as state law is irrelevant to the bankruptcy

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151. See, e.g., *Miller v. Wooley*, 141 F.2d 837 (9th Cir.), cert. denied, 323 U.S. 716 (1944); *In re Leibowitz*, 93 F.2d 333 (3d Cir. 1937), cert. denied, 303 U.S. 652 (1938); *Equitable Life Assur. Soc'y v. Stewart*, 12 F. Supp. 186 (W.D.S.C. 1935); *In re Rashbaum*, 4 F. Supp. 774 (E.D.N.Y. 1933).

152. In *In re Freight Drivers Local 600*, 432 F. Supp. 1326, 1330 (E.D. Mo. 1977), *rev'd sub nom.* *Freight Drivers Local 600 v. Gordon Transps., Inc.*, 576 F.2d 1285 (8th Cir. 1978), the district court refused to reach this question after concluding that labor organizations were not, in any event, amenable to the Bankruptcy Act.

153. See *Rose, Relationship of the Local Union to the International Organization*, 38 VA. L. REV. 843 (1952).

154. See statutes cited in notes 102-19 *supra*.

155. See Cohn, *The International and the Local Union*, in PROCEEDINGS OF NEW YORK UNIVERSITY ELEVENTH ANNUAL CONFERENCE ON LABOR 9 (1958); Comment, *supra* note 8, at 253.

156. See Cohn, *supra* note 155.

definition of "person,"<sup>157</sup> union constitutions cannot deprive the local of rights under federal law.<sup>158</sup> A particular union and constitution may necessitate closer scrutiny, for example, where the international's responsibility for the local's financial stability is carefully prescribed. Otherwise, the local enjoys a sufficient degree of autonomy to incur debts large enough to make voluntary bankruptcy desirable as a means of survival.<sup>159</sup>

An important tangential question is whether labor unions will disregard their collective bargaining obligations, secure in the knowledge that bankruptcy will provide relief.<sup>160</sup> It is doubtful whether bankruptcy provides a haven for an irresponsible union. To refuse adjudication to the honest debtor because of potential abuses by others begs the question. Adjudication does not guarantee discharge of the judgment debt; the Act deters bad faith to the extent it disallows the discharge of debts arising from willful and wanton conduct.<sup>161</sup> Although this provision was designed primarily to prevent discharge of malicious tort liability,<sup>162</sup> at least one court has found that the substance of the underlying act, tort, or contract, is irrelevant to the question of willfulness.<sup>163</sup> Nor should the consequences of bankruptcy be taken lightly. The Act provides only minimal relief; debtors relinquish all but exempt property when seeking adjudication,<sup>164</sup> and must wait six years before

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157. See *In re Missco Homestead Ass'n*, 86 F. Supp. 511, 518 (E.D. Ark. 1949), *aff'd sub nom.* *Missco Homestead Ass'n v. United States*, 185 F.2d 280 (8th Cir. 1950). *Accord*, *Burk-Waggoner Oil Ass'n v. Hopkins*, 269 U.S. 110 (1925); *In re Wisconsin Coop. Milk Pool*, 119 F.2d 999 (7th Cir.), *cert. denied*, 314 U.S. 655 (1941); *In re Carthage Lodge 365, I.O.O.F.*, 230 F. 694 (N.D.N.Y. 1916); Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013 (1953). See generally *Prudence Realization Corp. v. Geist*, 316 U.S. 89 (1942); *Royal Indem. Co. v. United States*, 313 U.S. 289 (1941); *Deitrick v. Greaney*, 309 U.S. 190 (1940); *Board of Comm'rs v. United States*, 308 U.S. 343 (1939); *Chesapeake & O. Ry. v. Martin*, 283 U.S. 209 (1931).

158. See 29 U.S.C. § 411(b) (1970).

159. The Bankruptcy Judge in *In re Freight Drivers Local 600*, No. 76-1517B, slip op. at 12-13 (E.D. Mo. Nov. 1, 1976), *rev'd on other grounds*, 432 F. Supp. 1326 (E.D. Mo. 1977), *aff'd sub nom.* *Freight Drivers Local 600 v. Gordon Transps., Inc.*, 576 F.2d 1285 (8th Cir. 1978), found that the local was sufficiently autonomous to qualify as a "person" under the Act.

160. *Cf.* *Local 455, Int'l Assoc. of Iron Workers v. Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975) (in employer bankruptcy, union argued that employers would always seek bankruptcy as an escape from burdensome collective bargaining agreements).

161. Bankruptcy Act § 17(a)(8), 11 U.S.C. § 35(a)(8) (1970), prohibits the discharge of debts incurred for "willful and malicious injuries to the person or property of another."

162. See *Bond v. Milliken*, 134 Iowa 447, 109 N.W. 774 (1906); *Clair v. Colmes*, 245 Mass. 281, 139 N.E. 519 (1923). *But see* *Perez v. Campbell*, 402 U.S. 637, 648 (1971) (the "new opportunity" afforded debtors includes freedom from many preexisting tort judgments).

163. See *Rivera v. Moore-McCormack Lines, Inc.*, 238 F. Supp. 233, 234 (S.D.N.Y. 1965).

164. Bankruptcy Act § 70(a), 11 U.S.C. § 110(a) (1970).



a court will again grant a discharge.<sup>165</sup>

The final policy analysis should give substantial weight to the importance of stable industrial-labor relations. Courts should construe the Bankruptcy Act to avoid potential conflicts with labor policy.<sup>166</sup> The union, as the duly elected representative of employee-members, should enjoy the same opportunities open to other debtors. Permitting the insolvent union an adjudication in bankruptcy advances the purposes of both regulatory schemes. If Congress, however, believes this will result in industrial-labor instability, it is certainly within its discretion to alter the law.

*Glenn J. Amster*

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165. *Id.* § 14(c)(5), 11 U.S.C. § 32(c)(5) (1970).

166. *See Durand v. NLRB*, 296 F. Supp. 1049, 1055 (W.D. Ark. 1969).

