

DAMAGE LIABILITY OF PUBLIC EMPLOYEE UNIONS FOR ILLEGAL STRIKES

Although Congress has comprehensively regulated private sector and federal employee labor relations,¹ its legislation has not extended to state, county or municipal employees.² Consequently, each state can regulate its public employees as it sees fit. The resulting state legislation in this area varies widely, ranging from complete statutory silence³ to complex regulatory schemes.⁴ Currently, thirty states prohibit public employee strikes by statute.⁵ Statutes in eight states permit strikes by certain classes of public employees.⁶ In

¹ The National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-69 (1976), as amended by the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 141-87 (1976), governs private sector employees. Federal employees are regulated by 5 U.S.C. §§ 7301-52 (1976).

² See 29 U.S.C. §§ 152(2), 152(3) (1976).

Furthermore, it is unlikely that the federal government will enact legislation regulating these employees, since in *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Supreme Court indicated that such legislation would encroach on the states' constitutional right to regulate their own affairs. Note, *Public Sector Strikes: Will the Illinois Legislature Answer the Challenge?*, 1980 U. ILL. L. F. 869, 880-81.

³ E.g., Arizona, Arkansas, West Virginia.

⁴ E.g., N.J. STAT. ANN. § 34:13A(1)-(21) (West 1965 & Supp. 1981); N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973 & Supp. 1981).

⁵ These state statutes prohibit strikes by all public employees, or all classes of public employees that are covered by the collective bargaining laws: ALA. CODE § 11-43-143 (1977) (firemen); CAL. LAB. CODE § 1962 (West 1971) (firemen); CONN. GEN. STAT. ANN. § 7-475 (West 1972 & Supp. 1981); DEL. CODE ANN. tit. 19, § 1312 (1977); D.C. CODE ENCYCL. § 4-125 (police) and § 4-407 (firemen) (West 1966); FLA. STAT. ANN. § 447.505 (West 1981); GA. CODE ANN. § 54-1302 (1974) (firemen) and § 89-1301 (1980) (state); IOWA CODE ANN. § 20.12 (West 1978); KAN. STAT. ANN. § 75.4333(c)(5) (1977); KY. REV. STAT. § 78.470 (1980) (police) and § 345.130 (1977) (firemen); ME. REV. STAT. ANN. tit. 26, §§ 964(2)(c), 979(C)(2)(c) (1974); MD. EDUC. CODE ANN. § 6-410(A) (1978); MASS. GEN. LAWS ANN. ch. 150E, § 9A (West Supp. 1981); MICH. STAT. ANN. § 17.455(2) (Callaghan 1975); MO. ANN. STAT. § 105.530 (Vernon Supp. 1982); NEB. REV. STAT. § 48.821 (1978); NEV. REV. STAT. § 288.230 (1977); N.H. REV. STAT. ANN. § 273-A:13 (1978); 2 Pub. Employee Bargaining Rep. (CCH) § 24,523 (March 31, 1978) (citing "N.M. Regulations for Labor-Management Relations in the Classified Service"); N.Y. CIV. SERV. LAW § 210 (McKinney 1973); N.D. CENT. CODE § 15-38.1-14 (1981) (teachers); OHIO REV. CODE ANN. § 4117.02 (Baldwin 1981) (police and firemen); R.I. GEN. LAWS §§ 28-9.1-12, 28-9.2-12, 28-9.3-1, 28-9.4-16 (1979); S.D. CODIFIED LAWS § 3-18-10 (1980); TENN. CODE ANN. § 7-56-109 (1980); TEX. REV. CIV. STAT. ANN. art. 5154c, 5154c-1(17) (Vernon 1971 & Supp. 1981); UTAH CODE ANN. § 34-20a-5 (Supp. 1981) and § 11-20-31 (1973); VA. CODE § 40.1-55 (1981); WASH. REV. CODE ANN. § 41.56.120 (1972).

⁶ In the following states "essential" public employees cannot strike: ALASKA STAT. § 23.40.200 (1972) (policemen, firemen, correction and hospital personnel); PA. STAT. ANN. tit. 43, § 1101.1001 (Purdon Supp. 1981) (guards at prisons and mental hospitals, and court personnel). The following states prohibit public employee strikes where they would endanger the public's health, safety or welfare: ALASKA STAT. § 23.40.200 (1972); HAWAII REV. STAT. § 89-12 (Supp. 1981); MINN. STAT. ANN. §§ 179.63(11), 179.64(1) (West Supp. 1981); OR. REV. STAT. § 243.726 (1979); PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1981); VT. STAT. ANN. tit. 21, § 1730(3) (1978). In Idaho, firemen are prohibited from striking only during the term of the collective bargaining agreement. IDAHO CODE § 44-1811 (1977); In Wisconsin, municipal employees only have a limited right to strike, WIS. STAT. ANN. § 111.70(4)(1) (West Supp. 1981).

the remaining states, which have no applicable statutes, the legality of a public employee strike is a common law question for the courts.⁷

In the event of an illegal public employee strike, the states have provided various measures, either by statute or at common law, to deal with the striking unions. These measures are available primarily to public employers and not to third parties. Employer remedies include injunctions,⁸ dismissal of striking employees,⁹ fines,¹⁰ loss of dues check-off,¹¹ and decertification of the union.¹² These measures, however, have failed to diminish the number of illegal strikes by public employees.¹³ This failure may be due to the impracticality, inadequacy or uselessness of many of the available measures. For example, the dismissal of striking employees may be an impractical sanction where the employees, such as policemen and firemen, are highly trained and provide essential services which the public cannot do without while replacements are being trained.¹⁴ An injunction also may be useless where the strike lasts only a short time, yet causes considerable damage.¹⁵ Furthermore, even mandatory fines may provide ineffective deterrence where a union hopes to achieve financial gains from the strike that will outweigh the cost of paying the fine.¹⁶ Even where the available measures would penalize the union harshly, a public employer might decline to exercise such harsh sanctions in order not to an-

⁷ The following states have not yet addressed the issue at common law: Arizona, Colorado, Louisiana, Mississippi, North Carolina, South Carolina, West Virginia, Wyoming. Although there are no West Virginia statutes or cases on point, public employee strikes have been held to be illegal in West Virginia in U.S. Dept. of Labor Summary of Public Sector Labor Relations Policies, 1976, at 121.

In one state, the cases allow strikes by those classes of public employees not specifically prohibited from striking: *State ex. rel. Dept. of Hwys. v. Public Employees Craft Council*, 165 Mont. 349, 355, 529 P.2d 785, 788 (1974). The common law of other states prohibits public employee strikes: *City of Fort Smith v. Arkansas State Council No. 38*, 245 Ark. 409, 410, 433 S.W.2d 153, 154 (1968); *City of Pana v. Crowe*, 57 Ill.2d 547, 550-53, 316 N.E.2d 513, 514-16 (1974); *Board of Educ. v. New Jersey Educ. Ass'n*, 53 N.J. 29, 36-7, 247 A.2d 867, 871 (1968).

⁸ See, e.g., N.Y. CIV. SERV. LAW § 211 (McKinney 1973); WIS. STAT. ANN. § 111.89(1) (West Supp. 1981).

⁹ See, e.g., FLA. STAT. ANN. § 447.507(5) (West 1981); MINN. STAT. ANN. § 179.64(2) (1981).

¹⁰ See, e.g., FLA. STAT. ANN. § 447.507(6)(a)(4) (West 1981); NEV. REV. STAT. § 288.250(1)(a) (1979); OKLA. STAT. ANN. tit. 11, § 51-113 (West 1978).

¹¹ See, e.g., DEL. CODE ANN. tit. 14, § 4011(b) (1974); FLA. STAT. ANN. § 447.507(6)(a)(3) (West 1981); MD. EDUC. CODE ANN. § 6-410(b)(2) (1978).

¹² See, e.g., IOWA CODE ANN. § 20.12(5) (West 1978); MD. EDUC. CODE ANN. § 6-410(b)(1) (1978); MINN. STAT. ANN. § 179.64(6) (West Supp. 1981).

¹³ The number of public employee work stoppages since 1965 have been as follows: 1965 - 42; 1966 - 142; 1967 - 181; 1968 - 254; 1969 - 411; 1970 - 412; 1971 - 329; 1972 - 375; 1973 - 387; 1974 - 384; 1975 - 478; 1976 - 378; 1977 - 413; 1978 - 481; 1979 - 593; GOV'T EMPL. REL. REP. (BNA) 71:1014 (1981).

¹⁴ Wohlers, *One Strike and You May be Out: The Legal Realities of the Hardball Game of Fire Fighter and Police Strikes*, 15 IDAHO L. REV. 39,55 (1978).

¹⁵ See *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash.2d 762, 763-65, 600 P.2d 1282, 1283-84 (1977) (a two-day strike by public ferry workers ended before an injunction could be obtained, yet inflicted great damage on local businesses).

¹⁶ Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 294 n.169 (1969).

tagonize the union and further disrupt the employer/union relationship.¹⁷ Since most sanctions and remedies created by the state courts and legislatures have been accorded to public employers, a union therefore might escape punishment for an illegal strike if the public employer foregoes the available measures.¹⁸

In contrast to the foregoing measures, granting damage actions to public employers and third parties against public employee unions would effectively deter the unions from illegally striking.¹⁹ Granting damage actions would deter unions from engaging in strikes which cause widespread harm because such strikes could result in enormous judgments against them.²⁰ Even short strikes can cause substantial damage²¹ and result in large judgments against a union.

¹⁷ In withholding a damage remedy from a public employer, the Michigan Supreme Court expressed the fear that "[i]n fact, the institution of a civil damage suit may very well lead instead to another strike and thereby cause a further suspension of services." *Lamphere Schools v. Lamphere Fed'n of Teachers*, 67 Mich. App. 331, 343 n.10, 240 N.W.2d 792, 799 n.10 (1976), *aff'd*, 400 Mich. 104, 252 N.W.2d 818 (1979). See also Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 293 (1969) (if "the union possesses the preponderance of power, the employer would be unlikely to invoke the damage remedy for fear of exacerbating relations[;]").

¹⁸ A few states, however, by statute or case law permit members of the public to seek injunctions against illegally striking unions if the appropriate public officials refuse to do so. See, e.g., *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash.2d 762, 776, 600 P.2d 1282, 1290 (1979); IOWA CODE ANN. § 20.12(3) (West 1978).

¹⁹ Large damage judgments could "effectively bankrupt striking unions and eliminate the gains that organized employees have so far secured in the public sector collective bargaining context." Jackson, *Public Employer Countermeasures to Union Concerted Activity: An Analysis of Alternatives*, 8 J.L. & EDUC. 73, 98 (1979).

See also *id.* at 87 (civil damages might help prevent strikes); *State v. Kansas City Fire Fighters Local 42*, 2 Pub. Bargaining Cas. (CCH) ¶ 20,438, at 21,471-72 (Mo. Cir. Ct. 1976) (court awarded punitive as well as compensatory damages in a third party suit, in order to deter public unions from striking).

²⁰ In *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 1980-81 Pub. Bargaining Cas. (CCH) ¶ 37,253 (N.Y. Sup. Ct. March 31, 1981) (motion to dismiss denied), the plaintiffs asked for damages of \$50 million a day for each of the eleven days of the strike. The union's attorney has stated that if the court awards the requested damages, "the unions are out of business." Podgers, *Sue NYC Transit Unions for Strike Disruptions*, 67 A.B.A. J. 690 (1981); *Precedent Sought in Public Worker Strikes*, 66 A.B.A. J. 549 (1980). See also Arouca, *Damages for Unlawful Strikes Under the Railway Labor Act*, 32 HAST. L.J. 779, 817 (1981) ("There will be less incentive for labor to avoid striking if concessions can be secured through an unlawful strike without attendant monetary liability.").

It has been argued, however, that civil damage actions by employers will not deter public employees from striking: "Many labor lawyers question whether private damage suits would dampen the apparently increasing willingness of public employee unions to strike." One labor lawyer maintained that "union members 'believe their principles are right' and private damage suits 'are not something that will force them to sacrifice those principles.'" Podgers, *supra*, at 690. See also Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 293 (1969) (while it is necessary to increase the costs of striking in order to deter public employees from engaging in illegal strike(s), employer damage suits would probably not have that effect). ("In situations in which the union possesses the preponderance of power, the employer would be unlikely to invoke the damage remedy for fear of exacerbating relations.").

²¹ For example, the strike by ferry workers in *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash.2d 762, 764-65, 600 P.2d 1282, 1284 (1979), lasted only two days, but

Thus, the fear of damage suits would deter public employee unions from engaging in short strikes, against which injunctive relief is useless, as well as long strikes. Of course, a damage action, even if more effective and useful than other measures, might be as much against a public employer's best interests as other measures. After a strike, an employer may wish to return to a harmonious working relationship with its employees as quickly as possible. A damage suit brought by an employer probably would cause resentment among the employees and interfere with the reestablishment of a good working relationship with the union.²² A public employer's refusal to bring suit against the union for an illegal strike, however, should not prevent third parties from suing for damages. Permitting third party damage suits would compensate injured plaintiffs while achieving the deterrent effect sacrificed by public employers who forego damages and other remedies in order to maintain industrial harmony.

Although providing damage actions to employers and third parties would significantly deter public unions from illegally striking,²³ few state statutes expressly provide this remedy to public employers,²⁴ and at present, no state statute expressly authorizes a third party damage action. Nevertheless, public employers and third parties have several possible theories of recovery against public unions. These theories of recovery include the implication of a damage action from a statute prohibiting public employee strikes, as well as various tort and contract theories. A public employer's or third party's success in pursuing

because it occurred on an important holiday weekend the plaintiff businesses claimed to have suffered more than \$1 million in damages.

²² *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 248 (1970) (stating that a damage suit by an employer either during or after the strike will only delay resolution and aggravate employer-union difficulties). See also Comment, *Parent Union Liability for Strikes in Breach of Contract*, 67 CAL. L. REV. 1028, 1032 (1979). Although the comment deals with contract suits brought pursuant to § 301 of the federal Labor Management Relations Act, the situation is analogous:

A rational employer may forego a tenable — even a strong — section 301 damage suit in order to preserve harmonious relations with a union and its officials

Post-strike damage suits impair this industrial harmony. Acrimony developed during a strike may not dissipate if a damage action is pending for months, perhaps years, after the strike ends.

Id. See also *infra* text and note at note 41.

²³ See *supra* text and notes at notes 19-21.

²⁴ Three states explicitly provide public employers with a contract damage remedy: ALASKA STAT. § 23.40.020 (1972); IOWA CODE ANN. § 20.17(5) (West 1978); KY. REV. STAT. § 345.100(3) (1977). Five other states have enacted general provisions for employer damage suits against public unions: IND. CODE ANN. § 20-7.5-1-14(b) (Burns 1975) (school employers, through any proper proceeding at law or in equity, may take action against teacher's organizations which strike illegally); N.H. REV. STAT. ANN. § 273-A:15 (1977) ("Actions by or against the exclusive representative of a [public employee] bargaining unit may be brought, without respect to the amount of damages, in the superior court. . . ."). See also FLA. STAT. ANN. § 447.507(4) (West 1981); MINN. STAT. ANN. § 179.68-3(11) and § 179.68-1 (West Supp. 1981); WIS. STAT. ANN. § 111.89(2)(c) (West 1974) (authorizing damage suits by an employer in the event of a public employee strike, without specifying whether the cause of action is in tort or contract).

these remedies will depend on such factors as the nature of a state's regulation of public employees and the state law regarding the different remedies.

This note will analyze the various theories of recovery available to public employers and third parties suing illegally striking public employee unions for damages. First it will discuss whether a statute prohibiting public employee strikes should provide the basis for the implication of a damage action for violation of the prohibition. Then the note will address whether a state's statutory scheme regulating public employees bespeaks a legislative intent to provide the exclusive remedies against striking public employee unions. Next, the various tort theories under which public employers and aggrieved third parties can sue public unions will be examined. The discussion will reveal that courts have differed in their treatment of these tort theories of recovery. Finally, the different contractual claims against public unions which may be available to public employers and third parties will be discussed. An assessment of the viability of these contractual claims, and a discussion of the reasons for permitting or denying them, will follow. It will be submitted that unless a state legislature has indicated that it has provided exclusive remedies against illegally striking public employee unions, courts should be willing to allow statutory, tort and contract causes of action against these unions. By not placing formalistic restrictions on the availability to public employers and third parties of a statutory, tort and contract theories of recovery against public employee unions, courts would further the state's policy behind the prohibition of public employee strikes.

I. STATUTORY ISSUES IN DAMAGE SUITS BY PUBLIC EMPLOYERS AND THIRD PARTIES

The nature of state statutes governing public employee labor relations often will determine whether a court recognizes a private damage action in favor of public employers or third parties who suffer harm from an illegal public employee strike.²⁵ Upon examining the state's statutory scheme regulating public employees, a court could reach three different conclusions: (1) if the statute does not expressly provide a damage action, a court nonetheless may decide to imply one from the statute prohibiting strikes;²⁶ (2) a court instead might regard the statutory scheme as evidence of a legislative intent to preempt the area of public employee labor relations;²⁷ under this view, the legislation

²⁵ See, e.g., *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 110-24, 252 N.W.2d 818, 821-27 (1977) (in deciding a statutory issue, a court must first determine the legislative intent which is controlling); *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash.2d 762, 770-75, 600 P.2d 1282, 1287-90 (1979) (court looked to statutory scheme and policies in deciding whether to create a new remedy under the statute); *Jamur Prods. Corp. v. Quill*, 51 Misc.2d 501, 506, 273 N.Y.S.2d 348, 352-53 (1966) (interpreted legislative failure to provide third party damage remedy as statement of public policy; therefore refused to imply damage remedy).

²⁶ See *infra* text and notes at notes 29-132.

²⁷ See *infra* text and notes at notes 133-66.

would occupy the field and preclude all remedies not explicitly provided by the legislature; (3) finally, a court could decide that the statutory scheme warrants neither the implication of a damage action nor the application of the preemption doctrine. If a court reaches this final conclusion, employer and third party claims based on tort or contract theories still would be available.²⁸ In deciding how to interpret the statutory scheme, such factors as the statutory language, the legislative history, the need for a damage action, and the public policies underlying the legislation should be considered. Courts' analyses of these factors may differ depending upon whether a public employer or a third party is bringing suit. Therefore, in exploring each possible approach a court could take towards a statutory scheme, public employer and third party claims will be examined separately.

A. *Implying a Cause of Action for Damages*

1. The Implication Doctrine: An Overview

The doctrine of implied causes of action provides a possible theory of recovery for either public employers or third parties against a public employee union which illegally strikes. Under this doctrine, a court may imply a civil right of action from a statute which does not expressly authorize that action²⁹ Since the court implies the action from a statute, this theory of recovery is available to employers or third parties only in states which prohibit public employee strikes by statute. The judicial practice of implying causes of action derives from the common law principle that where the law provides a right, it also will afford a remedy.³⁰ In seeking to implement this principle, courts have weighed a wide range of competing considerations, and have fashioned some of these considerations into various tests for the implication of remedies. As enunciated by the United States Supreme Court, the current standard for the im-

²⁸ See *infra* text and notes at notes 167-68.

²⁹ See generally Note, *Implied Causes of Action in the State Courts*, 30 STAN. L. REV. 1243 (1978) (discusses the implication of causes of action in the state courts). For a discussion of implied rights of action under federal statutes, see Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 COL. L. REV. 1085, 1085-1104 (1979); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963); Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell Nor a Moratorium — Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980).

³⁰ See *Couch v. Steel*, 118 Eng. Rep. 1193, 1196 (Q.B. 1854); *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33 (1916):

A disregard of the command of [a] statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law . . . : "[I]n every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." . . . This is but an application of the maxim, *Ubi jus ibi remedium*.

Id. at 39-40 (citing 1 COM. DIG. 248 (1762)). See also *J.I. Case Co. v. Borak*, 377 U.S. 426, 433-34 (1964); *Fitzgerald v. Pan Am. World Airways*, 229 F.2d 499, 501 (2d Cir. 1956).

plication of a private cause of action under a federal statute involves the ascertainment of legislative intent.³¹ Under this test, a cause of action will be implied only if the Court determines that Congress intended the action to be available to the party requesting it.³² The court begins the inquiry by looking to the statutory language for evidence of a congressional intent either to grant or to deny the cause of action.³³ If the language of the statute does not reveal the intent of Congress, the court then will consider the legislative history of the statute,³⁴ the regulatory scheme provided in the statute,³⁵ and whether the plaintiff is a member of the class of persons for whose special benefit the statute was enacted.³⁶ In looking to these factors, however, the court will not imply a private damage action from a federal statute merely because it would be a logical or desirable supplement to the statutory scheme.³⁷ Absent some indication that Congress intended to provide the cause of action, the court will not imply it.

State courts construing state statutes, however, need not comply with the standard formulated by the Supreme Court for implied rights of action.³⁸ In fact, the Supreme Court's approach generally would be of little use to state courts. Many state statutes have little or no legislative history, and it is difficult to determine legislative intent solely through an examination of the text of the statute.³⁹ State courts thus have been free to formulate their own standards for the implication of causes of action. Under these standards, clear evidence of legislative intent generally would be controlling.⁴⁰ Lacking such evidence, however, many state courts look to other factors in deciding whether to imply a remedy. Generally, they will imply one under two conditions. First, the legislature must have enacted the statute for the special benefit of a class of which the plaintiff is a member.⁴¹ Second, the implication of a cause of action

³¹ See *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2622 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979).

³² See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979).

Former Supreme Court decisions did not emphasize legislative intent to this extent. For example, in *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), the Court emphasized the necessity of an implied cause of action as a means of effectuating the purposes of the statute. In *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Court again looked to factors other than legislative intent in deciding whether to imply a remedy. 422 U.S. 66, 78 (1975).

³³ *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

³⁴ *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623 (1981); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979).

³⁵ *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2623 (1981).

³⁶ *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569-70 (1979).

³⁷ *Id.* at 578.

³⁸ See Stanford Note, *supra* note 29, at 1252-53.

³⁹ *Id.* at 1252.

⁴⁰ See, e.g., *id.* at 1253 n.49; *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 110, 252 N.W.2d 818, 821 (1977).

⁴¹ See, e.g., *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 305, 200 N.E.

must aid in the enforcement of and further the policies behind the statute.⁴² Since many of the state statutes prohibiting public employee strikes specify neither the class for whose benefit the strike prohibition was enacted nor the policies behind the prohibition, the answer to the two inquiries of this test generally must depend on the rationale behind the statute. That rationale will indicate whom the legislature intended to benefit and what goals it hoped to achieve by enacting the statute. Various rationales may underlie the prohibition of public employee strikes. Under one rationale, a strike prohibition is meant to insure the uninterrupted provision of services to the public, which suffers the harm or inconvenience caused by such strikes.⁴³ The members of the public who would be subject to such harm or inconvenience would be the intended beneficiaries of the statute. Thus, under such a statute, third parties harmed by public employee strikes should be accorded a private right of action. Allowing a third party action would further the policies behind this strike prohibition by compensating those people the legislature sought to benefit and by preventing future violations of the statute.

Another common rationale underlying the prohibition of public employee strikes is that granting the freedom to strike would give too much bargaining power to the public employee unions.⁴⁴ This unacceptable bargaining power would arise from two factors. First, the demand for public sector services is inelastic. The public cannot replace many governmental services, such as police and fire protection, with substitute services from the private sector.⁴⁵ Furthermore, the government need not make a profit. This lack of a profit motive, and the constant public need for government services, increase the coercive power of a strike, since the market forces of supply and demand and the need for profit would not restrain union demands for higher pay or better benefits.⁴⁶ The

824, 829 (1936); *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 139, 204 N.E.2d 635, 637 (1965); *Jenkins v. J.C. Penney Casualty Ins. Co.*, 280 S.E.2d 252, 254 (W. Va. 1981) (citing *Hurley v. Allied Chem. Corp.*, 262 S.E.2d 757, 763 (W. Va. 1980)); *Sherman v. Field Clinic*, 74 Ill. App.3d 21, 29, 392 N.E.2d 154, 160-61 (1979); 4 RESTATEMENT (SECOND) OF TORTS § 874A (1977).

⁴² See, e.g., *Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 576, 521 P.2d 1119, 1122 (1974); *McNeal v. Allen*, 95 Wash.2d 265, 621 P.2d 1285, 1292 (1980); *Young v. Joyce*, 351 A.2d 857, 859 (Del. 1975). In 4 RESTATEMENT (SECOND) OF TORTS § 874A (1977), the test for implication is described as follows:

When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.

⁴³ *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 128, 252 N.W.2d 818, 829 (1977). See also *Wohlers*, *supra* note 14, at 46.

⁴⁴ See Comment, *Strikes by Public Employees: The Consequence of Legislative Inattention*, 20 SANTA CLARA L. REV. 945, 949 (1980); Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQ. L. REV. 357, 361-62 (1971-72); Note, *Private Damage Actions Against Public Sector Unions for Illegal Strikes*, 91 HARV. L. REV. 1309, 1315 (1978).

⁴⁵ Harvard Note, *supra* note 44, at 1315 n.26.

⁴⁶ Comment, *Strikes by Public Employees: The Consequence of Legislative Inattention*, 20 SANTA CLARA L. REV. 945, 949 (1980); Edwards, *supra* note 44, at 361-62.

second reason for which a right to strike would give public unions unacceptable bargaining power is that public officials with an interest in reelection may agree to unreasonable union demands in order to placate a public angered by the hardships caused by a strike.⁴⁷ A prohibition on public employee strikes counteracts these two factors giving public unions unacceptable bargaining power and limits the ability of a public union to obtain unreasonable concessions from public employers. Under this rationale, the legislature intended to benefit public employers by prohibiting public employee strikes. Under a strike prohibition enacted for this reason, public employers should be accorded a private right of action. Granting public employers a damage action would further the policies underlying the statute by helping to rectify the harm which the statute was intended to avert and by deterring the union from striking in the future.

A third common rationale for the strike prohibition arises from the sovereignty concept. According to this rationale, a strike by public employees constitutes a challenge to governmental authority.⁴⁸ This justification for the strike prohibition would seem to establish no particular class of persons as intended beneficiaries.⁴⁹ Arguably, however, the public employers are the intended beneficiaries. It is their specific authority as government representatives which the public employees challenge by striking. The employers therefore should have a right of action against the union to vindicate the government's interest in not having its authority challenged.

In order to determine which rationale prompted a state's prohibition of public employee strikes, the language and legislative history of the statute first must be examined. In the absence of clear evidence of legislative intent in these sources, the legislative scheme governing public employees must be considered in its entirety in order to discover the reason(s) for the strike prohibition.⁵⁰ Like

⁴⁷ See Harvard Note, *supra* note 44, at 1315 n.26.

⁴⁸ See Comment, *Strikes by Public Employees: The Consequence of Legislative Inattention*, 20 SANTA CLARA L. REV. 945, 947 (1980); Edwards, *supra* note 44, at 358-61; Norwalk Teachers' Ass'n v. Board of Educ., 138 Conn. 269, 274-75, 83 A.2d 482, 484-85 (1951).

⁴⁹ See Harvard Note, *supra* note 44, at 1315.

⁵⁰ See Stanford Note, *supra* note 29, at 1253; Wyandotte Transp. Co. v. United States, 389 U.S. 191, 203-08 (1967); Panama Ref. Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) ("The meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view.").

Examination of the scheme as a whole may reveal that the legislature had more than one objective in prohibiting public employee strikes. For example, some state legislatures have prefaced statutes regulating public employees with a statement that the objective of the statute is to protect the public by assuring the uninterrupted provision of government services. See, e.g., FLA. STAT. ANN. § 447.201 (West 1981); IOWA CODE ANN. § 20.1 (West 1978); MINN. STAT. ANN. § 179.61 (Callaghan Supp. 1981); N.Y. CIV. SERV. LAW § 200 (McKinney 1973); TEX. REV. CIV. STAT. ANN. art. 5154c-I, § 2(b)(1) (Vernon Supp. 1981); WASH. REV. CODE ANN. § 41.56.430 (West Supp. 1981). The statutes of some of these same states, however, expressly provide public employers with damage remedies against striking unions. See FLA. STAT. ANN. § 447.507(4) (West 1981) (union liable for damage to employer as result of strike); MINN. STAT. ANN. § 179.68 subdvs. 1, 3(11) (Callaghan Supp. 1981) (An unlawful strike is an unfair labor practice for which employer can bring damage suit.). Provision of this remedy to public employers indicates that a concern for the public employers as well as the public prompted the strike prohibition. Thus it seems that more than one rationale could underlie a statute prohibiting

the language and legislative history of the statute prohibiting strikes, however, the legislative scheme regulating public employees might not indicate clearly whom the legislature intended to benefit and what purposes it hoped to achieve by prohibiting public employee strikes. A court therefore would have to resort to judicial law-making to effectuate what it perceives to be the legislature's purposes in enacting the statute and to ascertain whether the implication of a damage action will further these purposes.

Although a statute prohibiting strikes may not indicate clearly whom the legislature intended to benefit, the primary purpose of the prohibition in most cases will be to prevent public employee strikes. Courts will further this purpose by implying damage actions for the intended beneficiaries of the statute, whether they are public employers or third parties, since damage awards should deter the union from striking in the future. Thus, though it may be unclear from a statute prohibiting strikes that the legislature intended to compensate the intended beneficiaries of the statute for harm caused by a strike, the implied damage action nonetheless will effectuate the primary purpose of the strike prohibition by preventing public employee strikes.

2. The Implication of a Private Damage Action for Public Employers

Although a few state statutes permit public employers to sue public employee unions for damages resulting from illegal strikes,⁵¹ most state statutes do not expressly authorize a damage action in favor of employers. A damage action for public employers therefore must be implied from the statute prohibiting strikes. Since legislative intent is dispositive of the matter,⁵² the court first must look for evidence of a legislative intent either to grant or deny a damage remedy. To find this evidence, the court first should examine the statutory language. The Michigan Supreme Court followed this approach to

public employee strikes. The state legislature could have intended to benefit more than one class of persons and to achieve more than one goal. *See City of Detroit v. Division 26 of the Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Employees*, 332 Mich. 237, 248-49, 51 N.W.2d 228, 233 (1952) (there are many reasons why public employee strikes are prohibited). *See also Caso v. District Council 37, AFSCME*, 43 A.D.2d 159, 163, 350 N.Y.S.2d 173, 178 (1973) where the court recognized that a statute prohibiting strikes can have more than one purpose. The court noted that "[t]he purpose of the Taylor Law is, *inter alia*, 'to protect the public . . .'" which indicates that there were other purposes behind the law. One other purpose was to "'provide the basis upon which viable government-employee relationships in New York can be developed.'" (Final Report of Governor's Committee on Public Employee Relations (Public Papers of Governor Nelson A. Rockefeller, 1966, at 877, 883))." *Id.* at 161-62, 350 N.Y.S.2d at 176.

Thus, a statute prohibiting strikes could provide the basis for implication of a damage action for both public employers and third parties.

⁵¹ *See supra* note 24.

⁵² *See Stanford Note, supra* note 29, at 1253 n.49; Gamm & Eisberg, *The Implied Rights Doctrine*, 41 UMKC L. REV. 292, 293 (1972) (legislative intent to preclude remedy is dispositive); *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 110, 252 N.W.2d 818, 821 (1977) (in interpreting a statute, legislative intention is controlling).

ascertain legislative intent in *Lamphere Schools v. Lamphere Federation of Teachers*.⁵³ In *Lamphere*, which involved an illegal strike by public school teachers, the court based its denial of a damage remedy to the public employer in part on the language of the Michigan Public Employment Relations Act (PERA).⁵⁴ The court reached this result because section 6 of the PERA, dealing with sanctions against employees who illegally strike, begins with the phrase "notwithstanding the provisions of any other law."⁵⁵ From this phrase, the court inferred a legislative intent to provide in section 6 the exclusive sanctions against illegally striking public employees.⁵⁶

Where the statutory language has yielded inconclusive evidence of legislative intent regarding a damage action, courts have looked to the legislative history of the statute.⁵⁷ This approach may be of no avail, however, since many state statutes have little, if any, legislative history.⁵⁸ Even if a legislative history exists, it often is silent or ambiguous on the issue of a private right of action.⁵⁹ Thus, a statute's legislative history often is either useless or susceptible of manipulation on the issue of implied rights of action. The court can present an interpretation of the history which supports whatever result the court wants to reach.⁶⁰

Where the statutory language and legislative history are ambiguous, courts have looked to other aspects of the statutory scheme for evidence of legislative intent regarding the implication of a cause of action. For example,

⁵³ 400 Mich. 104, 252 N.W.2d 818 (1977).

⁵⁴ MICH. STAT. ANN. § 17.454(1)-(32) (Callaghan 1975 & Supp. 1981).

⁵⁵ *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 112-13, 252 N.W.2d 818, 821-22 (1977).

⁵⁶ *Id.* at 113, 252 N.W.2d at 822 (citing *Rockwell v. Crestwood School Dist. Bd. of Educ.*, 393 Mich. 616, 628, 227 N.W.2d 736, 741 (1975)).

Arguably, however, the court read too much into the phrase. The phrase immediately precedes the legislative definition of a strike, while the available sanctions are described later in the paragraph. MICH. STAT. ANN. § 17.455(6) (Callaghan 1975). Therefore, the language "notwithstanding the provisions of any other law" could indicate a legislative intent to provide the exclusive definition of a strike, without necessarily providing the exclusive remedies available to public employers.

⁵⁷ See Siegel, *supra* note 29, at 1093; *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 116-17, 252 N.W.2d 818, 823-24 (1977).

⁵⁸ *Hurley v. Allied Chem. Corp.*, 262 S.E.2d 757, 762 (W. Va. 1980); Stanford Note, *supra* note 29, at 1252.

⁵⁹ *Hurley v. Allied Chem. Corp.*, 262 S.E.2d 757, 763 (W. Va. 1980); accord, *McNeal v. Allen*, 95 Wash.2d 265, 277, 621 P.2d 1285, 1291 (1981).

⁶⁰ See Siegel, *supra* note 29, at 1093-96 (1979).

For example, in *Lamphere*, the court emphasized that in amending the Hutchinson Act to produce the PERA the Michigan legislature had deleted the section of the Hutchinson Act which provided for criminal penalties against public employee unions. *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 116-17, 252 N.W.2d 818, 823-24 (1977). The court viewed this deletion as indicating "a conscious legislative intent to nullify even the remotest possibility of such actions, criminal or civil." *Id.* at 117, 252 N.W.2d at 824. The court easily could have interpreted the deletion otherwise, however, as indicating a legislative intent merely to preclude criminal sanctions. The deleted section made no mention of civil penalties. *Id.*

some courts have viewed the types of sanctions and remedies expressly provided by the statute as significant. Where a statute provides *no* sanctions or inadequate sanctions, a court may imply a cause of action in order to render the statute meaningful.⁶¹ Similarly, the availability of express statutory remedies may connote a legislative intent to provide exclusive measures.⁶² Courts have reasoned that, had the legislature wished to provide for a private damage action, it would have done so in the statute. Nevertheless, some courts have implied such causes of action from statutes that contained a comprehensive remedial scheme.⁶³ One such court regarded a comprehensive list of statutory measures as non-exclusive because, under other provisions of the statute, the legislature had designated certain remedies as exclusive.⁶⁴ The court inferred from this statutory pattern that when the legislature wanted the statutory remedies to be exclusive, it expressly denominated them as such.⁶⁵ On similar reasoning, other courts have stated that if the legislature expressly authorized damage actions under other provisions of the statute, it could be inferred that when the legislature wished to provide a damage remedy, it did so explicitly.⁶⁶ Under this reasoning the absence of an express cause of action would indicate a legislative intent to preclude such actions. Thus, courts have placed varying importance on the presence of statutory sanctions as an indication of legislative intent.⁶⁷ The extent to which the availability of other statutory sanctions and remedies weighs against the implication of a private damage action may depend on the types of measures available, their adequacy in effectuating the purposes of the statute, and whether other provisions of the same statute authorize damage actions.⁶⁸

⁶¹ See *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202 (1967); *McNeal v. Allen*, 95 Wash.2d 265, 277, 621 P.2d 1285, 1292 (1981); Gamm & Eisberg, *The Implied Rights Doctrine*, 41 UMKC L. REV. 292, 298 (1972) ("Implying a private cause of action for violation of a statute is often the only means of effectuating the policy expressed by the statute."); Siegel, *supra* note 29, at 1097-99; Siegel, *supra* note 29, at 1254.

⁶² *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (where statute provides express remedies, a court should not imply remedies under the statute absent clear evidence of legislative intent); *Lamphere Schools v. Lamphere Fed'n of Teachers*, 67 Mich. App. 331, 341-42, 240 N.W.2d 792, 798-99 (1976), *aff'd*, 400 Mich. 104, 252 N.W.2d 818 (1977); *Christy v. Petrus*, 295 S.W.2d 122, 126 (Mo. 1956) (statute providing criminal penalties will not be read as implying a civil remedy absent clear evidence of legislative intent to that effect).

⁶³ See *Cannon v. University of Chicago*, 441 U.S. 677, 704-06 (1979); *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 402 n.4 (1971) (referring to the implication of a cause of action in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964)); *Fraternal Order of Police, Lodge 44 v. City of Dayton*, 2 Pub. Bargaining Cas. (CCH) ¶ 20,287, 20,950 (Ohio Ct. Com. Pl. 1976) (court rejected the argument that the comprehensive list of statutory measures precluded all other remedies).

⁶⁴ *Caso v. District Council 37, AFSCME*, 43 A.D.2d 159, 162, 350 N.Y.S.2d 173, 177 (1973).

⁶⁵ *Id.*

⁶⁶ See, e.g., *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979).

⁶⁷ As one court stated, "[v]iolation [of a statute] may carry a penal penalty, may provide administrative procedures or may be entirely silent on remedy, but yet be held to create a private civil remedy." *McNeal v. Allen*, 95 Wash.2d 265, 277, 621 P.2d 1285, 1290 (1981).

⁶⁸ For a suggested approach to when the presence of statutory sanctions should

Where the statutory language, the legislative history and the statutory remedial scheme provide ambiguous evidence of legislative intent regarding an implied action for damages, the court should look to whether the legislature enacted the strike prohibition for the special benefit of public employers.⁶⁹ A private damage action should be granted to public employers if the statute was enacted for their benefit and if implication of a damage action will further the purposes of the statute. If the legislature prohibited public employee strikes because the right to strike would give unacceptable bargaining power to the unions, then the legislature intended to benefit public employers by enacting the statute.⁷⁰ Where the legislature has not declared explicitly the intended beneficiaries of the strike prohibition, however, the court must examine the entire statutory scheme relating to public employee strikes to determine the purpose of the prohibition.⁷¹ Such an examination might show that in enacting the statute, the legislature intended especially to benefit more than one class.⁷² For example, the *Lamphere* court found that the legislature had prohibited public employee strikes in order to protect the public.⁷³ The only statutory sanctions provided against illegally striking employees, however, were to be exercised by the public employers.⁷⁴ Provision of these sanctions could indicate either that the legislature intended to benefit the public employers as well as the public, or that it provided these sanctions to public employers as a means of benefiting the public. Even in the latter instance, however, it is by benefiting the public employers that the legislature has benefited the public. Arguably, therefore, public employers as well as members of the public are the intended beneficiaries of the strike prohibition.

Where both the public and public employers benefit from a statute prohibiting public employee strikes, it may be difficult to determine whether the statute was enacted for the "special benefit" of public employers. For that reason, a court should deem the "special benefit" requirement to be satisfied as long as a plausible argument can be made, based on the provisions of the statute, that the legislature intended to benefit public employers.⁷⁵ To end the inquiry and deny an action for damages because of the uncertainty in determining the intended beneficiaries of the statute could have an unfortunate result. It could preclude the use of the one sanction against the public union that would deter it from striking. Thus, where it is uncertain whether the strike

preclude an implied right of action from a state statute, see Stanford Note, *supra* note 29, at 1253-61.

⁶⁹ See *supra* text and notes at notes 41-42.

⁷⁰ See *supra* text and notes at notes 44-47.

⁷¹ See *supra* text and note at note 50.

⁷² See *supra* note 50.

⁷³ *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 128, 252 N.W.2d 818, 829 (1977).

⁷⁴ See MICH. STAT. ANN. § 17.455(6) (Callaghan 1975) (providing for employer remedies of discipline and discharge).

⁷⁵ Indeed, some Supreme Court cases have indicated that a plaintiff need only be an *intended* beneficiary, rather than a member of the class that Congress wanted *especially* to benefit. Siegel, *supra* note 29, at 1100-01.

prohibition was enacted for the special benefit of public employers, courts should focus more on the other requirement for an implied cause of action, i.e., that it further the policies behind and enforcement of the statute.⁷⁶

The most obvious case in which implying a damage action in favor of public employers would not further the policies behind a statute prohibiting public employee strikes is where the implied action actually would conflict with the statutory provisions. In such a case, the legislation precludes the implied remedy.⁷⁷ Such conflict can arise in several ways. The most blatant example is where the implied action would directly interfere with the implementation of the statutory provisions. In *Lamphere*, the Michigan Supreme Court believed that it averted such a conflict by denying a damage action to a public employer.⁷⁸ Under the Michigan Public Employment Relations Act (PERA), public employees who were dismissed for participating in a strike could be reinstated if the Michigan Employment Relations Commission (MERC) determined that the public employer had precipitated the strike by engaging in an unfair labor practice.⁷⁹ The *Lamphere* court feared that if employers were permitted to bring damage suits against striking unions, the unions probably would defend by alleging that their employers had committed an unfair labor practice.⁸⁰ To rule on this defense, stated the *Lamphere* court, would be to infringe on MERC's exclusive authority to determine what actions by employers constitute unfair labor practices.⁸¹ Allowing courts to entertain damage actions by public employers might result in conflicting decisions by MERC and the courts on the issue of unfair labor practices, and would erode MERC's exclusive jurisdiction over this issue.⁸² Because of this potential conflict, the court decided that the public employer could not bring a damage suit against the union.

In addition to conflicting with other statutory provisions, implying a damage action for public employers under a statute prohibiting public employee strikes also could conflict more subtly with the policies behind the statute.⁸³ The *Lamphere* court foresaw this kind of conflict. It stated that "the

⁷⁶ It has been suggested that the "especial beneficiary" requirement is a dispensable element of the implication test, "for the relevant consideration should be whether and on what basis implication is warranted, not who is bringing suit, provided that such suits have no negative effects on the class that the statute was designed to protect." *Id.* at 1101-02.

⁷⁷ If it conflicts with the statutory provisions, then the legislature could not have wanted the action to be available, and legislative intent governs the issue. *See, e.g.,* *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 101 S. Ct. 2615, 2622 (1981); *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 705-07 (1st Cir. 1977); *Phoenix Ref. Co. v. Powell*, 251 S.W.2d 892, 896 (Tex. Civ. App. 1952) (courts seek to carry out the underlying statutory policies they believe the legislature must have had in mind) "The courts have been careful not to exceed the purpose which they attribute to the legislature." *W. PROSSER, HANDBOOK OF THE LAW OF TORTS* § 36 at 192 (4th ed. 1971).

⁷⁸ 400 Mich. 104, 119, 252 N.W.2d 818, 825 (1977).

⁷⁹ *Id.* at 117-18, 252 N.W.2d at 824.

⁸⁰ *Id.* at 119, 252 N.W.2d at 825.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See, e.g.,* *Mezullo v. Maletz*, 331 Mass. 233, 118 N.E.2d 356 (1954). In *Mezullo*, the

ultimate legislative goal [of the statute regulating public school employees] is to achieve a prompt, fair resolution of disputes while avoiding the disruption of the educational process."⁸⁴ The court feared that if a damage action were implied under the statute, strike settlements would be delayed while the courts resolved multiple claims and counterclaims.⁸⁵ These multiple claims, stated the court, would result in a "labor law logjam" in the courts, and also would aggravate labor-management disputes.⁸⁶ These potential results of public employer damage suits, concluded the court, militated strongly against granting a damage action to public employers.

The *Lamphere* court's decision to deny the public employer a damage action against the union may well be correct insofar as it is based on statutory interpretation and the possibility of conflicts between the rulings of MERC and the courts. The court's view that an employer damage action would conflict with the policies behind the public employee legislation, however, is less persuasive. First, the fear of a "labor-law logjam" seems unfounded, since there has been a dearth of employer damage suits even in states which expressly permit public employers to sue public unions for damages from illegal strikes.⁸⁷ Furthermore, the argument that employer damage actions will exacerbate labor-management disputes, while it has found some support,⁸⁸ is also flawed. Public employers should have the option of taking measures that may adversely affect labor-management relations. An employer understands the relationship it has with its employee's union and can best weigh the considerations involved in commencing a damage suit. In some cases the benefits an employer derives from a damage suit may outweigh the possible adverse effects. For example, in some circumstances an employer might feel that bringing suit would provide the showing of strength it needs in order to deal more effectively with the union.⁸⁹ Furthermore, other remedies expressly provided by statute also might aggravate a labor-management dispute. The Michigan PERA, for example, provides for the discharge of striking employees.⁹⁰ If exercised, this remedy

plaintiff sought to have a civil action implied under a penal statute forbidding wrongful commitment to mental institutions. The court refused to imply an action since implication would conflict with the legislative goal of immunizing doctors from civil liability when commitment was court-ordered. *Id.* at 239-40, 118 N.E.2d at 360. *See also* *Teale v. Sears, Roebuck & Co.*, 66 Ill. 2d 1, 359 N.E.2d 473 (1977): "The carefully limited civil remedies authorized by these statutes demonstrate, in our opinion, that it would be incongruous to derive by implication a right to recover unlimited damages for a violation of this statute." *Id.* at 6, 359 N.E.2d at 475; Stanford Note, *supra* note 29, at 1260-61 (in implying causes of action, courts must be careful not to thwart legislative purposes).

⁸⁴ 400 Mich. 104, 130, 252 N.W.2d 818, 830 (1977).

⁸⁵ *Id.* at 131, 252 N.W.2d at 830.

⁸⁶ *Id.*

⁸⁷ No cases involving employer damage suits have been found in the eight states that statutorily authorize an employer damage remedy. *See supra* note 24.

⁸⁸ *See supra* text and notes at notes 17 and 22.

⁸⁹ *See* Note, *Parent Union Liability for Strikes in Breach of Contract*, 67 CAL. L. REV. 1028, 1033 (1979) (discussing the analogous situation of why a private sector employer might want to bring a damage suit against the union).

⁹⁰ MICH. STAT. ANN. § 17.455(6) (Callaghan 1975).

also could intensify worker discontent and prolong a strike. It is suggested that the availability of a private action for employers would be no more damaging to employment relations than existing remedies.

Moreover, even if allowing employers to sue public employee unions would exacerbate labor-management disputes in particular cases, implying such a damage action still would effectuate the primary goal of the statutory strike prohibition by preventing future strikes.⁹¹ In some cases, however, a strike prohibition may be only part of an elaborate statutory scheme which prescribes a certain balance of power between public employers and public employees. Under such statutes, the strike prohibition may not be categorical, and implying an employer damage action would upset the legislatively established balance of power between public employers and employees.⁹² A damage action could give public employers a weapon that the legislature never intended the employer to have and may subject the unions to more liability than the legislature intended.⁹³ A court must determine, therefore, whether the state legislature intended to give priority to the prohibition of strikes or to the maintenance of a certain balance in labor-management relations.

To conclude that in regulating public employees the legislature was more concerned with striking a balance in employer-employee relations than with preventing strikes, however, "implies that the legislature intended that . . . public employee strikes [would] play a role in the bargaining relationship."⁹⁴ Generally, however, the prohibition of public employee strikes is an unconditional part of the legislatively established balance of power.⁹⁵ Where a state's legislation indicates such an absolute and unconditional prohibition, a court should try to enforce that prohibition. An implied damage action for the public employer would serve that goal. Only where legislation provides that statutory sanctions against a striking union are conditional upon other factors could this balance of power between public employers and employees take precedence over the prohibition of strikes.⁹⁶

⁹¹ See *supra* text and notes at notes 19-20.

⁹² Public employer damage suits, "far from promoting a balance of bargaining between the parties, would probably only aggravate any existing imbalance." Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 293 (1969); see also *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 131, 252 N.W.2d 818, 830 (1977).

⁹³ *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 131, 252 N.W.2d 818, 830 (1977).

⁹⁴ Harvard Note, *supra* note 44, at 1320.

⁹⁵ See Arouca, *supra* note 20, at 816-17, dealing with the illegality of railway strikes, and the possibility of employer damage suits. Arouca points out that the giving or withholding of the right to strike is part of the balance of power intended by the legislature between labor and management; the implication is that, in doing all they can to prevent illegal strikes, the courts are furthering the legislatively designed balance of power between labor and management, even if this balance results in hostility between the parties. *Id.*

⁹⁶ For example, under the Michigan legislation, public teachers who strike because of the employer's unfair labor practice may escape the statutory sanction of dismissal. *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 117-18, 252 N.W.2d 818, 824 (1977). Thus, the lower court in *Lamphere* held that "the strike prohibition alone is not conclusive as to

In deciding whether to imply a public employer damage action from the statute, a court must carefully examine the legislative scheme dealing with public employees. Absent clear evidence of legislative intent to provide or deny the action, a court should be decidedly receptive to implication where the legislation was intended to benefit public employers and where the remedies expressly provided by the statute are inadequate to protect public employers and prevent public employee strikes. The widespread occurrence of public employee strikes demonstrates the general inadequacy of the express statutory remedies. Thus, since a damage action will help rectify the harm illegally inflicted on the employers and deter the unions from violating the strike prohibition, such actions for employers usually will be warranted. An exception to the general desirability of a public employer damage action is where the legislative scheme carefully balances the rights of public employers and employees and punishment for illegal strikes is conditional or discretionary. In such instances, a court must determine whether the legislative balance of power should take precedence over the strike prohibition.

3. The Implication of a Third Party Damage Action

In deciding whether to imply a damage action for a third party harmed by an illegal strike, a court should employ the same analysis as when a public employer requests an implied action. The first step in this analysis is to determine whether the state legislature, in prohibiting public employee strikes, intended to grant third parties a damage action for violations of this prohibition. In *Jamur Productions Corp. v. Quill*⁹⁷ the New York Supreme Court held that it would not imply an action without some evidence of legislative intent to do so.⁹⁸ *Jamur* involved a damage suit by third parties who had suffered losses because of an illegal strike by public transit workers. The court refused to imply a damage action because the legislature had provided neither expressly nor implicitly for such an action. According to the court, "[t]he failure to act must be regarded as an expression of public policy."⁹⁹

Other courts have taken a less restrictive approach to implied actions. Where the statutory language and legislative history have yielded no evidence of legislative intent, these courts have looked to the two general criteria for the implication of remedies.¹⁰⁰ To satisfy the first criterion, a third party must be a member of the class for whose "especial benefit" the strike prohibition was enacted.¹⁰¹ For example, in those states which preface their legislation

the rights of the parties. . . ." and "is but only one element that need be considered in determining the respective rights and duties of the public employer and the public employees." *Lamphere Schools v. Lamphere Fed'n of Teachers*, 67 Mich. App. 331, 336, 240 N.W.2d 792, 796 (1976), *aff'd*, 400 Mich. 104, 252 N.W.2d 818 (1977).

⁹⁷ 51 Misc.2d 501, 273 N.Y.S.2d 348 (1966).

⁹⁸ *Id.* at 506, 273 N.Y.S.2d at 352-53.

⁹⁹ *Id.* at 506, 273 N.Y.S.2d at 353.

¹⁰⁰ See *supra* text and notes at notes 41-42.

¹⁰¹ See *supra* text and note at note 41.

regulating public employees with references to the public good,¹⁰² a third party should be able to establish that the strike prohibition was enacted for the benefit of members of the public. Even where the public employee legislation does not explicitly state that it is enacted for the public good, it is arguable that by enacting a statute prohibiting strikes, the legislature intended to protect the public. It is the public which often suffers the greatest harm from public employee strikes.¹⁰³ Thus, it is logical to assume that injury to the public is the harm which the legislature intended to avert by prohibiting strikes. Even if the legislature prohibited strikes for the benefit of the public, however, many courts will imply an action only from statutes which benefit a particular group or class of people and not from statutes enacted for the benefit of the general public.¹⁰⁴ The New York Supreme Court adopted this restrictive reading of the "especial benefit" requirement in *Jamur*. In refusing to imply a third party damage action, the *Jamur* court stated that "[w]hen the statute merely defines, in the interest of the general public, the degree of care which shall be exercised under specified circumstances, it does not 'create' a new liability."¹⁰⁵

Some courts have rejected this particular class/general public distinction and have implied actions from statutes enacted for the benefit of the general public.¹⁰⁶ This approach seems logical, because members of the general public are only potentially within the class of beneficiaries; only those who actually suffer the harm which the statute is intended to prevent can state a cause of action based on the statute.¹⁰⁷ Nonetheless, many courts do make the particular class/general public distinction. Thus, a third party's success in obtaining an implied damage action will depend on whether the particular court makes such a distinction.

The second criterion for the implication of a third party damage action is that the implied action must further the policies behind and the enforcement of

¹⁰² See, e.g., FLA. STAT. ANN. § 447.201 (West 1981); IOWA CODE ANN. § 20.1 (West 1978); MINN. STAT. ANN. § 179.61 (Callaghan Supp. 1981); N.Y. CIV. SERV. LAW § 200 (McKinney 1973); TEX. REV. CIV. STAT. ANN. art. 5154c-I, § 2(b)(1) (Vernon Supp. 1981); WASH. REV. CODE ANN. § 41.56.430 (West Supp. 1981).

¹⁰³ See *supra* text and note at note 43.

¹⁰⁴ *Odell v. Humble Oil & Ref. Co.*, 201 F.2d 123, 127 (10th Cir.), *cert. denied*, 345 U.S. 941 (1953); *Southern Mining Co. v. Saylor*, 264 Ky. 655, 664-65, 95 S.W.2d 236, 241 (1936); *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 305, 200 N.E. 824, 829 (1936); *Jamur Prods. Corp. v. Quill*, 51 Misc.2d 501, 505-06, 273 N.Y.S.2d 348, 352-53 (1966).

¹⁰⁵ 51 Misc.2d 501, 506, 273 N.Y.S.2d 348, 353 (1966) (citing *Schmidt v. Merchants Despatch Transp. Co.*, 270 N.Y. 287, 305, 200 N.E.2d 824, 829 (1936)).

¹⁰⁶ *Meshbesh v. Channellene Oil & Mfg. Co.*, 107 Minn. 104, 108, 119 N.W. 428, 429 (1909); *Abounader v. Strohmeier & Arpe Co.*, 243 N.Y. 458, 464, 154 N.E. 309, 311 (1926). See also *Costello v. City of Wheeling*, 145 W. Va. 455, 458-59, 117 S.E.2d 513, 515-16 (1960) (permitting private cause of action for violations of statute requiring sidewalks to be in good repair); *Caso v. Gotbaum*, 67 Misc.2d 205, 210, 323 N.Y.S.2d 742, 748-49 (1971) (questioning the particular class/general public distinction: "Can one distinguish penal statutes of 'particular benefit' from those for the benefit of the public at large? Should such a concept exist? Is the whole approach anything different than seeking to find in the books an existing base for a legal duty, even in a penal statute?").

¹⁰⁷ Harvard Note, *supra* note 44, at 1317.

the statute. Obviously, this criterion is not met if the damage action would conflict in some way with other statutory provisions. In *Burke & Thomas, Inc. v. International Organization of Masters, Mates & Pilots*¹⁰⁸ the Washington Supreme Court found such a conflict. *Burke* involved a damage suit brought by third parties who had suffered losses as a result of an illegal strike by public ferry workers.¹⁰⁹ Although the third parties sued under a novel tort theory rather than under the statute,¹¹⁰ the court's reasoning in denying the third parties' request for relief would apply as well to a request for the implication of a damage action. The court claimed that third party damage suits would interfere with the authority of the State Public Employment Relations Commission to resolve labor disputes.¹¹¹ The court asserted that union liability to third parties could nullify the effect of the Commission's resolution of disputes by imposing on the unions large penalties which the Commission had not intended.¹¹² Thus, the court refused to establish a new tort action because of that conflict.

In addition to the possibility of a direct conflict between a third party damage action and the Commission's authority to resolve disputes, the court contended that a third party damage action would hinder the effectuation of the policies behind the public employee relations legislation. Like the *Lamphere* court,¹¹³ the *Burke* court perceived the strike prohibition in the Washington statute as only one aspect of a legislative scheme that was intended to accommodate the rights of both public employers and employees.¹¹⁴ To the *Burke* court, the creation of implied actions in favor of third parties injured by public employee strikes would upset this legislatively established balance of power.¹¹⁵ While acknowledging that both the Washington statute and the common law prohibited public employee strikes,¹¹⁶ the court held that the overall goal of the state's public labor legislation was to achieve and maintain labor peace by carefully balancing labor-management relations.¹¹⁷ The court therefore maintained that the comprehensive legislation in the area warranted judicial restraint.¹¹⁸ The court pointed out that a third party damage action would disrupt the legislative balance¹¹⁹ and complicate the bargaining process,¹²⁰ since the unions would insist on contractual provisions whereby the public employers would indemnify them against third party damage awards.¹²¹

¹⁰⁸ 92 Wash.2d 762, 600 P.2d 1282 (1979).

¹⁰⁹ *Id.* at 763-64, 600 P.2d at 1283-84.

¹¹⁰ *Id.* at 770, 600 P.2d at 1287.

¹¹¹ *Id.* at 774-75, 600 P.2d at 1289.

¹¹² *Id.*

¹¹³ See *supra* text and notes at notes 84-86, 96, 101.

¹¹⁴ *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash.2d 762, 770-72, 600 P.2d 1282, 1287-88 (1979).

¹¹⁵ *Id.* at 772-73, 600 P.2d at 1288.

¹¹⁶ *Id.* at 770, 600 P.2d at 1287.

¹¹⁷ *Id.* at 771, 600 P.2d at 1287.

¹¹⁸ *Id.* at 772-74, 600 P.2d at 1287-88.

¹¹⁹ *Id.* at 772-73, 600 P.2d at 1288.

¹²⁰ *Id.* at 775, 600 P.2d at 1289-90.

¹²¹ *Id.* at 775, 600 P.2d at 1290. The court cited *Lamphere Schools v. Lamphere Fed'n*

The *Burke* court's contention that a third party damage action would upset the legislatively established balance in public employer-employee relations has some merit. When a state's labor legislation represents a careful balancing of the interests of labor and management, the courts should hesitate to imply actions based on the statute's prohibition of strikes.¹²² Even where such careful balancing is present, however, as long as the strike prohibition is unconditional other countervailing considerations may favor the implication of a third party damage action.¹²³ First, even if the sanctions available to public employers generally provide adequate deterrence against illegal strikes, these sanctions often cannot prevent great damage from being inflicted on the public if the union chooses to strike despite the sanctions. If the legislature prohibited public employee strikes in order to protect the public, then the members of the public should have a remedy for harm inflicted on them through a union's illegal actions. Moreover, a damage action would further the policies behind the strike prohibition by compensating third parties for harm that the statute was intended to avert and by deterring public unions from striking.¹²⁴

Indeed, an implied third party damage action is a more effective deterrent against illegal public employee strikes than is an employer damage action. For various reasons, a public employer may be reluctant to pursue any remedy against the union, including a damage action.¹²⁵ The employer may wish to end the strike quickly and forego all sanctions.¹²⁶ In that case, a third party damage suit, a sanction the employer is powerless to waive, might be the only way to penalize the union and deter it from striking again.¹²⁷ Admittedly, although a third party damage suit might prevent some strikes, it might prolong the strikes that do occur.¹²⁸ A union might be reluctant to settle the strike unless the public employer agreed to indemnify the union against potential third party suits.¹²⁹ Where the potential liability of the union was substantial,

of Teachers, 400 Mich. 104, 131, 252 N.W.2d 818, 830 (1977) as authority for the proposition that alternative tort remedies would delay the resolution of strikes. *Id.*

¹²² See Stanford Note, *supra* note 29, at 1253.

¹²³ As one commentator stated, "[i]f, for example, the guarantee of the right to collective bargaining is part of a larger scheme controlling labor-management relations, allowing a private action may interfere with the broader goals of the system. On the other hand, a private action may be essential to achieving the broader purpose." *Id.* at 1259. Arguably, the broad purpose of a state's public employee legislation is to establish a balance of power between public employer and employees in which the right to strike plays no part. A third party damage action may provide the deterrent effect needed to achieve this goal.

¹²⁴ See *Caso v. District Council 37, AFSCME*, 43 A.D.2d 159, 162, 350 N.Y.S.2d 173, 176 (1973) where the court noted that the purposes of the state's public employee legislation and strike prohibition, "as well as the general welfare of the public, are best served by permitting appropriate redress for violation of the law." *Id.* The court, therefore, permitted third parties to bring a tort action against an illegally striking public employee union.

¹²⁵ See *supra* text and notes at notes 14, 17.

¹²⁶ See *supra* text and note at note 17.

¹²⁷ See *supra* text and note at note 18.

¹²⁸ See *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 131, 252 N.W.2d 818, 830 (1977); *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash.2d 762, 600 P.2d 1282, 1290 (1979); Harvard Note, *supra* note 44, at 1320.

¹²⁹ See *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash.2d 762, 775, 600 P.2d 1282, 1290 (1979); see also Harvard Note, *supra* note 44, at 1320.

the public employer would be equally reluctant to indemnify the union.¹³⁰ Yet a strike settlement also could be delayed while the parties bargained over the employer's use of express statutory remedies. Furthermore, the public employer's reluctance to indemnify the union could help to deter the union from striking, since even if the employer agreed to indemnify, this agreement probably would be at the price of reducing other concessions made to the union.¹³¹ Thus, the prospect of a strike would be less attractive to the union than if there were no third party damage suits and consequently no indemnification agreements.¹³²

In summary, the two requirements for implication of a third party damage action from a statute prohibiting public employee strikes are that the strike prohibition has been enacted for the special benefit of the public and that the implied remedy will further the policies behind the statute. The first requirement poses the greatest difficulty for third parties, since many courts will not imply an action from statutes enacted for the benefit of the general public. Regarding the second requirement for implication, however, strong arguments can be made as to the importance, and even the need, of a third party damage action. As long as the statute *unconditionally* prohibits public employee strikes, a third party damage action will effectuate the purposes of the statute by compensating members of the public for harm inflicted on them and by preventing future violations of the statutes.

This note suggests one *caveat* to the preceding conclusions concerning implied damage actions for employers and third parties. Although implying a damage action may further the purposes of statutes prohibiting public employee strikes, the legislative scheme dealing with public employee labor relations may be of such a nature as to indicate that the legislature has preempted the area. In that case, the legislation would preclude not just the implication of damage actions, but also the use of any tort or contract remedies otherwise available to public employers and third parties.¹³³

B. Preemption of Remedies Not Expressly Provided By Statute

The preemption doctrine is a federal doctrine which generally holds that certain matters are of such national concern as to demand national uniformity of regulation.¹³⁴ Thus, federal laws on such matters preempt, or take precedence over, state laws concerning that matter. In some cases the state laws on the matter are only preempted to the extent that they actually conflict with the federal legislation.¹³⁵ In other cases, however, federal occupation of

¹³⁰ Harvard Note, *supra* note 44, at 1319 (A public employer "would be less likely to 'waive' privately recoverable damages by means of an indemnification agreement, since such indemnification would impose positive costs on the governmental unit.").

¹³¹ *Id.* at 1319 n.50.

¹³² *Id.*

¹³³ See *infra* text and notes at note 134-66.

¹³⁴ See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 267-70 (1978); Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515.

¹³⁵ NOWAK, *supra* note 134, at 267.

the field may be so complete as to preclude even non-conflicting state laws on the issue.¹³⁶ In the context of both public employer and third party damages suits, some public employee unions have used reasoning analogous to federal preemption concepts to argue that a state's public employee labor legislation occupies the field and provides the exclusive measures available against public employee unions which illegally strike.¹³⁷

1. Preemption Arguments and Public Employer Suits

In holding that a public employer could not bring a damage suit against an illegally striking public union, the *Lamphere* court explicitly relied on an analogy to federal preemption of the field of private sector labor relations.¹³⁸ The Michigan Supreme Court noted that the National Labor Relations Board (NLRB) has exclusive jurisdiction in ruling on unfair labor practice charges in the private sector, which precludes courts from hearing tort claims based on the same alleged unfair labor practice.¹³⁹ By analogy, the court reasoned that the Michigan Employment Relations Commission's (MERC) authority to hear unfair labor practices charges arising from public employee strikes precluded Michigan courts from entertaining damage suits based on such strikes.¹⁴⁰ The potential conflict in rulings by MERC and the courts on the same unfair labor practice charge was one basis for a finding of preemption.¹⁴¹ The court held, however, that even absent such conflict, the state labor legislation precluded public employer damage suits because the legislature intended to provide the exclusive remedies for illegal public employee strikes.¹⁴² The court found such a purpose behind the legislation.¹⁴³

If there is no state entity analogous to the NLRB, a public employee union nonetheless could argue that the very comprehensiveness of a state's statutory scheme indicates a legislative intent to preempt the field and provide the exclusive remedies for public employers in the event of an illegal strike.¹⁴⁴ One court has rejected such an argument, holding that it would liberally construe the state public employee labor legislation and permit any employer cause of

¹³⁶ *Id.*

¹³⁷ See *infra* text and notes at notes 138-46.

¹³⁸ 400 Mich. 104, 119-24, 252 N.W.2d 818, 825-26 (1977).

¹³⁹ See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246 (1959). For exceptions to this exclusive jurisdiction, see PROSSER, *supra* note 77, § 130 at 968-69.

¹⁴⁰ *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 118-19, 252 N.W.2d 818, 824-25 (1977).

¹⁴¹ *Id.* at 119, 252 N.W.2d at 825.

¹⁴² *Id.* at 124, 252 N.W.2d at 827.

¹⁴³ *Id.* at 113-14, 252 N.W.2d at 822. An exception to the NLRB's preemptive authority arises where union violence occurs. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247-48 (1959). In *San Diego* the Court held that the compelling state interest of maintaining peace permits state courts to hear tort claims based on the violence. *Id.* at 247. Since *Lamphere* involved a peaceful strike, the court found it unnecessary to decide whether such an exception to MERC's authority existed. 400 Mich. 104, 123 n.6, 252 N.W.2d 818, 826 n.6 (1977).

¹⁴⁴ Jackson, *supra* note 19, at 86.

action which did not directly conflict with the legislation.¹⁴⁵ Thus, where the state statute has created no entity analogous to the NLRB, it appears that courts will not embrace as willingly an analogy to federal preemption of private sector labor relations.¹⁴⁶

Another issue raised by the preemption doctrine is its applicability to breach of contract remedies. The analogy to federal preemption of private sector labor relations provides support for a finding that contract remedies are not preempted by state legislation. Section 301 of the Labor-Management Relations Act (LMRA)¹⁴⁷ permits federal court damage actions for breaches of labor contracts even if the breach also constitutes an unfair labor practice over which the NLRB ordinarily has sole jurisdiction.¹⁴⁸ The inference can be drawn from the enactment of section 301 that the need for preemption of the area of labor relations does not outweigh the necessity of permitting parties to vindicate their contractual rights. The *Lamphere* court drew a different inference from section 301, however, and stated that even contract remedies were precluded by the legislation.¹⁴⁹ The court reasoned that the legislature could have enacted a provision analogous to section 301 had it wished to provide contract remedies to public employers.¹⁵⁰ The absence of a statutory provision analogous to section 301 of the LMRA however, does not necessarily indicate that the legislature wished to preclude actions for breach of contract. It was necessary for Congress to enact section 301 because the clearly preemptive nature of federal labor legislation otherwise would have precluded any judicial interference with the NLRB's authority to implement uniform national labor policies.¹⁵¹ Thus, unless a state legislature has *clearly* indicated that the legislation precludes *all* other remedies, a court should permit breach of contract suits by public employers as long as such suits do not conflict with statutory provisions.¹⁵²

¹⁴⁵ *Fraternal Order of Police, Lodge 44 v. City of Dayton*, 2 Pub. Bargaining Cas. (CCH) ¶ 20,287 at 20,950 (Ohio Ct. Com. Pl. 1976).

¹⁴⁶ See also *Caso v. District Council 37, AFSCME*, 43 A.D.2d 159, 161-62, 350 N.Y.S.2d 173, 176 (1973) (court rejected argument that state's comprehensive public employee legislation precluded all other remedies).

¹⁴⁷ 29 U.S.C. § 185 (1976).

¹⁴⁸ *Id.*

¹⁴⁹ 400 Mich. 104, 123, 252 N.W.2d 818, 827 (1977).

¹⁵⁰ *Id.* It seems inconsistent with a preemption argument, however, for the court to state that all remedies not provided by statute are precluded *except* for the remedy of injunction, since the courts "recognize[d] that this remedy presents the best possible means for assuring the uninterrupted delivery of vital educational services to the *public*." *Id.* at 128, 252 N.W.2d at 829. If the legislature truly intended to preempt the area, the court would not be free to decide on additional remedies. See *supra* text and note at note 134.

¹⁵¹ See *supra* text and note at note 139.

¹⁵² See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620 n.4 (1978); *Goldstein v. California*, 412 U.S. 546, 554-55 (1973). See also NOWAK, *supra* note 134, at 270 (Supreme Court recently has refused to find preemption unless either Congress has explicitly stated its intention to preempt or there is a distinct possibility of conflict). The legislature might have considered it unnecessary to provide expressly for a remedy as basic as a contract remedy. For a discussion of the importance of a contract remedy, see *infra* text and notes at notes 320-27; see also Jackson, *supra* note 19, at 87.

In general, courts should require clear evidence of a legislative intent to preempt the area of public employee labor relations before it concludes that all remedies for illegal strikes not provided in the statute are precluded. Lacking such clear evidence, and absent any conflict between the proposed damage action and the statutory provisions, the court should permit public employers to bring damage suits against public unions on available tort and contract theories.

2. Preemption Arguments and Third Party Suits

A possible bar to third party damage suits, as well as to public employer damage suits, is a legislative intent to preempt the area and provide the exclusive remedies against illegally striking public employee unions. Had the plaintiff in *Lamphere* been a third party, rather than the public employer, the court's language indicates that the results would have been the same. The court held that only those remedies expressly provided in the statute could be invoked against an illegally striking employee union.¹⁵³ The Michigan statute contained no third party remedies.¹⁵⁴

Other courts have been less receptive to the argument that a state's labor legislation preempts the area and precludes all other remedies. In *Caso v. District Council 37, AFSCME*,¹⁵⁵ for example, the New York Supreme Court rejected the contention of the public employee union that New York's Taylor Law, dealing with public employee relations, provided the exclusive remedies against public unions which violated the Taylor Law.¹⁵⁶ *Caso* was a damage suit brought by municipalities whose beaches were polluted when public employees at a sewage treatment plant illegally went on strike.¹⁵⁷ Although the Taylor Law¹⁵⁸ comprehensively regulated the public employer-employee relationship in New York, the court held that the law did not govern public employee relations with third parties, such as the plaintiff.¹⁵⁹ Rather than view the comprehensiveness of the Taylor Law as indicative of a legislative intent to preempt the regulation of public employee relations, the court chose to construe the statute liberally to effectuate its purpose.¹⁶⁰ The court viewed as exclusive only those remedies which the legislature expressly designated as such.¹⁶¹ The court claimed that if the statutory remedies were regarded as exclusive, "the Taylor Law would become an impenetrable shield of immunity for public employees who may illegally cause serious damage to persons or parties other than their employer."¹⁶² The municipalities therefore were permitted

¹⁵³ 400 Mich. 104, 123-24, 252 N.W.2d 818, 827 (1977).

¹⁵⁴ See MICH. STAT. ANN. § 17.455(6) (Callaghan 1975).

¹⁵⁵ 43 A.D.2d 159, 350 N.Y.S.2d 173 (1973).

¹⁵⁶ *Id.* at 161-62, 350 N.Y.S.2d at 176-77.

¹⁵⁷ *Id.* at 160-61, 350 N.Y.S.2d at 175.

¹⁵⁸ N.Y. CIV. SERV. LAW §§ 200-14 (McKinney 1973 & Supp. 1981).

¹⁵⁹ 43 A.D.2d at 162, 350 N.Y.S.2d at 176.

¹⁶⁰ *Id.* at 163, 350 N.Y.S.2d at 178.

¹⁶¹ *Id.* at 162, 350 N.Y.S.2d at 177.

¹⁶² *Id.*

to bring a common law action in nuisance against the union,¹⁶³ although the Taylor Law did not expressly provide for this remedy.

In *Burke & Thomas, Inc. v. International Organization of Masters*, the Washington Supreme Court implicitly took the same approach towards Washington's labor legislation. Despite the comprehensiveness of the legislative scheme regulating public employees, the court indicated that third parties could bring applicable tort or contract actions against a union striking in violation of the statutory prohibition.¹⁶⁴ The court advocated judicial restraint, however, in creating *new* tort remedies for third parties against illegally striking public employee unions.¹⁶⁵ Thus, the court implicitly acknowledged that, however comprehensive the state public employee relations legislation, it did not preempt traditional tort and contract remedies for third parties.

For reasons even more compelling than those presented in the context of public employer suits, courts should not assume that in enacting public employee legislation the legislature intended to preempt the area of public employee relations and provide the exclusive remedies available in the event of an illegal public employee strike. For the most part, the express remedies provided by the applicable state statute will be for the public employer's use only.¹⁶⁶ Consequently, while a finding of preemption would merely limit public employers to the statutory remedies, it probably would totally deprive third parties of a remedy. The preemption of the entire area of public employee relations, such that public employers and third parties are precluded from bringing tort and contract actions against public unions, could deprive public employers and third parties of any redress for harm illegally inflicted on them by public unions. Therefore, a court should require clear evidence that the legislature intended such a result.

3. No Implication or Preemption of Remedies

Upon examining a state's legislative scheme concerning public employees, a court may determine that, while the statute prohibiting strikes does not afford a basis for the implication of a damage action, neither does the statutory scheme call for a finding of preemption. The *Burke* decision exemplifies this approach to a state statutory scheme. In *Burke*, the Washington Supreme Court refused to create a new tort action,¹⁶⁷ but indicated that traditional tort and contract remedies still were available against public employee unions which illegally strike.¹⁶⁸ If a court adopts this approach, a public employer or third party may state a cause of action against an illegally striking union under an existing tort or contract theory.

¹⁶³ *Id.* at 163, 350 N.Y.S.2d at 178.

¹⁶⁴ The third parties in *Burke* could not recover only because they did not allege facts sufficient to state a cause of action in tort or contract. 92 Wash.2d 762, 767-68, 600 P.2d 1282, 1285-86 (1979).

¹⁶⁵ *Id.* at 770, 600 P.2d at 1287-88.

¹⁶⁶ See *supra* text and notes at notes 8-12.

¹⁶⁷ 92 Wash.2d 762, 776-77, 600 P.2d 1282, 1290 (1979).

¹⁶⁸ See *supra* text and note at note 164.

II. TORT ACTIONS FOR PUBLIC EMPLOYERS AND THIRD PARTIES

Where a state statutory scheme does not preempt the area of public employee relations,¹⁶⁹ public employers and third parties can sue illegally striking public employee unions under several theories of tort liability. The first such tort theory is tortious interference with business relations. This general tort action encompasses three slightly different torts:¹⁷⁰ tortious inducement of breach of contract, tortious interference with contract, and tortious interference with prospective advantage. Tortious inducement of breach of contract involves situations where one party intentionally, and without privilege, persuades another to breach a contractual duty owed to a third party.¹⁷¹ Tortious interference with contract occurs where a party, while not *inducing* a breach of contract, without privilege prevents the performance of a contract or makes performance more difficult.¹⁷² The tort of interference with prospective advantage extends the principle behind the two preceding torts by imposing liability for unprivileged interference with advantageous economic relations which are merely prospective or potential, and not yet sealed by a contract.¹⁷³ The difference between this and the two preceding torts is that more extensive privileges are recognized in connection with interference with advantageous economic relations.¹⁷⁴

A second tort theory of recovery against an illegally striking union is tort per se, which imposes direct liability in damages for the breach of a legal duty which results in harm to another.¹⁷⁵ Finally, a cause of action in nuisance may be available. Nuisance encompasses the two distinct torts of public and private nuisance. A public nuisance is any unreasonable interference with the exercise of rights common to all members of the public.¹⁷⁶ A private nuisance is an interference with a person's use and enjoyment of his land.¹⁷⁷ The usefulness of these tort theories will depend on the status of the plaintiff. Some of the theories, for example, will be useful primarily, or only, to either public employers or third parties. The analysis of each tort theory, therefore, will include a discussion of any such limitations on its availability.

¹⁶⁹ See *supra* text and notes at notes 134-66.

¹⁷⁰ For a general discussion of the interrelation among these three torts, see PROSSER, *supra* note 77, § 129 at 927-49. Prosser does not refer to these three torts under the general name of interference with business relations. Some courts, however, have referred generally to the torts of interference with contractual relations and prospective advantage as interference with business relations. See, e.g., *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash.2d 762, 768, 600 P.2d 1282, 1286 (1979); *Island Air, Inc. v. LaBar*, 18 Wash. App. 129, 139, 566 P.2d 972, 978 (1977).

¹⁷¹ 4 RESTATEMENT (SECOND) OF TORTS § 766 (1977).

¹⁷² *Id.* § 766 comment h.

¹⁷³ *Id.* § 766B.

¹⁷⁴ See PROSSER, *supra* note 77, § 130 at 953-69.

¹⁷⁵ *Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, Local 1050*, 72 Cal. App.3d 100, 111-13, 140 Cal. Rptr. 41, 48-9 (1977).

¹⁷⁶ 4 RESTATEMENT (SECOND) OF TORTS § 821B (1977).

¹⁷⁷ *Id.* at § 821D.

A. Tortious Interference With Business Relations

By calling a strike, a public employee union induces its member employees to breach their contractual obligation not to strike. Since public employees owe this contractual duty to the employer and not to third parties, only the public employer can sue the union for tortiously inducing a breach of contract. A tortious interference with contract, however, requires merely that the defendant make it impossible, or very difficult, for another party to perform a contractual duty.¹⁷⁸ Since public employee strikes may make it difficult or impossible for members of the public to meet their contractual obligations,¹⁷⁹ such third parties may be able to avail themselves of this tort remedy.¹⁸⁰ Public employers generally cannot sue public unions on this tort theory, however. Government entities generally have no contractual duty to provide the public with the services ordinarily rendered by the striking public employees. Thus, a strike does not prevent a public employer from fulfilling a contractual obligation to the public. Both public employers and third parties may be able to sue a union for tortious interference with prospective advantage, which is the unprivileged, intentional interference with potential advantageous economic relations not yet sealed by contract. Thus, third parties may sue under this tort theory where a strike has prevented them from entering into a business or contractual relationship, such as where a transit strike results in a loss of customers.¹⁸¹ This tort theory also may be useful to public employers in cases where the striking public employees are not under contract, or where the strike occurs after the employment contracts of the striking employees have expired. In such cases, the calling of a strike interferes with an employment relationship which, while not contractual in nature, nonetheless is economically advantageous to the public employer.

Both public employers and third parties who sue a public union for tortious interference with business relations may have more difficulty overcoming a preemption argument than if they had brought suit on some other tort theory. This added difficulty arises from the observation in the Restatement (Second) of Torts that "[o]bviously, the law of labor disputes and their effect in interfering with contractual relations has ceased to be regarded as a part of tort law and has become an integral part of the general subject of Labor Law, with all of its statutory and administrative regulations. . . ."¹⁸² This statement indicates that, in general, labor legislation precludes tort actions against a union

¹⁷⁸ PROSSER, *supra* note 77, § 129 at 935.

¹⁷⁹ Transit strikes in particular may prevent third parties from fulfilling contractual obligations.

¹⁸⁰ See *infra* text and notes at notes 216-48.

¹⁸¹ See *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 1980-81 Pub. Bargaining Cas. (CCH) ¶ 37,253 (N.Y. Sup. Ct. March 31, 1981) (motion to dismiss denied).

¹⁸² 4 RESTATEMENT (SECOND) OF TORTS 2 (1977). The reporters therefore deleted from the RESTATEMENT (SECOND) chapter 38 of the first RESTATEMENT which dealt with interference with contractual relations caused by labor disputes. *Id.*

based on interference with contractual relations. It seems logical to assume, however, that in referring to "Labor Law," the Restatement reporters had in mind federal private sector labor legislation rather than public sector legislation. While federal labor legislation generally precludes courts from hearing tort actions against private sector labor unions,¹⁸³ legislation concerning public sector unions presents a different situation. Each state has regulated the area of public employment relations as it has seen fit and, while a particular state's legislation might mandate a finding of preemption,¹⁸⁴ such is not the case in many states. Therefore, a court must look to the particular state's legislation to determine whether it precludes suits against public unions for interference with business relations. Assuming that no preemption problems exist, public employers and third parties can proceed with these tort actions based on interference with business relations. The following two subsections will discuss such tort actions and their usefulness to public employers and third parties suing public unions for damages resulting from illegal strikes.

1. Public Employer Actions Based on Interference With Business Relations

To establish a tortious inducement of breach of contract, a public employer must show that the union intentionally¹⁸⁵ induced the public employees to strike in breach of provisions in the employment contracts which prohibited strikes, and that the union was not privileged¹⁸⁶ to induce this breach of contract. Inducing a breach of contract is not tortious if it is privileged, in which case no liability attaches.¹⁸⁷ With respect to the inducement of a breach of public employment contracts, the California Court of Appeal in *Pasadena Unified School District v. Pasadena Federation of Teachers, Local 1050*,¹⁸⁸ citing California case law and the Restatement of Torts, held that public employee unions are privileged in inducing such breaches of contract where the object and means of the action are lawful.¹⁸⁹ Generally, courts have deemed the union's object to be lawful where the objective in calling the strike is to better employment conditions, such as wages, hours, or working conditions.¹⁹⁰ Even if the union's objectives are permissible, however, the use of illegal means in conducting a strike will render the calling of the strike tortious.¹⁹¹ For example, the use of violence or threats of violence, and blocking access to the employer's premises constitute illegal means of conducting a strike.¹⁹² *Pasadena* involved a

¹⁸³ See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959). For exceptions to this rule see PROSSER, *supra* note 77, § 130 at 968-69.

¹⁸⁴ See *supra* text and notes at notes 134-66.

¹⁸⁵ Negligent interference with contract generally has been held not actionable. 4 RESTATEMENT (SECOND) OF TORTS § 766C comment a (1977).

¹⁸⁶ See *id.* § 766. (Referring to "improper interference").

¹⁸⁷ See PROSSER, *supra* note 77, § 129 at 942-43.

¹⁸⁸ 72 Cal. App.3d 100, 140 Cal. Rptr. 41 (1977).

¹⁸⁹ *Id.* at 111, 140 Cal. Rptr. at 47.

¹⁹⁰ PROSSER, *supra* note 77, § 130 at 963.

¹⁹¹ *Id.* at 963-64.

¹⁹² *Id.*

strike by public school teachers. The court ruled that because such strikes are illegal in California the strike was neither a lawful object nor means of union activity.¹⁹³ Therefore, the public union had not been privileged in calling the strike and the court held that it had tortiously induced the employees' breaches of contract.¹⁹⁴

While the illegality of public employee strikes will establish the union's lack of privilege in calling a strike, the other requirement for tortious inducement of breach of contract is that the individual employment contracts contain provisions prohibiting strikes.¹⁹⁵ If the contracts do not establish the employees' obligation not to strike, the union's calling of a strike would not induce a breach of contract.¹⁹⁶ Absent an express contractual provision prohibiting strikes, however, a court may imply a no-strike provision in a public employee's employment contract. In *Pasadena*, the court followed this approach and imposed liability on the public employee union for tortiously inducing a breach of contract.¹⁹⁷ Although the employment contracts at issue did not contain no-strike provisions, the court noted that the laws and regulations delineating the school board's authority were integral parts of the board's contract with each teacher.¹⁹⁸ Since California law prohibited public teacher strikes,¹⁹⁹ stated the court, the school board had no authority to grant the employees a right to strike.²⁰⁰ The court therefore concluded that the legal duty not to strike was an implicit term of each employment contract, and the union had tortiously induced a breach of this duty by calling a strike.²⁰¹

¹⁹³ 72 Cal. App.3d 100, 111, 140 Cal. Rptr. 41, 47-8 (1977).

¹⁹⁴ *Id.* at 111, 140 Cal. Rptr. at 48. Because a strike is a form of expression, the union argued that their first amendment rights would be violated by not permitting them to call a strike. *Id.* at 108, 140 Cal. Rptr. at 45. The court rejected this contention and held the union liable for inducing an illegal strike. *Id.* It declared that "insofar as speech is involved in such [concerted labor] activity, it is only an incidence of or means to promote the commercial activities of the union by exerting economic pressure. It is subject to restraint if either the purpose or the means used to exert such economic pressure is unlawful." *Id.* The court concluded that the strong public policy against public employee strikes outweighed any restraints on free speech. The court distinguished, however, between speech involved in merely advocating the right of public employees to strike and speech involved in inducing an unlawful strike. According to the court, it could not restrain the former type of speech unless a clear and present danger were involved. *Id.* at 107-10, 140 Cal. Rptr. at 45-47.

¹⁹⁵ *Id.* at 111-12, 140 Cal. Rptr. at 48. See also *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 124 n.7, 252 N.W.2d 818, 827 n.7 (1977).

¹⁹⁶ See *supra* note 195.

¹⁹⁷ 72 Cal. App. 3d 100, 111-12, 140 Cal. Rptr. 41, 48 (1977).

¹⁹⁸ *Id.* at 112, 140 Cal. Rptr. at 48 (citing *Fry v. Board of Educ.*, 17 Cal. 2d 753, 760, 112 P.2d 229, 234 (1941)).

¹⁹⁹ See 72 Cal. App. 3d 100, 105-07, 140 Cal. Rptr. 41, 44-45 (1977).

²⁰⁰ *Id.* at 112, 140 Cal. Rptr. at 48.

²⁰¹ *Id.* at 112, 140 Cal. Rptr. at 48. See also *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934) (quoting *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall) 535, 550 (1866): "[T]he laws which subsist at the time and place of the making of a contract, . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms."); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1072-73 (D.C. Cir. 1970); *Schiro v. W.E. Gould & Co.*, 18 Ill. 2d 538, 545 165 N.E.2d 286, 290 (1960).

The *Pasadena* approach is sound and should be followed. When a public employer cannot grant the right to strike, including a no-strike provision in the employment contracts would be a mere formality. It is reasonable to hold that, by signing a public employment contract, the employees implicitly promise to act in accordance with the law by refraining from striking.²⁰²

Some courts might refuse to make the assumption that, because a state prohibits public employee strikes, public employees implicitly were promising to obey this law when they signed their employment contracts. These courts might require either an explicit no-strike provision, or at least some indication in the contracts that the public employees were obligated not to strike. For example, a contractual agreement to resort to arbitration over disputed matters could constitute an implicit agreement not to strike.²⁰³ A court's reluctance to imply a no-strike provision absent some such indication would limit the availability to public employers of actions for tortious inducement of breach of contract.

In addition to the absence of a specific no-strike obligation in the contracts, the timing of a strike also may limit the availability of tort action to public employers. The problem of timing may arise if the individual employment contracts have expired at the time of the strike. In such a situation a public employer might have difficulty stating a cause of action for two reasons. First, the union could argue that in the interim between contracts the public employees are not employed, and thus their refusal to work is not a strike. This reasoning, however, does not accord with the idea behind the strike prohibition. The term "strike" encompasses any concerted work stoppage by employees, whether or not they are under contract.²⁰⁴ Unless employees actually quit, or are considered to have quit,²⁰⁵ they are participating in a strike regardless of the expiration of their contracts. Engaging in a concerted work stoppage in order to obtain concessions from a public employer is precisely what the legislature sought to prevent in proscribing public employee strikes.²⁰⁶

²⁰² A breach of the employment contract would not arise from every conceivable illegal act, however, because most illegal acts do not arise from the employment relationship. For example, while by definition a strike cannot occur unless there is an employment relationship, a crime such as theft is illegal regardless of whether an employment relationship exists between the thief and the victim. Thus, it reasonably can be assumed that, in signing an employment contract, a public employee implicitly promises to refrain from acts which are illegal solely because the employee has entered the employment relationship.

²⁰³ See, e.g., *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 381-82 (1974).

²⁰⁴ "The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement)" BLACK'S LAW DICTIONARY 1275 (rev. 5th ed. 1979) (emphasis added).

²⁰⁵ See, e.g., *Jamur Prods. Corp. v. Quill*, 51 Misc. 2d 501, 506 n.*, 273 N.Y.S.2d 348, 352 n.* (1966). The court said that since a statutory provision provided for automatic termination of employment (with possible reinstatement as provided) upon striking, then the strikers were no longer employed as of the time they left the job. *Id.* They were therefore no longer in violation of the strike prohibition, and "[c]learly, plaintiffs cannot recover if their assertion of liability is predicated upon a claim that the members of the defendant Unions could not refuse employment by the Transit Authority." *Id.*

²⁰⁶ A strike has been defined as a work stoppage by a body of employees for the purpose of coercing their employer to agree to a demand they have made on him. *Jeffrey-DeWitt In-*

The argument that the employees are not engaging in a strike therefore is unpersuasive.

A second reason why the timing of a strike might limit an action for tortious inducement of breach of contract is that a public employer may not be able to accuse a union of inducing the breach of contracts which have expired at the time of the strike.²⁰⁷ Thus, the extent to which the timing of the public employee strike will curtail the usefulness of this tort action to employers will depend on how the court views the relationship between the employer and employees as of the time the contracts expire. If public employees who strike after their employment contracts have expired are still considered to be "employed," then they still have unwritten employment contracts with their employer. Moreover, these employees are still "employed" unless they have quit, or are deemed to have quit by engaging in a strike. A court may take the view that the implied employment contract continues on the same terms as the expired written contracts until new contracts are negotiated.²⁰⁸ Even if a court were unwilling to imply into this contract all the terms of the expired contracts, the no-strike provision logically should be an implied provision. It is the one provision that is not subject to bargaining and will be incorporated in any new contracts that are negotiated.²⁰⁹ Thus, since this no-strike provision logically could be implied, in calling a strike the union would be inducing the public employees to breach their unwritten contracts. Other courts, however, might view the situation differently. Where the employment contracts had expired, a court could conclude that a contractual relationship no longer existed between a public employer and its employees. Because no contractual relationship existed, the union would not induce a breach of contract by calling a strike. The public employer therefore would have to seek some other tort theory upon which to recover damages from the union.

Where problems of timing or lack of an express no-strike provision prevent a public employer from suing the striking union on a theory of tortious inducement of breach of contract, the public employer still could sue the union under the theory of interference with advantageous relations. This tort involves the unprivileged, intentional interference with the business expectancies of another.²¹⁰ Examples of a business expectancy would be the prospects of ob-

ulator Co. v. NLRB, 91 F.2d 134, 138 (4th Cir. 1937). There is no requirement that the employees all be under contract at the time of the work stoppage for their act to constitute a strike.

²⁰⁷ In *Lamphere Schools v. Lamphere Fed'n of Teachers*, for example, the collective bargaining agreement between the union and employer had expired at the time of the strike. The union argued that the individual employment contracts were derivative contracts which expired at the same time as the collective bargaining agreement, and, therefore, that "it was impossible for the [union] to interfere with contracts which lacked any validity." 400 Mich. 104, 127 n.7, 252 N.W.2d 818, 827 n.7 (1977). The court found it unnecessary to resolve this issue and decided the case on other grounds. *Id.*

²⁰⁸ See *O'Brien v. Board of Educ.*, 70 Ill. App. 3d 604, 607-08, 388 N.E.2d 1104, 1107 (1979); *Andersen v. Waco Scaffold & Equip. Co.*, 259 Or. 100, 105, 485 P.2d 1091, 1094 (1971).

²⁰⁹ See *supra* text and notes at notes 197-201.

²¹⁰ *Island Air, Inc. v. LaBar*, 18 Wash. App. 129, 139, 566 P.2d 972, 978 (1977); *PROSER*, *supra* note 77, § 130 at 952-53.

taining customers or employees, or some future contract.²¹¹ Thus, if a court holds that a public employee union could not have induced a breach of contract because the contracts had expired, the court nonetheless should find that the union interfered with the public employer's business expectancies regarding the employment of the employees whose contracts had expired.²¹² The public union therefore should be liable for such interference if it acted intentionally and without privilege. The calling of a strike obviously would satisfy the requirement of this tort that the interference be intentional.²¹³ Regarding the issue of privilege, as with tortious inducement of breach of contract, a public union is privileged in interfering with a prospective advantage only if the purpose and means of the interference are proper.²¹⁴ Since an illegal strike constitutes an improper means of interference, the union's calling of the strike would not be privileged.²¹⁵ A public employer therefore should succeed in suing the striking union on the tort theory of interference with prospective advantage.

Thus, in states which proscribe public employee strikes, tortious inducement of breach of contract and tortious interference with prospective advantage provide useful theories on which a public employer can sue a public employee union which calls a strike. Under both theories, the illegality of public employee strikes renders the calling of such strikes unprivileged. The availability of both theories may be limited, however, depending on how the courts resolve the problem arising where the employment contracts do not contain express no-strike provisions. If the contracts do not contain these provisions, and a court refuses to imply no-strike provisions into the contracts, then both theories of recovery will be useless to a public employer. Absent any problems from the lack of express no-strike provisions, the determination of which of the two theories of recovery is appropriate in a particular case will depend on whether the public employment contracts have expired at the time of the strike. The expiration of the contracts will make interference with prospective advantage the more viable tort theory of recovery for an employer, since the applicability of this theory does not require the existence of a contract between the public employer and employees.

2. Third Party Actions Based on Interference With Business Relations

Under the general tort of interference with business relations, the two theories of recovery applicable to third parties are tortious interference with contract and tortious interference with prospective advantage. The former tort

²¹¹ PROSSER, *supra* note 77, § 130 at 950.

²¹² See *Island Air, Inc. v. LaBar*, 18 Wash. App. 129, 140, 566 P.2d 972, 978 (1977) (Liability for unjustifiable interference with another's business relations "does not depend on whether a contractual relationship was breached.").

²¹³ It is possible that there may be liability for negligent interference; but a special duty of care probably would be a prerequisite of such liability. See PROSSER, *supra* note 77, § 130 at 952.

²¹⁴ *Id.* at 952-53, 963-64.

²¹⁵ *Id.* at 952-53 (means which are themselves unlawful result in liability for the interference).

involves the intentional, unprivileged interference with the contract of another, whereby performance of the contract is either prevented or made more difficult.²¹⁶ The latter tort involves the intentional unprivileged interference with the business expectancies of another.²¹⁷ Business expectancies are advantageous economic relationships which are merely prospective or potential, and not yet contractual in nature.²¹⁸ An example of a business expectancy would be the prospect of obtaining customers.²¹⁹ For the purposes of this discussion the distinction between the two torts is unimportant, because the same standards for finding intent and privilege to interfere apply to both torts.²²⁰ Thus, the two torts will be discussed together under the general description of interference with business relations.²²¹

If a public employee union interferes with the business relations of a third party by engaging in a strike, the union is not liable if such interference was privileged. This privilege arises only where the objective and the means of the interference are proper.²²² Such interference never could be privileged in a state which prohibits public employee strikes, since the illegality of a strike automatically would render it an improper means of accomplishing the union's objectives.²²³ Despite its lack of privilege in striking, however, the union is liable only for *intentionally* interfering with the business relations of third parties.

The problem of showing that a union had this intent to interfere has proved to be a major obstacle to third parties who have sued illegally striking public employee unions for tortious interference with business relations. The problem of proving intent prevented third parties from recovering in *Burke & Thomas, Inc. v. International Organization of Masters*. *Burke* involved an illegal strike by public ferry workers which caused economic damage to businesses needing the ferry service in order to conduct business and attract tourists.²²⁴ Some of these businesses sued the union for tortious interference with business relations.²²⁵ The Washington Supreme Court held that the third parties had not established the requisite element of intent.²²⁶ While a strike may substantially affect third parties, any detrimental effects are "incidental" results of the strike, noted the *Burke* court, rather than the union's intended goal.²²⁷ Even

²¹⁶ *Id.*, § 129 at 935.

²¹⁷ *Id.*, § 130 at 949-50.

²¹⁸ *Id.*

²¹⁹ *Id.* at 950.

²²⁰ See PROSSER, *supra* note 77, § 129 at 947 (regarding labor unions) ("[t]he existence of a contract, while it may still be a factor entitled to consideration, is no longer of paramount importance" in establishing liability for the interference.).

²²¹ See *Island Air, Inc. v. LaBar*, 18 Wash. App. 129, 139, 566 P.2d 972, 978 (1977) (referred to these two torts generally as interference with business relationships).

²²² See PROSSER, *supra* note 77, § 130 at 963.

²²³ See *supra* text and notes at notes 191-94.

²²⁴ 92 Wash. 2d 762, 763, 600 P.2d 1282, 1283-84 (1977).

²²⁵ *Id.* at 768, 600 P.2d at 1286.

²²⁶ *Id.* at 769, 600 P.2d at 1286-87.

²²⁷ 92 Wash. 2d 762, 769, 600 P.2d 1282, 1286 (1977). See also *Jamur Prods. Corp. v. Quill*, 51 Misc. 2d 501, 508-09, 273 N.Y.S.2d 348, 354-55 (1966).

though the union can foresee this incidental harm, continued the court,²²⁸ the union's primary object is to apply pressure on the public employer and thereby obtain the desired concessions.²²⁹ Since strikes are tools in the bargaining process, held the court, they "are not to be construed as demonstrating an intent to interfere with the business relations of third parties" absent evidence to the contrary.²³⁰ The court therefore concluded that the union had not had the requisite intent for tortious interference with business relations.

In *Jamur Productions Corp. v. Quill* the New York Supreme Court used reasoning similar to that of the *Burke* court. *Jamur* involved claims by third parties who had suffered economic damage as a result of an illegal strike by public transit workers.²³¹ These businesses asserted that, by striking, the public employee union had committed a prima facie tort.²³² Prima facie tort is the term used to describe the intentional, unprivileged infliction of harm on another, and, as alleged in *Jamur*, is essentially the same as the tort of interference with business relations.²³³ In *Jamur*, as in *Burke*, the court found that the element of intent was not established by the evidence.²³⁴ The *Jamur* court recognized that, at least indirectly, the union did intend to harm third parties since the public employer could "be most directly affected only by pressure brought through inconvenience foisted upon the public."²³⁵ Both courts insisted, however, that because the *direct* object of the strike was to exert pressure on the public employer, the union had not intended to interfere with the economic relations of third parties in the sense required for liability to be imposed.²³⁶ Moreover, the *Burke* and *Jamur* courts refused to impose liability on the unions for incidental harm, that is, harm not directly intended by the union, but which was certain, or substantially certain, to result from a strike.²³⁷

²²⁸ 92 Wash. 2d 762, 768-69, 600 P.2d 1282, 1286 (1977). See also *Caso v. District Council 37, AFSCME*, 43 A.D.2d 159, 163, 350 N.Y.S.2d 173, 177 (1973) ("[i]t is the very inevitability of extensive damage which led to the prohibition of public strikes.").

²²⁹ 92 Wash. 2d 762, 769, 600 P.2d 1282, 1286 (1979).

²³⁰ *Id.*

²³¹ 51 Misc. 2d 501, 503, 273 N.Y.S.2d 348, 349-50 (1966).

²³² *Id.* at 507, 273 N.Y.S.2d at 353.

²³³ Prima facie tort is broader than interference with business relations and encompasses that tort. The two torts involve the same elements — the *intentional, unprivileged* infliction of harm — yet prima facie tort is not restricted to situations involving harm to a person's business relations. See Note, *Abstaining from Willful Injury — The Prima Facie Tort Doctrine*, 10 SYRACUSE L. REV. 53, 53-54 (1958). Prima facie tort has been alleged frequently in cases involving interference with contractual relations and prospective advantage, however, *id.* at 55, and in such a context it is identical to the tort of interference with business relations.

²³⁴ 51 Misc. 2d 501, 508-09, 273 N.Y.S.2d 348, 354-55 (1966).

²³⁵ 51 Misc. 2d 501, 504, 273 N.Y.S.2d 348, 351 (1966).

²³⁶ *Id.* at 504, 509, 273 N.Y.S.2d at 351, 355 (strike directed against nobody in particular except the employer); *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash. 2d 762, 769, 600 P.2d 1282, 1286 (1977).

²³⁷ The courts pointed out that this would be an unwarranted extension of liability under the proposed torts. *Jamur Prods. Corp. v. Quill*, 51 Misc. 2d 501, 509, 273 N.Y.S.2d 348, 355 (1966); *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash. 2d 762, 770, 600 P.2d 1282, 1287 (1979). Both courts instead advocated judicial restraint, stating that such expansion of liability was the province of the legislature. *Jamur* at 509-10, 273 N.Y.S.2d at 356-57 (1966); *Burke* at 776-77, 600 P.2d at 1290 (1979). In fact, the real thrust of the opinions was the concern

The *Jamur* court expressed concern over the almost unlimited liability which would be incurred by a public union if it held that indirect, albeit intentional, harm to third persons provided a sufficient basis for liability of the public union.²³⁸

In contrast to the approach of *Burke* and *Jamur*, some courts have imposed liability for this type of incidental interference, which the defendant knew was certain, or substantially certain, to result from his action.²³⁹ The Restatement (Second) of Torts states that "[t]he interferences with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action."²⁴⁰ If this standard were applied to the facts of *Burke* and *Jamur*, the third parties probably would have prevailed. In those cases the harm to the public was certain, or at least substantially certain, to result from the transit workers strike and the ferry workers strike.

Without explicitly adopting the Restatement view that parties are liable for interference which is substantially certain to occur, the New York Supreme Court in *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*²⁴¹ reached the result called for by the Restatement. *Burns*, which, at this writing, is pending in New York while the union appeals the denial of their motion to dismiss, involves a damage suit against a public employee union filed by businesses which suffered economic injury as a result of an illegal transit strike.²⁴² In denying the motion to dismiss, the court held that "[w]ith regard to the tort action, the element of intent was sufficiently pled since, in light of the . . . common law rule against public employee strikes, it could not be maintained that the unions conduct served any socially justifiable purpose."²⁴³ This statement indicates that the court regarded the strong public policy against public employee strikes as a sufficient reason to find that the union had the requisite intent to inflict the foreseeable economic damage incurred by the plaintiffs.

Public employee unions should be liable for interference with the business relations of third parties which the unions knew would be certain, or substantially certain, to result from an illegal strike. Indeed, it would be consistent with other areas of tort law to hold a public union liable for interference which

that, by increasing the scope of liability under the torts, the courts would be contravening legislative policies and intentions regarding public employee relations. *Jamur* at 504, 506, 273 N.Y.S.2d at 351, 353 (1966); *Burke* at 771-75, 600 P.2d at 1288-90 (1979).

²³⁸ 51 Misc. 2d 501, 509, 273 N.Y.S.2d 348, 355 (1966).

²³⁹ *Keene Lumber Co. v. Leventhal*, 165 F.2d 815, 822 (1st Cir. 1948); *Sidney Blumenthal & Co. v. United States*, 30 F.2d 247, 249 (2d Cir. 1929); *Glover v. Lee, Higginson Corp.*, 95 F. Supp. 504, 506 (D. Mass. 1950); *The Poznan*, 276 F. Supp. 418, 434-35 (S.D.N.Y. 1921). See also *Titus v. Tacoma Smeltermen's Union Local No. 25*, 62 Wash. 2d 461, 465-66, 383 P.2d 504, 507-08 (1963) (recovery not permitted since the requisite intent not found, but court indicated that the harm would not be incidental if the defendant knows that the interference will result).

²⁴⁰ 4 RESTATEMENT (SECOND) OF TORTS § 766B comment d (1977).

²⁴¹ 1980-81 Pub. Bargaining Cas. (CCH) ¶ 37,253 (N.Y. Sup. Ct. March 31, 1981) (motion to dismiss denied).

²⁴² *Id.* at ¶ 38,282.

²⁴³ *Id.*

it knew was substantially certain to result.²⁴⁴ Dean Prosser and the Restatement (Second) of Torts have suggested that the interference with another's business relations should be regarded as intentional, but that its incidental character be taken into account in determining whether the interference was privileged.²⁴⁵ Under this approach, such interference generally would be found unprivileged because the illegality of public employee strikes almost certainly would outweigh the incidental character of the harm caused by such strikes. The *Burns* court seems to have used the converse of this test and regarded the unprivileged nature of the strike as a factor in determining intent. Both the *Burns* approach and the Restatement suggestion that the incidental character of the interference be a factor in determining whether the interference was privileged seem preferable to a categorical ruling that a public union is not liable for interference which was not the direct object of the strike. Where a union strikes illegally and thereby causes interference with the business relations of others that was foreseeable, and perhaps intended as a means of exerting pressure on the public employer, such interference should be regarded as intentional even though it was not the direct object of the strike.

The concern expressed in *Jamur* that public unions would incur almost unlimited liability if held responsible for interference with the business relations of third parties caused by an illegal strike should not inhibit courts from applying the standard of liability proposed by the Restatement of Torts. The tort principles of foreseeability and proximate cause would have the salutary effect of limiting the scope of a union's liability.²⁴⁶ Thus, even if the Restatement standard were applied in *Burke* and *Jamur*, the plaintiffs still may have been denied relief if the specific damage alleged was either unforeseeable or not proximately caused by the strike.²⁴⁷ The plaintiffs in tort suits also have the burden of proving they suffered damage.²⁴⁸ Thus, tort actions would be limited

²⁴⁴ See PROSSER, *supra* note 77, § 8 at 31.

²⁴⁵ *Id.*, § 129 at 942; 4 RESTATEMENT (SECOND) OF TORTS § 766 comment j, § 766B comment d (1977).

²⁴⁶ "Proximate cause" involves a question of legal policy in determining how broad the scope of liability will be for the consequences of an act. PROSSER, *supra* note 77, § 42 at 244. "Foreseeability" is likewise a question of legal policy in determining how far to extend a defendant's responsibility for the consequences of his act. *Id.*, § 43 at 250. To get to the issue of either proximate cause or foreseeability, the plaintiff must first have established that his injury was in fact caused by the defendant's act. *Id.* § 42 at 244, § 43 at 250.

²⁴⁷ There is no standard for determining in every case whether a consequence is foreseeable and proximately caused; different courts have used different approaches. See generally PROSSER, *supra* note 77, § 42-43 at 244-70. For example, *Burns*, Jackson, Miller, Summit & Spitzer v. Lindner, 1980-81 Pub. Bargaining Cas. (CCH) ¶ 37,253 (N.Y. Sup. Ct. March 31, 1981) (motion to dismiss denied) involves facts almost identical to those in *Jamur Prods. Corp. v. Quill*, 51 Misc. 2d 501, 273 N.Y.S.2d 348 (1966). Unlike the *Jamur* court, however, the *Burns* court has held, in refusing to dismiss the claim, that the damage to the businesses was a foreseeable result of the strike. 1980-81 Pub. Bargaining Cas. (CCH) at ¶ 38,282.

In *Caso v. District Council 37, AFSCME*, 43 A.D.2d 173, 177 (1973), however, the court rejected the finding of unforeseeability in *Jamur* but agreed with the result in *Jamur*. The court said that the damage to the businesses in *Jamur* was only secondarily caused by the strike, which indicates that problems of proximate cause justified the result in *Jamur*. *Id.*

²⁴⁸ A plaintiff must prove that he suffered damage, *Rager v. McCloskey*, 305 N.Y. 75,

to those in which the damage was specific and determinable, rather than speculative.

A third party may have difficulty suing a public employee union on a theory of tortious interference with business relations. The union is liable only if it was not privileged in causing the interference and if the interference was intentional. The illegality of public employee strikes will make any interference unprivileged. There is no set standard, however, for determining whether the requisite intent is established by incidental interference which the union knew was certain, or substantially certain, to result from the strike. Consequently, a third party's success with this theory of recovery will depend on the approach taken by the particular court toward intent. While two courts that have addressed the issue have resolved it unfavorably to the third parties, other courts might follow the approach suggested by the Restatement and rule that the interference to the business relations of third parties caused by a strike was intentional.

B. *Tort Per Se*

In *Pasadena Unified School District v. Pasadena Federation of Teachers, Local 1050*, the California Court of Appeal held that a public employee union which illegally strikes, thereby causing damage to a public employer, is liable for such damage "on a theory of direct liability for harm resulting from unlawful acts."²⁴⁹ The court based its holding on previous California cases which held that anyone who violates the law, thereby causing harm to another, commits a tort for which he is liable in damages.²⁵⁰ This concept of direct liability will be referred to hereinafter as "tort per se." Under this theory, the tort element of duty arises solely from the illegality of the act.²⁵¹ The defendant is liable to anyone he harms, not just those to whom he owed a preexisting duty, as long as the harm occurred through the defendant's illegal act.²⁵² Thus, in order to prevail on a tort per se claim, a public employer need not show that its employees had a contractual duty not to strike; the illegality of the strike itself, not a contractual duty, provides the basis for the claim. In addition, both public employers and third parties can bring an action in tort per se; as long as a public employer or third party can show an injury from the illegal act, he can sue on a tort per se theory.²⁵³ Since the standard of recovery in a tort per se ac-

81, 111 N.E.2d 214, 217-18 (1953); see also PROSSER, *supra* note 77, § 129 at 948 (nominal damages may be awarded if plaintiff cannot show the extent of the damage suffered).

²⁴⁹ 72 Cal. App. 3d 100, 111, 140 Cal. Rptr. 41, 48 (1977).

²⁵⁰ *Id.* at 112-13, 140 Cal. Rptr. at 48 (citing *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 606, 320 P.2d 473, 479 (1958)).

²⁵¹ 72 Cal. App. 3d 100, 112, 140 Cal. Rptr. 41, 48 (1977) (the unlawful strike is *itself* a tort).

²⁵² *Id.*

²⁵³ Essentially, where a public employee union strikes in violation of a statute, a tort per se claim based on the strike is like an implied action which does not have to satisfy the criteria traditionally required for implication. See *supra* text and notes at notes 41-42. The plaintiff would not have to show that he belonged to the class for whose special benefit the strike prohibition was

tion is the same for public employers and third parties, the two types of suit will be discussed together.

The *Pasadena* court stated that a public union could not escape liability by claiming that it did not itself strike. To the court, it was sufficient that the union had induced and encouraged the illegal act.²⁵⁴ The Restatement of Torts provided support for this contention, in declaring that all who knowingly order, induce, or assist the commission of an intentional tort are liable for resulting harm.²⁵⁵ Presumably, the basic tort principles of foreseeability and proximate cause would limit the scope of liability in a tort per se action.²⁵⁶ In addition, like other tort actions, tort per se is unavailable if the legislature has pre-empted the area of public employee relations and the statutory scheme does not provide for such actions.²⁵⁷ The *Pasadena* court recognized this possibility, in deferring for future adjudication the question of whether the newly created Educational Employment Relations Board, upon becoming effective, would have such exclusive jurisdiction over illegal strikes as to preclude suits such as that in *Pasadena*.²⁵⁸ Other than preemption, foreseeability and proximate cause, however, there are no factors which might serve to restrict the availability of a tort per se action. Thus, the scope of liability under this theory is very broad, encompassing acts illegal at common law as well as under a statute.²⁵⁹ This theory of recovery therefore seems ideal for both public employers and third parties since they can recover damages for all injuries suffered from an illegal strike, subject only to the limiting principles of foreseeability and proximate cause.

Other than the *Pasadena* court, no courts have ruled that an illegal public employee strike is itself a tort for which damages can be awarded. Nonetheless, state courts have the common law power to recognize new torts as new fact situations arise,²⁶⁰ and the *Pasadena* court did just that in declaring that an illegal public employee strike is itself a tort. The tort per se theory also may have provided the basis for relief in *State v. Kansas City Firefighters, Local 42*.²⁶¹ Like the *Pasadena* court, the Missouri Circuit Court in *Kansas City* imposed liability

enacted, or that the tort per se suit would further the policies behind the statute. Thus, tort per se sweeps far more broadly than an implied action where a statutory violation is at issue. In addition, tort per se encompasses situations where the harm is inflicted through breach of a common law prohibition of public employee strikes, since such a breach also constitutes a tort.

²⁵⁴ 72 Cal. App. 3d at 113, 140 Cal. Rptr. at 49.

²⁵⁵ *Id.* (citing 4 RESTATEMENT OF TORTS § 876 (1939)).

²⁵⁶ See *supra* text and notes at note 246.

²⁵⁷ See *supra* text and notes at notes 134-66.

²⁵⁸ 72 Cal. App. 3d 100, 114, 140 Cal. Rptr. 41, 49 (1977).

²⁵⁹ The *Pasadena* court, for example, referred broadly to acts not authorized by law, which encompasses case law and statutes. 72 Cal. App. 3d 100, 112-13, 140 Cal. Rptr. 41, 48 (1977).

²⁶⁰ PROSSER, *supra* note 77, § 1 at 3. See also *Caso v. Gotbaum*, 67 Misc. 2d 205, 211, 213, 323 N.Y.S.2d 742, 749, 751 (1971), *rev'd on other grounds*, 38 A.D.2d 955, 331 N.Y.S.2d 507 (1972) (courts should not reject a claim merely because it is novel; they should be prepared to create new torts as the need arises).

²⁶¹ 2 Pub. Bargaining Cas. (CCH) ¶ 20,438 (Mo. Cir. Ct. 1976).

on a public employee union for damages resulting from an illegal strike.²⁶² *Kansas City* involved a suit against a firefighter's union by a third party, the State of Missouri, which incurred the expense of providing Kansas City with fire protection while the union illegally was engaged in a strike.²⁶³ The court did not denominate the suit as a tort action, although one commentator has classified it as such.²⁶⁴ In fact, the court's holding more clearly reflects a quasi-contractual analysis.²⁶⁵ Much of the court's reasoning, however, could have provided the basis for a tort recovery had either the public employer or a third party sued for damages incurred as a result of the strike. The court's analysis delineated the classic tort elements of duty and breach of duty. The court stated first that public employee strikes were prohibited in Missouri both by statute and at common law.²⁶⁶ The firemen thus had a legal obligation and responsibility to provide fire protection services to Kansas City and its citizens,²⁶⁷ reasoned the court, and the firemen willfully and intentionally breached this duty with knowledge of the harmful consequences to the city and its citizens.²⁶⁸ Given this analysis, it seems likely that if a public employer or a member of the public had suffered damages as a result of the strike, it could have recovered from the union on a tort per se theory.²⁶⁹

In contrast to the *Pasadena* court's adoption of a tort per se theory, other courts either explicitly or implicitly have rejected the tort per se approach and have indicated that the mere occurrence of an illegal strike which causes harm to some parties is not a sufficient basis for damage liability.²⁷⁰ As a prerequisite to liability these courts have required that the union owe a preexisting duty to the injured parties. Unlike the *Pasadena* court, these courts have not regarded the general duty to avoid committing illegal acts which result in harm to others as a duty upon which liability could be based. For example, the *Lamphere* court held that the case which had established the common law prohibition of public employee strikes²⁷¹ in Michigan had held only that public employee strikes were illegal and thus *subject to injunction*.²⁷² The case, in the *Lamphere* court's view, fell "far short of creating the classic 'duty', 'breach of duty', therefore,

²⁶² *Id.* at ¶ 21,471.

²⁶³ *Id.* at ¶ 21,469.

²⁶⁴ Jackson, *supra* note 19, at 83.

²⁶⁵ See *infra* text and notes at notes 356-63.

²⁶⁶ 2 Pub. Bargaining Cas. (CCH) ¶ 20,438 at 21,474 (Mo. Cir. Ct. 1976).

²⁶⁷ *Id.* at ¶ 21,475.

²⁶⁸ *Id.*

²⁶⁹ They could recover, of course, only for harm that was foreseeable and proximately caused by the strike. See *supra* text and note at note 246.

²⁷⁰ See, e.g., *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 128, 252 N.W.2d 818, 829 (1977); *Jamur Prods. Corp. v. Quill*, 51 Misc. 2d 501, 506, 510, 273 N.Y.S.2d 348, 352-53, 355 (1966); *Fairmont v. Retail, Wholesale and Dept. Store Union*, 1979-80 Pub. Bargaining Cas. (CCH) ¶ 37,157 at 38,124 (W. Va. 1980).

²⁷¹ *Detroit v. Division 26 of the Amalgamated Ass'n of St. Elec. Ry. and Motor Coach Employees*, 332 Mich. 237, 248-49, 51 N.W.2d 228, 233 (1952).

²⁷² *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 128, 252 N.W.2d 818, 829 (1977).

'monetary damages' triad of traditional tort law.'²⁷³ The court also noted that the common law prohibited public employee strikes in order to protect the public,²⁷⁴ not public employers. Thus the public unions owed no tort duty to the employers not to strike.²⁷⁵ Michigan case law thus contained no precedent which established an illegal public employee strike as a tort.²⁷⁶ Courts in other states have reached a similar result.²⁷⁷ Moreover, like the *Lamphere* court, these courts have declined to exercise their common law power to create a new tort action, since they have deemed it to be within the legislature's province to provide for actions against illegally striking public employee unions.²⁷⁸

In states that prohibit public employee strikes by statute and have provided express remedies for violations of the statute, courts should hesitate to adopt the tort per se theory of direct liability for an illegal strike. This approach is proper because courts run the risk of contravening legislative policies and intent by establishing new causes of action where the legislature has already enacted a remedial scheme. In such cases, courts should adhere strictly to the established criteria for implication²⁷⁹ in deciding whether to recognize new causes of action. In states where the only prohibition of public employee strikes is the common law, however, the tort per se approach of direct liability for harm caused by the illegal strike would be appropriate since there is no legislation with which the action can conflict. Nonetheless, even in these states the few courts that have addressed the issue have not taken a tort per se approach against illegally striking public employee unions. One court refused to find that the striking union owed to individual members of the public a duty not to strike.²⁸⁰ Another court held that, despite the illegality of public employee strikes at common law, a peaceful strike directed only against the public employer did not give rise to any common law action for damages for the

²⁷³ *Id.*

²⁷⁴ "Strikes by public school teachers are against public policy because they deprive the public of necessary educational services." *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 124-29, 252 N.W.2d at 827-29.

²⁷⁷ See *supra* note 270.

²⁷⁸ *Lamphere Schools v. Lamphere Fed'n of Teachers*, 400 Mich. 104, 133, 252 N.W.2d 818, 831 (1977); *Jamur Prods. Corp. v. Quill*, 51 Misc. 2d 501, 506, 510, 273 N.Y.S.2d 348, 353, 357 (1966); *Fairmont v. Retail, Wholesale & Dept. Store Union*, 1979-80 Pub. Bargaining Cas. (CCH) ¶ 37,157 at 38,124 (W. Va. 1980) See also *Fulenwider v. Firefighters Ass'n Local 1784*, 1979-80 Pub. Bargaining Cas. (CCH) ¶ 36,956 at 37,757 (Tenn. Ct. App. June 2, 1980) (court declared it knew "of no duty imposed upon a firemen's union to furnish adequate fire protection to an individual property owner" and that it had "no inclination to . . . create such a duty").

²⁷⁹ See *supra* text and notes at notes 41-42.

²⁸⁰ *Fulenwider v. Firefighters Ass'n Local 1784*, 1979-80 Pub. Bargaining Cas. (CCH) ¶ 36,956 at 37,757 (Tenn. Ct. App. June 2, 1980). The court imposed liability on the union, however, on the more traditional theory of nuisance, under which the union's duties are well established. *Id.* at 37,757-59. For a discussion of nuisance, see *infra* text and notes at notes 283-313.

employer.²⁸¹ There was no precedent for any tort action in these circumstances and the court refused to create a new tort action.²⁸²

Generally, courts have not applied the *Pasadena* approach of designating an illegal public employee strike as a tort per se and holding a public employee union liable for any harm resulting from an illegal strike. The courts instead have preferred traditional tort theories with clearly defined standards of duty and breach of duty. Therefore, rather than rely exclusively on an action in tort per se, third parties and public employers should try to bring actions under established tort theories. One theory which may prove very useful is nuisance.

C. *Public Employee Strikes as Constituting a Nuisance*

A final tort theory under which third parties and public employers may sue illegally striking public employee unions is an action for nuisance. There are two types of nuisance actions — public and private. A public nuisance is any unreasonable interference with the exercise of rights common to all members of the public.²⁸³ A private nuisance is an interference with the use and enjoyment of one's land.²⁸⁴ To constitute either a public or private nuisance, an act must be unreasonable²⁸⁵ and must cause substantial damage.²⁸⁶ The determination of reasonableness involves a balancing of the utility of the act against the harm it causes.²⁸⁷ Since an illegal public employee strike violates the law, it can be viewed as inherently unreasonable.²⁸⁸ Presumably the legislature already has weighed the interests involved and has decided that the harm caused by such strikes outweighs any utility they may have.²⁸⁹ The determination of whether the harm caused is substantial depends on the facts of the case, but generally, any damage to property qualifies as substantial.²⁹⁰ Absent such damage, the harm must be so offensive, annoying or inconvenient that it would upset the normal person.²⁹¹ Many public employee strikes conform to this standard, as they can cause great harm or inconvenience to the public. Examples of such substantial harm would be the great danger to the public posed by a police or firefighter's strike²⁹² or the great

²⁸¹ *Fairmont v. Retail, Wholesale and Dept. Store Union*, 1979-80 Pub. Bargaining Cas. (CCH) ¶ 37,157 at 38,124 (W. Va. 1980).

²⁸² *Id.*

²⁸³ 4 RESTATEMENT (SECOND) OF TORTS § 821B (1977).

²⁸⁴ *Id.*, § 821D.

²⁸⁵ PROSSER, *supra* note 77, § 87 at 580.

²⁸⁶ *Id.* at 577.

²⁸⁷ *Id.* at 581.

²⁸⁸ Harvard Note, *supra* note 44, at 1330.

²⁸⁹ *Id.*

²⁹⁰ PROSSER, *supra* note 77, § 87, at 578.

²⁹¹ *Id.*

²⁹² See *Wohlert*, *supra* note 14, at 46 (clear and present danger is involved in police and firefighter strikes).

inconvenience and hardship caused by a transit strike.²⁹³ Thus, since illegal public employee strikes are inherently unreasonable and often cause substantial harm, many of these strikes could provide the basis for nuisance actions.

Both third parties and public employers may be able to bring a public nuisance action against an illegally striking public employee union. A public nuisance suit may be brought by a public official, on behalf of the public, for purposes of enjoining the nuisance.²⁹⁴ In order to recover damages for a public nuisance, however, a party must show that the harm he has suffered differs in kind, rather than merely in degree, from that suffered by other members of the public.²⁹⁵ For example, one court permitted a third party to recover damages from a firefighter's union for damage to his property which burned during an illegal firefighter's strike.²⁹⁶ The theory of recovery was public nuisance.²⁹⁷ The court held that the public suffered the common injury of being without fire protection, while the individual plaintiff suffered a special injury because his property actually was destroyed.²⁹⁸ A third party generally can satisfy the requirement of harm different in kind where he suffers an injury to his person or property.²⁹⁹

Difficulties arise, however, where the loss is purely economic, such as lost profits, and does not arise from physical harm or damage to property.³⁰⁰ It has been asserted that economic harm suffered by businesses as the result of a transit strike does not qualify as a particular kind of injury.³⁰¹ This assertion applies to profits lost through the lack of customers, since all businesses in the area suffer this injury. In *Burns*, however, the New York Supreme Court has reached the opposite conclusion regarding economic harm as a "particular" kind of injury. In denying the public union's motion to dismiss, the court ruled that "the nuisance complaint was sufficient since it alleged pecuniary damages which were particular to professional and business enterprises operating for

²⁹³ See *Jamur Prods. Corp. v. Quill*, 51 Misc. 2d 501, 502, 273 N.Y.S.2d 348, 349 (1966) (transit strike had "awesome impact" on country).

²⁹⁴ PROSSER, *supra* note 77, § 90 at 604.

²⁹⁵ *Id.*, § 88 at 587; *Fulenwider v. Firefighters Local 1784*, 1979-80 Pub. Bargaining Cas. (CCH) ¶ 36,956 at 37,758 (Tenn. Cir. Ct. 1980).

²⁹⁶ *Fulenwider v. Firefighters Local 1784*, 1979-80 Pub. Bargaining Cas. (CCH) ¶ 36,956 at 37,756 (Tenn. Cir. Ct. 1980).

²⁹⁷ *Id.* at 37,759.

²⁹⁸ *Id.*

²⁹⁹ PROSSER, *supra* note 77, § 88 at 588.

³⁰⁰ Of course, where the pecuniary loss is of a kind particular to the plaintiff, as where he is prevented from performing a contract, he may recover; the contract is not something common to members of the public. PROSSER, *supra* note 77, § 88 at 590-91. Where a large segment of the public suffers the same type of pecuniary loss, however, no one individual may recover. *Id.*

³⁰¹ See Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1010-11, 1015 (1966) (In such a case, widespread economic losses will occur and it will be difficult to show that pecuniary losses are different in kind rather than in degree.). See also *Jamur Prods. Corp. v. Quill*, 51 Misc. 2d 501, 509, 273 N.Y.S.2d 348, 355 (1966) (economic losses suffered by plaintiffs during a transit strike were considered no different in kind from those suffered by the rest of the public).

profit."³⁰² Thus, the court decided that the economic harm suffered by the businesses differed in kind from the harm suffered by other third parties during the strike. *Burns*, however, appears to be the minority view. Thus, where a public employee strike causes widespread economic harm, a third party may have problems establishing that his economic injury differed in kind from the other economic harm inflicted by the strike.

Normally, public officials may sue on behalf of the public only to enjoin a public nuisance.³⁰³ There may be situations, however, where a public official is permitted to bring a suit for damages for public nuisance. *Caso v. District Council*³⁰⁴ 37, *AFSCME*³⁰⁴ was such a suit. In *Caso*, the New York Supreme Court awarded some municipalities damages for nuisance when an illegal public employee strike caused the pollution of beaches owned by the municipalities.³⁰⁵ The court found that the strike was willful and malicious, that it endangered the lives and health of the public, and that it caused considerable damage to the environment.³⁰⁶ As a result, the court decided that the municipalities had a cause of action in nuisance. The court, however, did not specify whether the cause of action was for public or private nuisance.³⁰⁷ Thus, it is not clear that *Caso* involved a public nuisance recovery, since *Caso* has been categorized both as a private nuisance³⁰⁸ case and a public nuisance case.³⁰⁹ *Caso* can be classified plausibly as a public nuisance recovery. The damage to the environment and the danger to the public certainly constituted a public nuisance, and the municipalities suffered the particular injury of having damage done to their land.

Whatever the rationale behind the recovery by the municipalities in *Caso*, it seems manifestly fair, albeit somewhat unorthodox, to allow government entities to recover damages on a public nuisance theory where an illegal strike creates a public nuisance and also causes a particular kind of harm to a government entity. An award of damages to a government entity is particularly appropriate in a situation like that in *Caso*, where an injunction would have been ineffective to prevent the harm. At present it is unclear, however, whether other courts will follow the *Caso* example and permit damage suits by government entities on a public nuisance theory.

Even if government entities were not permitted to recover damages on a public nuisance theory, the recovery by the municipalities in *Caso* was war-

³⁰² 1980-81 Pub. Bargaining Cas. (CCH) ¶ 37,253 at 38,282 (N.Y. Sup. Ct. March 31, 1981) (motion to dismiss denied).

³⁰³ PROSSER, *supra* note 77, § 90 at 604.

³⁰⁴ 43 A.D.2d 159, 350 N.Y.S.2d 173 (1973).

³⁰⁵ *Id.* at 160-61, 350 N.Y.S.2d at 175.

³⁰⁶ *Id.* at 162-63, 350 N.Y.S.2d at 177.

³⁰⁷ *Id.* at 163, 350 N.Y.S.2d at 178.

³⁰⁸ It was classified as a private nuisance in Harvard Note, *supra* note 44, at 1328.

³⁰⁹ It was classified as a public nuisance in *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash. 2d 762, 768, 600 P.2d 1282, 1286 (1979) and in *Jackson*, *supra* note 19, at 82.

ranted on a theory of private nuisance. *Caso* exemplifies those situations in which recovery can be predicated on a theory of either public or private nuisance. The two theories overlap to the extent that, where a public nuisance has the effect of interfering with a person's use and enjoyment of his land, he has a cause of action for private as well as public nuisance.³¹⁰ In such a case, injury to the land provides the basis for both a private nuisance action and the "particular injury" required for a public nuisance recovery. Thus, because of the municipalities' status as injured landowners in *Caso*, they should have been allowed to rely on either nuisance theory. In such cases, where both theories are available to a plaintiff, courts have permitted plaintiffs to proceed on either or both theories.³¹¹ Plaintiffs may proceed on either theory even where other landowners have suffered the same type of harm,³¹² which ordinarily would rule out a public nuisance recovery since the plaintiff has not suffered a particular type of harm. Harm to one's land, however, is deemed particular enough to permit recovery for nuisance even if other landowners have suffered the same harm.³¹³ Thus, if an illegal public employee strike causes harm sufficiently widespread to constitute a public nuisance and the strike also causes interference with a third party's use of his land, that third party should be able to proceed on either nuisance theory. Where the third party is a government entity, that party also should be granted recovery for harm to its land, though it is unclear whether the recovery is for public or private nuisance.

Similarly, where the government entity is not a third party, but is a public employer, the employer should be allowed to bring either a public or a private nuisance suit for any damage done to government land for which the public employer is responsible. Where no damage to government land is involved, however, a private nuisance suit would be unavailable and the viability of a public nuisance suit would be questionable. Because there is little authority for a government entity asserting a claim for damages for public nuisance,³¹⁴ a public employer should try to allege a more traditional tort. Due to the inherently unreasonable nature of an illegal public employer strike, however, and the substantial damage often caused by such strikes, a nuisance theory may provide a viable route to recovery for a third party. The third party should succeed if he can show interference with his use of his land, or some other type of particular injury not shared by the rest of the public.³¹⁵

³¹⁰ PROSSER, *supra* note 77, § 88 at 588-89.

³¹¹ *Id.* at 589.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ The only case found by this author which could be characterized as a public nuisance recovery by a government entity is *Caso v. District Council 37, AFSCME*, 43 A.D.2d 159, 350 N.Y.S.2d 173 (1973).

³¹⁵ Under all of the tort theories, in addition to compensatory damages, a public employer or third party might recover punitive damages. *See, e.g., State v. Fire Fighters, Local 42, 2 Pub. Bargaining Cas. (CCH)* ¶ 20,438 at 21,472 (Mo. Cir. Ct. 1976) (punitive damages granted against striking firefighters to deter them and others from striking, since such strikes posed great threat to citizens); *Caso v. Gotbaum*, 67 Misc. 2d 205, 212, 323 N.Y.S.2d 742, 750

III. CONTRACT THEORIES OF RECOVERY

In all of the tort actions previously described, the illegality of public employee strikes constituted an essential element of the tort action. No agreements between a public employer and public union could change the illegality of the strike. Contract actions, however, generally can be brought by public employers and third parties against public unions regardless of the general legality of public employee strikes. A contract action is predicated on the union's breach of a contractual obligation not to strike, rather than on a statutory or common law duty not to strike. Thus, a cause of action in contract might be the only available theory of recovery for a public employer or third party in a state where the public employee strike is legal.

There are three possible contract actions available against an illegally striking public employee union. First, a public employer may be able to sue a union for breach of contract if a public employee strike is in violation of a provision in the collective bargaining agreement prohibiting strikes. In addition, third parties may be able to bring suit against a public union on a third party beneficiary theory. Under this theory, if the union and public employer entered into a collective bargaining agreement for the benefit of the public, members of the public may be able to bring suit as third party beneficiaries of the contract should the union breach the terms of the agreement. Finally, a quasi-contractual theory of recovery may be available to certain third parties who intervene and fulfill the union's contractual duties while the strike lasts. The contract causes of action available to public employers will be examined

(1971), *rev'd*, 38 A.D.2d 955, 331 N.Y.S.2d 509 (1972) (plaintiff granted punitive damages from union which went on strike and thereby willfully and maliciously caused sewage to pollute waters and contaminate the environment). In *Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, Local 1050*, the court sanctioned the imposition of punitive damages against a teacher's union which engaged in an illegal one-day strike. 72 Cal. App.3d 100, 104-05, 140 Cal. Rptr. 41, 43-44 (1977).

The award of punitive damages against a public union which illegally strikes, however, has been criticized as contrary to the public policy favoring the continued existence of public employee unions, since these damages could cripple or destroy a union. See *Pasadena Unified School District v. Pasadena Federation of Teachers: A Limited Right to Strike for the Public School Teacher*, 10 SW. U.L. REV. 931, 941-42 (1978). See also *IBEW v. Forest*, 442 U.S. 42, 48 (1979) (punitive damages could impair financial stability of unions).

In some instances, however, the public policy of preventing public employee strikes outweighs any concern for a particular union's existence. In such instances, the deterrent effect of awarding punitive damages justifies the award. See *State v. Kansas City Firefighters, Local 42*, 2 Pub. Bargaining Cas. (CCH) ¶ 20,438 at 21,472 (Mo. Cir. Ct. 1976) (court awarded punitive damages to deter essential employees from striking and recklessly endangering the public). See also *Caso v. Gotbaum*, 67 Misc. 2d 205, 213, 323 N.Y.S.2d 742, 751 (1971), *rev'd*, 38 A.D.2d 955, 331 N.Y.S.2d 509 (1972) ("[T]he sanction of punitive damage must overhang those who would for their own ends wound the public interest in its environment.").

Furthermore, a jury can impose punitive damages in an amount short of that needed to destroy the union, and still obtain the desired deterrent effect. In deciding how much punitive damages, if any, to award, the jury should consider mitigating circumstances in assessing the willfulness of the illegal strike. For example, if the public employer played some role in instigating the strike, such as by bargaining unfairly, that factor should be reflected in the decision whether to award punitive damages.

first. A discussion of possible contract claims of third parties against illegally striking public employee unions will follow.

A. *Contract Suits by Public Employers*

Three states explicitly authorize suits for breach of contract by public employers against public employee unions.³¹⁶ Five other states have enacted general provisions for employer suits against the public unions, and these provisions seemingly encompass breach of contract suits.³¹⁷ Case law in four other states has established that public employees or employers can bring contract actions for violations of a collective bargaining agreement.³¹⁸ In one state, however, it has been held that courts may not hear damage actions for breaches of collective bargaining agreements.³¹⁹ Only these few states thus far have addressed the issue of permitting public employers to bring breach of contract suits against the unions.

Although most states do not yet offer guidelines on this matter, an analogy to the regulation of private sector labor relations provides persuasive reasons for allowing public employers to sue public employee unions for breach of contract. Section 301 of the Labor Management Relations Act (LMRA) provides that suits for the violation of a collective bargaining agreement may be brought by either employers or unions.³²⁰ Although section 301 does not specifically provide for a damage action,³²¹ courts have implied one.³²² Congress enacted

³¹⁶ See ALASKA STAT. § 23.40.020 (1972); IOWA CODE ANN. § 20.17(5) (West 1978); KY. REV. STAT. § 345.100(3) (1977).

³¹⁷ IND. CODE ANN. § 20-7.5-1-14(b) (Burns 1975) (school employers may, through any proper proceeding at law or in equity, take action against teacher's organizations which illegally strike); N.H. REV. STAT. ANN. § 273-A:15 (1977) ("Actions by or against the exclusive representative of a [public employee] bargaining unit may be brought, without respect to the amount of damages, in the superior court . . ."). See also FLA. STAT. ANN. § 447.507(4) (West 1981); MINN. STAT. ANN. § 179.68-3(11) & § 179.68-1 (West Supp. 1981); WIS. STAT. ANN. § 111.89(2)(c) (West 1974). These statutes authorize damage suits by an employer in the event of a public employee strike, without specifying whether the cause of action is in tort or contract.

³¹⁸ See Local No. 404, IAFF v. City of Walla Walla, (PERC 1976) Case No. U-76-45 (405), Dec. No. 104 PECB, cited in 2 Pub. Bargaining Cas. (CCH) Washington ¶ 7025 (1978). Washington follows the federal rule and permits the use of contract enforcement suits identical to § 301 suits under the NLRA. See also IAFF, Local No. 630 v. City of Livingston, (BPA 1974), ULP No. 2 (Mont. Bd. Pers. App. 1974, cited in 2 Pub. Bargaining Rep. (CCH) Mont. ¶ 7025 (1980)) (collective bargaining agreements may be enforced through civil actions in the appropriate court); Milford Educ. Ass'n v. Board of Educ., 167 Conn. 513, 520, 356 A.2d 109, 112 (1975) (union could have sued employer for breach of collective bargaining agreement); Morris v. Board of Educ., 2 Pub. Bargaining Cas. (CCH) ¶ 20,396 at 21,317 (D. Del. 1975) (teacher can sue school board for breach of collective bargaining agreement).

³¹⁹ Boothbay Region Teachers Ass'n v. Boothbay School Comm., (PELRB 1975) Case Nos. 74-04, 74-05 & 74-06, cited in 2 Pub. Employee Bargaining Rep. (CCH) Maine 7025. The aggrieved party, however, can seek injunctive relief from the superior court if the other party breaches a statutory duty. *Id.*

³²⁰ 29 U.S.C. § 185(a) (1976).

³²¹ *Id.*

³²² See *Vaca v. Sipes*, 386 U.S. 171, 196-97 (1967); *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 239-40, 241, 244 (1962). See also Arouca, *supra* note 20, at 799. In § 301 actions "courts

section 301 as an exception to the exclusive authority of the NLRB in dealing with private sector labor disputes,³²³ to recognize the importance of imposing on both employers and unions the responsibility of acting in accordance with contractual promises.³²⁴ A senate committee declared that "statutory recognition of the collective bargaining agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."³²⁵ These observations, it is suggested, apply as well to public sector labor relations. If it is the legislative policy to promote labor peace between public employers and employees, the availability of contract remedies to both labor and management should further this policy. It could prove very disruptive to labor relations if either party could violate the terms of collective bargaining agreements with impunity.³²⁶ The parties would have less incentive to abide by the agreement and breaches might occur more frequently, thus threatening labor peace. Thus, even though most states have not enacted provisions analogous to section 301 of the LMRA, courts should hesitate to find that contract actions have been preempted by legislation regulating public employees.

The general policy of encouraging contracting between parties by holding all parties liable for fulfillment of their contractual duties³²⁷ also supports the granting of contract remedies to public employers. If the parties have no recourse to the courts in the event of contract violations, they might have less desire to enter into a contractual relationship. The existence of a stable contractual relationship should help to minimize disputes between the parties and the consequent disruptions in government services. There would be little point in contractually defining the rights and duties of the parties if there were no means of enforcing compliance with the agreement. The policy of encouraging contracts between public employers and employees therefore favors the extension of contract remedies to parties to public employee collective bargaining agreements.

Of course, the availability of a breach of contract action for public employers presupposes a contractual obligation of the union not to strike. In

implied whatever remedies, including damages, that were necessary and appropriate to vindication of the congressional scheme." *Id.* at 812; Note, *Parent Union Liability for Strikes in Breach of Contract*, 67 CAL. L. REV. 1028, 1028 (1979) (§ 301 authorizes damage actions).

³²³ Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502, 513 (1962).

³²⁴ S. REP. NO. 105, 80th Cong., 1st Sess. 15-18 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 407 (1948) (hereinafter cited as LEGISLATIVE HISTORY). See also Arouca, *supra* note 20, at 811 & n.145.

³²⁵ LEGISLATIVE HISTORY, *supra* note 324, at 17.

³²⁶ See *Parent Union Liability*, *supra* note 322, at 1030 (citing Senator Taft's speech in LEGISLATIVE HISTORY, *supra* note 324, at 16. See also *supra* text and note at note 325.

³²⁷ "Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign [the collective bargaining agreement]." *Parent Union Liability*, *supra* note 322, at 1030 (citing Senator Taft's speech in LEGISLATIVE HISTORY, *supra* note 324, at 16).

the absence of an express contractual no-strike provision, courts in a state which prohibits public employee strikes may imply such a provision into all public employee collective bargaining agreements.³²⁸ A court logically can imply this obligation into public employee collective bargaining agreements because such a provision should not be subject to bargaining.³²⁹ Since both parties know of the illegality of a strike and bargain under the assumption that the union will not strike, the court could deem the union to have agreed to comply with the law and refrain from striking.³³⁰ If the court implies such a provision, a public employer can proceed with a breach of contract suit against a striking union.

Some courts might require an explicit contractual provision prohibiting strikes to limit the availability of breach of contract suits.³³¹ Such a requirement, however, may fail to acknowledge the intent of the parties in negotiating the contract. It is reasonable to assume that the public employer enters into a collective bargaining agreement with the underlying expectation that the union will not break the law by calling a strike. An illegal strike obviously is possible, but contractual silence on the issue should not be interpreted as indicating the employer's tacit acceptance of a strike by the union. In bargaining with a union, public employers do not have the authority to agree even tacitly to something which is illegal.³³² Therefore, courts should not require an explicit no-strike provision. Even if a court implies a no-strike provision into a collective bargaining agreement, the timing of a strike might preclude a suit for breach of contract for the same reasons that it could preclude suits for tortious inducement of breach of contract.³³³ Arguably, the contractual obligation not to strike cannot extend beyond the duration of the contract. Thus, if the strike occurs after the collective bargaining agreement has expired, the public union cannot be guilty of breaching the contract by striking. As one commentator noted, however, extending the obligation not to strike "would seem to be the very purpose of the statute [prohibiting strikes], since a strike can be defined only in terms of a preexisting obligation. As these obligations are defined by contract, it is reasonable to regard the continuance of those obligations as contractual in nature."³³⁴ Thus, it persuasively can be argued that a union has a contractual obligation to refrain from striking that extends beyond the term of the contract.

Where the timing of a strike and the absence of an express no-strike provision present no problems, public employee unions should be held liable for their contractual obligations in the same fashion as any other party to a con-

³²⁸ See *supra* text and notes at notes 197-201.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ See *supra* text and note at note 203.

³³² See *Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers*, 72 Cal. App.3d 100, 112, 140 Cal. Rptr. 41, 48 (1977).

³³³ See *supra* text and notes at notes 204-09.

³³⁴ Harvard Note, *supra* note 44, at 1321 n.57.

tract.³³⁵ As Congress has declared, collective bargaining agreements will be meaningful only if they can be enforced through the usual processes of the law.³³⁶ In the absence of legislation regarding contract remedies, the courts therefore should permit public employers to bring breach of contract suits against unions which strike in breach of contract.

B. *Contract Suits by Third Parties*

Third parties are less likely than public employers to succeed on a contract theory in an action against a public employee union which illegally goes on strike. Since the third parties themselves have not contracted with the union, they must rely on a third party beneficiary theory of recovery. Under this theory, a contract entered into for the benefit of a third party may be enforced by that party.³³⁷ The few courts that have been confronted with this claim by third parties who have suffered damage from an illegal public employee strike have rejected the third party beneficiary theory.³³⁸ These courts have focused on problems of intent. They have required explicit evidence in the contract that the employer and the union intended to establish the public, or certain members of the public, as third party beneficiaries of the collective bargaining agreement.³³⁹

This high standard for showing intent to establish a third party beneficiary has been confined to cases concerning contracts for the provision of government services to the public.³⁴⁰ In the non-governmental services context, explicit evidence of intent in the contract is not required to establish a third party beneficiary.³⁴¹ The heightened requirement for establishing intent in the government services context reflects the fear that contractors might be reluctant to enter into contracts with the government if such contracts might expose them to liability to the public for negligence or inability to perform.³⁴² This concern, however, does not apply to public employee strikes. Whereas the possibility of negligence or inability to perform may be unavoidable to a contractor, the decision to risk liability for damage caused by a strike remains with

³³⁵ See Arouca, *supra* note 20, at 814 n.157 (it is in union's best interest to assume financial responsibility for their unlawful acts).

³³⁶ See *supra* text and notes at notes 318-19.

³³⁷ See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 17-1 at 606 (2d ed. 1977).

³³⁸ See *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash. 2d 762, 767-68, 600 P.2d 1282, 1285-86 (1979); *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 1980-81 Pub. Bargaining Cas. (CCH) ¶ 37,253 (N.Y. Sup. Ct. March 31, 1981) (motion to dismiss denied; court held third-party beneficiary theory unavailable).

³³⁹ *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash. 2d 762, 767-68, 600 P.2d 1282, 1286 (1979); *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 1980-81 Pub. Bargaining Cas. (CCH) ¶ 37, 253 (N.Y. Sup. Ct. March 31, 1981) (motion to dismiss denied).

³⁴⁰ Harvard Note, *supra* note 44, at 1322-23.

³⁴¹ *Id.* at 1323.

³⁴² *Id.* at 1326-27.

the union. The union can avoid liability by not striking. The potential liability may deter the union from striking but should not deter it from entering into a collective bargaining agreement.³⁴³ Thus, where a public employee collective bargaining agreement is involved, it seems unnecessary to apply the strict standard for showing intent to establish a third party beneficiary that is ordinarily applied in the case of a contract for the provision of government services. Courts nonetheless have applied the strict standard in cases where third parties have sought to recover damages from an illegally striking public union on a third party beneficiary theory.³⁴⁴

In applying the strict standard for intent to a government services contract, some courts have held such contracts to establish the public as third party beneficiaries even if the contract did not expressly declare that intent.³⁴⁵ These courts have ruled that the contract established the public as third party beneficiary if the government had an obligation to provide to the public the services for which the public employer contracted with the union.³⁴⁶ In finding this obligation, some courts have held that when a government entity undertakes the provision of certain services, it assumes a duty to provide those services satisfactorily.³⁴⁷

In determining whether members of the public are third party beneficiaries of public employment collective bargaining agreements, courts have made a distinction between duties the government owes to the public at large and duties the government owes to individual members of the public.³⁴⁸ Only the latter type of duty provides the basis for a third party beneficiary suit.³⁴⁹ Those public sector services provided directly to members of the public, rather than merely made available to the public at large, constitute services owed to individual members of the public.³⁵⁰ For example, water is provided

³⁴³ *Id.* at 1327.

³⁴⁴ See *supra* text and note at note 339.

³⁴⁵ See, e.g., *Lopez v. Arizona Water Co.*, 23 Ariz. App. 99, 101, 530 P.2d 1132, 1134 (1975); *Jenree v. Metropolitan St. Ry.*, 86 Kan. 479, 482-85, 121 P. 510, 511-12 (1912).

³⁴⁶ See *supra* note 345. See also *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 1980-81 Pub. Bargaining Cas. (CCH) ¶ 37,253 (N.Y. Sup. Ct. March 31, 1981) (motion to dismiss denied; union owed no contractual duty to members of public unless contract clearly established such duty or government had duty to provide to the public the contracted-for services; court found no such government duty to provide transit services to the public). See also *Harvard Note, supra* note 44, at 1323. But see *Burke & Thomas, Inc. v. International Org. of Masters*, 92 Wash. 2d 762, 767, 600 P.2d 1282, (1979), where the court acknowledged the state's obligation to provide the service to the public, yet still required explicit contractual intent to establish the public as third party beneficiaries.

³⁴⁷ See, e.g., *Adams v. State*, 555 P.2d 235, 240 (Alaska 1976); *Veach v. City of Phoenix*, 102 Ariz. 195, 197, 427 P.2d 335, 337 (1967). See also *Harvard Note, supra* note 44, at 1324. Other courts, such as the New York court in *Burns, Jackson, Miller, Summit & Spitzer v. Lindner*, 1980-81 Pub. Bargaining Cas. (CCH) ¶ 37,253 at 38,283 (N.Y. Sup. Ct. March 31, 1981) (motion to dismiss denied), have been less liberal in finding this duty. The *Burns* court stated that the government had no duty to provide transit services to the public. *Id.*

³⁴⁸ J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS*, § 17-5 at 617 (2d ed. 1977).

³⁴⁹ *Id.*

³⁵⁰ See, e.g., *International Ry. Co. v. Rann*, 224 N.Y. 83, 87-8, 120 N.E. 153, 154 (1918); *Farnsworth v. Boro Oil & Gas Co.*, 216 N.Y. 40, 43-44, 48, 109 N.E. 860, 861, 863 (1915); *Pond v. New Rochelle Water Co.*, 183 N.Y. 330, 338, 76 N.E. 211, 214 (1906).

directly to the members of the public, while police and fire protection are merely available to those particular citizens who may require such services.³⁵¹ Thus, contracts into which a government enters to insure the provision of water to the members of the public should provide the basis for a third party beneficiary suit. Services such as police and fire protection, however, which are not provided directly to members of the public, are more difficult to characterize as owed to the public at large or to individual members of the public. This difficulty of distinguishing between the two types of duty has led one court to declare that "[a]ny duty owed to the public generally is a duty owed to individual members of the public."³⁵² Generally, however, courts have sought to apply the distinction.³⁵³

Third parties thus face several problems in trying to sue a striking public employee union on a third party beneficiary theory. First, they must prove that the parties to the collective bargaining agreement intended to establish them as third party beneficiaries of the agreement. Even if the third parties can establish that they are intended beneficiaries of the collective bargaining agreement, they may be unable to recover on a third party beneficiary theory if the services provided by striking public employees are services owed by the government to the public at large rather than to individual members of the public. In addition, third parties may confront the same problems of timing and lack of an express no-strike provision facing public employers who seek to bring breach of contract suits against striking unions.³⁵⁴ A contract damage remedy therefore may prove less useful to third parties than to public employers.

While a third party beneficiary action is potentially available to all third parties who suffer harm from a public employee strike, a different theory of recovery may be available to a limited class of third parties who have intervened to rectify the harm caused by an illegal public employee strike. This theory of recovery is an action in quasi-contract. A quasi-contract "is not a contract at all but an obligation imposed by law to do justice even though it is clear that no promise was ever made or intended."³⁵⁵ Essentially, a quasi-contractual obligation arises where one party performs another party's legal obligation, the second party having failed to discharge this obligation while knowing that performance of the obligation is of grave public importance.³⁵⁶ Moreover, the intervening party must be a proper party to intervene and not a mere intermeddler.³⁵⁷

This theory of recovery would be available to third party government en-

³⁵¹ Police and fire protection are made available to the public at large; "contracts with water, gas and other utility companies . . . have generally been held to create enforceable rights in individual consumers." J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS*, § 17-5 at 618-19 (2d ed. 1977).

³⁵² Coffey v. City of Milwaukee, 74 Wis. 2d 526, 540, 247 N.W.2d 132, 139 (1976).

³⁵³ See Harvard Note, *supra* note 44, at 1324.

³⁵⁴ See *supra* text and notes at notes 334-40.

³⁵⁵ J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS*, § 1-12 at 19 (2d ed. 1977).

³⁵⁶ Rysdam v. School Dist. No. 67, 154 Or. 347, 353, 58 P.2d 614, 616 (1936) (quoting *Sommers v. Putnam County Bd. of Educ.*, 113 Ohio St. 177, 184, 148 N.E. 682, 684 (1925)).

³⁵⁷ *Id.*

tities which, during a strike, provide the services essential to the public safety or welfare which normally are provided by the union members. The court in *Kansas City* delineated the elements of a quasi-contractual recovery in concluding that: (1) public employee strikes were illegal in Missouri;³⁵⁸ (2) the striking firemen had a legal obligation to provide fire protection to the citizens;³⁵⁹ (3) the firemen knowingly and intentionally breached this duty, knowing that this action would endanger the safety and welfare of the citizens;³⁶⁰ (4) the Missouri National Guard had to provide fire protection services as a direct, proximate and foreseeable result of the illegal strike;³⁶¹ and (5) in providing these services, the state was not a mere intermeddler.³⁶² The court therefore required the union to reimburse the state for costs it incurred by providing fire protection during the strike.³⁶³ This type of recovery is by definition limited to those situations where the strike poses a threat to the citizens and the third party is the proper party to intervene. Thus, citizens harmed by a public employee strike normally could not recover in quasi-contract against an illegally striking public employee union since members of the public probably would not have the capacity to provide the needed services, and could well be deemed to be intermeddlers if they did intervene.

Although public employers and third parties will face problems in bringing contract suits against illegally striking public employee unions, the importance of holding parties responsible for their contractual agreements weighs strongly in favor of permitting such suits. Public employee unions should not be permitted to escape liability for damage caused by their breach of an express or implied promise to refrain from striking. If the collective bargaining agreement is to have any meaning at all, the parties to it and the third party beneficiaries of it must be allowed to sue for enforcement. Furthermore, permitting damage suits for breach of an agreement not to strike should aid the enforcement of the strike prohibition by deterring public employee unions from striking in the future.³⁶⁴

³⁵⁸ *State v. Kansas City Firefighters, Local 42*, 2 Pub. Bargaining Cas. (CCH) ¶ 20,438 at 21,474 (Mo. Cir. Ct. 1976).

³⁵⁹ *Id.* at 21,475.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 21,471.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ Employers and third parties who succeed in a contract action against a public employee union may be able to recover punitive as well as contract damages. Punitive damages generally are not permissible in contract actions. See J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS*, § 14-3 at 520 (2d ed. 1977). In contract suits brought by private sector employers pursuant to § 301 of the LMRA, however, some courts have found that the legislative intent of preventing strikes in breach of contract and of maintaining labor peace warrants the award of punitive damages. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 195-96 (1967) (punitive damages may be an appropriate remedy in § 301 action); *College Hall Fashions, Inc. v. Philadelphia Joint Bd., Amalgamated Clothing Workers*, 408 F. Supp. 722, 727 n.3 (E.D. Pa. 1976) (court found authorities split on the issue; in this case punitive damages not allowed since would not further the goal of industrial peace because the employees were no longer working for company); *Sidney*

CONCLUSION

Public employers and third parties may confront great obstacles to bringing damage suits against public employee unions which have engaged in illegal strikes. A court's receptiveness to these suits will vary from state to state, depending on, among other things, state policy toward public employee strikes and the nature and extent of legislation concerning public employee labor relations. The courts should not bar such damage suits merely because of the novelty of the claim. A state which prohibits strikes has made an unequivocal statement of public policy. The courts should seek to enforce this prohibition, and provide damage actions to persons and entities injured by illegal strikes. Regardless of the wisdom or fairness of prohibiting these strikes, until the laws change, public employee unions should be held accountable for their illegal acts.

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Wanzer & Sons, Inc. v. Milk Drivers Union, Local 753, 249 F. Supp. 664, 671 & n.5 (N.D. Ill. 1966) (punitive damages permissible in § 301 action where they will deter future breaches). *But see* Local 127, United Shoe Workers v. Brooks Shoe Mfg., Co., 298 F.2d 277, 278 (3d Cir. 1962); Navajo Freight Lines, Inc. v. International Bhd. of Teamsters, 291 F. Supp. 908, 910 (D. Colo. 1968) (no punitive damages allowed). Depending on the state's policies regarding public employee strikes and punitive damages in general, a state court similarly might award punitive damages to a public employer or a third party in a contract suit against a public employee union.