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Brief of Amicus Curiae, in Support of Neither Party, Supporting Reversal, Smart v. International Brotherhood of Electrical Workers, Docket No. 07-4088, 562 F.3d 798 (Seventh Circuit Court of Appeals 2009)

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NO. 07-4088

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RONALD D. SMART
d/b/a PASCHALL ELECTRIC,

Plaintiff-Appellant,
v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 702,
and CHRISTOPHER N. GRANT, and
SCHUCHAT, COOK & WERNER,

Defendants-Appellees.

Appeal from The United States District Court
For the Southern District of Illinois,
Case No. 07-cv-94 DRH
The Honorable Judge David R. Herndon

BRIEF OF AMICUS CURIAE,
IN SUPPORT OF NEITHER PARTY, SUPPORTING REVERSAL

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

1. Undersigned counsel has been appointed as *amicus curiae* to address the question posed to the parties in the United States Court of Appeals' Order dated September 19, 2008.

2. The undersigned counsel is a professor of law at The John Marshall Law School in Chicago, Illinois, and no other attorneys have appeared or are expected to appear with him as *amicus curiae*.

3. The undersigned counsel appears as an individual by appointment of the Court and does not appear on behalf of The John Marshall Law School which takes no position in these matters before the Court.

4. The undersigned counsel was assisted by Nicole Renchen, a second-year student at The John Marshall Law School in Chicago, Illinois.

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I. Statement of Interest

The Court appointed Gerald E. Berendt *amicus curiae* on September 19, 2008, to address the question of whether, assuming the applicability of *Garmon* preemption, the court ought to treat the allegations contained in the count alleging a violation of the Illinois antitrust statute as also stating a federal claim under 29 U.S.C. § 187.

II. Introduction and Summary of Argument

The district court denied Appellant's motion for leave to amend his complaint which included an allegation that the Appellee Union violated the Illinois Antitrust Statute. The district court correctly concluded, *inter alia,* that the Appellant's state antitrust claim was preempted by Section 8(b)(4)(B) of the National Labor Relations Act. 29 U.S.C. § 158(b)(4)(B) (2008). Accordingly, the district court granted the Appellees' motion to dismiss and ordered the Appellant's claims dismissed with prejudice. The Appellant appealed this dismissal to the Court of Appeals for the Seventh Circuit.

The parties and the district court were apparently unaware of the possible availability of a claim by the Appellant under Section 303 of the Labor-Management Relations Act, 29 U.S.C. § 187 (2008), which would also have served to preempt the state antitrust claim. The Appellant's state antitrust law allegation did not give the Appellees fair notice of a possible

claim based on Section 303 of the Labor-Management Relations Act, and therefore did not state a claim of a violation of the latter federal law. However, since the district court and the parties were unaware of a possible claim under Section 303, the Appellant is appearing *pro se,* and there would be little prejudice to the Appellant, the court of appeals may consider reversing and remanding to the district court to permit the Appellant to amend his complaint to allege a claim founded in Section 303 of the Labor-Management Relations Act.

III. Argument

A. The United States Supreme Court's *Garmon* Doctrine Operates to Preempt Appellant's Count Alleging a State Antitrust Law Violation.

The Court of Appeals for the Seventh Circuit has ordered supplemental briefs on the following issue: Whether, assuming the applicability of *Garmon* preemption, the court ought to treat the allegations contained in the count alleging a violation of the Illinois Antitrust Statute (740 ILCS 10/2 (2008)), as stating a claim under Section 29 U.S.C § 187 (2008). The court's question assumes the applicability of *Garmon* preemption to the Appellant's Count 1, alleging a violation of the Illinois antitrust statute. Nevertheless, to answer the court's precise question, it is instructive to review the *Garmon* labor preemption doctrine.

In *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), the United States Supreme Court held that the states are preempted from exercising jurisdiction in cases arising from peaceful picketing where such picketing is regulated by federal labor law. 359 U.S. at 246. This labor preemption doctrine derives from the Supremacy Clause of the United States Constitution (U.S. CONST. ART. VI.), and has been developed by the federal courts in order to prevent state regulation from conflicting with national labor policy as set forth in federal statutes and further developed by the National Labor Relations Board and the federal courts. 359 U.S. at 247.

In *Garmon,* a union picketed an employer to compel that employer to execute a union-shop agreement with a minority union. 359 U.S. at 237. The National Labor Relations Board ("NLRB") declined to assert jurisdiction over the matter, but a California state court did. The California court concluded that the union had violated state tort law and a state labor code, awarding damages. The United States Supreme Court reversed. 359 U.S. at 246. Holding the state action preempted, the Court announced a test governing when such preemption would occur:

> When an activity is arguably subject to Section 7 or Section 8 of the [National Labor Relations] Act, the States as well as federal courts must defer to the exclusive competence of the [NLRB] if the danger of state interference with national labor policy is to be averted.... If the Board decides, subject to appropriate judicial review, that conduct is protected by Section 7, or prohibited by Section 8, then the matter is at an end, and the States are ousted of all jurisdiction."

359 U.S. at 244-45.

The NLRB had not adjudicated the legality of the union's conduct for which the State court sought to provide a remedy in damages. Nevertheless, the *Garmon* court concluded that State jurisdiction was displaced since the union's activity arguably fell within "the compass of Section 7 or Section 8 of the Act." 359 U.S. at 246. The *Garmon* court acknowledged that the states remained free to regulate "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act"… "[o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." 359 U.S. at 243-44.

The facts in the instant case support the assumption stated in this court's question presented to the parties and Amicus Curiae for briefing, *i.e.,* that the Appellant's allegation of a violation of the Illinois antitrust statute is preempted under *Garmon.* The Appellant has alleged that the Union in this case violated Section 3 of the Illinois Antitrust Act, engaging in a wrongful restraint of trade or elimination of competing business interest, by its threatening and coercive behavior towards the Appellant's client in attempts to make the client hire a union electrician instead of the Appellant. Appellant's Appendix. That conduct also arguably falls within the proscription of the National

Labor Relations Act. 359 U.S. at 244-45. Indeed, the Appellant also filed an unfair labor practice charge with the National Labor Relations Board alleging, in relevant part, that the Union violated Section 8(b)(4)(B) of the National Labor Relations Act (29 U.S.C. § 158(b)(4)(B) (2008)), by inducing or encouraging Appellant's customers to cease doing business with the Appellant in order to compel the Appellant to recognize and bargain with the Union, in other words to become a union contractor. Appellant's Appendix.

Not only are the facts alleged in the State antitrust allegation identical to those Appellant alleged in the unfair labor practice proceeding, but the Appellant's characterization of those facts as a violation of the respective state and federal laws is virtually identical as well. Thus, the Appellant's allegation of a state antitrust violation concerns a matter at least arguably, if not actually, prohibited by Section 8(b)(4)(B) of the National Labor Relations Act, inviting federal preemption of the state law allegation under the *Garmon* doctrine unless one of the two exceptions is made out. 359 U.S. at 243-44.

As the district court concluded, the Union's alleged conduct was not of mere peripheral concern to the National Labor Relations Act but strikes at the heart of Congress' concern to prohibit certain forms of secondary boycotts. Indeed, the centrality of the federal concern to prohibit such conduct is reflected in the settlement of the unfair labor practice charge. The Appellee Union agreed to post notice that it will not coerce others to force the customer

in question from doing business with the Appellant. Although the Union maintains it had a non-admissions clause in its settlement with the NLRB, this settlement and the concomitant posted notice further indicate the matter was at least arguably, if not actually, prohibited by the National Labor Relations Act.

The union conduct alleged in the state antitrust claim implicates one of the federal law's primary objectives, to protect neutrals from secondary pressure that would enmesh them into disputes between others. *R. L. Coolsaet Constr. Co. v. Local 150, Int'l Union of Operating Engineers.,* 177 F.3d 648, 654-55 (7th Cir. 1999), *cert. denied,* 528 U.S. 1004. Irrespective of any deep local feelings regarding the potential restraint of commerce and trade, the NLRA prohibition is clearly directed at the very same conduct targeted by the state law, which accordingly must give way, preempted due to federal supremacy. U.S. CONST. ART. VI. As the United States Supreme Court observed when comparing federal and state antitrust laws in *Connell Construction Co. v. Plumbers and Steamfitters Union Local Union No. 100,*

> State antitrust laws generally have not been subjected to this process of accommodation. If they take account of labor goals at all, they may represent a totally different balance between labor and antitrust policies. Permitting state antitrust law to operate in this field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques.

421 U.S. 616, 636 (1975).

Nor does the availability of different remedies under the state antitrust law compared to the National Labor Relations Act justify an exception to the *Garmon* preemption doctrine. In *Wisconsin Department of Industry, Labor & Human Relations v. Gould,* 475 U.S. 282, 291 (1986), the United States Supreme Court held preempted a Wisconsin law that forbade state government procurement of goods from firms that had committed multiple violations of the National Labor Relations Act. The Court characterized the state law as providing a supplemental remedy for violations of the National Labor Relations Act, comparable to the state civil damages for the picketing held preempted in *Garmon.* 475 U.S. at 287. The Supreme Court explained:

> Indeed, "to allow the State to grant a remedy … which has been withheld from the National Labor Relations Board only accentuates the danger of the conflict," … because "the range and nature of those remedies that are and are not available is a fundamental part" of a comprehensive system established by Congress."

475 U.S. at 287, quoting *Garmon,* 359 U.S. at 247 and *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge,* 403 U.S. 274, 287 (1971).

The Supreme Court later distinguished its *Gould* decision from situations where the state is a market actor rather than acting as a regulator of the conduct in question. *Building & Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island (Boston Harbor case),* 507 U.S. 218, 230 (1993). In the instant case, however, there is no allegation that the Illinois Antitrust

Act is an exercise of the State of Illinois' role as a market actor. Thus, the market actor distinction announced in the *Boston Harbor* case is inapplicable in the instant case.

Any doubt the *Boston Harbor* case may have cast on the continuing viability of the *Gould* precedent has been dispelled by the United States Supreme Court's recent decision in *Chamber of Commerce of the United States of America v. Brown,* 128 S. Ct. 2408 (2008). There, the United States Supreme Court held preempted provisions in a California statute, prohibiting employers receiving certain state funds from using such funds to assist, promote or deter union organizing. 128 S. Ct. at 2417. The Supreme Court expressly declined to reach the question of possible preemption under *Garmon,* concluding instead that the state laws were preempted under a second labor preemption test, *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission,* 427 U.S. 131 (1976), because the state laws sought to regulate within "a zone protected and reserved for market freedom." *Brown,* 128 S. Ct. at 2412, *quoting* the *Boston Harbor* case, 507 U.S. at 226. However, in the course of applying the *Machinist* test, both the majority and the dissenters cited the *Gould* case with approval.

The *Garmon* labor preemption doctrine applies in this case. Accordingly, the Appellant's allegation that the Appellee Union violated the

Illinois antitrust statute is preempted by Section 8(b)(4)(B) of the National Labor Relations Act.

B. Although Not Addressed by the District Court, Appellant's State Antitrust Law Claim Is Also Preempted by Section 303 of the Labor-Management Relations Act.

The Appellant's allegation of a state law violation would also likely be preempted by Section 303 of the federal Labor-Management Relations Act (29 U.S.C. § 187 (2008)). *Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton Trucking Co.,* 377 U.S. 252 (1964). Neither the Appellee Union nor the district court below raised this possibility. However, the court of appeals' Order, directing the filing of supplemental briefs, discloses that this court observed the availability of a Section 303 action under which the Appellant could seek compensatory damages under the federal law.

There are significant differences in the remedies available under the Illinois Antitrust Act compared to those available under Section 8(b)(4)(B) of the National Labor Relations Act and Section 303 of the Labor-Management Relations Act. In addition to providing for criminal actions and penalties, (740 ILCS 10/6 (2008)), the Illinois Antitrust Act provides for civil actions and remedies in the event of violation. 740 ILCS 10/7 (2008). In the instant case, the Appellant seeks civil remedies under Section 7(2) of the Illinois Antitrust Act which provides in relevant part:

> Any person who has been injured in his business or property, or is threatened with such injury, by a violation of Section 3 of this

> Act may maintain an action in the Circuit Court for damages, or for an injunction, or both, against any person who as committed such violation… In an action for damages, if injury is found to be due to a violation of subsections (1) or (4) of Section 3 of this Act, the person injured shall be awarded 3 times the amount of actual damages resulting from that violation, together with costs and reasonable attorney's fees. If injury is found to be due to a violation of subsections (2) or (3) of Section 3 of this Act, the person injured shall recover actual damages caused by the violation, together with costs and reasonable attorney's fees, and if it is shown that such violation was willful, the court may, in its discretion, increase the amount recovered as damages up to a total of 3 times the amount of actual damages….

740 ILCS 10/7(2) (2008).

For a violation of Section 8(b)(4)(B) of the National Labor Relations Act, the National Labor Relations Board ordinarily issues a cease and desist order with an order to post notice. When a complaint has issued alleging a violation of Section 8(b)(4)(B) of the Act, the NLRB must petition an appropriate federal district court for injunctive relief pending final adjudication of the matter. 29 U.S.C. § 160(l) (2008).

Significantly, Congress also provided a separate cause of action for damages, for victims of such violations of Section 8(b)(4) of the National Labor Relations Act. Section 303 of the Labor-Management Relations Act provides:

> Unlawful activities or conduct; right to sue; jurisdiction; limitations; damages
>
> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

> (b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefore in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. § 187 (2008).

Under Section 303 of the Labor-Management Relations Act, courts have awarded compensatory damages that are proximately caused by the union wrongdoing. Accordingly, the victim of an unlawful secondary boycott is entitled to a reasonable approximation of damages actually incurred as a result of the union's unlawful activity. *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494,* 798 F.2d 1016 (7th Cir. 1986). At trial, a plaintiff may establish by competent evidence damages based on sales lost due to the unlawful conduct of the union. *See, e.g., J. Pease Construction Co. v. Local 150, International Union of Operating Engineers,* No. 87 C 10515, 1992 WL 77731 (N.D. Ill. 1992). In addition, plaintiff may recover for lost profits if plaintiff establishes such damages are not speculative. *Beelman Truck Co. v. Chauffeurs, Teamsters, Warehousemen & Helpers, Local Union No. 525,* 33 F.3d 886 (7th Cir. 1994). Punitive damages are not available under Section 303. *Morton Trucking Co.,* 377 U.S. at 260 (1964). For a discussion and examples of compensatory damages recoverable under Section

303 of Taft-Hartley, *see* Higgins, The Developing Labor Law Vol. II 1859-1865 (5th Ed. 2006).

In Count 1 of his Amended Complaint, Appellant expressly alleges a violation of the Illinois Antitrust Act, 740 ILCS 10/2 (2008). On page 9 of that Amended Complaint, Appellant states:

> Wherefore, the Plaintiff prays that the court find the Defendants responsible for the following:
>
> A. Treble damages as allowed by the statute.
>
> B. Costs of the suit.
>
> C. Compensatory Damages to the Plaintiff, for damages to his credit and reputation that has restricted his ability to bid.
>
> D. Compensatory Damages to the Plaintiff for stress put upon the Plaintiff and his family, due to the bankruptcy of his company and his inability to continue to employ his son-in-law, Robert Thompson.
>
> E. Compensatory Damages for all court costs and attorney fees, and traveling expenses to court and attorneys offices from March 1999 to present.
>
> For these reasons and to protect the rights of the public to free commerce and to Compensate the Plaintiff for the damages listed above, The Plaintiff Prays that this court award him the amount of **TWELVE MILLION FIVE HUNDRED THOUSAND DOLLARS.** (Bold and capitals in original) Appellant's Appendix.

Appellant's express prayer for "[t]reble damages as allowed by the statute" clearly refers back to his Count 1 allegation of a violation of the Illinois Antitrust Act which provides for such damages.

Section 303 of the Labor-Management Relations Act provides a federal action for victims of secondary boycotts to obtain compensatory damages caused by a union's conduct. In addition to being preempted by Section 8(b)(4)(B) of the National Labor Relations Act, the Appellant's state antitrust claim is also preempted by Section 303 of the federal law.

C. Appellant's Count Alleging a Violation of the Illinois Antitrust Statute is Not the Equivalent of Stating a Claim Under Section 303 of the Labor-Management Relations Act.

There remains the precise question on which this court sought additional briefs: Whether assuming the applicability of *Garmon* preemption, the court ought to treat the allegations contained in the count alleging a violation of the Illinois antitrust statute as stating a claim under 29 U.S.C. § 187 (2008), also known as Section 303 of the Labor-Management Relations Act, familiarly known as Taft-Hartley. Drawing from the most recent case law regarding federal pleadings, the answer is no. *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955 (2007); *Tamayo v. Blagojevich,* 526 F.3d 1074 (7th cir. 2008); *Equal Employment Opportunity Commission v. Concentra Health Services, Inc.,* 496 F.3d 773 (7th Cir. 2007). Although *Amicus Curiae* is not an expert in federal pleadings law and practice, he will address this issue.

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a plaintiff's complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Whether

the plaintiff has done so may be tested in a defendant's motion to dismiss based on Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). Prior to 2007, the standard applied by the federal courts was that announced by the United States Supreme Court in *Conley v. Gibson,* 355 U.S. 41 (1957): "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S. at 45-46.

The *Conley* Court cited with approval *Dioguardi v. Durning,* 139 F.2d 774 (2nd Cir. 1944). In that case, a *pro se* plaintiff sued a customs collector, alleging a confusing set of facts to the effect that the collector had auctioned off his merchandise for less than the bid for it and that plaintiff's goods, two cases of tonics, disappeared three weeks before the sale. The plaintiff filed an amended complaint that was hardly more coherent, and the district court granted the defendant's motion to dismiss. On appeal, the court of appeals characterized the *pro se* plaintiff's brief as "a recital of facts, rather than an argument of law." 139 F.2d at 775. Nevertheless, the court of appeals reversed and remanded, reasoning:

> We think that, however inartistically they may be stated, the plaintiff has disclosed his claims that the collector has converted or otherwise done away with the two cases of medicinal tonics and has sold the rest in a manner incompatible with the public auction he had announced – and, indeed, required … by Treasury Regulations….

139 F.2d at 775.

In 2007 in *Bell Atlantic Corp.*, the United States Supreme Court observed that the "no set of facts" language in *Conley* could be read "as saying that a statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings…." 127 S. Ct. at 1968. In *Bell Atlantic,* the Supreme Court expressed concern that under *Conley*, "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." 127 S. Ct. at 1968. The Court then declared that *Conley*'s often quoted "no set of facts" passage had "earned its retirement." 127 S. Ct. at 1969. Instead, the Supreme Court looked "for plausibility" in the complaint in *Bell Atlantic* and concluded that the plaintiff's claim that defendant had engaged in a conspiracy in restraint of trade fell short. 127 S. Ct. at 1970.

The Court of Appeals for the Seventh Circuit has had occasion to interpret and apply the *Bell Atlantic* decision in recent months. Notably in *Tamayo v. Blagojevich,* the court of appeals cautioned that "the Court in *Bell Atlantic* made clear that it did not, in fact, supplant the basic notice-pleading standard." 526 F.3d at 1083. The court of appeals then declared, "A plaintiff still must provide only enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and, through his allegations, show that it is plausible, rather than merely speculative, that he is entitled to relief." 526 F. 3d at 1083 (quotations and citations omitted).

Quoting its 2007 decision in *Concentra,* the Court of Appeals for the Seventh Circuit then described a two-part test drawn from the *Bell Atlantic* opinion.

> First, the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests. Second, its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level"; if they do not, the plaintiff pleads itself out of court.

526 F.3d at 1084.

The *Tamayo* Court further explained that to survive dismissal, the complaint need not describe the allegations against the defendant with the specificity required at the summary judgment stage. "In these types of cases, the complaint merely needs to give the defendant sufficient notice to enable him to begin to investigate and prepare a defense." 526 F.3d at 1085.

The court of appeals then applied this two-part test and concluded that plaintiff Tamayo had stated claims for sex discrimination and retaliation for filing EEOC charges. 526 F.3d at 1085. Plaintiff Tamayo's other allegation, that she was treated adversely due to her political affiliation in violation of her First Amendment rights, did not foreclose the possibility that she could plausibly recover under her discrimination and retaliation claims. 526 F.3d at 1086. In so reasoning, the court of appeals stated, "Although our pleading rules do not tolerate factual inconsistencies in a complaint, they do permit inconsistent legal theories." 526 F.3d at 1086.

In the instant case, the Appellant's Count 1 factual allegations plausibly state a claim for a violation of the Illinois Antitrust Act.

Appellant's Amended Complaint. However, as recounted above, that claim was preempted by federal labor law under the *Garmon* doctrine. The Appellant expressly stated his first count as a violation of the state statute and sought relief as provided in that statute. To date, the Appellant has made no reference to Section 303 of Taft-Hartley and has never couched his prayer for relief in terms of that federal law. Thus, Appellees' motion to dismiss, as well as the district court's decision, dealt with the Appellant's first count on its own express terms, that is, whether Appellant had a plausible claim under the Illinois Antitrust Statute. The district court concluded he did not, due to federal preemption.

Appellant's Count 1 allegations do allege conduct by the Appellee Union that would make out some of the elements of a secondary boycott under both Section 8(b)(4)(B) of the National Labor Relations Act and Section 303 of the Labor-Management Relations Act. However, no reference is made to the Section 8(b)(4)(B) charge that Appellant filed with the NLRB nor to the Appellee Union's settlement with the NLRB. The Defendants-Appellees would reasonably understand these facts to allege only a violation of the state antitrust statute, as Appellant expressly stated in paragraph 15 of his Amended Complaint. Appellant's Appendix.

In his Amended Complaint, Appellant apparently attached copies of the Section 8(b)(4)(B) charge he filed with the National Labor Relations Board and the Notice posted by the Appellee Union pursuant to its

settlement with the NLRB. However, in Count 1 of his Amended Complaint, Appellant expressly stated his allegation of a violation of the Illinois Antitrust Statute and sought treble damages for the violation of that state law. Appellant's Appendix. Appellant neither referred to federal law nor limited his prayer for relief to compensatory damages which would be recoverable under Section 303 of Taft-Hartley.

In addition to treble damages, Appellant sought compensatory damages "for damages to his credit and reputation that has restricted his ability to bid," "for stress put upon Plaintiff and his family, due to the bankruptcy of his company and his inability to continue to employ his son-in-law," and for court costs, attorneys fees and travel expenses. Appellant's Amended Complaint 9-10. However, the Appellant did not indicate that the relief sought by his prayer for these "compensatory damages" was a remedy for the alleged antitrust violation or one of his other counts. However, given Appellant's express prayer for "[t]reble damages as allowed by statute," Defendants-Appellees were reasonable in understanding that Plaintiff-Appellant's claim was based in the state antitrust statute and would not think Appellant made a Section 303 claim under the federal Taft-Hartley law.

It might be argued that the Appellee Union is represented by experienced labor counsel who should have been aware that Appellant had a possible Section 303 claim in addition to the Section 8(b)(4)(B) charge that

Appellant filed with the NLRB. That argument is based on speculation. Moreover, even if counsel for the Appellee Union was aware of the available Section 303 action, it raises the question of whether opposing counsel had responsibility, ethically or otherwise, to so advise the Appellant. Amicus Curiae is not prepared by way of experience or expertise to address this question. Due to the speculative nature of this possible argument, Amicus Curiae would not make the leap and conclude that because opposing counsel is an experienced labor lawyer, Appellee Union would have notice that the state antitrust violation count states the equivalent of a federal Section 303 claim.

The closest the Appellant has come to stating a claim based in Section 303 of Taft-Hartley is in his passing references to his unfair labor practice charge filed with the NLRB and the subsequent settlement between the NLRB and the Appellee Union. Nevertheless, in this case the Appellant has not associated his unfair labor practice charge, the later settlement and the consequent posting of notice with his allegation that Appellee Union violated the state antitrust law. Thus, based on Appellant's Count 1, the Defendants-Appellees would not have notice that the state antitrust claim was the equivalent of a Section 303 claim under the federal law.

It may be argued that the permissive pleadings approach embraced by the court of appeals in *Dioguardi* remains viable even after *Bell Atlantic,* because *Dioguardi* may be distinguished from *Bell Atlantic.* The plaintiff in

Dioguardi alleged facts without a legal theory whereas the plaintiff in *Bell Atlantic* alleged a legal theory without stating facts to make the claim plausible. However, it should be noted that unlike the *pro se* plaintiff in *Dioguardi,* the *pro se* Appellant in this case did provide a legal theory, i.e., a violation of the state antitrust law. In this case, the Appellant's pleadings stated one legal theory, the preempted state antitrust law claim, made no reference to a possible federal Section 303 claim, and effectively led the Defendant's and the district court's attention away from the possible Section 303 claim.

Accordingly, the Appellant's Amended Complaint failed to give Defendants fair notice of a claim based in Section 303 of Taft-Hartley. This leaves the Appellant without a federal claim. In the jurisdictional statement in Appellees' Brief, Appellees state that "[t]he District Court's jurisdiction was based on federal question jurisdiction, 28 U.S.C. § 1331, because Plaintiff's state law legal malpractice and malicious prosecution claims are completely preempted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185." The Appellees then state, "The District Court has supplemental jurisdiction over Plaintiff' state law antitrust claim. 28 U.S.C. § 1367." Appellees' Brief 1. Thus, it appears that any federal questions were raised by way of defense and not in the Plaintiff's allegations. Nor does the Appellant set forth the rudiments of diversity jurisdiction in his Amended Complaint, since he referred to state residence as opposed to state

citizenship. Further, to the extent that Appellant's allegations may be taken as referring to state citizenship, there does not appear to be complete diversity of citizenship of the parties. Appellant's Amended Complaint 1-2. The court of appeals may raise *sua sponte* the issue of federal subject matter jurisdiction in this litigation.

D. Although Appellant Has Not Alleged a Claim Based on Section 303 of the Labor-Management Relations Act, the Court of Appeals Could Reverse and Remand for Dismissal *Without Prejudice* or to Permit the *Pro Se* Appellant to Amend His Complaint.

If this court concludes that Appellant's allegation of a state antitrust violation was not the equivalent of a claim under Section 303 of Taft-Hartley, it may not be too late for Appellant to file such a claim independently. The Court of Appeals for the Seventh Circuit has held that Section 303 actions are governed by Illinois's five-year statute of limitations for tort actions. *BE&K Construction v. Building Trades Council (Will & Grundy Counties),* 156 F.3d 756, 763 (7th Cir. 1998). 735 ILCS 5/13-205 (2008). It has been held that the statute of limitations for a Section 303 claim begins to run only when the damages become reasonably ascertainable. *Chester Railing v. United Mine Workers of America,* 445 F.2d 353 (4th Cir. 1971). Although it is not entirely clear when all of the events relating to the alleged secondary boycott occurred in this case, Appellant filed his unfair labor practice charge alleging a secondary boycott on July 12, 2004. Presumably, the alleged

unfair labor practice and resulting injury to the Appellant did not cease until the Appellee Union entered the subsequent settlement agreement with the NLRB and posted notice. Thus, the five-year statute of limitations for a Section 303 action may not have run.

It would not be "necessary that the union must have violated an NLRB order before the employer was entitled to institute, and successfully maintain, its suit for damages under section 303." *Plumbers & Fitters, Local 761 v. Matt J. Zaich Constr. Co.,* 418 F.2d 1054, 1057 (9th Cir. 1969). However, establishing the elements of a violation of Section 8(b)(4) of the NLRA would be necessary in a private action for damages under Section 303 of Taft-Hartley. *Tri-Gen Inc. v. Int'l Union of Operating Eng'rs, Local 150, AFL-CIO,* 433 F.3d 1024, 1034 (7th Cir. 2006). *See also, Chicago Dist. Council of Carpenters Pension Fund v. Reinke Insulation Co.,* 464 F.3d 651, 657-59 (7th Cir. 2006); *Mautz & Oren, Inc. v. Int'l Brotherhood of Teamsters, Chauffeurs, etc., Local No. 279,* 882 F.2d 1117 (7th Cir. 1989).

To the extent that a ruling in the present appeal may render any other claims arising from the same set of facts *res judicata,* the court of appeals may wish to take into account that the Appellant has appeared *pro se* during this litigation. Appellant was apparently unaware of the possible federal preemption of the state antitrust claim when he brought it. Nor was Appellant aware of the availability of the federal Section 303 Taft-Hartley right of action until this court of appeals issued its order for supplemental

briefs on the question presented. Although the *Diogaurdi* case may be distinguishable from the instant case as explained in Argument "C" above, this court of appeals may be inclined to embrace its spirit of leniency for *pro se* complainants. Thus, the court of appeals may wish to be lenient with the *pro se* Plaintiff-Appellant, and reverse and remand to the district court with instructions to dismiss the Appellant's claims *without prejudice,* in order to permit the Appellant to file a new claim based on Section 303 of the Labor-Management Relations Act. Alternatively, the court of appeals may reverse and remand to permit the Appellant to amend his complaint in the present action to allege a Section 303 of Taft-Hartley claim. "Instead of lavishing attention on the complaint until the plaintiff gets it just right, a district court should keep the case moving." *Bennett v. Schmidt,* 153 F.3d 516, 518 (7th Cir. 1998). *See also, Equal Employment Opportunity Comm'n v. Concentra Health Services, Inc.*, 496 F.3d 773, 780 (7th Cir. 2007).

The Appellees would suffer little prejudice were the court of appeals to remand to the district court to permit the Appellant to amend his complaint. This litigation is not an antitrust action or the sort of complex case that has or would subject the Appellees to extensive and expensive discovery to prepare its defense to a Section 303 action. Indeed, the elements of an alleged Section 303 action are the same as those of the unfair labor practice, Section 8(b)(4)(B) of the NLRA, that the Appellee Union settled with the NLRB. Moreover, it appears that many of the documents supporting the

elements of an alleged unlawful secondary boycott have already been provided by the Appellant to the Appellees in the appendices to the Appellant's various filings.

Reversal and remand would do more than simply afford the *pro se* Appellant another chance to pursue recovery. Permitting the Appellant to amend his complaint, or dismissing his present claim without prejudice, would serve the public interest by educating the Appellant and potential plaintiffs in similar situations of the preemptive effect of the federal labor laws and the availability of a private action under Section 303 of the Labor-Management Relations Act.

Conclusion

The Appellant's allegation that the Appellee Union's conduct violated the Illinois antitrust statute is preempted by Section 8(b)(4)(B) of the National Labor Relations Act and also by Section 303 of the Labor-Management Relations Act. Appellant's allegation of the state antitrust law violation and his prayer for treble damages did not afford the Appellee Union fair notice of a claim founded in Section 303 of the Labor-Management Relations Act. Nevertheless, the court of appeals should take into account that the parties and the district court were apparently unaware of the availability of a Section 303 action, and that the Appellant is appearing *pro se.* There will be little prejudice to Appellees if the court of appeals reverses and remands to the district court to permit the Appellant to amend his complaint by alleging a claim under Section 303 or for the district court to dismiss Appellant's present action without prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6037 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 processing program in 12 point Century font.

____
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CIRCUIT RULE 31(E) CERTIFICATION

I certify that a digital version of this brief, in searchable PDF format is being furnished to the Court. No appendix or other materials have been submitted.

____
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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Amicus Curiae Brief have been served upon the following by U.S. Postal Service, postage prepaid, this 17th day of October, 2008:

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