

June 2012

Civ. Serv. Law § 210: No Private Right of Action Under Taylor Law for Damages Resulting from Public Employee Strike

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taxpayer.

People v. Smith, commented upon in this edition of *The Survey*, reflects the Appellate Division, First Department's view that a criminal verdict is not tainted by juror experimentation, as long as it involves merely an application of common sense and everyday experience. Other appellate division cases discussed include *Burns Jackson Miller Summit & Spitzer v. Lindner*, wherein the second department held that no express or implied private cause of action exists under New York's Taylor Law. Of particular interest to the practitioner should be the same court's determination, in *Curry v. Moser*, that evidence of the nonuse of an available seatbelt is admissible to determine the plaintiff's contributory negligence as an alleged proximate cause of the underlying automobile accident.

A supreme court case analyzed in this issue involves another in the series of decisions interpreting New York's recently enacted equitable distribution law. In *M.V.R. v. T.V.R.*, the Supreme Court, New York County, held that as a matter of law marital fault may not be considered in determining an equitable distribution of marital property upon divorce.

It is hoped that *The Survey's* treatment of these developments in New York law will be of help and interest to members of the New York bar.

CIVIL SERVICE LAW

Civ. Serv. Law § 210: No private right of action under Taylor Law for damages resulting from public employee strike

Sections 200 to 214 of the New York Civil Service Law (the Taylor Law), which govern labor relations in the public sector,¹

¹ N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973 & Supp. 1981). Prior to enactment of the Taylor Law in 1967, public employer-employee relations primarily were governed by the Condon-Wadlin Act, N.Y. CIV. SERV. LAW § 108 (McKinney 1973); see *Jamur Prods. Corp. v. Quill*, 51 Misc. 2d 501, 502-03, 273 N.Y.S.2d 348, 349-50 (Sup. Ct. N.Y. County 1966); *Kheel, The Taylor Law: A Critical Examination of Its Virtues and Defects*, 20 SYRACUSE L. REV. 181, 181-82 (1968); see also NEW YORK STATE GOVERNOR'S COMMITTEE ON PUBLIC EMPLOYEE RELATIONS, 1966 FINAL REPORT 6-20 (providing a comprehensive view of the objectives of the Taylor Law from its inception) [hereinafter cited as FINAL REPORT]. The Condon-Wadlin Act was strictly a negative approach to the public employer-employee relationship which simply created a no-strike prohibition and "established harsh and fixed penalties . . . for its violation." King, *The Taylor Act—Experiment in Public Employer-Employee Relations*, 20 SYRACUSE L. REV. 1, 2 (1968). At the time of its repeal, the act was "largely ignored, violated and discredited." *Id.* The deficiencies of this legislation became glaringly apparent during the 1966 transit strike in New York City. This inadequacy

prohibit public employees and their unions from engaging in strikes, and provide for penalties and injunctive relief in the event of such an illegal strike.² While certain sanctions and remedies have been implied in the Taylor Law,³ it has been unclear whether

prompted Governor Nelson Rockefeller to request "legislative proposals for protecting the public against the disruption of vital public services." FINAL REPORT, at 9. The resulting proposals became the Taylor Law. See *id.* In addition to prohibiting strikes, the primary objectives of the Taylor Law were to give public employees the right of self-organization and representation, and to create the right of collective negotiation for the employees' organization. See Kheel, *supra*, at 182-83.

The constitutionality of the Taylor Law has been upheld by the New York courts, see *Sanford v. Rockefeller*, 35 N.Y.2d 547, 551, 555-56, 324 N.E.2d 113, 115, 117-18, 364 N.Y.S.2d 450, 452, 456 (1974), *appeal dismissed sub nom. Sanford v. Carey*, 421 U.S. 973 (1975); *New York State Inspection, Dist. Council 82 v. State*, 84 App. Div. 2d 448, 451, 448 N.Y.S.2d 524, 526 (3d Dep't 1982); *Burke v. Carey*, 82 App. Div. 2d 953, 954, 440 N.Y.S.2d 773, 775 (3d Dep't 1981); *Lawson v. Board of Educ.*, 62 Misc. 2d 281, 283, 307 N.Y.S.2d 333, 335 (Sup. Ct. Broome County), *aff'd*, 35 App. Div. 2d 878, 315 N.Y.S.2d 877 (3d Dep't 1970), as well as the federal courts, see *O'Brien v. Board of Educ.*, 498 F. Supp. 1033, 1037 (S.D.N.Y. 1980); *Tepper v. Galloway*, 481 F. Supp. 1211, 1224 (E.D.N.Y. 1979).

² See *Caso v. District Council 37*, 43 App. Div. 2d 159, 160-61, 350 N.Y.S.2d 173, 175-76 (2d Dep't 1973); N.Y. CIV. SERV. LAW §§ 210-211 (McKinney 1973); *King, supra* note 1, at 2; see also *People v. Vizzini*, 78 Misc. 2d 1040, 1042 n.2, 359 N.Y.S.2d 143, 147 n.2 (Sup. Ct. N.Y. County 1974). Upon enacting the Taylor Law, the legislature declared:

[I]t is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government. These policies are best effectuated by . . . continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibitions.

N.Y. CIV. SERV. LAW § 200 (McKinney 1973). Toward this end, section 210 of the Taylor Law provides that "[n]o public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike." *Id.* § 210(1).

³ See *Caso v. District Council 37*, 43 App. Div. 2d 159, 163, 350 N.Y.S.2d 173, 177 (2d Dep't 1973); *People v. Vizzini*, 78 Misc. 2d 1040, 1043, 359 N.Y.S.2d 143, 147-48 (Sup. Ct. N.Y. County 1974); *cf. Caso v. Gotbaum*, 67 Misc. 2d 205, 212, 323 N.Y.S.2d 742, 750 (Sup. Ct. Nassau County 1971) (recognizing a "new" rule that any adversely affected private individual may enjoin offending polluters), *rev'd on other grounds*, 38 App. Div. 2d 955, 331 N.Y.S.2d 507 (2d Dep't 1972).

In *Caso v. District Council 37*, officials and members of a public employee union that serviced sewage treatment plants in Manhattan engaged in a work stoppage. This resulted in the emission of approximately one billion gallons of raw sewage into the East River. 43 App. Div. 2d at 160, 350 N.Y.S.2d at 175. The plaintiffs, officials of Nassau County and the Towns of North Hempstead and Oyster Bay, sued under a common-law theory of nuisance for damage done to water and beaches. *Id.* at 161, 350 N.Y.S.2d at 175-76. The defendants claimed that no action in nuisance existed because the Taylor Law provided the exclusive remedy for its violation. *Id.* at 161, 350 N.Y.S.2d at 176. The court noted that "[t]he Taylor Law reflects the Legislature's attempt to delicately balance the rights of public employees against those of their employers." *Id.*; see N.Y. CIV. SERV. LAW § 200 (McKinney 1973). The court reasoned that the purposes of the Taylor Law, the prohibition against public employee strikes, as well as the general welfare of the public, are best served by permitting appropri-

a private cause of action can be inferred in favor of members of the public who are injured by public employees' violation of the statute.⁴ Recently, in *Burns Jackson Miller Summit & Spitzer v. Lindner*,⁵ the Appellate Division, Second Department, refused to recognize a private cause of action under the Taylor Law since the statute delineated a comprehensive remedial scheme.⁶

In *Lindner*, the Transport Workers Union of America (TWU) and the Amalgamated Transit Union (ATU) engaged in an illegal strike⁷ against the New York City Transit Authority and the Manhattan and Bronx Surface Operating Authority.⁸ As a result of the strike, the residents and businesses of New York City suffered major disruptions and severe economic losses.⁹ The plaintiffs, two Manhattan law firms,¹⁰ sought monetary damages from the defen-

ate redress for violations of the law. 43 App. Div. 2d at 162, 350 N.Y.S.2d at 176. The court concluded that the purpose of the Taylor Law, to provide orderly flow of operations, would "best be served by interpreting the Taylor Law provisions as nonexclusive as to remedies against public employees for damages caused by an illegal strike." *Id.* at 163, 350 N.Y.S.2d at 178; *see, e.g.*, *Civil Serv. Employees Ass'n v. Helsby*, 31 App. Div. 2d 325, 329-30, 297 N.Y.S.2d 813, 817-18 (3d Dep't), *aff'd*, 24 N.Y.2d 993, 250 N.E.2d 230, 302 N.Y.S.2d 822 (1969); *Local 456, Int'l Bhd. of Teamsters v. Town of Cortlandt*, 68 Misc. 2d 645, 327 N.Y.S.2d 143, 152 (Sup. Ct. Westchester County 1971); *Lecci v. Nickerson*, 63 Misc. 2d 756, 762, 313 N.Y.S.2d 474, 480 (Sup. Ct. Nassau County 1970).

⁴ The New York courts previously have implied a variety of remedies for Taylor Law violations. *See People v. Vizzini*, 78 Misc. 2d 1040, 1044, 359 N.Y.S.2d 143, 148-49 (Sup. Ct. N.Y. County 1974) (implying criminal sanctions); *Caso v. Gotbaum*, 67 Misc. 2d 205, 212, 323 N.Y.S.2d 742, 750 (Sup. Ct. Nassau County 1971) (implying an injunction for private citizens), *rev'd on other grounds*, 38 App. Div. 2d 955, 331 N.Y.S.2d 507 (2d Dep't 1972).

⁵ 88 App. Div. 2d 50, 452 N.Y.S.2d 80 (2d Dep't 1982).

⁶ *Id.* at 65, 452 N.Y.S.2d at 89.

⁷ *Id.* at 52, 452 N.Y.S.2d at 82; *see supra* note 2 and accompanying text. The defendants also included the local affiliated unions and their respective officials. 88 App. Div. 2d at 52, 452 N.Y.S.2d at 82.

⁸ *Burns Jackson Miller Summit & Spitzer v. Lindner*, 108 Misc. 2d 458, 458-59, 437 N.Y.S.2d 895, 898 (Sup. Ct. Queens County 1981), *rev'd*, 88 App. Div. 2d 50, 452 N.Y.S.2d 80 (2d Dep't 1982). On the eighth day of the strike, the court found the unions and several of the principal officers guilty of criminal contempt. 108 Misc. 2d at 460, 437 N.Y.S.2d at 898-99. Although the court imposed heavy fines, *id.*, 437 N.Y.S.2d at 899; *see N.Y. Civ. SERV. LAW* § 210(2) (McKinney 1973), the strike lasted until April 11, 1980, 108 Misc. 2d at 460, 437 N.Y.S.2d at 899.

⁹ 108 Misc. 2d at 460, 437 N.Y.S.2d at 899. The Office of Economic Development estimated that the City of New York would lose \$75-100 million per day during the strike. *N.Y. Times*, Apr. 2, 1980, at B6, col. 1.

¹⁰ *See* 88 App. Div. 2d at 52-53, 452 N.Y.S.2d at 82-83. The complaint consisted of a consolidation of two actions. *See id.* at 52-53, 452 N.Y.S.2d at 82-83. In the first action, the plaintiff was the law firm of Burns, Jackson, Miller, Summit & Spitzer appearing on behalf of their own law firm and all those professional and business organizations similarly situated. *Id.* at 52, 452 N.Y.S.2d at 82. The second action was commenced by the law firm of Jackson, Lewis, Schnitzler & Krupman. *Id.* at 53, 452 N.Y.S.2d at 83.

dant unions for economic loss resulting from the strike.¹¹ The plaintiffs asserted, *inter alia*,¹² a private right of action based upon the defendants' violation of the Taylor Law.¹³ The Supreme Court, Special Term, upheld the private cause of action,¹⁴ but the Appellate Division, Second Department, reversed, holding that the additional remedy of a private cause of action could not be inferred from the Taylor Law's enforcement scheme.¹⁵

Justice Gulotta, writing for a unanimous court,¹⁶ employed the test established by the United States Supreme Court in *Cort v. Ash*¹⁷ for determining whether a private right of action may be in-

¹¹ See *id.* at 52-54, 452 N.Y.S.2d at 82-83.

¹² *Id.* Action number one set forth two causes of action. *Id.* at 52, 452 N.Y.S.2d at 82. The first cause of action sounded in prima facie tort, and the second was based on public nuisance. *Id.* Under each cause of action, the plaintiffs sought damages in excess of \$50,000,000 per day for lost profits and out-of-pocket expenditures needed to remain in operation during the strike. See *id.* at 53, 452 N.Y.S.2d at 82-83. The nuisance action included damages for "substantial interference with, the public health, safety, comfort and convenience of persons within the New York City metropolitan area . . ." *Id.* at 53, 452 N.Y.S.2d at 83. In the second action, Jackson, Lewis, Schnitzler & Krupman alleged the following causes of action: (1) a private right of relief for violation of the Taylor Law, alleging that its provisions included the protection of the public from losses suffered as a result of public employee strikes; (2) prima facie tort, alleging that the illegal strike by the employees inflicted financial damage as a foreseeable result; (3) tortious interference with business relationships, alleging entitlement to damages because of intentional and malicious interference; (4) malice, or intentional tort, alleging that by the illegal strike the defendants maliciously caused injury; (5) conspiracy to violate the Taylor Law; and, (6) breach of contract, claiming status as a third-party beneficiary of the employer-employee collective bargaining agreement. *Id.* at 53-54, 452 N.Y.S.2d at 83.

¹³ *Id.* at 54, 452 N.Y.S.2d at 83. The complaint alleged that the purpose of the prohibitions embodied in the Taylor Law included safeguarding the public from damages caused by public employee strikes. *Id.* Individual damages of \$25,000 were claimed for such strike-related losses. *Id.*

¹⁴ See 108 Misc. 2d at 458, 437 N.Y.S.2d at 895. The court at special term sustained all the causes of action except that which sounded in breach of contract. *Id.*

¹⁵ 88 App. Div. 2d at 65, 452 N.Y.S.2d at 89.

¹⁶ Justice Gulotta was joined by Presiding Justice Mollen and Justices Weinstein and Thompson.

¹⁷ 422 U.S. 66 (1975). In *Cort*, the Supreme Court established guidelines for determining whether a private cause of action may be implied from a statute. *Id.* at 78. These guidelines were adopted by New York in the case of *Manfredonia v. American Airlines, Inc.*, 68 App. Div. 2d 131, 139-40, 416 N.Y.S.2d 286, 291 (2d Dep't 1979); see 88 App. Div. 2d at 59, 452 N.Y.S.2d at 86, and, as interpreted in *Manfredonia*, read as follows:

1. Was the statute intended to protect a particular class of persons? . . . 2. Was there an intention to create or deny a private right? . . . 3. Would the right be consistent with the goal of the statute? . . . 4. Is the cause of action one traditionally left to State law?

68 App. Div. 2d at 139-40, 416 N.Y.S.2d at 291.

ferred from a statute.¹⁸ Under the initial *Cort* inquiry, the *Lindner* court was required to determine whether the plaintiffs were in the "class for whose *especial* benefit the statute was enacted."¹⁹ While enactment of the Taylor Law was for the benefit of the entire public,²⁰ the court noted that this fact alone did not "preclude the implication of a private right of action for its violations."²¹ Turning to the second *Cort* criterion, namely, evidence of express or implied legislative intent to create a private remedy, Justice Gulotta determined that neither the committee report nor other legislative sources demonstrated any such intention.²² Finally, the court, applying the third prong of the *Cort* test, examined the underlying scheme of the Taylor Law to ascertain if the implication of a private remedy was consistent with the law's underlying purpose.²³ The *Lindner* court identified prevention of public employee strikes and promotion of public employee relations as two important objectives of the Taylor Law.²⁴ Although the court found it "self-evident" that allowing a private cause of action would promote the "no-strike" policy of the law,²⁵ it was deemed equally

¹⁸ 88 App. Div. 2d at 59, 452 N.Y.S.2d at 85-86.

¹⁹ *Id.*, 452 N.Y.S.2d at 86 (citations omitted) (quoting *Cort*, 422 U.S. at 78 (emphasis supplied by Court) (quoting *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916))).

²⁰ 88 App. Div. 2d at 59, 452 N.Y.S. 2d at 86.

²¹ *Id.*, 452 N.Y.S.2d at 87. It has been argued that laws which benefit members of the public as individuals rather than as a group may give rise to a private cause of action. Note, *Private Damage Actions Against Public Sector Unions for Illegal Strikes*, 91 HARV. L. REV. 1309, 1317 (1978); see 88 App. Div. 2d at 60-61, 452 N.Y.S.2d at 87. *But see* *Schmidt v. Merchant's Despatch Transp. Co.*, 270 N.Y. 287, 305, 200 N.E. 824, 829 (1936); *infra* note 32 and accompanying text. Furthermore, it has been suggested that the size of the beneficiary class should not be a factor in determining a private cause of action. See 88 App. Div. 2d at 61, 452 N.Y.S.2d at 87 (quoting Note, *supra*, at 1317).

²² 88 App. Div. 2d at 62, 452 N.Y.S.2d at 87. The court noted that in *Jamur Prods. Corp. v. Quill*, 51 Misc. 2d 501, 273 N.Y.S.2d 348 (Sup. Ct. N.Y. County 1966), a private cause of action was instituted against the TWU and the ATU for monetary damages suffered by corporations and individuals as a result of the 1966 New York City transit strike. *Id.* at 502, 243 N.Y.S.2d at 349. The *Jamur* court found that no implied cause of action enured to the plaintiffs as a result of the defendants' violation of the Condon-Wadlin Act (predecessor to the Taylor Law), because the statute made no provision for remedial action by the public. *Id.* at 506, 273 N.Y.S.2d at 353. Therefore, the *Lindner* court indicated, the failure of the legislature specifically to authorize a private cause of action after *Jamur*, implicitly pointed toward the denial of a private right of action. 88 App. Div. 2d at 65, 412 N.Y.S.2d at 89.

²³ See 88 App. Div. 2d at 62, 452 N.Y.S.2d at 88. The *Lindner* court noted that under its analysis, it was unnecessary to examine the fourth *Cort* inquiry. *Id.* at 65 n.2, 452 N.Y.S.2d at 89 n.2.

²⁴ See *infra* notes 26-27 and accompanying text.

²⁵ 88 App. Div. 2d at 62, 452 N.Y.S.2d at 88; see N.Y. CIV. SERV. LAW § 200 (McKinney

"self-evident" that permitting a private damage suit would jeopardize the existence of public sector labor unions.²⁶ The court concluded that "the question boils down to which of these statutory objectives is the more important: the prevention of strikes or the preservation of the public employee bargaining apparatus."²⁷ Justice Gulotta relied on an alternative line of cases and held that the comprehensiveness of the enforcement scheme enunciated in the Taylor Law supported the rejection of an implied private remedy.²⁸

1973).

²⁶ 88 App. Div. 2d at 62, 452 N.Y.S.2d at 88. Justice Gulotta noted that a stated purpose of the Taylor Law was to "promote harmonious and cooperative relationships between government and its employees." *Id.* (quoting N.Y. CIV. SERV. LAW § 200 (McKinney 1973)).

²⁷ 88 App. Div. 2d at 62, 452 N.Y.S.2d at 88. The court recognized that the appellate division in the past had appeared to accord the strike prevention purpose greater weight. *Id.* at 64-65, 452 N.Y.S.2d at 89; *see, e.g.,* New York City Transit Auth. v. Lindner, 83 App. Div. 2d 573, 573-74, 441 N.Y.S.2d 145, 146-47 (2d Dep't 1981).

²⁸ 88 App. Div. 2d at 65, 452 N.Y.S.2d at 89. The court found persuasive those cases that had concluded: "[T]he more comprehensive the legislative scheme with regard to enforcement, the stronger is the presumption that a given further remedy was intentionally omitted." *Id.* Justice Gulotta noted that the enforcement scheme of the Taylor Law provides for injunctions, deprivation of "dues check-off" privileges and deductions from employees' compensation. *Id.*; *see* N.Y. CIV. SERV. LAW §§ 210-211 (McKinney 1973).

In addition to dismissing the Taylor Law claim, the court dismissed the plaintiffs' remaining causes of action. 88 App. Div. 2d at 66, 452 N.Y.S.2d at 90. The court reasoned that since the alleged injury had been sustained by virtually all other businesses in the metropolitan area, the requisite determination of a peculiar injury could not be made to satisfy a public nuisance action for damages. *Id.* at 71, 452 N.Y.S.2d at 92-93. The court dismissed plaintiffs' count in prima facie tort for failure to allege that the transit strike in question was a lawful act, a required element of the cause of action. *Id.*, 452 N.Y.S.2d at 93. The cause of action for interference with the plaintiffs' business was insufficient, the court concluded, because the allegations were conclusory, failed to specify the relationships interfered with, the defendant's knowledge, and the interference. *Id.* at 72, 452 N.Y.S.2d at 93. The conspiracy allegation was dismissed on the ground that no independent tort of conspiracy is recognized in New York. *Id.* at 72, 452 N.Y.S.2d at 93-94.

Finally, the court addressed the breach of contract cause of action, under which the plaintiff Jackson, Lewis, Schnitzler & Krupman claimed to be a third-party beneficiary of the agreement between the TWU and the transit authority. *Id.* at 73, 452 N.Y.S.2d at 94. Although the collective bargaining agreement had expired before the commencement of the strike, *id.*, the plaintiff maintained that under *In re Triborough Bridge & Tunnel Auth.*, 5 N.Y. PUB. EMP. REL. Bd. ¶ 5-3037 (1972), the no-strike clause continued in effect until a new agreement was reached, 88 App. Div. 2d at 73, 452 N.Y.S.2d at 94. The court distinguished *Triborough*, which it read as preventing an employer from unilaterally changing the conditions of employment during the negotiation period following the expiration of the contract, *id.*, but not as holding that all of the items of a collective bargaining agreement will be carried over into the period following negotiations, *id.* Therefore, the effect of the no-strike clause did not carry over into the period following the expiration of the contract. *Id.* at 74, 452 N.Y.S.2d at 94. Additionally, the court examined *Kornblut v. Chevron Oil Co.*, 62 App. Div. 2d 831, 407 N.Y.S.2d 498 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 853, 400 N.E.2d 368, 424 N.Y.S.2d 429 (1979), to determine whether the plaintiffs properly could claim third-party

The *Lindner* court's prohibition of a private cause of action appears to be a retreat from the court's traditionally liberal construction of the Taylor Law in framing relief.²⁹ Remedies and penalties other than those set forth in the statute have been considered appropriate to effectuate the public benefit purposes of the Taylor Law.³⁰ Indeed, Justice Gulotta, relying on *Abounader v. Strohmeier & Arpe Co.*,³¹ stated that similar statutes have provided the basis for the implication of a private cause of action.³²

Nevertheless, the court's holding that no private cause of action arises for violation of the Taylor Law appears to be both proper and prudent. It is submitted, however, that in reaching its conclusion, the court departed from the third inquiry of the *Cort* test, which requires identification of the underlying purpose of a statute, and instead emphasized the Act's comprehensive enforce-

beneficiary status, even if the no-strike clause had been in effect. 88 App. Div. 2d at 74, 452 N.Y.S.2d at 94. The court noted that to establish such status, it is essential to demonstrate either "(1) an intention, manifested in the contract . . . that the promisor shall compensate the members of the public, or (2) that the contract was entered into with a municipality for the rendition of services the nonperformance of which would have subjected the municipality to liability for the damages incurred thereby." *Id.* at 74-75, 452 N.Y.S.2d at 95 (citation omitted). The court concluded that no intention to pay consequential damages of the type alleged was expressed in the contract and that neither party undertook to assume such a liability. *Id.* at 75, 452 N.Y.S.2d at 95.

²⁹ See *Caso v. District Council 37*, 43 App. Div. 2d at 163, 350 N.Y.S.2d at 178 (citing *Civil Serv. Employees Ass'n v. Helsby*, 31 App. Div. 2d 325, 330, 297 N.Y.S.2d 813, 818 (3d Dep't), *aff'd*, 24 N.Y.2d 993, 250 N.E.2d 230, 302 N.Y.S.2d 822 (1969)). As noted in *Caso*, "[t]he purposes of the Taylor Law . . . are best served by permitting appropriate redress for violation of the law." 43 App. Div. 2d at 162, 350 N.Y.S.2d at 176; see *infra* note 33.

Similarly, it is well settled that the Taylor Law should be construed to effectuate its public benefit purpose of assuring "orderly and uninterrupted operations and functions of government." 31 App. Div. 2d at 330, 297 N.Y.S.2d at 818; see N.Y. CIV. SERV. LAW § 200 (McKinney 1973); see also *Lecci v. Nickerson*, 63 Misc. 2d 756, 762, 313 N.Y.S.2d 474, 481 (Sup. Ct. Nassau County 1970).

³⁰ See *Caso v. District Council 37*, 43 App. Div. 2d 159, 162, 350 N.Y.S.2d 173, 176-77 (2d Dep't 1973); *infra* note 33.

³¹ 243 N.Y. 458, 154 N.E. 309 (1926). In *Abounader*, the New York Court of Appeals granted a private cause of action for violation of the Farm and Markets Law, a statute enacted for the benefit of the general public. *Id.* at 464-66, 154 N.E. at 311.

³² 88 App. Div. 2d at 60, 452 N.Y.S.2d at 86-87. Precedent subsequent to *Abounader* had denied an implied cause of action where the benefit inured to the general public. *Schmidt v. Merchant's Despatch Transp. Co.*, 270 N.Y. 287, 305, 200 N.E. 824, 829 (1936). As noted in *Schmidt*, "[w]hen the statute merely defines . . . the degree of care which shall be exercised under specified circumstances, it does not 'create' a new liability." *Id.* at 305, 200 N.E. at 829; see also *Motyka v. City of Amsterdam*, 15 N.Y.2d 134, 137, 204 N.E.2d 635, 637, 256 N.Y.S.2d 595, 598 (1965). Interestingly, it would appear to follow from the *Lindner* reasoning that when there exists no comprehensive legislative scheme to militate against a private cause of action, a private cause of action under a statute enacted for the benefit of the public may be available if the remaining *Cort* inquiries are satisfied.

ment scheme in rejecting a private cause of action.³³

Under the third criterion of *Cort*, a private cause of action will not be recognized if it is deemed inconsistent with the statute's underlying purpose.³⁴ The difficulty in *Lindner* arose because the Taylor Law's two purposes, the prevention of strikes and the promotion of stable labor relations, could not be promoted simultaneously.³⁵ Had the court found the strike prevention purpose to be of greater importance, the recognition of a private cause of action would have been consistent with the court's traditional liberal approach to shaping remedies under the Taylor Law.³⁶ Such recognition would also be consistent with the general policy of federal³⁷

³³ 88 App. Div. 2d at 65, 452 N.Y.S.2d at 89. The court in *Lindner* stated:

The enforcement scheme prescribed by the Taylor Law is quite comprehensive, and includes . . . the power to enjoin an illegal strike, to punish a union and its members for their willful violation of any such injunction, to deprive a striking union of its "dues check-off" privileges for an indefinite period of time, and to deduct from the compensation of every public employee who has been found to have violated its provisions

Id. The court followed the Supreme Court case of *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), in which the Supreme Court concluded that the existence of express remedies under the Federal Water Pollution Control Act and the Marine Protection, Research and Sanctions Act of 1972 demonstrated that Congress not only intended to foreclose implied private actions, but that it also intended to supplant any remedy that previously would have been available. *Id.* at 17-18.

Dissenting in *Middlesex*, Justice Stevens argued that "[n]o matter how comprehensive we may consider a statute's remedial scheme to be, Congress is at liberty to leave other remedial avenues open." *Id.* at 28 (Stevens, J., dissenting). Justice Stevens' reasoning is analogous to that employed by other New York courts interpreting Taylor Law provisions. See *People v. Vizzini*, 78 Misc. 2d 1040, 1044, 359 N.Y.S.2d 143, 148 (Sup. Ct. N.Y. County 1974) (implying criminal sanctions for Taylor Law violations); see also *Caso v. Gotbaum*, 67 Misc. 2d 205, 212, 323 N.Y.S.2d 742, 750 (Sup. Ct. Nassau County 1971) (recognizing a "new" rule that any adversely affected private citizen may enjoin polluters), *rev'd on other grounds*, 38 App. Div. 2d 955, 331 N.Y.S.2d 507 (2d Dep't 1972).

³⁴ 422 U.S. at 78; see *supra* note 17.

³⁵ See *supra* text accompanying notes 25-26.

³⁶ See *supra* note 33.

³⁷ See *J.I. Case Co. v. Borak*, 377 U.S. 426, 432-33 (1964) (providing a civil cause of action under the Securities Exchange Act of 1934); *Fitzgerald v. Pan Am. Airways, Inc.*, 229 F.2d 499, 501-02 (2d Cir. 1956) (civil action under the Civil Aeronautics Act of 1938); *Neiswonger v. Goodyear Tire & Rubber Co.*, 35 F.2d 761, 762-63 (N.D. Ohio 1929) (civil action under the Air Commerce Act of 1926); Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 291-92 (1963) [hereinafter cited as Note, *Civil Remedies*]; Note, *Implication of Private Actions From Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371, 374 (1976) [hereinafter cited as Note, *Private Actions*]. The argument is frequently made that without the courts' aid in the enforcement scheme, the statutory remedy would be inadequate. See *id.*, at 374 & n.35.

Private causes of action are implied most often in the securities litigation field. Recent Cases, *Remedies—Fair Labor Standards—Private Damage Suit Unavailable to Redress Vi-*

and New York courts³⁸ in inferring private damage actions from statutes.

The second purpose of the Taylor Law³⁹ is arguably of equal import as the goal of avoiding strikes, since the concern for promoting stable labor relations was the initial impetus behind the repeal of the Condon-Wadlin Act and the enactment of the Taylor Law.⁴⁰ A private cause of action would discourage illegal strikes

olations of Child Labor Provisions of the Fair Labor Standards Act, 26 VAND. L. REV. 867, 869 (1973); Note, *Civil Remedies*, *supra* at 286. An important case in the securities area is *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), in which a stockholder brought a civil action for the violation of the Securities and Exchange Act of 1934. *Id.* at 427. The Court reasoned that although the Act contained no specific mention of a private cause of action, "among its chief purposes is 'the protection of investors,'" which would imply judicial relief to effectuate this goal. *Id.* at 432. Furthermore, the Court concluded that it was the duty of the judiciary to provide remedies to achieve the legislative result, *id.* at 433, and that generally it is the function of the courts to grant necessary relief when rights are invaded, *id.* Notably, the existence of other private remedies did not prohibit an implied cause of action. See *Recent Cases*, *supra*, at 870. *But see* 88 App. Div. 2d at 65, 452 N.Y.S.2d at 89.

³⁸ *Atkin v. Hill, Darlington & Grimm*, 15 App. Div. 2d 362, 367, 224 N.Y.S.2d 553, 558 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 940, 188 N.E.2d 790, 238 N.Y.S.2d 516 (1963); see *American Bank & Trust Co. v. Barad Shaff Sec. Corp.*, 335 F. Supp. 1276, 1282-83 (S.D.N.Y. 1972); *Kessler, Business Associations*, 14 SYRACUSE L. REV. 217, 241 (1962). Courts have also implied a private cause of action for violation of the New York General Business Law, N.Y. GEN. BUS. LAW § 352(c) (McKinney 1968 & Supp. 1981-1982), which designates prohibited acts that are "engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase . . . of any securities or commodities . . ." *Hertzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 129 (S.D.N.Y. 1974) (quoting N.Y. GEN. BUS. LAW § 352(c)(1) (McKinney 1968)), *modified*, 540 F.2d 27, 39 (2d Cir. 1976). The statute provides criminal sanctions for its violation, but no civil remedies. *Lupardo v. I.M.N. Indus. Corp.*, 36 F.R.D. 438, 439 (S.D.N.Y. 1965); *Barnes v. Peat, Marwick, Mitchell & Co.*, 69 Misc. 2d 1068, 1072, 332 N.Y.S.2d 281, 285 (Sup. Ct. N.Y. County 1972), *modified on other grounds*, 42 App. Div. 2d 15, 344 N.Y.S.2d 645 (1st Dep't 1973). The courts have described the purpose of section 352(c) of the General Business Law as the protection of the public against fraud in the sale of securities. See, e.g., *Lupardo*, 36 F.R.D. at 439; *Herdegen v. Paine, Webber, Jackson & Curtis*, 31 Misc. 2d 104, 105, 220 N.Y.S.2d 459, 460 (Sup. Ct. N.Y. County 1961). To effectuate this legislative purpose, New York and federal courts have implied a private cause of action for its violation. See *Hertzfeld*, 378 F. Supp. at 130; 36 F.R.D. at 439; 69 Misc. 2d at 1072, 332 N.Y.S.2d at 285.

³⁹ See N.Y. CIV. SERV. LAW § 200 (McKinney 1973).

⁴⁰ See *supra* note 1. "There is now a widespread realization that protection of the public from strikes in the public services requires the designation of other ways and means for dealing with claims of public employees for equitable treatment." FINAL REPORT, *supra* note 1, at 9. The means are embodied in section 200 of the Taylor Law, "granting to public employees the right of organization and representation . . . [and] requiring the state, local governments and other political subdivisions to negotiate with, and enter into written agreements with employee organizations." N.Y. CIV. SERV. LAW § 200 (McKinney 1973); see *Reese v. Lombard*, 47 App. Div. 2d 327, 332, 366 N.Y.S.2d 493, 498-99 (4th Dep't 1975) (legislative desire to bring about harmonious employer-employee relationships); *County of Ulster v. CSEA Unit*, 37 App. Div. 2d 437, 439, 326 N.Y.S.2d 706, 709 (3d Dep't 1971) (Taylor Law enacted with hope of insuring tranquility of labor relations); *Civil Serv. Em-*

but would financially damage unions and likely prompt increased defiance.⁴¹ Moreover, recognition of a private cause of action might well lead to a flood of litigation instituted by individual members of the public inconvenienced by a public employee strike.⁴²

Rather than deciding between the twin objectives of the Taylor Law, the *Lindner* court instead referred to the comprehensive enforcement scheme as evidence of an intent to omit a private damage action.⁴³ Whether the court based its denial of a private cause of action upon a comprehensive legislative scheme which "militated" against such a conclusion,⁴⁴ or upon the overriding importance of stable labor relations,⁴⁵ the practical effect is the same—unions are protected from increased liability. It is clear, therefore, that the court could have pointed to the second purpose of the Taylor Law as preeminent, deemed the private cause of ac-

ployees v. Helsby, 31 App. Div. 2d 325, 330, 297 N.Y.S.2d 813, 818 (3d Dep't 1969) (main purpose of Taylor Law is promotion of harmonious relationships to protect public).

⁴¹ See 88 App. Div. 2d at 62-64, 452 N.Y.S.2d at 88-89.

⁴² See 88 App. Div. 2d at 64-65, 452 N.Y.S.2d at 87; cf. H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 168, 159 N.E. 896, 898-99 (1928) (defendant water company under contract with city held not liable to general public for failure to furnish water).

⁴³ 88 App. Div. 2d at 65, 452 N.Y.S.2d at 89. The court followed the doctrine of *expressio unius est exclusio alterius*, which provides that where the legislature has designated particulars of "performance and operation," the inference is that all omissions are exclusions. 2A J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 47.23, at 123 (C. Sands 4th ed. 1973); Note, *Remedies—Private Right of Action Not To Be Implied from Federal Corrupt Practices Act*, 50 TUL. L. REV. 713, 714 n.15 (1976); 26 VAND. L. REV., *supra* note 37, at 867-68. The reasoning behind the doctrine is that if the legislature had intended a remedy, it would have provided one. Gamm & Eisberg, *The Implied Rights Doctrine*, 41 UMKC L. REV. 292, 300 (1972); see 2A J. SUTHERLAND, *supra*, § 47.24, at 127-28; Note, *Civil Remedies*, *supra* note 37, at 290; Note, *Private Actions*, *supra* note 37, at 377-78. The doctrine has found little acceptance in the courts. See SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350-51 & n.8 (1943); Baird v. Franklin, 141 F.2d 238, 245 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944). *But see* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981) ("where a statute . . . provides . . . remedies, [the courts should] be chary of reading others into it"); Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1979) (when Congress intended a private remedy, it expressly provided it); 26 VAND. L. REV., *supra* note 37, at 868 & n.7. The criticism is that although the doctrine expresses a possible reading of the legislative intent, a contrary reading is usually also credible. Note, *Civil Remedies*, *supra* note 37, at 289-90; Note, *Private Actions*, *supra* note 37, at 378. In the *Lindner* case this is particularly true, since the court noted that "while the parties have quoted extensively from the Committee Report and other legislative sources . . . none of the quoted material indicates any intention either to create or deny a private remedy." 88 App. Div. 2d at 62, 452 N.Y.S.2d at 87. It is suggested that in *Lindner*, a reading that the legislature never considered the existence of a private cause of action is as equally plausible as the court's reading of an intentional omission.

⁴⁴ See *supra* note 43 and accompanying text.

⁴⁵ See 88 App. Div. 2d at 62, 452 N.Y.S.2d at 88.

tion to be in conflict with that purpose, and thus obtained the same result while remaining entirely consistent with the *Cort* analysis.⁴⁶

It is suggested, however, that the failure of the *Lindner* court to adhere to a strict *Cort* analysis evidences a recognition of the potential problems and implications inherent in selecting between two underlying statutory purposes of equal import.⁴⁷ The conclusion that the predominant purpose of the Taylor Law was to promote harmonious employer-employee relationships, and not to protect the general public, would inevitably undermine the statute's historically recognized public benefit function.⁴⁸ The *Lindner* court should be commended for recognizing and protecting the competing legislative purposes of the Taylor Law. It is hoped that future interpretations of the Taylor Law likewise will preserve the delicate balance between promotion of organized labor and protection of the public.

Douglas Wamsley

COURT OF CLAIMS ACT

Ct. Cl. Act § 8: Waiver of sovereign immunity does not permit assessment of punitive damages against the state or its political subdivisions

The State of New York was among the first jurisdictions to waive its common-law sovereign immunity from liability.⁴⁹ Section

⁴⁶ See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

⁴⁷ See N.Y. CIV. SERV. LAW § 200 (McKinney 1973).

⁴⁸ See *supra* note 29.

⁴⁹ See Court of Claims Act, ch. 467, § 12-a, [1929] N.Y. LAWS 994 (current version at N.Y. CT. CL. ACT § 8 (McKinney 1963)). Although a court of claims existed as early as 1897, see ch. 36, § 263, [1897] N.Y. LAWS 14-15, the Court of Claims Act did not come into existence until 1920, see ch. 922, § 2, [1920] N.Y. LAWS 3. The Court of Appeals created a problem, however, when it held that section 264 of the Code of Civil Procedure, which became section 12 of the Court of Claims Act, did not constitute a waiver of sovereign immunity. See *Smith v. State of New York*, 227 N.Y. 405, 409, 125 N.E. 841, 842 (1920). The apparent effect of the *Smith* decision was to impose liability upon the state for its employees' torts, provided that the employees acted in accordance with a specific law. See A Consideration of Section 176 of the Highway Law and Section 12-A of the Court of Claims Act, [1936] N.Y. LAW REV. COMM'N REP. 953, 963. State liability thus was limited to torts arising from conduct undertaken pursuant to the Highway Law. *Id.*; ch. 371, § 17, [1922] N.Y. LAWS 790. In 1929, due largely to the efforts of Governor Alfred Smith, the legislature enacted section 12-a of the Court of Claims Act. See McNamara, *The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 ST. JOHN'S L. REV. 1, 11 (1965).