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LIABILITY AND PRIVATE CAUSES OF ACTION FOR DAMAGES WHICH RESULT FROM ILLEGAL FIREFIGHTER STRIKES

Although strikes by public employees are illegal in almost every state,[1] they are still fairly common.[2] Damages resulting from a strike

1. Statutes declaring public employee strikes illegal include three types of statutory schemes. One commentator summarized all three types:

> One system prohibits strikes but provides for union recognition and exclusivity, collective bargaining, and impasse procedures including mediation and factfinding (the "collective bargaining group"). The second type provides for collective bargaining and permits at least a limited right to strike (the "right to strike" group). The third scheme prohibits strikes with no provision for collective bargaining (the "absolute ban group"). Statutes in the first group include: 5 U.S.C.A. §§ 7102-7123 (West 1980 & Supp. 1985); Cal. Gov't Code §§ 3500-3535 (West 1980 & Supp. 1985); Conn. Gen. Stat. Ann. §§ 7-467 to 475 (West 1972 & Supp. 1985); Del. Code Ann. tit. 14, §§ 4001-4013 (1981 & Supp. 1984); tit. 19 §§ 1301-1312 (1979); Idaho Code §§ 44-1801 to 1811 (1977 & Supp. 1985) (firefighters), § 33-1271 (1981) (teachers); Iowa Code Ann. §§ 20.1 to .27 (West 1978 & Supp. 1985); Kan. Stat. Ann. §§ 72-5413 to 5432 (1980), §§ 75-4321 10 4337 (1984); Me. Rev. Stat. Ann. tit. 26, §§ 961-972, 979 to 979N (1964 & Supp. 1984-1985); Md. Educ. Code Ann. §§ 6-401 to -411 (1985 & Supp. 1985) (teachers); Mass. Gen. Laws Ann. ch. 150E, §§ 1-15 (West 1982 & Supp. 1985); Mich. Comp. Laws. Ann. §§ 423-202 to 209 (West 1978); Nev. Rev. Stat. §§ 288.010 to .280 (1983); N.H. Rev. Stat. Ann. §§ 273-A:1 to :16 (1977 & Supp. 1983); N.J. Stat. Ann. §§ 34:13A-1 to 13 (West 1965 & Supp. 1985); N.Y. Civ. Serv. Law §§ 200-214 (McKinney 1983 & Supp. 1985); Ohio Rev. Code Ann. §§ 4117.01 to .23 (Page 1980 & Supp. 1984); Okla. Stat. Ann. tit. 11, §§ 51-101 to 113 (West 1978 & Supp. 1984-1985) (police and firefighters), tit. 70, §§ 509.1 to .10 (West 1972 & Supp. 1984-1985) (teachers); S.D. Codified Laws Ann. §§ 3-18-1 to 17 (1980 & Supp. 1984); Tenn. Code Ann. §§ 49-5-601 to 613 (1983) (teachers); Wash. Rev. Code Ann. §§ 41.56.010 to .950 (1972 & Supp. 1986) (public employees).
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> Statutes including some provision for legal strikes include Alaska Stat. §§ 23.40.070 to .260 (1984); Hawaii Rev. Stat. §§ 89-1 to 20 (1976 & Supp. 1984); Illinois Public Labor Relations Act §§ 1-27, Ill. Ann. Stat. ch. 48, §§ 1601-1627 (Smith-Hurd Supp. 1985) (public employees generally); Illinois Educational Labor

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of essential public service employees are often enormous.[3] State courts differ greatly on who is liable for damages resulting from these illegal strikes. Some courts allow recovery against public employees and unions that violate state anti-strike provisions, theorizing that private causes of action may deter public employee strikes.[4] Other courts re-

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Relations Act §§ 1-21, Ill. Ann. Stat. ch. 48, §§ 1701-1721 (Smith-Hurd Supp. 1985) (teachers); Minn. Stat. Ann. §§ 179A.01 to .25 (West Supp. 1985); Mont. Code Ann. §§ 39-31-101 to 409 (1983); Or. Rev. Stat. §§ 243.650 to .782 (1981); Pa. Stat. Ann. tit. 43, §§ 1101.101 to .2301 (Purdon Supp. 1985); Vt. Stat. Ann. tit. 21, §§ 1721-1735 (1978 & Supp. 1985) (municipal employees); Wis. Stat. Ann. §§ 111.70-111.97 (West 1974 & Supp. 1985). The typical provision in this group either limits the right to strike to certain categories of employees or provides that strikes may be enjoined on a showing of significant risk to the public safety, health, or welfare.

The third group legislates a strike ban without a provision for collective bargaining. See Fla. Const. art. I, § 7; Fla. Stat. § 447.505 (1983); Ga. Code Ann. §§ 45-19-1 to 5 (1982); Tex. Stat. Ann. art. 5154c, § 3 (Vernon 1971) (public employees generally), art. 5154c-1, § 2 (Vernon Supp. 1985) (police and firefighters); Va. Code § 40.1-55 to 57.1 (1981).

Dripps, *New Directions for the Regulation of Public Employee Strikes*, 60 N.Y.U. L. REV. 590, 591-92 (1985).

2. The number of public employee work stoppages has increased steadily over the past two decades, from 42 strikes in 1965 to 593 strikes in 1979. GOV'T EMPL. REL. REP. (BNA) 71:1014 (1981) *cited in* Note, *Damage Liability of Public Employee Unions for Illegal Strikes*, 23 B.C. L. REV. 1087, 1088 n.13 (1982) [hereinafter cited as *Damage Liability*].

3. For example, in Berger v. City of University City, 676 S.W.2d 39 (Mo. 1984), restaurant owners suffered a loss in excess of 1.25 million dollars when their restaurant was destroyed during a firefighters' strike. Similarly, in State v. Kansas City Firefighters Local 42, 672 S.W.2d 99 (Mo. App. 1984), the state incurred several hundred thousand dollars worth of expenses when the National Guard took over the duties of striking firefighters.

Monetary loss is not the only damage which may result from an illegal firefighters' strike. For example, in Jackson v. Byrne, 738 F.2d 1443 (7th Cir. 1984), the plaintiff sued the mayor and the city of Chicago when two children died in a fire during an illegal firefighters' strike. However, the plaintiffs' claim under 42 U.S.C. § 1983 failed because the firefighters lacked a constitutional duty to act. *Id.* at 1446.

4. The first such case was Caso v. District Counsel 37, 43 A.D.2d 159, 350 N.Y.S.2d 173 (N.Y. App. Div. 1971), in which the court allowed a private action for damages when striking sewage workers allowed raw sewage to be dumped into waters in Manhattan. Other cases allowing private actions include: Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 110, 140 Cal. Rptr. 41, 47 (Cal. Ct. App. 1977) (public school teachers' illegal strike); *Kansas City Firefighters Local 42*, 672 S.W.2d at 109 (firefighters' strike); Boyle v. Anderson Firefighters Ass'n Local 1262, 497 N.E.2d 1073 (Ind. 1986) (firefighters' strike).

Defendants in damage actions for employee strikes commonly include the municipality, firefighters' union, and individual strikers, although plaintiffs have not successfully recovered damages from all of these categories of defendants.

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fuse to permit private lawsuits if a state statute exclusively provides a governmental cause of action against strikers.[5]

This Note will examine the disparate treatment of public employee strikes by state courts, focusing on liability for damages resulting from illegal strikes by firefighters. Further, this Note will assert that state courts should allow private damage actions for illegal public employee strikes, absent express statutory language to the contrary. Finally, this Note will examine the possible theories under which an individual may pursue a private cause of action.

I. History

A. *Private Causes of Action Not Allowed*

Before 1971 no court permitted private citizens to recover damages for illegal public employee strikes. Although many courts now allow private actions,[6] some permit a cause of action only if special circumstances exist.[7]

The Tennessee Supreme Court denied a private cause of action in *Fulenwider v. Firefighters Association Local 1784*.[8] The court held that to maintain an action, the claimant must demonstrate a direct causal connection between the illegal strike and the resulting personal injury or property damage.[9] The fact that illegally striking firefighters refused to extinguish the fire that destroyed plaintiff's commercial property

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5. *See, e.g.*, Fulenwider v. Firefighters Ass'n Local Union 1784, 649 S.W.2d 268 (Tenn. Ct. App. 1982) (property owner had no enforceable rights arising out of city's labor agreement with firefighters); City of Hammond v. Cataldi, 449 N.E.2d 1184 (Ind. Ct. App. 1983) (firefighters had no special duty to property owner; therefore, property owner lacked a private cause of action against striking firefighters).

6. *See supra* note 4.

7. *See supra* note 5. Further, some states deny private causes of action for damages arising from illegal strikes because the anti-strike statutes specifically prohibit private actions. Lamphere Schools v. Lamphere Fed'n of Teachers, 400 Mich. 104, 252 N.W.2d 818 (1977) (since anti-strike statute was exclusive source of remedy for illegal strikes, and it failed to provide for private action, striking public teachers not subject to private action).

8. 649 S.W.2d 268 (Tenn. 1982). In this case, the plaintiff property owner alleged that an insufficient number of firefighters and a lack of dispatcher equipment, due to an illegal firefighters' strike, contributed to the destruction of plaintiff's property. The court found that the firefighters' strike, although illegal, did not alone create a nuisance. Therefore, the court refused to hold striking firefighters liable for property damage which occurred during the strike.

9. *Id.* at 272.

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was insufficient to impose liability on the strikers.[10] The court denied that incidental damage during a strike amounts to intentional destruction of property and refused to allow a private cause of action against the union and its members.[11]

Similarly, in *City of Hammond v. Cataldi*[12] an Indiana court denied a private right of action against a city for damages from an illegal firefighters' strike.[13] Before it would recognize a private cause of action, the court required the claimant to demonstrate that the city owed him a special duty.[14] The court reasoned that the breach of a general duty to protect the public was insufficient to impose liability.[15] The *Cataldi* plaintiff lacked a private cause of action because he failed to demonstrate that the firefighters owed him a special duty.[16]

Finally, in *Burke & Thomas, Inc. v. International Organization of Masters, Branch 6*[17] the Washington Supreme Court rejected a private action to recover lost business revenues resulting from an illegal strike

10. The court noted that it was unaware "of any case which has held that labor activity alone, whether legal or illegal, amounted to a nuisance in and of itself." *Id.* at 270. In this case, unlike other cases, the ability of nonstrikers and others to put out the fire was unimpeded by the strikers. Rather, the strikers simply refused to take any action to fight the fire themselves. *Id.*

11. If the strikers had interfered with the attempts of non-striking firefighters and volunteers to put out the fire, the Tennessee court may have imposed liability on the strikers. *Id.* Since the Tennessee court has yet to decide a case with this factual situation, however, the possible outcome is unknown.

12. 449 N.E.2d 1184 (Ind. 1983).

13. *Id.* The owners of a restaurant sued the city to recover damages which occurred when the restaurant burned down during a firefighters' strike. The plaintiffs failed to sue the union or the individual strikers, who would be the more probable defendants in a private action. 449 N.E.2d at 1185.

14. *Id.* at 1187-1188. Thus, the Indiana court implicitly rejected the per se tort theory in actions arising out of illegal strikes. In a per se tort action, the plaintiff does not have to be a member of the class protected by the labor contract (in public employee strikes, the protected party is the public employer, not the public itself.) Rather, the plaintiff must only be injured by an illegal act. *Damage Liability, supra* note 2, at 1123.

15. The court stated that since firefighting is a discretionary duty, it does not give rise to governmental liability. 449 N.E.2d at 1186. *See also* U.S. v. VARIG Airlines, 467 U.S. 797 (1984) (sovereign immunity applies to discretionary governmental activities).

16. 449 N.E.2d at 1188. The court held that the fire department had only a general duty to "protect the safety and welfare of the public," and not a special duty to citizens whose property is on fire. *Id.* It is possible, however, for a plaintiff to successfully argue that a fire on her property triggers a special duty on the part of firefighters to come to her aid. *See infra* Section III C of this Note for further discussion of this possibility.

17. 92 Wash. 2d 762, 600 P.2d 1282 (1979) (en banc).

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by state ferry system workers.[18] The court refused to find that an illegal strike is, by itself, tortious.[19] Dismissing monetary damages and inconvenience as foreseeable consequences of the strike, the court stated that private actions against strikers would disrupt the balance of power in labor negotiations.[20] Yet the court left open the possibility of private actions if the injured party proved that the strike fulfilled the elements of a particular tort.[21]

In these three cases, the courts refused to allow private lawsuits in the absence of specific statutory authority granting such rights. Moreover, these courts held that the circumstances involved were unexceptional and therefore failed to warrant private actions.[22] Plaintiffs cannot easily prove exceptional situations, and many state courts hesitate to admit that a private action is appropriate in even the most extreme circumstances.

B. *Actions Allowed in Restricted Circumstances*

Some state courts allow claimants to maintain private actions in re-

18. *Id.* at 776, 600 P.2d at 1290. Washington State Ferry Systems workers went on strike during Labor Day weekend. Businesses on several Washington islands claimed a substantial loss of revenues from decreased tourism due to the illegal strike. The court held that because the damages were merely an incidental result of the strike, the strikers were not liable for lost revenue. *Id.* at 768, 600 P.2d at 1286.

19. 92 Wash. 2d at 776, 600 P.2d at 1290. *See also supra* note 14.

20. 92 Wash. 2d at 766, 600 P.2d at 1285. The court held that creating a private cause of action in the absence of one in the anti-strike statute "could substantially interfere with progress towards the goal of labor peace." *Id.* One commentator rejected this argument, noting that state legislatures are more likely to be concerned with preventing strikes of essential public employees than with maintaining a balanced employer-employee relationship. Allowing private causes of action serves the legislature's goal of preventing strikes. *Damage Liability, supra* note 2, at 1102.

21. 92 Wash. 2d at 768, 600 P.2d at 1286. The court held that "a public employee union may be held to answer for its torts." *Id.* These plaintiffs, however, failed to prove facts necessary to make out a prima facie tort, so the court refused to impose damages on the union. *Id. See also Damage Liability, supra* note 2, at 1112.

22. The courts in the three preceding cases implied that in some specific fact situations a private cause of action might survive. For example, the *Hammond* court stated that if the fire department owed some special duty to a plaintiff whose property burned during an illegal firefighters' strike, that plaintiff could recover damages. However, the fact that the plaintiff's property caught fire alone failed to create a special duty. 449 N.E.2d 1184. If the plaintiff had an individual contract with the firefighters obligating them to extinguish any fire on the plaintiff's property, the firefighters would probably owe a special duty to that plaintiff. In such an admittedly unlikely circumstance, the court might hold firefighters liable for any fire damage which occurred to the plaintiff's property during an illegal strike. *Id.* at 1187.

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stricted circumstances. For example, the court in *State v. Kansas City Firefighters Local No. 42*[23] permitted the state to sue a firefighters' union for damages incurred during an illegal strike.[24] The city summoned the National Guard to fight fires during a strike. Although statutory provisions existed to reimburse the National Guard out of general revenues, the court allowed the state to recover its costs from the firefighters' union. Since the damages incurred by the state were a foreseeable consequence of the strike, the union was liable.[25] Further, the state could maintain its action against the union on behalf of the city, for whose benefit the legislature enacted the anti-strike statute.[26] The court declined, however, to give a private cause of action to any party beyond the state or municipality.[27]

In a later Missouri case, *Berger v. City of University City*,[28] the court conditionally allowed individuals a private cause of action against the chief of an illegally striking fire department, if they could show that the chief sought to prevent firefighters from neighboring communities from fighting a fire in his jurisdiction.[29] However, the court held both the

23. 672 S.W.2d 999 (Mo. 1984).

24. *Id.* at 104. When Kansas City firefighters engaged in a four day strike, the state incurred expenses of nearly $130,000 when it replaced striking firefighters with the National Guard.

25. The court held that even though the state had a fund to pay for its National Guard expenses, the strikers committed a legal wrong. Therefore, under the theory of *ubi ius, ibi remedium*—where there is a right there is a remedy—the officials of the striking union were liable for the state's expenses. *Id.* at 109.

26. Some authors argue that public employees owe a duty to members of the community because individuals are the third party beneficiaries of public employee contracts. Note, *Private Damage Actions Against Public Sector Unions for Illegal Strikes*, 91 HARV. L. REV. 1309 (1978) [hereinafter cited as *Private Action Against Public Unions*]. Courts, however, generally reject this approach. Therefore, individuals who wish to sue illegally striking public employees should use a theory of action other than breach of duty to a contractual beneficiary.

27. 672 S.W.2d at 110. The court held that the legislature enacted the state's no-strike clause. MO. ANN. STAT. § 105.500 (Vernon 1978), to benefit the "public body . . . that is, the public employer." *Id.* Thus, the municipality that employed the strikers had the right to maintain a damage action for losses incurred from the strike. *Id.* An individual who lost property to a fire during the illegal strike, on the other hand, would probably be unable to maintain a private action because individuals are not the intended beneficiaries of the law. *See supra* note 22, and *infra* Section III C, notes 85-90 for further analysis of this problem.

28. 676 S.W.2d 39 (Mo. App. 1984).

29. *Id.* at 42. Firefighters from neighboring communities attempted to extinguish a fire on plaintiff's property, but picketing firefighters threatened them with physical violence. As a result, plaintiff's business burned down completely. *Id.* at 40-41.

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city manager and any police official exempt from liability when the fire department refused to fight fires during the illegal strike.[30] Moreover, the court failed to hold the city liable for failing to enforce its anti-strike ordinances.[31]

These two cases show that some courts are willing to allow private actions in limited circumstances. Plaintiffs cannot entertain private suits absent a special relationship to the strikers,[32] or unless the strikers affirmatively prevented others from fighting fires.[33]

C. *Private Causes of Action Allowed in a Broad Range of Circumstances*

Some state courts impose few restrictions on private causes of action against illegally striking municipal employees. *Caso v. District Council 37*[34] was the first state court decision permitting a private action against public employees for damages resulting from an illegal sewage workers' strike. In *Caso*, the New York Appellate Court held that the Taylor Law,[35] New York's anti-strike legislation, was not the exclusive

30. *Id.* at 41. Plaintiff sued police officials and the city manager for their failure to prevent strikers from threatening the firefighters who attempted to extinguish the fire. The court held that these officials had a duty to protect the general public rather than to aid individuals (other than those in custody of the officials).

31. Plaintiffs claimed the city was liable for violating a local ordinance by failing to provide adequate police protection to firefighters. *Id.* at 41.

32. *See supra* notes 15, 16 and 22 and accompanying text.

33. *See, e.g.,* Boyle v. Anderson Firefighters Local 1262, 497 N.E.2d 1073 (Ind. Ct. App. 1986); and *infra* notes 43-49 and accompanying text.

34. 43 A.D.2d 159, 350 N.Y.S.2d 173 (N.Y. App. Div. 1971). The court implied a private cause of action from the anti-strike statute. 43 A.D.2d at 162, 350 N.Y.S.2d at 176-77. *See supra* note 31. On the issue of implying a private cause of action, *see generally Damage Liability, supra* note 2, at 1092-96.

Although *Caso* was the first case to grant a private cause of action against striking public employees, earlier plaintiffs unsuccessfully attempted to recover damages in private actions against public employees. Jamur Prod. v. Quill, 51 Misc. 2d 501, 273 N.Y.S.2d 348 (N.Y. Sup. Ct. 1966) is apparently the first case brought against a public employee union. A corporation sued the unions representing New York City Transit Authority workers who engaged in an illegal strike for alleged diminution of stock values. The court found for the strikers, holding that the corporation was not the intended beneficiary of the labor contract and that the damage alleged was too remote from the strike to support a private action. *Id.* at 509, 273 N.Y.S.2d at 355.

35. The relevant portion of the statute provides:

Section 210. Prohibition of Strikes

1. No 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.

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remedy against striking public employees.[36] Therefore, the court permitted the various communities whose waters and beaches were polluted by raw sewage emitted during the strike to recover damages from the union.[37] Because the legislature enacted the Taylor Law to protect the public from illegal work stoppages by public employees, the court held that private actions against violators would further the state's purpose.[38]

In *Pasadena Unified School District v. Pasadena Federation of Teachers*[39] the California Court of Appeals found an unlawful strike by pub-

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2. (a) Violations and penalties. A public employee shall violate this subdivision by engaging in a strike or violating paragraph (c) of this subdivision and shall be liable as provided in this subdivision pursuant to the procedures contained herein. In addition, any public employee who violates subdivision one of this section may be subject to removal or other disciplinary action provided by law for misconduct.

N.Y. CIV. SERV. LAW § 210 (McKinney 1983).

36. Even though the anti-strike statute lacks an express provision for a private cause of action, the court found that such a provision would further the legislature's goals. *Caso*, 43 A.D.2d at 162, 350 N.Y.S.2d at 177. Private causes of action effectuate legislative intent to prevent strikes by essential public employees. The court in State v. Kansas City Firefighters Local 42, 672 S.W.2d 99, 110 (Mo. App. 1984), correctly notes "that the traditional injunction, fine and contempt remedies have not deterred the public strike in areas of vital concern. . . . A private cause of action will impose a cost the decision to strike must reckon with." Thus, private causes of action seem to be the *only* effective method of preventing strikes by public employees. *See also infra* note 52 and accompanying text.

37. *Caso*, 43 A.D.2d at 162, 350 N.Y.S.2d at 177. The court stated further that although the Taylor Law governed public employees' relationship with the municipal government, the law did not govern public employees' relationships with the general public. *Id.* at 161, 350 N.Y.S.2d at 176. Thus, when wastes were emitted into waters in and around Manhattan and were washed up on the beaches of several towns during a sewage workers' strike, only the town's officials had a private cause of action for damages against the strikers. *Id.*

38. 43 A.D.2d at 163, 350 N.Y.S.2d at 178. The stated purpose of the Taylor Law is "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." N.Y. CIV. SERV. L. § 200 (McKinney 1983).

39. 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977). The court held that the state anti-strike provision was an integral part of the contract between the teachers' union and the public school board. Therefore, an illegal strike sanctioned by the union is a breach of that contract, and the union is liable for tortious inducement to breach. Further, engaging in an illegal strike is a per se tort for which damages are recoverable. *Id.* The court held: "In the absence of legislative authorization, public employees in California did not have the right to strike. . . ." 72 Cal. App. 3d at 104, 140 Cal. Rptr. at 44, (citing Los Angeles Met. Transit Auth. v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 687, 355 P.2d 905, 906, 8 Cal. Rptr. 1, 2 (1960)).

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lic school teachers to be the basis of a private cause of action. The striking school teachers' union alleged that the no-strike provision in their contract infringed upon their first amendment right to strike.[40] The court rejected this argument and denied that the union was privileged "to induce a breach of contract by calling an illegal strike."[41] Because the strike was illegal under California law and the school district was harmed by the action, the union could be liable in either tort or contract.[42]

Recently, the Court of Appeals of Indiana decided *Boyle v. Anderson Firefighters Local 1262*,[43] which presented an issue of first impression in that state. The plaintiffs sued the municipality, the local, national, and international unions, and individual firefighters when his business burned during a strike.[44] The court immunized the municipality from

40. The school district sued the teachers' union for inducing an unlawful strike by the teachers. The court implied that the result may have been different if the union had merely advocated the teachers' right to strike. 72 Cal. App. 3d at 108, 140 Cal. Rptr. at 45.

41. *Id.* at 105, 140 Cal. Rptr. at 44. The court quoted *In re* Porterfield for the proposition that prohibiting public employee strikes does not violate first amendment rights. The *Porterfield* court held:

> The right of free speech protected by the federal and state constitutional guaranties is not an absolute right which carries with it into businesses and professions total immunity from regulation in the performance of acts as to which speech is a mere incident or means of accomplishment. It was not intended that a right to speak for the purpose of profit may be created to the derogation of the police power of state or city.
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> The freedom of speech and of the press protected by the constitutional guaranties included in the main, it has been said, freedom of expressions on political, sociological, religious, and economic subjects, not commercial activities to which speech is only an incident or means.

168 P.2d 706 (Cal. 1946) (en banc).

42. 72 Cal. App. 3d 111, 140 Cal. Rptr. 48. The author of *Damage Liability, supra* note 2, noted the court's approach favorably. Because public employee strikes are illegal, the union's action in calling a strike is a tortious inducement to engage in illegal activity and to breach an employment contract. Therefore, the union can be held liable under tort and contract theories. *Damage Liability, supra* note 2, at 1116-17.

43. 497 N.E.2d 1073 (Ind. Ct. App. 1986). In *Boyle*, the strikers refused to fight a fire and also allegedly prevented firefighters from other communities from attempting to extinguish the blaze until a union official reprimanded the strikers. *Id.* at 1076.

44. *Id.* at 1077. Plaintiffs argued that the city was liable for failing to provide alternative means of fighting fires during a strike. Further, plaintiffs claimed the city should have enforced anti-strike provisions. The court ruled that the city was immune from liability on each of these counts because its actions were discretionary, and the Indiana Tort Claims Act immunized the municipality from liability for failure to enforce laws. *Id.* at 1077-78. *See also supra* note 15.

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suit by refusing to apply the doctrine of respondeat superior, finding that illegally striking workers act outside the scope of their employment.[45] The local, national, and international unions, and thus the striking firefighters themselves, however, could be liable for damages if they induced the strike or supported the strikers in any way.[46]

Boyle is unique for expressly holding individual firefighters liable for damages resulting from a strike.[47] Some courts have intimated that individual public employees may be liable for particularly grievous actions during a strike.[48] Prior to *Boyle*, however, no court had imposed individual liability for fire damage during a strike because of the uncertain causal connection between the strike and property loss.[49] *Boyle*, therefore, is unprecedented, and the court's approach is central to this Note.

II. Permissibility of Private Actions

Should private causes of action be allowed to supplement statutory remedies to compensate victims of illegal firefighter strikes? Some courts and commentators suggest allowing a private cause of action,

45. Employees are clearly acting on their own behalf, not for the benefit of their employer, during any strike. Further, the court stated that by striking, the firefighters were "patently inconsistent with the city's interest in providing uninterrupted fire protection." The court further held that the strikers' "acts were so outrageous as to be incompatible with the duties owed the public and the city and beyond the scope of their employment." *Id.* at 1078.

The city is also immune because firefighting is a discretionary function that does not lead to liability. *Id.* at 1077-78, *citing* City of Hammond v. Cataldi, 449 N.E.2d 1184 (Ind. Ct. App. 1983). *See supra* note 13.

46. There was some evidence that members of the national union met with the strikers to offer encouragement and to urge firefighters from other communities to refrain from putting out fires in Anderson. *Boyle*, 497 N.E.2d at 1083.

47. The court stated that "when a tortfeasor voluntarily commits a wrongful act in reckless disregard of the natural and probable harm that is likely to follow, the law presumes that the tortfeasor intended the consequences proximately owed by the intentional act, and the tortfeasor may be held liable therefore." *Id.* at 1080. Thus, the question of whether fire damages would have occurred even if the firefighters had not been on strike is irrelevant.

48. *See supra* notes 15, 16 and 22 and accompanying text.

49. *Id.* Firefighters have never before been held individually liable for damages that occurred during strikes due to the difficulty of proving a causal relationship between the strike and the actual fire damage. In other words, if firefighters do not actually start a fire, it is difficult to attribute a fixed amount of damages to a failure to fight a fire not started by striking firefighters. However, allowing individual liability is a strong strike deterrent, so the Indiana court's holding is wise. *See also infra* note 66 and accompanying text.

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unless an express statutory prohibition exists, to deter costly and dangerous illegal strikes.[50] Others contend that private actions would upset the delicate legislative balance between meaningful labor organization and collective bargaining by public employees and the public's need for safety and security.[51]

The threat of private actions can be a strong deterrent to public employee strikes.[52] Damages against illegally striking firefighters can reach millions of dollars.[53] Clearly, if a local union or individual firefighters are liable for damages, their resources will quickly evaporate. Even if a national or international union indemnifies the firefighters, funds are limited, so strikes would be short.[54] Allowing private actions would essentially make such strikes economically infeasible. Firefighters would strike only if the anticipated gain in increased bargaining power would outweigh possible monetary damages.[55] There-

50. *See generally* Dripps, *supra* note 1, at 591-92. The author argues that the traditional bases for disallowing private actions are unfounded, and that private actions are a sound deterrent to public employee strikes.

51. For example, the court in Burns, Jackson, Miller, Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 329-30, 451 N.E.2d 459, 465 (1983), argued that allowing private actions imposes such a burden on public employee unions that it would "overdeter" strikes.

52. One commentator described the deterrent effect of private actions:

> Damage actions impose a cost on public employee unions for illegal strikes. Everything else being equal, this cost will tend to discourage unions from striking and thus further the policy against illegal strikes. And this deterrence is likely to operate more effectively than sanction spelled out under a statute because of the large number of potential plaintiffs.

Note, *Statutory and Common Law Considerations in Defining the Tort Liability of Public Employee Unions to Private Citizens for Damages Inflicted by Illegal Strikes*, 80 MICH. L. REV. 1271, 1286 (1982) [hereinafter cited as *Statutory Considerations*].

Damage actions against individual strikers will provide an even stronger deterrent to essential public employee strikes than damage actions against a union because a union is better equipped to handle damage liability than an individual striker.

53. *See supra* note 3.

54. Short strikes resulting from limited funds are less effective than longer strikes because an employer can simply "weather the storm." If the duration of a strike appears indefinite, an employer is more likely to give in to strikers' demands.

55. Dripps, *supra* note 1, at 605. Professor Merton Bernstein suggested two alternatives to traditional public sector strikes which are less damaging to the public welfare and may alleviate the economic infeasibility of prolonged strikes to the union. First, Bernstein suggests a nonstoppage strike, where employees continue to work, with both the employees and the employer contributing equally to a special strike fund. The employer, to prevent the loss of its contribution, would thereby be pressured into negotiating. Since the loss to each side would be less than in a traditional strike, both would have sufficient time to bargain without harming the public. Second, Bernstein suggests

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fore, allowing private actions and the subsequent economic risk will deter public employees from striking illegally.[56]

Most state anti-strike legislation does not provide for private actions. State remedies against striking public employees typically include penalties such as injunctions,[57] fines,[58] loss of dues check-off,[59] union

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a gradual strike, whereby union members stop work for a half day during the first week of a strike, a full day during the second week, and so on. This plan has the advantage of pressuring both sides to negotiate reasonably without subjecting the public to a complete and sudden deprivation of essential services. Bernstein, *Alternatives to the Strike in Public Labor Relations,* 85 HARV. L. REV. 459, 470-74 (1971). Note, however, that this article was written before any case held that individuals harmed by public employee strikes could maintain private causes of action against the strikers.

56. *Damage Liability, supra* note 2, at 1089.

57. State statutes providing for injunctions generally follow this pattern:
Injunction
Sec. 111.89 Strike prohibited
(1) Upon establishing that a strike is in progress, the employer may either seek an injunction or file an unfair labor practice charge with the commission under § 111.84(2)(e) or both. In this regard it shall be the responsibility of the department of employment relations to decide whether to seek an injunction or file an unfair labor practice charge. The existence of an administrative remedy shall not constitute grounds for denial of injunctive relief.

WIS. STAT. ANN. § 111.89(1) (West Supp. 1981).

58. State statutes providing for fines against illegal strikers are generally similar to that of Nevada:
Sec. 288.250 Punishment of employee organization, officer or employee by court for commencement or continuation of strike in violation of order.
1. If a strike is commenced or continued in violation of an order issued pursuant to NRS 288.240, the court may:
   (a) Punish the employee organization or organizations guilty of such violation by a fine of not more than $50,000 against each organization for each day of continued violation.
   (b) Punish any officer of an employee organization who is wholly or partly responsible for such violation by a fine of not more than $1,000 for each day of continued violation, or by imprisonment as provided in NRS 22.110.

NEV. REV. STAT. § 288.250(1)(a), (b) (1979).

59. Loss of dues check-off privileges, a strong weapon, is allowed against Delaware public school teachers:
Loss of dues check-off privilege
Sec. 4011. Observance of teaching contract; violation; strike.
. . . . If an employee organization designated as exclusive representative shall violate the provisions hereof, its designation as exclusive representative shall be revoked . . . and said employee organization and any other employee organization which violates any of the provisions hereof shall be ineligible to be designated as exclusive representative for . . . 2 years. . . . If any employee organization violates the provisions hereof, *the public school employer shall refrain from making payroll*

decertification,[60] and dismissal of striking employees.[61] Some courts would allow private lawsuits against public sector employees only if the anti-strike legislation expressly provides for this supplemental deterrent. Courts hesitate to impose liability beyond that sanctioned by legislatures.[62]

Most anti-strike legislation was written before *Caso*, the first case allowing a private cause of action in addition to state sanctions against illegally striking public employees.[63] Therefore, plaintiffs may argue

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> *deductions for that organization's dues for a period of 1 year thereafter.* (emphasis added)

DEL. CODE ANN. tit. 14, § 4011(a), (b) (1974).

60. A good example of a decertification statute can be found in the Iowa code:

> Decertification of the union
>
> Sec. 20.12
>
> 5. If an employee organization or any of its officers is held to be in contempt of court for failure to comply with an injunction pursuant to this section, or is convicted of violating this section, the employee organization shall be immediately decertified, shall cease to represent the bargaining unit, shall cease to receive any dues by checkoff, and may again be certified only after twelve months have elapsed. . . . The penalties provided in this section may be suspended or modified by the court, but only upon request of the public employer and only if the court determines the suspension or modification is in the public interest.

IOWA CODE ANN. § 20.12(5) (West 1978).

61. Dismissal, the harshest remedy against striking employees, is exemplified by the Florida Code:

> Dismissal
>
> Sec. 477.507
>
> (5) If the commission, after a hearing . . . determines that an employee has violated § 447.505, it may order the termination of his employment by the public employer. Notwithstanding any other provision of law, a person knowingly violating the provision of said section may, subsequent to such violation, be appointed, reappointed, employed, or reemployed as a public employee, but only upon the following conditions.
>
> (a) Such person shall be on probation for a period of 6 months following his appointment, reappointment, employment, or reemployment, during which period he shall serve without tenure. During this period, the person may be discharged only upon a showing of just cause.
>
> (b) His compensation may in no event exceed that received by him immediately prior to the time of the violation.
>
> (c) The compensation of the person may not be increased until after the expiration of 1 year from such appointment, reappointment, employment, or reemployment.

FLA. STAT. ANN. § 447.507(5) (West 1981).

62. *See supra* note 7.

63. Caso v. District Council 37, 43 A.D.2d 159, 350 N.Y.S.2d 173 (N.Y. App. Div. 1971). *See supra* notes 34-43 and accompanying text. *See also Statutory Considerations,*

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that state legislators did not consider the possibility of private lawsuits when framing anti-strike provisions. Thus, they would argue that the lack of legislative reference does not bar private actions. Opponents of judicially imposed private actions argue that state legislatures could have amended their statutes after *Caso* to allow private actions if the legislatures so intended.[64]

The better position is to allow private actions in addition to statutorily created sanctions against illegally striking firefighters. In addition to their deterrent effect, private actions compensate people who may have suffered increased fire damage due to an illegal strike.[65] Moreover, state and municipal employers may be reluctant to impose severe penalties on strikers because of the fear of creating a hostile working environment after the strike.[66] Therefore, private causes of action may be the only effective remedy for illegal public employee strikes.[67] Further, since the private sector cannot readily provide fire protection to replace striking employees, it is extremely important to effectively deter strikes.[68] Finally, although only a limited number of public safety em-

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supra note 52, at 1274-75. The author argues that legislatures could not possibly have considered private actions when writing anti-strike statutes because such actions did not yet exist for public employee strikes. Therefore, the absence of language should not preclude private actions. *Id.*

64. *Caso* was decided in 1971, seven to fifteen years before t other cases discussed in this Note.

65. *See supra* notes 3 and 42.

66. One author observes:

> 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.

Damage Liability, supra note 2, at 1090. Further, a civil damages suit may remain in the courts for several years, so resentment among strikers may linger for a long time. *Id.* at 1090 n.22.

67. *Damage Liability, supra* note 2, at 1088-89. The author states that dismissing strikers, the most effective remedy for illegal strikes, is not feasible for highly trained and skilled workers, such as police officers or firefighters. If the city dismisses strikers, the public is without essential public service employees while replacements are trained, a clearly undesirable alternative. Therefore, municipal employers lack a sufficient means by which to deter illegal public employee strikes. *Id.*

68. When public employees strike, particularly police and firefighters, the entire supply of their services is removed from the market. This differs from the private sector, where a number of firms provide similar services, and a strike against one firm may reduce the supply rather than removing it entirely. Dripps, *supra* note 1, at 597-98.

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ployees may strike, the strikers can prevent other public safety officials from carrying out their duties.[69] For the foregoing reasons, it is especially important to effectively deter strikes or hold strikers individually liable for damages when nonstriking firefighters are unable to do their job.[70]

III. THEORIES OF RECOVERY IN PRIVATE ACTIONS

A. *Intentional Interference with a Contractual Relationship*

A city suing a union in connection with an illegal strike may allege that the union intentionally interfered with the city's contractual relationship with its employees.[71] Individuals harmed by public employee strikes who plead contractual interference, however, generally have been unsuccessful.[72] Although individuals incidentally benefit from public employee contracts, since municipalities are the intended beneficiaries, only they can allege intentional interference.[73] The court in *Pasadena Unified School District* held striking school teachers liable to the school board under this theory.[74] Private citizens, however, have not similarly prevailed.[75]

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69. For example, in *Boyle*, strikers allegedly refused to allow anyone into a burning building until a union official directed them to let the volunteers in. Boyle v. Anderson Firefighters Local 1262, 497 N.E.2d 1073, 1076 (Ind. Ct. App. 1986).

70. In *Boyle*, the non-striking firefighters attempted to extinguish the fire. However, they were not able to extinguish the fire without the strikers' assistance. 497 N.E.2d at 1076.

71. This theory was unsuccessfully applied in Burns, Jackson, Miller, Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 323, 451 N.E.2d 459, 462, 464 N.Y.S.2d 712, 715 (1983). *See supra* note 51.

72. To succeed on an intentional interference claim, the plaintiff must prove that she is a member of the class of intended beneficiaries of the contract. Theoretically, members of the public are the class protected by labor contracts between municipalities and public employees. Courts, however, generally hold that the party protected by these contracts is the municipality. Since the municipality has no duty to provide these services to the public, individuals are generally unable to plead intentional interference with respect to illegal public employee strikes. *Private Actions Against Public Unions*, *supra* note 26, at 1321-27.

73. *See supra* note 72.

74. Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 113, 140 Cal. Rptr. 41, 49 (1977). *See supra* notes 39-42 and accompanying text.

75. *See, e.g.*, Berger v. City of University City, 676 S.W.2d 39, 41-42 (Mo. App. 1984) (firefighters lack a duty to particular individuals as a result of municipal employment). Individuals are not the intended beneficiaries of a contract between the municipality and the firefighters. Therefore, individuals cannot maintain an action for

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B. *Per Se Tort*

Since public employee strikes are generally illegal, either under common law[76] or by statute,[77] an anti-strike law violation could lead to a per se tort claim. Unless the strikers intend to cause damage by illegally striking,[78] such a claim may fail. A per se tort exists only if a defendant commits an unlawful act which causes harm or damage to another.[79] The court in *Burke & Thomas,* however, refused to find an illegal strike tortious by itself.[80] Therefore, plaintiffs are unlikely to prevail under this theory.

C. *Prima Facie Tort*

Violating an anti-strike law may be prima facie evidence of a tort.[81] To successfully allege a tort, the plaintiff must prove that she was in a special class of citizens entitled to a higher duty of care from the strikers than the average citizen.[82] Although this theory of recovery is generally unsuccessful against strikers in such non-essential service areas as public transportation,[83] it may be effective in suits against firefight-

damages resulting from the breach of a contractual duty. *Cf.* Jamur Prod. v. Quill, 51 Misc. 2d 501, 273 N.Y.S.2d 348 (N.Y. Sup. Ct. 1966). *See supra* note 30.

76. Dripps, *supra* note 1, at n.7.

77. *Id.*

78. Evidence of a statutory violation is generally agreed to be negligence in itself, regardless of the intent of the offender. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 200 (1941). Therefore, if public employee strikes are prohibited by law, the act of engaging in a strike alone is illegal and is negligence per se. *See also Pasadena Unified School Dist.*, 72 Cal. App. 3d 100, 140 Cal. Rptr. 41, and *supra* note 39.

79. *Pasadena Unified School Dist.*, 72 Cal. App. 3d at 112, 140 Cal. Rptr. at 48.

80. Burke & Thomas, Inc. v. International Org. of Masters, Branch 16, 92 Wash. 2d 762, 768, 600 P.2d 1282, 1286 (1979). The court held that the strikers intended to put pressure on the employer, and not to injure any third party. Therefore, the court held that the strike was not tortious. *See supra* notes 16-19 and accompanying text.

81. In some states, statutory violation is merely prima facie, rather than per se, evidence of a tort. W. PROSSER, *supra* note 78, at 201. Further, some states require a plaintiff to prove that the striker owed her a duty in addition to proving a statutory violation. Because of the level of proof required in these states, private actions against striking public employees are generally unsuccessful. *See generally* Burns, Jackson, Miller, Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983).

82. The court in City of Hammond v. Cataldi, 449 N.E.2d 1184, 1187 (Ind. 1983), stated, however, that firefighters have no special duty to individual citizens above that owed to the public; therefore, striking firefighters did not commit a tort although the strike was illegal.

83. *See generally* Jamur Prod. v. Quill, 51 Misc. 2d 501, 273 N.Y.S.2d 348 (N.Y.

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ers. A successful claimant would thus allege that firefighters owe a higher duty to a citizen whose property is on fire than to the general public.[84] The *Cataldi*[85] and *Berger*[86] courts, however, rejected this theory.

D. *Public Nuisances*

One court defined public nuisance as "any reasonable interference with the rights common to all members of the community in general . . . [encompassing] the public health, safety, peace, morals, or convenience."[87] A strike by firefighters is clearly a public nuisance because it is unreasonable, illegal, and involves foreseeable danger.[88] A firefighters' strike interferes with the rights of all taxpayers who reasonably expect that public employees will protect them from the dangers of fire.[89] Finally, firefighter strikes are a public nuisance because they

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Sup. Ct. 1966) and *supra* note 34. The court held that "not every violation of a statute gives rise to civil liability on the part of the violator." In *Jamur*, striking transit workers were not liable to the public for damages because the anti-strike statute lacked a provision for a private cause of action. *Id.* at 504, 273 N.Y.S.2d at 351. The court interpreted the legislature's failure to expressly grant a private action as a prohibition. *Id.*

84. This duty requirement is similar to the same concept in negligence law. Municipalities lack a duty to provide police and fire protection to their citizens. One author, however, stated:

> The issue is not whether government owes private citizens a duty to provide services, but whether public employee unions owe a duty not to interfere with the services that government chose to provide. . . . Analogizing illegally striking public employees to private citizens who negligently interfere with the delivery of vital services is more precise than equating them with a sovereign who has no duty to provide services.

Statutory Considerations, supra note 52, at 1298-99.

Thus, because firefighters have a duty not to strike, they can be liable for breaching that duty in the event of a strike. This is a good policy argument, but courts have been unwilling to accept it.

85. City of Hammond v. Cataldi, 449 N.E.2d 1184 (Ind. 1983). *See supra* notes 13-16 and accompanying text.

86. Berger v. City of University City, 676 S.W.2d 39 (Mo. App. 1984). *See supra* notes 28-31 and accompanying text.

87. State v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99, 114 (Mo. 1984). The *Kansas City Firefighters* court held that a firefighters' strike was a nuisance, in part because the resulting damages were reasonably foreseeable. *Id.*

88. Losses from fires during firefighters' strikes may include destruction of property, loss of life, injury to persons, and so forth. *See supra* note 3 for details of such losses.

89. If citizens cannot rely on the firefighting services provided by a municipality, they will be forced to contract for private fire protection services. In fact, fire protection services are so expensive that some cities themselves contract for independent fire pro-

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pose a clear danger to the public health, safety, and convenience.[90]

Public nuisance is the clearest basis for imposing liability on striking firefighters. The court in *Fulenwider v. Firefighters Association Local 1784*[91] stated that although any condition deliberately and directly created by an illegal firefighters' strike could be termed a nuisance, damages incidental to a strike do not constitute a nuisance.[92]

IV. POSSIBLE DEFENDANTS IN PRIVATE CAUSES OF ACTION

A. *Public Employee Unions*

Public employee unions are often defendants in private actions for illegal public employee strikes.[93] Unions represent the illegally striking individuals, offer financial support from special strike funds,[94] and or-

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tection services from private security companies. *Private Sector Fire Services Expand in U.S.*, URBAN INNOVATIONS ABROAD (April 1982), *reprinted in* 10 CURRENT MUN. PROBS. 363, 364 (1984).

90. Professor Prosser defines nuisance as follows:

Meaning of Nuisance

Nuisance is a term which has been surrounded by much confusion. Properly applied, it refers to the invasion of two quite unrelated types of interests:

"Public nuisance" is a term applied to a miscellaneous group of minor criminal offenses, which obstruct or cause inconvenience or damage to the public in the exercise of rights common to the public.... The interference may be intentional, or negligent, or may result from an extra-hazardous activity for which strict liability is imposed. It must result from conduct of the defendant which is found to be unreasonable in the light of its utility and the harm or risk which results....

Public Nuisance

A public nuisance is an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all. A private individual may maintain an action for a public nuisance only if he suffers special damage, distinct from that common to the public.

PROSSER, *supra* note 74, at 549, 566.

Certainly, firefighters' strikes are criminal offenses which damage the public. The intended result of a strike, higher wages, is unreasonable in light of the risks to property and human life which occur during the strike. *See supra* note 3. Finally, an individual who loses property or a loved one in a fire during a strike has suffered a loss greater than that suffered by the general public. Clearly, an individual can recover from firefighters for damages suffered as a result of an illegal strike.

91. 649 S.W.2d 268 (Tenn. 1982).

92. *Id.* at 272. *See supra* notes 8-11 and accompanying text.

93. For example, a public employee union could be held liable in Boyle v. Anderson Firefighters Local 1262, 497 N.E.2d 1073, 1083 (Ind. Ct. App. 1986). The local, state, national, and international divisions of a union may all be liable for actions of union members if they were involved in the strike in any way. *Id.*

94. Plaintiffs in *Boyle* alleged that the local and national unions offered financial support and other encouragement for the duration of the strike. *Id.*

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ganize and advise the individual strikers on how to effectively use the strike to achieve certain goals.[95] Since unions have larger cash reserves than individual strikers, they are a natural target of plaintiffs. The *Pasadena Unified School District*,[96] *Kansas City Firefighters*,[97] and *Boyle*[98] courts all held unions liable for damages from illegal public employee strikes.

B. *Individual Strikers*

In *Boyle*, the Indiana Supreme Court recently held that individual firefighters could be liable for damages resulting from their strikes.[99] This novel approach is an extremely effective way to insure that essential public services are always available. The striking firefighters in *Boyle* refused to respond to an alarm and prevented firefighters from neighboring communities and volunteers from putting out the fire.[100] Courts should extend the *Boyle* holding to include liability for any strike by firefighters or other essential public service employees because strikes are a clearly foreseeable and dangerous breach of duty.[101]

95. If the court believed the *Boyle* plaintiff's contention about strikers allowing firefighters to do their job only after a union official told them to do so, the union advised the strikers about the best way to carry out the strike. *Id.* *See also supra* note 46 and accompanying text.

96. Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977). *See supra* notes 39-42 and accompanying text.

97. State v. Kansas City Firefighters Local No. 42, 672 S.W.2d 99 (Mo. App. 1984). *See supra* notes 24-27, 32-33 and accompanying text.

98. Boyle v. Anderson Firefighters Local 1262, 497 N.E.2d 1073 (Ind. Ct. App. 1986). *See supra* notes 43-49 and accompanying text.

99. 497 N.E.2d 1073 (Ind. Ct. App. 1986). *See supra* note 49 and accompanying text.

100. The actions of the strikers actually caused more damage by blocking access to the fire. However, it seems best to allow private causes of action against any illegally striking firefighters, regardless of their actions during the strike, to deter illegal strikes. *See supra* note 3.

101. The foreseeability of damage in firefighters' strikes is so clear that private recourse for damages suffered as a result of such strikes must be allowed. E. 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, 46 (1978). The foreseeability of danger is comparable to that in negligence law. There, a risk is a danger if it "is apparent, or should be apparent, to one in the position of the actor . . . [and] must be reasonable." W. PROSSER, *supra* note 74, at 220-21. Because the risk of harm inherent in a firefighters' strike is foreseeable and unreasonable, striking firefighters should be liable for the consequences of their actions. *See supra* note 90.

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V. CONCLUSION

Strikes by public safety employees pose a severe and foreseeable threat to property, and more importantly, to human life. Therefore, strong sanctions are necessary to protect the public. Effective deterrents, such as private actions against individual strikers, are the most certain means of assuring adequate public protection. Unless state legislatures choose to expressly restrict their availability, courts should allow private actions against unions and individual strikers to deter firefighter strikes.

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