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**FEDERAL APPEALS COURT UPHOLDS \$1.7 MILLION VERDICT
AGAINST UNION'S PICKETING, BANNERING, AND HANDBILLING
CAMPAIGN**

SUMMARY OF ELEVENTH CIRCUIT RULING, OF MARCH 29, 2012

*Fidelity Interior Constructions, Inc. Fidelity Interior, LLC v.
The Southeastern Carpenters Regional Council of the
United Brotherhood of Carpenters and Joiners of America*

1. The First Amendment offers no refuge to unfair labor practices, which include secondary boycotts marked by coercive picketing with unlawful intent. (p. 15)
2. Although peaceful hand-billing without other action is not picketing the “existence of placards on sticks is not a prerequisite to a finding that a union engaged in picketing.” Citing *Kentov*. (p.15)
3. The intent of the union is unlawful when its “conduct is calculated to force the secondary employer to cease doing business with the primary employer.” Quoting *Kentov*. (p. 15)
4. “If any object of the picketing is to subject the secondary employer to forbidden pressure then the picketing is illegal. It need not be the sole or even the main purpose. Citing *Superior Derrick*. (pp. 15-16)
5. Fact-finders may examine the entire course of conduct of a union to determine whether its actions were coercive. Cites omitted. (p. 17)
6. The jury may consider the content of handbills, warning letters, banners, and threats to picket to determine whether the union intended to enmesh neutral employers in its dispute with the primary employer. Cites omitted. (p. 17)
7. Often the content of handbills, banners and warning letters, “when evaluated in light of . . . [the] entire campaign strategy and conduct [of a union] offer[s] telling evidence of secondary intent.” Citing *Service Employees Int’l Union Local 525*. (p. 17)
8. The district court correctly allowed the jury to consider all of the conduct by the union to determine whether it had engaged in unlawful activity. The district court did not abuse its discretion when it admitted evidence of lawful conduct by the union. . . . the district

15. To satisfy the *Moore Dry Dock* standards, “the picketing union [must] make sure that people are not led to believe that the picket line is directed against anyone other than the primary employer.” Citing *Ramey* and *Superior Derrick*. “If the normal effect of the picket line causes confusion in the minds of the viewer as to its purpose . . . the burden is . . . on the picketing union to make known . . . that it is directed only against the primary employer and no other employer or a neutral person.” Citing *Texas Distributors, Inc. v. Local Union, No. 100*. (p. 22)
16. The union failed to ensure that those who viewed its picketing understood that its primary dispute was with Fidelity, not the neutral employers. The vast majority of signs at many of the construction sites referred only to the neutral employer. The picketers’ chants and banners also often referred to the neutral parties, but not Fidelity. The jury was entitled to find that the union picketing was an unlawful intent because the picketing did not conform to the *Moore Dry Dock* standards. (pp. 22-23)
17. At trial, Fidelity presented evidence that the union did nothing to lessen disruptions to third parties. “Demonstrating bare compliance with *Moore Dry Dock*, does not, in and of itself, prove that the common situs picketing was not infected with an improper secondary purpose.” Citing *Ramey*. The union bears a “heavy burden” and must “convince the trier of fact that the picketing was conducted in a manner least likely to encourage secondary effects.” Citing *Ramey*. (p. 23)
18. On more than one occasion, the union used in excess of 100 picketers and encouraged those picketers to scream and make as much noise as possible. The jury was entitled to find that the union picketed with an unlawful intent because the union did nothing to discourage secondary effects. (pp. 23-24)
19. “Even if the more ‘objective’ requirements of *Moore Dry Dock* and *Superior Derrick* are satisfied, if the totality of the circumstances unequivocally [sic] demonstrates a secondary purpose existed, the picketing should be deemed unlawful.” Citing *Ramey*. In determining whether the totality of the circumstances establishes that a union picketed with unlawful intent, we consider “threats, veiled or otherwise, by [a] picketing union that a secondary employer was not using good business judgment in doing business with the primary employer.” Citing *Texas Distributors*. We consider also whether “neutral persons were misled or encouraged to act as a result of the picketing.” Citing *Texas Distributors*. (p. 24)
20. Fidelity submitted ample evidence that the union picketed with an unlawful purpose when the union threatened to picket or continue to picket neutral employers until they promised to stop working with Fidelity. (pp. 24-25)
21. Fidelity also introduced the warning letters as evidence that the union intended to enmesh neutral employers in its dispute with Fidelity. In these letters, the union warned the neutral employers that its campaign against Fidelity “encompassed[d] all parties associated with the projects where Fidelity Construction Inc. is employed.” These letters stated the recipients would have an “adversarial relationship” with the union if they did business with Fidelity and encouraged recipients to do business with “certified area

standards constructors.” It is sometimes said that a picture is worth a thousand words, so the union also sent the neutrals a handbill depicting a rat nibbling an American flag with the phrase “Shame on [Secondary Employer] for the Desecration of the American Way of Life,” and a document entitled “Instructions for Picketers.” (p. 25)

22. At trial, the evidence established that the union had, if anything, touted its wrongdoing. Freitag conceded that the success of the union resulted from coercive picketing: “The union’s success is not because the contractors have a change of heart all of a sudden, it’s because they don’t want a hundred of us in front of their building.” (p. 25)
23. Because Fidelity suffered an actual loss – the neutral employers ceased asking Fidelity to bid on projects that otherwise would have been awarded to Fidelity – Fidelity is entitled to recover damages for lost opportunities to bid under section 303. (p. 28) Fidelity presented evidence that it was not even invited to bid on contracts because of the illegal pickets of the union. We reject the argument of the union that damages based on lost opportunities are too speculative as a matter of law. In other words, so long as a plaintiff can prove it had suffered some injury to its business, mathematical precision in proving the amount of damages is unnecessary. Fidelity proved the fact of its damages. “The fact of damage is made out upon proof that the plaintiff’s level of profits . . . is . . . less than it otherwise would have been absent some intervening cause.” Citing *Alan’s of Atlanta, Inc. v. Minolta Co.* (p. 29)
23. At trial, contractors testified that they would have continued to award Fidelity work absent the fear of future pickets. (pp. 29-30.)
24. As Fidelity persuasively argues, “This . . . go[es] beyond the Union’s alleged desire to . . . ‘level the playing field’; this is the blatant elimination of competition.” (p. 30)
25. The evidence Fidelity presented was not too speculative; “Proof of the amount [of damages] can be an estimate, uncertain, or inexact.” Citing *Mid-American Tablewares, Inc. v. Mogi Trading Co.* (p. 30)
26. Fidelity submitted evidence of the drywall work that [general contractors] subcontracted to other companies in 2005, 2006, 2007, and 2008. Many general contractors testified that they were satisfied with the work performed by Fidelity, and at least two of these contractors testified that they would have invited Fidelity to bid on their projects had the union not picketed. Fidelity also presented evidence about the percentage of drywall subcontract work that it had historically performed for various contractors and its historic profit margin, which provided a basis for the jury to infer that Fidelity would have continued to perform and profit from approximately the same proportion of drywall work as it had in the past. Ultimately, any “uncertainty as to the damages stems from the . . . illegal conduct [of the union], . . . [and] the [union] should not benefit from the uncertainty [it] created.” Citing *BE&K Construction Co. v. Will & Grundy Counties Bldg. Trades Council*. The union “is not entitled to complain that [the damages] cannot be measured with the exactness and precision that would be possible if the case, which [the union] alone is responsible for making, were otherwise.” Citing *Story Parchment Co.* (p. 30)