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EXHAUSTION OF INTRA-UNION REMEDIES AND ACCESS TO PUBLIC TRIBUNALS UNDER THE LANDRUM-GRIFFIN ACT

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I. INTRODUCTION

Section 101(a)(4) of Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)[1] guarantees to union members the right to sue and the right to participate in administrative proceedings.[2] At the time the LMRDA was enacted this section received somewhat less scrutiny and legislative comment than did other provisions[3]

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1. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. § 401 *et seq.* (1970) [hereinafter cited as LMRDA].

2. LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4) (1970), provides:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organization or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

3. In addition to the rights to sue and to participate in administrative proceedings, the section secures for every union member: (1) equal rights and privileges within his union to nominate candidates for union office, to vote in elections or referendums, and to attend union meetings,

of the "Bill of Rights,"[4] but since 1959 it has engendered as much litigation as any of these provisions.[5] Most of this litigation has involved the proviso to the section, which states that a "member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative" actions.[6]

An overriding issue has involved the determination of who possesses the power to require a union member to exhaust intra-union remedies. More specifically, questions center around whether the clause empowers courts and administrative agencies to dismiss any action filed before expiration of the four-month period and whether it authorizes unions to discipline members for resorting to extra-union remedies before four months have passed. Although the text of the proviso, when considered in context, indicates that it is solely a grant of power to the unions, the great majority of courts have concluded that it is a grant of power to courts and administrative agencies as well. It should be noted, however, that because courts and agencies have long been allowed to dismiss actions by applying traditional common law exhaustion standards,[7] this ostensible grant of authority is not the most significant consequence of the conclusion that the proviso applies to these judicial bodies. Rather, the most important result of the majority rule is that courts and agencies are now prohibited from dismissing actions brought after all remedies available within the statutory four-month period have been exhausted.

LMRDA § 101(a)(1), 29 U.S.C. § 411(a)(1) (1970); (2) the rights of free speech and assembly, LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1970); (3) freedom from arbitrary increases in dues, initiation fees, and assessments, LMRDA § 101(a)(3), 29 U.S.C. § 411(a)(3) (1970); and (4) the right to procedural due process in disciplinary proceedings within the union, LMRDA § 101(a)(5), 29 U.S.C. § 411(a)(5) (1970). For a discussion of §§ 101(a)(1) & 101(a)(3), see Beaird, *Some Aspects of the LMRDA "Bill of Rights,"* 5 GA. L. REV. 661 (1971). For a discussion of § 101(a)(2), see Beaird & Player, *Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577 (1973).

4. Rothman, *Legislative History of the "Bill of Rights" for Union Members*, 45 MINN. L. REV. 199, 203 (1960). Title I, § 101 of the LMRDA, 29 U.S.C. § 411 (1970), is commonly known as the "Bill of Rights of Union Members." *See, e.g.*, Beaird & Player, *Free Speech and the Landrum-Griffin Act*, 25 ALA. L. REV. 577, 579 (1973); Rothman, *supra* at 200.

5. *Compare, e.g.*, American Fed'n of Musicians v. Wittstein, 379 U.S. 171 (1964) (§ 101(a)(3)), Yanity v. Benware, 376 F.2d 197 (2d Cir.), *cert. denied*, 389 U.S. 874 (1967) (§ 101(a)(2)), *and* Thompson v. New York Cent. R.R., 361 F.2d 137 (2d Cir. 1966) (§ 101(a)(5)), *with, e.g.*, the cases cited in notes 9-26 *infra* and accompanying text.

6. LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4) (1970). The section is quoted in full in note 2 *supra*.

7. *See, e.g.*, McKart v. United States, 395 U.S. 185, 193 (1969); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938); Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981 (1939).

Another important question presented by the clause has been whether its directive is mandatory or discretionary; that is, must the courts and agencies demand exhaustion in every case or is the requirement a flexible one to be imposed in the discretion of the court or agency hearing the suit. Today the majority of courts hold that the exhaustion proviso of subsection (a)(4) is discretionary in nature. Moreover, the courts have even established a number of specific exceptions to the requirement.

The purpose of this article is to analyze the case law since 1959 in an effort to trace the developments outlined above. Part II will examine the debate with respect to whether the unions or the courts have the power to require exhaustion. Part III will consider the discretionary nature of the exhaustion requirement and the exceptions to it.

II. The Exhaustion Requirement

Based solely on the text of section 101(a)(4), one could make a strong argument that the proviso does not apply to courts and administrative agencies. In the first place, the clause's proscription of limitations on the right to sue is specifically directed to "labor organizations," and to labor organizations only.[8] Thus, it seems reasonable to assume that the phrase "may be required" in the proviso applies only to labor organizations also. Furthermore, had Congress intended that the proviso apply to courts and administrative agencies, the proviso could have been phrased "courts and/or agencies *may* require plaintiffs . . ." or in words of similar import.

In spite of such arguments, however, in the landmark decision of *Detroy v. American Guild of Variety Artists*,[9] the Second Circuit construed the proviso as applying to courts. There, after negotiation failed to settle a dispute between a union member and his employer, the union requested that the parties submit to arbitration. The arbitrators ruled against the union member and, upon his failure to abide by the award, the union placed him on its "National Unfair List," which prevented agents from booking him for employment. He then brought suit for injunctive relief and damages, arguing that the union's discipline violated the procedural rights guaranteed him by section 101(a)(5) of LMRDA.[10] The district court had dismissed the action because of the

8. *See* note 2 *supra.*

9. 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

10. 29 U.S.C. § 411(a)(5) (1970). This subsection provides for the right to procedural due process in disciplinary proceedings within the union. *See id.*

member's failure to exhaust intra-union remedies.[11] The Second Circuit reversed, holding that under the facts of the case exhaustion was not required.[12] For our purposes, however, the decision is significant because the court made it clear that the exhaustion proviso applies to courts and agencies:

> [I]t appears clear that the proviso was incorporated in order to preserve the exhaustion doctrine as it had developed and would continue to develop in the courts, lest it otherwise appear to be Congress' intention to have the right to sue secured by § 101 abrogate the requirement of prior resort to internal procedures. . . . We therefore construe the statute to mean that a member of a labor union who attempts to institute proceedings before a court or an administrative agency may be required *by that court or agency* to exhaust internal remedies of less than four months' duration before invoking outside assistance.[13]

Although some decisions since *Detroy* have disagreed with the court's conclusion that the exhaustion proviso applies to courts and administrative agencies,[14] the overwhelming majority of courts have followed it.[15] Moreover, the Supreme Court in *NLRB v. Industrial Union of Marine Workers*[16] reached an identical conclusion. In *Marine Workers*, a union member filed an unfair labor practice charge against his union with the National Labor Relations Board. While the charge was pending, the union began internal disciplinary proceedings against the member for violation of a provision of the union constitution which

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11. Detroy v. American Guild of Variety Artists, 189 F. Supp. 573 (S.D.N.Y. 1960), *rev'd*, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

12. The court said:

> Taking due account of the declared policy favoring self-regulation by unions, we nonetheless hold that where the internal union remedy is uncertain and has not been specifically brought to the attention of the disciplined party, the violation of federal law clear and undisputed, and the injury to the union member immediate and difficult to compensate by means of a subsequent money award, exhaustion of union remedies ought not to be required. The absence of any of these elements might, in light of Congressional approval of the exhaustion doctrine, call for a different result. The facts of this case, however, warrant immediate judicial intervention.

286 F.2d at 81.

13. *Id.* at 78 (emphasis in original).

14. *E.g.*, Mamula v. United Steelworkers, 414 Pa. 294, 200 A.2d 306 (4-3 decision), *appeal dismissed*, 379 U.S. 17 (1964).

15. *E.g.*, Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212 (5th Cir. 1969); Giordani v. Upholsterers Union, 403 F.2d 85 (2d Cir. 1968); Foy v. Norfolk & W. Ry., 377 F.2d 243 (4th Cir.), *cert. denied*, 389 U.S. 848 (1967); *see* Farowitz v. Musicians Local 802, 330 F.2d 999 (2d Cir. 1964); *cf.* Harris v. Longshoremen's Local 1291, 321 F.2d 801 (3d Cir. 1963).

16. 391 U.S. 418 (1968).

required a member to exhaust all intra-union remedies and appeals before resorting to any court or other extra-union tribunal. After the member had been found guilty and expelled from the union, he filed a second charge with the Board alleging that his expulsion for filing the first charge was unlawful. The Board had found his expulsion a violation of section 8(b)(1)(A) of the National Labor Relations Act[17] and had issued a remedial order.[18] Relying on the proviso to section 101(a)(4) of the LMRDA, however, the court of appeals had refused to enforce the order.[19]

To avoid the proviso's impact, the Board had argued that the proviso empowered the Board, rather than any labor organization, to require exhaustion of reasonable intra-union procedures.[20] The court of appeals felt that this conclusion, in effect the same as that reached by the *Detroy* court,[21] was "surprising."[22] The court further determined that such a construction did "violence to the structure and sense of section 101."[23] The court interpreted the proviso as empowering the unions, not courts or agencies, to require members to " 'devote not more than four months to reasonable grievance procedures within the organization.' "[24] The Supreme Court explicitly rejected this interpretation of the proviso:

> We conclude that "may be required" is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked may in their discretion stay their hands for four months, while the aggrieved person seeks relief within the union.[25]

It might be argued that the *Detroy* court's finding that the exhaustion proviso applies to the courts, and the subsequent adoption by the Supreme Court of this rule in *Marine Workers,* precludes union discipline against a member who fails to exhaust intra-union remedies. The decisions with respect to this point, however, show that agreement with the *Detroy-Marine Workers* interpretation of the proviso has not neces-

17. 29 U.S.C. § 158(b)(1)(A) (1970).
18. Industrial Union of Marine Workers, 159 N.L.R.B. 1065 (1966).
19. Industrial Union of Marine Workers v. NLRB, 379 F.2d 702 (3d Cir. 1967).
20. *Id.* at 708.
21. *See* note 13 *supra* and accompanying text.
22. 379 F.2d at 708.
23. *Id.*
24. *Id., quoting* Sheridan v. Carpenters Local 626, 306 F.2d 152, 160 (3d Cir. 1962) (concurring opinion).
25. 391 U.S. at 426.

sarily meant that all union discipline is prohibited.

In the case of *McCraw v. United Association of Plumbing*,[26] for example, McCraw, having unsuccessfully filed internal union charges against the local's business agent, filed an unfair labor practice charge against the local itself with the National Labor Relations Board. The Board declined to issue a complaint. Subsequently, the business agent filed charges with the local alleging that McCraw had violated the union constitution by going to the Board before exhausting union remedies. McCraw was found guilty and fined, and the punishment was affirmed on appeal to the executive board of the union. McCraw then filed an appeal to the general convention of the international union, but it was not scheduled to meet for five years. As an added exacerbation, shortly after McCraw had filed his first internal appeal, he was suspended from the union for non-payment of union dues.[27] Five months after his suspension, he brought an action in federal district court,[28] alleging, *inter alia*, that the fine and suspension were illegal. The district court, holding that imposition of the fine violated section 101(a)(4) of the LMRDA, set it aside and ordered the union to reinstate McCraw upon his payment of current dues.[29]

In reference to the exhaustion issue, the Sixth Circuit first considered whether the district court had improperly assumed jurisdiction over McCraw's claim in light of the subsection 101(a)(4) proviso.[30] By adopting this approach the court impliedly recognized that the exhaustion proviso does apply to the courts, and that if McCraw had failed to exhaust intra-union remedies, the district court should have dismissed the action. The court, however, accepted the district court's conclusion that McCraw had exhausted his available remedies, and thus concluded that jurisdiction existed.[31] More significantly, the *McCraw* court recognized that the exhaustion proviso authorizes union discipline. The court stated, "The statute does permit . . . a requirement that a union member exhaust reasonable hearing procedures, not exceeding four months lapse of time, before resorting to court action. In keeping with this permission, [the union constitution] requires an exhaustion of available

26. 341 F.2d 705 (6th Cir. 1965).

27. McCraw had continued to tender his dues throughout the controversy. Since McCraw refused to pay the fine, however, the union would not accept them. *Id.* at 708.

28. McCraw v. United Ass'n of Plumbing, 216 F. Supp. 655 (E.D. Tenn. 1963).

29. *Id.* at 662, 664.

30. 341 F.2d at 711.

31. *Id.*

remedies within the union."[32] It was only because McCraw had complied with this requirement that the discipline was invalid.[33] The necessary implication is that, had McCraw not complied with the union constitution, the punishment would have been allowed.

A case reaching the opposite conclusion is *Roberts v. NLRB*,[34] where a union member was fined by his union for filing charges with the National Labor Relations Board without having previously exhausted his internal union remedies. The Court of Appeals for the District of Columbia enforced the Board's order finding that the union's imposition of the fine constituted an unfair labor practice.[35] In interpreting the proviso to section 101(a)(4), the court concluded that it did "not legalize a coercive fine imposed upon a member by a labor organization for his failure to exhaust internal remedies for four months before filing an unfair labor practice charge against his union."[36] The court further recognized that:

> The proviso does authorize indeed it may require, the agency or court to which the member comes for relief to withhold the exercise of its authority—for four months if reasonable internal procedures are available and are not earlier exhausted—in deference to the congressional desire that a solution be reached by means other than at the hands of public authorities.[37]

The court concluded, however, that "[a]pproval of such restraint by agency or court is quite different . . . from freeing the Union itself to impose a fine for failure of a member to exhaust such procedures."[38]

A similar holding was reached in *Ryan v. IBEW*.[39] In *Ryan* three local union officers were expelled because they brought suit to enjoin arbitration of a dispute in the belief that the existing collective bargaining agreement did not require their local to submit to arbitration. The union argued that the discipline was justified because the three officials had violated the union constitution, which stated, in substance, that any member who resorted to the courts for redress before exhausting intra-union remedies would be automatically expelled. Interpreting the phrase

32. *Id.*
33. *See id.*
34. 350 F.2d 427 (D.C. Cir. 1965).
35. *Id.* at 430.
36. *Id.*
37. *Id.*
38. *Id.*
39. 361 F.2d 942 (7th Cir.), *cert. denied*, 385 U.S. 935 (1966).

"may be required" in the proviso to section 101(a)(4)[40] as implying that in some circumstances suit could be brought prior to the expiration of four months, the district court[41] had concluded that these justifying circumstances could be determined only by bringing suit to determine whether the court would accept jurisdiction over the controversy. Consequently, the district court had held that automatic expulsion for bringing suit was arbitrary and invalid.[42]

On appeal, the union contended that it had the right to expel a member should a court determine that the suit was not exceptional, that is, that exhaustion should be required.[43] The Seventh Circuit rejected this argument:

> This claim of the Union . . . makes a member's bringing of a suit . . . too chancy a gamble for the member and effectually blocks access to the courts by placing the member in the dilemma of swallowing the grievance about which he wishes to sue . . . or suing upon the speculation that he will be safe from expulsion by the court's discretion being exercised in his favor.
>
> . . . The right of free access to our courts is too precious a right to be curbed by the risky prediction that the judge's discretion may, like a lucky roll of dice, turn up in favor of the suitor.[44]

The *Roberts* and *Ryan* decisions indicate that the interpretation given to the exhaustion proviso by the *McCraw* court is incorrect. Any remaining doubt should have been resolved by the Supreme Court's decision in *NLRB v. Industrial Union of Marine Workers.*[45] As previously noted,[46] there the Court explicitly concluded that the proviso was not "a grant of authority to unions more firmly to police their members."[47]

It should be pointed out, however, that other language in the *Marine Workers* case appears to limit this holding. At the close of the opinion the Court noted that where the complaint or grievance did not concern an internal union matter, but touched a part of the public

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40. "*Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) . . . ." LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4) (1970).

41. Ryan v. IBEW, 241 F. Supp. 489 (N.D. Ill. 1965).

42. *Id.* at 493.

43. *See* 361 F.2d at 945.

44. *Id.* at 946.

45. 391 U.S. 418 (1968). *See generally* notes 16-25 *supra* and accompanying text.

46. *See* notes 16-25 *supra* and accompanying text.

47. 391 U.S. at 426.

domain covered by the National Labor Relations Act, failure to resort to intra-union grievance procedures was not a ground for expulsion.[48] By negative implication this statement could be interpreted as meaning that the proviso to section 101(a)(4) authorizes unions to discipline members if the alleged grievance concerns internal union matters rather than matters which are part of the public domain. Mr. Justice Harlan, in his concurring opinion, interpreted the majority's language in this fashion and criticized the majority for creating such a "dichotomy."[49] It is submitted, however, that this is not the proper interpretation of the majority's language.

In the first place, such a reading is logically inconsistent. Since earlier in the opinion the Court had specifically stated that the proviso was "not a grant of authority to unions"[50] at all, but was a statement of policy directed to public tribunals,[51] the argument that the proviso authorizes unions to discipline members is without merit. An even stronger refutation of such an interpretation is evinced by a close analysis of the majority opinion. When the majority made the statement in question it was not even referring to the exhaustion proviso of section 101(a)(4). Rather, the Court was alluding to its earlier discussion[52] of the proviso to section 8(b)(1)(A) of the National Labor Relations Act which preserves to unions "[t]he right . . . to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."[53] It was in this section of the opinion that the Court made the distinction between the internal affairs of a union and matters in the public domain and discussed the effect of this distinction upon a union's disciplinary powers.[54] Consequently, to import the distinction into the discussion of section 101(a)(4) is to apply it completely out of context.

The broader reading of the *Marine Workers* case, that is, that it established a rule prohibiting union discipline of a member who initiates

48. *Id.* at 428.

49. *Id.* at 429 (Harlan, J., concurring):

Assuming *arguendo* that there are member-union grievances untouched by the various federal labor statutes, this dichotomy has . . . precisely the disadvantage that the court has found in the third circuit's construction of the proviso: it compels a member to gamble his union membership, and often his employment, on the accuracy of his understanding of the federal labor laws.

50. *Id.* at 426.

51. *Id.*

52. *Id.* at 422-25.

53. 29 U.S.C. § 158(b)(1)(A) (1970).

54. 391 U.S. at 423-25.

"public tribunal" action without spending at least four months in the exhaustion of the union's internal hearing procedures, was adopted as a holding by the Ninth Circuit in *Operating Engineers Local 3 v. Burroughs.*[55] There a union member, alleging irregularities in the local union election procedure, secured two restraining orders against the opening of the ballot box after an election. Subsequently the member was found guilty of violating the union constitution, which required members to resort to intra-union remedies for four months before bringing court actions. He was fined, and on appeal within the union the punishment was affirmed. The union member had then sought to restrain enforcement of the penalty in federal district court.[56] The case came before the Ninth Circuit on the union's appeal of the district court decision in favor of the union member.[57]

The court of appeals, after quoting the interpretation given to the exhaustion proviso by the Supreme Court in *Marine Workers,* agreed that the proviso was not a grant of authority to unions and, consequently, did not authorize union discipline.[58] It is interesting to note, however, that the court then considered whether the remainder of section 101(a)(4) permitted discipline by the union. The court, emphasizing the precious nature of the right to sue, concluded that it did not.[59]

Although the *Roberts, Ryan, Marine Workers*, and *Burroughs* decisions would appear to have firmly established the rule prohibiting union discipline of members who fail to exhaust union remedies, the district court decision in *Buresch v. IBEW Local 24*[60] demonstrates that such is not the case. In *Buresch* a union member was fined and expelled after being found guilty of violating a provision of the union constitution quite similar to that involved in *Burroughs*. Alleging, *inter alia,* that he had been denied due process by the union, and asking to be reinstated, the member filed suit in federal district court. The court held that the member was not denied due process during the union disciplinary proceedings and granted the union's motion for summary judgment.[61] In so doing, the court impliedly affirmed the validity of the punishment imposed by the union.

55. 417 F.2d 370 (9th Cir. 1969) (2-1 decision), *cert. denied*, 397 U.S. 916 (1970).
56. *See* 417 F.2d at 371.
57. *Id.* at 371-72.
58. *See id.* at 372.
59. *Id.* at 372-73.
60. 343 F. Supp. 183 (D. Md. 1971), *aff'd mem.*, 460 F.2d 1405 (4th Cir. 1972).
61. 343 F. Supp. at 193.

III. The Discretionary Nature of the Exhaustion Requirement

Although some early district court cases indicated that the exhaustion requirement was absolute[62]—that courts and administrative agencies were required in every case to dismiss actions brought before four months had been spent exhausting intra-union remedies—today it is well established that the requirement is discretionary. In *Simmons v. Textile Workers, Avisco, Local 713*,[63] for example, the Fourth Circuit considered the case of a union member who had been suspended for failure to cooperate in the union's investigation of election irregularities. The member, asking to be reinstated and claiming damages, brought suit in federal district court.[64] After that court ruled in favor of the member, the union appealed, alleging, *inter alia*, that the complaint should have been dismissed because the member had failed to exhaust available internal union remedies.[65]

The court of appeals first considered the nature of the exhaustion requirement and held that the statute does "not make the exhaustion of hearing procedures mandatory in all cases, but allows the courts in their discretion to determine whether pursuit of such remedies is required."[66] Under the facts of the case, the court concluded that exhaustion was not required.[67]

The *Simmons* court's conclusion that the exhaustion requirement is discretionary has been reaffirmed in many subsequent decisions.[68] Moreover, one notes that any rule that the requirement is mandatory

62. *E.g.*, Durandetti v. Chrysler Corp., 195 F. Supp. 653, 656 (E.D. Mich. 1961); Smith v. General Truck Drivers Local 467, 181 F. Supp. 14 (S.D. Cal. 1960).

63. 350 F.2d 1012 (4th Cir. 1965).

64. *See id.* at 1015.

65. *Id.* at 1016.

66. *Id.*

67. *Id.* at 1016-17. The union member had been punished for "noncooperation." Because this offense was not specified in the union's constitution, the court concluded that the union lacked authority to discipline the member on such grounds and held that the proceedings against him were void. *Id.* at 1017. For a discussion of the voidness exception to the exhaustion requirement, see notes 122-39 *infra* and accompanying text.

68. *E.g.*, NLRB v. Marine Workers Local 22, 391 U.S. 418, 426, 428 (1968); Fulton Lodge No. 2, IAM v. Nix, 415 F.2d 212, 216 (5th Cir. 1969) ("The subsection . . . preserves the discretionary exhaustion doctrine."); Foy v. Norfolk & W. Ry., 377 F.2d 243, 246 (4th Cir. 1967) ("[The proviso] allows the courts in their discretion to determine whether pursuit of such remedies is required."); Semancik v. UMW, Dist. 5, 324 F. Supp. 1292, 1296 (W.D. Pa. 1971), *aff'd*, 466 F.2d 144 (3d Cir. 1972) ("Exhaustion of internal remedies is a discretionary requirement, not a mandatory one.").

would contravene the language of the proviso that a "member *may* be required to exhaust reasonable hearing procedures."[69] The discretionary nature of the requirement is, in fact, now so firmly established that the courts have delineated a set of exceptions to it which will be discussed below.

A. Where Intra-Union Remedies Have in Fact Been Exhausted for Four Months

The first exception to the exhaustion requirement is contained in the proviso itself, that is, the stipulation that a member may not be required to exhaust reasonable hearing procedures exceeding a four-month lapse of time.[70] In *Detroy v. American Guild of Variety Artists*,[71] the court read this restriction as "[a]n outside limit beyond which the judiciary cannot extend the requirement of exhaustion."[72] A number of courts have employed this interpretation to refute union arguments that exhaustion should have been required.

In *Eisman v. Joint Board of Clothing Workers*,[73] for instance, a union member who had exhausted his internal remedies for four months filed an action for damages against his union. The union argued that the case should be dismissed because of the member's failure to comply with the union constitution, which required that union members exhaust all internal remedies before instituting any court action. The court, however, held that the union constitution was subordinate to the mandate of section 101(a)(4) and, more specifically, to the command that exhaustion could be required only for a period not exceeding four months.[74] Consequently, a union member who had pursued intra-union remedies for four months could not be required to delay filing a court action in order to await a final union determination of whether he was entitled to relief.[75]

A similar result was reached in *Hart v. Carpenters Local 1292*.[76] There too the union moved to dismiss a complaint filed by a union member because of his failure to exhaust union remedies. The union argued that the member should not have filed suit before the interna-

69. LMRDA § 101(a)(4), 29 U.S.C. § 411(a)(4) (1970) (emphasis added).
70. *See id.*
71. 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).
72. 286 F.2d at 78.
73. 82 L.R.R.M. 2117 (D. Md. 1972).
74. *Id.* at 2120.
75. *Id.*
76. 341 F. Supp. 1266 (E.D.N.Y. 1972).

tional union had approved the trial committee's recommendation of discipline. The court, however, held that by waiting four months for a decision after he had filed his appeal, the member had fully met the exhaustion requirement.[77]

A case which illustrates the strength of the courts' adherence to the concept that exhaustion cannot be required beyond four months is *Giordani v. Upholsterers International Union*.[78] There the union offered an aggrieved member three courses of appeal; while two of the alternatives would have resulted in a speedy determination, the third would not have. The union argued that because the member had chosen the slowest method "[h]e should be deemed deliberately to have by-passed the statutory four-month limitation."[79] In rejecting this contention the court of appeals stated that since the union had permitted resort to any one of three reviewing bodies there was no reason to declare that the member's "[p]reference for one over the other should entail a forfeiture of his statutory right to bring an action in this forum after four months."[80]

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77. *Id.* at 1269. It is interesting to note that in *Hart* the union member was tried twice by the union trial committee. The court's discussion of the exhaustion requirement noted above was in relation to the first trial. Since it concluded that the requirement had been satisfied vis-a-vis that trial, the court proceeded to consider the merits of the member's claim. *Id.*

The court did, however, accept the union's defense of failure to exhaust against the member's attack on the validity of the second trial. The member had argued "[t]hat since his federal court action with respect to the first trial was then pending before the court at the time of the second trial, prior to which he had exhausted the four-month period, he was not also required to exhaust union procedures at a second trial on the same charge." *Id.* at 1270 (footnote omitted). In rejecting this argument the court emphasized the purposes of the exhaustion requirement and concluded that "[t]here was no justification for short-circuiting the union procedures in the second trial simply because an action was pending in this court pertaining only to the first trial." *Id.*

78. 403 F.2d 85 (2d Cir. 1968). *But see* Glasser v. American Federation of Musicians, 354 F. Supp. 1, 4-6 (S.D.N.Y. 1973) (dictum). The *Glasser* case involved a dispute between a member of a musicians' union and his booking agent. The union bylaws provided that all such disputes should be settled by arbitration. The member refused to participate in the arbitration proceedings and, after the arbitrators found against him, brought suit to enjoin enforcement of the award. Although the district court actually held that a previous state court decision operated as res judicata to bar the member's suit, *id.* at 4, in dictum it interpreted the four-month limitation in a manner which appears contrary to the idea that four months is the maximum period of time for which exhaustion of intra-union remedies can be required. *Id.* at 6. The member had argued that the union requirement of arbitration was invalid under § 101(a)(4). *Id.* at 3. The court rejected the theory that because the arbitration proceedings lasted longer than four months (by approximately fifteen days) the four-month rule had been violated. It first noted that the member had done nothing to intervene in or to expedite the arbitration proceedings. Furthermore, he had failed to initiate available state court action. Finally, the court concluded that the member had in no way been prejudiced by the fact that the proceedings lasted slightly more than four months. *Id.* at 6.

79. 403 F.2d at 88.

80. *Id.*

B. Where There Is No Likelihood That a Decision Will Be Rendered Within the Four-Month Period

In *Harris v. Longshoremen's Local 1291*,[81] the plaintiffs, alleging that the union "president's willful misconduct of union meetings [had] deprived [them] of their right to participate effectively,"[82] had filed suit in federal district court.[83] The lower court had granted summary judgment for the union because of plaintiff's failure to seek relief within the union.[84] On appeal the plaintiffs contended that resort to intra-union remedies was not required "on the ground that a final decision may well not have been obtainable within four months of the initiation of a proceeding."[85] The Third Circuit, however, concluded that this allegation did not excuse the plaintiffs' failure to seek intra-union relief: "The undisputed facts establish that, although there was no unqualified assurance of a final decision within four months, the plaintiffs could reasonably have expected to receive at least an initial decision within the specified period."[86] In the court's opinion this *likelihood* of an initial decision was sufficient to require a four-month effort to exhaust union remedies.[87] By negative implication such an effort would not be required where the plaintiff could show that there was no likelihood of any decision within the statutory period.

The *Harris* court's interpretation of the exhaustion requirement was followed in *McKeon v. Highway Truck Drivers Local 107*.[88] In the *McKeon* case, union members sought an order requiring the union to hold an election,[89] and the union argued that the members should be

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81. 321 F.2d 801 (3d Cir. 1963).

82. *Id.* at 803. The plaintiffs alleged that this misconduct constituted a violation of §§ 101(a)(1)-(2) of the LMRDA. *See id.* at 803 n.1.

83. 210 F. Supp. 4 (E.D. Pa. 1962).

84. *Id.* at 8.

85. 321 F.2d at 804. The members also argued that a multiplicity of appellate agencies rendered the union's appeal procedure unreasonable. The court rejected this contention because the union constitution did "not make successive resort to each of [the] agencies mandatory." *Id.*

86. *Id.* (footnote omitted).

87. *Id.* at 805. It should be noted that the *Harris* court did not recognize that the result would be different where a union member could show that he would be barred by being required to seek intra-union relief. *See, e.g.*, Sewell v. Grand Lodge, IAM, 445 F.2d 545, 548-50 (5th Cir. 1971) (action under LMRDA barred by state statute of limitations). It should be pointed out that at another place in the opinion the court justified its holding requiring a four month pursuit of internal remedies by stressing that here there was a "*substantial likelihood* that corrective action would be forthcoming within the statutory period . . . ." 321 F.2d at 806 (emphasis added). The court never explained whether "substantial likelihood" or mere "likelihood" was the applicable standard.

88. 223 F. Supp. 341 (D. Del. 1963).

89. The members alleged that business agents and stewards were "officers" within the mean-

required to exhaust internal remedies. To avoid the exhaustion requirement, the members maintained that the union procedures were unreasonable because they involved multiple appellate agencies which met infrequently. Relying on the *Harris* decision, the *McKeon* court refuted this contention by noting that these alleged deficiencies were not "[s]o unreasonable as to make some decision within the statutory four-month period impossible."[90]

The *Harris* and *McKeon* decisions make it clear that failure to resort to union remedies will not always be excused by the fact that all intra-union remedies may not be exhausted within the four-month period. In *Harris* the court stated that a reasonable expectation of "an initial decision" within the time period was enough to demand that union procedures be attempted.[91] No "unqualified assurance of a final decision" was required.[92] And in *McKeon* the court implied that the possibility of "some decision" was sufficient.[93] It should be noted, however, that at least one court has incorrectly interpreted *Harris* as excusing failure to utilize union procedure where it is not established that a final disposition of the case can be accomplished by the union within four months.

In *Tirino v. Bartenders Local 164*,[94] members were to be tried by the union trial committee for leading a wildcat strike. On the eve of the trial, the members brought suit for a declaratory judgment and injunctive relief.[95] The union moved for summary judgment partially[96] on the ground that the members had failed to exhaust union remedies. The court denied the motion as premised on this ground because there was "no evidence to indicate that the plaintiffs [could] exhaust their intraunion appellate remedies within four months . . . ."[97] Pursuant to the *Harris* rule, however, the only question the *Tirino* court should have

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ing of the LMRDA and thus were required to be elected. The local had filled these positions by appointment. *Id.* at 342.

90. *Id.* at 345.

91. 321 F.2d at 804-05.

92. *Id.*

93. 223 F. Supp. at 345. *See* Carpenters Local 853 v. United Bhd. of Carpenters, 83 L.R.R.M. 2759, 2763 (D.N.J. 1972) (dictum).

94. 282 F. Supp. 809 (E.D.N.Y. 1968).

95. The members alleged, *inter alia*, that the union charges against them were "unlawfully unspecific" and that they could not obtain a fair hearing. *Id.* at 810-11.

96. The union based its motion for summary judgment on five different grounds. *Id.* at 812.

97. *Id.* at 816. The motion was, however, partially granted as to one plaintiff on a procedural point not relevant to this discussion. *See id.* at 817-18.

asked was whether the evidence indicated a likelihood that "at least an initial decision" could have been rendered.[98]

C. *Absence of an Available Remedy*

Another exception to the exhaustion requirement had its origin in the landmark *Detroy*[99] decision. In that case one reason given by the court for not requiring exhaustion was the uncertainty that the union rules "afforded the [union member] a remedy within the organization."[100] The court reasoned that "[o]nly resort to those [remedies] expressly provided in the union's constitution or those clearly called to his attention by the union officials should be demanded . . . ."[101]

A number of decisions have emphasized that the existence of an available remedy must be established before a union's motion to dismiss for a member's failure to exhaust will be granted. In *Forline v. Helpers Local 42*,[102] for example, the court denied such a motion, as founded on failure to exhaust,[103] even though the facts alleged failed to show any reason that would excuse the plaintiffs' failure to resort to internal union processes. The court stressed that the union "should place before the court *facts* establishing that union remedies are available to the plaintiff and that plaintiff has neglected to use them."[104]

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98. *See* note 86 *supra* and accompanying text.

99. Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961). For the facts of this case, see text accompanying note 10 *supra*.

100. 286 F.2d at 80 ("[I]t is by no means clear that the union's own rules afforded the appellant a remedy within the organization."). The court also relied on the existence of a clear and undisputed violation of federal law and the fact that the member's injury was immediate and difficult to compensate by a subsequent money award. *Id.* at 81.

101. *Id.* at 80-81. It should be pointed out that the *Detroy* court appeared to limit its requirement of a certain remedy to those situations where a union member asserted a clear violation of a federal statute. *Id.* at 80 ("When asserting what is clearly a violation of a federal statute, a union member should not be required to first seek out remedies which are dubious."). Other decisions, however, have not so limited the requirement. *See* notes 102-08 *infra* and accompanying text.

102. 211 F. Supp. 315 (E.D. Pa. 1962).

103. The motion was granted on other grounds as to a portion of plaintiff's claim. *Id.* at 318.

104. *Id.* at 317 (emphasis in original). It should be noted, however, that the union's motion was denied without prejudice to a renewal of the motion if and when a proper factual foundation for such a motion were laid. *Id.* at 318; *see* Lavender v. UMW, 285 F. Supp. 869 (S.D. W. Va. 1968); *cf.* Adamczewski v. Local 1487, IAM, 84 L.R.R.M. 2791 (N.D. Ill. 1972); Burris v. International Bhd. of Teamsters, 224 F. Supp. 277 (W.D.N.C.. 1963). *Burris* involved a suit brought by union members who alleged that they had been misled into accepting honorable withdrawal cards from the union which led to their being blacklisted. Arguing that the former members had failed to exhaust union remedies, the union moved to dismiss the complaint. The court held

The absence of an available remedy has also been utilized on appeals from decisions on the merits to justify excusing the exhaustion requirement. In the Ninth Circuit case of *Fruit Packers Local 760 v. Morley*,[105] the court considered an action by union members to compel the union and its secretary-treasurer to permit an examination of union records. The union argued that the members had failed to exhaust intraunion remedies. The court of appeals, however, held that the union could not properly invoke the exhaustion doctrine because it had not shown "that there was a procedure available to the members within the union structure reasonably calculated to redress the particular grievance complained of."[106] A similar result was reached in *Steib v. Clerks Local 1497*.[107] There the Fifth Circuit, in an action by union members to enjoin a dues check-off procedure, held that the members were relieved from exhausting union remedies prior to bringing their action because the union constitution failed to provide an appropriate internal remedy and union officers had failed to bring any existing remedy to the attention of the members.[108]

D. Futility of Exhaustion

There are instances where the union has procedures which theoretically could provide an aggrieved member an internal remedy but which in reality would not produce the relief desired. In such cases exhaustion

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that the question of whether or not the union had made provision for reasonable hearing procedures with respect to the charge of wrongful issuance of withdrawal cards was one which could best be answered at trial. *Id.* at 280. Furthermore, the court believed that a trial was necessary to determine whether existing union remedies were open to ex-members out on withdrawal cards. *Id.*

105. 378 F.2d 738 (9th Cir. 1967).

106. *Id.* at 745. The court summarized, "Without any showing that there was some procedure, neither uncertain nor futile, by which the [members] might have redressed the violation of their statutory right to inspect union records, they cannot be barred from the courts for failure to exhaust intraunion remedies." *Id.*

107. 436 F.2d 1101 (5th Cir. 1971) (district court opinion adopted).

108. *Id.* at 1106; *see* Garrett v. Dorosh, 77 L.R.R.M. 2650 (E.D. Mich. 1971). In *Garrett*, union members, claiming a violation of their right to nominate the candidate of their choice for unit president, brought suit to nullify the nomination and to enjoin the election. Although the court did not expressly use the phrase "absence of an available remedy," it is clear that it concluded that there was no intraunion remedy which could have aided the plaintiffs. The court noted that the first available appeal did not commence until after the election. Furthermore, subsequent appeals could have consumed much of the president's term of office, during which "the very person charged with the improprieties, by virtue of the fact that he [was] presently unopposed for President," would serve. *Id.* at 2653. The court concluded that to force the members "[t]o pursue such a long appellate procedure would, in effect, deny them the relief they [sought] regardless of the merits of their claim." *Id.*

of intra-union remedies would be futile and the courts will not require it. In *Fulton Lodge No. 2, IAM v. Nix*,[109] for example, a union member was expelled for circulating allegedly false and malicious statements about the president of the local union. The court concluded that the member was not required to attempt to exhaust his internal union remedies because of the "continuing difficulties" between the member and both of the reviewing authorities to which he would have had to make his appeal.[110]

Other courts have found "futility" by emphasizing factors other than the prejudice of the review authorities against the aggrieved member. In *Farowitz v. Musicians Local 802*,[111] a member brought suit to nullify his expulsion from the union for publishing a bulletin advising union members not to pay certain union taxes. In rejecting the union's argument that the member's action was barred by his failure to appeal to the union's executive board, the court advanced a number of reasons to support its conclusion that exhaustion was not required in this instance because it would have been futile. First of all, members of the board had a personal interest in the result of the litigation because "[a]ny lessening of union revenues might have its most immediate effect on the number and salaries of union executives."[112] Furthermore, the legality of the union tax had been challenged numerous times in the past. The court pointed out that in view of this fact, "it would not be surprising if a harried Executive Board had developed a hardened position toward critics of taxes."[113]

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109. 415 F.2d 212 (5th Cir. 1969).

110. *Id.* at 216. Earlier the court had characterized the relationship between the member and the review authorities as "industrial warfare." *Id.* at 214. The court did not expressly state that exhaustion would have been futile, but it clearly implied that this was its rationale for excusing exhaustion. *Id.* at 216.

111. 241 F. Supp. 895 (S.D.N.Y. 1965).

112. *Id.* at 907. The *Farowitz* court, like the *Fulton Lodge* court, relied on the prejudice of the review authority. In *Farowitz*, the court stressed that the union member was regarded as an "exceptional" threat to the union, that one of the members of the executive board had an "intense personal dislike" for the union member, and that the member had been treated quite severely in the past when brought up on charges. *Id.*

113. *Id.* at 907-08. A similar rationale had been offered by the district court in an earlier decision which had granted the member a preliminary injunction and which was affirmed in Farowitz v. Musicians Local 802, 330 F.2d 999 (2d Cir. 1964). There the circuit court noted that the executive board of the union had consistently taken a position on the tax issue contrary to that advocated by the member. *Id.* at 1003. Although the court believed that one could not necessarily equate the board's position on this point to the view it would have taken on the propriety of the member's expulsion, it still could not conclude that the district court had abused its discretion in deciding "[t]hat the likelihood of futility was so great that preliminary relief ought not to be withheld." *Id.*

A "hardened position" by the union appellate body has been stressed in numerous other decisions where the courts have concluded that it would have been futile for the member to pursue union remedies. In *Adamczewski v. Local 1487, IAM*,[114] union members brought suit to enjoin union discipline against them for crossing a picket line. The court concluded that there was good reason to believe that exhaustion would be futile because of sanctions already imposed on other union members who had crossed the picket lines.[115] A similar rationale was utilized by the court in *Parish v. Legion*.[116] The action there was brought by plaintiffs on behalf of themselves and all other "travelers" (persons belonging to one local and working in the jurisdiction of another),[117] seeking a declaratory judgment that they were members of the local in whose jurisdiction they were working. Before filing suit, the travelers had complained to the district international vice-president, who made a strong recommendation that the local accept them into membership. However, because of repeated holdings of the international convention that the admission of travelers was a matter of local autonomy, he did not order compliance with his recommendation. The court believed that this justified the travelers' conclusion "that the most they could expect from higher Union authority was a similar recommendation and that a further appeal within the Union would be futile."[118]

The *Fulton Lodge*, *Farowitz*, *Adamczewski*, and *Parish* decisions demonstrate that the futility argument has often been employed successfully by members to counter union arguments that intra-union remedies should have been exhausted. One should not be misled, however, into assuming that the futility argument will invariably be accepted by the courts, for there are numerous cases in which the courts have found that there was an insufficient showing of futility.[119] Furthermore, it should be noted that several decisions have held that a mere allegation of futility will not suffice to excuse failure to resort to internal union procedures.[120] Finally, a possible obstacle to the success of the futility

114. 84 L.R.R.M. 2791 (N.D. Ill. 1972).

115. *Id.* at 2793.

116. 450 F.2d 821 (9th Cir. 1971).

117. *Id.* at 823 n.2.

118. *Id.* at 827.

119. *E.g.*, Buzzard v. Local 1040, IAM, 480 F.2d 35, 41 (9th Cir. 1973); Hayes v. IBEW, Local 481, 83 L.R.R.M. 2647, 2650 (S.D. Ind. 1973) (dictum).

120. *E.g.*, Moore v. North American Rockwell, 80 L.R.R.M. 2172 (E.D. Mich. 1972); *see* Fulsom v. United-Buckingham Freight Lines, Inc., 324 F. Supp. 135 (W.D. Mo. 1970); Carpenters Local 1219 v. United Bhd. of Carpenters, 314 F. Supp. 148 (D. Me. 1970); *cf.* Transport Workers Union v. American Airlines, Inc., 413 F.2d 746 (10th Cir. 1969) (Railway Labor Act case). In

argument is the position of some courts that allegations of futility are premature where no attempt has been made to exhaust union remedies.[121] The validity of this argument is questionable, for it seems senseless to require a union member to attempt union remedies in instances where he can adduce sufficient facts to establish futility. Nonetheless, union members filing suit in jurisdictions following this rationale should take steps to exhaust even "futile" union remedies.

E. Voidness or a Clear Violation of Federal Law

In *Libutti v. Di Brizzi*,[122] the Second Circuit enunciated what has become an extremely significant exception to the exhaustion requirement. In the *Libutti* case, union members, alleging that the union's executive board had imposed restrictions on eligibility for union office which violated the union's constitution and bylaws, were granted a restraining order by the district court.[123] On appeal the union argued that the members had failed to exhaust union remedies. The Second Circuit, however, held that exhaustion was not required because the union action complained of was "void"[124] in that it violated the fundamental right of union members to nominate candidates for union office.[125]

Two important facts should be noted concerning the *Libutti* decision. The first is the reasoning supporting the voidness exception, that is, that when the union action is void, "the reasons for requiring exhaustion are absent . . . ."[126] The policies underlying the exhaustion requirement were enumerated in the *Detroy*[127] decision: (1) "to stimulate labor organizations to take the initiative and independently to establish honest and democratic procedures;" (2) to conserve judicial resources; and (3) to ensure the valuable assistance which the courts would receive from "prior consideration of the issues by appellate union tribunals."[128] In

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Transport Workers the court stated that if "mere conclusionary language in a complaint" were sufficient to establish futility, "[t]he doctrine of exhaustion would be dissipated by mere form and the door to the courts could be opened by prediction rather than by jurisdictional fact." *Id.* at 751.

121. *E.g.*, Fulsom v. United-Buckingham Freight Lines, Inc., 324 F. Supp. 135 (W.D. Mo. 1970); McKeon v. Highway Truck Drivers Local 107, 223 F. Supp. 341 (D. Del. 1963).

122. 337 F.2d 216 (2d Cir. 1964), *opinion adhered to on rehearing*, 343 F.2d 460 (2d Cir. 1965).

123. 233 F. Supp. 924 (E.D.N.Y. 1964).

124. 337 F.2d at 219.

125. *See* LMRDA § 101(a)(1), 29 U.S.C. § 411(a)(1) (1970).

126. 337 F.2d at 219.

127. Detroy v. American Guild of Variety Artists, 286 F.2d 75 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

128. 286 F.2d at 79.

instances where a member's rights are seriously violated, concluded the *Libutti* court, none of the above policies are applicable: "[T]he commitment of judicial resources is not great; the risk of misconstruing procedures unfamiliar to the court is slight; a sufficient remedy given by the union tribunal would have to approximate that offered by the court."[129]

The second important facet of the *Libutti* decision is that the court specifically cautioned against "indiscriminate application"[130] of the voidness exception. Since the concept of voidness is so closely connected to the merits of the claim, the court believed that its indiscriminate use "[c]ould reduce the exhaustion requirement to the tautology that a plaintiff can find present relief in the courts only if his claim has legal merit."[131]

Since *Libutti*, numerous courts have utilized the voidness exception to justify the conclusion that exhaustion was not required. In *Simmons v. Textile Workers, Avisco, Local 713*,[132] a union member brought suit for restoration to union membership after he had been suspended for "non-cooperation,"[133] an offense not specified in the union's constitution.[134] The court held that discipline for an offense not set forth in the union's constitution or bylaws was void; thus exhaustion should not be required.[135] *Sheridan v. Liquor Salesmen's Local 2*[136] involved an action brought by union members to enjoin union discipline against them for publishing an article criticizing shop stewards. Finding a clear violation of the members' section 101(a)(2) right to free speech,[137] the court held that exhaustion was not required.[138] Finally, in *Eisman v. Amalgamated Clothing Workers*,[139] the court held that exhaustion was not required because the members had been expelled from the union without the due process guaranteed by LMRDA section 101(a)(5).

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129. 337 F.2d at 219.

130. *Id.*

131. *Id.* The court noted, however, that this danger "is [not] an inevitable result of applying the exception." *Id.*

132. 350 F.2d 1012 (4th Cir. 1965).

133. *See* text accompanying notes 64-67 *supra*.

134. 350 F.2d at 1017.

135. *Id.* at 1016-17; *cf.* Boilermakers Local 455 v. Terry, 398 F.2d 491 (5th Cir. 1968).

136. 303 F. Supp. 999 (S.D.N.Y. 1969).

137. LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2) (1970).

138. 303 F. Supp. at 1005; *see* Archibald v. Operating Eng'rs Local 57, 276 F. Supp. 326 (D.R.I. 1967).

139. 352 F. Supp. 429 (D. Md. 1972).

IV. Conclusion

The decisions interpreting section 101(a)(4) of the LMRDA have demonstrated an awareness of the inherent tension that pervades the entire Act, that is, the conflict between the view of the Act as a means of guaranteeing a more active role for the worker in his industrial community and the concept of the importance of preventing unwarranted governmental interference with internal union affairs.

Unjustified governmental intrusion is precluded by the now well established rule that the exhaustion proviso applies to the courts rather than to the unions themselves. The courts have not hesitated to invoke the proviso in order to dismiss actions filed before the statutory period has elapsed. Such dismissals, by preventing governmental interference, stimulate unions to establish fair internal procedures, conserve judicial resources, and provide valuable assistance to the courts by allowing union tribunals to construe unfamiliar procedures.

Existing case law also promotes the Act's goal of assuring democracy in internal union affairs. The majority rule prohibiting union discipline of members who fail to attempt intra-union remedies ensures that members will not be deterred from exercising their section 101(a)(4) right to sue. Furthermore, the various exceptions to the exhaustion requirement establish even more extensive protection for this important right. The exceptions in cases where union procedures have in fact been exhausted for four months and where there is no likelihood that any decision will be rendered within the four-month period are simply affirmations of the exclusion contained in the statute itself. The exceptions of absence of an available remedy and futility are essential because of the inequities which would result if aggrieved members were forced to resort to nonexistent remedies or to remedies which could not provide the relief sought. Finally, the voidness exception is justified by the inapplicability of the policies underlying the exhaustion requirement to situations where the union action complained of is void.

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