Catholic University Law Review

Volume 31
Issue 2 *Winter 1982*

Article 12

1982

Clayton v. UAW: A Temporary Reprieve from the Exhaustion of Internal Union Appeals in Duty of Fair Representation Actions

Leo E. Wetzel

NOTES

CLAYTON V. UAW: A TEMPORARY REPRIEVE FROM THE EXHAUSTION OF INTERNAL UNION APPEALS IN DUTY OF FAIR REPRESENTATION ACTIONS

A collective bargaining contract embodies an agreement on the terms and conditions of employment reached by an employer and a union.[1] Until recently, the United States Supreme Court had spoken only to the issue of exhaustion of the contractual remedies established by such an agreement as a prerequisite to an employee's action seeking to enforce his contractual rights under section 301 of the Labor Management Relations Act (LMRA).[2] The Court has held that an employee does not have standing to sue his employer under section 301 unless he exhausts the available collective bargaining grievance procedures.[3] However, it has excused such exhaustion when the plaintiff alleges and proves that the union breached its duty of fair representation.[4] Lower federal courts[5] have also required

1. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BILL NO. 1910 HANDBOOK OF METHODS FOR SURVEYS AND STUDIES 2-3 (1976); *see* H.J. Heinz v. NLRB, 311 U.S. 514 (1941) (unfair labor practice for employer to refuse to reduce agreements to signed written document).

2. Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Labor Management Relations Act of 1974 § 301(a), 29 U.S.C. § 185(a) (1976). Although the specific subsection which is the subject of this article is § 301(a), this Note will follow the common practice of referring to it as § 301. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 686-87 n.122 (1973). *See generally* Bsharah v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968); Neipert v. Arthur G. McKee & Co., 448 F. Supp. 206 (E.D. Pa. 1978). A cause of action is cognizable in state or federal court. *See* Vaca v. Sipes, 386 U.S. 171, 177 (1967). Regardless of where the suit is brought, federal law applies. *Id.* There is a marked absence of state court cases in duty of fair representation suits.

3. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by his Union*, 41 U. CIN. L. REV. 55, 65 (1972) [hereinafter cited as Tobias I].

4. Vaca v. Sipes, 386 U.S. 171 (1967).

plaintiffs to exhaust the separate and independent internal union appeals procedures enumerated in union constitutions.[6] There are two instances in which a section 301 plaintiff may be required to exhaust internal union appeals. The first instance is one in which the employee alleges that the union breached its duty of fair representation[7] by failing to arbitrate his grievance. Second, the issue of exhaustion of internal union appeals may arise where the employee has exhausted the available grievance and arbitration procedures but seeks to avoid their binding effect by alleging that the union breached its duty of fair representation at arbitration.[8]

In *Clayton v. UAW*,[9] the Supreme Court addressed the issue raised by several lower courts of whether an employee who alleges that his union breached its duty of fair representation by failing to process his grievance through arbitration must exhaust internal union appeals procedures prior to instituting a section 301 action. The Court held that an employee is not required to exhaust intra-union remedies that cannot provide either the complete relief he seeks or reactivate his grievance.

After working eight years for ITT Gilfillan, Clifford Clayton was fired for violating a plant rule prohibiting certain defined acts of conduct. Clayton followed the mandatory grievance procedure outlined in the collective bargaining agreement between ITT and his union by asking his union representative to file a grievance alleging that Clayton's dismissal was not for just cause. The union pursued the grievance and made a timely request for arbitration. The union later withdrew the request but did not inform Clayton until after the time for requesting arbitration had expired.[10]

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5. *E.g.*, Winter v. Local 639, International Brotherhood of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Newgent v. Modine Mfg. Co., 495 F.2d 919 (7th Cir. 1974); Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir.), *cert. denied*, 415 U.S. 915 (1973); Bsharsh v. Eltra Corp., 394 F.2d 502 (6th Cir. 1968).

6. For a general outline of internal appeals procedures in union constitutions, see Craypo, *The National Union Convention as an Internal Appeal Tribunal*, 22 INDUS. & LAB. REL. REV. 487, 489-90 (1969). *See also* Note, *Public Review Boards: A Check on Union Disciplinary Powers*, 11 STAN. L. REV. 497 (1959).

7. The duty of fair representation, initially declared by the Supreme Court in Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 202 (1944), prevents a labor union chosen as an exclusive representative from representing its members in a discriminatory or arbitrary manner, and requires that the union act in good faith. Vaca v. Sipes, 386 U.S. 171, 177 (1967). *See generally* Fanning, *The Duty of Fair Representation*, 19 B.C.L. REV. 813 (1978); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957). Summer, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?* 126 U. PA. L. REV. 251 (1977); Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973). *See also* Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 215 (1944).

8. *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

9. 101 S. Ct. 2088 (1981).

10. Article IX of the collective bargaining agreement between Local 509 and ITT Gilfil-

The union's constitution required Clayton to exhaust the internal union appeals procedure before seeking redress in court.[11] Clayton did not file a timely internal appeal of the local's decision not to seek arbitration. Instead, Clayton brought suit in federal court against his employer and his union, the United Auto Workers (UAW),[12] under section 301(a) of the LMRA.[13] He sought reinstatement of his job at ITT and, additionally, monetary relief from both his employer and his union.[14] Clayton alleged that his employer had breached the collective bargaining agreement by discharging him without just cause, and that the union had breached its duty of fair representation by refusing to arbitrate his grievance.[15] Both defendants relied on Clayton's failure to exhaust his internal union appeals as an affirmative defense. The federal district court sustained this defense and dismissed the suit. The court held that the union's internal appeals procedure was adequate, rejecting the plaintiff's argument that exhaustion of those remedies would be futile.[16] Accordingly, the court held that Clayton was required to exhaust the internal union appeals prior to bringing his suit. The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of Clayton's suit against the union,[17] holding that Clayton's nonexhaustion of the internal appeals procedure was an adequate defense with respect to his suit against the union for monetary relief.[18] However, since the internal appeals procedure could not result in Clayton's reinstatement or even in a reactivation of his grievance, the court rejected the employer's assertion of Clayton's failure to exhaust as an affirmative defense.[19]

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lan provides that if the union wishes to request arbitration, it must do so within 15 working days after the third step of the grievance procedure. *Id.* at 2092 n.1.

11. UAW Constitution, art. 33, § 5. The procedures incorporated into article IV of Local 509's bylaws are established in articles 32 & 33 of of the UAW Constitution. Clayton v. UAW, 101 S. Ct. at 2092.

12. Ordinarily, to prevail in a § 301 action, the employee must establish that the union breached its duty *and* that the employer breached the collective bargaining agreement. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976). For examples of cases where the only defendant was the employee's union, see Foust v. IBEW, 442 U.S. 42 (1979); Farmer v. Local 1064, Hotel Workers, 99 L.R.R.M. (BNA) 2166 (E.D. Mich. 1978); Seigle v. Local 1336, UAW, 87 L.R.R.M. (BNA) 3021 (W.D. Ky. 1973). Employees have also sued only their employer. *See, e.g.*, Orphan v. Furnco Constr. Corp., 466 F.2d 795 (7th Cir. 1972).

13. Labor Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (1976).

14. 101 S. Ct. 2088, 2096 (1981). *See* Czosek v. O'Mara, 397 U.S. 25 (1970) (union can be sued alone for the portion of damages independently caused by it).

15. *Id.* at 2092.

16. Clayton v. ITT Gilfillan, No. 76-730 (C.D. Cal. May 31, 1979).

17. Clayton v. ITT Gilfillan, 623 F.2d 563 (9th Cir. 1980).

18. *Id.* at 566-67.

19. *Id.* at 569-70.

The Supreme Court, in a five to four decision, affirmed in part and reversed in part. The Court held that a plaintiff is not required to exhaust internal union appeals which cannot result in either an award of the complete relief sought or in a reactivation of his grievance before suing his employer and union.[20] Justice Brennan, writing for the majority, stated that in such cases exhaustion is a "useless gesture" and does not serve national labor policy,[21] which favors private resolution of disputes arising out of collective bargaining agreements.[22]

Justice Powell, joined by Chief Justice Burger, dissented. He maintained that it was within the union's discretion to determine whether to pursue arbitration.[23] Justice Rehnquist wrote a separate dissent joined by the Chief Justice, Justice Powell, and Justice Stewart. He argued that the majority erred in holding that internal union remedies must be a complete substitute for either the courts or the contract grievance procedure before exhaustion of those remedies is required.[24] Justice Rehnquist maintained that the purpose of internal union remedies is "to facilitate or encourage the private resolution of disputes, not to be a complete substitute for the courts."[25]

This note will discuss the law of exhaustion as applied to internal union appeals and duty of fair representation actions. It will examine the Supreme Court's decision in *Clayton* and demonstrate the inappropriateness of requiring a section 301 plaintiff to exhaust internal union appeals prior to bringing a duty of fair representation suit. Finally, the note will conclude with an analysis of the impact of *Clayton* on the future of collective bargaining agreements.

I. History of the Exhaustion Requirement and Internal Union Appeals

The exhaustion requirement was first applied to labor disputes with re-

20. 101 S. Ct. at 2093.

21. *See, e.g.*, Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960).

22. 101 S. Ct. at 2097.

23. *Id.* at 2099. Justice Powell noted that the doctrine underlies the Court's decision in Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965). Justice Harlan's majority opinion in *Maddox* noted that requiring the employee to afford his union the opportunity to act on his behalf complements the union's prestige with employees and that permitting an employee to avoid the grievance procedure would prevent the union and employer from establishing a uniform and orderly method of settling employee grievances. *Id.* at 653. For further discussion of *Maddox*, see *infra* note 26 and accompanying text.

24. 101 S. Ct. at 2101.

25. *Id.*

spect to grievance procedures established by collective bargaining agreements. In *Republic Steel Corp. v. Maddox*,[26] the Supreme Court held that an employee must exhaust the exclusive grievance and arbitration procedures established in the collective bargaining agreement before he can sue the employer for an alleged breach of that agreement. Not long after, in *Vaca v. Sipes*,[27] the Court applied this exhaustion requirement to section 301 actions involving the union's duty of fair representation.[28] In *Vaca*, the Court enumerated an exception to the general rule established in *Republic Steel*[29] and held that exhaustion of the remedies provided by a collective bargaining agreement is not required where the employee can prove a breach of the union's duty of fair representation.[30] The Court reasoned that, without such an exception, the aggrieved employee would be left without a remedy if his union exercised exclusive control over the contract grievance procedure and refused to pursue his claim.

Republic Steel and *Vaca* involved remedies provided by a collective bargaining agreement. They did not specifically address whether to require exhaustion of remedies provided by the union's constitution. Nevertheless, some lower courts extended *Vaca* and held that an employee need not exhaust these internal union remedies.[31] A majority of federal courts, however, ruled that plaintiffs must exhaust these intra-union remedies prior to bringing a duty of fair representation action.[32] These courts employed dif-

26. 379 U.S. 650 (1965). In *Maddox*, a mine worker was laid off without severence pay which he alleged was due under the collective bargaining agreement. Instead of following a three-step grievance procedure provided for in the agreement, the employee waited three years and then filed suit in an Alabama state court. The court ruled in his favor. The Supreme Court reversed on grounds that the employee must "attempt" to follow the grievance mechanism provided in the collective bargaining agreement. *Id.* at 652.

27. 386 U.S. 171 (1967).

28. *See supra* note 7 and accompanying text. In *Vaca*, a discharged union member contended that his dismissal violated the collective bargaining agreement and that his union had arbitrarily decided not to process his grievance.

29. 386 U.S. at 184 (1967). Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965).

30. 386 U.S. at 186.

31. *E.g.*, Keeler v. Great A & P Tea Co., 95 L.R.R.M. (BNA) 3050, 3052 (E.D. Mich. 1977). Several courts have emphasized the distinction between collective bargaining agreement procedures and internal union remedies in an effort to counter this misconception. *See, e.g.*, Willetts v. Ford Motor Co., 583 F.2d 852, 856 (6th Cir. 1978); Ratliff v. Ford Motor Co., 98 L.R.R.M. (BNA) 2699, 2702 (E.D. Mich. 1978).

32. Apparently, the First Circuit is the only court of appeals not to have recognized the exhaustion requirement as it is applied to internal union appeals in duty of fair representation cases. The remaining 10 circuit courts have all either dismissed actions because the plaintiffs failed to exhaust intra-union appeals or enumerated an exception to the exhaustion requirement. Keene v. International Union of Operating Engr's Local 624, 569 F.2d 1375 (5th Cir. 1978); Winter v. Local 639, International Brotherhood of Teamsters, 569 F.2d 146 (D.C. Cir. 1977); Winterberger v. General Teamsters Auto Truck Drivers, 558 F.2d 923 (9th

fering rationales to require exhaustion of intra-union appeals, and also developed vague standards for determining when the exhaustion prerequisite can be waived.[33]

The first federal appellate case to consider whether an employee must exhaust internal union remedies before bringing a section 301 action was *Bsharah v. Eltra Corp.*[34] In *Bsharah*, the defendant employer had moved its operations to a different plant and the plaintiff employee had requested a transfer to the new location.[35] When the request was denied, the employee filed suit against her employer and her union alleging that the transfer denial breached her rights under the collective bargaining agreement. The district court dismissed the employee's action because she had failed first to initiate an internal union appeal as required by the union's constitution and bylaws. The United States Court of Appeals for the Sixth Circuit affirmed,[36] but did not articulate its reasons for requiring exhaustion.

Shortly after *Bsharah*, the Seventh Circuit developed the most persuasive rationale for the intra-union remedies exhaustion requirement in *Orphan v. Furnco Construction Corp.*[37] The plaintiffs in *Orphan* filed

Cir. 1977); Bright v. Taylor, 554 F.2d 854 (8th Cir. 1977); Newgent v. Modine Mfg. Co., 495 F.2d 919 (7th Cir. 1974); Imel v. Zohn Mfg. Co., 481 F.2d 181 (10th Cir. 1973); Caucuas v. General Motors Corp., 444 F.2d 506 (6th Cir. 1971); Sheridan v. Liquor Salesman Local 2, 444 F.2d 393 (2d Cir. 1971); Brady v. Trans World Airlines Inc., 401 F.2d 87 (3d Cir.), *cert. denied*, 393 U.S. 1048 (1968); Foy v. Norfolk & W. Ry. Co., 377 F.2d 243 (4th Cir.), *cert. denied*, 389 U.S. 848 (1967). *But see* Chambers v. Local 639, International Brotherhood of Teamsters, 578 F.2d 375 (D.C. Cir. 1978); Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972).

33. Some courts have maintained that the adequacy of the intra-union appeals procedure is determinative in deciding whether to require their exhaustion. *See infra* notes 37-46 and accompanying text. Other courts have excused exhaustion when it would be futile. *See infra* notes 47-78 and accompanying text. The reasonableness of requiring exhaustion in light of the facts and circumstances of the individual case has also been held to be the decisive factor. *See infra* notes 79-80 and accompanying text. A few courts have laid down a blanket rule of exhaustion on the theory that such a rule allows for a union's self control over its own affairs. *See infra* note 97 and accompanying text. Still other courts have dismissed suits against unions because the plaintiff failed to exhaust his internal union appeals on the ground that the union constitution represents a binding contract between the union member and his union. *See infra* note 97 and accompanying text.

34. 394 F.2d 502 (6th Cir. 1968).

35. *Id.*

36. *Id.* at 503.

37. 466 F.2d 795 (7th Cir. 1972). *See also*, Baldini v. Local 1095, UAW, 581 F.2d 145, 149-50 (7th Cir. 1978); Willets v. Ford Motor Co., 583 F.2d 852 (6th Cir. 1978); Verville v. International Ass'n of Machinists, 520 F.2d 615, 620 (6th Cir. 1975) (applying Labor-Management Reporting and Disclosure Act of 1959 § 101(a)(4), 29 U.S.C. § 411(a)(4) (1976)); Frederickson v. System Federation No. 114 of Ry. Employees Dep't, 436 F.2d 764, 768 (9th Cir. 1970).

grievances alleging that the defendant employer, a bricklaying and masonry contractor, violated the collective bargaining agreement in a number of ways.[38] When the union failed to process the grievances, the plaintiffs filed suit against the union and the employer. The trial court dismissed the action because the plaintiffs had failed to exhaust their intra-union remedies. The Seventh Circuit reversed, holding that the plaintiffs' failure to exhaust internal union remedies was not fatal to their action seeking damages against the employer. However, the court noted that a plaintiff must prove that his union breached its duty of fair representation before the merits of the breach of contract claim can be addressed. Therefore, the court maintained that the employer can raise the plaintiff's failure to exhaust internal union remedies as a defense to a charge that the union has breached its duty of fair representation.[39] The court held that exhaustion should be excused only where internal union procedures are found to be inadequate. Such a requirement is consistent with the national labor policy favoring arbitration.[40] Unfortunately, the court failed to articulate a definition of "adequacy".

In *Newgent v. Modine Manufacturing Co.*,[41] the Seventh Circuit added a further factor to the exhaustion of intra-union remedies analysis. In *Newgent*, the plaintiff had been discharged for failing to report to work.[42] He conceded that he had not exhausted the available internal union remedies before filing suit against his employer and union. However, he maintained that he was unaware of the union's appeal procedures regarding grievances and that he had relied on the advice of his union president.[43] The trial court granted summary judgment, holding that Newgent had been terminated properly. The court maintained that there was no evidence that the union's representation of Newgent was conducted in a discriminatory manner or in bad faith.[44]

The court of appeals affirmed and held that exhaustion of internal union remedies is required if the available procedures are deemed adequate and if, additionally, the union's constitution mandates exhaustion.[45] Again, no

38. 466 F.2d at 797.

39. *Id.* at 800-01.

40. *See supra* note 21.

41. 495 F.2d 919 (7th Cir. 1974).

42. *Id.* at 920-21.

43. *Id.* at 922.

44. *Id.* at 920.

45. *Id.* at 927: "[W]here, as here, there is no question as to the adequacy and mandatory nature of the intra-union remedies it is well settled that an exhaustion of the remedies is an indispensable prerequisite to the institution of a civil action against a union." Some commentators, noting that the plaintiff relied on the advice of the union president, assert that

meaningful standards were provided for determining the adequacy of intra-union remedies.[46]

While some courts use the adequacy test, other courts have considered the probable futility of internal union appeals as determinative of whether to require exhaustion of intra-union remedies.[47] *Imel v. Zohn Manufacturing Co.*[48] stands as an example. In *Imel*, the employees claimed their employer was underpaying them in violation of the collective bargaining agreement.[49] The employees alleged that they had attempted to file a grievance but that the union and the employer refused to process it.[50] The district court granted summary judgment in favor of the union because the employees had failed to exhaust the administrative appeals procedure provided by the union constitution.[51] The United States Court of Appeals for the Tenth Circuit affirmed,[52] reasoning that unless there was a clear and affirmative showing of futility, exhaustion would promote harmony in the field of labor-management relations.[53] The court held that because the em-

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Newgent is an example of a rigid application of the adequacy theory. *See, e.g.*, Tobias, *Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation*, 5 U. TOL. L. REV. 514, 531 n.48 (1974) [hereinafter cited as Tobias II]. The court stated that the plaintiff had an implied duty "to become aware of the nature and availability of union remedies." Newgent v. Modine Mfg. Co., 495 F.2d 919, 928 (7th Cir. 1974). It noted that the union constitution was "freely available from the U.S. Secretary of Labor upon request." *Id.* at 928 n.18.

46. *See* Comment, *The Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Labor Unions and Employers*, 55 CHI. KENT L. REV. 259, 268 (1979).

47. *E.g.*, Keppard v. International Harvester Co., 581 F.2d 764 (9th Cir. 1978) (citing Aldridge v. Ludwig-Honold Mfg. Co., 385 F. Supp. 695 (E.D. Pa. 1974)); Keene v. International Union of Operating Engr's Local 624, 569 F.2d 1375 (5th Cir. 1978); Bright v. Taylor, 554 F.2d 854 (8th Cir. 1977); Wood v. Dennis, 489 F.2d 849 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); Sheridan v. Liquor Salesmen Local 2, 444 F.2d 393 (2d Cir. 1971). Some courts have used both factors and spoken of the adequacy of the available union remedies along with the probable futility of exhausting them. *E.g.*, Baldini v. Local No. 1095, 581 F.2d 145, 149 (7th Cir. 1978); Buzzard v. Local Lodge 1040, 480 F.2d 35, 41 (9th Cir. 1973); Foy v. Norfolk & W. Ry. Co., 377 F.2d 243, 246 (4th Cir.), *cert. denied*, 389 U.S. 848 (1967). There is a distinction between the futility standard and the adequacy test. In general, courts applying the adequacy test have looked to the procedures for appeal set out in the union constitution. However, if the union's policy is not to pursue employees grievances, the plaintiff might escape the exhaustion requirement, even though the appeals procedure provided by the union's constitution is adequate. *See* Negri v. Service Employees Local 87, 97 L.R.R.M. (BNA) 3100 (N.D. Cal. 1978).

48. 481 F.2d 181 (10th Cir.), *cert. denied*, 415 U.S. 915 (1973).

49. *Id.* at 182.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 184.

ployees had not made such a showing, they were required to exhaust the available union appeals.

The United States Court of Appeals for the District of Columbia Circuit looked to the possible futility of exhaustion in *Winter v. Local 639, International Brotherhood of Teamsters*.[54] In *Winter*, the plaintiff had filed a grievance which alleged that his employer should award seniority on a company-wide, rather than plant-wide basis. The union declined to process Winter's grievance. He later filed suit in federal court, seeking, in part, injunctive relief. The district court granted summary judgment for the union because Winter had failed to exhaust the internal union appeals procedure.[55] The court of appeals affirmed, but indicated that if exhaustion of internal union remedies would be futile, then it would not be a prerequisite to a section 301 action.[56] The court stated that exhaustion is futile in two situations:[57] where the union constitution does not empower the appeals body to award the relief sought, and where hostility of the local union officials would deny a fair hearing to the employee. Since there was no clear showing of union hostility,[58] and Winter could have obtained his desired relief through the internal union appeals procedure,[59] the court concluded that he was required to exhaust his internal union remedies before suing the union.[60]

In deciding to require exhaustion, the *Winter* court relied in part on section 101(a)(4) of the Labor-Management Reporting and Disclosure Act (LMRDA).[61] The LMRDA provides safeguards to assure the democratic conduct of internal union affairs.[62] Title I enumerates a "Bill of Rights"

54. 569 F.2d 146 (D.C. Cir. 1977).
55. *Id.* at 148.
56. *Id.* at 149.
57. *Id.*
58. *Id.* at 150.
59. *Id.* at 149.
60. *Id.* at 150.
61. 569 F.2d at 148. 29 U.S.C. § 411(a)(4) (1976) provides in relevant part:
> No labor organization shall limit the right of any member thereof to institute an action in any court or . . . before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants . . . . *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 organizations or any officer thereof . . . .

See generally Beaird & Player, *Exhaustion of Intra-Union Remedies and Access to Public Tribunals Under the Landrum-Griffin Act*, 26 ALA. L. REV. 519 (1974); Boyle, *The Labor Bill of Rights and the Doctrine of Exhaustion of Remedies—A Marriage of Convenience*, 16 HASTINGS L.J. 590 (1965); O'Donoghue, *Protection of a Union Member's Right to Sue Under the Landrum-Griffin Act*, 14 CATH. U.L. REV. 215 (1965).
62. *See* LMRDA § 2 (a), 29 U.S.C. § 401(a) (1976).

for union members, covering such matters as union meetings and disciplinary proceedings.[63] Section 101(a)(4) guarantees to union members the right to sue and the right to participate in administrative proceedings, but also contains a proviso which permits courts to require plaintiffs to exhaust internal union appeals for a maximum of four months before filing suit under Title I.[64] The court in *Winter* noted that the exhaustion requirement is based on the policy of "staying the hand of judicial interference with the internal affairs of a labor organization until it has at least some opportunity to resolve disputes concerning its own internal affairs."[65] Reasoning that the union constitution established a contract between the employee and his union, the court held that the union could raise the employee's failure to exhaust intra-union procedures as a defense.[66] It is arguable, however, whether a duty of fair representation claim properly can be termed an internal union affair,[67] because the claim normally concerns the discipline of an employee as well as the union's refusal to pursue the employee's grievance. In addition, while section 101(a)(4) protects only union members' rights, the union owes a duty of fair representation to all members of the appropriate bargaining unit, including non-union employees.[68] Therefore, the section 101(a)(4) proviso can be applied to fair representation cases only by analogy.[69]

While some commentators maintain that *Winter* articulated an exhaustion standard,[70] in reality, it did little more than detail two more circumstances in which courts may consider exhaustion futile.[71] Other courts

63. *See* LMRDA § 101(a)(1)-(5), 29 U.S.C. § 411(a)(1)-(5) (1976).

64. 29 U.S.C. § 411(a)(4) (1976).

65. 569 F.2d at 148 n.6.

66. *Id.* at 150. The court, however, granted summary judgment to the employer on the ground that he did not breach the collective bargaining agreement. For further discussion of the contract theory, see *infra* notes 101-10 and accompanying text.

67. Just two months later, the United States Court of Appeals for the District of Columbia Circuit argued that employment relations issues and not questions of internal union affairs were raised by duty of fair representation cases. Chambers v. Local 639, International Brotherhood of Teamsters, 578 F.2d 375 (D.C. Cir. 1978). For a discussion of *Chambers*, see *infra* notes 75-81 and accompanying text.

68. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975); Vaca v. Sipes, 386 U.S. 171, 190 (1967); Steele v. Louisville & N.R.R. Co., 323 U.S. 192, 202-03 (1944).

69. *See infra* notes 150-53 and accompanying text.

70. *E.g.*, Comment, *supra* note 46, at 270-71.

71. *Compare* Goelowski v. Penn Cent. Transp. Co., 571 F.2d 747 (3d Cir. 1977) (exhaustion excused where union indicates fixed position not to process employee's grievance) *with* Sciacca v. Wine Salesmen's Union, Local 18, 65 Lab. Cas. (CCH) ¶ 11, 780 (S.D.N.Y. 1971) (conclusory allegations of anticipated union refusal to process insufficient to establish futility). *See also* Robinson v. Marsh Plating Corp., 443 F. Supp. 811 (E.D. Mich. 1978) (employee who was regularly misinformed by union about the status of his grievance not

have determined exhaustion to be futile where the union did not have the power to revive the contractual grievance procedure,[72] where the delay involved in pursuing internal union appeals was lengthy enough to prejudice the plaintiff's case,[73] and where the union's action in refusing to process the employee's grievance was found to be willful, wanton, arbitrary and capricious.[74]

Only two months after deciding *Winter*, the United States Court of Appeals for the District of Columbia Circuit applied a different test for determining the exhaustion issue in *Chambers v. Local 639, International Brotherhood of Teamsters.*[75] The plaintiffs in *Chambers* had been laid off and sought to "bump" workers with less seniority at the employer's second plant.[76] The employees argued that the collective bargaining agreement with their union required merger of the seniority lists at the two plants. While the union initially supported the employees' grievances, it later opposed company-wide seniority at a grievance hearing.[77] Subsequently, the plaintiffs filed suit in federal court. The district court granted summary judgment in favor of the union because the plaintiffs had failed to exhaust their internal union remedies.[78] The court of appeals vacated the judgment, holding that in light of the facts and circumstances, it would be unreasonable to require exhaustion.[79] Thus, instead of examining the exhaustion issue in terms of futility,[80] the court adopted a standard of reasonableness first developed by the Supreme Court in an analogous case, *NLRB v. Industrial Union of Marine & Shipbuilding Workers.*[81]

In *Marine Workers*, the Court addressed the intra-union exhaustion requirement in the context of an internal disciplinary action allegedly violative of section 8(b)(1)(A) of the LMRA.[82] In that case, the plaintiff filed a

required to exhaust internal union remedies). *But cf.* Perry v. Chrysler Corp., 101 L.R.R.M. (BNA) 2681 (E.D. Mich. 1979) (exhaustion not excused where employee had not relied on union misinformation).

72. Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977).

73. Dorn v. Meyers Parking Sys. Local 596, F. Supp. 779, 785 (E.D. Pa. 1975). *Cf.* Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975) (employee already had followed intra-union appeals procedures for 27 months).

74. Zamora v. Massey-Ferguson, Inc., 336 F. Supp. 588 (S.D. Iowa 1972).

75. 578 F.2d 375 (D.C. Cir. 1978).

76. *Id.* at 377.

77. *Id.* at 378.

78. *Id.* at 379, 383.

79. *Id.* at 388. The court noted that the union had reached a decision adverse to the plaintiffs which the employer was willing to implement and that there was little, if any, chance that the union would change its position during the appeals process. *Id.* at 387.

80. *Id.* at 386.

81. 391 U.S. 418 (1968).

82. Section 8(b)(1)(A) states that it is an unfair labor practice for a union "to restrain or

charge with the National Labor Relations Board alleging that a union officer had violated the union constitution.[83] Subsequently, he was expelled from the union because he had not exhausted the available internal union remedies prior to filing the charge. The plaintiff filed a second charge with the Board, claiming that his expulsion was unlawful. The Board found that the expulsion violated the LMRA and issued a remedial order.[84] However, the court of appeals refused to enforce the order and set it aside, relying on the exhaustion proviso of section 101(a)(4) of the LMRDA.[85] On appeal, the Supreme Court reversed the lower court and enforced the Board's order, holding that the union could not expel the plaintiff for not exhausting the internal union procedures before he filed a charge with the Board.[86]

The rationale for the Court's holding in *Marine Workers* is not readily apparent. At one point in the majority opinion, Justice Douglas stated that the discretionary exhaustion proviso of section 101(a)(4) does not authorize unions to police their members more firmly.[87] Rather, the proviso grants courts discretion to require exhaustion of internal union remedies. This language suggests that a union may never discipline a member because he failed to exhaust intra-union appeals before filing suit. Furthermore, Justice Douglas indicated that the internal union appeals procedure invoked in *Marine Workers* was inapplicable because the plaintiff's complaint did not concern an internal union matter, but, instead, raised public policy issues that were covered by the LMRA.[88] He reasoned that Congress intended the exhaustion proviso of the LMRDA to be interpreted in light of the facts and circumstances surrounding a particular case.[89] He concluded that it was unreasonable to require the plaintiff to exhaust his internal union appeals where the complaint or grievance touched a part of the public domain covered by the LMRA.[90] However, Justice Douglas also

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coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(b)(1)(A) (1976). Section 7 guarantees to employees the right to freedom of choice in labor activities. 29 U.S.C. § 157 (1976). Exhaustion is rarely required in cases involving the imposition of internal union discipline. One commentator has noted that in such cases courts have developed so many exceptions that the rule of exhaustion is effectively repudiated in internal union discipline actions. Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 207 (1960).

83. 391 U.S. 418, at 419-20.

84. *Id.* at 421.

85. Industrial Union of Marine & Shipbuilding Workers v. NLRB, 379 F.2d 702 (3d Cir. 1967), *rev'd*, 391 U.S. 418 (1968).

86. 391 U.S. 418.

87. *Id.* at 426.

88. *Id.* at 425.

89. *Id.* at 427-28, (quoting 105 CONG. REC. 17,899 (1959) (remarks of Sen. Kennedy)).

90. *Marine Workers* does not provide a clear answer as to what issues touch a part of

suggested that, under certain circumstances, a union may discipline a member for failure to exhaust.

Some commentators have urged that the facts and circumstances language in *Marine Workers* should also control duty of fair representation actions.[91] This reasonableness standard has been used by some courts.[92] However, *Chambers v. Local 639, International Brotherhood of Teamsters* demonstrates the limited utility of the standard. The *Chambers* court looked to the merits of the allegation that the union breached its duty of fair representation,[93] to the type of internal union review procedures available,[94] and to the fact that employment relations, and not internal union affairs, were involved.[95] Those factors arose under the particular facts and circumstances of *Chambers* and are not significant in all duty of fair representation cases. The surrounding facts and circumstances test articulated in *Marine Workers* and applied in *Chambers* provides no more than a general guideline as to when courts should require exhaustion.[96]

While many courts have adopted vague standards to be used in section 301 exhaustion cases, others have laid down a near blanket rule requiring exhaustion. These courts have maintained that exhaustion of internal union remedies encourages and supports a union's self-control over its own affairs. Consequently, with little consideration of the exhaustion issue, these courts have dismissed suits against unions where the plaintiff has failed to exhaust his internal union remedies.[97] Most often, courts have

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the public domain. Justice Douglas's opinion merely states that a court or agency "might consider whether a particular procedure was reasonable." 391 U.S. at 428.

The difficulties encountered with Douglas's opinion in *Marine Workers* are illustrated well by Pawlak v. Greenawalt, 105 L.R.R.M. 219 (3d Cir. 1980). In *Pawlak*, the United States Court of Appeals for the Third Circuit held that the distinction between internal union matters and those which touch a part of the public domain is not relevant to suits brought under the LMRDA because that act was designed specifically to regulate internal union affairs. *See also* Operating Eng'rs Local 3 v. Burroughs, 417 F.2d 370 (9th Cir. 1969), *cert. denied*, 397 U.S. 916 (1970); Ross v. IBEW, 544 F.2d 1022 (9th Cir. 1976).

91. *E.g.*, Note, *Exhaustion of Intra-Union Procedures in Duty of Fair Representation Cases*, 32 RUTGERS L. REV. 520, 530 (1979); Tobias I, *supra* note 3, at 72.

92. *See* Bise v. Local 1969, IBEW, 618 F.2d 1299, 1303 (9th Cir.), *cert. denied*, 446 U.S. 980 (1979) (internal union discipline action); Day v. Local 36, UAW, 466 F.2d 83, 96 (6th Cir. 1972).

93. 578 F.2d at 383.

94. *Id.* at 383-84.

95. *Id.* at 387.

96. *See* Comment, *supra* note 46, at 263.

97. *E.g.* Brady v. Trans World Airlines, Inc., 401 F.2d 87, 104 (3d Cir.), *cert. denied*, 393 U.S. 1048 (1968) (union should be allowed to resolve disputes concerning its own legitimate affairs). *Accord* Fizer v. Safeway Stores, Inc., 586 F.2d 182, 184 (10th Cir. 1978) (court should avoid interfering until union has at least had some opportunity to resolve disputes concerning its own internal affairs); Hazen v. Western Union Tel. Co., 518 F.2d 766, 769

implied the existence of a blanket rule of exhaustion in dicta. Courts which have held that an employee is not required to exhaust his internal union appeals before suing his employer often have relied on the theory that the union constitution represents a binding contract only between the employee and his union. In dicta, these courts imply that exhaustion always is required before an employee can sue his union.

Many courts that have dismissed suits because the plaintiff has failed to exhaust his internal union remedies have neglected to distinguish between the action against the union and the action against the codefendant employer.[98] A number of courts using the adequacy standard in deciding the exhaustion issue also have allowed the employer to use the plaintiff's failure to exhaust as an affirmative defense.[99] In fact, at least one court has held that the employer can use the defense whenever it is available to the union.[100] The vast majority of courts, however, have determined that the exhaustion defense is not available to the employer because he is not a party to the employee/union contract, i.e., the union constitution.[101]

In *Orphan*,[102] the Seventh Circuit became the first court explicitly[103] to apply contract analysis to the question of whether an employer may rely on an exhaustion defense.[104] The court noted that the case involved the plaintiff's failure to exhaust internal union remedies and not remedies out-

(6th Cir. 1975) (purpose of NLRA "thwarted" by an employee's ability to circumvent procedures over which union has control).

98. *See* Willetts v. Ford Motor Co., 583 F.2d 852 (6th Cir. 1978); Foy v. Norfolk & W. Ry. Co., 377 F.2d 243 (4th Cir.), *cert. denied*, 389 U.S. 848 (1967); McGovern v. International Brotherhood of Teamsters, 447 F. Supp. 368, 372 (E.D. Pa.), *aff'd*, 588 F.2d 821 (1978).

99. *E.g.*, Neipert v. Arthur G. McKee & Co., 448 F. Supp. 206 (E.D. Pa. 1978); Shepherd v. Chrysler Corp., 433 F. Supp. 950 (E.D. Mich. 1977).

100. Brookins v. Chrysler Corp., 381 F. Supp. 563 (E.D. Mich. 1974).

101. *E.g.*, Fizer v. Safeway Stores, Inc., 586 F.2d 182, 184 (10th Cir. 1978); Battle v. Clark Equip. Co., 579 F.2d 1338 (7th Cir. 1978); Fleming v. Chrysler Corp., 416 F. Supp. 1258 (E.D. Mich. 1975), *aff'd*, 575 F.2d 1187 (6th Cir. 1978).

102. 466 F.2d 795 (7th Cir. 1972).

103. The Eighth Circuit, in Petersen v. Rath Packing Co., 461 F.2d 312 (8th Cir. 1972), had used a similar approach. In that case, the plaintiffs sued their employer for breach of the collective bargaining agreement and their union for failing adequately to process their grievances. The plaintiffs, two female employees, alleged that Rath Packing had failed to make certain jobs available to women and, alternatively, had failed to assign them to jobs to which they were entitled, based on their seniority and qualifications. *Id.* at 314. The appellate court held that the company could not use the employee's failure to exhaust as a defense because "[t]he question of exhaustion of internal union procedures is the Union's concern, not the Company's." *Id.* at 315. The contract analysis approach is implied from this statement.

104. It is ironic that prior to enactment of statutory protections for the American worker, the contract analysis was utilized in labor cases to afford members rights vis-à-vis their unions. *See generally* Summers, *supra* note 82, at 184. Today, the contract analysis is used in order to restrict such rights.

lined by the collective bargaining agreement to which the employer was a party.[105]

The court then noted that the employer was not a party to the union constitution. He had not bargained for adherence to union procedures and had no control over compliance with them.[106] Thus, the court held that the employer could not rely on the plaintiff's failure to adhere to provisions of the union constitution as an affirmative defense.

While the contract approach to the exhaustion issue appears logical on its face, at least one commentator has argued that the union constitution's review procedures can only be considered a binding contract between a union and its members if traditional rules of contract construction are ignored.[107] The terms of a union constitution are often vague[108] and fall short of the certainty normally required of a contract.[109] The disparity in the bargaining strength of the parties to a union constitution also undermines the contract theory as it has been applied to union membership.[110] The union member has no real choice of "terms" in the intra-union exhaustion procedures and thus is restricted in his freedom of contract.[111]

The above review of federal court of appeals' decisions demonstrates that the courts have developed various reasons to support the requirement of exhaustion of internal union appeals prior to the filing of a duty of fair representation action. Not surprisingly, the conflicting and often vague circuit court opinions have led to cries for a final determination of the is-

105. 466 F.2d at 799-800.

106. *Id.* at 800.

107. Note, *supra* note 91, at 532-34. *See also* Fox & Sonethal, *Section 301 and Exhaustion of Intra-Union Appeals: A Misbegotten Marriage*, 128 U. PA. L. REV. 989, 1015 (1980).

108. For a detailed treatment of the vagueness problems in disciplinary provisions of union constitutions, see Summers, *Disciplinary Powers of Unions*, 3 INDUS. & LAB. REL. REV. 483, 492-508 (1950). For an example of the Supreme Court's recognition of this aspect of union constitutions, see International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233 (1971).

109. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 2-13 (2d ed. 1977).

110. Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker—Union Relationship*, 61 MICH. L. REV. 1435, 1457-58 (1963).

111. Contracts of adhesion are analyzed differently than mutually bargained contracts in determining whether a contract was created and how it should be interpreted. *See* Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198 (1919). For a general discussion of adhesion contracts, see Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

It is unclear whether joining a union which requires the exhaustion of internal appeals before filing suit constitutes a knowing and voluntary waiver of the member's right to legal redress. Basic contract theory requires that a waiver involve the intentional relinquishment of a known right. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 11-34 (2d ed. 1977).

sue.[112] The Supreme Court's response came in *Clayton v. UAW*.[113]

II. *CLAYTON*: A TEMPORARY REPRIEVE

In *Clayton v. UAW*,[114] the Supreme Court addressed the issue of exhaustion of remedies provided in the union constitution as a prerequisite to bringing a duty of fair representation suit. Although it ruled that the petitioner was not required to exhaust his intra-union appeals, the Court failed to resolve conclusively the difficulties presented by this issue.

The majority began its examination of the exhaustion question by noting the distinction between grievance settlement procedures provided in collective bargaining agreements and internal union appeals procedures set forth in union constitutions. The Court reasoned that the contractual procedures which an employee is required to exhaust under *Republic Steel*[115] are significantly different from those procedures created exclusively by a union constitution.[116]

The Court then proceeded to examine the two principle arguments of Clayton's employer and union. The employer and union first argued that Clayton should be required to exhaust the internal union appeals procedures to facilitate the union's ability to regulate its internal affairs. Secondly, they argued that requiring exhaustion would be consistent with the national labor policy favoring the private resolution of disputes arising out of collective bargaining contracts. The Court dismissed the first contention. Relying on language in *Marine Workers*, the Court determined that the policy of restraining judicial interference with internal union affairs was not broad and was inapplicable to this case because Clayton's suit raised issues beyond internal union interests.[117]

The Court then addressed the respondents' argument that exhaustion promotes the private resolution of disputes arising out of a collective bargaining agreement. The Court found that exhaustion does not always serve this purpose, and declined to establish a universal exhaustion requirement. Instead, the Supreme Court held that courts have discretion in determining whether to require exhaustion. The Court declined to require employees to

112. *See, e.g.*, Comment, *supra* note 46, at 259-60; Fox & Sonenthal, *supra* note 107, at 989-1035.

113. 101 S. Ct. 2088 (1981).

114. *Id.*

115. 379 U.S. 650 (1963). *See supra* note 26 and accompanying text.

116. 101 S. Ct. at 2094.

117. *Id.* at 2094-95, (quoting *Marine Workers*, 391 U.S. 418, at 426 n.8). The Court cited this language for the proposition that "the policy of deferring judicial consideration of internal union matters does not extend to issues 'in the public domain and beyond the internal affairs of union.'" 101 S. Ct. at 2095.

undertake lengthly and inadequate internal union procedures,[118] perhaps concerned that requiring exhaustion in all cases would deter employees with meritorious claims from pursuing their grievances. Citing language in *Marine Workers*, the Court established a tripartite test to determine when exhaustion is not required: first, where union officials are so hostile to the employee that he could not receive a fair hearing; second, where the union remedies cannot provide the relief sought; or third, where the employee's opportunity to obtain a judicial hearing would be unreasonably delayed by exhaustion of internal union procedures.[119] The Court did not consider the first factor because the fairness of the union procedures was not challenged.[120] Similarly, the third factor was never discussed.[121]

The majority opinion, written by Justice Brennan, focused its attention on the second factor and concluded that the internal union remedies available to Clayton were inadequate because they could not provide him with the complete relief he sought.[122] Although the union could have awarded at least some monetary relief, it was powerless to reinstate Clayton in his former job. Moreover, the union could not reconsider Clayton's grievance because the time period for reactivating grievances under the collective bargaining agreement had expired.[123]

The Court stated that where internal union appeals cannot result in either complete relief or reactivation of an employee's grievance, the national labor policy of encouraging the private resolution of contractual labor disputes would not be served by requiring exhaustion. The majority contended that in such cases exhaustion would be useless, delaying judicial consideration but not eliminating the need for it.[124]

Finally, the majority turned to the UAW's contention that even if exhaustion was not required before Clayton could bring his section 301 action against his employer, it should have been a prerequisite to his suit against the Union.[125] The Court rejected this argument and ruled that the exhaustion question should be addressed as if only one suit were in-

118. *Id.* at 2095.

119. *Id.*

120. *Id.* at 2095-96.

121. *Id.* at 2097 n.19.

122. *Id.* at 2096-98.

123. *Id.* at 2096. The majority maintained that where a collective bargaining agreement allowed for reinstatement of withdrawn grievances, the relief available would "presumably be adequate." *Id.* at 2097 n.18.

124. *Id.* at 2097.

125. *Id.* at 2098-99. Interestingly, the union's claim was not based on a contractual theory but rather on the fact that the union's internal appeals procedure could provide all the relief Clayton sought in his action against the UAW.

volved.[126] The Court held that where a section 301 suit is brought against both the union and the employer and neither complete relief nor reinstatement of the employee's grievance is possible, staying the action against the employer pending a decision of the union's appeals board violates national labor policy which effectively requires exhaustion when the remedies are inadequate. Furthermore, if the action against the employer is not stayed, a requirement that the plaintiff exhaust his internal union appeals before filing suit against the union would result in two separate section 301 court actions,[127] thereby unnecessarily burdening the courts.

Justice Powell's dissenting opinion argued that the union had not made a final determination whether to pursue arbitration and, therefore, Clayton could not claim a breach of the union's duty of fair representation. In addition, Justice Powell interpreted *Republic Steel* to require an employee to exhaust all procedures intended to aid the union in deciding whether to go forward with a grievance before filing a court action, even if revival of the grievance appeared to be barred by time limitations in a collective bargaining agreement.[128]

In his dissent, Justice Rehnquist maintained that an employee should always be required to exhaust internal union remedies, for a period of at least four months, before bringing a section 301 action against either his union or employer.[129] He asserted that the second factor of the majority's three prong test was improperly framed, arguing that neither *Marine Workers* nor any other Supreme Court decision supported the majority's contention that the adequacy of internal union appeals procedures should be examined in terms of their ability to provide the relief sought. Moreover, Justice Rehnquist suggested that the national labor policy favoring the private resolution of labor disputes is promoted by the exhaustion of all intra-union appeals procedures, even those which could not provide reinstatement or grievance reactivation. He argued that exhaustion of internal union appeals could avoid litigation in two ways. First, through the intra-union appeals procedures, the union might convince the employee that it had determined correctly not to pursue his grievance. In the event that the union decided that it had breached its duty of fair representation, the employer would be faced with the immediate prospect of the employee

126. *Id.* at 2099. For a similar analysis and result, see Chambers v. Local 659, International Brotherhood of Teamsters, 578 F.2d 375 (D.C. Cir. 1978).

127. 101 S. Ct. at 2098.

128. *Id.* at 2099. The Union's decision to withdraw its request for arbitration was, in effect, final due to the subsequent expiration of the period in which such a request could be made.

129. *Id.* at 2100-02. *Cf.* 29 U.S.C. § 411(a)(4) (1976) (proviso requires exhaustion for four months). *See supra* notes 61-74 and accompanying text.

filing suit and thus would probably reactivate the grievance voluntarily. Second, Justice Rehnquist maintained that even if litigation were commenced following the exhaustion of the intra-union appeals, the procedures might benefit courts by narrowing the factual and legal issues involved.[130]

Justice Rehnquist further stated that it was reasonable to allow a union the right to correct its own mistakes, at least for a short period of time.[131] Relying on the discretionary exhaustion provision of section 101(a)(4) of the LMRDA,[132] Justice Rehnquist inferred that Congress had determined that the benefits provided by exhaustion outweighed the price paid in limiting access to the courts for a short time.[133]

The requirement that a plaintiff exhaust the available internal union appeals procedures prior to bringing a duty of fair representation action has questionable merit. *Clayton* can be most strongly criticized for its disregard of proposals to abolish totally the exhaustion of internal union appeals requirement in duty of fair representation actions.[134] It has been urged that even where a union constitution and the applicable collective bargaining agreement allow for reactivation of an employee's grievance by a union tribunal, the problems undoubtedly encountered in applying the exhaustion doctrine outweigh the possible benefits.[135] As the National Labor Relations Board has recognized, it is doubtful that the union always will provide full and fair representation of the employee's reinstated grievance after having determined not to prosecute it.[136] Furthermore, it has been suggested by at least one commentator that higher union tribunals may be unavoidably biased in favor of local union officials[137] and reluctant to reverse their decisions.[138] An employer may also argue that his liability should be restricted because the union's initial decision not to pursue the grievance contributed to the employee's injury.[139] If such an argument is

130. 101 S. Ct. at 2100-01.

131. *See supra* note 97 and accompanying text.

132. Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(4) (1976). *See supra* notes 61-74 and accompanying text.

133. 101 S. Ct. at 2101-02.

134. *See* Tobias II, *supra* note 45; Fox & Sonethal, *supra* note 107, at 989.

135. Fox & Sonethal, *supra* note 107, at 1032-35.

136. *Cf.* NLRB v. Local 396, International Brotherhood of Teamsters, 509 F.2d 1075 (9th Cir. 1975) (enforcement of NLRB order finding that union had breached its duty of fair representation in failing to process employees' grievances and remanding case to determine if an award of attorneys fees against the union was necessary to vindicate the employees rights).

137. *See* Tobias I, *supra* note 3, at 71.

138. *See* Tobias II, *supra* note 45, at 532 n.52. Tobias, however, offers no evidence to support this claim.

139. Vaca v. Sipes, 386 U.S. 171, 187 (1967). The monetary award which a plaintiff in a

raised, the employee may well have to bring suit against the union to recover damages resulting from the added difficulty and expense of collecting from the employer as a result of its refusal to handle the employee's grievance.[140] Finally, in at least some cases, even if the employee ultimately wins a favorable award he may not be able to obtain complete relief without judicial aid. For example, a collective bargaining agreement may allow for reactivation of withdrawn grievances but explicitly relieve the employer of financial liability accruing from the time the grievance is dropped to the time it is later reactivated.[141] Therefore, although the *Clayton* Court properly refused to hold that exhaustion of internal union appeals procedures should always be required, it failed to recognize the invalidity of contentions that exhaustion promotes the conservation of judicial resources.[142]

The Court also failed to delineate the boundaries of the third factor in its three prong test for determining when to require exhaustion of intra-union appeals procedures.[143] It gave no indication of what would constitute an unreasonable delay. In his dissenting opinion, Justice Rehnquist implied that a delay greater than four months would be unreasonable. If this is the case, then exhaustion will be required in few, if any, cases since intra-union appeals procedures can be pursued for years before they are exhausted completely.[144] It is also possible that the Court will follow lower federal courts in requiring plaintiffs to exhaust their internal union appeals

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duty of fair representation suit seeks is usually based chiefly on loss of wages resulting from a discharge. When the union determines not to process the employee's grievance, the employee is normally without work for a longer period than if the union does grieve, and accordingly, damages increase. It is notable, however, that the employer, not the union, initially causes the employee's loss of wages.

140. *See* Czosek v. O'Mara, 397 U.S. 25, 29 (1970).

141. *See, e.g.*, Manica v. Chrysler Corp., 97 L.R.R.M. (BNA) 2679 (E.D. Mich. 1978). The collective bargaining agreement involved in *Manica* provided that if a grievance were withdrawn, all financial liabilities of the employer were to be cancelled, and if the grievance were reinstated within three months, the employer's financial liability would accrue from the date of reinstatement. *Id.* at 2681.

142. It is said that the exhaustion requirement permits courts to defer to others who possess expertise in labor relations. Rusicka v. General Motors Corp., 523 F.2d 306, 312 (6th Cir. 1975). Exhaustion of intra-union appeals, as Justice Rehnquist urged in his dissent in *Clayton*, also may eliminate the need for subsequent litigation or facilitate subsequent judicial disposition by affording partial relief. Internal union remedies may also allow an aggrieved employee quickly to resolve a dispute without the delay inherent in the judicial process. *Id.*.

143. 101 S. Ct. at 2095. *See supra* note 119 and accompanying text.

144. Fox & Sonethal, *supra* note 107, at 977. This is particularly the case where appeals must be taken to a union convention. Most union constitutions require conventions to be held no more than once every two years. *Id.* at 997 nn.34 & 35.

for a maximum of four months.[145] Finally, where the alleged breach of the union's duty of fair representation concerns the effectiveness of the union's actions at the arbitration stage, it is doubtful that the Court will ever require exhaustion of internal union procedures since the applicable statute of limitations in these cases is normally short and, thereby, would deny the plaintiff a forum.[146] *Clayton* does not indicate which, if any, view the Supreme Court will adopt.

Still, *Clayton* provides the section 301 plaintiff with at least a temporary respite from the inappropriate intra-union exhaustion requirement which had developed previously in the lower courts. Employees no longer will be required to engage in time-consuming and ineffective union appeals, provided that they sue both the union and the employer, or just the employer, and the relief sought is not available through internal union procedures.

Although the Court's reasoning in *Clayton* may be flawed, the dissent is more susceptible to criticism. Perhaps the most serious defect is Justice Rehnquist's contention that the Court improperly relied upon *Marine Workers*.[147] It is true that *Marine Workers* did not define adequacy in terms of the ability of internal union procedures to provide an employee with the complete relief he seeks. It is also true that the *Clayton* majority erred in not making clear the rationale behind its test for determining the adequacy of intra-union remedies. The problem with *Marine Workers*, however, is that it fails to define adequacy sufficiently.[148] The *Clayton* majority expands and gives meaning to the earlier language of the Court. Moreover, the Court's decision in *Clayton* coincides with a number of lower federal court decisions which suggest that an inability to provide the complete relief sought by a section 301 plaintiff renders the union procedures inadequate.[149]

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145. *See, e.g.*, Battle v. Clark Equip. Co., 579 F.2d 1338, 1342-43 (7th Cir. 1978); Winter v. Local 639, International Brotherhood of Teamsters, 569 F.2d 146, 148 n.5 (D.C. Cir. 1977); Thompson v. New York Cent. R.R. Co., 250 F. Supp. 175, 176 (S.D.N.Y. 1966) (claim under the Railway Labor Act).

146. In United Parcel Service v. Mitchell, 101 S. Ct. 1559 (1981), the Supreme Court recently ruled that a 90 day state statute of limitations for actions to vacate arbitration awards, and not the state's six year statute of limitations governing breach of contract issues, applied to the plaintiff's suit which alleged that his union had breached its duty of fair representation during arbitration. Because state statutes of limitations for actions to vacate arbitration awards typically provide such a short period, *id.* at 1564 n.5, courts will rarely, if ever, have the opportunity to require exhaustion in these cases. *See also* Scott v. Chrysler Corp., 107 L.R.R.M. (BNA) 3086 (E.D. Mich. 1981). But *cf.* Flowers v. Local 2602, United Steelworkers of America, No. 80-7020 (2d Cir. Feb. 1, 1982) (court refused to apply *Mitchell* analysis in action against union).

147. 101 S. Ct. at 2101 (citing NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418 (1968)).

148. *See supra* note 81 and accompanying text.

149. *See, e.g.*, Buchholtz v. Swift & Co., 609 F.2d 317, *cert. denied*, 444 U.S. 1018 (1980); Robinson v. Marsh Plating Corp., 443 F. Supp. 811 (E.D. Mich 1978); Emmanuel v. Omaha

Finally, Justice Rehnquist, like others before him,[150] erred in maintaining that section 101(a)(4) of the Labor-Management Reporting and Disclosure Act is applicable to duty of fair representation cases. The first difficulty with this argument is that Title I of the LMRDA concerns internal union affairs, such as disciplinary proceedings, and can be applied to duty of fair representation cases only by analogy. Also, while section 101(a)(4) concerns the rights of union members to file suit, the duty of fair representation is owed to all members of the bargaining unit, even if they are not union members.[151] For this reason, and because other LMRDA titles have separate exhaustion provisions, it has been urged that the exhaustion proviso of section 101(a)(4) was intended to apply only to suits involving Title I union membership rights.[152] Moreover, it is clear that the subsection was intended to assure, not restrict, the member's right to sue his union.[153]

Unfortunately, the Court's opinion contains an escape provision which undoubtedly will be used frequently. In a footnote,[154] the *Clayton* majority indicated that when a collective bargaining agreement permits the reactivation of grievances, the union's internal appeal procedures "would presumably be adequate."[155] Therefore, it can be expected that when current collective bargaining agreements are renegotiated, the use of reactivation provisions, currently found in few agreements,[156] will become more widespread.[157]

Carpenters Dist. Council, 422 F. Supp. 204 (D. Neb. 1976); Lucas v. Philco-Ford Co., 380 F. Supp. 139 (E.D. Pa. 1974).

150. *See supra* note 145 and accompanying text.

151. *See* Gould, *Labor Law Decisions of the Supreme Court 1980-81 Term*, 107 L.R.R.M. (BNA) 342, 356.

152. Fox & Sonethal, *supra* note 107, at 1020.

153. The basic intent and purpose of the provision was to insure the right of a union member to resort to the courts, administrative agencies, and legislatures without interference or frustration of that right by a labor organization. On the other hand, it was not and is not, the purpose of the law . . . to invalidate the considerable body of State and Federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case. So long as the union member is not prevented by his union from resorting to the courts, the intent and purpose of the 'right to sue' provision is fulfilled . . . .

105 CONG. REC. 17,899 (1959) (remarks of Sen. Kennedy). *See also* Detroy v. American Guild of Variety Artists, 286 F.2d 75, 78 n.2 (2d Cir.), *cert. denied*, 366 U.S. 929 (1961).

154. 101 S. Ct. at 2096 n.18.

155. *Id.* For reasons outlined above, this supposition may not be proper. *See supra* notes 135-46 and accompanying text.

156. 101 S. Ct. at 2096 n.18.

157. It should be noted that even where a collective bargaining agreement provides for

III. CONCLUSION

In *Clayton v. UAW*, the Supreme Court ruled that when internal union appeals cannot either award plaintiff the complete relief he seeks or reactivate his grievance, the aggrieved employee is not required to exhaust those appeals prior to filing a section 301 suit. The immediate effect of *Clayton* is to remove the exhaustion requirement from all but a small number of cases. This is a welcome, albeit incomplete, change. *Clayton* does little more than delay a thorough determination of whether internal union remedies must be exhausted in all duty of fair representation cases. It does not abolish the exhaustion requirement entirely. It does not provide clear guidelines as to when to require exhaustion nor does it articulate an unambiguous rationale for such a requirement. It can only be hoped that future decisions of the Court will recognize the cost of requiring the section 301 plaintiff to exhaust internal union appeal procedures and the concurrent benefits of allowing immediate judicial review of an aggrieved employee's claim. In light of the *Clayton* holding, this seems an unlikely prospect. Perhaps the only long-term hope for those advocating the abolishment of the exhaustion requirement is to be found in the third requirement of the Court's three prong test. The question remains, however, as to how much of a delay resulting from exhaustion the Court will deem unreasonable in reviewing a claim that a union breached its duty of fair representation by failing to process a grievance through arbitration.

Leo E. Wetzel

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reactivation, *Clayton* probably excuses the failure to exhaust intra-union remedies where the alleged breach of the union's duty of fair representation arose from the union's handling of the arbitration. *See supra* note 146 and accompanying text.