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STATUTES OF LIMITATIONS WHEN SECTION 301 AND FAIR REPRESENTATION CLAIMS ARE JOINED: MUST THEY BE THE SAME?

INTRODUCTION

The collective bargaining agreement between a union and an employer \(^1\) "most pointedly shapes the rights and duties for a mass of third persons, the employees in the plant." \(^2\) Therefore, section 301 of the Labor Management Relations Act (LMRA) \(^3\) has been interpreted as permitting an aggrieved employee to bring suit against his employer for breach of the collective bargaining agreement. \(^4\) An em-

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2. R. Gorman, supra note 1, at 540; accord, Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 606 (1956); Cox, supra note 1, at 5; Feller, supra note 1, at 719-20; Summers, supra note 1, at 528. Although the collective bargaining agreement is rarely considered an employment contract between an employer and an employee, J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944), it does govern such matters as hiring and wages, id. at 334-35, seniority, Local 1251, UAW v. Robertshaw Controls Co., 405 F.2d 29, 33 (2d Cir. 1968) (en banc), discharge, Boone v. Armstrong Cork Co., 384 F.2d 285, 291 (5th Cir. 1967), and grievance procedures. Local 19, Warehouse, Processing & Distributive Workers Union v. Buckeye Cotton Oil Co., 236 F.2d 776, 779 (6th Cir. 1956), cert. denied, 354 U.S. 910 (1957).


ployee’s right to sue his employer, however, is not absolute. When the collective bargaining agreement provides that the grievance procedure set forth is the exclusive remedy for employee claims, an employee must show that he has attempted to exhaust that remedy before he will be allowed to sue his employer. He will be excused from the exhaustion of remedies requirement, however, if he can show that he was prevented from fulfilling it by the union’s breach of its duty of fair representation.

The union’s duty of fair representation judicially evolved from section 9(a) of the National Labor Relations Act (NLRA). The leading
case defining the duty is Vaca v. Sipes. In Vaca, the Supreme Court stated that a union has “a statutory obligation to serve the interest of all members [of a designated unit] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” If a union fails to perform this duty, it is subject to suit by an employee. 

designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.” 29 U.S.C. § 159(a) (1976).


10. E.g., Butler v. Local 823, Int’l Bhd. of Teamsters, 514 F.2d 442, 453-54 (8th Cir.) (union breached duty of fair representation when hostile union president guaranteed that employee’s grievance would be rejected, and union failed to contest “irrational and discriminatory” decision of grievance committee), cert. denied, 423 U.S. 924 (1975); Figueres de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 285 (1st Cir.) (union breached duty of fair representation when it failed to make any investigation or judgment as to merits of employee’s grievance), cert. denied, 400 U.S. 877 (1970); Baker v. Unit Parts Co., 487 F. Supp. 1313, 1315 (W.D. Okla. 1980) (union breached duty of fair representation when it told discharged employee it would process her grievance and then failed to do so). A union has some discretion in its representation of employees. E.g., Humphrey v.
STATUTES OF LIMITATIONS

No express federal statute of limitations governs either a section 301 or a fair representation claim. A basic task for courts, therefore, is to determine the applicable limitations periods. Addressing the question whether to fashion a federal statute of limitations for section 301 claims, the Supreme Court, in UAW v. Hoosier Cardinal Corp., stated the general rule that courts should look to the statutes of limitations of the forum state when a federal statute fails to specify a limitations period. Although characterization of the action

Moore, 375 U.S. 335, 350 (1964) (union does not breach its duty of fair representation by dovetailing seniority lists of merging companies); Ford Motor Co. v. Huffman, 345 U.S. 330, 337-43 (1953) (union does not breach its duty of fair representation by accepting collective bargaining agreement provision that granted seniority credit for pre-employment military credit); Steele v. Louisville & N.R.R., 323 U.S. 192, 203 (1944) (union does not breach its duty of fair representation by negotiating a contract that favors some members of the craft over others provided that the distinctions imposed by the contract terms are "based on differences relevant to the authorized purposes of the contract.").


12. Originally, there was a question whether § 301 was merely jurisdictional, or whether it conferred substantive rights. Compare United Steelworkers, C.I.O. v. Galland-Gening Mfg. Co., 241 F.2d 323, 325 (7th Cir. 1957) and Mercury Oil Ref. Co. v. Oil Workers Int'l Union, C.I.O., 187 F.2d 980, 983 (10th Cir. 1951) with Signal-Stat Corp. v. Local 475, United Electrical, Radio & Mach. Workers, 235 F.2d 298, 300 (2d Cir. 1956) and United Electrical, Radio & Mach. Workers v. Oliver Corp., 205 F.2d 376, 384-85 (8th Cir. 1953). The Supreme Court resolved this question in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), holding that § 301 "authorizes federal courts to fashion a body of federal law for the enforcement of ... collective bargaining agreements." Id. at 451; accord, Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1962).


to determine the appropriate statute of limitations is ultimately a question of federal law, the Court said that "there is no reason to reject the characterization that state law would impose unless that characterization is unreasonable or otherwise inconsistent with national labor policy."  

Although this rule seems simple enough, its application is often complicated when an employee elects to join a section 301 claim and a fair representation claim. Some courts hold that, when the claims are joined, the statutes of limitations may differ. Many courts, however, have concluded that federal labor policy dictates the utilization of identical limitations periods. This Note contends that proper application of the Hoosier rule compels courts to employ different


statutes of limitations even when the two claims are joined. Part I demonstrates that the claim against the employer is properly characterized as in contract, and that the claim against the union is either statutory or tortious in nature. Part II observes that these differing characterizations result in application of different statutes of limitations, and contends that federal labor policy is not such an overriding concern as to merit altering this result.

I. Characterization of the Claims

Although the collective bargaining agreement is "technically an agreement between two signatory parties," the employer and the union, courts and commentators have consistently emphasized its uniqueness, "reecho[ing] the litany that 'a collective [bargaining] agreement is not an ordinary contract.'" Because the nature of the collective bargaining agreement is not clearly defined, it has been analogized to a trade agreement, a third-party beneficiary contract, and an agent’s contract on behalf of its principal. One commentator, however, has observed that “[i]n no one doubts that a collective agreement is a 'contract,' no matter which of many definitions of that term one selects." Therefore, it is well-settled that an employee’s section 301 claim against his employer for breach of the collective bargaining agreement is most reasonably characterized as in contract.

20. R. Gorman, supra note 1, at 540.
22. Feller, supra note 1, at 663.
23. J.I. Case Co. v. NLRB, 321 U.S. 332, 334-35 (1944); Cox, supra note 1, at 19.
26. Summers, supra note 1, at 527.
A cause of action for breach of the duty of fair representation has been variously characterized as contractual, statutory, or tortious. The latter two characterizations are reasonable; the first is not.

It is evident from an examination of the source and nature of the duty of fair representation that it is not contractual. Because the duty applies to both union and nonunion employees, it does not arise from any contractual relationship between an employee and his union. Against Union When Brought With Section 301 Action Against Employer, 44 Geo. Wash. L. Rev. 418, 423 n.36 (1976).


33. Howard v. Aluminum Workers Int'l Union, 589 F.2d 771, 774 (4th Cir. 1978); Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 286 (1st Cir.), cert. denied, 400 U.S. 877 (1970); Canada v. UPS, Inc., 446 F. Supp. 1048, 1050 (N.D. Ill. 1978); Feller, supra note 1, at 813. Characterization of an employee's claim against his union as contractual based solely on his membership in the union would lead to the unsatisfactory result of having nonunion employee suits subject to a shorter statute of limitations than union employee suits. Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 286 (1st Cir.) ("It would be bizarre indeed if the non-union employees were considered to have a tort claim for unfair representation, with generally a shorter limitations period, while union members' claims sounded in contract and were thus subject to a longer limitation period.")., cert. denied, 400 U.S. 877 (1970).
nate from the collective bargaining agreement.\textsuperscript{33} It is an obligation created and imposed by federal labor law,\textsuperscript{34} existing both before and after the collective bargaining agreement has been executed.\textsuperscript{35}

Furthermore, a breach of the duty may be found when a union’s actions are unrelated to any terms of the collective bargaining agreement.\textsuperscript{36} Often, however, a term of the agreement is involved.\textsuperscript{37} It has been contended that in such situations an em-

\textsuperscript{33} Vaca v. Sipes, 386 U.S. 171, 201-02 & n.4 (1967) (Fortas, J., concurring); Humphrey v. Moore, 375 U.S. 335, 356 (1964) (Goldberg, J., concurring); Sinyard v. Foote & Davies Div. of McCall Corp., 577 F.2d 943, 947 (5th Cir. 1978); Smith v. Local 25, Sheet Metal Workers Int'l Ass'n, 500 F.2d 741, 746 (5th Cir. 1974); Richardson v. Communications Workers, 443 F.2d 974, 980 (8th Cir. 1971); Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 285-86 (1st Cir.), \textit{cert. denied}, 400 U.S. 877 (1970); Nedd v. UMW, 400 F.2d 103, 105-06 (3d Cir. 1968); Jamison v. Olga Coal Co., 335 F. Supp. 454, 463 (S.D. W. Va. 1971); Woody v. Sterling Aluminum Prods., Inc., 243 F. Supp. 755, 772 (E.D. Mo. 1965), \textit{aff'd}, 365 F.2d 448 (8th Cir. 1966), \textit{cert. denied}, 366 U.S. 957 (1967); Blumrosen, \textit{supra} note 8, at 1468; Feller, \textit{supra} note 1, at 807, 825. But see Hensley v. United Transps., Inc., 346 F. Supp. 1108, 1114 (N.D. Tex. 1972) (collective bargaining agreement provided that the "Union is required . . . to represent all of the employees . . . fairly and equally"). The \textit{Hensley} case is the only case research has revealed in which the collective bargaining agreement expressly provided that the union represent employees fairly. Of course, in such cases characterization of the claim against the union as contractual would be appropriate.


\textsuperscript{35} Smith v. Local 25, Sheet Metal Workers Int'l Ass'n, 500 F.2d 741, 746 (5th Cir. 1974); Thacker v. Palm Beach Co., 450 F. Supp. 761, 764 (E.D. Tenn. 1978); Cox, \textit{supra} note 8, at 156. The duty of fair representation was first developed in cases involving the union’s representation of employees during the collective bargaining process, before an agreement had been reached. See, e.g., Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232, 239 (1949); Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944).

\textsuperscript{36} \textit{In re} Carter, 618 F.2d 1093, 1104 (5th Cir. 1980), \textit{appeal docketed sub nom.} Sheet Metal Workers' Int'l Ass'n v. Carter, 49 U.S.L.W. 3373 (U.S. Nov. 5, 1990) (No. 80-733); Smith v. Local 25, Sheet Metal Workers Int'l Ass'n, 500 F.2d 741, 746 (5th Cir. 1974); Retana v. Apartment, Motel, Hotel & Elevator Operators Local 14, 453 F.2d 1018, 1023 (9th Cir. 1972); Coleman v. Kroger Co., 399 F. Supp. 724, 729 (W.D. Va. 1975); see Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 299 (1971) ("Breach of a union's duty of fair representation [is] judicially cognizable . . . whether or not the lawsuit [is] bottomed on a collective agreement."); Conley v. Gibson, 355 U.S. 41, 46 (1957) ("Among other things, [the duty of fair representation] involves . . . resolution of new problems not covered by existing agreements . . . ").

\textsuperscript{37} E.g., Self v. Drivers Local 61, 620 F.2d 439, 440-41 (4th Cir. 1980) (wrongful discharge provision); Melendez v. United States Postal Serv., 589 F.2d 256, 257 (7th Cir. 1978) (per curiam) (disciplinary suspension provision); Lewis v. Greyhound Lines-East, 555 F.2d 1053, 1054 (D.C. Cir.) (per curiam) (wrongful discharge provi-
ployee’s fair representation claim is “intimately related” to the section 301 claim against his employer and should be given a contractual characterization. The Supreme Court in Vaca, however, made clear that an employee suit against an employer and a union involves separate and distinct claims. Moreover, a union will not be liable solely because it refused to process an employee’s claim according to the procedure provided for in the collective bargaining agreement. A breach of the duty of fair representation is found only when a union’s actions are arbitrary, discriminatory, or in bad faith. Therefore, although in a given case the collective bargaining contract may have “provided an occasion upon which the union’s preexisting obligation to serve the plaintiffs came into play,” a breach of the duty of fair representation is not a breach of the labor contract.
Characterization of the fair representation claim as statutory is most appropriate when the forum state has a limitations period for statutory causes of action. A statutory claim has been defined as "one in which no element of agreement enters [and] . . . which the law creates in the absence of an agreement." The duty of fair representation clearly does not arise from any agreement between either the union and the employer or the union and the employee. Rather, it is derived from the union's status under federal labor law as exclusive bargaining agent. It is this statutory power that gives rise to


46. See note 33 supra and accompanying text.


the corresponding obligation to represent fairly the interests of all members of the bargaining unit.\footnote{49}

For states that do not have a statute of limitations for statutory claims, the most reasonable alternative characterization of the fair representation claim is in tort. It has been observed that the duty of fair representation is "akin to . . . the duty of due care normally associated with tort actions."\footnote{50} This analogy is even more compelling in view of the finding of some courts that a union breached its duty when its actions were merely negligent.\footnote{51} For instance, in \textit{Ruzicka v. General Motors Corp.}, the Sixth Circuit held that the union's negligent failure to file a written grievance on time constituted a breach of the duty of fair representation.\footnote{52}

Indeed, many courts have characterized fair representation claims as tortious.\footnote{53} As one court noted, when "suit is based on the unions' alleged breach of a duty . . ., the complaint clearly sounds in

\begin{itemize}
\item \textit{52. 523 F.2d 306 (6th Cir. 1975).}
\item \textit{53. Id. at 310.}
\item \textit{54. 523 F.2d 306 (6th Cir. 1975).}
\item \textit{55. Id. at 310.}
\item \textit{56. 523 F.2d 306 (6th Cir. 1975).}
\end{itemize}
tort."  

Even courts that have held that both claims should be governed by the same period of limitations, and have imposed a contract statute of limitations on the claim against the union, have conceded that "characterization of the Union’s breach as tortious conduct is fitting."  

II. Federal Labor Policy Considerations

State statutes of limitations for contract actions are generally longer than those governing statutory or tort claims. Therefore, proper characterization according to the Hoosier rule will necessarily result in the employer and union being subject to liability for differing periods of time. Some courts, however, have held that federal labor policy requires that, when section 301 and fair representation claims are joined, they be governed by the same statute of limitations.

Hoosier made clear, however, that questions concerning statutes of limitations ordinarily do not implicate federal labor policy. Addressing the question whether to establish a uniform statute of limitations for section 301 suits, the Court stated that

[the need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that . . . .]

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57. See Blume & George, supra note 44, at 999-1001. The mean statute of limitations for contract actions is six years. Id. at 999. For statutory causes of action, it is three years, id. at 1000, and for actions for personal injury, it is two years. Id. at 1001.
58. See Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 981, 287 (1st Cir.) ("[W]e are satisfied that the proper legal analysis of the union’s and employer’s duties in cases such as this requires the imposition of different state statutes of limitations . . . ."), cert. denied, 400 U.S. 877 (1970).
federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it. For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy.61

This reasoning is equally applicable to the question whether the statutes of limitations in an employee’s suit against both his employer and union should be the same. These suits are also brought only after the grievance procedure provided for in the collective bargaining agreement has failed to settle an employee’s claim.62

Although Hoosier states the general rule that statutes of limitations do not normally involve considerations of federal labor policy, some courts have relied on a later Supreme Court decision, Vaca v. Sipes,63 to conclude that suits involving joinder of section 301 and fair representation claims raise particular federal labor policy problems that may only be remedied by application of the same statute of limitations.64 The Vaca Court held that state and federal court jurisdiction over fair representation suits is not preempted 65

61. 383 U.S. at 702; accord, Santos v. District Council of United Bhd. of Carpenters, 619 F.2d 963, 968 (2d Cir. 1980).
62. See notes 3-10 supra and accompanying text. In Santos v. District Council of United Bhd. of Carpenters, 619 F.2d 963 (2d Cir. 1980), a suit to enforce an arbitration award, the court noted that “[b]y definition, actions to enforce arbitration awards will arise only after efforts to settle the dispute through private channels have failed. At that late stage, as the Court observed in Hoosier Cardinal, the lack of uniformity inherent in borrowing limitations periods is unlikely to interfere in any important way with any significant goal of national labor policy.” Id. at 968 (citations and footnotes omitted).
63. 386 U.S. 171 (1967).
65. The well-recognized test for preemption in labor law is known as the Garmon doctrine. Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 187-90 (1978); Farmer v. Carpenters Local 25, 430 U.S. 290, 296 & n.6 (1977); Amalgamated Ass’n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 284-85 (1971). In San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1939), the Supreme Court held that “[w]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.” Id. at 245. See generally Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, 51 Tex. L. Rev. 1037 (1973); Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972); Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, 72 Colum. L. Rev. 469 (1972).
merely because breach of that duty may be an unfair labor practice subject to the jurisdiction of the National Labor Relations Board (NLRB). One rationale for the Court's holding was that, because an employee is excused from the exhaustion of remedies requirement when his union has breached its duty of fair representation, "it is obvious that the courts will be compelled to pass upon whether there has been a breach of [this] duty . . . in the context of many [section] 301" suits. The Court reasoned that "a court that has litigated the fault of employer and union" should be able to fashion a remedy with respect to both parties. In footnote twelve, the Court elaborated on the remedy problems that might arise if an employee had to bring his claims before "two independent tribunals, [the NLRB and a court,] with different procedures, time limitations, and remedial powers." Blindly adhering to footnote twelve, the Sixth Circuit summarily concluded that both claims should be subject to the same limitations period. Such reliance on Vaca as an expression of federal labor policy, however, is unfounded. The Vaca Court was merely making an observation by way of dicta in a footnote, not a definitive comment on what should result if a claim against a union were time-barred.

The Vaca requirement that damages in a suit against both an employer and a union be apportioned has been used by some courts to


67. 386 U.S. at 187. It has been noted that a breach of the duty of fair representation by a union "may open the way not only to a suit against itself, but also against the employer." Sanderson v. Ford Motor Co., 483 F.2d 102, 110 (5th Cir. 1973); accord, Tedford v. Peabody Coal Co., 383 F. Supp. 787, 795 (N.D. Ala. 1974), rev'd on other grounds, 533 F.2d 952 (5th Cir. 1976).

68. 386 U.S. at 187.

69. Id. at 188 n.12 (emphasis added).


71. As noted by Justice Fortas, Vaca "is not an action by the employee against the employer, and the discussion of the requisites of such an action is, in my judgment, unnecessary." Vaca v. Sipes, 386 U.S. 171, 199-200 (1967) (Fortas, J., concurring); accord, Clayton v. ITT Gilfillan, 623 F.2d 553, 557 n.5 (9th Cir. 1980), cert. granted, 101 S. Ct. 352 (1980).

72. Vaca v. Sipes, 386 U.S. 171, 196-98 (1967). The Vaca Court held that "[t]he governing principle . . . is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." Id. at 197-98, accord, Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 892 (4th Cir. 1980); Soto Segarra v.
justify holding that both of the employee’s claims be governed by the same statute of limitations. The rationale is that a court will be unable to apportion damages properly if the claim against the union is time-barred. Nowhere, however, did the Vaca Court say that federal labor policy requires that both parties actually be before the court for damages to be properly apportioned. In fact, a later Supreme Court decision, Czosek v. O’Mará, held that damages may be apportioned despite one party’s absence. In Czosek, a suit brought pursuant to the Railway Labor Act (RLA), an employee sued both his employer and union after his allegedly wrongful discharge. The lower court dismissed the claim against the employer because the employee had failed to exhaust his administrative remedies as required by the RLA. The union challenged this dismissal, “apparently fearing that if sued alone they [might] be forced to pay damages for which the employer [was] . . . responsible.”

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74. Butler v. Local 823, Int’l Bhd. of Teamsters, 514 F.2d 442, 447-48 (8th Cir.) (“[O]nly by providing the same limitations period against both employer and union, will the court be able to fashion a remedy which properly allocates the damages between them.” (footnote omitted)), cert. denied, 423 U.S. 924 (1975); Wallace v. AT&T Co., 460 F. Supp. 755, 760 (E.D.N.Y. 1978) (Courts would have difficulty “in attempting to adhere to the apportionment principle if, because of differing statutes of limitations, both union and employer were not actually before the court.”).


77. 397 U.S. at 26.

these fears as groundless, the Court stated that "[a]ssuming . . . wrongful discharge by the employer . . . and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages against the union . . . are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer." 80

A related concern of courts that maintain that damages may only be properly apportioned if both the employer and the union are before the court is that, when the claim against the union is time-barred, the employee will be unable to obtain full relief. 81 To assert that full relief is required, and therefore, that the fair representation claim may not be subject to a shorter statute of limitations is illogical. Carrying the full relief argument to its extreme would result in no limitations period whatsoever, a possibility that the Supreme Court has rejected. 82 Furthermore, "[w]hile adoption of relatively short [statutory] periods will prevent the fullest possible realization of . . . compensatory aims . . ., such is the inevitable result of any time bar to recovery." 83

Moreover, to attempt to resolve the full relief problem by holding that the section 301 and fair representation claims should be governed by the same limitation provision may lead to the anomalous result that an employee will be unable to obtain any relief. Such was the outcome in Gallagher v. Chrysler Corp., 84 an employee suit joining claims against his employer and union. The district court had dismissed both claims as barred by Michigan's three-year statute of limitations governing actions for injury to persons or property. 85 The employee appealed only the ruling with respect to the claim against his employer. 86 The court of appeals held that "in an action against an employer and a Union under [the] LMRA, the same statute of limitations ordinarily should apply as to both defendants." 87 Because the claim against the union had been held governed by the three-year statute of limitations, 88 the court also applied this limitation to...

80. Id. at 29.
82. Campbell v. Haverhill, 155 U.S. 610, 616-17 (1895); see note 14 supra.
84. 613 F.2d at 167 (6th Cir.), cert. denied, 101 S. Ct. 119 (1980).
85. Id. at 168.
86. Id. The employee did not object to the characterization of the duty of fair representation claim as tortious. Petition for Certiorari at 7 n.1, Gallagher v. Chrysler Corp., 101 S. Ct. 119 (1980).
87. 613 F.2d at 169 (footnote omitted).
88. Id. at 168.
the claim against the employer. Both claims being time-barred, the employee was unable to recover against either defendant. If the court had applied the contract statute of limitations to the claim against the employer, the employee might have at least recovered damages attributable to that defendant.

In addition to not being inconsistent with federal labor policy, application of a shorter statute of limitations to fair representation claims is in accord with Supreme Court decisions that indicate a desire to protect the financial stability of labor organizations. When the Court has addressed issues involving the duty of fair representation, it has weighed the rights of the individual employees against the interests of the collective bargaining unit as a whole. In Vaca v. Sipes, for example, the court held that an employee does not have an absolute right to bring his grievance to arbitration. One of the Court's concerns was that if employees did have such a right, many more claims would be submitted to arbitration. The Court feared that "[t]his would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully." Additionally, the Vaca Court stated that because damages must be apportioned, a union may not be liable for any damages caused by an employer's breach of a collective bargaining agreement. In IBEW v. Foust, the Court noted that

89. Id. The Sixth Circuit is the first circuit not to apply the contract statute of limitations to the claim against the employer. Petition for Certiorari at 11, Gallagher v. Chrysler Corp., 101 S. Ct. 119 (1980).
90. 613 F.2d at 168.
91. See note 72 supra.
94. Id. at 191; accord, Ryan v. New York Newspaper Printing Pressmen's Union No. 2, 590 F.2d 451, 455 (2d Cir. 1979); Hubicki v. ACF Indus., Inc., 494 F.2d 519, 525 (3d Cir. 1973); Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972); Lomax v. Armstrong Cork Co., 433 F.2d 1277, 1281 (5th Cir. 1970); Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 283-84 (1st Cir.), cert. denied, 400 U.S. 877 (1970).
95. 386 U.S. at 191-92.
96. Id. at 192.
97. Id. at 197; accord, IBEW v. Foust, 442 U.S. 42, 49-50 (1979); Miller v. Gateway Transp. Co., 616 F.2d 272, 275 n.6 (7th Cir. 1980); Crawford v. Pittsburgh-Des Moines Steel Co., 386 F. Supp. 290, 295 (D. Wyo. 1974). Damages resulting from an employer's breach of a collective bargaining agreement may not be assessed against a union even when the union has an indemnification agreement with the employer. Vaca v. Sipes, 386 U.S. 171, 197 (1967).
"[a]lthough this apportionment rule might in some instances effectively immunize unions from liability for a clear breach of duty, the [Vaca] Court found considerations of deterrence insufficient to risk endangering the financial stability of such institutions." Finally, in Foust, the Court held that punitive damages may not be awarded in fair representation suits.\(^\text{100}\) The Court was concerned that holding otherwise would "undermine [the] careful accommodation" between the individual employee's interest in obtaining "redress for injuries caused by union misconduct" and "the collective interests of union members in protecting limited funds."\(^\text{101}\) Similarly, application of a contract statute of limitations to fair representation claims would result in an increased number of suits against unions,\(^\text{102}\) with a concomitant strain on union funds. Application of a shorter statute of limitations, however, would not prejudice an employee's right to relief.\(^\text{103}\) Moreover, applying a shorter statute of limitations to the claim against the union, regardless of whether it is joined with a section 301 claim against the employer, is in accord with the basic purposes of limitations periods. Statutes of limitations are statutes of repose,\(^\text{104}\) designed to assure fairness to defendants.\(^\text{105}\)

99. Id. at 50.

100. Id. at 52. The lower courts do not agree on whether punitive damages are per se invalid in fair representation suits. Wells v. Southern Airways, Inc., 616 F.2d 107, 109 n.1 (5th Cir. 1980), or whether the Foust rule applies only when the union has failed to process an employee's grievance properly. Anderson v. United Paperworkers Int'l Union, AFL-CIO, 494 F. Supp. 77, 83 (D. Minn. 1980).

101. 442 U.S. at 50.


vent stale claims and unfair surprise. Potential defendants should "be able to rely upon the statutes in planning for litigation and the payment of claims." These purposes would be undermined if the length of time that a union is subject to suit depends on whether an employee decides to join his two claims.

Because an employee must prove that the union breached its duty of fair representation to bring suit against his employer, stale evidence will be introduced despite nonjoinder of the union as a defendant. Therefore, some courts contend that "the traditional argument favoring statutes of limitations—that claims based on stale evidence ought to be barred—is simply not applicable." These courts, however, fail to recognize that the propriety of using stale evidence depends on the use to which it is put.

Statutes of limitations are viewed as extinguishing only the right to a remedy, not the underlying claim. Although a statute of limitations may bar a direct action, a plaintiff may still assert that claim defensively or collaterally, utilizing the same evidence. Therefore, the purpose of statutes of limitations is not to preclude stale evidence in all instances, but to prevent such evidence from being used to impose liability. This distinction is crucial when an employee seeks to sue his employer and union. If the claim against the union is time-barred, use of evidence of breach of the duty of fair representation is permissible to determine whether the employee has exhausted his

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108. See Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 286 (1st Cir.), cert. denied, 400 U.S. 877 (1970); cf. Kutner, supra note 107, at 221 (policy of reliance on statutes of limitations undermined by allowing contribution between two tortfeasors when statute of limitations has run with respect to one).

109. See notes 5-6 supra and accompanying text.


111. Campbell v. Haverhill, 155 U.S. 610, 618 (1895); Kalmich v. Bruno, 553 F.2d 549, 553 (7th Cir. 1977); United States v. Studivant, 929 F.2d 673, 676 (3d Cir. 1976); Developments, supra note 14, at 1186-87.

112. Developments, supra note 14, at 1245, 1246.
remedies,\textsuperscript{113} a prerequisite to suit against the employer.\textsuperscript{114} To allow joinder of the claims and imposition of a longer statute of limitations to the claim against the union, however, results in an impermissible use of stale evidence.

**Conclusion**

An employee often joins a section 301 claim against his employer with a fair representation claim against his union. Contrary to what some courts have held, mere joinder of the claims does not make it necessary or desirable that they be subject to the same statute of limitations. Moreover, to hold that the same statute of limitations must govern both causes of action is contrary to the rule that reasonable characterizations of the claims not be rejected unless inconsistent with federal labor policy. Because no federal labor policy requires that the same statute of limitations apply to both claims, uniformity should yield to the results of proper characterization.

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\textsuperscript{114} See notes 5-6 \textit{supra} and accompanying text.