

ASSIGNMENT OF LABOR ARBITRATION

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INTRODUCTION

Imagine that you are a union lawyer assigned to represent an individual union member in a disciplinary arbitration.[1] The grievant has an excellent case that the union has agreed to arbitrate. The grievant, however, is distrustful of his or her union, has no confidence in your abilities because you are identified with the union, and would like to retain his or her own attorney. In short, the grievant wants nothing to do with you or the union. Should the grievant be permitted to proceed without union counsel?

Alternatively, imagine that the union proceeds with arbitration and the grievant is generally happy with the representation he received, but the union loses. Perhaps, the arbitrator even made a mistake. Given the extremely narrow standard of judicial review,[2] however, the union decides that it will not appeal[3] the adverse arbitration decision. Despite the long odds, the grievant wants to take a shot and is willing to pay for the cost of litigation, including his private attorney. Should the grievant be allowed to have his or her day in court?[4]

In both of these situations, which are unfortunately quite common, it would not appear to be in the best interests of the grievant, the union, or the union attorney to represent that

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[1] In labor law nomenclature, the individual union member is known as the "grievant." BLACK'S LAW DICTIONARY 722 (8th ed. 2004) (defining grievant as "[a]n employee who files a grievance and submits it to the grievance procedure outlined in a collective-bargaining agreement").

[2] I have recently extensively reviewed the narrow standard of judicial review applicable in labor arbitration. Mitchell H. Rubinstein, *Altering Judicial Review of Labor Arbitration Awards*, 2006 MICH. ST. L. REV. 235, 256–63. *See also infra* notes 42–45 and accompanying text (summarizing the standard of judicial review in labor arbitration).

[3] Under most arbitration statutes, there is no right to "appeal." What is usually sought, rather, is a vacatur or confirmation of an arbitration award. *See, e.g.*, N.Y. C.P.L.R. 7510 (McKinney 1962) (referring to vacatur and confirmation). The word "appeal" is used throughout this work to refer to vacatur and/or confirmation of an arbitration decision and award.

[4] Arbitration does not come cheap. According to a 2004 survey, labor arbitrators charge between $350 and $2400 per day, with the average being $826 per day, plus expenses. Mitchell H. Rubinstein, *Advisory Labor Arbitration Under New York Law: Does It Have a Place in Employment Law?*, 79 ST. JOHN'S L. REV. 419, 436 n.83 (2005). Additionally, they typically charge two days of study for each day of hearing. *Id.* The parties to the arbitration generally split this cost, and each side is responsible for its own attorney fees. Arbitration hearings can span several days, even months, though the hearings may not be on consecutive days.

individual in the arbitration. It might also not be in the best interest of the employer for the arbitration to proceed in this manner because this kind of situation could turn into a duty of fair representation case with the employer being named as a party in that litigation.[5] Regardless of whether the union arbitrates this claim or "assigns" it to the individual grievant, the employer will have to arbitrate the merits of the case.

Yet, in both of these situations, the grievant will run into the same problem: the grievant is not a party to the collective bargaining agreement between the union and the employer. Additionally, under the terms of most collective bargaining agreements, the union owns the arbitration procedure, and therefore, it is entirely up to the union whether it will proceed with the arbitration.[6] As a party to the arbitration, it is also the union's decision whether to appeal any adverse arbitration awards.[7] The grievant simply does not have standing to proceed in either of these situations.[8]

This Article argues that hostility and unnecessary litigation can be avoided in a way which will satisfy the grievant, his or her union, and perhaps even the employer. It is submitted that in certain cases the union could assign its right to proceed with the

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[5] *See infra* notes 15–48 and accompanying text (discussing the duty of fair representation).

[6] Arbitration is typically "the final step in a multi-step grievance procedure." Laura J. Cooper, *Discovery in Arbitration*, 72 MINN. L. REV. 1281, 1284 (1988). Grievance procedures usually commence with the union or an employee presenting the case to a low level management representative, and additional steps in the grievance procedure are generally held before successive higher levels of management with the hope of resolving the grievance without having to arbitrate the matter. *Id.* at 1284–85 (discussing the grievance and arbitration process).

[7] While the focus of this Article is labor arbitration, it should be noted that an employer and a union do not have to incorporate an arbitration provision into their collective bargaining contract. *See, e.g.*, Groves v. Ring Screw Works, 498 U.S. 168, 170 (1990) (holding that in an action for breach of a collective bargaining agreement, parties can proceed where grievance procedure did not provide for final and binding decision); Aeronautical Indus. Dist. Lodge 91 of Int'l Ass'n of Machinists and Aerospace Workers v. United Techs. Corp., 230 F.3d 569, 575 (2d Cir. 2000) (same). In the absence of an agreement to arbitrate, breach of contract claims may be brought pursuant to Section 301 of the National Labor Relations Act (current version at 29 U.S.C. § 185 (2000)), and federal law would preempt state breach of contract law. *See, e.g.*, Tand v. Solomon Schechter Day Sch., 324 F. Supp. 2d 379, 382–83 (E.D.N.Y. 2004). Only the parties to the collective bargaining agreement have standing to bring an action for breach of contract. *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 700 (1966).

[8] *See infra* notes 49–58 and accompanying text (discussing standing).

arbitration to the grievant. The grievant would have his day in court,[9] and the union would not have to bear the time and considerable expense of arbitration with respect to a claim it believed either lacked merit or which was in the best interests of the grievant to prosecute individually. If such an assignment were permitted, the union could also assign its right to appeal any adverse arbitration to the grievant. Again, the grievant would have his day in court, and the union would avoid a potential duty of fair representation claim.

Although upon assignment the employer would have to arbitrate the claim, he may have had to arbitrate it anyway because, absent the assignment, the union might have gone forward out of fear of duty of fair representation litigation. Moreover, the employer may avoid costly duty of fair representation litigation if the union does not proceed and the grievant files a duty of fair representation claim.[10]

This Article does not suggest that every arbitration or appeal can be assigned to individual grievants. It is recognized that assignment of the right to arbitrate or the right to appeal from an arbitration award would not always be appropriate. For example, if a grievant were seeking to assert a contractual claim that the union disagreed with, the union may not want to risk the establishment of adverse precedent. Additionally, the union may not want to make a certain argument in discharge arbitration due to concerns about how the decision might affect others. The decision to assign, however, is with the union. Save for limited situations where assignment is not in the best interests of the union, as determined by the union, it is submitted that assignment of arbitration and assignment of the right to appeal is something unions should seriously consider.

To this commentator's astonishment, there is no academic commentary addressing the important issue of whether unions can assign their right to arbitrate or their right to appeal to an individual grievant.[11] Furthermore, there are only three judicial

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[9] The U.S. Supreme Court has repeatedly recognized the important public policy of providing citizens with their day in court. *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561, 575 (1986); Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968).

[10] *See supra* note 35 and accompanying text (explaining that duty of fair representation suits are generally filed against employers and unions simultaneously and that damages are apportioned according to the degree of fault).

[11] Equally amazing is that there is no academic commentary on the related

decisions on this issue, and each arose in the public sector.[12] In all three decisions, the courts held that the union could not make an assignment.

Two decisions in this trilogy focused on whether a union could assign to an individual the right to arbitrate,[13] while the third addressed the issue of whether a union could assign to an individual the right to appeal from arbitration.[14] Each of these cases essentially involves the same issue: to wit, whether a union can assign the arbitration rights it has to individual union members by virtue of the fact that it is a party to the collective bargaining agreement.

A close analysis of these three decisions will demonstrate that each of them is simply wrong. The public policy that these cases rely on is questionable, and the analysis of each of the courts is overly conclusionary. This Article maintains that the benefit to be gained by the individual in both having his or her day in court and eliminating the specter of duty of fair representation litigation outweighs any concern over whether other bargaining unit members will be adversely affected by allowing the individual employee to arbitrate. After all, it is his or her union that agreed to the assignment. This Article concludes that if the parties want to prevent the assignment of labor arbitration or the assignment of the right to appeal from labor arbitration, then the parties must bargain for such language in the collective bargaining agreement.

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issue of whether an individual bargaining unit member has standing to challenge a labor arbitration in court—notwithstanding the fact that there is a significant body of judicial authority addressing this issue. *See, e.g.*, *infra* notes 50–52 and accompanying text (noting cases holding that an employee whose claims are arbitrated under a collective bargaining agreement usually lacks standing to vacate the award because the employee was not a party to the contract). By contrast, the law surrounding a union's duty of fair representation is highly developed, and there is a significant body of academic literature concerning the related issue of the duty of fair representation. For an inclusive discussion of its history and application, see THE DEVELOPING LABOR LAW, ch. 25 (Patrick Hardin et al. eds., 4th ed. 2001). Indeed, the duty of fair representation is even a staple of most labor law courses. Mitchell H. Rubinstein, *Union Immunity from Suit in New York,* 2 N.Y.U. J. L. & BUS. 641, 673 n.124 (2006).

[12] *See* Dillman v. Town of Hooksett, 898 A.2d 505 (N.H. 2006); Padovano v. Borough of E. Newark, 747 A.2d 303 (N.J. Super. Ct. App. Div. 2000); Martin v. City of O'Fallon, 670 N.E.2d 1238 (Ill. App. Ct. 1996).

[13] *See Padovano*, 747 A.2d at 307–08; *Martin*, 670 N.E.2d at 1239.

[14] *See Dillman*, 898 A.2d at 506.

Part I of this Article will review the duty of fair representation. Part II will then examine the issue of standing under a collective bargaining agreement. Part III of this Article will then extensively review each of the three cases that have addressed whether labor arbitration rights may be assigned. Part IV will next demonstrate that labor unions should be permitted to assign the right to arbitrate by examining each of the applicable public policies. Part V will discuss how contract law, labor arbitration, and collective bargaining principles support assignment. Finally, this Article will conclude that there should be a presumption in favor of assignment of labor arbitration and the right to appeal any labor arbitration decision absent express language prohibiting such assignments.

I. THE DUTY OF FAIR REPRESENTATION

Whether unions should be allowed to assign their right to arbitrate or their right to appeal from arbitration is directly related to a union's duty of fair representation. A union may be motivated to assign the arbitration or the appeal solely to avoid duty of fair representation litigation.[15] Indeed, in two of the three decisions that have examined assignment, the courts expressed concern with a union releasing itself from duty of fair representation exposure.[16] More fundamentally, the duty of fair representation stems from the union's role as the exclusive representative of employees.[17] This principle of exclusivity has been critical to courts that have addressed the issue of assignment in the context of labor arbitration.[18] Therefore, a review of duty of fair representation jurisprudence is necessary.

There was no duty of fair representation doctrine at common law.[19] Moreover, under the National Labor Relations Act,[20] there is no express language requiring "fair representation."[21]

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[15] In *Dillman* and *Martin*, the union coupled the assignment with an understanding that the individual would not make a duty of fair representation claim against the union. *See Dillman*, 898 A.2d at 508; *Martin*, 670 N.E.2d at 1239.

[16] *See infra* notes 86, 100 and accompanying text.

[17] *See infra* notes 23–25, 77–78, and accompanying text.

[18] *See infra* notes 86, 109, 109 and accompanying text.

[19] *See* Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 563 (1990).

[20] 29 U.S.C. §§ 151–69 (2000). The National Labor Relations Act is the statute which governs most private sector labor management relations in the United States.

[21] THE DEVELOPING LABOR LAW, *supra* note 11, at 1858.

Significantly, however, under federal law, a certified union[22] acts as the exclusive representative of employees.[23] This principal of exclusivity is what led to the recognition of the duty of fair representation.[24] As the Supreme Court explained:

> The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty and to avoid arbitrary conduct". . . . The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law."[25]

In what is perhaps the most important duty of fair representation case, *Vaca v. Sipes*,[26] the Supreme Court established that a union breaches its duty of fair representation when its conduct is "arbitrary, discriminatory, or in bad faith."[27]

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[22] Unions become the certified exclusive representative of employees if they win an election conducted by the National Labor Relations Board. For a further discussion of the representation process, see THE DEVELOPING LABOR LAW, *supra* note 11, Pt. III.

[23] Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159 (2000), provides:

> Representatives 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 suit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

[24] *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 n.15 (1977).

[25] DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 152 n.14 (1983) (citations omitted). The duty of fair representation has its genesis in the country's history of racial discrimination. It was first recognized in 1944 by the U.S. Supreme Court in *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 202–03 (1944), a case which arose under the Railway Labor Act of 1926, 45 U.S.C. §§ 151–164 (2002), and which involved the use of segregated seniority lists before modern employment statutes, such as Title VII, outlawed such racial discrimination.

[26] 386 U.S. 171 (1967).

[27] *Id.* at 190. The duty of fair representation tends to be defined in legal terms and provides unions with a high degree of flexibility given the fact that under this tripartite standard, the bar is set extremely high for a plaintiff to succeed.

That tripartite standard has been repeatedly reaffirmed.[28] *Vaca* also established that an individual employee does not have a right to have even a meritorious grievance presented to a labor arbitrator. Rather, recognizing the wide latitude that unions have to enforce their collective bargaining agreements, the Court held that unions could not simply ignore meritorious grievances.[29] *Vaca* also indicated that a plaintiff must exhaust his administrative contractual remedies before proceeding with a claim that the union breached its duty of fair representation.[30]

The Supreme Court later held that to establish liability, a plaintiff must establish both a breach of contract and a breach of the duty of fair representation;[31] that a union's mere negligence would not establish a breach of this duty;[32] and that a breach of the duty of fair representation would remove finality from any arbitration that may have already taken place.[33]

The Supreme Court also held that the employer's breach of the collective bargaining agreement and the union's breach of duty were two claims that were "inextricably interdependent."[34] The plaintiff employee files what is known as a hybrid claim, alleging breach of the duty of fair representation (against the union) and breach of contract (the collective bargaining agreement) against the employer, the union, or both.[35] Damages

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Rubinstein, *supra* note 11, at 672 (discussing duty of fair representation and the deference unions are afforded under this doctrine).

[28] *See, e.g.*, Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998); Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 77 (1991).

[29] *Vaca*, 386 U.S. at 191.

[30] *Id.* at 184–85.

[31] DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 165 (1983) (quoting United Parcel Serv. v. Mitchell, 451 U.S. 56, 66–67 (1981) (Stewart, J., concurring in the judgment) (internal citations omitted)).

[32] United Steelworkers v. Rawson, 495 U.S. 362, 372–73 (1990); *see also O'Neill*, 499 U.S. at 78.

[33] Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976).

[34] *DelCostello*, 462 U.S. at 164.

[35] *Id.* at 165. As a practical matter, in hybrid duty of fair representation lawsuits, plaintiffs sue employers and unions simultaneously. Although an employee may have a claim against his union because of the way a grievance was handled, it is the employer who took the action and it is the employer who generally has the deep pocket. Furthermore, if reinstatement is sought, unions cannot provide that remedy. *See generally* Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 80 (1989) ("In *Vaca*, we identified an 'intensely practical consideration' of having the same entity adjudicate a joint claim against both the employer and the union . . . .") (citations omitted).

for duty of fair representation claims are apportioned according to the degree of fault between the employer and the union.[36]

Under the *Vaca* tripartite standard, a union's actions are arbitrary if, in light of all the factual circumstances available at the time, it is "so far outside a wide range of reasonableness as to be irrational."[37] A union acts arbitrarily if it fails to take a basic and required step under the collective bargaining agreement such as timely filing a grievance.[38] It has also been described as when a union acts in "egregious disregard for the rights of union members."[39] This wide range allows unions to make discretionary decisions and choices even if those judgments are ultimately wrong.

Bad faith requires a showing of fraudulent, deceitful, or dishonest action.[40] To establish discrimination, a plaintiff must show both animus on the part of the union and that the plaintiff was treated differently from similarly-situated members.[41]

Under the *Vaca* tripartite standard, courts do not second-guess a union's decision not to pursue a grievance to arbitration.[42] A plaintiff who seeks to establish a breach of this duty has a very high mountain to climb.[43] Judicial review of

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[36] *See* Bowen v. U.S. Postal Serv., 459 U.S. 212, 218–28 (1983) (discussing apportionment of damages).

[37] *O'Neill*, 499 U.S. at 67 (1991), *quoted in* White v. White Rose Food, 237 F.3d 174, 178–79 (2d Cir. 2001).

[38] Vencl v. Int'l Union of Operating Eng'rs, Local 18, 137 F.3d 420, 426 (6th Cir. 1998); Ruzicka v. GMC, 649 F.2d 1207, 1211 (6th Cir. 1981).

[39] Peters v. Burlington N. R.R. Co., 931 F.2d 534, 538 (9th Cir. 1991) (quoting Tenorio v. NLRB, 680 F.2d 598, 601 (9th Cir. 1982) (listing cases that have defined what constitutes arbitrary conduct by a union)). Additionally, intentional misrepresentations by union officials can amount to arbitrary conduct. *See* Alicea v. Suffield Poultry, Inc., 902 F.2d 125, 130–33 (1st Cir. 1990).

[40] *See* Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 299 (1971).

[41] *See* Spellacy v. Airline Pilots Ass'n-Int'l, 156 F.3d 120, 130 (2d Cir. 1998) (finding that the plaintiff failed to give evidence of different treatment and that the union was motivated by animus).

[42] *Id.* at 130 (citing *Vaca*, 386 U.S. at 191; Saint Mary Home, Inc. v. Serv. Employees Int'l Union, Dist. 1199, 116 F.3d 41, 45 (2d Cir. 1997) (reinforcing that it is not for the court to question a union's choice to pursue or not to pursue a grievance to arbitration); Lapir v. Maimonides Med. Ctr., 750 F. Supp. 1171, 1179 (E.D.N.Y. 1990); *see also* Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985) (declaring that union representation does not have to be error free).

[43] In describing plaintiff's burden, the Seventh Circuit stated that a duty of fair representation plaintiff "does not get to first base unless . . . the union has abandoned him to the wolves." Pease v. Prod. Workers Union Local 707, 386 F.3d 819, 823 (7th Cir. 2004); *see also* DOUGLAS E. RAY, CALVIN WILLIAM SHARPE &

union actions have been described by the Supreme Court as "highly deferential."[44] Indeed, courts will defer to union interpretations of their collective bargaining agreements unless the union's claim is "patently unreasonable."[45]

This heightened standard is necessary because if unions were required to advocate an individual employee's view of the collective bargaining agreement under the guise of fair representation, it may undermine the union's role as the representative of the collective.[46] A union could not possibly satisfy all of its members all of the time. Therefore, it is not surprising that unions sometimes may read the collective bargaining agreement differently from individual employees.[47]

The duty of fair representation is the major litigation issue most unions face. Such allegations can be adjudicated by the NLRB as unfair labor practices in the private sector or by a corresponding public sector administrative agency. Additionally, in both the private and public sectors, a plaintiff has the option of proceeding directly in court.[48]

II. THE ISSUE OF STANDING AND ITS EXCEPTIONS

In order to fully appreciate the legal issues surrounding whether a union can assign its right to arbitrate or its right to appeal, it is also important to examine the issue of standing.[49] In

ROBERT N. STRASSFELD, UNDERSTANDING LABOR LAW § 16.03, at 343 (2d ed. 2005) (noting standards for duty of fair representation liability "are sufficiently high as to make it difficult for individual employees to establish liability"); David L. Gregory, *Union Liability for Damages After* Bowen v. Postal Service*: The Incongruity Between Labor Law and Title VII Jurisprudence*, 35 BAYLOR L. REV. 237, 249 n.72 (1983) (stating duty of fair representation plaintiffs face "formidable hurdles"); Ann C. Hodges, *Mediation and the Transformation of American Labor Unions,* 69 MO. L. REV. 365, 432 (2004) ("[T]he wide range of reasonableness accorded to the union under the duty of fair representation makes imposition of liability a relatively rare occurrence . . . .").

[44] Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 78 (1991).

[45] Sim v. New York Mailers' Union Number 6, 166 F.3d 465, 470 (2d Cir. 1999).

[46] *See* Carrion v. Enter. Ass'n, Metal Trades Branch Local Union 638, 227 F.3d 29, 33 (2d Cir. 2000).

[47] *See, e.g.*, Commodari v. Long Island Univ., 89 F. Supp. 2d 353, 363 (E.D.N.Y. 2000), *aff'd*, No. 02-7721, 2003 U.S. App. LEXIS 6352 (2d Cir. Apr. 2, 2003) (granting summary judgment to union in a case alleging breach of the duty of fair representation where union member read faculty tenure and review provisions differently from defendant union).

[48] Rubinstein, *supra* note 11, at 645–46.

[49] The issue of standing is perhaps most well known in the area of constitutional law. Constitutional law cases have recognized two different types of standing issues:

this Article, the term standing is simply meant to refer to whether an individual grievant can assert rights under a collective bargaining agreement to which he is not a party. The whole reason why an assignment may be necessary is because the individual might not otherwise have standing.

An employee whose claims are arbitrated under a collective bargaining agreement generally[50] does not have standing to seek to vacate the award since the employee is not a party[51] to the

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Article III standing and prudential standing. The Supreme Court described these two doctrinal approaches as follows:

> [O]ur standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement; and prudential standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction." The Article III limitations are familiar: The plaintiff must show that the conduct of which he complains has caused him to suffer an "injury in fact" that a favorable judgment will redress. Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked."

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11–12 (2004) (citations omitted).

The cases which discuss standing of an individual grievant to sue his employer under a collective bargaining agreement, see *infra* notes 50–68 and accompanying text, do not refer to these constitutional law principles, though it is apparent that these types of issues involve prudential standing in that they involve the question of whether one union member can raise a challenge under a collective bargaining agreement which may affect other employees.

[50] The word generally is emphasized because most collective bargaining agreements provide that only the parties to the collective bargaining agreement—the employer and the union—can seek arbitration. *See* Kozura v. Tulpehocken Area Sch. Dist., 791 A.2d 1169, 1173–74 (Pa. 2002). However, if the collective bargaining agreement gives the individual union member the right to arbitrate a dispute, that individual would have standing to litigate the arbitration in court. *See id.* at 1174–75 (applying Pennsylvania law); *see also* Gilden v. Singer Mfg. Co., 139 A.2d 611, 612 (Conn. 1958) (applying Connecticut law); AFSCME, Council 15, Local 1159 v. City of Bridgeport, 571 A.2d 127, 128 n.1 (Conn. App. Ct. 1990) (applying Connecticut law); Diaz v. Pilgrim State Psychiatric Ctr., 62 N.Y.2d 693, 695, 465 N.E.2d 32, 32, 476 N.Y.S.2d 525, 525 (1984) (applying New York Law).

[51] Aside from the issue of standing, the fact that the individual is not a party to the collective bargaining agreement generally means an attorney retained by the union represents the union and not the individual. Therefore, the individual grievant cannot successfully claim that an attorney committed malpractice. The individual is simply not the attorney's client. Peterson v. Kennedy, 771 F.2d 1244, 1258 (9th Cir. 1985); *see* Carino v. Stefan, 376 F.3d 156, 161–62 (3d Cir. 2004); Morris v. Local 819, Int'l Bhd. of Teamsters, 169 F.3d 782, 784 (2d Cir. 1999);

contract.[52] This rule, however, is not absolute. Significantly, several exceptions have developed. Perhaps the most cited exception recognized by the Supreme Court is that if a union

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Waterman v. Transp. Workers' Union Local 100, 176 F.3d 150, 150 (2d Cir. 1999); Mamorella v. Derkasch, 276 A.D.2d 152, 155, 716 N.Y.S.2d 211, 213 (4th Dep't 2000); Frontier Pilots Litig. Steering Comm., Inc. v. Cohen, Weiss & Simon, 227 A.D.2d 130, 131, 641 N.Y.S.2d 639, 639 (1st Dep't 1996); Niezbecki v. Eisner & Hubbard, P.C., 186 Misc. 2d 191, 197, 717 N.Y.S.2d 815, 821–22 (N.Y. Civ. Ct. N.Y. County 1999); *see also* Sales v. YM & YWHA of Wash. Heights and Inwood, Nos. 00 Civ. 8641 & 01 Civ. 1796, 2003 WL 164276, at *9 (S.D.N.Y. Jan. 22, 2003) (endorsing that union members are not entitled to an attorney and that union representatives are sufficiently competent advocates); Mullen v. Bevona, No. 95 Civ. 5838, 1999 WL 974023, at *3–4 (S.D.N.Y. Oct. 26, 1999) (collecting cases where courts have concluded that union has no duty to provide an attorney to represent its members at an arbitration proceeding and noting that many arbitrations are handled by non-lawyer union representatives).

[52] DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164 (1983); Bryant v. Bell Atl. Md., Inc., 288 F.3d 124, 131 (4th Cir. 2002); Cleveland v. Porca Co., 38 F.3d 289, 296–97 (7th Cir. 1994); Katir v. Columbia Univ., 15 F.3d 23, 24–25 (2d Cir. 1994); Bacashihua v. USPS, 859 F.2d 402, 405 (6th Cir. 1988); Nicholls v. Brookdale Univ. Hosp. & Med. Ctr., No. 05-CV-2666, 2005 U.S. Dist. LEXIS 14144, at *14 (E.D.N.Y. July 14, 2005); Crim v. Yale Univ., No. CV 980411708S, 1998 Conn. Super. LEXIS 2333, at *2 (Conn. Super. Ct. Aug. 19, 1998) (same under Connecticut law), *aff'd*, 744 A.2d 455 (Conn. App. Ct. 2000); *In re* Soto, 7 N.Y.2d 397, 399, 165 N.E.2d 855, 856, 198 N.Y.S.2d 282, 283 (1960) (applying New York law); Moreira-Brown v. Bd. of Educ., 288 A.D.2d 21, 21, 732 N.Y.S.2d 166, 166 (1st Dep't 2001) (applying New York law); Bd. of Educ. v. Steigerwald, 210 A.D.2d 401, 401, 620 N.Y.S.2d 109, 109 (2d Dep't 1994) (applying New York law); Sampson v. Bd. of Educ., 191 A.D.2d 283, 283, 594 N.Y.S.2d 264, 265 (1st Dep't 1993) (applying New York law).

The Supreme Court has succinctly stated: "The pertinent part of the collective-bargaining agreement, Article IX, consists entirely of agreements between the Union and the employer and enforceable only by them." United Steelworkers v. Rawson, 495 U.S. 362, 374 (1990). Indeed, one federal court has even stated that courts "routinely" dismiss arbitral type actions brought by individuals for want of standing. Crowell v. Int'l Bhd of Teamsters, Local 202, No. 00 CIV. 3480, 2001 WL 1230531, at *3 (S.D.N.Y. Oct. 16, 2001).

Despite the avalanche of judicial opinions to the contrary, it should be noted that one appellate court held that an individual employee did have standing to challenge an adverse arbitration decision in court. The court viewed the employee as the real party in interest since the employee would be affected by the outcome of the arbitration even though the employee was not a party to the collective bargaining agreement. Barksdale v. Ohio Dep't of Admin. Servs., 604 N.E.2d 798, 801 (Ohio Ct. App. 1992), *appeal dismissed*, 590 N.E.2d 1265 (Ohio 1992). However, a later appellate court in a different appellate district expressly refused to follow *Barksdale* and held that an individual union member does not have standing to challenge a labor arbitration award. Jones v. Ohio Dep't of Youth Servs., No. 83605, 2004 WL 906580, at *1 (Ohio Ct. App. Apr. 29, 2004). Additionally, the Supreme Court of Ohio has indicated that *Barksdale* "is a legal anomaly." Leon v. Boardman Twp., 800 N.E.2d 12, 14 (Ohio 2003).

breaches its duty of fair representation, the aggrieved employee would not be precluded from unilaterally bringing a lawsuit.[53]

Additionally, courts have recognized a handful of other exceptions, such as when the employer repudiated the collective bargaining agreement containing an arbitration procedure.[54] Some courts also have allowed employees to intervene under Rule 24 of the Federal Rules of Civil Procedure[55] in a suit seeking to vacate a labor arbitration favorable to the union where the union chooses not to appeal but acquiesces in the employee's court appearance.[56] In *F.W. Woolworth Co. v. Miscellaneous*

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[53] *DelCostello*, 462 U.S. at 164. As the Court explained:

> [W]e recognized that this rule [regarding standing] works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding.

Id.; *see also Bryant*, 288 F.3d at 131; *Katir*, 15 F.3d at 24–25 (holding that the petitioner-appellant, who was not a party to the arbitration, lacked standing to challenge the arbitrator's award because her petition did not support a claim for breach of the union's duty of fair representation); Dillman v. Town of Hooksett, 898 A.2d 505, 507–08 (N.H. 2006) (asserting that an employee who brings a claim against his union for a breach of its duty of fair representation has standing to challenge an arbitration proceeding to which he was not a party).

[54] Vaca v. Sipes, 386 U.S. 171, 185 (1967); Payne v. Giant Food, Inc., 346 F. Supp. 2d 15, 19 n.3 (D.D.C. 2004); Chester v. Wash. Metro. Area Transit Auth., 335 F. Supp. 2d 57, 64 (D.D.C. 2004).

[55] Rule 24 of the Federal Rules of Civil Procedure provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24.

[56] F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781, 629 F.2d 1204, 1213 (7th Cir. 1980); *see also* Martin v. Youngstown Sheet & Tube Co., 911 F.2d 1239, 1244 (7th Cir. 1990) (citing *F.W. Woolworth* with approval); Int'l Bhd. of Teamsters, Local Union No. 404 v. J.F. Partyka & Son, Inc., 176 F.R.D. 429, 431 (D. Mass. 1997) ("[I]ndividual union members may defend against a suit to vacate an arbitration award in favor of their union when the union . . . acquiesces in the employees' action."). However, in *J.F. Partyka & Son*, the court denied the individual employee's motion for intervention in an appeal from an arbitration which the union won, which was opposed by both the union and the employer, because there the union was adequately representing the employee's interests. *Id.* at 431–32.

Warehousemen's Union, Local No. 781, for example, the Seventh Circuit did not see any conflict with federal labor policy and reasoned that public policy would be furthered by allowing the individual grievant to intervene. The court stated:

> The issues presented in the instant case should be governed by flexible, pragmatic and, above all, just, procedural principles, not by some suffocating rule that unions may, under any imaginable circumstances, be the only party opposing the employer in proceedings involving the construction of collective bargaining agreements. . . . So long as the employees intervene in support of the award and without the opposition—formal or informal—of the Union, they are merely complementing the activities of the Union and seeking to vindicate the purposes for which the Union undertook their representation in the first place.[57]

A handful of lower courts have gone a bit further and held that an individual union member has standing to confirm a labor arbitration where he was the victor.[58] One federal circuit, the Second Circuit, appears to have approved of this proposition of law, but the case in which it did so involved an internal dispute between two labor unions and not a dispute between an employer and employee.[59] The Supreme Court has allowed individual union members and their union to jointly petition for enforcement of a labor arbitration, though the Court did not comment on the fact that the individuals were also plaintiffs.[60]

Additionally, in what might be considered a developing branch of the law of standing, courts have considered the labor arbitration rights of parties other than the grievant who may be affected by an arbitration award. In *Ciambriello v. County of Nassau*,[61] the Second Circuit held that an employee stated a 42 U.S.C. § 1983 claim[62] after he was effectively demoted as the

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[57] *Woolworth*, 629 F. 2d at 1212.

[58] *See* Serrano v. Delmonico's Hotel, No. 91 Civ. 2537, 1992 U.S. Dist. LEXIS 14160, at *7–8 (S.D.N.Y. Sept. 18, 1992); USPS v. Am. Postal Workers Union, 564 F. Supp. 545, 551 (S.D.N.Y. 1983); Lee v. Olin Mathieson Chem. Corp., 271 F. Supp. 635, 638 (W.D. Va. 1967).

[59] Santos v. Dist. Council of N.Y. City, 547 F.2d 197, 198 (2d Cir. 1977).

[60] General Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss & Co., 372 U.S. 517, 517 (1963).

[61] 292 F.3d 307 (2d Cir. 2002).

[62] 42 U.S.C. § 1983 (2000) is a procedural vehicle to adjudicate certain constitutional claims. The statute provides as follows:

> Every person who, under color of any statute, ordinance, regulation,

result of an arbitration to which he was not a party. Specifically, the union successfully arbitrated a grievance claiming that another employee was entitled to Ciambriello's position because the employer violated the collective bargaining agreement when it promoted Ciambriello to the position in question.

Significantly, this case arose in the public sector, and Ciambriello was found to have a property interest in his position by virtue of the collective bargaining agreement. The language in the collective bargaining agreement that formed this property interest concerned promotions[63] and demotions.[64] Because Ciambriello had this property interest, notwithstanding the fact that the arbitration award was confirmed in state court, the court held that he was removed from his position without due process in that he was not given an opportunity to be heard at the arbitration.[65]

Although the majority did not utilize the term standing or cite to cases involving this issue, its holding effectively creates another category of exception—for employees who may be affected by an arbitration to which they are not involved—to the general rule that only the parties to a collective bargaining agreement have standing under it. If *Ciambriello* is interpreted literally by later courts, it has the potential to upset the notion that the individual grievant does not have standing to challenge arbitration.

> custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2000).

[63] The promotion language stated that "ability, adaptability and seniority shall prevail insofar as practical and consistent with the needs of the department." *Ciambriello*, 292 F.3d at 314.

[64] The demotion language stated that an employee could not be demoted except for "just cause." *Id.*

[65] The parties to the arbitration appeared to be the union and the employer. The union was representing the interests of the grievant employee who claimed he was entitled to be promoted over Ciambriello.

It is ironic that under *Ciambriello*, an employee who is not directly involved in the arbitration has a type of standing to challenge the arbitration decision, while an employee directly involved in the arbitration who is represented by the union would not have such standing. Finally, it is important to recognize that *Ciambriello* is a limited exception[66] to the general rule that individual employees do not have standing to challenge arbitration decisions, as it is applicable only to employees in the public sector who have a property interest[67] in their positions.[68]

With this background of duty of fair representation and standing, it is now appropriate to analyze the trilogy of cases that have specifically addressed the issue of whether a union can

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[66] It is also important to recognize that *Ciambriello* was also a split decision. Circuit Judge Sack dissented with respect to the issue of whether plaintiff had a property interest in his position. Unlike the majority, Judge Sack did invoke standing principles and noted that Ciambriello did not have standing since he was not a party to the collective bargaining agreement. *Ciambriello*, 292 F.3d at 325–26 (Sack, J., dissenting).

[67] Property interests are not created by the Constitution, rather "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 313 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)). *Ciambriello* held that the collective bargaining agreement, which replaced Civil Service statutory provisions, was the source of this property interest. Other courts have found property interests in collective bargaining agreements, but *Ciambriello* is a case of first impression concerning the rights of non-grievant union members. *See* Dill v. City of Edmond, 155 F.3d 1193, 1206 (10th Cir. 1998) (recognizing that the collective bargaining agreement between the parties gave rise to the plaintiff's protected property interest while noting that the agreement provided discharge only "for cause"); Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir. 1991) (explaining that a just cause provision in a public sector collective bargaining agreement is a property interest); Int'l Union, United Gov't Security Officers v. U.S. Marshals Serv., No. 1:02CV1484, 2003 U.S. Dist. LEXIS 26992, at *13–14 (D.D.C. Aug. 28, 2003) (noting that the Court Security Officers have a cognizable property interest in their continued employment by virtue of the "just cause" provision in their collective bargaining agreements); *cf.* Hennigh v. City of Shawnee, 155 F.3d 1249, 1255 (10th Cir. 1998) (finding that, as a result of a public sector collective bargaining agreement, the employee had a property interest in his rank). It is beyond the scope of this work to further discuss the issue of property rights with regard to collective bargaining agreements.

[68] Providing non-party employees with standing to challenge arbitrations has the potential to change the dimensions of labor arbitration in the public sector because, until *Ciambriello*, labor arbitration traditionally had been limited between parties to a collective bargaining agreement—the employer and the union. *See, e.g.*, Kramer v. County of Nassau, 10 A.D.3d 686, 686, 783 N.Y.S.2d 590, 590–91 (2d Dep't. 2004) (vacating public sector labor arbitration because third party employee was not given an opportunity to participate in the arbitration).

assign its right to arbitrate or assign its right to appeal an arbitration decision.

III. CASES ADDRESSING WHETHER LABOR ARBITRATION MAY BE ASSIGNED

Nationwide, there are only three cases that address whether the right to arbitrate or the right to appeal an arbitration can be assigned to an individual grievant.[69] Interestingly, each of these three cases arose in the public sector.[70] While no authority addressing this issue in the private sector has been located, there is no reason why cases in the private sector should be treated differently than public sector labor cases.[71] Whether this trilogy

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[69] The three cases are: *Martin v. City of O'Fallon*, 670 N.E.2d 1238 (Ill. App. Ct. 1996); *Dillman v. Town of Hooksett*, 898 A.2d 505 (N.H. 2006); and *Padovano v. Borough of East Newark*, 747 A.2d 303 (N.J. Super. Ct. App. Div. 2000).

[70] Indeed, as can be seen throughout this Article, the issue of assignment is interwoven with the issue of standing and the duty of fair representation. While the duty of fair representation stems from the National Labor Relations Act, § 301 (current version at 29 U.S.C. § 185 (2000)), this statute does not apply to public sector employees. Police Dep't v. Mosley, 408 U.S. 92, 102 n.9 (1972) ("The City now recognizes that the National Labor Relations Act specifically exempts States and subdivisions (and therefore cities and their public school boards) from the definition of 'employer' within the Act."); Corredor v. UFT, No. 96 Civ. 0428, 1997 U.S. Dist. LEXIS 3000, at *2 (S.D.N.Y. Mar. 14, 1997), *aff'd*, 162 F.3d 1147 (2d Cir. 1998) (recognizing that, pursuant to the Labor Management Relations Act, the Board of Education is not an "employer"). Nevertheless, it is important to recognize that the duty of fair representation in the public sector is often identical to that in the private sector and may be traced to federal law. Baker v. Bd. of Educ., 70 N.Y.2d 314, 320, 514 N.E.2d 1109, 1112, 520 N.Y.S.2d 538, 541 (1987) (applying New York law), *superseded by statute* N.Y. C.P.L.R. 217(2)(a) (McKinney 2000), *as stated in* Alston v. Transp. Workers Union, 225 A.D.2d 424, 424, 639 N.Y.S.2d 359, 360 (1st Dep't 1996).

[71] I have previously discussed that in adjudicating a private sector labor dispute the Supreme Court has looked to public sector labor cases for guidance. Rubinstein, *supra* note 4, at 437 (citing NLRB v. Transp. Mgt., Corp., 462 U.S. 393 (1983)). Indeed, where public sector labor law is more fully developed, astute litigators would be well advised to look to state public sector labor law cases for guidance. Mitchell H. Rubinstein, *A New York Court Recognizes a Labor Union Evidentiary Privilege*, 9 LAB. LAW. 595, 600 (1993).

Public sector labor arbitration can be different because tenured public employees have a property interest in their positions. Bd of Regents v. Roth, 408 U.S 564, 576–77 (1972); *Ciambriello*, 292 F.3d at 320; *see also* CHARLES J. RUSSO, REUTTER'S THE LAW OF PUBLIC EDUCATION 639–41 (6th ed. 2006) (discussing property interest under teacher tenure statutes). Sometimes arbitration is negotiated as an alternative to a statutory process of discipline, which would otherwise constitute the due process that such an employee is entitled to. *See, e.g.*, *Ciambriello*, 292 F.3d at 314 (2d. Cir. 2002) (recognizing that New York Civil Service Law § 75 gives covered employees a property interest in their employment, which, however, may be

of cases should be followed, however, is an entirely different matter to which this Article now turns.

A. Martin v. City of O'Fallon

Martin v. City of O'Fallon[72] was the first court to address the issue of whether a union may assign to a union member the right to demand arbitration under a collective bargaining agreement between a union and a public sector employer. The collective bargaining agreement had a typical multi-step grievance procedure; the individual could file a grievance under the initial steps of the grievance procedure, but the right to demand arbitration, which was the final step of the grievance procedure, was reserved to the employer and union as parties to the collective agreement.

After complying with the initial steps of the grievance procedure, the individual grievant entered into a contract with his union whereby the union agreed to allow him to pursue arbitration in exchange for his agreement to pay the union's share of the arbitration costs.[73] Additionally, the union agreed to afford sole discretion to plaintiff's attorney in the arbitration in return for plaintiff's releasing the union "from all representational responsibility regarding the arbitration of his grievance protesting his suspension and discharge."[74] After the employer refused to arbitrate this matter, the grievant brought

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modified by a collective bargaining agreement); Dye v. N.Y. City Transit Auth., 88 A.D.2d 899, 899, 450 N.Y.S.2d 587, 588 (2d Dep't 1982), *aff'd,* 57 N.Y.2d 917, 442 N.E.2d 1271, 456 N.Y.S.2d 760 (1982) (noting that a contract provision in a collective bargaining agreement "may modify, supplement, or replace" protection that an employee might have pursuant to § 75 and § 76 of the Civil Service Law); Antinore v. State, 49 A.D.2d 6, 10, 371 N.Y.S.2d 213, 216 (4th Dep't. 1975), *aff'd.,* 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976) (recognizing that a union may negotiate arbitration as an alternative to a Civil Service Section 75 Hearing).

This may be the reason why certain public sector collective bargaining agreements permit employees to file for arbitration on their own. *See, e.g.*, *supra* note 50 (citing cases where collective bargaining agreement expressly gives individual employee the right to arbitrate grievance). This difference is not germane to the analysis of whether unions should be able to assign the right to arbitrate or the right to appeal an arbitration award to individual grievants.

[72] 670 N.E.2d 1238 (Ill. App. Ct. 1996).

[73] The decision does not state why the union did not arbitrate the grievance itself. Presumably, this was because the union concluded that the grievance lacked merit. However, it is also plausible that the grievant had no confidence in his union or that he simply wanted to utilize his private lawyer.

[74] *Martin*, 670 N.E.2d at 1240.

an action to compel arbitration. Plaintiff lost at the trial court level, and that decision was ultimately affirmed by an Illinois intermediate appellate court.

On appeal, the individual plaintiff argued that the right to arbitration was freely assignable and that no magic words were necessary in order to have a valid assignment. The employer, however, compared the collective bargaining agreement to a personal service contract and argued successfully that such an agreement was not assignable due to its personal nature. Specifically, the court stated:

> Where the personal qualities of either party are material to the contract, the contract is not assignable without the assent of both parties. . . . We agree that the personal nature of the roles of each party under the collective bargaining agreement prevents either party from assigning to a third party its right to demand arbitration.[75]

The court viewed the contract language as clear and unambiguous in that under the collective bargaining agreement only the parties could arbitrate. In addition, the court looked to the National Labor Relations Act[76] and concluded that permitting such an assignment would be against the policy of the Act because the union was exclusively recognized under this statute to protect and represent employees.[77] The court further reasoned that other members of the union did not designate this plaintiff to represent them. Thus, the court was understandably concerned with the fact that the decision of the arbitrator may affect employees who may be similarly situated.[78]

However, because this case involved a public sector employer, the National Labor Relations Act did not apply.[79] This judicial error, however, is not material to the issue at hand. This is because at the time of the court's decision, Illinois had a public sector collective bargaining statute that expressed similar policies.[80] Nevertheless, it simply begs the question to state that

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[75] *Id.* at 1241.

[76] 29 U.S.C. §§ 151–69 (2000).

[77] *Martin*, 670 N.E.2d at 1242.

[78] *Id.*

[79] *See supra* note 70.

[80] In Illinois, public employees were granted the right to bargain collectively in 1984. *See* 5 ILL. COMP. STAT. ANN. 315/6 (West 2005); *see generally* Sally J. Whiteside, Robert P. Vogt, Sheryl R. Scott, Comment, *Illinois Public Labor Relations Laws: A Commentary and Analysis,* 60 CHI.-KENT L. REV. 883 (1984) (discussing the

a union cannot assign arbitration because the individual is not a party to the collective bargaining agreement and may not represent the interests of other members whom the union was designated as the exclusive representative. Of course the individual grievant is not a party to the collective bargaining agreement. Otherwise, there would be no need for an assignment. Moreover, the grievant is, of course, seeking to protect his or her own rights. While a decision of an arbitrator may indeed affect the rights of other employees who may be similarly situated, the exclusive representative (the union) did agree to this assignment. Therefore, the analysis utilized by this court is questionable.

B. Padovano v. Borough of East Newark

In *Padovano v. Borough of East Newark*,[81] a discharged police officer filed a demand for arbitration on his own after the union refused to take his case to arbitration. As in *Martin*, the individual was not a party to the collective bargaining agreement and had no right to demand arbitration. The union, however, decided to assign to the individual grievant its right to pursue arbitration.[82] Under the terms of this purported assignment, the individual was responsible for all arbitration costs as well as his own attorney fees. Unlike the assignment provisions set forth in *Martin* and *Dillman*,[83] there was no language releasing the union from its duty of fair representation.

Illinois public sector bargaining statute). As in the private sector, under Illinois law, public sector unions are the exclusive representative of employees. Indeed, Illinois law expressly provides as follows:

> A labor organization designated by the Board as the representative of the majority of public employees in an appropriate unit in accordance with the procedures herein or recognized by a public employer as the representative of the majority of employees in an appropriate unit is the exclusive representative for the employees of such unit for the purpose of collective bargaining with respect to rates of pay, wages, hours and other conditions of employment not excluded by Section 4 of this Act.

5 ILL. COMP. STAT. ANN. 315/6(c) (West 2005). This statutory language was in place at the time of the *Martin* court decision.

[81] 747 A.2d 303 (N.J. Super. Ct. App. Div. 2000).

[82] The decision does not explain why the union did not handle this case itself. As in *Martin*, the union could have determined that the grievance lacked merit or it is possible that the grievant wanted to utilize his own lawyer because he did not have confidence in the union.

[83] For a discussion of *Dillman*, see *infra* notes 87–103 and accompanying text.

The individual employee was successful in the arbitration and was ordered reinstated by an arbitrator. The employee then moved to confirm the arbitration award,[84] and the employer cross-moved to vacate. The court vacated the award and held that the arbitration proceeding was "wholly void" because the arbitrator exceeded his authority by conducting an arbitration that was not in accordance with the collective bargaining agreement. The court viewed the arbitration clause in the collective bargaining agreement as providing a measure of protection to the employer:

> We have already noted that a contract clause restricting the right to pursue arbitration provides a measure of protection to the employer. Permitting the union to assign the right to proceed to arbitration only serves to undermine the employer's protection, however. It allows an employee to proceed to arbitrate a matter the union may have already determined lacks merit and thus exposes the employer to unnecessary cost, expenses and risks. If a union, moreover, could simply assign its rights to a member, it could seek to relieve itself of the hard choices it may confront when fulfilling its duty of fair representation.
>
> In this particular instance, the documents upon which Padovano relies were drafted in such a manner that the PBA assumed no responsibility for any of the expenses of the arbitration; the employer was unable to obtain any corresponding benefits for itself. The unilateral action of the PBA in purporting to assign its rights to Padovano required the Borough to participate in an arbitration that it had contracted to avoid. The PBA should not be permitted to subvert the Borough's contractual rights in such a unilateral manner. We see an analogy to the question presented here in the manner in which the UCC has handled the question whether a party may assign its rights under a contract of sale. Under N.J.S.A. 12A:2-210(2),[85] a party may assign its rights "except where the

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[84] The court did not address the issue whether the employee had standing to appeal the arbitration decision in court. *Dillman* held that a union cannot assign the right to appeal a labor arbitration decision to an individual employee. *See infra* notes 87–103 (discussing assignment of the right to appeal from a labor arbitration). For a discussion of *Martin*, see *supra* notes 72–80.

[85] This section of the Uniform Commercial Code provides:

> Except as otherwise provided in 12A:9–406, unless otherwise agreed, all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or

> assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract." Here, to permit such an assignment could "increase materially the burden" on the employer by creating the potential for a significantly greater number of matters to proceed to arbitration than otherwise might.[86]

The court also looked to *Martin* for guidance in support of its holding, because in that case the union could not assign the right to arbitrate to one of its members.

Padovano reads into a collective bargaining agreement the role of the union as a gate-keeper of claims against the employer, but this commentator is unaware of any such legal principle applicable to unions. The court's analysis is also conclusory in that it does not explain how allowing an individual to arbitrate will materially increase the burden on the employer, particularly when one of the parties to the collective bargaining agreement, the union, agreed to the assignment and may arbitrate the very same claim, absent the assignment.

C. Dillman v. Town of Hooksett

In *Dillman*, the union filed a grievance on behalf of plaintiff Dillman after he was terminated from his position as a firefighter. The union eventually arbitrated the grievance, and the arbitrator found that there was just cause for termination. Dissatisfied with the result, plaintiff Dillman sought to appeal. Rather than file the appeal itself, the union[87] assigned him its right to appeal under New Hampshire's arbitration statute.[88] Thereafter, Dillman brought suit seeking vacatur in state court.

> impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

N.J. STAT. ANN. § 12A:2-210(2) (West 2006).

[86] *Padovano*, 747 A.2d at 308 (citing Vaca v. Sipes, 386 U.S. 171 (1967)) (citation omitted).

[87] Like *Martin* and *Padovano,* the decision of the New Hampshire Supreme Court does not indicate why the union decided not to represent the grievant in the appeal but instead agreed to assign its right to appeal. Presumably, this was because the union concluded that any such appeal lacked merit. It is also possible that the grievant was unhappy with his union representation at the arbitration and, therefore, sought private counsel.

[88] *See infra* note 91.

The employer removed the case to federal court because the complaint alleged federal question jurisdiction.[89]

Once in federal court, the employer moved to dismiss by arguing that the purported assignment was invalid. Because this issue was not resolved under New Hampshire law, the federal district court certified the following question to the Supreme Court of New Hampshire:

> Whether, under New Hampshire law, including N.H. RSA 273-A,[90] an individual public sector union member may be assigned his union's right under N.H. RSA 542:8[91] to seek a vacation, confirmation, correction, or modification of an arbitration award entered in an arbitration conducted pursuant to a collective bargaining agreement between the member's union and his employer.[92]

In holding that a union may not make such an assignment, the court looked to New Hampshire case law,[93] as well as case law from other jurisdictions,[94] which held that individual

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[89] The New Hampshire Supreme Court decision did not indicate what question of federal law was presented. However, on remand, the federal district court indicated that Dillman alleged that his employer violated his right to Due Process under the Fourteenth Amendment. Dillman v. Town of Hooksett, No. 04-cv-482-JM, 2006 U.S. Dist. LEXIS 24422, at *2 (D.N.H. Apr. 11, 2006).

[90] New Hampshire RSA § 273-A is the state Public Employee Relations Act, which governs the relationship between public employers and their employees, including the certification of unions as the exclusive representative of employees. In 1975, this statute was enacted "to foster harmonious and cooperative relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government." Dillman v. Town of Hooksett, 898 A.2d 505, 508 (N.H. 2006).

[91] The New Hampshire Arbitration statute, N.H. RSA § 542:8, provides in relevant part:

> At any time within one year after the award is made any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers.

N.H. REV. STAT. ANN. § 542:8 (West 2006).

[92] *Dillman*, 898 A.2d at 506.

[93] *See* O'Brien v. Curran, 209 A.2d 723, 727 (N.H. 1965) (holding individual plaintiffs may not challenge an arbitration award where the plaintiffs' union, and not the plaintiffs themselves, was the party to the arbitration).

[94] *See* Aloisi v. Lockheed Martin Energy Sys., Inc., 321 F.3d 551, 558 (6th Cir. 2003); Bryant v. Bell Atl. Md., Inc., 288 F.3d 124, 131 (4th Cir. 2002); Cleveland v. Porca Co., 38 F.3d 289, 296–97 (7th Cir. 1994).

grievants do not normally have standing to challenge arbitration awards since they are not a party to the collective bargaining agreement; the parties are the employer and the union. However, the court did recognize that an exception to this standing requirement occurred if the union breached its duty of fair representation.[95] This exception, however, was not applicable because, in return for the assignment from the union, Dillman agreed in writing to surrender his right to claim that the union breached its duty of fair representation.[96]

Dillman argued that there was no statutory or contractual prohibition against the assignment and, therefore, it was valid. He cited to the Restatement (Second) of Contracts, which provides that assignments are valid unless the assignment would materially change the duty of the obligor, the assignment was violative of law or public policy, or the assignment was precluded by the terms of the contract itself.[97]

However, the court held "that public policy considerations preclude the assignment of a union's right to seek judicial review of an arbitration decision to aggrieved individual employees."[98] The court found this public policy in the state's labor relations statute, which regulates the relationship between labor and management.[99] Labor peace is enhanced, according to the court, when employees speak with a single voice. As the court explained:

> Permitting a union to unilaterally assign its right to demand arbitration under a collective bargaining agreement to an individual employee in exchange for a discharge from its duty of fair representation would, potentially, subject a public employer

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[95] *Dillman*, 898 A.2d at 508 (citing *Bryant*, 288 F.3d at 131); Katir v. Columbia. Univ., 15 F.3d 23, 24–25 (2d Cir. 1994)).

[96] *Dillman*, 898 A.2d at 508.

[97] The Restatement (Second) of Contracts provides that assignments of contractual rights are valid unless:

> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, . . . or (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or (c) assignment is validly precluded by contract.

RESTATEMENT (SECOND) OF CONTRACTS § 317 (1981). The court assumed, but did not decide, that the purported assignment involved contractual rights. *Dillman*, 898 A.2d at 508.

[98] *Dillman*, 898 A.2d at 508.

[99] *See supra* note 90.

> to a deluge of grievances and arbitration demands of variable, and perhaps negligible, merit. This would bring with it the attendant reality of dealing directly with multiple individual employees without collective representation, plausibly requiring a greater expenditure of public resources than an employer may have contemplated during negotiations with a union. Such a result could materially increase the burden upon a public employer that has negotiated the terms of a collective bargaining agreement in good faith, while leaving the union insulated from liability to the employees it was organized to represent.[100]

The court did not see any difference between a union's assigning its right to arbitrate from assigning its right to appeal. Neither would, according to the court, advance the statutory labor relations policy of harmonious labor management relations, nor would they protect the public by encouraging the orderly and uninterrupted operation of government.[101] Thus, the court concluded that such a purported assignment would violate this statutory public policy and therefore subdivision section 317(b) of the Restatement (Second) of Contracts. In addition to this public policy concern, the court held that any such assignment would materially increase the burden or risk imposed upon the employer as those terms are used in subdivision section 317(a) of the Restatement (Second) of Contracts.[102]

Though this issue was certainly novel under New Hampshire law, by the time of the New Hampshire Supreme Court decision in *Dillman*, two other courts had addressed virtually identical issues.[103] Unfortunately, the *Dillman* court did not cite to either

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[100] *Dillman*, 898 A.2d at 509.

[101] *Id.*

[102] *See supra* note 97 (quoting the Restatement (Second) of Contracts § 317). After the New Hampshire Supreme Court concluded that the assignment was invalid and answered the certified question in the negative, the case was remanded back to the federal district court, which dismissed on the basis of lack of standing. The district court reasoned:

> Since the New Hampshire Supreme Court has now conclusively determined that the purported assignment of the Union's rights under RSA 542:8 to the Plaintiff is invalid under New Hampshire law, the [c]ourt finds that the Plaintiff does not have standing to bring this lawsuit. The absence of standing presents a constitutional defect that deprives this court, and the New Hampshire state courts, of subject matter jurisdiction.

Dillman v. Town of Hooksett, No. 04-cv-482-JM, 2006 U.S. Dist. LEXIS 24422, at *3–4 (D.N.H. Apr. 11, 2006).

[103] *See* Padovano v. Borough of E. Newark, 747 A.2d 303, 308 (N.J. Super. Ct.

one of these decisions. While a union may indeed have an interest in speaking with one voice, the court ignored the fact that the union, as the exclusive representative of employees, agreed to the assignment in question. The court's public policy analysis is also conclusionary in that it did not explain how this assignment would interfere with harmonious labor management relations.

IV. LABOR UNIONS SHOULD BE PERMITTED TO ASSIGN THE RIGHT TO ARBITRATE

Though not stated expressly, underlying both the *Dillman* and *Martin* decisions appears to be a concern that if unions were permitted to assign the right to arbitrate, unions would be able to buy themselves out of duty of fair representation claims. Additionally, *Dillman* viewed public policy as requiring that unions speak with a single voice. *Martin* expressed these same policy concerns in a different manner. The *Martin* court viewed labor arbitration as a type of personal service contract because unions are certified as the exclusive representative of employees. *Padovano* expressed a different policy concern, that of protecting the employer from having to defend against meritless grievances, which the union itself refused to take.

These are legitimate concerns, but, as with most legal issues, courts need to balance the policy reasons against allowing assignment with those in favor of assignment. It is submitted that this balance comes out in favor of allowing such assignments. This Article comes to this conclusion by next analyzing each of the major policy justifications that underlie the trilogy of labor arbitration assignment decisions.[104]

App. Div. 2000) (holding that union may not assign the right to arbitrate a disciplinary grievance); Martin v. City of O'Fallon, 670 N.E.2d 1238, 1242 (Ill. App. Ct. 1996) (holding a municipality cannot be forced to arbitrate a dispute with an individual employee through an assignment where it only agreed to enter into arbitration with a union).

[104] *See Dillman*, 898 A.2d at 508 ("[P]olicy considerations preclude the assignment of a union's right to seek judicial review of an arbitration decision to aggrieved individual employees."); *Padovano*, 747 A.2d at 308 ("Permitting the union to assign the right to proceed to arbitration only serves to undermine the employer's protection . . . [and] relieve [the union] of the hard choices it may confront when fulfilling its duty of fair representation."); *Martin*, 670 N.E.2d at 1242 ("[I]t is contrary to . . . policy . . . to allow the [u]nion to assign its rights and obligations of collective bargaining to one of its members.").

A. The Individual Employee Is Surrendering His Right to Claim That His or Her Union Breached the Duty of Fair Representation

In two of the three cases which have addressed the assignment of arbitration, the courts were concerned with the fact that the individual expressly acknowledged that the union would be satisfying its duty of fair representation if the assignment was allowed.[105] What these courts have ignored however, is the fact that the individual employees are getting something of great value. They are getting their day in court, if you will. They will have the chance to make their claims before an arbitrator even though the union may think the cases lack merit.

Additionally, the grievance really might be meritorious. The grievant might just be a dissident union member. He might not trust his union or might feel that he could do a better job pro se or by retaining an attorney whom he trusts. The union might not even utilize attorneys in arbitrations, but the grievant might believe that his case deserves one and therefore might desire to retain counsel.[106] More fundamentally, the reality is that grievants have an almost insurmountable hill to climb to establish that the union breached its duty of fair

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[105] *See Martin*, 670 N.E.2d at 1240 ("[P]laintiff released the Union from all representational responsibility regarding the arbitration of his grievance protesting his suspension and discharge.") (internal quotation marks omitted); *Dillman*, 898 A.2d at 508 ("[P]laintiff . . . agreed in writing to surrender his right to bring a claim against the union for breach of the duty of fair representation.").

[106] An individual union member does not have a right to an attorney in labor arbitration. *See, e.g.*, Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483–84 (9th Cir. 1985); Seymour v. Olin Corp., 666 F.2d 202, 209 (5th Cir. 1982); Sales v. YM & YWHA of Wash. Heights and Inwood, Nos. 00 Civ. 8641 & 01 Civ. 1796, 2003 WL 164276, at *9 (S.D.N.Y. Jan. 22, 2003); Mullen v. Bevona, No. 95 Civ. 5838, 1999 WL 974023, at *3 (S.D.N.Y. Oct. 26, 1999); Henry v. Cmty. Res. Ctr., Inc., No. 95 Civ. 5480, 1996 WL 251845, at *8 (S.D.N.Y. May 13, 1996); Hussey v. Operating Engineers Local Union No. 3, 42 Cal. Rptr. 2d 389, 393 (Cal. Ct. App. 1995). If a union chooses to retain an attorney, the attorney is representing the union—not the individual. *See* cases cited *supra* note 51.

Nevertheless, it is important to recognize that some agreements may give the individual the right to retain his own attorney, but they generally provide that the union has the right to be present if the grievant chooses his own counsel. *See*, *e.g.*, Kozura v. Tulpehocken Area Sch. Dist., 791 A.2d 1169, 1175 (Pa. 2002) (citing the agreement between the parties). These types of agreements, however, appear to be rare and are probably utilized mainly in the public sector where the employee might have other statutory or constitutional rights.

representation.[107] Therefore, the individual is not giving up much, but is getting something of great value in return.

Moreover, employers extract releases from employees all the time.[108] Why should the law be different when it is a union receiving the release, as opposed to the employer? Additionally, while there does not appear to be any significant public policy preventing such assignments, if permitting a union to release itself from duty of fair representation lawsuits was a significant concern, perhaps courts could allow unions to make such assignments provided that the union does not also insist on a release from liability.

B. Union Speaking with a Single Voice

Both *Dillman* and *Martin* emphasized the need for the union to speak with a single voice, though *Martin* framed it a bit differently by viewing a labor arbitration as a type of personal service contract, due to the fact that the union is the exclusive representative of employees.[109] While there is no doubt that a union's ability to speak with a single voice is a significant policy concern, the fact of the matter is that it is the union itself agreeing to add more voices by permitting the assignment. Additionally, the individual's interest and the union's interest are often the same, so the identity of the speaker may be immaterial.

The most significant policy concern, however, is that the individual may create precedent that may affect other employees

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[107] *See supra* notes 43–45 and accompanying text (discussing high burden to establish a breach of the duty of fair representation).

[108] *See* Judith Droz Keyes & Douglas J. Farmer, *Settlement of Age Discrimination Claims—The Meaning and Impact of the Older Workers Benefit Protection Act*, 12 LAB. LAW. 261, 261–63 (1996) (discussing releases under the Age Discrimination in Employment Act of 1987); Daniel P. O'Gorman, *A State of Disarray: The "Knowing and Voluntary" Standard for Releasing Claims Under Title VII of the Civil Rights Act of 1964*, 8 U. PA. J. LAB. & EMP. L. 73, 73–79 (2005) (discussing releases under Title VII); *see also* Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 282–83 (2003) (discussing waiver of statutory, constitutional, and contractual claims generally).

[109] *See Martin*, 670 N.E.2d at 1241–42. If the collective bargaining agreement is a personal service contract, the arbitration provision contained in that contract may not be assignable based upon contractual principles that prohibit such assignments. For a discussion of these contractual principles, see *supra* notes 100–02 and accompanying text.

under the collective bargaining agreement.[110] An arbitral interpretation that employees may not come into work late on election day, for example, may affect the rights of other employees, yet the individual grievant does not represent other employees.[111] This concern, however, needs to be understood in context. Specifically, the union consented to allowing that individual to arbitrate a dispute that might affect other employees. Thus, if the union is concerned about creating precedent, it does not have to agree to the assignment.

C. The Need to Protect the Employer

The public policy expressed in *Padovano* and *Dillman* was the protection of employer rights. If a union did not want to go forward with arbitration, these courts were concerned that allowing an assignment would saddle an employer with having to defend cases that lacked merit. While there certainly is some truth to this proposition, as noted above, there may be times when an individual prefers his own representative for reasons that have nothing to do with the merits of the underlying case.[112]

If the union refuses to arbitrate, however, that employee might file a duty of fair representation case against his or her union, employer, or both.[113] Generally, it is the employer who has the deep pocket, and for that reason it is typically named as a party in duty of fair representation litigation.[114] If the matter is in litigation, the employer will likely have to litigate the breach of contract issue in the context of the hybrid duty of fair representation claim.[115] If this occurs, the employer will be

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[110] Unlike courts, which are bound by other judicial decisions under the doctrine of *stare decisis*, labor arbitrators are not bound by decisions of other arbitrators. *See* DISCIPLINE AND DISCHARGE IN ARBITRATION 486–88 (Norman Brand ed., 1998); FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 574–76 (Alan M. Ruben ed., 6th ed. 2003). A well-reasoned prior arbitration decision may be persuasive authority, but it is not controlling. *See* ELKOURI & ELKOURI, *supra*, at 577.

[111] Rather, the union is the exclusive representative of employees. *See supra* notes 22–25 and accompanying text (discussing the exclusivity principle).

[112] *See supra* notes 73, 82, 87.

[113] *See supra* Part I (outlining the history and application of the duty of fair representation).

[114] *See supra* note 35.

[115] Duty of fair representation claims are hybrid causes of action. The claim against the employer is for breach of contract (the collective bargaining agreement) and the claim against the union involves breach of duty. *See supra* notes 34–35 and

litigating this issue in court, which is generally more costly than arbitration. More fundamentally, without the right to assign, the union may arbitrate the grievance anyway. These facts mitigate the policy concerns raised by the assignment.

The *Padovano* court viewed unions as a sort of gatekeeper to prevent the prosecution of grievances that lack merit. That is not the role of unions, however. They exist to bargain over the terms and conditions of their members' employment. They also enforce contractual rights through arbitration. All an assignment would be doing is allowing an individual to step into the shoes of the union for that one particular case which the union voluntarily assigned to him.

V. PRINCIPLES OF CONTRACT LAW, LABOR ARBITRATION, AND COLLECTIVE BARGAINING SUPPORT BOTH THE RIGHT TO ASSIGN ARBITRATION AND THE RIGHT TO APPEAL THEREFROM

Historically, a contractual right was considered to be a chose in action ("thing in action"), which, at common law, was not freely transferable.[116] A debt was usually involved that was considered personal to the creditor, and such a rule was defensible in a society where sanctions for non-compliance were severe and credit played only a minor role.[117] By contrast, today most contracts are freely assignable. If the law were otherwise, our modern economy, which relies on credit, simply could not exist.[118] Indeed, the modern-day law of contracts favors[119]

accompanying text.

[116] *See* E. ALLAN FARNSWORTH, CONTRACTS §§ 11.1, 11.2 (3d ed. 2004).

[117] *See id.* at § 11.2.

[118] *See id.*

[119] *See* 6 AM. JUR. 2D *Assignments* § 17 (2006) ("Contract rights may be freely assigned unless an assignment would add to or materially alter the obligor's duty of risk, or there is a provision in the contract restricting its assignability, or the assignment would violate a statute."); Peterson v. D.C. Lottery & Charitable Games & Control Bd., 673 A.2d 664, 667 (D.C. 1996) (referring to the presumption favoring the free assignment of contracts); s*ee also* TWA v. Am. Coupon Exch., Inc., 913 F.2d 676, 685 (9th Cir. 1990) (stating that there is a presumption in favor of assignment of contracts.); Scott v. Fox Bros. Enters., Inc., 667 P.2d 773, 774 (Colo. Ct. App. 1983) (noting that the law favors assignment of contractual rights).

The right to assign contracts, however, is not absolute. Assignments that are against public policy, that may adversely affect the obligor, materially change the obligor's duty, materially increase the obligor's burden or risk, or that are prohibited by contract are not enforceable. *See* CONTRACTS, *supra* note 116, § 11.4; s*ee also* RESTATEMENT (SECOND) OF CONTRACTS § 317 (1981) (stating that contracts are assignable unless: (a) it "would materially change the duty of the obligor" or

assignment.[120] This Article maintains that labor contracts that contain arbitration provisions should be treated in a similar manner.

Outside the area of labor law, assignments of contractual arbitration provisions have been routinely allowed. Courts have rejected claims that the obligation to arbitrate is limited to those who personally signed the contract.[121] For example, in *International Transactions Ltd. v. Embotelladora Agral*

"materially increase the burden or risk imposed on him;" (b) "the assignment is forbidden by statute" or public policy; or (c) the assignment is "precluded by the contract").

[120] In contract law, there is a technical distinction between the "assignment of rights" and the "delegation of performance of duties." The former involves the obligee as assignor transferring rights to an assignee. With regard to a delegation, the obligor empowers a delegate to perform a duty that he owes to another. *See* CONTRACTS, *supra* note 116, § 11.1. Although parties to contracts sometimes do not distinguish between an assignment and a delegation, under the law of contracts, the difference can be significant in that a delegation does not always relieve the delegating party of its duty under the contract. Otherwise, an obligor could discharge his duties by delegating to an insolvent individual. *See id.* § 11.10. Like assignments, certain performances are considered "non-delegable," such as when the performance at issue is violative of public policy or when the contractual agreement does not permit performance to be delegable. *See id.* The issue most frequently occurs when the obligee claims *delectus personae* or that "the choice of the person" is of critical importance under the contract. *Id.*

For purposes of examining the issue of whether the right to arbitrate a labor grievance or the right to appeal a labor arbitration can be assigned, as those terms are used in this work, the nomenclature used ("assignment" or "delegation") appears to be immaterial. None of the three cases which have addressed assignment in the context of labor arbitration, see *supra* note 12, have discussed delegation. This is not particularly suprising, as courts often fail to distinguish between delegations and assignments. CONTRACTS, *supra* note 116, § 11.10. Regardless of what language is used, public policy should either permit this type of assignment or prohibit it.

[121] *See* Kentucky River Mills v. Jackson, 206 F.2d 111, 120 (6th Cir. 1953); Environmental Barrier Co. v. Slurry Sys., Inc., No. 06 C 0212, 2006 U.S. Dist. LEXIS 76050, at *10–12 (N.D. Ill. Sept. 29, 2006); Int'l Transactions Ltd. v. Embotelladora Agral Regiomontana, S.A., NO. 3:01-CV-1140-G, ECF, 2006 U.S. Dist. LEXIS 53748, at *19–21 (N.D. Tx. Aug. 3, 2006); Smith v. Cumberland Group, Ltd., 687 A.2d 1167, 1173 (Pa. Super. Ct. 1997) ("[A]rbitration clauses are assignable as part of a contract."); *see also* Asset Allocation & Mgmt. Co. v. W. Employers Ins. Co., 892 F.2d 566, 574 (7th Cir. 1989) (stating that the assignee to the contract is substituted "in the arbitration clause as in the contract's other clauses"); A/S Custodia v. Lessin Int'l, Inc., 503 F.2d 318, 320 (2d Cir. 1974); AM Property Holding Corp. v. Local 32B-32J Serv. Employees Int'l Union, No. 03 Civ. 3261, 2003 WL 21277111, at *4 (S.D.N.Y. June 2, 2003); Certain Underwriters at Lloyd's London v. Colonial Penn Ins. Co., No. 97 Civ. 767, 1997 WL 316459, at *2 (S.D.N.Y. June 11, 1997); Elzinga & Volkers, Inc. v. LSSC Corp., 852 F. Supp. 681, 690 (N.D. Ind. 1994), *rev'd on other grounds*, 47 F.3d 879 (7th Cir. 1995).

Regiomontana, S.A.,[122] the court held that parties to a commercial arbitration can assign an arbitration award because an arbitration award is a transferable property interest. Additionally, the court reasoned that nothing in the arbitration statute being reviewed—the Federal Arbitration Act—prohibited assignment. Similarly, nothing in the National Labor Relations Act or any state public sector labor relations statute expressly prohibits assignment.[123]

Additionally, outside the context of labor arbitration, two California intermediate appellate courts have recognized that employees can assign their statutory rights to their union.[124] If employees can make assignments to unions, it follows that unions should be able to make assignments to employees. One court did not even see any legal restriction with respect to such assignments because it simply examined whether the assigment agreement encompassed the dispute at issue over unpaid prevailing wages required under state law.[125] The other California intermediate court simply reasoned, in the absence of an express statutory prohibition, employees can assign statutory rights to unions because state contract law freely permits assignment.[126]

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[122] NO. 3:01-CV-1140-G, ECF, 2006 U.S. Dist. LEXIS 53748 (N.D. Tx. Aug. 3, 2006).

[123] There is precedent under another employment statute to prohibit assignment. The Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1056(d)(1), provides: "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." *See also* I.R.C. § 401(a)(13) (2000) (imposing similar prohibition on assignment as a condition of plan's receiving tax qualification); John H. Langbein, SUSAN J. STABILE, BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 268 (4th ed. 2006) (describing prohibition on assignment under pension plans as a "bedrock principle").

The ability to arbitrate a dispute is a type of benefit under a collective bargaining agreement, though this benefit is, of course, not a plan regulated by ERISA. If Congress wanted to prohibit assignments of the right to arbitrate, they surely could have, as they have done so with respect to ERISA. This provides further support for the proposition that labor arbitration agreements should be freely assignable.

[124] Road Sprinkler Fitters Local Union No. 669 v. G & G Fire Sprinklers, Inc., 125 Cal. Rptr. 2d 804 (Ct. App. 3rd App. Dist. 2002) (assignment involving state statutory prevailing wages); Amalgamated Transit Union, Local 1756 v. Superior Court, No. B191879, 2007 WL 602519 (Cal. App. 2d Feb. 28, 2007) (assignment involving compensation for meal and rest periods required under state law).

[125] *Road Sprinkler Fitters*, 125 Cal. Rptr. at 810.

[126] *Amalgamated Transit Union*, 2007 WL 602519, at *5. It should be pointed out that Amalgamated Transit Union concerned the assignment of state statutory

While this Article maintains that assignment of labor arbitration should be freely permitted, it should be recognized that labor arbitration is different from ordinary arbitration. Because it is different, proponents of prohibition of assignment might use these differences to claim that a different rule in labor arbitration is appropriate. It is submitted that precisely because of these differences assignment of labor arbitration and any resulting appeal should be freely permitted. In any event, labor arbitration should not be treated differently than ordinary arbitration.

Labor arbitration[127] is different from ordinary commercial arbitration for several reasons. The law surrounding labor arbitration was developed in order to avoid industrial strife, as well as litigation. In addition, as the Supreme Court recognized, "[a] collective bargaining agreement is an effort to erect a system of industrial self-government."[128] The processing of grievances lies "at the very heart of . . . industrial self-government."[129] Judicial decisions involving labor arbitration also have recognized that courts were not the best judges of the common law of the shop.[130]

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rights and in that context the court drew a distinction between assignment of a cause of action (which is permitted) and assignment of the mere right to sue in a representative capacity (which is not permitted). This aspect of the case does not appear germane to whether the right to arbitrate a labor grievance and the right to appeal from a labor arbitration decision can be assigned because this issue does not involve a statutory issue. In any event, since the union is seeking to assign its right to arbitrate and appeal from that arbitration under the applicable collective bargaining agreement, the union is essentially assigning a cause of action.

[127] When I refer to arbitration, I am referring to binding arbitration, which is essentially final unless there is some type of fraud or corruption involved. *See* MLB Players Assoc. v. Garvey, 532 U.S. 504, 509 (2001) ("When an arbitrator resolves disputes . . . and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award.") (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 39 (1987)). This needs to be contrasted with "advisory" or "non-binding" arbitration, largely used in the public sector, where arbitrators issue only advisory awards. *See* Rubinstein, *supra* note 4, at 421 (discussing fundamentals of advisory arbitration).

[128] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960).

[129] *Id.* at 581.

[130] *See* Rubinstein, *supra* note 2, at 256–63 (reviewing history of labor arbitration extensively and contrasting labor arbitration with commercial arbitration). It can hardly be questioned that the labor arbitration system works in that less than one percent of labor arbitration awards are appealed. *Id.* at 255–56 (citing MICHAEL C. HARPER, SAMUEL ESTREICHER & JOAN FLYNN, LABOR LAW: CASES AND MATERIALS 835 (5th ed. 2003)).

Collective bargaining agreements are also different from ordinary contracts because there is an element of compulsion, in that employers and unions are compelled by law to bargain in good faith to the exclusion of other unions.[131] The parties to this collective agreement are also repeat players.[132]

These doctrinal differences further support the argument that the right to arbitrate or appeal a labor dispute could be assigned. Precisely because the parties are in a continuing relationship and renegotiate the collective bargaining agreement every few years, assignment should be freely permitted. If the parties, or more specifically the employer, has a serious problem with the concept of assignment, he has the opportunity to try to change it through negotiation. The differences between labor arbitration and ordinary arbitration have not been recognized in the trilogy of cases that has forbidden assignment of labor arbitration.[133]

It is submitted that the benefits of allowing assignment outweigh its negatives. These benefits include providing the employee with his or her day in court, responding to the desires of union members, eliminating the risk of duty of fair representation litigation against the union, the employer, or both, and possibly reinstating an employee to his job. Each of the policy justifications used by the trilogy of labor assignment cases—surrendering the right to bring a duty of fair representation claim, the union's need to speak with a single voice, and the need to protect the employer from baseless arbitration—rests on questionable legal principles.[134]

More fundamentally, because the union is the exclusive representative and because it represents the collective, it may choose not to assign certain arbitrations. In this manner, the rights of other employees are considered. Additionally, if the

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[131] *Id.* at 261.

[132] The fact that union and management renegotiate collective bargaining agreements gives parties who are unhappy with a labor arbitration decision the opportunity to effectively overrule it through incorporating new language in a subsequent agreement. However, it does not follow that the parties (union and management) will be able to reach an agreement during negotiations. Collective bargaining often involves hard choices and the use of economic weapons such as strikes and lockouts. In a sense, this economic power and economic bargaining is what labor law is about.

[133] For the cases themselves, see *supra* note 12.

[134] *See* discussion *supra* Part IV, A.–C.

parties to a collective bargaining agreement want to prevent such arbitral assignments, they are free to bargain for this language during contract negotiations. Absent such language, it is submitted that the default rule should be that unions can freely make these assignments.

CONCLUSION

This author is amazed with the dearth of authority, judicial or academic, discussing the issue of whether the right to arbitrate a labor matter could be assigned to an individual employee, who after all is the union member and the one who in all probability stands to be directly affected by the decision to arbitrate or to appeal the arbitration.

Perhaps the paucity of authority is due to the fact that most unions and employers could not imagine that assignment of labor arbitration or assignment of the right to appeal from labor arbitration presented any legal issue. Perhaps it is due to the fact that when unions are faced with a grievant who does not want union representation, the employer is unaware that counsel who is appearing has not been retained by the union. Or perhaps it is due to the fact that many unions will enter into a type of co-counsel arrangement where they stand idle at the arbitration but allow the grievant's attorney to proceed. No matter what the cause for the lack of authority, it is hoped that this Article will contribute to the development of this important area of law.

The trilogy of cases that have been decided have given too much weight to the fact that an individual may be giving up his right to file a duty of fair representation claim, to the interest of a union's speaking with a single voice, and to the need to protect the employer. When these policy concerns are seriously examined, they are outweighed by the benefits in permitting an individual to have his or her day in court and in virtually eliminating the prospect of duty of fair representation litigation against both the employer and the union. Though in one sense the arbitration will be carried out by a single individual who does not represent other employees, in another sense that individual is indeed carrying out the desires of the collective group of employees because the union authorized the assignment.

Moreover, commercial contracts that contain arbitration clauses have generally allowed the assignment of arbitration. While labor arbitration is different from other forms of

arbitration, these differences actually support allowing assignments. The parties to a labor contract are involved in a continuing relationship. Therefore, if one party to the agreement does not want arbitration to be assignable, he or she has the opportunity to bargain for such a provision during the next round of collective bargaining negotiations. Stated somewhat differently, there should be a type of presumption, similar to that utilized under the Restatement (Second) of Contracts, in favor of the assignment of labor arbitration and the right to appeal from labor arbitration absent express language in the collective bargaining agreement prohibiting it.