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Union Liability in Fair Representation Suits

Robert Jones
Notre Dame Law School, rjones1@nd.edu

institutional discrimination and that, as the Court proclaimed in *Grace*, "the conciliation process of Title VII and the collective bargaining process [would] complement each other, rather than conflict."[48]

2. Union Liability in Fair Representation Suits. — In a suit initiated by an aggrieved employee charging her employer with wrongful discharge and her union with a breach of its duty of fair representation, a court confronts the issue whether and how liability should be apportioned between the union and the employer. Because the fear of adverse damage awards is an important determinant of the parties' behavior within the grievance structure, the manner of apportioning liability in such "hybrid"[1] cases has potentially far-reaching consequences for the integrity of the grievance process. Lower courts have generally resolved the troublesome question of apportionment by holding employers solely liable for backpay — the largest portion of the damages — and unions liable only for court costs and attorneys' fees.[2] Last Term, however, in *Bowen v. United States Postal Service*,[3] the Supreme Court squarely held that a union may be found liable for the portion of backpay damages attributable to its wrongful refusal to arbitrate grievances.

Charles Bowen, a United States Postal Service employee, was discharged in 1976 after an altercation with a fellow employee. He subsequently filed a grievance with his union, the American Postal Workers Union, AFL-CIO, which processed the grievance through three of the four steps of its grievance procedure but declined to take the grievance to arbitration.[4] Upon the union's dismissal of his grievance, Bowen filed suit in federal district court against the union and the employer. The court entered judgment for Bowen against both defendants on the basis of an advisory jury's verdict that the Postal Service had violated the collective bargaining agreement by discharging Bowen without just cause and that the union had violated its duty of fair representation by handling his grievance in "an arbitrary and perfunctory manner."[5] Finding that Bowen would have been rein-

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[48] 103 S. Ct. at 2186.

[1] In a hybrid suit, the aggrieved employee sues both the union and the employer. The employer is charged with violating the collective agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (Supp. V 1981); the union is charged with violating its duty of fair representation (first articulated by the Supreme Court in Steele v. Louisville & N.R.R., 323 U.S. 192 (1944)) by failing to pursue the employee's grievance properly.

[2] *See infra* notes 10 & 17.

[3] 103 S. Ct. 588 (1983).

[4] *See id.* at 590–91; Bowen v. United States Postal Serv., 642 F.2d 79, 84 (4th Cir. 1981) (Murnaghan, J., dissenting).

[5] Bowen v. United States Postal Serv., 470 F. Supp. 1127, 1129 (W.D. Va. 1979).

stated but for the union's failure to take his grievance to arbitration,[6] the court ordered the defendants to reimburse Bowen in the amount of $52,954 for lost benefits and wages. Apportioning the award between the union and the employer by estimating the date on which Bowen would have been reinstated had the union taken his grievance to arbitration, the court further ordered that $30,000 of the award be paid by the union and $22,954 by the employer.[7] On appeal by both defendants, the Court of Appeals for the Fourth Circuit upheld the district court's factual findings, but overturned the damage award against the union. The court of appeals held as a matter of law that no part of the backpay could be charged against the union because "Bowen's compensation was at all times payable only by the Service."[8]

The Supreme Court reviewed the Fourth Circuit's decision against the background of *Vaca v. Sipes*,[9] the landmark fair representation case in which the Court, more than fifteen years previously, had addressed the issue of apportionment. Although the facts of *Vaca* strongly suggest that the Court had intended to insulate the union entirely from backpay liability,[10] ambiguous language in the majority opinion left room for a reading under which the union could be ordered to assume a portion of that liability.[11] In *Bowen*, over a sharp dissent by *Vaca*'s author,[12] the Court read *Vaca* to authorize backpay awards against unions.

Although both the majority and the dissent in *Bowen* discussed *Vaca* at length, the *Bowen* opinions were grounded primarily on policy considerations. In fact, although arguing for sharply differing results, both sides drew upon the same concerns: fairness, the role of contract doctrine in the collective bargaining system, and the health of the

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[6] *Id.*

[7] *Id.* at 1131.

[8] Bowen v. United States Postal Serv., 642 F.2d 79, 82 (4th Cir. 1981).

[9] 386 U.S. 171, 197 (1967).

[10] *See* 103 S. Ct. at 601–02 (White, J., dissenting in relevant part). *But see* 103 S. Ct. at 596 n.13 (arguing that the account of the facts in *Vaca* was "not sufficiently clear" to allow the Court to determine in retrospect the portion of damages attributable to each party).

Courts of appeals construing *Vaca* and its Supreme Court progeny have generally interpreted *Vaca* to prohibit union liability for backpay. *See id.* at 593 n.8, 599 n.1. The majority and the dissent sharply disputed the consistency of the decisions by circuit courts after *Vaca*. Whereas Justice Powell's majority opinion quoted dicta from several courts of appeals indicating the possibility that unions could be liable for backpay damages, *see id.* at 593 n.8, Justice White's dissent pointed out that no court of appeals had ever actually awarded backpay against a union that had not affirmatively caused the wrongful discharge, *see id.* at 599 n.1 (White, J., dissenting in relevant part).

[11] *See Vaca*, 386 U.S. at 197–98. *Compare* 103 S. Ct. at 593, 595–96 (arguing that *Vaca*'s language is consistent with backpay apportionment), *with id.* at 601–02 (White, J., dissenting in relevant part) (arguing that *Vaca*'s language, as amplified in Czosek v. O'Mara, 397 U.S. 25, 29 (1970), is consistent with a rule against apportionment).

[12] *See* 103 S. Ct. at 600–02 (White, J., dissenting in relevant part).

grievance process. Justice Powell, writing for the majority,[13] asserted that considerations of fairness dictated that the union be liable for backpay accruing after the hypothetical arbitration date. He emphasized that it would be "unjust to require the employer to bear the increase in the damages caused by the union's wrongful conduct."[14] In dissent,[15] Justice White countered that damages on the order of those assessed against the union in *Bowen* were far out of proportion to the union's comparative culpability; the union should not be held liable for backpay damages greater than those awarded against the employer, given that the employer remains a "but for" cause of all such damages.[16]

With regard to the role of contract doctrine in fair representation suits, Justice White's dissent argued that the employer should be held exclusively liable for backpay according to "the traditional rule of contract law that a breaching defendant must pay damages equivalent to the total harm suffered."[17] Justice Powell responded that such a simple contractual analysis ignores the complex "relationships and interests" created by the collective bargaining system.[18] Under collective bargaining agreements containing arbitration clauses,[19] unions play a "pivotal role" in the grievance process because of their generally exclusive right to initiate grievances, and they have a duty to exercise

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[13] Chief Justice Burger and Justices Brennan, Stevens, and O'Connor joined in the majority opinion.

[14] 103 S. Ct. at 595 (footnote omitted). Although the Postal Workers Union was held liable for all post-arbitration-date backpay in *Bowen*, the majority indicated that its holding did not require such a result. The majority observed in a footnote that "the union would have the option, if it realized [after the arbitration deadline passed that] it had committed an arguable breach of duty, to bring its default to the employer's attention. Our holding today would not prevent a jury from taking such action into account." *Id.* at 597 n.15. This rule, which at first appears to provide unions with a ready means of limiting *Bowen* liability, is nevertheless unlikely to reduce significantly the incentives that *Bowen* gives unions to arbitrate additional grievances. The union would remain liable for backpay accruing between the arbitration deadline and the union's notification to the employer of a newfound desire to arbitrate. More importantly, a union could not be certain that a jury would take that notification into account or, if the jury did, that it would absolve the union entirely of liability.

[15] Justices Marshall and Blackmun joined in Justice White's dissent in its entirety. Justice Rehnquist joined the portions of the dissent that dealt with the apportionment of backpay liability between the union and the employer.

[16] 103 S. Ct. at 603–04 (White, J., dissenting in relevant part).

[17] *Id.* at 603. Justice White stated that, when the union does not affirmatively induce the employer to commit the wrongful discharge, the union is liable only for attorneys' fees, court costs, and other such damages "to the extent that its misconduct 'add[s] to the difficulty and expense of collecting from the employer.'" *Id.* at 602 (quoting Czosek v. O'Mara, 397 U.S. 25, 29 (1970)).

[18] 103 S. Ct. at 593–94.

[19] Approximately 97% of all collective bargaining agreements contain such provisions. *See, e.g.*, 2 COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) No. 990, at 51:5 (May 12, 1983) (sample of 400 agreements in various industries).

that right responsibly.[20] Although Justice Powell conceded that unions owe this duty of fair representation primarily to individual employees, he asserted that the employer should be able to rely on a union's decision not to pursue an employee's grievance.[21] Justice White, however, argued that in fashioning such a reliance interest, the majority had violated the Court's longstanding rule against reading implied terms into the collective bargaining agreement.[22] The employer that wishes to be indemnified against backpay liability, according to Justice White, should have to bargain with the union for such protection.

Justice Powell further claimed that apportionment of damages is essential to effectuating the national labor policy of ensuring that the grievance procedure provides the "uniform and exclusive method for [the] orderly settlement of employee grievances."[23] Placing total backpay liability on employers, Justice Powell argued, not only would weaken unions' incentives to comply with the grievance procedure, but also might reduce employers' willingness to enter into arbitration clauses as they are customarily written.[24] In reply, Justice White pointed out that the majority's rule may make *unions* unwilling to enter into the typical arbitration clause.[25] More importantly, Justice White argued, the majority's rule, ostensibly designed to protect the grievance process, may actually "impair[] the ability of the grievance machinery to provide for orderly dispute resolution" by causing unions to take many unmeritorious grievances to arbitration in order to avoid backpay liability for breach of duty.[26] Unions need no additional incentive to process valid grievances, according to Justice White, because adequate incentives are already provided by the potentially substantial fees and costs for which unions have long been liable in fair representation cases.[27]

As the dissent recognized, the Court's decision in *Bowen* does more than merely apportion damages: it threatens the integrity of the grievance process by giving unions an incentive to congest arbitration machinery with unmeritorious grievances. Such a result would not only defeat the important national labor policy of settling grievances before arbitration,[28] but would also jeopardize the efficiency of the arbitration process itself and render grievance negotiation a futile and perhaps even counterproductive activity. Thus, although the majority

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[20] 103 S. Ct. at 596–97.

[21] *Id.* at 597.

[22] *Id.* at 604–05 (White, J., dissenting in relevant part).

[23] 103 S. Ct. at 597 (quoting Clayton v. International Union, United Auto., Aerospace & Agric. Implement Workers, 451 U.S. 679, 686 (1981)).

[24] *Id.*

[25] *Id.* at 605.

[26] *Id.* The majority opinion failed to acknowledge this threat.

[27] *Id.* at 602 n.6.

[28] *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 191 (1967).

emphasized the "fundamental" importance of the grievance procedure to federal labor policy,[29] the Court's new approach may serve more to undermine than to strengthen the grievance process.

The incentives for unions to overload the arbitration machinery derive less from the mere possibility of backpay liability than from the unpredictability of the juries that often determine this liability.[30] Unions fear that juries, out of antiunion animus, sympathy for unemployed grievants, or simply ignorance of the realities of labor relations, may find breaches of duty in cases in which unions' refusals to arbitrate are based on valid considerations.[31] Even unbiased juries may erroneously find unions liable in hybrid suits because of the difficulty of separating contract claims from fair representation claims. In theory, juries are required to base their fair representation decisions on assessments of the reasonableness or good faith of union actions and not on independent judgments of the merits of a grievance.[32] In practice, however, it is difficult for a jury to distinguish the two inquiries.[33] Fear of unpredictable jury verdicts caused unions to send some unmeritorious claims to arbitration even before *Bowen*,[34] but

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[29] 103 S. Ct. at 596–97.

[30] Although fair representation cases are frequently tried to juries, the right to a jury trial in such cases has not been firmly established. *Compare* Rowan v. Howard Sober, Inc., 384 F. Supp. 1121, 1125 (E.D. Mich. 1974) (fair representation issues are triable to a jury), *with* Acheson v. Bottlers Local 896, 83 L.R.R.M. (BNA) 2845, 2846 (N.D. Cal. 1973) (no right to jury trial because of equitable nature of fair representation claims), *aff'd on other grounds sub. nom.* Acheson v. Falstaff Brewing Corp., 523 F.2d 1327 (9th Cir. 1975). *See generally* 2 THE DEVELOPING LABOR LAW 1306–07 (C. Morris 2d ed. 1983) (citing cases that conflict on jury right). The influence of juries in fair representation cases actually extends beyond the boundaries of any jury right, because juries are sometimes used in an advisory capacity even when the parties have no jury right. In *Bowen* itself, the district court employed an advisory jury and adopted its findings and verdict in every respect. *See supra* p. 278.

[31] In *Vaca*, for example, the jury found that the union had acted "arbitrarily, capriciously, and without just or reasonable reason or cause" in refusing to arbitrate a grievance for a health-related discharge, even though the union based its decision on the opinion of a medical specialist — chosen by the employee — that the employee was not only unfit for work, but also ill enough to qualify for total Social Security disability benefits. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 701 (1973). Although the Supreme Court ultimately overturned the jury's verdict, *see* Vaca v. Sipes, 386 U.S. 171, 188–89 (1967), that verdict remains significant as an example of a jury's harsh assessment of apparently reasonable union action.

[32] *See Vaca*, 386 U.S. at 192–93. A union is justified in dismissing a grievance that is later found meritorious if the union believes in good faith that the grievant has only a slight chance of prevailing in arbitration. *See, e.g.*, Buchanan v. NLRB, 597 F.2d 388, 394–95 (4th Cir. 1979); Shadday v. International Harvester, 112 L.R.R.M. (BNA) 3439, 3441–42 (S.D. Ind. 1983).

[33] *See* Feller, *supra* note 31, at 815. In *Bowen* itself, the employee based his case primarily upon a controversial expert witness whose opinion that the union had breached its duty was apparently founded in part on her view of the merits of the employee's claim. *See* Bowen v. United States Postal Serv., 642 F.2d 79, 82 (4th Cir. 1981); *id.* at 84 (Murnaghan, J., dissenting).

[34] *Cf.* Asher, *Comment*, 27 NAT'L ACAD. ARB. PROC. 31, 36–37 (1975) (stating that fear of

the pressure to do so has greatly increased now that juries can award much larger verdicts against unions.[35]

Serious harm to the grievance process may result if unions do feel compelled to push unmeritorious grievances to arbitration. Increases in the number of claims and in the "legalization" of the arbitration process have already added to the cost and length of grievance arbitration;[36] the *Bowen* decision may exacerbate the problem. More importantly, the frame of reference for grievance negotiations is supposed to be the anticipated judgment of arbitrators. The ability to predict arbitral decisions with some certainty — an ability founded on common knowledge of arbitrators and the "law of the shop"[37] — allows parties to fulfill the important policy of settling grievances at early stages of the grievance process. That ability has now been severely hampered. Unions may often be unwilling to settle early, because employers' arguments that particular grievances have no chance of success in arbitration will carry little weight in comparison with union fears that juries will find merit in apparently frivolous claims. Moreover, because they may feel compelled to claim that all grievances are meritorious in order to ward off the threat of *Bowen* liability,[38] unions will lose credibility with employers and arbitrators alike, and in doing so they may well prejudice even valid claims.

Because neither the majority nor the dissent acknowledged the serious problem that the jury poses in fair representation suits, neither opinion considered alternative solutions that might have deemphasized the jury's role without compromising major policy concerns. Under one such alternative approach — which *Bowen* neither examined nor foreclosed — a court would endeavor to lessen the jury threat by limiting the employee's remedy against the union to an order compel-

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courts' disposition of unfair representation claims caused unions to press unmeritorious grievances to arbitration); Rubenstein, *Comment*, 32 NAT'L ACAD. ARB. PROC. 47 (1980) (same).

[35] The uncertainty created by juries is exacerbated by the Court's failure to articulate a clear standard of union liability in fair representation cases. The Court has not considered the standard of liability since *Vaca*, in which it stated that a grievant must prove that the union's conduct is "arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. The courts of appeals have differed in their interpretations of the standard. *Compare* Dober v. Roadway Express, Inc., 707 F.2d 292, 294 (7th Cir. 1983) (breach of duty requires "intentional misconduct" by union), *with* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1088–90 (9th Cir. 1978) (unintentional acts or omissions may constitute breach of union's duty). *See generally* 2 THE DEVELOPING LABOR LAW, *supra* note 30, at 1322–25 (describing various standards applied in courts of appeals).

[36] *See, e.g.*, Bowers, Seeber & Stallworth, *Grievance Mediation: A Route to Resolution for the Cost-Conscious 1980s*, 33 LAB. L.J. 459, 459 (1982); Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U.L. REV. 270, 274–75 (1982).

[37] *See* Cox, *Reflections upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1512 (1959).

[38] The duty of fair representation requires the union not only to press valid grievances to arbitration, but also to represent the grievant fairly throughout arbitration. *See, e.g.*, Miller v. Gateway Transp. Co., 616 F.2d 272, 276–77 (7th Cir. 1980).

ling arbitration of the contract claim. After a jury verdict that the union violated its duty of fair representation, the court would order arbitration rather than immediately give force to the jury's backpay apportionment. The court would enter judgment on the jury's backpay verdict only if an arbitrator subsequently found the contract claim meritorious.[39] This solution, which has been advocated by at least one prominent labor commentator[40] and considered by the Court,[41] would require unions to bear backpay liability in appropriate situations without remitting the determination of the merits of particular grievances to the vagaries of the jury room.[42] Unions would not fear dismissing unmeritorious claims if they could rely on determinations by knowledgeable arbitrators. The likelihood that the grievance machinery would become congested would therefore be substantially reduced.

Although the congestion problem looms as one of the principal dangers of the *Bowen* decision, the considerable costs of arbitration provide unions with an incentive to prevent an increase in the number of cases arbitrated.[43] Thus, unions will doubtless develop strategies in response to *Bowen* that will both insulate them to the greatest possible extent from liability and at the same time alleviate the pressure to send a large number of unmeritorious cases mechanically to arbitration. To this end, unions are likely to explore possibilities of altering their internal grievance procedures or establishing grievance mediation programs.[44]

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[39] One problem with such a solution is that unions might inadequately represent the grievant in the ensuing arbitration. That problem would disappear, however, if the grievant were permitted to provide her own counsel for arbitration. *See* Feller, *supra* note 31, at 816.

[40] *See id.* at 813–17.

[41] *See* Vaca v. Sipes, 386 U.S. 171, 196 (1967). Although Justice White recognized in *Vaca* that an order compelling arbitration is an available remedy in fair representation cases, he stated that there is no reason "inflexibly to require arbitration in all cases," because an arbitrator may have no power under the bargaining agreement to award damages against the union and because the arbitrable issues "may be substantially resolved in the course of trying the fair representation controversy." *Id.* Neither of these arguments seems persuasive in light of *Bowen*. First, unions would probably be happy to grant arbitrators the power to award damages against the union if that concession would take such power out of the hands of juries. Second, the efficiency rationale advanced by Justice White is now counterbalanced by the threat that *Bowen* poses to the health of the grievance process.

[42] Because juries would be unable to assess backpay damages without the concurrence of an arbitrator, unions would have little reason to fear unreasonable jury verdicts.

[43] This argument assumes that unions would continue to bear all arbitration costs for their employees. In response to *Bowen*, a union might sacrifice its exclusive right to initiate arbitration and might seek a collective bargaining term that would grant employees the right to press discharge grievances to arbitration regardless of the union's assessment of the merits. *Cf.* P. WEILER, RECONCILABLE DIFFERENCES 137–39 (1980) (advocating such a system on fairness grounds). Employees pressing claims the union considered unmeritorious might be required to bear their own arbitration costs.

[44] Alternatively, the union could bargain for a clause requiring backpay indemnification from the employer.

One novel grievance procedure that mitigates the problems posed by *Bowen* is the United Auto Workers' system of internal appeals that an aggrieved employee must normally exhaust before she may file a lawsuit.[45] The grievant may appeal the dismissal of her grievance either to a rank-and-file appeals committee or to the United Auto Workers' Public Review Board.[46] If either body finds that the grievance was dismissed improperly, it may award relief against the union, including backpay and, in some cases, reinstatement of the grievance.[47] These backpay awards pose a much smaller threat to the union than do court-imposed damage awards, because the internal appeals are decided by experts or union members rather than juries. Under a system such as the UAW's, grievants unsuccessful in their internal appeals might still file fair representation suits, but many probably would hesitate to do so once a fair hearing before their peers or an impartial body[48] had established that their claims lacked merit. Further, those who filed suits would generally be unsuccessful, because courts have usually considered this elaborate appeals process to be a fair and reasonable means of handling grievances.[49] As a result, the internal appeals process would reduce the costs stemming from the threat of *Bowen* liability.

Nonbinding grievance mediation, which has been proposed as a solution to the "overlegalization" of arbitration,[50] might also insulate unions from the ramifications of *Bowen* liability. Grievants who agreed to mediated settlements would be barred from later filing hybrid suits.[51] Grievants unable or unwilling to settle would be given

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[45] *See, e.g.*, Willetts v. Ford Motor Co., 583 F.2d 852, 855–57 (6th Cir. 1978); Gomez v. International Union, UAW, 109 L.R.R.M. (BNA) 3356, 3358 (E.D. Mich. 1981); INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA CONST. art. 33, § 5 [hereinafter cited as UAW CONSTITUTION]. *But see* Clayton v. International Union, United Auto., Aerospace & Agric. Implement Workers, 451 U.S. 679, 693–95 (1981) (holding that some employees are not required to exhaust UAW internal appeals when internal remedies would be insufficient to redress their specific complaints).

[46] *See Clayton*, 451 U.S. at 682–83; UAW CONSTITUTION, *supra* note 45, art. 33, §§ 1–2.

[47] *See Clayton*, 451 U.S. at 690; Gomez v. International Union, UAW, 109 L.R.R.M. (BNA) 3356, 3358 (E.D. Mich. 1981).

[48] Courts regard the UAW's Public Review Board as an independent and impartial body. *See, e.g.*, Payne v. Ford Motor Co., 110 L.R.R.M. (BNA) 2428, 2430 (N.D. Ohio 1982); Rios v. International Union, United Auto., Aerospace & Agric. Implement Workers, 98 Lab. Cas. (CCH) ¶ 10,308, at 18,548 (C.D. Cal. 1982).

[49] *See, e.g.*, Pickens v. Quaker Oats Co., 108 L.R.R.M. (BNA) 3096, 3097 (N.D. Ohio 1981); Coleman v. General Motors Corp., 504 F. Supp. 900, 906–07 (E.D. Mo. 1980), *aff'd*, 667 F.2d 704 (8th Cir. 1982). *But see* Johnson v. General Motors Corp., 641 F.2d 1075, 1082 (2d Cir. 1981) (holding UAW internal appeals procedures not reasonable as a matter of law).

[50] *See* Bowers, Seeber & Stallworth, *supra* note 36; Goldberg, *supra* note 36. Mediation is speedier and less expensive than arbitration. *See* Bowers, Seeber & Stallworth, *supra* note 36, at 463; Goldberg, *supra* note 36, at 281.

[51] If the agreement were acceptable to the employee, one of its terms would be a waiver of the right to sue.

the mediator's judgment about the likely outcome in arbitration.[52] Although it would not be binding, a neutral mediator's opinion that a grievance lacked merit would nevertheless discourage many grievants from further pressing their claims through arbitration or a lawsuit[53] and would provide the union with a defense for not pursuing the grievance further.[54] Thus, mediation would reduce not only the number of lengthy, expensive arbitrations, but also the number of fair representation suits and the proportion of such suits that result in judgments against the union.

Despite its expression of concern for the grievance process, then, the *Bowen* decision poses a serious threat to the grievance machinery as well as to the financial health of unions. Because the Court failed to minimize the role of juries in fair representation suits, unions must now devise strategies to reduce both the number of lawsuits and the number of adverse judgments in the suits that are filed. The creativity of unions' response to *Bowen* will determine whether the decision's feared effect on union treasuries and on the grievance procedure will in fact materialize.

E. Securities Law

Insider Trading. — Last Term, in *Dirks v. SEC*,[1] the Supreme Court established a new test for determining the liability of persons who engage in securities transactions on the basis of "tips" from corporate insiders.[2] The Court held that a tippee who trades on the basis of a tip is liable under the federal securities laws only if: (1) his tipper breached a fiduciary duty in making the tip, and (2) the tippee knew or should have known of this breach.[3] *Dirks* attests that the Court's handling of insider trading cases will invariably turn on a fiduciary duty analysis.

The first definitive statement of the rationale for prohibiting trading by a tippee on the basis of inside information was provided by the Securities and Exchange Commission (SEC) in *Cady, Roberts & Co.*[4] The SEC declared that an insider who tips or trades subverts a relationship of trust by using information intended to be available

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[52] *See* Goldberg, *supra* note 36, at 281.

[53] Because of the considerable cost of defending fair representation suits, unions have a strong interest in preventing the filing of suits that is independent of their interest in preventing adverse judgments.

[54] *See* Goldberg, *supra* note 36, at 286–87.

[1] 103 S. Ct. 3255 (1983).

[2] Throughout this Case Comment, the term "insider trading" will be used to refer to transactions based upon nonpublic material information acquired from an insider.

[3] 103 S. Ct. at 3264.

[4] 40 S.E.C. 907 (1961).