Jury Trials in Hybrid and Non-Hybrid Actions: The Equitable Clean-up Doctrine in the Guise of Inseparability and Other Analytical Problems

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INTRODUCTION

The absence of a unified legal theory explaining the relationships of employers, unions and employees under a collective bargaining agreement is apparent from the many analogies used to explain those relationships.¹ In United Steelworkers v. Warrior & Gulf Navigation Co.,² for example, the Supreme Court referred to the collective agreement as a “generalized code”³ which calls into being a “new common law.”⁴ This Article examines only one aspect of the various relationships created by the collective agreement: suits by an individual employee against his employer, against his union or against both parties in a single action. The first two single defendant actions will be treated as “non-hybrid” actions while claims in which both the union and the employer are joined as codefendants will be denoted “hybrid”⁵ actions.

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¹ The courts have approached the issue of labor agreement enforcement in three separate theoretical fashions: custom and usage, agency, and third party beneficiary. See generally C. GREGORY & H. KATZ, LABOR AND THE LAW 477-89 (3d ed. 1979) (discussing three theories of labor agreements); Feller, A General Theory of the Collective Bargaining Agreement, 61 CALIF. L. REV. 663, 663 n. 1 (1973) (citing cases using the three theories). Occasionally contract principles are employed to explain certain results, e.g., Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), while, at other times, it has been possible to focus on the governmental functions performed by the collective bargaining agreement, see Cox, Some Aspects of the Labor Management Relations Act, 1947: II. The Negotiation and Administration of Collective Agreements, 61 HARV. L. REV. 274, 275-76 (1948).

² 363 U.S. 574 (1960).

³ Id. at 578.

⁴ Id. at 579. “The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.” Id.

⁵ The Court has characterized such claims under the NLRA as “hybrid section 301/fair representation claims.” DelCostello v. Teamsters, 462 U.S. 151, 165 (1983).
In both hybrid and non-hybrid actions, the right to a jury trial remains unresolved. This uncertainty has as much to do with the anatomy of hybrid and non-hybrid actions as it has to do with determining the appropriate constitutional test for the right to a jury trial. Courts currently focus both on the legal or equitable nature of the claim and on the legal or equitable nature of the remedies for deciding the seventh amendment right for these actions. Beyond this articulation of the relevant factors, however, there is no judicial consensus.

6. See, e.g., 2 C. Morris, The Developing Labor Law 1306-07 (2d ed. 1983) (discussing right to jury trial in fair representation actions); Goldberg, The Duty of Fair Representation: What the Courts Do In Fact, 34 Buffalo L. Rev. 89, 108 (1985) ("Lower courts are divided on the availability of jury trials in [hybrid] cases, but the current trend seems to favor them.").


7. Consensus, however, has not been quite so elusive in other areas. On one hand, the jury trial guarantee has been found to exist under some federal labor statutes. For example, under the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 411-15 (1982) (the "LMRDA"), all circuits but one, see McCraw v. United Ass'n of Journeymen, 341 F.2d 705 (6th Cir. 1965), have concluded that there is a right to a jury trial on a claim for damages under the LMRDA Bill of Rights. See Quinn v. Digiulian, 739 F.2d 637, 645-46 (D.C. Cir. 1984) (citing holding that jury trial attaches to actions brought under the LMRDA); see also Comment, The Right To Jury Trial Under The Age Discrimination In Employment and Fair Labor Standards Acts, 44 U. Chi. L. Rev. 365 (1977) (suggesting functional test to resolve jury trial issue under the ADEA and FLSA) [hereinafter Comment, The Right to Jury Trial Under ADEA and FLSA]; Note, Fair Labor Standards Act and Trial By Jury, 65 Colum. L. Rev. 514 (1965) (explaining conflicting decisions over right to jury under the FLSA and offering solutions for consistency).

In contrast, courts agree that no seventh amendment right attaches to actions brought under Title VII. See generally Comment, Jury Trial in Employment Discrimination Cases—Constitutionally Mandated?, 53 Tex. L. Rev. 483 (1975) (discussing issue of jury trial in Title VII actions for back pay); Comment, The Right to Jury Trial Under Title VII of the Civil Rights Act, 34 Buffalo L. Rev. 89 (1985) (discussing right to jury trial in Fair Representation actions); Goldberg, The Duty of Fair Representation: What the Courts Do In Fact, 34 Buffalo L. Rev. 89, 108 (1985) ("Lower courts are divided on the availability of jury trials in [hybrid] cases, but the current trend seems to favor them.").
This Article will describe the nature of the debate in this area and suggest an approach which takes into account both the complex web of federal labor common law principles and the Supreme Court explorations of the ambit of the seventh amendment. Part I will sketch the development of the intertwined DFR ("Duty of Fair Representation")/breach of contract hybrid action under the two relevant federal labor statutes. Part II will elucidate the test for the seventh amendment right to a jury trial. Part III examines the hybrid action, analyzes the current split among lower courts as to the proper characterization of such suits for jury trial purposes, and concludes that the Fifth Circuit approach, allowing a jury trial for either component of the hybrid case, is more consistent with Supreme Court doctrine. Finally, Part IV will analyze the right to a jury trial in non-hybrid actions against the employer and non-hybrid DFR cases against the union.

I. Development Of The Hybrid Action

A hybrid action can arise under either the National Labor Relations Act ("NLRA") or the Railway Labor Act ("RLA"). Although there are many similarities between hybrid actions under the NLRA and the RLA, there are also significant differences for purposes of seventh amendment analysis. Accordingly, this Article will analyze the hybrid action under each Act separately, pointing out the similarities as they arise.

A. The Hybrid Action Under the NLRA

There are two aspects to what has come to be known as a hybrid action under both the NLRA and the RLA. The first aspect is the portion of the suit in which an employee alleges that his employer, through the employer's breach of the labor contract with the employee's union, has breached its contractual obligations to him. This contract claim commonly consists of an allegation that the employer discharged the employee without "just cause," as was required by the collective bargaining agreement.

The employee's right to pursue his contract claim in federal court is not self-evident, however, even though it is federal law that guarantees employees the substantive right to bargain collectively. First, the actual signatories to a collective bargaining agreement are the employer and the union; the individual employees do not sign and therefore are, at best, third-party
beneficiaries to the agreement. Second, federal courts do not ordinarily have jurisdiction to hear ordinary breach of contract actions absent diversity of citizenship. This lack of federal question jurisdiction further means that state contract law would govern any breach of contract action on the collective bargaining agreement, raising uniformity and choice-of-law problems as well as questions regarding the union's status as a legal entity under state law.

The original version of the NLRA, passed in 1935, did not speak to these issues. Moreover, because Congress decided not to label the breach of a collective bargaining agreement an unfair labor practice, the National Labor Relations Board ("NLRB") also has no jurisdiction over these claims.

In an effort to clarify at least the jurisdictional question, the NLRA was amended in 1947 to include section 301 of the Labor-Management Relations Act ("LMRA"). Section 301 explicitly granted the federal courts subject jurisdiction over suits for breach of a collective bargaining agreement (except where there was diversity of citizenship), and any substantive rights and remedies were determined by state law. Legal rights and remedies were uncertain or ineffective or both... In most jurisdictions a class action was necessary for the union members to sue or be sued. Execution of a money judgment would have to be levied upon the individual property of the members. There was grave doubt whether a collective bargaining agreement was enforceable at all and, if so, by and against whom it was enforceable.

11. See Rosen, Fair Representation, Contract Breach and Fiduciary Obligations: Union Officials and the Worker in Collective Bargaining, 15 HASTINGS L.J. 391, 396 (1964) (discussing accepted view describing employees as "third party beneficiaries under the union-employer contract... "). The problem with employees being a third-party beneficiary is that they are not in privity with the employer-promisee. Although the privity requirement in contract law has certainly been relaxed a great deal, this has been a fairly recent development and was not the general rule in 1935 when the NLRA was passed into law. Moreover, without getting into detail, it is also clear that even in the most generous jurisdictions, third-party beneficiaries do not have the same rights as an actual party to the contract. See generally 4 A. CORBIN, CORBIN ON CONTRACTS §§ 772-818 (1951) (tracing history of the third-party beneficiary and the privity requirement and concluding that right of the promisee and right of the beneficiary have separate lives of their own—vicissitudes met by one do not necessarily affect the other).

12. See generally A. Cox, D. Bok & R. Gorman, CASES AND MATERIALS ON LABOR LAW 735-36 (10th ed. 1986). The authors describe the state of the law under the early years of the NLRA (1935-47) as follows:

Prior to the enactment of Section 301... the state courts alone had jurisdiction over suits for breach of a collective bargaining agreement (except where there was diversity of citizenship), and any substantive rights and remedies were determined by state law. Legal rights and remedies were uncertain or ineffective or both... In most jurisdictions a class action was necessary for the [union] members to sue or be sued. Execution of a money judgment would have to be levied upon the individual property of the members. There was grave doubt whether a collective bargaining agreement was enforceable at all and, if so, by and against whom it was enforceable.

13. The Senate proposal to make a breach of contract an unfair labor practice was deleted in conference: "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 42, reprinted in 1947 U.S. CODE CONG. SERV. 1147, 1147.

14. 29 U.S.C. §§ 141-87 (1982). The Labor-Management Relations Act, also known as the Taft-Hartley Act, 61 Stat. 136 (1947), amended and incorporated the NLRA into itself. See generally Note, Retaliatory Discharge, Workers' Compensation and Section 301 Preemption, Lingle v. Norge Div. of Magic Chef, Inc., 37 DePaul L. Rev. 675, 675 n.2 (1988) (brief explanation of relationship between the NLRA and the LMRA). For purposes of clarity, this Article will refer to those sections which were originally part of the Wagner Act of 1935 as the NLRA and those sections which were added by the Taft-Hartley Act of 1947 as the LMRA.
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matter jurisdiction for breach of contract actions between an employer and a labor organization.\textsuperscript{15} Moreover, although section 301 did not expressly provide for suits by individual employees against their employers,\textsuperscript{16} in Smith v. Evening News Ass'n\textsuperscript{17} the Supreme Court ruled that section 301 encompassed such suits. This holding, however, was qualified a few years later, in Republic Steel Corp. v. Maddox,\textsuperscript{18} when the Court held that workers must exhaust existing contractual grievance procedures before suing in court for breach of contract.\textsuperscript{19} Thus, after Maddox, an employee can only exercise his section 301 right to sue his employer for breach of labor contract if he has exhausted all remedies accorded him under that contract. It is this exhaustion of remedies requirement that gives rise to the second aspect of a hybrid action.

This second aspect is the employee's claim that his union has breached its statutory obligation to treat him fairly. This obligation on the part of unions has no explicit statutory source, but, rather, has developed in response to the great privileges accorded to unions under the NLRA. Section 9(a) of the

\textsuperscript{15} Section 301(a) of the Labor-Management Relations Act provides:

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


\textsuperscript{16} Cf. Cox, supra note 1, at 304 ("[t]he primary purpose of section 301 is to remove [the inability of unions to sue or be sued under state law] by treating labor organizations as entities for the purpose of actions to recover damages for breach of contract").

\textsuperscript{17} 371 U.S. 195 (1962). Employees who were not allowed to work when another union struck their employer alleged that the employer's conduct violated the collective bargaining agreement, which barred discrimination against any employee on account of his union membership. Id. at 196. The individual employees sued their employer for breach of contract in state court. The state court dismissed the case because the employer's conduct also constituted an unfair labor practice within the exclusive jurisdiction of the NLRB. Id. The Supreme Court reversed, holding that § 301 suits were not preempted merely because the underlying conduct might also constitute an unfair labor practice. Id. at 201.

\textsuperscript{18} 379 U.S. 650 (1965). Without attempting to use the grievance procedure in the collective bargaining agreement, Maddox sued for severance pay. Id. at 651. The Alabama courts permitted the suit, agreeing with the plaintiff that termination of employment creates an individual right to sue the employer for breach of contract. Id. The Supreme Court reversed. Id. at 659.

\textsuperscript{19} Id. at 652. Before bringing suit, the employee alleging the breach of contract must at least attempt to use the procedure established by the collective agreement. Id.

The Maddox Court primarily relied on the "Steelworkers Trilogy" for its holding: United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960). These cases established that employers bound by collective bargaining agreements were required to use the arbitration and grievance procedures set up by those agreements. Feller, supra note 1, at 689. The Steelworkers Trilogy put "to rest the fears aroused in many," id. at 688, by Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), where the Court had interpreted § 301 as authorization for creation of federal substantive law.
NLRA provides that a union which is chosen by a majority of the bargaining unit becomes the exclusive bargaining representative of that unit. Only the union has the authority to negotiate a collective bargaining agreement with the employer. Moreover, the collective agreement will usually provide that the union will have exclusive control over the grievance and arbitration process. Therefore, the individual employee is at the mercy of the union as to whether his grievance will be heard. Given the Supreme Court’s requirement in Maddox that all administrative remedies be exhausted before an employee can bring a section 301 suit against his employer, the significance of the union’s decision on whether or not to pursue those remedies in the first instance is great indeed.

The Supreme Court responded to the lack of statutory limits on unions’ power over workers by creating the duty of fair representation. The DFR was imposed on unions subject to the NLRA in order to prevent the union from exercising its virtually absolute authority over the employees it represents in a discriminatory fashion. Breach of the DFR may occur either in contract negotiation or in contract administration. The vast majority of DFR suits allege that the union has improperly handled an employee’s

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20. Section 9(a) of the National Labor Relations Act provides:
   "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.


22. See Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (scope of representation under NLRA). See also Wallace Corp. v. NLRB, 323 U.S. 248 (1944) (general discussion of bargaining agent’s duties under NLRA). The DFR was originally imposed under the Railway Labor Act in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). See infra notes 49-50 and accompanying text for a complete discussion of Steele and its rationale. Huffman merely extended to the NLRA the DFR principle that had been created under the RLA.

23. The duty of fair representation exists because the collective bargaining agreement usually divests the individual of the “ability to bargain individually or to select a minority union as [a] representative.” DelCostello v. Teamsters, 462 U.S. 151, 164 n.14 (1983). Because of this system, the union has a duty to represent all members fairly, “without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” Id. (quoting Vaca v. Sipes, 386 U.S. 171, 177 (1967)).


grievance.26 Today, an aggrieved employee can proceed against a union either before the NLRB27 or in state or federal court28 if he can show that the union's conduct was "arbitrary, discriminatory or in bad faith."29

The possibility of joining the employee's DFR claim against the union with the section 301 breach of contract claim against the employer in one hybrid action was first explored in Humphrey v. Moore.30 However, the contours of the hybrid action were more fully delineated by the Court three years later in the landmark case of Vaca v. Sipes.31 In Vaca, an employee, Benjamin Owens, was not permitted to return to work because of his poor health. He asked his union to take his grievance to arbitration.1

The union decided that the grievance was not meritorious and declined to seek arbitration.33 Owens brought separate suits against the union for breach of its DFR and against his employer for wrongful discharge in violation of the collective bargaining agreement.34

The Court, in Vaca, acknowledged that the plaintiff could sue the union and the employer either separately or together in a hybrid action.35 Moreover, the Maddox rule, requiring exhaustion of the grievance and arbitration process contained in the agreement, would be excused if the employee could

26. See, e.g., Goldberg, supra note 6, at 128 ("in approximately 80% of the published opinions and 90% of the cases in courthouse files, the alleged breach of the union's duty occurred in grievance handling").

27. See, e.g., NLRB v. Miranda Fuel Co., 140 N.L.R.B. 181 (1962) (finding union's breach of its DFR to violate § 8(b)(1)(A), and § 8(b)(2) of the NLRA, thus constituting an unfair labor practice and bringing matter within the jurisdiction of the NLRB), enforcement denied, 326 F.2d 172 (2d Cir. 1963) (although Second Circuit denied enforcement of the NLRB's judgment, it mustered no majority on the issue of whether a union's breach of its DFR could indeed constitute an unfair labor practice).

28. Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) (finding § 301 to grant concurrent jurisdiction to state and federal courts). See also Vaca v. Sipes, 386 U.S. 171, 186-87 (1967) (rejecting argument that, because NLRB had held breach of DFR could also constitute an unfair labor practice, DFR claims were therefore preempted under primary jurisdiction doctrine from being heard in courts in the first instance).

29. Vaca, 386 U.S. at 190.

30. 375 U.S. 335 (1964). A joint management and union committee decided to reduce seniority rights of plaintiffs during the term of the agreement. Id. at 339. A Kentucky court enjoined enforcement of the committee's decision because it lacked authority to reduce seniority in the absence of a merger. Id. at 341. The court also ruled that the union breached its DFR. Id. The Supreme Court reversed, concluding that the decision to change seniority was within the committee's authority since there had been an absorption of this type of matter which gave it authority to act. Id. at 347-48. The Court found that the union had not breached its DFR. Id. at 350.


32. Id. at 175.

33. Id. at 175-76.

34. Id. at 173.

35. Id. at 184-88. The employee is also free to sue only one or the other in a single action. Kaiser v. Local 83, 577 F.2d 642, 644 (9th Cir. 1978).
show a union's breach of the DFR. Therefore, proof that the union breached its DFR was to be determined in the first instance as a jurisdictional prerequisite to proceeding with the section 301 contract claim against the employer. Although the Vaca Court admitted that the two component claims of the hybrid action were distinct in nature and origin, the Court also realized that they were interrelated for purposes of determining liability of the two defendants and for apportioning damages.

B. The Hybrid Action Under the RLA

The breach of contract aspect of the hybrid action under the RLA is in many respects quite similar to that of the NLRA. Under the RLA, contract disputes are classified either as major or minor. Major disputes concern the actual formation of or change in a collective bargaining agreement. Minor disputes involve the interpretation of an existing agreement and, when brought under the RLA, are comparable to a breach of contract claim under the NLRA brought by an employee against his employer.

Yet, there are a number of procedural differences between breach of contract actions under the NLRA and those under the RLA. First, although the NLRA requires that contract disputes be submitted to a grievance and arbitration process only if voluntarily agreed upon by the parties, the RLA statutorily requires an employee to bring his contract dispute in the first instance to the National Railroad Adjustment Board (the "Adjustment Board") for resolution.

Second, most collective bargaining agreements governed by the NLRA provide that the union has exclusive control over the grievance and arbitration process. In contrast, under the RLA, an employee has standing before the

36. Vaca, 386 U.S. at 185.
   [If . . . the union has sole power under the contract to invoke the higher stages of the grievance procedure, and, if . . . the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance . . . [this would] leave the employee remediless . . . [and] . . . be a great injustice.]
   Id. at 185-86 (emphasis in original).
   Nor is exhaustion required if the employer repudiates the contractual procedures for resolving grievances. Id. at 185.

37. Id. at 183.


39. See Bonin v. American Airlines, Inc., 621 F.2d 635, 637 (5th Cir. 1980) (explaining distinction between major and minor disputes), cert. denied, 471 U.S. 1005 (1985); Goclowski, 571 F.2d at 754 n.6 (dispute involving interpretation of collective agreement is classified as minor).


41. Supra note 21 and accompanying text.
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Adjustment Board without regard for what the union concludes as to the merits of the grievance.\(^42\) Moreover, under the RLA, an employee may assert against his employer a separate category of claims which has no parallel under the NLRA. Under the RLA, when the claim against the employer is based on a statutory violation, rather than a contractual breach, the Adjustment Board has no jurisdiction\(^43\) and the case must therefore be brought in court. In contrast, under the NLRA, all unfair labor practices are within the exclusive jurisdiction of the NLRB.

Finally, unlike the NLRA, where court jurisdiction over breach of contract claims is based on section 301 of the LMRA, there is no statutory equivalent to section 301 under the RLA. Initially, in Moore v. Illinois Cent. R.R.,\(^44\) the Supreme Court stated that an employee could sue his employer in court without exhausting his administrative remedies before the Adjustment Board.\(^45\) Moore, however, was later overruled in Andrews v. Louisville & Nashville R.R.,\(^46\) where the Court held that the jurisdiction of the Adjustment Board over disputes arising out of a railroad’s collective bargaining agreement was exclusive.\(^47\)

The DFR aspect of the hybrid action under the RLA is quite similar to that of the NLRA. The RLA contains a provision analogous to section 9(a) of the NLRA granting a union the exclusive right to represent all members

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42. Thompson v. New York Cent. R.R., 361 F.2d 137, 143 n.7 (2d Cir. 1966).
44. 312 U.S. 630 (1941). Under a collective agreement negotiated between the railroad and a union, Moore was number 37 on the switchmen’s seniority roster. After Moore’s employer leased its tracks to another railroad, a new seniority agreement was entered into between this new employer and the union representing its employees. As a result, Moore’s seniority position was reduced to number 52. Illinois Central R.R. Co. v. Moore, 112 F.2d 959, 962 (1940). Moore sued for breach of contract. 312 U.S. at 632. The employer argued that the suit was premature because of Moore’s failure to exhaust the administrative remedies provided by the Railway Labor Act. Id. at 634. The Supreme Court decided that Moore did not have to use them in order to sue. Id. at 636.
45. Id. at 634-36. The Court held that nothing in the RLA took the jurisdiction to determine a wrongful discharge action away from the courts. Id. at 634. The Court found that the use of the word “may” as opposed to “shall” in the statute when referring to the jurisdiction of the Adjustment Board, only provided an avenue for litigants, but did not make exhaustion mandatory. Id. at 635.
46. 406 U.S. 320 (1972). The employee alleged that the Georgia Railroad Company refused to permit him to return to work after his total recovery from an auto accident. Id. at 321. The employee brought suit in state court for breach of contract based on the wrongful discharge. Id. at 320. The railroad convinced the state court to dismiss the suit because of the employee’s failure to exhaust the remedies provided in the Railway Labor Act. Id. at 321. The Supreme Court affirmed, thus overruling Moore. Id. at 326.
47. Id. at 325. But see also Middleton v. CSX Corp., 7 Lab. Rel. Rep. (BNA) (47 Fair Empl. Prac. Cas.) 1340 (S.D. Ga. Sep. 2, 1988), where a black railroad employee brought a hybrid action alleging that both his union and employer colluded to deny him contractual benefits because of his race. A federal district court in Georgia ruled that the employee need not submit his claims to an adjustment board under the Railway Labor Act because the board cannot provide complete relief or neutral fact-finders. Id. at 1345.
of a craft or class. In *Steele v. Louisville & Nashville R.R.*, the Supreme Court imposed a duty upon the labor organization not to discriminate against any member of the bargaining unit in the making of a collective bargaining agreement. The nature of the DFR claim and the standards for its breach are essentially identical under both the NLRA and the RLA.

There is, however, one significant procedural distinction between the two statutes with respect to the DFR. Under the NLRA, an employee can choose to bring his DFR claim either before the NLRB or in state or federal court. In contrast, under the RLA, the Supreme Court has held that state or federal courts have exclusive jurisdiction over DFR suits.

Notwithstanding these procedural distinctions, the nature of the hybrid DFR/breach of contract claim under the RLA, as developed by the Supreme Court in post-*Vaca* cases, parallels the hybrid action under the NLRA. In *Glover v. St. Louis-San Francisco Ry.*, for example, employees sued their union for breach of the DFR and their employer for breach of contract in a single action. Despite the employees' failure to exhaust the grievance procedure before proceeding to court, the Supreme Court allowed the suit which was "in essence" between the employees and their union. Indeed,

48. The RLA provides that: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this [Act]." 45 U.S.C. § 152 (1982).
49. 323 U.S. 192 (1944). In *Steele*, an all white union negotiated an agreement which had the effect of replacing black firemen working for the railroad with whites. *Id.* at 195. A black locomotive fireman convinced the Supreme Court to enjoin enforcement of the collective agreement. *Id.* at 203.
50. *Id.* at 204. The Court ruled that when a union becomes the exclusive bargaining representative of the employees in a bargaining unit, it must represent "non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." *Id.* Under the RLA, a union cannot sacrifice the rights of the "minority of the craft" for the benefit of its members. *Id.* at 199. Non-members are protected by the Act itself: "[t]he use of the word 'representative' . . . plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent." *Id.*
51. *Supra* notes 27-29 and accompanying text.
54. *Id.* at 325. The 13 petitioners, eight black and five white men, alleged that they were all qualified as "carmen," yet after many years of service, they continued to be classified as "carmen helpers" and were not promoted. *Id.* The petitioners were unable to present their grievances to the company and to the union despite repeated efforts. *Id.* at 325-27.
55. *Id.* at 329. The union lacked exclusive control over the grievance machinery; therefore, the employee was free to bring his contract claim against the employer before the Adjustment Board. *Id.*
56. *Id.* The *Glover* Court stressed that exhaustion was not required "where the effort to proceed formally with contractual or administrative remedies would be wholly futile." *Id.* at 330. If the allegations that the union is working in concert with the employer to discriminate is true, then exhaustion would be futile and "only serve to prolong the deprivation of rights to which these petitioners according to their allegations are justly and legally entitled." *Id.* at 331.
in *Czosek v. O'Mara*, a case whose facts parallel those in *Vaca*, the Court implicitly ruled that an employer could be joined with the union in a hybrid claim whenever the employee's failure to exhaust the Adjustment Board procedure resulted from a breach of the DFR by the union. Thus, the differences between the NLRA and the RLA loom large for seventh amendment purposes only when an employee brings a non-hybrid suit against the employer for a statutory violation under the RLA. In these suits, the legal or equitable nature of the RLA action may depend upon the proper analogy for statutory, rather than contractual, breaches. Otherwise, common principles govern hybrid actions under both statutes.

C. Absence of Statutory Guidance Regarding the Right to a Jury Trial in Hybrid Actions

A hybrid action is composed of two parts: the DFR claim against the union and the underlying contract-based claim against the employer. Even though the DFR is grounded in federal statutes, it is the product of federal common law because neither the NLRA nor the RLA explicitly mentions the concept. Therefore, it is futile to search any statute or legislative history for the purpose of determining a possible statutory right to a jury trial in such cases. Although the right to sue the employer for breach of contract under the NLRA derives from section 301 of the LMRA, there is no evidence in either the statutory language or its legislative history of any congressional intent as to the right to a jury trial. The RLA, on the other

57. 397 U.S. 25 (1970). After a merger of two railroads, the plaintiffs continued working for the new employer until they were furloughed. *Id.* at 26. Treating the furlough as a final discharge, plaintiffs sued their employer for misapplying the seniority provisions of the collective agreement and the union for breaching its DFR for refusing to process the claims of the plaintiffs. *Id.*. The Second Circuit had held that unless the railroad had actively participated in the union's breach of duty, the claim against the employer had to be dismissed and submitted to the Adjustment Board. *See id.* at 28. The Supreme Court affirmed that the court had jurisdiction over the DFR claim, but the Court was not asked to decide the proper forum for the breach-of-contract claim. *Id.* at 29-30.

58. *Id.* at 27-28. Therefore, a DFR suit under the RLA is neither within the jurisdiction of the Adjustment Board nor subject to the rules of exhaustion. *Id.* at 28.

59. For a thorough discussion of the similarities between hybrid actions under the two acts, see Feller, *supra* note 1, at 676-718.

60. Under the RLA, the claim against the employer may be based on a violation of the Act, rather than on a contract breach. *See supra* note 43 and accompanying text.


62. "[F]ederal common law... refers generally to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *Hart & Wechsler's THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 770 (2d ed. 1973).

63. *See, e.g., Leach v. Pan Am. World Airways*, 842 F.2d. 285, 286 n.1 (11th Cir. 1988) (finding statute and its history of no help because action for breach of DFR was judicially created).

64. *See supra* notes 14-15 and accompanying text.
hand, lacks even this specificity because it contains no jurisdictional grant analogous to section 301.

In the absence of a statutory basis for a jury trial in hybrid and non-hybrid cases, courts must decide if the guarantee is constitutionally required by the seventh amendment. Numerous federal courts have considered the right to a jury trial for these interrelated DFR/breach of contract suits and they have reached conflicting results. Before examining the lower court conflict, however, it is beneficial to consider the seventh amendment legal standard as set forth by the Supreme Court.

II. THE SEVENTH AMENDMENT TEST FOR THE RIGHT TO A JURY TRIAL

Much of the existing confusion as to whether a jury trial attaches for hybrid actions results from judicial stubbornness in continuing to apply the equitable clean-up doctrine, a rule that predates the procedural merger of law and equity. The doctrine is sometimes applied today despite the fact that the Supreme Court has redefined the scope of equitable jurisdiction for seventh amendment purposes under a merged procedure. However, in order to understand the error in using the equitable clean-up doctrine today, it is necessary to be familiar with the background of the seventh amendment right to a jury trial, its peculiar doctrines and the historical development of those doctrines. Accordingly, this section of this Article will provide such a background, beginning with the nature of the inquiry required by the language of the amendment itself, continuing with the approach used by the federal courts prior to 1959 and concluding with the Supreme Court's reformulation of the inquiry beginning that same year.

A. The Nature of the Seventh Amendment Inquiry

The seventh amendment "preserves" the right to a civil jury trial in the federal courts as it existed at common law in 1791, when that amendment

65. See infra notes 67-72 and accompanying text.

66. See infra notes 166-87 and accompanying text. Even though state and federal courts have concurrent jurisdiction to enforce collective bargaining agreements, Dowd Box Co. v. Courtney, 368 U.S. 502 (1962), there are no reported state court cases which have addressed a seventh amendment claim for related hybrid and non-hybrid actions. Although under current constitutional construction the right to a jury trial in civil cases is not applicable to the states, see Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211 (1916); Walker v. Sauvinet, 92 U.S. 90 (1875); Melancon v. McKeithen, 345 F. Supp. 1025 (E.D. La. 1972), aff'd sub nom., Davis v. Edwards, 409 U.S. 1098 (1973), it is clear that state courts must apply federal law in resolving this issue. See Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962) (holding federal common contract law created under § 301 to govern enforcement of labor contracts is binding on state courts hearing § 301 suits); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957) (finding § 301 to authorize creation of a body of federal common law principles to govern enforcement of labor contracts under the NLRA).

67. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.
was adopted. Therefore, the language of the amendment itself compels an historical inquiry as to whether the jury right attaches to a cause of action.

This historical approach requires a determination as to whether the action would have been heard “at common law” in 1791, i.e., does the action create rights and remedies that would have been heard by a court of law, as opposed to a court of equity. The Supreme Court, moreover, has interpreted the “common law” referred to by the amendment as including English common law. However, the fact that a cause of action did not exist when the amendment was ratified is not determinative of whether the right to a jury trial attaches. Rather, this issue is determined by asking: if the action had existed in 1791, would it have been tried in the English courts of law or in Chancery?

68. Dimick v Schiedt, 293 U.S. 474, 476 (1935) (“[i]n order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.”).

69. For a discussion on the historical test of the right to jury under the seventh amendment, see J. Friedenthal, M. Kane & A. Miller, Civil Procedure 483-87 (1985); F. James & G. Hazard, Civil Procedure 413-23 (3d ed. 1985); Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 640-49 (1973).

70. See, e.g., Kane, Civil Jury Trial: The Case For Reasoned Iconoclasm, 28 Hastings L.J. 1, 2 (1976) (“[u]nder this traditional approach, the Supreme Court has inquired whether the particular case in question would have been tried at law or in equity in 1791 . . . .”).

71. Thompson v. Utah, 170 U.S. 343, 350 (1898) (“[i]t must consequently be taken that the . . . words ‘trial by jury’ were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . . .”). See also Dimick, 293 U.S. at 476-77 (referring to English precedent to determine jury trial right). See generally Kane, supra note 70, at 3-7 (discussing historical development of right to jury trial under the seventh amendment); Wolfram, supra note 69, at 640-49 (discussing historical development of right to jury trial generally); Comment, From Beacon Theatres to Dairy Queen to Ross: The Seventh Amendment, The Federal Rules, and a Receding Law—Equity Dichotomy, 48 J. Urb. L. 459, 460-63 (discussing origins of right to jury trial in English common law) [hereinafter Comment, Receding Law—Equity Dichotomy].


In other words, modern-day courts, reasoning by analogy to the English common law of 1791, would ask: had such a cause of action existed at that time, would the common law have provided a right to jury trial. The answer is determined by finding an analogue in the common law, and ascertaining how the jury trial question was decided there.

Id. at 491 (emphasis in original).

The assertion of a seventh amendment right to jury trial under statutory causes of action triggers essentially the same type of inquiry as that required for nonstatutory civil actions. In Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830), the Supreme Court ruled that the jury trial right attaches not merely to suits that were tried in courts of law at the time the amendment was ratified, but to all causes of action—including those created by statute—that involve legal claims. Id. at 447. Suits at common law were defined by the Court as “suits in which legal rights are to be ascertained and determined, in contradistinction to those where equitable rights alone are recognized and equitable remedies administered.” Id.
Any purely historical approach for resolving the jury trial right will encounter several difficulties. First, in 1791, there existed separate equity and common law courts, but today federal courts operate under a merged procedure in which both legal and equitable claims may be joined. Second, the merger of law and equity has increased the circumstances under which a legal remedy may be adequate, thereby reducing the sphere of what would have been equitable jurisdiction prior to the merger. Third, many modern rights did not exist in 1791, thus necessitating a search for common law analogues to modern-day claims.

Further, even if a court today were transported back in time to the late eighteenth century, it would not necessarily be able to determine into which jurisdiction a particular claim would fit. One of the reasons for this confusion is that there was overlap between the two separate systems and each constantly borrowed principles from the other.

73. See, e.g., J. FRIEDENTHAL, M. KANE & A. MILLER, supra note 69, at 487-88 ("any test that is entirely directed to an historical inquiry inevitably fails to take account of the underlying policies of economy and efficiency with which any intelligent allocation of jury and trial rights must be concerned").

74. For a discussion on the development of equity and common law courts, see 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 63-119 (3d ed. 1768); 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (7th ed. 1956); F. MAITLAND, A TREATISE ON EQUITY (3d ed. 1949); W. WALSH, A TREATISE ON EQUITY 12-36 (1930).

75. Rule 2 of the Federal Rules of Civil Procedure provides: "[T]here shall be one form of action to be known as 'civil action.'" FED. R. CIV. P. 2. Professor Moore's famous treatise on federal practice describes the effect of rule 2 as follows:

Under the Federal Rules, the unification of law and equity was achieved by substituting the civil action for separate units at law and in equity, so that it became possible to present all claims and defenses, both legal and equitable, in the same action. Indeed, the Rules compel the parties to present all facts of the matter in controversy that involve a single claim.

5 J. MOORE, FEDERAL PRACTICE § 38.03, at 38-21 (2d ed. 1979).

76. See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959) (in discussing right to jury trial in an antitrust action, the Court stated that "liberal joinder" provisions of the Federal Rules of Civil Procedure and the Declaratory Judgment Act have affected "scope of equity").

77. See, e.g., Curtis v. Loether, 415 U.S. 189, 193-95 (1974) (court must look to whether or not the remedy is essentially legal or equitable in nature).

The problem with this approach is that sometimes there is no close equivalent. For example, the declaratory judgment procedure is neither purely equitable nor purely legal. It is a 20th century statutory procedural innovation that might be either legal or equitable or raise both legal and equitable issues in the same action. See Comment, Right to Trial by Jury in Declaratory Judgment Actions, 3 CONN. L. REV. 564, 566 (1971) (discussing sui generis nature of declaratory judgment proceedings).

78. For an historical perspective on this, see 1 W. HOLDSWORTH, supra note 74, at 453; D. KIRLY, AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 167 (1890); 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ 35-58 (15th ed. 1988).

79. See W. WALSH, supra note 74, at 28-34, 81-95 (discussing relationship between law and equity).
B. The Pre-1959 Approach to the Seventh Amendment

1. The Use of the Equitable Clean-Up Doctrine Prior to the Merger of Law and Equity

Notwithstanding the inherent difficulties in an historical approach, prior to the merger of law and equity determining the right to a jury was aided by the jurisdictional and procedural distinctions between courts of law and those of equity. If a litigant sought relief which could be classified as "legal," he would have to go to a court of law and would be entitled to receive a jury trial. If the claim was purely equitable, the litigant would go before a court of equity and the judge would resolve the case since there is no right to a jury for purely equitable claims.

However, when a litigant had both legal and equitable claims, he was faced with a difficult choice. He had the option of bringing an action in both courts or abandoning part of his claim. Because of this dilemma, as well as a matter of economy of litigation, courts developed the equitable clean-up doctrine.

80. Rule 1 of the Federal Rules of Civil Procedure provides: "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy and inexpensive determination of every action. FED. R. CIV. P. 1. See also FED. R. CIV. P. 2, supra note 75 and accompanying text.

81. See generally J. FRIEDENTHAL, M. KANE & A. MILLER, supra note 69, at 483-85 (describing "jurisdictional line" between law and equity); McCoid, Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover, 116 U. PA. L. REV. 1, 2 (1967) (right to jury was more a jurisdictional issue); Comment, Receding Law—Equity Dichotomy, supra note 71, at 463-67 (pre-merger analysis of right to jury trial).

82. 5 J. MOORE, supra note 75, at § 38.16[1].

83. Fleitmann v. Welsbach Co., 240 U.S. 27 (1916), is illustrative of this dilemma. In that case, a single shareholder brought an antitrust action and sought treble damages. The Court found that if the action would have been brought by the corporation itself, the action would be legal, and the legal remedy of treble damages allowable. Id. at 27-28. However, the Sherman Act was interpreted to give private parties only a right of bringing an action for an injunction against threatened loss, which was heard in a court of equity. Id. at 29. Although the plaintiff was properly in a court of equity, he could not maintain his action for treble damages. Id. at 28-29.


The fact that the equitable clean-up doctrine contributes to economy of litigation and operates to determine the mode of trial can be illustrated by a relatively simple example. Take the situation where an employee is discharged by his employer for stealing tools, and the union refuses to file a grievance on his behalf. The employee sues both union and employer in a hybrid action seeking money damages as well as judicially decreed reinstatement and backpay. Plaintiff also demands a jury trial. If the court applies the equitable clean-up doctrine, it will deny the request because the primary relief sought (reinstatement) is equitable and money damages (legal relief) is treated as incidental. As this example makes clear, when the rule is invoked, it operates to foreclose a jury trial on the legal issues which are treated as dependent on the equitable claim. Thus, where the claims would otherwise have been brought in two separate courts to resolve the entire matter, the doctrine would work to minimize the judicial resources necessary to complete this task.
clean-up doctrine. This doctrine allowed a court of equity with properly assumed jurisdiction over a case to resolve the combined, but subordinate, legal issues along with the equitable issues.

The existence of legal issues did not create the right to a jury trial because, in essence, the litigants were still in a court of equity. Nevertheless, the equitable clean-up doctrine served the necessary function of mitigating the unfairness, and often the wastefulness, created by separate procedures. Although the equitable clean-up doctrine was the result of a necessity created by separate court systems, its use was continued for over twenty years after the Federal Rules of Civil Procedure merged law and equity and created a single "civil action."

2. The Use of the Equitable Clean-Up Doctrine After the Merger of Law and Equity

The merger of law and equity is considered to have removed the jurisdictional and procedural distinctions between the two types of actions, while preserving the distinctions with respect to the jury trial right. As unclear as the standards to distinguish between actions at law and those at equity were during the pre-merger era, the loss of the jurisdictional crutch served to further confuse matters. With the opportunity for litigants to join both legal and equitable claims in one action, the issue of whether or not the jury trial right attached became increasingly difficult to answer.

Many courts adopted an approach which analyzed the "basic nature" of the claim. The inquiry required that the court ask whether the claim as a whole was basically legal or equitable in nature, i.e., would the claim have been brought to a court of law or a court of equity? If the action was basically legal, the inquiry then proceeded on an issue by issue basis. The

85. J. Friedenthal, M. Kane & A. Miller, supra note 69, at 490.
86. 1 J. Pomeroy, Equity Jurisprudence §§ 231-42 (S. Symons 5th ed. 1941).
87. "The general rule was often stated that equity, 'having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents, and not remit any part of it to a court of law.'" 5 J. Moore, supra note 75, at § 38.19[2] (quoting Greene v. Louisville & Interurban R.R., 244 U.S. 499, 520 (1917)). Note, however, that the use of the equitable clean-up doctrine was purely discretionary. See J. Friedenthal, M. Kane & A. Miller, supra note 69, at 490.
88. See J. Moore, supra note 75, at § 38.19.
89. E.g., Fraser v. Geist, 1 F.R.D. 267, 268 (E.D. Penn. 1940). As one commentator has noted: "[D]ecisions construing various provisions of the Federal Rules of Civil Procedure note the underlying rationale of a merged jurisdiction: abolition of procedural differences between law and equity actions but retention of substantive distinctions, i.e., equitable and legal rights and remedies." Comment, Receding Law—Equity Dichotomy, supra note 71, at 467.
90. See 5 J. Moore, supra note 75, § 38.16. For criticism of the "basic nature" test, see F. James & G. Hazard, supra note 69, at 447-48.
91. Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486, 488 (5th Cir. 1961) ("the determinative test on the point at issue was the 'basic character' of the relief sought").
right to a jury trial applied to all legal issues, which would be heard first, and the judge would then determine all undecided and equitable issues.\(^\text{92}\)

On the other hand, if the action was basically or mainly equitable, the judge would decide all the equitable issues in the case. The court had discretion, however, to apply the equitable clean-up doctrine. Any legal issues in the claim would be deemed "incidental" and subordinated to the larger equitable claim, thus foreclosing the right to a jury trial.\(^\text{93}\)

The "basic nature of the claim" test has been applied to determine whether the right to a jury trial attaches when an action has a mixture of legal and equitable claims.\(^\text{94}\) The test has also been applied when a court searches for a common law analogue to determine whether the rights and remedies are more like an action at law or one in equity.\(^\text{95}\) Under either application of the test, if a court determined that the basic nature of the claim was equitable, the clean-up doctrine could be used to foreclose the right to a jury trial altogether, even if legal issues were present.\(^\text{96}\)

However, as early as 1959, the Supreme Court had begun to chip away at this approach, which was based on an exaggerated emphasis on history

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\(^{92}\) See J. Friedenthal, M. Kane & A. Miller, supra note 69, at 485.

\(^{93}\) Id. at 485-86. See Levin, supra note 84, at 321; Redish, supra note 72, at 497.

A pre-merger example in the labor context of equity awarding legal relief "incidental" to equitable jurisdiction can be found in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), where the Supreme Court, in upholding the enforcement of a money award without jury trial, stated that the seventh amendment preserves only: "the right which existed under the common law when the Amendment was adopted. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law." Id. at 48. For a contemporary example of this approach in the hybrid DFR/breach-of-contract context, see Leach v. Pan Am. World Airways, 842 F.2d 285 (11th Cir. 1988).

\(^{94}\) See generally Simler v. Connor, 372 U.S. 221, 223 (1963) (although action was brought under declaratory judgment procedure, action "was in its basic character a suit to determine and adjudicate the amount of fees owing to a lawyer by a client under a contingent fee contract," which is a traditionally legal action); Comment, Receding Law—Equity Dichotomy, supra note 71, at 473 (listing cases where courts have used the "basic nature of the claim" test).

\(^{95}\) This application is required when a court is presented with a new statutory cause of action. See, e.g., Pernell v. Southall Realty, 416 U.S. 363, 375 (1974) ("[The seventh amendment] requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action in equity or admiralty."); Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp., 294 F.2d 486 (5th Cir. 1961) ("[f]als new rights of action developed, courts characterized them as legal or equitable by analogy to their historical counterparts to decide whether they created rights to a jury trial.").

\(^{96}\) In Fraser v. Geist, 1 F.R.D. 26 (E.D. Penn. 1940), the court stated the effect of the basic nature of the claim test as follows:

The decision as to whether or not the plaintiff is entitled to a jury trial as "of right" must rest upon a prior determination as to whether the action, in its essence, is one at law or in equity. If it is in law, the plaintiff is entitled to a jury trial; otherwise he is not.

Id. at 267.
and analogy. Through a series of cases, the Court adopted a dynamic concept of the jury trial right which recognized that modern procedural developments have expanded the universe of adequate legal remedies.97

C. Seventh Amendment Doctrine After 1959

1. The Decline of the Equitable Clean-up Doctrine

The Supreme Court has turned the equitable clean-up doctrine on its head by reversing the order of consideration: equitable issues should now be treated as incidental to legal ones.98 This transformation began in the antitrust case of Beacon Theatres v. Westover.99 Although the plaintiff (the alleged violator of the antitrust laws) sought a declaratory judgment and an injunction (essentially equitable relief), the defendant’s counterclaim requested treble damages (legal relief), on the ground that the plaintiff was violating the Clayton and Sherman Acts.100 Under the equitable clean-up doctrine, whether a jury heard the case would have depended on the chancellor’s discretion.101 The Supreme Court, however, rejected this view and eliminated any discretion on the part of the trial court in deciding the issue.102 The Court held that the right to a jury trial depended on the existence of an adequate legal remedy, not on analogies to pre-merger procedure.103 There-

97. J. Friedenthal, M. Kane & A. Miller, supra note 69, at 487. See also Beacon Theatres v. Westover, 359 U.S. 500, 509 (1959) (“the expansion of adequate legal remedies provided by the Declaratory Judgment Act and the Federal Rules necessarily affects the scope of equity”).
98. This reversal, of course, only applies to federal courts. Many state courts have refused to follow the Supreme Court’s lead and instead continue to adhere to the equitable clean-up doctrine. But it is also apparent that many federal courts have been slow to realize that the doctrine has little remaining significance. Redish, supra note 72, at 518-20.
99. 359 U.S. 500 (1959). Respondent Fox was a movie theatre operator that made exclusive showing contracts with movie distributors. Id. at 502. Beacon was a competitor that had threatened to sue Fox for treble damages on the grounds that the contracts violated the Clayton and Sherman Acts. Id. Fox, in response, filed an action under the Declaratory Judgment Act seeking a determination of the legality of his contracts as well as an injunction restraining Beacon from suing under the antitrust statutes. Id. at 502-03. Beacon filed a counterclaim alleging that the contract violated the antitrust laws and requested treble damages. Id. at 503.
100. Id. at 503. Note, however, that both the complaint and counterclaim raised the same issue: the validity of respondent Fox’s “first-run” exclusive showing contracts under the antitrust laws. Id.
101. Id. at 507. The trial judge denied Beacon’s request for a jury trial based on the equitable clean-up doctrine. The legal issues were subordinated to the equitable issues which the judge held would be tried first. Id.
102. Id. at 508. The Court asserted that the use of discretion “to deny Beacon a full jury trial . . . cannot be justified.” Id.
103. Id. at 507. The Court reasoned:

The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable
fore, the Court concluded that any legal claims in the case should be tried first, thus preserving the right to a jury trial.

The Supreme Court expanded the holding of Beacon Theatres in Dairy Queen v. Wood, where the Court held that even if the legal issue is only a fraction of the total claim, a jury trial is available on that legal cause.

origins to be tried ahead of legal ones, since this has the same effect as an equitable injunction of the legal claims. Inadequacy of remedy and irreparable harm are practical terms. As such their existence today must be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules.

Id. at 506-07.

104. The Court held that a preliminary injunction may be issued by a judge before trial, yet such would expire once the jury's findings of fact were received. Id. at 508.

105. Where both legal and equitable issues are presented in a single case, "only under the most imperative circumstances, . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." Id. at 510-11.

106. 369 U.S. 469 (1962). In Dairy Queen, the owners of a trademark sued for breach of contract and sought injunctive relief and an accounting to determine the money owing by petitioner. Id. at 473-75. The district court had denied a jury trial either because the action was "purely equitable" or because the legal issues were "incidental" to the equitable issues. Id. at 470. The Supreme Court rejected this approach as inconsistent with Beacon Theatres, id. at 472-73, and held that a jury trial of the factual issues involving the breach of contract and the trademark infringement claims should be granted. Id. at 479. The Court dismissed the fact that the complaint cast the money claim in terms of an "accounting," which is usually treated as equitable. Id. at 478-79. Reasoned the Court: "The legal remedy cannot be characterized an inadequate merely because the measure of damages may necessitate a look into the petitioner's business records." Id. at 479. Rather, if the accounts were of such a complex nature that "only a court of equity can unravel them," then an accounting may be deemed equitable, and this, the Court stressed, will be a "rare case." Id. at 478. This result raises the question as to whether, after Dairy Queen, any but the most complex claims for monetary remedies can ever be characterized as equitable. See 5 J. Moore, supra note 75, § 38.19[1], at 38-172.

This aspect of Dairy Queen, however, seems to have little support in lower federal court decisions. For example, in Nedd v. Thomas, 316 F. Supp. 74 (M.D. Pa. 1970), the court denied a jury trial in a hybrid action after characterizing the money sought not as "damages in the legal sense" but rather, as "requesting an equitable accounting wherein damages may be determined," and, therefore, the relief sought was equitable. See also Coca-Cola Co. v. Cahill, 330 F. Supp. 354, 355 (W.D. Okla. 1971) (characterizing relief sought in suit for an injunction against trademark infringement and for an accounting relative to infringement as "historically equitable in nature"), aff'd, 480 F.2d 153 (10th Cir. 1973); Coca-Cola Co. v. Wright, 55 F.R.D. 11 (W.D. Tenn. 1971) (holding suit for injunctive relief against trademark infringement and damages as equitable because "it is a claim primarily for injunctive relief").

107. 369 U.S. at 472-73. "Beacon Theatres requires that any legal issues for which a trial by jury is demanded be submitted to a jury." If this is the case, the "sole" determination is whether the action contains any legal issues. Id. at 473.

The Fifth Circuit summarized the revolution that Beacon Theatres had wrought in this way:

It is therefore immaterial that the case at bar contains a stronger basis for equitable relief than was present in Beacon Theatres. It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of Beacon Theatres, as we construe it.

The *Dairy Queen* Court stated that a court is not to weigh the equitable and the legal issues and determine whether the claimant has a right to a jury trial on the ground that one side outweighs the other.\(^\text{108}\) Neither can the defenses interposed by the opposing party render a legal claim equitable.\(^\text{109}\)

The third Supreme Court decision which contributed to the demise of the equitable clean-up doctrine, *Ross v. Bernhard*,\(^\text{110}\) involved a derivative action brought by shareholders against the directors of the company.\(^\text{111}\) Plaintiff alleged breach of trust, bad faith, willful misfeasance and gross negligence, and sought an accounting to the corporation.\(^\text{112}\) Reversing the First Circuit,\(^\text{113}\) the Supreme Court required that any legal component of an otherwise equitable claim must be separated out for seventh amendment purposes.\(^\text{114}\) While the right of the shareholder to sue on behalf of the corporation was equitable in nature,\(^\text{115}\) the claim itself was legal, and if it had been brought

\(^{108}\) *Dairy Queen*, 369 U.S. at 473. Rather, if a demand for a jury is made, such should be granted, and “the legal claims involved in the action must be determined prior to any final court determination of [the] equitable claims.” *Id.* at 479.

\(^{109}\) As the Court made clear in *Dairy Queen*, “the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings.” *Id.* at 477-78. For example, one defense common to both the DFR component and to the claim against the employer in the hybrid action is the employee’s failure to exhaust either contractual or internal union remedies. This failure-to-exhaust defense is typically characterized as within the discretion of the court. Nevertheless, *Dairy Queen* forbids such an admittedly equitable defense from tainting an otherwise legal claim.

In achieving this goal, *Dairy Queen* implicitly overruled that portion of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), in which the Supreme Court, in upholding the enforcement of a money award, assessed by an administrative agency without a jury trial, stated that the seventh amendment preserves only “the right which existed under the common law when the amendment was adopted. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law.” *Id.* at 48.

Notwithstanding, one remaining remnant of “incidental” jurisdiction today exists in the bankruptcy area, where an otherwise legal claim may become equitable without triggering the seventh amendment. See *Katchen v. Landy*, 382 U.S. 323 (1966). An attempt to reconcile *Dairy Queen* and *Katchen* can be found in Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 NW. U.L. REV. 503, 516-17 (1973) [hereinafter Comment, *History Adrift*].


\(^{111}\) *Id.*

\(^{112}\) *Id.* at 531-32.

\(^{113}\) *Id.* at 532. The district court had allowed an interlocutory appeal on the issue of the right to jury trial in shareholders’ derivative suits. *Id.* The Court of Appeals, in turn, held that “a derivative action was entirely equitable in nature, and no jury was available to try any part of it.” *Id.*

\(^{114}\) *Id.* at 542.

HYBRID AND NON-HYBRID ACTIONS

by the corporation itself, the right to jury trial would have existed.116 Accordingly, the Ross Court concluded that once the trial court determines the standing of the representatives to bring suit on behalf of the corporation, the legal issues may be resolved by a jury.117 The Court stressed that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action."118

The fourth and final Supreme Court ruling affecting the seventh amendment for purposes of this Article is Curtis v. Loether.119 In Curtis, the Supreme Court ruled that the statutory origin of a cause of action cannot be an impediment to a jury trial under the seventh amendment.120

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74 YALE L.J. 725 (1965) (discussing cases which first recognized right to jury trial in shareholders' derivative suits).
116. Id. at 532-33. The Ross Court reasoned:

The historical rule preventing a court of law from entertaining a shareholder's suit on behalf of the corporation is obsolete; it is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors.

Id. at 540.

117. Id.

118. Id. at 538. The Ross Court summarized Beacon Theatres and Dairy Queen as standing for the proposition that the right to a jury trial cannot be "infringed," either because the legal claim is considered "incidental" to the equitable claim, or because the issue is "common" to both and cannot be separated. Id.


120. In Curtis, a black woman sued a landlord under the fair housing provisions of Title VIII (currently codified at 42 U.S.C. § 3612 (1982)), alleging race discrimination in the landlord's refusal to rent an apartment to her. 415 U.S. at 190. Plaintiff sought injunctive relief, compensatory and punitive damages. Id. Although the defendant requested a jury trial, the district court denied the request, holding that no jury trial was "authorized by Title VIII nor required by the Seventh Amendment." Id. at 190-91.

On certiorari to the Supreme Court, the plaintiff argued that the seventh amendment was not applicable to new statutory causes of action. Id. at 193. The Court, however, listed a number of examples to the contrary, id. at 193-94, and held the amendment applicable to statutory rights "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Id. at 194.

The Curtis Court analogized the Title VIII claim to a new statutory duty sounding in tort that "merely defines a new legal duty." Id. at 195. The Court stressed that in cases where the exact common law equivalent is uncertain, the jury trial right must hinge on the nature of the remedies. Id. at 195-96. To quote the Court: "But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." Id. at 195. The Court distinguished the legal nature of the compensatory and punitive damages sought from the equitable nature of backpay under Title VII. Id. at 196-97.

As will be discussed in more detail later in this Article, to the extent that courts disagree as to the closest analogue for a breach of the DFR or for the claim against the employer, Curtis's advice to focus on the remedy seems sound. See also infra notes 329-32 and accompanying text for a discussion of Curtis's remedies-based approach and the irrelevance of the statutory nature of a cause of action for seventh amendment purposes.
Several general premises can be gleaned from these four Supreme Court cases as applied to DFR/breach of contract suits. First, those cases which have rejected a jury trial in either hybrid or non-hybrid actions by treating any legal claim as incidental to the main equitable issue are plainly incompatible with the language of *Beacon Theatres*. Second, the *Ross* approach fatally undermines the line of cases that have rejected a jury trial in hybrid actions because its component parts are inextricably intertwined. Third, the holding in *Curtis* rebuts those cases which have denied a jury trial for hybrid or non-hybrid actions because the right involved was unknown at common law. Thus, the cumulative effect of these cases makes it clear that any attempts to revive the pre-merger equitable clean-up doctrine, whether by disguising the attempt as an inseparability argument or characterizing legal remedies as incidental to the primary equitable one, is inconsistent with Supreme Court precedent.

2. The Current Seventh Amendment Test and Its Relation to Hybrid Actions

In *Ross*, the Supreme Court explained that a jury trial would be constitutionally mandated under the seventh amendment when the particular case was "legal" in nature. The Supreme Court, in a footnote, enunciated a three-part test to determine this issue. The nature of the claim "is determined by considering, first, the pre-merger [of law and equity] custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." The *Ross* test has been criticized as being "neither constitutionally compelled nor analytically useful." Nevertheless, it is clear that a court must focus both on the nature of the claim asserted and the type of remedy sought.

There are four possible combinations of claim and remedy: 1) a legal claim, such as breach of contract, and a legal remedy, such as damages; 2) a legal claim and an equitable remedy, such as an order to arbitrate; 3)
an equitable claim, such as seeking to vacate an order to arbitrate, and a legal remedy; and, 4) an equitable claim and an equitable remedy, such as reinstatement. Only in the first combination where both the claim and the remedy are legal do courts uniformly hold that a jury trial right attaches.\textsuperscript{127}

The test to determine the right to a jury trial, enunciated in Ross, is simple in theory but very complex in practice. Confusion arises, for example, in determining whether the claim is legal or equitable. As the previous section illustrates, often both legal and equitable claims are alleged, or both legal and equitable remedies are sought. Another source of difficulty is that it is also possible for a claim to be either legal or equitable, in which event the nature of the remedy is the best determinant of the mode of trial.\textsuperscript{128} Yet, confusion can also exist as to whether a particular remedy is legal or equitable.

Since neither the hybrid nor the non-hybrid action existed in 1791 when the seventh amendment was adopted, courts must analogize these claims to their closest common law equivalents under the first element of the Ross test. The claim against the employer has been compared to breach of contract when it arises under the NLRA,\textsuperscript{129} to an unfair labor practice,\textsuperscript{130}

\begin{itemize}
  \item \textsuperscript{127} But cf. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n, 430 U.S. 442 (1977) (holding that when Congress creates new public rights, it may assign their adjudication to administrative bodies, in which jury trials would be incompatible).
  \item \textsuperscript{128} See Curtis v. Loether, 415 U.S. 189, 196-97 (1974); Quinn v. Digiulian, 739 F.2d 637, 646 (D.C. Cir. 1984) (nature of remedies authorized and sought has become a more reliable clue to whether action is legal or equitable in nature than existence of a precise common law analogy to modern cause of action). The difference in the relief granted remains the most obvious ground for differentiating law and equity. 5 J. Moore, supra note 75, §§ 162.9-164.
  \item A brief, cogent discussion of the non-historical approach of deciding the jury trial question can be found in C & K Eng’g Contractors v. Amber Steel Co., 23 Cal. 3d 1, 14, 151 Cal. Rptr. 323, 330, 587 P.2d 1136, 1143 (1978) (Newman, J., dissenting):
    When California courts decide whether a jury trial should be assured, I believe that they should focus not on rights but on remedies.
    
    In fact, most rights that are now enforced via a jury were created not by courts but by legislatures. We look at the remedy sought, not at the judicial or legislative history of the right, to decide whether the trial is to be “legal” or “equitable.” . . . That approach requires no complex, historical research regarding when and by whom certain rights were created. It also requires less reliance on the anomalies of England’s unique juridical history. Courts thus may focus on a basic policy concern; that is, the typically more continuing and more personalized involvement of the trial judge in specific performance and injunctive decrees than in mere judgments for damages.

  \textit{Id.} at 14, 157 Cal. Rptr. at 330, 587 P.2d at 1143.
  \item Similarly, the Eleventh Circuit in Leach v. Pan Am. World Airways, 842 F.2d 285, 290 (11th Cir. 1988), stated that DFR actions do not resemble any particular actions at either law or equity. However, rather than focusing on remedies alone for determining the jury trial question, the \textit{Leach} court nevertheless treated the DFR claim as equitable because the judicial origin of the duty seems based on general notions of justice.
  \item \textsuperscript{129} Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 705 n.7 (1966).
  \item \textsuperscript{130} DelCostello v. Teamsters, 462 U.S. 151, 169-70 (1983).
\end{itemize}
and to an action to vacate an arbitration award. But it is the DFR claim which has produced a broad variety of analogies: to breach of a fiduciary duty; to breach of trust; to an unfair labor practice; to a personal injury action; to a malpractice action; to an action to vacate an arbitration award; to a tort; to a new statutory cause of action; and, to breach of contract. Some of these analogous claims were of equitable origin and others were tried to a jury at common law. None of these theories has provided much protection for the individual employee and they have been criticized as reflecting "overly traditional or conceptualized approaches to the unique problems in the field of labor-management relations."

The jury trial test is further complicated when the claims against the employer and the union are coupled in a hybrid action. There is no

133. See Rosen, supra note 11, at 396 n.23 (employees are the cestuis que trustent and union is the trustee of the trust).
134. See, e.g., DelCostello, 462 U.S. at 170 ("[e]ven if not all breaches of the duty are unfair labor practices . . . the family resemblance is undeniable"); Leach v. Pan Am. World Airways, 842 F.2d 285, 289 (11th Cir. 1988) (need for uniformity, predictability and lack of any state law analogy to the DFR leads us to eschew any analogy other than one to unfair labor practice charge); Badon v. General Motors Corp., 679 F.2d 93, 99 (6th Cir. 1982) (since the DFR springs from the NLRA, it is proper to look to limitations period in that statute for unfair labor practices when deciding timeliness of § 301 hybrid actions); De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 287 (1st Cir.), (since union's breach may be an unfair labor practice, statutory six-month period could be apt), cert. denied, 400 U.S. 877 (1970). Of the cases above, only Leach addressed the right to a jury trial in a hybrid action; the rest were concerned with the proper time bar for these claims.

Under the NLRA, charges of unfair labor practices are decided by the NLRB without the right to a jury trial. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937). Under the RLA, analogous "unfair labor practices" are tried first to the National Railroad Adjustment Board or a similar body. Appeals are made to a federal district court. 45 U.S.C. § 153 (1982).
140. See De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 285-86 (1st Cir.), cert. denied, 400 U.S. 877 (1970), where the court analyzed whether the DFR claim might seem "contractual" in the context of a hybrid action because the principal relief of reinstatement and backpay comes from the employer, while the union is a party only to allow the employee to overcome the employer's "exhaustion of contract" defense. However, under the allocation of back pay principles established in Bowen v. United States Postal Serv., 459 U.S. 212 (1983), the union may now have substantial liability for one of the main remedies.
141. See Rosen, supra note 11, at 396.
agreement whether to treat the hybrid as a unit for seventh amendment purposes or to analyze the right separately for each component of the cause of action. This only exemplifies some of the problems which arise when a court is trying to determine the legal or equitable nature of the claim.

The second tenet of the Ross test, the nature of the remedies sought, has also contributed to uncertainty in resolving a seventh amendment claim. Congress has not specified the available remedies in hybrid actions. The universe of remedies in hybrid DFR/breach of contract actions is formidable, but the most commonly sought include back pay, reinstatement, prospective wages where reinstatement is not possible, an order to arbitrate, an order to vacate an arbitration award, declaratory relief, possibly mental distress damages, attorneys' fees, and court

142. 396 U.S. at 538 n.10.
144. See, e.g., Thompson v. Board of Sleeping Car Porters, 367 F.2d 489 (4th Cir. 1966) (since the union's breach permitted employer to phase out employee's job, future damages were the only effective remedy); Bowen, 470 F. Supp. at 1131 (six-year delay since discharge may make reinstatement impractical).
145. Vaca v. Sipes, 386 U.S. 171, 196 (1967) (order to arbitrate not to be awarded inflexibly because sometimes the arbitrable issues may be resolved in the course of trying the DFR claim).
147. See, e.g., Acheson v. Bottlers Local 896, 83 L.R.R.M. (BNA) 2845 (N.D. Cal. 1973) (denying jury trial for a DFR action after treating the request for declaratory and injunctive relief as equitable in nature). In Beacon Theatres v. Westover, 359 U.S. 500, 504 (1959), and in Simler v. Conner, 372 U.S. 221, 223 (1963), however, the Supreme Court ruled that the fact that the action was in form a declaratory judgment case should not obscure the legal nature of the action.

In Spicher v. Wilson Foods Corp, 122 L.R.R.M. (BNA) 3168 (C.D. Ill. 1985), the court rejected a jury trial in a hybrid action even though emotional distress damages were sought, because they were treated as incidental to the equitable remedy of reinstatement. Id. at 3169.
costs.\textsuperscript{150} Punitive damages are generally unavailable under both the NLRA and the RLA, regardless of whether the action is brought against the union or the employer.\textsuperscript{151}

There is general agreement that, with relatively few exceptions,\textsuperscript{152} money damages are available at common law only as legal relief.\textsuperscript{153} Remedies such as reinstatement,\textsuperscript{154} an order to arbitrate,\textsuperscript{155} and an order to vacate an arbitration award\textsuperscript{156} are equitable in nature. Back pay has been characterized


\textsuperscript{151} See, e.g., International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979) (RLA does not contemplate the award of punitive damages against a union that violates its DFR, regardless of the degree of intent present on the union’s part); Spicher v. Wilson Foods Corp., 122 L.R.R.M. (BNA) 3168, 3169 (C.D. Ill. 1985) (employee alleging under the NLRA that employer violated collective bargaining agreement not entitled to punitive damages).

\textsuperscript{152} Some areas do remain enclaves of exclusive equitable jurisdiction, such as trusts and bankruptcy. See Katchen v. Landy, 382 U.S. 323 (1966):

So, in cases of bankruptcy, many incidental questions arise in the course of administering the bankrupt estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of a debt or damages against the bankrupt is investigated by chancery methods.

\textit{Id.} at 337 (quoting Barton v. Barbour, 104 U.S. 126, 134 (1881)).

For a recent article arguing that \textit{Katchen} did not preclude jury trials in bankruptcy courts, see Gibson, \textit{Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment}, 72 MINN. L. REV. 967 (1988).

\textsuperscript{153} The \textit{Leach} court cited Hartford v. Southern Pac., 273 U.S. 207, 217-18 (1927), in support of the position that a claim for damages is not always legal. 842 F.2d at 289 n.7. \textit{Hartford}, however, has little relevance to the question of the jury trial guarantee for hybrid actions for two reasons: 1) it is an admiralty case and “damages” in an admiralty suit are outside the jurisdiction of the law courts and hence are not triable to a jury under the seventh amendment; and, 2) \textit{Hartford} applied the equitable clean-up doctrine to reach a decision that predated both the merger of law and equity in federal courts, and the decisions in \textit{Beacon Theatres} and \textit{Dairy Queen}, which undermined use of the clean-up doctrine.

The \textit{Leach} court, however, was not without support for its proposition. In Curtis v. Loether, 415 U.S. 189 (1974), the Supreme Court stated that “we need not, and do not, go so far as to say that any award of monetary relief must necessarily be ‘legal’ relief.” \textit{Id.} at 196. Presumably, the Court had in mind the equitable characterization of back pay when it is coupled with reinstatement in Title VII cases. For an analysis of the cases cited by the Court in \textit{Curtis} to support this position, see Comment, \textit{The Right To Jury Trial Under ADEA and FLSA}, supra note 7, at 371-72 n.47.


\textsuperscript{155} See, e.g., Atwood v. Pacific Maritime Ass’n, 432 F. Supp. 491, 496-97 (D.Or. 1977) (since plaintiffs abandoned their claim for damages against the union, the only relief was to resume the grievance process and the court properly characterized this as equitable), aff’d, 657 F.2d 1055 (9th Cir. 1981).

\textsuperscript{156} See, e.g., Skidmore v. Consolidated Rail Corp., 619 F.2d 157 (2d Cir. 1979) (no right
as equitable relief when its recovery is within the discretion of the trial judge.\textsuperscript{157} However, when the trial judge has no discretion whether to award back pay, it has been termed legal relief.\textsuperscript{158}

Under the third prong of Ross, a jury trial may be denied on the ground that the issues presented are too complex for the average layperson to comprehend.\textsuperscript{159} Although the Supreme Court has shown indications of dis-

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157. Treating back pay as equitable relief has been justified on the basis that it is incidental relief to reinstatement, \textit{e.g.}, Harkless v. Sweeny School Dist., 427 F.2d. 319 (5th Cir. 1970), \textit{cert. denied}, 400 U.S. 991 (1971); Rowan v. Howard Sober, Inc., 384 F. Supp. 1121, 1124-25, n.2 (E.D. Mich., 1974) (action for money damages under Title VII does not create right to jury trial because such actions are equitable); Brady v. TWA, 196 F. Supp. 504 (D. Del. 1961) (reinstatement is equitable; back pay is incidental), or on the basis that district courts enjoy the \textquote{historic power of equity\textquoteright} to award lost wages to workers unlawfully discriminated against, \textit{e.g.}, Albemarle Paper Co. v. Moody, 422 U.S. 405, 413-25 (1975) (involving Title VII); Minnis v. Auto Workers, 531 F.2d 850, 852 (8th Cir. 1975) (equity court possesses some discretionary power to award damages in order to do complete justice) (citation omitted); Spicher v. Wilson Foods Corp., 122 L.R.R.M. (BNA) 3168, 3170 (C.D. Ill. 1985) (characterizing back pay as equitable and rejecting jury trial for a hybrid action) (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975)), or that, as restitution, back pay does not warrant a jury trial, \textit{see}, \textit{e.g.}, \textit{Federal Procedure: Labor & Labor Relations} \textsection 52 (1987) (seventh amendment establishes no right to jury trial over the issue of restitution).

However, treating a money claim for back pay as merely incidental to an equitable claim for reinstatement has been undermined by \textit{Dairy Queen}, where the Court specifically held that \textquote{incidental jurisdiction\textquoteright} theories would not support denial of a jury trial. Moreover, treating back pay as equitable because it is restitution is incorrect for two reasons. First, damages are measured by the plaintiff\textquotesingle s loss while restitution is measured by defendant\textquotesingle s wrongful profit. \textit{E.g.}, \textit{Restatement of Restitution} \textsection 1, at 12 (1937). Thus, back pay, being measured by plaintiff\textquotesingle s loss, is more accurately classified as damages. Second, even if back pay is restitution, the generalization that restitution is equitable is also erroneous. Quasi-contract and ejectment are but two examples of legal restitution which would warrant a jury trial.

For criticism of the discretion rationale used in Title VII cases to deem back pay an equitable remedy, see Comment, \textit{History Adrift}, supra note 109, at 523-24. \textit{ Cf.} Redish, \textit{supra} note 72, at 529 (fact that back pay remedy is discretionary should not determine that it is equitable in nature).

158. \textit{See} Curtis v. Loether, 415 U.S. 189, 197 (1974) (plaintiff in Title VIII action entitled to actual damages; court\textquotesingle s order cannot be viewed as requiring defendant to disgorge funds wrongfully held and thus, there is no basis for characterizing relief as equitable). As to hybrid claims, there is authority that damages resulting from a breach of the DFR do not fall into a discretionary category but may be recovered as of right. Richardson v. Communication Workers of Am., 443 F.2d. 974 (8th Cir. 1971). \textit{See also} 1 J. \textit{Pomeroy}, \textit{supra} note 86, \textsection 109, at 140 (\textquotelit{[t]he distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaption to circumstances, and the technical rules which govern their use.\textquoteright}). Equitable remedies, by contrast, are highly flexible.

159. 396 U.S. 531, 538 n.10 (1970). One reason often given for equity assuming jurisdiction over an accounting is the difficulty of the case for a jury. \textit{See} James, \textit{Right to a Jury Trial in Civil Actions}, 72 \textit{Yale L.J.} 655, 663 (1963). The issue of whether complex trials may be kept from juries simply because of their complexity remains unsettled. The increasing complexity of civil cases has lead many commentators to suggest a complexity exception to the seventh
avowing the complexity factor in deciding the jury trial question, and the Eleventh and Ninth Circuits decline to recognize it, the third Ross tenet is in wide use by lower federal courts. Some courts have discussed, in a cursory manner, the level of difficulty presented by the issues involved in hybrid and non-hybrid actions. Only one court has concluded that the issues in a hybrid action were too complicated for a jury. Indeed, factual issues arising in DFR/breach of contract actions are no more complicated than antitrust and shareholder derivative suits which have been found suitable for jury determination.

III. THE HYBRID ACTION'S STATUS UNDER THE SEVENTH AMENDMENT

A. The Nature of the Hybrid Action and the Conflict in Approaches

The hybrid action is a suit arising either under the NLRA or under the RLA in which the plaintiff joins both the union and the employer as defendants. Although the plaintiff has the option of bringing suit against...
the union and the employer separately, for purposes of this discussion, hybrid actions include those suits against the employer in which the plaintiff must prove breach of the union's DFR before he can proceed against the employer.

The hybrid claim can arise in many different contexts. For example, an employee who is disciplined or discharged by the employer will ask his union to file a grievance. Breach of the DFR can occur either by the union's refusal to file a grievance or by the manner in which it handles the grievance and arbitration process. However, in most instances the union has contractually acquired exclusive power to initiate and handle the grievance machinery. Therefore, the employee cannot gain relief from the employer unless he can prove that the reason he was unable to adjudicate his dispute by the mechanism provided for in the collective agreement was that the union undermined that process by violating its duty toward him.

The hybrid action rarely implicates a DFR breach occurring during contract negotiation. Consequently, most hybrid actions allege that the union upon which federal jurisdiction is based in DFR actions is actually the grant of exclusivity found in § 9(a) of the NLRA. See also Humphrey v. Moore, 375 U.S. 335, 356 (1964) (Goldberg, J., concurring) (jurisdiction for DFR claim based on federal labor statutes).


167. Vaca v. Sipes, 386 U.S. 171, 186 (1967). See also De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 286-87 (1st Cir.) (employee can sue employer under § 301 and overcome "exhaustion" defense by showing wrongful prevention by union without ever formally joining the union in that suit), cert. denied, 400 U.S. 877 (1970); Rivera v. NMU Pension & Welfare & Vacation Plan, 288 F. Supp. 874, 876 (E.D. La. 1968) (employee can sue employer and union separately for their alleged breaches of the collective bargaining agreement); Serra v. Pepsi-Cola Gen. Bottlers, Inc., 248 F. Supp. 684, 688 (N.D. Ill. 1965) (employee who seeks reinstatement and damages, and whose union refuses to press his grievance can vindicate his contract rights under § 301). Cf. Czosek v. O'Mara, 397 U.S. 25, 28-29 (1970) (employee's action against union upheld while leave was granted to amend action against employer). But cf. Atwood v. Pacific Maritime Ass'n, 432 F. Supp. 491, 495 (D. Or. 1977), aff'd, 657 F.2d 1055 (9th Cir. 1981). In Atwood, plaintiff sought to disjoin the union and collect damages only against the employer. The court held that "[i]f plaintiffs had not originally joined the union as a party defendant, the employers may well have been entitled to implead the Union as a third party defendant. Alternatively, the Employers may well have successfully moved for joinder of the union under Rule 19." Id.

168. See, e.g., DelCostello v. Teamsters, 462 U.S. 151, 165 (1983). "The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both . . . ." Id.


171. See Summers, supra note 21, at 254-56 (policy of NLRA is not to give exclusive control over grievances to unions; most unions, however, negotiate for such exclusive control, and as such, have special obligations to members).


173. A few courts, however, have held that if the employer conspired with the union in its
breached its DFR either by failing to process the grievance, or by its manner of conducting arbitration. A third category alleges that the union's violation stems from discrimination against the employee for engaging in protected activity. Although this category is often litigated as a non-hybrid DFR claim,174 these cases can also implicate the employer.175

For purposes of determining the right to a jury trial, the hybrid cases can be divided into three categories corresponding to the cluster of remedies necessary to satisfy the plaintiff. First, there is the Vaca v. Sipes176 model in which the DFR is breached by the union's failure to pursue a grievance through arbitration. The employee is generally urging the court either to order arbitration or to resolve the underlying arbitrable issue at the same time that the DFR breach is litigated.177 The employee will also usually ask for damages against both defendants.

The second model is based on the Supreme Court case of Hines v. Anchor Motor Freight, Inc.178 In contrast to Vaca, plaintiff's grievance in the Hines model has been arbitrated and the plaintiff has lost. However, the employee alleges that but for the DFR violation which occurred by the manner in which the union handled the proceeding, he would have won. Therefore, rather than arbitration, the plaintiff seeks to vacate the arbitration award. Similarly to Vaca, though, the plaintiff also seeks damages from both defendants.

breach of the DFR during contract negotiations, the employer may be sued along with the union. See infra discussion in part IV(B) for further discussion of this possibility and cases so holding.

174. See, e.g., Quinn v. Digiulian, 739 F.2d 637 (D.C. Cir. 1984) (action against union for challenging election procedures not treated as hybrid DFR claim).

175. See, e.g., Roscello v. Southwest Airlines Co., 726 F.2d 217 (5th Cir. 1984). In Roscello, a case arising under the RLA, the employee alleged that the employer discharged him for engaging in protected activity. Id. at 219-20. Plaintiff assisted the Teamsters in their efforts to represent Southwest Airlines' employees. Without an election, Southwest recognized another union and three days later plaintiff was fired, according to Southwest, for failure to perform duties and excessive absenteeism. Id. at 219. Plaintiff sued Southwest, alleging that he was fired for engaging in protected union organizing. Id. at 220. Plaintiff also sued the union that won the election, alleging that it had breached its DFR by discriminating against him because he was not a member of that union. Id.


177. The Vaca Court suggested that one reason the court itself might resolve the arbitrable dispute rather than order arbitration is that an arbitrator may lack authority under the collective bargaining agreement to award damages against the union for its breach. 386 U.S. at 196.

178. 424 U.S. 554 (1976). In Hines, the employer discharged employee truck drivers, claiming that they had been dishonest in submitting inflated lodging receipts. The employees asked the union to investigate their side of the story and the union's representative told them not to worry and not to hire an attorney. The union took the grievance to arbitration but did not investigate and did not produce any evidence contradicting the employer's documents. The arbitration committee upheld the discharges. Plaintiffs brought a hybrid action claiming wrongful discharge and breach of the DFR by the manner in which the union conducted the arbitration. The Supreme Court held that a breach of the union's DFR that taints the arbitration process removes the bar of the finality provision of the collective agreement. Id. at 567-69.
The third model, based on \textit{Cox v. C.H. Masland \& Sons},\textsuperscript{179} involves a DFR breach either by the union's failure to file a grievance or because the union conducts the arbitration proceeding in a perfunctory manner. In contrast to the other two models, the plaintiff in the \textit{Cox}-type hybrid action seeks only damages from the defendants.\textsuperscript{180}

As the models indicate, determining the right to a jury trial in hybrid actions is more complicated than when the employer or the union is sued alone in the non-hybrid context. Some courts have analyzed the right in terms of separating the suit against the employer from the suit against the union.\textsuperscript{181} This approach is consistent with the logic and policies of \textit{Beacon Theatres}, and the subsequent line of Supreme Court decisions consisting of \textit{Dairy Queen}, \textit{Ross} and \textit{Curtis}. All four of these cases suggest that the seventh amendment requires amalgamated claims to be pulled apart, separating the legal from the equitable strands and granting a jury trial for the legal components.\textsuperscript{182}

In sharp contrast stands the Eleventh Circuit's approach, adopted in \textit{Leach v. Pan Am. World Airways}.\textsuperscript{183} The court in \textit{Leach} treated the two components of the hybrid claim as "inextricably intertwined" for seventh amendment purposes. Under the \textit{Leach} approach, the hybrid DFR/breach of contract claim is viewed as an inseparable unit, which is then treated as primarily an action to vacate an arbitration award. The DFR component is,

\textsuperscript{179} 607 F.2d 138 (5th Cir. 1979). The employee, Cox, was fired for buying high quality carpet at scrap grade carpet prices for a fellow employee. Although the union pursued Cox's grievance through the first three steps of the grievance procedure, it refused to proceed to arbitration because it thought it could not win. Cox brought a hybrid action, seeking compensatory and punitive damages, and requested a jury trial. Applying the three-prong test for a jury trial found in \textit{Ross v. Bernhard}, 396 U.S. 531 (1970), the Fifth Circuit concluded that: 1) the DFR claim was legal in nature (after comparing it to a common tort and an action to enforce a statutory liability); 2) the relief sought was the traditional common law remedy; and, 3) the issues involved were not too complex for jury determination. \textit{Cox}, 607 F.2d at 143. Consequently, plaintiff was held to have the right to a jury trial for both components of the hybrid action. \textit{Id.}

\textsuperscript{180} \textit{See, e.g., Minnis v. Auto Workers}, 531 F.2d 850, 852-53 (8th Cir. 1975) (damages were the only relief requested; court granted a jury trial on both DFR claim and claim against the employer after analyzing the issues separately).

\textsuperscript{181} Some lower courts have compared the DFR claim to the equitable, rather than the legal equivalent, such as breach of trust or fiduciary duty; \textit{e.g.}, \textit{Atwood v. Pacific Maritime Ass'n}, 432 F. Supp. 491, 496-97 (D. Or. 1977), \textit{aff'd}, 657 F.2d 1055 (1981), while treating the claim against the employer as breach of contract; \textit{e.g.}, \textit{Davidson v. Teamsters Local 135}, 96 L.R.R.M. (BNA) 2808, 2809 (S.D. Ind. 1977). Other courts have treated both claims as legal. \textit{E.g.}, \textit{Rowan v. Howard Sober, Inc.}, 384 F. Supp. 1121, 1124-25 (E.D. Mich. 1974). Still other courts have characterized the DFR suit as legal while characterizing the claim against the employer as equitable. \textit{E.g.}, \textit{Roscello v. Southwest Airlines Co.}, 726 F.2d 217, 221 (5th Cir. 1984).

\textsuperscript{182} \textit{See supra} notes 99-120 and accompanying text for a complete discussion of these cases and their effect on the seventh amendment right to a jury trial, both generally and with reference to hybrid actions.

\textsuperscript{183} 842 F.2d 285 (11th Cir. 1988).
therefore, subordinated to the claim against the employer and the two are treated as a single equitable action. The Leach approach has typically gained acceptance in those situations where an employee has already lost an arbitration hearing and has been discharged. Under this approach, a jury trial is denied even if the plaintiff seeks damages in addition to reinstatement.

As stated above, the inseparability argument is usually made in the context of the Hines model. The plaintiff need not seek reinstatement, however, to ensure the argument's success, nor is it important that the employee seek to vacate the arbitration award. In fact, the only common denominator for use of "inseparability" seems to be that the grievant seeks to set aside a final and binding decision reached pursuant to the terms of a collective bargaining agreement. Further, although many hybrid DFR/breach of contract actions are indeed patterned on the Hines model, another significant question is the extent to which the logic of this unitary approach applies to the other two models.

In order to explore the above issues fully, as well as to better understand the merits of the inseparability argument, the following section will examine the strength of the Leach approach, its logical limitations and its applicability to hybrid actions other than those based on the Hines model. This section, in turn, will be followed by an examination of the case law which requires a separate analysis of the hybrid components for seventh amendment purposes. It will conclude not only that the latter approach is more consistent with Supreme Court seventh amendment precedent, but also that the "inseparability" rationale incorrectly resurrects the defunct doctrine of equitable clean-up by impermissibly treating legal claims as incidental to those brought in equity.

B. The Inseparability Argument

The Eleventh Circuit's decision, Leach v. Pan Am. World Airways, contains the most thorough explication of the inseparability argument and its importance for determining the right to a jury trial in a hybrid action. The court relied essentially on the Supreme Court decisions of United Parcel Serv., Inc. v. Mitchell and DelCostello v. Teamsters in developing its

184. Id. at 288.
185. E.g., Leach v. Pan Am. World Airways, 842 F.2d 285 (11th Cir. 1988).
186. See, e.g., Hammer v. Jones Transfer Co., 109 Lab. Cas. (CCH) para. 10,518 (D.C. Oh. 1988) (although plaintiff sought only money damages, this relief was dismissed as merely incidental to the primary remedy: vacation of the arbitration award).
188. 842 F.2d 285 (11th Cir. 1988).
These two Supreme Court cases dealt with the proper limitations period for hybrid actions. Therefore, it is necessary to turn to a brief analysis of these two cases.

In *Mitchell*, an employee brought a hybrid action in federal court seeking reinstatement and backpay after losing in arbitration. The issue in *Mitchell* was not whether there was a right to a jury trial; rather, the question presented was the appropriate state statute of limitations period for bringing the suit against the employer in the context of a hybrid action. The district court compared the hybrid action with an action to vacate an arbitration award, and barred the suit based on the state's statute of limitations period for the latter action. The Second Circuit, comparing the employee's claim against the employer to a breach of contract claim, reversed the district court, and held that New York's six-year statute of limitations period for contract actions was more appropriate. The Supreme Court reversed and held that the district court's position was more in line with the nature of the federal claim and the federal policies involved.

The *Mitchell* Court reasoned that regardless of the nature of either claim in isolation from each other, when the DFR claim and the breach of contract claim are coupled together in a hybrid action, each loses its separate identity through a kind of legal alchemy and coalesce to a single claim most closely related to an action to vacate an arbitration award. The Court was disinclined to compare the suit against the employer to common law analogues, such as personal injury or malpractice actions, because those actions "[o]verlook the fact that an arbitration award stands between the employee and any relief which may be awarded against the company." As a creature of federal labor common law, the Court in *Mitchell* seems to say that the hybrid action is *sui generis*.

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191. 842 F.2d at 288-91.
192. 451 U.S. at 60.
193. *Id.* at 59. The district court applied the principle articulated in *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), which required that "the timeliness of a section 301 suit . . . is to be determined, as a matter of federal law by reference to the appropriate state statute of limitations." *Id.* at 704-05. After deciding that the limitations period of the hybrid action would be dictated by that for vacating an arbitration award, the court simply turned to the applicable state statute. Section 7511(a) of the New York Civil Practice Law (McKinney 1963) provides that "[a]n application to vacate or modify an [arbitration] award may be made by a party within 90 days after its delivery to him." *Mitchell*, 451 U.S. at 59. The Supreme Court affirmed, noting that although a discharged employee could bring a direct suit under state law to vacate an arbitration award, a successful § 301 claim would have the same effect. *Id.* at 61 n.3.
194. 624 F.2d 394, 398 (2d Cir. 1980).
196. As one Court of Appeals has noted: "Perhaps the most vital part of the analysis in *Mitchell* was the Court's recognition that Section 301 claims are neither standard contract nor standard tort actions." *Badon v. General Motors Corp.*, 679 F.2d 93, 97 (6th Cir. 1982).
The *Mitchell* analogy should be considered in light of the fact that the comparatively short limitations periods for actions to vacate arbitration awards are consistent with the federal policy of "relatively rapid disposition of labor disputes." Sensitivity to this policy consideration by the *Mitchell* Court suggests that its chosen analogy was tailored to the special need for imposing a short limitations period.

Therefore, in light of the very different policies underlying the right to a jury trial, courts searching for legal or equitable analogues to the hybrid action should pause before importing *Mitchell's* imprecise analogy. Moreover, as Justice Stevens points out in his separate opinion, *Mitchell* did not address the time bar's application against the union. Finally, *Mitchell's* value was eroded two years later when the Court rejected *Mitchell's* analogy for hybrid actions by choosing the federal unfair labor practices statute of limitations period in *DelCostello v. Teamsters*.

Policy considerations to determine an appropriate limitations period because of imperfect analogy between state law action and hybrid action.


201. See, e.g., *Quinn v. Digiulian*, 739 F.2d 637, 646 (D.C. Cir. 1984) (finding *DelCostello*’s determination that DFR suits have no close analogy to ordinary state law actions for purposes of locating a limitations period to offer little support for the proposition that a DFR claim is equitable in nature for seventh amendment purposes).

202. Treating the hybrid claim as an action to vacate an arbitration award is imprecise with regard to the DFR component. As Justice Stevens points out in his separate opinion in *Mitchell*, "the arbitration proceeding did not, and indeed, could not, resolve the employee’s claim against the union." 451 U.S. at 73 (Stevens, J., concurring in part and dissenting in part). The DFR claim cannot be resolved in an arbitration proceeding because 1) it arises out of the conduct of that proceeding itself, id. at n.3; and, 2) "no arbitration award stands between the employee and any relief which may be awarded against the union," id. at 75 n.7. As it turned out, treating the hybrid action as one to vacate an arbitration award was criticized by a majority of the Court in *DelCostello*, 462 U.S. at 165-67 (finding that *Mitchell’s* analogies suffered from flaws, both of legal substance and of practical application).

Further, the Court in *Mitchell* complained that common law analogies are defective for use in describing unique creatures of federal labor law. 451 U.S. 56, 62-63, n.4. Yet the limitations period which it borrowed did not govern labor arbitration; rather, it borrowed the limitations period in which to seek vacation of commercial arbitration awards. For a brief discussion of the differences between labor and commercial arbitration, see *DelCostello*, 462 U.S. 151, 165-66 n.16.

203. *Mitchell* only addressed the limitations period for the claim against the employer. 451 U.S. at 71 (Stevens, J., concurring in part and dissenting in part).

HYBRID AND NON-HYBRID ACTIONS

In DelCostello, as in Mitchell, the issue was the proper limitations period for the hybrid action.\(^2\) Furthermore, both cases involved Hines-type hybrids. Rejecting Mitchell's comparison of a hybrid suit to an action to vacate an arbitration award as flawed "both in legal substance and practical application,"\(^2\) the Court in DelCostello analogized both components of the hybrid action to unfair labor practice claims.\(^7\) Therefore, the six-month limitations period in section 10(b) of the NLRA was held to govern claims against both the employer and the union. Although the Court acknowledged that the closest state law analogy for the claim against the union was an action in legal malpractice,\(^8\) it found that the relatively long limitations periods for such actions made it unsuitable.\(^9\)

Despite the fundamental differences between the policy considerations underlying the adoption of a limitations period and the determination of the right to a jury trial in hybrid actions, the Eleventh Circuit imported the inseparability rationale of Mitchell—DelCostello into its seventh amendment analysis in Leach v. Pan Am. World Airways.\(^10\) Although Leach was decided under the RLA,\(^11\) it is an example of the Hines-type hybrid action.\(^12\) The plaintiffs alleged that the DFR was breached by the flawed manner in which the union had presented their grievances at arbitration. Plaintiffs sued both the employer and the union seeking to overturn the arbitration award and seeking damages against the union for breach of its duty. Relying on Mitchell and DelCostello, the court treated the hybrid action as a single equitable claim and rejected plaintiffs' claim for a jury trial\(^13\) despite the fact that both legal and equitable relief was sought.\(^14\)

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\(^2\) DelCostello, 462 U.S. at 166-67.

\(^3\) Id. at 170.

\(^4\) Id. at 167.

\(^5\) Id. at 168 n.18. The length of the limitations periods for malpractice actions was not the only problem with adopting them in hybrid actions. Adopting such an analogy would also have meant different limitations periods for the two halves of the hybrid claim. Id. at 169 n.19.

\(^6\) 842 F.2d 285, 288-91 (11th Cir. 1988).

\(^7\) 45 U.S.C. §§ 151-88 (1982). "Since the Huffman case, the union's DFR has been the same duty whether the union involved is covered by the NLRA or the RLA." Roscello v. Southwest Airlines Co., 726 F.2d 217, 221 (5th Cir. 1984).

\(^8\) Hines-type hybrids typically involve an action to vacate an arbitration award. The plaintiff essentially alleges that if not for the breach of the DFR by the union during the grievance proceeding, the plaintiff would have won. See supra note 178 and accompanying text.

\(^9\) Leach, 842 F.2d at 290.

\(^10\) Id. at 288 n.5. The Leach court cited the following cases as authority that an action to vacate an arbitration award is equitable: Skidmore v. Consolidated Rail Corp., 619 F.2d 157 (2d Cir. 1979), cert. denied, 449 U.S. 854 (1980); Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 373 F.2d 136 (8th Cir.), cert. denied, 389 U.S. 827 (1967).
Indeed, in a final stroke, the *Leach* court also used the inseparability approach to characterize all the relief sought as equitable and based its determination on the ground that the primary relief (reinstatement and back pay from the employer) was equitable. However, the court completely missed the real significance *Mitchell* and *DelCostello* may have for determining the jury trial right in DFR/breach of contract claims. The search in those two cases for a suitable time bar in a hybrid claim is more consistent with actions at law than with equitable claims. The latter are not governed by rigid limitation periods, but rather, by the flexible concept of laches.216

Is it true, as Justice Stewart asserted in *Mitchell*, that “the two claims are inextricably interdependent” and that the “two elements of plaintiff’s hybrid action cannot be disentangled”?217 The inseparability argument, as applied in *Leach*, subordinates the DFR claim to the claim against the employer and treats it as ancillary in a manner similar to the way in which the equitable clean-up doctrine operated prior to the merger of law and equity.218 As to the remedies requested, because the action against the employer to vacate the arbitration award is equitable, the entire hybrid action submits to that classification for seventh amendment purposes. However, while the inseparability argument may be illuminating for the purpose of finding a limitations period in which to bring a hybrid claim, the language of *Beacon Theatres* and *Dairy Queen*, motivated by policies entirely different than uniformity and swift resolution of arbitral disputes, may require—and as the next section of this Article contends, does require—that the helix of the hybrid action be unraveled. Perhaps even more importantly, as the preceding paragraphs have demonstrated, the analogies invoked in *Mitchell* and *DelCostello* were mere creatures of convenience to begin with.

Further, although the inseparability rationale may at first seem to provide a plausible solution to some practical problems that arise in analyzing hybrid claims, closer examination reveals weaknesses in even these potential justifications for the *Leach* approach. In fact, as will be shown, the strongest statement that can be made to describe the relationship between the contract

216. In Holmberg v. Armbricht, 327 U.S. 392 (1946), the Supreme Court stated: 
    Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor’s intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair . . . .
    *Id.* at 396. Further, although actions at law are not governed by the equity doctrine of laches, see J. POMEROY, *supra* note 86, § 425, at 190, statutes of limitation can be so drafted as to govern both legal and equitable claims and remedies. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 44 n.20 (1973).
218. *See supra* notes 84-87 and accompanying text.
and the DFR aspects of a hybrid action is that they are, at best, interdependent.

First, analyzing the two components of the hybrid action separately for determining the right to a jury trial may result in changing the normal order of trial. For example, if the two claims are analyzed separately, a court may decide that the right to a jury trial exists for the claim against the employer but not for the claim against the union. *Beacon Theatres* and *Dairy Queen* tell us that the jury should hear the legal claims before the court determines the equitable ones. Therefore, the breach of contract claim would be determined before the court decides if the union breached its DFR. This is a reversal of the usual order in which such actions are litigated. Indeed, in a hybrid action, there is no need to determine whether the employer breached the agreement until it is determined that the union breached its DFR. Thus, from a standpoint of pure judicial efficiency, the *Leach* approach seems to have some merit. Judicial convenience, however, is not a compelling reason to deem the components of a hybrid action inseparable.

Second, in order for the employee to recover back pay from the union in a hybrid action, the employee must also prove that his discharge was unjust or wrongful. This might also seem to support the *Leach* approach in that it links the two aspects of the suit together. Yet, proof that the employer breached the agreement is not controlling as to whether there was any breach by the union at all. Nor does it necessarily follow that because the plaintiff can show a DFR breach that he can also show wrongful discharge. The arbitration award may be upheld without absolving the union for violating its DFR, but the employee will not have a chance to prove wrongful discharge unless he can show breach of the DFR. This "intricate relationship between DFR and the enforcement of collective bargaining agreements" is more accurately described as interdependent rather than as "inseparable," especially in those cases where the employer is not liable because no contract breach is shown, while the union remains liable for its independent breach.

Third, the plaintiff's success in proving breach of contract may have an impact on the amount of damages allocated to the union. But this result also tends to show interdependency rather than inseparability. Indeed, because of the apportionment of damages rules set forth by the Supreme Court

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220. See *Atwood v. Pacific Maritime Ass'n*, 432 F. Supp. 491, 499 (D. Or. 1977) (it is not necessary to determine whether the employers breached the agreement unless the trier of fact found that the union breached its DFR), aff'd, 657 F.2d 1055 (9th Cir. 1981).


222. *Id.*


in *Bowen v. United States Postal Serv.*,\(^{226}\) the amount recoverable from the union may far exceed the employer’s liability. Despite this, the court in *Leach* asserted that the claim against the union is only incidental to the more important breach of contract claim against the employer. If the two are indeed inseparable, which is the tail and which is the dog?\(^{227}\)

Finally, assuming that the inseparability argument accurately reflects the nature of *Hines*-type hybrids, does it have any validity for the other two categories of hybrids? Some courts have held that it does apply to the *Vaca* model. In *Spicher v. Wilson Foods Corp.*,\(^{228}\) a *Vaca*-type hybrid, the plaintiff was foreclosed from arbitration by the union’s breach of its DFR.\(^{229}\) Even though the plaintiff did not seek to vacate an arbitration award, he nevertheless sought to set aside a final decision which terminated his employment.\(^{230}\) The federal district court employed the *Mitchell* inseparability argument for purposes of rejecting the right to a jury trial.\(^{231}\)

Indeed, if the *Leach* approach is followed to its logical conclusion, the result in *Spicher* seems unavoidable. Essentially, both *Hines* and *Vaca* hybrids seek to set aside a final decision. The court may order a *de novo* arbitration for the *Hines* hybrid or an order to arbitrate in the first instance in the *Vaca* context. Alternatively, the court may resolve the underlying arbitral dispute in either category. An order to arbitrate is a direct form of specific per-

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\(^{226}\) 459 U.S. 212 (1983). Charles Bowen was suspended and ultimately discharged by the United States Postal Service after an altercation. After the union refused to take his grievance to arbitration, Bowen brought a hybrid DFR/breach of contract action in federal court seeking damages and injunctive relief. An advisory jury found both the Service and the union liable and the district court instructed the jury that apportioning damages was left to its discretion. The Supreme Court reversed, holding that liability was to be apportioned based on the damages caused by each. *Id.* at 222-28. The jury sat only as an advisory panel on Bowen’s claims because 28 U.S.C. § 2402 (1982), states that “[a]ny action against the United States under section 1346 shall be tried by the court without a jury . . . .”

\(^{227}\) De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 286 (1st Cir.) (union’s liability may well exceed the potential recovery against the employer in a hybrid action, thereby destroying the premise that the claim against the union is only incidental to the more important breach of contract claim against the employer), *cert. denied*, 400 U.S. 877 (1970).

\(^{228}\) 122 L.R.R.M. (BNA) 3168 (C.D. Ill. 1985).

\(^{229}\) *Id.* at 3169. Plaintiff, Leonard Spicher, brought a hybrid section 301 DFR/breach of contract action after he was discharged. He sought injunctive relief, reinstatement, back pay, punitive damages, and damages for mental suffering and humiliation. *Id.*

\(^{230}\) *Id.*

\(^{231}\) *Id.* at 3170-71. The district court rejected a jury trial for either component of the hybrid action after applying the three-prong test found in *Ross*. *Id.* at 3169-70. Relying on the inseparability rationale of *Mitchell* and *DelCostello*, the court analogized the hybrid action to an unfair labor practice which it correctly characterized as essentially equitable. *Id.* at 3170. The court rejected punitive damages against both defendants and treated the other legal relief as incidental to the equitable relief. *Id.* at 3169. As an alternative explanation, the court characterized the ultimate relief sought in a hybrid action as setting aside a final and binding decision reached pursuant to the collective agreement. *Id.* at 3170. The court dismissed the third prong of *Ross*, the relative simplicity of issues in a hybrid action, as insufficient to require a jury trial. *Id.*
formance; an order to vacate an arbitration award is an indirect attempt to exact the same remedy. To this extent, it is arguable that the Leach approach applies to Vaca-type hybrids as much as it does to the Hines model.

It is as yet unclear what impact the Leach approach has on the third model, or Cox-type hybrid, where, despite being discharged, the plaintiff seeks only damages rather than arbitration or judicially decreed reinstatement. However, while the courts using the inseparability doctrine have not yet addressed this issue, in effect, the plaintiff in a Cox-type hybrid action is still requesting the court to resolve the underlying arbitrable issue. A court has authority to do this only if the plaintiff is no longer bound by the final decision. The core of the inseparability argument seems only to require that the plaintiff seek relief from a final decision denying him any remedy. Under this logic, it is unimportant that the plaintiff only seeks damages rather than arbitration or reinstatement and the Leach approach would seem equally applicable to this third category of hybrid actions.

C. The Case for Separate Analysis of the Hybrid Components

When a court must judicially determine the appropriate limitations period for a cause of action, treating the hybrid action as a unit is a practical, logical and simple solution consistent with the federal labor policy of promoting uniformity and swiftly resolving arbitral issues. However, inconsistent and competing policies underlying the determination of the right to a jury trial serve to distinguish the limitations period issue and may require that the two components which make up the hybrid action be analyzed separately for seventh amendment purposes.

Indeed, before Mitchell introduced the inseparability approach in 1981, every court that addressed the issue of the right to a jury trial in hybrid actions separated the claim against the employer from the claim against the union for purposes of analysis. Some courts granted a jury trial for both claims after separate scrutiny. Other courts granted a jury trial for the claim against the employer but not against the union, and still others did the

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In Vaca, although the Court did not address the jury trial question, the case contains language firmly suggesting that the two components of the hybrid should be treated as distinct. For example, the Court concluded that the union was not a participant in the employer's allegedly wrongful discharge and that the employer was not a participant in the union's alleged wrongful refusal to process the grievance. Vaca v. Sipes, 396 U.S. 171, 196 (1967). Thus, joint liability for either wrong would have been unwarranted: "Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy . . . ." Id. at 197 (emphasis added). See also Feller, supra note 1, at 704 (arguing that claims against employer and union are analytically separable).
reverse. But, despite the variety of results on this issue, no court denied a jury trial for both claims. After Mitchell, however, courts applying the inseparability approach must inevitably deny a jury trial in hybrid actions.

Notwithstanding the rise of the Leach approach after Mitchell, some courts have seen through the superficial analogy that has been drawn to Mitchell and have refused to succumb to the siren call of inseparability. The seminal case rejecting the inseparability doctrine is the Fifth Circuit's 1984 decision in Roscello v. Southwest Airlines Co.233

In Roscello, an RLA case, an employee alleged that he was fired for engaging in union organizing, and that the union discriminated against him because he was not a union member.234 As in Leach, the Court applied the Ross criteria for determining the right to a jury trial,235 but in contrast to Leach, the court made a separate jury trial determination for each component of the hybrid action.236 Relying on its prior decision in Cox, the court analogized the DFR claim to a common law tort, thus making it a legal claim.237 However, the Court refused to decide the issue of whether or not the wrongful discharge claim against the employer was equitable.238 Since the DFR claim was legal, the Court held that the right to a jury trial existed even if the claim against the employer was equitable, because under Beacon Theatres, the "factual issues common to the legal and equitable claims must be submitted to a jury."239 After discussing the remedies, the court granted a jury trial on the DFR claim and its overlap with the wrongful discharge claim against the employer.240

Mitchell's approach of treating the hybrid as an action to vacate an arbitration award admittedly does not apply to RLA claims such as Roscello since such cases involve no prior final decision which the plaintiff seeks to avoid. Nevertheless, Roscello's approach of separating the components of the hybrid for jury trial determination is supported by Supreme Court seventh amendment precedent while the Leach approach is not.241

233. 726 F.2d 217 (5th Cir. 1984).
234. Id. at 219-20. Roscello does not fit under any of the three hybrid categories discussed thus far because no grievance and arbitration process was implicated and the claim against the employer would have been heard, if at all, by the NLRB rather than by the courts had it arisen under the NLRA. From the employer the plaintiff sought reinstatement, back pay, and punitive damages. Id. at 220. From both parties he sought damages for mental anguish, prospective wages and pre-judgment interest. Id.
235. Id. at 220.
236. Id. at 221.
237. Id. at 220-21.
238. Id. at 221.
239. Id.
240. Id.
241. Roscello's approach of preserving a jury trial for the legal component of the hybrid action is strikingly similar to the one taken by the Supreme Court in Ross v. Bernhard, 396 U.S. 531 (1970). In Ross, shareholders brought a derivative suit against the directors of their company alleging breach of fiduciary duty, breach of trust, bad faith and gross negligence. Id.
Further, several Supreme Court decisions have noted the discrete nature of the jurisdictional basis of the hybrid action's two components. These comments by the Court provide additional support for the proposition that the two parts of a hybrid action are not inseparable. For example, under the NLRA, jurisdiction for the contract claim against the employer is based on section 301, while jurisdiction for the DFR component is based on the grant of exclusivity contained in section 9(a) of the NLRA.\textsuperscript{242} Another way of stating this distinction, as the Court in \textit{DelCostello} noted, is that "[t]he suits at issue here . . . are amalgams, based on both an express statutory cause of action and an implied one."\textsuperscript{243}

In summary, it appears that the Eleventh Circuit's approach of treating the hybrid claim as a single equitable unit for seventh amendment purposes applies to any hybrid action where the plaintiff seeks relief from some final, antecedent decision. Although application of this doctrine of inseparability does seem to further the aim of uniformity important to federal labor law, the Supreme Court in \textit{Vaca} evidently saw little need for uniformity in this complex area when it concluded that the NLRB does not enjoy exclusive jurisdiction over the DFR component of hybrid actions.\textsuperscript{244}

Further, the \textit{Leach} approach belies the spirit if not the letter of the Supreme Court's modern seventh amendment doctrine. In fact, in its treatment of legal claims as incidental to the equitable aspects of a hybrid action, the inseparability doctrine resurrects the long discredited concept of equitable clean-up. While it might be slightly more efficient to deem the components of hybrid actions inseparable and thereby deny an employee the right to have a jury hear any portion of his claim, a mere gain in efficiency does

\begin{footnotes}
\item[242] See Coleman v. Kroger Co., 399 F. Supp. 724, 727 (W.D. Va. 1975) (DFR is not based on breach of a collective bargaining agreement; jurisdiction, therefore, cannot be based on § 301; instead, it is based on 28 U.S.C. § 1337 (1982), which confers federal jurisdiction over suits arising under any Act of Congress regulating commerce); 2 C. \textsc{Morris}, \textit{supra} note 6, at 1293 n.43 (same).
\item[243] 462 U.S. 151, 158-59 n.12 (1982).
\item[244] \textit{Vaca} v. \textit{Sipes}, 386 U.S. 171, 180-83 (1967).
\end{footnotes}
not justify a denial of seventh amendment rights. Therefore, on balance, it is the Fifth Circuit’s approach in *Roscello* which should form the basis for future development in this area. By its careful blending of the unique aspects of seventh amendment theory with the important policies of federal labor law, *Roscello* provides the better reasoned approach.

Having examined the seventh amendment’s application in hybrid actions, it remains only to address any change wrought in the seventh amendment calculus when the right to a jury trial is examined in the context of non-hybrid actions.

IV. Non-Hybrid Suits and the Seventh Amendment

A. Non-Hybrid Suits Against the Employer or Union (Not Involving DFR)

Section 301 of the LMRA has been interpreted to allow individual employees to sue either their union or employer for breach of the collective bargaining agreement.\(^{245}\) Although the RLA has no section 301 equivalent, that statute has been interpreted to permit individual suits by employees against the union,\(^{246}\) against the employer, or against both.\(^{247}\)

Nevertheless, a distinction must be made between the two statutes in analyzing the non-hybrid suits which may be brought against either the employer or the union which do not involve a breach of the DFR. Under the LMRA, section 301 provides for suits against either the employer or the union for breach of contract.\(^{248}\) By contrast, under the RLA, an employee may sue his employer in court for violating the statute without alleging

\(^{245}\) In *Smith v. Evening News Ass’n*, 371 U.S. 195 (1962), the Supreme Court ruled that to exclude individual suits by employees “from the ambit of section 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law.” *Id.* at 200. Exhaustion of contractual remedies was not an issue in *Smith* because the agreement contained no grievance-arbitration procedure. *Id.* at 196 n.1. *Smith* also confirmed the principle that judicial jurisdiction over breach of labor agreements is not preempted by the NLRB even though the underlying dispute involves an unfair labor practice. *Id.* at 197. This overlap with contract breach makes comparisons with unfair labor practices for jury trial purposes compelling.

\(^{246}\) In *Conley v. Gibson*, 355 U.S. 41, 44-45 (1957), the Court held that the National Railway Adjustment Board lacks jurisdiction over DFR claims arising under the RLA.

\(^{247}\) *Glover v. St. Louis-San Francisco Ry.*, 393 U.S. 324 (1969), held that district courts may hear RLA hybrid suits, even though the National Railway Adjustment Board has original jurisdiction over minor disputes between employees and the employer. *Id.* at 331. For a discussion of jurisdictional problems in bringing RLA hybrid actions in court, see Feller, *supra* note 1, at 707.

\(^{248}\) Section 301(a) of the LMRA, 61 Stat. 156 (1947) (current version at 29 U.S.C. § 185(a) (1982)). In the hybrid action, jurisdiction for the DFR claim is considered to be based on § 301 even though the nature of the DFR claim is closer to tort than to contract. With this exception, a suit under § 301 is essentially claiming breach of contract. See *supra* notes 14-15 and accompanying text.
breach of contract. Allegations of contract breach are heard by the National Railway Adjustment Board, which functions much like an arbitrator. Judicial review of Adjustment Board decisions is even more limited than review of arbitration awards subject to the NLRA. In Andrews v. Louisville & Nashville R.R., the Supreme Court concluded that greater deference must be paid to decisions rendered by the Adjustment Board procedures under the RLA than in cases arising under section 301 of the LMRA.

Distinguishing between the two statutes is further appropriate with regard to the jury trial question because the spectrum of remedies varies under each statute. Although both probably bar recovery of punitive damages from the employer, compensatory damages are more readily available under the LMRA. A majority of courts limit recovery under the RLA to reinstatement and back pay. Perhaps for this reason the right to a jury trial under the RLA should also be more circumscribed on the ground that compensatory damages are clearly legal in nature while reinstatement and back pay are considered equitable. Also, neither an order to arbitrate nor one to vacate an arbitration award is available under the RLA when the suit is based on a statutory, rather than on a contractual, violation.

As a consequence of these differences, non-hybrid cases in this area can best be analyzed by separating those arising under the LMRA alleging breach of contract from those arising under the RLA which may allege a statutory breach. The following cases will further illustrate these distinctions as they apply to the seventh amendment right to a jury trial as well as to help determine whether a jury is constitutionally required in these cases.

250. Section 3 First (i) of the RLA, 45 U.S.C. § 153 First (i) (1982), creates exclusive jurisdiction for the National Railroad Adjustment Board over contractual disputes which railway workers may have with their employers. In contrast, the Adjustment Board has no jurisdiction over disputes between railway employees and their unions. Conley, 355 U.S. at 44-45.
252. Id. at 323.

When the claim against the employer sounds in contract, punitive damages are awarded only if there is a "willful abuse of a duty imposed as a result of the defendant's position of authority or trust, as well as a breach of contract," Holodnak v. Avco-Lycoming Div., Avco Corp., 514 F.2d 285, 292 (2d Cir. 1975).
Auto Workers v. Hoosier Cardinal Corp. provides an example of a section 301 action alleging the employer's breach of contract. The Court was called upon to choose a limitations period for the section 301 action because neither the statute nor its legislative history provided guidance. Although the court did not address the jury trial issue, Hoosier Cardinal is a useful decision because it is typical of the pre-Mitchell contract analogy approach used for characterizing the suit against the employer. The Court borrowed the state's statute of limitations period for oral contracts because that was the closest state equivalent to the suit against the employer. Significantly, the plaintiffs did not seek reinstatement but only the money equivalent of their accumulated vacation pay. Had the court applied the Ross criteria, the Court should have found the nature of the claim analogous to breach of contract. Because breach of contract is a legal action when money damages are sought, cases following this pattern should provide a jury trial.

The fact that Mitchell more recently characterized the hybrid claim in a way that differs from that of Hoosier Cardinal does not detract from the validity of the above analysis. If the plaintiffs in Hoosier Cardinal had alleged wrongful discharge in violation of the collective bargaining agreement and sought reinstatement, rather than damages, the employer would have

256. The employer discharged employees without paying them any accumulated vacation pay as provided for in the collective agreement. Id. at 698. The employer breached both the written collective bargaining agreement and the individual oral employment contract by failing to pay accumulated vacation pay when the employees were discharged. Id. Seven years after the employees’ discharge, the union sued the employer in federal court under § 301 of the LMRA. Id. at 699.


Stamps v. Michigan Teamsters Joint Council No. 43, 431 F. Supp. 745, 746 (E.D. Mich. 1977), provides an example of a non-hybrid § 301 action brought against a union for a breach of contract that did not implicate the DFR. In Stamps, a jury trial was granted because of the legal characterization of the claim (breach of contract) and the remedy sought (damages).

257. 383 U.S. at 701. Although the union, rather than the affected employees, sued the employer, this is of small importance for seventh amendment purposes. Id. at 699-700. Since § 301 contains no limitations period for bringing such actions, the district court was called upon to borrow the closest state time bar. Id. at 701. The Supreme Court accepted the district court’s application of the six-year Indiana limitations period governing oral contracts and dismissed the suit. Id. at 707.

Because a § 301 suit involves consideration of both the collective bargaining agreement and the hiring contract between the employee and employer, damages assessed against the employer continue after expiration of the collective bargaining agreement. Richardson v. Communication Workers of Am., 443 F.2d 974, 980 (9th Cir. 1971). This approach to measuring damages reinforces the contract analogy.

258. 383 U.S. at 706-07. Moreover, the Court in DelCostello acknowledged that unlike the hybrid action, which has no close analogy, the non-hybrid claim in Hoosier Cardinal has a close analogy in ordinary state law to a contract claim. 462 U.S. at 165.

been able to assert the defense of failure by plaintiffs to exhaust contractual remedies, i.e., arbitration. If arbitration would have taken place and the plaintiffs had lost, then the finality of the arbitration award could only be removed by showing a breach of the DFR by the union in its handling of the grievance procedure. Therefore, Mitchell's characterization of the claim against the employer as one to vacate an arbitration award is only accurate (or possible) in the context of a hybrid action. Of course the plaintiff is free to sue only the employer for breaching the agreement, but, whether or not the union is joined, the plaintiff must still prove the union's DFR breach in order to gain reinstatement.

To summarize, prior to Mitchell, the suit against the employer was usually characterized as one for breach of contract and a jury trial granted where the employee sought a legal remedy. The Supreme Court, in Mitchell, asserted that for purposes of establishing a limitations period for suits against the employer where the union's breach of its DFR must nonetheless be shown, such claims were analogous to actions to vacate an arbitration award. Subsequently, DelCostello, in applying the six-month limitation found in section 10(b) of the LMRA, suggested yet another comparison: to an unfair labor practice. These cases, however, are limited by their own logic to hybrid actions. Thus, in cases where the DFR is not implicated, Hoosier Cardinal continues to provide the most appropriate analogy.

In contrast, non-hybrid suits against the employer arising under the RLA need not allege breach of contract. Moreover, the statutory basis for such suits makes comparison with the DFR claim inescapable. The case of Maas v. Frontier Airlines, Inc. is illustrative of the characterization dangers in this area. There, the court directly addressed the jury trial right for non-hybrid actions against an employer under the RLA. The plaintiff sued his

260. See Vaca v. Sipes, 386 U.S. 171, 184 (1967) (discussing Maddox); Republic Steel Corp. v. Maddox, 379 U.S. 650, 657 (1965) (requiring exhaustion of contractual grievance remedies before an action can be brought under § 301).
264. DelCostello v. Teamsters, 462 U.S. 151, 170-72 (1983). The overlap between breach of contract and unfair labor practices is particularly frequent in those suits implicating § 8(a)(5) (good faith bargaining) and § 8(a)(3) (discrimination for engaging in protected union activity) of the NLRA. However, since the RLA does not set forth unfair labor practices, DelCostello's analogy has less force in describing claims against the employer arising under that Act.
265. In Texas & N.O.R. v. Board of Ry. Clerks, 281 U.S. 548 (1930), the Supreme Court held that the RLA should be construed to empower the courts to issue injunctions against discharges of employees for their union activities and to order reinstatement.
employer for wrongful termination, claiming he was fired for engaging in protected union activity. Applying the Ross criteria, the court found no common law counterpart to this statutory-based claim against the employer. Without explanation, the court concluded that this lack of a common law analogue suggested that such action was equitable under the first tenet of Ross.

But this non sequitur is directly inconsistent with the holding and logic of Curtis v. Loether. According to Curtis, neither the statutory basis of the claim nor its lack of a common law analogue undermines the seventh amendment jury trial guarantee. In fact, discrimination is the nature of the wrongdoing both in Maas and in Curtis. But the Maas court seemed to consciously ignore this aspect of Curtis, while agreeing with the Curtis decision that the remedies sought, the second prong of Ross, is the most important tenet of the trio.

The plaintiff in Maas sought various forms of relief against the employer: reinstatement, back pay, and compensatory and punitive damages. The court rejected compensatory and punitive damages as inconsistent with the statutory scheme under the RLA. Reinstatement was properly classified as equitable, and the demand for back pay was treated as incidental to the primary equitable relief. The court also analogized the wrongful discharge claim under the RLA to a claim for reinstatement and back pay under Title VII in support for its equitable classification of the remedies. As to the third prong of Ross, the court felt that a jury could handle the complexities of such a case, nonetheless, it rejected the jury trial claim.

One final point to be gleaned from Maas is that the court was not able to borrow Mitchell's analogy to an action to vacate an arbitration award

267. Id. at 225. This same allegation, if made under the LMRA, would be preempted by the NLRB's exclusive jurisdiction of unfair labor practices. Under the RLA, however, such suits are tried first to the National Railroad Adjustment Board or a similar body. Appeals may be made to a federal district court. 45 U.S.C. § 153 (1982).

268. 676 F. Supp. at 225-27. The Maas court stated: "The rights and duties involved in the alleged unfair labor practice of discrimination based on union activity had no common law counterpart triable by a jury before the merger of law and equity." Id. at 225.

269. Id. at 226.


272. Id. at 226.

273. Id. at 224, 226.

274. Id. at 226. Both judicially decreed reinstatement and arbitration are remedies equitable in nature because they are in effect specific performance. See C. Wright & A. Miller, Federal Practice and Procedure § 2309 (1971).

275. 676 F. Supp. at 226. The Beacon Theatres and Dairy Queen cases, however, caution against characterizing any legal claims for money as incidental to the equitable relief. See supra notes 98-109 and accompanying text.

276. 676 F. Supp. at 226. Both the RLA and Title VII provide protection against employment discrimination while Title VIII comparisons (involved in Curtis) were distinguished as involving housing, not employment discrimination.

277. Id. at 227.
because, in Maas, the issue of reinstatement evidently was not arbitrable. Consequently, the claim against the employer could not be treated as an action to vacate an arbitration award. Moreover, Mitchell's rationale does not apply in this category of non-hybrid suits against the employer involving a statutory, rather than a contractual breach. Therefore, in RLA cases, the Curtis approach of comparing the statutory claim to a new legal duty would tend to support a right to a jury trial for purposes of the first Ross criterion.

To conclude, when the DFR is not implicated in the plaintiff's suit against his employer, the nature of the claim can usually be characterized as legal rather than equitable, whether the breach is of statutory or contractual origin. Thus, under the rule in Curtis, the constitutional right to a jury trial should depend on the nature of the remedies sought. Applying this principle, it is clear that reinstatement by itself is equitable, but reinstatement and back pay is mixed legal and equitable relief. Further, Supreme Court precedent dictates that the plaintiff is entitled to a jury trial on those facts common to both claims. And in any event, no reincarnation of the equitable clean-up doctrine in the guise of labeling legal relief as merely incidental is appropriate.

B. Non-Hybrid DFR Claims

Ever since the Supreme Court judicially created and articulated the DFR from the interstices of federal labor law, it has been the focus of controversy. Every component of the duty, including its nature, the standard for its breach, and exhaustion of available avenues of relief and remedies has

278. As a general rule contractual, rather than statutory disputes, are arbitrable.

279. Unless, of course, the analogy to an unfair labor practice is employed.

280. Most of the circuit courts require more than negligent conduct to show a violation of the DFR. See, e.g., Dober v. Roadway Express, Inc., 707 F.2d 292, 294 (7th Cir. 1983) (following a standard of deliberate unjustifiable refusal to pursue grievance); Poole v. Budd Co., 706 F.2d 181, 183 (6th Cir. 1983) (standard of arbitrary, discriminatory or bad faith action by union); Curtis v. United Transp. Union, 700 F.2d 457, 458 (8th Cir. 1983) (requiring a showing that union acted "without concern or solicitude"); Condon v. Local 2944, United Steelworkers, 683 F.2d 590, 594 (1st Cir. 1982) (standard of arbitrary, discriminatory, or bad faith action by union); Harris v. Schwerman Trucking Co., 668 F.2d 1204, 1206-07 (11th Cir. 1982) (standard of grossly deficient conduct or reckless disregard); Findley v. Jones Motor Freight, 639 F.2d 953, 960 (3d Cir. 1981) (rejecting mere negligence standard); Cee v. United Rubber Workers, 571 F.2d 1349, 1350-51 (5th Cir. 1978) (standard of arbitrary, discriminatory or bad faith conduct).

In contrast, some courts have accepted merely negligent conduct as evidence of breach. See, e.g., Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1089-91 (9th Cir. 1978) (union failed to fully inform employee of terms of settlement); Foust v. International Bhd. of Elec. Workers, 572 F.2d 710, 716 (10th Cir. 1978) (union failed to pursue grievances in timely fashion), rev'd on other grounds, 442 U.S. 42 (1979); Schum v. South Buffalo Ry. Co., 496 F.2d 328, 331-32 (2d Cir. 1974) (same); Griffin v. International Union, United Auto., A. & A.I.W., 469 F.2d 181, 184-85 (4th Cir. 1972) (union filed grievance with manager that employee had assaulted); De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 284-85 (1st Cir.) (union failed to investigate or pursue grievance), cert. denied, 400 U.S. 877 (1970).
divided both the courts and legal scholars. Therefore, it should come as no surprise that the issue of the right to a jury trial in non-hybrid DFR suits is as unsettled as every other aspect of this protean doctrine.281

Not every breach of the DFR by the union implicates the employer in any wrongdoing.282 This is so partly because the union owes a higher duty toward its constituents as a result of its position as fiduciary and agent. Employees, as third party beneficiaries under the collective bargaining agreement, are owed a lesser duty by the employer.283

Non-hybrid DFR suits can be divided into two groups based on the nature of the breach: 1) breaches occurring during contract negotiation; and, 2) breaches occurring during contract administration.284 Courts and legal scholars285 have often focused on this division in setting the proper standard

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281. Claims against the union for breach of its DFR can also be decided by the NLRB provided the underlying misconduct also constitutes an unfair labor practice. Although the Supreme Court has never decided the issue, most courts of appeal have ruled that DFR violations can also constitute unfair labor practices. See, e.g., United States Postal Serv., Inc. v. Mitchell, 451 U.S. 56, 67-68 n.3 (1981) (Stewart, J., concurring). But the Vaca Court ruled that state and federal courts have concurrent jurisdiction over DFR claims even if the violation also amounts to an unfair labor practice. Vaca v. Sipes, 386 U.S. 171, 179-80 (1967). There is no right to a jury trial before the NLRB. NLRB v. Jones & Laughlin, 301 U.S. 1 (1937). The possibility of lack of uniformity between DFR decisions heard by the NLRB and those decided by the courts was dismissed as minor by the Supreme Court in Vaca. 386 U.S. at 180-81. Comparing the DFR action to an unfair labor practice has occasionally resulted in the denial of the jury trial based on the argument that claims before the NLRB do not trigger the seventh amendment.

282. Cases alleging union discrimination in the administration of hiring halls usually do not result in the employer being named as a codefendant. See, e.g., Emmanuel v. Omaha Carpenters Dist. Council, 535 F.2d 420 (8th Cir. 1976). It has been suggested that this type of non-hybrid DFR claim should only be decided by the NLRB which can provide complete relief. See Goldberg, supra note 6, at 121 n.129, 125 n.141.

283. See J.I. Case Co. v. NLRB, 321 U.S. 332, 336 (1944) (employee as third party beneficiary is entitled to all benefits of collective trade agreements); Rosen, supra note 11, at 396 n.20 (employees have been described as third party beneficiaries under the union-employer contract). See also Badon v. General Motors Corp., 679 F.2d 93, 96 (6th Cir. 1982) (employer owes no fiduciary or other duty to employee); Coleman v. Kroger Co., 399 F. Supp. 724, 731 (W.D. Va. 1975) (same).

284. The Supreme Court extended the DFR from contract negotiation to contract administration in Conley v. Gibson, 355 U.S. 41 (1957). The distinction between contract negotiation and contract administration under the NLRA is similar to the distinction, under the RLA, between major disputes, arising out of the formation or change of collective agreements, Golcowski v. Penn Cent. Transp. Co., 571 F.2d 747, 755 n.11 (3d Cir. 1978), and minor disputes, which concern the interpretation or application of an existing agreement, Bonin v. American Airlines, Inc., 621 F.2d 635, 637 (5th Cir. 1980).


HYBRID AND NON-HYBRID ACTIONS

for proving a breach.\textsuperscript{287} However, this division is also useful in helping to resolve the jury trial issue for several reasons. First, juries are better suited for determining issues of fact,\textsuperscript{288} while legal questions should be left to the trial judge.\textsuperscript{289} Claims calling into question whether an actor has violated a legal duty are more likely to be characterized as factual and left for the jury if the actor has a limited range of discretionary conduct. On the other hand, where the actor is permitted a wide latitude of discretion in reaching his decisions, determining breach is more likely to be characterized as a legal one for the court.\textsuperscript{290} Applying these principles to the DFR, a union has more discretion when it is engaged in collective bargaining than in the administration of the agreement.\textsuperscript{291} Therefore, courts considering the jury trial right should be sensitive to this distinction.

Second, the remedies available to an aggrieved plaintiff can also differ according to whether the breach occurred in the negotiation or in the administration of the collective bargaining agreement. For example, if the terms of the collective bargaining agreement are the product of discrimination by the union against some of its constituents, a court may render the agreement voidable and order rescission.\textsuperscript{292} When the breach of the DFR involves intentional racial discrimination, there is also a split of authority as to the applicability of the prohibition against the recovery of punitive damages.\textsuperscript{293} The remedy of rescission, however, would not apply where the

\textsuperscript{287} It has been suggested that the DFR in contract negotiations is directly based on the union’s status as exclusive bargaining agent, while the duty is more contractually based in contract administration. This distinction results from the provisos in § 9(a) of the NLRA, 29 U.S.C. § 159(a) (1982); and § 3 First (j) of the RLA, 45 U.S.C. § 153 First (j) (1982), expressly reserving for individual employees a voice in presenting grievances to their employers. Most collective agreements, however, provide that the union has exclusive authority to process grievances; therefore, the DFR in contract administration is rooted in contract, rather than in the statute. See Goldberg, supra note 6, at 99 n.39; Summers, supra note 21, at 254-56.


\textsuperscript{290} Cf. Note, Enforcement Actions Under ERISA, supra note 125, at 745 (limited review accorded a trustee’s decision argues against the right to jury trial).

\textsuperscript{291} See Goldberg, supra note 6, at 138. Although a union has greater discretion during contract negotiation, it still has broad discretion in handling grievances. One of the policy reasons in Foust for barring punitive damages against unions breaching the DFR was the prospect that such damages could curtail the “broad discretion that Vaca afforded unions in handling grievances . . . .” International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 51 (1979).

\textsuperscript{292} See NLRB v. Heyman, 541 F.2d 796 (9th Cir. 1976).

\textsuperscript{293} Compare Foust, 442 U.S. at 59 (punitive damages not recoverable) (majority opinion); Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940) (same) and Comment, Apportionment Of Damages In DFR/Contract Suits: Who Pays For the Union’s Breach, 1981 Wisc. L. REV. 155, 163 [hereinafter Comment, Apportionment of Damages] (same) with Foust, 442 U.S. at
breach of the DFR occurs either by failure of a union to process a grievance or by the manner in which the arbitration proceeding is conducted. Also, neither an order to arbitrate nor an order of reinstatement is available in either category of non-hybrid DFR suits as long as the employer is not sued or otherwise implicated.

A third difference between the two non-hybrid DFR categories is that breach of the DFR in the negotiation stage does not ordinarily implicate the employer in any wrongdoing even if he aids and abets the union in its breach of the DFR. Consequently, this form of DFR claim is rarely, if ever, litigated as a hybrid action. Furthermore, when an employee alleges breach of the DFR by the union during contract negotiation, this grievance cannot be resolved by an interpretation of the agreement. Therefore, unlike the DFR case arising out of contract administration in which the plaintiff must prove that he has exhausted his contractual remedies, such exhaustion is usually excused in the context of contract negotiation. Since the issue of exhaustion of contractual remedies is normally determined by the court as a matter of law, there is one less impediment to a jury trial for non-hybrid DFR claims arising from contract negotiation.

For seventh amendment purposes, the nature of the non-hybrid DFR claim can often be described as a form of discrimination when it occurs during collective bargaining. The early DFR cases, such as Steele v. Louisville & Nashville R.R., are classic examples of union discrimination against mi-
nority members of the bargaining unit. Under the Ross criteria, courts might well analogize such DFR breaches to actions for defamation or intentional infliction of mental distress.

The union's breach in this context has alternatively been compared to a denial of equal protection. The right to a jury trial would then depend on the legal or equitable nature of the remedies appropriate to cure such discrimination. Under Beacon Theatres and Dairy Queen, there is a right to a jury trial on all issues common to the legal remedies of damages and the declaratory judgment. Finally, although non-hybrid DFR cases alleging some form of discrimination by the union do raise the specter of jury prejudice against unions, the Supreme Court has ruled that there are adequate judicial weapons which can reduce or eliminate the danger of tainted jury verdicts and inflated damage awards.

DFR breaches more commonly occur during the administration of a contract, as for example when the union arbitrarily decides not to process

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299. Enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17 (1982), has reduced the importance of the DFR as a cure for racial discrimination.


302. When the nature of the discrimination forming the basis for the DFR violation implicates § 8(b)(1), which prohibits unions from discriminating against employees for engaging in protected activity, it can be argued that the closest analogy for jury trial purposes is to that of an unfair labor practice which is treated as equitable under the seventh amendment. See Leach v. Pan Am. World Airways, 842 F.2d 285, 290 (11th Cir. 1988) (suits to prevent unfair labor practices are not accorded jury trial); NLRB v. Jones & Laughlin, 301 U.S. 1 (1937) (right to jury trial does not apply to NLRB proceeding which was not known at common law).

303. See supra notes 98-109 and accompanying text.


305. Curtis, 415 U.S. at 198. The Curtis Court stated that protection against the risk of jury prejudice lies with ""the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict, or to grant a new trial . . .."" Id.

306. Nonetheless, breaches of the DFR do occur in contract negotiations. E.g., Coleman v. Kroger Co., 399 F. Supp. 724 (W.D. Va. 1975). Coleman is also an example of the current confusion with respect to the seventh amendment analysis in hybrid and non-hybrid actions. The Coleman court, which was faced with the issue of the right to a jury trial, denied the right, but did allow—in its discretion—the use of an advisory jury. Id. at 732. In reaching its conclusion, however, the court not only compared the DFR claim to a tort action (clearly legal claim), it also omitted any mention of remedies (only other factor in analysis!). Id. at 729. Thus, the Coleman court's own reasoning makes it difficult to determine the propriety of denying the jury trial.

The recent Supreme Court decision in Communications Workers of Am. v. Beck, 108 S. Ct. 2641 (1988), is the latest example of a non-hybrid DFR claim arising from contract negotiation. The court held that requiring non-union members to pay agency fees beyond those necessary
a grievance or handles it perfunctorily. As a result, the employee sometimes will lose his job but may decide not to seek reinstatement. In such a case, the union alone is sued. Obviously, this means that certain remedies such as an order to arbitrate will be foreclosed.307

It is in this second category of non-hybrid DFR suits where the use of analogies proliferate. Courts seek legal equivalents of the DFR claim either for purposes of determining the appropriate statute of limitations for such actions,308 or because use of the Ross criteria for determining the jury trial right requires such an inquiry. Courts should consider, however, that common law principles may be inappropriate for describing creations of federal labor law.309

The DFR has commonly been compared to a fiduciary duty.310 To the extent that a union is the exclusive avenue by which an aggrieved employee may seek redress against his employer, the comparison is appropriate. The right to a jury trial has been rejected on the basis that breach of a fiduciary duty, like a violation of trust, historically has been treated as a creature of equity.311

The DFR has also been compared, erroneously however, to a breach of contract for purposes of applying a limitations period.312 This comparison is buttressed by the fact that part of plaintiff's burden in proving breach of

to finance collective bargaining activities violated the DFR. Id. at 2657. The decision did not directly address the appropriate remedies, but presumably they would include an injunction barring collection of fees in excess of the amount used by the union in collective bargaining. The collective bargaining agreement provision permitting any more than this amount would be unenforceable. Also, plaintiffs should recover any excess amounts paid in the past. All of these remedies sound in equity and, consequently, there would seem to be no basis for finding the right to a jury trial in such a case.

308. This was in the pre-DelCostello years, when there was no uniform limitations period.
310. See, e.g., Atwood v. Pacific Maritime Ass'n, 432 F. Supp. 491 (D. Or. 1977) (court rejected the right to jury trial, and partially based its conclusion on its analogy that a union's breach of its DFR was similar to a breach of a fiduciary duty), aff'd, 657 F.2d 1055 (9th Cir. 1981). See also Richardson v. Communications Workers of Am., 443 F.2d. 974, 980 (8th Cir. 1971) ("[the union] serves in the capacity of a fiduciary to the employees"); Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 21 (1958) ("the bargaining representative, which is subject to fiduciary obligations, holds the employer's promises in trust for the benefit of the individuals").
312. Butler v. Teamsters, Local 823, 514 F.2d. 442, 446 (8th Cir. 1975); Abrams v. Carrier Corp., 434 F.2d. 1234 (2d Cir. 1970), cert. denied, 401 U.S. 1009 (1971). These cases also involved claims against the employer for allegedly violating the collective bargaining agreement. Comparing the DFR to contract claims in these cases may only reflect a desire for a uniform limitations period. The DFR is more a creature of labor law as it has developed under § 301 than it is of general contract law. United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 63 (1981).
the DFR requires evidence that he has exhausted his contractual remedies.\textsuperscript{313} Also, the Supreme Court's formula for allocating liability for back pay between the employer and the union suggests that the union is partially liable for breach of contract damages.\textsuperscript{314} Indeed, the fact that punitive damages are not recoverable for a union's breach of its DFR\textsuperscript{315} is more consistent with contract law than with tort liability.\textsuperscript{316} But unavailability of punitive damages is also more consistent with equity than with legal relief.\textsuperscript{317} Yet it seems clear that the union's obligation is, in the end, most similar to a tort duty of statutory origin.\textsuperscript{318} Where the union has conspired with the employer

\textsuperscript{313} This is so at least where the violation occurred during contract administration. Another theory supporting the "contract" basis of the DFR claim was considered and rejected in De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 285-86 (1st Cir.), cert. denied, 400 U.S. 877 (1970). The De Arroyo court considered whether it was the employee's obligations as a member of the union which generated the reciprocal duty of fair representation by the union. Id. at 286. "This duty, however, imposed and defined by federal labor policy, is not capable of being bargained away by workers even though a written contract or union by-laws might so provide." Id. In addition, a union's duty extends to non-union employees. Id.


\textsuperscript{315} International Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979). The Foust Court was concerned that allowing punitive damages against unions in DFR suits would deplete union treasuries, curtail union discretion, and make results unpredictable. Id. at 48.

Leach v. Pan Am. World Airways, 842 F.2d 285 (11th Cir. 1988), cited Foust for the proposition that relief in DFR cases is essentially remedial since it makes the party whole, and it is governed by the compensation principle. Id. at 288. The Eleventh Circuit concluded that these characteristics of remedies for violation of the union's duty were all attributes of equity. Id. See also Comment, Apportionment of Damages, supra note 293, at 163 n.51 (Court's four reasons for denying punitive damages are: "1) employees in DFR suits should be 'made whole' but not more; 2) punitive awards are inhospitable to the remedial nature of federal labor policy; 3) union treasuries will be depleted; and, 4) union discretion will be curtailed") (citing Foust, 442 U.S. at 52).


\textsuperscript{317} The traditional rule has been that punitive damages are incompatible with equitable principles. See Recent Developments, Punitive Damages Held Recoverable In Action For Equitable Relief, 63 Colum. L. Rev. 175, 176-77 (1963) (although punitive damages may be awarded in equitable actions, it is not permitted under the weight of authority); Annotation, Punitive Damages—Award by Equity, 48 A.L.R.2d 947 (1956). The rule may partially reflect a concern that judicial discretion to award punitive damages contradicts the right to a jury trial. See Pedah Co. v. Hunt, 265 Or. 433, 509 P.2d 1197 (1973); Rexnord, Inc. v. Ferris, 294 Or. App. 392, 657 P.2d 73 (1973).

\textsuperscript{318} Foust, 442 U.S. at 59 (Blackmun, J., concurring) (DFR suit is analogous to ordinary tort action); Cox v. C.H. Masland & Sons, 607 F.2d 138, 143 (5th Cir. 1979) (same); Sanderson v. Ford Motor Co., 483 F.2d 102, 114 (5th Cir. 1973) (same); De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 287 (1st Cir.) (same), cert. denied, 400 U.S. 877 (1970); Coleman v. Kroger Co., 399 F. Supp. 724 (W.D. Va., 1975) (same).
to fire an employee, the union's breach seems indistinguishable from the
tort of inducing breach of contract.\textsuperscript{319} Every decision comparing the DFR claims either to contract or tort actions has provided a jury trial when a legal remedy was sought. Nonetheless, ever since \textit{DelCostello} borrowed the six-month limitations period from section 10(b) of the NLRA for the hybrid action, a few courts have rejected a jury trial after comparing the DFR claim to an unfair labor practice.\textsuperscript{320}

While each of these analogies has merit, judges should keep in mind the reasons for the inquiry in the first place. The policies underlying the proper limitations period have little in common with the policies for determining the right to a jury trial. Indeed, if the DFR claim is considered in isolation from the hybrid action, the nearest equivalent to a breach occurring during contract administration would be a malpractice action for faulty legal representation.\textsuperscript{321}

\textit{Quinn v. Digiulian}\textsuperscript{322} presents the best analysis of the seventh amendment issue in DFR claims based neither on contract negotiation nor administration. In \textit{Quinn}, the D.C. Circuit Court of Appeals found a right to a jury trial on the DFR claim.\textsuperscript{323} The union violated its duty by procuring plaintiff's discharge because of his political activity within the union.\textsuperscript{324} Quinn asked for damages against the union and its officers and an injunction barring the union from interfering with his rights as a union member. Since plaintiff sought neither arbitration nor reinstatement, the employer was not a party to the suit. In applying the first prong of the \textit{Ross} criteria, the court treated the DFR claim as a new cause of action with no precise common law analogue.\textsuperscript{325} While several federal district court decisions have rejected a jury

\textbf{Cf.} Richardson \textit{v. Communication Workers of Am.}, 443 F.2d 974, 981, 982 n.10 (8th Cir. 1971) (suggesting that when union wrongfully induces employer to discharge an employee, employee may pursue a tortious interference with contract claim in state court separate from DFR claim; DFR does not rest on strict principles of contract law).

\textsuperscript{319} See \textit{Sanderson}, 483 F.2d at 110 n.10 (finding wrongful inducement coextensive with unfair representation).

\textsuperscript{320} \textit{E.g.}, Spicher \textit{v. Wilson Foods Corp.}, 122 L.R.R.M. (BNA) 3168 (C.D. Ill. 1985).

\textsuperscript{321} See United Parcel Serv., Inc. \textit{v. Mitchell}, 451 U.S. 56, 74 (1981) (Stevens, J., concurring in part and dissenting in part) ("[t]he employee's claim against his union is properly characterized not as an action to vacate an arbitration award, but rather as a malpractice claim...[b]y analogy, a lawyer who negligently allows the statute of limitations to run on his client's valid claim may be liable to his client even though the original defendant no longer has any exposure"); \textit{C. Morris}, \textit{supra} note 6, at 1292 (DFR suit is more like a malpractice suit where grievance is mishandled in the arbitration as in \textit{Hines}). \textit{Cf.} DelCostello \textit{v. Teamsters}, 462 U.S. 151, 167 (1983) (state limitations period for legal malpractice is the closest state-law analogy for DFR claim); \textit{Id.} at 172 (Stevens, J., dissenting) (appropriate time bar for the DFR claim is the limitations period governing malpractice suits against attorneys); \textit{Id.} at 175 (O'Connor, J., dissenting) (malpractice action against attorney provides closest analogy to an employee's DFR claim).

\textsuperscript{322} 739 F.2d 637 (D.C. Cir. 1984).

\textsuperscript{323} \textit{Id.} at 646-47.

\textsuperscript{324} \textit{Id.} at 641-42.

\textsuperscript{325} \textit{Id.} at 646.
trial on this basis, Quinn correctly relied on Curtis to minimize the importance of this lack of a common law equivalent. Under Curtis, the right to a jury trial clearly hinges on the nature of the remedies. It is thus the remedies requested and not the court's preference in drawing analogies which should determine the right to a jury trial in non-contractual non-hybrid DFR cases.

Curtis also supports a remedies based approach to non-contract DFR suits in its clarification of NLRB v. Jones & Laughlin Steel Corp. The Curtis Court accomplished this by rejecting an interpretation of Jones & Laughlin which would have denied the right to a jury trial in cases involving a "statutory proceeding." According to the Curtis Court, the jury trial claim was rejected in Jones & Laughlin, not because the case derived from a statute, but because "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." Nevertheless, the Supreme Court has often found a right to a jury trial in statutory claims. Therefore, it should be irrelevant that DFR suits have no close analogy to common law actions. In such instances history offers no guide:

In determining whether there is a right to a jury trial of claims under a modern statutory cause of action, the nature of the remedies authorized and sought has become a more reliable clue to whether the action is legal or equitable in nature than the existence of a precise common law analogy to the modern cause of action.

This brief analysis of non-hybrid DFR claims suggests the protean nature of the union's duty. These actions, perhaps, "are not inherently legal or equitable. They are like chameleons which take their color from surrounding circumstances." The high degree of discretion afforded the union during contract negotiation supports the argument that breach of its DFR in this context should be closer to a legal rather than a factual determination. Such questions are for the judge rather than for the jury. Therefore, regardless

328. Quinn, 739 F.2d at 646.
329. 415 U.S. 189 (1974). In Curtis, the Supreme Court held with respect to federal housing discrimination claims that the jury trial right applied to statutory claims "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Id. at 194.
331. Curtis, 415 U.S. at 194 (citing Jones & Laughlin, 301 U.S. at 48).
332. Id. at 194.
335. James, supra note 159, at 692.
of the remedies sought, the equitable nature of the non-hybrid action arising from contract negotiation suggests that these claims do not warrant a jury trial. On the other hand, breach of the DFR during contract administration usually are fact-intensive. Also, the closest analogy for such union misconduct is to a common law malpractice action. Under this analysis, the jury trial right hinges on the nature of the remedies sought: if any legal remedy is requested, Supreme Court precedent requires a jury trial on all issues common to that claim.

V. Conclusion

There is a strong policy under federal labor law in favor of the private adjustment of contract disputes. Nevertheless, Congress consciously decided in enacting section 301 of the LMRA not to make breaches of the collective agreement an unfair labor practice. Rather, such disputes are to be adjudicated in state or federal courts. Similarly, the Supreme Court, in *Vaca*, expressly rejected the argument that DFR claims were exclusively within the jurisdiction of the NLRB. State and federal courts share concurrent jurisdiction over such actions. Therefore, the imperatives of federal labor policy offer no impediment to the judicial determination of these claims either separately or jointly in the hybrid action.

The courts should be concerned with preserving the jury trial in hybrid suits without undue worry that doing so would violate any countervailing values or goals of federal labor policy. Admittedly, the collective bargaining agreement is not an ordinary contract to be governed by ordinary principles

336. Section 203(d) of the LMRA provides in pertinent part: “Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement . . . .” 29 U.S.C. § 173(d) (1982).

337. See GORMAN, BASIC TEXT ON LABOR LAW 456 (1976).

338. In *Beacon Theatres v. Westover*, 359 U.S. 500 (1959), the Court held that where both legal and equitable issues are present in a single case, “only under the most imperative circumstances, . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.” *Id.* at 510-11. The Eleventh Circuit, in *Leach v. Pan Am. World Airways*, 842 F.2d 285 (11th Cir. 1988), commented in striking a seventh amendment claim that the federal policies at stake in labor law constitute the “imperative circumstances” to which *Beacon Theatres* referred. *Id.* at 289 n.7. This position is reminiscent of the “public right” rationale which maintains that when Congress creates new statutory “public rights,” it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the seventh amendment’s injunction that jury trial is to be “preserved” in “suits at common law.” See *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm’n*, 430 U.S. 442 (1977); *Wirtz v. Jones*, 340 F.2d 901 (5th Cir. 1965). But hybrid suits involve private actions brought by private individuals rather than actions initiated by the government. For a criticism of the public right doctrine, see Jaffe, *The Public Right Dogma in Labor Board Cases*, 59 HARV. L. REV. 720 (1946).

The “public right” reasoning would also apply when private plaintiffs rather than administrators sue under the Fair Labor Standards Act. However, under that statute, 29 U.S.C. § 16(b) (1982), private plaintiffs may recover lost pay with a jury trial.
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of contract law, and the DFR has no precise counterpart at common law. However, rather than dissipating judicial energy in any futile search for the true nature of the hybrid action, or of its components in non-hybrid suits, courts should listen to the sound advice of *Curtis v. Loether*[^39] and let the jury trial hinge on the nature of the remedies sought. In so doing, courts will avoid any application of the defunct equitable clean-up doctrine and resolve this important issue in a manner consistent with Supreme Court precedent.
