NEW YORK UNIVERSITY
JOURNAL OF LAW AND BUSINESS

VOL. 2 Summer 2006 No. 3

UNION IMMUNITY FROM SUIT IN NEW YORK

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> "Our Lady of the Common Law - I say it with the humility that is due from an old and faithful servant - our Lady in these days is no longer an easy one to please."
>
> Justice Benjamin N. Cardozo[1]

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1. Benjamin N. Cardozo, *Our Lady of the Common Law,* 13 ST. JOHN'S L. REV. 231, 232 (1939).

I.
INTRODUCTION

One of the best kept secrets in New York law is that most labor unions are immune from legal liability in court. Although labor unions play a large and important role in society, they have this immunity simply because they are not generally incorporated.[2] Most unions are organized as unincorporated associations.[3]

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2. Kirkman v. Westchester Newspapers, Inc., 39 N.E.2d 919, 921 (N.Y. 1942) ("We know that [labor unions] are rarely incorporated."); Schwartz v. Rivera, N.Y.L.J., Nov. 21, 1995, at 26 (N.Y. Sup. Ct. 1995) ("Historically, the common law has treated a labor union as an unincorporated membership association with no independent legal existence."); Jund v. Town of Hempstead, 941 F.2d 1271, 1279 (2d Cir. 1991) (trade unions are a form of unincorporated association); MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 2 (1988) (most unions are unincorporated associations).

3. *Id.* Some unions are indeed incorporated. These unions include: the Railway Labor Executives Association, Consolidated Rail Corp. v. Ry. Labor Executives Ass'n, 491 U.S. 299 (1989); the Buffalo Federation of Teachers, Inc., Bd. of Educ. v. Buffalo Fed'n of Teachers, Inc., 675 N.E.2d 1202 (N.Y. 1996); the Rochester Police Locust Club, Inc., City of Rochester v. Pub. Employment Relations Bd., 790 N.Y.S.2d 788 (N.Y. App. Div. 2005), *appeal denied,* 830 N.E. 2d 1146 (N.Y. 2005); and the Civil Service Employees Association, Inc., McClary v. Civil Serv. Employees Ass'n, Inc., 520 N.Y.S.2d 88 (N.Y. App. Div. 1987).

It is difficult to estimate how many unions are incorporated as there are not any formal statistics. It is also impossible to estimate how many courts and litigants might have overlooked a *Martin v. Curran* defense because it is not always possible to tell if the defendant union in a particular case was incorporated. Based upon this author's discussions with other union lawyers, it appears that this defense is often overlooked.

For recent examples of litigation involving labor unions where their status as unincorporated associations resulted in dismissal see Duane Reade, Inc. v. Local 338, Retail, Wholesale, Department Store Union, 794 N.Y.S. 2d 25 (N.Y. App. Div. 2005), *appeal dismissed, appeal denied,* 835 N.E.2d 328 (N.Y. 2005) (trespass, tortious interference with prospective business relations, fraud, and defamation causes of action dismissed against private sector unincorporated labor union governed by the National Labor Relations Act, 29 U.S.C. § 151, due to the failure to plead and prove that the union's actions were authorized or ratified by the entire union membership); Walsh v. Torres-Lynch, 697 N.Y.S.2d 434, 434 (N.Y. App. Div. 1999) (cause of action brought against public sector unincorporated labor union governed by the Taylor Law, New York Civil Service Law § 200, alleging that union breached its duty of fair representation dismissed due to failure to plead and prove authorization and ratification by each member of the union); Roth v. United Fed'n of Teachers, 787 N.Y.S. 2d 603, 612 (N.Y. Sup. Ct. 2004) (same with respect to defamation action); Salemeh v. Toussaint, 810 N.Y.S.2d 1 (N.Y.

In jurisdictions such as New York, which follow common law, unions are effectively immune from liability under state law because plaintiffs cannot met the stringent common law pleading and proof requirements. In New York, plaintiffs must allege, and ultimately establish, that the conduct complained of was approved and ratified by each and every member of the union for a claim to be cognizable against the organization.[4] Thus, the form in which a labor union is organ-

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App. Div. 2006) (same with respect to assault, battery and prima facie tort action resulting from union violence); Nickerson v. CWA, No. 504CV00875NPM, 2005 WL 1331122, at *4 (N.D.N.Y. May 31, 2005) (federal court indicates pendent New York State law claim alleging breach of implied covenants of good faith and fair dealing as well as tort claims could be dismissed against unincorporated private sector labor union subject to the Railway Labor Act, 45 U.S.C. § 184, due to the failure to plead and prove authorization and ratification by each member of the union, but court ultimately dismissed case on alternative grounds).

4. It has long been recognized that the common law rule provides unincorporated associations, such as labor unions, substantial immunity from suit. Legal commentators have also long criticized the resulting inequities and uncertain logic of the common law rule which made juristic capacity dependent upon incorporation status. Wesley A. Sturges, *Unincorporated Associations as Parties to Action,* 33 YALE L. J. 383, 402 (1924); E. Merrick Dodd, *Dogma and Practice in the Law of Associations,* 42 HARV. L. REV. 977 (1929); T. Richard Witmer, *Trade Union Liability: The Problem of the Unincorporated Corporation,* 51 YALE L.J. 40 (1941); Arlene Sellers, Comment, *Suability of Trade Unions as a Legal Entity,* 33 CAL. L. REV. 444 (1949); Note, *Unions as Juridical Persons,* 66 YALE L. J. 712 (1957); Note, *Judicial Control of Actions of Private Associations,* 76 HARV. L. REV. 983, 1081 (1963).

Indeed, more than a century ago, in 1903, then attorney Louis Brandeis debated American Federation of Labor President Samuel Gompers on the incorporation status of labor unions. Brandeis argued for incorporation due to the harshness of the common law rule and Gompers argued against it largely because of organized labor's distrust of the law at the time which gave very little protection to labor unions. Bernard D. Meltzer, *The Brandeis-Gompers Debate on "Incorporation" of Labor Unions,* 1 GREEN BAG 2D 299 (1998).

In modern times, however, to this commentator's amazement, there is virtually no scholarly commentary on this subject. Kimberly A. Davison, Note, Cox v. The Evergreen Church: *Liability Issues of The Unincorporated Association, Is It Time for the Legislature to Step In?,* 46 BAYLOR L. REV. 231, 231 (1994) (stating that the law in this area consists of conflicting opinions with little academic commentary). There is no academic commentary which focuses on New York law.

This is remarkable when one considers that many courts have severely criticized the common law rule. *See, e.g.,* A. Terzi Prods. v. Theatrical Protective Union, 2 F. Supp. 2d 485, 491 (S.D.N.Y. 1998) (stating that the *Martin* rule is often criticized); *Nickerson,* 2005 WL 1331122, at *4 (same); Modeste

ized has a significant impact on its potential for legal liability. This is reminiscent of the Middle Ages in England, when the form of the action determined whether a party possessed a remedy.[5]

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v. Local 1199, 850 F. Supp. 1156, 1168 (S.D.N.Y. 1994), *aff'd*, 38 F.3d 626 (2d Cir. 1994) (describing the New York common law rule as an "onerous and almost insurmountable burden"); Jund v. Town of Hempstead, 941 F.2d 1271, 1281 (2d Cir. 1991) ("Proof of authorization by every member . . . would be a virtually impossible burden to meet and would certainly extinguish [plaintiff's] claim"); People v. Newspaper and Mail Deliverers' Union, 683 N.Y.S. 2d 488, 493 (N.Y. App. Div. 1998), *appeal denied*, 711 N.E.2d 653, 719 N.E.2d 943 (N.Y. 1999), *cert. denied*, 528 U.S. 1081 (2000) (describing *Martin v. Curran* as an obsolete common law doctrine).

Additionally, the Court of Appeals itself, in *Martin v. Curran*, recognized the harshness of the common law which accords virtual immunity due to the requirement of ratification by stating, "[s]o, for better or worse, wisely or otherwise, the Legislature has limited . . . suits against association officers . . . to cases where the individual liability of every single member can be alleged and proven." Martin v. Curran, 101 N.E.2d 683, 689 (N.Y. 1951). Indeed, more than 85 years ago, the Supreme Court abandoned this common law doctrine with regard to unincorporated labor unions in federal court. United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922).

5. As Professor Maitland described the ancient English forms of action in his classic work on the forms of action at common law:

> [T]o a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents. It is quite possible that a litigant will find that his case will fit some two or three of these pigeon-holes. If that be so he will have a choice, which will often be a choice between the old, cumbrous, costly, on the one hand, the modern, rapid, cheap, on the other. Or again he may make a bad choice, fail in his action, and take such comfort as he can from the hints of the judges that another form of action might have been more successful. The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen. Lastly he may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong.

F. W. WAITLAND, EQUITY AND FORMS OF ACTION: TWO COURSES OF LECTURES, 298-99 (A.H. Chaytor & W.J. Whittaker eds. 1984).

By referencing this old common law form-over-substance doctrine, I am referring to the form in which a labor union or association is organized, i.e., as an incorporated or an unincorporated association.

The major litigation issue unions[6] face today in New York and throughout the country involves the duty of fair representation. Significantly, however, courts do not have primary jurisdiction over such claims.[7] Rather, plaintiffs can bring such claims before an administrative agency, such as PERB in the public sector, or the NLRB in the private sector,[8] or proceed

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6. It is important to note that labor unions are not the only type of unincorporated associations. Unincorporated associations are typically defined as a collection of persons who have united to accomplish a specific objective, such as the formation of a club. Associations are typically established by a constitution or articles of association which are formulated by their members. *See* WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 12.03 (8th ed. 2005) (illustrating that associations are usually clubs which are formed out of business necessity or for "pleasure, recreation, community service and other nonprofit purposes . . ."); 6 AM. JUR. 2D *Associations and Clubs* § 1 (2005) (describing nature and kinds of associations); Klinghoffer v. S.N.C. Achille Lauro Lines, 739 F. Supp. 854, 858 (S.D.N.Y. 1990), *vacated on other grounds*, 937 F.2d 44 (2d Cir. 1991) (same and stating that the Palestine Liberation Organization is an unincorporated association). *See also* Motta v. Samuel Weiser, Inc., 768 F. 2d 481, 485-86 (1st Cir. 1985) (describing unincorporated associations as a group of persons acting together), *citing* BLACK'S LAW DICTIONARY 111 (5th ed. 1979).

Some unincorporated associations are commonly referred to as "societ[ies]", "league[s]" or "board[s]." 6 AM. JUR. 2D *Associations and Clubs* 1 (2005). Indeed, the National Football League, or NFL, is an unincorporated organization. Jackson v. Nat'l Football League, No. 92 CIV. 7012, 1994 WL 282105, at *14 (S.D.N.Y. June 21, 1994).

Unincorporated associations may be organized as either non-profit organizations or as for-profit organizations. Davison, *supra* note 4, at 233-34.

7. *See supra* notes 132-133 and accompanying text.

8. The National Labor Relations Board was created by the National Labor Relations Act, 29 U.S.C. §§ 151-69 (2006) ("NLRA"). The NLRA does not apply to employees of state and political subdivisions and the unions which represent them. Police Dep't. v. Mosley, 408 U.S. 92, 102, n.9 (1972) ("The City now recognizes the National Labor Relations Act specifically exempts state and political subdivisions (and therefore cities and their public school boards) from the definition of 'employer' within the Act."). *See also* Corredor v. UFT, No. 96 Civ. 0428, 1997 WL 122877 (S.D.N.Y. Mar. 18, 1997), *aff'd*, No. 97-7488, 1998 WL 639403 (2d Cir. Apr. 6, 1998) (Union exempt from NLRA duty of fair representation suit since employer is a public board of education which is not subject to NLRA); Sampson v. UFT, No. 89 CIV. 5357, 1990 WL 48048, *3 (S.D.N.Y. Apr. 10, 1990) (same).

Accordingly, unions in the public sector faced with a duty of fair representation claim would be governed by New York law. Under New York law, in the public sector, breach of the duty of fair representation is an Improper Practice under the Taylor Law, N.Y. CIV. SERV. § 209-a (2004), and Improper

directly in court. If a plaintiff chooses to proceed directly in court against a public sector unincorporated labor union,[9] their case very likely will not be able to meet the stringent common law pleading and proof requirements, and therefore will be dismissed.[10]

However, plaintiffs who file a duty of fair representation charge with an administrative agency may fare better because it is unlikely that their cases will be dismissed based on pleading requirements. This is because the common law pleading requirements of *Martin v. Curran* do not apply to administrative agency charges that allege a breach of the duty of fair representation.[11] Accordingly, the forum in which an unfairly represented plaintiff chooses to litigate may also have a significant impact upon his or her chances of success.

The substantive law of the duty of fair representation is itself very deferential to unions in that the law has set a very high standard of proof for plaintiffs. Thus, both the common law procedural pleading requirements applicable to state litigation claims and the standard of liability for breaches of the duty of fair representation effectively provide unions with vir-

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Practices are adjudicated by the Public Employment Relations Board ("PERB").

Similarly, in the private sector, a breach of the duty of fair representation is an unfair labor practice in violation of § 158(b)(1) of the National Labor Relations Act, which can be adjudicated by the NLRB. *See, e.g., In re* Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963).

9. In the private sector, federal duty of fair representation law would apply; the common law pleading and proof requirements were discarded long ago in federal courts. *See infra* notes 94-105 and accompanying text.

10. *See infra* note 78 (citing duty of fair representation cases dismissed due to the failure to meet the common law pleading requirements of approval and ratification by each and every member of the union).

11. There is no authority discussing *Martin v. Curran* in the context of a duty of fair representation charge filed with an administrative agency such as PERB or the NLRB. Administrative agencies are governed by their own statutes and procedural rules and the common law pleading requirements would probably not apply to such cases. This is similar to People v. Newspaper and Mail Deliverers' Union, 683 N.Y.S. 2d 488 (N.Y. App. Div. 1998), *appeal denied*, 711 N.E.2d 653, 719 N.E.2d 943 (N.Y. 1999), *cert. denied*, 528 U.S. 1081 (2000), *infra* note 38, which held that the *Martin v. Curran* defense is not applicable to a claimed statutory violation since the statute in question alters the common law.

tual immunity from most types of litigation under New York State law.

This Article analyzes union liability - an important and little understood area of law. The article's conclusion is that the common law pleading requirements of *Martin v. Curran* make little sense today, particularly when applied to labor unions that already face a very favorable standard of review with respect to the duty of fair representation. However, the common law rule remains very much alive in New York and if a change is warranted, it is to the responsibility of the legislature to do so.

II.
THE COMMON LAW

Historically, under common law[12] labor unions were treated as unincorporated membership associations.[13] It is a legal maxim that unincorporated associations had no distinct legal identity or status separate from that of their members. Thus, under common law, unincorporated associations, such as unions, were not considered jural entities.[14] Rather, for le-

12. An excellent summary of common law principles can be found in Ostrom v. Greene, 55 N.E. 919, 926-928 (N.Y. 1900) and Martin v. Curran, 101 N.E.2d 683 (N.Y. 1951). *See also* MALIN, *supra* note 2, at 2-4; Meltzer, *supra* note 4, at 301 (summarizing the common law approach). For an exhaustive summary of the case law throughout the country see D.C. Barrett, *Suability Of Individual Members Of Unincorporated Association As Affected By Statute Or Rule Permitting Association To Be Sued As An Entity,* 92 A.L.R.2d 499 (2005).

13. Schwartz v. Rivera, N.Y.L.J., Nov. 21, 1995, at 26 (N.Y. Sup. Ct. 1995). *See also supra* note 2.

14. *Judicial Control of Actions of Private Associations, supra* note 4 at 1081; *Liability of Unincorporated Labor Organization to Suit,* 149 A.L.R. 508 (2006) (collecting case law throughout the United States). *See also* WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 12.03 (8th ed. 2005); 6 AM. JUR. 2D *Associations and Clubs* § 1 (2005); Pickett v. Walsh, 78 N.E.753, 760 (Mass. 1906) ("[p]laintiffs [cannot name] unincorporated labor unions [as] defendants. That's an impossibility. There is no entity known to law as an unincorporated association . . ."); *Martin v. Curran,* 101 N.E.2d 683, 685 (N.Y. 1951) (stating that voluntary unincorporated associations are not artificial persons and do not exist independently of their members). A union, however, can achieve legal status by incorporating. MALIN, *supra* note 2, at 2. In this work, Professor Malin also provides an excellent summary of the common law's treatment of unions. *Id.* at 2-4.

gal purposes they were treated as an "aggregate[s] of individuals."[15]

Because they had no legal status, unincorporated associations could neither sue nor be sued.[16] They were incapable of holding property or making contracts.[17] Property and contractual rights of the association were considered jointly held by the members and contractual liability was the joint liability of the members.[18] Torts committed against the association were suffered by the individual members and torts committed by the association resulted in the joint and several liability of the individual members.[19]

Members of such associations were co-principals who were individually liable for the acts of other members committed with their authorization or ratification.[20] Thus, only members of the association faced individual liability.[21] Because of the prospect of personal liability under the common law, to establish a cause of action against the association, the individual liability of every single member had to be alleged and proven through ratification or acceptance of the actions in question.[22]

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15. RESTATEMENT (SECOND) OF JUDGMENTS § 61 cmt. a (2005); MALIN, *supra* note 2, at 2 (discussing common law treatment of unions).

16. RESTATEMENT (SECOND) OF JUDGMENTS § 61 cmt. a (2005); *Judicial Control of Actions of Private Associations, supra* note 4, at 1081.

17. RESTATEMENT (SECOND) OF JUDGMENTS § 61 cmt. a (2005).

18. *Id.*

19. *Id.*

20. *Id.* In 1922, the U.S. Supreme Court explained:

> Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member.

United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 385 (1922).

21. *Coronado Coal Co.*, 259 U.S. at 385; 6 AM. JUR. 2D *Associations and Clubs*, § 46 (2005).

22. WRIGHTINGTON ON UNINCORPORATED ASSOCIATIONS AND BUSINESS Trusts § 64 (1922). *See* Martin v. Curran, 101 N.E.2d 683 (N.Y. 1951) (applying common law rule in New York); Mounteer v. Bayly, 448 N.Y.S.2d 582 (N.Y. App. Div. 1982) (describing this common law rule as long settled in New York).

At common law all members of the association were necessary parties.[23] As a result, actions against associations were often brought against the individual members in the form of a class action suit.[24] The ability to be considered a jural entity was considered "a gift of the sovereign conferred through incorporation."[25] The common law's treatment of unincorporated associations has been summarized by Harvard Law Review as simply involving "personal liability or no liability at all."[26]

Today, in many jurisdictions, unincorporated associations are treated as jural entities distinct from their members. Indeed, the Restatement states that "the trend of the decisions is to accord entity treatment to associations having a formally organized internal government . . ."[27] The common law has been modified in those jurisdictions by statute or case law.[28] Significantly, however, the common law approach remains valid and largely unaltered in New York. In this regard, New York remains in the company of a small minority of states.[29]

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23. *Judicial Control of Actions of Private Associations, supra* note 4, at 1080-81; RESTATEMENT (SECOND) OF JUDGMENTS § 61 cmt. a (2005); Schwartz v. Rivera, N.Y.L.J., Nov. 21, 1995, at 26 (N.Y. Sup. Ct. 1995).

24. RESTATEMENT (SECOND) OF JUDGMENTS § 61 cmt. a (2005).

25. *Id.*

26. *Judicial Control of Actions of Private Associations, supra* note 4, at 1090.

27. RESTATEMENT (SECOND) OF JUDGMENTS § 61 cmt. b (2005). *See also,* MALIN, *supra* note 2, at 3 (common law's treatment of unions has been altered in most states by conferring entity status on unions).

28. RESTATEMENT (SECOND) OF JUDGMENTS § 61 cmt. b (2005); 6 AM. JUR. 2D *Associations and Clubs* § 1 (2005).

29. The state of West Virginia applies common law to unincorporated associations similar to New York. City of Fairmont v. Retail, Wholesale, and Department Store Union, 283 S.E. 2d 589 (W. Va. 1981). However, several states have rejected the notion that to hold unincorporated labor unions liable, plaintiffs must satisfy the stringent common law pleading and proof requirements, demanding one hundred percent ratification. *See e.g.,* Donnelly v. United Fruit Co., 190 A.2d 825 (N.J. 1963), *overruled on other grounds,* Saginario v. Attorney Gen., 435 A.2d 1134 (N.J. 1981) (applying New Jersey Law); Diluzio v. United Electrical, Radio and Machine Workers of America, 435 N.E. 2d 1027 (Mass. 1982) (applying Massachusetts law); J.R. Norton Co. v. Teamsters, 256 Cal. Rptr. 246 (1989), *cert. denied,* 493 U.S. 894 (1989) (applying California law); Rivard v. Chicago Firefighters Union, 494 N.E. 2d. 756 (Ill. App. Ct. 1986) (discussing history of Ill. Ann. Stat., ch. 110, para. 2-209, which legislatively overruled the applicability of common law pleading requirements with respect to unincorporated associations). Thus, unincor-

III.
MARTIN V. CURRAN: THE ANCIENT COMMON LAW REMAINS ALIVE AND WELL IN NEW YORK

A number of states, including New York, have passed legislation which permits lawsuits to be brought against unincorporated associations.[30] In 1849, New York enacted legislation which modified the common law rule by authorizing suit against certain officers of unincorporated associations, such as labor unions, without the necessity of serving and naming each individual member of the association.[31] Today, that legislation is codified in New York General Associations Law Section 13.[32] However, the *suability* of association members needs to be distinguished from their *liability*.[33]

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porated associations have not been treated uniformly throughout the several states.

Interestingly, a District Court in Massachusetts held that the holding of *Diluzio, supra*, which rejected the application of the common law pleading requirements to unincorporated labor unions, only applies to actions against unincorporated unions and should not be applied to other types of unincorporated associations. Curley v. North American Man Boy Love Association, No. Civ.A. 00-10956-GAO, 2003 WL 21696547 (D. Mass. Mar. 31, 2003).

The comments to the Model Uniform Nonprofit Association Act, which has been adopted in nine states as well as in the District of Columbia, refer to unincorporated nonprofit associations as "governed by a hodgepodge of common law and state statutes governing some of their legal aspects." Uniform Unincorporated Nonprofit Associations Act, § 2 (2003). This uniform act has not been adopted in New York. For a discussion of this uniform act, see Kenneth D. Lewis, Jr., Comment, *The Ramifications of Idaho's New Uniform Unincorporated Non-Profit Associations Act,* 31 IDAHO L. REV. 297 (1994) (discussing Idaho law); Davison, *supra* note 4 (discussing Texas law).

30. *Judicial Control of Actions of Private Associations, supra* note 4, at 1081.

31. Martin v. Curran, 101 N.E.2d 683, 685 (N.Y. 1951).

32. N.Y. GEN. ASS'NS LAW § 13 (2003) provides:

> An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefore, either jointly or severally.

See also DAVID D. SIEGEL, NEW YORK PRACTICE § 189 (4th ed. 2005) (discussing New York General Associations Law).

33. *See generally* 6 AM. JUR. 2D *Associations and Clubs* § 43 (2005).

With respect to suability, under the General Associations Law, the failure to name the proper defendant in the complaint is considered to be a mere irregularity if the proper officer is served. *See* Motor Haulage Co., Inc.

The seminal case in this area, *Martin v. Curran*,[34] involved a tort action which an injured plaintiff brought against union officers in their representative capacities[35] for the publication of libelous statements in the union's official newspaper.[36] In a 4-3 decision the Court held that such an action could not be maintained since there was no allegation in the complaint that all of the individual members of the union authorized or ratified the tort at issue.

The Court, following common law, reasoned that an unincorporated association is neither a partnership nor a corporation, and as such, it is not an artificial person for legal purposes. Therefore, the union had no existence independent of its members.[37] The Court went on to say that voluntary organizations could not bind others without express consent of the act complained of, and that until the passage of General Associations Law Section 13 all members of unincorporated as-

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v. Teamsters, 81 N.E.2d 91 (N.Y. 1948), *cert. denied*, 338 U.S. 817 (1949); Burns, Jackson, Miller, Summit & Spitzer v. Lindner, 437 N.Y.S.2d 895 (N.Y. Sup. Ct. 1981), *modified on other grounds*, 452 N.Y.S.2d 80 (N.Y. App. Div. 1982), *aff'd on other grounds*, 451 N.E.2d 459 (N.Y. 1983); 20B CARMODY-WAIT § 122:63 (2d ed. 2005) (collecting cases holding same).

However, cases have been dismissed where the wrong individual was served. *See* Pickman Brokerage v. Bevona, 584 N.Y.S.2d 807 (N.Y. App. Div. 1992) (dismissing proceeding seeking vacatur of labor arbitration due to improper service of union); Gains v. Prudential, 168 N.Y.S.2d 13 (N.Y. Sur. 1957) (dismissing suit due to improper service of union officer).

34. 101 N.E.2d 683 (N.Y. 1951).

35. Plaintiffs also sued the union officers for libel in their individual capacities, but the Court of Appeals did not address the issue of individual liability. Generally, members of an unincorporated association could face individual liability for their actions. 6 AM. JUR. 2D *Associations and Clubs* § 43 (2005).

36. The union involved in the case, the National Maritime Union, was apparently quite large; the union newspaper where the alleged libelous statement was written had a circulation of 125,000. *Martin*, 101 N.E.2d at 684.

37. *Id. But see* People v. Newspaper and Mail Deliverers' Union, 683 N.Y.S. 2d 488 (N.Y. App. Div. 1998), *appeal denied*, 711 N.E.2d 653, 719 N.E.2d 943 (N.Y. 1999), *cert. denied*, 528 U.S. 1081 (2000) (holding that a union is an artificial person under New York Penal Law and that plaintiffs do not have to satisfy the common law requirement of authorization and ratification; therefore, a union can be held liable for the acts of its members. The court distinguished *Martin v. Curran* because here the liability was the result of a specific statutory provision and because *Martin v. Curran* did not involve the criminal law).

sociations were necessary parties and such a group could not be sued through its officers.[38]

As the Court explained, under the General Associations Law Section 13, the "privilege" of allowing an action or special proceeding to be brought against members of an unincorporated association by serving certain officers of the association created no new substantive liability or right.[39] Thus, the Court held that:

> A plaintiff "cannot, in any case, maintain such an action against the officer unless the debt which he seeks to recover is one upon which he could maintain an action against all the associates by reason of their liability therefore, either jointly or severally" . . . and the line of consistent decisions to that effect has been unbroken . . . The line includes not only contract but tort cases . . .
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> So, for better or worse, wisely or otherwise, the legislature has limited such suits against association officers, whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven. Despite procedural changes, substantive liability in such cases is still, as it was at common law, "that of the members severally" . . . "In the kind of association now under consideration, only those members are liable who expressly or impliedly with full knowledge authorize or ratify the specific acts in question."[40]

Accordingly, in reaching this decision, the Court seemed to recognize the harshness of the common law rule, but felt that it did not have the power to change it.

Though there is a certain amount of logic in the majority's opinion, it should also be recognized that about nine

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38. 101 N.E.2d at 685.

39. *Id.* As the Court further explained:

> The liability to be enforced in any such suit, in which association officers are named as representative defendants, is still that of the individual members as individuals, and so the cause of action has to be one "for or upon which the plaintiff may maintain such an action . . . against all the associates, by reason of their . . . liability therefore, either jointly or severally."

Id.

40. *Id.* at 685-86 (internal citations omitted).

years earlier the Court of Appeals held that unincorporated unions could bring suit for libel. The Court did not apply any ratification requirement to unincorporated associations before they could bring an affirmative lawsuit. Thus, an unincorporated association is treated as a jural entity for offensive litigation purposes when it is a plaintiff, but not for defensive purposes when it is a defendant.[41]

Judge Conway issued a stinging dissent. He viewed the common law as "flexible, self developing and all embracing."[42] He opined that this case should be treated the same as cases which held newspaper publishers responsible for libel even though the publisher had no actual knowledge of the libel. The dissent also looked to federal law which, since 1922, viewed unions as suable juristic entities.[43]

Judge Conway viewed trade unions as roughly the legal equivalent of corporations, reasoning:

> As noted in Appellant's brief, trades-unions, since 1902 . . . have played an increasingly important role in modern life. Recognized as juristic entities under both Federal and State statutes for many purposes . . . they have frequently thousands of members and have been subjected to and paid fines and damages out of their treasuries . . . Trades-unions are no longer mere unincorporated associations, as that term was formerly understood. As a practical matter, it has been held that labor unions have as perpetual an existence as corporations . . . They are not sporadic or transitory associations projecting "spasmodic moral movements" . . .
>
> Recent decisions emphasize that the realities of present day trades-union organization require a recognition of its unified character.[44]

Since *Martin v. Curran,* many labor unions as well as other unincorporated associations have routinely relied upon its

41. Kirkman v. Electrical Workers, 39 N.E.2d 919 (N.Y. 1942).

Neither *Martin v. Curran* itself nor any of the case law decided subsequently has noted this distinction.

42. 101 N.E.2d at 690 (Conway, J., dissenting).

43. *Id.* at 692 (Conway, J., dissenting) (citing United Mine Workers v. Coronado Coal, 259 U.S. 344 (1922)).

44. *Id.* at 692-93 (Conway, J., dissenting) (internal citations omitted).

holding to dismiss claims brought against them. For example, in *Duane Reade, Inc. v. Local 338*,[45] the following claims were all dismissed under *Martin v. Curran* for failure to comply with the common law pleading requirements of authorization and ratification: the employer's trespass claim against the union for entering the employer's premises and soliciting employees; a tortious interference with prospective business relations claim alleging that the union disturbed employees while they were helping customers; a fraud cause of action alleging that a union representative falsely represented that he was the Chief Executive Officer; and a defamation cause of action stemming from a union press release which exposed the employer to public contempt, ridicule and injury.

Similarly, in *Walsh v. Torres-Lynch*,[46] the plaintiff brought a claim against his union asserting intentional infliction of emotional distress and breach of the duty of fair representation on the grounds that faulty advice given by the union had resulted in plaintiff losing his job as a public school teacher. In dismissing the suit, the court explained, "[t]he failure to allege that the individual members of the Union authorized or ratified the complained of conduct renders the amended complaint fatally defective as against the union."[47]

In *Roth v. United Federation of Teachers*,[48] the court followed *Martin v. Curran* and dismissed a defamation case brought by a school principal against the union and its officers. The alleged defamatory statements occurred during a union meeting. At that meeting, the union passed a resolution which referred to the plaintiff as the "Principal from Hell." Even with the passage of such a resolution, the common law pleading requirements could not be satisfied.

While *Martin v. Curran* is part of settled law in New York,[49] some courts have ignored it or at least bent over backwards to

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45. *See* Duane Reade, Inc. v. Local 338, 777 N.Y.S.2d 231 (N.Y. Sup. Ct. 2003), *aff'd*, 794 N.Y.S.2d 25 (N.Y. App. Div. 2005), *appeal dismissed, appeal denied*, 835 N.E. 2d 328 (N.Y. 2005).

46. 697 N.Y.S.2d 434 (N.Y. App. Div. 1999).

47. *Id.* at 435.

48. 787 N.Y.S.2d 603 (N.Y. Sup. Ct. 2004).

49. Mounteer v. Bayly, 448 N.Y.S.2d 582 (N.Y. App. Div. 1982) (describing the common law rule set forth in *Martin v. Curran* as long settled in New York).

avoid it. In *Torres v. Lacey*,[50] the First Department limited *Martin v. Curran* to intentional tort cases. In a one paragraph opinion, the court stated simply that "to require membership authorization or even ratification of such an unintentional tort is, in effect, to attempt to transmute a negligent act into a willful wrong. This is an inadmissible result, straining both law and logic."[51]

The First Department is also the same court that simply applied a tort analysis to a personal injury action filed against a union without even citing to *Martin v. Curran*.[52] While it is possible that this case did not involve an unincorporated union or that the court simply overlooked the common law pleading requirements, it is also possible that this decision reflected the court's disdain for the doctrine. In any event, for these reasons, the case is of little utility.[53]

In three brief opinions which offer virtually no analysis, the Fourth Department has also held that the common law pleading requirement of *Martin v. Curran* is inapplicable to negligence, which by definition is not an intentional tort.[54]

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50. Torres v. Lacey, 163 N.Y.S.2d 451, 452 (N.Y. App. Div 1957).

51. *Id.* at 452. It is important to note that even though the court distinguished *Martin v. Curran* by limiting the case to its facts and refused to dismiss the case based upon the failure to comply with the common law pleading requirements, the complaint suffered from other procedural inadequacies which required its dismissal. Query whether the decision would have come out the same way if the case did not suffer from these other defects.

52. *See* Browne v. Teamsters, 609 N.Y.S.2d 237 (N.Y. App. Div. 1994).

53. This was precisely the analysis applied by a later case in the First Department in refusing to foliow *Browne*. *See* Salemeh v. Toussaint, 799 N.Y.S.2d 164, 165 (N.Y. Sup. Ct. 2003), *aff'd*, 810 N.Y.S.2d 1 (N.Y. App. Div. 2006).

54. Piniewski v. Panepinto, 701 N.Y.S.2d 215, 216 (N.Y. App. Div. 1999); Grahame v. Rochester Teachers Ass'n, 692 N.Y.S.2d 537, 538 (N.Y. App. Div. 1999); Zanghi v. Laborers' Int'l Union, 778 N.Y.S. 2d 607 (N.Y. App. Div. 2004) (cause of action for for negilgent hiring retention and supervision). *But see* Walsh v. Torres-Lynch, 697 N.Y.S.2d 434, 435 (N.Y. App. Div. 1999) (duty of fair representation cause of action brought against union dismissed for failure to comply with the common law pleading and proof requirements of *Martin v. Curran*).

For example, in *Grahame*, the court's entire analysis was as follows: "Plaintiff is not required to allege ratification of the alleged negligent act where the action against defendant union is based on the negligence of its agent 'in the course of performing an essential activity of the [union].'" 692 N.Y.S.2d at 538 (internal citations omitted).

Because of this lack of analysis, these decisions must be viewed as questionable.

One lower court was even brazen enough to hold that the common law pleading requirements of *Martin v. Curran* were abolished with the enactment of the C.P.L.R. The court cited no authority for its holding, however, so the decision is of little value.[55]

Other courts have sought to deviate from *Martin v. Curran* by simply asserting that the common law pleading requirements have been met. In the context of a petition to vacate an arbitration award which awarded damages against a union, one lower court found that *Martin v. Curran*'s pleading requirements were met because the strike which lead to the damages was ratified by the membership.[56] The court also distinguished *Martin v. Curran* because there the union was not a party, but it was a party in the instant case. In any event, this case is of little significance because the court's analysis is conclusory and the union could be viewed as waiving this defense. As noted by the court, the union waived its objection to the arbitration award by not first moving for a stay, since procedurally they would be required to do so in order to be able to assert the claim that the arbitrator did not have the authority to award damages.[57]

Another lower court concluded that the stringent pleading requirements of *Martin v. Curran* were met because the union membership approved of the conduct in question at a union membership meeting.[58] It is unclear whether this case

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55. Corder v. Amalgamated Clothing Workers of Am., 305 N.Y.S.2d 739, 741 (N.Y. Sup. Ct. 1969). The court's entire analysis was as follows:

> The strict, almost common-law requirements of pleading that existed under the Civil Practice Act have been abolished. The court concludes, in view of the aforesaid, that the first cause of action in the complaint herein sufficiently identifies the issues and indicates the theory of relief as against the defendant union. Accordingly, the motion is denied.

56. *In re* Arbitration between Advance Trucking Corp. and Truck Drivers Local 807, 240 N.Y.S.2d 203, 204 (N.Y. Sup. Ct. 1962). It is, of course, entirely possible that the entire membership of this union ratified the strike, in which case there would be literal compliance with the common law pleading mandates required under *Martin v. Curran*.

57. *Id.*

58. Westchester County v. Westchester County Fed'n of Labor, 129 N.Y.S.2d 211, 215 (N.Y. Special Term 1953).

is actually inconsistent with *Martin v. Curran* because the court did not indicate whether each and every union member ratified the conduct at issue.

Additionally, a lower court refused to dismiss a complaint which alleged multiple state law causes of action against a public sector union because of an illegal strike.[59] The lower court held that the union's tacit approval of the strike satisfied the pleading requirements, and went even further by declaring:

> [T]o permit a union organization with the breadth of membership of the ATU to win dismissal of a complaint upon the ground that the plaintiffs have not alleged approval or ratification by every single member of its far-flung domestic and foreign membership would amount to a grant of total immunity against suits for injuries alleged to have been caused by their unlawful conduct.[60]

Remarkably, the court did not even cite to *Martin v. Curran.* Given the fact that this case involved a public sector transit strike which caused havoc in New York City in 1980, the decision appears to be a political one. Perhaps most telling is that on appeal both the Appellate Division and the Court of Appeals did not address the *Martin v. Curran* defense. Thus, as late as 1983, the Court of Appeals could have overruled or at least revisited *Martin v. Curran,* but instead chose to ignore it.

Indeed, in the first case arising out of the 2005 New York City Transit strike, a small claims court held that the *Martin v. Curran* common law pleading and proof requirements did not mandate dismissal of a case brought by a worker who lost $999 in wages because he could not get to work, since under New York law Small Claims courts are not bound by "rules of practice, procedure, pleading, or evidence."[61]

With respect to the proof requirement of *Martin v. Curran,* the court held that it did not have to address this issue because the pleading requirements were not applicable. The

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59. *See* Burns, Jackson, Miller, Summit & Spitzer v. Lindner, 437 N.Y.S.2d 895 (N.Y. Special Term 1981), *modified,* 452 N.Y.S.2d 80 (N.Y. App. Div. 1982), *aff'd,* 451 N.E.2d 459 (N.Y. 1983).

60. *Id.* at 909.

61. Loakman v. Transp. Workers Union of Greater New York, No. SCNY20189/05, 2006 WL 481407, at *2 (N.Y. Civ. Ct. Feb. 28, 2006) (quoting CITY CIV. CT. ACT § 1804).

court cited no authority for this proposition, and its reasoning is conclusory and makes little sense. It is apparent that this court did not want to dismiss the case on the basis of *Martin v. Curran*, so it simply dismissed that argument. However, the court ultimately did dismiss the case for failure to state a cause of action under *Burns*[62] in that no cause of action was stated against the union for engaging in an unlawful strike.

On the other hand, at least one court has expanded the common law pleading requirements of *Martin v. Curran* by applying it to statutory claims of discrimination against a union under New York Executive Law Sec. 296. This decision does not seem consistent with *Martin v. Curran* because liability is predicated on a statute which, by definition, has altered the common law.[63]

Nevertheless, courts overwhelmingly continue to apply *Martin v. Curran* to intentional torts such as defamation,[64] tortious interference with prospective business relations and fraud,[65] trespass,[66] assault,[67] battery,[68] loss of society and ser-

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62. *See supra* note 59 and accompanying text.

63. Girolamo v. Teamsters Local 72, No. 97 CIV. 9412, 81676, 1998 WL 889039, at *9 (S.D.N.Y. Dec. 21, 1998). *See also supra* notes 11 and 37 and accompanying text.

64. Collum Acoustical Co. v. Local 46 Sheet Metal Workers Union, 269 N.Y.S.2d 392 (N.Y. App. Div. 1966); R.M. Perlman Inc. v. New York Coat, Suit Dresses, Rainwear & Allied Workers' Union Local 89-22-1, 789 F. Supp. 127, 133 (S.D.N.Y. 1992) (applying New York law); Stefania v. McNiff, 267 N.Y.S.2d 854, 857-58 (N.Y. Sup. Ct. 1996); Roth v. United Fed'n of Teachers, 787 N.Y.S. 2d 603, 609-610 (N.Y. Sup. Ct. 2004); Duane Reade, Inc. v. Local 338 Retail, Wholesale, Dep't Store Union, 777 N.Y.S.2d 231, 235-36 (N.Y. Sup. Ct. 2003), *aff'd*, 794 N.Y.S.2d 25 (N.Y. App. Div. 2005), *appeal dismissed, appeal denied*, 835 N.E. 2d 328 (N.Y. 2005).

65. *See Duane Reade, Inc.*, 777 N.Y.S.2d at 235-36; A. Terzi Prods., Inc. v. Theatrical Protective Union, 2 F. Supp. 2d 485, 493-95 (S.D.N.Y. 1998) (fraudulent inducement under New York law); U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local 3, No. 00 Civ. 4763, 2002 WL 91625, at *11-12 (S.D.N.Y. Jan. 23, 2002) (tortious interference with contract and/or prospective business advantage under New York law).

66. *Duane Reade, Inc.*,777 N.Y.S.2d at 235-36, *aff'd*, 794 N.Y.S. 2d 25 (N.Y. App. Div. 2005), *appeal dismissed, appeal denied*, 835 N.E. 2d 328 (N.Y. 2005); Salemeh v. Toussaint, 799 N.Y.S.2d 164, 164-166 (N.Y. Sup. Ct. 2003), *aff'd*, 810 N.Y.S.2d 1 (N.Y. App. Div. 2006); Kirby v. Dubinsky, 242 N.Y.S.2d 543, 544 (N.Y. Sup. Ct. 1963); Honegger v. O'Connell, 222 N.Y.S.2d 655, 657 (N.Y. Sup. Ct. 1961).

67. Salemeh v. Toussaint, 810 N.Y.S.2d 1 (N.Y. App. Div. 2006); Zanghi v. Laborers' Int'l Union, 778 N.Y.S.2d 607, 608 (N.Y. App. Div. 2004) *appeal*

vices,[69] cases alleging property damage,[70] intentional infliction of emotional distress,[71] prima facie tort,[72] as well as actions challenging union election procedures.[73]

Courts have interpreted the *Martin v. Curran* decision as requiring that the authorization and ratification in question be unanimous. Thus, "[i]t is insufficient [for plaintiffs] to plead that a majority or controlling portion of the union voted for a specific action; the authorization must be unanimous."[74] Stated another way, courts have rejected efforts to satisfy the common law pleading and proof requirements of *Martin v. Curran* with conclusory pleadings, and have refused to presume or imply liability.[75]

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denied, 824 N.E.2d 51 (2005); Piniewski v. Panepinto, 701 N.Y.S.2d 215, 216 (N.Y. App. Div. 1999); Modeste v. Local 1199, Drug, Hospital & Health Care Employees Union, 850 F. Supp. 1156 (S.D.N.Y. 1994), *aff'd*, 38 F.3d 626 (2d Cir. 1994) (applying New York law).

68. *Salemeh*, 810 N.Y.S.2d 1 (N.Y. App. Div. 2006).

69. *Modeste*, 850 F.Supp. at 1168.

70. Giffords Oil Co., Inc. v. Boss, 387 N.Y.S.2d 51, 52 (N.Y. App. Div. 1976).

71. Walsh v. Torres-Lynch, 697 N.Y.S.2d 434, 434 (N.Y. App. Div. 1999); Schwartz v. Rivera, N.Y.L.J., Nov. 21, 1995, at 26 (N.Y. Sup. Ct. 1995); *Modeste*, 850 F.Supp. at 1159, *aff'd*, 38 F.3d 626 (2d Cir. 1994) (applying New York law); Purnell v. Diesso, No. 94 Civ. 4361, 1996 WL 37770, at *2 (S.D.N.Y. Jan. 31, 1996) (applying New York law).

72. *Salemeh*, 799 N.Y.S.2d 164, 165 (N.Y. Sup. Ct. 2003), *aff'd*, 810 N.Y.S.2d 1 (N.Y. App. Div. 2006); R.M. Perlman Inc. v. New York Coat, Suit Dresses, Rainwear & Allied Workers' Union Local 89-22-1, 789 F. Supp. 127, 133 (S.D.N.Y. 1992) (applying New York law); A. Terzi Prods., Inc. v. Theatrical Protective Union, 2 F. Supp. 2d 485, 492 (S.D.N.Y. 1998) (applying New York law).

A prima facie tort is considered an intentional tort in New York. *See* Morrison v. Nat'l Broad. Corp., 266 N.Y.S.2d 406, 412 (N.Y. App. Div. 1965), *rev'd on other grounds*, 227 N.E. 2d 572 (N.Y. 1967); Bockian v. Katsky Korins & Singer, 467 N.Y.S.2d 1009 (N.Y. Fam. Ct. 1984).

73. Mounteer v. Bayly, 448 N.Y.S.2d 582 (N.Y. App. Div. 1982); *Purnell*, 1996 WL 37770 at *3 (applying New York law). This cause of action is probably not an intentional tort.

74. Duane Reade, Inc. v. Local 338 Retail, Wholesale, Dep't Store Union, 791 N.Y.S.2d 288, 290 (N.Y. Sup. Ct. 2004), *aff'd*, 794 N.Y.S.2d 25 (N.Y. App. Div. 2005), *appeal denied, appeal dismissed*, 835 N.E.2d 328 (N.Y. 2005).

75. *See generally* 20B CARMODY-WAIT § 122.59 (2d ed. 2005) (collecting cases). *See also Duane Reade, Inc.*, 791 N.Y.S.2d at 291, *aff'd*, 794 N.Y.S.2d 25 (N.Y. App. Div. 2005), *appeal dismissed, appeal denied*, 835 N.E. 2d 328 (N.Y. 2005) ("*Martin* requires direct ratification by each and every one of its members, it expressly excludes theories of agency or delegation. 'No agency of

For example, in *Terzi Productions Inc. v. Theatrical Protective Union,*[76] the court rejected the argument that simply because the union approved the agreement in question, they ratified the alleged tortious conduct. As the court explained, "under basic agency principles, ratification . . . requires 'full knowledge [of] . . . the specific acts in question.'"[77]

More significantly, the vast weight of authority has not limited *Martin v. Curran* to its facts or to intentional tort cases. Thus, courts have dismissed causes of action alleging that unions breached their duty of fair representation[78] and causes of action sounding in contract.[79]

Although *Martin v. Curran* did involve the intentional tort of libel, the Court did not state that the common law pleading requirements were only applicable to intentional tort actions. In fact, *Martin v. Curran* itself stated that the common law rule it adopted applied to contract cases.[80] Therefore, case law

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one member for another is implied.'"(internal citation omitted)); Roth v. United Fed'n of Teachers, 787 N.Y.S. 2d 603, 609-10 (N.Y. Sup. Ct. 2004) (same).

76. *A. Terzi Prods., Inc.*, 2 F. Supp. 2d at 492 (applying New York law).

77. *Id.* (quoting *Martin v. Curran*, 101 N.E. 2d at 686); *Duane Reade, Inc.*, 791 N.Y.S.2d at 291 (discussing how delegation and agency theories are expressly excluded from a *Martin v. Curran* analysis). *See also* New York State Med. Transporters Ass'n v. Perales, 566 N.E.2d 134, 137 (N.Y. 1990) (apparent authority, delegation and agency theories are expressly excluded from a *Martin v. Curran* analysis); Monarch Ins. Co. v. Ins. Corp. of Ireland Ltd., 835 F.2d 32, 36 (2d Cir. 1987) (same, applying New York law); 2 N.Y. Jur. 2d, *Agency* § 174 (collecting cases).

78. Walsh v. Torres-Lynch, 697 N.Y.S.2d 434, 435 (N.Y. App. Div. 1999); Butler v. McCarty, 762 N.Y.S.2d 129, 130 (N.Y. App. Div. 2003); Saint v. Pope, 211 N.Y.S.2d 9, 17 (N.Y. App. Div. 1961); Bonhomme-Isaiah v. New York City Bd. of Educ., Index No. 5876/02 (Queens Co. July 6, 2005) (Orlikoff, Flug, J.S.C.). *Accord* Prin v. De Luca, 218 N.Y.S. 2d 761, 764 (N.Y. Sup. Ct. 1961) (though complaint alleged sex discrimination by union, it is apparent that the gravamen of the complaint concerned the union's alleged breach of its duty of fair representation).

79. R.M. Perlman Inc. v. New York Coat, Suit Dresses, Rainwear & Allied Workers, 789 F. Supp. 127, 127 (S.D.N.Y.1992) (dismissing pendent New York claim); Bldg. Indus. Fund v. Int'l Bhd. of Elec. Workers, 992 F. Supp. 192, 195-96 (E.D.N.Y. 1996), *aff'd mem.*, 141 F.3d 1151 (2d Cir. 1998). *Accord* Nickerson v. CWA, No. 504CV00875NPM, 2005 WL 1331122, at *5 (N.D.N.Y. May 31, 2005) (while the court did not technically dismiss on the basis of *Martin v. Curran*, it indicated that it could have dismissed on this ground as well).

80. Martin v. Curran, 101 N.E.2d 683, 686 (N.Y. 1951).

which purports to limit *Martin v. Curran* to intentional torts is of questionable validity.[81] This is particularly true in light of the cases cited herein which have applied *Martin v. Curran* to non-intentional torts such as duty of fair representation claims.

While the common law pleading and proof requirements of *Martin v. Curran* provide most unions with immunity, some plaintiffs have been able to overcome the strict pleading and proof requirements. In *Metropolitan Opera Assoc. v. Local 100,*[82]the employer brought multiple state tort claims against the union that stemmed from a heated labor dispute and secondary boycott. The court concluded that the plaintiff sufficiently pleaded that the entire membership of the union approved of the conduct at issue during a union meeting even though the pleadings did not use the term "each and every."[83]

IV.
MADDEN V. ATKINS' LIMITED EXCEPTION

Despite widespread acceptance, the Court of Appeals has recognized one narrow exception to the common law rule. This exception was created by the court in *Madden v. Atkins.*[84] In *Madden,* a union member sued his national union, its affiliated local, and two officers after he was expelled from the local union.[85] While the court acknowledged the common law requirement of authorization or ratification by all members of the association, which was upheld seven years earlier in *Martin v. Curran,* the court ultimately held that "the rule is otherwise in cases of wrongful expulsion."[86]

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81. *See supra* notes 50-54 and accompanying text.

82. Metro. Opera Ass'n v. Local 100, Hotel Employees and Rest. Employees Int'l Union, 332 F.Supp.2d 667 (S.D.N.Y. 2004).

83. The court also stated that union ratification does not have to be formal but may be implied, citing one case, City of Solow v. Delit, No. 90 Civ. 2273, 1992 WL 249954 (S.D.N.Y. Sept. 21, 1992), *modified on other grounds,* 1993 WL 322838 (S.D.N.Y. Aug. 16, 1993). It is difficult to determine if this decision is inconsistent with *Martin v. Curran* as each and every member of the union may have authorized the conduct. *See supra* notes 74-77 and accompanying text (explaining that *Martin v. Curran* requires one hundred percent satisfaction).

84. 151 N.E.2d 73, 78-79 (N.Y. 1958).

85. *Id.* at 74-75.

86. *Id.* at 78-79.

Chief Judge Fuld, writing for a unanimous court, had no difficulty with *Martin v. Curran.* To avoid it, the Court simply pronounced as follows:

> [T]he principle to be educed from the decisions involving wrongful expulsion is this: Where it is brought about by action on the part of the membership, at a meeting or otherwise, in accordance with the union constitution, the act of expulsion will be regarded as the act of the union for which damages may be recovered from union funds. Where, however, proof of such union action is lacking, the claim for damages against the organization must fail.[87]

Citing a long line of cases, the Court concluded that "[i]t is certainly not too much to expect that a labor union, of all organizations, should not deprive its members of their jobs or of job opportunities without proof, fairly raised and fairly heard, of substantial wrongdoing."[88]

Madden clearly did not overrule *Martin v. Curran.* After *Madden,* several courts have held that *Madden* did not even "severely restrict" it; they view *Madden* as a very narrow exception to the common law ratification requirement - applicable only to wrongful expulsion cases.[89]

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87. *Id.* at 79.

88. *Id.* at 80. Interestingly, this quote could represent the court's view that for public policy reasons *Martin v. Curran* should not be applied to this type of case. However, that type of public policy analysis was rejected in *Martin v. Curran* on the grounds that such policy decisions were for the Legislature to decide. *See supra* notes 39-41 and accompanying text.

Judge Fuld's decision in *Madden* has been criticized because it did not go far enough in limiting *Martin v. Curran.* Emanuel Dannett, *Chief Judge Fuld's Contribution in the Labor Law Field,* 71 COLUM. L. REV. 567, 584 (1971) (quoting Clyde W. Summers, *The Law of Union Discipline: What the Courts Do in Fact,* 70 YALE L.J. 175, 215 (1960)).

89. R.M. Perlman v. New York Coat, Suit Dresses, Rainwear & Allied Workers' Union Local 89-22-1, 789 F. Supp. 127, 132 (S.D.N.Y. 1992) (*citing* Morrissey v. Nat'l Mar. Union, 544 F.2d 19, 33 (2d Cir. 1976); Jund v. Town of Hempstead, 941 F.2d 1271, 1281 (2d Cir. 1991) (acknowledging *Madden's* holding as a mere inconsistency and an exception to the rule set forth in *Martin v. Curran*); *Duane Reade, Inc.,* 777 N.Y.S.2d 231, 236 (N.Y. Sup. Ct. 2003), *aff'd,* 794 N.Y.S. 2d 25 (N.Y. App. Div. 2005), *appeal dismissed, appeal denied,* 835 N.E. 2d 238 (N.Y. 2005) ("*Madden* carved out a very narrow exception to the general rule in *Martin*").

In *Bingham v. Bessler*,[90] a wrongful expulsion case, the court, without citing *Madden*, stated that if a plaintiff could establish fraud or bad faith a damage action would be allowed. Because the case arose under the same factual context as *Madden*, it is not clear whether the court intended to create a separate fraud and bad faith exception to *Martin v. Curran*.[91] Two lower courts have read *Bessler* in this manner and created another exception to *Martin v. Curran*.[92] More recently, however, two courts, including one appellate court, have dismissed cases by applying *Martin v. Curran* to allegations of fraud which did not involve the wrongful expulsion of a union member.[93] Therefore, it appears that *Madden* is a limited exception to *Martin v. Curran* applicable only to wrongful expulsion cases.

V.
FEDERAL TREATMENT OF THE COMMON LAW PLEADING AND PROOF REQUIREMENTS

At the federal level, the strict common law pleading and proof requirements were rejected by the Supreme Court in 1922. In *United Mine Workers v. Coronado Coal Co.*,[94] the employer closed down its operations and then sought to open a new company on a non-union basis. The union responded by striking, and in the process destroyed company property.

The employer brought an action against the union under the Sherman Act,[95] for conspiracy in restraint of trade. The union argued that it could not be found liable for damages absent a showing that the entire union had authorized or ratified its members' actions.

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90. 199 N.Y.S.2d 681, 684 (N.Y. App. Div. 1960), *aff'd without opinion*, 176 N.E.2d 518 (N.Y. 1961).

91. Though *Bessler* was affirmed by the New York Court of Appeals, the affirmance was without opinion. An affirmance without opinion does not mean the Court of Appeals has approved of the Appellate Division's reasoning, and therefore the Court of Appeals' decision has limited precedential value. 1 CARMODY-WAIT § 2:279 (2d ed. 2001).

92. Honegger v. O'Connell, 222 N.Y.S.2d 655, 657 (N.Y. Sup. Ct. 1961); Corder v. Amalgamated Clothing Workers of Am., 305 N.Y.S.2d 739, 740-41 (N.Y. Sup. Ct. 1969).

93. *See Duane Reade, Inc.*, 777 N.Y.S.2d 25 (N.Y. App. Div. 2005), *appeal denied, appeal dismissed*, 835 N.E. 2d 238 (N.Y. 2005); *A. Terzi Prods.*, 2 F. Supp. 2d at 492.

94. 259 U.S. 344 (1922).

95. 15 U.S.C §§ 1, 2 (2001).

Chief Justice Taft, writing for a unanimous Supreme Court, examined the common law principle that unincorporated associations had no legal status independent of their members, and that any liability "had to be enforced against each member."[96] Significantly, however, the Court found this common law doctrine inapposite to the growing body of federal laws and regulations which recognized the independent legal nature of labor unions and the "need of representation by one person of many, too numerous to be sued."[97]

The Court held, "[i]n this state of federal legislation, we think that [labor unions] are suable for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes."[98] *Coronado Coal* thus held that as a matter of federal common law, labor unions had the capacity to sue and be sued for federal claims, and effectively subjected labor unions to almost unlimited liability for the unlawful acts of their members.[99]

Interestingly, the majority in *Martin v. Curran* did not cite to *Coronado Coal*, though it appears to have been briefed on it, as illustrated in the argument of counsel which preceded the opinion.[100] Also indicative of the Court's awareness of

96. 259 U.S. at 385.

97. *Id.* at 387.

98. *Id.* at 391.

99. Congress later enacted § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, in order to limit union member individual liability in federal courts to cases where clear evidence exists that the putative defendants actually participated in the alleged conduct or ratified it after actual knowledge. Unlike New York Law, this federal statute does not require that each and every member of the union ratify the conduct at issue. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 735 (1966) (discussing application of Norris-LaGuardia Act); Modeste v. Local 1199, 850 F. Supp 1156, 1163 (S.D.N.Y. 1994), *aff'd*, 38 F.3d 626 (2d Cir. 1994) (discussing *Coronado Coal* and the effect of the Norris LaGuardia Act).

New York has enacted a similar statute, N.Y. Labor Law § 807 (6), which applies to injunctions in labor disputes and not damage actions. *See* R. M. Perlman, Inc. v. New York Coat, Suit, Dresses & Allied Workers, 789 F. Supp. 127, 133 (S.D.N.Y. 1992).

These statutes are of less importance today as Congress later enacted § 301(b), 29 U.S.C. § 185 (b), which provides that union members do not face any individual liability. *See infra* notes 109-112 and accompanying text.

100. Martin v. Curran, 101 N.E.2d 683 (N.Y. 1951).

Coronado Coal is the fact that the dissent cited to it.[101] Therefore, it is difficult to believe that the *Martin v. Curran* court overlooked this decision. However, because *Martin v. Curran* did not involve a question of federal law or federal procedure, there was no real need for the Court to cite it.

In 1938, when the Federal Rules of Civil Procedure were enacted, Congress promulgated F.R.C.P. 17(b) which effectively codified the holding in *Coronado Coal* by stating that an association can be sued in its own name in federal court when a federal right underlies the claim or when the state in which the federal court sits allows suits against such associations.[102]

Significantly, however, federal courts in New York apply the common law pleading and proof requirements of *Martin v. Curran* to pendent New York state law claims, but not to federal claims.[103] Thus, in *Terzi Productions,*[104] the court relied on *Martin v. Curran* to dismiss several New York tort claims alleging fraudulent inducement, tortious interference with plaintiffs' contractual relationships, tortious interference with prospective contractual relations, defamation and prima facie tort arising from a union's picketing, violent and disruptive behavior which forced plaintiff to recognize the union.

In analyzing the plaintiff's claims, the court reviewed the history of *Martin v. Curran* and noted that federal law conflicts with state law on this issue. The court dismissed pendent state law claims because the common law pleading requirements of *Martin v. Curran* were not satisfied, and rejected the call to eliminate the common law pleading and proof requirements as outdated, reasoning:

> [*Martin v. Curran*] is designed to protect the members of the unincorporated association from unwitting liability for the acts of other members. This reasoning lies at the heart of the *Martin* decision, where

101. *Id.* at 693 (Conway, J., dissenting).

102. *Judicial Control of Actions of Private Associations, supra* note 4, at 1082; Sperry Prod., Inc. v. Ass'n of Am. R.R.s, 132 F.2d 408, 410 (2d Cir. 1942), *cert. denied,* 319 U.S. 744 (1943) (Hand, J.) (stating that Fed. R. Civ .P. 17(b) now covers the same ground as *Cornado Coal*). *See also* Klinghoffer v. S.N.C. Achille Lauro Lines, 937 F. 2d 44, 53 (2d Cir. 1991).

103. *See, e.g.,* Modeste v. Local 1199, 38 F.3d 626, 627 (2d Cir. 1994); Nickerson v. CWA, No. 504CV00875NPM, 2005 WL 1331122, at *5 (N.D.N.Y. May 31, 2005); *R.M. Perlman, Inc.,* 789 F. Supp. at 129.

104. *A. Terzi Prods., Inc.,* 2 F. Supp. 2d 485 (S.D.N.Y. 1998).

> the court determined that unions still lack any legal identity independent of their individual members for liability purposes. 303 N.Y. at 280, 101 N.E. 2d 683. Plaintiffs argue that this rationale is outdated, given the large size of most labor unions now, and that the *Martin* rule is unsound social policy, in that it effectively insulates unions from liability for damages for the tortious acts of its members. However, the decision in *Martin* reveals that these very policy arguments were made to that court, to no avail.[105]

VI.

DOES THE ANCIENT COMMON LAW PLEADING AND PROOF REQUIREMENTS MAKE SENSE TODAY?

While at first blush effectively granting total immunity to unions might be considered shocking, the ruling is understandable on a certain level in that members of an unincorporated association could face individual liability at common law.[106] However, by statute in New York, members of an unincorporated association could face individual liability only after a judgment is unsatisfied.[107] Thus, under New York law strict common law doctrine is somewhat tamer in that individuals

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105. *R.M. Perlman, Inc.*, 789 F. Supp. at 131. *See also* Jund v. Town of Hempstead, 941 F.2d 1271, 1281 (2d Cir. 1991) (stating that *Martin v. Curran* is inconsistent with federal law in context of 42 U.S.C. § 1983 action but is still good law in New York).

106. *See supra* notes 20-21 and accompanying text; *Martin*, 101 N.E.2d at 684.

107. *See* N.Y. GEN. ASS'NS LAW § 16 (McKinney's 1994), which provides:

> Where an action has been brought against an officer, or a counterclaim has been made, in an action brought by an officer, as described in this article, another action, for the same cause, shall not be brought against the members of the association, or any of them, until after final judgment in the action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon.

This statute was enacted in 1920 and effective since 1921, some thirty years before *Martin v. Curran* was decided. *See id.*; *Martin v. Curan*, 101 N.E.2d 683 (N.Y. 1951).

are in essence only secondarily liable.[108] The Court of Appeals in *Martin v. Curran* did not discuss this fact.

In any event, under New York law individual members of unincorporated associations can face personal liability. Thus, there is an element of common sense and equity inherent in the common law rule in that liability can only be imposed on individuals who ratified and approved of the conduct at issue.

Significantly, however, union members in the private sector are effectively insulated from lawsuits in their individual capacity under Section 301(b) of the National Labor Relations Act, as amended,[109] because they cannot be held responsible for acts they committed while representing the union - even if the activity in question was not authorized by the union.[110] The same rule appears to apply in state courts in the private sector.[111] Personal liability of individual bargaining unit members in the public sector under New York law is not fully devel-

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108. *See* Vincent Alexander, *Supplementary Practice Commentaries*, in McKINNEY'S ANNOTATED NEW YORK CIVIL PRACTICE LAW AND RULES § C1025:2 (discussing unincorporated associations).

109. That section provides:

> Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. *Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.*

29 U.S.C. § 185(b) (2001) (emphasis added).

110. Complete Auto Transit, Inc. v. Reis, 451 U.S. 401, 417 (1981); Atkinson v. Sinclair Refining Co., 370 U.S. 238, 247-48 (1962); Morris v. Local 819, Int'l Bhd of Teamsters, 169 F.3d 782, 784 (2d Cir. 1999); Covello v. Depository Trust Co., 88 F. Supp. 2d 59, 62 (E.D.N.Y. 2000).

111. Duane Reade, Inc. v. Local 338 Retail, Wholesale, Dept. Store Union, 794 N.Y.S. 2d 25 (N.Y. App. Div. 2005), *aff'g*, 777 N.Y.S.2d 231 (N.Y. Sup. Ct. 2003) (dismissing claims against union under *Martin* and claims against individual union members under *Complete Auto*); *cf.* Ryan v. Ajami, No. 02-Civ.-4019, 2002 WL 31890050, at *8 (S.D.N.Y. Dec. 30, 2002) ("New York State recognizes that an attorney acting on behalf of a union has immunity for claims of malpractice."). *See also* 6 AM. JUR. 2D *Associations & Clubs* §§ 44-48.

However, *Complete Auto Care* as well as the other cases cited by *Duane Reade* were all federal cases. By its terms, Section 301(b), which each of these courts relied upon, only applies to actions in federal court. The application of Section 301 does not appear to have been raised.

oped, but the trend seems to follow federal law, even though 29 U.S.C. Sec. 185 does not strictly apply to the public sector or to state courts.[112]

Therefore, whatever utility *Martin v. Curran* once had with respect to unincorporated associations, it does not seem to make sense today - at least not in the labor union context. Additionally, many labor unions today function in ways similar to corporations, and many directly employ large numbers of employees and professionals, such as accountants, labor negotiators and lawyers.[113]

Under current law, there appears to be no logical reason to apply different standards to state and federal claims. If the Supreme Court felt that the common law was outdated in 1922, it is difficult to understand how that same principle of common law is not outdated under state law.

Martin v. Curran today leaves unions with virtual immunity from state law lawsuits. This immunity is a powerful defense that unincorporated associations have whether the lawsuit involves a few thousand dollars or millions of dollars. Indeed, during the 2005 New York City Transit strike, New York City

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112. *See* Butler v. McCarty, 762 N.Y.S.2d 129 (N.Y. App. Div. 2003); Mamorella v. Derkasch, 716 N.Y.S.2d 211 (N.Y. App. Div. 2000). *But see* Salemeh v. Toussaint, 810 N.Y.S.2d 1 (N.Y. App. Div. 2006) (reinstating tort claims against individual union member arising during a labor dispute because dismissal against individual union member was not sought in motion for summary judgment).

The applicability of the federal statutes does not appear to have been argued in any New York State case. It is beyond the scope of this Article to discuss this issue in any further detail.

113. In 1963, the New Jersey Supreme Court extensively examined New Jersey law which, up until that time, had applied common law pleading requirements to unincorporated labor unions in a similar fashion as *Martin v. Curran*. The Court overruled this case law, reasoning that by enacting Section 301, 29 U.S.C. § 185, Congress intended to personify a union as a jural entity. Specifically, the Court stated, "[t]he Congressional intention manifested by section 301 was to eliminate the amorphous status of the union, and to personify it as a jural entity." Donnelly v. United Fruit Co., 190 A.2d 825 (N.J. 1963), *overruled on other grounds*, Saginario v. Attorney General, 435 A.2d 1134 (N.J. 1981).

The Court's analysis is questionable in that it did not cite to any legislative history which indicates that this was indeed the intent of Congress. Perhaps this case could be best understood as the New Jersey Supreme Court simply overruling the common law as the U.S. Supreme Court did in United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922) in 1922.

filed a suit for damages against the union seeking damages under a public nuisance theory; they sought $1,000,000 a day from the union and $25,000 a day from each individual union member.[114] It has also been reported that a lawsuit has been filed against the union seeking to compensate businesses for strike related losses.[115] It seems likely that *Martin v. Curran* should bar any such litigation from succeeding since one hundred percent of the membership did not vote in favor of the strike.

The sense of injustice brought about by continued adherence to common law was summarized by Justice Sax in a 2006 Appellate Division, First Department case which dismissed, on the basis of *Martin v. Curran,* multiple tort claims against a union where forty members of the union trespassed while holding a union rally, and assaulted and severely beat a security guard who sought to break up the rally. As dissenting Justice Sax explained:

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114. Tom Perrotta, *City's Suit Over Damages Raises Question of Standing,* N.Y.L.J., Dec. 15, 2005, at 1. Although this suit was later dropped by the City, Thomas J. Lueck, *City to Drop Lawsuit Against Strikers,* N.Y. TIMES, May 17, 2006, it would appear that the union had immunity from such suit under *Martin v. Curran.*

Additionally, it is doubtful that such a cause of action is viable in light of the Court of Appeals' decision in *Burns, Jackson, Miller, Summit & Spitzer v. Lindner* which arose out of the 1980 New York City Transit strike. In *Burns,* the Court held that there was no private right of action under the Taylor Law, New York Civil Service Law § 200 *et. seq.*, the statute in New York which governs public sector labor relations, and that plaintiffs did not state a cause of action for prima facie tort, public nuisance, intentional interference with business or breach of plaintiff's rights as a third party beneficiary of a public sector contract. *See* Burns, Jackson, Miller, Summit & Spitzer v. Lindner, 451 N.E.2d 459 (N.Y. 1983). For scholarly commentary on whether causes of action can be brought against public sector unions for engaging in illegal strikes see Louis Waldman, *Damage Actions and Other Remedies in the Public Employee Strike,* NYU 20th Annual Conference on Labor (T. Christensen ed. 1968); Note, *Private Damage Actions Against Public Sector Unions for Illegal Strikes,* 91 HARV. L. REV. 1309 (1978); Note, *Statutory and Common Law Considerations in Defining the Tort Liability of Public Employee Unions to Private Citizens for Damages Inflicted by Illegal Strikes,* 80 MICH. L. REV. 1271 (1982); Note, *Damage Liability of Public Employee Unions for Illegal Strikes,* 23 B.C. L. REV. 1087 (1982). *See also,* Wayne F. Foster, Annotation, *Damage Liability of State or Local Public Employees' Union or Union Officials for Unlawful Work Stoppage,* 84 A.L.R.3d 336 (1978).

115. *Manhattan Restaurant Sues Over Lost Business,* N.Y. TIMES, Dec. 23, 2005, at B9.

> Therefore, despite the fact that a similar type of action under federal law states a claim against a union for pleading purposes, under the existing law of New York as stated in *Martin v. Curran,* the motion court's decision here was indeed correct. But, that should not end our analysis, especially where an unremedied injustice exists, as here. Our common law is sufficiently elastic, and the application of our discretion to promote fairness and justice must be available in such an instance. The policy question presented here is a rhetorical one: how can the law permit a union to be relieved of collective responsibility *as a matter of law,* and to avoid any financial obligation, when a group of its members, marching under its banner and doing an activity for its benefit, causes severe injury with acts of violence, simply because the legal form which it chose to conduct its business was that of an unincorporated association? . . . I believe that there is no good reason to give continuing recognition to a decision that is not sound on the law and more importantly defies common sense.[116]

If the common law rule as affirmed in *Martin v. Curran* is to be applied to unincorporated associations today, it would seem to make sense to apply it only to small unincorporated associations – but, like labor unions, many unincorporated associations are quite large. The difficulty with this mode of analysis lies in determining where to the draw the line. In the final analysis such line-drawing appears to be a task most suited for the legislature, and this, after all, is what *Martin v. Curran* stated in the first place.

Finally, if *Martin v. Curran* is ever to be legislatively overruled, judicially abandoned or otherwise changed, prudence indicates that the law concerning individual liability also needs to be re-examined and clarified, particularly in public sector labor selections. If unincorporated associations are going to be held responsible for their actions, there is no need for individual members of such associations to face liability.

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116. *Salemeh,* 810 N.Y.S.2d at 3 (Saxe, J., dissenting) (citations omitted).

VII.
THE DUTY OF FAIR REPRESENTATION UNDER NEW YORK LAW

Any discussion of union liability and union immunity must also address the duty of fair representation - the most common source of litigation against unions in New York[117] and elsewhere.[118] There is even a significant body of authority in New York holding that the *only* duty a union owes its members is that of fair representation.[119]

While on the one hand a union is a private organization, under the law it is also the exclusive representative of employ-

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117. The duty of fair representation under New York law only applies to public sector unions. Private sector unions are governed by federal law. *See supra* note 8.

118. At common law, there was no duty of fair representation. *See* Chauffeurs Local No. 391 v. Terry, 494 U.S. 558, 563 (1990). This doctrine was judicially developed and implied from the unions' role as the exclusive representative of employees under the various labor law statutes. *See* Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) (interpreting Railway Labor Act, 45 U.S.C. § 151); Ford Motor Co. v. Huffman, 345 U.S. 330, 336-38 (1953) (interpreting National Labor Relations Act, 29 U.S.C. § 157, 159); Baker v. Board of Education, 514 N.E.2d 1109, 1111-13 (N.Y. 1987) (interpreting New York Taylor Law, Civil Service Law § 200 *et. seq.*).

In 1990, the New York Legislature amended the Taylor Law to expressly make a union's breach of its duty of fair representation an improper practice which can be adjudicated by filing an administrative charge with PERB. *Butler*, 762 N.Y.S.2d at 129, *aff'd*, 762 N.Y.S. 2d 129 (N.Y. App. Div. 2003). *See also* PHILLIP Maier, The Taylor Law and the Duty of Fair Representation 6 (N.Y.S. P.E.R.B., 2002).

The National Labor Relations Board recognized that unions owe their members a duty of fair representation in 1962. *In re* Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *enforcement denied*, 326 F.2d 172, 176 (2d Cir. 1963). Though the Second Circuit initially denied enforcement of the NLRB's conclusion that a breach of the duty of fair representation was an unfair labor practice, today it is widely understood that such a breach does indeed constitute an unfair labor practice under the National Labor Relations Act. *See* NLRB v. Katsaros, 740 F.2d 141, 145 (2d Cir. 1984) (collecting cases finding a breach of the duty of fair representation to be an unfair labor practice). The Supreme Court, which has not expressly ruled on this issue, has assumed that breach of the duty of fair representation constitutes an unfair labor practice. *See* Vaca v. Sipes, 386 U.S. 171, 176-78 (1967); MICHAEL HARPER ET AL., LABOR LAW CASES: MATERIALS, AND PROBLEMS 1039 (5th ed. 2003).

119. McClary v. Civil Serv. Employees Ass'n, Inc., 520 N.Y.S.2d 88 (N.Y. App. Div. 1987); Herington v. CSEA, Inc., 516 N.Y.S. 2d 377 (N.Y. App. Div. 1987); *Butler v. McCarty*, 740 N.Y.S.2d 801 (N.Y. Sup. Ct. 2002), *aff'd*, 762 N.Y.S.2d 129 (N.Y. App. Div. 2003).

ees. Because of this exclusivity, the law imposes a duty of fair representation on unions.[120] While at some level, the duty of fair representation is incapable of a precise definition,[121] it tends to be defined in legal terms, with courts holding that unions breach the duty if they act in an arbitrary, capricious or discriminatory way towards a particular union member.[122] Under this doctrine, unions are afforded a significant amount of deference and the bar is set very high for liability. While the duty of fair representation does not provide unions with total immunity like *Martin v. Curran* does, it provides them with quite a bit of flexibility given the high standard for liability.[123]

120. MICHAEL HARPER AT AL., *supra* note 118, at 982; National Labor Relations Act § 9, 29 U.S.C. § 159 (2006).

121. *See* Craig Becker, *Book Review: Individual Rights and Collective Action: The Legal History of Trade Unions in America,* 100 HARV. L. REV. 672, 679-84 (1987).

122. *See Vaca,* 386 U.S. at 178; *Baker,* 514 N.E.2d at 1110. *Vaca* also established that while "a union may not arbitrarily ignore a meritorious grievance," an individual employee does not have "an absolute right to have his grievance taken to arbitration." *Vaca,* 386 U.S. at 191.

123. In describing the duty of fair representation, one circuit court has stated that a plaintiff "does not get to first base unless the union has abandoned him to the wolves." Pease v. Prod. Workers Union, 386 F.3d 819, 823 (7th Cir. 2004). *See also* David L. Gregory, *Union Liability For Damages After* Bowen v. Postal Service*: The Incongruity Between Labor Law And Title VII Jurisprudence,* 35 BAYLOR L. REV. 237, 249 n.72 (Spring 1983) (stating duty of fair representation plaintiffs face "formidable hurdles"); LAURA J. COOPER, DENNIS R. NOLAN, RICHARD A. BALES, ADR IN THE WORKPLACE 162 (2d. ed. 2005) ("Duty of fair representation cases continue to be brought by large numbers of employees, but their successes are few."); Ann C. Hodges, *Mediation And The Transformation of American Labor Unions,* 69 MO. L. REV. 365, 432 (2004) ("the wide range of reasonableness accorded to the union under the duty of fair representation makes imposition of liability a relatively rare occurrence . . . "); DOUGLAS E. RAY, ET AL., UNDERSTANDING LABOR LAW, § 16.03, 343 (2d ed. 2005) (standards for duty of fair representation liability "are sufficiently high as to make it difficult for individual employees to establish liability").

Private-sector[124] unions are, of course, regulated by the National Labor Relations Act[125] where most duty of fair representation cases stem from.[126] However, the National Labor Relations Act does not apply to employees of state and political subdivisions and the unions which represent them.[127]

Under the Taylor Law,[128] New York has recognized a duty of fair representation for public sector unions almost identical to that which has been recognized in the private sector.[129] Indeed, the duty of fair representation under New York Law can

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124. The law surrounding the duty of fair representation in the private sector is highly developed. For a comprehensive discussion of its history and application, see PATRICK HARDIN AND JOHN E. HIGGINS, JR., The Developing Labor Law, Ch. 25 (4th ed. 2001); ROBERT A. GORMAN & MATHEW W. FINKIN, BASIC TEXT ON LABOR LAW, Ch. 30 (2d ed. 2004); JULIUS GETMAN, BERTRAND POGREBIN & DAVID L. GREGORY, LABOR MANAGEMENT RELATIONS AND THE LAW 209-41 (2d. ed. 1999); WILLIAM W. OSBORNE, JR., LABOR UNION LAW AND REGULATION 280-330 (2003). Indeed, the duty of fair representation is a significant part of major law school casebooks on labor law. *See, e.g.*, MICHAEL C. HARPER, ET AL., *supra* note 118 at 1034-80; ARCHIBALD COX, ET AL., CASES AND MATERIALS ON LABOR LAW 1036-88 (13th ed. 2001); THEODORE J. ST. ANTOINE, ET AL., LABOR RELATIONS LAW: CASES AND MATERIALS 822-53 (11th ed. 2005).

125. 29 U.S.C. § 151 *et. seq.* (2005).

126. Most private-sector employers and unions that are not governed by the NLRA are in the railroad and airline industries, which are subject to the Railway Labor Act, 45 U.S.C. §§ 151-188 (2003).

127. *See supra* note 8 and accompanying text.

128. Public Employees' Fair Employment Act, N.Y. CIV. SERV. LAW §§ 200 – 214 (2005). This statute is better known as the "Taylor Law." The Taylor Law governs collective bargaining between most public-sector employers and their unions in New York State. The Taylor Law established the Public Employment Relations Board which, like the National Labor Relations Board in the private sector, adjudicates unfair labor practices, referred to as "improper practices." For an exhaustive examination of the Taylor Law, see JEROME LEFKOWITZ ET AL., PUBLIC SECTOR LABOR AND EMPLOYMENT LAW (2d. ed.1998).

129. The major difference between New York and federal law regarding the duty of fair representation is the applicable statute of limitations. Under federal law, the applicable statute of limitations is six months, DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 159 (1983), while the statute of limitations under New York law is four months. Dolce v. Bayport-Blue Point Union Free Sch. Dist., 728 N.Y.S. 2d 772, 773 (N.Y. App. Div. 2001); Clissuras v. City of New York, 517 N.Y.S.2d 39, 40 (N.Y. App. Div. 1987). For a summary of New York duty of fair representation law, see, Mitchell H. Rubinstein, *Advisory Arbitration Under New York Law: Does It Have A Place In Employment Law?*, 79 ST. JOHN'S L. REV. 419 (2005).

be traced to federal law[130] and has been recognized in New York since 1971.[131]

The Supreme Court has held that the NLRB does not have primary jurisdiction over duty of fair representation claims in the private sector.[132] In the public sector, PERB also

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130. Baker v. Board of Education, 514 N.E.2d 1109, 1111 (N.Y. 1987). For an analysis of the duty of fair representation under New York Law, see MAIER, *supra* note 118. *See also,* Vincent M. Bonventre, *The Duty Of Fair Representation Under the Taylor Law: Supreme Court Development, New York State Adoption And A Call For Independence,* 20 FORDHAM URB. L.J. 1 (Fall 1992) (extensively discussing the development of the duty of fair representation under New York law).

Baker held that public sector duty of fair representation claims were subject to a six year statute of limitations under New York law, but this holding was legislatively overruled when the New York State Legislature amended the CPLR to provide for a four-month statute of limitations in duty of fair representation cases. *See* N.Y. C.P.L.R. 217; Alston v. Transport Workers Union of Greater New York, 639 N.Y.S.2d 359, 360 (N.Y. App. Div. 1996) (discussing legislative history of N.Y. C.P.L.R. 217).

131. Bonventre, *supra* note 130.

132. Breininger v. Sheet Metal Workers, 493 U.S. 67 (1989). The doctrine of primary jurisdiction is often confused with the doctrine of exhaustion of administrative remedies which is similar on its face, but different in practice. Exhaustion applies when a claim is cognizable in the first instance by the administrative agency only. Courts cannot review the matter until the administrative agency has made a ruling. By contrast, primary jurisdiction comes into play when a court *does* have the authority to resolve the claim in the first instance, but because of the agency's administrative expertise the court suspends the judicial process until it hears the administrative body's views. United States v. W. Pac. R.R. Co., 352 U.S. 59, 63-64 (1956); Reiter v. Cooper, 507 U.S. 258 (1993). *See also* Louis L. Jaffe, *Primary Jurisdiction,* 77 HARV. L. REV. 1037 (1964).

Referral to an administrative agency does not deprive the court of subject matter jurisdiction. The court has the discretion to either retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice. *Reiter,* 507 U.S. at 268. There is no fixed formula for determining when the doctrine of primary jurisdiction applies. *Western Pacific,* 352 U.S. at 64.

It may seem that permitting employees to file an unfair representation claim in court without first having to proceed administratively before the Board is out of step with modern notions encouraging alternative forms of dispute resolution, as well as the doctrine of primary jurisdiction. However, in other aspects of employment law, it is common for putative plaintiffs to have multiple forums to choose from. For example, a plaintiff alleging racial discrimination can proceed under Title VII or he or she could choose to litigate the issue under state law via an administrative agency or in some cases, directly in court. SAMUEL ESTREICHER & MICHAEL HARPER, CASES AND MATERIALS ON EMPLOYMENT LAW 479 (2004) ("Perhaps the most important

has concurrent jurisdiction over duty of fair representation claims. Thus, an unfairly represented employee can elect to proceed before PERB or in court.[133]

The choice of forum is critical in New York if the union is unincorporated. If the unfairly represented employee chooses to proceed in court, his case is subject to dismissal under *Martin v. Curran.* However, if he chooses to proceed before PERB, the common law pleading and proof requirements of *Martin v. Curran* simply do not apply.[134] With respect to private-sector unions, *Martin v. Curran* only applies to state law claims. Thus, this defense would not be applicable to private sector duty of fair representation claims because such claims are governed by federal law.

As under federal law, when a state law cause of action is pursued in court, it is usually brought as a hybrid action involving the employer's breach of contract (the collective bargaining agreement) and the union's breach of duty (fair representation).[135] New York Courts have adopted the *Vaca* tripartite

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procedural design is the choice of enforcement vehicle: whether to rely exclusively on the private suit or on a specialized administrative agency, or to utilize some mixture of both").

133. Prior to the 1990 amendments expressly making the duty of fair representation an improper practice, the appellate division rejected the argument that PERB had primary jurisdiction to adjudicate claims alleging a breach of the duty of fair representation. DeCherro v. Civil Serv. Employees Ass'n, 400 N.Y.S.2d 902, 903 (N.Y. App. Div. 1977); MAIER, *supra* note 119, at 9-10 (stating that state courts have concurrent jurisdiction with PERB over duty of fair representation claims); Peele v. New York City Dep't. of Soc. Servs./Human Res. Admin., No. 92 CIV. 3765, 1995 WL 728478 , at *2-3 (S.D.N.Y. Dec. 8, 1995), *aff'd,* 1996 WL 560751 (2d Cir. Oct. 3, 1996) (summarizing New York law).

It does not appear that the 1990 amendments which codified the duty of fair representation as an improper practice intended to alter PERB's concurrent jurisdiction. Memorandum from Pauline Kinsella, PERB Deputy Chairman and Counsel, to Evan A. Davis, Counsel to the Governor 6 (June 29, 1990), *reprinted in* NEW YORK GOVERNOR'S BILL JACKET, 1990 Chapter 467. However, there is no judicial or academic commentary with respect to this issue.

134. *See supra* note 11 and accompanying text.

135. Obot v. N.Y. State Dep't. of Corr. Serv., 675 N.E.2d 1197, 1198 (N.Y. 1996), *citing with approval,* DelCostello v. Teamsters, 462 U.S. 151, 163-164 (1983). *See also* Hoerger v. Bd. of Educ., 514 N.Y.S.2d 395 (N.Y. App. Div. 1987) (characterizing breach of duty of fair representation lawsuit as a hybrid action).

standard (arbitrary, discriminatory or in bad faith) to determine if the duty of fair representation has been breached.[136]

Under this standard, courts pay unions significant deference. In *Civil Service Bar Association v. Teamsters,*[137] the Court of Appeals recognized that a union's basic purpose is to address the needs of union members who at times may face conflicting situations. The court said that unions must have leeway to resolve grievances for the benefit of the entire membership, even if the resolution might occasionally be to the detriment of some members.[138]

Additionally, as in the private sector, New York courts have recognized that mere errors in judgment do not establish a breach of the duty of fair representation since union man-

136. *See* Baker v. Board of Education, 514 N.E.2d 1109, 1114 (N.Y. 1987) (adopting *Vaca* standard).

Some litigants seek to avoid this heightened standard by characterizing their claim as something other than a breach of the duty of fair representation claim. However, courts usually do not allow this kind of form-over-substance manipulation; they are not bound to a litigant's characterization of the case. Coleman v. City of New York, No. 99-CV-1159, 1999 WL 1215570 (E.D.N.Y. Dec. 7, 1999) (treating federal law laundry list of allegations against union, which included allegations of racial discrimination, as a claim for breach of the duty of fair representation); Carroll v. Local 317, Intern. Broth. of Teamsters, No. 99-CV-1362, 1999 WL 1138596 (N.D.N.Y. Dec. 6, 1999) (same); Dolce v. Bayport-Blue Point Union Free Sch. Dist., 728 N.Y.S.2d 772 (N.Y. App. Div. 2001) (laundry list of complaints against union treated as a cause of action for breach of the duty of fair representation under New York law); Mehrhoff v. William Foyd Union Free Sch. Dist., No. 04-CV-3850, 2005 WL 2077292, at *12 (E.D.N.Y. Aug. 22, 2005) (same applying New York law). *Accord,* WILLIAM W. OSBORNE, JR., LABOR UNION LAW AND REGULATION Ch. 4, § VI.D.3, at 133 (2005 Supp.) (collecting cases holding that state tort actions against unions for negligence, fraud, and unjust enrichment are preempted under Section 301, 29 U.S. C. § 185 as essentially duty of fair representation claims).

Under New York law, at times the duty of fair representation standard has been articulated as requiring a showing that the union acted "deliberately invidious, arbitrary or in bad faith." CSEA v. Pub. Employment Relations Bd., 522 N.Y.S.2d 709 (N.Y. App. Div. 1987), *aff'd,* 533 N.E.2d 1051 (N.Y. 1988). However, this appears to be a distinction in semantics which makes no difference in law. Indeed, in *Matter of Grassel,* 33 PERB & 3038 (2000), the *CSEA* standard was utilized. On appeal, however, the court reached the same result by applying the *Vaca* standard without even mentioning the *CSEA* standard. Grassel v. Pub. Employment Relations Bd., 753 N.Y.S.2d 522, 523 (N.Y. App. Div. 2003).

137. 474 N.E.2d 587, 592 (N.Y. 1994).

138. *Id.*

agement is not required to be infallible.[139] Hence, mere proof that an employee's rejected grievance was in fact meritorious is insufficient to establish liability.[140] Thus, New York courts do not get involved in second-guessing union decisions,[141] and a union's mere negligence or incompetence does not establish a cause of action for breach of the duty of fair representation.[142] As under federal law, an actual breach of the duty of fair representation removes the finality from any arbitration award that might have been issued.[143]

The vast majority of public sector duty of fair representation claims concern the failure of a union to provide representation in the grievance process.[144] However, duty of fair representation claims arise under other factual circumstance as well. For example, in one case, a duty of fair representation claim was dismissed even though the union incorrectly advised the member to file an intent to retire which deprived the plaintiff of a $15,000 retirement bonus.[145] Other cases involve claims that the union did not respond to reasonable inquires from members[146] and that the union represented a

139. Albino v. City of New York, 438 N.Y.S.2d 587 (N.Y. App. Div. 1981).

140. Jacobs v. Bd. of Educ., 409 N.Y.S.2d 234, 237 (N.Y. App. Div. 1978), *appeal dismissed,* 46 N.Y.2d 1075 (N.Y. 1979).

141. *Id.* at 239 n.3.

142. Altimari v. Parker, 592 N.Y.S.2d 509, 510 (N.Y. App. Div. 1993), *appeal denied,* 639 N.E.2d 417 (N.Y. 1994); McClary v. Civil Serv. Employees Ass'n, Inc., 520 N.Y.S.2d 88 (N.Y. App. Div. 1987).

143. Berlyn v. Bd. of Educ., 433 N.E.2d 1278, 1278 (N.Y. 1982). *See also* Bd. of Educ. Commack Union Free Sch. Dist. v. Ambach, 517 N.E.2d 509, 512 (N.Y. 1987) *cert. denied,* 485 U.S. 1034 (1988).

144. MAIER, *supra* note 118, at 39.

145. Schmidt v. Hicksville Union Free Sch. Dist., 606 N.Y.S.2d 761, 762 (N.Y. App. Div. 1994).

The negotiation and availability of retirement incentives has generated a significant amount of duty of fair representation litigation in the public sector. *See In re* Bergamine v. Patrolmen's Benevolent Ass'n, 608 N.Y.S.2d 431 (N.Y. App. Div. 1994), *appeal denied,* 639 N.E. 2d 417 (N.Y. 1994) (retirement incentive that did not cover all retirement age employees); Dolce v. Bayport-Blue Point Union Free Sch. Dist., 728 N.Y.S.2d 772, 773 (N.Y. App. Div. 2001) (retirement incentive applicable to only a handful of employees); Hoerger v. Bd. of Educ., 627 N.Y.S.2d 955, 955 (N.Y. App. Div. 1995) (retirement incentive for employees who faced disciplinary charges); Cooke v. Bd. of Educ., 528 N.Y.S.2d 140, 141 (N.Y. App. Div. 1998) (same).

146. MAIER, *supra* note 118, at 56-59.

member in a seniority dispute which adversely affected another employee.[147]

The Taylor law was amended to expressly make public employers "statutory parties"[148] in duty of fair representation cases in order to assure that PERB would have the authority to issue full remedial orders.[149] By making the employer a statutory party, the Taylor Law cures some of the problems the NLRB has in issuing duty of fair representation remedial orders. Under the Taylor law, for example, it does not appear that an employer would have to be sued in court for breach of contract by the injured employee in order to obtain complete relief, as it would in a case that was originally brought before the NLRB.[150]

In examining whether *Martin v. Curran* should continue to be applied to unincorporated labor unions, it also may be

147. *Id.* at 67-68.

148. The statute provides as follows:

> The public employer shall be made a party to any charge filed under subdivision two of this section which alleges that the duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

N.Y. Civ. Serv. Law § 209-a.3 (2003). In the private sector there is no corresponding statutory provision.

149. MAIER, *supra* note 118, at 7.

150. The Supreme Court has stated that the duty of fair representation in the unfair labor practice context resembles hybrid court actions "and indeed there is substantial overlap." DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 170 (1983). The Board has also recognized the resemblance, but has indicated that NLRB proceedings are "not precisely parallel" to court proceedings. This is because the employer is not typically a party and the Board does not always have jurisdiction to decide the breach of contract issue. Iron Workers Local Union No. 377, 326 N.L.R.B. 375, 378, n. 15 (1998).

Since 1998 the NLRB has issued remedial orders which mandate that the union request that the employer promptly consider the grievance, and if it agrees to do so, to process it and permit the unfairly represented employee to be represented by a private attorney, at the union's expense, in the grievance and/or arbitration hearing. In the event that it is not possible to pursue a grievance or arbitration, and if the General Counsel is able to show that a timely pursed grievance would have been successful, then the union is responsible for any increases in damages suffered as a consequence of its refusal to process a grievance. *Id.*; Branch 3126 Nat'l Ass'n. of Letter Carriers, 330 N.L.R.B. 587, 588 (2000); Warehouse Union Local 6, 336 N.L.R.B. No. 104 (2001). It is beyond the scope of this work to discuss situations where an individual may bring a breach of contract claim against the employer in court.

worth considering that unions already receive a significant degree of discretion under duty of fair representation jurisprudence.

VIII.
CONCLUSION

It is hoped that this Article contributes to an understanding of the rule in *Martin v. Curran.* While the common law rule that a plaintiff must plead and prove ratification of each and every member of the unincorporated association does not make sense in relation to modern unions which represent tens of thousands and even hundreds of thousands of workers, the rationale of the Court - namely that a change in the common law is for the legislature - is consistent with the Court's modern day decisions involving employment law.[151]

However, not all labor unions represent large numbers of workers.[152] Indeed, under the National Labor Relations Act,[153] unions can be formed with as few as two employees.[154] When viewed in that context, the common law rule can make sense - at least in some limited situations.

Perhaps the most important argument in favor of *Martin v. Curran* concerns its rationale. Since liability is ultimately the responsibility of the individual members, it makes sense that such individuals would only face such liability when they in fact approved of or ratified the conduct at issue. When examining whether *Martin v. Curran* still makes sense today, one must consider this doctrinal principle as well.

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151. Murphy v. Am. Home Prods, 448 N.E.2d 86, 89 (N.Y. 1983) (holding that a change in the employment-at-will doctrine is for the Legislature to make). *See also* Rubinstein, *supra* note 129, at 434-35 (discussing the employment-at-will doctrine).

152. Yet it cannot be denied that many unions today are highly structured, hierarchical and act like businesses in order to advance the interests of their members. *See* People v. Newspaper and Mail Deliverers' Union, 683 N.Y.S. 2d 488, 492 (N.Y. App. Div. 1998), *appeal denied,* 711 N.E.2d 653, 719 N.E.2d 943 (N.Y. 1999), *cert. denied,* 528 U.S. 1081 (2000) (describing modern day unions in this manner).

153. 29 U.S.C. § 181 (2005).

154. Nathan Katz Realty, LLC v. Nat'l Labor Relations Bd., 251 F.3d 981, 984 (D.C. Cir. 2001). Moreover, generally an unincorporated association must be made up of at least two persons. Uniform Unincorporated Nonprofit Association Act 1996 § 1(2) (2003).

The Supreme Court recognized early on that the common rule did not make sense, yet courts continue to apply it to state law claims whether they are filed in New York state courts or as pendent federal claims. Additionally, the NLRB treats labor organizations, for all practical purposes, as juridical entities.[155] Furthermore, several courts have found the common law outdated and refused to apply common law standards to unincorporated labor unions.[156]

Therefore, it is logical that the New York state courts would follow the federal lead and abolish this dated doctrine. Logic, however, is not always followed in labor and employment law. Indeed, *Martin v. Curran* has been severely criticized by courts and several courts have bent over backwards to create exceptions which have no basis in law.[157]

The law surrounding unincorporated associations in New York is also asymmetrical in that unincorporated associations are able to bring suit without satisfying any ratification requirement.[158] However, if they are sued, under *Martin v. Curran*, the approval and ratification of the act in question by each and every member of the association must be alleged and proven.

Public policy is certainly not furthered by blind obedience to an ancient common law doctrine which remains largely unaltered since the Middle Ages. Courts have not hesitated to discard obsolete common law doctrines when necessary.[159] On the other hand, it is not unusual for courts to hold steadfast to the notion that certain changes are for the legislature.

While *Martin v. Curran* makes little sense, particularly when one considers that union members, as opposed to members of other types of unincorporated associations, do not face individual liability, the fact of the matter is that more than half

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155. *In re* Longshoremen's Union and Warehousemen's Union, C. I. O., 79 N.L.R.B. 1487 (1948). *See also,* THEODORE J. ST. ANTOINE, CHARLES B. CRAVER, MARION G. CRAIN, LABOR RELATIONS LAW: CASES AND MATERIALS 934 (11th ed. 2005) (same).

156. *See, e.g., supra* notes 50-62 and accompanying text.

157. *Id.*

158. *See, e.g.*, Kirkman v. Electrical Workers, 39 N.E.2d 919, 923 (N.Y. 1942).

159. Adams v. New York City Transit Auth., 626 N.Y.S.2d 455, 462 (N.Y. App. Div. 1995), *aff'd*, 666 N.E.2d 216 (N.Y. 1996); *Newspaper and Mail Deliverers' Union*, 683 N.Y.S.2d at 492.

century after *Martin* v. *Curran* declared that a change in the common law was for the legislature, the legislature has not acted. The legislature's failure to act is probably the single most significant reason that this dated doctrine is still with us today.[160]

Were the legislature to act to eliminate the common law pleading and proof requirements, it would also need to eliminate individual liability.[161] Otherwise, individuals could face liability with respect to issues they did not even know about.

The common law pleading requirement of *Martin v. Curran* is not the only favorable legal provision applicable to unions in New York. The law regarding the duty of fair representation, which is the major liability unions face, affords unions favorable treatment because the standard of liability is set very high.[162] Though duty of fair representation cases can also be brought in court since PERB and the NLRB do not have primary jurisdiction, if a plaintiff proceeds in this manner, his or her case will be subject to dismissal under *Martin v. Curran*.[163]

The common law pleading requirements, together with the heightened standard of proof for fair representation claims demonstrate a "hands off" approach concerning the regulation of unions. These two doctrines result in courts avoiding interference with the economic and political jurisprudence of trade unions.

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160. *See, e.g.*, R. M. Perlman, Inc. v. New York Coat, Suit, Dresses & Allied Workers, 789 F. Supp. 127 (S.D.N.Y. 1992) ("It is for the Legislature to decide whether or not to overhaul these settled rules [referring to *Martin v. Curran*] after hearing both sides, and after considering the interests of the general public as well as those of the innumerable members of these associations").

161. In the case of torts, however, the individual tortfeasor has individual liability for the tort he or she committed whether or not *Martin v. Curran* is changed by the Legislature. 6A N.Y. JUR. 2D *Associations and Clubs* § 15 (1997). Such an individual would stand in the same shoes as any other tortfeasor. *Martin v. Curran* only concerns the unincorporated association's liability.

162. *See, supra* note 123 and accompanying text. Of course there are important policy reasons which support this heightened standard in that unions often face conflicting demands from their members and their responsibility is to represent the entire unit. *See, supra* notes 138-139 and accompanying text.

163. *See, supra* note 133 and accompanying text.

Unions, of course, are different from corporations as their purpose is not to produce a profit for shareholders. Rather, they exist to represent their members in an effort to achieve better working conditions. Perhaps their unique role in society explains why the law treats them so favorably.