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Title IV of the Labor Management Reporting and Disclosure Act - Should Intervening Plaintiffs be Permitted to Recover Attorney's Fees?

Martin H. Malin
IIT Chicago-Kent College of Law, mmalin@kentlaw.iit.edu

TITLE IV OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT—SHOULD INTERVENING PLAINTIFFS BE PERMITTED TO RECOVER ATTORNEY'S FEES?

*Martin H. Malin**

I. INTRODUCTION

Title IV of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) establishes comprehensive regulations governing the conduct of union elections.[1] Its passage represented a victory for advocates of union democracy over those who believed that regulation of internal union government would severely undermine the position of organized labor in its economic battles with employers.[2] As a

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* Assistant Professor of Business Law, Ohio State University; member of the Michigan Bar. B.A., Michigan State University, 1973; J.D., George Washington University, 1976.

1. National and international unions must elect their officers at least every five years, either by secret ballot or by convention of delegates chosen by secret ballot. Sections 401(a)&(c) of the LMRDA, 29 U.S.C. §§ 481(a)&(c) (1970). Locals must hold elections at least every three years, and the elections must be by secret ballot. *Id.* § 401(b), 29 U.S.C. § 481(b). Every union member in good standing must be given a reasonable opportunity to nominate candidates, must be permitted to vote, and, subject to statutory prohibitions and reasonable qualifications uniformly imposed, is eligible to be a candidate. *Id.* § 401(e), 29 U.S.C. § 481(e). Each candidate has the right to have the union distribute his campaign literature at his expense and has the right to inspect, but not copy, the union's membership list. *Id.* § 401(c), 29 U.S.C. § 481(c). Union members must be given at least fifteen days notice by mail of the coming election. *Id.* § 401(e), 29 U.S.C. § 481(e). Unions and employers are prohibited from financing the campaign of any candidate. *Id.* § 401(g), 29 U.S.C. § 481(g).

2. For a summary of the opposing views, *see* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 829-30 (1960); Note, *Union Elections and the LMRDA, Thirteen Years of Use and Abuse*, 81 YALE L.J. 407, 410-23 (1972) [hereinafter cited as *Union Elections and the LMRDA*].

The House and Senate Committees used identical language to express the congressional choice:

> It needs no argument to demonstrate the importance of free and democratic union elections. Under the National Labor Relations and Railway Labor Acts the union which is the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and conditions of employment. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. In practice, the union also has a significant role in enforcing the grievance procedure where a man's contract rights are enforced. The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent. The best assurance which can be given is a legal guaranty of free and periodic elections.

S. REP. NO. 187, 86th Cong., 1st Sess. 20, *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2336; H.R. REP. NO. 741, 86th Cong., 1st Sess. 15-16, *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2424, 2438.

safeguard against undue government interference in internal union affairs, Congress provided for exclusive enforcement of Title IV by the Secretary of Labor.[3] A union member may, however, intervene as a plaintiff in an enforcement action brought by the Secretary.[4] Two recent decisions by courts of appeals have held that such intervening union members may, in appropriate circumstances, recover attorney's fees from the defendant union.[5] This article examines the validity of these and similar attorney's fees awards to Title IV intervenors. It suggests that permitting intervenors to recover attorney's fees distorts the balance struck by Congress between two competing policies: assuring democratic unions and avoiding unnecessary interference in internal union affairs.

II. BACKGROUND AND HISTORY

A. *Relief Available Under Title IV*

Title IV's enforcement procedures apply only after an election has been held. The election is presumed valid, but an aggrieved union member may, after exhausting available internal union remedies, file a complaint with the Secretary.[6] The Secretary must investigate the complaint and, within sixty days, determine whether there is probable cause to believe a violation of the Act has occurred.[7] Upon such a determination, the Secretary shall file in United States District Court an action against the union to set aside the election.[8] The

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3. Section 403 of the LMRDA, 29 U.S.C. § 483 (1970) provides: "The remedy provided by this subchapter for challenging an election already conducted shall be exclusive." *See* Calhoon v. Harvey, 379 U.S. 134 (1964). Only section 401(c)'s requirement that a union distribute a candidate's campaign literature at the candidate's expense is privately enforceable by a pre-election federal suit. 29 U.S.C. § 481(c) (1970).

4. Trbovich v. United Mine Workers, 404 U.S. 528 (1972).

5. Brennan v. United Steelworkers, 554 F.2d 586 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978); Usery v. Local 639, Int'l Bhd. of Teamsters, 543 F.2d 369 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977). *But see* Brennan v. Connecticut State UAW, 74 Lab. Cas. 17,038 (D. Conn. 1974).

6. Section 402(a) of the LMRDA, 29 U.S.C. § 482(a) (1970). If the union has failed to rule on the member's complaint within three months of its filing, the member may consider his internal remedies exhausted. The complaint to the Secretary must be filed within one month following exhaustion of internal remedies. *Id.*

7. *Id.* § 402(b), 29 U.S.C. § 482(b).

8. *Id.* The union member's complaint to the Secretary determines the scope of the Secretary's investigation and subsequent legal action. Hodgson v. Steelworkers, 403 U.S. 333, 340-41 (1971). Violations which the member has not presented through the union's internal procedures and has not included in his complaint to the Secretary may, however, be considered in formulating the remedy. Brennan v. Local 639, Int'l Bhd. of Teamsters, 494 F.2d 1092, 1098-99 (D.C. Cir. 1974), *cert. denied*, 429 U.S. 1123 (1977).

court may order a rerun election. If so, the Secretary certifies the results of the rerun to the court, which enters an order declaring the persons elected officers of the union.[9] This is the exclusive remedy for challenges to elections already conducted.[10] The statute's language, however, is ambiguous concerning the availability of relief prior to the conduct of the election.[11]

This issue was addressed in *Calhoon v. Harvey*.[12] Members of the National Marine Engineers Beneficial Association brought a private pre-election action challenging union by-laws which severely restricted their right to nominate candidates. Plaintiffs contended that the by-law violated section 101's guarantee of equal rights to vote and nominate candidates.[13] The Court, however, found section 101 inapplicable because the by-law was not discriminatorily applied. Thus the by-laws, if violative of the LMRDA, violated only Title IV's requirement of providing a reasonable opportunity for nominations and its prohibition of restrictions on eligibility for candidacy except for reasonable qualifications uniformly imposed.[14] The Court concluded that congressional delegation of Title IV enforcement to the Secretary was intended to preclude individual actions designed to block or delay union elections. The Court observed that Congress evidenced a desire to afford unions wide latitude in resolving their internal controversies and, where that fails, to require them to utilize the special expertise of the Secretary to aid in resolving disputes prior to resort to the courts.[15]

B. *Availability of Private Judicial Remedies*

Calhoon did not address the availability of private judicial remedies following the filing of a Title IV action by the Secretary. That issue was considered by the Supreme Court in *Trbovich v. United Mine*

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9. Section 402(c) of the LMRDA, 29 U.S.C. § 482(c) (1970).

10. *Id.* § 403, 29 U.S.C. § 483.

11. *Compare* Beckman v. Bridge Workers, 314 F.2d 848 (7th Cir. 1963) *with* Robins v. Rarsback, 325 F.2d 929 (2d Cir. 1963), *cert. denied*, 379 U.S. 974 (1965). The statute does permit pre-election actions under state law to enforce the provisions of the union constitution. 29 U.S.C. § 483 (1970).

12. 379 U.S. 134 (1964).

13. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C. § 411(a)(i) (1970).

14. 379 U.S. at 138.

15. *Id.* at 140.

Workers,[16] a case in which complaining union members sought leave to intervene in an action brought by the Secretary. Reversing lower court decisions,[17] the Court held that section 403 did not bar such intervention. Review of that section's legislative history disclosed two primary functions: the protection of unions from unnecessary judicial interference and frivolous lawsuits and the consolidation of meritorious complaints in a single forum.[18] Allowing intervention in the Secretary's action would subject the union to neither multiple litigation nor harassment from groundless actions. The additional burden on the union was therefore considered minimal.[19]

The Court limited the intervenor's role to the presentation of evidence and argument in support of the Secretary's complaint. It follows that the intervenor may not allege additional violations, as such claims would unduly burden the union, the principal evil Congress sought to avoid by enacting section 403.[20] The Court did allow the intervenor a vastly expanded role in determining the outlines of the remedy, once the Court finds a violation.[21]

C. *Judicial Awards of Attorney's Fees*

In *Brennan v. United Steelworkers*,[22] Edward Sadlowski, a defeated candidate for district director of defendant union, filed a complaint with the Secretary charging Title IV violations.[23] Following an investigation, the Secretary filed suit and Sadlowski intervened. After negotiations involving the Secretary, defendant and Sadlowski, settlement was reached directing the holding of a new election. Sadlowski won the election, and the court entered judgment declaring him the district director. Sadlowski then petitioned the court for attorney's fees, contending that his prosecution of the action conferred

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16. 404 U.S. 528 (1972).

17. Hodgson v. UMW, 51 F.R.D. 270 (D.D.C. 1970), *aff'd*, 77 L.R.R.M. 2496 (D.C. Cir. 1971).

18. 404 U.S. at 532-33.

19. *Id.* at 536.

20. *Id.* at 537.

21. *Id.* at 537 n.8. The Court further held that the complaining union member had a right to intervene pursuant to FED. R. CIV. P. 24(a) (2). It rejected the Secretary's contention that he adequately represented complainant's interests. The Secretary has a dual function: representation of complainant and protection of the public interest in free and democratic unions. These functions may conflict or the union member may have a valid complaint concerning the Secretary's performance. 404 U.S. at 538-39.

22. 554 F.2d 586 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978).

23. Sadlowski alleged widespread violations of the LMRDA, including ballot fraud, illegal electioneering, deprivation of secret ballot, and interference with observers. *Id.* at 590.

a common benefit upon all members of the union.[24] Although the United States District Court for the Western District of Pennsylvania denied the petition, the Court of Appeals for the Third Circuit reversed, holding that attorney's fees may be recovered by a Title IV intervenor.

The court of appeals initially considered whether Congress intended to prohibit attorney's fees awards to Title IV intervenors. Relying upon the District of Columbia's decision in *Usery v. Local 639, International Brotherhood of Teamsters*,[25] the court reasoned that Congress did not provide the meticulously detailed remedies from which it could infer an intent to preclude the court from exercising its general equitable powers to award attorney's fees. Such an intent could not be inferred because Congress never focused on the possibility of union member intervention.[26]

The court then outlined the intervenor's role in enforcement and found that at every stage of the process, the intervenor plays an important role which must be encouraged by allowing him to recover attorney's fees. The initial stages of the enforcement scheme, the

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24. The "common fund" or "common benefit" theory has long been recognized as an exception to the general American rule disfavoring the recovery of attorney's fees by a victorious litigant in the absence of statutory or contractual authorization. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 257 (1975). The theory is based on the inherent equitable power of a federal court to fashion a complete remedy where "overriding considerations indicate the need for such a recovery." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970). It was first articulated in Trustees v. Greenough, 105 U.S. 527 (1882), where the Court affirmed the award of attorney's fees to a creditor of a trust after prosecution of an action to recapture looted assets. The suit resulted in the restoration of a fund under the court's jurisdiction which would be distributed to other creditors of the trust. The Court analogized to traditional English bankruptcy rulings that allowed a creditor to recover costs and attorney's fees under similar circumstances. *See, e.g.*, Worrall v. Harford, 8 Ves. Jr. 4, 32 Eng. Rep. 250 (1802).

Since *Greenough* the common benefit doctrine has been steadily expanded. *See, e.g.*, Hall v. Cole, 412 U.S. 1 (1973) (benefit conferred need not be monetary); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (shareholder's derivative action); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161 (1939) (not a class action, the benefit to other parties coming from the use of plaintiff's suit as res judicata to establish their right of recovery); Central Railroad and Banking Co. v. Pettus, 113 U.S. 116 (1885) (claim asserted by plaintiff's attorneys); Brisacher v. Tracy-Collins Trust Co., 277 F.2d 519 (10th Cir. 1960) (no actual fund in the court's control).

For an excellent summary of the history of the theory, *see* Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 HARV. L. REV. 1597 (1974); Note, *Attorney's Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717 (1976).

25. 543 F.2d 369 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977).

26. 554 F.2d at 591-94; 543 F.2d at 387. The courts viewed the issue as whether Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), applied to preclude them from awarding attorney's fees. In *Fleischmann* the Court held that because Congress had specifically and meticulously outlined the remedies available to an individual suing under the Lanham Trademark Act, 15 U.S.C. § 1051-1127 (1970), it inferentially barred the courts from awarding attorney's fees.

court observed, emphasize the role of the individual union member. He must exhaust his internal union remedies, and his failure to do so with respect to particular violations will bar the Secretary from prosecuting those violations. If he does not initiate a complaint, there will be no enforcement proceeding. Thus skillful private lawyering is indispensable at the outset of the enforcement procedure.[27]

The Third Circuit followed the D.C. Circuit's analysis in noting the substantial assistance which an intervening union member can provide the Secretary in unearthing material and elusive evidence and devising arguments in support of the Secretary's position.[28] Once a violation is established, the intervenor's role increases in scope. He may propose remedies which the Secretary fails to offer or which the Secretary opposes.[29] Both courts concluded that denial of attorney's fees would contradict the purposes of the Act by impeding an intervenor's ability to obtain competent counsel.[30]

III. Problems Inherent in Awards of Attorney's Fees

The approach of the *Steelworkers* and *Local 639* decisions assumes that the traditional equitable recovery of attorney's fees is available to a *Trbovich* intervenor and inquires whether Congress impliedly intended to prohibit such awards. The approach is misdirected. Congress did not provide any role for the private individual in the litigation stages of Title IV enforcement. *Trbovich* is a judicially-created exception to section 403's prohibition of private Title IV enforcement. The initial inquiry should therefore focus on whether this judicially-created exception should be expanded to enable an intervenor to recover attorney's fees.[31]

Title IV's legislative history demonstrates that Congress considered the use of private actions as a method of enforcing Title IV. The version of the LMRDA adopted by the House of Representatives provided for private actions to enforce the title.[32] The Senate, how-

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27. 554 F.2d at 594-95; 543 F.2d at 384.
28. 554 F.2d at 595; 543 F.2d at 384.
29. 554 F.2d at 595; 543 F.2d at 384.
30. 554 F.2d at 599; 543 F.2d at 384-85.
31. As stated by Judge Aldisert in his dissent in *Steelworkers*:

> I do not read the statute or its legislative history as contrary to the limited right of private intervention which *Trbovich* established. But where Congress definitely rejected private litigation as a means of enforcing Title IV, it is difficult for me to grasp how Congress at the same time could have intended that courts award attorney's fees to private counsel in connection with Title IV litigation.

554 F.2d at 612 (Aldisert, J., dissenting).
32. H.R. 8342, 86th Cong., 1st Sess. (1959).

ever, opted for exclusive enforcement by the Secretary of Labor.[33] During the debate in the Senate, Senator Kennedy responded to criticism that the Senate version eliminated private remedies for unfair election practices by characterizing such private remedies as ineffective. The primary reason which he saw for such ineffectiveness was the high cost of litigation, particularly attorney's fees.[34] Congress could have remedied this problem by providing for private suits and authorizing the award of attorney's fees, as it did in other titles of the Act.[35] It specifically rejected this possibility and adopted the Senate version.

In *Trbovich* the Court recognized this history but concluded that it did not preclude intervention by the complaining union member in the Secretary's action because intervention subjected the union to relatively little additional burden.[36] Allowing the *Trbovich* intervenor to recover attorney's fees substantially increases the union's burden. At the conclusion of the litigation the court must hold an additional hearing to determine whether the intervenor is entitled to attorney's fees and, if so, in what amount. The court will consider the intervenor's costs in exhausting his internal union remedies and filing the complaint with the Secretary.[37] It must then appraise the common benefit provided by the intervenor's efforts during the litigation. The union should not be required to pay for unnecessary legal services rendered by intervenor's counsel, yet the mere duplication of work already performed by the Secretary does not necessarily render counsel's work valueless.[38]

This additional hearing can be expected to become the standard procedure in Title IV litigation.[39] Every complaining union member

33. S. 1555, 86th Cong., 1st Sess. (1959).

34. Responding to criticism that the bill would destroy the individual's right to proceed against the union, Senator Kennedy stated:

> I have done some research into that matter, and I believe we have found that only one local union election in recent years has been set aside as a result of an attempt by a member to obtain his rights by appealing to a State court. The classic examples [*sic*] of the difficulties involved is that of the 13 members of the Teamsters Union who, after weeks and months of litigation, have had to accept a settlement which is highly unsatisfactory in regard to the holding of an election; but the lawyer for the rank-and-file members has submitted a bill for $300,000.

104 CONG. REC. 10,947 (1958).

35. *See, e.g.*, 29 U.S.C. § 501(b) (1970), authorizing attorney's fees in actions against union officers for breach of their fiduciary duties.

36. Trbovich v. UMW, 404 U.S. 528, 536-37 (1972).

37. Usery v. Local 639, Int'l Bhd. of Teamsters, 543 F.2d 369, 388 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1123 (1977).

38. Brennan v. Steelworkers, 554 F.2d 586, 608 (3d Cir. 1977), *cert. denied*, 435 U.S. 977 (1978).

39. Justices White, Stewart and Rehnquist dissented from the Court's denial of certiorari in

will have incurred costs, and most will have incurred legal fees while exhausting internal union remedies and filing the administrative complaint.[40] The potential recovery of these costs at the conclusion of the litigation provides a powerful incentive to intervene, even in those instances in which the complainant is confident in the Secretary's representation of his interests. The action could well become unnecessarily complicated as the intervenor not only seeks to support the Secretary's position as contemplated by *Trbovich*, but attempts to develop a record on which to rely in establishing that he has rendered substantial benefits to the union membership, apart from the services of the Secretary.[41]

The burden posed by the additional proceedings required where attorney's fees are recoverable contradicts the congressional policy of minimizing governmental interference in internal union affairs.[42]

Steelworkers. They emphasized that the additional hearing required to determine whether attorney's fees should be assessed was the type of multiple litigation from which, as *Trbovich* recognized, Congress intended to protect unions. 435 U.S. at 978 (White, J., dissenting).

The dissenting Justices were also influenced by a memorandum filed by the Secretary which contended that the awarding of attorney's fees to intervenors significantly impeded his ability to administer Title IV. *Id.* This position contradicts the Secretary's position on the identical issue before the D.C. Circuit. Usery v. Local 639, Int'l Bhd. of Teamsters, 543 F.2d at 385. The Secretary's view should be given very little weight because of his inconsistency. *Cf.* General Electric Co. v. Gilbert, 429 U.S. 125, 142-43 (1976) (EEOC guideline, inconsistent with previous position, "does not receive high marks.").

40. In *Steelworkers*, Sadlowski had ten days following the election to file an appeal with the International Tellers. The election involved 300 locals and 130,000 members. Witnesses had to be interviewed, affidavits prepared and other evidence gathered for the appeal and for the hearing which was held thirty days thereafter. When Sadlowski lost his appeal, he decided to appeal to the International Executive Board. Steelworkers' President I.W. Abel, who had actively campaigned for Sadlowski's opponent, presided. Following the Executive Board's decision affirming the Tellers, Sadlowski filed his complaint with the Secretary. The complaint was accompanied by exhibits, affidavits and a legal brief which totaled 100 pages. 554 F.2d at 595-96.

41. If the intervenor is unable to establish that he rendered a benefit to the union membership beyond the benefit rendered by the Secretary, he will be denied recovery of his attorney's fees. *See, e.g.*, Davis v. Ampthill Rayon Workers, Inc., 446 F. Supp. 681 (E.D. Va. 1978) (attorney's fees denied to section 101 plaintiff); Brennan v. Connecticut State UAW, 74 Lab. Cas. 17,038 (D. Conn. 1974) (attorney's fees denied to *Trbovich* intervenor).

42. The Senate expressed the policy as follows:

> The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents.

S. REP. NO. 187, 86th Cong., 1st Sess. *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2323.

This policy has been followed in determining the extent of substantive regulation of union elections. For example, many defeated candidates have complained that incumbents have gerrymandered local districts. *Union Elections and the LMRDA*, *supra* note 2, at 431. The courts,

The following examination of the intervenor's role at each stage of the enforcement procedure confirms that recovery of attorney's fees furthers no congressional policy and frequently frustrates it.

IV. THE ROLE OF THE INTERVENOR

A. *The Intervenor at the Pre-Litigation Stage of Enforcement*

The individual union member plays a substantial role in the enforcement of Title IV prior to the commencement of litigation. Congress, however, did not seek to emphasize the role of the individual. The union member's role is the by-product of a congressional determination that the initial burden of Title IV enforcement should rest on the union itself.[43] Thus, the requirement that a complaining union member exhaust internal union remedies is designed to maximize union independence and self-government by giving the international an opportunity to correct improper local elections.[44] Although the Secretary may, pursuant to section 601(a),[45] investigate Title IV violations,[46] he may not bring an action to correct even the most blatant violations unless the union has been afforded an oppor-

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however, have refused to involve themselves in such disputes, because the government should not mandate a union's internal structure. *See* American Fed'n of Musicians v. Wittstein, 379 U.S. 171 (1964). Similarly, dissidents have charged that immediately before commencing his 1969 campaign, incumbent United Mine Workers President W.A. Boyle convinced his fellow trustees of the UMW pension fund to increase payments to retirees. The action was effective; Boyle received 87% of the pensioners' votes. *Union Elections and the LMRDA, supra* note 2, at 431. Nevertheless, judicial or administrative scrutiny of such action could only result in improper government involvement in union policymaking.

43. This policy has to a large measure been successful. Following enactment of the LMRDA, the Labor Department studied seventy-two national unions, comparing their pre-LMRDA and post-LMRDA constitutions. The Department concluded that the Act substantially increased national union control over local election procedures. Of the sixty-six constitutions that contained local election provisions, fifty-one were amended. The most frequent amendments were those relating to notices of elections, preservation of records, terms of office, use of secret ballots and rights of candidates to have observers at the polls. Kleiler, *Recent Developments in Regulation of Intra-Union Affairs*, PROCEEDINGS OF THE SEVENTEENTH ANNUAL N.Y.U. CONFERENCE ON LABOR 325, 327-28 (1964).

44. S. REP. NO. 187, 86th Cong., 1st Sess. 7, *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2337. For a description of the internal remedies provided by some of the largest unions, *see Union Elections and the LMRDA, supra* note 2, at 529-44.

45. 29 U.S.C. § 521(a) (1970).

46. The Secretary's power to investigate Title IV violations pursuant to section 601 was upheld in Wirtz v. Local 191, Int'l Bhd. of Teamsters, 321 F.2d 445 (2d Cir. 1963). The Secretary, however, has declined to exercise this power. 29 C.F.R. § 452.4 (1977). *See also* Kleiler, *supra* note 43, at 342. The Secretary's restraint has been applauded for avoiding a situation which could make the Secretary a super-authority over union elections. Pressman, *The LMRDA and Franchise in the Union*, PROCEEDINGS OF THE SEVENTEENTH ANNUAL N.Y.U. CONFERENCE ON LABOR 383, 396 (1964).

tunity through its internal appeals procedures voluntarily to remedy the situation.[47] Thus, contrary to the view expressed in *Steelworkers* and *Local 639*, the substantial role of the individual union member in the initial stages of Title IV enforcement does not support expanding *Trbovich* to allow intervenors to recover attorney's fees.

B. *The Intervenor at the Liability Stage of Litigation*

The role of the individual union member is considerably diminished following his exhaustion of internal union remedies. Once a complaint is filed, the Secretary of Labor's discretion is broad. He must investigate the complaint and determine whether an action should be filed against the union. Although he must provide a statement of reasons justifying a decision not to sue and such a decision is subject to judicial review,[48] a court will compel the Secretary to bring suit only when it finds his reasons so irrational as to be arbitrary and capricious.[49] The court will not compel the Secretary to bring suit even when he has found reasonable cause to believe a violation has occurred, provided he has also determined the violation has not affected the election's outcome.[50] The most significant limitation on the Secretary's discretion, the requirement that any action he files be limited to those matters on which the complaining union member exhausted his internal union remedies, is designed for the protection of the union.[51]

The Secretary's consistent policy in enforcing Title IV has emphasized promotion of informal resolution of complaints.[52] When the

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47. Hodgson v. Steelworkers Local 6799, 403 U.S. 333 (1971), *noted in* 1971 U. ILL. L.F. 745. In Wirtz v. Laborers Local 125, 389 U.S. 477 (1968), the complainant protested internally that ineligible persons had voted in a runoff election. The Court held that the Secretary could incorporate in his complaint allegations that the same ineligible voters participated in the general election because the union had fair notice of its allegedly illegal conduct.

48. Dunlop v. Bachowski, 421 U.S. 560 (1975).

49. *Id.*

50. *See* Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 472 (1968). *Cf.* Schonfeld v. Wirtz, 258 F. Supp. 705 (S.D.N.Y. 1966) (the Secretary refused to bring suit because he did not believe that the violation affected the outcome. The court held the Secretary's action arbitrary and capricious because the violation prevented the plaintiff from communicating with over seventy voters in elections which he lost by thirty-five and eleven votes).

51. *See* notes 43-47 *supra* and accompanying text.

52. The Secretary's policy prior to the union member's complaint also emphasizes informal resolution. When the union member complains to the Secretary prior to the election, the Labor Department informally advises the union that a violation has been alleged and offers its technical assistance in correcting the violation. The Department is also receptive to requests by unions for non-binding pre-election advice concerning their election practices. *Union Elections and the LMRDA*, *supra* note 2, at 476-78.

Secretary determines that the Act has been violated, he sends a letter advising the local union of the violations found. This process is employed regardless of whether the Secretary intends to litigate the violation if a settlement cannot be reached.[53] The settlement will take the form of a "formal determination" that a violation occurred and usually results in a rerun of the election under the Department of Labor's supervision.[54] If the local refuses to settle, the Secretary will seek the assistance of the international to compel the local to comply voluntarily.[55] This procedure has been utilized effectively by the Labor Department. Between fiscal years 1965 and 1974, 221 cases were remedied by formal determination, while court-ordered rerun elections were obtained in only 165 cases.[56] Even when suit is filed, the Secretary continues to pursue settlement short of litigation. The Department's general goal is a stipulation providing for Department supervision of either the next union election or of a rerun election.[57]

The flexible informal enforcement outlined above is indispensable in both minimizing governmental intrusion into union internal affairs and providing for prompt remedies of violations. One commentator has estimated the average time between the filing of the complaint and a determination on the merits of a fully litigated Title IV proceeding at fifteen months.[58] The time lapse prior to a supervised rerun election has been found to average two years, six and seven-tenths months.[59] Throughout the litigation period, the election is presumed valid, and the winners remain in office. Thus an officer

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53. Thus the Secretary is able to obtain assurance of future voluntary compliance in cases where the violation did not affect the outcome.

54. *Union Elections and the LMRDA*, *supra* note 2, at 494-96.

55. *Id.* at 496.

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Fiscal Year	Formal determinations	Elections under court order
1965	13	8
1966	32	10
1967	21	16
1968	15	7
1969	19	11
1970	15	17
1971	20	35
1972	28	27
1973	26	24
1974	32	10

Source: U.S. DEP'T OF LABOR, COMPLIANCE, ENFORCEMENT & REPORTING IN 1974 UNDER THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 4. *See also Union Elections and the LMRDA*, *supra* note 2, at 571.

57. *Union Elections and the LMRDA*, *supra* note 2, at 509-10.

58. St. Antoine, *Landrum-Griffin, 1965-66: A Calculus of Democratic Values*, PROCEEDINGS OF THE NINETEENTH ANNUAL N.Y.U. CONFERENCE ON LABOR 35, 52 (1967).

59. *Union Elections and the LMRDA*, *supra* note 2, at 573, Appendix D.

whose election is tainted is capable of serving the majority of his term prior to the rerun. The internal political state of the union is uncertain while the tainted officers seek to negotiate collective bargaining agreements and process grievances. This instability undermines the ultimate goal of industrial peace.[60] By contrast, the average time for settlement by formal determination is four months.[61] The preference for such prompt settlements of labor disputes is firmly established.[62]

Courts have viewed favorably the Secretary's emphasis on informal resolution of Title IV disputes.[63] Although section 402 requires the Secretary to commence suit within sixty days following the filing of the complaint, courts have been quick to find a waiver of this limitation period in order to effectuate settlement.[64]

Similarly, the victorious candidate cannot intervene in a Title IV action as a defendant. Intervention may be sought at two stages. Initially, the incumbent may seek to intervene to defend the election against the Secretary's challenge. Such intervention has been disallowed because it would render the peaceful settlement of the election dispute virtually unattainable. Agreement between the Secretary and the union to rerun the election will be meaningless because they will still have to litigate the issue with the intervenor.[65] The incumbent

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60. *See* section 2(c) of the LMRDA, 29 U.S.C. § 401(c) (1970). The potential disruption of industrial peace is clearly illustrated by the following situation. On June 21, 1976, insurgent members of Teamsters Local 299 led a wildcat walkout at a number of trucking companies which specialized in the delivery of new cars from factories in the Detroit area to dealers across the country. The insurgents were protesting the internal handling by Teamster officials of the membership's rejection of a proposed collective bargaining agreement negotiated by the incumbent office holders. The strike closed the trucking firms and threatened to disrupt the orderly flow of new cars to the marketplace. The court, nevertheless, held that the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115 (1970), prohibited it from enjoining the walkout. Automobile Transport, Inc. v. Ferdnance, 420 F. Supp. 75 (E.D. Mich. 1976). Insurgents may similarly decide to protest allegedly unfair elections of officers by wildcatting.

61. *Union Elections and the LMRDA*, *supra* note 2, at 494 n.388.

62. *See, e.g.*, Irving, *Prosecutoral Discretion Under the National Labor Relations Act*, LABOR LAW DEVELOPMENTS 1978, 129, 129-31.

63. "Reliance on the discretion of the Secretary is in harmony with the general congressional policy . . . to utilize the agencies of the Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts." Calhoon v. Harvey, 379 U.S. 134, 140 (1964).

64. Hodgson v. Machinists Lodge 851, 454 F.2d 545 (7th Cir. 1971); Hodgson v. International Pressmen, 440 F.2d 1113 (6th Cir.), *cert. denied*, 404 U.S. 828 (1971).

65. When the Secretary must resort to a lawsuit, the burden upon him and upon the union greatly increases. The union is confronted with defense of the internal operation of its elections and inevitably it must publicly expose the scars of its internal warfare. Because the overriding purpose of Title IV is to ensure democratic elections, when the union and the Secretary agree to take mutual action in pursuit of that aim, e.g., to hold new supervised elections, the interests of the act in providing a judicial remedy are satisfied.

intervenor's interest would be served most effectively by delaying the proceedings so that he can remain in office as long as possible.

If the Secretary succeeds in obtaining a rerun election and the previously elected candidate loses in the rerun, the candidate may seek to intervene to challenge the Secretary's certification of the results. Such intervention is denied because of the instability in internal union affairs that would be fostered by continuous challenges.[66]

The *Trbovich* intervenor is generally the losing candidate in the challenged election.[67] His interest is thus to force a rerun election under conditions most favorable to his candidacy. The burden this intervention places upon the settlement process is illustrated by *Stein v. Wirtz*.[68] After exhausting his internal remedies, Stein complained to the Secretary about the union's refusal to allow him to be a candidate for business manager in an election held in June 1964. The Secretary filed his complaint on September 2, 1965. On November 25, 1965, the Secretary and the union stipulated that Stein would be on the ballot in the next election, scheduled for June 1966. In December 1965, Stein moved to intervene, characterizing the Secretary's representation of his interests as wholly inadequate.[69]

The barrier to settlement posed by the *Trbovich* intervenor is considerably less than that posed by the intervening victorious candidate. Permitting recovery of attorney's fees will, however, greatly enhance that barrier and substantially impede the policy favoring speedy resolution through informal compromise. The fees sought will usually be large[70] and will pose a financial cost to the union greatly exceed-

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> If an incumbent officer can intervene as a matter of right to oppose the Secretary's action to set aside an election, a peaceful settlement of the election dispute will almost never be attainable.

Brennan v. Machinists Silvergate Lodge 50, 503 F.2d 800, 806 (9th Cir. 1974).

66. *Id.* at 807-08. *Accord,* Usery v. District 22, UMW, 567 F.2d 972 (10th Cir. 1978). *Contra,* Hodgson v. Carpenters Local 2212, 457 F.2d 1364 (3d Cir. 1972).

67. This is not always the case. The statute permits a member of a labor organization to file a complaint with the Secretary. 29 U.S.C. § 482(a) (1970). The Secretary has interpreted this to include any member of a labor organization. 29 C.F.R. § 452.135(a) (1977). For examples of persons other than the defeated candidate who complained to the Secretary, *see* Schultz v. Local 1291, Int'l Longshoremen's Ass'n, 338 F. Supp. 1204 (E.D. PA. 1972); Wirtz v. Local 57, Int'l Union of Operating Eng'rs, 293 F. Supp. 89 (D.R.I. 1968).

68. 366 F.2d 188 (10th Cir. 1966), *cert. denied,* 386 U.S. 996 (1967).

69. 366 F.2d at 189. *See also* Brennan v. Connecticut State UAW Community Action Program Council, 373 F. Supp. 286 (D. Conn. 1974). The UAW intervenors eventually failed to recover attorney's fees. Brennan v. Connecticut State UAW, 74 Lab. Cas. 17,038 (D. Conn. 1974).

70. In *Steelworkers,* Sadlowski sought approximately $500,000. 554 F.2d at 611 n.1 (Aldisert, J., dissenting). In *Local 639* intervening plaintiffs were awarded $35,000. Marshall v. Local Union No. 639, No. 1963-72 (D.D.C., filed Aug. 4, 1977).

ing the cost of a rerun election. Even where the union considers settlement to be in its interest by avoiding public exposure of its internal warfare, the union may decide not to settle because of the financial burden of the intervenor's claim for attorney's fees. The primary controversy is thus shifted from the union's election practices to the intervenor's attorney's fees, and the intervenor will replace the Secretary as the primary plaintiff in a manner completely contrary to the Court's view of the intervenor's role in *Trbovich*.[71] Thus, the conduct of the liability stage of the litigation would be severely impeded if *Trbovich* intervenors are allowed to recover attorney's fees.

C. *The Intervenor and the Judicial Remedy*

When the court has found a violation of Title IV, it might appear initially that the dangers posed by allowing intervenors to recover attorney's fees no longer exist. The union which is in violation of Title IV cannot complain of excessive governmental interference in its internal processes. Thus the *Trbovich* intervenor's role is vastly expanded in the remedial hearings. Intervenors may present approaches to the remedy which are different from those of the Secretary.[72] The court may consider evidence of additional violations in formulating the remedy, even though the complainant failed to exhaust his internal union remedies with respect to those violations.[73]

It is at the remedial stage, however, that the defeated candidate most vigorously pursues his interest in obtaining a rerun election under conditions most favorable to his candidacy. In *Steelworkers*, Sadlowski vigorously opposed a Labor Department proposal to reopen

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71. The Third Circuit has apparently recognized this forced realignment of the parties. In *Steelworkers* it expressed the following view of the relationship among the parties:

> The Department of Labor performs a quasi-judicial, rather than a purely adversarial role in Title IV cases. Its duty is to the public, its own policies, the union interest, and the individual. . . . Before the *Trbovich*-intervenor existed, the statutory scheme involved only one party truly comporting itself in an adversarial posture: the union. But since *Trbovich* the "union interest" is defined by *two* parties with adverse viewpoints—even if their interest in the union remains a common denominator. The Secretary, in this circumstance, occupies a more tenable position since he has not only his own expertise in the field, but, in addition, the benefit of the crystallization and presentation of issues and viewpoints we associate with the adversary process. The intervenor's role created by *Trbovich* is thus that of an adversary to the union in developing the facts and the legal issues.

554 F.2d at 599.

72. Usery v. Masters, 538 F.2d 946, 952 (2d Cir. 1976); Brennan v. District 50, Allied and Tech. Workers, 499 F.2d 1051, 1056 n.12 (D.C. Cir. 1974).

73. Brennan v. Local 639, Int'l Bhd. of Teamsters, 494 F.2d 1092, 1098-99 (D.C. Cir. 1974), *cert. denied*, 429 U.S. 1123 (1977).

nominations in the rerun election because new nominations would probably divert some of his support.[74] The intervenor will thus use the remedial stage of the proceedings as a weapon in his political arsenal. Courts should be reluctant to involve themselves in such internal political battles,[75] but in the remedial stage of Title IV litigation the court will necessarily become enmeshed in partisan political jockeying. The statutory scheme minimizes this involvement by placing the burden of supervising the rerun election on the Secretary rather than on the court.[76] Both the refusal to allow the incumbent who is defeated in the rerun to intervene to challenge the Secretary's certification and the deferral to the Secretary's broad discretion in supervising the election minimize the potential abuse of the remedial stage.[77] Allowing the *Trbovich* intervenor to recover attorney's fees undermines this statutory scheme by encouraging the defeated candidate to use the court to maximize his political advantage. Moreover, it undermines Congress' express policy against union members bearing the costs of a candidate's partisan political activities.[78]

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74. 554 F.2d at 597. Other political jockeying by Sadlowski included: opposition to a Labor Department proposal to divide the district in half and to change the boundaries of the district; opposition to the date scheduled for the new election; opposition to the use of a mail ballot; opposition to the campaign activities of members of the union's staff. *Id.* at 597-98.

75. In Gurton v. Arons, 339 F.2d 371, 375 (2d Cir. 1964), the court expressed its reluctance to become involved in internal union political disputes:

> The basic issue, whether the union is to be run by its "working members" or by the members who are not employed full-time as musicians and who constitute a great majority of the membership is surely an issue for the union to decide for itself and not an issue on which the power of the courts should be enlisted on one side or the other. So long as the union in reaching its decision violates no provision of law, we judges should resolutely keep our hands off.

In Schonfeld v. Penza, 477 F.2d 899 (2d Cir. 1973), the court affirmed a district court injunction restraining defendant union from imposing penalties upon the leader of an opposition faction when the imposition of those penalties was for the purpose of intimidating the membership and punishing the plaintiff's advocacy of changes in the internal structure of the union. The court cautioned, "We by no means suggest, however, that the free speech rights of union members are threatened or infringed upon every time a political dispute occurs in a union and the dissident members interpret some action by union officials as a threat." *Id.* at 903. *See also* Driscoll v. Engineers Local 139, 484 F.2d 682, 687-88 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

The Secretary of Labor has similarly sought to minimize his interference in internal union political battles. For example, the Secretary refuses to investigate alleged Title IV violations prior to an election because "investigation prior to completion of an election may have the effect of publicizing the activities or unsubstantiated allegations of one faction to the prejudice of the opposition." 29 C.F.R. § 452 (1977).

76. Section 402(c) of the LMRDA, 29 U.S.C. § 482(c) (1970).

77. Brennan v. Local 551, UAW, 486 F.2d 6 (7th Cir. 1973).

78. Section 401(g) of the LMRDA, 29 U.S.C. § 481(g) (1970).

It has been suggested, however, that awarding an intervenor his attorney's fees furthers the enforcement of the Act by encouraging capable counsel to represent complaining union members. This view holds that such encouragement is particularly appropriate because of the heavy burden placed upon the individual in initiating the enforcement process. Further, it has been argued, attorney's fees awards serve to discourage unions from violating the Act.[79]

This argument may be offered to support awarding attorney's fees to any individual who takes action initiating the enforcement of any statute.[80] Such an approach is inconsistent with conventional American jurisprudence which presumes that each party will bear his own attorney's fees.[81] It is particularly inapplicable to Title IV enforcement.[82] Strong incentives exist for counsel to represent a defeated candidate. The requirement that the violation be one which may have affected the outcome of the election generally limits the *Trbovich* intervenors to those who have a substantial base of support within the union. Thus, intervenor's counsel will frequently be attracted to the case by the substantial possibility that in the rerun election this op-

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79. *See* note 30 *supra* and accompanying text.

80. Where Congress has determined that recovery of attorney's fees will effectuate the policies behind a statute, it has specifically provided for such a recovery. *See, e.g.*, Clayton Antitrust Act, 15 U.S.C. § 15 (1970); Securities Act of 1933, 15 U.S.C. § 77k (1970); Consumer Credit Protection Act, 15 U.S.C. §§ 1640, 1681(n),(o) (1970); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1970); Federal Water and Air Pollution Control Acts, 33 U.S.C.A. § 1415(g)(4) (West 1978); Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1970). It is not, however, the successful prosecution of an action that deters potential violations. Deterrence is provided by the threat that an action will be filed. One commentator has carried this argument so far as to contend that LMRDA plaintiffs should be allowed to recover their attorney's fees regardless of the outcome of the litigation when the action was begun in good faith. Note, *Attorney's Fees Under the Landrum-Griffin Act: The Need for "Union Therapeutics,"* 7 LOY. OF L.A. L. REV. 137, 159 (1974).

81. In the absence of statutory authorization, this argument closely resembles the private attorney general theory of attorney's fees rejected in Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975).

82. Deterring violations of Title IV by forcing the union membership to absorb the cost of the *Trbovich* intervenor's attorney's fees directly contravenes congressional policy that remedies for abuses and sanctions for violations be direct.

> The committee rejects the notion of applying destructive sanctions to a union, i.e., to a group of working men and women, for an offense for which the officers are responsible and over which the members have, at best, only indirect control. . . .
>
> The committee does not believe that the record demonstrates that the imposition of indirect sanctions, such as penalizing the union and its members for malpractices of its officers, would be effective in insuring compliance.

S. REP. NO. 187, 86th Cong., 1st Sess. 8, *reprinted in* [1959] U.S. CODE CONG. & AD. NEWS 2318, 2323.

position group will win control of the union,[83] and the intervenor's attorney will become the union's general counsel.[84]

V. CONCLUSION

Title IV of the Labor-Management Reporting and Disclosure Act represents an effort by Congress to balance the need to assure free and fair union elections with the desire to avoid undue governmental interference in the internal affairs of unions. In striking that balance, Congress provided that the exclusive post-election remedy would lie with the Secretary of Labor. Allowing the complaining union member to intervene in the Secretary's lawsuit does not materially distort this balance. At each stage of the proceedings, however, the policies behind this balance require that the intervening plaintiff not be permitted to recover his attorney's fees from the union treasury.

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83. This possibility is quite substantial. In 56.6% of the rerun elections conducted during fiscal years 1968-70, the winner of the challenged election did not run in the rerun. In 15% the winner of the challenged election ran in the rerun and was defeated. *Union Elections and the LMRDA*, *supra* note 2, at 573, Appendix E.

84. Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 214 (1960).

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