Preemption and Preclusion of Employee Common Law Rights by Federal and State Statutes*

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INTRODUCTION .................................................. 46

I. PREEMPTION BY THE NLRA AND LMRA OF STATE
   COMMON LAW CLAIMS ........................................ 48
   A. Common Law Claims of Wrongful Termination
      Preempted by Section 301 of the LMRA ................. 48
         1. “Public Policy” Exception ........................ 50
         2. “Individual Contract” Exception .................... 52
         3. “Outrageous Conduct” Exception ..................... 52
         4. “Outside Conduct” Exception ........................ 53
   B. Preemption by LMRA Concerning “Hybrid” Section
      301/Duty of Fair Representation Claims ................ 54

II. PREEMPTION BY ERISA OF STATE COMMON LAW
    CLAIMS .......................................................... 55
   A. Express ERISA Preemption of Claims of Termination to
      Prevent Vesting ........................................... 55
   B. ERISA Preemption of Severance Pay Disputes ........... 56
   C. Preemption of Disputes Concerning Health and Welfare
      and Pension Plans ....................................... 56

III. PRECLUSION BY STATE ANTI-DISCRIMINATION STATUTES
     OF STATE COMMON LAW CLAIMS ........................ 59
   A. FEHA Statutory Exclusivity May Preclude Common
      Law Claims ................................................. 59
   B. Failure to Pursue FEHA Remedy as Grounds to Dismiss
      the Entire Suit ........................................... 60

IV. PRECLUSION BY STATE WORKERS’ COMPENSATION
    STATUTES OF STATE COMMON LAW CLAIMS .............. 62

V. REMOVAL ISSUES CONCERNING LMRA AND ERISA ...... 64

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INTRODUCTION

Federal law preemption and state law preclusion decisions have in recent years been a bane for lawyers representing employees, and often a boon for those representing management. Employees have been finding with increasing frequency that they are denied access to juries, and unable to obtain punitive and emotional distress damages, because federal or state statutory schemes have displaced common law rights. The modern advocate representing employees, therefore, often finds herself arguing in favor of common law rights over statutory rights, while the employer's advocate argues the opposite.

Until recently these advocate roles were generally reversed: the employee's advocate typically argued in favor of statutory preemption while the employer's advocate argued in favor of the common law. Traditionally, an employee's common law rights were quite limited. In an early example, the preemptive effect of the National Labor Relations Act ("NLRA") made picketing lawful in situations where state common law prohibited picketing. Similarly, state statutory rights have traditionally displaced employer common law rights—for example, state minimum wage statutes displaced an employer's common law right to contract for a lower wage rate with employees.

Generally the political trade-off for these federal and state statutes was that employees gained new rights, but important limitations were placed on potential remedies. Further, there were often procedural restrictions, such as the lack of a jury trial, or the creation of administrative agencies either with exclusive jurisdiction or with initial authority to investigate and mediate.

All of these older statutory rights and schemes have been overtaken, of course, by the recent explosion of employee common law rights. This explosion in employee common law rights is unprecedented in employment law history, not only because of the scale, speed and dollar amounts involved, but also by the fact that it is being developed by judges—judges who do not necessarily have the time, training or administrative capacity...

2. Id. § 157.
to gather public testimony and evidence as to the effect of their acts on society at large, or on prior statutory compromises and actions.

Consequently, there is now a state of tension between prior statutory rights and these new common law rights. In response to this tension, advocates find themselves, somewhat ironically, switching sides in the historic argument. Management advocates now argue that statutory rights best embody society's intent and needs, as expressed through the legislature. Conversely employee advocates now argue that the new judge-made rules serve society better.

Additionally, in federal preemption cases, there is an element of tension between states' rights and the desire to let the states experiment with different forms of the employment relationship on one hand, and the Supremacy Clause of the U.S. Constitution\(^7\) and the desire for national uniformity on the other.

This Article will focus primarily on those issues most often seen by modern employment lawyers. The four areas addressed are:\(^8\)

1. Preemption by the NLRA\(^9\) and the Labor-Management Relations Act ("LMRA");\(^10\)
2. Preemption by the Employee Retirement Income Security Act ("ERISA");\(^11\)
3. Preclusion of state common law rights by state anti-discrimination statutes, such as the California Fair Employment and Housing Act ("FEHA");\(^12\) and
4. Preclusion of state common law rights by state workers' compensation statutes.\(^13\)

Preemption of state statutes by federal statutes will not be discussed in detail here.\(^14\)

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7. U.S. Const. art. VI, § 2.
8. The basic tension addressed in this Article is where statutory rights created by state legislatures or by Congress arguably exclude and bar state common law rights created by judges. The term "preemption" is, of course, the term used when federal law displaces state law, and the term "preclusion" will be used here to describe the situation where state statutory rights displace and bar state common law rights. In addition, in many states, including California, traditional tort and contract common law rights have been codified. Despite this codification, development and advancement of the common law remains the province of the judiciary—especially so in the area of modern employment-related common law rights. See supra note 6 and accompanying text.
I
PREEMPTION BY THE NLRA AND LMRA OF STATE COMMON LAW CLAIMS

Three similar but distinct bases exist for preemption. Under the first basis, if the root of the claim is that the employer violated a collective bargaining agreement or is a tort claim based on a contractual right, the LMRA entirely displaces any state cause of action.15

The second basis for federal preemption is where the dispute falls within the jurisdiction of the National Labor Relations Board—for example, the discharge of a union organizer.16

Under the third basis, a state right is preempted if it "interferes" with the policies of the LMRA and, specifically, with the goal of establishing an equitable bargaining process.17

Under these latter two bases, courts will balance federal and state interests and permit some state causes of action. However, if a breach of the collective bargaining agreement is claimed, the courts do not use a balancing test: all state law claims are preempted.18

A. Common Law Claims of Wrongful Termination Preempted by Section 301 of the LMRA

Recent decisions have greatly restricted union-represented employees' wrongful termination claims based on standard common law contract doctrines and tort claims such as intentional infliction of emotional distress. Except under unusual circumstances, union-represented employees' rights are limited to those provided in the collective bargaining agreement and the LMRA. Union-represented employees may not bring a common law cause of action for wrongful termination.

In an early example, Taylor v. St. Regis Paper Co.,19 a union-repre-
sented employee brought suit alleging wrongful discharge and breach of an implied covenant of good faith and fair dealing. The Taylor court held that common law claims based on violation of the collective bargaining agreement were governed exclusively by the LMRA, and that all state law causes of action were preempted. In rejecting the tort claims, the court specifically found that the claims were "merely incidents of [the employee's] federal claim for breach of the collective bargaining agreement arising from his allegedly wrongful termination."20

These rulings were ratified by the U.S. Supreme Court in Allis-Chalmers Corp. v. Lueck.21 In Lueck, the employee brought a state-law based tort action against his employer alleging bad faith in handling of his claim under a disability plan included in a collective bargaining agreement.

The Supreme Court first found a congressional intent that the LMRA be given broad preemptive effect. The Court stated that all contract questions concerning collective bargaining agreements were to be decided solely by federal substantive labor law.22

Second, the Lueck court, considering whether the alleged bad faith tort could survive the preemptive effect of the LMRA, stated that the test is whether the duty allegedly breached is one "independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with . . . the labor contract."23 If the state tort law purports to define the meaning of the contract relationship, the state law is preempted.24

The Court found that the bad faith tort was intrinsically related to the contract and based on the terms of the contract itself.25 The tort claim was therefore a claim for breach of contract which could be controlled only by federal substantive law, and all state law based causes of action were preempted.26

A recent example of this preemption doctrine is DeTomaso v. Pan American World Airways.27 In DeTomaso, the employee had purchased a bin of abandoned cargo from his employer. His employer later learned that the cargo had likely been stolen and the employee was discharged

20. Id.
21. 471 U.S. at 216-17. See also the following decision issued after presentation of this paper; Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1145-50 (9th Cir. 1988) (tort and contract claims based on issue of interpretation of collective bargaining agreement preempted by § 301).
22. 471 U.S. at 210-11.
23. Id. at 213.
24. Id. at 210.
25. Id. at 216-17.
26. Id. at 218-19.
for his alleged involvement in the theft. An investigator hired by the employer had visited the employee and made a statement that the employee interpreted as an accusation of theft. The employee proceeded both with a grievance under the collective bargaining agreement, and with common law actions against the employer and the investigator.

Under the grievance procedure, the employee was reinstated with back pay. At the trial of the common law actions for defamation by the investigator and intentional infliction of emotional distress against the employer based on termination, the jury awarded the employee $565,000.

In DeTomaso, the California Supreme Court began with an analysis of the Railway Labor Act ("RLA")—an analog of the NLRA covering airline and railroad employees. The California Supreme Court concluded that any claims against the employer were "inextricably intertwined with the investigation and discharge procedures mandated by the [collective bargaining] agreement...and...took place during the ordinary course of these proceedings." Therefore, the employee's tort claims against his employer were preempted.

Moreover, the court ruled that the defamation claim against the investigator was preempted because it arose from an investigation mandated by the collective bargaining agreement. The court held that "parties to such an agreement must be allowed to perform their duties without judicial interference." The federal courts have created four exceptions to the general preemption rules which allow union-represented employees to file common law actions against their employers.

1. "Public Policy" Exception

The first exception arises where a union-represented employee claims wrongful termination in violation of public policy. For example, in Paige v. Henry J. Kaiser Co., the Ninth Circuit permitted two union-
represented employees to bring common law actions against their employer.

In *Paige*, the employees alleged that they were fired in retaliation for complaining about unsafe job conditions that violated California public policy. The employees also claimed that their discharges violated an implied covenant of good faith and fair dealing.  

The *Paige* court held that the cause of action alleging breach of a covenant of good faith and fair dealing was clearly preempted because the covenant was purportedly implied by state law into the collective bargaining agreement—which must be interpreted only under federal substantive law.  

However, regarding the claim of termination in violation of public policy, the court concluded that the employees' claims did not arise under the collective bargaining agreement, but were based on state law rights independent of any contractual right. The court concluded that a cause of action based on a violation of public policy did not arise from the collective bargaining process and, accordingly, was not preempted.

The Ninth Circuit has limited these "public policy" claims. In *Evangelista v. Inlandboatman's Union of the Pacific*, the claim was a violation of a public policy that citizens be free from "job harassment." The *Evangelista* court ruled that public policy was not an independent state public policy; therefore, the claim was preempted.  

In light of *Evangelista*, state common law will apply if an employee's claim of wrongful termination is premised on an independent state public policy. Otherwise, the claim is preempted and must be adjudicated under federal law.

not merely disguised contract claims—will be permitted. In *Lingle*, a claim of termination in retaliation for filing a workers' compensation claim was held not preempted because it was based on a right independent of the collective bargaining agreement.

39. *Id.* at 863.
40. 777 F.2d 1390 (9th Cir. 1985). See also an interesting decision vacated and remanded by the U.S. Supreme Court after *Lingle*: *DeSoto v. Yellow Freight Systems*, 820 F.2d 1434, 1437-38 (9th Cir. 1987) (a wrongful termination claim is preempted and not saved by the public policy exception, where the employee protested an employer's act based on his mistaken belief that the act was illegal), vacated and remanded, 108 S. Ct. 2813 (1988) (remanded for further consideration in light of *Lingle*).
41. *Id.* at 1401.
42. Of great interest here are two decisions issued after the presentation of this paper: Utility Workers of America, Local 246 v. Southern California Edison Co., 852 F.2d 1083 (9th Cir. 1988); and *Laws v. Calmat*, 852 F.2d 430 (9th Cir. 1988). In both cases, employer-imposed drug-testing programs were challenged as violative of privacy rights guaranteed by the California state constitution. In both cases the Ninth Circuit held that the constitutional right to privacy is waivable by the union. Therefore, the first question is whether the privacy right had been waived by the collective bargaining agreement. This analysis necessarily involves interpretation of the collective bargaining agreement, controlled by federal law. Thus, all state law causes of action are preempted.
2. "Individual Contract" Exception

In *Caterpillar Inc. v. Williams*, the Supreme Court established another exception to the general preemption doctrine. The *Caterpillar* court ruled that individual employment contracts which were entered into separately from the collective bargaining agreement could form the basis of common law causes of action, and are not preempted by the LMRA. In *Caterpillar*, employees who had been managers at a plant alleged that they had been promised that they would be transferred to another plant if their plant closed. After the employer made this promise, the employees were demoted to union-represented positions. When their plant closed, the employees were not transferred, but were laid off. The employees brought common law causes of action to enforce their individual employment contracts. The Supreme Court's ruling in *Caterpillar* appears to indicate that individual contracts are not necessarily merged into and superceded by the collective bargaining agreement.

This issue has also arisen in suits involving alleged prehire contracts. In *Bale v. General Telephone Co. of California*, two employees sought to enforce certain promises made to them during the prehire process. The *Bale* court held that the employees' claims shared a "'common nucleus of operative fact,'" with issues under the collective bargaining agreement. Therefore any state contract claims, along with associated tort claims, were preempted because such claims "would require reference to, and interpretation of, the terms of the collective bargaining agreement."

Other circuits which have addressed this exception have split on the issue of whether prehire representations are preempted by the LMRA.

3. "Outrageous Conduct" Exception

A third exception is applicable only with the two "balancing test" preemption bases. Under this exception, truly "outrageous conduct" may be beyond exclusive federal jurisdiction and subject to state regulation.
As an example of "outrageous conduct," the Ninth Circuit, in *Truex v. Garrett Freightlines, Inc.*, 51 quoted an Eighth Circuit case, *Richardson v. Communication Workers*, 52 in which outrageous conduct had been found. In *Richardson*, the employee faced "1000 [v]ile and derogatory' signs, constant 'chanting, jeering and gesturing,' a daily 'rain of nuts, bolts and screws thrown at him,' intentional cigarette burns, vandalism of his car and locker, and vulgarities about his wife." 53

The outrageous conduct exception is not available in cases involving an alleged violation of the collective bargaining agreement. In such cases, federal preemption is absolute and cannot be displaced by state regulation. 54

4. "Outside Conduct" Exception

The fourth exception to the preemption doctrine is that under certain limited circumstances, tort claims based on conduct outside the collective bargaining agreement are permitted. Courts generally recognize the highly limited nature of this exception and have eliminated torts which appear to be based on a dispute under the collective bargaining agreement.

For example, in *Truex* an employee's intentional distress claims were based on alleged false termination letters and an alleged campaign of excessive surveillance and reassigned work duties. 55 The court found this employer conduct "inextricably intertwined" with the disciplinary process under the collective bargaining agreement; therefore, the claims were preempted. 56

In light of the *Truex* decision, the Ninth Circuit's decision in *Tellez v. Pacific Gas & Electric Co.* 57 is questionable. In *Tellez*, an employee was observed in what appeared to be a cocaine transaction. The employee was suspended and the supervisor sent copies of the suspension letter to other company managers.

Subsequently, the employee filed a grievance and the suspension was overturned. The employee then brought actions for, among other things,
intentional infliction of emotional distress and defamation based on the disciplinary letter.\textsuperscript{58} Despite the obvious intertwining of the collective bargaining agreement and the disciplinary process with the employee's tort claims, the \textit{Tellez} court nonetheless concluded that the claims were "independent" of the collective bargaining agreement.\textsuperscript{59} The \textit{Tellez} decision is questionable because both the truthfulness of the letter and the propriety of the distribution of copies of the letter appear to involve rights and procedures under the collective bargaining agreement, and hence should be preempted.\textsuperscript{60}

A better approach would preempt all state common law claims concerning discipline and the disciplinary process, except in those instances where the conduct was truly outside the collective bargaining agreement—such as an off-premises nonwork-related physical attack on the employee. Garden variety disciplinary disputes like those in \textit{Tellez} should not be litigated under state law in contravention of congressional intent.

\textbf{B. Preemption by LMRA Concerning "Hybrid" Section 301/Duty of Fair Representation Claims}\textsuperscript{61}

Courts have consistently held that "hybrid" section 301/duty of fair representation lawsuits by employees against their unions for breach of a duty of fair representation, and against their employer for breach of the collective bargaining agreement, are subject to the broad preemptive effect of the LMRA. For example, in \textit{Carter v. Smith Food King},\textsuperscript{62} the employee brought a hybrid action against his union and his employer, and included common law claims against both. The court in \textit{Carter} held that since the tort claims were based on the same acts and conduct underlying the employee's hybrid claims, they were preempted by federal labor law.\textsuperscript{63}

A significant procedural advantage available here to unions and employers is the very short statute of limitations applicable in hybrid claims. The Supreme Court in \textit{DelCostello v. Teamsters} held that, for these hybrid claims, the six-month limitations period set forth in section 10(b) of

\textsuperscript{58} \textit{Id.} at 537.
\textsuperscript{59} \textit{Id.} at 538-40.
\textsuperscript{60} \textit{See DeTomaso}, 43 Cal. 3d 517, 733 P.2d 614, 235 Cal. Rptr. 292.
\textsuperscript{61} As is well known, employees may bring claims, commonly known as "hybrid § 301/duty of fair representation" claims, alleging that the employer had breached a provision of the collective bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance and arbitration proceedings. \textit{DelCostello v. International Bhd. of Teamsters}, 462 U.S. 151 (1983); \textit{Bowen v. United States Postal Serv.}, 459 U.S. 212 (1983); \textit{Hines v. Anchor Motor Freight, Inc.}, 424 U.S. 554 (1976); \textit{Vaca v. Sipes}, 386 U.S. 171 (1967).
\textsuperscript{62} 765 F.2d 916 (9th Cir. 1985).
\textsuperscript{63} \textit{Id.} at 921.
the NLRA applied. Recently, in *West v. Conrail*, the Court made clear that the hybrid claim must be filed (but not necessarily served) within the six-month period. Some state law practitioners, accustomed to longer statutes of limitations for common law claims, may be unpleasantly surprised to learn that their newly-filed common law claims are completely preempted and recharacterized as federal claims, which will be barred as untimely filed.

II

PREEMPTION BY ERISA OF STATE COMMON LAW CLAIMS

The federal Employee Retirement Income Security Act of 1974 ("ERISA"), which governs both pension and health and welfare plans, affects the financial lives of virtually all private sector employers, as well as employees and dependents. Key ERISA preemption issues are currently before both the California Supreme Court and the Ninth Circuit.

A. *Express ERISA Preemption of Claims of Termination to Prevent Vesting*

ERISA completely preempts employee's common law claims that the employer terminated the employee to prevent the employee from receiving benefits under an ERISA plan. Accordingly, courts have exclusive jurisdiction over such claims. Thus, in *Johnson v. TWA*, plaintiff alleged that TWA terminated his eighteen-year employment with TWA for the sole purpose of depriving him of his employee benefits, including paid vacation, disability benefits, and retirement payments. A demurrer was sustained by the state trial court. The court of appeal affirmed, holding that the state court had no jurisdiction. The appellate court held that the claim was preempted

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64. 29 U.S.C. § 160(b) (1982).
65. 462 U.S. at 163.
69. *Id.* § 1144(a) (1982), in conjunction in *id.* § 1140 (1982).
71. 149 Cal. App. 3d 518, 196 Cal. Rptr. 896.
72. *Id.* at 521, 196 Cal. Rptr. at 898.
because "the gravamen of [the] complaint is that [the employee] was discharged for the sole purpose of depriving him of employee benefits," thus falling "squarely within the exclusive remedial provisions of ERISA." 73

Other state courts considering complaints alleging terminations intended to cause the loss of employee benefits have also held that state courts lack jurisdiction over such claims. For example, in Witkowski v. St. Anne's Hospital, Inc., 74 the court ruled that the employee's complaint alleging that the employer discharged her to prevent her from receiving long-term disability benefits was preempted by ERISA. 75

B. ERISA Preemption of Severance Pay Disputes

Agreements to pay employee's severance pay are deemed to be employee benefit plans, governed exclusively by ERISA. 76 Severance pay plans are subject to ERISA even if severance is paid directly by the employer and is not funded through a separate trust. 77

This type of preemption was affirmed most recently in Nevill v. Shell Oil Co., 78 in which plaintiff's common law claims were based on a denial of severance benefits after a corporate move. The Nevill court held that common law claims of breach of contract, breach of a covenant of good faith and fair dealing, and fraud were all preempted. 79

C. Preemption of Disputes Concerning Health and Welfare and Pension Plans

ERISA imposes a single, federal regulatory scheme for the administration of pension and health and welfare plans. The vast majority of

73. Id. at 530, 196 Cal. Rptr. at 904.
75. Id. at 749, 447 N.E.2d at 1019; see also Gordon, 562 F. Supp. at 1292-94 (granting motion to strike claim on ERISA preemption grounds of bad faith discharge motivated by the employer's intention to deprive plaintiff of soon-to-be vested retirement benefits); Baker, 608 F. Supp. at 1318 (plaintiff's claim that he was wrongfully discharged so as to deny him maximum pension benefits is preempted by ERISA).
78. 835 F.2d 209 (9th Cir. 1987).
79. Id. at 212; cf. Fort Halifax Packing Co. v. Coyne, 107 S. Ct. 2211 (1987), in which the Supreme Court recently held that a state statute requiring severance pay on plant shutdown or relocation was not preempted by ERISA where the law applied only to employees who were not covered by "an express contract providing for severance pay." This decision follows the Supreme Court's reasoning in Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985), which held that state statutes mandating levels of employee benefits are not preempted.
health and welfare plans are funded by insurance, thus raising the issue of whether claims-handling disputes under insured plans are governed by ERISA or state law. This question directly affects employers both through their exposure to claims and through resultant increases in insurance costs.

In Moore v. Provident Life & Accident Insurance Co., the Ninth Circuit ruled that when an employer has a "self-funded" employee benefit plan, all common causes of action arising out of disputes concerning that plan are preempted by ERISA. The Moore court also held that ERISA itself provides no punitive or extracontractual damages. 81

Next, the Supreme Court, in Pilot Life Insurance Co. v. Dedeaux, considered whether ERISA preempts state common law claims of general applicability where the employee benefit plan is insured. The Court held that ERISA preempted such claims because such claims did not rely on laws "regulating insurance." Therefore, such claims were not saved by ERISA's "saving" clause for state insurance regulation. 84 The Court in Pilot Life also held that ERISA's civil enforcement provisions have their own preemptive effect, and provide an exclusive federal remedy for all suits asserting improper processing of claims. 85

Following Pilot Life, the issue became whether ERISA had a similar preemptive effect in states, such as California, which have codified standards of claims-handling conduct. The first reported ERISA preemption decision addressing state common law claims citing state insurance codes after Pilot Life, Roberson v. Equitable Life Assurance Society, involved a suit against an employer and the employer's insurance company. The Roberson court concluded that California Insurance Code section 790.03 was not a law which regulates insurance within the meaning of ERISA, and therefore was not subject to ERISA's saving clause. It held further that, even assuming section 790.03 was a law regulating insurance, section 790.03 was preempted because it conflicted with ERISA's civil enforcement provisions which were intended to provide an "exclusive"

80. 786 F.2d 922 (9th Cir. 1986).
81. Id. at 926-27.
82. Id.; see also Russell v. Massachusetts Mutual Life Ins. Co., 722 F.2d 482, 487-88 (9th Cir. 1983), rev'd on other grounds, 473 U.S. 134, vacated on other grounds, 778 F.2d 542 (9th Cir. 1985). It is worthy of note that the Supreme Court decision reversed the Ninth Circuit's original decision only on the issue that the Circuit had been incorrect in holding that punitive and extracontractual damages were available in claims-handling disputes under ERISA. In fact, the Supreme Court ruled such damages are not available. Accord, Hancock v. Montgomery Ward Long Term Disability Trust, 787 F.2d 1302, 1307 (9th Cir. 1986); Powell v. Chesapeake & P. Tel. Co. of Va., 780 F.2d 419, 424 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986).
84. Id. at 17; 29 U.S.C. § 1144(b)(2)(A) (1982).
85. 481 U.S. at 19.
federal remedy for all claims handling disputes. Roberson is now on appeal to the Ninth Circuit.

The Ninth Circuit now faces these key ERISA preemption issues in Kanne v. Connecticut General Life Insurance Co.\(^{87}\) At stake in Kanne, which was argued in November 1987, is an award of over $750,000 for allegedly improper claims handling.

In Kanne, the first question is whether the Pilot Life holding that ERISA's civil enforcement provisions provide an exclusive federal remedy extends to section 790.03.\(^{88}\) If the court disagrees, it must still confront the following preemption issues: (1) whether section 790.03 is even a state law regulating insurance within the meaning of ERISA's savings clause; (2) if so, whether tort remedies sought under section 790.03 are preempted as common law claims of general applicability; and (3) whether preemption is required by a joint application of ERISA and the McCarran-Ferguson Act.\(^{89}\)

The Kanne case will decide whether ERISA's remedial civil enforcement provisions provide the exclusive source of regulation for claims handling disputes, or whether the laws of the fifty states will control, with the attendant exposure to punitive damages and emotional distress damages. Thus, decisions will greatly impact not only all private sector employees, but also their employees and dependents. The U.S. Supreme Court, once again, may well be called upon to give the final answer.\(^{90}\)

\(^{87}\) After presentation of this paper, the Ninth Circuit issued a new decision in Kanne, 859 F.2d 96 (9th Cir. 1988). It ruled that a codified state claims-handling statute is preempted by ERISA. The California Supreme Court has reached the same conclusion in Commercial Life Insurance Co. v. Superior Court, 47 Cal. 3d 473, 764 P.2d 1059, 253 Cal. Rptr. 682 (1988). See also Anschultz v. Connecticut Gen. Life Ins. Co., 850 F.2d 1467 (11th Cir. 1988) (Florida); Taylor v. Blue Cross/Blue Shield, 684 F. Supp. 1352 (E.D. La. 1988) (Louisiana); Juckett v. Beecham Home Improvement Prods., Inc., 684 F. Supp. 448 (N.D. Tex. 1988) (Texas).

\(^{88}\) In Pilot Life, the Supreme Court invited, and the United States Solicitor General filed, an amicus curiae brief on behalf of the United States, which was joined by the Department of Labor. The United States' brief argued that Congress intended ERISA's civil enforcement provisions to provide the exclusive remedy for all claims handling disputes, including those based on state insurance codes.

\(^{89}\) 15 U.S.C. §§ 1001-1026 (1982). The McCarran-Ferguson Act permits the states to regulate insurance in such primary areas as taxation, licensing, reserves and insurance policy content, but provides that federal law which "specifically relates" to insurance displaces state law. The insurance company in Kanne has argued that even if § 790.03 were a law which regulates insurance, ERISA—by comprehensively regulating insurance claims handling—"specifically relates" to exactly the same conduct, and thus preempts state law.

III
PRECLUSION BY STATE ANTI-DISCRIMINATION STATUTES
OF STATE COMMON LAW CLAIMS

A lawsuit might allege both a common law claim for wrongful termination and a civil rights claim based on a state anti-discrimination statute such as the California Fair Employment and Housing Act ("FEHA"). In FEHA cases, the employer may be able to obtain dismissal of the common law claim based on the ground that the FEHA provides the exclusive statutory remedy. Alternatively, the plaintiff may allege only a common law claim for unjust dismissal and not file an administrative complaint with the Department of Fair Employment and Housing ("Department"). In such a case, the employer may be able to obtain dismissal of the entire suit based on FEHA preclusion.

A. FEHA Statutory Exclusivity May Preclude Common Law Claims

As a prerequisite to filing a civil suit based on a claim of employment discrimination, the FEHA requires an employee to file an administrative complaint with the Department and exhaust administrative remedies by obtaining a notice of case closure. Not only does the FEHA set a one-year limitation period for filing an administrative complaint, but any civil suit must be filed within one year of the date of the Department's notice of case closure.

Thus, for example, a woman may allege that she was protected by a "good cause" discharge standard, and that her employer terminated her in violation of the "good cause" standard on the basis of sex discrimination. Before filing a civil suit, the woman must file an administrative complaint alleging sex discrimination and receive a notice of case closure. She then may file a civil suit, including both a common law claim for wrongful termination and a claim for sex discrimination in violation of the FEHA. A number of courts have held that the California Legislature intended the FEHA, which in certain cases permits recovery of emotional distress and punitive damages, to be the exclusive remedial scheme; therefore, there is no common law cause of action for sex, race or age discrimination in employment. If the rule were otherwise, em-

93. CAL. GOV'T CODE §§ 12960, 12965(b) (West 1980).
ployees in every instance could avoid the required exhaustion of FEHA remedies and simply bring a common law suit.

In *Ficalora v. Lockheed Corp.*, a California court of appeals held that the FEHA occupies the field of sex discrimination in employment and precludes common law claims for wrongful discharge, breach of an implied covenant of good faith and fair dealing, and retaliation for challenging discriminatory practices. The *Ficalora* court stated that FEHA prohibitions on employment discrimination are not a codification of pre-existing common law doctrine; "'the act includes areas and subject matters of legislative innovation, creating new limitations on an employer's right to hire, promote or discharge its employees.'" The *Ficalora* court further stated that "'[t]he Legislature has made clear its intent to 'occupy the field of regulation of discrimination in employment' by virtue of FEHA.'"

### B. Failure to Pursue FEHA Remedy as Grounds to Dismiss the Entire Suit

Under the California civil rights laws, an even more sophisticated defense may be available—one that bars the lawsuit completely. In some instances, the plaintiff may fail to invoke FEHA procedures and remedies, and instead pursue only a common law wrongful termination claim.

For example, the plaintiff may claim that he was protected by a "good cause" discharge standard, but that he incurred a nonwork-related injury which incapacitated him from his job, and the employer, rather than transferring the employee to different work, terminated his employment. The employer then could contend that the employee could no longer perform *any* job. The plaintiff could then file a common law wrongful termination suit, alleging a discharge without good cause, but fail to file an administrative complaint alleging physical handicap dis-

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Cal. App. 3d 1108, 1125, 228 Cal. Rptr. 591, 600-01 (1986); *Strauss*, 144 Cal. App. 3d at 520, 194 Cal. Rptr. at 524.


96. *Id.* at 492, 238 Cal. Rptr. at 361 (quoting Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 490, 595 P.2d 592, 612, 156 Cal. Rptr. 14, 34 (1979)).

97. *Id.* (quoting CAL. GOV'T CODE § 12993(c) (West 1980)). *But see Monge v. Superior Court*, 176 Cal. App. 3d 503, 509, 222 Cal. Rptr. 64, 67 (1986) (court permitted common law claims based on allegations of discriminatory conduct); *see also* Dyna-Med, Inc. v. FEHC, 43 Cal. 3d 1379, 1404, 241 Cal. Rptr. 67, 82 (dictum). Two decisions issued after the presentation of this paper are critical of the preclusion doctrine discussed here: Froyd v. Cook, 681 F. Supp. 669 (E.D. Cal. 1988); and Rojo v. Kliger, 205 Cal. App. 3d 646, 252 Cal. Rptr. 605 (1988) (FEHA precludes only local laws, not state laws), *reh'g granted*.

98. If the injury at issue were work-related, then the California workers' compensation statutes would provide the exclusive remedy—precluding both common law claims and a statutory claim under FEHA. Pickerel v. General Tel. Co., 205 Cal. App. 3d 1058, 252 Cal. Rptr. 878 (1988); CAL. LAB. CODE §§ 3600-3605 (West 1971 & Supp. 1988); *see also infra* notes 103 to 117 and accompanying text.
In defending this suit, an employer may move for dismissal based on FEHA preclusion after the one-year period for filing an administrative complaint with the Department has expired.

The FEHA should preempt the plaintiff's common law claim and provide the exclusive remedy. As with employment discrimination based on sex, age and race, the prohibition against physical handicap discrimination was a new right created by the legislature. Therefore, all common law claims should be precluded.

It is well settled, across the country, that state civil rights statutes barring discrimination based on physical handicap have exactly the same preemptive effect as statutes barring age, race and sex discrimination, and thus preclude all common law claims.

99. FEHA bars employment discrimination based on physical handicap. CAL. GOV'T CODE § 12940 (West 1980); American Nat. Ins. Co. v. FEHC, 32 Cal. 3d 603, 608, 786 Cal. Rptr. 345, 348, 651 P.2d 1151, 1154 (1982). Moreover, under the FEHA the employer may have a duty reasonably to accommodate such a handicap. 2 CAL. ADMIN. CODE § 7293.9 (1988).


101. Although no cases specifically so holding have been found, this same rationale should apply to preclude common law claims where the gravamen of the claim is adverse employer action because an employee filed a claim with the California Labor Commissioner. CAL. LAB. CODE §§ 98.6-7 (West Supp. 1987) (establishing rights, remedies and procedures for employees).

A different result was reached where the claim was adverse action based on an employee's purported whistle-blowing. In Garcia v. Rockwell International Corp., 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490 (1986), the court was careful to note that CAL. LAB. CODE § 1102.5 (West Supp. 1989) (the California whistle-blower's protection statute) "merely enunciated already existing public policy." 187 Cal. App. 3d at 1561 n.1, 232 Cal. Rptr. at 493 n.1. Because no new legal right, procedure or remedy was created by the statute, it is not clear whether the Ficalora analysis should apply. See supra notes 95-97 and accompanying text. While the Garcia court found that claims pursuant to Tameny could proceed, it may be argued that all other common law claims such as intentional infliction of emotional distress and breach of an implied covenant of good faith and fair dealing are precluded. It is similarly unclear whether common law claims alleging adverse action because of an employee's political activities should be precluded. See CAL. LAB. CODE §§ 1101-1102 (West 1971); cf. Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 486, 156 Cal. Rptr. 14, 31-32, 595 P.2d 592, 609-10 (1979) (action premised on violation of §§ 1101-1102).

Distinguishable here is Hentzel v. Singer Co., 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982), concerning a claim of retaliatory discharge for exercising rights under the California Occupational Safety and Health Act ("CAL-OSHA"). CAL. LAB. CODE §§ 6300-9061 (West 1971 & Supp. 1989). CAL-OSHA contains specific rights, procedures and remedies for employees. Id. §§ 6310-6312 (West Supp. 1989). The Hentzel court, however, permitted common law causes of action to proceed on the theory that the anti-retaliation provisions, id., were cumulative of preexisting common law rights and hence were not precluded. The court permitted a Tameny-type action to go forward, and, with little discussion, a cause of action for intentional infliction of emotional distress.


IV
PRECLUSION BY STATE WORKERS' COMPENSATION STATUTES OF STATE COMMON LAW CLAIMS

In general, the California workers' compensation statutes provide the exclusive remedy for employees' claims of work-related physical and emotional injury.\textsuperscript{103} Furthermore, the statutes are to be construed liberally in favor of their applicability.\textsuperscript{104} California courts have strictly construed these statutes' exclusive remedy provisions to preclude all common law contract and tort remedies in cases involving employment-related injuries and disabilities, including claims for wrongful termination.\textsuperscript{105}

In \textit{Hollywood Refrigeration Sales Co. v. Superior Court},\textsuperscript{106} the plaintiff claimed that as a result of his employer's conduct, he suffered a loss of earnings. The court of appeal held that workers' compensation provided the exclusive remedy in a wrongful termination suit. Since the plaintiff alleged a work-related disability causing loss of earnings, and had received a workers' compensation award, the award was res judicata and barred all common law tort claims.

Another California appellate court sharply reprimanded those who seek to "double dip."\textsuperscript{107} In holding that a civil action for wrongful death and emotional distress brought by the family of a worker killed in an industrial accident was barred, the court stated:

What is particularly disturbing about the trial court's ruling is that it appears to be part of a trend of refusing to recognize the exclusive jurisdiction of the Workers' Compensation Appeals Board. In these days of ever shrinking judicial resources, the plaintiffs' bar would be well advised to heed these rules and to concentrate its energy on securing swift and simple compensation for the injured employee in the forum which has exclusive jurisdiction over the claims. Its continual efforts to make end-runs around the exclusivity provisions of the workers' compensation system would be more appropriately addressed to the Legislature in which is vested the plenary power to create and enforce the workers' compensation system.\textsuperscript{108}

All of these themes have been amplified in three recent workers' compensation cases.


\textsuperscript{106} Id. at 754, 210 Cal. Rptr. 619 (1985).

\textsuperscript{107} \textit{United States Borax}, 167 Cal. App. 3d at 411, 213 Cal. Rptr. at 158.

\textsuperscript{108} Id. (citations omitted).
In *Cole v. Fair Oaks Fire Protection District*, the California Supreme Court strongly reaffirmed workers' compensation exclusivity for disabling injuries arising out of and in the course of employment. The *Cole* court held that an employee who is disabled and qualifies for workers' compensation because of injuries arising out of and in the course of employment harassment or discipline cannot sue his employer for common law intentional infliction of emotional distress.

*Cole* began as a common law suit for tort damages based on severe working conditions which included threats to punish the plaintiff for engaging in union activities, a written false accusation of dishonesty, a "kangaroo court" disciplinary hearing, and the assignment of humiliating entry-level duties at a lower salary, all of which reduced the employee to a state of total disability.

The *Cole* court held that the common law intentional infliction claim was precluded by the workers' compensation statutes, and expressly foreclosed the use of "creative pleading" of common law tort claims in order to overcome the statutes' exclusivity provisions.

Similarly, in *Spratley v. Winchell Donut House, Inc.*, the court of appeals rejected a plaintiff's attempt to avoid the exclusive remedy provisions through allegations of breach of an implied covenant of good faith and fair dealing and common law fraud. The employee sustained physical and mental injuries, and argued that at least the mental injuries should be recoverable in the common law claim because purportedly such injuries would not be recoverable in workers' compensation. The court ruled that the fact an injury is not compensable under workers' compensation does not, without more, abrogate the exclusivity provisions. It held that most of the common law claims were barred, and specifically that the claim for breach of an implied covenant was barred. The plaintiff's exclusive remedy was workers' compensation.

In another appellate level case, *Appl v. Lee Swett Livestock Co.*, the employee sustained a work-related physical injury and was terminated for inability to continue to work. The court of appeal held that common law claims arising from the termination of employment, including claims for violation of good faith and fair dealing, and wrongful termination, were barred by the exclusive jurisdiction of the Workers' Compensation Appeals Board ("WCAB").

Injuries other than work-related physical injuries are covered by the exclusivity provisions of workers' compensation. A disabling psychologi-

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110. Id. at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315.
112. Id. at 1418, 234 Cal. Rptr. at 126.
cal injury arising out of and occurring in the course of an employee's work is compensable under the workers' compensation statutes and claims of emotional distress are similarly precluded.\(^\text{115}\) Thus, physical injury is not a prerequisite for recovery under workers' compensation.\(^\text{116}\)

This analysis is buttressed strongly by the *Cole* decision in which the California Supreme Court discusses those limited number of cases which had required a physical injury before finding exclusive jurisdiction for the WCAB, and disapproved of that distinction calling the requirement of physical injury "an anomaly."\(^\text{117}\) Since disabling emotional injuries are compensable under the workers' compensation statutes, and in light of the California Supreme Court's very recent statement in *Cole*, those few previous cases which required physical injury should be viewed as disapproved.

V

REMOVAL ISSUES CONCERNING LMRA AND ERISA

An important procedural question in the preemption context is whether removal to federal court is available when the complaint on its face appears to raise only state law claims, although it is evident that the dispute concerns rights under a collective bargaining agreement or an employee benefit plan. Ordinarily, federal preemption is a defense and may not be used as a basis for removal if a federal question does not appear on the face of a complaint raising only state law claims. Under the well-pleaded complaint doctrine, the plaintiff is viewed as the "master of the action" and if only state law causes of action are pleaded, generally speaking, removal is not available because no federal question is presented.\(^\text{118}\)

\(^{115}\) 2 W. Hanna, *California Law of Employee Injuries and Workmen's Compensation* § 11.03[3][a] at 11-25 (2d ed. 1988); *Cole*, 43 Cal. 3d at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315 (disabilities caused by stresses in workplace are compensable whether or not the employer was at fault); *Traub* v. Board of Retirement, 34 Cal. 3d 793, 799, 195 Cal. Rptr. 681, 684, 670 P.2d 335, 338 (1983) (disability from emotional distress caused by psychological pressures imposed by an employer is ordinarily service-connected if based on the employer's dissatisfaction with the employee's job performance); see also *Baker* v. WCAB, 18 Cal. App. 3d 852, 861, 96 Cal. Rptr. 279, 285 (1971) (psychoneurotic injury caused by the work environment is a compensable injury); *Albertson's, Inc.* v. WCAB, 131 Cal. App. 3d 308, 313-14, 182 Cal. Rptr. 304, 307 (1982) (job harassment constituted a series of "potentially stressful circumstances" which can result in a compensable psychoneurotic injury). A decision to the same effect issued after the presentation of the paper is *Clay* v. WCAB, 206 Cal. App. 3d 1181, 254 Cal. Rptr. 144 (1988) (psychiatric injury from job stress justifies workers' compensation payments).

\(^{116}\) 2 W. Hanna, *supra* note 115, § 11.03[3][b][iii] at 11-28.1 (physical accident or trauma is not a precondition to recovery for a mental disorder); *Callahan* v. WCAB, 85 Cal. App. 3d 621, 628 n.3, 149 Cal. Rptr. 647, 651 n.3 (1978) (physical accident or trauma is not a precondition of recovery for psychoneurotic injury); see also *Bstandig* v. WCAB, 68 Cal. App. 3d 988, 137 Cal. Rptr. 713 (1977) (paranoid-schizophrenic eligible for workers' compensation benefits).

\(^{117}\) 43 Cal. 3d at 155-56, 729 P.2d at 746-47, 233 Cal. Rptr. at 312-13.

\(^{118}\) Franchise Tax Bd. v. Construction laborers Vacation Trust, 463 U.S. 1, 9-10 (1983); Gully
A major exception to this well-pleaded complaint doctrine concerns the LMRA and ERISA. The United States Supreme Court has developed the rule that where Congress has completely preempted a particular area, a complaint in that area is necessarily federal in character and hence removable—despite the lack of a federal question on the face of the complaint. Under these circumstances, any purported state law claim would be recharacterized to reflect its exclusively federal nature and would therefore form the basis of original federal court jurisdiction and removal.

The Supreme Court extended this recharacterization doctrine to claims concerning ERISA. Referring to the extensive nature of the ERISA civil enforcement section, and to ERISA legislative history which referred directly to the LMRA, the Court held that suits to recover plan benefits will be recharacterized as exclusively federal claims and hence are removable. Accordingly, although a suit seeking plan benefits may purport to raise only state law claims, that complaint is “necessarily federal in character by virtue of the clearly manifested intent of Congress . . . and is removable to federal court.”

CONCLUSION

As courts struggle to define the terms of the modern employment relationship, judges increasingly look to the multitude of congressional and state legislative bargains struck between the various factions of society. Since the Congress and state legislatures advocate the needs and desires of their constituents and are directly responsible for their actions by virtue of their election to office, statutory mandates must be presumed to be the best reflection of society's needs and desires. The courts have properly deferred to legislative mandate in most cases. As employment law continues to evolve, substantive changes must come from the legislative, rather than the judicial, branch of government.

122. 107 S. Ct. at 1548.