Lien On: The Story of the Elimination and Return of Mechanic Lien, Stop Notice and Bond Remedies for Collection of Contributions to Employee Benefit Funds

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Courts are currently divided as to whether state laws providing mechanic lien, stop notice, payment bond or similar remedies are preempted by the Employee Retirement Income Security Act (ERISA) when used to collect the portion of compensation paid in the form of contributions to employee benefit plans. After reviewing the legislative history of both ERISA and the California statutory scheme, the author argues that recent Supreme Court decisions in other aspects of ERISA preemption require a more pragmatic preemption test, which should result in overturning those lower court decisions finding preemption of these laws. The result of the cases finding preemption of these remedies has been discrimination against employees on the basis of their participation in collective bargaining and in ERISA plans. Not only is this result itself preempted, argues the author, but it could also be the basis of claims under the Civil Rights Act for discrimination on the basis of federally protected rights.

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I. INTRODUCTION

The first legislative session of the new state of California was a rau-
cous affair. Most of the legislators were new immigrants to the state, and
all were flush with the excitement of both new-found gold and new-granted
statehood. This first legislature was also pro-labor. Among the first legis-
lation passed was a mechanic lien law, assuring laborers a lien upon prop-
erty on which they worked.1

Those legislators would have found it strange that the pro-labor law
they had passed would later be held partially invalid because of another
pro-labor piece of legislation passed over a century later, the Employee Re-

tirement Income Security Act.2 California was not the only state to
experience the effect of ERISA; the preemptive force of ERISA has swept
through state laws like a tsunami. The mechanic lien and related laws in
various states, including California, have been among the casualties. That
is, several courts have held that ERISA preempts the use of these remedies
to collect that portion of the value of labor agreed to be paid through contri-
butions to ERISA benefit funds.3 More recently, the tsunami has receded,

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1. See Carey McWilliams, California: The Great Exception 44-45, 128-29 (University of
California Press 1999) for a description of this legislative session. The mechanic lien law was originally
passed as 1850 Cal. Stat. 211-13 ch. 87, §§ 1-4. This was placed in the Cal. Const. of 1879, art. 20
§ 15 (1879), and can now be found in Cal. Const. art. 14, § 3.
3. See Plumbing Industry Bd. v. E.W. Howell Co., 126 F.3d 61 (2d Cir. 1997) (finding preemp-
tion of New York Stop Notice); Williams v. Ashland Eng’g Co., 45 F.3d 588 (1st Cir.) (finding preemp-
tion of Massachusetts payment bond); Carpenters Health & Welfare Trust Fund for Cal. v. Tri Capital
Corp., 25 F.3d 849, 853-54 (9th Cir. 1994) (finding preemption of California Stop Notice); Trustees of
the Elec. Workers Health & Welfare Trust v. Marjo Corp., 988 F.2d 865 (9th Cir. 1993) (finding pre-
emption of Nevada general contractor liability); Bricklayers Local 33 Benefit Funds v. America’s Mar-
ble Source, 950 F.2d 114 (3rd Cir. 1991) (finding preemption of New Jersey Stop Notice); McCoy v.
Massachusetts Inst. of Tech., 950 F.2d 13 (1st Cir. 1991) (finding preemption of Massachusetts
mechanic lien); Iron Workers Mid-South Pension Fund v. Terotechnology Corp., 891 F.2d 548 (5th Cir.
1990) (finding preemption of Louisiana mechanic lien); Faeth v. ACA Envtl. Sevkos, Inc., 172 Misc. 2d
453, 659 N.Y.S.2d 683 (1997) (finding preemption of New York mechanic lien); Operating Eng’g Pen-
California Payment Bond); Carpenters Southern Cal. Admin. Corp. v. El Capitan Dev. Co., 53 Cal. 3d
1041, 282 Cal. Rptr. 277, 811 P.2d 296, cert. denied, 502 U.S. 963 (1991) (finding preemption of
California mechanic lien).
and courts have taken a more rational and practical approach in abandoning such preemption.4

The thesis of this article is that those cases holding mechanic lien and similar laws to be preempted by ERISA are not only mistaken, but themselves discriminate against ERISA plans and the employees who participate in them by treating ERISA benefits differently from other forms of compensation. While the U.S. Supreme Court has yet to face this issue, the approach to ERISA preemption reflected in the Court’s most recent (and in the author’s opinion, more sensible) decisions cast doubt upon the validity of lower court decisions finding preemption of these state remedies. Recent lower court decisions recognize that earlier decisions are probably not good law. However, none have yet been explicitly overturned.5 This article argues that they should be.

In presenting the argument, this article focuses on the mechanic lien and related laws in California. California has one of the oldest and most extensive statutory schemes to protect laborers on construction projects. It also has a rich history of case law interpreting those statutes. The essential characteristics of the remedies in California can be found in almost every other state. Therefore, the principles discussed here should apply to similar remedies provided in the laws of other states.

II.
The California Legislative Scheme

As described above, the mechanic lien law was passed in the very first legislative session of the new State of California. It was later codified in the 1879 Constitution.6 The mechanic lien law gives workers a lien on


5. See, e.g., JWJ Contracting Co., 135 F.3d at 676-79.

6. CAL. CONST. of 1879, art. 20 § 15 (1879). The text has remained primarily unchanged. The current CAL. CONST. art. 14, § 3 reads:

"Mechanics, persons furnishing materials, artisans and laborers of every class, shall have a lien upon the property upon which they have bestowed labor or furnished material for the value of such labor done and material furnished; and the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens."
“property upon which they have bestowed labor” in the amount of “the value of such labor.” The philosophy behind this law lies somewhere between the *laissez-faire* notion that the laborer freely contracts for the work to be performed, with an action for a breach of contract as the only remedy for the failure to pay, and early concepts of socialism, in which the laborer is said to own the fruit of his or her labor. Under this compromise, the sweat of the laborer, like the bricks and mortar of the material supplier, all become part of the structure built. The laborer and the material supplier “own” part of this structure in the form of liens which are released only upon payment of the value of the labor or materials. The current controversy over whether these lien remedies are preempted by the (breach of contract) remedies provided under ERISA is really only a continuation of this old ideological battle. On the one hand is the age-old concern for the just payment of workers. On the other is the relegation of labor claims to breach of contract. The antipathy of some courts toward this bow to the left in the mechanic lien laws is perhaps the true motivation for findings of preemption. Whether courts like it or not, the concept of the mechanic lien is now a firmly established part of California law.

The extent of protection provided by mechanic liens faced its first test after the railroads reached the coast in 1869, and then down to Southern California in 1876. The railroad’s arrival (and the expectation of it) sparked a series of booms, in which whole towns sprang up from nowhere, and various state agencies and local governments embarked upon ambitious public works projects to meet the (expected) demands of a growing popula-

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7. *Id.*

8. According to Karl Marx & Frederick Engels, *Communist Manifesto* (1848), first published two years before the enactment of the mechanic lien law, capitalism “has left remaining no other nexus between man and man than naked self-interest, than callous ‘cash payment.’” The communists, of course, pose the answer of complete “Abolition of private property.” *Id.* The view of *laissez-faire* capitalism, expressed in Adam Smith, The Wealth of Nations (1776) and John Stewart Mill, Principles of Political Economy (1848), was that all parties, including labor, freely contract in the marketplace, and their only remedy for breach was an action against the contracting party for the damages provided in the contract. The 49’ers respected both the value of labor, by which they extracted their wealth, and the right to keep their mining “stake” and its gold as private property. See McWilliams, *supra* note 1, at 26-30. Combining respect for the value of labor without abolishing private property would have been a natural compromise for them.

9. “Thou shalt not oppress an hired servant who is poor and needy, whether he be of thy brethren, or of thy strangers who are in thy land within thy gates. In the same day thou shalt give him his hire, neither shall the sun go down upon it; for he is poor, and seteth his heart upon it; lest he cry against thee unto the Lord, and it be sin unto thee.” Deuteronomy 24:14-15.

10. For example, in finding mechanic liens preempted, the California Supreme Court expressed concern that it “permits the creditor (the trust fund) to enforce a debt (for outstanding fringe benefit contributions) not against the debtor (the defaulting employer), but against the property of a third party that is not a party to the collective bargaining agreement.” Carpenters Southern Cal. Admin. Corp. v. El Capitan Dev. Co., 53 Cal. 3d 1041, 1055 (1991). The same could be said, of course, for a mechanic lien filed for any other labor or materials. It was thus the very idea of mechanic liens which the court found disturbing, not any real or imagined conflict with the policies of ERISA.
tion. Work on such projects posed an inevitable question: If the "property upon which [laborers] have bestowed labor" is publicly owned, are laborers allowed a lien on that public property? The answer of the courts was no: Public property was not subject to lien by private individuals. Laborers were still able to use a procedure, then available on both private and public works, to require the owner to withhold funds from the general contractor to pay their claims. "The theory upon which the right to so intercept the contract price rests is analogous to that underlying the entire scheme of mechanics' liens, viz. that the laborers and materialmen who have added value to the property should be protected by making the property liable to them for the increased value which they have created." In other words, a lien upon the public funds earmarked for the project is substituted for a lien on the public property itself. This procedure was the precursor to the stop notice now in Civil Code Section 3181.

There was still a gap in the special protection the legislature intended to accord the value of labor in the original mechanic lien law. Funds designated for public works were more limited than the value of the real property, and were often depleted before a proper stop notice could be recorded and enforced. In order to bridge this gap, the California legislature enacted statutes in 1897 to provide for what are now called payment bonds. This Act expanded the application of the mechanic lien law to public works by requiring that general contractors post a payment bond on certain public works assuring payment of the same labor and materials formerly protected

12. If this question had been put to the legislators who first enacted the mechanic lien law, there is little doubt that they would have found no problem in placing a lien on public property. After all, the gold rush itself was the extraction of minerals from what was technically property of the federal government, without payment of any type of royalty. See McWilliams, supra note 1, at 26-27. These first legislators had just made their fortunes, directly or indirectly, from this rape of public land. If they saw no problem with the extraction of value from public land by the force of labor, they would not see a problem with placing a lien on public land for the value of labor added. Of course, the question was posed not to the legislators, but to the courts, which had different considerations.
16. See Goldtree v. City of San Diego, 8 Cal.App. 505, 508-10 (1908) (reasoning that the stop notice procedure then in Cal. Code Civ. Proc. § 1184 was a fulfillment of the constitutional mandate for the legislature to provide for the "speedy and efficient enforcement of such liens" for the value of labor on public as well as private works, citing Cal. Const. of 1879, art. XX, § 15 (1879). "Section 1184 furnishes the only available method by which the laborer can obtain the benefit of his lien upon public work.").
by mechanic liens. At about the same time, similar remedies were enacted by Congress to apply to federal projects. Like the California law, the purpose of the federal law "was to provide security for the payment of all persons who provide labor or material on public work . . . by giving a claim under the bond in lieu of the lien upon land and buildings customary where property is owned by private persons." The Miller Act was passed to protect laborers "in lieu of the protection [they] might receive under state statutes with respect to the construction of nonfederal buildings.

The final element of the statutory scheme was added in 1931, with the enactment of the California Prevailing Wage Law. This required all contractors on public works over a threshold amount of funding to pay their workers on the project the "prevailing wage" in the community, as determined by the Department of Industrial Relations. The prevailing wage was required to be included in every public contract covered by the law, binding on subcontractors as well as the original general contractor. Ultimately, the general contractor was responsible for violations of the prevailing wage requirements by subcontractors, since the Department of Industrial Relations had the power to withhold payments to the general contractor in a manner similar to stop notices by private individuals.

At approximately the same time, the federal equivalent to the California Prevailing Wage law, the Davis-Bacon Act, was enacted. The Davis-Bacon Act provides for the payment of prevailing wage rates, determined by the Secretary of Labor, on applicable federal projects, with similar powers to withhold payment and assess penalties for violations.

By the 1950s, agreements to use a portion of employee wages for fringe benefits such as pension plans and health plans began to appear in

18. See French v. Powell, 135 Cal. 630, 641 (1902) (discussing the intent of this statute to fill the gap left by removing public property from the scope of mechanic liens). See also Globe Indemnity Co. v. Hanify, 217 Cal. 721, 730 (1933).
21. United States v. Carter, 353 U.S. 210, 216 (1957). Thus, it would be more correct to call the Miller Act a "federal mechanic lien law" than to call the state statutes "Little Miller Acts" as some courts have done. See, e.g. Operating Eng’g Health and Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671, 675 (9th Cir. 1998) (referring to the Arizona bond law as a “Little Miller Act”)
24. Cal. Lab. Code §§ 1771 (requirement to pay prevailing wage on public works), 1772 (workers covered), 1773.2 (prevailing wage included in bids and contracts), 1774 (binding on subcontractors).
27. 40 U.S.C. § 276(a). The Department of Labor regulations can be found at 29 C.F.R. §§ 1, 3-5.
many collective bargaining agreements. Courts had to determine whether contributions to these employee benefit plans were part of the compensation guaranteed by the statutory schemes discussed above. In 1957, in *U.S. v. Carter*, the U.S. Supreme Court gave an answer: they held that contributions to employee benefit plans were included in the value of labor protected by the Miller Act:

The unpaid contributions were a part of the compensation for the work to be done by Carter's [the contractor's] employees. . . . Not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective-bargaining agreements.29

The Court also answered the contention (still made today) that the trust funds did not "furnish labor" on the project and thus had no standing to make a claim against the Miller Bond:

An answer to this contention is found in cases arising under the Heard Act involving suits by assignees of the claims of persons furnishing labor or material. Such assignees were not the persons who had furnished the labor or material for which the claims were made. They did not seek 'sums justly due' to persons who had themselves furnished labor or material, since the assignments had extinguished the right which those persons had to the performance of the contractors' obligation. Yet these cases established that assignees of the claims of persons furnishing labor or material came within the protection of the statutory bond. It was pointed out that a denial of an assignee's right to sue on the bond might deprive those for whom the security was intended of a fair chance to realize upon their claims by assignment.30

Citing the *Carter* decision, California courts came to the same conclusion regarding payment bonds under California law. The court in *Bernard v. Indemnity Insurance Co.* held:

The Legislature intended to protect the laborer as to every element of his compensation, whether that compensation be an hourly wage, or whether it be an hourly wage plus other benefits, and the novelty of the health and welfare provisions of the contract does not in any wise prevent the contributions therefor from being considered as payments for 'any work or labor' on the bonded project.32

Addressing whether the trust funds had standing to bring the compensation claims of the employees, the *Bernard* court followed *Carter* and held that "The trustees, in this instance, are the assignees under an equitable assignment of the rights and claims of the carpenters, and as such have the

29. Id. at 217-18.
30. Id. at 218-19 (footnotes omitted).
32. Id. at 490. See also Dunlop v. Tremayne, 62 Cal. 2d 427, 431 (1965) (holding benefit contributions are part of "wages" given a priority claim under *Cal. Code Civ. Proc.* § 1204 when a receiver takes over an employer).
right to sue under the circumstances."33 Courts in other states have similarly applied the holding in Carter to their own statutes, giving trust funds access to mechanic lien and similar remedies on the same basis as laborers.34

The California legislature later codified the decisions in Bernard and Carter, by explicitly including fringe benefit contributions as part of the labor cost guaranteed by the statutory scheme. In 1965, subsection (d) was added to Cal. Code Civ. Proc. § 1182, allowing fringe benefit trust funds to file a lien for contributions arising from work on that property.35 In 1969, this provision was moved to Cal. Civ. Code § 3111, where it is now.36 Shortly after, other parts of the statutory scheme were conformed to put fringe benefit contributions in the same category, and entitled to the same protection, as cash wages.37 It is these statutes that some courts later characterized as giving "special treatment" to trust funds.38 But as will be explained, the opposite is true: these statutes assure that trust funds are treated in the same fashion as similar creditors.

The history of the California and federal statutes demonstrates that they are all part of an integrated statutory scheme to protect workers on construction projects. The pieces of this statutory scheme cannot be viewed in isolation, but must be considered as part of the entire structure built by the legislature during more than a century of legislation. This structure and each of its components serve the same purpose as the first legislation enacted in 1850: to protect and guarantee the just payment of labor.

The statutory scheme as currently enacted in California works as follows: all contractors on public works are required to pay the prevailing wage as determined by the Department of Industrial Relations for that area and craft.39 The prevailing wage can be met by either paying a single hourly cash wage, or by paying a combination of cash wage and fringe

37. 1971 Cal. Stat. 2517, ch. 1284 § 6 (amending Cal. Civ. Code § 3181, including trust funds described in § 3111, among those entitled to file a stop notice); 1969 Cal. Stat. 2752, Ch. 1362 § 2 (adding Cal. Civ. Code § 3248, referring to § 3181 to describe those protected by a payment bond); 1971 Cal. Stat. 2516, ch. 1284 § 3 (amending Cal. Civ. Code § 3098, putting trust funds in the same class as other labor, excused from the requirement of giving a 20-day preliminary notice); 1971 Cal. Stat. 2512, ch. 1284 § 2 (amending § 3097(a), providing same notice requirements on private works). The prevailing wage determinations of the Department of Industrial Relations were also modified to allow fringe benefit contributions to be considered part of the total wage package required of contractors on public works. Cal. Lab. Code §§ 1773.1, 1773.8; see WSB Elec., Inc. v. Curry, 88 F.3d 788, 790 (9th Cir. 1996).
benefit contributions. This entire amount, whether cash wages or fringe benefit contributions, is guaranteed by stop notice and bond claim rights. If a worker does not receive full compensation on the project, he or she (or his or her assignee) may file a stop notice for both unpaid wages and unpaid fringe benefit contributions. The general contractor on a public works is required to post a bond guaranteeing payment of both wages and fringe benefit contributions, up to the full amount of compensation due. There is no prevailing wage or bond requirement on private works. Instead, workers (or trust funds as their assignees) may file a mechanic lien and foreclose on the property for unpaid compensation, including compensation in the form of fringe benefit contributions. In enforcing these rights, trust funds are subject to the same time limits and procedural requirements as apply to wage claims by the employees. The legislation specifically provides that the rights and claims under this scheme do not affect any other rights claimants (including trust funds) have to pursue other remedies, such as contract claims.

III.
LEGISLATIVE HISTORY OF ERISA

ERISA was enacted as a remedial statute to address the problems found by Congress:

[T]hough the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . . .

40. This is described in WSB Electric, Inc. v. Curry, 88 F.3d 788, 790-91 (9th Cir. 1996).
42. CAL. CIV. CODE §§ 3248(c), 3226 (West Supp. 1999).
43. While not required by law, a bond may be posted on a private work, which is regulated and operates similar to a payment bond on a public work. See CAL. CIV. CODE §§ 3235-3242 (West Supp. 1999).
44. See CAL. CIV. CODE §§ 3110 (laborers entitled to lien), 3111 (trust funds entitled to lien), 3116 (recording of lien), 3144 (enforcement of lien).
45. See CAL. CIV. CODE §§ 3097 (no preliminary notice required on private work), 3098 (same for public work), 3116 (time to record mechanic lien), 3184 (time to file stop notice), 3239 (time to sue on payment bond on private works), 3249 (time to sue on payment bond on public works).
46. "Nothing contained in this title [Title 15 of Division 3 of the Civil Code, including §§ 3082-3268] affects the right of a claimant to maintain a personal action to recover a debt against the person liable therefor either in a separate action or in the action to foreclose the lien, nor any right the claimant may have to the issuance of a writ of attachment or execution or to enforce a judgment by other means." CAL. CIV. CODE § 3152 (West Supp 1999).
These problems were addressed by creating standards for reporting and disclosure,\(^{48}\) participation and vesting of benefits,\(^{49}\) funding,\(^{50}\) and fiduciary duties.\(^{51}\) Although the legislative history and Congressional Findings address primarily pension plan issues, ERISA covers many other types of benefit plan arrangements, including health funds, certain vacation funds, and training funds.\(^{52}\) Participants and beneficiaries were given standing to sue for denial of benefits and to enforce the provisions of ERISA, including breaches of fiduciary duties.\(^{53}\) Fiduciaries of plans were also given standing to sue for breaches of the plan documents or breaches of the substantive provisions of ERISA, including the fiduciary duties.\(^{54}\)

The statute also contains a broad preemption section, declaring that "the provisions of [ERISA] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."\(^{55}\) There are several complex exceptions to this broad preemption clause, including an important caveat: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law

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\(^{49}\) Id. §§ 1053-1061.

\(^{50}\) Id. §§ 1081-1086. Note that these sections of ERISA imposed requirements only on pension plans themselves, not on the employers who contributed to multi-employer plans. This, of course, is the reason the Multi-Employer Pension Plan Amendments of 1980 were necessary. See infra note 66.

\(^{51}\) Id. §§ 1101-1114.

\(^{52}\) The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." 29 U.S.C. § 1002(3) (1974). An "employee welfare benefit plan" includes "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions)." Id. § 1002(1).

The reference to section 186(c) is Section 302(c) of the Labor Management Relations Act (LMRA), which describes payments to certain trust funds created and maintained "for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance" as exempt from the criminal prohibition of payments by employers to unions. 29 U.S.C. § 186(c)(5)(A) (1998). Also exempt, and incorporated into the definition of welfare plans in 29 U.S.C. § 1002(1), are trust funds for certain "vacation, holiday, severance or similar benefits . . . apprenticeship or other training programs" and certain scholarships, child care, employee housing assistance or legal aid. 29 U.S.C. §§ 186(c)(6)-(8) (1994).

Employee benefit plans, as defined above, are covered by ERISA if they are maintained by employers or employee organizations affecting interstate commerce, with certain exceptions, such as government or church plans. 29 U.S.C. § 1003(a) (1974).


\(^{54}\) Id § 1132(a)(3).

\(^{55}\) ERISA § 514(a), 29 U.S.C. § 1144(a) (1974). See supra note 52 (describing the covered employee benefit plans to which this section refers).
of the United States . . . or any rule or regulation issued under any such law."\textsuperscript{56}

The legislative history of this "relate to" language is unenlightening. The House version would have preempted state laws which "relate to the reporting and disclosure responsibilities and fiduciary responsibilities of persons acting on behalf of" ERISA plans, as well as laws which "relate to" the funding and vesting provisions of ERISA plans.\textsuperscript{57} The Senate version stated more simply that it would preempt state laws which "relate to the subject matters regulated by this Act."\textsuperscript{58} Since the "subject matters" of the Act referred to in the Senate version were the same as those spelled out in the House version, there is no substantive difference between the two versions. Consequently, there is no explanation for the compromise which simply preempted all state laws which "relate to any employee benefit plan" covered by ERISA. As one commentator noted, this compromise was probably "more in the nature of a quick statement of general principal than a workable, final rule."\textsuperscript{59}

The only helpful bit of legislative history is the reference to court decisions interpreting the preemptive effect of Section 301(a) of the Labor Management Relations Act (LMRA).\textsuperscript{60} Referring to the civil enforcement provision in ERISA § 502(a), the Conference Report to the original enactment of ERISA stated that "All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947."\textsuperscript{61} Based on this reference, the Supreme Court has concluded that Congress intended that ERISA receive the same preemptive effect as the LMRA, and incorporated the decisions interpreting the LMRA up to that point.\textsuperscript{62} At that time, there were no decisions (and are none now) finding mechanic lien, stop notice or bond claim remedies preempted by the LMRA, so there should have been no such preemption under ERISA.

While the original enactment of ERISA in 1974 included a cause of action and provisions for enforcing benefit obligations, it did not explicitly provide for the enforcement of the obligation of employers to contribute.\textsuperscript{63} There was no statutory requirement for employers to contribute to multi-employer funds. Such a requirement arose instead from collective bargain-

\begin{itemize}
  \item \textsuperscript{56} ERISA § 514(d), 29 U.S.C. § 1144(d) (1974).
  \item \textsuperscript{57} H.R. 2, 93d Cong., 120 Cong. Rec. 4742 (1974).
  \item \textsuperscript{58} S. 4200, 93d Cong., 120 Cong. Rec. 5002 (1974).
  \item \textsuperscript{59} Leon Irish & Harrison Cohen, \textit{ERISA Preemption: Judicial Flexibility and Statutory Rigidity}, 19 U. Mich. J.L. Reform 109, 114 (1985). This view is supported by the fact that Section 3022 of the 1974 enactment of ERISA created a "Joint Pension Task Force" to study and make recommendations on the effect of ERISA preemption. Unfortunately, that study was never completed.
  \item \textsuperscript{60} 29 U.S.C. § 185(a) (1974).
  \item \textsuperscript{62} Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 55-56 (1987).
  \item \textsuperscript{63} 29 U.S.C. § 1132(a) (1974).
\end{itemize}
ing agreements, which were enforceable by trustees of benefit funds as third-party beneficiaries of those agreements under LMRA § 301(a). Until the 1980 amendments discussed below, actions to collect delinquent contributions were brought as suits to enforce collective bargaining agreements.

It was precisely because of this lack of a remedy in ERISA for collecting delinquent contributions, that Congress felt it needed to add such a provision to the Multi-Employer Pension Plan Amendments Act of 1980. Congress sought to "clarify the law in this respect by providing a direct unambiguous ERISA cause of action to a plan against a delinquent employer." The new provisions imposed "a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans."

Specifically, the 1980 amendment accomplished this purpose by adding section 515 to ERISA, 29 U.S.C. § 1145, which established an enforceable duty under ERISA for employers already obligated under collective bargaining agreements to "make such contributions in accordance with the terms and conditions of such plan or such agreement." Paragraph (2) was also added to subsection 502(g), 29 U.S.C. § 1132(g)(2), to specify the damages to be awarded plans in any action to enforce the obligation to contribute under § 515. "The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies."

Because the "provisions of this subchapter" referred to in the original preemption clause of ERISA did not include provisions for enforcement of the obligation to contribute until the 1980 amendments, it is the legislative intent of those 1980 amendments which should be considered first in determining whether state laws affecting the obligation to contribute are preempted. The legislative history of the 1980 amendments clearly states that such remedies should not to be preempted:

65. See, e.g. Audit Servs., Inc. v. Rolfsen, 641 F.2d 757, 760 (9th Cir. 1981); Seymour v. Hull & Moreland Eng’g, 605 F.2d 1105, 1109 (9th Cir. 1979). Arguably, the provision in ERISA § 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A) (1994), allowing a fiduciary to sue to "enjoin any act or practice which violates . . . the terms of the plan" could have given trustees authority to sue to enjoin further delinquencies, assuming that the obligation to contribute was considered part of the "plan" document. However, this would not allow an action for monetary damages.
68. STAFF OF THE SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., 2D SESS., MULTIEmployER PENSION PLAN AMENDMENTS ACT OF 1980, S. 1076 at 44 (1980).
70. See id.
71. STAFF REPORT, supra note 68, at 44.
The Committee Amendment does not change any other type of remedy [other than attorney fees and liquidated damages] permitted under state or federal law with respect to delinquent multiemployer plan contributions.\footnote{H.R. Rep. No. 96-869, pt. 2, at 49 (1980), reprinted in 1980 U.S.C.C.A.N. 2993, 3038. See also Hawaii Laborers Trust Funds v. Maui Prince Hotel, 81 Haw. 487, 499, 918 P.2d 1143, 1155 (Haw. 1998) (quoting this legislative history to hold that Congress did not intend to preempt neutral mechanic lien laws such as that of Hawaii).} This analysis of the legislative history of ERISA indicates that Congress did not intend to interfere with other remedies under state law to collect delinquent contributions. There is no evidence that Congress intended to interfere with state remedies which predated ERISA by over a century.

IV.

EARLY SUPREME COURT CASES ON ERISA PREEMPTION: THE "RELATED TO" TEST

Early cases interpreting the preemption clause of ERISA focused on the broad sweep of that clause. These decisions attempted to give effect to the “relate to” language of the statute. As discussed below, the reasoning of these early cases (although not their results) has been disavowed by the Supreme Court.

The Court first addressed the meaning of the preemption clause in \textit{Alessi v. Raybestos-Manhattan, Inc.}\footnote{451 U.S. 504 (1981).} \textit{Alessi} involved a state statute prohibiting pension plans from offsetting benefits by state worker compensation awards. The Court declined to “determine the outer bounds of ERISA’s pre-emptive language” since the state statute prohibited what federal regulation expressly allowed.\footnote{451 U.S. at 525.} However, the Court did observe that “even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern.”\footnote{Id.}

The next ERISA preemption case heard by the Court was \textit{Shaw v. Delta Airlines, Inc.}\footnote{463 U.S. 85 (1983).} The expansive scope attributed to the “relate to” language in the preemption clause can be traced to dicta in this decision. \textit{Shaw} involved a state fair employment law which prohibited certain types of discrimination in employee benefits. The Court had little difficulty in finding that this law did “relate to” employee benefit plans, since it purported to directly regulate what type of benefits they could offer. The Court went beyond what was necessary to decide the case, however, and stated that courts must “give effect to this plain language” in the “relate to” provision, in its “broad sense.”\footnote{Id. at 97.} According to the Court, state law “relate[s] to” employee benefit plans, and is thus preempted, “in the normal sense of the
phrase, if it has a connection with or reference to such a plan." This sweeping language was unfortunate, particularly given that it was unnecessary for the Court to take such a broad view in arriving at its decision.

The Shaw analysis was repeated (and expanded) in Metropolitan Life Insurance Co. v. Massachusetts. Here the Court stated that the "relate to" language was to be "given its broad common-sense meaning" and would "displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."

The case most often cited to support ERISA preemption of state mechanic lien, stop notice and bond claim laws is Pilot Life Insurance Co. v. Dedeaux. Pilot Life involved an employee who brought state law contract and tort claims arising from the denial of his benefits by an employee benefit plan. Referring to Shaw and Metropolitan, the Court first found that the contract and tort claims "relate to" employee benefit plans because they have a "connection with or reference to such a plan." The Court then reviewed the extensive provisions in ERISA regulating the enforcement of benefit rights. It concluded that state laws should not be permitted to tamper with this enforcement scheme.

Those who blindly cite to Pilot Life fail to note that, unlike the "comprehensive civil enforcement scheme" for enforcement of benefits, there was no provision in ERISA for enforcement of the obligation of employers to contribute when the preemption clause was enacted. The "provisions of this subchapter" which "supersede any and all State laws" in the preemption clause did not, when that clause was originally enacted, include provisions for collection of delinquent employer contributions. Applying Pilot Life to collection remedies would ascribe to Congress the intent to preempt an area which it had not even regulated in ERISA. Even within the sometimes obscure logic of preemption analysis, this does not make any sense. It is the intent of Congress when it first regulated this field, i.e., with the 1980 amendments, which should be relevant. When Congress did, in 1980, add

79. Id.
80. After finding that the state law obviously did "relate to" employee benefit plans, the Court went on to hold that the law was not preempted insofar as the state law reflected the same anti-discriminatory provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000c, et seq., but was preempted insofar as it prohibited discrimination not prohibited by Title VII. 463 U.S. at 101-06. This is because subsection (d) of the ERISA preemption clause, 29 U.S.C. § 1144(d), warns that preemption shall not "be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States." Title VII provides for cooperative enforcement with state agencies, 42 U.S.C. § 2000e-5(c), which would be impossible if state agencies were prohibited from enforcing their own anti-discrimination laws as to employee benefits because of preemption.
82. Id. at 739.
84. Id. at 47.
85. Id. at 54.
86. See supra notes 63-67 and accompanying text.
an enforcement provision for the contribution obligation of employers, it made clear that its intent was to expand, and not preempt, any existing state and federal remedies for collecting delinquent contributions.87

Later, in Mackey v. Lanier Collections Agency & Service, Inc.,88 the Court recognized some limits to the broad sweep of the “relate to” test of ERISA preemption. Mackey involved a state garnishment law that contained a provision exempting ERISA funds from most forms of garnishment.89 This provision exempting ERISA funds from garnishment was held preempted because it “singles out ERISA employee welfare benefit plans for different treatment” from other third parties who hold property subject to garnishment.90 This was not just because of the explicit reference to ERISA plans, but because of the “disparate treatment” between ERISA and non-ERISA plans.91 However, the Court held that the general state garnishment law, was not sufficiently “related to” employee benefit plans to be preempted, even though it had an “effect” on those plans. Noting that ERISA allowed employee benefit plans to “sue or be sued,”92 and that Federal Rule of Civil Procedure 69(a) incorporated state law remedies for enforcement of federal judgments, the Court explained that “state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA; otherwise there would be no way to enforce such a judgment won against an ERISA plan.”93 Mackey involved the converse of the situation dealt with in this article. Mackey stands for the proposition that ERISA plans should be treated no differently than any person or entity holding property subject to execution. Any disparate treatment is preempted, and generally applicable laws may be applied to ERISA plans on a non-discriminatory basis. In this article, we are concerned with the treatment of ERISA plans as creditors under state laws. Following the logic of Mackey, any disparate treatment of ERISA plans as creditors should still be preempted, while generally applicable enforcement mechanisms should be available to ERISA plans on the same basis as other similarly-situated creditors.94 Unfortunately, the lower courts did not realize this when they first began to address the issue.

87. See supra notes 66 to 73 and accompanying text.
89. GA. CODE ANN. § 18-4-22.1 (1982).
90. 486 U.S. at 830.
91. Id. at 830 n.4.
93. 486 U.S. at 834.
94. See Plumbers Local 458 Holiday Vacation Fund v. Immel, 151 Wis. 2d 233, 445 N.W.2d 43, 45-46 (Wis. Ct. App. 1989) (making the same argument in holding that Wisconsin’s mechanic lien statute was not preempted).
V.
LOWER COURTS ADDRESS ERISA PREEMPTION OF STATE MECHANIC LIENS, STOP NOTICES, AND BONDS

When the question of ERISA preemption of mechanic lien, stop notice, and bond claim laws first arose, the early decisions focused on the "unhelpful" text of the statute and the now-discredited "literal" analysis of Shaw and Metropolitan to find such laws preempted. Several of these cases also provided an outlet for some judges' distaste for the philosophy behind mechanic lien remedies.

The principal decision in California was Carpenters Southern California Administrative Corp. v. El Capitan Development Co. In El Capitan, the California Supreme Court focused on the "relate to" text, stating that "All that is necessary to invoke ERISA's statutory preemption provision is that the state law in question 'relate to' an ERISA plan." The court felt the "relate to" language should be interpreted broadly. Therefore, it concluded that California mechanics lien law was preempted because Civil Code § 3111 "singles out ERISA plans for a special treatment." Although acknowledging that "section 3111 does treat ERISA plans the same as other parties whose claims are based on having furnished labor or materials for a construction project" the court distinguished ERISA plans from other claimants because they "do not furnish labor or materials for construction projects." However, the Court overlooked the fact that no other assignee of claims furnish labor or materials either. In neglecting this fact, the Court ignored its own decision in Dunlop v. Tremayne, the U.S. Supreme Court decision in U.S. v. Carter and several other decisions. In each of these decisions, trust funds were declared assignees of a portion of the wages of the laborer and were given standing to enforce that portion of the compensation assigned.

The El Capitan court also relied heavily on the discussion in Pilot Life regarding the exclusive nature of the remedies in ERISA. The court dealt with the argument that the original enactment of ERISA did not

95. 53 Cal. 3d 1041, cert. denied, 502 U.S. 963 (1991). Previously, a California Court of Appeal had decided that mechanics liens were not preempted by ERISA. Carpenters Health & Welfare Trust Fund v. Parnas Corp., 176 Cal. App. 3d 1196, 1201 (1986). Parnas was overruled by the California Supreme Court in El Capitan, 53 Cal.3d at 1050 n.5.
96. 53 Cal. 3d at 1047.
97. Id. at 1048, citing Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138 (1990), which in turn relied on the now-discredited language in Shaw, 463 U.S. at 98.
98. Id. at 1049.
99. Id.
100. 62 Cal. 2d 427 (1965).
102. See Bernard, 162 Cal. App. 2d 479 (1958); see also supra notes 32-34 and accompanying text.
104. El Capitan, 53 Cal. 3d at 1052-53.
have a remedy to collect delinquent contributions, and thus could not pre-
empt such state remedies, by baldly asserting that "[e]ven in 1974 ERISA 
contained a cause of action to enforce its terms, section 502 . . . ." The "terms" of ERISA did not include a remedy for delinquent contributions 
until 1980, as discussed above. The *El Capitan* court was wrong on this 
point.

The *El Capitan* court also hinted strongly at its antipathy for the phi-
losophy behind mechanic liens. The court expressed concern that the statute "permits the creditor (the trust fund) to enforce a debt (for outstanding fringe benefit contributions) not against the debtor (the defaulting em-
ployer), but against the property of a third party that is not a party to the collective bargaining agreement." The same could be said of any other mechanic lien claimant. It was the extension of liability to parties not "privy" to the contract which disturbed the court most, a consideration inherent in the mechanic law in general, and not specific to its enforcement by trust funds.

A divided panel of the Ninth Circuit came to the same conclusion in *Sturgis v. Herman Miller, Inc.* The *Sturgis* majority relied on the "connection with or reference to" language in *Shaw* and consequently held that the California mechanic lien law "singles out employee benefit plans for the specific purpose of according them lien rights on real property to collect delinquent employer contributions." The dissent criticized the majority’s reliance on the mere reference to ERISA trusts as determinative of whether the statute "relates to" ERISA benefit plans. The Supreme Court did point out in *Mackey* that it is the "disparate treatment accorded," and not just the mere "reference" to ERISA plans, which is determinative. By carving out compensation in the form of benefit contributions, the *Sturgis* majority established just the sort of "disparate treatment" which the Supreme Court warned in *Mackey* was prohibited.

Whether or not the words "trust fund" or "ERISA" appear in the statute should have no bearing on preemption analysis. Before the California statute was amended to expressly refer to "trust funds," California courts had already held that trust funds could assert claims as assignees of part of

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105. *Id.* at 1053 n.8.
106. *See supra* notes 63-72 and accompanying text.
107. 53 Cal. 3d at 1055.
108. *See supra* notes 8-10 and accompanying text.
109. 943 F.2d 1127, 1129 (9th Cir. 1991).
111. 943 F.2d at 1130.
112. *Id.* at 1130 (Pregerson, J., dissenting) ("Rather, a careful reading of *Mackey* teaches us that the determinative pre-emption factor is whether the state-law enforcement procedure in question singles out ERISA plans for special treatment.").
the compensation due employees. In other states, trust funds are still not mentioned in the statutes, but the same result is achieved by virtue of court decisions holding benefit contributions included in the value of labor, and that trust funds have standing as assignees. Those "state laws" preempted by ERISA are defined as including "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." Preemption analysis should therefore be the same whether the alleged "reference to" or "singling out" of employee benefit plans occurs in the language of the statute or the language of decisions interpreting the statute.

Following El Capitan and Sturgis, the other elements of the California statutory scheme fell under the weight of the ERISA preemption tsunami. In Carpenters Health & Welfare Trust Fund v. Developers Insurance Co., a California Court of Appeal held the stop notice remedy to be preempted as applied to employee benefit contributions. The Ninth Circuit came to the same conclusion two years later. Shortly after, the use of payment bond remedies was declared preempted by ERISA. All of these remedies have their genesis in the 1850 mechanic lien law, and all currently refer back to the same reference to "trust funds" in Civil Code § 3111. There is no rational basis to distinguish among them for purposes of preemption. This reference to trust funds in Civil Code § 3111 is the trunk of the tree. If the trunk falls as preempted, the branches will fall with it. But if the trunk is allowed to stand, there is no logical reason to cut off any of the individual branches. They all must either stand or fall together.

While the California statutory scheme to protect laborers on construction projects was completely swept away by ERISA preemption, courts in other jurisdictions have split on these issues. The Supreme Court has not

115. See, e.g., Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. New Pueblo Constructors, Inc., 131 Ariz. 278 (1982) (holding that trust funds have standing to assert a claim against the payment bond required by Arizona Revised Statutes § 34-223, even though the statute does not mention trust funds).
120. Cal. Civil Code § 3181 (West 1993) gives "any person mentioned in Section . . . 3111" the right to serve a stop notice. Cal. Civil Code § 3248(c) requires that a payment bond "inure to the benefit of any of the persons named in Section 3181" which then refers to § 3111. Cal. Civil Code § 3111 itself includes trust funds among those entitled to a mechanic lien.
121. See supra notes 3, 4 There is not only a split between jurisdictions, but a split within some jurisdictions. Compare, e.g., Carpenters Health & Welfare Trust Fund v. Tri Capital Corp., 25 F.3d 849, 853-54 (9th Cir. 1994) (finding California stop notice preempted), with Operating Eng'rs Health & Welfare Trust Fund v. JWJ Contracting Co., 135 F.3d 671, 676-79 (9th Cir. 1998) (finding Arizona payment bond not preempted).
yet dealt with this split of authority. However, its decisions in other pre-emption cases show that it has called back the tsunami, and announced a more practical approach. It is to this change in the tide of Supreme Court decisions which we now turn.

VI.
THE SUPREME COURT ABANDONS THE METAPHYSICAL APPROACH TO ERISA PREEMPTION

After growing criticism of its “textual” approach to preemption which left the lower courts lost in the metaphysics of relativity, the Supreme Court finally reexamined its preemption analysis in New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co. Travelers Insurance involved surcharges on hospital patients. The petitioners there argued that surcharges on patients who were participants or beneficiaries of employee benefit plans were preempted by ERISA. The Court began its analysis by noting that “we have to recognize that our prior attempt to construe the phrase ‘relate to’ does not give us much help in drawing the line here.” Along the way, the Court also noted that its prior explanation in Shaw that a law “relates to” a plan if it has a “connection with or reference to” the plan was of little help:

[H]ere an uncritical literalism is no more help than in trying to construe ‘relate to.’ For the same reasons that infinite relations cannot be the measure of preemption, neither can infinite connections. We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.

According to the Court, the “starting presumption” in this analysis must be “that Congress does not intend to supplant state law.” Applying this new analysis, the Court held that the New York law was not preempted. In arriving at its decision, the Court also took into account similar laws existing at the time ERISA was passed, noting there was nothing in the legislative history of ERISA to indicate “that Congress intended to squelch these state efforts.”

Subsequently, in a case more closely related to the issue at hand, California Division of Labor Standards Enforcement v. Dillingham Construc-

124. Id. at 655.
125. Id. at 656.
126. Id. at 655.
127. Id. at 665.
tion, Inc., the Supreme Court held that one aspect of the California Prevailing Wage Law was not preempted by ERISA. *Dillingham* involved a requirement that a contractor participate in an approved apprenticeship program in order to take advantage of lower prevailing wages for apprentices. This requirement refers specifically to a “joint apprenticeship committee” and therefore could be said to “refer to” an employee benefit plan, in the same manner that Civil Code § 3111 makes “reference” to an “express trust fund established pursuant to a collective bargaining agreement . . . .” Despite this direct reference to employee benefit plans, the Court found that the statute *functions* irrespective of the existence of an ERISA plan; thus, the statute was not preempted solely because of this reference.

Referring to *Travelers Insurance*, the Court noted that it had recently “recognized that an ‘uncritical literalism’ in applying this standard offered scant utility in determining Congress’ intent as to the extent of § 514(a)’s reach.” While clinging to the language in *Shaw* that a law “relates to” an ERISA plan if it has a “reference or connection” to the plan, the Court redefined that language to be a more functional, and less literal, test. A law “refers” to an ERISA plan, not by its literal words, but where the “law acts immediately and exclusively upon ERISA plans, as in *Mackey*, or where the existence of ERISA plans is essential to the law’s operation . . . .” Instead of the discredited approach used in the past, “to determine whether a state law has the forbidden connection, we look both to ‘the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,’ . . . as well as to the nature of the effect of the state law on ERISA plans.”

Noting that apprenticeship standards are traditional areas of state concern, and that “wages to be paid on public works projects and the substantive standards to be applied to apprenticeship training programs are, however, quite removed from the areas which ERISA is expressly con-

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131. 519 U.S. at 328.
132. *Id.* at 325.
134. 519 U.S. at 325.
135. *Id.* (citing *Travelers*, 514 U.S. 645, 658-59 (1995)). *See also* *Livadas* v. Bradshaw, 512 U.S. 107, 119 (1994) (“Preemption analysis, rather, turns on the actual content of [state law] policy and its real effect on federal rights.”). The *Livadas* decision is discussed more fully, infra Part IX.
cerned," the *Dillingham* Court addressed the preemption issue "with the presumption that ERISA did not intend to supplant it." Despite the literal reference to employee benefit plans, the Court found there was no "reference" calling for preemption, since the law regulated non-ERISA (as well as ERISA) apprenticeship programs, and functioned irrespective of the existence of ERISA plans. The Court also held that the law did not have a sufficient "connection" to ERISA plans to overcome the presumption that Congress did not intend to disturb such an area of traditional state regulation, since it did not require participation in ERISA plans, and although it altered the incentives, it did not dictate the choices of ERISA plans.

A concurring opinion by Justices Scalia and Ginsberg went further. Agreeing with the majority's preemption analysis, the concurrence added that the majority "opinion is no more likely than our earlier ones, however, to bring clarity to this field – precisely because it does obeisance to all our prior cases, instead of acknowledging that the criteria set forth in some of them have in effect been abandoned." The concurrence explained that "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." Instead, "it accurately describes our current ERISA jurisprudence to say that we apply ordinary field pre-emption, and of course, ordinary conflict preemption."

The "field" and "conflict" preemption the concurrence refers to is that commonly applied to cases arising under LMRA § 301(a). It is fully described in *Silkwood v. Kerr-McGee Corp.*:

> [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. . . .

There is support for the application of simple "field" and "conflict" preemption in the legislative history of ERISA. One of the sponsors of the original enactment of ERISA stressed that "the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Fed-

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136. 519 U.S. at 330, 332.
137. Id. at 325-28.
138. Id. at 328-34.
139. Id. at 335. Criticism within the Court of the literal interpretation of the "relate to" language began with Justice Stevens in District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 133 (1992) (Stevens, J., dissenting).
140. 519 U.S. at 335.
141. Id. at 336.
eral regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." This language seems to be a clear signal that Congress meant to invoke both the “field” and “conflict” preemption jurisprudence as it existed at that time.

The more pragmatic approach taken in these recent cases has been applauded by commentators. Lower courts have now taken heed. In fact, the concurring opinion in Dillingham, urging a clear break from past precedent, seems to be cited as often as the majority opinion. The more recent decisions reflect this approach, and have questioned the wisdom of their earlier rush to preempt every law in sight.

VII.
RECENT CASES: THE TIDE RECEDES

Travelers and Dillingham compelled courts which had previously found preemption to reexamine their reasoning, if not their prior holdings. The Ninth Circuit and California courts are among those which are in the process of that reexamination.

The Ninth Circuit decided WSB Electric, Inc. v. Curry before the Supreme Court rendered its decision in Dillingham. Perhaps sensing its own mistake in Dillingham, the Ninth Circuit began a fast back pedal in WSB Electric. In WSB Electric, the court held that a central feature of the California prevailing wage law was not preempted by ERISA. Although both the portion of the statute at issue and the regulations referred specifically to employee benefit plans, the Ninth Circuit held that this was not determinative:

The Supreme Court, however, has never found a statute to be preempted simply because its text included the word ERISA or explicitly mentioned a covered employee welfare benefit plan. Although the statutes the Supreme Court has held to be preempted did expressly refer to ERISA plans, they also had some effect on those plans. Therefore, a statute “refers to” an ERISA plan and is preempted if it mentions or alludes to ERISA plans, and has some effect on the referenced plans.

144. For example, Professor Fisk says that “The Court took a step in the right direction” in the Travelers case. Fisk, supra note 122 at 93. “What the courts ought to ask themselves in deciding ERISA preemption cases, therefore, is a pragmatic question: to what extent will decentralization of regulatory authority over this area of law facilitate or hamper the sensible operation of the law?” Id. at 92.
145. See, e.g. Emard v. Hughes Aircraft Co., 153 F.3d 949, 953-54 (9th Cir. 1998). The observations of the “curbstone philosopher” in the Dillingham concurrence has been especially popular, even with the Court itself. See DeBuono v. NYSA-ILA Medical and Clinical Servs., 520 U.S. 806, 1751 n.7 (1997).
146. 88 F.3d 788 (9th Cir. 1996).
147. Id. at 793 (emphasis added) (citations omitted).
The Court then went on to find that the prevailing wage law was not sufficiently “related to” employee benefit plans to be preempted by ERISA.\textsuperscript{148} Ironically, the Ninth Circuit invoked the same rationale that the Supreme Court was to employ in overturning that Court’s decision in \textit{Dillingham}:\textsuperscript{149} The references to ERISA plans in the California prevailing wage law have no effect on any ERISA plans, but simply take them into account when calculating the cash wage that must be paid. . . . The scheme does not force employers to provide any particular employee benefits or plans, to alter their existing plans, or to even provide ERISA plans or employee benefits at all.\textsuperscript{150}

The case which shattered the looking-glass logic of preemption in the Ninth Circuit was \textit{Operating Engineers Health & Welfare Trust Fund v. JWJ Contracting Co.}\textsuperscript{151} The court there found that an Arizona law\textsuperscript{152} requiring payment bonds to guarantee payment of all labor costs on public works was \textit{not} preempted by ERISA.\textsuperscript{153} In \textit{JWJ Contracting}, the Ninth Circuit noted at length the change in preemption analysis in the \textit{Travelers} and \textit{Dillingham} cases.\textsuperscript{154} Applying this new analysis, that court held that the law was not preempted. Although the Arizona law “can be seen as regulating certain ERISA relationships—specifically the relationship between ERISA trust funds and an employer’s surety—but as a third party guarantor of an extant contractual relationship, this intrusion of state law into ERISA territory is too ‘tenuous, remote or peripheral’ to arouse preemption.”\textsuperscript{155}

The Ninth Circuit recognized that its decision conflicted with its earlier decisions in \textit{Tri-Capital} and \textit{Marjo}. The Court initially made a half-hearted attempt to distinguish these cases by pointing out that the laws there made “additional parties liable to plan employees” when the employer did not pay, while the Arizona law “merely substitutes obligors.”\textsuperscript{156} These are

\textsuperscript{148} See id. at 796.
\textsuperscript{149} Dillingham Constr. v. County of Sonoma, 57 F.3d 712 (9th Cir. 1995), rev’d, 519 U.S. 316 (1997).
\textsuperscript{150} 88 F.3d at 793 (citations omitted). Compare this to the Supreme Court’s analysis in \textit{Dillingham}, 519 U.S. at 332. California courts have also recently held that the California Prevailing Wage Law is not preempted by ERISA. In \textit{Department of Industrial Relations v. Nielsen Constr. Co.}, 51 Cal. App. 4th 1016, 1022 (1996), the Department of Industrial Relations (DIR) sued both a general contractor and the surety who provided its payment bond. The DIR claimed one of the subcontractors violated the prevailing wage law in failing to pay fringe benefit contributions on a public works project. See id. The court, citing \textit{WSB Electric} extensively, held that the prevailing wage law (\textit{Cal. Lab. Code} § 1775) and the payment bond law (\textit{Cal. Civ. Code} § 3247(b)) were \textit{not} preempted by ERISA. See 51 Cal. App. 4th at 1024-30.
\textsuperscript{151} 135 F.3d 671 (9th Cir. 1998).
\textsuperscript{153} 135 F.3d at 676-79.
\textsuperscript{154} See id. at 677-78.
\textsuperscript{155} See id. at 678-79.
\textsuperscript{156} Id at 679.
two ways of saying the same thing. All of these laws made an “additional party” responsible for labor costs on a jobsite, including employee benefit contributions. Under both Arizona and California payment bond laws this was the bond company, and ultimately the general contractor required to post the bond. Under the stop notice procedure at issue in Tri Capital this was the funds withheld from the general contractor, and under the Nevada law in Marjo, it was the general contractor directly. After acknowledging the conflict, the court recognized that Tri-Capital and Marjo no longer rested on solid ground:

Perhaps more importantly, however, this court decided both Marjo and Tri Capital before Travelers. If the breadth of federal preemption described in Marjo and Tri Capital were still good law, [the bond company] would probably prevail. However, these cases rely on expansive language from the Supreme Court demonstrating an understanding of ERISA preemption that has since been tailored to better fit Congress’s policy intentions.157

Subsequent decisions have also recognized this change in the law.158 Recently, the Sixth Circuit held that a payment bond statute was not preempted by ERISA.159 Quoting from a lower-court opinion it affirmed, the Sixth Circuit held:

The Michigan Public Works Act treats contributions due to an ERISA fund exactly as all other forms of compensation due a laborer or furnisher of materials on a public construction project. The statute does not interfere with nor require any administrative action of the Plans. It does not cause any additional expense to the Plans. To the extent that the statute operates to ensure payment of contributions to the Plans, it is incidental to its primary objective; in this case, to compel contractors on a public works project to pay their laborer’s full compensation either directly or through a bond secured as provided by law. This law does not affect an ERISA plan in any meaningful way.160

The Sixth Circuit also affirmed the district court ruling that the trust funds “do have standing to sue under the state statute, to recover as compensation ‘justly due’ unpaid fringe benefit contributions owed pursuant to the contract between the contractor and its union employees.”161 The observation that the fringe benefit contributions are only part of the “laborer’s full com-

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157. Id. at 679.
158. See, e.g., Emard v. Hughes Aircraft Co., 153 F.3d 949, 953 (9th Cir. 1998) (citing concurring opinion in Dillingham that the Court now applies “ordinary field pre-emption, and of course, ordinary conflict pre-emption” analysis instead of the former literal test); Bast v. Prudential Ins. Co., 150 F.3d 1003, 1007 (9th Cir. 1998) (recent decisions have limited the scope of the “relate to” provision, so that courts must now “look instead to the objectives of the ERISA statute”); Toumajian v. Frailey, 135 F.3d 648, 653 n.3 (9th Cir. 1998) (“Recently, the scope of this broad ‘relate to’ preemption was markedly narrowed.”).
160. Id. at 429 (quoting 921 F. Supp. 471, 479 (E.D. Mich. 1996)).
161. Id. at 430 (quoting 921 F. Supp. at 475).
pensation” comports with the earlier observation by the Supreme Court in *Carter* that “[n]ot until the required contributions have been made will Carter’s employees have been ‘paid in full’ for their labor in accordance with the collective bargaining agreements.” 162 Looking at the state statute this way (i.e., its effect, not its words) reflects the emphasis on the practical preemption analysis urged by the Supreme Court in *Travelers* and *Dillingham*. 163 It is this practical effect of the state statutes, with and without preemption, to which we now turn.

VIII.

THE PRACTICAL EFFECT OF PREEMPTING STATE MECHANIC LIEN AND RELATED REMEDIES

Decisions such as *El Capitan*164 and *Sturgis*,165 which erroneously held mechanic lien, stop notice, and bond laws preempted, drastically changed the operation of both the state and ERISA statutory schemes.166 To demonstrate that effect, consider a not-so-hypothetical situation on a public works project.167 Judy and Jane both perform the same work as Inside Wiremen [sic] electricians on the Boondoggle Project of Los Angeles County. Judy is a union member and works for Unionco. Unionco is an electrical contractor which has signed a collective bargaining agreement with the International Brotherhood of Electrical Workers. Jane is not a union member. She works for Nonunionco, a non-union electrical contractor.

The prevailing wage rate for the work of both Jane and Judy is a total of $37.73 per straight-time hour.168 Jane, the non-union worker, receives this entire amount in cash. She uses some of the money to buy a benefits package for herself and her family. Pursuant to its collective bargaining agreement, Unionco gives Judy $23.83 in cash wages. It contributes the remaining $13.90 required by the prevailing wage determination and collective bargaining agreement to various ERISA multi-employer benefit

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163. This practical analysis has been urged by other commentators. See, e.g., Catherine Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 Harv. J. on Legis. 35, 90-102 (Winter 1996).
164. See supra notes 95-107 and accompanying text.
165. See supra notes 109-112 and accompanying text.
166. See generally supra note 3.
167. The effect would be basically the same on a private construction project. Instead of stop notice rights, mechanic lien rights would be involved. While a payment bond is not required on private works as they are on public works, any savvy developer would demand one from its general contractor in order to protect itself from mechanic liens. Private, as well as public, payment bonds must be interpreted so that “the sole conditions of recovery shall be that claimant is a person described in Section 3110, 3111, or 3112, and has not been paid the full amount of his claim.” Cal. Civ. Code § 3226 (West Supp. 1999).
These benefit plans are commonly administered by Trust Funds which use the money to provide various benefits, including health, pension, and vacation.\textsuperscript{170}

Unionco and Nonunionco both subcontracted their work from the General Contractor. They also both purchased their supplies from Wires\&Plugs, and each obtained a line of credit secured by a UCC-1 Financing Statement\textsuperscript{171} from Bank. Pursuant to California Civil Code 3247, General Contractor purchased a payment bond from BondCo, guaranteeing payment of labor and materials cost on the Boondoggle Project.

As with many small subcontractors, both Unionco and Nonunionco operated on slim margins. Despite the money advanced by Bank, they depend on regular progress payments to meet their payroll and basic expenses. When the County was slow to pay, General Contractor in turn stopped paying its subcontractors. Both Unionco and Nonunionco were now without cash to pay their bills. Each shut down, leaving their workers, suppliers, and the Bank unpaid.

Jane filed a stop notice and made a claim on the payment bond for her 120 hours of unpaid work, totaling $4,527.60. Judy, through her union, filed a stop notice and bond claim for her 120 hours of cash wages, totaling $2,859.60. The Trust Funds filed a stop notice and made a bond claim for the unpaid contributions, $1,668.00. The Trust Funds also filed an action in federal court against Unionco for the delinquent contributions, together with interest, liquidated damages and attorney fees, pursuant to ERISA §§ 515 and 502(g)(2).\textsuperscript{172} At the same time, Wires\&Plugs assigned their claims to Collection Agency, who filed stop notices and made bond claims for supplies purchased by Unionco and Nonunionco. Bank asserted its rights to take possession of the property described in its security interest.\textsuperscript{173} This included the equipment and accounts receivables (namely the money owed to the subcontractors for their work done on the Boondoggle Project) of both Unionco and Nonunionco.

It is at this point that the disparate treatment created by preemption begins to manifest itself. There is no dispute over the amounts owed Jane. Jane promptly receives payment for her full compensation on the job.

\begin{footnotesize}
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\item[169] See id. Twelve percent of gross pay ($3.24 per hour at the $27.07 rate) is deducted from Judy's paycheck and sent to the Los Angeles Electrical Workers Credit Union, which is a vacation fund from which Judy can withdraw at specified times in the year. See Inside Wiremen's Agreement between Local No. 11, International Brotherhood of Electrical Workers and Los Angeles Chapter of National Electrical Contractors Association, §§ 7.40-7.42 (1996-1999). Her take-home pay, before taxes, is thus $23.83 per hour, with $13.90 per hour to be contributed to the various Trust Funds. Contributions to other funds, not included in the prevailing wage determination, are also required.
\item[170] The benefits package through the union trust funds are probably superior to those purchased individually by Jane, due to the size and resultant bargaining power of the multi-employer funds.
\item[171] See CAL. COM. CODE §9402 (West Supp. 1999).
\item[173] See CAL. COM. CODE § 9501(West Supp. 1999).
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$4,527.60. She uses part of the money to make her regular premium payments for her benefits, and then leaves for the vacation she had been saving for. Although there is similarly no dispute over the amount of compensation due to Judy, who did the same work during the same hours as Jane, she will only receive about two-thirds of her total compensation. Because of decisions finding her stop notice and bond claims preempted by ERISA, neither she nor the Trust Funds can collect her benefit payments by these means. She will only receive her $2,859.60 cash wages. She will not be able to join Jane on the vacation they had planned together. The money she expected to be in her account with the Vacation Fund will not be there. Worse, she may also lose eligibility for health insurance because no contributions were made to her account. Without insurance coverage, she must choose between foregoing necessary medical care or paying for it herself. Since she has already had her wages interrupted, the latter choice is not realistic.

Meanwhile, the Trust Funds are trying to collect the delinquent contributions from Unionco, pursuant to ERISA. Unionco defaults on the complaint, and the Trust Funds obtain a default judgment. When they try to enforce the judgment, they find that the Bank has already foreclosed its security interest on the meager bank accounts and equipment of Unionco. The only asset left is the account receivable for the money owed to Unionco by General Contractor for the Boondoggle Project. Federal Rules direct the Trust Funds to look to state law for the execution on their judgment. Here, though, the Trust Funds will again find that they are treated differently than other creditors.

The Trust Funds obtain a writ of execution and serve a levy on General Contractor for the money it owes Unionco. In responding to this levy, General Contractor may first deduct the money it has (through Bondco) paid to Collection Agency, as the assignee of Wires&Plugs, for the materials supplied on the job. Out of what is left, if anything, the Bank asserts a

174. Citing two Department of Labor Advisory Opinion Letters (No. 76-89, 8/31/76, and No. 78-28A, 12/5/78), the Supreme Court noted with approval that the “consistent view of the Secretary of Labor is that, under ERISA’s minimum participation, vesting and benefit accrual standards for pension plans, 29 U.S.C. §§ 1052, 1053, 1054, a pension plan covered by ERISA must award credit ‘solely on the basis of service performed for a participating employer, regardless [of] whether that employer is required to contribute for such service or has made or defaulted on his required contributions.’” Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 567 n.7 (1985) (holding that trust funds may enforce plan requirement that employers submit to an audit) (emphasis added).


178. See Cal. Code Civ. Code § 3193 (garnishment of money owed contractor subordinate to stop notices). If any money was owed by the county directly to Unionco, the Trust Funds would face the same problem. See Cal. Code Civ. Proc. § 708.760(a) (lien on money owed by public entity reaches only amount due after deducting stop notice claims).
prior security interest, based on its UCC Financing Statement. Not only do the Trust Funds receive nothing, but they have incurred administrative costs of the delinquency and out-of-pocket costs for legal fees.

The disparity is further exacerbated if Unionco files bankruptcy. The automatic bankruptcy stay will prevent the Trust Funds from filing any action against Unionco, or enforcing any judgment they have obtained. In fact, if the Trust Funds were lucky enough to have collected any money just before the bankruptcy, they may have to return it. Filing a stop notice, however, is not stayed by a bankruptcy filing. The General Contractor, County or Bondco may still pay Jane and Collection Agency on account of their stop notices, without the money becoming property of the bankruptcy estate or subject to being avoided as a preference. The priority given benefit contributions under the Bankruptcy Code is of little use to the Trust Funds. The prior stop notices of Jane, Collection Agency and others and the security interest of the Bank, plus the administrative costs of bankruptcy, leave nothing left for any unsecured creditors.

In sum, if the statutory scheme had been allowed to operate as written, both Jane and Judy would have been able to recover the full amount of compensation for their work on the Boondoggle Project. The Trust Funds would have been able to recover its debt on the same basis as the Collection

179. Under Cal. Com. Code § 9301(1)(b), a security interest takes priority over a levy served after the security is perfected. Here, the Bank perfected its security, by filing a Financing Statement at the time the money was loaned or the credit line was opened, long before a levy could be served. A mechanic lien or stop notice, however, has priority even over a previously-perfected security interest. Cal. Com. Code § 9310. Thus, the other stop notice claimants are first in line for the money due Unionco on the Project, the Bank is next, and the Trust Funds (along with Judy) are last.


181. With certain exceptions, a bankruptcy trustee may avoid any payment to a creditor within ninety days of the bankruptcy filing on account of an antecedent debt. 11 U.S.C. § 547(b) (1998). However, this provision of the Bankruptcy Code may conflict with the provision in ERISA preventing a return of money to employers, except under narrow circumstances. 29 U.S.C. § 1103(c) (1998).


183. See In re Arnold, 908 F.2d 52, 55-56 (6th Cir. 1990) (since general contractor has independent obligation under state law to pay material supplier of subcontractor, those payments, even if made after the subcontractor filed bankruptcy, were not avoidable preferences or property of the estate); Keenan Pipe & Supply Co. v. Shields, 241 F.2d 486 (9th Cir. 1956); In re Flooring Concepts, Inc., 37 B.R. 957 (B.A.P. 9th Cir. 1984) (prepetition payments made by general contractor to supplier of bankrupt subcontractor were not avoidable preferences where general contractor had independent obligation under mechanic lien law); Gold v. Alban Tractor Co., 202 B.R. 424, 426-429 (D.C. E.D. Mich 1996) (same, with independent obligation arising under Miller Act on federal project); but see Angeles Elec. Co. v. Superior Ct., 27 Cal. App. 4th 426, 432-41 (1994) (payment by general contractor to subcontractor in exchange for lien release was an avoidable preference when the general contractor then made an assignment for benefit of creditors under California law).

184. 11 U.S.C. § 507(a)(4) (1994). The first $4,300 of contributions, per employee, arising from work performed within 180 days of the bankruptcy filing, is given priority ahead of most other unsecured creditors. A similar priority is given under California law for an assignment for the benefit of creditors or state receivership. See Cal. Code Civ. Proc. § 1204. Ironically the same reasoning that would hold mechanic lien laws preempted, would hold this state law provision preempted as well. If so, trust funds would have an incentive (perhaps even a fiduciary duty) to put delinquent employers into an involuntary bankruptcy under 11 U.S.C. § 303 in order to preserve the priority status of contributions.
Agency (who was also assigned a claim arising from labor or materials on the job). If stop notice and bond claims by Trust Funds are preempted, Judy is able to recover only two-thirds of her compensation, due to her status as a union employee and a participant in ERISA plans. And because other creditors of a similar type are given priority, the Trust Funds are not able to recover their debt at all. While Jane leaves on her vacation, the Collection Agency and Bank count their profits, Judy goes without health insurance and her vacation account and the Trust Funds hold a worthless federal judgment.

Unfortunately, this scenario is not an exaggeration—it has been the common course of events since benefit contributions have been carved out of the employee compensation protected by state statutes. It affects real people in the real world.  

By carving out, in the name of preemption, benefit contributions from the labor costs protected by various state laws, courts have made ERISA plans second-class creditors. Worse, they have deprived employees the full protection of laws enacted more than a century before ERISA. This is not only wrong as matter of morals and policy, it may be the basis for a legal action under the Civil Rights Acts.

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185. Extrapolating from census data, the author estimates the annual loss of delinquent contributions in the construction industry to be in the billions of dollars annually, with about one-half billion in California alone. According to the U.S. Census Bureau, 1997 Economic Census: Advance Summary Statistics for the United States, 1997 NAICS Basis, the 1997 payroll for the construction industry was $174,678,608,000. Approximately 28.8% of this, or $50,307,439,104, is for benefit contributions. U.S. Department of Labor, Bureau of Labor Statistics, News, Employer Costs for Employee Compensation—March 1998 at 14 (Construction). One of the largest employee benefit funds, the Construction Laborers Pension Trust for Southern California, reports $4,241,035 unpaid contributions for $51,780,248 paid contributions in its Plan Year 1997 Form 5500. Applying this same ratio (8.19%) of unpaid to paid contributions to the national figures, there would be $4,120,405,333 in unpaid contributions each year throughout the nation. The experience of this fund, of course, could be more or less than the norm. But even if the Laborers delinquency rate were four times the norm, the annual delinquency would still be over one billion dollars.

The last available figures separated by state are from 1992. The 1992 U.S. Census Bureau, Census of Construction Industries: Geographic Area Summary of Findings, shows California had a $9,814,596,000 construction payroll, compared to a national total of $83,048,158,000. Applying the 1992 ratio of California payroll to national payroll (11.8%) to the 1997 national figures, above, there is nearly one-half billion dollars ($486,207,829) lost in California annually for unpaid benefit contributions.

While these figures are admittedly inexact, and will vary considerably from year to year, state to state, and fund to fund, the magnitude of the problem is undeniably large. Whether the total delinquent contributions are in the hundreds of millions or tens of billions annually, they are a significant amount. Even a small loss of contributions can have a significant effect on individual workers when it makes the difference in qualifying for needed benefits.
IX.
DISCRIMINATION AGAINST EMPLOYEES BECAUSE OF THEIR EXERCISE OF RIGHTS TO BARGAIN COLLECTIVELY AND PARTICIPATE IN ERISA BENEFIT PLANS

Jane and Judy have clearly been treated differently. The reason that Judy may not collect her entire compensation for her work on the Boondoggle Project, and Jane may, is that Judy has exercised her rights to participate in the collective bargaining process and to participate in an ERISA employee benefit plan. These are rights protected by federal law. Thus, the state law rulings finding and compelling different treatment for Judy may also give rise to a claim under Section 1983 of the Civil Rights Acts of 1871.

The Supreme Court endorsed such a claim in *Livadas v. Bradshaw*. *Livadas* involved the refusal of the California Labor Commissioner to enforce a wage claim for late payment of wages. The employee was a member of a union subject to an agreement which had an arbitration clause. The Labor Commissioner believed that any attempt to enforce the wage claim under state law would be preempted by federal law. She argued that her disposition of the employee’s claim would necessarily involve reference to the collective bargaining agreement to determine the proper wage rate, and could possibly be covered by the arbitration clause. The Supreme Court found this preemption argument incorrect. The “reference” to the collective bargaining agreement was only to measure the wage rate for calculating damages. The Court found the Labor Commissioner’s reasoning not only incorrect, but dangerous. “A state rule predating benefits on refraining from conduct protected by federal labor law poses special dangers of interference with congressional purpose.” The LMRA “cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law.” The Court found that the Labor Commissioner’s policy on preemption was not only incorrect, but was itself “in fact preempted by federal law . . . .” Finally, the Court held that the Labor

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188. 512 U.S. 107 (1994).
189. 512 U.S. at 113 n.6. The Labor Commissioner believed this result was compelled by the court decision in Plumbing, Heating and Piping Employers Council v. Howard, 53 Cal. App. 3d 828 (1975). That case involved a dispute over the applicable rate of pay under a collective bargaining agreement. Livadas’s pay, however, was undisputed. 512 U.S. at 124-25.
190. 512 U.S. at 124-25. Similarly, the “reference” to employee benefit plans in the statutes at issue in this article is only to measure the rate of contributions due as part of the employee’s total compensation.
191. 512 U.S. at 116.
192. Id. at 123.
193. Id. at 132.
Commissioner's refusal effectively deprived the plaintiff of her right to participate in collective bargaining guaranteed by Section 7 of the NLRA, and thus established her claim for violation of 42 U.S.C. § 1983.\footnote{194}

What courts have done to employees' rights to protect their compensation under state mechanic lien, stop notice, and bond claims is similar to what the Labor Commissioner tried to do to Livadas. To paraphrase the Livadas decision, decisions removing benefit contributions from the protection of state laws "[have] presented [Judy] and others like her with the choice of having state-law rights under [mechanic lien, stop notice, and bond statutes] enforced or exercising the right to enter into a collective bargaining agreement with [participation in employee benefit plans]."\footnote{195}

Thus, the denial of state law protection of compensation on construction work, based on participation in ERISA plans, should be actionable under § 1983. Judy may have a claim under § 1983 for the way she was treated. However, her claim must first meet the "state action" requirement.\footnote{196} The "state action" requirement of § 1983 may or may not be met under different circumstances. If the public agency simply refuses to even accept or process a stop notice, or a County Recorder refused to record a mechanic lien, there is clearly state action in the same way the Labor Commissioner refused to process Livadas's wage claim. However, if a bond company denies a bond claim or a court refuses to enforce a stop notice, the existence of state action is less clear. In American Manufacturers Mutual Insurance Co. v. Sullivan,\footnote{197} the Supreme Court held that there was no state action in the delay of worker compensation benefits by private insurers which was authorized, but not compelled, by state law. "Such permission of a private choice cannot support a finding of state action."\footnote{198} On the other hand, the denial of a payment bond claim on the grounds of preemption is compelled, not just permitted, by state law. It is the interpretation of state law in such a way as to carve out employee benefits from its protection which compels the resultant harm to Judy. "[A] State is responsible for the discriminatory act of a private party when the State, by its law, has compelled the act."\footnote{199}

Even where there is not sufficient state action to invoke § 1983, the disparate treatment accorded between union and non-union employees, participants and non-participants in ERISA plans, and trust funds and other

\footnote{194} Id. at 132-34.\footnote{195} Id. at 116.\footnote{196} Section 1983 prohibits certain discrimination carried out by private individuals "under color of law." To maintain a claim against private parties, plaintiffs must allege a nexus between the private acts of discrimination and "state action." See generally 1 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 930-45 (3d ed. 1996)\footnote{197} ___ U.S. ___, 119 S.Ct. 977 (1999).\footnote{198} 119 S.Ct. at 987.\footnote{199} Adickes v. S.H. Kress and Co., 398 U.S. 144, 170 (1970).
similarly situated creditors (and assignees of creditors)\textsuperscript{200} requires that the disparate treatment itself be held preempted.

X.
CONCLUSION

The first California Legislature would have indeed been confounded by the cases holding their mechanic lien law partially invalid, based on another law supposedly passed for the benefit of workers. The mirror-glass logic of ERISA preemption has finally been turned around by Supreme Court decisions, and the lower courts should welcome the return to a more pragmatic reasoning. The lower courts should overturn their earlier decisions finding these remedies preempted; otherwise, they may soon see civil right claims brought by employees to vindicate their right to collective bargaining and to participate in benefit plans without having to give up their state law protections. One way or another, and as originally intended, the protection of workers' payment in \textit{full} on construction jobs should be guaranteed. The "sun shall not go down upon it."\textsuperscript{201}

\textsuperscript{200} There is also disparate treatment between union-signatory general contractors and non-union general contractors. Under some collective bargaining agreements, general contractors may be held liable for the delinquency of their subcontractor. \textit{See}, \textit{e.g.}, Southern California Master Labor Agreement between Southern California General Contractors and Southern California District Council of Laborers, art. XXIII.B (1997). Those union general contractors thus have a contractual liability, whether or not the statutory liability is enforced. Without preemption of these remedies, they would stand on the same footing as their non-union competitors, but preemption has eliminated this liability for non-union general contractors, giving them an unfair competitive advantage.

\textsuperscript{201} \textit{Deuteronomy} 24:14-15.