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When State and Federal Laws Collide:
Preemption—Nightmare or Opportunity?*

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I
PRESENTATION OF WILLIAM B. GOULD IV

Thank you very much.
This is the third labor law symposium that I have spoken at down here and it's always a pleasure to be here.

Preemption is an issue that has been with us in labor law for some considerable period of time now. Preemption is a constitutional doctrine, as we know, which has two constitutional sources: the supremacy clause, article VI of the Constitution,1 and the commerce clause, article I, section 8 of the Constitution.2

It is the confluence of these two constitutional provisions which creates the doctrine of preemption and the view held by the courts, both inside and outside the labor arena, that in some instances the exercise of authority, or the possession of jurisdiction, by the states would be inconsistent with federal regulatory legislation because of the potential for collision and the potential for lack of uniformity existing between state and federal instrumentalities.

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1. "This Constitution, and the Laws of the United States which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.
2. "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

It is that potential for collision which has led to the "occupation of the field" test in preemption, the view that where Congress has legislated in detail about a particular subject matter and a congressional intent can be inferred from that detailed legislation, that renders the exercise of state jurisdiction unconstitutional. Generally, in the labor arena we speak about federal law as being dominant and depriving the states of jurisdiction, although there is one area of labor law where the states possess jurisdiction but nevertheless are deprived of their ability to devise their own law because of the potential for inconsistency.

There are three major areas of preemption in labor law. One is the Garmon case, in which the Supreme Court said in 1959 that where a subject matter is arguably protected by section 7 or prohibited by section 8, the unfair labor practice provisions, the states and also the federal courts are deprived of jurisdiction because of the doctrine of primary jurisdiction, and respect for the expertise of the Board. Now numerous exceptions have been created in the Garmon context, but Garmon still remains the law. That is the general law today, with regard to sections 7 and 8.

There is another line of cases which really begins with the Machinists case, which deals with economic self-regulation. Under the Machinists doctrine the states are denied jurisdiction even though the activity involved is neither protected nor prohibited, where state involvement would interfere with the use of economic weaponry, and therefore unconstitutionally tip the scales on labor's side or management's side. Representative of this line of cases, as I say, are the Machinists case and also Teamsters v. Morton, where the Supreme Court held that where secondary pressure was not made unlawful by the federal statute, state regulation was nevertheless preempted because of the involvement in the scheme of economic self-regulation which is promoted by the federal statute.

The third area of preemption, and one that I want to spend most of my time talking about today, is the area which I referred to earlier, where the states continue to possess jurisdiction but are precluded from fashioning a labor law which is inconsistent with federal labor law. That

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3. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). In this landmark case, the Supreme Court clarified the doctrine of federal preemption under the National Labor Relations Act ("NLRA") (codified as amended at 29 U.S.C. §§ 151-169 (1982)). The Garmon decision pointed out that state court jurisdiction must yield to federal jurisdiction when a dispute is "arguably" or "potentially" subject to §§ 7 or 8 of the NLRA, 29 U.S.C. §§ 157, 158 (1982). The Garmon type federal preemption is one of three types which has been recognized by the Court.

4. International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) (state could not regulate self-help economic activity in an area intended by Congress not to be regulated by the state or by the NLRA).

5. Local 20, Teamsters v. Morton, 377 U.S. 252 (1964) (state law preempted even though it involved activity not specifically protected or prohibited by the Act).
is section 301,6 the provision of the Taft-Hartley amendments which provides for the enforcement of collective bargaining agreements. The Supreme Court early on said that the states possess the jurisdiction that they possessed prior to the enactment of the Taft-Hartley amendment, section 301, but that they are obliged, at least in the area of substantive law, to fashion a uniform law of labor contract which is federal law. So in that sense, the states are precluded.

Now I want to refer to three major Supreme Court cases which have been decided recently, just in these past two Terms, and discuss with you some of the issues that they raise.

The first one I want to discuss is the *Golden State*7 case, a case that you are undoubtedly familiar with here, which was decided by the Supreme Court on April 1, 1986. In that case the Court held eight to one that a city could not withdraw a franchise from a taxi company simply because it was involved in a labor dispute. Justice Blackmun, speaking for the Court, said that the bargaining process was thwarted when the city, by virtue of its withdrawal of a franchise, in effect imposed a positive durational limit on the exercise of economic self-help. The Court held that the city's conduct with regard to the franchise directly interfered with the bargaining process, an essential concern of the Act.

Dave Rosenfeld is going to talk about the *Golden State* case itself, but there are three interesting issues that emerge from the case. The first is something I think we're going to see increasingly in the years to come in this age of cost containment and concession bargaining. There are some regulatory agencies—and I think there will be more of them, although thus far they exist mainly in areas of the country which have been traditionally inhospitable to the growth of trade unions—who refuse to pass on costs in the form of price or rate increases attributable to wages when the regulatory agency does not view those wage increases as consistent with principles of comparability.

Now, a number of things can happen as the result of the agencies' refusal to pass on the cost. Maybe the company takes less of a rate of return. Presumably, that would have no impact on the bargaining process whatsoever. But if it chooses not to take less of a rate of return, then


there is an increased potential for a strike. Also, and an essential concern of the statute, concession bargaining might change the content of the collective bargaining agreement and perhaps increase union pressures for union-sought concessions in other areas not directly related to those which are regulated by the regulatory agency.

A second issue which emerges—one which is currently pending before the Supreme Court—relates to a decision by the Michigan Supreme Court holding that disqualifying striking employees from eligibility for compensation is inconsistent with the principle of economic self-regulation. It is inconsistent for the state to provide for unemployment compensation on the part of those who are thrown out of work by virtue of a strike which their dues are financing. This also involves the principles of Golden State and Teamsters and Machinists.

A third issue, which I won’t dwell upon, relates to so-called strike-breaker legislation, something that I’m sure all of us are familiar with.

Now I want to spend most of my time here talking to you about wrongful discharge legislation and the compatibility between wrongful discharge litigation and the principles of preemption. We’ve had a Supreme Court case in this area the term before the last one. That is the case of Allis-Chalmers v. Lueck decided by the Court in 1985.

Allis-Chalmers involved a lawsuit alleging under state law a bad faith handling of an employee’s claim under a disability insurance plan included in the collective bargaining agreement. The question for the Court was whether the issue raised by the suit was essentially related to the terms of the collective bargaining agreement and therefore preempted by section 301.

The Court reversed the Supreme Court of Wisconsin, and stated that the federal interest in interpretive uniformity required that questions relating to what the agreement provided and what legal consequences were intended to flow from breaches of that agreement must be resolved by reference to uniform federal law. Whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort, any other result would elevate form over substance and allow parties to evade the requirements of section 301 by describing their action as something other than a breach of contract.

The Court in Allis-Chalmers was careful to point out that not every dispute "tangentially involving" a provision of a collective bargaining agreement is preempted by section 301 or other provisions of federal la-

8. Baker v. General Motors Corp., 420 Mich. 463, 363 N.W.2d 602 (1984). [Editor's Note: Subsequent to this presentation, the United States Supreme Court handed down its decision in this case. The Court affirmed the Michigan Supreme Court's holding that the Michigan statute in question was not preempted. Baker v. General Motors Corp., 106 S. Ct. 3129 (1986).]

The Court emphasized that section 301 was not designed to impose the substance of agreements upon parties. Furthermore, the Court noted, Congress could not be said to have intended to oust inconsistent state regulation in every instance, as would be accomplished by providing substantive provisions of private agreements with the force of law.

The Supreme Court in *Allis-Chalmers* seems to have assumed that only obligations expressly recited in the agreement could provide employees with rights to receive benefits. This was a very easy one for Justice Blackmun to handle in terms of the *Steelworkers Trilogy*\(^{10}\): the notion that anything which is not expressly in the collective bargaining agreement is not preempted and therefore not covered by the principles which *Steelworkers Trilogy* is designed to further.

It seems to me a fairly easy matter to dispose of, and Justice Blackmun had no problem concluding that Wisconsin's use of the covenant of good faith and fair dealing doctrine for an insurance claim which was covered by the collective bargaining agreement was preempted by section 301 and that the employees could not circumvent the grievance arbitration machinery or the principles of section 301. The Court stated that indeed it was concerned with this potential for circumvention in concluding that preemption was the appropriate result here.

The 64-dollar question arising in the wake of *Allis-Chalmers* is what it means for wrongful discharge litigation where employees are covered by collective bargaining agreements as a general matter. We tend to think of wrongful discharge litigation as litigation involving employees who are not represented by collective bargaining agreements.

Wrongful discharge litigation in California has emerged, from a preemption perspective, in a very curious way. If you look at the early cases, some of them speak of, for instance, retaliation for union activity as inconsistent with state public policy. Some of them condemn employer discharges. Some of the decisions condemn employer discharges for whistle blowing, for protests about working conditions. All these issues raise preemption problems.

If the Board is held to be wrong in the *Meyers*\(^{11}\) decision, as I suspect it will—it seems to me that the Supreme Court's *NLRB v. City Disposal*\(^{12}\) decision provides some of the handwriting on the wall—then the most ordinary whistle blowing wrongful discharge case outside a collective bargaining agreement as well as inside a collective bargaining agreement can be preempted under *Garmon*, because section 7 activity is

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clearly involved. This result would have to obtain unless the Court is willing to find some kind of overriding state interest in the subject matter.

The Court of Appeals for the Ninth Circuit confronted a case involving employees covered by collective bargaining agreements in *Garibaldi v. Lucky Food Stores*. Garibaldi had been dismissed for allegedly complaining to health officials about his company's shipment of adulterated milk. He then lost an arbitration proceeding under a collective bargaining agreement which covered him. The court rejected preemption arguments on the ground that California's interest in providing a course of action for violation of public policy or a statute is the enforcement of the underlying statute or policy, not the regulation of the employment relationship.

There's also a very important decision by the Supreme Court of Illinois, the *Midgett* decision, which comes to the same conclusion: that a suit alleging wrongful termination in violation of the state's public policy is not preempted by federal law, and therefore removal from state to federal court is improper.

The Ninth Circuit, in *Garibaldi*, perhaps anticipating the *Allis-Chalmers* decision, said that the covenant of good faith and fair dealing cases are really different from the public policy cases: the covenant of good faith and fair dealing cases have been those in which the court relied strongly on the lack of job security possessed by at-will employees under the former California common law; no such lack of job security exists for union employees. The court therefore was able to say that even if covenant of good faith and fair dealing cases in California and elsewhere are preempted, the public policy cases are not.

Now, let me make just three further comments about *Garibaldi*. One is that, of course, what has happened by virtue of *Garibaldi* is that you have a two-track system for employees who are covered by collective bargaining agreements. Some can go to court and obtain punitive and compensatory damages, and some go to the grievance arbitration machinery and are limited to traditional arbitration remedies of reinstatement and backpay.

The impact of *Garibaldi* may be to make many parties in California and elsewhere more interested in wrongful discharge legislation rather than wrongful discharge litigation, because obviously a two-track system, such as that which exists by virtue of *Garibaldi*, is an unwieldy one. I think that *Garibaldi* is rightly decided. I also think that it is consistent with the Supreme Court's decision in *Allis-Chalmers*, which was a very carefully limited decision.

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The argument which cuts in the other direction is that the public policy cases, or a good number of them, are preempted by virtue of *Allis-Chalmers*. That argument basically proceeds upon the theory that since all these public policy cases could be enveloped under the rubric of just cause, and just cause is the standard which is contained in most collective bargaining agreements, preemption follows, just as it did in *Allis-Chalmers*, where the disability plan was covered by the collective bargaining agreement. I don't believe that that is necessarily so. I think that unions can waive matters which, as a matter of state law, are nonnegotiable because of the state's public policy interest in protecting its citizens. It seems to me that the state's interest is an overriding one, but the collective bargaining agreement need not be synonymous with that interest at all.

It is said that the arbitration process will be disfavored as a result of *Garibaldi*. This, of course, has been said many times in the past. It was said at the time of the Supreme Court's decision in *Sinclair*, which precluded the issuance of injunctions under section 301 for union violations of no-strike clauses. I didn't notice, and I don't believe there are any people here who noticed, any appreciable decline in the interest of unions and employees in arbitration between 1962 and 1970, when *Sinclair* was good law prior to *Boys Markets*.

It was said also, in the wake of *Alexander v. Gardner-Denver*, where the Supreme Court held that despite the fact that an employee had lost an arbitration, he or she could nevertheless pursue their remedies in federal district court, that this would also disfavor arbitration. I believe that the studies that have been done in the wake of *Gardner-Denver* on the use of arbitration in connection with employment discrimination would lead one to believe that, if anything, unions and employers have become more interested in resolving disputes through their own grievance arbitration machinery now that this other forum exists out there for the regulation of the same kinds of disputes.

I don't mean to say, by making these comments, that we have a desirable state of affairs in the wake of *Garibaldi*. What I do mean to say is that it seems to me that many of the criticisms aimed at *Garibaldi* are misguided. If anything, the *Garibaldi* decision argues all the more for comprehensive wrongful discharge legislation which would include a just cause standard for most employees, both outside the collective bargaining agreement and now, by virtue of *Garibaldi*, inside as well.

A final issue relates to a recent decision arising under the covenant
of good faith and fair dealing. This one is rendered by Chief Judge Peckham in San Francisco. *Scott* is a case involving the NUMMI plant in Fremont, where a probationary employee not covered by a just cause provision in the collective bargaining agreement brought a covenant of good faith and fair dealing action. *Allis-Chalmers* notwithstanding, the court permitted the employee to maintain the case, despite the principles of preemption to which the Supreme Court had referred in *Allis-Chalmers*.

Judge Peckham distinguished *Allis-Chalmers* on a number of grounds. The probationary employee did not have access to the grievance procedure and therefore was not in a position to circumvent it. Grievance arbitration procedures provide for exclusive remedies. Here the collective bargaining agreement provided for no remedy for the probationary employee, and Judge Peckham referred to previous Ninth Circuit authority, to which *Garibaldi* also referred, which indicated that the covenant of good faith and fair dealing cases are in part predicated upon the lack of job security for nonunion employees. Here also, since this employee was a probationary employee, he had no job security. Therefore, Chief Judge Peckham found that the normal reasoning of the covenant of good faith and fair dealing cases and the preemption cases was not appropriate. He reasoned that otherwise, the individuals who do not belong to a union and do not have access to grievance procedures would be denied minimal protections. Also, he referred to the narrowness of the *Allis-Chalmers* holding, a narrowness emphasized by the Supreme Court itself in its conclusion.

While, as a matter of policy, I would like to see all employees protected against arbitrary action of management, I believe that Chief Judge Peckham’s opinion was wrongly decided and that the covenant of good faith and fair dealing action brought in *Scott* is preempted by the reasoning of *Allis-Chalmers*.

Judge Peckham’s decision suggests to me in any event, that anytime you have a gap in a collective bargaining agreement and an employee is left out in the cold, as probationary employees traditionally are, for a relatively brief period of time, then you have the potential for state court jurisdiction, the principles of preemption notwithstanding.

I believe that that is inconsistent with the reasoning of *Allis-Chalmers* and I believe that it is also inconsistent with the explicit reasoning of the Supreme Court in the *Steelworkers Trilogy* and its progeny, which talked about the virtues of industrial self-government. While these are virtues with which I have not always been particularly enamored, Justice Douglas was quite fond of them. Of course, most of us arbitrators would not recognize ourselves in the mirror in the morning when we look at the nice things that Justice Douglas says about us and the expertise which
we're supposed to possess. But Justice Douglas' views are still the law. I believe that Chief Judge Peckham's decision in Scott is inconsistent with the promotion of industrial self-government and, most importantly, with the expectations of the parties, labor and management, which are tied to the system of industrial self-government, as promoted by the Supreme Court in Steelworkers Trilogy.

It's been a pleasure to be here with you this morning and to reflect upon this area of law that has been with us for so long.

Thank you very much.

II

PRESENTATION OF HOWARD C. HAY

Thank you.

I think it is fair to say that the management perspective is clearly in favor of preemption in virtually all circumstances. I'm therefore going to come at this problem from that point of view, very much in favor of preemption for a number of reasons.

There are three different arguments in favor of preemption in any given case. One of them goes under the label of Garmon, and is basically the proposition that where the activities in question are either arguably protected or arguably prohibited by the National Labor Relations Act, state law regulating those activities is preempted. That's called the Garmon doctrine.

The second argument that is frequently made under the National Labor Relations Act frequently goes under the label of the Machinists argument. That is the proposition that where the state's involvement would interfere with the free play of economic forces which the National Labor Relations Act has deliberately left unregulated, state regulation is preempted.

The third theory to argue on behalf of preemption is best called the Lueck argument, after Allis-Chalmers v. Lueck. And that is the proposition that where the claim being made in the lawsuit is substantially dependent on an interpretation of the collective bargaining agreement, then it would be preempted.

So basically in every case that I get, and I would suggest in every case you get, what you would do is analyze to see whether that case is preempted under any one of those three theories, because you don't need to hit all three. You only need to hit on one of them, and if you can

bring yourself within the line of cases under either Garmon, Machinists, or Lueck, then it's preempted.

Obviously, there are all sorts of applications of those three doctrines but what I'm going to focus on for the next several minutes, and really what all of my comments have to do with, is wrongful termination lawsuits. Basically, you have to start by dividing those lawsuits into two kinds of categories. The first category is where the plaintiff was covered by a collective bargaining agreement during the time of the activities in question. The second category is where the employee, the plaintiff, was not covered by a collective bargaining agreement. The analysis of those two situations is radically different.

Let's take the situation of an employee bringing a wrongful termination in state court, where he was covered by a collective bargaining agreement. It's perfectly clear that the general rule, true about ninety percent of the time, is that the employee's state court lawsuit will be preempted. The leading case for that proposition is the Lueck case, but there are eight other decisions which applied that general rule in essentially eight or nine different circumstances. So whenever you encounter a situation where the person was covered by a collective bargaining agreement, you have at least nine cases, including Lueck, which stand for the proposition that that case is preempted.

However, what we have in various stages of development are four exceptions to the general rule, so you look to see whether your case

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22. National Metal Crafters, Div. of Keystone Consol. Indus. v. McNeil, 784 F.2d 817 (7th Cir. 1986) (state law requiring employer to pay vacation benefits preempted because the law did not establish a duty independent of the collective bargaining agreement; it merely required the employer to keep its contractual promise to provide the benefits); Harper v. San Diego Transit Corp., 764 F.2d 663 (9th Cir. 1985) (employee's state law claim of "breach of covenant of good faith and fair dealing" preempted because the collective bargaining agreement's "good cause" procedure provided the same protection to the employee); Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985) (union employee's state law claim that he was illegally subjected to a drug search held preempted as the collective bargaining agreement provided for drug testing, making the claim subject to the grievance and arbitration procedure); Truex v. Garrett Freightlines, Inc., 784 F.2d 1347 (9th Cir. 1985) (union employees' claim for "intentional infliction of emotional distress" based on allegation that employer had issued unjustified warning letters held preempted as it was subject to the grievance and arbitration provisions of the collective bargaining agreement); Michigan Mut. Ins. Co. v. United Steelworkers, 774 F.2d 104 (6th Cir. 1985) (insurance company's claim for contribution from the union because the union did not fulfill its duty of fair representation held preempted because the right was not created independently of the collective bargaining agreement); Evangelista v. Inlandboatmen's Union of Pac., 777 F.2d 1390 (9th Cir. 1985) (employee's state law claims against an employer and a union for wrongful discharge, intentional interference with economic advantage, and inducing breach of contract were preempted because they simply restated the employee's claim that the employer breached the collective bargaining agreement and the union breached its duty of fair representation); Cavins v. Aetna Life Ins. Co., 609 F. Supp. 309 (E.D. Wis. 1985) (applying Allis-Chalmers, the court held that five state law claims of action were preempted because resolution of the claims would depend on interpreting the collective bargaining agreement); Marine Transp. Lines, Inc. v. International Org. of Masters, 609 F. Supp. 282 (S.D.N.Y. 1985) (union's claim that employer engaged in activities designed to undermine the union's status as the employees' bargaining representative dismissed on the ground that it had failed to exhaust the arbitration process).
might fall within one of the four exceptions. The first exception is best labeled the Garibaldi v. Lucky Stores exception, where the employee covered by a collective bargaining agreement alleges that his termination was motivated by a reason which is prohibited by either state statute or state public policy. The Ninth Circuit in Garibaldi said that kind of a case can be brought by the person directly to superior court without regard to the collective bargaining agreement. The Garibaldi idea of the state statute or state public policy being the motivation for the termination has also been applied in a case called Bloom v. Teamsters 952. So you have Garibaldi and Bloom, two good examples of the Garibaldi exception.

There are, on the other hand, limitations to this, the most important of which is a case called Olguin v. Inspiration Consolidated Copper Co., which makes clear that if the employee's claim is really that a federal policy—as opposed to a state policy—was violated, then preemption occurs.

Another interesting case, very recent, is Friday v. Hughes Aircraft Co., which is about three weeks old and it's out of the appellate court in Orange County. Basically, the gentleman was protesting safety conditions and therefore one might have thought that this was a Garibaldi situation. Indeed, that's what he argued. But the collective bargaining agreement contained some language about safety. Therefore, the state court held that the claim did not fit within Garibaldi. Rather, it had to be processed through the collective bargaining agreement because the collective bargaining agreement did provide language dealing with the claim.

So basically, the first exception to preemption for employees covered by collective bargaining agreements is Garibaldi. The significant limitations are Olguin and Friday v. Hughes. It does seem to me that Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied, 105 S. Ct. 2319 (1985).


24. Bloom v. Teamsters Local 952, 783 F.2d 1356 (9th Cir. 1986) (union official's claim that he was wrongfully terminated in retaliation for refusing to alter minutes of union meeting not preempted because a contrary finding would not promote union democracy or the rights of union members).

25. Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984) (union employee's claim that he was discharged in retaliation for complaining about OSHA safety violations held preempted, as state has no interest in enforcing federal statutes).

26. Friday v. Hughes Aircraft Co., 179 Cal. App. 3d 947, 225 Cal. Rptr. 89 (1986) (union employee's claim that he was terminated for generally complaining about "haphazard and dangerous handling of volatile chemicals" held preempted because safety in the workplace was expressly covered by the collective bargaining agreement; unlike the plaintiff in Garibaldi, the employee "did not report the clear violation of a specific statute for the protection of the general public.").

27. See also Vantine v. Elkhart Brass Mfg. Co., 762 F.2d 511 (7th Cir. 1985) (claim for retaliatory discharge under state workers' compensation law held preempted as it raised an issue under the "just cause" provision of the collective bargaining agreement); Johnson v. Hussmann Corp., 610 F. Supp. 757 (E.D. Mo. 1985) (union employee's state law claim alleging that his employment was
is correctly decided. The real question is its refinement and application in other cases. For example, I do think that Friday v. Hughes is correctly decided where it's clear that the collective bargaining agreement addressed the kind of protest which the employee was making. That's the first exception.

The second exception involves the employee under a collective bargaining agreement who brings a cause of action for intentional infliction of emotional distress. In other words, "I was covered by a collective bargaining agreement but they intentionally inflicted emotional distress and I don't want to screw around with the collective bargaining agreement. I want to run right in and get my million dollars from the state court jury." The three cases which suggest that that is possible are Alpha Beta v. Nam, DeTomaso v. Pan American, and, by implication, Farmer v. Carpenters Union. The first two of these cases hold that an employee covered by a collective bargaining agreement could go to the state court with his intentional infliction claim. Farmer does not hold that, but there is language that might suggest that conclusion. The better decided cases reject that, and there are at least four.

First of all, Lueck v. Allis-Chalmers would be applicable to the great majority of situations where the employee is saying that he was intentionally inflicted with emotional distress. There would be some involvement of the collective bargaining agreement in almost all such circumstances, and therefore Lueck demonstrates that Alpha Beta and DeTomaso are wrong.

The second case which directly addresses it is a Ninth Circuit decision called Truex, which is about a month old. It specifically deals with the question, and basically says that Lueck makes clear that the intentional infliction claim by a person covered by a collective bargaining agreement is preempted in part because of the collective bargaining agreement); Bartley v. University Asphalt Co., 111 Ill. 2d 318, 489 N.E.2d 1367 (1986) (union employee's state law claim that he was discharged for cooperating with FBI investigation of employer held preempted).
agreement is preempted. So *Truex* specifically rejects the *Alpha Beta, DeTomaso* exception. Two other cases that do that are *Buscemi*,\(^{32}\) and the *Friday v. Hughes Aircraft* case.

So whereas I think that there is merit to the *Garibaldi* exception, if it is narrow, I think there is no merit at all to the intentional infliction exception. The trend after *Lueck* and *Truex* is clearly in that direction, and if I were a plaintiff’s lawyer, I would not pursue that as much as some other cases.

The third exception is sort of the notion that “I’m covered by a collective bargaining agreement but I had a separate contract.” In other words, I had a special deal that nobody else had, or that very few other people had. There are two illustrations of that.

One is the *Scott v. NUMMI*\(^{33}\) case, where it’s clear that the person is covered by the collective bargaining agreement. It’s clear that he is a probationary employee. It’s clear under the collective bargaining agreement that he can be terminated without cause. And so Chief Judge Peckham decides that, gee, he must have an independent contract that we could give him a right here. Therefore, Chief Judge Peckham seems to find, the probationary employee can bring a state court case, whereas if he had passed his probationary period, he clearly could not have.

I agree with Bill Gould—which is a pleasure, because I don’t always agree with Bill, and I never like disagreeing with him—that *Scott v. NUMMI* is incorrectly decided and it’s absurd. The logic of a situation where you have a sixty-day probationary period and if you fire the person at the fifty-eighth day, they can sue you in state court for one million dollars, but if you fire them on the sixty-second day, it’s preempted, strikes me as absurd.

On the other hand, there is one other very recent case called *Williams v. Caterpillar*,\(^{34}\) which is a Ninth Circuit decision. It’s sort of the same theory that some people covered by a collective bargaining agreement had a separate contract. This one arises in what strikes me as very appealing cases from the plaintiff’s perspective.

Basically, the plaintiffs were supervisors and they said that while they were supervisors they were made promises about job security. Thereafter, because of bona fide layoffs they were reduced into the bargaining unit, and therefore became covered by the collective bargaining agreement, and then were laid off when the plant closed. So basically

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\(^{32}\) *Buscemi v. McDonnell Douglas Corp.*, 736 F.2d 1348 (9th Cir. 1984) (wrongful termination claim held preempted where employee claimed retaliation for protected concerted activity).

\(^{33}\) *Scott v. New United Motor Mfg., Inc.*, 632 F. Supp. 891 (N.D. Cal. 1986) (claims of union employee who was discharged during probationary period for breach of the implied covenant, violation of public policy, fraud, and intentional infliction of emotional distress held not preempted because he had no collective bargaining protection against discharge or right to initiate arbitration).

\(^{34}\) *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir. 1986).
they were suing saying, "Yeah, I was covered by a collective bargaining agreement but I had a special deal that I cut while I was a supervisor."

The Ninth Circuit in that case says that's right, those supervisors can bring a lawsuit based on the theory that even though they were terminated under the collective bargaining agreement, their allegations suggest that there is a valid contract separate from the collective bargaining agreement.

Analytically that is unsound for a number of reasons, but it's clearly the sympathetic case which seems to me a tough case. So while I disagreed with it, it does seem to me that for the people who are terminated under a collective bargaining agreement or have their rights under the collective bargaining agreement, that case is an interesting application and strikes me as a much more defensible one than Scott v. NUMMI.

The fourth exception would be the employee covered by a collective bargaining agreement who brings a fraud or misrepresentation kind of claim, which at the heart is really the same thing as Williams v. Caterpillar. In other words, he's saying, "There was some misrepresentation or fraud involved in my circumstances of getting under the collective bargaining agreement, and therefore I'm not suing on a contract, I'm suing on a misrepresentation theory." The case that suggests that such an employee might get somewhere, it seems to me, is the Belknap case, which has some favorable language about not lying to people, although the plaintiffs in that case were not covered by a collective bargaining agreement, and that's part of the decision too.

The best case that I found that rejects the notion that a person covered by a collective bargaining agreement can bring a fraud case is Mason v. Continental Group. It's an Eleventh Circuit decision which basically says that if you claim that you got misrepresented into that collective bargaining position, that's too bad, you still take your case under the collective bargaining agreement. It does seem to me that that is an appropriate decision.

So, that's my analysis of preemption of people covered by collective bargaining agreements. Ninety-five percent of the cases are clearly preempted. There are four exceptions which are in various stages of development. Garibaldi is appropriate; the other three are much less so.

As a practical matter, given the numerous advantages of arbitration over the court system, putting these things into arbitration on balance is better, philosophically. I think that Bill Gould and I in our differences

35. Belknap, Inc. v. Hale, 463 U.S. 491 (1983) (state action for misrepresentation brought by strike replacements held not preempted because employer's action was neither arguably prohibited nor protected by the Act and replacements lacked any remedy under the Act).
on the State Bar report basically did agree that in most situations arbitration is preferable to litigation. And the Lueck decision, which is fairly recent, concludes with sort of glowing terminology about how nice arbitration works. So I do think that the Supreme Court will move us toward resolving more of these disputes under the collective bargaining agreement.

On the other hand, taking now the situation of the employee who’s not covered by a collective bargaining agreement, clearly the general rule is exactly the opposite. An employee bringing a state law wrongful termination case who is not covered by a collective bargaining agreement, is usually not preempted unless the employer can demonstrate that the conduct in question in the lawsuit was either arguably protected or arguably prohibited by federal law. So most of the time when the employee is bringing an action in state court and he was not covered by the collective bargaining agreement, the Garmon set of cases will be the best argument for preemption.

Belknap, Linn v. Plant Guards, and Farmer v. Carpenters are examples of the Supreme Court saying that there is no preemption either because it was not arguably protected or prohibited, or because the particular conduct in question was viewed as involving a vital state interest.

On the other hand, there are a number of cases where preemption was found either because the conduct was arguably an unfair labor practice, or because the employee was arguably engaged in protected concerted activity and was terminated for that. The claim of an employee who is terminated for protected concerted activity is preempted. Among other cases, Buscemi so holds.

My friend Jay Roth tells me that I’ve taken my twenty minutes,
which is convenient, because I've told you all that I had planned to tell you about the subject.

III

PRESENTATION OF DAVID ROSEN Feld

When Victor Van Bourg asked me to take his place today, I said I was more than pleased because I had a theory about preemption which I would like to espouse, and I knew it was not entirely consistent with his theory.

He said, "But I want you to give my ideas." And I said, "I'm sorry, Victor, it's a matter of preemption; I will be there, you won't."

I agree that Scott \(^{39}\) is entirely wrongly decided on the ground of preemption, but for a different reason than Howard has pointed out to you. I want to lead up to that concept in the course of my discussion of why, from at least a trade union point of view, the preemption doctrine has very serious problems.

In my view, deregulation of the workplace is probably in labor's best interest, to use a phrase that perhaps is not applicable to labor regulation. It is because I think today we can do better without the law being a shield or a sword. Let me illustrate this by explaining a little bit about the history of labor legislation.

From my point of view, labor legislation has been the history of the preemption doctrine. The Norris-La Guardia Act\(^ {40}\) in effect preempted the federal courts from entertaining certain litigation in labor disputes. Although not couched in the preemption doctrine, that is the effect of Norris-La Guardia. When the Wagner Act\(^ {41}\) was enacted and subsequently Taft-Hartley, there were no explicit provisions regarding preemption other than section 14(b).\(^ {42}\) But the courts brought the preemption doctrine from other cases into labor legislation and Congress, when it amended Taft-Hartley in 1959, never rejected that proposition and in fact accepted it.

OSHA\(^ {43}\) has its own preemption provision. ERISA\(^ {44}\) has its own preemption provision, a provision which has been very strongly upheld. Those preemption provisions and concepts are ones that labor supported.

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42. Id. § 164(b).
When preemption cases came to the Supreme Court, the amicus briefs that labor filed supported the concept of the broadest preemption.

The one statute that rejects the preemption doctrine is the Landrum-Griffin Act, the one statute that most hurt labor. When you take a close look at Landrum-Griffin, you'll see that with respect to Title I rights, Title II, Title IV and Title V rights, there are explicit provisions saying state law may still be used by plaintiffs to govern those internal union disputes. You can still use your state law concepts in trusteeships, you can still use them in the area of fiduciary duty, you can still use them with the Title I guarantees of free speech. With respect to elections, the Secretary of Labor has exclusive jurisdiction at a point in time after the election, but before that, your state and federal law remedy still exists.

So the one statute that was enacted against labor has a clear doctrine of no preemption. Go ahead and go to state court in addition to federal court. I think this illustrates the important point about preemption; that it’s a matter of which side you’re on, where you want to assert the doctrine.

With respect to preemption, I think a good argument can be made that, with respect to the laws that are on the books, trade unions can make an effective use of existing law if we can somehow limit the preemption doctrine. There are two fields in which this happens. One is with respect to federal law, that is federal preemption versus federal labor law, although I think that is a misnomer. The other, of course, is state law.

Let me just give you one example of how federal laws can be effectively used, as a sword, as long as we get beyond or around the preemption doctrine. And that is the use of RICO. Some of you probably saw a case reported about a month ago—it happens to be one of my cases, but I think it’s an effective example of this—where we brought a suit alleging that a management lawyer and some employers had conspired to bring in an employer-dominated union.

Now normally that sounds like something that would be preempted, that you couldn’t bring as a separate lawsuit, but because we were able to allege that there were payments that were violative of section 302 Taft-Hartley, we got beyond the preemption doctrine. Judge Karlton ruled that as long as you can allege that in the course of aiding another union,
payments were made in violation of 302—that is, payments to a union official by management—you're not preempted.

Judge Karlton in that same case ruled, however, that you can't make a mail or wire fraud allegation—that in the course of this conspiracy or conduct, the employer, or the lawyers involved and the other union involved, had engaged in mail or wire fraud. He held that was preempted. It seems to be probably a correct result. I view this as an illustration of how effectively other laws can be used if we avoid preemption doctrine.

Now I know you're all sitting there saying to yourselves, well, you may well be correct using these laws as a sword, but what does labor do when management uses them as a sword or when workers use them as a sword? RICO has been used by management and RICO has been used by individuals in duty-of-fair-representation cases. I recognize that and I welcome questions on that, but on the other hand, we may have to be willing to stand and defend ourselves in those situations because we need these more effective weapons because the Labor Board and the National Labor Relations Act are so useless at this point.

You go from federal law, federal legislation, to state legislation. The state of California was, at least at one point, blessed with rather strong Industrial Welfare Commission orders, state labor laws, and there is no reason that those laws ought to be preempted. There is every reason, it seems to me, for labor to advocate stronger laws regulating the workplace. I know in saying that I am in effect suggesting that Oliver ought to be overruled.

There is one case that discusses this. When the employers attacked the Industrial Welfare Commission orders they attacked them on the ground that they regulated the workplace and cited Oliver. There was a subsequent case—Machinists v. Utility Trailer Sales Co., 141 Cal. App. 3d 80, 190 Cal. Rptr. 98, appeal dismissed, 464 U.S. 1005 (1983)—where Labor Code section 2802 formed the basis for the holding that employers had to reimburse employees whose tools were stolen in the context of a collective bargaining relationship where the contract did not explicitly provide that protection. That case once again holds that the state may regulate substantively, notwithstanding the preemption doctrine of Oliver. And I say from labor's point of view that is a good result if we can get the legislation that regulates the workplace.

That of course brings me to Golden State. I will take the Justice Rehnquist view, with all apologies to Justice Rehnquist. And that is because he says a local body or state should be able to regulate in that

context. Had the ordinance here said something to the effect that when we grant a franchise for a taxicab company, it should be on condition that during the course of this franchise, there should be no interruption of taxicab service, and provided that, in order for a franchise to be granted there be a very substantial bond, would that have not had the same effect of precluding a taxicab company from getting a franchise, except in circumstances where it had a no strike clause? I think that had the ordinance read that way, there would never have been a problem of preemption and labor could have gotten what it wanted within the context of Justice Rehnquist's dissent.

Likewise, I say that Belknap offers immense opportunities for litigation. However I think one has to concede that Belknap occurs in a sense, as Howard pointed out, in the nonunion situation because the employees had sued in Belknap in a situation where they were not represented by the union because they were the replacements.

Now all this leads me to the one area of law where I think trade unions have to protect the doctrine of preemption, and that is the concept of preemption of arbitration.

Let me just sort of summarize where I've gotten to at this point. That is, that I view the doctrine of preemption as being one that hinders us to the extent that we can obtain legislation that regulates the workplace. I recognize that in some states and in some areas we can't. But on the other hand, I say that because arbitration is the most favorable forum for litigation, we ought to expand the doctrine of preemption with respect to grievance and arbitration. Now I say that because, unfortunately, the trend has been to the contrary. Scott, of course, is perhaps the best example of that.

But let me give another example of it because it's an embarrassment having won a case and then having to come back and say it was a mistake. And that is the recent horn honking case, Garcia v. NLRB.54

Dominic Garcia was a rank and file, somewhat dissident Teamster member in Stockton, who was a United Parcel Service driver. He was told that when he had to deliver packages in the residential areas he had to toot his horn so that the customers would come running down from their door, get the package, and he could be off on his way much quicker.

Dominic said, "Well, I'm not going to toot my horn. There's a state law that says you can't unnecessarily honk your horn."

UPS said, "You better honk your horn or otherwise you'll be fired."

Dominic said, "I'm not violating state law. I'm a professional driver."

He was fired. Under the UPS procedure, UPS filed its intent to dis-

54. Garcia v. NLRB, 785 F.2d 807 (9th Cir. 1986).
charge, so he remained on the job. He went to a grievance committee, which reduced the discharge to a five day suspension.

The union thereafter grieved and said, "This policy is improper. You can’t force drivers to violate the law because the collective bargaining agreement provides very explicitly that drivers will not be required to violate traffic laws."

The grievance committee denied the union’s grievance because UPS came back and said, "We will pay the fine of any driver who’s fined for honking his horn." And the grievance committee said, "That’s an acceptable resolution of the problem," and denied the grievance.

Garcia filed a discrimination charge with the NLRB, and although I don’t need to go through how convoluted the eventual result was, it got to the Ninth Circuit on a deferral question. Should the Board defer to the decision of a grievance committee, which approved UPS’s policy requiring drivers to honk their horns in violation of state law? And for those of you who have seen the decision, and those of you who know UPS, the decision takes the Labor Board to task for approving an agreement between the union and employer which was, in my view, a reasonable solution to a difficult problem.

It seems to me that labor and management came to a solution of the problem, one that really didn’t put any driver in jeopardy. It was a solution which the Labor Board approved under the deferral doctrine, but the Ninth Circuit was not willing to approve because it encouraged violation of law.

But I say that I think now, in retrospect, that I am sorry that I won Garcia, because the result of Garcia now is that the courts will feel more free to overturn arbitration awards, more free to look at the arbitration situation and say, for whatever reason, we will not approve that arbitration award.

This process has been demonstrated in the recent AT&T Technologies case. You may be sitting there saying why is AT&T Tech a preemption case? I view it as a preemption case because it still has the question of who is to decide these disputes. AT&T Tech, of course, involves a situation where the union said that whether something was arbitrable or not was a question of interpretation of the contract. The employer said that’s true, but it’s a question of interpretation of whether something is arbitrable. And the Seventh Circuit said that the question of whether it’s arbitrable is a matter for the arbitrator to decide, and the Supreme Court reversed.

I view that as a very sad result, although probably consistent with

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55. AT&T Technologies, Inc. v. Communication Workers of Am., 54 U.S.L.W. 4339 (U.S. April 7, 1986).
the Steelworkers Trilogy, because had the Seventh Circuit said that it wasn't really deciding or remanding to the arbitrator the question of arbitrability, but was remanding to the arbitrator the question of the interpretation of the contract, the problem would not have been created and the case would not have gone to the Supreme Court.

Now I say this because what's happening today is that unions are doing the best that they can to avoid the Labor Board. Therefore, the Board's expansion of the whole deferral doctrine two years ago is something that we should welcome.

Remember that historically the deferral doctrine arose from what labor considered a favorable Board that viewed the deferral doctrine as saying to workers: your remedy is through your union, it is through the collective bargaining agreement and through the grievance and arbitration procedure, and you rise or fall—your complaint rises or falls—upon the collective action which the union can take through arbitration. And don't come to the Labor Board, because when you come to us for a remedy, you've said the union is weak.

And I agree with that proposition, and therefore, when you have a sour Labor Board, from labor's point of view, the broader the deferral doctrine, the better. And the result is that I think we have to argue in light of this preemption issue that labor arbitration preemption ought to be given the broadest deference, so that all issues that we possibly can resolve in arbitration are resolved there.

Now let me conclude by going back to DeTomaso and Scott, because there I agree with management. Let me explain why.

Once individuals may, in the collective bargaining context, bring wrongful termination cases and call them outrageous conduct, call them intentional infliction of emotional distress, the result is you've said to the employer and the union, "Why have arbitration?"

DeTomaso is the perfect example. He got a full remedy in a grievance procedure, a reinstatement with backpay, so he sued only for emotional distress and for defamation. He didn't ask for backpay. Now that tells Pan Am and the union although something was achieved through arbitration, something far more, almost $200,000 in damages, was achieved through a lawsuit. It renders the grievance procedure a nullity and an employer's going to say to the union, "Why should I agree to it?"

Howard and I were joking, but the fact is that I've told a lot of management lawyers that after you've sent the client a bill for $70,000

for defending that wrongful termination case, give me a call. I have some
clients that would be happy to sign the collective bargaining agreement
to preempt those kinds of lawsuits. And they've said, "You know,
there's some point to that."

I say, therefore, with respect to the preemption doctrine and De
Tomaso outrageous conduct kinds of things, we're better off having those
preempted. For those of you who are arbitrators in the audience, don't
forget that when it comes to that arbitration, we have the right to ask you
not only for backpay and reinstatement but for damages for infliction of
emotional distress and for punitive damages. It's not a usual remedy, but
there's nothing preemptive about it.

Isn't labor better off arguing for those remedies before the arbitra-
tor, where we have the choice of arbitrators and can tell an arbitrator, "If
you're chicken to award those damages, we don't have to pick you." And I think that from the long range point of view we're better off em-
phasizing that forum and arguing that the courts and the Board are pre-
empted from interfering in the least in the arbitration process.

IV
QUESTIONS AND ANSWERS

Has Garibaldi been appealed to the Supreme Court? A second question
asks the status of the Scott case.

PROF. GOULD: I believe that there's been a denial of cert in Garibaldi.\textsuperscript{59} Now in Scott v. New United Motor Manufacturing, Inc.,\textsuperscript{60} I believe that case is not going up. I don't know.

MR. ROSENFELD: Scott would not be appealable since it's a remand
to state court. It's only by way of a writ that it can be reviewed.

Wouldn't management argue against preemption if the NLRB was more
liberal and not in its current conservative state?

MR. HAY: No, basically for the reason that the NLRB and the arbi-
tration process are so much more efficient in resolving disputes than the
civil court system, that for basically one-tenth the cost you can get, it
seems to me, an equally fair decision.

And so, while I have my differences with arbitrators from time to
time and my differences with the NLRB from time to time, the truth is
that having efficient ways of resolving employment disputes helps every-
body. I think the NLRB and arbitrators generally do an excellent job of
doing that, and I think the state court system is akin to going to Las
Vegas, where you have one one-million-dollar winner and a thousand
people who lose their money.

\textsuperscript{59} Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), cert. denied, 105 S.
Cr. 2319 (1985).
\textsuperscript{60} 632 F. Supp. 891 (N.D. Cal. 1986).
Even when the NLRB swings back, as it will someday, and even though I have my differences from time to time with them, as a method of resolving disputes, it’s far preferable.

PROF. GOULD: My assumption would be that, for different reasons, both labor and management would prefer the Board and arbitration to state courts. Obviously management has gotten the fear of God put into it by virtue of the rise of these wrongful discharge cases and the damage awards that are available.

I have always regarded myself as a strong pro-preemption individual, although I have found myself in agreement with many of the exceptions that Garmon itself created to a strong preemption policy.

I’m curious about some of the comments that have been made against, for instance, DeTomaso, the case that is now pending before the Supreme Court of California, where an exception has been carved out. If the employer, rather than going to Mr. DeTomaso’s home, as it was alleged, to invade his privacy and to subject him to emotional harm and the like, had beaten him over the head physically, presumably there would be no preemption. I’m curious as to why the alleged harassment of Mr. DeTomaso would be preempted and yet physical violence done to him would not be preempted under Garmon itself.

And I want to make a second comment as well and that is that while I view many of the remedies associated with wrongful discharge cases and the cases themselves to be unwieldy and to be mischief-making cases, one beneficial byproduct of these cases is that they have focused our minds marvelously upon both the inadequacy of remedies that are traditionally accepted in labor law under the National Labor Relations Act and arbitration, and also inadequate standards.

Let me just give two quick illustrations of what I mean by that. The Supreme Court of Illinois—and this has caused great consternation at the Labor Board—pointed to the obvious inadequacy of an ordinary reinstatement backpay remedy, which frequently involves deductions for interim earnings, or deductions attributable to what could have been obtained through the exercise of reasonable diligence. This has been said of course for many years and I think that the fact that the courts are now recognizing that traditional remedies are inadequate in the wrongful discharge arena is going to focus many of our minds on the subject more dramatically.

Let me just give you one other example. Arbitrators—and sometimes collective bargaining agreements themselves—say that there are certain exceptions to the principle of progressive discipline, theft being

one of them. There are arbitrators' decisions which say that where a flight attendant on an airline put a bag of peanuts in her pocket at the end of the airline trip—that bag would have been thrown away in any event—she was guilty of theft, and there are arbitrators' decisions upholding such employer judgments. Now, can you imagine what a jury in a wrongful discharge action would do with a case like this? I think there is a lot of beneficial fallout, so to speak, that has emerged from these exceptions from the preemption doctrine.

And finally, of course, I view with a greater degree of skepticism, as I've said earlier, notions about expertise among arbitrators generally.

MR. ROSENFELD: I'm going to respond to Bill's comment by suggesting that in one respect, and a very major respect, it terribly undermines unions. In DeTomaso's situation, the union would be better off had he gotten backpay and reinstatement and come to the union and gotten that remedy and then been told there's nothing more that can be gotten for you. Now this may sound anti-worker, but the union as an institution is better off if the exclusive remedy is through it and it succeeds in getting the best it can.

Now that doesn't mean we shouldn't argue for more damages in the arbitration process, but the remedy should be through that process. Otherwise, the union's role is undermined. And I think that's what Lueck teaches in that respect. Lueck simply says that if an employee is denied benefits under the contract, the union should grieve it, and ask not only that the benefits be paid, but that the employer be assessed a penalty for failing to pay them.

PROF. GOULD: What do you do if the employer physically assaulted DeTomaso? What's your view there?

MR. ROSENFELD: Well, as a law professor, you're entitled to ask the more difficult questions. I think one can distinguish an assault from outrageous conduct, although it seems to me, why not argue in the grievance procedure that the employer assaulted the employee and ask the arbitrator to award substantial damages for assault? The only defense the employer would have going to arbitration is the assault was totally outside the employment context, which it wasn't. It was within the employment context.

And don't forget the same preemption principle applies in workers' compensation situations, where the exclusive remedy is workers' compensation, even for an assault.

What is the status of Assembly Member McAlister's Wrongful Termination bill? Does it deal with the preemption issue?

PROF. GOULD: There is a virtual standoff in the legislature on the

McAlister bill. The bill has been opposed by the AFL-CIO and the ACLU and the plaintiffs' attorneys.

Other legislation which was introduced in the senate, Senator Greene's bill, which largely mirrors ACLU proposals, particularly the Los Angeles ACLU, is also stalled because it is opposed by the business community and I believe also plaintiff's lawyers as well.

On the issue of preemption, neither bill covers employees who are covered by collective bargaining agreements. Insofar as unorganized employees are concerned, the bills do not address that subject matter, and the current state of law, whatever it is, would be left intact.

Can, and under what circumstances, may wrongfully discharged in-plant organizers in unorganized shops successfully avoid preemption in bringing state wrongful discharge litigation?

MR. ROSENFELD: I've thought about that problem, and it seems to me the only way to do it is very simple. You never file an 8(a)(1) or 8(a)(3). You bring your wrongful termination action based upon state law, and you don't allege in the complaint that the termination had anything to do with union activity but was rather based on something else. Now that doesn't do you a lot of good, it seems to me.

MR. HAY: Then the employer defends on the grounds we did it for the anti-union reasons.

MR. ROSENFELD: Howard points out that the employer comes back in an answer and says, "Oh, we fired him for protected activity. He was organizing."

MR. HAY: I think if you can delay your answer in affirmative defense until after the six-month statute runs, then that's exactly the way you might consider answering. I'd think twice about it, but I'd think about it.

I think the answer is that he does not have a remedy and the Ninth Circuit in the Buscemi case so held.

PROF. GOULD: Both Howard and I referred to a decision called the Malquist decision, by the Montana Supreme Court, dealing with a lawsuit brought by union employees attacking employer blacklisting in Montana. The question there was whether that was preempted. And the court held—and perhaps the union had David as its attorney—that the employees were not seeking damages for blacklisting because of union activity but simply were attacking blacklisting under a state statute.

This raises a very important theme that has emerged in the preemption cases and that is reflected in the Supreme Court's New York Telephone decision. New York Telephone involves the constitutionality of

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the award of unemployment compensation benefits by the state of New York to striking employees, the contention being that intervention is inconsistent with economic self-regulation and the Machinists line of cases. A plurality of the Supreme Court in *New York Telephone* concluded that where a statute is of general application, i.e., governing the award of employment compensation benefits to many employees, and the employer awards such benefits only to those who are involved in labor disputes, the subject matter being comprehensively addressed by the federal statute will not be found to be preempted.

The Supreme Court in the *Metropolitan Life Insurance* case approves what could be regarded as *dicta* in *New York Telephone*—insofar as this general, common application theory exception to preemption theory is concerned.

We contended in the California State Bar Report that a wrongful discharge statute ought to cover, inasmuch as it would provide for a just cause standard, union activity as well as other kinds of activity that would normally be enveloped by the just cause standard under a collective bargaining agreement. And we maintain that such a statute would not be unconstitutional under the theory of *New York Telephone*, which as I say, now seems to have received approval for common application theory in *Metropolitan Life Insurance*.

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