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MUDDY WATERS: *ALLIS-CHALMERS* AND THE *FEDERAL POLICY FAVORING LABOR ARBITRATION*

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Much of the attention given to the dynamic relationship between state court jurisdiction and the federal labor laws focuses upon the pre-emptive strength of various unfair labor practice provisions of the National Labor Relations Act (NLRA).[1] Arbitral pre-emption, an equally significant pre-emptive force not found in express NLRA language, frequently is overlooked or misunderstood. Arbitral pre-emption arises from the judicially created federal policy favoring the resolution of labor disputes exclusively through the grievance and arbitration procedures of a collective bargaining agreement. Unlike its Railway Labor Act counterpart,[2] this NLRA policy is not spelled out in express statutory language, but rather arises from the Supreme Court's construction of Sections 203(d) and 301 of the Taft-Hartley Act.[3] The Supreme Court's recent decision in *Allis-Chalmers Corp. v. Lueck,*[4] has expanded the pre-emptive strength of this policy, but the Court still leaves unanswered questions about the policy's precise parameters.

This article traces the history of arbitral pre-emption from its origins, examines ways in which lower courts have misused and misunderstood principal authorities, evaluates the impact of *Allis-Chalmers,* and considers how the law will develop after *Allis-Chalmers.* The article reaches three conclusions. First, although correcting many lower court distortions, *Allis-Chalmers* has encouraged others to flourish. Second, uncertainty in the boundaries of exceptions to arbitral pre-emption remains the chief difficulty with the doctrine. Finally, the further defining of these boundaries will be

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1. *See generally* Cox, *Recent Developments in Federal Labor Law Preemption,* 41 OHIO ST. L. J. 277 (1980); Cox, *Labor Law Preemption Revisited,* 85 HARV. L. REV. 1337 (1972).

2. *See generally* 45 U.S.C. § 158 (1982).

3. *See, e.g.,* Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); United Steelworkers of America v. Enterprise Wheel and Car, 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

4. 471 U.S. 202 (1985).

influenced by the extent to which government protection, by expansion of exceptions to the employment-at-will rule, replaces traditional union grievance and arbitration protection as the employee's principal remedy.

I. The Development of Arbitral Pre-Emption—The Building Blocks

Presently, the NLRA, as amended, exercises pre-emptive force over state court jurisdiction in two ways. The Supreme Court's decision in *Belknap, Inc. v. Hale*[5] identifies each:

> Our cases have announced two doctrines for determining whether state regulations or causes are pre-empted by the NLRA. Under the first, set out in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 [] (1959), state regulations and causes of action are presumptively pre-empted if they concern conduct that is actually or arguably either prohibited or protected by the Act . . . the state regulation or causes of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility . . . *Farmer v. Carpenters,* 430 U.S. 290, 296-97 (1977). In such cases, the State's interest in controlling or remedying the effect of the conduct is balanced against both the interference with the National Labor Relations Board's ability to adjudicate controversies committed to it by the Act, *Farmer v. Carpenters,* supra, at 297 . . . and the risk that the State will sanction conduct that the Act protects. The second pre-emption doctrine, set out in *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132 (1976), proscribes state regulation and state-law causes of action concerning conduct that Congress intended to be unregulated. . . .[6]

A review of the evolution of the doctrine of labor law pre-emption, of the policy favoring arbitration, and of the interaction of the two to create arbitral pre-emption, reveals how arbitral pre-emption developed.

A. Early Cases

Early cases addressing the issue of federal law's pre-emptive scope confused the two types of labor law pre-emption. Generally, early cases held that a state could not interfere with conduct actually protected or actually prohibited by the NLRA, but that the state could, for reasons independent of NLRA concerns, regulate conduct arguably within the scope of the Act when Congress had provided no corresponding federal remedy.[7]

The Supreme Court struck down efforts by states to impose concurrent

5. 463 U.S. 491 (1983).
6. *Id.* at 498-99.
7. *Allis-Chalmers,* 471 U.S. at 213 n.9.

regulations upon matters covered by the NLRA. *Garner v. Teamsters Union*[8] struck down a state court injunction prohibiting recognitional picketing as a matter committed by Congress to a centralized tribunal, the National Labor Relations Board (NLRB), within that tribunal's authority to remedy, and not within state police power. *Weber v. Anheuser-Bush, Inc.*[9] held that a state court might not enjoin conduct in connection with a jurisdictional dispute covered by section 8(b)(4)(D).[10] The Court allowed more latitude in these early decisions when Congress had neither actually protected nor actually prohibited the conduct affected by state regulation or when Congress provided no remedy for persons aggrieved. The Court most frequently allowed the state claims to stand when they reached coercive and violent strike methods.[11] *International Union of United Auto Workers v. Wisconsin Employment Relations Board,*[12] however, extended this rationale outside the context of violence, holding that a state agency could enjoin intermittent work stoppages because they were not actually protected or prohibited by federal labor law, which reached only the strike's objective and not its methods. Finally, the Court repeatedly allowed state courts to award damages for traditional common law torts that occurred in the course of NLRA protected activity.[13]

B. The *Garmon* Doctrine

Modern pre-emption began with *San Diego Building Trades Council v. Garmon.*[14] The Supreme Court in *Garmon* held that an employer group's state labor and tort law damages action against a union group for recognitional picketing was pre-empted even though the NLRB had declined jurisdiction over an election petition arising out of the same dispute. Emphasizing, as in *Garner,* the NLRB's role as Congress's centralized forum for defining the NLRA's scope, the Court held judicial participation limited to determining whether the Act "arguably protected" or "arguably prohibited" the activity the state sought to regulate. The Court rejected, as overly narrow, the *International Union of United Auto Workers* doctrine declaring that a court finds pre-emption only when the activity was "actually" protected or prohibited.[15]

Having "due regard for the presuppositions of our embracing federal

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8. 346 U.S. 485 (1953).

9. 348 U.S. 468 (1955).

10. 29 U.S.C. § 158(b)(4)(D) (1982). Other decisions reached similar conclusions. *See* International Union of United Auto Workers v. O'Brien, 339 U.S. 454 (1950); LaCrosse Tel. Corp. v. Wisconsin Empl. Rel. Bd., 336 U.S. 18 (1949); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947).

11. *See, e.g.,* Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); Allen-Bradley Local No. 1111 v. Wisconsin Empl. Rel. Bd., 315 U.S. 740 (1942).

12. 336 U.S. 245 (1949).

13. *See* International Union of United Auto Workers v. Russell, 356 U.S. 634, 640-41 (1958); United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656, 663-64 (1954).

14. 359 U.S. 236 (1959).

15. *Garmon,* 359 U.S. at 245 and n.4.

system,"[16] the Court in *Garmon* declared that activity arguably protected or prohibited by the NLRA nevertheless was not pre-empted if it was "merely a peripheral concern" to the Act,[17] or, "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] . . . could not infer that Congress had deprived the States of the power to act."[18] If an activity did not fall within one of these exceptions, it was not subject to state regulation unless the NLRB made a "clear determination that an activity is neither protected nor prohibited."[19] The Board's mere failure to determine the status of such activity, either by declining jurisdiction or by the General Counsel's refusal to file a charge, would not be sufficient to prevent pre-emption.

Garmon did not just establish that Congress had selected a forum—the NLRB—as prescribed rules governing the resolution of labor disputes. *Garmon* also made clear that a presumption *favored* pre-emption once activity was found arguably protected or arguably prohibited by the NLRA without regard to the method of regulation[20] or the remedy sought.[21] The *Garmon* decision presumed no pre-emption only in cases "deeply rooted in local feeling," an exception the Court limited to measures taken to keep the peace.[22]

Applying *Garmon,* the Court in *Linn v. Local 114 United Plant Guard Workers of America*[23] held that the NLRB's narrow focus on election language and the absence of any NLRA section 8(c) protection of malicious libel rendered a supervisor's defamation claim against a union only "of peripheral concern" to federal labor law.[24] According to *Linn,* defamation actions involving actual malice and actual damage survive pre-emption by

16. *Id.* at 243.
17. *Id.* at 244.
18. *Id.* at 246; *see id.* at 245.
19. *Id.* at 246.
20. *Id.* at 244.
21. *Id.* at 246.
22. *Id.* at 247.
23. 383 U.S. 53 (1966).
24. *Id.* at 61; *see generally* 29 U.S.C. § 158(c) (1982). At first blush, *Linn* appeared to expand substantially state court jurisdiction over labor matters, allowing a state remedy to exist with the potential for conflict notwithstanding the Court's admonition in *Garner* that identical remedies were impermissible because of the mere potential for conflict. *See* Garner v. Teamsters, 346 U.S. 485, 498-99 (1953). However, closer examination of this decision revealed that the contrary was true. *Garmon* did not find it determinative that the Board had declined to exercise its election jurisdiction, emphasizing that the Board had not made a determination concerning unfair labor practice jurisdiction. In *Linn,* by contrast, the Board had declined unfair labor practice jurisdiction over the acts complained of in the state law action, thus removing any practical possibility of conflicting remedies. In addition, the Court treated both considerations of the peripheral nature of the state claim and the importance of the state's interest, and did not indicate whether, as *Garmon* makes clear, one of these elements without the other could justify exception from pre-emption. Finally, in recognizing defamation as exempt in some circumstances from pre-emption, the Court linked it to the state torts remedying violent actions that have traditionally enjoyed exemption from pre-emption. *Id.* at 64 n.6.

NLRA unfair labor practice provisions when the Board has declined unfair labor practice jurisdiction because reputation is a peripheral concern of the NLRA, and state defamation claims serve the traditional state interest of preventing violence.[25]

The Supreme Court further clarified pre-emption in *Amalgamated Ass'n of Street Employees v. Lockridge,*[26] holding pre-empted an employee's contract claim against his union. The Court declared that there would be no pre-emption (1) "when Congress has affirmatively declared that [judicial] power should exist,"[27] (2) "whe[n] th[e] Court cannot . . .'conscientiously presume that Congress meant to intrude so deeply into areas traditionally left to local law,' "[28] or (3) "whe[n] the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that initial supervision will not disserve the interests promoted by the federal labor statutes."[29]

Lockridge reemphasized, as in *Garner* and *Garmon,* that Congress chose a forum, as well as prescribing rules, for the resolution of labor disputes.[30] *Lockridge* also made clear that the issue of pre-emption turned on the act being regulated and not on the particular state tort challenging the act.[31] Finally, Lockridge recognized a broader federal pre-emption when the conduct subject to state regulation directly affected the employment relationship and when it involved the more peripheral relation between the employee and his or her union.[32]

Farmer v. United Brotherhood of Carpenters, Local 25[33] reversed the state court's finding that *Lockridge* pre-empted an employee's outrage claim against his union.[34] The Court emphasized that *Lockridge* had expressly rejected blanket pre-emption. The Court held that the important state interest in remedying outrageous conduct,[35] like the important state interest in remedying defamation in *Linn,* preserved the action from pre-emption even though it involved the same hiring hall discrimination proscribed by the NLRA.[36] The Court explained that the NLRB was not concerned with nor inclined to remedy the outrageous manner in which the union allegedly

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25. *Linn,* 383 U.S. at 64.
26. 403 U.S. 274 (1971).
27. *Id.* at 297.
28. *Id.*
29. *Id.* at 297-98.
30. *Id.* at 297-98. The Court recognized that "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Id.* at 287. Congress "sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing the comprehensive legal system in the hands of an expert administrative [system] . . . rather than the federalized judicial system." *Id.* at 288.
31. *Id.* at 292.
32. *Id.* at 296.
33. 430 U.S. 290 (1977).
34. *Id.* at 294-95.
35. *Id.* at 299-303.
36. *Id.* at 300-03.

discriminated,[37] but that the state had an important interest in providing the remedy and could provide relief without inquiring into the object with which the Board was concerned.[38]

Farmer represents a shift back from *Lockridge's* emphasis on the nature of the "conduct" regulated to *Linn's* emphasis on the nature of the "state's interest" in litigating. *Farmer* also revives the rationale of earlier cases that viewed NLRB remedies as regulating only objectives and viewing state remedies as regulating the means by which such objectives are accomplished. *Farmer* continues to place emphasis on the "ability of the NLRB to remedy" the act complained of as a determinant in ascertaining whether or not the state claim should be pre-empted. Finally, *Farmer* extends *Linn's* violent tort analogy to include outrage as well as defamation.

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters[39] seems to combine *Garmon's* two exceptions into one. In preserving from pre-emption an employer's trespass claim against the union, the Court declared that pre-emption under this branch depended upon whether, "[f]irst, there exist[s] a significant state interest in protecting the citizen from the challenged conduct," and "second, [whether] the exercise of state jurisdiction over the tort claim entail[s] little risk of interference with the regulatory jurisdiction of the Labor Board."[40] The Court combined these two factors into the single inquiry of "whether the controversy presented to the state court is identical to (as in *Garner)* or different from (as in *Farmer)* that which could have been, but was not, presented to the Labor Board."[41]

The Court held that there was no pre-emption under the "arguably prohibited" branch because the state court's inquiry concerning picketing location was different from the Board's focus upon the picketing's objective.[42] Finding *Garmon's* "arguably protected" branch was limited based upon the strength of the claim of "protected" status, the Court declared that this branch did not pre-empt the plaintiff's trespass action because trespass is generally unprotected,[43] and the union had a fair opportunity to claim to the Board that it was protected activity, but the union did not avail itself at this opportunity.[44]

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37. *Id.* at 304.

38. *Id.* at 304-05.

39. 436 U.S. 180 (1978). The *Sears, Roebuck & Co.* Court preserved from pre-emption an employer's trespass claim against a union for picketing. *See id.*

40. *Id.* at 196.

41. *Id.* at 197.

42. *Id.* at 198.

43. *Id.* at 205.

44. *Id.* at 207. *Sears, Roebuck & Co.* is extremely significant in the development of the *Garmon* doctrine because it represents the first time after *Garmon* in which the Court held that a state claim attacking conduct "arguably protected" by federal labor law was found not pre-empted. *Linn* and *Farmer* involved arguably prohibited conduct. While earlier *Garmon* progeny decisions had indicated no difference in application of the standard between situations in which the conduct was arguably prohibited, *Sears, Roebuck & Co.* makes a clear distinction. When the conduct is arguably prohibited, the principal concern is in allowing the NLRB, Congress' chosen forum, to have the first opportunity to decide the case. When the conduct is arguably protected, however, questions of federal supremacy, as well as NLRB primary

International Union of Operating Eng'rs, Local 926 v. Jones[45] found pre-empted a discharged supervisor's claim against a union for intentional interference with his employment contract. The Court held that *Garmon* warranted pre-emption because the state cause of action, even if extending to discharges not the result of coercion in violation of federal law, would require state courts, rather than the Board, to determine initially whether the union conduct was coercive.[46] The Court makes clear in *Jones* that even "deeply rooted" state interests in preserving tort actions sometimes must give way to federal labor regulatory policies.[47] State tort elements, even if completely different from federal unfair labor practice elements, nevertheless are pre-empted if the resolution or application of the state elements would require the state court to determine initially an element of the federal unfair labor practice. Finally, the Court declared that the availability of greater relief from the state tort claim than the relief which the Board would provide in adjudicating unfair labor practice violations is irrelevant to the pre-emption determination.[48]

Three things about the *Garmon* doctrine are evident from the foregoing discussion. First, *Garmon* recognizes that Congress not only prescribed the rules, but also chose a forum for adjudicating unfair labor practice disputes, however they arise. Second, the scope of *Garmon* pre-emption covers penumbral areas defined by what the express language of the Act arguably prohibits or arguably protects. Finally, this pre-emption is not complete, but has exceptions in instances in which federalism dictates that the state claim be preserved. This third factor is the center of the controversy. The extent to which this factor focuses on the conduct regulated, rather than on the state's reason for regulating, significantly affects the scope of *Garmon* pre-emption. The scope of *Garmon* pre-emption is also affected by the extent to which the reviewing court focuses on the comparative strength and suitability of state and federal remedies. Whatever the scope, however,

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jurisdiction, become significant. Pre-emption of arguably protected conduct, therefore, is "at least in part, a function of the strength of the argument that § 7 does in fact protect the disputed conduct." 436 U.S. at 203. *Sears, Roebuck & Co.* is also significant in that it chose, as a measure of the significance of the "arguably protected" claim the willingness of the union to file an unfair labor practice charge. If the union has a fair opportunity to invoke NLRB jurisdiction, but does not avail itself of the opportunity, the Court concluded that the union "retains meaningful protection against the risk of error in a state tribunal." *Id.* at 207. There are two limitations to be noted concerning *Sears, Roebuck & Co.* First, the Court itself admitted that the nature of the particular trespass involved almost certainly was not protected conduct. *Id.* at 207. Second, the employer itself had no means of invoking the Board's jurisdiction in this case. Invoking state court jurisdiction was its only viable option. *Id.* at 202. A case that had involved conduct closer to the heart of § 7's protection might have been held pre-empted even though the union failed to take advantage of a fair opportunity to invoke ULP jurisdiction. Likewise, the Court might not be as quick to find pre-emption if the employer had some alternative other than a state court suit available.

45. 460 U.S. 669 (1983).

46. *Id.* at 682. The Court distinguished *Sears, Roebuck & Co.* on this basis because the state concern with the picketing location in Sears did not affect the federal inquiry into picketing objectives. *Id.* at 682-83.

47. *Jones,* 460 U.S. at 676.

48. *Id.* at 684.

the heart of *Garmon* pre-emption remains the balancing of state and federal interests.

C. The *Morton/Machinists* Pre-emption Doctrine

Garmon is not the alpha and omega of federal labor law pre-emption under the NLRA and its amendments. It involves only pre-emption by unfair labor practice provisions. In addition, there has arisen a doctrine providing for federal pre-emption when state regulation would interfere with federal labor policy.

In the same year that it decided *Garmon,* the Supreme Court sowed the seeds of a second pre-emption doctrine in *International Bhd. of Teamsters, Local 24 v. Oliver.*[49] *Oliver* held pre-empted a state antitrust statute as applied to trailer rental rates negotiated between truck lines and the Teamsters.[50] *Oliver* recognized that the NLRA's pre-emptive force applied not only to the unfair labor practice provisions and their penumbras, but also to the relationship established by the Act between employers and certified bargaining representatives.[51] The Court in *Oliver* also made clear that here, as with *Garmon* pre-emption, the primary focus must be on the conduct regulated and the impact of the state regulation upon federal labor law policy, not on the state's reason for regulating the conduct. The Court expressly disregarded the fact that the state law was an "antitrust law,"[52] as opposed to a "labor law."

In *Teamsters, Local 20 v. Morton*[53] the Supreme Court distinguished *Garmon* pre-emption from the pre-emption suggested in *Oliver.* The Court held in *Morton* that a district court could not permit, pursuant to pendent jurisdiction, an award of damages for a union's violation of a state law prohibiting peaceful persuasion tactics aimed at the struck employer's customer. The Court reasoned that section 303 of the Labor Management Relations Act,[54] in prohibiting only secondary persuasion of *employees,* occupied the field and struck a balance of power that would be frustrated if activity not reached by § 303 were prohibited by the states. The Court's inquiry was not simply whether the conduct was "arguably protected" or "arguably prohibited," but whether state law "would operate to frustrate the purpose of the federal regulation."[55] The Court concluded that if there were no pre-emption, "the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and

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49. 358 U.S. 283 (1959).

50. *Oliver,* 358 U.S. at 296-97. *But see* Metropolitan Life Ins. Co. v. Massachusetts, 105 S. Ct. 2380 (1985).

51. *Oliver,* 358 U.S. at 297. The court in *Oliver* defined exceptions to the new pre-emption doctrine, suggesting exception for state safety and health regulations. *Id.*

52. *Id.* at 297.

53. 377 U.S. 252 (1964).

54. 29 U.S.C. § 188 (1982).

55. 377 U.S. at 258.

to upset the balance of power between labor and management expressed in our national labor policy."[56] *Morton* continues the new version of pre-emption first established in the labor field in *Oliver* and makes clear that *Garmon* has no application in this area,[57] and establishes that the new form of pre-emption was equally as important as *Garmon* pre-emption.[58]

International Ass'n of Machinists, Lodge 76 v. Wisconsin Employment Relations Comm'n,[59] held pre-empted a state agency's order prohibiting union members from refusing to work overtime to pressure their employer during post-contractual negotiations even though the NLRB's Regional Director had dismissed the employer's unfair labor practice charge before the state agency issued the order. Relying upon *Morton* and upon *NLRB v. Insurance Agents Int'l Union,*[60] the Court found that *Morton* recognized a form of pre-emption distinct from *Garmon*[61] and that, by analogy to *Insurance Agents Int'l Union,* this *Morton* pre-emption applied to protect from state regulation the economic weapons not "arguably protected" nor "arguably prohibited" by the NLRA because congressional labor policy intended that such weapons be left available to the parties.[62] The Court reversed *International Union of United Auto Workers v. Wisconsin Employment Relations Board,* which had reached a contrary conclusion in the context of a partial strike.

International Ass'n of Machinists confirmed the distinctive nature of *Morton* pre-emption from *Garmon* pre-emption, making clear that federal labor policy, and not merely matters arguably protected or arguably prohibited by express NLRA provisions, would be protected from state regulation. *International Ass'n of Machinists,* however, like *Morton,* failed to delineate for this type of pre-emption the kind of identifiable exceptions

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56. *Id.* at 259-60.

57. *See id.* at 259-60; *see also* Vaca v. Sipes, 386 U.S. 171, 183-84 (1967).

58. *See* 377 U.S. at 260 (quoting Garner v. Teamsters Union, 346 U.S. 485, 500 (1953)).

59. 427 U.S. 132 (1976).

60. 361 U.S. 477 (1960).

61. *See Insurance Agents Int'l Union,* 361 U.S. at 488-89.

62. The Court in *International Ass'n of Machinists v. Wisconsin Empl. Rel. Comm'n* made clear that parties were to have economic leverage:

> Our decisions hold that Congress meant that these activities, whether of employer or employees, were not to be regulable by States any more than by the N.L.R.B. for neither States nor the Board is 'afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful,' *Ibid.* Rather, both are without authority to attempt to 'introduce some standard of properly "balanced" bargaining power,' *id.* at 497 (footnote omitted), or to define 'what economic sanctions might be permitted negotiating parties in an "ideal" or "balanced" state of collective bargaining.' *Id.* at 500. . . . To sanction state regulation of such economic pressure deemed by the federal Act 'desirabl[e]. . . is not merely [to fill] a gap [by] outlaw[ing] what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available.'

427 U.S. at 149-50 (quoting 361 U.S. at 497, 498, 500); Lesnick, *Pre-emption Reconsidered: The Apparent Reaffirmation of Garmon,* 72 COLUM. L. REV. 469, 478 (1972).

from pre-emption that the Court had developed in *Garmon* and its progeny, and failed to indicate, as had *Garmon* progeny cases, whether *Oliver's* description of exceptions was still controlling.

Applying the *International Ass'n of Machinists* analysis, the Court in *Malone v. White Motor Corp.*[63] rejected an employer's pre-ERISA challenge to a state pension statute that affected the vesting rights and the employer's termination obligations under a collectively-bargained pension plan. The Court held that it would not find the state law pre-empted "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States."[64] Finding that nothing foreclosed all state regulation of matters subject to a collective bargaining agreement, the Court declared that it must affirmatively imply from the labor laws intent to pre-empt.[65] Here, the Court discovered no basis for implying an attempt to pre-empt because the pre-ERISA federal Pension Plan Disclosure Act's "savings clause" expressly preserved state regulation of pension plans, and its legislative history demonstrated that Congress was aware, in enacting this clause, that pension plans frequently resulted from collective bargaining.[66] *Malone* makes clear that just because a matter is the subject of a collective bargaining agreement does not immunize the matter from state regulation even if state regulation were to modify the agreement's terms and obligations,[67] that *Morton* pre-emption must be capable of implication from federal labor statutes,[68] and that Congress, by means of a savings clause, could preserve state regulation from such pre-emption.[69]

In *New York Telephone Co. v. New York State Dep't of Labor,*[70] the Court in a split decision held that a state law authorizing unemployment benefits to strikers was not pre-empted. *New York Telephone Co.* is important because a majority of the justices, writing separately, made clear that there continues to exist a theory of pre-emption under *Morton* and *International Ass'n of Machinists* that is separate and distinct from the pre-emption theory under *Garmon.*[71] However, the plurality's application of *Garmon's* "deeply rooted in local feelings" exception in this wholly-inappropriate setting continued the confusion over the nature of exceptions to the *Morton/Machinists/Malone* pre-emption doctrine and the continued viability of *Oliver* as a complete statement of exceptions to *Morton/Machinists/Malone,*[72] and the plurality's distinction between laws of general

63. 435 U.S. 497 (1978).
64. *Malone,* 435 U.S. at 504.
65. *Id.* at 504-05.
66. *Id.* at 507-10.
67. *Id.* at 504-05.
68. *Id.* at 505.
69. *Id.* at 513.
70. 440 U.S. 519 (1979).
71. *Id.* at 533-40.
72. *Id.* at 540-46.

application and state labor laws is particularly troubling, as even *Garmon* has expressly rejected such a distinction.[73]

This line of cases makes three things clear. First, federal labor pre-emption is not limited to *Garmon*. In addition, state regulation of matters not "arguably protected" nor "arguably prohibited" by the NLRA nevertheless may be pre-empted if such regulation frustrates a federal policy. Just as *Garmon* pre-emption protects the forum chosen by Congress to adjudicate unfair labor practices, the *Morton/Machinists/Malone* doctrine protects relationships established by federal labor law. Second, the exceptions to this kind of pre-emption are not as clear as the exceptions to *Garmon* pre-emption, thus encouraging the borrowing of *Garmon* exceptions in a context for which they are not suited. Third, in order to find this type of pre-emption, there must be some affirmative legislative declaration. In short, just as *Garmon* protects the forum chosen by Congress to adjudicate unfair labor practices, this type of pre-emption protects from state interference the relationships established by federal labor law. Because the contours of these relationships are defined by implication and not, like *Garmon,* by express statutory provisions, however, the process of establishing what is and what is not covered is fundamentally different from determining coverage under *Garmon.*

D. Arbitration

Federal labor policy places a high premium on preserving the effectiveness of collectively-negotiated grievance procedures culminating in binding arbitration. As recognized by the Court in *United Steel Workers of America v. Warrior & Gulf Navigation Co.,*[74] the "collective-bargaining agreement is an effort to erect a system of industrial self government"[75] and the "grievance machinery under a collective bargaining agreement is at the very heart of the system."[76] Preserving the finality of arbitration from state intrusion, however, creates peculiar pre-emption problems.

The Supreme Court has consistently applied the *Morton/Machinists/Malone* pre-emption doctrine in ascertaining whether the federal policy favoring arbitration pre-empts a particular state claim. As *Malone* makes clear, this doctrine requires an affirmative legislative declaration in order to find pre-emption. The only statutory basis for such pre-emption based on the federal policy favoring arbitration, however, is a general policy

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73. *See id.* at 546 (Brennan, J., concurring), 547 (Blackmun, J., joined by Marshall, J., concurring); *cf. Garmon,* 359 U.S. at 243, 246-47 (expressly rejecting the distinction between law of general applicability and those of applicability only to labor relations). The concurring justices adopted the second rationale because they found it consistent with *International Ass'n of Machinists. See* New York Telephone Co., 440 U.S. at 549, 551 (Blackmun, J., joined by Marshall, J., concurring).

74. 363 U.S. 574 (1960).

75. *Id.* at 580.

76. *Id.* at 581.

declaration in section 203(d) of the Labor Management Relations Act (LMRA) that "[f]inal adjustment by a method agreed upon by the parties is declared to be desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."[77] The only other provision bearing on this issue is section 301 of the LMRA, which is the general provision for suits "for violation of contracts between an employer and a labor organization representing employee in an industry affecting commerce."[78] The legislative history of neither § 203(d) nor § 301 is helpful. Thus, the policy favoring arbitration relies heavily upon Supreme Court decisions interpreting the statutory provisions discussed, above.

1. The Policy Favoring Arbitration

Textile Workers Union of America v. Lincoln Mills of Alabama,[79] held that section 301 supported issuance of an injunction compelling an employer's specific performance of a binding arbitration clause because section 301 authorizes the creation of federal contract law permitting enforcement in federal court,[80] because section 301's legislative history reflects a congressional intent to enforce arbitration clauses specifically, and because past Railway Labor Act and NLRA decisions recognizing Norris-LaGuardia Act exceptions also warrant recognizing an exception for injunctions enforcing arbitration clauses under section 301.[81] *Textile Workers Union of America* is important to arbitral pre-emption because it lays the foundation for the creation of a basis for federal law from which to infer pre-emption of state claims that could interfere with the grievance and arbitration procedure.

The three most important cases in fashioning the federal policy favoring arbitration are called collectively the *Steel Workers* trilogy.[82] The *Steel Workers* trilogy established binding arbitration as the preferred method under federal law of resolving employer-employee disputes. Stated differently, just as Congress, in the *Garmon* context, designated the NLRB as its chosen forum to resolve unfair labor practices, Congress empowered employers and unions to designate an arbitrator as the chosen forum to resolve disputes arising in connection with the collective bargaining agreement.

United Steel Workers of America v. American Mfg. Co.,[83] the first of the *Steel Workers* trilogy, held for a union in its suit to compel arbitration of its grievance under a seniority selection provision concerning an employee

77. LMRA § 203(d), 29 U.S.C. § 173(d).

78. 29 U.S.C. § 185(a).

79. 353 U.S. 448 (1957).

80. 353 U.S. at 451, 456.

81. LMRA § 301, 29 U.S.C. § 185(a).

82. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960).

83. 363 U.S. 564 (1960).

who was the subject of a workers' compensation settlement.[84] The Court reasoned that section 203(d) of the Labor Management Relations Act established a policy favoring private resolution of employment disputes which restricted court involvement to the limited role of making a determination of "whether the party seeking arbitration is making a claim which on its face is governed by the contract."[85] *American Mfg. Co.* involved a dispute over a specific contract provision.[86]

Granting the union an order requiring arbitration, *United Steel Workers of America v. Warrior & Gulf Navigation Co.*,[87] held that management rights language declaring that "matters which are strictly a function of management shall not be subject to arbitration" did not, without more, remove the subcontracting of unit work issue from an arbitration clause governing "differences . . . as to the meaning and application of the provisions of this Agreement, . . . [including] any local trouble of any kind."[88] The Court did not deem such general management rights language sufficient to overcome the presumption favoring arbitrability.[89] The Court gave labor arbitration a special place, recognizing that it, unlike commercial arbitration, was a substitute for industrial strife and not merely a substitute for litigation.[90] Accordingly, the Court declared that it would not deny arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" and made clear that it would resolve all doubts in favor of coverage.[91] Throughout its opinion the Court stressed the "superior expertise" of the labor arbitrator over the judge in resolving employment matters.[92]

The third Trilogy case, *United Steel Workers of America v. Enterprise Wheel & Car Corp.*,[93] enforced an arbitration award reinstating a discharged employee and granted backpay beyond the agreement's expiration date. As in *Warrior & Gulf Navigation Co.*, the Court here stressed that the presumption was in favor of arbitrability. Beyond *Warrior & Gulf Navigation Co.*, the Court declared that mere ambiguity was not enough to set aside an arbitration award, and that an arbitrator need not explain the reasons for his or her decision.[94]

Finally, following the *Steel Workers* trilogy, the Supreme Court in *Smith v. Evening News Ass'n*,[95] gave the federal policy favoring arbitration that was

84. *Id.* at 569.
85. *American Mfg. Co.*, 363 U.S. at 568.
86. *Id.* at 569.
87. 363 U.S. 574 (1960).
88. *Id.* at 576.
89. *Id.* at 582-83.
90. *Id.* at 578.
91. *Id.* at 582-83. However, it left arbitrability as a judicial inquiry. *See id.* at 583 n.7.
92. *Id.* at 582; *see also American Mfg. Co.*, 363 U.S. at 567.
93. 363 U.S. 593 (1960).
94. *Id.* at 598.
95. 371 U.S. 195 (1962).

created in the *Steelworkers* Trilogy a position beside the express NLRA unfair labor practice provisions. In holding that section 8(a)(3)'s arguable protection of activity did not, under *Garmon*, prevent an employee from bringing a section 301 action in state court against an employer who breached a nondiscrimination clause, the Court in *Smith* made clear that the unfair labor practice provisions did not prevent a union from bringing a § 301 action to vindicate an individual employee's rights under the contract.[96]

The doctrine of arbitral pre-emption that emerged from the Steelworkers' trilogy, although based on *Morton/Machinists/Malone,* had some of the features of *Garmon* pre-emption. Arbitral pre-emption, like other forms of *Morton/Machinists/Malone* pre-emption, protected a relationship arising from the implications of federal labor law. It protected the relationship between the parties establishing their own system of industrial self-government through the collective bargaining agreement because it guaranteed finality to disputes resolved by a "bargained-for" mechanism. Because of the nature of the relationship, however, the protection provided resembled *Garmon's* protection. Just as *Garmon* recognized the NLRB as the exclusive forum for the resolution of unfair labor practice cases, arbitral pre-emption recognized the grievance and arbitration procedure as the exclusive forum for the resolution of disputes arising in the work place in connection with the collective bargaining agreement. Just as *Garmon* had the express unfair labor practice provisions as its guide, arbitral pre-emption was guided by the express provisions of the parties' collective agreement. Just as *Garmon* reached penumbral matters "arguably" protected or prohibited by unfair labor practice statutory provisions, arbitral pre-emption reached matters "arguably" covered by the grievance and arbitration procedure, absent an express contractual exception. Therefore, while not controlling arbitral pre-emption, *Garmon* and its progeny provided courts with a well-stocked body of law from which courts could analogize in defining arbitral pre-emption's parameters.

Arbitral pre-emption differed from *Garmon* pre-emption, however, in an important respect. *Garmon* pre-emption involved the pre-emptive strength of specific statutory provisions, while arbitral pre-emption, like other forms of *Morton/Machinists/Malone* pre-emption, involved the pre-emptive scope of a relationship. Congress drafted the precise language from which *Garmon* pre-emption arose. In the case of arbitral pre-emption, Congress simply ordained the relationship, and left it to the parties, by agreement, and the courts, by scrutiny of that agreement, to define the scope of pre-emption. This difference, coupled with the fact that the Court had not defined the exceptions to arbitral pre-emption with the same precision as it had used in defining the exceptions to *Garmon* pre-emption, invited lower courts to apply the exemptions fashioned in *Garmon* and its progeny to the delicate balance struck by arbitral pre-emption. This would prove to be a serious

96. *Id.* at 197-200.

error, as *Garmon* exceptions, designed to strike a balance between federal statutes and state statutes and common law, were not suited for arbitral pre-emption, a form of *Morton/Machinists/Malone* pre-emption designed to protect the operation of a federally-approved relationship from state interference.

2. *State Courts and the Federal Policy Favoring Arbitration*

Inevitably, the judicially-created federal policy favoring arbitration had to come into conflict with state claims. A series of Supreme Court decisions made clear that as with the NLRA unfair labor practice provisions under *Garmon,* the federal law must prevail when it conflicts with state law.

In *Teamsters of America, Local 124 v. Lucas Flour Co.,*[97] in affirming a state court damages award to an employer for a union's strike over a matter subject to arbitration, the Court held that the threat of disruption to a collective bargaining agreement's negotiation and administration mandated that state courts apply federal law in resolving section 301 actions.[98] The Court further held that federal law warranted finding a violation when, as here, the union struck over a matter within the scope of a final and binding arbitration clause even if the collective agreement did not have an express "no strike clause."[99]

In *Republic Steel Corp. v. Maddox,*[100] the Court faced directly the issue of federal arbitral pre-emption versus state law. In holding that an employer's failure to use the grievance and arbitration procedure precluded a state court suit for severance pay under the collective bargaining agreement, the Court emphasized that allowing the employee to sidestep the grievance and arbitration procedure would frustrate employer and union efforts to establish a uniform method for dispute resolution.[101] The Court further noted that the claim asserted and the relief sought were not unlike what was typical of arbitration,[102] and that there was no suggestion that the plaintiff was prevented by the circumstances from using the grievance procedure.[103]

The Court offered a four-part rationale for its holding in *Maddox.* First, the Court noted that federal labor policy generally requires that the employee "attempt" to use the grievance and arbitration procedure in order to assert contract grievances in court.[104] Second, the Court noted that section 203(d) of the LMRA expressed a preference for private resolution of employment disputes, and that allowing circumvention of the grievance and

97. 369 U.S. 95 (1962).
98. *Id.* at 102-103.
99. *Id.* at 105-06.
100. 379 U.S. 650 (1965).
101. *Id.* at 653.
102. *Id.* at 656.
103. *Id.* at 652-53.
104. *Id.* at 652.

arbitration procedure would frustrate this policy.[105] Third, the Court found severance pay claims not unlike other grievances because the employees remaining in the bargaining unit had a significant interest in the resolution of disputes that occurred when one was terminated.[106] Fourth, the Court observed that the remedy provided by arbitration was not unlike that sought by the plaintiff.[107] The Court summarized its position in footnote 13, in which it construed section 301's language as covering all "suits based on contracts" between employers and unions and not only "contract suits" between employers and unions.[108]

Justice Black's dissent in *Maddox* is significant because it expresses many concerns with this federal policy that courts have subsequently echoed in declining to accord exclusivity to a grievance and arbitration remedy. Finding the policy favoring arbitration simply to be the "brainchild of this Court's recent consistently expressed preference for arbitration over litigation in all types of cases,"[109] Justice Black contended that Congress had passed no law authorizing this type of preference and expressed concern over its constitutionality.[110] Most significantly, in contrast to the majority in *Warrior & Gulf Navigation Co.*, Justice Black outlined numerous ways in which arbitration was a less effective means of fact-finding than a judicial proceeding, and complained that the majority's position effectively allowed prospective waiver of judicial remedies that was not permitted in other contexts.[111] As subsequent decisions illustrate, these specific concerns proved prophetic.[112]

Maddox is an unconscious beginning to the doctrine of federal arbitral pre-emption of state law. Although *Maddox* plainly is a pre-emption decision, it nowhere expresses itself as such. Rather, the language of the opinion is of primary jurisdiction, purporting to require only that the employee go to the arbitrator first.[113] Of course, under *Lucas Flour's* mandate that state courts apply federal law in section 301 actions, together with the narrow scope of review that the *Steel Workers* trilogy permitted after an arbitration, requiring an exhaustion of arbitration prior to suit effectively would preclude any subsequent state claim under the contract. However, *Maddox* never explored the breadth of this pre-emption, not once mentioning *Morton* or *Garmon* and coming before *International Ass'n of Machinists* and *Malone* were decided. Nor did *Maddox* discuss, as had *Garmon*, those situations that might be ex-

105. *Id.* at 653.
106. *Id.* at 656.
107. *Id.* at 657.
108. *Id.* at n.13.
109. *Id.* at 662-63 (Black, J., dissenting).
110. *Id.*
111. *Id.* at 664-65.
112. *See infra* notes 140-45, 183-86 and accompanying text.
113. *Maddox*, 379 U.S. at 652.

cepted from arbitration preemption. After *Maddox*, therefore, the precise parameters of doctrine remained largely undefined.

3. The Development of Exceptions

Prior to *Allis-Chalmers,* no Supreme Court case clearly delineated under what circumstances a state claim, although within the scope of a collective bargaining agreement grievance and arbitration clause, nevertheless would survive pre-emption. The result was that state and lower federal courts borrowed haphazardly from the *Garmon* exceptions in order to justify decisions finding no pre-emption of state law. There was, however, considerable attention paid to the circumstances under federal law that would dictate finding no arbitral pre-emption, and it is to these circumstances that we now turn.

a. the Alexander *exception*

The first exception is described as the "*Alexander* exception" taking its name from the Court's decision in *Alexander v. Gardner-Denver Co.,*[114] which held that an arbitrator's prior finding in an employer's favor on a race discrimination grievance did not preclude a subsequent Title VII suit.[115] The Supreme Court has applied this exception to find that neither the availability nor the exercise of a grievance and arbitration procedure prevents subsequent actions under the Fair Labor Standards Act (FLSA)[116] nor those under 42 U.S.C. section 1983.[117] In addition, lower federal courts have applied this doctrine to numerous other federal protective statutes.[118] *Alexander* mandates that these actions be preserved independent of the arbitration, and that courts neither hold arbitration preclusive of such actions nor even defer to arbitration as would the NLRB under *Smith* in an unfair labor practice case.

The rationale supporting *Alexander* has little to recommend it. It is rife with inconsistencies, and it has misled numerous state courts into applying its principles to preserve from pre-emption various state claims based upon state statutes or policies.[119]

In *Alexander,* the Court held that neither the election of remedies doctrine nor waiver nor arbitral deferral precluded a black employee covered by a collective bargaining agreement containing anti-discrimination and arbitration provisions from bringing a Title VII action after challenging his discharge unsuccessfully through the grievance and arbitration procedure.[120]

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114. 415 U.S. 36 (1974).

115. *Id.* at 59-60.

116. Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U.S. 728 (1981).

117. McDonald v. City of West Branch, 466 U.S. 284 (1984).

118. *See generally* Fowler, *Arbitration, the Triology, and Individual Rights: Developments Since Alexander v. Gardner-Denver,* 36 LAB. L.J. 173 (1985).

119. *See infra* notes 183-86 and accompanying text.

120. *Alexander,* 415 U.S. at 47, 49-51.

The Court reasoned that election of remedies did not preclude the subsequent Title VII action because provisions giving courts *de novo* power even after the Equal Employment Opportunity Commission's (EEOC) determination demonstrated that Congress intended the federal courts to have authority independent of other forums to entertain Title VII claims.[121] Furthermore, the Court reasoned that the general intent to allow Title VII as a remedy independent of other federal statutory actions compelled this conclusion.[122] The Court rejected the doctrine of waiver because collective agreements in the arbitration "concern[ed] . . . majoritarian processes" while Title VII involved "an individual's right to equal employment opportunities."[123] Finally the Court found that deferral to arbitration was not feasible because the arbitral fact-finding process was inferior to the judicial fact-finding process.[124]

Serious flaws in the Court's rationale demonstrate the absurdity of this result. The argument that courts are entitled to make determinations independent of the arbitrator because they can make determinations independent of the EEOC ignores the fact that the federal policy favoring arbitration enjoyed parity with NLRA provisions under *Smith,* and Title VII nowhere indicates an intent to exalt its policies over the federal policy favoring arbitration. Moreover, the Court reached this decision in *Smith* even though *Smith,* like *Alexander,* involved a statutory prohibition of discrimination.[125] Also, recent Court decisions according state agency determinations increasing *res judicata* and collateral estoppel effect in subsequent federal court actions undercut the persuasiveness of the *Alexander* analogy.[126] The argument that other federal actions are independent of Title VII holds no weight when the NLRA, the most analogous statutory situation previously addressed by the Court, calls for deferral to arbitration. The contention that Title VII, unlike the collective bargaining agreement and arbitration, involves individual rights rather than majoritarian processes begs the question; if the contract contains an anti-discrimination clause, it protects the same individual rights as Title VII.[127] If the union failed to carry out its duty of fair representation, then the employee would have a cause of action under federal law for breach of the duty of fair representation.[128] After all, this

121. *Id.* at 45, 47-49.

122. *Id.*

123. *Id.* at 51.

124. *Id.* at 56-57.

125. *Smith* involved § 8(a)(3), which prohibits discrimination against an employee for engaging in, or refusing to engage in, protected activity. *See* 29 U.S.C. § 158(a)(3) (1982). *Alexander* involved Title VII, which prohibits discrimination because of race, sex, religion, or national origin. *See* 29 U.S.C. § 2000e (1982).

126. *Alexander,* 415 U.S. at 57-59; *cf.,* Republic Steel Corp. v. Maddox, 379 U.S. 650, 664-65 (1964) (Black, J., dissenting) (arguing against federal pre-emption policy on grounds that arbitral process was inferior fact finding process to judicial procedures).

127. *See, e.g.,* Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982).

128. Moreover, numerous past Supreme Court decisions rejected the precise distinction between individuals and collective rights. *See, e.g.,* Smith v. Evening News Ass'n, 371 U.S. 195, 198-200 (1962).

duty arose in the context of race discrimination long before Title VII was enacted.[129]

Progeny cases have fared no better. In *Barrentine v. Arkansas-Best Freight System, Inc.,*[130] the Court held that a binding arbitration clause and an arbitrator's prior construction of the contract's language providing drivers with compensation "for all time spent in the service of the Employer" as not including pre-trip inspection and transportation time did not preclude drivers from bringing subsequently an FLSA claim seeking compensation for pre-trip inspection and transportation time because "statute[s] designed to provide minimum substantive guarantees" are not suited for resolution by arbitration.[131] The Court reasoned that the statutory scheme granted rights of action to individuals that could be neither waived nor limited by a collective bargaining agreement;[132] that unions focused on maximizing overall compensation in processing grievances, and could act in good faith to decline to process some individual grievances despite the breach of FLSA rights;[133] that arbitrators may lack familiarity with FLSA principles[134] or be prevented by the collective bargaining agreement from following them;[135] and that arbitrators may be unable to grant relief available under FLSA.[136]

These four justifications are makeweight arguments. If the arbitrator's judgment was what was bargained for and if employees bargained for that judgment to extend to pay matters, they cannot complain that their chosen forum is less familiar than a court with the FLSA. Moreover, whether or not an employee had greater relief available from a court than from an arbitrator was a factor found irrelevant in many past decisions.[137]

McDonald v. City of West Branch,[138] in holding a police officer's prior arbitration concerning his discharge did not have collateral estoppel or *res judicata* effect in his subsequent section 1983 action claiming he was discharged for exercising First Amendment rights, reasoned, first that *Kremer v. Chemical Construction Corp.*[139] made clear that 28 U.S.C. section 1738 did not require federal courts to give claim preclusion or issue preclusion effect to arbitration awards, and, second, that *Alexander* and *Barrentine* exposed shortcomings in the arbitration process's ability to vindicate the individual employee's statutory rights that prevented federal courts from choosing to accord a prior arbitration such effect.[140]

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129. Steele v. Louisville & N. Railroad, 323 U.S. 192 (1944).

130. 450 U.S. 728 (1981).

131. *Barrantine,* 450 U.S. at 731 n. 3 & 737.

132. *Id.* at 739.

133. *Id.* at 742.

134. *Id.* at 743.

135. *Id.* at 744.

136. *Id.* at 745.

137. *See, e.g.,* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 246-47 (1959). *But see* Republic Steel Corp. v. Maddox, 379 U.S. 650, 656 (1965).

138. 466 U.S. 284 (1984).

139. 456 U.S. 461 (1982).

140. *McDonald,* 466 U.S. at 288-89; *see Kremer,* 456 U.S. at 477-78.

The Court offered four reasons why arbitration is inadequate to allow such preclusive effect. First, the Court emphasized that here, as in *Alexander,* the arbitrators lacked expertise in handling "the complex legal questions that arise in section 1983 actions."[141] Second, the Court declared that the contract unduly confines the arbitrator because it may not give the arbitrator sufficient authority to enforce § 1983 and because the arbitrator must follow the contract if there is a conflict with section 1983.[142] Third, the Court expressed concern that the interest of the union in charge of processing grievances may conflict with that of the individual employee.[143] Finally, and most significantly, the Court found that arbitral fact-finding was not an adequate substitute for the judicial fact-finding anticipated by Congress in creating section 1983.[144]

None of these reasons has merit. The first three raise irrelevant concerns. The ability to handle fact questions is all that is required; the arbitrator need not be an expert in section 1983 actions in order to determine whether a police officer was fired for speaking his mind or for some other reason. The scope of the arbitrator's authority likewise is a non-issue, as the arbitrator will not be capable of making a determination that would satisfy the elements of collateral estoppel or *res judicata* in a subsequent section 1983 action unless the contract actually covers the subject of the subsequent section 1983 action. Moreover, it is the arbitrator's factual determination, not the significance attached to it, that will be given preclusive effect. Finally, it is the arbitrator's determination for which the employee bargained; the employee was free to bargain for exclusion of matters that could be the subject of section 1983 actions.

The potential union conflict likewise is a non-issue; if the union treats the employee unfairly, his or her remedy is a duty of fair representation action. If the union chooses in good faith not to take the employee's claim to arbitration, there can be no collateral estoppel or *res judicata* effect because there was no issue actually litigated and no opportunity to litigate;[145] and, again, this risk is what the employee bargained for when he chose the union as his representative.

The remaining concern, the reliability of the fact-finding process, represents a flip-flop from *Warrior & Gulf Navigation Co.,* and an alignment with the concerns expressed by Justice Black in his dissent to *Maddox.* If the Court rejected it in *Maddox,* it is unclear why this contention was accepted in *McDonald.* It appears only that *McDonald* continues the illogical, inexplicable insistence of the Court on in-court adjudication of facts connected with certain "red-circled" statutory actions.

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141. *McDonald,* 466 U.S. at 290.

142. *Id.* at 290-91.

143. *Id.*

144. *Id.*

145. *Id.* Of course such a regulation could preclude a subsequent action under principles of waiver, or accord and satisfaction, or compromise and settlement.

b. the duty of fair representation exception

The federal policy favoring exclusive resolution of employment disputes through agreements in arbitration presumes that the union will attempt fairly to represent the employees. Otherwise, the policy would not succeed in its aim to minimize industrial strife. Accordingly, there must be an exception to arbitral finality when an employee has proved a breach of the duty of fair representation.

The Supreme Court in *Vaca v. Sipes*[146] first created the duty of fair representation in the NLRA context. There, in reversing a jury verdict for an employee in his suit against the employer and the union because the employer discharged him for being medically unfit and the union chose not to arbitrate the claim, the Court held that *Garmon* did not pre-empt the action because *Garmon* did not apply to section 301 suits.[147] It reversed nevertheless because the employer had not repudiated the agreement and the mere fact that the union reached a different evaluation of the grievance than a jury did not mean that the union acted arbitrarily or otherwise reached the duty of fair representation.[148]

The Court discussed two situations in which there would be an exception to the *Maddox* exhaustion requirement. First, an employee would be excused from exhausting grievance and arbitration procedures when the employer repudiates the grievance and arbitration procedure by its conduct.[149] Second, the employee is excused when the union has sole responsibility for arbitration *and* breaches its duty of fair representation,[150] by acting in an arbitrary, discriminatory, or bad faith manner,[151] but not simply by either merely refusing to arbitrate,[152] or making an error.[153]

The Court further clarified the duty of fair representation exception in *Hines v. Anchor Motor Freight, Inc.*[154] In a hybrid duty of fair representation/section 301 suit involving the discharge of employees for falsifying expense vouchers, the Court held that "enforcement of the finality provision where the arbitrator has erred is conditioned upon the union's having satisfied its statutory duty fairly to represent the employee in connection with the arbitration proceedings."[155] The Court declared that the focus following arbitration must be upon whether there is substantial reason to believe that a union's breach of the duty contributed to the erroneous outcome of the contractual proceedings.

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146. 386 U.S. 171 (1967).
147. *Id.* at 183-84.
148. *Id.* at 192-95.
149. *Id.* at 185-86.
150. *Id.*
151. *Id.* at 190.
152. *Id.* at 192.
153. *Id.* at 193-95.
154. 424 U.S. 554 (1976).
155. *Id.* at 571.

c. summary

The *Alexander* doctrine and the duty of fair representation doctrine have been the only exceptions to the doctrine of arbitral pre-emption expressly created by the Supreme Court. From *Oliver* and *New York Tel. Co.* (*Morton/Machinists/Malone* decisions that did not involve arbitration), one could expect that state courts and lower federal courts would limit implied exceptions to state health and safety laws and benefits under workers' compensation and unemployment compensation laws. However, the Court's failure to deal comprehensively with the precise parameters of arbitral pre-emption, coupled with the flaws in the *Alexander* doctrine, caused numerous state and lower federal courts prior to *Allis-Chalmers* to create haphazard exceptions of their own.

II. Arbitral Pre-emption in the Lower Courts Prior to Allis-Chalmers

The nature and scope of arbitral pre-emption was uncertain prior to *Allis-Chalmers*. It was unclear whether arbitral pre-emption was an affirmative defense or whether it affected subject matter jurisdiction. Regarding the scope, state and lower federal courts frequently unduly restricted the doctrine, principally by misusing *Garmon* criteria, or by applying the *Alexander* exception to state causes of action.

A. Nature of Arbitral Pre-emption

If only an affirmative defense, arbitral pre-emption would be waived unless pleaded; if subject matter jurisdiction, it could be raised at any stage of the proceeding. If only an affirmative defense, arbitral pre-emption could not provide the basis for removal, which turns on the contents of the well-pleaded complaint; if subject matter jurisdiction, of course, arbitral pre-emption would necessarily provide a basis for removal.[156]

Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers[157] should have put the problem to rest when it held that a state law injunction action could be removed to federal court based upon defendant's characterization of plaintiff's claim of arising under section 301.[158] Most lower federal courts viewed *Avco* as dispositive of the pleading issue as well as the removal issue.[159] The same was true of most state

156. *See, e.g.*, Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 12-14 (1983).

157. 390 U.S. 557 (1968).

158. *Id.* at 560-61; *see Franchise Tax Bd.*, 463 U.S. at 23-24.

159. *See, e.g.*, Olguin v. Inspiration Consol. Copper Co., 740 F.2d 1468 (9th Cir. 1984); Eitmann v. New Orleans Public Service, Inc., 730 F.2d 359 (5th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984).

courts.[160] Alabama's Supreme Court, however, adopted the opposite position in *International Longshoremen's Ass'n v. Davis.*[161] In an analogous context, the court in *Longshoremen* held that *Garmon* pre-emption was an affirmative defense that can be waived if not pleaded. The court drew a distinction between the court's subject matter jurisdiction and the court's power to act.[162] This indicated that arbitral pre-emption would receive similar treatment. Thus, before *Allis-Chalmers,* the courts were split over whether arbitral pre-emption was an affirmative defense or whether arbitral pre-emption divested the court of subject matter jurisdiction.

B. Scope of Arbitral Pre-emption

Unlike the clear delineation of *Garmon* pre-emption in the *Garmon* decision and its progeny, the Supreme Court decisions prior to *Allis-Chalmers* offered very little guidance about the parameters of the arbitral pre-emption doctrine as derived from *Machinists,* the *United Steelworkers of America* Trilogy, and *Maddox.* The lower courts, in attempting to fill in the blanks, frequently became confused. There are four ways in which to evaluate lower court views on the scope of arbitral pre-emption of state law claims prior to *Allis-Chalmers:* according to Supreme Court pre-emption decisions chosen as the basis for its rationale, according to what state claims were involved, according to whether state claims under consideration were filed before or after arbitration, and finally, according to whether the defendant was a party other than the employer itself.

As for basis evaluation, all such cases in theory should rest upon *Morton/Machinists/Maddox* rather than upon *Garmon/Linn/Farmer.* Arbitral pre-emption rests upon the federal policy favoring preservation of a mechanism for private resolution of employment disputes, not upon what express NLRA language arguably prohibits or arguably protects. All arbitral pre-emption cases in theory should not except from pre-emption any otherwise pre-empted claims unless, under *Vaca,* the employer has repudiated the collective bargaining agreement or the union has breached the duty of fair representation, or, under *Alexander/Barrentine/McDonald,* the claim involved some federal statutory right intended to be a remedy preserved in addition to arbitration.

Concerning evaluation by claim, *Maddox* and the *Steel Workers* trilogy in theory extend arbitral pre-emption to any claim arguably covered by the collective bargaining agreement's arbitration clause. Nevertheless, decisions prior to *Allis-Chalmers* by state and lower courts involving arbitral pre-emption place greater emphasis upon the nature of the state claim involved

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160. *See, e.g.,* Consolidated Theatres, Inc. v. Theatrical Stage Employees Union, Local 16, 69 Cal.2d 713, 447 P.2d 325, 73 Cal. Rptr. 213 (1968); Chicago and North Western Ry. Co. v. La Follette, 27 Wis.2d 505, 135 N.W.2d 269 (1965); General Bldg. Contractors Ass'n v. Local Unions Nos. 542, 542-A and 542-B, 370 Pa. 73, 87 A.2d 250 (1952).

161. 470 So.2d 1215 (Ala. 1985), *aff'd,* 476 U.S. 380 (1986).

162. *Id.* at 1216.

and the comparative adequacy of the remedies, without regard to whether a binding arbitration clause actually covered the matter.

Whether the claim had been raised before or after the processing of the grievance to arbitration should not have mattered under the *Steel Workers* trilogy and *Maddox* because *Maddox* dictated that an employee at least attempt to arbitrate the grievance before resorting to the courts, and the *Steel Workers* trilogy permitted only the most perfunctory review by the courts of matters decided by the arbitrator. With regard to claims against defendants other than employers, what happened, for example, if the employee brought a fraud claim against both the employer and an individual superivsory employee? What happened if the insurance company retained to provide benefits granted by the collective bargaining agreement was named as a defendant with the employer? Would arbitral pre-emption protect the employer but not the supervisory employee or the insurer? The Supreme Court had given no guidance.

1. According to Basis

Decisions prior to *Allis-Chalmers* declining to find a state claim pre-empted by the federal policy favoring private resolution of employment disputes most frequently relied upon a combination of *Garmon/Linn/Farmer* and *Alexander/Barrentine/McDonald,* or upon *Garmon/Linn/Farmer* alone. The *Garmon/Linn/Farmer* rationale did not fit arbitral pre-emption, but, if applied, ran the risk of destroying the arbitral pre-emption doctrine entirely. *Garmon* commanded the court to look to whether specific language arguably protected or arguably prohibited certain conduct. There was no language in the NLRA that clearly established a grievance and arbitration clause as an employee's exclusive remedy. Accordingly, many decisions would conclude, in balancing federal interest and state interest under *Garmon,* that the matter covered by the arbitration clause was something of only peripheral concern to the labor laws while the state tort involved was a matter deeply rooted in local interest and therefore not pre-empted. In those decisions in which *Alexander/Barrentine/McDonald* played a role, the court would find no pre-emption because it would determine that just as certain federal statutes guaranteed remedies for individual rights independent of an arbitration clause, certain state statutes and/or policies also provided independent remedies. If the particular tort claim qualified, in the court's view, as a independent claim, the tort was not pre-empted.

Peabody Galion v. Dollar[163] represents the worst example of both errors, combining a misinterpretation of *Garmon* and *Farmer*[164] with a misapplication of *Alexander*[165] to preserve from pre-emption an employee's claim

163. 666 F.2d 1309 (10th Cir. 1981).
164. *Id.* at 1314-15.
165. *Id.* at 1320-23.

under a state statute prohibiting discharge for filing a workers' compensation claim.[166] In *Dollar,* a dispute arose when an employer used a collective bargaining provision allowing disability layoffs[167] to place an employee on workers' compensation leave.[168] Employees, after arbitrating unsuccessfully, filed diversity actions under an Oklahoma statute prohibiting discharge for filing a workers' compensation claim and providing the discharged employee with a civil action for damages.[169]

Citing the *Vaca* decision that held *Garmon* not applicable to arbitral pre-emption, the *Dollar* court blindly posited the issue in *Garmon* terms as whether "the state statute interfere[s] with the workings of the National Labor Relations Act."[170] The court concluded that *Sears, Roebuck & Co.,* a *Garmon* progeny case, "seriously undermine[d] the appellees' argument that the state statute is facially precluded by federal law" because *Sears, Roebuck & Co.* held that a trespass claim was not pre-empted.[171] Relying on *Garmon,* the court committed the incredible blunder of finding that the wrongful discharge claim was a matter of peripheral concern and was not arguably protected nor arguably prohibited because it "has nothing whatsoever to do with union organization or collective bargaining."[172] The court then concluded that a balancing of interests warranted no pre-emption because workers' compensation was very important to states, the statute in question was a law of general application rather than a law applying only to labor relations, and because it was not unlike the defamation action allowed by the Supreme Court in *Linn.*[173]

The *Dollar* court recognized that *Morton* established a separate line of pre-emption, but concluded that the *Morton* doctrine did not pre-empt because there was "no special congressional consideration of workmen's compensation related discharges" and "discharging workers because they had filed claims has nothing to do with collective bargaining."[174] The specific collective bargaining provision here did not warrant a different result, the court concluded, because the source of the state tort claim was a state statute and the Supreme Court in *Barrentine* and *Alexander* had held that arbitration was not the exclusive remedy for individual statutory rights.[175]

This analysis is flawed in four respects. First, it applies *Garmon* in a context that *Garmon* does not govern.[176] Second, by splitting *Garmon* into

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166. *Id.* at 1323-24.
167. *Id.* at 1311 n.1a.
168. *Id.* at 1311 n.5, 1312.
169. *Id.* at 1312 n.2.
170. *Id.* at 1313.
171. *Id.* at 1314.
172. *Id.* at 1316.
173. *Id.* at 1318.
174. *Id.* at 1316.
175. *Id.* at 1320-21.
176. *Garmon* involved pre-emption by ULP provisions. *See* 29 U.S.C. § 158 (1982). *Dollar* concerned the pre-emptive impact of a dispute over the meaning of a collective bargaining

a *Garmon* doctrine and a *Sears, Roebuck & Co.* doctrine, and by demonstrating complete obliviousness to the importance of the federal policy favoring arbitration, the court misapplied *Garmon's* factors to the case before it.[177] Third, the court ignored the admonition of *Maddox* to focus on the conduct (here, a discharge) rather than upon the state's reason for regulating (here, furthering workers' compensation policies).[178] Finally, the court ignored the difference between a state statute and a federal statute for pre-emption purposes.[179] Federal statutes and policies stand on equal footing with each other and, unless their terms indicate otherwise, must be reconciled; the Constitution's supremacy clause, however, makes plain that this is not the case with federal law and state law.[180] It made no sense for the court to apply *Alexander* and *Barrentine—cases* accommodating two conflicting federal policies—to the context in which the conflict was between federal and state law. The tortured road that the court had to follow in order to reach its decision should have suggested that the right answer lay elsewhere; had it found pre-emption, the road would have been much easier.

The court should have begun with *Morton/Machinists.* The court should have found, under *Morton/Machinists,* that the federal policy favoring arbitration pre-empted state court actions on matters covered by an arbitration clause unless the *Vaca* exception applied, in which case the federal duty of fair representation law for the law under section 301 of the Labor Management Relations Act would govern. Applying this rule to the facts, the court should have determined that the collective bargaining agreement contained a binding arbitration provision covering all disputes under the

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agreement, a matter of pre-emption by the grievance resolution relationship given quasi-judicial status in the *Steelworkers* triology. Pre-emption by federal policy, as distinguished from pre-emption by express provisions, is governed by *Malone/Machinists.* This makes a difference because *Garmon,* intended to protect specific provisions, calls for a balancing of federal stautory language with state policies embodied in common law torts or statutory claims. *Morton/Machinists/Malone,* by contrast, calls for no such balancing because this preemption protects relationships arising by implication. *Any* state interference with the smooth operation of those relationships would frustrate the federal policy. The issue is not a balancing of interests, but whether the federal relationship reaches or does not reach a particluar incident. To apply *Garmon* in this context would frustrate federal policy because, as *Dollar* illustrates, the balancing would be done between a clear state tort or statute and a federal relationship without any clear statutory language.

177. Properly applying *Garmon* to arbitration requires recognition of the importance of the federal policy favoring arbitration. *See infra* notes 281-82 and accompanying text.

178. *Peabody Galion,* 666 F.2d at 1316.

179. *Id.* at 1323-24.

180. A conflict between two federal statutes involves a contest between equals. The law avoids implied repeal of one in favor of another because, absent congressional direction to the contrary, the courts presume that Congress intended to give effect to both statutes as far as possible. *See generally* 1A SUTHERLAND ON STATUTORY CONSTRUCTION § 23.10 (1972 & Supp. 1985). A conflict between a federal statute and a state statute, by contrast, is governed by the supremacy clause and considerations of federalism. Unless federalism dictates that state law be preserved, the supremacy clause presumes that federal law displaces state law. *See generally id.* at § 36.08.

contract, that the contract contained clauses outlining the employer's right to lay off and discharge, and that the arbitration had to take place. Finally, the court should have engaged only in those narrow inquiries established by the *Steel Workers* trilogy to determine if the arbitration proceeding was fair and regular and if the duty of fair representation was satisfied. Unfortunately, the court did not do this.[181]

Some courts, although choosing the *Garmon* analysis, avoided these errors.[182] Many cases other than *Dollar* made the mistake of applying

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181. Other decisions erroneously applying *Garmon/Farmer* to arbitral pre-emption reached similar results. In *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985), the court held not pre-empted a "whistle-blower's" public policy wrongful discharge claim under California law because *Garmon-progeny* cases *Farmer* and *New York Telephone Co.* held that the state had a significant interest in protecting public policy. *Id.* at 1373-75. In addition, the *Garibaldi* court concluded that there would be no interference with labor policy because the claim sounded in tort and not in contract. *Id.* at 1375. *Lueck v. Aetna Life Ins. Co.*, 116 Wis.2d 559, 342 N.W.2d 699 (1984), *rev'd*, 471 U.S. 202 (1985), held an employer's bad faith claim for interference with receipt of medical insurance benefits was not pre-empted because it sounded in tort and not contract. *Id.* at 702-03. *Garmon*, as interpreted by *Farmer*, made clear that bad faith actions were " 'a merely peripheral concern of the Labor Management Relations Act.' " *Id.* at 704 (quoting Farmer v. Carpenter, 430 U.S. 290 (1977). *Garmon* also made clear that the state's interest in making sure insurance claims are paid was an interest "deeply rooted in local feeling" and the state tort claim offered more types of relief than arbitration. *Id.* at 706-07.

Alpha Beta, Inc. v. Superior Court, 160 Cal.App.3d 1049, 1057, 207 Cal. Rptr. 117, 121-22 (1984), held that a terminated employee's outrage claim against an employer was not pre-empted because the NLRA, as amended, contained no express provision mandating arbitration like the Railway Labor Act provision; *Farmer* and *Garmon* held that federal labor law did not pre-empt outrage actions; and the fact that the claim sounded in tort rather than contract precluded application of the *Maddox* exhaustion requirement. *See* Collins v. General Time Corp., 549 F. Supp. 770 (N.D. Ala. 1982) (court relied on *Farmer* in holding Alabama outrage action not pre-empted); Vaughn v. Pacific Northwest Bell Tel. Co., 289 Or. 73, 611 P.2d 281, 287 (1980) (held that plaintiff whose grievance was pending at time of his state claim was not prevented from bringing action under state statute prohibiting discharge for filing workmen's compensation claim because statute, under *Garmon*, was " 'deeply rooted in local feeling' ").

182. Although mistakenly choosing the *Garmon* analysis, the Eighth Circuit in *Moore v. General Motors Corp.*, 739 F.2d 311, 315 (8th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985), held a fraud claim pre-empted by the failure to exhaust arbitration because the complained-of conduct was arguably protected or prohibited by §§ 7 and 8 of the NLRA because it "essentially arises from an employment contract between [the employee] and GM that was entered into pursuant to an agreement between GM and the Union." The court rejected the contention that the conduct was "merely peripheral," reasoning that it "arises from a transfer that was provided for generally in the Collective Bargaining Agreement, and specifically, in the Memorandum of Understanding between the Union and GM." *Id.* at 316. The court also rejected another pitfall of applying *Garmon* to arbitral pre-emption, holding that no *Garmon* exception applied because the "damages which Moore alleges she suffered were at least partially a result of her personal reaction to the transfer" and the right infringed "evolves from the Collective Bargaining Agreement and the Memorandum of Understanding . . . which is governed by federal law, not state law." *Id.* Finally, the court rejected the contention that any difference in remedies would prevent pre-emption, reasoning that the issue was " 'not the nature of the remedy sought . . . but whether the remedy sought may require that the court

Alexander/Barrentine/McDonald to state statutory claims.[183] As with *Garmon,* however, not all state courts presented with arguments by analogy to *Alexander* fell into this trap.[184] Most frequently, decisions prior to *Allis-Chalmers* that found pre-emption did not mention *Garmon* progeny or *Alexander* progeny cases at all. Rather, they relied upon the *Steel Workers* trilogy and *Maddox.*[185] Other decisions reached the correct result without citing

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from which it is sought . . . interpret a collective bargaining agreement.' " *Id.* at 217 (quoting Wilkes-Barre Publishing Co. v. Newspaper Guild, Local 120, 647 F.2d 372, 380 (4th Cir. 1981), *cert. denied,* 454 U.S. 1143 (1982)); *see Wilkes-Barre Publishing,* 647 F.2d at 381.

183. *See, e.g.,* Midgett v. Sackett-Chicago, 105 Ill.2d 143, 473 N.E.2d 1280 (1984), *cert. denied,* 106 S. Ct. 278 (1985) (held that employee's claim that he was discharged in violation of state workmen's compensation statute was not pre-empted, reasoning that: it would be anomalous if statute protected only employees not covered by collective bargaining agreements; employee's arbitration remedy would be less attractive because he cannot recover punitive damages; and that *Alexander* and its progeny hold that failure to arbitrate does not preclude federal statutory remedies); Elia v. Industrial Personnel Corp. 125 Ill. App.3d 1026, 466 N.E.2d 1054, 1057-58 (1st Dist. 1984) (held that action for retaliatory discharge for filing workmen's compensation claim was not precluded by prior adverse arbitration decision because specific issue of retaliation was not raised in arbitration proceeding, because arbitrators "are, at best, poorly equipped to enforce the public policy of this State" and because *Alexander* and its progeny applied to state law actions); Machinists Automotive Trades Dist. Lodge No. 190 v. Utility Trailer Sales Co., 141 Cal. App.3d 80, 82-83, 190 Cal. Rptr. 98, 100 (1983), *appeal dismissed,* 464 U.S. 1005 (1984) (court observed, in *dicta* by analogy to *Alexander,* that arbitrator's decision would not foreclose employee from bringing state court action to enforce his statutory right to reimbursement for lost tools). Numerous courts have held that state claims under state anti-discrimination provisions survive federal arbitral pre-emption because of *Alexander. See* Hayworth v. Oakland, 129 Cal. App.3d 723, 181 Cal. Rptr. 214 (1982); Weiss v. Ford Motor Co., 64 Mich. App. 519, 236 N.W.2d 124 (1975); Thornton v. Potamkin Chevrolet, 94 N.J. 1, 462 A.2d 133 (1983).

184. Payne v. Pennzoil Corp., 138 Az. 52, 672 P.2d 1322 (1983) (holding that employee's arbitration remedy was exclusive in that his action under state statute prohibiting discharge for filing workers' compensation claim was pre-empted by collective bargaining agreement's grievance and arbitration clause even though statute voided any preexisting contractual waiver of rights that it conferred, correctly reasoning that *Alexander* and its progeny are limited to federal rights and that state rights stand on different ground); Embry v. Pacific Stationery and Printing Co., 62 Or. App. 113, 659 P.2d 436, 437 (1983) (limited *Alexander* only to statutory actions, holding that plaintiff's failure to exhaust grievance and arbitration remedies precluded him from bringing state wrongful discharge action under public policy theory, because there was no independent statutory basis for the claim).

185. Redmond v. Dresser Indus., Inc., 734 F.2d 633, 635-36 (11th Cir. 1984) (per *curiam)* (held that contract, fraud, outrage, and bad faith claims were pre-empted because all derived from plaintiff's layoff, and plaintiff had failed to exhaust grievance and arbitration procedure); Kaferle v. Fredrick, 360 F.2d 536, 539 (3d Cir. 1966) (court, relying on *Maddox,* held employee's suit for back wages for breach to collective bargaining agreement was pre-empted because plaintiff had not grieved arbitrated dispute); Rhine v. Union Carbide Corp., 343 F.2d 12, 15-16 (6th Cir. 1965) (relying upon *Warrior & Gulf Navigation,* 363 U.S. at 15, held that suit for disability pay under contract's disability pay clause was pre-empted); Henderson v. Eastern Gas and Fuel Assocs., 290 F.2d 677, 680-81 (4th Cir. 1961) (court, relying upon *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 374 (1960), observed in *dicta* that failure to exhaust grievance and arbitration remedies precluded suit for back wages on contract); Mason v. Continental Group, Inc., 569 F. Supp. 1241, 1245-47 (N.D. Ala. 1983), *aff'd,* 763 F.2d 1219 (11th Cir. 1985), *cert. denied,* 106 S. Ct. 863 (1986) (held that claims

Maddox or the *Steel Workers* trilogy.[186]

2. *According to Claim.*

Wrongful discharge was perhaps the grayest area of controversy prior to *Allis-Chalmers,* as the upswing in state law exceptions to the employment-at-will rule provided protection that until recently had only been available under a collective bargaining agreement's clause permitting discharge only for "just cause." Relatively new actions for discharging in retaliation for filing workers' compensation claims were most controversial. Courts holding such actions not pre-empted generally relied on *Alexander* analysis.[187] Others reached the same result based on *Garmon.*[188] Courts adopting the opposite view tended to reject *Alexander* analysis in the context of state statutory rights.[189] Wrongful discharge claims based on the "public policy" theory caused similar controversy.[190]

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arising out of discharge of employees were pre-empted even though claims were not contract claims because *Warrior & Gulf Navigation* and *Maddox* precluded any such claims when plaintiffs had not exhausted grievance and arbitration procedure); Vantine v. Elkhart Brass Mfg., 572 F. Supp. 636 (N.D. Ind. 1983), *aff'd,* 762 F.2d 511 (7th Cir. 1985) (relying on *United Steelworkers of America* Trilogy, held pre-empted plaintiff's action under state statute for wrongful discharge for filing workmen's compensation claim); Frame v. B. F. Goodrich Co., 453 F. Supp. 63, 65-66 (E.D. Pa. 1978) (relying upon *Warrior & Gulf Navigation* and *Enterprise Wheel and Car,* held that suit for pension benefits was pre-empted because arbitration clause provided exclusive remedy); Reese v. Mead Corp., 79 Lab. Cas. (CCH) 11,732 (N.D. ALA. 1975) (held plaintiffs' fraud claims arising out of representatives made by employer in connection with reduction in force was pre-empted because plaintiffs had not even attempted to utilize grievance and arbitration procedure); Thompson v. Modernfold Indus., 175 IND. APP. 686, 373 N.E.2d 916, 919-20 (1978) (relying on *Warrior & Gulf Navigation,* and *Maddox,* held wrongful discharge suit was pre-empted for failure to exhaust arbitration); Thompson v. Monsanto Co., 559 S.W.2d 873, 875 (Tex. Ct. App. 1977) (relying upon *Maddox* and *Warrior & Gulf Navigation,* held that prior arbitration precluded action under state statute prohibiting discharges for filing workers' compensation claims).

186. Thus, *Bertrand v. Quincy Market,* 99 Lab. Cas. (CCH) 10,577 (D. Mass. 1983) held a wrongful discharge claim based on the covenant of fair dealing theory was preempted because the plaintiff had failed to exhaust his grievance and arbitration procedure. Hilliard v. Arco Steel Corp., 421 F. Supp. 658, 662 (W.D. Pa. 1976), *aff'd,* 532 F.2d 746 (3d Cir. 1976), *cert. denied,* 429 U.S. 828 (1976), relying on *Vaca,* held that an employee whose discharge the Union grieved but did not take to arbitration could not sue his employer for wrongful discharge without satisfying one of the *Vaca* exceptions.

187. *See, e.g.,* Peabody Gallion v. Dollar, 666 F.2d 1309, 1321-22 (10th Cir. 1981); Elia v. Industrial Personnel Corp., 125 Ill. App.3d 1026, 466 N.E.2d 1054, 1057-58 (1984).

188. *See* Vaughn v. Pacific Northwest Bell Tel. Co., 289 Or. 73, 611 P.2d 281, 287 (1980); *see also* Wyatt v. Jewel Co., 108 Ill. App.3d 840, 439 N.E. 2d 1053, 1054 (1982) (workers' compensation discharge claim was held not pre-empted because it was tort claim).

189. *See, e.g.,* Lamb v. Briggs, 700 F.2d 1092, 1095 (7th Cir. 1983); Payne v. Pennzoil Corp., 138 Ariz. 52, 672 P.2d 1322, 1326 (1983); Thompson v. Monsanto, 559 S.W.2d 873 (Tex. App. 1977). *Compare* Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367 (9th Cir. 1984), *cert. denied,* 471 U.S. 1049 (1985) (held"whistle blower's" wrongful discharge action not pre-empted); Messenger v . Volkswagen of America, Inc., 585 F. Supp. 565 (S.D. W.Va.

The more traditional fraud claims attracted none of the controversy that the wrongful discharge claims attracted. Prior to *Allis-Chalmers,* courts reaching the issue held that when the fraud arose out of a matter subject to the grievance and arbitration procedure, the fraud claim was pre-empted.[191]

Other new torts, such as outrage and bad faith, were the center of controversy prior to *Allis-Chalmers* principally because lower courts were frequently misled into applying *Farmer* analysis in the setting of arbitral pre-emption. *Farmer* had held, under *Garmon,* that an outrage claim was not pre-empted by section 8(b) of the NLRA. Decisions finding that grievance and arbitration provisions did not pre-empt outrage and bad faith claims within their scope tended to rely on *Farmer.*[192] Decisions finding no pre-emption either rejected the applicability of *Farmer* to arbitral pre-emption[193] or held that the facts in this instance did not meet the *Farmer* threshold.[194]

Other than fraud, the areas in which there was very little controversy before *Allis-Chalmers* are not surprising. The least controversial area in which courts regularly found pre-emption involved contract claims.[195] Courts frequently built upon *J. I. Case Co. v. NLRB,*[196] which held that collective bargaining agreement supercedes the individual employment contracts of bargaining unit employees.[197] In light of *Alexander,* the least controversial area in which courts regularly found no pre-emption was state law discrimination claims.[198]

3. *According to Time*

In theory, whether the state court claims are before or after the exhaustion of the grievance and arbitration procedure should not be a

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1984) (held whistle blower's wrongful discharge action not pre-empted); *with* Embry v. Pacific Stationery and Printing Co., 62 Or. App. 113, 659 P.2d 436, 437-38 (1983) (held public policy wrongful discharge claim pre-empted because public policy had no statutory basis).

190. *See supra* notes 181, 184-89 and accompanying text.

191. Moore v. General Motors Corp., 739 F.2d 311, 314 (8th Cir. 1984), *cert. denied,* 471 U.S. 1099 (1985); Mason v. Continental Group, Inc., 569 F. Supp. 1241 (N.D. Ala. 1983), *aff'd,* 763 F.2d 1219 (11th Cir. 1985), *cert. denied,* 106 S. Ct. 863 (1986); Reese v. Mead Corp., 79 Lab. Cas. (CCH) 11,732 (N.D. Ala. 1975); Collins v. MBPXL Corp., 9 Kan. App.2d 363, 679 P.2d 746 (1984).

192. *See* Alpha Beta Inc. v. Superior Court, 160 Cal. L. App.3d 1049, 1057, 207 Cal. L. Rptr. 117, 121-22 (1984), *vacated,* 472 U.S. 1604 (1985); Lueck v. Aetna Life Ins. Co., 116 Wis.2d 559, 342 N.W.2d 699 (1984), *rev'd.,* 471 U.S. 202 (1985).

193. Redmond v. Dresser, 734 F.2d 633 (11th Cir. 1984).

194. Collins v. MBPXL Corp., 9 Kan. App.2d 363, 679 P.2d 746, 749-52 (1984).

195. See Rhine v. Union Carbide Corp., 343 F.2d 12, 15 (6th Cir. 1965); Thompson v. Modernfold Industries, 175 Ind. App. 686, 373 N.E.2d 916 (1978).

196. 321 U.S. 332 (1944).

197. *See, e.g.,* Eitmann v. New Orleans Public Service, Inc., 730 F.2d 359 (5th Cir. 1984), *cert. denied,* 469 U.S. 1018 (1984).

198. Hayworth v. City of Oakland, 129 Cal. App.2d 723, 181 Cal. Rptr. 214 (1982); Weiss v. Ford Motor Co., 64 Mich. App. 519, 236 N.W.2d 124, 127 (1975).

determinative factor of whether they are pre-empted. If the arbitration remedy is available but not used, failure to exhaust precludes the claims; if arbitration is available and used, it is refutable only on the narrow grounds set forth in *Vaca* and the *Steel Workers* trilogy. Nevertheless, numerous decisions prior to *Allis-Chalmers* placed great weight upon whether arbitration was ignored entirely or whether it was completed prior to the filing of the state claim.

Based on *Maddox,* one would have expected the courts to find pre-emption most frequently when the claim had not been arbitrated because the employee or his representative had failed to make use of the available grievance and arbitration procedure. *Maddox,* after all, had precluded the state claim because the grievance procedure had not been exhausted. However, just the opposite was true. For example, in *Cushing v. General Time Corp.,*[199] the court held that a plaintiff that had submitted to arbitration her challenge to her suspension could not subsequently bring an outrage action challenging the supervisor's behavior in connection with that suspension.[200] However, in the companion case of *Collins v. General Time Corp.,*[201] the same judge held that the outrage claim of a plaintiff who had not yet exhausted her contractual grievance and arbitration procedure was not pre-empted.

In *Wyatt v. Jewel Companies,*[202] the court held not pre-empted a claim for discharge in retaliation for filing a workers' compensation claim even though the plaintiff had not exhausted the grievance and arbitration. However, *Bertling v. Roadway Express, Inc.,*[203] while acknowledging *Wyatt* and declining to reach the pre-emption question, held that the prior arbitration and the plaintiff's discharge precluded the plaintiff, under state issue preclusion law, from subsequently bringing a claim for discharge and retaliation for filing a workmen's compensation suit.[204]

4. According to Party

As is reflected by the Supreme Court's opinion in *Maddox,* the strength of the federal policy favoring arbitration depends upon whether the finality of arbitration can be undermined by parallel state law claims.[205] The problem is the same whether the defendant named in the state law action is the employer itself, or one of the employer's representatives individually, such

199. 549 F. Supp. 768 (N.D. Ala. 1982).

200. *Id.* at 769-70.

201. 549 F. Supp. 770 (N.D. Ala. 1982).

202. 108 Ill. App.3d 840, 439 N.E.2d 1053 (1982).

203. 121 Ill. App.3d 60, 459 N.E.2d 265 (1984).

204. 459 N.E.2d at 267-68; *compare* Thompson v. Monsanto, 559 S.W.2d 873 (Tex. App. 1977) (holding claim for discharge in retaliation for filing workmen's compensation claim pre-empted); *with* Carnation Co. v. Borner, 610 S.W.2d 450 (Tex. 1980) (court held claim for discharge in retaliation for filing workmen's compensation claim not pre-empted because, *inter alia,* there had been no final and binding arbitration).

205. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965).

as a supervisor or an insurance carrier. If an employee can sue his or her supervisor for actions taken in the course of employment, such as wrongful discharge or fraud, the employer's incentive to honor an agreement to let an arbitrator decide whether the discharge was for "just cause" is just as frustrated as if the actions were directed against the employer itself. Recent experience with allowing employees to circumvent workers' compensation schemes by filing co-employee law suits demonstrates vividly how legislative policy designating a particular remedy can be frustrated if other remedies are allowed. Alabama's experience is typical. Alabama, one of a handful of states allowing such actions, suffered measurably because it permitted co-employee actions notwithstanding a worker's compensation scheme that purported to provide employees with an exclusive remedy. As a result, Alabama has sharply curtailed these claims.[206]

Pre-Allis-Chalmers decisions appeared to recognize this danger in the context of arbitral pre-emption. *Payne v. Pennzoil Corp.*[207] affirmed summary judgment in favor of three supervisory employees against claims by discharged subordinates that they interfered with plaintiffs' employment contracts, invaded plaintiffs' privacy by engaging in surveillance following his workers' compensation claim, and discharged him in retaliation for filing workers' compensation claims.[208] The court accepted the defendants' uncontroverted affidavits that they were acting within the scope of employment and that, therefore, they were a "party" to the collective bargaining agreement containing an arbitration clause.[209] *Collins v. MBPXL Corp.*,[210] in rejecting as pre-empted plaintiff's fraud and outrage against his employer arising out of his discharge, also rejected without discussion the same claims against his supervisor.[211]

The insurance company defendants did not fare as well. The Eighth Circuit, in *United Steel Workers of America v. General Steel Industries, Inc.*,[212] held that a claim against the insurance carrier providing benefits pursuant to the employer's and the union's collective bargaining agreement was not subject to arbitration because the insurer was not a party to the agreement,[213] even though the employer and the union were required to arbitrate their dispute concerning benefits paid pursuant to the separate insurance contract (having no arbitration clause) because it was incorporated by reference into the collective bargaining agreement (containing such a clause).

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206. Ala. Code §§ 25-5-11, 25-5-53 (Michie Supp. 1986) (as amended); *see generally* Johnson and Cassady, *Co-Employee Lawsuits Under the Alabama Workmen's Compensation Acts*, 14 CUMB. L. REV. 267 (1984).

207. 138 Ariz. 52, 672 P.2d 1322 (1983).

208. The court rejected state court decisions declaring that an arbitration agreement did not oust the court of jurisdiction absolutely and limiting the scope of arbitration to issues set forth in the clause's clear language. *See* 672 P.2d at 1325-26.

209. *Id.* at 1326-27.

210. 9 Kan. App.2d 363, 679 P.2d 746 (1984).

211. *Id.* at 751-52.

212. 499 F.2d 215 (8th Cir. 1974).

213. *Id.* at 217-18.

From the foregoing, it appears that, prior to *Allis-Chalmers,* a suit against the insurance company for bad faith refusal to pay would not be pre-empted even if payment were withheld by the employer's order, but that a supervisory employee involved in carrying out the employee's order would be immunized from suit by arbitral pre-emption. It is difficult to draw such generalizations, however, because the number of cases are small, they were decided by different courts, and those reaching the issue of parties other than the employer were decisions that took a broad view of arbitral pre-emption generally.

It is safe to say, however, that before *Allis-Chalmers,* the scope of arbitral pre-emption in the lower courts was confused. State and lower federal courts frequently based decisions finding no pre-emption on *Garmon* or *Alexander* in situations to which *Garmon* and *Alexander* did not apply. These tribunals frequently preserved torts because they were torts or because the state felt they served a significant purpose. Matters such as timing and the identity of the defendant made a difference when they should not have. Guidance from the Supreme Court was sorely needed.

II. Allis-Chalmers and Companions

In *Allis-Chalmers Corp. v. Lueck*[214] and in various companion cases[215] the Court once again addressed the issued posed by the incomplete doctrine of arbitral pre-emption. These issues included first, the extent to which *Garmon* and its progeny defined exceptions to arbitral pre-emption; second, the scope of state law claims pre-empted; third, whether the state claim came before or after arbitration made any difference in the scope of arbitral pre-emption; and finally, the extent to which the scope of arbitral pre-emption was affected by the identity of the defendant.

A. Allis-Chalmers

Allis-Chalmers held that an employee's failure to exhaust the grievance and arbitration procedure pre-empted his state law claim of bad faith against his employer for interfering with his disability benefits because resolution of the bad faith tort claim was substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract. In *Allis-Chalmers,* an employee and a union negotiated, along with the collective bargaining agreement, a separate disability plan, and provided that the collective bargaining agreement's grievance and arbitration procedure would ultimately resolve any disability disputes.[216] An employee claiming that the employer interfered with disability benefits brought a bad faith state tort action without exhausting the grievance and arbitration procedure. The state trial and an intermediate appellant courts rejected the suit as pre-

214. 471 U.S. 202 (1985).
215. *See infra* notes 242-62 and accompanying text.
216. 471 U.S. at 219-20.

empted, but the state supreme court reversed because *Garmon,* as interpreted by *Farmer,* made clear that bad faith actions touched only a peripheral concern of the NLRA and, therefore, were saved from pre-emption.[217]

The Supreme Court reversed, reasoning that *Lucas Flour* extended section 301 pre-emption to torts whose disposition was substantially dependent on a collective bargaining agreement. The Court began by observing that although Congress had not completely pre-empted the field from state regulation through section 301, "courts [have] sustain[ed] a local regulation 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'"[218] Declaring that *Lucas Flour* requires states to apply federal law to contract suits brought for breaching a collective bargaining agreement, the Court in *Allis-Chalmers* made clear that concerns about state interference articulated in *Lucas Flour* extended beyond mere contract actions:

> If the policies that animate section 301 are to be given their proper range . . . the pre-emptive effect of section 301 must extend beyond suits alleging contract violations. . . . Thus, questions relating to what the parties to a labor agreement agreed, 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.[219]

In making these remarks about arbitral pre-emption, the Court cautioned that not every dispute concerning employment was covered, as "[s]uch a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored."[220] Thus, "it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."[221] The issue was whether the disposition of the state claim required analysis of contractual terms: "If the state tort law purports to define the meaning of the contractual relationship, the law is pre-empted."[222]

The parameters of this pre-emption remained vague, however, because state courts must accord the same deference to implicit as well as to express contractual obligations and must not assume that there are no implicit obligations created by a collective bargaining agreement; even the existence of such obligations was a question of federal law.[223] The Court indicated

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217. *See supra* notes 181 & 192 and accompanying text.
218. 471 U.S. at 209 (quoting Malone v. White Motor Corp., 435 U.S. 497, 504 (1978).
219. 471 U.S. at 210-11.
220. *Id.* at 212.
221. *Id.*
222. *Id.*
223. *Id.*

that, under the facts of *Allis-Chalmers,* the *Garmon/Farmer* distinction between the objective of the conduct and the manner of the conduct did not apply to arbitral pre-emption. In the case before it, the "parties' agreement as to the manner in which a benefit claim would be handled," potentially covered in an implicit collective bargaining agreement term, "will necessarily be relevant to any allegation that the claim was handled in a dilatory manner."[224] Because the plaintiff failed to exhaust the grievance and arbitration procedure, the bad faith claim was dismissed.[225]

Although declaring that pre-emption would be determined on a case-by-case basis, the Court offered general guidance for ascertaining whether arbitral pre-emption applied to a particular case: "We do not hold that when the resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, the claim must either be treated as a section 301 claim . . . or dismissed as pre-empted by federal labor-contract law."[226]

The Court in *Allis-Chalmers* does not offer much guidance regarding the nature of arbitral pre-emption, but it does address the doctrine's scope. The Court squarely held that bad faith claims are pre-empted because they require the adjudicating court to interpret and analyze contractual obligations, a function that federal law gives to the arbitrator in the first instance. The Court's rationale appears likewise to require pre-emption of other contract-based torts, such as interference with contractual relations or fraud. Evaluating the opinion according to basis, state claims, impact before and after arbitration, and impact according to the identity of the defendant, reveals that the opinion offers little further guidance.

1. Nature

Allis-Chalmers did not address the issues surrounding the nature of arbitral pre-emption. There was no question about the pleadings, and the case did not involve a removal issue. However, *Allis-Chalmers* impacted this issue indirectly through its delineation of pre-empted state claims from preserved state claims. The Court's repeated emphasis on the need to preserve from state intrusion the uniform federal law governing the construction of collective bargaining agreements[227] is consistent with past decisions recognizing that section 301 displaces state court subject matter jurisdiction to hear state claims requiring a construction of the collective agreement.[228] Other than these implications, the decision is silent on the nature of pre-emption.

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224. *Id.* at 218.
225. *Id.* at 221.
226. *Id.*
227. *See Allis-Chalmers,* 471 U.S. at 209-212.
228. *Id.* at 212; *see supra* notes 156-57.

2. Scope

Although *Allis-Chalmers* did not directly deal with the nature of arbitral pre-emption, it certainly affected the scope.

a. according to basis

Allis-Chalmers made clear that arbitral pre-emption extended beyond disputes involving express collective bargaining agreement language and included also disputes involving implied contractual provisions. The Court guaranteed that implied provisions would not be overlooked by holding that the existence of implied contractual provisions was itself an issue of federal law. The Court did not, however, consider the application of arbitral pre-emption to disputes over "past practice" or "the law of the shop" in cases in which the arbitration clause covered such disputes, but the collective bargaining agreement did not expressly address them. When there existed some express contractual language from which an implied provision could be formed, *Allis-Chalmers* directed that arbitral pre-emption applied. *Allis-Chalmers* did not appear to reach cases involving only past practice without relation to such express language.[229]

Allis-Chalmers continued the confusion over the exceptions to arbitral pre-emption. *Allis-Chalmers* rests essentially upon a *Morton/Machinist/ Malone* basis, but the opinion pays homage to the *Alexander* analysis. The Court preserves from pre-emption "rights and obligations independent of a labor contract,"[230] and suggests that drawing analogies between state statutes and the federal statutory actions preserved in *Alexander* and its progeny is an acceptable analysis.[231] This is particularly curious because the analysis begins with a different standard than the one applied by courts in reconciling two conflicting federal statutes.[232] If the same standards applied by federal courts in reconciling conflicts between federal statutes were intended to be applied in determining whether a state statutory action fell within the scope of arbitral pre-emption, one would have expected that the analysis used in reconciling the federal statutes would apply in this case as well. *Allis-Chalmers,* however, did not do this. Rather than preserve the bad faith claim under *Alexander, Allis-Chalmers* held the claim pre-empted.

On the positive side, it appears that the Court's discussion clearly rejects the views of many lower courts that *Garmon* analysis somehow governs the scope of arbitral pre-emption. The Court focuses most of its discussion on *Lucas Flour,* a good sign because it demonstrates to state courts following a *Garmon* analysis that labor arbitration does indeed have a federal statutory basis and is not a matter of peripheral concern, and because it makes clear

229. *See id.at* 213 n.8.
230. *See id.*
231. *See id.* at 212, n.6, 213-14 n.9.
232. *Id.* at 211-12.

that the federal statutory basis is section 301 and not, as these courts believed, the unfair labor practice provisions of the NLRA.[233]

In addition, the Court in *Allis-Chalmers* grapples with the difference between exceptions to *Garmon* pre-emption and exceptions to arbitral pre-emption. While the Court reaches no firm conclusions, it recognizes expressly that exceptions developed in the context of a pre-emption doctrine protecting express statutory provisions cannot be applied as is in the context of a pre-emption doctrine that protects a federally sanctioned relationship whose precise parameters are left for the parties and the courts. The Court made clear that "Congress, in adopting section 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation."[234] This was fundamentally different from *Garmon*. The Court in *Allis-Chalmers* noted that "in this situation the balancing by *Garmon* pre-emption is irrelevant, since Congress, acting within its power under the Commerce Clause, has provided that federal law must prevail."[235] The independence of the state claim from the collective agreement's terms, and not the strength of the state's interest in preserving the claim, determined the scope of exceptions to arbitral pre-emption.

On the negative side, the Court, having determined that *Garmon* exceptions did not apply, failed to define artfully what exceptions did apply. Instead, *Allis-Chalmers* provided plenty of ammunition for state courts that insist on using *Alexander* to protect certain wrongful discharge claims from arbitral pre-emption:

> Clearly, section 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations independent of a labor contract. . . . While the nature of the state law is a matter of state law, the question whether the . . . [state] tort is sufficiently independent of federal contract interpretation to avoid pre-emption is, of course, a question of federal law.[236]

What this means is unclear. The blanket statement that the parties cannot contract for what is illegal under state law is false and misleading. It specifically contradicts *Lucas Flour* and *Lincoln Mills*. Surely the Court does not mean that arbitration clauses are unenforceable in states that prohibit arbitration. Nor would it seem, in light of the holding, that the Court in *Allis-Chalmers* intended to limit arbitral pre-emption only to claims that could, under state law, be waived in advance by contract. However, a state court could read the language this way.

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233. *Id.* at 213-14.
234. *Id.* at 211-12.
235. *Id.* at 213-14 n.9.
236. *Id.* at 212-14.

Had the Court avoided the language quoted above, it could have provided the clearest expression to date of the exceptions to arbitral pre-emption. The Court could have been more helpful had it simply excepted from pre-emption state claims arising from facts not implicating the collective bargaining agreement. By adding the cryptic language referring to agreements illegal under state law, however, the Court guaranteed continued confusion.

b. according to claim

Allis-Chalmers is most confusing here. While assuring states, under *Alexander,* that it does not disturb causes of action "independent" of the collective bargaining agreement,[237] the Court in *Allis-Chalmers* lists many such actions among claims it implicitly presumes to be pre-empted.[238] One example is retaliatory discharge for filing a workers' compensation claim. Since retaliatory discharge is a statutory action in most states that recognize it, a state court could reach conflicting conclusions depending on the part of the *Allis-Chalmers* opinion on which it relied. On the one hand, it could conclude that this is an independent statutory action and therefore not pre-empted.[239] Alternately, it could conclude that the unfair discharge, a commonly arbitrated grievance, is a matter solely for the arbitrator and that the mere existence of state law does not convert a wrongful discharge claim into an independent cause of action.[240] States that recognize the "public policy" exception to the wrongful discharge theory face the same dilemma. The state might contend that its basis for allowing the action is not the agreement but some independent public policy, or, as before, the state might conclude that, notwithstanding an independent public policy, the discharge requires interpretation of the "just cause" provision of a collective bargaining agreement.

c. according to time

Allis-Chalmers appears to dispose of the common lower court error of applying different standards according to whether the state claim was filed before or after a binding arbitration. *Allis-Chalmers* takes a completely different approach to this issue than many state courts; whereas state courts saw the absence of exhaustion as a mitigating factor (the employee had not yet made the choice), *Allis-Chalmers* makes clear that this is not the case. The Court could have done a better job, however, of explaining itself. The Court's cryptic formula at the end of the opinion[241] appears to mean that, although different theories apply before and after arbitration, the result is

237. *Id.* at 212-13 n.8.
238. *Id.* at 218.
239. *Id.*
240. *See supra* note 188; *see infra* notes 320-29 and accompanying text.
241. Allis-Chalmers Corp. v. Lueck,, 471 U.S. at 220-21.

the same. What the Court apparently means by distinguishing between a claim being pre-empted by federal labor contract law and a claim being "treated as a section 301 action" is that, under *Maddox,* a state claim brought without exhausting arbitration is pre-empted[242] and, under the *Steel Workers* trilogy, a claim brought after arbitration is treated as a section 301 suit to set aside or to enforce the arbitrator's award.[243] Practically speaking, there is no difference between these two results because the failure to exhaust arbitration is excused essentially for the same reasons that an arbitration award could be side aside—repudiation by the employer of the collective bargaining agreement or breach by the union of the duty of fair representation.

B. Companion Cases

If the Court sent out conflicting signals in *Allis-Chalmers,* contemporaneous cases that were accorded summary disposition muddied the waters even more. *Garibaldi v. Lucky Food Stores*[244] declined to review a decision holding that a whistle-blower's public policy wrongful discharge claim was not pre-empted because the state's significant interest in the public policy under *Garmon* and *Farmer* warranted preserving it from pre-emption. The Court also denied *certiorari* to two decisions finding not pre-empted claims for wrongful discharge in retaliation for filing workers' compensation claims.[245] However, in *Alpha Beta v. Superior Court,*[246] the Court vacated, in light of *Allis-Chalmers,* a decision holding that a terminated employee's outrage claim attacking her discharge was not pre-empted.

It is always dangerous to speculate based upon denials of *certiorari* petitions and dispositions on summary review. However, the three denials of *certiorari* here appear to cut against the very heart of *Allis-Chalmers.* Wrongful discharges are contract law actions, matters frequently arbitrated under collective bargaining agreements. One would expect a wrongful discharge claim, traditionally an action in contract having to do only with the fact of an employment decision, would be pre-empted before intentional infliction of emotional distress, a tort action having to do with the manner in which an employment decision was carried out. The Court did precisely the opposite in *Garibaldi* and *Alpha Beta.*[247] The only consistent explanation of *Allis-Chalmers,* the two denials of *certiorari,* and *Alpha Beta* is that the Court simply is not ready to face the interplay between recently created

242. Republic Steel Corp. v. Maddox, 379 U.S. 650, 656-59 (1965).

243. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 543, 598-99 (1960).

244. 471 U.S. 1099 (1985), *denying cert.* to 726 F.2d 1367 (9th Cir. 1984).

245. Midgett v. Sackett-Chicago, 472 U.S. 1032 (1985), *denying cert.* to 105 Ill.2d 143, 473 N.E.2d 1280 (1984); Prestress Engingeering Co. v. Gonzales, 53 U.S.L.W. 3895 (June 24, 1985), *denying cert.* to 473 N.E.2d 1280 (1980).

246. 472 U.S. 1004 (1985), *vacating* 160 Cal. App.2d 1049, 207 Cal. Rptr. 117 (1984).

247. *See supra* notes 239-241 and accompanying text.

state law exceptions to the employment-at-will doctrine and the long established federal policy favoring arbitration.

The Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts,*[248] rendered two months after *Allis-Chalmers,* offers further insight into areas *Allis-Chalmers* left open. Although it did not involve arbitration, *Metropolitan Life* is significant to arbitral pre-emption because it changes the contours of the *Morton/Machinists* pre-emption on which arbitral pre-emption is based. In *Metropolitan Life,* the Court held that he NLRA did not pre-empt a state statute requiring employers to include mental illness within the coverage of any medical insurance plan provided employees even though, as in *Oliver,* the state law limited the parties' agreement regarding a mandatory subject of bargaining.[249] Relying heavily upon the NLRA's declaration of policy, the Court reasoned that the state statutes establishing minimum standards did not interfere with the NLRA's purposes, and that the same logic that justified preservation of actions under similar federal statutes against preclusion by a prior arbitration decision warranted preservation of such state statutes.[250]

Metropolitan Life muddies the water further because it suggests approval for decisions that preserve state law claims from pre-emption by analogy to the *Alexander/Barrentine/McDonald* line of cases. In upholding the Massachusetts statute, the Court observes that, under *Barrentine,* collective bargaining policies do not preclude federal actions under statutes that establish minimum standards.[251] The Court then declares flatly that state statutes establishing minimum standards do not interfere with NLRA policies.[252] It does not require a conceptual leap to conclude that if state minimum standards statutes are not inconsistent with NLRA policies, statutory claims for wrongful discharge under such statutes are not pre-empted under Taft-Hartley's policy favoring arbitration.

The next major section 301 pre-emption case, like *Metropolitan Life,* sheds light on arbitral pre-emption under *Allis Chalmers* even though arbitral pre-emption was not involved. IBEW *v. Hechler*[253] held that a bargaining unit employee's personal injury negligence action against her union for breach of its duty to train her and provide her a safe workplace was pre-empted under *Allis Chalmers* because "[i]n order to determine the Union's tort liability, . . . a court would have to ascertain, first, whether the collective bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged

248. 471 U.S. 724 (1985).
249. *Id.* at 758.
250. *Id.* at 756-58.
251. *Id.* at 755.
252. *Id.*.
253. 55 U.S.L.W. 4694 (May 26, 1987).

by respondent in her complaint."[254] Because here, as in *Allis Chalmers,* " '*questions* of contract interpretation . . . underlie any finding of tort liability,' "[255] the "need for federal uniformity in the interpretation of contract terms . . . mandates that here, respondent is precluded from evading the pre-emptive force of section 301 by casting her claim as a state-law tort action."[256]

The Court's decision in *Hechler* is important both for the question it resolves and for the question it declined to reach. It stressed that state law normally placed the duty of providing a safe workplace only on the employer,[257] and declined to reach the issue of whether a different result would follow if state law placed this duty on the Union as well.[258] Because state law recognized no such duty there, it could arise only from the collective bargaining agreement. Therefore, here, as in *Allis Chalmers,* judicial resolution of the tort would require judicial construction of the agreement. While the Court's decision was consistent with an interpretation of *Allis Chalmers* that recognized broad pre-emption, this rationale suggested that the Court viewed *Allis Chalmers* much more narrowly. What would the Court do if an employee challenged the investigation of his discharge under the independent state law basis of invasion of privacy and bypassed a collective bargaining agreement's grievance procedure?[259] The holding in *Allis Chalmers,* coupled with the *Steel Workers* trilogy, dictated that this claim be treated as pre-empted, but the "independent of federal contract interpretation" language in *Allis Chalmers,* coupled with the rationale of *Hechler,* suggests a different result.

So might the Court's most recent section 301 pre-emption decision. *Caterpillar, Inc. v. Williams*[260] held that when employees bring suit on an implied contract made while they were outside the bargaining unit but breached by their layoff after they were demoted into the bargaining unit, the claim could not be removed as "artfully pleaded" under section 301 even though the employer claimed that the collective bargaining agreement operated to extinguish all express or implied contracts made prior to entering the bargaining unit. The Court, while declining to opine on the merit of section 301 pre-emption as an affirmative defense,[261] held that section 301 pre-emption did not render the claim itself a section 301 claim because the claim was based upon a contract independent of the collective bargaining

254. *Id.* at 4697.
255. *Id.*
256. *Id.*
257. *Id.* at 4696.
258. *Id.* at 4697-98 n.5.
259. *See, e.g.,* Kirby v. Allegheny Bev. Corp., 811 F.2d 253, 255-56 (4th Cir. 1987) (a pre-Hechler case that held privacy claim pre-empted); Strachan v. Union Oil Co., 768 F.2d 703, 705 (5th Cir. 1985) (same).
260. 55 U.S.L.W. 4804 (June 9, 1987).
261. *Id.* at 4807 n.13.

agreement.[262] It had the independent basis that the negligence claim in *Hechler* lacked.

While this rational has a superficial appeal, a closer examination reveals potential for confusion in the state and lower federal courts. There is a difference between the bad faith claim in *Allis Chalmers,* which required a construction of the collective bargaining agreement's express and implied insurance benefit terms as part of the determination of the elements of bad faith, and the claim in *Williams,* which did not implicate the collective agreement in the determination of the elements of breach of the independent contract, but only implicated the collective agreement in the adjudication of the validity of the employee's affirmative defense. Only in adjudications of whether the collective agreement waived prior agreements would implicate the collective agreement, only then would pre-emption be relevant. Lower courts may easily misread this decision as standing for the proposition that a state law claim by a bargaining unit employee for breach of an independent contract with terms addressing the same subjects as the collective bargaining agreement will survive a claim of section 301 pre-emption. This cannot have been intended, as it would be contrary to *J. I. Case Co. v. NLRB,*[263] and would undermine the *Steel Workers* trilogy. Properly viewed, *Williams* is consistent with *Allis Chalmers,* but the potential for confusion exists because some lower courts could conclude that claims that do involve the collective agreement at the breach stage—such as the claim for breach of an independent agreement on a subject covered by the collective agreement—are not pre-empted. This is not what *Williams* held, and it would be contrary to *J. I. Case.*

C. Summary

Allis-Chalmers, its companions, and subsequent Supreme Court decisions, answered some of the questions about arbitral pre-emption that previously had confused state and lower federal courts. First, *Allis-Chalmers* made clear that the *Garmon* analysis was not the correct analysis in which to evaluate an arbitral pre-emption claim. Second, *Allis-Chalmers* made clear that the issue of whether a particular state law claim was pre-empted would depend upon whether, under federal law, it was sufficiently independent of the collective bargaining agreement and the collective bargaining agreement's express or implied obligations, or, on the other hand, whether under federal law, its disposition required a substantial construction of express or implied terms. Third, *Allis-Chalmers* suggests, and *Metropolitan Life, Hechler,* and the summary disposition of *Allis-Chalmers* companion cases affirm *Alexander* and its progeny will have some relevance in determining whether a state claim is sufficiently independent to be saved from pre-emption. Finally, the *Allis-Chalmers* companion cases make clear that

262. *Id.* at 4806-07.
263. 321 U.S. 332 (1944).

the Court has not yet come to grips with the interplay between the federal policy favoring arbitration—a policy created at a time when "employment-at-will" was the standard under state law—and the more recently created state law exceptions to the "employment-at-will" doctrine. This seems to mean that future development of the doctrine of arbitral pre-emption will depend upon the extent to which the Court concludes that the new state law exceptions provided more reliable protection to discharged employees than does union representation at an arbitration.

IV. Arbitral Pre-emption After Allis-Chalmers

About two years have passed since the Supreme Court decided *Allis-Chalmers,* and it is too early to gauge the full impact of the decision. However, in decisions since *Allis-Chalmers,* there has developed a noticeable increase in the amount of respect accorded the arbitral pre-emption doctrine as a separate and distinct doctrine from pre-emption under *Garmon.*[264] Moreover, recent decisions accord broader parameters to arbitral pre-emption, holding pre-empted state claims that would have been preserved before.[265] Third, despite the fact that *Allis-Chalmers* provided only perfunctory treatment to the issue, most decisions since *Allis-Chalmers* evidence no distinction in treatment according to whether the state law claim is filed before or after the arbitration.[266] Finally, the arbitral pre-emption doctrine has expanded in scope according to party, with decisions now recognizing that the employer's insurer, as well as supervisory employees, can enjoy the protection of a grievance and arbitration clause. Nevertheless, much remains to be done.

A. Nature of Arbitral Pre-emption

After *Allis-Chalmers,* confusion continues to reign in the dispute concerning the nature of arbitral pre-emption. The Supreme Court's reasoning in the recent *International Longshoremen's Ass'n v. Davis*[267] decision would appear to put to rest any lingering doubts that federal labor pre-emption affects subject matter jurisdiction. The Court noted:

> A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court. Consequently, the state procedural rule [treating it as an affirmative defense] . . . was not a sufficient ground, and the union is entitled to an adjudication of its pre-emption claim on the merits.[268]

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264. *See infra* notes 273-75 and accompanying test.
265. *See infra* notes 320-35, 343-52, and accompanying text.
266. *See infra* note 300 and accompanying text.
267. 476 U.S. 380, 106 S. Ct. 1904 (1986).
268. *Davis,* 476 U.S. at 390, 106 S. Ct. at 1913.

Franchise Tax Board seemed to say the same thing about section 301 pre-emption, of which arbitral pre-emption is a subset. "[T]he pre-emptive force of section 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, not withstanding the fact that state law would provide a cause of action in the absence of section 301."[269] The Supreme Court's recent decision in *Caterpillar Tractor Corp. v. Williams*[270] does not support a contrary conclusion. There the Court held that a suit on an implied contract made while plaintiffs were outside the bargaining unit but breached by their layoff after plaintiffs were demoted back into the bargaining unit could not be removed to federal court as an artfully pleaded section 301 claim.

The Court in *Williams* expressly reaffirmed its declaration in *Franchise Tax* that when section 301 pre-emption was implicated, it affected subject matter jurisdiction and was not purely an affirmative defense. The Court held simply that adjudication of the elements of a claim for breach of a contract independent of the collective bargaining agreement did not involve a construction of the collective agreement and, therefore, did not involve section 301 pre-emption. That adjudication of the affirmative defense of waiver might involve the collective agreement and, therefore, section 301 pre-emption, did not affect removal, which depended upon the plaintiff's claim.

The Court thus makes clear in *Williams* that section 301 pre-emption, of which arbitral pre-emption is a part, is treated as an affirmative defense for removal purposes only when the adjudication of an affirmative defense, such as the waiver defense involved there, and not the adjudication of the plaintiff's claim, required a substantial construction of the collective bargaining agreement under *Allis Chalmers.* This did not mean that a defendant would be required to plead pre-emption affirmatively or waive it. If pre-emption arises because the plaintiff's claim requires a substantial construction of the collective agreement, *Franchise Tax Board* dictates that the court's subject matter jurisdiction to adjudicate the claim depends upon federal law under section 301. The defendant need only plead the defense giving rise to pre-emption. If, as in *Williams,* the adjudication of some defense implicates the collective bargaining agreement and raise pre-emption only at that stage, the fact that section 301 law may govern the disposition of the affirmative defense does not absolve the defendant from asserting it.[271]

There is, however, support for a contrary view that arbitral pre-emption, because of unique characteristics, is different in nature than *Garmon* pre-emption. Three factors support this view. First, *Maddox* never refers to

269. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 23 (1983).

270. 55 U.S.L.W. 4804 (June 9, 1987).

271. *See generally Davis,* 476 U.S. at 393, 106 S. Ct. at 1916-18 (Rehnquist, J., concurring, joined by Powell, Stevens, O'Conner, JJ.).

subject matter jurisdiction; it speaks only in terms of exhaustion when discussing arbitral pre-emption. Exhaustion of remedies is an affirmative waivable defense; it does not affect subject matter jurisdiction. Second, the high position *Allis-Chalmers* accords to independent state causes of action is uncharacteristic of something powerful enough to displace subject matter jurisdiction. If, under *Allis-Chalmers,* the employer and the union cannot agree to anything illegal under state law, how can the agreement of the parties displace the state court's jurisdiction to determine under traditional tort theories whether illegality has occurred? The third factor involves the nature of federal subject matter jurisdiction. If the parties to a dispute cannot, by agreement, confer or remove a court's subject matter jurisdiction, how can they agree to divest the state court of jurisdiction by agreeing to designate their own private decision maker?

These factors are not persuasive. Although *Maddox* never refers to arbitral pre-emption as affecting subject matter jurisdiction, one cannot infer that the Court in *Maddox* did not have this in mind. *Maddox* meant that section 301 pre-empts the claim, but that arbitration must be exhausted before a section 301 action may be brought. *Maddox,* like *Lucas Flour,* established that the collective bargaining agreement's arbitration clause displaced state law claims involving matters covered by the clause, and that the summary procedure outlined in the *Steel Workers* trilogy to follow arbitration made clear that the state law did not simply become available again after arbitration was "exhausted." Rather, section 301's scheme replaced the state law claims entirely. Regarding the second factor, the position accorded independent state law claims simply reflects that with arbitral pre-emption, as with *Garmon* pre-emption, ours is a federal system that requires some means of accommodating state and federal interests. This does not change the fact that federal law, when applicable, displaces state law entirely. The third factor, the limitation of jurisdiction by agreement, misunderstands the nature of the collective bargaining agreement and its arbitration clause. According to *United Steel Workers of America v. Warrior & Gulf Navigation Co.,* the collective bargaining agreement is not just a contract; it is the code that establishes an industrial system of self-government. The grievance and arbitration procedure is not simply an alternative to litigation; it is an alternative to industrial strife, and is at the heart of the collective bargaining agreement's system of industrial self-government.[272] Thus, it is not the collective agreement that displaces court subject matter jurisdiction over state claims; it is the congressional designation through LMRA sections 301 and 203(d) of the parties' arbitrator as the forum of choice for the resolution of disputes with the employer. From the foregoing, it is evident that the better view is to treat arbitral pre-emption as affecting subject matter jurisdiction for pleading purposes.

272. *See* United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1959).

By making clear that *Garmon* pre-emption affects subject matter jurisdiction, the Court in *Davis* has suggested implicitly that this is true as well of arbitral pre-emption. As discussed previously, dicta in the earlier *Franchise Tax Board* decision, followed more recently in *Caterpillar,* supports this extension. Doubtless, some courts will become confused and reject this analogy on grounds that the parties cannot, by agreement, divest a court of jurisdiction. Doubtless, the Court will have to face this issue soon. However, *Davis,* together with the earlier *Franchise Tax Board* dicta, represents a first step in defining the nature of arbitral pre-emption.

While *Davis,* and not *Allis-Chalmers,* is principally responsible for making clear pre-emption is jurisdictional rather than an affirmative defense, the changes made by *Allis-Chalmers* will make it easier for the lower courts to apply the *Davis* subject matter jurisdiction rule developed in a *Garmon* case in the context of arbitral pre-emption as well. *Allis-Chalmers,* by expanding the scope of arbitral pre-emption to include many traditional torts, reaffirms the *Franchise Tax Board* view as the correct description of arbitral pre-emption.

B. Scope of Arbitral Pre-emption

Allis-Chalmers has cleared up many of the problems with state and lower federal court analysis of arbitral pre-emption by declaring that *Garmon* does not apply. Some courts persist in applying *Garmon,* but now even some courts finding no pre-emption recognize that *Garmon* analysis has been rejected by the Court in *Allis-Chalmers.* However, *Allis-Chalmers* has been less successful in clearing up the misapplication of *Alexander* to state law, and other courts have had trouble understanding the factors determining when a state claim is sufficiently independent of the contract in order to survive the pre-emption.

1. According to Basis

The Seventh Circuit's decision in *Gibson v. AT&T Technologies,*[273] exemplifies the impact of *Allis-Chalmers* on invitations to apply *Garmon* to arbitral pre-emption. There, the court rejected employees' contentions that fraud claims arising out of a plant closing were preserved from pre-emption under *Garmon's* "deeply rooted in local feeling" exception. Relying on *Allis-Chalmers,* the court declared that "the standards set out in *Garmon* which engage in a 'balancing' of state and federal interests, are irrelevant to the different question presented here."[274]

Although the Court in *Allis-Chalmers* has cleared up most of the confusion about *Garmon,* some courts still persist in applying *Garmon* and

273. 782 F.2d 686 (7th Cir. 1986).
274. *Id.* at 689.

Garmon-progeny cases in the arbitral pre-emption context.[275] Most egregious among these is the frequently-reversed[276] Alabama Supreme Court's recent decision in *Surrency v. Harbison.*[277] Disregarding *Allis-Chalmers,* the court there astonishingly declared that "[i]intentional torts claims, such as defamation and assault and battery actions . . . are not pre-empted from consideration in state court" because the court found that *Maddox* "did not intend such language to apply to all types of lawsuits, because the following year the Court held that the National Labor Relations Act did not bar maintenance of a libel action" in *Linn.*[278] This flagrant misapplication of *Garmon* analysis flies in the face of *Allis-Chalmers,* which itself involved the type of intentional tort that *Surrency* would preserve from pre-emption.

The *Garmon*-progeny *Linn* exception simply is not appropriate in the context of arbitral pre-emption. Arbitral pre-emption anticipates that all claims arising out of arbitrable matters such as discharge will be subject to the exclusive arbitration remedy. Whether called a defamation claim, an outrage claim, or a wrongful discharge claim, any claim caused by a discharge or the investigation leading up to a discharge should be subject to arbitration alone if the collective bargaining agreement contains provisions governing final and binding resolution of discharge disputes. *Allis-Chalmers* makes clear that claims having to do with the *manner* of discharge in such instances are governed by federal law determining the extent to which express obligations concerning the fact of discharge give rise to implied obligations concerning the manner of discharge.

If, as the Fifth Circuit in *Strachan v. Union Oil Co.*[279] recognized, the focus is on the employer's action, and not on the theory plaintiff uses to attack it, this should be as true for *Linn's* defamation tort as it is for other torts.[280] The only question regarding the state tort is whether some element of it requires a substantial construction of the express or implied terms of

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275. In *Mitchell v. Pepsi Cola,* 772 F.2d 342 (7th Cir. 1985) for example, the court held that the defamation claim of a plaintiff arising out of his discharge was not pre-empted because *Linn,* a *Garmon*-progeny case, held that defamation was not pre-empted by the NLRA's unfair labor practice provisions. The same was true in Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985), a case that followed *Linn* regarding a defamation claim even though it otherwise strictly adhered to *Allis-Chalmers* with regard to other state law claims. The court in Anderson v. Ford Motor Co., 803 F.2d 953 (8th Cir. 1986), held that the fraud and quasi-contract claims of employees bumped from their jobs pursuant to a negotiated preferential hiring agreement were not pre-empted because in part, these claims were "deeply rooted in local standards of individual and social responsibility. *Anderson,* 803 F.2d at 957. *But cf. Anderson,* 803 F.2d at 960 (Bright, J., dissenting).

276. The United States Supreme Court has twice rejected the rationale of the Alabama court's decisions involving labor pre-emption. *See supra* notes 100, 129 & 267 and accompanying text.

277. 489 So.2d 1097 (Ala. 1986). The Alabama court reached the opposite conclusion a year later in a decision that never mentions *Surrency. See* Reynolds Metals Co. v. Mays, ____ So.2d ____, (Aug. 21, 1987).

278. *Id.* at 1102.

279. 768 F.2d 703 (5th Cir. 1985).

280. *But see id.* at 706.

the collective bargaining agreement. If the litigation of a defamation claim arising out of discharge requires construction of express and implied collective bargaining agreement obligations governing discharge, the defamation claim is pre-empted without regard to what *Linn* says. If the defamation claim attacks behavior independent of collective bargaining agreement express and implied obligations, however, it is not pre-empted.

The decision of the United States District Court for the Western District of Wisconsin in *Muenchow v. Parker Pen Co.*[281] made clear that *Allis-Chalmers* had some influence even among decisions that persisted in following *Garmon.* In applying *Garmon,* the court in *Muenchow* gave heavier weight to the policy favoring arbitration than did pre-Allis-Chalmers decisions, which generally treated this policy as a "peripheral concern."[282]

Even after *Allis-Chalmers,* some courts continue to focus on the sufficiency of the state law remedy.[283] By far, however, the most common post-Allis-Chalmers analytical error has been the continued insistence of some courts in applying *Alexander* analysis to state causes of action.[284] *Allis-Chalmers* encouraged this error by mentioning the preservation of independent state actions and stating in *dicta* that a collective bargaining agreement could not be enforced on a subject illegal under state law. *Muenchow,* misled by this dicta and by *Allis-Chalmers'* implied approval of *Alexander,* held not pre-empted a claim for fraud against an employer because of alleged misrepresentations to induce employees to terminate seniority rights:

> The Court's analysis in *Allis-Chalmers* suggests that the question for purposes of § 185(a) [§ 301 of the LMRA] pre-emption is not simply whether the dispute underlying plaintiffs' claims may be subject to the terms of the collective bargaining agreement, but whether plaintiffs' claims rely upon state rules that do not exist independently of private agreements and that can be prospectively waived or altered by such agreements, and thus cannot be resolved without consideration of the collective bargaining agreement. In the case before the court, pre-emption would not apply because plaintiffs' state claims of deceptive mispresentations rely upon state rules that exist independently of private agreements and that cannot be prospectively waived or altered by such agreements.[285]

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281. 615 F. Supp. 1405 (D.C. Wis. 1985).

282. *See, e.g., supra* notes 160-76 and accompanying text.

283. *See, e.g.,* Harper v. San Diego Transit Corp., 764 F.2d 663 (9th Cir. 1985) (found pre-emption when the collective bargaining agreement gave the same remedy available under state tort law); Vantine v. Elkhart Brass, 762 F.2d 511, 517 (7th Cir. 1985) (followed by similar line of reasoning in finding pre-empted a claim for discharge in retaliation for filing a workers' compensation claim). Although *Allis-Chalmers* seemed to direct its attention away from the comparative *sufficiency* of the remedies offered by the arbitrator, it did contain some discussion of this issue, and *Maddox* emphasized the *propriety of arbitration* on the particular facts as a qualifying circumstance to its decision. *See Maddox,* 379 U.S. at 657.

284. *See infra* notes 285-87 and accompanying text.

285. 615 F. Supp. at 1415.

This analysis flies in the face of *Lucas Flour's* admonition that section 301 actions are governed by federal law. Furthermore, the analysis disregards *Allis-Chalmers'* declaration that "the question whether the Wisconsin tort is sufficiently independent of federal contract interpretation to avoid pre-emption is, of course, a question of federal law."[286] The United States District Court for the Western District of Wisconsin, in *Muenchow* seemed to say that whether a claim can be waived prospectively by being subject to a collective bargaining agreement's arbitration clause is a matter of state law; *Lucas Flour* and *Allis-Chalmers,* however, mandate that this is matter of federal law. The Supreme Court of Appeals for West Virginia in *Yoho v. Triangle PWC, Inc.*[287] makes the same error in holding not pre-empted an action for discharge in retaliation for filing a workmen's compensation claim.

Unlike decisions prior to *Allis-Chalmers,* however, numerous courts have not been misled. The United States District Court for the Eastern District of Wisconsin in *Cavins v. Aetna Life Insurance Co.*[288] recognized that *Allis-Chalmers* required focusing upon the employer's act and not upon the state law claim chosen to challenge it: "Among other matters, the Court is convinced that the resolution of the present plaintiff's five state law claims is, in Justice Blackmun's words,'substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract.'"[289]

The Eighth Circuit in *Bell v. Gas Service Co.*[290] looked past a fraud claim and recognized that "appellant's claim turns on the application of appellee's bid procedure, training procedure, and disqualification procedure, all of which are subject to grievance under the collective bargaining agreement."[291] The United States District Court for Montana in *Hohn v. Kaiser Cement Corp.*[292] looked past claims of wrongful discharge and outrage, finding both pre-empted because both related only to plaintiff's discharge. The Fifth Circuit in *Strachan v. Union Oil Co.*[293] likewise dismissed various state tort claims arising out of drug and urine tests used in an employment investigation that cleared two plaintiffs because the plaintiffs' obvious remedy was to refuse the tests and then grieve their discharge.[294]

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286. 471 U.S. 202, 215-16 (1985).

287. 336 S.E.2d 204 (W. Va. 1985).

288. 609 F. Supp. 309 (E.D. Wis. 1985).

289. 609 F. Supp. at 313 (quoting *Allis-Chalmers*, 471 U.S. at 216).

290. 778 F.2d 512 (8th Cir. 1985). *Anderson v. Ford Motor Co.* distinguished *Bell* when, as here, the fraud claim did not, under state law, require a construction of the collective bargaining agreement. *Anderson*, 803 F.2d 953, 957 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3242 (1987). Nevertheless, *Anderson* can be distinguished because it involved probationary employees who, like the employees in *Varnum* raised hiring claims not covered by the collective bargaining agreement. *See id.* at 959.

291. *Bell,* 778 F.2d at 517.

292. 624 F. Supp. 549 (D. Mont. 1986).

293. 768 F.2d 703 (5th Cir. 1985).

294. *Id.* at 705.

The United States District Courts for the Northern District of Illinois in *Clark v. Momence Packing Co.*[295] and the Eastern District of Missouri in *Johnson v. Hussmann Corp.*[296] held pre-empted actions for discharges in retaliation for filing workers' compensation claims because both courts recognized that, without regard to the nature of the state claim, the challenged act was the discharge and the adjudication of the state claims would require substantial construction of collective bargaining agreement provisions governing discharge.[297] The court in *Clark* further observed, contrary to *Muenchow,* that it did not matter that, under state law, one could not waive in advance by contract one's right not to be discharged for filing a workers' compensation claim.[298]

One issue raised by *Allis-Chalmers* was whether state claims were only pre-empted if they required a "substantial construction" of a collective bargaining agreement clause other than the arbitration clause, or whether the arbitration clause itself was enough. In *Barnes v. Purex Corp.,*[299] the United States District Court for the Eastern District of Pennsylvania, in holding a wrongful discharge claim pre-empted, focused neither on the arbitration clause nor the "just cause" clause, but rather on the implications of a seniority provision.[300] Likewise, *Malone v. Kitchens of Sara Lee*[301] held a discharge claim pre-empted because a precise contract clause covered the reason for discharge.[302] *Vantine* and *Clark* relied on "just cause" for discharge provisions.[303]

While *Allis-Chalmers* clarified arbitral pre-emption in some respects, it created uncertainty regarding the breadth of arbitral pre-emption. Did it cover disputes only concerning express contractual terms? Did it include disputes covered by terms arising by implication from express terms? Did it include disputes over matters left open by the agreement's express terms but settled by past practice or the common law of the shop? Prior to *Allis-Chalmers, Warrior & Gulf Navigation* indicated that when the grievance and arbitration clause was drafted sufficiently broadly, arbitral pre-emption would cover all three types of disputes:

> The collective bargaining agreement states the right and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the

295. 637 F. Supp. 16 (N.D. Ill. 1985).
296. 610 F. Supp. 757 (E.D. Mo. 1985), *aff'd,* 805 F.2d 795 (8th Cir. 1986).
297. *Clark,* 637 F. Supp. at 18; *Johnson,* 610 F. Supp. at 759.
298. *Clark,* 637 F. Supp. at 19.
299. No. 85-2283 (E.D. Pa. Sept. 26, 1985).
300. *Id.* Slip op. at 2.
301. 613 F. Supp. 1074 (N.D. Ill. 1985).
302. *Id.* at 1075-76.
303. *See Vantine,* 762 F.2d at 517; *Clark,* 657 F. Supp. at 18; *see also* Smith v. Capitol Manufacturing Co., 626 F. Supp. 110 (S.D. Ohio 1985).

common law of a particular industry or of a particular plant.[304]

Warrior & Gulf Navigation held that an arbitrator, in making a decision about a particular grievance arising under the contract, could look beyond the contract's express terms to "the industrial common law—the practices of the industry and the shop—[because they were] . . . equally a part of the collective bargaining agreement although not expresses in it."[305] Did this mean that the arbitral pre-emption extended to disputes arising over a matter governed only by past practice and the common law of the shop? The Court in *Warrior & Gulf Navigation* seemed to say yes, declaring any disputes between the parties to be arbitrable unless the particular collective bargaining agreement specifically excluded it.[306]

At least one circuit picked up from where Warrior *& Gulf Navigation* left off, holding that if disputes over matters of past practice were subject to the grievance and arbitration clause, the availability of arbitration prevented aggrieved employees from bringing state tort actions based on these disputes. In *Eitmann v. New Orleans Public Service, Inc.*,[307] the Fifth Circuit held pre-empted a discharged employee's state tort actions arising out of his former employer's alleged misrepresentation that all linemen were afforded lifetime employment.[308] The court viewed this claim as a dispute of a matter covered by the "industrial common law" and as pre-empted by *Warrior & Gulf Navigation.*[309]

Under the pre-*Allis-Chalmers* view, therefore, employees having disputes arising out of their employee's application of "past practice" or the "common law of the shop" would be precluded from bringing a state court suit if the arbitration clause arguably covered such disputes. It was unnecessary to show that some express contractual provision or its implications governed the merits of the dispute. *Allis-Chalmers* confused lower courts into searching for express provisions governing the merits of disputes because the Court in *Allis-Chalmers* couched the scope of arbitral pre-emption in terms of whether an express or implied collective bargaining agreement provision applied.[310] The Court in *Allis-Chalmers* did not inquire whether "past practice" or the "common law of the shop" governed the employer's manner in paying health insurance claims; rather, it found pre-emption because the express contractual language governing payment of insurance benefits gave rise to implied contractual provisions governing the manner of payment, and the manner of payment was at the heart of the merits of the state cause of action.[311]

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304. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960).

305. *Id.* at 581-82.

306. *Id.* at 584-85.

307. 730 F.2d 359 (5th Cir. 1984), *cert. denied,* 469 U.S. 1018 (1984).

308. *Id.* at 364.

309. *Id.* at 363.

310. *Allis-Chalmers,* 471 U.S. at 216, 220.

311. *Id.* at 220.

This is more than a matter of semantics. If an arbitration clause did not expressly except grievances arising in connection with a past practice neither mentioned in nor capable of implication from a collective bargaining agreement's express terms, lower courts that require an express or implied clause governing the merits of a dispute could read *Allis-Chalmers* as preserving the employee's right to bring a state-court suit. Such courts would reason that, under *Allis-Chalmers,* the state-court tort or contract claims were independent of the terms of the collective bargaining agreement.

Such analysis, however, emasculates *Warrior & Gulf Navigation's* declaration that "[t]he industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it."[312] This could not have been the Court's intent in *Allis-Chalmers.* The Court nowhere indicated expressly that it was limiting *Warrior & Gulf Navigation,* but rather relied in part on *Warrior & Gulf Navigation* in reaching its conclusion.[313] Nevertheless, the Court also treated the agreement in question less like "a generalized code to govern a myriad of cases"[314] and more like an ordinary contract, holding pre-empted only "state-law rights and obligations that do not exist independently of private agreements."[315] Thus, the uncertainty remains.

In summary, *Allis-Chalmers* had three effects on the basis of later cases. First, it has largely eliminated mistaken reliance on *Garmon* by making clear that whether a state claim is saved from pre-emption depends upon whether the claim is sufficiently independent of the collective agreement as not to require a substantial construction of the agreement's terms, and does not, as in *Garmon,* involve the strength of the state's interest in preserving the claim. Second, it has largely perpetuated uncertainty about arbitral pre-emption exceptions by perpetuating the basis on which to analogize state claims to federal statutes protected from pre-emption by *Alexander.* Finally, it has raised the issue of whether arbitral pre-emption applies at all to claims over the application of "past practice" or "the common law of the shop" that do not involve matters addressed by the express language and implications of the collective bargaining agreement.

2. *According to Claim*

Obviously, *Allis-Chalmers* limits the types of available state claims that can survive arbitral pre-emption. However, the curious references in *Allis-Chalmers* to the impossibility of agreeing to a collective bargaining provision illegal under state law, together with the Court's reliance upon *Alexander* terminology, makes clear that *Allis-Chalmers* does not draw clear boundaries between claims that are pre-empted and claims that are not.

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312. *Warrior & Gulf Navigation,* 363 U.S. at 581-82.
313. *Allis-Chalmers,* 471 U.S. at 213.
314. *Warrior & Gulf Navigation,* 363 U.S. at 578.
315. *Allis-Chalmers,* 471 U.S. at 213.

Wrongful discharge claims continue to create some controversy, although most courts hold them pre-empted. As before, the two trouble areas involved statutes making it unlawful to discharge in retaliation for filing workers' compensation claims, and judicially-created theories allowing actions for wrongful discharge in violation of a public policy. Regarding retaliatory discharges, the West Virginia Supreme Court of Appeals in *Yoho v. Triangle PWC, Inc.*,[316] relied upon *Allis-Chalmers'* misleading language to find a retaliatory discharge claim not pre-empted.[317] The Second Circuit tripped over the same stumbling block in *Baldracchi v. Pratt & Whitney Aircraft Div.*,[318] in which it preserved from pre-emption a state law claim of discharge in retaliation for filing a worker's compensation claim.[319]

The United States District Court for the Eastern District of Missouri, in *Smith v. Hussmann Corp.*,[320] concluded that state law rights and obligations that do not exist independently of collective bargaining agreements are pre-empted by those agreements.[321] The court further reasoned that "an action that permits an individual to sidestep the available grievance and arbitration procedure eviscerates a central tenet of federal labor law."[322] The court went on to relate how this conclusion in *Allis-Chalmers* changed the court's mind about retaliatory discharges.[323]

> The issue raised by plaintiff in this case is whether or not he was properly discharged. The parties' collective bargaining agreement contains a grievance and arbitration procedure by which plaintiff and other defendant's employees may challenge the propriety of a decision by the defendant to terminate their employment. It can fairly be said that the relationship between employer and employee that is the subject of the collective bargaining agreement is also the basis for the tort of retaliatory discharge under Missouri law. . . . Therefore, because the Missouri law in this case is related directly to and affects the contractual relationship between the parties, it is pre-empted by the federal law.[324]

The United States District Court for the Northern District of Illinois in *Clark v. Momence Packing Co.*[325] explains why analogizing state statutes prohibiting retaliatory discharge did not, after *Allis-Chalmers,* survive pre-

316. 336 S.E.2d 204 (W. Va. 1985).

317. *Id.* at 207-08; *see supra* note 287 and accompanying text.

318. 814 F.2d 102 (2d Cir. 1987).

319. *See id.* at 105-07. The court relied heavily upon *Alexander,* which does not apply to state law claims, *see supra* note 180, and upon *Allis-Chalmers'* pronouncement that the parties cannot agree to what state law makes illegal. *See supra* note 236 and accompanying text.

320. 610 F. Supp. 757 (E.D. Mo. 1985), *aff'd,* 805 F.2d 795 (8th Cir. 1986).

321. *Smith,* 610 F. Supp. at 758.

322. *Id.*

323. *Id.*

324. *Id.* at 758-59.

325. 637 F. Supp. 16 (N.D. Ill. 1985).

emption under *Alexander*:

> [The plaintiffs] misstate the right which avoids pre-emption; it is the right to file a workmen's compensation claim without retaliation. This right may exist independently of any contractual obligation between unionized employees and their employers. However, the right to file a workmen's compensation claim is not the equivalent of a right to file a state tort claim for retaliatory discharge. A unionized employee must first present his claim of retaliatory discharge as a grievance. Federal law requires a unionized employee to exhaust contractually created grievance procedures before filing suit in a court for discharge and violation of a collective bargaining agreement. . . . The right to file a workmen's compensation claim is not altered or compromised by the federal preemption of the state tort action. A collective bargaining agreement cannot allow an employer to violate the Illinois statute prohibiting retaliation for filing a worker's compensation claim. Such a contract would be unenforceable.[326]

The Seventh and Eighth Circuits have accepted this logic.[327] The position of these decisions makes more sense. Arbitrators in the past have demonstrated their ability to tackle the issue of discharge in retaliation for filing a workers' compensation claim.[328] There is no reason to believe they cannot continue to do so.[329]

It is too early to tell the precise influence of *Garibaldi* on *Allis-Chalmers,* but it appears that at least some courts following *Allis-Chalmers* have relied upon *Garibaldi* as supporting a distinction between public policy wrongful discharge claims, which are not pre-empted, and other wrongful discharge claims, which are pre-empted. *Evangelista v. Inland-Boatman's Union of the Pacific,*[330] a Ninth Circuit *Garibaldi* progeny case involving a dispute over the impact of intermittent unemployment on seniority, held pre-empted a wrongful discharge claim because, unlike the claim in *Garibaldi,* it did not implicate a public policy. In *Harper v. San Diego Transit Corp.*[331] the Ninth Circuit held pre-empted a wrongful discharge claim under the covenant of good faith theory because the contract provided as much protection as did California wrongful discharge law and no public policy was implicated

326. *Clark,* 637 F. Supp. at 19; *accord,* Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031, 1044-47 (7th Cir. 1987), *cert. granted,* 56 U.S.L.W. 3263 (U.S. Oct. 13, 1987) (No. 87-259); *see* Vantine v. Elkhardt Brass Manufacturing Co., 762 F.2d 511, 517 (7th Cir. 1985).

327. *Lingle,* 823 F.2d at 1044-47; Smith v. Hussman Corp., 805 F.2d 795 (8th Cir. 1986).

328. *See, e.g.,* Papercraft Corp. v. United Paper Workers International Union Local 1446, 85 Lab. Arb. (BNA) 1963 (1985) (Edward E. Hales, Arb.); United Technologies Corp. v. Aerospace Workers, Local Lodge No. 1746, 80 Lab. Arb. (BNA) 92 (1982) (Richard Block, Arb.); *see also* Mitchell v. Pepsi Cola Bottlers Co., 772 F.2d 342 (7th Cir. 1985) (considered past arbitration decisions as part of the reason for holding that the plaintiff's wrongful discharge claim was pre-empted).

329. *See supra* note 184 and accompanying text.

330. 777 F.2d 1390 (9th Cir. 1985).

331. 764 F.2d 663 (9th Cir. 1985); *accord* Scott v. Machinists Automotive Trades Dist., 815 F.2d 1281, 1283-84 (9th Cir. 1987).

as in *Garibaldi.* In *Hohn v. Kaiser Cement Corp.*[332] the United States District Court for the District of Montana held pre-empted a wrongful discharge claim under the covenant of good faith and fair dealing because "Montana tort law regarding good faith purports to define the meaning of the contract relationship."[333] In *Smith v. Capitol Manufacturing Co.*,[334] the United States District Court for the Southern District of Ohio, though noting in *dicta* that *Garibaldi* would allow a retaliatory discharge claim by one discharged for seeking workers' compensation, held pre-empted a wrongful discharge claim that did not implicate a public policy.[335]

Despite *Allis-Chalmers,* defamation still continues to divide the courts. The Seventh Circuit in *Mitchell v. Pepsi Cola Bottlers, Inc.*,[336] held not pre-empted a defamation claim arising out of a discharge, treating it separately from the wrongful discharge claim found pre-empted, because a court apparently concluded that *Linn* had preserved such claims from arbitral as well as from *Garmon* pre-emption.[337] The Alabama Supreme Court has reached opposite conclusions in decisions rendered within one year of each other.[338] Even *Strachan v. Union Oil Co.*,[339] a decision that correctly looked through other claims to the precipitating employment action to determine if the contract dealt with it, did not do so for the defamation. Although stating the proposition negatively—that defamation is pre-empted absent a showing of malice—the court implicitly recognized that showing malice under *Linn* preserves this claim against arbitral pre-emption.[340] The Ninth Circuit in *Tellez v. Pacific Gas & Electric Co.*,[341] although not falling prey to misapplication of the *Linn* rationale, nevertheless held preserved from pre-emption a defamation claim based on a suspension letter issued to a bargaining unit employee because the relief provided by arbitration would be different.[342] This ignores the precise holding of *Allis-Chalmers,* which held pre-empted a bad faith claim even though a jury could have awarded more relief than an arbitrator.[343]

The United States District Court for the Eastern District of Wisconsin did not commit either error in *Cavins v. Aetna Life Insurance Co.*[344] In looking past a conspiracy to injure reputation claim, the court determined that this and four other state pendent claims were substantially dependent upon analysis of the terms of an agreement made between the parties in a

332. 624 F. Supp. 54, (D. Mont. 1986).

333. *Id.* at 551.

334. 626 F. Supp. 110 (S.D. Ohio 1985).

335. 626 F. Supp. at 112.

336. 772 F.2d 342 (7th Cir. 1985), *cert. denied,* 106 S. Ct. 1266 (1986); *accord* Barnes v. Purex Corp., No. 85-2283 (E.D. Pa. Sept. 26, 1985).

337. *Mitchell,* 772 F.2d at 347-48.

338. *Compare* Surrency v. Harbison, 489 So.2d 1097, 1102 (Ala. 1986) (defamation not pre-empted); *with* Reynolds Metals Co. v. Mays, ___ So.2d ___ (Aug. 21, 1987) (defamation pre-empted; no mention of Surrency).

339. 768 F.2d 703 (5th Cir. 1985).

340. *Id.* at 706.

341. 125 L.R.R.M. (BNA) 2481 (9th Cir. 1987).

342. *Id.* at 2483.

343. *See Allis-Chalmers,* 471 U.S. at 210-221.

344. 609 F. Supp. 313 (E.D. Wis. 1985).

labor contract because they all arose out of a dispute over insurance benefits and a discharge.[345] This is the correct view. The issue is not when, if ever, defamation is pre-empted, but rather whether one should evaluate each state claim separately or look beyond them to the particular employment action they attack and then determine whether the elements of the state law claim would require a construction of express or implied collective bargaining provisions governing this employment action.

Nor was the Northern District of Alabama fooled in the unpublished decision in *Willie Gillis v. Reynolds Metals Co.*[346] There, an employee suspended pending investigation of a fire brought a state law libel and slander suit after being cleared by polygraph. The employee was covered by a collective bargaining agreement containing a grievance and arbitration clause, but the employee brought his claim before exhausting the contractual remedies. Holding the claim pre-empted, the court recognized that "in order to enforce a national labor policy suits asserting state law tort claims arising from the relationships created by the collective bargaining agreement, as well as those alleging labor contract violations, must be pre-empted.[347]

Inexplicably, fraud, not a subject of controversy before *Allis-Chalmers,* now has divided courts as well. The Eighth Circuit in *Bell v. Gas Service Co.*[348] held pre-empted plaintiff's fraud claim because it merely represented one means of attacking employment practices subject to the collective bargaining agreement. The court declared that the claim "turns on the application of appellee's bid procedure, training procedure, and disqualification procedure, all of which are subject to grievance under the collective bargaining agreement."[349] The Seventh Circuit reached the same conclusion in *Gibson v. AT&T Technologies.*[350] On the other hand, the Court in *Muenchow v. Parker Pen Co.*,[351] held that a fraud claim arising out of an employer's alleged false inducements to terminate seniority rights created and covered by the collective bargaining agreement was not pre-empted. The *Muenchow* court read *Allis-Chalmers* as saying that all claims could not be waived in advance under state law, because *Allis-Chalmers* declared that the parties to a collective bargaining agreement could not agree to a term illegal under state law, and because this state prohibited such prospective waiver.[352] This view is squarely contrary to *Lincoln Mills* and *Lucas Flour.*[353]

Fraud in hiring has developed into a peculiar subset of this controversy. The Eleventh Circuit in *Varnum v. Nu-Car Carriers,*[354] and the Eighth

345. *Id.*

346. No. 86-7125 (N.D. Ala. 1986), *aff'd without op.*, 802 F.2d 1398 (11th Cir. 1986).

347. *Id.*

348. 778 F.2d 512 (8th Cir. 1985).

349. *Id.* at 517.

350. 782 F.2d 686, 688-89 (7th Cir. 1986), *cert. denied*, 106 S. Ct. 3275 (1986).

351. 615 F. Supp. 1405 (W.D. 1985).

352. *Id.* at 1411-1416.

353. *See supra* notes 79-81, 97-99, 285-86 and accompanying text; *but cf. supra* note 236 and accompanying text.

354. 804 F.2d 638 (11th Cir. 1986), *cert. denied*, 107 S. Ct. 2181 (1987).

Circuit, in *Anderson v. Ford Motor Co.*,[355] have held that fraud in hiring bargaining unit employees is not pre-empted. The Ninth Circuit, in *Bale v. General Telephone Co.*,[356] has reached a contrary conclusion.

Bale clearly is correct. To prove fraud in hiring them as temporary employees upon an implied promise of vested rights after six months, the plaintiffs would have had "to show that the terms of the collective bargaining agreement differed significantly from the terms of the individual contract they believed they had made."[357]

Anderson is not correct. *Anderson,* involving the bumping of new employees during probation, found no pre-emption because the court mistakenly relied upon a *Linn* analysis and, contrary to *Allis-Chalmers,* considered significant the fact that fraud was "deeply rooted in local standards of social and individual responsibility."[358] The court erred further in relying on *Belknap, Inc. v. Hale*,[359] a decision preserving the fraud claims of persons with no recourse of any kind under the collective bargaining agreement.[360] Dissenting Judge Bright correctly observed that the majority's reasoning disregarded the Supreme Court's *J.I. Case v. Borak*[361] decision's declaration that the collective agreement supersedes the individual contract's terms; and ignored the simple fact that a claim for fraudulently misrepresenting a collective bargaining agreement can never be independent of that agreement. "[T]here is no way to measure the misrepresentations alleged without examining that which has been misrepresented."[362] To allow such suits would undermine the collective bargaining process as much as would allowing suits on individual contracts with bargaining unit employees.

Varnum is a closer case because the plaintiffs were not yet members of the bargaining unit. *Varnum* seems unwise nevertheless because, as *Bale* shows, pre-hiring representations can affect employee privileges while subject to the collective agreement. There the employer provided a prospective hiree with incentive information it knew would be altered soon by changes in the collective bargaining agreement that had been negotiated but not yet implemented. While the employer's behavior is not to be condoned, Judge Bright's words in *Anderson* ring true here as well. It is difficult to imagine how better to undermine arbitration than allowing suits based upon the employer's misrepresentation of the collective bargaining agreement's terms, and it

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355. 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 3242 (1987).

356. 795 F.2d 775 (9th Cir. 1986).

357. *Id.* at 780.

358. 803 F.2d at 957. *But see Allis-Chalmers*, 471 U.S. at 213 n.9.

359. 463 U.S. 491 (1983).

360. *See Anderson*, 803 F.2d at 958-59. *Belknap* involved claims by temporary replacements during an unfair labor practice strike that the employer falsely promised permanent positions and then replaced them with returning strikers in settlement of a ULP charge. *See Belknap,* 463 U.S. at 500-512. Because temporary replacements must yield to returning unfair labor practice strikers, these plaintiffs had no recourse under the collective agreement. The *Anderson* plaintiffs faced no such dilemma.

361. 321 U.S. 332 (1944).

362. *Anderson*, 803 F.2d at 960 (Bright, J., dissenting).

is difficult to see how a court can evaluate such misrepresentations without construing the agreement's terms. All such claims require a substantial construction of applicable agreement terms because all such claims require a determination of whether the employer's representation is true.

Nor can these decisions be defended as consistent with the Supreme Court's decision in *Caterpillar, Inc. v. Williams*. The Court in *Williams* held simply that a claim for breach of contract independent of the collective bargaining agreement may not *per se* be removed to federal court and automatically treated as a section 301 claim. The Court expressly declined to consider whether this claim, based upon an agreement made outside the collective bargaining unit, is pre-empted because the unit employees, by agreeing to be bound by the collective agreement, implicitly waived rights under any other contract.[363]

Other torts almost uniformly have been found pre-empted. Outrage, the tort that *Farmer* made the center of controversy before *Allis-Chalmers*, almost uniformly has been found pre-empted in post-Allis-Chalmers decisions.[364] The same is true of invasion of privacy.[365] Torts such as tortious interference suits against the union[366] or the employer[367] and a suit for insurance benefits due and owing[368] likewise have been held pre-empted.

3. *According to Timing*

Before *Allis-Chalmers*, there appeared to be a distinction between how some courts treated arbitral pre-emption of state law claims filed before arbitration was instituted and how they treated claims filed after arbitration. Although no post-Allis-Chalmers decision rests on this distinction, a review of post-Allis-Chalmers decisions arising both before and after arbitrations reveals no difference in treatment.[369] However, at least one decision, in the course of holding *Allis-Chalmers* precluded a retaliatory discharge claim,

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363. 55 U.S.L.W. at 4807 n.13.

364. Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985); Cavins v. Aetna Life Insurance Co., 609 F. Supp. 309 (E.D. Wis. 1985); Darden v. U.S. Steel Corp., 124 L.R.R.M. (BNA) 2688 (S.D. Ala. 1987). *But see* Tellez v. Pacific Gas and Electric Co., 125 L.R.R.M. (BNA) 2481, 2484 (9th Cir. 1987) (holding action for intentional infliction of emotional distress not pre-empted).

365. *Strachan*, 768 F.2d at 705; *accord* Kirby v. Allegheny Bev. Corp., 811 F.2d 253, 255-56 (4th Cir. 1987).

366. Marine Transport Lines v. International Organization of Masters, Mates and Pilots, 609 F. Supp. 282 (S.D.N.Y. 1985); Aiello v. Apex Marine Corp., 610 F. Supp. 1255, 1260 (E.D. Pa. 1985).

367. Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3263 (Oct. 13, 1987).

368. Cavins v. Aetna Life Insurance Co., 609 F. Supp. 309, 313 (E.D. Wis. 1985).

369. *Compare, e.g.*, Barnes v. Purex Corp., No. 85-2283 (E.D. Pa. Sept. 26, 1985) (holding wrongful discharge claim precluded after arbitration); *with* Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985) and Cavins v. Aetna Life Insurance Co., 609 F. Supp. 309 (E.D. Wis. 1985) (decisions holding various state tort claims precluded because of failure to exhaust grievance and arbitration remedies).

gave reason for some concern in this area.[370] It found pre-emption for failure to exhaust arbitration, but its discussion suggested that it might have allowed the same state claim to proceed once arbitration had been exhausted: "An employee must first present his claim of retaliatory discharge as a grievance. Federal law requires a unionized employee *to exhaust* contractually created grievance procedures before filing suit in a court for discharge and violation of the collective bargaining agreement."[371]

While what the court says is correct as far as it goes, two things must be emphasized. First, the federal policy favoring arbitration raises issues of *pre-emption,* not of *exhaustion.* The policy applies with the same force without regard to whether the employee has or has not already arbitrated the core of his state claim before filing suit. Second, while a suit following the arbitration would be allowed, it would not be a suit under state law for retaliatory discharge. Rather, it would be a suit under section 301 of the Labor Management Relations Act to determine whether the arbitration decision should be set aside. The inquiry would not be whether the individual's state law right had been violated, but rather whether the arbitration proceeding was fair and regular, whether the employer repudiated the contract, and whether the union had breached its duty of fair representation. Thus, *Allis-Chalmers* may or may not have resolved the confusion about this issue.

4. Parties Involved

Post-Allis-Chalmers decisions have strengthened the trend of extending arbitral pre-emption to those acting on the employer's behalf, recognizing that insurance companies as well as supervisors, can benefit from arbitral pre-emption. In an unpublished decision,[372] Judge Seyborne Lynne, author of *Mason v. Continental Group,*[373] and *Reese v. Mead Corp.,*[374] held that the plaintiff's failure to exhaust the grievance procedure precluded assault and battery and false imprisonment claims against his employer's security officers because they conducted an investigatory interview leading up to his discharge and his discharge was arbitrable under the collective bargaining agreement. Moreover, the United States District Court for the Eastern District of Wisconsin in *Cavins v. Aetna Life Insurance Co.*[375] held that an employee's failure to exhaust the grievance procedure precluded his subsequent breach of contract, bad faith refusal to pay benefits, outrage, conspiracy, and loss of consortium claims against the employer's health and disability carrier because "resolution of the present plaintiff's five state law

370. Clark v. Momence Packing Co., 637 F. Supp. 16 (N.D. Ill. Nov. 21, 1985).

371. *Id.* at 19.

372. *See* Hunt v. Alabama Power Company, No. CV84-L-0306-S (N.D. Ala. Dec. 18, 1985).

373. 569 F. Supp. 1241 (N.D. Ala. 1983).

374. 79 Lab. Cas. (CCH) 11,732 (N.D. Ala. 1975).

375. 609 F. Supp. 309 (N.D. Wis. 1985).

claims is . . .'substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract.'"[376]

The United States District Court for the Southern District of Mississippi in *Nicholson v. Amalgamated Life Insurance Co.*,[377] rejected a contention that there was a difference between delay in payment of benefits based on on an interpretation of the collective bargaining agreement and bad faith delay in payment based upon state law, and held pre-empted the plaintiff's bad faith delay in payment claim against the employer's health insurance carrier because plaintiff failed to exhaust the grievance and arbitration procedure.[378] Thus, it appears from *Cavins* and *Nicholson* that pre-emption extends to the employer's insurance company as well.

One issue regarding the parties' identity apparently did not arise before *Allis Chalmers* but has arisen since—the identity of the plaintiff. This issue can arise in two ways. First, as in *Varnum*,[379] *Anderson*,[380] and *Bale*,[381] the issue can arise when a bargaining unit employee files suit to recover for promises made when he or she applied for work. As discussed previously, *Bale* correctly found pre-emption and *Anderson* and *Varnum* erroneously reached the opposite conclusion.[382] Second, someone outside the bargaining unit might file suit in connection with a former unit employee's rights. One example would be a unit employee's widow's suit for bad faith failure to pay life insurance benefits. Although research reveals no such case to date, the answer here would appear obvious. *Republic Steel Corp. v. Maddox*,[383] which involved severance pay, would compel the conclusion that the suit is pre-empted as long as the widow has access to the grievance and arbitration procedure.[384] It is difficult to believe that the Court would have decided *Allis-Chalmers* differently had the plaintiff been the employee's widow claiming bad faith refusal to pay life insurance.

V. Conclusion

Allis-Chalmers and other recent decisions have done much to clarify the parameters of arbitral pre-emption. By making clear that *Garmon* pre-emption affects subject matter jurisdiction, the Court in *Davis* has provided a strong basis for contending that the same is true of arbitral pre-emption. On the other hand, those supporting the view that arbitral pre-emption always is a

376. *Cavins*, 609 F. Supp. at 313 (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985)).

377. 616 F. Supp. 318 (S.D. Miss. 1985).

378. *Id.* at 321.

379. 804 F.2d 638 (11th Cir. 1986).

380. 803 F.2d 953 (8th Cir. 1986).

381. 795 F.2d 775 (9th Cir. 1986).

382. *See supra* notes 356-62, and accompanying text.

383. 379 U.S. 650, 653 (1965).

384. *Id.* The plaintiff has no access to the grievance procedure when *Belknap* would preclude pre-emption. *See supra* note 330.

waivable defense have available the argument that the agreement of parties to a dispute does not confer nor remove a court's subject matter jurisdiction, and language in *Allis-Chalmers* indicating that state law confines arbitral pre-emption in ways that it does not normally confine subject matter jurisdiction. The Court will have to decide whether the nature of arbitral pre-emption is similar to *Garmon* pre-emption, or whether, in this instance, the unique characteristics of arbitral pre-emption compel that it be treated differently. *Williams* suggests the Court will follow *Davis* in the arbitral pre-emption context as well.

The principal issues regarding the scope of arbitral pre-emption involve the types of claims affected. *Allis-Chalmers* has virtually eliminated the common analytical error of evaluating arbitral pre-emption claims under *Garmon,* but has allowed courts to continue to save some state causes of action from pre-emption by drawing analogies to the *Alexander/Barrentine/McDonald* line of cases. The one area in which *Garmon* may retain influence is in the defamation torts. Courts will continue to struggle with the applicability of *Linn,* a *Garmon-progeny* decision, to except libel and slander claims from arbitral pre-emption.

The exception in *Allis-Chalmers* for independent state claims likely will continue to preserve benefits claims under unemployment compensation and workers' compensation from arbitral pre-emption, and will provide a basis for the court to continue to preserve certain types of wrongful discharge claims as well. An exception covering benefits cases seems logical; as *New York Tel. Co.* recognizes, remedies such as unemployment compensation have traditionally remained available since before the Taft-Hartley Act was passed. The same logic warrants preservation of state safety and health standards; the portion of Oliver that mandates this seems to survive *Metropolitan Life.*

While the preservation of any wrongful discharge claims would seem to allow the *Allis-Chalmers* exception to swallow the *Allis-Chalmers* rule, result-oriented courts will tend to follow this course if the discharge violates a statute or a public policy, and if they perceive unions as less effective than new state wrongful discharge actions in protecting employee rights, or if they attach great importance to the superiority of these new wrongful discharge tort remedies over relief available through the grievance and arbitration procedure. Courts that resist result-oriented temptations will find it easier, under *Allis-Chalmers,* to look beyond the nature of the particular state claims raised and the available remedies, and will ascertain pre-emption according to the nature of the underlying conduct involved. Even in these courts, however, the applicability of arbitral pre-emption may be affected significantly by the court's view of the union's ability to protect the grievant and the arbitrator's ability to make the grievant whole.[385]

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385. If these result-oriented courts ultimately prevail upon the Supreme Court to preserve from pre-emption the new state law actions in derogation of the traditional employee-at-will rule, the heart of the industrial form of self-government as established by the *Steelworkers*

With the expansion of arbitral pre-emption of new claims will come the expansion of the doctrine to new parties. Already, since *Allis-Chalmers,* lower federal court decisions have recognized that claims against insurance carriers that provide collectively bargained benefits and claims against supervisory employees are covered by arbitral pre-emption to the same extent as would be claims against the employer itself. With the expanding scope of pre-emption, courts will have to consider whether collective bargaining agreement signatories other than the employer can raise the arbitral pre-emption defense. If an electrical subcontractor's employee has a dispute with a signatory who is the general contractor or the project owner, would the agreement's arbitration clause be the employee's exclusive remedy if the clause did not, under *Warrior & Gulf Navigation,* except such disputes? Logic would compel an affirmative response, but this is the sort of issue that many courts will have to face soon.

There remains one significant issue regarding the parties involved that the courts will have to resolve after *Allis Chalmers—the* impact, if any, on pre-emption when the plaintiff is not, has not been, and does not aspire to be a bargaining unit employee, but whose suit implicates the collective agreement. What if the plaintiff bringing the bad faith claim in *Allis Chalmers* had been a bargaining unit employee's widow seeking life insurance? The answer would appear to be that pre-emption remains a barrier because she stands in her husband's shoes just as the carrier stands in the employer's shoes. If she cannot file a grievance, however, then her claim should not be pre-empted. Courts will face these and similar issues when, as in the case posited, the employee is not the plaintiff, or, as in *Varnum* and *Anderson,* the plaintiff is not an employee.

As the doctrine of arbitral pre-emption develops, every employer should recognize four things. First, federal courts are more likely than state courts to look kindly on pre-emption claims, so removal of an action filed in state court always should be considered when there is an arbitration clause in the picture.[386] Second, state and federal forums in states such as California, which recognize many exceptions to the employment-at-will rule, appear more likely to find that these exceptions, rather than arbitration, are better

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Trilogy will likely fade from the prominent place it now occupies. The decline in unionization suggests that this could happen in the not-too-distant future. With the decrease in union power to protect employee rights, the Court may well conclude that wrongful discharge actions based on state law are the employee's only protection. If this happens, the continuing need for uniform federal labor policy and current jury excesses should prompt Congress to enact federal wrongful discharge legislation, with decisions to be adjudicated either by a federal agency or by mandatory arbitration. If the latter route is chosen, the sound rationale of *Allis-Chalmers* may continue to play an important role.

386. Removal sometimes may prove difficult. At least one decisions since *Allis-Chalmers* has side-stepped that decision by treating pre-emption as a defense that need not be considered in determining removability. *See* Caterpillar Tractor Co. v. Williams, 55 U.S.L.W. 4804 (June 9, 1987).

remedies for the aggrieved employees.[387] Accordingly, while it is good advice for all employers, employers in states recognizing many such exceptions should make certain in all grievance settlements that the employee releases his or her rights under state law claims as well. Third, an employer still can benefit from arbitration even in cases in which state law makes plain that pre-emption is not available. While the arbitrator's determination may not be preclusive of a subsequent state law claim, a favorable decision nevertheless is strong evidence of the propriety of the discharge, and an arbitration transcript can be used to impeach the grievant's credibility. Title VII decisions following arbitrations under *Alexander* make clear the value of arbitrations even absent pre-emption.[388] Finally, and most importantly, every employer should consider carefully the nature and scope of the arbitral pre-emption doctrine, as redefined, in negotiating and administering its collective bargaining agreement.

Allis-Chalmers has not cleared up all of the uncertainty about arbitral pre-emption, but it has made a start. Lower courts since *Allis-Chalmers* demonstrate a heightened awareness of the arbitral pre-emption doctrine, but their perpetuation of certain misconceptions makes clear that the Court's job is not finished. The nature of arbitral pre-emption remains to be settled, and the misapplication of *Linn* and *Alexander* still must be corrected. Until this is done, the doctrine of arbitral pre-emption will remain submerged in muddy waters.

387. The two companion cases to *Allis-Chalmers, see supra* note 181, both involve California law. California law recognizes numerous exceptions to the employment-at-will doctrine. *See generally* L. LARSON & P. BOROWSKY, UNJUST DISMISSAL § 10.05[2].

388. *See, e.g.*, Becton v. Detroit Terminal, 490 F. Supp. 464 (E.D. Mich. 1980), *aff'd in part, rev'd in part*, 687 F.2d 140 (6th Cir.), *cert. denied*, 460 U.S. 1040 (1982).