University of Richmond Law Review

Volume 24 | Issue 2 Article 7

1990

Steering Away From the Arbitration Process: Recognizing State Law Tort Actions for Unionized Employees

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STEERING AWAY FROM THE ARBITRATION PROCESS: RECOGNIZING STATE LAW TORT ACTIONS FOR UNIONIZED EMPLOYEES

I. INTRODUCTION

When an employer and a labor union negotiate over an employment contract, their agreements are usually set forth in a collective bargaining agreement. The collective bargaining agreement defines the relationship between the employer and the unionized employees and addresses such matters as wages, hours, and other conditions of employment. Additionally, collective bargaining agreements usually include grievance procedures and arbitration clauses to resolve disputes between the employer and the unionized employees.[1]

Frequently, unionized employees bypass the grievance procedures and file suit against the employer in court based on a state law claim.[2] The employer usually responds with a motion to dismiss on grounds that the employee's claim is preempted by federal labor law under section 301 of the Labor Management Relations Act.[3]

These state law claims have generated much debate over the scope of federal preemption. At the center of the debate is the apparent conflict between the original interpretation of section 301 and the United States Supreme Court's recent holdings recognizing state law rights for unionized employees.

This Note will examine the preemptive effect of section 301 since the United States Supreme Court's recent decision in *Lingle v. Norge Division of Magic Chef, Inc.*[4] as contrasted with the principles underlying section 301 since its inception.[5] After a discussion of the history of section

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1. Arbitration was provided for in 99% of 400 sample collective bargaining agreements examined by the Bureau of National Affairs. BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS 37 (11th ed. 1986).

2. Several reasons may exist for the employee to bypass the grievance procedures. The employee might be dissatisfied with the union and its representation of the claim. The employee may also want to recover under state law because it usually provides a larger recovery.

3. Employers claim section 301 preemption as a defense because the usual result is dismissal of the claim for failure to exhaust the grievance procedures as the mode of redress. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965). The claim may also be dismissed for failure to file a grievance within the six-month statute of limitations under the Labor Management Relations Act. 29 U.S.C. § 160(b) (1982).

4. 108 S. Ct. 1877 (1988).

5. If section 301 does not preempt the state law claim, it may be preempted by other sections of the Labor Management Relations Act. *See, e.g.*, San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (preemption by sections 7 and 8 of the National Labor

301, an analysis of the federal circuit courts' treatment of the *Lingle* decision will provide insight into the future preemptive effect of section 301. The note will then consider whether this result is consistent with Congress' intent when it enacted the Labor Management Relations Act of 1947.

II. The History and Scope of Section 301 Preemption

A. *Early Interpretation of Section 301*

Section 301 of the Labor Management Relations Act of 1947 states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act], or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.[6]

The purpose of section 301 was first examined by the United States Supreme Court in *Textile Workers Union v. Lincoln Mills*.[7] The Court held that Congress enacted section 301 to create a uniform body of federal law governing enforcement of collective bargaining agreements.[8] This case laid the foundation for future treatment of section 301.

In a line of cases known as the *Steelworkers* trilogy,[9] the Court declared that arbitration should be the method of labor dispute resolution unless the parties to the dispute expressly agree not to submit the matter to arbitration.[10] Any doubts as to whether the dispute is governed by the arbitration clause will be resolved in favor of arbitration.[11] The Court stated that an arbitrator is more competent to settle a labor dispute since

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Relations Act).

6. 29 U.S.C. § 185(a) (1982).

7. 353 U.S. 448 (1957). The suit arose when the employer refused to submit the union's grievance to arbitration. The court of appeals held that the district court had the authority to hear the suit under section 301, but it had no authority under federal or state law to grant relief. *Id.* at 449.

8. *See id.* at 456. Federal statutes as well as legislative policies could be used to create this new body of federal labor law. State law could be used if it was compatible with the purpose of section 301, but it would not be an independent source of private rights. *Id.* at 457.

9. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). In each of these cases, the union sued the employer to compel arbitration of grievances which arose under the collective bargaining agreement.

10. *Warrior & Gulf Navigation*, 363 U.S. at 582. Arbitration would be a stabilizing influence only if it was used to resolve any and all disputes arising under the collective bargaining agreement. *American Mfg.*, 363 U.S. at 567.

11. *Warrior & Gulf Navigation*, 363 U.S. at 583.

the arbitrator is more versed in the practices of the industry and the common law of the shop.[12]

The Court, in *Local 174, Teamsters v. Lucas Flour Co.*[13], considered the preemptive effect of section 301 for the first time.[14] In *Lucas Flour*, the employer sued the union for damages in a state court after the union called a strike to protest the firing of an employee.[15] In holding that the strike violated the collective bargaining agreement, the Court stressed the importance of applying uniform federal law, rather than inconsistent local rules, to cases involving labor disputes.[16] The Court also emphasized the need for arbitration in settling these disputes. According to the Court, avoiding the arbitration clause in the contract violates the principles of traditional contract law and hinders the national labor policy of encouraging arbitration to settle labor disputes.[17]

The preemptive effect of section 301 was later expanded through the application of the "complete preemption" doctrine.[18] As a result, any state law claim would be preempted if it concerned rights directly related or substantially dependent on terms of a collective bargaining agreement.[19] The "complete preemption" doctrine was applied to section 301

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12. *Id.* at 581-82.

13. 369 U.S. 95 (1962).

14. The United States Supreme Court had earlier concluded that state courts as well as federal courts have jurisdiction to hear section 301 claims, although federal law must be applied. *See* Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962).

15. *Lucas Flour*, 369 U.S. at 97. This case is unusual in that the employer filed suit, not the employee. The rest of the cases analyzed in this Note will involve employees suing their employers.

16. Justice Stewart makes this point clear in his opinion, stating:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective [bargaining] agreements.
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> . . . .
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> . . . The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Id. at 103-04.

17. Justice Stewart stated that the basic policy of national labor law was to promote arbitration as a "substitute for economic warfare." *Id.* at 105. Although there was not a no-strike provision in the labor contract, the Court found that both parties expressly agreed to settle the dispute through final and binding arbitration. *Id.* at 106.

18. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 23-24 (1983). Under the "complete preemption" doctrine, the preemptive force of a federal statute is so extraordinary that it converts a state law complaint into a federal claim for purposes of the well pleaded complaint rule. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987).

19. *See* Caterpillar, Inc. v. Williams, 482 U.S. 386, 394 (1987). In *Caterpillar*, the employer made individual contracts with its employees promising them indefinite employment. *Id.* at 388. After being fired, the employees sued the employer in state court alleging breach

to deter plaintiffs' attempts to avoid preemption solely by pleading a state law claim.[20]

B. *Recognized Private Rights of Action for Unionized Employees*

The United States Supreme Court has held that unionized employees have substantive rights independent of the collective bargaining agreement.[21] In *Alexander v. Gardner-Denver Co.*,[22] the Court held that the arbitration process was not the sole remedy for a unionized employee's claim of racial discrimination under Title VII of the Civil Rights Act. The Court stated that, while an arbitrator's decision can address the norms of industrial relations, the resolution of statutory or constitutional issues is the primary responsibility of the courts.[23]

In *Barrentine v. Arkansas-Best Freight Sys.*,[24] the United States Supreme Court upheld wage claims brought by employees under the Fair Labor Standards Act. Although wages and hours were usually the primary considerations in a collective bargaining agreement, the Court stated that the congressional intent of the Fair Labor Standards Act was to protect workers from substandard wages and oppressive working hours.[25] Allowing the employer and the union to abridge these rights

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of their individual employment contracts. *Id.* at 390. The Court held that the individual contracts were not preempted by section 301 since they existed independently of a collective bargaining agreement. *Id.* at 396.

20. The Court stated that the plaintiff, as the master of his complaint, still had control over the choice of forum if his claim did not interpret a term in the labor contract. *Id.* at 398-99.

21. *See, e.g.*, Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (Maine severance pay statute not preempted); Atchison, T. & S.F. Ry. v. Buell, 107 S. Ct. 1410 (1987) (action under Federal Employer's Liability Act not preempted); McDonald v. City of West Branch, 466 U.S. 284 (1984) (section 1983 claim based on first amendment not preempted); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) (claim under Fair Labor Standards Act not preempted); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (racial discrimination claim not preempted).

22. 415 U.S. at 36. Arbitration is not the sole remedy; moreover, it is an "inappropriate forum" for resolving civil rights in comparison with judicial process. *Id.* at 56-57.

23. *Id.* at 57. The Court also stated that the arbitrator's task was to effectuate the intent of the parties according to the "industrial common law of the shop." The arbitrator, however, had no authority to enforce public laws which exceeded the scope of the bargain between the parties. *Id.* at 53.

24. 450 U.S. 728 (1981).

25. *Id.* at 738-39. The Court's opinion stated the following:

> In contrast to the Labor Management Relations Act, which was designed to minimize industrial strife and to improve working conditions by encouraging employees to promote their interests *collectively*, the FLSA was designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive " '[a] fair day's pay for a fair day's work' " and would be protected from "the evil of 'overwork' as well as 'underpay.' "

Id. at 739 (quoting Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942) (quoting 81 CONG. REC. 4983 (1937) (message of President Roosevelt))). The Court also relied on the

would "nullify the purposes" of the statute.[26] Chief Justice Burger's dissent sharply criticized the majority for allowing an employee access to the federal courts for an issue which could adequately be resolved through arbitration.[27]

In *Fort Halifax Packing Co. v. Coyne*,[28] the Court upheld a claim under a Maine statute which set minimum standards for severance pay. The Court stated that preemption should not be lightly inferred since the establishment of labor standards falls within the traditional police power of the states.[29] The Court also stated that nothing in the National Labor Relations Act foreclosed all state regulatory power over issues which are subject to collective bargaining.[30]

C. *The* Allis-Chalmers *Test for Section 301 Preemption*

In *Allis-Chalmers Corp. v. Lueck*,[31] the United States Supreme Court expanded the preemptive effect of section 301 to include state law tort claims which sought to interpret a contract term.[32] In *Allis-Chalmers*, a unionized employee claimed that his employer handled the employee's insurance payments in bad faith.[33] The Wisconsin Supreme Court held that section 301 applied only to violations of labor contracts.[34] Under Wisconsin law, the tort of bad faith is independent of a contract even though a breach of duty arises from the contractual relationship.[35] Therefore, the court held that the employee's claim was not preempted by section 301 since the employee did not allege a violation of the labor contract.[36]

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fact that the FLSA gave individual employees access to the courts to resolve their claims. *Barrentine*, 450 U.S. at 740.

26. *Barrentine*, 450 U.S. at 740 (quoting Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 (1945)). The Court was also concerned that the union might not vigorously support a wage claim and that the arbitrator might lack the competence to correctly interpret the statute. *Id.* at 742-43.

27. *Id.* at 746 (Burger, C.J., dissenting).

28. 482 U.S. 1 (1987).

29. *Id.*

30. *Id.* at 2 (quoting Malone v. White Motor Corp., 435 U.S. 497, 504-05 (1978)).

31. 471 U.S. 202 (1985).

32. The Court stated the preemptive effect of section 301 must extend beyond suits alleging contract violations in order to further the policies of creating a uniform labor law for the interpretation of terms in the labor contract. *Id.* at 210-11.

33. *Id.* at 206. The collective bargaining agreement incorporated by reference an insurance plan and contained a grievance procedure which covered disputes over disability payments. *Id.* at 204. The employee's state law claim alleged breach of covenant of good faith and fair dealing resulting in emotional distress, physical impairment and pain and suffering. *Id.* at 206.

34. *Id.* at 207.

35. *Id.*

36. *Id.*

The United States Supreme Court reversed, holding that the employee's claim was preempted since it was "inextricably intertwined" with the terms of the labor contract.[37] In reaching this conclusion, the Court developed a test for section 301 preemption. Under this test, section 301 preempts state law if resolution of the claim depends substantially on the terms of the collective bargaining agreement.[38]

Applying this test to the employee's claim, the Court found that the Wisconsin tort "intrinsically relates to the nature and existence of the contract" because whether the employer acted in bad faith can only be determined by knowing the rights and duties imposed by the labor contract.[39] Thus, the tort must be analyzed in light of the terms of the contract; it is not independent of the labor contract.[40]

The Court noted that the Wisconsin decision would allow the same suit to be brought in state court without first exhausting the grievance procedures in the collective bargaining agreement.[41] A rule which permitted such a result "would cause arbitration to lose most of its effectiveness."[42]

After *Allis-Chalmers*, interpretation of section 301 requires the application of federal law to disputes concerning collective bargaining agreements. The United States Supreme Court's decisions reflect the policies of maintaining uniform federal law and preserving arbitration. State law has prevailed only when a statute has provided minimum substantive guarantees for its employees.

III. The New Test for Section 301 Preemption

A. *The Mandate of* Lingle

In *Lingle v. Norge Division of Magic Chef, Inc.*,[43] the Supreme Court

37. *See id.* at 218. The Court's analysis focused on whether the state tort conferred nonnegotiable rights on employees or whether the tort was "inextricably intertwined" with the terms of the labor contract. *Id.* at 213. The Court noted that, under Wisconsin law, the parties were free to bargain over the performance of the insurance contract. In essence, the claim was a dispute over a contractual term and federal labor law should be applied. *Id.* at 217.

38. *See id.* at 220. The Court also stated that disputes only tangentially involving the terms of a labor contract would not be preempted by section 301. *Id.* at 211.

39. *Id.* at 216-17.

40. *Id.* at 218.

41. *Id.* at 219. The parties also had a federal right to choose the forum for resolution of contract disputes. The parties chose arbitration. Allowing an employee to bypass the arbitration process would destroy the parties' right to choose the forum. *Id.*

42. *Id.* at 220.

43. 108 S. Ct. 1877 (1988). *Lingle* attempted to resolve a split among circuit courts regarding retaliatory discharge claims. *Compare* Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp., 814 F.2d 102 (2d Cir. 1987) (retaliatory discharge claim not preempted by section 301), *cert. denied*, 108 S. Ct. 2819 (1988) *and* Herring v. Prince Macaroni, Inc., 799 F.2d 120 (3d Cir. 1986) (no preemption) *and* Peabody Galion v. Dollar, 666

formulated the most recent test for section 301 preemption. In *Lingle*, an employee sued her employer for allegedly discharging her after she had filed a worker's compensation claim.[44] Illinois law required the employee to prove not only that she was discharged or threatened with discharge, but also that the employer's motive for discharging her was to deter her from filing a worker's compensation claim.[45] Relying on *Allis-Chalmers*, the district court and court of appeals dismissed the employee's suit, holding that it was "inextricably intertwined" with the terms of the collective bargaining agreement.[46]

The United States Supreme Court reversed, stating that the Illinois tort of retaliatory discharge redresses conduct of the employee and the motivation of the employer, and neither element requires the interpretation of the collective bargaining agreement.[47] In reaching its decision, the Court fashioned a new rule for section 301 preemption. After *Lingle*, "an application of state law is preempted by section 301 . . . only if such application requires the interpretation of a collective bargaining agreement."[48]

In deciding the preemption issue, the Court first examined Illinois law regarding retaliatory discharge.[49] After reviewing the elements of the tort, the Court found that none required interpretation of any terms in the collective bargaining agreement.[50] Therefore, the employee's claim was not preempted by section 301.

B. *Comparing* Lingle *with the History of Section 301*

The possible effect of *Lingle* on section 301 preemption is not evident unless the case is compared with *Allis-Chalmers* and *Lucas Flour*. Only

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F.2d 1309 (10th Cir. 1981) (no preemption) *with* Johnson v. Hussmann Corp., 805 F.2d 795 (8th Cir. 1986) (retaliatory discharge preempted by section 301).

44. *Lingle*, 108 S. Ct. at 1879.

45. *Id.* at 1882 (quoting Horton v. Miller Chem. Co., 776 F.2d 1351, 1356 (7th Cir. 1985) (summarizing Illinois court decisions), *cert. denied*, 475 U.S. 1122 (1986)).

46. The court of appeals also based its holding on the fact that the court would be analyzing the same set of facts as the arbitrator. *Id.* at 1879. For the opinion of the district court, see *Lingle*, 618 F. Supp. 1448 (S.D. Ill. 1985), *aff'd*, 823 F.2d 1031 (7th Cir. 1987). For the opinion of the court of appeals, see *Lingle*, 823 F.2d 1031 (7th Cir. 1987) (en banc), *rev'd*, 486 U.S. 399 (1988).

47. *Lingle*, 108 S. Ct. at 1882.

48. *Id.* at 1885.

49. *See id.* at 1881-82. The Court relied on Illinois *case* law, not statutory law, to find that Illinois recognized the tort of retaliatory discharge. The Court further found that Illinois allowed retaliatory discharge claims brought by employees covered by union contracts. *Id.* Justice Stevens noted that the *Allis-Chalmers* Court examined the collective bargaining agreement before consulting Wisconsin law. *Id.* at 1881. This distinction will be discussed later in the Note.

50. *See id.* at 1882.

then is it clear that *Lingle* may have an adverse effect on the arbitration process.

The *Lingle* Court relied on *Allis-Chalmers* and stressed that its holding was consistent with the *Lucas Flour* policies governing enforcement of collective bargaining agreements.[51] However, in *Lingle* the Court stated that the broad contractual protection against discriminatory discharge did not make state law dependent upon the labor contract.[52]

There are two points which distinguish *Allis-Chalmers* from *Lingle*. *Allis-Chalmers* focused on the duties and rights of the parties established by the labor contract to determine whether the state tort was dependent on the collective bargaining agreement.[53] *Lingle* did not address the rights and duties under the collective bargaining agreement; the Court viewed such inquiry as irrelevant, unless analysis of the state tort required interpretation of the agreement.[54]

Lingle essentially ignored the term in the labor contract which provided for dispute resolution through arbitration. In contrast, *Allis-Chalmers* emphasized the provisions in the contract to preserve arbitration as the primary forum for resolving labor disputes.[55] While *Lingle* gave the employee the option of using arbitration or the courts to resolve the employee's dispute,[56] *Allis-Chalmers* stated that arbitration would be se-

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51. *Id.* at 1884. Justice Stevens, writing for a unanimous Court, stated:

> The result we reach today is consistent both with the policy of fostering uniform, certain adjudication of disputes over the meaning of collective bargaining agreements and with cases that have permitted separate fonts of substantive rights to remain unpre-empted by other federal labor-law statutes.
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> . . . Today's decision should make clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements.

Id. (footnote omitted).

52. *Id.* at 1885. The Court relied on language in the *Allis-Chalmers* opinion which stated that disputes only tangentially related to the labor contract are not preempted. *See* Allis-Chalmers v. Lueck, 471 U.S. 202, 220 (1985). The Court also relied on the cases recognizing substantive minimum standards for unionized employees. *See supra* notes 21-30 and accompanying text.

53. *See Allis-Chalmers*, 471 U.S. at 216-17.

54. *See Lingle*, 108 S. Ct. at 1882.

55. The *Allis-Chalmers* Court stated "it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Allis-Chalmers*, 471 U.S. at 220. Section 203(d) of the Labor Management Relations Act declares that the final resolution of disputes should be the method agreed to by the parties. 29 U.S.C. § 173(d) (1982). This policy can be enforced only if the means chosen by the parties is given full play. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960).

56. *Lingle*, 108 S. Ct. at 1882-83. *Lingle* stated that both the arbitrator and the courts can hear a labor dispute even though it may require interpreting the same set of facts. In fact, if the employee first used the arbitration process and was unhappy with the results, she could then resort to the courts to rehear her claim without being bound by the arbitrator's deci-

verely weakened if "[c]laims involving vacation or overtime pay, work assignment, *unfair discharge*—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court."[57]

The line of cases recognizing substantive rights for unionized employees provides greater support for the *Lingle* decision.[58] Most of these cases, however, involved federal statutes which would not affect the uniformity concerns of *Lucas Flour*.[59] These federal statutes were also created to remedy specific and self-evident national concerns.[60] It is plausible that the United States Supreme Court, in each of these cases, intended only to remedy these national problems and did not intend to de-emphasize arbitration as the preferred method of dispute resolution.[61] Additionally, the Court was concerned with the arbitrator's ability to handle these federal statutes.[62]

Fort Halifax involved a state statute, but the statute was designed to set minimum standards for severance pay. Although the statute may have affected collective bargaining by imposing a bargaining floor, the parties were free to exceed this minimum standard in the labor contract. The statute did not affect the arbitration process.

Two factors not mentioned in the *Lingle* opinion may have persuaded the United States Supreme Court to allow the employee's state law tort claim. The first factor is the Court's hesitancy to impute the union's acceptance of certain terms in the collective bargaining agreement, such as arbitration, to its individual members.[63] The second factor is the disparity between the remedies available under state law and the remedies available through arbitration. For instance, in Illinois an employee may recover compensatory as well as punitive damages for retaliatory discharge.[64] The employee's award through arbitration, however, will most likely be limited to back pay. Thus, the Court may have been hesitant to force an

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sion. *But see* Vacca v. Viacom Broadcasting, Inc., 875 F.2d 1337, 1340-41 (8th Cir. 1989).

57. *Allis-Chalmers*, 471 U.S. at 219-20 (emphasis added).

58. *See supra* notes 21-30 and accompanying text.

59. *See supra* note 21.

60. For a discussion on the interpretation of these cases, see Kinyon & Rohlik, *"Deflouring"* Lucas *Through Labored Characterizations: Tort Actions of Unionized Employees*, 30 ST. LOUIS U.L.J. 1, 43 (1985). [hereinafter Kinyon & Rohlik].

61. *Id.*

62. *See* Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 742-43 (1981); Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974).

63. Although the union may be a "reliable proxy" for most economic issues, member interests are likely to diverge on certain issues of individual liberty. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 453 (1989) (commenting on the Supreme Court's decision in McDonald v. City of West-Branch, 466 U.S. 284 (1984)).

64. Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877, 1878-79 (1988).

employee to forego a more desirable state law remedy as a result of the union's acceptance of arbitration as the final forum for dispute resolution.

IV. Treatment by the Federal Circuit Courts

A. *Initial Reaction to* Lingle

After *Lingle*, the federal courts must use the following analysis to determine whether a state law tort claim is preempted by section 301. The courts must first examine the employee's complaint to determine the alleged claim. Second, the court must examine the relevant state law to determine the elements of the claimed tort. Finally, the courts must decide whether resolution of the state law claim requires interpretation of the collective bargaining agreement.

The federal circuit courts have applied the new test for preemption under section 301 in numerous cases involving a myriad of state law tort claims. Among the various torts are claims for retaliatory discharge,[65] wrongful discharge,[66] right to privacy,[67] intentional infliction of emotional distress,[68] and breach of contract.[69] Other claims include breach of implied covenant of good faith and fair dealing,[70] tortious interference with

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65. All of these cases upheld state claims for retaliatory discharge. *See* Griess v. Consolidated Freightways Corp., No. 87-1837 (10th Cir. Aug. 7, 1989); Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir. 1989); Bettis v. Oscar Mayer Foods Corp., 878 F.2d 192 (7th Cir. 1989); Curl v. General Tel. Co., 861 F.2d 171 (8th Cir. 1988); Wolfe v. Central Mine Equip. Co., 850 F.2d 469 (8th Cir. 1988); *see also* Merchant v. American S.S. Co., 860 F.2d 204 (6th Cir. 1988) (federal maritime discharge claim not preempted by section 301).

66. All of the following cases, except one, have held that wrongful discharge claims are preempted since the power of the employer to discharge an employee is defined in the labor contract. *See* Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989); Shane v. Greyhound Lines, Inc., 868 F.2d 1057 (9th Cir. 1989); Hanks v. General Motors Corp., 859 F.2d 67 (8th Cir. 1988). *But see* Rintone v. Southern Bell Tel. & Tel. Co., 865 F.2d 1220 (11th Cir. 1989) (not preempted). The *Rintone* opinion contained no analysis on why the claim was not preempted. It relied solely on the *Lingle* decision for its holding.

67. *See* Utility Workers of Am., Local 246 v. Southern Cal. Edison Co., 852 F.2d 1083 (9th Cir.), *cert. denied*, 109 S. Ct. 1530 (1988); Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988); Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988) (appeal pending). All of these cases preempt state law actions based on drug testing provisions in the labor contract.

68. To date, notwithstanding the pendency of appeals, emotional distress cases have been preempted by section 301. *See* Douglas v. American Information Technologies Corp., 877 F.2d 565 (7th Cir. 1989); *Anheuser Busch*, 876 F.2d at 620; Newberry v. Pacific Racing Ass'n, 854 F.2d 1142 (9th Cir. 1988); Hyles v. Mensing, 849 F.2d 1213 (9th Cir. 1988); Willis v. Reynolds Metals Co., 840 F.2d 254 (4th Cir. 1988).

69. *See* "Vacca" v.Viacom Broadcasting of Mo., Inc., 875 F.2d at 1337 (8th Cir. 1989) (claim preempted by section 301); De Lapp v. Continental Can Co., 868 F.2d 1073 (9th Cir. 1989) (claim preempted).

70. *See* Chmiel v. Beverly Wilshire Hotel Co., 873 F.2d 1283 (9th Cir. 1989) (claim preempted by section 301).

a contract,[71] slander,[72] fraud,[73] and defamation.[74] These suits commonly claim several torts arising out of the same dispute.[75]

The *Lingle* decision has been relied on most heavily by the federal circuit courts considering retaliatory discharge claims. The result is logical since *Lingle* dealt directly with this issue. However, due to problems in the *Lingle* analysis, the circuit courts have been hesitant to uphold other state law claims.[76] These problems include conflicting application of the first step of the *Lingle* analysis and trouble in determining the state law on a specific tort. Factors such as deference to the arbitration process may also contribute to the limited number of state law torts which the federal circuit courts have upheld over section 301 preemption challenges.

The first step in the *Lingle* analysis requires a determination of the plaintiff's cause of action. It is unclear, however, whether the court should look only at the face of the plaintiff's complaint or the complete factual background of the case, including the defenses.

The Sixth and Seventh Circuits have stated that the plaintiff, based on the well pleaded complaint rule, can choose the claim which he wishes to pursue and that the defendant may not destroy the state law character of the complaint by raising a federal defense.[77] The Fourth and Eighth Circuits have stated that the entire factual background of the case, including the defenses, must be examined to determine whether the terms of the collective bargaining agreement are applicable.[78] The Sixth and Seventh Circuits relied on language in *Caterpillar* to come to their conclusions.[79] The Fourth and Eighth Circuits, on the other hand, seem to have recognized the effect of the "complete preemption" doctrine as applied to sec-

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71. *Compare* Dougherty v. Parsec, Inc., 872 F.2d 766 (6th Cir. 1989) (no preemption) *with Anheuser Busch*, 876 F.2d at 620 (claim preempted by section 301). For further discussion on *Dougherty*, see *infra* notes 100-02 and accompanying text.

72. *See Anheuser Busch*, 876 F.2d at 620 (claim preempted); *Willis*, 840 F.2d at 254 (claim preempted).

73. Fraud is one of the few areas where a state law claim has been recognized. *See* Berda v. CBS, Inc., No. 88-3405 (3d Cir. July 20, 1989).

74. *See* Meadows v. General Elec. Co., No. 88-2914 (4th Cir. May 10, 1989) (claim preempted by section 301).

75. The courts must analyze each separate claim to determine whether it is preempted. Therefore, it is possible that federal law will govern one claim while state law will govern a second claim in the same suit. *See, e.g.*, Hanks v. General Motors Corp., 859 F.2d 67, 69 (8th Cir. 1988).

76. *See supra* notes 66-74.

77. Smolarek v. Chrysler Corp., 879 F.2d 1326, 1329 (6th Cir. 1989); Nelson v. Central Ill. Light Co., 878 F.2d 198, 202 (7th Cir. 1989).

78. Johnson v. Anheuser Busch, Inc., 876 F.2d 620, 623 (8th Cir. 1989); *Hanks*, 859 F.2d at 70; Willis v. Reynolds Metals Co., 840 F.2d 254, 255 (4th Cir. 1988).

79. *See Nelson*, 878 F.2d at 202 (citing Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987)).

tion 301.[80] However, in analyzing both of these circuit courts' opinions, it is unclear whether both correctly applied the teachings in *Caterpillar*.[81]

The decision whether to look solely at the face of the complaint in determining the plaintiff's cause of action can dictate whether preemption will take place. If the plaintiff pleads a state law claim in which section 301 does not apply, preemption will be avoided. However, the complaint will be preempted if it arises under the collective bargaining agreement.

The different treatment of wrongful discharge claims and retaliatory discharge claims by the federal circuits exemplifies the importance of this characterization. After *Lingle*, all of the circuit courts have held that a retaliatory discharge claim is not preempted by section 301.[82] In contrast, nearly all courts have held that a wrongful discharge claim is preempted by section 301.[83] The differing treatment of the two claims lies in the elements of each tort.

A retaliatory discharge claim involves examination into the employer's motives for discharging an employee.[84] The employer need only show that his motives were not in retaliation for the employee's filing of a worker's compensation claim.[85] If the court finds that the employer was motivated by something other than retaliation then the employer's motive is irrelevant.[86]

In a wrongful discharge claim, the employer's reasons for and authority to discharge an employee are essential to the case. As a result, courts will examine the terms of the collective bargaining agreement to ascertain the employer's authority to control the workplace and the employee's conduct.[87]

As exemplified above, preemption may depend on the circuit courts' characterization of the employee's claim.[88] The characterization process is

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80. These courts look to the defenses out of the fear that the plaintiff might try to avoid preemption by relabeling his claim to one which is not preempted. *See Willis*, 840 F.2d at 255 (quoting Allis-Chalmers v. Lueck, 471 U.S. 202, 211 (1985)).

81. The *Caterpillar* Court stated that the defendant cannot destroy the nature of a plaintiff's state law claim merely by pleading a federal defense. *Caterpillar*, 482 U.S. at 398-99. However, the defenses raised by the defendant, if based on terms in the collective bargaining agreement, must be analyzed to determine whether the court will have to interpret the labor contract. *Id.*

82. *See supra* note 65.

83. *See supra* note 66.

84. Lingle v. Norge Div. of Magic Chef, Inc., 108 S. Ct. 1877, 1882 (1988).

85. Nelson v. Central Ill. Light Co., 878 F.2d 198, 202 (7th Cir. 1989).

86. *Id.*

87. *See* Johnson v. Anheuser Busch, Inc., 876 F.2d 620, 624 (8th Cir. 1989); Shane v. Greyhound Lines, Inc., 868 F.2d 1057, 1060 (9th Cir. 1989); Hanks v. General Motors Corp., 859 F.2d 67, 69 (8th Cir. 1988). *But see* Rintone v. Southern Bell Tel. & Tel. Co., 865 F.2d 1220, 1221 (11th Cir. 1989).

88. For an analysis of the problems inherent in claim characterization, see Twitchell,

overemphasized when a dispute centers on the application of one of two claims which are similar in nature but treated differently by the courts. There is no reason why retaliatory discharge and wrongful discharge should be treated differently. Retaliatory discharge is merely a subset of wrongful discharge, and analyzing both of these torts involves the same set of facts and circumstances surrounding the discharge of the employee. The preemption result should be the same for both of these torts.

The second part of the *Lingle* analysis, determining the elements of the state law tort, is a potential source of confusion in the circuit courts. Such confusion is exemplified by the conflicting results of the federal circuits in determining the elements for the tort of intentional infliction of emotional distress.

The Eighth Circuit concluded that Missouri law on emotional distress required the plaintiff to prove (1) extreme and outrageous conduct by the employer; (2) intentional or reckless action by the employer; and (3) severe emotional distress resulting from the employer's conduct.[89] The Seventh Circuit, interpreting Illinois law, recognized the same elements but further found specific law covering intentional infliction of emotional distress in the employer/employee context.[90] Illinois law stated that an employer would not be liable where he legitimately exercised his legal rights, even though it may have caused emotional distress.[91]

The Eighth Circuit's definition does not require interpretation of the collective bargaining agreement to determine whether the employer acted with extreme and outrageous conduct.[92] Therefore, the claim would not be preempted. However, the Seventh Circuit's definition would require interpretation of the collective bargaining agreement in order to determine whether the employer acted within his authority under the labor contract.[93]

As shown in the above example, determination of the preemption issue will depend on the court's interpretation of the alleged state law tort. Since tort law varies among states, a claim may be preempted in one circuit and not in another depending on the state law which the court

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Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts, 54 GEO. WASH. L. REV. 812 (1986).

89. *Hanks*, 859 F.2d at 70.

90. *See* Douglas v. American Information Technologies, Corp., 877 F.2d 565, 571 (7th Cir. 1989).

91. *Id.* (quoting Public Fin. Corp. v. Davis, 66 Ill. 2d 85, ___, 360 N.E.2d 765, 768 (1976)).

92. *Hanks*, 859 F.2d at 70.

93. *Douglas*, 877 F.2d at 572. Most of the circuit courts have followed the *Douglas* line of reasoning. *See* Newberry v. Pacific Racing Ass'n, 854 F.2d 1142, 1149 (9th Cir. 1988); Hyles v. Mensing, 849 F.2d at 1216; Willis v. Reynolds Metals Co., 840 F.2d 254, 255 (4th Cir. 1988).

applies.[94]

Another problem the circuit courts have encountered is the weight, if any, to be placed on the provisions of the collective bargaining agreement. Under *Lingle*, if a state law does not require the interpretation of the collective bargaining agreement, the labor contract does not need to be referenced or even produced at trial. The court would need to look only at the relevant state law to decide the case. However, some courts have examined the collective bargaining agreement before considering the state law.[95] The most likely reason for this is that many courts still rely heavily on *Allis-Chalmers*, which held that the collective bargaining agreement determined the rights and duties of the parties. In fact, many courts mention *Lingle* only after they have performed the *Allis-Chalmers* analysis.[96]

The courts' reliance on *Allis-Chalmers* is understandable, considering most tort claims brought by employees involve issues concerning the employer/employee relationship and whether one of the parties deviated from the common practices of the workplace. Determining the working relationship can usually be done only with reference to the collective bargaining agreement. This may be the reason behind the federal courts' refusal to extend the *Lingle* analysis beyond cases involving retaliatory discharge claims.

B. *The Future of the* Lingle *Analysis*

Shortly after *Lingle*, the United States Supreme Court granted *certiorari* to several cases in which employee tort claims were preempted.[97] The Court vacated the judgment of these cases and remanded them for a new hearing in light of *Lingle*. The state law torts pleaded in these cases consisted not only of retaliatory discharge claims, but also of torts such as defamation,[98] wrongful discharge,[99] and tortious interference with

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94. The state may have specific statutory law, rely on the common law, or may not even recognize the particular tort in issue.

95. *See, e.g.*, *Willis*, 840 F.2d at 255.

96. *See, e.g.*, Johnson v. Anheuser Busch, 876 F.2d at 620-23.

97. *See* Dougherty v. Parsec, Inc., 872 F.2d 766 (6th Cir. 1989) (decision on remand), *cert. granted*, 108 S. Ct. 2812 (1988); Clark v. Momence Packing Co., 828 F.2d 22 (7th Cir. 1987) (unpublished opinion), *cert. granted*, 108 S. Ct. 2813 (1988); Willoughby v. Central Ill. Light Co., 826 F.2d 1067 (7th Cir. 1987) (unpublished opinion), *cert. granted*, 108 S. Ct. 2812 (1988); Lastimoso v. Hughes Aircraft Co., 823 F.2d 1552 (9th Cir. 1987) (unpublished opinion), *cert. granted*, 108 S. Ct. 2814 (1988); Hanneken v. Dixon Distrib. Co., 822 F.2d 1091 (7th Cir. 1987) (unpublished opinion), *cert. granted*, 108 S. Ct. 2813 (1988); DeSoto v. Yellow Freight Sys., Inc., 820 F.2d 1434 (9th Cir. 1987), *cert. granted*, 108 S. Ct. 2813 (1988); Mays v. Reynolds Metal Co., 516 So. 2d 517 (Ala. 1987), *cert. granted*, 108 S. Ct. 2814 (1988). The state law claims in these cases were preempted before the Supreme Court remanded them.

98. *See Mays*, 516 So. 2d at 518. In *Mays*, the Alabama Supreme Court held that the employee's defamation claim was preempted since it would prevent the employer from con-

contract.[100]

The tortious interference with contract suit was subsequently found not to be preempted by section 301.[101] The Sixth Circuit held that a state law claim against a party who did not sign the labor contract would not affect the contractual relationship between the employer and the employee.[102]

Perhaps the most important case on remand involved a wrongful discharge claim. In *DeSoto v. Yellow Freight Sys., Inc.*,[103] an employee brought a wrongful discharge action against his employer after being discharged for refusing to drive a trailer. The employee mistakenly believed that the trailer's registration had expired and, therefore, refused to drive the trailer.[104] The employee brought suit under California law which allowed claims for wrongful discharge based on public policy reasons.[105] The Ninth Circuit held that the employee's claim was preempted by section 301.[106]

This case is important for two reasons. First, a holding that a wrongful discharge claim is not preempted may alter other circuit courts' treatment of similar claims.[107] Second, and more importantly, a holding that a state law tort based on a public policy is not preempted will expand the state's power to provide tort remedies for unionized employees based solely on that state's own public policy reasons.

The Court's granting of *certiorari* to the above cases shows the Court's intent to permit states to provide unionized employees with state law tort remedies in addition to the remedies they have under the collective bargaining agreement.[108] As a result, the principles of *Allis-Chalmers* and *Lucas Flour* will be subtly overruled.

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ducting a routine and proper investigation. *Id.* at 519.

99. *DeSoto*, 820 F.2d at 1434.

100. *Dougherty*, 872 F.2d at 767.

101. *Id.* at 771.

102. *Id.* Ohio's law on tortious interference with contractual relations states that one who, without privilege to do so, purposely causes a person not to enter into a business relationship with another is liable for any harm caused. *Id.* at 770.

103. *DeSoto*, 820 F.2d at 1435.

104. *Id.* at 1438.

105. *Id.* at 1436-37.

106. *Id.* at 1438. The Ninth Circuit held that the employee was not acting in defense of public policy, but incorrectly asserting his own interpretation of the law. *Id.* The court reasoned that this kind of dispute was appropriate for resolution through the grievance procedure. *Id.*

107. The recognition of wrongful discharge claims for unionized employees in this case will most likely have the same effect on the courts that *Lingle* had on retaliatory discharge claims.

108. Note that all of the cases on remand held that the state law tort claims were preempted by section 301 before the Supreme Court granted certiorari. *See supra* note 97.

V. An Argument for Arbitration

The *Lingle* analysis is straightforward and will produce more consistent results than the *Allis-Chalmers* test. However, whether the *Lingle* analysis preserves the arbitration process as the forum for interpreting collective bargaining agreements is highly questionable.[109] A strong argument can be made that the *Lingle* rule will weaken the arbitration process and create a body of labor law with inconsistent state rules. A stronger argument can be made that arbitration is more than adequate to resolve labor disputes without resorting to the state courts.

Lingle states that even though an arbitrator would be considering the same set of facts, a state court may entertain a unionized employee's tort claim so long as the state law does not require interpretation of the collective bargaining agreement.[110] Thus, a term in the collective bargaining agreement expressly requiring arbitration for the claimed dispute will be ignored, even though the arbitration clause was a vital part of the contract upon which the employer and the union agreed.[111] Moreover, the collective bargaining agreement itself is more than a document containing specific contract terms.[112] It is a generalized source of rights, both express and implied, governing the working relationship between the employer and the employee.[113] Negotiation of these rights must be done in a voluntary environment where the union and the employer are free to bargain over the terms of the contract. The creation of state rights for unionized employees would conflict with the freedom to contract and lead to the application of inconsistent state laws to unionized employee claims.[114] Since these rights would inevitably vary from state-to-state, an employer with plants nationwide must determine whether certain terms in the collective bargaining agreement will be enforceable in each particular state.[115] The United States Supreme Court in *Lucas Flour* and *Lincoln Mills* sought to avoid a system where labor laws differ among states.

There is nothing unfair about requiring unionized employees to use the arbitration process for settling disputes. Although the individual employ-

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109. *See generally* Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 Cath. U.L. Rev. 1, 59-66 (1988).

110. *Lingle*, 108 S. Ct. at 1883.

111. *See* Kinyon & Rohlik, *supra* note 60, at 64.

112. Douglas v. American Information Technologies, Corp., 877 F.2d 565, 572-73 (7th Cir. 1989).

113. *Id.* at 573.

114. Kinyon & Rohlik, *supra* note 60, at 62.

115. *See* Rutkowski, *Federal Preemption Versus States' Rights*, 40 Labor L.J. 105, 107 (1989). A conflict of laws problem could arise with conflicting state laws. If an employee in State *A* sues his national employer and State *A* does not recognize the claimed tort, the employee could bring suit in State *B* which does recognize the tort if the employer does business in State *B*. *See* Kinyon & Rohlik, *supra* note 60, at 62.

ees may not have participated in the negotiations, they did agree to accept the terms which were negotiated by the union representatives. To say that the unionized employee is sacrificing substantive rights given to nonunionized employees is to assume that arbitration and collective bargaining are inadequate.[116]

Unionized employees have a stronger bargaining position than individual employees. As a result, the union can secure benefits that the individual employees cannot. In securing these benefits, the union may have to sacrifice certain other rights. The unionized employee has received the benefits of the labor contract; it is fair to require the employee to accept the disadvantages.[117]

Although the employee may collect a larger award under a state law tort action, the final amount received will be considerably less after deducting attorneys' fees and various court expenses. If the employee uses arbitration, the union will represent the employee free of charge. Arbitration will also be quicker and less costly for all the parties involved. If the union fails to represent the employee adequately or refuses to arbitrate, the employee may sue the employer and the union.[118]

Commentators and judges have stated that arbitrators are often more effective than courts in resolving labor disputes.[119] The arbitrator possesses specific knowledge of the workplace and the customs of the industry. Furthermore, the arbitrator is better suited to resolve labor disputes in accordance with the intent of the parties.[120] The courts cannot and

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116. One commentator has stated that unionized employees would have to "pay for elementary industrial justice at the bargaining table, even though a state grants it free of charge." Klare, *supra* note 109, at 66.

117. Antinore v. State, 49 A.D.2d 6, ___, 371 N.Y.S.2d 213, 217 (1975), *aff'd*, 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976). The *Antinore* case also stated that an employee waives certain due process requirements by voluntarily agreeing to submit disputes to an arbitration process which dispenses with certain constitutional rights. *Id.* at ___, 371 N.Y.S. 2d at 216.

118. An employee may sue the employer under federal law if the union controls the grievance procedures and wrongfully refuses to submit the employee's claim to arbitration. The employee may also join the union as a defendant for breach of its duty of fair representation. Vaca v. Sipes, 386 U.S. 171, 185-87 (1967).

119. Arbitrators can use common sense more than courts, and adversaries are usually more satisfied with arbitration awards than those issued by the courts. *See* Kinyon & Rohlik, *supra* note 60, at 54. "[A]rbitrators have not functioned as mere factfinders, but, in fact, have not hesitated to interpret collective bargaining agreements in the context of the changing society and have been continuously mindful of expanding protection of individuals in the society." *Id.* at 61. The most experienced judge cannot bring the same competence to bear upon the determination of a grievance as an arbitrator because the judge cannot be similarly informed. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

120. Workplaces vary widely in their own procedures, customs, and understandings. A determination in a particular case as to whether a termination decision was made in good faith would be difficult for a court that does not possess specific knowledge of the workplace

should not be expected to handle such a dispute with the same level of expertise.

Perhaps the most detrimental result of allowing a unionized employee to bypass the arbitration process would be the increased flow of cases into the court system. Congress and other branches of the government have endorsed the use of arbitration to alleviate the burden on the overloaded court system.[121] Arbitration provides a quick and inexpensive method of resolving disputes in comparison to the time consuming and expensive nature of litigation.[122]

If the remedies available to the employee are inadequate, the federal government, not the states, should take steps to correct the deficiencies. Federal supervision is the only way to ensure the creation of a uniform body of federal labor law.

VI. Conclusion

The purpose of section 301, as interpreted by the United States Supreme Court, is to require courts to apply uniform federal labor law to disputes which depend on collective bargaining agreements. The policies of promoting uniform labor law and arbitration have been emphasized in the Court's interpretation of section 301 since *Lucas Flour*.

The Court's recent decision in *Lingle*, although stressing these same principles, may threaten the use of arbitration as an alternate and effective forum for resolving labor disputes, by granting state law tort remedies to unionized employees. The impact of *Lingle* will become clear only after the courts correctly apply the *Lingle* test to claims other than retaliatory discharge.

To preserve the effectiveness of arbitration, disputes for which the collective bargaining agreement requires arbitration should be heard by the arbitrator and not the courts. Allowing a unionized employee the option of pursuing a state tort claim will not only result in a waste of time and money to both the employee and the employer, but will also place an added strain on the already burdened court system.

Although the states' interest in protecting their citizens is legitimate, arbitration can adequately resolve labor disputes between the employer and the employee. Honoring all of the terms of the collective bargaining agreement is necessary in creating uniform federal labor law and preserv-

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and the expectations and understandings of those who work there. Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. Rev. 631, 657 (1988).

121. For a summary of studies on the feasibility and need for arbitration, see Barrentine v. Arkansas-Best Freight Sys., 450 U.S. 728, 748-49, 752-53 (Burger, C.J., dissenting).

122. *Id.* at 748.

ing the arbitration process. The United States Supreme Court should reconsider *Lingle* and its effect on federal labor law.

David C. Gardiner, Jr.