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PROTECTING COMMON LAW RIGHTS OF THE UNIONIZED WORKER: DEMYSTIFYING SECTION 301 PREEMPTION

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I. INTRODUCTION

Employers are frequently subject to employee lawsuits alleging a tort. Non-unionized employees may seek damages for such conduct by their employers in state court.[1] Unionized employees, however, face the risk that employers will seek to transfer the case to a federal district court in an attempt to immunize tort liability by claiming the complaint is preempted by § 301 of the Labor Management Relations Act of 1947 (LMRA).[2] Although § 301 remains essentially unchanged from the date of its adoption, judicial confusion over the scope of its preemptive effect frequently has broadened an employer's ability to defeat state tort claims by its employees in the early stages of litigation with a motion to dismiss.[3] As a result of this evolution and accompanying confusion, the common law rights of unionized workers have been unfairly circumscribed simply because their union entered into a collective bargaining agreement with their employer.[4] Neither the statute's framers nor the Supreme Court opinions which delineated § 301's impact intended such an expansive result in favor of management. A proper understanding of § 301 and its preemptive effect produces a judicial test which protects the

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1. 29 U.S.C. § 107 (2012).
2. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185(b) (2012).
3. Some scholars have referred to a "presumption in favor of preemption." Robert M. Sagerian, *A Penalty Flag for Preemption: The NFL Concussion Litigation, Tortious Fraud, and the Steel Curtain Defense of Section 301 of the Labor Management Relations Act*, 35 T. JEFFERSON L. REV. 229, 255 (2013).
4. *See* Regina Goshorn, *Section 301, Tortious Interference and the Sixth Circuit: Immunization for the Tortfeasor*, 82 U. DET. MERCY L. REV. 253, 277 (2005).

common law rights of unionized workers while still ensuring that collectively bargained agreements will be enforced uniformly throughout the country.

A series of federal statutes regulate labor law in detail. The genesis of this legislation is found in President Franklin Delano Roosevelt's New Deal.[5] Prior to the involvement of Congress in the field, common law courts were often hostile to union activity.[6] The Supreme Court found unions to be illegal combinations in restraint of the labor market and therefore, violative of the Sherman Act.[7] Union members were also personally liable for any damages caused by their union.[8] Harsh working conditions, the economic impact of the Great Depression, and the states' failure to regulate effectively multi-state business entities all contributed to a pro-union political majority in the 1930s.[9] The statutes passed during that era—the Norris-LaGuardia Act of 1932,[10] the National Labor Relations Act of 1935 (often referred to as the "Wagner Act"),[11] and the Fair Labor Standards Act of 1938[12]—form the basis of modern American labor law. The other two bedrock statutes of labor law are the Labor Management Relations Act of 1947 (often referred to as the "Taft-Hartley Act")[13] and the Labor-Management Reporting and Disclosure Act of 1959 (often referred to as the "Landrum-Griffin Act").[14] The political will which produced this statutory framework came from a desire to protect unions and the collective bargaining process, as well as stabilize employee access to a unionized workplace.[15]

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5. Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1357 (1983).
6. For use of the doctrine of criminal conspiracy as an anti-union legal doctrine, see Benjamin Levin, *Blue-Collar Crime: Conspiracy, Organized Labor and the Anti-Union Civil Rico Claim*, 75 ALB. L. REV. 559, 577–86 (2012).
7. *See* Loewe v. Lawlor, 208 U.S. 274, 283, 297 (1908).
8. *Id.* at 306, 308–09.
9. *See* Levin, *supra* note 6, at 588–90, 597–601.
10. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101–115 (2012)).
11. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (2012)).
12. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. § 201 (2012)).
13. Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 141 (2012)).
14. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. 86-257, 73 Stat. 519 (1959) (current version at 29 U.S.C. § 401 (2012)).
15. *See* 29 U.S.C. § 141.

Congress intended that labor relations generally be governed by federal law.[16] In order to effectuate this goal, federal courts were given explicit jurisdiction over lawsuits involving disputes regarding the meaning of collective bargaining agreements. Section 301 of the Labor-Management Relations Act of 1947 states:

> (a) 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.[17]

This statutory provision therefore expressly permits plaintiffs to file a contract claim in federal court and defendants to remove a contract claim originally filed in state court to federal court.

The Supreme Court has interpreted § 301 to be more than simply a statute granting jurisdiction.[18] The Court has held that the substantive meaning of § 301 directs federal courts to create a body of national law for the enforcement of collective bargaining agreements and the promise to arbitrate grievances found therein.[19] Therefore, the Court also has held that § 301 preempts any state lawsuit alleging a contractual breach of a collective bargaining agreement. However, in order to protect exclusive federal control over the meaning of such collective agreements, the Court also has held that state tort lawsuits, which were in fact contract claims, must also be preempted.[20] This expanded preemptive effect of § 301 has led to confusion as judges have struggled to distinguish "real" tort claims from "disguised" tort claims that are actually contract claims

16. *See id.*
17. Labor Management Relations (Taft-Hartley) Act, ch. 120, § 301(a), 61 Stat. 136, 156–57 (1947) (current version at 29 U.S.C. § 185(a) (2012)). Section 301(b) provides, among other things, that a labor union may sue or be sued as an entity in federal court and that any money judgments against a union shall by enforceable only against the union as an entity and its assets, not the assets of its individual members. *Id.* at § 301(b).
18. Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 450–51 (1957).
19. *Id.*
20. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985).

for breach of a collective bargaining agreement.[21] The lack of clarity has been exacerbated by the failure of some judges to distinguish between the substantive attributes of § 301 labor law and the requirements for preempting state law.[22] Some courts have avoided a detailed preemptive analysis by citing the importance of arbitration in labor law and simply expanding the preemptive scope of § 301.[23] This judicial trend has unfairly limited the common law rights of unionized workers and has extended the reach of § 301 into disputes that were never intended to be federalized.

This Article asserts that the Supreme Court has delineated the preemptive effect of § 301 with more clarity than many lower courts realize. Part II of this Article examines Supreme Court cases and preemptive principles contained therein. Part III analyzes the accepted principles that have arisen from application of those Supreme Court opinions by lower courts. Part IV discusses the main areas of confusion that still exist as lower courts seek to define § 301 preemption. Part IV also offers proposals to distinguish more clearly state tort claims which are truly based on traditional common law principles from tort claims that are actually disagreements over terms of a collective bargaining agreement.

II. THE SUPREME COURT CASES

The Supreme Court first dealt with the meaning of § 301 in the seminal case of *Textile Workers Union of America v. Lincoln Mills of Alabama*.[24] In that case, the union and the company executed a collective bargaining agreement which provided that there would be no strikes or work stoppages in exchange for a grievance procedure that involved good faith negotiation and, if that failed, arbitration.[25] The union filed grievances regarding workloads and work assignments.[26] When negotiations failed, the union requested the agreed upon arbitration, and the employer refused.[27] The union then filed a lawsuit in federal court to compel arbitration.[28] The Court

21. *See* McCormick v. AT&T Techs., Inc., 934 F.2d 531, 539 (4th Cir. 1991) (Phillips, J., dissenting).
22. *See infra* notes 216–20 and accompanying text.
23. *See infra* notes 218–20 and accompanying text.
24. 353 U.S. 448 (1957).
25. *Id.* at 449.
26. *Id.*
27. *Id.*
28. *Id.*

held that "§ 301(a) is more than jurisdictional—that it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements."[29] The opinion further noted that the law to be applied was "federal law, which the courts must fashion from the policy of our national labor laws."[30] Since the union had given up the right to strike in exchange for the arbitration clause, the national policy favoring labor peace dictated that either side of the collective bargaining agreement have access to the full powers of the federal courts to enforce the clear terms of the contract.[31] The result in favor of the union was consistent with the dictates of federal labor policy as revealed in the legislative history of § 301.[32] Therefore, while *Lincoln Mills* did not deal directly with the issue of the preemption of state law, the opinion is noteworthy for its holding that substantive federal common law would govern lawsuits for which § 301 provided federal jurisdiction.

The Supreme Court reiterated the principles of *Lincoln Mills* in its next major § 301 decision, *Local 174 v. Lucas Flour Co.*[33] The applicable collective bargaining agreement provided that the employer could discharge any worker if his work was not satisfactory.[34] The agreement also contained a binding arbitration clause for resolving any differences in the true interpretation of the contract.[35] Lucas Flour discharged an employee for unsatisfactory work.[36] In response, the union went on strike for eight days.[37] After the strike ended, the issue was submitted to arbitration as prescribed in the agreement, and the arbitration panel eventually held that the employee was validly fired.[38] Lucas Flour thereafter filed a state lawsuit against the union seeking monetary damages for business

29. *Id.* at 450–51.
30. *Id.* at 456.
31. *Id.* at 455.
32. *Id.* at 453–56.
33. 369 U.S. 95 (1962).
34. *Id.* at 96.
35. *Id.*
36. *Id.* at 97.
37. *Id.*
38. *Id.*

losses caused by the strike.[39] The state court awarded damages against the union in the amount of $6,501.60.[40]

The Court upheld the damage award against the union, but only because the strike was a breach of the agreement under federal, not state law.[41] Section 301 depended upon a substantive federal labor law in order to provide interpretive uniformity of all collective bargaining agreements:

> 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 agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract.[42]

The holdings in *Lincoln Mills* and *Lucas Flour*—that § 301 implied a preemptive, substantive federal labor law—was not controversial in the fact patterns of those cases. Such a result was necessary to effectuate the recognized national labor policy of encouraging the peaceful resolution of management-labor disagreements through collective bargaining. State law was preempted only in the context of lawsuits between an employer and a union to enforce explicit provisions of a relevant collective bargaining agreement. Therefore, the two cases that created § 301 preemption applied it narrowly.

The Court next dealt with the issue twenty-three years later in *Allis-Chalmers Corp. v. Lueck*.[43] The fact pattern at issue provided the basis for expanding the scope of § 301 preemption beyond the holdings of *Lincoln Mills* and *Lucas Flour*. *Lueck* was not a dispute between an employer and a union; rather, an employee filed the complaint alleging a tort against his employer.[44] The collective bargaining agreement at issue detailed a disability plan which

39. *Id.*
40. *Id.*
41. *Id.* at 104.
42. *Id.* at 103.
43. 471 U.S. 202 (1985).
44. *Id.* at 206.

provided benefits for non-occupational injuries to employees.[45] The agreement also contained a grievance procedure which culminated in binding arbitration.[46] After suffering a non-occupational back injury, Lueck filed a claim under the disability plan and won an award pursuant to it.[47] Lueck later believed that Allis-Chalmers was trying to avoid paying the award in full by not making payments, delaying payments, or insisting that he see various doctors to reconfirm the extent of his injury.[48] However, instead of filing a second grievance under the collective bargaining agreement, he filed a lawsuit in Wisconsin state court alleging that Allis-Chalmers had processed his claim in bad faith, a tort under state law.[49] The issue, therefore, was whether § 301 preempted Lueck's state-law claim.[50]

The Supreme Court began its analysis by citing *Lucas Flour* for the principle that "[a] state rule that purports to define the meaning or scope of a term in a contract suit therefore is pre-empted by federal labor law."[51] The opinion then significantly expanded the reach of § 301 by noting that, in order to effectuate the national policies at stake, certain state tort lawsuits would be preempted in addition to those alleging breaches of contract:

> The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. 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.[52]

However, the Court was equally clear that not all tort suits were proscribed by § 301:

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45. *Id.* at 214.
46. *Id.* at 204.
47. *Id.* at 205.
48. *Id.*
49. *Id.* at 206.
50. *Id.* at 206–08.
51. *Id.* at 210.
52. *Id.* at 211.

> Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation. Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored. Clearly, § 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 preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.[53]

The Court specifically noted in a footnote that preemption was not appropriate simply because a state tort lawsuit contained a claim that was a mandatory subject of collective bargaining.[54] The opinion then stated the appropriate test for determining the extent of § 301 preemption:

> Our analysis must focus, then, on whether the Wisconsin tort action for breach of the duty of good faith as applied here confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state tort law purports to define the meaning of the contract relationship, that law is pre-empted.[55]

The Court concluded that Lueck's claim was preempted pursuant to this test. The key to the state claim was the interpretation of the phrase "good faith."[56] That concept was not independently defined by state law, but was necessarily related to the duty or obligation imposed on Allis-Chalmers by the terms and conditions of the contract.[57] The Court stated, "Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will

53. *Id.* at 211–12 (footnote omitted).
54. *Id.* at 212 n.7.
55. *Id.* at 213.
56. *Id.* at 215.
57. *Id.* at 217.

involve contract interpretation."[58] Since Lueck's claim could have been pled as a contract claim, his lawsuit was properly preempted. The opinion further noted that an additional reason for preempting Lueck's state-law tort claim was the national policy of encouraging arbitration.[59] The Court stated, "The need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding in *Lucas Flour*."[60]

The Court concluded by emphasizing the narrow focus of its holding: "Nor do we hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301."[61] The inquiry must necessarily proceed on a case-by-case basis. Since Lueck's claim was "substantially dependent" upon an analysis of a provision in a collective bargaining agreement, the lawsuit must be treated as a labor claim under § 301 (and consequently dismissed for failure to use the grievance procedure) or dismissed as preempted by federal labor-contract law pursuant to § 301.[62]

The Supreme Court expanded its understanding of § 301 preemption in *International Brotherhood of Electrical Workers v. Hechler*.[63] Hechler was a union member and electrical apprentice employed by Florida Power and Light Company.[64] She was injured when she came into contact with highly energized equipment at her workplace.[65] Hechler sued her union for damages related to her injuries, alleging the union had assumed a duty to ensure that she was provided with a safe workplace.[66] After the union removed the case to federal court, Hechler conceded that the union's duty was created solely by its collective bargaining agreement negotiated with Florida Power.[67] In spite of that admission, the Eleventh Circuit reversed the District Court's holding that the lawsuit was preempted by § 301.[68] The Court of Appeals ruled that, even if the duty was created by the

58. *Id.* at 218.
59. *Id.* at 219.
60. *Id.*
61. *Id.* at 220.
62. *Id.*
63. 481 U.S. 851 (1987).
64. *Id.* at 853.
65. *Id.*
66. *Id.*
67. *Id.* at 854.
68. *Id.*

collective bargaining agreement, the union's liability would be assessed on traditional state negligence principles.[69]

The Supreme Court reversed the Eleventh Circuit by holding that Hechler had effectively alleged a "tortious breach-of-contract claim" that was preempted by § 301.[70] The Court had earlier noted that "[t]he ordinary § 301 case is a contract claim in which a party to the collective-bargaining agreement expressly asserts that a provision of the agreement has been violated."[71] Although the parties in the case at bar were not an employer and a union, the same reasoning applied to a lawsuit by a worker against her union when the collective bargaining agreement created the duty:

> In order to determine the Union's tort liability, however, 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 by respondent in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that "questions of contract interpretation . . . underlie any finding of tort liability."[72]

The Supreme Court earlier noted that the resolution of § 301 preemption would be different if Hechler's lawsuit was against Florida Power: "Under the common law, however, it is the *employer*, not a labor union, that owes employees a duty to exercise reasonable care in providing a safe workplace."[73] The common law tort would impose a duty on an employer, which would be independent of a collective bargaining agreement.[74] Since the union had no equivalent common law responsibility, its duty could originate only from the agreement.[75] Hechler's tort lawsuit was therefore dependent on contract interpretation.[76]

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69. *Id.* at 855.
70. *Id.* at 861, 865.
71. *Id.* at 857.
72. *Id.* at 862 (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218 (1985)).
73. *Id.* at 859.
74. *Id.*
75. *Id.* at 862.
76. *Id.*

Caterpillar Inc. v. Williams[77] emphasized that a plaintiff's complaint alone must be the basis for evaluating a § 301 preemption claim. In *Williams*, several employees began their employment with Caterpillar as union workers subject to a collective bargaining agreement.[78] Eventually, they each were promoted to managerial or weekly salaried employees, which were non-unionized positions outside the scope of the agreement.[79] According to these employees, Caterpillar's management consistently assured them that, if the plant ever closed, they would have jobs in other Caterpillar facilities.[80] These employees were later returned to their hourly unionized positions, subject to the collective bargaining agreement.[81] Caterpillar eventually closed the plant and laid off this group of employees.[82] The former employees then filed a lawsuit in state court alleging breach of their employment promises and the contract that resulted therefrom.[83] Caterpillar removed the case to federal court and asserted § 301 preemption.[84]

The Supreme Court affirmed the Ninth Circuit's holding that the lawsuit was not preempted by § 301.[85] The Court began its analysis by stating that prior cases had established a two-part test for § 301 preemption: "Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.'"[86] However, the test must focus on the allegations contained in a plaintiff's complaint, not on a defense mounted by an employer:

> Caterpillar impermissibly attempts to create the prerequisites to removal by ignoring the set of facts (i.e., the individual employment contracts) presented by respondents, along with their legal characterization of those facts, and arguing that there are different facts respondents might have alleged that would have constituted a federal claim. In sum,

77. 482 U.S. 386 (1987).
78. *Id.* at 388.
79. *Id.*
80. *Id.* at 389.
81. *Id.*
82. *Id.*
83. *Id.* at 390.
84. *Id.*
85. *Id.* at 399.
86. *Id.* at 394 (quoting Int'l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 859 n.3 (1987)).

> Caterpillar does not seek to point out that the contract relied upon by respondents is in fact a collective agreement; rather it attempts to justify removal on the basis of facts not alleged in the complaint.[87]

The Court emphasized the importance of the complaint as the touchstone for § 301 preemption in its conclusion:

> But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule – that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has chosen to plead what we have held must be regarded as a federal claim, and removal is at the defendant's option. But a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. [88]

Plaintiffs' claims for breach of an oral contract were not created by, or dependent on, the collective bargaining agreement. The existence of provisions in the bargaining agreement which dealt with termination of employees and Caterpillar's duty to reassign laid off workers were not determinative of § 301 preemption since the complaint was not based on, nor made reference to, such provisions.[89] The existence of the oral contracts and their breach were therefore properly resolved by state, not federal, law.

The Supreme Court clarified the relationship between § 301 preemption and the existence of a grievance process in its next decision, *Lingle v. Norge Division of Magic Chef, Inc*.[90] In analyzing *Lingle*, it is important to note that the *Lueck* opinion stated that the holding in *Lucas Flour* was based in significant part on preserving

87. *Id.* at 396–97 (emphasis omitted).
88. *Id.* at 398–99 (emphases omitted) (footnote omitted).
89. *Id.* at 394–95.
90. 486 U.S. 399 (1988).

the effectiveness of arbitration.[91] Lingle was injured on the job and requested compensation for her medical expenses from Norge consistent with Illinois workers' compensation law.[92] Norge thereafter discharged her for filing a "false" workers' compensation claim.[93] The applicable collective bargaining agreement contained provisions protecting unionized workers from discharge except for "proper" or "just" cause.[94] Lingle's union promptly filed a grievance on her behalf pursuant to the process detailed in the agreement.[95] An arbitrator eventually ruled in Lingle's favor, and she received reinstatement with full back pay.[96] After the grievance was filed, Lingle also filed a lawsuit in state court alleging that Norge had fired her in retaliation for exercising her rights under Illinois law.[97] Norge removed the case to federal court and moved to dismiss based on § 301 preemption.[98] The District Court granted Norge's motion and the Court of Appeals affirmed the dismissal of Lingle's complaint.[99]

The Supreme Court reversed the Seventh Circuit and held that Lingle's state lawsuit was not preempted by § 301 despite the concurrent grievance filing.[100] The Court noted that the facts of retaliatory discharge did not involve the interpretation of a provision in the collective bargaining agreement, but instead focused on "the conduct of the employee and the conduct and motivation of the employer."[101] Accordingly, "the state-law remedy in this case is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement."[102]

The Court of Appeals decided to preempt because the state court would be resolving the same facts and deciding the same issue as the arbitrator—whether there was just cause to fire Lingle. The Court expressly rejected that analytical similarity as the basis for § 301 preemption:

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91. *See supra* notes 59–60 and accompanying text.
92. *Lingle*, 486 U.S. at 401.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 402.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 413.
101. *Id.* at 407.
102. *Id.*

> [Section] 301 pre-emption merely ensures that federal law will be the basis for interpreting collective-bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. In other words, even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.[103]

The Supreme Court therefore held that the existence of a grievance or arbitration process in an applicable collective bargaining agreement was not relevant in a § 301 preemption analysis. While preserving the efficacy of arbitration factored into the development of federal common law under § 301, preemption under that statutory provision focused on the need to interpret a term of the collective bargaining agreement in order to resolve the complaint.

The case *United Steelworkers v. Rawson*[104] presented the Court with a state tort claim brought by the survivors of four employees against their union. The workers were miners who were killed in an underground fire that occurred at the Sunshine Mine in Kellogg, Idaho.[105] The "complaint alleged that the miners' deaths were caused by [the] fraudulent and negligent acts" of the union.[106] The applicable collective bargaining agreement had established a joint management-labor safety committee to make the mines safer for workers.[107] Plaintiffs alleged that the union had inadequately prepared its investigators and, as a result, negligently performed inspections that failed to detect obvious flaws in the mines.[108] The Court cited *Hechler* in holding that the basis of the state tort alleged in the complaint—the union's duty to inspect the mines—was created and defined by the collective bargaining agreement.[109] Since the union did not have a common law duty to provide a safe workplace, the complaint could not allege that the union violated the independent

103. *Id.* at 409–10 (footnote omitted).
104. 495 U.S. 362 (1990).
105. *Id.* at 364.
106. *Id.*
107. *Id.* at 365.
108. *Id.* at 364–65.
109. *Id.* at 370.

duty of reasonable care owed to every person in society.[110] Therefore, the Plaintiffs' complaint was preempted under § 301.[111]

The most recent Supreme Court case of significance regarding § 301 preemption is *Livadas v. Bradshaw*.[112] Livadas was a grocery store clerk at Safeway until her discharge.[113] Her collective bargaining agreement explicitly provided that all disputes relating to unjust discharge would be subject to binding arbitration.[114] California state law required that all discharged workers be paid the wages owed to them immediately.[115] When Lividas was fired on January 2, 1990, she demanded her wages immediately.[116] Her manager refused to pay her, stating that company policy was to mail her a check from a central location.[117] She received the check on January 5, 1990 for all wages due to her through January 2, 1990.[118] She then filed a claim against Safeway with the California Division of Labor Standards Enforcement, demanding three days' wages to compensate for the delay.[119] The Commissioner refused her claim, relying on a policy that statutory wage claims were not available to workers covered by collective bargaining agreements.[120] Livadas filed a lawsuit in federal District Court to enforce payment of her claim.[121]

The Commissioner argued that § 301 preempted her from paying Livadas on her claim since the determination of the amount she would be owed would depend on the collective bargaining agreement, and federal labor policy favored arbitration to resolve these types of grievances.[122] The Supreme Court disagreed and held that § 301 did not preempt Livadas' claim:

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110. *Id.* at 371. The Court cited *Hechler*, again noting that the situation would be different if the lawsuit had been brought against an employer who possesses a common law duty to provide a safe workplace. *Id.* at 374.
111. *Id.* at 372. The Court also held that, pursuant to § 301 federal common law, mere negligence was not enough for the union to violate its duty of fair representation to its members. *Id.* at 372–73.
112. 512 U.S. 107 (1994).
113. *Id.* at 110.
114. *Id.*
115. *Id.*
116. *Id.* at 111.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 112–13.
121. *Id.* at 113–14.
122. *Id.* at 121.

> In *Lueck* and in *Lingle* . . . we underscored the point that § 301 cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law, and we stressed that it is the legal character of a claim, as "independent" of rights under the collective-bargaining agreement . . . that decides whether a state cause of action may go forward. Finally, we were clear that when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished.[123]

The only issue in the case—whether Safeway willfully failed to pay Livadas' wages promptly on severance—was strictly a question of state law independent of the bargaining agreement.[124] Preemption was not supported because the collective bargaining agreement needed to be referenced in order to determine Livadas' wage and therefore her damages.[125] The opinion concluded by noting that § 301 and other federal labor laws should not be interpreted to deny union workers state-law rights granted to all non-union workers, especially in the absence of clear and explicit language waiving the right if state law permits such a waiver.[126]

Williams, *Lingle*, and *Livadas* all held that the employee's claims were not preempted. These three opinions reflect the Supreme Court's belief that many of the lower courts had been reading § 301 preemption too broadly. After those decisions, a number of circuits revisited their preemption decisions and revised them to conform to Supreme Court precedent.[127]

III. PREEMPTION CLARITY

Although the Supreme Court cases appear to establish clear rules for the interpretation of § 301 preemption, lower federal courts occasionally have struggled to apply them to a wider range of fact patterns. The Ninth Circuit, in *Cramer v. Consolidated Freightways*,[128] noted the difficulty of the task in determining the extent of § 301 preemption:

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123. *Id.* at 123–24 (footnotes omitted).
124. *Id.* at 124–25.
125. *Id.* at 125.
126. *Id.* at 128–33.
127. *See infra* Part III.
128. 255 F.3d 683 (9th Cir. 2001).

> The demarcation between preempted claims and those that survive § 301's reach is not, however, a line that lends itself to analytical precision. As the Supreme Court acknowledged in *Livadas*, "[T]he Courts of Appeals have not been entirely uniform in their understanding and application of the principles set down in *Lingle* and [*Allis-Chalmers*]." And little wonder. "Substantial dependence" on a CBA is an inexact concept, turning on the specific facts of each case, and the distinction between "looking to" a CBA and "interpreting" it is not always clear or amenable to a bright-line test.[129]

Other circuits have noted the difficulties inherent in § 301 inquiry.[130] However, the case law has in fact developed a number of accepted black letter law principles in the preemptive analysis.[131]

The Supreme Court in *Williams* noted that preemption was appropriate when a claim was premised on rights directly created by a collective bargaining agreement or substantially dependent on an analysis of a collective bargaining agreement.[132] A two-part test has emerged from the application of this language:

> 1) Is the right (or corresponding duty) alleged by the plaintiff *only* (or solely) created by the applicable collective bargaining agreement?; and
> 2) Is any element of the state-law claim alleged by the plaintiff substantially dependent on the interpretation of a term or provision contained in the applicable collective bargaining agreement for its resolution?[133]

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129. *Id.* at 691 (citation omitted).
130. McCormick v. AT&T Techs., Inc., 934 F.2d 531, 539 (4th Cir. 1991); *see also* Michael Telis, *Playing Through the Haze: The NFL Concussion Litigation and Section 301 Preemption*, 102 GEO. L.J. 1841, 1854–55 (2014).
131. The circuit courts of appeals were more willing to preempt state-law claims before the clarifying Supreme Court decisions of *Williams*, *Lingle*, *Rawson*, and *Livadas*. Both the Third and the Ninth Circuits have explicitly overruled earlier cases as being inconsistent with these later Supreme Court decisions. *See* Kline v. Sec. Guards, Inc., 386 F.3d 246, 258–59 (3d Cir. 2004); *see also Cramer*, 255 F.3d at 692–93 (9th Cir. 2001).
132. *See supra* notes 77–89 and accompanying text.
133. *See* Brown v. Pro Football, Inc., 518 U.S. 231, 265 (1996); Williams v. NFL, 582 F.3d 863, 874 (8th Cir. 2009); Alongi v. Ford Motor Co., 386 F.3d 716, 724 (6th Cir. 2004); Goshorn, *supra* note 4, at 264–65; Telis, *supra* note 130, at 1849. The word "only" is properly added to the creation of the right or duty because the Supreme Court held in *Lingle* that if a right is created by both state law and the collective

If the answer to both questions is no, then the complaint should not be preempted. If the answer to either or both questions is yes, then § 301 preemption is appropriate and the matter should be resolved by substantive federal labor law. Both questions must be resolved solely by an examination of the plaintiff's complaint.[134] The defendant's defensive assertions may not be considered in the resolution of the preemptive questions.[135]

The first prong of this test is the easiest to apply. The complaint on its face or by necessity must allege a right or duty that is only found in a collective bargaining agreement. This requirement is derived from the Supreme Court's opinions in *Hechler* and *Rawson*. In both of those cases, the defendant was a union.[136] Because unions were not recognized at common law as full legal entities and are mainly creatures of federal statutory law, they historically have not been subject to common law duties.[137] In fact, both opinions noted that the respective employers, not the unions, had the independent common law duty of reasonable care to maintain a safe workplace owed to every member of society.[138] The lawsuit, therefore, would not have been preempted if brought against the employer. However, the union's lack of common law duty meant that the right asserted by the plaintiffs was necessarily created and defined by the collective bargaining agreement.[139] Therefore, preemption was appropriate since the right and corresponding duty were solely created by contract, not state common law or statutory law.

In a lawsuit against an employer, preemption under this first test also applies to any complaint which—explicitly or by necessary implication—alleges rights that originate only from a collective bargaining agreement. In *Foy v. Pratt & Whitney Group*,[140] the Second Circuit stated that preemption was appropriate if a complaint

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bargaining agreement, then the plaintiff is not limited simply to the agreement and therefore not preempted. Burnside v. Kiewit Pac. Corp., 491 F.3d 1053, 1059 (9th Cir. 2007); Humble v. Boeing Co., 305 F.3d 1004, 1009 (9th Cir. 2002); Sagerian, *supra* note 3, at 252.

134. *Alongi*, 386 F.3d at 727; *see also* Caterpillar Inc. v. Williams, 482 U.S. 386, 397 (1987).

135. Humphrey v. Sequentia, Inc., 58 F.3d 1238, 1244 (8th Cir. 1995); *see also Williams*, 482 U.S. at 397.

136. United Steelworkers v. Rawson, 495 U.S. 362, 364 (1990); Int'l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 853 (1987).

137. *Rawson*, 495 U.S. at 369; *Hechler*, 481 U.S. at 859.

138. *Rawson*, 495 U.S. at 371; *Hechler*, 481 U.S. at 859.

139. *Rawson*, 495 U.S. at 370; *Hechler*, 481 U.S. at 862. *Hechler* had in fact explicitly conceded that the duty came only from the CBA. *Hechler*, 481 U.S. at 854.

140. 127 F.3d 229 (2d Cir. 1997).

alleging a state common law "tort premised on the violation of duties in the CBA."[141] Former employees in *Foy*, however, alleged that their employer made intentional or negligent misrepresentations to them that violated state statutory and common law.[142] Foy claimed that her employer promised that she would be given an opportunity to transfer to another factory prior to any layoff at her current factory.[143] She was laid off without such an opportunity as permitted by the terms of her collective bargaining agreement.[144] The Second Circuit held that Foy's complaint was not preempted because she alleged independent state-law rights and did not reference any collective bargaining agreement: "State law—not the CBA—is the source of the rights asserted by plaintiffs: the right to be free of economic harm caused by misrepresentation."[145] In *Cephas v. MVM, Inc.*,[146] the District of Columbia Circuit preempted a state-law-based complaint by an employee against his employer alleging that the employer had transferred him in violation of its collective bargaining agreement.[147] However, Cephas's lawsuit was properly preempted because "[n]either his complaint nor his brief, however, identifies any source of right—such as an individual employment agreement—other than the CBA."[148] Accordingly, Cephas's only recourse was a suit pursuant to the substantive federal labor law contained in § 301.[149]

The first part of this test is therefore clear in its application. If the defendant in a common law tort suit brought by an employee is a union, *Hechler* and *Rawson* effectively hold that most common law claims will be preempted. If the defendant in such a case is an employer, and the complaint makes no reference to a collective bargaining agreement but relies solely on state law, the claim will not be preempted pursuant to this part of the test. A plausible argument that the right or duty at issue is not exclusively derived from a collective bargaining agreement (but can be grounded on independent state grounds) should satisfy this portion of the preemption analysis.

The limited nature of the first part of the § 301 preemption test, however, means that the second prong is the one more frequently in

141. *Id.* at 235.
142. *Id.* at 232.
143. *Id.* at 231.
144. *Id.*
145. *Id.* at 235.
146. 520 F.3d 480 (D.C. Cir. 2008).
147. *Id.* at 482.
148. *Id.* at 484.
149. *Id.* The court also held that such a § 301 action was not precluded by the applicable statute of limitations and could therefore proceed in the district court. *Id.* at 490.

dispute and, therefore, more difficult to apply. Preemption of claims that are substantially dependent on the interpretation of a term in a collective bargaining agreement is required to enforce the policy against enforcement of tort claims that are simply cleverly disguised contract disputes.[150] Interpretive preemption was created by *Lueck*. The employee in that case alleged that his employer had violated a state-law duty to process his disability claim in good faith.[151] Accordingly, the right or duty was not created solely by the collective bargaining agreement but had an independent basis in state law. The Court therefore could not use the first part of the preemption test as defined herein. However, the opinion noted that the state law at issue did not define "good faith"; that determination was a case by case inquiry of the applicable standards contained within the collective bargaining agreement.[152] Thus, the complaint was preempted because the definition of the state-law claim necessarily required an interpretation of "good faith" as detailed in the collective bargaining agreement.[153] The need for uniformity in the meaning of terms in collective bargaining agreements dictated that terms be defined by federal, not state, law.[154] The agreement provided in detail the meaning of "good faith" in the processing of disability claims.[155]

The *Lueck* result has been the source of confusion as lower courts struggle with the issue of whether traditional tort concepts such as "reasonable," "outrageous," or "reliance" are as vague as "good faith," consequently requiring interpretation of the collective bargaining agreement for their definitions. However, some parts of the analysis are clear: *Lueck* holds that not all claims related to the workplace must be resolved by federal law, and preemption does not occur simply because the lawsuit arises from a mandatory subject of collective bargaining.[156] The circuits have applied this concept to mean that preemption cannot occur simply because the general subject of the complaint is covered by a collective bargaining agreement; defendant must show that the elements of the complaint are substantially dependent on a specific provision of the agreement.[157] *Lueck* also explicitly states that a complaint alleging conduct by a defendant that is illegal under state law may not be

150. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985).
151. *Id.* at 206.
152. *Id.* at 213.
153. *Id.* at 218.
154. *Id.* at 211.
155. *Id.* at 215–16.
156. *Id.* at 212 n.7.
157. Kline v. Sec. Guards, Inc., 386 F.3d 246, 256 (3d Cir. 2004) (citing Berda v. CBS Inc., 881 F.2d 20, 27 (3d Cir. 1989)).

preempted.[158] The circuits have reinforced this rule by holding that a collective bargaining agreement could not authorize a violation of state or federal law even if it purported to do so.[159] Therefore, no term would be subject to interpretation. The illegality exception has been extended to include claims that assert a public policy violation of a state.[160] Employees—under the reasonable person standard from tort theory—have a right to assume their employers will obey the law since illegal behavior is inherently unreasonable.[161] Finally, the Supreme Court in *Lingle* held that preemption would not be supported simply because the same facts in the state claim could possibly support a grievance pursuant to the collective agreement.[162] The circuits have therefore held that the existence of a grievance process in an agreement is irrelevant for preemption purposes.[163]

The treatment of the tort of intentional infliction of emotional distress in the circuit courts of appeals provides a clear illustration of the preemption rules in application. If an employee alleges that an employer has committed such a tort, state law requires that the employee prove the employer's conduct to be "outrageous."[164] However, the term "outrageous" is not defined by tort law, so it must be decided on a case-by-case basis. In *Douglas v. American Information Technologies Corp.*, the Seventh Circuit preempted an intentional infliction of emotional distress charge because the complaint only alleged employer activity that was covered by the applicable collective bargaining agreement.[165] The court noted that the tort did not exist when the employer "has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress."[166] Similarly, in *Baker v. Farmers Electric Cooperative, Inc.*, the Fifth Circuit preempted a claim of intentional infliction of emotional distress because the plaintiff did not allege any activities by the employer that were outside of those sanctioned by the

158. *Lueck*, 471 U.S. at 212. The most frequent types of these claims are based on assault and battery, retaliatory discharge, and age and gender (especially sexual favors) discrimination. *See* Goshorn, *supra* note 4, at 270.
159. Alongi v. Ford Motor Co., 386 F.3d 716, 727 (6th Cir. 2004).
160. *See* Goshorn, *supra* note 4, at 272–73.
161. Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 695–96 (9th Cir. 2001).
162. *See supra* note 103 and accompanying text.
163. *See* Humphrey v. Sequentia, Inc., 58 F.3d 1238, 1243–44 (8th Cir. 1995).
164. Baker v. Farmers Elec. Coop., 34 F.3d 274, 280 (5th Cir. 1994); Douglas v. Am. Info. Techs. Corp., 877 F.2d 565, 570–71 (7th Cir. 1989).
165. *Douglas*, 877 F.2d at 572–73.
166. *Id.* at 571 (quoting Pub. Fin. Corp. v. Davis, 360 N.E.2d 765, 768 (Ill. 1976)).

collective bargaining agreement: "Baker does not allege that any action on the part of the defendants other than his reassignment to a maintenance position has caused him mental distress. He alleges no instances of harassment, discrimination, physical abuse, or other conduct which would provide grounds for an emotional distress claim."[167]

If the collective bargaining agreement could not possibly sanction the employer's activity (e.g., assault and battery or sexual harassment), the definition of "outrageous" can be determined without reliance on the agreement, and preemption is not warranted.[168] However, conduct authorized by the bargaining agreement—such as the reassignment of an employee here—requires interpretation of the agreement in order to define an element of the claim. Such conduct cannot be "outrageous" and preemption is mandated.[169]

In *Lightning v. Roadway Express, Inc.*,[170] the Eleventh Circuit adopted the analysis of the Fifth and Seventh Circuits, but reached a different result based on the facts before it. Lightning alleged that Roadway management had spit on him, verbally abused him and tried to hit him.[171] The court affirmed the District Court's holding that Lightning's claim was not preempted:

> Contrary to Roadway's assertions, Lightning's intentional infliction of emotional distress claim does not concern the terms and conditions of his employment, but rather the severe abuse he endured from Roadway's supervisors. . . . Thus, Lightning's claim "revolve[s] around conduct by his employer that is not even arguably sanctioned by the labor contract."[172]

The resolution of the preemption issue thus centered on whether the plaintiff's complaint alleged outrageous conduct by the defendant that was outside the scope of the collective bargaining agreement.[173]

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167. *Baker*, 34 F.3d at 280.
168. *Id.* at 280–81.
169. *Id.*
170. 60 F.3d 1551, 1557-58 (11th Cir. 1995).
171. *Id.* at 1554–55.
172. *Id.* at 1557 (alteration in original) (quoting Keehr v. Consol. Freightways of Del., Inc., 825 F.2d 133, 138 n.6 (7th Cir. 1987)).
173. Other circuit courts of appeals have accepted this distinction between complaints which only alleged activity covered by a collective bargaining agreement and those which allege actions outside of anything contemplated by the agreement. *See*

The circuits also agree that non-signatories to the collective bargaining agreements may not bring § 301 lawsuits and, therefore, are not able to assert § 301 preemption.[174] The lower courts also have held that § 301 preemption should be granted only when doing so furthers the purposes behind the Labor-Management Relations Act as stated in *Livadas*—preventing state law from deciding what parties agreed to in a collective bargaining agreement, determining what legal consequences flow from breaches of the agreement, and permitting parties to renege on their arbitration promises by relabeling grievable issues as tort claims.[175] Lawsuits involving non-signatories do not implicate any of the recognized purposes of the LMRA and § 301 preemption is therefore appropriately irrelevant to such a dispute.

IV. PREEMPTION CONFUSION

The concepts noted in Part III are easy to comprehend as black letter law. However, certain repeated misunderstandings in the application of those principles have produced the judicial confusion noted in many Courts of Appeals' opinions. Most of the difficulties are caused by a court expanding the reach of § 301 preemption beyond its intended scope. This judicial overreaching manifests itself in four basic ways:

> (1) a lack of clarity regarding what is an element of a claim and what is a defense; (2) a decision to preempt because a collective bargaining agreement has terms dealing with the general subject matter of the complaint, but not the specific claim alleged; (3) a different interpretation of the concept of "duty"; and (4) an erroneous perception regarding the role of a collective bargaining agreement's grievance process in the preemptive assessment.

As noted above, the case law is clear that preemption analysis should be focused solely on the plaintiff's complaint and not potential defenses by the defendant.[176] However, even this seemingly "bright

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Perugini v. Safeway Stores, Inc., 935 F.2d 1083, 1089 (9th Cir. 1991); Fox v. Parker Hannifin Corp., 914 F.2d 795, 802 (6th Cir. 1990).

174. *See* Jackson v. Kimel, 992 F.2d 1318, 1325 n.4 (4th Cir. 1993); UMWA v. Covenant Coal Corp., 977 F.2d 895, 898 (4th Cir. 1992); *see also* Goshorn, *supra* note 4, at 271–72.

175. Foy v. Pratt & Whitney Grp., 127 F.3d 229, 234 (2d Cir. 1997) (citing Livadas v. Bradshaw, 512 U.S. 107, 122–23 (1994)).

176. *See supra* Parts II–III.

line" test can be difficult to apply as judges disagree on what is defined as an element of the claim and what is properly characterized as a defense. This distinction split an en banc panel on the Fourth Circuit regarding application of § 301 preemption to a claim of intentional infliction of emotional distress in *McCormick v. AT&T Technologies, Inc*.[177] McCormick alleged that, after he was terminated, an AT&T supervisor forced open his locker, removed his personal possessions, and threw them in the trash.[178] McCormick's complaint alleged that, pursuant to Virginia tort law, such a disposition constituted an intentional infliction of emotional distress, negligent infliction of the same, conversion, and negligence in the care of a bailment.[179] Both the majority and the dissent agreed that the critical inquiry involved the location of the defendant's duty.[180] The majority concluded that, under Virginia law, the plaintiff had the burden of proving that the defendant engaged in wrongful conduct that was also "outrageous and intolerable."[181] Both elements required interpretation of the collective bargaining agreement for a resolution:

> If management owed him no duty and was entitled under the agreement to dispose of the contents of his locker in the manner it did, its actions *ipso facto* could not have been wrongful under state law. . . . If management's actions in disposing of the contents of McCormick's locker were authorized under the collective bargaining agreement, those actions could not simultaneously be considered "outrageous and intolerable" under Virginia law.[182]

The majority perceived that the plaintiff must establish the defendant's duty, and his claims were preempted since interpretation of the collective bargaining agreement was essential to determining that issue.[183]

The dissent argued vigorously that applicable Supreme Court precedent indicated that preemption was appropriate when the defendant's duty could be located *only* in the collective bargaining agreement.[184] The dissent believed the majority reached the wrong

177. *See* McCormick v. AT&T Techs., Inc., 934 F.2d 531, 531 (4th Cir. 1991) (4-3 decision).
178. *Id.* at 533.
179. *Id.*
180. *Id.* at 542, 543 (Phillips, J., dissenting).
181. *Id.* at 535 (majority opinion).
182. *Id.* at 537.
183. *See id.* at 535–37.
184. *Id.* at 543 (Phillips, J., dissenting).

conclusion by failing to look solely at the plaintiff's complaint, but instead considered the entire action—claims and defenses—in evaluating the propriety of preemption.[185] Such methodology was in direct conflict with repeated Supreme Court holdings that the complaint alone should be considered in the assessment.[186] The dissent then concluded with addressing what the relevant issue should be:

> [W]hether McCormick's well-pleaded state-law tort claim locates the duty allegedly violated by AT & T in their labor contact [sic] or in some source of legal duty independent of that contract. The answer to that issue is plain: in an independent source, Virginia tort law. Specifically, in the duty imposed by that body of law upon all persons, running to society in general and not dependent upon any employment relationships, (1) not to engage in intentional or reckless conduct (2) that is outrageous and intolerable, offending generally accepted standards of decency . . . .[187]

The issue of whether AT&T was authorized to open the locker and dispose of its contents was a defense that should be resolved properly at trial, not in a preemption motion.[188] Since the tort duty pled in the complaint could be determined without reference to any collective bargaining agreement, the dissent concluded that McCormick's claims should not be preempted.[189]

McCormick confused the preemption analysis by incorrectly focusing on whether the defendant's conduct was authorized by the collective bargaining agreement.[190] This emphasis is inconsistent with the accepted rule that a defense cannot support a preemption decision. The majority should have adopted the analysis of other circuits that have considered the issue: did the complaint allege behavior outside of the scope of activities covered by the collective bargaining agreement?[191] If yes, then the defendant's duty is independently grounded in state law and preemption is inappropriate; if no, then the complaint is substantially dependent on the contract

185. *See id.* at 544.
186. *Id.*
187. *Id.* at 545.
188. *See id.*
189. *Id.* at 547.
190. *See id.* at 544.
191. *See* cases cited *supra* notes 163–73 and accompanying text.

and preemption should be applied. Since the collective bargaining agreement never mentioned lockers or the employer's ability to open them, preemption in *McCormick* was inappropriate because the complaint alleged behavior outside the scope of the collective bargaining agreement.[192]

The *McCormick* majority compounded its error by relying on general provisions of the collective bargaining agreement to justify opening the locker and disposing of its contents. The actual collective bargaining agreement contained no authorization for opening an employee's locker and no provision for dealing with the disposition of its contents.[193] Instead, the majority relied on a general management rights provision and the existence of a grievance process for any mandatory subject of bargaining.[194] Precedent clearly has established that a specific provision in an agreement is needed to support preemption; it cannot be granted simply because the claim relates to a mandatory subject of bargaining or the agreement deals with the general subject matter of the complaint.

This type of error is also illustrated by comparing two cases regarding concussions in professional football: *Duerson v. NFL*[195] and *Green v. Arizona Cardinals Football Club LLC*.[196] In *Duerson*, the estate of a deceased football player sued the NFL for negligence, fraudulent concealment, and negligent failure to warn regarding the organization's knowledge of the dangers of concussions in professional football and its failure to inform players of the brain damage possible from such concussions.[197] The district court preempted all of the plaintiff's claims by accepting the NFL's argument that the state-law tort standard of reasonableness required interpretation of the terms of the NFL's collective bargaining agreements.[198] The court then cited multiple provisions dealing with player health and concluded that those provisions might be interpreted to impose a general duty on the NFL clubs to provide health care for players.[199] The opinion then stated that the agreement's imposition of health care duties on the clubs could justify a lower standard of reasonableness for the NFL than generally

192. *See McCormick*, 934 F.2d at 536. For an application of a similar "something extra" beyond the collective agreement in any intentional tort claim, see Sagerian, *supra* note 3, at 267–69.
193. *McCormick*, 934 F.2d at 536.
194. *Id.*
195. No. 12 C 2513, 2012 WL 1658353, at *1 (N.D. Ill. May 11, 2012).
196. 21 F. Supp. 3d 1020 (E.D. Mo. 2014).
197. *Duerson*, 2012 WL 1658353, at *1.
198. *Id.* at *4.
199. *Id.*

required for state tort law.[200] The decision failed to identify a specific term of the collective bargaining agreement, relying instead on the agreement's general inclusion of player health issues. As noted above, this methodology is inconsistent with preemption precedent.

In *Green*, a district court faced a preemption claim similar to *Duerson* in the context of a lawsuit against an NFL Club for negligence, negligent misrepresentation, and fraudulent concealment in failing to inform players about potential brain injuries from concussions.[201] The defendant argued the same collective bargaining agreement provisions regarding general player safety that were accepted by *Duerson*.[202] The *Green* opinion, however, correctly rejected the same preemption motion granted by the *Duerson* opinion.[203] The opinion noted, "[H]ere the duties arise out of the common law based upon the employer-employee relationship and not out of any particular terms in the CBAs."[204] The plaintiffs' right to rely is similarly situated in their common law status as employees, not a term in the collective bargaining agreement.[205] The opinion further stated that the complaint is not alleging that the Club failed to provide anything required by the agreement; the complaint does not allege that the Club failed to provide a certified trainer or give pre-season physicals.[206] The complaint simply alleges that the Club failed to provide a safe workplace or provide warnings of dangers the players could not reasonably have been expected to be aware of, as required by Missouri common law of torts.[207] *Green* is therefore consistent with preemption precedent.

Another area of confusion is the ambiguous use of the term "duty" by courts. The concept of a defendant's duty can arise in the first prong of the preemption test as reciprocal of the plaintiff's right.[208] As noted above, that duty can be resolved by analyzing whether the duty is found *only* in the collective bargaining agreement.[209]

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200. *Id.*
201. *See Green*, 21 F. Supp. 3d at 1024.
202. *See id.* at 1028–30; *Duerson*, 2012 WL 1658353, at *4–5.
203. *Green*, 21 F. Supp. 3d at 1030.
204. *Id.* at 1028.
205. *Id.* at 1030. The court also noted that the assertions of the general terms of the agreement were, at best, defenses by the Club that could not justify preemption. *Id.*
206. *See id.* at 1028.
207. *Id.* at 1026–28.
208. *See, e.g.*, Int'l Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 859 (1987) (exemplifying the issue of duty arising in first prong of preemption test).
209. *See supra* notes 134–50 and accompanying text.

However, duty also can be raised as an issue in the second prong of the preemption test when it is included as an element in a plaintiff's common law tort claim.[210] A court may look to the collective bargaining agreement as interpreting the common law element, as did the courts in *McCormick* and *Duerson*.[211] In this vein, the duty issue is best resolved by only looking at the plaintiff's complaint and analyzing whether it alleges rights or duties outside of a specific term in the collective agreement.[212] If it does, the duty is not substantially dependent on the interpretation of a collective bargaining agreement; if it does not, the duty is dependent and the interpretation of an essential element of the claim justifies preemption. The dissent in *McCormick* confused this distinction by stating that preemption is applicable when the duty is found *only* in a collective bargaining agreement.[213] The dissent had previously stated that the case was concerned with the second prong of the test—whether the complaint was substantially dependent upon a term of the collective bargaining agreement.[214] This portion of the analysis should have been utilized only in the first prong of the test, not the second, interpretive prong.[215] *Duerson* is more confused by stating that it was only employing the interpretive part of the test, but also stating at one point, "[s]howing that a duty raised in a state-law tort claim originates in a CBA is certainly sufficient to require preemption" and citing *Rawson*.[216] *Duerson* did not properly delineate the differences between the two independent parts of the accepted preemption test, but simply blended the two together.

The concept of duty has been confused even further because of a quote by Justice White in *Rawson*: "This is not a situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every person in society."[217] Some courts have interpreted this language to mean that, for preemption purposes, the defendant's duty must be more than the

210. *See, e.g.*, McCormick v. AT&T Techs., Inc., 934 F.2d 531, 535–36 (4th Cir. 1991) (exemplifying the issue of duty arising in the second prong of the preemption test).
211. *Id.* at 536; Duerson v. NFL, No. 12 C 2513, 2012 WL 1658353, at *3 (N.D. Ill. May 11, 2012).
212. Alongi v. Ford Motor Co., 386 F.3d 716, 724 (6th Cir. 2004).
213. *McCormick*, 934 F.2d at 547–48 (Phillips, J., dissenting).
214. *Id.* at 540.
215. *See supra* notes 139–50 and accompanying text.
216. *Duerson*, 2012 WL 1658353, at *4 (citing United Steelworkers v. Rawson, 495 U.S. 362, 369 (1990)).
217. *Rawson*, 495 U.S. at 371.

common law tort duty and must be owed to everyone.[218] Such a reading is too broad. The better interpretation is that Justice White intended to reference traditional common law tort duty: a general duty owed to the public at large.[219] Even if the narrower reading is incorrect, the most important preemption inquiry is the source of the defendant's duty, not individuals to whom it is owed.[220]

The final major source of confusion is the ambivalent use of a collective bargaining agreement's grievance process by the Supreme Court. *Livadas* specifically stated that one of the purposes of the LMRA, which supports preemption, is not to allow employers or employees "to renege on their arbitration promises by 'relabeling'" grievable issues as tort claims.[221] On the other hand, *Lingle* specifically stated that preemption is not appropriate even if the state-law claim encompasses the same set of facts as a grievance process as long as the compliant can be resolved without interpretation of the agreement.[222] Therefore, the Supreme Court has stated that the existence of a possible grievance process is not relevant to determining whether a claim is independent of the agreement, but courts must be diligent to prohibit attempts to avoid the grievance process.

The *Lueck* decision both created the confusion and provided the basis for its ultimate resolution. The use of the disjunctive "or" at the conclusion of the opinion implies that the preemption issue is a separate analysis from the meaning of the substantive federal common law which should ultimately resolve the case.[223] Therefore, the existence of a grievance provision ending in arbitration was not relevant to the preemption result, but would be important in applying § 301 substantive law. The preemption issue should be resolved by determining whether the state claim relied on a non-negotiable state-law right or is "inextricably intertwined" with the terms of a collective bargaining agreement.[224] If the claim was substantially dependent on a term or provisions of the collective bargaining agreement, then substantive § 301 common law dictated that the plaintiff should not succeed because he failed to follow the grievance

218. Brown v. NFL, 219 F. Supp. 2d 372, 380 (S.D.N.Y. 2002); Sherwin v. Indianapolis Colts, 752 F. Supp. 1172, 1177 (N.D.N.Y. 1990).
219. Sagerian, *supra* note 3, at 239; Telis, *supra* note 130, at 1850.
220. Stringer v. NFL, 474 F. Supp. 2d 894, 908 (S.D. Ohio 2007).
221. Livadas v. Bradshaw, 512 U.S. 107, 123 (1994) (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985)).
222. *See supra* note 103 and accompanying text.
223. *Lueck*, 471 U.S. at 220.
224. *Id.* at 213.

procedure in the collective bargaining agreement. The Court confused the issue by stating early in the opinion that Lueck's state-law claim was preempted because of the national policy of encouraging arbitration.[225] *Lucas Flour*, cited by *Lueck*, correctly placed arbitration in the substantive law of § 301.

Therefore, the proper resolution of this ambiguity should be that the existence of a grievance process is irrelevant to the decision of whether a claim is independent of the collective bargaining agreement. That analysis should proceed as detailed in this Article. If the claim is independent of the collective bargaining agreement, then preemption is inappropriate and the existence of a possible (or actual in *Lingle*) grievance should be ignored. However, if the claim is found to be substantially dependent on a term in the collective bargaining agreement, then the grievance process is the appropriate forum for raising the claim.[226]

V. CONCLUSION

Much of the confusion in applying § 301 is related to a judicial desire to expand the scope of its preemptive reach. The analysis contained in this Article is premised on a narrower exclusion of state common law tort claims. The language in the relevant Supreme Court cases supports this perspective. In *Lueck*, the Court used the phrase "inextricably intertwined" to describe the relationship between a claim and a term of a collective bargaining agreement that justifies preemption.[227] In *Williams*, the Court used the phrase "substantially dependent" to illustrate the fit between the complaint and collective bargaining agreement needed to support preemption.[228] The adverbs contained in those formulations indicate that the relationship between the claim and a term in the contract must be close in order to support preemption. In *Livadas*, the Court described § 301 preemption as a "sensible acorn" and not a "mighty oak."[229] The analogy is the Supreme Court's statement that a broad preemption of state common law claims is inappropriate. The Ninth Circuit has explicitly stated

225. *Id.* at 219.
226. *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 411 (1988); Givens v. Tennessee Football, Inc., 684 F. Supp. 2d 985, 991–92 (M.D. Tenn. 2010) (quoting *Lueck*, 471 U.S. at 219–20). For a discussion on the insufficiency of arbitration as a remedy for state tort claims, see Sagerian, *supra* note 3, at 262–66.
227. *Lueck*, 471 U.S. at 213.
228. Caterpillar Inc. v. Williams, 482 U.S. 386, 395 (1987).
229. Livadas v. Bradshaw, 512 U. S. 107, 122 (1994) (citations omitted).

that § 301 preemption should be narrowly interpreted.[230] The dissent in *McCormick* acknowledges that its analysis:

> [Section 301] dictates a comparably limited scope for the preemptive force of that statute. It obviously preempts state-law claims formally alleging violations of labor contracts – the exact and only kind expressly made federal ones by § 301. Beyond those, it only preempts, as a matter of judicial interpretation, state-law claims that can be determined to be claims for violation of labor contracts in substance though not in form, and those only out of the felt necessity that parties not be allowed "to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract."[231]

In fact, some scholars have argued that the limited scope of this inquiry means that intentional torts should never be preempted.[232]

The narrow interpretation embraced by this Article is consistent with Supreme Court opinions and significantly reduces the confusion regarding the application of § 301 preemption. This approach also restores the balance between the common law rights of unionized and non-unionized workers.[233] Neither Congress nor the Supreme Court intended to restrict state common law tort claims unless there were clear indications that the plaintiff was, in effect, filing a disguised contract claim. The proposals contained herein reinvigorate the true meaning of § 301 while still preserving the grievance process for those contract claims that are properly within its jurisdiction.

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230. Balcorta v. Twentieth Century Fox-Film Corp., 208 F.3d 1102, 1108 (9th Cir. 2000) (citations omitted).

231. McCormick v. AT&T Techs., Inc., 934 F.2d 531, 543 (4th Cir. 1991) (Phillips, J., dissenting) (quoting *Lueck*, 471 U.S. at 211).

232. Sagerian, *supra* note 3, at 232. For a contrary view, see Telis, *supra* note 130, 1860–64.

233. *See supra* note 126 and accompanying text.