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80418-4

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Supreme Court No.80418-4

BY RONALD R. CARPENTER **IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON**

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SUMMIT CENTRAL CONSTRUCTION, INC. a Washington  
Corporation,  
*Respondent,*

vs.

CEMENT MASONS & PLASTERERS HEALTH AND WELFARE  
TRUST; CEMENT MASONS AND PLASTERERS RETIREMENT  
TRUST; CEMENT MASONS JOURNEYMAN AND  
APPRENTICESHIP PLAN; and WESTERN WASHINGTON CEMENT  
MASONS LOCAL 528 VACATION TRUST FUND AND PLAN  
*Appellants.*

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**RESPONDENT'S BRIEF**

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## I. STATEMENT OF THE CASE

Summit Central Construction, Inc. ("SCCI") is a general contractor. SCCI was hired by the Skyway Water & Sewer District to perform work as the general contractor on the Administrative Office and Vehicle Storage Building construction project. (CP 31) SCCI was also hired by the Central Puget Sound Regional Transit Authority to perform work as the general contractor on the Bellevue Transit Center Rider Services Building construction project. (CP 32) Under state law, SCCI was required to provide a payment bond to provide for payment of subcontractors and suppliers who provided goods or services on the projects. (CP 32) Under state law, the Skyway District and Sound Transit also withheld a 5% retained percentage of SCCI's contract price as another means of providing payment for subcontractors and suppliers who provided goods or services on the project. (CP 21)

On both the Skyway Project and the Bellevue Project, SCCI hired GBC Northwest, LLC ("GBC") to perform work as a subcontractor. (CP 32) SCCI paid GBC for the work performed. (CP 32) GBC is, upon information and belief, insolvent. GBC was a party to a collective bargaining agreement that required it to make certain contributions to the Trusts. (CP 32) GBC is alleged to have failed to pay the union cement masons pension and benefit trust funds sums it had contractually agreed to

pay. (CP 32) These contributions are governed by Federal Employee Retirement Income Security Act (ERISA). SCCI, however, was neither a party to, nor obligated by, the collective bargaining agreement.

The trust funds filed claims against SCCI's retainage payment bond under RCW 60.28 and 39.08 in August 2006 on the Skyway Project and the Bellevue Project. (CP 32-36) As set forth in the notices of claim, the Trusts were attempting to recover from the payment bonds and/or retainage funds delinquent contributions that the Trusts allege GBC owed under the collective bargaining agreement. (CP 32-36)

SCCI wrote the trust funds and requested that they dismiss these claims made under state law to recover pension fund contributions that were allegedly owed them by GBC, not by SCCI. (CP 32, 38) SCCI pointed out that on two successive occasions the Washington Supreme Court has ruled that ERISA preempts state law and makes these state remedies unavailable for union trust funds seeking to recover contributions that should have been made by GBC. (CP 38-43) The trust funds refused to release their claims. (CP 22) SCCI responded to the Trusts by filing a declaratory judgment lawsuit in King County Superior Court on November 1, 2006. (CP 1-17)

SCCI asked the Court to declare that under Federal and Washington law the Trusts are prohibited from recovering on their claims

against the payment bonds and/or retainage funds. (CP 3) The Trusts filed their Answers on November 17, 2006. (CP 18-19) The Trusts did not file a Complaint in state court to foreclose on the lien claims within four months of filing the claim pursuant to RCW 60.28.030.

After SCCI had filed its declaratory judgment action, the Trusts then filed two separate lawsuits against GBC in the Federal District Court of Western Washington on November 29, 2006. (CP 44-58) One suit was for the Skyway project; the other suit was for the Bellevue project. (CP 44-58) The trust funds named SCCI as a party to the federal lawsuits, claiming that the Federal District Court had “supplemental jurisdiction” over these state claims under its “supplemental jurisdiction.” (CP 23, 48, 55) The Trusts asserted ERISA did not preempt the state lien claims. (CP 23)

SCCI filed motions in both federal cases requesting the judges to “decline” supplemental jurisdiction over these claims because they were already pending in this state court. (CP 23) The Federal District Judge in the Bellevue suit declined jurisdiction over these state law bond and retainage claims on March 6, 2007 in favor of resolution of the matter in state court. (CP 60-61) However, the District Judge in the Skyway District matter refused to decline jurisdiction. Instead, on May 3, 2007, that Judge granted the pension funds summary judgment, stating expressly

that he did so because the King County Superior Court would enforce the Washington's Supreme Court rulings that he said were *wrong*. (CP 63-68)

SCCI moved for summary judgment and the trial court granted the motion with respect to the Bellevue project on the grounds that the Trusts' claims under Washington's public works lien statutes, RCW 39.08 and RCW 60.28, are preempted by ERISA. (CP 104-105) The trial court denied the motion with respect to the Skyway project, finding that the federal district court judgment entered by Judge Coughenour was entitled to full faith and credit under principles of res judicata. (CP 105)

## II. ARGUMENT AND AUTHORITY

### A. *Mootness*

Since this lawsuit was initiated any rights claimed by the Trusts to pursue retainage claims have expired as a matter of law.

RCW 60.28.030 requires:

Any person, firm, or corporation filing a claim against the reserve fund shall have four months from the time of the filing thereof in which to bring an action to foreclose the lien. The lien shall be enforced by action in the superior court of the county where filed, and shall be governed by the laws regulating the proceedings in civil actions...

The Cement Mason Trusts did not file a lawsuit in superior court within four months from the time of the filing. The Trusts have relinquished retainage rights.

“As a general rule, we will not review a question that has become moot.” *Citizens for Financially Responsible Government v. City of Spokane*, 99 Wash.2d 339, 350 (1983). “Ordinarily if the question is purely academic, this court is not required to pass upon it and will not do so however much both parties desire such a determination.” *Grays Harbor Paper Co. v. Grays Harbor County*, 74 Wash.2d 70, 73 (1968). Because these Trusts will have no bond or retainage rights on this project, it is purely academic to litigate whether ERISA prohibits those remedies.

### ***B. Stare Decisis***

The public's willingness to abide by the common law is tied to the respect the public has for a Court's decisions. The respect the public has for a Court's decisions is directly affected by the respect the Court itself shows for its own decisions. A court that freely disregards its own earlier decisions would rightly be perceived as having little respect itself for its own decisions. The public would soon lose respect for the rulings of such a court. Washington's Supreme Court has long acknowledged the doctrine of *stare decisis* and the "importance of continuity in the law and the

necessity of respect for precedent if we are to remain a society of laws and not of men." *In Re Stranger Creek*, 77 Wn.2d 649, 652, 466 P.2d 508 (1970).

*Stare decisis* is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office. ... The doctrine requires a clear showing that an established rule is incorrect and harmful before it is abandoned.

*In Re Stranger Creek*, at 653 (emphasis added).

The doctrine of *stare decisis* must be considered in advance of any decision by this Court on the present appeal. In 1994, this Court issued a *unanimous* ruling that the federal ERISA law preempted use of state lien laws by union trust funds to collect benefit plan contributions from third parties who were never obligated to make such contributions. This Court stated then:

Washington's public works lien statutes expand liability to ensure the funding of ERISA plans. Although these statutes assist the ERISA funds and are not inconsistent with the policies of ERISA, their enforcement and collection mechanisms must yield to the extent they supplement those provided by ERISA. Thus, we hold that RCW 39.08 [Washington's public works lien statutes] relate to ERISA plans for the purposes of preemption under section 514(a) of ERISA.

*Puget Sound Electrical Workers Health And Welfare Trust Fund, et al, Appellants, v. Merit Company, et al.*, 123 Wn.2d 565, 573, 870 P.2d 960 (1994)(emphasis added).

Six years later, the pension benefits trust funds invited this Court to overrule its unanimous decision in *Merit* in *IBEW Local 46 v. Trig Electric*, 142 Wn.2d 431, 13 P.2d 622 (2000), *cert. denied*, 532 U.S. 1002, 121 S.Ct. 1672, 149 L.Ed.2d 652 (U.S. Wash. Apr 23, 2001).

Because this Court is presented with the identical issue presented in *Merit*, and because the Appellant can make no "clear showing that [the] established rule is incorrect and harmful," preservation of public confidence in this Court demands that its decision on this occasion be the same as it was in *Merit*. *Stare decisis*, therefore, compels an affirmation of this Court's decision in *Merit* and a rejection of the appeal of the union trust funds.

### **C. ERISA Preemption**

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA"). The purpose of ERISA was to make administration of benefit plans more economical by eliminating the myriad differences in the laws adopted by the fifty states relating to benefit plan administration. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. at 656, 115 S.Ct. 1671;

*Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 484, 112 L.Ed.2d 474 (1990).<sup>1</sup> The means of achieving this harmony was, first, by enacting a single body of federal laws for administering benefit plans and, second, by *nullifying* all state laws (as applied to benefit plans) that varied from the federal law.<sup>2</sup> This nullification was accomplished through the concept of legal *preemption*. Congress declared that:

[T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.

ERISA, § 514a, 29 U.S. C. § 1144(a)(emphasis added). The scope of ERISA's preemption is acknowledged to be the broadest pre-emption law Congress ever enacted.<sup>3</sup>

The scope of ERISA's preemption included *remedies*. *FMC Corp. v. Holliday*, 498 U.S. 52, 58, 111 S.Ct. 403, 407, 112 L.Ed.2d 356 (1990). Any state law that offered, or denied, access to a remedy at variance with those provided by ERISA was unenforceable as a matter of law.

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<sup>1</sup> "The basic objective of Congress, the Court concluded, "was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *In re Estate of Egelhoff*, 139 Wash.2d 557, 989 P.2d 80 (1999), quoting *Travelers, supra*.

<sup>2</sup> "To these ends [promotion of uniformity], the preemption clause has been interpreted broadly. *FMC Corp. v. Holliday, supra; Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2388-89, 85 L.Ed.2d 728 (1985).

<sup>3</sup> "In section 514(a) of the act, ERISA contains a general preemption provision, as do many deferral schemes. [Citation omitted.] ERISA's provision, however, is virtually unique and is 'conspicuous for its breadth.'" *GMC Corp. v. Holliday*, 498 U.S. 52, 58, 112 L.Ed.2d 356, 111 S. Ct. 403 (1990).

ERISA's "comprehensive legislative scheme" includes "an integrated system of procedures for enforcement." [Citation omitted]. This integrated enforcement mechanism, ERISA § 502(a), 29 U.S.C. § 1132(a), is a distinctive feature of ERISA, and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans. As the Court said in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987):

"[T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted ... provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Id.*, at 54, 107 S.Ct. 1549 (quoting *Russell, supra*, at 146, 105 S.Ct. 3085).

Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted. See 481 U.S., at 54-56, 107 S.Ct. 1549; see also *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143-145, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990).

*Aetna Health Inc. v. Davila*, 542 U.S. 200, 208-09 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004). A state law that "relates to" ERISA plans is preempted even if the law is consistent with ERISA's policies and

substantive requirements. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380, 2388-89, 85 L.Ed.2d 728 (1985).

### **The U.S. Supreme Court's Clarifications of Congress' Preemption Standard**

Since the enactment of ERISA, numerous court cases challenging the scope of ERISA preemption have been presented to the U.S. Supreme Court. The decisions in these cases have largely dealt with two issues: (1) articulating a usable standard for use by lower courts to identify what laws Congress intended to preempt, and (2) evaluating the facts of particular cases to determine whether they were within or beyond the scope of that preemption.

The Trusts argue that this Court's *Trig* decision must be reversed because "the U.S. Supreme Court has narrowed the scope of ERISA preemption." The argument is incorrect. While the Supreme Court has deliberately clarified, actually supplemented, the *test* for preemption, it did *not* limit the *scope* of ERISA preemption itself (which under the Constitution it would be powerless to do). Under the test for ERISA preemption announced by the Supreme Court in *Travelers*, the *Trig* decision was correctly decided. This conclusion is substantiated by the Supreme Court's denial of the appellant's Petition for Certiorari in *Trig*.

*IBEW Local 46 v. Trig Electric*, 532 U.S. 1002, 121 S.Ct. 1672, 149 L.Ed.2d 652 (U.S. Wash. Apr 23, 2001).

In the course of deciding the first round of ERISA preemption cases, the U.S. Supreme Court acknowledged the unsurpassed breadth of preemption enacted by Congress in ERISA.

In section 514(a) of the act, ERISA contains a general preemption provision, as do many deferral schemes. [Citation omitted.] ERISA's provision, however, is *virtually unique* and is "*conspicuous for its breadth.*"

*GMC Corp. v. Holliday*, 498 U.S. 52, 58, 112 L.Ed.2d 356, 111 S. Ct. 403 (1990) (emphasis added).

The test first articulated by the U.S. Supreme Court to determine whether a State law was preempted under ERISA arose out of *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983):

In *Shaw*, we explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with or reference to* such a plan." 463 U.S. at 96-97.

*Travelers*, 514 U.S. at 656 (emphasis added). Beginning with the *Travelers* case, more challenging fact situations were presented to the Supreme Court causing it to observe that the *Shaw* test alone was no longer sufficient.

[W]e have to recognize that our prior attempt [the *Shaw* test] to construe the phrase "relate to" does not give us much *help drawing the line here.*

*Travelers*, 514 U.S. at 655 (emphasis added). The Court in *Travelers* then proceeded to formulate a clearer, more useful test.

In formulating the *Travelers* test, the Supreme Court began with the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Travelers* at 515. Two sentences later it then observes that, with respect to ERISA, Congress had demonstrated just such intent: "The governing text of ERISA [anything that 'relate[s] to an employee benefit plan'] is *clearly expansive*."

*Id.* at 516 (emphasis added). The Court then revisited its earlier *Shaw* test for preemption: "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a *connection with or reference to* such a plan." *Shaw v Delia Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 77 L.Ed2d 490 (1983). It found that both the statutory language ("relation to") and the *Shaw* test ("connection with") were too vague to offer meaningful guidance for the closer cases it was being presented. It then issued a new, more objective test of preemption based on determining whether a State's law conflicted with Congress's goals in enacting ERISA.

We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term and *look instead to the objectives of the ERISA statute* as a guide to the scope of the state law that Congress understood would survive.

*Travelers* at 656 (emphasis added). In stating the new test, the Court did not profess to change or limit the existing scope of preemption under

ERISA. Under the Constitution, the Court lacked the power to do so.<sup>4</sup> Nor did the Court suggest that its earlier decisions were being overruled or were inconsistent with the new standard. To the contrary, the Court confirmed its continuing "fidelity" to both the analysis and the results of the Shaw era decisions.

[W]e do not hold today that ERISA pre-empts only direct regulation of ERISA plans, nor could we do that *with fidelity to the views expressed in our prior opinions on the matter.* See, e.g., *Ingersoll-Rand*, 498 U.S., at 139; *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 47-048 (1987); *Shaw*, 463 U.S., at 98.

*Travelers* at 668. The Court validated the *Shaw* line of decisions by noting that adoption of a clearer test was not required at that time because those cases clearly infringed upon the goals of ERISA:

In our earlier ERISA preemption cases, it had not been necessary to rely on the expansive character of ERISA's literal language in order to find preemption because the state laws at issue in those cases had a clear "connection with or reference to" [citation omitted] ERISA benefit plans.

*DeBuono v. NYSA-ILA Medical Services Fund*, 520 U.S. 806, 117 S.Ct. 1747, 138 L.Ed.2d 21 (1997). The Court in *Travelers* did not overrule or reverse *any* of its earlier cases finding State laws preempted. As this analysis demonstrates, there is no support to be found in U.S. Supreme

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<sup>4</sup> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives " U S Constitution, Art I, Sec 1

Court decisions for the proposition that the exceptional scope of preemption under ERISA has in any way been reduced or narrowed as is evident in the following quotation from the 2001 decision in *Egelhoff v. Egelhoff ex rel. Breiner*:

ERISA's pre-emption section, 29 U.S.C. § 1144(a), states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. A state law relates to an ERISA plan "if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97, 103 S.Ct. 2890, 77 L.Ed.2d 490. To determine whether there is a forbidden connection, the Court looks both to ERISA's objectives as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the state law's effect on ERISA plans. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 325, 117 S.Ct. 832, 136 L.Ed.2d 791.

*Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001)(emphasis added).

The essential issue in *Trig Electric*, was *identical* to the one presented in *Puget Sound Electrical Workers Trust Fund v Merit Company*, 123 Wn. 2d 565, 569, 870 P.2d 960 (1994)("Merit"): Whether the use of this State's public works lien laws by benefit plan administrators to compel third parties, possessing no relationship to the plans, to fund those plans when the real signatory defaults is preempted by ERISA.

The test of ERISA preemption following *Travelers* involves a "two-part inquiry": first, application of the still-valid *Shaw* test insofar as

any "references" to an ERISA plan can be found and, second, an evaluation of whether the State law conflicts with Congress's goals in enacting ERISA. *California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 324-25, 117 S.Ct. 832, 136 L.Ed2d 791 (1997).

As there is no express reference to an ERISA plan under RCW 39.08 or RCW 60.28, the second part of the test, "conflicts with Congress' goals," will therefore be the dispositive test. The process will consist of determining whether any of Congress's goals in enacting ERISA would be affected by permitting the plan administrators to compel unrelated third parties to fund the benefit plans. While under no compulsion to have done so at the time, the process just described is the process utilized by this Court in its *Merit* decision. The Court first determined that *uniformity* was a goal of Congress underlying enactment of ERISA<sup>5</sup>:

"With the narrow exceptions, specified in the bill, the substantive and enforcement provisions are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulations of employee benefit plans" [Citation omitted.] The basic thrust of the

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<sup>5</sup> FN3. We have found in passing that § 514(a), Congress intended "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law, the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government ..., [and to prevent] the potential for conflict in substantive law... requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction" *Ingersoll Rand*, 498 U.S. at 142.

preemption clause then was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans

*New York State Blue Cross Plans v Travelers Ins.*, 514 U.S. 645, 656-57, 115 S.Ct 1671, 131 L Ed 2d 695 (1995).

ERISA's preemption provision is intended to promote uniformity among the states. Namely, it ensures that plans and plan sponsors will be subject to a uniform body of benefits law. Congress' goal was to minimize the administrative and financial burden of complying with conflicting directives among states, thereby maximizing the efficiency of the plans. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142, 112 L.Ed.2d 474, 111 S.Ct. 478 (1990). To these ends, the preemption clause has been interpreted broadly. *FMC Corp. v. Holliday*, *supra*; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 85 L.Ed.2d 728, 105 S.Ct. 2380 (1985).

*Merit*, 123 Wn. at 572-73. The Court then evaluated whether use of Washington's public works lien laws to compel third parties to fund delinquent trust fund contributions impeded that goal:

The Trusts argue that Washington's public works lien statutes. Like the general garnishment statute in *Mackey*, merely provide a procedural mechanism for ERISA funds to collect employer contributions. We disagree. Unlike the garnishment statute in *Mackey*, Washington's public works lien statutes create an entirely separate cause of action against the general contractors who otherwise have no contractual obligation to the plans. Furthermore, they provide a mechanism for funding employee benefit plans not available under the provisions of ERISA.

By imposing, liability upon general contractors who have not agreed to make contributions to ERISA

funds. Washington's public works lien statutes regulate how ERISA plans are funded. Consequently, they relate to ERISA benefit plans and the provisions of ERISA that address the nonpayment of contributions by employers to employee benefit plans

*Id.* at 572-73 (emphasis added).<sup>6</sup> Thus, under the *Travelers* test (and under the *Shaw* test), use of Washington's public works lien laws to compel third parties to fund delinquent benefit plan contributions remains preempted by ERISA.

#### **California and 9<sup>th</sup> Circuit Decisions**

Appellant urges this court to be persuaded by the decisions rendered in jurisdictions other than Washington. The authorities it relies upon, however, are not persuasive. The Trusts cite to the California case of *Betancourt v. Storke Housing Investors*, 82 P.3d 286 (2003), for the proposition that state lien laws are not preempted by ERISA. The *Betancourt* decision is seriously flawed: (1) the California Supreme concluded erroneously that the U.S. Supreme Court had “narrowed” the scope of ERISA preemption in its *Traveler’s* decision; (2) the California court acknowledged that state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption and then disregarded this fact in favor of other considerations; and (3) the

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<sup>6</sup> It bears noting that none of the authorities relied upon by this Court in arriving at its *Merit* decision has never been overruled.

California court exalted its own state constitutional grant of lien rights over the preemptive power of the federal law without citing any authority permitting this.

As stated above, the U.S. Supreme Court's repeated confirmation that it has not reversed any of its earlier ERISA preemption decisions, and to the contrary, asserts their continuing validity, belies the conclusion of a narrowing of the scope of ERISA preemption. In addition to the absence of any citation to authority by the California Supreme Court that California's constitutional grant of lien rights supersedes ERISA's preemption power, there is no comparable constitutional provision under Washington law. Finally, that Court cites to the U.S. Supreme Court's *Ingersoll-Rand* line of decisions (forbidding the enforcement of state alternative enforcement mechanisms) without arguing either that California's lien laws were not an "enforcement mechanism" or that, for some reason, they were exempt from the federal law. That constitutes a gaping hole in that court's analysis.

The Ninth Circuit Court of Appeals in *So. Cal. IBEW-NECA v. Standard Industrial Electric*, 247 F.3d 920 (2001), also recited that ERISA preemption had narrowed under *Travelers*. This court too failed to analyze the Supreme Court decisions or provide citation to a supporting statement of the Supreme Court that ERISA preemption had narrowed

under *Travelers*. The Ninth Circuit did not explain why the Supreme Court itself had not said this nor did it reconcile the Supreme Court's contrary statement that it had pronounced "fidelity" to the earlier rulings.

The Ninth Circuit also failed to recognize the significant distinction between the facts in *Operating Engineers Health & Welfare Trust Fund v. JWJ Contracting Co.*, 135 F. 3d 671 (9<sup>th</sup> Cir 1998) and the facts in *Standard Industrial Electric*, 247 F. 3d 920, 928-29 (9<sup>th</sup> Cir 2001). The Ninth Circuit wrongly equated the liability of the surety for the contractually-bound signatory to the benefit plans with the liability of the surety of a third-party having no contractual relationship to the benefit plans. The distinction, however, is both genuine and plain: In *JWJ*, the surety that provided the bond was the surety for the direct contractual obligor to the benefit plans. The opposite was true of the surety in *Standard Industrial Electric*. The bond that the benefit plans claimed against in *Standard Industrial Electric* was only subject to the claims of the benefit plans because of the effect of a state statute that declared this, unlike in *JWJ*. Accordingly, it was the interposition of state law alone that presented the benefit plan trustees with the opportunity to avail themselves of a remedy against a third party's surety that did not exist under ERISA.

Finally, the Ninth Circuit claimed that courts which had ruled that lien claims were preempted by ERISA had failed to give adequate

consideration to the presumption against preemption of areas of “traditional state regulation.” The Ninth Circuit characterized lien laws as areas of traditional state regulation, found no compelling evidence of Congressional intent to preempt the lien laws, and therefore found them to be beyond the scope of ERISA preemption. The Ninth Circuit’s conclusion that providing the benefit plans with a remedy against third parties who, but for the state law, would have no liability for the pension plan benefits cannot be reconciled with the express statements of the U.S. Supreme Court regarding the exclusivity of the remedies provided for in ERISA.

In ERISA law, we have recognized one example of this sort of overpowering federal policy in the civil enforcement provisions, 29 U.S.C. § 1132(a), authorizing civil actions for six specific types of relief.

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The first case touching on the point did not involve preemption at all; it arose from an ERISA beneficiary's reliance on ERISA's own enforcement scheme to claim a private right of action for types of damages beyond those expressly provided. *Russell*, 473 U.S., at 145, 105 S.Ct. 3085. We concluded that Congress had not intended causes of action under ERISA itself beyond those specified in § 1132(a). ... *Russell* and *Taylor* naturally led to the holding in *Pilot Life* that ERISA would not tolerate a diversity action seeking monetary damages for breach generally and for consequential emotional distress, neither of which Congress had authorized in § 1132(a). These monetary awards were claimed as remedies to be provided at the ultimate step of plan enforcement, and even if they could have been characterized as products of “insurance

regulation,” they would have significantly expanded the potential scope of ultimate liability imposed upon employers by the ERISA scheme.

Since *Pilot Life*, we have found only one other state law to “conflict” with § 1132(a) in providing a prohibited alternative remedy. In *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), we had no trouble finding that Texas’s tort of wrongful discharge, turning on an employer’s motivation to avoid paying pension benefits, conflicted with ERISA enforcement; while state law duplicated the elements of a claim available under ERISA, it converted the remedy from an equitable one under § 1132(a)(3) (available exclusively in federal district courts) into a legal one for money damages (available in a state tribunal). Thus, *Ingersoll-Rand* fit within the category of state laws *Pilot Life* had held to be incompatible with ERISA’s enforcement scheme; the law provided a form of ultimate relief in a judicial forum that added to the judicial remedies provided by ERISA. Any such provision patently violates ERISA’s policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred. ... (“The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop ... would make little sense if the remedies available to ERISA participants and beneficiaries under [§ 1132(a)] could be supplemented or supplanted by varying state laws”).

*Rush Prudential HMO v. Moran*, 536 U.S. 355, 376, 122 S.Ct. 2151, 153 L.Ed.2d 375, (2002); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); see also, *Egelhoff*, *supra*.

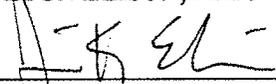
### III. CONCLUSION

It is well established that the use of Washington's public works lien laws to compel third parties to fund delinquent benefit plan contributions is preempted by ERISA. The United States Supreme Court decisions since the Washington Supreme court decided *Trig* in 2001 have further confirmed Washington's correct interpretation. The Trusts in this case have seized upon a couple poorly reasoned decisions as a basis to once again bring this same issue to the Washington Supreme Court.

The law is well established that the Trusts may not pursue lien rights as supplemental remedies to ERISA. That is the correct application of the law pronounced by the United States Supreme Court.

DATED this 17<sup>th</sup> day of September, 2007.

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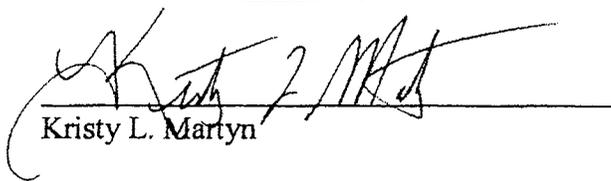
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