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I. INTRODUCTION

A cornerstone of American jurisprudence is the principle that federal courts have limited jurisdiction.[1] Federal courts may hear only cases or controversies that meet the requirements of both the United States Constitution, article III and a jurisdictional grant by Congress.[2] Conversely, state courts

1. *See* Aldinger v. Howard, 427 U.S. 1, 15 (1976)(well-established principle that federal courts have limited jurisdiction). *See generally* 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522 (2d ed. 1984)(overview of concept that federal courts have limited jurisdiction).

2. *See, e.g.*, Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978)(limits imposed on federal courts by Constitution or Congress must not be disregarded); Sheldon v. Sill, 49 U.S. (8 How.) 441, 442 (1849)(Congress may restrict jurisdiction of lower federal courts); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809)(constitutionally created jurisdiction of lower federal courts cannot be enlarged by Congress). *See generally* 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, MOORE'S FEDERAL PRACTICE. ¶ .60[3] (2d ed. 1986)(federal courts are courts of limited jurisdiction).

are courts of general jurisdiction unless controverting facts show otherwise.[3] The situation is reversed in federal court where the claimant must rebut a presumption against jurisdiction.[4] Thus, in federal court, the threshold issue of jurisdiction becomes a matter of overwhelming importance.[5]

Federal law grants a defendant the right, in certain situations, to remove a case from state court to federal court.[6] However, the defendant must show that the federal court has jurisdiction over the complaint.[7] Federal subject matter jurisdiction may be based on either diversity of citizenship[8] or the presence of a federal question.[9] For more than one hundred years, federal

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3. *See* Aldinger v. Howard, 427 U.S. 1, 15 (1976)(state trial courts are courts of general jurisdiction); *see also* C. WRIGHT, LAW OF FEDERAL COURTS § 7 at 22-23 (4th ed. 1983)(most state courts are courts of general jurisdiction).

4. *See, e.g.*, Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327, 337 (1895)(presumption that federal court without jurisdiction); King Iron Bridge & Mfg. Co. v. County of Oteo, 120 U.S. 225, 226 (1887)(presumption that federal court lacks jurisdiction); Bors v. Preston, 111 U.S. 252, 255 (1884)(federal court jurisdiction must appear affirmatively in record due to presumption against jurisdiction). *See generally* Baker, *Thinking About Federal Jurisdiction — Of Serpents and Swallows*, 17 ST. MARY'S L.J. 239, 239-41 (1986)(details importance of rebutting presumption against jurisdiction).

5. *See* FED. R. CIV. P. 8(a)(1)(requires pleading to set forth ground of court's jurisdiction); *see also* McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936)(party seeking relief in federal court must state facts in pleading demonstrating court's jurisdiction). Questions of jurisdiction are not mere disputes over procedural technicalities, but, instead, they are fundamental problems of constitutional law. C. WRIGHT, LAW OF FEDERAL COURTS § 1 at 1 (4th ed. 1983). Perhaps Justice Frankfurter put it best when he wrote: "The law of the jurisdiction of this Court raises problems of a highly technical nature. But underlying their solution are matters of substance in the practical working of our dual system . . . ." Flournoy v. Weiner, 321 U.S. 253, 263 (1944).

6. *See* 28 U.S.C. § 1441 (1982)(federal removal statute).

7. *See* Grubbs v. General Elec. Credit Corp., 405 U.S. 699, 702 (1972)(question in removal case whether federal district court would have had original jurisdiction). Removal is purely statutory and dependent on the whim of Congress. There was no comparable procedure at English common law, but the United States has provided for removal jurisdiction since the Judiciary Act of 1789. *See* 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3721 (2d ed. 1984). Removal to federal courts is complicated and technical, requiring both procedural and jurisdictional considerations. For a discussion of the procedural aspects of removal, see generally Fritsche and Osman, *In and Out of Federal Court: Removal and Remand*, 51 TEX. B.J. 85, 85-87 (1988).

8. *See* 28 U.S.C. § 1332 (1982). Questions about diversity jurisdiction are not within the scope of this comment. For a discussion of diversity, see generally Rowe and Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 7-14 (1986)(overview of modern implications of federal diversity jurisdiction).

9. *See* 28 U.S.C. § 1331 (1982). The United States Constitution contains the original grant of federal question jurisdiction. *See* U.S. CONST. art. III, § 2. Even though federal question jurisdiction was one of the primary reasons the Constitution granted Congress the power to create inferior federal courts, Congress did not give federal courts original jurisdiction over these cases until 1875. *See* 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3561 (2d ed. 1984).

courts have required that a federal question appear on the face of the plaintiff's complaint in order to invoke jurisdiction in federal question cases.[10] This requirement is known as the well-pleaded complaint rule.[11] The well-pleaded complaint rule also applies to a defendant's right to removal.[12]

The well-pleaded complaint rule has been used in attempts to defeat congressional intent to regulate different areas of the law.[13] From the 1930's onward, Congress displaced state law in numerous fields through use of its commerce clause power.[14] Because federal remedies for violations of federal law are often not as favorable as state law causes of action,[15] plaintiffs have

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10. *See, e.g.*, Gully v. First Nat'l Bank, 299 U.S. 109, 113 (1936)(controversy must be disclosed on face of complaint); Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)(federal jurisdiction due to federal question must appear in plaintiff's claim); Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1877)(first case construing 1875 statute required federal question to appear on face of complaint).

11. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983)(powerful doctrine controlling federal question jurisdiction known as "well-pleaded complaint" rule). *See generally* 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3566 (2d ed. 1984)(presents overview of well-pleaded complaint rule).

12. *See* Tennessee v. Union & Planters' Bank, 152 U.S. 454, 461 (1894)(first case explicitly linking well-pleaded complaint rule to removal jurisdiction).

13. *See, e.g.*, Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981)(federal law claims artfully pled as state law claims in order to avoid federal jurisdiction); Hearst Corp. v. Shopping Center Network, Inc., 307 F. Supp. 551, 556 (1969)(plaintiff's use of well-pleaded complaint rule to defeat congressional intent unacceptable).

14. *See, e.g.*, 29 U.S.C. §§ 151-169 (1982)(National Labor Relations Act of 1937 regulated labor); 42 U.S.C. §§ 2000e to 2000e-17 (1982)(Title VII of Civil Rights Act of 1964 regulates employer-employee relations); 29 U.S.C. §§ 553, 671-678 (1982)(Occupational Safety and Health Act of 1970 regulates working conditions across nation); 29 U.S.C. §§ 301-309, 441, 1001-1461 (1982)(Employee Retirement Income Security Act of 1974 regulates nation's private pension plans). This is a list of federal laws which regulate employer-employee relationships. In addition, the federal government regulates numerous other fields of endeavor. In the 1930's and 1940's the United States Supreme Court construed the commerce clause as giving congress the power to regulate the national economy through various pieces of "New Deal" legislation. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 128 (1942)(Congress exercised constitutionally appropriate power under commerce clause to regulate prices for commodities); United States v. Darby, 312 U.S. 100, 118-9 (1941)(federal hour and wage regulation upheld for employees engaged in goods production for interstate commerce); Helvering v. Davis, 301 U.S. 619, 641 (1937)(old age benefits provision of Social Security Act upheld). *See generally* NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW § 4.9 (3d ed. 1986)(traces extension of federal regulation through commerce clause power).

15. *See* Powers v. Southern Cent. United Food & Commercial Workers Unions, 719 F.2d 760, 761 (5th Cir. 1983). In *Powers*, the plaintiff brought suit against her employer's pension plan under the Texas Deceptive Trade Practices — Consumer Protection Act (DTPA) despite the fact that she also had a cause of action under the federal Employee Retirement Income Security Act of 1974 (ERISA). *Id.* at 761-62. It is not difficult to understand why the plaintiff chose to forsake the federal law in favor of the state remedy. The DTPA provides for the

frequently failed to plead federal claims to avoid removal to federal court.[16] In one narrow field of law, the Labor-Management Relations Act of 1947 (LMRA) 301,[17] removal has been allowed without reference to the plaintiff's complaint.[18] This doctrine is known as preemption removal.[19] Recently, the United States Supreme Court expanded preemption removal to the Employee Retirement Income Security Act of 1974 (ERISA).[20] By so doing, the Court defined the requirements of preemption removal and laid the foundation for further expansion of federal court jurisdiction.[21]

This comment will examine the evolution of the preemption removal doctrine. Initially, federal question jurisdiction and competing interpretations of the well-pleaded complaint rule will be explained. Next, the doctrine of preemption removal will be traced from its beginnings through the passage of ERISA. Detailed analysis will be given to the Court's extension of preemption removal to certain ERISA actions. Finally, this comment will assert that preemption removal should be applied to other federal laws which meet the Court's qualifications.

II. FEDERAL QUESTION JURISDICTION AND PREEMPTION REMOVAL

A. *The Meaning of "Arising Under"*

The United States Constitution grants jurisdiction to federal courts over "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their au-

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recovery of treble damages. *See* TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 1988). Punitive damages are not provided for in ERISA. *See* 29 U.S.C. § 1132(1)(B)(1982).

16. *E.g.*, Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n, 657 F.2d 29, 32 (3d Cir. 1981)(plaintiff initiated state complaint despite availability of federal law); First Nat'l Bank of Aberdeen v. Aberdeen Nat'l Bank, 627 F.2d 843, 845-6 (8th Cir. 1980)(plaintiff relied on state law instead of pleading federal law).

17. Labor Management Relations (Taft-Hartley) Act, § 301, 29 U.S.C. § 185 (1982).

18. *See* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1546, 95 L. Ed. 2d 55, 63 (1987)(LMRA § 301 claims completely preempt area of law); *see also* Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968)(claims arising under LMRA § 301 clearly federal).

19. *See* Price v. PSA, Inc., 829 F.2d 871, 875 (9th Cir. 1987)(refers to doctrine as "preemption removal"); *see also* Comment, *Federal Preemption, Removal Jurisdiction, and the WellPleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 648 (1984)(refers to *Avco* situation as preemption removal). The doctrine is also referred to as "extraordinary preemption" and "complete preemption." *See* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __ 107 S. Ct. 1542, 1547, 95 L. Ed. 2d 55, 64 (1987).

20. *See* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1547, 95 L. Ed. 2d 55, 64 (1987).

21. *See* Texas Employers Ins. Co. v. Jackson, 820 F.2d 1406, 1420 (5th Cir. 1987)(preemption removal extended to Longshore and Harbor Workers' Compensation Act claims).

thority."[22] This clause was first construed by Chief Justice Marshall in *Osborne v. Bank of the United States*.[23] In *Osborne*, the Bank of the United States, which had been chartered by Congress to sue and be sued, brought suit to enjoin the Ohio state auditor from collecting an allegedly unconstitutional tax from the bank.[24] Chief Justice Marshall held that federal jurisdiction existed in any suit concerning the Bank of the United States.[25] The bank was a mere creature of federal law, therefore, any case to which the bank was a party arose under the United States Constitution because federal law was an "ingredient" of the claim.[26] Marshall's "ingredient" theory of arising under did not become important until general jurisdiction was granted to federal courts by Congress in 1875.[27] The expansive reading given "arising under" in *Osborne* might have opened the federal courts to a flood of litigation,[28] therefore, the statutory grant was more narrowly construed by federal judges in the late nineteenth century.[29]

B. *The Well-Pleaded Complaint Rule*

One of the theories which federal courts developed to restrict the statutory grant of jurisdiction was the "well-pleaded complaint" rule.[30] Under this

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22. U.S. CONST. art. III, § 2.

23. 22 U.S. (9 Wheat.) 738 (1824).

24. *Id.* at 828-29.

25. *Id.* at 827-28.

26. *Id.* at 823.

27. *See* Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331 (1982)). Prior to Judiciary Act of 1875, Congress limited federal appellate review to federal issues decided by state courts. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85 (current version at 28 U.S.C. § 1257 (1987)).

28. *See* Judiciary Act of 1875, ch. 137 § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331 (1982)). The Judiciary Act of 1875 repeated verbatim the language of article III, section 2 of the Constitution. *See id. Osborne* set the outer constitutional limits of arising under jurisdiction, while Congress granted less jurisdiction than the Constitution authorized. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494 (1983). Fear of opening the federal courthouse door to a flood of litigation prompted a more restrictive reading. *See* Pacific R.R. Removal Cases, 115 U.S. 1, 24-5 (1885)(Waite, J., dissenting)(broad meaning of "arising under" would lead to federal court jurisdiction over all cases involving federal corporations). *See generally* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3562, at 22-3 (2d ed. 1984)(under ingredient test every land title case in western states could be brought in federal court).

29. *See, e.g., Verlinden B.V.*, 461 U.S. at 494 (Art. III jurisdiction broader than federal question jurisdiction in § 1331); Starin v. City of New York, 115 U.S. 248, 257 (1885)(if construction of Constitution or law of United States defeats or sustains recovery, then federal question present); Gold-Washing & Water Co. v. Keys, 96 U.S. 199, 203-4 (1877)(suit must arise out of controversy about effect of Constitution or laws). *See generally* C. WRIGHT, THE LAW OF FEDERAL COURTS 93 (4th ed. 1983)(1875 statute given more restrictive reading while purporting to follow *Osborne* rule).

30. *See Gold-Washing & Water Co.*, 96 U.S. at 203 (federal court jurisdiction must appear

rule, federal jurisdiction will not attach unless a federal question appears on the face of the complaint, unaided by the anticipation of a federal defense.[31] The well-pleaded complaint rule also applies to federal removal jurisdiction.[32] A case filed in state court cannot be removed unless the federal district court could have had original jurisdiction.[33] Therefore, the defendant's right to a federal forum is conditioned upon whether the plaintiff chooses to invoke a federal claim in its complaint.[34] The linking of removal jurisdiction to the well-pleaded complaint rule has been routinely criticized by commentators as an incentive to forum manipulation, or artful pleading, on the part of the plaintiff.[35] The plaintiff can claim to rely on state law when federal law should actually govern the complaint.[36]

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on record as required by good pleading). Since *Gold-Washing & Water Co.*, the well-pleaded complaint rule has been consistently reasserted. *See, e.g.*, Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983)(well-pleaded complaint rule powerful doctrine which severely limits number of cases tried in federal district court); *Verlinden B.V.*, 461 U.S. at 494 (question in case arose solely as defense not on face of well-pleaded complaint).

31. *See* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908). In *Mottley*, the Louisville & Nashville railroad agreed to give the Mottley's free passes each year for the rest of their lives as settlement for a tort claim. *See id.* at 150. In 1906, the Hepburn Act prohibited railroads from granting free passes; subsequently the railroad refused to renew the Mottley's passes. *See id.* at 151. The Mottley's brought suit in federal district court alleging the breach of contract was based solely on the Hepburn Act. *Id.* The Supreme Court held that the Mottley's were barred from pursuing their case in federal court because the federal question did not appear on the face of their well-pleaded complaint, but was merely an anticipated defense to their claim. *See id.* at 152.

32. *See* Tennessee v. Union & Planters' Bank, 152 U.S. 454, 460-61 (1894). The Supreme Court first engrafted the well-pleaded complaint rule onto the removal statute while construing the Act of March 3, 1887, amending the Judiciary Act of 1875. *See id.* at 458-9. The Court stated that the well-pleaded complaint rule applied to the removal statute, and the defendant could remove his case only if the plaintiff could have originally brought an action in federal court. *See id.* at 461-2. Prior to *Tennessee v. Union & Planters' Bank*, the well-pleaded complaint rule was not applied to the removal statute. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 10-11 n. 9 (1983).

33. *See* 28 U.S.C. § 1441(a)(1982). Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. *Id.*

34. *See* Tennessee v. Union & Planters' Bank, 152 U.S. 454, 461-2 (1894)(defendant may remove if upon face of plaintiff's complaint federal court has jurisdiction).

35. *See, e.g.*, AMERICAN LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 196-200 (1969)(proposed change of removal statute to allow removal based on federal defense or counterclaims) Currie, *The Federal Courts and the American Law Institute (pt. 2)*, 36 U. CHI. L. REV. 268, 269 (1969)(well-pleaded complaint rule capricious and unrelated to jurisdictional policy); Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 915 (1967)(well-pleaded complaint rule sets arbitrary and capricious standard).

36. *See* Nuclear Eng'g Co. v. Scott, 660 F.2d 241, 249 (7th Cir. 1981)(plaintiff may not

Generally, there are two interpretations of the well-pleaded complaint rule.[37] The first approach emphasizes the "plaintiff's statement," and is explained in *Gully v. First National Bank*.[38] In *Gully*, Justice Cardozo, stated that a federal question ". . . must be disclosed upon the face of the complaint unaided by the answer or the petition for removal . . . ."[39] Under *Gully*, the characterization of the plaintiff's complaint as stating federal or purely state law claims becomes dispositive of the cause of action.[40]

In the second approach, a court may look beyond the surface of the plaintiff's complaint to ascertain the true nature of the cause of action. This interpretation of the well-pleaded complaint rule can be found in *Skelly Oil Company v. Phillips Petroleum Company*.[41] In *Skelly Oil*, the declaratory judgment plaintiff alleged a federal right, however, the Supreme Court held that the federal right alleged was only in anticipation of a federal defense to a state law contract claim.[42] The Court hypothesized that if the declaratory judgment plaintiff had brought a coercive action[43] against the defendant there would have been no federal question in the plaintiff's complaint.[44] Under *Skelly Oil*, the Court must look beneath the face of the declaratory

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deny federal jurisdiction by artfully disguising federal claim). *See generally* Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 825-834 (1986)(fear of forum manipulation provides strong impetus to recharacterize plaintiff's state claim as federal).

37. *See* Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 646 (1984)(discusses dual interpretation of well-pleaded complaint rule).

38. 299 U.S. 109 (1936).

39. *Id.* at 112-13.

40. *See, e.g.*, Local Div. No. 714, Etc. v. Greater Portland, Etc., 589 F.2d 1, 5 (1st Cir. 1978)(essential inquiry whether face of complaint alleges cause of action based on federal law); North Davis Bank v. First Nat'l Bank of Layton, 457 F.2d 820, 823 (10th Cir. 1972)(state court case removable only when federal question appears on face of complaint); Rivera v. Federacion de Musicos de Puerto Rico, Inc., 369 F. Supp. 1169, 1171-72 (D.P.R. 1974)(federal question arises only when element of plaintiff's complaint). Justice Cardozo stated that it was futile to attempt to ascertain the true character of a plaintiff's cause of action. *See Gully*, 299 U.S. at 117.

41. 339 U.S. 667 (1950).

42. *See Skelly*, 339 U.S. at 672-74. Phillips brought suit under the Declaratory Judgment Act for a declaration that contracts between the plaintiff and defendant were still in effect. *See id.* at 669-71. The contracts were contingent upon a third party, Michigan-Wisconsin Pipeline Co., receiving a federal license to construct pipelines to carry natural gas interstate. *See id.* at 669. The declaratory judgment petition specifically asked whether the Michigan-Wisconsin pipelines had been federally certified. *See id.* at 670. The Court wrote that Phillips was trying to get into federal court through the back door by anticipating a defense based on federal law. *See id.* at 673-74.

43. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 19 (1983)(coercive action is action seeking any relief other than declaratory judgment).

44. *See Skelly Oil*, 339 U.S. at 672 (if Skelly sought damages or specific performance, suit would arise under state contract law).

judgment complaint to determine whether the actual dispute is based on federal law.[45]

The *Gully* approach to the well-pleaded complaint rule significantly restricts the number of preemption cases that reach federal court.[46] Federal preemption is usually a defense to a plaintiff's state law claim.[47] Therefore, if the *Gully* approach is followed, state courts will usually make the crucial decision whether state law or federal law is to apply.[48] Some commentators believe there is a danger that state courts may thwart the intent of Congress.[49] On the other hand, in the past, courts have expressed a fear that extending the *Skelly Oil* approach beyond the confines of the Declaratory Judgment Act would vitiate the well-pleaded complaint rule.[50] It is neces-

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45. *See id.* at 672-74. The Court, in *Skelly Oil*, feared that declaratory judgment action would open the federal courthouse door to a flood of litigation and encourage a race to the courthouse. *See id.* at 673. The Court held that the Federal Declaratory Judgment Act was procedural. *See id.* at 671. Therefore, courts must look at the underlying lawsuit and can only exercise jurisdiction if it would be proper in the absence of the Declaratory Judgment Act. *Id. See generally* Note, *Federal Jurisdiction over Preemption Claims: A Post-Franchise Tax Board Analysis*, 62 TEX. L. REV. 893, 899-900 (1984)(overview of the decision in *Skelly Oil*).

46. *See, e.g.*, Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 129 (1974)(federal court lacked jurisdiction because only effect of Natural Gas Act was to overcome potential defense to action); Superior Oil Co. v. Pioneer Corp., 706 F.2d 603, 606 (5th Cir. 1983)(federal court lacked jurisdiction because Natural Gas Policy Act would be brought into action only as defense to state suit); Howard v. Furst, 238 F.2d 790, 793 (2d Cir. 1956)(case did not arise under federal laws because Section 14(a) of Securities Exchange Act did not create federal right).

47. *See, e.g.*, Olgiun v. Inspiration Consol. Copper Co., 704 F.2d 1468, 1470 (9th Cir. 1984)(plaintiff's carefully worded complaint invoked state law, but defendant removed on federal preemption basis); Rose v. Intelogic Trace, Inc., 652 F. Supp. 1328, 1329 (W.D. Tex. 1987)(plaintiff brought suit in state court alleging wrongful termination; defendant successfully removed to federal court on ERISA preemption); Kerbow v. Kerbow, 421 F. Supp. 1253, 1256-57 (N.D. Tex. 1976)(plaintiff filed case in state court seeking portion of ex-husband's pension; defendant unsuccessful in attempt to remove on ERISA preemption basis).

48. *See* Eure v. NVF Co., 481 F. Supp. 639, 643 (E.D. N.C. 1979)(state judges capable of adjucating federal rights in preemption dispute). *See generally* Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 859 (1986)(modification of *Gully* approach to well-pleaded complaint rule would result in federal courts making more preemption decisions).

49. *See* Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 814 n. 8 (1986)(state courts may distort federal policy if allowed to make initial decision); *see also* Segreti, *Vesting the Whole "Arising Under" Power of the District Courts in Federal Preemption Cases*, 37 OKLA. L. REV. 539, 557-58 (1984)(federal courts more likely than state courts to find federal preemption).

50. *E.g.*, Pan American Petro. Corp. v. Superior Court of Del., 366 U.S. 656, 663 (1961)(no substitute for well-pleaded complaint rule that defendant certain to raise federal defense); Hunter v. United Van Lines, 746 F.2d 635, 640 (9th Cir. 1984)(court recognizes defendant's interest in having federal preemption decided in federal court but current removal statute won't allow), *cert. denied*, 474 U.S. 863 (1986); Powers v. South Cent. United Food &

sary to recall that the Court in *Skelly Oil* modified *Gully* to achieve the goal of the well-pleaded complaint rule, which is to keep cases that primarily involve state law issues out of federal courts.[51] Federal courts are faced with a dilemma when presented a removal petition based on federal preemption. Are federal courts limited to a mechanical inspection of the state court plaintiff's petition,[52] or may they inquire into the underlying nature of the plaintiff's cause of action?[53] This dilemma implicates the nature of our federal system:[54] Will federal or state courts decide preemption questions?[55]

C. *The Development of Preemption Removal*

In the second half of the twentieth century, the well-pleaded complaint

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Commercial Workers Unions, 719 F.2d 760, 765 (5th Cir. 1983)(plaintiff relied on no federal cause of action; therefore, removal not allowed on basis of ERISA preemption).

51. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950)(Federal Declaratory Judgment Act enlarged range of remedies but did not extend federal court jurisdiction). Justice Frankfurter, author of the *Skelly Oil* opinion, looked beyond the plaintiff's declaratory relief complaint to the underlying cause of action in order to restrain federal court jurisdiction. *See* Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 644 n. 40 (1984). Justice Frankfurter believed the Supreme Court and the federal court system had a defined sphere within which to operate; due to this philosophy, he did not support expanding federal court jurisdiction. *See* H. THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH 268-71 (1960).

52. *See, e.g.*, Caterpillar Inc. v. Williams, __ U.S. __, __, 107 S. Ct. 2425, 2430, 96 L. Ed. 2d 318, 326 (1987)(case may not be removed to federal court on basis of federal preemption, even if both parties concede only federal question in dispute); Pan American Petro. Corp. v. Superior Court of Del., 366 U.S. 656, 663 (1961)(no federal question jurisdiction even if certain defendant will raise federal defense); Motores, S.A. v. Eagle Nat'l Bank, 632 F. Supp. 645, 647 (S.D. Fla. 1986)(court can look to plaintiff's complaint and no other pleading to determine if federal question present).

53. *See, e.g.*, Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1548, 95 L. Ed. 2d 55, 65 (1987)(under the facts of *Taylor*, suits which purport raising only state law claims are necessarily federal and removable by defendant); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968)(plaintiff's state law claim removed to federal court because suit clearly arose under federal law); Fay v. American Cystoscope Makers, 98 F. Supp. 278, 280 (S.D.N.Y. 1951)(court may look beyond plaintiff's complaint to ascertain status of parties in removal proceeding).

54. *See* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decisions*, 105 U. PA. L. REV. 797, 797 (1957). Professor Mishkin states:

> As the national government expands into widening realms of activities, its operations ramify myriads of new and existing legal relationships . . . . The question of what law, state or federal, and in what combinations, should govern the several parts of these different relationships thus becomes more frequent and pressing.

Id.

55. *See* Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 814 (1986)(should state or federal system get first crack at deciding preemption questions).

rule clashed with burgeoning federal regulation.[56] Federal preemption removal questions began appearing frequently in the courts.[57] Competing readings of the well-pleaded complaint rule, and a growing public policy in favor of federal regulation, combined to create confusion over preemption removal. Removal based on preemption was first recognized in the field of labor law.[58] However, the limits of preemption removal remained unclear.

In 1947, Congress passed the Labor-Management Relations Act (LMRA), which was designed to protect employers, employees, and the general public from unfair labor practices.[59] Section 301 of the LMRA gives federal courts jurisdiction over disputes arising out of collective bargaining agreements.[60] In *Textile Workers Union v. Lincoln Mills*,[61] the Supreme Court held that LMRA section 301[62] was a substantive provision which gave federal courts the power to create common law in the field of collective bargaining agreements.[63] The Court construed section 301 as manifesting a congressional policy favoring federal enforcement of collective bargaining agreements.[64] This set the stage for an expansion of federal removal juris-

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56. *See* Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 646 (1984)(preemption removal problem of recent origin because of proliferation of federal regulation).

57. *See Fay*, 98 F. Supp. at 280 (removal of state court action based on federal preemption). *Fay* was the first case allowing preemption removal. Since 1951, preemption removal questions have become common in federal courts. *See, e.g.*, Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1545, 95 L. Ed. 2d 55, 61 (1987)(plaintiff's state law claims removed to federal court on ERISA preemption basis); Franchise Tax. Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 7 (1983)(case removed to federal court remanded because ERISA preemption defense not on face of well-pleaded complaint); Johnson v. England, 356 F.2d 44, 46-47 (9th Cir. 1966)(case filed in state court removable under section 301 LMRA).

58. *See* Fay v. American Cystoscope Makers, 98 F. Supp. 278, 280 (S.D.N.Y. 1951)(involved section 301 of the Labor-Management Relations Act).

59. *See* 29 U.S.C. §§ 140-188 (1982); *see also* Hoffman v. Beer Drivers & Salesmen Local No. 888, 536 F.2d 1268, 1276 (9th Cir. 1976)(Congressional purpose of LMRA to protect employees, employers, and general public from dislocations of commerce caused by unfair labor practices). The Labor Management Relations Act of 1947, also known as the Taft-Hartley Act, was an amendment to the National Labor Relation Act of 1937 (NLRA). *See* 29 U.S.C. §§ 151-169 (1982). The LMRA was passed due to widespread criticism by business of President Roosevelt's New Deal policies and the NLRA in particular. Employers criticized the NLRA as a tool of organized labor. The LMRA extended the NLRA to unfair labor practices by unions. *See* Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 509 n. 9 (1986).

60. *See* Labor Management Relations (Taft-Hartley) Act, § 301, 29 U.S.C. § 185 (1982).

61. 353 U.S. 449 (1957).

62. Labor Management Relations (Taft-Hartley) Act, § 301, 29 U.S.C. § 185 (1982).

63. *See Lincoln Mills*, 353 U.S. at 456 (Congress intended section 301 to create substantive body of federal common law).

64. *See id.* at 455 (congressional purpose of section 301 to provide legal remedies). In a spirited dissent, Justice Frankfurter accused the majority of attributing an "occult content" to

diction under LMRA section 301.[65]

Section 301 became the vehicle for allowing preemption removal. In *Fay v. America Cystoscope Makers, Inc.*,[66] the district court avoided the effect of *Gully* in a case where the plaintiff pleaded only a state law cause of action. The court wrote that it can look beyond the face of the complaint in order to determine the status of the parties if federal jurisdiction hinges on that status.[67] The plaintiff's status as a union representing employees placed its complaint squarely within LMRA section 301.[68] Further, the court held that since LMRA section 301 authorized the creation of a new, substantive federal right, it preempted the field.[69]

The reasoning in *Fay* was repeated in *Avco Corp. v. Aero Lodge No. 735*.[70] In a fact situation similar to *Fay*,[71] the United States Supreme Court held that the district court had federal question jurisdiction in *Avco*.[72] The plaintiff in *Fay* was a union charging unfair labor practices,[73] whereas, in *Avco*, the plaintiff was a business bringing suit against a union alleging unfair labor practices.[74] The Court held that since the dispute arose under LMRA section 301, it was controlled by federal law.[75] In *Avco*, Justice Douglas stated

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section 301. *Id.* at 461. Frankfurter argued that section 301 was plainly procedural, yet the Court, by relying on a few well chosen excerpts from the Act's legislative history, transmitted it into a mandate to create a body of federal common law. *See id.*

65. *See* Comment, *Intentions of Federal Removal Jurisdiction in Labor Cases: The Pleading Nexus*, 1981 DUKE L.J. 743, 744 (federal jurisdiction steadily expanded since *Lincoln Mills*).

66. 98 F. Supp. 278 (S.D.N.Y. 1951).

67. *Id.* at 280. The *Fay* court stated:

> The normal rule in removal proceedings prohibits the court from looking outside the complaint to determine whether or not a suit arises under federal law. [citation omitted]. However, where federal jurisdiction hinges on the parties, or one of them, having a particular status, the court may ascertain the existence of that status independent of the complaint.

Id.

68. *See id.* (jurisdiction depends upon plaintiff's status as union representing employees to bring case within section 301).

69. *See id.* at 281. "However, in the light of the determination that the section creates a new, federal, substantive right, . . . it seems clear that congress preempted the field in this area." *Id.*

70. 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968).

71. *Compare id.* at 339 (corporation filed suit in state court to enjoin union from striking; union removed on basis of federal labor law preemption) *with* Fay v. American Cystoscope Makers, 98 F. Supp. 278, 279-80 (S.D.N.Y. 1951)(union filed suit in state court; corporation removed on basis of federal preemption).

72. 390 U.S. 557 (1968).

73. *See Fay*, 98 F. Supp. at 279-80 (corporation seeking removal).

74. *See Avco Corp.*, 376 F.2d at 339 (union seeking removal).

75. *See Avco Corp.*, 390 U.S. at 560.

only that arising-under jurisdiction,[76] and therefore removal jurisdiction, was "clear." The Supreme Court tacitly approved preemption removal without supplying any analysis to support its reasoning in *Avco*.[77]

After *Avco*, defendants attempted preemption removal in fields other than labor law,[78] but since there were no definite guidelines for evaluating these claims, the courts split in their treatment of the problem.[79] Generally, three lines of reasoning developed with respect to the well-pleaded complaint rule and preemption removal.

1. Rejection of Preemption Removal

Some courts refused to make exceptions to the well-pleaded complaint rule to allow removal based on preemption.[80] The Court of Appeals for the Third Circuit rejected the *Avco* approach.[81] The court stated that federal courts should not engraft exceptions to the well-pleaded complaint rule without a legislative mandate.[82] This line of reasoning advanced the notion that courts cannot look beyond the face of the complaint until Congress changes the removal statute.[83] Other courts rejected *Avco* as an isolated exception to the well-pleaded complaint rule limited solely to LMRA section 301.[84]

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76. *Id.* The Court provides no analysis or discussion of original jurisdiction whatsoever. The most the court says is that original jurisdiction was "clear." *Id.*

77. *See id.*

78. *See, e.g.*, Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n, 657 F.2d 29, 35 (3d Cir. 1981)(no basis for preemption removal within homeowners loan context); North Am. Philips Corp. v. Emery Air Freight Corp., 579 F.2d 229, 231 (2d Cir. 1978)(federal regulation of interstate air carriers occupies field, therefore, preemption removal approved); La Chemise Lacoste v. Alligator Co., 506 F.2d 339, 342 (3d Cir. 1974)(preemption removal rejected in trademark field).

79. *Compare* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981)(court will not permit artful pleading to block defendants right to federal forum) *with* Motores, S.A. v. Eagle Nat'l Bank, 632 F. Supp. 645, 647 (S.D. Fla. 1986)(court cannot look to removal petition to establish federal jurisdiction) *and* Central Metal Products v. International Union, Etc., 195 F. Supp. 70, 71-72 (E.D. Ark. 1961)(removal based on preemption by LMRA section 301 allowed).

80. *See* Washington v. Am. League of Professional Baseball Clubs, 460 F.2d 654, 658-60 (9th Cir. 1972)(federal preemption is defense, not ground for removal); Ely v. Allied Prods. Corp., 562 F. Supp. 528, 530-31 (N.D. Ind. 1983)(removal not allowed even though dispute might ultimately revolve around federal issues).

81. *See* La Chemise Lacoste v. Alligator Co., 506 F.2d 339, 345 (3d Cir. 1974)(preemption removal rejected because preemption is defense).

82. *Id.*

83. *Id.*

84. *See, e.g.*, First Nat'l Bank of Aberdeen v. Aberdeen Nat'l Bank, 627 F.2d 843, 853 (8th Cir. 1980)(court acknowledged preemption removal under LMRA section 301, but rejects it within banking context); Johnson v. England, 356 F.2d 44, 47-48 (9th Cir. 1966)(removal of state claim proper because section 301 preempts field); Central Metal Products v. International

2. The "Artful Pleading" Doctrine

Other courts did not permit plaintiffs to frustrate the intent of Congress by artfully pleading their complaint.[85] These courts followed the *Skelly Oil* principle of seeking to determine the true nature of the complaint, despite plaintiff's characterization,[86] by focusing on the plaintiff's motive.[87] The Fifth Circuit Court of Appeals in *Villareal v. Brown Express, Inc.*[88] stated that a " . . . party may not fraudulently evade removal by drafting a complaint so that the true purpose of the lawsuit is artfully disguised."[89] Under the artful pleading doctrine, the courts determine that the plaintiff is actually relying on federal law but invoking only state law in order to avoid federal court.[90] Artful pleading has become an important theme in analyzing preemption removal cases.[91]

Union, Etc., 195 F. Supp. 70, 71-72 (E.D. Ark. 1961)(removal based on preemption by LMRA section 301 allowed). *See generally* Comment, *Intimation of Federal Removal Jurisdiction in Labor Cases: The Pleading Nexus*, 1981 DUKE L.J. 743, 745-46 (generally no problem removing labor case from state court if section 301 cited).

85. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2 (1981)(plaintiff may not employ artful pleading in effort to deny defendant right to federal forum); *see also* Eitman v. New Orleans Pub. Serv., 730 F.2d 359, 365 (5th Cir. 1984)(plaintiff may not defeat removal by artful pleading); Hearst Corp. v. Shopping Center Network, Inc., 307 F. Supp. 551, 556 (S.D.N.Y. 1969)(plaintiff may not by artful manipulation defeat congressional intent). *See generally* Note, *Sullivan v. First Affiliated Securities: When Will The Artful Pleading Doctrine Support Removal of a State Claim to Federal Court?*, 18 GOLDEN GATE U. L. REV. 177 (1988)(discussing of status of artful pleading doctrine in Ninth Circuit).

86. *See Moitie*, 452 U.S. at 397 n.2. Determination of the true or underlying nature of a complaint was first allowed in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

87. *See, e.g.*, Eitman v. New Orleans Pub. Serv., 730 F.2d 359, 365 (5th Cir. 1984)(plaintiff may not defeat removal by fraudulent means); Jones v. General Tire & Rubber Co., 541 F.2d 660, 664 (7th Cir. 1976)(plaintiff may defeat removal unless fraud involved); Angela Cummings, Inc. v. Purolator Courier Corp., 670 F. Supp. 92, 93 (S.D.N.Y. 1987)(suit may be removed where plaintiff fraudulently conceals federal question); *See generally* 14A C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722 (2d ed. 1984)(overview of removal jurisdiction and artful pleading doctrine).

88. 529 F.2d 1219 (5th Cir. 1976).

89. *Id.* at 1221.

90. *See* Hunter v. United Van Lines, 746 F.2d 635, 641-42 (9th Cir. 1984)(plaintiff disguised federal claim as state claim in order to avoid *res judicata*), *cert. denied*, 474 U.S. 863 (1985).

91. *Cf.* Buchanan v. Delaware Valley News, 571 F. Supp. 868, 871 (E.D. Pa. 1983)(exception to well-pleaded complaint rule arises when plaintiff conceals federal nature of claim); Salveson v. Western States Bankcard Ass'n, 731 F.2d 1423, 1427 (9th Cir. 1984)(application of artful pleading doctrine in antitrust context); New York v. Local 115 Joint Bd. Nursing Home & Hosp. Employees Div., 412 F. Supp. 720, 722 (E.D.N.Y. 1976)(artful pleading doctrine caveat to well-pleaded complaint rule).

3. The Superseding Cause of Action

The third line of reasoning recognized but limited preemption removal to situations in which federal law provided for both preemption and a civil remedy.[92] Once Congress preempts a field of law and provides a remedy, the federal cause of action supersedes any state law cause of action.[93] These courts reasoned that if federal law fails to replace rights previously granted by state law, it is illogical to maintain that the litigant's claim is based on a federal law which gives him no rights.[94] These courts have required that a plaintiff possess a right to recovery under federal law before preemption removal is allowed.[95] The reasoning of these cases can be traced to Justice Holmes formulation of "arising under" in *American Well Works v. Layne*.[96] In *Layne*, the Court stated: "A suit arises under the law that creates the cause of action."[97] If a state law has been preempted by a federal law which also provides a cause of action, then these courts would allow removal based on preemption.[98]

Perhaps the lack of analysis in *Avco* was due to LMRA section 301 it-

92. *See, e.g.*, Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, 656 F.2d 1364, 1367 (9th Cir. 1981)(removal appropriate when federal law displaces state law and confers federal remedy), *cert. denied*, 455 U.S. 1020 (1982); Long Island R.R. v. United Transp. Union, 484 F. Supp. 1290, 1293 (S.D.N.Y. 1980)(where federal law source of plaintiff's rights, courts look beyond face of complaint); New York v. Local 1115 Joint Bd. Nursing Home & Hosp. Employees Div., 412 F. Supp. 720, 723 (E.D.N.Y. 1976)(removal proper when preempting federal law provides federal claim). *See generally* Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 654 (1984)(discussion of preemption removal based on superseding cause of action).

93. *See* Garibaldi v. Lucky Food Stores, Inc., 726 F.2d 1367, 1370 n.5 (9th Cir. 1984)(state law must be preempted and facts must state a federal cause of action to allow preemption removal).

94. *See* Long Island R.R. v. United Transp. Union, 484 F. Supp. 1290, 1293 (S.D.N.Y. 1980)(illogical to state that cause of action based on law that provides plaintiff no rights).

95. *See, e.g.*, Caterpillar Inc. v. Williams, __ U.S. __, __ 107 S. Ct. 2425, 2430, 96 L. Ed. 2d 318, 326 (1987)(when federal law preempts state law and provides a remedy then it is said to completely preempt state law for purposes of removal); Hunter v. United Van Lines, 746 F.2d 635, 642-43 (9th Cir. 1984)(removal based on preemption improper unless federal law also provides remedy); Olgiun v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1476 (9th Cir. 1984)(removal proper when federal law both preempts state law and replaced it with federal cause of action).

96. 241 U.S. 257 (1916).

97. *Id.* at 260.

98. *See, e.g.*, Olgiun v. Inspiration Consol. Copper Co., 740 F.2d 1468, 1476 (9th Cir. 1984)(removal based on federal preemption allowed because plaintiff's exclusive remedy was federal); Guinasso v. Pacific First Fed. Sav. & Loan Ass'n, 656 F.2d 1364, 1367 (9th Cir. 1981)(preemption removal proper when federal law displaces state law and confers federal remedy), *cert. denied*, 455 U.S. 1020 (1982).

self.[99] The language in section 301 and the legislative history of that section are ambiguous at best.[100] In 1974, Congress, enacted the Employee Retirement Income Security Act (ERISA) which contained an explicit preemption clause supported by a clear legislative history.[101] ERISA's preemption clause, section 514(a),[102] has been utilized by the Supreme Court to analyze and clarify preemption removal.[103]

III. ERISA PREEMPTION

The enactment of ERISA in 1974 was the culmination of years of study and debate over the regulation of private pension plans in the United States.[104] Congress, in order to achieve its goal of federal pension regulation, included a sweeping preemption clause which displaced state laws relating to employee pension and benefit plans.[105] Federal preemption of state law under ERISA has been, for the most part, straightforward.[106] However,

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99. *See* Labor Management Relations (Taft-Hartley) Act, § 301(a), 29 U.S.C. § 185(a) (1982).

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, 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.

Id.

100. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 460-62 (1957)(Frankfurter, J., dissenting)(legislative history of section 301 "cloudy and confusing").

101. *See* 29 U.S.C. § 1001-1461 (1982). The legislative history of ERISA may be found in SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG. 2D SESS., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (Comm. Print 1976).

102. 29 U.S.C. § 1144(a) (1982).

103. *See* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1544-45, 94 L. Ed. 2d 55, 58-9 (1987)(Court decided that ERISA section 502(a)(1)(B) allows preemption removal); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 7 (1983)(preemption removal not allowed in ERISA case due to well-pleaded complaint rule).

104. *See* Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 361 (1980)(Congress enacted ERISA after a decade of study). Interestingly enough, Congress' first attempt at regulating pensions came in LMRA section 3-2, which dealt only with pensions established as a result of collective bargaining agreements. *See* 29 U.S.C. § 186(c)(5)(A)(1982). Congress later enacted the Welfare Pension Plan Disclosure Act (WPPDA) of 1958, which proved to be inadequate and was repealed. In 1962, President Kennedy created a task force to study the problem of pension plan abuse and corruption. The efforts of this task force culminated in the enactment of ERISA by Congress and the President in 1974. *See* 120 CONG. REC. 29, 934 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4843.

105. 29 U.S.C. § 1144(a)(1982).

106. *See, e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 108 (1983)(state human rights law preempted as applied to ERISA benefit plans); Alessi v. Raybestos - Manhattan, Inc., 451 U.S. 504, 521 (1981)(state law which prohibited reducing retiree's pension benefits by amount

the question of preemption removal in ERISA cases plagued lower federal courts.[107] In two preemption removal cases involving ERISA section 514, the United States Supreme Court finally gave the preemption removal doctrine the analytical underpinnings which lower courts need to guide their decisions.[108]

IV. Clarification and Expansion of Preemption Removal

A. Franchise Tax Board v. Construction Laborers Vacation Trust

The first ERISA case in which preemption removal was directly addressed by the Supreme Court was *Franchise Tax Board v. Construction Laborers Vacation Trust*.[109] In *Franchise Tax Board*, the defendant pension trust was able to remove a state court claim for a taxpayer's attachment, and a declaratory judgment to federal district court based on ERISA preemption.[110] Justice Brennan, writing for a unanimous court, held the federal district court lacked removal jurisdiction over both claims due to the well-pleaded complaint rule.[111]

The Court in *Franchise Tax Board* finally supplemented the *Avco* decision with the analysis which had been lacking for fifteen years.[112] The Court said *Avco* stood for the proposition that a federal cause of action can be so encompassing that it entirely displaces any related state cause of action. Therefore, any claim within the scope of the federal cause of action necessarily arises under federal law.[113]

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of workers' compensation benefits received before retirement preempted by ERISA). *But see* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 758 (1985)(state mandated-benefit law not preempted by ERISA).

107. *Compare* Sorosky v. Burroughs Corp., 826 F.2d 794, 798 (9th Cir. 1987)(plaintiff's state court suit alleging only state-based causes of action removed on basis of ERISA preemption) *with* Powers v. South Cent. United Food & Commercial Workers Unions, 719 F.2d 760, 765 (5th Cir. 1983)(plaintiff's state suit claiming relief under Texas Deceptive Trade Practices Act not removable on ERISA preemption basis).

108. *See* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1546-47, 95 L. Ed. 2d 55, 62-64 (1987); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 22-25 (1983).

109. 463 U.S. 1 (1983).

110. *Id.* at 7. The Franchise Tax Board is the California agency created to enforce the state's personal income tax law. *Id* at 5. The Construction Laborers Vacation Trust is a pension trust established by four associations of employers in the construction industry for the purpose of funding yearly paid vacations for construction workers. *Id.* at 4. The underlying issue in dispute between the parties was whether ERISA allows state tax authorities to collect income taxes on funds held in trust under an ERISA regulated benefit plan. *Id.* at 3-4. The Court never reached the merits of this issue. *Id.*

111. *See id.* at 28.

112. *See id.* at 24.

113. *Id.*

The *Franchise Tax Board* Court, however, declined to allow removal based on preemption.[114] The Supreme Court stated that a claim by a party specifically listed in ERISA section 502(a), the civil remedies clause, might be removable to federal court on the basis of preemption.[115] However, state tax authorities are not given a cause of action under ERISA.[116]

The elements necessary for supporting preemption removal were enumerated in *Franchise Tax Board*[117] There must be a clear intent by Congress to preempt a field.[118] This intent can be found if Congress expressly preempts state law and provides a federal remedy.[119] In this situation, the Court will adopt the *Skelly Oil* analysis of the well-pleaded complaint rule and characterize a complaint containing only state law claims as one "necessarily arising under federal law."[120]

B. Metropolitan Life Insurance Company v. Taylor

In its 1987 decision of *Metropolitan Life Insurance Company v. Taylor*,[121] the Supreme Court expanded preemption removal to include ERISA actions

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114. *Id.* at 28. Also, the Court applied the *Skelly Oil* principle to state declaratory judgment actions. *Id.* at 18-19. The Court reasoned that if *Skelly Oil* did not apply to state declaratory judgment actions, the doctrine of *Skelly Oil* would become a dead letter because litigants could avoid its limits by asking for a state declaratory judgment of federal law. *Id.*

115. *Id.* at 24. The Court states that claims arising under ERISA § 502(a) might be treated analogously to LMRA § 301 claims as interpreted in *Avco*. That is, the Court is holding out the possibility that preemption removal may be extended from LMRA § 301 to ERISA § 502(a). *Id.*

116. *Id.* at 25-26.

117. *Id.* at 25 (federal preemption coupled with federal remedy).

118. *Id.* The Court stresses the fact that ERISA does not reach every question connected to pension plans. As evidence for this proposition, the Court points to ERISA § 514(b)(2)(A) which manifests congressional intent not to preempt state laws which regulate insurance, banking, or securities. *Id.*

119. *Id.* at 26. The Court uses this factor, among others, to distinguish *Franchise Tax Board* from *Avco*. However, it is clear that this lack of an express federal remedy is at the heart of the Court's decision not to allow removal jurisdiction. *See* Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 845 (1986)(according to *Franchise Tax Board* analysis, court must find plaintiff has federal cause of action before recharacterizing claim).

120. *Franchise Tax Bd.*, 463 U.S. at 24. It is ironic that the same type of recharacterization analysis first put forward in *Skelly Oil* is being used to expand federal court jurisdiction. Justice Frankfurter, the author of *Skelly Oil*, was a foe of expansive federal jurisdiction and engaged in recharacterization analysis in order to limit federal court jurisdiction. *Skelly Oil* type analysis has now come full circle and is employed to enlarge federal court jurisdiction. *See* Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 644 n. 40 (1984)(Frankfurter rejected *Gully* and looked to underlying cause of action to avoid expansion of federal jurisdiction).

121. __ U.S. __, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987).

under section 502(a)(1)(B).[122] In *Metropolitan Life*, the plaintiff's state complaint was removed to federal district court on the basis of ERISA preemption.[123] The plaintiff claimed disability benefits under his former employer's ERISA covered employee benefit plan.[124] The Court held that the plaintiff's state law causes of action had been completely preempted by ERISA section 514(a).[125] In reaching this decision, the Court listed several factors. First, the claim fell directly within section 502(a)(1)(B), ERISA's civil remedy provision, unlike the claim in *Franchise Tax Board*.[126] In addition, the unique preemptive force of ERISA was noted.[127] Finally, the Court found clear evidence of congressional intent to preempt this field because the language of LMRA section 301(a) and ERISA section 502(f) is parallel.[128] Further evidence of congressional intent that ERISA section 502(a)(1)(B) and LMRA section 301 claims should be treated similarly can be found in the remarks of ERISA's legislative sponsors.[129]

Franchise Tax Board and *Metropolitan Life* together show that the Supreme Court has adopted the superseding cause of action justification for preemption removal.[130] Yet, a superseding cause of action is not really the

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122. *See id.* at __, 107 S. Ct. at 1547, 95 L. Ed. 2d at 64.

123. *Id.* at __, 107 S. Ct. at 1545, 95 L. Ed. 2d at 61. The plaintiff, Arthur Taylor, had been employed by General Motors from 1959-1980. In 1980, Taylor took a leave of absence from work while involved in a divorce and child custody dispute. A General Motors psychiatrist determined that Taylor was fit to return to work. When Taylor refused to return to work, his employment was terminated. Taylor filed suit in Michigan state court for breach of contract, wrongful termination, and wrongfully failing to promote him. *Id.*

124. *See id.* at __, 107 S. Ct. at 1545, 95 L. Ed. 2d at 61. General Motors, Taylor's employer, has set up an ERISA covered employee benefit plan for its salaried employees. The plan pays sickness and accident benefits to its employees and is carried by Metropolitan Life Insurance Company. Taylor claimed benefits under the plan for emotional problems and for back injuries he sustained in 1961. *Id.*

125. *See id.* at __, 107 S. Ct. at 1546, 95 L. Ed. 2d at 62. The Court held that common law claims relating to employee benefit plans are preempted by ERISA. In support, the Court cited a case which was handed down on the same day. *See* Pilot Life Ins. Co. v. Dedeaux, __ U.S. __, __, 107 S. Ct. 1549, 1553, 95 L. Ed. 2d 39, 48 (1987)(civil enforcement provisions of ERISA section 502(a) preempt state causes of action for claims within scope of section 502(a)).

126. *See* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1547, 95 L. Ed. 2d 55, 63 (plaintiff's claim falls within civil remedy provision of ERISA).

127. *Id.* at __, 107 S. Ct. at 1547, 95 L. Ed. 2d at 64 (ERISA section 502(a)(1)(B) has unique preemptive force).

128. *Id.* at __, 107 S. Ct. at 1547, 95 L. Ed. 2d at 64 (presumption that similar language in two labor statutes has similar meanings).

129. *Id.* The Court quotes a Conference Report on ERISA § 502 (a) in part:

> All such actions in federal or state courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Action of 1947.

H. R. CONF. REP. NO. 93-1280, p. 327 (1974), *quoted in* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1547, 95 L. Ed. 2d 55, 64 (1987).

130. *Compare* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1,

gravamen of *Metropolitan Life*; instead the superseding cause of action is evidence of congressional intent to preempt the field.[131] The *Metropolitan Life* Court implicitly rejected the artful pleading doctrine by failing to mention the plaintiff's motive for filing a state law claim.[132] The plaintiff's motive was irrelevant because the decision hinged on the nature of the cause of action asserted.[133] The plaintiff in this case had no state cause of action to rely on; it had been completely displaced by the federal cause of action.[134] Thus, the artfulness of the plaintiff's complaint in avoiding reference to federal law was moot.

The Court in *Franchise Tax Board* and *Metropolitan Life* provided the substantive analysis to preemption removal which *Avco* had lacked.[135] In such cases, the Court will look beyond the complaint, which purports to rely only on state law causes of action, and determine whether the true nature of the complaint is federal.[136] If Congress has manifested an intent to preempt an area of law, and has provided a federal remedy, then the complaint is

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24-25 (1983)(state action coming within civil remedies provision section 502(a) of ERISA may be removable) *with* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1547, 95 L. Ed. 2d 55, 64 (1987)(clear congressional intention to make ERISA § 502(a)(1)(B) suits federal questions for purposes of federal jurisdiction). *See generally* Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 845-47 (1986)(court must find plaintiff has federal cause of action before allowing preemption removal).

131. *See* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1548, 95 L. Ed. 2d 55, 66 (1987)(suit which purports to rely on state law necessarily federal in character due to clear intent of Congress).

132. *Id.* The Court does not mention the phrase "artful pleading," nor is there a reference to the plaintiff's motive in *Metropolitan Life*. It can be inferred from this omission that the Court has abandoned the artful pleading doctrine in the preemption removal context. *See* Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 660-62 (1984)(commentator notes a similar omission regarding artful pleading in *Franchise Tax Board*). Similarly, the Court in *Franchise Tax Board* also refrained from referring to the artful pleading doctrine. *Id.* One commentator has suggested that this omission evidences a retreat from the Court's prior acceptance of the artful pleading doctrine. *Id.*

133. *See* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1547, 95 L. Ed. 2d 55, 64 (1987)(extraordinary preemptive power converts state common law complaint into federal claim for purposes of well-pleaded complaint rule).

134. *See id.*

135. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 19-20 (1983). The *Franchise Tax Board* Court focused on the actual nature of the plaintiff's underlying cause of action. In formulating the *Avco* principle in *Franchise Tax Board*, the Court focused exclusively on the cause of action. *Id.* at 23-4. The Court rejects the *Gully* language of the complaint approach in some instances. *Id.*

136. *See* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1548, 95 L. Ed. 2d 55, 65 (1987)(court looks to intent of Congress to decide if complaint necessarily federal).

considered "necessarily federal."[137] The Supreme Court in *Franchise Tax Board* and *Metropolitan Life* adopted the superseding cause of action justification for preemption removal, rejected the artful pleading doctrine, and approved the *Skelly Oil* approach to the well-pleaded complaint rule. The next question is how far will the preemption removal doctrine be extended?

C. *Application of* Metropolitan Life

In a concurring opinion in *Metropolitan Life*, Justice Brennan noted that this decision was restricted to statutes where Congress has clearly manifested an intent to allow preemption removal.[138] Justice O'Connor, who authored the majority opinion, also noted the Court's reluctance in extending the preemption removal doctrine beyond LMRA section 301.[139] However, attempts have been made to apply the *Metropolitan Life* rationale to other federal laws.[140] Arguments both for and against an expansive reading of *Metropolitan Life* were articulated in *Texas Employers Insurance Association v. Jackson*.[141]

In *Jackson*, the Court of Appeals for the Fifth Circuit extended the *Avco* doctrine to the Longshore and Harbor Workers' Compensation Act (LHWCA).[142] The court in *Jackson* noted that the case might raise the "evil spectre" of the well pleaded complaint doctrine.[143] The court avoided this obstacle by applying an expansive reading of *Metropolitan Life* to the LHWCA.[144] The *Jackson* court pointed to LHWCA's private remedy clause as evidence of congressional intent to displace state law.[145] The court

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137. *Id.*

138. *Id.* at __, 107 S. Ct. at 1548, 95 L. Ed. 2d at 65. (Brennan, J., concurring)(Court holds removal jurisdiction exists only where Congress has manifested obvious intent to make causes of action removable).

139. *Id.* at __, 107 S. Ct. at 1547, 95 L. Ed. 2d at 64 (Court reluctant to find extraordinary preemptive power such as LMRA § 301).

140. *Compare* Price v. PSA, Inc., 829 F.2d 871, 876 (9th Cir. 1987)(court held that Railway Labor Act (RLA) does not contain civil enforcement remedy on which to base preemption removal) *with* Texas Employers Ins. Ass'n v. Jackson, 820 F.2d 1406, 1420 (5th Cir. 1987)(court extends preemption removal doctrine to Longshore and Harbor Workers' Compensation Act (LHWCA) based on presence of exclusive federal remedy).

141. 820 F.2d 1406 (5th Cir. 1987).

142. 33 U.S.C. §§ 901-948(a) (1982). In *Jackson*, appellant Leroy Jackson filed a state court claim for bad faith insurance practice. *Jackson*, 820 F.2d at 1410. The insurance company sought a declaratory judgment and injunction against Jackson from prosecuting his state court claim. *Id.*

143. *See id.* at 1418. Although not referring specifically to *Skelly Oil*, the court noted that the well-pleaded complaint rule had "dropped a stitch or two" after being knitted into the Declaratory Judgment Act. *Id.*

144. *See id.* at 1419. The *Jackson* court reads *Metropolitan Life* as focusing on congressional intent. *Id.*

145. *See id.* at 1419 n.15. The court noted that evidence of congressional intent was the

also noted that the LHWCA is broader than the LMRA.[146] On this basis, the Fifth Circuit expanded preemption removal to the LHWCA.[147]

Judge Jones, in her dissent in *Jackson*, narrowly interpreted *Metropolitan Life*.[148] Judge Jones argued that *Avco* is a singular exception to the well-pleaded complaint rule.[149] This dissent acknowledged that *Metropolitan Life* extended preemption removal to ERISA 502(1)(1)(B).[150] However, Judge Jones read *Metropolitan Life* as requiring language identical to LMRA 301 in order to extend the *Avco* doctrine to other federal statutes.[151] The dissent maintained that the LHWCA lacked a civil enforcement clause like the "Siamese twin" provisions of ERISA section 502(f) and LMRA section 301.[152] Also, the Ninth Circuit in *Price v. PSA, Inc.* [153] has refused to extend the *Avco* doctrine to the Railway Labor Act (RLA).[154] However, the *Price* decision can be distinguished from *Jackson* on the basis that the RLA contains no civil enforcement provision.[155]

The debate over preemption removal will now center around the proper interpretation of *Metropolitan Life*.[156] The majority in *Jackson* takes the better approach. It is often difficult for a judge to determine what the true character of an apparent state law claim is until the federal substantive law

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provision of a federal private cause of action. *Id.* The majority alleged that the LHWCA contained such a provision. *Id.* The court's analysis of *Metropolitan Life* is buttressed by Merrell Dow Pharmaceuticals Inc. v. Thompson, __ U.S. __, 106 S. Ct. 3229, 92 L. Ed. 2d 650 (1986). In *Merrell Dow*, the Supreme Court held that a state-based cause of action was improperly removed to federal court because the Federal Food, Drug, and Cosmetic Act (FDCA) did not provide a private cause of action. *See id.* at __, 106 S. Ct. at 3237, 92 L. Ed. 2d at 664.

146. *See* Texas Employers Ins. Ass'n v. Jackson, 820 F.2d at 1406, 1420 (5th Cir. 1987)(LHWCA remedy is broader than LMRA remedy). The majority points out that the LHWCA was originally a product of the federal province of admiralty jurisdiction. *Id.* The *Jackson* court maintains that LMRA § 301 is merely jurisdictional, while the LHWCA provides for comprehensive regulation of employers and insurance carriers. *Id.*

147. *Id.*

148. *See id.* at 1422 (Jones, J., dissenting).

149. *See id.* at 1423 (*Avco* rule unique exception to well-pleaded complaint rule).

150. *See id.* at 1423-24 n.1.

151. *See id.* The dissent reads *Metropolitan Life* as focusing solely on the similarities in language between LMRA section 301 and ERISA section 502(f). *Id.* The dissent also stresses the importance of the fact that ERISA's legislative sponsors directly referred to LMRA § 301. *Id.*

152. *See id.*

153. 829 F.2d 871 (9th Cir. 1987).

154. 45 U.S.C. §§ 151-163, 181-185, 187-188 (1982). The *Price* court held that the *Avco* doctrine did not extend to the RLA. *See Price*, 829 F.2d at 876.

155. *Id.*

156. *See* Texas Employers Ins. Ass'n v. Jackson, 820 F.2d 1406, 1419 (5th Cir. 1987); Price v. PSA, Inc., 829 F.2d 871, 875 (9th Cir. 1987).

has been defined.[157] Federal courts will be better equipped to delineate the boundaries of arising-under jurisdiction if they are allowed to use a flexible *Metropolitan Life* approach.[158] Preemption removal should be expanded in order to avoid state court hostility or confusion about a preemption defense.[159] As the majority in *Jackson* implies, the decisions in *Franchise Tax Board* and *Metropolitan Life* lay out a two-prong test for applying the preemption removal doctrine.[160] First, a federal law must completely occupy, or preempt, a particular field of law.[161] Secondly, a superseding federal cause of action is evidence of congressional intent to allow preemption removal.[162] Preemption removal should be extended to any federal statute which can satisfy this two-part test.[163]

V. CONCLUSION

Federal removal jurisdiction has been restricted by the well-pleaded complaint rule for almost one hundred years. In the second half of the twentieth century, the well-pleaded complaint rule came into conflict with growing federal regulation. Plaintiffs avoided the effects of federal regulation by relying on the well-pleaded complaint rule to stay in state court. In some cases however, Congress intended to completely preempt a particular field for federal regulation. In *Avco*, the Supreme Court initiated a new doctrine which allowed removal on the basis of preemption. The Court, however, failed to supply any analysis to support preemption removal. For the next fifteen years, lower federal courts split over how and when to apply preemption removal.

The passage of ERISA presented the Court with new opportunities to clarify the preemption removal doctrine. In two ERISA cases, *Franchise Tax Board* and *Metropolitan Life*, the Court finally decided the appropriate

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157. *See* Allis - Chalmers Corp. v. Lueck, 471 U.S. 202, 207 (1985)(Wisconsin Supreme Court holding that state tort claim not preempted by LMRA § 301 reversed).

158. *See* Twitchell, *Characterizing Federal Claims: Preemption Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812, 837 (1986)(preemption analysis difficult to make until contours of federal substantive law known).

159. *See* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 93 (1969)(removal based on preemption defense should be allowed to avoid state court hostility).

160. *See Jackson*, 820 F.2d at 1419-20. The *Jackson* court does not expressly call it a two-prong test, however, the court focuses on the preemptive effect of the LHWCA and its private remedy clause. *Id.*

161. *See* Metropolitan Life Ins. Co. v. Taylor, __ U.S. __, __, 107 S. Ct. 1542, 1547, 95 L. Ed. 2d 55, 63 (1987)(ERISA section 502 has unique preemptive force).

162. *See id.* at __, 107 S. Ct. at 1547, 95 L. Ed. 2d at 63 (similar civil enforcement provisions manifest intent of Congress to allow preemption removal).

163. *See Jackson*, 820 F.2d at 1420 (LHWCA broader than LMRA and should come within *Avco* doctrine).

method for applying preemption removal. The Court adopted the *Skelly Oil* interpretation of the well-pleaded complaint rule in its analysis of preemption removal. In preemption removal cases the Court will look beyond the face of the well-pleaded complaint to the underlying cause of action. If the underlying cause of action is necessarily federal, then removal will be allowed on the basis of federal preemption. In order to determine whether the cause of action is necessarily federal, the Court developed a two-prong test. First, the Court will ascertain whether a federal law has displaced state law in a particular field. Second, a superseding federal cause of action is evidence of congressional intent to allow preemption removal. Thus, the Court in *Franchise Tax Board* and *Metropolitan Life* laid the groundwork for extending preemption removal to other federal laws; federal jurisdiction on the basis of preemption removal should be extended to federal laws which meet the requirements of *Franchise Tax Board* and *Metropolitan Life.*