UNDERSTANDING *MERRELL DOW*: FEDERAL QUESTION JURISDICTION FOR STATE-FEDERAL HYBRID CASES

What is surprising is the continuing belief that there is, or should be, a single, all-purpose, neutral analytical concept which marks out federal question jurisdiction.[1]

I. INTRODUCTION

A clear and consistent definition of the scope of federal question jurisdiction has eluded both commentators and the Supreme Court for as long as the statutory grant of federal question jurisdiction has existed.[2] While several theories have been proposed, the Court has yet to agree on a unifying principle.[3] Instead, the Court, perhaps wisely, recognizes different theories at different times in a manner that gives the Court the flexibility to effectively regulate the federal docket.[4]

The Supreme Court's last major decision on federal question jurisdiction, *Merrell Dow Pharmaceuticals, Inc. v. Thompson*,[5] reiterates many of these theories, but at the end concludes that:

> a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."[6]

This apparently exclusive focus on the existence of a federal remedy in state-

1. William Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 907 (1967).

2. *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 878-993 (4th ed. 1996) [hereinafter HART & WECHSLER]; Donald L. Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 601-11 (1987).

3. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983).

4. Indeed, in an early instance, Justice Cardozo recognized the need to define jurisdictional theory in a more practical context. *See infra* note 24. The Court recently recognized the importance of federal question jurisdiction decisions in the "proper management of the federal judicial system." *Franchise Tax Bd.*, 463 U.S. at 8.

5. 478 U.S. 804 (1986).

6. *Id.* at 817 (quoting 28 U.S.C. § 1331 (1982)).

federal hybrid cases[7] has led many lower federal courts to severely restrict access to federal question jurisdiction.[8] Moreover, the Court's unprecedented use of the implied remedy doctrine in analyzing the jurisdictional issue has led commentators to criticize *Merrell Dow*'s reasoning.[9]

But *Merrell Dow* is not as restrictive as many courts and commentators think. In fact, the reasoning in *Merrell Dow* appears largely to parallel portions of Professor Cohen's classic article on federal question jurisdiction, which advocates a flexible, pragmatic approach.[10] When *Merrell Dow* is read in conjunction with both its statements of underlying jurisdiction principles and Professor Cohen's article, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law* ("*The Broken Compass*"), a more flexible approach for federal question jurisdiction emerges.[11] Furtheremore, a comparative reading of *Merrell Dow* and *The Broken Compass* places the Court's use of the implied remedy doctrine in the context of this flexible, pragmatic approach.[12] In the meantime though, lower federal courts faced with cases on the fringe of federal question jurisdiction, especially state-federal hybrid cases, have struggled to identify a single workable test.[13] Courts have even more difficulty when faced with these issues in the context of removal jurisdiction.[14]

This Note argues that a proper understanding of *Merrell Dow* does not limit federal question jurisdiction to only those cases alleging a federal cause of action. Instead, *Merrell Dow* articulates a pragmatic test for federal question jurisdiction in which a federal remedy is just one factor. To focus the discussion,

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7. The term "state-federal hybrid case" is used in this Note to refer to cases in which the well-pleaded complaint states a cause of action requiring resolution of both state and federal law issues.

8. *See* Patti Alleva, *Prerogative Lost: The Trouble with Statutory Federal Question Doctrine After* Merrell Dow, 52 OHIO ST. L.J. 1477, 1532-38 (1991); *see also* cases cited *infra* note 45.

9. *See* Alleva, *supra* note 8, at 1543-51; Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the "Martian Chronicles,"* 78 VA. L. REV. 1769, 1790-91 (1992).

10. *See* Cohen, *supra* note 1, at 910-12.

11. *See infra* notes 104-35 and accompanying text.

12. *See infra* notes 117-28 and accompanying text.

13. The lower courts have difficulty assessing the appropriate test. *See* Alleva, *supra* note 8, at 1532-38. For conflicts over the appropriate test for federal question jurisdiction in complete preemption cases, see Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 WAKE FOREST L. REV. 927, 964-83 (1996).

14. *See* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986). Federal question jurisdiction is especially difficult in the removal context because plaintiffs frequently attempt to bury federal issues and defendants go to great lengths to spot them. *See* Lynn C. Tyler, *Federal Question Jurisdiction: How Plaintiffs Can Avoid Inadvertently Alleging It and How Defendants Can Spot It Where It May Not Be Obvious*, 37 RES GESTAE 566 (1994).

this Note analyzes three recent circuit court decisions faced with the same issue: whether federal question removal jurisdiction exists for state law insurance claims seeking coverage under federal employee health insurance contracts. These federal insurance removal cases present an example of the confusion in the lower courts over federal question jurisdiction and provide a framework for applying an understanding of *Merrell Dow* to state-federal hybrid cases.

Part II of this Note outlines the major Supreme Court decisions on federal question jurisdiction. Part III discusses the federal insurance removal cases in light of this outline. Part IV compares the reasoning of *Merrell Dow* to *The Broken Compass* and describes a less restrictive understanding of *Merrell Dow*. Finally, Part V applies this understanding of *Merrell Dow* to the federal insurance removal cases.

II. INTERPRETATION OF THE STATUTORY GROUNDS FOR FEDERAL QUESTION REMOVAL JURISDICTION

Civil actions brought in state court that "arise under" federal law for the purposes of 28 U.S.C. § 1331[15] can be removed to federal court by the defendant under 28 U.S.C. § 1441.[16] While the statutory grant of federal question jurisdiction has traditionally been interpreted more narrowly than the constitutional grant[17] of judicial power, the precise bounds of the statutory grant

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15. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1994).

16. Section 1441 provides among other things:

> (a) 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. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
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> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441 (1994).

17. Article III, section 2 provides:

> The judicial Power shall extend to all 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 Authority . . . .

U.S. CONST. art. III, § 2, cl. 1. The constitutional grant of judicial power to decide federal question jurisdiction generally is thought to be quite broad. Chief Justice John Marshall claimed that the constitutional power extended to every case in which there was a federal "ingredient." Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 823 (1824). For a discussion of modern Supreme Court interpretation of Article III, Section 2, see *The Supreme Court, 1982 Term—II. Federal Jurisdiction and Procedure*, 97 HARV. L. REV. 208 (1983).

remain elusive.[18]

In attempts to mark these bounds, courts and commentators have formulated several tests.[19] Justice Holmes' famous formulation that "[a] suit arises under the law that creates the cause of action,"[20] is "useful for describing the vast majority of cases that come within the district courts' original jurisdiction."[21] In

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18. The reason for the difference between the breadth of the constitutional grant and the breadth of the statutory grant is not immediately obvious. A comparison of the language of section 1331, *see supra* note 15, and Article III, section 2, *see supra* note 17, of the Constitution reveals no significant difference. In fact, some scholars believe that the 1875 Act, which originally conferred statutory federal question jurisdiction, was actually intended to give the courts the full extent of the constitutional grant of judicial power. *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 65-69 (1928); James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942); Ray Forrester, *The Nature of a "Federal Question,"* 16 TUL. L. REV. 362, 375 (1942) (quoting Sen. Matthew H. Carpenter, the Act's primary draftsman, as saying, "This bill gives precisely the power which the Constitution confers—nothing more, nothing less." (emphasis omitted)). But as Professor Cohen noted, such a broad interpretation of the statutory grant would have been extremely impractical. "Such an interpretation would make those courts substantially courts of general jurisdiction, since large numbers of law suits could be said to depend potentially on relevant issues of federal law." Cohen, *supra* note 1, at 891. For a discussion of this dichotomy, see Doernberg, *supra* note 2, at 601-11.

The recognition that a coextensive interpretation of the statutory and constitutional grants would be impractical arguably led the Court to interpret the statutory doctrine as it would a common-law doctrine. Under such a view, the Court's understanding of the statutory grant is overtly nonoriginalist and evolves in light of experience and new developments. *See* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 22-24 (1990); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1100 & n.109 (1992). There is a rich literature on the legitimacy of this common-law approach to the regulation of federal court jurisdiction. *See, e.g.*, Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Gene R. Shreve, *Pragmatism Without Politics—A Half Measure of Authority for Jurisdictional Common Law*, 1991 BYU L. REV. 767.

On the other hand, at the time of the 1875 Act, there was a textual hook for a narrow construction of the statutory grant. Section 5 of the Act directed the federal court to dismiss or remand if it appeared at any time "that such suit does not really and substantially involve a dispute or controversy properly within [its] jurisdiction." Act of March 3, 1875, ch. 137, § 5, 18 Stat. 470, 472. Indeed, the first Supreme Court case to interpret federal question jurisdiction under the 1875 Act relied on section 5 to affirm the remand of a state cause of action for which there was a possible federal defense. *See* Gold-Washing & Water Co. v. Keyes, 96 U.S. 199, 203 (1877). *See generally* Chadbourn & Levin, *supra*, at 649-50. Section 5 was eliminated as "unnecessary" in the 1948 revision of the Judicial Code. 28 U.S.C. § 1359 (1994) (Historical and Revision Notes).

19. *See* sources cited *supra* notes 2-3, 10.

20. American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). Although this test is universally attributed to Justice Holmes, it can be traced as far back as Justice Matthews' opinion in *Feibelman v. Packard*, 109 U.S. 421, 423-24 (1883).

21. Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983). The test almost completely breaks down, however, in those cases presenting mixed questions of state and federal law. "What appears to be a self-applying analytical standard breaks down because it fails to supply an analytical definition which will determine whether plaintiff's claim is a federal cause of action incorporating state law, or a state cause of action incorporating federal law." Cohen, *supra* note 1, at 898. One could argue, though, that this defect has largely been corrected with the advent of modern implied remedy doctrine. Under the prevailing doctrine, there appears to be a presumption that state law creates the

rare circumstances, however, the Holmes' analysis fails as an inclusionary principle.[22] For example, a federal cause of action that raises mostly state law issues with little or no federal law issues of any significance may not obtain jurisdiction.[23] Furthermore, the Holmes' analysis has generally been "rejected as an exclusionary principle."[24]

The most significant exclusionary principle to emerge as a test for federal question jurisdiction is the "well-pleaded complaint" rule.[25] Under this rule, an action arises under federal law only if federal law appears in the plaintiff's own well-pleaded complaint.[26] Additionally, the federal law must not appear as a defense or in anticipation of a defense.[27]

Despite its prominence as an exclusionary principle, the well-pleaded complaint rule is not without exception. In the case of removal jurisdiction, a "plaintiff may not defeat removal by omitting to plead necessary federal

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cause of action, absent an explicit indication of congressional intent to create a federal remedy. *See infra* note 40.

22. *See* Shulthis v. McDougal, 225 U.S. 561 (1912); Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900).

23. *See Franchise Tax Bd.*, 463 U.S. at 9.

24. *Id.* (citing Flournoy v. Wiener, 321 U.S. 253, 270-72 (1944) (Frankfurter, J., dissenting); T.B. Harms Co. v. Eliscu, 339 F.2d 823, 826-27 (2d Cir. 1964) (Friendly, J.)). Justice Cardozo recognized the need to view the Holmes' formulation in context:

> This Court has had occasion to point out how futile is the attempt to define a "cause of action" without reference to the context. To define broadly and in the abstract "a case arising under the Constitution or laws of the United States" has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterize the law in its treatment of causation. . . . To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

Gully v. First Nat'l Bank, 299 U.S. 109, 117-18 (1936) (citations omitted).

25. Commentators generally trace this rule back to *Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894), although the most famous description of the rule is contained in *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149 (1908) (holding that an assertion of federal law in anticipation of a defense is not sufficient for federal question jurisdiction).

> It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.

Id. at 152. For a criticism of the well-pleaded complaint rule, see Doernberg, *supra* note 2.

26. *See Mottley*, 211 U.S. at 152. For a discussion of strategic pleading concerns, see Tyler, *supra* note 14.

27. *See Mottley*, 211 U.S. at 152. Professor Collins argues that this construction of the 1887 amendments to the 1875 statute which tied removal to the well-pleaded complaint rule is fundamentally flawed and contrary to the Framers' intent. *See* Collins, *supra* note 14. But as Professor Redish says, "It often seems irrelevant that something is being done incorrectly, as long as it has been done incorrectly long enough." Redish, *supra* note 9, at 1769. He describes this as a theory of legal process "adverse possession." *Id.*

questions in a complaint."[28] In rare circumstances, such "artful pleading"[29] occurs when a plaintiff pleads a state cause of action that has been "completely preempted" by a federal cause of action such that "any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law."[30]

The well-pleaded complaint rule does not only fail as an exclusionary principle as in the case of complete preemption; on occasion, it also fails as an inclusionary principle. State-federal hybrid cases, those cases in which a "well-pleaded complaint establish[es] that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties," create additional problems for the well-pleaded complaint rule.[31]

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28. *Franchise Tax Bd.*, 463 U.S. at 22. The intentional omission of necessary federal questions in a complaint is euphemistically referred to as "artful pleading." *See* Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273 (1993). For a discussion of artful pleading techniques, see Tyler, *supra* note 14.

29. *See supra* note 28.

30. *Franchise Tax Bd.*, 463 U.S. at 24. The Supreme Court recognizes only two completely preemptive federal statutes: section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185 (1994), and section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132 (1994). *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 230 (5th ed. 1994).

The complete preemption doctrine has its origin in cases interpreting the LMRA. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), held that the "substantive law to apply in suits under § 301(a) is federal law." *Id.* at 456. In fashioning appropriate federal law, federal courts must look to the "policy of our national labor laws," but can resort to state law if necessary. *Id.* at 456-57. But "any state law applied . . . will be absorbed as federal law and will not be an independent source of private rights." *Id.* at 457.

In *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968), the Court built on its construction of section 301 of the LMRA to find that any action to enforce a collective bargaining agreement necessarily arises under section 301 of the LMRA and therefore, must arise under federal law. Whether the Court recognized that the decision in *Avco* effectively created an exception to the well-pleaded complaint rule is unclear. In any case, the Court acknowledged in subsequent cases that *Avco* creates such an exception. *See Franchise Tax Bd.*, 463 U.S. at 23-24.

The narrowness of the complete preemption exception is illustrated in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987). In *Taylor* the Court found that a state claim for employee benefits was preempted by ERISA and also fell within the civil enforcement provisions of section 502(a) of ERISA. But "federal pre-emption is ordinarily a federal defense to the plaintiff's suit." *Id.* at 63. Without explicit direction from Congress, the Court was "reluctant to find that extraordinary pre-emptive power . . . that converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* at 65. The Court found the necessary direction from Congress in section 502(f), which granted federal jurisdiction "to grant the relief provided for in [section 502(a)] in any action." 29 U.S.C. § 1132(f). Furthermore, legislative history indicated congressional intent to allow such jurisdiction in a manner consistent with section 301 of the LMRA, that is, to allow complete preemption. *See Taylor*, 481 U.S. at 65-66.

Justice Brennan's concurrence in *Taylor* highlighted the importance of this particular direction from Congress. *See id.* at 67. Removal jurisdiction should not be found merely upon a finding of congressional intent to preempt state law. *See id.* Instead, Congress must "*clearly* manifest[] an intent to make causes of action . . . *removable* to *federal court*." *Id.* at 68.

31. *Franchise Tax Bd.*, 463 U.S. at 13. Cases of this type pose what Justice Frankfurter called the

The jurisdiction problem of state-federal hybrid cases is highlighted by the apparent conflict between the Supreme Court's decisions in *Smith v. Kansas City Title & Trust Co.*[32] and *Merrell Dow Pharmaceuticals Inc. v. Thompson*.[33] Both cases involved a well-pleaded state cause of action, an element of which required proof of a violation of federal law. But *Smith* upheld jurisdiction,[34] while *Merrell Dow* did not.[35]

In *Smith* shareholders of a state bank brought an action to enjoin the bank from investing in certain federal bonds.[36] Arguing that the federal statute authorizing issuance of the bonds was unconstitutional, the shareholders claimed a right to relief under state law on the basis that state law prohibited the bank from investing in bonds not issued pursuant to a valid law.[37] Although federal law did not create the cause of action and the violation of federal law was essentially only an element of the state cause of action, the Court upheld jurisdiction on the theory that the plaintiff's right to relief "depends upon the construction or application of the Constitution or laws of the United States."[38]

"litigation-provoking problem." *Lincoln Mills*, 353 U.S. at 470 (Frankfurter, J., dissenting). Frankfurter viewed jurisdiction in these cases as dependent on the "degree to which federal law must be in the forefront of the case and not collateral, peripheral or remote." *Id.*

32. 255 U.S. 180 (1921).

33. 478 U.S. 804 (1986). For discussion and critique of *Merrell Dow*, see Alleva, *supra* note 8; William V. Luneberg, *Nonoriginalist Interpretation—A Comment on Federal Question Jurisdiction and* Merrell Dow Pharmaceuticals v. Thompson, 48 U. PITT. L. REV. 757 (1987); Redish, *supra* note 9, at 1787-94. Luneberg points out that the Court's opinion in *Merrell Dow* does not depend exclusively on typical originalist statutory interpretation of section 1331, that is, the Court looks beyond original intent in interpreting section 1331. *See id.*; *see also supra* note 18. Furthermore, the Court's interpretation of section 1331 takes into account practical and judicial policy considerations. "We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." *Merrell Dow*, 478 U.S. at 810. Luneburg interprets this statement to mean that "construction of section 1331 will not turn solely on divination of the original intent of that provision but on developments which occurred after its enactment." Luneburg, *supra*, at 761. Luneburg concludes that the majority's decision in *Merrell Dow* is attributable to two practical considerations: a pragmatic determination of whether federal adjudication or federal appellate review is the most efficient method of protecting the federal interest at stake and the concern that state claim incorporation of federal standards would significantly threaten the already burdened federal docket. *See id.* at 766-70. Luneburg finally hypothesizes that *Merrell Dow* may ultimately represent a move toward requiring Congress to clearly state an intent to grant federal jurisdiction before the Court will sanction its exercise. *See id.* at 770-71.

34. *See Smith*, 255 U.S. at 202.

35. *See Merrell Dow*, 478 U.S. at 817.

36. 255 U.S. at 195.

37. *See id.* at 197-98.

38. *Id*. at 199. Hart and Wechsler put the holding more starkly: "Thus state law supplied both the claimed right and the claimed remedy. Nevertheless, the Supreme Court upheld jurisdiction on the ground that 'the controversy concerns the constitutional validity of an act of Congress, which is directly drawn in question.'" HART & WECHSLER, *supra* note 2, at 926. Justice Holmes dissented, based in part on his test for jurisdiction from *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916). *See Smith*,

In contrast, the Court in *Merrell Dow* rejected jurisdiction over a state tort action alleging that a violation of the Food, Drug, and Cosmetic Act ("FDCA") constituted per se negligence.[39] Based on the assumption that no federal cause of action exists for FDCA violations,[40] the Court found that the "congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction."[41]

The Court's expansive language at the end of its opinion causes broader concern for the *Smith* analysis.[42] The Court's seemingly exclusive focus on the

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255 U.S. at 214.

39. *See Merrell Dow*, 478 U.S. at 805-06. The Court stated:

> In Count IV, respondents alleged that the drug Bendectin was "misbranded" in violation of the [FDCA] because its labeling did not provide adequate warning that its use was potentially dangerous. Paragraph 26 alleged that the violation of the FDCA "in the promotion" of Bendectin "constitutes a rebuttable presumption of negligence." Paragraph 27 alleged that the "violation of said federal statutes directly and proximately cause the injuries suffered" by the two infants.

Id. (citations omitted).

40. *See id.* at 810. Given the ultimate importance of this assumption to the decision in the case, one wonders why the Court would simply make the assumption without any discussion: "In this case, both parties agree with the Court of Appeals' conclusion that there is no federal cause of action for FDCA violations. For purposes of our decision, we assume that this is a correct interpretation of the FDCA." *Id.* The Court took this assumption and worked backwards through the implied cause of action test of *Cort v. Ash*, 422 U.S. 66, 78 (1975). The Court stated:

> Thus, as the case comes to us, it is appropriate to assume that, under the settled framework for evaluating whether a federal cause of action lies, some combination of the following factors is present: (1) the plaintiffs are not part of the class for whose special benefit the statute was passed; (2) the indicia of legislative intent reveal no congressional purpose to provide a private cause of action; (3) a federal cause of action would not further the underlying purposes of the legislative scheme; and (4) the respondents' cause of action is a subject traditionally relegated to state law. In short, Congress did not intend a private federal remedy for violations of the statute that it enacted.

Merrell Dow, 478 U.S. at 810-11 (footnote omitted). The assumption that some combination of the *Cort* factors existed led directly to the conclusion that Congress did not intend a private federal remedy. This reasoning, though not analytically persuasive, is consistent with post-*Cort* case law essentially recognizing that congressional intent is the central inquiry in determining the existence of private federal remedies. *See, e.g.*, California v. Sierra Club, 451 U.S. 287, 293 (1981); Cannon v. University of Chicago, 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting). While the ultimate conclusion that Congress did not intend a private federal remedy may be supportable, this method of reasoning is troubling in light of the Court's observation that a "more careful scrutiny of legislative intent . . . should inform the concern for practicality and necessity" in the construction of section 1331. *Merrell Dow*, 478 U.S. at 811 (quotations & citations omitted). The Court's backward reasoning from an assumption about the absence of a private federal remedy to an assumption about the absence of congressional intent to create such a remedy does not constitute a more careful scrutiny of legislative intent.

41. *Id.* at 814. The final inquiry in *Merrell Dow* is whether Congress intended to create federal jurisdiction. In this case, the Court uses its assumption that Congress did not intend to create a private federal remedy to infer that Congress intended to foreclose federal jurisdiction.

42. The Court stated its holding:

> We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of

lack of a federal remedy has led many courts and commentators to conclude that the Court has abandoned *Smith* and with it, all practical discretion over the bounds of federal question jurisdiction.[43] Indeed, the predominant interpretation of *Merrell Dow* seems to be that the Court will now only recognize federal question jurisdiction under the Holmes' formulation.[44]

III. THE FEDERAL INSURANCE REMOVAL CASES

Since *Merrell Dow*, confusion over the scope of federal question jurisdiction has plagued the lower courts. Their approach to federal question jurisdiction over state-federal hybrid cases is especially confused. Some courts rely solely on Holmes' narrow formulation of jurisdiction;[45] others apply a more flexible

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> action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States."

Merrell Dow, 478 U.S. at 817 (quoting 28 U.S.C. § 1331 (1982)). Compare this to the Court's statement of the question presented:

> The question presented is whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one "arising under the Constitution, laws, or treaties of the United States."

Id. at 805 (quoting 28 U.S.C. § 1331).

43. *See, e.g.*, Willy v. Coastal Corp., 855 F.2d 1160, 1168-69 (5th Cir. 1988); Rogers v. Platt, 814 F.2d 683, 688 (D.C. Cir. 1987); Utley v. Varian Assocs., 811 F.2d 1279, 1283 (9th Cir. 1987); Alleva, *supra* note 8, at 1521-31.

44. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 273 (2d ed. 1994) ("Therefore, without a federal cause of action, a federal law cannot be the basis for federal question jurisdiction."); MARTIN H. REDISH, FEDERAL COURTS 461 (2d ed. 1989) ("What is left of *Smith* after *Merrell Dow*?"); Friedman, *supra* note 18, at 24 (stating *Merrell Dow* held that "federal ingredient in a state cause of action" cases should not be heard in lower federal courts); David L. Shapiro, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts*," 78 VA. L. REV. 1839, 1842 n.17 (1992) ("But the Court in *Merrell Dow* appears to have made the absence of a private, federal cause of action entirely determinative of the jurisdictional issue."); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1146 n.267 (1992) (asserting that *Merrell Dow* establishes "that federal jurisdiction may not exist under that statute if the federal law establishing the primary right is not enforceable through a federal right of action"); Marianne Auld, Note, Merrell Dow Pharmaceutical, Inc. v. Thompson*: Limitations on Federal Question Jurisdiction*, 39 BAYLOR L. REV. 543, 560 (1987) ("Under [a literal interpretation of *Merrell Dow*] a court faced with the question of whether federal jurisdiction exists would do no more than determine whether federal or state law creates the plaintiff's cause of action."); *The Supreme Court, 1985 Term—Leading Cases: II. Federal Jurisdiction and Procedure*, 100 HARV. L. REV. 230, 236 (1986) ("Here the Court may have gone too far; indeed, it may have transformed the federal question jurisdictional prerequisite into a requirement of the existence of a federal remedy rather than the presence of an important federal issue—at least insofar as a private litigant relies on violation of a federal statute.").

45. *See, e.g.*, Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 152 (4th Cir. 1994) ("Therefore, under *Merrell Dow*, if a federal law does not provide a private right of action, a state law action based on its violation does not raise a 'substantial' federal question."); Smith v. Industrial Valley Title Ins. Co., 957 F.2d 90, 93 (3d Cir. 1992) ("Following *Merrell Dow*, we hold that a private federal

approach;[46] and still others approach the issue haphazardly.[47] The federal insurance removal cases exemplify this confusion.

Like most large organizations, the federal government provides health insurance for its employees.[48] This coverage, authorized under the Federal Employee Health Benefits Act ("FEHBA"),[49] is the result of contracts between the Federal Government and health insurance carriers.[50] Congress enacted the FEHBA to provide employees financial protection against both common and catastrophic health problems.[51] A federal agency, the Office of Personnel Management ("OPM"), ensures employees such financial protection by

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remedy for violating a federal statute is a prerequisite for finding federal question jurisdiction in this circumstance."); Dillon v. Combs, 895 F.2d 1175, 1177 (7th Cir. 1990) ("A federal rule of decision is necessary but not sufficient for federal jurisdiction. There must also be a right of action to enforce that rule."); *Rogers*, 814 F.2d at 688 (stating, in dicta, that it is not "necessary for federal courts to consider whether a substantial federal question is a necessary element of a state cause of action because congressional intent not to create a federal cause of action is deemed a proxy for the ultimate question whether or not Congress intended to confer federal jurisdiction"); *Utley*, 811 F.2d at 1284 ("Only if the [affirmative action] executive order provides . . . a private right of action . . . in federal court might his complaint raise a 'substantial' federal question permitting removal jurisdiction.").

46. *See, e.g.*, City of Huntsville v. City of Madison, 24 F.3d 169, 174 (11th Cir. 1994) ("We conclude that it will be only the exceptional federal statute that does not provide for a private remedy but still raises a federal question substantial enough to confer federal question jurisdiction when it is an element of a state cause of action."); West 14th St. Commercial Corp. v. 5 W. 14th Owners Corp., 815 F.2d 188, 193 (2d Cir. 1987) ("To determine whether the court has federal question jurisdiction to decide the case, the complaint must contain either a federal cause of action or a state cause of action embodying a substantial federal question.").

47. *See, e.g.*, Milan Express Co. v. Western Sur. Co., 886 F.2d 783 (6th Cir. 1989) (holding that federal question jurisdiction is available for action seeking proceeds of surety bonds prescribed by the Interstate Commerce Act although the court seemingly failed to find federal cause of action under Act or substantial federal question).

48. In 1959 Congress found a "wide gap" existed between the Government and private employers in the provision of employee health benefits. H.R. REP. NO. 86-957, at 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2913, 2914. While approximately seventeen million civilians participated in insurance plans offering major medical insurance, "no more than a relative handful of Federal employees" had such protection. *Id.* at 2. Congress responded by enacting the FEHBA to protect "civilian Government employees against the high, unbudgetable, and, therefore, financially burdensome costs of medical service through a comprehensive Government-wide program of insurance." *Id.* at 1. The costs of the new insurance plans were to be shared equally between the Government and its employees. *See id*.

49. 5 U.S.C. §§ 8901-8914 (1994).

50. To provide employees with health insurance, the Federal Government negotiates and executes insurance contracts with private health insurance carries such as Blue Cross & Blue Shield. *See id.* § 8902. Federal employees then enroll in an insurance plan with a carrier of their choice subject to the terms of the insurance contract. *See* 5 C.F.R. § 890.101 (1998). Federal employees are not parties to the contracts but are considered enrollees or third-party beneficiaries. *See id.*

51. The FEHBA intended to provide "a wide range of hospital, surgical, medical, and related benefits designed to afford the employees full or substantially full protection against expenses of both common and catastrophic illness or injury." H.R. REP. NO. 86-957, at 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2913.

negotiating and executing the contracts.[52] Despite the OPM's efforts, federal employees, like other insureds, occasionally demand medical procedures for which the insurance carriers are reluctant to pay. Sometimes, and especially when the employee faces a terminal disease for which the only hope may lie in experimental medical procedures, these coverage disputes result in lawsuits.[53]

Federal employees routinely file these suits against the insurance carriers in state courts.[54] Indeed, insurance coverage disputes are usually brought as contract or tort actions and are normally the province of exclusive state jurisdiction. But when the insured is an employee of the Federal Government and the Government is a party to an insurance contract subject to the provisions of the FEHBA, the cases are no longer based exclusively on state law. In fact,

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52. *See* 5 U.S.C. § 8902. Originally, the administrative authority was vested in the U.S. Civil Service Commission. In 1978 Congress amended the FEHBA to vest the OPM with such authority. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 906(a), 92 Stat. 1111, 1224-25.

53. Health insurance coverage disputes have a rich history. But the increasing reliance on high technology in medicine coupled with the advent of managed care have raised the stakes significantly. *See generally* Mark A. Hall et al., *Judicial Protection of Managed Care Consumers: An Empirical Study of Insurance Coverage Disputes*, 26 SETON HALL L. REV. 1055 (1996); Helene L. Parise, Comment, *The Proper Extension of Tort Liability Principles in the Managed Care Industry*, 64 TEMP. L. REV. 977 (1991); Richard S. Saver, Note, *Reimbursing New Technologies: Why Are the Courts Judging Experimental Medicine?*, 44 STAN. L. REV. 1095 (1992). For discussion of some current conflicts, see Barbara A. Fisfis, Comment, *Who Should Rightfully Decide Whether a Medical Treatment Necessarily Incurred Should Be Excluded from Coverage Under a Health Insurance Policy Provision Which Excludes from Coverage "Experimental" Medical Treatments?*, 31 DUQ. L. REV. 777 (1993). *See also* Jennifer Barber, Note, *Experimental Treatment Exclusions from Medical Insurance Coverage: Who Should Decide?*, 1 WIDENER L. SYMP. J. 389 (1996).

54. At the time of the circuit courts' decisions on federal question removal jurisdiction of FEHB contract claims, OPM regulations provided that "litigation to recover on the claim should be brought against the carrier, not against OPM." 5 C.F.R. § 890.107 (1994). After the decisions, the OPM amended the FEHBA regulations with respect to actions for the recovery of benefits. *See* 5 C.F.R. § 890.107(c) (1998). The regulations now provide that "[a] legal action to review final action by OPM involving such denial of health benefits must be brought against OPM and not against the carrier or carrier's subcontractors." *Id.*

This new regulation may change the jurisdictional analysis for these cases because the FEHBA provides for federal jurisdiction over any "civil action or claim against the United States founded on this chapter." 5 U.S.C. § 8912 (1994). Nevertheless, federal employees continue to bring coverage claims against insurance carriers, and some federal courts continue to remand removed actions to state court. *See* Arnold v. Blue Cross & Blue Shield, 973 F. Supp. 726 (S.D. Tex. 1997); Roux v. Lovelace Health Sys., Inc., 947 F. Supp. 1534 (D.N.M. 1996); Santitoro v. Evans, 935 F. Supp. 733 (E.D.N.C. 1996); Sarkis v. Heimburger, 933 F. Supp. 828 (E.D. Mo. 1996). *But see* Hanson v. Blue Cross & Blue Shield, 953 F. Supp. 270 (N.D. Iowa 1996).

FEHB contract claims in state courts continue largely because the OPM has limited "[t]he recovery in such a suit [against the OPM] to a court order directing OPM to require the carrier to pay the amount of benefits in dispute." 5 C.F.R. § 890.107(c) (1998). Therefore, plaintiffs argue that they are not bringing "[a] legal action to review final action by OPM," *id.*, but are bringing tort or contract actions seeking more extensive damages. *See* cases cited *supra*. For the purposes of this Note, however, the insurance decisions serve only as a framework for the discussion of *Merrell Dow*'s effect on state-federal hybrid claims. Therefore, this Note ignores the effect of the amendment on the jurisdictional analysis.

the FEHBA specifically provides that the provisions of FEHB contracts "which relate to the nature or extent of coverage or benefits . . . shall supercede and preempt any State or local law."[55] Instead, they are state-federal hybrid cases, possibly subject to the jurisdiction of the federal courts.[56]

When faced with an action brought in state court by an insured federal employee alleging unlawful denial of health insurance coverage, insurers have good strategic reasons to remove the action to federal court including: expectations of less hostility toward business litigants;[57] a perception that

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55. 5 U.S.C. § 8902(m) (1994). In the mid-1970s, federal officials became increasingly concerned about conflicts between state law and FEHB contracts in coverage disputes between federal employees and FEHB insurance carriers. *See* S. REP. NO. 95-903, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1413, 1414. The Senate was primarily concerned with state laws that imposed requirements on health insurance plans and the actions of state officials in attempting to enforce those requirements on FEHB contracts:

> Some States have established health insurance requirements that conflict with the provisions of the FEHB contracts, such as requiring recognition of certain practitioners not covered by Federal employee's health benefits plans. Many States have not attempted to enforce their requirements that conflict with the FEHB plans. In other States, the carriers have been successful in convincing the States that the Federal employees' plans are exempt from State requirements. Other States have enforced their requirements but have not done so uniformly for all carriers in the Federal program.

Id. In particular, states were "becoming increasingly active in establishing and enforcing health insurance requirements," and "confusion exist[ed] . . . regarding the applicability of state requirements to FEHB contracts." *Id.* (citing COMPTROLLER GENERAL, CONFLICTS BETWEEN STATE HEALTH INSURANCE REQUIREMENTS AND CONTRACTS OF THE FEDERAL EMPLOYEE HEALTH BENEFITS CARRIERS (1975)). At the time, the Comptroller General thought that the FEHBA already preempted state laws related to health benefits. *See id.* Despite those indications, Congress chose to amend the FEHBA to avoid "time consuming and costly litigation" thought to be necessary to establish such preemption. *Id.* The purpose of the amendment was "to establish uniformity in Federal employee health benefits and coverage." *Id.* at 1. But the preemption was "purposely limited" and was not intended to "provide insurance carriers under the program with exemptions from State laws and regulations governing other aspects of the insurance business." *Id.* at 4. State requirements that the Committee did not intend to preempt included the payment of premium taxes and requirements for statutory reserves. *See id.* Although the preemption clause was purposely limited, it was intended to clarify any confusion concerning the Commission's "authority to issue regulations restricting the application of State laws when their provisions do not parallel the provisions in the Commission's health benefits contracts." *Id.* The legislative history essentially seems consistent with the plain language of the preemption clause. The Committee only seemed to envision the preemption of state laws which "relate to the nature or extent of coverage or benefits." 5 U.S.C. § 8902(m).

56. This question could become especially important if Congress ever authorized a national health care program. *See* Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339, 1379 (1994).

57. In one recent study, 77.4% of defense attorneys who removed cases to federal court did so due to fears of bias. *See* Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 399-400 (1992). Further, 44.8% specifically cited the business or corporation status of their client as their reason for fearing bias. *See id.* at 408-09. This expectation of less hostility toward corporate defendants in federal court appears to be primarily based on an expectation of federal judges' greater competence and willingness to check jury bias. *See id.* at 424-25. Additionally, in some jurisdictions attorneys expect differences in the state and federal jury pools will affect the amount of bias against corporate defendants. *See id.* at 425. This perception about judicial competence is also strongly related to certain structural differences between federal and state

federal judges are more competent than their state colleagues, especially in matters involving the interpretation of federal law;[58] and a desire for uniform federal precedent that cuts across state borders.[59] Given these powerful incentives, the large body of district court law on FEHBA removal is not surprising.[60]

Only three circuit courts have faced the issue,[61] however, and each analyzed

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courts. While federal courts' independence is constitutionally protected, state judges usually serve limited terms and must either seek reelection or reappointment. *See* Redish, *supra* note 9, at 1779-80.

58. While perceptions about judicial competence have a strong effect on the expectations of hostility, *see supra* note 57, defense attorneys also note a greater availability of favorable rulings in federal court, especially summary judgments. *See* Miller, *supra* note 57, at 425. More importantly, this belief is based on the fact that federal judges are simply more experienced in the interpretation of federal law. This experience will likely lead to more uniform results. Professor Cohen also noted an expectation that inferior federal courts would be "more sympathetic to the enforcement of federal rights claimed by the plaintiff. Potential antagonism in the state courts to the enforcement of the plaintiff's federal right may adversely color findings of fact as well as rulings on issues of law." Cohen, *supra* note 1, at 893. Indeed, one "reason Congress conferred original federal question jurisdiction on the [federal] courts was its belief that state courts are hostile to assertions of federal rights." Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 827 n.6 (1986); *see also* THE FEDERALIST NO. 80, at 591 (A. Hamilton) (J. Hamilton ed., 1864) ("The reasonableness of the agency of the national courts, in cases in which the state tribunals cannot be supposed to be impartial, speaks for itself."); David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 328 (1978) (arguing that federal question jurisdiction rests upon "fear of state court hostility to or misunderstanding of federal rights"). Of course, this logic applies equally to the enforcement of a defendant's federal rights.

59. Federal court decisions interpreting federal law have wide-ranging precedential value, especially at the federal appellate levels. In contrast, state court decisions interpreting federal law have marginal precedential value within the state and almost no value outside the state.

60. Several district courts have upheld federal jurisdiction over the FEHBA claims upon removal. *See* Hanson v. Blue Cross & Blue Shield, 953 F. Supp. 270 (N.D. Iowa 1996); Mondor v. Blue Cross & Blue Shield, 895 F. Supp. 142 (S.D. Tex. 1995); Williams v. Blue Cross & Blue Shield, 827 F. Supp. 1228 (E.D. Va. 1993); Roseberry v. Blue Cross & Blue Shield, 821 F. Supp. 1313 (D. Neb. 1993); Lieberman v. National Postal Mail Handlers Union, 819 F. Supp. 344 (S.D.N.Y. 1993); Grazel v. Nazari, Civ. A. No. 92-CV-1471, 1992 WL 122913 (E.D. Pa. June 1, 1992); Woodson v. Blue Cross & Blue Shield, Civ. A. No. 91-923-A, 1992 WL 127482 (M.D. La. Apr. 22, 1992); Hirsch v. Blue Cross & Blue Shield, Civ. A. No. MJG-90-3049, 1991 WL 502004 (D. Md. Dec. 26, 1991); Ochsner Found. Hosp. v. Louisiana Health Serv. & Indem. Co., Civ. A. No. 88-5028, 1989 WL 6013 (E.D. La. Jan. 24, 1989). Other district courts have remanded the action back to state court. *See* Arnold v. Blue Cross & Blue Shield, 973 F. Supp. 726 (S.D. Tex. 1997); Collins v. Baxter Healthcare Corp., 949 F. Supp. 1143 (D.N.J. 1996); Roux v. Lovelace Health Sys., Inc., 947 F. Supp. 1534 (D.N.M. 1996); Santitoro v. Evans, 935 F. Supp. 733 (E.D.N.C. 1996); Sarkis v. Heimburger, 933 F. Supp. 828 (E.D. Mo. 1996); Transitional Hosp. Corp. v. Blue Cross & Blue Shield, 924 F. Supp. 67 (W.D. Tex. 1996); Lambert v. Mail Handler Benefit Plan, 886 F. Supp. 830 (M.D. Ala. 1995); Rocky Mountain Hosp. & Med. Serv. v. Phillips, 835 F. Supp. 575 (D. Colo. 1993); Baptist Hosp. v. Timke, 832 F. Supp. 338 (S.D. Fla. 1993); Craig v. Government Employees' Ins. Co., 134 F.R.D. 126 (D. Md. 1991); Furey v. U.S. Healthcare HMO, Civ. A. No. 91-1072, 1991 WL 206761 (E.D. Pa. Oct. 2, 1991).

61. This inconsistency exists largely because circuit courts generally lack the power to review remand orders:

> An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

federal question removal jurisdiction in a significantly different manner. The Tenth Circuit in *Howard v. Group Hospital Service*[62] found that removal jurisdiction does not exist because federal law does not apply to the interpretation of FEHB contracts.[63] The Fourth Circuit disagreed in *Caudill v. Blue Cross & Blue Shield*,[64] finding that removal jurisdiction existed because the interpretation of FEHB contracts is governed by federal common law that displaces state law.[65] Finally, the Third Circuit in *Goepel v. National Postal Mail Handlers Union*[66] found no removal jurisdiction because the FEHBA does not create a federal cause of action against carriers and, therefore, does not completely preempt state causes of action for denial of coverage.[67] In an attempt to resolve this circuit split, the United States Supreme Court granted certiorari on the issue in 1995,[68] however, the parties settled before oral argument.[69]

In *Howard*, the Tenth Circuit found that federal question jurisdiction did not exist because federal law does not apply to the interpretation of FEHB contracts.[70] Federal law should govern a controversy involving private litigants only when the "federal government has an articulable interest in the outcome of

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28 U.S.C. § 1447(d) (1994). Section 1443 provides for the removal of civil rights cases. *See id*. § 1443. The Supreme Court has allowed appellate review of remand orders issued for reasons other than lack of jurisdiction or improvident removal. *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336 (1976). For criticism of section 1447(d), see Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 MO. L. REV. 287 (1993). *See also* Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83 (1994).

62. 739 F.2d 1508 (10th Cir. 1984).

63. *See id*. at 1512.

64. 999 F.2d 74 (4th Cir. 1993).

65. *See id*. at 77.

66. 36 F.3d 306 (3d Cir. 1994).

67. *See id*. at 313. The term "completely preempt" was first used by the Supreme Court in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 (1983). For a discussion of the complete preemption doctrine, see *supra* notes 28-30 and accompanying text.

68. *See* Rocky Mountain Hosp. & Med. Serv. v. Phillips, 835 F. Supp. 575 (D. Colo. 1993), *aff'd*, 28 F.3d 113, 1994 WL 315811 (10th Cir. 1994) (unpublished table decision), *cert. granted*, 513 U.S. 1071 (1995) (mem.), *and cert. dismissed*, 514 U.S. 1048 (1995) (mem.).

69. The writ of certiorari was dismissed pursuant to Supreme Court Rule 46, *see Rocky Mountain*, 514 U.S. at 1048, which provides for dismissal upon agreement of the parties. *See* SUP. CT. R. 46. After respondent's brief was filed, the Solicitor General indicated support for the respondent's position. The insurer then settled the action. *See* Telephone Interview with Ronald J. Mann, Counsel for Respondent and Assistant Professor of Law, University of Michigan Law School (Nov. 12, 1997).

70. *See* Howard v. Group Hosp. Serv., 739 F.2d 1508 (10th Cir. 1984). In *Howard*, a federal employee brought a tort and contract action in Oklahoma state court arising from the FEHB carrier's failure to pay claims for treatment of his wife's nervous and mental problems. The insurer removed the action to federal court, which, in turn, denied the insured's motion to remand. After trial and on appeal, the Tenth Circuit vacated the trial court's judgment for lack of federal question jurisdiction. *See id*. at 1508.

a dispute."[71] For example, federal law would govern when "diverse resolutions of a controversy would frustrate the operations of a federal program, conflict with a specific national policy, or have some direct effect on the United States or its treasury."[72]

The majority found that no such interest existed because the OPM regulations in effect at the time indicated that the Federal Government was not concerned with the possible effect of state court judgments on the FEHB contract.[73] Furthermore, state court damages "do not have a sufficiently direct effect on the federal treasury to necessitate federal jurisdiction."[74] Finally, the court concluded that the claim "is a private controversy in which the federal government simply does not have an interest sufficient to justify invoking federal question jurisdiction."[75]

Certainly the magnitude of the Federal Government's interest is relevant to whether federal common law should govern the interpretation of FEHB contracts.[76] But the Federal Government's interest is only indirectly related to the tests for federal question removal jurisdiction. Had the Tenth Circuit found the federal interest sufficient to justify the application of federal common law to the interpretation of FEHB contracts, the court still would have needed to decide whether the action raised substantial issues of federal law or whether federal law authorized a federal cause of action that completely preempts the state action.[77]

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71. *Id.* at 1510. The court relied heavily on *Miree v. DeKalb County*, 433 U.S. 25 (1977), in its analysis of the applicability of federal common law. In *Miree*, victims of a plane crash brought a complaint alleging that the local county had breached their contract with the Federal Aviation Administration and, thereby, contributed to the crash. *See id.* at 26-27. The victims asserted that they were third-party beneficiaries of the contracts and, therefore, had standing to sue under the federal common law. *See id.* at 27. In finding that federal common law did not govern the claim, the Supreme Court found that the application of state law would not have a "direct effect on the United States or its Treasury." *Id.* at 29. Furthermore, "any federal interest in the outcome of the question . . . 'is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern.'" *Id.* at 32-33 (quoting American Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 33-34 (1956)).

72. *Howard*, 739 F.2d at 1510-11 (citing United States v. Carson, 372 F.2d 429, 432 (6th Cir. 1967); Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 153 (2d Cir. 1968)) (footnote omitted).

73. *See id.* at 1511. This conclusion appears to be in direct conflict with the purpose and legislative history behind the enactment of the FEHBA preemption clause. *See supra* note 55.

74. *Howard*, 739 F.2d at 1511.

75. *Id.* at 1512.

76. *See* Boyle v. United Tech. Corp., 487 U.S. 500, 504-07 (1988); *Miree*, 433 U.S. at 29.

77. The magnitude of the Federal Government's interest and the application of federal common law is not relevant to the Holmes' formulation for jurisdiction analysis. *See supra* notes 21-22, 31-44 and accompanying text. Furthermore, the application of federal common law is necessary but not sufficient for federal jurisdiction under the well-pleaded complaint rule. *See supra* notes 25-27 and accompanying text. The Tenth Circuit's analysis is relevant to jurisdictional analysis under *Smith* and *Merrell Dow*. *See supra* notes 31-44 and accompanying text.

Ultimately, the Tenth Circuit's finding that federal common law does not govern the interpretation of FEHB contracts foreclosed further federal question removal jurisdiction analysis. Without federal law to apply to FEHB contracts, there simply could not be any federal issues in the case.

In *Caudill*,[78] the Fourth Circuit analyzed the law governing the interpretation of FEHB contracts in light of the Supreme Court's intervening decision in *Boyle v. United Technology Corp.*[79] The court found that a conflict existed between a uniquely federal interest and the application of state law to the interpretation of FEHB contracts.[80] First, there is a uniquely federal interest at stake in the interpretation of FEHB contracts.[81] The federal government is a party to the contracts and the interpretation of these contracts affects "health benefits for federal employees across the country."[82]

Second, a significant conflict exists between those federal interests and the application of state law.[83] Application of state law liability would affect the "government's ability to enter into contracts [with health insurers,] the price paid for such contracts[, and] would result in a patchwork quilt of benefits that varied from state to state under the same contract because of the vast differences in the common law of contracts from state to state."[84]

Finally, the Fourth Circuit found the conflict to be so extensive that "in the area of federal employee health benefits, federal common law entirely replaces state contract law."[85] The court found such a conflict because application of state law would "undermine the uniformity envisioned by Congress when it

78. 999 F.2d 74 (4th Cir. 1993). In *Caudill*, a federal employee with breast cancer sought coverage of a treatment called high dose chemotherapy with autologous bone marrow transplant support. *See id.* at 76. Her insurer denied coverage and she sought administrative review. After the OPM denied coverage, she brought an action in North Carolina state court against her insurer. The insurer removed the action to district court which denied a motion for remand and granted summary judgment for the insurer. Caudill appealed to the Fourth Circuit. *See id.*

79. 487 U.S. 500 (1988). In *Boyle*, the Court found that in a dispute involving private parties, "federal common law still may apply if the litigation would directly affect a federal interest." *Caudill*, 999 F.2d at 78 (citing *Boyle*, 487 U.S. at 507). *Boyle* requires that in order to apply federal common law there must be a "significant conflict" between a "uniquely federal interest" and the application of state law. 487 U.S. at 507. While the Tenth Circuit decided *Howard* three years before the Supreme Court decided *Boyle*, the Tenth Circuit continues to follow *Howard* despite *Boyle*. *See* Fields v. Farmers Ins. Co., 18 F.3d 831, 834 (10th Cir. 1994); *see also* Roux v. Lovelace Health Sys., Inc., 947 F. Supp. 1534, 1542 (D.N.M. 1996).

80. *See Caudill*, 999 F.2d at 78-79.

81. *See id*. at 78.

82. *Id.*

83. *See id.*

84. *Id*. at 78-79.

85. *Id*. at 79.

delegated the authority to interpret health benefits contracts to OPM."[86] Therefore, the court found that removal jurisdiction existed.[87] The court reached this conclusion while specifically refusing to decide "whether the FEHBA completely preempts state law claims."[88]

The court, however, failed to ask whether the existence of the federal contract issues were substantial enough to justify federal question removal jurisdiction.[89] Instead, the court simply relied on *Boyle* to hold that the "suit involves a federal question because it arises from a federal contract, giving rise to a uniquely federal interest so important that the 'federal common law' supplants state law either partially or entirely regardless of Congress' intent to preempt the area involved."[90]

While the Fourth Circuit's reliance on *Boyle* was justified to reach its conclusion that federal common law governs "[l]itigation regarding this insurance contract,"[91] *Boyle* does not support the court's exercise of jurisdiction. *Boyle* was a diversity case in which federal jurisdiction was not an issue.[92] The Supreme Court only decided that the contract at issue in *Boyle* was governed by federal common law. *Boyle* did not indicate that a finding that federal common law governs the interpretation of the contract would justify the exercise of federal question jurisdiction.[93]

Instead, the Fourth Circuit was left with a state cause of action for breach of a contract governed by federal common law.[94] The court failed to describe why federal question jurisdiction over this state-federal hybrid case is justifiable in

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86. *Id.*

87. *See id.*

88. *Id.* at 77.

89. Had the insurance company raised federal contract issues in *Caudill* only as a defense to the state action, *Mottley* would have foreclosed jurisdiction. *See supra* note 27 and accompanying text. Instead, the plaintiff in *Caudill* was required to prove a state action for breach of a federal contract. Because the contract was governed by federal law, the well-pleaded complaint necessarily raised issues of federal law. This is necessary but not sufficient for federal jurisdiction under *Merrell Dow*. *See supra* notes 31-44 and accompanying text.

90. *Caudill*, 999 F.2d at 77 (citing Boyle v. United Tech. Corp, 487 U.S. 500, 504 (1988)).

91. *Id.*

92. *See Boyle*, 487 U.S. at 502.

93. Such a finding would have required a careful refining of the *Smith* and *Merrell Dow* analysis. *Merrell Dow* was decided only two years prior to *Boyle*, but the Court did not mention it at all. One can only assume that the Court did not consider any of these jurisdictional issues as diversity jurisdiction was uncontested.

94. While the court did say that federal common law would supplant state law either partially or entirely, the court could not have meant to supplant the state cause of action as well. Such a move would have required complete preemption analysis, something the court expressly refused to do. *See Caudill*, 999 F.2d at 77.

light of *Merrell Dow*.[95]

In *Goepel*, the Third Circuit restricted its analysis to whether state claims for the recovery of FEHB benefits are completely preempted by the FEHBA.[96] The court subscribed to the restrictive view of *Merrell Dow*, relying on a prior circuit holding that the "only state claims that are 'really' federal claims and thus removable to federal court are those that are preempted completely by federal law."[97]

The Third Circuit required the preemptive statute to contain both "civil enforcement provisions within the scope of which the plaintiff's state claim falls" and "a clear indication of a congressional intention to permit removal despite the plaintiff's exclusive reliance on state law."[98] The court found that the FEHBA does not authorize such a federal cause of action because the FEHBA only provides for federal jurisdiction for claims against the United States. Because the regulations promulgated by the OPM under the FEHBA at the time *Goepel* was decided required an "action to recover on a claim for health benefits should be brought against the carrier of the health benefits plan,"[99] the Third Circuit concluded that the FEHBA does not completely preempt state law claims for health benefits.[100]

The court, in finding that the FEHBA does not completely preempt plaintiff's state law cause of action, appeared to subscribe to Holmes' theory that an action only arises under the law that creates the cause of action.[101] Because plaintiff alleged only state law causes of action, the court restricted its

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95. *See supra* notes 31-44 and accompanying text.

96. 36 F.3d 306 (3d Cir. 1994). The insurer in *Goepel* removed an action arising out of their denial of coverage for a breast cancer treatment. *See id.* at 308-09. After the district court denied their motion to remand and entered judgment for the insurer, the insured appealed on the ground that their claims were based "exclusively on state law, and thus [did] not raise any 'federal questions.'" *Id.* at 309. For a discussion of the lower court decision, see Selected Recent Court Decisions, *Health Insurance: Coverage for Bone Marrow Transplants*: Goepel v. Mail Handlers Benefit Plan, 19 AM. J.L. & MED. 351 (1993).

97. *Goepel*, 36 F.3d at 311-12 (citing Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 12 (1983); Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie Ry., 858 F.2d 936, 942 (3d Cir. 1988)). *Railway Labor* reasoned that without a federal cause of action, the state claim could not be recharacterized as a federal claim. Therefore, there would be no claim arising under federal law. *See Railway Labor*, 858 F.2d at 942. This analysis ignores the underlying importance of congressional intent and the practical judicial considerations at work in federal question jurisdiction analysis. *See infra* notes 104-35 and accompanying text.

98. *Goepel*, 36 F.3d at 311 (citing *Railway Labor*, 858 F.2d at 942).

99. *Id.* at 312 (citing 5 C.F.R. § 890.107 (1994)). The OPM has since amended this regulation to require such actions to be brought against the OPM and not the carriers. *See supra* note 54 and accompanying text.

100. *See Goepel*, 36 F.3d at 313.

101. *See supra* note 54.

analysis to whether the FEHBA provides a federal cause of action that completely preempts the state cause of action.[102] This analysis ignores the possibility of obtaining jurisdiction under a less restrictive view of *Merrell Dow*.

The discussion of federal question jurisdiction in these federal insurance removal cases is not limited to the state-federal hybrid case analysis of *Smith* and *Merrell Dow*. In fact, the court in *Howard* never even reached the issue due to its finding that federal common law does not govern the interpretation of FEHB contracts. For the moment, however, assume that federal common law governs the interpretation of these contracts as the Fourth Circuit held in *Caudill*. Further, assume that there is no federal cause of action to recover under FEHB contracts and therefore no complete preemption as the Third Circuit held in *Goepel*. What remains is a well-pleaded complaint alleging a state law cause of action requiring resolution of federal law issues, that is, a state-federal hybrid case. Based on these assumptions, which this Note later contends are correct,[103] federal question jurisdiction over the federal insurance removal cases depends on a court's interpretation of *Merrell Dow*.

IV. *MERRELL DOW* AND *THE BROKEN COMPASS*

Under the restrictive view of *Merrell Dow*, federal question jurisdiction analysis is simple:[104] the court should decide whether Congress intended there to be a private, federal cause of action for violation of the federal law at issue. This question is dispositive of jurisdiction and amounts to no more than the classic Holmes' formulation of federal question jurisdiction: a case arises under the law that creates the cause of action.[105]

But there are several reasons to think that the Court in *Merrell Dow* did not intend to completely abandon over a hundred years of federal question jurisprudence and regress to the restrictive and inflexible Holmes' formulation. The most obvious sign is the Court's repeated approval of jurisdictional doctrines reflecting the need for a flexible and practical approach to federal question jurisdiction.

First, the Court cited *Smith* with cautionary approval, thus recognizing that

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102. Note that the complete preemption doctrine is completely consistent with Holmes' theory. If the federal cause of action completely preempts plaintiff's state law cause of action, then plaintiff actually pled a federal cause of action. Therefore, the case arises under federal law because federal law creates the cause of action that plaintiff actually pled.

103. *See infra* Part V.

104. *See supra* notes 42-44 and accompanying text.

105. *See supra* notes 20-24 and accompanying text.

some state created causes of action, which necessarily turn on some construction of federal law, may be entitled to federal jurisdiction.[106] The Court then indicated that those circumstances depend substantially on practical and "sensitive judgments about congressional intent, judicial power, and the federal system."[107] Second, the Court discussed the jurisdiction in *Smith* as dependent on the "*nature* of the federal interest at stake."[108] The issue in *Smith* was very substantial: the "constitutionality of an important federal statute."[109]

Ultimately, however, any understanding of *Merrell Dow* must somehow come to terms with the Court's strange use of the implied remedy doctrine. As the Court noted, *Merrell Dow* represents the first time the Court used the four factors of the implied remedy doctrine to analyze a jurisdictional claim.[110] Other than dismissing its surprising use as a by-product of its youth, the Court failed to explain why its use is appropriate in this context.[111] In fact, this failing is the principal criticism of *Merrell Dow*.[112] Commentators do not understand why the

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106. *See* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 809 n.5 (1986). After citing the rule from *Smith*, as stated in *Franchise Tax Board*, that "a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law,'" *Id.* at 808, the Court warned that "[o]ur actual holding in *Franchise Tax Board* demonstrates that this statement must be read with caution." *Id.* at 809.

107. *Id.* at 810. The Court also noted the need for flexibility when it quoted from *Franchise Tax Board*: "There is no single, precise definition of that concept; rather, the phrase arising under masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system." *Id*. at 808 (quotations omitted). One could argue that the Court was merely paying lip service to the old formulations, but this Note contends that the Court implicitly made these practical judgments about federal standards cases and only performed implied remedy analysis to add further support. *See infra* notes 111-35 and accompanying text.

108. *Id.* at 814 n.12. The Court stated:

> Several commentators have suggested that our § 1331 decisions can best be understood as an evaluation of the *nature* of the federal interest at stake. . . .
>
> Focusing on the nature of the federal interest, moreover, suggests that the widely perceived "irreconcilable" conflict between the finding of jurisdiction in [*Smith*] and the finding of no jurisdiction in *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205 (1934), . . . is far from clear. For the difference in results can be seen as manifestations of the differences in the nature of the federal issues at stake. In *Smith*, as the Court emphasized, the issue was the constitutionality of an important federal statute. . . . In *Moore*, in contrast, the Court emphasized that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action. . . .
>
> The importance of the nature of the federal issue in federal-question jurisdiction is highlighted by the fact that, despite the usual reliability of the Holmes test as an inclusionary principle, this Court has sometimes found that formally federal causes of action were not properly brought under federal-question jurisdiction because of the overwhelming predominance of state-law issues.

Id. at 814 n.12.

109. *Id.* at 814 n.12. The statute at issue in *Smith* was the Federal Farm Loan Act. *See* Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 195-98 (1921).

110. *See Merrell Dow*, 478 U.S. at 811.

111. *See id.*

112. *See supra* note 9.

Court used the implied remedy doctrine to analyze a jurisdiction claim. Most commentators think that the Court simply confused the two doctrines.[113]

Merrell Dow's citation of Professor Cohen's article, *The Broken Compass*, may explain the Court's use of the implied remedy doctrine.[114] After detailing his famous proposal that federal question jurisdiction cases should be explicitly, and already are implicitly, judged solely by pragmatic considerations, Professor Cohen detailed certain classes of cases where particular jurisdiction tests work but actually "obscure the pragmatic considerations which may govern [the] decisions."[115]

One such case is the "personal injury action where a federal law standard is used to demonstrate that defendant's conduct amounted to wrongdoing."[116] Professor Cohen acknowledged that federal question jurisdiction in these cases routinely turns on Holmes' analysis but argued that this technique can be explained pragmatically.[117] In short, he asserted that federal judges are unhappy with the large number of personal injury diversity cases, that the need for an expert federal forum to decide federal law issues is minimal, and that jurisdiction over such cases would add significantly to the federal docket given the "growing number of federal laws regulating individual conduct."[118] Finally, he asserted that without "something more" federal courts should refuse to hear these cases in light of the pragmatic considerations.[119]

Then, in a remarkable parallel to *Merrell Dow*, Professor Cohen asserted that the "something more" could only be a federal cause of action, either explicit or *implicit*, for the federal standard violation.[120] A federal cause of action supplies that "'something more' . . . in the sense that a decision that federal law provides the cause of action represents a judgment by Congress, or by the courts, of the necessity for a protective federal forum."[121]

Although substantially truncated, the Court's analysis in *Merrell Dow* has essentially the same structural features as *The Broken Compass*. First, the question presented described the "incorporation of a federal standard in a state-

113. *See* Redish, *supra* note 9, at 1790-91; Alleva, *supra* note 8, at 1543-51.

114. *See* Cohen, *supra* note 1. The Court cited *The Broken Compass* on page 814 in the well-known footnote 12. *See Merrell Dow*, 478 U.S. at 814 n.12.

115. Cohen, *supra* note 1, at 911-12.

116. *Id.* at 911.

117. *See id.* at 911-12.

118. *Id.* at 912.

119. *Id.*

120. *See id.*

121. *Id.*

law private action."[122] The action in *Merrell Dow*, a personal injury, products liability action based on a violation of a federal standard, was exactly the same as the class of cases described by Professor Cohen. Second, the Court recognized that the claim presented a state-federal hybrid case.[123] Third, the Court described the use of practical considerations in the limitations over jurisdiction of such cases.[124] Fourth, the Court inquired into the existence of a federal cause of action for federal standard violations.[125] Finally, the Court described the practical reasons why the absence of a federal remedy further dictates against upholding federal jurisdiction over such cases.[126]

Most importantly, the reference to Professor Cohen's article explains the context of the Court's decision to refer to the implied remedy doctrine. Without the implied federal remedy, the Court did not have that "something more" with which to overcome the practical presumption against federal question jurisdiction in federal standard incorporation cases. Furthermore, the Court used the implied remedy doctrine to strengthen the case against jurisdiction.[127]

This analysis of the reasoning in *Merrell Dow* demonstrates that the Court was not using the existence of a federal remedy as the sole determinant of federal question jurisdiction. Instead, the Court reaffirmed its pragmatic approach to jurisdictional theory. Congressional intent to provide a federal remedy is simply one more factor to consider in the federal question jurisdiction analysis of state-federal hybrid claims.

Finally, the Court's broad statement of its holding[128] is consistent with Professor Cohen's concern that courts should not decide jurisdictional questions on a case-by-case basis:

> It may be objected that recognition of the pragmatic nature of the decision whether a claim arises directly under federal law will lead to an *ad hoc*, unpredictable, case-by-case decision of jurisdictional questions. It goes without saying that it is undesirable for jurisdictional rules to be uncertain. . . .
>
> . . . [But], the process is not simply case-by-case decision making, with each case standing on its own bottom, but rather a process of

122. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 805 (1986).
123. *See id.* at 809-10.
124. *See id.* at 810.
125. *See id.* at 810-11.
126. *See id.* at 811-12.
127. *See id.*
128. *See supra* text accompanying note 6.

> clarifying jurisdictional uncertainty in *classes of cases* before the court.[129]

Merrell Dow also noted a concern that jurisdictional decisions not be made on a case-by-case basis:

> "[T]he interrelation of federal and state authority and the proper management of the federal judicial system," would be ill served by a rule that made the existence of federal-question jurisdiction depend on the district court's case-by-case appraisal of the novelty of the federal question asserted as an element of the state tort.[130]

The Court's broad holding, then, is properly seen as an attempt to make its jurisdiction decision applicable to a broad class of cases and not as a dramatic retrenchment to the restrictive Holmes' analysis.

Pragmatic considerations should form the crux of the jurisdictional analysis in state-federal hybrid claims. These considerations amount to basic concerns about our federal system of government. An extremely important federal interest will suffice.[131] Additionally, the courts should weigh the relative efficiencies of original versus appellate jurisdiction in protecting the federal interest, the necessity for a forum with expertise in federal law, and the potential for state court hostility against the enforcement of federal rights.[132] Furthermore, concern is warranted over the potential for overwhelming the federal docket if courts obtain original jurisdiction over a class of claims.[133] Conversely, if the cases do not involve actual contested issues of federal law, then state court jurisdiction is probably adequate. Finally, an indication of congressional intent, if not a clear statement, that the federal courts should take jurisdiction over a state cause of

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129. Cohen, *supra* note 1, at 908 (emphasis added).

130. *Merrell Dow*, 478 U.S. at 817 (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8 (1983)).

131. *See supra* notes 108-10 and accompanying text.

132. This assessment raises many practical and sensitive concerns about our federal system of government. Many of these concerns closely parallel the reasons practitioners purport to remove cases to federal court. *See supra* notes 57-59 and accompanying text. A weighing of the need for original versus appellate jurisdiction is likely to be influenced by several factors including: (1) the likelihood of state court hostility toward the application of federal law in this area; (2) the perception that federal court precedent is needed sooner rather than later to establish more uniform standards of conduct for health insurers; and (3) the nature and number of these claims and their likelihood of clogging the federal docket. *See* Cohen, *supra* note 1.

133. This concern essentially amounts to an assessment of the number of potential FEHB contract claims. Given the federal court's experience with the large volume of federal ERISA claims, the courts are probably much more hesitant to recognize jurisdiction over similar claims.

action will generally override any presumption against jurisdiction.[134]

V. FEDERAL QUESTION JURISDICTION FOR THE FEDERAL INSURANCE REMOVAL CLAIMS

When federal employees bring coverage claims, they generally do not allege that the insurance company violated the Federal Employee Health Benefits Act and that they have a federal cause of action to remedy that violation.[135] Without this allegation in the complaint, federal question removal jurisdiction is not obtainable under the traditional Holmes' analysis because the well-pleaded complaint rule forbids it.[136]

Instead, plaintiffs generally bring state law causes of action such as breach of contract or bad faith refusal to pay an insurance claim,[137] an element of which is necessarily a breach of the FEHB contract.[138] Whether these state

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134. *See supra* note 127 and accompanying text.

135. Analysis of FEHB contract claims removed to federal district courts reveals a variety of state law actions. For breach of contract claims, see *Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306, 308 (3d Cir. 1994); *Howard v. Group Hospital Service*, 739 F.2d 1508, 1508 (10th Cir. 1984); *Hanson v. Blue Cross & Blue Shield*, 953 F. Supp. 270, 275 (N.D. Iowa 1996); *Transitional Hospital Corp. v. Blue Cross & Blue Shield*, 924 F. Supp. 67, 68 (W.D. Tex. 1996); *Williams v. Blue Cross & Blue Shield*, 827 F. Supp. 1228, 1229 (E.D. Va. 1993); *Lieberman v. National Postal Mail Handlers Union*, 819 F. Supp. 344, 345 (S.D.N.Y. 1993); *Grazel v. Nazari*, No. 92-CV-1471, 1992 WL 122913, at *1 (E.D. Pa. June 1, 1992); *Furey v. U.S. Healthcare HMO*, No. 91-1072, 1991 WL 206761, at *1 (E.D. Pa. Oct. 2, 1991); *Mooney v. Blue Cross*, 678 F. Supp. 565, 567 (W.D. Pa. 1988). For bad faith refusal to pay claims, see *Howard*, 739 F.2d at 1508; *Hanson*, 953 F. Supp. at 275; *Lambert v. Mail Handlers Benefit Plan*, 886 F. Supp. 830, 832 (M.D. Ala. 1995); *Williams*, 827 F. Supp. at 1229; *Furey*, 1991 WL 206761, at *1; *Ochsner Foundation Hospital v. Louisiana Health Services & Indemnity Co.*, No. 88-5028, 1989 WL 6013, at *1 (E.D. La. Jan. 24, 1989). For state unfair trade practice claims, see *Goepel*, 36 F.3d at 308; *Arnold v. Blue Cross & Blue Shield*, 973 F. Supp. 726, 729 (S.D. Tex. 1997); *Furey*, 1991 WL 206761, at *1. For declaratory judgment actions, see *Roux v. Lovelace Health Systems, Inc.*, 947 F. Supp. 1534, 1536 (D.N.M. 1996); *Rocky Mountain Hospital & Medical Services v. Phillips*, 835 F. Supp. 575, 576 (D. Colo. 1993); *Hirsch v. Blue Cross & Blue Shield*, No. MJG-90-3049, 1991 WL 502004, at *1 (D. Md. Dec. 26, 1991). Although the declaratory judgment actions are brought under the Federal Declaratory Judgment Act, this federal law is merely procedural and does not create a federal cause of action. *See* Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 15-19 (1983); Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950); Ronald J. Mann, Note, *Federal Jurisdiction over Preemption Claims: A Post*-Franchise Tax Board *Analysis*, 62 TEX. L. REV. 893, 899-900 (1984).

136. *See supra* notes 20-24 and accompanying text.

137. *See supra* note 135.

138. That a complaint alleging that an insurer breached the terms of the plaintiff's insurance coverage is sufficient to establish that the plaintiff's right to recovery depends on interpretation of the insurance contract is beyond question. But without a statement in the complaint that the contract at issue is a FEHB contract, the complaint does not literally show that plaintiff's right to recovery depends on the interpretation of a federal contract. For the purposes of this analysis, this Note assumes that all such complaints either plead breach of a FEHB contract or that failing to do so constitutes artful pleading. *See supra* note 28 and accompanying text.

claims are actually artfully pled federal causes of action and removable to federal court depends on whether the FEHBA completely preempts these state law causes of action.

The FEHBA, as it existed at the time of *Goepel*, did not completely preempt state causes of action for denial of coverage.[139] First, FEHBA preemption, unlike ERISA preemption, is relatively narrow. The FEHBA only allows the preemption of law related "to the nature and extent of coverage or benefits."[140] There is no indication of congressional intent to preempt state law remedies. Second, while the regulations in effect at the time recognized that an enrollee could bring an "action to recover on a claim for health benefits . . . against the carrier of the health benefits plan,"[141] the FEHBA only provided federal jurisdiction for claims against the United States.[142] This combination simultaneously recognized that such actions would be brought against carriers but specifically precluded them from the original jurisdiction of the federal courts.[143] Because federal causes of action are within the statutory grant of federal question jurisdiction,[144] this combination seems to foreclose the possibility of a federal cause of action against the carrier. Therefore, the state cause of action cannot really be a federal cause of action, and the FEHBA does not completely preempt state coverage claims.[145]

Whether FEHB contract claims are removable to federal court under state-federal hybrid case analysis is a complicated question. First, as both *Howard*

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139. This section essentially parallels the analysis of the Third Circuit. *See generally* Goepel v. National Postal Mail Handlers Union, 36 F.3d 306 (3d Cir. 1994).

140. 5 U.S.C. § 8901(m)(1) (1994).

141. 5 C.F.R. § 890.107 (1994).

142. *See* 5 U.S.C. § 8912 (1994).

143. OPM regulations at the time of *Goepel* specifically recognized that coverage actions would be brought but provided no indication that the actions would be federal in nature. While the regulations recognizing that claims for health benefits "should be brought against the carrier, not against OPM," 5 C.F.R. § 890.107 (1994), were simply "regulations necessary to carry out," 5 U.S.C. § 8913 (1994), the provisions of the FEHBA and not *necessarily* an indication of congressional intent, federal courts generally defer to an agency's construction of a statutory scheme it is entrusted to administer. *See* Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984).

144. *See* 28 U.S.C. § 1331 (1994).

145. Perhaps a simpler analysis would focus on the congressional intent not to provide jurisdiction to claims against FEHB carriers. This analysis would fall squarely under the language of Justice Brennan's concurrence in *Taylor*: "removal jurisdiction exists when, as here, 'Congress has *clearly* manifested an intent to make causes of action . . . *removable* to *federal court*.'" Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 67-68 (1987). This analysis avoids the Third Circuit's forced interpretation of *Franchise Tax Board* that requires a federal cause of action to exist regardless of congressional intent to provide removal jurisdiction. The Eighth Circuit analyzes complete preemption cases almost entirely through indications of congressional intent, the existence of a federal cause of action being just one factor. *See* Deford v. Soo Line Ry., 867 F.2d 1080, 1086 (8th Cir. 1989).

and *Caudill* recognized, the interpretation of FEHB contracts must be governed by federal law in order for there even to be any federal law at issue in the well-pleaded complaint of the state cause of action. Second, assuming federal common law governs the interpretation of FEHB contracts, whether federal question jurisdiction is appropriate for the state-federal hybrid claims ultimately depends on a court's interpretation of *Merrell Dow*.

The conflict between *Howard* and *Caudill* over the law governing interpretation of the FEHB contracts seems largely due to the failure of the Tenth Circuit to recognize the federal interests that Congress intended to protect when it enacted the FEHBA's preemption clause.[146] Congress was so concerned with lack of uniformity resulting from the use of state law in interpreting the contracts that it responded with preemption legislation.[147] Furthermore, in enacting the legislation, Congress explicitly acknowledged its extensive federal interests. Besides uniformity and efficiency, Congress recognized that preventing the application of state law to the interpretation of FEHB contracts "should result in a reduction of cost to the Federal Government and the employees."[148]

Finally, as the Fourth Circuit noted, the Federal Government's interest in ensuring uniformity in its "rights and duties" under FEHB contracts[149] seems much stronger than the interests at stake in *Boyle*.[150] The health of every federal

146. The Tenth Circuit reasoned that federal law would apply only "if diverse resolutions of a controversy would frustrate the operations of a federal program, conflict with a specific national policy, or have some direct effect on the United States or its treasury." *Howard*, 739 F.2d at 1510-11 (citations and footnote omitted). This statement was essentially correct at the time. *See* Miree v. DeKalb County, 433 U.S. 25 (1977); Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). But Congress specifically passed the preemption provision to prevent diverse decisions in state courts from frustrating the uniform operation of the FEHB program. *See supra* note 55. Furthermore, the Civil Service Commission recommended the preemption provision to Congress to avoid the "time consuming and costly litigation" thought necessary to establish the application of federal law to FEHB contracts. S. REP. NO. 95-903, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1413, 1415. Finally, the application of state law to the interpretation of FEHB contracts presents courts with an interpretative paradox. *See infra* note 147. Unfortunately, the Tenth Circuit failed to mention the preemption provision in its decision in *Howard*. Ultimately, the Supreme Court's decision four years later in *Boyle* makes it clear that federal common law should govern the interpretation of these federal contracts. *See supra* note 79.

147. *See* 5 U.S.C. § 8902(m)(1) (1994); *supra* note 55. In fact, the clause itself provides a strong argument against the use of state law in the interpretation of FEHB contracts. The application of state law to the interpretation of contractual provisions having the preemptive power to displace those very state laws presents a paradox. Courts must decide what a contractual clause means before they can decide whether it conflicts with state law. It would be entirely anomalous to have state law govern the preemptive effect of federal contractual provisions.

148. S. REP. NO. 95-903, at 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1413, 1415.

149. *See* Caudill v. Blue Cross & Blue Shield, 999 F.2d 74, 78 (4th Cir. 1993).

150. *See* Boyle v. United Tech. Corp., 487 U.S. 500, 504-13 (1988); *Caudill*, 999 F.2d at 78-79.

government employee is a uniquely federal interest of paramount importance. In fact, the health of government employees implicates the very same interest at stake in *Boyle*: the "interest in getting the Government's work done."[151]

The uniquely federal interests at stake in the interpretation of FEHB contracts also significantly conflict with the application of state law. In fact, Congress explicitly recognized this conflict when it amended the FEHBA to preempt state laws which relate to the nature or extent of benefits or coverage.[152] Application of state law to FEHB contracts that have national scope would significantly alter the uniformity of benefits that Congress intended to provide to federal employees. Given the uniquely federal interests at stake in the uniform interpretation of FEHB contracts and the significant conflict that would arise if courts attempted to apply state insurance laws, it seems clear that federal common law must govern the interpretation of FEHB contracts.[153]

It is not enough that federal law is at issue in the well-pleaded complaint, however. The federal law issues must be substantial enough to merit original federal jurisdiction. The question of substantiality requires sensitive judgments and a pragmatic consideration about the nature of the federal interests at stake, indications of congressional intent to provide jurisdiction, and the possible effects original jurisdiction would have on federal court burdens.[154]

At the outset, FEHB contract claims should be placed in proper perspective. A court should not decide whether federal question jurisdiction should obtain over a particular FEHB contract claim merely on the facts of the particular case. Instead, the court should make judgments about the class of cases within which the FEHB contract claim belongs.[155] As in *Merrell Dow*, the class of claims should be defined quite broadly.[156] One might define the class as those cases in which a party brings a state cause of action, either sounding in contract or tort, over a federal contract.

First, it should be clear that these cases do not merely allege a violation of a federal standard as in *Merrell Dow*. Instead, these cases allege state actions for which the key issues hinge upon the interpretation of a contract under federal common law. Therefore, *Merrell Dow* does not create a presumption against federal question jurisdiction.

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151. *Boyle*, 487 U.S. at 505.
152. *See supra* note 55 and accompanying text.
153. This reasoning essentially parallels that of the Fourth Circuit. *See Caudill*, 999 F.2d at 78-79.
154. *See supra* notes 131-35 and accompanying text
155. *See supra* notes 128-31 and accompanying text.
156. *See id.*

Conversely, the questions of federal law presented in federal contract claims certainly do not rise to the level of substantiality present in *Smith*.[157] Most of these claims simply amount to an interpretation of the federal contract, not the "constitutionality of an important federal statute."[158] As the discussion above indicates, however, the federal interests at stake are significant.[159] In the general class of federal contract claims, there is a strong federal interest in the uniform interpretation of these contracts and usually a more particular federal interest regarding the subject matter of the contract. For example, in the context of FEHB contract claims, the federal interests are in the uniform and efficient provision of health benefits to federal employees responsible for getting the government's work done. These federal interests seem much more important than the interests at stake in *Merrell Dow*.[160] Federal contract cases raise federal law issues somewhere in between the importance of the issues raised in *Smith* and *Merrell Dow*.

In terms of federal docket management, upholding original jurisdiction in this case would not subject the federal courts to the kind of overwhelming burden possible in *Merrell Dow*. The universe of possible plaintiffs here is limited to parties to or beneficiaries of federal contracts, while the number of possible plaintiffs who could sue for FDCA violations seems unlimited.[161]

The application of federal common law to these federal contracts also highlights the need for a federal forum. State court judges, accustomed to

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157. The issue in *Smith* was the constitutionality of an important federal statute. *See* Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 195 (1921).

158. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 814 n.12 (1986).

159. *See supra* notes 147-55 and accompanying text.

160. The federal interest at stake in *Merrell Dow* was the protection of consumers from misleading and perhaps dangerous pharmaceutical labeling. Congress seemed to envision the protection of that interest through government regulatory programs not private federal action, however.

One could argue that, in fact, there is no federal interest at stake in incorporation cases like *Merrell Dow*.

> When a state, rather than having anything turn on the reach of federal law, has merely incorporated the standard contained in a federal law by analogy, the bases for the exercise of federal question jurisdiction disappear. If, for example, a state has enacted an antitrust statute, to apply only to intrastate commerce, which provides that any violation of federal antitrust law will constitute a violation of state law as well, the federal courts have no legitimate interest in the state law's interpretation. While the state courts may incorrectly construe federal law, that is of concern only to the state itself. Since by hypothesis there has been no effect on interstate commerce, no federal interest of any kind has been implicated.

MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 67-68 (1980).

161. The number of product liability actions brought each year regarding products subject to the FDCA is undoubtedly enormous. The FDCA regulates products used by almost every citizen of the United States. On the other hand, FEHB contracts only cover approximately nine million federal employees. Out of that relatively small pool, only a handful have brought suit for denial of health insurance benefits.

applying their generally consumer friendly state contract and tort law, may be hostile to a federal contractor's attempt to enforce their federal rights. Additionally, these cases will almost always involve actual contested issues of federal law. Contract claims necessarily involve the interpretation of the contracts. The synthesis and application of federal common law to these contracts is a process best suited for federal judges with an expertise in federal law.

Although there is no indication that Congress intended to provide federal question jurisdiction for these cases, that is not fatal here. All of the other factors point to strong pragmatic reasons for federal question jurisdiction over these claims. A federal remedy is not needed here to overcome a presumption against federal jurisdiction as it was in *Merrell Dow*. Based on the significance of the federal interests at stake, the predominance of federal law issues requiring the expertise of a federal forum and the limited potential impact on the federal docket, federal contract cases, including the federal insurance removal cases, should warrant federal question jurisdiction.

VII. CONCLUSION

A restrictive view of *Merrell Dow* prevents courts from obtaining federal question jurisdiction over state-federal hybrid cases for which there are important federal interests at stake and good pragmatic reasons for allowing jurisdiction. When read in conjunction with Professor Cohen's article, *The Broken Compass*, the more flexible and pragmatic structure of *Merrell Dow* is revealed. Such a framework makes it clear that courts should abandon the search for "a single, all-purpose, neutral analytical concept."[162] Jurisdictional decisions in state-federal hybrid cases should be made from a pragmatic perspective. Under this framework, federal question jurisdiction is appropriate for the federal insurance removal cases and federal contract cases in general.

Kenneth Lee Marshall

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162. Cohen, *supra* note 1, at 907.