REMOVING THE REMOVAL MYSTERY: WHEN WORK-RELATED CLAIMS ARE REMOVABLE UNDER 28 U.S.C. § 1445(c)

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Abstract

Removing the Removal Mystery: When Work-Related Claims Are Removable Under 28 U.S.C. § 1445(c) analyzes the removability of various work-related claims and, in particular, tort claims filed against employers that do not subscribe to worker's compensation insurance. Part One introduces the questions raised by § 1445(c). Part Two explains the legislative history of § 1445(c) and the circumstances leading to its enactment. Part Three analyzes various Federal appellate courts' interpretation of § 1445(c) as applied to various work-related claims, including intentional torts, retaliatory discharge, and breach of contract. It demonstrates that for many courts, the pivotal issue is whether the work-related claim is codified in a statute. Finally, Part Four specifically analyzes whether a common-law negligence claim against a nonsubscribing employer (a "nonsubscriber claim") is removable under § 1445(c).

To date, no federal court of appeals has decided whether a nonsubscriber claim is barred from removal under § 1445(c). Within the district courts of the Fifth Circuit, however, judges have reached different conclusions regarding whether a nonsubscriber claim can be removed. Two judges from the Northern District of Texas have held that because a negligence claim exists at common law wholly apart from the workmen's compensation statutes, it does not arise under the workmen's compensation laws and may be removed. Judges from the Eastern and Southern Districts, on the other hand, have held that an employer doing business in a state with workmen's compensation insurance chooses to depart from the general common-law tort system, and that § 1445(c) therefore bars removal of nonsubscriber claims.

This Article argues that the better reasoned opinions hold that § 1445(c) does not bar removal of nonsubscriber claims because a nonsubscriber claim is merely a simple negligence claim with no significant relation to the workmen's compensation laws. A state's codification of the claim does not transform it into a workmen's compensation law.

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PART ONE - THE REMOVAL MYSTERY

In an effort to reduce Federal courts' congestion, Congress passed 28 U.S.C. § 1445(c), barring removal of any case involving a claim that arises under workmen's compensation laws. The statute provides, "A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any District Court of the United States."[1]

Interpretation of Section 1445(c) has led to conflicting opinions about when a particular claim "arises under" a state's workmen's compensation scheme and which laws are considered "workmen's compensation laws." For example, courts disagree whether a claim alleging retaliatory discharge from filing a workmen's compensation claim arises under workmen's compensation laws, since absent such a regulatory scheme no claim for retaliatory discharge would exist.[2] Similarly, courts have struggled with the question of whether an employee's claim for personal injuries against a nonsubscribing employer (*i.e.*, an employer that does not subscribe to a state's workmen's compensation system) arises under a state's workmen's compensation statutes.[3]

This article provides an in-depth look at Congress's intent in passing § 1445(c), as well as

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1 28 U.S.C. § 1445(c) (2000).

2 *Compare* *Jones v. Roadway Express, Inc.*, 931 F.2d 1086 (5th Cir. 1991) (Texas action for retaliatory discharge in anticipation of filing workers' compensation claim was civil action arising under the workers' compensation laws of Texas and could not be removed to Federal court), *with* *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722 (7th Cir. 1994), *cert. denied*, 513 U.S. 1955 (1994) (retaliatory-discharge claim asserted by employee discharged due to excess absences did not arise under workers' compensation laws of Illinois).

3 *Compare* *Figueroa v. Healthmark Partners*, 125 F. Supp. 2d 209 (S.D. Tex. 2000) (claim against nonsubscribing employer arises under Texas workers' compensation laws and is barred from removal under 28 U.S.C. § 1445(c)), *with* *Pyle v. Beverly Enterprises-Texas, Inc.*, 826 F. Supp. 206 (N.D. Tex. 1993) (claim against nonsubscribing employer does not arise under Texas workers' compensation laws and can properly be removed to Federal Court).

an overview of Federal courts' interpretation of that statute. Part One introduces the questions raised by § 1445(c). Part Two explains the legislative history of § 1445(c) and the circumstances leading to its enactment. Part Three analyzes the Federal appellate courts' interpretation of § 1445(c) as applied to various work-related claims, including intentional torts, retaliatory discharge, and breach of contract. Finally, Part Four specifically analyzes whether a common-law negligence claim against a nonsubscribing employer (for convenience referred to as a "nonsubscriber claim") is removable under § 1445(c) and explains why the better reasoned opinions hold that § 1445(c) does not bar removal of nonsubscriber claims.

PART TWO - GENERAL OVERVIEW OF § 1445(c)

When the language of a statute is straightforward, the court need not consider its legislative history to interpret it.[4] Although some Federal courts have held § 1445(c) is unambiguous,[5] the many conflicting interpretations of § 1445(c) suggest that the statute's meaning is anything but clear.

The history and policies behind § 1445(c) provide helpful insight for interpreting the statute by illuminating three factors Congress considered when enacting it. First, Congress considered a report by the Division of Procedural Studies and Statistics that analyzed the workload of Federal district courts and documented the high volume of workmen's compensation cases pending in Texas and New Mexico Federal district courts.

Second, Congress considered the fact that removal of compensation cases undermines the "expedit[ious] and inexpensive settlement of claims by injured workmen against the employer."[6]

Third, Congress considered the fact that workmen's compensation cases involve no Federal issues. Together, these three factors led to the passage of Public Law 85-554, codified in 1958 as 28 U.S.C. § 1445(c), which prohibits the removal of a civil action "arising under" the workmen's compensation laws of a state.

I. THE CONGESTION OF FEDERAL DISTRICT COURTS

The first and most significant factor prompting Congress to enact § 1445(c) was the congestion of workmen's compensation cases in Federal courts. "In the years following World War II, the judicial business of the United States District Courts increased tremendously."[7] Diversity-of-citizenship cases authorized by 28 U.S.C. § 1332 accounted for most of this increase, with diversity cases increasing 180 percent from 7,286 in 1941 to 20,524 in 1956.[8] Among the diversity cases, workmen's compensation cases accounted for a large number, as the Committee on the Judiciary noted in its Senate Report:

> In a number of States the workload of the Federal courts has greatly increased

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4 *Harper v. Autoalliance Int'l, Inc.*, 392 F.3d 195, 207 (6th Cir. 2004).

5 *See, e.g.*, *Reed v. Heil Co.*, 206 F.3d 1055, 1060 n.3 (11th Cir. 2000) ("When interpreting statutes, courts should 'not resort to the legislative history' if the statutory language is straightforward. [Since] section 1445(c)'s language is clear . . . we do not need the legislative history for interpretive guidance.") (citations omitted); *see also* Harper, 392 F.3d at 207 (if the statutory language is straightforward, the court need not resort to the legislative history in interpreting the statute).

6 S. REP. NO. 85-1830 (1978), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3106.

7 *Id.* at 3100.

8 *Id.*

> because of the removal of workmen's compensation cases from the State courts to the Federal courts . . . The removal of workmen's compensation cases from State courts to the Federal courts adds to the already overburdened docket of the Federal courts, the congestion in some of which is now most deplorable.[9]

In fiscal year 1957 alone, 2,147 workmen's compensation suits entered the Federal district courts in Texas, with 982 of those filed as original suits, and 1,148 removed from state courts.[10]

II. NULLIFICATION OF THE STATES' SUMMARY PROCEEDINGS FOR HANDLING WORKMEN'S COMPENSATION CLAIMS

A second factor that Congress considered when enacting § 1445(c) was the need to protect the administrative systems that states designed to handle employee injury claims. In the 1950s, "nearly all of the state statutes on workmen's compensation provide[d] summary proceedings" to expedite and simplify the workmen's ability to obtain compensation.[11] Upon removal, however, the state procedures "are not, as a rule, applicable . . . in Federal courts,"[12] and "the state statutes, in many instances, are entirely nullified."[13]

Further, some employers used removal to inconvenience employees and make prosecution more difficult:

> [S]ome of these state statutes limit the venue to the place where the accident occurred or to the district of the workman's residence. When removed to the Federal Court the venue provisions of the state statute cannot be applied. Very often cases removed to the Federal courts require the workman to travel long distances and to bring his eyewitnesses at great expense. This places an undue burden upon the workman and very often the workman settles his claim because he cannot afford the luxury of a trial in Federal court.[14]

Congress intended Section 1445(c) to protect the states' summary proceedings and to bring state workmen's compensation laws in line with various Federal statutes that allow employees the option of filing in state or Federal court.[15] Section 1445(c) makes the employee's venue-selection decision final by preventing the employer-defendant from removing the case to Federal court.[16]

III. THE ABSENCE OF ANY SIGNIFICANT FEDERAL ISSUE

The third and final factor supporting the passage of § 1445(c) was Congress's recognition that workmen's compensation cases are primarily local in nature: "[W]orkmen's compensation

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9 *Id.* at 3105-06.
10 *Id.* at 3106.
11 S. REP. NO. 85-1830 (1978), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3106.
12 *Id.*
13 *Id.*
14 *Id.*
15 *See id.* For example, the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act "are in the nature of workmen's compensation [laws]." *Id.*
16 *See* S. REP. NO. 85-1830 (1978), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3106.

cases arise and exist only by virtue of State laws. No Federal question is involved and no law of the United States is involved in these cases."[17] In the absence of Federal issues, states are best equipped to handle local state-law based disputes.

PART THREE - FEDERAL COURTS' INTERPRETION OF § 1445(c)

I. FEDERAL LAW GOVERNS THE INTERPRETATION OF FEDERAL STATUTES

"Because section 1445 is a Federal jurisdiction statute with nationwide application, Federal law governs its interpretation."[18] Accordingly, § 1445(c) "must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits may not be removed."[19]

Although Federal courts look at states' treatment of the underlying claims to determine whether they are removable, "[s]tates cannot by definition or characterization enlarge or narrow the categories of cases subject to removal."[20] For example, "[a] state could not prevent removal of ordinary tort cases by calling its common law of torts a 'workmen's compensation law.'"[21] Likewise, "a state could not facilitate removal by calling a claim arising under its workmen's compensation laws an independent tort."[22]

When determining whether a work-related claim is removable under § 1445(c), courts must ask two questions: (1) what are "workmen's compensation laws," and (2) does the claim "arise under" workmen's compensation laws?

II. THE INTERPRETATION OF "WORKMEN'S COMPENSATION LAWS"

"That Federal law supplies the definition of 'workmen's compensation laws' is beyond doubt."[23] Federal courts must look to "the ordinary meaning of the term in 1958, the year Congress passed section 1445(c)."[24] In other words, courts must ask "how [would] a sophisticated legal audience . . . have understood the words "workmen's compensation law" at the time?"[25]

A. The Fourth, Sixth and Seventh Circuits' View: Workmen's Compensation Laws Are No-Fault Regulatory Schemes

The Fourth, Sixth and Seventh Circuits agree that when § 1445(c) was enacted, the term "workmen's compensation laws" had evolved to signify no-fault regimes: "By 1958, all states

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17 *Id.*

18 *Reed v. Heil Co.*, 206 F.3d 1055, 1059 (11th Cir. 2001); *see also Patin v. Allied Signal, Inc.*, 77 F.3d 782, 788 (5th Cir. 1996) (citing *Jones v. Roadway Express, Inc.*, 931 F.2d 1086 (5th Cir. 1991)) (Federal law governs the interpretation of removal statutes).

19 *Arthur v. E.I. Dupont de Nemours & Co.*, 58 F.3d 121, 125 (4th Cir. 1995).

20 *Id*.

21 *Id.* (citing *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 724 (7th Cir. 1994), *cert. denied*, 513 U.S. 1955 (1994)).

22 *Id.* (Rovner, J., dissenting).

23 *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 724 (7th Cir. 1994), *cert. denied*, 513 U.S. 1955 (1994) (citations omitted).

24 *Arthur*, 58 F.3d at 125 (citations omitted).

25 *Spearman*, 16 F.3d at 724.

had "workmen's compensation laws" on the books. These laws created state-mandated insurance systems that provided benefits to employees for work-related injuries ***without regard to fault***."[26]

Other characteristics include summary proceedings, limited damages, and civil immunity for the employer. Incorporating these concepts, the Fourth Circuit created the following definition of "workmen's compensation laws":

> According to the leading authorities in the 1950s, the typical state act included the following features: (1) negligence and fault of the employer and employee were immaterial to recovery, (2) common law suits against the employer were barred, (3) medical expenses were covered and cash benefits were capped at a percentage of the employee's wage, (4) an administrative agency ran the system with relaxed rules of procedure to facilitate prompt compensation, and (5) state court review of agency decisions occurred on a deferential basis.[27]

The Fourth Circuit condensed this description into an "ordinary (shorthand) meaning of 'workmen's compensation laws' as understood in 1958: a statutorily created insurance system that allows employees to receive fixed benefits, without regard to fault, for work-related injuries."[28]

Other circuits have adopted the same or similar shorthand definition.[29] For example, the Seventh Circuit interprets the phrase "workmen's compensation laws" to refer to "limited compensation without fault," in which the state has devised expeditious and inexpensive procedures for workmen's compensation claims.[30] Its research established that "*[n]o* case or definition from the 1950s and before… treats unlimited liability for an intentional tort as part of a [workmen's] compensation program."[31] Thus, the Seventh Circuit draws a bright line between no-fault and fault-based regimes: A fault-based regime with common law damages is not a "workmen's compensation law" no matter what the state calls it.[32]

Similarly, the Sixth Circuit held that the term refers to "laws [that] establish a scheme for compensating employee's [sic] injured on the job, but the extent and character of that scheme varies by state."[33]

B. The Eighth Circuit's View: Workmen's Compensation Laws Are Not Limited to Fault-Based Claims

The Eighth Circuit has rejected the view that Congress only envisioned no-fault regimes as workmen's compensation laws: "[T]o the extent that defendant argues that a fault-based claim, regardless of its origins, may never serve as the basis for applying § 1445(c), we

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26 *See Arthur*, 58 F.3d at 125 (emphasis added).
27 *Id.* (citations omitted).
28 *Id.*
29 *See, e.g.*, *Harper v. Autoalliance Int'l, Inc.*, 392 F.3d 195, 207 (6th Cir. 2004); *Arnett v. Leviton Mfg., Inc.*, 174 F. Supp. 2d 410, 414 -15 (W.D.N.C. 2001).
30 *See Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 724 (7th Cir. 1994), *cert. denied*, 513 U.S. 1955 (1994).
31 *Id.*
32 *Id.*
33 *Harper*, 392 F.3d at 207.

disagree."[34] The Tenth and Eleventh Circuits implicitly agreed with the Eighth Circuit that "workmen's compensation laws" are not limited to no-fault regimes when holding that a retaliatory-discharge claim—which requires fault—arises under a state's "workmen's compensation laws."[35]

C. The Fifth Circuit's View is Unclear

The Fifth Circuit's position is less clear. In *Jones v. Roadway Express, Inc.*, the Fifth Circuit held that a Texas statutory retaliatory-discharge claim was essential to Texas workmen's compensation regime.[36] In another context, however, it held in *Hook v. Morrison Milling Co.* that an unsafe-workplace claim against a nonsubscriber is merely "a common law negligence claim."[37] In *Hook*, however, the Fifth Circuit focused on how a nonsubscriber claim relates to ERISA, not the Texas Workers' Compensation Act. When asked to analyze its relation to Texas' workmen's compensation laws, it may conclude that the otherwise common-law claim became part of the workmen's compensation laws through its codification in the Act.

III. THE INTERPRETATION OF "ARISING UNDER"

The phrase "arising under" has stymied jurists at all levels of the Federal judiciary, from district court judges to several generations of Supreme Court Justices. As Charles Alan Wright and Arthur Miller noted, "[t]he meaning of this phrase has attracted the interest of such giants of the bench as Marshall, Waite, Bradley, the first Harlan, Holmes, Cardozo, and Frankfurter – to name only the dead."[38]

A. The Interpretation of "Arising Under" as Used in § 1331

Courts generally agree that the phrase "arising under" as used in § 1445(c) "should be interpreted broadly and in a manner consistent with" the interpretation of that standard in 28 U.S.C. § 1331, which governs Federal-question jurisdiction.[39] Unfortunately, however, courts' analysis of the same phrase in § 1331 has generated little clarity but a proliferation of confusion and largely unhelpful expositions.

The Supreme Court last attempted to define "arising under" jurisdiction in *Franchise Tax Board v. Construction Laborers Vacation Trust.*[40] Justice Brennan held that "arising under" jurisdiction exists only in "those cases in which a well-pleaded complaint establishes either that Federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on a substantial question of Federal law."[41]

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34 *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1246 (8th Cir. 1995).

35 *See Jones v. Roadway Express, Inc.*, 931 F.2d 1086 (5th Cir. 1991); *Suder v. Blue Circle*, 116 F.3d 1351 (10th Cir. 1997); *Reed v. Heil Co.*, 206 F.3d 1055, 1060 n.3 (11th Cir. 2000).

36 *Jones*, 931 F.2d 1086.

37 *Hook v. Morrison Milling Co.*, 38 F.3d 776, 784 (5th Cir. 1994).

38 13B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE §3562 (2d ed. 1987).

39 *Patin v. Allied Signal, Inc.*, 77 F.3d 782, 787 (5th Cir. 1996); *see also Jones v. Roadway Express, Inc.*, 931 F. 2d 1086, 1092 (5th Cir. 1991).

40 *Franchise Tax Board v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983).

41 *Id.* (holding that state tax board's claim against ERISA trusts to recover workers' delinquent state taxes did not "arise under" ERISA).

The Supreme Court cautioned, however, that many Federal statutes serve as the "jumping-off point for state claims without converting these into claims under Federal law."[42] For example, a state claim for violation of a Federal safety standard does not "arise under" that standard for purposes of Federal-question jurisdiction in § 1331.[43] Similarly, a dispute about the ownership of a copyright arises under state rather than Federal law, even though the very existence of a copyright depends on Federal copyright laws.[44] In the context of § 1445(c), this means that many common-law claims may "relate to" workmen's compensation laws without "arising under" those laws.[45] In other words, "[t]hat a [workmen's] compensation law is a premise of the tort does not [necessarily] mean that the tort 'arises under' the [workmen's] compensation laws."[46]

B. The Interpretation of "Arising Under" as Used in § 1445(c)

Most courts interpreting § 1445(c) have applied the disjunctive definition derived from the *Franchise Tax Board* decision[47] and held that a claim "arises under" a workmen's compensation law "when either: (1) the workmen's compensation law created the cause of action; or (2) the plaintiff's right to relief necessarily depends upon resolution of a substantial question of workmen's compensation law."[48] When applying this test, most Federal courts' decisions turn on whether the particular cause of action is codified in a workmen's compensation statute or is solely a creature of common law.[49] In fact, codification tends to be the pivotal factor in many retaliatory-discharge cases:

> This split [of authority over 1445(c)'s application to retaliatory-discharge claims] centers primarily on whether the cause of action has been codified in the state's [workmen's] compensation statute. In cases where the cause of action is statutorily created, the claim is generally held to "arise under" for purposes of § 1445(c). Conversely, where the claim has been judicially created, removal has been held proper under § 1445(c).[50]

Confusion arises, however, when claims that originally derive from the common law are later codified in a statute. At least two courts have held that codification of such claims does not transform them into ones arising under the workmen's compensation laws.[51]

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42 *Spearman v. Exxon Coal USA Inc.*, 16 F.3d 722, 725 (7th Cir. 1994).

43 *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986).

44 *See, e.g.*, *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964).

45 *Patin v. Allied Signal, Inc.*, 77 F.3d 782, 789 (5th Cir. 1996) ("[W]e conclude that claims for breach of the duty of good faith and fair dealing do not 'arise under' the state workers' compensation statutes but are, at most, 'related to' those statutes and thus do not come within the ambit of the non-removability provision of § 1445(c).").

46 *Ehler v. St. Paul Fire & Marine Ins. Co.*, 66 F.3d 771, 772-73 (5th Cir. 1995).

47 *See Franchise Tax Board v. Constr. Laborers Vacation Trust*, 463 U.S. 1 (1983).

48 *Harper v. Autoalliance Int'l, Inc.*, 392 F.3d 195, 202-03 (6th Cir. 2004).

49 *See, e.g.*, *Wiley v. UPS Inc.*, 227 F. Supp. 2d 480, 485 (M.D.N.C. 2002) (discussing dichotomy of decisions along lines of whether remedy was judicially or statutorily created).

50 *Rundle v. Frontier-Kemper Constructors, Inc.*, 170 F. Supp. 2d 1075, 1079 (D. Colo. 2001).

51 *See Arthur v. E.I. Dupont de Nemours & Co.*, 58 F.3d 121 (4th Cir. 1995); *Harper v. Autoalliance Int'l, Inc.*, 392 F.3d 195 (6th Cir. 2004).

1. *Uncodified Common-Law Claims that Relate to Workmen's Compensation Laws Do Not "Arise Under" Those Laws*

The Fourth, Fifth, Sixth and Seventh Circuits hold that a common-law work-related claim that is not codified as part of the workmen's compensation scheme does not "arise under" those laws.

a. The Seventh Circuit

The *Spearman* decision is widely regarded as the "seminal case involving a judicially created retaliatory discharge action and its relationship to the state's workmen's compensation law for removal purposes."[52] In *Spearman v. Exxon Coal USA, Inc.*, the Seventh Circuit held that a former employee's retaliatory-discharge claim under Illinois law (called a *Kelsay* tort)[53] did not arise under Illinois' workmen's compensation laws so as to preclude removal under § 1445(c).[54] An Illinois retaliatory-discharge claim "rests on general tort doctrines rather than the contents of the [workmen's compensation] statutes"[55] and is "distinct from the [workmen's] compensation laws,"[56] although it relates to those laws:

> That [workmen's] compensation law is a premise of the tort does not mean that the tort 'arises under' the [workmen's] compensation law, anymore than a state tort based on the violation of a Federal safety standard 'arises under' that standard for purposes of the Federal question jurisdiction in 18 U.S.C. § 1331."[57]

The mere dependence of a claim on a particular law "does not mean that the claim arises under that law, unless the suit presents a dispute about the validity, construction, or effect of the law."[58]

Many courts distinguish *Spearman* on the basis that the *Kelsay* tort is not codified. However, the codification issue did not dominate the Seventh Circuit's reasoning.[59] Rather, the *Spearman* court concluded that regardless of whether a retaliatory-discharge claim is codified, it simply does not arise under a "workmen's compensation law" because it "lacks the essential no-fault element of workmen's compensation laws" and does not affect, much less nullify, "the expeditious and inexpensive procedures states had devised for workmen's compensation claims."[60] After all, "tort litigation in Federal court is no more cumbersome than tort litigation in state court."[61]

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52 *Wiley*, 227 F. Supp. 2d at 485.

53 The name is based on the Illinois Supreme Court decision in *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978), which treats a retaliatory-discharge claim as a tort.

54 *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722 (7th Cir. 1994), *cert. denied*, 513 U.S. 1955 (1994).

55 *Id.* at 723.

56 *Id.* at 725.

57 *Id.*

58 *Id.* at 725-26; *Gully v. First Nat'l Bank*, 299 U.S. 109, 114-15 (1936); *Sulthis v. McDougal*, 225 U.S. 561, 569-70 (1912).

59 *See, e.g.*, *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995); *Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352 (10th Cir. 1997).

60 *Spearman*, 16 F.3d at 724.

61 *Id.*

b. The Fourth Circuit

In *Arthur v. E.I. Dupont de Nemours & Co.*, the Fourth Circuit analyzed the removability of a West Virginia "*Mandolidis* claim," which allows a limited exception to an employer's immunity from common-law actions under the workmen's compensation laws if the employer acts with "deliberate intention" to injure an employee.[62] Focusing on the common-law root of the *Mandolidis* claim, the Fourth Circuit held that the claim did not arise under the workmen's compensation laws of West Virginia:

> The *Mandolidis* or "deliberate intention" claim has always been considered a creature of the common law. In 1959 the Supreme Court of Appeals said specifically that the "deliberate intention" exception "merely preserves unto an employee his *common law right of action* to sue for an injury" inflicted by deliberate intention.[63]

Although the *Mandolidis* suit originally was created by common law, it later was codified in West Virginia's Workers' Compensation Act.[64] The Fourth Circuit found this technicality irrelevant, however, since "[i]n no sense does the amendment eradicate the common-law action itself or create a new statutory action supplanting it."[65]

c. The Fifth Circuit

The Fifth Circuit has twice considered whether claims that arise under a state's common law, but that relate to an employee's workmen's compensation claim, "arise under" workmen's compensation laws for purposes of § 1445(c).

First, in *Ehler v. St. Paul Fire & Marine Insurance Co.*, the Fifth Circuit considered an employee's claim against his employer's workmen's compensation carrier to set aside a compromise settlement agreement ("CSA") because of alleged misrepresentations by the carrier's representative.[66] The defendant removed to Federal court, and the plaintiff moved to remand, claiming that § 1445(c) bars removal because his claims arise under the workmen's compensation laws of Texas.[67] The Fifth Circuit disagreed:

> That a [workmen's] compensation law is a premise of the tort does not mean that the tort "arises under" the workmen's compensation laws. Rather, the focus must be on the source of the right of action. Ehler's suit to set aside a CSA for fraud or misrepresentation is a common law action for rescission and cancellation of a contract. While such an action may require interpretation of rights or benefits

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62 *See Arthur v. E.I Dupont de Nemours & Co.*, 58 F.3d 121, 123 (4th Cir. 1995). Cases in which a West Virginia plaintiff seeks to impose liability under the "deliberate intention" exception to immunity afforded to employers carrying workers' compensation insurance are referred to "*Mandolidis*" suits, named after *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907 (W. Va. 1978), "a decision that liberalized the definition of 'deliberate intention.'"

63 *Arthur*, 58 F.3d at 127 (emphasis in original).

64 *Id.* at 124 (noting that the *Mandolidis* action was codified at Section 23-4-2 of the West Virginia Workers' Compensation Code).

65 *Id.*

66 *Ehler v. St. Paul Fire & Marine Ins. Co.*, 66 F.3d 771, 772 (5th Cir. 1995).

67 *Id.*

> under the Texas Workers' Compensation Act, the Act itself does not provide for the specific right of action asserted by Ehler.[68]

Thus, the court concluded "that Ehler's action to set aside his CSA with St. Paul's arises under the Texas common law, not the Texas Workers' Compensation Act," and therefore was removable under § 1445(c).[69]

A few months later in *Patin v. Allied Signal, Inc.*, the Fifth Circuit again examined the removability of a common-law tort against a workmen's compensation carrier. In *Patin*, the plaintiff sued his employer's workmen's compensation insurer claiming breach of the duty of good faith and fair dealing.[70] The Fifth Circuit used the *Patin* case as an opportunity "to resolve an intra-circuit conflict on an important and recurring issue[:] [whether] a covered employee's claims . . . against the employer's workmen's compensation insurance carrier for breach of duty of good faith and fair dealing are . . . immunized against removal to Federal court by . . . § 1445(c)."[71] The court concluded that § 1445(c) does not prohibit removal of a bad-faith claim:

> We conclude that such a claim is not a civil action "arising under" the state's workmen's compensation law; rather, such a claim – basically an insurance malpractice tort – is separate from and independent of a claim for statutory workmen's compensation benefits, regardless of the fact that such a tort claim is "related to" a compensation benefits claim and to the workmen's compensation insurance coverage of the claimant's employer.[72]

d. The Sixth Circuit

In *Thornton v. Denny's Inc*, the Sixth Circuit concluded that a Michigan retaliatory-discharge claim "does not arise under the Michigan workmen's compensation law" because the Michigan workmen's compensation statute "provides neither the mechanisms nor the remedy" for retaliatory-discharge claims.[73] Although the Sixth Circuit did not specifically address the importance of codification in *Thornton*, it later addressed this issue in *Harper v. Autoalliance International, Inc*.[74] In that case, the court explained that while the Michigan workmen's compensation statute "makes it unlawful for an employer to discharge . . . or in any manner discriminate" against an employee filing a workmen's compensation claim, "the Act fails to specify a remedy for retaliation or even a means to enforce the right to be protected from retaliation."[75] The Michigan legislature's incorporation of the anti-retaliation provision into the Michigan workmen's compensation laws "does not mean that a retaliation claim arises under that statute, let alone provides a remedy."[76] Rather, the legislature added that provision in 1981 "merely to codify the judicially-created remedy against wrongful discharge for filing a

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68 *Id.* at 772-73.
69 *Id.*
70 *Patin v. Allied Signal, Inc.*, 77 F.3d 782, 784-85 (5th Cir. 1996). The Patins apparently asserted other claims, too, but the court only discussed the breach of duty of good faith and fair dealing.
71 *Id.* at 784.
72 *Id.*
73 *Thornton v. Denny's Inc.*, No. 92-1368, 992 F.2d 1217 (table), 1993 WL 137078, at *2 (6th Cir. Apr. 29, 1993).
74 *Harper v. Autoalliance Int'l, Inc.*, 392 F.3d 195, 207 (6th Cir. 2004).
75 *Id.* (citations omitted).
76 *Id.* at 204.

workmen's compensation claim previously announced in [Michigan case law.]"[77] In other words, "the common law right to be free from retaliatory discharge does not arise under Michigan's [workmen's] compensation statute, but is merely reflected in it."[78]

2. *Statutory Claims that Relate to Workmen's Compensation Laws "Arise Under" Those Laws*

The Fifth, Eighth, Tenth and Eleventh Circuits hold that where a law proscribing an employer from retaliating against an employee for filing a retaliatory discharge claim is codified in a state statute—regardless of whether that statute is part of the workmen's compensation laws—it "arises under" those laws. In those circuits, claims based on Texas, Missouri, Oklahoma, and Alabama retaliatory-discharge statutes cannot be removed under § 1445(c).

a. The Fifth Circuit

In *Jones v. Roadway Express, Inc.*, the Fifth Circuit held that a Texas statutory retaliatory-discharge claim arises under Texas workmen's compensation laws and is consequently barred from removal by § 1445(c), even though the statute was not codified as part of the Texas Workers' Compensation Act:

> [W]e are satisfied that such a suit arises under the [workmen's] compensation laws of Texas within the meaning of section 1445(c). Article 8307c enables injured workers to exercise their rights under that scheme. The Texas legislature enacted article 8307c to safeguard its [workmen's] compensation scheme . . . In short, were it not for the [workmen's] compensation laws, article 8307c would not exist, as its incorporation and Title 130 of the revised civil statute of Texas covering [workmen's] compensation suggests.[79]

Shortly after the *Jones* decision, the Texas legislature repealed article 8307c and formally incorporated the retaliatory-discharge cause of action into the Texas Workers' Compensation Act. Interestingly, the *Jones* court did not address the fact that other forms of retaliatory discharge existed at common law in Texas long before the enactment of Article 8307c in 1971.[80]

b. The Eighth Circuit

In *Humphrey v. Sequentia, Inc.*, the Eighth Circuit held that a Missouri retaliatory-discharge claim "arises under" Missouri workmen's compensation laws, barring removal under § 1445(c).[81] The *Humphrey* court's decision hinged on the codification of the claim:

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77 *Id.*

78 *Id.*

79 *Jones v. Roadway Express, Inc.*, 931 F.2d 1086, 1092 (5th Cir. 1991).

80 *See, e.g.*, *Galveston County v. Ducie*, 45 S.W. 798 (Tex. 1898) (wrongful discharge claim); *Harkness v. Hutcherson*, 38 S.W. 1120 (Tex. 1897) (same); *Hearne v. Garrett*, 49 Tex. 619 (Tex. 1878) (a servant, wrongfully discharged before the expiration of his term, may sue for damages for such wrongful discharge before the expiration of the term for which he was employed).

81 *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238 (8th Cir. 1995).

> Under the plain meaning of [§ 1445(c)], where a state legislature enacts a provision within its [workmen's] compensation laws and creates a specific right of action, a civil action brought to enforce that right of action is, by definition, a civil action arising under the [workmen's] compensation laws of that state and therefore § 1445(c) applies; under such circumstances the action would be nonremovable, subject only to the complete preemption doctrine.[82]

The Eighth Circuit further cited the claim's codification to distinguish the Seventh Circuit's decision in *Spearman*.[83]

c. The Tenth Circuit

In *Suder v. Blue Circle, Inc.*, the Tenth Circuit followed the Eighth Circuit's decision in *Humphrey* to hold that an Oklahoma retaliatory-discharge claim "arises under" the state's workmen's compensation laws such that § 1445(c) bars its removal.[84] The court distinguished *Spearman*, because in that case "the Illinois law of retaliatory discharge had its genesis, not in any statutory [workmen's] compensation scheme, but rather in the general tort law of the state."[85] Oklahoma, on the other hand, codified its retaliatory-discharge statute as part of the [workmen's] compensation laws.[86]

d. The Eleventh Circuit

In *Reed v. The Heil Co.*, persuaded heavily by Alabama's codification of its retaliatory-discharge prohibition, the Eleventh Circuit held that "claims brought pursuant to Alabama's statute barring retaliation for the filing of [workmen's] compensation claims do arise under that state's [workmen's] compensation laws" and cannot be removed.[87] Although the Sixth Circuit acknowledged that "the Alabama courts and legislature… cannot decide for us whether the retaliatory discharge provision arises under the [workmen's] compensation laws within the meaning of section 1445(c),"[88] it nevertheless found the fact of codification compelling and distinguished the Fourth and Seventh Circuits' decisions in *Arthur* and *Spearman* on that basis.[89]

PART FOUR – THE REMOVABILITY OF NONSUBSCRIBER CLAIMS

I. THE TEXAS WORKMEN'S COMPENSATION SYSTEM PROVIDES FODDER FOR THE DEBATE

Texas has a voluntary workmen's compensation system, permitting both employers and

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82 *Id.* at 1246.
83 *Id.* at 1245.
84 *Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352 (10th Cir. 1997).
85 *Id.*
86 *See* OKLA. STAT. tit. 85 (2005).
87 *Reed v. Heil Co.*, 206 F.3d 1055, 1057 (11th Cir. 2000).
88 *Id.* at 1059.
89 *Id.*

employees to opt out of the state's no-fault workplace-insurance scheme.[90] Although in the early 1900s many states had elective systems,[91] most states now require workmen's compensation insurance, whether through a state-sponsored fund or self-funded insurance. Texas, on the other hand, does not require workmen's compensation insurance coverage for most non-governmental employers. However, employers deciding whether to subscribe "must face a Texas statutory scheme that wields both a stick and a carrot."[92] Texas employers who elect to participate in the Texas workmen's compensation system gain the benefit of no-fault insurance with limited financial liability, as well as general immunity from civil suits.[93] By contrast, employers who opt out must defend themselves against employees' personal-injury actions without the benefit of several common-law defenses.[94] Although many nonsubscribers believe they save money handling employee injuries outside the workmen's compensation system, the Fifth Circuit describes the choice to opt out as "an unattractive one."[95]

The Texas Workers' Compensation Act ("the Act") provides that "[a]n employer who elects to obtain [workmen's compensation insurance] coverage is subject to [the Act]."[96] Nowhere does the Act expressly provide that nonsubscribing employers are likewise "subject to" any of its provisions. The Act does, however, contain provisions applicable to employers who opt out of the coverage. In particular, the Act strips nonsubscribers of three common-law defenses otherwise available, including contributory negligence, assumed risk, and the negligence of a fellow employee.[97] The Act further details particular defenses that are available to the nonsubscribing employer,[98] as well as the standard of proof.[99] These provisions, specifically directed at nonsubscribing employers, fuel the debate whether a nonsubscriber claim in Texas is removable under § 1445(c).

II. TEXAS FEDERAL DISTRICT JUDGES' OPPOSING VIEWS ON WHETHER A NONSUBSCRIBER CLAIM ARISES UNDER WORKMEN'S COMPENSATION LAWS

To date, no Federal appeals court has decided whether a nonsubscriber claim is removable under 28 U.S.C. § 1445(c). Several Texas federal district judges have decided the

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90 *See* TEX. LAB. CODE ANN. § 406.002 (Vernon 1996). Although Oregon now has a compulsory workers' compensation system, it at one time allowed employers to opt out of the system. *See, e.g.*, OR. REV. STAT. § 656.012 (2005); *Colvin v. Weyerhaeuser Co.*, 229 F. Supp. 1022 (D. Or. 1964) (employer "lawfully rejected the provisions and benefits of [the Oregon Workmen's Compensation Act]").

91 *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 160 (1919) (listing laws from Illinois, Iowa, Kansas, Kentucky, New Jersey, Massachusetts, Minnesota, Ohio, Rhode Island, and Wisconsin as allowing election).

92 *Figueroa v. Healthmark Partners*, 125 F. Supp. 2d 209, 210 (S.D. Tex. 2000); *cf.* TEX. LAB. CODE ANN. § 406.034(b) (Vernon 1996) (employees of employers who subscribe to the workers' compensation system likewise can opt out of its provisions).

93 *See* TEX. LAB. CODE ANN. § 406.031 (Vernon 1996) (providing no-fault insurance for injuries arising out of and in the course and scope of employment); *Id.* § 406.034 (exempting employers who subscribe to the Texas workers' compensation system from civil actions by employees covered under the Texas Workers' Compensation Act, subject to certain exceptions).

94 *See id.* § 406.033(a).

95 *See Hook v. Morrison Milling Co.*, 38 F.3d 776, 778 (5th Cir. 1994).

96 TEX. LAB. CODE ANN. § 406.002 (Vernon 1996).

97 *See id.* § 406.033(a).

98 *See id.* § 406.033(c).

99 *See id.* § 406.033(d) ("In an action described by Subsection (a) against an employer who does not have workers' compensation insurance coverage, the plaintiff must prove negligence of the employer or of an agent or servant of the employer acting within the general scope of the agent's or servant's employment.").

issue, but they have reached conflicting conclusions.

Two judges from the Northern District of Texas have held that because a negligence claim exists at common law wholly apart from and independent of the workmen's compensation statutes, it does not arise under the workmen's compensation laws and may be removed.[100] Judges from the Eastern and Southern Districts, on the other hand, reasoned that an employer doing business in a state with workmen's compensation insurance chose to depart from the general common-law tort system. Thus, any personal-injury action by its employee arises under the workmen's compensation laws and cannot be removed.[101]

A. The *Eurine* and *Pyle* Decisions: Nonsubscriber Claims *Can* Be Removed Under § 1445(c)

Judge Sanders first addressed the removability of nonsubscriber claims in an unpublished opinion, *Eurine v. Wyatt Cafeterias, Inc.*[102] In that case, the plaintiff employee "assert[ed] state common law causes of action" against her nonsubscribing employer for injuries she sustained from a slip and fall on the job.[103] Her employer removed the case, arguing that ERISA preempted plaintiff's state-law causes of action.

Interestingly, the parties in *Eurine* did not focus on ERISA preemption during the remand proceedings, but rather debated the applicability of 28 U.S.C. §1445(c).[104] Plaintiff argued that removal was improper under § 1445(c) because the defendant's employee-benefit plan ("Plan") arises under the Texas Workers' Compensation Act. Judge Sanders rejected that contention and held "the Plan is beyond the scope" of § 1445(c) because plaintiff's common-law claims "existed long before the enactment of the first Texas workmen's compensation statute in 1917."[105] Thus, Judge Sanders reasoned, "these causes of action were not created by the workmen's compensation laws and did not arise under them," and "removal of the case is not barred by § 1445(c)."[106]

The court nevertheless remanded the case, finding that plaintiff's claims did not "relate to" the employee-benefit plan and were not preempted by ERISA.[107] Since the defendant removed solely on the basis of the ERISA preemption, the court found remand appropriate.

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100 *See, e.g.*, *Pyle v. Beverly Enterprises-Texas, Inc.*, 826 F. Supp. 206 (N.D. Tex. 1993) (employee's common-law claims against nonsubscribing employer are not brought pursuant to TWCA but rather exist independent of the TWCA); *Eurine v. Wyatt Cafeterias, Inc.*, No. 3-91-0408-H, 1991 WL 207468 (N.D. Tex. Aug. 21, 1991). *But see Dean v. Texas Steel Co.*, 837 F. Supp. 212 (N.D. Tex. 1993) (stating in dicta that "this Court finds that a negligence action brought by an employee against an employer is commenced pursuant to Texas workers' compensation law, even if it [is] not within the workers' compensation system").

101 *See, e.g.*, *Figueroa v. Healthmark Partners*, 125 F. Supp. 2d 209 (S.D. Tex. 2000) (nonsubscribing employer could not remove negligence claims asserted by employee because "plaintiff's action is completely provided for and described in the workers' compensation act."); *Smith v. Tubal-Cain Indus., Inc.*, 196 F. Supp. 2d 421 (E.D. Tex. 2001) (nonsubscriber claim not removable under § 1445(c)); *cf. Foust v. City Ins. Co.*, 704 F. Supp. 752 (S.D. Tex. 1989) (Gee, J., 5th Cir. J., sitting by designation) (nonsubscribing employer who self-funds employee benefit plan does so for sole purpose of complying with Texas Workers' compensation Act).

102 *Eurine v. Wyatt Cafeterias, Inc.*, No. 3-91-0408-H, 1991 WL 207468 (N.D. Tex. Aug. 21, 1991).

103 *Id.* at *1.

104 *Id.*

105 *Id.* at *2.

106 *Id.* at *1.

107 *Id. See also* 29 U.S.C. § 1144(a) (The ERISA preemption provides that its regulations "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.").

Two years after the *Eurine* decision, Judge Fitzwater addressed the removability of nonsubscriber claims in *Pyle v. Beverly Enterprises-Texas, Inc.*[108] In *Pyle*, as in *Eurine*, the plaintiff sued her nonsubscribing employer for negligence after an alleged workplace injury.[109] The *Pyle* defendant removed, alleging that ERISA preempted plaintiff's claims.

The plaintiff's argument in favor of remand differed in *Pyle* from the plaintiff's arguments in *Eurine*, however. In *Eurine*, the plaintiff argued that the defendant's employee benefit plan was a workmen's compensation plan subject to § 1445(c). In *Pyle*, on the other hand, the plaintiff "urge[d] that the TWCA is a state law that regulates insurance, and because such a law is not preempted by ERISA, the [plaintiff's] claims brought pursuant to the TWCA are viable."[110] Judge Fitzwater rejected the plaintiff's argument, noting that the plaintiff's negligence claims "exist independently" of the TWCA:

> This argument is without merit. Pyle's state court petition does not seek recovery pursuant to the TWCA. It clearly alleges common law claims of negligence, intentional infliction of emotional distress and breach of duty of good faith and fair dealing. These are not causes of action that are created by the TWCA; they exist independently. [111]

Accordingly, the Court held that the plaintiff's claims "are not brought pursuant to the TWCA" and denied her motion to remand.[112]

B. The *Figueroa* and *Smith* Decisions: Nonsubscriber Claims Cannot Be Removed Under § 1445(c)

Judges from the Eastern and Southern Districts rejected *Eurine* and *Pyle* and held that nonsubscriber claims arise under the workmen's compensation laws of Texas, and therefore cannot be removed under § 1445(c).

First Judge Kent held in *Figueroa v. Healthmark Partners*, 125 F. Supp. 2d 209 (S.D. Tex. 2000) that a nonsubscriber claim "is completely provided for and described in the Workmen's Compensation Act," and therefore arises under the Act.[113] In *Figueroa*, as in *Eurine* and *Pyle*, a plaintiff filed a personal-injury action in state court against her nonsubscribing employer, and the employer removed. However, unlike the *Eurine* and *Pyle* defendants who removed based on the ERISA preemption, the *Figueroa* defendant removed on the basis of diversity jurisdiction.[114] Thus, the only question presented was "whether or not this case arises under [workmen's] compensation laws of Texas."[115]

After holding that § 1445(c) barred removal, Judge Kent noted the conflicting *Eurine* and

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108 *See Pyle v. Beverly Enterprises-Texas, Inc.*, 826 F. Supp. 206 (N.D. Tex. 1993).

109 *Id.* at 208. Plaintiff also asserted claims for intentional infliction of emotional distress and breach of the duty of good faith and fair dealing.

110 *Id.* at 209.

111 *Id.*

112 *Id.*

113 *Id.* at 211 (citing *Britt v. Suckle*, 453 F. Supp. 987, 993 (E.D. Tex. 1978)); *cf. Sbrusch v. Dow Chemical Co.*, 124 F. Supp. 2d 1090 (S.D. Tex.) (claim for exemplary damages by heirs of deceased employees under TEX. LAB. CODE § 408.001(b) arises under workers' compensation laws of Texas for purposes of § 1445(c)).

114 *See Figueroa v. Healthmark Partners*, 125 F. Supp. 2d 209 (S.D. Tex. 2000); 28 U.S.C. § 1332.

115 *Figueroa*, 125 F. Supp. 2d at 210.

Pyle decisions, but emphasized that the disagreement could not be resolved by review of the remand order: "The Court respectfully disagrees with the decisions of its sister courts that are to the contrary. [F]urthermore, pursuant to the clear language of 28 U.S.C. § 1447(d), this Order of Remand is unreviewable, by appeal or otherwise."[116]

Judge Cobb of the Eastern District employed similar reasoning a few months later in *Smith v. Tubal-Cain Industries, Inc.*.[117] In *Smith*, the plaintiff filed a nonsubscriber claim in state court, and the employer defendant removed on the basis of alleged ERISA preemption.[118] Smith's employer had required him to sign a pre-injury waiver, in which Smith agreed to waive certain statutory causes of action and arbitrate any disputes, in exchange for eligibility under the employer's employee benefit plan.[119] The employer argued that because the plaintiff's rights could only be determined by analyzing the ERISA plan, ERISA preempted the plaintiff's state-law causes of actions.

Judge Cobb rejected the ERISA preemption argument, noting that "ERISA was enacted to protect employees, not strip them of numerous rights." In dicta, he noted that "[a]nother reason that this case should be remanded is the application of 28 U.S.C. § 1445(c)."[120]

In his Memorandum Opinion, Judge Cobb cited two bases for his decision that § 1445(c) bars removal of nonsubscriber claims. First, citing Judge Means' "well reasoned opinion" in *Dean v. Texas Steel Co.*, he agreed that "[n]egligence actions against nonsubscribing employers are expressly contemplated by Texas [workmen's] compensation law; indeed, several common-law defenses have been eliminated by statute."[121] Second, citing *Figueroa* and *Foust v. City Ins. Co.*, Judge Cobb agreed with Judge Gee's belief that irrespective of whether an employer chooses to become part of the Texas workmen's compensation system, it nonetheless is required to comply with the workmen's compensation law.[122] Thus, "a negligence action brought by an employee against an employer is commenced pursuant to Texas [workmen's] compensation law, even if it is not within the [workmen's] compensation system."[123]

C. The *Hagendorf* Decision: Nonsubscriber Claims Arise Under the Texas Workers' Compensation Act

The only Texas Federal district in which no judge has addressed § 1445(c)'s application to a nonsubscriber claim is the Western District. However, in *Illinois National Insurance Co. v. Hagendorf Construction Co.*, Judge Rodriguez analyzed the *Figuero* and *Smith* decisions, albeit in the context of an insurance dispute instead of removal.[124]

In *Hagendorf*, an insurance company filed a declaratory-judgment action against its insured, a Texas nonsubscriber, seeking a declaration that it owed no duty to defend or indemnify the nonsubscriber in an employee's personal-injury lawsuit. The insurer argued that a "Workers' Compensation" exclusion in the policy barred coverage for nonsubscriber claims: "This insurance does not apply to… [a]ny obligation for which the insured or the insured's

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116 *Id.* at 212 (citations omitted).
117 *Smith v. Tubal-Cain Indus., Inc.*, 196 F. Supp. 2d 421 (E.D. Tex. 2001).
118 *Id.* at 422.
119 *Id.*
120 *Id.* at 423.
121 *Id.* (citing *Dean v. Texas Steel Co.*, 837 F. Supp. 212 (N.D. Tex. 1993).
122 *Id.* at 423 (citing *Figueroa*, 125 F. Supp. 2d 209; *Foust v. City Ins. Co.*, 704 F. Supp. 752 (W.D. Tex. 1989)).
123 *Smith*, 196 F. Supp. 2d at 423 (citing *Dean*, 837 F. Supp. at 214).
124 *Illinois Nat'l Ins. Co. v. Hagendorf Constr. Co.*, 337 F. Supp. 2d 902, 905 (W.D. Tex. 2004).

insurer may be held liable under any workers compensation, disability benefits or unemployment compensation law or any similar law."[125] While the contractual language at issue in *Hagendorf* ("***liable under*** any workers' compensation… law") differs from the statutory language of § 1445(c) ("***arising under*** the workmen's compensation laws"), Judge Rodriguez cited *Figueroa* and *Smith* to support his conclusion that the exclusion barred coverage: "[W]hen an employee . . . brings a negligence suit against his nonsubscriber employer, such a suit arises under the Texas Workers' Compensation Act."[126] Further, by using the words "arises under" in his holding, Judge Rodriguez effectively equated the contractual language of the insurance policy with the statutory language of § 1445(c).

Until the Fifth Circuit finally resolves the conflict between the various Texas district judges' decisions, a Texas nonsubscriber's ability to remove a case will depend primarily upon which district judge decides the motion to remand. Because orders ***granting*** motions to remand typically are not subject to review,[127] the issue likely will not reach the Fifth Circuit until a plaintiff employee appeals an order denying remand. Of course, many nonsubscriber claims—such as minor slip-and-fall claims—do not involve high enough damages to satisfy the threshold amount in controversy to create Federal jurisdiction, much less justify the expense of an appeal.

III. THE BETTER REASONED VIEW: NONSUBSCRIBER CLAIMS DO NOT ARISE UNDER THE TEXAS WORKMEN'S COMPENSATION LAWS

A. The Texas Workmen's Compensation Statutes Did Not Create Nonsubscriber Claims

In analyzing § 1445(c), the Fifth Circuit correctly observed, "[t]hat a [workmen's] compensation law is a premise of the tort does not mean that the tort 'arises under' the [workmen's] compensation laws."[128] Rather, "the focus must be on the source of the right of action."[129]

Texas common law is the source of a nonsubscriber employee's right of action because a nonsubscriber employee's remedy "is governed by principles of common-law negligence."[130] Nonsubscriber claims are simply common-law negligence claims that predate Texas' workmen's compensation system. Like the *Mandolidis* action in *Arthur*,[131] the claim for rescission in *Patin*,[132] the bad-faith claim in *Ehler*,[133] and the *Kelsay* tort in *Spearman*,[134] negligence claims

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125 *Id.* at 904.

126 *Id.* at 905 (holding that negligence claim against nonsubscribing employer is an obligation for which the employer may be held liable under a workers' compensation law, and employer's insurer had no duty to defend or indemnify insurer under policy containing workers' compensation exclusion).

127 *See* 28 U.S.C. § 1447(d) (except for civil-rights cases, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise").

128 *Ehler v. St. Paul Fire & Marine Ins. Co.*, 66 F.3d 771, 772-73 (citations omitted).

129 *Id.* at 773.

130 *See* In re Autotainment Partners Ltd. Partnership, 183 S.W.3d 532, 537 (Tex. App. 2006); *see also Skiles v. Jack In The Box, Inc.*, 170 S.W.3d 173, 179 (Tex. App. 2005) ("The responsibility for [plaintiff's] work-related injuries is governed by principles of common-law negligence because Jack-in-the-Box is a nonsubscriber to workers' compensation.").

131 *Arthur v. E.I Dupont de Nemours & Co.*, 58 F.3d 121 (4th Cir. 1995).

132 *Patin v. Allied Signal, Inc.*, 77 F.3d 782 (5th Cir. 1996).

133 *Ehler*, 66 F.3d at 771.

134 *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722 (7th Cir. 1994).

existed in Texas long before the Texas legislature enacted the Texas Workers' Compensation Act in 1917:[135] "Any liability for the state common laws asserted here existed long before the enactment of the first Texas [workmen's] compensation statute in 1917. Thus, these causes of action were not created by the [workmen's] compensation laws and do not arise under them."[136]

Even the United States Supreme Court has described the Texas workmen's compensation system as returning nonsubscribers to the common law: "Employers who do not become subscribers are subject ***as before*** to suits for damages based on negligence for injuries to employes [sic] or for death resulting therefrom…"[137]

Further, the language of the statute itself similarly suggests that it merely returns to the common law those who choose not to participate. For example, just as employers are given the option whether to subscribe, employees of companies that subscribe to the workmen's compensation system likewise are allowed to opt out: "An employee who desires ***to retain the common-law right of action*** to recover damages for personal injuries or death shall notify the employer in writing that the employee waives coverage under this subtitle and ***retains all rights of action under common law.***"[138] Just as an employee who elects not to participate "retains" his common-law rights, an employer who elects not to participate "retains" its common-law rights too, albeit without certain defenses that would otherwise have been available under the common law.[139]

B. Nonsubscriber Claims Do Not Necessarily Depend On Resolution of a Substantial Question of Workmen's Compensation Law

The conclusion that workmen's compensation laws did not create nonsubscriber claims does not end the inquiry. Under *Franchise Tax Board*,[140] a civil action may still "arise under" the workmen's compensation laws if "plaintiff's right to relief necessarily depends upon resolution of a substantial question of workmen's compensation law."[141]

A nonsubscriber employee's right to relief does not require resolution of any "substantial" question of workmen's compensation laws. Stated differently, the plaintiff would not be obliged to establish "both the correctness and the applicability" of any workmen's compensation law.[142] At most, a court may be required to refer to the workmen's compensation laws to determine which defenses are available to the employer.

None of the traditional workmen's compensation issues are present in nonsubscriber claims. For example, a court hearing a nonsubscriber claim would not need to review the administrative process required for workmen's compensation claims; the wage and/or medical benefits available under the workmen's compensation system; or whether the injury occurred in

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135 *See, e.g.*, *Postal Tel. Cable Co. v. Coote*, 57 S.W. 912 (Tex. Civ. App. 1900); *Hillsboro Oil Co. v. White*, 54 S.W. 432 (Tex. Civ. App. 1899).

136 *Eurine v. Wyatt Cafeterias, Inc.*, No. 3-91-0408-H, 1991 WL 207468, at *2 (N.D. Tex. Aug. 21, 1991).

137 *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 156 (1919) (emphasis added).

138 TEX. LAB. CODE ANN. § 406.034(b) (Vernon 1996) (emphasis added). The same statute further prohibits an employer from requiring "an employee ***to retain common-law rights*** under this section as a condition of employment." *Id.* § 406.034(c) (emphasis added).

139 *See id.* § 406.033(a).

140 *Franchise Tax Board v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9 (1983).

141 *Harper v. Autoalliance Int'l, Inc.*, 392 F.3d 195, 202-03 (6th Cir. 2004).

142 *See Franchise Tax Board*, 463 U.S. at 9 (citing PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 889 (2d ed. 1973)).

the scope of the employee's employment, as required for a traditional workmen's compensation claim.

The fact that a state may, through legislation, change the definition of a common-law tort does not change the fact that the tort derived from common law, "as rules of conduct… are subject to legislative modification."[143] Simply stated, although the Texas Workers' Compensation Act may be a "jumping off point" for a nonsubscriber claim, that fact alone does not convert it into a claim under the workmen's compensation laws.[144]

C. The Texas Workers' Compensation Act's Deprivation of Certain Common-Law Defenses Does Not Mean the Action "Arises Under" the Workmen's Compensation Laws

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, the Supreme Court reiterated that "a Federal court does not have original ["arising under"] jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that Federal law deprives the defendant of a defense he may raise."[145] In *Eurine v. Wyatt Cafeterias, Inc.*, Judge Sanders correctly applied this principle to nonsubscriber claims to hold that "[t]he fact that the [workmen's] compensation statute here deprives employers of certain defenses to negligence claims does not require a different conclusion."[146] Just as a defense created by a Federal statute does not transform a controversy into a Federal dispute, a defense created (or removed) by a state workmen's compensation statute does not transform a common-law claim into a claim arising under that statute:[147] "[T]he fact that the TWCA deprives employers of certain defenses to negligence claims does not mean that claims by employees against nonsubscribing employers are brought pursuant to the TWCA." [148] Nevertheless, courts that remand Texas nonsubscriber claims under § 1445(c) often appear to be, at least in part, persuaded by the Act's removal of common-law defenses.[149]

IV. COMMON-LAW NEGLIGENCE IS NOT A "WORKMEN'S COMPENSATION LAW"

Section 1445(c) does not bar removal of nonsubscriber claims because negligence does not fit the 1950s definition of "workmen's compensation laws."

Unlike a workmen's compensation law, negligence is a fault-based tort with unlimited damages. Negligence claims are not administered under a regime of simplified or expedited procedures, and they are—and always have been—typically litigated in courts. Further, negligence is not integrally related to the workmen's compensation laws, in that none of those laws' safeguards for workers would be compromised by allowing litigation of negligence claims in Federal court. Finally, there are no published studies showing that in 1958, negligence claims

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143 *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 163 (1919).

144 *See Spearman v. Exxon Coal USA Inc.*, 16 F.3d 722, 725 (7th Cir. 1994) (many Federal statutes serve as the "jumping-off point for state claims without converting these into claims under Federal law").

145 *See Franchise Tax Board*, 463 U.S. at 10.

146 *Eurine v. Wyatt Cafeterias, Inc.*, No. 3-91-0408-H, 1991 WL 207468, at *2 (N.D. Tex. Aug. 21, 1991).

147 *See, e.g.*, *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392-93 (1987) (Federal defenses do not provide a basis for removal); *Humphrey v. Sequentia, Inc.*, 58 F.3d 1238, 1244 (8th Cir. 1995) (a defendant may not inject a Federal question into a state-law claim and thereby transform it into one "arising under" Federal law).

148 *Pyle v. Beverly Enterprises-Texas, Inc.*, 826 F. Supp. 206, 209 (N.D. Tex. 1993).

149 *See, e.g.*, *Figueroa v. Healthmark Partners*, 125 F. Supp. 2d 209 (S.D. Tex. 2000).

clogged the Federal district court dockets. In sum, negligence claims—whether asserted against a nonsubscribing employer or any other third party—bear all the characteristics of traditional common-law claims and are in no way unique to, or critical to, a state's workmen's compensation system.

V. ALLOWING REMOVAL OF NONSUBSCRIBER CLAIMS IS CONSISTENT WITH THE POLICIES BEHIND § 1445(C)

Although at least one court has suggested that prohibiting diversity cases of any kind furthers § 1445(c)'s goal of lessening the burden on Federal courts,[150] there is no evidence that in 1958, Congress considered nonsubscriber claims part of the congestion problem. Congress designed § 1445(c) to address the proliferation of pure (traditional) workmen's compensation cases, which are better handled exclusively within the states' own regulatory system: "[T]he primary purpose of section 1445(c)… was to stop the removal of compensation cases that were jamming the dockets of busy Federal courts in the handful of states where these claims could be litigated in the courts."[151]

The litigation of nonsubscriber claims in federal court does not undermine the state's no-fault summary-proceedings, since claims against nonsubscribing employers do not qualify for administration under that system. Torts that have "no relationship to providing no-fault benefits and play[] no role in promoting the just and smooth operation of the [workmen's] compensation system" are not "workmen's compensation laws," as that phrase was intended in 1958.[152]

Finally, litigating nonsubscriber claims between diverse parties does not undermine the rights afforded employees under workmen's compensation laws. As the Seventh Circuit pointed out, "tort litigation in Federal court is no more cumbersome than tort litigation in state court."[153]

VI. CONGRESS'S CHOICE OF LANGUAGE SUPPORTS THE CONCLUSION THAT CONGRESS DID NOT INTEND TO BAR REMOVAL OF NONSUBSCRIBER CLAIMS

Finally, Congress's ability to carefully choose how it words a statute should not be lost in the methodical dissection and analysis of a statute. Congress deliberately limited the § 1445(c) prohibition against removal to cases "arising under the workmen's compensation laws." Its specific word choice suggests that Congress did not intend to include all claims involving or somehow relating to an employee's claim for a workplace injury. Had Congress intended to bar removal of ***all cases*** involving workplace injuries, Congress could have crafted § 1445(c) to apply to all cases "arising out of a workplace injury," "relating to an injured employee's claim for compensation," or "by an employee injured in the course and scope of employment."

By limiting the prohibition against removal to cases "arising under workmen's compensation laws," Congress narrowed the prohibition to particular cases involving particular state-created administrative schemes.

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150 *Reed v. Heil Co.*, 206 F.3d 1055, 1060 n.3 (11th Cir. 2000).

151 S. REP. NO. 85-1830 (1978), *as reprinted in* 1958 U.S.C.C.A.N. 3105-06; *see also Arthur v. E.I Dupont de Nemours & Co.*, 58 F.3d 121, 128 (4th Cir. 1995).

152 *Arthur*, 58 F.3d at 128.

153 *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722, 724 (7th Cir. 1994), *cert. denied*, 513 U.S. 1955 (1994) (citations omitted).

VII. CONCLUSION

Section 1445(c) does not bar the removal of nonsubscriber claims for three reasons. First, no matter who the defendant, negligence is a creature of common law, even if memorialized in a state's workmen's compensation laws. It therefore "arises under" the common law because it is neither created by nor substantially related to workmen's compensation laws.

Second, nonsubscriber claims are not "workmen's compensation laws." In 1958, "workmen's compensation laws" signified a statutorily created insurance system that allows employees injured on the job to receive fixed benefits under summary proceedings, without regard to fault. Negligence, on the other hand, is typically litigated in courts with no procedural safeguards for employees, and fault is a primary component of those claims. Furthermore, damages are potentially unlimited, not "fixed" as in traditional workmen's compensation claims.

Third, Congress was trying to fix a very specific problem in 1958 with § 1445(c): the congestion of compensation cases in Federal courts. There is no evidence that common-law claims against employers were part of the congestion problem. Moreover, had Congress intended to bar removal of all work-related claims, it could have phrased § 1445(c) more broadly.

In sum, negligence cases against nonsubscribing employers do not arise under the workmen's compensation laws of a state. Consequently, § 1445(c) does not bar removal of negligence claims against nonsubscribing employers.