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THE STEELWORKERS' TRILOGY AND THE COAL MINERS' TRILOGY: IS DISCRIMINATION AN EXCEPTION TO THE RULE?

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I. INTRODUCTION.................................................... 737

II. THE COAL MINERS' TRILOGY.................................. 740
A. Anti-Discrimination/Retaliation Policy .............. 740
B. Wiggins v. Eastern Associated Coal Corp. ........ 742
C. Davis v. Kitt Energy Corp. ............................ 743
D. Collins v. Elkay Mining Co ........................... 746
E. The Effect of the Trilogy............................... 747

III. FEDERAL PREEMPTION AND THE STEELWORKERS'
     TRILOGY............................................................ 748
A. Scope of Federal Labor Law Preemption ............. 748
B. Federal Labor Law.......................................... 755
C. Preemption as a Basis for Jurisdiction ............. 761

IV. DISCRIMINATION AS AN EXCEPTION TO THE RULE ...... 765
A. Impact of the West Virginia Trilogy on Enforce-
    ment Efforts................................................. 765
B. Impact of the Trilogy on Collective Bargaining.. 769
C. Practical Forum Considerations........................ 771
   1. Removal of a Davis Claim............................ 771
   2. Removal of a Wiggins Claim.......................... 772

V. CONCLUSION...................................................... 773

I. INTRODUCTION

For as long as most union miners can remember, the National Bituminous Coal Wage Agreement1 has included health and safety

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1. The various coal wage agreements will be collectively referred to as the Contract, Agreement or Coal Wage Agreement throughout this article.
provisions negotiated with other terms and conditions of employment. One provision in Article III of the Agreement provides for individual safety rights which protect miners from good faith work refusals based upon safety concerns. Another Article III provision creates a safety committee at each mine. The committee's job is to serve as liaison with the employer-operator on health and safety matters. Included in the powers given to the mine safety committee are the rights to inspect the mine—and, when the committee believes an imminent danger exists, to recommend withdrawal of all miners from the area involved. The operator must then follow the recommendation. Although individual safety rights in the Agreement in some cases overlap rights under state and federal law, the mine safety committee's power to exercise collective control over other miners flows exclusively from the Contract.

The Contract gives the employer a quid pro quo for the union safety committee's withdrawal power: a contractually-insured restraint of that power. An employer may remove from the mine safety committee any member or members who act arbitrarily or capriciously in closing an area of the mine. Under the Agreement, dis-

2. See, e.g., National Bituminous Coal Wage Agreement of 1988, Article III, section (d). Similar provisions have been included in the coal wage agreements since at least 1968. See generally Gateway Coal Co. v. UMWA, 414 U.S. 368, 380 n.10 (1974).

3. The current version of the contract states:

The Mine Health and Safety Committee may inspect any portion of a mine and surface installations, dams or waste impoundments and gob piles connected therewith. If the Committee believes conditions found endanger the lives and bodies of the Employees, it shall report its findings and recommendations to the Employer. In those special instances where the Committee believes that an imminent danger exists and the Committee recommends that the Employer remove all Employees from the involved area, the Employer is required to follow the Committee's recommendation and remove the Employees from the involved area immediately.

National Bituminous Coal Wage Agreement of 1988, Article III, section (d)(3).


5. Article III, section (d)(5) of the current Agreement provides:

If the Mine Health and Safety Committee in closing down an area of the mine acts arbitrarily or capriciously, a member or members of such Committee may be removed from the Committee. An Employer seeking to remove a Committee member shall so notify the affected Committee member and the other members of the Mine Health and Safety Committee. If the Committee objects to such removal, the matter shall be submitted directly to arbitration within 15 days. If the other members of the Committee so determine, the affected member
In a recent trilogy of decisions, the West Virginia Supreme Court of Appeals examined some of the issues which may arise when individual miners or mine safety committees file discrimination or retaliation claims against employers who have taken action against miners as a result of safety-related activities. These claims, filed under the anti-discrimination provisions contained in the federal and state mine safety acts, are often brought after a miner has unsuccessfully arbitrated a grievance under the Coal Wage Agreement. The trilogy provides an appropriate framework for comparing express statutory policy, which protects coal miners from discriminatory acts, and traditional federal labor law preemption principles which provide arbitration as the exclusive remedy for breaches of the collective bargaining agreement.

As a practical matter, the West Virginia trilogy of cases may do little more than make mine safety committees somewhat of a "sacred cow" and give miners an additional "bite at the apple." It may also serve to expose coal operators to additional liability for damages, including punitive damages and awards for emotional distress and other noneconomic injuries. As a matter of legal policy, however, the impact of the cases seems greater. The cases raise the question of whether the interest in protecting miners from discrimination when they exercise safety rights is sufficient to overcome the preemption doctrine and to thereby allow private litigation, which then requires an examination and interpretation of the collective bargaining agreement.

This article will examine the recent West Virginia decisions and attempt to define the current relationship between safety and labor

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7. This article will use the term discrimination synonymously with retaliation, as retaliation is generally considered a form of discrimination. See State ex rel. Perry v. Miller, 300 S.E.2d 622 (W. Va. 1983); UMWA v. Miller, 291 S.E.2d 673 (W. Va. 1982).
relations in West Virginia. It will examine the preemption doctrine as it applies to federal labor law, the policy considerations underlying it, the level of deference normally given to federal labor law in this area and possible exceptions to the rule. Finally, it will consider whether the West Virginia court articulated a sufficient explanation for refusing to defer to the arbitration process.

II. THE COAL MINERS' TRILOGY

A. Anti-Discrimination/Retaliation Policy

There are strong public policies in the United States and in West Virginia favoring safe coal mines. The ability of workers to be free from retaliation for safety-related complaints made in furtherance of these policies is of unquestionable value. Both the Federal Mine Safety and Health Act of 1977, as amended (MSHA), and the West Virginia Mine Safety Act (collectively, the Acts) contain provisions prohibiting discrimination against miners or their representatives who have made or are believed to have made safety-related complaints, filed proceedings under the mine laws or testified in safety-related proceedings.

Courts and agencies charged with the administration of the anti-discrimination laws, both federal and state, have steadfastly protected coal miners from acts of discrimination arising out of individual and, to some extent, collective safety concerns. For example, mine safety laws give miners' representatives the right to accompany inspectors on walkaround inspections of the mine. In interpreting those provisions, courts and agencies have said it is unlawful discrimination to refuse to pay representatives if they miss scheduled


11. See, e.g., Consolidation Coal Co. v. FMSHRC, 795 F.2d 364 (4th Cir. 1986); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Robinette v. United Castle Coal Co., 2 FMSHRC 700 (1980); Davis, 365 S.E.2d 82.
work time. Similarly, miners who spend time testifying in official proceedings are entitled both to compensation from the operator for the time spent testifying and to the witness fees obtained from the tribunal.

The discrimination cases decided under mine safety laws prior to the West Virginia trilogy generally dealt with claims of discrimination arising directly from mine safety act protections. For example, a miner's complaints or testimony concerning unsafe or potentially dangerous conditions in the mine fit squarely within the corners of the anti-discrimination statutes. A miner's refusal to work in conditions reasonably believed to be dangerous or unsafe to himself or another miner was considered to be protected activity under the Acts, even though the Acts do not specifically grant a miner the right to refuse to work. The initial focus in these cases was on whether the miner was engaged in protected activity under the Acts. Where the activity was found to be outside the scope of the Acts, the discrimination claim was rejected.

While the Coal Wage Agreement also contains a personal safety rights provision, it was unnecessary in the past to look at the Agree-

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12. UMWA v. FMSHRC, 671 F.2d 615 (D.C. Cir.), cert. denied, 459 U.S. 927 (1982); Magma Copper Co. v. Secretary of Labor, 645 F.2d 694 (9th Cir. 1981); Miller, 291 S.E.2d 673; but see Colehagie v. Consolidation Coal Co., 5 FMSHRC 1469, reprinted in 3 MSHC (BNA) 1089 (1983); Beaver v. North America Coal Corp., reprinted in 2 MSHC (BNA) 1417 (1981) (miners who are not scheduled to work do not have to be paid).
15. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). West Virginia law specifically authorizes miners to refuse to operate unsafe equipment and restricts an employer's ability to take action against employees who do so in cases where the miner's representative or the director of the Department of Energy concludes that the miner acted in bad faith. W. Va. CODE § 22A-2-71 (1985). In 1987 a separate section was added to the West Virginia Act giving miners the statutory right to refuse to work in an area or under conditions which the miner believes to be unsafe. W. Va. CODE § 22A-2-71a (1988 Supp.). The new section contains no good faith requirement, although one may well be implied.
16. See, e.g., Brock v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987); Southern Ohio Coal Co. v. FMSHRC, 716 F.2d 1105 (6th Cir. 1983); Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Marshall, 663 F.2d 1211; but see Harmon v. Consolidation Coal Co., 9 FMSHRC 549, reprinted in 4 MSHC (BNA) 1326 (1987) (holding that being a member of the Mine Safety Committee is protected activity, but exceeding legitimate Article III powers as a committee member is not); cf. Johnson v. Scotts Branch Mine, 9 FMSHRC 1851, reprinted in 4 MSHC (BNA) 1631 (1987).
ment to determine whether unlawful anti-discrimination had occurred, because the source of the right upon which the discrimination action was based was the anti-discrimination statute and not the Coal Wage Agreement. Moreover, anti-discrimination statutes, providing for a variety of remedies which satisfactorily resolve most cases, fostered a fairly well-defined body of discrimination law separate and apart from grievances and arbitration decisions arising out of the Coal Wage Agreement. Although miners did file grievances and take them to arbitration in some cases, analysis of arbitration and contract claims remained distinct from analysis of discrimination claims because the sources of contract claims and of discrimination claims differed. Furthermore, because the arbitration and administrative proceedings produced faster results than courts, few miners attempted to bring civil actions to remedy discrimination claims. The trilogy cases may change that pattern.

B. Wiggins v. Eastern Associated Coal Corp.

Compensation for lost wages, costs and attorneys' fees is available to successful miners under the federal and state anti-discrimination statutes. However, in the first of the trilogy cases, Wiggins v. Eastern Associated Coal Corp., the West Virginia high court found that the anti-discrimination statutes do not provide the exclusive remedy.

In Wiggins, a foreman contended that he shut down a roof bolting machine to correct a ventilation problem. He alleged in a circuit court action for retaliatory discharge that he was (1) reprimanded and transferred for his actions; (2) verbally reprimanded a few days

17. Admittedly, a grievance proceeding resulting in a decision favorable to the miners may resolve some cases without further proceedings. However, as will be shown, the trilogy cases raise the stakes and may result in additional proceedings even if the miner wins in arbitration. The Federal Mine Safety and Health Review Commission (FMSHRC) has left to ALJ discretion the admissibility and weight to be accorded arbitration findings in discrimination actions brought under MSHA. Marshall, 663 F.2d at 1218-19.

18. Id. at 1219.

19. A discussion of the res judicata or collateral estoppel implications of prior proceedings is beyond the scope of this article.

later for refusing to operate a faulty piece of equipment; and (3) fired a week later.

The circuit court dismissed the foreman’s complaint, finding that the anti-discrimination statute provided the exclusive remedy and that the foreman had failed to exhaust his administrative remedies. The foreman had filed complaints under both the state and anti-discrimination statutes. The MSHA claim was decided in his favor and resulted in an award of back pay, attorneys’ fees and costs.

On appeal from the circuit court’s dismissal, the West Virginia Supreme Court of Appeals reversed. It held that a miner who brings a successful discrimination claim in the administrative arena, federal or state, may also bring a common law action for retaliatory discharge and recover damages, such as punitive and compensatory damages, unavailable under the administrative scheme. In doing so, the court rejected the notion that the administrative remedies were adequate and found that statutory remedies were meant to ensure the reporting of violations while civil actions would provide for full compensation.\(^2\)

Two justices dissented, claiming that the majority distorted the appropriate exclusivity test. In essence, they charged, the majority opinion created a vehicle for double recovery.\(^2\\)

C. *Davis v. Kitt Energy Corp.*

In the second of the trilogy cases, *Davis v. Kitt Energy Corp.*,\(^2\) a different but more difficult question arose. A broken water main had caused an accumulation of water on a track in the Kitt mine at which Davis was a safety committeeman. After observing the water on the track, a designated escapeway, Davis demanded withdrawal of miners who needed to pass through the water to reach

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21. The *Wiggins* court found that the state and federal anti-discrimination schemes are virtually identical thus making it unnecessary for miners to seek redress in both forums in order to exhaust administrative remedies. The court refused to consider whether exhaustion of administrative remedies, through either a state or federal forum, should be required before allowing civil actions to be filed. *Id.* That question was later answered, however, in the negative.

22. *Id.* at 749.

their work area. He made this withdrawal order under powers granted solely by the Coal Wage Agreement. The mine superintendent objected to withdrawal, claiming that the area was passable and that there was no imminent danger. Davis invoked Article III(d) of the Agreement and insisted that miners be withdrawn. The superintendent complied with the demand and federal mine inspectors were summoned to the mine. They inspected the area and issued a citation for the presence of water on the escapeway, but did not cite an imminent danger requiring the withdrawal of miners. After the inspection the superintendent ordered the affected miners to return to work. Davis again invoked Article III(d) and demanded their withdrawal. The superintendent again complied and the miners were not returned until the water was cleared. Later in the day Davis was advised that the company felt his withdrawal demands were arbitrary and capricious and he was being removed from the safety committee under the applicable Article III provisions.

Davis’ removal was submitted to arbitration pursuant to the Agreement and the arbitrator upheld the company’s position, finding Davis had acted arbitrarily and capriciously. Two weeks after the arbitrator announced his decision, Davis filed a petition with the West Virginia Coal Mine Safety Board of Appeals under the state anti-discrimination statute claiming that his removal from the safety committee was in retaliation for notifying mine management of an alleged violation or danger. A majority of that Board found that the withdrawal demand was protected activity under the state anti-discrimination statute, that removal of a safety committee man for protected activity was unlawful discrimination under the statute, and that the water made an escapeway impassable in violation of state mine safety law. The Board ordered Davis reinstated to the safety committee with all accrued benefits restored.

Kitt refused to comply with the Board’s reinstatement order, so Davis brought suit in state circuit court to enforce the order. Kitt cross-claimed for enforcement of the prior arbitration award. The circuit court concluded that Davis was acting exclusively under au-

thority of the Coal Wage Agreement when he demanded the withdrawal of miners, and therefore, his remedy was controlled by that Agreement. The state Supreme Court of Appeals disagreed and reversed.

Initially the state high court discussed the "strong public policy to insure the safety of personnel employed in mines throughout" West Virginia.\(^{25}\) That policy, the court observed, would be jeopardized if employers were allowed to retaliate against miners who participated in safety enforcement.\(^{26}\)

However, in analyzing whether Davis was entitled to the protection of the anti-discrimination statute for his contractually-based withdrawal demand, the court went beyond West Virginia public policy or state mining law. In frank terms, the court acknowledged that Davis' retaliation action could not be separated from contractual rights.

We agree with Mr. Davis that mine safety is regulated by a dual system of rules which substantially overlap. Kitt asks us to divide a miner's world into separate and mutually exclusive spheres, so that protection against discrimination is available only where the miner has authority to act under the Mine Safety Act. This we are unable to do. We cannot simply ignore the reality of the workplace. Miners bargain for and secure valuable rights which are memorialized in the wage agreement. These rights do not exist in a vacuum, but are ultimately bound up with rights arising under the Mine Safety Act.

The right at issue here, that of a safety committeeman to demand withdrawal of miners, is unquestionably one of contract. Yet, while the right is not specifically recognized by the Mine Safety Act, it invariably is triggered by safety conditions which are regulated by the Act. The wage agreement does not detail what safety violations will support a withdrawal and these conditions must be determined by reference to the Mine Safety Act. Similarly, the reasonableness of the exercise of the right is determined by reference to the hazard covered in the Mine Safety Act.

Furthermore, the right to discipline is also drawn into the Mine Safety Act by the discrimination statute. . . .\(^{27}\)

The court went on to note that it saw the arbitrary and capricious standard under the contract as a "mirror image" of the standard

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25. \textit{Davis}, 365 S.E.2d at 86.
26. \textit{Id.} at 86.
27. \textit{Id.} at 87.
used to determine reasonable good faith in discrimination cases under the federal statute.\textsuperscript{28}

Anticipating a claim that the Coal Wage Agreement provided the exclusive dispute resolution mechanism, the court rejected the contention out of hand. It cited United States Supreme Court decisions for the proposition that rights arising from a collective bargaining agreement cannot supplant or diminish statutory rights.\textsuperscript{29} The \textit{Davis} court also rejected a claim that the prior arbitration decision in favor of Kitt precluded further litigation under the anti-discrimination statute. Again focusing on United States Supreme Court authority dealing with statutory rights, the court concluded that the arbitration decision should be considered, but the weight given to the arbitration decision was left to the administrative board below.\textsuperscript{30}

Two dissenting justices argued that the arbitration mechanism was exclusive and deprived the Coal Mine Health and Safety Board of Appeals of jurisdiction to hear the discrimination charge. They also attacked the majority's public policy analysis and maintained that the discrimination claim should be barred by collateral estoppel.\textsuperscript{31}

\textbf{D. Collins v. Elkay Mining Co.}

The final case in the trilogy is \textit{Collins v. Elkay Mining Co.}.\textsuperscript{32} There the West Virginia high court determined that a miner need not file a discrimination claim in the administrative forum at all, but can proceed directly to court with a common law retaliatory discharge action. The majority found no evidence in the anti-discrimination statute to indicate that the legislature intended the administrative remedy to be a prerequisite to maintaining a court action. The court also noted that an employee handbook or policy manual

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} at 88.
\item \textsuperscript{29} \textit{Id.} None of the United States Supreme Court cases cited, however, looked to the collective bargaining agreement as the source of the right at issue. Rather, all the cases cited involved independent statutory rights being exercised without reference to the collective bargaining agreement.
\item \textsuperscript{30} That view is apparently consistent with the view under the federal statute, insofar as the weight to be given is concerned. \textit{Marshall}, 663 F.2d at 1218-19.
\item \textsuperscript{31} \textit{Davis}, 365 S.E.2d at 90-92.
\item \textsuperscript{32} \textit{Collins v. Elkay Mining Co.}, 371 S.E.2d 46 (W. Va. 1988).
\end{itemize}
could create a binding employment contract, although the employee involved was not subject to the Coal Wage Agreement.

The two judges who dissented in *Davis* again dissented in *Collins*.

They argued that the majority was gutting the administrative system created by the legislature and further burdening the courts of the state. The exhaustion requirement, they maintained, was normally presumed in the presence of an administrative remedial scheme sufficient to protect the policy at issue. The dissenters also attacked the majority's employee handbook holding, finding that it essentially set the stage for perpetual employment.

E. *The Effect of the Trilogy*

The immediate effect of the trilogy is to give miners additional choices in determining where they want to bring discrimination claims. While the administrative and, if applicable, arbitration forums may provide faster relief, they may not provide a remedy package as attractive as court relief. Moreover, the trilogy gives the miner another "bite at the apple," because his unappealed loss in the administrative forum does not preclude a common law suit. Thus, while an operator's loss in any forum (arbitration, administrative or judicial) is fatal unless successfully appealed, the miner's loss simply reduces the choices remaining and in turn leads to interminable litigation.

Another effect of the trilogy is that the length of time an operator remains exposed to claims for discrimination is extended. Both the Coal Wage Agreement and the administrative scheme have time deadlines requiring that claims be made in a timely fashion. The

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33. Justices Neely and Brotherton dissented in each of the trilogy cases.

34. Because the plaintiff in *Collins* was a supervisory level employee, he would not have been subject to the Coal Wage Agreement. If a union miner made a claim that employee manuals created additional contract terms outside of the collective bargaining agreement, a host of additional issues would arise. *Collins*, 371 S.E.2d 46. See, e.g., Olguin v. Inspiration Consol. Co., 740 F.2d 1468, 1474 (9th Cir. 1984); see also Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987).

time in which a common law suit must be filed is substantially greater.

The trilogy also seems to make virtually any discipline of miners, even that taken exclusively under the Coal Wage Agreement, susceptible to attack if there is a safety connection of any nature. Arbitration is no longer an end to the dispute if there is a claim which can be plead, directly or indirectly, under the anti-discrimination statute's bundle of rights. It would appear that the source of the right acted upon is no longer an essential element in the inquiry under the West Virginia anti-discrimination statute. Rather, the test is now whether safety concerns formed a basis for the miner's action.

The trilogy may create a new incentive for miners to seek court redress and enhanced remedies. In addition to traditional breach of contract remedies, statutory remedies, attorneys' fees and fines for violations, operators are now exposed to common law damages, including punitive damages for alleged discrimination under the Acts. If, as Davis suggests, collective bargaining and safety rights merge into statutory rights, then a common law retaliation claim can now be brought for the violation of contractual safety rights and a private right of action under the Acts.

III. FEDERAL PREEMPTION AND THE STEELWORKERS' TRILOGY

The topic of federal labor law preemption has been amply discussed in numerous books and articles. Part III of this article synthesizes select cases on preemption for the purposes of developing a framework by which the West Virginia trilogy can be analyzed and of lending a perspective to recent case law developments. To that end, Part III explores three aspects of federal preemption: first, the scope of federal preemption; second, the development of federal labor law; and third, preemption as a basis for jurisdiction. Each aspect is, of course, interrelated and in practical application inseparable and correlative.

A. Scope of Federal Labor Law Preemption

A long standing axiom of constitutional jurisprudence is that state law which conflicts with valid federal law must give way to

37. There is a line of preemption cases addressing deference to the jurisdiction of the National
the federal. If Congress manifests its intent to occupy a given field, then a state law falling within that field is preempted. Likewise, state law may be preempted when "it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." The commerce clause grants Congress plenary power to regulate commerce among the states; national labor laws have been enacted pursuant to these powers.

Through enactment of the federal labor laws, Congress has sought to promote industrial peace. More specifically, through Section 301 of the Labor Management Relations Act (LMRA), Congress granted the courts jurisdiction over suits for violations of collective bargaining agreements. The Supreme Court concluded that Congress, through section 301, authorized courts to create a body of federal law for the enforcement of collective bargaining agreements, law "which the courts must fashion from the policy of our national labor laws."

In addressing the scope of federal labor law preemption, the Supreme Court has repeatedly said that federal common and statutory law, rather than state law, governs as to rights arising from

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collective bargaining agreements. The extent of federal labor law preemption is a source of tension. It requires federal labor law policies to be accommodated and balanced with state laws embodying individual rights and remedies. The dimensions of federal labor law preemption are best ascertained through examination of past and recent decisions.

In Teamsters v. Lucas Flour, the employer brought a state breach of contract suit against a union for striking in violation of the no-strike clause of the collective bargaining agreement. The Supreme Court, in analyzing the preemptive effect of section 301, stated that "incompatible doctrines of local law must give way to principles of federal labor law." The Court ruled that a state court action alleging a violation of a collective bargaining agreement must be resolved by reference to federal labor law. The rationale for the holding is that "existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." In other words, submission to the uniform application of law, as opposed to a patchwork of competing legal systems, is the quid pro quo for entering into a collective bargaining agreement.

Textile Workers Union of America v. Lincoln Mills, was a landmark decision in which the Court held that section 301 of the LMRA required courts to fashion a body of federal law to address disputes arising out of collective bargaining agreements. Since the Lincoln Mills decision, the courts have endeavored to create federal labor law even though section 301 provides limited substantive guidance. The Lincoln Mills Court noted that state law which is compatible with the purpose or policy of section 301 may be absorbed into federal law as an interpretive guide, but it cannot be an "inde-

45. Lucas Flour, 369 U.S. 95.
46. Id. at 102.
47. Id. at 104.
penthic source of private rights.\textsuperscript{49} The Court also has held that a suit to enforce contract rights may be brought under section 301 by an individual employee.\textsuperscript{50} This right is tempered, however, when the collective bargaining agreement contains a grievance and arbitration provision.\textsuperscript{51}

The earlier Court decisions have conclusively settled one issue of preemption: the existence of a collective bargaining agreement preempts a state cause of action by an employer, union or employee for breach of contract arising out of the terms of the collective bargaining agreement. The issue before the Court in those earlier decisions was a "straightforward question of contract interpretation."\textsuperscript{52} In more recent decisions, the Court has adhered to the principles of \textit{Lucas Flour} to define the scope of preemption over other state claims of a "non-contractual" nature.

Because Congress never explicitly stated the extent to which it intended section 301 to preempt state law, the courts have attempted to set guidelines. In \textit{Allis-Chalmers v. Lueck},\textsuperscript{53} the employee brought an action in state court for a state law tort claim of bad faith delay in making disability benefit payments under a provision of a collective bargaining agreement. The employee alleged that the employer and an insurance carrier unreasonably withheld payments resulting in damages for emotional distress, physical impairment and pain and suffering. The employee did not exhaust the grievance procedure established in the collective bargaining agreement prior to bringing his action. The Wisconsin Supreme Court reasoned that the tort of bad faith was distinguishable and independent from a breach of contract claim. That court apparently relied upon the tort nature of the claim as imposing a duty separate and apart from one arising out of contract.

In addressing the faulty rationale of the state court, the Supreme Court relied principally upon its decision in \textit{Lucas Flour} in con-

\textsuperscript{49} Id. at 457.
\textsuperscript{50} \textit{Evening News Assoc.}, 371 U.S. 195.
\textsuperscript{51} See, \textit{e.g.}, \textit{Vacca v. Sipes}, 386 U.S. 171 (1967) (an individual claimant must show that the union breached its duty of fair representation and that the employer breached the contract).
\textsuperscript{53} \textit{Allis-Chalmers}, 471 U.S. 202.
cluding that Congress intended this kind of tort claim, derived from obligations set forth in a collective bargaining agreement, to be pre-empted. However, the Court cautioned that section 301 was not intended to preempt "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract."\textsuperscript{54}

In attempting to draw the line between claims arising out of a collective bargaining agreement and those arising from sources independent of such contracts, the Court fashioned the following test:

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

The \textit{Lueck} Court made it clear that parties cannot escape the pre-emptive effect of section 301 simply by casting their claims as tort actions rather than contract actions. The \textit{Lueck} decision compels the lower courts to engage in a cognitive analysis of the collective bargaining agreement and of the nature of the state law claims to determine whether such claims are preempted.

In two recent decisions, the Supreme Court took the opportunity to apply the \textit{Lueck} test. In \textit{International Brotherhood of Electrical Workers v. Hechler},\textsuperscript{56} the employee was assigned work which required her to perform tasks allegedly beyond the scope of her training and experience. She was injured while performing that task, and two years later brought suit against the union in state court. The employee alleged in her suit that the union had failed to maintain safe working conditions as it was required to do under state law and under the collective bargaining agreement. After removal of the action, the district court granted the union's motion to dismiss and held that the claim was preempted. The court of appeals reversed, whereupon, the Supreme Court granted certiorari.

\textsuperscript{54} Id. at 212.
\textsuperscript{55} Id. at 213.
\textsuperscript{56} \textit{Int'l Bhd. of Elec. Workers}, 481 U.S. 851 (citations omitted).
One issue confronting the Supreme Court was whether the union employee's state tort claim against the union was independent of the collective bargaining agreement and therefore not preempted. The Court noted that the employee's allegation that the union was negligent in failing to provide a safe workplace was significant only if the union had assumed a duty of care pursuant to the collective bargaining agreement. The Court found that no duty of care existed under state law which was independent of the collective bargaining agreement. Reiterating the principles set forth in *Lueck*, the Court reasoned as follows:

In order to determine the Union's tort liability, however, a court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that "questions of contract interpretation . . . underlie any finding of tort liability." The need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers*, respondent is precluded from evading the preemptive force of § 301 by casting her claim as a state-law tort action.  

The Court concluded that to determine whether the union had assumed the duty to provide a safe workplace to the employees required interpretation of the collective bargaining agreement. Thus, the Court remanded the case, recognizing that the union had undertaken a contractual duty of care based upon the safety provision in the contract.

As the Court presciently said in *Lueck*, "not every dispute . . . tangentially involving a provision of a collective bargaining agreement is preempted by § 301 . . . ." In *Lingle v. Norge Division of Magic Chef, Inc.*, an employee notified her employer that she had been injured in the course of employment. She made a claim for workers' compensation benefits and was subsequently dismissed for filing a false claim. The union filed a grievance claiming that

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57. Id. at 862.
58. *Allis-Chalmers*, 471 U.S. at 211.
she was dismissed without just cause. Eventually, an arbitrator ruled in favor of the employee and ordered her employer to reinstate her with backpay. The employee also instituted suit against her employer alleging that her dismissal was in retaliation for exercising her right to file a workers' compensation claim. The issue before the Court was whether the claim for retaliatory discharge was inextricably intertwined with the collective bargaining provision prohibiting dismissal without just cause.  

The employee's arbitration and state tort claims presented common factual issues which had already been resolved by the arbitrator. Nonetheless, the "parallelism" of facts did not render the state claim dependent upon the just cause provision of the contract. The Court reasoned that

[even if dispute resolution pursuant to a collective bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 pre-emption purposes.]

The Court further cited precedent that substantive rights in the labor relations context can exist independent of the collective bargaining agreement.

The distinction between Lueck and Lingle is apparent but the decisions are consistent. To determine whether a state cause of action is "inextricably intertwined" requires the courts to engage in an analysis of the nature of the state claim and the specific provision of the collective bargaining agreement. Perhaps a simple and appropriate analogue to the "inextricably intertwined" test would be the "sneak a peek" test: if the court must sneak a peek at specific contract provisions to determine the rights, duties and obligations of the parties, then an employee cannot maintain a separate and independent cause of action.

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60. The court of appeals ruled that the just cause requirement in the collective bargaining agreement prohibited state claims for retaliatory discharge. Lingle v. Norge Div. of Magic Chef, Inc., 823 F.2d 1031 (7th Cir. 1987).
B. Federal Labor Law

Coterminal with the explication of the scope of preemption, the courts have been creating a body of federal labor law. The principles which sustain the evolution of that body of law are succinctly stated in Lueck:

The interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort. Any other result would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract.62

The policy of our federal labor law is to promote industrial peace through expeditious and non-judicial means of dispute resolution. Because section 301 of the LMRA lacks detail with respect to substantive law, federal policy has served as a beacon to guide courts in formulating rules of decision. The cornerstone of federal common law is the contractual process for grievance and arbitration.

Early in the formulation of federal common law, the Supreme Court held that, under section 301, courts could enforce specific performance of a provision of a collective bargaining agreement calling for the parties to arbitrate disputes.63 In the now famous Steelworkers' Trilogy,64 the Supreme Court further expounded upon the vitality of arbitration as a preferred means of dispute resolution.

In United Steelworkers of America v. American Manufacturing Co.,65 the collective bargaining agreement contained an arbitration clause covering disputes over the meaning, interpretation and application of the labor contract. An employee left work as a result

62. Allis-Chalmers, 471 U.S. at 211.
63. Lincoln Mills, 353 U.S. 448.
of an injury and later filed a workers’ compensation claim against the company on the basis that he was permanently partially disabled. Thereafter, the union filed a grievance on the basis that the employee was entitled to return to his job under the seniority provision. The employer refused to arbitrate and sued the union. The Supreme Court enforced the arbitration provision, stating:

The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking an arbitration is making a claim which on its face is covered by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator . . . . The courts, therefore, have no business weighing the merits of the grievance . . . . The process of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.66

In the second of the trilogy cases, United Steelworkers of America v. Warrior & Gulf Navigation Co.,67 the employer maintained that it could contract out maintenance work because of a provision in the collective bargaining agreement which stated that issues which were “strictly a function of management” were not arbitrable. The Court noted “that in the absence of any express provision excluding a particular grievance from arbitration[,]” doubt over the scope of an arbitration clause should be resolved in favor of coverage, as a means of promoting industrial peace.68

Whereas the first two cases of the trilogy dealt with judicial enforcement of agreements to arbitrate, United Steelworkers of America v. Enterprise Wheel and Car Corp.69 dealt with judicial enforcement of an arbitration award. Consistent with national labor policy, the Court gave great deference to the arbitrator’s decision. On the one hand, the Court noted that an arbitrator’s award must “draw its essence from the collective bargaining agreement” and not from “his own brand of industrial justice.”70 On the other hand, the Court limited the scope of judicial review: “It is the arbitrator’s

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66. Id. at 567-68.
68. Id. at 584-85.
70. Id. at 597.
construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." As a result of the Steelworkers' Trilogy, the Supreme Court firmly fixed in federal common law a preference for private settlement of labor disputes.

Even in the amalgamated area of mine safety and labor law, the Supreme Court has steadfastly maintained the integrity of arbitration provisions. In *Gateway Coal Co. v. United Mine Workers of America,* the union demanded the suspension of certain foremen for falsifying records to show that there had been no reduction in airflow at the mine when, in fact, airflow had been reduced because of the collapse of the ventilation structure. An investigation by the state and federal mine safety authorities resulted in criminal charges being filed against the foremen, and the company suspended them. The company then lifted the suspension and reinstated the foremen after receiving approval to do so from the state mine safety authority. The union struck to protest the alleged safety hazard created by the presence of the foremen in the mines and refused to arbitrate the dispute.

The Court was presented with the issue of whether the collective bargaining agreement imposed a compulsory duty on the parties to submit certain safety disputes to arbitration. The court of appeals, in reaching its decision on this issue, assumed the existence of a public policy which disfavored the arbitration of safety disputes. The Supreme Court strongly disagreed.

Looking first at the collective bargaining agreement, the Court had no difficulty finding that the arbitration provision was sufficiently broad to encompass a safety dispute. Secondly, the Court noted that the Federal Coal Mine Health and Safety Act of 1969 did not displace all agreements to arbitrate safety conditions. Thirdly, the Court remarked that section (e) of the labor contract, empowering a mine safety committee to act if it finds immediate danger,

71. *Id.* at 599.
did not operate to exclude from arbitration a claim brought under that section. The Court then relied upon the Steelworkers' Trilogy in holding that the presumption of arbitrability applies to safety disputes.

Gateway was decided under the Federal Coal Mine Health and Safety Act of 1969, the predecessor to MSHA. Nevertheless, Gateway retains its vitality as controlling precedent. The statute as amended provides in pertinent part that:

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this chapter because such miner, representative of miners or applicant for employer has filed or made a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of any alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 811 of this title or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

Congress clearly expressed its intent under the current version of the Act to protect miners against discrimination only in the exercise of their statutory rights, thereby leaving to the contract negotiation process the resolution of any additional safety concerns. Moreover, Lingle requires courts to engage in an analytical process to determine whether a right arises from a contract or from a statute. Finally, despite amendments to federal coal mine safety laws, there has been no congressional override of Gateway’s holding.

73. The anti-discrimination provision of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 820(b)(1), stated as follows:

No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provision of this Act.

More recently, the preference for arbitral resolution of labor disputes was again voiced in *United Paperworkers International Union, AFL-CIO v. Misco, Inc.* In *Misco,* the collective bargaining agreement contained an arbitration provision and a provision which reserved to management the right to establish, amend, and enforce rules regulating the discipline of its employees and the procedures for imposing discipline. One of the employer's rules stated that bringing intoxicants or other controlled substances onto plant property, consuming any such substances on plant property, or reporting for work under the influence of such substances would give rise to dismissal. Under somewhat murky facts, an employee of the plant was apprehended by the police while parked in the plant parking lot. The police found a lighted marijuana cigarette in the front seat and upon searching the employee's car found other paraphernalia related to marijuana use. As a result of this apprehension, the company discharged the employee asserting that he had violated plant rules proscribing such conduct.

The employee filed a grievance. At the arbitration hearing, it was stipulated that the issue was whether the company had just cause to discharge the grievant under its rules. The arbitrator ruled in favor of the employee and ordered the company to reinstate the employee with backpay and full seniority. The company filed suit in district court seeking to vacate the arbitration award on the grounds, among others, that (1) it was contrary to public policy regarding the general safety concerns that arise from the operation of machinery, and (2) it was contrary to state criminal law, which prohibits drug possession. The district court agreed with the employer, and the district court's opinion was affirmed by the court of appeals.

Relying upon *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, the Supreme Court reversed, emphatically adhering to the recognized policies of federal labor law. First, the Court noted that in the absence of fraud by the parties or dishonesty by the arbitrator, a lower court cannot overturn an arbitrator's findings of fact and therefore refuse to enforce an arbitrator's award. Secondly,
the Court addressed the issue of whether the arbitrator’s decision was contrary to public policy. With respect to that issue, the Court declared that a public policy must be specific, well-defined and dominant. In order to establish public policy, a court must look at existing laws and legal precedents and cannot rely upon “general considerations of supposed public interests.” In essence, the Court refused to elevate private contractual rights to a level of public policy and concern.

It is well settled that an arbitrator’s decision which interprets a provision of a collective bargaining agreement reigns supreme. On the other hand, where an employee’s rights are of an individual nature and do not emanate from the collective bargaining agreement, the courts, not the arbitrators, resolve disputes. In *Alexander v. Gardner Denver Co.*, the Supreme Court was confronted with the issue of whether an individual employee was barred from pursuing a Title VII claim in court because he had elected to pursue his grievance to final arbitration under the non-discrimination clause of the collective bargaining agreement. In deciding in favor of the employee, the Court relied upon statutory construction and congressional intent in order to reconcile the federal statutory rights afforded an individual under Title VII with collective rights embodied in federal labor law. Quite simply, the Court held that, though an arbitrator may be expert in resolving disputes under the collective bargaining agreement, it is not the role of an arbitrator to resolve rights afforded an individual under Title VII.

Likewise in *Barentine v. Arkansas Best Freight Systems, Inc.*, the Court faced the issue of whether an action instituted in federal court for claims under the Fair Labor Standards Act (FLSA) was barred by the dispute resolution process embodied in the collective bargaining agreement. In ruling that an employee could assert in-

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77. Misco, 108 S. Ct. at 367.
78. However, it remains with the courts to determine the arbitrability of a grievance under terms of the labor contract. AT&T Technologies v. Communications Workets of Am., 475 U.S. 643 (1986).
dependent statutory rights under the FLSA, the court once again reconciled two conflicting aspects of federal labor policy.

Conceivably, under *Alexander* and *Barentine*, an individual employee can seek recourse under the grievance and arbitration procedures of a collective bargaining agreement which provides for protection of certain individual as well as collective rights. That same employee is entitled to a "second bite at the apple" and can seek recourse in a judicial forum even after a favorable decision by an arbitrator. For example, an arbitrator may award reinstatement to an employee; the employee may then sue his employer and seek backpay damages and attorney's fees under Title VII. Before a court can entertain such a claim by an individual employee, however, it must first engage in the analytical process prescribed under *Lueck*, *Lucas Flour*, and *Lingle* to determine whether an individual's claims are independent and not arising from a collective bargaining agreement.

C. *Preemption as a basis for jurisdiction*

Section 301 of the LMRA provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties.81

The Supreme Court also established that jurisdiction under this section is concurrent with state and federal courts.82

The issue which frequently arises is whether state claims are not only preempted by the LMRA, but also displaced to the extent that complaints filed in state courts purporting to plead state causes of action are removable to federal courts under 28 U.S.C. section 1441. Traditional wisdom has been that a plaintiff is the master of his complaint and may avoid federal jurisdiction by exclusive reliance

on state law. Thus, federal question jurisdiction is determined under the "well-pleaded complaint rule" which authorizes federal jurisdiction when a federal question is presented on the face of a properly pleaded complaint. A case may not be removed to federal court, however, on the basis of a federal preemption defense even if the defense is anticipated in the complaint and even if both parties admit that the federal defense is the only question truly at issue.

The Court has recognized, as an "independent corollary" to the well-pleaded complaint rule, the doctrine of complete preemption. In Avco v. Machinists, the Court cursorily affirmed the court of appeals which decided that "state law does not exist as an independent source of private rights to enforce collective bargaining contracts." Elaborating upon Avco, the Court in Franchise Tax Board v. Construction Laborers Vacation Trust for Southern Cal, remarked that the extraordinary preemptive power of section 301 of the LMRA converts a state common law complaint into a federal claim for purposes of removal.

Under the Employee Retirement Income Security Act (ERISA), the Supreme Court has also recognized a departure from the well-pleaded complaint rule which serves as a useful reference in determining the preemptive effect of the LMRA. In Taylor v. Metropolitan Life, the employer-defendant discontinued the plaintiff's disability benefits after a finding by the employer's doctor that the plaintiff was fit to resume work. The plaintiff filed a suit in state

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85. See infra notes 94-97 and accompanying text.
89. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1 (1963). In Franchise, the Court held that the Employee Retirement Income Security Act (ERISA) does not bar an action by state government to enforce tax levies against an ERISA plan entity because a state government is not an enumerated party entitled to seek relief under § 502 of ERISA. Id. Otherwise, the Franchise Court noted the broad preemptive effect of ERISA by comparing it to the LMRA.
court seeking compensatory damages for breach of contract, compensation for mental anguish and reimplementation of all benefits. The plaintiff also asserted claims for wrongful discharge. The defendant removed the case to district court, whereupon it was granted summary judgment on the merits. The court of appeals reversed on the ground that the district court lacked jurisdiction. The Supreme Court granted certiorari and reversed the court of appeals.

Under the exception to the well-pleaded complaint rule recognized by the Taylor Court, removal jurisdiction is not based on the "obviousness" of the preemption defense but rather on the clearly manifested intent of Congress to develop an exclusive and controlling body of federal ERISA law. The import and applicability of the Taylor decision is that the Court relied upon Avco, an LMRA preemption case:

The necessary ground of decision in Avco was that the pre-emptive force of section 301 is so powerful as to displace entirely any state cause of action for violation of contracts between an employer and a labor organization. Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of section 301.92

Essentially, the Taylor Court applied the Avco doctrine to "recharacterize a state law complaint displaced [by the enforcement provisions of ERISA] as an action arising under federal law, even though the defense of ERISA preemption does not appear on the face of the complaint . . . ."93 Thus, based on the rationale of Taylor, it appears that even when an LMRA claim or defense is not obvious in the complaint, a state cause of action displaced by section 301 of the LMRA is removable to federal court.

As a practical matter, a determination of federal question jurisdiction and removability hinges upon a resolution of the substantive merits of the complaint. In Caterpillar Inc. v. Williams,94 certain employees were hired by Caterpillar to work initially in a facility covered by a collective bargaining agreement. Eventually, the employees assumed managerial and salaried positions not covered

92. Id. at 64 (quoting Franchise, 463 U.S. at 23).
93. Id.
by a labor contract. The employees allegedly were assured of continued employment even if the facility were closed. Subsequently, the employees were downgraded to contract positions, but were assured that the downgrades would be temporary. Thereafter, the employees were laid off due to a plant closing.

The employees instituted suit in state court\textsuperscript{95} alleging a breach of their individual employment contracts, a cognizable state law claim. Caterpillar removed the action to federal district court arguing that removal was proper because the alleged individual employment contracts were superseded by the collective bargaining agreement. The district court held that removal was proper and dismissed the case when the employees refused to amend the complaint to state a claim under section 301. The court of appeals reversed,\textsuperscript{96} holding that the case was not removable to federal court. The Supreme Court granted certiorari and affirmed.

The Court held that the state common law claim was not converted into a federal claim for purposes of complete preemption because the complaint did not seek to enforce the collective bargaining agreement, was not substantially dependent upon interpretation of the collective bargaining agreement, and did not reveal a relationship between the alleged individual contracts and the collective bargaining agreement. The Court emphasized the distinction between a state law claim which is transformed into a federal question for jurisdictional purposes and a defense of preemption to a quintessential state law claim which does not grant a basis for federal jurisdiction. In clarifying that distinction the Court stated:

But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court. When a plaintiff invokes a right created by a collective-bargaining agreement, the plaintiff has chosen to plead what we have held must be regarded as a federal claim, and removal is at the defendant’s option. But a defendant cannot, merely by injecting a federal question into an action that asserts what is plainly

\textsuperscript{95} Id. at 2428.

\textsuperscript{96} Id.
a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be the master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.\textsuperscript{97}

However, it must also be stressed that, even where the federal court remands a case, the merits of the federal preemption defense remain with the state court to resolve.\textsuperscript{98}

IV. DISCRIMINATION AS AN EXCEPTION TO THE RULES

A. The Impact of the West Virginia Trilogy on Enforcement Efforts

The \textit{Wiggins} decision allows an employee to institute a \textit{Harless} type\textsuperscript{99} tort action for retaliatory discharge predicated upon an alleged violation of public policy embodied in state and federal mine safety laws. The court reasoned that the remedial schemes of the respective safety statutes were inadequate and, therefore, not exclusive because the statutes did not provide for complete recovery of damages, especially emotional distress and punitive damages. The \textit{Collins} decision allows a coal miner to institute a suit for retaliatory discharge directly in circuit court without first resorting to the administrative scheme. The synergistic effect of \textit{Wiggins} and \textit{Collins} is to allow a miner to bypass statutorily created state and federal enforcement mechanisms in order to vindicate an individual claim.

As to the exhaustion requirement and exclusivity of remedies implied in the comprehensive federal mining statute, the \textit{Wiggins} court appears to have strayed significantly from settled principles of statutory interpretation and construction. Moreover, while states are authorized by MSHA to retain and promulgate coal mine safety legislation,\textsuperscript{100} there is some question as to whether judicial interpretation of West Virginia’s anti-discrimination statute creates an obstacle to accomplishment of the full purposes and objectives ex-

\begin{itemize}
\item \textsuperscript{97} Id. at 2433.
\item \textsuperscript{98} Id. at 2432.
\item \textsuperscript{99} The tort of retaliatory discharge was first recognized as a cause of action by West Virginia in \textit{Harless v. First Nat’l Bank}, 162 W. Va. 116, 246 S.E.2d 270 (1978).
\item \textsuperscript{100} 30 U.S.C. § 955 (1982).
\end{itemize}
pressed by Congress in MSHA. To the extent that Collins and Wig- 
gins allow claimants to bypass the enforcement mechanism and 
remedial schemes of MSHA, the decisions pose an obstacle to the 
following goals and purposes of the federal legislation:

(a) The first priority and concern of all in the coal or other mining industry must 
be the health and safety of its most precious resource the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and prac-
tices in the coal or other mines cause grief and suffering to the miners and to 
their families;

(c) there is an urgent need to provide more effective means and measures for 
improving the working conditions and practices in the nation's coal or other mines 
in order to prevent death and serious physical harm, and in order to prevent 
occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the nation's 
coal or other mines is a serious impediment to the future growth of the coal or 
other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary 
responsibility to prevent the existence of such conditions and practices in such 
mines;

(f) the disruption of production and the loss of income to operators and miners 
as a result of coal or other mine accidents or occupationally caused diseases unduly 
impedes and burdens commerce; and

(g) it is the purpose of this chapter (1) to establish interim mandatory health and 
safety standards and to direct the Secretary of Health and Human Services and 
the Secretary of Labor to develop and promulgate improved mandatory health 
or safety standards to protect the health and safety of the Nation's coal or other 
miners; (2) to require that each operator of a coal or other mine and every miner 
in such mine comply with such standards; (3) to cooperate with and provide 
assistance to the States in the development and enforcement of effective State 
coal or other mine health and safety programs; and (4) to improve and expand, 
in cooperation with the States and the coal or other mining industry, research 
and development and training programs aimed at preventing coal or other mine 
accidents and occupationally caused diseases in the industry.  

To effect these pronounced goals, Congress has encouraged reports 
of safety transgressions, protected miners from retaliation, and pro-
vided for a process of administrative adjudication and court review.

By express language, Congress also created a statutory right not 
to be discharged in retaliation for filing safety complaints. In related

safety discrimination provisions found under section 11(c) of the Occupational Safety and Health Act (OSHA), courts have consistently found that no private right of action exists for the tort of retaliatory discharge as a result of an employee's OSHA-related activity. In closely examining the legislative history of section 11(c) of OSHA, the Sixth Circuit in *Taylor v. Brighton Corp.* noted that remedies provided under OSHA for retaliatory discharge were exclusive. Allowing a private cause of action under OSHA was simply found to be inconsistent with the safety enforcement scheme directed by Congress. In other words, a private cause of action, while vindicating personal rights, would undermine OSHA's remedial enforcement efforts which, otherwise, would be triggered by filing claims under the statute. The *Taylor* rationale should apply with equal force under MSHA.

The Ninth Circuit addressed the issue of MSHA preemption over a state tort claim for retaliatory discharge in *Olguin v. Inspirational Consolidated Copper Co.*, where the plaintiff's claim for wrongful discharge was predicated upon 30 U.S.C. section 815(c). The court, disposing of the issue without elaboration, held that the plaintiff's remedies were provided under the federal statute. The court prophetically observed that the state would have little interest in enforcing federal law even if the law is incorporated in the state's general public policy.

In *Snow v. Bechtel Construction Inc.*, the district court held that plaintiff's state law claim of retaliatory discharge was preempted by the "whistle-blower" provision of the Atomic Energy Act

104. *Taylor*, 616 F.2d at 262.
The court observed that the AEA whistle-blower provision was modeled after the MSHA provision, stating that "[t]he two Acts 'share a broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality.'" Based on the similarity between the Atomic Energy Act and the MSHA, the Snow court relied upon the Olguin decision as persuasive authority for holding that the tort action was preempted.

The Wiggins court made no analysis of the legislative intent behind the MSHA. Yet, as the United States Supreme Court has stated:

[It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. "When a statute limits a thing to be done in a particular mode, it excludes the negative of any other mode."]

The sole basis for the Wiggins court allowing a claim for retaliatory discharge was that the remedy provided by the administrative scheme was inadequate because it does not allow an employee to make a complete recovery for all damages. Even assuming that reasoning is sound, the language of MSHA does not limit damages in that manner.

MSHA provides that a complainant may recover, but is not limited to, the aggregate amount of all costs and expenses (including attorney's fees), back pay, interest and reinstatement. Indeed, the Senate Conference Committee Report states in pertinent part:

It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

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109. Snow, 647 F. Supp. at 1517 (quoting Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1163 (9th Cir. 1984)).
Moreover, an operator is subject to "punitive damages" vis-a-vis civil penalties assessed by the Secretary of Labor for violations of the federal mine safety code.\(^{113}\)

Likewise, exhaustion of administrative remedies is required in order to preclude premature interference with an agency's administrative process.\(^{114}\) This principle allows an administrative agency to apply its experience and expertise, to correct its own errors, and to compile a record for judicial review.\(^{115}\) In other contexts, courts have required plaintiffs to exhaust all possible administrative appeals provided by Congress before seeking judicial review.\(^{116}\)

The elaborate enforcement and remedial provisions of MSHA, decisional law, and congressional intent make a strong case for the position that despite the Congressional grant to states of the right to make and maintain their own mine safety legislation, a state tort claim for retaliatory discharge is preempted by MSHA because the state claim is an obstacle to accomplishment of the full purposes and objectives expressed by Congress. If nothing else, the *Wiggins* and *Collins* decisions eviscerate the legislative mandate of the West Virginia Division of Mines and Minerals. Indeed, West Virginia law, like its federal counterpart, contains elaborate enforcement, hearing, appeal, remedy and penalty provisions.\(^{117}\) A private cause of action in state court, while perhaps vindicating personal rights, denies the government its mandated enforcement role and, thus, is inconsistent with federal mine safety policy.

**B. Impact of the Trilogy on Collective Bargaining**

In *Gateway Coal* the United States Supreme Court sanctioned the use of collective bargaining in safety related issues even in the face of government regulation of the industry involved. But under the West Virginia trilogy, the safety matters contained in the Coal

\(^{115}\) Id.; see also Hopewell Nursing Home, Inc. v. Hechler, 784 F.2d 554 (4th Cir. 1986); Mullins Coal Co. v. Clark, 759 F.2d 1142 (4th Cir. 1985).
\(^{116}\) See Hopewell Nursing Home, 784 F.2d 554.
Wage Agreement seem to be subsumed into the state mine safety act. Might that institutionalization of contractual rights impede the ability to deinstitutionalize or bargain over them in the future?

It would seem the trilogy is also inconsistent with federal labor policy favoring collective bargaining and peaceful dispute resolution in several respects. The value of the company’s *quid pro quo* for allowing mine safety committees to close the mines is lessened by making it virtually impossible for the company to exercise its right to remove committeemen who exceed legitimate contractual authority.\(^\text{118}\) The same could probably be argued, albeit to a lesser extent, of the effect the trilogy has on individual safety rights under the contract. The contract favors a method of quickly and fairly resolving individual and collective mine safety concerns by using enforcement agencies to resolve disputes on the spot. The incentive to use that mechanism is lacking when a potential monetary gain may result from using a judicial forum to resolve the dispute.

In addition to the preemption issue, the trilogy undermines the value of bargained-for arbitration by the creation of an exception which is ill-defined. To what extent does discrimination in the coal mines, with no suspect class involved, justify the state Supreme Court of Appeals’ creation of an exception to the Steelworkers Trilogy? To what extent will miners and attorneys be more willing to pursue civil damages, including punitive damages, decided by a local jury instead of using the arbitration or administrative vehicles? Does *Davis*, read in conjunction with *Wiggins* and *Collins*, give miners an unfettered right to use the courts to challenge any adverse action taken against them under the contract where safety is even tangentially at issue?

Admittedly there are more questions than answers at this point because the full impact of the trilogy is uncertain. It is clear that

\(^{118}\) Two cases decided under MSHA have made the distinction. The cases held that although an employee serving on a mine safety committee may be protected under MSHA, the employee's actions in excess of legitimate authority given by the contract cannot serve as the basis for a discrimination claim. Harmon v. Consolidation Coal Co. and Johnson v. Scotts Branch Mine, 9 FMSHRC 1851, reprinted in *4 MSHC (BNA)* 1631 (1987).
the trilogy gives miners additional "bites at the apple" and operators new concerns about labor relations and safety.

C. Practical Forum Considerations

1. Removal of a Davis Claim

Recent amendments to the Judiciary Act have all but eliminated appeal by right to the Supreme Court from a state high court ruling on an issue of federal law.\textsuperscript{119} Coal operators are left with one option: removal of a Davis- or Wiggins-type claim to federal court. Though the need for removal is apparent, the means by which to accomplish removal poses a procedural conundrum.

Removal is not likely when an employee is faced with an administrative hearing before the state board regarding a safety issue clearly arising from a term of the collective bargaining agreement. Removal from an administrative forum to a federal court is simply not authorized.\textsuperscript{120} Also, the traditional principle has succinctly been stated: a litigant must exhaust state administrative remedies before challenging a state action in federal court.\textsuperscript{121} The rationale supporting this principle is that, unless the plaintiff exhausts the state administrative process, the court cannot be certain that a party will need judicial relief. But, when an issue ripens for judicial determination, a plaintiff may choose to resort to either the state or federal court for relief.\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{119} As amended, 28 U.S.C. \textsection 1257(a) now reads: \\
\textsection 1257. State courts; certiorari \\
(a) Final judgment or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

\item \textsuperscript{120} 28 U.S.C. \textsection 1441(a) and (b) (1982).

\item \textsuperscript{121} Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Porter v. Investors' Syndicate, 286 U.S. 461 (1932).

\item \textsuperscript{122} See \textsc{Wright \& Miller, Federal Practice \& Procedure}, \textsection 4233 (1978).
\end{itemize}
The defendant operator who is faced with an action may proceed in one of two ways. First, the operator may choose to defend the claim in the administrative forum. If the defendant operator loses, as in *Davis*, the operator can then collaterally attack enforcement of the order by seeking removal to federal court. The risk is that a federal court may view enforcement of a state administrative order as strictly an issue of state law, even though LMRA preemption is a cognizable defense. After all, enforcement of a state order does not on its face involve a question of federal law.

As a second option, a defendant may choose to institute a suit for injunctive relief and/or a declaratory judgment regarding the rights of the parties under the pertinent safety and arbitration provision of the labor contract. *Gateway Coal* clearly establishes that even collectively-bargained safety rights are properly the subject of grievance and arbitration proceedings.

The Steelworkers' Trilogy allows a party to a collective bargaining agreement to seek judicial enforcement of an arbitration provision as well as judicial enforcement of an arbitration decision. Conflict will arise if there is a federal court finding in favor of the operator and a state administrative forum finding in favor of the miner for which the state mining board seeks an enforcement order in state court. Arguably, the federal court can enjoin any further state court proceeding.

2. Removal of a *Wiggins* Claim

It appears, based on the *Davis* court's rationale, that a miner could file a common law retaliation claim relying only on the safety

123. See *supra* notes 58-61 and accompanying text.
124. *Id*.
125. The issue which arises is whether the federal court could enjoin a state court proceeding. The pertinent anti-injunction statute, 28 U.S.C. § 2283 (1982), provides: "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." It is beyond the scope of this article to analyze the anti-injunction act in detail; permutations of the issue are many. Nonetheless, while acknowledging a certain bias on the part of the authors in favor of the operator's position, a federal court would likely enjoin the state court proceeding with facts similar to *Davis v. Kitt Energy*, 365 S.E.2d 82 (W. Va. 1987).
provisions of the collective bargaining agreement. If the complaint clearly establishes, at least in part, that a state common law claim relies upon the terms of the labor contract, then, under the Avco doctrine, the case is properly removable to federal court. Artfully drafted complaints, however, may color the basis for the claim. Counsel for the operator then should consider filing a motion for a more definite statement to establish clearly the source of the plaintiff's rights and to further establish a basis for removal.

Upon removal to federal court, the Wiggins, Davis, and Collins decisions may be of limited precedential value in guiding a federal district court on the issue of whether the miner's rights at issue are statutory or contractual in nature. Federal courts need not adhere to state court decisions on matters of federal law. Though state courts may resolve issues arising under the federal statute, the supremacy clause and strong federal interests require uniform application of federal law by state courts. Quite simply, Wiggins, Davis, and Collins may present inconsistent and incorrect interpretations of federal law.

V. CONCLUSION

West Virginia's coal miners' trilogy would appear to do more than simply give the broadest reading possible to the anti-discrimination provisions in the federal and state mine safety acts. In addition to giving miners a judicial forum with no administrative prerequisites, the trilogy challenges federal labor policies and pre-emption principles. Where arbitration was once a negotiated term and the final word in contract based employee-employer disputes, the West Virginia Supreme Court of Appeals has attempted to open the door a crack. Where the source of the right, contract or statute, was once the key to determining rights and remedies, the new cases seem to authorize West Virginia courts to look at and interpret the collective bargaining agreement insofar as necessary to resolve dis-

discrimination claims. Unfortunately, these new directions do not appear to square with existing federal principles.

It seems clear that the exhaustion and exclusivity defenses are defunct in state cases brought under the anti-discrimination statute. While critics may argue that the result is inconsistent with federal policies and procedures, that issue will probably not be judicially resolved. On the other hand, the issue which will probably be the subject of litigation is the extent to which operators’ actions taken under the authority of the Coal Wage Agreement may be challenged, absent additional facts, by claiming that an action discriminates under federal and state mine safety acts. The impact of such challenges on an operator’s right to control the work force may be too great to go unopposed, especially when the weight of precedential federal preemption authority is considered.