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FEDERAL JURISDICTION

SULLIVAN v. FIRST AFFILIATED SECURITIES: WHEN WILL THE “ARTFUL PLEADING DOCTRINE” SUPPORT REMOVAL OF A STATE CLAIM TO FEDERAL COURT?

I. INTRODUCTION

In *Sullivan v. First Affiliated Securities*,¹ the Ninth Circuit interpreted the U. S. Supreme Court’s application of the artful pleading doctrine in *Federated Department Stores v. Moitie*² and reviewed the Ninth Circuit’s earlier application of the artful pleading doctrine in *Salveson v. Western States Bankcard Association*.³ The Ninth Circuit concluded that where a plaintiff has filed parallel securities actions in federal court and in state court, and where the state claim is not precluded by the res judicata effect of a federal judgment, the defendant may not use the artful pleading doctrine to remove the state claim to federal court.⁴

II. FACTS

Plaintiffs were thirty-four investors⁵ who purchased stock in

1. 813 F.2d 1368 (9th Cir. 1987) (per Wiggins, J.; the other panel members were Schroeder, J., and Thompson, J.), *petition for cert. filed*, 56 U.S.L.W. 3093 (U.S. July 17, 1987) (No. 87-102).

2. 452 U.S. 394 (1981). *See infra* notes 51-61 and accompanying text.

3. 731 F.2d 1423 (9th Cir. 1984). *See infra* notes 62-73 and accompanying text.

4. *Sullivan*, 813 F.2d at 1370, 1376.

5. *Sullivan v. First Affiliated Securities*, 813 F.2d 1368, 1370 (9th Cir. 1987). Twenty three of the investors, including Sullivan, were individuals; other investors were corporations, limited partnerships, pension plans and trusts. *Id.* at 1368. Most were California residents. *Id.* at 1370.

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Midwestern Companies.⁶ Defendants were a brokerage firm, First Affiliated Securities, Inc., its broker, and insiders of Midwestern Companies (collectively "FAS-Midwestern").⁷ The investors filed two suits against FAS-Midwestern. One suit was filed in California state court alleging claims under California state law.⁸ A second suit was filed in federal court alleging substantially the same facts but asserting claims under federal law.⁹ The state action was filed in February of 1985¹⁰ and the federal action was filed the following month, before serving summons in the state action.¹¹

The defendants, FAS-Midwestern, removed the state action to federal court.¹² The investors moved to remand the state action to state court claiming that the federal court had no removal jurisdiction over the state claim.¹³ The district court denied the motion to remand.¹⁴ The district court reasoned that the investors, by filing their federal claim shortly after filing their state claim to redress essentially the same injury, had affirmatively elected to avail themselves of a federal forum.¹⁵ The district court concluded that under *Moitie*¹⁶ and *Salveson*¹⁷ the plaintiff's contemporaneous filing of federal and state claims

6. *Id.* at 1370.

7. *Id.* First Affiliated Securities is a California firm and Midwestern Companies is a Missouri based corporation. *Id.* Insiders at Midwestern included its former officers, directors, accountants and attorneys. *Id.*

8. *Id.* Investors' state claims included allegations of fraud, negligent misrepresentation and breach of fiduciary duty under California common law. *Id.* Investors also alleged violations of California's Blue Sky securities laws (Cal. Corp. Code §§ 1507(a), 2254, 25401, and 25402 (West 1977)). *Id.* at 1370.

9. *Id.* The investors asserted claims under the Securities Exchange Act of 1934, as amended, 15 U.S.C. §§ 78a et seq., (1982) and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1982).

10. *Sullivan*, 813 F.2d at 1370.

11. *Id.*

12. *Id.* at 1370-71.

13. *Id.* at 1371. Although the investors apparently preferred to proceed in the state court under state law, they filed the federal action to obtain collateral discovery that could also be used in the state action and to protect against the possibility that the state court would lack personal jurisdiction over the Midwestern insiders. *Id.* at 1370 n.2.

14. *Id.* at 1371.

15. *Id.*

16. *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981). See *infra* notes 51-63 and accompanying text.

17. *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984). See *infra* notes 64-76 and accompanying text.

amounted to “artful pleading,”¹⁸ and that the plaintiff’s state claim could be properly removed by the defendant to federal court.¹⁹ The Ninth Circuit Court of Appeals granted the investors’ petition for interlocutory appeal in order to consider whether or not the state claim should be remanded to state court.²⁰

III. BACKGROUND

A. REMOVAL JURISDICTION

The federal courts are courts of limited jurisdiction. The Constitution limits the power of the judiciary to certain very specific classes of cases and controversies, including cases “arising under the Constitution, laws or treaties of the United States.”²¹ Congress created the lower federal courts, and by statute the federal courts have jurisdiction over those cases “arising under the Constitution, laws, or treaties of the United States.”²² The meaning of the words “arising under” thus assumes both a constitutional dimension and a statutory dimension.²³ Congress has no *power* under the Constitution to grant the federal courts jurisdiction over cases that do not “arise under” federal law; Congress did not *intend*, when enacting the federal question statute, to confer jurisdiction over cases not “arising under” federal law.²⁴

18. *Sullivan*, 813 F.2d at 1371.

19. *Id.*

20. *Id.* The Ninth Circuit Court of Appeals granted the investors’ petition to file an interlocutory appeal under 28 U.S.C. § 1292(b). *Id.* That section provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order

28 U.S.C. § 1292(b) (1982).

21. U.S. CONST. art. III, § 2.

22. 28 U.S.C. § 1331 (1982).

23. J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE*, § 2.3, at 16-19 (1985) [hereinafter *FRIEDENTHAL, KANE & MILLER*].

24. *Id.* See generally *Powers v. South Cent. United Food and Commercial Workers Unions*, 719 F.2d 760, 763 n.1 (5th Cir. 1983) (citing numerous cases and commentaries

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A plaintiff is said to be "master of his complaint."²⁵ It is the plaintiff who assesses his claim and determines whether it arises under state law, federal law, or both.²⁶ Ordinarily, if a plaintiff has a remedy under state law and also has a remedy under federal law he may choose to litigate in either forum, or he may pursue his claim in both the federal and state courts.²⁷

Removal jurisdiction permits a defendant to force the plaintiff to litigate certain actions in federal court, rather than in the state forum the plaintiff originally selected.²⁸ The federal removal statute provides that an action is removable only if it could have been brought originally in federal court.²⁹ The removal statute further provides that claims which arise under federal law are removable without regard to the citizenship or residence of the parties.³⁰

analyzing the "arising under" component of federal subject matter jurisdiction). *See also* Note, *The Outer Limits of "Arising Under"*, 54 N.Y.U. L. REV. 978 (1979) (a thorough discussion of "arising under" requirement for attachment of federal jurisdiction).

25. *Franchise Tax Bd. v. Construction Laborers' Vacation Trust*, 463 U.S. 1, 22 (1983) (removal of actions filed in state court only proper if a federal question appears on the face of a properly pleaded complaint). *See also* *The Fair v. Kohler Die and Specialty Co.*, 228 U.S. 22, 25 (1913). (Holmes, J.) ("Of course the party who brings a suit is master to decide what law he will rely upon")

26. 1A J. MOORE & B. RINGLE, *MOORE'S FEDERAL PRACTICE*, § 0.160, at 231-32 (2d ed. 1987). [hereinafter MOORE & RINGLE]

27. *Id.* *See also* *California v. California & Hawaiian Sugar Co.*, 588 F.2d 1270 (9th Cir. 1979). In *Hawaiian Sugar*, the plaintiff sought state court relief for antitrust violations. *Id.* at 1271. Defendant thereafter removed the action to federal court. *Id.* The court of appeals remanded the case to state court stating that there is nothing improper about pursuing state claims in state court while pursuing federal claims in federal court arising from the same operative facts. *Id.* at 1272, 1274.

28. FRIEDENTHAL, KANE, & MILLER, *supra* note 23, § 2.11 at 57. *See also* C. WRIGHT, *THE LAW OF FEDERAL COURTS* 212 (4th ed. 1983) (because removal jurisdiction is derivative, if the state court lacks jurisdiction over a case, the federal court cannot acquire jurisdiction through removal).

29. 28 U.S.C. § 1441(a) (1982) provides: "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States"

30. 28 U.S.C. § 1441(b) (1982) provides: "Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." In *Sullivan v. First Affiliated Securities*, 813 F.2d 1368 (9th Cir. 1987) the parties were not of completely diverse citizenship; therefore, the defendants claimed that the federal court had removal jurisdiction because the plaintiffs' state claim actually arose under federal law. *Id.* at 1371 and n.3.

B. THE WELL-PLEADED COMPLAINT

Normally, a defendant may only remove an action filed in state court to federal court based on a federal question if the federal question appears on the face of the plaintiff's properly pleaded complaint.³¹ Theoretically, removal jurisdiction could be viewed as a way for the federal court to hear what should have been before it in the first instance.³² If the plaintiff's well-pleaded complaint shows a federal claim on its face, the defendant will not be deprived of a federal forum just because the plaintiff happened to file the complaint in state court.³³

A long standing corollary to the well-pleaded complaint rule is that the defendant cannot have the plaintiff's case removed to federal court simply because he asserts a federal defense, even if his entire defense is based on federal law.³⁴ Thus, the circumstances under which a defendant may remove an action involving a federal question from state court to federal court are very narrow, consisting almost exclusively of instances where the face

31. *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754, 758 (2d Cir.) (ordinarily, defendant may remove an action to federal court only if a federal question appears on the face of a well-pleaded complaint), *cert. denied*, 107 S.Ct. 277 (1986). See *Gully v. First National Bank*, 299 U.S. 109 (1936) (applying what is now called the "well-pleaded complaint rule" in a removal context). Justice Cardozo wrote the opinion for the Supreme Court which said that a "genuine and present controversy, not merely a possible or conjectural one, must exist . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." (citations omitted) *Id.* at 113. The Supreme Court unanimously reaffirmed the well-pleaded complaint rule as fundamental to the determination of removal jurisdiction in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

32. FRIEDENTHAL, KANE, & MILLER, *supra* note 23, § 2.11 at 57. "In a case involving a claim raising an issue of federal law, removal equalizes the ability of both parties to have a federal question litigated in its 'natural' forum." *Id.* See also Norton, *Recent Development: Removal Doctrine Reaffirmed: Franchise Tax Board v. Construction Laborers Vacation Trust*, 70 CORNELL L. REV. 557 (1985) (a survey of federal removal jurisdiction, the well-pleaded complaint rule in a removal context, and removability of state court actions for declaratory judgments).

33. FRIEDENTHAL, KANE, & MILLER, *supra* note 23, § 2.11 at 57.

34. *Hunter v. United Van Lines* 746 F.2d 635, 639 (9th Cir. 1984), *cert denied*, 106 S.Ct 180 (1985) (even though the defendants have a real and substantial interest in having their preemption defense heard in federal court, such an interest is not a cognizable basis for federal removal jurisdiction). See also *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908) (federal jurisdiction is lacking even if defense is based on federal law). The logic of denying removal jurisdiction to a defendant who raises a federal defense has been questioned by various authorities including the American Law Institute, but Congress has not seen fit to permit removal unless the plaintiff relies on federal law. *Sullivan v. First Affiliated Securities*, 813 F.2d 1368, 1372 n.4 (9th Cir. 1987).

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of the plaintiff's complaint discloses a cause of action arising under federal law.³⁵ The source of removal is purely statutory, and removal itself represents an intrusion upon the judicial power of the state courts.³⁶

C. THE ARTFUL PLEADING DOCTRINE

Occasionally, a plaintiff may realize that his claim is one that arises under federal law but does not want to proceed in federal court.³⁷ If the plaintiff characterizes his essentially federal law claim as a state claim, omitting all mention of the applicable federal law, and files the complaint in state court, the plaintiff has engaged in "artful pleading."³⁸ If the defendant then attempts to remove what he believes to be a federal claim to federal court, the court will be permitted to look behind the face of the complaint. The court will seek to determine whether the real nature of the claim is federal regardless of the plaintiff's characterization.³⁹ Thus, the artful pleading doctrine, which permits the court to look behind the face of the complaint to determine the true nature of the plaintiff's claims, represents an exception to the well-pleaded complaint rule, which ordinarily

35. Norton, *supra* note 32, at 557 and n.6.

36. FRIEDENTHAL, KANE, & MILLER, *supra* note 23, § 2.11 at 57.

37. Most cases where a plaintiff may try to circumvent the proper federal forum and file in state court involve situations where federal law completely preempts state law on a subject but if state law applied, plaintiff would have a remedy, perhaps a better one than is available under federal law. *See, e.g.,* Schroeder v. Trans World Airlines, 702 F.2d 189, 190 (9th Cir. 1980) (airline employee brought an action for wrongful demotion under state law, removed to federal court and dismissed); *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1210-11 (9th Cir. 1980) (action in state court relating to employee-management altercation preempted by Labor Management Relations Act, 29 U.S.C. § 185 (1982)). The artful pleading doctrine has also been applied to permit federal court jurisdiction through removal in a few cases where plaintiff has already been denied a remedy under federal law but tries to get relief by stating the same claim in state court under state law. *See, e.g.,* Federated Department Stores v. Moitie, 452 U.S. 394 (1981) (discussed *infra* at notes 51-63 and accompanying text); and *Salveson v. Western States Bankcard Ass'n.*, 731 F.2d 1423 (9th Cir. 1984) (discussed *infra* at notes 62-73 and accompanying text).

38. *Graf v. Elgin, Joliet and Eastern Ry. Co.*, 790 F.2d 1341, 1344 (7th Cir. 1986) (employee's state claim for unlawful termination and negligent failure to process a union grievance removed to federal court and dismissed). *But cf. Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 575 (7th Cir.) (state action regarding disposal of radioactive waste not removable because it was not properly before the state court), *cert. denied*, 459 U.S. 1049 (1982).

39. 14A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3722, 266-70 (2d ed. 1985) [hereinafter WRIGHT, MILLER & COOPER].

permits removal only when the federal question appears on the face of the complaint.⁴⁰

Artful pleading has been colorfully described by various district courts as “a federal case in state wrapping paper,”⁴¹ “clothing a federal claim in state garb,”⁴² and a federal claim “in disguise.”⁴³ Artful pleading is said to be the plaintiff’s characterization of a federal claim as a state claim.⁴⁴ Artful pleading, however, must be carefully distinguished from the situation where a plaintiff has various separate claims, some arising under federal law and some arising under state law. If a plaintiff has causes of action under both state law and federal law, remembering that a plaintiff is “master of his complaint,” the plaintiff is *not* engaging in artful pleading if he ignores the federal claim and proceeds solely under state law.⁴⁵ Likewise, the plaintiff may ignore his state claims and proceed solely under federal law.⁴⁶ Occasionally, the plaintiff will decide, as did the investors in *Sullivan*, to pursue both federal and state claims in separate actions.⁴⁷ The plaintiff’s genuine state action is not subject to the federal court’s removal jurisdiction because the plaintiff has not stated a federal cause of action on the face of his complaint, nor has the plaintiff attempted to engage in artful pleading by characterizing a federal claim as a state claim.⁴⁸

40. 1A MOORE & RINGLE, *supra* note 26, § 0.160, at 233. “The ‘artful pleading doctrine’ is a *narrow* exception to the ordinary rules of federal jurisdiction . . .” *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 931 n.1 (9th Cir. 1986) (emphasis added). “The artful pleading doctrine is to be invoked only in exceptional circumstances as it raises difficult issues of state and federal relationships and often yields unsatisfactory results.” *Salveson*, 731 F.2d at 1427.

41. *Graf*, 790 F.2d at 1344.

42. *Travelers Indemnity Co. v. Sarkisian*, 794 F. 2d 754, 758 (2nd Cir.) (artful pleading doctrine inapplicable where state law claim, filed after dismissal of a federal “RICO” action, does not contain elements essential to the federal claim), *cert. denied*, 107 S.Ct. 277 (1986).

43. *Salveson*, 731 F.2d at 1427.

44. *Powers v. South Cent. United Food and Commercial Workers Unions*, 719 F.2d 760, 765 (5th Cir. 1983) (plaintiff’s state law claims for negligence, fraud, deceptive trade practices not preempted by federal law and removal was improper).

45. 1A MOORE & RINGLE, *supra* note 26, § 0.160, at 231-32. “Plaintiff is, however, free to ignore the state question and pitch his claim on the federal ground, or ignore the federal ground and rely on the state ground.” (citations omitted.) *Id.*

46. *Id.*

47. *Sullivan v. First Affiliated Securities*, 813 F. 2d 1368, 1370 (9th Cir. 1987).

48. *See California v. California & Hawaiian Sugar Co.*, 588 F.2d 1270, 1271-72 (9th Cir. 1978) (the court found nothing improper where plaintiff pursued both a state action for restraint of trade and a federal antitrust action arising out of the same operative

Artful pleading in the removal context is most often encountered when a plaintiff attempts to assert a claim under state law that has been preempted by federal law.⁴⁹ However, the artful pleading doctrine is occasionally encountered in non-preemption settings as well.⁵⁰ The only acknowledgement of artful pleading by the Supreme Court in a non-preemption setting occurred in *Federated Department Stores v. Moitie*.⁵¹ In *Moitie*, plaintiff Brown filed suit against Federated Department Stores in federal court alleging violations of federal law (*Brown I*).⁵² *Moitie* filed suit against the same defendants in state court (*Moitie I*).⁵³ *Moitie I* was removed to federal court where both *Brown I* and *Moitie I* were dismissed.⁵⁴ *Moitie* and Brown, represented by the same counsel, did not appeal but instead filed the same cases as new claims in state court (*Moitie II* and *Brown II*).⁵⁵ Defendants removed *Moitie II* and *Brown II* to federal court and moved to dismiss on grounds of res judicata.⁵⁶ The district court refused to remand *Moitie II* and *Brown II* to state court holding that the complaints, although artfully

facts).

49. See *Hunter v. United Van Lines*, 746 F.2d 635, 640-41 (9th Cir. 1984), *cert. denied*, 106 S.Ct. 180 (1985). Preemption removal is a matter of considerable controversy among the circuits. *Id.* Courts are struggling with the circumstances under which they will remove a state claim that was in reality an artfully pleaded federal claim when the subject matter of the claim has been preempted by federal law. *Id.* "[T]he better view is expressed by the Third, Seventh, Eighth, and Ninth Circuits which have concluded that the assertion of a defense that federal law has preempted the state law upon which plaintiff relies does not create a federal question for purposes of the general removal statute." *Id.* at 641 (quoting *MOORE & RINGLE*, *supra* note 26, § 0.160[4]). See generally Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634 (1984) (analysis of removal jurisdiction based on defendant's allegations of federal preemption).

50. Six relatively recent cases discuss the artful pleading doctrine leading to removal jurisdiction in a non-preemption setting: *Sullivan v. First Affiliated Securities*, 813 F.2d 1368 (9th Cir. 1987) (the subject of this Note); *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981) (see *infra* notes 51-63 and accompanying text); *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984) (see *infra* notes 64-76 and accompanying text); *California v. California & Hawaiian Sugar Co.*, 588 F.2d 1270 (9th Cir. 1979) (see *supra* note 27); *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.), *cert. denied*, 107 S.Ct. 277 (1986) (see *supra* note 31); and *Reid v. Walsh*, 620 F. Supp. 930 (M.D. La. 1985). The *Reid* court reached a conclusion contrary to the one reached in *Sullivan*, holding that a state securities action *can* be removed to federal court because plaintiffs filed a federal securities action on the same facts. *Reid*, 620 F. Supp. at 932.

51. 452 U.S. 394 (1981).

52. *Id.* at 395-96.

53. *Id.* at 395.

54. *Id.* at 396.

55. *Id.*

56. *Id.*

couched in terms of state law, were “essentially federal law claims.”⁵⁷ The district court also concluded that the doctrine of res judicata required that *Moitie II* and *Brown II* be dismissed because *Moitie II* and *Brown II* involved the same parties, the same alleged offenses, and the same time periods as *Moitie I* and *Brown I*.⁵⁸ On appeal, the Ninth Circuit refused to remand *Moitie II* and *Brown II* to state court and affirmed the lower court’s opinion that they were artfully pleaded state claims.⁵⁹ However, the Ninth Circuit did reverse the district court’s conclusion that the removed state actions were barred by res judicata.⁶⁰

The Supreme Court reversed the Ninth Circuit’s refusal to bar *Brown II* and *Moitie II* based on res judicata.⁶¹ In a footnote, the Supreme Court affirmed the Ninth Circuit Court of Appeals’ conclusion that the federal court had removal jurisdiction over *Brown II* and *Moitie II* because the purported state claims were really artfully pleaded federal claims.⁶² Thus, although artful pleading was suggested in the footnote as the rationale under which the federal court had jurisdiction over the

57. *Id.*

58. *Id.* at 396-97.

59. *Moitie v. Federated Department Stores*, 611 F.2d 1267, 1268 (9th Cir. 1980) affirming removal with the following language:

Appellants first contend that removal was improper because they stated a valid state law claim. We disagree. The court below correctly held that the claims presented were federal in nature, arising solely from price fixing on defendants’ part. In light of our disposition of this appeal, appellants will not quarrel with the result.

Id.

60. *Moitie*, 452 U.S. at 397-98. Recent developments changing the law regarding *Moitie*’s and *Brown*’s underlying claims caused the Ninth Circuit to find that “simple justice” and “public policy” required the doctrine of res judicata to give way and allow *Moitie* and *Brown* a second chance to have their claims considered, even though a final judgment of dismissal had been previously entered on the same claims. *Id.*

61. *Id.* at 394. “We granted certiorari, 449 U.S. 991 (1980), to consider the validity of the Court of Appeals’ novel exception to the doctrine of res judicata.” *Id.* at 398.

A lengthy dissent by Justice Brennan points out that the theoretical underpinnings for the majority decision are far from clear. *Id.* at 408-10 (Brennan, J., dissenting). Justice Brennan states: “The Court today nevertheless sustains removal of this action on the ground that ‘at least some of the claims had a sufficient federal character to support removal.’ . . . I do not understand what the Court means by this. Which of the claims are federal in character? Why are the claims federal in character?” *Id.* at 409 (Brennan, J., dissenting).

62. *Id.* at 397 n.2. “[R]espondents had attempted to avoid removal jurisdiction by ‘artful[ly]’ casting their ‘essentially federal law claims’ as state-law claims. We will not question here that finding.” *Id.*

purported state claims, the Supreme Court was only concerned in its review of the case with the Ninth Circuit's "novel exception to the doctrine of res judicata."⁶³

The Ninth Circuit, in *Salveson v. Western States Bankcard Association*,⁶⁴ attempted to apply the artful pleading doctrine in light of the Supreme Court's decision in *Moitie*.⁶⁵ In *Salveson*, the plaintiff filed a federal antitrust claim against the defendants in federal court.⁶⁶ The district court eventually granted defendants' motion for summary judgment on the grounds that the suit was barred by the statute of limitations.⁶⁷ Following entry of judgment, plaintiffs filed essentially the same claim in Cali-

63. *Id.* at 398. The significance of the *Moitie* decision with respect to removal based on the artful pleading doctrine has been sharply questioned. In *Magic Chef, Inc. v. International Molders and Allied Workers Union*, 581 F. Supp. 772 (E.D. Tenn. 1983), defendants argued for removal of state claims based upon *Moitie* saying that plaintiffs had artfully pleaded an essentially federal claim, and based upon federal preemption saying that federal law completely preempts state law in the field of labor relations. *Id.* at 774-75. The court rejected the *Moitie* argument for removal in a footnote. *Id.* at 776 n.4. The footnote contains the following language:

In that case, [*Moitie*] the Court held that the plaintiff's state law case was properly removed because "some of the claims had a sufficient federal character to support removal." One of the authorities upon which the Court relied has recently attempted to explain this holding (after stating that "several of the Court's statements about removal . . . are difficult to understand."), 14 C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3722 at 202 (1983) Pocket Part:

"In brief, the Court's only intention in its footnote may have been a narrow one: to tip the balance in favor of defendant's right to a federal forum and against plaintiff's right to be master of his claim in antitrust actions when the plaintiff already had availed himself of a federal forum and when his state claims as removed would be res judicata from the earlier federal decisions" *Id.* at 203.

It should be noted that the most recent edition of WRIGHT, MILLER & COOPER, *supra* note 39, § 3722 at 266 cites *Moitie* in its section regarding artful pleading with no comment whatsoever, except to note that the decision quotes WRIGHT, MILLER, & COOPER.

The court in *Gold v. Blinder, Robinson & Co., Inc.*, 580 F. Supp. 50, 53, n.1 (S.D.N.Y. 1984), although most concerned about the master-of-the-complaint rule, was blunt in its criticism of *Moitie* in dictum: "Although it is perhaps impossible intellectually to reconcile *Moitie* with established law, it seems proper, absent more direct and fuller consideration of the issue by the Court, to view the result as an aberration, necessary in light of the unusual facts of that case."

64. 731 F.2d 1423 (9th Cir. 1984).

65. *Id.* at 1425.

66. *Id.*

67. *Id.* at 1426.

for California state court.⁶⁸ Defendants then removed the state court suit to federal district court, and there moved to dismiss on the grounds of res judicata and statute of limitations.⁶⁹ The district court concluded that the state claims were actually artfully pleaded federal claims and that res judicata properly applied.⁷⁰ Most of the claims were dismissed with prejudice.⁷¹ The Ninth Circuit Court of Appeals agreed, but went further, ordering all of plaintiffs' state law claims dismissed with prejudice.⁷² The Ninth Circuit agreed with the district court that *Salveson's* state claim was indeed an example of artful pleading as articulated in *Moitie*.⁷³ The plaintiffs chose to proceed under federal law in federal court for four years repeatedly asserting a federal claim until it was dismissed.⁷⁴ Having elected to proceed in a federal forum and pursue their claim under federal law, it was artful pleading to later recast the same claims as state claims.⁷⁵ The *Salveson* court reasoned that removal jurisdiction in *Moitie* was founded upon the fact that in that case as well, the plaintiff had previously filed the claims as federal claims in federal court, thereby electing the federal court as the forum for resolving the dispute.⁷⁶

IV. THE COURT'S ANALYSIS

In *Sullivan v. First Affiliated Securities*,⁷⁷ the Ninth Circuit noted that the investors filed claims in state court and in federal

68. *Id.* The state law complaint contained seven causes of action including allegations of common law fraud, fraudulent inducement to contract, misappropriation of plaintiffs' programs and ideas, interference with business relations and violation of the state antitrust statute. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* The first six causes of action were dismissed with prejudice on statute of limitations or res judicata grounds. *Id.* The last cause of action involving violation of the state antitrust statute was dismissed without prejudice for want of derivative jurisdiction upon removal to the federal court. *Id.*

72. *Id.* at 1433.

73. *Id.* at 1429.

74. *Id.*

75. *Id.*

76. *Id.* "We agree [with the lower court] that the conclusion of artful pleading is properly drawn when the plaintiff 'by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one.'" *Id.* (citation omitted).

77. 813 F.2d 1368 (9th Cir. 1987).

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court arising out of the same core of operative facts.⁷⁸ The defendants, FAS-Midwestern, did not contend that federal law preempted the state claim.⁷⁹ The defendants contended only that the investors engaged in "artful pleading" by filing claims in both state and federal court on the same operative facts.⁸⁰ The Ninth Circuit stated that such an argument was previously rejected in *California v. California & Hawaiian Sugar Co.*⁸¹ The court then said that "[w]ere it not for . . . *Moitie* . . . , FAS-Midwestern's argument would be groundless."⁸² The court acknowledged that it had interpreted *Moitie* in its earlier *Salveson*⁸³ decision, and allowed removal on the basis that the plaintiffs had elected to pursue their claim in a federal forum and therefore the state claim was simply their federal claim recast under state law.⁸⁴

The *Sullivan* court observed that the *Moitie* court had approved removal of the state action to federal court in a footnote and as pointed out by the Brennan dissent in *Moitie*, "the task of divining *Moitie*'s theoretical underpinnings has fallen to the lower courts and commentators."⁸⁵ Both *Moitie* and *Salveson* applied the artful pleading doctrine in a non-preemption context, and removal of the state action was permitted in both cases.⁸⁶ The *Sullivan* court examined the possible theoretical bases for asserting removal jurisdiction in *Moitie* and *Salveson* to determine if the investors' state claim could properly be removed to federal court in light of those two cases.⁸⁷

The *Sullivan* court concluded that two possible justifications may be advanced for *Moitie*'s use of the artful pleading doctrine: (1) plaintiff's election of a federal forum by suing in federal court (essentially the consent theory articulated in *Salveson*⁸⁸), and (2) federal res judicata.⁸⁹

78. *Id.* at 1370.

79. *Id.* at 1372-73.

80. *Id.* at 1373.

81. 588 F.2d 1270 (9th Cir. 1979). *See supra* notes 27, 48.

82. *Sullivan*, 813 F.2d at 1373.

83. *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984). *See supra* notes 64-76.

84. *Sullivan*, 813 F.2d at 1373.

85. *Id.*

86. *Id.* at 1373-74.

87. *Id.* at 1373-76.

88. *See supra* notes 74-75 and accompanying text.

The *Sullivan* court described five flaws in basing *Moitie*'s removal jurisdiction on an election of forum rationale. (1) The Supreme Court did not articulate the election theory in *Moitie*, and that approach had never been accepted as justifying removal.⁹⁰ (2) The election approach is inconsistent with the removal statute.⁹¹ (3) The election justification does not conform to traditional notions of removal under the artful pleading doctrine—the investors have not failed to plead necessary federal law.⁹² (4) Acceptance of an election theory would expand removal jurisdiction to a significant number of state cases in which the plaintiff has filed a parallel federal case, contrary to principles of federalism.⁹³ (5) Attempts to place limits on the election rationale have been unsatisfactory.⁹⁴

The *Sullivan* court concluded that the better view is that removal jurisdiction in *Moitie* rests on the existence of a res judicata defense.⁹⁵ *Moitie* can be fairly construed as “permitting removal only of state claims filed to circumvent the res judicata impact of a federal judgment.”⁹⁶

89. *Sullivan*, 813 F.2d at 1373.

90. *Id.* at 1374.

91. *Id.* Because “the state and federal claims were filed separately, the state claims are not pendent, nor within original federal jurisdiction, and do not arise under federal law.” *Id.*

92. *Id.* at 1374-75. The state claims are created and governed by state law, even though they are based on the same operative facts as plaintiffs’ federal claims, and in the absence of preemption cannot be characterized as federal claims. *Id.*

93. *Id.* at 1375.

94. *Id.* The *Sullivan* court noted that the Second Circuit has allowed removal after the *Moitie* decision if the state claim and the federal claim are “substantially similar”, and if the plaintiff first pursued his claim in federal court thereby electing a federal forum. *Id.* See *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754, *cert. denied*, 107 S.Ct. 277 (1986). In *Sarkisian*, plaintiff first filed a RICO claim in federal court, which was dismissed. *Id.* at 756-57. Plaintiff then filed a state action based on the same operative facts alleging various breaches of state law. *Id.* at 757. The Second Circuit found that the state action was not “substantially similar” to the federal action because the state action did not allege “a pattern of racketeering activity” or operation of an “enterprise,” as did the federal action. *Id.* at 761. The *Sullivan* court argued that “substantial similarity of claims seems unsound” as the presence of shared elements does not mean that the state claim arises under federal law. *Sullivan*, 813 F.2d at 1375. The *Sullivan* court further argued that the order of filing should make no difference if the rationale for removal rests upon an election of forums rationale. “Regardless of the filing order, the plaintiff will have elected to use the federal forum . . .” *Id.*

95. *Sullivan*, 813 F.2d at 1376.

96. *Id.* The court also noted that its new interpretation of the basis for removal jurisdiction in *Moitie* (that the federal courts have removal jurisdiction when the state claim would be barred by the doctrine of res judicata) is subject to criticism. *Id.* If the

Applying the foregoing rationale to *Sullivan*, the Ninth Circuit held that the investors' state claims should be remanded to state court.⁹⁷ Their state claims were not barred by res judicata because a final judgment had not been entered on the federal action.⁹⁸ The investors' state claims were not preempted by federal law and therefore could be properly pursued under state law.⁹⁹ The state law claims did not fall within the federal court's original jurisdiction because they were never joined with the plaintiffs' federal claims.¹⁰⁰ The federal court could not exercise pendent jurisdiction over the state law claims because the plaintiff did not choose to file the state claims in the same complaint as the federal claims.¹⁰¹ The plaintiff was therefore permitted to assert parallel state and federal claims, and removal jurisdiction did not attach to the state claims under the "artful pleading doctrine."¹⁰²

V. CRITIQUE

The Ninth Circuit significantly elucidated the applicability of the artful pleading doctrine in the removal context in *Sullivan v. First Affiliated Securities*.¹⁰³ *Sullivan* offered the court an opportunity to (1) define the basis for removal jurisdiction in *Moitie*;¹⁰⁴ (2) step away from the court's previous explanation of

"state court is competent to apply federal res judicata in the state lawsuit," why should the existence of a res judicata defense allow the case to be removed to federal court? *Id.* Nevertheless, the *Sullivan* court proceeded to reason:

The federal judgment would ordinarily preclude the plaintiff from relitigating any federal or state claim arising out of the same operative facts. A purported state claim based on those facts would be in effect the same federal claim against which the judgment had been entered. The removing court could thus recharacterize the state claim as an artfully pleaded federal claim filed to circumvent the res judicata effect of the federal judgment.

Id. (citations omitted).

97. *Id.*

98. *Id.*

99. *Id.* The defendants never contended that federal law preempted plaintiffs' state law claims. *Id.* at 1372-73.

100. *Id.* at 1376.

101. *Id.* at 1376 n.8.

102. *Id.* at 1376.

103. 813 F.2d 1368 (9th Cir. 1987).

104. *Id.* at 1373-76.

the theoretical basis for *Moitie* as enunciated in *Salveson*¹⁰⁵; and (3) to impliedly reassert the preeminence of the well-pleaded complaint rule in the Ninth Circuit, carving out only a narrow exception from it in the form of the artful pleading doctrine.¹⁰⁶

A careful reading of the *Moitie* decision gives credence to the notion that “the task of divining *Moitie*’s theoretical underpinnings has fallen to the lower courts and commentators.”¹⁰⁷ Although *Moitie* clearly applied res judicata to the state claims filed after final judgment was rendered on the federal claim, the basis upon which the federal court approved removal jurisdiction was not articulated.¹⁰⁸ Because the defendants in *Sullivan* sought to apply the artful pleading doctrine to permit removal in a non-preemption setting, a rationale for the Supreme Court’s use of the artful pleading doctrine to permit removal in *Moitie* was critical.¹⁰⁹ Even though both *Sullivan* and *Moitie* involved artful pleading and removal in a non-preemption setting, it must be noted that the facts of the two cases are very dissimilar. In *Sullivan* the plaintiff asserted parallel state and federal claims, and pursued both claims independently from the beginning of litigation.¹¹⁰ In *Moitie* the plaintiff did not object to federal jurisdiction over his lawsuit, and only after his federal lawsuit was dismissed did he file an action in state court based on the same facts.¹¹¹ It is ironic that the Ninth Circuit struggled in *Sullivan* with the rationale underlying removal in *Moitie*. The Supreme Court in its footnote approving removal in *Moitie* simply agreed with the Ninth Circuit Court of Appeals, which had agreed with the district court that the claims presented were “federal in nature.”¹¹²

105. *Id.*

106. *Id.* at 1375-76.

107. *Id.* at 1373.

108. *Federated Department Stores v. Moitie*, 452 U.S. 394, 397 n.2. (1981).

109. *Sullivan*, 813 F.2d at 1373. The Second Circuit in *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754, 760 (2d Cir.), cert. denied, 107 S.Ct. 277 (1986) was faced with the same problem and gave its own interpretation to the rationale for removal in *Moitie*. See *supra* note 94.

110. *Sullivan*, 813 F.2d at 1370-71.

111. *Moitie*, 452 U.S. at 395-96.

112. *Moitie*, 452 U.S. at 397 n.2. “The Court of Appeals also affirmed the District Court’s conclusion that *Brown II* was properly removed to federal court, reasoning that the claims presented were ‘federal in nature.’ We agree that at least some of the claims had a sufficient federal character to support removal.” *Id.*

The Ninth Circuit once before addressed the rationale underlying *Moitie's* removal jurisdiction. In *Salveson v. Western States Bankcard Association*¹¹³ the Ninth Circuit reasoned that removal in *Moitie* rested on an election of forum rationale.¹¹⁴ In *Salveson* the court was faced with a case very similar to *Moitie*. Because the Supreme Court, in *Moitie*, had approved removal under the artful pleading doctrine when the plaintiff filed a suit in state court after a judgment had already been rendered in plaintiff's federal suit, it would seem that the basis for removal was not so important as the outcome—that the state action must be banned by the doctrine of res judicata.¹¹⁵ In *Sullivan* however, plaintiff had been pursuing both his federal court action and his state claims from the beginning of the lawsuit.¹¹⁶ If the *Moitie* decision really meant that a defendant could remove a state action to federal court whenever plaintiff pursued a federal remedy, then removal based upon an election of forum theory could serve as the rationale for removing state claims to federal court whenever the plaintiff also chose to pursue a parallel federal claim in federal court, precisely the position taken by the defendant in *Sullivan*.¹¹⁷

The *Sullivan* court was correct to retreat from any interpretation of *Moitie* that would permit such an enormous expansion of removal jurisdiction and a departure from settled precedent permitting concurrent progress of parallel lawsuits through the federal and state courts.¹¹⁸ Because an election of forum rationale¹¹⁹ could arguably expand removal jurisdiction well beyond

113. *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, (9th Cir. 1984).

114. *Id.* at 1425-29. The facts in *Salveson* were very similar to those in *Moitie*. *Id.* After summary judgment was entered against plaintiff's federal law claim, plaintiff filed an action in state court based on the same facts. *Id.* The state action was removed to federal court and dismissed. The Ninth Circuit concluded that the federal court had removal jurisdiction because plaintiff elected to proceed in federal court, therefore the state court action really arose under federal law. *Id.*

115. *Salveson*, 731 F.2d at 1432. "We view the Supreme Court's holding as standing at least for the proposition that if a state claim is found on removal to be an artfully pleaded federal claim which was previously before the federal court and was dismissed, then res judicata is to be applied." *Id.*

116. *Sullivan*, 813 F.2d at 1370.

117. *Id.* at 1374.

118. See generally Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 GEO. WASH. L. REV. 812 (surveying removal jurisdiction and characterizing it as being narrowly construed with courts giving deference to the well-pleaded complaint rule).

119. *Salveson*, 731 F.2d at 1429 (quoting the lower court decision in the same case:

what the Supreme Court envisioned when it decided *Moitie*, the *Sullivan* court was wise to step away from its reasoning in *Salveson*.¹²⁰ What the court has effectively done in *Sullivan* is to limit *Moitie* to its facts, and to permit removal only when plaintiff's state law claim would be barred by res judicata.¹²¹ Limiting the effect of *Moitie* appears to be entirely appropriate in light of *Moitie*'s poorly defined theoretical underpinnings.¹²² By limiting *Moitie* to its facts, the court also wisely limited the artful pleading doctrine to a narrow exception to the well-pleaded complaint rule.¹²³ The narrow exception means that the Ninth Circuit will continue to look only to the face of the complaint to determine the existence of a federal claim. Removal under the artful pleading exception will continue to be appropriate only where plaintiff's claim is completely preempted by federal law or when the state claim is barred by res judicata.¹²⁴

The *Sullivan* court noted that if the federal court's removal jurisdiction was broadened to permit removal of state claims pursued simultaneously with federal actions, judicial economy would be served by hearing as many of the plaintiff's claims together as possible.¹²⁵ The court further noted that "complex state and federal actions proceeding simultaneously against the same parties [may] pose grave problems in the management of litigation."¹²⁶ The court correctly concluded, however, that issues of judicial economy and litigation management are beyond the scope of the removal statute and the removal jurisdiction of the federal courts.¹²⁷ Other means are available to courts to coordinate duplicative state and federal litigation. Procedures

Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566, 577 (N.D. Cal. 1981)): "[T]he conclusion of artful pleading is properly drawn when the plaintiff 'by his own conduct, either by filing originally in federal court or by acceding to federal jurisdiction after removal, has made his claim a federal one.'"

120. *Sullivan*, 813 F.2d at 1374.

121. *Id.* at 1376.

122. *Id.* at 1373.

123. *Id.* at 1375-76.

124. *Id.* at 1375 (quoting *Salveson*). The artful pleading doctrine should be invoked "only in exceptional circumstances." *Salveson*, 731 F.2d at 1427.

125. *Sullivan*, 813 F.2d at 1374. Under the particular facts of this case, parallel state and federal claims may have led to some judicial economy by avoiding duplicative discovery. Reply Brief for Appellant at 7-10, *Sullivan v. First Affiliated Securities*, 813 F.2d 1368 (9th Cir. 1987) (No. 85-2961).

126. *Sullivan*, 813 F.2d at 1377 (quoting *California v. California & Hawaiian Sugar Co.*, 588 F.2d 1270, 1273 (9th Cir. 1979)).

127. *Id.* at 1377.

available include stays of either the state or the federal claims to permit litigation of one type of claim at a time,¹²⁸ injunctions,¹²⁹ and the doctrine of res judicata.¹³⁰

VI. CONCLUSION

By holding that the artful pleading doctrine as articulated in *Federated Department Stores v. Moitie*¹³¹ and *Salveson v. Western States Bankcard Association*¹³² does not support removal of an independent, parallel state claim to federal court, the Ninth Circuit has moved to limit the artful pleading doctrine. Removal is permitted only in a narrow range of cases that are either completely preempted by federal law or that have been precluded by federal res judicata.¹³³ The court's inquiry into potential removal jurisdiction will continue to begin with the traditional "face of the complaint" rule.¹³⁴ The court has narrowly defined its willingness to "look behind the complaint" and apply the artful pleading doctrine.

Susan H. Handelman*

128. See generally Note, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641 (1977) (concerning when federal courts should stay actions before them in order to protect parties from having to litigate actions in state and in federal courts concurrently).

129. See, e.g., *Golden v. Pacific Maritime Ass'n*, 786 F.2d 1425, 1427 (9th Cir. 1986). See generally Annotation, *Stay of Action in Federal Court Until Determination of Similar Action Pending in State Court*, 5 A.L.R. FED. 10 (1970) (collection of cases where courts have considered whether and when they can order a stay of action in federal court to allow determination of a similar action in state court).

130. MANUAL FOR COMPLEX LITIGATION 2d § 31.32 (1986) describes the role of res judicata as follows: "Federal law, however, generally permits multiple actions between the same parties to be pursued simultaneously, whether in other federal courts or in state courts, until a judgment is obtained that will be given effect in other cases under the doctrines of issue preclusion or claim preclusion." *Id.*

131. 452 U.S. 394 (1981).

132. 731 F.2d 1423 (9th Cir. 1984).

133. *Sullivan*, 813 F.2d at 1376.

134. See *supra* note 31.

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