

---

## COMMENT

---

---

### UNIFORMITY, FEDERALISM, AND TORT REFORM: THE *ERIE* IMPLICATIONS OF MEDICAL MALPRACTICE CERTIFICATE OF MERIT STATUTES

---

BENJAMIN GROSSBERG<sup>†</sup>

INTRODUCTION .....	218
I. BACKGROUND .....	219
A. <i>Relevance to Health Care Reform</i> .....	219
B. <i>Survey of Statutes</i> .....	222
C. <i>Relevance in Federal Court</i> .....	225
D. <i>Past Decisions</i> .....	226
E. <i>Other Scholarly Work</i> .....	228
II. THE <i>ERIE</i> ANALYSIS .....	229
A. <i>The Federal Rules of Civil Procedure: Hanna's First Prong</i> ...	231
1. Determining Whether There Is a Controlling Federal Enactment on Point .....	231
2. Rules 8, 9, and 12 .....	242
a. <i>Statutes Requiring Plaintiffs to File                Certificates of Merit and Complaints                Simultaneously</i> .....	243
b. <i>Statutes Requiring Plaintiffs to File                Certificates of Merit by a Specified                Point in Time After the Filing                of Complaints</i> .....	245
c. <i>The 12(b)(6) Question</i> .....	247
d. <i>The Role of Twombly and Iqbal</i> .....	249

---

<sup>†</sup> J.D. Candidate, 2011, University of Pennsylvania Law School. The Author thanks Professors Stephen B. Burbank, Catherine Struve, Geoffrey C. Hazard, Jr., and Allan Ides for their helpful thoughts and comments. He would also like to thank his wife and his parents for all their love and support.

3. Rule 11.....	250
a. <i>Rule 11's Qualified Rejection of Verifications or Affidavits</i> .....	251
b. <i>The Heightened Verification and Certification Requirement Implemented by Certificate of Merit Statutes</i> .....	253
c. <i>Discretion to Punish Under Rule 11</i> .....	256
4. Rules 26 and 37.....	257
a. <i>Disclosure Timing</i> .....	258
b. <i>Nontestifying Experts Under Rule 26</i> .....	259
c. <i>Punishment for Noncompliance Under Rule 37</i> .....	260
B. <i>The Two Prongs of Hanna: A Paradox</i> .....	261
III. THE POLICY IMPLICATIONS OF CERTIFICATE OF MERIT STATUTES .....	264
CONCLUSION.....	273

## INTRODUCTION

Medical malpractice “certificate of merit” statutes are pieces of state legislation designed to reduce frivolous malpractice lawsuits and associated costs.<sup>1</sup> Although the statutes vary in the requirements they place on litigants and in the breadth of lawsuits to which they apply, they all require the plaintiff in a malpractice action to consult with an expert either before the suit is filed or within a fixed period of time thereafter.<sup>2</sup>

This Comment addresses whether, under the *Erie* doctrine, these statutes are applicable in federal court. It then considers the policy implications of the answer. This Comment concludes that the statutes are not applicable in federal court. A faithful application of *Hanna*<sup>3</sup> and its progeny—including the Supreme Court’s recent decision in

---

<sup>1</sup> See, e.g., *State v. Nieto*, 993 P.2d 493, 502 (Colo. 2000) (stating that the purpose of a state’s certificate of merit statute is to ensure that the expert “has concluded that the plaintiff’s claim is meritorious,” thereby “avoiding unnecessary time and costs in defending professional negligence claims [and] weeding out frivolous claims” (quoting *Shelton v. Penrose/St. Francis Healthcare Sys.*, 984 P.2d 623, 628 (Colo. 1999)); *Bell v. Phoebe Putney Health Sys., Inc.*, 614 S.E.2d 115, 118 (Ga. Ct. App. 2005) (explaining that statute’s goal is “to reduce the number of frivolous malpractice suits”).

<sup>2</sup> For a broad discussion of certificate of merit statutes, see generally 2 STEVEN E. PEGALIS, *AMERICAN LAW OF MEDICAL MALPRACTICE* § 9:1 (3d ed. 2005), Karen Lerner, *Junk Lawsuits? Tinkering with the Tort Laws*, MED. MALPRACTICE L. & STRATEGY, March 2003, at 1, and Jefferey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 BYU L. REV. 537.

<sup>3</sup> *Hanna v. Plumer*, 380 U.S. 460 (1965).

*Shady Grove*<sup>4</sup>—shows that the vast majority of the statutes conflict with one or more of the Federal Rules of Civil Procedure. The few that are not clearly in conflict are not outcome determinative when that test is applied as *Hanna* instructs. As to the policy question, this Comment observes that *Hanna* tends to require the subordination in federal court of certain state laws designed to regulate specific areas of policy. Questioning whether reform is needed to provide greater protection, this Comment analyzes both radical and moderate suggestions for reforming the *Erie* doctrine, incorporating where appropriate the three main viewpoints represented in *Shady Grove*. The policy discussion concludes by analyzing how a moderate adjustment to *Hanna* might affect the certificate of merit issue.

Part I contains a brief discussion of the timeliness of this issue, followed by an overview of the statutes currently enacted, a survey of past decisions, and a review of other scholarly works. In order to determine whether these statutes conflict with the Federal Rules, Section II.A analyzes the decisions in which the Supreme Court has indicated whether or not a state statute and a Federal Rule conflict. To the extent possible, that Section extracts the legal principles animating those decisions and uses them as a framework to analyze whether various state statutes conflict with Rules 8, 9, 11, 12, 26, and 37. Concluding that conflicts do exist, the discussion in Section II.A points out errors in the reasoning of the courts that have concluded otherwise. Section II.B discusses the modified outcome determination test and how its application reveals a paradox built into *Hanna*, which favors the application of federal law. Part III discusses policy implications.

## I. BACKGROUND

### A. *Relevance to Health Care Reform*

The debate on health care reform culminating in the March 2010 passage of the Patient Protection and Affordable Care Act<sup>5</sup> gave new prominence to certificate of merit statutes. As proponents and opponents of medical malpractice reform debated the virtues of various reform proposals,<sup>6</sup> the certificate of merit garnered national attention

---

<sup>4</sup> *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010).

<sup>5</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>6</sup> See, e.g., 155 CONG. REC. H12,963-67 (daily ed. Nov. 7, 2009) (debating medical malpractice reform proposals contained in the Republican motion to recommit the Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009)).

as a type of malpractice reform that was less controversial than limiting damages or attorneys' fees.

In July of 2009, during a markup of an early version of the health care reform bill, the House Committee on Energy and Commerce approved an amendment offered by Representative Bart Gordon encouraging states to implement certificate of merit legislation.<sup>7</sup> The amendment created an incentive-payment program to reward states for implementing certain kinds of medical liability reform.<sup>8</sup> Under the amendment as passed by the Committee, Congress would have been authorized to appropriate funds that the Secretary of Health and Human Services could then distribute to states whose malpractice reform programs were "effective" and in compliance with the amendment's guidelines.<sup>9</sup> Those guidelines allowed incentive payments to be made if a state enacted certificate of merit laws, early offer laws, or both.<sup>10</sup>

During President Obama's ultimately fruitless attempt to win Republican support for health care reform, he stated to a joint session of Congress in September 2009 that he would instruct the Department of Health and Human Services to begin immediately providing incentives for states that implemented appropriate medical malpractice reform proposals, rather than wait for the passage of a final bill.<sup>11</sup> White House officials specifically indicated that eligible state legislation could include laws implementing expert-certificate requirements.<sup>12</sup> They further indicated that Representative Gordon's amendment was "a model for what Obama has in mind."<sup>13</sup>

<sup>7</sup> See *Markup of H.R. 3200 Before the H. Comm. on Energy and Commerce*, 111th Cong. (2009) (amendment offered by Reps. Bart Gordon, Nathan Deal, and Jim Matheson).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* Early offer laws allow a defendant to offer a malpractice plaintiff a settlement covering economic damages and modest attorneys' fees within a set period after the filing of the complaint. If the plaintiff rejects the offer, she will later be subject to a heightened burden of proof at trial. See generally Joni Hersch et al., *An Empirical Assessment of Early Offer Reform for Medical Malpractice*, 36 J. LEGAL STUD. S231, S256 (2007) (finding that early offer programs can furnish a variety of benefits, such as expedited payments and reduced litigation costs); Jeffrey O'Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law*, 78 NEB. L. REV. 858, 866 (1999) (describing the impediments faced by plaintiffs who decline early offers).

<sup>11</sup> See Amy Goldstein, *On Malpractice Reform, Fine Print Is Still Hazy*, WASH. POST, Sept. 11, 2009, at A7 (reporting on President Obama's desire for states to experiment with reforms that reduce the costs of medical malpractice litigation).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

Although the House of Representatives subsequently passed the Gordon amendment as part of a larger health care reform bill,<sup>14</sup> the specific bill into which the amendment was incorporated was not the final bill that the President ultimately signed into law.<sup>15</sup> President Obama nonetheless delivered on his promise to create an incentive program without waiting for specific congressional approval. On October 20, 2009, the Agency for Healthcare Research and Quality, a division of the Department of Health and Human Services, released a Request for Applications detailing the grant program.<sup>16</sup> The program offered up to \$3 million per state (up to a total of \$21 million for the entire program) for the implementation of current or future medical liability models that, among other things, reduce both “the incidence of frivolous lawsuits and liability premiums.”<sup>17</sup> An Administration fact sheet confirmed that this grant program corresponded to the initiative that the President had mentioned to Congress.<sup>18</sup> Recent national atten-

---

<sup>14</sup> Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 2531 (as passed by House, Nov. 7, 2009). This version of the Gordon amendment required that, in addition to enacting either a certificate of merit requirement or early offer requirement, to be eligible, the state law could not limit attorneys’ fees or damages. *Id.* § 2531(a)(4). However, the efficacy of this limitation was undermined by subsection (a)(5), which explained that an eligible state could still limit fees or damages, as long as the law doing so “is not established or implemented as part of the” same law implementing certificates of merit or early offers. *Id.* § 2531(a)(5)(C).

<sup>15</sup> *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, sec. 10607, § 399V-4, 125 Stat. 119, 1009-14 (2010) (to be codified at 42 U.S.C. § 280g-15). This bill did authorize a broader incentive program to provide further funding to states that develop and implement “alternatives to current tort litigation” for resolving medical malpractice disputes. *Id.* § 399V-4(a). However, the program would seem to exclude mandatory certificate of merit statutes because of its requirement that any program receiving funding “provide[] patients the ability to opt out of or voluntarily withdraw from participating in the alternative at any time.” *Id.* § 399V-4(c)(2)(G). Moreover, a mandatory certificate of merit statute might conflict with the statute’s requirement that any program receiving funding cannot “limit or curtail” a patient’s “ability to file a claim.” *Id.* § 399V-4(c)(2)(I). *But see* COMM. ON ENERGY AND COMMERCE ET AL., 111TH CONG., HR 3962, THE AFFORDABLE HEALTH CARE FOR AMERICA ACT SECTION-BY-SECTION ANALYSIS 45 (considering certificate of merit statutes to fit within the definition of the term “medical liability alternatives” for the purposes of an earlier version of health care reform).

<sup>16</sup> *See* AGENCY FOR HEALTHCARE RESEARCH & QUALITY, U.S. DEP’T OF HEALTH & HUMAN SERVS., RFA-HS-10-021, MEDICAL LIABILITY REFORM AND PATIENT SAFETY DEMONSTRATION PROJECTS (2009) (instituting a grant program for states and health care systems willing to undertake reforms), *available at* <http://grants1.nih.gov/grants/guide/rfa-files/RFA-HS-10-021.html>.

<sup>17</sup> *Id.*

<sup>18</sup> *See* Fact Sheet, U.S. Dep’t of Health & Human Servs., Patient Safety and Medical Liability Reform Demonstration (Sept. 17, 2009), *available at* <http://healthreform.gov/newsroom/factsheet/medicalliability.html> (quoting President Obama’s September

tion, along with an Obama Administration–provided stamp of federal approval, make an analysis of the applicability of certificate of merit statutes in federal court relevant and timely.

### B. *Survey of Statutes*

State certificate of merit statutes vary widely in their exact provisions. For instance, some are limited to medical negligence while others cover other types of professional negligence as well.<sup>19</sup> For the purposes of this discussion, however, it is useful to categorize them into three rough groups.

The first category consists of statutes that require the attorney, when filing the complaint, to certify that she has consulted with an expert and that the expert has indicated that the claim has at least a reasonable chance of being meritorious. For instance, Florida’s statute asserts that

[n]o action shall be filed for personal injury or wrongful death arising out of medical negligence, whether in tort or in contract, unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint or initial pleading shall contain a certificate of counsel that such reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant. For purposes of this section, good faith may be shown to exist if the claimant or his or her counsel has received a written opinion, which shall not be subject to discovery by an opposing party, of an expert as defined in s. 766.102 that there appears to be evidence of medical negligence.<sup>20</sup>

Other states with statutes falling into this category include Minnesota, Mississippi, New York, North Carolina, Oklahoma, and Tennessee.<sup>21</sup>

The second category consists of statutes that require the attorney to file a certificate or affidavit from the expert herself, rather than a certificate merely verifying that a consultation has occurred. For ex-

---

2009 congressional address and explaining that the demonstration initiative was implemented “[a]s directed by President Obama”).

<sup>19</sup> Compare FLA. STAT. § 766.104 (2010) (requiring certificates of merit only in medical negligence actions), with COLO. REV. STAT. § 13-20-602 (2008) (requiring a “certificate of review” in any action “based upon the alleged professional negligence of an acupuncturist . . . or a licensed professional”).

<sup>20</sup> FLA. STAT. § 766.104.

<sup>21</sup> See MINN. STAT. ANN. § 145.682 (West 2005); MISS. CODE ANN. § 11-1-58 (West 2008); N.Y. C.P.L.R. 3012-a (McKinney 1991); N.C. GEN. STAT. § 1A-1 r. 9(j) (2007); OKLA. STAT. tit. 12, § 19 (Supp. 2009); TENN. CODE ANN. § 29-26-122 (Supp. 2009).

ample, Ohio's Rule of Civil Procedure 10(D) requires that the complaint in any medical negligence claim include one or more "affidavits of merit" per defendant.<sup>22</sup> Each affidavit must include

- (i) [a] statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;
- (ii) [a] statement that the affiant is familiar with the applicable standard of care;
- (iii) [t]he opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.<sup>23</sup>

Other states that employ or have employed a similar approach include Connecticut, Delaware, Georgia, Illinois, Michigan, Nevada, South Carolina, and Washington.<sup>24</sup>

The third category consists of statutes that require the filing of certificates or affidavits similar to those in the first two categories; however, rather than mandating that plaintiffs file certificates with the complaint, these statutes require the certificate to be filed within a set period of time after the complaint. For instance, New Jersey's statute requires that

[i]n any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices.<sup>25</sup>

---

<sup>22</sup> OHIO R. CIV. P. 10(D).

<sup>23</sup> *Id.*

<sup>24</sup> See CONN. GEN. STAT. ANN. § 52-190a (West Supp. 2009); DEL. CODE ANN. tit. 18, § 6853 (Supp. 2008); GA. CODE ANN. § 9-11-9.1 (Supp. 2008); 735 ILL. COMP. STAT. ANN. 5/2-622 (West Supp. 2009), *invalidated by* *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010); MICH. COMP. LAWS ANN. § 600.2912d (West 2000); NEV. REV. STAT. ANN. § 41A.071 (LexisNexis 2006); S.C. CODE ANN. § 15-36-100 (Supp. 2008); WASH. REV. CODE § 7.70.150 (2007), *invalidated by* *Putman v. Wenatchee Med. Ctr.*, 216 P.3d 374, 377-79 (Wash. 2009) (holding that statute restricted access to courts, violated separation of powers by intruding upon the Washington Supreme Court's constitutional power to promulgate procedural rules, and conflicted with state procedural rules concerning pleadings and verifications).

<sup>25</sup> N.J. STAT. ANN. § 2A:53A-27 (West Supp. 2010).

States with similar statutes include Arkansas, Colorado, Maryland, Missouri, North Dakota, Pennsylvania, and Texas.<sup>26</sup>

In addition to these three categories, there are a few other noteworthy variations among certificate of merit statutes.<sup>27</sup> A number of states require that the affidavit or certificate contain a significant description of the operative facts and theories employed by the consulted expert in reaching her opinion. For instance, Georgia's statute requires that the affidavit "set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."<sup>28</sup> Texas's statute goes as far as to require that, within 120 days of filing a malpractice complaint, the plaintiff produce at least one detailed expert report for every physician-defendant in the case.<sup>29</sup> Another important distinction among the various statutes lies in the repercussions for noncompliance or compliance in bad faith. The penalties for not adhering to a certificate of merit statute include dismissal without prejudice,<sup>30</sup> dismissal with prejudice,<sup>31</sup> awarding attorneys' fees to defendants,<sup>32</sup> sanctions for the attorney,<sup>33</sup> and even disciplinary proceedings with the state bar association.<sup>34</sup>

---

<sup>26</sup> See ARK. CODE ANN. § 16-114-209 (2006), *partially invalidated* by *Summerville v. Throer*, 253 S.W.3d 415, 420-21 (Ark. 2007) (holding subsection (b)(3)(a), which calls for dismissal of the action if the affidavit is not filed within thirty days of the complaint, unconstitutional because it conflicted with Arkansas Rule 3, which governs the commencement of actions, and thereby intruded upon state supreme court's constitutional power to make court procedural rules); COLO. REV. STAT. § 13-20-602 (2008); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04 (LexisNexis Supp. 2008); MO. REV. STAT. § 538.225 (2000); N.D. CENT. CODE § 28-01-46 (Supp. 2009); 231 PA. CODE § 1042.3 (2008), TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West Supp. 2009). *But see* W. VA. CODE ANN. § 55-7B-6 (LexisNexis 2008) (requiring plaintiffs to produce "screening certificate[s] of merit" at least thirty days *before* complaint is filed).

<sup>27</sup> This paragraph focuses on variations that have a direct bearing on whether the statutes are enforceable in federal court. There are, of course, other important variations that will not be discussed in this Comment. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-190a (West Supp. 2009) (allowing a court to extend the relevant statute of limitations if necessary to allow plaintiff time to comply with the "certificate of good faith" statute).

<sup>28</sup> GA. CODE ANN. § 9-11-9.1 (Supp. 2008).

<sup>29</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2005 & Supp. 2009).

<sup>30</sup> *See, e.g.*, OKLA. STAT. ANN. tit. 12, § 19(A)(2) (Supp. 2009) ("If the civil action for professional negligence is filed . . . without an affidavit being attached to the petition . . . the court shall, upon motion of the defendant, dismiss the action without prejudice to its refiling.").

<sup>31</sup> *See, e.g.*, MINN. STAT. ANN. § 145.682 (West 2005) ("Failure to comply with subdivision 2, clause (1), within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal with prejudice of each cause of action as to which expert testimony is necessary to establish a prima facie case.").

<sup>32</sup> *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West Supp. 2009) (establishing that if an expert report is not filed, the court should enter an order that



All together, this Comment has identified at least twenty-five states that have enacted certificate of merit statutes.<sup>35</sup> These include states in ten of the eleven numbered Circuits; cumulatively, these states represent well over sixty percent of the United States' population.<sup>36</sup>

### C. *Relevance in Federal Court*

Certificate of merit statutes can become relevant whenever state malpractice law provides the rule of decision in federal court. Because there is no general federal malpractice cause of action, any medical negligence case in federal court will employ state medical negligence law. Medical negligence actions arrive in federal court<sup>37</sup> under three different scenarios: diversity cases,<sup>38</sup> federal question cases<sup>39</sup> in which a state malpractice claim is pendent to the federal claim,<sup>40</sup> and malpractice claims against the federal government arising

“awards to the affected physician or health care provider reasonable attorney’s fees and costs of court incurred by the physician or health care provider”).

<sup>33</sup> See, e.g., ARK. CODE ANN. § 16-114-209(a) (2006) (allowing “appropriate sanctions” in the case of noncompliance).

<sup>34</sup> See, e.g., FLA. STAT. § 766.104 (2010) (declaring that if the attorney did not file in good faith, “the court shall award attorney’s fees and taxable costs against claimant’s counsel, and shall submit the matter to The Florida Bar for disciplinary review of the attorney”).

<sup>35</sup> See *supra* notes 20-26.

<sup>36</sup> See United States 2009 Population Estimates by State, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow “Population Finder” hyperlink; then follow “Alphabetic” hyperlink) (last visited Sept. 15, 2010).

<sup>37</sup> From January 1, 2008, to December 31, 2008, 1126 complaints containing a medical malpractice claim were filed in federal court. See *Personal Injury—Medical Malpractice Cases Filed Between January 1, 2008 and December 31, 2008*, JUSTIA.COM, <http://dockets.justia.com/search?nos=362&after=2008-01-01&before=2008-12-31> (last visited Sept. 15, 2010) (listing results of an online docket search).

<sup>38</sup> See, e.g., *Baird v. Celis*, 41 F. Supp. 2d 1358, 1359 (N.D. Ga. 1999) (applying state malpractice law in a claim brought by an Alabama resident against a hospital in Georgia).

<sup>39</sup> When a district court exercises pendent jurisdiction over state claims pursuant to 28 U.S.C. § 1367, it applies state law as if deciding a diversity case. See *Felder v. Casey*, 487 U.S. 131, 151 (1988) (“[W]hen a federal court exercises diversity or pendent jurisdiction over state-law claims, ‘the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.’” (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945))).

<sup>40</sup> Litigants attach state medical malpractice complaints to claims arising under several federal statutes, including 42 U.S.C. § 1983 and the Federal Patient Anti-Dumping Act, 42 U.S.C. § 1395dd (2006). See, e.g., *Hunter v. Amin*, 583 F.3d 486, 488 (7th Cir. 2009) (42 U.S.C. § 1983); *Palmer v. Hosp. Auth.*, 22 F.3d 1559, 1561-62 (11th Cir. 1994) (Federal Patient Anti-Dumping Act).

under the Federal Tort Claims Act (FTCA).<sup>41</sup> Cases brought under any of these three scenarios can result in consideration of the applicability of certificate of merit statutes.

#### D. Past Decisions

Two circuit courts have considered the *Erie* implications of certificate of merit statutes, both ruling that such statutes were applicable in federal court. In *Chamberlain v. Giampapa*, the Third Circuit held that New Jersey's affidavit of merit statute was applicable in federal court.<sup>42</sup> The Tenth Circuit, in *Trierweiler v. Croxton and Trench Holding Corp.*, similarly held that Colorado's certificate of review statute was applicable in federal court.<sup>43</sup> Additionally, two circuits, the Eighth<sup>44</sup> and the Eleventh (in a nonprecedential opinion),<sup>45</sup> have affirmed decisions in which the statutes were applied, but the *Erie* issue was not considered.

---

<sup>41</sup> 28 U.S.C. §§ 1346(b), 2671–2680. Although the policy considerations that animate rule-of-decision jurisprudence are different for claims brought under the FTCA, some federal courts apply the *Erie* doctrine. See, e.g., *Seery v. United States*, No. 98-0671, 2001 WL 34368387, at \*1 (D. Del. May 1, 2001) (citing *Chamberlain v. Giampapa*, 210 F.3d 154, 161 (3d Cir. 2000) (citing a Third Circuit diversity analysis of New Jersey's certificate of merit statute to support the proposition that “the New Jersey Affidavit of Merit Statute is substantive state law that should be applied to FTCA actions”); see also *Daniel v. United States*, No. 09-2371, 2010 WL 481267, at \*2-4 (N.D. Ohio Feb. 5, 2010) (using *Erie* analysis to determine the applicable law in FTCA claims); *Rahimi v. United States*, 474 F. Supp. 2d 825, 827-29 (N.D. Tex. 2006) (same); *Straley v. United States*, 887 F. Supp. 728, 734-37 (D.N.J. 1995) (same); cf., *Richards v. United States*, 369 U.S. 1, 11 (1962) (holding that district courts presiding over FTCA actions should apply the “whole law” of the forum state). But see *United States v. Yellow Cab Co.*, 340 U.S. 543, 553 (1951) (clarifying that the Federal Rules of Civil Procedure always apply in FTCA actions).

Federal courts that import an *Erie* analysis into FTCA cases are probably ruling incorrectly. See Gregory Gelfand & Howard B. Adams, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937, 978 n.129 (1988) (“The states are never offended by the use of federal procedure in cases involving the [FTCA], as they are not perceived as state-law matters, and the concern over forum shopping is not as relevant as it is in *Erie* because there is no comparable case that is only capable of being brought in state court.”). Nevertheless, to the extent that federal courts do apply *Erie* in FTCA contexts, those cases are relevant to this Comment.

<sup>42</sup> 210 F.3d 154, 161 (3d Cir. 2000).

<sup>43</sup> 90 F.3d 1523, 1538-41 (10th Cir. 1996).

<sup>44</sup> See *Weasel v. St. Alexius Med. Ctr.*, 230 F.3d 348, 352 (8th Cir. 2000) (affirming the dismissal of a medical malpractice claim for failure to comply with North Dakota's expert-affidavit statute without considering whether the law is applicable in federal court).

<sup>45</sup> See *Johnson v. McNeil*, 278 Fed. App'x 866, 871-72 (11th Cir. 2008) (upholding the dismissal of a negligence action for failure to comply with Florida's presuit requirements for medical malpractice claims without questioning whether the statute applies in federal court). According to Eleventh Circuit rules, this opinion does not create binding precedent. See 11TH CIR. R. 36-2 (considering unpublished opinions nonbinding).

Although these affirmations suggest implicit approval by those courts, when the Eleventh Circuit previously considered the issue directly, it suggested in dicta that it might find Georgia's statute to be applicable in federal court.<sup>46</sup>

One reason for the lack of settled appellate law is that *Erie* issues at the pleading stage are generally not appealed.<sup>47</sup> In most states, a plaintiff who fails to file a certificate of merit will be given a second chance. Assuming the plaintiff is then able to fulfill the requirements of the statute, she may never have a reason to appeal the prior ruling. If, on the other hand, a defendant fails to convince a district court that the plaintiff must file a certificate, she probably cannot immediately appeal the court's ruling.<sup>48</sup> Even if the defendant loses the case, the court's ruling on the certificate of merit is unlikely to constitute reversible error.<sup>49</sup> Given the limited space available in a federal appellate brief, defendants focus their efforts elsewhere.<sup>50</sup>

At the district court level, the picture becomes murkier. While a majority of courts appear to have concluded that the statutes are applicable, a strong minority has ruled that they are not.<sup>51</sup> Of the courts that have concluded that the statutes are applicable, some have given only cursory analysis. For instance, in *Finnegan v. University of Rochester Medical Center*, the court briefly cited some nonbinding precedent and then summarily concluded, "I agree with these cases that a state statute requiring a certificate of merit is substantive law that applies in a federal diversity action."<sup>52</sup> Moreover, a majority or near majority of

---

<sup>46</sup> See *Brown v. Nichols*, 8 F.3d 770, 773-74 (11th Cir. 1993) (noting that plaintiff's complaint would have been sufficiently pled under either Rule 8 or Georgia's statute).

<sup>47</sup> Cf. Richard Henry Seamon, *An Erie Obstacle to State Tort Reform*, 43 IDAHO L. REV. 37, 86-88 (2006) (explaining that the applicability in federal court of state statutes restricting the pleading of punitive damages is an issue that tends to avoid appellate review).

<sup>48</sup> See 28 U.S.C. § 1292 (2006) (setting forth the narrow circumstances under which interlocutory appeals are granted).

<sup>49</sup> Cf. *infra* text accompanying notes 233-36 (explaining why nonenforcement of a certificate of merit statute at the trial court level is unlikely to alter the ultimate outcome of a case).

<sup>50</sup> See FED. R. APP. P. 32(a)(7) (limiting appellant's principal brief to either 14,000 words or approximate equivalents in pages and lines).

<sup>51</sup> Compare *Smith v. Planned Parenthood of the St. Louis Region*, 225 F.R.D. 233, 242 (E.D. Mo. 2004) (applying Missouri's health care affidavit statute), with *Long v. Adams*, 411 F. Supp. 2d 701, 709 (E.D. Mich. 2006) (refusing to apply Michigan's affidavit of merit requirement in a diversity malpractice suit).

<sup>52</sup> 180 F.R.D. 247, 249 (W.D.N.Y. 1998).

federal courts in Georgia,<sup>53</sup> Texas,<sup>54</sup> and Florida<sup>55</sup> have determined that their state statutes are not applicable in federal court. While the decisional material suggests that most courts consider the statutes to apply in federal court, the picture is far from clear.

It is possible that the outcomes of the decided cases are skewed by the quality of representation. Caution dictates that more competent plaintiffs' attorneys would file a certificate of merit if there were even a possibility that a judge might determine that failure to do so would be grounds for dismissal. Indeed, if most plaintiffs' attorneys voluntarily submit the certificates in federal court, it might predispose judges to assume that the statutes must apply there. This raises questions about the competence of counsel who decide not to file certificates and who consequently are the same attorneys who will be making the *Erie* argument to courts.

### E. Other Scholarly Work

There is a small body of scholarly work addressing the applicability of certificate of merit statutes in federal court.<sup>56</sup> There is, however, no recent, comprehensive analysis of the problem. Some of the articles focus on the statute of only one state.<sup>57</sup> Other articles are limited in analytical scope, focusing chiefly on the conflict between the various statutes and Federal Rules 8, 9 and 11, to the exclusion of other relevant Rules, including 26 and 37.<sup>58</sup> Lastly, at the time of writing,

<sup>53</sup> See *Denton v. United States*, No. 04-3285, 2006 WL 358273, at \*2 (N.D. Ga. Feb. 15, 2006) (“[C]ourts in this district have previously held that Georgia’s expert-affidavit requirement contained in O.C.G.A. § 9-11-9.1 does not apply in diversity actions filed in federal district courts.”).

<sup>54</sup> See *Guzman v. Mem’l Hermann Hosp. Sys.*, No. 07-3973, 2008 WL 5273713, at \*15 (S.D. Tex. Dec. 17, 2008) (listing extensive decisional law to support the proposition that federal courts in Texas do not apply Texas’s expert-report statute).

<sup>55</sup> See, e.g., *Braddock v. Orlando Reg’l Health Care Sys.*, 881 F. Supp. 580, 584 (M.D. Fla. 1995) (holding that Florida’s expert-affidavit statute directly conflicts with Rule 8).

<sup>56</sup> Interestingly, in contrast to majority of the judicial decisions on this topic suggesting that certificate of merit statutes should apply in federal court, the scholarly material overwhelmingly suggests that they should not.

<sup>57</sup> See, e.g., Dace A. Caldwell, Comment, *Civil Procedure: Medical Malpractice Gets Erie: The Erie Implications of a Heightened Pleading Burden in Oklahoma*, 57 OKLA. L. REV. 977 (2004); Robert K. Harris, Case Comment, *Brown v. Nichols: The Eleventh Circuit Refuses to Play the Erie Game with Georgia’s Expert Affidavit Requirement*, 29 GA. L. REV. 291 (1994); Melinda L. Stroub, Note, *The Unforeseen Creation of a Procedural Minefield—New Jersey’s Affidavit of Merit Statute Spurs Litigation and Expense in Its Interpretation and Application*, 34 RUTGERS L.J. 279, 290 n.61 (2002).

<sup>58</sup> See Jeffrey A. Parness et al., *The Substantive Elements in the New Special Pleading Laws*, 78 NEB. L. REV. 412, 431-33 (1999) (discussing cases that considered if state sta-

no work has been done on the applicability of certificate of merit statutes in federal court since the Supreme Court's decision in *Shady Grove*, its most recent *Erie* case, or even since its decisions in *Twombly*<sup>59</sup> and *Iqbal*,<sup>60</sup> cases that have fundamentally altered the meaning of Rule 8.<sup>61</sup> In light of the shortcomings of prior work, the still-unsettled nature of the question, and the newfound prominence of the issue in the context of health care reform, the issue is ripe for further exploration.

## II. THE *ERIE* ANALYSIS

Courts determine whether state laws should be enforced in federal court by applying the *Erie* doctrine. *Erie Railroad Co. v. Tompkins* established the basic proposition that federal courts sitting in diversity must apply state substantive law and federal procedural law.<sup>62</sup> *Guaranty Trust Co. v. York* instructed lower courts to distinguish between substance and procedure in the *Erie* context by applying an outcome-determination test.<sup>63</sup>

The Court enunciated the framework for its modern *Erie* jurisprudence in *Hanna v. Plumer*.<sup>64</sup> *Hanna* established two separate prongs

tutes requiring special pleading of medical malpractice claims conflict with federal pleading requirements); Mary Margaret Penrose & Dace A. Caldwell, *A Short and Plain Solution to the Medical Malpractice Crisis: Why Charles E. Clark Remains Prophetically Correct About Special Pleading and the Big Case*, 39 GA. L. REV. 971, 1003-20 (2005) (explaining why state statutes imposing heightened pleading standards on medical malpractice claims conflict with the notice pleading regime established by the Federal Rules); Harris, *supra* note 57, at 301-07 (concluding that Georgia's expert-affidavit requirement conflicts with Federal Rules of Civil Procedure 8, 11, and 15).

<sup>59</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

<sup>60</sup> Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

<sup>61</sup> Cf. Penrose & Caldwell, *supra* note 58, at 999 (arguing that certificate of merit statutes conflict with the Federal Rules because "[i]n 1957, 1993, and 2002, the Supreme Court evaluated the issue of heightened pleadings and, in each instance, rebuffed attempts to incorporate any heightened pleading requirement into Rule 8").

<sup>62</sup> 304 U.S. 64, 78 (1938); see also *Hanna v. Plumer*, 380 U.S. 460, 465 (1965) ("The broad command of *Erie* was . . . [that] federal courts are to apply state substantive law and federal procedural law.").

<sup>63</sup> See *Guar. Trust Co. v. York*, 326 U.S. 99, 109 (1945) ("In essence, the intent of [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.").

<sup>64</sup> See *Hanna*, 380 U.S. at 465-74. For a discussion of the development of the *Erie* doctrine through *Hanna*, see John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974), and Allan Ides, *The Supreme Court and the Law to be Applied in Diversity*

for analyzing *Erie* questions: a first prong for areas where a valid Federal Rule or federal statute is directly on point and a second prong where no Rule or statute covers the issue in dispute and only federal common law stands in opposition to the application of the state law in question.<sup>65</sup> In the case of a controlling Federal Rule of Civil Procedure, promulgated by the Supreme Court with Congress's acquiescence, the Court ruled that only the Constitution and the Rules Enabling Act establish limitations on the Rule's enforceability.<sup>66</sup> As long as the Rule does not exceed the power granted to the courts by either the Constitution or the Rules Enabling Act, federal courts will enforce it over a conflicting state law, even if this might yield a different outcome in litigation.<sup>67</sup>

When there is no controlling Federal Rule or statute on point, *Hanna's* second prong instructs courts to answer the substance/procedure question by applying an outcome-determination test.<sup>68</sup> However, *Hanna* tempered *York's* outcome-determination test.

*Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Problems*, 163 F.R.D. 19 (1995).

<sup>65</sup> See *Hanna*, 380 U.S. at 469-71 (distinguishing between situations in which state law applies because no Federal Rule covers the point in dispute and those in which a Federal Rule controls the issue, displacing conflicting state laws).

<sup>66</sup> See *id.* at 463-64 (concluding that, because Rule 4(d)(1) is valid pursuant to both the Constitution and the Rules Enabling Act, it controls).

<sup>67</sup> See *id.* at 472-74 ("To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."). A Rule is valid under the Rules Enabling Act as long as it does not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2006). In *Sibbach v. Wilson & Co.* and its progeny, the Court explained that this limitation permits any rule that "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law." 312 U.S. 1, 14 (1941); accord *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.) ("We have long held that this limitation means that the Rule must 'really regulat[e] procedure, the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them . . .'" (quoting *Sibbach*, 312 U.S. at 14)). For further discussion of the validity of the *Sibbach* test following *Shady Grove*, see *infra* note 256.

<sup>68</sup> See *Hanna*, 380 U.S. at 465-67, 470-74 (asserting that the outcome-determination test applies in those cases where "no Federal Rule . . . cover[s] the point in dispute"). Interestingly, the Court characterizes both the test to determine validity under the Rules Enabling Act and the outcome-determination test as tests that distinguish between substance and procedure, even though those two tests can yield different results. See *id.* at 470-71 ("It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law . . ."). For a discussion of the shifting line between substance and procedure in

First, *Hanna* warned courts not to apply the test syllogistically. The Court explained that any state procedural law not followed by a litigant in federal court can seem outcome determinative if its application in federal court means the litigant loses, whereas refusal to apply it means the litigation continues.<sup>69</sup> Instead, the *Hanna* Court explained, lower courts should apply the outcome-determination test with “reference to the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.”<sup>70</sup> Although later cases have refined the meaning of the Supreme Court’s *Erie* jurisprudence, *Hanna* still provides the basic framework by which federal courts must analyze the applicability of certificate of merit statutes.

### A. *The Federal Rules of Civil Procedure: Hanna’s First Prong*

#### 1. Determining Whether There Is a Controlling Federal Enactment on Point

Analyzing a potential conflict under the first prong of *Hanna* requires a determination of whether the state law conflicts with any of the Federal Rules of Civil Procedure.<sup>71</sup> Because the Supreme Court has never found that a Federal Rule violates the Constitution or goes beyond the limits set by the Rules Enabling Act,<sup>72</sup> the crucial analysis in *Hanna*’s first prong is determining whether the Federal Rule in question is broad enough to control the situation.<sup>73</sup>

---

the context of *Hanna*, see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1027-35 (1982), and Ely, *supra* note 64, at 718-38.

<sup>69</sup> *Hanna*, 380 U.S. at 468-69; see also A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 356 (2007) (criticizing *York*’s outcome-determination test by suggesting that “all legal rules have the potential to impact the outcome of a case”).

<sup>70</sup> *Hanna*, 380 U.S. at 468.

<sup>71</sup> For discussions of the scope of the Federal Rules of Civil Procedure, see generally 17A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 124.03 (3d ed. 2007); 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4510 (2d ed. 1996); Ides, *supra* note 64, at 61-67.

<sup>72</sup> 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1030, at 166-67 (3d ed. 2002). See also *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.) (“[W]e have rejected every statutory challenge to a Federal Rule that has come before us.”).

<sup>73</sup> It is important to note that in recent years, most notably in *Semtek*, the Court has resorted to strained, narrow interpretations of the Federal Rules in order to avoid Enabling Act challenges. See *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001) (holding that although Rule 41(b) deems an involuntary dismissal under its terms to be an “adjudication on the merits,” that term confers no preclusive ef-

In *Hanna*, the Supreme Court contrasted the supposed simplicity of this step with the “relatively unguided *Erie* choice.”<sup>74</sup> However, defining when a Federal Rule is coextensive with state law to the point that the Federal Rule controls is, in reality, a difficult and abstract question. Although the Supreme Court has provided some guidance, it is the ambiguity of this question that leads to discord among courts and scholars as to whether certificate of merit statutes are applicable in federal court. To construct a general framework for determining when a Federal Rule and state law conflict, it makes sense to study the line of Supreme Court cases analyzing this question in an attempt to form the most cohesive set of principles possible.

Prior to *Hanna*, the Supreme Court had never explicitly declared that a valid Federal Rule always trumps state law with which it is sufficiently coextensive.<sup>75</sup> In *Hanna*, the plaintiff served the executor of the defendant’s estate by leaving copies of the summons and complaint with the executor’s wife at his residence.<sup>76</sup> This service was sufficient to satisfy the requirements of Rule 4(d)(1), which allows service to be made by leaving copies at the defendant’s “dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.”<sup>77</sup> The trial court granted summary judgment in favor of the defendant because the plaintiff had failed to adhere to a Massachusetts statute requiring in-hand service for the executor of an estate.<sup>78</sup> The Supreme Court concluded that as to these two enactments, “the clash is unavoidable; Rule 4(d)(1) says—implicitly, but with unmistakable clarity—that in-hand service is not required in federal courts.”<sup>79</sup>

---

fect if a claim is brought in other districts); see also Stephen B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1042-46 (2002) (explaining that the drafters of Rule 41(b) intended for the Rule to have preclusive effect in other districts); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1150-52 (2002) (observing that in its efforts to avoid Enabling Act challenges, the Court has shown a willingness to depart “from a Rule’s text and Notes”); cf. *Shady Grove*, 130 S. Ct. 1431, 1448-60 (Stevens, J., concurring) (urging the Court to employ stricter scrutiny when evaluating the validity of a Federal Rule under the Rules Enabling Act).

<sup>74</sup> *Hanna*, 380 U.S. at 471.

<sup>75</sup> See *Ides*, *supra* note 64, at 34-55 (tracking doctrinal developments from *Erie* to *Hanna*).

<sup>76</sup> *Hanna*, 380 U.S. at 461.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 462.

<sup>79</sup> *Id.* at 470.



*Hanna* suggested that if the Federal Rules explicitly say that a given means (residential service) of accomplishing an end (notice) is sufficient, then it shall be sufficient even if a state statute requires more rigorous means (in-hand service).

The next important case in this chain is *Walker v. Armco Steel Corp.*<sup>80</sup> In *Walker*, the Court held that Rule 3, which deems an action commenced when the plaintiff files her complaint with the court, did not exclude the operation of an Oklahoma statute mandating that, for the purpose of tolling a statute of limitations, an action is commenced upon service of the summons to the defendant.<sup>81</sup> The Court observed that the “*Hanna* analysis” only occurs if there is a “‘direct collision’ between the Federal Rule and the state law.”<sup>82</sup> The Court framed the question by asking whether “the Federal Rule . . . is sufficiently broad to control the issue before the Court.”<sup>83</sup> However, the Court immediately softened that rule with a footnote instructing that “this is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a ‘direct collision’ with state law. The Federal Rules should be given their plain meaning.”<sup>84</sup>

In justifying its holding, the Court observed that there is nothing to suggest that Rule 3 was intended to govern tolling of statutes or to displace state laws governing that topic.<sup>85</sup> The Court concluded that

<sup>80</sup> 446 U.S. 740 (1980).

<sup>81</sup> See *id.* at 750-52 (describing the Federal Rule and state statute at issue to conclude that the latter applies in a federal court exercising diversity jurisdiction). The facts of this case were virtually indistinguishable from those of *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). The Court used *Walker* as an opportunity to show that the pre-*Hanna* cases construing the *Erie* doctrine did indeed survive the decision in *Hanna*. *Walker*, 446 U.S. at 749.

<sup>82</sup> *Walker*, 446 U.S. at 749 (citing *Hanna*, 380 U.S. at 472). *Walker* credits *Hanna* for the “direct collision” language. However, in *Hanna*, the Court uses “direct collision” to describe the type of cases that had *not* previously been decided in the Court’s *Erie* jurisprudence. In *Walker*, “direct collision” explicitly becomes an affirmative requirement. Compare *Hanna*, 380 U.S. at 472 (“[T]his Court has never before been confronted with a case where the applicable Federal Rule is in direct collision with the law of the relevant State . . .”), with *Walker*, 446 U.S. at 749 (“Application of the *Hanna* analysis is premised on a ‘direct collision’ between the Federal Rule and the state law.”).

<sup>83</sup> *Walker*, 446 U.S. at 749-50.

<sup>84</sup> *Id.* at 750 n.9.

<sup>85</sup> *Id.* at 750-51 (“There is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations.” (footnote omitted)). The Court supported its findings on the intent of Rule 3 by citing two sources: a section from Wright and Miller’s treatise, observing that Rule 3 does not explicitly state that it has a tolling effect, and an Advisory Committee Note, stating that the answer to the question of whether Rule 3 tolls a statute *might* turn on whether or not the Supreme Court can promulgate

because Rule 3 and the Oklahoma statute serve different purposes and are animated by different policies, they can “exist side by side . . . each controlling its own intended sphere of coverage without conflict.”<sup>86</sup>

At first glance, *Hanna* and *Walker* seem compatible. In *Hanna*, the Federal Rules explicitly set forth the sufficiency requirements for service of process, whereas, in *Walker*, the unsuccessful petitioner attempted to take a Rule that governed when the internal clock of the Federal Rules began running and apply it to toll a state statute of limitations. However, a tension appears between the two decisions in light of scholarship observing that the Supreme Court in *Hanna* ignored the First Circuit’s observation below that Massachusetts had its own rule identical to Rule 4(d)(1) to govern service of process.<sup>87</sup> The in-hand requirement added by the Massachusetts statute was to ensure that in the case of an executor, service was “sufficient to satisfy due process requirements for in personam jurisdiction.”<sup>88</sup> In this light, the cases seem to conflict. In both cases, the Federal Rule and the state law seem to set the procedural requirements for accomplishing the same thing (“service of process” in *Hanna* and “commencement of the action” in *Walker*) but for different reasons.

Although a skeptic (and perhaps a realist) would explain the difference by pointing to the Court’s desire to use *Hanna* as an opportunity to protect the uniformity of the Federal Rules,<sup>89</sup> federal courts must make a good-faith attempt to distinguish the two cases. That distinction is best stated as follows: while the Federal Rule and the state law in *Hanna* may have been designed to accomplish different ultimate ends, within the context of the litigation they were both rules governing the same procedural activity (service of process). On the other hand, in *Walker*, the state law and Federal Rule only appeared to govern the same thing (commencement of the action), when in actuality, they governed different procedural activities (the “various timing

rules that affect the functioning of statutes of limitations without simultaneously exceeding the limitations of the Rules Enabling Act. *Id.* at 750 n.10. The Court explained the relevance of the latter by observing that the Advisory Committee predicted the problem without explicitly resolving it. *Id.*

<sup>86</sup> *Id.* at 752.

<sup>87</sup> See, e.g., Burbank, *supra* note 68, at 1173-76 (“The court of appeals’ gloss confirms what a fair reading of the statute as a whole suggests, namely that the [state] statutory provisions in question were the functional equivalent of a tolling rule.”).

<sup>88</sup> *Id.* (quoting *Hanna v. Plumer*, 331 F.2d 157, 159 (1st Cir. 1964), *rev’d*, 380 U.S. 460 (1965)).

<sup>89</sup> See *Hanna*, 380 U.S. at 463 (“Because of the threat to the goal of uniformity of federal procedure posed by the decision below, we granted certiorari.”); see also Burbank, *supra* note 68, at 1176 (characterizing *Hanna* as “invoking a threat that did not exist”).

requirements of the Federal Rules<sup>90</sup> versus the tolling of a state statute of limitations). This rather abstract distinction is more easily understood by examining what happens if a federal court gives effect to the state laws in question. Enforcement of the Massachusetts statute in federal court would rob Rule 4 of the ability to set the sufficiency requirements for service of process in federal court. On the other hand, enforcement in federal court of Oklahoma's law requiring service of process in order to toll a statute of limitations does not undermine Rule 3's ability to initiate the "various timing requirements of the Federal Rules." Thus the logical principles to extract from *Walker* are the following: the Rules should be given their plain meaning, and when a Federal Rule and a state statute appear to function similarly—but govern entirely different procedural activities—a federal court should allow them both to operate.

Seven years after *Walker*, the Court took a step toward a broader reading of the Federal Rules in *Burlington Northern Railroad Co. v. Woods*.<sup>91</sup> In *Burlington Northern*, the Eleventh Circuit, in accordance with the mandates of an Alabama statute, had imposed a ten-percent penalty on an appellant-defendant who had obtained a stay on judgment and subsequently lost his appeal.<sup>92</sup> The Court ruled that the Alabama statute was inapplicable in federal court because it conflicted with Rule 38 of the Federal Rules of Appellate Procedure, which gives judges the discretion to punish appellants who take frivolous appeals.<sup>93</sup>

The Court's reasoning is instructive for the task at hand. While confirming that a "direct collision" between a Federal Rule and a state statute was a sure sign that the Federal Rule, if valid, must prevail, the Court also suggested that the Federal Rule prevails if it is "sufficiently broad" that it "implicitly . . . 'control[s] the issue' before the court."<sup>94</sup> The Court cited with approval and then applied two propositions from an analogous Fifth Circuit case: first, the mandatory operation of the state penalty statute interferes with "the discretionary mode of operation of the Federal Rule"; and second, the Federal Rule punishes only frivolously taken appeals, whereas the state statute penalizes all

---

<sup>90</sup> *Walker*, 446 U.S. at 751.

<sup>91</sup> 480 U.S. 1 (1987).

<sup>92</sup> *Id.* at 2-3.

<sup>93</sup> *See id.* at 7 (holding that because "the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute," the latter is precluded from application in federal diversity actions); *see also* FED. R. APP. P. 38 (permitting a court of appeals to "award just damages and single or double costs to the appellee" if it "determines that an appeal is frivolous").

<sup>94</sup> *Burlington Northern*, 480 U.S. at 4-5 (quoting *Walker*, 446 U.S. at 749).

unsuccessful appellants.<sup>95</sup> That both the Rule and statute serve the same purpose (“compensate[ing] a victorious appellee for the lost use of the judgment proceeds”) constituted a further indication that “the Rule occupies the [Alabama] statute’s field of operation so as to preclude its application in federal diversity actions.”<sup>96</sup> It makes no difference, the Court added, that Alabama’s Rule 28, modeled after the Federal Rules, is capable of operating side by side with its mandatory penalty statute.<sup>97</sup>

From *Burlington Northern* we can extract the principle that when the Federal Rules leave a question to the discretion of the trial court, state laws that interfere with that discretion will not be enforced. Moreover, the decision suggests that when it comes to punishing misbehaving litigants, interfering with the Court’s ability *not* to punish is grounds to refuse application of a state law in federal court.

The Supreme Court reinforced *Burlington Northern*’s holding in *Stewart Organization, Inc. v. Ricoh Corp.*<sup>98</sup> Although *Ricoh* involved a federal statute rather than a Court-promulgated rule, the “direct collision” step of the analysis is the same.<sup>99</sup> In *Ricoh*, the district court denied defendant’s 28 U.S.C. § 1404(a) motion to transfer venue even though the parties’ contract had a forum-selection clause requiring suits to proceed in the target venue.<sup>100</sup> The trial judge justified his ruling by explaining that Alabama law looked unfavorably upon forum-selection clauses.<sup>101</sup>

Notably, the Supreme Court dropped the “direct collision” language and clarified that the federal enactment governs if it is “sufficiently broad to control the issue before the Court.”<sup>102</sup> The Court, citing *Burlington Northern*, ruled that the Alabama law disallowing forum-

<sup>95</sup> See *id.* at 6-7 (invoking the Fifth Circuit’s analysis in *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984)).

<sup>96</sup> *Id.* at 7 & n.5.

<sup>97</sup> *Id.* at 7-8.

<sup>98</sup> 487 U.S. 22 (1988).

<sup>99</sup> See *Ides, supra* note 64, at 80 (describing the analysis for a Federal Rule and a federal statute as “identical”).

<sup>100</sup> *Ricoh*, 487 U.S. at 24-25.

<sup>101</sup> *Id.* at 24.

<sup>102</sup> *Id.* at 26 (quoting *Walker*, 446 U.S. at 749-50). As the Court explained,

[l]ogic indicates . . . that this language is not meant to mandate that federal law and state law be perfectly coextensive and equally applicable to the issue at hand; rather, the “direct collision” language, at least where the applicability of a federal statute is at issue, expresses the requirement that the federal statute be sufficiently broad to cover the point in dispute.

*Id.* at 26 n.4 (construing *Hanna v. Plumer*, 380 U.S. 460, 470 (1965)).

selection clauses could not be enforced in federal court, as it destroyed the discretion Congress gave judges in its enactment of the venue transfer statute.<sup>103</sup> The Court clarified that it did not matter if the policy concerns animating the Alabama law “are not perfectly coextensive” with the policies that determine the factors the district court considers when ruling on a motion to transfer venue.<sup>104</sup>

*Ricoh* strengthened *Burlington Northern*'s holding. If the federal enactment's “discretionary mode of operation’ conflicts with the nondiscretionary provision[s]” of state law, the federal enactment applies in diversity even if wholly different policy concerns animate the state law.<sup>105</sup> Although the discretionary/mandatory core of the holdings in *Ricoh* and *Burlington Northern* remains undisturbed, after *Ricoh* the Court's *Hanna* jurisprudence began to focus on the question of what role, if any, state policies had in determining whether a Federal Rule and state law conflicted.

In *Gasperini v. Center for Humanities*, a question arose concerning the scope of Rule 59 in a case determining whether federal judges are bound by New York's “deviates materially” standard for granting new trials in response to excessive jury verdicts.<sup>106</sup> Rule 59 allows a trial judge to grant a new jury trial “for any reason for which a new trial has heretofore been granted in an action at law in federal court.”<sup>107</sup> Citing *Burlington Northern*, Justice Scalia argued in dissent that Rule 59 was sufficiently broad to control the issue of when district courts can grant new trials, thereby requiring that federal law control the issue.<sup>108</sup> He further argued that the phrase “in the courts of the United States” shows that a federal standard must apply.<sup>109</sup>

By contrast, Justice Ginsburg's majority opinion argued that whether damages are excessive (a traditional reason for granting a new trial) must be determined by *some* standard; a standard that the Rules of Decision Act requires to be a state standard in state causes of

<sup>103</sup> See *id.* at 31 (“Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command.”).

<sup>104</sup> *Id.* at 30. But see *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996) (observing, in dicta, that “[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies”).

<sup>105</sup> *Ricoh*, 487 U.S. at 30 (quoting *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987)).

<sup>106</sup> 518 U.S. 415, 420-22 (1996).

<sup>107</sup> FED. R. CIV. P. 59(a)(1)(A).

<sup>108</sup> *Gasperini*, 518 U.S. at 468 (Scalia, J., dissenting).

<sup>109</sup> *Id.* at 467-68.

action.<sup>110</sup> Perhaps more important than the Court's holding on whether Rule 59 conflicted with the New York standard was the Court's characterization of the method for determining when a Federal Rule conflicts with state law. Justice Ginsburg, writing for a 5-4 majority, twice invoked avoidance of conflict with important state regulatory interests and policies as a major guidepost for federal courts construing the breadth of the Federal Rules.<sup>111</sup> Although there was little precedent establishing this as a major concern of the *Hanna* analysis in the Supreme Court's cases prior to *Gasperini*,<sup>112</sup> Justice Ginsburg's

---

<sup>110</sup> See *id.* at 437 n.22 (majority opinion) ("Whether damages are excessive for the claim-in-suit must be governed by *some law*. And there is no candidate for that governance other than the law that gives rise to the claim in relief—here, the law of New York." (citing Rules of Decision Act, 28 U.S.C. § 2072(a)–(b) (1994))); see also *id.* at 440 n.1 (Stevens, J., dissenting) ("The Rule does state that new trials may be granted 'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States,' but that hardly constitutes a command that federal courts must always substitute federal limits on the size of judgments for those set by the several States in cases founded upon state-law causes of action." (quoting FED. R. CIV. P. 59)).

<sup>111</sup> *Id.* at 427 n.7, 437 n.22 (majority opinion).

<sup>112</sup> To support the majority's assertion that a concern for state regulatory policies played a major role in pre-*Gasperini* cases interpreting the Federal Rules, the Court cited *Walker*, a case from the Seventh Circuit, and a federal courts casebook. *Id.* at 427 n.7 (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-752 (1980), *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 310-312 (7th Cir. 1995), and RICHARD H. FALLON ET AL., *HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 729-730 (4th ed. 1996)). Although *Walker* did examine the policies underpinning the Oklahoma law in support of its determination that the state law was not coextensive with the Federal Rule, at no point did the *Walker* Court anoint protection of state regulatory policies as a normative value in its own right for the purposes of the conflict-analysis step of *Hanna*. *Walker*, 446 U.S. at 751-52.

The Court's citation of *Healy* also raises eyebrows. In *Healy*, Judge Posner observed that there were two "pretty clear" classes of cases for the purposes of the *Erie* doctrine. *Healy*, 60 F.3d at 310. First, the court rightly observed that if a state law conflicts with a Federal Rule, it is easy to rule that the Federal Rule controls (assuming the Rule's validity under the Constitution and the Rules Enabling Act). *Id.* The second "pretty clear" type of case occurs when "the state procedural rule, though undeniably 'procedural' in the ordinary sense of the term, is limited to a particular substantive area, such as contract law." *Id.* In this instance, the court opined, the state's substantive intent is "manifest" and the law must be enforced. *Id.* This second observation is much more troublesome. First, there is nothing that guarantees that laws included in the second class of "pretty clear" cases do not also conflict with the Federal Rules. In fact, that is precisely the problem that certificate of merit statutes present. Second, even for state laws that only fall in the second category of "pretty clear" cases, deciding their fate in federal court by concluding that they are obviously evidence of the state's manifest substantive intent flouts *Hanna's* instructions to analyze such laws by querying whether they are outcome determinative with respect to the twin aims of *Erie*. Instead, it harkens back to a pre-*Guaranty Trust* method of resolving *Erie* questions by an intuitive analysis of whether the law is substantive or procedural.

opinion unequivocally listed it as a relevant factor. Therefore, *Gasperi*'s holding added to the doctrine that although a Federal Rule might be sufficiently broad to control a situation, that Rule's application may implicitly involve the use of state laws. Its dicta added that it is important for federal courts to interpret Federal Rules "with sensitivity to important state interests and regulatory policies."<sup>113</sup>

The Court handed down its most recent gloss on *Hanna* in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*<sup>114</sup> In *Shady Grove*, the petitioner brought a diversity claim against Allstate for roughly five-hundred dollars in statutory interest that had accrued while Allstate delayed payment of a claim.<sup>115</sup> Admitting that the claim fell far short of the amount-in-controversy requirement for individual diversity claims,<sup>116</sup> the petitioner attempted to certify its claim as a class action,<sup>117</sup> despite the fact that New York law forbids class certification in actions involving this type of statutory penalty.<sup>118</sup> Both the trial court and the Second Circuit rejected the petitioner's argument that the New York law conflicted with Rule 23, concluding that the state law and the Federal Rule served different purposes.<sup>119</sup>

---

Flaws in the reasoning of *Healy* aside, its use in *Gasperi* is also questionable. Although the parenthetical following the citation accurately summarizes the holding of *Healy*, the case is cited to support the Court's assertion that the federal courts interpret the Rules "with sensitivity to important state interests and regulatory policies." *Gasperi*, 518 U.S. at 427 n.7. However, the portion of *Healy* that pays attention to state interests and regulatory policies is its description of the "second class of pretty easy cases." *Healy*, 60 F.3d at 310. When it came to interpreting a Federal Rule, as the Court's parenthetical acknowledges, *Healy* merely held that Rule 68, which on its face only applies to offers by defendants, did not also apply to offers by plaintiffs. *Id.* Such a holding does not require particular sensitivity to state regulatory interests.

<sup>113</sup> *Gasperi*, 518 U.S. at 427 n.7.

<sup>114</sup> 130 S. Ct. 1431 (2010).

<sup>115</sup> *Id.* at 1436-37.

<sup>116</sup> See 28 U.S.C. § 1332(a) (2006) (requiring the amount in controversy to exceed \$75,000 for individual diversity claims in federal court).

<sup>117</sup> See Class Action Fairness Act of 2005 § 4, 28 U.S.C. § 1332(d) (granting to federal district courts original jurisdiction over class actions in which there is minimum diversity and the aggregate amount in controversy of all class claims exceeds \$5 million).

<sup>118</sup> *Shady Grove*, 130 S. Ct. at 1436-37; see also N.Y. C.P.L.R. 901(b) (McKinney 2006) ("Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action.").

<sup>119</sup> *Shady Grove*, 130 S. Ct. at 1437; see also FED R. CIV. P. 23 (setting forth requirements for bringing a class action in federal court).

With a 5-4 majority representing Chief Justice Roberts, Justice Sotomayor, and the still-sitting dissenters from *Gasperini*,<sup>120</sup> the Court reversed, concluding that Rule 23's language—"a class action may be maintained" if certain conditions are met—"[b]y its terms . . . creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."<sup>121</sup> Justice Scalia's majority opinion explained with unmistakable clarity that, because the Court viewed Rule 23 as setting forth sufficient, rather than necessary, criteria for bringing class actions, state laws imposing further duties conflicted with Rule 23 and would not be enforced in federal court.<sup>122</sup> It made no apparent difference that the state law may have had a different purpose or that it was able to coexist at the state level with another state law structured similarly to the Federal Rule in question.<sup>123</sup>

The Court also attempted to shed some light on what role state regulatory policies (and federal sensitivity thereto) should play when a federal court construes the Federal Rules. However, it is difficult to discern which Justices' views on the subject will ultimately carry the most precedential weight. This difficulty is largely the result of potential inconsistencies between portions of the majority opinion joined by Justice Stevens and comments made in Justice Stevens's concurrence. The majority opinion, in sections joined by Justice Stevens, took strong steps to contradict the language in *Gasperini* regarding state interests and regulatory policies. The majority wrote that "[t]he dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature is an enterprise destined to produce 'confusion worse confounded.'"<sup>124</sup> Specifically in response to the dissent's invocation of *Gasperini*'s language regarding "important state interests" and "state regulatory policies," the Court commented that "[t]he search for state interests and

---

<sup>120</sup> Compare *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 418 (1996) (attributing dissenting votes to then-Chief Justice Rehnquist and Associate Justices Stevens, Scalia, and Thomas), with *Shady Grove*, 130 S. Ct. at 1436, 1448 (attributing majority votes to Chief Justice Roberts and Associate Justices Stevens, Scalia, Thomas, and Sotomayor).

<sup>121</sup> *Shady Grove*, 130 S. Ct. at 1437.

<sup>122</sup> See *id.* at 1439 ("Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission . . ."). The Court went as far as to announce its first clear-cut rule for determining when Federal Rules and state laws conflict. Justice Scalia's majority opinion observed that "[t]he Federal Rules regularly use 'may' to confer categorical permission," implying that any state law that adds requirements to what the Federal Rules say a litigant otherwise "may" do necessarily conflicts with the Federal Rules. *Id.* at 1437.

<sup>123</sup> *Id.* at 1438-39.

<sup>124</sup> *Id.* at 1440-41 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).



policies that are ‘important’ is just as standardless as the ‘important or substantial’ criterion we rejected in *Sibbach*.<sup>125</sup> The majority conceded that federalism concerns might play a role in the interpretation of an *ambiguous* Federal Rule, but only to the extent that in discerning the Rule’s meaning, courts can assume that “Congress is just as concerned as we have been to avoid significant differences between state and federal courts.”<sup>126</sup> In other words, courts might consider federalism concerns when attempting to discern the Rule’s meaning in general, but they will not consider the policies that the specific, potentially conflicting state law raises in the adjudication at hand.

Were it not for the concurrence, this would be a clear indication that a majority of the Court rejected Justice Ginsburg’s belief—as expressed in *Gasperini* and in the *Shady Grove* dissent—that important state policies should play a role at the conflict-analysis stage of *Hanna*. But Justice Stevens’s concurrence appeared to rehabilitate the *Gasperini* language to a limited extent. He commented that, in applying the first step of *Hanna*, courts should construe the Federal Rules with “sensitivity to important state interests and regulatory policies.”<sup>127</sup> However, while admitting that he agreed with Justice Ginsburg that courts should consider state interests and regulatory policies, Justice Stevens stated that he “disagree[d] . . . about the degree to which the meaning of federal rules may be contorted . . . to accommodate state policy goals.”<sup>128</sup> Specifically, his citation to Justice Scalia’s dissenting opinion in *Ricoh* suggests that Stevens actually agreed with the majority that courts can consider federalism concerns in the abstract when determining the general scope of a Federal Rule, but that courts should

---

<sup>125</sup> *Id.* at 1441 n.7 (quoting *Sibbach*, 312 U.S. at 13-14). The Court also took issue with *Gasperini*’s characterization of *Walker* as having been guided by the Court’s impression of state policies, noting that

[w]hile our opinion [in *Walker*] observed that the State’s actual-service rule was (in the State’s judgment) an “integral part of the several policies served by the statute of limitations,” nothing in our decision suggested that a federal court may resolve an obvious conflict between the texts of state and federal rules by resorting to the state law’s ostensible objectives.

*Id.* at 1440 n.6 (citation omitted) (quoting *Walker v. Armco Steel Co.*, 466 U.S. 740, 751 (1980)).

<sup>126</sup> *Id.* at 1441 n.7 (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37-38 (1988)).

<sup>127</sup> *Id.* at 1451 (Stevens, J., concurring) (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 n.7 (1996)).

<sup>128</sup> *Id.* at 1451.

not worry about effectuating the substantive state policies motivating individual state laws when they are at the conflict-analysis stage.<sup>129</sup>

Thus, *Hanna* and its progeny leave the following concepts for construing when a Federal Rule is sufficiently broad to control an issue: (1) if the Federal Rules say that meeting enunciated standards is sufficient to accomplish a procedural objective, those standards suffice even if state law calls for something greater—this is especially true if the Rules state a litigant “may” do something; (2) the Federal Rules should not be narrowly construed in order to avoid a “direct collision” with state law—they should be given their plain meaning; (3) when a Federal Rule and state statute appear to do the same thing, but govern entirely different procedural activities, the federal court should allow both to operate side by side; (4) when the Federal Rules leave an issue to the court’s discretion, a mandatory state rule interfering with that discretion will not be enforced in federal court; (5) the previous rule is true even if the state rule is animated by different policy concerns than the Federal Rule—to the extent that federalism concerns influence the construction of the Rules, they affect the general scope of the Rule, but the Rule does not need to be narrowly constructed to avoid conflict with individual state policies; and (6) effectuating a Federal Rule may implicitly involve the use of legal standards supplied by state law. It is under these principles that this Comment argues certificate of merit statutes conflict with the Federal Rules.

## 2. Rules 8, 9, and 12

Federal Rules of Civil Procedure 8, 9, and 12 provide a logical starting point. These three rules work together to govern pleading in federal court, so it makes sense to discuss them as a unit.<sup>130</sup> Rule 8 re-

---

<sup>129</sup> See *id.* at 1456-57 (“The dissent would apply the Rules of Decision Act inquiry under *Erie* even to cases in which there is a governing federal rule, and thus the Act, by its own terms, does not apply. . . . Although it reflects a laudable concern to protect ‘state regulatory policies,’ Justice Ginsburg’s approach would, in my view, work an end run around Congress’ system of uniform federal rules, and our decision in *Hanna*. Federal courts can and should interpret federal rules with sensitivity to ‘state prerogatives,’ but even when ‘state interests . . . warrant our respectful consideration,’ federal courts cannot rewrite the rules.” (second alteration in original) (citations omitted) (quoting *Id.* at 1462, 1464 (Ginsberg, J., dissenting))).

<sup>130</sup> Rule 8 covers pleading generally, Rule 9 covers instances in which the Federal Rules require a heightened pleading standard, and Rule 12 covers the consequences for insufficient pleadings. FED. R. CIV. P. 8; FED. R. CIV. P. 9; FED. R. CIV. P. 12; see also 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1203 (3d ed. 2004) (discussing the relationship between Rule 8 and the other Rules

quires a plaintiff's complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>131</sup> The Supreme Court has recently ruled that this Rule requires complaints to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"<sup>132</sup> If a complaint does not meet these requirements, the trial court may dismiss it under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted."<sup>133</sup>

a. *Statutes Requiring Plaintiffs to File Certificates of Merit and Complaints Simultaneously*

Certificate of merit statutes that require plaintiffs to file the certificate contemporaneously with the complaint are incompatible with the pleading scheme established by the Federal Rules. By requiring plaintiffs to include or attach certain items to their complaints, or else face dismissal for failure to state a claim, these statutes have effectively mandated a heightened pleading requirement. The analogy to *Hanna* and *Shady Grove* is striking. In *Hanna*, the Court found that Rule 4, which establishes the requirements for sufficient service, operated to the exclusion of state statutes requiring more demanding service.<sup>134</sup> Similarly, in *Shady Grove*, the Court found that Rule 23 establishes the requirements for bringing a class action and determined that federal courts should not enforce additional state law requirements.<sup>135</sup> Applying this logic, lower courts should rule that, because the Federal Rules set the sufficiency requirement for complaints in federal court, state laws requiring more should not be enforced.

---

of Civil Procedure). This discussion focuses principally on the affirmative requirements of Rule 8, which implicitly operates with Rules 9 and 12.

<sup>131</sup> FED. R. CIV. P. 8(a)(2).

<sup>132</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court elaborated, "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

<sup>133</sup> FED. R. CIV. P. 12(b)(6); *see also Iqbal*, 129 S. Ct. at 1949 (discussing the standard for dismissal under Rule 12(b)(6)).

<sup>134</sup> *See Hanna v. Plumer*, 380 U.S. 460, 470 (1965) (asserting that a state in-hand service requirement directly collides with Rule 4(d)(1), which "says . . . that in-hand service is not required in federal courts").

<sup>135</sup> *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, at 1437-38 (2010) (explaining that Rule 23 permits all plaintiffs satisfying its criteria to initiate a class action regardless of contrary state law). The Court specifically suggested that pleading standards were difficult cases but should generally be considered procedural. *Id.* at 1441.

Rule 8's history and motivation support this argument. The drafters of the Federal Rules created Rule 8 to depart from the highly technical code pleading that preceded it.<sup>136</sup> They designed Rule 8 to provide the federal courts with a simplified form of transsubstantive pleading, without formal requirements for different claims.<sup>137</sup> It is antithetical to the purpose of Rule 8 to enforce state statutes under which failing to specify certain things or include certain items in a complaint might result in dismissal.

Several federal courts have applied similar logic. In an oft-cited decision, Judge Alaimo in the Southern District of Georgia held that by "requiring that the plaintiff attach to his complaint the affidavit of an expert witness, [Georgia's] statute in effect mandates the pleading of evidentiary material."<sup>138</sup> The court concluded that "[t]he teaching of *Hanna* is that, in situations of such conflict, the Federal Rule is controlling. Therefore, the sufficiency of plaintiff's pleading must be judged solely by reference to Federal Rule 8."<sup>139</sup>

Other courts have disagreed, but their reasoning seems questionable. The decision in *Thompson ex rel. Thompson v. Kishwaukee Valley Medical Group*<sup>140</sup> is typical in this regard. A then-valid Illinois statute required that a plaintiff attach to her complaint both an affidavit saying that an expert has found the claim to be reasonable and meritorious, as well as a signed report from that expert.<sup>141</sup> *Thompson*, a frequently cited opinion, held in two sentences that Rule 8 did not conflict with the state statute, concluding that requiring the attachment of the affidavit to the complaint does not enlarge pleading standards because a plaintiff could attach the affidavit "and still plead the factual basis of his claim in a short plain statement in the complaint itself."<sup>142</sup>

This is an illusory argument. If the sufficiency of the pleading is judged in part by adherence to the affidavit requirement, then the affidavit requirement is part of the pleading requirement. The mere fact that the affidavit is a physically separate document should not

<sup>136</sup> See generally Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456 (1941) (discussing the benefits of simplified pleadings in comparison to the technical requirements of the earlier code-pleading regime).

<sup>137</sup> See WRIGHT & MILLER, *supra* note 130, § 1221 (discussing the transsubstantive nature of Rule 8).

<sup>138</sup> *Boone v. Knight*, 131 F.R.D. 609, 611 (S.D. Ga. 1990).

<sup>139</sup> *Id.*

<sup>140</sup> No. 86-1483, 1986 WL 11381 (N.D. Ill. Oct. 6, 1986).

<sup>141</sup> See 735 ILL. COMP. STAT. ANN. 5/2-622 (West Supp. 2009), *invalidated by* *Lebron v. Gottlieb Mem'l Hosp.*, 930 N.E.2d 895, 914 (Ill. 2010).

<sup>142</sup> *Thompson*, 1986 WL 11381, at \*2.

matter. Following the court's logic would mean that any time a state wanted to require a party to submit more than what is required by the Federal Rules, it would merely need to label the extra part a "certificate" or "affidavit" and require it to be filed with the court on a separate sheet of paper.<sup>143</sup>

Some statutes that appear even more troublesome have gone unquestioned. Rule 9(j) of the North Carolina Rules of Civil Procedure, which are modeled after the Federal Rules, requires that a "pleading specifically assert[] that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify."<sup>144</sup> Despite the fact that this statute openly modifies pleadings themselves and is featured in North Carolina's Rule 9, which governs heightened pleading standards,<sup>145</sup> not one published opinion from a federal court has considered the choice of law implications of the North Carolina Rule.<sup>146</sup> A proper application of the principles of *Hanna* and its progeny mandates that Federal Rules 8 and 9 be construed as sufficiently broad to cover the pleading standard in federal court. Therefore, certificate of merit statutes requiring plaintiffs to file certificates or affidavits contemporaneously with their complaints should not be enforced.

b. *Statutes Requiring Plaintiffs to File Certificates of Merit by a Specified Point in Time After the Filing of Complaints*

The question is more difficult when dealing with statutes in the third category—statutes that do not require an affidavit or certificate to be filed with the pleading, but rather at some point thereafter. The

---

<sup>143</sup> By arguing that Rule 8 is unchanged because a plaintiff attaching an affidavit can otherwise adhere to Rule 8, the court has effectively argued that the pleading requirement is not heightened, because as long as one does not consider the requirements the statute adds, the statute does not add any requirements at all.

<sup>144</sup> N.C. GEN. STAT. § 1A-1 r. 9(j)(1) (2007).

<sup>145</sup> See, e.g., *Brisson v. Santoriello*, 516 S.E.2d 911, 913-14 (N.C. Ct. App. 1999) (observing that North Carolina's Rule 9(j) defines a "pleading requirement," failure to comply with which results in a dismissal under North Carolina Rule 12(b)(6)).

<sup>146</sup> At the time of writing, a Westlaw search of the thirty-nine federal cases that cite North Carolina's Rule 9(j) reveals that none contain the words "*Erie*" or "*Hanna*." See, e.g., *Gregory v. Schatzman*, No. 08-0497, 2009 WL 3151867, at \*2, \*4 (M.D.N.C. Sept. 24, 2009) (failing to consider choice-of-law concerns while noting that North Carolina Rule 9(j) requires that a certification statement be placed "in the complaint itself when filed" and ultimately granting defendant's Federal Rule 12(c) motion for judgment on the pleadings because of plaintiff's failure to comply with North Carolina Rule 9(j)). Obviously, these statutes may receive increased scrutiny in federal court in light of the Supreme Court's decision in *Shady Grove*.

Third Circuit focused on this distinction when it ruled that New Jersey's statute was applicable in federal court.<sup>147</sup> In its ruling, the court noted that the affidavit required by New Jersey's statute—which plaintiffs need not file until 60 days (extendable to 120 days) after the defendant files her answer—“is not a pleading, is not filed until after the pleadings are closed, and does not contain a statement of the factual basis for the claim.”<sup>148</sup>

A mere difference in timing, however, is not an automatic guarantee that the statute does not offend federal pleading rules. As the amount of time between the filing of the complaint and the date on which the plaintiff must file her certificate or affidavit decreases—especially if it shrinks to a point at which plaintiffs will be submitting the certificate before defendants are likely to have filed a 12(b)(6) motion for dismissal<sup>149</sup>—the change in timing becomes less and less convincing as a reason why the statute does not conflict with the Federal Rules governing pleading. However, in New Jersey's case, the interval is sufficiently lengthy so as not to significantly disrupt the federal pleading process and requirements. The Third Circuit concluded that, because the Federal Rules and the New Jersey statute serve different purposes (notice to defense versus the prevention of frivolous lawsuits, respectively), and because the mechanics of the New Jersey statute did not impede the operation of Rules 8 and 9, *Walker* controlled and the two enactments could operate “side by side, ‘each controlled

<sup>147</sup> See *Chamberlain v. Giampapa*, 210 F.3d 154, 160 (3d Cir. 2000) (“We find no direct conflict between the New Jersey affidavit of merit statute and Federal Rules 8 and 9.”).

<sup>148</sup> *Id.* In *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Co.*, the court compared New Jersey's professional negligence affidavit of merit requirement to a similar Georgia statute that federal courts in Georgia have generally found to be inapplicable in diversity suits. 981 F. Supp. 334, 343-44 (D.N.J. 1997). The court noted first that New Jersey's statute required filing sixty days after the defendant files her answer, whereas Georgia's statute required contemporaneous filing. *Id.* The court then noted that New Jersey's statute only requires that the affidavit state that “there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices,” whereas the Georgia statute requires that the affidavit “set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each claim.” *Id.* (quoting N.J. STAT. ANN. § 2A:53A-27 (West Supp. 2010) and GA. CODE ANN. § 9-11-9.1(a) (Supp. 2008)).

<sup>149</sup> Compare N.J. STAT. ANN. § 2A:53A-27 (requiring the affidavit be filed within sixty days from when the defendant files an answer), and MO. REV. STAT. § 538.225 (2000) (within ninety days of filing a complaint), with ARK. CODE ANN. § 16-114-209 (2006) (within thirty days of filing a complaint), *invalidated by* *Summerville v. Thrower*, 253 S.W.3d 415 (Ark. 2007).

trolling its own intended sphere of coverage without conflict.”<sup>150</sup> It is doubtful, in light of *Ricoh* and *Shady Grove*, whether the Third Circuit’s “different purposes” argument could stand alone, but the lengthy period between pleading and the affidavit filing deadline make the Third Circuit’s holding a reasonable one.

c. *The 12(b)(6) Question*

Any argument suggesting that certificate of merit requirements do not conflict with Rule 8 because they do not constitute a part of the pleading requirement encounters problems if it foresees dismissing a complaint filed without the certificate under a Rule 12(b)(6) motion for failure to state a claim. The Third Circuit commented that although New Jersey’s statute directs courts to dismiss lawsuits for “failure to state a claim” when the plaintiff failed to file an affidavit of merit, this consequence was not an indication that the affidavit of merit statute affected pleading standards.<sup>151</sup> The court concluded that the statutory language was merely the “legislature’s way of saying that the consequences of a failure to file [the affidavit] shall be the same as those of a failure to state a claim,” namely dismissal with prejudice unless “extraordinary circumstances” are found.<sup>152</sup>

Other federal courts have routinely granted 12(b)(6) motions to dismiss for failure to adhere to a certificate of merit statute.<sup>153</sup> If one

<sup>150</sup> *Chamberlain*, 210 F.3d at 160 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)).

<sup>151</sup> *See id.* at 160-61 (“Contrary to the plaintiff’s suggestion, we do not read this stipulation as implying that a failure to file the required affidavit somehow renders pleadings insufficient that would otherwise be sufficient.”).

<sup>152</sup> *Id.* (citing *Cornblatt v. Barow*, 708 A.2d 401, 415 (N.J. 1998)). An alternative substance/procedure framework might lead to the conclusion that if a statute specifically states that failure to file the certificate of merit leaves the plaintiff susceptible to dismissal for failure to state a claim, then the statute is per se substantive. In other words, if failure to state a claim is the legal result of noncompliance, then compliance logically must be an element of the claim. Elements of the claim are substantive law.

There are several counters to this argument. As the Third Circuit observed, the demurrer remedy is possibly just the state’s way of establishing the method of dismissal, not necessarily the legal rationale behind dismissal. *Id.* It is also possible to argue that successfully stating a claim logically has two components: the substantive claim itself and the procedural act of stating it properly for the court. Viewed in this light, the affidavit requirement does not have to be considered part of the substantive legal claim. More importantly, for the purposes of this discussion, this sort of logical parsing of the substance/procedure distinction is not grounded in the Supreme Court’s *Hanna* jurisprudence and will not help answer the doctrinal question that this Section discusses.

<sup>153</sup> *See, e.g.,* *Donnelly v. O’Malley & Langan, P.C.*, No. 08-1945, 2009 WL 3241662, at \*3-4 (M.D. Pa. Oct. 2, 2009) (granting a motion to dismiss due to plaintiff’s failure

accepts this Comment's argument that certificate of merit statutes that heighten pleading requirements are incompatible with Rules 8 and 9, and that the only reason that statutes like the one in New Jersey do not directly conflict with Rule 8 is because they do not affect the pleading standard, an interesting question arises. If the affidavits are not part of the pleading process, is it proper to grant a 12(b)(6) motion to punish a plaintiff who has not filed one?

Rule 12(d) specifies that

[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.<sup>154</sup>

If the consideration of materials outside the pleadings triggers a 12(b)(6) motion to be treated as a Rule 56 motion for summary judgment, it certainly seems logical to infer that a 12(b)(6) motion arguing that certain materials outside of the pleadings *are missing* should have the same effect. Of course, if the court treats the motion as one for summary judgment, the plaintiff should receive an opportunity to conduct discovery, thereby defeating the purpose of the certificate of merit statute.<sup>155</sup> Ultimately, as with other motions to dismiss aside from those listed in Rule 12(b), the decision of how to treat a defendant's motion to dismiss for plaintiff's failure to comply with a state statute lies in the discretion of the court.<sup>156</sup> However, when considering such motions, courts should pay close attention to Rule 12(d) and its tendency to require the procedural protections of Rule 56 (including a chance for discovery).

---

to file a certificate of merit or demonstrate a reasonable excuse for such failure), *aff'd*, 370 F. App'x 347 (3d Cir. 2010).

<sup>154</sup> FED. R. CIV. P. 12(d).

<sup>155</sup> Presumably, plaintiffs who are unable to find an expert witness to support their negligence theory will be unable to proceed past the summary judgment stage in states that require the standard of care to be established by expert witnesses. *See, e.g.*, *Dodd v. Sparks Reg'l Med. Ctr.*, 204 S.W.3d 579, 584 (Ark. Ct. App. 2005) ("In malpractice cases, a defendant is entitled to summary judgment when it is shown that the plaintiff has no qualified expert to testify as to the applicable standard of care."). Thus, the purpose of the certificate of merit statutes is implicitly to require dismissal of frivolously filed suits *before* discovery and summary judgment.

<sup>156</sup> *See* 5C WRIGHT & MILLER, *supra* note 130, § 1360, at 77-78 (commenting that the trial judge's discretion typically governs how the court handles preliminary motions to dismiss not enumerated in Rule 12(b)).



d. *The Role of Twombly and Iqbal*

It might be natural to assume that *Twombly*<sup>157</sup> and *Iqbal*<sup>158</sup> make it less likely that certificate of merit statutes conflict with the Federal Rules. After all, by heightening the federal pleading standard, *Twombly* and *Iqbal* have elevated the requirements for a minimally sufficient complaint closer to the standards espoused in certificate of merit statutes. But these cases actually make it more likely that certificate of merit statutes conflict with the federal pleading rules.

In the wake of *Twombly*, some practitioners thought the Supreme Court's pronouncement that a pleading must provide enough factual material to support a plausible inference of wrongdoing might apply only to Sherman Act antitrust actions, prompting the respondent in *Iqbal* to assert that the *Twombly* decision was so limited in scope.<sup>159</sup> The Court, however, concluded that the respondent's argument was "not supported by *Twombly*" and was "incompatible" with the Federal Rules.<sup>160</sup> The Court explicitly clarified that Rule 8 "governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'"<sup>161</sup> This statement confirmed that while *Twombly* may have raised the overall pleading standard, it did not undermine the standard's uniformity. The Court's prior rejections of heightened standards for specific actions (Rule 9 aside) remain undisturbed.<sup>162</sup> As those who wrote on the potential conflict between the Federal Rules of pleading and certificate of merit statutes before *Twombly* observed,<sup>163</sup> it is difficult to square the Supreme Court's blunt statements on the transsubstantive uniformity of Rule 8's application with the notion that state statutes requiring more at the pleading stage might not conflict with that Rule.

<sup>157</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

<sup>158</sup> Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

<sup>159</sup> See *Iqbal*, 129 S. Ct. at 1953 ("Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute.").

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (quoting FED. R. CIV. P. 1).

<sup>162</sup> See, e.g., Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513, 515 (2002) ("Rule 8(a)'s simplified pleading standard *applies to all civil actions*, with limited exceptions [such as those in Rule 9]. . . . [T]he Federal rules do not contain a heightened pleading requirement for employment discrimination suits." (emphasis added)); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993) (holding that federal courts cannot apply pleading standards more rigorous than those enunciated in Rule 8 for civil rights cases).

<sup>163</sup> For an excellent discussion of the relationship between a uniform pleading standard in federal court and state certificate of merit statutes, see Penrose & Caldwell, *supra* note 58.

*Twombly* and *Iqbal* have had a second impact on this discussion. Some federal courts, typically those invoking *Walker*, have justified holding that state statutes do not conflict with Rule 8 by asserting that Rule 8's sole purpose is to give notice to litigants, whereas the certificate of merit statutes filter out frivolous lawsuits.<sup>164</sup> Although the Court's rulings in *Ricoh* and *Shady Grove* cast doubt on the assumption that different policies can excuse otherwise conflicting rules from the reach of *Hanna*,<sup>165</sup> even if one were to accept that assumption as a valid legal principle, the Court's recent pleading jurisprudence makes that principle inapposite to the Rule 8 question. By injecting plausibility into the Rule 8 analysis, the Court has asserted that, in addition to providing notice of claims and defenses, Rule 8 plays a role in establishing that a plaintiff's claims have at least a chance of being meritorious. The plausibility standard that the Court has read into Rule 8 suggests that Rule 8 gauges the sufficiency of notice and likelihood of merit at the pleading stage.<sup>166</sup>

### 3. Rule 11

Because the purpose of certificate of merit statutes is to prevent the filing of frivolous malpractice suits, it should be unsurprising that there are conflicts with Rule 11, which contains its own procedures for ensuring that claims are meritorious. Rule 11 raises three concerns about possible conflicts between certificate of merit statutes and the Federal Rules: (1) Rule 11 explicitly states that verifications or affidavits need not be filed with the complaint; (2) certificate of merit statutes require a more rigorous verification or certification by the parties than what is required by Rule 11; and (3) the mandatory penalties that some of these statutes contain interfere with the Court's discretion to sanction attorneys who file frivolous claims.

---

<sup>164</sup> See, e.g., *Chamberlain v. Giampapa*, 210 F.3d 154, 160 (3d Cir. 2000) ("The rules' overall purpose is to provide notice of the claims and defenses of the parties. . . . Its purpose is not to give notice of the plaintiff's claim, but rather to assure that malpractice claims for which there is no expert support will be terminated at an early stage in the proceedings."); *RTC Mortg. Trust 1994 N-1 v. Fid. Nat'l Title Ins. Co.*, 981 F. Supp. 334, 342 (D.N.J. 1997) ("The central purpose of the modern 'short and plain statement' standard is to 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests,' and not much more." (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007))).

<sup>165</sup> See *supra* notes 104, 124-29 and accompanying text (discussing the Court's treatment of state policies under *Erie* analysis).

<sup>166</sup> As discussed in Subsection II.A.2, *supra*, *Hanna* suggests that when the Federal Rules set the sufficiency standard for a particular procedural device, state statutes establishing a more rigorous standard will not be enforced.

a. *Rule 11's Qualified Rejection of Verifications or Affidavits*

Rule 11 provides that “[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit.”<sup>167</sup> It does not specify whether the “rule or statute” exception applies only to federal enactments or whether state statutes can also override the exception.

Resolution of this question could be dispositive. If the exception contemplates inclusion of state statutes, at minimum those statutes would not conflict with Rule 11, and one could argue that the exception specifically allows application of all certificate of merit statutes no matter what other rules they may disrupt. On the other hand, if one were to interpret the “rule or statute” exception as applying to federal enactments only, then the rule is squarely in conflict with state statutes requiring otherwise.

Scholars and practitioners have paid this topic remarkably little attention.<sup>168</sup> Both Wright and Miller’s treatise and Moore’s treatise assert that the exception applies to federal rules and statutes only, but neither does much to justify its conclusion.<sup>169</sup> Interestingly, every case that has considered this question in the context of certificate of merit statutes has found that the exception does include state statutes, whereas virtually every other case that has considered the question in other contexts has concluded that state statutes are excluded.<sup>170</sup> The

<sup>167</sup> FED. R. CIV. P. 11(a).

<sup>168</sup> Only one article, published over fifty years ago, has focused on this question. See Royal H. Brin, Jr., *Verification of Pleadings in Federal Court As Affected by Requirements of State Statutes*, 25 INS. COUNSEL J. 219, 223 (1958) (concluding that “it would now seem to be at least reasonably safe for even a cautious practitioner to omit verification of pleadings in federal court where it would be required by state statute or rule”).

<sup>169</sup> See 2 MOORE ET AL., *supra* note 71, at § 11.10[2], at 11-18 (“A pleading does not have to be verified or accompanied by an affidavit, unless there is a specific provision to that effect in a *federal* rule or statute.” (emphasis added) (footnote omitted)); 5A WRIGHT & MILLER, *supra* note 130, § 1339, at 810-11 (“[T]he language presumably refers to federal statutes and rules, which means that a federal court need not follow a forum state practice requiring verification or the attachment of an affidavit to the pleadings.”); see also 1 STEVEN S. GENSLER, *FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY* 162 (2010) (“[Rule 11] supersedes any contrary state law verification requirement.”).

<sup>170</sup> Compare *Velazquez v. UPMC Bedford Mem’l Hosp.*, 328 F. Supp. 2d 549, 556 (W.D. Pa. 2004) (“Rule 11 states ‘except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit.’ . . . [The Rule] can co-exist with a state affidavit of merit statute . . .”), *RTC Mortg. Trust 1994 N-1 v. Fid. Nat’l Title Ins. Co.*, 981 F. Supp. 334, 345 (D.N.J. 1997) (“Rule 11 specifically allows room for the operation of other statutes which may require an affidavit.”), and *Thompson ex rel. Thompson v. Kishwaukee Valley Med. Grp.*, No. 86-1483, 1986 WL

leading modern case addressing the topic is *Farzana K. v. Indiana Department of Education*.<sup>171</sup> The *Farzana* opinion, authored by Judge Easterbrook and joined by Judges Posner and Ripple, invoked the Supreme Court's *Hanna* jurisprudence to support its conclusion that state statutes do not fit the exception. The court reasoned that "[r]ules established under the Rules Enabling Act supersede state norms."<sup>172</sup> Though the panel reached the correct conclusion, it did so for the wrong reason.

In *Gasperini*, when explaining why enforcement of New York's standard for overturning excessive jury verdicts did not conflict with Rule 59, the Court explained that although Rule 59 provided the procedural vehicle for requesting a new trial, that request should be evaluated in accordance with the New York state standard.<sup>173</sup> Thus, it is contrary to the Supreme Court's holding to assert that Rule 11 does not permit the incorporation of state law in its operation because it is part of the greater collection of Federal Rules.

A superior approach would look to the Federal Rule's intent. Both history and logic suggest that the exception is meant to apply only to federal enactments. The original Advisory Committee's Note to Rule 11 cites only federal statutes as examples of statutes requiring that pleadings be verified.<sup>174</sup> Moreover, the language of the Note suggests that the rulemakers' concern was assuring that the continuity of certain federal statutes was not disrupted. The rulemakers observed that the "rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit."<sup>175</sup> The Rules Enabl-

11381, at \*2 (N.D. Ill. Oct. 6, 1986) ("That § 2-622 is not a federal statute is irrelevant. There is nothing in Rule 11 which limits the exception only to federal statutes."), with *Farzana K. v. Indiana Dep't of Educ.*, 473 F.3d 703, 705 (7th Cir. 2007) ("[Rule 11(a)] means federal rule or federal statute, because state requirements for pleading do not apply in federal litigation."), *Follenfant v. Rogers*, 359 F.2d 30, 32 n.2 (5th Cir. 1966) ("[S]tate rules requiring verified pleadings . . . are wholly inapposite."), and *Fimbres v. Chapel Mortgage Corp.*, No. 09-0886, 2009 WL 4163332, at \*6 (S.D. Cal. Nov. 20, 2009) ("[A] federal court need not follow a forum state practice requiring verification." (citing *Farzana K.*, 473 F.3d at 705)).

<sup>171</sup> *Farzana K.*, 473 F.3d at 705. This case is cited in numerous cases and secondary sources. See, e.g., *Fimbres*, 2009 WL 4163332, at \*6; *H.H. ex rel. Hough v. Ind. Bd. of Special Educ. Appeals*, 501 F. Supp. 2d 1188, 1193 (N.D. Ind. 2007); GENSLER, *supra* note 169, at 162; 2 MOORE ET AL., *supra* note 71, § 11.10, at 11-18 n.7.

<sup>172</sup> *Farzana K.*, 473 F.3d at 705.

<sup>173</sup> See *supra* text accompanying notes 111-13 (discussing *Gasperini*'s incorporation of state legal standards into the operation of a Federal Rule).

<sup>174</sup> See FED. R. CIV. P. 11 advisory committee's note (1937) (listing as examples 28 U.S.C. §§ 381, 762, and 829).

<sup>175</sup> *Id.*

ing Act, of course, did not give the rulemakers the ability to discontinue *in toto* the operation of any state statutes. It did, however, give them the ability to supersede already existing federal laws under 28 U.S.C. § 2072(b).<sup>176</sup> The exception thus makes sense as a declaration that the rulemakers were not exercising their explicitly granted ability to supersede already existing federal laws.

The remarks of one of the Federal Rules' primary architects supports this understanding of the rulemakers' intent. In a 1941 article, Judge Charles E. Clark declared that "[R]ule 11 *does away* with the all too barren formality of an oath to pleadings."<sup>177</sup> The sweeping nature of Judge Clark's language suggests that any exceptions to the changes made by Rule 11 would be few. There is also a lengthy body of case law denying the enforcement of state law verification requirements without consideration of the "rule or statute" exception.<sup>178</sup> In light of judicial precedent, the apparent intent of Rule 11, and the overall federal orientation of the Rule's structure, the logical conclusion is that the exception applies only to federal enactments.

b. *The Heightened Verification and Certification Requirement Implemented by Certificate of Merit Statutes*

Rule 11 requires that at least one attorney of record sign every pleading.<sup>179</sup> By signing a complaint, the filing attorney declares, to the best of her knowledge after a reasonable inquiry under the circumstances, that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law" and "the factual contentions have evidentiary support or, if specifically so

---

<sup>176</sup> See 18 U.S.C. § 2072(b) (2006) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

<sup>177</sup> Clark, *supra* note 136, at 463 (emphasis added).

<sup>178</sup> See 5A WRIGHT & MILLER, *supra* note 130, § 1339, at 810 n.4, 811 n.5 (collecting cases in which federal courts rejected adherence to state verification laws). Of course, it is possible to speculate whether *Shady Grove* provides any clues as to how the current Supreme Court might rule if confronted with this question. To the extent that *Shady Grove* represents a preference for federal domination of procedure, the opinion suggests that the exception is limited to federal enactments. However, *Shady Grove* also represents a preference for a mechanical reading of the Federal Rules of Civil Procedure. Justices espousing such a viewpoint might well reject adding an exclusively federal limitation to the text of the exception.

<sup>179</sup> FED. R. CIV. P. 11(a).

identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”<sup>180</sup>

Problematically, certificate of merit statutes requiring the attorney to file a certificate stating that she has consulted with an expert seem to heighten this requirement. Rule 11 indicates that by signing a pleading, the attorney is averring both to the nonfrivolity of claims presented therein and to the fact that she has made a reasonable inquiry into the complaint’s contents.<sup>181</sup> The Rule explicitly states that no other verifications or affidavits are required.<sup>182</sup>

This Rule is too broad to leave room for the operation of a statute like Florida’s, which requires that the attorney, after making a reasonable investigation, include with her complaint “a certificate of counsel that such reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant.”<sup>183</sup> Both *Hanna* and *Shady Grove* suggest that when the Federal Rules establish a sufficiency standard, that standard operates to the exclusion of more burdensome state laws.<sup>184</sup>

A number of federal courts considering the question have come to the opposite answer, but their reasoning is questionable. For example, in *Trierweiler v. Croxton & Trench Holding Corp.*, the Tenth Circuit determined that an analogous Colorado law did not conflict with Rule 11.<sup>185</sup> The court conceded that both rules “operate[] in a similar fashion” and that both “demonstrate an intent to weed unjustifiable claims out of the

<sup>180</sup> FED. R. CIV. P. 11(b)(2)–(3).

<sup>181</sup> FED. R. CIV. P. 11(a)–(b).

<sup>182</sup> See FED. R. CIV. P. 11(a) (“[A] pleading need not be verified or accompanied by an affidavit.”).

<sup>183</sup> FLA. STAT. § 766.104(1) (2010). Good faith, in turn, exists when the attorney has received written opinions from experts. *Id.*

<sup>184</sup> See *supra* notes 78-79, 121-23, and accompanying text.

<sup>185</sup> See 90 F.3d 1523, 1540 (10th Cir. 1996) (“Despite the superficial similarity of the two rules, we conclude that they do not collide.”). This was a professional negligence case governed under the same Colorado certificate of merit statute that applies to medical malpractice actions. *Id.* at 1539. The Colorado statute requires that the certificate of merit confirm

(I) [t]hat the attorney has consulted a person who has expertise in the area of the alleged negligent conduct; and (II) [t]hat the professional who has been consulted pursuant to subparagraph (I) of this paragraph (a) has reviewed the known facts, including such records, documents, and other materials which the professional has found to be relevant to the allegations of negligent conduct and, based on the review of such facts, has concluded that the filing of the claim, counterclaim, or cross claim does not lack substantial justification.

COLO. REV. STAT. § 13-20-602(3)(a) (2008).

system.”<sup>186</sup> Nevertheless, despite the “superficial similarity,” the Tenth Circuit concluded the rules did not collide for two reasons.<sup>187</sup>

First, the court noted that Rule 11 targets attorneys (and pro se parties) whereas the Colorado statute penalizes the parties directly.<sup>188</sup> However, this is a fair representation of neither Rule 11 nor Colorado’s statute. Both rules require the attorney to sign or execute the requisite document.<sup>189</sup> As for deterrence, Colorado’s statute requires dismissal of the claim if the attorney fails to file the certificate.<sup>190</sup> Rule 11 calls for unsigned papers to be struck and allows sanctions for papers signed in bad faith.<sup>191</sup> It is difficult to understand the Tenth Circuit’s analysis here. Noncompliance under either rule results in the case not moving forward (it is difficult to proceed when one’s complaint has been struck), punishing both the party and the attorney (especially considering that most of the affected plaintiffs’ attorneys will be operating on a contingency basis). Furthermore, Rule 11’s text and the Advisory Committee Notes make it abundantly clear that sanctions can be applied to either the attorneys or the parties themselves.<sup>192</sup>

The Tenth Circuit’s second argument is also puzzling. The court asserted that the statute and Federal Rule do not conflict because the state statute has an additional purpose.<sup>193</sup> The court explained that in addition to weeding out frivolous claims, the Colorado statute also seeks “to expedite the litigation process” by imposing a time limit on the certificate.<sup>194</sup> Again, this reasoning is questionable because the Federal Rules require confirmation that a filing is nonfrivolous at the time of filing, not sixty days later as required by the Colorado statute. Moreover, *Ricoh* held that the fact that policies are not perfectly coextensive does not guarantee enforcement of an otherwise conflicting state rule.<sup>195</sup> *Shady Grove* added that federalism concerns regarding

<sup>186</sup> *Trierweiler*, 90 F.3d at 1540.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Compare FED. R. CIV. P. 11(a) (“Every pleading . . . must be signed by at least one attorney . . .”), with COLO. REV. STAT. § 13-20-602(3)(a) (2008) (“A certificate of review shall be executed by the attorney . . .”).

<sup>190</sup> See COLO. REV. STAT. § 13-20-602(4).

<sup>191</sup> FED. R. CIV. P. 11(a)–(c).

<sup>192</sup> See FED. R. CIV. P. 11 advisory committee’s note to 1993 amendment (“The sanction should be imposed on the persons—whether attorneys, law firms, or parties—who have violated the rule . . .”).

<sup>193</sup> See *Trierweiler*, 90 F.3d at 1540.

<sup>194</sup> *Id.* (quoting *Martinez v. Badis*, 842 P.2d 245, 251 (Colo. 1992)).

<sup>195</sup> See *supra* text accompanying note 105 (discussing the *Ricoh* Court’s disregard for differing policy rationales).

state policies will be considered only in generalized evaluations of the Rule's validity under the Rules Enabling Act.<sup>196</sup> Both decisions suggest that the Tenth Circuit's arguments are unavailing.<sup>197</sup>

Other courts have made arguments similar to those of the Tenth Circuit. For instance, in *Hill v. Morrison*, the district court concluded that Rule 11 does not conflict with Missouri's affidavit requirement because Missouri has a state rule of civil procedure modeled on Rule 11 that operates in state court concomitantly with the affidavit of merit statute.<sup>198</sup> This argument is astonishingly similar to the one the Supreme Court considered and rejected in *Burlington Northern*.<sup>199</sup>

### c. *Discretion to Punish Under Rule 11*

The most troublesome concern regarding Rule 11 arises over the question of punishment for noncompliance or compliance in bad faith. Rule 11(c) commits to the discretion of the trial judge the decision of whether to impose sanctions for a violation of Rule 11(b)'s good faith certification requirement, whereas many certificate of merit statutes make punishment mandatory for failing to file a certificate or filing in bad faith.<sup>200</sup> The Court's ruling in *Burlington Northern* is directly on point here. Just as the Court ruled that Alabama's mandatory penalty for losing parties at the appellate level would interfere with

<sup>196</sup> See *supra* text accompanying note 126 (discussing the *Shady Grove* Court's understanding of the relevance of state regulatory policies when interpreting ambiguous Federal Rules).

<sup>197</sup> Obviously, this Comment does not fault the Tenth Circuit or any other court for failing to foresee the Supreme Court's decision in *Shady Grove*.

<sup>198</sup> See 870 F. Supp. 978, 982 (W.D. Mo. 1994) ("Just as section 538.225 and Missouri Rule 55.03 can both apply in state court without conflict, so too both section 538.225 and Rule 11 can be given effect in federal court in a diversity action.")

<sup>199</sup> See *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 7-8 (1987) (concluding that it was irrelevant that Alabama's law punishing frivolous appeals operated side by side with a state law based on Federal Rule of Appellate Procedure 38).

<sup>200</sup> Compare FED. R. CIV. P. 11 advisory committee's note to 1993 amendment ("The court has significant discretion in determining what sanctions, if any, should be imposed for a violation . . ."), with FLA. STAT. § 766.104 (2010) (declaring that if an attorney did not file in good faith, "the court *shall* award attorney's fees and taxable costs against claimant's counsel, and *shall* submit the matter to The Florida Bar for disciplinary review of the attorney" (emphasis added)) and TENN. CODE ANN. § 29-26-122(d)(3) (Supp. 2009) ("[T]he court *shall* award appropriate sanctions against the attorney . . . [T]he court *shall* forward the order to the board of professional responsibility for appropriate action. . . . [T]he court *shall*, upon motion, require the party or party's counsel to post a bond in the amount of ten thousand dollars (\$10,000) per adverse party in any future medical malpractice case to secure payment of sanctions for any violation of this section in such case." (emphasis added)).



a judge's discretion to impose sanctions for frivolous appeals, a state statute mandating that a judge impose sanctions for failure to file a certificate of merit in good faith interferes with the judge's discretion as to whether and how to punish a party who has knowingly filed a frivolous complaint.<sup>201</sup>

Although the Supreme Court has twice found a mandatory state statute to conflict with a discretionary Federal Rule,<sup>202</sup> the mandatory/discretionary distinction was cited at least once as a reason why a Federal Rule and state statute *did not* conflict. In *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Co.*, to support its holding that the New Jersey statute did not conflict with Rule 11, the court observed that "the Affidavit of Merit statute mandates that failure to consult with and provide an affidavit from an expert 'shall be deemed a failure to state a cause of action.' Rule 11, on the other hand, makes sanctions discretionary."<sup>203</sup>

Contrary to the court's understanding in *RTC Mortgage Trust*, the Supreme Court has made it clear that state rules that extinguish the discretion federal judges possess, especially in the context of penalizing parties for frivolous actions, conflict with Federal Rules providing that discretion and therefore should not be enforced in federal court.

#### 4. Rules 26 and 37

Certificate of merit statutes that require the plaintiff to disclose substantive information concerning the opinions of the consulted expert conflict with the disclosure and discovery provisions of the Federal Rules in three ways: (1) they destroy the discretion that a trial judge has over the timing of expert-report disclosures; (2) they may disrupt protections in the Federal Rules against discovery of advice from nontestifying experts; and (3) they destroy the trial judge's discretion to punish noncompliant parties.

---

<sup>201</sup> See *Burlington*, 480 U.S. at 7 ("Thus, the Rule's discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute.").

<sup>202</sup> See *id.*; *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30-32 (1988) (finding that the mandatory Alabama law against enforcement of forum selection clauses destroyed the discretion the federal venue-transfer statute provided).

<sup>203</sup> 981 F. Supp 334, 345 (D.N.J. 1997) (quoting N.J. STAT. ANN. § 2A:53A-19 (West Supp. 2010)).

a. *Disclosure Timing*

Rule 26(a)(2)(C) gives the trial court discretion to determine when parties must disclose the identities and reports of any expert witnesses.<sup>204</sup> The statutes of a number of states completely destroy this discretion.

At the extreme, Texas's statute comes close to implementing its own disclosure and discovery scheme, requiring that within 120 days of filing a complaint, the plaintiff serve each defendant with a full expert report and curriculum vitae.<sup>205</sup> The mandatory 120-day time limit is in direct conflict with Rule 26(a)(2)(C)'s discretionary timing. Most federal courts that have considered whether Texas's law applies in diversity suits have concluded that it does not.<sup>206</sup>

As with Rules 8, 9, 11, and 12, courts in other states have found no conflict, but their reasoning is again suspect. Minnesota's statute requires that within 180 days of filing a complaint, the plaintiff must produce signed affidavits containing detailed reports from experts who are expected to testify.<sup>207</sup> In *Ellingson v. Walgreen Co.*, the plaintiff argued that Minnesota's statute conflicted with Rule 26(a).<sup>208</sup> In rejecting the plaintiff's argument, the trial court did not analyze the *Erie* issue.<sup>209</sup> Without citing *Hanna* or its progeny, the trial court merely listed four federal courts that had also applied the statute (only one of which had

<sup>204</sup> See FED. R. CIV. P. 26(a)(2)(C) ("A party must make these disclosures at the times and in the sequence that the court orders."); see also FED. R. CIV. P. 26 advisory committee's note to 1993 amendment ("Normally the court should prescribe a time for these disclosures . . .").

<sup>205</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West Supp. 2009).

<sup>206</sup> For a thorough discussion of why federal courts should not enforce Texas's law, see *Poindexter v. Bonsukan*, 145 F. Supp. 2d 800, 803-10 (E.D. Tex. 2001). *Accord* *Hall v. Trisun*, No. 05-0984, 2006 WL 1788192, at \*2-4 (W.D. Tex. June 23, 2006); *Garza v. Scott & White Mem'l Hosp.*, 234 F.R.D. 617, 621-23 (W.D. Tex. 2005); *Brown v. Brooks Cnty. Det. Ctr.*, No. 04-0329, 2005 WL 1515466, at \*2-3 (S.D. Tex. June 23, 2005); *Nelson v. Myrick*, No. 04-0828, 2005 WL 723459, at \*2-4 (N.D. Tex. Mar. 29, 2005); *McDaniel v. United States*, No. 04-0314, 2004 WL 2616305, at \*5-9 (W.D. Tex. Nov. 16, 2004). *But see* *Cruz v. Chang*, 400 F. Supp. 2d 906, 911-15 (W.D. Tex. 2005) (holding that Texas's statute should apply in federal court). A district court in South Dakota, applying North Dakota law, reached an identical conclusion to *Poindexter* and barred application of a similar North Dakota statute. See *Serocki v. MeritCare Health Sys.*, 312 F. Supp. 2d 1201, 1211 (D.S.D. 2004) (concluding that North Dakota's affidavit requirement does not apply in federal court).

<sup>207</sup> See MINN. STAT. ANN. § 145.682 (West 2005) (requiring identification of expert witnesses, as well as "the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion").

<sup>208</sup> See 78 F. Supp. 2d 965, 968 (D. Minn. 1999) ("Plaintiffs particularly claim the 1993 amendments to [Federal Rule] 26(a) preempt . . . § 145.682 in diversity cases.").

<sup>209</sup> See *id.* (rejecting plaintiff's argument summarily).

actually considered the *Erie* question) and concluded that the plaintiff's argument "has been uniformly rejected by the federal courts."<sup>210</sup>

The one court cited in *Ellingson* that had considered the *Erie* issue also issued a suspect opinion. In *Oslund v. United States*, an FTCA case in which the plaintiff asserted that Minnesota's expert statute conflicted with the Federal Rules, the court cited an Eighth Circuit case as an example of an "action dismissed for failure to file an expert affidavit required by § 145.682."<sup>211</sup> However, in the cited case, the Eighth Circuit reversed a dismissal and held that the affidavit of merit statute did not apply because the plaintiffs filed their case before the statute became effective.<sup>212</sup> The *Oslund* court, after misconstruing the Eighth Circuit's decision, merely concluded that because dismissal under the statute is mandatory, the plaintiff was incorrect to characterize it as "purely procedural."<sup>213</sup> Therefore, "[a]fter careful consideration of the statute and cases construing it," the court held that Minnesota's statute "is not the sort of purely procedural rule which should be preempted by the Federal Rules in federal question cases."<sup>214</sup>

#### b. *Nontestifying Experts Under Rule 26*

A second potential conflict involves Rule 26(b)(4)(B), which states that, under ordinary circumstances, "a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not ex-

---

<sup>210</sup> *Id.* For an extended discussion of the decision in *Ellingson*, see *Poindexter*, 145 F. Supp. 2d at 805-06.

<sup>211</sup> 701 F. Supp. 710, 713 (D. Minn. 1988) (construing *Hughes v. Mayo Clinic*, 834 F.2d 713 (8th Cir. 1987)).

<sup>212</sup> See *Hughes*, 834 F.2d at 715 ("Since [the Minnesota statute] does not apply to suits commenced prior to August 1, 1986, the requirement of expert review does not apply to the *Hughes*' suit.").

<sup>213</sup> *Oslund*, 701 F. Supp. at 713-14.

<sup>214</sup> *Id.* at 714. In case readers are concerned that the difference between FTCA and diversity cases makes this decision irrelevant, the court explained that its ruling was ensuring conformity between FTCA and diversity actions. See *id.* ("If the contrary was true, the anomalous result would be that the federal government would be exposed to liability when a cause of action involving similar conduct would be dismissed in a diversity case . . ."). It is also interesting that this decision, which did not mention a single Supreme Court opinion in the entire *Erie* line of cases, seemed to suggest that the Federal Rules only trumped if the state rule was "purely procedural." *Id.* at 714. As the Supreme Court noted in *Hanna*, matters "falling within the uncertain area between substance and procedure[] are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

pected to be called as a witness at trial.”<sup>215</sup> The Advisory Committee’s Note goes as far as to suggest that a “proper showing” is required even to obtain the names of nontestifying experts.<sup>216</sup>

Rule 26 thus gives parties a qualified right to protect from discovery the opinions, and sometimes even the identities, of experts whom they will not call to testify. Statutes requiring the disclosure of expert opinions and identities, without regard to whether the party intends to call the expert as a witness, necessarily interfere with this right. Unless the plaintiff knows that the affiant-expert will testify, an affidavit of merit statute forces the plaintiff to disclose advice from the affiant that the Rules make undiscoverable. It appears that no court to date has considered whether state certificate of merit statutes conflict with Rule 26(b)(4)(B), but there is a strong argument that they do.<sup>217</sup>

*c. Punishment for Noncompliance Under Rule 37*

The last potential conflict with the Federal Rules governing discovery involves punishment for noncompliance. Under Rule 37(c), if a party fails to disclose an expert report or identify a witness as required by Rule 26(a), the default penalty is exclusion of that witness from the trial.<sup>218</sup> However, Rule 37 entrusts the trial judge with great discretion to modify the penalty in a number of ways, ranging from postponing the proceedings until the delinquent party discloses the information to dismissing the action and awarding attorneys’ fees to the other side.<sup>219</sup> When a state statute contains mandatory penalties for failing to produce an expert report by a specific date, it extinguishes the judge’s discretion to impose the penalty she sees fit.

For example, Texas’s statute requires that a court dismiss a complaint with prejudice and award attorneys’ fees and court costs to the

---

<sup>215</sup> FED. R. CIV. P. 26(b)(4)(B). Excepted from this Rule are experts conducting a physical or mental examination ordered pursuant to Rule 35(b) and instances where “exceptional circumstances” make it “impracticable for the party to obtain facts or opinions on the same subject by other means.” *Id.* 26(b)(4)(B)(i)–(ii).

<sup>216</sup> See FED. R. CIV. P. 26 advisory committee’s note to 1970 amendment (“[A] party may on a proper showing require the other party to name experts retained or specifically employed . . . .”); see also 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, § 2032, at 101-105 (2010) (discussing the meaning of “proper showing”).

<sup>217</sup> One question that may arise is whether Rule 26(b)(4)(B) impermissibly creates a privilege. That question, however, is beyond the scope of this Comment.

<sup>218</sup> FED. R. CIV. P. 37(c)(1).

<sup>219</sup> *Id.*; see also FED. R. CIV. P. 37(b)(2)(A)(i)–(vi) (listing the orders that a court may issue in response to a party’s failure to comply with Rule 37(a)).

defendant if the plaintiff has not served each defendant with an expert report within 120 days of filing her complaint.<sup>220</sup> Under the principles of *Burlington Northern* and *Ricoh*, Rule 37 is sufficiently broad to control the question of how to punish those who do not submit expert reports, leaving no room for operation of the state statutes.<sup>221</sup> Enforcing the Texas statute would extinguish the discretion granted under the Federal Rules. As the court in *Poindexter v. Bonsukan* observed, even though the mandatory penalties under Texas law are within the range of what a judge could order under Rule 37, the rules conflict because they “cannot operate simultaneously without one being subordinated to the other.”<sup>222</sup>

### B. *The Two Prongs of Hanna: A Paradox*

A thorough examination of state certificate of merit statutes, the Federal Rules, and *Hanna* and its progeny show that, being faithful to the Supreme Court’s holdings as a whole, almost all certificate of merit statutes conflict with at least one Federal Rule and should not be enforced in federal court.

But what about the borderline cases? What about the certificates that are due long after pleading has concluded, do not require the submission of substantive expert opinions, and do not interfere with a judge’s discretion in punishing frivolous or otherwise misbehaving litigants?

*Hanna* stated that if there is no direct conflict between a Federal Rule and state law, courts should apply the modified outcome-determination test to see if the state law must be given effect over the traditional federal practice.<sup>223</sup> However, this instruction comes with a warning. If one analyzes the outcome-determination test by comparing what happens to a litigant who adheres to a procedural requirement with one who does not, then “every procedural variation is ‘outcome-determinative.’”<sup>224</sup> Instead, courts should apply the outcome-determination test with an eye to the “the twin aims of the *Erie* rule:

<sup>220</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West Supp. 2009).

<sup>221</sup> See *supra* notes 91-104 and accompanying text (discussing how *Burlington Northern* and *Ricoh* found the discretion granted to trial courts by Rule 38 and 28 U.S.C. § 1404(a), respectively, conflicted with nondiscretionary state law provisions).

<sup>222</sup> 145 F. Supp. 2d 800, 809 (E.D. Tex. 2001).

<sup>223</sup> *Hanna v. Plumer*, 380 U.S. 460, 469-71 (1965).

<sup>224</sup> *Id.* at 468-69.

discouragement of forum shopping and avoidance of inequitable administration of the laws.”<sup>225</sup>

In light of *Hanna*, this Section will apply the outcome-determination test to New Jersey’s statute because, as the country’s most innocuous certificate of merit statute, it is the statute least likely to interfere with any of the Federal Rules. New Jersey’s statute requires that within 60 days (extendable to 120 days) of receiving the defendant’s answer, the plaintiff file an affidavit from a sufficiently qualified expert stating that there is at least a “reasonable probability” that the defendant’s care fell outside the professional norm.<sup>226</sup>

The Third Circuit in *Chamberlain* began its modified outcome-determination analysis of New Jersey’s statute by commenting that the statute is “outcome determinative on its face.”<sup>227</sup> The court explained that because litigants who did not comply with the statute would face dismissal, “failure to apply the statute in a federal diversity action where no affidavit of merit has been filed would produce a different outcome than that mandated in a state proceeding.”<sup>228</sup> This is precisely the syllogistic conception of outcome determination that *Hanna* warned reduces the test to a truism.

The Third Circuit then analyzed the statute under the twin aims of *Erie*. The court concluded that failure to enforce the statute would lead to forum shopping because a plaintiff in federal court who is “unable to secure expert support” might nevertheless “be able to survive beyond the pleading stage and secure discovery.”<sup>229</sup> This argument has a number of problems. First, it raises internal consistency questions because the same court that earlier refused to characterize New Jersey’s certificate of merit statute as a pleading requirement later associated adherence to the statute with survival beyond the pleading stage.<sup>230</sup> Still more relevant to the question at hand, the Third Circuit’s argument is based on the erroneous assumption that discovery does not occur until after the plaintiff serves his affidavit.

<sup>225</sup> *Id.*

<sup>226</sup> N.J. STAT. ANN. § 2A:53A-27 (West Supp. 2010).

<sup>227</sup> *Chamberlain v. Giampapa*, 210 F.3d 154, 161 (3d Cir. 2000).

<sup>228</sup> *Id.* at 161.

<sup>229</sup> *Id.* The opinion goes on to raise the specter of the “fishing expedition.” *Id.*

<sup>230</sup> *Compare id.* at 160 (distinguishing Rules 8 and 9 from the state statute on the ground that only the former govern pleadings), *with id.* at 161 (discussing the potential for plaintiffs with little expert support to “survive beyond the pleading stage” in federal court).

On the contrary, in terms of document production, if the physician-defendants fail to provide any of the plaintiff's relevant medical records, the affidavit requirement is waived.<sup>231</sup> As for disclosure, interrogatories, and depositions, formal discovery proceeds over the 60 days (extendable to 120 days on a showing of good cause) between when the defendant serves his answer and when the plaintiff must serve his affidavit.<sup>232</sup> In a medical malpractice action, with a limited number of potential deponents, it is unlikely that plaintiffs' counsel might hope to achieve a markedly more intrusive "fishing expedition" in federal court than she could achieve in state court given 120 days of discovery and full access to the relevant documents.

As for the inequitable administration of justice, the Third Circuit concluded that defendants in federal court would be "unfairly exposed to additional litigation time and expense before the dismissal of a non-meritorious lawsuit."<sup>233</sup> Again, this assertion is questionable. Presumably, either 60 or 120 days after the defendant files his answer, a plaintiff unable to secure expert support would be tossed out of state court for failure to adhere to the affidavit of merit statute. The result would not be markedly different in federal court. New Jersey substantive law requires expert testimony to establish the standard of care in a malpractice action.<sup>234</sup> If a plaintiff does not produce an expert affidavit stating that the standard of care was violated, a federal court will grant a defendant's motion for summary judgment.<sup>235</sup> At most, it seems that the defendant in federal court would be exposed to a longer period of discovery before she could win the case with prejudice.<sup>236</sup>

<sup>231</sup> See N.J. STAT. ANN. § 2A:53A-28 (providing for a "sworn statement in lieu of the affidavit" when defendants are noncompliant).

<sup>232</sup> See *Ferreira v. Rancocas Orthopedic Assocs.*, 836 A.2d 779, 780, 785 (N.J. 2003) (noting that "[d]iscovery proceeded in the ordinary course" during the 120 days plaintiff had to file her affidavit of merit and instructing trial courts that part of discovery management is ensuring that plaintiff's counsel is aware of affidavit requirements and deadlines).

<sup>233</sup> *Chamberlain*, 210 F.3d at 161.

<sup>234</sup> See *Rosenberg ex rel. Rosenberg v. Cahill*, 492 A.2d 371, 374 (N.J. 1985) ("It is generally recognized that in the ordinary medical malpractice case 'the standard of practice to which [the defendant-practitioner] failed to adhere must be established by expert testimony . . .'" (alterations in original) (quoting *Sanzari v. Rosenfeld*, 167 A.2d 625 (N.J. 1966)).

<sup>235</sup> See, e.g., *Wenner v. Corr. Med. Servs., Inc.*, No. 04-3414, 2009 WL 1089555, at \*6-7 (D.N.J. Apr. 21, 2009) (granting defendant's motion to dismiss a medical malpractice claim because plaintiff did not produce an expert affidavit stating that defendant had violated the standard of care).

<sup>236</sup> Cf. Michael A. Berch & Rebecca White Berch, *An Essay Regarding Gasperini v. Center for Humanities, Inc. and the Demise of the Uniform Application of the Federal Rules of*

The internal strain in the logic of *Chamberlain* is representative of a paradox built into *Hanna* that favors the application of federal law in this and analogous situations. To hold that state law must be enforced, a federal court must minimize the scope of the state statute when deciding if the statute conflicts with the Federal Rules (“this isn’t a pleading requirement”) and then aggrandize the role of the statute when deciding if it is outcome determinative (“this statute determines survival past the pleading stage”).

In other words, the paradox is that the statutes that are most innocuous in terms of procedural hurdles are least likely to conflict with a Federal Rule, but they are also much less likely to be outcome determinative in a way that implicates the twin aims of *Erie*. Conversely, the statutes that are more likely to be considered outcome determinative *should* never reach the second stage of the analysis because they are so disruptive of the Federal Rules. For example, few would argue that Georgia’s statute, which requires that the complaint be filed with a detailed expert report, would not encourage forum shopping. But the federal courts in Georgia never reach that stage of the analysis because they always find that the statute conflicts with the Federal Rules.<sup>237</sup>

### III. THE POLICY IMPLICATIONS OF CERTIFICATE OF MERIT STATUTES

A faithful application of *Hanna* and its progeny suggests that certificate of merit statutes are not applicable in federal court. The vast majority of the statutes conflict directly with at least one of the Federal Rules, and, in cases where the statute is so innocuous that it does not wander across the path of one of the Federal Rules, the very mildness that ensures it survives the first prong of *Hanna* spells its doom on the second prong.

At the same time, certificate of merit statutes represent clear attempts by the states to regulate substantive policy issues (namely, medical malpractice), albeit through procedural reforms. None of the tests enunciated by *Hanna* and its progeny for determining when a Federal Rule and a state law conflict requires treating a state proce-

---

*Civil Procedure*, 69 MISS. L.J. 715, 727 (1999) (criticizing the *Trierweiler* court for deciding that Colorado’s statute was outcome determinative because “rejecting the state rule would merely postpone the stage at which some noncertifiable cases would be dismissed”).

<sup>237</sup> See, e.g., *Baird v. Celis*, 41 F. Supp. 2d 1358, 1360-61 (N.D. Ga. 1999) (finding a conflict between the Georgia expert-affidavit requirement and Rule 8(a)); *Boone v. Knight*, 131 F.R.D. 609, 611 (S.D. Ga. 1990) (same).



dural rule particular to one area of substantive law any differently than a transsubstantive state procedural rule. This Part of the Comment, in light of the “*Hanna* paradox” and the Court’s decision in *Shady Grove*, first considers whether *Erie* jurisprudence needs a major overhaul to allow easier enforcement of substantively motivated state litigation reforms in federal court. Rejecting a major overhaul as imprudent, this Part then considers whether a more moderate reform of the *Erie* doctrine might be justified to protect federalism. Concluding that a moderate revision of *Erie* is defensible, this Part then reconsiders certificate of merit statutes in light of such a revision. This Comment’s conclusion is that, although certificate of merit statutes are not within the scope of state legislation that would be protected by a minor revision to the *Erie* doctrine, this result is acceptable because subordination of the statutes in federal court results in only minimal threats to federalism.

Prior to *Gasperini* and *Shady Grove*, the Seventh Circuit determined that federal courts must consider whether state procedural reforms are limited to a substantive policy area. In *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District*, Judge Posner indicated that there are two categories of state procedural rules, the applicability of which presents a simple question for federal courts.<sup>238</sup> The first category consists of state rules that squarely conflict with the Federal Rules.<sup>239</sup> The second group “of pretty easy cases is where the state procedural rule, though undeniably ‘procedural’ in the ordinary sense of the term, is limited to a particular substantive area.”<sup>240</sup> At the time, Judge Posner’s assertion was supported by citations to other Seventh Circuit cases only.<sup>241</sup> The analysis described for such cases was not grounded in the Supreme Court’s *Erie* jurisprudence.<sup>242</sup> Although Justice Ginsburg re-

---

<sup>238</sup> See 60 F.3d 305, 310 (7th Cir. 1995) (“There are, however, two classes of pretty clear cases . . .”).

<sup>239</sup> See *id.* (describing the first category of cases as those “in which the state rule is in actual conflict with one of the Federal Rules”).

<sup>240</sup> *Id.*

<sup>241</sup> See *id.* (citing several sources in reference to tort-specific rules, including *Todd ex rel. Todd v. Merrell Dow Pharmaceuticals, Inc.*, 942 F.2d 1173, 1177 & n. 1 (7th Cir. 1991), *Jones v. Griffith*, 870 F.2d 1363, 1368 (7th Cir. 1989), and *Hines v. Elkhart General Hospital*, 603 F.2d 646 (7th Cir. 1979)).

<sup>242</sup> See *id.* (suggesting that the analysis for this group of cases turns on whether state goals are substantively designed); see also *supra* note 112 (criticizing *Gasperini*’s reliance upon *Healy*’s analysis).

troactively tried to incorporate *Healy* into the doctrine,<sup>243</sup> the Court in *Shady Grove*, perhaps owing to changes in membership,<sup>244</sup> rejected incorporating *Healy*'s concern for individual state policies into the *Hanna* conflict analysis.<sup>245</sup> This struggle is indicative of the perception of some that *Hanna* is inadequate when it comes to protecting state prerogatives, especially when substantive state policies shape procedural litigation reforms.

Several scholars have explicitly criticized *Hanna*'s tendency to trump substantively motivated state legislation. Professor Lynch has argued that because *Hanna* prevents the enforcement of state litigation reform measures in federal court, the decision should be scrapped and replaced with a system of comparative impairment, under which federal courts would determine the prevailing procedural law by asking whether the federal or state government would be more impaired if its law were subordinated.<sup>246</sup> Lynch asserts that *Hanna* and the enactment of the Rules Enabling Act occurred before the Supreme Court or Congress could have foreseen the "litigation reform movement."<sup>247</sup> The implicit suggestion is that, had the Supreme Court and Congress known that states would attempt to control substantive areas of policy by regulating procedure, *Hanna* and the Rules Enabling Act would have been structured in a way that would allow the effectuation of state litigation reform in federal court. However, despite the appeal of these arguments, they must fail.

Professor Lynch's argument that *Hanna* and the Rules Enabling Act predate the litigation reform movement is factually inaccurate. Tort reform movements, which tend to occur cyclically, date back to

<sup>243</sup> See *supra* text accompanying notes 111-13 (noting Justice Ginsburg's efforts to install avoidance of conflict with state regulatory interests as a guiding principle in construing a Federal Rule's scope).

<sup>244</sup> See *supra* note 120 (comparing the composition of the majority for *Gasperini* in 1996 with its composition for *Shady Grove* in 2010).

<sup>245</sup> See *supra* notes 124-29 and accompanying text (explaining the *Shady Grove* majority's rejection of a standard based on the subjective intent of state legislators).

<sup>246</sup> See John A. Lynch, Jr., *Federal Procedure and Erie: Saving State Litigation Reform Through Comparative Impairment*, 30 WHITTIER L. REV. 283, 285-86 (2008) (urging either the Supreme Court or Congress to ensure "appropriate deference to state litigation reform measures in diversity cases" and suggesting comparative impairment as a means by which to do so); see also Richard D. Freer, *Some Thoughts on the State of Erie after Gasperini*, 76 TEX. L. REV. 1637, 1643 (1998) (hoping that *Gasperini* signals a "heightened sensitivity" to any impact a *Hanna* ruling might have on state policy concerns).

<sup>247</sup> See Lynch, *supra* note 246, at 293-94 (asserting that the litigation reform movement "could not even have been imagined by the *Hanna* Court in 1965" or by Congress in 1934).

the nineteenth century.<sup>248</sup> To the extent that his argument is accurate—that states enacted the specific statutes about which he has voiced concern (including certificate of merit statutes) after *Hanna* and the Rules Enabling Act—this Comment draws a different conclusion. Because the states passed their statutes after the Court’s ruling in *Hanna* (and in most instances, after *Burlington Northern* and *Ricoh*), the states enacted their litigation reform with full notice that any reforms conflicting with the Federal Rules would not be enforced in federal court. Instead of considering *Hanna*’s antecedence to state litigation-reform statutes as a reason to question *Hanna*’s validity, we should view *Hanna* as an indication that state legislatures knew or should have known that attempts to regulate tort claims via procedural reforms in conflict with the Federal Rules (or, alternatively, procedural reforms that are not outcome determinative with respect to the twin aims of *Erie*) would not affect claims in federal court.

There is, however, a more compelling argument against a major overhaul of *Hanna* in order to accommodate state procedural litigation reform motivated by substantive concerns. Although applying certificate of merit statutes in federal court may seem harmless in isolation, allowing any state procedural reform that regulates a substantive area of law to trump the Federal Rules would, in the aggregate, have a disastrous effect on the uniformity of practice in the federal courts. Under such a system, the more states choose to regulate substantive policy through procedural reform, the more the resultant disruption to the uniformity of federal procedure would approach the level of disruption one would expect if the federal courts wholly applied transsubstantive state procedural rules. As more state procedural rules replace Federal Rules, procedure in the federal courts would begin to resemble federal procedure during the unsatisfactory days of the Conformity Act.<sup>249</sup>

---

<sup>248</sup> See, e.g., Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 *FORDHAM L. REV.* 943, 955-69 (2004) (discussing critiques of the medical malpractice litigation system and proposals for reform in the nineteenth century); John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 *RUTGERS L.J.* 1159, 1168-69 (2005) (discussing late-nineteenth and early-twentieth century enactments of state constitutional provisions designed to restrict wrongful death litigation).

<sup>249</sup> See RICHARD H. FIELD ET AL., *CIVIL PROCEDURE* 20 (9th ed. 2007) (characterizing the mixture of federal and state procedure under the Conformity Act as “rampantly confusing”); Burbank, *supra* note 68, at 1039-42 (cataloging contemporary discontent with the Conformity Act).

Uniformity of procedure was among the foremost goals motivating Congress and the rulemakers to draft the Federal Rules of Civil Procedure.<sup>250</sup> The Supreme Court explicitly identified preservation of that uniformity as the impetus for its decision in *Hanna*.<sup>251</sup> Without the uniformity imposed by *Hanna*, the federal courts of each state would assume their own idiosyncratic combination of state and federal procedural laws. This would have a pernicious effect on both interstate and transsubstantive procedural uniformity.<sup>252</sup> In other words, not only would attorneys who practice in federal court in different states be tasked with learning multiple sets of procedural rules, but attorneys who practice in multiple substantive areas within the federal courts of one state would also have to juggle different sets of procedural rules.<sup>253</sup>

---

<sup>250</sup> See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 496 (9th ed. 2005) (framing the Federal Rules as a response to “an extended period of agitation for uniform procedural rules”); CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 429, 432 (6th ed. 2002) (listing “erratic conformity to state procedure” as one of the three problems the Federal Rules were intended to address and stating that the uniform procedure provided by the Rules in itself “would be a fine accomplishment”); Burbank, *supra* note 68, at 1043-1095 (chronicling the history of the Rules Enabling Act, including the activities of the ABA’s Committee on Uniform Judicial Procedure and early drafts of the Act in the form of the Uniform Federal Procedure Bill).

<sup>251</sup> See *Hanna v. Plumer*, 380 U.S. 460, 463 (1965) (“Because of the threat to the goal of uniformity of federal procedure posed by the decision below, we granted certiorari.” (citation omitted)).

<sup>252</sup> Cf. Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2006 (1989) (identifying four “strands” of procedural uniformity: “interdistrict court uniformity, intrastate uniformity, trans-substantive uniformity, and . . . uniformity of result”). One could argue that uniformity in the Federal Rules is a myth (or at least an exaggeration), because the Rules largely provide discretionary authority to federal judges. See, e.g., Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1474 (1987) (book review) (“Many of the Federal Rules authorize essentially ad hoc decisions and therefore are trans-substantive in only the most trivial sense.”); Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case For Presumptive Limits*, 49 ALA. L. REV. 79, 88-89 (1997) (arguing that the lack of “limits and constraints” in the Federal Rules has led to “disuniformity and experimentation”). The validity of these criticisms notwithstanding, even when the Rules provide judicial discretion, they play a normative role in defining when discretion exists and how broadly the range of discretion extends. Thus, to the extent that the Rules provide a set of answers to a series of equations balancing uniformity and discretion, those equations are applied uniformly. Litigants therefore know the presumptive areas and ranges within which a federal judge may exercise discretion and the appellate process acts as a check on judges who stray beyond the tolerated ranges of discretion.

<sup>253</sup> See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1441 (2010) (criticizing the dissent’s policy-driven approach because “[i]t would mean, to begin with, that one State’s statute could survive pre-emption (and accordingly affect the procedures in federal court) while another State’s identical law would not, merely because its authors had different aspirations”).

Nevertheless, while a major overhaul of *Hanna* might pose an unjustifiably large threat to procedural uniformity, the jurisprudence as framed by the majority in *Shady Grove* is not necessarily adequate. Threats to federalism might not warrant injecting individual state policies into the conflict-analysis prong of *Hanna*, but it does not necessarily follow that a more moderate revision of the doctrine is similarly imprudent. After all, procedure is power.<sup>254</sup> And if states attempt to use that power to accomplish substantive ends, there is no reason that the *Erie* doctrine should make *all* of those efforts per se unenforceable in federal court merely because the state laws can be characterized as conflicting with one of the Federal Rules.<sup>255</sup>

Under *Hanna*, when a state law conflicts with a Federal Rule, there are two points of analysis: the conflict-analysis stage of *Hanna* and the Rules Enabling Act–validity stage of *Sibbach*. If a court finds a conflict under the expansive post–*Shady Grove* conflict test, the only hope for enforcement of the state law is if the court finds the Rule to be invalid. Justice Ginsburg’s preferred method of guarding state interests, expressed in *Gasperini* and in the *Shady Grove* dissent, calls for narrowing the scope of what is considered a conflict at the first stage of *Hanna*, thereby channeling more *Erie* questions into the more state-law-friendly modified outcome-determination test. However, this policy could unjustifiably disrupt procedural uniformity in federal court.

Justice Stevens’s concurrence in *Shady Grove* offers a more modest approach. Rather than protect federalism by narrowing the range of cases decided by the federal-law-friendly *Sibbach* test, Justice Stevens’s proposal keeps the range of cases exposed to the *Sibbach* test the same, but increases the scrutiny of the test. Specifically, Justice Stevens opined that, under the Rules Enabling Act, a federal court cannot apply a Federal Rule if that application “would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a

---

<sup>254</sup> See, e.g., Stephen B. Burbank, *Procedure, Politics, and Power*, 52 J. LEGAL EDUC. 342 (2002) (discussing “procedure as power” in the context of legal training and scholarship); Richard Marcus, *Confessions of a Federal “Bureaucrat”: The Possibilities of Perfecting Procedural Reform*, 35 W. ST. U. L. REV. 103, 113 (2007) (acknowledging that “procedure is power”).

<sup>255</sup> See *WSU Symposium on State Civil Procedure: Transcript Highlights of Panelist Discussions*, 35 W. ST. U. L. REV. 255, 295 (2007) (comments of Professor Stephen Burbank) (“One of the things that . . . state legislatures have learned is that procedure is power. And . . . Congress knows the power of those so-called procedural provisions to effect realization or not of the substance of that legislation. It’s crazy to me—recognizing that, at least on matters of substantive law, states will always have different views on some subjects—to think that they would or they should give up the power of procedure to effectuate or not their substantive goals.”).

state right or remedy that it functions to define the scope of the state-created right.”<sup>256</sup> As examples of state laws that are so intertwined, Justice Stevens listed the New York law concerning review of damages that

---

<sup>256</sup> *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring). Early analysis of *Shady Grove*, citing *United States v. Marks*, claimed that Justice Stevens’s concurrence controlled on this question. See Lyle Denniston, *Analysis: Sorting Out an Erie Sequel*, SCOTUSBLOG (Mar. 31, 2010, 1:16 PM), <http://www.scotusblog.com/2010/03/analysis-sorting-out-an-erie-sequel> (“Stevens’ view on this general point becomes controlling through the practice of the Court . . .”). This is incorrect. *Marks* held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’” *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). As several courts have recognized, “the *Marks* rule is applicable only where one opinion can be meaningfully regarded as narrower than another and can represent a common denominator of the Court’s reasoning.” *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1140 (9th Cir. 2005) (quoting *Anker Energy Corp. v. Consolidation Coal Co.*, 177 F.3d 161, 170 (3d Cir. 1999) (internal quotation marks omitted); *accord United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *A.T. Massey Coal Co. v. Massanari*, 305 F.3d 226, 236 (4th Cir. 2002); *Anker Energy Corp.*, 177 F.3d at 170; *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991).

The opinions in *Shady Grove* do not indicate that the other Justices share Justice Stevens’s views on this question. The plurality believed that courts should continue to evaluate the validity of the Federal Rules under *Sibbach*, querying whether a Rule “really regulates procedure.” See *Shady Grove*, 130 S. Ct. at 1444 (Scalia, J., for himself, Roberts, C.J., Thomas, J., and Sotomayor, J.) (“We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule depends entirely upon whether it regulates procedure.”). Three of the four Justices in the plurality so strenuously disagreed with Justice Stevens’s approach that they felt compelled to devote a subsection of their opinion to criticizing his opinion. *Id.* at 1444-47 (Scalia, J., for himself, Roberts, C.J., and Thomas, J.). Nor can the votes to enact Justice Stevens’s concurrence come from the dissent. Although one might conjecture that, owing to their apparently greater concerns about the federalism implications of *Hanna*, the dissenting Justices might prefer Justice Stevens’s approach to that of the plurality, the dissent did not address the issue of how Rules should be evaluated under the Rules Enabling Act. See *id.* at 1460-73 (Ginsburg, J., dissenting). This is presumably because the dissent would have resolved the issue by finding no conflict between New York’s statute and Rule 23, thereby channeling the question into the modified outcome-determination test. Therefore, it seems that the *Shady Grove* Court created no new binding precedent on this question and *Sibbach* remains the proper test for determining the validity of a Federal Rule. See also *King*, 950 F.2d at 782 (“If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law.”); Tristan C. Pelham-Webb, Note, *Powelling for Precedent: “Binding” Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 696 (2009) (observing that the *Marks* rule cannot be applied “where the concurring opinion cannot reasonably be described as narrower than its accompanying majority or plurality opinion,” and suggesting instead that legal principles should only become binding precedent if there is a majority that supports both the outcome of the case and the rationale supporting it).

was at issue in *Gasperini*, statutes of limitations, and burdens of proof.<sup>257</sup> One drawback of Justice Stevens's approach is that it appears to allow as-applied challenges resulting in the subordination of individual Federal Rules in individual cases, thereby undermining uniformity in application of the Rules. Nevertheless, more intense scrutiny of the Rules' validity appears to be one sensible way to reform the overall *Hanna* framework to provide greater protection to federalism.<sup>258</sup>

It is also important to observe that Justice Stevens's proposal would not rescue certificate of merit statutes in federal court. An inevitable side effect of any framework governing the compromise between procedural uniformity and substantive conformity is that the closer a given question is to the appointed line of demarcation, the more harmful the resolution will seem to the interest it adversely affects. In other words, when a state rule is so substantive that it almost, but ultimately does not, merit enforcement in federal court, federalism will seem particularly aggrieved. Thus the final question to consider is as follows: assuming that some modest reform of *Hanna* is justified to protect federalism, is it acceptable if that reform does not sweep so broadly as to compel the enforcement of certificate of merit statutes in federal court?

The answer to this question is "yes." Viewing substantively motivated procedural reforms along a spectrum, it is possible to place them in three broad categories. At one end lie the statutes about which Justice Stevens was most concerned—namely, those that appear procedural but are "so intertwined with a state right or remedy that [they] function[] to define the scope of the state-created right."<sup>259</sup> In the middle lie statutes that regulate procedure in order to tip the playing field so that a certain substantive result is more or less likely at the end of a fully adjudicated proceeding.<sup>260</sup> At the far end of the spec-

---

<sup>257</sup> See *Shady Grove*, 130 S. Ct. at 1453 n.8 (Stevens, J., concurring) (asserting that these three types of laws "are the sorts of rules that one might describe as 'procedural,' but they nonetheless define substantive rights").

<sup>258</sup> This approach, of course, enhances the misperception that federalism provided the primary impetus behind the limitations in the Rules Enabling Act. See Burbank, *supra* note 68, at 1108-13 (demonstrating that separation of powers, not federalism, was the primary motivation behind the limitations in the Rules Enabling Act). Nevertheless, at this point, the misconception is inextricably tied to the doctrine. Therefore, to the extent that the courts need to be more protective of federalism, the limitations in the Rules Enabling Act present an established framework for doing so in the field of procedure.

<sup>259</sup> *Shady Grove*, 130 S. Ct. at 1452 (Stevens, J., concurring).

<sup>260</sup> These statutes often involve admissibility of evidence or forum shopping. See, e.g., ALA. CODE § 6-3-7 (LexisNexis 2005) (limiting venues in which parties can pursue

trum lie statutes that seek to regulate litigant behavior, but do not seek to influence *ultimate* adjudications (aside from any effect the statutes have on pressure to settle).<sup>261</sup>

Federal subordination of certificate of merit statutes—laws that fall into this third category—simply does not represent that great of a threat to federalism. Aside from slightly reducing the pressure to settle certain suits, certificate of merit statutes have an almost negligible effect on the outcome of individual adjudications.<sup>262</sup> Instead, their greater purpose is in the aggregate. By reducing frivolous malpractice litigation, states hope the statutes will lead to lower malpractice premiums and, ultimately, cheaper health care and greater patient access.<sup>263</sup> Because the statute's intent lies not in determining the scope of the rights or remedies of individual litigants, but rather in its aggregate effect on litigation, allowing a small proportion<sup>264</sup> of cases to

class actions and cases against corporations); CAL GOV'T CODE § 11440.45 (West 2005) (barring admission of defendant's sympathy as evidence of liability); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(e) (West Supp. 2009) (requiring a unanimous jury verdict to award punitive damages).

<sup>261</sup> *See, e.g.*, ARK. CODE ANN. § 16-55-214 (2005) (placing a twenty-five million dollar cap on appeal bonds); ME. REV. STAT. ANN. tit. 14, § 52 (2003) (disallowing inclusion of the specific amount of damages sought in a complaint).

<sup>262</sup> *See supra* text accompanying notes 233-36 (discussing the low probability that the claim of a plaintiff who is unable to obtain an expert affidavit would survive summary judgment). This, of course, is not to say that the statutes have no effect at all. For a negative appraisal of the effect of certificate of merit statutes, *see Zeier v. Zimmer, Inc.*, 152 P.3d 861, 869-70 (Okla. 2006). For a more positive treatment, *see* Press Release, Office of Rep. Bart Gordon, Gordon's Medical Malpractice Reform Embraced by Administration (Sept. 10, 2009), and Press Release, Admin. Office of Pa. Courts, Pennsylvania Supreme Court Announces Favorable Trends From Preliminary Data (Mar. 18, 2004).

<sup>263</sup> *See, e.g., Zeier*, 152 P.3d at 869 ("The Oklahoma Legislature implemented the [certificate of merit statute] for the purpose of implementing reasonable, comprehensive reforms designed to improve the availability of health care services while lowering the cost of medical liability insurance and ensuring that persons with meritorious injury claims receive fair and adequate compensation."); Press Release, Office of Rep. Bart Gordon, *supra* note 262 (stating that the primary goals of certificate of merit statutes are "to reduce frivolous malpractice lawsuits and encourage doctors to abandon the practice of defensive medicine"). This Comment takes no position on the efficacy of these statutes, litigation's influence on the cost of health care, or the merits of tort reform in general.

<sup>264</sup> For instance, in 2008, plaintiffs filed 1602 medical malpractice suits in Pennsylvania. *See* Press Release, Admin. Office of Pa. Courts, Latest Medical Malpractice Data Shows Stable Decline in Number of New Cases and Verdicts tbl.1 (Apr. 9, 2009) (indicating that this figure constituted a forty-one percent decline from the 2000-2002 period). Over the same period, only forty-seven medical malpractice cases were filed in the federal district courts located in Pennsylvania. *See* Personal Injury—Medical Malpractice Cases Filed in Pennsylvania Between January 1, 2008 and December 31, 2008, <http://dockets.justia.com/search?state=pennsylvania&nos=362&after=2008-01-01&before=2008-12-31> (last visited Sept. 15, 2010) (listing results of an online docket search).



proceed in federal court without the certificate requirement will present minimal disruption to the state's scheme. One potential concern is that plaintiffs might attempt to attach federal causes of action to their malpractice claims in order to avoid their state's certificate requirement.<sup>265</sup> When *Hanna* requires the subordination of a substantively motivated state law in federal court, federal judges should be particularly wary of any lawsuits in which the plaintiff has attached a questionable federal claim or claims to a state cause of action. Under such circumstances, judges should exercise with alacrity their discretion under 28 U.S.C. § 1367(c) to remand the purely state claims to state court, especially if the federal claims are easily dismissed.<sup>266</sup> The courts can thus attempt to minimize the effect of forum shopping.

### CONCLUSION

As the nation grapples with the costs of health care, doctors, liability insurers, and hospitals will continue to advocate state tort reform as a method of controlling expenses. Certificate of merit statutes wonderfully illustrate the competing interests at play when federal courts consider the enforcement of state litigation reforms. In principle, the *Hanna* framework establishes a compromise between procedural uniformity and substantive conformity, but the hill is steep for substantively motivated state procedural laws. Applying *Hanna* faithfully, federal courts should not enforce certificate of merit statutes while exercising diversity jurisdiction. Most of the statutes conflict with at least one Federal Rule, and those that do not are generally not out-

---

<sup>265</sup> See, e.g., *Farrell v. A.I. DuPont Hosp. for Children of the Nemours Found.*, No. 04-3877, 2006 WL 1284947, at \*8 n.6 (E.D. Pa. May 5, 2006) (allowing nondiverse plaintiffs to maintain state malpractice claims in federal court even after dismissal of their federal Rehabilitation Act claims).

<sup>266</sup> See 28 U.S.C. § 1367(c) (2006) (setting forth criteria under which federal courts may exercise their discretion to dismiss pendent state claims); *Green v. Young*, No. 03-0722, 2004 WL 5327170, at \*9 (E.D. Va. June 8, 2004) (dismissing plaintiff's Rehabilitation Act claims for failure to state a claim and dismissing remaining state claims pursuant to § 1367(c)); see also *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (establishing judicial economy, convenience, fairness, and comity as the guideposts for discretionary exercises of supplemental jurisdiction). See generally 13D CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE*, § 3567.3 (3d ed. 2008) (providing an overview of § 1367(c)). Such an approach is consistent with other federal precedent that attempts to prevent litigants from forum shopping to take unfair advantage of the *Erie* doctrine. See, e.g., *Martel v. Stafford*, 992 F.2d 1244, 1247 (1st Cir. 1993) (declining to predict the expansion of a state law remedy at the request of a plaintiff who elected to file in federal court).

come determinative. However, at least until *Shady Grove*, a majority of federal courts enforced the statutes anyway.

The same tension that has led federal courts to misapply *Hanna* is also visible in the conflicting approaches of Justices Ginsburg and Scalia in *Gasperini* and *Shady Grove*. Consideration of that tension reveals that too great a concern for state policies can have a disastrous effect on procedural uniformity. But an overly moderate reform of *Hanna* might not change the doctrine enough to allow enforcement of certificate of merit statutes in federal court. Ultimately, though, this emerges as the most sensible solution. State causes of action make up a large percentage of claims litigants bring in federal court, yet only a small percentage of claims under any given state cause of action are brought in federal court. Conformity's threat to procedure is greater than uniformity's threat to substance. In the case of certificate of merit statutes, the claimed benefit is in the aggregate: reduced malpractice premiums, cheaper health care, and greater patient access. Because subordination of the statutes in a small percentage of the cases should not greatly disrupt the statute's aggregate goals, nonenforcement seems a small price to pay to maintain the procedural uniformity of the Federal Rules of Civil Procedure.