UNNECESSARY PLEADING: *ERIE* AND AFFIDAVITS OF MERIT

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ABSTRACT

Beginning in the 1970s and continuing into the twenty-first century, states have experimented with various forms of tort reform to address a perception that the amount of tort litigation, particularly medical malpractice litigation, is out of control and must be addressed. To address this perceived problem, states have enacted statutes imposing heightened pleading requirements on plaintiffs in medical malpractice cases. In general, these statutes require that plaintiffs in medical malpractice suits submit an affidavit along with their complaint that verifies that a doctor or other medical professional has reviewed the case and has determined that a reasonable and meritorious basis exists for the claims made in the complaint.

This Article first discusses the development of these state affidavit of merit statutes. Then it examines the evolution of the Erie *doctrine through the Supreme Court's decision in* Shady Grove*, ultimately focusing on how federal courts have struggled to make sense of* Shady Grove *in the context of state affidavit of merit pleading requirements. This Article then discusses various theoretical solutions that have been offered to resolve this dilemma, concluding that the conflict between state affidavit of merit statutes and the Federal Rules of Civil Procedure is unavoidable and irreconcilable under the Rules Enabling Act,* Erie*, and its progeny. This Article concludes that federal courts should not apply state affidavit of merit statutes, a position that was confirmed by the Supreme Court in* Berk v. Choy.

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"Have you ever waited hours in line at the DMV, only to be told once you got to the front that you didn't have the right paperwork?"[1]

I. INTRODUCTION

Beginning in the 1970s and continuing into the twenty-first century, states have experimented with various forms of tort reform in an effort to address a perception that the amount of medical malpractice litigation is out of control and must be addressed.[2] An underlying assumption, whether accurate or not, has been that this litigation is largely frivolous.[3] According to the tort reform movement, this type of litigation, if not controlled, will inevitably lead to rising health care costs and increased malpractice premiums.[4]

To address this perceived problem, a number of states have enacted statutes imposing heightened pleading requirements on plaintiffs in medical malpractice cases.[5] In general, these statutes require that plaintiffs in medical malpractice suits submit an affidavit along with their complaint that verifies that a doctor or other medical professional has reviewed the case and has determined that a reasonable and meritorious basis exists for the claims made in the complaint.[6] Underlying this requirement appears to be a belief that it will result in: (1) a fewer number of medical malpractice suits being filed; (2) a reduction in the amount of money that is expended to settle frivolous claims; (3) a limitation on the amount of malpractice insurance required; and (4) a reduction in the incentive for medical professionals

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1. Gallivan v. United States, 943 F.3d 291, 292 (6th Cir. 2019).

2. D. Chanslor Gallenstein, *Whose Law is it Anyway? The* Erie *Doctrine, State Law Affidavits of Merit, and the Federal Tort Claims Act*, 60 U. LOUISVILLE L. REV. 19, 30–31 (2021); *see also* Christine Funk, *Affidavits of Merit in Medical Malpractice Cases*, EXPERT INST. (Aug. 4, 2025), https://www.expertinstitute.com/resources/insights/affidavits-merit-medical-malpractice-cases/ [https://perma.cc/Q8ZM-9XVV] ("Affidavits of merit are a product of tort reform efforts."); Meryl J. Thomas, Note, *The Merits of Procedure vs. Substance:* Erie*,* Iqbal*, and Affidavits of Merit as MedMal Reform*, 52 ARIZ. L. REV. 1135, 1136–40 (2010) (discussing damages caps, mandatory mediation or arbitration, and preliminary screening as methods of reducing medical malpractice actions); Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The* Erie *Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 219–24 (2010) (highlighting the use of certificate of merit statutes to limit medical malpractice claims).

3. Thomas, *supra* note 2, at 1136–37.

4. *Id.*

5. 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, 982–84 (2005).

6. Gallenstein, *supra* note 2, at 30–31.

to settle frivolous claims out of fear of potential lawsuits.[7] Currently, 29 states have adopted statutes requiring an affidavit of merit in a medical malpractice claim, although the timing of the filing and the content of the affidavit may vary.[8]

However, this additional pleading requirement gives rise to the question that is the focus of this Article: Should this additional state pleading requirement be applied when malpractice claims are brought in federal court on the basis of diversity subject matter jurisdiction? As most first-year law students learn, the Rules of Decision Act and the *Erie* doctrine require that federal courts sitting in diversity apply state substantive law and federal procedural rules.[9] Do these affidavit of merit requirements represent state substantive law, thus requiring that they be applied in federal courts, or are they simply an attempted procedural modification of the pleading requirements of Rule 8 and Rule 9 of the Federal Rules of Civil Procedure which federal courts should not apply?[10] This is the fundamental question explored in this Article. Briefly examining two similar cases with different outcomes will quickly bring the importance of this question into stark relief.

Harold R. Berk is a Florida resident, who also owns a home in Delaware.[11] In August 2020, Berk injured his left ankle and foot as a result of a fall that occurred in his Delaware home.[12] He was taken to the emergency room at Beebe Healthcare, where an X-ray revealed fractures to the tibia and fibula.[13] Berk was seen by Dr. Wilson C. Choy, who recommended that his ankle be placed in a splint.[14] However, because Berk had a history of chronic injuries in his lower

7. Funk, *supra* note 2.

8. *See* Gallenstein, *supra* note 2, at 30–34.

9. *See* Jack B. Harrison, Erie *Slapp Back*, 95 WASH. L. REV. 1253, 1265–68 (2020). In this prior article, I explored the impact of the *Erie* doctrine upon the interplay between state anti-SLAPP statutes, providing for special motions to dismiss, discovery limitations, and fee shifting, and the Federal Rules of Civil Procedure, specifically Rules 12 and 56. I examined the evolution of the *Erie* doctrine through the *Shady Grove* decision, ultimately examining how lower courts have struggled to make sense of *Shady Grove* in the context of state anti-SLAPP special motions to dismiss. *See generally id.*

10. *See* Hanna v. Plumer, 380 U.S. 460, 465 (1965) ("The broad command of Erie was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law."); Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 535–38 (1958) (requiring federal courts in diversity to apply state law for substantive issues, those "bound up with the [state-created] rights and obligations of the parties").

11. Petition for a Writ of Certiorari at 4, Berk v. Choy, 146 S. Ct. 546 (2026) (No. 24–440).

12. Brief for the Petitioner at 3, Berk v. Choy, 146 S. Ct. 546 (2026) (No. 24–440).

13. *Id.*

14. *Id.*

extremities, Dr. Choy concluded that a controlled ankle monitor (CAM) boot should be used instead.[15]

Beebe Healthcare staff encountered great difficulty in fitting Berk with a CAM boot.[16] In attempting to force the boot on Berk's foot, the staff aggressively twisted and turned Berk's leg and ankle.[17] Ultimately, the Beebe Healthcare staff failed to fit the boot on Berk's foot.[18] Even though the repetitive twisting and turning of his leg and ankle appeared to aggravate Berk's condition, evidenced by extreme pain, no further X-rays were taken.[19]

Berk remained hospitalized following the attempted CAM boot placement.[20] When Dr. Choy saw Berk later that evening, he told him that surgery would not be necessary and to not put weight on his left leg for eight weeks.[21] Dr. Choy gave no indication that he was aware of the staff's failed attempt to fit him with the CAM boot.[22] He also ordered no additional X-rays.[23]

Berk was then transferred to Encompass Health Rehabilitation Hospital of Middletown.[24] While there, Berk noticed that his left leg appeared to be deformed and turned in an unusual way.[25] He informed Encompass staff of his concern.[26] However, no X-rays were taken, and no additional treatment was provided.[27]

Ultimately, it was determined that Berk's leg was indeed "severely deformed, [with] his fractured bones . . . pointing in three different directions-a serious injury known as a trimalleolar ankle fracture."[28] Over the next year, Berk would undergo multiple surgeries, experience extreme pain, and endure months of occupational and physical therapy.[29] By October 2021, Berk was only able to walk short distances using a cane.[30]

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15. *Id.*
16. *Id.* at 3–4.
17. *Id.*
18. *Id.*
19. *Id.* at 4.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 5.
29. *Id.*
30. *Id.*

In November 2022, Berk filed a lawsuit pro se in the U.S. District Court for the District of Delaware.[31] In his complaint, he alleged claims of medical negligence against the hospital, Dr. Choy, and the rehabilitation center.[32] Berk sought an extension of time to comply with Delaware's affidavit of merit requirement, which was granted by the court.[33] Berk asked the surgeon who had performed the two surgeries on his left leg to supply an affidavit of merit.[34] The surgeon indicated that while he believed Berk had a meritorious malpractice claim, he was unable to provide an affidavit.[35] Failing to obtain an affidavit of merit, Berk sought to comply with the Delaware statutory requirement by filing medical records and documents related to his treatment under seal.[36]

Beebe, Encompass, and Dr. Choy filed motions seeking in-camera review of the medical records and documents that Berk had filed.[37] Berk opposed these motions, asserting, in part, that the Delaware affidavit of merit requirement simply does not apply in federal diversity actions.[38] However, the district court dismissed Berk's complaint for failing to comply with the Delaware affidavit of merit requirement, concluding the controlling law in the Third Circuit required the Delaware affidavit of merit statute be applied in federal diversity cases.[39]

The decision of the district court was affirmed by the United States Court of Appeals for the Third Circuit in an unpublished opinion.[40] In its decision, the Third Circuit Court of Appeals concluded that the Delaware affidavit of merit statute did not conflict with the Federal Rules of Civil Procedure, including Rules 8, 9, 11, and 12, and that the statute is "substantive state law" that is to be applied in federal court.[41] On March 10, 2025, the United States Supreme Court granted a petition for certiorari in *Berk v. Choy* to answer the following question: "Whether a state

31. *Id.* at 6.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. Berk v. Choy, No. 22-1506, 2023 WL 2770573, at *1–2 (D. Del. Apr. 4, 2023), *rev'd and remanded*, No. 23-1620, 2026 WL 550054 (3d Cir. Feb. 23, 2026).
40. Berk v. Choy, No. 23-1620, 2024 WL 3534482, at *1 (3d Cir. July 25, 2024), *rev'd and remanded*, 146 S. Ct. 546 (2026).
41. *Id.* at *1–3.

law providing that a complaint must be dismissed unless it is accompanied by an expert affidavit may be applied in federal court."[42]

Contrasting the decision of Third Circuit Court of Appeals in *Berk* with the decision of the Sixth Circuit Court of Appeals in *Gallivan v. United States* demonstrates the intractable conflict that existed in federal courts regarding the application of state affidavit of merit requirements.[43]

Dennis Gallivan, a federal inmate incarcerated at FCI Elkton, in Ohio, claimed that on April 7, 2015, "the BOP, in conjunction with its preferred medical provider, Crystal Clinic, Inc. ('CCI'), performed a left hand patial [sic] palmar fasciectomy on the Plaintiff."[44] Gallivan asserted that he was not provided with any necessary post-surgical therapy, causing the range of motion in his left hand to be very limited and leaving him in constant pain.[45] He claimed the United States, through the Federal Bureau of Prisons, was negligent in the performance of the surgery and in post-surgical care.[46]

Because he was required to exhaust all administrative remedies before filing suit, Gallivan first filed an administrative claim with the Bureau of Prisons.[47] Gallivan's administrative claim against the Bureau was denied on September 7, 2017.[48] In its denial letter, the Bureau concluded that Gallivan's administrative claim must be denied because "there is no evidence to suggest [Gallivan] experienced compensable loss as the result of negligence on the part of any Bureau of Prisons employee."[49]

Following the Bureau's denial of his administrative claim, Gallivan filed suit pro se in the United States District Court for the Northern District of Ohio against the United States, under the Federal Tort Claims Act (FTCA),[50] alleging that the Federal Bureau of Prisons had been negligent in providing medical care to him.[51]

42. *See* Berk v. Choy, 145 S. Ct. 1328 (2025); Petition for a Writ of Certiorari, *supra* note 11, at i.

43. *Berk*, 2024 WL 3534482, at *1–4; Gallivan v. United States, 943 F.3d 291, 292–97 (6th Cir. 2019).

44. Gallivan v. United States, No. 4:18CV00545, 2018 WL 4145012, at *1 (N.D. Ohio Aug. 30, 2018) (alteration in original) (citation omitted), *vacated and remanded*, 943 F.3d 291 (6th Cir. 2019).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* (citation omitted).

50. *See* 28 U.S.C. § 1346(b)(1).

51. *Gallivan*, 2018 WL 4145012, at *1.

Gallivan did not file an affidavit of merit from an expert along with his complaint, as required by Ohio Civil Rule 10(D)(2).[52]

Ohio Civil Rule 10(D)(2) specifically requires that a medical malpractice plaintiff submit an affidavit of merit from an expert witness stating that the claim is meritorious.[53] In this case, the district court agreed that when a federal court sitting in diversity is applying state law, even in the context of a claim brought under the FTCA, "federal courts apply state substantive law and federal procedural law."[54] Thus, the question in Gallivan's situation, not unlike that of *Berk*, is whether the affidavit of merit requirements of Rule 10(D)(2) are procedural or substantive.[55] The district court, with very limited analysis, concluded that this requirement was state substantive law which the court was obligated to apply.[56] As a result, the district court dismissed Gallivan's case.[57]

Gallivan appealed this decision to the United States Court of Appeals for the Sixth Circuit, arguing that, under the *Erie* doctrine, the affidavit of merit requirement found in Ohio Rule 10(D)(2) should not apply in federal court.[58] Contrary to the decision of the Third Circuit in *Berk*, the Sixth Circuit concluded that the district court was incorrect in applying the Ohio affidavit of merit requirement in federal court.[59]

According to the court in *Gallivan*, under the *Erie* doctrine, this analysis was relatively straightforward. The first step in this analysis was to determine "whether the Federal Rules of Civil Procedure answer the question in dispute: [D]oes someone need an affidavit of merit to state a claim for medical negligence?"[60] According to the court, the second step in this analysis is, "If the Federal Rules answer that question, we then must ask whether the Federal Rules are valid under

52. *Id.* at *3–4; *see* OHIO R. CIV. P. 10(D)(2) ("[A] complaint that contains a medical claim . . . shall be accompanied by one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability.").

53. *See* OHIO R. CIV. P. 10(D)(2).

54. *Gallivan*, 2018 WL 4145012, at *2 (quoting Daniel v. United States, 716 F. Supp. 2d 694, 696 (N.D. Ohio 2010)).

55. *Compare id.* (stating the appropriate rule under *Erie*), *with* Berk v. Choy, No. 23-1620, 2024 WL 3534482, at *1 (3d Cir. July 25, 2024) (relying on the same rule from *Erie*), *rev'd and remanded*, 146 S. Ct. 546 (2026).

56. *See Gallivan*, 2018 WL 4145012, at *3 (reasoning that an affidavit of merit is state substantive law because it "gives rise to state-created obligations, and it determines the outcome of [the] case.").

57. *Id.* at *4.

58. Gallivan v. United States, 943 F.3d 291, 293 (6th Cir. 2019).

59. *Id.* at 297; *Berk*, 2024 WL 3534482, at *1.

60. *Gallivan*, 943 F.3d at 293.

the Constitution and the Rules Enabling Act."[61] If the answers to both questions are yes, then a federal court is to apply the Federal Rules of Civil Procedure, not the Ohio rule.[62] In *Gallivan*, the court concluded that the answer to both questions was yes, requiring reversal of the district court's decision.[63]

While the distinction between the decisions in *Berk* and *Gallivan* may seem trivial, the impact is significant. Are state affidavit of merit requirements simply heightened procedural requirements of state pleading standards, or do they somehow reflect the substantive law of the state? If it is the former, then this heightened pleading requirement would seem to be in direct conflict with the pleading requirements of the Federal Rules of Civil Procedure.[64] Where such a direct conflict exists, the Supreme Court has concluded that the federal rules must control.[65] The Supreme Court recently readdressed this issue in *Berk v. Choy*.[66]

This question is the focus of this Article. Under the *Erie* doctrine a federal court sitting in diversity is to apply substantive state law to the state law claim in front of it and apply federal procedural law.[67] Yet, state affidavit of merit requirements on federal court plaintiffs impose a heighted pleading burden to

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61. *Id.*

62. *Id.*

63. *Id.* at 294. One scholar described the analysis by the court in *Gallivan* in the following manner:

> Applying *Shady Grove*, the *Gallivan* court held that the rule (which, as discussed above requires a plaintiff to contemporaneously file an affidavit of merit with the complaint) conflicts with Rule 8(a) because the latter provides the requirements for a complaint: "(1) a short and plain jurisdictional statement, (2) a short and plain statement of the claim, and (3) an explanation of the relief sought." And by listing these elements, "Rule 8 implicitly 'excludes other requirements that must be satisfied for a complaint to state a claim for relief.'" Therefore, the court concluded, the Ohio rule, which requires an affidavit to be filed with a complaint, conflicts with Rule 8, and is inapplicable in federal court. The court further concluded that the Ohio rule conflicted with Rule 12 because Rule 12 does not demand any evidentiary support for a claim to be plausible. And finally, the fact that Rule 9 specifies the circumstances in which a part *is* subject to a heightened pleading standard means that the heightened pleading standard in the Ohio rule conflicts with Rule 9 as well.

Gallenstein, *supra* note 2, at 35–36 (footnotes omitted).

64. *See* FED. R. CIV. P. 8–9.

65. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010).

66. *See* 146 S. Ct. 546 (2026).

67. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79–80 (1938).

sufficiently state a claim for relief.[68] This requirement seems to be fundamentally procedural and to answer the same procedural question regarding the sufficiency of pleading under Rules 8, 9, and 12 of the Federal Rules of Civil Procedure. Further, state affidavit of merit requirements impose a burden on plaintiffs greater than that imposed by the federal rules.[69]

This Article explores this conflict between the Federal Rules of Civil Procedure and state affidavit of merit requirements. It seeks to analyze the current legal uncertainty surrounding the applicability of state affidavit of merit requirements in federal court under the *Erie* doctrine.[70] As most first-year civil procedure students learn, the Supreme Court, in *Erie Railroad Co. v. Tompkins*[71] and the cases that follow it, established that a federal court sitting in diversity is to apply state substantive law and federal procedural rules.[72] However, following the Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,[73] it was unclear whether state affidavit of merit requirements should apply in federal courts sitting in diversity.[74]

Part I of this Article introduced this conflict and demonstrated the difficulty courts have had in providing a clear analytical path to address the issue, using the *Berk* and *Gallivan* cases as exemplars. Part II discusses the rise of state affidavit of merit requirements as tools for tort reform and examines the various forms in which these rules have appeared. Part III discusses the history and development of the *Erie* doctrine, leading to the current uncertainty about the application of affidavit of merit requirements in federal court. Part IV provides a review of the current circuit split regarding whether state affidavit of merit requirements are merely heightened procedural requirements of state pleading standards or whether they are somehow a manifestation of the substantive law of the state. Part V argues that, based on Supreme Court precedent under the *Erie* doctrine, state affidavit of merit requirements should not apply in a federal court sitting in diversity as a procedural matter.

68. *Contrast* Funk, *supra* note 2 (noting the heightened standard imposed by an affidavit of merit), *with* FED. R. CIV. P. 8–9, 12 (presenting the generally applicable pleading standards in federal court).

69. *Contrast* Funk, *supra* note 2 (noting the heightened standard imposed by an affidavit of merit), *with* FED. R. CIV. P. 8–9, 12 (presenting the lower pleading standards applied in federal court).

70. *See infra* Part IV.

71. 304 U.S. 64 (1938).

72. *Id.* at 79–80.

73. 559 U.S. 393 (2010).

74. *See id.* at 410 (plurality opinion).

II. Tort Reform And the Rise of Affidavits or Certificates of Merit

Beginning in the 1970s, states sought to limit "frivolous lawsuits" against medical professionals.[75] The underlying policy reason for this development was the belief that the medical profession was overrun with malpractice lawsuits that had little to no merit, but were designed to intimidate a medical professional into offering to settle, rather than litigating the claim with all the concomitant costs associated with litigation.[76] Such lawsuits also result in the imposition of costs on society in general and, specifically, the judicial system by consuming limited judicial resources and denying access to those who have meritorious claims.[77]

To address these concerns, among other things, states have adopted statutes that impose additional pleading requirements on plaintiffs in medical malpractice cases.[78] To date, 29 states have adopted such a statute.[79] While these statutes are varied, they all impose a requirement that along with the complaint plaintiffs must file an affidavit or certificate of merit from a doctor or other medical professional who has reviewed the basic facts of the case and has concluded that there is a reasonable and meritorious basis for the lawsuit.[80] Generally, failing to submit an affidavit or certificate of merit results in dismissal.[81]

Statutes requiring the submission of an affidavit or certificate of merit vary in language.[82] However, they generally can be organized into three buckets.

First, some statutes mandate that, at the time of filing the complaint, the attorney certifies they have consulted an expert regarding the claim and the expert has concluded that there is a reasonably meritorious basis for the claim.[83] For example, Florida's statute states:

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75. Deanna Arpi Youssoufian, Note, *The Rules of the Malpractice Game: Affidavit of Merit Statutes,* Erie*, and the Cautionary Tale of an Overbroad Application of Rule 11*, 87 BROOK. L. REV. 1459, 1462–65 (2022); Gallenstein, *supra* note 2, at 30–31.

76. Youssoufian, *supra* note 75, at 1462–63.

77. *Id.*

78. *Id.* at 1463; *see also* Gallenstein, *supra* note 2, at 30–31 (reporting states imposed heightened pleading standards on medical malpractice cases to resolve frivolous cases quickly); Funk, *supra* note 2 ("Affidavits of merit are a product of tort reform efforts.").

79. *See* Gallenstein, *supra* note 2, at 30–31, 31 n.101 (providing the state statutes). For a more detailed survey of state AOM statutes, see Grossberg, *supra* note 2, at 222–26.

80. *See* Gallenstein, *supra* note 2, at 30–31, 31 n.101.

81. *Id.* at 32; *see also id.* 32 n.107 ("Accordingly, the failure to submit the certificate of merit . . . warrants dismissal of the medical malpractice claim." (quoting Crowhurst v. Szczucki, No. 16-cv-00182, 2017 WL 519262, at *3 (S.D.N.Y. Feb. 8, 2017))).

82. Grossberg, *supra* note 2, at 222–25.

83. *Id.* at 222.

> No 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. If the court determines that such certificate of counsel was not made in good faith and that no justiciable issue was presented against a health care provider that fully cooperated in providing informal discovery, 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.[84]

In the second bucket are statutes that require the submission of an affidavit or certificate of merit from the expert themselves at the time the complaint is filed.[85] For example, Ohio Rule of Civil Procedure 10(D) states in relevant part:

> Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in R.C. 2305.113, shall be accompanied by one or more affidavits of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. Affidavits of merit shall be provided by an expert witness meeting the requirements of Evid.R. 702 and, if applicable, also meeting the requirements of Evid.R. 601(B)(5).[86]

States in this bucket require that an affidavit or certificate of merit be filed with the filing of the complaint.[87] Failure to do so may well result in a dismissal of the claim or the claim not being filed.[88]

84. FLA. STAT. § 766.104(1) (2025); *see also* Grossberg, *supra* note 2, at 222 ("Other states with statutes falling into this category include Minnesota, Mississippi, New York, North Carolina, Oklahoma, and Tennessee.").

85. Grossberg, *supra* note 2, at 222.

86. OHIO R. CIV. P. 10(D)(2)(a).

87. *See* Grossberg, *supra* note 2, at 223 n.24 (providing statutes from states in this category including Connecticut, Delaware, Georgia, Illinois, Michigan, Nevada, South Carolina, and Washington).

88. *See id.*

In the third bucket are statutes that require the filing of certificates or affidavits of merits but do not require that they be filed with the complaint.[89] Instead, the certificate or affidavit must be filed within a set period of time after filing the complaint.[90] For example, New Jersey requires:

> [W]ithin 60 days following the date of filing of the answer to the complaint by the defendant, [the plaintiff is to] 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.[91]

These various statutes are all intended to establish procedures for the filing of medical malpractice actions in these states.[92] Are these statutes intended to be procedural pleading rules or are they intended to be somehow a part of the substantive claim? In examining these statutes, some are included with the states' rules of civil procedure, while others are found in the section of state law addressing substantive tort law.[93]

For example, Ohio, New York, Connecticut, and Georgia all include the affidavit or certificate of merit requirement in the portion of their respective rules of civil procedure that governs pleading.[94] This would seem to indicate that the state legislatures in these states intended this requirement to be a procedural pleading requirement. In each of these states, with the exception of Georgia, failure to file an affidavit or a certificate with the complaint subjects the complaint to dismissal for failure to state a claim.[95] In contrast, Georgia's statute allows plaintiffs who do not file the affidavit or certificate of merit with their complaint the opportunity to amend their complaints with an affidavit or certificate of merit to avoid dismissal.[96]

89. *Id.* at 223.

90. *Id.*

91. N.J. STAT. ANN. § 2A:53A-27 (West 2025). Arkansas, Colorado, Maryland, Missouri, North Dakota, Pennsylvania, and Texas all have a similar requirement that calls for the submission of an affidavit or certificate of merit within a set period following the filing of the complaint. Grossberg, *supra* note 2, at 224 n.25.

92. *See* Grossberg, *supra* note 2, at 222–25.

93. *See id.*

94. OHIO R. CIV. P. 10(D)(2); N.Y. C.P.L.R. 3012-a (MCKINNEY 2025); CONN. GEN. STAT. § 52-190a(a) (2025); GA. CODE ANN. § 9-11-9.1 (2025).

95. OHIO R. CIV. P. 10(D)(2); N.Y. C.P.L.R. 3012-a (MCKINNEY 2025); CONN. GEN. STAT. § 52-190a(a) (2025). *But see* GA. CODE ANN. § 9-11-9.1 (2025).

96. GA. CODE ANN. § 9-11-9.1 (2025).

On the other hand, Delaware, Florida, Michigan, Minnesota, Mississippi, South Carolina, Tennessee, Virginia, and West Virginia include the affidavit or certificate of merit requirement in the portion of state tort law that contains the substantive law of medical malpractice claims.[97] Tennessee, for example, codifies the requirement for the filing of an affidavit or certificate of merit in a medical malpractice case in the section of the code that regulates health care liability actions.[98] Though it is placed within the section of the state code governing substantive tort law, these states all require the filing of an affidavit or certificate confirming the merits of the case with the complaint.[99] Failure to file such an affidavit or certificate of merit is also a basis for dismissal under these statutes.[100]

Does the specific placement of these pleading requirements in state law—within the civil procedure rules or within the state substantive tort law—matter for the purposes of an *Erie* analysis following *Shady Grove*? Does placing the requirement that an affidavit or certificate of merit be filed with the complaint within the section of the state code addressing tort claims make the requirement any less procedural? As discussed throughout this Article, my conclusion is that it does not, such that a pleading requirement that conflicts with the pleading requirements found in the Federal Rules of Civil Procedure must give way to the operation of the federal rules no matter where it is placed in state law.

III. THE *ERIE* PROBLEM

The experience of Harry James Tompkins on the evening of July 27, 1934, makes for both a quaint and tragic story.[101] However, this set of fairly ordinary

97. DEL. CODE ANN. tit. 18, § 6853(a)(1) (2025) ; FLA. STAT. § 766.104(1) (2025); MICH. COMP. LAWS § 600.2912d(1) (2025); MINN. STAT. § 145.682 (2025); MISS. CODE ANN. § 11-1-58(1) (2025); S.C. CODE ANN. § 15-36-100(B) (2025); TENN. CODE ANN. § 29-26-122(a) (2025); VA. CODE ANN. § 8.01-20.1(A) (2025); W. VA. CODE § 55-7B-6(b) (2025).

98. TENN. CODE ANN. § 29-26-122(a) (2025).

99. *See* sources cited *supra* note 97.

100. While some statutes state it explicitly, other jurisdictions require statutory interpretation by the judiciary to determine that not meeting this requirement is grounds for dismissal. *Contrast, e.g.*, TENN. CODE ANN. § 29-26-122(a) (2025) ("If the certificate is not filed with the complaint, the complaint shall be dismissed[.]"), *with* Smith v. Kobasa, No. 404, 2014, 2015 WL 1903546, at *1 (Del. Apr. 24, 2015) (affirming the Superior Court's dismissal for "failure to file the required Affidavit in a timely manner.").

101. *See* Brian L. Frye, *The Ballad of Harry James Tompkins*, 52 AKRON L. REV. 531, 532–33 (2018).

facts unexpectedly led to the creation of a far-reaching and revolutionary legal doctrine.[102]

Tompkins asserted that his injury occurred as he walked along a footpath beside the tracks located in Pennsylvania.[103] He claimed he had been struck by an open door swinging from one of the cars on a freight train operated by the Erie Railroad Company, specifically Ashley Special No. 2499.[104]

Tompkins regained consciousness following the accident in the hospital receiving room.[105] The hospital doctors sedated him, treated the wound on his face, and amputated the remainder of his right arm.[106] Tompkins spent about three weeks in the hospital.[107] While in the hospital, he developed an infection in his shoulder, leading to the development of an abscess, which eventually healed.[108] However, Tompkins continued to experience persistent phantom limb pain related to his missing fingers.[109] Tompkins's surgery cost about $350, with the hospital stay costing about $89.[110]

Tompkins ultimately filed a diversity action against Erie in federal court.[111] As in any negligence case, the key legal issue was the standard of care that the

102. Harrison, *supra* note 9, at 1265; *see also* Frye, *supra* note 101, at 533 ("The Supreme Court's decision in *Erie Railroad Company v. Tompkins* 'was completely unheralded and unexpected.'" (citation omitted)); Bob Rizzi, Erie *Memoirs Reveal Drama, Tragedy*, HARV. L. REC., Sep. 24, 1976, at 2 (illustrating how a commonplace railroad accident became the vehicle for a major doctrinal upheaval); Irving Younger, *What Happened in* Erie, 56 TEX. L. REV. 1011, 1018 (1978) (setting out an ordinary negligence pleading and contributory-negligence defense); *Celebrating The* Erie Railroad Company v. Tompkins *Project*, 97 LUZERNE REG. 1, 8 (2007), https://docplayer.net/4106463-Published-weekly-by-the-wilkes-barre-law-library-association.html [https://perma.cc/LKB8-JP36] (recounting the seemingly ordinary circumstances of Tompkins's injury along a railroad right-of-way); Edward A. Purcell, Jr., *The Story of* Erie*: How Litigants, Lawyers, Judges, Politics and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES 21, 21–22 (Kevin M. Clermont ed., 2d ed. 2008) (collecting information from a wide range of primary and secondary sources).

103. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69 (1938).

104. *Id.*

105. *Id.* at 533.

106. *Id.*; Transcript of Record at 31–32, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (No. 367). Tompkins testified that the doctors amputated the socket, "[h]owever, the doctors actually performed a 'shoulder disarticulation,' removing the entire humerus at the socket." Frye, *supra* note 101, at 533 n.5.

107. Transcript of Record, *supra* note 106, at 49.

108. *Id.*

109. *Id.* at 49–50.

110. *Id.* at 29.

111. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69 (1938).

railroad Erie owed to Tompkins.[112] The railroad argued that liability was governed by Pennsylvania law, which would treat Tompkins as a trespasser who could recover only if Erie acted with wanton or willful negligence (not mere negligence).[113] Tompkins, on the other hand, asserted that under *Swift v. Tyson*, a federal court was not bound by the decisions of the Pennsylvania Supreme Court and was free to apply federal common law, which would not require Tompkins to show wanton or willful negligence in order to establish liability.[114] The district court found for Tompkins on this issue, and he ultimately won a $30,000 verdict.[115]

While Tompkins was also successful at the intermediate appellate court, the United States Supreme Court reversed, holding that federal courts sitting in diversity must apply state substantive law.[116] The Court's decision "was completely unheralded and unexpected."[117] For almost a century, the Court had followed its prior decision in *Swift v. Tyson*, holding that federal courts sitting in

112. *Id.* at 69–70.

113. *Id.* at 70.

114. *See* Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 255–58 (2008) [hereinafter Steinman, *What Is the* Erie *Doctrine*]. The position advanced by Tompkins was based upon a Supreme Court case nearly a century earlier. *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18–19 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). According to *Swift*, federal courts exercising jurisdiction on the ground of diversity of citizenship were not required to apply the unwritten substantive law of the state as declared by its highest court. *Id.* In *Erie*, the Court, discussing previous law, interpreted *Swift* as having concluded that federal courts may "exercise their independent judgment as to what the law is" in the absence of a local statute. *Erie*, 304 U.S. at 70 (citation omitted). The doctrine announced by the Court in *Swift* was an interpretation of Section 34 of the Judiciary Act of 1789 (Rules of Decision Act). *Swift*, 41 U.S. (16 Pet.) at 18. The Act provides, "The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." *Erie*, 304 U.S. at 71 (citation omitted). In *Swift*, the Court concluded that the Rules of Decision Act required federal courts to follow only "the positive statutes of the state," but did not require federal courts to follow decisions by state courts on "questions of a more general nature," or issues for which state courts simply "ascertain, upon general reasoning and legal analogies . . . what is the just rule furnished by the principles of commercial law to govern the case." *Swift*, 41 U.S. (16 Pet.) at 18–19.

115. *Erie*, 304 U.S. at 70.

116. *Id.* at 70, 78–80.

117. Robert L. Stearns, *Erie Railroad Versus Tompkins: One Year After*, 12 ROCKY MOUNTAIN L. REV. 1, 1 (1939); *see also* Frye, *supra* note 101, at 533 (noting that, despite the surprising outcome, the *Erie* decision was "immediately" heralded as "significan[t]").

diversity should apply "general" common law, which gradually became "federal" common law.[118] After *Erie*, "federal general common law" was no more.[119]

In his opinion for the Court, Justice Louis D. Brandeis criticized *Swift* on several grounds. First, Brandeis asserted that in *Swift*, the Court had misinterpreted congressional intention when it adopted the Rules of Decision Act.[120] Relying on the work of legal historian Charles Warren, Justice Brandeis concluded that the legislative history of the Rules of Decision Act indicated that Congress intended for federal courts to follow rules of decision set forth by state courts as well as state legislatures.[121] Justice Brandeis was also concerned about the potential consequences of *Swift*.[122] Specifically, he worried that parties' substantive rights would be dependent upon whether the case was adjudicated in state court or federal court, preventing "uniformity in the administration of the law of the State."[123] Justice Brandeis was particularly concerned by the ease with which parties could manipulate the judicial system to obtain the benefits of the federal common law.[124]

Even after offering these critiques, Justice Brandeis concluded that they were insufficient to justify overruling *Swift*, given that its interpretation of the Rules of Decision Act had been widely applied and relied upon for almost a century.[125] However, he asserted that *Swift*, beyond its statutory infirmities, was "an unconstitutional assumption of powers by the Courts of the United States[.]"[126]

118. *See* Frye, *supra* note 101, at 533; *Swift*, 41 U.S. (16 Pet.) at 18–19.

119. *Erie*, 304 U.S. at 78 ("There is no federal general common law.").

120. *Id.* at 72–73.

121. *Id.* (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923)).

122. *Id.* at 74–75.

123. *Id.*

124. *Id.* at 73–74 (citing Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) as an example where a Kentucky corporation reincorporated in Tennessee to manufacture diversity jurisdiction and thereby enforce in federal court a contract that would be void under the common law of Kentucky). Justice Brandeis pointed out that individual (non-corporate) litigants could manipulate diversity jurisdiction as well. *Id.* at 76 ("[I]ndividual citizens willing to remove from their own state and become citizens of another might avail themselves of the federal rule.").

125. *Id.* at 77.

126. *Id.* at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)). In reaching this conclusion, Justice Brandeis stated that there is "no federal general common law" and "no clause in the Constitution" that gives federal courts the power to create such common law. *Id.* at 78. Over time, various scholars have become highly critical of this conclusion and the reach of the *Erie* decision. For example, Antonin Scalia Professor of Law at Harvard University Stephen Sachs argued that the federal court decisions following *Erie*

The Court held that, in this case, a federal court must apply Pennsylvania's liability standard to determine Tompkins's claim, even if that standard was articulated by the state's judiciary acting as a common law court, rather than by an act of the legislature.[127] According to Justice Brandeis, the *Swift* doctrine "invaded rights which in our opinion are reserved by the Constitution to the several states."[128]

A. *The Road to* Shady Grove*: A Doctrine in Development*

Following the decision in *Erie*, the Supreme Court faced several cases that led to further developments in the *Erie* doctrine.[129] In *Guaranty Trust Co. v. York*, the Supreme Court faced the question of whether a particular New York statute of limitations was to be applied in federal court, as opposed to the federal doctrine of laches.[130]

In deciding this case, the Court reaffirmed the principle that federal courts were to enforce state substantive rights but had no obligation to apply state procedural rules in federal court.[131] Justice Felix Frankfurter, in his opinion for the Court, discussed the inadequacy of analysis reliant upon the distinction between substance and procedure in determining what law should be applied.[132] He indicated that the appropriate governing principle was that a federal court could disregard a state law that "concerns merely the manner and the means by which a right to recover . . . is enforced . . . ."[133] However, Justice Frankfurter concluded that a federal court must follow state law where it significantly affects the outcome of the litigation.[134] *Guaranty Trust* was seen as establishing an "outcome-determinative" test for *Erie* analysis.[135]

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improperly applied the rule and rendered "basic aspects of American jurisprudence" (such as the law governing interstate relations and constitutional protection of fundamental rights). Stephen E. Sachs, Antonin Scalia Professor of L., Harvard L. Sch., Life After *Erie* 2–3 (Nov. 1, 2023). Sachs further criticized the reasoning behind *Erie*, arguing that the philosophical claims upheld in the decision are no longer seen as credible but still retain a "corrupting" influence among lawyers and judges acting "in excess of their true authority." *Id.* at 3.

127. *Erie*, 304 U.S. at 80.

128. *Id.*; *see also* Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 996–97 (2011) (discussing the constitutional limits of federal courts).

129. *See* Harrison, *supra* note 9, at 1268–72.

130. 326 U.S. 99, 100–01 (1945).

131. *Id.* at 109.

132. *Id.* at 108–09.

133. *Id.* at 109.

134. *Id.*

135. Steinman, *What Is the* Erie *Doctrine*, *supra* note 114, at 259.

In *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[136] which examined whether a federal court must follow South Carolina's requirement that a judge (not a jury) is to determine if a defendant is exempt from liability under South Carolina's Workmen's Compensation Act, the Supreme Court held that federal courts must follow the federal practice of allowing juries to determine such issues.[137] In writing for the Court, Justice William Brennan concluded that the required *Erie* analysis was much more complex than the simple outcome-determinative test of *Guaranty Trust*.[138] Justice Brennan asserted that *Erie* required federal courts to "respect the definition of state-created rights and obligations by the state courts," as well as state rules that are "bound up with" state law substantive rights and obligations.[139]

Justice Brennan agreed with the reasoning in *Guaranty Trust* that where state law provides the "form and mode" for litigating and determining state substantive rights, *Erie* requires federal courts to consider whether the failure to apply that state law would have a substantial impact on the substantive outcome.[140] He asserted that this impact on the outcome also must be measured against the fact that "[t]he federal system is an independent system for administering justice[.]"[141]

Perhaps not the most coherent, but the most significant development in the methodology analyzing the *Erie* problem was articulated in 1965 by the Supreme Court in *Hanna v. Plumer*.[142] In *Hanna*, the Court faced a potential conflict between a state law that required in-hand delivery on the executor or administrator of an estate and the application of Rule 4 of the Federal Rules of Civil Procedure, which allowed methods of service in addition to in-hand delivery.[143] In determining that the federal courts were not bound by the state law service of process methods, the Court adopted a bifurcated approach to the analysis of *Erie* questions.[144]

Chief Justice Earl Warren, writing for the Court, asserted that in situations where there was not a federal rule specifically concerned with the issue covered by state law (the "unguided" *Erie* context), the court's analysis must focus on "the

136. 356 U.S. 525 (1958).

137. *Id.* at 532, 538.

138. *See id.* at 539–40.

139. *Id.* at 535.

140. *Id.* at 536–37.

141. *Id.* at 537.

142. 380 U.S. 460 (1965); *see also* Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 428 (1996) (calling *Hanna* a "pathmarking case").

143. *See Hanna*, 380 U.S. at 461–64.

144. *Id.* at 468.

twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws" in determining whether to apply state or federal law.[145]

However, where the issue at hand is specifically covered by a federal rule (the "guided" *Erie* context), the Court stated that a federal court must apply that federal rule unless the rule violates either the Rules Enabling Act (REA), the statutory authority for the federal rules, or the U.S. Constitution.[146] Under the REA, the Court is authorized to promulgate "general rules" prescribing the "practice and procedure" of the district courts of the United States in civil actions.[147] Yet, the REA states that those general rules "shall not abridge, enlarge or modify any substantive right."[148]

Following *Hanna*, in analyzing *Erie* issues, a federal court first looks to see if there is a direct conflict between some federal rule and state law.[149] If a direct conflict exists, then the federal court must apply the federal rule if it is determined to be valid under the Constitution and the REA.[150] Where there is no conflict between the federal rule and state law, the federal court weighs the federal policies behind the federal rule against the twin concerns of *Erie*, the "discouragement of forum-shopping and avoidance of inequitable administration of the laws," in determining whether to apply state or federal law.[151] After *Hanna*, the existence or absence of a conflict is often the ultimate disputed question in the *Erie* analysis.[152]

145. *Id.*; *see also* Diane P. Wood, *Back to the Basics of* Erie, 18 LEWIS & CLARK L. REV. 673, 685 (2014) (noting that the Supreme Court repudiated the "outcome-determinative test" in favor of one which sorted cases by whether the federal rule governs a matter that is "arguably procedural").

146. *Hanna*, 380 U.S. at 471.

147. 28 U.S.C. § 2072(a).

148. *Id.* § 2072(b). Interestingly, several commentators criticized the outcome of *Hanna* in the years following the decision. *See, e.g.*, John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 718–20 (1974); John C. McCoid, II, Hanna v. Plumer*: The* Erie *Doctrine Changes Shape*, 51 VA. L. REV. 884, 901–03 (1965). *But see* Paul J. Mishkin, *Some Further Last Words on* Erie - *The Thread*, 87 HARV. L. REV. 1682, 1684 n.10 (1974).

149. *See Hanna*, 380 U.S. at 470.

150. *Id.* at 471.

151. *Id.* at 468.

152. For example, in *Walker v. Armco Steel Corp.*, the Court framed the issue as whether "the scope of the Federal Rule in fact is sufficiently broad to control the issue[.]" 446 U.S. 740, 749 (1980). The Court held that the two provisions "can exist side by side . . . each controlling its own intended sphere of coverage without conflict." *Id.* at 752. According to the Court, "Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations." *Id.* at 751. The state law, by contrast, was a

B. *Does* Shady Grove *Represent Maturation of the* Erie *Doctrine?*

While the fundamental principle that a federal court sitting in diversity applies state substantive law and federal procedural rules is well established, the determination of exactly what are substantive laws and what are procedural rules continues to confound federal courts.[153]

In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co*., the Supreme Court again struggled with this question.[154] In *Shady Grove*, the Court was faced with a potential conflict between Rule 23 of the Federal Rules of Civil Procedure and a New York statute that prohibited "class actions in suits seeking penalties or statutory minimum damages."[155] Shady Grove asserted that Allstate

"statement of a substantive decision . . . that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations." *Id.* However, in *Burlington Northern Railroad Co. v. Woods*, the Court concluded that the federal rule's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute[,]" and that the federal rule's purposes were also "sufficiently coextensive" with the state law's purposes "to indicate that the [federal rule] occupies the statute's field of operation[.]" 480 U.S. 1, 7 (1987).

153. *See* Harrison, *supra* note 9, at 1272–79; *see also* Suzanna Sherry, *Normalizing* Erie, 69 VAND. L. REV. 1161, 1227 (2016) (discussing *Erie*'s ability to override federal interests when the federal legislature has not yet codified those interests); Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 629–30 (2013) (discussing the difficulty in even deciding whether state and federal rules conflict); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1970 (2011) ("[S]tatutory interpretation methodology might be understood as a set of rules that provides courts with a reasoning process."); Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1059–63 (2011) (explaining how Justice Stevens distinguished *Sibbach* and arguing that he was correct); Jeffrey W. Stempel, Shady Grove *and the Potential Democracy-Enhancing Benefits of* Erie *Formalism*, 44 AKRON L. REV. 907, 916–17 (2011) (discussing how *Shady Grove*'s formalist approach can allow states to override federal law by clothing substantive laws in procedural garb); Adam N. Steinman, *Our Class Action Federalism:* Erie *and the Rules Enabling Act After* Shady Grove, 86 NOTRE DAME L. REV. 1131, 1135–36 (2011) [hereinafter Steinman, *Our Class Action Federalism*] (discussing the application of *Erie* and *Shady Grove* in class action lawsuits); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 25–26 (2010) (noting the "incentive for restrained interpretation" of the Federal Rules to avoid overstepping the boundaries of federal lawmaking authority); Patrick J. Borchers, *The Real Risk of Forum Shopping: A Dissent from* Shady Grove, 44 CREIGHTON L. REV. 29, 34 (2010) (pointing to the Court's lack of "a coherent theory of when federal and state rules collide").

154. 559 U.S. 393, 396–98 (2010).

155. *Id.* at 396.

Insurance owed unpaid statutory interest to itself and a class of others similarly situated.[156]

If the New York state law applied, then consideration of statutory interest for the members of the class was barred.[157] As a result, Shady Grove's claim would fail to meet the amount in controversy requirement for federal diversity jurisdiction.[158] On the other hand, if Rule 23 of the Federal Rules of Civil Procedure applied, then there would be no bar on the federal court having diversity jurisdiction over the class action based on statutory interest.[159] In short, if the New York law controlled the suit, then Shady Grove's claim would not be able to proceed as a class action; but if the New York law did not control, then a federal court could have jurisdiction over the matter under Rule 23.[160]

The Court concluded that Rule 23, rather than the New York statute, applied, though the justices' reasoning varied.[161] In rejecting the argument that the New York statute should be applied because of the substantive rights it protects, the Court noted, "A Federal Rule of Procedure is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others—depending upon whether its effect is to frustrate a state substantive law (or a state procedural law enacted for substantive purposes)."[162] The Court concluded that if a federal rule was valid under the limits set forth in the REA, then the rule had to be constitutional.[163] The majority found that appealing to the substantive nature of the state statutes simply confounded the question.[164] Requiring federal judges to

156. *Id.* at 397.

157. *Id.*

158. *Id.*

159. *See id.* at 398; FED. R. CIV. P. 23(b).

160. *See Shady Grove*, 559 U.S. at 398–99.

161. *See id.* at 399.

162. *Id.* at 409–10 (plurality opinion) (reiterating that "[i]f we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded." (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941))).

163. *Id.* at 410 ("[T]he court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." (alteration in original) (quoting Hanna v. Plumer, 380 U.S. 460, 471 (1965))).

164. *See id.* at 404 (majority opinion) ("The 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[.]'" (quoting *Sibbach*, 312 U.S. at 14)).

laboriously pore over state legislative records to determine the intention behind a statute would most likely prove inefficient and unrewarding.[165]

1. *The Expansive Framework of Justice Scalia*

Writing for the Court, Justice Antonin Scalia first determined that in *Shady Grove*, the state law and federal rule were in direct conflict, concluding that the federal rule should apply because it "really regulates procedure."[166] Justice Scalia indicated that a conflict exists where the reach of the federal rule is sufficiently broad and where the text of the federal rule "leaves no room for special exemptions based on the function or purpose of a particular state rule."[167]

Justice Scalia identified the issue before the Court as whether the lawsuit could proceed as a class action.[168] Under Rule 23, the answer was "yes."[169] Under the New York law, the answer was "no."[170] Justice Scalia concluded that both the federal Rule and the state statute "undeniably" sought to "answer the same question[,]" making it impossible for them to operate alongside each other.[171]

After concluding that a conflict existed, Justice Scalia, writing for a plurality of the Court, examined whether the federal rule at issue was a valid exercise of federal rulemaking power under the REA.[172] The REA gives the Court "the power to prescribe general [federal] rules of practice and procedure[,]"[173] but those

165. *See id.* ("[D]istrict courts would have to discern, in every diversity case, the purpose behind any putatively pre-empted state procedural rule, even if its text squarely conflicts with federal law. That task will often prove arduous. Many laws further more than one aim, and the aim of others may be impossible to discern."). *But see* Mark DeForrest, *Taming a Dragon: Legislative History in Legal Analysis*, 39 U. DAYTON L. REV. 37, 49 (2013) (finding that the Internet has made legislative history more available, which makes it more relevant when interpreting a statute).

166. *Shady Grove*, 559 U.S. at 411 (plurality opinion) (quoting *Sibbach*, 312 U.S. at 14).

167. *Id.* at 410–12. Justice Stevens's concurrence succinctly phrased this inquiry as whether the "scope of the federal rule is 'sufficiently broad' to 'control the issue' before the court, 'thereby leaving no room for the operation' of seemingly conflicting state law." *Id.* at 421 (Stevens, J., concurring in part and concurring in the judgment) (first quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987); and then quoting Walker v. Armco Steel Corp., 446 U.S. 740, 749–50, 750 n.9 (1980)).

168. *Id.* at 398 (majority opinion).

169. *Id.*

170. *Id.* at 399.

171. *Id.* at 401.

172. *Id.* at 406 (plurality opinion).

173. 28 U.S.C. § 2072(a).

federal rules may "not abridge, enlarge or modify any substantive right."[174] A federal rule is valid under the REA so long as it "really regulates procedure."[175] Under this analysis, the substantive characteristic or purpose of the state law "makes no difference."[176]

Even where, as in *Shady Grove*, the state law has the practical effect of limiting or expanding the party's rights and remedies, the state law "regulate[s] only the process for enforcing those rights" and not the substantive rights themselves.[177] For Justice Scalia, the importance of this approach was in the ease of administration and the resulting uniformity.[178] He argued that this was true, even though it might be "hard to square" the application with the language of the REA.[179] Thus, Justice Scalia concluded that Rule 23 really regulates the procedure of class actions and therefore is valid under the REA.[180]

2. *Justice Stevens and Narrow Conflict Avoidance*

Justice John Paul Stevens concurred with Justice Scalia's ultimate conclusion regarding the law to be applied.[181] However, Justice Stevens disagreed with the overall breadth of Justice Scalia's analytical determinations.[182] Justice

174. *Id.* § 2072(b).

175. *Shady Grove*, 559 U.S. at 411 (plurality opinion) (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

176. *Id.* at 409 (emphasis omitted).

177. *Id.* at 407.

178. *See id.* at 413 (noting that this procedural test was "driven by the very real concern that Federal Rules which vary from State to State would be chaos" (citing *Sibbach*, 312 U.S. at 13–14)).

179. *Id.*

180. *See id.* at 408 (implying that FED. R. CIV. P. 23, which here turns thousands of $500 claims into a single $5 million claim, does not substantially affect the plaintiffs' remedies and thus "alter[s] only how the claims are processed"); *see also, e.g.*, Mark P. Gaber, *Maintaining Uniform Federal Rules: Why the* Shady Grove *Plurality Was Right*, 44 AKRON L. REV. 979, 980, 991 (2011) (recognizing the inherent conflict between the New York Law and Rule 23 in *Shady Grove* and framing the issue within Justice Scalia's point of view).

181. *Shady Grove*, 559 U.S. at 416 (Stevens, J., concurring in part and concurring in the judgment).

182. *Id.* In determining whether any opinion would be controlling in this situation, subsequent courts would look to the decision of the Court in *Marks v. United States*, 430 U.S. 188 (1977), for guidance. However, in this situation, *Marks* seems unavailing. As then Judge Brett Kavanaugh wrote in *Abbas v. Foreign Policy Group, LLC*:

Stevens agreed that the New York law conflicted with Rule 23.[183] He also agreed that Rule 23 was a valid exercise of rulemaking authority under the REA.[184] However, Justice Stevens rejected Justice Scalia's "really regulates procedure" approach, arguing that the approach was unfaithful to the text of the REA.[185] For Justice Stevens, the "bar for finding an [REA] problem is a high one[,]"[186] requiring more than a "mere possibility that a federal rule would alter a state-created right[.]"[187]

For Justice Stevens, a valid exercise of federal rulemaking meant that the federal rule could not displace a state law that is facially procedural "but is so intertwined with a state right or remedy that [the state law] functions to define the scope of the state-created right."[188] Justice Stevens asserted that the proper analysis must look beyond the federal rule itself to the substantive and extrinsic policy reasons behind the state law.[189] According to Justice Stevens, the role of the federal court is to determine "whether the state law actually is part of a State's framework of substantive rights or remedies."[190] If it is, then the federal rule is valid only

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> So four Justices adopted one formulation. One Justice adopted a different formulation. And four Justices did not address the question. What should we do in the face of such an unresolved 4–1 disagreement? Neither the 4–Justice view nor the 1–Justice view on its own is binding in these unusual circumstances. Moreover, neither opinion can be considered the *Marks* middle ground or narrowest opinion, as the four Justices in dissent simply did not address the issue. In addition, on the precise question before us—whether the governing standard is still the *Sibbach* standard of "really regulates procedure" or instead something else—no common conclusion was articulated by the 4–Justice opinion and the 1–Justice opinion. Therefore, the answer for us, in these particular circumstances, is to follow the Supreme Court's pre-existing precedent in *Sibbach*. Unless and until the Supreme Court overrules or narrows its decision in *Sibbach*, that case remains good law and is binding on lower courts.

783 F.3d 1328, 1336–37 (D.C. Cir. 2015) (internal citations omitted).

183. *See Shady Grove*, 559 U.S. at 416 (Stevens, J., concurring in part and concurring in the judgment).

184. *See id.*

185. *See id.* at 424.

186. *Id.* at 432.

187. *Id.*

188. *Id.* at 423.

189. *See id.* at 429–36 (outlining the legislative history and possible interpretations of the New York law).

190. *Id.* at 419. *But see* Gaber, *supra* note 180, at 995 (suggesting Justice Stevens's position is misguided because he "could not come up with a relevant procedural state law that is so interwoven with a state's substantive law" to justify his position).

where it does not intrude into those substantive rights.[191] In *Shady Grove*, Stevens concluded that Rule 23 did not intrude on state substantive rights, in that the New York law is not "so bound up with [a] state-created right or remedy[.]"[192] Therefore, Rule 23 is a valid exercise of rulemaking authority.[193]

3. *The "Really Necessary" Conflict Avoidance Approach of Justice Ginsburg*

Justice Ruth Bader Ginsburg dissented, asserting that the New York state law should apply because it furthers the equality of litigants and because no conflict exists between the state law and the federal rule.[194] Justice Ginsburg agreed with both Justice Scalia and Justice Stevens that the first question the court must address is whether the federal rule leaves no room for the operation of the state law.[195] However, unlike the approaches urged by Justice Scalia and Justice Stevens, Justice Ginsburg inserted a basic threshold question.[196] She argued that the initial question should be whether a conflict between the state law and federal rule is "really necessary."[197]

Justice Ginsburg argued that a court should approach questions like those raised in *Shady Grove* by "vigilantly read[ing] the Federal Rules to avoid conflict with state laws."[198] By employing this conflict avoidance approach, Justice Ginsburg asserted that often such a conflict is simply unnecessary.[199] In reviewing the text of the federal Rule and the purpose and legislative history of the New York law, Justice Ginsburg concluded that Rule 23 and the New York law serve different

191. *See Shady Grove*, 559 U.S. at 424–25 (Stevens, J., concurring in part and concurring in the judgment) (criticizing Justice Scalia for ignoring "the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies" and the "separation-of-powers presumption, and federalism presumption, that counsel against judicially created rules displacing state substantive law" (internal citations omitted)).

192. *Id.* at 420.

193. *See id.* at 432 ("It is . . . hard to see how [the New York law] could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies.").

194. *Id.* at 446–48 (Ginsburg, J., dissenting).

195. *Id.* at 439.

196. *See id.* at 437 (citing Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959)).

197. *Id.*

198. *Id.* at 439.

199. *See id.* at 442 ("In sum, both before and after *Hanna*, the above-described decisions show, federal courts have been cautioned by this Court to 'interpre[t] the Federal Rules . . . with sensitivity to important state interests,' and a will 'to avoid conflict with important state regulatory policies . . . .'" (alteration in original) (citations omitted)).

goals.[200] On one hand, Rule 23 addresses certification of class actions, whereas, on the other hand, the New York law focuses on remedies, specifically statutory damages caps.[201]

Justice Ginsburg moved away from the traditional REA analysis toward the alternative unguided *Erie* analysis articulated in *Hanna*.[202] In most situations, employing an unguided *Erie* analysis forces a court to look closely to determine if the state law or rule at issue is inseparably connected with an underlying substantive state right.[203] An affirmative answer to that question strongly supports applying state law.[204] However, where the application of state law would alter or disrupt an essential characteristic of the federal court system, then the federal rule or practice should generally be applied.[205]

200. *See id.* at 437–39, 443, 448 n.7 (criticizing the plurality's interpretation of Rule 23 as "mechanical," "insensitive," and "relentless").

201. *Id.* at 447 ("Rule 23 describes a method of enforcing a claim for relief, while [the New York law] defines the dimensions of the claim itself."); *id.* at 446 ("The Court . . . finds conflict where none is necessary.").

202. The phrase "relatively unguided approach" or "relatively unguided Erie Choice" is drawn from *Hanna*. In *Hanna*, the Court stressed that when there is no federal rule or statute on point, "the typical, relatively unguided Erie Choice" controls. Hanna v. Plumer, 380 U.S. 460, 471 (1965). Justice Stevens's concurring opinion in *Shady Grove* also briefly addressed this relatively unguided approach. *See Shady Grove*, 559 U.S. at 417 (Stevens, J., concurring in part and concurring in the judgment). However, Justice Ginsburg went into much detail about this approach in *Shady Grove* but did not use the phrase "relatively unguided" to describe her framework. *See id.* at 452–58 (Ginsburg, J., dissenting) ("[S]tatutes qualify as 'substantive' for *Erie* purposes even when they have 'procedural' thrusts as well." (citations omitted)).

203. *See Shady Grove*, 559 U.S. at 423–24 (Stevens, J., concurring in part and concurring in the judgment) (emphasizing that this application of the analysis ensures that "federal rules that ordinarily 'prescribe general rules of practice and procedure,' . . . do 'not abridge, enlarge or modify any substantive right . . . .'" (citations omitted)).

204. *See id.* at 457 (Ginsburg, J., dissenting) ("We have long recognized the impropriety of displacing, in a diversity action, state-law limitations on state-created remedies.").

205. *See id.* at 439 ("In our prior decisions in point, many of them not mentioned in the Court's opinion, we have avoided immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest."); *see also* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538–39 (1958) (concluding that the constitutional right to a jury trial and the corresponding federal policy was an essential characteristic of the federal court system that outweighed a South Carolina law requiring a judge to decide whether an employer was immune from liability).

Justice Ginsburg also stressed the importance of the twin aims of *Erie* in this analysis, in that the federal rule should apply only when it: (1) will not lead to forum shopping and (2) avoids the inequitable administration of justice.[206]

Justice Ginsburg emphasized "sensitivity to important state interests"[207] and deference to state regulatory interests.[208] Regarding the specific issue raised in *Shady Grove*, Ginsburg concluded that New York had a strong interest in prohibiting statutory damages in class actions and that the New York law was inseparably intertwined with important state rights, making application of the New York law appropriate.[209]

C. *The Aftermath of* Shady Grove*: What Now?*

Shady Grove left many important questions unanswered. As a court seeks to decide whether the federal rule is "'sufficiently broad' to 'control the issue' before the court," how broadly is the court to frame the issue and construe the federal rule at issue?[210] Are courts to focus on the guided REA analysis, as required under Justice Scalia's approach, or employ the unguided analysis asserted by Justice Ginsburg? In determining whether a federal rule really regulates procedure, should the focus in Justice Scalia's REA analysis be the text of the REA itself? How is a court to determine whether a state law is "so intertwined with a state right or remedy that [the state law] functions to define the scope of the state-created right[?]"[211]

Confusion over the appropriate approach to an *Erie* analysis has led to inconsistency in application in federal courts, even when addressing essentially the

206. *See Shady Grove*, 559 U.S. at 438–39 (Ginsburg, J., dissenting) (emphasizing that federal courts must "apply state law when failure to do so would invite forum shopping and yield markedly disparate litigation outcomes").

207. *Id.* at 442 (quoting Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 427 n.7 (1996)).

208. *See id.* at 439–42 (listing past decisions in which the Supreme Court deferred to state interests); *see also* Michael S. Green, *The* Erie *Doctrine: A Flowchart*, 52 AKRON L. REV. 215, 243 (2018) (acknowledging that Justice Ginsburg's approach "has the benefit of showing respect for state and foreign regulatory interests, but it greatly increases the administrative burden on federal courts").

209. *See Shady Grove*, 559 U.S. at 452–58 (Ginsburg, J., dissenting).

210. *Id.* at 421 (Stevens, J., concurring in part and concurring in the judgment) (first quoting Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987); and then quoting Walker v. Armco Steel Corp., 446 U.S. 740, 749–50, 750 n.9 (1980)).

211. *Id.* at 423.

same issue.[212] Courts faced with *Erie* questions have, at times, concluded that a conflict exists between state law and federal rules and have followed Justice Scalia's "really regulates procedure" approach.[213] Other courts faced with similar *Erie* questions have followed Justice Stevens's approach, seeking to determine whether the state law at issue is "so intertwined with a state right or remedy that [the state law] functions to define the scope of the state-created right."[214] Still other courts have followed Justice Ginsburg's relatively unguided approach and avoided conflict by "vigilantly read[ing] the Federal Rules to avoid conflict with state laws."[215]

IV. THE APPLICATION OF THE *ERIE* DOCTRINE TO STATE REQUIREMENTS OF AFFIDAVITS OF MERIT

Given the confusion in approaches, how have federal courts of appeals attempted to make sense of *Shady Grove* in the context of state affidavit of merit requirements? Federal courts of appeals, when faced with basically the same legal question concerning nearly identical state laws, have adopted several varying and inconsistent approaches.[216] This has created an entrenched and intractable conflict

212. Harrison, *supra* note 9, at 1279–80; *see also* Jack E. Pace III & Rachel J. Feldman, *From Shady to Dark: One Year Later,* Shady Grove*'s Meaning Remains Unclear*, 25 ANTITRUST 75, 78–80 (2011) (summarizing how lower courts have reached different conclusions in cases involving similar facts). *Contrast* Van Dyke v. Retzlaff, No. 4:18-CV-247, 2018 WL 4261193, at *2–3 (E.D. Tex. July 24, 2018) (refusing to apply Texas Anti-SLAPP law in federal court in defamation case), *aff'd*, 781 F. App'x 368 (5th Cir. 2019) (per curiam), *with* Floyd v. Aalaei, No. 4:15CV525-RC, 2016 WL 11472821, at *3 (E.D. Tex. Apr. 28, 2016) (applying Texas Anti-SLAPP law in federal court in defamation case).

213. *See, e.g.*, Jones v. United Parcel Serv., Inc., 674 F.3d 1187, 1206 (10th Cir. 2012) (finding conflict and examining the purposes of the federal rule); Durmishi v. Nat'l Cas. Co., 720 F. Supp. 2d 862, 876–77 (E.D. Mich. 2010) (same); O'Gara v. Binkley, 384 F. Supp. 3d 674, 684 (N.D. Tex. 2019); Intercon Sols., Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1050–52 (N.D. Ill. 2013), *aff'd on other grounds*, 791 F.3d 729 (7th Cir. 2015).

214. *Shady Grove*, 559 U.S. at 423 (Stevens, J., concurring in part and concurring in the judgment); *see, e.g.*, Garman v. Campbell Cnty. Sch. Dist. No. 1, 630 F.3d 977, 983–85 (10th Cir. 2010) (finding conflict and examining the purposes of the state law); Estate of C.A. v. Grier, 752 F. Supp. 2d 763, 767 (S.D. Tex. 2010) (same); Steinmetz v. Coyle & Caron, Inc., No.: 15-cv-13594, 2016 WL 4074135, at *3 (D. Mass. July 29, 2016) (same).

215. *Shady Grove*, 559 U.S. at 439 (Ginsburg, J., dissenting); *see, e.g.*, All Plaintiffs v. All Defendants, 645 F.3d 329, 332–35 (5th Cir. 2011) (finding no conflict); Scottsdale Ins. Co. v. Tolliver, 636 F.3d 1273, 1278–80 (10th Cir. 2011) (same).

216. *Contrast* Corley v. United States, 11 F.4th 79, 85–89 (2d Cir. 2021) (holding that Connecticut's certificate of merit requirement is a procedural rule and therefore should not be applied in federal court), *and* Gallivan v. United States, 943 F.3d 291, 296–97 (6th Cir. 2019)

over a question "of significance . . . about whether analogous 'state law certification requirements should be given effect in a federal court.'"[217]

Describing the struggle by courts to determine the boundary between procedure and substance, legal scholar John Hart Ely asserted that a procedural rule is "one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes" while a substantive rule "or more particularly a substantive right, which is what the Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[218] Are state affidavit of merit requirement statutes bound up with substantive rights in the same manner that Justice Stevens and Justice Ginsburg may have envisioned in *Shady Grove*?[219]

(holding the same for Ohio statute), *with* Schmigel v. Uchal, 800 F.3d 113, 119–24 (3d Cir. 2015) (holding that Pennsylvania's certificate of merit statute is substantive and therefore should be applied in federal court).

217. *Corley*, 11 F.4th at 87 (quoting Shields v. United States, 436 F. Supp. 3d 540, 543 (D. Conn. 2020)).

218. Ely, *supra* note 148, at 724–25 (footnote omitted). As Ely notes:

> We were all brought up on sophisticated talk about the fluidity of the line between substance and procedure. But the realization that the terms carry no monolithic meaning at once appropriate to all the contexts in which courts have seen fit to employ them need not imply that they can have no meaning at all. And they are the terms the Enabling Act uses. We have, I think, some moderately clear notion of what a procedural rule is—one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes. Thus, one way of doing things may be chosen over another because it is thought to be more likely to get at the truth, or better calculated to give the parties a fair opportunity to present their sides of the story, or because, and this may point quite the other way, it is a means of promoting the efficiency of the process. Or the protection of the process may proceed at wholesale, as by keeping the size of the docket at a level consistent with giving those cases that are heard the attention they deserve. The most helpful way, it seems to me, of defining a substantive rule—or more particularly a substantive right, which is what the Act refers to—is as a right granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process.

Id. (footnotes omitted).

219. *See Shady Grove*, 559 U.S. at 428 n.13 (Stevens, J., concurring in part and concurring in the judgment) ("Put another way, even if a federal rule in most cases 'really regulates procedure,' it does not 'really regulat[e] procedure' when it displaces those rare state rules that, although 'procedural' in the ordinary sense of the term, operate to define the rights and remedies available in a case. This is so because what is procedural in one context may be substantive in another." (alteration in original) (internal citation omitted)).

Under the *Shady Grove* analysis, the primary issue is whether the procedural mechanism of the state affidavit of merit requirement statute covers the same procedural ground as Rules 8, 9, and 12 of the Federal Rules of Civil Procedure.[220] Rules 8 and 9 specifically address what content is required in a complaint filed in federal court to sufficiently state a claim.[221] Rule 12 provides a specific procedural mechanism in which a federal court can test the sufficiency of the complaint.[222] Seemingly no reading of the affidavit of merit statutes and the federal procedural rules can possibly avoid a collision. Still, a common argument in support of applying state affidavit of merit requirement statutes in federal court is that the interest of the state embodied in these statutes is the public policy decision of the state to limit meritless lawsuits against medical and other professionals, unlike the purposes of Rules 8, 9 and 12, which are purely procedural.[223]

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220. As Judge Amul Thapar wrote in his opinion in *Gallivan:*

> Under Rule 8(a), which provides the general rules of pleadings, a complaint must include (1) a short and plain jurisdictional statement, (2) a short and plain statement of the claim, and (3) an explanation of the relief sought. That's it. By listing these elements, Rule 8 implicitly "excludes other requirements that must be satisfied for a complaint to state a claim for relief." Rule 8 does not require litigants to file any affidavits.
>
> Nor does Rule 12. A complaint survives a motion to dismiss under Rule 12(b)(6) by simply alleging facts "sufficient to state a claim to relief that is plausible on its face." Rule 12 does not demand "evidentiary support"—in an affidavit or any other form—for a claim to be plausible. Even without an affidavit, a complaint can move beyond the pleading stage and into discovery.
>
> And Rule 9 confirms the point by specifying the few situations when heightened pleading *is* required—for instance, when a party alleges fraud or mistake. Since none of those heightened requirements apply here, Rule 8's more liberal pleading standards govern. To impose a heightened pleading standard in Gallivan's case would upset the careful balance struck by the Federal Rules.

Gallivan, 943 F.3d at 293–94 (internal citations omitted).

221. *See id.*

222. *See id.*

223. *See, e.g.*, Berk v. Choy, No. 23-1620, 2024 WL 3534482, at *2 (3d Cir. July 25, 2024), *rev'd and remanded*, 146 S. Ct. 546 (2026). In *Berk*, the Third Circuit articulated these differences in purpose in the following manner:

> A state AOM statute does not conflict with Federal Rules 8 or 9 if it (1) "does not require a plaintiff to set forth any factual averments upon which a claim is based,"; (2) "does not have any effect on what is included in the pleadings of a case or the specificity thereof[,]"; and (3) "is not a pleading and need not be filed until well after

On the other hand, a number of courts have found that state affidavit of merit requirement statutes, while perhaps cloaked in substantive language, "merely provide[] a procedural mechanism for vindicating existing rights."[224] These state statutes cover the same ground and answer the same questions as the federal rules and therefore ought to be treated as conflicting.[225] Unless there is some legitimate challenge to the breadth of the REA's authority, the rules should apply rather than the state statute, allowing the purpose of the state statutes to be appropriately served by Rules 8, 9, and 12.[226]

Where, as Ely correctly asserts, a substantive rule is defined as granting a right "for one or more nonprocedural reasons, for some purpose . . . not having to do with the fairness or efficiency of the litigation process[,]" it becomes apparent that the operation of the affidavit of merit requirement statutes interferes with the ability of the federal procedural rules to maintain federal courts as a fair place devoid of wasteful suits.[227] The federal rules arguably remain the best mechanism for maintaining fairness in federal courts. The alternative would be to allow state legislatures to strip from federal courts and Congress the ability to govern procedure in federal courts, causing unnecessary difficulty by "forcing federal courts to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule."[228]

> the complaint[.]" The Delaware AOM statute (1) does not require a plaintiff to state any facts to support his claim and (2) has no impact on the contents of the pleadings or specificity of the allegations. Unlike Rules 8 and 9, which "dictate the content of the pleadings and the degree of specificity that is required," the Delaware statute functions simply "to reduce the filing of meritless medical negligence claims." Furthermore, an AOM is not a pleading because it does not provide notice of a claim or seek court intervention. Finally, a plaintiff can seek permission to submit the AOM after he files his complaint, thereby demonstrating it is separate and distinct from the pleading. Because the AOM is not a pleading and serves a different purpose than pleadings do, there is no conflict between the Delaware statute and Rules 8 or 9.

Id. (first alteration in original) (footnotes and internal citations omitted).

224. *See, e.g.*, Makaeff v. Trump Univ., LLC, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring).

225. *Gallivan*, 943 F.3d at 295.

226. *Id.* at 294–95; *see also* Hanna v. Plumer, 380 U.S. 460, 473–74 (1965); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 343–45 (6th ed. 2012).

227. Ely, *supra* note 148, at 725.

228. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 415 (2010) (plurality opinion); *see also* John B. Oakley, *Illuminating* Shady Grove*: A General Approach to Resolving* Erie *Problems*, 44 CREIGHTON L. REV. 79, 87–88 (2010) (finding that an approach which measures the substantive right upheld by a state procedural rule that is in conflict with a federal rule would undermine the purpose of having universal Federal Rules of Civil Procedure).

A. *Circuits Not Applying State Requirements of Affidavits of Merit in Federal Court*

1. *United States Court of Appeals for the Third Circuit*

As seen in *Berk* discussed above, the Third Circuit has held for decades that affidavit of merit statutes are not in conflict with any Federal Rules of Civil Procedure and that the affidavit of merit requirements should apply in federal court.[229] In a series of cases culminating with *Berk*, the Third Circuit has concluded that state affidavit of merit requirements have no impact on pleading requirements.[230] Thus, those requirements do not conflict with Rules 8 or 9.[231] According to the Third Circuit, failure to include an affidavit of merit is simply another grounds for dismissal which does not conflict with the specifically enumerated grounds for dismissal set forth in Rule 12.[232]

2. *United States Court of Appeals for the Tenth Circuit*

The Tenth Circuit has followed the reasoning of the Third Circuit in addressing this question.[233] In *Trierweiler v. Croxton & Trench Holding Corp.*, an accounting malpractice case, the court was faced with the question of whether the Colorado requirement of an affidavit of merit (certificate of review) in professional

229. *See supra* Part I.

230. Berk v. Choy, No. 23-1620, 2024 WL 3534482, at *2 (3d Cir. July 25, 2024), *rev'd and remanded*, 146 S. Ct. 546 (2026); Schmigel v. Uchal, 800 F.3d 113, 122 (3d Cir. 2015); Nuveen Mun. Tr. *ex rel.* Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C., 692 F.3d 283, 303 (3d Cir. 2012); Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 263 (3d Cir. 2011), *abrogation recognized by* DiFraia v. Ransom, No. 24-2673, 2026 WL 878627 (3d Cir. Mar. 31, 2026); Chamberlain v. Giampapa, 210 F.3d 154, 160 (3d Cir. 2000).

231. *Berk*, 2024 WL 3534482, at *2.

232. *Id.* at *3. As the court stated in *Berk*:

> Rule 12 also does not conflict with the Delaware AOM statute. Rule 12 provides litigants a mechanism to test the sufficiency of a complaint's factual allegations and whether they provide a basis for relief. Whether a complaint is sufficient, however, has no bearing on a court's decision to dismiss an action for failure to comply with an AOM statute. As stated previously, a state AOM statute "serves an entirely different purpose" from a pleading and contemplates a process for addressing noncompliance that differs from a motion to dismiss based on a pleading defect. Therefore, the Delaware AOM statute does not collide with Rule 12.

Id. (internal citations omitted).

233. *See* Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1530 (10th Cir. 1996).

malpractice cases should apply in federal court.[234] The Colorado statute requires the plaintiff's attorney in professional negligence cases "certify, within sixty days of filing the complaint, that an expert has examined their clients' claims and found them to have 'substantial justification[.]'"[235] Under the Colorado statute, the "failure to comply with this requirement results in dismissal."[236]

In *Trierweiler*, the court held that the state affidavit of merit statute does not "collide[] with any federal procedural rule."[237] In reviewing both the Colorado statute and the relevant Federal Rules of Civil Procedure, the court concluded that no federal rule was "directly on point," and therefore, there was no direct conflict between the statute and the federal rules.[238] Interestingly, according to the court, the only rule that possibly could result in a direct collision was Rule 11.[239] The court indicated that while both the affidavit of merit statute and Rule 11 "demonstrate an intent to weed unjustifiable claims out of the system[,]" and "[d]espite the superficial similarity of the two rules, . . . they do not collide."[240] The court held that both Rule 11 and the affidavit of merit requirement could "exist side by side, . . . each controlling its own intended sphere of coverage without conflict."[241] Thus, "[a]lthough the state and federal rules [were] similar," there was "no 'direct collision' between the two."[242]

B. *Circuits Applying State Requirements of Affidavits of Merit in Federal Court*

1. *United States Court of Appeals for the Sixth Circuit*

As discussed in the introduction to this Article, in *Gallivan v. United States*, the Sixth Circuit determined that state affidavit of merit requirements do not apply in federal court.[243] The court employed the analytical framework from *Shady Grove* and concluded that the Federal Rules of Civil Procedure, Rules 8 and 12 specifically, define the exclusive requirements for a party to state a valid claim for relief in federal court.[244] State laws, such as affidavit of merit requirement statutes,

234. *See id.*

235. *Id.* at 1537–38 (citation omitted).

236. *Id.* at 1538.

237. *See id.* at 1539–40.

238. *Id.* at 1540.

239. *Id.*

240. *Id.*

241. *Id.* (quoting Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980)).

242. *Id.*

243. 943 F.3d 291, 293–94 (6th Cir. 2019); *see also supra* note 63 and accompanying text for further discussion of this issue.

244. *Gallivan*, 943 F.3d at 293–94.

that are designed to impose additional pleading requirements are in conflict with the federal rules and should not be applied in federal court.[245]

According to the court, Rule 8(a) establishes the necessary requirements for a complaint in federal court.[246] Rule 8 also "implicitly 'excludes other requirements that must be satisfied for a complaint to state a claim for relief.'"[247] Relatedly, Rule 12 provides that a complaint can survive a motion to dismiss by alleging facts "sufficient to state a claim to relief that is plausible on its face[,]" without requiring any "evidentiary support."[248] Further, "Rule 9 confirms the point by specifying the few situations when heightened pleading *is* required—for instance, when a party alleges fraud or mistake."[249]

The court rejected the notion that the Federal Rules of Civil Procedure should more readily give way to state requirements in cases brought under the Federal Tort Claims Act (FTCA), in contrast to cases where the basis of the federal court's subject matter jurisdiction was diversity.[250] According to the court, "Rule 1 states that the Federal Rules apply in basically *all* civil actions in federal court[.]"[251] Because an "FTCA action is a civil action in federal court[,]" the federal rules should apply equally.[252] Ultimately, the court in *Gallivan* determined that because affidavit of merit statutes function as "a pleading requirement that does *not* go to the merits of a medical-negligence claim[,]" there was a "clear conflict between the federal pleading rules and the state affidavit-of-merit requirement" under this court's guidance in *Shady Grove*.[253]

2. *United States Court of Appeals for the Second Circuit*

In *Corley v. United States*, the Second Circuit, following the analysis in *Gallivan*, held that, under the *Erie* doctrine, state affidavit of merit requirements

245. *Id.*
246. *Id.* at 293.
247. *Id.* (quoting Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1352 (11th Cir. 2018)).
248. *Id.* (first quoting Majestic Bldg. Maint., Inc. v. Huntington Bancshares Inc., 864 F.3d 455, 458 (6th Cir. 2017); and then quoting Klocke v. Watson, 936 F.3d 240, 246 (5th Cir. 2019)).
249. *Id.* (citing FED. R. CIV. P. 9(b)).
250. *Id.* at 294.
251. *Id.*
252. *Id.*
253. *Id.* at 296–97.

should not be applied in federal court.[254] Finding the analysis in *Gallivan* "instructive[,]"[255] the court stated:

> All that Federal Rule of Civil Procedure 8 requires . . . is a "short and plain statement of the claim showing that the pleader is entitled to relief." The Rule embodies a policy of "notice pleading" that eschews the need to plead specific types of documentary evidence to establish a plausible claim.[256]

In contrast, state affidavit of merit statutes impose a heightened pleading requirement beyond any requirement of Rule 8.[257] Given this, the court concluded that the requirements of state affidavit of merit statutes are in direct conflict with the procedural requirements of Rule 8 and, therefore, should not be applied in federal court.[258] Thus, the Second Circuit held that such affidavit of merit statutes conflict with the Federal Rules.[259]

3. *United States Court of Appeals for the Fourth Circuit*

In *Pledger v. Lynch*, the Fourth Circuit held that West Virginia's state affidavit of merit statute conflicts with the Federal Rules of Civil Procedure.[260] In reaching this conclusion, the court relied on the prior analysis employed by both the Sixth Circuit in *Gallivan* and the Seventh Circuit in *Young*, in which those courts concluded that state affidavit of merit statutes are in direct conflict with Federal Rules of Civil Procedure 8, 9, and 12.[261]

The court concluded that "the Federal Rules governing the sufficiency of pleadings . . . answer the 'question in dispute' here, and thus supplant" state affidavit of merit statute requirements.[262] For example, Rule 8 requires only a short and plain statement to state a claim, requiring no further supporting documents.[263] Likewise, Rule 9 sets forth the very narrow circumstances in which the pleading

254. 11 F.4th 79, 88–89 (2d Cir. 2021).

255. *Id.* at 88.

256. *Id.* at 88–89 (internal citation omitted).

257. *Id.*

258. *Id.* at 88.

259. *Id.*

260. 5 F.4th 511, 520 (4th Cir. 2021).

261. *Id.* at 518–20.

262. *Id.* at 519.

263. *Id.* ("Rule 8 of the Federal Rules of Civil Procedure requires only a 'short and plain statement' of a plaintiff's claim, in a deliberate departure from the more detailed pleading requirements of the past." (quoting FED. R. CIV. P. 8(a)(2))).

requirements may be heightened.[264] Finally, Rule 12 provides an exclusive list of bases for dismissing an action, which does not include the failure to provide a supporting document of any kind.[265] Additionally, the court concluded that the state affidavit of merit statute was in direct conflict with Rule 11 because they both sought to accomplish the same end—the deterrence of frivolous lawsuits.[266]

In an interesting opinion, Judge Marvin Quattlebaum dissented from the conclusion that state affidavit of merit statutes necessarily are in direct conflict with the Federal Rules of Civil Procedure.[267] In his opinion, Judge Quattlebaum accurately outlines the fundamental dilemma faced by courts, scholars, and students in addressing these questions:

> The West Virginia certificate of merit portion of this appeal involves the interplay of federal and state law, the *Erie* doctrine and whether laws are substantive or procedural. Admittedly, discussion of these issues may conjure up nightmares from law school. And if not that, it most certainly will cause a reader's eyes to glaze over. Any way you slice it, this is wonky stuff. But as esoteric as these concepts can be, underneath them are important principles of federalism. What is the proper balance of power between the federal government and the states? How do the Supremacy Clause and the Tenth Amendment interact? The gravity of these concepts should wake us from our *Erie*-induced slumber.[268]

264. *Id.* at 519–20 ("Rule 9 only 'confirms' this contrast between the [state law] and the Federal Rules' baseline pleading standard 'by specifying the few situations when heightened pleading *is* required' in federal court." (quoting Gallivan v. United States, 943 F.3d 291, 293 (6th Cir. 2019))).

265. *Id.* at 520 ("Under Rule 12, . . . [p]laintiffs need not gather any expert evidence or serve it on defendants for a claim to be plausible. The [state's] certificate requirement thus represents an additional hurdle for plaintiffs." (internal citation and quotation marks omitted)).

266. *Id.* In describing this, the court stated:

> Finally, we agree with Pledger that West Virginia's MPLA is inconsistent with Rule 11, which addresses frivolous filings. As the United States itself acknowledges, the MPLA's certificate requirement addresses the same issue, and likewise seeks to limit frivolous malpractice suits. But it does so through a mechanism – an early affidavit from an expert – that Rule 11 specifically disclaims: Rule 11 expressly provides that "a pleading need *not* be verified or accompanied by an affidavit," and instead treats the signature of an attorney or party as a certification that the claim is legally sufficient and likely factually supported.

Id. (internal citation omitted) (quoting FED. R. CIV. P. 11(a)).

267. *Id.* at 535 (Quattlebaum, J., concurring in part and dissenting in part).

268. *Id.* at 527 (footnote omitted).

In conclusion, Judge Quattlebaum asserted that state affidavit of merit requirements are substantive state law, rather than procedural.[269] Therefore, he concluded that because they do not conflict with the Federal Rules, state affidavit of merit requirements should be applied in federal court.[270]

4. *United States Court of Appeals for the Fifth Circuit*

In *Passmore v. Baylor Health Care System*, the Fifth Circuit addressed whether § 74.351 of the Texas Civil Practice and Remedies Code should be applied in federal court.[271] Unlike the affidavit of merit statutes discussed to this point, which required the filing of an affidavit alongside the complaint, the Texas statute required the filing of an expert report within 120 days of a defendant's answer.[272] According to the Texas Supreme Court, the purpose of the statute was twofold: (1) "inform the defendant of the specific conduct the plaintiff has called into question" and; (2) "provide a basis for the trial court to conclude that the claims have merit."[273]

In determining the Texas statute should not be applied in federal court, the court concluded that by requiring the submission of an expert report on a mandatory timeline and mandating complaints be dismissed if an expert report is not submitted by that deadline, the Texas statute was in direct conflict with Rules 26 and 37 of the Federal Rules of Civil Procedure.[274] According to the court, Rule 26(a) governs pretrial disclosures and discovery, including the disclosure of expert reports, while Rule 37(c) provides the consequences for a party's failure to comply with the requirements of Rule 26(a).[275] Accordingly, the court concluded the state affidavit of merit statute was in direct conflict with those federal Rules.[276] Under the reasoning of *Shady Grove*, the result of this conflict could only mean that the state statute was displaced by the Federal Rules in federal court.[277]

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269. *Id.* at 535.
270. *Id.*
271. 823 F.3d 292, 293 (5th Cir. 2016).
272. *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West 2025).
273. Certified EMS, Inc. v. Potts, 392 S.W.3d 625, 630 (Tex. 2013) (quoting Am. Transitional Care Ctrs. of Tex., Inc. v. Palacios, 46 S.W.3d 873, 879 (Tex. 2001)).
274. *Passmore*, 823 F.3d at 296–97.
275. *Id.* at 296.
276. *Id.* at 297.
277. *See id.* at 296–97 (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 399 (2010)).

A request for an en banc rehearing of this decision was denied by the court.[278] However, in the denial of rehearing en banc, four members of the court dissented—Jones, Smith, Clement, and Owen.[279] The four dissenters asserted that the panel "does not apply *Erie*-related concepts accurately[.]"[280] In making this argument, the dissenters relied upon the analysis employed in decisions of the Third Circuit and Tenth Circuit addressing this issue.[281]

5. *United States Court of Appeals for the Seventh Circuit*

In *Young v. United States*, the Seventh Circuit addressed whether the requirement of the submission of an affidavit contained in Illinois law was to be applied in federal court.[282] The statute, 735 Ill. Comp. Stat.5/2-622, required an affidavit of merit and a report of a physician be attached to the complaint unless an exception applies.[283] The statute required the physician's report to support the assertions contained in the affidavit.[284] According to the court, the report submitted at the time of the complaint "must show that the physician has reviewed the plaintiff's medical records and must justify the conclusion that 'a reasonable and meritorious cause' exists."[285]

The court concluded the requirements of the Illinois statute were in direct conflict with the Federal Rules of Civil Procedure.[286] According to the court, Rule

278. Passmore v. Baylor Health Care Sys., 841 F.3d 284, 284 (5th Cir. 2016) (per curiam).

279. *Id.* at 285 (Jones, J., dissenting from Denial of Rehearing En Banc).

280. *Id.*

281. *Id.* at 285–86 (citing Liggon-Redding v. Estate of Sugarman, 659 F.3d 258 (3d Cir. 2011), *abrogation recognized by* DiFraia v. Ransom, No. 24-2673, 2026 WL 878627 (3d Cir. Mar. 31, 2026); Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523 (10th Cir. 1996)).

282. 942 F.3d 349 (7th Cir. 2019).

283. *Id.* at 351; 735 ILL. COMP. STAT. 5/2-622 (2025).

284. *Young*, 942 F.3d at 350.

285. *Id.*

286. *Id.* at 351. Judge Frank Easterbrook explained why the requirements of the Illinois statute were in direct conflict with the Federal Rules of Civil Procedure as follows:

> [W]e now conclude that a complaint in federal court cannot properly be dismissed because it lacks an affidavit and report under § 5/2-622. . . .
>
> Rule 8 of the Federal Rules of Civil Procedure specifies what a complaint must contain. It does not require attachments. . . . Section 5/2-622 applies in federal court to the extent that it is a rule of *substance*; but to the extent that it is a rule of *procedure* it gives way to Rule 8 and other doctrines that determine how litigation proceeds in a federal tribunal.

Id.

8 governs what must be included in a complaint filed in federal court, and it specifically does not require any attachments to survive a Rule 12 motion to dismiss.[287] As the court explained, "One can initiate a contract case in federal court without attaching the contract, an insurance case without attaching the policy, a securities case without attaching the registration statement, and a tort case without attaching an expert's report."[288] As the court noted, "Many cases hold that federal, not state, rules apply to procedural matters—such as what ought to be attached to pleadings—in all federal suits, whether they arise under federal or state law."[289] By the court's reasoning, the affidavit of merit requirement clearly conflicted with Rule 8.[290]

6. *United States Court of Appeals for the Ninth Circuit*

In *Martin v. Pierce County*, the Ninth Circuit addressed the issue of whether a Washington statute requiring a plaintiff to file a declaration electing or declining arbitration with the complaint should be applied in federal court.[291] In evaluating this question, the court looked to decisions from the Second, Fourth, Sixth, and Seventh Circuits.[292] As the court noted, while no court had yet addressed "a declaration requirement exactly like Washington's," prior cases discussing the requirement that an affidavit of merit be filed with a complaint "provide a useful analogy."[293] The court asserted that these prior affidavit of merit cases were analogous specifically because "they generally require plaintiffs to file a declaration with the pleadings containing some reassurance, usually by an expert, that the claim has merit."[294]

The court concluded that a consensus was emerging among federal circuit courts "that such certificate requirements do not govern actions in federal court, because they conflict with and are thus supplanted by the Federal Rules of Civil Procedure."[295] Accordingly, the court determined that the Washington statute creates virtually the same conflicts as do the affidavit of merit statutes and, therefore, the state statute must be displaced by the federal rules in federal court.[296]

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287. *Id.*
288. *Id.*
289. *Id.* (quoting Cooke v. Jackson Nat'l Life Ins. Co., 919 F.3d 1024, 1027 (7th Cir. 2019)).
290. *Id.*
291. 34 F.4th 1125, 1128 (9th Cir. 2022).
292. *Id.* at 1129–30.
293. *Id.* at 1129.
294. *Id.*
295. *Id.*
296. *See id.* at 1130–33.

Applying the reasoning from the Fourth Circuit in *Pledger*, the Sixth Circuit in *Gallivan*, and the Seventh Circuit in *Young*, the court concluded, "Rule 8's requirement of a short and plain statement of the plaintiff's claim, jurisdictional statement, and explanation of the relief sought is a list of elements that implicitly excludes other requirements."[297] In applying this reasoning to the Washington statute, the court determined that because the statute sought to add additional requirements to that exclusive list, it was necessarily displaced by Rule 8 and should not be applied in federal court.[298]

Interestingly, the court also determined that the statute was displaced by Rule 3, in that Rule 3 "requires only the filing of a complaint to commence an action—nothing more."[299] By "adding additional, procedural steps for commencing a suit beyond those that Rule 3 contemplates[,]" the statute is in direct conflict with Rule 3.[300] Rule 3 "governs *how* a lawsuit is commenced."[301] The Washington statute, in comparison, requires the filing of a declaration "*when commencing* a medical malpractice claim."[302] By imposing this additional burden on the commencement of an action, the state provision was displaced by Rule 3 and should not be applied in federal court.[303]

V. Should State Affidavit of Merit Pleading Requirements be Applied in Federal Court?

A. *Is Unguided Conflict Avoidance the Proper Approach Under* Erie *and Its Progeny?*

As legal scholar Suzanna Sherry has pointed out, the *Erie* problem is, fundamentally, a question regarding federalism and preemption.[304] Since *Erie*, the Supreme Court has asserted that "in the absence of a federal directive to the contrary federal courts must always follow state substantive law[.]"[305] This conclusion rested on an assumption, made explicit in *Hanna*, that "the judiciary

297. *Id.* at 1130 (internal quotation marks omitted) (first quoting FED. R. CIV. P. 8; and then quoting Pledger v. Lynch, 5 F.4th 511, 519 (4th Cir. 2021)).

298. *Id.*

299. *Id.* at 1131 (quoting Albright v. Christensen, 24 F.4th 1039, 1046 (6th Cir. 2022)).

300. *Id.*

301. *Id.*

302. *Id.* at 1132.

303. *Id.*

304. Sherry, *supra* note 153, at 1185–86 (discussing post-*Erie* questions related to the need to identify and apply state law).

305. *Id.* at 1186.

lacked power to protect unarticulated federal interests."[306] Where Congress has expressly identified and codified the federal interest, either through statute or through the approval of federal rules, "federal courts should apply the (codified) federal rule."[307]

At root, state affidavit of merit statutes impermissibly conflict with valid federal rules created under the Rules Enabling Act.[308] Therefore, under the *Erie* doctrine, state affidavit of merit statutes should not apply in federal diversity cases as a procedural matter.[309] While state concerns regarding frivolous lawsuits, along with procedural attempts to limit them through affidavit of merit pleading requirements, are both important and significant, equally so are the federalism interests embedded in the *Erie* doctrine.[310]

In determining whether state affidavit of merit statutes should apply in federal court, the analysis confronts a situation where Congress, through the Federal Rules of Civil Procedure, has seemingly codified the federal interest by defining the requirements for a complaint filed in federal court and the mechanisms by which that complaint can be dismissed early in the litigation process.[311] If that is true, then the conflict between state affidavit of merit statutes and Rules 8, 9, and 12 of the Federal Rules of Civil Procedure seems apparent on its face.[312]

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306. *Id.*

307. *Id.* at 1187; *see also* Erbsen, *supra* note 154, at 635 ("A federal rule that arises directly from the Constitution or a statute applies automatically under the Supremacy Clause."); Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 35 (2012) ("If the federal law at issue in an Erie analysis is the Constitution, a statute, or a Federal Rule of Civil Procedure, it will be given effect as written."); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1416–17 (2001) ("When the federal government follows these procedures to adopt [a law], then Erie acknowledges that federal courts must apply such law notwithstanding state law to the contrary."); Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1792–95 (1997) (discussing the evolution of the federal common law which ultimately lead to *Erie*); Martin H. Redish, *Continuing the* Erie *Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959, 969 (1980) (discussing the underlying problem with respecting substantive federal interests in a diversity case, because "it is assumed that there are no substantive federal policies being furthered in the adjudication of a diversity case.").

308. Penrose & Caldwell, *supra* note 5, at 1020; Grossberg, *supra* note 2, at 243.

309. Penrose & Caldwell, *supra* note 5, at 976.

310. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 13–14 (1941).

311. Grossberg, *supra* note 2, at 242–43.

312. *Id.* at 443–47. *Contrast, e.g.*, FED. R. CIV. P. 8–9, 12 (setting broad pleading standards), *with* 735 ILL. COMP. STAT. 5/2-622 (2025) (requiring heightened pleading standards and timing restraints).

As discussed above, the opinions in *Shady Grove* offer several competing approaches to address this apparent conflict.[313] Justice Stevens, in his concurrence, and Justice Ginsburg, in her dissent, offer two different conflict avoidance approaches to this dilemma.[314] Both approaches require a highly subjective analysis on the part of a court, in that they both require a court to determine the subjective intent of the federal rule, the state law, or both.[315] Ultimately, such an approach undermines the uniformity and consistency sought by the application of the *Erie* doctrine.[316]

Under Stevens's approach, the federal rule at issue could not displace a state law that is procedural if that state law is "so intertwined with a state right or remedy that [the state law] functions to define the scope of the state-created right."[317] This approach requires a federal court to look beyond the mere existence of the federal rule itself to the substantive and extrinsic policy reasons behind the state law.[318] Here, the role of the federal court is to determine "whether the state law actually is part of a State's framework of substantive rights or remedies."[319] If so, then the federal rule is valid only where it does not intrude into those substantive rights.[320]

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313. *See supra* Part III.A.

314. *See supra* Part III.C. A number of academic commentators have written on the need for a unifying approach for assessing *Erie* conflicts. *See, e.g.*, Joshua P. Zoffer, Note, *An Avoidance Canon for* Erie*: Using Federalism to Resolve* Shady Grove'*s Conflicts Analysis Problem*, 128 YALE L.J. 482, 530–31 (2018); Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1239 (1999); Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707, 708 (2006); Bernadette Bollas Genetin, *Reassessing the Avoidance Canon in* Erie *Cases*, 44 AKRON L. REV. 1067, 1068 (2011); Roosevelt III, *supra* note 307, at 2; Steinman, *Our Class Action Federalism*, *supra* note 153, at 1135–36; Stempel, *supra* note 154, at 916–17; Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187, 191 (2013).

315. *See supra* Part III.B.

316. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 404 (2010).

317. *Id.* at 423 (Stevens, J., concurring in part and concurring in the judgment); *see supra* Part III.C.2.

318. *See Shady Grove*, 559 U.S. at 429–36 (Stevens, J., concurring in part and concurring in the judgment) (outlining the legislative history and possible interpretations of the New York law).

319. *Id.* at 419.

320. *See id.* at 424–25 (criticizing Justice Scalia for ignoring "the balance that Congress struck between uniform rules of federal procedure and respect for a State's construction of its own rights and remedies" and the "separation-of-powers presumption, and federalism presumption, that counsel against judicially created rules displacing state substantive law" (internal citations omitted)).

However, this approach is seemingly inconsistent with prior decisions of the Supreme Court, notably *Hanna* and *Sibbach v. Wilson & Co.*[321] These cases both held that so long as a federal rule truly regulates procedure, the conflicting state law must give way to the federal rule.[322] Additionally, Stevens's approach would require an analysis by a federal judge of "whether the state law actually is part of a State's framework of substantive rights or remedies[,]" an analysis that necessarily would be highly subjective.[323] Justice Stevens recognized this dilemma, admitting that "there are costs involved in attempting to discover the true nature of a state procedural rule[.]"[324] As one scholar notes, "When 'a State chooses to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies,' the facial operation of the statute (procedural) purposefully differs from its intended effect (substantive), making intent especially hard to evaluate."[325] For Justice Stevens, a state procedural law could only be considered substantive in situations where "little doubt" exists as to its purpose.[326]

Justice Ginsburg, on the other hand, proposed a very different conflict approach to resolve potential conflicts between a federal rule and a state law.[327] The first question a court must address, according to Justice Ginsburg, is whether the federal rule leaves any room for the operation of the state law.[328] However, even before turning to that question, the court must decide whether a conflict between the state law and federal rule is "really necessary?"[329] In resolving this question, a court should "vigilantly read the Federal Rules to avoid conflict with state laws."[330]

As with Justice Stevens's approach, subjectivity is the primary problem with Justice Ginsburg's approach.[331] Yet here, the potential subjectivity is even greater, in that the court is required to carefully assess the substantive intent of both the

321. *See id.* at 427–28.

322. *Id.*; *see also* Ides, *supra* note 153, at 1059–63 (analyzing Justice Stevens's attempt to distinguish *Sibbach*); Ely, *supra* note 148, at 697 (discussing the twisted rendition of *Erie* found in the *Hanna* opinion).

323. *Shady Grove*, 559 U.S. at 419 (Stevens, J., concurring in part and concurring in the judgment).

324. *Id.* at 432.

325. Zoffer, *supra* note 314, at 530–31 (footnote omitted).

326. *Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring in part and concurring in the judgment).

327. *Id.* at 436–59 (Ginsburg, J., dissenting).

328. *Id.* at 439; *see supra* Part III.B.3.

329. *Shady Grove*, 559 U.S. at 437 (Ginsburg, J., dissenting).

330. *Id.* at 439.

331. *See id.* at 429–31 (Stevens, J., concurring in part and concurring in the judgment).

federal rule and the state law to determine the appropriate scope of the interpretation of the rule.[332]

The subjectivity necessarily present in conflict avoidance approaches undermines the uniformity that should be sought in applying the *Erie* doctrine, leading inevitably to the violation of one of the twin aims of *Erie*—the inequitable administration of justice.[333] Additionally, contrary to the arguments put forth in support of a conflict avoidance methodology to address these thorny questions, conflict avoidance depends upon some evaluation of the presence of ambiguity in the application of federal rules and state laws, making the approach far more complicated for courts to apply.[334]

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332. *See id.* at 445–51 (Ginsburg, J., dissenting).

333. *See id.* at 417 n.2 (Stevens, J., concurring in part and concurring in the judgment).

334. In discussing the role of judges in interpreting statutes, Justice Kavanaugh provides helpful guidance in how this problem of ambiguity and subjectivity should be addressed by courts:

> But in most statutory cases, the issue is one of interpretation. To assist the interpretive process, judges over time have devised many semantic and substantive canons of construction — what we might refer to collectively as the interpretive rules of the road. To make judges more neutral and impartial in statutory interpretation cases, we should carefully examine the interpretive rules of the road and try to settle as many of them *in advance* as we can. Doing so would make the rules more predictable in application. In other words, if we could achieve more agreement ahead of time on the rules of the road, there would be many fewer disputed calls in actual cases. That in turn would be enormously beneficial to the neutral and impartial rule of law, and to the ideal and reality of a principled, nonpartisan judiciary.
>
> With that objective in mind, I will advance one overarching argument in this Book Review. A number of canons of statutory interpretation depend on an initial evaluation of whether the statutory text is clear or ambiguous. But because it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity. Instead, courts should seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons. Once they have discerned the best reading of the text in that way, they can depart from that baseline if required to do so by any relevant substantive canons — for example, the absurdity doctrine.

Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (footnote omitted).

B. *Applying a Traditional Guided Erie REA Approach to State Affidavit of Merit Laws*

As seen in the cases discussed above, the question of whether a state affidavit of merit statute applies in federal court turns almost exclusively on whether there is a direct collision between Rules 8, 9, 12, and perhaps 3 and 11, of the Federal Rules of Civil Procedure and state affidavit of merit statutes.[335] Determining whether a conflict exists requires an exploration of the procedural scope of the affidavit of merit statute alongside the procedural scope of the federal rules at issue.[336] If the conclusion to this exploration is that state affidavit of merit statutes answer the same procedural question as the federal rules and, in some fashion, limit the procedural operation of the federal rule, then a direct conflict exists between the two.[337]

Seemingly, while state affidavit of merit statutes are designed to prevent frivolous lawsuits, their operation is wholly procedural.[338] State affidavit of merit statutes require that additional supporting material be submitted by a plaintiff with the complaint or soon after.[339] Failure to submit this additional material—an affidavit of merit—may result in the dismissal of the complaint as meritless.[340]

On the other hand, Rules 8 and 9 establish the basic requirements for a complaint filed in federal court to be deemed sufficient and to avoid dismissal under Rule 12.[341] In this case, Rule 12 provides a process whereby a court can determine whether a complaint is sufficient and sufficiently meritorious to continue through the discovery process and toward trial.[342]

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335. *See supra* Part IV.

336. *See supra* Part IV.

337. *See supra* Part IV.

338. *Shady Grove*, 559 U.S. at 410 (plurality opinion). Consistent with *Shady Grove* and canons of statutory construction, courts should generally not undertake an inquiry into the underlying purpose of the state law and, concomitantly, any substantive rights supposedly protected by a state law. *See id.* In other words, in evaluating the scope of the state statute a court should look only to the procedural functions of the statute in determining whether the scope of the statute is the same as the scope of a federal rule. *Id.*

339. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2603(B) (2025) (requiring initial disclosures to be served with expert opinion affidavits).

340. *See, e.g.*, *id.* § 12-2603(F) (allowing the court to dismiss a claim on its own if the claimant fails to file a preliminary affidavit).

341. *See* FED. R. CIV. P. 8–9.

342. *See* FED. R. CIV. P. 12.

Both the federal rules and affidavit of merit statutes answer the same question: Is the pleading filed by a plaintiff sufficient and meritorious?[343] The real difference between these two mechanisms is the standard by which the court determines whether dismissal is required.[344] Under Rule 12, where a party is able to show that the claim asserted in their complaint is plausible on its face, then the claim of that party survives dismissal and may continue toward trial.[345] In contrast, under state affidavit of merit statutes, a party is required at the pleading stage to offer evidence, beyond the allegations contained in the complaint, that the claim is supported by expert evidence and has merit.[346] This is a much greater pleading requirement than that required by the federal rules to survive dismissal and continue toward trial.[347]

Thus, no legitimate construction of Rules 8, 9, and 12 exists that does not create a direct conflict with state affidavit of merit statutes. This situation is analogous to the situation in *Shady Grove*, where the Court concluded that a state statute interfered with and conflicted with the mechanism for class actions under Rule 23 and therefore, had to give way to the federal rule.[348] As Justice Scalia wrote in *Shady Grove*:

> We must acknowledge the reality that keeping the federal-court door open to class actions that cannot proceed in state court will produce forum shopping. That is unacceptable when it comes as the consequence of judge-made rules created to fill supposed "gaps" in positive federal law. For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, "state law must govern because there can be no other law." But divergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure. Congress itself has created the possibility that the same case may follow a different course if filed

343. *Compare, e.g.*, ARIZ. REV. STAT. ANN. § 12-2603 (2025) (setting forth the minimum pleading standards for claims against health care professionals), *with* FED. R. CIV. P. 8–9 (setting forth the minimum standards for claims in general, with special rules for cases of fraud).

344. *Contrast*, *e.g.*, ARIZ. REV. STAT. ANN. § 12-2603 (2025) (requiring an expert opinion affidavit be filed to support a complaint against a health care professional), *with* FED. R. CIV. P. 8 (requiring only a "short and plain statement" of the grounds for relief).

345. *See* FED. R. CIV. P. 12.

346. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2603(B) (2025) (requiring initial disclosures to be served with expert opinion affidavits).

347. *Contrast, e.g.*, ARIZ. REV. STAT. ANN. § 12-2603(B) (2025) (requiring a heightened pleading standard), *with* FED. R. CIV. P. 8 (requiring only a "short and plain statement of the claim").

348. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 401 (2010).

> in federal instead of state court. The short of the matter is that a Federal Rule governing procedure is valid whether or not it alters the outcome of the case in a way that induces forum shopping. To hold otherwise would be to "disembowel either the Constitution's grant of power over federal procedure" or Congress's exercise of it.[349]

In other words, where a federal rule and a state law are in conflict, as in the case of state affidavit of merit statutes, the federal rule must be applied in federal court if the rule is constitutional and complies with the REA.[350] The constitutional question is fairly straightforward because a rule is constitutionally valid if it "regulates matters which can reasonably be classified as procedural[.]"[351] Regarding the conflict with state affidavit of merit statutes, it is hard to conclude anything other than that Rules 8, 9, and 12 are wholly procedural because they establish the requirements for the sufficiency of a complaint filed in federal court with Rule 12 operating to test that sufficiency.[352] Likewise, a federal rule is valid under the REA if it does not " abridge, enlarge or modify any substantive right."[353] Drawing from *Sibbach*, Justice Scalia presented this question accordingly:

> [T]he 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[.]" The test is not whether the rule affects a litigant's substantive rights; most procedural rules do. What matters is what the rule itself regulates: If it governs only "the manner and the means" by which the litigants' rights are "enforced," it is valid; if it alters "the rules of decision by which [the] court will adjudicate [those] rights," it is not.[354]

In short, state affidavit of merit statutes impermissibly conflict with the federal rules, and the application of Rules 8, 9, and 12 in their place by federal courts does not violate the Rules Enabling Act.

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349. *Id.* at 415–16 (plurality opinion) (internal citations omitted).

350. Hanna v. Plumer, 380 U.S. 460, 471 (1965) ("When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.").

351. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 8 (1987).

352. FED. R. CIV. P. 8–9, 12.

353. 28 U.S.C. § 2072(b).

354. *Shady Grove*, 559 U.S. at 407 (plurality opinion) (second, forth, and fifth alterations in original) (internal citations omitted).

VI. CONCLUSION

It is certainly a truism that the federal rules involve some degree of textual interpretation.[355] Without some action by Congress or specific language in the text of the rule itself, state law cannot limit the operation of the federal rules.[356] In performing a textual analysis to determine whether a conflict exists between a federal rule and a state statute, the scope of the state statute should be read solely in terms of its procedural functions, ignoring any substantive interpretation of the statute that might exist. The Federal Rules of Civil Procedure protect important procedural rights of litigants that cannot be displaced by a conflicting state law.[357]

On January 20, 2026, the Supreme Court issued its opinion in *Berk v. Choy*.[358] In this decision, the Court addressed the ongoing tension between state procedural requirements and the Federal Rules of Civil Procedure in diversity jurisdiction cases discussed throughout this Article.[359] In a unanimous decision, consistent with the reasoning outlined in this Article, the Court held that Delaware's affidavit of merit statute, requiring medical malpractice plaintiffs to submit an expert affidavit alongside the complaint, cannot be enforced in federal court because it conflicts primarily with Federal Rule of Civil Procedure 8.[360]

The majority opinion, authored by Justice Amy Coney Barrett and joined by seven justices, reaffirms the supremacy of valid federal rules over conflicting state procedural requirements, even when those state requirements serve state substantive policy goals.[361] Justice Ketanji Brown Jackson's separate concurrence, while agreeing with the outcome, articulates a different analytical framework that may prove influential in future cases.[362] This conclusion is consistent with the *Erie* doctrine, particularly as the doctrine is articulated in *Shady Grove.* However, while this conclusion is correct, it may lead to an unfortunate result as a matter of normative policy.

States certainly have a legitimate interest in limiting and minimizing frivolous lawsuits against professionals,[363] such as doctors. However, the

355. Orin S. Kerr, *A Theory of Law*, 16 GREEN BAG 2d 111, 111 (2012).

356. *See Shady Grove*, 559 U.S. at 401.

357. Intercon Sols., Inc. v. Basel Action Network, 969 F. Supp. 2d 1026, 1048 (N.D. Ill. 2013), *aff'd on other grounds*, 791 F.3d 729 (7th Cir. 2015).

358. 146 S. Ct. 546 (2026).

359. *Id.* at 552.

360. *Id.* at 557.

361. *Id.* at 556–57.

362. *See id.* at 557–64 (Jackson, J., concurring in the judgment).

363. *See* Youssoufian, *supra* note 75, at 1484.

federalism interests embedded in the *Erie* doctrine are also important.[364] The Court has long recognized that federal procedural mechanisms embedded in the federal rules inevitably impact state substantive rights by their procedural operation.[365] Protections against frivolous substantive claims do not cease to exist where no state affidavit of merit statute exists, in that state affidavit of merit statutes do not create or eliminate any substantive defenses.[366] The Federal Rules of Civil Procedure provide adequate protections against frivolous substantive claims brought in federal court. However, states may be able to avoid the conflict discussed throughout this Article by placing the requirement for the submission of an affidavit of merit within the state procedural rules governing discovery, similar to the requirement of expert reports found in Rule 26 of the Federal Rules of Civil Procedure.[367]

364. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 13–14 (1941).

365. *See* Hanna v. Plumer, 380 U.S. 460, 473–74 (1965) (rejecting an argument that a federal rule "must cease to function whenever it alters the mode of enforcing" substantive rights); *see also* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 430-32 (2010) (Stevens, J., concurring in part and concurring in the judgment) (explaining that the Rules Enabling Act inquiry is "not always a simple one" because almost any rule of procedure can be said to have substantive effects).

366. *See, e.g.*, Makaeff v. Trump Univ., LLC, 715 F.3d 254, 273 (9th Cir. 2013) (Kozinski, C.J., concurring) (similarly noting that an anti-SLAPP statute "merely provides a procedural mechanism for vindicating existing rights[,]" rights that are already protected by the Federal Rules of Civil Procedure).

367. *See* FED. R. CIV. P. 26(a)(2)(B).