I. Introduction

Medical care has become a frightening expense in the twenty-first century. The growing number of medical malpractice lawsuits represents a large factor in the increasing cost of medical treatment.¹ In an effort to curb the alarming growth rate of medical malpractice actions over the past several decades,² legislatures around the country have enacted measures to heighten the standards and procedures under which plaintiffs can bring medical liability actions.³ In 2003, the Oklahoma legislature followed the trend of other states by passing the Affordable Access to Health Care Act (Health Care Act),⁴ which requires plaintiffs in a medical liability action to attach an affidavit to their petition attesting that they have consulted an expert and have received a written opinion from that expert concluding, after an examination of the available facts, that the plaintiff’s claim is meritorious.⁵

The Health Care Act embodies a legislative effort to reform medical liability to increase access to health care services while simultaneously decreasing the cost of liability insurance for such actions.⁶ The Oklahoma legislature designed the Health Care Act to ensure that a plaintiff’s meritorious medical liability

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¹ President George W. Bush, State of the Union Address (Jan. 29, 2003), GPO Access, available at http://www.gpoaccess.gov/sou/index.html [hereinafter Bush, State of the Union Address] (“[O]ne of the prime causes of higher cost[s] [of our health care system] . . . . [is] the constant threat that physicians and hospitals will be unfairly sued. Because of excessive litigation, everybody pays more for health care . . . .”).

² Patricia M. Danzon, The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims, 48 OHIO ST. L.J. 413, 413 (1987) (noting that in the decade from 1975-1984, the number of medical malpractice claims filed per doctor grew by about 10% each year).

³ Nancy M. Simone, Medical Malpractice Litigation: A Comparative Analysis of United States and Great Britain, 12 SUFFOLK TRANSNAT’L L.J. 577, 577 (1989) (discussing the medical malpractice crisis of the 1970s that caused nearly all states to pass laws attempting to limit the number of malpractice claims filed by plaintiffs).

⁴ 63 OKLA. STAT. ANN. § 1-1708.1E (West Supp. 2004).

⁵ Id.

claim will receive “fair and adequate compensation” and to improve the overall “fairness and cost-effectiveness of . . . [Oklahoma’s] current medical liability system” by placing a procedural barrier in the path of medical malpractice plaintiffs filing suit in Oklahoma.7

This comment analyzes whether Oklahoma’s newly ratified Health Care Act, which mandates a heightened pleading standard as a prerequisite to a medical malpractice suit, applies in a diversity action in federal court. Because the Oklahoma statute requires the plaintiff to attach an affidavit at the pleading stage of litigation, this comment considers the Health Care Act’s applicability in light of the notice pleading standard under Rule 8 of the Federal Rules of Civil Procedure.8 This comment ultimately concludes that because Federal Rule 8 already covers the level of pleading required in federal courts, federal judges should refrain from applying the heightened pleading requirements of Oklahoma’s Health Care Act.

In Part II, this comment sets forth a practical and user-friendly analysis of the Erie doctrine9 that a federal judge can apply to any situation in which litigants ask a federal judge to apply state law rather than federal law. Part III compares various state statutes that require plaintiffs to file expert affidavits when bringing a medical malpractice action. Additionally, Part III considers the consequences when district judges within a single state use varying approaches in interpreting the scope of one of the Federal Rules of Civil Procedure. Part IV emphasizes the importance of determining the source of the controlling federal standard that arguably should prohibit a federal court from applying a state statute that affects pleading at the federal level. Part IV particularly considers the scope of Federal Rule 8 over federal court pleadings. Finally, Part V applies a full Erie analysis to the Health Care Act to provide guidance to Oklahoma federal courts choosing whether to apply the pleading requirements of the Health Care Act or Federal Rule 8 in medical malpractice suits.

II. The Erie Doctrine: Not As Scary As It Sounds

Like fingernails on a chalkboard or a wolf howling in darkness that is disturbed only by the light of a full moon, the mere mention of Erie causes most people who dwell in the legal world to shudder or cringe with fright. Such feelings most likely stem from a misunderstanding of the ideas and analytical

7. Id.
9. The Erie doctrine is the body of Supreme Court jurisprudence beginning with Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), that advises federal courts when to apply federal and when to apply state law.
framework embodied in the jurisprudence handed down from the U.S. Supreme Court labeled “The Erie Doctrine.” Unsurprisingly, many people do not hold *Erie* in high regard because of the doctrine’s perceived complexities. In fact, Supreme Court Justice Ruth Bader Ginsburg recently recognized that the pivotal classifications of the *Erie* doctrine, such as those distinguishing substance from procedure, can be “a challenging endeavor.” One district court judge went so far as to proclaim that “[i]f there has been a spell cast by these *Erie* incantations . . . it has produced more befuddlement than enchantment.” By examining the doctrine from a perspective that revolves around the origins of the arguably applicable federal law, however, an analytical framework can be formed that makes *Erie* easier to apply and understand, contrary to most lawyers’ initial fears.

**A. A User-Friendly Analytical Framework of the Erie Doctrine**

Federal courts and litigants may use the following “user-friendly” analysis in a federal diversity action when one of the litigants argues that the judge must apply the state standard or law rather than the federal standard or law. While this analysis is admittedly not a perfected scientific formula, it is intended to serve as a solid framework on which federal judges and litigants can build an *Erie* analysis.

As in any legal problem, the logical place to start is to define the issue. In an *Erie* problem, this requires identifying both the federal source of law and the state source of law. Thus, the first important question to ask is not whether the state law is substantive or procedural. A number of courts have mistakenly begun their *Erie* analysis with this inquiry in hopes of achieving a quick answer. In an effort to oversimplify *Erie*, these courts are distracted from the

true, “structured” path of the *Erie* search and often err in their final *Erie* determination. Instead, in an *Erie* analysis, federal courts must first determine the source of the federal law.

1. The Federal Law Stems from the U.S. Constitution or an Act of Congress

If the federal law stems directly from the U.S. Constitution, the Supremacy Clause requires federal courts to apply the federal standard. If, however, Congress directly created the federal law via a statute, then federal courts must first determine whether the statute is “sufficiently broad to control the issue before the Court.” In *Stewart Organization, Inc. v. Ricoh Corp.*, the Supreme Court explained that courts should engage in a “straightforward exercise in statutory interpretation” when deciding whether the federal statute at issue encompasses the point in dispute.

If the court determines that the federal statute covers the dispute at issue, the court should next consider whether Congress spoke within its constitutional powers when enacting the statute. Congress enacts laws in harmony with the Constitution when it uses the powers given by Article I, section 8 and the

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14. RTC Mortgage Trust 1994 N-1 v. Fid. Nat’l Title Ins. Co., 981 F. Supp. 334, 340 (D.N.J. 1997) (noting that the *Erie* doctrine “has occasionally (and both misleadingly and unhelpfully), been characterized as a question of whether the state statute is ‘substantive’ or ‘procedural.’ However, the test is much more structured, yet no less difficult to apply, than the frequently daunting choice between the two.”).

15. U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .”).

16. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26 (1988) (stating that “when the federal law sought to be applied is a congressional statute, the first and chief question for the district court’s determination is whether the statute is ‘sufficiently broad to control the issue before the Court’”)(quoting Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980)).


18. *Id.* at 26. The *Stewart* Court noted that the federal law and state law at issue do not have to be “perfectly coextensive and equally applicable to the issue at hand.” *Id.* at 27 n.4 (“It would make no sense for the supremacy of federal law to wane precisely because there is no state law directly on point.”). As Professor Allan Ides has noted, “[t]he lesson to be learned from *Ricoh* is that a federal procedural statute trumps contrary state law in a diversity case so long as the federal statute is designed to apply to the circumstances and so long as the federal statute can be classified as procedural.” Ides, *supra* note 12, at 77.

19. *Stewart Org.*, 487 U.S. at 27 (summarizing this inquiry by succinctly stating that “[i]f Congress intended to reach the issue before the District Court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter”); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that any law that is repugnant to the U.S. Constitution is automatically void).
Necessary and Proper Clause to create procedural rules or rules that, “though falling within the uncertain area between substance and procedure,” can rationally be classified as both.20 Thus, if the court determines that Congress enacted a federal statute in accordance with its constitutional authority, then the federal statute controls.21 In summary, when the court determines that (1) a statute is sufficiently broad to cover the issue of law at hand, and (2) Congress enacted the statute within its constitutional powers by regulating procedural or arguably procedural matters, the federal judge must apply the federal statute.22

If the source of the federal law stems from Congress as a Federal Rule of Civil Procedure, the court must first assess whether the rule is sufficiently broad to control the issue at hand.23 In making this assessment, the Supreme Court has instructed that courts should not impose an overly narrow interpretation of the Federal Rules.24 Nevertheless, Supreme Court precedent demonstrates that the Court does not always adhere to its own guidelines in giving the rules a plain reading.25 Courts have the discretion to interpret a rule as being either

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20. Hanna v. Plumer, 380 U.S. 460, 472 (1965). The Hanna Court explained that Congress has the power to create “rules governing the practice and pleading in [federal] courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.” Id.


22. Id. at 27 (“[A] district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress’ constitutional powers.”). Id.

23. Burlington N. R. R. Co. v. Woods, 480 U.S. 1, 4-5 (1987) (noting that the first inquiry is whether the scope of the Federal Rule is broad enough to directly collide with the state law).


25. Interestingly, the Supreme Court went to great lengths in Walker to set forth a “plain meaning” test, which mandated that courts not take an overly narrow approach to the direct collision analysis. Id. Nevertheless, the Court read Federal Rule 3 narrowly. Id. at 751 (limiting Rule 3’s breadth to governing the date from which the Federal Rules’ requirements take effect and narrowly interpreting Rule 3 as not affecting state statutes of limitation). Most recently, in Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996), the Supreme Court once again ignored Walker’s mandate of broadly interpreting Federal Rules and Stewart’s policy of applying relevant federal procedural statutes by holding that “[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies.” Richard D. Freer, Some Thoughts on the State of Erie After Gasperini, 76 TEX. L. REV. 1637, 1643 (1998) (quoting Gasperini, 518 U.S. at 427 n.7). The exact basis of the Court’s conclusion in Gasperini is hard to grasp. Accordingly, scholars have extensively criticized Gasperini, and one scholar has concluded that although the Court had an excellent opportunity to make a “meaningful contribution” to the Erie analysis, particularly in clarifying the Rules of Decision Act and its decision in Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525 (1958), the Court instead “left the field about as murky as it was before.” Id. at 1663; see also Wendy Collins Perdue, The Sources and Scope of Federal Procedural Common Law: Some Reflections on Erie and Gasperini, 46 U. KAN. L. REV. 751, 751 (1998) (recognizing that the Court’s recent Erie jurisprudence, including Gasperini, has not made the
broad enough to govern the issue before the court or, alternatively, narrow enough to avoid a direct collision with the state rule or law. Although the Supreme Court noted in *Walker v. Armco Steel Corp.* that federal courts must give the Federal Rules their "plain meaning" when determining their ability to sufficiently control the area of law at issue, judges still have different preferences when interpreting the Federal Rules. Thus, whether a rule applies in federal court largely depends on whether the judge interprets the rule narrowly or broadly.

After determining that the scope of the Federal Rule encompasses the point in dispute, the court must apply the rule if it represents "a valid exercise of Congress' rulemaking authority." In such a circumstance, *Hanna v. Plumer* clearly admonishes the federal judge to avoid the "relatively unguided" *Erie* analysis because the judge has already "been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and

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*Erie* doctrine any easier to understand and has ultimately created more questions than answers). Despite such widespread criticism, *Gasperini's* effect on the Court's *Erie* analysis remains to be seen. If the Court continues down the path it took in *Gasperini* toward *Walker's* narrow application of *Erie*, fewer instances of "direct collision" between state and federal law will likely occur, which will result in a greater propensity of the Court to narrowly interpret federal laws so that the ideas and policies behind state laws can be applied. *See Gasperini,* 518 U.S. at 428 n.9.

27. 446 U.S. 740 (1980).
28. *Id.* at 750 n.9.
29. Freer, *supra* note 25, at 1642 (noting that the "plain meaning" instruction "is not much of an instruction because plain meaning is undoubtedly in the eye of the beholder").
30. Rhett Traband, *An Erie Decision: Should Statutes Prohibiting the Pleading of Punitive Damages Claims Be Applied in Federal Diversity Actions?*, 26 STETSON L. REV. 225, 235-36 (1996). Although the *Hanna* decision allowed federal courts significant leeway in finding conflict between state law and federal rules, the *Walker* Court seemed to indicate that courts tend to construe laws to avoid such a direct conflict. *Id.* Because judges can construe the laws to make them avoid or achieve collision, a thorough analysis will consider both possible approaches.

32. 380 U.S. 460 (1965). *Hanna v. Plumer* remains perhaps the single most influential decision in interpreting and applying the *Erie* doctrine. *Ides, supra* note 12, at 56 ("Next to *Erie, Hanna* is the Court's most important decision in this realm, largely because it reestablishes the primacy of legitimate federal law and provides a coherent method for assessing the legitimacy of that law."). Courts rarely decide an *Erie* issue without citing to the “twin aims” of *Erie*, which are described in footnote nine of the *Hanna* opinion. *Hanna,* 380 U.S. at 468 n.9 (establishing the “twin aims of the *Erie* rule [as]: [1] discouragement of forum-shopping and [2] the avoidance of inequitable administration of the laws").
33. *Hanna,* 380 U.S. at 471.
Congress erred” in determining that the rule is consistent with both the Rules Enabling Act and the U.S. Constitution.\textsuperscript{34}

To determine whether a Federal Rule of Civil Procedure is authorized by congressional power, the federal court must make two inquiries. First, the court must determine whether Congress’s delegation to the Supreme Court of the task of creating the Federal Rules under the Rules Enabling Act was a delegation to regulate matters procedural or arguably procedural.\textsuperscript{35} Second, the federal court must determine whether the Federal Rule infringes on any substantive right. This second inquiry is required because, although the Rules Enabling Act gives power to the Supreme Court to formulate procedural rules of law to govern civil actions in the U.S. district courts, the text explicitly states that such rules are not valid if they “abridge, enlarge, or modify any substantive right.”\textsuperscript{36}

In \textit{Sibbach v. Wilson & Co.},\textsuperscript{37} the Court broadly interpreted the caveat that the Federal Rule must not infringe upon substantive rights. The Court held that the initial inquiry in determining whether a Federal Rule complies with the Rules Enabling Act is to decide whether the rule “really regulates procedure.”\textsuperscript{38} In making such an inquiry, the Court noted that substantive rights should not be equated with “important” or “substantial” rights, thus eliminating arguments that a federal court should categorize a rule as substantive merely because of its importance to the lawsuit.\textsuperscript{39} Also, the \textit{Sibbach} Court suggested that a Federal Rule should be presumed valid under the Rules Enabling Act because Congress’s failure to take adverse action against the Federal Rules at the time of their conception “indicates, at least, that no transgression of legislative policy was found.”\textsuperscript{40} Therefore, because Congress had an opportunity to declare that a rule violates the Rules Enabling Act during its adoption process and declined to do so gives weight to the argument that the Federal Rules do not “abridge, enlarge, or modify any substantive right.”\textsuperscript{41}

\begin{itemize}
  \item \textsuperscript{34} \textit{Id}.
  \item \textsuperscript{35} \textit{See id. at 472}.
  \item \textsuperscript{36} \textit{See The Rules Enabling Act, 28 U.S.C. § 2072 (2000) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals. Such rules shall not abridge, enlarge or modify any substantive right.”).}
  \item \textsuperscript{37} 312 U.S. 1 (1941).
  \item \textsuperscript{38} \textit{Id. at 14}.
  \item \textsuperscript{39} \textit{Id. at 11}.
  \item \textsuperscript{40} \textit{Id. at 16}.
\end{itemize}
In addition to Sibbach’s generous interpretation of the Rules Enabling Act, the Supreme Court has never found a procedural rule to have more than an incidental effect on a substantive right, thanks in large part to the logistical process by which the Federal Rules were created. Furthermore, the process by which an amendment to an old rule or proposal for a new rule must currently pass before taking effect also contributes to the validity of the Federal Rules. Accordingly, the Court has never struck down a Federal Rule of Civil Procedure as violating the Rules Enabling Act. Therefore, if the source of federal law is a Federal Rule of Civil Procedure that (1) covers the issue in dispute, and (2) does not exceed the power given to the Supreme Court by Congress to create such rules in that it regulates arguably procedural matters and does not have more than an incidental effect on substantive rights, then the federal court must apply the Federal Rule.46


43. Struve, supra note 41, at 1103 (noting that amendments and proposals to the Federal Rules must undergo at least seven stages of formal review from “five separate institutions: the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, the Supreme Court, and Congress”).

44. Id. at 1147 (“To the contrary, the Court has created a presumption of validity for the Rules based on their transmission by the Court and on Congress’s failure to enact legislation to prevent them from taking effect.”).

45. At least one scholar has argued that the Supreme Court’s large role in creating the Federal Rules of Civil Procedure should be extended to interpreting the Federal Rules because, unlike statutory interpretation, the Court does not have to defer to another branch to determine legislative intent or to avoid infringing upon another branch’s federal powers. See Joseph P. Bauer, Schiavone: An Un-Fortune-ate Illustration of the Supreme Court’s Role as Interpreter of the Federal Rules of Civil Procedure, 63 NOTRE DAME L. REV. 720, 720 (1988). Instead, the Court should have full rein to interpret the Federal Rules as broadly as they deem necessary for the rules to take the full effect and role intended by the Court. Id.; see also Karen Nelson Moore, The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure, 44 HASTINGS L.J. 1039, 1093, 1097 (1993) (stating that because Congress has “delegated to the Court rulemaking power . . . it is not inconsistent to imply the Court has greater power to interpret Rules than it does to interpret statutes”). But see Struve, supra note 41, at 1102 (contending that “Congress’s delegation of rulemaking authority should constrain, rather than liberate, courts’ interpretation of the Rules”).

2. The Federal Law Derives from a Judge-Made Standard

Finally, in such instances where the federal law does not derive from the U.S. Constitution or from Congress via a statute or rule, courts must determine whether the federal law is a “judge-made rule” that can provide the applicable rule of decision. If the source of federal law appears to be a judge-made standard, the court must engage in an outcome-determination analysis that applies Hanna v. Plumer’s “twin aims” of Erie.

The Hanna Court established the “twin aims of the Erie rule [as]: discouragement of forum-shopping and the avoidance of inequitable administration of the laws.” Thus, the twin aims analysis determines (1) whether there is such a difference between the state and federal laws as to cause a litigant to forum shop, and (2) whether the difference between the federal and state laws would unfairly discriminate against citizens of the forum state. Federal courts must apply the test for outcome-determination from an ex ante perspective by looking at the facts as they existed before the filing of the lawsuit rather than at the time the issue is raised in litigation. If the federal law is not outcome-determinative under the twin aims of Erie, then the court should apply the federal law.

If the federal law appears to be outcome-determinative — for example, if it is clear in advance that applying or failing to apply a rule will greatly favor one

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48. Seven years after Erie, the Supreme Court decided Guaranty Trust Co. of New York v. York, in which the Court announced that it intended Erie to ensure that in federal diversity actions, “the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in State court.” 326 U.S. 99, 109 (1945) (emphasis added). Thus, York derived from Erie an outcome-determination test that favors vertical uniformity — that is, achieving the same results whether in state or federal court — over horizontal uniformity, which favors attaining similar outcomes in all federal courts. Jed I. Bergman, Note, Putting Precedent in Its Place: Stare Decisis and Federal Predictions of State Law, 96 COLUM. L. REV. 969, 980 n.60 (1996) (noting that horizontal uniformity among federal courts was sacrificed to achieve vertical uniformity among state and federal courts under Erie). In other words, the Court recognized that in a federal diversity action, the federal judge should apply the governing rules a state judge would so that litigants do not receive a substantive advantage by strategically filing in one court instead of the other.
49. See Hanna, 380 U.S. at 468 n.9.
50. Id. at 468.
51. Id.
52. Richard D. Freer, Erie's Mid-Life Crisis, 63 TUL. L. REV. 1087, 1106 (1989) (stating that “[i]nstead of assessing outcome determination at the point at which it is raised in litigation — when it will always make a difference in outcome — it should be assessed ex ante, as of the outset of litigation”).
of the parties — then the court must take another step to determine if an affirmative countervailing federal interest exists.\textsuperscript{53} In \textit{Byrd v. Blue Ridge Rural Electric Cooperative, Inc.},\textsuperscript{54} the Supreme Court recognized that when there are “affirmative countervailing considerations at work,” federal judges should consider more than whether a different “outcome” would occur in state and federal court.\textsuperscript{55} The \textit{Byrd} Court balanced the “policy of uniform enforcement of state-created rights and obligations” with the “federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts.”\textsuperscript{56} The Court determined that federal courts should not apply the state rule allowing a judge to decide the facts in particular cases in diversity actions to preserve the federal constitutional preference for a jury trial.\textsuperscript{57}

The only affirmative countervailing interest recognized by the Supreme Court thus far is the federal system’s preference for a jury trial recognized in \textit{Byrd}.\textsuperscript{58} Such preference stems from the Supremacy Clause, which requires judges to apply the Seventh Amendment over state law.\textsuperscript{59} This balancing step is the unguided portion of the \textit{Erie} analysis because judges must make a policy choice between federal and state laws.\textsuperscript{60} In essence, the judge balances whether the policy preferring the same outcomes in federal and state courts outweighs the affirmative countervailing interest of following the federal law.\textsuperscript{61} If the policy of vertical uniformity outweighs the policy behind the federal law, then the judge should apply the state law.\textsuperscript{62}

\begin{itemize}
  \item \textsuperscript{54} 356 U.S. 525 (1958).
  \item \textsuperscript{55} \textit{Id.} at 537.
  \item \textsuperscript{56} \textit{Id.} at 537-38.
  \item \textsuperscript{57} \textit{Id.}
  \item \textsuperscript{58} See \textit{id.} at 539.
  \item \textsuperscript{59} See \textit{id.}
  \item \textsuperscript{60} See \textit{id.} at 538 (“[T]he inquiry here is whether the federal policy favoring jury decision of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.”).
  \item \textsuperscript{61} See \textit{id.}
  \item \textsuperscript{62} While the conventional \textit{Erie} analysis subjects all cases involving judge-made federal law to the balancing test, some commentators question this approach. According to one alternative view, the balancing test does not apply if either the judge-made federal law is true federal common law or the state practice is bound-up with substantive rights. See Steven S. Gensler, \textit{The Relatively Underguided Erie Analysis} (unpublished draft, on file with author). Professor Gensler argues that courts mistakenly use the balancing test to identify state rules of decision when the test’s proper role is far more limited — to solve so-called \textit{Erie} conflicts after the court has determined that the state rule or practice is not a rule of decision. \textit{Id.} In contrast, if the case involves either true federal common law or a state rule of decision, then the case is in fact “guided” by the plain text of the Rules of Decision Act. \textit{Id.}
\end{itemize}
B. Erie Analysis Summary

In summary, the *Erie* analysis consists of three main branches — federal laws stemming from (1) the U.S. Constitution, (2) acts of Congress, and (3) judge-made standards. The source of the federal law determines the path of analysis down which to travel.

If the Constitution is the source of the law, the Supremacy Clause mandates that the constitutional provision apply.63 If Congress provides the source of law directly via a federal statute, then courts should apply the federal statute so long as it covers the point in dispute and was enacted within Congress’s constitutional authority by covering matters that can be classified as procedural or arguably procedural.64 Similarly, if Congress provides the source of law indirectly through its delegated rule-making power, then courts should apply the Federal Rule as long as it covers the issue in dispute and Congress has acted within its constitutional powers by enacting a procedural rule in compliance with the Rules Enabling Act.65

Finally, if the source of law stems from judge-made federal law, the court must apply the twin aims of *Erie* under *Hanna*. Thus, the federal court should defer to and apply state law if the disparity between the federal and state standards would encourage forum shopping. If a federal affirmative countervailing interest outweighs the preference for vertical uniformity, however, the federal court should apply the federal standard even if the difference in the standards causes litigants to forum shop.66

III. Certificates of Merit in Federal Court: A Contrast Among the Various State Statutes

When assessing whether *Erie* requires federal courts to apply federal or state pleading requirements in medical malpractice actions, a federal judge must separately examine each state statute to determine the source of the federal law. In other words, the judge must establish the origins of the federal standard that arguably controls the issue at hand. The determining factor for whether to apply the state statute in federal court depends on whether the state law conflicts with a federal statute, a Federal Rule of Civil Procedure, or a federal judge-made rule.67 Thus, after determining what the state statute prescribes, a

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63. U.S. CONST. art. VI.
64. See supra notes 16-21 and accompanying text.
66. See Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965); see also Byrd, 356 U.S. at 537-38.
federal judge must further examine whether a Federal Rule or other federal law already governs the particular area of law.

Many federal judges are presented with the opportunity to apply an *Erie* analysis when examining state certificate of merit statutes. Such statutes require plaintiffs “to file a certificate . . . that certifies, typically by way of an attached expert report, that the claim is meritorious.”68 As illustrated by the differences among courts in applying certificate of merit statutes, the text and specific requirements of each statute are fundamental in determining the source of the federal law and, ultimately, in determining a state statute’s applicability in federal court under *Erie*.

A. Georgia and Florida: Federal Rule 8 Governs

More than one Georgia court has held strong to the proposition that Federal Rule 8 is the controlling law for the “form of pleading in federal court.”69 The Georgia statute interpreted in these cases requires plaintiffs to file an affidavit “of an expert competent to testify” with their complaint in a medical malpractice suit.70 The Georgia statute also requires the filed affidavit to specifically assert facts that support at least “one negligent act or omission claimed to exist.”71

In *Boone v. Knight*,72 a Georgia district court noted that the Georgia statute that requires the attachment of an expert affidavit to the pleadings “is codified in the state’s civil procedure code and is essentially a pleading requirement.”73 The *Boone* court held that the statute essentially requires a pleading of evidence by compelling a plaintiff to attach an expert’s affidavit to the pleadings, an area

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70. GA. CODE ANN. § 9-11-9.1 (1998). The statute reads:
(a) In any action for damages alleging professional malpractice against a professional licensed by the State of Georgia . . . or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia . . . the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

Id.

71. Id.


73. Id. at 611.
of law that Federal Rule 8 clearly governs. In reaching its decision to apply Federal Rule 8, the Boone court cited various authorities that proclaim the fundamental principles of Rule 8’s liberal pleading requirements and that note the Rule’s deliberate difference from the detailed facts sometimes required in the state pleading system.

Basing its decision on the rule from Hanna v. Plumer, a second Georgia district court found that the Georgia statute was inapplicable in federal proceedings under diversity jurisdiction. In Baird v. Celis, the court considered that in Hanna, Federal Rule 4 would have governed the plaintiff’s service of process absent the Massachusetts statute covering service requirements in state proceedings. The Baird court interpreted Hanna to hold that

[w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: 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.

Adhering to Hanna’s determination that the “less restrictive Federal Rule [4] regarding service [be] applied in the federal diversity case despite the substantive policy behind the Massachusetts law,” the Baird court similarly held that the Georgia statute was not the governing law in federal court because Federal Rule 8 “would govern a professional malpractice plaintiff’s pleading requirements in the absence of the state created affidavit requirement.” The Baird court recognized that Georgia’s affidavit requirement, like the state rule in Hanna, “creates a higher standard for plaintiffs seeking to initiate a particular type of action than the conflicting Federal Rule.” Much like the Supreme Court in Hanna, the Baird court acknowledged that while the Georgia legislature may have enacted the affidavit requirement with the substantive

74. Id.
75. Id. at 611-12 (stating that “[t]he pleading of evidence should be avoided insofar as it . . . violates the requirement of a short and plain statement” under Federal Rule 8 and that “[t]he Erie doctrine has very little application to pleading in a federal court. A complaint is sufficient if it meets the test of Rule 8(a), though it . . . fail[s] to set forth the detailed facts cherished in the state system.”) (internal quotations and citations omitted).
77. Id. at 1360.
78. Id. (quoting Hanna v. Plumer, 380 U.S. 460, 471 (1965)).
79. Id.
80. Id. at 1361.
policy of tort reform in mind, Federal Rule 8 still controls the pleading burden on plaintiffs in federal court.\textsuperscript{81}

In addition to the Georgia district court holdings, at least one Florida district court has similarly refused to apply a heightened pleading state statute, finding Federal Rule 8 to be sufficiently broad to control the pleading requirements in federal court. In \textit{Braddock v. Orlando Regional Health Care System, Inc.},\textsuperscript{82} the U.S. District Court for the Middle District of Florida interpreted a Florida statute requiring an affidavit from a medical expert to accompany the plaintiff’s complaint as a procedural rule and held that Federal Rule 8 was the governing source of the federal law.\textsuperscript{83} Furthermore, the court held that the heightened

\begin{itemize}
\item \textsuperscript{81} Id. On an interesting note, the Eleventh Circuit had the opportunity to interpret the Georgia statute evaluated in \textit{Boone and Baird}, but declined to do so. \textit{Brown v. Nichols}, 8 F.3d 770, 774 (11th Cir. 1993) (“We therefore need not reach the question of whether § 9-11-9.1 actually applies in federal court.”); \textit{see also} Harris, supra note 11, at 299 (“Rather than attempting to resolve the question of whether the Georgia statute applied in federal court, the Eleventh Circuit passed up an ideal opportunity to rule on Georgia’s expert affidavit statute by putting off the true question for another day.”). In \textit{Brown v. Nichols}, 8 F.3d 770 (11th Cir. 1993), the Eleventh Circuit held that the district court erred in dismissing a malpractice petitioner’s complaint for failing to attach an expert affidavit. \textit{Id.} at 771-72. The Eleventh Circuit found that if the Georgia statute \textit{does not apply} in federal courts, then the district court erred in dismissing the complaint because the complaint complied with Federal Rule 8. \textit{Id.} at 773. Alternatively, the Eleventh Circuit found that even if the Georgia statute \textit{does apply} in federal court, the district court should have allowed the petitioner a “reasonable time” to file the required affidavit rather than dismissing the claim with prejudice. \textit{Id.} Because the lower court should not have dismissed the plaintiff’s petition under either scenario, the Eleventh Circuit concluded that it need not reach the question of whether the Georgia statute applies in federal court. \textit{Id.} at 774. The court recognized, however, the Supreme Court’s recent emphasis “that the Federal Rules ‘do not require a claimant to set out in detail the facts upon which he bases his claim,’” reiterating the Eleventh Circuit’s repeated emphasis on the liberal principles behind the notice pleading standard that applies in federal court. \textit{Id.} at 773 (quoting \textit{Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit}, 507 U.S. 163, 168 (1993)).
\item \textsuperscript{82} 881 F. Supp. 580 (M.D. Fla. 1995).
\item \textsuperscript{83} \textit{Id.} at 584; \textit{see also} \textit{FLA. STAT. ANN.} § 766.203(2) (West 1997). The statute reads:
Prior to issuing notification of intent to initiate medical malpractice litigation pursuant to s. 766.106, the claimant shall conduct an investigation to ascertain that there are reasonable grounds to believe that:

\begin{enumerate}
\item Any named defendant in the litigation was negligent in the care or treatment of the claimant; and
\item Such negligence resulted in injury to the claimant.
\end{enumerate}
Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant’s submission of a verified written medical expert opinion from a medical expert as defined in s. 766.202(5), at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.
\textit{FLA. STAT. ANN.} § 766.203(2).
\end{itemize}
B. New Jersey and Colorado: No Direct Conflict Exists Between the Federal Rules of Civil Procedure and Certificate of Merit Statutes

Contrary to lower court findings based on the respective Georgia and Florida statutes, the Third and Tenth Circuits have refused to find a direct collision between a Federal Rule of Civil Procedure and the New Jersey or Colorado state statutes. Accordingly, both the Third and Tenth Circuits have applied the state statutes in federal court.  

In *Chamberlain v. Giampapa*, the Third Circuit considered New Jersey’s heightened pleading statute requiring the plaintiff in a medical malpractice action to file an affidavit of a licensed physician within sixty days of the date of the answer, and rejected Federal Rule 8 as the governing source of the federal law. The court reasoned that because the New Jersey statute requires the
plaintiff to file an affidavit of merit sixty days after the defendant’s answer, the
pleading requirements remain unaffected, and thus, there is no direct collision
between the affidavit of merit statute and Rule 8.89

The court further stated that the purpose of the New Jersey statute is not to
“give notice of the plaintiff’s claim,” but to ensure that illegitimate medical
malpractice claims will be “terminated at an early stage in the proceedings.”90
Such reasoning, however, ignores the structure of notice pleading and the
purpose of Federal Rules 12 and 56 in the federal system, which are designed
eradicate unmeritorious claims early in the litigation process.91 Furthermore,
the Third Circuit reasoned that Federal Rule 992 was not triggered because the
New Jersey statute does not require the affidavit to include any statement of
facts. Thus, the court concluded that the statute does not contain a heightened
pleading requirement.93 Because the Third Circuit noted that the New Jersey
statute does not compromise any of the policy choices set forth in Rules 8 and
9, the court concluded that the statute could coexist with the Federal Rules.94
Having rendered such a narrow reading of Federal Rules 8 and 9, the court
emphasized that failing to apply the New Jersey statute in federal courts would
result in forum shopping and an inequitable administration of the laws.
Additionally, the court rejected the notion that any affirmative countervailing
federal interest might outweigh the state policy behind the affidavit of merit
statute.95

The Tenth Circuit reached a similar conclusion regarding the applicability
of a state statute in federal court in evaluating the Colorado heightened pleading

practice substantially to the general area or specialty involved in the action for
a period of at least five years. The person shall have no financial interest in the
outcome of the case under review, but this prohibition shall not exclude the
person from being an expert witness in the case.
89. Chamberlain, 210 F.3d at 160.
90. Id.
91. Fed. R. Civ. P. 12, 56 (setting forth vehicles for dismissal of the suit and the summary
judgment standard to be applied by courts, respectively). By instituting additional policies in
an attempt to eradicate illegitimate lawsuits early in the litigation process, courts infringe upon
the Federal Rules of Civil Procedure. The Federal Rules have already created the procedural
rules for federal courts to abide by and, in doing so, have already taken into consideration the
desired level of pleading requirements and have provided courts with an opportunity to dismiss
an illegitimate lawsuit early in the process via the appropriate summary judgment procedure.
92. Fed. R. Civ. P. 9 (mandating a heightened pleading standard for fraud and mistake by
requiring plaintiffs to plead such allegations with particularity).
93. See Chamberlain, 210 F.3d at 160.
94. Id.
95. See id. at 161.
standard in *Trierweiler v. Croxton & Trench Holding Corp.* 96 In 1996, the Tenth Circuit narrowly interpreted the Colorado medical malpractice pleading statute 97 requiring a plaintiff’s attorney to certify within sixty days of filing that

96. 90 F.3d 1523 (10th Cir. 1996).

97. At the time that *Trierweiler* was decided, the pertinent part of the statute read:

1. In every action for damages or indemnity based upon the alleged professional negligence of a licensed professional, the plaintiff’s or complainant’s attorney shall file with the court a certificate of review, for each licensed professional named as a party, as specified in subsection (3) of this section, within sixty days after the service of the complaint, counterclaim, or cross claim against such licensed professional unless the court determines that a longer period is necessary for good cause shown.

2. A certificate of review shall be executed by the attorney for the plaintiff or complainant declaring:

(I) That the attorney has consulted a person who has expertise in the area of the alleged negligent conduct; and

(II) That the professional . . . has reviewed the known facts relevant to the allegations of negligent conduct and, based on such facts, has concluded that the filing of the claim, counterclaim, or cross claim does not lack substantial justification within the meaning of section 13-17-102(4).

3. The failure to file a certificate of review in accordance with this section shall result in the dismissal of the complaint, counterclaim, or cross claim.

*Trierweiler*, 90 F.3d at 1538 n.9 (quoting COLO. REV. STAT. § 13-20-602). The statute currently reads:

1. In every action for damages or indemnity based upon the alleged professional negligence of an acupuncturist . . . or a licensed professional, the plaintiff’s or complainant’s attorney shall file with the court a certificate of review for each acupuncturist or licensed professional named as a party, as specified in subsection (3) of this section, within sixty days after the service of the complaint, counterclaim, or cross claim against such person unless the court determines that a longer period is necessary for good cause shown.

2. A certificate of review shall be filed with respect to every action described in paragraph (a) of this subsection . . .

3. In the event of failure to file a certificate of review in accordance with this section . . . the defense may move the court for an order requiring filing of such a certificate. The court shall give priority to deciding such a motion, and in no event shall the court allow the case to be set for trial without a decision on such motion.

4. A certificate of review shall be executed by the attorney for the plaintiff or complainant declaring:

(I) That the attorney has consulted a person who has expertise in the area of the alleged negligent conduct; and

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

(4) The failure to file a certificate of review in accordance with this section shall result in the dismissal of the complaint, counterclaim, or cross claim.


98. Trierweiler, 90 F.3d at 1540; see also FED. R. CIV. P. 11. Federal Rule 11 reads:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose . . . ;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

FED. R. CIV. P. 11 (emphasis added).

99. Id. at 1540; see also FED. R. CIV. P. 11. Federal Rule 11 reads:

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(1) it is not being presented for any improper purpose . . . ;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .

100. FED. R. CIV. P. 11.

101. Trierweiler, 90 F.3d at 1540.

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

103. Id.

104. Id. (quoting Martinez v. Baldi, 842 P.2d 245, 251 (Colo. 1992)).
from the adverse party, and by Federal Rule 56, which provides litigants with an opportunity to eradicate frivolous or meritless lawsuits at an early stage of the proceedings.106

The Trierweiler court justified its decision to apply the Colorado statute in federal court by reasoning that the statute “vindicates substantive interests of Colorado not covered by Rule 11.”107 Accordingly, and despite their similarities, the court failed to find a “direct collision” between Rule 11 and the state statute.108 Because the court did not find a collision between the two, it held that: (1) a plaintiff seeking to litigate a medical malpractice claim would be more inclined to forum shop because of the obvious advantage of filing in a court system that does not require a “certificate of review hurdle;”109 (2) the failure to apply the state statute in federal court would result in a penalty being inequitably bestowed upon plaintiffs in state court “but not on those in federal court;”110 and (3) the state policy reflected in the statute was “bound up with [state-created] rights and obligations.”111

C. Illinois: Disharmony Resounds Regarding Federal Rule 8

The disparities of the Erie application to certificate of merit statutes extend beyond interstate federal courts to the district courts within a single state.112 In 1985, the Illinois legislature amended the Illinois Code of Civil Procedure to include section 2-622,113 which requires plaintiffs in a medical liability action

107. Trierweiler, 90 F.3d at 1540.
108. Id.
109. Id. at 1541 (“A plaintiff alleging professional negligence is likely to seek a forum without the certificate of review hurdle either to avoid the extra cost, to give himself or herself more time to build a meritorious case, or to increase the settlement value of his or her claims . . . .”) (emphasis added).
110. Id.
113. 735 ILL. COMP. STAT. 5/2-622 (1998). The statute reads in pertinent part:
   (a) In any action, whether in tort, contract or otherwise, in which the plaintiff seeks damages for injuries or death by reason of medical, hospital, or other healing art malpractice, the plaintiff's attorney or the plaintiff, if the plaintiff is proceeding pro se, shall file an affidavit, attached to the original and all copies of the complaint, declaring one of the following:
   1. That the affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: (i) is knowledgeable in the relevant issues involved in the particular action; (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action; and (iii)
in Illinois to file a certificate of merit from a medical expert validating the basis for bringing the suit with their petition. Although the Illinois statute was enacted over fifteen years ago, federal district courts still differ on the issue of whether the statute applies to a federal diversity action for medical malpractice. Illinois federal judges at the district level have adopted at least three conflicting methods of applying the statute in federal court.

Most Illinois federal district courts have applied the state statute at both the state and federal level. By construing the nature of the expert affidavit as an “attachment” rather than a pleading standard, these courts found Federal Rule 8 inapplicable. Accordingly, these courts moved directly into an analysis under the twin aims of *Erie* and concluded that applying the statute in state court, but not in federal court, would lead to both forum shopping and discrimination among litigants.

Still, another set of federal judges from the district courts of Illinois have declined to apply the Illinois statute to federal diversity actions because they

is qualified by experience or demonstrated competence in the subject of the case; that the reviewing health professional has determined in a written report, after a review of the medical record and other relevant material involved in the particular action that there is a reasonable and meritorious cause for the filing of such action; and that the affiant has concluded on the basis of the reviewing health professional's review and consultation that there is a reasonable and meritorious cause for filing of such action.

[T]he affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit. The report shall include the name and the address of the health professional.

*Id.*


116. *Id.* at 72. Robert P. Vogt contends that while the Seventh Circuit has not “expressly ruled that section 2-622 applies to medical malpractice claims filed in Illinois federal district courts, the court has issued two opinions suggesting as much.” *Id.* at 73 (suggesting that *Hines v. Elkhart General Hospital*, 603 F.2d 646 (7th Cir. 1979), and *Sherrod v. Lingle*, 223 F.3d 605 (7th Cir. 2000), both require the application of section 2-622 in federal court).


118. *Id.*; see Thompson *ex rel.* Thompson v. Kishwaukee Valley Med. Group, No. 86 C 1483, 1986 WL 11381, at *2 (N.D. Ill. Oct. 6, 1986) (explaining that section 2-622 does not collide with either Federal Rule 8 or 9 because the attachment of an affidavit does not enlarge the pleading requirements).

have recognized the Illinois statute as “a mere ‘state pleading rule.’”\textsuperscript{120} Further, these judges acknowledged the direct conflict between the statute and the liberal pleading standards mandated by Federal Rule 8.\textsuperscript{121} As one judge explained, “I will not dismiss a state claim made in federal court for failure to comply with a state pleading rule.”\textsuperscript{122}

Finally, at least two federal district court judges in Illinois have ruled both ways regarding the statute’s applicability in federal court.\textsuperscript{123} Both judges initially found the Illinois state statute applicable in federal court. In subsequent cases, however, both judges refused to dismiss a plaintiff’s claim for failure to comply with the state pleading rule.\textsuperscript{124}

Although the courts’ disharmony in applying additional pleading requirements in federal court based on state medical malpractice statutes may initially appear odd, such disparities are logical and explicable because, as illustrated by New Jersey, Colorado, Georgia, and Florida, judges rely on variations in the state statutes to justify decisions for or against applying the heightened pleading requirements in federal court. Regardless of the statutory variations in timing or other technical requirements, however, any attempt to heighten the level of pleading required in federal court directly contravenes the notice pleading requirements set forth in Federal Rule 8. Nevertheless, because courts look to the variations within the statutory requirements, a careful examination of individual state statutes is important in determining whether expert affidavit requirements directly conflict with federal law and, therefore, should not be applied in federal court.

Still, as illustrated by Illinois, even courts applying the same state statute can disagree about the appropriate application of state or federal law. The disagreement among the Illinois courts illustrates the difficulty of forecasting whether federal courts will apply state certificate of merit statutes. Federal judges who read Rule 8 narrowly will determine that it can peacefully coexist with expert affidavit requirements and, therefore, will apply the state certificate of merit statute.\textsuperscript{125} Judges who read Rule 8 according to its plain meaning as directed by the Supreme Court in \textit{Walker v. Armco Steel Corp.},\textsuperscript{126} however, will find a direct collision between Rule 8 and the additional affidavit requirements

\textsuperscript{120} \textit{Id.} at 73 (quoting Threlkeld v. White Castle Sys., 127 F. Supp. 2d 986, 991 (N.D. Ill. 2001)).
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} (quoting Threlkeld, 127 F. Supp. 2d at 991).
\textsuperscript{123} \textit{Id.} at 75 n.19.
\textsuperscript{124} \textit{Id.} (criticizing the judges for their failure to explain their opinion on the issue and for their avoidance of mentioning their own past rulings).
\textsuperscript{125} \textit{See, e.g.,} Chamberlain v. Giampapa, 210 F.3d 154 (3d Cir. 2000).
\textsuperscript{126} \textit{Walker v. Armco Steel Corp.}, 446 U.S. 740, 749-50 (1980).
because of the liberal notice pleading standard mandated by Rule 8.\textsuperscript{127} Thus, federal courts must consider the specific text of the state statute coupled with the scope of Rule 8 as applied in federal court in the quest to determine whether a state’s certificate of merit requirements apply in federal court.

\section*{IV. The Scope of Federal Rule 8}

\subsection*{A. Just How Broad Is Federal Rule 8?}

A close examination of Federal Rule 8 reveals that the Rule is sufficiently broad to cover all pleading requirements in federal court.\textsuperscript{128} Furthermore, because Rule 8 already prescribes federal pleading standards, the Rule cannot peacefully coexist with state certificate of merit statutes, which impose additional expert affidavit pleading requirements.

Federal Rule 8 requires mere notice pleading. As one scholar recently explained, “a pleading is to do little more than indicate the type of litigation that is involved.”\textsuperscript{129} Such modern federal pleading standards were developed in response to the disdain for the detailed pleading requirements under the common law.\textsuperscript{130}

Common law pleadings were notoriously “slow, expensive, and unworkable” because litigants were forced through various stages of pleading that courts ultimately relied upon to determine the outcome of the suit.\textsuperscript{131} Thus, by the mid-1800s, many states had adopted the Field Code as an attempt to reform pleadings.\textsuperscript{132} In doing so, the Field Code moved the facts of the case to the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{127} E.g., Boone v. Knight, 131 F.R.D. 609, 611 (S.D. Ga. 1990).
\item \textsuperscript{128} See Mary Margaret Penrose & Dace A. Caldwell, \textit{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, 1021-25 (2005) (analyzing Rule 8’s history and purpose in concluding that Rule 8 is broad enough to cover all pleading requirements in federal court unless Rule 9 specifically provides otherwise).
\item \textsuperscript{129} Scozzaro, \textit{supra} note 42, at 416-17; \textit{see also} Richard L. Marcus, \textit{The Revival of Fact Pleading Under the Federal Rules of Civil Procedure}, 86 COLUM. L. REV. 433, 451 (1986) (“Whatever the earlier function of pleadings, the stated modern justification is limited to notice.”).
\item \textsuperscript{130} Robert B. Millner, \textit{Notice Pleading Today}, LITIG., Spring 1992, at 33, 33 (noting that before 1938, the common law requirements of detailed pleading meant that “[f]ailure to plead the magic words could mean prompt dismissal . . . . This process, known as fact pleading, was rife with technicalities and traps for the unwary, and litigation pleading was as much a game as a quest for justice.”).
\item \textsuperscript{131} Christopher M. Fairman, \textit{Heightened Pleading}, 81 TEX. L. REV. 551, 554-55 (2002) (quoting CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 467 (5th ed. 1994)). For a more extensive analysis of the history behind modern federal pleading standards, see Penrose & Caldwell, \textit{supra} note 128, at 1000-03.
\item \textsuperscript{132} Fairman, \textit{supra} note 131, at 555.
\end{enumerate}
\end{footnotesize}
forefront of the pleadings instead of focusing on the issues as required by common law.\textsuperscript{133} Rather than replacing common law pleadings with a more efficient system, however, the Field Code produced more undesired results as disputes escalated over whether allegations were evidence, facts, or conclusions of law.\textsuperscript{134} Thus, the framers of the Federal Rules of Civil Procedure carefully crafted Rule 8 with the deficiencies of the previous systems in mind.\textsuperscript{135} The framers drafted Rule 8(a)(2), in particular, to avoid the requirement of a pleading of the facts.\textsuperscript{136}

Only a few years after the federal courts adopted the Federal Rules of Civil Procedure, Judge Charles E. Clark, one of the principal drafters of the Federal Rules,\textsuperscript{137} articulated the meaning of Rule 8 in his majority opinion in \textit{Dioguardi v. Durning}.\textsuperscript{138} Judge Clark explained, “Under the new rules of civil procedure, there is no pleading requirement of stating ‘facts sufficient to constitute a cause of action,’ but only that there be ‘a short and plain statement of the claim showing that the pleader is entitled to relief . . . .’”\textsuperscript{139} In refusing to uphold a motion to dismiss for failure to state a claim based on an “obviously home drawn” and inartistic complaint, Judge Clark and the Second Circuit paved one of the first stepping stones on the pathway to recognizing a requirement of mere notice pleading under the modern Federal Rules of Civil Procedure.\textsuperscript{140}

If any doubts of the validity of the new liberal pleading requirements under the Federal Rules remained, these doubts were cast away years ago in the 1957 decision of \textit{Conley v. Gibson},\textsuperscript{141} when the U.S. Supreme Court displayed its overwhelming support for the “notice pleading” standard behind Rule 8.\textsuperscript{142} If \textit{Dioguardi} was a stepping stone on the path to recognizing notice pleading

\begin{itemize}
\item \textsuperscript{133} \textit{Id.}
\item \textsuperscript{134} \textit{Id.}
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} Marcus, \textit{supra} note 129, at 439 (stating that “Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases ‘fact,’ ‘conclusion,’ and ‘cause of action’”).
\item \textsuperscript{138} 139 F.2d 774 (2d Cir. 1944). While Justice Clark initially desired the “abolition of all pleading motions,” he settled for Federal Rule 8, which the drafters carefully wrote to avoid pleadings of fact and issue by requiring only a “short and plain statement of [the] claim.” Fairman, \textit{supra} note 131, at 556 (quoting \textit{Fed. R. Civ. P. 8(a)}).
\item \textsuperscript{139} \textit{Dioguardi}, 139 F.2d at 775 (quoting \textit{Fed. R. Civ. P. 8(a)(2)}).
\item \textsuperscript{140} \textit{Id.} at 774.
\item \textsuperscript{141} 355 U.S. 41 (1957).
\item \textsuperscript{142} See \textit{id.} at 47-48.
\end{itemize}
under Rule 8, then \textit{Conley v. Gibson} is the cornerstone of the Court’s notice pleading jurisprudence. Just a few years before the Court’s ruling in \textit{Conley}, a group of federal judges sought to resurrect a form of code pleading to require plaintiffs to plead at least a minimum amount of facts in support of their cause of action. Nevertheless, the Advisory Committee on the Civil Rules’ refusal to adopt the proposal to change Rule 8 coupled with the \textit{Conley} decision seemed to dispose of any lingering notions to revive code pleadings.\footnote{143}

In \textit{Conley}, the Court rejected the argument that a federal court should dismiss a complaint for failure to state specific facts to support its allegations.\footnote{144} The Court declared that its “decisive answer” to the dismissal argument was that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”\footnote{145} In addition to noting that the “illustrative forms” attached to the Federal Rules of Civil Procedure clearly demonstrate that Rule 8 requires only a mere “short and plain statement of the claim,” the \textit{Conley} Court also recognized that “simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules.”\footnote{146} Finally, the Court rejected the idea that the Federal Rules perceive pleading as a skillful game in which a single mistake by counsel could be detrimental to the outcome of the case, and instead adopted the approach that the purpose of pleading is “to facilitate a proper decision on the merits.”\footnote{147} The Court’s holding and analysis of Federal Rule 8 in \textit{Conley} has remained undisturbed for many years and is cited routinely for its proposition that Rule 8 means precisely what it says when it requires only "a short and plain statement of the claim."\footnote{148}

The U.S. Supreme Court relied on \textit{Conley}’s interpretation of Federal Rule 8 in \textit{Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit}.\footnote{149} In 1993, the \textit{Leatherman} Court determined whether federal courts may...
The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.\footnote{150}{Id. at 168 (citing Conley, 355 U.S. at 47).} After examining the Fifth Circuit’s decision, the Supreme Court declared that the “heightened pleading standard” was clearly “a more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief.”\footnote{151}{Id. at 164 (stating the issue before the court as whether a federal court could apply a “heightened pleading requirement” in civil rights cases alleging municipal liability under 42 U.S.C. § 1983).} Although the respondents argued that a mere notice pleading requirement would cause municipalities to devote significant amounts of time and money to discovery in each § 1983 case, thereby voiding their immunity from suit and disturbing their municipal duties,\footnote{152}{Id. at 167.} the Court held that harmonizing the “heightened pleading standard” required by the Fifth Circuit with the “liberal system of ‘notice pleading’ set up by the Federal Rules [of Civil Procedure]” was not feasible.\footnote{154}{Id.}

Furthermore, the Court noted that the drafters of the Federal Rules created Federal Rule 9(b) to specifically address instances in which a heightened pleading standard was required and that the drafters of Rule 9(b) had limited those instances to fraud and mistake.\footnote{155}{Id. at 168.} Although the Court acknowledged that if Rule 9(b) were written today, the drafters might have included civil rights claims against municipalities in the list of claims that plaintiffs are required to apply a “heightened pleading standard” that is more rigorous and stringent than the normal requirements of Rule 8 in civil rights cases alleging municipal liability.\footnote{150}{The Supreme Court reviewed a case in which the U.S. Court of Appeals for the Fifth Circuit affirmed the district court’s decision to dismiss a civil rights action under 42 U.S.C. § 1983 because it failed to meet the “heightened pleading standard.”\footnote{151}{Id. at 168 (citing Conley, 355 U.S. at 47).} After examining the 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plead with particularity, the Court correctly determined that it lacked the appropriate power to judicially engraft § 1983 claims into Rule 9(b). The Court recognized that only by the proper process of amending Rule 9(b) can a federal court apply a heightened pleading requirement to a § 1983 claim and that until such an amendment is made, municipalities will have to rely on “summary judgment and control of discovery to weed out unmeritorious claims.”

Before the Supreme Court’s holding in *Leatherman*, Professor Richard Marcus, in his article entitled “The Revival of Fact Pleading Under the Federal Rules of Civil Procedure,” identified three areas of law where lower courts had been more stringent in requiring fact pleading — securities fraud, conspiracy, and civil rights cases. Professor Marcus contended that the common thread between these three areas of law is twofold: (1) each area of law has undergone a significant increase in litigation since the Federal Rules’ inception in 1938; and (2) each of the three areas of law involves “the potential abuse of litigation because they often involve outwardly innocent or admitted behavior that can . . . result in very substantial liability.” Medical malpractice suits might logically fit into Professor Marcus’s three areas because of the recent growth of medical liability actions coupled with their potential abuse of litigation. The bottom line, however, as recently recognized by the Supreme Court, remains that “[a] requirement of greater specificity for particular claims is a result that ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.’”

Therefore, while allowing a heightened pleading standard to curb the growth of medical malpractice litigation and further the nationwide tort reform movement may seem proper from a policy standpoint, federal courts may not

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156. Id.
157. Id. at 168-69.
161. Bush, State of the Union Address, supra note 1 (urging Congress to pass “medical liability reform” because “[n]o one has ever been healed by a frivolous lawsuit”).
make this decision from the bench without engaging in judicial legislation.\textsuperscript{162}
The Constitution clearly sets forth that the legislative branch has sole authority to make new laws and amend old laws.\textsuperscript{163} Thus, according to \textit{Leatherman}, even if the Supreme Court determines that a form of heightened pleading is necessary in an area of law other than those provided for in Federal Rule 9,\textsuperscript{164} the appropriate judicial remedy is to change the Federal Rules through the proper amendment process.\textsuperscript{165}

\textbf{B. Swierkiewicz: The Breadth of \textit{Federal Rule 8} Is Affirmed}

In 2002, the Court further endorsed the minimal pleading standards prescribed by \textit{Federal Rule 8} in \textit{Swierkiewicz v. Sorema N.A.}\textsuperscript{166} In \textit{Swierkiewicz}, the Supreme Court rejected the notion that an employment discrimination plaintiff is required to plead specific facts to establish a prima facie case of discrimination.\textsuperscript{167} The petitioner had filed an action alleging that his employer improperly terminated him based on his age and national origin in direct violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967.\textsuperscript{168} The district court dismissed the petitioner’s complaint for failing to allege a prima facie case because the petition did not properly state circumstances that created an inference of discrimination.\textsuperscript{169} After the Second Circuit affirmed the district court’s dismissal of the action, the Supreme Court granted certiorari to “resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases.”\textsuperscript{170}

The Supreme Court determined that the court of appeals improperly construed evidentiary requirements as pleading standards, and therefore, erroneously required the petitioner to allege the following in his complaint: (1) that he was part of a “protected group,” (2) that he was qualified for the job at issue, (3) that he was the recipient of an “adverse employment action,” and (4)

\begin{footnotesize}
\begin{itemize}
\item[163.] \textit{See} U.S. CONST. art. I.
\item[164.] FED. R. CIV. P. 9.
\item[165.] \textit{See} Swierkiewicz, 534 U.S. at 515.
\item[166.] 534 U.S. 506 (2002).
\item[167.] \textit{Id.} at 508.
\item[168.] \textit{Id.} at 509.
\item[169.] \textit{Id.}
\item[170.] \textit{Id.} at 509-10.
\end{itemize}
\end{footnotesize}
any circumstances or facts supporting an “inference of discrimination.”171 The Court clarified that it had never indicated that the evidentiary factors required in proving a prima facie case also apply in determining the level of pleading required for a plaintiff to prevail over a defendant’s motion to dismiss.172 Furthermore, the Court reestablished the principle that when a federal court reviews the sufficiency of a complaint, its task is not to determine whether the plaintiff’s action will ultimately succeed, but rather whether the court should afford the petitioner an opportunity to offer evidence to support the allegations made in the complaint.173

The Swierkiewicz Court found that imposing a heightened pleading standard in employment discrimination cases conflicted with Federal Rule 8.174 The Court noted that the Federal Rules only require a petitioner to give the defendant “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”175 Consistent with its reasoning in Conley and Leatherman, the Supreme Court again acknowledged the existence of other measures within the Federal Rules that are specifically designed to clarify disputed facts and to eliminate unmeritorious claims.176 In acknowledging that Rule 8 applies to nearly all civil actions, the Court distinguished the limited cases of fraud and mistake, which require a heightened pleading standard under Rule 9.177 The Court concluded that because Rule 9 makes no mention of employment discrimination lawsuits, these complaints “must satisfy only the simple requirements of Rule 8(a).”178

Finally, the Swierkiewicz Court rejected the policy arguments raised by the respondent contending that allowing employment discrimination suits without substantiated facts would unduly burden the court system and encourage employees to bring unmeritorious suits.179 The Court denied this argument,

171. Id. at 510. Although the Supreme Court had indeed articulated the four factors relied upon by the Second Circuit, the Court noted that these factors were a formulation for the petitioner’s evidentiary standard, not a pleading requirement. Id. Thus, the appellate court incorrectly applied evidentiary factors handed down in McDonnell Douglas and, in doing so, incorrectly dismissed petitioner’s complaint. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
172. Swierkiewicz, 534 U.S. at 511.
173. Id. (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).
174. Id. at 512.
175. Id. (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
176. Id. The Court stated that notice pleadings are supported by “liberal discovery rules and summary judgment motions.” Id. These provisions provide both parties with an adequate opportunity to define the factual issues and to eliminate any invalid claims before a trial ever takes place. See id. at 512-13.
177. Id. at 513.
178. Id.
179. Id. at 514.
regardless of its practicality, because the Federal Rules do not require a heightened pleading standard for employment discrimination suits.180 Relying on its instruction of a legislative remedy in Leatherman, the Court reiterated that a requirement of greater specificity for a particular type of pleading can only be achieved by amending the Federal Rules and not by judicial determination.181 Thus, the Supreme Court yet again strictly adhered to Rule 8's notice pleading requirement and rejected the notion of applying a heightened pleading standard.

The Supreme Court’s jurisprudence announced in Conley, Leatherman, and Swierkiewicz strongly supports the principle that Federal Rule 8 is the controlling standard for pleading requirements in federal court. These decisions weigh heavily in favor of determining that a state statute or policy requiring a heightened pleading standard in federal court will directly collide with Rule 8.182 Furthermore, the Court stated that although Rule 9 has carefully carved exceptions in invoking a higher pleading standard for actions of fraud or mistake, in the absence of such actions, Rule 8 is the controlling provision to be applied in federal court and requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.”183

V. Applying Erie to Oklahoma’s Health Care Act

Oklahoma federal courts will inevitably be faced with the decision of whether to apply Oklahoma’s newly created Health Care Act to the pleadings of a medical malpractice action filed in a federal diversity suit or whether Federal Rule 8 is sufficiently broad to cover all pleading requirements.184

180. Id. at 515.
181. Id.
182. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (finding it impossible to harmonize a heightened pleading standard with the notice pleading standard enacted by Rule 8(a)(2)).
183. See Swierkiewicz, 534 U.S. at 512-13 (quoting FED. R. CIV. P. 8(a)(2)).
184. See 63 OKLA. STAT. § 1-1708.1E (Supp. 2003). The new measure reads as follows:
   § 1-1708.1E [Affordable Access to Health Care Act]
   1. In any medical liability action, except as provided in subsection B of this section, the plaintiff shall attach to the petition an affidavit attesting that:
      a. the plaintiff has consulted and reviewed the facts of the claim with a qualified expert,
      b. the plaintiff has obtained a written opinion from a qualified expert that clearly identifies the plaintiff and includes the expert’s determination that, based upon a review of the available medical records, facts or other relevant material, a reasonable interpretation of the facts supports a finding that the acts or omissions of the health care provider against whom the action is brought constituted professional negligence, and
The Health Care Act requires the plaintiff to attach an expert affidavit with and in addition to the complaint as part of the pleadings of a medical liability action. In the affidavit, the plaintiff must attest that she has reviewed the facts of the claim with an expert and has obtained the expert’s written opinion that, based on those facts, the plaintiff has a legitimate claim for professional negligence that is both “meritorious” and “based on good cause.” If the plaintiff files a medical malpractice action without an affidavit attached to the pleadings, the court may grant a ninety-day extension for the plaintiff to file such affidavit, upon the plaintiff’s request and after a showing of good cause. If the plaintiff files the action without an affidavit and the court does not grant an extension, the court shall dismiss the action without prejudice upon the defendant’s motion.

In contrast, Federal Rule 8, as interpreted by the U.S. Supreme Court in Conley, Leatherman, and Swierkiewicz, requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Although Federal Rule 9 sets forth the instances in which the federal courts require plaintiffs to plead certain actions with particularity, Rule 9 does not impose such heightened pleading requirements on medical liability actions.

A. The Health Care Act Attempts to Heighten the Level of Pleading Already Covered by Federal Rule 8

1. The Health Care Act requires the plaintiff to attach an expert affidavit with and in addition to the complaint as part of the pleadings of a medical liability action. In the affidavit, the plaintiff must attest that she has reviewed the facts of the claim with an expert and has obtained the expert’s written opinion that, based on those facts, the plaintiff has a legitimate claim for professional negligence that is both “meritorious” and “based on good cause.” If the plaintiff files a medical malpractice action without an affidavit attached to the pleadings, the court may grant a ninety-day extension for the plaintiff to file such affidavit, upon the plaintiff’s request and after a showing of good cause. If the plaintiff files the action without an affidavit and the court does not grant an extension, the court shall dismiss the action without prejudice upon the defendant’s motion.

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A. The Health Care Act Attempts to Heighten the Level of Pleading Already Covered by Federal Rule 8

1. on the basis of the qualified expert’s review and consultation, the plaintiff has concluded that the claim is meritorious and based on good cause.
2. If a medical liability action is filed:
   a. without an affidavit being attached to the petition, as required in paragraph 1 of this subsection, and
   b. no extension of time is subsequently granted by the court, pursuant to subsection B of this section, the court shall, upon motion of the defendant, dismiss the action without prejudice to its refiling.
3. The written opinion from the qualified expert shall state the acts or omissions of the defendant(s) that the expert then believes constituted professional negligence and shall include reasons explaining why the acts or omissions constituted professional negligence. The written opinion from the qualified expert shall not be admissible at trial for any purpose nor shall any inquiry be permitted with regard to the written opinion for any purpose either in discovery or at trial.

Id. (emphasis added).
185. Id.
186. Id.
187. Id.
189. Fed. R. Civ. P. 9(b) (requiring that in all claims “of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity”) (emphasis added).
Because the Health Care Act and Federal Rule 8 prescribe different pleading requirements, federal courts should engage in an *Erie* analysis to determine whether the state or federal standard should apply in diversity actions. Given that Rule 8 has governed pleading requirements since the inception of the Federal Rules of Civil Procedure in 1938, a Federal Rule enacted by Congress is clearly the source of the federal law for pleading requirements in federal court. Therefore, the federal courts should begin by examining Rule 8 to see if its scope governs all pleading requirements in federal court or whether other pleading requirements can peacefully coexist, thereby avoiding a direct collision with Rule 8.

When deciding whether a possible collision exists between a state law and a Federal Rule, the Supreme Court has instructed the federal courts to give the Federal Rules their “plain meaning.” In recently interpreting a Federal Rule, the Court noted that its task was to “apply the text, not to improve upon it.” The Supreme Court articulated the plain meaning of Rule 8 in *Conley v. Gibson* by stating that “all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” The Court in *Leatherman* confirmed this plain meaning approach by reiterating the “notice pleading” requirements of Rule 8 and noting that a heightened pleading requirement in cases other than fraud or mistake is “impossible to square” with such a notice pleading standard. Finally, the Court’s most recent pronouncement in *Swierkiewicz*, namely that Rule 8’s simplistic standards of pleading apply to all civil actions with limited exceptions under Rule 9, suggests a direct collision between Rule 8 and the new Oklahoma statute.

Thus, considering the Supreme Court’s jurisprudence requiring Rule 8 to govern the content of pleadings in federal court, Oklahoma’s Health Care Act, which creates additional pleading requirements for plaintiffs in medical situations, raises the question of whether these requirements can coexist with Rule 8.

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malpractice suits, directly collides with a Federal Rule of Civil Procedure. *Hanna v. Plumer* clearly holds that where the issue before the court is covered by a Federal Rule of Civil Procedure and is within the confines of the Rules Enabling Act and the U.S. Constitution, the federal court must apply the Federal Rule.197

Furthermore, federal courts in Georgia have applied Rule 8 rather than Georgia’s state certificate of merit statute, which is similar to Oklahoma’s Health Care Act.198 Both Georgia and Oklahoma’s certificate of merit statutes require medical malpractice plaintiffs to attach expert affidavits to their pleadings.199 As recognized by the *Boone* court, the affidavit requirement essentially heightens the requisite level of pleading from that required under Rule 8.200 Because Rule 8 governs federal court pleading standards, any requirement beyond “a short and plain statement of the claim” directly contravenes the intentions of the Federal Rules unless such requirement falls within the specific exceptions for fraud and mistake created by Rule 9.201 The *Boone* court held that a federal court must consider the sufficiency of a complaint under Rule 8 rather than under the Georgia statute, and concluded that “[s]ince there is a special Federal Rule governing the form of pleading in federal court, that rule controls over any contrary provision of state law.”202

Also analogous to the Georgia statute, the affidavit required under Oklahoma’s Health Care Act must be based upon a “written opinion from a qualified expert that shall state the acts or omissions of the defendant(s) that the expert then believes constituted professional negligence.”203 Although the Georgia statute requires the actual affidavit to assert at least one act of negligence and the facts behind such a claim,204 the resulting effect of each statute is the same — the statutes subject plaintiffs to a higher burden of pleading regarding the factual basis of their claim.205 As noted by the U.S. Supreme Court in *Conley* and *Swierkiewicz*, a premature search for unmeritorious claims based on factual contentions conflicts with the default

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203. *63 OKLA. STAT.* § 1-1708.1E.
functions instilled by the Federal Rules, which rely on liberal discovery methods to flesh out the facts behind a petitioner’s claims.206

Therefore, the Oklahoma federal courts should consider decisions from states with similar affidavit requirements within their respective statutes, such as Georgia, and examine the reasoning used by courts that have interpreted whether the statute directly collides with a Federal Rule of Civil Procedure. On the other hand, the Oklahoma federal courts are not controlled and should not be persuaded by cases involving dissimilar statutes, such as those requiring postfiling affidavits rather than affidavits concurrent with filing. Thus, the Tenth Circuit’s holding in Trierweiler v. Croxton & Trench Holding Corp., which considered the applicability of a Colorado statute in federal court that required an affidavit of attorney certification within sixty days of filing of the lawsuit, is not binding on the Oklahoma federal courts or the Tenth Circuit when considering Oklahoma’s Health Care Act.207

B. Federal Rule 8 Is a Valid Exercise of Procedural Power and Rule-Making

Because the scope of Federal Rule 8 is broad enough to cover the level of pleading required in a medical malpractice action, federal courts must further inquire into whether the Rule was validly enacted by Congress. First, the federal court must classify Congress’s delegation of power to the Supreme Court to create the Federal Rules of Civil Procedure as procedural or capable of being rationally classified as either substantive or procedural.208 Because the Federal Rules of Civil Procedure — particularly Rule 8, which sets forth the essential procedure to initiate a federal action — create rules of procedure for federal courts, Congress’s delegation of power is clearly procedural. Second, the federal court must make sure that Rule 8 does not “abridge, enlarge, or modify any substantive right.”209 Because Congress failed to declare that Rule


207. See generally Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523 (10th Cir. 1996). Even the Trierweiler court noted its reluctance to impose state procedural rules on federal proceedings for fear of encroaching on another branch’s powers. Id. at 1540. Thus, regardless of the variations in timing and other technical requirements, courts should recognize that the results of state certificate of merit statutes are the same because of their tendency to heighten the level of pleading required to initiate a lawsuit in federal court. See also Penrose & Caldwell, supra note 128.


8 violates the Rules Enabling Act during its adoption process,210 and because the Supreme Court has never found Rule 8 to infringe upon any substantive right, Federal Rule 8 is a valid enactment of Congress’s power.211 Therefore, because the Health Care Act infringes upon an area of law clearly governed by Rule 8 and because Rule 8 was valid in both its inception and its application, federal courts applying Oklahoma law should reject the Health Care Act’s heightened pleading requirement. Instead, the federal courts should adhere to Rule 8’s requirement of a mere “short and plain statement of the claim.”212

C. Reconsidering the Usual Arguments for Applying Certificate of Merit Statutes in Federal Court

Although Rule 8 clearly provides the required level of pleading in federal courts and was a valid enactment of Congress’s power, arguments are nevertheless raised in favor of applying certificate of merit statutes in federal court. Oklahoma federal courts should not apply the Health Care Act based on arguments that a federal court’s failure to apply it will encourage litigants to forum shop. Once a federal court determines that Rule 8 directly collides with the Health Care Act, the court should never even reach the “unguided Erie analysis.”213 Instead, the court is required to apply the governing Federal Rule.214 In other words, because the source of the federal law is a valid Federal Rule of Civil Procedure that controls the issue of law before the court, the court should never apply the branch of “judge-made federal law,” leaving notions of “Byrd balancing” and the “twin aims of Erie” inapplicable to the present analysis.215

210. See supra notes 36-42 and accompanying text.
211. Chamberlain v. Giampapa, 210 F.3d 154, 160 (3d Cir. 2000) (holding that “[t]here is . . . no contention that Federal Rules 8 and 9 are beyond the scope of the Rules Enabling Act or inconsistent with the Constitution”).
212. FED. R. CIV. P. 8(a)(2).
213. Hanna, 380 U.S. at 471.
214. See Chamberlain, 210 F.3d at 160. Hanna states that if a Federal Rule controls a situation, the court must apply the rule and does not need to consider the typical “unguided” Erie decision. Id.
215. See supra Part II.A. Consider, however, the result if a federal judge ignores the guidance handed down by the U.S. Supreme Court in determining whether Oklahoma’s Health Care Act applies in federal court. If a judge chooses to narrowly construe Rule 8 and declare that the expert affidavit requirement applies in federal court, further examination would be necessary under the judge-made rule prong of Erie, which ultimately leads to an analysis of outcome-determination. See supra Part II.A. First, the judge would consider the extent of the difference between the state law requiring attachment of an expert affidavit and the federal law, which requires mere notice pleading. See Hanna, 380 U.S. at 468 n.9. Second, the judge would determine whether the variation between such laws would result in unfair
discrimination against citizens of the forum state. \textit{Id.} Based on the deliberations of judges who have declared that Rule 8 is not sufficiently broad to cover the state certificate of merit requirements, the judge is likely to conclude in the affirmative to at least one of these two issues. If so, the judge should also ensure that the Oklahoma statute does not infringe upon a federal affirmative countervailing interest. See, e.g., Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1541 (10th Cir. 1996). Considering that the only important federal governmental interest recognized by the Supreme Court is the federal system’s preference for a jury trial, a narrow interpretation of Rule 8 would easily lead a judge to apply the pleading requirements of Oklahoma’s Health Care Act in federal court. See supra notes 55-62 and accompanying text.

216. In applying Federal Rule 11, the Seventh Circuit has demonstrated the abuse of a Federal Rule to achieve a public policy purpose. In 1986, the Seventh Circuit waged war against frivolous lawsuits and applied sanctions under Rule 11 with vigorous force. Struve, \textit{supra} note 41, at 1142. In doing so, the court stated, “The rules, whether statutory or judge-made, designed to discourage groundless litigation are being and will continue to be enforced in this circuit to the hilt . . . . Lawyers practicing in the Seventh Circuit, take heed!” Dreis & Krump Mfg. Co. v. Int’l Ass’n of Machinists, Dist. No. 8, 802 F.2d 247, 255-56 (7th Cir. 1986) (“Mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation have made it imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts.”). True to its word, the Seventh Circuit applied Rule 11 not only to discourage violations as intended, but also to provide compensation for injured parties. Struve, \textit{supra} note 41, at 1146. The Supreme Court, however, reverted back to the text of Rule 11 and rejected the Seventh Circuit’s public policy approach. \textit{Id.} By proclaiming that Rule 11 does not shift fees among the parties, the Supreme Court rejected the Seventh Circuit’s compensation approach to Rule 11 and acknowledged that the main goal of Rule 11 “is not to reward parties who are victimized by litigation.” \textit{Id.} (quoting Bus. Guides, Inc. v. Chromatic Communications Enter., 498 U.S. 533, 553 (1991)) (emphasis added). The 1993 amendments to the Federal Rules of Civil Procedure furthered the Supreme Court’s decision by explicitly stating that the deterrence rationale behind Rule 11 provides that the sanction “shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.” \textit{Id.} (quoting \textit{Fed. R. Civ. P. 11}(c)(2) (1993)). Had the Seventh Circuit interpreted and applied Rule 11 according to its text, such proclamations from the Supreme Court and such an amendment to the Federal Rules would not have been necessary. \textit{Id.} Nevertheless, the Supreme Court’s decision coupled with Rule 11’s amendment provides evidence that courts must \textit{not} read and interpret Federal Rules in a manner that furthers preferable public policies.
amendment process to the Federal Rules, not by mere judicial determination.217 Second, the Supreme Court has clarified that the pleading standard established by Rule 8 is “without regard to whether a claim will succeed on the merits.”218 Therefore, by attempting to determine the merits of a plaintiff’s claim based on the initial pleading and any attached affidavits, the Health Care Act contravenes Rule 8’s policy of simply giving the defendant fair notice of the plaintiff’s claim. Instead, Rule 8 relies on the Federal Rules’ discovery and summary judgment provisions to clarify issues and facts of the plaintiff’s claim and to eliminate meritless lawsuits.219

218. Id.
219. Id. at 512.
VI. Conclusion

When federal courts determine whether to apply Oklahoma’s Health Care Act in federal court, the courts should adhere to binding U.S. Supreme Court precedent. First, federal judges applying the Health Care Act should engage in a “plain meaning” reading of Federal Rule 8, as expressly required in *Walker.*

In doing so, judges should follow the law developed in *Conley, Leatherman,* and *Swierkiewicz,* which together beautifully illustrate the magnitude of Rule 8’s scope and breadth. As noted in *Leatherman,* Rule 8 means what it says regarding the sufficiency of a mere “short and plain statement of the claim.”

Second, federal judges should recognize that Federal Rule 9, which enumerates the actions that require more particularity in pleading, is silent regarding complaints that allege liability for medical malpractice. Such silence demonstrates that although Rule 9 has the ability to determine the instances that require heightened pleading standards, it has declined to raise the required level of pleading in medical liability actions.

Finally, judges should resist the temptation to apply the Health Care Act based on policy arguments that its application will reduce the number of frivolous lawsuits in Oklahoma. In doing so, Oklahoma federal courts will inevitably come to the conclusion that the Health Care Act’s application should be limited to state court actions, and accordingly, federal judges should continue to use Federal Rule 8 to measure the appropriate level of pleading in federal court.

*Dace A. Caldwell*

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221. *See supra* Part IV.
223. *Cf. id.* (noting that Rule 9(b) does not require heightened pleading for complaints alleging municipal liability under § 1983).
224. *See supra* notes 216-19 and accompanying text.