WHOSE LAW IS IT ANYWAY? THE ERIE DOCTRINE, STATE LAW AFFIDAVITS OF MERIT, AND THE FEDERAL TORT CLAIMS ACT

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ABSTRACT

In the wake of the tort reform movement of the 1970s, more than half of the states aimed to curb frivolous medical malpractice claims. Many states accomplished that goal by enacting statutes imposing pleading requirements on medical malpractice cases. The statutes require plaintiffs to file with their complaints an affidavit from a medical expert stating that the claim has merit. But because the Federal Rules of Civil Procedure do not impose a similar requirement, there is an ostensible conflict between the state law and the Federal Rules when these claims are brought in federal court. Federal courts have been inconsistent in their analysis of this conflict. Some conclude that the state laws are substantive and should therefore apply in actions in federal court. Others conclude that there is an irreconcilable conflict between the state law and federal law, and thus federal law must prevail. And when the basis of a federal court's jurisdiction is the Federal Tort Claims Act, another wrinkle emerges: should a court engage in an *Erie* analysis at all?

This article addresses two distinct issues. First, it addresses whether a federal court exercising federal question jurisdiction should engage in an *Erie* analysis to determine whether a federal law should trump a conflicting state law. Second, it addresses whether there is a conflict between the state laws and the Federal Rules of Civil Procedure. The article concludes that a federal court should engage in an *Erie* analysis, and that the state statutes conflict with the Federal Rules and thus should not apply in an action brought in federal court. The article further offers a middle ground whereby the states' substantive goal of dealing with frivolous medical malpractice claims expeditiously can, in some circumstances, still be vindicated.

I. INTRODUCTION

The *Erie* Doctrine is familiar to everyone who has completed a semester of law school. Its premise is rather simple:[1] a federal court sitting in diversity must apply substantive state law and federal procedural law.[2] Until the Court decided *Shady Grove Orthopedic Association v. Allstate Insurance Co.*, the analysis was rather simple: if states were regulating substantive law through procedure, the state law would apply in federal court.[3] But after *Shady Grove*, this query is murkier. *Shady Grove* held that, when a Federal Rule of Civil Procedure "answers the question,"[4] then the Federal Rule displaces state law, regardless of whether the state law would otherwise apply in the traditional *Erie* framework. *Shady Grove* has affected federal court treatment of state statutes that, in some way or another, require plaintiffs in medical negligence cases to include with their complaint an affidavit from a medical expert that supports the merits of the claim.[5]

When medical negligence cases in which an affidavit of merit is required are brought in federal court, there is an apparent conflict between the state law and the Federal Rules: the Federal Rules impose certain requirements for pleadings, and AOM statutes impose additional requirements. An analysis of the conflict between these state laws and the Federal Rules is complicated when the lawsuit is brought against an arm of the federal government under the Federal Tort Claims Act (FTCA), which directs federal courts to apply state substantive law (even though the court is not sitting in diversity).[6] This conflict raises two questions. First, should federal courts engage in an *Erie* analysis when a federal statute directs them to apply state substantive law?[7] Second, should these state laws apply in federal court under *Erie* and its progeny?

Although state AOM laws have been on the books for decades, and numerous federal cases have felt their impact, there has been little consistent

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[1] With apologies to all first-year law students.

[2] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

[3] *See* Gasperini v. Ctr. For Humanities, Inc., 518 U.S. 415 (1994); Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

[4] *See* Gallivan v. United States, 943 F.3d 291, 293 (6th Cir. 2019) (citing Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010) (majority opinion)).

[5] I will refer to these affidavit-of-merit laws generally as "AOM" statutes.

[6] *See* 28 U.S.C. § 1346 (2012).

[7] *See id.*

guidance from the Courts of Appeals since *Shady Grove* as to whether these statutes actually conflict with the Federal Rules of Civil Procedure and thus should not apply in federal court. Some courts have held that the state laws are substantive and should apply in federal court.[8] Others have held that these laws conflict with the Federal Rules of Civil Procedure regardless of whether they are substantive or procedural, and thus should not apply in federal court.[9] Still others have held that in suits brought under the FTCA, courts should apply state law wholesale without considering *Erie* at all.[10]

This article attempts to clarify the confusion among the various federal courts as to whether AOM statutes should apply at the pleading stage. In so doing, I conclude that federal courts should engage in a *Shady Grove* analysis when presented with a state statute that imposes a heightened pleading requirement on plaintiffs in medical malpractice actions. Those laws, I conclude, conflict with the Federal Rules that govern pleadings in federal court, and should therefore not be applied in federal cases. That result gives rise to significant federalism concerns, which I address as well.

In Part II of this article, I briefly describe the Supreme Court's treatment of state laws that ostensibly conflict with the Federal Rules of Civil Procedure and how cases brought under the Federal Tort Claims Act complicate the familiar paradigm. Part III discusses the various state statutes that impose additional requirements on plaintiffs pursuing medical negligence actions. In Part IV, I describe the decisions handed down by various Courts of Appeals that have muddied the waters by applying inconsistent reasoning to reach inconsistent results. In Part V, I discuss what I see as a proper way to engage in a choice of law analysis in suits brought under the FTCA, ultimately concluding that courts should engage in an *Erie* analysis because that inquiry is rooted in the Supremacy Clause and is not dependent on a lawsuit's jurisdictional basis. Finally, in Part VI, I describe why federal courts should apply these state laws but, where possible, should try to vindicate the states' substantive goals by treating a motion to dismiss for failure to file an affidavit as a motion for summary judgment. This approach allows state substantive goals to be vindicated by treating affidavits of merit as an evidentiary requirement at summary judgment.

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[8] *See* Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 262–63 (3d Cir. 2011) (concluding that Pennsylvania's AOM requirement that an affidavit be filed with a complaint is substantive law that must be applied in federal court).

[9] *See Gallivan*, 943 F.3d at 293.

[10] *See* Dutton v. United States, 621 F. App'x 962 (11th Cir. 2015) ("This, of course, is an FTCA case . . . so the *Erie* doctrine does not apply."); see also Brusch v. United States, 823 F. App'x 409, 412–13 (6th Cir. 2020) (Readler, J., concurring).

II. AN *ERIE* PROBLEM

This section provides a brief overview of the history of the *Erie* doctrine as it relates to state laws that arguably regulate procedure. Part A describes the foundational principals of the doctrine, particularly the early cases that involved conflicts between state laws and the Federal Rules. Part B describes the Supreme Court's inconsistent treatment over the last seven decades of quasi-procedural state rules, concluding with *Shady Grove*. Finally, Part C describes the Court's decision in *Shady Grove*, which will inform the analysis in the remainder of this article.

A. Erie *and the Early Years*

When Harry James Tompkins went for a late-night stroll in Hughestown, Pennsylvania on July 27, 1934, he could not have foreseen the train's impact (on his life and on the future of the federal courts).[11] For nearly a century, federal courts had followed the ruling in *Swift v. Tyson*, which held that federal courts sitting in diversity should apply "general" common law.[12] But that changed in 1938 when the Supreme Court sounded the death knell for federal general common law, holding that a federal court sitting in diversity is to apply state substantive law (meaning *all* state law, including decisions of the state courts).[13] Justice Reed signaled the problems that would come in the next several decades in his concurrence, stressing that "no one doubts federal power over procedure."[14] Although the basic proposition for which it stands—that a federal court sitting in diversity jurisdiction must apply state substantive law and federal procedural law[15]—is rather simple, the exact implications of *Erie*'s holding have been under debate by the Court and scholars ever since that case was decided.

In many ways, *Erie* was an easy case. It involved a conflict of purely substantive law: i.e., the duty owed in a tort case. The later cases were not so simple. The Court expounded upon *Erie*'s holding—and addressed for the first time the truism that Justice Reed identified in his concurrence—in *Guaranty Trust Co. v. York*.[16] *York* involved a statute of limitations in a suit

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[11] *See* Brian L. Frye, *The Ballad of Harry James Tompkins*, 52 AKRON L. REV. 531, 532 (2018).
[12] Swift v. Tyson, 41 U.S. 1 (1842).
[13] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").
[14] *Id.* at 92 (Reed, J., concurring).
[15] *Id.* at 79.
[16] Guar. Tr. Co. v. York, 326 U.S. 99 (1945).

brought in equity.[17] Instead of applying state statutes of limitation, federal courts sitting in equity would often apply the federal common law doctrine of laches.[18] Justice Frankfurter concluded that federal courts apply federal procedure and state substantive law.[19] So ultimately, the Court suggested that, to determine whether the law is substantive or procedural, the best way to address *Erie*'s concerns is to engage in an "outcome determinative" test and ask whether application of the state rule would change the outcome of the case.[20]

The next seminal cases that threw a wrench into the *Erie* analysis were *Byrd v. Blue Ridge*[21] and *Hanna v. Plumer*,[22] the latter of which will be discussed in more detail in the next section. In *Byrd*, the Court had to decide whether a federal court should apply a South Carolina statute that vested fact-finding authority in workers' compensation cases in the judge, rather than the Seventh Amendment, which would allow the parties to invoke their right to a jury trial on the question.[23] This time, federal law came out on top.[24] The Court concluded that a clue as to whether a law is substantive or procedural is whether it is "bound up with rights and obligations."[25] Then, the Court articulated a balancing test whereby courts should balance the federal and state interests involved to determine whether state or federal law applies—that is, under *Byrd*'s logic, if the conflict is outcome determinative, then a court will apply state law unless the interests weighing in favor of applying federal law outweigh the interests behind the state law.[26]

The once-simple *Erie* analysis now involved a three-step process.[27] First, federal courts determined whether a conflict existed between federal and state law.[28] If no conflict existed, then there was no need for an *Erie* analysis.[29] If there was a conflict, courts next asked whether the conflict was outcome-determinative.[30] If not, federal law applied.[31] But even outcome-

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[17] *Id.* at 101.
[18] *Id.* at 119 (Rutledge, J., dissenting).
[19] *Id.* at 110.
[20] *Id.* at 109.
[21] Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).
[22] Hanna v. Plumer, 380 U.S. 460 (1965).
[23] *Byrd*, 356 U.S. at 527–28.
[24] *Id.*
[25] *Id.* at 538.
[26] *Id.*
[27] *See* Alexander A. Reinert, Erie *Step Zero*, 85 FORDHAM L. REV. 2341, 2370 (2017).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

determinative state laws were not always applied under this formula.[32] Courts then engaged in the *Byrd* balancing test to determine whether, even in the face of an outcome-determinative conflict between federal and state law, federal interests dictated that federal law should govern.[33]

B. The Road to Shady Grove is Paved with Good Intentions

The Court reached consistent outcomes, although it was sometimes less than clear in its reasoning in its early *Erie* cases. However, the Court approached the more difficult *Erie* problems with less consistency. Cases where arguably procedural state laws ostensibly conflicted with the Federal Rules have troubled the Court for nearly three-quarters of a century. From the early days of the *Erie* doctrine to today, courts have struggled with a relatively simple question: which law applies when a state law regulates substance through a procedural rule that arguably conflicts with the Federal Rules of Civil Procedure?

In the early years after *Erie* was decided, the Court dipped its toes into murky waters in cases involving ostensible conflicts between state laws and the Federal Rules. The Supreme Court laid the groundwork for those decisions in *Sibbach v. Wilson & Co.*[34] There, the Court held that Rule 35 of the Federal Rules of Civil Procedure should prevail over a contrary state rule, concluding that "[t]he test must be whether a rule really regulates procedure."[35] The same was true in *Palmer v. Hoffman*.[36] Like *Erie*, *Palmer* involved a train.[37] An accident at a railroad grade crossing in Massachusetts on Christmas night in 1940 claimed the life of Inez Hoffman.[38] Her husband, Howard Hoffman, brought suit against the railroad in federal court in New York.[39] The railroad claimed that the Hoffmans were contributorily negligent.[40] The Second Circuit had held that Rule 8(c) governed contributory negligence matters because it made contributory negligence an affirmative defense.[41] The Supreme Court disagreed.[42] It held, albeit with

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[32] *Id.*

[33] *Id.*

[34] Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

[35] *Id.* at 14.

[36] Palmer v. Hoffman, 318 U.S. 109 (1943).

[37] *Id.* at 110.

[38] *Id.*

[39] *Id.*

[40] *Id.* at 116.

[41] *See* Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1942), *aff'd sub nom.* Palmer v. Hoffman, 318 U.S. 109 (1943).

[42] Palmer v. Hoffman, 318 U.S. at 117–18.

sparse analysis, that state law governs contributory negligence, despite the language of Rule 8(c).[43] The Court held that the affirmative defenses enumerated in Rule 8(c) applied only to the burden of *pleading*.[44] State law governing the burden of *proof*—which makes it more or less likely that one of the parties will prevail at trial, and therefore could also affect the parties' primary conduct even before any litigation arises—continued to apply in a diversity action.[45]

Next up is *Cohen v. Beneficial Industrial Loan Corp*.[46] That case did not involve a train wreck, but it did involve a state statute that crashed into the Federal Rules (ironically, the same rule at issue in *Shady Grove*, Rule 23). In *Cohen*, the Supreme Court addressed whether a New Jersey statute that required the posting of a bond in certain actions should be enforced in federal court where the Federal Rules had no such requirement.[47] This statute imposed certain requirements on class actions, including, among other things, a showing that the suit was not collusive, that a plaintiff suing a corporation had issued a demand on the corporation, and finally, that the suit not be dismissed without approval of the court and notice of all class members.[48] The Court concluded that "[t]hese provisions neither create nor exempt from liabilities, but require complete disclosure to the court and notice to parties in interest. None [of the provisions in Rule 23] conflict with the statute in question and all may be observed by a federal court. . . ."[49] This holding was consistent with the Court's early *Erie* cases in holding that a state statute that used procedural vehicles to achieve substantive goals applied in federal court.[50]

But then came *Hanna v. Plumer*,[51] which has been called "arguably the most significant *Erie*-doctrine decision of the last seventy years."[52] *Hanna* presented the first deep dive into a conflict between an ostensibly procedural state law and a Federal Rule. It is, therefore, where the problem addressed in

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[43] *Id.*

[44] *Id.* at 117.

[45] *Id.*

[46] Cohen v. Benefit Indus. Loan Corp., 337 U.S. 541 (1949).

[47] *Id.* at 556.

[48] *Id.*

[49] *Id.*

[50] *See generally* Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 532–33 (1949) (holding that the tolling of statute of limitations in a diversity case is not governed by Fed. R. Civ. P. 3, but rather when an action is "commenced" pursuant to state statutes); Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) (in a diversity case, if a case is barred from recovery in the state court it is also barred in the federal court).

[51] Hanna v. Plumer, 380 U.S. 460 (1965).

[52] Adam N. Steinman, *What Is the* Erie *Doctrine (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 260 (2008) (citing *Gasperini*, 518 U.S. 415, 428 (1996) (calling *Hanna v. Plumer* a "pathmarking case")).

this article finds its genesis. *Hanna* involved a conflict between the Massachusetts rule of service of process and Federal Rule 4(d)(1) (now Rule 4(e)(2)).[53] The state rule required personal service of process on the executor of an in-state defendant, while the federal counterpart required only that service be made on a competent adult who resided at the same residence as the defendant.[54] *Hanna* would have been easy under *York*'s "outcome-determinative" test: If the Massachusetts rule applied, then service was insufficient and Hanna's lawsuit would be dismissed, but if the Federal Rule applied, then Hanna's suit could continue. But the Court repudiated the "outcome-determination" inquiry from *York* in contexts involving the Federal Rules.[55] Instead, it sorted future cases by whether the Federal Rule at issue governs a matter that is "arguably procedural."[56] So the Court held that if a state rule and federal rule are in direct conflict, then the federal rule prevails so long as it is constitutionally valid and complies with the Rules Enabling Act.[57]nThe takeaway from *Hanna* can reasonably be described as "the idea that there are certain irreducible powers that go along with the institution of a court,"[58] and so when a state law conflicts with those irreducible powers, those powers win. So, if there is a conflict between a state law and a valid federal rule, the federal rule displaces state law.

Hanna announced what was supposed to be a workable and relatively straightforward rule, and so it should surprise no one that over the next three decades the Court would complicate it. This, of course, led to inconsistent results. The first case to complicate things was *Walker v. Armco Steel Corp.*[59] The question in *Walker* was basically an amalgamation of *York* and *Hanna*: whether a federal court should follow state law, or alternatively, Rule 3 in determining whether an action is commenced for the purpose of tolling the statute of limitations.[60] Rule 3 commanded that "[a] civil action is commenced by filing a complaint with the court,"[61] whereas the state law required that a complaint be served on the defendant, and that state law

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[53] *Hanna*, 380 U.S. at 466.

[54] *Id.* at 461 (citing Fed. R. Civ. P. 4(d)(1)).

[55] *See id.* at 466–67. *See also* Diane P. Wood, *Back to the Basics of* Erie, 18 LEWIS & CLARK L. REV. 673, 685 (2014) (noting that the Supreme Court repudiated the "outcome determinative test" in favor of one which sorted cases by whether the federal rule governs a matter that is "arguably procedural").

[56] *Hanna*, 380 U.S. at 476 (Harlan, J., concurring). *See also* Erie R.R. v. Tompkins, 304 U.S. 64, 92 (1938) (Reed, J., concurring).

[57] *Hanna*, 380 U.S. at 464. The *Hanna* Court further concluded that, in the absence of a Federal Rule on point, a Court should consider the problem with the twin aims of *Erie* in mind: to discourage forum shopping and avoid inequitable administration of laws. *Id.* at 468. This conclusion is important, but outside the scope of this article.

[58] *See* Wood, *supra* note 55, at 685.

[59] Walker v. Armco Steel Corp., 446 U.S. 740 (1980).

[60] *Id.* at 741.

[61] *Id.* at 750 (quoting FED. R. CIV. P. 3).

required adequate service in order for the action to be commenced.[62] We know from *York* that statutes of limitations (although neither truly substantive nor procedural) often apply in federal court,[63] but that when there is a conflict between a state law and a valid Federal Rule, the Federal Rule trumps state law.[64] The Court purported to strike a middle ground between these competing state and federal interests. Because "actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations,"[65] the Court held that Rule 3 did not displace state law.[66] The Court reasoned that "Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations."[67] The Court concluded: "Rule 3 and [the Oklahoma statute] can exist side by side, each controlling its own intended sphere of coverage without conflict."[68]

Then there was the "unusual decision"[69] of *Gasperini v. Center for Humanities*.[70] *Gasperini* involved the applicability of a New York remittitur statute that contained substantive and procedural elements.[71] It was substantive because it provided the standard for assessing excessiveness of a verdict (and thus whether remittitur was warranted), but it was procedural inasmuch as it assigned the decision making authority as to whether remittitur was appropriate to the appellate court, rather than the trial court.[72] The plaintiff argued that Federal Rule of Civil Procedure 59, which empowers district courts to alter or amend a judgment, or to grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law

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[62] *Id.* at 742–43.

[63] Guar. Tr. Co. v. York, 326 U.S. 99, 110 (1945).

[64] Hanna v. Plumer, 380 U.S. 460, 463–64 (1965).

[65] *Walker*, 446 U.S. at 751 (citing C & C Tile Co. v. Indep. Sch. Dist. No. 7 of Tulsa Cty., 503 P.2d 554, 559 (Okla. 1972)).

[66] *Id.* at 750–51.

[67] *Id.* at 751–52.

[68] *Id.* at 752. After *Walker*, the Court displaced state law in favor of the Federal Rules of Appellate Procedure in *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987). There, an Alabama statute provided that, when a trial court's money judgment award against a defendant is successfully appealed, the defendant must pay a penalty in the amount of ten percent of the judgment. *Id.* at 3 (citing Ala. Code § 12-22-72 (1987)). Federal Rule of Appellate Procedure 38, on the other hand, gave federal courts discretion to "'award just damages and single or double costs,'" in the event of an unsuccessful appeal. *Id.* at 4 (quoting FED. R. APP. P. 38). The Court held that the Alabama rule did not apply in federal court because the Federal Rule's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute." *Id.* at 7.

[69] *See* Wood, *supra* note 55, at 686.

[70] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

[71] *See id.* at 426.

[72] *See id.*

in federal court,"[73] should displace the state law. Under *Byrd* or *Hanna*, this should have been a straightforward case: there was a Federal Rule that was broad enough to conflict with state law (thus being controlled by *Hanna*) and what's more, we know from *Byrd* that federal courts are entitled to divide responsibilities between judge and jury in their own way.[74] But instead of following the easier path, the Court "came up with a Rube Goldberg-like rule . . . that bent over backwards to implement the state's policy."[75] In declining to reach a middle ground as it did in *Walker*, the *Gasperini* Court suggested that the Federal Rules should be construed narrowly to avoid conflicts with state interests.[76]

C. Shady Grove: Back to the Basics?

Finally, we reach *Shady Grove*,[77] a relatively controversial decision that further complicated the *Erie* analysis. But in many ways, after inconsistent results in *Walker* and *Gasperini*, *Shady Grove* brought the Court back to the basic principles of the *Hanna-Sibbach* paradigm. *Shady Grove* involved a conflict between Federal Rule of Civil Procedure 23 and section 901(b) of the New York procedural code.[78] The New York law contains detailed requirements for maintaining a class action suit, including a provision prohibiting class action lawsuits for statutory damages.[79] Federal Rule of Civil Procedure 23, on the other hand, contains no such limitation.[80]

The New York law at issue required an insurance company to either pay a claim or "deny it within thirty days of submission.[81] That law also imposes a statutory penalty [of] two percent per month" on insurance companies that do not comply with the law.[82] Shady Grove Orthopedics treated a patient who was insured by Allstate, and Allstate failed to timely pay the claim and then

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[73] FED. R. CIV. P. 59(a)(1).

[74] Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958).

[75] *See* Wood, *supra* note 55, at 686.

[76] *See* Allan Erbsen, Erie*'s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 629–30, 630 n.176 (2013). *See also Gasperini*, 518 U.S. at 437 n.22 (noting that the Court "has continued . . . to interpret the [F]ederal [R]ules to avoid convlict with state regulatory policies") (quoting Richard Fallon Jr. et al., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729–30 (4th ed. 1996)).

[77] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

[78] *See id.* at 398–99.

[79] N.Y. C.P.L.R. 901(a)–(b) (MCKINNEY 1975).

[80] *See* FED. R. CIV. P. 23.

[81] Joseph P. Bauer, *Shedding Light on* Shady Grove*: Further Reflections on the* Erie *Doctrine from a Conflicts Perspective*, 86 NOTRE DAME L. REV. 939, 950 (2011). S*ee also* N.Y. INS. LAW § 5106(a) (McKinney 2021).

[82] Bauer, *supra* note 81. *See also* N.Y. INS. LAW § 5106(a) (McKinney 2017).

failed to pay the statutory penalty.[83] Shady Grove brought suit in federal court in New York.[84] Although its individual damages were only about $500, "Shady Grove sought to maintain [its suit] as a class action on behalf of all similarly situated providers."[85] The district court dismissed the action for lack of subject matter jurisdiction, concluding that New York's prohibition on maintaining class actions for statutory damages controlled in federal court.[86] Therefore, the amount in controversy was far less than the statutory amount-in-controversy requirement of $75,000.[87] The Second Circuit affirmed, concluding that because the New York statute and Rule 23 addressed different issues, there was no conflict for *Erie* purposes, and that the statute was "substantive," and thus controlled in a diversity action.[88]

The Supreme Court reversed.[89] Justice Scalia authored a plurality opinion, and Justice Stevens's concurrence provided the fifth vote. Justice Ginsburg led the Court's four dissenters. The majority concluded that Rule 23 displaced the New York rule, notwithstanding the fact that the same action could not have been maintained in New York state courts.[90] In so doing, the majority found that Rule 23 and the New York rule were in conflict—"[b]oth of § 901's subsections undeniably answer the same question as Rule 23: whether a class action may proceed for a given suit."[91] This is because Rule 23 provides that a class action may be "maintained" if "two conditions are met: The suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality, and adequacy of representation), and it also must fit into one of the three categories of subdivision (b)."[92] The New York rule, on the other hand, disallowed certain class actions that would be allowed under Rule 23, thus placing the two rules in obvious conflict.[93] In short, Justice Scalia's plurality opinion concluded that rules authorized under the Rules Enabling Act "automatically" displace state law unless they are

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[83] *See* Bauer, *supra* note 81.

[84] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 466 F. Supp. 2d 467 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008), *rev'd*, 559 U.S. 393 (2010), and *vacated and remanded*, 380 F. App'x 96 (2d Cir. 2010).

[85] Bauer, *supra* note 81.

[86] *Shady Grove*, 466 F. Supp. 2d at 475–76.

[87] *See id.* at 476.

[88] *See* Shady Grove Orthopedic Assocs, P.A. v. Allstate Ins. Co., 549 F.3d 137, 141 (2d Cir. 2008), *rev'd*, 559 U.S. 393 (2010).

[89] Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 416 (2010).

[90] *See id.* at 415–16.

[91] *Id.* at 401.

[92] Id. at 398 (citing FED. R. CIV. P. 23).

[93] *See id.* at 398–99.

"invalid" under the REA or "inapplicable" because the issue is outside the rule's scope.[94]

Justice Ginsburg would have returned to her analysis in *Gasperini*, giving the New York rule the benefit of the doubt and reading it as a substantive cap on damages.[95] She concluded: "The limitation was not designed with the fair conduct or efficiency of litigation in mind. Indeed, suits seeking statutory damages are arguably best suited to the class device because individual proof of factual damages is unnecessary."[96] Justice Ginsburg went on to conclude that "New York's decision instead to block class-action proceedings for statutory damages therefore makes scant sense, except as a means to a manifestly substantive end," thus suggesting that state law should prevail in a conflict when the state law vindicates substantive interests.[97]

Shady Grove may have been an overcorrection of three decades of inconsistent decisions. And perhaps it was simply an exercise in line-drawing as to when exactly state and federal laws conflict, reflecting Justice Scalia's preference for easily administrable rules.[98] But as it has been applied by some lower courts, it simplified that hard question. In essence, instead of engaging in a complex analysis to determine if there is a conflict, if a state law "answer[s] the same question" as a valid Federal Rule, then there is a conflict and the Federal Rule wins.[99] In many ways, *Shady Grove* is an enigma. It marked a radical departure from the Court's holdings in *Walker* and *Gasperini*. But it also corrected course inasmuch that it returned to a simple rule not dissimilar from that of *Hanna* and *Sibbach*. But of course, things are never so easy.

III. THE AFFAIRS OF STATES COMPLICATE THE STATE OF AFFAIRS

In the wake of the tort reform movement of the 1970s,[100] and in order to resolve frivolous medical malpractice claims swiftly, twenty-nine states

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[94] *Id.* at 398, 400.

[95] *See* Mark P. Gaber, *Maintaining Uniform Federal Rules: Why the* Shady Grove *Plurality Was Right*, 44 AKRON L. REV. 979, 986 (2011).

[96] *Shady Grove*, 559 U.S. at 445 (Ginsburg, J., dissenting).

[97] *Id.*

[98] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[99] *Shady Grove*, 599 U.S. at 393. Of course, Justice Scalia's opinion as to this issue garnered only four votes, so technically Justice Stevens's concurring opinion is controlling. Justice Stevens would recognize the proposition that sometimes state law wins even when federal and state law answer the same question. *See id.* at 416–36 (Stevens, J., concurring). However, as I discuss below, many of the lower federal courts have applied Justice Scalia's zero-sum approach.

[100] *See* Christine Funk, *Affidavits of Merit in Medical Malpractice Cases*, EXPERT INSTITUTE, (June 23, 2020), https://www.expertinstitute.com/resources/insights/affidavits-merit-medical-malpractice-

enacted—in one form or another—statutes that impose some additional pleading requirement on plaintiffs in medical malpractice cases.[101] Those statutes, although all marginally different from one another, have the same basic effect: They require plaintiffs in medical malpractice suits to file an affidavit with their complaint from a doctor or other medical professional who has reviewed the pertinent facts of the case that states that there is a reasonable and meritorious cause for filing the lawsuit.[102] These documents are called affidavits (or certificates) of merit. Failure to submit such an affidavit often results in dismissal.[103]

I place these laws into two primary buckets. The first bucket is for those laws that require a plaintiff to attach an affidavit or certificate of merit to their complaint and do not permit any delay in filing the affidavit. The second bucket is for those laws that require a plaintiff file a certificate or affidavit with the complaint, but allow for some wiggle room with the timing. Here, I will provide a brief overview of these two types of laws to set up my analysis as to why they should not apply in federal court at the pleading stage.

A. Laws That Require Strict Compliance with the AOM Statute at the Pleading Stage

First, there are the rigid state laws. These state laws are meant to govern the results of medical malpractice actions in the states. Some are codified in the states' rules of civil procedure, and others are codified in the sections of

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cases/ [https://perma.cc/N64J-T7VK] ("Affidavits of merit are a product of tort reform efforts.").

[101] *See* ARIZ. REV. STAT. ANN. §12-2603 (2004); COLO. REV. STAT. § 13-20-602 (2019); CONN. GEN. STAT. § 52-190a (2019); DEL. CODE ANN. tit. 18, § 6853 (2003); FLA. STAT. § 766.104 (2019); GA. CODE ANN. § 9-11-9.1 (2007); HAW. REV. STAT. § 671-12.5 (2013); 735 ILL. COMP. STAT. 5/2-622 (2013); MD. CODE ANN., CTS. & JUD. PROC. §3-2A-04 (West 2019); MICH. COMP. LAWS § 600.2912d (1993); MINN. STAT. § 145.682 (2014); MISS. CODE ANN. § 11-1-58 (2003); MO. REV. STAT. § 538.225 (2005); NEV. REV. STAT. § 41A.071 (2015); N.J. STAT. ANN. § 2A:53A-27 (West 2004); N.Y. C.P.L.R. 3012-a (MCKINNEY 1987); N.D. CENT. CODE § 28-01-46 (2009); OHIO CIV. R. 10; OKLA. STAT. tit. 12, § 19.1 (2013); PA. R. CIV. P. 1042.3; S.C. CODE ANN. § 15-36-100 (2005); TENN. CODE ANN. §29-26-122 (2012); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2013); UTAH CODE ANN. § 78B-3-423 (West 2018); VT. STAT. ANN. tit. 12, § 1042 (2013); VA. CODE ANN. § 8.01-20.1 (2013); WASH. REV. CODE § 7.70.150 (2006); W. VA. CODE § 55-7B-6 (2019). For a more detailed survey of state AOM statutes, see Benjamin Grossberg, *Uniformity, Federalism, and Tort Reform: The* Erie *Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 222–26 (2011).

[102] *See, e.g.*, TENN. CODE ANN. § 29-26-122. Some statutes, like Arizona's, require a plaintiff to file an affidavit with her initial discovery disclosures. *See* ARIZ. REV. STAT. ANN. § 12-2603. Others require the certificate be filed after the defendant files her answer. *See* N.J. STAT. ANN. § 2A:53A-27. Others still require a certificate be filed before a medical review panel, not a court. *See* HAW. REV. STAT. § 671-12.5. Those statutes are not within the purview of this article.

[103] *See* TENN. CODE ANN. § 29-26-122(d).

the statutes governing the substance of claims. I will discuss these laws in turn.

Consider first Ohio Rule of Civil Procedure 10(D). It provides that, "a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim . . . shall be accompanied by one or more affidavits of merit relative to each defendant . . . for whom expert testimony is necessary to establish liability."[104] New York has a similar rule. It provides: "In any action for medical, dental[,] or podiatric malpractice, the complaint shall be accompanied by a certificate [of merit]"[105] declaring that the attorney has consulted with a medical professional who is knowledgeable in the relevant issues related to the action, and that the attorney has concluded that there is a reasonable basis for commencement of the suit.[106] Failure to submit this certificate can result in dismissal of the lawsuit.[107] Connecticut's AOM statute, also codified in the state's civil rules, is similarly restrictive. It prohibits a plaintiff from filing a complaint in a medical malpractice action unless she attaches an affidavit of merit.[108] Accordingly, the failure to file an affidavit of merit is grounds for dismissal.[109] Illinois's rule follows the same general framework. It too requires a plaintiff to attach to her complaint both an affidavit saying that an expert has found the claim to be reasonable and meritorious, as well as a signed report from that expert.[110]

Finally, consider the Georgia rule.[111] Like Ohio, New York, and Connecticut, Georgia codified its AOM statute in its rules of civil procedure. And like other statutes, it requires a plaintiff in a medical malpractice suit to contemporaneously file an affidavit with her complaint, or the suit is subject to dismissal for failure to state a claim.[112] But unlike most other statutes, the Georgia rule gives plaintiffs the ability to cure the defect by amending their complaints with an affidavit.[113]

And then you have the ostensibly substantive laws.[114] Unlike the laws discussed above that are codified in the state rules of civil procedure, these

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[104] OHIO CIV. R. 10(D)(2).

[105] N.Y. C.P.L.R. 3012-a(a).

[106] *Id.*

[107] *See* Crowhurst v. Szczucki, No. 16-cv-00182, 2017 WL 519262, at *3 (S.D.N.Y. Feb. 8, 2017) ("Accordingly, the failure to submit the certificate of merit . . . warrants dismissal of the medical malpractice claim.").

[108] CONN. GEN. STAT. § 52-190a(a) (2019).

[109] *Id.* § 52-190a(c).

[110] *See* 735 ILL. COMP. STAT. 5/2-622 (2013).

[111] GA. CODE ANN. § 9-11-9.1 (2007).

[112] *Id.* § 9-11-9.1(a), (d).

[113] *Id.* § 9-11-9.1(e).

[114] *See, e.g.*, DEL. CODE ANN. tit. 18, § 6853 (2003); FLA. STAT. § 766.104 (2019); MICH. COMP. LAWS § 600.2912d (1993); MINN. STAT. § 145.682 (2014); MISS. CODE ANN. § 11-1-58 (2003); S.C.

statutes are codified in sections that govern the substance of medical malpractice claims.[115] Although these laws have the same effect as the facially procedural laws, they complicate the choice of law analysis in claims brought in federal court. In some form, they all require an affidavit that attests to the merits of the claim be filed with the complaint.[116] And failure to file an affidavit with the complaint is grounds for dismissal on the merits.[117]

Tennessee's rule is a good example. It provides that in a medical malpractice action for which expert testimony is required,[118] the plaintiff "shall file a certificate of good faith with the complaint."[119] And if the certificate is not filed with the complaint, "the complaint shall be dismissed . . . with prejudice."[120] Delaware is similar. It too requires a plaintiff in a medical malpractice action to file with her complaint an affidavit of merit, and if the complaint does not have the affidavit attached, then the clerk "shall refuse to file the complaint and it shall not be docketed with the court."[121] Other states that have these statutes include Florida, Michigan, Minnesota, Mississippi, South Carolina, Virginia, and West Virginia.[122]

B. Laws That Allow Some Delay in Filing the Affidavit

In contrast to the states that require plaintiffs to file an affidavit with their complaint, some states are more lenient and allow plaintiffs to file an affidavit of merit after service of the complaint in certain circumstances. I discuss more fully below why that distinction matters but, in short, laws that allow some delay are more likely to be applied in actions in federal court *after* the pleading stage. The Illinois rule, for example, requires that a plaintiff in a medical malpractice action "file an affidavit, attached to the complaint" declaring that a health professional has reviewed the claim and that there is

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CODE ANN. § 15-36-100 (2005); VA. CODE ANN. § 8.01-20.1 (2013); W. VA. CODE § 55-7B-6 (2019).

[115] For example, Tennessee's AOM statute is codified in the section of the code that regulates the merits of health care liability actions. *See, e.g.*, TENN. CODE ANN. § 29-26-101 (2015), et seq.

[116] *See, e.g.*, TENN. CODE ANN. § 29-26-122(a) (2012).

[117] *See, e.g.*, *id.* at § 29-26-122(a).

[118] Expert testimony is not required in cases involving the "common knowledge" exception, such as obvious cases of medical negligence like a medical instrument being left inside a patient after surgery. *See* Seavers v. Methodist Med. Ctr. of Oak Ridge, 9 S.W.3d 86, 92 (Tenn. 1999).

[119] See TENN. CODE ANN. § 29-26-122(a) (2012).

[120] *Id.* §§ 29-26-122(a), (c).

[121] DEL. CODE ANN. tit. 18, § 6853(a)(1) (2003).

[122] *See* FLA. STAT. §766.104 (2019); MICH. COMP. LAWS §600.2912d (1993); MINN. STAT. §145.682 (2014); MISS. CODE ANN. §11-1-58 (2003); S.C. CODE ANN. §15-36-100 (2005); VA. CODE §8.01-20.1 (2013); W. VA. CODE §55-7B-6 (2019).

"a reasonable and meritorious cause for filing of such action."[123] This rule allows a ninety-day delay in filing an affidavit if consulting with a healthcare professional would cause the lawsuit to be barred by the statute of limitations.[124] Maryland's rule is similar, but also allows a ninety-day extension if the failure to file the certificate was the result of neither willfulness nor gross negligence.[125] Pennsylvania's rule allows a court, upon good cause, to extend the time for filing an affidavit of merit for sixty days.[126]

IV. FEDERAL COURTS COMPOUND THE PROBLEM

Because the Supreme Court has been inconsistent in its guidance on resolving conflicts between state laws and Federal Rules, it should come as little surprise that the federal courts of appeals have reached similarly inconsistent results vis-a-vis AOM statutes. Some courts have held outright that the AOM statutes apply,[127] others have held that the Federal Rules displace state law,[128] while others still have split the baby, and have created intra-circuit splits on the issue.[129] And when this problem arises in suits brought against the federal government under the FTCA, some judges have declined to do an *Erie* analysis altogether.[130]

Several courts of appeals have held that state law AOM statutes are substantive and thus apply in federal court. Many of those cases, however, were decided before *Shady Grove*,[131] and others involved statutes that are not within the scope of this article.[132] In the wake of *Shady Grove*, the Sixth and Seventh Circuits have had much internal disagreement as to whether AOM statutes should apply in federal court. And that disagreement has resulted in confusing and inconsistent decisions. Although some cases discussed in this section involve run-of-the-mill diversity lawsuits, the purpose of this section

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[123] 735 ILL. COMP. STAT. 5/2-622(a)(1) (2013).

[124] *Id.*

[125] *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04(b) (2019).

[126] 231 PA. CODE § 1042.3(d) (2013).

[127] *See* Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 262–63 (3d Cir. 2011) (concluding that Pennsylvania's AOM requirement that an affidavit be filed with a complaint is substantive law that must be applied in federal court); Simmons v. Miss. CVS Pharm., L.L.C., No. 4:19-CV-148-DMB-JMV, 2020 WL 5520559, at *2 n.6 (N.D. Miss. Sept. 14, 2020) (concluding that the Mississippi rule deals with "substantive, pre-suit requirements" that would apply in federal court).

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

[129] *See* Hahn v. Walsh, 762 F.3d 617 (7th Cir. 2014); Young v. United States, 942 F.3d 349 (7th Cir. 2019).

[130] *See, e.g.*, Brusch v. United States, 823 F. App'x 408, 413 (6th Cir. 2020) (Readler, J., concurring).

[131] *See* Chamberlain v. Giampapa, 210 F.3d 154, 161 (3d Cir. 2000); Trierweiler v. Croxton and Trench Holding Corp., 90 F.3d 1523, 1538–41 (10th Cir. 1996).

[132] *See Chamberlain*, 210 F.3d at 161.

is to illustrate how federal courts analyze these state laws under the *Erie* doctrine more generally. I focus primarily on the Sixth and Seventh Circuits because their cases illustrate the more general confusion surrounding AOM statutes and the *Erie* doctrine.

A. The Sixth Circuit: A Tale of Two Statutes

Three of the four states in the Sixth Circuit have AOM statutes.[133] And of those three statutes, the Sixth Circuit has reached contrary results in cases involving two of them.[134] The first is *Gallivan v. United States*.[135] While in a federal prison in Ohio, Dennis Gallivan had surgery that left him permanently disabled.[136] He sued, alleging that the Bureau of Prisons had been negligent and that the United States was liable under the FTCA.[137] But the district court dismissed his lawsuit because Gallivan did not file an affidavit of merit with his complaint.[138] The Sixth Circuit reversed, concluding that the Ohio AOM statute should not apply in federal court.[139] The panel concluded that the Ohio rule conflicted with three Federal Rules: 8, 9, and 12.[140]

Applying *Shady Grove*, the *Gallivan* court held that the rule (which, as discussed above requires a plaintiff to contemporaneously file an affidavit of merit with the complaint) conflicts with Rule 8(a) because the latter provides the requirements for a complaint: "(1) a short and plain jurisdictional statement, (2) a short and plain statement of the claim, and (3) an explanation of the relief sought."[141] And by listing these elements, "Rule 8 implicitly 'excludes other requirements that must be satisfied for a complaint to state a claim for relief.'"[142] Therefore, the court concluded, the Ohio rule, which requires an affidavit to be filed with a complaint, conflicts with Rule 8, and

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[133] *See* MICH. COMP. LAWS § 600.2912d (1993); OHIO R. CIV. P. 10(D); TENN. CODE ANN. § 29-26-122 (2012).

[134] A district court in Michigan has concluded that the Michigan AOM statute conflicts with Rule 8 and therefore cannot apply in federal court. *See* Long v. Adams, 411 F. Supp. 2d 701 (E.D. Mich. 2006). Curiously, the district court used *Walker* to reach this conclusion, while other courts used *Walker* to reach the opposite conclusion.

[135] Gallivan v. United States, 943 F.3d 291 (6th Cir. 2019).

[136] *Id.* at 292.

[137] *Id.*

[138] *Id.* at 293.

[139] *Id.* at 294.

[140] *Id.* at 293–94.

[141] *Id.* (citing FED. R. CIV. P. 8(a)).

[142] *Id.* (quoting Carbone v. Cable News Network, Inc., 910 F.3d 1345, 1352 (11th Cir. 2018) (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 10 at 107 (2012))).

is inapplicable in federal court.[143] The court further concluded that the Ohio rule conflicted with Rule 12 because Rule 12 does not demand any evidentiary support for a claim to be plausible.[144] And finally, the fact that Rule 9 specifies the circumstances in which a part *is* subject to a heightened pleading standard means that the heightened pleading standard in the Ohio rule conflicts with Rule 9 as well.[145]

Although the Sixth Circuit held that Ohio's rule is inapplicable in federal court, it has not done the same for Tennessee's AOM statute.[146] Even after *Gallivan* was decided, the Sixth Circuit has declined to address whether the Tennessee rule is applicable in federal court.[147] In both *Barnwell* and *Brusch*, the panels recognized the precedential effect of *Gallivan* and its implications on the Tennessee rule, but nonetheless upheld the district courts' applications of the statutes because in both cases the plaintiff had forfeited the argument that the Tennessee rule does not apply in federal court.[148] But in a concurrence, Judge Readler cast doubt as to the propriety of engaging in a *Shady Grove* analysis in a case brought under the FTCA.[149] Because the FTCA commands that courts apply state substantive law, Judge Readler concluded, a substantive law would apply in an action brought under the FTCA regardless of a conflict with a federal rule, because in the FTCA context a court should not engage in an *Erie*/*Shady Grove* analysis at all[150] (thus implying that *Gallivan* was wrongly decided).

B. The Seventh Circuit's Split

The Seventh Circuit has also been inconsistent in its two decisions analyzing AOM statues post-*Shady Grove*. Both cases involved the Illinois statute, but they reached different results. The first case, *Hahn v. Walsh*, involved a state-law wrongful death claim against a correctional facility after

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[143] *Id.*

[144] *Id.*

[145] *Id.* The Ohio Supreme Court's interpretation of the Ohio rule supports this conclusion. That court has read the "explicit text" of the rule as placing "a heightened pleading requirement" on parties bringing medical negligence claims. *See* Fletcher v. Univ. Hosps. of Cleveland, 897 N.E.2d 147, 150 (Ohio 2008). A complaint that lacks the affidavit may be dismissed. *See id.*

[146] *See, e.g.*, Burns v. United States, 542 F. App'x 461, 463–64 (6th Cir. 2013) (noting that the Tennessee rule "is substantive Tennessee law applicable to FTCA cases which arise in that state"); Southwell v. Summit View of Farragut, LLC, 494 F. App'x 508, 511–12 (6th Cir. 2012); Reed v. Speck, 508 F. App'x 415, 422–23 (6th Cir. 2012).

[147] *See* Estate of Barnwell v. Grigsby, 801 F. App'x 354 (6th Cir. 2020); Brusch v. United States, 823 F. App'x 409 (6th Cir. 2020).

[148] *Estate of Barnwell*, 801 F. App'x at 359 n.1; *Brusch*, 823 F. App'x at 412.

[149] *Brusch*, 823 F. App'x at 412–13 (Readler, J., concurring).

[150] *Id.* at 413.

Janet Hahn died of diabetic ketoacidosis.[151] Like many cases involving AOM statutes, Hahn's executor failed to file an affidavit of merit with the complaint.[152] And like all of the other cases, the district court applied the Illinois AOM statute and dismissed Hahn's complaint.[153] The Seventh Circuit affirmed.[154] Recall that the Illinois AOM statute requires a plaintiff in a medical malpractice action to attach to her complaint an affidavit that a healthcare professional has reviewed the facts and believes that there is a "reasonable and meritorious cause for the filing of such action."[155] Hahn contended that the Illinois rule conflicted with Rules 8 and 11 of the Federal Rules of Civil Procedure, and the state claimed that the Illinois rule was a substantive law that should apply in federal court.[156] The court relied on *Hanna* and *Walker* (though curiously, not *Shady Grove*) to hold that the Illinois rule "comfortably 'can exist side by side.'"[157] The Illinois rule, the Seventh Circuit reasoned, only concerned "a pre-suit consultation and related attachments to the complaint," and thus did not regulate the contents of a plaintiff's complaint.[158] Consequently, the statute could coexist with Rule 8.[159] So too, the court concluded, could the statute coexist with Rule 11 because the Illinois statute was "designed to ensure that a complaint has 'factual validity' and 'reasonable merit,'"[160] whereas Rule 11's "central purpose . . . is to deter baseless filings in district court . . . ."[161]

Then the Seventh Circuit created an intra-circuit split in *Young v. United States*.[162] There, the Seventh Circuit held that the same Illinois statute at issue in *Hahn* did not apply in a medical malpractice action brought under the FTCA. This time, the court concluded that the Illinois rule *does* conflict with Rule 8.[163] Judge Easterbrook concluded that "[Rule 8] specifies what a complaint must contain. It does not require attachments. One can initiate a contract case in federal court without attaching the contract, an insurance case without attaching the policy, a securities case without attaching the registration statement, and a tort case without attaching an expert's report."[164]

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[151] Hahn v. Walsh, 672 F.3d 617, 620 (7th Cir. 2014).
[152] Id. at 617.
[153] *Id.*
[154] *Id.*
[155] 735 ILL. COMP. STAT. 5/2-622(a) (2013).
[156] *Hahn*, 672 F.3d at 629.
[157] *Id.* at 631 (quoting Walker v. Armco Steel Corp., 466 U.S. 740, 741 (1980)).
[158] *Id.*
[159] *Id.*
[160] *Id.* (citation omitted).
[161] *Id.* (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990)).
[162] Young v. United States, 942 F.3d 349 (7th Cir. 2019).
[163] *Id.*
[164] *Id.* at 351.

Therefore, he reasoned, "[the Illinois rule] applies in federal court to the extent that it is a rule of *substance*; but to the extent that it is a rule of *procedure* it gives way to Rule 8 and other doctrines that determine how litigation proceeds in a federal tribunal."[165]

In a display of Solomonic wisdom, however, the panel in *Young* found a way to vindicate Illinois's substantive goals (wanting insubstantial medical-malpractice claims resolved swiftly) in federal court: summary judgment.[166] Rule 56(b) allows a motion for summary judgment to be filed "at any time," and therefore, a defendant can immediately move for summary judgment "because the plaintiff has not supplied the required affidavit and report."[167]

C. Other Courts Follow Suit

Although the decisions of the Sixth and Seventh Circuits sufficiently illustrate the problem that federal courts face addressing the issue of *Shady Grove*'s effect on AOM statutes, other courts have also addressed this issue, with similarly inconsistent results. Two circuit courts have concluded that state AOM statutes are substantive law that apply in diversity actions, while two others have affirmed the application of AOM statutes in diversity actions without an independent *Erie* analysis.[168] Various district courts too have weighed in on this issue.[169]

The Third Circuit has addressed the question in the context of both the Pennsylvania and New Jersey AOM statutes. In a case that predated *Shady Grove*, the Third Circuit held that the New Jersey statute, which requires a plaintiff file an affidavit within sixty days of the date the answer is filed or the complaint could be dismissed, applied in a diversity action.[170] The court concluded that the New Jersey law did not have "any effect on what is included in the pleadings of a case or the specificity thereof."[171] Further, the Third Circuit has concluded that the Pennsylvania law, which requires a

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[165] *Id.*

[166] *Id.*

[167] *Id. See also* FED. R. CIV. P. 56(b).

[168] *See* Weasel v. St. Alexius Med. Ctr., 230 F.3d 348, 352 (8th Cir. 2000) (affirming the dismissal of a medical malpractice claim for failure to comply with North Dakota's expert-affidavit statute without considering whether the law is applicable in federal court). *See also* Johnson v. McNeil, 278 F. App'x 866, 871–72 (11th Cir. 2008) (upholding the dismissal of a negligence action for failure to comply with Florida's AOM statute without questioning whether the statute applies in federal court).

[169] *See generally* Long v. Adams, 411 F. Supp. 2d 701 (E.D. Mich. 2006); Velazquez v. UPMC Bedford Mem'l Hosp., 328 F. Supp. 2d (W.D. Pa. 2004); Estate of C.A. v. Grier, 752 F. Supp. 2d 763 (S.D. Tex. 2010); RTC Mortg. Trust 1994 N-1 v. Fidelity Nat'l Title Ins. Co., 981 F. Supp. 334 (D.N.J. 1997).

[170] Chamberlain v. Giampapa, 210 F.3d 154, 160–61 (3d Cir. 2000).

[171] *Id.* at 160.

plaintiff file an affidavit of merit with the complaint or within sixty days after filing the complaint, is substantive law and thus applies in a diversity action in federal court.[172] Although *Liggon-Redding* postdated *Shady Grove*, the Third Circuit did not address *Shady Grove* in its analysis, relying instead on the rule from *Hanna v. Plumer*.[173] The court relied on the holding from *Chamberlain* to further bolster its conclusion.[174]

The Fourth Circuit recently held that West Virginia's AOM statute would not preclude a suit brought under the FTCA.[175] The West Virginia law requires a plaintiff in a medical malpractice action serve the defendants with a certificate of merit before she can file her complaint.[176] The Fourth Circuit followed *Gallivan*'s reasoning, holding that the West Virginia law conflicts with Rules 8, 9, 11, and 12.[177]

In another case that predates *Shady Grove*, the Tenth Circuit concluded that the Colorado statute, which was fundamentally the same as the New Jersey and Pennsylvania statutes, applied in a diversity case in federal court.[178] The court considered whether the Colorado rule conflicted with Rule 11.[179] The court concluded that because the Colorado statute did not conflict with any Federal Rule, the statute "manifests 'a substantive decision by that state.'"[180]

The water becomes even murkier at the district court level. Although a sizable majority of district courts have held that state AOM statutes apply in federal court, some have broken ranks and held that the laws do not apply.[181] A case that predates *Walker*, *Gasperini*, and *Shady Grove* provides some of the best analysis of the conflict between an AOM statute and the Federal Rules. In *Boone v. Knight*, the court observed that by "requiring that the plaintiff attach to his complaint the affidavit of an expert witness, [Georgia's] statute in effect mandates the pleading of evidentiary material."[182] Thus, the court concluded, "[t]he teaching of *Hanna* is that, in situations of such

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[172] *See* Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 264–65 (3d Cir. 2011).
[173] *Id.* at 264.
[174] *Id.*
[175] Pledger v. Lynch, No. 18-2213, 2021 U.S. App. LEXIS 21587 (4th Cir. July 21, 2021).
[176] W. VA. CODE § 55-7B-6(b).
[177] *Pledger*, 2021 U.S. App. LEXIS 21587, at *13.
[178] Trierweiler v. Croxton and Trench Holding Corp., 90 F.3d 1523, 1538–41 (10th Cir. 1996).
[179] *Id.* at 1540.
[180] *Id.* at 1541 (quoting Walker v. Armco Steel Corp., 446 U.S. 741, 751 (1980)).
[181] *Compare* Smith v. Planned Parenthood of the St. Louis Region, 225 F.R.D. 233, 242 (E.D. Mo. 2004) (applying Missouri's AOM statute) *with* Long v. Adams, 411 F. Supp. 2d 701, 709 (E.D. Mich. 2006) (declining to apply Michigan's AOM statute in a diversity suit).
[182] Boone v. Knight, 131 F.R.D. 609, 611 (S.D. Ga. 1990).

conflict, the Federal Rule is controlling. Therefore, the sufficiency of plaintiff's pleading must be judged solely by reference to Federal Rule 8."[183]

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Federal courts have complicated an already complex problem by reaching inconsistent conclusions with inconsistent reasoning. For the remainder of this article, I will describe how federal courts should address state AOM statutes and any potential conflicts with the Federal Rules.

V. WHOSE LAW IS IT ANYWAY? CHOICE OF LAW PRINCIPLES UNDER THE FEDERAL TORT CLAIMS ACT

So now we get to the first part of the problem: how should courts go about analyzing choice-of-law (*Erie*) arguments when a case is brought under the Federal Tort Claims Act? In the most basic sense, the FTCA is a jurisdictional statute that acts as a limited waiver of the federal government's sovereign immunity.[184] But it contains an *Erie* wrinkle. Generally, in cases arising under a court's federal question jurisdiction,[185] conflicts between state law and federal law rarely arise because federal law governs the substantive law. But the FTCA provides that the United States is liable in tort "if a private person [] would be liable . . . in accordance with the law of the place where the act or omission occurred."[186] Therefore, under the FTCA, the tort law of the state in which the negligent act occurred always governs.[187] So when a federal court's jurisdiction is based on federal question, but the federal statute directs the federal court to apply state law, how should federal courts deal with conflicts between ostensibly substantive state laws and the federal rules?

As I discussed in Part IV, *supra*, federal courts have been inconsistent in their decisions regarding AOM statutes in federal court. They also have been inconsistent in decisions involving choice of law under the FTCA. The primary disagreement among the courts with respect to this issue seems to be whether they should apply the *Erie* doctrine at all.[188] That confusion is

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[183] *Id.*

[184] Gallivan v. United States, 943 F.3d 291, 293 (6th Cir. 2019) (citing 28 U.S.C. § 1346(b)(1) (2012)).

[185] *See* 28 U.S.C. § 1331 (2012).

[186] 28 U.S.C. § 1346(b) (2012).

[187] *See* Jude v. Comm'r of Soc. Sec., 908 F.3d 152, 158 (6th Cir. 2018) ("State tort law provides the substance of a claim that gains its jurisdictional basis through the FTCA.").

[188] *Compare Gallivan*, 943 F.3d at 293–94 (analyzing a conflict between a state AOM statute and the Federal Rules under the *Shady Grove* framework), *with* Cibula v. United States, 551 F.3d 316, 321 (4th Cir. 2009) (declining to analyze a conflict under the *Erie* doctrine because "the FTCA contains an explicit

understandable. *Erie* was, after all, a diversity case,[189] and the seminal cases that expanded the doctrine did so in the context of diversity jurisdiction.[190]

But to say that courts should engage in an *Erie* (or more pertinently here, a *Shady Grove*) analysis only in diversity cases is wrong.[191] Scholars "have almost uniformly stated that *Erie* doctrine applies in the same way to all state law claims in federal court, whatever the basis for federal court jurisdiction."[192] Judge Friendly concluded that the notion that *Erie* only applies in diversity cases is an "oft-encountered heresy,"[193] although he acknowledged that the Supreme Court's jurisprudence had contributed to that confusion.[194] The lower courts, on the other hand, have stated with some certainty that "[t]he principles set forth in *Erie* and its progeny apply *equally* to diversity and federal question cases."[195]

So why all the confusion about whether courts should apply the *Erie* doctrine in cases brought under the FTCA? It could reasonably be attributed to the current text of the FTCA itself. Recall that the FTCA provides, in relevant part, that liability against the United States is imposed "under circumstances where the United States, if a private person, would be liable . . . in accordance with the law of the place where the act or omission

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instruction by Congress regarding which law to use, courts should not engage in their normal *Erie* analysis to make that determination"); Brusch v. United States, 823 F. App'x 409, 412–13 (6th Cir. 2020) (Readler, J., concurring).

189 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

190 *See generally* Part II, *supra*. *See also* Reinert, *supra* note 27, at 2352 ("By contrast, every Supreme Court case to actually apply an *Erie* analysis to a choice-of-law question has been founded on diversity jurisdiction."); Gasperini v. Ctr. For Humanities, Inc., 518 U.S. 415, 434 (1994) (noting that "cases arising wholly under federal law" are "cases in which the *Erie* doctrine was not in play").

191 For a review of the scholarly commentary on the application of the *Erie* doctrine in nondiversity cases, *see* Reinert, *supra* note 27, at 2346–51. S*ee also* CHARLES ALLEN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 4520 (4th ed. 2021) (noting that the notion that the *Erie* doctrine only applies in diversity cases "simply is wrong").

192 *See* Reinert, *supra* note 27, at 2346. *See also* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1926 (2011) ("It is important to remember that the *Erie* doctrine applies in federal-question and federal constitutional cases, just as it does in diversity cases, provided that an analytically separate question of state law is presented."); Geri J. Yonover, *Ascertaining State Law: The Continuing* Erie *Dilemma*, 38 DEPAUL L. REV. 1, 22 (1988) ("It is also clear that *Erie*'s mandate impinges in areas of pendent and federal question, as well as diversity, jurisdiction.").

193 *See* Henry Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.122 (1964).

194 *See id.*

195 *See, e.g.*, Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102 (9th Cir. 2003) ("*Erie* applies irrespective of whether the source of subject matter jurisdiction is diversity or federal question."). *See also* Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540–41 n.1 (2d Cir. 1956) ("Thus, the *Erie* doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law.").

occurred."[196] Thus, some courts have implied that all state law, including state procedural law applies. Such courts have reasoned that "the FTCA contains an explicit instruction by Congress regarding which law to use, courts should not engage in their normal *Erie* analysis to make that determination."[197]

Although it is true enough that the text of the FTCA puts a wrinkle in a traditional *Erie* analysis, courts that have concluded that it is improper to engage in an *Erie* analysis in FTCA cases ignore two important points. First, they ignore the statutory and legislative history of the FTCA, and second, they ignore that the *Erie* analysis was never predicated on diversity jurisdiction. Consider first the text of the FTCA as enacted. It provided:

> In [tort claims against the United States], the forms of process, writs, pleadings, and motions, and the practice and procedure, shall be in accordance with the [Federal Rules of Civil Procedure].[198]

Congress later omitted this language from the FTCA in 1948 as "unnecessary because 'the Rules of Civil Procedure promulgated by the Supreme Court shall apply to all civil actions.'"[199] Consider too the text of Federal Rule of Civil Procedure 1: "These rules govern the procedure in *all* civil actions and proceedings in the United States district courts" absent a few limited exceptions.[200]

Because the Federal Rules unquestionably apply in actions brought under the FTCA, it must be the case that courts should engage in *some* form of an *Erie* analysis if there is a conflict between a state law and a Federal Rule. It could be that courts and scholars have become too accustomed to the nomenclature of "the *Erie* doctrine" when the problems that arise in FTCA cases do not really implicate the core of *Erie* at all. As Judge Readler pointed out, the FTCA directs courts to apply the substantive law of the state in which the act or omission occurred.[201] To that end, it is understandable to cast *Erie* aside insofar as it relates to a choice of substantive law. But that position ignores *Erie*'s progeny, particularly *Hanna* and *Shady Grove*, exploring the often illusory distinction between substance and procedure. It also ignores the fact that *Erie*'s holding was not limited to diversity of citizenship.[202]

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196 28 U.S.C. § 1346(b)(1) (2012).
197 Cibula v. United States, 551 F.3d 316, 321 (4th Cir. 2009).
198 United States v. Yellow Cab Co., 340 U.S. 543, 553 n.9 (1951).
199 *Id.*
200 *See* FED. R. CIV. P. 1 (emphasis added).
201 Brusch v. United States, 823 F. App'x 409, 413 (6th Cir. 2020) (Readler, J., concurring).
202 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

That's not to say that *Erie*'s holding is remarkably clear.[203] What is clear is that *Erie* was based on more than just parity between federal and state governments. Professor Steinman concludes that "Justice Brandeis clearly based *Erie* on a principle of constitutional law."[204] And as other commentators and courts have pointed out, "[p]roperly understood, *Erie* rests on recognition of the Supremacy Clause as the exclusive basis for displacing state law, and on the procedural and 'political safeguards of federalism' built into the clause."[205] *Erie* does not cite the Supremacy Clause. But the first sentence of the Court's constitutional analysis provides firm ground for the notion that *Erie* was, above all, about the Supremacy Clause. It reads: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."[206] By implication, Professor Clark concludes, *Erie*'s basis is in the Supremacy Clause.[207] Because *Erie* itself and the subsequent Supreme Court decisions interpreting the doctrine are not based on diversity of citizenship, a federal court adjudicating a claim brought under the FTCA should still apply the *Erie* doctrine.

Although courts *should* engage in an *Erie* analysis when sitting in federal question jurisdiction, the *Erie* analysis is, at bottom, unnecessary. Regardless of the basis of a federal court's jurisdiction, and regardless of whether a court engages in an *Erie* analysis, a valid federal rule displaces inconsistent state law.[208] The Supremacy Clause tells us that much.[209] The Federal Rules of Civil Procedure have the force and effect of federal statutes,[210] and thus displace any state law with which there is a conflict.[211]

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[203] Indeed, "[t]he holding has been subject to disagreement and controversy over the years." Jack Goldsmith & Steven Walt, Erie *and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 676 (1998).

[204] *See* Steinman, *supra* note 52, at 312.

[205] Bradford R. Clark, Erie*'s Constitutional Source*, 95 CAL. L. REV. 1289, 1290–91, n.11 (2007).

[206] *Erie*, 304 U.S. at 78.

[207] *See* Clark, *supra* note 205, at 1308. That is not to say, however, that *Erie*'s basis in the Supremacy Clause is immune from critique. Judge Clark considered *Erie*'s invocation of the Supremacy Clause as "dictum." Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of* Erie v. Tompkins, 55 YALE L.J. 267, 287 (1946). And Craig Green argues that none of the grounds for the Supreme Court's decision in *Erie* "provide[] adequate constitutional support for . . . the result." Craig Green, *Repressing* Erie*'s Myth*, 96 CAL. L. REV. 595, 622 (2008).

[208] *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965).

[209] *See* U.S. CONST., art. VI, cl. 2; S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995).

[210] *See* Gallivan v. United States, 943 F.3d 291, 295 (6th Cir. 2019) (citing Am. Fed'n of Musicians v. Stein, 213 F.2d 679, 686 (6th Cir. 1954)).

[211] *See* U.S. CONST., art. VI, cl. 2 ("This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.").

What's more, the parallels between the Rules of Decision Act and the FTCA further support this conclusion. The RDA provides that: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[212] Recall that the FTCA has a similar demand: that the federal government should be held liable "in accordance with the law of the place where the act or omission occurred."[213] After all, *Erie* itself was based, at least somewhat, on the Rules of Decision Act.[214] As such, these textual parallels suggest that the proper course of action in FTCA cases is to engage in an *Erie* analysis.

Although the doctrine is unclear (and perhaps even convoluted), the notion that federal courts should not determine whether there is a conflict between a state law and a Federal Rule simply because jurisdiction is granted by the Federal Tort Claims Act[215] is wrong. The FTCA as enacted directed courts to always apply Federal Rules.[216] Further, because *Erie* itself had constitutional underpinnings, it matters little what the basis of a court's jurisdiction is when deciding whether to engage in an analysis. Indeed, the Supremacy Clause instructs that a court should determine whether a state law interferes with a Federal Rule.[217] Finally, there are significant parallels between the text of the Rules of Decisions Act and the FTCA, which further supports the notion that courts should engage in an *Erie* analysis in these cases.

VI. AN ERIE SOLUTION

To this point, I have reviewed the relevant history of the *Erie* doctrine and the Supreme Court's jurisprudence regarding conflicts between state law and the Federal Rules of Civil Procedure. I then discussed the various state statutes that require plaintiffs to file affidavits of merit with their complaint in medical malpractice actions, and why those laws present a difficult *Erie* question, particularly when a court's jurisdiction is based on the FTCA. Next,

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[212] 28 U.S.C. § 1652 (2012).

[213] 28 U.S.C. § 1346(b) (2012).

[214] Erie R. Co. v. Tompkins, 304 U.S. 64, 71 (1938).

[215] *See* Cibula v. United States, 551 F.3d 316, 321 (4th Cir. 2009).

[216] *Id.*

[217] Jay B. Skykes & Nicole Vanatko, *Federal Preemption: A Legal Primer*, CONGRESSIONAL RESEARCH SERVICE (July 23, 2019), https://fas.org/sgp/crs/misc/R45825.pdf [https://perma.cc/8W4A-P9Y7].

I discussed the inconsistent treatment among the various Courts of Appeals. Then, I analyzed the implications of the *Erie* doctrine in cases brought under the FTCA, concluding that courts should engage in such an analysis.

In this section, I describe why *Erie*/*Shady Grove* mandates that federal courts should not apply state AOM statutes at the pleading stage of litigation. In doing so, I conclude that these statutes conflict with Rules 8, 11, and 12, and their application in federal court thus runs afoul of *Shady Grove*. However, despite this conclusion, I argue that the states' substantive interests here should be respected and, in some circumstances, can still be vindicated through summary judgment practice.

A. Competing Interests

Recall that *Shady Grove* marked the Court's return to (in my view) a simpler interpretation of the *Erie* doctrine. In the decades prior to that decision, the Court had gone out of its way to vindicate state interests, often at the expense of the Federal Rules (and the Supremacy Clause).[218] These AOM statutes would have almost assuredly been applied in federal courts under the *Walker*/*Gasperini* paradigm.[219] But this is not the case under the relatively straightforward *Shady Grove* rule. A simplified version of the *Shady Grove* test goes something like this: First, a court must ask whether the Federal Rules answer "the same question" as the state law;[220] and if the Federal Rule is valid under the Rules Enabling Act, then the rule displaces state law.[221] To that end, state AOM statutes potentially conflict with four of the Federal Rules: Rules 8, 9, 11, and 12.

1. Rule 8

Federal Rule of Civil Procedure 8 governs the general rules of pleading. According to Rule 8, a complaint must contain three things: (1) a short and plain statement of the grounds for jurisdiction; (2) a short and plain statement of the claim showing that the plaintiff is entitled to relief; and (3) a demand

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[218] *See* Walker v. Armco Steel Corp., 446 U.S. 740, 751–52 (1980); Gasperini v. Ctr. For Humanities, Inc., 518 U.S. 415, 415 (1994).

[219] *See Gasperini*, 518 U.S. at 416 (applying state statute in federal court despite an ostensible conflict with a federal rule when "the State's objective [was] manifestly substantive").

[220] *See* Gallivan v. United States, 943 F.3d 291, 293 (6th Cir. 2019).

[221] *See id.* at 294. The second prong of this test is largely superfluous because the Supreme Court has never held that a Federal Rule has exceeded the scope of the REA. *See* Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1336 (D.C. Cir. 2015) (noting that "the Supreme Court has rejected every challenge to the Federal Rules that it has considered under the Rules Enabling Act").

for relief sought.[222] By listing these elements, Rule 8 "implicitly excludes other requirements that must be satisfied for a complaint to state a claim for relief."[223]

State AOM statutes, on the other hand, generally require plaintiffs to file *something* in addition to the complaint. Almost all of these statutes require that a plaintiff attach an affidavit to her complaint, and failure to do so will result in the action being dismissed[224] or the complaint being rejected by the clerk entirely.[225] So, do these rules answer the same question as Rule 8? Undoubtedly so. Rule 8 tells us exactly what a complaint must contain in order to state a claim—no more, no less.[226] By mandating that plaintiffs attach an affidavit to their complaint, or else face dismissal for failure to state a claim, these statutes impose requirements that go far beyond what the text of Rule 8 directs.[227]

The history of Rule 8 supports this conclusion. Chief Judge Charles E. Clark of the Second Circuit, the principal draftsman of the Federal Rules,[228] concluded that Rule 8 precluded courts from imposing a heightened pleading standard in a run of the mill case.[229] In so doing, Chief Judge Clark explained that:

> When the rules were adopted there was considerable pressure for separate provisions in patent, copyright, and other allegedly special types of litigation. Such arguments did not prevail; instead there was adopted a

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[222] FED. R. CIV. P. 8(a)(1)–(3).

[223] *Gallivan*, 943 F.3d at 293; *see* Chevron U.S.A. v. Echazabal, 536 U.S. 73, 80 (2002) (Under the "interpretive canon, *expressio unius est exclusion alterius*, 'expressing one item of [an] associated group or series excludes another left unmentioned.'"); SCALIA & GARNER, *supra* note 142 at 107 ("The expression of one thing implies the exclusion of others."). The Federal Rules are interpreted using the same canons of interpretation as statutes. *See* Pavelic & LeFlore v. Marvel Entm't Grp., 493 U.S. 120, 123 (1989).

[224] *See, e.g.*, N.Y. C.P.L.R. 3012-a(a) (MCKINNEY 1987); TENN. CODE ANN. § 29-26-122 (2012).

[225] *See, e.g.*, DEL. CODE ANN. tit. 18, § 6853(a)(1) (2003).

[226] *Cf.* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 401 (2010) ("Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements.").

[227] These statutes are similar to the state laws at issue in both *Hanna* and *Shady Grove* inasmuch that they impose additional requirements on top of what is required by the Federal Rules. Recall that in the former case, Massachusetts law required process in cases against an estate to be served directly on the executor of the estate. Hanna v. Plumer, 380 U.S. 460, 462 (1965). The relevant federal rule, on the other hand, did *not* impose special service rules on executors. *Id.* The federal rule, therefore, displaced the inconsistent state law. *Id.* at 470. And the state statute in *Shady Grove* imposed additional requirements on class actions on top of what Rule 23 requires, and was thus displaced by the Rule. *Shady Grove*, 559 U.S. at 401.

[228] *See* Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976).

[229] *See* Nagler v. Admiral Corp., 248 F.3d 319, 322 (2d Cir. 1957).

> uniform system for all cases – one which nevertheless allows some discretion to the trial judge to require fuller disclosure in a particular case by more definite statement, . . . discovery and summary judgment, . . . and pre-trial conference.[230]

Both the text and the history of Rule 8 confirm that it was intended to establish a simplified form of pleading applicable in all civil cases.[231] State laws that require a plaintiff to attach an affidavit to her complaint, therefore, conflict with Rule 8 and should not apply in federal court.[232]

2. Rule 9

Some state AOM statutes also run afoul of Rule 9. Rule 9 governs the circumstances under which special or heightened pleading is required.[233] Ohio's rule, for example, requires a plaintiff in a medical malpractice action to attach an affidavit to her complaint, or her lawsuit is subject to dismissal for failure to state a claim.[234] The Ohio Supreme Court has interpreted that rule as imposing "a heightened pleading requirement on parties bringing medical claims."[235] Since none of the circumstances that invoke Rule 9's heightened pleading standards are present in medical malpractice cases, Rule 8's more liberal pleading standard applies.[236] Therefore, to the extent that

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[230] *Id.* at 323.

[231] FED. R. CIV. P. 8(d) (Rule 8 eliminated technical pleadings requirements in favor of a more liberal standard: "[e]ach allegation must be simple, concise, and direct. No technical form is required."); liberal rules of pleading embodied in Rule 8 were promulgated to provide flexibility to the pleading process. FTC v. Consol. Foods Corp., 396 F. Supp. 1344, 1348 (S.D.N.Y. 1974).

[232] Some parties have argued that state rules that require parties attach an affidavit to their complaint do not conflict with Rule 8 because those laws do not regulate the *contents* of the complaint. *See* Supplemental Brief on Behalf of Defendant-Appellee at 8, Brusch v. United States, 823 F. App'x 409 (6th Cir. 2020) (No. 19-6308). And some courts have concluded the same. *See* Lindon-Redding v. Estate of Sugarman, 659 F.3d 258, 263 (3d Cir. 2011) (concluding that "Pennsylvania's [affidavit of merit law] does not govern the content of pleadings or the level of specificity contained therein"). That is too formalistic an approach that ignores the truism that these state laws do, in many ways, govern the contents of a pleading. These laws require that a complaint include attachments in order to state a claim upon which relief can be granted. Rule 8 does not. In any event, requiring attachments conflicts with Rule 11, which I discuss *infra*.

[233] *See* FED. R. CIV. P. 9.

[234] *See* OHIO CIV. R. 10(D)(2).

[235] Fletcher v. Univ. Hosps. of Cleveland, 897 N.E.2d 147, 150 (Ohio 2008).

[236] *See, e.g.*, Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (holding that complaints alleging municipal liability under 42 U.S.C. § 1983 are not subject to Rule 9's heightened pleading requirements); Farmer v. Eagle Sys. and Servs., Inc., 654 F. App'x 157, 159 n.4 (4th Cir. 2016) (claims under False Claims Act's anti-retaliation provision need only satisfy Rule 8's pleading standard); Wyatt v. Terhune, 315 F.3d 1108, 1118 (9th Cir. 2003) ("[W]e will not impose heightened pleading requirements where Congress has not expressly instructed us to do so.").

state AOM statutes impose a heightened pleading standard in medical malpractice cases, they conflict with Rule 9 and should not apply in federal court.

3. Rule 11

Rule 11 likewise "answers the question in dispute."[237] Rule 11(a) provides in relevant part that "unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit."[238] This one is easy; most AOM statutes discussed in this article require a plaintiff to attach an affidavit to her complaint.[239] But neither Rule 11 nor any federal statute impose such a rule on medical malpractice actions in federal court. Judge Clark commented that "Rule 11 [did] away with the all too barren formality of an oath to pleadings."[240] But state AOM statutes effectively resurrected an oath requirement by requiring parties attest to the validity of their claims in addition to what the text of Rule 11 mandates. Because AOM statutes require a more rigorous verification than what is required by Rule 11, they conflict with Rule 11 and cannot apply in federal court.[241]

4. Rule 12

State AOM statutes also run afoul of Rule 12. Rule 12 dictates the grounds on which a complaint may be dismissed: lack of subject-matter jurisdiction; lack of personal jurisdiction; improper venue; insufficient process; insufficient service of process; failure to state a claim; and failure to join a party under Rule 19.[242] At this point, the standard by which a complaint is judged on a motion to dismiss for failure to state a claim is axiomatic. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[243] Rule 12 does not demand any evidentiary support—in an affidavit,

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[237] *Cf.* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 398 (2010).

[238] FED. R. CIV. P. 11(a); *see* Farzana K. v. Ind. Dep't of Educ., 473 F.3d 703, 705 (7th Cir. 2007) (explaining that Rule 11's reference to other rules or statutes "means federal rule or federal statute, because state requirements for pleading do not apply in federal litigation").

[239] *See* Part III, *supra*.

[240] Judge Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 463 (1941).

[241] The Eleventh Circuit has concluded that the Georgia anti-SLAPP statute verification requirement, which imposed a similar affidavit requirement, conflicted with Rule 11 and was therefore inapplicable in federal court. *See* Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1362 (11th Cir. 2014).

[242] FED. R. CIV. P. 12(b)(1)–(7).

[243] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S.

certificate, or any other form—for a claim to be plausible and thus survive a motion to dismiss for failure to state a claim.[244] Indeed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely."[245]

State affidavit of merit statutes, on the other hand, *do* require that a plaintiff put forth evidentiary support at the pleading stage in the form of an affidavit or certificate of merit. Otherwise, the lawsuit is subject to dismissal for failure to state a claim. Tennessee's AOM statute, for example, dictates that "if the certificate [of merit] is not filed with the complaint, the complaint *shall be dismissed* . . . with prejudice."[246] Georgia also mandates that failure to submit an affidavit with the complaint subjects the action to dismissal for failure to state a claim.[247]

By directing that a complaint *must* contain an affidavit in order to state a claim upon which relief may be granted, state AOM statutes conflict with Rule 12.

B. Federalism Concerns

Accordingly, state laws that impose additional pleading requirements in medical malpractice cases conflict with Rules 8, 9, 11, and 12, and should not apply in actions in federal court. The fact that some of the state laws may reasonably be characterized as "substantive" is not, as some courts have held,[248] dispositive for the reasons discussed in Part V, *supra*. To be sure, a system in which an ostensibly substantive state law is preempted by a Federal Rule seems to contradict the basic tenets of the *Erie* doctrine as it is generally understood.[249] But even when a state's goal in regulating procedures is "manifestly substantive,"[250] the Supremacy Clause requires that a federal law

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544, 570 (2007)).

[244] *See* Klocke v. Watson, 936 F.3d 240, 246 (5th Cir. 2019) (concluding that a state law that imposes any evidentiary requirement at the motion to dismiss state conflicts with Rule 12).

[245] *Twombly*, 550 U.S. at 556.

[246] TENN. CODE ANN. § 29-26-122(a), (c) (2012).

[247] GA. CODE ANN. § 9-11-9.1(d) (2007).

[248] *See, e.g.*, Hahn v. Walsh, 762 F.3d 617, 629–30 (7th Cir. 2014).

[249] *See* Steinman, *supra* note 52, at 251 (noting that "*Erie*, after all, is often described as requiring federal courts to apply state substantive law and federal procedural law.") (quoting Gasperini v. Ctr. For Humanities, Inc., 518 U.S. 415, 427 (1994)).

[250] *Gasperini*, 518 U.S. at 429.

displace a state law,[251] regardless of whether it can reasonably be characterized as "substantive."[252]

But regardless of what the legally correct result is in these cases, principles of federalism counsel against a blasé attitude towards state interests in the event of conflicting rules. Although courts should not "bend over backwards"[253] to ensure that states' substantive goals are met, they should at least do their best to vindicate these policies.[254]

States enacted these statutes as a measure to resolve insubstantial and frivolous medical malpractice actions expeditiously.[255] And although the *Shady Grove* majority purported to only take federalism concerns into account in the event of an ambiguous federal rule,[256] there is a mechanism by which federal courts can vindicate both federal and state interests: summary judgment practice.

The problem that I identified above is that state AOM statutes require plaintiffs to attach evidentiary material to their complaints in order to state a claim on which relief may be granted, which conflicts with the pleading rules. However, Rule 12(d) provides a workaround to that conflict. It provides that:

> If, on a motion under Rule 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a

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[251] Professor Steinman argues that the *Erie* doctrine obliges federal courts to follow state law on ostensibly procedural issues. *See* Steinman, *supra* note 52, at 250–51. To be sure, the calculus of whether to displace a state AOM statute in favor of a Federal Rule becomes much more complicated in a diversity action when forum shopping and inequitable administration of law are concerns. But because FTCA actions can be brought only in *federal court*, *see* 28 U.S.C. § 1346(b) (2012), Professor Steinman's concerns should have no bearing in these cases. *Cf.* Rahimi v. United States, 474 F. Supp. 2d 825, 828 (N.D. Tex. 2006) ("Since a FTCA case must be brought in federal court, the prevention of forum shopping is not a relevant factor.").

[252] There is a growing trend among federal courts to hold that various state anti-SLAPP statutes are inapplicable in actions in federal court for similar reasons I discussed in Part V. *See, e.g.*, La Liberte v. Reid, 966 F.3d 79, 88–89 (2d Cir. 2020) (concluding that the California anti-SLAPP statute, which requires a plaintiff to establish that success is not merely plausible but probable, conflicts with Rule 12(b)(6) and therefore does not apply in actions in federal court); Abbas v. Foreign Pol'y Grp., LLC, 783 F.3d 1328, 1334 (D.C. Cir. 2015) (concluding that the D.C. anti-SLAPP statute, which requires a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal, conflicts with Rule 12 and cannot apply in federal court); Royalty Network, Inc. v. Harris, 756 F.3d 1351, 1360 (11th Cir. 2014).

[253] *See* Wood, *supra* note 55, at 686 ("The Court reached a result that bent over backwards to implement the state's policy.").

[254] *Cf., e.g.*, *La Liberte*, 966 F.3d at 88 ("The idea that the more stringent requirement of the [California] anti-SLAPP standard is a beneficial 'supplement' to the Federal rules is a policy argument—and fatal, because the more permissive standards of the Federal Rules likewise reflect policy judgments as to what is sufficient.").

[255] *See* Young v. United States, 942 F.3d 349, 351 (7th Cir. 2019).

[256] Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 405 n.7 (2010).

> reasonable opportunity to present all material that is pertinent to the motion.[257]

An affidavit of merit is, for all intents and purposes, a matter outside the pleadings because it cannot be considered a required part of a complaint. Therefore, a federal court should treat a motion to dismiss for failure to attach an affidavit of merit as a motion for summary judgment, which may be filed "at any time."[258] And Rule 56 further permits a district court to grant extra time to the nonmovant to gather essential evidence.[259] Judge Easterbrook aptly noted this compromise in *Young*, where he concluded that "[t]he state substantive goal and the federal procedural system thus can exist harmoniously."[260]

That assumes, of course, that the state law itself permits any delay in filing the affidavit. The Illinois statute at issue in *Young* was an easy case because it explicitly allowed for a delay in filing the affidavit in certain circumstances.[261] Maryland's rule is similar but also allows a ninety-day extension if the failure to file the certificate was the result of neither willfulness nor gross negligence.[262] Pennsylvania's rule allows a court, upon good cause, to extend the time for filing an affidavit of merit for sixty days.[263] And Georgia's rule allows a plaintiff to cure the defective pleading by amending her complaint with the affidavit.[264] The permissive rules in these state statutes make it more reasonable for a federal court to comply with Rule 12(d)'s mandate that "[a]ll parties must be given a reasonable opportunity to present all material that is pertinent to the motion."[265]

The majority of the state statutes relevant to this article, however, do not explicitly allow for such a delay. Ohio's rule demands that an affidavit be attached to the complaint, or the suit will be subject to dismissal.[266] New York[267] and Connecticut[268] do the same. Delaware's law requires a plaintiff in a medical malpractice action to file with her complaint an affidavit of merit, and if the complaint does not have the affidavit attached, then the clerk

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[257] FED. R. CIV. P. 12(d).
[258] *See* FED. R. CIV. P. 56(b).
[259] *See* FED. R. CIV. P. 56(d).
[260] *Young*, 942 F.3d at 352.
[261] *See id.* at 351 (citing 735 ILL. COMP. STAT. ANN. 5/2-622(a)(2)–(3) (2013)).
[262] *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04 (2019).
[263] 231 PA. CODE § 1042.3(d) (2016).
[264] GA. CODE ANN. § 9-11-9.1(e) (2007).
[265] FED. R. CIV. P. 12(d).
[266] OHIO R. CIV. P. 10(D)(2).
[267] N.Y. C.P.L.R. 3012-a(a) (MCKINNEY 1987).
[268] CONN. GEN. STAT. § 52-190a(a) (2019).

"shall refuse to file the complaint and it shall not be docketed with the court."[269] And finally, Tennessee's rule requires contemporaneous filing with the complaint with no wiggle room in the text of the statute.[270]

How then can a federal court vindicate the states' interests when the plain text of the state statute does not allow for any delay in filing an affidavit? Issues of state statutory interpretation are by and large governed by federal common law,[271] and so federal courts can interpret these state statutes without reference to how a state court would interpret the statute.[272] That being said, we have two primary interpretive schemes to go by: textualism and purposivism.[273]

The summary judgment approach does not fare well under a textualist reading of the state statutes. Take Tennessee's rule, for example. As noted above, it does not allow for any delay in filing an affidavit of merit.[274] Its language regarding the affidavit of merit is also mandatory.[275] Again, it provides that, in any medical malpractice action, "the plaintiff . . . *shall* file a certificate of good faith with the complaint. If the certificate is not filed with the complaint, the complaint *shall be dismissed*."[276] That presents a significant barrier to implementing this summary judgment compromise. The Supreme Court has noted that the word "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion."[277] If a state statute does not allow for any delay in filing an affidavit of merit, and also demands that the affidavit be filed with the complaint or the action will be dismissed, then there is no room to go against the plain text of the statute and allow the affidavit to be filed at a later time. Thus, in an action against the federal

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[269] DEL. CODE ANN. tit. 18, § 6853(a)(1) (2003).

[270] TENN. CODE ANN. § 29-26-122 (2012).

[271] *See* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 780–87 (2013) (concluding that only the Fifth Circuit has consistently held that *Erie* requires it to apply state interpretive methodology to state statutes in diversity). Shady Grove Orthopidics Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) presents a good example. Both the majority and the dissent had to analyze a New York statute. Justice Scalia gave a textual reading, while Justice Ginsburg gave a purposivist reading. But, as Professor Gluck notes, neither Justice decided how New York's highest court would have interpreted the New York statute. Instead, both Justices looked to federal statutory interpretation cases.

[272] *See, e.g.*, *Shady Grove*, 559 U.S. at 405 (2010) (noting that if federal courts would utilize purposivist state statutory interpretation principles, "federal judges would be condemned to poring through state legislative history").

[273] *See generally*, Richard H. Fallon Jr., *Three Symmetries between Textualist and Purposivist Theories of Statutory Interpretation – and the Irreducible Role of Values and Judgment within Both*, 99 CORNELL L. REV. 685 (2014).

[274] *See* TENN. CODE ANN. § 29-26-122 (2012).

[275] TENN. CODE ANN. § 29-26-122(a) (2012).

[276] *Id.*

[277] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998).

government brought under the Federal Tort Claims Act, a plaintiff would not be required to file an affidavit of merit at all. As such, a state's goal of resolving a malpractice claim quickly—perhaps even without litigation—would not be vindicated.

A purposivist reading of a state statute, on the other hand, might allow for this summary judgment compromise to work. Purposivists often consider the "policy context" of a statute, interpreting a statute involving evidence of the likely aims of the legislators who enacted the statute.[278] A purposivist reading of the Tennessee statute would recognize that the state legislators who enacted the law would likely prefer that an affidavit of merit requirement be enforced at *some point* in the litigation, rather than not at all.[279] This may well be the way to reach the most favorable result as far as principles of federalism are concerned. However, if a federal court were to engage in a purposivist reading of these state statutes for one reason, what is to stop them from engaging in such a reading from the get-go? A purposivist reading of these statutes would result in a federal court applying the state statutes at the pleading stage in a way that is contrary to *Erie*'s basis in the Supremacy Clause.[280]

Some commentators, on the other hand, suggest that a federal rule should not displace state law in favor of a federal rule in areas traditionally regulated by the states.[281] Professor Thompson suggests that there should be a rebuttable presumption that a Federal Rule will yield to a state law where "the state practice . . . bears a discernable relationship to the effective functioning of the state's regulation."[282] In cases "where states are primary regulators,"[283] Professor Thompson suggests that a federal rule should not displace the state's substantive policy considerations, regardless of an ostensible conflict between the state law and the Federal Rule.[284] Although I agree to some extent that a "federalism canon" can be useful to achieve a

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[278] *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 91 (2006).

[279] *See id.* at 91 ("Purposivists give precedence to policy context—evidence that goes to the way a reasonable person conversant with circumstances underlying enactment would suppress the mischief and advance the remedy.").

[280] *See, e.g.*, Shady Grove Orthopedics Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 438–59 (2010) (Ginsburg, J., dissenting) (engaging in a purposivist reading of a state statute to find no conflict between the state law and the Federal Rule); Gasperini v. Ctr. For Humanities, Inc., 518 U.S. 415, 429–30 (1994) (same).

[281] *See* Margaret S. Thompson, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187, 252 (2013).

[282] *Id.*

[283] *Id.*

[284] *Id.*

federalism-protective effect of state statutory schemes,[285] I do not believe that the proper application of such a "federalism canon" is to apply a rebuttable presumption for a Federal Rule to yield to a state law in federal court. However, the proper invocation of a federalism canon is beyond the scope of this article.

Although it frustrates the states' purpose in enacting their AOM statutes, the textualist approach is the better, more consistent way to interpret these statutes. True, under this reading a state AOM statute with rigid, mandatory requirements may never be enforceable in an action in federal court, particularly when the case is brought under the FTCA. But it will at least result in consistent decisions and it is faithful to *Erie*'s basis in the Supremacy Clause.

There may be some significance that the FTCA is, in essence, a waiver of sovereign immunity. After all, waivers of sovereign immunity must "be construed strictly in favor of the sovereign."[286] One could argue that this waiver of sovereign immunity should be narrowly construed to ensure that the federal government is only vulnerable to liability when a private person in the state would be vulnerable, as the text of the FTCA dictates. This approach would, in theory, favor application of *all* state limitations, including affidavits of merit. However, a narrow construction of the FTCA's waiver of sovereign immunity is of no real consequence here. The United States has waived sovereign immunity when it violates the substantive law of a state. An affidavit of merit has no bearing on whether medical malpractice actually occurred.

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State AOM statutes that impose heightened pleading requirements on plaintiffs in medical malpractice suits should not apply to actions brought in federal court. That much is clear from *Shady Grove*. However, given the considerable federalism interests at stake, federal courts should (within reason) endeavor to give effect to these state laws, be it through summary judgment or some other avenue. But courts should not bend over backwards to implement state policies, and the Supremacy Clause mandates that state AOM statutes cannot apply in federal court at the pleading stage.

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[285] *See* Richard H. Fallon, Jr., *Federalism as a Constitutional Concept*, 49 ARIZ. ST. L.J. 961, 980 n.66 (2017).

[286] McMahon v. United States, 342 U.S. 25, 27 (1951).

VII. CONCLUSION

Given the number of states that have enacted affidavit of merit requirements, and the inconsistent decisions by federal courts, the question of what to do with those statutes in actions brought in federal court is likely to get worse before it gets better. This is particularly true in actions brought under the Federal Tort Claims Act because of the widespread misunderstanding among courts as to whether to engage in an *Erie* analysis at all in those cases. But *Erie* finds its constitutional "hook" in the Supremacy Clause, and therefore, courts should engage in the analysis regardless of the jurisdictional basis of the claim.

State affidavit of merit statutes that impose additional requirements at the pleading stage conflict with the Federal Rules, and therefore, should not apply in actions brought in federal court. That is the correct result under *Shady Grove* and under the *Erie* Doctrine as properly understood as a creature of the Supremacy Clause. State interests can still be vindicated, however, for state statutes that permit delayed filing of an AOM. If the state law does not permit such a delay, then the state's substantive goal of weeding out non-meritorious medical malpractice claims simply cannot be vindicated by valid methods of interpretation by federal judges. Unless the Supreme Court suggests otherwise, this is just a consequence of the Supremacy Clause and the system the Founders envisioned.