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A Short and Plain Solution to the Medical Malpractice Crisis: Why Charles E. Clark Remains Prophetically Correct about Special Pleading and the Big Case

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A SHORT AND PLAIN SOLUTION TO THE MEDICAL MALPRACTICE CRISIS: WHY CHARLES E. CLARK REMAINS PROPHETICALLY CORRECT ABOUT SPECIAL PLEADING AND THE BIG CASE

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I. THE "BIG CASE"

Antitrust.[1] Patent infringement.[2] Civil rights.[3] Employment discrimination.[4] And now, medical malpractice. The common thread among each of these categories of cases is that judges and advocates have, at one time or another, sought to elevate the pleading requirements in federal court for these so-called "big cases."[5] To date, every such effort has failed.[6] But none of the previous attempts have garnered the wide range of support now coming from such influential sources as the majority of physicians, Congress, and the President of the United States.[7]

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[1] United States v. Employing Plasterer's Ass'n., 347 U.S. 186, 189 (1954).

[2] Charles E. Clark, *Special Pleading in the "Big Case"*, 21 F.R.D. 45, 48 (1957) [hereinafter Clark, *The Big Case*].

[3] Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993).

[4] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

[5] Clark, *The Big Case*, *supra* note 2, at 48. Big cases, under Judge Clark's definition, are those cases that are costly, time-consuming, and perpetually motivate lawyers and legislatures to abandon the simplified notice pleading requirements of the Federal Rules without any appreciation for the history of heightened pleading and the overall design of the Federal Rules. *Id.* at 45-48.

[6] The U.S. Supreme Court has never affirmed attempts to require heightened pleading beyond the few instances listed in Rule 9. *See infra* notes 208-28 and accompanying text. In addition, Professor Charles Alan Wright noted as follows:

> The modern philosophy of [notice] pleading has been received with general approval and applied with success. Reviewing its operation, after 17 years' experience, the Advisory Committee on Civil Rules said: "While there has been some minority criticism, the consensus favors the rule and the reported cases indicate that it has worked satisfactorily and has advanced the administration of justice in the [federal] district courts."

CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 68, at 473 (5th ed. 1994).

[7] The current crisis has garnered the attention of the U.S. General Accounting Office, the Congressional Budget Office, the American Medical Association, the American Trial Lawyer's Association, the President, Congress, and numerous state legislatures. Evidence of each group's participation can be discerned from their various publications, speeches, and websites. For a sampling, see generally JOINT ECON. COMM. OF U.S. CONGRESS, LIABILITY FOR MEDICAL MALPRACTICE ISSUES AND EVIDENCE (2003); U.S. CONG. BUDGET OFFICE, LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE (2004); U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE: EFFECTS OF VARYING LAWS IN THE DISTRICT OF COLUMBIA, MARYLAND AND VIRGINIA (1999); Donald J. Palmisano, M.D., Will Your Physician Be There? The Medical Liability Crisis in America, Keynote Speech to National Press Club (July 9, 2003) (transcript on file with author); Press Release, Office of the Press Sec'y, President Bush Calls for Medical Liability Reform (Jan. 26, 2004) [hereinafter Bush Calls for Medical Liability Reform], *available at* http://www.whitehouse.gov/news/releases/2004/01/20040126-3.html; Assoc. of Trial Lawyers of Am., Medical Malpractice Fibs and Facts, *at* http://www.atla.org/Consumer

In 1957, Judge Charles E. Clark observed that a mere twenty years after the passage of the Federal Rules of Civil Procedure ("Federal Rules"), noted jurists were attacking the minimal pleading requirements established by Rule 8.[8] While Judge Clark, the principal architect of the Federal Rules and a longtime member of the Advisory Committee on Federal Procedural Rules, recognized that certain categories of cases burdened lawyers and courts with great frequency, he still believed that pleading was *not* the appropriate point at which to dispose of these taxing cases.[9] Rather, only those cases identified in Rule 9 merited heightened pleading.[10] All other cases could be sufficiently vetted using the discovery and summary judgment procedures set forth in the Federal Rules.[11] In 1957, Judge Clark was specifically referring to the onerous nature of antitrust and patent infringement cases when he admonished:

> I have spent a lifetime studying, teaching, and working in this field and I assert dogmatically that strict special pleading has never been found workable or even useful in English and American law.

MediaResources/Tier3/press_room/FACTS/medmal/medmalfibsfacts.aspx (last visited Jan. 22, 2005).

[8] Clark, *The Big Case*, *supra* note 2, at 48-53 (cataloguing various cases).

[9] *See* Nagler v. Admiral Corp., 248 F.2d 319, 326 (2d Cir. 1957) (lamenting "sad truth" that such cases would likely "prove laborious" but stating special pleading is not remedy). In 1957, the same year *Conley v. Gibson*, 355 U.S. 41 (1957), was decided by the U.S. Supreme Court, Charles E. Clark, then Chief Judge for the Second Circuit Court of Appeals, authored *Nagler*. 248 F.2d at 321. Judge Clark explained in *Nagler* that the nuances of antitrust did not justify displacing the pleading requirements of Rule 8. *Id.* at 326-27.

[10] *See* FED. R. CIV. P. 9(b) (requiring particularity in pleading for fraud and mistake only).

[11] Clark, *The Big Case*, *supra* note 2, at 47-48. Judge Clark eloquently reminded that:

> The function of the summary judgment motion as an adjunct of discovery is well recognized. And finally the pre-trial conference carries the case just as far as is possible in advance of the taking of testimony. These are all definite steps toward trial committing the parties, as the pleadings never do, to precise versions of facts so far as they can be developed preliminarily. They thus have a degree of precision and finality that the pleadings can never have. But even as useful as these devices are, hardly anyone goes so far as to think of them as real substitutes for a trial which must be had where grievances definitely separate the parties. It is anomalous, particularly in the light of history and experience, that so much more seems to be expected of the paper pleadings than of these useful and highly practical adjuncts to trial.

Id.

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> Now it is clear that in federal pleading no special exceptions have been created for the "Big Case" or for any other particular type of action.
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> . . . .
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> Notwithstanding this background there seems now to be developing something bordering on a revolt led by some of the most distinguished of my colleagues. . . . I am not able to appraise quite how extensive the movement is; but in view of the powerful names already enlisted, it is certainly not to be lightly dismissed. But I must confess to disappointment that there is not more analysis of the *intent* of the rules and quite no discussion of the *precedents*.[12]

Our country is in the middle of a similar predicament—a medical malpractice crisis that is influencing, and attempting to alter, the rules of pleading in federal court. Essentially, doctors and their advocates assert that without stiff and immediate limitations on medical malpractice litigation, doctors will be unable to afford the escalating costs of medical malpractice insurance coverage and will eventually be "run out of town" or at least out of business, leaving many of us without the aid of a physician when we need medical care.[13] Although many reforms have already been enacted, those

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[12] *Id.* at 47-49 (emphasis added).

[13] Doctors and their representatives have appeared before Congress alerting government officials that if medical malpractice premiums continue to rise without restraint, many physicians will either leave their specialties or leave their communities. *The Medical Liability Crisis and Its Impact on Patient Care: Hearing Before the Senate Comm. on the Judiciary*, 108 Cong. 1, 3 (2004) (statement of George F. Lee, M.D., for American Hospital Association); *Dying for Help: Are Patients Needlessly Suffering Due to the High Cost of Medical Liability Insurance?: Hearing Before the Subcomm. on Human Rights & Wellness of the Comm. on Gov't Reform*, 108th Cong. 4-6 (2003) (statement of Sherman Joyce, President of American Tort Reform Association). Thus, many rural areas risk losing medical care in certain high-risk specialties such as obstetrics. Further evidence of the growing rift between plaintiff's lawyers and physicians is the recent proposal debated by the American Medical Association that physicians should not be required to treat plaintiff's lawyers or their family members except in emergencies. Keith Griffin, *You're a Paralegal Where? Sorry, the Doctor Is Out*, CONN. L. TRIB., July 15, 2004, *at* http://www.law.com/jsp/article.jsp?id=108931503 3510; Laura Parker, *Medical-Malpractice Battle Gets Personal*, USA TODAY, June 14, 2004, at 1A. The "no treatment" controversy has generated a host of criticism and editorials

challenging the reforms assert that medical malpractice continues to occur and that victims continue to need access to a forum for judicial relief.[14] Without seeking to embrace or advance the merits of either camp's arguments, this Article will instead seek to respond to the residual quandary posed by the current national crisis—how pleading requirements in medical malpractice cases are infringing upon the Federal Rules in diversity actions.

While Judge Clark would have had no trouble applying the traditional "short and plain" pleading requirements of Rule 8 to perceived "big cases" like medical malpractice, various lower courts seem divided on whether requiring additional information from prospective medical malpractice plaintiffs in federal court comports or conflicts with Rule 8's mandate of notice pleading.[15] And true to Judge Clark's 1957 trepidation, these decisions are seemingly being written without adequate "analysis of the intent of the rules and . . . discussion of the precedents."[16] The issue of heightened pleading in medical malpractice actions becomes relevant not in state cases—where state procedural rules clearly apply—but, rather, in federal diversity actions where *Erie Railroad Co. v. Tompkins* instructs courts to apply state substantive law and federal procedural requirements.[17] Thus, a key question becomes whether heightened pleading in medical malpractice cases amounts to a substantive requirement or a procedural burden. With every state legislature that passes some form of heightened pleading requirement, the question described herein assumes greater urgency.

Because there are very few instances where medical malpractice issues arise under federal statute,[18] invariably, the majority of

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challenging the proposal.

[14] CONG. BUDGET OFFICE, THE ECONOMICS OF U.S. TORT LIABILITY 23, 30 (2003), *available at* http://www.cbo.gov/ftpdocs/46xx/doc4641/10-22-TortReform-Study.pdf.

[15] *See infra* notes 104-52 and accompanying text.

[16] Clark, *The Big Case*, *supra* note 2, at 49.

[17] 304 U.S. 64, 78 (1938); *see also* Hanna v. Plumer, 380 U.S. 460, 465 (1965) (noting that "[t]he broad command of Erie was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law").

[18] The main exception continues to be the Federal Tort Claims Act, codified at 28 U.S.C. §§ 2671-2680 (2000). Two cases grappling with the issue of state pleading requirements in medical malpractice cases brought under the Federal Tort Claims Act are *Oslund v. United States*, 701 F. Supp. 710, 713-14 (D. Minn. 1988) (interpreting Minnesota's malpractice statute as applied to Vietnam veteran), and *Hill v. United States*, 751 F. Supp. 909, 910 (D.

medical malpractice cases filed in federal court will enter via diversity jurisdiction. Thus, while doctors and plaintiff's lawyers debate the finer points of the medical malpractice crisis, this Article focuses on resolving the impending *Erie* question regarding heightened pleading in federally filed medical malpractice actions. Part II of this Article provides a brief overview of the medical malpractice crisis and its impact on litigation. Part III evaluates the proffered solution—heightened pleading—and assesses the various approaches taken by federal courts in resolving the *Erie* issue presented by heightened pleading. Part IV critiques the proffered solution from the perspective of history, the Federal Rules, and precedent. In doing so, Part IV will trace the evolution of notice pleading and underscore the lasting and unchanging nature of Rule 8 from *Dioguardi*[19] to *Conley*[20] to *Leatherman*[21] to *Swierkiewicz*.[22] Finally, Part V offers an improved solution to the medical malpractice crisis that more fully addresses the concerns of overburdened physicians while more closely meeting the equally important needs of injured patients and keeping intact the important procedural design of the Federal Rules. For now, it appears the "big case" is once again upon us.

II. BAD MEDICINE: MEDICAL MALPRACTICE AND HEIGHTENED PLEADING

In the mid-1950s, the United States grappled with a perceived litigation crisis: How, from a societal perspective, do we deal with expensive and time consuming lawsuits?[23] Proponents of heightened pleading sought to require something more from pleadings

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Colo. 1990) (evaluating application of Colorado's malpractice statute to parents of child injured in Army hospital care).

[19] Dioguardi v. Durning, 139 F.2d 774 (S.D.N.Y. 1944).

[20] Conley v. Gibson, 355 U.S. 41 (1957).

[21] Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

[22] Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

[23] *See generally* Clark, *The Big Case*, *supra* note 2 (discussing movement for heightened pleading requirements in some cases but empahisizing importance of pretrial discovery or conference to compensate for "lack of detail" in complaint).

than was envisioned under the Federal Rules.[24] The perceived crisis purportedly called for deviation from the norm.[25] Ultimately, however, no such deviation occurred.[26]

Fast forward fifty years and the reverberations of crisis once again emanate throughout the country. Today, doctors and lawyers

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[24] *Id.* at 48.

[25] *Id.*

[26] *Id.* at 53-54. Judge Clark attached as an appendix to his article the 1955 Advisory Committee Note relating to Rule 8(a)(2). This Note was prepared during the height of the criticism calling for heightened pleading in difficult and costly cases. The Note, while long, bears repeating in full here to underscore the allegiance that the Advisory Committee felt toward notice pleading in the face of stiff challenge.

> *Note.* Rule 8(a)(2) is retained in its present form. This Note is appended to it in answer to various criticisms and suggestions for amendment which have been presented to the Committee.
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> The criticisms appear to be based on the view that the rule does not require the averment of any information as to what has actually happened. That Rule 8(a) envisages the statement of the circumstances, occurrences, and events in support of the claim presented is clearly indicated not only by the forms appended to the rules showing what should be considered as sufficient compliance with the rule, but also by other intermeshing rules; see, inter alia, Rules 8(c) and (e), 9(b-g), 10(b), 12(b)(6), 12(h), 15(c), 20 and 54(b). Rule 12(e), providing for a motion for a more definite statement, also shows that the complaint must disclose information with sufficient definiteness. The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. The decision in Dioguardi v. Durning, 2 Cir., 1944, 139 F.2d 774, [sic] to which proponents of an amendment to Rule 8(a) have especially referred, was not based on any holding that a pleader is not required to supply information disclosing a ground for relief. The complaint in that case stated a plethora of facts and the court so construed them as to sustain the validity of the pleading.
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> While there has been some minority criticism, the consensus favors the rule and the reported cases indicated that it has worked satisfactorily and has advanced the administration of justice in the district courts. The rule has been adopted verbatim by a number of states in framing their own rules of court procedure. This circumstance appears to the Committee to confirm its view that no change in the rule is required or justified.
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> It is accordingly the opinion of the Advisory Committee that, as it stands, the rule adequately sets forth the characteristics of good pleading; does away with the confusion resulting from the use of "facts" and "cause of action"; and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.

Id.

are battling inside and outside the courtroom to resolve a perceived medical malpractice crisis. There is strong and unyielding rhetoric on both sides. The uproar even has Congress and the President calling for reforms.[27] Yet the empirical research guiding these reforms has not produced consistent results.[28]

Federally compiled data confirms that medical malpractice lawsuits accounted for 7.4% of all federal cases during the 1996-97 fiscal year.[29] In 2001, the Department of Justice confirmed that 90%

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[27] *See supra* note 7. While delivering a speech in Little Rock, Arkansas, President Bush emphatically stressed the need for medical malpractice liability reform. Bush Calls for Medical Liability Reform, *supra* note 7. The following are excerpts from his speech:

> I'm here to talk about one of the reasons why health care costs are going up. And that's the fact that we've got too many darn lawsuits, too many frivolous and junk lawsuits that are affecting people. I'm here to make sure that we talk in a way that says to the people of Arkansas and America that we need medical liability reform to make sure that medicine is affordable and available.
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> . . . .
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> These are good steps. Yet one of the main cost drivers that has nothing to do with what happens in an operating room or a waiting room—happen in the courtroom. One of the reasons people are finding their premiums are up, and it's hard to find a doc these days, is because frivolous and junk lawsuits are threatening medicine across the country. And there's a lot of them, people just filing these suits. I call them junk suits because they don't have any merit. The problem is they cost money to fight.

Id.

[28] Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 57, 58-59. Professor Danzon explains that "[t]o date, there have been only two published statistical analyses of the impact of tort reform and other factors on malpractice claims." *Id.* at 58. Thereafter, she admonishes that "[g]iven the recent rise in claims and severity as well as the necessarily less-than-definitive nature of previous analyses, the time is ripe for additional information." *Id.* at 59. *See also* Stephen Zuckerman et al., *Information on Malpractice: A Review of Empirical Research on Major Policy Issues*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 85, 85 (noting that "[e]ven a casual follower of malpractice policy debates can see that the amount of published and unpublished information is voluminous: however, very little of that information consists of systematic empirical studies"); *cf.* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 982 (2003) (examining use of Summary Judgment and Motion to Dismiss to resolve disputes in federal courts that would be better left to juries). While ultimately concluding that little empirical research has been conducted to verify the fears behind the proposed litigation crisis, Miller notes that "[s]ome empirical evidence indicates that awards in tort cases have increased significantly and that the number of million-dollar awards has risen sharply over a thirty-year period, most dramatically in the area[ ] of medical malpractice." *Id.* at 988.

[29] U.S. Dep't of Justice Bureau of Justice Statistics, *Federal Tort Trials and Verdicts, 1996-97*, at 3 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fttv97.pdf. The Department of Justice statistical analysis states that "vehicle claims comprised 19.4% of tort

of all medical malpractice cases sought compensation for death or permanent injury.[30] Yet only 27% of patients pursuing medical malpractice claims were ultimately successful in their cases.[31] This figure is much lower than the success rate of other tort litigants, who succeeded in federal court at a rate of 52%.[32] Nevertheless, the reality of the current state of medicine is replete with instances of doctors who refuse to perform vital medical services, such as delivering babies, because of the fear of the resulting monetary judgments that even the smallest of errors could produce.[33]

Without seeking to place any value judgment on the current debate, we accept as factual that many individuals are injured each year as a result of medical treatment, and out of this larger category, some individuals sue based upon their injuries. Thus,

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trial cases, product liability 15.9%, and medical malpractice 7.4%." *Id.*

[30] U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, MEDICAL MALPRACTICE TRIALS AND VERDICTS IN LARGE COUNTIES, 2001, at 1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mmtvlC01.pdf.

[31] *Id.*

[32] *Id.* "The overall win rate for medical malpractice plaintiffs (27%) was about half of that found among plaintiffs in all tort trials (52%)." *Id.* This data is consistent with the 1986 Harvard Medical Practice Study investigating medical malpractice in the State of New York. PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION (1993). This extensive empirical study reviewed health care costs, health care injuries, and the role of medical malpractice litigation in New York. The authors extrapolated their data on iatrogenic, or medically related, injury to conclude the following:

> Several findings from this study are worthy of emphasis. First is disclosure of the overall magnitude of mortality and morbidity produced by iatrogenic injury. In New York in 1984 almost 100,000 injuries occurred as a result of adverse events, and more than a quarter of those were caused by substandard care. These numbers are even more striking when compared with other important sources of accidents in this country. This is especially true of the fatality rate. If New York's adverse-event-related death total can be extrapolated to the U.S. population as a whole, one would estimate over 150,000 iatrogenic fatalities annually, more than half of which are due to negligence. Medical injury, then, accounts for more deaths than all other types of accidents combined, and dwarfs the mortality rates associated with motor vehicle accidents (50,000 deaths per year) and occupation-related mishaps (6,000 deaths per year).

Id. at 55.

[33] Thomas D. Rowley, *High Insurance Premiums Jeopardize Rural OBs*, 9 RURAL HEALTH NEWS 1 (2002), *available at* http://www.nal.usda.gov/ric/richs/sprsum02.htm (last visited Jan. 27, 2005) (noting that at 2002 press conference, American College of Obstetricians and Gynecologists "named nine 'Red Alert' States where the medical liability insurance situation threatens the availability of physicians to deliver babies").

while the true underlying crisis invokes traditional tort law, of which medical malpractice litigation is merely a subset, the debate remains multifaceted and requires further empirical data before it can be properly resolved.

Casual observers will note a pattern of medical malpractice crises in this country.[34] Three times during the past forty years, medical malpractice litigation has reached crisis levels. During the 1970s,[35]

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[34] Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, 49 LAW & CONTEMP. PROBS., Spring 1986, at 5, 5. Professor Robinson's comments regarding the 1970s medical malpractice crisis ring true in today's volatile litigation climate:

> Renewed increases in the severity (size) and frequency (number) of malpractice claims, accompanied by new increases in insurance premiums, are now causing fresh anxiety within the medical profession. New proposals for legal reform have included not only a myriad of bills in state legislatures—only a handful of which have been enacted to date—but also two bills in Congress. The renewed interest in the problem makes timely another look at the crisis of the 1970's and the legal and insurance changes it produced.

Id. at 6.

[35] WEILER ET AL., *supra* note 32, at 3. The authors observed:

> Medical liability costs began to rise sharply in the late 1960s, leading the Nixon administration to appoint a national commission to analyze the problem. The commission's report, issued in 1973, was decidedly nonalarmist in tone. Its basic verdict was that doctors did not need special legal protection not afforded to other tort defendants. But the ink was barely dry on the commission's report when the country's first malpractice "crisis" emerged in the mid-1970s, with premium levels doubling in just three years. Numerous states, including New York, responded with legislation that favored doctors with a variety of measures in malpractice litigation. In the immediate aftermath of this legislative effort the malpractice insurance market stabilized, with real premiums increasing quite slowly for the next several years. Unfortunately that equilibrium did not hold. A second equally severe malpractice crisis occurred in the mid-1980's, with premium levels again doubling in just three years.

Id. *See also* Robinson, *supra* note 34, at 6. Professor Robinson explains that:

> The malpractice crisis of the mid-1970's has several facets. For health care providers the immediate crisis was essentially two-fold: a sudden and substantial increase in malpractice insurance premiums rates and, worse, the threat that liability coverage would become unavailable at any price as a consequence of carrier withdrawal from the field. For the carriers themselves, the crisis was an unanticipated increase in both the number of claims filed for negligent injuries and the amounts recovered. Rising underwriting costs were compounded by investment losses that a nationwide recession inflicted on insurance companies along with other investors.

Id.

1980s,[36] and again most recently during the late 1990s[37] and early twenty-first century,[38] commentators have noted that medical malpractice litigation and its attendant expenditures have placed an unacceptable onus on doctors. Each crisis has led to reforms.[39] No reform, however, has yet forestalled future crises. The "big case" appears to persist without solution or cure.

State legislatures intent on averting full-blown medical malpractice crises within their communities have begun to mandate heightened pleading requirements in medical malpractice cases.[40] This legislation continues without due regard for history or due regard for the general principles of tort law. Legislatures are, perhaps unintentionally, creating potential substantive immunities through the manipulation of procedural requirements.

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[36] *See* Danzon, *supra* note 28, at 57 ("Claim severity increased faster than the rate of inflation throughout the 1970's, and this trend appears to have continued into the 1980's."); *see also* U.S. GEN. ACCOUNTING OFFICE, *supra* note 7, at 1 (explaining in report delivered to Honorable Dick Armey that "[i]n both the mid-1970s and mid-1980s, medical malpractice insurance premiums grew significantly, causing the medical profession to be alarmed by a crisis in the affordability and availability of [malpractice] insurance").

[37] Elizabeth Anne Keith, Pulliam v. Coastal Emergency Services of Richmond, Inc.: *Reconsidering the Standard of Review and Constitutionality of Virginia's Medical Malpractice Cap*, 8 GEO. MASON L. REV. 587, 589 (2000).

[38] John Conyers, Jr., *The Health Act: A Bad Prescription for Consumers*, 27 SETON HALL LEGIS. J. 191, 198-200 (2003).

[39] WEILER ET AL., *supra* note 32, at 6-7. The authors observed in finalizing their report that:

> The sense of crisis that recurrently overtakes the malpractice system is, not surprisingly, also felt by state politicians. In New York and elsewhere in the country, significant legislative changes have been enacted in an effort to alleviate the problems felt by doctors with malpractice litigation. Waves of such legislative activity occurred initially in 1975-76 and then again in 1985-86, coinciding with the peak points in the premium spiral.
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> These statutory changes addressed numerous facets of each of the three distinct components of the overall malpractice regime. One component is the liability insurance system, which has generated the sharply increased premium bills to hospitals and doctors needed to cover the large liability costs incurred by providers to their patients. The second component is the tort litigation process, which determines which injured patients will be able to collect on their tort claims and how much compensation successful claimants will receive. The third major component is the health care system itself, in which patients are looked after by doctors and other providers, and in which the treatment occasionally exacerbates rather than ameliorates the patient's condition, consequently moving some patients to seek legal and monetary relief.

Id.

[40] *See infra* notes 49-60 and accompanying text.

As a general rule, tort litigation seeks to attain two equally important goals: compensation to injured parties and deterrence against negligent behavior. The American tort system has often been criticized as inefficient, costly, and ineffective.[41] And yet, many products are improved and risky behavior curtailed through tort litigation.[42] In the medical malpractice arena, the goals of tort litigation remain unchanged: Compensation must be delivered to injured patients, which simultaneously serves to deter physicians from engaging in negligent behavior.[43] Any proposed reforms—procedural or substantive—must preserve these aims. Despite the many calls for protection against frivolous medical malpractice lawsuits, medical malpractice is merely a subset of tort law. Tinkering with the protections afforded under general principles of tort doctrine risks immunizing an entire community from the consequences of their negligent acts, while also creating a disfavored group of litigants. This is a cure that, at best, re-injures.

In the end, the inquiry is rather simple: Does the current medical malpractice crisis justify deviations from the procedural norm? Is medical malpractice so unique that it requires exceptional treatment, different from all other "big cases"? Has Rule 8 finally met its match? One thing seems certain: Were Judge Clark alive today, he would undoubtedly proclaim that no crisis looms large enough to discard the time-honored and time-tested Federal Rules. Any such prescription must surely be deemed bad medicine.

III. THE PROFFERED SOLUTION: AMENDING STATE PLEADING RULES

A. STATE STATUTE VARIATIONS WITH A COMMON RESULT

In response to the arguably mounting medical malpractice crisis, numerous states have enacted legislation in an attempt to curb

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[41] CONG. BUDGET OFFICE, *supra* note 14, at 11, 21; Edward T. Schroeder, *A Tort by Any Other Name? In Search of the Distinction Between Regulation Through Litigation and Conventional Tort Law*, 83 TEX. L. REV. 897, 897-99 (2005).

[42] DEBORAH L. RHODE, ACCESS TO JUSTICE 34-35 (2004).

[43] Frank A. Sloan & Stephen S. van Wert, *Cost and Compensation of Injuries in Medical Malpractice*, 54 LAW & CONTEMP. PROBS., Winter & Spring 1991, at 131, 131.

frivolous lawsuits that burden the judicial system. Many of the enacted laws heighten the standard of pleading required to bring a medical malpractice action into state court.[44] As noted by one state's legislature, the purpose behind such tort reform legislation is "to discourage unjustified medical malpractice lawsuits and reduce the costs of the medical malpractice liability system, thus helping to contain spiraling health care costs, stem the flight of physicians out of [the state], and assure the citizens . . . access to affordable health care."[45] Another state's highest court has recognized that its medical malpractice statute serves "to alleviate the high cost of medical negligence claims through early determination and prompt resolution of claims."[46]

While such laws have developed rapidly, special pleading laws are difficult to find because they often do not appear among a section of statutes devoted to special pleading standards, and there are few cross-references that provide guidance.[47] Rather, the heightened pleading laws for medical malpractice actions are scattered throughout the various state statutes in whatever manner they were presented to their respective state legislatures.[48] For example, the heightened pleading statutes developed in North Dakota,[49] Illinois,[50] Georgia,[51] and North Carolina[52] are each found

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[44] *See infra* notes 49-60 and accompanying text. In addition to the heightened pleading statutory requirements, other efforts have been made to reduce frivolous medical malpractice claims. For example, in Louisiana and Nebraska plaintiffs may not bring an action against a health care provider until a claimant's proposed complaint is reviewed by a medical review panel and such panel has issued an opinion. LA. REV. STAT. ANN. § 40:1299.47 (West Supp. 2004); NEB. REV. STAT. § 44-2840 (1998 & Supp. 2002).

[45] Ericson v. Pollack, 110 F. Supp. 2d 582, 586 (E.D. Mich. 2000) (quoting position paper analyzing Senate Bill 270, which became applicable statute, to explain legislative intent behind Michigan's affidavit of merit statute).

[46] Weinstock v. Groth, 629 So. 2d 835, 838 (Fla. 1993).

[47] Jeffrey A. Parness et al., *The Substantive Elements in the New Special Pleading Laws*, 78 NEB. L. REV. 412, 438-39 (1999).

[48] *Id.* at 418-19 (noting specific location of statutes from Florida, Illinois, Texas, Minnesota, Missouri, and North Carolina).

[49] N.D. CENT. CODE § 28-01-46 (2003).

[50] 735 ILL. COMP. STAT. ANN. 5/2-622 (West 2003).

[51] O.C.G.A. § 9-11-9.1 (1993 & Supp. 2004).

[52] N.C. R. CIV. P. 9(j). The rule requires that a medical malpractice claim be dismissed unless the pleading (1) specifically asserts that a person reasonably expected to qualify as an expert has reviewed the medical care given and is willing to testify that it did not meet the required standard of care; (2) specifically asserts that a person who the claimant will try to

within their respective state's statutory section devoted to civil procedure, while Colorado's statute[53] is located in the laws concerning courts and court procedure. On the other hand, heightened pleading statutes from Florida,[54] Missouri,[55] and New Jersey[56] are embedded within the sections regarding torts, particularly those involving medical malpractice, while Nevada's law[57] is within a statutory section devoted solely to actions for malpractice. Finally, Minnesota[58] and Oklahoma's[59] heightened pleading statutes are found among the states' public health provisions, while Michigan's law[60] is within the revised judicature act. Regardless of each law's location, however, the result is the same: a more stringent and heightened level of pleading in order to achieve a reduced number of frivolous lawsuits plaguing the judicial system.

1. Timing Variations. While state legislatures often have the same goal in mind when arriving at statutory remedies to the medical malpractice crisis, they differ significantly in their approaches and ultimate resulting solutions. Thus, state heightened pleading statutes vary not only by their location within state statutory schemes, but also in their timing requirements.[61] For

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use as part of her expert testimony by motion is willing to testify that the medical care did not reach the appropriate standard of care and the motion is filed with the complaint; and (3) alleges facts giving rise to negligence under res ipsa loquitur. *Id.* In 2001, the Court of Appeals of North Carolina declared Rule 9(j) to be both unconstitutional and void because it was not the least restrictive means for the state to achieve its purported interest in preventing frivolous lawsuits. Anderson v. Assimos, 553 S.E.2d 63, 68-69 (N.C. Ct. App. 2001). The court found that because Rule 9(j) "classifies malpractice actions into two groups: medical and non-medical," the equal protection clause was implicated. *Id.* at 68. However, one year later, the Supreme Court of North Carolina vacated the lower court's opinion that Rule 9(j) was unconstitutional. Anderson v. Assimos, 572 S.E.2d 101, 103 (N.C. 2002). On appeal, the Supreme Court found that Rule 9(j) only applies to "medical malpractice cases where the plaintiff seeks to prove that the defendant's conduct breached the requisite standard of care—not *res ipsa loquitur* claims." *Id.* Because the plaintiff's claim asserted only res ipsa loquitur, Rule 9(j) was not triggered, and the lower court erred in addressing Rule 9(j)'s constitutionality. *Id.*

[53] COLO. REV. STAT. § 13-20-602 (2002).

[54] FLA. STAT. ANN. § 766.104 (West 1997 & Supp. 2005).

[55] MO. ANN. STAT. § 538.225 (West 2000).

[56] N.J. STAT. ANN. § 2A:53A-27 (West 2000).

[57] NEV. REV. STAT. 41A.071 (2003).

[58] MINN. STAT. § 145.682 (2002).

[59] OKLA. STAT. tit. 63, § 1-1708.1E (2001).

[60] MICH. COMP. LAWS ANN. § 600.2912b (West 2000).

[61] Parness et al., *supra* note 47, at 419.

example, a Michigan statute requires that before a plaintiff may bring a medical malpractice action the plaintiff must give the health care provider written notice at least 182 days *before* actually filing the claim.[62] New Jersey's heightened pleading statute, on the other hand, requires that in a medical malpractice or negligence action the plaintiff must provide an expert affidavit acknowledging a reasonable probability of negligence to each defendant within sixty days *after* the filing of defendant's answer.[63] States such as Georgia and Oklahoma require an expert affidavit to simultaneously accompany the plaintiff's complaint at the time of filing or service of the medical malpractice action.[64]

In *RTC v. Fidelity National Title Insurance Co.*, the U.S. District Court for the District of New Jersey relied on the sixty-day delay for submission of an expert affidavit as "strongly suggest[ing]" that the New Jersey statute is completely unrelated to pleading.[65] In reviewing Colorado's heightened pleading statute,[66] which also provides a sixty-day grace period after service of the complaint upon defendant in which to file an expert affidavit, the Tenth Circuit failed to even discuss the statutory affidavit requirement's effect of raising pleading standards, presumably because of the gap in time

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[62] *Id.* at 417-18 (explaining comprehensive requirements under Michigan's statute).

[63] N.J. STAT. ANN. § 2A:53A-27 (West 2000); *see also* COLO. REV. STAT. § 13-20-602 (Supp. 2003) (allowing sixty-day delay after service); MINN. STAT. § 145.682 (2002) (allowing ninety days after service); MO. ANN. STAT. § 538.225 (West 2000) (allowing ninety days after filing); N.D. CENT. CODE § 28-01-46 (2003) (allowing three months after commencement of action).

[64] O.C.G.A. § 9-11-9.1 (1993 & Supp. 2004) (providing exception to contemporaneous filing when there is good faith belief that statute of limitations will expire within ten days of filing complaint, requiring that expert affidavit supplement pleadings within forty-five days of original filing); OKLA. STAT. tit. 63, § 1-1708.1E (2001) (allowing court to grant extension of time, not to exceed ninety days after filing of petition except for good cause shown, to meet affidavit filing requirements); *see also* FLA. STAT. ANN. § 766.104 (West 1997 & Supp. 2004) (granting ninety-day extension of statute of limitations when complaint filed to allow attorney to conduct reasonable investigation to determine whether grounds for good faith belief of negligence exists); 735 ILL. COMP. STAT. ANN. 5/2-622 (West 2003) (requiring affidavit to accompany complaint that states affiant consulted qualified and competent health care professional and that professional believes there is meritorious cause of action); N.Y. C.P.L.R. 3012-a (Consol. 1991) (requiring attorney to execute certificate of merit upon filing action or to file such certificate within ninety days if action would otherwise be barred by statute of limitations).

[65] RTC Mortgage Trust v. Fid. Nat'l Title Ins. Co., 981 F. Supp. 334, 343 (D.N.J. 1997).

[66] COLO. REV. STAT. § 13-20-602 (Supp. 2003).

between service and the expert affidavit deadline.[67] Similarly, the Eighth Circuit applied North Dakota's statute, which allows a plaintiff three months from commencement of an action to obtain an expert affidavit, in federal court without so much as noting the ramifications under the Federal Rules of bestowing an extra burden on initiating the lawsuit.[68] The U.S. District Court for the Southern District of Georgia, however, recognized that the Georgia statute requiring an expert affidavit to be attached with the complaint "in effect mandates the pleading of evidentiary material."[69] Thus, federal courts sitting in diversity have utilized the statutory variations in timing requirements for submission of expert affidavits to justify determinations both for and against applying the particular state statute in federal court.

2. Other Substantive Variations. State heightened pleading standards also vary in their substantive approaches and requirements. For example, some states, including Georgia and New Jersey, require that the accompanying affidavit emanate from an appropriately licensed person or an expert competent to testify.[70] Other states, such as Colorado and Florida, require a certificate of counsel stating that, after a reasonable investigation, the attorney believes there is a good faith ground for bringing the malpractice lawsuit.[71] Illinois's statute specifically requires an affidavit declaring that the affiant has discussed the case with a "health professional" who has "determined in a written report, after a review of the medical record and other relevant material involved . . . that there is a reasonable and meritorious cause for the filing of such action."[72] Thus, each state's heightened pleading statute contains not only different technical requirements, but also unique substantive requirements such as varying requirements for

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[67] *See* Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1540 (10th Cir. 1996) (discussing instead possibility of direct collision between Colorado statute and Federal Rule 11).

[68] Weasel v. St. Alexius Med. Ctr., 230 F.3d 348, 353 (8th Cir. 2000).

[69] Boone v. Knight, 131 F.R.D. 609, 611 (S.D. Ga. 1990).

[70] O.C.G.A. § 9-11-9.1 (1993 & Supp. 2004); N.J. STAT. ANN. § 2A:53A-27 (West 2000).

[71] COLO. REV. STAT. § 13-20-602 (Supp. 2004); FLA. STAT. ANN. § 766.104 (West Supp. 2004).

[72] 735 ILL. COMP. STAT. ANN. 5/2-622 (West 2003).

who serves as the affiant and what information must be contained in the submitted affidavit.

Whether the above state statutes (1) are discovered in the state's civil pleading rules, the statutes governing torts and medical malpractice, or the laws governing public healthcare; (2) allow for a sixty day delay or require immediate filing of an expert affidavit; or (3) demand that the affidavit be from an expert competent to testify at trial, from the complainant, or from the plaintiff's attorney, each is an attempt to raise the requisite level of pleading necessary to bring an action for medical malpractice. Because these statutes essentially serve as amendments to pleading, a special analysis is required to determine whether such statutes can or should be applied in instances when a federal court is sitting in diversity.

B. FEDERAL COURT INTERPRETATIONS WITH AN UNCOMMON RESULT

Despite the state statutes' common result of heightening the standard of pleading in medical malpractice actions, federal courts have considered such statutes' applicability in federal court with varying results.[73] Most federal courts at least recognize that the proper determination for whether a state statute even applies in federal court stems from an analysis under the *Erie* Doctrine.[74] In *Erie Railroad Co. v. Tompkins*,[75] the U.S. Supreme Court overturned its previous decision in *Swift v. Tyson*, which had essentially allowed federal courts to create their own federal common law in cases of diversity if the area was not explicitly covered by a state statute.[76] The *Erie* Court held that "[t]here is no federal general common law."[77] Rather, federal courts should apply state law in substantive areas of a diversity action, unless the area is governed

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[73] *See infra* notes 104-52 and accompanying text.

[74] *E.g.*, Braddock v. Orlando Reg'l Health Care Sys. Inc., 881 F. Supp. 580, 582 (M.D. Fla. 1995) (recognizing need to confront conflict between federal and state law and citing *Erie* Doctrine that federal courts sitting in diversity must apply substantive law of forum state); Boone v. Knight, 131 F.R.D. 609, 610 (S.D. Ga. 1990) (same).

[75] 304 U.S. 64, 79 (1938).

[76] 41 U.S. (16 Pet.) 1, 18 (1842) (holding for nearly one hundred years that local state courts decisions would be respected, but not binding, in federal court diversity actions).

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

by the U.S. Constitution or an act of Congress.[78] Alternatively, in matters of procedure, federal courts should apply federal procedural law.[79]

Since the famed *Erie* decision in 1938, the U.S. Supreme Court has further clarified, and sometimes muddied,[80] the question of when state law should be applied in federal court in a body of law now referred to as the "*Erie* Doctrine." Several years after *Erie* was decided, the Supreme Court stated that its intent in *Erie* was to ensure that "the outcome of litigation in the federal court should be substantially the same . . . as it would if tried in a State court."[81] Thus, in *York*, the Supreme Court developed an outcome-determination test that favored vertical uniformity over horizontal uniformity.[82] Vertical uniformity, achieving the same results whether the litigants are in state or federal court, could best be achieved by applying state substantive law in federal courts while limiting application of federal law to issues of procedure.[83] Although the ultimate goal of such application of laws was clearly to achieve uniformity of outcomes in federal and state court actions, the Supreme Court later clarified in *Byrd v. Blue Ridge Rural Electric Cooperative* that outcome-determination is not the only consideration.[84] Rather, upon determining whether to apply state or federal law, a court should also consider whether there are "affirmative

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[78] *Id.* at 74.

[79] Hanna v. Plumer, 380 U.S. 460, 471 (1965).

[80] *See* Robert K. Harris, Brown v. Nichols*: The Eleventh Circuit Refuses to Play the* Erie *Game with Georgia's Expert Affidavit Requirement*, 29 GA. L. REV. 291, 291 (1994) (" '[I]f there has been a spell cast by these *Erie* incantations . . . it has produced more befuddlement than enchantment.' " (alteration in original) (quoting J. Aron & Co. v. Serv. Transp. Co., 515 F. Supp. 428, 435 n.8 (D. Md. 1981))).

[81] *See* Guar. Trust Co. v. York, 326 U.S. 99, 109-11 (1945) (holding that state statute of limitation laws should be applied in federal courts because of such laws' ability to affect outcome of litigation in federal court).

[82] *See* Jed I. Bergman, Note, *Putting Precedent in Its Place:* Stare Decisis *and Federal Predictions of State Law*, 96 COLUM. L. REV. 969, 980 n.60 (1996) (noting that *Erie* sacrificed horizontal unity among federal courts in return for vertical uniformity between state and federal courts).

[83] *See York*, 326 U.S. at 109 (indicating that determination of whether state law is substantive or procedural under *Erie* analysis should be informed by policy of vertical uniformity).

[84] 356 U.S. 525, 537-38 (1958) (holding that federal preference for jury trial should be applied over state rule allowing judge to determine factual issues in federal diversity action).

countervailing considerations at work."[85] The *Byrd* Court specifically determined that the federal preference for a jury trial to determine issues of fact exists as an affirmative countervailing interest to mandate its application in federal diversity actions over a state's rule allowing a judge to determine issues of fact.[86]

Perhaps the *Erie* Doctrine was most significantly enhanced by the explanation given in *Hanna v. Plumer*,[87] when the Supreme Court announced the "twin aims of the *Erie* rule [as] [1] discouragement of forum-shopping and [2] the avoidance of inequitable administration of the laws."[88] While ultimately reiterating that *Erie* "has never been invoked to void a Federal Rule,"[89] the Supreme Court created a twofold test to guide courts in their quest to determine the correct application of federal or state law.[90] The first prong of the *Erie* test reminds courts that the design behind *Erie*'s goal of vertical uniformity is to prohibit forum-shopping by litigants.[91] In other words, if federal courts correctly apply state substantive law in federal diversity actions, litigants will not file in the location where they perceive an outcome will be more favorable to their cause because the outcomes should be nearly the same regardless of the locale.[92] The second prong of *Hanna*'s test underscores the notion that *Erie* does not intend to result in the application of a law that "would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State."[93] Rather, the second aim of *Erie* is to ensure uniformity of treatment

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[85] *Id.* at 537.

[86] *Id.* at 537-38.

[87] 380 U.S. 460, 474 (1965) (applying Rule 4(d)(1) of Federal Rules of Civil Procedure over local state service rules in federal diversity action); *see also* Alan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the* Erie *Doctrine and Related Problems*, 163 F.R.D. 19, 56 (1995) ("Next to *Erie*, *Hanna* is the court's most important decision in this realm, largely because it reestablishes the primacy of legitimate federal law and provides a coherent method for assessing the legitimacy of that law.").

[88] *Hanna*, 380 U.S. at 468.

[89] *Id.* at 470.

[90] *Id.* at 468.

[91] *Id.*

[92] *Id.* at 468 n.9.

[93] *Id.*

in state and federal court, thereby preventing an undue advantage obtained by proceeding in federal court.[94]

In addition to providing the twin aims of *Erie*, the Supreme Court instructed in *Hanna* that when a Federal Rule would govern a situation in the absence of the state law at issue, federal courts are to apply the Federal Rule.[95] Adhering to *Erie*'s broad rule that federal law should govern procedural issues in federal court, the *Hanna* Court determined that Rule 4 applied in federal diversity actions rather than the state service of process law.[96]

While the twin aims of *Erie* articulated in *Hanna* gave clearer direction to lower federal courts, the Supreme Court has continuously confronted *Erie* questions during the past twenty-five years. In 1980, the *Walker* Court clarified that when determining whether a federal rule or statute already encompasses the area at issue, the federal law should be interpreted according to its "plain meaning."[97] In other words, the *Walker* Court indicated that courts should follow a textualist interpretation of federal rules and statutes in order to avoid overly narrow interpretations of federal law that tend to result in the incorrect application of a state law.[98] Thus, the Court reiterated the importance of applying federal law when an area is plainly governed by the U.S. Constitution or acts of Congress.[99] In 1988 the *Ricoh* Court, as described by Professor Allen Ides, taught lower courts the lesson "that a federal procedural statute trumps contrary state law in a diversity case so long as the federal statute is designed to apply to the circumstances and so long as the federal statute can be classified as procedural."[100] Although the Supreme Court revisited *Erie* in 1996,[101] arguably giving additional guidance to its *Erie* jurisprudence,[102] Professor Ides' description of the *Ricoh*

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[94] *See supra* note 88 and accompanying text.

[95] *Hanna*, 380 U.S. at 471.

[96] *Id.* at 473-74.

[97] Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980).

[98] *See id.* (stating that Federal Rules should not necessarily be interpreted narrowly to avoid direct conflict with state law).

[99] *See id.* at 748 (noting that *Hanna*'s holding applies where Federal Rule is clearly applicable and within Congress' rulemaking power).

[100] Ides, *supra* note 87, at 77 (commenting on Stewart Org. v. Ricoh Corp., 487 U.S. 22 (1988)).

[101] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 438 (1996).

[102] *See* Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L.

decision, supplemented by the preceding cases, essentially sets forth the proper formula for federal courts when determining whether to apply state heightened pleading statutes in federal medical malpractice diversity actions.[103] Nevertheless, lower courts have varied in their results under *Erie* upon such determinations.

For example, the U.S. District Court for the Eastern District of Michigan applied Michigan's affidavit of merit statute without any real analysis of whether the *Erie* doctrine mandates or even permits application of the state law in federal court.[104] Conversely, more than one U.S. district court in Georgia has carefully considered the issue of whether Georgia's state law, which requires an expert affidavit to accompany a medical malpractice complaint,[105] governs in federal court.[106] In *Boone v. Knight*, the U.S. District Court for the Southern District of Georgia traced the law handed down in *Erie* and its progeny and concluded that Georgia's statute has no place in federal diversity actions.[107] The *Boone* court reasoned that Georgia's statute, located in the state's civil procedure code, "is

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REV. 1637, 1663 (1998) (noting that *Gasperini* has not provided additional guidance to Supreme Court's *Erie* jurisprudence, but rather, has created more questions than answers).

[103] *See* Dace A. Caldwell, *Medical Malpractice Gets Eerie, The Erie Implications of Heightened Pleading Burden in Oklahoma*, 57 OKLA. L. REV. (forthcoming Winter 2005) (providing an in-depth *Erie* analysis that federal courts should follow when deciding whether to apply state heightened pleading statute in federal court).

[104] Ericson v. Pollack, 110 F. Supp. 2d 582, 586-87 (E.D. Mich. 2000).

[105] O.C.G.A. § 9-11-9.1 (Supp. 2004) reads:

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

[106] *See* Baird v. Celis, 41 F. Supp. 2d 1358, 1360 (N.D. Ga. 1999) (holding that Georgia's expert affidavit requirement did not apply in federal diversity actions); Boone v. Knight, 131 F.R.D. 609, 612 (S.D. Ga. 1990) (holding same). The U.S. Court of Appeals for the Eleventh Circuit passed on the opportunity to rule on whether Georgia's heightened pleading statute applies in federal diversity actions by finding that regardless of whether the statue applied in federal court, the district court had erred in failing to provide the plaintiff leave to amend the complaint in order to produce the requisite affidavit. Brown v. Nichols, 8 F.3d 770, 774 (11th Cir. 1993). Thus, the Eleventh Circuit declined to determine whether the Georgia statute applies in federal court. *Id.*

[107] *Boone*, 131 F.R.D. at 610-12.

essentially a *pleading requirement*."[108] Therefore, by "requiring that the plaintiff attach to his complaint the affidavit of an expert witness, the statute in effect mandates the pleading of evidentiary material."[109] The *Boone* court further concluded that Rule 8 governs pleading in federal courts and that evidentiary pleadings run afoul of the notice pleading standard set forth in Rule 8.[110] Following the "teaching of *Hanna*," which requires the Federal Rules to control in situations of conflict with state rules, the *Boone* court held that when a specific Federal Rule governs "the form of pleading in federal court, that rule controls over any contrary provisions of state law."[111]

Nine years later, the U.S. District Court for the Northern District of Georgia revisited the issue of whether Georgia's statute should apply in federal court.[112] In *Baird v. Celis*, the court considered whether, in absence of the state statute, Rule 8 would govern the pleading requirements for medical malpractice actions.[113] Once again, direction provided by the U.S. Supreme Court in *Hanna* was relied upon to determine that Georgia's heightened pleading statute was a procedural rule rather than a substantive rule.[114] The *Baird* court reasoned that in *Hanna*, Rule 4 would have controlled the plaintiff's service of process requirements if the state statute was not in existence.[115] Therefore, the *Baird* court relied on *Hanna*'s instruction that:

> [w]hen a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided Erie choice: the court has been instructed to apply the Federal Rule and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the

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[108] *Id.* at 611.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] Baird v. Celis, 41 F. Supp. 2d 1358, 1359 (N.D. Ga. 1999).
[113] *Id.* at 1360.
[114] *See id.* at 1360-61 (noting that similar to rule at issue in *Hanna*, Georgia's statute sets forth stricter pleading standards).
[115] *Id.* at 1360.

> Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[116]

Thus, the *Baird* court found that because Georgia's statute was in direct conflict with the notice pleading standards prescribed in Rule 8, the court was "bound by *Hanna* to adhere to the Federal Rules of Civil Procedure governing Plaintiff's pleading obligations."[117]

Similarly, in 1995 the U.S. District Court for the Middle District of Florida recognized that Florida's heightened pleading statute, which also requires an expert affidavit to be filed simultaneously with a medical malpractice complaint,[118] directly conflicts with Rule 8.[119] The *Braddock* court relied in part on an Eleventh Circuit decision that overruled a district court's decision to require plaintiffs to plead their defamation claim with particularity under a Florida state law.[120] In considering the defamation pleading requirements, the Eleventh Circuit had held that "[w]hile Florida requires, perhaps wisely, specific allegations of publication in the complaint, under *Hanna* a federal court need not adhere to a state's strict pleading requirements but should instead follow [Rule 8]."[121] Thus, the *Braddock* court reasoned that the heightened pleading requirements set forth for medical malpractice actions should be treated similarly, thereby requiring that the Federal Rules governing procedure apply in federal court.[122]

On the other hand, federal courts sitting in diversity in other states have chosen to apply heightened pleading statutes, often by claiming an alleged absence of a direct collision between Rule 8 and the particular state statute. For example, in 1997 the U.S. District Court for the District of New Jersey held that New Jersey's state statute, which requires plaintiffs to provide an expert affidavit within sixty days of filing a medical malpractice action,[123] should be

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[116] *Id.* (quoting Hanna v. Plumer, 380 U.S. 460, 471 (1965)).

[117] *Id.* at 1362.

[118] FLA. STAT. ANN. § 766.203(2) (West 1997).

[119] Braddock v. Orlando Reg'l Health Care Sys., Inc., 881 F. Supp. 580, 584 (M.D. Fla. 1995).

[120] *Id.* (discussing *Caster v. Hennessey*, 781 F.2d 1569 (11th Cir. 1986)).

[121] *Caster*, 781 F.2d at 1570 (citations omitted).

[122] *Braddock*, 881 F. Supp. at 584.

[123] N.J. STAT. ANN. § 2A:53A-27 (West 2000) reads:

applied by a federal court sitting in diversity.[124] The *RTC* court began by admitting that the determination of whether a situation is covered by state law or a Federal Rule is not always "straightforward."[125] In considering Rules 8 and 9, the *RTC* court cited *Leatherman v. Tarrant City Narcotics Intelligence & Coordination Unit*[126] and *Conley v. Gibson*,[127] two of the Supreme Court's seminal decisions regarding the function and intent of Rule 8, as espousing the notion that the pleading structure of the Federal Rules "leaves further procedures, specifically, discovery and motions to dismiss or for summary judgment, to perform other functions that historically had been performed by pleadings."[128] The *RTC* court failed, however, to actually apply the Supreme Court's directive to rely on these other Federal Rules to flesh out the merits and facts behind a pleading, instead applying New Jersey's affidavit requirement in hopes of eliminating unmeritorious claims.[129]

The *RTC* court also acknowledged the U.S. District Court for the Southern District of Georgia's decision in *Boone*, which held that a Georgia statute "somewhat similar" to New Jersey's statute conflicted with Rule 8.[130] Nevertheless, the *RTC* court proceeded to outline each difference between the New Jersey and Georgia statutes.[131] The court particularly relied upon the variation in timing, noting that New Jersey's requirement that the plaintiff submit an affidavit within sixty days *after* the defendant's answer

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

[124] RTC Mortgage Trust 1994 N-1 v. Fid. Nat'l Title Ins. Co., 981 F. Supp. 334, 347 (D.N.J. 1997).

[125] *Id.* at 342.

[126] 507 U.S. 163, 168-69 (1993).

[127] 355 U.S. 41, 47-48 (1957).

[128] *RTC*, 981 F. Supp. at 342-43.

[129] *Id.* at 345.

[130] *Id.* at 343.

[131] *Id.* at 343-44.

strongly suggests that the requirement is completely separate from pleading.[132] The *RTC* court ultimately found that the affidavit of merit requirement could not be characterized as a pleading because it was "functionally unrelated, physically separated, and temporally disconnected from the pleading stage of a case."[133] In doing so, the *RTC* court utilized a technical variation in the timing of filing to circumvent Rule 8's notice pleading requirements. Thus, the New Jersey federal district court was able to determine that the statute did not conflict with Rules 8 and 9.[134] Because of the alleged absence of a direct conflict between the affidavit of merit statute and any of the Federal Rules, the court continued its *Erie* analysis, ultimately concluding that the New Jersey statute was outcome-determinative, that no overriding federal interest required application of federal law, and that the state statute should therefore apply in federal court.[135]

Three years later, the U.S. Court of Appeals for the Third Circuit also considered whether New Jersey's affidavit of merit statute should be applied in federal court diversity actions.[136] The *Chamberlain* court held that "[t]he required affidavit is not a pleading, is not filed until after the pleadings are closed, and does not contain a statement of the factual basis of the claim."[137] The Third Circuit came to this conclusion despite the provision in the New Jersey statute stating that failure to file the affidavit of merit is deemed as " 'failure to state a cause of action,' " thus implying that failure to comply with the statute is a direct violation of a pleading requirement.[138] Instead, the *Chamberlain* court considered the purpose of the affidavit requirement as assuring that "malpractice claims for which there is no expert support will be terminated at an early

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[132] *Id.* at 343.

[133] *Id.* at 345.

[134] *Id.*

[135] *Id.* at 346-47.

[136] Chamberlain v. Giampapa, 210 F.3d 154, 157 (3d Cir. 2000).

[137] *Id.* at 160.

[138] *Id.* (quoting N.J. STAT. ANN. § 2A:53A-29 (West 2000)). The Third Circuit read "the 'deeming' language to be no more than the New Jersey legislature's way of saying that the *consequences* of a failure to file shall be the same as those of a failure to state a claim." *Id.* (emphasis added).

stage in the proceedings."[139] The Third Circuit failed to consider, however, the Supreme Court's pronouncements that the Federal Rules rely upon liberal discovery methods and summary judgment to eliminate unmeritorious claims.[140] The Third Circuit also failed to consider that Rule 26 already controls the mandatory disclosures during the initial phases of discovery.[141] The court ignored the fact that the Federal Rules are already replete with tools that judges and litigants should use to eradicate frivolous lawsuits without having to resort to state heightened pleading statutes. Instead, the Third Circuit affirmed the decision to apply the New Jersey affidavit of merit statute, justifying its decision by claiming that the statute's application would not compromise the pleading system designed by the Federal Rules.[142]

Similarly, the U.S. Court of Appeals for the Tenth Circuit has deemed Colorado's certificate of review statute applicable to federal court diversity proceedings.[143] Colorado's statute essentially requires the plaintiff's attorney to certify within sixty days of filing a complaint that an expert has reviewed the medical malpractice claims and has found them to contain "'substantial justification.'"[144] In determining whether the state statute should apply in federal diversity actions, the Tenth Circuit considered whether the certificate of review statute was in direct conflict with Rule 11,[145] which requires attorneys to certify that papers submitted to the court are not given for "any improper purpose" and that the allegations "have evidentiary support" or will likely have such

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[139] *Id.*

[140] *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (noting that Rule 8's standard of notice pleading relies on "liberal discovery rules and summary judgment motions to weed out frivolous claims"); Conley v. Gibson, 355 U.S. 41, 47-48 (1957) (stating that simplified pleading standards embodied in Rule 8 are made possible by other procedures set forth in Federal Rules, including "liberal opportunity for discovery and . . . other pretrial procedures").

[141] *See* FED. R. CIV. P. 26(a) (setting forth requirements for disclosure of certain information, including expert testimony, initially and prior to trial).

[142] *Chamberlain*, 210 F.3d at 161. In 2001, the U.S. District Court for the District of New Jersey relied upon the *Chamberlain* court's decision in applying New Jersey's affidavit of merit statute in federal court. Kindig v. Gooberman, 149 F. Supp. 2d 159, 163 (D.N.J. 2001).

[143] Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1541 (1996).

[144] *Id.* at 1537-38 (quoting COLO. REV. STAT. § 13-20-602 (2002)).

[145] *Id.* at 1540.

support after further discovery.[146] Although the Tenth Circuit noted that both the Colorado statute and Rule 11 intend to "weed unjustifiable claims out of the system," the court concluded that the two rules do not collide and can peacefully coexist.[147] The Tenth Circuit reasoned that because the certificate of review statute covered a special class of defendants and expedited the litigation process by imposing a sixty-day time limit, the Colorado statute covered substantive interests not addressed by Rule 11.[148] Like the Third Circuit would do four years later, the Tenth Circuit failed to even mention the Supreme Court's jurisprudence handed down in *Conley* and *Leatherman*. Both cases specifically articulate that the Federal Rules are already equipped to guard against frivolous claims in a timely manner through application of liberal discovery rules, including mandatory initial disclosures, and through summary judgment and motions to dismiss.[149] Furthermore, while the Tenth Circuit noted its reluctance to impinge upon federal pleading requirements, the court justified its decision to require an additional filing of a certificate of merit in federal court by rationalizing that "one additional filing with the court [ ] is *relatively minor*."[150] But the idea that a "relatively minor" alteration of the federal pleading requirements is ever permissible directly contravenes the Supreme Court's repeated pronouncement that notice pleading should not be disturbed, as embodied in the trilogy of *Conley*, *Leatherman*, and *Swierkiewicz*.[151]

Thus, federal courts have continually varied when determining whether to apply state heightened pleading statutes.[152] The common denominator among the courts deeming such statutes applicable in federal court is a failure to consider Supreme Court

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[146] FED. R. CIV. P. 11(b).

[147] *Trierweiler*, 90 F.3d at 1540.

[148] *Id.*

[149] *See supra* notes 126-28 and accompanying text.

[150] *Trierweiler*, 90 F.3d at 1540 (emphasis added).

[151] *See infra* notes 208-28 and accompanying text.

[152] For a discussion of how the federal courts of a single state have inconsistently applied a state certificate of merit statute in federal court, see Robert P. Vogt, *Must Med-Mal Plaintiffs File Section 2-622 Certificates of Merit in Federal Court?*, 91 ILL. B.J. 72, 72-74 (2003).

guidance by refusing to uphold the sanctity of the Federal Rules, particularly Rule 8.

IV. THE PROBLEM WITH THE CURRENT SOLUTION—HISTORY, PRECEDENT, AND THE FEDERAL RULES

Heightened pleading requirements in medical malpractice actions should not govern in federal court. The reasons are simple: history, precedent, and the Federal Rules. History does not support any claim that heightened pleading should be used to filter out expensive and time consuming claims.[153] Rather, history emphasizes a gradual shift toward notice pleading to ensure that litigants are not procedurally precluded from receiving their day in court.[154] Likewise, precedent has uniformly condemned attempts to circumvent the notice pleading requirements successfully utilized in federal courts since 1938.[155] In 1957, 1993, and 2002, the Supreme Court evaluated the issue of heightened pleadings and, in each instance, rebuffed attempts to incorporate any heightened pleading requirement into Rule 8.[156] Finally, the letter and the spirit of the Federal Rules reserve only two categories of claims that merit heightened pleading: fraud and mistake.[157] Because the current medical malpractice crisis does not present any compelling reason to discard history, precedent, or the Federal Rules, the state

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[153] *See* Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 403 (1910) (noting that "principle [was] submitted and . . . discussed at length in the report of the special committee of the American Bar Association to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation"). Pound further observed that "[e]xperience has shown abundantly that a huge mass of detail, such as the present New York Code of Civil Procedure, is a mistake." *Id.*

[154] *See infra* notes 189-97 and accompanying text.

[155] The paradigmatic example of notice pleading remains *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). Students of Civil Procedure should be familiar with this case as *Dioguardi* is included in nearly every major Civil Procedure textbook. Interestingly, the author of *Dioguardi* was none other than Judge Clark himself, the principal architect of the Federal Rules' simple pleading design. Thus, it is not surprising that the *Dioguardi* decision takes a very liberal view toward notice pleading. It is important to note, however, that *Dioguardi* is cited with approval in footnote five of *Conley v. Gibson*. Conley v. Gibson, 355 U.S. 41, 46 n.5 (1957).

[156] *See infra* notes 208-28 and accompanying text.

[157] FED. R. CIV. P. 9(b).

solution of heightened pleading is unacceptable in the federal system.

A. THE BIRTH OF NOTICE PLEADING—THE ROLE OF HISTORY

Scholars and litigators have constantly challenged the formalities of pleading and procedure. In 1909, Roscoe Pound inquired whether it was possible to "make the rules of procedure, rules to help litigants, rules to assist them in getting through the courts" more user-friendly.[158] The solution, Pound proposed, was to "mak[e] it unprofitable to raise questions of procedure for any purpose except to develop the merits of the cause to the full."[159] But early forms of pleading capitalized on formalities and often discarded cases on procedural shortcomings rather than on merit-based determinations.[160]

The earliest pleadings were presented orally and permitted an informal process of exchange with the court.[161] This informality empowered courts to correct the missteps of counsel and ensure that the applicable law was considered in any given case. With the rise of the jury in the fifteenth and sixteenth centuries, pleadings shifted from oral to written presentations.[162] The advent of written pleadings placed new emphasis on the form of the claims and the packaging or presentation of the lawsuit.

The first major pleading system was the English common-law system.[163] Under the common law, litigants were forced to choose from one of eleven discrete forms of action: trespass; trespass on the

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[158] Pound, *supra* note 153, at 400.

[159] *Id.*

[160] Charles E. Clark, *The Tompkins Case and the Federal Rules*, 1 F.R.D. 417, 420 (1940) (criticizing that "under the ancient common law, one really had no substantive right unless he could find a procedural form of action wherein to enforce it"), *reprinted in* 24 J. AM. JUDICATURE SOC'Y 158, 160 (1941).

[161] CHARLES E. CLARK, CASES ON MODERN PLEADING 18 (3d ed. 1952) [hereinafter CLARK, MODERN PLEADING] ("When the pleadings were oral, a considerable degree of informality in discussion and colloquy with the court appears to have been stimulated.").

[162] *Id.*

[163] For an exceptional treatment of historical pleading systems spanning the Norman conquest in 1066 to the Curia Regis, or King's Court, which evolved into the common-law system, see ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 523-34 (2003).

case; debt; detinue; replevin; trover; ejectment; covenant; account; special assumpsit; and general assumpsit.[164] These finite forms of action provided the sole options for litigants. Unless a case fit neatly into one of the eleven established categories, no legal relief was possible.[165] Further, in presenting the form of action, litigants were forced to choose between courts of law and courts of equity.[166] Common-law pleading did not permit claims to simultaneously seek relief under law and in the courts of equity.[167]

The final distinction between common-law pleading and modern pleading stems from the purpose of pleadings.[168] Out of concern that lay juries could not fully appreciate complicated issues, the goal of common-law pleading was to have the adversaries plead back and forth in response until, finally, a single issue was isolated for trial.[169] Thus, early juries were never presented with a multi-issue case, and any misstep by counsel along the way could prove fatal to a client's success.

Common-law pleading, with its formal, unyielding writs and its insistence on narrowing every controversy to a single issue, eventually gave way to the system referred to as code pleading.[170] Although most scholars credit Professor David Dudley Field with

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[164] *Id.* at 526-29.

[165] *Id.* at 526.

[166] *Id.* at 533-34.

[167] *Id.*

[168] *Id.* at 529-32 (discussing pleading ritual of plaintiff initiating action by filing his or her declaration, followed by defendant's demurrer or plea, followed by plaintiff's demurrer or replication, followed by defendant's rejoinder and rebutter and, finally, close of pleadings with plaintiff's surrejoinder and rebutter).

[169] Judge Clark described the evolution as follows:

> Since the facts were passed upon by a body of laymen, not by a trained judge, it was felt necessary to ascertain clearly the points of dispute between the parties before the trial was begun. The institution of trial by jury, which meant so much to our ancestors in their efforts to secure a free and impartial justice, is therefore responsible for this striking characteristic of common-law pleading—the development of an issue.

CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 13 (2d ed. 1947) [hereinafter CLARK, CODE PLEADING].

[170] *See* Charles E. Clark, *Trial of Actions Under the Code*, 11 CORNELL L.Q. 482, 482-83 (1926) (explaining that "[t]he long-protracted struggle against this system resulted in the legislative decree abolishing these forms and substituting therefor an entirely different pleading objective, the pleading of the *facts* only, that is, the respective stories of the parties litigant").

crafting the modern code system in 1848, Judge Clark suggested that much of the "Field Code" emanated from Edward Livingston's Louisiana Code of Civil Procedure in 1805.[171] Regardless of its genesis, the New York Field Code bequeathed three vital contributions to procedural law, all of which would be replicated in some form under the Federal Rules: (1) the merger of courts of law and equity; (2) the creation of a single cause of action, the civil action; and (3) the simplification of pleading.[172]

Under the Field Code, pleaders were expected to assert "[a] plain and concise statement of the facts constituting each cause of action without unnecessary repetition."[173] This form of pleading, now known as fact pleading, placed an emphasis on the material facts in dispute. However, much confusion and an equal amount of controversy erupted over whether facts were considered "material," "ultimate," "evidentiary," or simply conclusions of law.[174] Much litigation was generated on matters of pleading procedure, which unintentionally resurrected the common-law emphasis on form over substance.[175] In evaluating the historical systems of pleading, Judge Clark reflected that "the lawsuit is to vindicate rules of substantive law, not rules of pleading, and the latter must always yield to the

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[171] Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 305 (1938) [hereinafter Clark, *Handmaid of Justice*].

[172] *See* CLARK, CODE PLEADING, *supra* note 169, at 81 (describing New York statute that abolished distinction between law and equity). In interpreting the New York statute, Judge Clark admonished that "[i]t should be noticed that the distinction between the actions themselves *and also between their forms* is to be abolished. Distinctions of form *and* of substance are to be done away with." *Id.*

[173] *Id.* at 210. A cursory review of code pleading under the Field Code reveals that, much like the modern Federal Rules, there were three simple components to code pleading: "(1) pleading the title of the action, including the names of plaintiffs and defendants; (2) pleading 'a plain and concise statement of facts constituting each cause of action without unnecessary repetition;' and, (3) a demand for judgment." *Id.* In contrast, the Federal Rules require that pleaders set forth a short and plain statement regarding the court's jurisdiction and the claim entitling the pleaders to relief, as well as a demand for judgment. FED. R. CIV. P. 8(a). The Field Code requirement for a caption, or title, is covered under the Federal Rules by Rule 10, "Form of Pleadings, Caption; Names of Parties." *Id.* 10(a).

[174] *See* CLARK, CODE PLEADING, *supra* note 169, at 225-30 (discussing sufficiency of notice issues that arise with fact pleading). The objective of pleading material facts yielded many cases on pleading. As Judge Clark noted, "[the codifiers'] ideal of pleading facts, as it has been worked out, has proved probably the most unsatisfactory part of their reform." *Id.* at 226.

[175] *Id.* at 228.

former."[176] Thus, within the next hundred years, code pleading and its unforeseen formalism was abandoned for a more straightforward process.[177]

B. NOTICE PLEADING AS A CORNERSTONE IN THE FEDERAL RULES

Simplified notice pleading remains the cornerstone of the Federal Rules.[178] "It is in effect a de-emphasis upon pleading as a controlling element in decision and a subordination of procedure to its proper position as an aid to the understanding of a case, rather than a series of restrictions on the parties or the court."[179] To fully appreciate the importance of simplified pleading as the quintessence of the Federal Rules, one must have a modicum of understanding of the two antiquated American pleading systems. For without an understanding of the impetus for procedural reform and the historical disdain for form over substance,[180] critics will remain able to erroneously suggest that certain "big cases" merit some form of heightened pleading.

The adoption of the Federal Rules in 1938 was a major legislative accomplishment.[181] The Federal Rules achieved two main objectives: (1) They provided simplified rules for pleading, and (2) they merged law and equity before a single court.[182] U.S. Attorney

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[176] *Id.* at 60.

[177] *See* Pound, *supra* note 153, at 403 (remarking that "[e]xperience has shown abundantly that a huge mass of details, such as the present New York Code of Civil Procedure, is a mistake . . . [b]ut it proceeded upon a wrong principle"). The "wrong principle" included the shortcoming that the Field Code eventually swelled to over 3,000 sections. *Id.* In contrast, the English Judicature Act codified a mere 100 sections and appended 58. *Id.*

[178] Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS., Winter 1948, at 144, 154 [hereinafter Clark, *Federal Procedural Reform*] ("The cornerstone of the new reform is a system of simple, direct, and unprolonged allegations of claims and defenses by the litigants . . . ."); *see also* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 551 (2002) (stating that Rule 8 "is the keystone of the system of procedure embodied in the Federal Rules"); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917-18 (1998) (referring to Rule 8 as "a jewel in the crown of the Federal Rules").

[179] Clark, *Federal Procedure Reform*, *supra* note 178, at 154.

[180] *See* Fairman, *supra* note 178, at 554 (observing that Rule 8 "with its splendid simplicity, stands as the centerpiece of a procedural system designed to rectify the pleading abuses of the past").

[181] Clark, *Handmaid of Justice*, *supra* note 171, at 298.

[182] *See* Clark, *Federal Procedural Reform*, *supra* note 178, at 154-55 (observing that

General Homer S. Cummings worked diligently to secure federal legislation that ultimately empowered the U.S. Supreme Court to promulgate the rules of procedure for civil actions in federal court.[183] Previously, federal courts were bound by the Conformity Act of 1873,[184] which required federal courts to apply procedural rules " 'as near as may be' to the local practice of the state wherein the federal court was sitting."[185] For example, the Conformity Act required a Texas federal court to apply the procedural requirements mandated in Texas state courts, while a California federal court would abide by procedures applied in California state courts.[186] This system was quickly perceived as "highly unsatisfactory."[187] As certain scholars noted:

> The purpose of the [Conformity] Act was to provide a uniform procedure for all courts in the same state, but exceptions to its application caused adherence to state practice by the federal courts to be erratic. In addition, the effect of the Act was to abdicate responsibility for formulating rules of procedure for the federal courts to state legislatures, instead of giving that responsibility to

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"[w]ith the de-emphasizing of particularized pleading there remained no reason why all claims between litigants could not be desirably adjusted at one time").

[183] Honorable Oscar R. Luhring, Federal Rules of Civil Procedure and the Rules of Civil Procedure for the District of Columbia, Lecture at the Mayflower Hotel, Washington, D.C. 5 (Nov. 17, 1938) (transcript on file with author).

[184] Conformity Act, ch. 255, § 5, 17 Stat. 196, 197 (1872) (repealed 1934). *See also* CLARK, MODERN PLEADING, *supra* note 161, at 15 (explaining that "Conformity Act . . . was superseded by the Federal Rules of Civil Procedure, adopted by the Supreme Court of the United States under statutory authority effective September 16, 1938, and providing for a uniform system of pleading and practice throughout the federal system of courts").

[185] Clark, *Federal Procedural Reform*, *supra* note 178, at 146.

[186] The Supreme Court observed that:

> Under the Conformity Act, "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding." How a suit shall be begun, whether by writ or by informal notice, is a question of the practice of the state or of its forms and modes of proceeding.

Chisholm v. Gilmer, 299 U.S. 99, 102 (1936) (internal citations omitted).

[187] Clark, *Federal Procedural Reform*, *supra* note 178, at 146.

> the federal courts, which are more qualified to undertake this task.[188]

Thus, with the formation of the American Bar Association in 1878, procedural reform became an immediate priority.[189] As early as 1912, the American Bar Association pushed for procedural reform to no avail.[190] Once Congress enacted the Rules Enabling Act in 1934, the long awaited relief finally seemed forthcoming.[191] With the combined efforts of Attorney General Cummings and the Advisory Committee appointed to draft the new rules, federal litigators received a truly uniform set of rules to apply in federal civil cases.[192] With their efforts, notice pleading was born.

One of the main driving forces behind procedural reform was the growing disdain for formalistic code pleading.[193] The aim of the new Federal Rules was to provide a pleading system based on simplicity

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[188] JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 4.4, at 210 (3d ed. 1999) (citations omitted).

[189] Clark, *Federal Procedural Reform*, *supra* note 178, at 146-47.

[190] *See* Clark, *Handmaid of Justice*, *supra* note 171, at 307-08 (recounting collective efforts needed to effect procedural reform).

[191] The Rules Enabling Act is currently codified at 28 U.S.C. §§ 2071-2077 and provides that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate Judges thereof) and courts of appeals." 28 U.S.C. § 2072(a) (2000).

[192] For a brief history of Cummings' role in securing the passage of the 1934 Act, which enabled the Federal Rules to be passed, see Clark, *Federal Procedural Reform*, *supra* note 178, at 147-48. Judge Clark remarked that Cummings had "[w]ithin the short space of ninety days . . . practically singlehanded [sic], secured the adoption of the measure, on June 19, 1934." *Id.* at 148.

[193] Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 277 (1942) [hereinafter Clark, *Simplified Pleading*]. Judge Clark admonished as follows:

> Therefore, it may be concluded that this tendency to seek admissions by detailed pleadings is at best wasteful, inefficient, and time-consuming, at most productive of confusion as to the real merits of the cause and even of actual denial of justice. The continuous experience from common-law pleading down through the reversions to pleading formalities recurring under code pleading indicates the necessity of having clearly in mind the limited, but important, purposes of pleading and how they cannot be pressed wisely beyond such purposes. It demonstrates, in the writer's judgment, the necessity of procedural rules which enforce the mandate of simplicity and directness and which are made real and compelling by illustrative forms showing what this simplicity means in actual experience.

Id.

and uniformity.[194] Generations past had suffered years of common-law pleading only to find this perilous system replaced by the equally problematic system of code or fact-based pleading.[195] The one consistency in both the common-law and code pleading systems was that litigants often missed their opportunity to argue the merits of their claims due to procedural defects in their pleadings.[196] Thus, the new Federal Rules sought to overcome this limitation of form over substance and ensure that cases were decided on the merits.[197]

Rule 8 epitomizes the simplicity of the Federal Rules by requiring that a complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief."[198] There are no magic words, no requirement that a case fit any particular model or design, and no mandate for specificity of facts, claims, or evidence. Rather, the Federal Rules only require that a complaint provide ample notice to the defendant, enabling the defendant to answer.[199] Rule 84 explicitly refers litigants to the Appendix of Forms attached to the Federal Rules for guidance illustrating "the simplicity and

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[194] *See id.* at 272 (observing that "[s]implified pleading is basic to any program of civil procedural reform"); *see also* FED. R. CIV. P. 1 (stating unequivocally that Federal Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action").

[195] Judge Clark explained the difference between the two as follows:

> For the present we may attempt to state the main purpose of pleading as we now conceive of it. If the common law may be termed *issue pleading*, since its main purpose was the framing of an issue, code pleading may be referred to as *fact pleading*, in view of the great emphasis placed under the codes upon getting the facts stated. More recently there has been advocated what is called *notice pleading*. This is in general a very brief statement, designed merely to give notice of the claim to the opponent.

CLARK, CODE PLEADING, *supra* note 169, at 56 (emphasis in original).

[196] Fairman, *supra* note 178, at 555-56.

[197] *See id.* at 557 ("The notice function of pleading, however, cannot be divorced from the global vision of the drafters: litigants should have their day in court. Consequently, the Rules were designed to encourage determination on the *merits*." (emphasis in original)).

[198] FED. R. CIV. P. 8(a).

[199] Fairman, *supra* note 178, at 561-62. Fairman notes that:

> Indeed, the pleading need only give the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved. As long as the opposing party and the court can have a basic understanding of the claim being made, the requirements are satisfied.

Id.

brevity of statement which the rules contemplate."[200] Rule 8 provides further protection against formalistic pitfalls by specifying that "[n]o technical forms of pleading or motions are required."[201] Finally, Rule 8 ensures that "[a]ll pleadings shall be so construed as to do substantial justice."[202] With two simple rules, Rules 8 and 84, the drafters of the Federal Rules eliminated the main quagmire delimiting common-law and code pleading.[203] As Judge Clark noted, "These minimal requirements . . . emphasize only the setting forth of the factual situation as a whole; they do not compel the alleging of fine details, or the inclusion of a series of legal epithets or conclusions as to the defendant's conduct."[204]

This minimalist pleading approach has existed since the Federal Rules became effective on September 16, 1938.[205] And yet, as

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[200] FED. R. CIV. P. 84.

[201] *Id.* 8(e)(1).

[202] *Id.* 8(f).

[203] Luhring, *supra* note 183, at 8. Judge Luhring eloquently illustrated this point:

> One of the major difficulties that we encountered under the old system were these successive dilatory pleadings. These pleadings were presented before pleading to the merits. For example, there were pleas to the jurisdiction or venue, pleas in abatement on account of the disability of the plaintiff or defendant, and for defect of parties or for pendency [sic] of another action. File one and that is overruled; file another and that, too, is overruled and so on, each postponing the day of judgment and all making for delay.
>
> These new rules put a stop to that sort of practice.

Id. Judge Clark noted the dichotomy between the advantageous nature of common-law pleading and the pitfalls of specialized pleading as follows:

> Indeed, it is interesting to see how the true common-law pleading had at one and the same time a simple system of direct allegation which is the basis of the federal forms today in negligence and contract actions, and also that system of specialized allegation which was the glory of technician and the shame of the lover of justice. . . . Many of these written pleadings did become highly formalized, as counsel realized the possibilities of extensive allegation followed by affirmation and denial, together with confession and avoidance, replication, rebutter, and surrebutter, as long as anything stood not completely denied. The system lent itself to prolonged paper disputations, of which advantage was taken by lawyers naturally anxious to obtain admissions from their opponents without committing themselves. This was the side of common-law pleading which brought it into disrepute.

Clark, *Simplified Pleading*, *supra* note 193, at 275.

[204] Clark, *Simplified Pleading*, *supra* note 193, at 273.

[205] *See* Clark, *Federal Procedural Reform*, *supra* note 178, at 150 (discussing history of drafting Federal Rules from committee activity to presentation to Court approval). The Federal Rules were presented to the Seventy-fifth session of Congress by Attorney General

recently illustrated by federal courts in the Third Circuit,[206] many litigants and judges have sought to disturb the basic pleading system by insisting that certain "big cases" require something more than a short and plain statement of the claim.[207] Fortunately, the Supreme Court has continually rebuffed these efforts. Thus, it is surprising that once again a group is clamoring for their "big case" to receive special treatment.

C. THE FIRM FOUNDATION OF NOTICE PLEADING IN PRECEDENT

The Supreme Court has never required anything more than notice pleading in any case falling within the ambit of Rule 8.[208] In a trilogy of cases, the Supreme Court has demonstrated unyielding fidelity to Judge Clark's desire for simplicity in pleading.[209] Beginning with the seminal case of *Conley v. Gibson* in 1957, the Supreme Court has continually and consistently interpreted Rule 8 to require simplified notice pleading.[210] As the Court noted, "[s]uch simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the [Federal] Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and

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Cummings. *Id.* Congress levied no objections, and the Federal Rules became effective on September 16, 1938. *Id.*

[206] *See supra* notes 123-42 and accompanying text.

[207] Professor Miller's article begins with a challenge to the litigation crisis reforms:

> The loudly trumpeted (but as yet unproven) "litigation explosion" and its metaphorical twin, the "liability crisis," have energized court "reform" efforts in recent years on both the local and national levels. Critics maintain that excessive and frivolous litigation overwhelms the judicial system's capacity to administer speedy and efficient justice, leads to higher costs for litigants and society at large, and even hinders America's competitive position in the global economy.

Miller, *supra* note 28, at 984.

[208] *But see* FED. R. CIV. P. 9(b) (requiring heightened pleading in cases claiming fraud or mistake). Fraud and mistake are the only two exceptions to notice pleading enshrined in the Federal Rules. *Id.*

[209] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) (alleging employment discrimination under Title VII); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (alleging civil rights claim against municipality); Conley v. Gibson, 355 U.S. 41, 47 (1957) (alleging race discrimination under Railway Labor Act).

[210] *Conley*, 355 U.S. at 47-48.

issues."[211] The purpose of notice pleading is not to set forth evidence in an attempt to sift merit-based claims from frivolous lawsuits. Rather, the purpose of pleading under the Federal Rules is simply to notify the parties and the court of the basics of the dispute.[212]

Unlike previous pleading systems, the Federal Rules do not envision pleadings as a means to an end in themselves. Pleadings in federal court provide a mere outline of the pending controversy.[213] *Conley* underscores this point in a still oft-quoted passage: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[214]

Despite the clarity of *Conley*, federal courts have often required heightened pleading in various civil actions ranging from antitrust to civil rights to defamation to employment discrimination to RICO.[215] These requirements are not consistent with either the letter or spirit of Rule 8 and have, accordingly, been disavowed by the Supreme Court when faced with heightened pleading requests. Despite the Supreme Court's demonstrated allegiance toward notice pleading under Rule 8, there have been repeated attempts to circumvent the amendment process of the Federal Rules by trying

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[211] *Id.*

[212] Fairman, *supra* note 178, at 561-62.

[213] Charles E. Clark, *Simplified Pleading and the Demurrer*, 26 J. AM. JUDICATURE SOC'Y 81, 81 (1942). Judge Clark considered the purpose of pleadings to be:

> The usual modern expression, at least of text writers, is to refer to the notice function of pleadings; notice of the case to the parties, the court, and the persons interested. This is a sound approach so far as it goes; but content must still be given to the word "notice." It cannot be defined so literally as to mean all the details of the parties' claims, or else the rule is no advance. The notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based, so as to differentiate it from other acts or events, to inform the opponent of the affair or transaction to be litigated—but not of details which he should ascertain for himself in preparing his defense—and to tell the court of the broad outlines of the case.

Id.

[214] *Conley*, 355 U.S. at 48.

[215] For an extraordinary treatment of heightened pleading for specific categories of cases, see Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011-59 (2003) (detailing pleading practice in antitrust, CERCLA, civil rights, conspiracy, copyright, defamation, negligence, and RICO cases).

to justify heightened pleading in special "big cases."[216] The defining feature of these "big cases" appears to be the potential expense and disruption that a lawsuit might cause the defendant. But these justifications have not yet convinced the Court to vary from its firm support of notice pleading.

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, the Supreme Court unanimously reaffirmed its holding in *Conley* when confronted with the issue of whether federal courts may apply heightened pleading to civil rights cases alleging municipal liability.[217] The respondents, seeking to impose heightened pleading requirements against civil rights plaintiffs, reasoned that "a more relaxed pleading requirement would subject municipalities to expensive and time-consuming discovery in every § 1983 case, eviscerating their immunity from suit and disrupting municipal functions."[218] In other words, the respondents asserted that without heightened pleading rules, cities might be prone to frivolous lawsuits that would be costly.[219]

The Supreme Court was unaffected by this argument. Staying true to Rule 8's mandate for a short and plain statement, the Supreme Court explained that the only permissible method for demanding heightened pleading was the Federal Rules' amendment process.[220] Writing for the Court, Chief Justice Rehnquist explained:

> Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment

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[216] *See, e.g.*, Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir. 2005) (emphasizing that deceptive trade practices claims asserted in McDonald's obesity litigation "need only meet the bare-bones notice-pleading requirements of Rule 8(a)").

[217] 507 U.S. 163, 164-68 (1993).

[218] *Id.* at 166.

[219] *Id.*

[220] *Id.* at 168.

> and control of discovery to weed out unmeritorious claims sooner rather than later.[221]

Less than ten years later in *Swierkiewicz v. Sorema N.A.*, the Supreme Court took the opportunity to revisit the issue of heightened pleading in another distinct category of cases—employment discrimination.[222] Once again, in a unanimous opinion, the Court reiterated that "[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."[223] The respondent, despite the petitioner's nine page complaint,[224] challenged the sufficiency of the petitioner's allegations because the respondent feared that "allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits."[225]

The Court did not permit fears concerning frivolous lawsuits and litigation expenses to transmogrify the pleading requirements in federal court. Rather, the Court emphasized the Federal Rules' reliance on liberal discovery and summary judgment proceedings to ferret out meritless claims.[226] Returning to the point made a decade earlier in *Leatherman*, the Court noted that the only manner in which heightened pleading should be invoked is through the amendment process to the Federal Rules.[227] Rule 8(a) addresses civil actions generally and does not vary or waiver depending on the subjective belief of certain defendants who categorically assert the claims against them are without merit.[228]

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[221] *Id.* at 168-69.

[222] 534 U.S. 506, 506 (2002).

[223] *Id.* at 514.

[224] Transcript of Oral Argument at 17 (Jan. 15, 2002), Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002), 2002 WL 54497.

[225] *Swierkiewicz*, 534 U.S. at 514.

[226] *Id.* at 512 ("This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.").

[227] *Id.* at 515 (noting that "[a] requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation' " (quoting Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993))).

[228] *Id.*

It was once thought that *Leatherman* would put to rest any residual hope that certain categories of claims could be subjected to heightened pleading requirements by judicial fiat.[229] Judges and litigants, however, persisted in making the charge that certain cases should require something more than Rule 8's plain and simple statement.[230] And, so, the Supreme Court was required to revisit the issue and has again admonished that notice pleading constitutes a simplified version of pleading.[231] The only two exceptions to notice pleading remain encompassed in Rule 9(b): cases alleging fraud and mistake.[232] The short and plain statement requirement remains the standard in federal court, and the Supreme Court has shown no willingness to make any exceptions for the "big case."

D. THE MERITS-BASED DESIGN OF THE FEDERAL RULES

Heightened pleading is antithetical to the design of the Federal Rules.[233] Rather, the Federal Rules were intended to provide a more expedient and simplified route to merits-based decisions.[234] The overall structure of the Federal Rules empowers judges to discard frivolous lawsuits through pretrial control and pretrial procedures.[235] Provided that judges properly apply the provisions

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[229] 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1230 (3d ed. 2004); Fairman, *supra* note 178, at 572.

[230] *E.g.*, Pelman v. McDonald's Corp., 396 F.3d 508, 512 n.5 (2d Cir. 2005) (vacating district court's dismissal of claim for vagueness and noting that cure for deficiency of claim that is not required to be pleaded with particularity is motion for more definite statement under Rule 12(e)).

[231] *Swierkiewicz*, 534 U.S. at 512.

[232] FED. R. CIV. P. 9(b).

[233] *See* Charles E. Clark, *The Federal Rules in State Practice*, 23 ROCKY MTN. L. REV. 520, 524 (1950-51) [hereinafter Clark, *Federal Rules in State Practice*] (reminding that "[i]n drafting the original rules, the Advisory Committee did have in mind the inconvenience for many of continued attendance upon the court and did all it could to discourage preliminary formal attacks involving mere shadow-boxing of counsel, not reaching the merits of litigated matters").

[234] *See Swierkiewicz*, 534 U.S. at 514 (reminding that "[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim").

[235] Charles E. Clark, *"Clarifying" Amendments to the Federal Rules?*, 14 OHIO ST. L.J. 241, 246 (1953). Judge Clark emphasized the importance of pretrial procedures over formalized complaints and special pleading by reasoning as follows:

> The purpose [of the Federal Rules] was rather to get away from the welter

encompassed in the Federal Rules, there is no need to resort to heightened pleading to curb frivolous litigation.[236]

Beginning with Rule 1, the Federal Rules inform that all Rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."[237] Thus, the starting point must be to concentrate on efficient *and* just solutions to curtail costs of litigation. Once a complaint is filed consistent with Rule 8's instruction to provide averments in a "simple, concise, and direct" manner,[238] the Federal rules permit defendants to respond in four distinct ways.

First, defendants may do absolutely nothing. Failure to respond to a properly served complaint, however, is risky and can result in a default judgment.[239] Default allows defendants who believe that jurisdiction is not properly obtained to simply ignore the case until judgment is rendered. At that point, defendants can raise limited collateral attacks to the judgment—attacks generally isolated to jurisdictional matters.[240] Default is both disfavored and of extremely limited value in federal practice.[241]

The second option available to defendants is the Rule 12(b) motion. While the Federal Rules explicitly omit challenges based on

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> of details required in some jurisdictions and to follow the more generalized statements of some states and, also, of the general (as distinguished from the special) pleading of the common law. The various [federal] rules all intermesh to the end; the complaint rule is not necessarily the most important, but others carry forward this idea. These include the rules supporting general pleading, limiting the nature of objections to pleadings, providing for amendments requiring plain error for reversal, for discovery, pretrial and summary judgment (aimed at quick reaching of the merits, whatever the formal pleadings), and, especially important, the Appendix of Forms.

Id.

[236] *See* Clark, *Federal Rules in State Practice*, *supra* note 233, at 524. Judge Clark conceded that the Federal Rule "system does recognize and rely upon the key importance of the trial judge. It gives him power and means to run his court well; it can and does aid, but cannot create, judicial skill and competence." *Id.*

[237] FED. R. CIV. P. 1.

[238] *Id.* 8(e)(1).

[239] *See id.* 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . the clerk shall enter the party's default.").

[240] Perhaps the most renowned example of a jurisdictional challenge to a default judgment is *Pennoyer v. Neff*, 95 U.S. 714 (1877). *Pennoyer* is a difficult, but staple, component of most first-year legal studies in Federal Civil Procedure.

[241] 10A WRIGHT & MILLER, *supra* note 229, § 2693.

"demurrers, pleas, and exceptions for insufficiency of a pleading,"[242] Rule 12 provides litigants with modern equivalents to these antiquated pleading motions.[243] Rule 12 allows defendants to challenge jurisdictional matters, venue, and service of process.[244] Rule 12 also permits defendants to challenge the complaint itself for failure to provide a minimally acceptable form of notice by filing a Rule 12(e) Motion for More Definite Statement.[245] Due to the simplified pleading design of Rule 8, Rule 12(e) motions are disfavored and not likely to find solace before the typical federal judge.[246] Judge Clark was highly opposed to the pleading motions contained in Rule 12.[247] His concern was that Rule 12 would simply perpetuate the dilatory abuses experienced under the common-law and code pleading systems of the past. Nonetheless, Rule 12 remains an integral part of the Federal Rules' structure. The last option under Rule 12 is the Rule 12(b)(6) Motion to Dismiss.[248] Under Rule 12(b)(6), defendants may file a Motion to Dismiss for "failure to state a claim upon which relief can be granted."[249] Rule 12(b)(6) motions challenge the legal sufficiency of a

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[242] FED. R. CIV. P. 7(c).

[243] Charles E. Clark, *Simplified Pleading*, *supra* note 193, at 82 ("Lawyers who have objected to any need of the Federal Rules in their own jurisdictions have pointed out with a good deal of reason that this is merely the old plea in abatement, the demurrer, and the plea in bar under a different name.").

[244] FED. R. CIV. P. 12(b)(1), 12(b)(2), 12(b)(3), 12(b)(4), and 12(b)(5).

[245] *Id.* 12(e). Rule 12(e) provides in pertinent part as follows: "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." *Id.*

[246] This statement is particularly true under Judge Clark's vision of Rule 12. In a rather stern challenge to the use of Rule 12 motion to amplify pleadings, Judge Clark admonished:

> After all, under the present scheme the pleadings are not the place to obtain particularization of the case. The general objection that no claim for relief or defense has been stated would, of course, still be open and is all that is necessary. If a claim or defense is legally stated, then the matter of particularization should be foregone. The parties are protected by discovery, pre-trial and summary judgment.

Clark, *Simplified Pleading*, *supra* note 193, at 83.

[247] *Id.* Judge Clark was very critical of Rule 12 pleading motions. Challenging the Rule 12(e) Motion for More Definite Statement, Judge Clark wrote that "[t]his, unfortunately, has proved somewhat of an invitation to counsel once more to seek for particularization, and hence for admissions from the opponent on the paper pleadings." *Id.*

[248] FED. R. CIV. P. 12(b)(6).

[249] *Id.*

claim—essentially whether the facts as alleged, if believed and taken in the light most favorable to the plaintiff, amount to a legally cognizable action against the defendant.[250] Thus, Rule 12(b)(6) motions will rarely restrain the frivolous medical malpractice claim unless: (1) The defendant is a legally improper defendant, or (2) there is no existing cause of action for the alleged wrongful conduct.

The third available option under the federal system is to respond to the complaint "in short and plain terms."[251] In responding under Rule 8, defendants simply push the proceedings to the next stage of discovery and pretrial motions by filing all of their defenses, affirmative defenses, and counterclaims in a single pleading referred to as the answer.[252] Accordingly, the filing of an answer does little to evade or restrict frivolous litigation.

The fourth and most viable option for weeding out frivolous lawsuits in the early stages of litigation is a Rule 56 Motion for Summary Judgment.[253] Unlike Motions to Dismiss filed pursuant to Rule 12(b)(6), Motions for Summary Judgment allow courts to consider the parties' evidence to discern whether there is a factual dispute between the parties that precludes the entry of judgment without resorting to trial.[254] Motions for Summary Judgment may

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[250] *Conley v. Gibson* remains the seminal case in 12(b)(6) jurisprudence, involving a legal challenge to the sufficiency of the complaint. 355 U.S. 41, 45-46 (1957). In *Conley*, the Supreme Court articulated the standard governing 12(b)(6) motions, which remains valid today:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Id.; *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513-14 (2002) ("Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984))).

[251] FED. R. CIV. P. 8(b). In addition, defendants should be advised to raise all affirmative defenses and compulsory counterclaims then available contemporaneously with the answer. *Id.* 8(c); *see also id.* 13(a).

[252] Unlike the common-law system that involved pleas, replies, demurrers, rebutters, and surrebutters, the Federal Rules do not generally require a reply once the original complaint and answer are filed. *See id.* 7 (stating "[t]here shall be a complaint and an answer").

[253] *Id.* 56.

[254] *Id.* 56(c). Rule 56(c) provides in pertinent part as follows:

> The judgment sought shall be rendered forthwith if the pleadings,

be filed by the defendant at any time after service of the complaint and can even be filed contemporaneously with the answer.[255] Thus, concerns that a claim is legally frivolous and completely unsubstantiated should be resolved quite readily under Rule 56 without extravagant expense or delay.[256] Either the patient was treated by this physician at this hospital or she was not. Either the patient suffered an injury and can substantiate that injury with admissible evidence or she cannot. Either the act, as alleged, violates professional norms or it does not. To be frivolous, there can be no doubt about the testimony and evidence. Essentially, the case will be one-sided, and the Motion for Summary Judgment should provide a quick remedy to avoid abuse. Although Rule 56 permits plaintiffs to request limited discovery if a defendant files a Motion for Summary Judgment prior to the close of discovery, this section of the Rule is discretionary and subject to the judge's control.[257] Properly invoked, summary judgment provides further stopgap against frivolous filings and authorizes the judge to dismiss a case well before expenditures become excessive.[258]

Proponents of medical malpractice reform underplay the inherent remedies currently available within the federal system. Defense lawyers are undoubtedly familiar with the federal courts' penchant for summary judgment disposition, particularly in light of the 1986

> depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Id.

[255] *Id.* 56(b). Rule 56(b) further provides that: "A party against whom a claim, counterclaim, or cross-claim is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." *Id.*

[256] *See* Charles E. Clark, *Edson Sunderland and the Federal Rules of Civil Procedure*, 58 MICH. L. REV. 6, 12 (1959-60) (observing that "[t]he system has proved itself highly operable and a necessary corollary to the general (as opposed to special) pleading planned generally in modern procedure").

[257] FED. R. CIV. P. 56(f).

[258] *See* Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 746 (1974) ("The motion for summary judgment has become the first real opportunity for identifying factually deficient claims or defenses.").

trio of Supreme Court cases broadening the applicability of summary judgment.[259]

Finally, beyond the initial four options available to defendants, the Federal Rules permit judges to take early control of case management through discovery proceedings and scheduling.[260] Rule 26 requires parties, including those in medical malpractice cases, to confer before the Rule 16 scheduling conference to discuss such matters as discovery and initial disclosures.[261] Both Rule 26 and Rule 16 empower the court to penetrate the pleadings if the judge suspects a frivolous or meritless case.[262] Rule 16 provides in pertinent part that the court:

> may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as
> (1) expediting the disposition of the action;
> (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
> (3) discouraging wasteful pretrial activities;
> . . .
> (5) facilitating the settlement of the case.[263]

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[259] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88 (1986) (requiring plaintiffs to offer more persuasive evidence in support of claims than normally necessary); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (finding that "the plain language of Rule 56(e) mandates [ ] the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the evidence of an element essential to that party's case"); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) ("[A] ruling on a motion for summary judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.").

[260] *See* FED. R. CIV. P. 16 (allowing for pretrial and scheduling conferences).

[261] *Id.* 26(f). Initial disclosures are required in most cases under the Federal Rules pursuant to Rule 26(a). *See id.* 26(a)(1) (requiring four distinct items that must be proffered by parties prior to any request for such information). However, judges may exempt individual cases from these spontaneous disclosures—or discovery that is exchanged without inquiry. *Id.* Rule 26(a) evinces the movement toward merits-based determinations by mandating that parties exchange certain limited information without resort to costly discovery devices such as interrogatories or requests for production. *Id.* 26(a)(1)(A)-(D).

[262] *See* Charles E. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 163 (1956) (stating that Rule 16 "has been the most popular of all the Federal Rules").

[263] FED. R. CIV. P. 16(a).

Likewise, Rule 26 allows the judge to delimit discovery upon belief that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).[264]

Considering the elaborate and extensive procedural protections available to defendants under the Federal Rules, it is surprising that litigants remain fixated on the minimal pleading requirements as a target for reform.[265] The framework of the Federal Rules provides sufficient safeguard against frivolous litigation. In addition to the foregoing provisions, which, acting in concert, provide abundant resources against frivolous lawsuits, there are additional punitive provisions available under the Federal Rules and federal statutes to protect against abusive litigation tactics. Lawyers are acutely aware of the Rule 11 requirements attendant

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[264] *Id.* 26(b)(2).

[265] Clark, *Handmaid of Justice*, *supra* note 171, at 318. Judge Clark emphasized the important design of the Federal Rules in leading to quick and efficient resolution of disputes as follows:

> Attempted use of the pleadings as proof is now less necessary than ever with the development of two devices to supply such elements of proof as may be necessary before trial. These are discovery and summary judgment, both the subject of extensive provisions in the new rules. . . . [Summary judgment] can therefore accomplish what pleadings cannot.

Id.

to their signature on all pleadings and motions.[266] The discovery provisions mandate similar verification and provide sanctions for violators.[267] Finally, 28 U.S.C. § 1927 imposes monetary sanctions against any attorney who "unreasonably and vexatiously" protracts litigation.[268]

Thus, despite the clamor for pleading reform, the original design of Judge Clark and the Advisory Committee remains capable of securing justice for those wrongfully sued.[269] Insistence on additional procedural barriers suggests either a distrust of federal judges or a disdain for medical malpractice litigation that eclipses the Federal Rules' system. In other words, physicians and their advocates must believe that their cases are sufficiently special and

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[266] FED. R. CIV. P. 11(b), which applies to both lawyers and unrepresented parties, provides that:

> [b]y presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information and belief.

Id. Subsection (c) describes the possibilities for and the spectrum of possible sanctions for violation of the Rule. *Id.* 11(c).

[267] *Id.* 26(g). Rule 26(g) is the Rule 11 equivalent for discovery and governs both lawyers and unrepresented parties. Subsection (g)(2) requires a signature from the lawyer or unrepresented party affirming that the requests or responses are made in good faith, consistent with the Federal Rules, and "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *Id.* 26(g)(2)(B). By design, Rule 26(g) should help avoid frivolous and costly expenditures in litigation.

[268] 28 U.S.C. § 1927 provides in pertinent part as follows: "Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

[269] *See* Clark, *Handmaid of Justice*, *supra* note 171, at 315 ("Special pleading, in other words, just does not work. It never has; it cannot be expected to in the future.").

different to justify disturbing the balance of a procedural system that has remained intact and effectual for nearly seventy years. This belief, however loudly and forcefully presented, is simply misguided. Medical malpractice remains a legitimate concern in our country. But the fortitude of support for this purported crisis does not authenticate the continued efforts to disturb the balance of the Federal Rules. Rather, resort to the existing rules and a clamoring for their proper application provides the necessary fix.

E. NO ROOM FOR THE "BIG CASE"

Neither the Federal Rules nor the Supreme Court has found occasion to preempt the unequivocal mandate of Rule 8. Plainly put, there are no exceptions. There are no exceptions for antitrust, civil rights, copyright, defamation, employment law, or patent cases.[270] And there is certainly no exception for the average medical malpractice case based upon acts of negligence.[271]

The only possible avenue for change is through the amendment process of the Federal Rules. State legislatures cannot impose heightened pleading requirements in federal court through legislative mandate without returning to the unworkable days of the Conformity Act. And this result is not permitted under the Rules Enabling Act.[272] Further, states are not in a proper position to structure pleading requirements for federal cases. For these reasons, under the authority of *Erie Railroad Co. v. Tompkins*, states are relegated to promulgating state-specific substantive law, while procedure remains squarely within the federal domain. Although states are reacting to a perceived societal quandary in

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[270] Mid Am. Title Co. v. Kirk, 991 F.2d 417, 418 (7th Cir. 1993) (copyright); Cimijotti v. Paulsen, 219 F. Supp. 621, 622-23 (N.D. Iowa 1963) (defamation); *see also supra* notes 1-4 and accompanying text.

[271] *See* Form 9, Appendix of Forms, FED. R. CIV. P. (prescribing bare requirements for cases grounded in negligence). Form 9, which was referenced directly in *Swierkiewicz v. Sorema N.A.*, "simply states in relevant part: 'On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.' " 534 U.S. 506, 513 n.4 (2002).

[272] *See* 28 U.S.C. § 2072 (2000) (empowering the Supreme Court to prescribe rules of practice and procedure in federal district courts and courts of appeals). *See also* FRIEDENTHAL ET AL., *supra* note 188, at 210 (noting that Rules Enabling Act "authorized the Supreme Court to draft and promulgate an independent set of procedural rules for the federal courts").

medical malpractice litigation,[273] pleading rules in diversity cases have never depended on the type of case initiated. Careful insight into the varied state pleading statutes and the inconsistent treatment of heightened pleading requirements by federal courts, as analyzed above, merely underscores this point. As Judge Clark so eloquently noted: In fact in the case of a real dispute, there is no substitute anywhere for a trial. To attempt to make the pleadings serve as such a substitute is in very truth to make technical forms the mistress and not the handmaid of justice.[274]

V. THE PROPER SOLUTION: ADHERENCE TO THE EXISTING FEDERAL RULES IS JUST WHAT THE DOCTOR ORDERED

Simplicity in pleading is the grand design of the Federal Rules. The current medical malpractice pleading dilemma poses a direct challenge to the historical preference for notice pleading. Courts that have ignored or underplayed the tension that heightened pleading and affidavit requirements impose on notice pleading fail to appreciate the pedigree of Rule 8 and the evolution of our pleading system. As courts continue to embark on their quest to determine whether application of a state heightened pleading requirement is acceptable and proper in federal courts, each court should remember three things: (1) the guidance handed down in *Erie* and its progeny for determining whether federal courts should apply state or federal law; (2) the unwavering support of the notice pleading requirements embodied in Rule 8, as evidenced through history and the Supreme Court's jurisprudence in *Conley*, *Leatherman*, and *Swierkiewicz*; and (3) the duty to refrain from altering what is perhaps the most sacred Federal Rule in order to achieve public policy purposes without abiding by the appropriate amendment process.

First, in determining whether federal court litigants must meet state heightened pleading requirements to properly invoke a lawsuit in federal court, courts should consider the analysis dictated by *Erie*.

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[273] *See* Miller, *supra* note 28, at 984-87 (discussing "[t]he recent outcry in this country over the societal costs of civil litigation").

[274] Clark, *Handmaid of Justice*, *supra* note 171, at 319.

As noted in *Hanna*, the broad rule behind *Erie* is the notion that federal courts should apply state substantive law and federal procedural law.[275] The *Hanna* Court illustrated that the Federal Rules of Civil Procedure, at the least, fit neatly within the category of procedural law and should be applied unless the Federal Rule's scope is not broad enough to govern the "point in dispute."[276] Any doubt that Rule 8 is not broad enough to cover all pleading requirements in federal court, however, was surely swept away by the Supreme Court's continual proclamation of Rule 8's power and the Court's unwavering insistence that Rule 8 cannot be circumvented via state pleading requirements, regardless of the underlying policy arguments.[277] Furthermore, the *Erie* doctrine instructs that when a Federal Rule governs a situation, just as Rule 8 governs all pleading requirements in federal courts, courts are not to proceed to the "relatively unguided *Erie* Choice," but should instead "apply the Federal Rule."[278] Thus, courts should never reach considerations of whether application of Rule 8 over a state heightened pleading statute will cause litigants to forum shop or whether citizens of the forum state would be unfairly discriminated against. Instead, courts should consider Rule 8, the instigating procedural rule by which a litigant commences a lawsuit, as broad enough to control any form of pleading required in federal court. Perhaps the simplicity of this result was most aptly articulated in Charles Wright's treatise on federal courts: "The Erie doctrine has very little application to pleading in federal court. A complaint is sufficient if it meets the test of Rule 8(a), though it . . . fail[s] to set forth the detailed facts cherished in the state system."[279]

Second, courts should adhere to the history and tradition of notice pleading since the Federal Rules' adoption in 1938.[280] The clarity of the notice pleading standard embodied in Rule 8 is

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[275] Hanna v. Plumer, 380 U.S. 460, 465 (1965).

[276] *Id.* at 470.

[277] *See supra* notes 208-28 and accompanying text.

[278] *Hanna*, 380 U.S. at 471. In such circumstance, the Federal Rule must be applied unless "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.*

[279] CHARLES WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 280 (2d ed. 1970).

[280] *See supra* notes 178-207 and accompanying text.

illustrated not only by the text of the rule itself, but also by Supreme Court precedent. During the past fifty years, the Supreme Court has not once, not twice, but three times pledged its full support for the notice pleading standard prescribed in Rule 8.[281] In fact, the Supreme Court has continuously insisted on Rule 8's application,[282] except in the limited instances of fraud and mistake provided for in Rule 9.[283] Perhaps most unique and fundamental to the Supreme Court's full-fledged support of the notice pleading standards in Rule 8 is the Court's reasoning behind such support. *Conley*, *Leatherman*, and *Swierkiewicz* specifically rely on other Federal Rules to do away with unmeritorious or frivolous claims.[284] Thus, Supreme Court precedent is clear that Rule 8 is the governing standard for pleadings in federal court.

Finally, even if future empirical evidence shows that the United States is indeed in the midst of a grave medical malpractice crisis, and the policy concerns are so deep as to justify a heightened pleading requirement for medical malpractice actions in federal court, the only viable option is to amend Rule 9. While Rule 9 currently requires heightened pleading in cases alleging fraud or mistake,[285] the Supreme Court has articulated that *all* other instances are governed by Rule 8.[286] Thus, the Supreme Court has clearly warned against mandating heightened pleading via judicial interpretation, instead instructing that such change "must be obtained by the process of amending the Federal Rules."[287]

The solution is simple. It is branded on the pages of Supreme Court decisions and has remained unwavering despite strong and viable public policy arguments that heightened pleading require-

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[281] *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) ("[A] complaint must include only 'a short' and plain statement of the claim" (quoting FED. R. CIV. P. 8)); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) (noting "liberal system of 'notice pleading' set up by the Federal Rules"); Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding "that the Federal Rules . . . do not require a claimant to set out in detail the facts upon which he bases his claim").

[282] *Swierkiewicz*, 534 U.S. at 512.

[283] *Leatherman*, 507 U.S. at 168.

[284] *Swierkiewicz*, 534 U.S. at 512; *Leatherman*, 507 U.S. at 168-69; *Conley*, 355 U.S. at 47-48.

[285] FED. R. CIV. P. 9(b).

[286] *Leatherman*, 507 U.S. at 168.

[287] *Id.*

ments should be instituted. Federal courts must not only rely on, but also properly utilize and enforce the Federal Rules to attend to issues of procedure in federal court. The Federal Rules speak loud and clear that "a short and plain statement of the claim" is all that is required under notice pleading.[288] Furthermore, the Federal Rules make a narrow, specific exception in Rule 9, which requires pleading with particularity only in instances of fraud or mistake.[289] Thus, any complaint filed in federal court that adheres to the notice pleading standards of Rule 8 should be readily embraced and accepted. Fraud and mistake remain the only exceptions to this rule.

This simple solution, however, does not mean that unmeritorious claims will run rampant within the federal court system. Rather, the Supreme Court has continuously articulated that the Federal Rules have built-in defenses to eradicate such frivolous claims.[290] It is up to both litigants and federal judges to ensure that these defenses are properly utilized. For example, litigants can bring motions under Rule 12, which allows for both Motions to Dismiss and Motions for More Definite Statement.[291] If litigants choose to instead file an answer, they are then armed with discovery tools that mandate prompt disclosure of vital information to the lawsuit.[292] Perhaps most appropriately, litigants can eliminate unmeritorious lawsuits by filing a Rule 56 Motion for Summary Judgment.[293] In doing so, judges will be permitted to consider the underlying facts of a lawsuit, thereby dispensing of legally frivolous or unsubstantiated claims in a prompt, less expensive manner. Finally, numerous outlets via discovery provisions and sanctioning rules impart judges with the power to severely limit frivolous claims within the federal court system. The sum of these Rules equals an

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[288] FED. R. CIV. P. 8(a)(2).

[289] *Id.* 9(b).

[290] *See supra* notes 233-69 and accompanying text.

[291] FED. R. CIV. P. 12(b)(6), 12(e).

[292] *Id.* 26(a).

[293] *Id.* 56; *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " (quoting FED. R. CIV. P. 1)).

already paved avenue by which litigants can ensure that unmeritorious claims are disposed of in a timely and inexpensive manner.

Federal courts, when faced with the issue of whether to apply a state heightened pleading requirement over medical malpractice actions in federal court, should follow both the history and plain text of Rule 8, along with the Supreme Court's consistent precedent set forth in bodies of law ranging from *Erie* to *Hanna* to *Conley* to *Leatherman* to *Swierkiewicz*. In doing so, federal courts will resist the temptation to improperly heighten the notice pleading standard prescribed in Rule 8, instead following the Supreme Court's ultimate instruction to "rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."[294]

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[294] Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993).