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The Substantive Elements in the New Special Pleading Laws

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I. INTRODUCTION

In recent years, both federal and state lawmakers have initiated new special pleading standards applicable to discrete substantive law claims or to certain remedial requests. Relevant claims include allegations of securities fraud, professional malpractice, childhood sexual abuse, and civil rights violations, while relevant remedial requests include punitive damages demands. Generally, these standards require, at the least, the pleading of significant additional facts not demanded by the otherwise applicable general pleading standards; in some instances, they also require that pleadings at the outset, or later in litigation, be accompanied by evidence, often involving experts¹ or special certificates of merits.²

While often characterized as procedural law reforms, many of these standards seem better described as substantive law revisions. Recognition and resolution of troubling procedure/substance dichotomies in these settings is important not only for semanticists, but also for the legislators, judges, and lawyers developing or utilizing the new standards. Differentiations are key in at least two contexts - separation of powers and choice of law. Thus, when dealing with these new pleading norms, many must resolve who should determine the new standards and which standards should apply when two interested governments have divergent norms. These two contexts will be examined in this paper.³

This paper initially reviews some of these new pleading standards. It examines the application of such standards in the separation of powers and choice of law contexts. Finally, general guidelines will be

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1. Such new pleading norms are reviewed in Jeffrey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 *BYU L. REV.* 537.
 2. These new pleading standards differ from other recent pleading law initiatives which will not be discussed herein. See, e.g., Amended Order 98-01 of the Wisconsin Supreme Court, reprinted in *Supreme Court Orders*, 71 *Wis. LAW.* 55 (Aug. 1998) (proposed development of standard court forms for mandatory use in civil actions).
 3. Beside applications of substance/procedure dichotomies to these new pleading laws, those creating or utilizing such laws often must confront other challenges, such as assuring that constitutionally based access to court and jury trial rights are preserved. See, e.g., *Royle v. Florida Hosp.-E. Orlando*, 679 So.2d 1209 (Fla. Dist. Ct. App. 1996) (holding court access rights are not denied under laws usually requiring medical negligence claimants to give presuit notices of intent to initiate medical malpractice litigation and demanding evidence of compliance upon filing). These substance/procedure dichotomies must also be drawn in other procedural law rulings. See *McDougall v. Schanz*, 597 N.W.2d 148 (Mich. 1999) (finding admissibility standards for expert testimony in medical malpractice cases may be either procedural rules of evidence or evidentiary rules of substantive law; the legislature may create the latter without intruding on judicial rulemaking powers).

suggested for all involved in determining and applying the new special pleading norms.

II. ILLUSTRATIVE LAWS

Special civil claim pleading standards governing particular claims or remedial requests have been established recently for both federal and state trial courts. These standards were formulated by a variety of lawmakers, and apply in several different settings. They are exemplified by the following laws.⁴

A. Federal Securities Claims

The special pleading standards of the Private Securities Litigation Reform Act of 1995 (PSLR) apply to plaintiff class actions arising under 15 U.S.C. §78a.⁵ Every plaintiff seeking class representative status must file a "sworn certification" with the complaint stating: the plaintiff reviewed the complaint and authorized its filing; the plaintiff did not purchase the relevant security at the direction of a lawyer or in order to participate in any private civil action; the plaintiff is willing to serve as a representative and to provide testimony; the identity of any other civil action under the same chapter within the last three years where the plaintiff has sought class representative status; and an assurance that the plaintiff will not receive any payment for service as a class representative beyond a pro rata share of recovery, unless it is approved by the court.⁶

The Act also sets out additional pleading requirements for certain securities actions where the plaintiff alleges the defendant made untrue statements of material fact or omitted to state a necessary mate-

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4. The illustrative laws are neither exhaustive nor indicative that other claims or requests for remedies may not soon become subject to new special pleading laws. See, e.g., ARIZ. REV. STAT. §§ 12-2601 to -2602 (Supp. 1998) (claims against contractors, architects, assayers, engineers, geologists, landscape architects or land surveyors normally require that expert affidavits accompany pleadings); *Bockrath v. Aldrich Chem. Co.*, 86 Cal. Rptr. 2d 846, 851 (Cal. Ct. App. 1999) (requiring particularized pleading in suits claiming fraud, statutory causes of action, and personal injury where the negligence and injury alleged do not naturally give rise to an inference of causation); *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1104-05 (Ill. 1997) (striking statutory certificate of merit requirements for product liability claims from other invalid laws within the same General Assembly act as nonseverable, though the General Assembly was free to reenact the product liability pleading requirements if desirable and appropriate).
 5. See 15 U.S.C.S. § 78u-4(a)(1) (Law. Co-op. 1998). For a critique of how the Act has failed to strike the proper balance on pleading, in part because of its ambiguity, see Note, *What Congress Said About the Heightened Pleading Standard: A Proposed Solution to the Securities Fraud Pleading Confusion*, 66 *FORDHAM L. REV.* 2517 (1998).
 6. See 15 U.S.C.S. § 78u-4(a)(2) (Law. Co-op. 1998).

rial fact so as to prevent statements from being misleading.⁷ Here, a complaint must “specify” each statement alleged to be misleading, the reason or reasons why the statement was misleading, and, if the allegation is made on information and belief, the particular facts on which the belief is formed.⁸ And in those securities actions in which a plaintiff must prove “a defendant acted with a particular state of mind” before recovering money, the plaintiff must state with particularity the “facts giving rise to a strong inference that defendant acted with the required state of mind.”⁹ Dismissal follows for any complaint failing to meet the heightened pleading requirements of the Act.¹⁰

The passage of the Securities Litigation Uniform Standards Act of 1998 generally precluded plaintiffs from filing certain securities actions in state courts in order to avoid the strict pleading requirements of the PSLR.¹¹ Specifically, for example, Congress found that since 1995 there had been a shift of securities class action lawsuits from federal to state courts, preventing full achievement of the objectives of the 1995 Act and thus requiring “national standards for securities class action lawsuits involving nationally traded securities.”¹²

The substantive elements in the PSLR have not gone unnoticed. They are viewed as undermining the goal of a “truly neutral” proce-

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7. See 15 U.S.C.S. § 78u-4(b)(1) (Law. Co-op. 1998).
 8. See *id.* These requirements have generated some differing applications. See, e.g., *Coates v. Heartland Wireless Communications, Inc.*, 26 F. Supp. 2d 910, 916 n.3 (N.D. Tex. 1998) (recognizing a split of authority on whether the Act bans “group pleading” or the “group published doctrine”).
 9. 15 U.S.C.S. § 78u-4(b)(2) (Law. Co-op. 1998). The Reform Act is silent as to what the “required state of mind” denotes. To date, many lower courts have found that recklessness suffices as the required state of mind, with recklessness defined as a conscious disregard of the truth about a substantial risk. See, e.g., *Malin v. IVAX Corp.*, 17 F. Supp. 2d 1345, 1357 (S.D. Fla. 1998); *In re Baesa Sec. Litig.*, 969 F. Supp. 238, 241 (S.D.N.Y. 1997). *But see Janas v. McCracken (In Re Silicon Graphics, Inc., Sec. Litig.)*, 183 F.3d 970, 974 (9th Cir. 1999) (“We hold that although facts showing mere recklessness or a motive to commit fraud and opportunity to do so may provide some reasonable inference of intent, they are not sufficient to establish a strong inference of deliberate recklessness.”). On the sufficiency of allegations as to scienter, the cases are reviewed in Matthew Roskoski, Note, *A Case-By-Case Approach to Pleading Scienter Under the Private Securities Litigation Reform Act of 1995*, 97 MICH. L. REV. 2265 (1999).
 10. See 15 U.S.C.S. § 78U-4(b)(3) (Law. Co-op. 1998).
 11. Act of November 3, 1998, Pub. L. No. 105-353, 112 Stat. 3227 (codified in scattered sections of 15 U.S.C.).
 12. Act of November 3, 1998, Pub. L. No. 105-353, 112 Stat. 3227 (Section 2: Findings). Not everyone agrees that there was a shift, or with the policy determinations made by Congress to address any shift. See, e.g., Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 99 (1998) (“Congress should not have passed the Uniform Standards Act until it knew more about critical developments that would have determined whether preemption was truly necessary. Furthermore, having decided to preempt state law, Congress should have considered the precise method of preemption more carefully.”).

dural system.¹³ And they have been read to portend even further blurring of "the hazy line between substance and procedure" through congressional "tinkering with procedure" for certain claims in order to vindicate "substantive purposes."¹⁴

B. New Jersey and Georgia Professional Malpractice Claims

A New Jersey statute requires that an affidavit of "an appropriate licensed person" be filed by a plaintiff in any action for damages resulting from an alleged act of malpractice or negligence by a "licensed person in his profession or occupation" within sixty days following the date on which the answer is filed.¹⁵ The affiant must state that there is a "reasonable probability" that the conduct alleged in the complaint "fell outside acceptable professional or occupational standards or treatment practices."¹⁶ A plaintiff can escape the affidavit requirement by providing a "sworn statement" that the defendant failed to provide "information having a substantial bearing on preparation of the affidavit."¹⁷ Failure to comply with the requirements is deemed a failure to state a cause of action.¹⁸

This New Jersey law can be read to impose delayed, special pleading requirements, often involving evidence, for certain professional malpractice claims. The New Jersey statute appears under the title "Administration of Civil and Criminal Justice," a subtitle on "Specific Civil Actions," and a chapter on "Negligence and Other Torts."¹⁹ Here, the broader categories imply the requirements involve procedural law, but the narrowest category suggests they are substantive. The requirements were enacted as part of a larger tort reform package.²⁰

In Georgia, a similar affidavit requirement exists for professional malpractice actions. It was part of an enactment entitled "Medical Malpractice Reform Act of 1987" and was "located between provisions on medical malpractice and health care providers."²¹ Its particulars

13. See Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 61 (1998).

14. *Id.*

15. N.J. STAT. ANN. § 2A:53A-27 (West Supp. 1999). See generally *id.* § 2A:53A-26 (West Supp. 1999) (defining licensed persons to include accountants, architects, attorneys, engineers, physicians and certain health care facilities).

16. *Id.* § 2A:53A-27 (West Supp. 1999).

17. *Id.* § 2A:53A-28 (West Supp. 1999).

18. See *id.* § 2A:53A-29 (West Supp. 1999).

19. *Id.* § 2A:53A-1 (West 1987).

20. See, e.g., RTC Mortgage Trust 1994 N-1 v. Fidelity Nat'l Title Ins. Co., 981 F. Supp. 334, 346 (D.N.J. 1997); Alan J. Cornblatt, P.A. v. Barrow, 708 A.2d 401, 405 (N.J. 1998).

21. See Lutz v. Foran, 427 S.E.2d 248, 251-52 (Ga. 1993) (requirement is not invalid though it is in a bill that includes subject matter not described in the title of the bill).

are found in a title on "Civil Practice," a chapter called the "Civil Practice Act," under an article involving "Pleadings and Motions."²² Here, the affidavit requirement was not enacted as part of a larger tort reform initiative, but as an effort to reduce frivolous malpractice lawsuits.²³ There are other significant differences between the New Jersey and Georgia expert affidavit laws. The affidavit in Georgia must be completed by an expert who is "competent to testify," be filed "with the complaint," set forth "at least one alleged negligent act or omission," and present "the factual basis" for each claim of professional malpractice.²⁴

C. Medical Malpractice Claims

Outside of New Jersey and Georgia, several states have special pleading norms applicable only to medical malpractice claims. A Michigan statute on pleading medical malpractice claims differs from both the New Jersey and Georgia schemes in that it requires a plaintiff, in an action against a health professional or health facility, to give the prospective defendant written notice of the medical malpractice claim 182 days before filing.²⁵ The notice must be mailed to the defendant's last known professional business address or residential address.²⁶ The notice must contain allegations as to the "factual basis for the claim," the "applicable standard of practice or care," the manner of the breach, the conduct that should have been taken by the defendant, and the manner in which proximate cause arises, as well as the names of all other health professionals and health facilities who have been notified.²⁷ If at any time within the notice period a potential defendant informs the claimant that it does not intend to settle, the claimant may then commence an action alleging medical malprac-

22. GA. CODE ANN. § 9-11-9.1 (1993 & Supp. 1998).

23. See *Labovitz v. Hopkinson*, 271 Ga. 330 (1999) (finding the act does not apply to claims alleging intentional misconduct); Richard T. Hills, Hewitt v. Kalish: *Qualifying as an "Expert Competent to Testify" Under O.C.G.A. Section 9-11-9.1*, 46 MERCER L. REV. 1537, 1538-39 (1995). For an in-depth analysis of Georgia's professional malpractice affidavit requirement, see Robert D. Brussack, *Georgia's Professional Malpractice Affidavit Requirement*, 31 GA. L. REV. 1031 (1997).

24. GA. CODE ANN. § 9-11-9.1(a) (1998). Similar to the Georgia law is an Arizona requirement that an expert affidavit accompany pleadings containing professional misconduct claims, though it applies only to those (as architects and engineers) "registered by the board of technical registration." See ARIZ. REV. STAT. ANN. §§ 12-2601 to -2602 (West Supp. 1998) (also covering claims against contractors).

25. See MICH. COMP. LAWS ANN. § 600.2912b(1) (West Supp. 1998). The period can be shortened to 91 days under certain circumstances. See *id.* § 600.2912b(3) (West Supp. 1998).

26. See *id.* § 600.2912b(2) (West Supp. 1998). Where the address is not readily ascertainable, the notice can be mailed to the facility where the relevant care was given. See *id.*

27. *Id.* § 600.2912b(4) (West Supp. 1998).

tice.²⁸ After the notice period has ended, if a plaintiff files an action for medical malpractice, the plaintiff must attach "an affidavit of merit signed by a health professional."²⁹ The affidavit must certify that the expert reviewed the notice and medical records, indicate the applicable standard of care, demonstrate how the standard of care should have been met, and show that the breach was the proximate cause of plaintiff's injury.³⁰ Plaintiff may be granted additional time to file the affidavit upon motion for good cause³¹ or when a prospective defendant fails to allow access to medical records.³² The Michigan statute appears within the "Revised Judicature Act," under a chapter titled "Provisions Concerning Specific Actions."³³ Its provisions were part of a broader medical malpractice reform package.³⁴

The Michigan law differs significantly from other special medical malpractice pleading requirements. Thus, a very similar provision in Florida appears under the title "Torts" and in a chapter on "Medical Malpractice and Related Matters,"³⁵ though it too was a part of a larger tort reform package.³⁶ In Illinois, one provision of a major medical malpractice reform package was a statute requiring a written report of a reviewing health professional, located within the Code of Civil Procedure in an article known as Civil Practice.³⁷ A similar Texas statute was enacted as part of the Medical Liability and Insurance Improvement Act.³⁸ A comparable Minnesota law is found under the title "Public Health Provisions" and in a section on "Malpractice Actions: Expert Review."³⁹ In Missouri, an expert affidavit requirement for medical malpractice actions claims lies within a section on

28. *See id.* § 600.2912b(9) (West Supp. 1998) (assuming no limitations period problems).

29. *Id.* § 600.2912d(1) (West Supp. 1998) (where a plaintiff is represented by an attorney, the attorney must reasonably believe the health professional meets the requirements for an expert witness).

30. *See id.*

31. *See id.* § 600.2912d(2) (West Supp. 1998).

32. *See id.* § 600.2912d(3) (West Supp. 1998).

33. *Id.* § 600.2912 (West 1986 & Supp. 1998).

34. *See* MICH. COMP. LAWS ANN. § 600.2912 (West 1986 & Supp. 1998) (Historical and Statutory Notes). For an argument that the Michigan notice and affidavit of merit requirements violate the state separation of powers doctrine as they significantly encroach upon judicial authority, see Jeanne M. Scherlinck, Note, *Medical Malpractice, Tort Reform, and Separation of Powers Doctrine in Michigan*, 44 WAYNE L. REV. 313 (1998).

35. FLA. STAT. ANN. § 766.104 (West 1997 & Supp. 1999).

36. *See* Jessica Fonseca-Nader, *Florida's Comprehensive Medical Malpractice Reform Act: Is it Time for a Change?*, 8 ST. THOMAS L. REV. 551 (1996).

37. *See* 735 ILL. COMP. STAT. ANN. 5/2-622 (West 1992 & Supp. 1999).

38. TEX. REV. CIV. STAT. ANN. art. 4590i (West Supp. 1999).

39. MINN. STAT. ANN. § 145.682 (West 1998). This statute was recently construed in *Lindberg v. Health Partners*, No. C2-98-505, 1999 WL 681659, at *6 (Minn. Sept 2, 1999).

"Statutory Actions and Torts: Tort Actions Based on Improper Health Care."⁴⁰ And in North Carolina, a special pleading requirement for medical malpractice claims involving expert opinion pleading appears in the high court rule on "Pleading Special Matters."⁴¹

The varying medical malpractice laws differ not only in their designated locations, but also in their timing and in other substantive requirements. Michigan and Florida have both pre-complaint notice requirements⁴² and mandate that expert reports usually be received at or before the filing of the complaint.⁴³ Missouri and Minnesota laws only require that expert reports be undertaken by the time of the filing of the complaint.⁴⁴ In Texas, an "expert report" must be filed no later than ninety days after the day the medical malpractice claim is filed where no cost bond or cash deposit has been tendered.⁴⁵ In North Carolina a "complaint alleging medical malpractice by a health care provider" need only aver that the relevant "medical care" was "reviewed" by a person who is reasonably expected to qualify as an expert witness,⁴⁶ while in New York the pleading usually must be accompanied by a certificate of merit executed by an attorney and indicating a consulting physician has been employed.⁴⁷

Regarding other substantive requirements, in Michigan the expert affidavit accompanying the complaint must certify that the expert reviewed relevant medical records and must state the applicable standard of care, an opinion that this standard was breached, and how the breach was the proximate cause of plaintiff's injury.⁴⁸ The Minnesota and Missouri requirements are similar.⁴⁹ In Florida the written expert opinion used by an attorney to demonstrate good faith need only state that "there appears to be evidence of" medical negligence,⁵⁰

40. MO. ANN. STAT. § 538.225 (West 1998 & Supp. 1999).

41. N.C. R. Civ. P. 9(j).

42. See FLA. STAT. ANN. § 766.203(2) (West 1997 & Supp. 1998); MICH. COMP. LAWS ANN. § 600.2912 b(1) (Supp. 1999).

43. See FLA. STAT. ANN. § 766.104(1) (West 1997 & Supp. 1999) (stating that receipt of expert opinion normally should precede filing of complaint); MICH. COMP. LAWS ANN. § 600.2912d(1) (West Supp. 1998) (requiring that the expert affidavit be attached to the complaint).

44. See MO. ANN. STAT. § 538.225(1) (West 1988 & Supp. 1999) ("[W]ritten opinion of a legally qualified health care provider"); MINN. STAT. ANN. § 145.682(2) (West 1998) (plaintiff's attorney's affidavit that there has been "expert review").

45. See TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(a)(3) (West Supp. 1999).

46. See N.C. R. Civ. P. 9(j).

47. See N.Y. C.P.L.R. § 3012-a (McKinney 1991) (also requiring comparable attorney certificates for dental and podiatric malpractice claims).

48. See MICH. COMP. LAWS ANN. § 600.2912 d(1) (West Supp. 1999).

49. See MINN. STAT. ANN. § 145.682(3) (West 1998) (expert must state defendant deviated from standard of care causing plaintiff's injury); MO. ANN. STAT. § 538.225 (West 1988) (expert must conclude standard of care was breached and breach was proximate cause of injury).

50. FLA. STAT. ANN. § 766.104(1) (West 1997 & Supp. 1999).

while in North Carolina the pleading need only aver that the expert witness "is willing to testify that the medical care did not comply with the applicable standard of care."⁵¹

In contrast to these expert opinion pleading standards for medical malpractice claims, in Alabama a special statutory pleading norm for a claim against a health care provider involving a breach of a standard of care requires only "a detailed specification and factual description of each act and omission alleged . . . to render the health care provider liable."⁵² The norm appears in the Medical Liability Act of 1987⁵³, which also contains an array of substantive law provisions.

D. Requests for Punitive Damages

In Florida, any request for punitive damages in a civil action must be accompanied by an evidentiary demonstration of a "reasonable basis for recovery."⁵⁴ Before the relevant pleading, the claimant is allowed "discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages."⁵⁵ The relevant Florida statute is found under the title "Torts," in a chapter on "Negligence" and in a part on "Damages."

Similar statutory norms exist in other American states.⁵⁶ In both Oregon and California, comparable provisions are located within codes of civil procedure.⁵⁷ The Oregon law applies to all civil actions, while the California law applies to actions involving alleged professional negligence by a health care provider. In both Florida and in California, the punitive damages laws were part of a larger tort reform package. The pleading seeking punitive damages may be in the initial

51. N.C. R. Civ. P. 9(j).

52. ALA. CODE § 6-5-551 (1993).

53. See *id.* § 6-5-541. What precedent there is finds no separation of powers difficulties with the norm. See *Ex Parte McCollough v. Dalraida Health Ctr., Inc.*, No. CV-96-1264, 1999 WL 6946, at *7 (Ala. Jan. 8, 1999) (decision not yet released for publication) (Lyons, J. dissenting).

54. FLA. STAT. ANN. § 768.72 (West 1997 & Supp. 1999). Evidence used may be from the record or proffered by the claimant with the pleading.

55. *Id.* However, no discovery of financial worth can precede the filing of the pleading seeking punitive damages.

56. See, e.g., CAL. CIV. PROC. CODE § 425.13 (West Supp. 1999); IDAHO CODE § 6-1604(2)(1998); MINN. STAT. ANN. § 549.191 (West 1998); OR. REV. STAT. ANN. § 18.535 (LEXIS Law 1998 & 1998 Supp. Pt. 1).

57. See CAL. CIV. PROC. CODE § 425.13 (West 1973 & Supp. 1999); OR. REV. STAT. ANN. § 18.535 (LEXIS Law 1998 & 1998 Supp. Pt. 1).

complaint in Florida,⁵⁸ while in California⁵⁹ and Oregon⁶⁰ punitive damages requests can only appear in amended pleadings.

By contrast, in North Carolina in the article within the Civil Procedure Rules addressing "Pleadings and Motions," there is a provision on punitive damages indicating that they "shall be specifically stated, except for the amount," and that the "aggravating factor that supports the award . . . shall be averred with particularity."⁶¹

E. Childhood Sexual Abuse Claims

In California, a plaintiff twenty-six years of age or older who presents a civil action for damages suffered as a result of childhood sexual abuse usually must file two different certificates.⁶² The attorney for the plaintiff must declare in a certificate of merit that upon consultation with a licensed mental health practitioner, "there is reasonable and meritorious cause for the filing of the action."⁶³ A certificate of a licensed mental health practitioner must declare that she is not a party to the action; did not treat the plaintiff, but did interview the plaintiff; and has determined "there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse."⁶⁴ Failure to file these certificates shall be grounds for dismissal.⁶⁵ Initially, in California, it is permissible for the complaint to only name a John Doe defendant.⁶⁶ Plaintiff may later move to add the actual name of the defendant by attaching "a certificate of corroborative fact executed by the attorney for the plaintiff" to an application to amend.⁶⁷ This certificate must include the nature and substance of the corroborative fact, and if supported by the testimony of a witness or document, the identity or location must be disclosed.⁶⁸ This certificate is reviewed *in camera*.⁶⁹ The certificate of corroborative fact is maintained under seal and thus remains out of reach to the public and even to the parties in the litigation.⁷⁰ If the defendant prevails, the court may inquire into the plaintiff's and the plaintiff's attorney's com-

58. See FLA. STAT. ANN. § 768.72 (West 1997 & Supp. 1999).

59. See CAL. CIV. PROC. CODE § 425.13(a) (West 1973 & Supp. 1999). The court will not approve the amendment unless the motion is filed within two years of the complaint or not less than nine months before the first trial date, whichever is earlier.

60. See OR. REV. STAT. ANN. § 18.535(2) (LEXIS Law 1998 & 1998 Supp. Pt. 1).

61. N.C. R. CIV. P. 9(k).

62. See CAL. CIV. PROC. CODE. § 340.1(e)-(f) (West Supp. 1999).

63. *Id.* § 340.1(f)(1) (West Supp. 1999).

64. *Id.* § 340.1(f)(2) (West Supp. 1999).

65. See *id.* § 340.1(j) (West Supp. 1999).

66. See *id.* § 340.1(k) (West Supp. 1999).

67. CAL. CIV. PROC. CODE. § 340.1(l)(1) (West Supp. 1999).

68. See *id.* § 340.1(l)(1) (West Supp. 1999).

69. See *id.* § 340.1(m) (West Supp. 1999).

70. See *id.* § 340.1(n) (West Supp. 1999).

pliance with the initial certification standards and may issue sanctions involving "reasonable expenses" upon a finding of noncompliance.⁷¹

While in California these special pleading requirements appear within the Code of Civil Procedure,⁷² similar norms in Louisiana appear in the "Civil Code Ancillaries."⁷³ While neither law was part of a broader tort reform package, the California and Louisiana laws differ in key respects. The California certificates of merit law are demanded of plaintiffs who are twenty-six years or older at the time the action is filed, while the Louisiana law applies to plaintiffs twenty-one years of age or older at the time the action is filed.⁷⁴ As well, in Louisiana certificates of merit are also required for claims involving "physical abuse of a minor resulting in permanent impairment or permanent physical injury or scarring."⁷⁵ And in Louisiana, there is no certificate of corroborative fact required, though the two certificates of merit are subject to in camera court review before any defendant may be named in the lawsuit.⁷⁶

F. Federal Civil Rights Claims

Other forms of special pleading norms are occasionally employed for certain federal civil rights claims under 42 U.S.C. § 1983. Since 1993, the possible breadth of such requirements has been uncertain. Prior to 1993, heightened pleading demands on civil rights claimants under § 1983 were more widespread.

In the mid 1980s the United States Court of Appeals for the Fifth Circuit recognized a local common law standard demanding that allegations supporting claims under § 1983 be stated with particularity. The standard applied to claims against both municipalities⁷⁷ and individuals.⁷⁸ This common law standard relating to claims against individuals developed, in part, in conjunction with judicial expectations about requests by individual defendants for more definite statements under Federal Rule of Civil Procedure 12(2).⁷⁹ The court held a Rule

71. *See id.* § 340.1(o) (West Supp. 1999); *see also id.* § 340.1(i) (West Supp. 1999) (violations by attorneys also "may constitute unprofessional conduct and may be the grounds for discipline").

72. *See CAL. CIV. PROC. CODE* § 340.1 (West Supp. 1999).

73. *LA. REV. STAT. ANN.* § 9:2800.9 (West 1997).

74. *See id.* § 9:2800.9(B) (West 1997).

75. *Id.* § 9:2800.9(A) (West 1997).

76. *See id.* § 9:2800.9(D) (West 1997) (court must find "there is reasonable and meritorious cause for filing of the action").

77. *See Palmer v. City of San Antonio, Tex.*, 810 F.2d 514, 516 (5th Cir. 1987) (extending the rule involving claims against individual governmental officials to claims against municipal corporations).

78. *See Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985).

79. *See id.* at 1482.

12(e) inquiry should be initiated by district judges on their own whenever a § 1983 complaint “raises the likely issue of immunity.”⁸⁰ The inquiry required the plaintiff to allege “with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained.”⁸¹ The heightened pleading requirement for claims against government officials was adopted as a response to unfortunate experiences with broadly-worded civil rights complaints which left to discovery “the development of the real facts,” effectively eviscerating “important functions and protections of official immunity.”⁸² The public goals sought by official immunity were deemed not to be “procedural,” but rather to be related “to very fundamental substantive objectives.”⁸³ Thus, official immunity could not be undermined by the application of the general pleading standards of the Federal Rules of Civil Procedure.⁸⁴ In creating the common law standard involving individuals, the court referred to the Enabling Act⁸⁵ which mandates that civil procedure rules shall not abridge, enlarge or modify any substantive right.⁸⁶ In justifying the heightened pleading requirement, the court also focused on the recent amendments to the Federal Rules of Civil Procedure on the signing of court papers⁸⁷ and on pretrial conferences.⁸⁸ Their intent was to encourage federal district judges to become more active managers of the civil litigation process.⁸⁹

In 1993, the United States Supreme Court expressly invalidated the Fifth Circuit practice, but only as it related to claims against municipal corporations. The practice involving municipalities as defendants was deemed contrary to the liberal pleading norms of the Federal Rules of Civil Procedure.⁹⁰ Since then, however, many federal courts, including the Fifth Circuit, still demand particularity in certain plead-

80. *Id.*

81. *Id.*

82. *Id.* at 1476.

83. *Id.* at 1479.

84. *See id.*

85. 28 U.S.C. § 2072(b) (1992).

86. *See Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985).

87. *See* FED. R. CIV. P. 11.

88. *See* FED. R. CIV. P. 16.

89. *See Elliott v. Perez*, 751 F.2d 1472, 1481 (5th Cir. 1985).

90. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (finding that the heightened pleading standard could not be squared with the liberal system of notice pleading under the general civil procedure rules and that the special civil pleading rules did not include provisions on civil rights claims). Since *Leatherman*, § 1983 claimants are occasionally found to have failed to provide even the minimal notice required under the liberal pleading rules. *See, e.g., Kyle v. Morton High School*, 144 F.3d 448 (7th Cir. 1998) (holding the claimant in a First Amendment case failed to allege operative facts on which a claim against the school district was based).

ings involving § 1983 claims,⁹¹ including claims against government officials, through newer common law decisions which distinguish the high court precedent.⁹² The Supreme Court did say in 1993 that it had “no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving government officials.”⁹³

The Fifth Circuit pleading practice since 1993 involving government officials who are defendants in § 1983 claims is an illustration of a substance based special pleading norm, that is, of substantive federal common law. Thus, the practice applies to similar § 1983 claims filed in state courts within the Fifth Circuit. In some ways this pleading norm is odd in that it has been deemed an appropriate subject for substantive common lawmaking on pleading though it would be an inappropriate subject for judicial rulemaking on pleading.⁹⁴

III. DETERMINING AND APPLYING THE SUBSTANTIVE ELEMENTS OF THE SPECIAL PLEADING LAWS

New special pleading standards for certain claims or for certain remedial requests often raise problems of creation and application. Separation of powers issues arise involving who should make the stan-

91. See *Schultea v. Wood*, 47 F.3d 1427, 1430, 1434 (5th Cir. 1995) (en banc) (engaging in “the age-old dance of procedure and substance, . . . with the music of qualified immunity”, court finds that once “the defense of qualified immunity” is raised in a § 1983 claim, the claimant “ordinarily” must set forth in a reply allegations “with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant’s conduct at the time of the alleged acts”); see also *Breidenbach v. Bolish*, 126 F.3d 1288, 1292-1293 (10th Cir. 1997) (not all courts use the reply as the vehicle for heightened pleading); *Veney v. Hogan*, 70 F.3d 917, 922 n.6 (6th Cir. 1995) (supporting a heightened pleading standard when defense of qualified immunity is asserted).

92. At least some of these special common law pleading norms seem wholly procedural in nature and thus more troublesome under *Leatherman*. Purely procedural laws are wholly concerned with the orderly dispatch of judicial business, with mechanisms for fair and efficient dispute resolutions. See Kelleher, *supra* note 13, at 68-69. For an excellent review of common law special pleading norms in the federal district courts today, in and outside of procedure and of federal civil rights claims, see Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEXAS L. REV. 1749 (1998). Professor Marcus concludes that even after *Leatherman*, there continues “a kind of common-law activity in which judges develop standards for assessing the complaints in different kinds of cases”; while it seems “inconsistent with the transsubstantive orientation of the rules,” he finds “it actually comports with the relatively loose wording of the rules.” *Id.* at 1778 (noting the official forms accompanying the federal civil procedure rules “vary in detail depending on the type of claim asserted”).

93. *Leatherman*, 507 U.S. at 166-67.

94. See, e.g., Kelleher, *supra* note 13, at 108-121 (stating under proposed test for Rules Enabling Act, governing federal judicial rulemaking, the Fifth Circuit pleading norm for claims against government officials affects impermissibly substantive rights).

dards. Choice of law issues also arise when such standards might be employed in civil actions involving the interests of more than a single government. In both settings, a procedure/substance dichotomy will be explored, though the ultimate characterizations can differ in the two arenas and can differ within the same arena from government to government. The following cases illustrate the challenges facing those charged with creating and applying new special pleading norms.

A. Separation of Powers: Who Makes the Law?

1. Legislature or Judiciary?

Significant separation of powers issues can underlie new special pleading requirements. At times, these requirements arise under statutes which effectively modify high court rules relating to pleadings or to attorney conduct. Here, the special statutory norms may be subject to challenge as infringements on high court rulemaking authority. Such challenges chiefly occur in American state court settings.⁹⁵

In *Hiatt v. Southern Health Facilities, Inc.*,⁹⁶ the Ohio Supreme Court found that the state constitution delegated to the high court rulemaking powers over "practice and procedure in all courts of the state," subject to only limited oversight by the General Assembly, which involves the adoption of a "concurrent resolution of disapproval."⁹⁷ The court determined that "all laws" conflicting with high court general pleading rules were of "no further force or effect." The court therefore invalidated a statute mandating that any affirmative pleadings on a "medical, dental, optometric, or chiropractic" claim be supported by documentation, usually involving an affidavit by the claimant's attorney indicating there had been consultation with an expert who determined, along with the affiant, that a "reasonable cause" for the claim existed. The court found the affidavit requirement conflicted with the civil procedure rule mandating that a pleading "need not be verified or accompanied by affidavit" except when "otherwise specifically provided" by a high court rule.⁹⁸

By contrast, a similar Illinois statute was sustained by the Illinois Supreme Court in *DeLuna v. St. Elizabeth's Hospital*.⁹⁹ The Illinois legislation required that a pleading arising out of "medical, hospital, or other healing art malpractice" usually be accompanied by an affidavit of the claimant's attorney indicating that the lawyer had consulted

95. In federal court, challenges to statutes as intrusive upon inherent United States Supreme Court rulemaking authority are very limited and would involve a small "undefined area where the Court's authority over procedure is supreme, such as the core contempt power." Kelleher, *supra* note 13, at 70.

96. 626 N.E.2d 71 (Ohio 1994).

97. See *Hiatt*, 626 N.E.2d at 72.

98. *Id.* at 72-73.

99. 588 N.E.2d 1139 (Ill. 1992).

with a qualified health professional and that both the consultant and the affiant had determined that "there is a reasonable and meritorious cause" for the filing.¹⁰⁰ In Illinois there is no explicit state constitutional provision delegating civil procedure rulemaking to the high court. In fact, the high court has consistently found that the General Assembly may, consistent with the separation of powers principle, impose requirements governing matters of procedure and the presentation of claims.¹⁰¹ In particular, an Illinois Supreme Court rule recognizes statutes may provide that pleadings "be verified or accompanied by an affidavit."¹⁰²

In New Jersey, a statute requires affidavits of merit for professional malpractice claims within sixty days of the filing of responsive pleadings, effectively compelling delayed special pleadings. Recently, the high court in *Alan J. Cornblatt, P.A. v. Barrow*,¹⁰³ with very little analysis, deemed the statute did not raise "significant and imperative issues of public concern" regarding separation of powers as it could be accommodated so as not to interfere with judicial authority.¹⁰⁴ Neither *Hiatt* nor *DeLuna* was mentioned, nor was the New Jersey constitutional provision delegating to the high court the power to make rules governing the practice and procedure in all courts in the state.¹⁰⁵

Separation of powers issues involving encroachment by the judiciary on the special pleading law prerogatives of the legislature may also arise, though to date they have not yet appeared. Here, for example, it seems reasonable to conclude that the Rules Enabling Act, allowing the United States Supreme Court to promulgate only civil procedure rules which do not enlarge, abridge, or modify any substantive right,¹⁰⁶ would preclude judicially promulgated special pleading

100. See *DeLuna*, 588 N.E.2d at 1142.

101. See *id.* at 1144 (stating that these requirements may not unduly encroach upon inherent judicial powers or conflict with any high court rules).

102. ILL. SUP. CT. RULE 137. In *Best v. Taylor Machine Works*, 689 N.E.2d 1057 (Ill. 1997), the high court failed to rule on the constitutionality of a special Illinois pleading statute applicable to product liability claims and containing certificate of merit requirements since the provision was a part of a series of tort reform measures containing other invalid provisions which were not severable. See *id.* at 1104-05.

103. 708 A.2d 401 (N.J. 1998).

104. See *id.* at 416.

105. See N.J. CONST. art. VI, § 2(3); accord *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 510-11 (Mo. 1991) (finding a Missouri statute, comparable to the New Jersey law, valid, where separation of powers issues did not involve who was the proper lawmaker, but rather whether the need to have an opinion from a consulting health care provider in a health care services case encroached upon the inherent function of the judiciary).

106. See 28 U.S.C. § 2072(b) (1994).

norms (via Advisory Committee assisted or common law rulemaking) for federal securities claims.¹⁰⁷

2. Lower Court or High Court?

A second separation of powers issue arising with the promulgation of new special pleading norms involves relationships between high court rules and lower court rules. Such an issue arose in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,¹⁰⁸ decided in 1993 by the United States Supreme Court. In *Leatherman*, the Court had to resolve whether a federal circuit court could establish a "heightened pleading standard," for certain civil rights claims against municipalities, which was more rigorous than general pleading requirements found in the Federal Rules of Civil Procedure.¹⁰⁹ Here, a "heightened pleading standard" had been applied to claims seeking relief under 42 U.S.C. § 1983. The Court found it impossible to reconcile the local "heightened pleading standard" with the more liberal "notice pleading" requirement of Federal Rule of Civil Procedure 8(a)(2).¹¹⁰ It held that while Rule 9(b) did impose a particularity requirement for fraud or mistake, it made no mention of civil rights claims. Thus, the local standard fell.

Yet, the high court in *Leatherman* did not eliminate the possibility of any local pleading norms for § 1983 claims. It expressly said it had "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving government officials."¹¹¹ This left the door open for lower federal courts, primarily through common law procedural rulemaking, to continue to impose heightened pleading norms for claims against municipal officers, at least until a national standard was established. For some lower courts such special norms involving claims against municipal officers do not conflict with the general civil procedure norms, as did the special norms involving claims against municipalities; concerns with "qualified immunity jurisprudence" only arise with claims against officers, where there may be substance based (and not procedure-based) pleading standards.

107. See Kelleher, *supra* note 13, at 71 n.98 ("It is the contention of this Article also that the Rules Enabling Act does not purport to delegate to the Court authority to promulgate rules in areas where Congress has legislated extensively."); see also *id.* at 112-13.

108. 507 U.S. 163 (1993).

109. See *Leatherman*, 507 U.S. at 165.

110. See *id.* at 168.

111. *Id.* at 166-67.

B. Choice of Law: Which Law Applies?

New special pleading norms have recently emerged in both federal and state law settings. At times, a few governments have initiated differing special pleading requirements for similar claims while others apply their general pleading norms to the same claims. Because civil claims arising under the substantive laws of one government are often presented in the trial courts of another government, significant choice of law issues can develop regarding conflicting special pleading norms.

1. *Federal or State Law?*

Sometimes choices must be made between federal and state laws. The *Erie* analysis applies when state law claims are presented in federal district courts, while a reverse-*Erie* analysis applies when federal law claims are presented in state trial courts.

a. *Erie Analysis*

The earlier review of illustrative laws suggests an *Erie* analysis, based on the landmark case *Erie Railroad Co. v. Tompkins*,¹¹² may be required in several settings, including cases or controversies wherein federal district courts are presented with state professional malpractice claims, state medical malpractice claims, and requests for punitive damages related to state law claims.

i. *Professional Malpractice Claims*

On the surface, there appears to be disagreement over the applicability of state heightened pleading requirements governing state professional malpractice claims presented in federal district courts.¹¹³ In Minnesota, one district judge deemed applicable a state statute requiring that attorney affidavits regarding expert reviews be attached to professional malpractice complaints.¹¹⁴ The court in *Oslund v. United States*¹¹⁵ reasoned that the state law requirements were not "purely procedural" as they were intended to eliminate nuisance malpractice suits¹¹⁶ and had a "jurisdictional component" as compliance failures triggered mandatory dismissals.¹¹⁷ The court stated that

112. 304 U.S. 64 (1938) (finding that in diversity cases a federal court must apply state substantive law and federal procedural law).

113. Compare, e.g., *Boone v. Knight*, 131 F.R.D. 609 (S.D. Ga. 1990), with *Oslund v. United States*, 701 F. Supp. 710 (D. Minn. 1988).

114. See *Oslund*, 701 F. Supp. at 714.

115. 701 F. Supp. 710 (D. Minn. 1988).

116. See *id.* at 713-14.

117. See *id.*

similar results should obtain for similar claims involving professional malpractice filed in state and federal courts.¹¹⁸

In Georgia, in *Boone v. Knight*,¹¹⁹ a district judge held that a state special pleading statute requiring affidavits of experts for professional malpractice claims was inapplicable in the federal courts. The court reasoned that the statute was embodied in the civil procedure code and was essentially a pleading requirement.¹²⁰ The court found this pleading norm "runs directly afoul" of Federal Rule of Civil Procedure 8, which requires only "notice pleading."¹²¹ The court relied on cases under *Hanna v. Plummer*¹²² which held that where state and federal pleading norms conflict, federal law controls.¹²³ The court left little, if any, room for application of state special pleading norms in federal district courts, seemingly even where the state pleading law is in some sense "substantive,"¹²⁴ as it quoted a noted commentary observing that the *Erie* doctrine "has very little application to pleading in a federal court."¹²⁵

As in Georgia, a New Jersey statute requires an affidavit of merit by a licensed professional be filed in any civil action involving professional malpractice or negligence, though it need be filed only after the defendant has answered.¹²⁶ On its applicability in a federal civil action, a New Jersey District Court, in *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Co.*,¹²⁷ found that it applied.¹²⁸ That court undertook a lengthy analysis. First, it asked whether there was an applicable federal civil procedure rule.¹²⁹ If not, the court would then ask if the application of state law would likely be outcome determinative.¹³⁰ Even if the application of state law was

118. *See id.* (noting the "anomalous result" if the state statute was not applied; claims against the federal government would survive in federal court though similarly pleaded claims involving similar private conduct by other defendants would not survive in state or federal court).

119. 131 F.R.D. 609 (S.D. Ga. 1990).

120. *See Boone*, 131 F.R.D. at 611.

121. *Id.*

122. 380 U.S. 460 (1964).

123. *See Boone*, 131 F.R.D. at 611.

124. *See id.*

125. *Id.* at 611-12 (quoting CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, 280 (2d ed. 1970)).

126. *See N.J. STAT. ANN. § 2A:53A-27* (West Supp. 1999) (not indicating whether the affidavit should be viewed as an attachment to an earlier pleading or as part of an amended pleading).

127. 981 F. Supp. 334 (D.N.J. 1994).

128. *See RTC Mortgage Trust*, 981 F. Supp. 334.

129. *See id.* at 340.

130. *See id.* at 346. The outcome determinative test promotes the twin aims of *Erie*, the discouragement of forum shopping and the avoidance of the inequitable administration of the laws. *See id.* at 346-47.

outcome determinative, federal law would still apply if "overriding federal interests" were found.¹³¹

Plaintiff argued that the New Jersey statute conflicted with Federal Rule of Civil Procedure 8(a), requiring only a short and plain statement, and with Federal Rule of Civil Procedure 9, requiring particularity in pleadings in settings not involving professional misconduct.¹³² The court compared the New Jersey statute to the Georgia statute, found inapplicable in *Boone* due to its clash with the federal rules. The New Jersey Court concluded the two state laws were quite different. In Georgia, an affidavit must be filed with the complaint, while in New Jersey there was a required filing within sixty days of the answer. Further, the Georgia law said the affidavit should contain an account of facts, while the New Jersey law said the affidavit needed only an opinion as to facts earlier alleged in the complaint.¹³³ The court concluded that the New Jersey statute was not a special pleading norm, as it was "functionally unrelated, physically separated, and temporally disconnected from the pleading stage of a case."¹³⁴ In suggesting that affidavit of merit laws would conflict with federal pleading norms if they affected "the mechanics of pleading,"¹³⁵ the court provided an illustration of such a conflict, the Florida statute on requests for punitive damages,¹³⁶ which "numerous" courts had found to "interfere" with the federal notice pleading scheme.¹³⁷ Unlike the New Jersey law, the Florida statute forbade certain pleading allegations before a reasonable showing of evidence had been made.¹³⁸

The New Jersey court also found the New Jersey statute was outcome determinative.¹³⁹ The law was part of "a broad legislative package to reform New Jersey tort law"¹⁴⁰ and evinced "an intent to determine conclusively the outcome of litigation" in "a limited class of cases."¹⁴¹

In deciding whether "any overriding federal interests require[d] the application of federal law,"¹⁴² the court found the only substantial

131. *See id.* at 347.

132. *See id.* at 342. The plaintiff also unsuccessfully argued that the New Jersey statute conflicted with the certified pleading standards of FED. R. CIV. P. 11. *See id.* at 345 (relying in part on the fact that Rule 11 did not require dismissal when there was a violation).

133. *See RTC Mortgage Trust*, 981 F. Supp. at 343-44.

134. *Id.* at 345.

135. *Id.* at 344.

136. *See id.* at 344. The statute, FLA. STAT. ANN. § 768.72 (West 1997 & Supp. 1999), is reviewed *infra*, § II.D.

137. *See RTC Mortgage Trust*, 981 F. Supp. at 344.

138. *See id.*

139. *See id.* at 346.

140. *Id.*

141. *Id.*

142. *Id.* at 347.

federal interest was the maintenance of "the systematic integrity of the federal pleading scheme,"¹⁴³ an interest deemed not to embody "an essential characteristic" of the federal court system.¹⁴⁴

In Colorado, the federal court in *Trierweiler v. Croxton & Trench Holding Corp.*¹⁴⁵ came to a similar conclusion, though with a different analysis. As in New Jersey, the relevant Colorado law required a plaintiff's attorney in a professional negligence case to certify within sixty days after the filing of a complaint that an expert determined the claim did not lack "substantial justification."¹⁴⁶ Compliance failures could result in dismissal.¹⁴⁷ Under *Erie*, the court determined the Colorado law did not collide with any federal law. Although the state law operated like Federal Rule of Civil Procedure 11, the two could exist "side by side."¹⁴⁸ The court reasoned that while the two had similar goals, the state law protected "a particular class of defendants," thereby vindicating "substantive interests of Colorado not covered by Rule 11."¹⁴⁹ The court further found that the outcome determinative test was met, as the twin aims of *Erie* would be promoted by federal court use of the Colorado law.¹⁵⁰ It said the Colorado law was intended to be a "substantive decision" which was "bound up with the substantive right embodied in the state cause of action."¹⁵¹

ii. Medical Malpractice Claims

Under Florida law the filing of a claim for medical malpractice usually must be preceded by notice to any prospective defendant of "intent to initiate litigation."¹⁵² The notice may only be sent when the claimant has secured "a verified written medical expert opinion" that corroborates the "reasonable grounds to support the claim of medical negligence."¹⁵³ In *Braddock v. Orlando Regional Health Care System, Inc.*,¹⁵⁴ a federal court was urged to apply this law to claims based upon acts of medical malpractice occurring in a Florida hospital. The court said it should apply the Federal Rules of Civil Procedure if they are directly on point, constitutional, and within the scope of the Rules

143. *Id.*

144. *See id.* (employing a term from *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996)).

145. 90 F.3d 1523 (10th Cir. 1996).

146. *Id.* at 1538 n.9 (quoting COLO. REV. STAT. § 13-20-602).

147. *See id.*

148. *See id.* at 1540 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)).

149. *Id.*

150. *See id.* at 1540-41.

151. *Id.* at 1541.

152. FLA. STAT. ANN. § 766.106(2) (West 1997 & Supp. 1999).

153. *Id.* § 766.203(2) (West 1997).

154. 881 F. Supp. 580 (M.D. Fla. 1995).

Enabling Act.¹⁵⁵ If a federal rule is not on point, the court should consider the twin aims of *Erie*.¹⁵⁶ The defendants who urged the statute's applicability primarily relied on rulings by Florida state courts finding the notice requirements were substantive;¹⁵⁷ the state courts had found a legislative intent "to promote the settlement of meritorious claims at an early stage without the necessity of a full adversarial proceeding," a goal deemed "primarily substantive in nature."¹⁵⁸ The *Braddock* court stated that these state court decisions were not binding and that the federal court must make its own determination under *Erie*.¹⁵⁹ The court found controlling a federal appeals court decision¹⁶⁰ determining that a Florida statute requiring a plaintiff to wait six months to file a civil action after notifying a defendant of a claim was procedural.¹⁶¹ The appeals court held the Florida statute was procedural under *Erie* as it directly conflicted with Federal Rules of Civil Procedure 3 and 4.¹⁶² Rule 3 states a civil action is commenced with a complaint¹⁶³ while service of process under Rule 4 was said to provide adequate notice about the filing of a complaint.¹⁶⁴ As a result, the *Braddock* court held the Florida statute on prefiling notice of medical malpractice claims should not be applied in federal court.¹⁶⁵ The *Braddock* court did not follow another federal appeals court decision deeming applicable in federal court a state statute establishing compulsory prelawsuit mediation for medical malpractice claims.¹⁶⁶ Without explanation, the *Braddock* court suggested statutes requiring prelawsuit "specialized panel" proceedings were not "specialized hurdles for filing particular causes of action," as were the medical malpractice notices of intent to initiate litigation.¹⁶⁷

The *Braddock* court next turned to the special pleading requirement in the Florida statute that demanded an affidavit from a medical

155. See *Braddock*, 881 F. Supp. at 583.

156. See *id.*

157. See *id.* at 582.

158. *Id.* (quoting *Williams v. Campagnulo*, 588 So.2d 982, 983 (Fla. 1991)).

159. See *id.* at 583 (stating federal courts are "final arbiters," though state court decisions might be "persuasive").

160. See *Lundgren v. McDaniel*, 814 F.2d 600 (11th. Cir. 1987).

161. See *Braddock*, 881 F. Supp. at 584.

162. See *id.*

163. See *id.*

164. See *id.*

165. See *id.*

166. See *id.* at 583 (reviewing *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979)).

167. *Id.* Compare *id.*, with *McKenzie v. Hawaii Permanente Med. Group, Inc.*, 29 F. Supp. 2d 1174, 1177 (D. Haw. 1998) (holding state law requirement that claims against health care providers proceed through medical claim conciliation panels before lawsuits may be filed are procedural under *Erie*).

expert be attached to any complaint.¹⁶⁸ The court compared this affidavit to a Florida law which required that the publication of a defamation be pled with particularity.¹⁶⁹ That defamation law had been deemed inapplicable in federal court because it conflicted with Federal Rule of Civil Procedure 8(a), which requires only notice pleading.¹⁷⁰ The *Braddock* court said that the "heightened pleading requirement for medical malpractice cases should be treated in the same fashion."¹⁷¹

Special pleading norms for medical malpractice claims are not always deemed procedural under *Erie* as was done in *Braddock*. Thus, in *Finnegan v. University of Rochester Medical Center*,¹⁷² a federal court found the New York statute¹⁷³ requiring a certificate of merit by a plaintiff's attorney in a medical, dental, or podiatric malpractice action to be "substantive law that applies in a federal diversity action."¹⁷⁴ However, there the court simply agreed with earlier precedents involving Connecticut, Maryland and Illinois laws, failing to compare the statutory requisites or to examine contrary authority such as *Braddock*.

iii. Punitive Damages Requests

In Florida, punitive damages requests in pleadings must be accompanied by an evidentiary demonstration of a "reasonable basis for recovery."¹⁷⁵ Several federal district courts have addressed the applicability of this norm in a federal court.¹⁷⁶ Among the precedents finding that the law is procedural, and thus inapplicable in federal court, is *Citron v. Armstrong World Industries, Inc.*¹⁷⁷ In *Citron*, a judge in the Southern District of Florida said the law "is clearly a pleading statute and, indeed, is labeled as such."¹⁷⁸ There, the court

168. See *Braddock v. Orlando Reg'l Health Care Sys., Inc.*, 881 F. Supp. 580, 584 (M.D. Fla. 1995).

169. See *id.*

170. See *id.*

171. *Id.*

172. 180 F.R.D. 247 (W.D.N.Y. 1998).

173. See N.Y. C.P.L.R. § 3012-a (McKinney 1991).

174. *Finnegan*, 180 F.R.D. at 249.

175. FLA. STAT. ANN. § 768.72 (West 1997 & Supp. 1999) (stating evidence may originate in the record or be proffered by a claimant with the pleading). The law was added in 1986. See *Citron v. Armstrong World Indus., Inc.*, 721 F. Supp. 1259, 1260 (S.D. Fla. 1989).

176. For a review of Florida case law, see Rhett Traband, *An Erie Decision: Should State Statutes Prohibiting the Pleading of Punitive Damages Claims Be Applied in Federal Diversity Actions?*, 26 STETSON L. REV. 225 (1996). Recently, a federal appeals court found the norm inapplicable in federal diversity actions. See *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1299 (11th Cir. 1999).

177. 721 F. Supp. 1259 (S.D. Fla. 1989).

178. *Citron*, 721 F. Supp. at 1262.

also found the statute was "in direct conflict with Federal Rule of Civil Procedure 9(g)" which requires a plaintiff to state specifically punitive damages items in the complaint.¹⁷⁹ The court opined that even if the state and federal pleading laws were not in direct conflict, "no inequitable administration of law" would result from a failure to use the state law in federal court because "the only practical difference . . . relates to the posture in the lawsuit in which a court decides whether a claim for punitive damages is appropriate."¹⁸⁰

Within a few years of *Citron* there were several other decisions on the same issue by different judges in the same federal district, with differing analyses and outcomes. In *Tutor Line Child Care Systems, Inc. v. Franks Investment Group, Inc.*,¹⁸¹ a second judge found the Florida statute conflicted with Federal Rule of Civil Procedure 8(a) (on notice pleading) as well as with Rule 9(g),¹⁸² though it said that other judges had found one, but not the other,¹⁸³ federal rule in conflict, and that two judges found no conflict at all.¹⁸⁴

While federal district judges in one district in Florida disagreed on the applicability of the Florida law on pleading punitive damages in federal court, Florida federal judges all agree that a related Florida law found within the same statute and involving limits on discovery of financial worth was applicable in federal court.¹⁸⁵ The related law says "no discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted."¹⁸⁶ The placement of the pleading and discovery laws within a single enactment was important to at least one federal court undertaking an *Erie* analysis regarding the special pleading law. In *Teel v. United Technologies Pratte Whitney*,¹⁸⁷ the court found the pleading and discovery provisions were inextricably intertwined in that there was no ready distinc-

179. *Id.* at 1261.

180. *Id.* at 1262.

181. 966 F. Supp. 1188 (S.D. Fla. 1997).

182. *See id.*

183. *See id.* at 1190 (citing *Wisconsin Inv. Bd. v. Plantation Square Assocs.*, 761 F. Supp. 1569, 1573 (S.D. Fla. 1991) (finding a conflict with Rule 8(a) but not 9(g)) and *Citron v. Armstrong World Indus.*, 721 F. Supp. 1259, 1262 (S.D. Fla. 1989) (finding a conflict with Rule 9(g) but not 8(a)).

184. *See id.* (citing *Teel v. United Techs. Pratt & Whitney*, 953 F. Supp. 1534, 1539 (S.D. Fla. 1997) and *Al-Site Corp. v. VSI Int'l, Inc.*, 842 F. Supp. 507, 512-13 (S.D. Fla. 1993)).

185. *See Teel*, 953 F. Supp. at 1536 ("[T]here is universal agreement that the discovery component applies as substantive law for claims in federal court which arise under Florida law."). *But see Oakes v. Halverson Marine Ltd.*, 179 F.R.D. 281, 286 (C.D. Cal. 1998) (holding that comparable California law limiting discovery of defendant's financial worth is procedural and inapplicable in federal court).

186. FLA. STAT. ANN. § 768.72 (West 1997 & Supp. 1999).

187. 953 F. Supp. 1534 (S.D. Fla. 1997).

tion "in practice" for the two components.¹⁸⁸ That court also found important, though not conclusive, the placement of two laws in statutes rather than in court rules, as it was "typical" for Florida Statutes to be "the source of substantive rights" and for "procedural law" to be "reserved to the Supreme Court of Florida."¹⁸⁹ Thus, the *Teel* Court found both the pleading and discovery laws applied in federal court.

Similarly, in *Neill v. Gulf Stream Coach, Inc.*,¹⁹⁰ a federal judge found the pleading law to be substantive and applicable in federal court under *Erie*, in part because it found the law was "not simply an isolated provision related to judicial procedure, but is instead a part of a cohesive and comprehensive statutory scheme establishing the substantive law of the state."¹⁹¹ The law was "a part of the Florida Tort Reform and Insurance Act of 1986," and the pleading law was "only one feature of an even broader statutory scheme addressing damages in general."¹⁹²

b. Reverse-Erie Analysis

Where Congress or some federal court adopts special substance based pleading requirements for federal claims which can be presented in state courts, the potential for a reverse-*Erie* analysis arises. Recently, Congress recognized the difficult reverse-*Erie* problems arising from the Private Securities Litigation Reform Act of 1995 by passing the Securities Litigation Uniform Standards Act of 1998.¹⁹³ The Act restricts state court lawsuits involving private fed-

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188. *See id.* at 1541. The court also referred to the close, and perhaps even indivisible, link between federal pleading and federal discovery. *See id.* at 1540.
189. *Id.* at 1540; *see also* *Marcus v. Carrasquillo*, 782 F. Supp. 593, 600 (M.D. Fla. 1992) (citing a Florida constitutional provision allowing high court practice and procedure rules, though failing to note that such rules may be repealed by a supermajority in the General Assembly, FLA. CONST. art. V, § 2(a)). *See generally* Jeffrey A. Parness, *The Legislative Roles in Florida's Judicial Rulemaking*, 33 FLA. L. REV. 359, 360 (1981) (stating that the Florida legislature has played "an active, even primary role in the promulgation of controversial, issue-laden procedural rules").
190. 966 F. Supp. 1149 (M.D. Fla. 1997).
191. *Neill*, 966 F. Supp. at 1152.
192. *Id.*; *see also* *Pruett v. Erickson Air-Crane Co.*, 183 F.R.D. 248, 250-51 (D. Or. 1998) (finding Oregon punitive damage pleading statute inapplicable in federal diversity case).
193. Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified in scattered portions of 15 U.S.C.). For a brief review of the Act, *see* Gregory P. Joseph, *Federal Practice: Securities Pleadings*, NAT'L L.J., Nov. 9, 1998, at B15. A more comprehensive review appears in David M. Levine & Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 BUS. LAW. 1 (Nov. 1998), while a critique of the Act appears in Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL LAW REV. 1 (1998).

eral securities fraud claims and was motivated, in part, by the perception that such federal claims were being commenced in state courts in order to avoid the strict pleading requirements mandated by the 1995 Reform Act.¹⁹⁴ For example, under the 1995 Act a plaintiff alleging that a defendant made an untrue statement must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, . . . all facts on which that belief is informed."¹⁹⁵ The negative effects of state court lawsuits involving private federal securities fraud claims under the 1995 Act were said to include: 1) a lack of uniformity in federal securities litigation; 2) an abridgement of the safeguards provided defendants under the 1995 Act; and 3) the frustration of the intent of the 1995 Act to curb abuses in securities fraud lawsuits.

State trial court failures to utilize the special pleading standards of the PSLR seem wrong. In *Brown v. Western Railway of Alabama*,¹⁹⁶ a plaintiff commenced an action in negligence in a Georgia state court to recover damages for personal injuries under the Federal Employers' Liability Act (FELA). Plaintiff failed to survive a challenge to the complaint under a Georgia rule that required that pleading allegations be construed most strongly against the pleader, which was interpreted to require here that plaintiff allege the relevant accident was unavoidable and the defendant was negligent.¹⁹⁷ Yet, plaintiff did meet the standard under federal court precedents requiring that presentations of federal statutory claims be made "plainly and reasonably."¹⁹⁸ The United States Supreme Court concluded that the FELA claim could not be defeated by the local Georgia procedures because otherwise "desirable uniformity in adjudication of federally created rights could not be achieved."¹⁹⁹ While the dissent found the Georgia

194. See Levine & Pritchard, *supra* note 193, at 7. Also of concern was the perceived avoidance of the safe harbor and discovery stay provisions of the 1995 Act.

195. 15 U.S.C.S. § 78u-4(b)(1) (Law. Co-op. 1998).

196. 338 U.S. 294 (1949).

197. See *Brown*, 338 U.S. at 295.

198. *Id.* at 299.

199. *Id.*; see also *Felder v. Casey*, 487 U.S. 131, 141 (1988) (requiring, under state law, in all civil actions against local governmental entities, a notice of claim and 120 day wait; this state law was inapplicable in § 1983 cases in state courts as "enforcement . . . will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court"); Kelleher, *supra* note 13, at 64, n.73. Kelleher, citing *Felder* and *Brown* as authority, notes:

Substantive federal common law is binding on state courts under the Supremacy Clause A federal procedural rule, by contrast, normally will not be applied by a state court, even in a matter as to which federal law controls the substantive outcome. In some such matters, however, the federal procedural rule will be considered part of the substantive federal law, and thus binding on state courts.

procedures to be “finicky” and “to reflect something of the pignicketness with which seventeenth-century common law read a pleading,”²⁰⁰ it also found them applicable to “all” civil litigation in the Georgia courts (i.e., state and federal claims)²⁰¹ and to constitute procedural law under the “controlling considerations” applicable in an *Erie* setting which presents “essentially the same kind of problem”²⁰² as is presented in a reverse-*Erie* setting.

2. Whose State Law?

At times choices must be made between the conflicting special pleading standards of two different states. A claim under one state’s law may be presented in another state’s court, or a claim chiefly under one’s state law may nevertheless implicate particular substantive law policies of another state, as when a party is a citizen of the other state and has acted in that state. Often, though not always, the choice between competing state laws is made upon a Full Faith and Credit Clause analysis.²⁰³

Of course no such analysis is required when false conflicts are found. Thus, in *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Co.*,²⁰⁴ a federal court in New Jersey was asked to apply a special New Jersey pleading requirement in a professional malpractice case against an out-of-state law firm that acted in New Jersey. The federal court predicted that the New Jersey Supreme Court would determine that the New Jersey statute would not apply in such a case.²⁰⁵ The court reasoned that the New Jersey statute expressly applied to “a licensed person admitted to practice law in New Jersey.”²⁰⁶ As the defendant law firm did not maintain a “bona fide office for the practice of law” in New Jersey, as was required by the State of New Jersey for those qualified to practice law there,²⁰⁷ the defendant was not licensed in New Jersey and so was not covered by the New Jersey statute.²⁰⁸

Similarly, in *Braddock v. Orlando Regional Health Care System, Inc.*,²⁰⁹ a Florida federal court heard a medical malpractice claim by a Michigan plaintiff against a Florida hospital and two Florida doctors

Id.

200. *Brown*, 338 U.S. at 301, 303 (Frankfurter, J., dissenting).

201. *See id.* at 301 (Frankfurter, J., dissenting).

202. *Id.* at 302 (Frankfurter, J., dissenting).

203. *See* U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts . . . of every other State.”).

204. 981 F. Supp. 334 (D.N.J. 1997).

205. *See RTC Mortgage Trust*, 981 F. Supp. at 348.

206. *Id.* at 339 (quoting N.J. STAT. ANN. § 2A:53A-27 (West Supp. 1999)).

207. *Id.* at 348.

208. *See id.* at 349.

209. 881 F. Supp. 580 (M.D. Fla. 1995).

which arose out of medical treatment provided in Florida. Here, no one even questioned the possible use of Michigan law, as the only issues were the applicability in a federal court of a Florida statute requiring prelawsuit notices to the defendants (effectively mandating a time for settlement talks without any litigation)²¹⁰ and a Florida statute requiring that an affidavit from a medical expert be attached to any complaint.²¹¹

In *Braddock*, had the Florida federal court determined state law on pleading applied and, under *Erie*, looked to both Florida and Michigan pleading requirements as the Florida state courts would have done,²¹² arguably significant differences in the two state laws would have appeared. While each state generally requires both prelawsuit notices to potential defendants and affidavits of consulting health professionals accompanying complaints, the affidavits demanded in Michigan must be much more detailed than those required in Florida.²¹³

IV. GUIDELINES FOR ASSESSING THE SUBSTANCE BASED NEW SPECIAL PLEADING LAWS

Special pleading standards applicable to discrete substantive law claims or to certain remedial requests often raise difficult questions involving procedure/substance dichotomies. Such questions involving substance based pleading laws must be determined in at least two contexts—separation of powers and choice of law. The following guidelines for those creating or applying substance based pleading laws emerge from a review of some of the new special pleading norms and their judicial precedents.

Initially, it should be noted that many special pleading norms are difficult to locate, as they frequently do not appear alongside other special pleading standards and there are few cross-references. Thus, civil procedure rules and codes typically contain within a single sec-

210. See *Braddock*, 881 F. Supp. at 582-84.

211. See *id.* at 584. Comparably, in *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996), seemingly no one questioned the possible use of Michigan, Florida or Nevada laws, but assumed Colorado law on attorney certificates regarding favorable expert reviews of attorney professional negligence claims would be chosen by a Michigan state court for a claim assumed to be heard in a Colorado court, brought by a Florida citizen, and involving business done in Michigan based upon an opinion letter given by a lawyer who was not a Michigan citizen but who was general counsel for a Nevada corporation.

212. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (holding when *Erie* compels use of state law, applicable state law is chosen under forum state's conflict of law rules).

213. Compare FLA. STAT. ANN. § 766.104(1) (West 1997 & Supp. 1999) (expert opinion need only state "there appears to be evidence" of negligence), with MICH. COMP. LAWS ANN. § 600.2912d(1) (West 1986 & Supp. 1999) (expert affidavit must address review of medical records; applicable standard of care; and proximate cause).

tion both general and special pleading norms; yet often, additional special norms for discrete substantive law claims and for certain remedial requests appear elsewhere because there is a different lawmaker or a different lawmaking process. Thus, the special pleading standards for Illinois healing art malpractice claims, including requirements involving an affidavit from a plaintiff's attorney and a written report by a health professional, appear in the Civil Procedure Code, in the Part on Pleading.²¹⁴ Comparable standards in Florida appear in a statutory chapter on medical malpractice under the title "Torts."²¹⁵ The special pleading standards for punitive damages in Florida appear in a statutory chapter on negligence, under the title "Torts,"²¹⁶ while in North Carolina they are found in the Civil Procedure Rules.²¹⁷

Further, special pleading norms not only are difficult to locate, but also to differentiate from each other and from other special norms having little to do with the contents of pleadings. Thus, in *RTC Mortgage Trust*, the federal court found that a certificate of merit which was related to, but filed after, a pleading was not itself a part of an initial pleading.²¹⁸ Seemingly, there was no such recognition by the federal court in *Trierweiler v. Croxton & Trench Holding Corp.*²¹⁹ The need for a later filed certificate may be reasonably viewed as a delayed, special pleading requirement; as a form of a required amended pleading (or part thereof); or as a necessary filing which constitutes no part of any pleading (and perhaps is related to a court-initiated summary judgment proceeding or to a compulsory discovery disclosure norm which operates without a discovery request by a party).

Finally, special pleading norms may themselves need to be differentiated as they may dictate that there be particular contents for certain pleadings for a variety of reasons. Some norms seek only to provide more detailed information to adverse parties and to the trial court than would otherwise be presented, thus addressing a function typically promoted by procedure based pleading laws.²²⁰ Others may

214. See 735 ILL. COMP. STAT. ANN. 5/2-622 (West 1992 & Supp. 1999).

215. See FLA. STAT. ANN. § 766.104 (West 1997 & Supp. 1999).

216. See *id.* § 768.72 (West 1997 & Supp. 1999).

217. See N.C. R. Civ. P. 9(k).

218. See *supra* notes 126-44 and accompanying text ("[The affidavit was] functionally unrelated, physically separated, and temporally disconnected from the pleading stage.").

219. 90 F.3d 1523 (10th Cir. 1996); see *supra* notes 145-51 and accompanying text (noting Federal Rule of Civil Procedure 11, on certifying pleadings, could exist "side by side" with the state affidavit requirement). The certification in *RTC Mortgage Trust* was to be filed by "an appropriate licensed person," 981 F. Supp. at 339, while the certification in *Trierweiler* was to be usually filed by the plaintiff's attorney, 90 F.3d at 1538, n.9.

220. The purpose may not be to inform better adversaries and judges, but to "enable courts to decide cases on their merits" more expeditiously by creating special

seek to mandate special attorney conduct, including evidence assembly, prior to pleading presentations,²²¹ thus modifying the procedure-based general "reasonable inquiry" standard applicable to civil litigation papers.²²² Yet others may be primarily directed to reducing the presentation of certain civil claims disfavored under prevailing substantive law. Any recorded legislative history should not solely control the search for rationale(s), as lawmakers may at times seek to skirt separation of powers restrictions; rather, history must be assessed with a keen analysis of how and on whom the special pleading norm will operate. As well, differing locations of the same pleading requirement should not always control the search for rationale(s). Placement of pleading norms within a series of tort law standards does not always indicate the pleading norms are substantive, since legislatures often have the power to make both civil procedure and substantive laws and are not required to locate all civil procedure laws within the code of civil procedure or to locate all substantive laws outside the civil procedure code.²²³

Wherever located and whatever their rationale, separation of powers questions regarding these special pleading norms can arise as civil procedure or attorney conduct lawmaking may be constitutionally vested in the judiciary while lawmaking involving recovery on tort, contract, sexual abuse and other civil claims lies primarily in the legislature. Procedure/substance dichotomies are required, and especially problematic, where, for example, civil procedure or attorney conduct lawmaking is within the exclusive province of the high court, but where statutory pleading norms are tied to particular civil claims. They are also difficult, yet needed, where attorney conduct lawmaking is within exclusive high court authority, but where the civil procedure

pleading norms for claims where the requirement of more detail will often reveal fatal defects in claimants' presentations or the absence of any substantive law violation. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 436 (1986).

221. Compare, e.g., FLA. STAT. ANN. § 768.72 (West 1997 & Supp. 1999) (requiring punitive damages pleadings to be accompanied by an evidentiary demonstration of "a reasonable basis for recovery"), with N.C. R. Civ. P. 9(k) (requiring that punitive damages "shall be specifically stated, except for amount," with particular averments as to any "aggravating factor" necessary).
222. See *McAlister v. Schick*, 588 N.E.2d 1151, 1157-58 (Ill. 1992) (noting that if a healing art malpractice lawyer cannot satisfy the special attorney certification and expert opinion standards, "it is unlikely" that the lawyer will be able to fulfill the requirements of Supreme Court Rule 137, which usually requires the plaintiff's attorney to certify that, to the best of the attorney's knowledge, information, and belief formed after reasonable inquiry, the pleading is well-grounded in fact).
223. While location of special pleading norms is important it should not always control the search for applicable policy, placement of special pleading norms within a statutory section of civil procedure or torts is also important, but not dispositive, elsewhere, as where judicial rules may supercede statutes on procedure but not substantive law statutes. See Kelleher, *supra* note 13, at 87.

lawmaking powers are shared by the legislature and the judiciary. Here, a detailed analysis of a single government's allocation of law-making duties, both through the relevant constitution and via delegations of authority, is needed without much reference to the separation of powers doctrines employed elsewhere in America, since American governments usually differ significantly in their assignments of law-making authority.²²⁴

Separation of powers analyses are required not only when judicial rules on pleading applicable throughout the trial courts of a single government seemingly clash with statutory directives both within and outside any civil procedure code, but also when such judicial rules apparently conflict with the local court rules or with the common law precedents of a lower court. The *Leatherman* decision and its progeny,²²⁵ for now anyway, illustrate how local laws may not be generated when there will be conflict with the general and special civil procedure pleading norms applicable everywhere, but how some local substance based precedents involving pleading duties may arise notwithstanding civil procedure pleading norms of widespread application.

Choice of law questions involving substance based special pleading norms can arise in *Erie*, reverse-*Erie*, and choice of state law settings. While each setting is comparable in that a trial court of one government must initially decide whether to apply its own pleading law or a special pleading law of another government to a claim arising under that other government's substantive law, usually entailing a procedure/substance dichotomy, these procedure/substance inquiries need not yield the same results. Thus, a law which is procedural in one setting may nevertheless be substantive in another setting.²²⁶

Though the three settings may produce differing characterizations, all choice of law inquiries should be guided by at least some common principles. First, even though deemed by lawmakers as "pleading" norms, federal and state laws dictating what must be alleged in, or attached to, pleadings can be so grounded in the substantive law policies underlying certain civil claims or defenses, or classes of civil claims or defenses, that they should be viewed as substantive for choice of law purposes. Labels employed by lawmakers are not dispo-

224. Such an analysis appeared in both *Hiatt* and *DeLuna*, but not in *Cornblatt*, when special medical malpractice pleading norms were challenged on separation of powers grounds. See *supra* notes 95-107 and accompanying text; see also *Finnegan v. University of Rochester Med. Ctr.*, 180 F.R.D., 247, 249 (W.D.N.Y. 1998) (failing to recognize different rationales and lawmakers may be involved in similar certificate of merit laws).

225. See *supra* notes 108-11 and accompanying text.

226. See, e.g., *Sampson v. Channell*, 110 F.2d 754, 756-58 (1st Cir. 1940) (stating under *Erie*, burden of proof is substantive, while under Massachusetts choice of law rules same burden of proof is procedural).

itive. Thus, a designated "pleading" law found within a statutory section on torts, which was enacted as a part of a tort reform package and which has withstood a separation of powers challenge, should normally be viewed as substantive for choice of law purposes, especially when the law is viewed by its makers as "jurisdictional"²²⁷ and "bound up"²²⁸ with the relevant substantive law. Functions rather than labels are often key.

Second, false conflicts must be recognized. At times, upon first glance the pleading laws of two relevant governments may appear to clash as their requirements differ, even significantly. However, upon close examination, the direct collision can evaporate. For example, one of the two laws can be inapplicable. A civil procedure rule in one state is usually deemed to apply only in the courts of that state, and thus (comity aside) need not usually even be considered for use by the courts of another state.²²⁹

Third, in assessing whether there are any conflicts, forum courts should not assume that potentially competing laws from elsewhere are located or designated comparably to their own laws. It is not enough, if the special medical malpractice "pleading" norms within the forum are located in the civil procedure rules in the section on pleadings and motions, for the court to examine whatever special "pleading" standards are found in the comparable provisions of the civil procedure rules or code of any other interested government. American governments differ in their constitutional delegations and nonconstitutional assignments of procedural and substantive lawmaking powers on matters related to civil litigation papers as well as in their placements of relevant laws. Consider, for example, that via statutes the Federal Rules of Civil Procedure usually are to be initially prescribed by the United States Supreme Court,²³⁰ may be altered by Congress,²³¹ but may not "abridge, enlarge or modify any substantive right";²³² that via the state constitution the North Carolina Rules of Civil Procedure are within the province of the General Assembly,²³³ but that much rulemaking authority may be (and has been) delegated to the Supreme Court²³⁴ and that civil procedure rules can impact upon sub-

227. *Oslund v. United States*, 701 F. Supp. 710, 714 (D. Minn. 1988).

228. *Trierweiler v. Croxton & Trench Holding Corp.*, 90 F.3d 1523, 1541 (10th Cir. 1996).

229. *See, e.g.*, N.C. R. Civ. P. 9(j) (special pleading norms for medical malpractice complaints); N.C. R. Civ. P. 1 (rules govern procedure in North Carolina superior and district courts).

230. *See* 28 U.S.C. § 2072(a) (1994).

231. *See id.* § 2074(a).

232. *Id.* § 2072(b).

233. *See* N.C. CONST. art. IV, § 13(2).

234. *See id.*; N.C. GEN. STAT. § 7A-34 (1995) (stating Supreme Court rules for superior and district courts may be "supplementary to, and not inconsistent with, acts of the General Assembly").

stantive rights, at least where the rules originate in the General Assembly;²³⁵ and that via the state constitution the Florida Rules of Civil Procedure are adopted by the Supreme Court, though they "may be repealed by general law enacted by two thirds vote of the membership of each house of the legislature" and may only address matters of "practice and procedure."²³⁶

V. CONCLUSION

Recently there have emerged new special pleading standards applicable to discrete substantive law claims or to certain remedial requests. These norms often raise troubling procedure/substance questions in separation of powers and choice of law settings. The questions are especially difficult where the standards are hard to locate; to distinguish from nonpleading laws; and to differentiate by rationale(s).

In the separation of powers setting, these questions must be approached only after undertaking a distinct and detailed analysis of each relevant government's allocation of lawmaking duties. American governments differ significantly in these allocations.

In the choice of law setting, these questions can arise in circumstances involving *Erie*, reverse-*Erie* and choice of state law. The procedure/substance issues here must be approached only after undertaking a close look at functions, not labels; at the possibility of false conflicts; and without a parochial view as to the possible location or designation of the special pleading norms of other interested governments.

235. See, e.g., N.C. R. Civ. P. 9(j) (medical malpractice complaints); see also N.C. CONST. art. IV, § 13(2) (practice and procedure rules cannot "abridge substantive rights" or limit the jury trial right).

236. FLA. CONST. art. V, § 2(a). For a review of the interplay between the legislature and high court under this provision, see Jeffrey A. Parness, *The Legislative Roles in Florida's Judicial Rulemaking*, 33 U. FLA. L. REV. 359 (1981).