

# Expert Opinion Pleading: Any Merit to Special Certificates of Merit?

*Jefferey A. Parness & Amy Leonetti\**

## Table of Contents

I. INTRODUCTION .....	538
II. WHY REQUIRE EXPERT OPINION PLEADING? .....	541
A. <i>Reducing Frivolous Claims</i> .....	542
1. <i>The Illinois Civil Justice Reform            Amendments of 1995</i> .....	542
2. <i>The proposed Federal Common Sense Product            Liability and Legal Reform Act of 1996</i> .....	545
B. <i>Protection from Reputational Harm</i> .....	549
III. EXAMPLES OF EXPERT OPINION PLEADING .....	552
A. <i>General Pleading Certification Standards</i> .....	552
B. <i>Illinois Product Liability</i> .....	554
C. <i>Illinois Healing Art Malpractice</i> .....	556
D. <i>Florida Medical Negligence</i> .....	559
E. <i>Virgin Islands Medical Malpractice</i> .....	560
F. <i>Georgia Professional Malpractice</i> .....	562
G. <i>California Childhood Sexual Abuse</i> .....	563
IV. ATTRIBUTES OF EXPERT OPINION PLEADING .....	564
A. <i>Coverage</i> .....	565
B. <i>The Expert Opinion</i> .....	567
C. <i>Prefiling Information Gathering</i> .....	573
D. <i>Sanctions</i> .....	575
V. CONCERNS ABOUT EXPERT OPINION PLEADING .....	576
A. <i>Rationales Disfavoring Expert Opinion         Pleading Standards</i> .....	576

---

\* Jefferey A. Parness is a Professor of Law, Northern Illinois University College of Law; B.A., Colby College, 1970; J.D., University of Chicago, 1974. Amy Leonetti is a J.D. Candidate, Northern Illinois University College of Law; B.A., National Louis University, 1992.

1. <i>No empirical basis?</i> .....	576
2. <i>Proper exercise of legislative authority?</i> .....	578
3. <i>Infringement on constitutional rights?</i> .....	581
B. <i>Problems with Certain Expert Opinion</i>	
<i>Pleading Standards</i> .....	582
1. <i>Coverage</i> .....	583
2. <i>The expert opinion</i> .....	584
3. <i>Relationship to other pleading laws</i> .....	586
4. <i>Prefiling information gathering</i> .....	588
VI. CONCLUSION .....	589

## I. INTRODUCTION

In the two presidential debates of October 1996, the need for civil litigation reform was mentioned four times,<sup>1</sup> and the problems caused by frivolous civil claims were noted three times.<sup>2</sup> This attention to reform reflects the widespread debate in America over meritless civil lawsuits.

State lawmakers have recently sought to deter certain types of frivolous civil claims by requiring special "certificates of merit" involving the use of an expert opinion. These special certificates of merit extend beyond general pleading certificates, as in Federal Civil Procedure Rule 11, and usually require that a claimant or a claimant's lawyer obtain an expert opinion on the merits of

---

1. See *Presidential Debate*, FED. NEWS SERVICE, Oct. 6, 1996, available in LEXIS, News Library, Fednew File [hereinafter *First Debate*]; *The Second Presidential Debate*, CNN TRANSCRIPT #96101601v97, Oct. 16, 1996, available in LEXIS, News Library, CNN File [hereinafter *Second Debate*]. Republican candidate Bob Dole pressed incumbent President Clinton for litigation reform.

2. See *First Debate*, *supra* note 1. In response to Bob Dole's call for putting an end to frivolous lawsuits, President Clinton stated:

In the case of the product liability bill which they passed and I vetoed—I think that's what he's talking about—I actually wanted to sign that bill, and I told the people exactly what—the Congress exactly what kind of bill I would sign. Now a lot of the trial lawyers didn't want me to sign any bill at all, but I thought we ought to do what we could to cut frivolous lawsuits, but they wouldn't make some changes that I thought should be made. Now let me just give you an example. I had a person in the Oval Office who lost a child in a school bus accident where a drunk driver caused the accident directly, but there were problems with the school bus. The drunk driver had no money. Under the new bill, if I had signed it, a person like that could never have had any recovery. I thought that was wrong.

*Id.* See also *Second Debate*, *supra* note 1. The product liability reform bill vetoed by President Clinton is discussed later in this Article.

certain aspects of a particular claim. Standards differ as to who undertakes certification; the form and content of the expert opinion; when the expert opinion must be submitted, if at all; whether formal discovery or other information gathering techniques may be compelled prior to any certification; and what sanctions may or must follow noncompliance. Additionally, these special certificates of merit occasionally require that a claimant or a claimant's lawyer certify certain factual allegations underlying particular claims; that is, the who, what, where, why and how.

Most special certificates of merit involving an expert opinion concern medical malpractice claims,<sup>3</sup> although some certificates apply to other professional malpractice claims,<sup>4</sup> to product liability claims,<sup>5</sup> and to certain sexual abuse claims.<sup>6</sup> These certificate of merit standards are distinct from other new forms of special pleading requirements, such as for punitive damage requests<sup>7</sup>

---

3. See FLA. STAT. ANN. § 766.104 (West Supp. 1997) (requiring, in most cases, expert opinion to be obtained by all claimants prior to filing medical negligence claims); 735 ILL. COMP. STAT. ANN. 5/2-622 (West 1997) (requiring affidavit and written report by a health professional in healing art malpractice action); MICH. COMP. LAWS ANN. § 600.2912d (West Supp. 1997) (requiring health professional's affidavit of merit in actions alleging medical malpractice); MINN. STAT. ANN. § 145.682 (West 1989 & Supp. 1997) (requiring affidavit regarding expert review in malpractice actions against health care providers); MO. ANN. STAT. § 538.225 (West 1988) (requiring affidavits that written opinions of qualified health care providers have been obtained in actions against health care providers); N.Y. C.P.L.R. 3012-a (McKinney 1991) (requiring certificate of merit by claimant's attorney in medical, dental, and pediatric malpractice actions); TEX. REV. CIV. STAT. ANN. art. 4590i (West Supp. 1997) (requiring expert report in actions alleging health care liability); see also OHIO REV. CODE ANN. § 2307.42 (Anderson Supp. 1996) (requiring affidavits regarding consultation and review with experts in actions involving medical, dental, optometric or chiropractic claim). The Ohio Supreme Court held this statute unconstitutional because it usurped the rulemaking powers of the high court. See *Hiatt v. Southern Health Facilities, Inc.*, 626 N.E.2d 71 (Ohio 1994).

4. See CAL. CIV. PROC. CODE § 411.35 (West Supp. I 1997) (requiring certificate of merit in actions alleging professional negligence involving a certified architect, engineer, or land surveyor); GA. CODE ANN. § 9-11-9.1 (1987) (amended 1996) (requiring affidavit of a competent expert in professional malpractice cases); N.J. STAT. ANN. § 2A:53A-27 (West Supp. 1997) (requiring certificate of merit in malpractice or negligence action against a person licensed in a profession or occupation).

5. See 735 ILL. COMP. STAT. ANN. 5/2-623 (West 1997) (requiring certificate of merit in all product liability actions).

6. See CAL. CIV. PROC. CODE § 340.1(d) (West 1986) (amended 1994) (requiring a certificate of merit for plaintiffs 26 years or older making claims of childhood sexual abuse); LA. REV. STAT. ANN. § 9:2800.9(B) (West 1997) (requiring certificates of merit for plaintiffs 21 years or older making claims of criminal sexual activity or physical abuse during childhood).

7. See FLA. STAT. ANN. § 768.72 (West Supp. 1997) (requiring reasonable showing of evidence in the record to assert a claim for punitive damages).

and federal securities fraud actions,<sup>8</sup> in that expert opinion pleading is demanded at the outset. These standards are also distinct from the general legal guidelines on the discoverability or mandatory disclosure of expert opinions.<sup>9</sup>

American lawmakers will likely further consider special certificates of merit involving an expert opinion for diverse claims within civil litigation.<sup>10</sup> Yet, not all lawmakers are convinced of their need, effectiveness, or validity.<sup>11</sup> Additionally, some special certificate legislation has been challenged as unconstitutional.<sup>12</sup>

8. See 15 U.S.C. § 78u-4(b) (1996) (requiring that the complaint contain each statement alleged to have been misleading, the reasons why it is allegedly misleading, and the facts giving rise to a strong inference that the defendant acted with the required state of mind). Like the Product Liability Reform Act, President Clinton vetoed the Private Securities Litigation Reform Act, in part, because the pleading requirement would "impose an unacceptable procedural hurdle to meritorious claims being heard in Federal Courts." Elliott J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675, 675 (1996) (quoting Private Securities Litigation Reform Act of 1995—Veto Message from the President of the United States, H. DOC. NO. 104-150 (1995)). Subsequently, Congress overrode the President's veto. As with other tort reform measures enacted to reduce frivolous claims, the empirical basis underlying the reform has been questioned. See Leonard B. Simon & William S. Dato, *Legislating on a False Foundation: The Erroneous Academic Underpinnings of the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 959, 962 (1996) ("Congress has legislated on the basis of false and/or misleading data."). The new pleading standards envisioned for federal securities actions are reviewed in William S. Lerach & Eric A. Isaacson, *Pleading Scierter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness, and the Private Securities Reform Act of 1995*, 33 SAN DIEGO L. REV. 893 (1996).

9. See FED. R. CIV. P. 26.

10. See H.R. 819, 1996 Leg. (Md. 1996) (proposing certificate of merit in actions against specified licensed or certified professionals); H.R. 2840, 54th Leg., 1996 Reg. Sess. (Wash. 1996) (proposing a certificate of merit in lawsuits relating to health care); H.R. 1823, 79th Leg., 1995 Reg. Sess. (Minn. 1995) (proposing certificates of merit for malpractice actions against design professionals, including architects, engineers, land surveyors, landscape architects, and interior designers).

11. See H.R. 20, 89th Gen. Assembly 16 (Ill. 1995) (Senate Transcript Mar. 3, 1995) [hereinafter Senate Transcript] at 57 (statement of Sen. Demuzio) (stating there haven't been any scientific studies that show economic benefits follow from restrictions on the civil justice system); see also *id.* at 50-51 (statement of Sen. Shadid) (stating medical malpractice and product liability account for one-tenth of one percent of all lawsuits filed in Illinois, product liability lawsuits filed annually have decreased by over half in the past decade, less than one percent of all manufacturing concerns in the U.S. have any involvement at all in product liability litigation, there is no lack of product liability coverage in the present market, no evidence of vastly increased insurance premiums, and no evidence to suggest an insurance crisis in Illinois); *id.* at 55 (statement of Sen. Jones) (stating objective studies show the Illinois economy is growing at a faster rate than the nation as a whole, unemployment is below the national average, and large employers continue to invest in Illinois).

12. Various trial courts, for example, have found parts of the Illinois General Assembly tort reform law initiatives of 1995 unconstitutional, including certificates of merit for product liability claims. The law is now before the Illinois Supreme Court.

Are American courts clogged with frivolous civil claims? If so, are certain claims prone to more abuse? Can special certificates of merit involving an expert opinion help eliminate abuse? This Article explores why special certificates of merit involving an expert opinion have been adopted and how they operate. This Article then concludes that American lawmakers should be wary of these special certificates and implement them for certain civil claims only after finding that there are adequate empirical bases and inadequacies in other civil procedure laws, such as general pleading, other special pleading, or expert opinion discovery or disclosure laws. In any implementation, the components of these special certificates, including the expert opinion, the timing of any release, the opportunity for information gathering, and the sanctions for noncompliance, should be carefully crafted to ensure that access to a judicial remedy is not significantly imperiled for deserving claimants and that large unnecessary costs are not borne by successful claimants.

## II. WHY REQUIRE EXPERT OPINION PLEADING?

In exploring special certificates of merit involving an expert opinion, this Article will first focus on underlying rationales. The major goal typically is a reduction in the number of frivolous claims. This goal may be explored through reviewing recent developments in the product liability realm. Both the Illinois General Assembly and the United States Congress recently considered such special certificates in the product liability area as a means to reduce frivolous claims. An examination of the relevant legislative histories will help explain the empirical bases behind special pleading rules designed to curb meritless civil lawsuits. While the goals in the two legislatures were similar, the empirical foundations for any new pleading rules were unclear. Although the goals and findings were generally similar, Illinois legislators opted for expert opinion pleading while federal legislators did not, suggesting there is much room for legislative discretion. Beyond a reduction in frivolous claims, a secondary goal behind some expert opinion pleading initiatives seemingly involves protecting defendants from reputational harm.

---

See David Heckelman, *Product Suit May Proceed: High Court*, CHI. DAILY L. BULL., Jan. 24, 1997 at 1, (noting that the case of *Vernon Best v. Taylor Machine Works*, Nos. 81890-81893, is now pending on appeal before the high court).

### A. Reducing Frivolous Claims

#### 1. The Illinois Civil Justice Reform Amendments of 1995

In 1995 the Illinois General Assembly passed sweeping tort reform legislation under the Civil Justice Reform Amendments.<sup>13</sup> The stated aims of the amendments were to improve the civil justice system, to establish fault as the basis for tort liability, to decrease the systemic cost of tort recovery, to protect the economic health of business and local government, to reduce the frequency and severity of civil claims in product liability actions, and to protect the availability of affordable liability insurance.<sup>14</sup>

To achieve those goals, the amendments included caps on certain punitive damages,<sup>15</sup> changes in several tort liability,<sup>16</sup>

13. See Civil Justice Reform Amendments of 1995, Pub. L. No. 89-7, 1995 Ill. Laws 7. The amendments created many controversial changes in tort law, especially in the areas of product liability and medical malpractice. Aside from creating a certificate of merit requirement in product liability actions, the legislature also amended the certificate of merit provision in healing art actions. See H.R. 20, 89th Gen. Assembly 105 (Ill. 1995) (House of Representatives Transcript Feb. 16, 1995) [hereinafter House Transcript] (statement of Rep. Cross) (stating that modification of the statute to require that the affidavit contain the name of the certifying health care professional will influence the expert to use the utmost care in making a decision, thereby reducing the potential for frivolous lawsuits). Another modification prevents a plaintiff from obtaining the statutory 90-day extension, then voluntarily dismissing the action, refiling the action, then obtaining another 90-day extension. See *id.* The validity of the 1995 legislation is now before the Illinois Supreme Court in *Vernon Best v. Taylor Machine Works*, Nos. 81890-81893.

14. See Preamble, 1995 Ill. Laws 7.

15. See 735 ILL. COMP. STAT. ANN. 5/2-1115.05 (West 1997). In particular, the Act states:

(a) In all cases on account of bodily injury, or physical damage to property based on negligence, or product liability based on any theory or doctrine, other than those cases described in Section 2-1115 [healing art and legal malpractice cases], punitive damages may be awarded only if actual damages are awarded. The amount of punitive damages that may be awarded for a claim in any civil action subject to this Section shall not exceed 3 times the amount awarded to the claimant for the economic damages on which such claim is based.

*Id.*

16. See title 735, 5/2-1117. In particular, the Act states:

(a) In any action brought on account of death, bodily injury to person, or physical damage to property in which recovery is predicated upon fault . . . a defendant is severally liable only and is liable only for that proportion of recoverable economic and non-economic damages, if any, that the amount of that defendant's fault, if any, bears to the aggregate amount of fault of all other tortfeasors . . . whose fault was a proximate cause of the death, bodily injury, economic loss, or physical damage to property for which recovery is sought.

and alterations of liability standards for product liability.<sup>17</sup> One provision required that certificates of merit involving an expert opinion usually be filed with product liability claims.<sup>18</sup>

In product liability actions where damages are sought,<sup>19</sup> a claimant or a claimant's lawyer must now submit an affidavit indicating she has consulted and reviewed the facts of the case with a qualified expert; that the expert has completed a written report on the relevant product; and that the report, which must be attached to the pleading, contains determinations on such matters as fault and proximate cause.<sup>20</sup> The preamble to the amendments sets out findings and rationales, including those applicable to the special certificates of merit.<sup>21</sup> The Illinois General Assembly found that problems in the civil justice system affect the creation and retention of jobs;<sup>22</sup> create unacceptable systemic costs of tort liability that threaten the economic health

---

*Id.*

17. See John C. Mulgrew, Jr., *The Civil Justice Reform Act's Impact on Product Liability Litigation*, TORT TRENDS, Aug. 1996, at 5, 6 [hereinafter TORT TRENDS]. The new law creates a presumption that the product is reasonably safe if it complies with state or federal regulations that monitor the safety of products in Illinois. See *id.* Under prior law such evidence was admissible as to a defect in the product but did not create a presumption. Depending on judicial interpretation of the presumption, the effects could be dramatic. See *id.* Another important change occurs in the area of warning standards. The statute flatly states that warnings shall be deemed adequate if they are in conformity with generally recognized industry standards. See *id.* Under prior law, conformity with industry standards was only evidence of adequacy to be considered by the trier of fact. The new law also specifies that there is no liability if damage is caused by an inherent characteristic of the product that can not be eliminated without substantially compromising the product's usefulness or desirability, which is generally recognized by the community. See *id.* Previously, under Illinois case law, liability was imposed when a product had such a dangerous quality that it should not be placed in the stream of commerce, or, if placed in the stream of commerce, the risk to the public was so great that liability should be imposed on the manufacturer. This precedent may no longer have force under the new law. See *id.*

18. This provision was modeled on, but is different from, an Illinois statute on medical malpractice claims. See Senate Transcript, *supra* note 11 (statement of Sen. Dillard); cf. title 735, 5/2-622 (requiring affidavit and written report by a health professional in cases involving healing art malpractice).

19. See title 735, 5/2-623.

20. Requirements as to other determinations vary, depending upon whether the claim is an action based on strict liability in tort or implied warranty. See *id.* at 5/2-623(a)(1)(A)-(B).

21. See Preamble, 1995 Ill. Laws 7.

22. See House Transcript, *supra* note 13, at 91 (statement of Rep. Cross) (stating by 1980, Illinois lost 300,000 jobs; between 1978-1993, manufacturing jobs in Illinois fell 37%; and in 15 years, the manufacturing component of Illinois's economy fell from 26.6% to 17.5% of the workforce). Representative Cross did not cite any studies that show a causal link between product liability litigation and these statistics.

of the State through higher consumer prices and increased taxes; and prompt drastic restrictions in insurance liability coverage as well as increased insurance premiums for many products and services.<sup>23</sup> The amendments were intended to "reduce the frequency and severity" of product liability claims, so that new product development would not be chilled by fear of litigation.<sup>24</sup> Additional legislative history is scarce. Some history does suggest the new provision requires little more than is mandated under the general pleading standards, which demand that claimants or their attorneys certify their allegations are well grounded in fact and are not interposed for any bad purpose.<sup>25</sup> This suggestion is founded on the premise that it is virtually impossible to certify that a product liability claim is well-grounded in fact without a determination by a qualified expert.<sup>26</sup> But if this is true, the general pleading standards should be adequate to deter frivolous product liability claims and special certificates would be unnecessary.

Opponents of special product liability certificates in Illinois thus did not agree that the new mandates require little more than the general pleading standards. They argued that the new

23. See *id.* at 59 (statement of Rep. Biggins) (stating the Girl Scouts in Southern Illinois must sell 53,000 boxes of cookies a year to cover their liability insurance costs; other areas of the state have similar problems). But see *id.* at 74 (statement of Rep. Dart) (stating the Girl Scouts have only been sued once and they were sued by a member of the Civil Justice League, a major backer of this legislation). Representative Dart also suggested the high insurance premiums have nothing to do with frivolous lawsuits. See *id.*

24. Senate Transcript, *supra* note 11, at 13 (statement of Sen. Dillard). Senator Dillard also suggested the reform is a response to people's beliefs "that they should have the right to sue and receive award for slight, or for inconvenience, or for minor injury." *Id.* at 11. Senator Dillard defended the legislation when he stated:

No one wants unsafe products in the State of Illinois. However, in order to protect the economic health of our businesses we must provide for rational review and limits on the way in which product liability litigation may be brought. We don't know how many good products have not come to market because of the fear of litigation.

*Id.* at 13; see also *id.* at 67 (statement of Sen. Fitzgerald) (stating new small airplanes carry as much as 50% premium for insurance, and because of that, new planes are not as competitive as they otherwise would be, forcing people to use older products that are less safe); *id.* at 84 (statement of Sen. Dillard) (stating manufacturers provide many jobs in Illinois and support the legislation because it helps them create jobs and keep the economy growing without worrying about unmeritorious lawsuits, which have caused manufacturers to slow research and development).

25. See *id.* at 77 (statement of Sen. Dillard). The general pleading standards are found in ILL. SUP. CT. R. 137.

26. See Senate Transcript, *supra* note 11, at 77 (statement of Sen. Dillard).



provisions would bar many legitimate product liability claims.<sup>27</sup> Opponents also deemed the legislation unnecessary because there was no evidence presented showing how the existing civil justice system negatively affected job creation, job retention, or insurance costs in Illinois.<sup>28</sup>

## 2. *The proposed Federal Common Sense Product Liability and Legal Reform Act of 1996*

The United States Congress also recently relied on arguments based on job creation, job retention, and insurance costs when it forwarded to President Clinton a bill containing a special pleading standard aimed at reducing frivolous product liability claims.<sup>29</sup> The bill, known as the Common Sense Product Liability and Legal Reform Act of 1996, was vetoed by President Clinton on May 2, 1996.<sup>30</sup> Unlike the Illinois General Assembly, Congress opted for a special standard that did not include expert opinion pleading.<sup>31</sup>

The proposed federal pleading law required claimants presenting product liability claims to certify by signature that, to the signors' "best knowledge, information and belief, formed

---

27. See *id.* at 22 (statement of Sen. Welch) (speaking of the amendments to product liability as a whole, not the certificate of merit provision alone).

28. See *supra* note 11.

29. See H.R. 956, 104th Cong. (1996).

30. See United States Bill Tracking, 1995 United States House Bill No. 956, 104th Congress—1995-96 Regular Session, available in LEXIS, Legis Library, Bltrck file; see also Sherman Joyce, *Federal Product Liability Litigation Reform: Recent Developments and Statistics*, 19 SEATTLE U. L. REV. 421, 423, 431 (1996) [hereinafter *Federal Product Liability*]. President Clinton wrote in a letter he would veto the bill because it "represents an unwarranted intrusion on state authority." *Id.* at 423. However, the article concluded that Congress has the authority to legislate in the field of product liability because it "is inextricably intertwined with matters that are fundamental to interstate commerce; the manufacture, distribution, and sale of products." *Id.* at 431; see generally Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 918-19 (1996) (finding that, although Republicans usually support devolving federal regulation to the states and liberals usually support expansion of federal programs, the reverse is true when it comes to federalization of tort law and suggesting the federalism argument was only used strategically).

31. The 105th Congress is continuing to formulate a product liability reform act that might be acceptable to President Clinton. A proposal introduced in the Senate on January 21, 1997, does not contain a special pleading requirement but still includes provisions for caps on punitive damages, abolishes joint liability, and provides for either a plaintiff or a defendant to make an offer for alternative dispute resolution within 60 days of service of the complaint or the applicable deadline for a responsive pleading. See S. Res. 5, 105th Cong. (1997).

after reasonable inquiry," the pleading was not frivolous.<sup>32</sup> "Frivolous" was defined as groundless and brought in bad faith, or groundless and brought for the purpose of harassment, or groundless and interposed for only an improper purpose.<sup>33</sup> "Groundless" was defined as having no basis in fact or not warranted by existing law or good faith argument for extension, modification, or reversal of existing law.<sup>34</sup> Under the bill, a defendant could move for a determination that a product liability pleading was frivolous,<sup>35</sup> which would prompt the court to consider such factors as the multiplicity of the parties, the complexity of the claims and defenses, the length of time available to the claimant to investigate and conduct discovery, and other matters.<sup>36</sup> Appropriate sanctions for noncompliance included striking the pleading or its offending portion, dismissing a party, and ordering the offending party to pay reasonable expenses, including costs, attorney fees, witness and expert fees, and deposition expenses.<sup>37</sup>

Substantive alterations in product liability law accompanied these procedural law changes.<sup>38</sup> The special pleading provisions

32. H.R. REP. NO. 104-63, pt. 1 (1996).

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.*

37. *See id.*

38. *See* 142 CONG. REC. H2238 (daily ed. Mar. 14, 1996). The proposed changes stated in part:

(a) GENERAL RULE.—

(1) IN GENERAL.—In any product liability action, a product seller other than a manufacturer shall be liable to a claimant only if the claimant establishes—

(A) that—

(i) the product that allegedly caused the harm that is the subject of the complaint was sold, rented, or leased by the product seller;

(ii) the product seller failed to exercise reasonable care with respect to the product; and

(iii) the failure to exercise reasonable care was a proximate cause of harm to the claimant;

(B) that—

(i) the product seller made an express warranty applicable to the product that allegedly caused the harm that is the subject of the complaint, independent of any express warranty made by a manufacturer as to the same product;

(ii) the product failed to conform to the warranty; and

(iii) the failure of the product to conform to the warranty caused harm to the claimant; or

(C) that—

went beyond the general pleading requirements found in Federal Civil Procedure Rule 11 by specifically including such available remedies as the assessment of witness fees and deposition costs, by not including a safe harbor provision that allows a claimant twenty-one days to amend a challenged pleading in order to avoid certain sanctions, and by not limiting sanctions to those sufficient to deter comparable conduct.<sup>39</sup>

As in Illinois, there was much debate over the necessity of special pleading mandates. Proponents argued the legislation would help end certain civil litigation abuse and prompt job creation and growth for the economy.<sup>40</sup> Proponents claimed contemporary product liability law places enormous burdens on interstate commerce, causing inflated prices and stifling innovation.<sup>41</sup> Proponents relied on survey reports of manufacturers and on the perceptions of CEOs on the costs of product liability litigation to their businesses.<sup>42</sup>

Proponents did not, however, cite statistics on the number of frivolous product liability claims. They did say claimants had become "remarkably skilled at identifying and joining defendants with deep pockets who, despite limited responsibility for injury, would rather settle a case than face the costs and publicity associated with litigation."<sup>43</sup> This suggests proponents believed many claimants, hoping for settlements, sued without much basis for their claims. Proponents argued that the bill would ensure legiti-

---

(i) the product seller engaged in intentional wrongdoing, as determined under applicable State law; and

(ii) such intentional wrongdoing was a proximate cause of the harm that is the subject of the complaint.

*Id.* at H2240.

39. *Cf.* FED. R. CIV. P. 11. The present rule focuses on public interest sanctions as reprimands, fines, and disciplinary referrals rather than on such private interest sanctions as fee and cost recovery. Additionally, it contains a safe harbor provision and stresses deterrence. On the changes in remedies under the 1993 version of the Federal Civil Procedure Rule 11, see Jeffrey A. Parness, *Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the "Stop-and-Think Again" Rule*, 1993 BYU L. REV. 879.

40. *See* 142 CONG. REC. H3184, H3185 (daily ed. Mar. 29, 1996) (statement of Rep. Hyde) (stating the reforms did not go as far as he would have liked, but were a step in correcting "the current out-of-control legal system").

41. *See id.* at H3189 (statement of Rep. Bliley) (explaining the connection between product liability law and interstate commerce by stating: "As transportation and communications systems developed, more products crossed State boundaries, increasing the volume of interstate commerce exponentially, creating more interstate product liability.").

42. *See id.* at H3189-90.

43. *Id.* at H3190.

mate claimants their day in court while reducing frivolous claims.<sup>44</sup>

Opponents of the bill disagreed with the need for reform and questioned the stated goals.<sup>45</sup> They argued the bill was designed to disadvantage American consumers and benefit corporations.<sup>46</sup> Opponents further claimed the bill would not only fail to reduce frivolous claims, but also would remove the threat of private lawsuits as the most important deterrent to "dangerous products."<sup>47</sup> They cited research that product liability suits represent less than 2% of litigation in America, product liability insurance premiums dropped more than 28% during 1989 to 1994, and product liability filings have been decreasing.<sup>48</sup> Further, they argued the bill would have little effect on American competitiveness since the total cost for all product liability claims only represents one cent per every five-dollar purchase.<sup>49</sup> Finally, opponents complained that so-called tort reformers were seeking to create or expand and then exploit the myth of a litigation explosion.<sup>50</sup> They cited the U.S. Chamber of Commerce's advertisement stating that "Girl Scouts in just one area have to sell 87,000 boxes of their cookies just to protect against lawsuits,"<sup>51</sup> though Girl Scout officials denied being bombarded with frivolous lawsuits.<sup>52</sup>

44. *See id.* at H3193 (statement of Rep. Stearns).

45. *See generally id.* at H3184 (containing statements of opponents of the bill).

46. *See id.* at H3187 (statement of Rep. Conyers).

47. *Id.* at H3188. Representative Conyers further stated:

If Members do not think that the threat of private lawsuits can help keep dangerous products off the market, which is what we hope to continue to do in our legal system, just ask the parents of children who have been killed by flammable pajamas, or the women who have been maimed by the Dalkon shield.

*Id.*

48. *See id.*

49. *See id.*

50. *See* Beth Rogers, *Legal Reform—At the Expense of Federalism?: House Bill 956, Common Sense Civil Justice Reform Act and Senate Bill 565, Product Liability Reform Act*, 21 U. DAYTON L. REV. 513, 524-25 (1996) [hereinafter *Legal Reform*] (stating that various proponents of tort reform exploit the facts of numerous lawsuits including the infamous McDonald's coffee-spilling case to get public support for tort reform). The article also states that federal product liability reform is unnecessary and constitutionally questionable because, under the Interstate Commerce Clause and the Tenth Amendment, Congress' ability to preempt state law is limited. *See id.* at 521.

51. *Id.* at 525 (quoting Sandra Torry, *Tort and Retort: The Battle Over Reform Heats Up*, WASH. POST, Mar. 6, 1995, at 7).

52. *See id.*

The empirical evidence utilized in the recent Illinois and congressional debates on the numbers and costs of frivolous product liability claims in both the Illinois and federal courts is uncertain, with no reason to believe clarity will soon arrive. Nevertheless, debate and reform involving expert opinion pleading in the product liability arena will likely continue. There is a need for more work on whether product liability claims are particularly susceptible to pleading abuse. Given recent American pleading-law reforms outside of the product liability arena, new initiatives involving expert opinion pleading likely will also be proposed for such other civil claims as professional malpractice and childhood sexual abuse, though here too empirical data is scant or uncertain.

Before reviewing some current expert opinion pleading standards, another less-noted rationale for such standards will be explored. This rationale involves the protection of certain civil defendants from significant reputational harm arising from the mere filing of frivolous civil lawsuits.

### *B. Protection from Reputational Harm*

Although there may be little empirical evidence to suggest courts are clogged with frivolous product liability lawsuits, other legitimate purposes for requiring expert opinion pleading may exist. Another major goal may be to protect the defendant's reputation. At least one special certificate of merit standard involving an expert opinion, required in civil cases for damages suffered from childhood sexual abuse, seems partially based on protecting the defendant's reputation.<sup>53</sup>

Several notorious product liability lawsuits illustrate the potential for harm to a defendant's reputation when there is significant media attention. In 1982, civil lawsuits were filed against Johnson and Johnson by the families of victims who died after taking cyanide-laced Tylenol; the families alleged that the product was defective because its package was not tamper resis-

---

53. See CAL CIV. PROC. CODE § 340.1 (West 1997). Even after certificates of merit are executed by a claimant's attorney and licensed mental health practitioner, pleadings may only designate "Doe" defendants until the trial court judge finds there has been an appropriate "certificate of corroborative fact." *Id.* Further, the Doe pleadings may not even be served on defendants until the trial court judge has reviewed the certificates of merit. See *id.*

tant.<sup>54</sup> The litigation defense costs were great, but the costs involving harm to the defendant's reputation were greater. A stockbroker said at the time: "The name Tylenol is now linked with poison in people's minds."<sup>55</sup> When a product is implicated in causing death or injury, fear and loss of public confidence can destroy years of effort spent promoting and creating a good reputation among consumers.<sup>56</sup> Further, when the quality of one product is questioned, there is potential for a drop in public confidence for the manufacturer's other products,<sup>57</sup> and not only the one manufacturer, but also the whole industry may suffer.<sup>58</sup>

Because product liability lawsuits can have tremendous negative effects on defendants' reputations, or even upon entire industries, there is some logical support for requiring special certificates of merit. The value of such certificates must be weighed, however, against the possibility of deterring meritorious claims, as well as informing the public of possible safety risks with certain dangerous products.

Another area where special pleading laws may seek to protect a defendant's reputation through the requirement of expert opinion pleading involves civil actions by adults for sexual abuse occurring during their childhood. A California law<sup>59</sup> and a Louisiana law<sup>60</sup> each require expert opinion pleading before certain of these claims may proceed. Civil filings by victims of childhood sexual abuse have been rising, perhaps because criminal laws

---

54. See George J. Church, *Murder by Remote Control: The Tylenol Case Brings Calls for Tamperproof Packaging of Drugs*, TIME, Oct. 18, 1982, at 16, 19.

55. Susan Tiff, *Poison Madness in the Midwest; Seven People Die after Taking Cyanide-laced Tylenol*, TIME, Oct. 11, 1982, at 18, 18.

56. See *A Death Blow for Tylenol?*, BUS. WK., Oct. 18, 1982, at 151, 151.

57. Cf. Rebecca Fannin, *Most Lie Low When Disaster Strikes*, MARKETING & MEDIA DECISIONS, Jan. 1983, at 58.

58. See Marc G. Weinberger & Jean B. Romeo, *The Impact of Negative Product News*, BUS. HORIZONS, Jan. 1989, at 44. An example cited was the product liability lawsuits against the makers of Rely tampons based on research suggesting a causal link between tampon use and toxic shock syndrome. Tampon use declined five percent, reflecting three to four million women discontinued use of tampons. *Id.* When lawsuits were filed alleging hand-held cellular phones caused users to develop brain cancer, the media and public reaction was quick. Some felt the industry would never be the same. See Fredric S. Newman, *Products Liability—Don't Get Caught*, CELLULAR MARKETING, May 1993, at 30 [hereinafter *Products Liability*].

59. See CAL. CIV. PROC. CODE § 340.1 (West 1997).

60. See LA. REV. STAT. ANN. § 9:2800.9 (West Supp. 1997); see also Gregory G. Gordon, Comment, *Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359, 1359 (1993) [hereinafter *Adult Survivors*].

ineffectively punish and deter. At least 200,000 new instances of childhood sexual abuse are reported each year in America, and some experts believe that as many as one in three females and one in six males are sexually abused as children.<sup>61</sup>

Given these statistics, large numbers of civil lawsuits might be expected. But many potential plaintiffs are discouraged by the adversarial nature of litigation and the stress of dealing with disturbing issues.<sup>62</sup> Where claimants do step forward, many mental health experts question the validity of claims founded on the recovery of repressed childhood memories.<sup>63</sup> Additionally, the potential public attention will often cause defendants much stress, especially if they are public officials or persons who work with children, such as teachers or priests. Careers and lives may be ruined even when the allegations are never proven, or even proven beyond any doubt to be false. As in the product liability setting, there are valid interests for requiring certificates of merit to protect against reputational harm caused by false claims.

Yet when considering such interests, legislatures need to inquire as to any bases for assuming childhood sexual abuse plaintiffs are fabricating claims or are being misled by experts and others.<sup>64</sup> In light of statistics reflecting increasing incidents of childhood sexual abuse, is it appropriate to increase the procedural law requirements and thus the costs for filing such claims in order to protect alleged abusers?<sup>65</sup> And if some protection against reputational harm is appropriate, may it be achieved by heightened pleading and verification requirements rather than by expert opinion pleading? Further, should there be the same concern about frivolous lawsuits for all childhood sexual abuse claims? In California, expert opinion pleading seems chiefly mandated for repressed memory cases pursued by adults,<sup>66</sup> but in

---

61. See *Adult Survivors*, *supra* note 60, at 1363.

62. See *id.* at 1374.

63. See Calor McHugh, *Suits Claiming Childhood Sex Abuse on Rise; Lawyers, Experts Question Recovered Memories*, CHI. DAILY L. BULL., Sept. 22, 1993, at 1.

64. See generally *Adult Survivors*, *supra* note 60, at 1402 (describing a proposed legislative response).

65. See *id.*

66. See CAL. CIV. PROC. CODE § 340.1(a), (d) (West 1997) (requiring when an adult claimant has always remembered the abuse, suit must be commenced by the age of 26 and no certificates of merit are needed; if an adult claimant only recalls the childhood abuse as an adult, and thus is likely over 26 when filing the claim, then certificates of merit are needed).

Louisiana similar expert opinion pleading standards apply to all cases when childhood sexual abuse is claimed by adults,<sup>67</sup> even when there are no repressed memory issues or where eyewitness accounts or a defendant's own statements constitute the most important evidence for the claimant.

In the following section, recent expert opinion pleading initiatives aimed at reducing meritless civil claims will be examined. These initiatives demonstrate the wide range of available approaches to similarly perceived problems. At the outset, the typical general pleading requirements, which operate in the absence of special certificate of merit standards, will be reviewed so that the option to "do nothing" special can be measured.

### III. EXAMPLES OF EXPERT OPINION PLEADING

In America today there are varying legislative directives aimed at reducing certain types of meritless civil claims by requiring some form of expert opinion pleading. Some of the laws demand that civil claimants produce a supporting expert opinion at the time of an initial pleading.<sup>68</sup> Others demand such an opinion shortly after the initial pleading, usually long before there has been extensive discovery or pretrial conference time devoted to trial preparation.<sup>69</sup> On occasion, an expert opinion is needed even before a civil claim can be filed.<sup>70</sup> The following sections examine some current expert opinion pleading laws, as well as general pleading certification standards, to demonstrate contrasting approaches.

#### A. *General Pleading Certification Standards*

In the absence of heightened pleading requirements, including certificates of merit involving an expert opinion, general pleading requirements serve to reduce frivolous civil lawsuits.

67. See LA. REV. STAT. ANN. § 9:2800.9(B) (West Supp. 1997) (requiring certificates of merit by attorney and licensed mental health practitioner for all sexual abuse of a minor claims filed by claimants twenty-one or older).

68. See ARIZ. REV. STAT. ANN. § 12-2602 (West Supp. 1996); CAL. CIV. PROC. CODE § 411.35 (Supp. I 1997); GA. CODE ANN. § 9-11-9.1 (1993) (amended 1996); 735 ILL. COMP. STAT. ANN. 5/2-622 (West 1997); *id.* at 5/2-623; MICH. COMP. LAWS ANN. § 600.2912d (West Supp. 1996); N.Y. C.P.L.R. 3012-a (McKinney 1991).

69. See COLO. REV. STAT. ANN. § 13-20-602(1) (West 1989 & Supp. 1996); MO. ANN. STAT. § 538.225 (West 1988); N.J. STAT. ANN. § 2A:53A-27 (West Supp. 1997); N.D. CENT. CODE § 28-01-46 (1991).

70. See FLA. STAT. ANN. § 766.203(2) (West Supp. 1997).



On the federal level, the original version of Rule 11 of the Federal Rules of Civil Procedure required signed pleadings to be supported by "good ground," did not expressly require reasonable prefiling inquiry, and permitted "appropriate disciplinary action" against an attorney who willfully violated the rule.<sup>71</sup> Under Rule 11, as amended in 1983, mandatory sanctions, which usually included attorneys' fees, were to be imposed on those who signed pleadings that were not "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."<sup>72</sup> Further, the 1983 rule required the signor to certify there had been a reasonable prefiling inquiry. The rule was again amended in 1993, allowing groundless papers to be more easily withdrawn within a twenty-one day safe harbor period without fear of sanction, and making attorney fee awards less available as a remedy for non-compliance. Many state legislatures and state supreme courts have adopted provisions which parallel Federal Rule 11, although some have modifications of the rule.<sup>73</sup> Yet recently, at least in certain contexts, both federal and state lawmakers have shown their dissatisfaction with such general pleading rules by adopting special certificate of merit and other special pleading requirements.

---

71. Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1075 (1994).

72. *Id.* at 1074 (stating that the amendments were designed to encourage courts to impose sanctions because few sanctions had been imposed under the prior version).

73. *See id.* at 1094-95.

### B. *Illinois Product Liability*

The new Illinois product liability pleading law<sup>74</sup> usually requires a special certificate of merit from a claimant's expert. It specifically provides that an affidavit shall be filed with the pleading of a claim, declaring the affiant, usually the claimant's lawyer, reviewed the case with a qualified expert.<sup>75</sup> A qualified expert is someone who possesses scientific, technical, or other specialized knowledge regarding the product at issue or similar products.<sup>76</sup> The expert must have completed a written report after examining the product, or reviewing the literature pertaining to the product,<sup>77</sup> with the report attached to the pleading. In

74. See 735 ILL. COMP. STAT. ANN. 5/2-623 (West 1997). The law has been challenged on constitutional grounds in a case now before the Illinois Supreme Court. See *Panzer v. Owens-Corning Fiberglass Corp.*, No. 95L9815 (Cook County Cir. Ct. May 22, 1996). The law was found, in part, to require the expert not only to make a technical conclusion, but also to do a substantial search of legal standards as well as industry standards, thus violating the separation of powers and the right to a jury trial provisions "by making it a precondition . . . that a plaintiff in a product liability case file this very substantial, and detailed, affidavit prior to the case actually beginning." *Id.*; cf. Martin H. Redish, *The Constitutionality of Illinois Tort Reform, IV Product Liability*, IDC Q., 3d Quarter 1996, at 8, 9 (stating constitutional challenges that may be brought are denial of right of access to the courts, violation of separation of powers, and contravention of the bar of special legislation). Specifically, Professor Redish concluded: "For an attack under the special legislation prohibition to succeed, those challenging the law would have to establish that the General Assembly's application of the certificate of merit requirement only in product liability actions is irrational. This they will be unable to do." *Id.* As to any separation of powers challenge, Redish suggested that plaintiffs misconstrued the product liability law provision when they argued that the legislature had created a rebuttable presumption and determined the only way in which it can be rebutted. He suggested the legislature was permissibly altering the governing substantive law by establishing a product is reasonably safe unless a feasible alternative design existed, and that the point in which a plaintiff is required to establish the existence of a feasible alternative design is a matter of social policy to be decided by the legislature. See *id.* at 10-11. See also David Bailey, *New Product Liability Affidavits Stricken as "Tort Reform" Hit Again*, CHI. DAILY L. BULL., Sept. 17, 1996, at 1 (reviewing circuit rulings of unconstitutionality).

75. See 735 ILL. COMP. STAT. ANN. 5/2-623(a)(1) (West 1997).

76. See *id.* at 5/2-623(c); Note, *Tort Law—Product Liability—Illinois Imposes Certificate of Merit Requirement On Product Liability Actions*, 109 HARV. L. REV. 705, 708 (1996) [hereinafter *Tort Law*] (stating the definition of expert "probably allows for a range of friendly sources from whom a plaintiff can obtain 'qualified' certification").

77. See title 735, 5/2-623(a)(1); see also *Tort Law*, supra note 76, at 709-10 (stating bases for strict liability theories can probably be determined through examinations without discovery but allegations of negligence, recklessness, or willfulness in causing harm are often demonstrable only with information obtained through court-ordered discovery, and concluding that making negligence theories as hard to certify as strict liability theories is at odds with the legislature's stated goal of supporting fault-based theories). *But see* *Braverman v. Kucharik Bicycle Clothing Co.*, 678 N.E.2d 80 (Ill. App. Ct. 1997) (absence of allegedly defective product was not fatal to claim in product liability).

an action based on strict liability or implied warranty, the report must identify specific defects that have a potential for harm beyond that which would be objectively contemplated by the ordinary user and must determine that the product was in a defective condition or unreasonably dangerous when it left control of the manufacturer.<sup>78</sup> In other product liability actions, the report must point to the specific conduct on the part of the defendant and determine that the product's defective condition or other fault was a proximate cause of the claimant's harm.<sup>79</sup> When the defective condition is based on a design defect, the expert report must demonstrate a feasible alternative design that existed at the time the product left the manufacturer's control or an applicable government or industry standard to which the product did not conform.<sup>80</sup> Some supporters of the new product liability law viewed its pleading requirements as adding little to the pleading burdens imposed upon claimants by the preexisting Illinois Supreme Court general pleading rule.<sup>81</sup>

The statute provides some leeway for claimants. If a claimant has not voluntarily dismissed an earlier action based on the same occurrences and an affiant was unable to consult with an expert because of statute of limitations problems despite a good faith effort to comply, or the claimant was prevented from inspecting or conducting nondestructive testing of the product, upon submission of an affidavit the claimant may be given ninety more days to file.<sup>82</sup> Failure to file an affidavit shall be grounds

---

78. See title 735, 5/2-623(a)(1)(A)(i), (ii); see also TORT TRENDS, *supra* note 17, at 6 (suggesting that this provision exclusively adopts the "consumer contemplation test" indicated by RESTATEMENT (SECOND) OF TORTS § 402A and that the "risk-benefit analysis" test for a product defect is no longer available in Illinois; and further suggesting that given the specificity required in the certificate of merit, also unavailable is the theory of an "unidentified" defect that the plaintiff establishes by proving the product caused injury or damage in failing to perform in the manner reasonably expected in light of its nature and intended function, as well as the absence of an abnormal use of the product).

79. See title 735, 5/2-623(a)(1)(B); see, e.g., *Irizarry v. Digital Equip. Corp.*, 919 F. Supp. 301, 305 (N.D. Ill. 1996) (holding affidavit is inadequate when attorney merely consults with an expert regarding the type of product used by the plaintiff where important facts are not alleged and the report fails to determine that the defective product was the proximate cause of plaintiff's injury).

80. See title 735, 5/2-623(b).

81. See Senate Transcript, *supra* note 11, at 77. This view seemingly arose from the Illinois Supreme Court's finding that the comparable special pleading statute on healing art malpractice claims differed little from its own general pleading rule. See *DeLuna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139 (Ill. 1992).

82. See title 735, 5/2-623(a)(2).

for dismissal.<sup>83</sup> The statute has been deemed substantive and thus applicable in federal trial courts hearing Illinois product liability claims.<sup>84</sup>

### C. *Illinois Healing Art Malpractice*

The Illinois product liability statute<sup>85</sup> was modeled after an earlier Illinois statute dealing with healing art malpractice.<sup>86</sup> The healing art malpractice provisions cover most pleadings wherein claimants seek damages for injury or death caused by medical, hospital, or other healing art professionals.<sup>87</sup> An affidavit is usually required of the claimant or the claimant's lawyer, wherein she states she reviewed the case with a health professional who she reasonably believes is knowledgeable in relevant issues, has practiced or taught within the last six years in the relevant area of health care or medicine, and is qualified in the subject of the case.<sup>88</sup> The affiant must also conclude upon review of the health professional's written report that "there is a reasonable and meritorious cause" for filing the civil action.<sup>89</sup> The health professional's written report must be attached to the affidavit and must state that after review of the medical record and other relevant materials, the health professional has determined that "there is a reasonable and meritorious cause" for filing the civil action.<sup>90</sup> A separate report is needed for each defendant.<sup>91</sup>

83. See *id.* at 5/2-623(e) (West 1997).

84. See *Irizarry*, 919 F. Supp. at 304 (finding the statute is substantive because it applies to a particular substantive area and it would defeat the state legislature's intent to influence the substantive outcome by allowing parties to lessen their litigation burden by filing in federal court).

85. Title 735, 5/2-622.

86. See Senate Transcript, *supra* note 11, at 15.

87. See title 735, 5/2-622(a). The law on expert affidavits for medical malpractice claims has been sustained upon constitutional attack. See *DeLuna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139 (Ill. 1992); *McAlister v. Schick*, 588 N.E.2d 1151 (Ill. 1992). Commentators have reviewed and endorsed these rulings. See Saul J. Morse & Elizabeth W. Anderson, *DeLuna in Review: Upholding the Medical Malpractice Affidavit Requirement*, 80 ILL. B.J. 454 (1992).

88. See title 735, 5/2-622(a)(1).

89. *Id.*

90. *Id.* The statute further requires:

If the affidavit is filed as to a defendant who is a physician licensed to treat human ailments without the use of drugs or medicines and without operative surgery, a dentist, a podiatrist, or a psychologist, the written report must be from a health professional licensed in the same profession, with the same class of license, as the defendant. For affidavits filed as to all other defendants, the written report must be from a physician licensed to practice

The healing art malpractice provisions protect claimants who previously have not voluntarily dismissed a related action and who cannot obtain the health professional report before the statute of limitations runs in that the provisions allow extensions when the examination and copying of relevant medical records has been delayed because they have not been produced.<sup>92</sup> When allegations and denials in the affidavit are made without reasonable cause and are found to be untrue, the claimant, her attorney, or both "shall" be subject to the payment of the other party's resulting reasonable expenses and attorneys' fees.<sup>93</sup> A reviewing health professional who prepares a report in good faith has civil immunity.<sup>94</sup> Failure to file an affidavit "shall be grounds for dismissal."<sup>95</sup> The statute has been regarded as substantive and thus applicable at least in federal trial courts hearing Illinois healing art malpractice claims.<sup>96</sup>

The Illinois Supreme Court, in *DeLuna v. St. Elizabeth's Hospital*,<sup>97</sup> addressed the relationship between the certificates of merit required for healing art malpractice claims and the general pleading rule in Illinois, which provides in part:

The signature of an attorney or party constitutes a certification by him that he has read the pleading, . . . that to the best of his

medicine in all its branches. In either event, the affidavit must identify the profession of the reviewing health professional. A copy of the written report, clearly identifying the plaintiff and the reasons for the reviewing health professional's determination that a reasonable and meritorious cause for the filing of the action exists, must be attached to the affidavit. The report shall include the name and the address of the health professional.

*Id.*

91. *See id.* at 5/2-622(a)(3)(b).

92. *See id.* at 5/2-622(a)(3).

93. *See id.* at 5/2-622(a)(3)(e). The statute further states:

In no event shall the award for attorneys' fees and expenses exceed those actually paid by the moving party, including the insurer, if any. In proceedings under this paragraph (e), the moving party shall have the right to depose and examine any and all reviewing health professionals who prepared reports used in conjunction with an affidavit required by this Section.

*Id.*

94. *See id.* at 5/2-622(3)(f).

95. *Id.* at 5/2-622(3)(g).

96. *See Doe v. City of Chicago*, 883 F. Supp. 1126, 1134 (N.D. Ill. 1994). On similar state professional malpractice pleading statutes, the lower federal courts are divided on applicability under the *Erie* doctrine. *Compare Oslund v. United States*, 701 F. Supp. 710, 714 (D. Minn. 1988) (applicable), with *Boone v. Knight*, 131 F.R.D. 609, 611-12 (S.D. Ga. 1990) (not applicable).

97. 588 N.E.2d 1139, 1145 (Ill. 1992).

knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.<sup>98</sup>

The court found that the pleading requisites for healing art malpractice claims were similar to the general pleading rule's requirements because expert opinions in healing art malpractice claims would usually be necessary to satisfy the general pleading rule obligation that "reasonable investigation" was undertaken.<sup>99</sup>

The scant legislative history and judicial precedent suggest that the primary differences between the special certificates of merit requirements for healing art malpractice claims and the general pleading rules are that the former are more specific in what is required for reasonable investigation. However, the consequences of noncompliance with healing art malpractice law and with the general pleading rule requirements seem quite different. Shortcomings in an attorney's affidavit for a healing art malpractice claim will more likely result in dismissal, as that sanction is expressly noted in the statutory scheme.<sup>100</sup> Under the general pleading rule,<sup>101</sup> sanctions are imposed at the discretion of the judge, dismissal is not expressly mentioned, and a party usually does not suffer dismissal due to an attorney's failings.<sup>102</sup>

98. ILL. SUP. CT. R. 137.

99. *DeLuna*, 588 N.E.2d at 1145; see also *Mahoney v. Doerhoff Surgical Servs., Inc.*, 807 S.W.2d 503, 508 (Mo. 1991) (noting medical malpractice petition procedure "parallels the practice already prescribed for all civil actions, and is hardly more onerous to the right to trial by jury").

100. See title 735, 5/2-622(g) (stating failure of attorney to file proper certificate "shall be grounds for dismissal"); see also *id.* at 5/2-623(e) (same for product liability claims). But see *Lindgren v. Moore*, 907 F. Supp. 1183 (N.D. Ill. 1995) (holding dismissal for noncompliance with healing art malpractice certification standards is discretionary, not mandatory).

101. ILL. SUP. CT. R. 137 states, in part:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.

102. However, dismissals are more appropriate where a party and her attorney share joint and several liability for an intentional rule violation (as where an attorney knowingly engaged in insufficient inquiry and her client as a claimant verified pleadings she had reason to question). See, e.g., *Edwards v. Estate of Harrison*, 601

*D. Florida Medical Negligence*

Florida has a two-tiered expert opinion pleading requirement.<sup>103</sup> First, a potential plaintiff must investigate prior to issuing a "notification of intent to initiate medical malpractice litigation."<sup>104</sup> Upon investigation, the claimant must conclude "any named defendant" was negligent in the care of plaintiff and such negligence was the cause of claimant's injury.<sup>105</sup> Claimant must submit<sup>106</sup> a "verified written medical expert opinion" to corroborate the finding of reasonable grounds at the time the notice regarding a possible lawsuit is mailed.<sup>107</sup> The potential defendant is required to investigate prior to responding to the notice.<sup>108</sup> If the defendant rejects the claim, she must submit a verified written medical expert opinion that "reasonable grounds for lack of negligent injury" exist.<sup>109</sup> If a medical expert supplying an opinion has had any previous opinion disqualified, the expert must specify the opinion and the relevant court and case number.<sup>110</sup> If the claim is not settled before the end of the notice period,<sup>111</sup> a plaintiff must file a certificate of counsel with the initial

---

N.E.2d 862, 869 (Ill. App. Ct. 1992).

103. Florida's expert opinion pleading requirement for medical negligence claims is reviewed in John A. Grant, *Florida's Presuit Requirements for Medical Malpractice Actions*, 68 FLA. B.J. 12 (1994).

104. FLA. STAT. ANN. § 766.203(2) (West Supp. 1997). Michigan also has a prefiling notice requirement. One-hundred-eighty-two days before filing a medical malpractice action, plaintiff must notify each defendant. *See* MICH. COMP. LAWS ANN. § 600.2912b(1) (West Supp. 1997). The notice must contain the factual basis for the claim, the applicable standard of care, the manner of breach, the action that should have been taken, and the proximate cause. *See id.* § 600.2912b(4). The provision does not expressly require an expert opinion at this stage, as in Florida, but such an opinion seems, as a practical matter, necessary. The defendant must respond to the notice with a factual basis for defenses, including compliance with the standard of care and the lack of proximate cause. *See id.* § 600.2912b(7). After the notice period, if plaintiff files an action for medical malpractice, plaintiff must attach an affidavit of merit signed by an expert health professional. *See id.* § 600.2912d(1)(d). The affidavit must certify the expert reviewed the notice and medical records supplied and state the applicable standard of care, the expert's opinion as to breach of that standard, how the standard should have been complied with, and how the breach was the proximate cause of injury. *See id.*

105. FLA. STAT. ANN. § 766.203(2) (West Supp. 1997).

106. This language implies the written expert opinion must be attached to the notification.

107. FLA. STAT. ANN. § 766.203(2)(b) (West Supp. 1997).

108. *See id.* § 766.203(3).

109. *Id.* § 766.203(3)(b).

110. *See id.* § 766.203(4).

111. *See id.* § 766.106(3)(a) (stating no suit may be filed within 90 days after

pleading.<sup>112</sup> This certificate is required in any civil action "arising out of medical negligence, whether in tort or in contract."<sup>113</sup> The certificate must state there was a "reasonable investigation" that gave claimant or his counsel "a good faith belief that grounds exist" for an action against each named defendant.<sup>114</sup> Good faith "may be shown to exist" where the claimant has obtained a written medical expert opinion that "there appears to be evidence of medical negligence."<sup>115</sup> This expert opinion is not subject to normal discovery.<sup>116</sup> If the court finds the certificate of counsel lacked good faith and no justiciable issue was presented against a health care provider who cooperated in informal discovery, the court "shall award" costs and attorney's fees against counsel and "shall submit the matter . . . for disciplinary review of the attorney."<sup>117</sup> Plaintiff may petition the court for a ninety-day extension of the statute of limitations period to allow time for the required investigation.<sup>118</sup> Precedents to date are unclear on whether the statute is substantive and thus applicable in federal trial courts hearing Florida medical negligence claims.<sup>119</sup>

### *E. Virgin Islands Medical Malpractice*

In the Virgin Islands there is a Medical Malpractice Action Review Committee that, within the Office of the Commissioner of Health, arranges for the review of all prospective "malpractice" claims by experts before civil actions may be commenced.<sup>120</sup>

---

notice of intent to initiate litigation).

112. *See id.* § 766.104(1).

113. *Id.*

114. *Id.*

115. *Id.*

116. *See id.* Similarly, in the prelawsuit stage where a claimant's notice to a potential defendant of intent to initiate medical negligence litigation is accompanied by "a verified written medical expert opinion," *id.* § 766.203(2)(b), the expert herself and other matters pertaining to her opinion may not be discovered. *See id.* § 766.205(4); *see also* *Watkins v. Rosenthal*, 637 So. 2d 993 (Fla. Dist. Ct. App. 1994).

117. FLA. STAT. ANN. § 766.104(1) (West Supp. 1997).

118. *See id.* § 766.104(2).

119. *Compare* *Teel v. United Techs. Pratt & Whitney*, 953 F. Supp 1534 (S.D. Fla. 1997) (noting Florida's statute regarding pleading of punitive damages is substantive for *Erie* doctrine purposes), *with* *Tutor Time Child Care Sys., Inc. v. Franks Inv. Group, Inc.*, 966 F. Supp. 1188 (S.D. Fla. 1997) (holding Florida's statute inapplicable in a diversity case).

120. *See* V.I. CODE ANN. tit., 27 § 166i(a) (1997). Case law has determined the only purpose of the Committee is to obtain expert review of all malpractice claims, so no meeting is needed. *See* *Quinones v. Charles Harwood Mem'l. Hosp.*, 573 F. Supp. 1101, 1102 (V.I. 1983).



Depending on the circumstances, the committee may include the commissioner of insurance, the president of the Virgin Islands Bar Association or a designee, the president of the Virgin Islands Medical Society or a designee, and the president of the Virgin Islands Nurses' Association or a designee.<sup>121</sup> A claimant must file a "proposed complaint,"<sup>122</sup> which is sent to each named defendant, who "may" file a proposed answer.<sup>123</sup> The Committee determines what expertise is necessary<sup>124</sup> and arranges for expert review.<sup>125</sup> The expert must examine "the medical records and the legal papers submitted" and may examine the claimant if the Committee deems it necessary.<sup>126</sup> The expert then must submit in writing an opinion "concerning whether or not the defendant acted or failed to act within the appropriate standards of medical care."<sup>127</sup> The cost of obtaining the expert opinion is funded by the Medical Expert Fund.<sup>128</sup> The Committee has the power to obtain "all necessary information from health care providers" and to examine preexisting health care reports as "necessary."<sup>129</sup> A health care provider, other than a hospital, who refuses to comply with the requests for information is subject to disciplinary action by the appropriate licensing board.<sup>130</sup> The expert opinion is immediately forwarded to the parties and is available to either party in a subsequent civil action, although if either party wishes to call the expert as a witness, "the party must do so at his own cost."<sup>131</sup> The Committee members receive absolute civil immunity for their participation in this process within the scope of their statutory duties.<sup>132</sup> A claimant may proceed whatever the results of the Committee's expert report, as the goals of the law are to encourage withdrawal of potential claims without merit and to encourage settlement where potential claims have merit.<sup>133</sup>

---

121. See title 27, § 166i(a).

122. *Id.* § 166i(b).

123. *Id.* § 166i(c).

124. See *id.* § 166i(d).

125. See *id.* § 166i(d)(1).

126. *Id.*

127. *Id.*

128. See *id.* § 166i(d)(3). The Medical Expert Fund was created, V.I. CODE ANN. tit. 33, § 3042 (1975), expressly to pay for the expert opinions required in medical malpractice claims.

129. Title 27, § 166i(d)(2).

130. See *id.* (appropriate discipline may be license suspension or revocation).

131. *Id.* § 166i(d)(4).

132. See *id.* § 166i(e).

133. See, e.g., *Abdallah v. Callender*, 1 F.3d 141, 145 (3rd Cir. 1993) (citing Berry

### F. Georgia Professional Malpractice

A Georgia statute requires a certificate of merit in civil actions for "professional malpractice."<sup>134</sup> These actions involve professionals who are recognized by state statute as involved in certain occupations or who are regulated by state examining boards where licensure is predicated on specialized training.<sup>135</sup> The required certificate is an affidavit of an expert who is competent to testify and who sets forth specifically at least one relevant negligent act or omission and its factual basis.<sup>136</sup> Case law has established that affidavits are only needed when the defendants fail in "expert judgment and skill," and not where professionals fail in their "administrative, clerical, or routine" acts.<sup>137</sup> Safeguards are in place for statute of limitations problems.<sup>138</sup> Dismissal can occur if there is a failure to file, and pleading deficiencies can not be cured by amendment unless the claimant had the requisite affidavit available prior to filing and the failure to file was due to a mistake.<sup>139</sup> The statute so far has been regarded as procedural and thus applicable only to claims filed in Georgia state trial courts.<sup>140</sup>

v. Curreri, 837 F.2d 623 (6th Cir. 1988)).

134. GA. CODE ANN. § 9-11-9.1(a) (1993) (amended 1996); cf. N.J. STAT. ANN. § 2A:53A-27 (West Supp. 1997) (requiring expert affidavit after complaint and answer are filed "[i]n 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").

135. See *Lutz v. Foran*, 427 S.E.2d 248 (Ga. 1993). Professionals include licensed pharmacists, *Harrell v. Lusk*, 439 S.E.2d 896 (Ga. 1994); physical therapists, *Hodo v. General Hosp.*, 438 S.E.2d 378 (Ga. Ct. App. 1993); pest controllers, *Colston v. Fred's Pest Control, Inc.*, 436 S.E.2d 23 (Ga. Ct. App. 1993); and real estate brokers, *Allen v. Remax North Atlanta, Inc.*, 445 S.E.2d 774 (Ga. Ct. App. 1994).

136. See GA. CODE ANN. § 9-11-9.1(a) (1993) (amended 1996); cf. N.J. STAT. ANN. § 2A:53A-27 (West Supp. 1997) (requiring an affidavit of "an appropriate licensed person that there exists a reasonable probability" that defendant's care "fell outside acceptable professional or occupational standards").

137. *Lutz*, 427 S.E.2d at 250.

138. See GA. CODE ANN. § 9-11-9.1(b) (1993) (amended 1996).

139. See *id.* § 9-11-9.1(e).

140. See *Boone v. Knight*, 131 F.R.D. 609, 611 (S.D. Ga. 1990). The court cited the *Erie* doctrine and stated federal courts are bound only by substantive not procedural laws of the states. See *id.* at 610. Relying on *Hanna v. Plumer*, 380 U.S. 460 (1965), the court stated: "The *Hanna* decision makes clear that *Erie* does not require the federal courts to depart from the Federal Rules in cases where those rules conflict with state law, even if the state law is in some sense 'substantive.'" *Boone*, 131 F.R.D. at 611. The court found the statute at issue to be essentially a pleading requirement based partly on the fact that it was codified in the state's civil procedure code. See *id.* Additionally, the court found the pleading requirements to be in conflict with Federal

### G. California Childhood Sexual Abuse

In California, any plaintiff twenty-six or older who files a civil action for damages suffered from childhood sexual abuse must file two certificates with the complaint.<sup>141</sup> The plaintiff's attorney and a licensed mental health practitioner must each certify that there is a "reasonable" basis for the action.<sup>142</sup> The mental health practitioner must certify that she is not a party to the action, is not treating and has not treated the plaintiff, but has interviewed the plaintiff and has concluded "there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse."<sup>143</sup> The complaint may not be served upon any defendant until the court, in camera, reviews the certificates and determines "there is a reasonable and meritorious cause for the filing of the action."<sup>144</sup> Furthermore, the complaint initially must name any defendant only by a Doe designation.<sup>145</sup> Plaintiff may apply to the court for permission to substitute the actual name of any defendant by submitting "a certificate of corroborative fact executed by the attorney for the plaintiff."<sup>146</sup> This certificate must set forth the nature and substance of the corroborative fact, and, if the fact is supported by testimony of a witness or contents of a document, their identity and location

---

Rule 8, which requires the plaintiff to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* (quoting FED. R. CIV. P. 8).

141. See CAL. CIV. PROC. CODE § 340.1(e) (West 1986) (amended 1994) (requiring certificate of attorney and licensed mental health practitioner); cf. LA. REV. STAT. ANN. § 9:2800.9(B) (West Supp. 1997) (stating certificate of merit required by attorney and licensed mental health practitioner for every plaintiff 21 years of age or older in actions for sexual abuse of a minor or physical abuse of a minor resulting in permanent impairment, injury, or scarring). The California provision typically applies only to repressed memory claims as the limitations period on childhood sexual abuse claims where there were no repressed memories expires at the age of 26. CAL. CIV. PROC. CODE § 340.1(a) (West 1997).

142. CAL. CIV. PROC. CODE § 340.1(e)(1), (2) (West 1997).

143. *Id.* § 340.1(e)(2); cf. LA. REV. STAT. ANN. § 9:2800.9(B)(1) (West 1993) (amended 1995) (stating the expert consulted may not be a party to the litigation, but the provision does not address whether the expert may be the treating mental health practitioner).

144. CAL. CIV. PROC. CODE § 340.1(g) (West 1997).

145. See *id.* § 340.1(j). In Louisiana, the plaintiff may not name the defendant until the court has determined, in camera, based on the certificate of merit filed with the complaint, that there is a reasonable and meritorious cause for filing. The defendant's name may be added at such time and the duty to give notice then attaches. See LA. REV. STAT. ANN. § 9:2800.9(D) (West Supp. 1997).

146. CAL. CIV. PROC. CODE § 340.1(k) (West 1997).

must be indicated.<sup>147</sup> The court reviews the certificate of corroborative fact, *in camera*, and determines whether one or more facts corroborate the allegation; if so, the court allows the complaint to be amended to substitute the defendant's name.<sup>148</sup> The court maintains all certificates of corroborative fact "under seal and confidential from the public and all parties to the litigation."<sup>149</sup> Failure to file certificates of merit may result in a demurrer or a motion to strike,<sup>150</sup> and "violation" of the statute by an attorney may be grounds for professional discipline.<sup>151</sup> If a defendant against whom a certificate was filed prevails, the court may verify the plaintiff's compliance with the certification standards by requiring the plaintiff's attorney to disclose the name, address, and telephone number of the consulting expert.<sup>152</sup> The court reviews the information, *in camera*, to determine if there has been a failure to comply,<sup>153</sup> with noncompliance possibly resulting in an order that the offending party or party's attorney pay defendant's reasonable expenses, including attorney fees.<sup>154</sup>

#### IV. ATTRIBUTES OF EXPERT OPINION PLEADING

Because the use of certificates of merit involving an expert opinion is a relatively new form of special pleading requirement that is quite distinct from other special pleading rules, general discovery rules, and general pleading certification standards, some of the certificates of merit's most distinctive attributes will now be examined. These attributes include the breadth of coverage, the presentation of the expert opinion through consultation or report, the opportunity for prefiling information gathering, and the sanctions available upon noncompliance.

---

147. *See id.* § 340.1(k)(1).

148. *See id.* § 340.1(l).

149. *Id.* § 340.1(m).

150. *See id.* § 340.1(i).

151. *Id.* § 340.1(h). In Louisiana, a violation may be grounds for discipline against the attorney, but there is not a provision to disclose the identity of the consulting expert to establish failure to comply and sanction the party or party's attorney. *See* LA. REV. STAT. ANN. § 9:2800.9(E) (West Supp. 1997).

152. *See* CAL. CIV. PROC. CODE § 340.1(n) (West 1997).

153. *See id.*

154. *See id.*

### A. Coverage

Expert opinion pleading provisions usually apply to a narrow range of specific claims, although exemptions are sometimes recognized. There are several expert opinion pleading laws in the areas of professional negligence or malpractice, and their breadth of coverage and enumerated exceptions vary widely. For example, in Illinois a certificate of merit is required in all civil actions for "healing art malpractice," including actions involving "tort, contract or otherwise."<sup>155</sup> The relevant statute specifically includes claims involving the doctrine of *res ipsa loquitur*.<sup>156</sup> Case law has determined that Illinois healing art malpractice includes actions where a hospital negligently allowed a doctor to use a device on which the FDA had withdrawn approval,<sup>157</sup> where a hospital negligently restrained a partially paralyzed patient who fell out of bed,<sup>158</sup> and where an ambulance service negligently failed to provide equipment.<sup>159</sup> However, Illinois case law has also determined healing art malpractice does not include actions where a hospital negligently allowed liquid to accumulate on the floor,<sup>160</sup> where a nursing home resident fell out of a wheel chair while trying to get out on his own,<sup>161</sup> and where a wrongful death action was based on the death of an inmate.<sup>162</sup>

---

155. 735 ILL. COMP. STAT. ANN. 5/2-622(a) (West 1997). *But see* *Comfort v. Wheaton Family Practice*, 594 N.E.2d 381 (Ill. App. Ct. 1992) (holding no affidavit needed for claim against medical partnership based on vicarious liability for medical malpractice of employee and agent); *see generally supra* Part III.C.

156. *See* title 735, 5/2-622(c).

157. *See* *Kus v. Sherman Hosp.*, 561 N.E.2d 381 (Ill. App. Ct. 1990) (reasoning negligence was based on conduct requiring medical knowledge, and thus action was not for administrative hospital negligence).

158. *See* *Kolanowski v. Illinois Valley Community Hosp.*, 544 N.E.2d 821 (Ill. App. Ct. 1989) (reasoning medical judgment was involved, and that hospital's failure to provide adequate restraints, including bed rails, could be established only upon expert testimony).

159. *See* *Lyon by Lyon v. Hasbro Indus., Inc.*, 509 N.E.2d 702, 706 (Ill. App. Ct. 1987) (holding that a determination of which equipment is needed to facilitate emergency health care is "inherently one of medical judgment").

160. *See* *Mooney v. Graham Hosp. Ass'n*, 513 N.E.2d 633, 636 (Ill. App. Ct. 1987) (holding that healing art claims do not include "ordinary premises liability claims").

161. *See* *Owens v. Manor Health Care Corp.*, 512 N.E.2d 820 (Ill. App. Ct. 1987) (reasoning medical diagnosis or treatment was not involved, but rather only "custodial shelter," whose standards would not be established by expert testimony).

162. *See* *Freeman v. Fairman*, 916 F. Supp. 786 (N.D. Ill. 1996) (reasoning plaintiffs had not sued any physicians and that claims were founded on a breach of the jailor's duty of due care).

By contrast, the New York certificate of merit requirement for medical malpractice actions distinguishes negligence from medical malpractice claims,<sup>163</sup> exempts claims pursued pro se,<sup>164</sup> and excludes actions based solely on *res ipsa loquitur*.<sup>165</sup> And in Texas, a certificate of merit is required in "health care liability" claims,<sup>166</sup> but is limited to issues "relating to liability or causation."<sup>167</sup> In North Dakota, the expert opinion pleading standard covers "professional negligence" claims only against a North Dakota licensed "physician, nurse or hospital," and specifically excludes allegations as to "lack of informed consent, unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb or other part of the patient's body, or other obvious occurrence."<sup>168</sup>

Other certificate of merit provisions cover very broad areas of professional negligence and malpractice, and are often unclear about when certificates are needed. In Missouri, a certificate is required in any action against a health care provider that seeks damages for "personal injury or death on account of the rendering of or failing to render health care services."<sup>169</sup> Case law has determined this includes an action for libel<sup>170</sup> and an action for

163. See *Safier & Vogelman, M.D.s v. Calvin*, 579 N.Y.S.2d 548 (N.Y. App. Term. 1991) (holding doctor's failure to advise patient prior to surgery not to take aspirin on day of scheduled surgery required no certificate of merit as claim was for negligence rather than malpractice); cf. MICH. COMP. LAWS ANN. § 600-2912(d)(1) (West Supp. 1996) (requiring certificate of merit in actions alleging medical malpractice).

164. See N.Y. C.P.L.R. 3012-a(f) (McKinney 1991) (waiving the requirement for a "plaintiff who is not represented by an attorney").

165. See *id.* 3012-a(c).

166. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(a) (West Supp. 1997).

167. *Id.* § 13.01(j).

168. N.D. CENT. CODE § 28-01-46 (1991).

169. MO. ANN. STAT. § 538.225 (West 1988); see also, e.g., *Mullins v. Miller*, 796 S.W.2d 119 (Mo. Ct. App. 1990) (holding affidavit of merit needed, notwithstanding that dentist's obligation to supply dentures arose out of contract), *overruled on other grounds* by *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503 (Mo. 1991); compare FLA. STAT. ch. 766.104(1) (1986) (amended 1995) (addressing actions for "personal injury or wrongful death arising out of medical negligence, whether in tort or in contract"), and MINN. STAT. ANN. § 145.682(2) (West Supp. 1997) (requiring certificate of merit in action against health care provider alleging "malpractice, error, mistake, or failure to cure, whether based on contract or tort"), with *Mahoney*, 807 S.W.2d at 508 (holding that "implicitly" the statutory procedure does not require an expert opinion when the civil action is "untypical" in that it "does not require proof of standard of care").

170. See *Vitale v. Sandow*, 912 S.W.2d 121 (Mo. Ct. App. 1995) (holding libel action against doctor who diagnosed patient as "malingerer" requires expert affidavit as claim is for misdiagnosis).

false imprisonment.<sup>171</sup> Missouri case law has also determined a nursing home falls within the meaning of "health care provider."<sup>172</sup> Even broader and similarly uncertain, a Georgia statute requires an expert's affidavit for any damages action alleging "professional malpractice."<sup>173</sup>

Outside the professional negligence and malpractice arenas, there are fewer expert opinion pleading laws. But here too the scope of coverage is difficult to discern. For example, in Illinois, a certificate is required in any "product liability action" in which plaintiff seeks "damage for harm."<sup>174</sup> And in both California<sup>175</sup> and Louisiana,<sup>176</sup> certificates are required for certain civil claims involving "sexual abuse."

### B. *The Expert Opinion*

An important attribute of many special certificate of merit laws involves the expert opinion, which may be rendered after oral consultation or which, at times, must appear in a written document that is usually either in the form of a report or an affidavit. Within the requirements for an expert opinion, states have taken different approaches to the roles of the claimant or claimant's attorney, the identity of the expert, the qualifications of the expert, the matters certified or reviewed by the expert, the

---

171. See *St. John's Reg'l Health Ctr., Inc. v. Windler*, 847 S.W.2d 168 (Mo. Ct. App. 1993) (holding affidavit needed where there are allegations of false imprisonment against doctor and nurse in their capacities as health care providers). *But see Morrison v. St. Luke's Health Corp.*, 929 S.W.2d 898, 905 (Mo. Ct. App. 1996) (holding affidavit required for claim of false imprisonment only where plaintiff's "true claim" was false imprisonment caused by incorrect medical determination that she needed to be confined).

172. See *Ferrier-Harris, Ltd. v. Sanders*, 905 S.W.2d 123 (Mo. Ct. App. 1995).

173. GA. CODE ANN. § 9-11-9.1 (1987) (amended 1996); see, e.g., *Richmond Leasing Co. v. Cooper, Cooper, Maioriello & Stalnaker*, 428 S.E.2d 603 (Ga. Ct. App. 1993) (holding action against attorney for negligent legal representation in bankruptcy proceedings required expert affidavit).

174. 735 ILL. COMP. STAT. ANN. 5/2-623 (West 1996); see also *Tort Law*, *supra* note 76, at 705 (finding Illinois product liability law either "ineffective or quixotically burdensome" because of its "vagueness"). Illinois case law has determined an affidavit is not required when an employee of a truck repair company was injured by a truck on employer's premises even though product liability actions include those against persons who repair products. See *Gozenpud v. Crown Controls Corp.*, 897 F. Supp. 372 (N.D. Ill. 1995). The court reasoned the truck involved was not in the stream of commerce so the statute did not apply; see *id.* at 374; see also *supra* Part III.B.

175. See CAL. CIV. PROC. CODE § 340.1(d) (West 1986) (amended 1994); see also *supra* Part III.G.

176. See LA. REV. STAT. ANN. § 9:2800.9(B)(2) (West 1993) (amended 1995).

necessary strength of the expert's conviction, and the timing of the expert opinion.

Significant variations exist among the states regarding the roles of the plaintiff or plaintiff's attorney in the expert opinion process. For Illinois civil actions involving healing art malpractice, the plaintiff or plaintiff's attorney must submit an affidavit that she has consulted and reviewed the facts of the case with a qualified expert and has concluded on the basis of this review that "there is a reasonable and meritorious cause" for filing the action.<sup>177</sup> The plaintiff or plaintiff's attorney must also attach the expert's report to the pleading.<sup>178</sup> In contrast, the New York statute on certificates of merit in medical malpractice actions<sup>179</sup> and the California statute on certificates in professional negligence claims against architects, engineers, and land surveyors<sup>180</sup> usually require only the attorney's affidavit regarding the consultation,<sup>181</sup> and in the case of the New York statute, only when the plaintiff is represented by an attorney.<sup>182</sup> In California and New York, there is no provision requiring any consulting expert's report to be attached to a pleading, or even that a written report be made. In Missouri, the plaintiff or her attorney must file an affidavit stating she has obtained a written opinion of an expert but the written opinion need not be attached.<sup>183</sup> In other states, the plaintiff or plaintiff's attorney need not even submit a special affidavit certifying the merits or the consultation, but must only attach to a pleading an expert's report certifying the merits of the claim.<sup>184</sup>

177. 735 ILL. COMP. STAT. ANN. 5/2-622(a)(1) (West 1993) (amended 1996); *see also* LA. REV. STAT. ANN. § 9:2800.9(B)(1) (West 1993) (amended 1995) (requiring, in certain actions involving abuse of a minor, attorney to consult with expert and conclude "there is reasonable and meritorious cause for the filing"); *supra* Part III.C.

178. *See* 735 ILL. COMP. STAT. ANN. 5/2-622(a)(1) (West 1993) (amended 1996); LA. REV. STAT. ANN. § 9:2800.9(B) (West 1993) (amended 1995) (requiring, in certain actions involving abuse of a minor, attorney to attach her own certificate of merit as well as a merit certificate by an expert to petition).

179. *See* N.Y. C.P.L.R. 3012-a(a) (McKinney 1991).

180. *See* CAL. CIV. PROC. CODE § 411.35 (West Supp. I 1997).

181. *See id.* § 411.35(b)(1); N.Y. C.P.L.R. 3012-a(a) (McKinney 1991).

182. *See* N.Y. C.P.L.R. 3012-a(f) (McKinney 1991). *But cf.* CONN. GEN. STAT. ANN. § 52-190a(a) (West 1991) (requiring a certificate by attorney or party filing the action); TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(o) (West Supp. 1997) (requiring plaintiff proceeding pro se to file an affidavit).

183. *See* MO. ANN. STAT. § 538.225(1) (West 1988).

184. *See* ARIZ. REV. STAT. ANN. § 12-2602(A) (West Supp. 1996); GA. CODE ANN. § 9-11-9.1 (1987) (amended 1996); MICH. COMP. LAWS ANN. § 600.2912d (West Supp. 1996).



American legislatures have taken at least three basic approaches regarding the disclosure of an expert's identity. First, some jurisdictions require that the expert's report contain the name and address of the reviewing expert.<sup>185</sup> Second, other jurisdictions do not require that the claimant disclose the name of the reviewing expert, even though an expert has been consulted regarding the merits of the claim.<sup>186</sup> The third approach involves two steps. The claimant first files an affidavit that need not include the name of the expert, then, within 180 days after filing, the claimant must send each defendant a report containing the names of the experts who will testify at trial.<sup>187</sup> Here, it appears the claimant need not disclose the name of the reviewing expert unless that expert will testify. A variation on the third approach requires an expert report to be filed within 90 days of the filing of the pleading; within 180 days of the filing of the pleading the plaintiff must "furnish to counsel for each physician or health care provider one or more expert reports, with a curriculum vitae of each expert listed in the report."<sup>188</sup> With this approach, the expert report "is not admissible in evidence by a defendant"; the report can not be used in a deposition, trial, or other proceeding; and the defendant may not refer to the report for any purpose.<sup>189</sup>

Regarding the qualifications required of the certifying or consulting experts, some laws require higher qualifications than found under evidence rules, while others require similar qualifications. Consider Federal Rule of Evidence 702, which states a witness may be qualified as an expert "by knowledge, skill, experience, training, or education."<sup>190</sup> The Texas certificate of merit standard for healing art malpractice claims goes beyond this by requiring that the consulting expert in a health care liability case against a physician be a practitioner of medicine when the claim arose or when the testimony was given.<sup>191</sup> Similarly, for an

---

185. See, e.g., 735 ILL. COMP. STAT. ANN. 5/2-622 (West 1993) (amended 1996) (healing art malpractice); *id.* at 5/2-623 (product liability); V.I. CODE ANN. tit. 27, § 166i(d) (1975) (amended 1993) (requiring expert appointed by a governmental agency to review medical malpractice claims).

186. See, e.g., COLO. REV. STAT. ANN. § 13-20-602(3) (West 1989 & Supp. 1996); CONN. GEN. STAT. ANN. § 52-190a(a) (West 1991); N.Y. C.P.L.R. 3012-a(e) (McKinney 1991).

187. See MINN. STAT. ANN. § 145.682 (West 1989 & Supp. 1997).

188. TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(a), (d)(1) (West Supp. 1997).

189. *Id.* § 13.01(k).

190. FED. R. EVID. 702.

191. See TEX. REV. CIV. STAT. ANN. art. 4590i, § 14.01(a)(1) (West Supp. 1997).

Illinois certificate of merit in a healing art malpractice case, the consulting expert must have practiced or taught in the relevant area within the past six years.<sup>192</sup> In Missouri, the consulting expert must simply be a "legally qualified health care provider."<sup>193</sup> In Arizona, Michigan, and Georgia, the expert is defined under evidence law standards.<sup>194</sup> In Minnesota, the expert's qualifications "must provide a reasonable expectation that the expert's opinions could be admissible at trial."<sup>195</sup> In New York, the expert must be "licensed to practice in . . . any state."<sup>196</sup> For Illinois product liability claims, the expert must have "scientific, technical or other specialized knowledge regarding the product at issue or similar products" and must be "qualified to prepare the report."<sup>197</sup> And for California childhood sexual abuse claims, the consulting licensed mental health practitioner selected by the claimant simply may not be treating or have treated the claimant.<sup>198</sup>

Standards vary significantly regarding what the consulting expert must certify or review. For example, Illinois statutes are quite demanding. In the healing art malpractice area, Illinois requires the consulting expert to conclude that there is "cause" to file the action.<sup>199</sup> Furthermore, if the action involves *res ipsa loquitur*, the expert must conclude negligence occurred in the course of medical treatment;<sup>200</sup> if the action involves failure to inform a patient of consequences, the expert must conclude the defendant breached the standard of care.<sup>201</sup> The Illinois product liability certificate of merit standard requires even more. In varying settings, the expert must identify "specific defects in the product that have a potential for harm beyond that which would

192. See 735 ILL. COMP. STAT. ANN. 5/2-622 (a)(1)(ii) (West 1996).

193. MO. ANN. STAT. § 538.225 (West 1988).

194. See ARIZ. REV. STAT. ANN. § 12-2602(A) (West Supp. 1996) (requiring expert to be one competent to testify); GA. CODE ANN. § 9-11-9.1 (1987) (amended 1996) (requiring an expert to be one competent to testify); MICH. COMP. LAWS ANN. § 600.2912d (West Supp. 1996) (requiring that the expert "meet the requirements for an expert witness").

195. MINN. STAT. ANN. § 145.682(3)(a) (West Supp. 1997).

196. N.Y. C.P.L.R. 3012-a(a)(1) (McKinney 1991).

197. 735 ILL. COMP. STAT. ANN. 5/2-623(c) (West 1996); see also *supra* Part III.B.

198. See CAL. CIV. PROC. CODE § 340.1(e)(2) (West 1986) (amended 1994); see also *supra* Part III.G.

199. 735 ILL. COMP. STAT. ANN. 5/2-622(a)(1) (West 1993) (amended 1996).

200. See *id.* at 5/2-622(c).

201. See *id.* at 5/2-622(d).

be objectively contemplated by the ordinary user,"<sup>202</sup> determine defects were present in the product when it left the manufacturer's control,<sup>203</sup> determine that there was a feasible alternative design available that existed when the product left the manufacturer's control,<sup>204</sup> or determine the defect was the proximate cause of injury.<sup>205</sup> By contrast, in a Michigan medical malpractice action the expert must simply give a statement as to the standard of care, that the standard was breached, what compliance with the standard should have entailed, and the manner in which the breach was the proximate cause of injury.<sup>206</sup> The Georgia professional malpractice statute requires only that the expert set forth at least one negligent act or omission alleged to exist and its underlying factual basis.<sup>207</sup> In Florida, the written opinion of the expert, which need not be attached to the complaint, must state that there is an indication of "medical negligence."<sup>208</sup> And in Colorado, the expert opinion need only conclude that "the filing of the claim . . . does not lack substantial justification."<sup>209</sup>

Regarding the necessary strength of the expert's conviction, the standards range from quite demanding to very relaxed. Thus, in Illinois, experts involved in certifying healing art malpractice claims must find "there is a reasonable and meritorious

202. *Id.* at 5/2-623(a)(1)(A)(i).

203. *See id.* at 5/2-623(a)(1)(A)(ii).

204. *See id.* at 5/2-623(b).

205. *See id.* at 5/2-623(a)(1)(C); *see also, e.g.,* Irizarry v. Digital Equip. Corp., 919 F. Supp. 301 (N.D. Ill. 1996) (holding affidavit was inadequate in suit for an injury caused by a computer keyboard where the attorney merely consulted with an expert regarding the type of keyboard used, did not state any facts such as the frequency and duration of plaintiff's use of the keyboard, did not state the manner in which plaintiff used the keyboard, did not state other possible medical conditions that could have led to plaintiff's injuries, and where the expert report failed to determine the defective product was the proximate cause of plaintiff's injuries).

206. *See* MICH. COMP. LAWS ANN. § 600.2912d (West Supp. 1996); *see also* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(r)(6) (West Supp. 1997) (requiring that expert state standard of care, manner breached, and proximate cause); *cf.* MINN. STAT. ANN. § 145.682(3) (West 1989 & Supp. 1997) (requiring that expert state one or more defendants deviated from standard of care and by that action caused injury to plaintiff); MO. ANN. STAT. § 538.225 (West 1988) (requiring that expert conclude defendant breached the standard of care and such breach was the proximate cause of plaintiff's injury).

207. *See* GA. CODE ANN. § 9-11-9.1(a) (1987) (amended 1996); *see also* ARIZ. REV. STAT. ANN. § 12-2602(A) (West Supp. 1996) (requiring statement of facts on which each claim is based, factual basis for each claim, and causation).

208. FLA. STAT. ANN. § 766.104(1) (West Supp. 1997).

209. COLO. REV. STAT. ANN. § 13-20-602(3)(a)(II) (West Supp. 1996).

cause" for the filing.<sup>210</sup> Yet, experts who certify product liability claims must make specific identifications<sup>211</sup> and determinations.<sup>212</sup> By contrast, in Florida experts involved in reviewing medical negligence claims must simply find that "there appears to be evidence of medical negligence,"<sup>213</sup> while in Louisiana experts in child abuse civil claims must conclude "there is a reasonable basis to believe that the plaintiff has been subject to criminal sexual activity or physical abuse" during childhood.<sup>214</sup>

Standards also vary regarding the timing of the claimant's procurement of an expert opinion.<sup>215</sup> Occasionally, an expert opinion must be procured before a claim is even filed in a civil trial court because consultation with an expert is a prerequisite to the claimant's compelled prefiling notice of a proposed claim.<sup>216</sup> Where such presuit notice is not demanded, evidence of consultation with an expert often is required for any initial pleading.<sup>217</sup> The evidence involving the certification of the claim's merit may, but need not, involve a written expert report presented with the initial pleading.<sup>218</sup> By contrast, some certificate

210. 735 ILL. COMP. STAT. ANN. 5/2-622(a)(1) (West 1993) (amended 1996).

211. *See, e.g., id.* at 5/2-623(a)(1)(A)(i) (requiring that, in action based on strict liability in tort or implied warranty, expert report "identify" specific product defects having certain potential for harm).

212. *See id.* at 5/2-623(a)(1)(A)(ii) (requiring that, in action based on strict liability in tort or implied warranty, expert report contain a "determination" on product's unreasonable danger and defective condition at time product left manufacturer's control).

213. FLA. STAT. ANN. § 766.104(1) (West Supp. 1997); *see also* CONN. GEN. STAT. ANN. § 52-190a(a) (West 1991).

214. LA. REV. STAT. ANN. § 9:2800.9(B)(2) (West 1993) (amended 1995).

215. Procurement of an expert opinion is essential to a pleading seeking relief for such designated claims as medical malpractice, professional malpractice, product liability, and sexual abuse.

216. *See, e.g.,* FLA. STAT. ANN. § 766.203(2) (West Supp. 1997) (requiring that notification of intent to initiate medical malpractice litigation include claimant's "submission of a verified written medical expert opinion . . . which . . . shall corroborate reasonable grounds to support the claim of medical negligence"); *cf.* MICH. COMP. LAWS ANN. § 600.2912b(4) (West Supp. 1996) (stating that presuit notice of medical malpractice claim need not include expert opinion, but must contain claimant's statements on the applicable standard of care, its breach, and how the breach could have been avoided, all of which often are aided by consultation with an expert); V.I. CODE ANN. tit. 27, § 166i (1975) (amended 1993) (requiring review by governmental committee of experts before claim may be filed).

217. *See* 735 ILL. COMP. STAT. ANN. 5/2-623(a)(1) (West 1997) (requiring affidavit stating case was reviewed with a qualified expert).

218. *Compare, e.g., id.* at 5/2-622(a)(1) (amended 1996) (requiring that, for healing art malpractice claim, expert's written report be attached to a claimant's or a claimant's lawyer's affidavit accompanying a pleading), *with* N.Y. C.P.L.R. 3012-a(a), (e) (McKinney 1991) (requiring that, for medical, dental or podiatric claim, claimant's

of merit pleading standards require evidence of an expert report only some time shortly after the initial relevant pleading is presented, as within a certain time period from when the initial pleading was filed or when it was answered.<sup>219</sup>

### C. Prefiling Information Gathering

State certificate of merit standards differ in their treatment of the opportunity for prefiling information gathering allowed to the claimant or her lawyer to assist in complying with the heightened pleading demands. For example, many certificate of merit laws for medical malpractice actions allow the claimant an opportunity to copy her medical records and grant the claimant an extension of time in which to file the certificate if the records are not provided.<sup>220</sup> The Florida provision requires full cooperation in "providing informal discovery" related to the filing of the certificate of merit.<sup>221</sup> Other certificate of merit statutes do not mention an opportunity for prefiling information gathering.<sup>222</sup> In these states, lawmakers may have presumed that a person always has access to relevant information, such as to her medical records in medical malpractice actions or to the product in product liability actions.<sup>223</sup>

Some states require prefiling notice of medical malpractice claims and, within these notice requirements, provide for informal prefiling information gathering. In Michigan, for example, prefiling notice of a claim must usually occur 182 days prior to

---

attorney need only certify that there has been consultation with an expert, with no duty to disclose the expert's identity).

219. *See, e.g.*, COLO. REV. STAT. ANN. § 13-20-602(1) (West 1989 & Supp. 1996) (60 days after service of process); N.J. STAT. ANN. § 2A:53A-27 (West Supp. 1996) (60 days after answer to complaint); N.D. CENT. CODE § 28-01-46 (1991) (usually 3 months after action commenced).

220. *See* 735 ILL. COMP. STAT. ANN. 5/2-622 (West 1993) (amended 1996); MICH. COMP. LAWS ANN. § 600.2912d (West Supp. 1996); N.Y. C.P.L.R. 3012-a (McKinney 1991); *cf.* N.J. STAT. ANN. § 2A:53A-29 (West Supp. 1996) (stating that the expert affidavit required for "certain actions against licensed persons" is unnecessary where claimant provides sworn statement showing defendant has failed to provide relevant medical records).

221. FLA. STAT. ANN. § 766.104(1) (West Supp. 1997). The provision in section 2 allows plaintiff an extension of time to conduct a reasonable investigation. *See also supra* Part III.D.

222. *See e.g.* GA. CODE ANN. § 9-11-9.1 (1993) (amended 1996); 735 ILL. COMP. STAT. ANN. 5/2-623 (West 1997).

223. *But see* 735 ILL. COMP. STAT. ANN. 5/2-623(a)(2) (West 1993) (amended 1996) (allowing product liability claimant an extension of time in which to file the affidavit if defendant prevented inspection or nondestructive testing of the product at issue).

the filing of the action,<sup>224</sup> although the period can be reduced to 91 days under certain circumstances.<sup>225</sup> Within 56 days after giving notice, the statute commands that the claimant shall allow those notified parties access to medical records relevant to the claim and within the claimant's control.<sup>226</sup> After 56 days from receipt of notice, the defending health professional or facilities shall allow the claimant access to related records that are in their control.<sup>227</sup> Within 154 days of receipt of the notice of the claim, the health professionals or facilities must respond in writing on the factual basis for any defense to the claim, the applicable standard of care and the defendant's compliance, and why the alleged negligence was not the proximate cause of the claimant's injury.<sup>228</sup> A civil action may be commenced before the notice period expires if the health professional or facility informs claimant it does not intend to settle.<sup>229</sup> The statute of limitations for the civil action tolls during the notice period.<sup>230</sup>

Florida, in addition to requiring prefiling notice,<sup>231</sup> also requires a prenotice investigation of medical negligence claims and defenses.<sup>232</sup> The prenotice investigation must establish there are reasonable grounds to believe that any named defendant was negligent in the care of the claimant and that such negligence resulted in injury to the claimant.<sup>233</sup> The "reasonable grounds" must be corroborated by a "verified written medical expert opinion" submitted with the notice.<sup>234</sup> The prospective defendant or defendant's insurer must then conduct an investigation to ascertain whether there are reasonable grounds for the claim.<sup>235</sup> During the presuit phase the parties are compelled to "make discov-

---

224. See MICH. COMP. LAWS ANN. § 600.2912b(1), (4) (West Supp. 1996) (stating that, while the notice need not be accompanied by an expert report or by an affidavit of reasonable attorney inquiry or the like, it may be difficult to comply with the notice standards without consultation with an expert as the notice must speak to such issues as the manner in which the applicable standard of care was breached and the care which should have been given).

225. See *id.* § 600.2912b(3).

226. See *id.* § 600.2912b(5).

227. See *id.*

228. See *id.* § 600.2912b(7).

229. See *id.* § 600.2912b(9).

230. See *id.* § 600.5856(d).

231. See FLA. STAT. ANN. § 766.106 (West Supp. 1997).

232. See *id.* § 766.203.

233. See *id.* § 766.203(2).

234. *Id.*

235. See *id.* § 766.203(3).

erable information available without formal discovery," with failure to do so constituting "grounds for dismissal of claims or defenses ultimately asserted."<sup>236</sup> Informal discovery can be used to obtain unsworn statements,<sup>237</sup> documents or things,<sup>238</sup> or physical and mental examinations.<sup>239</sup> Requests must be in writing with copies sent to all parties.<sup>240</sup> No work product created in the presuit process is discoverable or admissible "in any civil action for any purpose by the opposing party."<sup>241</sup> All participants have immunity from civil liability that may arise from acts during the presuit screening process.<sup>242</sup>

#### D. Sanctions

A final attribute of certificate of merit laws involves sanctions for noncompliance. Sanctions of varying types may be imposed on the party, the party's attorney, or the expert for a failure to file. The most serious sanction against a party is dismissal of the pleading. In both the Illinois healing art malpractice<sup>243</sup> and product liability certificate of merit provisions,<sup>244</sup> "failure to file . . . shall be grounds for dismissal."<sup>245</sup> Yet, reviewing courts often liberally construe those provisions to allow leave to amend.<sup>246</sup> The Missouri statute provides the court may dismiss the complaint without prejudice if the required affidavit is not filed.<sup>247</sup> In Minnesota there is a mandatory dismissal with prejudice if the required affidavit is not filed within sixty days of demand.<sup>248</sup> Some states also subject the noncomplying party to monetary sanctions.<sup>249</sup> In other jurisdictions, plaintiff's attorneys

---

236. *Id.* § 766.106(6).

237. *See id.* § 766.106(7)(a).

238. *See id.* § 766.106(7)(b).

239. *See id.* § 766.106(7)(c).

240. *See id.* § 766.106(8).

241. *Id.* § 766.106(5).

242. *See id.*

243. *See supra* Part III.C.

244. *See supra* Part III.B.

245. 735 ILL. COMP. STAT. ANN. 5/2-623 (West 1996); *id.* at 5/2-622 (amended 1996).

246. *See Irizarry v. Digital Equip. Corp.*, 919 F. Supp. 301, 305 (N.D. Ill. 1996).

247. *See* MO. ANN. STAT. § 538.225 (West 1988).

248. *See* MINN. STAT. ANN. § 145.682(6) (West 1989 & Supp. 1997); *cf.* GA. CODE ANN. § 9-11-9.1 (1987) (amended 1996) (stating that dismissal cannot be cured by amendment unless failure to file was a mistake and plaintiff had the affidavit prior to filing).

249. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/2-622 (West 1993) (amended 1996) (providing that, for certificates containing bad faith allegations, a party, a party's attorney, or both may be subject to money sanctions in the amount of reasonable costs

are subject to monetary sanctions under some laws,<sup>250</sup> while still other laws indicate noncompliance "may constitute unprofessional conduct," which could lead to "discipline against the attorney."<sup>251</sup> Some certificate of merit provisions include immunity for the expert in any civil action that may result in connection with filing the certificate of merit.<sup>252</sup> Perhaps where immunity is not expressly recognized, an expert may be subject to liability in connection with filing the expert report.

## V. CONCERNS ABOUT EXPERT OPINION PLEADING

Certificates of merit involving an expert opinion that appear within special pleading requirements raise two fundamental questions. First, should there ever be such certificates? Second, assuming there will be some certificates, how should they operate?

### A. *Rationales Disfavoring Expert Opinion Pleading Standards*

There are at least three major concerns suggesting why certificates of merit involving an expert opinion should never be employed or should be employed sparingly. They are the lack of an adequate empirical basis justifying the use of such provisions, the lack of legislative authority, and the infringement of constitutional rights.

#### 1. *No empirical basis?*

New certificate of merit statutes should be enacted, if at all, only after additional and adequate empirical bases justifying their use have been established. To date, tort reform efforts have been based largely on anecdotal reports, which are usually unsupported empirically and thus create risks that new norms will not address the real problems.<sup>253</sup> One example of anecdotal justi-

---

and attorney's fees of the defending party).

250. See, e.g., MINN. STAT. ANN. § 145.682 (West 1989 & Supp. 1997); cf. 735 ILL. COMP. STAT. ANN. 5/2-622 (West 1993) (amended 1996) (providing for sanctions against attorney or party when affidavit is made "without reasonable cause" and "found to be untrue").

251. LA. REV. STAT. ANN. § 9:2800.9(E) (West 1993) (amended 1995).

252. See, e.g., 735 ILL. COMP. STAT. ANN. 5/2-622(f) (West 1993) (amended 1996).

253. See generally Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1097 (1996) [hereinafter *Real World Torts*] (arguing "common-sense" assertions "largely pass by the real problems of the tort system and offer flawed and harmful prescriptions for change based on a misreading of the patterns, trends and



fiction for tort reform is found in the product liability area. Powerful narratives about “outrageous” lawsuits, like the one based on spilled coffee at a fast food restaurant, have convinced many Americans that the civil justice system has spun out of control.<sup>254</sup> Such narratives have prompted strong political discourse supporting significant product liability reform, where product liability claims make up only a small portion of tort cases nationally.<sup>255</sup> Aside from relying on anecdotes, product liability reformers often cite survey reports of manufacturers as well as the perceptions of CEOs on the effects of litigation, while ignoring other surveys that “totally reject[] the notion that there [is] a major liability crisis.”<sup>256</sup> More fruitful public debate and reforms would result if empirical studies were more objectively conducted and more comprehensively considered. Empirical data may reveal there is no need for certificates of merit. In the area of product liability, “serious investigation” arguably has revealed litigation does not have a “significant effect on America’s prosperity.”<sup>257</sup>

In the area of medical malpractice, a major purpose of pleading reform is to reduce costs to the consumer by reducing expenditures on “defensive medicine” in the form of unnecessary tests and treatment.<sup>258</sup> But significant empirical evidence demonstrating the benefits of certificate of merit reforms in medical malpractice actions is still lacking,<sup>259</sup> although there appear to be significant costs incurred. Further, legislative initiatives occur on the state front, though studies of what is happening in the relevant state usually are unavailable and are not commissioned prior to debates on reform. Can it truly be imagined that frivolous medical malpractice claims are more common in Illinois, where special certificate legislation has been implemented, than in Wisconsin, where it has not; or that California’s current law reflects a greater incidence of frivolous claims against “architects, engineers and land surveyors” than against doctors?<sup>260</sup>

---

effects of litigation”).

254. This perception has “displayed a remarkable resilience in occupying the public forum and setting the terms of public debate.” *Id.* at 1155.

255. *See id.* at 1109.

256. *Id.* at 1148.

257. *Id.* at 1145.

258. *Id.* at 1151.

259. *See id.* at 1149-53 (reviewing studies on medical malpractice reforms).

260. Compare CAL. CIV. PROC. CODE § 411.30 (West 1978) (repealed 1989) (1978 law requiring certificate of merit in medical malpractice action), with CAL. CIV. PROC. CODE

As President Clinton noted in the Presidential Debates,<sup>261</sup> tort reform efforts must aim to deter frivolous claims without denying justice for claims with merit. It would be unfortunate to initiate significant new pleading reforms without understanding their effects, with the distinct prospect of reducing the rights of the injured, and without some assurance that there will be a reduction in the transaction costs or in harm to defendants.<sup>262</sup>

## 2. *Proper exercise of legislative authority?*

As special certificate of merit requirements usually operate under statute and alter either the general pleading or the general attorney conduct standards, or both, formulated in state court rules, at least some of the requirements may be challenged as undue infringements on state court rulemaking authority. The challenges are most apt to be successful where the state constitution expressly delegates to the state court broad rulemaking powers over trial court practices or over the legal profession, with the legislative role in civil procedure lawmaking encompassing, at best, only oversight of judicial rulemaking initiatives and not independent initiatives. Such separation of powers challenges are illustrated by recent case developments in Ohio and Illinois.

In Ohio, legislation at one time required that any pleading setting forth "a medical, dental, optometric, or chiropractic claim" be supported by "documentation," usually involving an affidavit by a claimant's attorney or by a pro se claimant, indicating there had been consultation with an expert who determined, along with the affiant, that there was "a reasonable cause" for the claim.<sup>263</sup> As the affidavit was a prerequisite to jurisdiction, its absence would lead to dismissal.<sup>264</sup> However, in *Hiatt v. Southern Health Facilities, Inc.*,<sup>265</sup> the Ohio Supreme Court recognized that the Ohio Constitution gives the court rulemaking authority over "practice and procedure in all courts of the state," limited only by the power of the general assembly

---

§ 411.35 (West Supp. 1997) (1979 law requiring certificate of merit in professional negligence action against architect, engineer or land surveyor operative in the early 1990s).

261. See *First Debate*, *supra* note 1; *Second Debate*, *supra* note 1.

262. See *Real World Torts*, *supra* note 253, at 1142.

263. OHIO REV. CODE ANN. § 2307.42(c)(1)(a)(I) (Anderson 1995).

264. See *id.* § 2307.42(c)(3).

265. 626 N.E.2d 71 (Ohio 1994).

to adopt "a concurrent resolution of disapproval" of a proposed high court rule.<sup>266</sup> The court also noted that the Ohio Constitution declares that "all laws" in conflict with such a high court general pleading rule "shall be of no further force or effect."<sup>267</sup> The special certificate requirement was found to be in conflict with the general pleading rule declaring that pleadings "need not be verified or accompanied by affidavit" except "when otherwise specifically provided" by high court rules.<sup>268</sup> Therefore, the legislation was held invalid.<sup>269</sup>

Illinois legislation similarly requires that a pleading setting forth a claim arising out of "medical, hospital or other healing art malpractice" usually be accompanied by an affidavit of the claimant's attorney or a pro se claimant indicating that the affiant has "consulted and reviewed the facts" with a qualified health professional and that both the consultant and the affiant have determined "that there is a reasonable and meritorious cause" for the filing.<sup>270</sup> However, in contrast to Ohio, in Illinois there is no explicit state constitutional provision recognizing and guiding state court civil procedure rulemaking. In fact, the Illinois high court has consistently found that "the legislature may, consistent with the separation of powers principle, impose requirements governing matters of procedure and the presentation of claims," even where noncompliance with these requirements can result in claim dismissal.<sup>271</sup> Further, the Illinois general pleading rule, unlike its Ohio counterpart, specifically states that legislation may provide that pleadings "be verified or accompanied by affidavit."<sup>272</sup> Therefore, in contrast to the Ohio

---

266. OHIO CONST. art. IV, § 5(B). For a review of Ohio Supreme Court rulemaking authority, see Jeffrey A. Parness & Christopher C. Manthey, *Public Process and Ohio Supreme Court Rulemaking*, 28 CLEV. ST. L. REV. 249 (1979).

267. OHIO CONST. art. IV, § 5(B).

268. OHIO R. CIV. P. 11.

269. See *Hiatt*, 626 N.E.2d at 71.

270. 735 ILL. COMP. STAT. ANN. 5/2-622(a)(1) (West 1993) (amended 1996).

271. *DeLuna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139, 1146 (Ill. 1992). For a review of Illinois Supreme Court rulemaking authority, see Jeffrey A. Parness and Bruce Elliot Keller, *Increased and Accessible Illinois Judicial Rulemaking*, 8 N. ILL. U. L. REV. 817 (1988).

272. ILL. SUP. CT. R. 137. Had the healing art malpractice provisions on attorney affidavits been deemed as a means of assuring compliance with ethical constraints on attorneys, then they may have been subject to characterization as provisions on attorney discipline which improperly transgressed upon the high court's "sole authority to regulate and discipline attorney conduct." *People ex rel. Brazen v. Finley*, 519 N.E.2d 898, 901 (Ill. 1988).

legislation, the Illinois law was sustained by the Illinois Supreme Court as a rational provision governing trial court procedure in *DeLuna v. St. Elizabeth's Hospital*<sup>273</sup> upon a constitutional challenge founded, in part, upon separation of powers concerns.<sup>274</sup>

The Ohio and Illinois precedents demonstrate state statutory certificate of merit requirements may fall outside the scope of proper legislative authority as infringements on judicial rulemaking authority. Transgressions might occur in the trial court practice and procedure area or in the regulation of the practice of law area, as the requirements typically address pleading standards<sup>275</sup> and demand certain prefilings attorney work product.<sup>276</sup>

Other separation of powers challenges have been raised to certain special certificate of merit requirements. For example, undue infringement on judicial functions was alleged in *DeLuna* regarding the law that requires that, prior to filing a healing art malpractice claim, a consulting health professional prepare a

273. 588 N.E.2d 1139, 1147 (Ill. 1992). By contrast, a dissenting justice characterized the law as governing legal and factual decision making on the merits of the claim, unduly burdensome on "the judiciary's exercise of its inherent judicial powers," and thus unconstitutional under the doctrine of separation of powers. *Id.* at 1150-51 (Clark, J., dissenting).

274. *See id.* at 1144-45 (finding no conflict between legislation and high court rule and no improper grant of a judicial power to a health care professional); *see also* *McAlister v. Schick*, 588 N.E.2d 1151, 1156 (Ill. 1992) (finding legislation may regulate a trial court's practice so long as it does not dictate how it must adjudicate and apply the law and it does not conflict with judicial control over procedures).

275. Beyond Ohio, where earlier or later laws in conflict with a rule on pleadings accompanied by affidavits have no force or effect, and Illinois, where later laws on pleadings accompanied by affidavits may have effect though different from an earlier rule, there are other variations in the legislative/judicial interplay over trial court practice and procedure standards. *See, e.g.*, FLA. CONST. art. V, § 2(a) (stating Supreme Court practice and procedure rules may be adopted without referral to the legislature, but such rules may be repealed by general law enacted by two-thirds vote of membership of each house of the legislature); MONT. CONST. art. VII, § 2(3) (stating practice and procedure rules subject to legislative disapproval in either of the two sessions following promulgation).

276. If certificates of merit are characterized as lawyer conduct standards, infringements generally will more likely be found, as state high courts are more likely to possess greater, if not exclusive, rulemaking authority. Thus, in Ohio, proposed practice and procedure rules for trial courts are submitted for General Assembly review while professional responsibility rules are not. *See* OHIO CONST. art. IV, § 5. And in Illinois, the high court claims it has "sole authority to regulate and discipline attorney conduct" arising from its inherent power, *Brazen*, 519 N.E.2d at 901, while recognizing its trial court practice and procedure rules may be supplemented by statutes, as long as they do not dictate how a court "must adjudicate and apply the law or conflict with a court's right to control its procedures." *McAlister*, 588 N.E.2d at 1156.

report determining the claim is meritorious. A dissenting justice found the provision unconstitutional, as it empowered the expert to assess the merits of a claim, an inherently judicial function, with the absence of such an assessment necessarily resulting in a dismissal.<sup>277</sup> The majority, however, found no exercise of judicial power as the expert was not asked to render views concerning the outcome of the suit, but was only asked to do what would otherwise be done at trial, though the majority conceded an expert may not always be needed at trial.<sup>278</sup>

### 3. *Infringement on constitutional rights?*

Beyond separation of powers issues involving state court rulemaking and judicial functions, individual rights concerns occasionally have been raised in challenges to certificate of merit requirements. Relevant constitutional rights arise under both the federal and state constitutions. To date, these challenges have been largely unsuccessful.<sup>279</sup>

Federal constitutional challenges often involve equal protection claims since certificate of merit standards treat differently malpractice, product liability, or other specified claimants from all other claimants. To secure a stricter standard of scrutiny, challengers have urged that certificate of merit standards unduly burden such constitutional interests as the right of access to the courts or the right to a remedy for all wrongs.<sup>280</sup> These pleas to date have failed, meaning that a rational basis test has been employed.<sup>281</sup> In assessing certificate of merit standards, courts have had “no difficulty” in concluding there is a rational relation-

---

277. See *DeLuna*, 588 N.E.2d at 1150 (Clark, J., dissenting).

278. See *id.* at 1144 (viewing the provision as merely accelerating the time by which the expert opinion must be obtained, though conceding that a report is needed “even in cases in which expert testimony might not be necessary”). A similar constitutional ruling on judicial power is found in *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 508 (Mo. 1991) (en banc). For an example of an expert performing a judicial function, see *Wright v. Central DuPage Hospital Association*, 347 N.E.2d 736 (1976) (requiring panel of a lawyer, judge, and physician to determine any liability and compensation before a medical malpractice claim could be tried to a jury unconstitutionally vested judicial power in nonjudicial personnel).

279. See, e.g., *DeLuna*, 588 N.E.2d at 1146; *McAlister*, 588 N.E.2d at 1154; *Mahoney*, 807 S.W.2d at 511.

280. See, e.g., *DeLuna*, 588 N.E.2d at 1146 (right of access to courts); *McAlister*, 588 N.E.2d at 1157 (right to a remedy); *Mahoney*, 807 S.W.2d at 511, 512 (access to courts value).

281. See *DeLuna*, 588 N.E.2d at 1146; *McAlister*, 588 N.E.2d at 1154; *Mahoney*, 807 S.W.2d at 511.

ship to a legitimate governmental interest, with legislative goals involving the reduction of "the number of frivolous actions that might otherwise be filed."<sup>282</sup> In deeming the standards rational, reviewing courts typically pay little attention to the inadequacy or inconsistency in the empirical bases, seemingly assuming the rationally stated goals are achieved.<sup>283</sup>

State constitutional challenges to certificate of merit standards, unlike their federal counterparts, often involve fundamental rights expressly recognized in state bills of rights that extend beyond equal protection. Unsuccessful challenges in Illinois have involved such fundamental rights as "the right . . . to apply for redress of grievances";<sup>284</sup> the right to "find a certain remedy in the laws for all injuries and wrongs" received to a "person, privacy, property or reputation";<sup>285</sup> and the "right of trial by jury."<sup>286</sup> To date, certificate of merit requirements elsewhere have withstood similar challenges.<sup>287</sup>

### *B. Problems with Certain Expert Opinion Pleading Standards*

Assuming new forms of expert opinion pleading will be debated, if not widely accepted, there are at least four major issues which deserve particular attention.<sup>288</sup> They involve the claims

282. *DeLuna*, 588 N.E.2d at 1147; see also *Mahoney*, 807 S.W.2d at 512-13 (finding legislature could have reasonably decided certificate of merit mandate in health care provider cases "would ameliorate the cost and availability of health care services").

283. Federal due process rights are also usually raised, as are state equal protection and due process rights, with similar results. See *McAlister*, 588 N.E.2d at 1153-54; *Mahoney*, 807 S.W.2d at 511.

284. ILL. CONST. art. I, § 5; cf., e.g., *DeLuna*, 588 N.E.2d at 1146 (finding that the provision does not "burden[] a litigant's right of access to the courts under" either the federal or Illinois constitutions).

285. ILL. CONST. art. I, § 12; see, e.g., *DeLuna*, 588 N.E.2d at 1146 (holding Illinois certificate of merit law for healing art malpractice claims "does not unconstitutionally infringe on litigants' right of access to the courts").

286. ILL. CONST. art. I, § 13; see, e.g., *Mahoney*, 807 S.W.2d at 507-09; cf. *DeLuna*, 588 N.E.2d at 1149 (Clark, J., dissenting) (finding Illinois certificate of merit law for healing art malpractice claims that mandates an expert deem the claim "meritorious" violates separation of powers as the expert performs a function "normally reserved for the trier of fact").

287. See, e.g., *Mahoney*, 807 S.W.2d at 507-10 (addressing state constitutional jury trial and access to court rights); *Royle v. Florida Hosp.-E. Orlando*, 679 So. 2d 1209 (Fla. Dist. App. 1996) (state constitutional right of access to courts).

288. There are other significant issues as well. One involves the circumstances under which the expert opinion pleading laws of one jurisdiction may be deemed substantive and thus applicable in the courts of other jurisdictions. Cf. 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)

covered, the nature of any expert opinion required, the relationship of certificates of merit to other pleading standards, and the opportunity for prefilng discovery.

### 1. Coverage

Significant problems with some special certificate of merit standards involve issues of coverage, which include ambiguity over what civil actions are covered, overinclusiveness, and underinclusiveness. Particular attention should be directed to these issues by legislators considering new special certificate of merit standards.

An analysis of contemporary special certificate of merit standards reveals that it is often unclear when a certificate is required. Use of broad statutory language implicating "all actions" for healing art malpractice, "whether in tort, contract or otherwise,"<sup>289</sup> or "any action" alleging "professional malpractice,"<sup>290</sup> prompt uncertainty. In one state, certificate of merit standards demand that negligence claims against doctors be distinguished from medical malpractice claims.<sup>291</sup> In light of the provisions for harsh sanctions when claimants fail to comply,<sup>292</sup> ambiguities pose serious problems.

Another problem with special certificate of merit standards is their overinclusiveness. For example, in a product liability action, is an expert opinion needed to certify that a certain car should not explode upon slight impact and that such an explosion was the proximate cause of a claimant's injury where the car model has prompted thousands of similar claims and where the defendant's position on the defects in its cars may even be favorable to claimants? Another example of overinclusiveness can be illustrated by applying the Illinois healing art malpractice law<sup>293</sup> to the well-known case of *Hawkins v. McGee*.<sup>294</sup> In Illinois,

---

(opining the statutes are substantive, though finding the cases split).

289. 735 ILL. COMP. STAT. ANN. 5/2-622(a) (West 1993) (amended 1996).

290. GA. CODE ANN. § 9-11-9.1 (1987) (amended 1996).

291. See *Safier & Vogelman M.D.s v. Kalvin*, 579 N.Y.S.2d 548 (N.Y. App. Term. 1991) (finding medical malpractice, but not negligence, claims fall within New York law).

292. See, e.g., *Miller v. Gupta*, 672 N.E.2d 1229 (Ill. 1996) (holding failure to file affidavit in medical malpractice case leads to dismissal even though failure was due to defendant's inadvertent destruction of x-rays, yet cause of action for spoliation of evidence might be pleaded).

293. See *supra* Part III.B.

294. 146 A. 641 (N.H. 1929).

an expert report is required in every action alleging "healing art malpractice" whether in "tort, contract or otherwise."<sup>295</sup> Seemingly, an expert report would be required in *Hawkins*, where the defendant doctor allegedly breached the warranty that the small scar on the plaintiff's hand would be as good as new after cosmetic surgery, and the surgery instead resulted in a hairy, claw-like hand.<sup>296</sup> Many such "malpractice" claims should not require an expert to determine the defendant breached the contemplated standard of care. In rejecting a challenge to the Illinois healing art malpractice law, the *DeLuna* court did acknowledge that a health professional's report would be required "even in cases in which expert testimony might not be necessary at trial,"<sup>297</sup> but seemed unfazed as it said this merely reflected "the legislature's assessment of the statute's desired scope."<sup>298</sup> By contrast, some states have acted more responsibly by expressly limiting their certificate of merit requirements to claims for which "expert testimony would be necessary to establish a prima facie case."<sup>299</sup>

Beside uncertainty and overinclusiveness, underinclusiveness is occasionally a problem as well. For example, in North Dakota "an admissible expert opinion to support the allegation of professional negligence" is usually needed shortly after a civil action is commenced, but only if the defendant is a "physician, nurse or hospital licensed by" North Dakota.<sup>300</sup> The aim is not to better regulate in-state licensed professionals, as the requirements include no duty to report alleged negligence to state licensing officials and appear in a statutory section on civil judicial procedure. Are North Dakota claimants less likely to pursue meritless claims against nonresidents than they are against residents?

## 2. *The expert opinion*

Significant problems with some special certificate of merit requirements involve the circumstances under which the expert opinion is secured and presented. For example, issues arise re-

295. 735 ILL. COMP. STAT. ANN. 5/2-622(a) (West 1993) (amended 1996).

296. See *Hawkins*, 146 A. at 643.

297. *DeLuna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139, 1144 (Ill. 1992) (citing *Walski v. Tiesenga*, 381 N.E.2d 279 (Ill. 1978), where the court held no expert testimony was needed on standard of care if the physician's conduct was grossly negligent or the treatment was so common that a lay person could readily appraise it).

298. *Id.*

299. COLO. REV. STAT. ANN. § 13-20-601 (West 1989).

300. N.D. CENT. CODE § 28-01-46 (1991).



garding the timing of any needed expert report or filing. The proposition that expert opinion pleading requires little more than an expedited presentation of evidentiary materials which will inevitably be forthcoming<sup>301</sup> seems questionable. This was recognized in the Model Uniform Product Liability Act of 1979,<sup>302</sup> which did not require early filings of expert opinions by claimants but which did allow the court to conduct postfiling, pretrial evaluations of experts selected by the parties.<sup>303</sup> The purpose of such evaluations was to weed out biased and unqualified experts.<sup>304</sup> The proponents of the act evidently found it would not be cost efficient to utilize the procedure in all cases, deeming it most appropriate in cases where it was more likely there would be attempts at presenting unqualified witnesses. The rationales for a pretrial judicial evaluation of experts and for an expert report to be attached to an initial complaint may be similar,<sup>305</sup> but the latter carries additional significant costs.<sup>306</sup> Consider a product liability lawsuit under the Illinois certificate of merit law. The plaintiff must find a qualified expert to prepare the usually lengthy affidavit. Yet a potential defendant, in a later answer, may be willing or obligated to admit to the validity of many, if not all, of the expert's opinions. The resulting waste of time and money could be avoided under the approach of the 1979 Model Act, which allows disclosure of experts to be compelled

---

301. See *DeLuna*, 588 N.E.2d at 1144 (deeming requirement of health care professional's certification at time of initial pleading "merely" to accelerate "the time by which an expert opinion must be obtained").

302. Notice, 44 Fed. Reg. 62,714, 62,746 (1979).

303. See *id.*

304. See *id.* at 62,746-47.

305. The rationales both involve the elimination of frivolous claims and defenses and a more expeditious claim resolution process.

306. By requiring a plaintiff to obtain an expert opinion before filing a complaint, litigation costs will undoubtedly increase for plaintiffs and may prohibit some plaintiffs from seeking redress. *But cf.* *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997) (stating that the section of the Prison Litigation Reform Act which requires prisoners proceeding in forma pauperis to pay a partial filing fee before filing a lawsuit is a legitimate and constitutional exercise of Congressional power to reduce frivolous lawsuits). The court's reasoning in *Roller* may apply as well to the argument that the certificate of merit provision denies court access rights to indigent plaintiffs, as the court stated:

Those living outside of prisons cannot file a lawsuit every time they suffer a real or imagined slight. Instead, they must weigh the importance of redress before resorting to the legal system. If a prisoner determines that his funds are better spent on other items rather than filing a civil rights suit, "he has demonstrated an implied evaluation of that suit."

*Id.* at 233 (quoting *Lumbert v. Illinois Dept. of Corrections*, 827 F.2d 257, 260 (7th Cir. 1987)).

usually only after the initial pleadings have been completed, typically when the court actually finds that money or time could be saved. Filing expert opinion disclosures later in the action would also ameliorate some legitimate concerns over the breadth of coverage, which could be resolved in an adversarial setting in advance of the procurement of any expert, as well as lessen the need for possibly successive expert opinions as claims are amended to conform with information gleaned from pleadings and discovery.

Another problem with the expert opinion occurs when the testimony of the expert preparing the opinion must be admissible.<sup>307</sup> It is difficult for trial courts very early in civil litigation to make such a determination. Regarding the trial court's "gatekeeping" responsibility in deciding upon the admissibility of expert scientific testimony, the U.S. Supreme Court has said: "[T]he trial court judge must determine at the outset . . . whether the reasoning or methodology underlying the testimony is scientifically valid . . . [and] whether that reasoning or methodology properly can be applied to the facts in issue."<sup>308</sup> Such determinations at the outset of civil litigation are problematic because they may lead to excessive satellite litigation,<sup>309</sup> as was often the case under the 1983 version of Federal Civil Procedure Rule 11.<sup>310</sup> Additionally, the relevant factual issues may not have surfaced at such a preliminary stage.

### 3. *Relationship to other pleading laws*

Courts considering challenges to special certificate of merit requirements usually note that their purposes "parallel"<sup>311</sup> or are

307. See, e.g., N.D. CENT. CODE § 28-01-46 (1991) (requiring "an admissible expert opinion to support the allegation of professional negligence").

308. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-93 (1993).

309. See, e.g., *Duran by Duran v. Cullinan*, 677 N.E.2d 999, 1004 (Ill. Ct. App. 1997). In determining whether expert's methodology of extrapolation from scientific materials is generally accepted within the scientific community, the trial court was faced with two competing affidavits. On the use of technical advisors by trial court judges undertaking gatekeeping responsibilities regarding expert testimony, see generally Comment, *Improving Judicial Gatekeeping: Technical Advisors and Scientific Evidence*, 110 HARV. L. REV. 941 (1997).

310. In the note accompanying the 1993 amendment to the 1983 version of Rule 11, the Advisory Committee said the Rule has been altered to attempt to reduce the large number of motions for sanctions presented under the old Rule, most of which were denied. See the Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401, 523 (1993) (Advisory Committee letter).

311. *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 508 (Mo. 1991) (en

the "same"<sup>312</sup> as the purposes of the otherwise applicable general pleading laws. Both attempt to promote good faith and reasonable presentation of claims in order to eliminate or curtail frivolous actions.<sup>313</sup> Occasionally, courts even suggest that the special certificate of merit requirements would usually be dictated by the general pleading laws even if special provisions had never been enacted or were repealed.<sup>314</sup>

Courts generally overstate the similarities and belittle, or simply avoid, key differences between special certificate of merit laws and general pleading laws. For example, in Illinois in the *DeLuna* case, the state court focused on the similarities between the "burdens" on pleaders of the special and general laws,<sup>315</sup> seemingly finding that the major differences in the "consequences of noncompliance" were inconsequential, though dismissal was far more likely in the certificate of merit setting.<sup>316</sup> In deeming the burdens "similar," the court belittled key differences between pleading evidence and nonevidence; between pleading evidentiary and ultimate facts; and between generally pleading the opinion work product of a claimant's lawyer on the merits of a claim and specially pleading a nonattorney, testifying expert's opinion assessing both ultimate and evidentiary facts. Such differences are key in that certificate of merit requirements are more likely to lock claimants into their early positions, thus limiting later opportunities to amend pleadings or to alter projected offers of proof, as well as to lock them into their testifying experts.

---

banc).

312. *DeLuna v. St. Elizabeth's Hosp.*, 588 N.E.2d 1139, 1145 (Ill. 1992).

313. *Compare id.* (stating the purpose of special certificate of merit requirements is to prevent the "misuse of the judicial process in order to wrest a settlement from the adversary by the threat of the exaggerated cost of defense" by controlling "ungrounded claims"), *with Mahoney*, 807 S.W.2d at 507-08 (stating the purpose of the general pleading requirement is "the elimination or curtailment of frivolous actions").

314. *See DeLuna*, 588 N.E.2d at 1145 (holding that "in many cases" a health professional's prefiling review would be "a necessary concomitant" of satisfying the general pleading laws).

315. *Id.*

316. *Compare* 735 ILL. COMP. STAT. ANN. 5/2-622(g) (West 1993) (amended 1996) (holding failure to file is grounds for dismissal), *with* ILL. SUP. CT. R. 137 (stating "appropriate sanction" for violation, with no express mention of dismissal), *and* *Freeland v. Amigo*, 103 F.3d 1271 (6th Cir. 1997) (finding trial court abused its discretion by precluding testimony of medical malpractice claimant's expert on the ground that claimant failed to comply with pretrial order setting date for discovery cutoff where preclusion resulted in dismissal and where less drastic sanctions were not considered).

#### 4. *Prefiling information gathering*

There are two concerns with the prefiling information gathering provisions of current certificate of merit standards requiring that an expert opinion be obtained prior to the commencement of a civil action on a designated claim. The first concern involves the failure to provide for sufficient opportunity to access information otherwise unavailable to a claimant.<sup>317</sup> This occurs where certification is required at the time a civil action is commenced, as there is little or no chance for formal discovery before filing and there is no duty of mandatory disclosure if a claim is noticed though not filed. The second concern involves affording a defending party access to information contained in the claimant's expert opinion.

Without an opportunity for formal discovery or without mandatory prefiling information disclosure, a claimant may be incapable of procuring a required certificate. Such a failure could result in dismissal with<sup>318</sup> or without<sup>319</sup> prejudice. This result seems quite possible in product liability actions, where claimants often do not have much access to data on the products in question. At the least, avenues of court-supported prefiling information gathering should be available on a case-by-case basis. In these situations, a provision like that in the heightened pleading standard for federal private securities litigation would be warranted, as it would allow discovery which is necessary to "prevent undue prejudice."<sup>320</sup>

Where the defendant receives a wealth of information about the plaintiff's claim via an expert opinion before the plaintiff has had much or any opportunity for formal discovery from the de-

317. See, e.g., GA. CODE ANN. § 9-11-9.1 (1987) (amended 1996) (making no mention of accessing information prior to submission of expert affidavit in professional malpractice claim); 735 ILL. COMP. STAT. ANN. 5/2-623(a)(2) (West 1996) (stating product liability claimant only has access to materials allowing claimant to conduct testing); *id.* at 5/2-622(a)(3) (West 1993) (amended 1996) (providing that healing art malpractice claimant only guaranteed access to medical records).

318. See 735 ILL. COMP. STAT. ANN. 5/2-622(g) (West 1993) (amended 1996) (stating dismissal is the sanction for noncompliance with healing art malpractice certificate law); ILL. SUP. CT. R. 273 (stating involuntary dismissal usually operates as an adjudication on the merits unless based on lack of jurisdiction, venue, or indispensable party). *But see* DeLuna v. Treister, 676 N.E. 2d 973 (Ill. App. Ct. 1996) (allowing new lawsuit with necessary certificate even though the previous suit, *DeLuna v. St Elizabeth's Hospital*, 588 N.E.2d 1139, 1147 (1992), was dismissed on grounds that certificate of merit was lacking).

319. See MO. ANN. STAT. § 538.225(5) (West 1988).

320. 15 U.S.C. § 78u-4(b)(3)(B) (1995).

fendant or others, the plaintiff is forced to do a significant amount of trial preparation that may later need to be reevaluated. Most certificate of merit provisions do not specifically address whether amendments altering initial factual or legal theories should be liberally allowed. This creates a problem for the plaintiff who decides to use a different expert at trial than during prefilings inquiry or whose strategies may change when new information is received from the defendant or others. Additionally, compulsory disclosure of the entirety of an expert opinion and all information leading to its creation often will air otherwise undiscoverable work product, especially where the expert will not testify, and thus requires a claimant's attorney to proceed so cautiously in obtaining the expert opinion that zealous representation becomes quite difficult. Special certificate of merit provisions typically fail to address significant attorney-client communications, doctor-patient communications, work product, and waiver issues.

## VI. CONCLUSION

Civil litigation reform to reduce frivolous civil lawsuits was a hot topic in the most recent Presidential debates. It has stirred much recent interest and action in state and federal legislatures. Some new developments involve special pleading norms. Lawmakers will likely debate and implement new special pleading requirements in coming years, often involving certificates of merit. Such certificates are now required for most or some professional malpractice claims in several states. Illinois recently adopted a certificate of merit standard for product liability actions, while certificates of merit for certain childhood sexual abuse claims are necessary in both California and Louisiana. As debate continues over the need for and benefits of such special pleading requirements, lawmakers should ensure that empirical evidence supports any new legislation.<sup>321</sup> In implementing new certificates of merit, careful attention must be directed to constitutional issues, as well as to policy questions involving the breadth of coverage, the nature of any needed expert opinion,

---

321. The Illinois Civil Justice Reform Amendments of 1995 were signed only fifteen days after being introduced. See Russ Bleemer, *How Illinois Overhauled Tort Law in Two Weeks*, N.J. L.J., April 10, 1995, at 4.

the opportunity for prefilng discovery, and the possible sanctions upon noncompliance.

Upon reviewing various approaches to the use of special certificates of merit to reduce frivolous lawsuits, certain provisions for any future legislation are recommended to address the problems raised by current statutes. To address ambiguities in the breadth of coverage, certificate of merit requirements should be limited to claims where expert testimony is necessary to establish a *prima facie* case. Expert opinions should be required only after the initial pleadings have been completed, after there has been some opportunity for discovery, and only when the court deems them necessary. Expert opinions filed only for the purpose of certifying the merits of the civil action should not normally be admissible unless the experts are expected to testify at trial.

Most would agree with President Clinton who said in the 1996 Presidential debates that frivolous civil lawsuits should be reduced as long as deserving claimants are also not denied recovery. Easier said than done.