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State Medical Malpractice Screening Panels in Federal Diversity Actions

Vincent C. Alexander*

During the early 1970's, a medical malpractice crisis was perceived in the United States. An increasing number of costly and time-consuming lawsuits alleging medical malpractice against doctors, hospitals, and other health care providers caused malpractice insurers to raise premiums substantially, which in turn threatened to curtail the availability of adequate health care at reasonable cost. State legislatures re-

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2. The HEW Report recognized an increase both in the number of malpractice claims and in the size of awards and settlements. HEW REPORT, supra note 1, at 6, 10. It was also observed that many medical malpractice actions are more expensive to litigate and take longer to resolve than other personal injury actions. Id. at 11; Mallor, A Cure for the Plaintiff's Ills?, 51 IND. L.J. 103, 104 (1975); Comment, The Medical Malpractice Mediation Panel in the First Judicial Department of New York: An Alternative to Litigation, 2 HOFSTRA L. REV. 261, 265 (1974). Because of the high cost of increased litigation, medical malpractice insurers raised premiums substantially. Health care providers could be expected to pass this cost along to patients in the form of higher fees for services, with resulting economic harm to the public. HEW REPORT, supra note 1, at 12-14. It was feared that some practitioners might abandon the medical profession, curtail their services or migrate to a state in which insurance is more readily available, thereby creating a shortage in health care services. See Note, Rx for New York's Medical Malpractice Crisis, 11 COLUM. J. OF L. & SOC. PROB. 467, 469-70 (1975) [hereinafter cited as Rx for New York].

Increased litigation also has tempted some doctors to practice "defensive medicine." Such practice consists of administering unnecessary diagnostic or therapeutic tests, or of refusing to give such tests where they might be beneficial, for the purpose of defending against or preventing claims for liability. HEW REPORT, supra note 1, at 14-15; Roth, The Medical Malpractice Insurance Crisis: Its Causes, The Effects, and Proposed Solutions, 44 INS. COUNS. J. 469, 474 (1977); Rx for New York, supra, at 477-78.

The causes for increased claims of malpractice are varied and complex. The prime cause, according to the HEW Report, is an increase in the number of patient injuries. HEW REPORT, supra note 1, at 24. Other causes include general breakdown of the traditional doctor-patient relationship, unrealistic expectations aroused in patients by the media concerning the availability of cures for many illnesses, and greater litigiousness on the part of the public. See generally HEW REPORT, supra note 1, at 25; Roth, supra, at 470-73; Note, Recent Medical Malpractice Legislation—A First Checkup, 50 TUL. L. REV. 655, 655-60 (1976) [hereinafter cited as Recent Medical
responded to the crisis with a variety of substantive and procedural measures intended to reduce the number of litigated claims and the size of jury awards. One of the principal steps taken in a majority of states was the creation of extrajudicial panels comprised of some combination of doctors, attorneys, judges, and laymen for the consideration of medical malpractice claims prior to the ordinary trial process. Such panels, variously termed screening, mediation, review, advisory, hearing, or arbitration panels, generally determine in an informal manner whether a plaintiff's claim has merit before it is presented to a jury, thereby facilitating early settlement of meritorious claims and discouraging the prosecution of groundless ones. The desired result is a reduction in the costs, expenses, and consumption of time associated with the litigation of medical malpractice actions in the courts, thus easing the malpractice crisis.

Inevitably, some medical malpractice claims find their way into federal district courts pursuant to diversity-of-citizenship jurisdiction.

Malpractice Legislation. Many doctors feel that the root cause of the problem is the contingent fee system, whereby an attorney takes a case for an injured patient under an arrangement in which no fee is charged unless there is a settlement or judgment in the client's favor. See HEW REPORT, supra note 1, at 32-34; Rx for New York, supra, at 479-80.

3. Legislation aimed solely at medical malpractice claims has included: imposition of a ceiling on the amount of collectible damages; elimination of the "collateral source rule," which prevents deductions from damage awards of payments received by an injured patient from his own insurance or other sources; clarification of the doctrine of "informed consent," a theory of liability based on a physician's failure adequately to disclose to the patient the risks of treatment; elimination of claims based on failure to achieve guaranteed results unless the promise was made in writing; restrictions on the use of res ipsa loquitur as a means of establishing negligence; reduction of the limitations period within which claims may be brought; prohibition in the pleadings of ad damnum clauses specifying the amount of damages being sought; and imposition of ceilings on attorney's contingent fee arrangements. See generally Comment, An Analysis of State Legislative Responses to the Medical Malpractice Crisis, 1975 Duke L.J. 1417, 1418-55; Recent Medical Malpractice Legislation, supra note 2, at 666-79.

4. See HEW REPORT, supra note 1, at 91. Reductions in the overall frequency and costs of litigation should result in lower malpractice insurance premiums for health care providers and help maintain the quality and quantity of health services. Woods v. Holy Cross Hosp., 591 F.2d 1164, 1174 (5th Cir. 1979); Roth, supra note 2, at 497; Recent Medical Malpractice Legislation, supra note 2, at 679.

5. Under the diversity statute currently in effect, federal district courts have original subject matter jurisdiction in all suits between citizens of different states if the amount in controversy exceeds $10,000. 28 U.S.C. § 1332(a)(1) (1976). In addition, defendants sued in state courts may remove the action to federal court if the amount in controversy exceeds $10,000, there is complete diversity of citizenship, and none of the defendants is a citizen of the state in which the action was commenced. Id. § 1441(a), (b).

The commonly accepted historical rationale for inclusion of diversity-of-citizenship jurisdiction in the Constitution is the fear that out-of-state suitors might be subjected to bias or prejudice in local courts and therefore should have the advantage of a more neutral forum with an impartial judge. See Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). Many authorities today question the continuing validity of this rationale, as well as the benefits of diversity jurisdiction in general, and two bills are pending in the 96th Congress which would virtually eliminate diversity jurisdiction by limiting it to suits between United States citizens and aliens, 28 U.S.C. § 1332(a)(2)-(4) (1976), and to federal statutory interpleader actions, id. § 1335. See S. 679, 96th Cong., 1st Sess., 125 CONG. REC. S2869 (daily ed. Mar. 15, 1979); H.R. 2202, 96th Cong., 1st Sess., 125 CONG. REC. H692 (daily ed. Feb. 15, 1979). The same legislation was approved by the House of Representatives of the 95th Congress, H.R. 9622, 95th Cong., 2d Sess., 124 CONG. REC. H1569 (1978), but the Senate Bill, S. 2389, 95th Cong., 2d Sess., 124 CONG. REC. S28...
If the federal court is located in a state which requires the screening of such claims, the court must decide whether, and to what extent, the panel procedures must be utilized. The court’s decision will be based on the resolution of several issues: Whether the particular claim and litigants fall within the scope of the panel legislation; whether the legislation is constitutional under state and federal principles of equal protection, due process, and the right to jury trial; and whether the

(1978), was never reported out of the Judiciary Committee. A less radical proposal would increase the requisite amount in controversy and disallow the plaintiff from invoking diversity jurisdiction in a federal court located in plaintiff’s own state of citizenship. This proposal was made to the 95th Congress by the Department of Justice. S. 2094, 95th Cong., 1st Sess., 123 CONG. REC. S14870 (1978).


One of the arguments against diversity jurisdiction is related to the problem addressed in this article, namely, the requirement under Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938), that federal judges apply state law in diversity cases. Some federal judges dislike this inhibition on their ability to “make new law” and are disturbed by the frequently encountered difficulty of ascertaining state law. H. FRIENDLY, supra, at 142-43. To the extent that Congress curtails diversity jurisdiction, the practical utility of this article will be reduced proportionately.

6. For example, some states recognize contractual theories of liability against doctors whose treatment does not meet with patient approval, and the question might arise whether such claims are subject to screening. See Salem Orthopedic Surgeons, Inc. v. Quinn, — Mass. —, 386 N.E.2d 1268, 1271-73 (1979) (patient’s contractual claim for breach of promise to produce a specific medical result held to fall within scope of legislation requiring screening of actions for “malpractice, error or mistake”). In addition, there is lack of uniformity among the states with respect to the designation of defendants who are subject to the panel procedures. See, e.g., IDAHO CODE § 6-1001 (1979) (physicians, surgeons, and general hospitals); IND. CODE ANN. § 16-9.5-9-2 (Burns Supp. 1979) (“health care providers”); NEV. REV. STAT. § 41A.040 (1977) (physicians and associates, servants, agents or employees, and nurses).

A problem recently resolved in Pennsylvania is whether that state’s preaction arbitration panel is applicable to third-party claims for contribution by one health care provider against another. Both federal and state courts have held that the panel should be utilized only for claims brought by patients. Zielinski v. Zappala, 470 F. Supp. 351, 354 (E.D. Pa. 1979); Staub v. Southwest Butler County School Dist. — Pa. Super. Ct. —, 398 A.2d 204 (1979). A related question is whether, as a matter of statutory interpretation, the convening of a panel is required solely for a particular state court, which could eliminate the Erie problem in federal court. See note 186 infra.

7. Legislation requiring the screening of medical malpractice claims, as opposed to other types of tort claims, is potentially violative of the equal protection and due process provisions of the fourteenth amendment of the United States Constitution and analogous provisions of state constitutions. It also raises questions under state constitutional provisions guaranteeing the right of trial by jury and, in federal diversity actions, under the seventh amendment of the United States Constitution. The legislation may also violate unique state constitutional provisions, such as prohibitions against the vesting of judicial power in nonmembers of the judiciary or guarantees of free access to the courts. See generally Lenore, MANDATORY MEDICAL MALPRACTICE MEDIATION PANELS—A CONSTITUTIONAL EXAMINATION, 44 INS. COUNSEL J. 416, 419-26 (1977); Redish, LEGISLATIVE RESPONSE TO THE MEDICAL MALPRACTICE INSURANCE CRISIS: CONSTITUTIONAL IMPLICATIONS, 55 TEX. L. REV. 759, 769-96 (1977); Note, MEDICAL MALPRACTICE MEDIATION PANELS: A CONSTITUTIONAL ANALYSIS, 46
legislation is a state law which must be applied in federal court under the Rules of Decision Act as construed by Erie Railroad v. Tompkins and its progeny.

The constitutionality of screening panels has been upheld by most courts that have considered the issue, and other commentators have treated the subject in depth. This article focuses upon the three unique problems presented by the applicability of screening panel legislation in federal courts: Erie, the Federal Rules of Evidence, and the seventh amendment right to jury trial. Section I surveys the principal types of screening panels that have been utilized to date. Section II analyzes the evolution of the standard to be applied under Erie in determining whether state rules having both procedural and substantive attributes must be applied in federal courts. The recommended test is a flexible one, but in accordance with the principles of federalism, it pre-


9. 304 U.S. 64 (1938).


11. See commentaries cited in note 7 supra.

vents impairment of clearly discernible substantive policies of the states. Section III takes up the question whether Erie requires compliance with screening panel hearings in federal courts under such standard. Section IV examines the trio of authorities—Erie, the Federal Rules of Evidence, and the seventh amendment—that must be considered in determining whether panel findings may be admitted into evidence at a subsequent trial in federal court. It is concluded that a proper regard for the principles of federalism requires application of screening panel legislation in federal diversity actions in accordance with state law and that the seventh amendment is not thereby violated.

I. CHARACTERISTICS OF MEDICAL MALPRACTICE SCREENING PANELS

Unlike measures changing the substantive law of medical malpractice, screening panels alter the dispute resolution mechanism. The concept of screening panels was not new when state legislatures began to impose them as mandatory steps in the medical malpractice litigation process. They had been employed on a regional basis through the voluntary cooperation of physicians and lawyers. Such plans, which became the prototypes for mandatory screening panels, provided for the pretrial review of a plaintiff's claim by a panel of "experts" comprised either of doctors, or doctors and lawyers in combination. After an informal presentation of evidence, a panel would state whether it found sufficient evidence of negligence to warrant the bringing of an action at law. A finding that the claim had merit was intended to pressure the defendant into settlement. Conversely, a panel finding that the claim was groundless, hopefully, would encourage the plaintiff and his attorney to abandon the case. The inherent shortcoming of voluntary participation has been cured in many states by legislation imposing screening as a required step in the litigation process.

13. Two notable arrangements were those adopted by physicians and lawyers in Pima County, Arizona, and by the state medical society and state bar of New Mexico. Baird, Munsterman, & Stevens, Alternatives to Litigation I: Technical Analysis, reprinted in HEW REPORT, supra note 1, at 214, 225 app. Plans that provide for doctors and lawyers as panelists have been termed "medico-legal" panels. Id. Other voluntary arrangements have included medical review boards consisting solely of doctors who render opinions to other doctors as to whether claims against them should be settled or defended. Id. at 224-25; Abraham, Medical Malpractice Reform: A Preliminary Analysis, 36 MD. L. REV. 489, 512-13 (1977). A description of the various voluntary plans is set forth in Gibbs, Malpractice Screening Panels and Arbitration in Medical Liability Disputes, 1 J. LEGAL MED. 30-36 (1973). See also Mallor, supra note 2, at 109-11; Documentary Supplement, Medical-Legal Screening Panels as an Alternative Approach to Medical Malpractice Claims, 13 WM. & MARY L. REV. 695, 704-21 (1972).
14. Baird, Munsterman, & Stevens, supra note 13, reprinted in HEW REPORT, supra note 1, at 283-84 app.
15. Id. at 224, 292-93.
16. Id. at 224.
17. Id.
Mandatory screening panels must be distinguished from arbitration. The latter results in total preclusion of a jury trial by submission of the claim to a private arbitrator or group of arbitrators who render a final, binding decision or award which is enforceable by the court. Screening panels, on the other hand, serve an "advisory" function: If the panel's decision is rejected by the litigants, they may proceed to trial in the ordinary manner.\footnote{Redish, supra note 7, at 768; Note, supra note 7, at 323. Arbitration is like a screening panel to the extent that it is intended to provide a quick and inexpensive resolution of a dispute. It goes a step further than screening by providing a final, binding decision which eliminates any possibility of a courtroom trial. This aspect of arbitration makes it attractive to members of the medical profession who distrust juries and are disturbed by the publicity associated with courtroom proceedings. Recent Medical Malpractice Legislation, supra note 2, at 683. See note 29 infra.} Arbitration in the traditional sense depends upon the existence of a private agreement between the parties to submit an existing or future dispute to arbitration.\footnote{Henderson, Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice, 58 Va. L. Rev. 947, 948 (1972).} Many states have facilitated arbitration of medical malpractice claims by providing for judicial enforcement of consensual agreements to arbitrate,\footnote{See Ladimer, Medical Malpractice Arbitration: 1978 Roundup, 668 Insns. L.J. 530, 536-40 (1978) (setting forth tables of state legislation providing for enforceability of agreements to arbitrate generally and specifically as to medical malpractice claims); Note, Medical Malpractice Arbitration: A Comparative Analysis, 62 Va. L. Rev. 1285, 1296-1300 (1976).} but no state has imposed mandatory arbitration of malpractice claims without providing for a subsequent jury trial in which the arbitrator's award may be challenged.\footnote{Maryland, Ohio, and Pennsylvania require "arbitration" of all medical malpractice claims, but each state allows the parties to challenge the award in a courtroom jury trial. Md. Cts. & Jud. Proc. Code Ann. § 3-2A-06 (Supp. 1979); Ohio Rev. Code Ann. § 2711.21 (Page Supp. 1978); Pa. Stat. Ann. tit. 40, § 1301.509 (Purdon Supp. 1979-80). Statutorily imposed arbitration which does not ultimately provide for an "appeal" or trial de novo before a jury probably would violate due process or the right to jury trial guaranteed by virtually all state constitutions. See Comment, supra note 3, at 1465-67; Note, supra note 7, at 342-43. Cf. In re Smith, 381 Pa. 223, 112 A.2d 625 (compulsory arbitration of small claims upheld against constitutional challenge in view of provision for appeal with jury trial), appeal dismissed sub. nom. Smith v. Wissler, 350 U.S. 858 (1955). The HEW Report recommended that any state compulsory arbitration plan should provide for a subsequent trial de novo upon the request of either party. HEW Report, supra note 1, at 92-93.} Such "arbitration" in effect is a form of screening.

tion precedent to suit: The claim must be submitted to the panel before an action at law may be commenced. The second category consists of court-regulated panels which are not invoked until after an action has been formally commenced, usually within a fixed period of time after process and pleadings have been served or filed. Most of the postcommencement panels are compulsory, but some states leave the matter to the discretion of the judge or the request of the parties.


23. All of the states adopting preaction screening procedures have imposed them as prerequisites to the institution of a lawsuit except the following: Arkansas, which leaves the matter to the voluntary discretion of the plaintiff, Ark. Stat. Ann. § 34-2603 (Supp. 1979); Maine, which allows the plaintiff to request a panel subject to the defendant's acquiescence, Me. Rev. Stat. tit. 24, § 2803(1)-(2) (Supp. 1978-79); New Hampshire, which leaves the matter to the voluntary discretion of the plaintiff, N.H. Rev. Stat. Ann. §§ 519-A:2 (1974); and Virginia, which permits either the plaintiff or defendant to request a panel, Va. Code § 8.01-581.2 (1977).

Connecticut provides for a completely voluntary screening panel dependent upon a request from all the parties to a malpractice claim. Conn. Gen. Stat. Ann. § 38-19c (West Supp. 1979). Kansas allows the parties to a malpractice claim to request the court to convene a panel prior to the lawsuit, or if the action has already been commenced, allows the court to convene such a panel sua sponte. Kan. Stat. § 65-4901 (Supp. 1978).


25. The Alaska statute provides that a panel is to be appointed "unless the court decides that an expert advisory opinion is not necessary for a decision in the case." Alaska Stat. § 09.55.536(a) (Supp. 1979). Arizona allows the court to waive the panel requirement "upon stipulation of all the parties." Ariz. Rev. Stat. Ann. § 12-567(A) (Supp. 1979). In Delaware the panel must be convened only upon the request of any party. Del. Code Ann. tit. 18, § 6802(b) (Supp. 1978). Kansas appears to leave the matter to the discretion of the judge, who "may convene" a panel after an action has been commenced or, upon request of all parties, prior to the action. Kan. Stat. Ann. § 65-4901 (Supp. 1978). New Jersey permits the judge to dispense with a submission to the panel if there is no issue with respect to the standard of care or violation thereof, and the sole factual issue is one of witness credibility. N.J. Civ. Prac. R. 4:21-2(d) (1979). All of the other reference panels are mandatory.

The discretionary system allows the judge to avoid invoking panels in cases that do not require the purported expertise of the panel, that are trivial in amount, or that might be more easily resolved by a motion directed to the pleadings or by summary judgment. Note, supra note 7, at 325 n.1, 348.

The Connecticut panel does not fall within either of the two categories discussed in the text. The relevant legislation provides that "[w]henever all parties to a claim for malpractice agree," they may request the convening of a screening panel by the state division of insurance. Conn. Gen. Stat. Ann. § 38-19c (Supp. 1979). The statute does not state whether the request should be made prior to commencement of a lawsuit or thereafter. In any event, the screening procedure is completely voluntary.
Both types of pretrial screening panels are intended generally to foster speedy and inexpensive resolutions of medical malpractice claims. They also serve to limit publicity in connection with a malpractice claim, although they differ somewhat in their ability to achieve this goal. It is believed that the media has played an adverse role in the medical malpractice crisis by publicizing the filing of sensational lawsuits and the granting of large jury verdicts. A possible effect of this publicity is the stirring up of more such litigation. Out-of-court settlements, which both types of screening panel encourage, usually do not attract the same degree of media coverage. Preaction panels help limit publicity by keeping the case out of the courthouse until after a panel decision is rendered; if the parties accept the decision, no lawsuit need ever be filed. The postcommencement reference panel, on the other hand, is less effective in reducing publicity because it functions as part of the court system itself and is not utilized until after the pleadings have become a matter of public record upon filing. Since neither type of screening panel totally eliminates the ultimate possibility of a public judicial resolution, some states have taken the additional step of eliminating the ad damnum from the pleadings, which aids somewhat in limiting publicity with respect to large damage requests.

26. HEW REPORT, supra note 1, at 18.
27. Id.
28. See Comment, supra note 3, at 1458 n.203.
29. See, e.g., ARIZ. REV. STAT. ANN. § 12-566 (Supp. 1979) (ad damnum eliminated in all “health actions”); FLA. STAT. ANN. § 768.042(1) (West Supp. 1979) (no ad damnum in any personal injury or wrongful death action); IND. CODE ANN. § 16-9.5-1-6 (Burns Supp. 1979) (ad damnum eliminated in medical malpractice actions); N.Y. Civ. PRAC. § 3017(c) (McKinney Supp. 1979-80) (ad damnum eliminated in medical malpractice action). The statutes typically provide that if an action is brought in a court with a monetary jurisdictional threshold, the pleader may aver generally that such jurisdictional requirement has been met. See, e.g., N.M. STAT. ANN. §§ 41-5-4 (1978).

In states that permit the reading of a complaint to the jury, there exists the potential for undue influence on the jury's determination of liability and damages if a large ad damnum is quoted. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1259, at 260 (1969). The elimination of ad damnum clauses in medical malpractice litigation is intended to prevent such influence in particular cases and in the longrun to deflate public expectations of high damages in malpractice actions, thereby reducing the size of jury awards. Everett v. Goldman, 359 So. 2d 1256, 1263 (La. 1978); Comment, supra note 3, at 1451-53. The HEW Report concluded:

[The astronomical amounts of damages set forth in malpractice complaints by attorneys are an unnecessary source of friction between the legal and medical professions. These large demands attract sensational newspaper coverage, impose needless anxiety and often unfounded notoriety upon defendant physicians, create a feeling of unfair persecution in the medical world and are of no special benefit to the plaintiff-patients.]

HEW REPORT, supra note 1, at 38.

An interesting Erie question beyond the scope of this article is whether a state's rule against ad damnum clauses in medical malpractice complaints would be binding on a federal court in a diversity action. FED. R. CIV. P. 8(a)(2) requires the pleader to state "the relief to which he deems himself entitled," but this may be construed as requiring simply a statement of the type of relief sought, legal or equitable, not necessarily a particular amount of damages. 5 C. WRIGHT & A. MILLER, supra, § 1259, at 259. If the latter construction of the Federal Rule is followed, there would be no conflict, leaving the federal court free to apply state law. See id. Cf. R.S.E., Inc. v. Pennsylvania Supply, Inc., 77 F.R.D. 702, 703 (M.D. Pa. 1977) (Pennsylvania court rule disallow-
Beyond the separation of screening panels into preaction and postcommencement categories, generalization is difficult. Panels consist of at least three persons, with medical professionals serving as the principal type of panelist. Most panels, however, provide for the participation of an attorney or judge, who serves either as a voting member or nonvoting chairman or referee. Some panels include lay persons.

A mixed panel generally is viewed as the preferable model: Medical professionals provide needed scientific expertise while lawyers provide legal knowledge and help counterbalance any tendency by the doctors to insulate the defendant from liability. Lay persons add a nonprofessional viewpoint akin to that of the jury.

Panels are administered by state courts, by state departments of insurance or public health, or by agencies created specially for the purpose. Panelists usually are selected from lists or "pools" of local lay persons and medical and legal professionals licensed within the state. Some states require panelists to serve without compensation but most provide for expenses and statutorily fixed fees on a per diem basis. States which have provided for compensation of panelists or have created special offices to administer panels finance such costs either from the state's general funds, from a special fund created by annual surcharges collected from all health care providers collected from all health care providers collected from all health care providers collected from all health care providers collected from all health care providers collected from all health care providers collected from all health care providers collected from all health care providers collected from all health care providers collected from all health care providers.
state, or from the litigants themselves.  

Most states allow the parties to engage in discovery prior to the panel hearing, either by explicit provision for the taking of depositions or by incorporation of all discovery rules in force in the jurisdiction. Statutes generally provide that the hearing is to be informal, but the procedures in individual states range from adversarial "trials" with opening and closing statements, live testimony under oath, and cross-examination of witnesses, to submissions in writing in which the parties explain their position and provide evidentiary exhibits such as x-rays, hospital reports, and deposition transcripts. Presumably, the more in-

40. Massachusetts provides an example of a state which absorbs panel expenses from general funds. Mass. Gen. Laws Ann. ch. 231, § 60B (West Supp. 1979) ("the expenses and compensation of said tribunal shall be paid by the commonwealth"). Tennessee is one of the states which has created a special fund, providing for annual fees of $100 from each physician, $250 from each licensed hospital with 250 or more beds, $100 from all other licensed hospitals and health care facilities, and $30 from all other health care providers with enumerated exceptions. Tenn. Code Ann. § 23-3421 (Supp. 1978).

41. Florida, for example, specifically provides for a full range of civil action discovery devices. Fla. Stat. Ann. § 768.44(5) (West Supp. 1979). The North Dakota statute, in contrast, states only that the parties may take depositions prior to the panel hearing. N.D. Cent. Code § 32-29.1-06 (Supp. 1979). Some of the preaction statutes are silent on the issue of discovery by the parties, but give the panel subpoena power or other authority to obtain medical records or testimony. Nev. Rev. Stat. § 41A.055(1) (1977). Hawaii is a preaction state specifically disallowing discovery by the parties, Hawaii Rev. Stat. § 671-13 (1976), and Idaho disallows such discovery except in extraordinary circumstances. Idaho Code § 6-1003 (1979). Unless otherwise provided, the court-regulated reference statutes presumably contemplate the use of all available discovery procedures. Abraham, supra note 13, at 516 n.68; Rx for New York, supra note 2, at 491. The Alaska reference statute, however, disallows discovery by the parties until after a panel decision has been rendered unless a party can show good cause for relaxation of such prohibition. Alaska Stat. § 09.55.536(f) (Supp. 1979).

42. Arizona is representative of the states adopting a "trial" approach to the hearing: Witnesses may be called, all testimony shall be under oath, testimony may be taken either orally before the panel or by deposition, copies of hospital and medical records, nurses' notes, x-rays and other records kept in the usual course of the practice of the licensed health care provider may be admitted without the necessity for other identification or authentication, statements of facts or opinions on a subject contained in a published treatise, periodical, book or pamphlet or statements by experts may be admitted without the necessity of such experts appearing at said hearing, and the right to subpoena witnesses and evidence shall obtain as to all witnesses who testify in person. The panel may, upon application of any party or upon its own initiative, summon or subpoena any records or persons to substantiate or clarify any evidence which has been presented to it and may appoint impartial and qualified health care providers to conduct any necessary professional or expert examination of the plaintiff or any evidentiary matter and to testify as a witness.

Both parties shall be entitled, individually and through counsel, to make opening and closing statements. No transcript or record of the proceedings shall be required, but
formal the proceedings, the greater will be the savings in time and litigation expenses.

Although a few states allow also for a determination of damages, the panel’s decision usually is confined to the question of liability. The decision is never binding on the parties unless they consent to be bound. Any person unwilling to accept the panel’s decision has an opportunity for traditional judicial resolution. Most states simply allow the plaintiff to file an action or continue to prosecute a pending action without qualification if either plaintiff or defendant rejects the panel decision. Some states, however, make it more difficult to proceed to trial and avoid the binding effect of the panel decision. The preaction statute in Maryland, for example, provides that the parties are bound by the panel decision unless one of the parties files a notice of rejection with the panel within ninety days after the decision and files an action in court within the same period. If the panel finds for the defendant, Massachusetts requires the plaintiff to file a security bond of $2000 for costs and attorney’s fees as a precondition to continued prosecution of the action. A few states indirectly encourage acceptance of the

any party may have the proceedings transcribed or recorded at such party’s own cost. . . .


Indiana’s procedure is typical of the states limiting the hearing to written submissions: The evidence to be considered by the medical review panel shall be promptly submitted by the respective parties in written form only. The evidence may consist of medical charts, x-rays, lab tests, excerpts of treatises, depositions of witnesses including parties and any other form of evidence allowable by the medical review panel. . . . Either party, after submission of all evidence and upon ten [10] days’ notice to the other side, shall have the right to convene the panel at a time and place agreeable to the members of the panel. Either party may question the panel concerning any matters relevant to issues to be decided by the panel before the issuance of their report. The chairman of the panel shall preside at all meetings. Meetings shall be informal.

. . . The panel shall have the right and duty to request all necessary information. The panel may consult with medical authorities. The panel may examine reports of such other health care providers necessary to fully inform itself regarding the issue to be decided. Both parties shall have full access to any material submitted to the panel.

IND. CODE ANN. §§ 16-9.5-9-4 to -6 (Burns Supp. 1979). The other states play numerous variations on the two themes stated in the Arizona and Indiana statutes.

43. It has been suggested that a finding on the issue of damages is helpful in reaching settlement. Abraham, supra note 13, at 514-15. On the other hand, the determination of damages will require a greater evidentiary presentation, possibly increasing the costs of the panel hearing. Comment, supra note 3, at 1460.

44. See, e.g., ARK. STAT. ANN. § 34-2606 (Supp. 1979) (litigation may be instituted if either party rejects the preaction panel decision); N.Y. JUD. LAW § 148-a(7) (McKinney Supp. 1978-79) (case is remanded to regular place on calendar if no disposition is reached as result of reference panel hearing); TENN. CODE ANN. § 23-3403(d) (Supp. 1978) (claimant may proceed with pending court action within 30 days after service of reference panel’s recommendation).

45. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(a)-(b) (Supp. 1979). Rhode Island requires at least one of the parties to file a notice of rejection within 30 days of the decision before the action may proceed in court. R.I. GEN. LAWS. § 10-19-9 (Supp. 1978).

46. MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1979). The judge has discretion to lower the amount of the bond in cases of indigency. The Massachusetts bonding requirement was upheld against federal and state constitutional challenges in Paro v. Longwood Hosp., — Mass.—, 369 N.E.2d 985, 989-91 (1977), but a similar bond in Arizona was deemed violative of the state constitution in Eastin v. Broomfield, 116 Ariz. 576, 585-86, 570 P.2d 744, 753-54 (1977). Penn-
A majority of states allow panel decisions to be admitted into evidence at subsequent jury trials. Admissible panel findings, however, are never binding on the jury, and are to be given only such weight as the jury chooses. In some of the states providing for admissible panel findings, panelists may be called as witnesses by either party.

Sylvania requires the party “appealing” the panel decision to pay all “record costs of arbitration” as a precondition to filing a court action. PA. STAT. ANN. tit. 40, § 1301.509 (Purdon Supp. 1979-80).

The following statutes preclude the admissibility of panel findings: ARK. STAT. ANN. § 34-2609 (Supp. 1979); HAWAII REV. STAT. § 671-16 (1976); IDAHO CODE § 6-1001 (1979); ILL. ANN. STAT. ch. 110, § 58.8(4) (Smith-Hurd Supp. 1979); KAN. STAT. § 65-4904(c) (Supp. 1978); ME. REV. STAT. tit. 24, § 2807 (Supp. 1978-79); MO. ANN. STAT. § 538.050 (Vernon Supp. 1979); MONT. REV. CODES ANN. § 17-1312(4) (Supp. 1977); N.H. REV. STAT. ANN. § 519-A:3 (1974); N.M. STAT. ANN. § 41-5-20(D) (1978). The Nevada statute, NEV. REV. STAT. §§ 41A.010 to .097 (1977), has no provision covering admissibility.

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But see, e.g., MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (Supp. 1979) (panel’s award is “presumed to be correct, and the burden is on the party rejecting it to prove that it is not correct”).
Proponents of admissibility argue that it is necessary to give teeth to the screening process. The litigant who is disappointed by an adverse panel finding has no incentive to settle if he knows that the jury will not be made aware of the panel's expert opinion.\textsuperscript{51} If the parties know that the finding is admissible, they will take the screening procedures seriously and prepare thoroughly for the panel hearing, hopefully producing an accurate result.\textsuperscript{52} Proponents also argue that the panel's decision is helpful to the jury in the fact-finding process.\textsuperscript{53} On the other hand, opponents of admissibility contend that the panel's finding could strongly influence the jury, substantially benefitting the party in whose favor the decision was rendered.\textsuperscript{54} An inaccurate or unjust panel decision might be carried over into a judgment if the jury is hesitant to reach a contrary conclusion.\textsuperscript{55}

Screening panels of the type employed by the states for medical malpractice claims have not been adopted by Congress or its rulemaking delegate, the Supreme Court, for use in federal district courts. When a federal court sitting in a state with a preaction panel requirement is presented with a malpractice claim by a plaintiff who has not gone before the panel, the defendant is likely to move for dismissal of the action for failure to satisfy a condition precedent or to state a claim. A similar motion requesting reference of the claim to a panel after the federal action has been commenced might be made if the court is located in a state which provides for postcommencement screening. Whether such motions should be granted depends upon a proper interpretation of \textit{Erie}.\textsuperscript{56} At a subsequent trial, \textit{Erie}, together with the Federal Rules of Evidence and the seventh amendment, must be

\textsuperscript{51} Redish, \textit{supra} note 7, at 767 n.55; Comment, \textit{supra} note 3, at 1461-62.
\textsuperscript{52} Parker v. Children's Hosp., 483 Pa. 106, 121-24, 394 A.2d 932, 940-41 (1978); Note, \textit{supra} note 7, at 347.
\textsuperscript{53} \textit{Rx for New York, supra} note 2, at 498.
\textsuperscript{54} Abraham, \textit{supra} note 13, at 515; Note, \textit{Ohio's Rx for the Medical Malpractice Crisis: The Patient Pays, 45 U. Cin. L. Rev.} 90, 102 (1976); Note, \textit{supra} note 20, at 1303-04.
\textsuperscript{55} There is an apparent discrepancy among New York attorneys concerning the effect on juries of unanimous decisions rendered by New York panels, each of which is comprised of a doctor, lawyer, and a judge. Representatives of the plaintiffs' bar complain that a finding in defendant's favor makes it substantially more difficult to win a case at trial. Fuchsberg & Turkewitz, \textit{Coping with Medical Malpractice Panels, N.Y.L.J., June 20, 1979, at 1}. Attorneys for the medical profession, on the contrary, have stated that a finding in defendant's favor has little effect because the jury believes the doctor member of the panel undoubtedly was biased, whereas a finding for plaintiff carries great weight because the doctor member voted against a colleague. Bard & Krevitsky, \textit{A Review of Medical Malpractice Mediation, N.Y.L.J., Mar. 26, 1979, at 4}.
\textsuperscript{56} Wheeler v. Shoemaker, 78 F.R.D. 218, 226 (D.R.I. 1978); \textit{Recent Medical Malpractice Legislation, supra} note 2, at 681.
\textsuperscript{56} Regardless of \textit{Erie}, the seventh amendment would prevent the granting of such motions if the court accepts the argument that screening panels impermissibly delay a party's access to a federal jury trial. This issue is considered in Section IV \textit{infra}.
considered in connection with the question whether panel findings should be introduced into evidence.

The *Erie* problem is troublesome because the Supreme Court has not provided a definitive test for determining when to apply state laws intended to advance both procedural and substantive goals. Screening panels fall within this category because they seek to affect both procedural and substantive aspects of medical malpractice disputes. One of the procedural purposes of a screening panel is to enhance the overall efficiency of the medical malpractice adjudicative process by keeping malpractice claims out of court, reducing the size of court dockets, and minimizing the parties' litigation costs. Screening panels also serve to manage litigation by facilitating the opportunity for settlement at an early stage of the dispute. In this regard, the screening process has been likened to a pretrial settlement conference with a judge.

The substantive purposes furthered by a screening panel relate both to individual cases and to medical malpractice generally. The existence of a panel will influence the conduct of the plaintiff and his attorney in determining whether to bring a claim that is factually or legally weak, since they know it might be "screened out" prior to trial by the panel. As a result, the potential defendant is given a measure of protection from a frivolous claim at the outset. Assuming a claim is asserted, the panel will influence both plaintiff and defendant in deciding whether to pursue the litigation further or to settle. Screening panels are also intended to affect conduct beyond that of the parties in individual cases. By reducing the number of medical malpractice claims that make it to trial, thus reducing publicity, screening panels may help discourage the frequency of other litigation. The fewer number of publicized jury verdicts may also help to dispel beliefs among future jurors that high damage awards are common in medical

57. The difference between "procedural" and "substantive" rules is often difficult to perceive. Generally, procedural rules are the "incidents of adjudication" regulating "the decisional forms" by which substantive rights and obligations are enforced. F. JAMES & G. HAZARD, CIVIL PROCEDURE 1 (2d ed. 1977). Procedural rules have also been defined as rules "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." Ely, The Inexpressible Myth of Erie, 87 HARV. L. REV. 693, 724 (1974), and as "law regulating merely the course of litigation." McCoid, Hanna v. Plumer, The Erie Doctrine Changes Shape, 51 VA. L. REV. 884, 888 n.18 (1965). Examples include rules designed to elicit truth, to regulate the manner in which adversaries present their cases, or to promote efficiency of the process. Ely, supra, at 724-25.

Substantive law, on the other hand, is concerned generally with regulation of human conduct and relationships—"the activity which gives rise to litigation and the fruits thereof." McCoid, supra, at 888 n.18; see Ely, supra, at 725-26. In differentiating procedure and substance in an *Erie* context, rules should be examined from the viewpoint of the purposes they are intended to serve, since many laws can have both procedural and substantive effects. Id. at 724 n.170; McCoid, supra, at 888 n.18. Some laws serve both procedural and substantive purposes, regulating not only the management of litigation but also human activity peripheral to the litigation. See Ely, supra, at 726.

malpractice cases. The ultimate goal of screening panels, along with other legislative responses to the medical malpractice crisis, is to influence the insurance industry's rate-setting decisions, specifically, to keep insurance premiums down.59

Screening panels, therefore, are neither exclusively procedural nor substantive. In order to determine the extent to which screening panels are applicable in federal diversity actions, it is necessary first to identify a proper standard for dealing with laws which serve such dual functions.

II. DISCERNING A PROPER TEST FOR RESOLVING ERIE PROBLEMS

The starting point for inquiry into the applicability of state law in federal diversity actions60 is the Rules of Decision Act: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." The evolution of the Supreme Court's interpretation of the Act should be familiar to all students of civil procedure.

From 1842 until 1938, the phrase "laws of the several states" was limited by the decision in Swift v. Tyson62 to mean statutory law of the states and state decisional law to the extent it involved "rights and titles to things having a permanent locality, such as the rights and titles to real estate."63 Federal diversity courts were not required to apply the state's decisional law on matters involving the "general" common law and were left free to perceive for themselves an appropriate rule of law.64 All of this changed with the Court's decision in Erie Railroad v. Tompkins,65 in which Swift was overruled. Justice Brandeis, author of

59. See note 4 supra. The cost of insurance premiums affects decisions by medical professionals regarding the locality in which they will practice and the specialties they will pursue, and also affects the prices paid by the public for health care services. See note 2 supra.

60. Although the question of the applicability of state law in the federal courts arises most frequently in cases where jurisdiction is premised on diversity of citizenship between the parties, the issue can also arise where the court's jurisdiction is founded on a claim arising under federal law, as for example, in the case of a state claim adjudicated pursuant to the doctrine of pendent jurisdiction. See Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540-41 n.1 (2d Cir. 1956) (Erie doctrine applies to all issues or claims having their source in state law, regardless of the ground for federal jurisdiction) (dictum); 1A, pt. 2 J. Moore, W. Taggart, A. Vestal, & J. Wicker, Moore's FEDERAL PRACTICE § 0.305[3] (2d ed. 1978) [hereinafter cited as Moore].


63. Id. at 18.


the *Erie* opinion, gave three reasons why the "laws of the several states" should be interpreted to encompass all state law, whether "declared by its Legislature in a statute or by its highest court in a decision": 66 (1) The Rules of Decision Act had been misinterpreted by the *Swift* Court; 67 (2) the *Swift* doctrine had produced "mischievous results," allowing parties of diverse citizenship to bring a case to federal court where a "general" common law rule at odds with the common law rule prevailing under the applicable state law might be applied, creating problems of equal protection for nondiverse parties compelled to litigate in state courts; 68 and (3) the *Swift* doctrine was "unconstitutional," since neither Congress nor the federal courts have the power "to declare substantive rules of common law." 69 In *Erie*, this meant that, in order to determine the standard of care owed by the Erie Railroad to Mr. Tompkins, the federal district court was compelled to apply the common law rules of Pennsylvania, not the "federal common law." 70

The validity and scope of the Court's third ground has been a subject of scholarly debate. 71 The constitutional wing of the opinion seems

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66. 304 U.S. at 78.
68. 304 U.S. at 74-75. The Court observed that one of the goals underlying *Swift* had been to achieve uniformity of law among federal courts. *Id.* at 74. The states, however, persisted in applying their own views of the common law. As a result, a party able to take his case to federal court because of diversity of citizenship might be able to obtain the advantage of a rule of law different from that applied in state courts. This "introduced grave discrimination by noncitizens against citizens," rendering "impossible equal protection of the law." *Id.* at 74-75. The resulting lack of uniformity between federal and state courts in adjudicating similar claims produced "injustice and confusion." *Id.* at 77.
69. *Id.* at 78-79. The Court did not specify which particular clause of the Constitution was violated, although the tenth amendment comes to mind. *See* C. Wright, *supra* note 64, § 56, at 259; Stason, *Choice of Law Within the Federal System, Erie Versus Hanna*, 52 Cornell L.Q. 377, 393-94 (1967). It was said that the Constitution "recognizes and preserves the autonomy and independence of the States—autonomy and independence in their legislative and independence in their judicial departments," 304 U.S. at 78-79, and that the federal courts (including "this Court") had invaded "rights which in our opinion are reserved by the Constitution to the several States." *Id.* at 80.
70. *Id.*
71. *See generally* C. Wright, *supra* note 64, § 56. Some have argued that the Court's discussion of the constitutional issue was dictum. *See, e.g.*, 1A, pt. 2 Moore, *supra* note 60, § 0.304; Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 Yale L.J. 257, 278 (1946). In his concurring opinion in *Erie*, Justice Reed stated that the Court's declarations with respect to the unconstitutionality of the *Swift* doctrine were "unnecessary," and questioned the conclusion that Congress would be without power to declare rules of substantive law to govern federal courts. 304 U.S. at 91. Several years later, Justice Rutledge expressed the same sentiment in his dissenting opinion in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). He accepted *Erie*'s holding with respect to prohibiting the federal judiciary from determining matters of substantive common law as "a wise rule of administration" but had "grave doubt that it has any solid constitutional foundation." *Id.* at 558. Others have contended that the constitutional branch of the *Erie* opinion was an essential component. *See* Friendly, *supra* note 67, at
sound as applied to cases such as *Erie*, that involve general substantive lawmaking by the federal judiciary without specific constitutional authorization. The extent to which the Constitution may require federal courts to adhere to state law in matters that are procedural in nature is less certain. Opinions subsequent to *Erie* have focused not on the constitutional limitations on federal courts, but rather on the limitations imposed by the Rules of Decision Act, which are to be gleaned from the "policy" underlying *Erie*. This policy appears to be a concern for the accommodation of state and federal law in dual court systems in accordance with general principles of federalism. The

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The Supreme Court itself, in Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956), suggested in dictum that *Erie* was constitutionally based. The Court stated that if congressional legislation were to make private arbitration agreements enforceable in federal diversity actions, absent the necessary ingredient of interstate commerce, "a constitutional question might be presented. *Erie* . . . indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases." *Id.* at 202.

Professor John Hart Ely maintains that the correct analysis for any inquiry into congressional power to prescribe rules of law in federal courts should be premised on the Constitution itself, not *Erie*’s pronouncements concerning the reserved powers of the states. *Ely*, *supra* note 57, at 700-06. Congressional legislation should be measured solely against the enumerated areas of federal legislative competence set forth in the Constitution. *Id.* at 701-04. With respect to matters that can be classified as either substantive or procedural, article III and the necessary and proper clause provide sufficient authority for congressional regulation of law in diversity courts. *Id.* at 706. In the absence of such an area of authority granted by the Constitution, Congress is incompetent, and state law, therefore, can be the only applicable law. *Id.* at 701-02. Professor Ely’s position is based on the Supreme Court’s opinion in Hanna v. Plumer, 380 U.S. 460, 471-72 (1965). Under this analysis, *Erie* was correctly decided since nothing in the Constitution gives federal courts general lawmaking authority in diversity actions. *Ely*, *supra* note 57, at 703.

72. C. WRIGHT, *supra* note 64, § 56, at 261; *Ely*, *supra* note 57, at 703.

73. Mr. Justice Reed noted in *Erie* that "no one doubts federal power over procedure." 304 U.S. at 92 (Reed, J., concurring). *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting) ("[I]t is Congress which has the power to govern the procedure of the federal courts in diversity cases, and the states which have that power over matters clearly substantive in nature."). The line between substance and procedure is not always easy to draw, as the subsequent history of *Erie* has demonstrated.

74. Subsequent to *Erie*, none of the three major Supreme Court opinions concerning the Rules of Decision Act, Hanna v. Plumer, 380 U.S. 460 (1965), Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958), Guaranty Trust Co. v. York, 326 U.S. 99 (1945), has spoken of constitutional prerogatives. *See* McCoid, *supra* note 57, at 890. For example, in Hanna v. Plumer, 380 U.S. 460 (1965), the Court stated that "the message of York . . . is that choices between state and federal law are to be made . . . by reference to the policies underlying the Erie rule." *Id.* at 467 (emphasis added). The Hanna Court then defined the test for Rules of Decision Act cases in terms of compliance with "the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468.

In all three cases, the state rules at issue were not "clearly substantive" as was the situation in *Erie*. Each had a procedural aspect. As to these rules, the Court said nothing about any constitutional compulsion that state law be followed—merely that a "policy" of *Erie* should be examined to determine whether compliance is required. *See* id. at 467-68; Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 536-38 (1958); Guaranty Trust Co. v. York, 326 U.S. 99, 101, 109 (1945).

75. Justice Harlan, in his concurring opinion in Hanna v. Plumer, 380 U.S. 460, 474 (1965), described *Erie* as "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *See also* note 74 *supra*.

In Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160, 164 (3d Cir. 1976), the court summarized the federalism principle of *Erie* as follows: "[C]ertainly a concern for states' policies
subsequent history of *Erie* has involved an effort to fashion an appropriate standard for implementing this policy.

In the immediate aftermath of *Erie*, it appeared that in diversity actions federal courts were to apply state law to matters of "substance" and federal law to matters of "procedure." Such a view led to problems of characterization. In *Guaranty Trust Co. v. York*, the Court eschewed a purely substance versus procedure analysis and developed an "outcome-determinative" test: "[T]he outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State Court." Federal courts trying diversity claims were said to be "in effect, only another court of the State." There is no need to determine whether a state rule is procedural or substantive; the federal district court must merely determine whether disregard of such law would "substantially affect the enforcement of the right" being sued upon. Thus, a state statute of limitations that could "completely bar recovery" on a state-based claim if brought in a state court likewise had to be applied by the federal court.

As exemplified by three decisions handed down by the Supreme

and prerogatives can never be out of place in a system of coordinate sovereignties—as a matter of prudence and comity as not as a matter of constitutional law.”

76. C. WRIGHT, *supra* note 64, § 59, at 272; Keeffe, Gilhooley, Bailey, & Day, *Weary Erie*, 34 CORNELL L.Q. 494, 506-07 (1949). The Supreme Court appears to have applied this test in *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208, 212 (1939), which held that an evidentiary issue of burden of proof was so “related[d] to a substantial right” as to require application of state law. It has been noted that the *Erie* opinion itself establishes no such dichotomy between substance and procedure as a definitive test for Rules of Decision Act problems. Ely, *supra* note 57, at 708. Justice Brandeis’ opinion says only that federal courts cannot declare “substantive rules of common law.” 304 U.S. at 78 (emphasis added). It is Justice Reed’s concurring opinion which reaffirms federal power over procedure. *Id.* at 92. See Hanna v. Plumer, 380 U.S. 460, 465, 471 (1965) (*Erie* says “roughly” that federal courts should apply substantive law and federal procedural law).

Professor McCoid maintains that the substance-procedure distinction is still the appropriate test: “The difficulty of the inquiry [distinguishing substance and procedure] . . . does not justify its avoidance; it is necessary for precisely the reasons stated in *Erie*.” McCoid, *supra* note 57, at 888. Justice Rutledge expressed the same view in his dissenting opinion in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 559 (1949):

*The accepted dichotomy is the familiar “procedural-substantive” one. This of course is a subject of endless discussion, which hardly needs to be repeated here. Suffice it to say that actually in many situations procedure and substance are so interwoven that rational separation becomes well-nigh impossible. But, even so, this fact cannot dispense with the necessity of making a distinction.*

77. 326 U.S. 99 (1945).


79. 326 U.S. at 108.

80. *Id.* at 108-09.

81. *Id.* at 110. The issue in *York* was whether plaintiff’s claim was barred by a state statute of limitations. The lower federal appellate court had been persuaded that since plaintiff’s claim was equitable in nature, the district court in its administration of equitable remedies was free to ignore state law. *Id.* at 100-01. The Supreme Court reversed and remanded, holding that the rights and obligations at issue were created by state law, and that this should be the decisive factor. *Id.* at 112. Recognizing that the “forms and mode” of enforcing an equitable right may occasionally vary depending on whether suit is brought in state or federal court, the federal court nevertheless cannot grant recovery where the state would not. *Id.* at 108-09.
Court on the same day in 1949—Ragan v. Merchants Transfer & Warehouse Co.,
Woods v. Interstate Realty Co.,
and Cohen v. Beneficial Industrial Loan Corp.—the outcome-determinative test proved extremely deferential toward state rules arguably procedural in nature. In Ragan, the Court held that a federal court must apply the method specified by state law for the tolling of the statute of limitations. In Woods, it was held that a federal court must apply a state “door-closing” statute which barred foreign corporations from suing in state courts if they were doing business in the forum without having complied with statutory qualification procedures. Finally, Cohen held ap-

82. 337 U.S. 530 (1949).
84. 337 U.S. 541 (1949).
85. 337 U.S. at 533. The plaintiff in Ragan filed his complaint in a federal district court in Kansas prior to expiration of the statute of limitations. Id. at 531. Process was not delivered by the United States Marshall to the defendant, however, until several weeks after the statute had expired. Id. The applicable law of Kansas provided that the statute of limitations was not tolled until service of process. Id. Although a Kansas court would have dismissed the action as barred, plaintiff argued that he had properly “commenced” his action within the meaning of Rule 3 of the Federal Rules of Civil Procedure by filing the complaint in court and that this should be deemed a toll of the statute. Id. at 532-33. The Court held that since the claim was based on state law, the “measure” of the claim must be found in state law: “It accrues and comes to an end when local law so declares.” Id. at 533. The Court felt that Erie would be violated if “longer life” were given to the claim in federal court than it would have received in state court. Id. at 533-34.

Ragan seemed to present a square conflict between a state rule and a specific Federal Rule of Civil Procedure. Some authorities hold that Ragan was inferentially overruled by the decision in Hanna v. Plumer, 380 U.S. 460 (1965), which seemed to give supremacy to any Federal Rule of Civil Procedure which squarely conflicts with a state rule. See, e.g., Smith v. Peters, 482 F.2d 799, 801-02 (6th Cir. 1973), cert. denied, 415 U.S. 989 (1974); Sylvester v. Warner & Swasey Co., 398 F.2d 598, 604-06 (6th Cir. 1968); 2 Moore, supra note 60, ¶ 3.07 [4.-3-1]. Others contend that Ragan is consistent with Hanna, either because Fed. R. Civ. P. 3 does not cover the subject of tolling the statute of limitations or, assuming it does, the federal rule cannot supersede a state rule specifying the event which tolls the statute if the rule is intimately connected with a substantive goal. See Anderson v. Papilion, 445 F.2d 841, 842 (5th Cir. 1971) (Ragan still applicable); C. Wright, supra note 64, § 59, at 277; Ely, supra note 57, at 729-32. Cf. Frashar v. Volkswagen of America, Inc., 480 F.2d 947, 954 (6th Cir. 1973) (Ragan not necessarily overruled by Hanna, but in case at bar provision for “commencement” of action by serving process was not “intrinsically related to the rights flowing from the statute of limitations”). The Supreme Court itself in Hanna distinguished Ragan on the grounds that the latter involved a complete bar to recovery, 380 U.S. at 469 n.10, and suggested that Fed. R. Civ. P. 3 was not so broad as to encompass the question of tolling the statute of limitations. Id. at 470. Justice Harlan, on the other hand, stated in his concurring opinion that Ragan was “wrong.” 380 U.S. at 477. In a recent case involving a similar statute, the United States Supreme Court has granted certiorari. See Walker v. Armco Steel Corp., 592 F.2d 1133 (10th Cir. 1979), cert. granted, 48 U.S.L.W. 3217 (Oct. 2, 1979).

86. 337 U.S. at 538. A “door-closing” statute is one which does not relate to the underlying merits of the plaintiff’s claim but merely prevents its enforcement for some extrinsic reason. See Hill, The Erie Doctrine and the Constitution, 53 Nw. U. L. Rev. 427, 568 (1958); Meador, supra note 78, at 1092. The Mississippi provision at issue in Woods required foreign corporations doing business in Mississippi to file with the state the name of a designated agent upon whom process could be served. 337 U.S. at 535-36. Failure to comply with the provision would result in forfeiture of the right to bring or maintain an action in state court. Id. at 536 n.1.

The Court held the Mississippi statute applicable in federal district court on the authority of its earlier decision in Angel v. Bullington, 330 U.S. 183 (1947). Angel involved a North Carolina statute which disallowed suits against debtors on deficiencies from prior mortgage foreclosure proceedings. Id. at 185. The plaintiff in Angel brought suit against a debtor in a North Carolina court on a deficiency judgment obtained in Virginia only to have the case dismissed by the North Carolina state courts. Id. at 184-85. Plaintiff thereafter attempted to sue the debtor for the deficiency in a North Carolina federal district court. Id. at 185. The Supreme Court held that the
plicable in federal court a state law requiring certain plaintiffs in corporate shareholder derivative actions to post a security bond for costs and attorney's fees as a precondition to prosecution of the action. 87

The state laws at issue in the foregoing cases had the earmarks of procedural rules; clearly they did not constitute the rights or obligations underlying the claims or defenses being asserted by the parties. On the other hand, like the statute of limitations in York, the rules would have a substantial impact on the ability to enforce state-created rights and obligations and therefore were outcome-determinative. The keystone of the Erie policy seemed to be uniformity of result between federal and state courts with respect to the same litigated matters. This approach, if carried to an extreme, would require the application of any and all state procedural rules, no matter how unrelated to substantive rights and relations between the parties. 88

This was not to be, however, for in Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 89 the Court indicated that the test of outcome determination was subject to qualification. Byrd involved a rule under South Carolina law which required the judge, in a negligence action by an injured workman, to decide as a matter of law whether under the workmen's compensation statute the plaintiff was an employee of the defendant, thereby immunizing the defendant from an action at law. 90

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87. 337 U.S. at 555-57. The law in question was a New Jersey statute requiring stockholders with small holdings to post an indemnity bond for expenses and attorney's fees for which plaintiff would be liable in the event the action was terminated in defendant's favor. Id. at 543-45. The Court viewed the statute as having created "a new liability where none existed before," the enforcement of which was insured through the bonding requirement. Id. at 555-56. The Court held that "a statute which so conditions the stockholder's action [cannot] be disregarded by the federal court as a mere procedural device." Id. at 556. The Court held that "a statute which so conditions the stockholder's action [cannot] be disregarded by the federal court as a mere procedural device." Id. at 556. The Court saw no conflict with FED. R. CIV. P. 23, which governs shareholder derivative actions but which is silent on the issue of plaintiff's liability for litigation expenses. Id.

Justice Douglas, in dissent, took the position that FED. R. CIV. P. 23 alone defines the procedure for stockholder derivative suits in federal court. Id. at 557. Justice Douglas maintained that the Erie principle does not require application of state rules which "merely prescribe the method" by which suits are instituted: State rules "do not fall under the principle of Erie . . . unless they define, qualify or delimit the cause of action or otherwise relate to it." Id.

Justice Rutledge's separate dissenting opinion took the position that the outcome-determinative test was an improper gloss on Erie and that the proper test should be one which differentiates substance from procedure. Id. at 558-59. The New Jersey bonding requirement, in his view, was "too close to controlling the incidents of the litigation rather than its outcome to be identified" as a rule of substance. Id. at 560.

88. See C. WRIGHT, supra note 64, §§ 55, 59, at 256-57, 273. After Ragan, Woods, and Cohen some observers feared the outcome-determinative test would eviscerate the Federal Rules of Civil Procedure, since any time a state rule of procedure varied from one of the Federal Rules, a different outcome would be the result of noncompliance with the state rule, thereby mandating application of state law. See id.; Meador, supra note 78, at 1097-98.


90. Id. at 527, 533-34.
Such a question in federal court, on the other hand, was one of fact for the jury's decision. The Supreme Court held that the federal district court should submit the question to the jury, even though this might produce a different result from that which would be reached in the state court.

The Court applied a new two-part test in reaching this conclusion. First, the South Carolina rule should be examined to see whether it was "bound up" with the rights and obligations arising out of the relationship between the parties as established by the statute, implying that an affirmative answer would mandate application of the state rule. In this case the Court found that the rule was not an integral part of the substantive relations; it concerned "merely a form and mode of enforcing the immunity." Second, the Court focused on whether nonrecognition of the state rule would produce a different outcome from that of the state court. Outcome, however, was not to be the sole criterion: account must be taken of "affirmative countervailing considerations." The Court declared that "[t]he federal system is an independent system for administering justice," and that an essential characteristic of that system is the manner in which trial functions are distributed between judge and jury "under the influence—if not the command—of the Seventh Amendment." The "strong federal policy" governing the jury's role as arbiter of all disputed fact questions was deemed to outweigh the Erie policy of uniformity of result.

Thus, Byrd formulated a balancing test in which federal courts could forego the objective of identical outcomes if the state rule was not bound up with substantive rights and obligations, and considerations of "federal policy" outweighed an apparent presumption favoring application of state law. This, however, was not to be the last pronouncement of the Court on the Rules of Decision Act.

In Hanna v. Plumer, the Court was faced with a direct conflict between Rule 4(d)(1) of the Federal Rules of Civil Procedure, allowing service of process on the defendant by delivery to a person of suitable age and discretion residing at the defendant's home, and a more restric-

91. Id. at 537.
92. Id. at 538.
93. Id. at 535-36.
94. Id. at 536.
95. Id. at 537.
96. Id.
97. Id. at 538-39. As an additional basis for its holding that federal jury trial procedures should govern, the Court opined that there was no certainty that federal procedures would produce a different outcome. Id. at 540. This aspect of the Court's opinion has been criticized as unrealistic and inconsistent with the earlier section of the opinion. Whicher, The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict, 37 TEX. L. REV. 549, 560 (1959).
tive rule under Massachusetts law requiring process to be delivered personally to the executor in actions against estates. The major thrust of the decision was to free the Federal Rules of Civil Procedure from the tests developed by the *Erie* line of cases construing the Rules of Decision Act. The Court held that the applicability of one of the Federal Rules, in the face of a contrary state rule, is to be tested under the Rules Enabling Act.

In what Professor John Hart Ely terms a "considered dictum," however, the *Hanna* Court stated that Federal Rule 4(d)(1) would have prevailed even under a Rules of Decision Act analysis. The Court relied upon the outcome-determinative test, but cited *Byrd* for the proposition that this test is not to be a "talisman." The Court did not rely upon Byrd's concept of "countervailing" federal considerations. Rather, courts should ascertain whether the outcome would be so substantially different as to (1) encourage forum shopping by the party entitled to take his case to federal court and (2) result in the unequal administration of the laws. Elimination of these two evils were the "twin aims of *Erie*." Accordingly, the outcome test should be applied only to the extent necessary to discourage a litigant from shop-

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99. *Id.* at 461.
100. *Id.* at 469-71. The Enabling Act provides in pertinent part:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.


Some critics of *Hanna* maintain that in extricating the Federal Rules of Civil Procedure from an *Erie* analysis, the Court went too far towards elevating the Federal Rules over conflicting state rules that may bear on substantive rights. See McCoild, *supra* note 57, at 901-03, 915; Sliason, *supra* note 69, at 384-91. Professor Ely points out that the Rules Enabling Act itself, in the second sentence, prohibits incursions by the rulemakers into areas of "substance," and argues that this should serve as an adequate check on the Federal Rules. Ely, *supra* note 57, at 718-23. Professor McCoild has also noted the explicit limitation of the Enabling Act's second sentence, but views the Rules of Decision Act as an additional check on the Federal Rules to prevent derogation of state substantive law. McCoild, *supra* note 57, at 901-03.

101. *Id.* at 710; See Miller v. Davis, 507 F.2d 308, 313 (6th Cir. 1974) (*Hanna* decision rested on the Rules Enabling Act, but Supreme Court "went out of its way" to show that a proper outcome-determinative analysis would result in application of the Federal Rule).

102. 380 U.S. at 465-69.
103. *Id.* at 466-67.
104. *Id.* at 468.
105. *Id.* Justice Harlan concurred in the Court's holding with respect to the applicability of Fed. R. Civ. P. 4(d)(1), but he accepted neither the majority's apparent deference to the inviolability of the Federal Rules of Civil Procedure nor its formulation of the twin-aims approach to the outcome-determinative test. He found in *Erie* a command that federal courts are bound by any state law, whether substantive or procedural, if it governs "primary private activity." *Id.* at 475. Thus, in deciding conflicts between state and federal law (even if the federal law is one of the Federal Rules of Civil Procedure), a court should inquire whether the law "would substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation." *Id.* Under this analysis, Justice Harlan concluded that Fed. R. Civ. P. 4(d)(1) could be applied since the conflicting Massachusetts rule played an insignificant role in state regul-
ping for a federal forum to avoid a state rule that would have a substantial impact on the right to recover and to prevent unfairness to litigants of the state unable to take the same claim to federal court because of the absence of diversity.\textsuperscript{106}

Professor Ely contends that \textit{Hanna} put to rest any notion that the appropriate test for Rules of Decision Act problems is the balancing of state laws against possible "affirmative countervailing considerations" of federal policy.\textsuperscript{107} It is his position that the sole test is that of outcome determination as "rejuvenated" by the \textit{Hanna} Court, with its twin qualifications concerning forum shopping and the unfairness of applying separate bodies of law when similar litigation arises between diverse adversaries and nondiverse adversaries.\textsuperscript{108}

Many lower federal courts subsequent to \textit{Hanna}, however, either missed the point of \textit{Hanna} or do not agree with Professor Ely. For

\textsuperscript{106} It has been observed that \textit{Erie}'s "twin aims" express essentially a single concern for the unfairness which results when a litigant of diverse citizenship obtains recovery or avoids a burdensome state procedure in federal court while a nondiverse litigant is constrained by the limitations and burdens imposed in state court. \textit{See} Ely, supra note 57, at 712; McCoid, supra note 57, at 889. There is nothing particularly evil about "shopping" for a federal forum if the desire is to obtain the benefits of the Federal Rules of Civil Procedure, such as the liberal provisions for pretrial discovery, \textit{see} Vestal, \textit{Erie} R.R. v. Tompkins: A Projection, 48 Iowa L. Rev. 249, 261-62 (1963), or the putative \textit{raison d'etre} of diversity jurisdiction: the avoidance of local bias in state courts. \textit{See} Ely, supra note 57, at 713; McCoid, supra note 57, at 889. \textit{But see} note 5 supra. Professor McCoid suggests that the unfairness branch of the \textit{Hanna} twin-aims test comes closer to the essence of \textit{Erie}'s policy of uniformity than does the forum shopping concern. He argues that \textit{Hanna} did not really retain the outcome-determinative test, but rather returned to a substance-procedure analysis, whereby \textit{Erie}'s policy of uniformity is narrowed "to uniformity of substantive law between the federal and state courts." McCoid, supra note 57, at 898. \textit{See} note 76 supra. Under such an approach, "impairment of litigants' substantive rights is the only kind of inequity which really justifies requiring application of state law in lieu of a fair federal law." McCoid, supra note 57, at 896. This analysis "satisfactorily" explains the prior decisions of \textit{York}, \textit{Angel}, \textit{Ragan}, \textit{Woods} and \textit{Cohen}, see text & notes 77-87 supra, since the state laws at issue in all of these cases arguably had substantive purposes. McCoid, supra note 57, at 891-94.

\textsuperscript{107} Ely, supra note 57, at 717 n.130.

\textsuperscript{108} Id. at 717-18. Professor Ely's arguments are set forth as part of an overall framework for analyzing whether proper authority exists for the application of federal law in derogation of state law in diversity actions: (1) If the question is one of congressional power to promulgate legislation affecting the enforcement of rights in diversity actions, the sole reference point should be the Constitution, specifically, whether one of the enumerated powers of Congress provides authority for the legislation, \textit{see} note 71 supra; (2) if the question concerns the validity and scope of the Federal Rules of Civil Procedure, the sole reference point should be the Rules Enabling Act, \textit{see} Ely, supra note 57, at 698, 718-38; and (3) if the question concerns a conflict between state and federal law and there is no federal legislation or Federal Rule of Civil Procedure on point, the Rules of Decision Act as construed in \textit{Hanna} should be the point of reference. Thus, Professor Ely's thesis is that \textit{Erie} should not be viewed as an all-encompassing doctrine limiting the development of federal legislation governing rules of law for application in federal diversity actions.
example, in *Szantay v. Beech Aircraft Corp.*, the Fourth Circuit developed a tripartite test conceivably consistent with *Hanna*, but based primarily on *Byrd*'s balancing approach: (1) If the state law at issue is the substantive right or obligation being asserted, such law must be applied; (2) if the state law at issue is a procedural rule intimately bound up with the substantive rights or obligations being asserted, such law is likewise controlling; and (3) if the state law at issue is a procedural rule not intimately bound up with the substantive rights or obligations being asserted, yet its application could substantially affect the outcome of the litigation, the state law should be applied unless there are countervailing federal considerations.

The test was applied in *Szantay* to reject a South Carolina door-closing statute that disallowed actions in state courts by nonresidents against foreign corporations with respect to claims arising outside the state. The court concluded that the South Carolina rule was procedural in nature and was not intimately bound up with the rights being asserted. Applying the third branch of the test, the court found that the rule was devoid of any significant state policies aside from procedural interests in the doctrine of *forum non conveniens* and the reduction of court congestion. The countervailing federal considerations were: The constitutional grant of diversity jurisdiction, which frees nonresidents from local discrimination or bias; the policy underlying the full faith and credit clause, which insures maximum enforcement of out-of-state claims; and the federal policy favoring joinder of multiple parties in one action, which apparently could be achieved in this case only in an action in South Carolina.

The *Szantay* test has been followed in the Fourth Circuit and

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109. 349 F.2d 60 (4th Cir. 1965).
110. Id. at 63-64.
111. Id. at 62-63.
112. Id. at 64.
113. Id. at 65.
114. Id. at 65-66. The plaintiffs in *Szantay* were Illinois citizens asserting wrongful death actions arising out of an airplane accident which occurred in Tennessee. The defendants were a South Carolina corporation and a Delaware corporation that had an agent for service of process in South Carolina. The court found that the South Carolina corporation could be served only in that state. *Id.* at 66.

The Supreme Court decisions in *Angel* and *Woods*, see note 86 supra, were distinguished on the grounds that the state provisions at issue in those cases involved "clear state policies" designed to effectuate state regulatory concerns. 349 F.2d at 66. The *Szantay* court paid lip service to *Hanna* by noting that the different outcome here would not be unfair to South Carolina citizen-plaintiffs, who had the capacity to sue nonresidents with respect to out-of-state claims in state courts. On the contrary, the federal court would be avoiding discrimination against nonresidents by providing a forum and thereby putting nonresidents on equal footing with residents. *Id.* at 64.

115. In Atkins v. Schmutz Mfg. Co., 435 F.2d 527, 535-38 (4th Cir. 1970), the tripartite analysis was applied to a Virginia state rule of law which provided that the commencement of an action in one state court of Virginia would not serve as a toll of the statute of limitations if the plaintiff thereafter wished to commence an action on the same claim against the same defendant in a separate court. The *Atkins* court rejected Virginia's rule, holding that an action commenced in a
has been adopted by the Sixth and Second Circuits, the latter having described the test as "thorough." Although the tripartite analysis includes no specific reference to the twin aims of *Erie* as articulated in *Hanna*, the test appears to be consistent with *Hanna*. Under the first two branches of *Szantay*, uniformity of result is maintained between state and federal litigants with respect to substantive and quasi-substantive matters. Clearly this prevents forum shopping and unequal administration of the laws. The third branch of the test preserves uniformity of result, except where a countervailing federal policy militates against application of state law. No damage is done to a state's substantive policy, because the balancing of state and federal interests is not to occur unless the state rule is a procedure that is not intended to

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116. Miller v. Davis, 507 F.2d 308, 314 (6th Cir. 1974). The Sixth Circuit refused to follow a Kentucky rule of law which apparently would disallow suit in a local court by Kentucky residents against the trustees of a pension fund the situs of which was not in Kentucky. *Id.* at 310-11. The court found that the Kentucky policy derived from outdated notions of choice-of-law rules and in *persona* jurisdiction, and was not meant to inhibit enforcement of state-created rights. *Id.* at 314-15. Balanced against the "minimal" state policy were the overriding federal policies of the grant of diversity jurisdiction itself: The providing of a separate system of independent, convenient forums for the enforcement of rights free from local bias; uniform application of federal venue provisions; and the need for uniform administration of nationwide trusts. *Id.* at 316-18.

advance substantive policies. A difference in outcome would be tolerable under *Hanna*, because the difference relates only to a matter of procedure that is not likely to encourage forum shopping and result in inequitable treatment of diverse and nondiverse litigants.

None of the other circuits, however, has adopted the *Szantay* court's three-part analysis, each applying its own test for resolving conflicts between state and federal law from among those articulated by the Supreme Court. On the other hand, no court seems to explicitly have ruled out the balancing of state and federal considerations as suggested by *Byrd*. In recognition of the possible continued vitality of *Byrd*, a recent law review article, by Professor Martin H. Redish and Mr. Carter G. Phillips, proposes that, rather than adopting *Hanna*'s "modified" outcome-determination test, courts should adopt instead a "refined balancing" test in which the federal interests to be considered in the analysis are carefully limited. Four possible federal interests

118. See Wilson v. Nooter Corp., 475 F.2d 497, 503-04 (1st Cir.), cert denied, 414 U.S. 865 (1973) (*Byrd* relied upon to reject a state's 12-person jury rule in favor of the federal court's 6-person jury); Johnson Chem. Co. v. Condado Center, Inc., 453 F.2d 1044, 1045-47 (1st Cir. 1972) (both *Hanna*'s twin-aims test and *Byrd*'s balancing approach relied upon to avoid application of a Puerto Rican rule which would have resulted in dismissal of a class action for failure timely to meet a security bonding requirement); Witherow v. Firestone Tire & Rubber Co., 530 F.2d 160, 163, 166, 168 (3d Cir. 1976) (Pennsylvania door-closing statute viewed as "substantially" affecting outcome and "worthy of federal respect," citing *Angel* and *Woods*; court perceived no federal affirmative countervailing considerations, citing *Byrd*; Sun Sales Corp. v. Block Land, Inc., 456 F.2d 857, 862-63 (3d Cir. 1972) (the "reasoning" of *Hanna* protects "clear federal interests": Pennsylvania rule requiring out-of-state real estate brokers to obtain license prior to commencing action was rejected as applied to New York corporation not doing business in Pennsylvania); Woods v. Holy Cross Hosp., 591 F.2d 1164, 1168-69 (5th Cir. 1979) (principal reliance placed upon *Hanna* to require compliance with Florida's medical malpractice screening panel); Baron Tube Co. v. Transport Ins. Co., 365 F.2d 858, 862 (5th Cir. 1966) (*Byrd* relied upon in deciding that the scope of counsel's arguments to the jury on the issue of damages "is a matter of federal trial procedure"); Hines v. Elkhart Gen. Hosp., 603 F.2d 647, 647-49 (7th Cir. 1979) (*Byrd* utilized to uphold the applicability in federal court of Indiana's medical malpractice screening panel); Dorin v. Equitable Life Assurance Soc'y of the United States, 382 F.2d 73, 78-79 (7th Cir. 1967) (*Hanna*'s twin-aims test preserves federal judge's power over remittitur of jury verdicts); Poitra v. Demarrrias, 502 F.2d 23, 25-27 (8th Cir. 1974) (quasi-balancing test akin to *Szantay* resulted in rejection of North Dakota statute forbidding actions in state courts between Indians based on claims arising on Indian reservation); Hot Oil Serv., Inc. v. Hall, 366 F.2d 295, 297 (9th Cir. 1966) (*Woods* cited as precedent requiring application of Arizona statute forbidding actions against Indians in state courts); Palmer v. Ford Motor Co., 498 F.2d 952, 954-56 (10th Cir. 1974) (*Byrd*, *York*, and *Hanna* applied *seriatim* to conclude that a state law requiring 12-person juries in civil actions is not applicable in federal court); Walko Corp. v. Burger Chef Systems, Inc., 554 F.2d 1165, 1171-72 (D.C. Cir. 1977) (*Byrd* and *Hanna* require application of state law with respect to the circumstances which will suspend the tolling of the statute of limitations).


120. Id. at 384-400. Professor Redish and Mr. Phillips contend that the *Hanna* Court overemphasized the forum shopping and inequality concerns of *Erie* and failed to focus on another important policy underlying *Erie*: the concern of federalism for accommodating competing state and federal interests. Id. at 373-80. The authors argue that forum shopping is not per se evil and that disparity in treatment between diverse and nondiverse litigants is not always unfair; however, assuming these are proper concerns, they should not be exclusive. Id. at 377. A test which balances federal and state interests ultimately is necessary for proper resolution of Rules of Decision Act cases. Id. at 380. They believe any such test, however, must be carefully tailored to avoid freewheeling, ad hoc determinations by federal courts, which may be tempted to apply vague and undefined "federal interests" in derogation of state law. Id. at 384, 389. They recognize that a
are identified: The federal system as an independent system for administering justice; the "quasi-seventh amendment" interest of assigning factual questions to the jury; the federal judge-jury relationship; and the avoidance of expense or inconvenience resulting from compliance with a state procedural rule. It is only the latter interest which the authors would allow in some circumstances to "outbalance a truly significant competing state interest." The other three interests are either rejected as too vague or are substantially limited in their applicability. If the financial cost to the federal judicial system of applying a state rule resulted in its rejection, the proposed balancing test would go a step beyond Byrd, since the Court there intimated that any procedural rule bound up with substantive rights and obligations should be applied without further inquiry into considerations of federal case-by-case balancing approach might threaten the law's goal of predictability in the planning of one's social and commercial affairs—the so-called private primary activity to which Justice Harlan referred in his concurring opinion in Hanna. Id. at 381-83. See note 105 supra. This threat is reduced by Erie's requirement that state law be applied to issues wholly substantive in nature. As to matters of a procedural nature, there is less danger of affecting primary behavior by choosing federal over state law. Redish & Phillips, supra note 119, at 383. Such danger still exists, as for example, in the case of a rule requiring the posting of a security bond prior to commencement of a shareholder derivative action in order to deter the filing of frivolous suits. See Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 548-49 (1949). Accordingly, the balancing test "must carefully identify and assign weight to the federal and state interests to be considered on each side of the balance" in order to minimize "the incidental, yet significant, harms of unpredictability in deciding diversity choice-of-law issues." Redish & Phillips, supra note 119, at 384.

121. The first three interests were suggested in Byrd. 356 U.S. at 537-38. The authors feel that the federal judge-jury relationship is analytically distinguishable from the seventh amendment consideration. Redish & Phillips, supra note 119, at 387. Identification of the federal court's interest in avoiding the expenses of compliance with state law was articulated in Wilson v. Nooter Corp., 475 F.2d 497 (1st Cir.), cert. denied, 414 U.S. 865 (1973), in which the court refused to follow a state's 12-person jury rule, noting the "not insignificant issue of expense and inconvenience given today's crowded docket." Id. at 504.

122. Redish & Phillips, supra note 119, at 392. This federal interest, unlike most of the others, see note 123 infra, is objective, concrete, and capable of quantification. Redish & Phillips, supra note 119, at 391-94.

123. There is no "quasi-seventh amendment" interest: The amendment should be applied outright to a situation such as that in Byrd, see text & notes 90-91 supra, or not at all. Redish & Phillips, supra note 119, at 386-87. In other words, there is no residual "influence" of the seventh amendment. Id. at 387. Accord, Whicher, supra note 97, at 561-62. As for the federal interest in the judge-jury relationship, "absent the support of the seventh amendment, it is not clear what specific federal interests exist in this area." Redish & Phillips, supra note 119, at 387. The interest of the federal courts as an "independent system for administering justice," which has been applied by some federal courts, see notes 115-16, 118 supra, is criticized as vague and susceptible to "unprincipled ad hoc judicial decision making," which could lead to "uncertainty in the planning of primary conduct." Redish & Phillips, supra note 119, at 389. Nevertheless, it is recognized that there may be some interest in allowing a federal court to control procedural matters "bound up with its daily internal operations" and this interest may be allowed to prevail "where the competing state interest is of relatively slight significance." Id. at 391.

Possible state interests in procedural rules are of four types: Rules designed to affect behavior or attain a substantive goal, such as evidentiary privileges or rules barring unlicensed corporations doing local business from suing in state courts; rules for the conduct of trials which favor one party more than another, such as burdens of proof; rules designed to ascertain the truth, such as discovery rules; and rules merely of a housekeeping nature, such as the size and type of papers submitted in court. The first two are deserving of the highest respect by federal courts, and the third and fourth can be rejected more easily in favor of overriding federal interests. Id. at 394-95.
Lower federal courts have been compelled to continue searching for an appropriate test to implement the Rules of Decision Act, because neither Byrd nor Hanna necessarily provides definitive authority. The appropriateness of a "countervailing" balance of federal policy in Byrd seems clear in view of the strength of the seventh amendment right to jury trial. In Hanna, application of the refined outcome-determination test was technically dictum, since the Court held that direct conflicts between the Federal Rules of Civil Procedure and state rules of procedure are to be tested under the Enabling Act, not under the Rules of Decision Act or the progeny of Erie. Assuming the authoritative-ness of the Hanna Court's redefinition of outcome determination, it is arguable nevertheless that the Court did not entirely abandon Byrd, since Byrd was cited for the proposition that the outcome test "was never intended to serve as a talisman." Although the Hanna Court added its own checks on the outcome test, it did not explicitly deny the existence of a residual check in the form of countervailing considerations of federal policy.

Of the various tests proposed by courts and commentators, the approach developed by the Fourth Circuit in Szantay properly

124. 356 U.S. at 535-36. See Hill, supra note 86, at 604-06; Vestal, supra note 106, at 269. 125. It has been suggested that the Court should have straightforwardly applied the amendment, which would have superseded a contrary state law. Friendly, supra note 67, at 403 n.95; Whicher, supra note 97, at 560-61. Whicher takes the position that the Byrd test concerning countervailing federal policies should be strictly confined to jury trial issues. See also Smith, Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation, 36 TUL. L. REV. 443, 450-51 (1962).
126. 380 U.S. at 469-71. See text & note 100 supra.
127. See text & notes 103-06 supra. The Court's directive obviously cannot be discounted simply because it is dictum. For example, in Woods v. Interstate Realty Co., 337 U.S. 535 (1949), the Court held that a prior decision was authoritative on an Erie issue although the case could have been adequately decided on res judicata grounds: "[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." Id. at 537. See McCoid, supra note 57, at 885 (Hanna was based "upon two separate grounds").
128. 380 U.S. at 466-67.
129. The Court sustained Fed. R. Civ. P. 4(d)(1) in Hanna under an Erie analysis on the grounds that plaintiff would have sought a federal forum simply to attain the benefits of the Rule, nor would application of the Rule "raise the sort of equal protection problems to which the Erie opinion alluded." 380 U.S. at 469-70. If avoidance of the state rule either had been perceived by the Court as an inducement to forum shopping or would have produced an arguably unfair result, the Court nevertheless might have justified application of the Federal Rule on the grounds of a countervailing federal policy of uniformity in federal courts as to procedural matters, such as the methods of serving process. Indeed, the Court quoted with approval the Fifth Circuit's decision in Lumbermen's Mutual Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963), which had applied Fed. R. Civ. P. 41(b) in disregard of state law: "The purpose of the Erie doctrine, even as extended in York and Ragan, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers—when there are 'affirmative countervailing [federal] considerations' and when there is a Congressional mandate (the Rules) supported by constitutional authority." Id. at 764, quoted in Hanna, 380 U.S. at 473. In any event, the Hanna Court found all the justification it needed for displacing state law in the Rules Enabling Act, under which it concluded that methods of serving process are clearly procedural, since they relate only to the "form and mode" of enforcing rights created under state law. 380 U.S. at 469, 473.
synthesizes *Erie* and its progeny and seems best suited for dealing with most Rules of Decision Act problems. The first branch of the test, which requires application of state law defining the substantive rights or obligations at issue, encompasses questions solely of substance, such as the one presented in *Erie*. The second branch, which requires application of state procedural rules intimately bound up with substantive rights or obligations, encompasses such cases as *York, Ragan, Woods,* and *Cohen*. The third branch covers *Byrd* and situations like the one in *Szantay*, permitting application of federal procedure if the rejected state procedure is unrelated to substantive policy and the federal interests in such application outweigh those of the state.

In essence, the *Szantay* test is a substance-procedure analysis. Federal courts are directed to apply state laws that are substantive or quasi-substantive in the sense of being bound up with, or intended to advance, substantive purposes. Procedural laws lacking such substantive import need not be applied, depending on the existence of countervailing federal policies. The *Szantay* test is preferable to the "twin-aims" analysis of *Hanna* because it more clearly expresses the core principle of federalism underlying *Erie*: Federal courts may not interfere with clearly discernible state policies intended to affect substantive rights. At the same time, it allows federal courts to impose their own procedure on diversity claims if there is no conflict with state substantive policies and there exist affirmative countervailing federal policies—whether grounded in the Constitution, a federal statute, the Federal Rules of Civil Procedure, or perhaps fiscal concerns of the federal court system. The remainder of this Article will consider the extent to which *Erie*’s principle of federalism, as properly articulated in *Szantay*, requires the utilization of state medical malpractice screening panels in federal diversity actions.

III. Applicability of Pretrial Screening in Federal Courts

The question whether the Rules of Decision Act requires litigants...
in federal diversity actions to submit medical malpractice claims to a state's screening panel in advance of trial can differ depending on whether the panel is of the preaction or postcommencement variety. Accordingly, they will be treated separately. The *Erie* question raised by the admissibility of the panel findings into evidence at a subsequent trial is common to both types of panel and is covered in section IV.

**Preaction Screening Panels**

Failure to comply with a mandatory preaction screening statute would prevent enforceability of a plaintiff's malpractice claim in state court on the grounds that the plaintiff either has failed to state a claim, has failed to meet a condition precedent, or has brought an action in a court lacking original subject matter jurisdiction. Applying the three-part test for resolution of Rules of Decision Act problems suggested in *Szantay*, the same result should follow in a federal court located in a state with such a statute.

Screening panels do not fall under the first branch of the *Szantay* test because they do not govern the substantive elements of a claim or defense in medical malpractice. The rights and obligations flowing from the relationship of patient and doctor or hospital are dependent solely upon the state's substantive law; liability for medical malpractice can be established with or without the screening panel. The second branch of the test, however, is applicable, because the panels are procedural rules "intimately bound up" with the rights and obligations being asserted. As noted previously, panels serve the procedural purposes of facilitating settlements and reducing court dockets. The substantive purposes include discouraging the assertion of groundless claims and encouraging defendants to settle meritorious claims. In addition, the use of preaction panels is intended generally to reduce medical malpractice litigation and the accompanying publicity, in order to keep insurance premiums down, assuring that health care professionals will continue providing services at reasonable prices. In view of such substantive purposes, federal courts should insist upon compliance with state law.

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131. See text & note 110 *supra*.
132. See text & notes 58-59 *supra*.
133. To the extent the state leaves the matter of screening to the voluntary choice of the parties, see note 23 *supra*, the federal court should compel the procedure only if the option is exercised by the parties. Similarly, if state law permits the parties to waive a panel that is otherwise mandatory, the federal court should give effect to such a waiver. For example, in Cline v. Richards, 455 F. Supp. 45 (E.D. Tenn. 1978), the federal court enforced a stipulation between the parties waiving a hearing before Tennessee's postcommencement screening panel. *Id.* at 46. The court's decision is in accord with the general rule that "stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts." *In re New York, Lackawanna & W. R.R. Co.*, 98 N.Y. 447.
The third branch of the test should not be applied to preaction screening panels in view of the pervasive, clearly-defined substantive policies furthered by their use. Moreover, there are no federal policies or procedures in conflict with the screening procedures. It might be argued that the federal policy underlying diversity jurisdiction—providing a neutral forum free of local bias—\textsuperscript{134} is infringed by subjecting the out-of-state party's claim or defense in the first instance to a decisionmaking panel composed solely of local professionals.\textsuperscript{135} This policy is not defeated, however, since the nonbinding nature of the panel hearing means the parties ultimately may have their case heard in federal district court. The only incursion on diversity jurisdiction is a delay in its invocation, and federal courts have no overriding interest in providing immediate access to the judicial process. Furthermore, plaintiff will not be prejudiced by expiration of the applicable statute of limitations, since initiation of the panel procedure tolls the statute,\textsuperscript{136} and it is well-settled that federal courts in diversity actions are bound by state statutes of limitation.\textsuperscript{137} Allowing virtually nonexistent federal policies to supersede the strong state policies evinced in screening panels would do violence to the concept of federalism.

Preaction screening panels are analogous to the state statutes deemed applicable in federal diversity actions in \textit{Woods v. Interstate Realty Co.}\textsuperscript{138} and \textit{Cohen v. Beneficial Industrial Loan Corp.}\textsuperscript{139} The door-closing statute in \textit{Woods}, which prevented unqualified foreign corporations from suing in state court, had both a procedural and substantive purpose. It served the procedural purpose of reducing court dockets but had the substantive purpose of encouraging foreign corporations to register to do business within the state.\textsuperscript{140} In \textit{Cohen}, the...

\textsuperscript{134} See note 5 supra.

\textsuperscript{135} See Note, \textit{A Constitutional Perspective on the Indiana Medical Malpractice Act}, 51 \textit{Ind. L.J.} 143, 163 n.105 (1975) ("requiring a hearing [before an Indiana panel] would subject an out-of-state plaintiff to scrutiny by a panel composed entirely of the defendant's Indiana colleagues").

\textsuperscript{136} See note 22 supra.


\textsuperscript{138} 337 U.S. 535 (1949).

\textsuperscript{139} 337 U.S. 541 (1949).

\textsuperscript{140} Ely, supra note 57, at 728;McCoid, supra note 57, at 894; Redish & Phillips, supra note 119, at 398-99 (registration to do local business affects "primary commercial activity" of corpora-
state's requirement that a bond be posted as security for defense costs in stockholder derivative suits served not only the procedural purpose of allocating the costs of litigation but also the substantive purpose of inhibiting "strike suits." In both Woods and Cohen the state procedural rules were intimately bound up with substantive goals and therefore properly applicable in federal court. Screening panels likewise seek to influence substantive conduct. As in Woods, nonlitigative conduct is affected to the extent insurance companies might be prompted to lower their premium rates and health care providers to maintain proper services at reasonable costs. As in the case of Cohen, litigative conduct is affected to the extent plaintiffs with weak claims are discouraged from pursuing court actions.

The reported decisions of federal courts are in agreement that Erie mandates the applicability of preaction screening panels, but there is little consistency in the use of Erie tests. In Edelson v. Soricelli, the Third Circuit, in a two-to-one decision, rejected plaintiffs' argument that the Pennsylvania preaction arbitration process was "merely procedural" and therefore inapplicable in federal court. Drawing upon the outcome-determinative test of York, the majority viewed the arbitration requirement as "a condition precedent to entry into the state judicial system." Malpractice plaintiffs in federal courts "may not have rights superior to state citizen plaintiffs because a fundamental notion underlying Erie is that a federal court sitting in diversity merely provides an impartial forum, not a different set of legal rules."

Plaintiffs argued, alternatively, that even if the state arbitration system were deemed outcome-determinative, it should nevertheless be

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141. Hanna v. Plumer, 380 U.S. 460, 477-78 (1965) (Harlan, J., concurring); Ely, supra note 57, at 729; McCoid, supra note 57, at 894. A groundless derivative action, brought solely for the purpose of harassing corporate management in the hopes of obtaining a remunerative settlement, would harm the corporation, its officers and directors and the other stockholders. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547-48 (1949). The imposition of liability for costs and attorney's fees in the event the action fails, coupled with the condition precedent of a bond for security of such expenses, would tend to discourage the bringing of meritless claims.

142. 610 F.2d 131 (3d Cir. 1979).

143. Id. at 133-35.

144. Id. at 134. The court also analogized the Pennsylvania system to a statute of limitations, since preaction arbitration "regulates the time and, in addition, the means of entry to the courtroom." Id.

145. Id. The majority expressed its approval of the decision in Marquez v. Hahnemann Medical College, 435 F. Supp. 972, 973 (E.D. Pa. 1976), in which Pennsylvania's arbitration legislation was characterized as a door-closing statute. 610 F.2d at 134. The Marquez court stressed that compliance with the legislation was necessary in order to preserve uniformity of result and to avoid interfering with the statutory goal of ameliorating the medical malpractice crisis. 435 F. Supp. at 973-74.
rejected under *Byrd* because of a conflict with affirmative counter-
vailing federal considerations.\textsuperscript{146} Data provided by plaintiffs showed that from April 5, 1976 to August 31, 1979, a total of 2,466 malpractice claims had been filed for arbitration in Pennsylvania, but only nine had reached the hearing stage and only two had been appealed for judicial trials de novo.\textsuperscript{147} Based on these statistics, plaintiffs argued that arbitration causes “oppressive delay,” imposing “a substantial pressure on them to settle or even forego their claims, thereby totally depriving them of their opportunity for trial before a federal judge and jury.”\textsuperscript{148} Such consequences are “offensive to the federal interest in prompt de-
termination and adjudication of claims.”\textsuperscript{149}

The court agreed that Pennsylvania’s screening mechanism was “a resounding flop,”\textsuperscript{150} but held that plaintiffs’ position would overextend *Byrd*.\textsuperscript{151} First, the Pennsylvania malpractice legislation, unlike the judge-jury rule at issue in *Byrd*, was based on clear state interests, albeit unfulfilled, in making liability insurance available at reasonable costs and providing for prompt resolution of claims.\textsuperscript{152} Second, although arbitration might delay a plaintiff’s access to a jury trial, thereby implicating *Byrd*’s emphasis on federal jury procedures, such delay is consonant with federal policy favoring arbitration as a means of resolving disputes.\textsuperscript{153} Third, the court felt that an outcome-deter-
nination analysis was still appropriate if the application of federal law “would radically alter the substantive results of the state court sys-
tem.”\textsuperscript{154} In conclusion, the court stressed that the procedures do not discriminate against noncitizens, because they apply with equal force to all malpractice plaintiffs.\textsuperscript{155}
The main thrust of the dissent was that *Erie* and its progeny are inapposite, because Pennsylvania's arbitration panel constitutes a de facto judicial tribunal for malpractice claims in substitution for state courts.\(^{156}\) Relying upon an opinion of the Rhode Island District Court,\(^{157}\) the dissenting judge concluded that the arbitration procedure, if binding on federal courts, would be an impermissible limitation on federal jurisdiction.\(^{158}\) Although states may validly create conditions precedent to suit, they "may not limit the forum for a right to recovery to only state courts."\(^{159}\)

The Fifth Circuit in *Woods v. Holy Cross Hospital*\(^ {160}\) held that "[u]nder any of the relevant tests," the steps set forth in Florida's screening panel must be followed prior to commencement of an action in federal court.\(^ {161}\) The court relied principally upon *Hanna*’s twin-aims analysis of *Erie*: If out-of-state plaintiffs are allowed to bypass the panel procedures by bringing their malpractice claims in federal court, "Florida's medical malpractice statutory scheme will be inequitably administered," and noncitizens will have a "substantial advantage" over local citizens.\(^ {162}\) This, in turn, will encourage "the worst form of forum

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156. *Id.* at 141-46 (Rosenn, J., dissenting).


159. 610 F.2d at 145. The dissent also took issue with the majority's *Erie* analysis, arguing that the arbitration panel is a "procedural device for allocating cases" rather than an alteration of the substantive rights of the parties. *Id.* at 147. Judge Rosenn rejected the majority's analogy to the statute of limitations, see note 144 supra, contending that arbitration, which regulates entry to the courtroom rather than defining the right to a remedy, is "closer to the federal rule governing manner of service held to prevail over the state rule in *Hanna*." 610 F.2d at 147. To the extent out-of-state malpractice plaintiffs might be encouraged to shop for a federal forum, such forum shopping must be tolerated to enable noncitizens to exercise their right to "a fair federal forum." *Id.*

With respect to the majority's application of *Byrd*, the dissent felt that the arbitration scheme accomplishes no legitimate state interest because of its ineffective operation. *Id.* at 148. It was also argued that the arbitration procedure runs contrary to the federal interests in allowing full and fair litigation before a jury, maintaining an appearance of neutrality for plaintiffs, and maintaining judicial convenience and economical administration of justice. *Id.* at 148-49. Federal statutes evincing a policy in favor of consensual arbitration were distinguished on the ground that the Pennsylvania system is compulsory. *Id.* at 148. Finally, the dissenting judge believed that federal cognizance of malpractice actions would not produce results substantially different from those of the arbitration panel, but rather, would merely provide a different forum. *Id.* at 149.

Judge Rosenn's analysis, like that of Wheeler v. Shoemaker, 78 F.R.D. 218, 224-29 (D.R.I. 1978), upon which it is based, seems at odds with a proper application of *Erie*. See text & notes 210-26 infra.

160. 591 F.2d 1164 (5th Cir. 1979).

161. *Id.* at 1168.

162. *Id.*
shopping." The court also emphasized that the panel procedures were an integral part of Florida's attempts to stem the malpractice crisis, and failure to apply the panel in federal court "would do grave damage to the legislative response." Accordingly, the court held that dismissal was proper until such time as the plaintiff complied with the panel procedures.

In *Hines v. Elkhart General Hospital*, the Seventh Circuit rejected plaintiffs' argument, based on *Byrd*, that the Indiana screening panel infringes upon "the federal interest in preserving the essential character of the federal courts, particularly the role of the jury." The court properly distinguished *Byrd* by noting that pretrial screening is a procedure "bound up" with the rights and obligations established by Indiana's Medical Malpractice Act, and is "not a mere form or mode" for enforcing those rights and obligations. Stressing the continued availability of a jury trial, the court summarily concluded that the screening process does not "disrupt the traditional federal system of allocating functions between judge and jury." The court paid lip service to *Hanna*, stating that its holding was "consonant" with *Erie*’s objectives of discouraging forum shopping and avoiding inequitable administration of the laws.

Similarly, a number of district courts have held that plaintiffs may not cross the threshold of the federal courthouse without having first complied with state screening panels. In *Davison v. Sinai Hospital, Inc.*, the court used a *Hanna* analysis in requiring compliance with Maryland's preaction "arbitration" panel. First, it was observed that unfairness would result between federal and state court litigants because "the character of litigation would differ drastically" if the federal

163. *Id.*

164. *Id.* at 1168-69.

165. The court noted that a district court properly could exercise discretion and stay the action pending compliance with the mediation procedures. *Id.* at 1170 n.8.

166. 603 F.2d 646 (7th Cir.), aff’g 465 F. Supp. 421 (N.D. Ind. 1979).


168. 603 F.2d at 648.

169. *Id.* The court of appeals refused to consider plaintiffs' additional argument that the procedures were violative of the seventh amendment right to jury trial. *See* note 294 infra.

170. 603 F.2d at 648-49. Despite its allusion to *Hanna*, the court of appeals seemed content to rely upon *Byrd* as the appropriate test. The district court, on the other hand, did not clearly articulate the standard deemed proper for resolution of the problem. The district court observed that the balancing test of *Byrd* may not be the appropriate standard for resolution of *Erie* problems in view of the Supreme Court's subsequent opinion in *Hanna*. 465 F. Supp. at 425. The district court, however, found the Indiana screening panel applicable "even under the balancing test." *Id.* at 433-34. It was concluded that "the state interest" which prompted enactment of the panel legislation, the "substantive nature" of its provisions, and "the lack of any conflicting federal procedure or substantive law" mandated its application. *Id.* at 434. The court's reasoning suggests acceptance of a test akin to the three-part *Szantay* analysis.

court failed to require pretrial screening.\textsuperscript{172} Second, plaintiffs seeking to avoid the screening panel might be tempted to "manufacture" diversity of citizenship in order to shop for a federal forum.\textsuperscript{173}

The \textit{Davison} court, like the district court in \textit{Hines}, rejected arguments that the state statute, by its terms, excluded federal court actions from its coverage.\textsuperscript{174} In both \textit{Davison} and \textit{Hines}, the statutory language provided that screening procedures must be followed prior to the commencement of an action in "any court of this state."\textsuperscript{175} The district court in \textit{Hines} reasoned that in cases based upon diversity jurisdiction, a federal court sitting in Indiana in effect is "only another court of the State."\textsuperscript{176} The \textit{Davison} court examined the history of the Maryland legislation and concluded that although the legislature did not consider the issue, there was no clear intent to preclude its application in federal courts.\textsuperscript{177} Similar statutory language is used in all of the preaction screening statutes, and the federal courts' conclusion that such language does not preclude applicability in diversity actions seems accurate.

\textit{Wells v. McCarthy}\textsuperscript{178} required compliance with Missouri's screening procedures, stating that any other holding would result in discrimination against citizens of the state, one of the evils which \textit{Erie} sought to avoid.\textsuperscript{179} The court also relied upon the Supreme Court's language in \textit{Ragan} that the "measure" of a state-created cause of action is to be

\begin{itemize}
\item 172. \textit{Id.} at 780.
\item 173. \textit{Id.}
\item 174. \textit{Id.} at 779.
\item 175. The Indiana statute at issue in \textit{Hines} provides that "[n]o action against a health care provider may be commenced in any court of this state before the claimant's proposed complaint has been presented to a medical review panel." IND. CODE ANN. § 16-9.5-9-2 (Burns Supp. 1979) (emphasis added). \textit{Davison} dealt with Maryland's statute, which requires "arbitration" of malpractice claims seeking damages in excess of $5000: "An action or suit of that type may not be brought or pursued in any court of this State except in accordance with this subtitle." MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-02 (Supp. 1978) (emphasis added). Rejection of the arbitrators' award entitles the party to bring an "action to nullify the award" consisting of a trial de novo in court. \textit{Id.} § 3-2A-06(b).
\item 176. 465 F. Supp. at 424 (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945)). The Seventh Circuit agreed with the district court's analysis. 603 F.2d at 647.
\item 177. 462 F. Supp. at 779. The court's conclusion is consistent with Angel v. Bullington, 330 U.S. 183 (1947), where it was argued that a North Carolina rule disallowing suits on deficiency judgments in state courts was not intended to apply to federal courts. The Supreme Court rejected this reasoning:
\begin{quote}
If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a Statewide policy through occasional suit in a federal court.
\end{quote}
What is more important, diversity jurisdiction must follow State law and policy . . . .
\textit{Id.} at 191-92. A similar problem of interpretation arises in the case of postcommencement panel legislation that calls for panels in specific state courts. See note 186 \textit{infra}.
\item 179. 432 F. Supp. at 689.
\end{itemize}
found only in state law: "It accrues and comes to an end when local law so declares." The earliest reported decision to pass upon the applicability in federal court of screening panels was *Flotemersch v. Bedford County General Hospital,* in which a district court in Tennessee held simply that plaintiff had failed in her complaint to allege compliance with a statutory condition precedent. The court made no mention of *Erie,* but declared that plaintiff had failed to state a claim for relief under the "substantive law of the state." Relying upon many of the foregoing precedents, a district court in Louisiana in *Seoane v. Ortho Pharmaceuticals, Inc.*, held, without amplification, that Louisiana’s panel was applicable in federal court.

The failure of the courts to approach the *Erie* problem with a more consistent analysis is regrettable, but the results of the decisions to date are accurate. The courts are maintaining the balance of federalism by deferring to the clear substantive interests bound up in screening panels.

**Postcommencement Panels**

The convening of a screening panel after commencement of an action may present an administrative problem for federal courts that is not present in the case of a preaction screening panel. The precommencement panel affects the dispute before judicial jurisdiction is invoked, whereas the postcommencement panel interrupts the normal judicial process. Nevertheless, like its preaction counterpart, a postcommencement reference panel furthers substantive purposes by discouraging prosecution of baseless claims, encouraging settlements, and seeking generally to stabilize the health care system.

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180. 337 U.S. at 533. See note 85 supra. Applying *Ragan* to the case at bar, the court reasoned that a plaintiff’s judicial cause of action in medical malpractice did not “accrue” under Missouri law until after a screening panel had reached its decision. 432 F. Supp. at 689.


182. *Id.* at 557.

183. *Id.* The Tennessee statute under consideration was of the preaction variety. The current Tennessee statute, however, provides for reference to a panel after the action has been commenced. See note 24 supra.


185. It has been suggested that the primary purpose of “court-sponsored,” *i.e.*, postcommencement, panels is to remove cases from the trial docket rather than to discourage the bringing of any action at all, distinguishing them from preaction panels. Baird, Munsterman & Stevens, *supra* note 13, reprinted in HEW REPORT, *supra* note 1, at 272 app. By providing a screening panel which encourages the abandonment of meritless claims and the settlement of good claims, however, a “docket-controlling” reference procedure serves the wider purpose of inhibiting medical malpractice litigation, which in turn will help relieve the medical malpractice crisis. Redish & Phillips, *supra* note 119, at 399 n.228, 400 n.231. See Woods v. Holy Cross Hosp., 591 F.2d 1164, 1174 (5th Cir. 1979) (“One significant factor causing the rising insurance rates was an increase in malpractice litigation, and one way to reduce such litigation was to screen out non-meritorious claims through the use of liability mediation panels.”)
to require their utilization by the federal courts in diversity actions. 186

A contrary conclusion, however, was reached by the Federal District Court for Rhode Island in *Wheeler v. Shoemaker*. 187 In an action against a Rhode Island doctor and hospital brought by citizens of Washington, defendants moved for reference to a medical liability mediation panel as applicable in Rhode Island's superior court. 188 Such panels are comprised of a "special master" appointed by the presiding justice of the superior court and a Rhode Island attorney and physician. 189 The parties are afforded discovery under the state rules of civil procedure and hearings before the panel are governed by the Rhode Island Rules of Evidence. 190 The panel's findings are deemed accepted by both parties unless one party rejects them within thirty days. 191 If the case proceeds to trial, the panel's findings on the issue of liability are admissible in evidence. 192 There is no provision for the calling of panelists as witnesses, although any expert witness consulted by the panel may be called. 193

The district court concluded that the Rhode Island screening panel

186. In some cases the *Erie* problem can be minimized or avoided entirely if, as a matter of state law, the convening of a panel is not required. This possibility exists in the case of reference panels whose use lies in the discretion of the trial judge or the parties, see note 25 *supra*; mandatory panels that are voluntarily waived by the parties pursuant to stipulation, see note 133 *supra*; or panels whose use is intended solely for particular state courts. As an example of the third contingency, the New York statute provides for panels to facilitate the disposition of medical malpractice actions "in the supreme court," N.Y. Jud. Law § 148-a(1) (McKinney Supp. 1979-80), which is New York's trial court of general jurisdiction. There are also several trial courts of limited monetary jurisdiction in New York, see D. Siegel, *New York Practice* §§ 9-22 (1978), and two cases have held that the panel legislation is inapplicable in such courts. *La Placa v. Boorstein*, 87 Misc. 2d 45, 46, 385 N.Y.S.2d 250, 251 (Sup. Ct. 1976) (no panel hearing may be obtained in an action in the New York City Civil Court, which has monetary jurisdiction only up to $10,000); *Ernst v. Good Samaritan Hosp.*, 86 Misc. 2d 694, 695, 382 N.Y.S.2d 915, 916 (Dist. Ct. 1976) (district court, with monetary jurisdiction only up to $6000, lacks power to convene panel). Thus, it might be concluded that the New York legislation, by its terms, would be inapplicable in a federal court, thereby eliminating the *Erie* problem. On the other hand, the *La Placa* court observed that the legislative intent was to provide for screening panels in "cases wherein substantial damages are sought," 87 Misc. 2d at 46, 385 N.Y.S.2d at 251, which arguably would include federal court actions in which a claim for damages must exceed $10,000. 28 U.S.C. § 1332(a) (1976).

The latter position would be in accord with the Massachusetts procedure laid down in *Austin v. Boston Univ. Hosp.*, — Mass. —, 363 N.E.2d 515, 518-19 (1977). The Massachusetts legislation requires that in all actions alleging medical malpractice a panel shall be convened by the "superior court." Mass. Gen. Laws Ann. ch. 231, § 60B (West Supp. 1979). *Austin* held that actions commenced in other state courts within Massachusetts should be transferred to the superior court for the purpose of a panel hearing, after which the action is to be transferred back to the other state court. — Mass. at —, 363 N.E.2d at 519. The procedure was extended by analogy to actions brought in federal court. *Id.* Lacking guidance from the state courts, the federal district court in *Wheeler v. Shoemaker*, 78 F.R.D. 218 (D.R.I. 1978), similarly concluded that the Rhode Island panel, used in conjunction with the "filling of a civil action in superior court," was intended to apply to federal diversity actions. *Id.* at 221 n.4.

188. *Id.* at 219.
190. *Id.* § 10-19-5.
191. *Id.* § 10-19-9(a).
192. *Id.* § 10-19-8.
193. *Id.*
functioned as an "adjunct of the superior court" and, as such, would impermissibly deprive the federal court of "the congressional grant of diversity jurisdiction." The court also rejected defendants' alternative request that the court convene its own panel, staffed under federal direction, on the grounds that such panel would interfere with the ordinary role of the jury in federal court, would create an appearance of unfairness to plaintiffs, and would impose too great a financial burden on the federal system.

The court argued that reference to a state-created panel furnishes the state court with "an opportunity to pass upon the claim initially" and therefore "is tantamount to vesting original jurisdiction in state court." The court felt that subjecting the claim to a panel comprised of local professionals whose decision would influence both settlement negotiations and the course of the subsequent trial would expose the noncitizen plaintiff to the local bias and prejudice that diversity jurisdiction was intended to avoid. The panel legislation therefore was an impermissible effort "to limit enforcement of state-created causes of action to state tribunals."

The court's reasoning is not persuasive. The error of the analysis is the court's failure to consider whether the substantive purposes underlying the reference procedure constituted an Erie-mandated limitation on the federal court's jurisdiction. State door-closing statutes, such as the corporate registration requirement in Woods and statutory conditions to litigation, such as the security bond requirement in Cohen, do not "divest" a court, state or federal, of jurisdiction. They merely "burden" the right of enforcement of a claim for the purpose of achieving some substantive goal. Screening panels perform the same function. To the extent that a federal court is deprived of jurisdiction by reference to a screening panel, the ouster is only temporary. Assuming either party rejects the panel decision, the action will continue in federal court in normal fashion; diversity jurisdiction will remain intact.

Insofar as a panel decision in favor of local defendants may be

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194. 78 F.R.D. at 219, 221-23.
195. Id. at 223-29.
196. Id. at 221.
197. Id. at 222. See note 5 supra.
198. 78 F.R.D. at 222.
199. See text & note 86 supra.
200. See text & note 87 supra.
201. The continued availability of diversity jurisdiction distinguishes reference panels from state laws which seek to vest exclusive jurisdiction in state courts. See, e.g., Home Ins. Co. v. Morse, 87 U.S. (20 Wall) 445, 458 (1874) (Wisconsin statute requiring foreign corporations to waive their right to remove state actions to federal court held void); Chicago & N.W. R.R. Co. v. Whitton, 80 U.S. (13 Wall) 270, 286 (1872) (plaintiff permitted to bring wrongful death action in federal district court despite Wisconsin statute purporting to limit jurisdiction of such actions to state courts); Markham v. City of Newport News, 292 F.2d 711, 718 (4th Cir. 1961) (Virginia statute waiving tort immunity for cities but only as to actions commenced in state courts held not
biased because it is rendered by local citizens, any such bias may be brought to the jury's attention, as in the case of an expert witness's opinion.\textsuperscript{202} In short, the \textit{Wheeler} court failed to take into account the qualification that \textit{Erie} imposed on the federal court's exercise of diversity jurisdiction; namely, uniform treatment of litigants with respect to rules having substantive import.\textsuperscript{203}

The second holding in \textit{Wheeler} was that \textit{Erie} did not require the federal court's appointment of its own reference panel.\textsuperscript{204} Although the screening legislation need not be interpreted as contemplating federal administration of the panel, the court was compelled to address the issue from this perspective as a result of its conclusion that reference to a state-operated panel would violate the principles of federal jurisdiction. Based on the analysis of \textit{Erie} set forth in the second portion of the opinion,\textsuperscript{205} the court probably would have decided against applicability of the state law regardless of whether it viewed the procedure as calling for reference to a state or federally created panel.

The court properly rejected plaintiffs' argument that screening panels are "purely procedural" and, under \textit{Hanna}, superseded in federal courts by Federal Rule of Civil Procedure 53, governing the use of court-appointed masters.\textsuperscript{206} Plaintiff contended that mandatory reference of all medical malpractice claims squarely conflicts with the Federal Rule, which allows discretionary references to masters in jury cases only as an "exception and not the rule" and only "when the issues are complicated."\textsuperscript{207} The court noted the similarities between the two procedures but concluded they are "simply two different animals."\textsuperscript{208}

\begin{footnotes}
\footnoteref{208} binding on federal court. Statutes requiring the convening of screening panels do not discriminate against federal jurisdiction by denying relief in federal actions that otherwise would be available in state court.

\footnoteref{202} See 3 J. Weinstein & M. Berger, \textit{Weinstein's Evidence} § 607(03) (1978); 3 J. Wigmore, \textit{Evidence} § 949 (1940). The ability to impeach the panel's findings helps preserve the constitutionality of their admissibility. See note 289 infra. Admissible panel findings frequently have been likened to expert testimony. \textit{See} note 261 infra.

\footnoteref{203} Like door-closing statutes, screening panels can be viewed as an "implied limitation" on the federal court's jurisdiction. \textit{See} Markham v. City of Newport News, 292 F.2d 711, 718 (4th Cir. 1961) ("To the extent it may be said that such cases \[e.g., Angel, Woods, see note 86 supra\] require a federal court to refrain from exercising its jurisdiction, it is a rational development of the \textit{Erie} doctrine"); Vestal & Foster, \textit{Implied Limitations on the Diversity Jurisdiction of Federal Courts}, 41 \textit{Minn. L. Rev.} 1, 7-8 (1956).

\footnoteref{204} 78 F.R.D. at 229.
\footnoteref{205} \textit{Id.} at 224-29.
\footnoteref{206} \textit{Id.} at 223.


\footnoteref{208} 78 F.R.D. at 224. The similarities include the fact of court appointment, the ability to conduct an evidentiary hearing, and the admissibility of the findings at a subsequent trial. One of the differences according to the court, aside from the discretionary versus mandatory nature of the procedures, is the scope of the master's findings, which generally are limited to facts, whereas screening panels determine ultimate issues of liability. In this regard, the court felt that masters' reports are intended to aid the jury in the fact-finding process while screening panels are intended
\end{footnotes}
Thus, the issue was to be resolved under the Rules of Decision Act and *Erie*. The court determined that the appropriate *Erie* test is a straight balancing approach which considers whether state interests may be outweighed by countervailing considerations of federal policy—the methodology suggested in the Redish-Phillips article. The danger in using such test, as exemplified in *Wheeler*, lies in the possibility that federal interests will be allowed to outweigh state procedural rules bound up with substantive rights—a result the Supreme Court rejected in *Byrd*.

The *Wheeler* court found that Rhode Island’s screening procedure interfered with the role of the jury in the federal system by replacing the jury’s decision, in effect, with that of the reference panel. Reviewing the history of the Rhode Island act, the court noted that the legislature lacked “‘faith’ in the jury’s ability to fairly decide liability and damages” in medical malpractice cases and therefore instituted a panel whose conclusions on the issue of liability would be brought to the jury’s attention with a view toward influencing their decision. This function of the panel constituted interference with the jury’s role because “most juries are not likely to conduct an independent evaluation of the evidence and conclude contrary to a court-appointed panel of esteemed professionals who have reviewed all the evidence.”

The *Wheeler* court recognized that failure to follow the reference procedure would frustrate the state’s substantive goals of eliminating frivolous claims, encouraging settlements, stabilizing malpractice insurance rates, and generally favoring medical malpractice defendants. It was also conceded that the twin aims of *Erie*, as articulated in *Hanna*, would be frustrated, since refusal to appoint a panel would encourage forum shopping by out-of-state plaintiffs and would produce inequity towards defendants who might be exposed to a greater risk of

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211. *Id.* at 226.
212. *Id.* at 225-26.
213. *Id.* at 226.
214. *Id.* at 227.
adverse settlements and jury verdicts if they are sued in federal court, rather than in state courts where the panel procedures are in effect.\textsuperscript{215} These considerations were outweighed, however, by the federal court's interest in preserving the role of the jury.\textsuperscript{216} The court also identified a countervailing federal interest in "the fairness of the process," arguing that "adherence to the panel procedure will result, at the very least, in the appearance of unfairness to plaintiffs" and "undermine the confidence and respect for judgments obtained in federal court."\textsuperscript{217}

The court's reasoning with respect to federal interests in jury decisions and fairness would encompass references to state-operated panels, as well as to panels convened by a federal court. Since the court viewed the issue as whether it should convene its own panel financed out of federal funds, however, the court also held that the state's interests were outweighed by the federal interest in "controlling the administrative burdens imposed on its judiciary and the expansion of its staff and budget," an interest identified in the Redish-Phillips article.\textsuperscript{218} In conclusion, the state's interests in curtailing medical malpractice claims were outweighed by "the federal interests in controlling both the character, quality and cost of the adjudicatory process in federal court."\textsuperscript{220}

In permitting considerations of federal policy to outweigh the substantive purposes underlying Rhode Island's screening procedures, the \textit{Wheeler} court upset the balance of federalism that \textit{Erie} seeks to protect. The court's objection to the "unfairness" of the screening process seems to be a veiled attack on its constitutionality under the due process clause.\textsuperscript{221} Although a federal court may have a general interest in the fairness of its procedures, this interest should not be allowed to supersede a presumptively valid state procedure that furthers significant

\textsuperscript{215} Id. at 227-28.
\textsuperscript{216} Id. at 226. The court expressly disavowed that it was deciding the case on seventh amendment grounds, and relied instead on the suggestion in \textit{Byrd} that "[t]he federal interest in the jury's role is not necessarily coterminous with the seventh amendment guarantee." \textit{Id.} at 226 n.12. It seems clear that the seventh amendment is not violated by pretrial screening procedures. See text & notes 272-97 \textit{infra}.
\textsuperscript{217} 78 F.R.D. at 228.
\textsuperscript{218} Id. "[T]he state legislature cannot unilaterally thrust the substantial, added inconvenience and cost onto the federal system." \textit{Id}.
\textsuperscript{219} Redish & Phillips, supra note 119, at 392-94. See text & notes 121-22 supra.
\textsuperscript{220} 78 F.R.D. at 229.
\textsuperscript{221} See Woods v. Holy Cross Hosp., 591 F.2d 1164, 1176 (5th Cir. 1979) (in response to due process challenge to Florida's preaction screening panel, court examined "fairness" of the dealings between the state and malpractice claimants). The test of due process is whether legislation is arbitrary and irrational, bearing no reasonable relationship to a legitimate state purpose. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). Courts have been directed to refrain from striking down legislation on due process grounds simply because they deem it unwise or improvident. Ferguson v. Skrupa, 372 U.S. 726, 729 (1963); Williamson v. Lee Optical, 348 U.S. 483, 488 (1955). Medical malpractice legislation has survived all due process challenges under this standard. See note 10 supra.
substantive goals.²²² Similarly, the court's analysis of the panel's "interference" with the role of the jury, although arguably an Erie issue pursuant to Byrd,²²³ is more appropriate for an inquiry directly under the seventh amendment.²²⁴ Moreover, Byrd suggested that absent the direct applicability of the seventh amendment, a federal court's interest in protection of the jury's function should yield to state rules intimately related to specific substantive interests.²²⁵ The court's final point—that compliance with state procedure would impermissibly interfere with financial interests of the federal court system—need not have been reached if the court had properly interpreted the legislation as requiring the convening of a panel by state authorities, thereby avoiding the conflict. In any event, such federal fiscal interests should yield to the significant substantive interests underlying medical malpractice screening panels, a conclusion reached by the very authors of the balancing test adopted in Wheeler.²²⁶

A more accurate result was reached by the Federal District Court for Massachusetts in Byrnes v. Kirby.²²⁷ The Byrnes court ordered reference of the plaintiff's malpractice claim to a Massachusetts screening panel comprised of a justice of the Massachusetts Superior Court and a Massachusetts-licensed physician and attorney.²²⁸ The Massachusetts statute, like that of Rhode Island, provides for a hearing, the results of which may be introduced at trial.²²⁹ If the panel finds for the defendant, an additional burden is imposed upon the plaintiff: He must post a $2000 bond as security for defendant's costs, including witness' and attorney's fees, in the event the plaintiff does not prevail at trial.²³⁰

The court relied upon Cohen and Hanna in concluding that reference was mandatory. The court focused on the bonding requirement as creating a substantive liability, analogous to the bond in stockholder derivative actions in Cohen.²³¹ In addition, allowing a noncitizen plaintiff to bypass the reference panel would violate the twin aims of Erie by encouraging forum shopping and promoting inequitable ad-

²²³. See text & notes 89-92 supra.
²²⁴. Id. at 386-87; Whicher, supra note 97, at 561-62. See note 123 supra.
²²⁶. Professor Redish and Mr. Phillips view the conflict between state medical malpractice screening panels and the "cost-avoidance" interest of the federal system as a "tie" between significant competing interests. Redish & Phillips, supra note 119, at 400. Unlike the Wheeler court, the authors would allow the imposition of such costs on the federal courts in deference to the state's interest in "controlling potential litigants' primary conduct." Another recent article, however, agrees with the reasoning and conclusions of the Wheeler court. Turner, Medical Malpractice Arbitration on the Erie Railroad 11 U. TOLEDO L. REV. 1, 22-25 (1979). Id.
²²⁸. Id. at 1016, 1020. See MASS. GEN. LAWS. ANN. ch. 231, § 60B (West Supp. 1979).
²²⁹. Id.
³³⁰. Id.
The court also declared that there was "no federal policy, such as that favoring jury determination of factual issues recognized in Byrd that would be contravened by reference of this case to a state medical malpractice tribunal." In implementing the reference, the Byrnes court was aided by the prior opinion of the Supreme Judicial Court of Massachusetts in Austin v. Boston University Hospital. The Austin court had suggested that if a federal court determines that reference procedures are applicable in a diversity action, the reference should be made to the state superior court, which will appoint a tribunal to act on the matter, "after which its findings will be transmitted to the clerk of the Federal Court." Thus, the Byrnes court, unlike the Wheeler court, did not entertain the notion of appointing its own panel.

Because Erie requires application of procedural laws closely related to substantive rights, the result reached in Byrnes is the correct one. To be sure, the use of reference panels may present problems of administration where no guidance has been provided by local law on the mechanics of convening such a panel in a federal action. It has been said, however, that in state-federal conflicts with "substantive overtones," it is important for federal courts "to take advantage of every available procedural device to indirectly accomplish a coordination of the two systems." The approach suggested by Massachusetts' highest court provides a workable model that should be followed elsewhere: References from the federal court should be made to the state court empowered to convene a panel under the state legislation, after which the panel findings can be returned to the federal court for further proceedings. Such procedure eliminates the economic concerns expressed in Wheeler, since the federal court will not be required to pay the expenses of the panel.

232. Id.
233. Id.
235. Id. at —, 363 N.E.2d at 519.
236. Callahan v. American Sugar Refining Co., 47 F.R.D. 359, 362 (E.D.N.Y. 1969) (Weinstein, J.) (loss of consortium action by wife brought in federal court while husband's primary action for negligence was pending in state court, creating conflict with state policy favoring joint trials of such actions).
237. The federal court should grant a continuance while the malpractice claim is pending before the state panel. Cf. Woods v. Holy Cross Hosp., 591 F.2d 1164, 1170 n.8 (5th Cir. 1979) (it lies within discretion of district judge to stay action pending compliance with state screening panel); 9 C. Wright & A. Miller, supra note 29, § 2352 (decision to grant a continuance lies in the sound discretion of the court). Since the discovery provisions of the Federal Rules of Civil Procedure have been held to supersede contrary state discovery rules, Sibbach v. Wilson & Co., 312 U.S. 1, 14-16 (1941) (FED. R. CIV. P. 35 given precedence over state law disallowing physical examinations), the parties should be entitled to continue the discovery process in accordance with federal law. The physical transmittal of the reference to the state court and its return to the federal court can be accomplished through procedures analogous to those used in implementing references to federal masters. FED. R. CIV. P. 53(d)(1), (e)(1).
Delaware is the only state that has made explicit provision in its reference panel legislation for actions brought in federal court. The statute provides that the State Insurance Commissioner shall convene a panel "upon request" of a federal court in Delaware "in the manner instructed by the said federal court," provided, however, that such panel shall not be convened "unless provisions are made for the payment of the compensation and expenses" of panelists and expert witnesses "out of the funds other than those of the General Fund of the State."238 The Commissioner's ability to refuse acceptance of a federal court's request for a reference seems unwise to the extent the federal court is expected to absorb the costs of such panel. The statute provides, however, that the Commissioner's selection of panelists and their powers and duties "shall be subject to the order of [the federal] court and/or such rules as the federal court system shall designate for the implementation of such panels."239 Thus, the statute contains sufficient flexibility to allow the federal court to fashion an order eliminating or minimizing any imposition on the federal treasury, as for example, by reducing the number of panelists and expert witnesses, by requesting that the Commissioner select panelists willing to serve without compensation, or by limiting the number of days for a hearing.240

Other states with reference panels should follow Delaware's lead in making statutory provision for actions in federal courts, but a healthier regard for federalism counsels inclusion of an explicit provision that the expenses of such panels be borne by the state. In the absence of such a funding provision or some other arrangement relieving the federal treasury of responsibility for the operational costs of reference panels, a federal court may be tempted to follow the doubtful lead of

238. Del. Code Ann. tit. 18, § 6814 (Supp. 1978). Delaware's panel consists of two health care providers, one attorney, two lay persons and a nonvoting ex officio member of the Commissioner's staff, who have the power to appoint expert witnesses to review the evidence and submit testimony or reports. Id. §§ 6804, 6810. Each panelist, other than the Commissioner's staff member, is entitled to $100 per diem plus expenses, not to exceed a total of $700 per panelist. Id. § 6813. An expert witness is entitled to reimbursement of expenses and a "reasonable fee" to be fixed by the panel. Id. § 6810. All fees and expenses are to be paid "out of the general funds of the State," id. § 6813, subject to the apparent exception in § 6814 for panels in federal court actions. The panel is empowered in its discretion to impose such costs up to a maximum of $1000 upon the party who loses before the panel. Id. § 6813. If the case goes to trial, the panel expenses may be assessed as costs subject to the same limitation. Id.

239. Id. § 6814.

240. The court might also take advantage of Delaware's provision allowing imposition of panel costs on the parties. See note 238 supra. Fed. R. Evid. 706 provides additional guidance in its procedures for the appointment of expert witnesses. Such court-appointed witnesses are entitled to reasonable compensation either payable from federal funds, or "paid by the parties in such proportion and at such time as the court directs." Id. 706(b). By analogy, such compensatory scheme could be applied to the expert witnesses consulted by a screening panel, or to the panelists themselves, whose collective opinion has been treated as that of an expert witness. See note 261 infra. Another analogy with respect to panelists can be made to Fed. R. Civ. P. 53(a), which allows compensation of masters to be fixed by the court and charged to the parties. The Wheeler court, unfortunately, rejected such possibilities. 78 F.R.D. at 227 n.14, 228.
Wheeler and refuse to implement the important state policies underlying the screening of medical malpractice claims.

IV. ADMISSIBILITY OF PANEL FINDINGS IN SUBSEQUENT TRIALS

The admissibility of a screening panel’s findings during a subsequent trial in federal court raises an Erie question separate from that of compliance with the panel hearing itself. Resolution of the admissibility issue requires consideration not only of Erie but also of the Federal Rules of Evidence and the seventh amendment.

Erie and the Federal Rules of Evidence

In federal courts matters of evidence, which can be classified generally as “procedural” rules,241 are governed by the congressionally enacted Federal Rules of Evidence.242 Erie complicates the law of evidence in diversity actions because some evidence rules are closely related to substantive rights and policies under state law.243 If a state’s rule of evidence is bound up with such substantive interests, Erie would seem to require compliance with the state rule notwithstanding the general applicability of the Federal Rules of Evidence.244 Deciding the question of admissibility of medical malpractice panel decisions in ac-

244. If there is a square conflict between a state rule of evidence and one of the Federal Rules of Evidence, however, Erie becomes irrelevant. Hanna v. Plumer, 380 U.S. 460, 472 (1965) declared that Congress has power under the Constitution to regulate all matters in federal courts “rationally capable of classification as either” substantive or procedural. See note 71 supra. Assuming, therefore, that Congress has plenary power over evidence in federal courts, see Degnan, supra note 241, at 278, 288, a congressionally enacted Federal Rule of Evidence should supersede a contrary state rule, even if the latter expresses a substantive policy. The Supreme Court, on the other hand, is prohibited by the Rules Enabling Act from promulgating rules abridging “substantive” rights. See note 100 supra. Thus, if enacted by the Supreme Court pursuant to the Enabling Act, a Federal Rule of Evidence could not displace a state rule closely related to substantive policy.

Professor Ely cites privileges as an example of evidentiary rules bound up with substance: If rules of privilege were included in Federal Rules of Evidence enacted by the Supreme Court, they would have to yield to conflicting state rules; if enacted by Congress, the Federal Rules would prevail, since Congress is not bound by the restrictive language of the Rules Enabling Act. Ely, supra note 57, at 738-40. The issue of privileges is moot because Congress chose to defer to state law on this issue. See text & notes 251-59 infra.

If an evidentiary issue is not covered explicitly by the Federal Rules of Evidence, Erie and the Rules of Decision Act become the appropriate standards. Degnan, supra note 241, at 288; Ely, supra note 57, at 739.
cordance with *Erie*, however, does not conflict with the Federal Rules of Evidence.

If panel findings are admissible under state law, it is arguable that the same result should obtain in federal court pursuant to the hearsay exception in Federal Rule of Evidence 803(8)(C). The Rule permits the admissibility of "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law."245 The Supreme Court has cited the Rule in sanctioning the admission of administrative agency findings and an arbitration award during subsequent employment discrimination cases.246 Screening panel decisions would seem to fall within the same category of admissible reports sanctioned by Rule 803(8)(C).247 The admissibility of panel findings is also analogous to the admissibility of a federal master's report permitted by Federal Rule of Civil Procedure 53(e).248 An apparent conflict with these rules would arise, however, in a state which excludes panel findings from a subsequent trial. The federal court should conform to state practice in either case because *Erie*, as well as other provisions of the Federal Rules of Evidence, so requires.

In deciding whether to allow panel findings into evidence, strong policy considerations have influenced state legislatures. States disallowing admissibility might be fearful that the panel decision will unduly influence the jury.249 States providing for admissibility, on the other hand, have determined that this might be the best way to encourage cooperative conduct by the litigants in their participation in panel proceedings and subsequent settlement negotiations.250 In either case, substantive state policies would be undermined if a federal court failed to follow the state rule.

Fortunately, the Federal Rules of Evidence were designed to operate, for the most part, in conformity with *Erie*'s principle of deference to state substantive policy. The three rules governing presumptions,251

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245. FED. R. EVID. 803(8)(C).
249. Redish, *supra* note 7, at 793; see text & notes 54-55 *supra*. Another possible reason for excluding the panel's findings at a subsequent trial is to maintain an atmosphere of mediation during the panel proceedings. Redish, *supra* note 7, at 767 n.55.
250. See text & notes 51-53 *supra*.
251. FED. R. EVID. 302.
privileged communications,\textsuperscript{252} and competency of witnesses\textsuperscript{253} explicitly provide that state law as to these matters should be followed in civil actions in which "State law supplies the rule of decision" regarding an element of a claim or defense.\textsuperscript{254} Thus, Congress not only preserved prior \textit{Erie} principles with respect to burden of proof and presumptions,\textsuperscript{255} it also extended \textit{Erie} to encompass privileges and competency.\textsuperscript{256} Such evidentiary rules further substantive state policies, and in diversity actions Congress has determined that such policies should be respected. Burdens of proof and presumptions are intended to favor one party or claim over another and their application will have a substantial impact on the enforcement of substantive rights and obligations.\textsuperscript{257} Even if privileged communications do not affect the enforcement of a particular claim, they reflect strong state interests in the confidentiality of certain transactions and human relationships.\textsuperscript{258} Competency, which relates to whether a particular witness should be prohibited from testifying, might also, at times, reflect a strong state policy, as in the case of a "dead man's statute."\textsuperscript{259}

Similarly, the evidentiary rules contained in screening panel legislation seek to effectuate substantive policies. If the panel decision is admissible, it is expected to benefit the party in whose favor it was rendered, making its operation similar to that of a burden of proof or presumption.\textsuperscript{260} If the panel decision is not admissible, the state has

\textsuperscript{252} Id. 501.
\textsuperscript{253} Id. 601.
\textsuperscript{254} With respect to claims and defenses based on federal law, the rules provide for uniform "federal" standards. \textit{See} id. 301, 302, 501, 601.
\textsuperscript{255} Burden of proof and presumptions were treated by the Supreme Court as "substantive" for \textit{Erie} purposes even prior to the adoption of the Federal Rules of Evidence. Palmer v. Hoffman, 318 U.S. 109, 117 (1943) (burden of proof); Cities Serv. Co. v. Dunlap, 308 U.S. 208, 212 (1939) (burden of proof); Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959) (presumptions). Presumptions are now explicitly covered in \textit{Fed. R. Evid. 302}, and since the rules do not cover burden of proof, prior law is left intact. 9 C. \textsc{Wright} \& A. \textsc{Miller}, \textit{supra} note 29, at § 2409.
\textsuperscript{256} There was disagreement prior to adoption of the Federal Rules of Evidence concerning the treatment to be accorded such rules under \textit{Erie}. \textit{See} 9 C. \textsc{Wright} \& A. \textsc{Miller}, \textit{supra} note 29, at §§ 2406, 2408; \textsc{Weinstein}, \textit{supra} note 243, at 370-73.
\textsuperscript{257} \textsc{Degnan}, \textit{supra} note 299; \textsc{Redish} \& \textsc{Phillips}, \textit{supra} note 119, at 394; \textsc{Weinstein}, \textit{supra} note 243, at 363-64.
\textsuperscript{258} \textsc{Ely}, \textit{supra} note 57, at 738-40; \textsc{Redish} \& \textsc{Phillips}, \textit{supra} note 119, at 394.
\textsuperscript{259} Privileges for confidential communications are created because the state thinks a particular relationship—attorney-client, husband-wife, journalist-source—is sufficiently important that it should be fostered by preserving confidentiality in the relationship even at the cost of losing evidence that would help to determine the truth in later litigation.
\textsuperscript{260} A dead man's statute generally prohibits a party from testifying about a transaction with a decedent in an action against the decedent's estate. \textit{See} N.Y. \textsc{Civ. Prac.} § 4519 (McKinney 1963). One of its purposes is to protect estates from fraudulent claims. \textsc{Weinstein}, \textit{supra} note 243, at 365.
decided to avoid any possibility of undue influence on the jury and, in effect, has rendered the panel’s “expert opinion” incompetent. In such case, the panel decision should be inadmissible in federal court because Federal Rule of Evidence 601 requires conformity with state practice regarding competency of witnesses. Although the panel opinion is not literally a “witness,” Rule 601 has been held to encompass “documents or other written evidence” in a case involving a toxicologist’s report in a vehicular accident case where the state rule against admissibility of such report “embodie[d] a clear, unequivocal public policy.”

State rules either excluding or admitting screening panel decisions also embody an “unequivocal” legislative policy to which federal courts should yield. A Hanna analysis buttresses the conclusion that state law should be followed, particularly in the case of a state rule of nonadmissibility following preaction screening. For example, assume that a nonresident plaintiff obtains a favorable panel ruling but the defendant refuses to settle. In choosing a court in which to sue the defendant, plaintiff undoubtedly will pick the federal forum if it is believed that the panel findings will be held admissible, contrary to state practice. Such admissibility would produce inequitable administration of the law with respect to similarly situated defendants sued in state courts and resident plaintiffs unable to sue in federal court.

Case law dealing with the interplay between Erie and the Federal

presumption within the meaning of Fed. R. Evid. 302, since the award is “presumed to be correct, and the burden is on the party rejecting it to prove that it is not correct.” Md. Cts. & Jud. Proc. Code Ann. § 3-2A-06(d) (Supp. 1979).


It might also be argued that the inadmissibility of a panel decision is analogous in function to a privileged communication, which must be excluded from evidence in federal courts pursuant to Fed. R. Evid. 501. Some states disallowing the admissibility of panel findings describe the entire screening process as “confidential.” Ark. Stat. Ann. § 34-2609 (Supp. 1979); Idaho Code § 6-1001 (1979); Me. Rev. Stat. Ann. tit. 24, § 2807 (Supp. 1978-79).

Bearce v. United States, 433 F. Supp. 549, 553 (N.D. Ill. 1977) (local statute explicitly provided that the results of toxicologist’s examinations “shall not be admissible in evidence in any action of any kind in any court”).

In view of the competency test in Fed. R. Evid. 601, compliance with state law is also required with respect to the calling of panel members as witnesses at the trial. Although the substantive policies furthered by qualification or disqualification of panelists as witnesses are less clear than those surrounding the admissibility of the findings, see note 50 supra, the federal rule eliminates the necessity of making such an inquiry.

The forum shopping dimension would be eliminated if the same situation arose in federal court in a postcommencement panel state, because the outcome of the panel hearing would not be known at the time of selection of the judicial forum. The inequity argument, however, would still be valid. In the unlikely event that a federal court would choose a rule of exclusion in conflict with a state rule allowing the panel findings into evidence, the Hanna analysis is persuasive in the case of a plaintiff who loses before the panel.
Rules of Evidence in the context of malpractice panel findings is sparse. In *Woods v. Holy Cross Hospital*,266 the Fifth Circuit held in a footnote "that the admissibility of panel findings is so important a part of the mediation panel framework that [Florida's statute] must be enforced in a federal diversity case."267 Quoting language from a prior opinion applying a Texas rule of evidence,268 the court "recognize[d] in [Florida's statute] one of those rare evidentiary rules which is so bound up with state substantive law that federal courts sitting in [Florida] should accord it the same treatment as state courts in order to give full effect to [Florida's] substantive policy."269 In recognition of the significant substantive goals of screening panels, other federal courts should follow the lead of the Fifth Circuit in adhering to state evidentiary rules allowing admissibility of panel findings. Likewise, in a state with a rule of nonadmissibility, the federal court should give it "the same treatment as state courts in order to give full effect to [the state's] substantive policy."270

The Seventh Amendment

Although conformity to screening panel legislation is required by *Erie* and the Federal Rules of Evidence, attention must also be paid to the seventh amendment, which provides "[i]n Suits at common law, . . . the right of trial by jury shall be preserved."271 Although no state screening procedure denies malpractice litigants the opportunity to have the claim ultimately heard and decided by a jury, compliance with such procedure might present an unconstitutional "interference" with the right of jury trial.272 The most troublesome argument is that

266. 591 F.2d 1164 (5th Cir. 1979).
267. Id. at 1178 n.23.
268. Conway v. Chemical Leaman Tank Lines, Inc., 540 F.2d 837 (5th Cir. 1976). The Texas statute governing wrongful death actions had been amended to permit the admissibility into evidence of the fact of remarriage by the surviving spouse. *Id.* at 859. The district court had refused to apply the amendment, possibly in reliance upon FED. R. EVID. 403 (exclusion of prejudicial or confusing evidence). *Id.* at 838. The Fifth Circuit reversed, holding that the court should have "recognized an exception to the inapplicability of *Erie* to evidentiary questions," since the state rule of evidence was "embedded in Texas substantive law and policy." *Id.* at 839. The Texas legislature had passed the amendment "doubtless to forestall further use of the tactics employed here to create a misleading impression of continuing widowhood. *Id.*
269. 591 F.2d at 1169 n.6. The *Woods* court also relied upon the Fourth Circuit's opinion in Stonehocker v. General Motors Corp., 587 F.2d 153 (4th Cir. 1978), which disapproved the South Carolina District Court's refusal to admit into evidence a Federal Motor Vehicle Safety Standard in a diversity action for personal injuries against a car manufacturer. The *Stonehocker* court determined that such relevant evidence was admissible under FED. R. EVID. 402. *Id.* at 155. The court, however, noted that "there are some matters of State policy so basic that they should be accorded the same treatment they have in the State courts even under the new rules." *Id.* at 156. In the instant case, there was "no stated policy of South Carolina either favoring the admissibility of such evidence or disfavoring it." *Id.* at 155.
271. U.S. CONST. amend. VII.
272. *See generally* Lenore, supra note 7, at 419-23; *Note, supra* note 7, at 328-36.
admitting panel decisions into evidence will have a strong influence on the jury, unfairly prejudicing the party against whom the decision was rendered. This argument rests on the “assumption that no jury could evaluate a medical malpractice panel’s recommendation with objectivity, or follow a trial court’s instructions regarding the weight to be given it.” 273 Another alleged ground of interference, applicable to all panels regardless of whether the findings are admissible into evidence, is the delayed access to a jury inherent in the screening process.

Woods v. Holy Cross Hospital 274 upheld screening legislation against these seventh amendment challenges. 275 In Woods, the Fifth Circuit denied that Florida’s panel procedure unduly delayed plaintiff’s access to a jury, stating that “[n]othing in the seventh amendment requires that a jury make its findings at the earliest possible moment in the course of civil litigation.” 276 Further, the admission into evidence of the panel findings “does not unconstitutionally usurp the function of a seventh amendment-required jury.” 277 The court stressed that the panel findings, although relevant evidence, are not binding on the jury. Although the Florida statute forbids panelists from testifying as witnesses, the panel decision may be impeached through the presentation of the same witnesses and exhibits that were presented to the panel, leaving the jury free to reach its own conclusions. 278

The Fifth Circuit relied upon two Supreme Court opinions, Meeker v. Lehigh Valley Railroad 279 and In re Peterson. 280 In Meeker, the defendant railroad argued that its seventh amendment rights were violated during a rate discrimination trial by the introduction of adverse findings of the Interstate Commerce Commission rendered in prior proceedings before that agency. 281 The Court held that the relevant statute making such findings admissible as prima facie evidence did not violate the seventh amendment. 282 The provision “cut[off] no defense, interpose[d] no obstacle to a full contestation of all the issues, and [took] no question of fact from either court or jury.” 283

The Peterson Court upheld the constitutionality under the seventh

274. 591 F.2d 1164 (5th Cir. 1979).
276. 591 F.2d at 1178.
277. Id. at 1181.
278. Id. at 1180.
279. 236 U.S. 412 (1915).
280. 253 U.S. 300 (1920).
281. 236 U.S. at 430.
282. Id.
283. Id.
amendment of a procedure similar in many respects to pretrial screening of malpractice claims. In a diversity action for alleged payments due under a sales contract, the trial court granted the defendant’s motion to appoint an auditor to conduct a hearing and submit a report setting forth his opinion as to the amount due plaintiff on each disputed invoice. Plaintiff petitioned for a writ revoking the order on the grounds, inter alia, that the procedure violated his seventh amendment rights. The Supreme Court held that “[n]o incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor or by the use to which his report may be put.”

The jury’s power to make the ultimate determination of fact was unobstructed, because the auditor’s report “will be treated, at most, as prima facie evidence . . . . The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made.”

The Supreme Court’s opinions in *Meeker* and *Peterson* indicate that neither the inherent delay nor the admission into evidence of the findings of medical malpractice screening panels would violate the seventh amendment. Although a jury, in fact, might be influenced by the panel decision, it nevertheless will remain the final arbiter of all the issues. In all states except Maryland, the jury will be instructed to ascribe only such weight to the panel decision as it chooses. As in *Peterson*, the parties may “call, examine, and cross-examine witnesses as if the [panel’s] report had not been made.” The ability to impeach the panel decision will be even greater in states allowing the calling of panelists as witnesses. The fact that the reference procedure sanc-

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284. 253 U.S. at 304-05.
285. Id. at 311.
286. Id. The auditor’s report, unlike most screening panel decisions, was not automatically admissible into evidence. *Id* at 312. The court retained the power to approve or reject the report, *id*, a procedure which has been carried over into Fed. R. Civ. P. 53, governing federal masters’ reports. See Fed. R. Civ. P. 53(e)(2), (3).

*Peterson* provides the constitutional underpinning for Rule 53, which allows references to masters in jury trial cases “when the issues are complicated.” Fed. R. Civ. P. 53(b). See 5A J. Moore & J. Lucas, *supra* note 207, ¶ 53.14[3]. References to masters are compared to malpractice screening panels in *supra* note 208. See *supra* note 49.

287. See note 49 *supra*.
288. 253 U.S. at 311.
289. See, e.g., Halpern v. Gozan, 85 Misc. 2d 753, 758, 381 N.Y.S.2d 744, 748 (Sup. Ct. 1976) (“the ‘attacking’ party could attempt to neutralize the impact of the recommendation by demonstrating that the panel hearing was neither as detailed, incisive, nor far-reaching as the jury trial itself”); Fuchsberg & Turkewitz, *supra* note 54, at 26.

The inability to call panelists as witnesses for purposes of cross-examination or otherwise does not render the admissibility of the panel decision unconstitutional. Woods v. Holy Cross Hosp., 591 F.2d 1164, 1180 (5th Cir. 1979). The parties are still free to “impeach” the panel finding by introduction before the jury of the same evidence presented before the panel. *Id*. The parties might also comment during opening and closing arguments on the nature of panel proceedings, the composition of the panel, the evidence presented before the panel, and the panel decision itself. See Eastin v. Broomfield, 116 Ariz. 576, 580-81, 570 P.2d 744, 748-49 (1977); Strykowski v. Wilkie, 81 Wis. 2d 491, 527, 261 N.W.2d 434, 451 (1978). Further, as in the case of other items of evidence, a federal judge may comment on the panel decision. See 11 J. Moore &
tioned by the Supreme Court in Peterson involved a report only as to findings of fact, whereas panel decisions contain an opinion on the ultimate issue of liability, should not make a difference. Admissible panel decisions frequently have been analogized to the opinions of expert witnesses, who are permitted by the Federal Rules of Evidence to render opinions on ultimate issues. Juries are aided, not displaced, by such opinions.

The holding of the Fifth Circuit in Woods is sound, and all of the district courts passing on the seventh amendment issues have reached similar conclusions. The only contrary authority is that of the Illinois Supreme Court and an Ohio trial court with respect to state constitutional provisions governing the right to jury trial. All other state appellate courts have upheld the constitutionality of panel procedures.

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291. See see note 261 supra.

292. Fed. R. Evid. 704. See 11 J. Moore & M. Bendix, supra note 242, ¶ 704.10, at VII-66 ("[O]pinion testimony on ultimate issues . . . will aid the trier, but not supplant nor invade his province, since it is the trier of fact who ultimately determines what weight to give the opinion testimony of the witness."). Similarly, the federal master's report, admissible in a jury trial pursuant to Fed. R. Civ. P. 53(e)(3), has been described as the report of an expert witness which the jury may accept or reject as it sees fit. 5A J. Moore & J. Lucas, supra note 207, §§ 53.14[3]-[4].

293. Strykowski v. Wilkie, 81 Wis. 2d 491, 524, 261 N.W.2d 434, 449 (1978) ("[B]y identifying and focusing complex issues, the panels aid jury determination of those cases which do go to trial."). See also Redish, supra note 7, at 793; Rx for New York, supra note 2, at 498; Note, supra note 7, at 333.


Hines is the only district court opinion containing a significant discussion of the issues. The court summarily dismissed the delay argument because the plaintiffs had "failed to detail how even presumed costs and delays affect the right to trial by jury." 465 F. Supp. at 428. The admissibility of the panel decision was upheld as a "reasonable chang[e] in the procedure surrounding the right to trial by jury." Id. at 427. Admissible panel findings were likened to an exception to the hearsay rule and to an expert witness's opinion. Id. at 428.

On appeal, the Seventh Circuit refused to reach the federal constitutional question because of "an inadequate record." 603 F.2d 646, 649 (7th Cir. 1979). No facts had been developed in the district court that were relevant to the delay, expenses and increased burden of proof allegedly impairing the right to jury trial. Id. The court "declare[d] to make a constitutional adjudication in advance of demonstrated facts supporting the asserted unconstitutional results of the Act's application." Id.

295. Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976). Under the Illinois statute, panel findings are not admissible at trial. Ill. Ann. Stat. ch. 110, § 58.8(4) (Smith-Hurd Supp. 1979). The court's holding that the Illinois panel was "an impermissible restriction on the right to trial by jury," id. at 324, 347 N.E.2d at 741, apparently was based on the delay in access to jury trial. The case is criticized in Redish, supra note 7, at 793-95; Note, supra note 7, at 329-30; 1977 Wis. L. Rev. 203. See Strykowski v. Wilkie, 81 Wis. 2d 491, 525, 261 N.W.2d 434, 450 (1978) ("[T]he [Illinois] court's discussion of this issue was purely conclusory . . . and offers no guidance for this court.").

296. Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (1976). The Ohio court found that the admissibility into evidence of the panel decision "effectively and substantially reduces a party's ability to prove his case, because that party must persuade a jury that the decision of the arbitrators was incorrect, a task not easily accomplished in view of the added weight which juries have traditionally accorded the testimony of experts." Id. at 168, 355 N.E.2d at 908.
dures against challenges based on the right of trial by jury.\textsuperscript{297} When the jury trial issue arises in future federal court actions, the majority view should be followed.

\section*{Conclusion}

Whether screening panels are serving their intended purpose of easing the medical malpractice crisis through curtailment of courtroom litigation is uncertain. Screening procedures have the potential for increasing litigation costs rather than reducing them, since claims which proceed to trial will have been delayed and the expenses of two hearings will have been incurred.\textsuperscript{298} Some medical professionals may dislike screening procedures in the belief that plaintiffs use them merely as discovery devices.\textsuperscript{299} Further, there is no guarantee that the plaintiff will not resort to a jury trial.\textsuperscript{300} It remains to be seen whether the benefits of screening exceed the disadvantages in the overall scheme of controlling the medical malpractice problem.

The principles of federalism underlying \textit{Erie} ensure that federal courts will not frustrate the experiment by refusing to apply screening procedures in diversity actions. The substantive policies underlying screening legislation are far too important to be cast aside in deference to federal interests in controlling the "character" of adjudication in fed-

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\item[]\textsuperscript{297} Eastin v. Broomfield, 116 Ariz. 576, 580-81, 570 P.2d 744, 748-49 (1977) (neither delay factor nor admissibility of panel decision prevents jury from acting as final arbiter); Attorney Gen. v. Johnson, 282 Md. 274, 291-97, 385 A.2d 57, 67-70 (admissibility of award merely alters the burden of proof; parties are free to attack the award with whatever evidence and arguments they wish); appeal dismissed, 99 S. Ct. 60 (1978); Paro v. Longwood Hosp., — Mass. —, 369 N.E.2d 985, 991 (1977) (bond requirement does not obstruct access to a jury); Prendergast v. Nelson, 199 Neb. 97, 107-09, 256 N.W.2d 657, 665-66 (1977) (panel decision is equivalent to expert testimony; jury remains ultimate arbiter); Comiskey v. Arlen, 55 A.D.2d 304, 307-09, 390 N.Y.S.2d 122, 125-28 (1976), aff'd on other grounds, 43 N.Y.2d 969, 372 N.E.2d 34, 401 N.Y.S.2d 200 (1977) (panel decision is, in effect, an expert opinion, which may be weighed by the jury as it chooses); Halpern v. Gozan, 85 Misc. 2d 753, 758-59, 381 N.Y.S.2d 744, 748-49 (Sup. Ct. 1976) (jury can be expected to exercise its independence in deciding the case); Parker v. Children's Hosp., 483 Pa. 106, 116-28, 394 A.2d 932, 937-43 (1978) (requirement of pretrial proceeding is not an onerous burden and is counterbalanced, in any event, by potential for swift adjudication at minimal cost; availability of trial \textit{de novo} does not preclude jury's consideration of panel award as evidence).

A thorough discussion of the jury trial issue is contained in Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978). The Wisconsin court rejected the costs-and-delays argument, likening the preliminary hearing procedures to the "exhaustion-of-remedies requirement" that litigants avail themselves of applicable administrative agency proceedings prior to court action. \textit{Id.} at 524-25, 261 N.W.2d at 450. The court answered the undue influence argument by noting that the jury retains the ultimate power of decision and that the parties are free to impeach the panel decision. \textit{Id.} at 524-26, 261 N.W.2d at 451. Further, the decision "should help to focus and clarify the issues, which are often highly technical, for the benefit of the jury." \textit{Id.} at 528, 261 N.W.2d at 451. In sum, the panel decision is "simply evidence to be weighed by the jury and accepted or rejected, as with any other evidence." \textit{Id.}

\item[]\textsuperscript{298} Carter v. Sparkman, 335 So. 2d 802, 807-08 (Fla. 1976) (England, J., concurring), cert. denied, 429 U.S. 1041 (1977); Abraham, supra note 13, at 516-17; Redish, supra note 7, at 768; \textit{Recent Medical Malpractice Legislation}, supra note 2, at 681; Bard & Krevitsky, supra note 54, at 4.

\item[]\textsuperscript{299} Comment, supra note 3, at 1458.

\item[]\textsuperscript{300} See Roth, supra note 2, at 497; \textit{Rx for New York}, supra note 2, at 496.
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eral courts. Although the seventh amendment forbids enforcement of state practices altering the role of the jury in federal court, neither the screening process nor subsequent admissibility of panel findings prevents the jury from performing its traditional function. In a litigation-prone society, federal courts should welcome partnership with the states in testing the effectiveness of mechanisms designed to encourage resolution of disputes outside of the courtroom in a fair, speedy, and inexpensive manner.