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An Erie Obstacle to State Tort Reform

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ABSTRACT

The national wave of tort reform that began in the 1980s wrought procedural and substantive changes in Idaho law. This article focuses on one such change: the 1987 enactment of the Idaho law that restricts the pleading of punitive damages, Idaho Code § 6-1604(2). That law, similar to laws in seven other states, bars punitive damage claims from an initial complaint and allows a punitive damage claim to be included in an amended complaint only if the plaintiff demonstrates a reasonable likelihood that he or she will prove facts sufficient to recover a punitive damage award at trial. This article addresses whether this state law restricting the pleading of punitive damages applies in federal-court diversity actions. The federal district courts in Idaho have held that, under the *Erie* doctrine, the Idaho law does apply in diversity actions. This article argues that those courts are incorrect. The Idaho law and similar state laws restricting the pleading of punitive damages do not apply in federal court because they conflict with the Federal Rules of Civil Procedure ("FRCPs"). Moreover, even if the FRCPs are interpreted not to conflict with these state laws, federal courts should still disregard the state laws, in the exercise of the federal courts' inherent power to make procedural rules for their own proceedings that trump state law.

Idaho and other states have pursued tort reform for more than twenty years.[1] Some of the state laws born of this effort are purely

1. *See, e.g.*, John T. Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOY. L.A. L. REV. 1021, 1026–34 (2005) (offering a brief history of tort reform); James McMillan, *Contributory Negligence and Statutory Damage Limits—An Old Alternative to a Contemporary Movement?*, 42 IDAHO L. REV. 269, 291–92 (2005) (discussing "the wave of tort reform in the mid-1980s" in Idaho); John O. Ward, *Origins of the Tort Reform Movement*, VI CONTEMP. ECON. POL'Y 97 (1988)

substantive, while others are partly substantive and partly procedural. To cite a purely substantive example, Idaho and other states have enacted laws capping punitive damage awards.[2] These punitive damage caps are substantive because they define tort plaintiffs' right to a particular legal remedy.[3] To cite an example of a type of tort reform law that is partly substantive and partly procedural—and that is the focus of this article—laws in Idaho and seven other states restrict the pleading of punitive damages.[4] More specifically, these laws require plaintiffs in certain cases to get the court's permission before including a request for punitive damages in the complaint.[5] Though procedural in operation, these state-law restrictions on pleading punitive damages seem to have a substantive purpose and effect: by limiting unsubstantiated punitive damage *claims*, the laws seem designed to limit unwarranted punitive damage *awards*. Thus, these state laws restricting the pleading of punitive damages occupy a borderland where procedure and substance blend.

State laws in the substance-procedure borderland pose a challenge when it comes to determining their applicability to diversity cases in federal court.[6] The applicability of state laws in diversity cases is governed by the doctrine of *Erie Railroad v. Tompkins*.[7] Roughly speaking, *Erie* requires federal courts adjudicating

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("In 1986, 39 states passed tort reform laws in response to the 'great liability insurance crisis' of 1984-1986.").

2. IDAHO CODE ANN. § 6-1604(3) (2005), *amended by* ch. 122, § 3, 2003 Idaho Sess. Laws 372. *See generally* 1 JOHN J. KIRCHER & CHRISTINE M. WISEMAN, PUNITIVE DAMAGES: LAW AND PRACTICE § 5:31 (2d ed. 2006) (discussing various states' caps on punitive damages).

3. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428 (1996) (accepting the parties' agreement that "a statutory cap on [tort] damages would supply substantive law for *Erie* purposes"); Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 278 (1989) ("In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.").

4. *See infra* Part I.A–B.

5. The laws apply to punitive damage claims asserted in complaints as well as in answers (in connection with counterclaims) and in cross-claims. *See, e.g.*, Harwood v. Talbert, 39 P.3d 612, 615–16 (Idaho 2001) (applying IDAHO CODE ANN. § 6-1604 to counterclaim including request for punitive damages). For simplicity's sake, however, this article will refer to the laws as governing the contents of complaints.

6. The *Erie* doctrine applies in diversity cases as well as when federal courts adjudicate state law claims within supplemental jurisdiction. For simplicity's sake, however, this article will refer to the universe of cases to which *Erie* applies as "diversity" cases.

7. 304 U.S. 64 (1938). This article uses the term "*Erie* doctrine" in its broad signification, which actually encompasses several different situations pitting federal law against state law. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 698 (1974) (stating that use of "the single rubric of 'the Erie doctrine'" has obscured

state-law claims to apply federal procedural law and state substantive law.[8] Under *Erie*, for example, a federal court sitting in diversity clearly must apply a state law capping punitive damage awards because such state laws are substantive; they put a substantive restriction on a legal remedy.[9] Less clear is whether *Erie* also requires federal courts to apply state laws, such as Idaho's, that restrict the pleading of punitive damages; such laws mandate a procedure that may have a substantive purpose and effect.

The lower federal courts disagree on the issue of whether state laws restricting the pleading of punitive damages, such as Idaho's, apply in diversity cases. The United States Courts of Appeals for the Eighth and Ninth Circuits have reached results that conflict with the result reached in the U.S. Court of Appeals for the Eleventh Circuit. The federal district courts have likewise reached conflicting results. The federal district courts of Idaho have held that the Idaho law restricting the pleading of punitive damages does apply in diversity actions. Many other district courts have reached a contrary conclusion with respect to substantially similar laws of other states. Moreover, even courts that reach the same result use differing approaches. Indeed, a thorough survey of the case law shows a bewildering array of approaches, some of which reflect fundamental misunderstanding of the *Erie* doctrine.

The U.S. Supreme Court may very well need to resolve this disagreement on the applicability of state laws restricting the pleading of punitive damages. The issue is important as a matter of federalism, because it concerns whether a state's tort reform efforts can reach into the federal courts in that state.[10] The issue has great importance for individual litigants, too, for it will control the outcome of many law

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"what are really three distinct and rather ordinary problems of statutory and constitutional interpretation").

8. *See, e.g., Gasperini*, 518 U.S. at 427 ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."); *see also* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (citing *Erie* for proposition that federal courts should apply state law when exercising pendent (today "supplemental") jurisdiction over state-law claims); Hanna v. Plumer, 380 U.S. 460, 465 (1965) ("The broad command of *Erie* was . . . [that] federal courts are to apply state substantive law and federal procedural law.").

9. *See Gasperini*, 518 U.S. at 428–29 (starting its analysis from a point accepted by the parties: namely, "that a statutory cap on damages would supply substantive law for *Erie* purposes"); *id.* at 426 (parties arguing that New York law is "substantive" because it "controls how much a plaintiff can be awarded").

10. J. Benjamin King, Note, *Clarification and Disruption: The Effect of* Gasperini v. Ctr. for Humanities, Inc. *on the* Erie *Doctrine*, 83 CORNELL L. REV. 161, 162 (1997) ("As more state law is labeled 'substantive' for Erie purposes, more state law flows into federal court.").

suits brought in the federal courts in eight states,[11] including California, the most populous state.[12] Despite the importance of the issue and its unsettled resolution, the issue has received little scholarly attention.[13] This article attempts to fill the gap.

This article concludes that federal courts should not apply the Idaho law and other state laws that similarly restrict the pleading of punitive damages. These state laws cannot apply in federal court because they conflict with two Federal Rules of Civil Procedure. They conflict with FRCP 8(a)(3) by prohibiting initial complaints from including punitive damage requests. Additionally, they conflict with FRCP 15 by requiring plaintiffs seeking to amend their complaint to request punitive damages to demonstrate a likelihood of success in recovering those damages. Because FRCP 8(a)(3) and 15 are valid, they prevent federal courts in diversity cases from applying Idaho law restricting the pleading of punitive damages and similar state laws. Thus, this article concludes that the Idaho federal courts have erred in applying the Idaho law in diversity actions.

Contrary to the analysis proposed in this article, some courts have interpreted the FRCPs not to conflict with state laws restricting the pleading of punitive damages. Even if those courts are correct, federal courts in diversity should not apply the state laws. Instead, they should refuse to apply the state law as a matter of federal common law.

Precedent recognizes that, in the absence of a federal statute or FRCP, federal courts have inherent power to devise rules of procedure as a matter of federal common law. In diversity cases, the federal

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11. *See infra* Part I.A–B (discussing the eight state statutes).

12. California is the most populous state. *See* U.S. Census Bureau, 2005 Population Estimates, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-T1-R&-ds_name=PEP_2005_EST&-_lang=en&-format=US-9S&-_sse=on (last visited Nov. 17, 2006). Also included among the eight states that have laws restricting the pleading of punitive damages are the populous states of Florida and Illinois. *See infra* notes 29–30.

13. *See, e.g.*, Josh Jacobson, *Pleading Punitive Damages: An* Erie *Dilemma*, 58 BENCH & BAR MINN. 17, 17–19 (2001) (focusing on decisions of federal district courts in the District of Minnesota holding that *Erie* requires them to apply Minnesota statute restricting the pleading of punitive damages and concluding that those decisions are incorrect); Jeffrey A. Parness et al., *The Substantive Elements in the New Special Pleading Laws*, 78 NEB. L. REV. 412, 420–21, 433–35 (1999) (discussing state-law rules for pleading punitive damages in several states and case law addressing the applicability of those rules in federal court actions); Rhett Traband, *An* Erie *Decision: Should State Statutes Prohibiting the Pleading of Punitive Damages Claims Be Applied in Federal Diversity Actions?*, 26 STETSON L. REV. 225, 227 (1996) (concluding that "these state statutes are substantive in nature and must be applied by the federal courts sitting in diversity"). *See generally* 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 8.04(8)(c), at 8–31 (3d ed. 2006) ("[T]he lower federal courts have divided on [the] applicability [of state professional malpractice pleading statutes] under *Erie*.").

courts can apply these federal judge-made rules if their application, in lieu of conflicting state laws, would not disserve the twin aims of *Erie*: avoidance of forum shopping and inequitable administration of the laws. Furthermore, even if the application of federal judge-made rules would fail this "modified outcome-determinative" test, federal courts my be able to apply their own judicially created rules, instead of conflicting state law, if a strong enough federal interest supports their application.[14] Thus, the federal courts' inherent power to make procedural rules can trump state law.

This article argues that—if state laws restricting the pleading of punitive damages are found not to conflict with any FRCPs—federal courts should use their inherent power to disregard those state laws. True, the federal courts' application of their own rules in this situation probably fails the "modified outcome-determinative" test. It would encourage plaintiffs seeking punitive damages to choose federal court over state court, to avoid the stricter pleading requirements of state law. Defendants in these federal-court cases could be exposed to punitive damages claims to which their state-court counterpart would not be exposed, a seemingly unfair disparity. Nonetheless, federal-court disregard of state laws restricting the pleading of punitive damages is justified to preserve the uniform, simplified system of pleading and the liberal standards for amendment of pleadings established in the FRCPs. That is because these have become "essential characteristic[s] of [the federal court] system."[15]

This article proceeds in six parts. Part I describes the Idaho statute and similar state laws restricting the pleading of punitive damage claims. Part II briefly describes the *Erie* framework in general. Part III surveys the case law that has applied the *Erie* framework to the Idaho statute and similar state laws. Part IV discusses the doctrinal confusion and practical importance of this issue. Part V explains how state laws restricting the pleading of punitive damages should be analyzed under *Erie*. Part VI concludes by urging the Idaho federal courts to revisit the issue.

14. *See Gasperini*, 518 U.S. at 431–32; Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537–38 (1958).

15. *Gasperini*, 518 U.S. at 431 (quoting *Byrd*, 356 U.S. at 537) (second alteration in original).

I. STATE LAWS RESTRICTING THE PLEADING OF PUNITIVE DAMAGES

A. Idaho

The statute with which we are principally concerned is Idaho Code section 6-1604 (though, as we will see, Idaho's statute resembles those in seven other states).[16] Section 6-1604 was enacted in 1987 as part of a larger legislative attempt at tort reform.[17] Section 6-1604 was significantly amended in 2003, in a later round of legislative tort reform.[18]

As amended in 2003, section 6-1604 contains three subsections. The first subsection establishes a standard of proof for recovering punitive damages at trial:

> (1) In any action seeking recovery of punitive damages, the claimant must prove, by clear and convincing evidence, oppressive, fraudulent, malicious or outrageous conduct by the party against whom the claim for punitive damages is asserted.[19]

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16. *See infra* Part I.B (discussing state statutes similar to Idaho Code § 6-1602(2)).

17. For historical background pre-dating the tort reform of the 1980s, see Douglas D. Kramer & Thomas J. Schnebeck, *Punitive Damages in Idaho*, 17 IDAHO L. REV. 87 (1980). In Idaho, the tort reform effort was led by the Idaho Liability Reform Coalition. Telephone Interview by Nance Ceccarelli with Matt Fullenbaum, Director of Legislation, American Tort Reform Coalition, in Washington, D.C. (Sep. 19, 2006). Supporters of reform feared "social norming," in which individual plaintiffs come to expect large awards beyond actual damages and juries are desensitized to making large awards. Telephone Interview by Nance Ceccarelli with Kenneth R. McClure, Givens Pursely, LLP and founder and executive director of Idaho Liability Reform Coalition, in Boise, Idaho (Oct. 11, 2006). Opponents argued that Idaho did not have a record of unusually large jury awards and that restrictions on such awards could harm plaintiffs with legitimate claims. Telephone Interview with Matt Fullenbaum, *supra*; telephone interview by Nance Ceccarelli with Governor James Risch, former member of the Idaho Senate Judiciary Committee, in Boise, Idaho (Oct. 25, 2006).

18. 2003 Idaho Sess. Laws 371–72, Ch. 122.

19. IDAHO CODE ANN. § 6-1604(1) (2005). As originally enacted in 1987, the statute required proof "by a preponderance of the evidence." 1987 Idaho Sess. Laws 576, Ch. 278, § 1. In 2003, the provision was amended to increase the burden of proof to the current "clear and convincing evidence" standard. 2003 Idaho Sess. Laws 371, Ch. 122, § 3. This change was prompted by concern that trial judges were not adequately performing the gatekeeping role contemplated for them in the 1987 legislation, under which they were supposed to prevent poorly supported punitive damage claims from going to the jury. The judge's failure to fulfill that role, in turn, was apparently influenced in part by the liberal standard for amending pleadings established by the Idaho Rules of Civil Procedure. Telephone Interview with Kenneth R. McClure, *supra* note 17; telephone inter-

The second subsection, our main focus, prescribes the procedure and standard for pleading punitive damages:

> (2) In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. A prayer for relief added pursuant to this section shall not be barred by lapse of time under any applicable limitation on the time in which an action may be brought or claim asserted, if the time prescribed or limited had not expired when the original pleading was filed.[20]

The third subsection caps punitive damage awards at "the greater of" $250,000 or three times the amount of compensatory damages.[21]

As stated above, this article focuses on subsection (2) of section 6-1604, which governs the procedure for pleading punitive damages. I have described subsections (1) and (3) as well because a statutory provision is known by the company it keeps. Subsection (2)'s restriction on the pleading of punitive damages keeps company with two other subsections that have the substantive purpose and effect of limiting liability for punitive damages. We might reasonably infer that a similar, substantive purpose underlies subsection (2), even though it is

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view with Senator Denton Darrington, chair, Idaho Senate Judiciary Committee, in Boise, Idaho (Oct. 25, 2006); *see also* IDAHO R. CIV. P. 15(a) & 16(c)(2), (d)(2).

20. IDAHO CODE ANN. § 6-1604(2) (2005). As originally enacted in 1987, the statute did not explicitly require the court to consider evidence when deciding whether to allow the pleadings to be amended to include a claim for punitive damages. Rather, the 1987 statute provided that the court would allow the amendment "if the moving party establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." 1987 Idaho Sess. Laws 576, Ch. 278, § 1. The 1987 version could plausibly have been read to allow a party to establish the requisite likelihood through a proffer of evidence, instead of producing actual evidence. That option seems foreclosed by the 2003 amendment, which provides for the court to allow an amendment of pleadings to include a punitive damage request "after weighing the evidence presented" at the hearing on a motion to amend the pleadings. 2003 Idaho Sess. Laws 372, Ch. 122, § 3. *See generally* Paterson v. State, 128 Idaho 494, 501 (1996) (applying IDAHO CODE ANN. § 6-1604(2)).

21. IDAHO CODE ANN. § 6-1604(3) (2005), *as amended by* 2003 Idaho Sess. Laws 372, Ch. 122, § 3.

procedural in its operation (restricting the pleading of punitive damages).

The inference of section 6-1604(2)'s substantive purpose gains strength from section 6-1604's location. It is in Chapter 16 of Title 6 of the Idaho Code. Chapter 16 is entitled "Periodic Payment of Judgments—Limitation on Certain Tort Damages and Liabilities." The second part of that title—referring to limitations on tort damages and liabilities—signifies that its provisions impose substantive limitations.[22]

In the 1987 legislation that created section 6-1604, the Idaho legislature also created section 5-335.[23] Section 5-335 is described here because it shows how the legislature apparently pursued a substantive purpose (limiting tort defendants' liability for punitive damage awards) partly through procedural means restricting a tort plaintiff's ability to plead punitive damages.

Section 5-335 is entitled "General rules of pleading—Claims for relief." Reflecting that title, section 5-335 prescribes rules specifically for the required contents of complaints and other pleadings containing claims. Most of section 5-335 closely resembles Idaho Rule of Civil Procedure (IRCP) 8(a), which was on the books when section 5-335 was enacted. Section 5-335 not only replicates IRCP 8(a) but also includes additional language, not found in IRCP 8(a), which is italicized below:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) if the court has limited jurisdiction, a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claims showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which the pleader

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22. *See, e.g.*, Comm'r of Internal Revenue v. Stern, 357 U.S. 39, 45 (1958) (describing *Erie* as requiring federal courts in diversity to "apply state . . . law in defining state-created rights, obligations, and *liabilities*") (emphasis added). Interviews conducted on the history of Section 6-1604 confirm its substantive purpose. The principal drafter of the provision and of the 2003 legislation amending it was Kenneth R. McClure. Mr. McClure stated that the background to subsection (2) of section 6-1604 was to discourage punitive damage claims that lacked adequate support from being pleaded for purely strategic purposes. It was common ground that on occasion punitive damage claims were being used as a sword to force settlement, and that such claims could have this effect even when they would not survive FRCP 12(b)(6) motions to dismiss or FRCP 56 motions for summary judgment. In addition, the amounts claimed for punitive damages sometimes reflected the defendant's financial statement and not necessarily the degree of wrongdoing or appropriate deterrence. Telephone Interview with Kenneth R. McClure, *supra* note 17.

23. 1987 Idaho Sess. Laws 581, Ch. 278, § 9.

> deems himself or herself entitled. Relief in the alternative or of several different types may be demanded. *In any action for recovery because of personal injury or death, the claim for relief shall not specify the amount of damages claimed, but shall, instead, contain a general allegation of damage and shall state that the damages claimed are within any minimum or maximum jurisdictional limits of the court to which the pleading is addressed. At any time after service of the pleading, the defendant may, by special interrogatory, demand a statement of the amount of damages claimed by the plaintiff, which shall be answered within fifteen (15) days. The information provided in the response to the special interrogatory shall not be admissible into evidence at trial, nor shall it be communicated to the jury by argument or otherwise, nor shall it affect or limit the verdict rendered by the jury or the judgment issued by the court, in accordance with Idaho rule of civil procedure 54(c).*[24]

One apparent purpose of the portion of section 5-335 that has been italicized above is to prevent circumvention of section 6-1604(2)'s restriction on pleading punitive damages. Section 6-1604(2) prohibits a specific request for punitive damages in the initial complaint. Section 5-335 prevents a plaintiff from circumventing that prohibition by requesting an astronomical amount of damages that reflects (but does not expressly request) an amount sought as punitive damages.

Section 5-535 goes further. Section 6-1604(2) allows the plaintiff to move to amend the initial complaint to pray for punitive damages. Section 5-335, however, appears to prohibit even the amended complaint from seeking a specific amount of punitive damages. This reading of section 5-335 finds support in IRCP 9(g), which is entitled "Damages," providing in relevant part: "When items of general damage or punitive damages are claimed, no dollar amount or figure shall be included in the complaint beyond a statement reciting that the jurisdictional amount established for filing the action is satisfied."[25] FRCP 9(g) was amended to prohibit complaints from referring to dollar figures in 1987, a few months after enactment of the 1987 legislation that created sections 6-1604 and 5-335.[26]

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24. IDAHO CODE ANN. § 5-335 (2005) (emphasis added).
25. IDAHO R. CIV. P. 9(g).
26. 1 IDAHO CT. R., at 115 (Compiler's notes).

In sum, Idaho has, as part of its tort reform effort, clamped down on punitive damages.[27] The effort comprises both a substantive law that limits defendants' liability for punitive damage awards and procedural laws that restrict plaintiffs' ability to plead punitive damages.

B. Other States

Seven other states have laws restricting the pleading of punitive damages that are similar to Idaho Code section 60-1604(2). They are California,[28] Florida,[29] Illinois,[30] Kansas,[31] Minnesota,[32] North Dakota,[33] and Oregon.[34] These states' statutes concern us because they, like the Idaho statute, have generated case law on the *Erie* issue on which this article focuses.

The other states' statutes track Idaho's in three key ways. First, they prohibit plaintiffs from putting punitive damage claims in their initial complaint.[35] Second, having barred punitive damage requests

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27. Idaho's restrictions on punitive damages reflect only part of the state's tort reform legislation. Other significant legislation restricts awards of "noneconomic damages" in personal injury actions. IDAHO CODE ANN. § 6-1603 (2005).

28. CAL. CIV. PROC. CODE §§ 425.13 & 425.14 (West 2004).

29. FLA. STAT. ANN. § 768.72(1) (West 2005).

30. 735 ILL. COMP. STAT. ANN. 5/2-604.1 (West 2003). A 1995 statute amending Section 5/2-604.1 was held unconstitutional, the effect of which was to restore the version in effect before the amendment. *See* Probasco v. Ford Motor Co., 182 F. Supp. 2d 701, 703 (C.D. Ill. 2002).

31. KAN. STAT. ANN. § 60-3703 (2004).

32. MINN. STAT. ANN. § 549.191 (West 2000).

33. N.D. CENT. CODE § 32-03.2-11 (2005).

34. OR. REV. STAT. ANN. § 31.725(2) (West 2004).

35. *See* CAL. CIV. PROC. CODE § 425.13(a) ("[N]o claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed."); FLA. STAT. ANN. § 768.72(1) (West 2005) ("[N]o claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure."); 735 ILL. COMP. STAT. ANN. 5/2-604.1 ("[N]o complaint shall be filed containing a prayer for relief seeking punitive damages. However, a plaintiff may, pursuant to a pretrial motion and after a hearing before the court, amend the complaint to include a prayer for relief seeking punitive damages."); KAN. STAT. ANN. § 60-3703 ("No tort claim or reference to a tort claim for punitive damages shall be included in a petition or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed."); MINN. STAT. ANN. § 549.191 ("Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages."); N.D. CENT. CODE § 32-03.2-11 ("Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages."); OR. REV. STAT. ANN. § 31.725(2) ("At the time of filing a pleading with the court, the pleading may not contain a request for an

from initial complaints, the statutes authorize the plaintiff to move to amend the complaint to add a request for punitive damages.[36] Third, they require the court—when ruling on the motion to amend—to assess the likelihood that the plaintiff will prove entitlement to punitive damages.[37] Thus, all seven states, like Idaho, condition requests for punitive damages on court approval, which depends on the court's assessment of the plaintiff's likelihood of success in ultimately recovering punitive damages.

The other states' statutes differ from Idaho's, and from each other, in some ways. Specifically, they differ in describing the range of civil actions to which they apply.[38] In addition, they differ in describ-

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award of punitive damages. At any time after the pleading is filed, a party may move the court to allow the party to amend the pleading to assert a claim for punitive damages.").

36. *See supra* note 35.

37. *See* CAL. CIV. PROC. CODE § 425.13 ("The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code," which prescribes the standard of proof for recovery of punitive damages); FLA. STAT. ANN. § 768.72 (1) (allowing a claimant to move to amend a complaint to add a claim for punitive damages and requiring "a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages"); 735 ILL. COMP. STAT. ANN. 5/2-604.1 ("The court shall allow the motion to amend the complaint if the plaintiff establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages."); KAN. STAT. ANN. § 60-3703 ("The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim pursuant to K.S.A. 60-209," which prescribes the standard of proof for recovering punitive damages.); MINN. STAT. ANN. § 549.191 (requiring the motion to amend the complaint to seek punitive damages to "be accompanied by one or more affidavits showing the factual basis for the claim" and requiring the court to grant the motion if it "finds prima facie evidence in support of the motion"); N.D. CENT. CODE § 32-03.2-11 ("If the court finds, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages."); OR. REV. STAT. ANN. § 31.725(3)(a) (requiring court to deny motion to amend a pleading to add a request for punitive damages if "[t]he court determines that the affidavits and supporting documentation submitted by the party seeking punitive damages fail to set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for a directed verdict to the party opposing the motion on the issue of punitive damages in a trial of the matter").

38. *See* CAL. CIV. PROC. CODE § 425.13(a) (applying "[i]n any action for damages arising out of the professional negligence of a health care provider"); *id.* § 425.14 (applicable to claims "for punitive or exemplary damages against a religious corporation or religious corporation sole"); FLA. STAT. ANN. § 768.72(1) (applying "[i]n any civil action"); 735 ILL. COMP. STAT. ANN. 5/2-604.1 (applying "[i]n all actions on account of bodily injury or physical damage to property, based on negligence, or product liability based on any theory or doctrine, where punitive damages are permitted"); KAN. STAT. ANN. § 60-3703 (govern-

ing the material that the court should consider when ruling on the plaintiff's motion to amend the complaint to request punitive damages.[39] They also differ in prescribing the standard the court should apply in deciding whether to allow the amendment.[40]

Despite those differences, the statutes' essential similarity might lead you to expect that federal courts would treat them similarly when deciding their applicability in diversity actions. As we will see, nothing could be further from the truth. The federal courts diverge widely in analyzing these statutes under *Erie*. We will explore that case law after a brief, general description of *Erie* analysis.

II. *ERIE* ANALYSIS IN GENERAL

Erie analysis loosely refers to principles used to determine when state law applies in federal courts' adjudication of claims arising under state law. These principles stem in part from the Rules of Decision Act (RDA),[41] in part from the Rules Enabling Act (REA),[42] and in part

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ing any "tort claim or reference to a tort claim for punitive damages . . . in a petition or other pleading"); MINN. STAT. ANN. § 549.191 (covering claims for punitive damages in "a civil action"); OR. REV. STAT. ANN. § 31.725(1) ("A pleading in a civil action may not contain a request for an award of punitive damages except as provided in this section.").

39. *See* CAL. CIV. PROC. CODE § 425.13(a) (requiring court to consider "supporting and opposing affidavits"); FLA. STAT. ANN. § 768.72(1) (requiring court to consider "evidence in the record or proffered by the claimant"); 735 ILL. COMP. STAT. ANN. 5/2-604.1 (West 2003) (providing for "a hearing before the court" on a plaintiff's pretrial motion to amend the complaint to contain a prayer for relief seeking punitive damages); KAN. STAT. ANN. § 60-3703 (2004) (requiring court to consider "supporting and opposing affidavits"); MINN. STAT. ANN. § 549.191 (requiring plaintiff to submit "one or more affidavits showing the factual basis for the [punitive damages] claim"); OR. REV. STAT. ANN. § 31.725(2) (permitting parties to submit supporting and opposing "affidavits and documentation").

40. *See* CAL. CIV. PROC. CODE § 425.13(a) (requiring court to allow amendment if "plaintiff has established that there is a substantial probability that the plaintiff will prevail on the [punitive damages] claim"); FLA. STAT. ANN. § 768.72(1) (requiring plaintiff to establish "a reasonable basis for recovery of [punitive] damages"); 735 ILL. COMP. STAT. ANN. 5/2-604.1 (stating that a court may allow amendment if plaintiff establishes "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages"); KAN. STAT. ANN. § 60-3703 (permitting court to allow amendment if the plaintiff "has established that there is a probability that the plaintiff will prevail on the [punitive damages] claim"); MINN. STAT. ANN. § 549.191 (permitting court to grant motion to amend "if the court finds prima facie evidence in support of the motion"); OR. REV. STAT. ANN. § 31.725(3) (permitting court to deny motion to amend if it finds that affidavits and supporting documentation "fail to set forth specific facts supported by admissible evidence adequate to avoid the granting of a motion for a directed verdict to the party opposing the motion on the issue of punitive damages in a trial of the matter").

41. The RDA states: "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." 28 U.S.C. § 1652 (2000). In *Erie*, the Court held that, except in matters governed by the U.S. Constitution or acts of Congress, the RDA obligates federal

from the Constitution.[43] The analysis results in a determination of whether the federal court must apply state law or, instead, must apply federal law to the issue at hand.[44]

In *Erie* analysis, a federal court must first determine whether the issue at hand is covered by a Federal Rule of Civil Procedure (FRCP).[45] If so, the court must apply the FRCP, rather than the state law, as long as the FRCP is valid.[46] An FRCP will be valid if Congress could have constitutionally enacted the rule itself and the rule falls within the scope of the rulemaking power that Congress has dele-

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courts to apply not only state statutory law but also the decisional law of the states' highest courts, whether or not the decisional law concerned matters of local law or of general law. Erie R.R. Co. v. Tomkins, 304 U.S. 64, 71–78 (1938).

42. The REA, 28 U.S.C. § 2072 (2000), authorizes the U.S. Supreme Court "to prescribe the general rules of practice and procedure ... for cases in the United States district courts ... and courts of appeals." *Id.* § 2072(a). The REA's second sentence, however, limits this authority by providing: "Such rules shall not abridge, enlarge or modify any substantive rights." *Id.* § 2072(b).

43. The Court in *Erie* explained that federal courts in diversity cases must apply state law in the absence of valid federal law because "[t]here is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78. Thus, state law fills the vacuum left by the absence of federal law. Hanna v. Plumer, 380 U.S. 460, 471–72 (1965) ("[N]either Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.").

44. Sun Oil Co. v. Wortman, 486 U.S. 717, 727 (1988) ("It is never the case under *Erie* that either federal *or* state law—if the two differ—can properly be applied to a particular issue . . . .").

45. Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987) ("The initial step is to determine whether, when fairly construed, the scope of [an FRCP] is sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court, thereby leaving no room for the operation of that law.") (internal quotation marks omitted); Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980) ("The first question must therefore be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court."); *see also Hanna*, 380 U.S. at 470–71 (distinguishing case law involving conflict between state law and FRCPs from cases in which state law did not conflict with FRCP). If state law conflicts with the U.S. Constitution, the Constitution of course preempts the state law. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause). Similarly, if state law conflicts with a federal statute, the federal statute preempts state law as long as the federal statute is valid. *See, e.g.*, Stewart Org. v. Ricoh Corp., 487 U.S. 22, 27 (1988) ("[A] district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress' constitutional powers.").

46. *Burlington N.*, 480 U.S. at 5 (stating that if FRCP covers the issue at hand, "[t]he Rule must then be applied if it represents a valid exercise of Congress' rulemaking power, which originates in the Constitution and has been bestowed on [the U.S. Supreme] Court by the Rules Enabling Act, 28 U.S.C. § 2072."); *see also Hanna*, 380 U.S. at 471–74 (discussing analysis for validity of FRCP).

gated to the U.S. Supreme Court in the Rules Enabling Act.[47] Analysis of whether state law conflicts with a valid FRCP is known as "*Hanna* Part II" analysis because it was famously described in the second part of the Court's decision in *Hanna v. Plumer*.[48]

The test for an FRCP's validity under *Hanna* Part II is lenient. Congress has power under the Constitution to create the lower federal courts.[49] That power, as augmented by the Necessary and Proper Clause, "carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[50] In the Rules Enabling Act (REA), Congress delegated to the U.S. Supreme Court "the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals."[51] The REA limits that power by providing that the rules prescribed under it "shall not abridge, enlarge or modify any substantive right."[52] The Court has, at least until recently, interpreted this limit to be almost toothless.[53] The Court has said: "Congress' prohibition of any alteration of substantive rights . . . was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure."[54] The Court has interpreted an FRCP narrowly to avoid the

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47. *Burlington N.*, 480 U.S. at 5.

48. 380 U.S. at 469–74; Ely, *supra* note 7, at 698 (arguing that situations involving FRCPs require "discrete" inquiry from those involving federal judge-made rules; the first is governed by REA, the second by RDA); *see also* Megan Barbero, Note, *Interpreting Rule 68 to Conform with the Rules Enabling Act*, 57 STAN. L. REV. 2017, 2032 (2005) (describing "Hanna Part I" and "Hanna Part II").

49. U.S. CONST. art. I, § 8, cl. 9 (empowering Congress "[t]o constitute tribunals inferior to the Supreme Court"); *see also id.* art. III, § 1 (vesting judicial power of U.S. "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

50. *Hanna*, 380 U.S. at 472; *see also* U.S. CONST. art. I, § 8 cl. 18 (empowering Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

51. 28 U.S.C. § 2072(a) (2000).

52. *Id.* § 2072(b).

53. *See* Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 48–49 (1998) (arguing that Court has begun giving more effect to the portion of REA that prohibits rules from altering substantive rights).

54. *Hanna*, 380 U.S. at 465; *see also Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 ("The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision [i.e., 28 U.S.C. § 2072(b)] if reasonably necessary to maintain the integrity of that system of rules."); Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445–46 (1946) (holding that the

REA's bar on rules that alter substantive rights,[55] but the Court has never invalidated a rule under that bar.[56] Thus, when a federal court in a diversity case determines that a state law conflicts with an FRCP, it is a good bet that the FRCP will prevail.

When state law does not conflict with an FRCP or any federal statute or provision in U.S. Constitution, federal courts in diversity use what is called "*Hanna* Part I" analysis.[57] *Hanna* Part I analysis determines whether a federal court's use of a federal judge-made rule, in lieu of the forum state's law, in a diversity case would disserve the twin aims of *Erie*: "discouragement of forum-shopping" that would cause litigants to choose federal court over state court (when that choice is available); and "avoidance of inequitable administration of the laws."[58] If application of the federal judge-made rule would disserve those twin aims, the state law is said to satisfy the Court's "modified outcome-determination" test,[59] and the federal court ordinarily should apply the state law instead of federal judge-made law.[60] It is possible, however, that a federal court should apply a federal judge-made rule instead of state law—even if the state law satisfies the modified outcome-determination test—if application of the federal judge-made law is justified by a strong enough federal inter-

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FRCP at issue there did not alter substantive rights, even though it would "undoubtedly affect [defendant's] rights," because it "relates merely to 'the manner and the means by which a right to recover * * * is enforced.'") (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945)); Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) ("The test [under 28 U.S.C. § 2072(b)] must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.").

55. *See* Semtek Int'l, Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (rejecting an interpretation of FRCP 41(b) in part because that interpretation "would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)"); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612–13 (1997) (interpreting FRCP 23 "mindful that" its requirements "must be interpreted in keeping . . . with the Rules Enabling Act['s instruction] that rules of procedure 'shall not abridge, enlarge or modify any substantive right'" (citations omitted)); Kamen v. Kemper Fin. Servs., 500 U.S. 90, 96 (1991) (rejecting an interpretation of FRCP 23.1, implying that the interpretation would violate REA).

56. *See* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 978 (1998) (stating that Court has upheld every FRCP that it has found to conflict with state law).

57. *See* Barbero, *supra* note 48, at 2032.

58. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 n.6 (1988).

59. *See, e.g.*, Patrick Woolley, *The Source of Federal Preclusion After* Semtek, 72 U. CIN. L. REV. 527, 531 (2003).

60. *See Stewart*, 487 U.S. at 27 n.6. As to which state's law should apply, the federal court in a diversity case applies the choice of law rules of the state in which the federal court sits. *See* Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941).

est. This possibility largely depends on the continuing vitality of the Court's decision in *Byrd v. Blue Ridge Rural Electronic Cooperative, Inc.*[61]

Although *Erie* analysis can raise hard questions, its outlines are clear.[62] Applied to Idaho Code section 6-1604(2), for example, the first step under *Erie* is to determine whether section 6-1604(2) conflicts with an FRCP. If so, federal courts—even in diversity cases—must apply the FRCP, instead of section 6-1604(2), as long as the FRCP falls within Congress's rulemaking power under the Constitution and the Court's rulemaking power under the REA. If section 6-1604(2) does not conflict with any FRCP or federal statute, section 6-1604(2) applies in federal courts unless, perhaps, a strong enough federal interest compels that the state law be rejected in favor of federal judge-made law.

However, the actual course that analysis has taken in the lower federal courts has been much rockier than the paragraph above suggests, as discussed below.

III. CASE LAW

Federal courts have purported to apply *Erie* analysis to analyze all of the eight state statutes that restrict the pleading of punitive damages. I say "purported" because many of the courts misunderstand *Erie*. Indeed, the decisions sketch out a bewildering array of analyses. This section undertakes a comprehensive survey of the case law. The survey (1) demonstrates the depth of the confusion among federal courts on this issue; (2) illustrates the basic misconceptions about *Erie* that are rampant; and (3) lays out the strands of case law that point to a correct analysis of the issue.

A. Case Law on the Idaho Statute

The first published federal district court opinion analyzing Idaho Code section 6-1604(2) under *Erie* was *Windsor v. Guarantee Trust Life Insurance Co.*[63] *Windsor* remains the leading decision on this issue among the Idaho federal courts, and it therefore deserves close examination.

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61. 356 U.S. 525 (1958); *see also* Rowe, *supra* note 56, at 965 (noting uncertainty among commentators about the continuing place of *Byrd* in *Erie* doctrine).

62. *See* Rowe, *supra* note 56, at 966 (arguing that, "since the Court decided *Hanna* in 1965 it has provided and maintained a reasonably stable, workable, and sensible structure" for analysis).

63. 684 F. Supp. 630 (D. Idaho 1988); *see also supra* notes 16–22 and accompanying text (describing Idaho Code § 6-1604).

In *Windsor*, an insured sued his insurance company for the tort of bad faith in settling his claim under a policy.[64] In his initial complaint, the insured sought $100,000 in punitive damages from the insurance company.[65] The company argued that Idaho Code section 6-1604(2) barred the initial complaint's request for punitive damages.[66] The company further argued that, without the punitive damages claim, the complaint failed to plead the amount-in-controversy required for diversity jurisdiction.[67] The district court believed that the company's argument required the court to decide whether Idaho Code section 6-1604(2) applies in federal court actions.[68] The court concluded that section 6-1604(2) "is substantive in nature and therefore controlling in federal court in a diversity case."[69] The court gave two reasons for finding section 6-1604(2) "substantive."[70] "First," the *Windsor* court said, section 6-1604(2) "does not directly conflict with the federal rule."[71] "Second," the court added, "the statute requires the plaintiff to meet an additional burden of proof directly affecting the outcome of the case."[72]

The court's approach seems to reflect the *Hanna* Part I analysis. At the first step, the court found that Idaho Code section 6-1604 does not conflict with any FRCP or federal statute. At the second step, the court held that section 6-1604(2) satisfies the modified outcome-determination test.

In finding no "direct[] conflict" between section 6-1604(2) and "the federal rule," the court did not say what "federal rule" it had in mind. The court apparently meant the federal rule for determining whether the amount-in-controversy requirement is satisfied.[73] Under

64. *Windsor*, 684 F. Supp. at 632.

65. *Id.* at 631.

66. *Id.* at 633.

67. *Id.* The amount-in-controversy requirement is a statutory restriction on the federal courts' power to exercise subject matter jurisdiction over actions between citizens of different states. At the time of the action in *Windsor*, the relevant federal statute authorized federal courts to hear actions between citizens of different states "where the matter in controversy exceeds the sum or value of $10,000." 28 U.S.C. § 1332(a)(1) (1988). In 1988, the statute was amended to increase the amount-in-controversy requirement to $75,000, where it now stands. 28 USCA § 1332(a)(1) (2005).

68. *Windsor*, 684 F. Supp. at 632–33.

69. *Id.* at 633.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 631–32 (describing "[t]he rule governing dismissal for want of jurisdiction in cases brought in federal court," under which "the sum claimed by the plaintiff controls if the claim is apparently made in good faith," unless "it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed . . . if actual damages are less than the jurisdictional amount but, when combined with punitive damages, the total amount is greater than the jurisdictional amount, federal jurisdiction exists.") (citing,

this rule, courts consider not only the actual damages, but also the punitive damages claimed by the plaintiff in the complaint.[74] The *Windsor* court acknowledged that section 6-1604(2) would prevent some plaintiffs—such as Windsor himself—from pleading the required amount in controversy in the initial complaint by preventing them from including a claim for punitive damages.[75] The court thought that plaintiffs in this situation could avoid dismissal by moving to amend their complaints to include a claim for punitive damages.[76] In the court's view, the problem that Windsor and similarly situated plaintiffs face in initially pleading the requisite amount in controversy "is so easily resolved that the Court need not recharacterize [section] 6-1604(2) as procedural simply for cases like this one."[77]

Like the first step of the *Windsor* court's analysis, the second step was not fully explained. The court said that section 6-1604(2) "requires the plaintiff to meet an additional burden of proof directly affecting the outcome of the case."[78] By "burden of proof," the court apparently meant section 6-1604(2)'s requirement that a plaintiff "establish[ ] . . . a reasonable likelihood of proving the facts at trial sufficient to support award of punitive damages."[79] The *Windsor* court did not explain how this statutory requirement for amending a complaint to request punitive damages could "affect the outcome of the case," much less how it could do so "directly."[80] Perhaps the court meant that plaintiffs in Windsor's situation who could not meet this "additional," state-law pleading requirement for pleading punitive damages would have their cases dismissed from federal court for failure to satisfy the amount-in-controversy requirement. In contrast, plaintiffs who did not have to meet this additional, state-law requirement could plead the requisite amount in controversy in their initial complaint under more lenient federal standards and might ultimately recover a judgment rather than having their case dismissed, as would have occurred if the state-law pleading requirement had been applied.[81] Even if

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among other cases, St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938), and Bell v. Preferred Life Assurance Soc'y, 320 U.S. 238 (1943)).

74. *Windsor*, 684 F. Supp at 632 ("[I]f actual damages are less than the jurisdictional amount but, when combined with punitive damages, the total amount is greater than the jurisdictional amount, federal jurisdiction exists.") (citing, *inter alia*, *Bell*, 320 U.S. 238).

75. *Id.* at 633 ("A problem . . . arises when, as in this case, the underlying claim [for actual damages] is insufficient to support federal jurisdiction standing alone").

76. *See id.* at 633–34.

77. *Id.* at 633.

78. *Id.*

79. IDAHO CODE ANN. § 6-1604(2) (2004).

80. *Windsor*, 684 F. Supp. at 633.

81. As discussed *infra* notes 295–96 and accompanying text, the Idaho Code does indeed put an "additional burden" on plaintiffs seeking punitive damages, compared to the requirements of federal law. Idaho law requires the plaintiff to establish a "reason-

such a plaintiff ultimately recovered a judgment for less than the required amount in controversy, that would not result in dismissal of the case.[82] Thus, for some plaintiffs, section 6-1604 could mean the difference between dismissal and a favorable judgment on the merits.[83]

This discussion of *Windsor* is detailed because the United States District Court for the District of Idaho has consistently followed *Win-*

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able likelihood" of proving entitlement to punitive damages at a hearing after which the court is instructed to "weigh[] the evidence presented." IDAHO CODE ANN. § 6-1604(2). The plaintiff who makes this showing can amend the initial complaint to request punitive damages. In contrast, FRCP 8(a)(3) allows a plaintiff to request punitive damages in the initial complaint. Rather than requiring a "reasonable likelihood" of success to request punitive damages, FRCP 11(b) more modestly requires the punitive damage claim, like all other claims, to be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" and to be supported by factual allegations that "have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." FED. R. CIV. P. 11(b)(2), (b)(3). The punitive damage claim can be dismissed only if it is clear to a legal certainty from the face of the pleadings, even taking all the allegations as true, that the plaintiff will not be able to recover the punitive damages claimed. Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (quoted in, *e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654 (1999), *see* Jones v. Miller, No. CIV A. 6:06-CV-00014, 2006 WL 1867321, at *2 (W.D. Va. June 30, 2006) (applying this standard on motion to strike punitive damages claim); Northwest Pipe Co. v. Travelers Indem. Co., No. C-02-04189JF, 2003 WL 24027882, at *1 (N.D. Cal. Feb. 12, 2003) (applying the same standard as in *Jones*); Ross-Simons v. Baccarat, 182 F.R.D. 386, 399-400 (D.R.I. 1998) (applying the same standard as in *Jones*); *see also* Sharp Elecs. Corp. v. Copy Plus, Inc., 939 F.2d 513, 515 (7th Cir. 1991) (granting motion to dismiss for failure to allege requisite amount in controversy, the court considered whether punitive damages were available under applicable state law and whether plaintiff's factual allegations met state-law standard).

82. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938) ("The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.").

83. *See also* Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd., 32 F.3d 1244, 1255-58 (8th Cir. 1994) (upholding district court's refusal to allow complaint to be amended to seek punitive damages on state law claim, because plaintiff could not satisfy Minnesota law similar to Idaho Code section 6-1604(2); but reversing district court's refusal to allow complaint to be amended to seek punitive damages on federal maritime claim, because plaintiff did satisfy standard for amending complaint in Fed. R. Civ. P. 15(a)); Baumann v. Hall, No. 98-2126-JWL, 1998 WL 513008, at *1 (D. Kan. July 15, 1998) (viewing plaintiff's ability to provide evidence to support punitive damage claim with skepticism, as would have been required by Kansas law similar to Idaho Code section 6-1604(2), but the court granted the motion to amend the complaint to request punitive damages because "[i]t cannot say . . . that plaintiff could prove no set of facts entitling her to punitive damages. Evidence supporting such a claim is better considered in a motion for summary judgment."). *But cf.* Whittenburg v. L.J. Holding Co., 830 F. Supp. 557, 566 (D. Kan. 1993) (stating although plaintiffs in diversity action did not have to satisfy Kansas statute requiring them, at pleading stage, to prove a likelihood of recovering punitive damages, they still had to satisfy summary judgment standards of FRCP 56, and they "have not made a sufficient showing to withstand the defendant's motion for summary judgment on the issue of punitive damages").

dsor with little discussion.[84] For example, the court in *Doe v. Cutter Biological* cited *Windsor* in applying Idaho Code section 6-1604(2) to a diversity action based on Idaho tort law.[85] The *Cutter* court noted, however, "the tension existing between the principles of Rule 15(a) of the Federal Rules of Civil Procedure, for example, that leave to amend pleadings shall be 'freely given,' and the limiting provisions of Idaho statutory and case law, which disfavor punitive damages."[86] *Cutter* was cited by the district court in *Strong v. Unumprovident Corp.* to support applying the Idaho statute in a diversity action.[87] *Strong*, in turn, has been cited in three recent diversity cases in Idaho federal court to justify applying section 6-1604(2).[88]

The Ninth Circuit has not analyzed the applicability of section 6-1604(2) in diversity. In three cases, however, the Ninth Circuit has assumed that section 6-1604(2) does apply in diversity cases.[89] In two of those cases, the Ninth Circuit affirmed the district court's holding that the plaintiff did not satisfy section 6-1604(2) and therefore could

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84. The federal district courts in Idaho apply Idaho Code section 6-1604(2) even in cases in which they find the law of a different state governs the state law claims asserted. *See* Strong v. Unumprovident Corp., 393 F. Supp. 2d 1012, 1025–27 (D. Idaho 2005) (applying Idaho Code section 6-1604(2) to case in which court concluded that Texas law governed claims). This reflects that a forum state's law may be considered "substantive" for *Erie* purposes (in the sense that it applies in federal courts sitting in that state) even though the same law is considered "procedural" for choice-of-law purposes (in that it applies even in cases where another state's law is found to govern the substance of the claims). *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 721–30 (1988) (holding that a state court could, consistently with Full Faith and Credit and Due Process Clauses, apply a forum state's statute of limitations to claims that the Constitution requires to be governed by the substantive law of other states); *see also* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (holding that state court's application of forum state law to all claims before it, the vast majority of which involved leases in other states, "is sufficiently arbitrary and unfair as to exceed constitutional limits").

85. Doe v. Cutter Biological, 844 F. Supp. 602, 609 (D. Idaho 1994).

86. *Id.* at 610.

87. 393 F. Supp. 2d 1012, 1025 (D. Idaho 2005); *see also id.* at 1018 (noting the case was a diversity action).

88. DeShazo v. Estate of Clayton, No. CV 05-202-S-EJL, 2006 WL 1794735, at *10–11 (D. Idaho June 28, 2006); DBSI Signature Place, LLC v. BL Greensboro, L.P., No. CV 05-051-SLMB, 2006 WL 1275394, at *17–18 (D. Idaho May 9, 2006); Prado v. Potlatch Corp., No. CV 05-256-C-LMB, 2006 WL 1207612, at *3–4 (D. Idaho May 1, 2006).

89. Kuntz v. Lamar Corp., 385 F.3d 1177, 1187 (9th Cir. 2004) (applying Idaho Code section 6-1604(2) to hold that the district court did not abuse its discretion in denying plaintiff leave to amend complaint to add punitive damages); Native Am. Servs., Inc. v. Givens, 213 F.3d 642 (9th Cir. 2000) (unpublished table decision), opinion at 2000 WL 328137, at *3 ("[Plaintiff] cites no authority, and we have discovered none, to support its contention that the district court erred in dismissing NASI's claim for punitive damages for its failure to comply with [Idaho Code] section 6-1604(2)."); Bendocchi v. Howmedica, Inc., 2 F. App'x 711, 713 (9th Cir. 2001) (stating in dicta of this unpublished opinion that "section 6-1604(2) controls the disposition of a motion to amend pleadings to state a punitive damage claim").

not request punitive damages.[90] (In the third case, the Ninth Circuit said that section 6-1604(2) "controls the disposition of a motion to amend pleadings to state a punitive damages claim," but the court rejected the defendants' argument that section 6-1604(2) also applies to the trial judge's determination of whether to send a punitive damage claim to the jury.[91]) In none of these cases case did the Ninth Circuit analyze section 6-1604(2) under *Erie*.

Indeed, none of the post-*Windsor* decisions applying section 6-1604(2) discusses the *Erie* issue. They treat *Windsor* as the final, comprehensive resolution of that issue. That treatment is unwarranted. *Windsor* addressed only whether section 6-1604(2) conflicted with the federal rule for determining whether the plaintiff has satisfied the amount-in-controversy requirement.[92] The *Windsor* court did not address whether section 6-1604(2) conflicts with other federal rules governing pleadings. As discussed below, other courts have done so and reached differing results.

B. The Eleventh Circuit

In *Cohen v. Office Depot*, the Eleventh Circuit addressed a situation similar to that of *Windsor*: the plaintiff in a diversity action could satisfy the amount-in-controversy requirement only if the plaintiff's claim for punitive damages was considered.[93] The defendant in *Cohen* moved to strike the claim for punitive damages in plaintiff's initial complaint, relying on a Florida statute similar to Idaho Code section 6-1604(2).[94] The Florida statute prohibits plaintiffs from including punitive damage claims in their complaints except upon leave of the

90. *Kuntz*, 385 F.3d at 1187 (holding that the district court did not abuse its discretion in concluding that plaintiff failed to satisfy Idaho Code section 6-1604(2)'s requirements for seeking punitive damages); *Native Am. Servs., Inc.*, 213 F.3d 642, at *3 (affirming district court's dismissal of plaintiff's punitive damages claim, stating that "[plaintiff] cites no authority, and we have discovered none, to support its contention that the district court erred in dismissing [plaintiff's] claim for punitive damages for its failure to comply with [Idaho Code] section 6-1604(2)").

91. *Bendocchi*, 2 F. App'x at 713 ("While [Idaho Code] section 6-1604(2) controls the disposition of a motion to amend pleadings to state a punitive damages claim-normally, as the statute contemplates, in the pretrial context it does not address the central issue before us: the exercise of the court's discretion whether to instruct a jury on punitive damages after the close of evidence. On that issue, Idaho courts have consistently held that '[t]he decision of whether to instruct on punitive damages is within the discretion of the trial judge.'").

92. *See supra* notes 63–83 and accompanying text.

93. Cohen v. Office Depot, Inc., 184 F.3d 1292, 1295–99 (11th Cir. 1999), *vacated in part on other grounds*, 204 F.3d 1069 (11th Cir. 2000).

94. *Id.* at 1295 (discussing FLA. STAT. ANN. § 768.72 (West 2005)).

court on a motion to amend.[95] To obtain leave to amend, the Florida statute requires "a reasonable showing by evidence in the record or proferred by the claimant which would provide a reasonable basis for recovery of such damages."[96]

Unlike the *Windsor* court, the Eleventh Circuit held that the state statutory requirement for pleading punitive damages does not apply in diversity actions in federal court.[97] The *Cohen* court observed that the first question in *Erie* analysis is whether the state statute conflicts with a Federal Rule of Civil Procedure. "If it does, the federal procedural rule applies and the state provision does not."[98] The *Cohen* court held that the Florida statute conflicts with FRCP 8(a)(3). FRCP 8(a)(3) states, "A pleading which sets forth a claim for relief . . . shall contain . . . (3) a demand for judgment for the relief the pleader seeks."[99] The Eleventh Circuit had previously explained that, under FRCP 8(a)(3), the plaintiff must "identify[] the remedies . . . sought."[100] The *Cohen* court reasoned, "[p]unitive damages are a remedy, so under the rule a request for them should be included in the complaint."[101] Under this reasoning, FRCP 8(a)(3) requires plaintiffs seeking punitive damages to request them specifically in their complaint, whereas the Florida statute prohibits such requests. Thus, FRCP 8(a)(3) and the Florida statute conflict.

The *Cohen* court continued, "[e]ven if Rule 8(a)(3) does not *require* a plaintiff to include in a complaint a request for all the relief sought, there is still a conflict between [Florida Statutes] section

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95. *Cohen*, 184 F.3d at 1295 (observing that "the Florida Supreme Court has interpreted [section] 768.72 as requiring the dismissal of any request for punitive damages asserted without leave of the court") (citing Simeon, Inc. v. Cox, 671 So. 2d 158, 160 (Fla. 1996)).

96. FLA. STAT. ANN. § 768.72. The showing required by the Florida statute resembles that of Idaho Code section 6-1604(2), which requires the plaintiff to establish "a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages." IDAHO CODE ANN. § 6-1604(2) (2004).

97. *Cohen*, 184 F.3d at 1299 ("[W]e hold that the pleading requirements of Florida Statutes [section] 768.72 are inapplicable in federal diversity cases."). On rehearing, the Eleventh Circuit partially vacated its original panel opinion. 204 F.3d 1069 (11th Cir. 2000). In doing so, however, the Eleventh Circuit stated, "[w]e adhere to and leave . . . intact" the portion of its opinion holding the Florida statutory requirement for pleading punitive damages inapplicable in federal court. *Id.* at 1072; *see also* Porter v. Ogden, Newell & Welch, 241 F.3d 1334, 1341 (11th Cir. 2001) ("This court has held that the pleading rules set forth in FRCP 8(a)(3) preempt [Fla. Stat. section] 768.72's requirement that a plaintiff must obtain leave from the court before including a prayer for punitive damages.").

98. *Cohen*, 184 F.3d at 1296.

99. FED. R. CIV. P. 8(a)(3).

100. *Cohen*, 184 F.3d at 1297 (quoting Goldsmith v. City of Atmore, 996 F.2d 1155, 1161 (11th Cir. 1993)).

101. *Cohen*, 184 F.3d. at 1297–98.

768.72 and Rule 8(a)(3)."[102] The conflict still exists "because the [federal] rule clearly *allows* the plaintiff to include a request for punitive damages in her initial complaint, whereas [Florida Statutes] section 768.72 *prevents* her from doing so."[103] The court observed that "[a] state law may conflict with a Federal Rule even where it violates no affirmative command or requirement of the [federal] rule."[104] In support of this observation, the court cited the Supreme Court case of *Hanna v. Plumer*.[105] In *Hanna*, a Massachusetts statute required in-hand service of process on the defendant whereas the relevant Federal Rule of Civil Procedure allowed in-hand service as well as other methods of service.[106] The express language of the Federal Rule at issue in *Hanna* could have been read as not conflicting with the state statute, since the Federal Rule *allowed* the method of service that the state statute *required*. Nonetheless, the Court in *Hanna* found an "unavoidable" conflict between them.[107] The *Cohen* court stated as follows:

> Likewise, in this case, because Rule 8(a)(3) allows a plaintiff to request in her initial complaint all the relief she seeks, it says "implicitly, but with unmistakable clarity" that a plaintiff is not required to wait until a later stage of the litigation to include a prayer for punitive damages, nor is she required to proffer evidence or obtain leave of court before doing so.[108]

Having found a conflict between the state law and an FRCP, the *Cohen* court recognized that the Supreme Court's *Erie* doctrine required it to apply the federal rule unless the rule "transgresses the Rules Enabling Act or the Constitution."[109] The *Cohen* court found no transgression and accordingly held that federal courts must apply FRCP 8(a)(3) instead of the Florida statute that restricts the pleading of punitive damages.[110]

Cohen conflicts with *Windsor* in the result. *Windsor* held that federal courts in diversity cases must apply an Idaho statute that closely resembles the Florida statute.[111] As noted above, the Ninth

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102. *Id.* at 1298.
103. *Id.*
104. *Id.*
105. *Id.* (discussing Hanna v. Plumer, 380 U.S. 460 (1965)).
106. 380 U.S. at 461–62.
107. *Cohen*, 184 F.3d at 1298.
108. *Id.* at 1298–99 (quoting *Hanna*, 380 U.S. at 470).
109. *Id.* at 1299.
110. *See id.*
111. *See supra* notes 63–83 and accompanying text.

Circuit has, consistently with *Windsor*, assumed that the Idaho statute applies in federal court.[112] Thus, the Ninth Circuit and the Eleventh Circuit have come out differently on the question whether *Erie* requires federal courts to apply state statutes restricting the pleading of punitive damages. Considering the disarray among yet other courts, described in the next section, the conflict may well warrant Supreme Court attention.[113]

C. Other Jurisdictions

1. Oregon

Like the law in Idaho and Florida, Oregon law allows a plaintiff to request punitive damages only after a court has granted a motion to amend the complaint to add the request.[114] The Oregon statute, like Florida's and Idaho's, requires the plaintiff to present evidence to support the motion to amend.[115] In *Pruett v. Erickson Air-Crane Co.*, the federal district court for the District of Oregon held that the Oregon statute does not apply in federal court.[116] Like the Eleventh Circuit in *Cohen*, the *Pruett* court concluded that state law conflicts with the FRCPs and is therefore preempted.

The *Pruett* court found a conflict between the Oregon statute and FRCP 8(a). The court observed that, in contrast to the Oregon statute, "the Federal Rules permit a plaintiff to pray for punitive damages in their complaint."[117] In particular, "FRCP 8(a) enunciates the liberal

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112. *See supra* notes 89–91 and accompanying text

113. Although two of the Ninth Circuit decisions creating the conflict are unpublished, that does not prevent the Court from granting certiorari to resolve the conflict. *See, e.g.*, Comm'r of Internal Revenue v. McCoy, 484 U.S. 3, 7 (1987) ("We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case."); *see also* United States v. Janis, 428 U.S. 433, 439 (1976) (granting review of an unpublished court of appeals opinion).

114. OR. REV. STAT. § 31.725 (2004). Whereas Idaho Code 6-1604(2) requires the evidence to establish a "reasonable likelihood" of success at trial, the Oregon statute, section 31.725, requires "admissible evidence adequate to avoid the granting of a motion for a directed verdict to the party opposing the motion." *Id.* § 31.725(3)(a). In addition to prescribing a different standard for amendment, section 31.725 differs from Idaho's statute in other ways. Specifically, section 31.725 requires the court to hold a hearing and make a decision on the motion to amend within prescribed time periods. *Id.* § 31.725(5) (generally requiring court to hold a hearing not more than 30 days after motion to amend is filed and served, and to decide the motion within 10 days after the hearing.). It also restricts discovery on a defendant's ability to pay. *Id.* § 31.725(6). Idaho law imposes no similar restrictions.

115. OR. REV. STAT. § 31.725.

116. 183 F.R.D. 248, 249–52 (D. Or. 1998).

117. *Id.* at 250.

notice pleading concept . . . by requiring that a plaintiff provide a short and plain statement of the claim showing s/he is entitled to relief and a demand for the relief sought."[118] The *Pruett* court determined:

> These minimal pleading requirements would be frustrated if the court were forced to say that, while the pleading requirements of the Federal Rules are met, the plaintiff must now make a factual and evidentiary showing that they are entitled to punitive damages before being permitted to pray for punitive damages.[119]

Thus, *Pruett*, like *Cohen*, found a conflict between a state law restricting the pleading of punitive damages and FRCP 8(a)(3).[120]

The *Pruett* court also found a conflict between the Oregon statute and FRCP 9(g). FRCP 9(g) requires items of special damages to be "specifically stated."[121] Under FRCP 9(g), the *Pruett* court observed, "a plaintiff need not offer evidence sufficient to sustain the claim before pleading special damages."[122] "In contrast," the Oregon statute "requires plaintiff to make an evidentiary showing sufficient to withstand a directed verdict before plaintiff may plead punitive damages."[123] The court concluded that application of the Oregon statute would therefore "create a direct conflict" with FRCP 9(g).[124] This conclusion implicitly assumes that punitive damages are an item of special damages for purposes of FRCP 9(g), an assumption that is examined in a later section.[125]

2. Kansas

The federal courts in Kansas take an approach similar to that of the federal courts in Oregon. A Kansas statute requires court approval before punitive damages may be pleaded, and court approval depends on the plaintiffs establishing "a probability" of ultimately

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118. *Id.* at 251.

119. *Id.*

120. *See supra* notes 93–110 and accompanying text (discussing *Cohen*).

121. FED. R. CIV. P. 9(g).

122. *Pruett*, 183 F.R.D. at 251.

123. *Id.*; *see also* OR. REV. STAT. § 31.725(3)(a) (2004) (requiring "admissible evidence adequate to avoid the granting of a motion for a directed verdict to the party opposing the motion").

124. *Pruett*, 183 F.R.D. at 251; *see also* Burkhart v. L.M. Becker & Co. Corp., No. CV-04-420-ST, 2004 WL 1920196, at *2 (D. Or. Aug. 26, 2004) (relying on *Pruett* to hold that FRCP 8(a)(2), rather than OR. REV. STAT. § 31.725, governed sufficiency of plaintiff's allegations of punitive damages in complaint).

125. *See infra* notes 306–16 and accompanying text.

proving entitlement to punitive damages.[126] The Kansas federal courts have held that this statute does not apply in diversity actions because it conflicts with FRCP 9(g).

The earliest such case, which remains the one that discusses the issue at the greatest length, is *NAL II, Ltd. v. Tonkin*.[127] The court in *NAL II* interpreted FRCP 9(g) to "require[], in mandatory language, that a claim for punitive damages be set forth in a party's complaint."[128] The court reasoned that since the Kansas statute "prohibits the pleading of punitive damages in a party's initial complaint," the Kansas statute "cannot co-exist" with FRCP 9(g).[129] The court recognized that in light of the conflict, FRCP 9(g) must apply, instead of the Kansas law, as long as FRCP 9(g) is "within the scope of the Rules Enabling Act and . . . is constitutional."[130] The court "ha[d] no problem" finding that FRCP 9(g) meets both requirements.[131]

The *NAL II* court continued that "[e]ven if no conflict between Rule 9(g) and the [Kansas] statute existed," it would "still find that the [Kansas] statute is not applicable in federal diversity cases."[132] The court observed that *Erie* required federal courts to apply state law that does not conflict with any FRCP or federal statute "if the failure to apply the [state] law would result in an inequitable administration of the law."[133] The court found no inequity in having FRCP 9(g) apply in federal courts in Kansas, while Kansas state courts apply the Kansas law. The court explained that a federal court can still decide whether a punitive damage claim has adequate evidentiary support when the court rules on a motion for summary judgment.[134] Thus, "[t]he only difference resulting from the state law's application is the time in the life of the lawsuit when the court determines whether the claim for punitive damages is appropriate."[135] The court concluded that "[t]his difference is not material to the character or result in the litigation" and therefore did not reflect an inequitable administration of law.[136]

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126. KAN. STAT. ANN. § 60-3703 (1997).
127. 705 F. Supp. 522 (D. Kan. 1989).
128. *Id.* at 528.
129. *Id.*
130. *Id.* (citations omitted).
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 529.
135. *Id.*
136. *Id.* In *NAL II*, the court recognized that, having found a conflict between the Kansas law and an FRCP, the court did not need to decide whether the federal courts' application of the Federal Rule, while state courts applied the state law, would result in an inequitable administration of the laws. *See id.* at 528 ("[U]nder the *Hanna* analysis, Rule 9(g)'s requirement must be applied in federal diversity cases."). A later decision from

In cases after *NAL II*, the Kansas federal district courts have consistently held that the Kansas law restricting the pleading of punitive damages does not apply in federal courts.[137]

3. Minnesota

The federal district courts in Minnesota have applied *Erie* analysis to the Minnesota law, Minnesota Statutes section 549.191, that restricts the pleading of punitive damages. After one decision to the contrary,[138] those courts have consistently held that section 549.191 applies in diversity actions.[139] In so holding, the Minnesota federal courts have used two different rationales. One is flawed and undermines the other rationale.

In *Fournier v. Marigold Foods, Inc.*, the district court held, "[t]he *Erie* doctrine requires this court to apply section 549.191 prohibiting pleading punitive damages without leave of court."[140] The court understood the *Erie* doctrine to require a federal court in a diversity action to apply state law "if application of a *conflicting* federal rule would encourage forum-shopping."[141] The court found that a federal court's failure to apply section 549.191 would encourage forum shopping. The court explained that section 549.191 "creates a preliminary evidentiary burden" for pleading punitive damages.[142] In the absence of section 549.191, "a claim for punitive damages remains in the

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the federal court in Kansas mistakenly believed that the inequitable-administration analysis is necessary even though Kansas law conflicts with FRCP 9(g). *See* Metal Trading Servs. v. Transp. Servs., 781 F. Supp. 1539, 1546–47 (D. Kan. 1991) (observing that Kansas statute conflicts with FRCP 9(g), court says it "must also determine whether the character or result of the case will be materially altered by failing to apply the state law").

137. *See* Vance *ex rel.* Wood v. Midwest Coast Transp., Inc., 314 F. Supp. 2d 1089, 1090 (D. Kan. 2004) (rejecting defendants' contention that plaintiff's inclusion of punitive damages claim violated Kansas statute requiring court's approval, and stating, "[c]ourts in this district have repeatedly held that claims for punitive damages are properly pled in the complaint without court order."); Stewart v. Mitchell Transp., No. 01-2546-JWL, 2002 WL 1203650, at *1 (D. Kan. May 30, 2002) ("It is well settled that K.S.A. 60-3703 does not apply to cases filed in federal court."); Arnold *ex rel* Shrout v. Holmes, No. 00-2069-KHV, 2001 WL 167438, at *1 (D. Kan. Feb. 20, 2001); Schneulle v. C & C Auto Sales, Inc., 99 F. Supp. 2d 1294, 1299 (D. Kan. 2000); Steinert v. Winn Group, 83 F. Supp. 2d 1234, 1248 (D. Kan. 2000); Baumann v. Hall, No. 98-2126-JWL, 1998 WL 513008, at *1 n.1 (D. Kan. July 15, 1998); Amundson & Assocs. Art Studio, Ltd. v. Nat'l Counsel on Comp. Ins., Inc., 977 F. Supp. 1116, 1126 (D. Kan. 1997).

138. Jacobs v. Pickands Mather & Co., No. 5-87-CIV 49, 1987 WL 47387, at *1 (D. Minn. Aug. 24, 1987) (declining to apply MINN. STAT. ANN. § 549.191 in diversity case on the ground that its provisions "are procedural in nature, and do not affect the ultimate outcome of the plaintiffs' claim for punitive damages").

139. *See infra* notes 140–62 and accompanying text.

140. 678 F. Supp. 1420, 1422 (D. Minn. 1988).

141. *Id.* (emphasis added).

142. *Id.*

pleadings unless and until challenged by defendant, giving plaintiff a tactical advantage in resolving his claims."[143]

The *Fournier* court misunderstood *Erie*. When a federal court must choose between a state law and a "conflicting federal rule," *Erie* requires the court to apply the federal rule, not the state law.[144] That is true even if application of the federal rule instead of the state law would encourage forum shopping.[145] In applying its mistaken understanding of *Erie*, the *Fournier* court identified the conflict between the Minnesota law and the federal rules. The Minnesota law creates a "preliminary evidentiary burden" for plaintiffs seeking punitive damages that they do not have under the federal rules governing pleadings.[146] Under the federal rules, the plaintiff can include a punitive damage claim in her complaint and there it stays until the defendant successfully moves to dismiss it.[147] To defeat such a motion, the plaintiff does not need to meet any evidentiary burden.[148]

Decisions by the Minnesota federal courts after *Fournier* do not repeat its mistake. The rationale of these later cases, however, is un-

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143. *Id.*

144. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n.7 (1996) ("It is settled that if the [Federal] Rule in point is consonant with the Rules Enabling Act and the Constitution, the Federal Rule applies regardless of contrary state law.") (citations omitted); Hanna v. Plumer, 380 U.S. 460, 471 (1965).

> When a situation is covered by one of the Federal Rules . . . the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. (footnotes omitted).

145. *See* Burlington N. R.R. v. Woods, 480 U.S. 1, 3–8 (1987) (holding that federal court in diversity case had to apply Federal Rule of Appellate Procedure that conflicted with state law, without discussing outcome-determination test); *cf.* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32 n.11 (1998) (because federal statute controlled issue arising in diversity action, Court did not have to determine whether application of a federal judge-made rule would implicate the twin aims of *Erie*).

146. *See Fournier*, 678 F. Supp. at 1422.

147. *See id.*

148. *E.g.*, Scheur v. Rhodes, 416 U.S. 232, 236 (1974). The court states as follows:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim. . . .
>
> ". . . [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Id. (citation omitted).

dermined by the *Fournier* court's recognition—which later cases also reflect—that the Minnesota law restricting the pleading of punitive damages conflicts with federal law by creating an evidentiary burden for plaintiffs seeking to plead a request for punitive damages.

In *Kuehn v. Shelcore, Inc.*, the court observed that under *Erie*, "[t]he preliminary question . . . [is] whether there is a Federal Rule on point which directly conflicts with the state provision."[149] The court rejected the plaintiff's argument that section 549.191 conflicts with FRCP 8.[150] The court admitted that unlike section 549.191, FRCP 8 "does not prohibit pleading punitive damages without leave of court."[151] That difference, in the *Kuehn* court's view, created only a "*potential* conflict" between FRCP 8 and section 549.191. The court believed that the two provisions could still "be given simultaneous effect" because they had different purposes: "Federal Rule 8 is concerned with simplifying pleading requirements; section 549.191, however, is aimed at deterring past abusive pleading practices regarding punitive damages in order to address a perceived insurance crisis."[152] As support for its view that the provisions do not conflict, the *Kuehn* court observed that Minnesota Rule of Civil Procedure 8 was almost identical to FRCP 8 and was not changed after enactment of section 549.191.[153]

Despite finding no conflict between FRCP 8 and the Minnesota law, the *Kuehn* court found the "variation" between them substantial enough to encourage forum shopping and therefore justify application of the Minnesota law under *Hanna* Part I. The court explained that the variation arose because section 549.191 "keeps a claim for punitive damages out of the case unless and until plaintiff can make a prima facie showing" of entitlement to punitive damages.[154] The court determined that "[w]hen faced with the choice between a forum which applies section 549.191 and one which does not, a party might well choose the latter because it provides a tactical, though non-dispositive, advantage."[155] The court concluded that "this variation is substantial enough to influence forum choice and, under *Erie*, must be eliminated by applying section 549.191 in this federal diversity action."[156] Thus, the court found the Minnesota law applicable in diver-

149. 686 F. Supp. 233, 234 (D. Minn. 1988).
150. *Id.*
151. *Id.*
152. *Id.* (citations omitted).
153. *Id.*
154. *Id.* at 235.
155. *Id.*
156. *Id.*; *see also* Zeelan Indus. v. De Zeeuw, 706 F. Supp. 702, 705 (D. Minn. 1989) (finding that "the failure of courts to apply Minn. Stat. [section] 549.191 in federal diversity actions has the potential to significantly influence choice of forum," and holding

sity cases based on the absence of a "conflict," coupled with the presence of a "variation," between the Minnesota law and the FRCPs.

Relying on *Kuehn*, the Minnesota federal court in a later case rejected the argument that section 549.191 conflicts with FRCP 15(a), which governs the amendment of pleadings. The later case is *Security Savings Bank v. Green Tree Acceptance, Inc.*[157] The court in *Security Savings* found no conflict because section 549.191 and FRCP 15(a) differ in scope:

> Section 549.191 attempts to address the issue of whether or not a party should be permitted to assert a claim for punitive damages. FRCP 15(a) attempts to address the issue of whether a party should be permitted to amend his pleadings generally. There is no direct conflict between Federal Rule 15(a) and section 549.191 .... Rule 15 ... does not even attempt to address the issue posed in section 549.191.[158]

The court observed that this analysis was similar to that of *Kuehn*.[159] Similar to the court in *Kuehn*, the court in *Security Savings* found evidence for the lack of a conflict in the fact that Minnesota had a rule of civil procedure almost identical to FRCP 15(a).[160] Finding no conflict, the *Security Savings* court turned to the question of whether a federal court's failure to apply section 549.191 "is substantial enough to raise equal protection problems or influence the choice of forum."[161] The court answered that question in the affirmative, as the court did in *Kuehn*.[162]

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the Minnesota statute applicable in diversity actions). For additional federal court cases applying Minn. Stat. section 549.191, see Knight v. Prod. Res. Group, No. Civ.036443(MJD/JGL), 2005 WL 1630523, at *8 (D. Minn. July 11, 2005) (relying on section 549.191 to hold motion to amend to add punitive damages claim was untimely); Berczyk v. Emerson Tool Co., 291 F. Supp. 2d 1004, 1008–18 (D. Minn. 2003) (applying section 549.191 to deny motion to amend complaint to seek punitive damages); Olson v. Snap Prods., Inc., 29 F. Supp. 2d 1027, 1028–40 (D. Minn. 1998) (applying section 549.191 to grant motion to amend complaint to seek punitive damages); Hammond v. Northland Counseling Ctr., Inc., No. CIV.5-96-353MJD/RLE, 1998 WL 315333, at *3–11 (D. Minn. Feb. 27, 1998) (applying section 549.191 to motion to amend complaint to seek punitive damages on state law claim while applying FRCP 15(a) to motion to amend complaint to seek punitive damages on federal claim); Ulrich v. City of Crosby, 848 F. Supp. 861, 866–76 (D. Minn. 1994) (applying section 549.191 to motion to amend complaint to seek punitive damages); Stock v. Heiner, 696 F. Supp. 1253, 1263 (D. Minn. 1988) (holding that section 549.191 applied to state law claim in federal court under supplemental jurisdiction).

157. CIV. No. 3-89-28, 1990 WL 36142 (D. Minn. Mar. 22, 1990).
158. *Id.* at *2.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at *3.

The Eighth Circuit has not squarely addressed whether Minnesota Statutes section 549.191 applies in federal court diversity cases. The Eighth Circuit has, however, in two cases affirmed district court decisions that relied on the Minnesota statute in diversity cases to deny motions to amend complaints to request punitive damages.[163] Thus, the Eighth Circuit is in the same situation as the Ninth Circuit. Without discussing the *Erie* issue, both circuits have reached results that conflict with the result that the Eleventh Circuit reached, after discussing the issue, in *Cohen*.[164]

4. North Dakota

A North Dakota statute prohibits initial complaints from including punitive damage claims but allows plaintiffs to amend their complaints to request punitive damages if they provide "sufficient evidence to support a finding by the trier of fact" that the plaintiff is entitled to punitive damages.[165] In *Nereson v. Zurich Insurance Co.*, the federal district court for the District of North Dakota held that the North Dakota statute applies in federal court.[166] Later decisions by that court adhere to that holding.[167]

The *Nereson* court found "no direct conflict between the North Dakota statute and the Federal Rules of Civil Procedure."[168] Without mentioning any particular FRCPs, the court said, "[w]hile the statute and the federal rules are not perfectly matched, they can coexist."[169]

The *Nereson* court observed that when state law does not conflict with the FRCPs, "the court must apply state law if there is a potential

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163. *See* Bunker v. Meshbesher, 147 F.3d 691, 696 (8th Cir. 1998) (holding that the district court did not err under section 549.191 in denying the motion to amend to add punitive damages claim and observing, "[u]nder Minnesota law, a trial court may not allow an amendment [of the complaint to add a punitive damages claim] where the motion and supporting affidavits do not reasonably allow a conclusion that clear and convincing evidence will establish [that] the defendant[s] acted with willful indifference to the rights or safety of others.") (internal quotation marks omitted) (citations omitted); Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd., 32 F.3d 1244, 1255 (8th Cir. 1994) ("Given Minnesota's requirement of clear and convincing evidence and the policy considerations behind Minn. Stat. [section] 549.191, we will not disturb the district court's ruling insofar as it refused to permit the amendment and instruct the jury that G-10 could recover punitive damages under Minnesota law.").

164. *See supra* notes 89–91, 93–113 and accompanying text.

165. N.D. CENT. CODE § 32-03.2-11(1) (2005).

166. Civ. No. A3-91-72, 1992 WL 212233, at *1–2 (D.N.D. Aug. 20, 1992).

167. *See, e.g.*, Poitra v. DaimlerChrysler Corp., No. 4:04-cv-58, 2006 WL 2349981, at *2 (D.N.D. Aug. 10, 2006); Olson v. Ford Motor Co., No. A4-04-102, 2005 WL 3271945, at *1 (D.N.D. Nov. 29, 2005); Myers v. Richland County, 288 F. Supp. 2d 1013, 1021 (D.N.D. 2003).

168. 1992 WL 212233, at *1.

169. *Id.*

for forum shopping or inequitable administration of the law."[170] The court determined that the potential for those results does exist. It observed that the North Dakota statute mandates procedures that "place the burden upon the plaintiff to show a factual and legal basis for the [punitive damages] claim before it can be plead [sic]."[171] That requirement, the court reasoned, "is certainly more restrictive than the liberal pleading rule under the federal rules whereby the plaintiff can plead a cause without any required showing and then proceed to prove up the claim."[172] Considering the less restrictive nature of federal law, "plaintiffs may choose to bring their actions in federal court rather than state court."[173] Thus, the federal court's failure to apply the North Dakota statute could lead to forum shopping, the prevention of which "is one of the primary goals of the *Erie* doctrine."[174]

Nereson's reasoning resembles that of the Minnesota district court in *Kuehn* discussed above,[175] and that of the Colorado federal courts, which are discussed below.[176] Despite finding no conflict between state law and the FRCPs, these courts rely on the difference between state law and the FRCPs to find that the federal courts' failure to apply state law could encourage forum shopping or result in the inequitable administration of the laws. In effect, the courts are trying to have it both ways. They minimize or ignore the difference between state law and the FRCPs in order to avoid finding a conflict, yet they rely on that same difference when applying the modified outcome-determination test.

5. Illinois

Illinois law provides that in certain tort actions "no complaint shall be filed containing a prayer for relief seeking punitive damages."[177] The Illinois statute authorizes the plaintiff, however, to move to amend the complaint to request punitive damages.[178] The Illinois statute requires the court to allow the amendment "if the plaintiff establishes at . . . [a] hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages."[179] In several

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.* at *2.
174. *Id.*
175. *See supra* notes 148–56 and accompanying text.
176. *See infra* notes 222–43 and accompanying text.
177. 735 ILL. COMP. STAT. ANN. § 5/2-604.1 (West 2003).
178. *Id.*
179. *Id.*; *cf.* IDAHO CODE ANN. § 6-1604(2) (2004) ("The court shall allow the motion to amend the pleadings if, after weighing the evidence presented, the court concludes

cases, federal district courts in Illinois have concluded that this Illinois statute does not apply in diversity cases.[180]

The earliest case is *Berry v. Eagle-Picher*, an asbestos-exposure case brought in diversity.[181] The defendants in *Berry* relied on the Illinois statute in moving to strike a punitive damage claim from the initial complaint.[182] The court framed the issue as "whether this Illinois statute is properly viewed as substantive or procedural."[183] The court found two reasons for concluding that the Illinois statute "is procedural."[184] First, the Illinois law is in the Illinois Code of Civil Procedure, in the portion of the Code governing pleadings.[185] Its "federal counterpart" is FRCP 8, "[which] provides for notice pleading and contains no restrictions comparable to that found in [the Illinois statute]."[186] These circumstances indicated that the Illinois law "is a rule of pleading procedure which must give way to [FRCP] 8 . . . ."[187] Second, the court found the Illinois law procedural when analyzed under the modified outcome-determination test.[188] The court reasoned that in requiring plaintiffs to demonstrate a "reasonable likelihood" that they would ultimately prove entitlement to punitive damages, the Illinois law imposed a burden comparable to that imposed by FRCP 11. FRCP 11, as the court described it, "compels counsel to make reasonable inquiry to assure that the claims asserted are well-grounded in fact."[189] Thus, the court did not think that the federal courts' failure to

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that, the moving party has established at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.").

180. *See* Atlas v. City of N. Chicago, No. 03 C 4814, 2004 WL 1166627, at *3 (N.D. Ill. May 25, 2004); Dewick v. Maytag Corp., 296 F. Supp. 2d 905, 906 n.3 (N.D. Ill. 2003); MCI Worldcom Network Servs., Inc. v. Big John's Sewer Contractors, Inc., No. 03 C 4991, 2003 WL 22532804, at *3 (N.D. Ill. Nov. 7, 2003); Probasco v. Ford Motor Co., 182 F. Supp. 2d 701, 703–05 (C.D. Ill. 2002); Randle v. Chicago, No. 00 C 299, 2000 WL 1536070, at *6 (N.D. Ill. Oct. 17, 2000); Serfecz v. Jewel Food Stores, Inc., No. 92 C 4171, 1997 WL 543116, at *6–8 (N.D. Ill. Sept. 2, 1997); Johnson v. Ramesh Vermuri, Horizons, the Ctr. for Counseling Servs., No. 94 C 2005, 1994 WL 695527, at *4–5 (N.D. Ill. Dec. 9, 1994); Worthem v. Gillette Co., 774 F. Supp. 514, 515–17 (N.D. Ill. 1991); *In re* Asbestos Cases, No. 86 C 1739, 1990 WL 36790, at *3 (N.D. Ill. Mar. 8, 1990); Belkow v. Celotex Corp., 722 F. Supp. 1547, 1551–52 (N.D. Ill. 1989); Berry v. Eagle-Picher, Nos. 86 C 1739, 88 C 10631, 1989 WL 77764 (N.D. Ill. June 27, 1989).

181. 1989 WL 77764, at *1.

182. *Id.*

183. *Id.*

184. *Id.* at *2.

185. *Id.* at *1.

186. *Id.*

187. *Id.*

188. *Id.* at *2.

189. *Id.* At the time of the court's decision, FRCP 11 required an attorney to sign a pleading, and the signature represented a certification "that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact." FED. R. CIV. P. 11 (1988). The current version of FRCP 11 says that the attorney's

apply the Illinois law in diversity cases was likely to encourage forum shopping or lead to inequitable administration of law. Accordingly, in the court's view, "an outcome determinative analysis suggests that . . . [the Illinois law] is procedural . . . ."[190]

The *Berry* court did note that FRCP 8 had "no restrictions [on pleading punitive damages] comparable to" those of the Illinois statute.[191] The court did not conclude from this difference that the Illinois law conflicted with FRCP 8. Instead, the court determined that the restrictions in the Illinois statute were "similar" to those imposed by FRCP 11.[192] Thus, the court in *Berry* refused to apply a state law restricting the pleading of punitive damages—not because that law conflicted with an FRCP, which is the ground upon which other federal courts, such as the Eleventh Circuit in *Cohen*, have refused to apply similar state laws, but because it determined that the state law was procedural, rather than substantive.

Decisions by federal courts in Illinois after *Berry* have generally followed its reasoning. They cite two reasons for finding the Illinois law procedural. The first reason, explained in *Probasco v. Ford Motor Co.*, concerns the law's location and equivalence to FRCP 8:

> Section 5/2-604.1 "is expressly labeled as a pleading provision and is located in the Illinois Code of Civil Procedure . . . ." "The federal equivalent of the state pleading section is found in Rule 8 of the Federal Rules of Civil Procedure and is undisputably a procedural provision." This strongly suggests that section 5/2-604.1 is procedural as well.[193]

This reasoning treats state law as inapplicable in federal court not because it conflicts with FRCP 8 but because it is "equivalent" to FRCP 8, an indisputably "procedural" provision. The second reason the post-*Berry* decisions give for holding the Illinois law inapplicable is that it does not meet the modified outcome-determination test.[194] One decision explained the application of the test this way:

> In the first instance, forum shopping is not encouraged.

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signature certifies "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id.* 11(b)(3).

190. *Berry*, 1989 WL 77764, at *2.

191. *Id.* at *1.

192. *Id.* at *2.

193. 182 F. Supp. 2d 701, 705 (C.D. Ill. 2002) (quoting *Serfecz*, 1997 WL 543116, at *8 and *Johnson*, 1994 WL 695527 at *5; *see also Worthem*, 774 F. Supp. at 516.

194. *See, e.g., Serfecz*, 1997 WL 543116 at *6.

> All a state court plaintiff must show at a hearing is a "reasonable likelihood of proving facts at trial sufficient to support an award for punitive damages." Under the federal rules a party must make a good faith reasonable inquiry into the facts of each case before it is filed. Fed.R.Civ.P. 11. Further, frivolous suits are subject to dismissal under Rule 12(b)(6), and summary judgment pursuant to Rule 56(c). . . .
>
> For the same reasons, there is no inequitable application of laws. If anything, the federal law requires inquiry earlier and more substantially than 2-604.1. If a litigant were seeking to avoid the "harshness" of this law, knocking on the federal courthouse door would provide no refuge if this law were considered procedural.[195]

Cohen did not apply the modified outcome-determination test to the state law because that test is inapplicable once it is determined (as the court in *Cohen* did) that state law conflicts with a valid FRCP.[196] In contrast, the Illinois district courts have decided to skip the conflict analysis and "cut to the chase," finding the Illinois law procedural—and therefore inapplicable in federal courts—because of its similarity to an FRCP and its absence of an outcome-determinative effect.

One decision by a federal court in Illinois possibly broke from this rationale, focusing on FRCP 15(a). The case is *Dewick v. Maytag Corp.*[197] This diversity case was brought by the parents of an infant who was injured when he crawled inside the broiler section of a kitchen range.[198] On the parents' motion to amend their complaint to request punitive damages, the court applied FRCP 15(a) and rejected Maytag's argument to apply the Illinois law instead.[199] The court said

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195. *Worthem*, 774 F. Supp. at 516; *see also, e.g., Probasco*, 182 F. Supp. 2d at 704 ("Courts are in agreement that because Fed. R. Civ. P. 11, like [section] 5/2-604.1, requires a party to make a reasonable inquiry to ensure that allegations and actual contentions have or will have evidentiary support, there is little likelihood that parties will flock to federal court to avoid Illinois' requirement of a hearing under [section] 5/2-604.1."); Belkow v. Celotex Corp., 722 F. Supp. 1547, 1552 (noting Illinois law and FRCP 11 put "a similar burden" on plaintiffs).

196. In addition to conflicting with the approach in *Cohen*, the Illinois courts differ from the Idaho district court's decision in *Windsor v. Guar. Trust Life Ins. Co.*, which found that a state law similar to Illinois' (namely, Idaho Code § 6-1604) could affect the outcome of a case if it were applied instead of the federal rule for determining whether a complaint satisfied the amount in controversy requirement of the diversity statute. 684 F. Supp. 630, 633 (D. Idaho 1988), discussed *supra* note 72, 78–83 and accompanying text.

197. 296 F. Supp. 2d 905 (N.D. Ill. 2003).

198. *Id.* at 906.

199. *Id.* at 906 & n.3.

that a federal court sitting in diversity "applies its own federal procedures over *conflicting* state procedures, particularly where the federal procedure is embodied in an applicable and valid provision such as Rule 15(a)."[200] The court added that the Illinois law "is clearly procedural rather than substantive in nature" considering its "placement . . . in the Illinois Code of Civil Procedure."[201] Thus, the *Dewick* court seemed to recognize that the Illinois law conflicted with FRCP 15(a) and refused to apply Illinois law primarily because of that conflict. Even so, its decision not to apply the Illinois law rested at least partly on its determination that the law was procedural rather than substantive. Reinforcing that rationale is its citation of *Probasco*.[202] As discussed above, the court in *Probasco* did not discuss whether the Illinois law conflicted with an FRCP, relying instead on its determination that the Illinois law was inapplicable in federal court because it was procedural, rather than substantive.[203]

Two features distinguish Illinois cases from some or all of the other case law discussed in this section of the article. One is that after *Berry*, they cite FRCP 8—not in discussing whether FRCP 8 conflicts with the state law restricting the pleading of punitive damages (an issue on which other courts disagree), but instead as a comparable provision the indisputably procedural nature of which supports labeling the state law procedural. Their failure to address the conflict issue is remarkable considering that the issue was mentioned (albeit glancingly) in *Berry*[204] and has been discussed repeatedly (albeit with differing results) in other federal courts.[205] Second, the Illinois courts continue to rely on FRCP 11 in finding that federal law imposes an evidentiary burden on the pleading of punitive damages that is comparable to that imposed by the Illinois statute—even though FRCP 11 has been amended and in current form does *not* require evidentiary support in all circumstances.[206]

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200. *Id.* at 906 n.3 (emphasis added).

201. *Id.*

202. *Id.*

203. Probasco v. Ford Motor Co. 182 F. Supp. 2d 701 (C.D. Ill. 2002); *see also supra* note 193 and accompanying text.

204. *See supra* notes 181–92 and accompanying text.

205. *See, e.g., supra* note 99 and accompanying text (discussing *Cohen*), 117–24 and accompanying text (discussing *Pruett*), 127–31 and accompanying text (discussing *NAL II*), 168 and accompanying text (discussing *Nereson*); *infra* notes 224–35 and accompanying text (discussing case law on Colorado statute).

206. FED. R. CIV. P. 11(b)(3), quoted in relevant part *supra* note 189.

6. California

Section 425.13 of the California Code of Civil Procedure states in relevant part:

> In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages shall be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim [under the standard of proof applicable at trial].[207]

The federal courts in California disagree on whether federal courts must apply section 425.13 in diversity cases.

The federal district court for the Northern District of California held in *Jackson v. East Bay Hospital* that section 425.13 does not apply in federal court.[208] The *Jackson* court identified the "essential" inquiry as whether section 425.13 is substantive or procedural.[209] The court determined that the law is procedural, because "[it] is essentially a method of managing or directing a plaintiff's pleadings, rather than a determination of substantive rights."[210] This approach resembles that of many federal court decisions in Illinois, which bypass the issue of whether the state law conflicts with any FRCPs by cutting to the chase and finding the state law procedural.[211]

In contrast to the Northern District's decision in *Jackson*, the federal district court for the Eastern District of California recently held in *Allen v. Woodford* that section 425.13 does apply in federal court.[212] The *Allen* court classified section 425.13 as an "evidentiary

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207. CAL. CIV. PROC. CODE § 425.13 (West 2004).

208. 980 F. Supp. 1341, 1350–53 (N.D. Cal. 1997).

209. *Id.* at 1351 ("[T]he court's determination of whether to apply section 425.13's requirement of seeking permission of the court to claim punitive damages raises an *Erie* issue: Is the punitive damages requirement substantive, so that state law applies, or is it procedural, so that federal law applies?"); *id.* at 1352 (stating that cases relied upon by defendant did not examine "whether [Section 425.13] is procedural or substantive, an inquiry this court finds essential to resolution of the issue.").

210. *Id.* at 1352.

211. *See supra* notes 181–96 and accompanying text.

212. No. 1:05-CV-01104-OWW-LJO, 2006 WL 1748587, at *20–21 (June 26, 2006).

rule . . . intimately bound up with the rights and obligations being asserted."[213] This made section 425.13 similar, in the *Allen* court's view, to a Nevada law that the Ninth Circuit had previously held to be applicable in federal courts under the *Erie* doctrine.[214] The Nevada law provided that the findings of medical malpractice screening boards are admissible in malpractice actions.[215] The Ninth Circuit held that this law applies in a diversity action.[216] In the Ninth Circuit's view, "where a state evidence rule is 'intimately bound up' with the rights and obligations being asserted, *Erie* mandates the application of the state rule in a federal diversity [action]."[217] In *Allen*, the Eastern District of California adopted a similar approach, and found that Section 425.13 is "intimately bound to the state substantive cause of action for professional negligence."[218]

Neither the *Jackson* court nor the *Allen* court addressed whether section 425.13 conflicts with the FRCPs. Instead, the *Jackson* court decided that section 425.13 does not apply in diversity actions simply because it is procedural, rather than substantive.[219] The *Allen* court decided that section 425.13 *does* apply in diversity actions because it is an "evidentiary rule . . . intimately bound up with" substantive rights.[220] The implication of *Jackson* is that if a state law can confidently be labeled "procedural," the federal courts do not have to apply it under *Erie*, even if the state law does not conflict with any FRCP or federal statute. The implication of *Allen* is that if a state law is "intimately bound up" with state substantive rights, the federal courts must apply it whether or not it conflicts with an FRCP. These implica-

213. *Id.* at *20.

214. Wray v. Gregory, 61 F.3d 1414, 1417 (9th Cir. 1995), cited in *Allen*, 2006 WL 1748587, at *20–21.

215. *Id.* at 1416 (citing NEV. REV. STAT. § 41A.016(2)).

216. *Id.* at 1417–18.

217. D'Orio v. W. Jersey Health Sys., 797 F. Supp. 371, 376 (D.N.J. 1992), quoted in *Wray*, 61 F.3d at 1417; *see also Allen*, 2006 WL 1748587, at *20.

218. *Allen*, 2006 WL 1748587, at *21. The *Allen* court distinguished *Jackson* on a ground that is incorrect. The *Allen* court described *Jackson* as reasoning that "[section] 425.13 does not apply to Plaintiff's federal cause of action." *Id.* at *21. The *Allen* court thus distinguished *Jackson* from the case before it, explaining that "Allen is not bringing a claim for punitive damages under a federal act." *Id.* Actually, *Jackson* addressed whether section 425.13 applied to the claims that plaintiff was asserting under California law, not her federal claims. *See Jackson*, 980 F. Supp. at 1345 ("This decision resolves whether [California] Code of Civil Procedure section 425.13 . . . [is] applicable to a pendent state claim in federal court."); *id.* at 1351 ("The parties have fully briefed the application of state punitive damages requirements on plaintiff's state claims in federal court. The court will now resolve that issue.").

219. *Jackson*, 980 F. Supp. at 1350–53.

220. *Allen*, 2006 WL 1748587, at *20.

tions are evaluated later in this article.[221] For now it suffices to observe that *Jackson* and *Allen* conflict insofar as one finds a state law restricting the pleading of punitive damages to be plainly procedural, while the other finds the same state law "intimately bound up with" state substantive rights.

7. Colorado

Colorado law prohibits claims for punitive damages in initial complaints in actions "alleging negligence against a health care professional." [222] In such cases, the Colorado law allows the plaintiff to amend the complaint to request punitive damages only if the plaintiff establishes "*prima facie* proof of a triable issue" of exemplary damages.[223] In *Jones v. Krautheim*, the federal court for the District of Colorado held that this Colorado law applies in diversity actions.[224] *Jones* provides a detailed analysis of the issue, discussing whether the state law conflicted with several FRCPs and, having found no conflict, whether application of the state law is warranted under the modified outcome-determination test of *Hanna* Part I.[225]

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221. *See infra* notes 260–68 and accompanying text. In brief, it is true that *Erie* does not obligate federal courts to apply state laws that are correctly classified as procedural, even when the state law does not conflict with any FRCP or federal statute, but in the absence of such a conflict federal courts must use the modified outcome-determination test to determine whether a state law should be classified as procedural. *Jackson* did not use this test. As for Allen, it may be true that, if a state law is "bound up with" state substantive rights, federal courts in diversity must apply the state law, rather than an applicable FRCP, even if the state law is procedural in operation. This depends on whether, by preventing federal courts from applying state laws that are "bound up with" state substantive rights, the FRCP would alter those substantive rights, in violation of 28 U.S.C. § 2072(b). Thus, *Allen* may be correct that federal courts must sometimes apply state law that is "intimately bound up with" state substantive rights, rather than a conflicting FRCP. The *Allen* court erred, however, by failing to determine whether any FRCPs were applicable. Moreover, I disagree with the *Allen* court's determination that a state law restricting the pleading of punitive damages is "intimately bound up with" state tort law. *See infra* notes 345–65 and accompanying text.

222. COLO. REV. STAT. ANN. § 13-64-302.5(3) (West 2005). Colorado law also restricts the timing of an amendment to request punitive damages. The amendment can occur "only after the exchange of initial disclosures" required under Colorado Rule of Civil Procedure 26, which governs discovery. *Id.* § 13-21-102(1.5)(a).

223. *Id.* § 13-64-3-2.5(3) (emphasis added).

224. 208 F. Supp. 2d 1173, 1174–75 (2002).

225. *See Jones*, 208 F. Supp. 2d 1173. The decision in *Jones* was followed in *Witt v. Condos. at the Boulders Ass'n*, No. CIVA04CV02000MSKOES, 2006 WL 348086, at *7 (D. Colo. Feb. 13, 2006). *Jones* and *Witt* conflict, however, with *Hamilton v. Matrix Logistics, Inc.*, No. Civ.A. 05-CV-00757LT, 2006 WL 318662, at *3 (D. Colo. Feb. 9, 2006), in which the district court for the District of Colorado held that the Colorado law restricting the pleading of punitive damages "dictates procedural requirements in state court and does not apply in this action," when the plaintiff alleged both federal and state law claims. *Hamilton* provides no analysis to support this holding.

The *Jones* court held that the Colorado law does not conflict with FRCP 8. Specifically, the court held that the Colorado law does not conflict with FRCP 8(a)(2), which requires a "short and plain statement of the claim," because a request for punitive damages is not a "claim"; it is only a form of relief.[226] The court further held that the Colorado law does not conflict with FRCP 8(a)(3), which requires "a demand for judgment for the relief the pleader seeks."[227] The court reasoned that the Colorado law's requirement for court approval to plead punitive damages in an amended complaint "would create an obvious conflict between the statute and the rule were it not for the fact that Rule 8 imposes no timing requirement."[228] Thus, the court based its finding of no conflict on the view that FRCP 8(a)(3) does not require the request for punitive damages to be included in the initial complaint. The court reasoned that because FRCP 8 imposes no timing requirement, FRCP 15, which allows "liberal amendment of pleadings," would give the plaintiff "the opportunity to amend the initial complaint to comply with Rule 8(a)(3) before the issues are ultimately tried."[229] The court seemed to recognize that "to comply with Rule 8(a)(3)," the plaintiff seeking punitive damages must specifically request them in the complaint. The court simply did not think that FRCP 8(a)(3) requires them to be requested in the *initial* complaint.[230]

The *Jones* court also held that the Colorado law does not conflict with FRCP 9(g), which requires items of "special damages" to be "specifically stated."[231] The court reasoned as follows:

> As with Rule 8, Rule 9 contains no timing requirement and must be construed in conjunction with Rule 15. So long as a plaintiff can amend pleadings to state special damages in conformance with Rule 9(g) before the issues are tried, there is no practical conflict between the Colorado statute and the federal rules.[232]

Thus, just like the court apparently interpreted FRCP 8(a)(3) to require the plaintiff specifically to request punitive damages in the complaint, the court apparently interpreted FRCP 9(g) to require the re-

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226. 208 F. Supp. 2d at 1178 (quoting FED. R. CIV. P. 8(a)(2)).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Cf.* Cohen v. Office Depot, Inc., 184 F.3d 1292, 1297–98 (11th Cir. 1999), *vacated in part on other grounds*, 204 F.3d 1069 (11th Cir. 2000) ("Punitive damages are a remedy, so under the rule [FRCP 8(a)(3)] a request for them should be included in the complaint."), discussed *supra* notes 93–110.

231. FED. R. CIV. P. 9(g).

232. *Jones*, 208 F. Supp. 2d at 1179.

quest to be "specifically stated." In the court's view, however, FRCP 9(g) does not conflict with Colorado's bar on pleading punitive damages in initial complaints because FRCP 9(g) does not dictate *when* the request for punitive damages must be "specifically stated" in the complaint and so FRCP 9(g) can be satisfied by amending the initial complaint to specifically state a request for punitive damages.

The *Jones* court similarly found no conflict between the Colorado law and FRCPs 15, 26, and 56. The court found FRCP 15 "expressly consistent" with the Colorado law "because [the Colorado law] authorizes amendment by motion after a responsive pleading has been filed with leave of court."[233] The court did not discuss whether the standard for amending a complaint under FRCP 15 conflicts with the standard for amending a complaint under the Colorado law. Then the court turned to whether the Colorado law conflicts with FRCP 26 by limiting the scope of discovery. The court found no conflict. It explained that whether or not a complaint expressly seeks punitive damages, "[b]ecause basic facts can and should be stated in the initial complaint, all facts relevant to a request for relief of exemplary damages would fall within permissible discovery under FRCP 26."[234] Finally, the court did not find FRCP 56 implicated by the Colorado statute, since the filing of summary judgment motions under FRCP 56 "routinely occurs after the close of discovery and therefore would occur after an appropriate motion to amend is offered."[235]

Having found no conflict between the Colorado law and federal law, the *Jones* court applied the "outcome-determinative test in light of the twin aims of *Erie*."[236] The court concluded that the federal courts' failure to apply the Colorado law would implicate both aims, tending to "promote forum shopping and result in inequitable administration of the laws."[237] The court reasoned that federal law would permit plaintiffs to assert punitive damages early—as early as in their initial complaint—and without the "factual development" needed to support the request under the Colorado law.[238] The court explained that the earlier assertion of punitive damages claims permitted under federal law could affect the outcome of the case:

> Defendant notes that awards of exemplary damages are rarely

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233. *Id.*

234. *Id.*

235. *Id.* The *Jones* court also addressed whether the Colorado law conflicted with FRCPs 11 or 16, though plaintiff did not raise the issue. The court found that the Colorado law shared with those rules the purpose and function of "simplify[ing] litigation by preventing the waste of time and resources on frivolous claims." *Id.*

236. *Id.* (citing Walker v. Armco Steel Corp., 446 U.S. 740, at 752–53 (1980)).

237. *Id.* at 1180.

238. *Id.*

> covered by professional liability insurance and that insurance carriers often are not obligated to defend against such requests. When exemplary damages are asserted early in litigation, the health care defendant may be required to retain private counsel or to incur additional legal fees in conjunction with such issues. This burdens such defendant with additional cost, changes the settlement dynamics and therefore affects the determination, amount and imposition of exemplary damages.[239]

In contrast to federal law, which permits the assertion of punitive damage claims early in the litigation without factual support,

> [t]he Colorado statute requires a sound factual basis for the assertion of exemplary damage claims, enabling the health care defendant to rely upon representation by its, his or her insurance carrier for the initial stages of the litigation and delaying settlement of such claims until facts have been shown to support them.[240]

In light of the differing operation of federal and state law, the court determined that "[p]laintiffs not required to comply with [the Colorado law] in diversity actions will likely prefer the federal court to state court because the exemplary damages can be raised early in the litigation without factual development."[241] This result would be inequitable to defendants in federal court "either because they must obtain private representation to address exemplary damage issues early in the litigation or because they must consider early settlement to avoid such expenses."[242] Application of federal law, instead of the Colorado law, could not only influence plaintiffs' choice of forum and disadvantage defendants in federal court; it would also defeat the stated objective of the Colorado law, which was to achieve "consistency in the determination, amount and imposition of exemplary damages against all health care providers."[243]

Most notable about the *Jones* decision is that, when the court analyzed whether the Colorado law conflicted with any FRCP, the court did not mention the Colorado law's creation of an evidentiary requirement for pleading punitive damages that is not required under the FRCPs. That state-law evidentiary burden figured prominently,

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239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*

however, in the court's discussion of whether application of the Colorado law by the federal courts was warranted in light of the twin aims of *Erie*. The court was trying to have it both ways: ignoring the evidentiary burden created by state law when discussing whether the state law conflicts with federal law, and then emphasizing that evidentiary burden in order to show that the state law is "substantive" under the modified outcome-determination test.

IV. SUMMARY OF CASE LAW AND IMPORTANCE OF THE ISSUE

A. The Breadth and Depth of the Conflict

The chart below summarizes the approaches that federal courts have taken to the issue whether *Erie* requires them to apply state laws restricting the pleading of punitive damages. It depicts a conflict that is broad and deep, reflecting not only difficult questions about how *Erie* principles apply to these state laws, but also some misunderstandings of basic *Erie* principles.

Eleven federal courts—consisting of ten district courts and one federal court of appeals—have addressed the issue. Three have consistently held that these state laws *do* apply in federal court;[244] six have consistently held that these state laws do *not* apply in federal court;[245] and two have reached conflicting results.[246] The one federal court of appeals to address the issue expressly (the Eleventh Circuit) reached a result—holding state laws inapplicable in federal court—that conflicts with the results in two other circuits (the Eighth and Ninth Circuits), which have upheld the federal district courts' application of state law.

Besides the difference in results, the analyses diverge widely. Indeed, some federal courts reach the same result through different analyses. Specifically, some courts do not address whether state law conflicts with federal law; instead, they hold that state law does not apply in federal court simply because the state law is procedural and federal courts have no obligation under *Erie* to apply state procedural law.[247] Other courts hold state law inapplicable because

244. These courts are the District of Idaho, the District of North Dakota, and the Eastern District of California.

245. These courts are the Eleventh Circuit, the District of Oregon, the District of Kansas, the Northern and Central Districts of Illinois, and the Northern District of California.

246. These courts are the District of Minnesota and the District of Colorado.

247. *See supra* notes 177–206, 208–11, 225 and accompanying text (discussing decisions on Illinois law, decision on California law by district court for Northern District of California, and decision on Colorado law by district court for District of Colorado in

the state law conflicts with federal law.[248] Moreover, courts finding a conflict between state law and federal law rely on one or more of several federal provisions as the source of the conflict.[249]

The conflict among federal courts is not only broad but long-standing and deep. State laws restricting the pleading of punitive damages date back to the late 1980s, when states throughout the country enacted tort reform. The twenty years since then have witnessed a deepening of the conflict among federal courts over their applicability in federal courts. Over that time, federal courts in many of the eleven jurisdictions that have addressed the issue have repeatedly adhered to their original determination.

The following table summarizes the case law.

Hamilton v. Matrix Logistics, Inc., No. Civ.A. 05-CV-00757LT, 2006 WL 318662, at *3 (D. Colo. Feb. 9, 2006)).

248. *See supra* notes 93–113, 114–25, 197–203 and accompanying text (discussing decisions on Florida law by Eleventh Circuit, on Oregon law by District of Oregon, and on Illinois law by District Court for Northern District of Illinois in *Dewick v. Maytag Corp.*, 296 F. Supp. 2d 905 (N.D. Ill. 2003)).

249. See chart entitled "Case Law Conducting *Erie* Analysis of State Laws Restricting the Pleading of Punitive Damages Chart."

Case Law Conducting *Erie* Analysis of State Laws Restricting the Pleading of Punitive Damages				
Name of federal court	**Does state law apply in federal court under Erie?**	**Does state law conflict with federal law? Which, if any, federal law is in conflict?**	**Is difference between state law and federal law outcome-determinative?**	**Leading case name**
District of Idaho	Yes	No, not with federal amount in controversy requirement	Yes	*Windsor v. Guarantee Trust Life Ins. Co.*; *see also Kuntz v. Lamar Corp.*; *Native Am. Servs., Inc. v. Givens* (9th Cir. cases assuming that Idaho statute does apply in federal courts)
11th Circuit	No	Yes, with FRCP 8(a)(3), but not with 8(a)(2)	Not necessary to address	*Cohen v. Office Depot*
District of Oregon	No	Yes, with FRCP 8(a) and 9(g)	Not necessary to address	*Pruett v. Erickson Air-Crane Co.*
District of Kansas	No	Yes, with FRCP 9(g)	No (alternative holding)	*NAL II, Ltd. v. Tonkin*

Case Law Conducting *Erie* Analysis of State Laws Restricting the Pleading of Punitive Damages				
Name of federal court	**Does state law apply in federal court under Erie?**	**Does state law conflict with federal law? Which, if any, federal law is in conflict?**	**Is difference between state law and federal law outcome-determinative?**	**Leading case name**
District of Minnesota	No	no analysis	no direct analysis; state law found to be procedural	*Jacobs v. Pickands Mather & Co.*
	Yes	Yes, because state law creates a "preliminary evidentiary burden" not found in federal law	Yes, because federal law gives plaintiffs a tactical advantage	*Fournier v. Marigold Foods, Inc.*
	Yes	There is only a "potential" conflict between FRCP 8 and state law, but no actual conflict because federal law and state law have different purposes	Yes, because federal law gives plaintiffs a tactical advantage	*Kuehn v. Shelcore, Inc.*; *see also Bunker v. Meshbesher; Gamma-10 Plastics, Inc. v. Am. President Lines* (8th Circuit cases assuming that Minnesota statute does not apply in diversity cases)
	Yes	No conflict with FRCP 15(a)	Yes, because federal law gives plaintiffs a tactical advantage	*Security Sav. Bank v. Green Tree Acceptance, Inc.*

Case Law Conducting *Erie* Analysis of State Laws Restricting the Pleading of Punitive Damages				
Name of federal court	**Does state law apply in federal court under Erie?**	**Does state law conflict with federal law? Which, if any, federal law is in conflict?**	**Is difference between state law and federal law outcome-determinative?**	**Leading case name**
District of North Dakota	Yes	No direct conflict between state law and FRCPs; doesn't discuss any particular FRCPs	Yes, because state law is "certainly more restrictive than" federal law on plaintiffs' ability to plead punitives	*Nereson v. Zurich Ins. Co.*
Northern and Central Districts of Illinois	No	No analysis	No, because FRCPs 11 & 12(b)(6), similar to state law, weed out unmeritorious punitive damage claims; also finds that state law is procedural	*E.g., Probasco v. Ford Motor Co.*; *Berry v. Eagle-Picher*
	No	Appears to hold that state law conflicts with FRCP 15(a)	No direct analysis; finds state law is procedural	*Dewick v. Maytag Corp.*

Case Law Conducting *Erie* Analysis of State Laws Restricting the Pleading of Punitive Damages				
Name of federal court	**Does state law apply in federal court under Erie?**	**Does state law conflict with federal law? Which, if any, federal law is in conflict?**	**Is difference between state law and federal law outcome-determinative?**	**Leading case name**
Northern District of California	No	No analysis	No direct analysis; state law found to be procedural	*Jackson v. East Bay Hosp.*
Eastern District of California	Yes	No analysis	No direct analysis; state law found to be "intimately bound to the state substantive cause of action"	*Allen v. Woodford*
District of Colorado	Yes	No, not with FRCP 8(a)(2), 8(a)(3), 9(g), 15, 26, or 56	Yes	*Jones v. Krautheim*; *Witt v. Condos at the Boulders Ass'n*
	No	No analysis	No direct analysis; state law found to be procedural	*Hamilton v. Matrix Logistics, Inc.*

B. The Conflict Tends to Evade Appellate Review

As noted above, the issue examined in this article has been squarely addressed only by one federal court of appeals, the Eleventh Circuit. The lack of appellate case law, however, does not mean the issue lacks importance. Instead, the lack of appellate case law reflects that the issue tends to evade appellate review. With one exception to be discussed below, a district court's ruling on whether to apply state law on the pleading of punitive damages is not immediately appealable. When the ruling cannot be appealed, later events in the district court proceeding will often cause that interlocutory ruling not to be challenged on appeal from a final judgment.[250]

First, suppose that a district court holds that a state law restricting the pleading of punitive damages *does* apply in federal court. The

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250. Wisconsin Inv. Bd. v. Plantation Square Assocs., 761 F. Supp. 1569, 1573 (S.D. Fla. 1991) ("[B]ecause a district court's decision of whether to apply a state punitive damage pleading rule is not immediately appealable, and because the district court's ruling would in all likelihood not affect the outcome of the litigation, appeal of such a ruling, though possible in some narrow contexts, has proven elusive as of yet.") (footnotes omitted).

Consider the appealability of the federal district court rulings that are most likely to raise the issue of the applicability of a state law restricting the pleading of punitive damages. The two rulings most likely to raise this issue are as follow. (1) Rulings on motions to strike or dismiss requests for punitive damages that have been pleaded in the initial complaint. *See, e.g.*, Pruett v. Erickson Air-Crane Co., 183 F.R.D. 248 (D. Or. 1998) (motion to strike); Berry v. Eagle-Picher, No. CIV. 98-571-AA, 1989 WL 77764 (N.D. Ill. June 27, 1989) (motion to dismiss); Kuehn v. Shelcore, Inc., 686 F. Supp. 233 (D. Minn. 1988) (motion to strike); Jacobs v. Pickands Mather & Co., No. 5-87-CIV 49, 1987 WL 47387 (D. Minn. Aug. 24, 1987) (motion to dismiss). (2) Rulings on motions to amend the complaint to add a request for punitive damages. *See, e.g.*, Robinson v. Raina's Residential Prop. Mgmt., No. CV-05-152-S-BLW, 2006 WL 2095871 (D. Idaho Jul 27, 2006); Strong v. Unumprovident Corp., 393 F. Supp. 2d 1012 (D. Idaho 2005); Security Sav. Bank v. Green Tree Acceptance, Inc., CIV. No. 3-89-28, 1990 WL 36142 (D. Minn. Mar. 22, 1990). Ordinarily, rulings on motions to amend cannot be immediately appealed. *E.g.*, Stevens v. Brink's Home Sec., Inc., 378 F.3d 944, 946–47 (9th Cir. 2004) (order granting amendment of complaint to add non-diverse defendants was not appealable as final order); Encoder Commc'ns, Inc. v. Telegen, Inc., 654 F.2d 198, 202 (2nd Cir. 1981) (denial of motion to amend complaint is not ordinarily appealable); Michelson v. Citicorp Nat'l Servs., Inc., 138 F.3d 508, 512 (3rd Cir. 1998) (stating that orders granting or denying motion to amend complaint are not immediately appealable). Likewise, orders on motions to strike or dismiss punitive damage claims are ordinarily not immediately appealable unless they dispose of the action or a separable part of the action. *See In re* Russell, 957 F.2d 534, 535 (8th Cir. 1992); Arizona State Carpenters Pension Trust Fund v. Miller, 938 F.2d 1038, 1040 (9th Cir. 1991); Sussex Drug Prods. v. Kanasco, Ltd. 920 F.2d 1150, 1155–56 (3rd Cir. 1990); Harvey Aluminum v. Int'l Longshoremen's & Warehousemen's Union, Local 8, 278 F.2d 63, 63–64 (9th Cir. 1960). As discussed *infra* note 252 and accompanying text, there is one important situation in which it will be possible for a plaintiff to take an immediate appeal of an order dismissing or striking a punitive damage claim, or denying a motion to amend a complaint, and that is when the effect of the order is dismissal of the entire action or a separable part of it.

defendant will ordinarily be happy with that ruling, since state law is more restrictive than federal law. If the plaintiff can meet the state-law restrictions, the plaintiff, too, will have no cause to complain of the court's application of those restrictions: application of the state standard will not have prevented the plaintiff from seeking punitive damages. If, on the other hand, the plaintiff cannot meet the state-law restrictions for pleading punitive damages, and consequently receives no award of punitive damages, the plaintiff may, on appeal from the final judgment, challenge the district court's application of state law. It may not make sense for the plaintiff to take that appeal, however, unless the plaintiff already has, or can obtain, evidence strong enough to recover punitive damages at trial. It is possible that few plaintiffs will have, or be likely to obtain, evidence strong enough to *recover* punitive damages if they have been found unable even to meet the state-law standard for *pleading* punitive damages. Those plaintiffs may reasonably decide not to appeal a district court's application of the state-law restrictions on pleading punitive damages. In short, plaintiffs who cannot meet the state-law standard for pleading punitive damages often do not have a punitive damages claim that is strong enough to justify appealing a district court's decision to apply the state-law standard for pleading punitive damages. Of course, some appeals do occur in this situation.[251]

Now suppose, contrary to the scenario described in the last paragraph, that the district court holds that the state law restricting the pleading of punitive damages does *not* apply in federal court. This ruling will ordinarily make the plaintiff happy, because federal law is less restrictive than state law. By the same token, this ruling will dissatisfy the defendant, but it will provide a basis for an appeal by the defendant only if the plaintiff ultimately recovers punitive damages at the district-court level. If the plaintiff does not recover punitive damages, the defendant will ordinarily lack standing to appeal the district court's ruling that refused to apply state law to plaintiff's request for punitive damages. If the plaintiff does recover punitive damages at the district-court level, the defendant can appeal the district court's ruling refusing to apply the state law restricting the pleading of punitive damages. It may make sense for the defendant to appeal that ruling, however, only if the plaintiff's evidence of punitive damages was so weak that it would not have satisfied the state-law requirements for pleading punitive damages. The plaintiff who has *recovered* an award of punitive damages seldom has evidence so weak that it would

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251. *See* Kuntz v. Lamar Corp., 385 F.3d 1177 (9th Cir. 2004); Native Am. Servs., Inc. v. Givens, 213 F.3d 642 (9th Cir. 2000) (unpublished table decision); Bunker v. Methbesher, 147 F.3d 691 (8th Cir. 1998); Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd., 32 F.3d 1244 (8th Cir. 1994).

not even meet the state-law requirements for *pleading* punitive damages. In short, defendants against whom punitive damages have been awarded often may be unable to show that the evidence of punitive damages was so weak that it would not have met the state-law requirements for pleading punitive damages; these defendants accordingly may have little incentive to appeal the district court's determination that the state-law requirements for pleading punitive damages are applicable.

There is one main situation in which a party can immediately appeal a district court's ruling on whether to apply a state law restricting the pleading of punitive damages. An immediate appeal is possible when the district court rules that (1) the state law does apply; (2) the plaintiff has failed to meet the state-law requirements for pleading punitive damages; *and* (3) that failure requires dismissal of all or part of plaintiff's case. The third situation can arise, for example, if the plaintiff relies on diversity jurisdiction and cannot meet the amount-in-controversy requirement for a diversity case unless he is allowed to plead punitive damages. This situation, indeed, led to *Cohen v. Office Depot, Inc.*, which is the only court of appeals decision expressly addressing whether federal courts must apply state laws restricting the pleading of punitive damages.[252]

In sum, the *Erie* issue of whether federal courts should apply state laws restricting the pleading of punitive damages tends to evade appellate review. Rulings addressing the issue are seldom subject to an immediate appeal—with *Cohen* representing the one significant, exceptional situation in which an immediate appeal is possible. In cases where the rulings are not immediately appealable, later trial court proceedings tend either (1) to render the ruling on the *Erie* issue not subject to appeal by the party whom the ruling disfavored; or (2) to cause an appeal to be unwise because of the likelihood that the party who would take the appeal will not ultimately prevail on the merits of the punitive damage claim.

C. The Conflict Concerns an Important Issue

The question whether federal courts in diversity cases must apply state laws restricting the pleading of punitive damages has doctrinal and practical importance. Its importance surely warrants the U.S. Supreme Court's resolution of the deep, broad conflict among the lower courts on this issue.

The doctrinal importance sounds in federalism. Justice Harlan regarded *Erie* as "one of the modern cornerstones of our federal-

252. 184 F.3d 1292 (11th Cir. 1999), *vacated in part*, 204 F.3d 1069 (11th Cir. 2000), discussed *supra* notes 93–110 and accompanying text.

ism."[253] He is not alone in this view.[254] *Erie* safeguards federalism by helping ensure that state courts remain viable institutions for resolution of state-law disputes and that state law preserves its integrity when applied by federal courts. Both interests are potentially threatened, and significant state policy thwarted, to the extent that state tort reform measures apply in a state court but not the federal court that may sit across the street from the state court and that, like the state court, adjudicates state tort claims.[255]

This becomes evident when one considers the state concerns underlying the state laws restricting the pleading of punitive damages. The concern is to prevent the assertion of unwarranted punitive damage claims.[256] This concern reflects the perception that—for various reasons, including a desire to avoid bad publicity—the mere pleading of a large punitive damage request can force a defendant to settle the case quickly and on unfavorable terms.[257] This dynamic can arise re-

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253. Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

254. *See, e.g.*, Ely, *supra* note 7, at 695 ("[*Erie*] implicates, indeed perhaps it is, the very essence of our federalism."); Winton D. Woods, Jr., Erie *Enigma: Appellate Review of Conclusions of Law*, 26 ARIZ. L. REV. 755, 757 (1984) ("There is wide agreement that the *Erie* doctrine is, to use Justice Harlan's phrase, 'one of the modern cornerstones of our federalism.'"); *see also* Guaranty Trust Co. v. New York, 326 U.S. 99, 110 (1945) ("A policy so important to our federalism [the *Erie* doctrine] must be kept free from entanglements with analytical or terminological niceties.").

255. Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 378 (1977) ("[T]o the extent a federal diversity court refuses to follow the applicable state rule, it may significantly undermine the attainment of legitimate state objectives.").

256. *See, e.g., Gamma-10 Plastics*, 32 F.3d at 1255 (finding that a Minnesota law restricting pleading of punitive damages "was enacted to prevent frivolous punitive damage claims by allowing a court to determine first if punitive damages are appropriate"); Worthem v. Gillette Co., 774 F. Supp. 514, 516 (N.D. Ill. 1990) (quoting legislative material stating that Illinois law restricting the pleading of punitive damages "employs the device of prescribing pleading restrictions as a way of indirectly affecting the ultimate right to recover") (emphasis omitted); Central Pathology Serv. Medical Clinic, Inc. v. Superior Court, 832 P.2d 924, 929 (Cal. 1992) (finding that a California statute restricting the pleading of punitive damages had overall purpose of giving health care providers "relief from unsubstantiated claims of punitive damages").

257. *See, e.g.*, Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 172 ("[E]ven though the empirical research consistently shows that punitive damages are rare and well-controlled by the judiciary, this remedy plays a significant role in driving settlements."); Arvin Maskin, *Litigating Claims for Punitive Damages: The View From the Front Line*, 31 LOY. L.A. L. REV. 489, 489–90 (1998) ("Regardless of whether or not awards for such damages are empirically on the rise, there is no doubt that the possibility of an extraordinary punitive damages award influences the dynamics of personal injury litigation by increasing plaintiffs' opportunities and defendants' exposure."). *But see, e.g.*, Thomas A. Eaton et al., *The Effects of Seeking Punitive Damages on the Processing of Tort Claims*, 34 J. Legal Stud. 343, 343 (2005) ("[W]e find that seeking punitive damages has no statistically significant effect on most phases of the tort litigation process."); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL

gardless of the merits of the claim. It is a particularly strong dynamic when the defendant's insurance company refuses to defend against the punitive damage claims.[258] State laws that require evidentiary showings to support punitive damage requests aim to prevent quick, plaintiff-favorable settlements forced by unsupported punitive damage claims. If federal courts do not enforce these state laws, federal courts enable plaintiffs who can bring their cases in federal courts to avoid having the state laws enforced against them, even when enforcement would further the state's important interests.

For the same reasons, the applicability in federal courts of state laws restricting the pleading of punitive damages has great importance for individual litigants. These state laws can affect the outcome of many cases in the eight states with those laws on the books. The mere inclusion of punitive damage claims in a civil complaint can influence the timing and terms of settlements. The inclusion of these claims also can influence the outcome of trials and dispositive motions. This is not to say that the state laws weed out only punitive damage claims that lack merit. To the contrary, some plaintiffs who could ultimately prove entitlement to punitive damages will not be able to meet these state law requirements for pleading punitive damages—even though those same plaintiffs could meet the more liberal federal standards for pleading punitive damages. The outcome of these plaintiffs' cases will vary depending on whether the state laws are applied to them or not.

Thus, as esoteric as the *Erie* doctrine is considered by some to be, it has real world significance in the balance of power between the federal government and the states and in the fortunes of litigants. The *Erie* doctrine protects important state policy judgments, such as those underlying the tort reform measures under discussion here, and it can mean the difference between success and failure for litigants in many cases—specifically including the success and failure of punitive damage claims. The doctrinal and practical significance, coupled with the broad and deep division among federal courts over the issue discussed here warrants Supreme Court resolution.

PRACTICE AND PROCEDURE § 1259, at 519 (3rd ed. 2004) (specifying amount of damages in complaint may cause "unfavorable publicity").

258. *See generally* 14 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE 3D § 201:25, at 201:57–58 (discussing case law on insurers' duty to defend actions involving punitive damage claims).

V. *ERIE* ANALYSIS

A. Necessity of Conflict Analysis

It is well established that the first step of *Erie* analysis is to determine whether the state law conflicts with federal law, including an FRCP.[259] Surprisingly, some of the decisions discussed in Part III skip the conflict-analysis step and go directly to the question of whether, in a generic sense, the state law is substantive or procedural.[260] This approach is wrong for two reasons.

First, the question whether a state law is substantive or procedural cannot be answered in a vacuum.[261] For example, a state law may be procedural for conflict-of-law purposes but substantive for *Erie* purposes.[262] For that very reason, *Erie* can require a federal

259. *See, e.g.*, Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 4–5 (1987) ("The initial step is to determine whether, when fairly construed, the scope of [a federal rule] is 'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law.") (citations omitted); Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980) ("The first question must . . . be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue . . . .").

260. These courts include federal district courts in the District of Minnesota, *see* Jacobs v. Pickands Mather & Co., No. 5-87-CIV 49, 1987 WL 47387, at *1 (D. Minn. Aug. 24, 1987) (holding that MINN. STAT. ANN. § 549.191 did not apply in diversity case because it is "procedural in nature, and do[es] not affect the ultimate outcome of the plaintiff's claim for punitive damages"); the District of Colorado, *see* Hamilton v. Matrix Logistics, Inc., No. Civ.A. 05-CV-00757LT, 2006 WL 318662, at *3 (D. Colo. Feb. 9, 2006) (holding that Colorado statute restricting the pleading of punitive damages "dictates procedural requirements in state court and does not apply in this action"); the Central District of Illinois, *see* Probasco v. Ford Motor Co., 182 F. Supp. 2d 701, 705 (C.D. Ill. 2002), discussed *supra* note 193 and accompanying text; and the Northern District of California, *see* Jackson v. East Bay Hosp., 980 F. Supp. 1341, 1351–52, (N.D. Cal. 1997) discussed *supra* notes 208–11; *cf.* Beul v. ASSE Int'l, Inc., 233 F.3d 441, 449 (7th Cir. 2000) (holding that federal court adjudicating state-law claim should reject state law in favor of federal law governing method of instructing jury, without analyzing whether state law conflicts with federal law, but instead relying on the determination that "[r]ules of general applicability and purely managerial character governing the jury, such as the form in which a civil jury is instructed, are quintessentially procedural for purposes of the *Erie* rule"). *But see* Fournier v. Marigold Foods, Inc., 678 F. Supp. 1420, 1422 (D. Minn. 1988) (understanding *Erie* doctrine to require a federal court in a diversity action to apply state law "if application of a *conflicting* federal rule would encourage forum-shopping") (emphasis added), discussed *supra* notes 140–48 and accompanying text.

261. *See* Guaranty Trust Co. v. New York, 326 U.S. 99, 108 (1945) (stating that the terms "substance" and "procedure" "impl[y] different variables depending upon the particular problem for which [each term] is used").

262. *See, e.g.*, Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988) (noting that the Court has rejected "the notion that there is an equivalence between what is substantive under the *Erie* doctrine and what is substantive for purposes of conflict of laws").

court to apply the forum state's statute of limitations (the statute of limitations being considered "substantive" for *Erie* purposes) even when adjudicating a cause of action that, under the forum state's choice-of-law rules, would be governed in other respects by the law of another state (the statute of limitations being considered "procedural" for choice-of-law purposes).[263] Likewise, *Erie* may require a federal court in a diversity action to apply the forum state's law governing the burden of proof (the burden of proof being "substantive" for *Erie* purposes) even when adjudicating a cause of action otherwise governed by the laws of another state (the burden of proof being "procedural" for choice-of-law purposes).[264] In short, the terms "procedure" and "substance" have no fixed meaning, and therefore courts err when they attempt to decide whether state laws restricting the pleading of punitive damages are "substantive" or "procedural" in a generic sense.

More fundamentally, even if it were possible to label a state law substantive or procedural in some generic sense, that label would not determine its applicability in diversity actions. If a state law conflicts with a valid federal law, the state law cannot apply in a federal diversity action even if, in the abstract, the state law could reasonably be characterized as substantive.[265] For example, while a state law fixing the burden of proof for a category of civil actions may reasonably be considered "substantive" because of its effect on a litigant's substantive right to recover a judgment, the state law could probably be preempted by a federal law prescribing a uniform burden of proof for diversity actions.[266] By the same token, if the state law does *not* conflict

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263. *See id.* (upholding application of Kansas statute of limitations to a claim brought in state court in Kansas even though Kansas lacked sufficient contacts to the controversy to apply its own substantive law).

264. *See* JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS 230 (5th ed. 2006).

265. Hanna v. Plumer, 380 U.S. 460, 471 (1965).

> It is true that both the Enabling Act and the *Erie* rule say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical. For they were designed to control very different sorts of decisions. When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* Choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. Hanna thus contemplates that federal rules can override state laws that are rationally capable of classification as substantive.

266. *See, e.g.*, Sampson v. Channell, 110 F.2d 754, 757 (1st Cir. 1940) (stating in dicta that, if FRCP 8(c) "could be construed as imposing upon the defendant the burden of

with any federal law, *Erie* may require federal courts to apply the state law in diversity cases even though the state law could reasonably be characterized as procedural.[267] Again, a state law prescribing the burden of proof illustrates the point. A burden of proof rule is procedural in the sense that it controls the order in which the parties present evidence at trial and other procedural matters, but state laws prescribing the burden of proof nonetheless generally apply in federal court diversity actions, in the absence of conflicting federal laws, because of their outcome-determinative effect.[268]

Thus we can set aside as erroneous federal court decisions that cut to the chase by determining whether state laws restricting the pleading of punitive damages are procedural or substantive in some generic sense. No universal criteria govern that determination, and, in the *Erie* analysis, the determination is meaningless without a prior determination of whether the state law under analysis conflicts with federal law.

B. Determining Whether There is a Conflict Between State Laws Restricting the Pleading of Punitive Damages and the FRCPs or Other Federal Law

Most of the cases that address the applicability of state laws restricting the pleading of punitive damages have discussed whether the state law conflicts with federal law.[269] All but one of the cases that perform conflict analysis consider, more specifically, whether the state laws conflict with any FRCPs. *Windsor* is the exception: the *Windsor* court analyzed whether state law conflicted with federal judicially developed rules governing determination of the amount in controversy.

This section first explores whether state law restricting the pleading of punitive damages conflict with any of the FRCPs discussed in the case law. That exploration begins with a discussion of how FRCPs should be interpreted when they assertedly conflict with state law, and then it discusses each of the FRCPs that federal courts have cited as conflicting with state laws that restrict the pleading of

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proof of contributory negligence, it seems that this would be valid and conclusive" in a diversity case).

267. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 555 (1949) (stating that in the absence of conflicting federal law, a state law will be inapplicable in federal diversity actions as "mere" procedural rule only if not outcome determinative under *Hanna* part I).

268. *See* Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939) (rejecting the view that Texas law governing the burden of proof in land dispute "was only one of practice" and concluding, instead, that "it relates to a substantial right").

269. *See supra* Part III.

punitive damages. Thereafter, the analysis turns to the District of Idaho's *Windsor* analysis.

1. Whether the FRCPs Should be Construed Broadly, Narrowly, or Neutrally

Often a court must interpret an FRCP to determine whether it conflicts with state law.[270] Thus, a threshold issue in *Erie* conflict analysis is whether the FRCPs should be interpreted with a thumb on the scale. The issue has importance in our situation. As discussed above, federal courts disagree on whether state laws restricting the pleading of punitive damages conflict with any FRCPs. The disagreement reflects that there may be more than one reasonable interpretation of one or more FRCPs, in which case a rule of construction may be determinative. Thus, we need to know whether *Erie* doctrine includes (and should include) any principle that requires the FRCPs to be interpreted narrowly, broadly, or neutrally.

The Supreme Court has not approached this interpretive issue consistently. Sometimes the Court has suggested that the FRCPs should be interpreted neutrally.[271] Other times the Court has suggested that the FRCPs should be interpreted narrowly.[272] Indeed, in one case the Court said one thing and did the other. In *Walker v. Armco Steel*, the Court endorsed a "plain meaning" approach in an opinion that read an FRCP narrowly.[273] In short, the Court has not been predictable in applying a rule of narrow construction.

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270. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501–06 (2001) (construing FRCP 41(b) to determine whether it conflicted with state law); *see also* Rowe, *supra* note 56, at 969–70 (stating that the *Erie* analysis includes consideration of "judicial constructions" of FRCPs). The determination of whether state law conflicts with an FRCP in connection with *Erie* analysis is a species of preemption analysis. In the broader realm of preemption doctrine, the Court likewise has observed that preemption analysis "requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

271. Walker v. Armco Steel Corp., 446 U.S. 740, 750 n.9 (1980) ("This is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a 'direct collision' with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies.").

272. See *infra* notes 274–82, 345–65 and accompanying text

273. In *Walker*, the Court said that the FRCPs should be given their "plain meaning," but it interpreted the FRCP at issue narrowly, apparently to minimize trenching on important state interests. *See id.*, 446 U.S. at 750 n.9 ("The Federal rules should be given their plain meaning."); *id.* at 750–52 (interpreting FRCP 3 not to conflict with an Oklahoma statute that "is an integral part of the several policies served by the statute of limitations").

Moreover, the Court has identified three different situations for interpreting the FRCPs narrowly. One is when a broad reading would arguably abridge, alter, or modify substantive rights.[274] This narrow-interpretation principle reflects the command of the REA, which forbids the FRCPs from altering substantive rights.[275] A second occasion for a narrow interpretation of an FRCP, the Court has held, is when a broad interpretation of an FRCP would encourage forum shopping or result in the inequitable administration of laws.[276] This narrow-interpretation principle reflects the twin aims of the *Erie* doctrine, as the doctrine was clarified in *Hanna*.[277] The third situation in which the Court has seemingly endorsed narrow interpretation is when a broad interpretation of an FRCP would conflict with "important state regulatory policies."[278] This narrow-interpretation principle seems to have originated in a leading casebook on federal courts.[279]

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274. *See Semtek*, 531 U.S. at 503 (rejecting an interpretation of FRCP 41(b) in part because that interpretation "would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)"); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612–13 (1997) (interpreting FRCP 23 "mindful that [its] requirements must be interpreted in keeping . . . with the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right'"); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 96 (1991) (rejecting an interpretation of FRCP 23.1, implying that the interpretation would violate REA); *see also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 437 n.22 (1996) ("Whether damages are excessive for the claim-in-suit must be governed by *some law*. And there is no candidate for that governance other than the law that gives rise to the claim for relief–here, the law of New York. *See* 28 U.S.C. §§ 2072(a) and (b) ('Supreme Court shall have the power to prescribe general rules of . . . procedure'; '[s]uch rules shall not abridge, enlarge or modify any substantive right'); . . . ."); Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1184–85 (2006) (discussing these cases).

275. 28 U.S.C. § 2072(b) (2000).

276. *Semtek*, 531 U.S. at 504 (rejecting interpretation of FRCP 41(b) that not only would arguably alter substantive rights, in violation of REA, but also "would in many cases violate the federalism principle of *Erie* . . . by engendering substantial variations in outcomes between state and federal litigation which would likely . . . influence the choice of a forum") (internal quotation marks, citations, and brackets omitted).

277. Hanna v. Plumer, 380 U.S. 460, 467–68 (1965), quoted in *Semtek*, 531 U.S. at 504.

278. *Gasperini*, 518 U.S. at 437 n.22 (quoting RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729–30 (4th ed. 1996)); *see also id.*, 518 U.S. at 427 n.7 (observing with apparent approval, "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies"); Stewart Org. v. Ricoh Corp., 487 U.S. 22, 38 (1988) (Scalia, J., dissenting) (citing, with "cf." signal, and quoting passage from earlier edition of Hart and Wechsler treatise similar to that cited and quoted in *Gasperini*); Robert J. Condlin, *"A Formstone of Our Federalism:" The Erie/Hanna Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 529 n.223 (2006) (statement in *Gasperini* about interpreting FRCPs "with sensitivity to important state interests and regulatory policies" is apparently "another way of saying that Federal Rules must be read narrowly in order to avoid conflicts with state law"); Lear, *supra* note 274, at 1204 n.388

Having laid out these three narrow-interpretation principles, I will merely add my view that only the first has clear legitimacy. It is legitimate to interpret an ambiguous FRCP narrowly when a broader, equally plausible interpretation might well alter substantive rights and thus violate the REA. This is simply making sure to color inside the lines established by the REA. In contrast, interpreting an FRCP narrowly in light of the twin aims of *Erie* is dubious. It treats the FRCPs on a par with federal judicially developed rules of procedure, when the whole point of *Hanna* was that the FRCPs should *not* be treated the same as federal judicially developed rules.[280] Finally, interpreting FRCPs narrowly to avoid conflict with important state interests or regulatory policies is akin to the principle that a federal statute should not be interpreted to preempt a state law in a traditional area of state concern unless Congress has expressed a clear intent for the federal statute to have that effect.[281] That principle does not readily apply to the FRCPs, however, because the FRCPs do not operate in a traditional area of state concern. They govern procedure in the federal courts.[282]

In any event, it matters for our purposes which, if any, of these narrow-interpretation principles apply, as discussed below. Before that discussion, however, let us explore whether—if we leave a thumb off the scale for now—state laws restricting the pleading of punitive damages conflict with any FRCP.

(stating that *Gasperini* "could be read to require" an approach to conflict analysis that is relatively "deferential" to state law).

279. *See supra* notes 278. Professor Woolley suggests that the "important state interests and regulatory policies" that one narrow-interpretation principle seeks to protect "arguably encompasses outcome-determinative state rules." Patrick Woolley, *Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(B)(3),* 2004 MICH. ST. L. REV. 799, 815 n.55 (2004).

280. *See Hanna,* 380 U.S. at 469–70 (identifying as a "fundamental flaw" the "incorrect assumption that the rule of *Erie* [*Railroad*] *Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure"); *see also* Ely, *supra* note 7, at 721–22 (rejecting the view that the 28 U.S.C. § 2072(b) of Rules Enabling Act should be read to invalidate Federal Rules whose application in lieu of state law would be outcome determinative under the modified outcome determinative test of *Hanna*).

281. *See, e.g.*, City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 432 (2002) ("When considering pre-emption, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress") (internal quotation marks omitted) (quoting Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991)).

282. *See Hanna,* 380 U.S. at 472 ("For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.").

2. Whether State Laws Restricting the Pleading of Punitive Damages Conflict with the FRCPs

Federal courts have found conflicts with FRCPs 8(a)(3), 9(g), 15(a), 26, and 56 but there are also decisions that deny a conflict with any of these provisions. I am going to focus on the first three provisions.[283] I conclude that these state laws conflict with 8(a)(3) and 15(a) but not necessarily with 9(g). The court that comes closest to this conclusion is *Cohen*. In my view, however, *Cohen's* analysis overlooks the central way in which these state laws conflict with the FRCPs. The central conflict concerns the state laws' imposition of an evidentiary requirement for pleading punitive damages. This requirement contravenes the simplified system of pleading and liberal standard for amending pleadings established by the FRCPs, which are essential features of the present federal court system for civil actions.

a. FRCP 8(a)(3)

FRCP 8(a)(3) says that "[a] pleading which sets forth a claim for relief . . . shall contain . . . (3) a demand for judgment for the relief the pleader seeks."[284] This means that in the complaint the plaintiff should demand the relief that he or she is seeking. FRCP 8(a)(3) obviously can be read to permit—and perhaps to require—the plaintiff seeking punitive damages to include an explicit request for punitive damages in the initial complaint. Nonetheless, FRCP 8(a)(3) does not specifically address the contents of *initial* complaints. Nor does FRCP 8(a)(3) specifically address relief in the form of *punitive damages*.

FRCP 8(a)(3)'s lack of specificity on these two matters has led some courts to find no conflict between FRCP 8(a)(3) and state laws that prohibit initial complaints from including punitive damage re-

283. At least one court found a conflict between FRCP 8(a)(2) and a state law restricting the pleading of punitive damages. FRCP 8(a)(2) requires the complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). The *Cohen* court held "that a request for punitive damages is not a 'claim' within the meaning of Rule 8(a)(2)," and I agree. Cohen v. Office Depot, Inc., 184 F.3d 1292, 1297 (11th Cir. 1999). The term "claim" refers to the invocation of a legal theory supporting relief. A request for punitive damages is a request for a particular kind of legal relief, but is not a freestanding theory supporting such relief. Put another way, the request for punitive damages has to be attached to some legal theory such as a type of tort or a statutory provision authorizing private actions. *See* Bontowski v. Smith, 305 F.3d 757, 762 (7th Cir. 2002) (the demand for relief required by FRCP 8(a)(3) "is not itself a part of the plaintiff's claim"); Neill v. Gulf Stream Coach, Inc., 966 F. Supp. 1149, 1153 n.8 (M.D. Fla. 1997) (holding that Florida statute restricting the pleading of punitive damages did not conflict with FRCP 8(a)(2) because "there can be no such thing as a free standing 'claim' for punitive damages"); WRIGHT & MILLER, *supra* note 257, § 1255, at 509 (to the same effect).

284. FED. R. CIV. P. 8(a)(3).

quests. These state laws allow the plaintiff to amend the complaint to request punitive damages if the plaintiff can substantiate the request. Some courts have reasoned that the state laws merely control the *timing* of the request for punitive damages, a matter that FRCP 8(a)(3) does not address.[285] On this interpretation, FRCP 8(a)(3) is satisfied as long as the plaintiff who seeks punitive damages eventually amends the complaint, in accordance with state law, to add a punitive damages claim.

This reasoning is flawed. To begin with, FRCP 8(a)(3) does address the contents of initial complaints. It governs the contents of any pleading "which sets forth a claim for relief."[286] Thus, it means that *every* complaint, including an initial complaint, "*shall* contain" a demand for the relief that the plaintiff seeks. Of course, the improper omission of material required in the initial complaint can usually be cured under the liberal standard prescribed in FRCP 15 for amending complaints.[287] The fact that the plaintiff can easily supply the omitted material does not mean the material was not required in the first place.

Furthermore, FRCP 8(a)(3) is most naturally read to permit, even if it does not require, the initial complaint specifically to demand punitive damages if the plaintiff wants them. FRCP 8(a) prescribes the contents of the complaint so that the complaint gives the defendant adequate notice of the lawsuit. A request for punitive damages is generally such a significant aspect of the lawsuit that the defendant should always get specific notice when that type of relief is sought. Accordingly, federal courts have set aside punitive damage awards when defendants did not have adequate notice that punitive damages were sought.[288] The plaintiff may give notice other than in the com-

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285. Jones v. Krautheim, 208 F. Supp. 2d 1173, 1178 (D. Colo. 2002) (finding that FRCP 8(a)(3)'s requirement that plaintiff include a demand for judgment for the relief sought "would create an obvious conflict between the statute and the rule were it not for the fact that Rule 8 imposes no timing requirement"), discussed *supra* notes 224-43; Wisconsin Inv. Bd. v. Plantation Square Assocs., Ltd., 761 F. Supp. 1569, 1575 (S.D. Fla. 1991) (holding that a Florida statute restricting the pleading of punitive damages "merely changes the time at which a plaintiff can plead punitive claims and at which defendants are formally exposed to such claims"); *cf. NAL II Ltd. V. Tonkin*, 705 F. Supp. at 529 (holding that federal court's failure to apply Kansas statute would only affect timing of when court evaluates evidentiary support for punitive damage claim), discussed *supra* note 134-36 and accompanying text.

286. FED. R. CIV. P. 8(a).

287. *See, e.g.*, WRIGHT & MILLER, *supra* note 257, § 1255, at 511 ("The liberal policies reflected in Rules 15(a) and 15(b) permit the demand [for judgment required by Rule 8(a)(3)] to be amended either before or during trial.").

288. *See, e.g.*, Anheuser-Busch, Inc. v. John Labatt Ltd., 89 F.3d 1339, 1350 (8th Cir. 1996) (upholding district court decision setting aside jury award of punitive damages when plaintiff did not include punitive damage requests in pleadings or responses to interrogatories); *see also* Scott v. Jenkins, 690 A.2d 1000, 1007 (Md. 1997) ("A punitive

plaint, such as in a pretrial order.[289] This does not alter the fact that, under FRCP 8(a)(3), the initial complaint itself should specify that the plaintiff seeks punitive damages.[290]

In any event, as the Eleventh Circuit observed in *Cohen*, even if FRCP 8(a)(3) merely permits—but does not require—the initial complaint to include a specific request for punitive damages, it conflicts with a state law that prohibits initial complaints from including requests for punitive damages.[291] In general preemption analysis, federal and state law can conflict even if it is physically possible to comply with both.[292] The same is true in a *Hanna* Part II analy-

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damages award based upon an insufficiently pleaded complaint may render the judgment constitutionally infirm.").

289. *See, e.g.*, Bowles v. Osmose Utils. Servs., Inc., 443 F.3d 671, 675 (8th Cir. 2006) (affirming punitive damage award, despite plaintiff's failure to request them specifically in the original or amended complaint, because plaintiff explicitly stated in his pretrial statement that he intended to seek them); Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1319 (9th Cir. 1982) (holding that a specific prayer for punitive damages not needed when plaintiffs' pretrial statement specified that they sought punitive damages); *see also* FED. R. CIV. P. 54(c) ("Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings."). *But cf.* Albemarle Paper Co. v. Moody, 422 U.S. 405, 424 (1975) (holding that a plaintiff may not be "entitled" to relief under FED. R. CIV. P. 54(c) if defendant is prejudiced by plaintiff's failure to make clear that plaintiff is seeking that relief).

290. *See* WRIGHT & MILLER, *supra* note 257, § 1259, at 520 (noting that even narrowly construed, FRCP 8(a)(3) requires "assertion of the type or nature of relief requested"); Barrow v. Greenville Indep. Sch. Dist., No. Civ.A.3:00CV0919-D, 2005 WL 39086, at *8 (N.D. Tex., Jan. 7, 2005) (although plaintiff does not have to expressly use the term "punitive damages" in her complaint, to satisfy FRCP 8(a)(3) she does need to "plead[ ] facts sufficient to put [the defendant] on notice that she seeks punitive damages"); D. DEL. R. 9.4(a) ("A pleading which sets forth a claim for relief in the nature of unliquidated money damages shall state in the ad damnum clause a demand specifying the nature of the damages claimed, e.g., 'compensatory,' 'punitive,' or both, but shall not claim any specific sum."); E.D. PA. R. 5.1.1 (similar local rule); *see also* Scutieri v. Paige, 808 F.2d 785, 790–92 (11th Cir. 1987) (prayer for punitive damages not necessary when body of complaint alleged that defendants' conduct was egregious enough to warrant punitive damages); Guilen v. Kuykendall, 470 F.2d 745, 748 (5th Cir. 1972) (plaintiff did not need to "claim exemplary damages by specific denomination" where the complaint "alleged malice and unwarranted excessive actions"); *In re* Landbank Equity Corp., 83 Bankr. 362, 376 (E.D. Va. 1987) ("A failure to specifically plead and demand exemplary damages will not bar an award of such damages under [FRCP] 54(c) where the body of the complaint alleges facts sufficient to support the award.").

291. Cohen v. Office Depot, Inc., 184 F.3d 1292, 1298 (11th Cir. 1999), vacated in part on other grounds, 204 F.3d 1069 (11th Cir. 2000).

292. *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 380 (2000) ("[T]he fact that some companies may be able to comply with both [state and federal statutory] sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ [against foreign government]."); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 155 (1982) (holding that state law restricting inclusion of "due on sale" clauses in loan contracts conflicted with federal regulation that allowed such clauses to be included in loan contracts but did

sis. Indeed, in *Hanna* itself, the Court found an "unavoidable" clash between a federal rule that permitted the method of serving process required by state law, but that also permitted other methods of service that were not allowed by state law.[293] Because the federal rule addressed the same subject as the state law, but was more permissive than the state law, the two conflicted.[294] Thus, finding that FRCP 8(a)(3) permits initial complaints to include requests for punitive damages is enough to conclude that it conflicts with state laws prohibiting their inclusion.

Of course, to say that FRCP 8(a)(3) permits punitive damages to be requested in the initial complaint does not mean federal law imposes no restrictions on their inclusion in initial complaints. The restrictions are modest, however. Under federal law, the test of whether a punitive damage claim belongs in the complaint is whether the allegations, if accepted as true, state a claim for which punitive damages can be granted.[295] To include factual allegations supporting punitive damages in the complaint, the plaintiff does not need evidentiary support if the allegations "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[296] These lenient federal standards for pleading punitive damages, as applied to initial complaints, conflict with the flat prohibition

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not compel their inclusion). *See generally* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280 (1987) (general preemption case discussing ways besides "physical impossibility" of dual compliance in which state law can conflict with, and therefore be preempted by, federal law).

293. Hanna v. Plumer, 380 U.S. 460, 470 (1965).

294. *See id.* (reading FRCP 4(d)(1) to state "implicitly, but with unmistakable clarity—that inhand service is not required in federal courts"); *see also* Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 7 (1987) (holding that FRCP 38's "discretionary mode of operation" for assessing damages and costs for frivolous appeals "unmistakably conflict[ed]" with Alabama statute mandating defined penalty when appellate court affirms judgment that was stayed on appeal).

295. Jones v. Wal-Mart Stores, Inc., No. 90-14113-CIV-PAINE, 1991 WL 236503 (S.D. Fla. Apr. 25, 1991) (applying this standard in ruling on motion to dismiss and strike punitive damage claim asserted in federal court in connection with state-law claims); Geisinger v. Armstrong World Indus., Inc, No. 90-0872-CIV-SPELLMAN, 1990 WL 120749 (S.D. Fla. Aug. 10, 1990); Paul v. Gomez, 190 F.R.D. 402, 404 (W.D. Va. 2000) (rejecting motion to dismiss or strike claim for punitive damages in medical malpractice case; no evidentiary requirement); Carpenter v. Land O'Lakes, Inc., 880 F. Supp. 758, 763–64 (D. Or. 1995); Ross-Simons of Warwick, Inc. v. Baccarat, Inc. 182 F.R.D. 386 (D. R.I. 1998); Northwest Pipe Co. v. Travelers Indem. Co. of Conn., No. C-02-04189JF, 2003 WL 24027882, at *2 (N.D. Cal. Feb. 12, 2003) ("Plaintiff need not plead evidentiary facts to support his contention that Defendant had the requisite mental state to impose punitive damages under [state law, Calif. Civil Code] § 3294."); Jones v. Miller, No. CIV A. 6:06-CV-00014, 2006 WL 1867321 (W.D. Va., June 30, 2006) (motion to strike/dismiss punitive damages governed by federal rules, not Virginia rules of fact pleading); Lindsay v. Kvortek, 865 F. Supp. 264, 268–69 (W.D. Pa. 1994).

296. FED. R. CIV. P. 11(b)(3).

that Idaho Code section 6-1604(2), as well as laws in seven other states, puts on requesting punitive damages in initial complaints.

One court—the District of Minnesota in *Kuehn v. Shelcore, Inc.*—nonetheless discerned only a "potential" conflict, but not a "direct" conflict between FRCP 8 and state laws restricting the pleading of punitive damages.[297] The *Kuehn* court cited two reasons for finding only a potential conflict. One was that FRCP 8 has a different purpose than the state law at issue in that case: "Rule 8 is concerned with simplifying pleading requirements," whereas the state law at issue there "is aimed at deterring past abusive pleading practices regarding punitive damages in order to address a perceived insurance crisis."[298] In addition, the court observed, the state had a rule of civil procedure that was "virtually identical" to FRCP 8, and the state had not changed the rule after enacting the law restricting the pleading of punitive damages.[299]

Neither consideration dispels the conflict. If state law and federal law conflict in operation, it does not matter whether their purpose is different or the same.[300] Nor is it necessarily significant that a state version of FRCP 8 was not amended after enactment of the state statute that restricted the pleading of punitive damages. This could simply reflect that FRCP 8 and these statutes are not perfectly coextensive.[301] FRCP 8(a)(3) addresses demands for *all* types of relief, including but not limited to punitive damages, in *all* pleadings that contain claims, including but not limited to initial complaints. Because FRCP 8(a)(3) is broader than state statutes prohibiting punitive damage requests in initial complaints, under ordinary canons of interpretation, the statutes would be deemed controlling over a state version of FRCP 8(a)(3). Thus, it would not be necessary to alter the earlier, general provision for the later, specific provision to have effect to the extent it altered the earlier provision. For example, a state version of FRCP 8 would still require (or at least permit) punitive damages to be requested in *amended* complaints. The later statute, however, would

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297. 686 F. Supp. 233, 234 (D. Minn. 1988), discussed *supra* notes 149–56 and accompanying text.

298. *Id.*

299. *Id.*

300. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379 n.14 (2000) ("Identity of ends does not end our analysis of preemption."); *see also* Hines v. Davidowitz, 312 U.S. 52, 66 (1941) (even though state law regulating aliens "may be immediately associated with the accomplishment of a local purpose," it was preempted by Congress's regulation of aliens in the exercise of control over international affairs); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982).

301. *Cf.* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988) (finding a conflict even though "§ 1404(a) and Alabama's putative policy regarding forum-selection clauses are not perfectly coextensive").

prohibit the state version of FRCP 8 from being read to allow requests for punitive damages in initial complaints and would restrict their inclusion in amended complaints. In this way, the rule and the statute would be interpreted to "co-exist," even though the statute would partially repeal the rule.[302]

In sum, the Idaho statute and similar state laws restricting the pleading of punitive damages conflict with FRCP 8(a)(3). The conflict arises because, and to the extent that, the latter permits (even if it does not require) initial complaints to include requests for punitive damages. The state laws forbid this. The conflict is clear—even though the wording of FRCP 8 is more general (befitting its broader applicability to *all* complaints, including amended complaints, and to *all* types of relief) than these state laws, and even though the state laws' purpose differs from FRCP 8(a)(3)'s. This conflict alone cause federal law to preempt the state laws to the extent that they would otherwise apply in federal courts.

b. FRCP 9(g)

As its title announces, FRCP 9 governs "pleading special matters." Among those special matters are special damages. FRCP 9(g) says that "[w]hen items of special damage are claimed, they shall be specifically stated."[303] If punitive damages qualify as special damages,

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302. *See* Burlington N. R.R. Co. v. Woods 480 U.S. 1, 7 (1987) (rejecting reliance on the argument that Alabama statute did not conflict with Federal Rule of Appellate Procedure (FRAP) 38 since Alabama statute coexisted with Alabama appellate rule similar to FRAP 38).

303. FED. R. CIV. P. 9(g). FRCP 9(g) reflects longstanding pleading principles. The Supreme Court observed long ago that, "[a]s a general proposition," a plaintiff is not "allowed to recover for a special damage not alleged in the complaint." Roberts v. Graham, 73 U.S. 578, 579 (1867); *see also* Kendall v. Stokes, 44 U.S. 87, 102–03 (1845) (testimony of special damages was inadmissible because "no special damages are laid in the declaration; and in that form of pleading no damages are recoverable, but such as the law implies to have accrued from the wrong complained of; and certainly the law does not imply damages of the description" given in the testimony). The *Roberts* Court explained that special damages must be specially stated "in order that the defendant may be notified of the charge, and come [to court] prepared to meet it." 73 U.S. at 579. This purpose reflects the definition of special damages: they are damages that are "the natural, but not the necessary, consequence, of the act complained of." *Id.* Because special damages do not necessarily flow from the act on which the plaintiff sues, the defendant cannot assume that a plaintiff has suffered, and will seek to recover, special damages unless the plaintiff specifically says so in the complaint. *See* WRIGHT & MILLER, *supra* note 257, § 1310, at 349. The suffering of special damages is an essential element of some causes of action. *Id.* When plaintiff pleads one of those causes of action, the plaintiff must plead special damages to demonstrate the sufficiency of the cause of action. *Id.* § 1310, at 351; *see also* Pollard v. Lyon, 91 U.S. 225, 237 (1875) (in action for slander that was not actionable per se, plaintiff's declaration had to set forth specifically the special damages and show that they were natural result of slanderous statement).

FRCP 9(g) would require them to be specifically stated in pleadings—including the initial complaint. The state laws we have been discussing bar punitive damage requests from initial complaints. Accordingly, the federal district courts in Kansas and Oregon hold that these state laws conflict with FRCP 9(g).[304] In contrast, a federal district court in Colorado held that they do not conflict.[305] Courts in these three districts and elsewhere have assumed that punitive damages qualify as special damages.[306] That assumption may be incorrect.

A threshold issue is whether federal law or state law governs the classification of punitive damages as "special damages" in diversity cases.[307] That issue, too, is an unresolved *Erie* issue—existing within the broader *Erie* question on which this article focuses.[308] Resolution

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304. *See* Pruett v. Erickson Air-Crane Co., 183 F.R.D. 248, 251 (D. Or. 1998), discussed *supra* notes 116–25 and accompanying text; Whittenburg v. L.J. Holding Co., 830 F. Supp. 557, 565 n.8 (D. Kan. 1993) (observing that federal district courts in Kansas have repeatedly held that Kansas statute requiring court's leave to plead punitive damages conflicts with FRCP 9(g)); NAL II, Ltd. v. Tonkin, 705 F. Supp. 522, 528 (D. Kan. 1989) (finding a "direct collision" between FRCP 9(g) and Kansas statute restricting the pleading of punitive damages), discussed *supra* notes 127–37 and accompanying text.

305. Witt v. Condos. at the Boulders Ass'n, No. CIVA04CV02000MSKOES, 2006 WL 348086 (D. Colo. Feb. 13, 2006) (holding that Colorado statute similar to Idaho's did not conflict with FRCP 9(g) because 9(g) does not address *when* special damages shall be pleaded, and Colorado statute permits punitive damages to be pleaded specifically in an amended complaint); Jones v. Krautheim, 208 F. Supp. 2d 1173, 1178–79 (D. Colo., 2002) discussed *supra* notes 224–43 and accompanying text.

306. *See, e.g., Jones*, 208 F. Supp. 2d at 1179 ("So long as a plaintiff can amend pleadings to state special damages in conformance with Rule 9(g) before the issues are tried, there is no practical conflict between the Colorado statute [prohibiting punitive damage requests in initial complaints] and the federal rules."); Teel v. United Techs. Pratt & Whitney, 953 F. Supp. 1534, 1539 (S.D. Fla. 1997) (stating that "if any rule is implicated" by state law restricting the pleading of punitive damages, it is FRCP 9(g)), *disapproved*, Cohen v. Office Depot, Inc., 184 F.3d 1292, 1297 (11th Cir. 1999), *vacated in part on other grounds*, 204 F.3d 1069 (11th Cir. 2000); Comeau v. Rupp, 762 F. Supp. 1434, 1449 (D. Kan. 1991) (citing FRCP 9(g) as "the only applicable federal rule relating to pleading of special damages" in discussing defendants motion to strike plaintiffs' punitive damage claim and holding that plaintiffs complied with FRCP 9(g)); *NAL II*, 705 F. Supp. at 528 (FRCP 9(g) "requires, in mandatory language, that a claim for punitive damages be set forth in a party's complaint"); *cf.* Gertz v. Robert Welch, Inc., 306 F. Supp. 310, 311 (N.D. Ill 1969) (holding that plaintiff could recover punitive damages without pleading then specially because special damages were not an essential element of plaintiff's cause of action).

307. *See* NTBS Storage & Retrieval, Inc. v. Kardex Sys., Inc., No. CIV. 3:98CV0996-M, 2001 WL 238110, at * 1 n.2 (N.D. Tex. Mar. 30, 2001) (noting that the issue of whether federal court in diversity action should consult state law to determine "[w]hat constitutes 'special damages'" is separate from the question whether damages classified as special damages have been stated with sufficient particularity to satisfy FRCP 9(g)).

308. *See* S. Pac. Transp. Co. v. Builders Transp. Co., Inc., Civ. A. No. 90-3177, 1993 WL 232058, at *4 & n.5 (E.D. La. June 22, 1993) (noting disagreement among federal courts on this issue); *see also* Hogan v. Wal-Mart Stores, Inc., 167 F.3d 781, 783 (2nd Cir. 1999) ("Rule 9 does not define special damages, and it is not settled in this Circuit

of the interior *Erie* issue would require a separate article. I can, however, identify the relevant considerations at this point and examine the consequences of the resolution for the issue under discussion.

I tend to think that federal law governs the definition of "special damages" for purposes of 9(g), even in diversity cases. True, FRCP 9(g) uses the term "special damages" without defining it. When FRCP 9(g) was adopted, however, the federal courts had developed a well-established definition of the term.[309] FRCP 9(g) is therefore appropriately read to incorporate this judicially developed definition.[310] Thus, when federal courts today apply that definition to determine whether particular kinds of damages are "special damages," they are not only applying the federal judicially developed definition of "special damages"; they are also interpreting FRCP 9(g). An interpretation of an FRCP should be treated as part and parcel of the FRCP itself, for purposes of *Hanna* Part II analysis. For that reason, in federal diversity cases the interpretation will trump conflicting state law, as long as the underlying FRCP is valid. A federal definition of "special damages" that functions solely to identify damages that have to be pleaded specially is valid, because it falls within Congress's power under the Constitution and the Court's power under the REA. On this analysis, federal law—embodied in federal case law interpreting FRCP 9(g)—governs the definition of special damages in diversity cases.[311]

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whether the law defining damages as general or special is procedural [for *Erie* purposes]."). *Compare, e.g.*, Nelson v. G.C. Murphy Co., 245 F. Supp. 846, 847 (N.D. Ala. 1965) (relying on Alabama law in diversity action to hold that punitive damages are not special damages that need to be specially stated under FRCP 9(g)), *with* Maglione v. Cottrell, Inc., No. 00 C2436, 2001 WL 946189, at *2 (N.D. Ill. Apr. 27, 2001) (applying federal case law interpreting FRCP 9(g) to determine whether plaintiffs in diversity action had to specially plead punitive damages). *See also* Comeau v. Rupp, 762 F. Supp. 1434, 1449 (D. Kan. 1991) (diversity action holding that FRCP 9(g) was "applicable" to plaintiffs' punitive damage claim and that plaintiffs complied with FRCP 9(g)).

309. *See supra* note 303 (discussing Roberts v. Graham, 73 U.S. 578, 579 (1867), and Kendall v. Stokes, 44 U.S. 87, 102–03 (1845)); *see also, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 765, n.1 (1985) (White, J., concurring) (discussing concept of special damages required for most actions for slander at common law, and referring separately to "special damages" and "punitive damages").

310. *Cf.* Marek v. Chesny, 473 U.S. 1, 7–9 (1985) (interpreting FRCP in light of case law and statutory landscape that existed when FRCPs were adopted).

311. *See* T.G.J., Jr., Note, *The Definition and Pleading of Special Damage Under the Federal Rules of Civil Procedure*, 55 VA. L. REV. 542, 553–54 (1969) (arguing that in diversity cases federal law, rather than state law, "governs the definition [as well as] . . . [the] pleading of special damage" because FRCP "9(g) implicitly contains standards for defining both special damage and the degree of specificity with which it should be pleaded"). The strongest counterargument that I have been able to identify would rest on *Palmer v. Hoffman*, 318 U.S. 109 (1943). There, the Court held that, under *Erie*, state law governs the determination in a diversity action of whether a defense (in that case, contributory negligence) is an affirmative defense. *Id.* at 117. That state-law determination,

If this analysis is correct, then we face yet another issue on which federal courts disagree: whether, under federal law, punitive damages are special damages.[312] Again without resolving the matter

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in turn, would presumably control whether the defense must be affirmatively pleaded under FRCP 8(c). (FRCP 8(c) governs burden of pleading, while "local law" governs who bears the burden of establishing contributory negligence at trial). *See id.* You could reasonably argue that, just as federal courts in diversity actions must use state law to determine which defenses are affirmative defenses that must be specifically pleaded under FRCP 8(c), those courts must use state law to determine which damages are "special" damages that must be specifically stated under FRCP 9(g). My response to this argument would be that the concept of an affirmative defense differs from the concept of special damages in a way that matters for *Erie* purposes. Labeling a defense an affirmative defense not only controls who bears the burden of pleading it, but also who bears the burden of proving it at trial. The burden of proof is a substantive matter for *Erie* purposes. *See, e.g.*, Dick v. New York Life Ins. Co., 359 U.S. 437, 446 (1959) ("Under the *Erie* rule, presumptions (and their effects) and burden of proof are 'substantive' . . . .") (footnote omitted); Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530, 533–34 (1949) (finding that reliance on federal doctrine to allow state law action to be brought in federal court that would be time-barred under state law would "add[] something to the [state law] cause of action," an impermissible result under *Erie*). In contrast, the concept of special damages has—with one exception—significance solely for purposes of pleading, a matter that is customarily considered procedural for *Erie* purpose. *See* 28 U.S.C. § 2072(a) (2000) (empowering Supreme Court to prescribe the forms of pleading); Hanna v. Plumer, 380 U.S. 460, 472 (1965) (holding that the Constitution gives Congress "power to make rules governing the practice and pleading" in federal courts.); *Hoffman*, 318 U.S. at 117 (distinguishing the burden of pleading, which is addressed in FRCP 8(c), from the burden of proof at trial, which is "a question of local law"). The exception is that the occurrence of special damages is an essential element of some state law causes of action. *Id. See supra* note 303. With reference to this exception, one federal court has suggested in dicta that state law should govern the definition of "special damages" for purposes of 9(g) when they are an essential element of a state law claim asserted in the federal court, while federal law would govern the definition in other situations. *See Hogan*, 167 F.3d at 783. Although this suggested approach differs from the approach tentatively endorsed here, the difference may not matter in the situation under discussion. I know of no situations in which proof of punitive damages is an essential element of a cause of action. Therefore, the approach suggested in *Hogan* does not seem to require that state law ever govern the definition of punitive damages as special damages under 9(g). Rather, they would be governed by federal law, as I tend to think they should be in all cases.

312. Tutor Time Child Care Sys., Inc. v. Frank Inv. Group, Inc., 966 F. Supp. 1188, 1192 n.5 (S.D. Fla. 1997) (noting disagreement among federal courts on whether punitive damages are special damages), *disapproved on other grounds by* Cohen v. Office Depot, 184 F.3d 1292, 1297 (11th Cir. 1999), *vacated in part on other grounds by* Cohen v. Office Depot, Inc., 204 F.3d 1069 (11th Cir. 2000); S. Pac. Transp. Co. v. Builders Tranp., Inc., Civ. A. No. 90-3177, 1993 WL 232058, at *4 (E.D. La. June 22, 1993) (same); *see, e.g.*, Maglione v. Cotrell, Inc., No. 00 C 2436, 2001 WL 946189, at *2 (N.D. Ill. Apr. 27, 2001) (holding that punitive damages are not special damages under FRCP 9(g)); Dow v. Edwards & Kelcey, Inc., No. CIV.A. 97-8078, WL 531838, at *3 (E.D. Pa. Aug 21, 1998) (expressing doubt whether punitive damages are special damages under FRCP 9(g)); *In re* Harry Levin, 175 B.R.. 560, 569 (Bankr. E.D. Pa. 1994) (holding that punitive damages are not special damages under FRCP 9(g)); *In re* Barber, 326 B.R. 463, 466, n.7 (B.A.P.

definitively, I tend to side with the cases holding that punitive damages are not special damages. As one court has reasoned:

> A noted authority defines "special damages" as "[t]hose which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions." *Black's Law Dictionary* (6th Ed.), p. 392. Thus, special damages are consequential damages incurred by the plaintiff, and are included in the broad category of compensatory damages. Punitive damages, on the other hand, are not "the result of the injury complained of." "Unlike compensatory or actual damages," which are designed to make the plaintiff whole, punitive or exemplary damages are based upon an entirely different public policy consideration—that of punishing the defendant or of setting an example for similar wrongdoers . . . ." Punitive damages are simply *not* special damages, and need not be stated specifically under FRCP 9(g).[313]

Because FRCP 9(g) does not require punitive damages to be pleaded specially, the rule does not conflict with state laws that prohibit initial complaints from pleading punitive damages.

Even if state law, rather than federal law, governs the definition of special damages, FRCP 9(g) would not conflict with the Idaho law banning punitive damage requests in initial complaints. That is because Idaho law defines special damages to exclude punitive damages.[314] Therefore, if Idaho law defined "special damages" for purposes of FRCP 9(g) in diversity actions, FRCP 9(g) would not require

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10th Cir. 2005 (assuming *arguendo* that punitive damages are special damages under FRCP 9(g)).

313. *S. Pac. Transp.*, 1993 WL 232058, at *4 (citation omitted); *see also Maglione*, 2001 WL 946189, at *2 (using similar reasoning to hold that FRCP 9(g) "does not govern Plaintiffs' claim for punitive damages since punitive damages are not special damages").

314. *See* Klam v. Koppel, 63 Idaho 171, 183, 118 P.2d 729, 734 (1941) ("The rules of pleading do not require that the allegations relating to exemplary damages should be set out separately from the other averments of the complaint. Special damages must be grounded upon separate allegations, but exemplary damages are so intimately connected with general damages that if the general allegations are sufficient to show the wrong complained of was inflicted with malice or oppression or other like circumstances, the complaint will be sufficient to authorize the infliction of punitive or exemplary damages.") (quoting Stark v. Epler, 117 P. 276, 278 (Or. 1911)); Dwyer v. Libert, 30 Idaho 576, 586, 167 P. 651, 653 (1917) ("It is not necessary to the recovery of exemplary damages that they should be specially claimed in the complaint, but such damages may be recovered under a claim for damages generally."); *see also, e.g.*, Barlow v. Int'l Harvester Co., 95 Idaho 881, 898, 522 P.2d 1102, 1119 (1974) (referring separately to "special and punitive damages").

them to be pleaded specially. If FRCP 9(g) is interpreted not to require punitive damages to be specially stated, then FRCP 9(g) does not conflict with Idaho Code § 6-1604(2)'s ban on the pleading of punitive damages in initial complaints.

Of course, other states may define special damages to include punitive damages. For example, Kansas law appears to treat punitive damages as a species of special damages.[315] If a federal court had to apply Kansas law to define special damages for purposes of FRCP 9(g) in a diversity case, FRCP 9(g) would require punitive damages to be specially stated. FRCP 9(g) would then conflict with the Kansas statute that prohibits punitive damages from being pleaded in the initial complaint.[316]

In short, state laws restricting the pleading of punitive damages may not conflict with FRCP 9(g). That depends on (1) whether federal law or state law governs the definition of "special damage[s]" in FRCP 9(g); and (2) whether the applicable law (be it federal or state) defines special damages to include punitive damages. I believe that federal law governs, and that federal law defines special damages as not including punitive damages. If that is right, the state laws do not conflict with FRCP 9(g) because FRCP 9(g) does not require punitive damages to be specially pleaded. In any event, federal courts addressing this issue are deficient because they have all assumed that punitive damages constitute special damages without recognizing the difficult issues underlying that assumption.

c. FRCP 15(a)

FRCP 15 governs the amendment of pleadings, including complaints. FRCP 15 allows the plaintiff to amend a complaint as of right (for example, without leave of the court or consent of the defendant) before the answer is served.[317] After the answer is served, the plaintiff needs leave of the court or the consent of the defendant to amend

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315. KAN. STAT. ANN. § 60-209(g) (2005).

> When items of special damage are claimed, their nature shall be specifically stated. In actions where exemplary or punitive damages are recoverable, the amended petition shall not state a dollar amount for damages sought to be recovered but shall state whether the amount of damages sought to be recovered is in excess of or not in excess of $75,000.

Id. The purpose of the statute "is to put a party on notice that a claim for special damages is being asserted so that the party defending the assessment of punitive damages may investigate details of the claim by discovery processes." Fusaro v. First Family Mortg. Corp., 897 P.2d 123, 134 (Kan. 1995).

316. KAN. STAT. ANN. § 60-3703, discussed at *supra* notes 126–37 and accompanying text.

317. FED. R. CIV. P. 15(a).

the complaint.[318] FRCP 15(a) says that, when the plaintiff seeks the court's leave, "leave shall be freely given when justice so requires."[319] The Supreme Court has interpreted this language to prescribe a liberal standard for amendment, and to require courts to allow an amendment unless the court specifies some reason for denying it "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."[320]

Federal courts apparently disagree on whether state laws restricting the pleading of punitive damages conflict with FRCP 15(a). Federal courts in Colorado and Minnesota hold there is no conflict.[321] By comparison, a federal court in Illinois seems to hold that these state laws do conflict with FRCP 15(a).[322] In addition, some federal district court decisions in Idaho recognize that there is tension between FRCP 15 and these state laws.[323] Finally, outside the specific

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318. *Id.*

319. *Id.*

320. Foman v. Davis, 371 U.S. 178, 182 (1962).

321. Jones v. Krautheim, 208 F. Supp. 2d 1173, 1179 (D. Colo. 2002), discussed *supra* note 233 and accompanying text; Sec. Sav. Bank v. Green Tree Acceptance, Inc., No. Civ. 3-89-28, 1990 WL 36142, at *2 (D. Minn. Mar. 22, 1990), discussed *supra* note 157–62 and accompanying text; *see also* Neill v. Gulf Stream Coach, Inc., 966 F. Supp. 1149, 1154 (M.D. Fla. 1997) ("The lack of a timing provision in Rule 9(g) read in light of the liberal amendment provisions of Rule 15 compels the conclusion that the Rule 9(g) and [Florida statute restricting the pleading of punitive damages] can exist side by side . . . each controlling its own intended sphere of coverage without conflict.") (internal quotation marks omitted); Teel v. United Techs. Pratt & Whitney, 953 F. Supp. 1534, 1539 (S.D. Fla. 1997) (holding that Florida law restricting the pleading of punitive damages "accords with" the "free amendment" policy of FRCPs).

322. Dewick v. Maytag Corp., 296 F. Supp. 2d 905, 906 & n.3 (N.D. Ill. 2003), discussed *supra* notes 197-203 and accompanying text.

323. Doe v. Cutter Biological, 844 F. Supp. 602, 610 (D. Idaho 1994) (referring to "the tension existing between the principles of Rule 15(a) of the Federal Rules of Civil Procedure, i.e., that leave to amend pleadings shall be 'freely given,' and the limiting provisions of Idaho statutory and case law, which disfavor punitive damages"). In other cases besides *Cutter*, the federal district court for the District of Idaho has recognized tension between FRCP 15(a)'s standard for amending pleadings and that imposed by Idaho law. In *Deshazo v. Estate of* Clayton, for example, Magistrate Judge Boyle said the following:

> [T]hough Federal Rule of Civil Procedure 15(a) encourages the liberal granting of motions to amend pleadings, due to the strict conditions precedent to and the disfavor of punitive damages, a plaintiff will be allowed to amend the pleadings to assert a claim for punitive damages only if, after weighing the evidence presented, the presiding judge concludes that Plaintiffs have established a reasonable likelihood of proving, by clear and convincing evidence, that Defendants' conduct was oppressive, fraudulent, malicious, or outrageous.

No. CV 05-202-S-EJL, 2006 WL 1794735, at *11 (D. Idaho June 28, 2006); *see also* DBSI Signature Place, LLC v. BL Greensboro, No. CV 05-051-SLMB, 2006 WL 1275394, at *18

context of state laws restricting the pleading of punitive damages, many federal courts have held that FRCP 15, rather than state law, governs amendment of pleadings.[324]

In my view, of all the FRCPs, Rule 15 is the FRCP that most clearly conflicts with the Idaho law and similar state laws restricting the pleading of punitive. That is because these state laws require an evidentiary showing for amending pleadings that FRCP 15 does not require.

The conflict begins when a plaintiff seeks to amend a complaint before an answer is served. FRCP 15 allows the plaintiff during this period to amend the complaint "as a matter of course."[325] In contrast, the state laws under discussion apparently require leave of the court whenever the plaintiff seeks to amend the complaint to request punitive damages.[326] Thus, the state laws conflict with FRCP 15 as applied

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(D. Idaho May 9 2006); Prado v. Potlatch Corp., No. CV 05-256-C-LMB, 2006 WL 1207612, at *4 (D. Idaho May 1, 2006).

324. *See* Loudenslager v. Teeple, 466 F.2d 249, 250 (3rd Cir. 1972) (holding that FRCP 15, rather than Pennsylvania law, governed motion to amend pleading in diversity case to name personal representative of estate, rather than decedent, as defendant); Gifford v. Wichita Falls & S. Ry. Co., 224 F.2d 374, 376 (5th Cir. 1955) (holding in diversity case that FRCP 15, rather than state law, governed amendment of pleadings to name proper defendant, stating that "[t]he matter of amendment to pleadings is a procedural matter governed by Federal law and the Federal Rules of Civil Procedure and not by *Erie*."); Ross v. Philip Morris Co., 164 F. Supp. 683, 687 (W.D. Mo. 1958) (holding that FRCP 15, rather than state law, governed "the propriety and legal effect of the amendments made in plaintiff's third amended complaint" in diversity case); Bixby v. Chris Craft Corp., 7 F.R.D. 80, 81 (E.D. Mich. 1946) (holding that FRCP 15 governed amendment of complaint in diversity case to conform to evidence presented at trial and stating that under FRCP 15 "a more generous interpretation is given aimed at permitting amendments than under state rules, and on this point *Erie Railroad Co. v. Tompkins* . . . is not applicable since it refers to substantive law. This is procedural.").

325. FED. R. CIV. P. 15(a). Some courts recognize an exception for situations in which the original complaint has been dismissed and the amended complaint "fails to cure the deficiencies in the original pleading, or could not survive a second motion to dismiss." *See* Perkins v. Silverstein, 939 F.2d 463, 471–72 (7th Cir. 1991).

326. *See, e.g.*, IDAHO CODE ANN. § 6-1604(2) (2004)

> In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages.

Id. Interestingly, Idaho Rule of Civil Procedure 15(a), like FRCP 15(a), allows a party to amend a pleading as a matter of course before a responsive pleading is filed. IDAHO R. CIV. P. 15(a). The Idaho courts, however, would apparently interpret Idaho Code § 6-1604(2) to require leave of court even if a plaintiff sought to amend the complaint to seek punitive damages before service of the answer on the ground that the specific statute controls over the more general rule. *See* Ausman v. State, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (Idaho 1993). Many courts in other states with similar rules of civil procedure and similar statutes would probably take the same approach.

to amendments that request punitive damages and that are made by plaintiffs before service of a responsive pleading.

The conflict does not end there. Rather, it extends to the period when a plaintiff moves to amend the complaint to seek punitive damages before a defense motion for summary judgment on the punitive damage request would be appropriate. During this period, federal law, as relevant here, would treat the motion to amend like a motion under FRCP 12(b)(6).[327] Thus, the court would apply the liberal standard of *Conley v. Gibson*.[328] The court would assume the truth of the facts asserted by plaintiff in support of the request for punitive damages.[329] On that assumption it would deny the amendment only if it appeared beyond a doubt that the plaintiff could prove no set of facts entitling the plaintiff to punitive damages.[330] This framework does not require the plaintiff to present evidence of punitive damages or otherwise demonstrate a likelihood of success.[331]

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327. In Foman v. Davis, 371 U.S. 178, 182 (1962), the Court construed FRCP 15(a) to require a federal court to allow an amendment unless the court found some specific reason to deny it. Among the reasons that the Court cited as grounds for denying leave to amend was "futility." The lower courts have cited the futility ground to deny amendment if the proposed amendment would not withstand a FRCP 12(b)(6) motion to dismiss. *See, e.g.*, Dougherty v. Town of North Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 88 (2nd Cir. 2002); Stripling v. Jordan Prod. Co., 234 F.3d 863, 873 (5th Cir. 2000); Alvin v. Suzuki, 227 F.3d 107, 121 (3rd Cir. 2000); Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996); Thiokol Corp. v. Mich. Dep't of Treasury, 987 F.2d 376, 382–83 (6th Cir. 1993).

328. 355 U.S. 41, 45–46 (1957); *see also* Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984) (applying *Conley* standard).

329. *See, e.g.*, Dewick v. Maytag Corp., 296 F. Supp 2d 905, 906–07 (N.D. Ill. 2003). The court states that on a motion to amend the complaint to seek punitive damages, "[T]he court accepts all well-pleaded allegations as true and draws all reasonable inferences in [the plaintiffs'] favor." *Id.*; *see also* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002).

330. *E.g.*, *Hishon*, 467 U.S. at 73; *Conley*, 355 U.S. at 45–46.

331. *See* Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."); Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd., 32 F.3d 1244, 1255–57 (8th Cir. 1994) (holding that district court erred, when ruling on plaintiff's motion to amend complaint to seek punitive damages on her maritime law claim, "by weighing the likelihood of success on the punitive damages claim"; stating, "[l]ikelihood of success . . . is no basis for denying an amendment" under FRCP 15(a); but affirming district court's refusal to allow plaintiff to amend complaint to seek punitive damages on state-law claim because plaintiff did not, as required by Minnesota statute restricting the pleading of punitive damages, "establish[ ] a prima facie case by clear and convincing evidence"); Burkhart *ex rel.* Burkhart v. L.M. Becker & Co. Corp., No. CV-04-420-ST, 2004 WL 1920196, at *2 (D. Or. Aug. 26, 2004) (observing that in contrast to Oregon statute restricting the pleading of punitive damages, under FRCP 8(a)(2) plaintiff "is not required to submit admissible evidence in support of his amendment to allege punitive damages"); *Dewick*, 296 F. Supp. 2d at 911 (holding that plaintiff was entitled to amend complaint to seek punitive damages even though it [was] "too early in the

In contrast, the state laws under discussion here *do* require the plaintiff to show a likelihood of success before allowing the plaintiff to amend the complaint to request punitive damages. These state laws vary in articulating the required showing, but they all seem to demand more than required by FRCP 15(a), as construed to incorporate the *Conley v. Gibson* standard. For example, the Minnesota law has been construed to require the plaintiff to submit admissible evidence sufficient to avoid a directed verdict.[332] Idaho's law allows amendment "if, after weighing the evidence presented, the court concludes that, the moving party has established . . . a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages."[333] The Idaho law's requirement that the court "weigh[] the evidence presented" seems to contemplate an evidentiary showing to support the proposed amendment. The evidentiary showing might not be limited to presentation of evidence that would be admissible at trial.[334] The Idaho law has, however, been construed to require denial of a motion to amend "when the moving party's claims are reasonably disputed and there is substantial evidence that supports the non-moving party's claims."[335] This reflects a more demanding showing than required by FRCP 15(a), as the Idaho courts have recognized.[336]

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game to determine whether [plaintiffs] will ultimately succeed in mulcting [defendant] in punitive damages"); Baumann v. Hall, No. 98-2126-JWL, 1998 WL 513008, at *1 & n.1 (D. Kan. Jul. 15, 1998) (finding that defendant's argument—that evidence does not support plaintiff's motion to amend the complaint to request punitive damages—is "premature" in analyzing the motion under *Conley* standard; court rejects defendant's argument that motion is governed by Kansas statute restricting the pleading of punitive damages).

332. *See* Berczyk v. Emerson Tool Co., 291 F. Supp. 2d 1004, 1008 n.3, 1010 (D. Minn. 2003) (holding that evidence required by Minnesota statute to support motion to amend complaint to request punitive damages must be admissible and is reviewed as a court would review a motion for a directed verdict); Ulrich v. City of Crosby, 848 F. Supp. 861, 867 (D. Minn. 1994) ("[U]nder the strictures of Section 549.191, the Court reviews the evidence in support of a Motion to Amend as the Court would review a Motion for a Directed Verdict"); *cf.* Nereson v. Zurich Ins. Co., Civ. No. A3-91-72, 1992 WL 212233, at *2 (D. N.D. Aug. 20, 1992) (under N.D. law restricting pleading of punitive damage, to determine whether plaintiff is entitled to amend complaint to request punitive damages, court must examine evidence to "determine if a reasonable jury could find the defendant guilty of oppression, fraud or malice)".

333. IDAHO CODE ANN. § 6-1604(2) (2004).

334. *But cf.* Strong v. Unumprovident Corp., 393 F. Supp. 2d 1012, 1025–26 (D. Idaho 2005) (finding "no competent evidence in the record" to support motion to amend complaint to request punitive damages).

335. DeShazo v. Estate of Clayton, No. CV 05-202-S-EJL, 2006 WL 1794735, at *11 (D. Idaho June 28, 2006); Prado v. Potlach Corp., No. CV 05-256-C-LMB, 2006 WL 1207612, at *3 (D. Idaho May 1, 2006); DBSI Signature Place, L.L.C. v. BL Greensboro, L.P., No. CV 05-051-SLMB, 2006 WL 1275394 at *18 (D. Idaho May 1, 2006); *Strong*, 393 F. Supp 2d at 1026. The standard quoted in the text made sense in the *Strong* case, which involved a claim of bad faith by an insurance company that denied disability coverage under the "accident" clause of a policy. *Id.* Because substantial medical evidence supported

True, at some point in pretrial proceedings, the showing to support a motion to amend under FRCP 15(a) may approach that required by the state laws under discussion. Several federal courts hold that at a certain point in pre-trial proceedings, a motion to amend the complaint should be judged under a standard comparable or identical to the FRCP 56 standard for summary judgment.[337] The rationale for this holding is that the determination of whether an amendment is "futile" depends on the procedural posture of the case.[338] The First Circuit explained as follows:

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both sides of the parties' reasonable dispute over whether the insured plaintiff's disability was caused by an "accident," the court determined that the plaintiff would not likely be able to show that, in denying coverage, the insurance company committed conduct that was egregious enough, and acted with a sufficiently bad intent, to be liable for punitive damages. *See id.* at 1026. It is not clear, however, that an identical standard should be used for all cases in which a plaintiff moves under Idaho Code § 6-1604(2) to amend the complaint to request punitive damages. After all, in some cases the plaintiff may be able to establish a reasonable likelihood of recovering punitive damages even though there is a reasonable dispute about whether the defendant's conduct and state of mind met the standard for punitive damages and the defendant has substantial evidence supporting his or her position. In this situation, the plaintiff would not be entitled to summary judgment on the issue of punitive damages. *See* IDAHO R. CIV. P. 56; *see also* McCorkle v. Nw. Mut. Life Ins. Co., 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005) (discussing standard for summary judgment); Ryan v. Beisner, 123 Idaho 42, 44–45, 844 P.2d 24, 26–27 (Ct. App. 1992). The plaintiff could nonetheless have enough evidence to warrant allowing a request for punitive damages. *Cf.* Doe v. Cutter Biological, 844 F. Supp. 602, 610 (D. Idaho 1994) (finding enough evidence to allow amendment to request punitive damages, but emphasizing that the evidence might not be sufficient to allow the request to reach the jury); Vendelin v. Costco Wholesale Corp., 140 Idaho 416, 424, 95 P.3d 34, 42 (2004) (quoting trial court ruling in which judge allowed amendment to request punitive damages given conflicting evidence).

336. *See supra* note 323 and accompanying text; *see also* Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd., 32 F.3d 1244, 1254–57 (8th Cir. 1994) (holding that district court correctly relied on Minnesota statute restricting the pleading of punitive damages to refuse to allow plaintiff to add punitive damage request to state-law claim but abused its discretion under FRCP 15(a) in refusing to allow plaintiff to add punitive damage request to claim based on maritime law).

337. Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2nd Cir. 2001). The court said in *Milanese* that, when a motion to amend the complaint is made in response to a motion for summary judgment, "even if the amended complaint would state a valid claim on its face, the court may deny the amendment as futile when the evidence in support of the plaintiff's proposed new claim creates no triable issue of fact and the defendant would be entitled to judgment as a matter of law under Fed. R. Civ. P. 56(c)." *Id.*; Hatch v. Dep't for Children, Youth and Their Families, 274 F.3d 12, 19 (1st Cir. 2001) ("If . . . leave to amend is not sought until after discovery has closed and a summary judgment motion has been docketed, the proposed amendment must be not only theoretically viable but also solidly grounded in the record."); Bethany Pharmacal Co. v. QVC, Inc., 241 F.3d 854, 861(7th Cir. 2001) ("An amendment [of a complaint] is futile if the added claim would not survive a motion for summary judgment."); Schmitt v. True, 387 F. Supp. 2d 622, 653 (E.D. Va. 2005); *see also* Watson v. Deaconess Walthan Hosp., 298 F.3d 102, 109 (1st Cir. 2002) (following *Hatch* standard for motion to amend).

338. *Hatch*, 274 F.3d at 19.

> If leave to amend is sought before discovery is complete and neither party has moved for summary judgment, the accuracy of the "futility" label is gauged by reference to the liberal criteria of FRCP 12(b)(6). In this situation, amendment is not deemed futile as long as the proposed amended complaint set forth a general scenario which, if proven, would entitle the plaintiff to relief against the defendant on some cognizable theory. If, however, leave to amend is not sought until after discovery has closed and a summary judgment motion has been docketed, the proposed amendment must be not only theoretically viable but also solidly grounded in the record. In that type of situation, an amendment is properly classified as futile unless the allegations of the proposed amended complaint are supported by substantial evidence.[339]

This rationale requires "substantial evidence" supporting a motion to amend filed in the later stages of pretrial litigation, an evidentiary standard that still arguably falls short of that required, for example, by the Idaho statute, under which, as discussed above, some courts *deny* a proposed amendment "when the moving party's claims are reasonably disputed and there is substantial evidence that supports the non-moving party's claims."[340] In any event, the existence of some overlap between FRCP 15 and state laws restricting the pleading of punitive damages does not eliminate the substantial extent to which they conflict.[341]

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339. *Id.* (citations omitted).

340. *DeShazo*, 2006 WL 1794735, at *11; *Strong*, 393 F. Supp 2d at 1026; *see also supra* note 335 (criticizing universal use of standard quoted in the text); Whittenburg v. L.J. Holding Co., 830 F. Supp. 557, 565–66 (D. Kan. 1993) (holding that, although plaintiffs in diversity action did not have to satisfy Kansas statute's standard for pleading punitive damages, they did have to provide enough evidence to defeat summary judgment motion under federal standards and had failed to do so). Not all of the Idaho federal courts appear to follow the standard quoted in *DeShazo* by denying motions to amend under Idaho Code § 6-1604(2) "when the moving party's claims are reasonably disputed and there is substantial evidence that supports the non-moving party." In two recent cases, Chief Judge Winmill has said that, when ruling on a motion to amend under Idaho Code 6-1604(2), "the Court will assume the truth of [the plaintiff's] allegations." Robinson v. Raina's Residential Prop. Mgmt., LLC., No. CV-05-152-5-BLW, 2006 WL 2095871, at *1 (D. Idaho July 27, 2006); SITCO, Inc. v. AGCO Corp., No. CV-05-073-EBLW, 2006 WL 908065, at *2 (D. Idaho Apr. 7, 2006). With respect, this assumption does not square with the text of Section 6-1604(2), which contemplates an evidentiary hearing followed by a trial court ruling based on "weighing the evidence presented." IDAHO CODE ANN. § 6-1604(2) (2004).

341. You could plausibly argue that in diversity cases courts should interpret FRCP 15(a)'s standard for amending pleadings—calling for amendment "when justice so requires"—to mean "when permitted by state laws, including those restricting the pleading of punitive damages." This argument has two flaws, though. First, it conflicts with the interpretation of FRCP 15(a) in *Foman v. Davis*, 371 U.S. 178 (1962), discussed *supra*

This is particularly true when you consider the basic function of FRCP 15 in relation to the other rules governing pleadings, FRCPs 8 and 9. The primary function of these pleading rules is to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[342] Their purpose is not to test the evidentiary sufficiency of the pleadings; that evidence-evaluation purpose is served, instead, by other rules, such as FRCP 56 governing summary judgment.[343] By requiring the pleadings to serve an evidence-screening function, state laws restricting the pleading of punitive damages thwart two central functions of the Federal Rules—to create (1) a "simplified system of pleading," and (2) a liberal standard for amending those pleadings.[344]

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notes 320, 327 and accompanying test. *Foman* recognizes that an amendment can be denied if the amendment is "futile." That "futility" basis permits a federal court sitting in diversity to consider, under an FRCP 12(b)(6) or FRCP 56 standard, the plaintiff's ability to plead and prove entitlement to punitive damages under the state-law standard for obtaining a punitive damage *award*, but not to consider the state-law standard for *pleading* punitive damages. Second, the Court rejected an argument similar to the one proposed in this note in *Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). The federal provision at issue there, 28 U.S.C. § 1404(a), provided for a transfer "[f]or the convenience of parties and witnesses, in the interest of justice." *Id.* That phrase could have been read to incorporate an Alabama statute restricting the effect of forum selection clauses a trump. The dissent in *Stewart* argued for just such an interpretation, but the majority rejected it. *See id.* at 29, 31 n.10.

342. Mayle v. Felix, 545 U.S. 644, 125 S. Ct. 2562, 2570 (2005) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

343. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) The Court in *Celotex* said, "with the advent of 'notice pleading,'" the motion to dismiss the complaint is no longer a "principal tool[] by which factually insufficient claims . . . [can] be isolated and prevented from going to trial." *Id.* Instead, the motion to dismiss's place "has been taken by the motion for summary judgment." *Id.*; *see also* Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993) ("[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.").

344. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510, 514 (2002) (refusing to convert an evidentiary standard to a pleading requirement; referring to the "Federal rules' simplified standard for pleading"; and stating that "[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."); *Conley*, 355 U.S. at 47–48 ("Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues."); RTC Mortg. Trust 1994 N-1 v. Fid. Nat'l Title Ins. Co., 981 F. Supp. 334, 344 (D.N.J. 1997) (citing a Florida statute restricting the pleading of punitive damages as an "example of a state statute which could reasonably be seen to impact the essential aspects of pleading in federal court"); WRIGHT & MILLER, *supra* note 257, § 1202, at 87–88 ("As a practical matter provisions in Rule 8 have ramifications that transcend the pleading stage of federal practice. To some degree, the functioning of all the procedures in the federal rules for . . . summary judgment are intertwined inextricably with the pleading philosophy embodied in Rule 8."); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1049,

3. Whether FRCPs 8(a)(3) and 15(a) Should be Construed Narrowly to Prevent Them from Arguably Altering Substantive Rights

In subsection 1 above, I discussed the general question whether the FRCPs should be construed narrowly, broadly, or neutrally when determining whether they conflict with state law. I expressed the view that the only legitimate basis for construing an FRCP narrowly is to avoid an interpretation that would arguably alter substantive rights (and that would, consequently, arguably violate the second sentence of the REA, 28 U.S.C. § 2072(b)). In subsection 2, construing the FRCPs neutrally, I concluded that state laws restricting the pleading of punitive damages conflict with FRCP 8(a)(3) and 15(a). Now I must address whether those particular rules should be construed narrowly to prevent them from arguably altering substantive rights created by state laws that restrict the pleading of punitive damages. I believe the answer is "no;" a narrow interpretation is not warranted.

A threshold question is how to identify "substantive rights" for purposes of determining under 28 U.S.C. § 2072(b) whether an FRCP arguably alters such rights. Relevant to that question, the Supreme Court held in *Sibbach v. Wilson & Co.*[345] that substantive rights include rights that, if violated, give rise to a cause of action under state law. For example, the *Sibbach* Court said that substantive rights include "the right not to be injured in one's person by another's negligence."[346] The *Sibbach* Court recognized that substantive rights might not be confined to laws defining causes of action.[347] On the other hand, the Court rejected the argument that the term "substantive rights" includes all "important and substantial rights" recognized by law prior to adoption of the FRCPs.[348] Instead, the Court concluded that an FRCP should not be deemed to alter "substantive rights," as long as the FRCP "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[349] In a later case, the Court emphasized that rules that meet this test do not violate Section 2072(b) merely because they "inciden-

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1067 (1982) (discussing history of the Rules Enabling Act relating to its objective of providing simplified rules of pleading); Ely, *supra* note 7, at 722 ("[L]iberal construction and amendment of pleading . . . are obviously central to the Rules' design.").

345. 312 U.S. 1 (1941).

346. *Id.* at 13.

347. *Id.* (posing the question, "Is the phrase 'substantive rights' confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure?").

348. *Id.* at 13–14.

349. *Id.* at 14.

tally affect litigants' substantive rights," as long as they are "reasonably necessary to maintain the integrity of [the FRCPs]."[350]

In my view, under the (neutral) interpretation proposed here, FRCPs 8(a)(3) and 15 meet the *Sibbach* test, have no more than an incidental effect on substantive rights, and are reasonably necessary to maintaining the integrity of the FRCPs. FRCPs 8(a)(3) and 15 govern pleading. Pleading is part of the "judicial process for enforcing rights and duties recognized by substantive law."[351] FRCPs 8(a)(3) and 15 may affect some plaintiffs' substantive right to punitive damages because they make it easier than do the state laws under discussion to plead punitive damages. Specifically, a plaintiff who is entitled to punitive damages but who cannot meet the demanding pleading standard of state law—and who therefore would not be allowed ultimately to prove entitlement to punitive damages—may be able to meet the more lenient federal standard and then go on to recover punitive damages. The plaintiff's substantive rights are affected by the federal rules as they have been interpreted here.[352] But the effect is incidental; it flows from the way that the federal rules regulate the judicial *process* for requesting punitive damages.[353] Finally, as discussed above, the rules are an integral part of the simplified system of pleading that it was a central purpose of the FRCPs to create; that system, in turn, interrelates with other rules for pre-trial disposition

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350. Burlington N. R.R. v. Woods, 480 U.S. 1, 5 (1987). Many commentators have criticized *Sibbach*'s interpretation of 28 U.S.C. § 2072(b) on the ground that the interpretation renders this provision a dead letter. *See, e.g.*, Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 48–49 (1998). This article does not wade into that debate.

351. *Sibbach*, 312 U.S. at 14.

352. *Cf.* Ely, *supra* note 7, at 722 (stating that FRCPs "that ensure the liberal construction and amendment of pleadings [including FRCP 15(a)] have doubtless often meant the difference between winning and losing a lawsuit").

353. *Cf.* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946) (holding that FRCP providing for service of process throughout the state in which federal district was located did not violate 28 U.S.C. § 2072(b). The court states as follows:

> Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. The fact that the application of Rule 4(f) will operate to subject petitioner's rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to the manner and the means by which a right to recover . . . is enforced.

Id. (internal quotation marks and citation omitted).

of cases, including FRCP 56.[354] Interpreting the pleading rules to preempt the evidentiary requirements for pleading punitive damages imposed by certain states is therefore reasonably necessary to the integrity of the FRCPs.

This analysis gains support from *Palmer v. Hoffman*.[355] *Palmer* was a diversity case arising from an accident at a railroad crossing.[356] Defendants challenged a jury instruction stating that they bore the burden of proving contributory negligence.[357] Plaintiff defended the instruction on the ground that FRCP 8(c) "makes contributory negligence an affirmative defense" that the defendant must plead and prove.[358] FRCP 8(c), entitled "Affirmative Defenses," requires a party in a responsive pleading to "set forth affirmatively . . . contributory negligence . . . and any other matter constituting an . . . affirmative defense."[359] The Court held that FRCP 8(c) does not govern the burden of proof. It explained, "Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence [at trial] is a question of local law which federal courts in diversity . . . cases must apply."[360] Thus, the Court distinguished the burden of *pleading* contributory negligence from the burden of *proving* it. The first matter is governed by an FRCP, the second by state law.

The Court in *Palmer* did not explain why it interpreted FRCP 8(c) as not addressing burden of proof at trial.[361] Perhaps the Court in *Palmer* construed FRCP 8(c) narrowly to avoid an interpretation that would violate 28 U.S.C. § 2072(b) by altering substantive rights.[362] On this reading of *Palmer*, substantive rights under 28 U.S.C. § 2072(b) include not only state laws defining causes of action and defenses but also matters "bound up" with such laws.[363] Continuing with this read-

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354. *See supra* note 344 and accompanying text.

355. 318 U.S. 109 (1943).

356. *Id.* at 110.

357. *Id.* at 116–17.

358. *Id.* at 117.

359. FED. R. CIV. P. 8(c).

360. *Palmer*, 318 U.S. at 117 (internal citation omitted).

361. *See* Robert P. Wasson, Jr., *Resolving Separation of Powers and Federalism Problems Raised by* Erie, *the Rules of Decision Act, and the Rules Enabling Act: A Proposed Solution*, 32 CAP. U. L. REV. 519, 594 (2004) (observing that the Court in *Palmer* "failed to explain how it determined that there was no direct, head-on conflict between Rule 8(c) and the substantive state law regarding the burden of proof on an affirmative defense").

362. *Cf.* Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1648 (1998) (reading *Palmer* as identifying circumstances under which federal courts in diversity cases must apply state law in the absence of a federal statute or rule on point).

363. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535 (1958):

ing, *Palmer* identifies the burden of *proof* as substantive and the burden of *pleading* as procedural for purposes of Section 2072(b).

The matter of how to plead punitive damages is more akin to the matter of who bears the burden of pleading contributory negligence than to who bears the burden of proving that defense. Pleading requirements govern what goes into a court document and when. The purpose of pleading rules is to identify issues that may need to be tried. These are procedural matters. In contrast, the question of who bears the burden of proof often turns on substantive considerations such as "an assessment of the comparative social disutility" of erroneous determinations affecting one party rather than another.[364] The burden of proof is thus much more closely tied—to use the Court's phrase "bound up with"—to the question of who should win and who should lose, and is therefore more appropriately characterized as substantive for purposes of 28 U.S.C. § 2072 than are the burden of pleading and other matters of pleading, including the standard and procedures for pleading punitive damages.[365]

In sum, the standard and procedures for pleading punitive damages are procedural for purposes of section 2072(b). Therefore, we do not need to interpret FRCPs 8(a)(3) or 15(a) narrowly—so that they do not conflict with state laws prescribing standards and procedures for pleading punitive damages—to avoid causing those FRCPs arguably to violate section 2072(b).

> It was decided in [*Erie*] that the federal courts in diversity cases must respect the definition of state-created rights and obligations . . . . We must, therefore, first examine [the state rule] to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.

Id.; *see also* Freer, *supra* note 362, at 1648 (discussing this passage of *Byrd*).

364. Santosky v. Kramer, 455 U.S. 745, 786–87 (1982) ("the choice of the standard [of proof] to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of" erroneous determinations favoring one side of the litigation rather than the other side) (quoting *In re* Winship, 397 U.S. 358, 370–71 (1970) (Harlan, J., concurring)); *see also* Ronan E. Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 299 n.103 (1962) (discussing burdens of proof as "involving predilections as to who should bear loss when responsibility for it is not shown").

365. *See* Jackson v. East Bay Hosp., 980 F. Supp. 1341, 1352 (N.D. Cal 1997) (determining that California law restricting the pleading of punitive damages is not "so 'intimately bound up' with the state's substantive law that it must be applied"); *see also* Rowe, *supra* note 56, at 999 n.147 (endorsing use of the "bound up with" factor in "trying to figure out whether a state rule . . . has enough of a substantive nature that it would threaten inequitable administration of the laws") (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965).

4. Whether State Laws Restricting the Pleading of Punitive Damages Conflict with the Federal Rule for Determining Satisfaction of the Amount-in-Controversy Requirement

In *Windsor*, the federal district court for the District of Idaho held that the Idaho law restricting the pleading of punitive damages does not conflict with the federal rule for determining whether the plaintiff has satisfied the amount-in-controversy requirement.[366] After finding no conflict, the court determined that the Idaho law "directly affect[s] the outcome of the case."[367] In light of the state law's outcome-determinative effect, the court held that *Erie* required the state law to be applied in a diversity case.[368] The court's reasoning may well have been correct, but, correct or not, it was beside the point.

The court was probably correct in finding no conflict between state law and the federal rule.[369] The federal rule requires courts generally to go by the amounts requested in good faith in the plaintiff's pleadings to determine whether the amount-in-controversy requirement is met. This rule does not concern what types or amount of monetary relief the plaintiff can plead; it concerns the effect to be accorded to what the plaintiff's pleading says on those matters. In contrast, the Idaho law *does* concern what types and amount of relief the plaintiff can plead; the Idaho law says nothing about reliance on the pleadings to determine whether the amount-in-controversy requirement has been met. Because the federal rule and the Idaho rule address different matters, both can be given effect. When the plaintiff's initial complaint does not plead the amount in controversy required for diversity jurisdiction, the court can use state law to determine whether the plaintiff should be allowed to amend the initial complaint to request punitive damages. The court then uses the federal rule to determine whether the complaint—as successfully amended or not—satisfies the amount- in-controversy requirement. Indeed, this is essentially the approach that the *Windsor* court took.[370] This approach lets state law and federal law operate in their separate spheres.

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366. Windsor v. Guarantee Trust Life Ins. Co., 684 F. Supp. 630, 632–33 (D. Idaho 1988), discussed at *supra* notes 63–83 and accompanying text.

367. *Id.* at 633.

368. *Id.*

369. As noted above, the federal rule for determining whether the plaintiff has satisfied the diversity statute's amount-in-controversy requirement reflects an interpretation of the diversity statute. *See supra* note 67. Under *Erie* precedent, state laws that conflict with a valid federal statute cannot apply in federal courts, just as is true for state laws that conflict with a valid FRCP. To determine whether a conflict of either type exists, a court accepts existing, definitive interpretations of the federal provision.

370. *See Windsor*, 684 F. Supp. at 634 (taking essentially the approach proposed in the text).

The *Windsor* court also correctly concluded that the Idaho law is outcome determinative. This is true for reasons discussed below.[371] To summarize those reasons, if federal courts do not apply state laws restricting the pleading of punitive damages, plaintiffs will often prefer the federal courts to the state courts. By the same token, defendants in federal courts will unfairly face punitive damage claims that otherwise similarly situated defendants in state courts will not face.

The *Windsor* court ultimately erred, however, in both its analysis and its conclusion. The court analyzed the Idaho law under *Hanna* part I because it found no conflict between the Idaho law and the federal law. This analysis is incomplete because the court did not consider whether the Idaho law conflicts with any FRCPs. To be fair to the court in *Windsor*, presumably the parties did not address this issue. In any event, for reasons discussed above, the Idaho law does conflict with FRCPs 8(a)(3) and 15(a). Because of that conflict, the Idaho law should be analyzed under *Hanna* Part II, and that analysis leads to the conclusion that the Idaho law cannot apply in federal diversity cases. This is true even though—as the *Windsor* court correctly concluded—the state law is outcome determinative under *Hanna I*.

D. Whether the FRCPs are Valid, as Interpreted Here

An FRCP trumps conflicting state law only if the FRCP is valid. To be valid, the FRCP must fall within Congress's power under the Constitution and the Court's power under the REA.[372] FRCPs 8(a)(3) and 15(a), with which the state laws restricting the pleading of punitive damages have been found above to conflict, easily satisfy both tests.

FRCPs 8(a)(3) and 15(a) govern quintessentially procedural subjects: the form and contents of, and the rules for amending, pleadings in federal district courts. Congress's power to establish the federal district courts (among other lower federal courts) encompasses the power to prescribe rules for the pleadings filed in those courts. This is so clear that none of the case law discussed in Section III has questioned the validity of FRCPs 8(a)(3) or 15(a).[373]

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371. *See infra* notes 380-83 and accompanying text.

372. Rules Enabling Act, 28 U.S.C. § 2072 (2006).

373. *See* Cohen v. Office Depot, Inc., 184 F.3d 1292, 1299 (11th Cir. 1999) (holding that FRCP 8(a)(3) falls within Congress's constitutional power to make rules for the lower federal courts and within the REA); Pruett v. Erickson Air-Crane Co., 183 F.R.D. 248, 252 (D. Or. 1998) ("[T]he court finds that the Federal Rules [with which the court had found the Oregon statute restricting the pleading of punitive damages is in conflict] have been promulgated within the scope of the Rules Enabling Act and are constitutional."); NAL II, Ltd. v. Tonkin, 705 F. Supp. 522, 528 (D. Kan. 1989) (holding that FRCP

So, too, the Supreme Court's power under the REA to prescribe general rules of practice and procedure includes the power to prescribe rules of pleading.[374] FRCP 8(a)(3) and 15(a) do not violate the REA by altering substantive rights under the Supreme Court's traditional interpretation of the REA. That is because the rules "really regulate [] procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[375]

E. Whether Courts Should Refuse to Apply State Laws Restricting the Pleading of Punitive Damages as a Matter of Federal Common Law

Some courts have interpreted the FRCPs not to conflict with the state laws that restrict the pleading of punitive damages. If they are interpreting the FRCPs correctly, this does not automatically mean the state laws apply in diversity actions. Instead, the question becomes whether federal courts should refuse to apply the state laws in the exercise of the federal courts' inherent power to make rules for the conduct of their own proceedings. I believe that the federal courts should so exercise that power.[376]

9(g), with which the court had found the Kansas statute restricting the pleading of punitive damages is in conflict, is constitutional and falls within the REA).

374. 28 U.S.C. § 2071(a).

375. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

376. This conclusion is in a sense the flip side of my prior conclusion that the FRCPs should be interpreted to preclude application of state laws restricting the pleading of punitive damages. *See supra* notes 283-365 and accompanying text. The federal courts' power to interpret the FRCPs shades into their limited power to create a federal common law of procedure. *See* Beul v. ASSE Int'l. Inc., 233 F.3d 441, 449 (7th Cir. 2000) (explaining that federal court should reject state law in favor of federal law governing method of instructing jury, whether federal law is considered to be an interpretation of an FRCP or federal judge-made common law); Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV. 751, 756 (1998) (stating that the distinction between a federal court's interpretation of a federal enactment and its creation of federal common law "is entirely one of degree" and "[t]he more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law.") (quoting Peter Westen & Jeffrey S. Lehman, *Is there Life for* Erie *after the Death of Diversity?*, 78 MICH. L. REV. 311, 332 (1980)); *cf.* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 38–39 (1988) (Scalia, J., dissenting) (distinguishing federal courts' power to create substantive federal common law from their power "to make procedural rules that govern the practice before them"); Wallis v. Pan Am. Petroleum Co., 384 U.S. 63, 67–68 (1966) (distinguishing substantive federal common law from procedural rules on which state and federal courts can differ).

Since the federal courts' power in this area is not always recognized, let us clarify the relevant precedent. In *Stewart v. Ricoh*, the Court said

> If no federal statute or Rule covers the point in dispute, the district court then proceeds to evaluate whether application of federal judge-made law would disserve the so-called "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." If application of federal judge-made law would disserve these two policies [and would accordingly be "outcome determinative" in the manner with which the *Erie* Court was concerned] the district court should apply state law.[377]

The negative implication is that, if a federal judge-made law of procedure does not disserve the twin aims of *Erie*, it trumps conflicting state law. Furthermore, *Byrd* and *Gasperini v. Center for Humanities, Inc.* suggest that these "federal judge-made" rules of procedure prevail over state law—even if their application *would* disserve the twin aims of *Erie*—if their application is supported by a strong enough federal interest.[378] The precedent does not establish the source of the federal courts' power to make rules of procedure in diversity cases. It may stem from the FRCPs themselves—to the extent the common law rules fill the FRCPs' interstices and preserve their integrity—or from the statutes that create the federal courts.[379]

Whatever the source of this common law rulemaking power, it may authorize federal courts to disregard state laws restricting the pleading of punitive damages. The federal courts' application of the FRCPs in lieu of these state laws probably disserves the twin aims of *Erie*. I would argue, however, that application of the FRCPs is justified by the strong federal interest in the uniform, simplified system of pleading and liberal standard for amendment of pleading established by the FRCPs.

Most courts considering the issue have held that the failure of federal courts in diversity actions to apply the state laws under discussion would encourage forum shopping or result in the inequitable

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377. *Stewart*, 487 U.S. at 27 n.6 (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965)).

378. *See Gasperini*, 518 U.S. at 438 (holding that "practical reasons continue with Seventh Amendment constraints" to require federal trial court to apply state law standard for reviewing jury awards while federal courts of appeals apply a federal standard of review); Byrd v. Blue Rural Elec. Co-op, Inc., 356 U.S. 525 (1958).

379. *See* Perdue, *supra* note 376, at 759–60.

administration of law, or both.[380] I agree, the state laws make it harder for plaintiffs to plead punitive damages than does federal law. Therefore, plaintiffs who want punitive damages, and have a choice, would rationally choose federal court over state court, all other things being equal, if federal courts applied the liberal federal pleadings requirements instead of the stricter state-law pleading requirements. By the same token, it seems unfair for defendants in federal court to be exposed to punitive damage claims that could not be asserted against similarly situated defendants in state courts.

One might argue fairness to defendants should be measured, not by their exposure to punitive damage *claims* but, rather, by their exposure to punitive damage *awards*. On this argument, the difference between federal rules and state laws for pending punitive damages does not cause any relevant unfairness to defendants. This argument is unpersuasive in my view. For one thing, even if application of these federal rules would not be unfair to defendants, if it would encourage forum shopping by plaintiffs, that alone is enough to cause the difference between the federal rules and the state laws to be outcome determinative.[381] For another thing, the mere exposure to punitive damage claims does often matter to defendants, and reasonably so. Large punitive damage claims can attract publicity that is unwelcome to defendants and that can adversely affect the defendants' ability to settle on favorable terms. Furthermore, even unwarranted punitive damage claims can result in punitive damage awards. True, both state and federal court systems have procedural devices to prevent this result, such as motions for summary judgment, for judgment as a matter of law, and for new trial. Unwarranted punitive damage awards also can be set aside on appeal. Nevertheless, the use of these procedural devices costs defendants time and money, and successfully using them ultimately to eliminate a punitive damage claim does not necessarily avoid the bad publicity and adverse settlement pressure arising from the mere assertion of a claim.

No doubt the problems posed to a defendant by the plaintiff's mere assertion of a punitive damage claim are what have led eight states to restrict the pleading of punitive damages. These states include the restrictions as an element of tort reform along with caps on

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380. *See supra* chart entitled "Case Law Conducting *Erie* Qnalysis of State Laws Restricting the Pleading of Punitive Damages (column 4).

381. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 753 (1980) (holding that state law applied in diversity cases because, though federal courts' failure to apply state law would not encourage forum shopping, their failure to do so *would* result in the inequitable administration of law); *see also Stewart*, 487 U.S. at 40 (Scalia, J., dissenting) (observing that, under *Walker*, the "failure to meet one part of the twin-aims test suffices to warrant application of state law.").

punitive damage awards. The Court in *Gasperini* held that state-law restrictions on punitive damage awards have a "manifestly substantive" objective.[382] You might consider restrictions on pleading punitive damage claims to be part and parcel with restrictions on punitive damage awards and accordingly to share the latter's substantive objective. It may be possible, however, to distinguish the objectives underlying restrictions on pleading punitive damage caps from those underlying restrictions on punitive damage awards.[383] It is also possible that objectives differ enough from state to state that generalization is not appropriate. In any event, the strong possibility that a substantive objective underlies state laws restricting the pleading of punitive damages has only marginal effect on analysis under the modified outcome-determination test. That test focuses, not on a state's objective, but on the forum-shopping and fairness effects of a federal court in diversity applying federal judge-made rules that differ from the state rules applied by a state court located in the same state as the federal court. As discussed above, the effect of applying different federal and state rules on pleading punitive damages is likely to be outcome determinative in a way that disserves the twin aims of *Erie*.

If so, only a strong federal interest might support the federal courts' application of the federal judge-made rules in lieu of state laws restricting the pleading of punitive damages. In two cases, the Court has held that "countervailing federal interests" may preclude or truncate federal courts' application of state law that is outcome determinative.[384] The Court has not explained how to determine when a federal interest is sufficiently strong to have this preclusive effect.[385] I

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382. *Gasperini*, 518 U.S. at 430.

383. Professor Ely defines a procedural rule as "one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes." Ely, *supra* note 7, at 724 (citations omitted). Restrictions on pleading punitive damages meet his definition if they are understood to prevent the litigation process from being used, unfairly, to assert headline-grabbing, unwarranted punitive damage claims that force quick settlements on terms unjustifiably adverse to defendants.

384. In *Gasperini*, 518 U.S. at 426, 431–38 the Court applied the *Erie* analysis to hold that to avoid "untoward alteration of the federal scheme"—specifically "the federal system's division of trial and appellate court functions, an allocation weighted by the Seventh Amendment"—while at the same time "giv[ing] effect to the substantive thrust of" a New York law that was found to be outcome determinative under *Hanna* Part I in limiting excessive jury damages award. To achieve those results, the Court held that federal district courts should apply the N.Y. law but federal courts of appeals would not. *Id.*; *see also Byrd*, 356 U.S. at 538–39 (holding that "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts" required federal courts in diversity cases to refuse to apply state law assigning the determination of a particular question of fact to the judge rather than the jury even assuming that the "outcome of the litigation may be substantially affected" by the state law).

385. Rowe, *supra* note 56, at 1005 (noting that the Court in *Gasperini* is "cryptic or unclear" about "what might constitute an 'essential characteristic' or 'countervailing

would nonetheless submit that there is a sufficiently strong federal interest in preserving the uniform, simplified system of pleadings and liberal standard for their amendment established by the FRCPs. As noted above, that system of pleadings and that standard for amendment of pleadings are central features of the FRCPs; their design is intertwined with other rules for ferreting out unwarranted claims and defenses.[386] They have become "essential characteristic[s]" of the federal system.[387] To preserve these essential characteristics, federal courts should refuse to apply the Idaho law and similar state laws that restrict the pleading of punitive damages.

VI. CONCLUSION

Idaho law bars punitive damages claims from being included in initial complaints in civil actions. The plaintiff in such an action may amend the complaint to include a punitive damages claim only by establishing a reasonable likelihood of proving entitlement to punitive damages at trial. This article has argued that this state-law restriction on the pleading of punitive damages–which closely resembles restrictions in seven other states–does not apply in diversity actions brought in federal court. The state-law restrictions do not apply for two reasons, either of which, if accepted, prevents the application of these state-law restrictions in federal diversity cases. First, the state-law restrictions conflict with FRCPs 8(a)(3) and 15(a). Because those rules are valid, they preempt state law to the extent the state law would otherwise apply in diversity actions under the *Erie* doctrine. Second, even if state laws restricting the pleading of punitive damages do not conflict with any FRCP, federal courts should still disregard those state laws in the exercise of the federal court's inherent power to make procedural rules for their own proceedings. The application of federal-judge made rules of procedure for pleading punitive damages, instead of more restrictive state laws, is justified by the strong federal interest in preserving the integrity of the simplified

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federal interest' sufficient to call for going beyond the *Hanna* 'twin aims' analysis"). One commentator has argued that, as the Court interpreted its *Byrd* precedent in *Gasperini*, a federal interest is strong enough to outweigh outcome-determinative state law only "when a constitutional provision looms near." King, *supra* note 10, at 186. In *Byrd*, however, the Court cited a case in which a federal court in a diversity case disregarded state law in favor of a federal judicially developed practice that was constitutionally inspired only in the most generalized sense. *See Byrd*, 356 U.S. at 538–39, 540 & n.15 (discussing Herron v. S. Pac. Co., 283 U.S. 91, 95 (1931). *Herron* is a diversity case in which the Court upheld the federal court's entry of a directed verdict despite a state constitutional provision to the contrary and characterized a federal trial judge's control of the case as "an essential factor in the process for which the Federal Constitution provides." *Id.*

386. *See supra* notes 344, 354 and accompanying text.

387. *Gasperini*, 518 U.S. at 431 (quoting *Byrd*, 356 U.S. at 537).

system of pleading and the liberal standard for amendment of pleadings, which have become essential characteristics of the federal court system. The author respectfully urges federal courts for the District of Idaho to reconsider their view that the Idaho law restricting the pleading of punitive damages applies in federal diversity cases.