Medical Malpractice Panel Decisions: Are They Admissible as Evidence in Federal Diversity Proceedings?

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Arizona's medical malpractice statutes[1] provide that a medical malpractice action must be submitted to a screening panel prior to trial.[2] The panel's conclusion is not binding on the parties, but in state court it is admissible as evidence at trial.[3] In *Von Mosher v. Doctors Hospital*,[4] an Arizona federal district court addressed the admissibility of a malpractice panel finding in federal court. The court determined that, although state law governed submission of the action to a review panel prior to trial in federal court, federal procedural law governed the question of admissibility of panel findings at trial.[5] The court ultimately concluded that panel findings were inadmissible under Rules 702 and 705 of the Federal Rules of Evidence.[6]

The *Von Mosher* decision is an anomaly among the recent rulings of federal courts addressing the question of admissibility of review panel

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1. ARIZ. REV. STAT. ANN. §§ 12-561 to 12-569 (1982 & Supp. 1983-84).

2. *See* ARIZ. REV. STAT. ANN. § 12-567(A) (Supp. 1983-84), which states in part: "Upon the filing of a complaint in any medical malpractice action, the matter shall be referred to a medical liability review panel appointed pursuant to this section."

3. ARIZ. REV. STAT. ANN. § 12-567(K) (Supp. 1983-84), which states in part:

> The conclusion of the panel may be admitted into evidence in any subsequent trial. Parties may, in the opening statement or argument to the court or jury, comment on the panel's conclusion in the same manner as any other evidence introduced at trial. Panel members may not be called to testify as to the merits of the case. The jury shall be instructed that the conclusion of the panel shall not be binding but shall be accorded such weight as they choose to give it.

4. No. 77-3 Civ., slip op. (D. Ariz. March 27, 1979). *Von Mosher* is an unpublished opinion. The Ninth Circuit in its own Rules of Court does not permit an unpublished opinion to be regarded as precedent. 9TH CIR. R. 21(c). *See* United States v. Allard, 600 F.2d 1301 (9th Cir. 1979) (unpublished memorandum of the court of appeals was not binding on district court); Webber v. Skoko, 432 F.Supp. 810 (D. Or. 1977) (district court would not rely on unpublished memorandum in keeping with Ninth Circuit rule). However, this does not rule out the persuasive effect of the *Von Mosher* decision on other courts addressing the same question. Because of this effect, *Von Mosher* likely impacts on the litigation strategy of attorneys practicing in the medical malpractice field. Attorneys are more apt to waive the panel in a diversity action than to proceed with it, reasoning that the *Von Mosher* ruling might persuade other courts to follow its lead on the admissibility question. Accordingly, spending time, money and effort to bring the case before a panel makes little sense if the panel's decision is not admissible.

5. No. 77-3 Civ., slip op. at 6-7.

6. *See infra* notes 49-55 and accompanying text.

findings in medical malpractice cases.[7] This Note examines the court's reasoning in *Von Mosher* and analyzes three approaches taken by other federal courts in concluding that panel findings are admissible. Drawing from the analysis, this Note suggests reasons why the *Von Mosher* decision is not sound. Finally, two possible solutions are offered to resolve the admissibility question, which is likely to confront federal courts again.

Background: The "Malpractice Crisis" and Arizona's Response

The early 1970's brought a crisis in the medical malpractice insurance industry that permeated the health care industry as well. Rising malpractice insurance rates,[8] largely attributable to an increase in malpractice litigation,[9] threatened to curtail physicians' practices because liability insurance was not affordable.[10] Some physicians protested the increased rates by refusing to provide medical care except in the event of an emergency.[11] Still others increased their fees, thereby transferring the higher insurance charges to the public.[12] The net effect was a serious threat to the availability of health care services across the country.[13]

These special circumstances prompted many state legislatures, including Arizona's, to adopt legislation aimed at reducing malpractice litigation. The theory was that a reduction in litigation would result in a curtailment of large money awards[14] and litigation expenses, with the result of more affordable malpractice insurance.[15] Reduced insurance rates in turn would allow more affordable and available medical care for the public.[16]

The Arizona legislature's effort to weed out frivolous malpractice claims and to encourage pretrial settlement[17] resulted in a statute creating

7. *See infra* notes 61-78 and accompanying text.

8. In Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977), the Arizona Supreme Court cited evidence that medical malpractice insurance costs for Arizona physicians were doubling every three years at the time the Arizona malpractice statute was passed. *Id.* at 583, 570 P.2d at 751. Between 1960 and 1970, insurance premiums for surgeons rose 949.2%; premiums for non-surgeons rose 540.8%; hospital premiums rose 262.7%. U.S. DEPT. OF HEALTH, EDUC. & WELFARE, PUB. NO. (OS) 73-88, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 13 (1973) [hereinafter cited as HEW Report]. Between 1974 and mid-1975, the premiums paid by some physicians increased another 100%. ALL INDUS. MEDICAL INS. COMM., THE PROBLEMS OF INSURING MEDICAL MALPRACTICE 2 (1975), *reprinted in Hearing on Examination of the Continuing Medical Malpractice Insurance Crisis Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 1st Sess. 184 (1975).

9. *See* Woods v. Holy Cross Hosp., 591 F.2d 1164, 1174 (5th Cir. 1979). *See also* SENATE SUBCOMM. ON EXECUTIVE REORGANIZATION, 91ST CONG., 1ST SESS., A STUDY ON MEDICAL MALPRACTICE: THE PATIENT VERSUS THE PHYSICIAN 2 (Comm. Print 1969).

10. Carter v. Sparkman, 335 So. 2d 802, 805-06 (Fla. 1976) (preamble to the Florida malpractice statute recognizes threat that doctors may be forced to curtail their practices).

11. See Halpern v. Gozan, 85 Misc. 2d 753, 755, 381 N.Y.S.2d 744, 746 (Sup. Ct. 1976).

12. *See id.*

13. *See generally* Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759, 759-60 (1977); Roth, *The Medical Malpractice Insurance Crisis: Its Causes, the Effects, and Proposed Solutions*, 44 INS. COUNS. J. 469 (1977).

14. *See* Halpern v. Gozan, 85 Misc. 2d at 756, 381 N.Y.S.2d at 746 (New York's panel system established to expedite early disposition of malpractice cases so as to reduce the threat of "runaway" jury verdicts).

15. *See* Redish, *supra* note 13, at 761.

16. *See id.*

17. Campbell v. Arnold, 121 Ariz. 396, 397, 590 P.2d 935, 936 (Ct. App. 1978); Eastin v. Broomfield, 116 Ariz. 576, 583, 570 P.2d 744, 751 (1977).

a medical liability review panel system.[18] Section 12-567 of the Arizona Revised Statutes provides that every medical malpractice action shall be screened by a review panel to determine questions of liability before proceeding to trial.[19] The panel's findings are admissible evidence at trial, and the jury may give whatever weight it chooses to the panel's conclusion.[20]

The Arizona Supreme Court addressed the constitutionality of Arizona's malpractice panel statute in *Eastin v. Broomfield*.[21] In *Eastin*, the court upheld the statute, including its admissibility provision, in the face of challenges based on the right to a jury trial,[22] equal protection,[23] and violation of state judicial function.[24] State courts in other jurisdictions have addressed the constitutionality of screening panels and have generally upheld the statutes creating them.[25]

In federal diversity cases concerning state malpractice statutes, district courts face a two-fold dilemma. First, a district court must decide whether to apply the state law requiring a pretrial screening. Then, if the court applies the state rule, it must next decide whether the panel's decision should be admissible as evidence in a federal diversity proceeding.

Determining the Applicable Law in Diversity Actions

The threshold question a federal court must address is whether the state statutory provision at issue is "substantive"[26] or "procedural" law.[27]

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18. ARIZ. REV. STAT. ANN. § 12-561 to 12-569 (1976).

19. *See* ARIZ. REV. STAT. ANN. § 12-567(A), *supra* note 2. The panel may, however, be waived by stipulation of the parties. *Id.*

20. ARIZ. REV. STAT. ANN. § 12-567(K), *supra* note 3.

21. 116 Ariz. 576, 579-86, 570 P.2d 744, 747-54 (1977).

22. *Id.* at 580-81, 570 P.2d at 748-49. Petitioners contended that the statute requiring submission of claims to a medical review panel and admissibility of the panel's decision at trial violated article II section 23 of the Arizona Constitution. The court held that there was no violation, recognizing that under the scheme the jury remained the final arbiter and was free to accept or reject the panel's conclusion: "[I]f the trial court properly instructs the jury they will perform their role as the exclusive finder of fact." *Id.* at 581, 570 P.2d at 749.

23. *Id.* at 583, 570 P.2d at 751. Petitioners asserted that the statute created an arbitrary and unreasonable classification by which medical malpractice plaintiffs were treated differently than were tort plaintiffs. The court held that there was no equal protection violation, as the classification had a rational basis in furthering the state's goal of curbing the influx of non-meritorious claims and promoting settlement of disputes. *Id.*

24. *Id.* at 582, 570 P.2d at 750. Petitioners contend that the statute's provision that a lawyer and health care provider be included on the panel invades the judicial function of the courts as enunciated in article VI section 1 of the Arizona Constitution. The court held that there was no violation because panel members do not enter judgment against any party. The court concluded that the panel's conclusion is, at most, advisory and parties may accept or reject the panel's decision. *Id.*

25. For a list of cases from other jurisdictions which have dealt with the constitutionality of review panel statutes, see Alexander, *State Malpractice Screening Panels in Federal Diversity Actions*, 21 ARIZ. L. REV. 959, 962 n.10 (1979). *See also* Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585 (Ind. 1980) (Indiana panel provisions upheld on challenge to right to jury trial, due process, access to state courts, equal protection and violation of doctrine of separation of powers); Linder v. Smith, 629 P.2d 1187 (Mont. 1981) (Montana panel provisions upheld on challenge to right to jury trial, access to state courts, due process, equal protection and violation of separation of powers).

26. Whether a rule is "substantive" or "procedural" is often difficult to determine. It is not unusual for a state rule to advance both substantive and procedural goals. *See* Alexander, *supra* note 25, at 972-73. Substantive law has been defined as that which "is concerned generally with

Once the court has determined this, it can decide whether it will apply the state provision in the case before it.

The test to determine whether state substantive law applies in federal court[28] is based on the twin aims underlying the United States Supreme Court's decision in *Erie Railroad Co. v. Tompkins*:[29] discouragement of "forum shopping"[30] and avoidance of inequitable administration of the law.[31] The federal courts should apply the state rule if its application aids in the attainment of the goals underlying *Erie*. In other words, federal courts should apply the state rule if such application allows state and federal courts to uniformly administer the state's substantive law.[32] This uniformity avoids giving a potentially unfair advantage to the nonresident plaintiff who files in federal court in order to circumvent a state rule that disadvantages his case.[33] The federal litigant thus is subject to the same body of law as the resident plaintiff who files in state court.

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regulation of human conduct and relationships—'the activity which gives rise to litigation and the fruits thereof.'" *Id.* at 972 n.57.

27. Procedural rules are rules designed for "enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1940).

28. For an analysis of the various tests that have emerged since *Erie* to determine applicability of a state law in federal diversity proceedings under the Rules of Decision Act, see Alexander, *supra* note 25, at 973-87.

29. 304 U.S. 64 (1938). In *Erie*, plaintiff, a Pennsylvania resident, was injured by the open door of a passing railroad car belonging to the Erie Railroad Co., incorporated in New York. Plaintiff brought a diversity action in New York federal district court. The issue before the court was the substantive question of which standard of care to apply to the railroad: whether the railroad owed a duty of care to plaintiff as a trespasser (Pennsylvania law) or as a licensee (New York law). The United States Supreme Court applied Pennsylvania law, the substantive law which the New York state court would have applied had the case been filed in state court. By its decision, the Court overruled Swift v. Tyson, 16 Pet. 1 (1842), where the Court had held that federal courts in diversity actions need not apply the law of the state but could exercise their own judgment on what the common law of the state is or should be. 304 U.S. at 71. The Court reasoned that federal courts do not have the power to declare common law rules applicable in a state. State law is determined by the state and this right shall not be invaded. *Id.* at 78.

The general rule that emerges from *Erie* is that in federal diversity actions the district court applies the substantive law of the forum state. *See* Woods v. Holy Cross Hospital, 591 F.2d 1164, 1168 (5th Cir. 1979); Marquez v. Hahnemann Medical College & Hosp., 435 F. Supp. 972, 973 (E.D. Pa. 1976).

30. "Forum shopping" refers to the nonresident plaintiff's ability to choose whether to bring his claim in federal court or state court. Because there may be substantial variations in the law between state and federal courts, the plaintiff will choose that forum which will determine his rights to his best advantage. *See* Hanna v. Plumer, 380 U.S. 460, 467-68 (1965). Thus, if a federal court sitting in a diversity case refuses to apply the state rule concerning panel referral, the nonresident plaintiff may choose the federal forum if it is to his advantage to avoid the malpractice panel altogether. This disadvantages the resident plaintiff who can file only in state court, where he is subject to the panel requirement. *Erie* sought to avoid this inequity. *See* Woods v. Holy Cross Hosp., 591 F.2d at 1168.

31. "Inequitable administration of the law" refers to the unequal treatment which results when the nonresident plaintiff in litigating his claim is accorded an unfair advantage over the resident plaintiff because of the accident of citizenship. Specifically, in a diversity action, the nonresident plaintiff can choose between federal and state courts to litigate his claim. If the federal forum offers some advantage, this advantage is not available to the resident plaintiff, who can file in state court only. *See* Hanna v. Plumer, 380 U.S. at 467-68. *See also* Woods v. Holy Cross Hosp., 591 F.2d at 1168; Marquez v. Hahnemann Medical College & Hosp., 435 F. Supp. at 973.

32. *See* Woods v. Holy Cross Hosp., 591 F.2d at 1168. *See also* Wells v. McCarthy, 432 F. Supp. 688, 689 (E.D. Mo. 1977); Miller v. Davis, 507 F.2d 308, 313 (6th Cir. 1974).

33. *See* cases cited *supra* note 32.

Although principles of *Erie* and the Rules of Decision Act[34] govern application of state substantive law in a federal action, a different standard governs application of state procedural law in diversity actions. This standard is set forth in *Hanna v. Plumer*[35] and the Rules Enabling Act.[36] The *Hanna* decision states that when a situation is covered by a federal procedural rule passed pursuant to the Rules Enabling Act, the court must apply the federal rule notwithstanding a conflicting state procedural rule.[37] The Rules Enabling Act, however, prohibits application of the federal rule if its application would modify substantive state rights.[38]

Case law overwhelmingly favors application of the state rule requiring panel referral in medical malpractice diversity actions.[39] This result can be traced back to the Rules of Decision Act, construed in *Erie* as requiring strict adherence to state substantive law.[40] Although panel referral by federal courts seems to be a settled question, admissibility of the panel's decision at trial in a federal action is less clear. Federal courts have analyzed this question from various points of view.

The Von Mosher *Decision*

In *Von Mosher v. Doctors Hospital*,[41] the United States District Court in Arizona applied the *Hanna* principles in analyzing the question of admissibility at trial of a medical liability review panel's decision. The Von Moshers brought a medical malpractice action based on diversity of citizenship in federal district court. Upon defendants' motion, the court stayed the proceedings pending review by a medical liability review panel. The panel found against one of the two physician defendants, both of whom then moved to strike the panel finding or, alternatively, to preclude

34. "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 the cases where they apply." 28 U.S.C. § 1652 (1976).

35. 380 U.S. 460 (1965). In *Hanna*, plaintiff, an Ohio citizen, was injured in an automobile accident allegedly caused by a Massachusetts citizen who later died. Plaintiff brought a diversity action against the decedent's estate in Massachusetts federal district court. The question before the court was whether the applicable state or federal procedural rule should apply. Plaintiff had complied with Rule 4(d)(1) of the Federal Rules of Civil Procedure, which allowed service of process to one of suitable age and discretion residing at the defendant's home; the Massachusetts law, however, required personal service to the executor in actions against an estate. The United States Supreme Court applied the federal rule, reasoning that its application "transgresses neither the terms of the Enabling Act nor constitutional restrictions." *Id.* at 471.

36. The Rules Enabling Act provides in part: "The Supreme Court shall have the power to prescribe by general rules . . . the practice and procedure of the district courts . . . . Such rules shall not abridge, enlarge or modify any substantive right. . . ." 28 U.S.C. § 2072 (1976).

37. 380 U.S. at 471.

38. 28 U.S.C. § 2072 (1976). *See also* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 698 (1974). "Where the matter in issue is covered by a Federal Rule . . . the Enabling Act . . . constitutes the relevant standard. To say that . . . is by no means to concede the validity of all Federal Rules, for the Enabling Act contains significant limiting language of its own." *Id.*

39. For a list of cases in which courts have held that *Erie* requires referral to review panels in diversity actions see DiFilippo v. Beck, 520 F.Supp. 1009, 1013 (D. Del. 1981).

40. *See* Marquez v. Hahnemann Medical College & Hosp., 435 F. Supp. at 974 (*Erie's* main point was to allow state legislatures to define the substantive rights of their citizens); *see also* Miller v. Davis, 507 F.2d 308, 313 (6th Cir. 1974).

41. No. 77-3 Civ., slip op. (D. Ariz. March 27, 1979).

admissibility of the panel's finding at trial.[42]

The *Von Mosher* court's ruling was twofold. It confirmed its previous ruling that the malpractice claim must be referred to the state review panel. The court based this decision on the twin policies of *Erie* and on the recognition that the panel procedure is "bound up"[43] with a substantive state policy to decrease medical malpractice litigation. Although the court applied the state rule requiring panel review, it nevertheless concluded that the panel's decision was not admissible as evidence at trial.[44]

The *Von Mosher* court essentially split the malpractice statute into two separate parts: one part required submission of a case to the panel, while the other governed admissibility of the panel's finding at trial. The court viewed the provisions requiring submission to the panel as state substantive law and applied *Erie* and the Rules of Decision Act to determine whether the state law requiring panel review should be applied in this federal action.[45] The court, however, regarded the admissibility provision as state procedural law and found that it conflicted with a federal rule.[46] Concluding that *Erie* was not the applicable standard,[47] the court applied *Hanna* and the Rules Enabling Act to determine applicability of the state law governing admissibility.[48]

The court noted that Rules 702 and 705 of the Federal Rules of Evidence controlled admissibility of the panel's decision.[49] These evidentiary rules provide that an expert's opinion is inadmissible hearsay[50] unless the expert is qualified at trial to render expert testimony[51] and is subject to cross-examination on the substance of his opinion.[52] The *Von Mosher* court recognized that, even though the panel's conclusion constitutes ex-

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42. *Id.* at 1-2.

43. *Id.* at 2. "Bound up" is a term used by the United States Supreme Court in Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958). The Court applied a two-part test to determine application of a state rule in a federal action. In part one of the test, the Court examined the state rule to determine whether the rule was "bound up" with substantive rights and obligations. If the answer was in the affirmative, it was appropriate to apply the state rule. *Id.* at 535-36. For further discussion of the two-part test in *Byrd*, see Alexander, *supra* note 25, at 978-79. Courts continue to use "bound up" as a term of art in *Erie* cases to describe the close relationship between the state rule and substantive rights.

44. Von Mosher v. Doctors Hosp., No. 77-3 Civ., slip op. at 2, 6-7.

45. *Id.* at 2. *See supra* notes 28-34 and accompanying text.

46. Von Mosher v. Doctors Hosp., No. 77-3 Civ., slip op. at 4-7.

47. "The *Erie* Rule has never been invoked to void a Federal Rule." Hanna v. Plumer, 380 U.S. 460, 470 (1965). *Erie* governs application of state substantive law in federal actions. For further discussion, see *infra* note 48.

48. *See* Hanna v. Plumer, 380 U.S. at 469-71. *See also* Ely, *supra* note 38, at 718 (*Hanna* stands for the proposition that when application of a federal rule is "at issue," the Rules Enabling Act is the appropriate standard for determining whether federal or state law applies, not the Rules of Decision Act as construed by *Erie*).

49. Von Mosher v. Doctors Hosp., No. 77-3 Civ., slip op. at 5-6.

50. *See* Bryan v. John Bean Div. of F.M.C. Corp., 566 F.2d 541, 546 (5th Cir. 1978) (admitting the hearsay opinion of an expert not subject to cross-examination "goes against the natural reticence of courts to permit expert opinion unless the expert has been qualified before the jury to render an opinion").

51. FED. R. EVID. 702 (only a witness qualified as an expert "by knowledge, skill, experience, training, or education" may testify in the form of an opinion as to scientific, technical, or other specialized knowledge).

52. FED. R. EVID. 705 (expert may be cross-examined on the underlying facts which form the bases for his opinion).

pert opinion,[53] Arizona's malpractice statute does not permit panel members to testify on the merits of the case at trial.[54] Consequently, the party against whom the panel renders a decision has no opportunity to question the qualifications of panel members or to cross-examine them on the substance of the opinion. The court held that, under Rules 702 and 705, the panel's opinion must therefore be hearsay and inadmissible at trial.[55]

Admissibility of Panel Decisions in Other Jurisdictions

Federal courts in other jurisdictions generally disagree with the result in *Von Mosher* and conclude that the panel's decision is admissible in federal diversity proceedings. Three different approaches by the courts enable them to reach this conclusion: (1) the preservation of substantive state interests demands application of the state rule;[56] (2) the absence of conflict between state and federal procedural law demands application of the state rule;[57] and (3) the Rules Enabling Act prohibition against modifying substantive rights demands application of the state rule.[58] Each of these approaches will be discussed in turn.

Preservation of Substantive State Interests

One group of courts treats the admissibility provision of the malpractice statute as part of a substantive whole. These courts apply *Erie* principles[59] to the admissibility question: federal courts should apply the state rule if, by its application, forum shopping is discouraged and the law is administered equitably.[60]

In *DiAntonio v. Northampton-Accomack Memorial Hospital*,[61] plaintiff Joseph DiAntonio brought a medical malpractice action in a Virginia federal court. The suit was dismissed for failure to give notice of intent to file a malpractice action as required by the Virginia malpractice statute.[62] On appeal to the Fourth Circuit Court of Appeals, DiAntonio argued that Virginia's Medical Malpractice Act did not apply to him as a diversity plaintiff. He leveled his principal attack on the admissibility provision of the statute, arguing that admissibility of the panel's decision at trial would "unduly influence the jury."[63] The court noted that, although the panel's

53. Von Mosher v. Doctors Hosp., No. 77-3 Civ., slip op. at 5. *See* Eastin v. Broomfield, 116 Ariz. at 581, 570 P.2d at 749 (panel's finding constitutes an expert opinion).

54. Von Mosher v. Doctors Hosp., No. 77-3 Civ., slip op. at 5. ARIZ. REV. STAT. ANN. § 12-567(K).

55. Von Mosher v. Doctors Hosp., No. 77-3 Civ., slip op. at 5-6.

56. *See infra* notes 59-68 and accompanying text.

57. *See infra* notes 69-78 and accompanying text.

58. *See infra* notes 79-83 and accompanying text.

59. *See infra* notes 28-33 and accompanying text.

60. *Id.*

61. 628 F.2d 287 (4th Cir. 1980).

62. *DiAntonio*, 628 F.2d at 289. *See* VA. CODE § 8.01-581.2 (Supp. 1983), which provides that a medical malpractice action may not be brought unless the claimant first notifies the health care provider of his intent to bring the action.

63. *DiAntonio*, 628 F.2d at 289-90. *See* VA. CODE § 8.01-581.8, which provides that the panel's opinion is "admissible as evidence in any action subsequently brought by the claimant in a court of law. . . ." Under the Virginia statute, panel members may be called as witnesses to testify. *DiAntonio*, 628 F.2d at 291.

decision would be admissible, it would not be conclusive. The jury would remain free to accept or reject the panel findings.[64]

The *DiAntonio* court further stated that it would be incongruous and damaging to the state's legislative scheme to uphold the panel requirement while denying admissibility of the panel decision at trial. Such a system would violate *Erie* principles by offering non-resident plaintiffs an advantage not available to state court plaintiffs, thus encouraging forum shopping.[65]

The *DiAntonio* court suggested that, even if the admissibility provision were procedural, a federal court might apply it nonetheless. The court acknowledged that under some circumstances a question of admissibility of evidence is "so intertwined with a state substantive rule that the state rule . . . will be followed in order to give full effect to the state's substantive policy."[66] The *DiAntonio* court found that the admissibility provision was intertwined with Virginia's policies of promoting pretrial mediation and encouraging settlement.[67] Because admissibility furthered these substantive state interests, the court concluded that it was proper to apply the admissibility provision in a federal diversity proceeding.[68]

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64. *DiAntonio*, 628 F.2d at 291.

65. *Id.*

66. 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2405 at 326-27 (1971). *See also* Conway v. Chemical Leaman Tank Lines, Inc., 540 F.2d 837, 838 (5th Cir. 1976).

For example, those rules of evidence governing presumptions (FED. R. EVID. 302), privileges (FED. R. EVID. 501), and competency of witnesses (FED. R. EVID. 601) are closely related to substantive rights and policies under state law. *See* Alexander, *supra* note 25, at 1005-07. This relationship of evidentiary rules to substantive law is perhaps best understood in the context of the privilege rules proposed by the United States Supreme Court in the original draft of the Federal Rules of Evidence. In the original draft, the Court did not recognize the privileges created by state law and instead substituted a set of narrow privileges defined by the Rules themselves. The rules included a narrow husband-wife privilege and elimination of the doctor-patient privilege, with the result that personal privacy was seriously threatened. The newsman's privilege was not recognized; yet extensive protection existed for trade secrets. There was no coherent philosophy on why the Rules were so drafted. *See* Ely, *supra* note 38, at 693-94. Furthermore, scholars clamored that state substantive rights mandated by *Erie* were being ignored. *See* S. REP. No. 93-1277, 93d Cong. 2d Sess. 6 (1974) [hereinafter cited as SENATE REPORT 93-1277].

Congress intervened to amend the Rules. The most far-reaching change occurred with elimination of the Court's proposed rules on privilege. *Id.* Congress substituted Rule 501, which states that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." 28 U.S.C. § 501 (1975). Congress reasoned that federal law should not supersede substantive state law absent a compelling reason. *See* SENATE REPORT 93-1277 at 7.

Congress' amendment of the rules governing privileges signifies its recognition that the privilege rules are more than procedural—that they are intertwined with substantive state policy. This deference to substantive state law can also be seen in *DiAntonio*. The *DiAntonio* court recognized that admissibility of the panel decision is an evidentiary rule created to further substantive state policy; thus, the court held that the state rule should be followed in a federal diversity action. 628 F.2d at 291.

67. 628 F.2d at 291.

68. *Id.* In Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979), the Fifth Circuit Court of Appeals held that failure to apply Florida's malpractice statute requiring a panel finding and providing for its admissibility at trial would encourage forum shopping and inequitable administration of the law in violation of *Erie*. *Id.* at 1170. The *Woods* court also recognized that the admissibility provision is an evidentiary rule that is bound up with substantive state interests. It therefore declined to take any step that would damage the state interests reflected in the malpractice statute. *Id.* at 1168-69.

In DiFilippo v. Beck, 520 F. Supp. 1009 (D. Del. 1981), plaintiff argued in part that referral of

Absence of a Conflict Between State and Federal Procedural Law

A second group of courts admits the panel decision in federal diversity actions by recognizing that the state admissibility provision is procedural, but that it does not conflict with federal procedural rules.[69] These courts characterize the admissibility provision as within the hearsay exception set out in Rule 803(8)(C) of the Federal Rules of Evidence.[70]

Winfree v. May[71] is an example of this approach. In *Winfree*, the northern district court of Ohio addressed the *Erie* question of panel review of a malpractice claim filed in federal court. The court ordered panel arbitration and announced that the arbitrators' decision would be admissible at trial unless it failed to satisfy the statute's reliability criteria.[72] The court relied on Rules 701 and 702 of the Federal Rules of Evidence, which govern admissibility of opinion testimony by lay witnesses and experts in federal court.[73] In dictum, the *Winfree* court further concluded that if the panel's opinion were offered into evidence as a "pre-existing fact,"[74] rather than by testimony of the arbitrators as to presently held opinion, the evidence would be hearsay.[75] The court added that it would still be admissible, however, under the administrative findings exception found in Rule 803(8)(C).[76]

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his malpractice claims to a panel and admissibility of the panel's decision as evidence at trial were procedural matters to which *Erie* did not apply. The district court of Delaware held that adherence to the Delaware statute governing panel referral and admissibility was mandated by principles of *Erie*. *Id.* at 1012-13. *See supra* notes 28-33 and accompanying text.

69. *See* Hines v. Elkhart Gen. Hosp., 465 F.Supp. 421, 428 (N.D. Ind.), *aff'd*, 603 F.2d 646 (7th Cir. 1979); Comiskey v. Arlen, 55 A.D.2d 304, 309, 390 N.Y.S.2d 122, 126 (1976) (admissibility provision likened to a legislatively imposed exception to the hearsay rule). Unlike the Arizona statute, both the Indiana and New York statutes permit panel members to be called as witnesses to testify at trial. The *Von Mosher* court considered applying the Rule 803(8)(C) hearsay exception, but instead applied Rules 702 and 705 to exclude the evidence.

70. The Rule permits admissibility of '[r]ecords, reports, statements, or data compilations in any form, of public offices or agencies, setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law. . . .' FED. R. EVID. 803(8)(C). Under the rule, the panel finding is admissible absent indications of untrustworthiness. *Id.*

71. No. C77-88, slip op. (N.D. Ohio Jan. 31, 1979). The *Winfree* opinion is unpublished, but it is discussed in part in Turner, *Medical Malpractice Arbitration on the Erie Railroad*, 11 TOLEDO L. REV. 1, 19-22 (1979).

72. *Winfree*, No. C77-88, slip op. at 3-6. *Winfree* decided the admissibility question by applying *Erie* principles and emphasizing adherence to substantive state interests. *Id. See* OHIO REV. CODE ANN. § 2711.21 (C) (Page 1981).

73. No. C77-88, slip op. at 3. In *Hines*, 465 F. Supp. at 428, the district court likened the panel decision to expert opinion admissible under Rules 702-706.

74. To understand the *Winfree* court's reference to "preexisting fact," see Baker v. Elcona Homes Corp., 588 F.2d 551 (6th Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (sergeant's police accident report containing sergeant's own objective findings of fact, that automobile entered the intersection against a red light, was admissible despite hearsay objection because circumstances of report did not indicate lack of trustworthiness, report was timely, sergeant possessed special skill and expertise in automobile accident investigations, and there was no indication that report was made with any improper motive, FED. R. EVID. 803(8)(C)).

75. *Winfree*, No. C77-88, slip op. at 3-4. Arizona's malpractice statute does not permit panel members to testify on the merits of the case at trial. *See supra* notes 53-54 and accompanying text.

76. *Winfree*, No. C77-88, slip op. at 3-4. *See* Chandler v. Roudebush, 425 U.S. 840, 863 n.39 (1976), where the Supreme Court cited Rule 803(8)(C) as authority for admission of a prior administrative agency finding of no discrimination as evidence in an employment discrimination case in federal court. *See also* Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n.21 (1974) (arbitration decision in employment discrimination case is admissible as evidence at subsequent trial de novo).

The absence of a conflict between state and federal procedural law as exhibited in *Winfree* does not permit application of the standards set forth in *Hanna v. Plumer* and the Rules Enabling Act.[77] Instead, the principles of *Erie* and the Rules of Decision Act are the appropriate standards.[78] Together, these two authorities emphasize adherence to substantive state interests and require application of the state admissibility rule.

Rules Enabling Act Prohibition

Another approach recognizes a square procedural conflict between state admissibility provisions and federal procedural rules and concludes that, in a situation where procedural rules so conflict, *Hanna* requires application of the federal rule.[79] The Rules Enabling Act, however, qualifies *Hanna's* application:[80] if the federal procedural rule modifies substantive rights, the court may not apply the federal rule.[81] Although no reported federal cases have applied the state rule on admissibility under the authority of the Rules Enabling Act, Justice Harlan's concurrence in *Hanna* suggests such an approach.[82] Justice Harlan suggested that when state and federal procedural rules conflict, the state rule should override application of the federal provision if the state statute reflects strong state policies.[83]

The *Von Mosher* court followed only a portion of the *Hanna*/Rules

77. *See supra* notes 35-38 & 48 and accompanying text.

78. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 556-57 (1949). In *Cohen*, stockholders brought a derivative action against the corporation in federal court on the basis of diversity. The New Jersey statute required plaintiffs to post a bond as security for payment of defense costs in the event the corporation prevailed. Rule 23 of the Federal Rules of Civil Procedure dealt with requirements for bringing a derivative action in federal court, but the Rule in no way conflicted with the state requirement to post a bond. The Supreme Court directed the federal court to apply the state statute. *See also* Alexander, *supra* note 25 at 966 n.29 (where there is no conflict between state and federal rules, federal courts are "free to apply state law"); Ely, *supra* note 38, at 728-29 n.189 (absence of conflict between the state and federal rules made *Cohen* a Rules of Decision case).

79. *See supra* notes 35-38 & 48 and accompanying text.

80. *Id.*

81. *Hanna*, 380 U.S. at 471. *See supra* notes 36-38.

A controversy exists as to whether the Federal Rules of Evidence are subject to the Rules Enabling Act, 20 U.S.C. § 2072. Justice Douglas addressed the issue in his dissent to the Supreme Court's order to transmit to Congress the Rules of Evidence promulgated by the Supreme Court. He said, in part, that there is nothing in the legislative history of the Rules Enabling Act to indicate whether the power to make rules of "practice and procedure" includes the power to promulgate rules of evidence. Order, 56 F.R.D. 184, 185-86 (1972) (Douglas, J., dissenting). For more discussion, see Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275, 277-82 (1962).

It is not within the scope of this Note to analyze this issue but if the Federal Rules of Evidence were not passed pursuant to the Enabling Act, one might question whether the Act's prohibition against modifying substantive rights applies to Federal Rules of Evidence. If it does not, it seems that the federal rule would be applicable notwithstanding the fact that it modifies substantive rights.

82. *Hanna*, 380 U.S. at 477-78 (Harlan, J., concurring).

83. 380 U.S. at 477-78. Justice Harlan discussed the Supreme Court's application of the state rule in Cohen v. Beneficial Indus. Loan Corp. *See supra* note 78. Justice Harlan agreed with the Court's application of *Erie* principles in *Cohen* because there was no conflict between state and federal procedural rules. He also suggested that had there been a conflict such that *Hanna* applied, the state rule should prevail if it reflects strong state policies. *Id.* With this focus on strong state policies, Justice Harlan seems to have equated the Rules Enabling Act reference to "substantive rights" with "substantive interests" of the state.

Enabling Act approach. The court found a procedural conflict between the state admissibility provision and the Federal Rules of Evidence and so applied *Hanna's* principles.[84] It seemed to pass lightly, however, over the Rules Enabling Act prohibition against modification of state substantive law. The *Von Mosher* court concluded that, because the panel would still provide an appraisal of the validity of the malpractice claim, the state's goal of encouraging a reasonable settlement would not be undermined by inadmissibility of the panel's decision.[85] *Von Mosher* thus raises the question whether the state goal is met by referral to the panel alone, without admissibility of its findings at trial.

Does Application of the Federal Rule Denying Admissibility Modify Substantive State Interests?

The *Von Mosher* conclusion that the state's interest in encouraging pretrial settlements[86] is not undermined by the decision of inadmissibility[87] is partially correct. Even an inadmissible panel decision that is unfavorable might convince a plaintiff not to pursue the matter further, as litigation can be an expensive, time-consuming process. Furthermore, the panel decision is a good indicator of a claim's validity[88] and therefore might encourage parties to settle.

Even though inadmissible panel findings can serve to discourage litigation, the teeth in the malpractice statute concerning the panel system is still the statute's admissibility provision.[89] When a panel's decision is admissible, the party who lost before the panel must overcome the effect of that decision on the jury. Admissibility encourages the jury to go along with the panel's conclusion.[90] As a result, the losing party faces a greater burden than that which he faces if the panel's decision is not admissible;[91] settlement becomes an even more attractive alternative. Inadmissibility, on the other hand, may cause litigants to take the panel less seriously[92] and

84. Von Mosher v. Doctors Hosp., No. 77-3 Civ., slip op. at 6-7.

85. *Id.* at 7.

86. *See supra* text accompanying notes 8-17.

87. *See supra* text accompanying note 85.

88. *See* Alexander, *supra* note 25, at 972 (the panel influences plaintiff's conduct in determining whether to bring a weak claim and also influences both plaintiff and defendant's decisions to pursue or forego litigation).

89. *See* Alexander, *supra* note 25, at 971.

90. *See* Turner, *supra* note 71, at 24.

91. *See* Alexander, *supra* note 25, at 1006.

92. *See DiAntonio*, 628 F.2d at 291. The *DiAntonio* court advanced the argument that parties would not exert themselves before the panel if the panel's decision were not admissible at trial. The panel would thus become an empty condition precedent to litigation, the court argued, presenting no meaningful opportunity for settlement. This argument is weakened if the panel decision is admissible and parties still fail to exert themselves because there is no requirement for diligence in litigating before the panel.

In a recent special action, the Arizona Supreme Court addressed a situation where plaintiff had appeared before the panel but had declined to participate, offering no evidence and refusing to cross-examine defense witnesses. In essence. plaintiff stood mute before the panel, no doubt intending to argue at trial that the jury should give little weight to the panel's decision because the panel did not hear the evidence plaintiff will have presented at trial. The supreme court agreed with the petitioners' contention that plaintiff's conduct disrupts the legislative intent of the malpractice panel system. However, the court noted that the panel is not a tribunal of the judicial department and that it does not have the judicial power to impose sanctions such as dismissal for

may encourage them to go forward and gamble for a different outcome at trial.[93]

The *Von Mosher* decision interferes with the settlement-inducing purpose behind the malpractice statute by not allowing admission of the panel finding as evidence in federal court.[94] Such interference contravenes the policy of the Rules Enabling Act; it does not protect substantive state interests.[95] Accordingly, the federal rule should yield to application of the state rule.

Proposals to Resolve the Admissibility Question in Arizona

In *Von Mosher v. Doctors Hospital*, a federal district court in Arizona addressed the question of admissibility of the panel's decision in a federal diversity proceeding. The *Von Mosher* court held the panel's conclusion not admissible at trial. The court reasoned that the state admissibility provision conflicted with Rules 702 and 705 of the Federal Rules of Evidence, which govern admissibility of expert opinion in federal court. The court applied the principles of *Hanna v. Plumer* and concluded that the federal evidentiary rules preempted the conflicting state admissibility provision. The *Von Mosher* court also addressed the Rules Enabling Act prohibition against modification of substantive rights and concluded that inadmissibility of panel decisions in federal trials would not undermine the state's objective of encouraging pretrial settlement of malpractice cases.

There is no question that a panel's determination of liability may sometimes encourage settlement even if it is not admissible. However, the precise question before the *Von Mosher* court was not whether panel review encourages settlement but whether inadmissibility of the panel finding interferes with the state's settlement objective as reflected in the malpractice statute. In denying admissibility, the *Von Mosher* court minimized the vital interplay of the panel requirement and the admissibility provision, which operate together to further the state's early settlement policy. The district court's application of the federal rule denying admissibility interferes with that policy and thus violates the Rules Enabling Act.

Other federal courts seem to recognize that interference with state objectives may be the result if panel decisions are found inadmissible. These courts avoid such interference by acknowledging that the admissibility provision is substantive law or by ruling that the federal law does not

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plaintiff's conduct. The court concluded that if a plaintiff chooses not to present his case before the panel, the panel will most certainly rule against him. This ruling is admissible at trial. The law provides for no other "penalty." Phoenix Gen. Hosp. v. Superior Court of the State of Arizona, — Ariz. —, 675 P.2d 1323 (1984).

The supreme court's ruling poses an interesting situation at the federal level. If courts apply the *Von Mosher* admissibility rule in federal actions, the "penalty" referred to by the Arizona Supreme Court for plaintiffs who fail to exert a good faith effort before the panel does not exist in federal courts. Plaintiffs can successfully avoid the legislative intent of the entire panel system.

93. *See* Alexander, *supra* note 25, at 971; Redish, *supra* note 13, at 767 n.55; Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417, 1461-62. The panel becomes less effective as a screening device because its decision has only a minimal effect.

94. *See supra* text accompanying notes 17-18.

95. *See supra* text accompanying notes 80-81.

conflict with the state's admissibility rule. *Erie* principles apply in both instances to support admissibility of panel decisions in subsequent federal actions. By adopting either of these approaches, Arizona's federal courts could avoid interference with the state's early settlement objective.

Arizona's malpractice statute might also be amended to include an express statement that the admissibility provision is substantive law designed to facilitate early disposition of malpractice claims. Such an amendment would clearly point to *Erie* principles to determine whether the state admissibility provision applies and would thus eliminate the debate on whether *Erie* or *Hanna* provides the appropriate standards.

Conclusion

Judicial and legislative alternatives to *Von Mosher* are offered to encourage a new approach to the question of admissibility of medical malpractice panel findings in federal courts in Arizona. It is recommended that courts consider these alternatives that avoid interference with substantive state interests before applying the *Von Mosher* ruling. *Von Mosher's* interference with substantive state interests is unwarranted in view of such alternatives. Medical liability review panel decisions are properly admissible in federal diversity actions.