THE MERITS OF PROCEDURE VS. SUBSTANCE: *ERIE*, *IQBAL*, AND AFFIDAVITS OF MERIT AS MEDMAL REFORM

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Plausibility is much on the collective mind of the legal profession these days. The Supreme Court set the stage in Twombly *and* Iqbal*, resetting federal civil pleading to a "plausibility standard." Now, judges, practicing lawyers, and commentators have been struggling to predict the extent of change wrought by these cases and how far outside of their factual contexts they may apply.*

Rarely addressed in the literature is the impact of Iqbal *on diversity cases. Federal courts sitting in diversity, of course, always face* Erie *choice-of-law questions, as they are tasked with minimizing forum shopping by distinguishing procedural matters in which federal rules govern from substantive issues that must be controlled by state law. While the pleading standard may seem to be the prototypical procedural rule, state laws that adopt heightened pleading standards to serve substantive ends cast doubt upon this presumption.*

State affidavit-of-merit laws are illustrative. These requirements serve the substantive end of effecting MedMal reform by requiring an affidavit of merit to be filed with, or soon after, the complaint. The method used, however, is procedural: these laws implicate the pleading standard for MedMal cases.

Even before Twombly *and* Iqbal*, the task of characterizing a state substantive policy effected through a procedural mechanism presented a conundrum for diversity courts. But which rule should win out under the now-heightened federal pleading standard? With an eye to both the system and the policy underlying* Erie*, does federal or state law prevail?*

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INTRODUCTION

Explanations exist; they have existed for all time; there is always a well-known solution to every human problem—neat, plausible, and wrong.

– H. L. Mencken

In the midst of the national debate over health care reform, President Obama recognized that "reforming our medical malpractice laws can help bring down the cost of health care."[1] With national attention now directed at the health care overhaul, medical malpractice (MedMal) reform is likely to take at least a portion of the national limelight, if not center stage. But MedMal reform is not a new issue. For years, states have been addressing concerns that the common law of torts has allowed MedMal litigation to spiral out of control, needlessly permitting frivolous suits that contribute both to defensive medicine and to rising health care costs as the price and necessity of malpractice insurance increases.[2]

Several states have chosen to combat the perceived overabundance of MedMal litigation through a statutory adjustment to pleading requirements: an affidavit-of-merit approach.[3] While not the only approach to limiting or restricting MedMal suits, the affidavit-of-merit approach focuses narrowly on the issue of stopping frivolous lawsuits at the gate, while ostensibly allowing all meritorious claims to go forward.[4]

This additional pleading requirement for state-law MedMal claims, however, raises the issue of which pleading standard applies when such claims are

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1. President Barack Obama, Remarks by the President to a Joint Session of Congress on Health Care (Sept. 9, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/ (suggesting MedMal reform as one aspect of the broader federal initiative for health care reform).

2. *See generally* U.S. GEN. ACCOUNTING OFFICE, GAO-03-702, MEDICAL MALPRACTICE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES (2003), *available at* http://www.gao.gov/new.items/d03702.pdf ("GAO found that losses on medical malpractice claims—which make up the largest part of insurers' costs—appear to be the primary driver of rate increases in the long run."); U.S. GEN. ACCOUNTING OFFICE, GAO-03-836, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE (2003), *available at* http://www.gao.gov/new.items/d03836.pdf.

3. *See, e.g.*, MICH. COMP. LAWS § 600.2912d (2004) (requiring a MedMal plaintiff to file with the complaint an affidavit from a qualified health professional certifying that the defendant seems to have breached the applicable duty of professional care).

4. Other approaches to MedMal reform often limit either the type or amount of damages available to victorious MedMal plaintiffs. *See, e.g.*, ALASKA STAT. § 09.17.020 (2008) (limiting the amount of punitive damages recoverable in MedMal suits and other civil actions); DEL. CODE ANN. tit. 18, § 6855 (1999) (limiting punitive damages to cases where the injury was "maliciously intended" or resulted from "willful or wanton misconduct," and requiring a separate jury finding for applicability and amount of punitive damages). While limited recoveries decrease the amount paid by MedMal insurers, thereby ostensibly lowering MedMal insurance costs and, by extension, health care costs in general, they also run the risk of denying full recovery to plaintiffs who have been seriously injured by negligent health professionals.

brought in federal court on diversity grounds. Generally, federal courts sitting in diversity must apply state substantive law, but federal procedural rules—even regarding state-law claims.[5] Thus, if the state's heightened pleading requirement is merely a procedural modification, Rule 8 of the Federal Rules of Civil Procedure—with its lesser notice-pleading requirement—controls, to the exclusion of an affidavit of merit.[6] If the affidavit-of-merit requirement instead reflects state substantive law, federal courts are bound to enforce the heightened pleading requirement.[7]

While the distinction may seem trivial, the ramifications of the decision between state and federal law are significant. If affidavit-of-merit requirements are mere procedural modifications of state pleading standards, then Rule 8's notice-pleading requirements control, effectively undermining this MedMal reform technique in diversity cases. Plaintiffs who are diverse from the health professional or facility they are suing can escape the state-law heightened pleading standard by the simple expedient of filing in federal court. With such an easy escape, the efficacy of affidavits of merit for MedMal reform becomes questionable. This may necessitate reliance on alternative MedMal reform techniques that tend to penalize deserving plaintiffs in addition to barring those seeking to file frivolous suits.[8] Disparate pleading standards in federal and state courts for the same claim could also lead to forum shopping, the very evil sought to be avoided by application of state substantive law in diversity cases.[9] Adding to the confusion, federal courts have split on the issue of whether state-law affidavit-of-merit requirements are substantive or merely procedural.[10]

Recent modifications of the federal pleading standard have added further nuance to this already convoluted issue. The U.S. Supreme Court's decisions in *Bell Atlantic Corporation v. Twombly*[11] and *Ashcroft v. Iqbal*[12] make clear that the Rule 8 pleading standard requires something more than mere notice of claims to the opposing party. Instead, the federal pleading standard for civil cases is now

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5. Hanna v. Plumer, 380 U.S. 460, 465 (1965) ("The broad command of *Erie* was therefore identical to that of the Enabling Act: federal courts are to apply state substantive law and federal procedural law.").

6. FED. R. CIV. P. 8(a)(2) (requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief").

7. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535–38 (1958) (requiring federal courts in diversity to apply state law for substantive issues, those "bound up with the [state-created] rights and obligations of the parties").

8. *See supra* note 4.

9. *Hanna*, 380 U.S. at 467–68 (recognizing that avoiding forum shopping was one major aim of the *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), decision mandating application of state substantive law in diversity cases).

10. *Compare* Chamberlain v. Giampapa, 210 F.3d 154 (3d Cir. 2000) (applying the state-law affidavit-of-merit requirement as substantive law in a MedMal diversity case), *with* Long v. Adams, 411 F. Supp. 2d 701 (E.D. Mich. 2006) (applying the federal pleading standard—and excluding the state affidavit-of-merit requirement as a procedural matter—in a MedMal diversity case).

11. 550 U.S. 544 (2007).

12. 129 S. Ct. 1937 (2009).

described as a "plausibility standard," requiring "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[13]

This subtle shift changes the game for federal courts analyzing the applicability of affidavit-of-merit requirements in diversity actions. This Note investigates just how the plausibility pleading standard announced and described in *Twombly* and *Iqbal* changes the *Erie* analysis of affidavits of merit. The result is a conflict between a heightened state pleading standard and a newly heightened federal pleading standard. This Note concludes that the best approach in the spirit of *Erie*, as well as the best approach from a policy perspective, is to apply the federal plausibility standard rather than state affidavit-of-merit requirements.

Part I briefly provides a background of the instant issue, from affidavits of merit and pleading in MedMal diversity cases to the now-heightened federal pleading standard. Part II analyzes the impact of the federal plausibility pleading standard on the *Erie* question of affidavits of merit in diversity cases. It carefully reassesses the rationales of federal courts that addressed the issue before *Iqbal* and concludes that the best approach is to apply the federal standard. Part III outlines some of the practical repercussions of applying a heightened federal pleading standard rather than state affidavit-of-merit requirements in MedMal diversity cases.

I. THE WORLD AS OF 2007

The world changed in 2007—the world of federal civil pleading, at least. This Part surveys the state of the affidavit-of-merit *Erie* question before *Twombly* was handed down. Section A describes the objectives and policies underlying MedMal affidavits of merit. Section B briefly outlines several of the ways different federal courts decided the affidavit-of-merit *Erie* question before the introduction of a federal plausibility pleading standard. Section C addresses the *Twombly* and *Iqbal* decisions, describing in general terms their holdings and impacts. This background informs how *Iqbal*'s plausibility pleading affects the *Erie* question of affidavits of merit, taking into account both the letter and the purpose of state MedMal reform statutes.

A. The Affidavit-of-Merit Approach to Medical Malpractice Reform

Medical malpractice reform can take a variety of forms, each of which reflects, to some extent, a different policy choice. Caps on the amount of recoverable noneconomic damages directly address the perceived problem of rising litigation and pay-out costs for insurance companies, burdens which cause an increase in MedMal insurance premiums and, indirectly, health care costs.[14] The same purpose—decreasing the monetary cost of MedMal actions—is served by reform statutes that either cap the amount of recoverable punitive damages or

13. *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555).

14. *See, e.g.*, ALASKA STAT. § 09.17.010(c) (2008) (limiting noneconomic damages to $1 million); FLA. STAT. ANN. § 766.118(2) (2005 & Supp. 2010) (limiting noneconomic damages in most MedMal actions to $500,000 per claimant, with no defendant practitioner to pay more than $500,000).

limit the circumstances in which a jury may award punitives.[15] Some states have enacted statutes mandating mediation or arbitration as a prerequisite to a traditional claim, while retaining trial as an option if the alternative dispute resolution process does not settle the matter.[16] States may also seek to eliminate frivolous MedMal suits by establishing preliminary screening panels composed of medical experts to screen claims for medical merit before allowing a trial to go forward.[17]

The affidavit-of-merit approach to MedMal reform focuses narrowly on preventing frivolous lawsuits by requiring plaintiffs to certify a good faith belief in the merit of their claims at the outset of the case.[18] It avoids the administrative cost of state-wide preliminary screening panels, but still serves as a barrier to meritless suits. It is also tailored more specifically to meritless claims than are the generally applicable damages restrictions described above, seeking to weed out frivolous suits while not directly limiting the recovery of a plaintiff who wins at trial. Over a third of the states have adopted some form of an affidavit-of-merit requirement.[19]

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15. *See, e.g.*, ALASKA STAT. § 09.17.020 (2008) (limiting the amount of recoverable punitive damages to the greater of three times the amount of compensatory damages or $500,000, and delineating in detail the circumstances under which punitive damages may be awarded); DEL. CODE ANN. tit. 18, § 6855 (1999) (limiting punitive damages to cases where the injury was "maliciously intended" or resulted from "willful or wanton misconduct," and requiring a separate jury finding for applicability and amount of punitive damages).

16. *See, e.g.*, FLA. STAT. ANN. § 766.107 (2005 & Supp. 2010) (allowing the court, on motion by either party, to order the claim be submitted to nonbinding arbitration, while retaining jurisdiction for a trial de novo if either party is unsatisfied with the result of arbitration).

17. *See, e.g.*, HAW. REV. STAT. § 671-12.5 (1993 & Supp. 2008) (requiring the plaintiff to certify a good faith belief of merit based on consultation with a licensed physician before a "medical claim conciliation" panel); LA. REV. STAT. ANN. § 40:1299.39.1 (2008) (requiring MedMal plaintiffs to file a request for review with a state medical review panel as a precursor to suit).

18. *See, e.g.*, Dorris v. Detroit Osteopathic Hosp. Corp., 594 N.W.2d 455, 466 (Mich. 1999) (construing the purpose of the Michigan affidavit-of-merit statute as "to prevent frivolous medical malpractice claims").

19. *See, e.g.*, DEL. CODE ANN. tit. 18, § 6853 (1999 & Supp. 2008); GA. CODE ANN. § 9-11-9.1 (2007); MICH. COMP. LAWS § 600.2912d (2004); MO. REV. STAT. § 538.225 (2008); N.J. STAT. ANN. § 2A:53A-27 (West 2000 & Supp. 2010); N.Y. C.P.L.R. § 3012-a (McKinney 1991); N.D. CENT. CODE § 28-01-46 (2006); OKLA. STAT. tit. 63, § 1-1708.1E (repealed 2009); PA. R. CIV. P. 1042.3; S.C. CODE ANN. § 15-36-100 (2005 & Supp. 2008); VA. CODE ANN. § 8.01-50.1 (2007); W. VA. CODE ANN. § 55-7B-6(b) (LexisNexis 2008). Arizona has a slightly modified affidavit-of-merit statute, requiring "a preliminary expert opinion affidavit" to be served with initial disclosures only if expert testimony will be required. ARIZ. REV. STAT. ANN. § 12-2602(A) (2003). Some statutes explicitly require dismissal of a MedMal suit if the complaint is filed without an affidavit of merit. *E.g.*, NEV. REV. STAT. ANN. § 41A.071 (West 2006). While most states require an affidavit from a qualified medical professional, some allow the plaintiff's attorney to certify a good faith basis for belief in the merits of the case. *E.g.*, CONN. GEN. STAT. § 52-190a (2005 & Supp. 2010); FLA. STAT. ANN. § 766.104 (2005); MISS. CODE ANN. § 11-1-58 (2002 & Supp. 2008).

While the various reform approaches are not mutually exclusive,[20] the affidavit-of-merit requirement provides a low-cost way to prevent meritless suits at the earliest possible stage in litigation. It establishes an extra hurdle to filing suit, with the aim of disincentivizing only those claims entirely without merit, thereby eliminating the expense of defending against or settling clearly nonmeritorious claims.[21] In short, affidavit-of-merit statutes are drawn "to prevent frivolous medical malpractice claims."[22]

B. Pleading MedMal Diversity Cases

Diversity cases provide a special instance of MedMal litigation: federal adjudication of the generally state-law claims. Under the doctrine established in *Erie Railroad v. Tompkins*, federal courts sitting in diversity must apply state substantive law and federal procedural rules.[23] This principle aims to eliminate vertical forum shopping between state and federal courts by guaranteeing that the substantive rule of decision will be the same whether a state-law claim is brought in state or federal court.[24]

While the principle is fairly simple—equitable administration of the laws—in practice, the *Erie* determination of which law controls can be significantly more complex. *Erie* analysis begins, for our purposes, by determining whether one of the Federal Rules of Civil Procedure is directly on point and in conflict with the state rule. If so, the federal rule controls so long as it is constitutional and (even arguably) procedural.[25] If no federal rule is directly on

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20. Florida, for example, has adopted an affidavit-of-merit requirement as well as a limitation on noneconomic damages and court-ordered pretrial nonbinding arbitration. FLA. STAT. §§ 766.104, .107, .118(2) (2005).

21. *See* ARIZONA STATE SENATE RESEARCH STAFF, ISSUE PAPER: MEDICAL MALPRACTICE, at 2 (2010), *available at* http://www.azleg.gov/briefs/Senate/MEDICAL%20MALPRACTICE%20_UPDATE3.pdf (recounting that the primary insurer of practicing Arizona physicians spent nearly $6 million in 2003 defending doctors against 270 MedMal claims found to be meritless by a court).

22. *Dorris*, 594 N.W.2d at 466 (construing the purpose of the Michigan affidavit-of-merit statute).

23. 304 U.S. 64 (1938); *see also* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426 (1996) ("Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law.").

24. Hanna v. Plumer, 380 U.S. 460, 467–68 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court.").

25. *Id.* at 469–74. In its most recent foray into the *Erie* doctrine, the Supreme Court restated the "familiar" process for *Erie* analysis: "[w]e must first determine whether [the federal rule] answers the question in dispute. If it does, it governs—[state] law notwithstanding—unless it exceeds statutory authorization of Congress's rulemaking power. We do not wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid." Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010) (citations omitted).

No federal rule has ever been determined to be unconstitutional in violation of the Rules Enabling Act's admonition that the rules "not abridge, enlarge or modify any

point, the court next decides whether the state rule is "bound up" with state-created rights and obligations.[26] If so, the state rule is substantive and should control. If not, the court must then determine whether applying federal rather than state law would be outcome determinative (as measured from the time of initiation of the lawsuit). If not outcome determinative, the federal rule will apply since there is no risk of forum shopping or inequitable administration of the laws in such a case.[27] If, on the other hand, the choice of law is outcome determinative, state law must be applied, at least in the absence of "affirmative countervailing [federal] considerations."[28]

Federal courts hearing state-law MedMal claims involving affidavit-of-merit requirements face an apparent *Erie* conflict between the notice-pleading standard set forth in Rule 8 of the Federal Rules[29] and the heightened pleading requirement of state law. Perhaps not surprisingly, different federal courts have reached different conclusions: some finding that affidavit-of-merit requirements are substantive state law that merely takes the form of a procedural rule (and therefore applying the affidavit-of-merit requirement in diversity actions),[30] and others finding that Rule 8 of the Federal Rules of Civil Procedure is directly on point and in conflict with the heightened procedural pleading requirement (and therefore *not* applying the affidavit-of-merit requirement in diversity actions).[31]

The United States District Court for the Eastern District of Michigan, for example, found a direct conflict between Rule 8's notice-pleading requirements and the affidavit of merit demanded by Michigan statutory law.[32] The court based its ruling on a rather broad construction of Rule 8, finding the rule's "short and

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substantive right," 28 U.S.C. § 2072(b) (2006), but courts have occasionally construed an applicable rule narrowly to avoid a possibly unconstitutional effect on substantive state law:

> The *Erie* rule has never been invoked to void a Federal Rule. It is true that there have been cases where this Court has held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law.

Hanna, 380 U.S. at 470; *see also Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (recounting that the Court has "rejected every statutory challenge to a Federal Rule").

26. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535–38 (1958).

27. *Id.* at 536–37.

28. *Id.* at 537–38.

29. FED. R. CIV. P. 8(a)(2) (requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief").

30. *E.g.*, Chamberlain v. Giampapa, 210 F.3d 154 (3d Cir. 2000); Finnegan v. Univ. of Rochester Med. Ctr., 180 F.R.D. 247, 248–49 (W.D.N.Y. 1998).

31. *E.g.*, Long v. Adams, 411 F. Supp. 2d 701 (E.D. Mich. 2006).

32. *Id.*

plain statement of the claim"[33] language to be incompatible with heightened pleading requirements not otherwise specified in the Federal Rules.[34]

Similarly, the United States District Court for the Southern District of Georgia found a direct conflict between Rule 8 and the Georgia affidavit-of-merit statute.[35] The court reasoned that the state statute in effect established a pleading requirement mandating the inclusion of specific evidentiary material.[36] This requirement of specificity in pleading—particularly the pleading of evidentiary material—directly controverted the Federal Rules' notice-pleading standard.[37] The court thereby construed the Georgia statute as an inconsistent procedural requirement, despite its substantive purpose, and gave effect to the federal pleading standard instead.[38]

The Third Circuit Court of Appeals, in contrast, found no direct conflict between the federal pleading standard and New Jersey's affidavit-of-merit statute.[39] The court emphasized that the affidavit of merit required by statute was not, in fact, a part of the pleadings.[40] The statute did not mandate filing the affidavit until after the close of the pleadings, and the content of the affidavit did not need to include a full statement of the facts underlying the claim.[41] Beyond these procedural minutiae, the court emphasized that the purposes of the federal and state provisions were entirely distinct: the federal pleading standard was intended to give an opposing party notice of the basis and substance of the claim, whereas the New Jersey affidavit-of-merit statute was meant to weed out meritless claims at an early stage in the proceedings.[42] Since the court construed the affidavit requirement as outside of both the procedure and the purpose of the pleadings, both the federal notice-pleading standard and the state statutory requirements could be given effect.[43]

Such variation among circuits is by no means uncommon and is often quite obvious, but the reasons underlying circuit splits in general—and this one in

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33. FED. R. CIV. P. 8(a)(2).
34. *Long*, 411 F. Supp. 2d at 706.
35. Boone v. Knight, 131 F.R.D. 609 (S.D. Ga. 1990).
36. *Id.* at 611.
37. *Id.*
38. *Id.*; *see infra* Part II.A.2.
39. Chamberlain v. Giampapa, 210 F.3d 154, 158–61 (3d Cir. 2000).
40. *Id.* at 160.
41. *Id.*
42. *Id.* Some other federal courts seem to have assumed affidavit-of-merit statutes to be substantive state law, applying their requirements in diversity MedMal actions without reference to *Erie* analysis. *E.g.*, Law v. Greenwich Hosp., No. 396-cv-2147, 1997 WL 695506 (D. Conn. Oct. 21, 1997) (applying a Connecticut statute requiring MedMal plaintiffs to file with the complaint a certificate of good faith belief in the merits of each claim, which may be supported by the written opinion of a qualified health professional); Finnegan v. Univ. of Rochester Med. Ctr., 180 F.R.D. 247, 249 (W.D.N.Y. 1998) (declaring the New York affidavit-of-merit statute to be substantive law applicable in federal diversity action).
43. *Chamberlain*, 210 F.3d at 158–61.

particular—are significantly less clear.[44] Here, disparate results may be partially explained by differences in the terms of the state statutes at issue. For instance, the post-pleadings filing time specified by the New Jersey affidavit-of-merit statute allowed the Third Circuit to find that this state-law requirement was not in fact a modification of the pleading standard, and therefore not in conflict with Rule 8.[45]

This also reflects, perhaps, a narrower reading of Rule 8 by the Third Circuit than by the courts that have found such a conflict. The Michigan district court, for example, read Rule 8's statement of notice pleading more broadly, holding that the "short and plain statement" standard is a hard-and-fast rule exclusive of heightened requirements.[46] This seems to reflect a broader reading of Rule 8, giving effect to notice pleading's spirit of open courts without needless formality.

The divergent holdings may also be the result of distinct interpretive approaches to the state affidavit-of-merit statutes. That is, a court may read such a statute with an eye to its legislative purpose—substantive tort reform through a nominally procedural mechanism—and hold the state-law standard applicable. Alternatively, a court may read the statute more literally as a mere procedural modification and therefore be prone to apply the federal procedural Rule 8 in diversity cases. Whatever the reason for the split in these cases, it is interesting to note that none of their rationales explicitly hinge on the risk of forum shopping, the danger that *Erie* analysis was designed to avoid.[47]

C. Twombly *and* Iqbal *Arrive on the Scene*

In 2007, the Supreme Court changed the face of civil litigation. In *Twombly*, the Court applied a heightened pleading standard to claims brought under section 1 of the Sherman Antitrust Act.[48] Rather than accepting a complaint "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,"[49] the Court required "plausible grounds" supporting the plaintiff's claims.[50] The Court was careful to note that its holding "does not impose a probability requirement at the pleading

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44. For further discussion of federal courts' *Erie* analysis regarding the conflict between affidavit-of-merit statutes and Rule 8 before *Iqbal*'s heightened federal pleading standard, see Richard Henry Seamon, *An* Erie *Obstacle to State Tort Reform*, 43 IDAHO L. REV. 37 (2006); Dade A. Caldwell, Comment, *Civil Procedure: Medical Malpractice Gets Eerie: The* Erie *Implications of a Heightened Pleading Burden in Oklahoma*, 57 OKLA. L. REV. 977 (2004).

45. *Chamberlain*, 210 F.3d at 160.

46. Long v. Adams, 411 F. Supp. 2d 701, 706 (E.D. Mich. 2006).

47. The Third Circuit in *Chamberlain v. Giampapa* does mention forum shopping, but treats it rather summarily, accepting that there is a risk "despite the relatively low hurdle the New Jersey affidavit requirement presents to a legitimate claimant." 210 F.3d at 161.

48. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–63 (2007).

49. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

50. *Twombly*, 550 U.S. at 556.

stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the alleged wrong]."[51]

In the immediate wake of *Twombly*, commentators debated the scope of this restatement of the Rule 8 standard requiring plausibility rather than simple notice.[52] Some scholars supported the view that *Twombly* did "not mark a sea-change in pleading standards for civil litigation generally," instead predicting that the plausibility standard was intended to be applied solely in the antitrust context (or at least only in areas with comparably expensive discovery);[53] others, however, anticipated a much broader reach.[54]

In 2009, the Supreme Court dispelled these doubts about the reach of the restated pleading standard in *Ashcroft v. Iqbal*.[55] There, the Court made clear that the "decision in *Twombly* expounded the pleading standard for 'all civil actions,'" not just antitrust suits or other complex litigation.[56] The Court again emphasized that the plausibility standard is required by Rule 8, not merely a de facto amendment to the Federal Rules.[57]

II. *ERIE*, *IQBAL*, AND TORT REFORM

In the wake of *Iqbal*, it is clear that the plausibility standard also applies to pleadings in MedMal diversity actions. Rather than the simple, no-set-of-facts notice pleading required by Rule 8 prior to 2007, the plausibility standard changes Rule 8's breadth and thus the *Erie* analysis of affidavit-of-merit requirements in federal diversity suits.

A heightened federal pleading standard may appear to minimize potential conflict between Rule 8 and state affidavit-of-merit requirements: logically, a heightened federal pleading standard is closer to heightened state pleading requirements than no-set-of-facts notice pleading. Ironically, however, *Iqbal* suggests that affidavit-of-merit requirements are actually incompatible with the federal pleading standard. The Court in *Iqbal* explicitly stated that "the pleading standard Rule 8 announces *does not require 'detailed factual allegations.*'"[58] But some level of "detailed factual allegations" is exactly what affidavit-of-merit

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51. *Id.*

52. *See, e.g.*, Kendall W. Hannon, Note, *Much Ado about* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008); Wendy N. Davis, *Just the Facts, But More of Them*, A.B.A. J., Oct. 2007, at 16; John H. Bogart, *The Supreme Court Decision in* Twombly*: A New Federal Pleading Standard?*, UTAH B.J., Sept.–Oct. 2007, at 20, 22.

53. Bogart, *supra* note 52, at 22.

54. *See* Davis, *supra* note 52, at 16 (describing the use of *Twombly* in lower courts' rulings "in all types of lawsuits, including those involving employment discrimination and civil rights").

55. 129 S. Ct. 1937 (2009).

56. *Id.* at 1953 (quoting FED. R. CIV. P. 1).

57. *Id.* at 1949.

58. *Id.* (emphasis added) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

statutes require.[59] Therefore, the interpretation of even the heightened Rule 8 standard mandated by the Supreme Court's language in *Iqbal* directly conflicts with states' specific pleading requirements. In such circumstances, the state law must give way.[60]

The heightened federal pleading standard adopted in *Iqbal* addresses the same policy goals as the affidavit-of-merit approach—the dismissal of meritless claims from state and federal court systems. It also serves to decrease the risk of forum shopping due to potentially disparate pleading requirements for MedMal suits brought in federal rather than state court. Since the federal plausibility standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation,"[61] even MedMal plaintiffs subject only to the federal standard must show some level of merit to their case—enough at least to make the claim "plausible on its face."[62] While the federal standard may not require showing plausibility—or merit—by the specific means set out in state affidavit-of-merit statutes, the result is the same: an early screening of the plaintiff's claims to dismiss frivolous or clearly meritless cases at the earliest possible stage in litigation.

With these general principles in mind, this Note now reassesses analysis of the Rule 8 versus affidavit-of-merit *Erie* question in light of *Iqbal*'s new characterization of the federal pleading standard. Such analysis should help to determine how federal courts will now respond to affidavit-of-merit statutes, which itself may impact the viability of affidavits of merit as a method of MedMal reform. Interestingly enough, *Iqbal* could cause each court, while retaining its original rationale, to reverse its position.

*A. Pre-*Twombly *Cases in the Age of* Iqbal

As described above in Part I.B., courts took three distinct views of the affidavit-of-merit *Erie* question under the traditional notice-pleading rule. A broad interpretation of Rule 8's letter and policy—notice pleading as essentially mandating "a short and plain statement"[63] and no more, with heightened requirements thereby barred unless otherwise mandated by the federal rules—led the Eastern District of Michigan to conclude that Rule 8 controls.[64] The Southern District of Georgia also applied Rule 8, but based that holding primarily on the essentially procedural nature of the state-law requirement.[65] In contrast, the Third Circuit emphasized the disparate purposes of Rule 8 and the state law and read the

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59. Michigan's affidavit-of-merit statute, for example, requires that the written certification include: (1) the applicable standard of care; (2) the affiant's opinion as to how that standard of care was breached; (3) the actions that should have been taken by the defendant to comply with the standard of care; and (4) how the breach was the proximate cause of the plaintiff's injury. MICH. COMP. LAWS § 600.2912d(1) (2004).

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

61. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

62. *Twombly*, 550 U.S. at 570.

63. FED. R. CIV. P. 8(a)(2).

64. Long v. Adams, 411 F. Supp. 2d 701, 706 (E.D. Mich. 2006).

65. *See* Boone v. Knight, 131 F.R.D. 609, 611 (S.D. Ga. 1990).

state provision narrowly as outside, and independent of, the pleadings.[66] Because the affidavit-of-merit statute served a different purpose than Rule 8, the court ultimately concluded that the federal and state requirements could coexist.[67] All three rationales are based on a pre-*Twombly* notice-pleading interpretation of Rule 8 and are dramatically changed by application of the new federal plausibility standard per *Twombly* and *Iqbal*.

1. Eastern District of Michigan: A Broad Interpretation of Rule 8

The Eastern District of Michigan in *Long v. Adams* adopted a fairly broad reading of Rule 8 when determining that Rule 8 pleading requirements were in direct conflict with the Michigan state affidavit-of-merit statute.[68] The court rested primarily on a holding that Rule 8 is broad enough to "leav[e] no room for the operation of the [state] law."[69] That is, because Rule 8 contains no heightened pleading requirements—indeed, because the language requiring only "a short and plain statement of the claim"[70] is incompatible with a heightened standard—the state's heightened pleading requirement cannot reasonably coexist with the federal rule.[71]

The breadth of the rule is based, according to the court, on the juxtaposition of a general notice-pleading standard in Rule 8[72] with specific enumerated exceptions in Rule 9, which set forth a heightened requirement for pleading fraud or mistake.[73] The court bolstered its conclusion by reference to a Supreme Court case explaining that notice pleading is the rule in all civil actions unless otherwise mandated by the Federal Rules themselves: "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts."[74] Such a reading incorporates the common textual canon of reading enumerated exceptions to be exclusive exceptions, absent a clause indicating that the list of exceptions is, for instance, merely illustrative.[75] This is reinforced by the rule against surplusage,[76] for if the general rule stating the pleading standard can

66. Chamberlain v. Giampapa, 210 F.3d 154, 158–61 (3d Cir. 2000).
67. *Id.*
68. 411 F. Supp. 2d at 706.
69. *Id.* (citing Burlington Northern R.R. v. Woods, 480 U.S. 1, 4–5 (1987)).
70. FED. R. CIV. P. 8(a)(2).
71. *Long*, 411 F. Supp. 2d at 706.
72. Rule 8 requires only "a short and plain statement of the claim." FED. R. CIV. P. 8(a)(2).
73. FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.").
74. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) (footnote omitted).
75. This canon states that "[e]xceptions not made cannot be read" or "[e]xpression of one thing excludes another." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision & the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 404–05 (1950).
76. The rule against surplusage is a textual canon of interpretation that requires a court to read a rule, regulation, or statute in a manner so as to give effect to *all* of its

itself incorporate heightened pleading requirements, the enumerated exceptions would be superfluous. This argument, however, is not entirely complete. The exceptions to notice pleading enumerated in Rule 9 could just be stating one *specific* heightened requirement, which does not necessarily mean that some *general* heightened pleading could not be within Rule 8's provisions. Nevertheless, the Court has "declined to extend such exceptions to other contexts."[77]

Since the language of Rule 8(a) clearly does not itself require an affidavit of merit for MedMal claims, the court therefore found the Michigan affidavit-of-merit requirement to be incompatible with Rule 8(a) and applied the federal pleading standard.[78] Thus, a broad Rule 8 taken together with a procedural interpretation of the state affidavit-of-merit requirement[79] led the Eastern District of Michigan to conclude that the predominately procedural state and federal pleading standards were in direct conflict: *Erie* mandated Rule 8 to the exclusion of a heightened state requirement.

Extrapolating from this rationale, the Eastern District of Michigan is likely to reverse course when applying *Iqbal*'s plausibility standard. *Iqbal* reaffirmed *Twombly*'s admonition that, to survive a motion to dismiss for failure to state a claim, "the 'plain statement' [must] possess enough heft to '*sho[w]* that the pleader is entitled to relief.'"[80] This infuses the Rule 8 obligation to *show*

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provisions, that is, not construe the source in a way that would leave any clause superfluous. *See id.* at 404 ("Every word and clause must be given effect.").

77. *Swierkiewicz*, 534 U.S. at 513.

78. Long v. Adams, 411 F. Supp. 2d 701, 707 (E.D. Mich. 2006). It is interesting to note that, in slightly different circumstances, another federal court in Michigan found no direct conflict between Rule 8 and Michigan's affidavit-of-merit statute, Michigan Compiled Laws section 600.2912d. Lee v. Putz, No. 1:03-CV-267, 2006 WL 1791304, at *4 (W.D. Mich. June 27, 2006). There, the court found the affidavit-of-merit requirement to be applicable when the plaintiff had originally brought the case in state court, after which the defendant removed to federal court. *Id.* at *3. Even though the intervening procedural issue—original filing in state court and removal to federal—is pertinent to determining whether the federal pleading standard applied to the complaint as originally filed, the court went on to assert that:

> There is no direct conflict between § 600.2912d's affidavit of merit requirement and Rule 8(a). . . . The filing of an affidavit of merit along with a complaint, as required by § 600.2912d, does not expand or conflict with Rule 8(a)'s minimal pleading requirements. In fact, the affidavit of merit requirement does not have any effect on the content of a plaintiff's complaint. A plaintiff may still plead the grounds for his claim in a short plain statement while also attaching an affidavit of merit that complies with § 600.2912d. Thus, there is no conflict between Rule 8(a) and § 600.2912d.

Id. at *4.

79. This court took the view that the affidavit-of-merit requirement is given effect through a procedural mechanism, rather than interpreting it as a substantive provision. *Long*, 411 F. Supp. 2d at 707–08.

80. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) (emphasis added).

entitlement to relief[81] with a requirement that certain facts alleged in the pleadings suffice to "nudge[] [the] claims across the line from conceivable to plausible."[82]

Requiring this plausibility in pleadings undermines the court's decision to apply Rule 8. Before *Iqbal*, the court found that Rule 8 applied broadly enough to overlap with Michigan's affidavit-of-merit statute.[83] But now, *Iqbal*'s mandate of heightened pleading requirements to establish a claim's plausibility[84] directly controverts the court's finding that Rule 8 and the state statute are directly in conflict.[85] That is, *Long* depended in part on a construction of Rule 8 that absolutely barred any pleading requirement over and above simple notice pleading unless specifically excepted by the Federal Rules.[86] Now the federal standard requires just that: allegations over and above simple notice pleading to "nudge" a claim from merely possible to plausible.[87] The Michigan requirement that a MedMal complaint be accompanied by the certification of a medical practitioner that the defendant appears to have breached the applicable standard of care[88] is consistent with the new Rule 8 obligation to present enough facts to render the claim plausible on its face.[89] While the Michigan statute provides a specific manner in which the plaintiff is to plead plausibility, it is still, at heart, just a requirement that an expert certify the claim as non-frivolous and therefore plausible.[90]

The federal plausibility standard can therefore operate in concert with Michigan's affidavit-of-merit statute. But should it? Even though Rule 8 now admits some type of heightened pleading requirement, it fails to specify what form such additional allegations need take. In form, if not in underlying policy, Rule 8 still conflicts with the affidavit-of-merit statute in its specificity. Further, Rule 8's heightened standard makes forum shopping for Michigan MedMal plaintiffs less likely. These plaintiffs now cannot escape some baseline pleading requirement to show that their suit is not frivolous by the simple expedient of filing in federal court. This form of state–federal forum shopping was precisely the danger the *Erie* doctrine was designed to avoid.[91] Since the new-and-improved federal standard also disincentivizes meritless federal filings just as the affidavit-of-merit requirement does in state courts, application of state law in this context would seem less important. The diminished risk of forum shopping underscores the coordinate policy effects of plausibility pleading and affidavit-of-merit laws: a heightened Rule 8 pleading standard will act in MedMal cases to implement the substance of the affidavit-of-merit requirement. Even if affidavits of merit as tort reform represent a state's substantive policy choice merely clothed as a procedural

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81. FED. R. CIV. P. 8(a)(2).
82. *Twombly*, 550 U.S. at 570.
83. *Long*, 411 F. Supp. 2d at 706.
84. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009).
85. *Long*, 411 F. Supp. 2d at 706.
86. *Id.* at 707.
87. *Twombly*, 550 U.S. at 570.
88. MICH. COMP. LAWS § 600.2912d(1) (2004).
89. *Twombly*, 550 U.S. at 557–58.
90. § 600.2912d(1).
91. Hanna v. Plumer, 380 U.S. 460, 467–68 (1965).

requirement, diversity courts do not undermine that state substantive policy by applying the new, heightened federal procedural rule.

2. Southern District of Georgia: Affidavits of Merit as Procedure

The Southern District of Georgia also held a state affidavit-of-merit provision to be inapplicable in MedMal cases filed in federal court.[92] This court, in contrast to the Eastern District of Michigan, emphasized the procedural nature of the state-law requirement in finding that *Erie*'s rule precluded application of the state provision in diversity actions.[93] The court placed great weight on the balance between procedure and substance struck by *Erie* and its progeny.[94]

Having found that the Georgia affidavit-of-merit statute[95] set out "essentially a pleading requirement," compelling the plaintiff to include the affidavit of an expert witness in the complaint and "in effect mandat[ing] the pleading of evidentiary material,"[96] the court was compelled to give effect to the federal procedural mandate of Rule 8: notice pleading. Such specificity in pleadings—particularly the requirement of pleading evidence—runs directly contrary to the notice-pleading standard set forth by the Federal Rules.[97] In such a case, the federal rule controls over a contrary state-law provision.[98] The court was careful to note that, even though Georgia's affidavit-of-merit statute served a substantive tort-reform purpose, the mere fact that a state law "is in some sense 'substantive'" is not enough to trump the Federal Rules when a rule is directly on point and in conflict with the state law.[99]

Again, application of the *Twombly–Iqbal* plausibility standard may well change the result in the Southern District of Georgia. Even accepting the Georgia

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92. Boone v. Knight, 131 F.R.D. 609, 610 (S.D. Ga. 1990).
93. *Id.* at 610–11.
94. *Id.*
95. GA. CODE ANN. § 9-11-9.1 (2007).
96. *Boone*, 131 F.R.D. at 611 (emphasis omitted).
97. *Id*.
98. *Id.*
99. *Id.* (referring to Hanna v. Plumer, 380 U.S. 460 (1965)). This type of analysis finds some support in the Supreme Court's most recent *Erie* case. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1439–42 (2010). Writing for the Court, Justice Scalia dismissed "[t]he dissent's approach of determining whether state and federal rules conflict based on the subjective intentions of the state legislature [as] an enterprise destined to produce 'confusion worse confounded.'" *Id.* at 1441–42 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)). The dissent argued that a state law's distinct substantive purpose could save it from conflict with a federal rule which, although apparently conflicting in form, served a different purpose. *Id.* at 1466–67 (Ginsburg, J., dissenting). That interpretation would directly and broadly address the mandate that federal diversity courts apply state substantive law and only procedural aspects of federal law. *Id.* at 1460. The *Shady Grove* majority, however, took a different position, instead eschewing the "arduous" task of determining the legislative "purpose behind any putatively pre-empted state procedural rule, even if its text squarely conflicts with federal law." *Id.* at 1441 (majority opinion). Indeed, as Justice Scalia pointed out, the test cannot be "whether the rule affects a litigant's substantive rights [because] most procedural rules do." *Id.* at 1442 (plurality opinion) (citation omitted).

statute as essentially procedural in nature, *Erie* teaches only that "in situations of . . . *conflict*, the Federal Rule is controlling."[100] A broadened Rule 8 that contemplates some aspects of heightened pleading calls into question whether Georgia's affidavit-of-merit requirement in fact conflicts with the federal standard. Since both the federal and the state provisions contemplate some version of a heightened pleading standard, it seems that they can operate in conjunction. Rule 8 requires pleading of sufficient facts to render the claims plausible rather than merely possible.[101] Georgia's statute requiring the "[a]ffidavit of [an] expert to be filed with complaint in [an] action for damages alleging professional malpractice"[102] can be read merely to inform *what method* of heightened pleading (as per the federal standard) is necessary in a Georgia-based MedMal diversity case.[103]

3. Third Circuit: The Purpose of the Provisions

In contrast, the Third Circuit's decision in *Chamberlain v. Giampapa* emphasized the distinct operation and purposes of Rule 8 and a New Jersey affidavit-of-merit statute[104] by allowing both to be given effect in a diversity action.[105] This court reasoned that both Rule 8 and the New Jersey statute could operate because they control different spheres of the litigation: Rule 8 governs the form and content of the pleadings, and the affidavit statute essentially adds a substantive element to the plaintiff's prima facie case.[106] That is, the required affidavit "is not a pleading, is not filed until after the pleadings are closed, and does not contain a statement of the factual basis for the claim."[107] Construed in this manner, the affidavit is not truly a part of the pleadings, so the added specificity required by the state law does not change the "short and plain statement" required by Rule 8.[108] This reading of the Federal Rules construes the applicability of Rule 8 more narrowly, essentially applying it only to the complaint itself filed by the plaintiff. It is based at least in part on the time at which the affidavit must be filed: "after the pleadings are closed."[109]

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100. *Boone*, 131 F.R.D. at 611 (emphasis added) (construing Hanna v. Plumer, 380 U.S. 460 (1965)).

101. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

102. GA. CODE ANN. § 9-11-9.1 (2007).

103. As was the case in Michigan, see *supra* Part II.A.1, the question remains whether the court *should* allow the affidavit-of-merit statute to function. Again, a heightened federal pleading standard decreases the likelihood of forum shopping and supports the policy implemented by state tort-reform efforts. These implications are discussed further below. *See infra* Part II.B.

104. N.J. STAT. ANN. § 2A:53A-27 (2009).

105. 210 F.3d 154, 158–61 (3d Cir. 2000).

106. *Id.* The technical distinction rests to a certain extent on a nuanced view of the New Jersey statute's terms: because the affidavit "is not filed until after the pleadings are closed, and does not contain a statement of the factual basis for the claim," it is not, in the court's view, part of the pleadings. *Id.* at 160 (construing section 2A:53A-27).

107. *Id.*

108. *Id.*

109. *Id.*

This technical rationale was supported, in the court's view, by the disparate purposes of Rule 8 and the state law.[110] The procedural distinction was justified because "[Rule 8's] overall purpose is to provide notice of the claims and defenses of the parties," whereas the state law's "purpose is not to give notice of the plaintiff's claim, but rather to assure that malpractice claims for which there is no expert support will be terminated at an early stage in the proceedings."[111] Given the different underlying policies, as well as the difference in filing deadlines, allowing these seemingly contradictory rules to "exist side by side, 'each controlling its own intended sphere of coverage without conflict,'" became a viable option.[112]

Application of *Iqbal*'s plausibility standard to the technical rationale of *Chamberlain* does not change the conclusion that Rule 8 and the New Jersey statute are not in conflict, since the court's rationale depends on a construction of the affidavit-of-merit requirement as an independent element of the claim outside of the pleadings.[113] The policy basis for applying the state law, however, is undermined by the new federal plausibility standard. The Third Circuit described Rule 8's general purpose as "provid[ing] notice of the claims and defenses of the parties."[114] While that certainly was the purpose of notice pleading, the new federal plausibility standard incorporates more than mere notice of claims and defenses. At some level, the standard announced in *Twombly* and reaffirmed in *Iqbal* is designed to ensure, by "ask[ing] for more than a sheer possibility that a defendant has acted unlawfully," that frivolous claims filed in federal court can be eliminated at an early stage through dismissal for failure to state a claim.[115] This underlying plausibility purpose mirrors the purpose of New Jersey's affidavit-of-merit statute as described by the Third Circuit: "to assure that malpractice claims for which there is no expert support will be terminated at an early stage in the proceedings."[116] Granted, the New Jersey statute is drawn more narrowly, requiring a specific type of evidence to weed out frivolous suits. But Rule 8 and the New Jersey provision nevertheless operate in essentially the same way to effect essentially the same purpose.

To a certain extent, this new similarity of purpose also undermines the Third Circuit's construction of the New Jersey statute as distinct from a pleading standard. There, the court based its characterization of the state law on the content and timing of the required affidavit.[117] Because the state-required affidavit "does not contain a statement of the factual basis for the claim," it is not in fact a part of the pleadings but more of an independent element of the state-law MedMal claim.[118] The same could be argued, however, of any extra facts included in a complaint to meet the heightened federal plausibility standard. That is, the

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110. *Id.*
111. *Id.*
112. *Id.* (citing Walker v. Armco Steel Corp., 446 U.S. 740, 752 (1980)).
113. *Id.* at 158–61.
114. *Id.* at 160.
115. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009).
116. *Chamberlain*, 210 F.3d at 160.
117. *Id.*
118. *Id.*

additional information provided in an affidavit of merit, while providing evidence beyond that required for a traditional conception of stating a claim, should now be seen as enhancing the likelihood of the claim: taking it from possible to plausible as required by *Twombly* and *Iqbal*.[119] This leaves only the timing for filing the affidavit[120]—rather weak grounds—to distinguish the affidavit-of-merit requirement from a pleading requirement.

Iqbal also minimizes the already low risk of forum shopping (and "inequitable administration of the laws")[121] due to disparate treatment of the New Jersey affidavit-of-merit requirement in state and federal courts, respectively. The Third Circuit found a risk of forum shopping if the state law were not applied in diversity actions, despite recognizing that the affidavit-of-merit provision constitutes a "relatively low hurdle . . . [for] a legitimate claimant."[122] After *Iqbal*, the plausibility standard provides a similar, if less specifically defined, hurdle for potential plaintiffs. While the federal rule does not require an affidavit of merit per se, plaintiffs must provide some evidence from which the court can find their claims more than merely conceivable.[123] Thus, plaintiffs who cannot provide sufficient support for their claims in state court will not, as the Third Circuit feared, have an "opportunity for a 'fishing expedition' . . . [with] the hope of turning up evidence of a meritorious claim or of a settlement to save defense litigation costs"[124] by the mere expedient of filing in federal court.

4. MedMal Cases After Iqbal

It is too soon as yet to know just what actual impact *Iqbal*'s plausibility standard will have on diversity actions implicating the applicability of state-law affidavit-of-merit provisions in federal court. It may be that courts remain divided, sticking to their original rationales with little regard for the difference plausibility pleading could make. Or the courts may apply the plausibility standard to reach the opposite conclusion than before, which would still yield a circuit split.

The United States District Court for the Northern District of Ohio, one of the few courts to directly address the affidavit-of-merit *Erie* question in the wake of *Iqbal*, determined that Ohio's affidavit-of-merit statute[125] was indeed applicable to state MedMal claims filed in federal court.[126] The court there emphasized the different purposes served by the pleading standard (notice of claims) and the

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119. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (clarifying that the plausibility standard "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [the alleged wrong]").

120. Within sixty days after the defendant answers the complaint. N.J. STAT. ANN. § 2A:53A-27 (2009).

121. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

122. *Chamberlain*, 210 F.3d at 161.

123. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009).

124. *Chamberlain*, 210 F.3d at 161.

125. OHIO R. CIV. P. 10(D)(2).

126. Nicholson v. Catholic Health Partners, No. 4:08CV2410, 2009 WL 700768, at *2–5 (N.D. Ohio Mar. 13, 2009). Note that the Northern District of Ohio to a great extent adopted the reasoning of the Third Circuit in *Chamberlain v. Giampapa*, 210 F.3d 154 (3d Cir. 2000). *See supra* Part II.A.3.

affidavit-of-merit requirement (terminating unsupported claims early in the proceedings).[127] It also applied a version of *Erie* analysis focusing on whether the choice of law would be outcome determinative.[128] The court reasoned that the statute seeks to do more than simply modify a procedural rule, "rather, it seeks to accomplish an important policy consideration of deterring the filing of frivolous medical malpractice claims."[129] Further, forum shopping would be encouraged by applying the federal pleading standard to the exclusion of the Ohio statute "because it would allow plaintiffs who would otherwise face dismissal in Ohio courts to file the claim without an affidavit of merit in federal court and proceed through discovery in federal court."[130]

The Northern District of Ohio did not, however, address the impact of *Twombly* and *Iqbal*'s federal plausibility pleading standard on the issue. Again, the policy clarified in *Iqbal* includes an implicit desire to eliminate frivolous claims early in the litigation by "ask[ing] for more than a sheer possibility that a defendant has acted unlawfully."[131] This essentially mirrors the purpose of the Ohio affidavit-of-merit statute as construed by the Supreme Court of Ohio and adopted by the Northern District of Ohio here: "to deter the filing of frivolous medical-malpractice claims."[132]

Similarly, the *Twombly–Iqbal* plausibility rule mitigates the forum shopping concern raised by the court. The question of whether the choice of law would be outcome determinative—and thus incentivize forum shopping—must be addressed from the time of the lawsuit's initiation.[133] This focuses the inquiry on whether the application of the federal rather than state rule in federal court would influence a plaintiff's initial decision of where to file, not whether the choice of law would determine the outcome at some later point.[134] Because the *Iqbal*

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127. *Nicholson*, 2009 WL 700768, at *4 (citing *Chamberlain*, 210 F.3d at 160).

128. *Id.* at *5.

129. *Id.* (citing Fletcher v. Univ. Hosps. of Cleveland, 897 N.E.2d 147, 149 (Ohio 2008) (construing the Ohio affidavit-of-merit statute)).

130. *Id.*

131. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

132. *Nicholson*, 2009 WL 700768, at *5 (citing *Fletcher*, 897 N.E.2d at 149).

133. Hanna v. Plumer, 380 U.S. 460, 468–69 (1965).

134. *Id.* The Court in *Hanna* explained that "outcome determinative" was to be analyzed as it might reflect on initial choice of forum, not whether at some point in the litigation the rule might dictate the result:

> The difference between the conclusion that the [state] rule is applicable, and the conclusion that it is not, is of course at this point 'outcome-determinative' in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4(d)(1) governs, the litigation will continue. But in this sense every procedural variation is 'outcome-determinative.' For example, having brought suit in a federal court, a plaintiff cannot then insist on the right to file subsequent pleadings in accord with the time limits applicable in state courts, even though enforcement of the federal timetable will, if he continues to insist that he must meet only the state time limit, result in determination of the controversy against him. So it is here. Though choice of the federal or

standard requires plausibility, not mere notice, it is unlikely that a plaintiff, when choosing where to file suit, would find federal court preferable due to the absence of an affidavit-of-merit requirement. While the federal rule would allow various forms of evidence to support plausibility and Ohio's statute permits only one, the fact remains that both the federal and the state rule require something more than notice, something to "nudge" a claim from merely possible to plausible.[135]

The most to be gleaned from *Nicholson* seems to be that, while the court attacked the *Erie* question of affidavits of merit head on, it failed to address the *Iqbal* question. For now, at least, the potential impact of plausibility pleading on the decision between Rule 8 and state-law affidavit-of-merit requirements remains to be seen.

B. Back to Square One: Applying Iqbal *to the Affidavit-of-Merit* Erie *Question*

1. In Theory

Interestingly, *Iqbal* would seem to suggest both that state law should apply and that Rule 8 should control. On the state-law side, a plausibility pleading standard diminishes conflict between the Rule 8 pleading standard and heightened state affidavit-of-merit requirements; under traditional *Erie* analysis, the state law should therefore control.[136] Affidavit-of-merit statutes add a requirement of pleading certain facts that tend to show the plaintiff has a meritorious claim.[137] Michigan, for example, requires that the affidavit of merit contain a medical professional's sworn statement as to: (1) the applicable standard of care; (2) the affiant's opinion as to how that standard of care was breached; (3) the actions that should have been taken by the defendant to comply with the standard of care; and (4) how the breach was the proximate cause of the plaintiff's injury.[138]

The federal plausibility standard similarly requires "enough fact to raise a reasonable expectation that discovery will reveal evidence of [the alleged wrong]."[139] This is, of course, a more general requirement; it does not specify particular facts that need to be pled in order to give rise to plausibility. It is not, however, necessarily inconsistent with the specific requirements of affidavit-of-merit provisions. In both cases, more facts than mere notice must be included to avoid dismissal for failure to state a claim. Traditional *Erie* analysis would suggest that, since there is no inherent conflict between the rules and since the state provision serves some substantive purpose—since it is in some way "bound up with [state-created] rights and obligations"[140]—state law should govern.

> state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of a forum.

Id.

135. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).
136. *See supra* text accompanying notes 25–28.
137. *See supra* Part I.A.
138. MICH. COMP. LAWS § 600.2912d(1) (2004).
139. *Twombly*, 550 U.S. at 556.
140. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535–38 (1958).

However, *Iqbal* also minimizes the risk of forum shopping, thereby addressing *Erie*'s underlying policy concern without the need to apply state law in federal court.[141] From this perspective, *Iqbal* seems to make a stronger case for applying the federal pleading standard and excluding affidavit-of-merit requirements. Plaintiffs choosing where to file suit face some form of heightened pleading requirement in both federal and state forums. Even if federal courts refuse to require plaintiffs to plead the specific information mandated by state-law affidavits of merit, the plaintiff must still plead sufficient facts to make the claim "plausible on its face."[142] Even without applying affidavit-of-merit provisions, there is still a barrier to plaintiffs seeking to file frivolous MedMal suits in federal court.

The *Iqbal* plausibility standard adequately addresses the substantive aspect of affidavit-of-merit statutes: tort reform through avoiding frivolous litigation at the outset. And the requirements of the affidavit-of-merit statutes are in sufficient conflict with Rule 8's more general plausibility standard so as to mandate, under *Erie* analysis, the federal over the state standard. Under *Erie*, if a Federal Rule is on point and conflicts with the state statute, the federal provision controls.[143]

This Author suggests that the federal plausibility standard should apply despite more specific heightened state-law provisions for these reasons: (1) Rule 8 and specific affidavit-of-merit requirements, while not entirely inconsistent, certainly conflict as to the specificity of evidence demanded; (2) insofar as affidavit-of-merit requirements reflect the substantive policy of a state to reform MedMal litigation by eliminating frivolous suits as early as possible, *Iqbal*'s plausibility standard serves the same purpose; and (3) adopting the federal rule is not outcome determinative in the pre-filing forum-shopping sense.

2. In Practice

An example of the full *Erie* analysis that accounts for *Iqbal*'s pleading standard may be instructive. Assume that the affidavit-of-merit statute mirrors Michigan's provision:

> [T]he plaintiff in an action alleging medical malpractice . . . shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness . . . . The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.

141. *See supra* text accompanying notes 27–28.
142. *Twombly*, 550 U.S. at 570.
143. *See supra* text accompanying note 25.

> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.[144]

The core issue the court must determine is whether the affidavit-of-merit provision is to be considered an aspect of substantive state law (even if phrased as a procedural requirement), or just a procedural requirement (even if in some way related to effectuating a substantive policy).

First, the court will determine whether Rule 8 is directly on point and in conflict with the state rule.[145] Rule 8, of course, governs the adequacy of pleadings. Here, the precise terms of the statute at issue may be determinative. While the general run of affidavit-of-merit statutes are presented as pleading requirements,[146] some of these provisions allow a certain amount of leeway for courts to construe them as non-pleadings.[147] However, the more straightforward reading of most of these state statutes leads to the conclusion that, as a practical matter, they announce a legislative modification of the pleading standard for MedMal cases. Michigan's statute, for example, actually requires the affidavit of merit to be filed with the complaint.[148] Additionally, the content of the affidavit is tailored to describe the elements of a MedMal claim: standard of care, breach, and causation.[149] While the form is slightly different than traditional negligence notice pleading, the timing and content track (and somewhat supplement) traditional pleading requirements. Here, it is reasonable to conclude that the affidavit-of-merit statute, like Rule 8, is designed to determine the adequacy of pleadings.

Since Rule 8 is directly on point for a state statute that also seeks to govern pleadings, the court must determine whether the state and federal rules directly conflict.[150] This question could be resolved either way. The affidavit-of-merit statute with its required content of duty, breach, causation, and what actions should have been taken[151] is obviously more specific in its requirements than the

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144. MICH. COMP. LAWS § 600.2912d(1) (2004).

145. Hanna v. Plumer, 380 U.S. 460, 469–74 (1965).

146. *E.g.*, GA. CODE ANN. § 9-11-9.1 (2007) (requiring an expert's affidavit to be filed with the MedMal complaint); MICH. COMP. LAWS § 600.2912d (requiring a MedMal plaintiff to file the affidavit with the complaint); NEV. REV. STAT. § 41A.071 (2006) (requiring dismissal of a MedMal suit if the complaint is filed without an affidavit of merit).

147. *See* Chamberlain v. Giampapa, 210 F.3d 154, 160 (3d Cir. 2000) (construing the New Jersey affidavit-of-merit statute, N.J. STAT. ANN. § 2A:53A-27 (2009), to find that the required affidavit "is not a pleading, is not filed until after the pleadings are closed, and does not contain a statement of the factual basis for the claim"). *See supra* Part II.A.3.

148. MICH. COMP. LAWS § 600.2912d(1).

149. *Id.*

150. *Hanna*, 380 U.S. at 469–74.

151. *E.g.*, MICH. COMP. LAWS § 600.2912d(1).

plausibility standard. In that sense, the two directly conflict since Rule 8 would allow different types of evidence to shore up a complaint—just "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence."[152] On the other hand, the two rules are not entirely incompatible. Indeed, the information provided in the affidavit of merit is precisely the type that would tend to make the plaintiff's claim plausible rather than merely possible. On balance, however, the state requirement seems too narrowly drawn to comport with even the heightened federal standard: after *Twombly* and *Iqbal*, Rule 8 does not connote mere notice pleading, but its plausibility requirement is not nearly as stringent or as specific as the state affidavit-of-merit provision.

With the Federal Rule directly on point and in conflict with the state statute, *Erie* would mandate applying Rule 8.[153] However, assume for the sake of argument that Rule 8 is not directly on point. The court next determines whether the state provision is "bound up with [state-created] rights and obligations."[154] As a part of broader MedMal reform, an affidavit-of-merit statute likely qualifies under this criterion. While the method is procedural, the purpose is substantive: lower health care costs by limiting the costs of MedMal litigation through early dismissal of frivolous claims.[155] Because of this substantive purpose and impact, this element of *Erie* analysis suggests state law should control.[156]

Assuming that the last factor did not dispose of the issue, the court must finally address whether failure to apply the state law would be outcome determinative at the outset of a suit.[157] This factor squarely addresses the possibility of forum shopping, the very thing *Erie* sought to avoid.[158] There is some small chance, of course, that plaintiffs might choose to file in federal court because of the absence of an affidavit-of-merit requirement. That danger is mitigated, however, by *Iqbal*'s raising of the threshold for pleading to plausibility. While the plausibility standard may not require the same evidence in the same form as the affidavit-of-merit statute, it nevertheless "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[159] Thus the danger the Third Circuit foresaw in *Chamberlain*—the "opportunity for a 'fishing expedition'" in federal court for a bad-faith plaintiff with a frivolous claim, who could not acquire an affidavit of merit and therefore could not sue in state court[160]—is significantly lessened.

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152. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

153. *Hanna*, 380 U.S. at 469–74.

154. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535–38 (1958).

155. *See supra* notes 2, 21, 111 and accompanying text.

156. *See Hanna*, 380 U.S. at 469–74. *But see* Shady Grove Orthopedic Assocs. V. Allstate Ins. Co., 130 S. Ct. 1431, 1441–42 (2010) ("[D]etermining whether state and federal rules conflict based on the subjective intentions of the state legislature [as] an enterprise destine to produce 'confusion worse confounded.'" (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

157. *Byrd*, 356 U.S. at 537; *Hanna*, 380 U.S. at 468–69.

158. *Hanna*, 380 U.S. at 468–69.

159. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

160. Chamberlain v. Giampapa, 210 F.3d 154, 161 (3d Cir. 2000).

III. OPEN POLICY QUESTIONS

Assume for the moment that *Iqbal* inspires courts to apply the federal pleading standard in MedMal diversity cases, leaving state affidavit-of-merit statutes by the wayside. What impact might this have on affidavit-of-merit statutes currently on the books, and how would it affect the viability of affidavit-of-merit statutes as an avenue of MedMal reform?

An affidavit of merit (or some variation thereof incorporated into the complaint) may itself form the basis of the plausibility required by *Iqbal*.[161] Even if federal plaintiffs are not technically required to seek and file affidavits of merit, some may choose to do so anyway. Here, state affidavit-of-merit statutes would retain their practical effect—avoiding frivolous litigation—even without being directly applied by their terms in federal court.

Additionally, the majority of MedMal cases are likely filed in state courts because federal courts require some independent basis, such as diversity or supplemental jurisdiction, to support jurisdiction in MedMal actions.[162] As such, federal courts refusing to apply affidavit-of-merit statutes may have a limited effect on the impact of current affidavit-of-merit provisions and the prospects for future such provisions.

There is a further question—independent of *Iqbal* and the applicability of affidavit-of-merit requirements in federal courts—of the efficacy of these statutes in creating positive change in the health care system. Physicians cite a fear of being sued, rather than a fear of large damage awards, as at least one cause of the increase in defensive medicine, which in turn tends to drive up health care costs through the extra tests and procedures that would not have been ordered but for the implicit threat of litigation.[163] Since affidavit-of-merit statutes ostensibly bar the courthouse door to plaintiffs with meritless claims who otherwise would have filed suit,[164] physicians in a state with such a law should feel, and actually be, somewhat shielded from unwarranted liability and the hassle and cost of a frivolous lawsuit.

Others suggest that different reforms—for instance, focusing directly on limiting available damages, seen as the greatest cost of the MedMal system—are more effective in decreasing the cost of the malpractice system. The Congressional Budget Office (CBO), for example, has listed several recommendations—with no mention of affidavits of merit—for limiting MedMal liability and thereby reducing health care costs.[165] Indeed, the CBO reported that payment of claims itself

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161. *See supra* text accompanying notes 150–152.

162. *See* 28 U.S.C. §§ 1332(a), 1367 (2006).

163. *Obama's Health Care Plan and Tort Reform*, FINDLAW (Aug. 19, 2009), http://knowledgebase.findlaw.com/kb/2009/Aug/1339643_1.html.

164. *See Chamberlain*, 210 F.3d at 160 (construing the purpose of New Jersey's affidavit-of-merit statute as weeding out frivolous suits); ARIZONA STATE SENATE RESEARCH STAFF, *supra* note 21, at 2 (describing an affidavit-of-merit law as a cure to excessive costs incurred defending against meritless claims).

165. Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Senator Orrin G. Hatch (Oct. 9, 2009), *available at* http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort_Reform.pdf (noting a noneconomic damage cap, a punitive damage cap, an abrogation of the collateral source rule, the replacement of joint-and-several liability

accounted for approximately two-thirds of MedMal insurers' total costs.[166] Assuming these claims are non-frivolous, the vast majority of MedMal costs would not be affected directly by affidavit-of-merit requirements tailored to prevent frivolous suits. This suggests that if the CBO's numbers are accurate, then damage caps may increasingly be preferred over affidavit-of-merit approaches. Any perceived lack of efficacy—due, for example, to federal courts refusing to apply affidavit-of-merit requirements in diversity cases—could further disincentivize MedMal reform by affidavit of merit.

The aftermath of federal health care reform may witness a resurgence in state attempts to further regulate or limit MedMal litigation. While the federal health care reform law did not address MedMal directly, the Senate amendments to the House bill incorporated a call for state demonstration programs testing new avenues to limit the cost of MedMal to the health care system.[167] Just what role affidavits of merit may play in a renewed MedMal reform effort remains unclear, but the coming months should see some experimentation with—if not clarification of—the role of federal courts in MedMal reform.

While the future of affidavits of merit as MedMal reform remains hazy, these statutes remain in force across much of the country.[168] Given the likelihood that the proportion of MedMal claims filed in federal court is small, plus the potential for an affidavit of merit or its analogue to satisfy the new federal pleading standard, *Iqbal*'s impact[169] on the *Erie* decision not to apply affidavit-of-merit requirements in federal court may have a limited effect on legislative policy.

CONCLUSION

Iqbal has sent ripples across the waters of civil litigation in federal courts. Its full effect has yet to be seen, but as of this writing it has already been cited in over 15,000 cases. One of the most remarkable things about *Iqbal*—beyond its fundamental shift in what had, prior to 2007, appeared to be a well-settled area of the law—is the breadth of its reach across all civil claims.

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with a fair-share rule, and a shortened statute of limitations as "typical proposals" for MedMal reform).

166. CONG. BUDGET OFFICE, LIMITING TORT LIABILITY FOR MEDICAL MALPRACTICE 3 (2004), *available at* http://www.cbo.gov/ftpdocs/49xx/doc4968/01-08-MedicalMalpractice.pdf.

167. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6801, 124 Stat. 119, 804 (2010). This section, delineating the "sense of the Senate" regarding MedMal, suggested that health care reform could be "an opportunity to address issues related to medical malpractice" and encouraged states to "develop and test alternatives to the existing civil litigation system as a way of improving patient safety, reducing medical errors, encouraging the efficient resolution of disputes, [and] increasing the availability of prompt and fair resolution of disputes." *Id.* The law also calls for state experimentation in the area of MedMal reform, suggesting a "[s]tate demonstration program to evaluate alternatives to the existing civil litigation system with respect to the resolution of medical malpractice claims." *Id.*

168. *See supra* Part I.A.

169. The existence of which depends on whether the courts in the end incorporate *Iqbal*'s standard and policies into the affidavit-of-merit question in diversity suits.

Affidavits of merit provide a good window into the potential impact of *Iqbal*. Arising as a legislature's substantive policy choice in tort reform, in the medical malpractice arena generally relegated to state law, affidavits of merit may still be disrupted by *Iqbal*'s new pleading standard.

But *Iqbal*'s new standard also gives the courts a chance to revisit the *Erie* question of affidavits of merit; to take a second look at whether the state rules are procedure masquerading as substantive law, or vice versa; to reassess the policies supported by both the pleading standard and the state statute; and to closely investigate the real tie between affidavits of merit and forum shopping. Perhaps such inquiries will lead, eventually, to some clarity and uniformity in the law. Perhaps we will be left with a heretofore little-known solution to the affidavit-of-merit *Erie* problem that is neat, plausible, and right.