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David L. Bishop

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NOTES

MEDICAL MALPRACTICE PANELS AND FEDERAL DIVERSITY JURISDICTION: PRESERVING ACCESS TO FEDERAL COURTS BY ANALYZING THE NATURE OF THE PANEL

State legislatures have responded to the spiraling costs of medical malpractice insurance by enacting laws to encourage out-of-court settlement of malpractice claims. Over twenty states have enacted Medical Malpractice Panel (MMP) laws that require plaintiffs to submit malpractice claims to a panel before bringing suit in state court.¹ The panel's findings usually are not binding, and the parties may seek a trial de novo after the MMP proceeding.² Nonetheless, plaintiffs have sought to circumvent these statutes by filing malpractice claims directly in federal court.

The courts have disagreed about whether the application of MMP laws impermissibly impairs federal diversity jurisdiction. One court focused on whether the panel resembled a judicial or administrative body, and, concluding that it was closely akin to a court, held that states may not require plaintiffs who meet the requirements of federal diversity jurisdiction to proceed first in a quasi-state court.³ Most courts,⁴ however, have analyzed attempts

¹ See Note, *Mandatory State Malpractice Arbitration Boards and the Erie Problem: Edelson v. Soricelli*, 93 HARV. L. REV. 1562, 1562 n.2 (1980); Note, *The Confrontation Between State Compulsory Medical Malpractice Screening Statutes and Federal Diversity Jurisdiction*, 1980 DUKE L.J. 546, 548 n.5; notes 18, 19, and accompanying text *infra*.

The statutes in nine states merely provide frameworks for the state administration of whatever dispute resolution procedure the parties agree upon. See ALA. CODE §§ 6-5-584 (1975); CAL. CIV. PROC. CODE § 1295 (West Supp. 1980); CONN. GEN. STAT. §§ 38-19b to 19f (1979); GA. CODE ANN. §§ 7-402 to 424 (Supp. 1980); ILL. ANN. STAT. ch. 10, §§ 201-214 (Smith-Hurd Supp. 1981), *declared unconstitutional*, *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); ME. REV. STAT. ANN. tit. 24, §§ 2801 to 2809 (Supp. 1980-81); MICH. COMP. LAWS ANN. §§ 500.3054 to .3056 (Supp. 1980-81); S.D. CODIFIED LAWS ANN. § 21-25b-1 to -26 (1979); VT. STAT. ANN. tit. 12, §§ 7001 to 7008 (Supp. 1980).

Although a claimant may immediately bring an action in court in Arkansas and New Hampshire, he has the option of initially bringing the claim before a panel. ARK. STAT. ANN. § 34-2601 to 2612 (Supp. 1979); N.H. REV. STAT. ANN. § 519-A:1-10 (1974).

² See notes 18, 19, and accompanying text *infra*.

³ *Wheeler v. Shoemaker*, 78 F.R.D. 218, 222-23 (D.R.I. 1978). See also *Edelson v. Soricelli*, 610 F.2d 131, 141-46 (3d Cir. 1979) (Rosenn, J., dissenting).

Plaintiffs have also alleged that MMP statutes violate due process, equal protection, separation of powers, and the right to trial by jury. Some have argued that the laws create a conflict of interest when panelists are physicians and violate state laws requiring that judges be elected. One or more of these arguments failed in the following cases: *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979) (Florida MMP law); *Seoane v. Ortho*

to circumvent MMP laws without characterizing the nature of the panel and have held that *Erie Railroad v. Tompkins*⁵ and its progeny require plaintiffs to follow the state procedure before suing in federal court.

This Note suggests a methodology for courts to use in examining the conflict between MMP laws and the federal courts' free exercise of their diversity jurisdiction. When determining whether to apply the MMP law, federal courts should initially focus on the nature of the panel. Whether MMP laws undermine the choice of judicial forums guaranteed by the federal diversity jurisdiction statute⁶ by requiring plaintiffs to submit claims first to a state court is an essential element of a balancing of federal and state interests. Because of the differences among MMP statutes, however, this Note refrains from uniformly characterizing these

Pharmaceuticals, Inc., 472 F. Supp. 468 (E.D. La. 1979) (Louisiana MMP law); Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421 (N.D. Ind.), *aff'd*, 603 F.2d 646 (7th Cir. 1979) (Indiana MMP law); Flotemersch v. Bedford County Gen. Hosp., 69 F.R.D. 556 (E.D. Tenn. 1975); Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (en banc); Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976); Everett v. Goldman, 359 So. 2d 1256 (La. 1978); Attorney Gen. v. Johnson, 282 Md. 274, 385 A.2d 57 (1978); Prendergast v. Nelson, 199 Neb. 97, 246 N.W.2d 657 (1977); Kletnieks v. Brookhaven Mem. Ass'n, 53 A.D.2d 169, 385 N.Y.S.2d 575 (2d Dep't 1976); Halpern v. Gozan, 85 Misc. 2d 753, 381 N.Y.S.2d 744 (Sup. Ct. 1976); Parker v. Childrens Hosp., 483 Pa. 106, 394 A.2d 932 (1978), *overruled*, Mattos v. Thompson, 421 A.2d 190 (Pa. 1980); State *ex. rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978).

But see Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977) (Arizona MMP bonding requirement violated state privileges and immunities clauses); Aldana v. Holub, 381 So. 2d 231 (Fla. 1980) (Florida MMP statute violates due process clauses of federal and state constitutions); Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976) (Illinois MMP act violated state constitutional provisions vesting judicial power in the state courts and granting right to trial by jury); Cardinal Glennon Mem. Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. 1979) (Missouri MMP statute violated state constitutional right to open courts); Simon v. St. Elizabeth Medical Center, 3 Ohio Op. 3d 164, 355 N.E.2d 903 (C.P. 1976) (Ohio MMP law violated equal protection and right to trial by jury) (dicta); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (C.P. 1976) (Ohio MMP law treating medical malpractice claims and other tort claims differently violated equal protection) (dicta); Mattos v. Thompson, 421 A.2d 190 (Pa. 1980) (Pennsylvania MMP violated state constitutional right to trial by jury).

See generally Note, *The Constitutional Considerations of Medical Malpractice Screening Panels*, 27 AM. U.L. REV. 161 (1977); Comment, *Constitutional Challenges to Medical Malpractice Review Boards*, 46 TENN. L. REV. 607 (1979); 9 TEX. TECH. L. REV. 679 (1978); 53 TUL. L. REV. 640 (1979).

⁴ *See, e.g.*, DiAntonio v. Northampton-Accomack Mem. Hosp., 628 F.2d 287 (4th Cir. 1980); Davison v. Sinai Hosp., 617 F.2d 361-362 (4th Cir. 1980) (per curiam); Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979).

⁵ 304 U.S. 64 (1938).

⁶ 28 U.S.C. § 1332 (1976). For a discussion of the possible supremacy clause implications of MMP statutes, see notes 64-65 *infra*.

statutes; rather, it proposes an analytical framework within which courts can examine the peculiarities of each law.⁷

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STRUCTURE OF STATE MEDICAL MALPRACTICE PANELS

Mandatory MMP laws are diverse. The statutes authorize malpractice arbitration panels of from three to seven⁸ attorneys,⁹ health care professionals,¹⁰ laymen,¹¹ or arbitrators.¹² Frequently, state court judges serve on the panels.¹³ In most states a state judge,¹⁴ an administrator,¹⁵ or the parties themselves¹⁶ select the members. Panel proceedings are generally informal, although some statutes import state judicial rules of evidence and procedure.¹⁷ Some statutes require aggrieved parties to seek an arbi-

⁷ *But see* Note, 1980 DUKE L.J., *supra* note 1 (arguing MMP statutes need not be applied by federal courts).

⁸ *See, e.g.*, IDAHO CODE § 6-1002 (1979) (four member panel when claim involves hospital); N.M. STAT. ANN. § 41-5-17 (D) (1978) (six member panel consisting of three attorneys and three health care providers); PA. STAT. ANN. tit. 40, § 1301-308(b) (Purdon Supp. 1980-81) (seven member panel consisting of three members of the public, two attorneys, and two health care providers), *declared unconstitutional*, *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980); TENN. CODE ANN. § 23-3406 (Supp. 1979) (panel consisting of one attorney, one physician and one member of the public). Some states allow the parties to agree to present the case before a single arbitrator. *See, e.g.*, MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-04 (e) (1980).

⁹ *See, e.g.*, N.D. CENT. CODE § 32-29.1-01 (Supp. 1979) (attorneys comprise two members of panel).

¹⁰ *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.47 (C) (West Supp. 1980) (panel consisting of one non-voting attorney, one physician chosen by each of the parties, and a third physician selected by the parties' doctors).

¹¹ *See, e.g.*, DEL. CODE ANN. tit. 18, § 6804 (a) (Supp. 1978); MO. ANN. STAT. § 538.0215 (1) (Vernon Supp. 1979), *declared unconstitutional*, *Cardinal Glennon Mem. Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979); N.D. CENT. CODE § 32-29.1-01 (Supp. 1979) (panel including "one citizen member who shall represent health care consumers").

¹² MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-03(c) (1980).

¹³ ARIZ. REV. STAT. ANN. § 12-567B(1) (Supp. 1979); FLA. STAT. ANN. § 768.44(2) (West Supp. 1980), *declared unconstitutional*, *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980); MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1980); MO. ANN. STAT. § 538.025.1 (Vernon Supp. 1980) (circuit judge comprising one nonvoting member), *declared unconstitutional*, *Cardinal Glennon Mem. Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979); N.Y. JUD. LAW § 148-a (McKinney Supp. 1979-80). *Cf.* R.I. GEN. LAWS § 10-19-1 (Supp. 1979) (one panel member entitled a "special master").

¹⁴ ARIZ. REV. STAT. ANN. § 12-567(B) (Supp. 1979); N.Y. JUD. LAW 148-a (McKinney Supp. 1979-80); R.I. GEN. LAWS § 10-19-1 (Supp. 1979).

¹⁵ DEL. CODE ANN. tit. 18, § 6805 (Supp. 1978); NEV. REV. STAT. § 41A.030 (1979); WIS. STAT. ANN. § 655.03 (West 1980).

¹⁶ IND. CODE ANN. § 16-9.5-9-3 (Burns Supp. 1980).

¹⁷ *See, e.g.*, PA. STAT. ANN. tit. 40, §§ 1301.307, 1301.506 (Purdon Supp. 1980-81) (panel bound by rules of evidence and state common and statutory law), *declared unconstitutional*, *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980).

trated decision before filing with the court;¹⁸ others require filing with the court before arbitration.¹⁹

The powers of MMPs also vary. Some states authorize panels to determine the liability of the medical professional,²⁰ while others limit the panel's authority to determining specific questions of fact.²¹ Still others empower panels to rule on the extent of the plaintiff's disability²² and to award damages.²³

Although some statutes label the review process "arbitration,"²⁴ a panel decision is not binding.²⁵ Parties may reject the

¹⁸ See, e.g., FLA. STAT. ANN. 768.4417(a) (West Supp. 1980), *declared unconstitutional* Aldana v. Holub, 381 So. 2d 231 (Fla. 1980); HAWAII REV. STAT. § 671-12 (1976); IDAHO CODE §§ 6-1001 to 1013 (1979); IND. CODE ANN. § 16-9.5-9-2 (Burns Supp. 1980); MD. CTS. & JUD. PROC. CODE ANN. §§ 3-2A-01 to -09 (1980) (mandatory for claims of more than \$5,000); MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1980); MO. ANN. STAT. § 538.020.1 (Vernon Supp. 1980), *declared unconstitutional*, Cardinal Glennon Mem. Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. 1979); MONT. REV. CODES ANN. §§ 27-6-301, 701 (1979); NEB. REV. STAT. § 44-2840(2) (1978); NEV. REV. STAT. § 41A.070 (1979); N.M. STAT. ANN. §§ 41-5-15.A (1978); N.D. CENT. CODE § 32-29.101 (Supp. 1979); PA. STAT. ANN. tit. 40, § 1301.309 (Purdon Supp. 1980-81), *declared unconstitutional*, Mattos v. Thompson, 421 A.2d 190 (Pa. 1980); VA. CODE § 8.01-581.2 (1977) (mandatory if either party requests arbitration); WIS. STAT. ANN. §§ 655.001 to .27 (1980 & West Supp. 1980-81) (claimant's option to invoke panel).

¹⁹ Some states require parties to file with the court before engaging the MMP. A trial is unavailable until the MMP proceeding is complete. See ALASKA STAT. § 09.55.536(a) (Supp. 1979) (within court's discretion to hear case without first submitting it to panel); ARIZ. REV. STAT. ANN. § 12-567 (Supp. 1979); DEL. CODE ANN. tit. 18, §§ 6801-14 (Supp. 1978); KAN. STAT. ANN. § 65-4901 (Supp. 1979) (within court's discretion to hear case without first submitting it to panel); N.Y. JUD. LAW § 148-a (McKinney Supp. 1979-80); OHIO REV. CODE ANN. § 2711.21 (Page Supp. 1979); R.I. GEN. LAWS §§ 10-19-1, -2 (Supp. 1979); TENN. CODE ANN. §§ 23-3403 (Supp. 1979).

²⁰ See, e.g., HAWAII REV. STAT. § 671-15 (1976 & Supp. 1978). Several states limit the panel to three possible findings: (1) whether the defendant failed to comply with the appropriate standard of care; (2) whether the defendant met the appropriate standard of care; or (3) whether there is a material issue of fact bearing on liability to be decided by a court or jury. See, e.g., N.D. CENT. CODE § 32-29.1-09 (Supp. 1979).

²¹ See, e.g., ALASKA STAT. § 09.55.536(c) (Supp. 1979); MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1980) (panel to determine only whether evidence is "sufficient to raise a legitimate question of liability appropriate for judicial inquiry"); NEV. REV. STAT. § 41A.060 (1979).

²² See, e.g., DEL. CODE ANN. tit. 18, § 6811(b)(4) (Supp. 1978); LA. REV. STAT. ANN. § 40:1299.47G(4) (West 1977).

²³ FLA. STAT. ANN. § 768.44(8) (West Supp. 1980) (panel may fix damages only if both parties agree), *declared unconstitutional*, Aldana v. Holub, 381 So. 2d 231 (Fla. 1980); HAWAII REV. STAT. § 671-15(b) (1976); IDAHO CODE § 6-1004 (1979) (panel must find liability by unanimous agreement); MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-05 (1980); PA. STAT. ANN. tit. 40, § 1301.508a(9) (Purdon Supp. 1979-80), *declared unconstitutional*, Mattos v. Thompson, 421 A.2d 190 (Pa. 1980); R.I. GEN. LAWS § 10-19-7 (Supp. 1979).

²⁴ See MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-01 (1980); OHIO REV. CODE ANN. § 2711.21 (Page Supp. 1979); PA. STAT. ANN. tit. 40, § 1301.308 (Purdon Supp. 1980-81), *declared unconstitutional*, Mattos v. Thompson, 421 A.2d 190 (Pa. 1980).

²⁵ In some states, however, the medical malpractice panel's award may become binding if neither party takes further action. See, e.g., R.I. GEN. LAWS § 10-19-9a (Supp. 1978)

panel's determination and obtain a trial de novo. Frequently, however, statutes explicitly make MMP findings admissible into evidence at subsequent trials.²⁶

Some statutes require panel members to assist plaintiffs with meritorious complaints by retaining expert witnesses for a later trial.²⁷ Others prohibit panel members from testifying at the trial de novo.²⁸ Finally, the statute of limitations on medical malpractice claims may toll during the pendency of panel proceedings,²⁹ and a few states limit how long review proceedings may delay the plaintiff from instituting suit.³⁰

MMP laws present formidable obstacles for claimants seeking jury trials. In some states, a party requesting a trial de novo after an MMP hearing must comply with stiff bonding requirements³¹

("Any party who does not file a notice of rejection within the time set herein shall be deemed conclusively to have accepted said findings or award.")

²⁶ See, e.g., ARIZ. REV. STAT. ANN. § 12-567M (Supp. 1979); PA. STAT. ANN. tit. 40, § 1301.510 (Purdon Supp. 1980-81), *declared unconstitutional*, *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980); R.I. GEN. LAWS § 10-19-8 (Supp. 1979). Maryland admits the panel's opinion into evidence at trial and accords it a presumption of correctness. MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(d) (1980).

²⁷ ARIZ. REV. STAT. ANN. § 12-567(J) (Supp. 1979); NEV. REV. STAT. § 41A.090 (1979), *as amended by* 1979 NEV. STATS. ch. 368, § 4.

²⁸ See, e.g., MONT. REV. CODES ANN. § 27-6-704 (1979); TENN. CODE ANN. § 23-3409 (Supp. 1979). *Cf.* KAN. STAT. ANN. § 65-4904(c) (Supp. 1979) (panel's report not admissible in evidence, but panel members may be subpoenaed as witnesses).

²⁹ MONT. REV. CODES ANN. § 27-6-702 (1979); VA. CODE § 8.01-581.9 (1977) (statute of limitations tolled for longer of 120 days following notice of claim or 60 days following panel's decision).

³⁰ FLA. STAT. ANN. § 768.44(4) (West Supp. 1980) (jurisdiction of panel ceases 10 months from date claim filed), *declared unconstitutional*, *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980); IDAHO CODE § 6-1001 (1979) (panel retains jurisdiction for only 90 days from date of commencement of proceedings).

³¹ See, e.g., MASS. GEN. LAWS ANN. ch. 231, § 60B (West Supp. 1980) (unsatisfied plaintiff required to file \$2,000 bond payable to defendant if plaintiff fails to prevail in trial de novo).

In *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 555-56 (1949), the Court held that the Rules of Decision Act, 28 U.S.C. § 1652 (1976) (RDA), compelled federal courts sitting in diversity to give effect to state statutes requiring litigants to post bond before suing in stockholders' derivative actions. That the RDA requires application in federal court of bonding statutes, which arguably burden the exercise of diversity jurisdiction, suggests that the RDA also compels application of MMP laws, which ostensibly burden diversity jurisdiction less. In *Cohen*, however, failure to post bond shut the doors of both the federal and state courthouses. If MMPs are surrogates of the state courts, MMP statutes close only the federal courthouse doors during the pendency of the panel proceedings. In so doing, this MMP provision—but not the bonding requirement in *Cohen*—forces litigants into state courts, thereby undermining the choice of forums federal diversity jurisdiction provides. See notes 62, 67-69, and accompanying text *infra*.

or is liable for panel and court costs.³² Furthermore, an unfavorable panel decision may pose an insurmountable barrier to recovery when it is admitted into evidence or when panel members testify at the subsequent trial. Plaintiffs who are able to invoke federal diversity jurisdiction,³³ therefore, have a strong incentive to bypass panel proceedings and litigate in federal court from the outset.

II

JUDICIAL TREATMENT OF ATTEMPTS TO CIRCUMVENT MEDICAL MALPRACTICE PANELS

A. *The Condition Precedent Approach*

Some federal courts regard the MMP as a condition precedent to the cause of action,³⁴ and dismiss suits brought directly to federal court for failure to state a claim. In *Edelson v. Soricelli*,³⁵ the Third Circuit held that *Erie* and its progeny require federal courts sitting in diversity to enforce such conditions precedent.³⁶

³² See MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-06(e) (1980) (if trial verdict not more favorable than panel's award, party rejecting award must pay costs of judicial proceeding); DEL. CODE ANN. tit. 18, § 6813 (Supp. 1980) (panel costs paid by same party assessed court costs).

³³ 28 U.S.C. § 1332 (1976) provides:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

(1) citizens of different States. . . .

³⁴ See, e.g., *Flotemersch v. Bedford County Gen. Hosp.*, 69 F.R.D. 556, 557 (E.D. Tenn. 1975) (plaintiff must "allege the substantive law of the [forum] state . . . showing that [she] is entitled to relief . . ." and must "aver generally that all conditions precedent have been performed' . . .") (quoting in part FED. R. CIV. P. 8(a) (2), 9(c)). See also *Stoner v. Presbyterian Univ. Hosp.*, 609 F.2d 109 (3d Cir. 1979); *Edelson v. Soricelli*, 610 F.2d 131 (3d Cir. 1979); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164 (5th Cir. 1979); *Seoane v. Ortho Pharmaceuticals, Inc.*, 472 F. Supp. 468 (E.D. La. 1979); *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421 (N.D. Ind.), *aff'd*, 603 F.2d 646 (7th Cir. 1979); *Davison v. Sinai Hosp.*, 462 F. Supp. 778 (D. Md. 1978), *aff'd per curiam*, 617 F.2d 361 (4th Cir. 1980); *Wells v. McCarthy*, 432 F. Supp. 688 (E.D. Mo. 1977); *Marquez v. Hahnemann Med. C. & Hosp.*, 435 F. Supp. 972 (E.D. Pa. 1976).

³⁵ 610 F.2d 131 (3d Cir. 1979). In *Edelson*, citizens of New Jersey and New York brought separate suits against Pennsylvania health care providers in Pennsylvania federal district court. The cases were consolidated on appeal. The district court dismissed one suit under the authority of *Marquez v. Hahnemann Med. C. & Hosp.*, 435 F. Supp. 972 (E.D. Pa. 1976), and held that the state panel had exclusive primary jurisdiction in the other. "Both dismissals were without prejudice to the plaintiffs' right to file fresh complaints after completing arbitration." *Id.* at 133.

³⁶ See also *DiAntonio v. Northampton-Accomack Mem. Hosp.*, 628 F.2d 287 (4th Cir. 1980) (relying on *Edelson*); *Davison v. Sinai Hosp.*, 617 F.2d 361, 362 (4th Cir.

Like most courts that have scrutinized MMP laws, however, the *Edelson* court failed to consider the nature of the panel, and thus avoided analyzing whether applying an MMP statute in federal court would conflict with the diversity jurisdiction statute.³⁷

The *Edelson* court dismissed two objections rooted in the *Erie* doctrine to the application of state law in federal court: (1) that because the state MMP law was merely procedural, *Hanna v. Plumer*³⁸ enabled federal courts sitting in diversity to reject it;³⁹ and (2) that a balancing of federal and state interests under *Byrd v. Blue Ridge Rural Electric Cooperative*⁴⁰ required the federal court to ignore the MMP statute.⁴¹ The court held that the policies underlying *Erie* and *Hanna*—preventing forum-shopping and insuring the equitable administration of justice⁴²—and the “*Byrd*-balance”⁴³ required the application of the MMP statute. Thus, the

1980) (per curiam) (citing *Edelson* and requiring that malpractice claim first be brought before Maryland MMP). Cf. *Hamilton v. Roth*, 624 F.2d 1024, 1210-12 (3d Cir. 1980) (following *Edelson* and requiring that pendent malpractice claim be brought first before Pennsylvania MMP).

³⁷ See 610 F.2d at 142 (Rosenn, J., dissenting); Note, 93 HARV. L. REV., *supra* note 1, at 1566 (“unfortunate that . . . majority did not respond to . . . dissent’s concern about . . . nature of . . . panel. . .”). Although the court considered the relationship between MMP statutes and the Federal judicial system, it focused on the effect of MMP’s upon the Federal jury right, not upon the potential infringement of diversity jurisdiction. See 610 F.2d at 139-40.

³⁸ 380 U.S. 460 (1965).

³⁹ 610 F.2d at 135.

⁴⁰ 356 U.S. 525 (1958).

⁴¹ Appellants argued that delays and disincentives to suit in the Pennsylvania MMP program offended the federal interests in promptly adjudicating claims and maintaining an appearance of fairness. Furthermore, they argued that the admissibility of MMP findings in subsequent trials would prejudice juries and usurp their factfinding function, thereby denying plaintiffs their right to trial by jury. 610 F.2d at 135, 139.

⁴² The court described these policies as “avoid[ing] having the outcome of a case depend on whether it was brought in a state or federal court and [permitting] the state legislatures to define the substantive rights of their citizens.” 610 F.2d at 134 (quoting *Marquez v. Hahnemann Med. C. & Hosp.*, 435 F. Supp. 972, 974 (E.D. Pa. 1976)).

⁴³ The court distinguished *Byrd*. There, the court observed, (1) applying federal law had near-constitutional significance; (2) the state law involved rested on no strong state policy; and (3) the likelihood of a result under federal law differing from one under state law was minimal. 610 F.2d at 138-40. The federal interest in not applying the MMP law, however, was less compelling than the federal interest in *Byrd*. The court did not find the delays caused by the program distressing and was confident that juries, assisted by special masters, would not be prejudiced by panel findings. *Id.* at 140. *But see* *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980) (excessive delay violated state constitutional right to trial by jury). The court also emphasized the underlying state policy of reducing the cost of malpractice insurance, although it admitted the panel system was a “resounding flop.” 610 F.2d at 136. The court observed that allowing diversity plaintiffs to circumvent MMPs would afford them a right denied to state-court plaintiffs, thus directly contravening the policies in *Erie*. *Id.* at 141.

court concluded that plaintiffs had to comply with the MMP law before asserting a valid claim in federal court.⁴⁴

B. Examination of the Panel's Nature

The District Court for the District of Rhode Island reached the opposite result in *Wheeler v. Shoemaker*,⁴⁵ holding that the plaintiff was not required to submit his action to a Rhode Island MMP⁴⁶ before bringing suit in federal court. Examining the legislative history and structure of the MMP law, the court concluded that the Rhode Island legislature "intended the panel . . . to function as an adjunct of the state court rather than as an independent agency."⁴⁷ Furthermore, the court concluded that because the panel hearing was likely to be the determinative adjudication between the litigants,⁴⁸ deferring to the state MMP would be "tantamount to vesting original jurisdiction in [the] state court [system] and would defeat the purpose of the congressional grant of diversity jurisdiction."⁴⁹ Thus, the *Wheeler* court refused to enforce the MMP law, and accepted jurisdiction over the claim.⁵⁰

⁴⁴ *But see* Note, 1980 DUKE L.J., *supra* note 1, at 554-67 (rejecting *Edelson* approach and arguing no MMP law need be applied by federal courts because MMPs (1) are not bound up or intimately involved with basic rights or obligations; (2) do not substantially affect the ultimate determination of liability; and (3) frustrate strong federal interests in preserving diversity jurisdiction).

⁴⁵ 78 F.R.D. 218 (D.R.I. 1978) (Pettine, C.J.).

⁴⁶ R.I. GEN. LAWS §§ 10-19-1 to 10 (Supp. 1979).

⁴⁷ 78 F.R.D. at 221.

⁴⁸ *Id.* at 222-23. Alternatively, the defendant argued that the federal court, if it accepted jurisdiction, must give effect to the state statutory scheme by appointing a federal malpractice panel. The court disagreed. It explained that *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), allows federal courts to balance both federal and state interests when deciding whether to apply state law in federal diversity actions. The court acknowledged that important state interests underlay the Rhode Island MMP law, but refused to mimic the state procedure because of the significant federal interest in controlling the administrative burdens imposed upon the federal judiciary. 78 F.R.D. at 227-29.

⁴⁹ *Id.* at 222. *See* Turner, *Medical Malpractice Arbitration on the Erie Railroad*, 11 TOLEDO L. REV. 1, 22-25 (1979) (approving *Wheeler* approach). *But see* Alexander, *State Medical Malpractice Screening Panels in Federal Diversity Actions*, 21 ARIZ. L. REV. 959, 997 (1979) (*Wheeler's* conclusion that state MMP statute divested federal courts of jurisdiction erroneous because courts ultimately take jurisdiction in trial de novo).

No court has followed *Wheeler's* approach to MMP laws. Most cursorily distinguish the case on two grounds: (1) that, unlike the typical panel statute, Rhode Island's MMP law requires referral to a panel *after* filing an action in court, rather than completion of panel proceedings prior to filing; and (2) that *Wheeler* involved a motion to refer rather than a motion to dismiss. *See, e.g.*, *Hines v. Elkhart Gen. Hosp.*, 603 F.2d 646, 648 n.2 (7th Cir. 1979) (construing IND. CODE ANN. §§ 16-9. 5-9-1 to 10 (Burns Supp. 1980)); *Woods v. Holy Cross Hosp.*, 591 F.2d 1164, 1169 n.7 (5th Cir. 1979) (construing FLA. STAT. ANN. § 768.44 (West Supp. 1980)); *Seoane v. Ortho Pharmaceuticals, Inc.*, 472 F. Supp. 468, 471 (E.D. La. 1979). (construing LA. REV. STAT. ANN. § 40:1299. 41-48 (West Supp. 1980)). *See* note

Similarly, Judge Rosenn, dissenting in *Edelson*, argued that federal courts should not apply the Pennsylvania MMP law in diversity actions.⁵¹ Judge Rosenn claimed that the Pennsylvania MMP "is not an administrative body reviewing claims prior to judicial action but its functions, powers, and procedures are those of a judicial entity artfully draped in non-judicial garb."⁵² Reasoning that "Pennsylvania ha[d] attempted to limit . . . residents and non-residents, at least in the first instance, to a Pennsylvania court,"⁵³ Judge Rosenn concluded that the Third Circuit should disregard the Pennsylvania law.

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THE PROPER METHODOLOGY

Courts should first investigate the extent to which an MMP resembles a state court. A federal court cannot give effect to an MMP law if it undermines the federal diversity jurisdiction statute; state law cannot apply in federal court when a federal statute "otherwise require[s] or provide[s]."⁵⁴ If a court determines that the MMP is closely akin to a judicial body, it should exercise diversity jurisdiction⁵⁵ and disregard the MMP statute as an im-

19 *supra* (state statutes requiring initial filing with the court). These distinctions are tenuous because they place inordinate reliance on the procedural distinction between filing a claim first with the panel clerk or the court clerk. See text accompanying note 87 *infra*. Moreover, the court in *Wheeler* had the power to dismiss. See FED. R. CIV. P. 12 (h) (3); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1350, at 545 (1969) ("Lack of subject matter jurisdiction . . . may be asserted at any time by the court, sua sponte, either at the trial or appellate level.") (footnote omitted).

⁵⁰ 78 F.R.D. at 229.

⁵¹ *Edelson v. Soricelli*, 610 F.2d 131, 141-49 (3d Cir. 1979).

⁵² *Id.* at 142 (footnote omitted).

⁵³ *Id.* at 145.

⁵⁴ The RDA's command to absorb state law does not apply where "the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." 28 U.S.C. § 1652 (1976). Where application of a state statute emasculates the purposes of a federal law, the federal statute clearly "requires or provides" that the federal court eschew the state legislation. The treatment of such state legislation is identical under *Erie* because the command of the RDA is the same as that of the *Erie* doctrine. *Erie* "[t]echnically . . . can be viewed as an interpretation of the [RDA]." Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 n.16 (1957).

⁵⁵ Federal courts need not exercise jurisdiction when the requirements of the diversity jurisdiction statute are met. Courts may refuse jurisdiction by invoking discretionary doctrines such as abstention, forum non conveniens, and exhaustion of administrative remedies. For a discussion of the exhaustion doctrine, see notes 101-10 and accompanying text *infra*.

permissible intrusion on federal jurisdiction. Further balancing of state and federal interests is unnecessary.⁵⁶

Analyzing the nature of the tribunal at the outset makes sense for another reason. Even when the MMP does not actually undermine the diversity jurisdiction statute, the extent to which the panel impairs the plaintiff's right to a choice of forum is an important federal concern.⁵⁷ Hence, the characterization of the panel must be resolved before federal courts can adequately balance the competing federal and state interests⁵⁸ in employing MMP laws.

A. *Undermining the Choice of Forums Under the Federal Diversity Jurisdiction Statute*

Traditionally, federal courts have zealously protected the congressional grant of diversity jurisdiction. Although the exhaustion of state administrative remedies doctrine generally requires them to dismiss a suit if the plaintiff has not pursued state administrative relief, federal courts have long ignored laws that restrict the trial of state claims to state courts.⁵⁹ *Railway Co. v. Whitton's Administrator*⁶⁰ is the watershed.

⁵⁶ See Note, 93 HARV. L. REV., *supra* note 1, at 1566. Of course, further discussion of *Erie* becomes superfluous only if the state law undermines the diversity jurisdiction statute. If the panel does not emasculate the plaintiff's choice of forums, a complete *Erie* analysis is necessary to determine whether application of the MMP law is required.

⁵⁷ See notes 67-68 and accompanying text *infra* (diversity jurisdiction scheme affords litigants a federal right to choice of forums). See Note, 1980 DUKE L.J., *supra* note 1, at 554-67 (arguing *Erie* balance will always reject state MMP laws).

⁵⁸ See, e.g., *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958); *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60, 63-64 (4th Cir. 1965); *Wheeler v. Shoemaker*, 78 F.R.D. 218, 224 (D.R.I. 1978); Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 367-72 (1977). *But see* Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 717 n.130 (1974) (*Hanna v. Plumer*, 380 U.S. 460 (1965), displaced *Byrd* balancing analysis by articulating the twin concerns in *Erie*—deterrence of forum shopping and avoiding inequitable administration of the law). Professor Ely's view of *Hanna*, however, is arguably inapplicable when the validity of a rule enacted under the Rules Enabling Act, 28 U.S.C. § 2071 (1976), is not in issue. See notes 117-21 and accompanying text *infra*.

⁵⁹ See notes 98-109 and accompanying text *infra*. Early Supreme Court decisions held that the Constitution guaranteed plaintiffs the right to sue defendants from other states in federal courts; the Constitution prohibited any state limitation, however indirect, of federal diversity jurisdiction. For example, in *Suydam v. Broadnax*, 39 U.S. (14 Pet.) 67 (1840), the plaintiff sued a debtor's estate for payment of a note even though a state statute barred actions after a state commission declared an estate insolvent. The Supreme Court upheld plaintiff's right to sue:

The [diversity jurisdiction statute] carries out the constitutional right of a citizen of one state to sue a citizen of another state in the Circuit Court of the United States; and gives to the Circuit Court "original cognisance, concurrent with the

In *Whitton's Administrator*, the state statute creating plaintiff's cause of action vested exclusive jurisdiction in the state courts. In dicta, the Supreme Court laid down a broad prohibition of any state interference with diversity jurisdiction:

[State claims] cannot be withdrawn from the cognizance of [a] Federal court by any provision of State legislation that it shall only be enforced in a State court. . . . [I]t never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal court over such suits where the citizenship of one of the parties was otherwise sufficient. Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.⁶¹

Courts of the several states, of all suits of a civil nature, at common law, and in equity" . . . It was certainly intended to give to suitors having a right to sue in the Circuit Court remedies co-extensive with these rights.

Id. at 75. See also *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 429-30 (1868). The origin of the concept of a constitutional right to sue may lie in dicta in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816). See *Friendly, The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 506-07 (1928). See generally *id.* at 506-09.

Several Court opinions, however, dispelled the notion of a constitutional right to sue defendants of diverse citizenship in federal court. For example, in *Gaines v. Fuentes*, 92 U.S. 10 (1875) the Court stated:

The Constitution declares that the judicial power of the United States shall extend to "controversies between citizens of different states," as well as to cases arising under the Constitution, treaties, and laws of the United States; but the conditions upon which the power shall be exercised, except so far as the original or appellate character of the jurisdiction is designated in the Constitution, are matters of legislative direction.

Id. at 17. See also *Turner v. Bank of America*, 4 U.S. (4 Dall.) 8 (1799) (Congress may limit federal diversity jurisdiction). Furthermore, after deciding *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Court reevaluated the *Suydam* rationale. Although proscribing state laws limiting jurisdiction exclusively to state courts, the Court held that *Erie* requires federal courts to respect state laws, such as that in *Suydam*, that deny the right to sue in any court. See note 62 *infra*.

⁶⁰ 80 U.S. (13 Wall.) 270 (1871).

⁶¹ *Id.* at 286. Subsequent Supreme Court decisions relied on *Whitton's Administrator's* broad prohibition against any state interference with federal diversity jurisdiction. See, e.g., *Martin's Adm'r v. Baltimore & Ohio R.R.*, 151 U.S. 673 (1894); *Mexican Cent. Ry. v. Pinkney*, 149 U.S. 194 (1893); *Ellis v. Davis*, 109 U.S. 485 (1883); *Kern v. Huidekoper*, 103 U.S. 485 (1880); *Insurance Co. v. Morse*, 87 U.S. (20 Wall.) 445 (1874). After *Erie's* reinterpretation of the relationship between state and federal law, however, the continued authority of *Whitton's Administrator* was questioned.

In *Angel v. Bullington*, 330 U.S. 183 (1947) and *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), the Supreme Court held that *Erie* compelled federal courts to enforce

Although the Court did not invoke the supremacy clause,⁶² later cases invalidating intrusive state statutes⁶³ implicitly acknowledged its importance.⁶⁴

state "door-closing" statutes, which barred suits in state court by designated parties or upon certain state created rights. *See, e.g.*, *Woods v. Interstate Realty Co.*, 337 U.S. 535, 536 n.1 (1949) (state law prohibited foreign corporation failing to file power of attorney with state from bringing action or suit in any state court); *Angel v. Bullington*, 330 U.S. 183, 185 (1947) (state law forbade suits for deficiency judgments on notes). *Cf.* *Lapides v. Doner*, 248 F. Supp. 883 (E.D. Mich. 1965) (state court would not hear cases involving the exercise of control or management of the internal affairs of a foreign corporation). *But see Szantay v. Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965) (federal diversity jurisdiction available despite state door-closing statute denying state court jurisdiction over suits brought by non-resident against a foreign defendant on a foreign cause of action). Because a federal court sitting in diversity is "in effect, only another court of the State," *Guaranty Trust Co. v. York*, 326 U.S. 99, 108 (1945), a state legislature's decision to close the doors of the state courthouse will also close the doors of the federal courthouse. The question thus remained whether *Erie* also required federal courts to honor state laws closing only federal courthouse doors by vesting exclusive jurisdiction in state courts.

Recent cases have answered this question in the negative: under *Erie*, state legislatures may not bar access to federal courts without also barring access to state courts. For example, in *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961), Judge Haynsworth stated:

To the extent it may be said that [*Angel v. Bullington* and *Woods v. Interstate Realty Co.*] require a federal court to refrain from exercising its jurisdiction, it is a rational development of the *Erie* doctrine and a requisite one if the result of the litigation in the federal court is to be the same as in the state courts. . . . It would be quite foreign to the *Erie* doctrine, however, to apply a state statute in such a way as to deny all relief in a federal court to a non-resident plaintiff on a cause of action which, clearly, the state courts would recognize and enforce.

Id. at 718. *See also Grand Bahama Petroleum Co. v. Asiatic Petroleum Corp.*, 550 F.2d 1320, 1324-25 (2d Cir. 1977); *S.J. Groves & Sons Co. v. New Jersey Turnpike Auth.*, 268 F. Supp. 568 (D.N.J. 1967).

⁶² U.S. CONST. art VI, cl. 2.

⁶³ In *Kern v. Huidekoper*, 103 U.S. 485 (1880), the Supreme Court first indicated that the supremacy clause underlay the protection of federal diversity jurisdiction from state interference in *Whitton's Administrator*. Responding to a motion to remand a case removed to federal district court, the Supreme Court stated;

When the prerequisites for removal have been performed, *the paramount law of the land* says that the case shall be removed. . . . [N]o provision of the State law, no peculiarity in the nature of the litigation which would forbid the United States court from entertaining original jurisdiction, could prevent the removal, provided the case fell within the terms of the statute for the removal of causes.

Id. at 491-92 (emphasis added) (citations omitted).

⁶⁴ Courts have not interpreted MMP statutes themselves to require that federal courts sitting in diversity defer to panels before adjudicating malpractice claims. Rather, the RDA determines whether MMP laws apply in federal court. *See, e.g.*, *Wheeler v. Shoemaker*, 78 F.R.D. 218, 220 n.4 (D.R.I. 1978) (declining to infer that Rhode Island MMP statute ousted federal courts of jurisdiction); *Byrnes v. Kirby*, 453 F. Supp. 1014, 1017 (D. Mass. 1978); *Austin v. Boston Univ. Hosp.*, 372 Mass. 654, 363 N.E.2d 515, 518-19 (Mass. 1977) (whether MMP statutes apply in federal court solely a question of federal law).

However, if an MMP statute did command federal courts to defer to court-like state panels, it would violate the supremacy clause. U.S. CONST. art. VI, cl. 2. Forcing plaintiffs who meet the requirements of the diversity jurisdiction statute into state judicial bodies

Although both Judge Rosenn in *Edelson* and the *Wheeler* court relied heavily on the rationale of *Whitton's Administrator* to justify their refusal to enforce state MMP laws, the case is not entirely apposite. *Whitton's Administrator* dealt with a statute vesting exclusive jurisdiction in state courts, whereas MMP statutes permit subsequent trials de novo.⁶⁵ MMP laws thus at most only deprive federal courts of initial jurisdiction. Nonetheless, the purpose behind the diversity jurisdiction statute supports *Whitton's Administrator's* broad prohibition of any state interference with diversity jurisdiction. Viewed in this context, it is unimportant whether a

would undermine the statute's purpose to confer a choice of forums. See notes 67-69 and accompanying text *supra*. Under traditional supremacy clause "conflict" theory, see generally Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, *passim* (1975), a state law violates the Constitution when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez v. Campbell*, 402 U.S. 637, 649 (1971) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *Accord*, *Free v. Bland*, 369 U.S. 663, 666 (1962).

Although the Supreme Court has held that mere potential conflict between state legislation and effectuation of federal purposes will oust a state law, see *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (state law invalidated because of "potential frustration of national purposes"); *Pennsylvania v. Nelson*, 350 U.S. 497, 509-10 (1956) (state law invalidated because of possibility of double punishments imposed by state and federal judgments); Note, *supra*, at 636, recent cases indicate a movement toward requiring actual and substantial conflict. See *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 539-40, 544-45 (1979); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 583 (1979) ("State family and family property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overriden."); *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 423 n.29 (1973) (dictum) (substantial conflict). See generally Note, *supra*, at 646-49. Even under the stricter test, however, a state law requiring claims to be brought to a state court before they may be brought to a federal court certainly poses an "actual and substantial" conflict with the choice of forums that Congress intended to confer through the diversity jurisdiction statute. Thus, if an MMP resembles a court, the federal court must ignore the state statute and may take jurisdiction immediately if the requisites for diversity jurisdiction are satisfied.

Laws mandating initial proceedings in a nonjudicial panel, however, would not abrogate the federal choice of forums and thus not violate the supremacy clause. The choice of forums under the diversity jurisdiction statute arises only after the claimant has fulfilled all state conditions precedent to suit, to which the *Erie* doctrine gives effect in the absence of countervailing federal interests. Such conditions precedent may include MMP statutes valid under the Constitution. See note 34 and accompanying text *supra*.

⁶⁵ See notes 24-26 and accompanying text *supra*. Although MMP statutes do not explicitly permit trials de novo in federal courts, courts refuse to interpret them as only permitting trials in state courts. Indeed, the Rhode Island MMP statute provides that a dissatisfied party may file suit "in the superior court" after notice of his rejection of panel findings. R.I. GEN. LAWS § 10-19-9(b) (Supp. 1979). In *Wheeler*, the court declined to infer that, by this language, the legislature intended to deprive the federal courts of jurisdiction. 78 F.R.D. at 220 n.4. See also *Hines v. Elkhart Gen. Hosp.*, 465 F. Supp. 421, 424 (N.D. Ind. 1978). However, other laws do not easily permit interpretations favorable to federal jurisdiction. See, e.g., DEL. CODE ANN. tit. 18, § 6802(a) (Supp. 1978) ("The Superior Court of the State shall have exclusive jurisdiction of civil actions alleging health care malpractice.").

state statute deprives the federal courts of initial jurisdiction or deprives them of all jurisdiction.

Most commentators agree that Congress intended the diversity jurisdiction statute to afford parties of diverse citizenship an impartial federal forum to which they can bring their claims, and thereby avoid prejudice in local tribunals.⁶⁶ In short, the statute confers a choice of forums on plaintiffs who meet certain requirements.⁶⁷ A state law that forces such a claimant to bring his suit before a state judicial body abrogates this choice—even if it permits a subsequent federal trial *de novo*.⁶⁸

B. *Determining Whether an MMP More Closely Resembles an Administrative Board or a Court*

Because states cannot compel litigants satisfying federal diversity jurisdiction initially to bring suit in state courts,⁶⁹ it is crucial for courts to determine if an MMP is a "state court." A state's characterization of its tribunals as judicial, legislative, or administrative is not binding on the federal judiciary; federal courts should independently investigate the nature of the state body.⁷⁰ In such investigations, however, courts have applied imprecise standards.

Federal courts focus on various factors when deciding whether an MMP is a judicial or administrative body. For example, in characterizing the Rhode Island MMP⁷¹ as judicial, the *Wheeler* court emphasized that the presiding justice of the state superior court appointed the panel members⁷² and that claimants had to file with the superior court rather than with the MMP.⁷³ Courts also place considerable weight upon the formality of panel

⁶⁶ See generally Friendly, *supra* note 59, at 495-97.

⁶⁷ See note 33 *supra*.

⁶⁸ On the other hand, laws that bar suit upon a claim in any court, including state courts, do not interfere with this choice of forums. If the state denies the right to sue upon a state-created claim, it is as if the state has also abrogated the substantive right itself. The diversity jurisdiction statute confers a choice of forums only where the state recognizes a substantive cause of action. Moreover, were a federal court sitting in diversity to accept jurisdiction where state courts could not, it would confer superior rights on federal plaintiffs and violate the equitable administration of the law mandated by *Erie*. See note 61 *supra*.

⁶⁹ See note 64 and accompanying text *supra*.

⁷⁰ See, e.g., *Upshur County v. Rich*, 135 U.S. 467, 477 (1890); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Rel. Bd.*, 455 F.2d 38, 44 (1st Cir. 1972); *United States v. Pennsylvania Environ. Hearing Bd.*, 377 F. Supp. 545, 553 (M.D. Pa. 1974).

⁷¹ R.I. GEN. LAWS §109-19-1 to -10 (Supp. 1979).

⁷² 78 F.R.D. at 221.

⁷³ *Id.*

proceedings and the effect of panel findings in subsequent litigation. Both the *Wheeler* court and Judge Rosenn in *Edelson* stressed that the state MMPs were bound by state statutory and common law,⁷⁴ and that the MMP hearing would likely be the dispositive litigation of a dispute, despite the availability of a trial de novo.⁷⁵ Furthermore, both feared that a jury might accord panel findings undue weight.⁷⁶ Judge Rosenn also focused on the power of the Pennsylvania MMP not only to determine factual issues, but also to issue subpoenas, compel production of records, decide liability, and assess damages.⁷⁷

In cases involving the removal jurisdiction statutes, which permit litigants to remove to federal court any "civil action" brought in a "State court,"⁷⁸ courts have focused on still other

⁷⁴ 610 F.2d at 149 (Rosenn, J., dissenting); 78 F.R.D. at 222.

⁷⁵ 610 F.2d at 144-45 (Rosenn, J., dissenting); 78 F.R.D. at 222.

⁷⁶ 610 F.2d at 144-45 (Rosenn, J., dissenting); 78 F.R.D. at 222.

⁷⁷ 610 F.2d at 143. See also *In re Silvies River*, 199 F. 495, 502 (D. Ore. 1912) (considering power to adjudicate rights and award damages in defining "state court" in removal statute); *Fuller v. County of Colfax*, 14 F. 177, 178 (D. Neb. 1882) (considering power to adjudicate rights and award damages in defining "state court" in removal statute).

⁷⁸ Several federal statutes authorize the removal of actions from a "state court" to a federal court. For example, 28 U.S.C. § 1441 (1976) generally provides for removal in federal question cases regardless of the parties' citizenship or residence and in diversity cases in which no defendant is a citizen of the forum state. *Id.* 28 U.S.C. § 1442 (1976) allows removal of actions involving various federal officers. 28 U.S.C. § 1443 (1976) allows any person "who is denied or cannot enforce" his "equal civil rights" in the state courts to remove to federal court.

Judicial interpretations of "state court" in the context of 28 U.S.C. § 1441 (1976) provide a helpful framework for determining whether an MMP constitutes a judicial body. That statute and the diversity jurisdiction statute, 28 U.S.C. § 1332 (1976), share at least one purpose: to provide an alternate forum to litigants unable to obtain an impartial trial in the state courts. See notes 67-68 and accompanying text *supra*. Judicial interpretations of "state court" as used in the other removal provisions, however, may be inappropriate guides for evaluating the nature of MMPs because of different underlying policies.

Not only may cases removed under provisions other than 28 U.S.C. § 1441 (1976) be inapposite, but removal cases involving actions under different substantive statutes may not provide helpful guidance. Consider, for example, three cases on which Judge Rosenn relied in his dissent in *Edelson*: *Floeter v. C.W. Transp., Inc.*, 598 F.2d 1100 (7th Cir. 1979), *Volkswagen de Puerto Rico, Inc. v. Labor Rel. Bd.*, 455 F.2d 38 (1st Cir. 1972), and *Tool & Die Makers Lodge No. 78 v. General Elec. Co.*, 170 F. Supp. 945 (E.D. Wis. 1959). These cases alleged in part jurisdiction under the Labor Management Relations (Taft-Harley) Act, 29 U.S.C. § 185(a) (1976), which states "[s]uits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States, having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." This statute ensures the availability of a federal forum to administer the national labor laws. The strong policies militating for a uniform system of labor relations may influence a court's interpretation of whether a tribunal is sufficiently court-like to permit removal to a federal forum. Thus, the factors on which courts focus and the weight that courts accord them may render seemingly analogous issues inapplicable to evaluation of MMPs.

aspects to determine whether state tribunals are court-like. In the removal context, federal courts have inquired whether a state body was a "court of record" under state law,⁷⁹ whether the state constitution incorporated the tribunal into the state judicial system,⁸⁰ and whether adverse parties were involved.⁸¹ Some courts have found state tribunals more like courts than administrative bodies when the "locus of traditional jurisdiction" over the particular subject matter lay in the state courts.⁸² Other courts applying the removal statutes have found telling signs of judicial functions when the state body can enforce its rulings in the state court system but lacks legislative or rulemaking duties typical of administrative agencies.⁸³

The difficulty in ascertaining definitive standards for distinguishing judicial from nonjudicial bodies results from several factors: the innumerable state tribunals have unique attributes, cases arise in many different procedural settings, and disputes are based on different underlying claims for relief. Consequently, federal courts can only determine whether MMPs possess sufficient judicial qualities to undermine the diversity jurisdiction statute on a case-by-case basis. Furthermore, the process of characterizing a panel cannot be reduced to a mathematical equation; the decision whether an MMP has usurped the plaintiff's choice

⁷⁹ See, e.g., *Cappetta v. Atlantic Ref. Co.*, 12 F. Supp. 89, 90 (D. Conn. 1935) (justice of the peace a "court of record" when performing duties; hence, action removable).

⁸⁰ See, e.g., *Katz v. Herschel Mfg. Co.*, 150 F. 684, 685 (D. Neb. 1906) (justice of peace a "court" for removal purposes because state constitution vests judicial power in the office).

⁸¹ See, e.g., *Commissioners of Rd. Improvement Dist. No. 2 v. St. Louis S.W. Ry.*, 257 U.S. 547, 557 (1922) (county court a "state court" under removal statute where there are "adversary parties and an issue in which the claim of one of the parties against the other capable of pecuniary estimation, is stated and answered in some form of pleading, and is to be determined.").

⁸² See, e.g., *Floeter v. C.W. Transp., Inc.*, 597 F.2d 1100 (7th Cir. 1979); *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Rel. Bd.*, 454 F.2d 38, 44 (1st Cir. 1972).

⁸³ See, e.g., *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Rel. Bd.*, 454 F.2d 38, 44 (1st Cir. 1972) (considering panel's lack of legislative duties); *Tool & Die Makers Lodge No. 78 v. General Elec. Co.*, 170 F. Supp. 945, 950 (E.D. Wis. 1959) (considering panel's ability to enforce rulings through state courts). See also *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908) (appeal of injunction under statute prohibiting federal court from enjoining "state courts"). In *Prentis*, the Supreme Court distinguished judicial from legislative activity:

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. . . . Legislation on the other hand looks to the future and changes existing conditions. . . .

Proceedings legislative in nature are not proceedings in a court . . . no matter what may be the general or dominant character of the body in which they may take place.

Id. at 226 (citations omitted).

of forums involves a subjective balancing of qualitative factors. Thus, this Note isolates the margins: those criteria that are particularly accurate or especially unreliable indicators of a panel's nature.

Two factors are generally unreliable. First, courts should not inquire whether a state legislature intended the MMP to function as "an adjunct of the state court" system.⁸⁴ The federal courts have traditionally reserved for themselves the right to characterize the nature of a state tribunal.⁸⁵ Furthermore, a state's label is irrelevant; a state law that interferes with the full effectuation of a federal statutory scheme cannot be applied in federal court—regardless of the state legislature's intent.⁸⁶

Second, courts should not consider the procedural format or the mode of access to an MMP to be dispositive of its nature. Courts should accord little weight to whether judicial rules of evidence govern a panel hearing or whether parties initially file with a panel or with a state superior court. Otherwise, state legislatures could deprive plaintiffs of a choice of forums by merely endowing an MMP with its own procedure.⁸⁷

Federal courts should accord significant weight to other criteria when characterizing an MMP. First, courts should inquire whether a panel resembles a component of the state judiciary.⁸⁸ If a state judge presides over the panel and interprets questions of law,⁸⁹ the panel proceeding mirrors a mandatory pre-trial conference within the state court system. If a lawyer serves as an officer of the court to guide medical professionals chosen for their expertise,⁹⁰ the panel parallels mandatory referral to a special master.

⁸⁴ See *Wheeler v. Shoemaker*, 78 F.R.D. 218, 221 (D.R.I. 1978).

⁸⁵ See note 70 and accompanying text *supra*. Because federal jurisdiction is a question of federal law, the states' label for a tribunal should not govern the federal court's determination of whether the state body ousts it of jurisdiction.

⁸⁶ One can persuasively argue, however, that federal courts should *automatically* refuse to apply MMP statutes if the state legislature clearly intended to create a judicial body. If legislative intent is clear, a court should not risk erroneously characterizing a panel, thus depriving a claimant of his right to choose between federal and state forums. This federal right to choose may be sufficiently important to justify such a prophylactic rule.

⁸⁷ The court in *Wheeler v. Shoemaker*, 78 F.R.D. 218, 221 (D.R.I. 1978), wisely accorded limited weight to procedure when analyzing the nature of the Rhode Island MMP. *But see* *Woods v. Holy Cross Hosp.*, 591 F.2d. 1164, 1169 n.7 (5th Cir. 1979) (distinguishing statute requiring filing in court before action is referred to panel from statute requiring referral to panel before filing in court).

⁸⁸ State laws labelling a tribunal a "court of record" or state constitutions expressly placing a tribunal within the state judicial framework may be reliable indications that the state body is judicial. See notes 79-80 and accompanying text *supra*.

⁸⁹ See note 13 and accompanying text *supra*.

⁹⁰ See R.I. GEN. LAWS § 10-19-1 (Supp. 1979).

The panel's power to bind the parties is a second important consideration in characterizing MMPs. A panel's decision hardly constitutes an adjudication that usurps a claimant's choice of forums if its decision has no effect on subsequent litigation. But it increasingly resembles a court as its ability to determine parties' rights grows. Although the availability of a trial *de novo* after an MMP hearing ostensibly robs the panel of such effect, many states expressly allow the panel's decision into evidence at trial.⁹¹ One state even requires a presumption that the panel's finding is correct.⁹² Furthermore, after the statute of limitations for contesting a panel's decision has run, some states allow the victorious party to execute the award, thus giving the decision the force of a judgment.⁹³ Finally, those MMPs empowered to determine the merits of a controversy, fix liability, and award damages⁹⁴ are more judicial than those only having the authority to find facts.⁹⁵

When determining the nature of a state agency, federal courts might analyze whether the locus of traditional jurisdiction over claims brought before a panel is in the state courts. Because malpractice claims are tort actions, and the traditional locus of jurisdiction of tort claims is in the state judiciary, however, MMPs will always be court-like under this criteria. Merely examining the original forum for tort claims does not suffice to characterize an MMP as judicial.

Many criteria may assist a federal court's determination of whether a panel more resembles a court than an administrative board.⁹⁶ Certain factors, however, have limited usefulness.⁹⁷

⁹¹ See note 26 *supra*.

⁹² MD. CTS. & JUD. PROC. CODE ANN. § 3-2A-6(d) (1980).

⁹³ See, e.g., *id.* § 3-2A-05 to -06 (award binding on the parties unless notice of rejection and action to nullify award filed within 90 day period); PA. STAT. ANN. tit. 40, § 1301.511 (Purdon Supp. 1980-81) ("If an appeal is not entered within the prescribed time, the party in whose favor the award shall have been made may . . . transfer the record and judgment to the court . . . for execution."), *declared unconstitutional*, *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980); R.I. GEN. LAWS § 10-19-9a (Supp. 1979) ("Any party who does not file a notice of rejection within [thirty days of receipt of the award] shall be deemed conclusively to have accepted said findings or award."); WIS. STAT. ANN. § 655.20 (1980) ("After the . . . time for petitioning the circuit court for a trial . . . has passed, any party may file a certified copy of the order containing the award . . . and the court shall then render judgment in accordance with the order.");

⁹⁴ See notes 22, 23 and accompanying text *supra*.

⁹⁵ See note 21 and accompanying text *supra*.

⁹⁶ See notes 89-95 and accompanying text *supra*.

⁹⁷ See notes 84-86 and accompanying text *supra*. Courts should give little weight to certain characteristics of MMPs that are judicial in form. For example, both court and

Because no criterion is determinative, courts should analyze a panel's composition and all its procedures, powers and duties in determining whether an MMP usurps the choice of initial forums federal diversity jurisdiction provides.

C. *Completion of the Erie Analysis and the Exhaustion of State Administrative Remedies Doctrine*

If a federal court determines that an MMP resembles an administrative body more than a court, and thus does not undermine federal diversity jurisdiction, it must determine whether to exercise jurisdiction or to dismiss the suit and defer to the MMP. Although the court might⁹⁸ proceed under either the exhaustion of state administrative remedies doctrine,⁹⁹ or continue under *Erie Railroad v. Tompkins*¹⁰⁰ and its progeny,¹⁰¹ the applicability of the

panel proceedings involve adverse parties and usually result in a written opinion based on independent investigation of facts and law. Many state administrative agencies, to which federal courts regularly defer under the exhaustion of administrative remedies doctrine, also exhibit these attributes. Invalidating an MMP law on the basis of such factors would expose almost every state agency to attack. *But see* Note, 1980 DUKE L.J., *supra* note I, at 565.

Similarly, courts should ignore the burden on the right to choose a federal forum resulting from costs, delays, and possible prejudice within an MMP system. *But cf.* Edelson v. Soricelli, 610 F.2d 131, 148 (3d Cir. 1979) (Rosenn, J., dissenting) (possible prejudice, "additional expenses," and inefficiency are important in analyzing federal interest not to defer to panel). Almost every state administrative hearing arguably entails sufficient expense and delay to deter claimants from exercising their right to a federal forum. Moreover, the potential for prejudice against noncitizens in state forums is always present. If delay, costs, and potential prejudice burdened the right of access to a federal forum, federal courts would seldom defer to any state administrative body under the exhaustion doctrine.

⁹⁸ Courts have not considered the exhaustion of state administrative remedies doctrine when determining whether to give effect to MMP statutes. Most courts look exclusively to the command of *Erie*. *See, e.g.*, Davison v. Sinai Hosp., 462 F. Supp. 778 (1978), *aff'd per curiam*, 617 F.2d 361, 362 (4th Cir. 1978); Hamilton v. Roth, 624 F.2d 1204, 1208-12 (3d Cir. 1980); Edelson v. Soricelli, 610 F.2d 131 (3d Cir. 1979). *But see* Wheeler v. Shoemaker, 78 F.R.D. 218, 222-23 (D.R.I. 1978) (focusing on nature of panel as administrative or judicial).

⁹⁹ *See generally* Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L.J. 817, 859-911 (1976).

¹⁰⁰ 304 U.S. 64 (1938).

¹⁰¹ A determination that a MMP statute undermines a claimant's choice of forums obviates further analysis of the state statute; the court should immediately take jurisdiction. At least one federal court, however, has refused to defer to a court-like MMP—implicitly on grounds that the MMP undermined federal diversity jurisdiction—but went on to consider whether the *Erie* doctrine required it to pattern the federal proceeding according to the state MMP statute. *See* Wheeler v. Shoemaker, 78 F.R.D. 218, 223-29 (D.R.I. 1978). This approach is incorrect. If an MMP statute is constitutionally infirm, the statute should not affect a federal court's procedure. The RDA as interpreted by *Erie* and its progeny, *see* notes 111-12 *infra*, does not compel application of state law where "the Constitution . . . otherwise require[s] or provide[s]." 28 U.S.C. § 1652 (1976). *See* note 54 *supra*.

exhaustion doctrine is unnecessary where state statutes *require* administrative proceedings. Moreover, because of the statutory basis of the *Erie* doctrine, logic requires that courts analyze exclusively the command of *Erie* and its progeny.

Exhaustion is a discretionary doctrine that generally requires¹⁰² federal courts to dismiss or stay suits when the plaintiff has not pursued applicable state administrative remedies before seeking federal relief.¹⁰³ Generally applied to state statutes that do not require exhaustion,¹⁰⁴ the doctrine is not a limitation on federal jurisdiction.¹⁰⁵ Rather, the exhaustion requirement is rooted in equitable discretion,¹⁰⁶ reflecting federalism concerns¹⁰⁷

¹⁰² Exhaustion, however, is unnecessary in several situations, such as when the state remedy is inadequate. See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 49, at 211 (3d ed. 1976). See generally K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.01-10 (1958 & Supp. 1970).

¹⁰³ *Myers v. Bethlehem Ship Bldg. Corp.*, 303 U.S. 41, 50-51 (1938); C. WRIGHT, *supra* note 102, at 210.

Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908) is the seminal state exhaustion doctrine case. The defendant, Virginia State Corporation Commission, appealed a federal injunction against enforcing an allegedly confiscatory order fixing railroad transportation rates. *Id.* at 223. The Court dismissed the defendant's argument that, because the commission was a "court," federal courts lacked power to enjoin it under the Anti-Injunction Act of 1793, ch. 22, § 5, 1 Stat. 334 (current version with substantive modifications at 28 U.S.C. § 2283 (1976)) 211 U.S. at 223-28. However, the Court held that the plaintiff railroad had appealed the Commission's rate order to the federal courts prematurely because Virginia provided an appeal of right from any rate order to its own supreme court. *Id.* at 230-31. "The question to be decided . . . is legislative, whether a certain rule shall be made. Although the appeal [to the state supreme court] is given of right, it is not a remedy, properly so called. At that time, no case exists." *Id.* at 229. The Court reasoned that deferral to the state proceeding might save the federal courts time and expense if the state itself found the Commission's rate to be confiscatory, thus rendering federal relief unnecessary. See *id.* at 231.

The Court narrowed the apparent scope of the *Prentis* exhaustion doctrine in *Bacon v. Rutland R.R.*, 232 U.S. 134 (1914), by holding that parties must exhaust only nonjudicial remedies. Emphasizing that the Virginia Supreme Court in *Prentis* would have exercised only "legislative" powers in a rate-order appeal, the Court held that "at the judicial stage [an aggrieved party has] a right to resort to the courts of the United States at once." *Id.* at 137.

Although *Bacon* and *Prentis* involved exhaustion of state *legislative* remedies, they are commonly interpreted to require exhaustion of state *administrative* remedies as well. See C. WRIGHT, *supra* note 102, at 210 ("A litigant must normally exhaust state 'legislative' or 'administrative' remedies. . .").

¹⁰⁴ See, e.g., *Gibson v. Berryhill*, 411 U.S. 564, 574 (1973) (*dictum*); *Timmons v. Andrews*, 538 F.2d 584, 586 (4th Cir. 1976); *Guzzard v. Local Lodge 1040*, 480 F.2d 35, 41 (9th Cir. 1973).

¹⁰⁵ C. WRIGHT, *supra* note 102, at 210.

¹⁰⁶ *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 229 (1908) (exhaustion of state legislative remedies); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 980 (2d ed. 1973) ("traditional discretion of the chancellor . . . mother of [exhaustion] doctrin[e]").

¹⁰⁷ See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 425 (1965). Raoul Berger has argued, however, that comity was a significant rationale only for the exhaustion of state

and an interest in judicial convenience and efficiency.¹⁰⁸ By requiring exhaustion, the federal courts show solicitude for state-created mediation procedures, reduce court dockets,¹⁰⁹ and gain the advantage of an administrative record enhanced by the agency's expertise.¹¹⁰ Unlike the exhaustion doctrine, however, the *Erie* doctrine is based on the command of a statute, the Rules of Decision Act (RDA),¹¹¹ and of the Constitution.¹¹²

legislative remedies. He states that "the earlier applications of the [exhaustion doctrine] . . . to state administrative bodies were based not so much upon considerations of comity as upon the theory that resort to equity is premature in the absence of administrative action, or so long as some other remedy is available." Berger, *Exhaustion of State Administrative Remedies*, 48 YALE L.J. 981, 985 (1939) (footnotes omitted). For a discussion of the exhaustion of legislative remedy in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), see note 103 *supra*.

¹⁰⁸ See *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 229 (1908) (exhaustion of state legislative remedies).

¹⁰⁹ See *McKart v. United States*, 395 U.S. 185, 193 (1969); *Seepe v. Department of Navy*, 518 F.2d 760, 768 (6th Cir. 1975); *Penzoil Co. v. Department of Energy*, 466 F. Supp. 238, 244 (D. Del. 1979).

¹¹⁰ *American Nursing Home Ass'n v. Cost of Living Council*, 497 F.2d 909, 913 (Temp. Emer. Ct. App. 1974) (*Cost of Living Council*); *Bralley v. Weinberger*, 483 F.2d 410, 415 (1st Cir. 1973) (*Food & Drug Administration*).

¹¹¹ 28 U.S.C. § 1652 (1976). The Act provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." Commentators generally agree that *Erie* and its progeny interpret the RDA—at least where federal rules that are "arguably procedural" are involved. See, e.g., Ely, *supra* note 58, at 698, 706; Mishkin, *supra* note 54; Redish & Phillips, *supra* note 58, at 358-61; cf. Alexander, *supra* note 49, at 975 ("Opinions subsequent to *Erie* have focused not on . . . constitutional limitations on federal courts, but rather on the limitations imposed by the Rules of Decision Act. . ."). But see Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 386 (1964) ("[T]he constitutional ground taken in *Erie* was precisely the right ground—indeed, the only tenable one").

¹¹² In *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Court stated:

If only a question of statutory construction were involved, we should not be prepared to abandon [the] doctrine [of *Swift v. Tyson*] so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

. . . There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Id. at 77-78 (footnote omitted). The federal courts have no constitutional power to engage in general substantive lawmaking in diversity actions. However, the grant of diversity jurisdiction in article III of the Constitution does empower the federal judiciary to regulate its own procedure. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965); Ely, *supra* note 58, at 698, 703 n.62, 706; Friendly, *supra* note 111, at 402-03; Redish & Phillips, *supra* note 58, at 358. Professor Ely states that Congress and the courts (through congressional delegation) have constitutional power to create rules as long as they are not "plainly unprocedural."

Erie and its progeny require federal courts sitting in diversity to give effect to a state's substantive law regulating the primary conduct of its citizens.¹¹³ Courts and commentators disagree, however, about the effect that federal courts must give to state rules that are not clearly substantive. The controversy stems from conflicting interpretations of *Byrd v. Blue Ridge Rural Electric Cooperative*.¹¹⁴ One interpretation of *Byrd* is that, in the absence of a clearly applicable federal rule of procedure, a federal court must honor state procedural rules that are intimately "bound up" with substantive state policies.¹¹⁵ Another interpretation is that *Byrd* requires federal courts to engage in a free-form balancing process when determining whether to follow state rules that are arguably not substantive.¹¹⁶ Under this approach, the court balances both the state interests in promoting state substantive policies and the litigants' interests in not having the outcome of a suit be

Ely, *supra* note 58, at 705. Ely thus argues that the RDA restricts the federal courts' constitutional power to ignore state law in arguably procedural matters:

The United States Constitution . . . constitutes the relevant text only where Congress has passed a statute creating law for diversity actions, and it is in this situation alone that *Hanna's* "arguably procedural" test controls. Where a nonstatutory rule is involved, the Constitution necessarily remains in the background, but is functionally irrelevant because the applicable statutes are significantly more protective of the prerogatives of state law.

Id. at 698. *See id.* at 705, 720; P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *supra* note 106, at 120 (Supp. 1977). *Accord*, Redish & Phillips, *supra* note 58, at 358. When no federal statute or rule of procedure controls, the RDA requires application of the state law if applying federal law would probably produce a different outcome or unfairness to the litigants. *Hanna v. Plumer*, 380 U.S. 460, 467 (1965); Ely, *supra* note 58, at 712, 714, 722. Thus, Ely argues that the constitutional component in *Erie* is "functionally irrelevant" in all cases that do not involve clear substantive issues. *Id.* at 698, 706. *See generally*, C. WRIGHT, *supra* note 102, § 56, at 258-62.

The arguably procedural character of MMPs, *see* Note, 93 HARV. L. REV., *supra* note 1, at 1569-70, satisfies the constitutional component of *Erie*. However, if MMPs were held to be clearly substantive, the Constitution, absent a contrary congressional statement, would compel their application in federal courts sitting in diversity. The rub, then, would be whether federal diversity jurisdiction constitutes such a congressional statement.

¹¹³ "*Erie* recognized that there should not be two conflicting systems of law controlling the *primary activity of citizens*, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of everyday affairs." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (emphasis added).

¹¹⁴ 356 U.S. 525 (1958). For a discussion of *Byrd's* application to MMPs, *see* Alexander, *supra* note 49, at 981-87; Note, 1980 DUKE L.J. *supra* note 1, at 556-62.

¹¹⁵ Redish & Phillips, *supra* note 58, at 364.

¹¹⁶ *Id.* The court in *Wheeler v. Shoemaker*, 78 F.R.D. 218 (D.R.I. 1978) adopted this flexible balancing test. "The interpretation this Court prefers is that *Byrd* counsels a balancing of the federal interest even if a significant state interest is "bound up" with [a] state statute." *Id.* at 225 n.9.

determined by the "accident of diversity of citizenship"¹¹⁷ against the countervailing federal interests in applying federal law. A third interpretation is that the emphasis upon the twin aims of *Erie* in *Hanna v. Plumer*¹¹⁸ displaced the "balancing of federal and state interests contemplated by the *Byrd* opinion."¹¹⁹ This view, however, must be tempered by the facts in *Hanna*, where a Federal Rule of Civil Procedure was at issue. Any rejection of *Byrd* by *Hanna*, therefore, is arguably confined¹²⁰ to an analysis of Federal Rules enacted under the Rules Enabling Act.¹²¹

Logic dictates that federal courts analyze MMP statutes exclusively under the *Erie* doctrine. On the one hand, a determination that federal interests under *Byrd* are insufficient to override the absorption of state law would nullify a contrary command of the exhaustion doctrine. Even if a malpractice suit were to fall into one of the narrow exceptions to the exhaustion requirement,¹²² the RDA still requires the court to defer to the panel. On the other hand, a conclusion that federal interests require the federal court to ignore state law and immediately take jurisdiction accounts for and dismisses the policies underlying the exhaustion doctrine. If a court decides that *Byrd* requires a federal rule of decision, it at least implicitly balances the exhaustion rule's concerns for federalism, convenience, and administrative expertise

¹¹⁷ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (in diversity cases federal courts must follow conflicts of laws rules of the forum state).

¹¹⁸ 380 U.S. 460 (1965).

¹¹⁹ Ely, *supra* note 58, at 717 n.130. See 380 U.S. at 468 n.9. Ely notes, however, that "if the 'federal interest' involved is one whose recognition is required by the United States Constitution . . . it should be honored regardless of what the Rules of Decision Act might otherwise imply." Ely, *supra* note 58, at 717 n.130. Cf. note 54 *supra* (arguing that RDA analysis would reject state law violating the Constitution).

¹²⁰ Despite contrary statements elsewhere (see Ely, *supra* note 58, at 707-18), Professor Ely implicitly suggests a limitation on *Hanna's* review of *Byrd* by his reliance on Professor Miller's article, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 714-15 (1962); Ely, *supra* note 58, at 717 n.130. The topic sentence of the paragraph in Professor Miller's article, that Professor Ely quotes, begins: "*Hanna* seems to require that a federal court confronted with a challenge to a Federal Rule. . . ." Miller, *supra*, at 714 (emphasis added). Thus, Professor Miller's discussion of *Hanna's* effect on *Byrd* is confined to a challenge to a federal rule enacted under the Rules Enabling Act, 28 U.S.C. § 2077 (1976). Cf. Miller, *supra*, at 715 n.375 (suggesting *Hanna* permits balancing of interests when Federal Rule of Civil Procedure in question). But see Redish & Phillips, *supra* note 58, at 368-69 (*Hanna* rejected *Byrd*-balance).

Whatever the view of the commentators, however, federal courts continue to balance federal and state interests when determining choice of law in diversity actions. See Redish & Phillips, *supra* note 58, at 369 n.74 ("decisions from all circuits but the Ninth . . . [continue to apply] *Byrd*."). See generally *id.* at 369-72.

¹²¹ 28 U.S.C. § 2077 (1976).

¹²² See note 102 *supra*.

against other contrary and weightier federal interests. Thus, regardless of the outcome under the *Erie* doctrine, the command of the exhaustion doctrine is irrelevant.¹²³

CONCLUSION

Federal courts confronted with attempts to avoid state MMPs should engage in an *Erie* analysis to determine the applicability of the state MMP statute. To do so, courts must initially characterize the nature of the panel to determine whether the MMP law abrogates the choice of forums federal diversity jurisdiction provides. Only if the state law is compatible with diversity jurisdiction should federal courts complete the *Erie* analysis. Because the policies underlying the exhaustion of state administrative remedies are subsumed in an *Erie* balance of federal and state interests, independent consideration of the exhaustion doctrine is unnecessary. The outcome under an *Erie* analysis, therefore, will settle the issue.

David L. Bishop

¹²³ Other reasons also suggest that a court should analyze the requirements of the *Erie* doctrine exclusively. The exhaustion doctrine may not even apply to MMP statutes. The doctrine commonly applies where state statutes do not make administrative proceedings a condition precedent to suit. See note 104 *supra*. In addition, the federal interest in administrative expertise underlying the exhaustion doctrine, see note 110 and accompanying text *supra*, is not necessarily promoted by deferring to an MMP. Random procedures in many states for selecting MMP personnel substantially prevent panel members from developing expertise.