

AN *ERIE* DECISION: SHOULD STATE STATUTES PROHIBITING THE PLEADING OF PUNITIVE DAMAGES CLAIMS BE APPLIED IN FEDERAL DIVERSITY ACTIONS?

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I. INTRODUCTION

In the current maelstrom surrounding tort reform, punitive damages have become the topic of much consternation and debate, within and outside of the legal profession.¹ Critics of punitive damages justifiably complain about the disproportionately large punitive damages awards and the concomitant strain placed on insurance companies from having to defend against and/or to pay large punitive damages awards.² In response to these criticisms, many states have implemented legislative reforms which typically place limitations on how punitive damages are awarded and on the amount of punitive damages that may be awarded.³

Several states also enacted laws which prohibit plaintiffs from asserting a claim for punitive damages absent court approval,⁴

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1. See Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 195 (1994).

2. See Grace M. Giesel, *The Knowledge of Insurers and the Posture of the Parties in the Determination of the Insurability of Punitive Damages*, 39 KAN. L. REV. 355, 355-56 (1991); Russell G. Murphy, "Common Sense Legal Reform" and Bell's Toll: *Eliminating Punitive Damages Claims from Jurisdictional Amount Calculations in Federal Diversity Cases*, 84 KY. L.J. 71, 91-92 (1996). Insurance companies are generally obligated to defend a policyholder against punitive damages claims, unless the policy excludes such coverage by its terms or by state law. Giesel, *supra*.

3. Hurd & Zollers, *supra* note 1, at 195. During this wave of tort reform, more than half of the states enacted laws limiting or otherwise affecting a plaintiff's right to punitive damages. *Id.* See *College Hosp., Inc. v. Superior Court*, 882 P.2d 894, 898 (Cal. 1994) (discussing various California laws governing awards of punitive damages).

4. For a further discussion of the provisions of these state statutes and the policies behind them, see Section II.A. *infra*.

thereby theoretically eliminating the leverage⁵ inherent in pleading entitlement to punitive damages, especially where the claim for punitive damages was meritless. There is no federal counterpart to these state statutes.⁶

Accordingly, the federal district courts question whether they must apply these state statutes in federal diversity actions⁷ consistent with the dictates of the *Erie* Doctrine.⁸ However, no consensus has emerged among the various district courts as to whether these state punitive damages pleading statutes must apply in federal diversity actions.⁹

5. Courts have long recognized the face value impact of punitive damages claims. *See Zeelan Indus. v. De Zeeuw*, 706 F. Supp. 702, 705 (D. Minn. 1989); *Fournier v. Marigold Foods, Inc.*, 678 F. Supp. 1420, 1422 (D. Minn. 1988) (stating that punitive damages claims produce "tactical advantage"); *College Hosp.*, 882 P.2d at 898 (recognizing that the assertion of a punitive damages claim is often a "tactical ploy"). Asserting a punitive damages claim often escalates a relatively simple action, in which the compensatory damages are likely to be small, into a war with potential exposure to millions of dollars in liability.

6. Several federal district courts have determined that certain Federal Rules of Civil Procedure conflict with the various state statutes, including Rules 8(a)(2) and 9(g). *See Wisconsin Inv. Bd. v. Plantation Square Assocs.*, 761 F. Supp. 1569 (S.D. Fla. 1991) (finding conflict with Rule 8(a)(2)); *NAL II, Ltd. v. Tonkin*, 705 F. Supp. 522, 527 (D. Kan. 1989) (finding conflict with Rule 9(g)). Other federal courts have found an absence of conflict with any rule. *See Al-Site Corp. v. VSI Int'l, Inc.*, 842 F. Supp. 507, 511-12 (S.D. Fla. 1993); *Kuehn v. Shelcore, Inc.*, 686 F. Supp. 233, 234 (D. Minn. 1988).

7. Federal diversity jurisdiction is based on two necessary elements: (1) complete diversity of citizenship; and (2) the amount in controversy exceeding \$50,000. 28 U.S.C. § 1332 (1994).

State punitive damages pleading statutes generally do not apply in actions where jurisdiction is founded on a federal statute or a federal question. *Meade v. Prison Health Servs., Inc.*, No. 94-854-CIV-T-17B, 1995 WL 350207, at *2 (M.D. Fla. June 8, 1995); *Morris v. Crow*, 825 F. Supp. 295, 298 (M.D. Fla. 1993); *Brennan v. City of Minneola*, 723 F. Supp. 1442, 1443 (M.D. Fla. 1989). *But see Marcus v. Carrasquillo*, 782 F. Supp. 593, 600-01 (M.D. Fla. 1992) (finding Florida law governing pleading of punitive damages must be applied by federal courts to claims brought under federal statutes). The court in *Morris* distinguished *Marcus*, stating that there were pendent state law claims in *Marcus* in addition to federal civil rights claims. *Morris*, 825 F. Supp. at 298.

8. The *Erie* Doctrine stems from the United States Supreme Court's holding in *Erie Railroad v. Tompkins*, 304 U.S. 64, 76-78 (1938), which states that federal courts must apply only state substantive law in federal diversity actions. Determining whether a state's law is substantive or procedural is the true purpose of the *Erie* Doctrine. *See Nereson v. Zurich Ins. Co.*, No. A3-91-72, 1992 WL 212233, at *1 (D.N.D. Aug. 20, 1992) (noting that "[r]oughly speaking, the *Erie* doctrine stands for the proposition that federal courts sitting in diversity shall apply state substantive law and federal procedural law"). For a further discussion of the *Erie* Doctrine, see *infra* notes 41-43 and accompanying text.

9. *See Al-Site Corp. v. VSI Int'l, Inc.*, 842 F. Supp. 507, 511 n.6 (S.D. Fla. 1993)

This Article begins with an examination of the states that have enacted statutes governing the pleading of punitive damages. Against a background of the *Erie* Doctrine, this Article then examines a representative series of cases setting forth the conflict as to whether state statutes governing the pleading of punitive damages are procedural or substantive law, and thus, whether the state statutes must be applied in federal diversity actions. This Article concludes that these state statutes are substantive in nature and must be applied by the federal courts sitting in diversity.

II. BACKGROUND

Punitive damages are a type of damage award available to plaintiffs in certain actions.¹⁰ Punitive damages are not tied to actual harm, rather, they serve to punish defendants for their misconduct and to deter similar conduct by others.¹¹ Plaintiffs seeking an award of punitive damages must prove that the defendant(s) engaged in conduct which rises to a socially unacceptable level. Where punitive damages awards are permitted, state law determines what constitutes a socially unacceptable level of conduct sufficient to support a punitive damages award.¹²

(cataloguing various holdings on both sides of issue rendered within Florida district courts). Moreover, only one appellate court — the Eighth Circuit — has even tangentially addressed this issue. *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.*, 32 F.3d 1244, 1254–55 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1270 (1995).

10. Generally, punitive damages are only available in non-contractual actions. Various states have barred the punitive damages awards for certain actions or against certain defendants.

11. *Worthem v. Gillette Co.*, 774 F. Supp. 514, 517 (N.D. Ill. 1991). The *Worthem* court explained that punitive damages punish a defendant for his outrageous conduct and deter the defendant, and others, from engaging in morally offensive behavior. *Id.* Most courts impose punitive damages to serve the goals of punishment and deterrence. There are, however, other purposes behind punitive damages. David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 373–82 (1994) (identifying education, retribution, deterrence, compensation, and law enforcement as other purposes behind punitive damages).

12. Many states have legislated in the area, while others have left the task up to the courts. For instance, by statute, Minnesota requires a showing of “deliberate disregard for the rights or safety of others.” MINN. STAT. § 549.20(1)(a) (1996). The standard in Illinois requires proof of fraud, “actual malice, deliberate violence or oppression” or gross negligence. *Worthem*, 774 F. Supp. at 517. In California, a plaintiff must prove “oppression, fraud, or malice.” *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 832 P.2d 924, 928 (Cal. 1992); *see* CAL. CIV. CODE § 3294 (West Supp. 1996).

A. State Statutes Governing the Pleading of Punitive Damages

There are eight states which have enacted legislation purporting to govern the pleading of punitive damages.¹³ These states typically prohibit plaintiffs from asserting a claim for punitive damages in their initial pleadings. Instead plaintiffs are required to obtain leave of court before adding a claim for punitive damages.¹⁴ In order to obtain court approval, the plaintiff is required to adduce a certain quantum of proof to demonstrate a likelihood of ultimate entitlement to an award of punitive damages.¹⁵

1. Florida

In 1986, Florida enacted section 768.72 to govern the pleading of punitive damages in civil actions.¹⁶ Section 768.72 provides:

In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. . . . No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.¹⁷

Section 768.72 codifies three important policy objectives. First, on its face, section 768.72 indicates that punitive damages may not be specifically sought in the complaint.¹⁸ Second, Florida creates a height-

13. Six states have comprehensive statutes governing the pleading of punitive damages in all actions where they are available: Florida, Idaho, Illinois, Kansas, Minnesota and North Dakota. Additionally, California and Colorado regulate the pleading of punitive damages in certain types of actions.

14. States vary in prescribing the procedure necessary to obtain court approval. Compare MINN. STAT. ANN. § 549.191 (West 1988) (requiring submission of affidavits) with KAN. STAT. ANN. § 60-3703 (1996) (requiring a court hearing after showing of prima facie entitlement).

15. Again, the showing varies by state. Compare FLA. STAT. § 768.72 (1995) ("reasonable basis") with IDAHO CODE § 6-1604(2) (1990) ("reasonable likelihood").

16. Laws of 1986, ch. 86-160, § 51, effective July 1, 1986 (current version at FLA. STAT. § 768.72 (1995)). Florida enacted § 768.72 as part of comprehensive tort reform legislation known as the "Tort Reform and Insurance Act of 1986."

17. FLA. STAT. § 768.72 (1995).

18. This is clearly indicated by reference in the statute to a procedure for amending the initial complaint. *Id.* The Florida state courts have agreed with this construction.

ened standard for demonstrating entitlement to an award of punitive damages. Demonstrating a "reasonable basis" in compliance with section 768.72 requires a procedure which has evolved into a mini-trial of whether the plaintiff will be able to prove that the defendant acted with the requisite level of intent and misconduct. Third, Florida bars discovery of a defendant's financial worth until after the plaintiff has obtained court approval to add a claim for punitive damages.¹⁹

2. Idaho

In 1987, Idaho's legislature passed tort reform legislation which included a statute governing the pleading of punitive damages.²⁰ Idaho's section 6-1604(2) states:

In all civil actions in which punitive damages are permitted, no claim for damages shall be filed containing a prayer for relief seeking punitive damages. However, a party may, pursuant to a pretrial motion and after hearing before the court, amend the pleadings to include a prayer for relief seeking punitive damages. The court shall allow the motion to amend the pleadings if the moving party establishes at such hearing a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.²¹

Like Florida, Idaho requires litigants to seek court approval before asserting a claim for punitive damages. Kansas has enacted legislation similar to Idaho's section 6-1604.²²

See Wolper Ross Ingham & Co. v. Liedman, 544 So. 2d 307 (Fla. 3d Dist. Ct. App. 1989).

19. Florida Statutes § 768.72 is unlike most punitive damages statutes, because it includes the discovery bar. Thus, courts have correctly identified § 768.72 as "both a pleading rule and a discovery rule." Wisconsin Inv. Bd. v. Plantation Square Assocs., 761 F. Supp. 1569, 1572 (S.D. Fla. 1991). In fact, Florida's discovery bar is uncommon. *Id.* at 1576 n.9 (noting that "[t]he court's research has failed to uncover any other similar state statutory provision"). *But see* ALA. CODE § 6-11-23 (1993) (preventing financial worth discovery until verdict for punitive damages is awarded); S.D. CODIFIED LAWS ANN. § 21-1-4.1 (1987).

20. Laws of 1987, ch. 276, § 1, p. 571 (current version at IDAHO CODE § 6-1604(2) (1990)). Section 6-1604(1) codifies the standard for obtaining a punitive damages award in Idaho which requires litigants to prove "oppressive, fraudulent, wanton, malicious or outrageous conduct." IDAHO CODE § 6-1604(1) (1990).

21. *Id.* § 6-1604(2).

22. In 1988, Kansas passed legislation prohibiting the pleading of punitive damages "unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed." Laws of July 1, 1988, *as amended by* Laws of 1992, ch.

3. Illinois

Section 5/2-604.1 governs the pleading of punitive damages in Illinois and is found in the Illinois Code of Civil Procedure.²³ Section 5/2-604.1 provides in part that:

In all actions on account of bodily injury or physical damage to property, based on negligence, or product liability based on any theory or doctrine, where punitive damages are permitted no complaint shall be filed containing a prayer for relief seeking punitive damages.²⁴

Illinois requires litigants to file a motion to amend and demonstrate at a hearing “a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages.”²⁵ Section 5/2-604.1 further provides that claims for punitive damages are not barred by any applicable statute of limitations as long as the original pleading — without the punitive damages claims — was timely when it was filed.²⁶

4. Minnesota

307, § A (current version at KAN. STAT. ANN. § 60-3703 (1996)). Under the terms of § 60-3703, a litigant could seek to amend pleadings to include a claim for punitive damages after a motion and a hearing at which the litigant had to establish a probability of success on the merits of the punitive damages claim. KAN. STAT. ANN. § 60-3703 (1996). Kansas required the motion to be filed before the pretrial conference. *Id.*

In construing § 60-3703, the Kansas Supreme Court ruled that the trial court must determine that it is more likely than not, given a plaintiff's burden to prove the matter by clear and convincing evidence, that the plaintiff will prevail on a claim for punitive damages. *Fusaro v. First Family Mortgage Corp.*, 897 P.2d 123, 129 (Kan. 1995). The trial court must resolve doubt in favor of the plaintiff, and it must not engage in areas which will be left to the fact finder, such as credibility determinations. *Id.* Although this standard is similar to a summary judgment standard, the *Fusaro* court was careful to distinguish the two standards. *Id.*

23. ILL. ANN. STAT. ch. 5, para. 2-604.1 (Smith-Hurd 1992 & Supp. 1996). Section 5/2-604.1 was formerly known as § 2-604.1.

24. *Id.*

25. *Id.* Section 5/2-604.1 further specifies that any motion to add a claim for punitive damages must be brought no later than 30 days after discovery is completed. *Id.*

26. *Id.* See KAN. STAT. ANN. § 60-3703 (1996).

In 1986, Minnesota also enacted a statute governing the pleading of punitive damages as part of extensive tort reform legislation.²⁷ Section 549.191 follows the typical model of punitive damages statutes, in that it: (1) prevents the filing of a complaint which seeks punitive damages; (2) requires the plaintiff to move to amend to add a punitive damages claim; and (3) requires the plaintiff to make a prima facie showing in support of the motion to amend.²⁸ However, Minnesota's section 549.191 has two provisions not typically found in punitive damages statutes; it requires that the motion to amend be supported by at least one affidavit, and it stipulates that the amended pleadings relate back to the date of the filing of the original complaint.²⁹

The courts that have construed section 549.191 determine that it was enacted, in part, to eliminate the tactical advantage gained by a plaintiff who demands punitive damages at the outset of the case.³⁰

5. California

There is no comprehensive law in California which purports to govern the pleading of punitive damages in all actions where punitive damages may be awarded.³¹ However, in 1987, California enacted sections 425.13 and 425.14 which prohibit plaintiffs from asserting a claim for punitive damages in certain types of actions.³²

27. Laws of 1986, ch. 455, § 95 (current version at MINN. STAT. ANN. § 549.191 (West 1988)).

28. MINN. STAT. ANN. § 549.191 (West 1988). North Dakota enacted a statute similar to Minnesota's § 549.191. See Laws of 1987, ch. 404, § 11, *as amended by* Laws of 1995, ch. 305, § 2 (current version at N.D. CENT. CODE § 32-03.2-11.1 (1996)).

29. MINN. STAT. ANN. § 549.191 (West 1988).

30. *Filz v. Mayo Found.*, 136 F.R.D. 165, 174 (D. Minn. 1991); *Fournier v. Marigold Foods, Inc.*, 678 F. Supp. 1420, 1422 (D. Minn. 1988).

31. The aforementioned states refer to "all civil actions" in which punitive damages are an available remedy. See FLA. STAT. § 768.72 (1995) (providing "[i]n any civil action"); IDAHO CODE § 6-1604(2) (1990) (stating that "[i]n all civil actions in which punitive damages are permitted . . ."); see also ILL. ANN. STAT. ch. 5, para. 2-604.1 (Smith-Hurd Supp. 1996) (providing "[i]n all actions on account of bodily injury or physical damage to property, based on negligence, or products liability based on any theory or doctrine, where punitive damages are permitted . . .").

32. Statutes of 1987, ch. 1498, § 7, *as amended by* Statutes of 1988, ch. 1205, § 1 (current version at CAL. CIV. PROC. CODE § 425.13 (West Supp. 1996)); Statutes of 1988, ch. 1410, § 1 (current version at CAL. CIV. PROC. CODE § 425.14 (West Supp. 1996)).

These sections were part of the Brown-Lockyer Civil Liability Reform Act. *Central Pathology Serv. Medical Clinic, Inc. v. Superior Court*, 832 P.2d 924, 928 (Cal. 1992). The

Section 425.13 prevents plaintiffs from asserting a punitive damages claim in the complaint in any action founded on a claim of professional negligence by a "health care provider."³³ Similarly, section 425.14 prevents plaintiffs from pleading a punitive damages claim in an action against a religious corporation.³⁴ Both laws require the plaintiff to seek a court order permitting the filing of an amended pleading.³⁵ The California Supreme Court has construed the procedure outlined in both sections as requiring a plaintiff to substantiate a claim for punitive damages, but not to prove it.³⁶ No federal district court in California has construed either section 425.13 or section 425.14 in a published opinion.³⁷

All of the aforementioned state statutes prohibit a plaintiff from asserting a claim for punitive damages at the outset of the case and require court approval before adding such claims. However, whether such statutes are procedural, as they appear to be at first blush, or substantive, as they appear to be after careful analysis, must be determined by interpretation and application of the *Erie* Doctrine.

B. The *Erie* Doctrine and Its Progeny

Act also increased the "evidentiary threshold" necessary to obtain an award of punitive damages. *Id.*

33. CAL. CIV. PROC. CODE § 425.13 (West Supp. 1996). The California Legislature noted that § 425.13 was enacted to reduce the amount of frivolous punitive damages claims that were asserted against health-care providers. See *Central Pathology*, 832 P.2d at 929. The enactors of § 425.13 sought to establish a pretrial screening mechanism to weed out meritless claims for punitive damages. *Id.*

Colorado has a similar statute which prohibits the pleading of a claim for exemplary damages — which is statutorily defined to include punitive damages — in an original pleading seeking relief for a medical malpractice cause of action. COLO. REV. STAT. ANN. § 13-64-302.5(3) (West 1995).

34. CAL. CIV. PROC. CODE § 425.14 (West Supp. 1996).

35. Like Minnesota's § 549.191, California requires an affidavit demonstrating a "substantial probability that the plaintiff will prevail on the claim . . ." CAL. CIV. PROC. CODE § 425.13 (West Supp. 1996). Although the term "substantial probability" appears to heighten the standard a plaintiff must meet in order to amend, the California Supreme Court subsequently construed the words to have weakened meaning. *College Hosp., Inc. v. Superior Court*, 882 P.2d 894, 900–03 (Cal. 1994).

36. *College Hosp.*, 882 P.2d at 900.

37. Likewise, no federal district court in Colorado has construed its punitive damages pleading statute.

The federal courts have long been troubled by which law — state, or to the extent it exists, federal — applies in actions founded on diversity jurisdiction. The Federal Judiciary Act of 1789 appeared to resolve that problem by requiring federal courts to apply state law where there was no conflicting federal law.³⁸ However, the Supreme Court's 1842 holding in *Swift v. Tyson*³⁹ gave the federal courts virtual carte blanche to create or apply their own law when the dispute did not involve purely local issues.⁴⁰

In 1938, the Supreme Court suddenly reversed nearly a century of jurisprudence and overruled *Swift* in *Erie Railroad v. Tompkins*.⁴¹ In *Erie*, the Court ruled that federal judges were constrained to apply state law where it existed.⁴² Subsequent to *Erie*'s pronouncement, the federal courts have judiciously refrained — or so stated that they have judiciously refrained — from creating federal common law except in narrow and limited areas of jurisprudence.⁴³ However, *Erie* did not address whether certain nebulous state laws that seemed to govern procedure were to apply in federal actions, especially after the enactment of the Federal Rules of Civil Proce-

38. 28 U.S.C. § 1652 (1994). 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.

Id.

39. 41 U.S. (16 Pet.) 1 (1842).

40. The *Swift* Court construed the Act as only requiring application of state decisional law to local issues, primarily related to property laws. *Id.* The courts that followed *Swift* assumed the power to construe the “general law,” thereby displacing much of the state court's power. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 72 (1938). As the *Erie* Court noted, the *Swift* holding prevented any sort of uniformity and greatly promoted forum shopping. *Id.* at 74–76. The Court later commented that *Swift* gave rise to “mutilating construction” of the federal court mandate. *Guaranty Trust Co. v. York*, 326 U.S. 99, 102 (1945).

41. *Erie*, 304 U.S. at 64.

42. *Id.* at 78. Justice Brandeis succinctly stated that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.” *Id.*

43. *See id.* The Supreme Court explained in *City of Milwaukee v. Illinois & Michigan*, that “[w]hen Congress has not spoken to a particular issue, however, and when there exists a significant conflict between some federal policy or interest and the use of state law, . . . the Court has found it necessary, in a few and restricted instances . . . to develop federal common law.” 451 U.S. 304, 313 (1981) (citations omitted). The Court thus recognized that it and the lower federal courts were not empowered to make substantive law in diversity actions, but rather to construe it. *Id.* at 312.

dure during the same year *Erie* was decided.

Subsequently, in *Guaranty Trust Co. v. York*,⁴⁴ the Supreme Court ruled that federal procedural law must apply over state procedural laws in diversity actions.⁴⁵ *Guaranty Trust* did not address the dichotomy between state substantive law and state procedural law, but it did draw the demarcation line which federal courts could not cross by creating the outcome-determination test.⁴⁶ The outcome-determination test required application of the state law if failure to apply it would substantially affect the outcome of the case.⁴⁷

Continuing to explicate the young *Erie* Doctrine, in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,⁴⁸ the Court modified the *Guaranty Trust* outcome-determination test. The *Byrd* Court ruled that federal policies must be balanced with the effect on the litigation caused by the failure to apply the state law.⁴⁹ Thus, even if a failure to apply the state law would greatly affect the outcome of the cause, the court could refuse to apply it and defer to federal interests.

Nearly thirty years after breaking away from the judicial activism of *Swift v. Tyson*, the Supreme Court articulated a clear vision of the line between substantive law and procedural law. In *Hanna v. Plumer*,⁵⁰ the Supreme Court decided the relatively facile issue of which rule governing service of process — state or federal — applied in a federal diversity action.⁵¹ The First Circuit Court of Appeals had ruled that a conflict between Massachusetts' "hand delivery" service of process statute and Rule 4(d)(1) of the Federal Rules of Civil Procedure, was a conflict between substantive laws.⁵² The Su-

44. 326 U.S. 99 (1945).

45. *Id.* at 110–11. In *Guaranty Trust*, the Court addressed whether a federal court in equity could hear a state cause of action that was barred by a state statute of limitations and could not be brought in state court. *Id.* at 107–08. The Court determined that the state statute of limitations must be applied by the federal court. *Id.* at 110.

46. It was the *Guaranty Trust* Court that first used the terms "substance" and "procedure" in the *Erie* context. *See id.* at 109.

47. *Id.*

48. 356 U.S. 525 (1958).

49. *Id.* at 537 (stating that the outcome-determination test was not meant to be a "talisman").

50. 380 U.S. 460 (1965).

51. Today, the issue seems facile in light of the last 30 years of practice.

52. *Hanna v. Plumer*, 331 F.2d 157 (1st Cir. 1964). Applying the outcome-determination analysis, the First Circuit concluded that failure to apply the Massachusetts rule would result in a dismissal of the suit based on application of the statute of limitations.

preme Court hastily granted certiorari.⁵³

Reversing the First Circuit, the *Hanna* Court determined that Rule 4(d)(1) was constitutional and was promulgated within the limits of the Rules Enabling Act.⁵⁴ Chief Justice Warren wrote that because Rule 4(d)(1) was validly enacted, it would control absent a conflicting state statute; however, the Massachusetts service of process statute clearly conflicted with Rule 4(d)(1).⁵⁵ The Respondent in *Hanna* argued that the Court was thus constrained to apply the outcome-determination test as enunciated in *Guaranty Trust*.⁵⁶

Chief Justice Warren explained that the outcome-determination test did not stand on its own and could only be used in connection with a balancing of the federal policies served by the Federal Rules of Civil Procedure.⁵⁷ Thus, the *Hanna* Court created a test that required analysis of whether application of the federal law served the “twin aims of the Erie rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.”⁵⁸ Implicit in the Court's decision is a desire to emphasize the importance of the Federal Rules of Civil Procedure.⁵⁹

Id. Accordingly, the First Circuit applied Massachusetts' service of process statute.

53. The Court noted: “[B]ecause of the threat to the goal of uniformity of federal procedure posed by the decision below, we granted certiorari.” *Hanna*, 380 U.S. at 463 (footnote omitted).

54. *Id.* at 463–64. The Rules Enabling Act provides that “the Supreme Court shall have the power to prescribe general rules of *practice and procedure and rules of evidence for cases in the United States district courts . . .*” 28 U.S.C. § 2072(a) (1994) (emphasis added).

55. *Hanna*, 380 U.S. at 468–69.

56. *Id.* at 466. The First Circuit concluded, and the Supreme Court agreed, that application of a strict outcome-determination test would require application of the Massachusetts rule. *Id.*

57. *Id.* at 466–67. Chief Justice Warren wrote that the “[o]utcome-determination’ analysis was never intended to serve as a talisman. . . . [C]hoices between state and federal law are to be made not by application of any automatic, ‘litmus paper’ criterion, but rather by reference to the policies underlying the *Erie* rule.” *Id.* (citations omitted). This language was consistent with the Court's holding in *Byrd*.

58. *Id.* at 468. Accordingly, under its new test, the Court was able to circumvent the fact that its refusal to apply the Massachusetts service of process statute would result in dismissal of the otherwise time-barred action. *Id.*

59. *Id.* at 473–74. The Court stated: “To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.” *Id.* Chief Justice Warren wrote that *Erie* was not meant to test the validity of the Federal Rules of Civil Procedure. *Id.* at 472–73.

Thus, following *Hanna*: If there is conflict between the state law and the federal law, the federal law will apply unless it was enacted contrary to constitutional authority;⁶⁰ if there is no conflict between the state law and the federal law, the federal law will prevail unless application of the federal law will violate one of the twin aims of *Erie*, such that it will result in either inequitable administration of law or will promote forum-shopping. Since 1965, the Court has essentially left *Hanna* unabridged.⁶¹

The *Hanna* test allowed federal courts significant leeway in interpreting the twin aims of *Erie* and finding conflict between state law and the federal rules. The Supreme Court seemingly acknowledged in *Walker v. Armco Steel Corp.*⁶² that the courts are prone to construe laws around conflict. The Court stated that “[t]his is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed in order to avoid a ‘direct collision’ with state law.”⁶³

III. ANALYSIS

It is against this background that state statutes governing the pleading of punitive damages are plugged into the *Erie* equation. At first blush, these state laws seem procedural, but this hasty conclusion ignores the lack of conflict between any federal rule and the state law. Further, the characterization of these state laws as procedural would emasculate the substantive legal rights embodied in these state laws. Recognizing these concerns, there is a split between federal courts that do not apply these state laws in diversity actions and those courts that do apply — in toto or in part — these state laws in diversity actions.

60. The Court noted in *Hanna* that the *Erie* Doctrine had never been successfully used to void a federal rule. *Hanna*, 380 U.S. at 470. That precedent combined with the strong language used by Chief Justice Warren to emphasize the sway of the Federal Rules of Civil Procedure created an almost irrebuttable presumption that the federal rule will always apply where there is conflict with a state law.

61. Although the Court left *Hanna* unabridged, the lower courts have failed to evenly apply the *Hanna* test. See *Bankest Imports, Inc. v. ISCA Corp.*, 717 F. Supp. 1537, 1542 (S.D. Fla. 1989) (finding that state law altered the federal rule, thus, clearly contravening *Hanna*); *Berry v. Eagle-Picher*, Nos. 86C 1739, 88C 10631, 1989 WL 77764, at *2 (N.D. Ill. June 27, 1989). Some of these decisions can be attributed to the *Hanna* Court's refusal to explicitly overrule *Guaranty Trust* and its outcome-determination test.

62. 446 U.S. 740 (1980).

63. *Id.* at 750 n.9.

A. The Cases Holding that State Punitive Damages Pleading Laws Are Inapplicable in Federal Diversity Actions

The federal district courts which have determined that state punitive damages pleading laws are procedural in nature and thus inapplicable in federal diversity actions have generally grounded their decisions on one of two principles. These courts either determine that the state statutes directly conflict with a federal rule of civil procedure, thus avoiding the *Erie* analysis,⁶⁴ or they find that there is no conflict, but the twin aims of *Erie* are nonetheless satisfied by failing to apply state law.⁶⁵

1. Finding Direct Conflict Between State Law and a Validly Enacted Federal Rule of Civil Procedure

Since its 1989 ruling in *NAL II, Ltd. v. Tonkin*,⁶⁶ the United States District Court for the District of Kansas has consistently held that Kansas' section 60-3703 is inapplicable in actions founded on federal diversity jurisdiction due to direct conflict with a federal rule.⁶⁷ The *NAL II* court held that section 60-3703 directly conflicted with Rule 9(g).⁶⁸ The court believed that Rule 9(g) requires a litigant to plead a claim for special damages, which the court believed in-

64. See, e.g., *NAL II, Ltd. v. Tonkin*, 705 F. Supp. 522, 528 (D. Kan. 1989).

65. See, e.g., *Worthern v. Gillette Co.*, 774 F. Supp. 514 (N.D. Ill. 1989). Generally, this requires the court to make a finding that failure to apply the state law will not promote forum shopping. See *id.*

66. *NAL II*, 705 F. Supp. at 522.

67. See *Shultz v. Ford Motor Co.*, No. 95-2412-JWL, 1995 WL 655197, at *1 (D. Kan. Oct. 30, 1995) (“[E]very United States District Court in this district which has considered the subject has concluded . . . that K.S.A. § 60-3703 is procedural in nature and in conflict with Fed. R. Civ. P. 9(g)”); *Whittenburg v. L.J. Holding Co.*, 830 F. Supp. 557, 565 n.8 (D. Kan. 1993) (citing *NAL II*, 705 F. Supp. at 529); *Metal Trading Servs. of Colo., Inc. v. Trans-World Servs., Inc.*, 781 F. Supp. 1539, 1546–47 (D. Kan. 1991) (finding direct conflict with Rule 9(g)); *Comeau v. Rupp*, 762 F. Supp. 1434, 1449 (D. Kan. 1991) (citing *NAL II*, 705 F. Supp. at 522).

68. *NAL II*, 705 F. Supp. at 528. Rule 9(g) states simply: “When items of special damage are claimed, they shall be specifically stated.” FED. R. CIV. P. 9(g).

There is a split of authority among the federal courts as to whether punitive damages are “special damages” or some other breed of damages. Compare *Comeau*, 762 F. Supp. at 1449 (implying punitive damages are special damages for Rule 9(g) purposes) with *Southern Pac. Transp. Co. v. Builders Transp., Inc.*, No. 90-3177, 1993 WL 232058, at *4 (E.D. La. June 22, 1993) (finding punitive damages are not special damages). For a further discussion of whether punitive damages should be considered “special damages,” see *infra* notes 157–65 and accompanying text.

cluded punitive damages, in the initial complaint.⁶⁹

As an alternative basis — and possibly to bulletproof its ruling — the court engaged in the *Hanna* analysis and held that failing to apply section 60-3703 would not work as an “inequitable administration of the law.”⁷⁰ According to the *NAL II* court, applying the Kansas statute would not bar a litigant from ever seeking punitive damages; it was only an inconsequential matter of timing.⁷¹ Engaging in the *Hanna* test was not required once the court determined that the Kansas law was in direct conflict with a validly enacted federal rule of civil procedure.⁷²

At least one court has also determined that state punitive damages pleading laws conflict with Rule 8(a)(2) because the state laws seemingly require prolix pleading of evidence in order to justify an award of punitive damages.⁷³ The courts which have found direct conflict between any of the state statutes and any Federal Rule have reached decisions that comply with *Hanna* but which are ultimately erroneous.⁷⁴

2. *The Courts Finding an Absence of Direct Conflict, but Ruling that a Failure to Apply State Law Will Not Promote Forum Shopping*

Certain courts, most notably in the Northern District of Illinois, have found an absence of direct conflict between state punitive damages pleading statutes and any federal rule; but in applying the *Erie* twin aims test, courts have found that the state statutes should not

69. *NAL II*, 705 F. Supp. at 528. The court in *Citron v. Armstrong World Industries*, 721 F. Supp. 1259, 1261 (S.D. Fla. 1989), likewise found that Florida Statutes § 768.72 contravened Rule 9(g), which, according to the *Citron* court, requires “a plaintiff to set forth a demand for punitive damages in its complaint.”

70. *NAL II*, 705 F. Supp. at 529.

71. *Id.* The court stated that “[t]he only difference resulting from the state law’s application is the time in the life of the lawsuit when the court determines whether the claim for punitive damages is appropriate.” *Id.* One basis for the court’s conclusion that Kansas Statutes § 60-3703 was procedural was the court’s facile reasoning that § 60-3703 was a modification to the Kansas Rules of Civil Procedure. *Id.* at 527.

72. *NAL II*, 705 F. Supp. at 528–29. The court in *Citron* also found direct conflict, but applied the *Hanna* test just to be sure. *Citron*, 721 F. Supp. at 1262.

73. *Wisconsin Inv. Bd. v. Plantation Square Assocs.*, 761 F. Supp. 1569, 1572–74 (S.D. Fla. 1991). For a further discussion of *Plantation Square*, see *infra* Section III.C.

74. For a further discussion of why state statutes are not in conflict with any federal rule, see *infra* notes 163–64, 166–67 and accompanying text.

be applied in federal diversity actions because the twin aims are satisfied.

Shortly after enactment of Illinois' section 5/2-604.1,⁷⁵ the Northern District construed the statute and determined that it should not apply in federal diversity actions.⁷⁶ In *Worthem v. Gillette Co.*,⁷⁷ the United States District Court for the Northern District of Illinois denied a motion to dismiss a claim for punitive damages. The defendant manufacturer in *Worthem* sought to dismiss the plaintiff's punitive damages claim based on his failure to comply with the procedures prescribed by Illinois' section 5/2-604.1.⁷⁸ Based on the statute's location in the Illinois Code of Civil Procedure and on its purpose, the court concluded that section 5/2-604.1 was procedural in nature and inapplicable to diversity actions.⁷⁹

Unlike earlier courts, the *Worthem* court found an absence of conflict between section 5/2-604.1 and any Federal Rule; thus, the court was constrained to engage in *Erie* analysis.⁸⁰ Applying the *Hanna* test, the court found that the failure to apply section 5/2-604.1 would not "alter the outcome of this case nor others to follow it."⁸¹ The *Worthem* court rejected the argument that a failure to apply the state law would affect forum choice; in fact, the court concluded that the federal forum was still a stricter place to file suit than the Illinois state courts, even without application of section 5/2-604.1.⁸² The court viewed Rule 11 of the Federal Rules of Civil Procedure as a check on the assertion of frivolous claims for punitive damages.⁸³

75. Pub. L. No. 84-1431, Art. 3, § 1, effective Nov. 25, 1986 (current version at ILL. REV. STAT. ch. 735, para. 5/2-604.1 (1991)).

76. See *Berry v. Eagle-Picher*, Nos. 86C 1739, 88C 10631, 1989 WL 77764, at *1 (N.D. Ill. June 27, 1989).

77. 774 F. Supp. 514 (N.D. Ill. 1991).

78. *Id.* at 514.

79. *Id.* at 516.

80. *Id.* In *Berry*, Judge Kocoras implied that § 5/2-604.1 conflicted with Rule 8. *Berry*, 1989 WL 77764, at *1 ("[I]t seems clear that [5/2-604.1] is a rule of pleading procedure which must give way to Rule 8 . . ."). Even after finding direct conflict, the *Berry* court ignored the teachings of *Hanna* and applied the *Erie* analysis anyway. *Id.* at *2.

81. *Worthem*, 774 F. Supp. at 516.

82. *Id.* at 516-17. Remarkably, the court believed that "the federal law requires inquiry earlier and more substantially than [§ 5/2-604.1]." *Id.* at 516.

83. *Id.* See *Belkow v. Celotex Corp.*, 722 F. Supp. 1547 (N.D. Ill. 1989). This argument presumes the effectiveness of Rule 11 as a pleading deterrent.

In fact, there are only a few reported instances where litigants or counsel have

B. The Courts Holding that States Statutes Governing
the Pleading of Punitive Damages Are Applicable in Federal
Diversity Actions

In contrast to the courts in Kansas and Illinois, many courts have determined that state punitive damages pleading statutes are substantive in nature and must be applied in federal diversity actions. These courts have all found — expressly or implicitly — an absence of conflict between the state law and any federal rule.⁸⁴ Typically these courts also find that a failure to apply the state law will promote forum-shopping, and thus would violate one of *Erie's* basic tenets.⁸⁵

In *Al-Site Corp. v. VSI International, Inc.*,⁸⁶ the United States District Court for the Southern District of Florida affirmed the order of a magistrate judge denying a motion to compel the production of documents relating to a defendant's financial worth. The defendant argued that the financial-worth discovery was barred by the discovery prohibition in Florida's section 768.72.⁸⁷

The *Al-Site* court first noted that Florida state courts construed Florida Statutes, section 768.72 as substantive in nature.⁸⁸ Judge

been sanctioned under Rule 11 solely for asserting a frivolous claim for punitive damages. *See, e.g.,* *Carvalho v. MacArthur Corp.*, 615 F. Supp. 164, 165 (S.D. Fla. 1985) (assessing Rule 11 sanctions for failing to justify asserting untenable claim for compensatory and punitive damages under the ADEA); *Flaherty v. Gas Research Inst.*, No. 92C 7315, 1993 WL 121973, at *5 (N.D. Ill. Apr. 19, 1993), *aff'd*, 31 F.3d 451 (7th Cir. 1994); *Olga's Kitchen of Hayward, Inc. v. Papo*, 108 F.R.D. 695, 708 (E.D. Mich. 1985) (imposing Rule 11 sanctions for asserting frivolous punitive damages claim and other oppressive conduct), *aff'd in part, rev'd in part*, 815 F.2d 79 (6th Cir. 1987); *Index Fund, Inc. v. Hagopian*, 107 F.R.D. 95, 99 (S.D.N.Y. 1985) (finding Rule 11 sanctions appropriate for amending its complaint — without court permission — to include \$10,000,000 punitive damages claim).

84. *See, e.g.,* *Nereson v. Zurich Ins. Co.*, No. A3-91-72, 1992 WL 212233, at *1 (D.N.D. Aug. 20, 1992). The *Nereson* court stated that “[w]hile the statute and the federal rules are not perfectly matched, they can coexist.” *Id.* The court avoided the choice between conflict with Rule 9(g) or Rule 8(a)(2) by using the term the “federal rules.” *Id.*

85. *See, e.g., id.*

86. 842 F. Supp. 507 (S.D. Fla. 1993).

87. *Id.* at 508. Florida Statutes § 768.72 bars “discovery of financial worth . . . until after the pleading concerning punitive damages is permitted.” FLA. STAT. § 768.72 (1995).

88. *Al-Site*, 842 F. Supp. at 509. Chief among these Florida state courts' decisions, at the time of the ruling in *Al-Site* was *Smith v. Department of Insurance*. *Id.* (citing *Smith v. Department of Ins.*, 507 So. 2d 1080, 1092 n.10 (Fla. 1987)). The Florida Su-

Atkins noted that those state court decisions were not binding on federal courts when interpreting the Federal Rules of Civil Procedure.⁸⁹

Analyzing earlier opinions within the Southern District of Florida, the *Al-Site* court agreed with at least one opinion that Florida Statutes, section 768.72 clearly created certain substantive legal rights in restricting discovery of a defendant's financial worth.⁹⁰

preme Court ruled in *Smith* that Florida Statutes § 768.72 was “clearly substantive” because it governed a litigant's entitlement to any punitive damages. *Smith*, 507 So. 2d at 1092 n.10. *Smith* arose in connection with a broad-based challenge to the constitutionality of Florida's tort reform statutes and the court's ruling with respect to Florida Statutes § 768.72 was brief. *Id.* at 1080.

Since *Smith*, several intermediate Florida appellate courts have held that Florida Statutes § 768.72 creates a legal right that protects defendants from discovery of their financial worth until a court determines that there is a basis for pleading a claim for punitive damages. *See, e.g.*, *Henn v. Sandler*, 589 So. 2d 1334, 1335 (Fla. 4th Dist. Ct. App. 1991).

In 1995, the Florida Supreme Court held that Florida Statutes § 768.72 creates not only a legal right to be free from discovery of financial worth absent a reasonable basis, but it also “create[s] a substantive legal right not to be subject to a punitive damages claim . . . until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages.” *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995). The Florida Supreme Court further ruled that a litigant could obtain appellate review before final judgment to determine if the trial court correctly applied Florida Statutes § 768.72's procedures. *Id.* at 519–20. However, the court held that litigants could not appeal the basis for the trial court's ruling on a motion to add a claim for punitive damages — that ruling would remain intact until final judgment or final disposition. *Id.*

89. *Al-Site*, 842 F. Supp. at 509. Other judges of the Southern District of Florida criticized the reference to state decisional law to determine whether the court should apply state law to govern pleading in a federal diversity action. *Citron v. Armstrong World Indus., Inc.*, 721 F. Supp. 1259, 1261 (S.D. Fla. 1989). However, a state court's determination that a state law creates *substantive* rights, without reference to the *Erie* test should have, at a minimum, a persuasive impact on a federal court's inquiry.

Smith stands for the persuasive proposition that “Florida courts have held that this statute [section 768.72] is substantive in nature and, thus, should be applied by a federal court in Florida, sitting in diversity.” *Bankest Imports, Inc. v. ISCA Corp.*, 717 F. Supp. 1537, 1542 (S.D. Fla. 1989) (citing *Smith*, 507 So. 2d at 1080). In fact, no Florida state court has held — or could hold — that a federal court must apply Florida Statutes § 768.72 in a federal diversity action. Such a holding, as the *Al-Site* court reasoned, would have no effect on a federal court's decision. *Al-Site*, 842 F. Supp. at 509–10. However, the Florida Supreme Court's ruling that Florida Statutes § 768.72 created substantive legal rights should provide guidance when federal courts construe the statute, the policies served by the statute, and the effect such statute will have on litigation. *Id.*

90. *Al-Site*, 842 F. Supp. at 510 (citing *Wisconsin Inv. Bd. v. Plantation Square Assocs.*, 761 F. Supp. 1569, 1580 (S.D. Fla. 1991)). This conclusion is further cemented by the position of the Florida intermediate appellate courts that a pretrial order permitting financial worth discovery causes such irreparable harm as to be reviewed by certio-

Thus, the *Al-Site* court concluded that at least one part of section 768.72 had to be applied in a diversity action. Although other judges within the Southern District of Florida had refused to construe section 768.72's pleading aspects as substantive, Judge Atkins further concluded that courts must apply this standard in federal diversity actions.⁹¹

Judge Atkins determined that Florida Statutes, section 768.72 did not conflict with either Federal Rule of Civil Procedure 9(g) or Federal Rule of Civil Procedure 8(a)(2), and that it satisfied the twin aims test. The court found there was no conflict between section 768.72 and Federal Rule of Civil Procedure 9(g), because Rule 9(g) does not establish when a litigant needs to plead entitlement to special damages.⁹² Further, there was no conflict between section 768.72 and Federal Rule of Civil Procedure 8(a)(2), because section 768.72 does not permit a litigant to plead detailed facts in the complaint to demonstrate "a reasonable basis for recovery of [such] damages."⁹³ Judge Atkins noted that section 768.72 only requires that the showing of entitlement to an award of punitive damages be made before the court; the facts and evidence demonstrating entitlement did not have to be pled nor would such detailed pleading circumvent the need for court approval of the punitive damages claim.⁹⁴ The *Al-Site* court logically held that a failure to apply Florida Statutes, section 768.72 was certain to lead to a preference of the federal court over the state court.⁹⁵

In *Bankest Imports, Inc. v. ISCA Corp.*,⁹⁶ a decision that preceded *Al-Site*, the court held that Florida Statutes, section 768.72 was substantive in nature.⁹⁷ Several courts relied on *Bankest*; however,

rari petition. *Key W. Convalescent Ctr., Inc. v. Doherty*, 619 So. 2d 367, 369 n.1 (Fla. 3d Dist. Ct. App. 1993) (citing cases which permit financial worth discovery).

91. *Al-Site*, 842 F. Supp. at 510.

92. *Id.* at 511–12. Judge Atkins did not address whether punitive damages were considered special damages for Federal Rule of Civil Procedure 9(g) purposes.

93. *Id.* at 512; see FLA. STAT. § 768.72 (1995).

94. *Al-Site*, 842 F. Supp. at 512. Section 768.72, like other state punitive damages pleading statutes, does not specify — and the courts have not ruled — whether facts demonstrating a reasonable basis to support an award of punitive damages must be pled in an amended pleading following court approval.

95. *Al-Site*, 842 F. Supp. at 513. This conclusion recognizes that one's ability to plead a claim for punitive damages at the inception of the lawsuit might be an important consideration in choosing a forum.

96. 717 F. Supp. 1537 (S.D. Fla. 1989).

97. *Id.* at 1542.

Bankest was based on flawed reasoning and an incorrect application of the *Erie* test. Thus, *Bankest* was bad precedent.⁹⁸

In *Bankest*, the court concluded that section 768.72: (1) altered Federal Rule of Civil Procedure 8(a)(2)'s notice pleading requirements; (2) created substantive rights as determined by the Florida Supreme Court; and (3) required a plaintiff to plead facts in the original complaint demonstrating entitlement to an award of punitive damages.⁹⁹ Some of these findings are in conflict with precedent and/or constitute an unsupported interpretation of law.

First, a state pleading law that conflicts with a federal rule of civil procedure cannot displace or modify the federal rule. The Supreme Court in *Hanna* explicitly stated that a state law which conflicts with a federal rule must give way to the federal rule.¹⁰⁰ Second, Florida Statutes, section 768.72 does not require a plaintiff to plead facts in the initial complaint or in amended pleadings demonstrating an entitlement to an award of punitive damages;¹⁰¹ the statute only envisions and provides for court-approved amendments. Accordingly, the *Bankest* court's erroneous finding that plaintiffs seeking punitive damages must plead evidentiary facts in the original pleadings is a direct violation of Federal Rule of Civil Procedure 8(a)(2).

In comparison, the United States District Court for the District of Minnesota held that Minnesota Statutes, section 549.191 is substantive in nature and thus applicable in federal diversity actions.¹⁰² The Minnesota line of cases primarily stems from the 1988 ruling in

98. Other courts have rightfully questioned *Bankest*. See *Citron v. Armstrong World Indus., Inc.*, 721 F. Supp. 1259, 1261 (S.D. Fla. 1989).

99. *Bankest*, 717 F. Supp. at 1542.

100. *Hanna v. Plumer*, 380 U.S. 460, 470 (1965). Thus, after the *Bankest* court made its finding that Florida Statutes § 768.72 altered a federal rule, the *Bankest* court was constrained to apply Federal Rule of Civil Procedure 8(a)(2). *Bankest*, 717 F. Supp. at 1542-43.

101. FLA. STAT. § 768.72 (1995).

102. See, e.g., *Ulrich v. City of Crosby*, 848 F. Supp. 861 (D. Minn. 1994); *Security Sav. Bank v. Green Tree Acceptance, Inc.*, 739 F. Supp. 1342 (D. Minn. 1990); *Zeelan Indus. v. De Zeeuw*, 706 F. Supp. 702, 705 (D. Minn. 1989); *Kuehn v. Shelcore, Inc.*, 686 F. Supp. 233 (D. Minn. 1988); *Fournier v. Marigold Foods, Inc.*, 678 F. Supp. 1420 (D. Minn. 1988).

The earliest case and the only case within the District of Minnesota to rule that Minnesota Statutes § 549.191 is procedural was *Jacobs v. Pickands Mather & Co.*, No. 5-87-Civ. 49, 1987 WL 47387, *1 (D. Minn. Aug. 24, 1987). Several years later, in the interest of promoting consistency within the district, Chief Judge Alsop reversed his ruling in *Jacobs* in *Security Sav.*, 739 F. Supp. at 1353.

*Kuehn v. Shelcore, Inc.*¹⁰³ In ruling on a motion to strike a plaintiff's claim for punitive damages, the *Kuehn* court first determined there was no conflict between section 549.191 and any federal rule.¹⁰⁴ The court rejected the plaintiff's argument that section 549.191 conflicted with Federal Rule of Civil Procedure 8. Instead, the court found that the two rules worked in conjunction with one another.¹⁰⁵ Part of the court's reasoning was based on the fact that Minnesota's Rule of Civil Procedure 8 — Minnesota's counterpart to Rule 8 of the Federal Rules of Civil Procedure — was unchanged by the enactment of section 549.191.¹⁰⁶

Applying the *Erie* analysis as articulated in *Hanna*, the *Kuehn* court found that litigants would be influenced in their choice of forum based on the failure to apply Minnesota Statutes, section 549.191 in federal diversity actions.¹⁰⁷ Of the cases that follow *Kuehn*, most agree that a failure to apply Minnesota Statutes, section 549.191 promotes forum-shopping,¹⁰⁸ but not every judge within the District of Minnesota has left *Kuehn* unaltered.¹⁰⁹

103. *Kuehn*, 686 F. Supp. at 233. Although the *Fournier* decision preceded *Kuehn*, the reasoning and analysis in *Kuehn* is more extensive and better reasoned than the *Fournier* analysis.

104. *Id.* at 234.

105. *Id.* The *Kuehn* court stated that Federal Rule of Civil Procedure 8 addressed the simplification of pleading, while Minnesota Statutes § 549.191 was a tort reform statute which addressed a perceived insurance crisis. *Id.*

106. *Id.* The court made no mention of Rule 9(g).

107. *Id.* at 234–35. If the choice between the federal and the state courts revolved around an ability to plead punitive damages at the outset of the case, clearly plaintiffs would choose the forum where they could plead punitive damages at the outset simply to increase settlement leverage and to place more of a defendant's assets at risk, where insurance does not apply. *Id.*

108. For example, the court in *Zeelan Indus.* ruled that a failure to apply Minnesota Statutes § 549.191 promotes forum shopping. *Zeelan Indus. v. De Zeeuw*, 706 F. Supp. 702, 705 (D. Minn. 1989). The *Zeelan* court stated that “[t]he Court finds that if Minn. Stat. § 549.191 is not applied in federal courts, a plaintiff might well be influenced to choose a federal forum based on plaintiff's ability to brandish a claim for punitive damages as a tool for promoting an advantageous settlement or otherwise advancing his claims.” *Id.*

109. There is a line of cases in Minnesota which created a unique exception for plaintiffs who assert a claim under the Minnesota Human Rights Act [hereinafter the MHRA], by permitting MHRA plaintiffs to seek punitive damages at the outset of the action. *Daines v. City of Mankato*, 754 F. Supp. 681, 704 (D. Minn. 1990); see *Engel v. Independent Sch. Dist. No. 91*, 846 F. Supp. 760, 768 (D. Minn. 1994) (following *Daines*). According to the court in *Daines*, plaintiffs alleging a claim under the MHRA are not required to comply with Minnesota Statutes § 549.191, because the MHRA does not explicitly incorporate § 549.191's pleading requirements and the amount of any punitive

The United States District Court for the District of Idaho briefly construed Idaho's punitive damages pleading statute and in so doing illustrated an important aspect of punitive damages. In *Windsor v. Guarantee Trust Life Insurance Co.*,¹¹⁰ the court granted a motion to dismiss where plaintiff failed to allege sufficient damages to qualify for diversity jurisdiction.¹¹¹

The plaintiff-insured in *Windsor* argued that the amalgamation of the compensatory damages and the punitive damages which he sought exceeded \$100,000, thus satisfying the amount in controversy requirement.¹¹² The court determined that Idaho's Statute section 6-1604 was "substantive in nature," and thus, the court had to apply it.¹¹³ Accordingly, the court dismissed plaintiff's action because plaintiff pled a claim for punitive damages in traverse of the guidelines established by Idaho Statutes, section 6-1604.¹¹⁴

Although the court in *Windsor* did not strike plaintiff's punitive damages claim, it clearly applied Idaho's punitive damages pleading rule in dismissing the complaint. The court concluded that there was no conflict between Idaho Statutes, section 6-1604 and any federal rule.¹¹⁵ Idaho's requirement of demonstrating a reasonable likelihood of success to obtain punitive damages further convinced the court that section 6-1604 was substantive.¹¹⁶ Thus, the *Windsor*

damages award a plaintiff can obtain when suing under the MHRA is limited by the terms of the MHRA. *Daines*, 754 F. Supp. at 704.

110. 684 F. Supp. 630 (D. Idaho 1988).

111. *Id.* Plaintiff-insured sued his insurer on two viable causes of action: breach of contract and a claim sounding in tort. *Id.* at 632. Since punitive damages are unavailable in a breach of contract claim, plaintiff was unable to meet the jurisdictional amount for that count. *Id.* The court further determined that the tort cause of action could not result in an award of more than \$10,000 in punitive damages. *Id.*

112. *Id.* at 631. Claims for punitive damages can be combined with a compensatory damage claim to meet the jurisdictional test. *Id.* at 632 (citing *Bell v. Preferred Life Assurance Soc'y*, 320 U.S. 238 (1943)). The Supreme Court decided in *Bell* that claims for punitive damages may be considered to determine whether the jurisdictional amount has been met, as long as there is a possibility that the award of punitive damages may exceed the requisite amount. *Bell*, 320 U.S. at 240. For a further discussion of the use of punitive damages claims to achieve diversity jurisdiction, see *infra* note 152 and accompanying text.

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

114. *Id.* at 632.

115. *Id.* at 633. Like the *Nereson* court, the *Windsor* court used the broad term "federal rules" and did not specify either Rule 9(g) or Rule 8(a)(2). *Id.*

116. *Id.* at 633. The court interpreted Idaho Statutes § 6-1604 as requiring "plaintiff to meet an additional burden of proof directly affecting the outcome of the case." *Id.*

court's application of the state punitive damages pleading statute illustrates the significant impact that application may have on certain claims, especially those claims which are dependent on punitive damages to satisfy the jurisdictional test.¹¹⁷

C. The *Plantation Square* Compromise: Solomonic Wisdom

As discussed above, Florida's punitive damages pleading statute contains a unique, substantive element — a financial worth discovery bar¹¹⁸ — that has greatly confused the federal district courts in Florida when analyzing Florida Statutes, section 768.72. In *Wisconsin Investment Board v. Plantation Square Associates*,¹¹⁹ the Southern District of Florida grappled with the issue of the applicability of section 768.72 and reached a decision that departed from the holdings in *Bankest* — that section 768.72 applies — and in *Citron* — that section 768.72 does not apply.¹²⁰ Faced with a slew of motions relating to Plaintiff Wisconsin Investment Board's claim for punitive damages, the court ruled that only portions of Florida's punitive damages pleading statute applied to the federal diversity action.¹²¹

The *Plantation Square* court began its analysis by conceding “that section 768.72 is both a pleading rule and a discovery rule.”¹²² The court initially determined that Florida Statutes, section 768.72, to the extent it governed pleadings, directly conflicted with Federal Rule of Civil Procedure 8(a)(2).¹²³ Rule 8(a)(2)'s re

117. See generally *id.* at 633–34.

118. See *supra* text accompanying notes 16–19. Other states have laws which prohibit certain discovery of financial worth in connection with an award of punitive damages. ALA. CODE § 6-11-23 (Supp. 1995). Alabama requires that evidence relating to “the economic impact of the [punitive damages] verdict on the defendant or the plaintiff . . . shall be admissible; however, such information shall not be subject to discovery, . . . until after a verdict for punitive damages has been rendered.” *Id.*; see *Wilson v. Gillis Advertising Co.*, 145 F.R.D. 578, 580 (N.D. Ala. 1993) (applying Alabama Code § 6-11-23 in federal diversity actions).

119. 761 F. Supp. 1569 (S.D. Fla. 1991).

120. *Id.*

121. *Id.* at 1571–72. Several defendants sought to dismiss Plaintiff's claim for punitive damages and Plaintiff sought to submit evidence justifying an award of punitive damages, in an attempt to comply with the statute, should the court apply the state statute. *Id.* at 1571.

122. *Id.* at 1572. The court found that Florida created a “limited right of privacy to information concerning their net worth when faced with punitive damages claims.” *Id.* at 1578.

123. *Id.* at 1574. Rule 8(a)(2) provides in part: “A pleading which sets forth a claim

quirement that the complaint set forth only a brief statement of facts appeared to conflict with the apparent pleading of evidence contemplated by section 768.72.¹²⁴ Presuming that Rule 8(a)(2) was constitutionally enacted, the *Plantation Square* court was constrained to apply it rather than section 768.72.¹²⁵ The court found no conflict between Rule 9(g) and section 768.72, because Rule 9(g) does not govern when items of special damages must be pled.¹²⁶

Even though it found conflict with Rule 8(a)(2), the court, perhaps to bulletproof its opinion, engaged in *Erie* analysis.¹²⁷ The court

for relief . . . shall contain . . . (2) a short and plain statement of the claim[s] showing that the pleader is entitled to relief . . .” FED. R. CIV. P. 8(a)(2).

124. Several of the federal district courts in Florida have interpreted Florida Statutes § 768.72 as permitting a claim for punitive damages, if sufficient facts are pled in the complaint which establish a plaintiff's entitlement to an award of such damages. *See, e.g.,* *Water Int'l Network, U.S.A., Inc. v. East*, 892 F. Supp. 1477, 1483 (M.D. Fla. 1995) (citing *L.S.T., Inc. v. Crow*, 772 F. Supp. 1254 (M.D. Fla. 1991)). The *Water Int'l* court cited *L.S.T.* for the proposition that a complaint must contain allegations sufficient to support a punitive damages award. *Id.* However, the *L.S.T.* court cited no opinion in which a Florida state court ruled that Florida Statutes § 768.72 requires a plaintiff to plead the basis for a punitive damages claim in the original complaint. *See L.S.T., 772 F. Supp. at 1256.* In fact, the cases cited by the *L.S.T.* court merely reflect that certain torts contain elements which must be pled which will also satisfy an award of punitive damages. *Id.* (citing *Ciamar Marcy, Inc. v. Monteiro Da Costa*, 508 So. 2d 1282 (Fla. 3d Dist. Ct. App. 1987) (upholding judgment for conversion of private property which included malice as an essential element which had to be pled)).

No Florida state court has held that, under Florida Statutes § 768.72, a complaint can contain a prayer for punitive damages no matter how many facts justifying such an award are pled. *See Simeon, Inc. v. Cox*, 671 So. 2d 158, 160 (Fla. 1996). Thus, there is a fundamental misconception by certain courts that laws such as Florida Statutes § 768.72 require fact or evidence pleading. Section 768.72 specifically contemplates an evidentiary hearing before a judge, no matter how many allegations are contained in the complaint. *See FLA. STAT. § 768.72* (1995). Further, allegations in a pleading are not “evidence,” and the pleading cannot be used on its own at the evidentiary hearing. *See DiBernardo v. Waste Management, Inc.*, 838 F. Supp. 567, 571 (M.D. Fla. 1993) (finding plaintiff's complaint and attached affidavit established record evidence to satisfy § 768.72).

125. *Plantation Square*, 761 F. Supp. at 1575. The Florida Supreme Court's holding in *Smith v. Department of Insurance*, 507 So. 2d 1080 (Fla. 1987), was immaterial, because a state court cannot make a finding that a statute is substantive or procedural for *Erie* purposes. *Id.* Further, the court found that Florida Statutes § 768.72 only changed the guidelines for pleading punitive damages; it did not “alter the substantive elements governing punitive damages . . .” *Id.*

126. *Plantation Square*, 761 F. Supp. at 1576. Judge Hoeveler noted that most courts (most notably the *NAL II* court) found direct conflict between the state statute at issue and Rule 9(g), not with Rule 8(a)(2). *Id.*

127. *Id.* The court acknowledged that there was no need to apply *Erie* after finding direct conflict with Rule 8(a)(2). *Id.*

determined there was no inequitable administration of law because a litigant could amend his pleadings to add a punitive damages claim. The court further believed that refusing to apply Florida Statutes, section 768.72 would not foster forum-shopping.¹²⁸

With respect to the discovery bar, the court applied the *Hanna* test,¹²⁹ and found no conflict between Federal Rule of Civil Procedure 26 and Florida Statutes, section 768.72.¹³⁰ Having found no direct conflict, the court concluded that under the *Hanna*/*Erie* analysis, a failure to apply section 768.72's discovery bar in federal court would lead to forum shopping.¹³¹ The court reasoned that there would only be a few — most likely unsavory — litigants who would forum shop, but it was precisely these plaintiffs that Florida sought to deter by enacting section 768.72.¹³² Accordingly, the court severed portions of section 768.72, and only applied its discovery bar. *Plantation Square* thus splintered the Southern District of Florida into three distinct camps.¹³³

D. The Fractured State of the Law

As noted, the federal district courts in Kansas, Minnesota, North Dakota and Illinois, have generally followed precedent and consistently ruled either that the state statute at issue is substantive or procedural. On the other hand, Florida, primarily the Southern District, has splintered into different factions.

The Southern District of Florida has taken three divergent positions on the application of Florida Statutes, section 768.72 in federal

128. *Id.*

129. *Id.* at 1577–78. Judge Hoeveler sardonically stated: “Hesitant to decide the issue on divine intuition alone, the court looks to *Hanna* and *Erie* for help.” *Id.* at 1577.

130. *Id.* Section 768.72 seemingly only affected the timing of discovery and did not alter traditional notions of relevance and discoverability. *Id.* at 1578. The court found that § 768.72's discovery bar did not conflict with Rule 26's concept of relevancy. *Id.* The court compared § 768.72's discovery bar to a state evidentiary privilege which must be applied in a diversity action. *Id.* at 1579 n.17; see *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

131. *Plantation Square*, 761 F. Supp. at 1579. The court determined that there would be no inequitable administration of law by failing to apply the discovery bar. *Id.* Judge Hoeveler reasoned that “[p]laintiffs with insubstantial punitive damages claims — especially those of the harassing and unscrupulous sort — would likely prefer the federal over the State forum were § 768.72 not applied there” *Id.* at 1579–80. This reasoning ignores the impact and effect of Federal Rule of Civil Procedure 11.

132. *Id.* at 1579–80.

133. The Southern District has yet to reconcile the three lines of cases.

diversity actions.¹³⁴ The various judges of the Southern District of Florida have held that: (1) section 768.72 is procedural in nature and, therefore, does not apply in federal diversity actions;¹³⁵ (2) section 768.72 is substantive in nature and applies in toto;¹³⁶ and (3) portions of section 768.72 are substantive, and those portions apply in federal diversity actions, but the remainder of the statute does not.¹³⁷ The Middle District of Florida favors the *Al-Site* approach;¹³⁸ and the Northern District of Florida also recently weighed in on the side of substance.¹³⁹

E. Challenging a Claim for Punitive Damages, to 12(b) or Not to 12(b) — Does it Matter?

The proper procedure for challenging a claim for punitive damages in a complaint that contravenes a state punitive damages pleading statute is an issue of some dispute and importance. Courts have permitted the striking of punitive damages claims under a motion brought pursuant to Rule 12(f)¹⁴⁰ or as a basis for dismiss

134. Clearly the judges of the Southern District have not heeded the wisdom displayed by Chief Judge Alsop of the Minnesota district court in *Security Savings*, where, in the interests of consistency, Chief Judge Alsop reversed his earlier ruling and held that Minnesota's § 549.191 applied in federal court. *Security Sav. Bank v. Green Tree Acceptance, Inc.*, 739 F. Supp. 1342, 1352–53 (D. Minn. 1990).

135. *See, e.g.*, *Burger King Corp. v. Austin*, 805 F. Supp. 1007, 1025 n.30 (S.D. Fla. 1992); *Amerifirst Bank v. Bomar*, 757 F. Supp. 1365, 1378 (S.D. Fla. 1991); *Citron v. Armstrong World Indus., Inc.*, 721 F. Supp. 1259, 1261 (S.D. Fla. 1989).

136. *Sanders v. Mayor's Jewelers, Inc.*, No. 95-2085, 1996 U.S. Dist. LEXIS 14223, at *9-16 (S.D. Fla. August 2, 1996); *Al-Site Corp. v. VSI Int'l, Inc.*, 842 F. Supp. 507, 510–11 (S.D. Fla. 1993); *Frio Ice, S.A. v. Sunfruit, Inc.*, 724 F. Supp. 1373, 1380–83 (S.D. Fla. 1989), *rev'd on other grounds*, 918 F.2d 154 (11th Cir. 1990); *Bankest Imports, Inc. v. ISCA Corp.*, 717 F. Supp. 1537, 1542–43 (S.D. Fla. 1989).

137. *Plantation Square*, 761 F. Supp. at 1576–81. The court held that the discovery elements of § 768.72 applied, but its pleading elements did not. *Id.*

138. *See Meade v. Prison Health Servs., Inc.*, No. 94-854-CIV-T-17B, 1995 WL 350207, at *2 (M.D. Fla. June 8, 1995); *Marcus v. Carrasquillo*, 782 F. Supp. 593, 600–01 (M.D. Fla. 1992).

139. *T.W.M. v. American Medical Sys., Inc.*, 886 F. Supp. 842, 845 (N.D. Fla. 1995) (striking punitive damages claim from a complaint seeking damages based on a defective penile implant).

140. Rule 12(f) provides that:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous

al under Rule 12(b)(6).¹⁴¹

In *Lancer Arabians, Inc. v. Beech Aircraft Corp.*,¹⁴² the court held that a litigant seeking to excise a claim for punitive damages must file a Rule 12(b)(6) motion to dismiss, not a motion to strike.¹⁴³ In contrast, a Minnesota district court held in *Zeelan Industries v. De Zeeuw* that a defendant's motion to strike a claim for punitive damages pursuant to Rule 12(f) was untimely, but the court acted *sua sponte*, as Rule 12(f) permits, to strike the punitive damages claim.¹⁴⁴ However, the court noted that a punitive damages claim could just as easily be tested via a Rule 12(b)(6) motion to dismiss.¹⁴⁵ Claims for punitive damages have also been challenged through Rule 56 motions for summary judgment.¹⁴⁶

Such a determination is important for more than reasons of technical compliance with the Rules of Civil Procedure. As noted by the *Lancer Arabians* court, federal magistrate judges are limited in what motions they may hear.¹⁴⁷ Accordingly, a magistrate judge may hear and rule upon a Rule 12(f) motion to strike, but may generally not rule upon a Rule 12(b)(6) motion to dismiss.¹⁴⁸ The choice between Rule 12(f) and Rule 12(b)(6) may have other slight variations,¹⁴⁹ but there is little practical import to the choice as to which method is used to challenge a punitive damages claim.

matter.

FED. R. CIV. P. 12(f).

141. FED. R. CIV. P. 12(b)(6). Rule 12(b)(6) is an oft-used challenge to pleadings for failure to state a cause of action. *Id.* A dismissal under Rule 12(b)(6) may be appealable as a matter of right.

142. 723 F. Supp. 1444 (M.D. Fla. 1989).

143. *Id.* at 1446-47.

144. *Zeelan Indus. v. De Zeeuw*, 706 F. Supp. 702, 704-05 (D. Minn. 1989).

145. *Id.* at 705 n.3.

146. *See* FED. R. CIV. P. 56; *see, e.g.*, *Metal Trading Servs. of Colo., Inc. v. Trans-World Servs., Inc.*, 781 F. Supp. 1539, 1546 (D. Kan. 1991) (denying plaintiff's motion for summary judgment by finding Kansas' § 60-3703 inapplicable). *But see* *Will v. System Eng'g Consultants*, 554 So. 2d 591, 592 (Fla. 3d Dist. Ct. App. 1989) (expressing state court's aversion to considering punitive damages claim on motion for summary judgment).

147. *Lancer Arabians*, 723 F. Supp. at 1445.

148. *See* FED. R. CIV. P. 72; *see also* 28 U.S.C. § 636(b)(1)(A) (1994) (preventing district court judges from designating magistrate judges to hear any dispositive motions absent consent of all parties).

149. Time for filing both motions is essentially the same, except a court may act *sua sponte* under Rule 12(f). *See* FED. R. CIV. P. 12(f). The grant of a motion to dismiss a pleading — in its entirety — is immediately appealable. Both motions are generally disfavored.

IV. CONCLUSION

The importance of the application of a state punitive damages pleading statute in a federal diversity action cannot be gainsaid. Application of such a state statute has the following effects: 1) eliminating part of a plaintiff's settlement leverage; 2) depriving a plaintiff of the requisite jurisdictional amount in controversy; and 3) providing a trial preview if an evidentiary hearing is conducted.

First, if the state statutes are held to apply in federal diversity actions, plaintiffs cannot assert a claim for punitive damages at the outset of a case.¹⁵⁰ As a result, one important settlement tool is removed from the plaintiff's arsenal at the beginning of the litigation. As a tactical weapon, a claim for punitive damages places defendants on notice that they are facing the possibility of a huge punitive damages award, which may not be covered by insurance.¹⁵¹

Second, punitive damages claims can be aggregated with a claim for compensatory damages, so a plaintiff meets the \$50,000 requirement to establish diversity jurisdiction.¹⁵² This enables plaintiffs with small compensatory damages claims to litigate in federal court. However, application of a state punitive damages pleading statute could deprive plaintiffs of their federal forum. Under the current confused state of the law, application of a state punitive damages pleading statute could very well cost the plaintiff a cause of action.

For instance, a plaintiff in the Southern District of Florida could

150. These statutes would not prohibit informal notification that the plaintiff intends to seek punitive damages at some point in the action, but such notification would hardly have the same impact as a demand in a complaint.

151. Giesel, *supra* note 2, at 356–58. Although insurers often cover punitive damages, certain courts have stated that a “vanilla” policy may not extend coverage to a punitive damages award. *Id.* at 358 nn.10–11. Further, some courts have forbidden the shifting of the risk on a punitive damages award from tortfeasor to insurer. *Id.* at 358 n.12.

152. *Windsor v. Guarantee Trust Life Ins. Co.*, 684 F. Supp. 630, 632 (D. Idaho 1988). The courts have generally followed the Supreme Court's decision in *Bell v. Preferred Life Assurance Soc'y*, 320 U.S. 238 (1943). However, there is growing dissatisfaction with the concept that meritless punitive damages claims must be included in jurisdictional amount calculations. See *Murphy*, *supra* note 2 (discussing dissidents from *Bell*). Several federal district courts have refused to include facially frivolous punitive damages claims with compensatory damage claims in order to meet the jurisdictional bar. See, e.g., *Hohn v. Volkswagen of Am., Inc.*, 837 F. Supp. 943, 945–46 (C.D. Ill. 1993) (dismissing action where punitive damages claim was extremely dubious); *Lindsay v. Kvortek*, 865 F. Supp. 264, 267–70 (W.D. Pa. 1994).

file a complaint seeking compensatory damages of \$45,000 and punitive damages in excess of \$50,000. If the plaintiff draws a judge of the Southern District who finds that Florida's section 768.72 applies to the case, the complaint will likely be dismissed for lack of jurisdiction. This dismissal may result in a time-barred action, even in state court, which could deprive the plaintiff — by blind draw — of the right to sue for any damages.¹⁵³

Third, most states require an evidentiary hearing before a litigant is permitted to add a claim for punitive damages which provides a trial preview for the defendant.¹⁵⁴ Thus, the court's ruling on a motion to amend to include a punitive damages claim is an important event which can dramatically affect the outcome of a case.¹⁵⁵ Accordingly, the issue of application of a state punitive damages pleading statute has significant implications — even to the extent of barring a cause of action.

153. This may be the type of case which the *Plantation Square* court thought was immediately appealable. *Wisconsin Inv. Bd. v. Plantation Square Assocs.*, 761 F. Supp. 1569, 1575 n.6 (S.D. Fla. 1991) (referencing *Windsor*).

154. See, e.g., *Plantation Square*, 761 F. Supp. at 1569. Such a preview may foster confidence in the strength of a case or fear relative to the strength of an adversary's case. The *Plantation Square* court believed that the hearing was akin to a slightly heightened motion to dismiss. *Id.* at 1580. "The court seriously doubts that the statute intended such a fact-intensive investigation into the merits of Plaintiff's punitive damages claim." *Id.* Experience within the Florida state courts and the Southern District of Florida dictates that such evidentiary hearings are often mini-trials.

155. However, a ruling permitting amendment to add a claim for punitive damages may not prevent the court from later granting summary judgment against the plaintiff on the punitive damages claim. *Morrow v. Air Methods, Inc.*, 884 F. Supp. 1353, 1355, 1358-59 (D. Minn. 1995) (granting summary judgment against plaintiff on punitive damages claim after leave to amend had been granted); *Spires v. Mooney Motors, Inc.*, 595 N.E.2d 225, 229-30 (Ill. App. Ct. 1992), *appeal denied*, 602 N.E.2d 476 (Ill. 1992).

However, the ruling will significantly impact the case in other ways. For instance, a plaintiff who succeeds in amending to add a claim for punitive damages has important and increased leverage in settlement talks. A judicial determination of a plaintiff's entitlement to punitive damages and a finding that punitive damages are likely to be awarded carries significantly more weight than mere pleading of entitlement to punitive damages at the outset of the case. Conversely, a litigant who is successful in opposing a motion to add a punitive damages claim has settlement leverage and may decide to proceed to trial, given exposure to a potential liability that is limited to a defined amount.

A. State Punitive Damages Pleading Statutes Are Substantive Laws and Should Be Applied in Federal Diversity Actions

State punitive damages pleading laws should be applied in federal diversity actions, because: (1) they do not conflict with either Rule 9(g) or Rule 8(a)(2);¹⁵⁶ (2) these state statutes create important substantive legal rights which must be honored by the federal courts; and (3) a failure to apply these laws will result in forum-shopping.

State punitive damages pleading rules do not conflict with Rule 9(g). At the outset, it is unclear whether punitive damages are “special damages” for the purposes of Rule 9(g); and thus, whether Rule 9(g) *even* applies to a claim for punitive damages.¹⁵⁷ Several courts have held that punitive damages are “special damages” and thus encompassed by Rule 9(g); however, these opinions are by and large conclusory and do not generally engage in a lengthy analysis of what constitutes special damages.¹⁵⁸

In a better-reasoned analysis, the United States District Court for the Eastern District of Louisiana concluded that punitive damages are not special damages.¹⁵⁹ Special damages are defined as those damages suffered by the victim which were unusual but *consequential* damages caused by the defendant's action or inaction.¹⁶⁰ The court persuasively reasoned that punitive damages are a special breed of damages which bear no relation to an injury suffered by the

156. See *supra* notes 68 & 123 for a discussion of Rule 9(g) and Rule 8(a)(2).

157. See note 68 *supra*. Rule 9(g) refers solely to “items of special damage.” FED. R. CIV. P. 9(g).

158. See *Kingston Square Tenants Ass'n v. Tuskegee Gardens, Ltd.*, 792 F. Supp. 1566, 1579 (S.D. Fla. 1992) (stating that “Rule 9(g) provides that items of special damages, such as punitive damages, are to be specifically pleaded”); *Citron v. Armstrong World Indus., Inc.*, 721 F. Supp. 1259, 1261 (S.D. Fla. 1989); *Comeau v. Rupp*, 762 F. Supp. 1434, 1449 (D. Kan. 1991) (implying that punitive damages were special damages for Rule 9(g) purposes). The Kansas district courts consistently equate punitive damages with special damages without discussing how they reached this conclusion. See, e.g., *Comeau*, 762 F. Supp. at 1449.

159. *Southern Pac. Transp. Co. v. Builders Transp., Inc.*, No. 90-3177, 1993 WL 232058, at *4 (E.D. La. June 22, 1993).

160. *Id.* The *Southern Pacific* court quoted the dictionary definition of special damages as “[t]hose which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions.” *Id.* (citing BLACK'S LAW DICTIONARY 392 (6th ed. 1990)); 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1310 (2d ed. 1990).

plaintiff, but which exist solely to punish and deter.¹⁶¹ Other courts have reached a similar conclusion.¹⁶²

Punitive damages exist in their own realm¹⁶³ and are not encompassed in the meaning of the term “special damages” for Rule 9(g) or any other purposes. Accordingly, Rule 9(g) should have no application to punitive damages claims. Even if applicable to a claim for punitive damages, Rule 9(g) does not specify when a claim for “special damages” must be made.¹⁶⁴ Accordingly, the prohibition on asserting a claim for punitive damages in the original complaint is not violative of Rule 9(g). The state punitive damages pleading statutes require court approval and amendment so that the pleadings at trial reflect the claim for punitive damages. Thus, these statutes satisfy the policy of placing defendants on notice of a claim for punitive damages.¹⁶⁵

There is likewise no conflict between the state laws and Rule 8(a)(2).¹⁶⁶ None of the state statutes contemplate or require extensive pleading of facts supporting an entitlement to an award of punitive damages at the outset of the case.¹⁶⁷ The statutes are all envisioned as motions to amend, not the pleading of evidence, thus, Rule 8(a)(2) is not contravened.

The state statutes are substantive in nature because they embody choices by the state to create or protect certain important sub-

161. *Southern Pacific*, 1993 WL 232058, at *4.

162. *See, e.g.*, *Nelson v. G.C. Murphy Co.*, 245 F. Supp. 846, 847 (N.D. Ala. 1965).

163. *See Owen, supra* note 11. Professor Owen described punitive damages as quasi-criminal damages. *Id.* at 365.

164. Even the court in *Plantation Square*, which ultimately did not apply the pleading aspects of Florida's punitive damages law, found no conflict between the state law and Rule 9(g). *Wisconsin Inv. Bd. v. Plantation Square Assocs.*, 761 F. Supp. 1569, 1574 (S.D. Fla. 1991).

165. Rule 9(g) serves to place defendants on notice as to the damages sought by the plaintiff. *WRIGHT & MILLER, supra* note 160, § 1310. A full-fledged, contested evidentiary hearing as contemplated by the state punitive damages pleading statutes also satisfies Rule 9(g)'s notice function.

166. Only the courts in *Plantation Square*, 761 F. Supp. at 1574, and by implication in *Berry v. Eagle-Picher*, Nos. 86C 1739, 88C 10631, 1989 WL 77764, at *1 (N.D. Ill. June 27, 1989), have found conflict with Rule 8(a)(2).

167. The pleading of evidence to establish entitlement to an award of punitive damages — no matter how persuasive — will not evade the requirement of obtaining court approval before asserting a claim for punitive damages. *See, e.g.*, *Simeon, Inc. v. Cox*, 671 So. 2d 158, 160 (Fla. 1996) (“[A]ny punitive damages claim alleged prior to a party asking for a receiving leave of the court must be dismissed or stricken.”); *Keller Indus. v. Kennedy*, 668 So. 2d 328, 329 (Fla. 4th Dist. Ct. App. 1996); *Mayer v. Frank*, 659 So. 2d 1254, 1255 (Fla. 4th Dist. Ct. App. 1995).

stantive rights.¹⁶⁸ The statutes reflect state policy to: (1) remove the stigma created by pleading a meritless claim for punitive damages unless and until facts justifying such a claim are adduced;¹⁶⁹ (2) restrict the use of frivolous punitive damages claims solely for leverage — and to concomitantly reduce the burden on the insurance industry; (3) create a preliminary evidentiary burden for plaintiffs seeking to add a claim for punitive damages; and, in Florida, to (4) restrict discovery of financial worth until the court permits a claim for punitive damages to be stated.

Moreover, application of these state laws clearly satisfies one of the *Erie* twin aims: preventing forum shopping. Permitting a plaintiff to allege entitlement to an award of punitive damages in a federal court, where the plaintiff is prevented from alleging such a claim in the state court will be an important factor in the forum choice decision.¹⁷⁰

B. Appellate Review Is Necessary

The issue of whether a state statute governs the pleading of punitive damages has never been extensively addressed by a federal appellate court.¹⁷¹ The Eighth Circuit has implicitly ruled — without extensive discussion of the issue — that Minnesota's section 549.191 applies to pendent state law claims in federal diversity actions.¹⁷²

168. See *College Craft Co. v. Perry*, Civ. No. 3-95-583, 1995 WL 783612, at *6 (D. Minn. Aug. 9, 1995). The court in *College Craft* recognized that Minnesota enacted § 549.191 to reduce “certain practices in the presentment of punitive damages claims which were thought to be abusive” *Id.* (quoting *Ulrich v. City of Crosby*, 848 F. Supp. 861, 867 (D. Minn. 1994)).

169. Punitive damages operate as a stigma upon a defendant, much like a charge of fraud. See *Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 777 n.4 (7th Cir. 1994); *DiVittorio v. Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir. 1987); *WRIGHT & MILLER*, *supra* note 160, § 1296. By seeking punitive damages, a litigant is casting aspersions of gross misconduct, malice, fraud and socially intolerable behavior upon a defendant. Thus, the reasoning that there is a right to be free from such a claim — or stigma — as expressed by the state courts is another indicia of a punitive pleading statute's substantive nature. *Globe Newspaper Co. v. King*, 658 So. 2d 518, 520 (Fla. 1995) (acknowledging the “statutory right . . . to be free of punitive [damage] allegations in a complaint until there is a reasonable showing by evidence in the record or proffered by the claimant”).

170. Many courts have so found. See, e.g., *Al-Site Corp. v. VSI Int'l, Inc.*, 842 F. Supp. 507, 512 (S.D. Fla. 1993).

171. *Plantation Square*, 761 F. Supp. at 1573 (stating that “[t]he court is unaware of any appellate decision which has dealt with the issue now before it”).

172. *Gamma-10 Plastics, Inc. v. American President Lines*, 32 F.3d 1244, 1254–57

This opinion and its lack of analysis, however, is hardly the foundation for uniform resolution of this issue.

A definite and uniform resolution of this issue is overdue and needed, especially in states as fractured as Florida. In *Plantation Square*, Judge Hoeveler correctly noted that:

[B]ecause a district court's decision of whether to apply a state punitive damage pleading rule is not immediately appealable, and because the district court's ruling would in all likelihood not affect the outcome of the litigation, appeal of such a ruling, though possible in some narrow contexts, has proven elusive as of yet.¹⁷³

Thus, appellate review of this issue — although sorely needed — is unlikely to occur. However, an appeal from this issue can conceivably occur through the interlocutory appeal process.¹⁷⁴

The confusion in the Florida federal district courts is the poster-child for certifying interlocutory review on this issue. Litigants in the Florida federal district courts have no idea whether the judge they randomly draw will strike a claim for punitive damages or not. Success in litigation should not hinge upon a blind draw.

Fortunately, the federal district courts that have recently ruled on this issue appear to be on the right track in determining that these state laws are substantive in nature and should be applied in federal diversity actions.¹⁷⁵ However, without a definitive ruling by a

(8th Cir. 1994), *cert. denied*, 115 S. Ct. 1270 (1995). In *Gamma-10*, the Eighth Circuit heard the appeal from a final judgment awarding damages in a shipping deal gone bad. *Id.* at 1247. *Gamma-10* is different from most actions addressed herein because the plaintiff sought to amend its pleadings during trial to add a claim for punitive damages. *Id.* at 1249. The trial court denied the plaintiff's motion to amend, and the plaintiff appealed from that order and others. *Id.* at 1254. The Eighth Circuit ruled that the trial court had not abused its discretion in finding no basis for an award of punitive damages under Minnesota law. *Id.* at 1255. At issue, thus, was the quantum of evidence, not whether punitive damages could be claimed from the outset of the case. At least one court in Minnesota has cited *Gamma-10* for the proposition that § 549.191 applies in all diversity actions. See *College Craft*, 1995 WL 783612, at *6.

173. *Plantation Square*, 761 F. Supp. at 1573 (footnotes omitted).

174. See 28 U.S.C. § 1292 (1994). Section 1292 permits district court judges to certify orders as appealable when they involve “a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation” 28 U.S.C. § 1292(b) (1994). Such an appeal would not stay the underlying suit.

175. See *Sanders v. Mayor's Jewelers, Inc.*, 1996 U.S. Dist. LEXIS 14223, at *9-16 (S.D. Fla. August 2, 1996); *College Craft*, 1995 WL 783612, at *6; *Meade v. Prison Health Servs., Inc.*, No. 94-854-CIV-T-17B, 1995 WL 350207, at *2 (M.D. Fla. June 8,

federal appellate court, the state of the law will remain largely fractured.¹⁷⁶

1995); Moreover, the Eighth Circuit's casual application of Minnesota's § 549.191 in *Gamma-10*, may indicate a turning of the tide. *See Gamma-10*, 32 F.3d at 1254–57.

176. It will be interesting to watch as the federal district courts in California or Colorado are called upon to rule on this issue.