FEDERAL CIVIL PROCEDURE MANUAL

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Chapter 5

LAW APPLIED

§ 5.1 LAW APPLIED IN FEDERAL COURT

§ 5.1.3 Diversity Action

§ 5.1.3.4 Procedure

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[After note 32, replace all material in §5.1.3.4 with:]

In 1934, Congress enacted the Rules Enabling Act, which granted the Supreme Court the authority to "prescribe general rules of practice and procedure," but insisted that "such rules shall not abridge, enlarge, or modify any substantive right."[32.1] In a diversity action filed in or removed to federal court, although the court must apply the state's substantive law, federal law governs matters of procedure. *Berk v. Choy*[32.2] brought important clarity to this issue in 2026. There, an opinion from eight of the nine U.S. Supreme Court justices made clear that valid federal rules displace contrary state procedures when they "answer the same question," full stop.[32.3] *Berk* also suggests an overwhelming presumption that it will find federal rules to be valid. Under Delaware law, medical malpractice plaintiffs had to include an affidavit from a medical professional attesting that the suit was meritorious with their complaint.[32.4] Delaware clerks of court were required not to docket cases without an affidavit.[32.5] When an out-of-state plaintiff sued Delaware defendants for medical malpractice in federal court, the case raised the question of whether Rule 8—which does not impose an affidavit requirement

[32.1] 28 U.S.C. § 2072(a)–(b).

[32.2] 607 U.S.187 (2026).

[32.3] *Id.* at 198. Justice Jackson wrote separately to concur in the judgment.

[32.4] *Id.* at 190.

[32.5] *Id.*

in medical malpractice cases—displaced Delaware law in deciding whether to dismiss the complaint. The Court concluded that Rule 8 governed. In doing so, it held that whether a state procedure could be described as "substantive" in some sense was irrelevant to the analysis. Instead, as long as the federal rule "really regulates procedure," it will apply in federal court.[32.6] And the Court explained that it had never invalidated a federal rule.[32.7] Going forward, practitioners should, therefore, as a practical matter, expect anything in the Federal Rules of Civil Procedure to apply regardless of contrary state law. Perhaps most immediately, practitioners should likely expect that state laws imposing other preliminary procedural requirements on certain types of lawsuits not present in the Federal Rules of Civil Procedure will not apply when a federal court exercises diversity jurisdiction.

Berk should end the confusion in the lower courts[32.8] spawned by the Court's previous decision in *Shady Grove*.[32.9] The Court held that a New York law barring class action suits in cases in which penalties were sought conflicted with Rule 23 of the Federal Rules of Civil Procedure regulating class actions, and that Rule 23 was valid under the Rules Enabling Act.[32.10] But the decision produced competing approaches to the Rules Enabling Act.

Justice Scalia wrote the plurality opinion in *Shady Grove*, Justice Stevens wrote a concurrence, and Justice Ginsburg wrote a dissent for the remaining four justices. Justice Scalia's plurality opinion focused on whether the federal rule "really regulates procedure," expressly accepted the possibility that following Rule 23 would cause a different result in federal court than would obtain in state court and lead to forum shopping, and demonstrated no concern about countervailing state interests in having a state rule apply in a diversity action.[32.11] Justice Stevens, however, insisted that courts were supposed to consider legislative history and demonstrate "sensitivity to important state

[32.6] *Id.* at 199 (internal citation omitted).

[32.7] *Id.*

[32.8] *See* Ipock v. Manor Care of Tulsa, OK, LLC, 274 F. Supp. 3d 1249, 1254 (N.D. Okla. 2017) (discussing the application of the "splintered" opinions from Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co., 559 U.S. 393 (2010)).

[32.9] Shady Grove Orth. Assocs. P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

[32.10] *Id.* at 399.

[32.11] *Id.* at 410–16.

interests" in evaluating whether a federal rule was inconsistent with 28 U.S.C. §2072(b) in a particular case and should be displaced by a state rule.[32.12]

Berk draws upon, and heavily resembles, Justice Scalia's plurality from *Shady Grove*. Given that, practitioners should expect lower courts to cease utilizing Justice Stevens's approach from *Shady Grove*.

[32.12] *Id.* at 418 (Stevens, J., Concurring).

Chapter 19

STATE CIVIL PROCEDURE

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The Federal Rules of Civil Procedure and the process to make them have had a profound influence on state courts. This section briefly explains how many states have imitated the federal rulemaking process and how states have reacted to developments in the Federal Rules in the areas of (1) pleading standards, (2) summary judgment, and (3) class actions.

§ 19.0 STATE RULEMAKING PROCESSES

Forty-one states use a rulemaking process similar to that of the federal government (described in chapter one).[1] Nine states give legislatures the primary role in revising civil procedure rules.[2] Many states have wholesale adopted federal rules.[3] This makes developments in federal rules highly relevant to those who practice in state courts.

§ 19.1 STATE REACTION TO DEVELOPMENTS IN FEDERAL LAW

§ 19.1.1 Pleading Standards

Chapter 7 described how the U.S. Supreme Court has raised pleading standards with its interpretations of Rule 8 in *Twombly* and *Iqbal*. Courts in

[1] Zachary D. Clopton, *Making State Civil Procedure* 104 CORNELL L. REV. 1, 10 (2019).

[2] *Id.*

[3] John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377 (1986).

Alabama, Colorado, Connecticut, the District of Columbia, Kentucky, Massachusetts, Nebraska, Ohio, Pennsylvania, South Dakota, Texas, and Wisconsin have applied *Iqbal* or *Twombly* when interpreting their own civil procedure codes.[4] However, courts in Delaware, Iowa, Kansas, Minnesota, Montana, New Mexico, New York, North Carolina, Oklahoma, Tennessee, Washington State, and West Virginia have expressed disapproval of *Twombly* and/or *Iqbal*.[5] For an incisive scholarly article considering the interaction of federal pleading standards and state constitutions, *see* Marcus Gadson, *Federal Pleading Standards in State Court*, 121 MICH. L. REV. 409 (2022).

[4] *E.g.*, Am. Suzuki Motor Corp. v. Burns, 81 So. 3d 320, 324 (Ala. 2011); Warne v. Hall, 373 P.3d 588, 595 (Colo. 2016); Bridgeport Harbour Place I, LLC v. Ganim, 32 A.3d 296, 301–02 (Conn. 2011); Potomac Dev. Corp. v. Dist. of Columbia, 28 A.3d 531, 543–45 (D.C. 2011); Williams v. City of Glasgow, No. 2017-CA-001246-MR, 2018 WL 3794739, at *3 & n.6 (Ky. Ct. App. Aug. 10, 2018); Edwards v. Commonwealth, 76 N.E.3d 248, 254 (Mass. 2017); Doe v. Bd. of Regents of the Univ. of Neb., 788 N.W.2d 264, 274, 278 (Neb. 2010); Snowville Subdivision Joint Venture Phase I v. Homes Sav. & Loan of Youngstown, No. 96675, 2012 WL 1067748, at *2 (Ohio Ct. App. Mar. 29, 2012); Briggs v. Sw. Energy Prod. Co., 224 A.3d 334, 351 (Pa. 2020); Sisney v. Best Inc., 754 N.W.2d 804, 808–09 (S.D. 2008); GoDaddy.com, LLC v. Toups, 429 S.W.3d 752, 754 (Tex. Ct. App. 2014); Data Key Partners v. Permira Advisers LLC, 849 N.W.2d 693, 699–701 (Wis. 2014). *But see* Brown v. Carlton Harley-Davidson, Inc., No. 99761, 2013 WL 5310216, at *3 (Ohio Ct. App. Sept. 19, 2013) (applying "no set of facts" standard Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).

[5] *E.g.*, Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC, 27 A.3d 531, 537 (Del. 2011) (the court declined to definitively state that it would never follow *Iqbal* and *Twombly* as the "parties have not fully and fairly litigated the issue"); Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 607–08 (Iowa 2012); Smith v. State, No. 104,775, 2012 WL 1072756, at *6 (Kan. Ct. App. Mar. 23, 2012) (per curiam); Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 603 (Minn. 2014); Brilz v. Metro. Gen. Ins. Co., 285 P.3d 494, 500 (Mont. 2012); Madrid v. Vill. of Chama, 283 P.3d 871, 876 (N.M. Ct. App. 2012); Krause v. Lancer & Loader Grp., LLC, 965 N.Y.S.2d 312, 319 n.3 (N.Y. Sup. Ct. 2013); Holleman v. Aiken, 668 S.E.2d 579, 584–85 (N.C. Ct. App. 2008); Edelen v. Bd. of Comm'rs of Bryan Cnty., 266 P.3d 660, 663 (Okla. Ct. App. 2011); Webb v. Nashville Area Habitat for Human., Inc., 346 S.W.3d 422, 429–30 (Tenn. 2011); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863– 64 (Wash. 2010); Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 189 n.4 (W. Va. 2010).

§ 19.1.2 Summary Judgment

Chapter 13 describes how the U.S. Supreme Court enthusiastically embraced summary judgment and made it easier for lower courts to grant in the so-called *Celotex* trilogy. Courts in Alabama, Alaska, Arizona, Arkansas, Colorado, the District of Columbia, Delaware, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming have favorably cited the *Celotex* trilogy.[6] Courts in Connecticut, Florida, Georgia, Indiana, Kentucky, Missouri, New Mexico, New York,

[6] Ex parte Gen. Motors Corp., 769 So. 2d 903 (Ala. 1999); Greywolf v. Carroll, 151 P.3d 1234, 1241 (Alaska 2007); Orme Sch. v. Reeves, 802 P.2d 1000 (Ariz. 1990) (in banc); Wallace v. Broyles, 961 S.W.2d 712 (Ark. 1998); Aguilar v. Atl. Richfield Co., 24 P.3d 493 (Cal. 2001); Cont'l Air Lines, Inc. v. Keenan, 731 P.2d 708 (Colo.1987) (en banc); Burkhart v. Davies, 602 A.2d 56 (Del. 1991); Hollins v. Fed. Nat'l. Mortg. Ass'n, 760 A.2d 563 (D.C. 2000); Ralston v. Yim, 292 P.3d 1276 (Haw. 2013); Chandler v. Hayden, 215 P.3d 485 (Idaho 2009); Ganci v. Washington, 745 N.E.2d 42 (Ill. App. Ct. 4th Dist. 2001); Unified Sch. Dist. No. 232, Johnson Cty. v. CWD Invs., LLC, 205 P.3d 1245 (Kan. 2009); Samaha v. Rau, 977 So. 2d 880 (La. 2016); Corey v. Norman, Hanson & DeTroy, 742 A.2d 933 (Me. 1999); Beatty v. Trailmaster Prods., Inc., 625 A.2d 1005 (Md. 1993); Kourouvacilis v. Gen. Motors Corp., 575 N.E.2d 734 (Mass. 1991); Quinto v. Cross & Peters Co., 547 N.W.2d 314 (Mich. 1996); DLH, Inc. v. Russ, 566 N.W.2d 60 (Minn. 1997); Ladnier v. Hester, 98 So. 3d 1025n1 (Miss. 2012); Monroe v. Cogswell Agency, 234 P.3d 79 (Mont. 2010) (Rice, J., concurring in part); Roskop Dairy, LLC v. GEA Farm Techs., Inc., 871 N.W.2d 776, 793n10 (Neb. 2015); Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 172 P.3d 131, 134 (Nev. 2007); Pennichuck Corp. v. City of Nashua, 886 A.2d 1014, 1024 (N.H. 2005); Brill v. Guardian Life Ins. Co. of Am., 666 A.2d 146 (N.J. 1995); Scarborough v. Dillard's Inc., 693 S.E.2d 640, 644 (N.C. 2011); Rooks v. Robb, 871 N.W.2d 468, 471 (N.D. 2015); Wing v. Anchor Media, Ltd. of Tex., 570 N.E.2d 1095, 1099 (Ohio 1991); Ertel v. Patriot-News Co., 674 A.2d 1038, 1042 (Pa. 1996); Lavoie v. N.E. Knitting, Inc., 918 A.2d 225, 228 (R.I. 2007); Baughman v. AT & T, 410 S.E.2d 537, 545 (S.C. 1991); U.S. Bank Nat'l. Ass'n v. Scott, 673 N.W.2d 646, 657 (S.D. 2003); Rye v. Women's Care Ctr. of Memphis, 477 S.W.3d 235, 262 (Tenn. 2015); Estate of Alden v. Dee, 35 A.3d 950, 962 (Vt. 2011); Young v. Key Pharm., Inc., 770 P.2d 182, 226 (Wash. 1989) (en banc); Williams v. Precision Coil, Inc., 459 S.E.2d 329, 338 (W. Va. 1995); Yahnke v. Carson, 613 N.W.2d 102, 108 (Wis. 2000); Franks v. Olson, 975 P.2d 588, 593 (Wyo. 1999).

Oklahoma, Oregon, Texas, Utah, and Virginia have rejected *Celotex*.[7] For an incisive scholarly article considering the interaction of federal summary judgment standards and state constitutions, *see* Marcus Gadson, *State Constitutions and Summary Judgment*, 68 U.C.L.A. L. REV. 988 (2021).

§ 19.1.3 Class Actions

Chapter 9 discusses how the U.S. Supreme Court has made the commonality requirement in Rule 23 more difficult to satisfy in *Wal-Mart v. Dukes*, 564 U.S. 338 (2011). Courts in Georgia, Louisiana, Montana, Oklahoma, Delaware, Missouri, Texas, Wisconsin, Connecticut, North Carolina, and Tennessee have expressed approval of *Dukes*.[8] Courts in New York and Iowa have expressed hesitancy or criticism regarding adopting *Dukes*.[9]

[7] Thomas v. A.O. Smith Corp., No. CV105029385S, 2012 WL 695550, at *2 (Conn. Super. Ct. Feb. 15, 2012); Green v. CSX Transp., Inc., 626 So. 2d 974, 975 (Fla. Dist. Ct. App. 1st Dist. 1993) (per curiam); First Union Nat'l. Bank of Ga. v. J. Reisbaum Co., 378 S.E.2d 317, 319 (Ga. Ct. App. 1989); Jarboe v. Landmark Cmty. Newspapers of Ind., Inc., 644 N.E.2d 118, 123 (Ind. 1994); Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 481–82 (Ky. 1991); Powel v. Chaminade Coll. Preparatory, Inc., 197 S.W.3d 576, 591 (Mo. 2006) (Wolf, J., concurring); Romero v. Philip Morris Inc., 242 P.3d 280, 287 (N.M. 2010); Yun Tung Chow v. Reckitt & Colman, Inc., 950 N.E.2d 113, 118 (N.Y. 2011) (Smith, J., concurring); Kating v. City of Pryor *ex rel*. Mun. Util. Bd. of Pryor, 977 P.2d 1142, 1144 (Okla. Civ. App. 1998); Jones v. Gen. Motors Corp., 939 P.2d 608, 616 (Or. 1997); Huckabee v. Time Warner Entm't Co., L.P., 19 S.W.3d 413, 423 (Tex. 2000); Orvis v. Johnson, 177 P.3d 600, 604 (Utah 2008); Realstar Realtors, LLC v. Glenn *ex rel*. Smith, No. CL99-186, 2001 WL 587489, at *5 (Va. Cir. Ct. May 23, 2001).

[8] Georgia-Pacific Consumer Prods., LP v. Ratner, 762 S.E.2d 419, 421–22 (Ga. 2014); Price v. Martin, 79 So. 3d 960, 969 (La. 2011); Roose v. Lincoln Cty. Emp. Grp. Health Plan, 362 P.3d 40, 46 (Mont. 2015); Marshall Cty. v. Homesales, Inc., 339 P.3d 878, 884 (Okla. 2014); Carroll v. Philip Morris USA, Inc., 163 A.3d 91, 107 & n.77 (Del. Super. Ct. 2017); Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc., 524 S.W.3d 116, 129-30 (Mo. Ct. App. 2017); Peter G. Milne, P.C. v. Ryan, 477 S.W.3d 888, 914 (Tex. Ct. App. 2015); McDaniel v. Wisc. Dep't of Corrections, 21 N.W. 3d 749, 755 (Wis. 2025); Rodriguez v. Kaiffa, LLC, 253 A.3d 13, 28 (Conn. 2020); *Dewalt v. Hooks*, 382 N.C. 340, 344 (2022); Bruce v. Tenn. Am. Water Co., No. E2024-00933-COA-R3-CV, 2025 WL 3485601, at *8 (Tenn. Ct. App. Dec. 4, 2025).

[9] Jiannaras v. Alfant, 52 N.E.3d 1166, 1169 (N.Y. 2016); Pippen v. Iowa, 854 N.W.2d 1 (Iowa 2014).