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## Congress Prescribes Preemption of State Tort-Reform Laws to Remedy Healthcare "Crisis": An Improper Prognosis?

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# CONGRESS PRESCRIBES PREEMPTION OF STATE TORT-REFORM LAWS TO REMEDY HEALTHCARE “CRISIS”: AN IMPROPER PROGNOSIS?

JASON C. SHEFFIELD<sup>1</sup>

## *Abstract*

*Say what you want about the tort-reform debate, but it has staying power. Over the last half-century, legislators and commentators have extensively debated every aspect of tort reform and the litigation “crisis” arguably giving rise to it, without resolving much of anything. Despite this ideological stalemate, tort-reform proponents have managed to push measures through every state legislature. With fifty tries come fifty results, and for the most part, fifty failures. But have all these efforts been in vain? As of yet, no. Although the healthcare system does not appear to be improving, the numerous tort-reform measures states have adopted provide valuable insight into the litigation crisis, even (perhaps especially) when those measures have no effect. But Congress is impatient, one of its many child-like qualities.*

*In June 2017, the United States House of Representatives passed H.R. 1215—The Protecting Access to Care Act of 2017 (PACA). If enacted, PACA would impose comprehensive tort reform on states and, in many cases, preempt similar state laws currently in effect. For many legislators, regardless of political affiliation, this understandably raises federalism concerns. To appease these concerns, PACA’s drafters included provisions that appear deferential to similar state laws. However, when considered in context with the rest of the bill, PACA would likely preempt many state tort-reform provisions. This Article focuses on two PACA sections—the affidavit-of-merit section and the expert-witness-qualifications section. PACA adopts both sections from existing state statutes that have proven controversial and resulted in arguably absurd results. By analyzing state approaches in both areas, this Article concludes that these sections of PACA would preempt all similar state laws, setting a uniform federal standard. This uniformity, however, would come at a high price—an unprecedented encroachment on states’ rights in an area of traditional state regulation. Further, the inequitable and absurd results occurring in these states would occur nationwide if PACA is enacted.*

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## I. INTRODUCTION

“Extreme remedies are very appropriate for extreme diseases”

—Hippocrates

The healthcare system is diseased. The symptoms are well known: increasing healthcare costs, dwindling numbers of doctors and specialists, less access to care, and a poorer quality of care. But as anyone who has ever used WebMD knows, a single set of symptoms can indicate anything from a common cold to the bubonic plague. It is important, then, to determine the healthcare system’s disease before prescribing a treatment plan. With the Protecting Access to Care Act of 2017 (PACA), Congress has proposed an extreme remedy to combat the healthcare system’s symptoms, but it has misdiagnosed the disease.

The U.S. House of Representatives passed PACA in June 2017 with the express purpose of “improv[ing] patient access to health care services and provid[ing] improved medical care by reducing the excessive burden the liability system places on the health system.”<sup>2</sup> Congress has identified the symptoms—decreased patient access to care due to exorbitant healthcare costs. But what is the remedy? According to the House, it is comprehensive federal tort reform. Implicit in this prescription, Congress diagnosed the disease—medical malpractice plaintiffs.

PACA includes several state tort-reform measures popular with tort-reform proponents, including a noneconomic damages cap and a shortened statute of limitations.<sup>3</sup> This Article, however, focuses on two interrelated sections incorporated into PACA via an amendment introduced on the day it was passed in the House—the affidavit of merit section and the expert witness qualifications section.

An affidavit of merit<sup>4</sup> is a tort-reform measure requiring medical-malpractice plaintiffs to file an affidavit (either before, contemporaneously with, or shortly after filing a complaint) signed by an expert or the plaintiff’s attorney attesting to the expert’s belief that the case is meritorious.<sup>5</sup> Currently, twenty-seven states require a certificate of merit in medical-malpractice cases, but each state takes a different approach.<sup>6</sup> Some states also increase the requirements an expert must possess before

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<sup>2</sup> Protecting Access to Care Act, H.R. 1215, 115th Cong. (2017).

<sup>3</sup> See Emily S. Madden, *One Nation, Even in Tort Law: How States Can Preempt or Circumvent Federal Preemption of Noneconomic Damage Limitations*, 18 WYO. L. REV. 53, 64 (2018) (discussing PACA’s preemption provision in its noneconomic damage cap section).

<sup>4</sup> This Article uses the term “certificate of merit” when generally referring to the body of law that has developed in this area. However, states use different terms, including “affidavit or merit,” expert report, as well as other variations.

<sup>5</sup> Mitchell J. Nathanson, *It’s the Economy (And Combined Ratio), Stupid: Examining the Medical Malpractice Litigation Crisis Myth and the Factors Critical to Reform*, 108 PENN ST. L. REV. 1077, 1111 (2014); Carrie Lynn Vine, *Addressing the Medical Malpractice Insurance Crisis: Alternatives to Damage Caps*, 26 N. ILL. U. L. REV. 413, 425–26 (2006).

<sup>6</sup> 163 CONG. REC. H5280 (June 28, 2017) (statement of Rep. Hudson). In addition to the twenty-seven statutes in effect, at least four other states have enacted certificate of merit statutes that are no longer effective. See Discussion *infra* at Section II.C. regarding state statutes held unconstitutional in state courts.

qualifying to sign the affidavit, often requiring that the expert practice or specialize in the same medical field as the defendant.<sup>7</sup>

PACA includes an express preemption clause in both the affidavit of merit and expert witness sections. Although these provisions are titled “State Flexibility,” neither preemption clause is flexible in its application to state law. By using vague language, these sections initially seem to defer to state law and appear to merely establish a legislative floor. However, when compared to similar state statutes, it becomes clear that the drafters intended to establish both a floor and a ceiling, preempting every state law currently in effect.

This Article argues that because no state certificate of merit approach has proven superior to others, mandating a uniform federal standard is unsound policy. If and until a certain approach proves effective, Congress should not foreclose states from experimenting with different tort-reform measures. Further, PACA’s preemption provisions will confuse state courts interpreting PACA’s preemption scope, creating disparate holdings across jurisdictions. Finally, PACA’s expert witness qualifications section will cause absurd results that could otherwise be avoided.

Section II details the development of tort-reform in the states, provides a survey of state certificate of merit and expert witness statutes, and discusses some recurring issues associated with these state statutes. Section III examines PACA’s affidavit of merit and expert witness qualifications sections. Section III also breaks down both PACA sections into several core elements used in the preemption analysis in Section IV. Section IV concludes that despite preemption language disguised to appear deferential to state law, PACA would preempt every state certificate of merit and expert witness qualifications statute currently in effect. Section IV also discusses the negative ramifications of this result. Section V is a brief conclusion.

## II. BACKGROUND

### A. *The Litigation “Crisis” and Tort Reform*

Terms like “litigation crisis,” “insurance crisis, and “medical malpractice crisis,” refer to the modern public perception that frivolous litigation is rampant in the United States and substantially burdens our society.<sup>8</sup> Over the last four decades, several of these so-called crises have garnered heavy attention from the media and politicians, both at the state and national levels. Tort reform measures are legislative responses to these purported crises. This section briefly examines the origins of the tort-reform movement, its goals (both express and actual), and some empirical studies that call the movement’s efficacy into question.

The first litigation crisis occurred in the mid-1970s, followed by subsequent crises in the 1980s and early 2000s.<sup>9</sup> In response, state legislatures enacted tort-reform measures aimed at limiting personal injury claims and recovery of damages by

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<sup>7</sup> Vine, *supra* note 5, at 426.

<sup>8</sup> Michael D. Johnston, *The Litigation Explosion, Proposed Reforms, and Their Consequences*, 21 BYUJ. PUB. L. 179, 181 (2007). This Article uses the term “litigation crisis” to refer generally to the various crises as each is rooted in the basic premise that excessive litigation gave rise to it.

<sup>9</sup> Scott DeVito & Andrew Jurs, *An Overreaction to a Nonexistent Problem: Empirical Analysis of Tort Reform from the 1980s to 2000s*, 3 STAN. J. COMPLEX LITIG. 62, 69–70 (2015); Vine, *supra* note 5, at 420.

plaintiffs.<sup>10</sup> By the mid-1980s, more than forty states had enacted tort-reform measures.<sup>11</sup> And states with tort reform already in place were not hesitant to enact more. In 1986 alone, forty-one states enacted tort reform legislation.<sup>12</sup> In 1988, the Republican party made tort reform part of its national platform, and it has remained there ever since.<sup>13</sup> Today, every state has enacted or elected tort-reform measures.<sup>14</sup> Thus, tort-reform proponents have been extremely successful in getting tort reform enacted at the state level. But that does not mean tort reform itself has been successful.

Proponents claim that tort reform is necessary to lower skyrocketing medical insurance premiums on doctors caused by an increased rate of personal injury lawsuits.<sup>15</sup> High insurance premiums, they argue, cause a decrease in physician supply and a lower quality of care for patients.<sup>16</sup> Tort reform is thus a means to an end, the end being lower medical insurance premiums and better healthcare.<sup>17</sup> To accomplish this end, tort-reform measures aim to reduce the overall volume of litigation and the amount of damages awarded in the suits that are filed.<sup>18</sup> In this respect, studies seem to indicate that tort reform has been wildly successful at accomplishing the means towards its end.

Tort filings have decreased significantly in the last several decades, as have jury awards in cases in which the plaintiff prevails on the merits. For example, a study by Scott DeVito and Andrew Jurs found that states enacting noneconomic damage caps resulted in total tort filings decreasing by 18% and medical malpractice filings decreasing by 86%.<sup>19</sup> Other studies show drops in damage awards of 30% or more.<sup>20</sup> Findings like these could lead one to conclude that tort reform proponents are right about both the problem and the solution. However, other data calls both of those conclusions into serious question.

In addition to examining the results occurring when states enact a noneconomic damages cap, DeVito and Jurs also looked at what happened in states that had no such cap during the same period. They found that in these states, total tort filing decreased by 26% in the 1990s and another 27% in the 2000s.<sup>21</sup> Similarly, medical malpractice

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<sup>10</sup> DeVito, *supra* note 9, at 69.

<sup>11</sup> Vairo, *infra* note 34, at 1744; George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1523 (1987).

<sup>12</sup> Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1901 (2008).

<sup>13</sup> DeVito, *supra* note 9, at 69–70.

<sup>14</sup> Nathanson, *supra* note 5, at 1077.

<sup>15</sup> DeVito, *supra* note 9, at 64.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 111.

<sup>18</sup> *Id.* at 69.

<sup>19</sup> *Id.* at 79.

<sup>20</sup> *Id.* at 72–73.

<sup>21</sup> DeVito, *supra* note 9, at 79.

filings dropped 18% during the 1990s and 24% in the 2000s.<sup>22</sup> Other studies show similar patterns between states that had adopted tort reform and those that had not.<sup>23</sup> These studies indicate that individuals with meritorious tort claims are less likely to sue than in previous decades, regardless of whether their state has enacted tort reform.

An even more surprising finding by DeVito and Jurs is what happened when a states noneconomic damages cap was nullified by the state's high court. They theorized that eliminating the caps would lead to tort filings rebounding to pre-cap levels.<sup>24</sup> However, they found that the opposite occurred—tort filings further decreased in these states after the caps were eliminated.<sup>25</sup> While this is initially surprising, it becomes less so when considered in context with the way in which proponents were able to enact such pervasive tort-reform measures in the first place.

### B. *The Tort-Reform Movement: A Scorched Earth Campaign*

From a political perspective, tort reform is a partisan issue. Republicans and conservatives are for it, and democrats are against it. But tort reform was around long before the Republican party added it to its platform in 1988. As it turns out, looking at the origins of the tort-reform movement illuminates its underlying validity or lack thereof.

The tort-reform movement may have actually started as early as the 1950s, but it began accelerating in the 1960s and 1970s.<sup>26</sup> Among the most influential actors were organization such as the Chamber of Commerce, various organizations funded by large corporations and insurance companies, as well as conservative political organizations, and conservative individuals like the Koch brothers.<sup>27</sup> Armed with a multi-billion dollar budget, they waged a tort reform war on multiple fronts.<sup>28</sup> On one front, there was a push to fund the campaigns of “tort-reform-oriented judges—especially at the state supreme court level—as well as reformist legislators.”<sup>29</sup> On another front, they started a public relations campaign with a narrative focused on turning the public against plaintiffs and plaintiff's attorneys.<sup>30</sup> The tort reform movement, therefore, was not just about influencing formal legal changes, it “has always been about altering the cultural environment surrounding civil litigation.”<sup>31</sup>

Just as important as their strategy was their message. Tort reform draws on shared cultural ideals to create basic themes aimed at persuading the public of certain

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<sup>22</sup> *Id.* at 79.

<sup>23</sup> *Id.* at 74–75.

<sup>24</sup> *Id.* at 80.

<sup>25</sup> *Id.* at 80.

<sup>26</sup> Vairo, *infra* note 34, at 1741–42.

<sup>27</sup> *Id.* at 1743.

<sup>28</sup> *Id.* at 1742–43.

<sup>29</sup> *Id.* at 1743.

<sup>30</sup> *Id.* at 1741.

<sup>31</sup> Stephen Daniels & Joanne Martin, *The Impact it has had is Between People's Ears: Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453, 453 (2000).

propositions.<sup>32</sup> These themes are ideas that everyone agrees with when stated abstractly.<sup>33</sup> Tort reform used these themes to convince the public of certain notions, such as an out of control civil litigation system.<sup>34</sup> First, an abundance of frivolous plaintiffs who, with the assistance of greedy plaintiff's lawyers, file a substantial number of unmeritorious lawsuits, commanding unreasonably high settlement payments, creating the most litigious legal environment in the world.<sup>35</sup> Second, when meritorious claims go to trial, juries are overly sympathetic to plaintiffs and award exorbitantly high noneconomic damages. To keep up with these expenses, insurance companies are forced to raise premiums on doctors, which the doctors pass onto to their patients through higher rates for their services.

Through countless television, radio, and print advertising campaigns, tort reformers were able to shift public opinion toward a view that condemns civil litigation and its participants. Public opinion polls conducted in the mid-1980s and later show the effectiveness of their message.<sup>36</sup> There was also a noticeable effect on juror's attitudes toward plaintiffs. Thus, it is not surprising that tort filings, particularly medical malpractice filings, have experienced significant declines, even in the absence of tort reform measures. There has not, however, been a corresponding decrease in medical insurance premiums or healthcare costs generally.<sup>37</sup> It appears, then, that tort reform's main contentions have been disproven, and one might expect to see legislatures start rolling back tort reform measures or at least not enacting more tort reform. But tort reform proponents have found a new theme to support their agenda, one that tort reform itself created—defensive medicine.

C. *The Effect on Doctors: Defensive Medicine as a Justification for More Tort Reform*

Much like the general public, physicians and healthcare providers believe that the litigation crisis is real and that it increases their insurance premiums.<sup>38</sup> The fear of malpractice lawsuits causes many doctors to practice what is known as “defensive medicine.”<sup>39</sup> Defensive medicine occurs when doctors practice in a way aimed at avoiding malpractice suits rather than in a way calculated to serve the patient's best interest.<sup>40</sup> Examples of defensive medicine include ordering additional diagnostic tests after diagnosis, unnecessarily referring patients to other doctors, refusing to treat high-risk patients or to perform high-risk procedures, prescribing additional medication the

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<sup>32</sup> *Id.* at 454–55.

<sup>33</sup> *Id.* at 455.

<sup>34</sup> *Id.*

<sup>35</sup> Georgene Vairo, *The Role of Influence in the Arc of Tort “Reform”*, 65 EMORY L. J. 1741, 1741 (2016); Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 4–5 (1986).

<sup>36</sup> Daniels, *supra* note 31, at 464–65.

<sup>37</sup> Nathanson, *supra* note 5, at 1078.

<sup>38</sup> Alan G. Williams, *The Cure for What Ails: A Realistic Remedy for the Medical Malpractice “Crisis”*, 23 STAN L. & POL'Y REV. 477, 480–81 (2012).

<sup>39</sup> *Id.* at 486.

<sup>40</sup> *Id.*



patient does not need, and recommending unnecessary invasive procedures.<sup>41</sup> Some studies indicate that 83% to 93% of doctors practice some type of defensive medicine.<sup>42</sup> However, as just discussed, Americans are substantially less likely to sue for injuries today, especially in the medical-malpractice context, than they were twenty to thirty years ago. So defensive medicine is likely a by-product of tort reform's effect on doctors' perception of their patients as being eager to sue in the event of an injury, which we now know is untrue.

With the empirical evidence showing that tort reform proponent's claims of American litigiousness and sympathetic juries are not real, defensive medicine provides tort reform proponents with a new justification for enacting more tort reform measures. During House debates on PACA, some representatives cited figures as high as \$650 billion that PACA might save in defensive medicine costs.<sup>43</sup> This strategy is not novel. In 2005, the Bush administration and congressional republicans cited defensive medicine as a primary justification for a similar federal tort reform bill, which, like PACA, was passed in the House before stalling in the Senate.<sup>44</sup>

Somewhat ironically, defensive medicine may be more costly than medical malpractice. Medical malpractice costs an estimated \$30 billion per year, or 1% of total healthcare spending.<sup>45</sup> Conversely, defensive medicine costs estimates range from \$100 billion to \$300 billion, or 10% to 30% of annual healthcare spending.<sup>46</sup> So, if there is a healthcare crisis occurring today, the effect tort reform's public relations campaign had on doctors is far more likely to be the cause than medical malpractice suits. Proponents are thus now using a crisis of their own making to justify enacting more tort reform. But, since tort reform leads to defensive medicine, more tort reform will not suddenly make doctors fearless about being sued for malpractice, which is probably not a desirable outcome anyway. With all of this in mind, the true motivations behind tort reform have become muddled. While the motivations are outside the scope of this Article, it may prove useful when considering the drafter's intent in the preemption section below.

#### *D. State Certificate of Merit Statutes*

Academics and legislators have coined numerous terms for statutes imposing increased pleading requirements on medical-malpractice plaintiffs: affidavits and certificates of merit, expert opinion pleading,<sup>47</sup> special pleading,<sup>48</sup> heightened

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 163 CONG. REC. H5273 (June 28, 2017) (statement of Rep. King).

<sup>44</sup> Alexee Deep Conroy, *Lessons Learned From the "Laboratories of Democracy": A Critique of Federal Medical Liability Reform*, 91 CORNELL L. REV. 1159, 1162–63 (2006).

<sup>45</sup> Jill Fairchild, *The Defensive Medicine Debate: Driven by Special Interests*, 19 ANNALS HEALTH L. ADVANCE DIRECTIVE 297, 301 (2010).

<sup>46</sup> *Id.*

<sup>47</sup> Parness, *infra* note 50, at 537 (referring to similar statutes as "Expert Opinion Pleading).

<sup>48</sup> Mary Margaret Penrose & Dace A. Caldwell, *A Short and Plain Solution to the Medical Malpractice Crisis: Why Charles E. Clark Remains Prophetically Correct About Special Pleading and the Big Case*, 39 GA. L. REV. 971, 971 (2005).

pleading,<sup>49</sup> the list goes on.<sup>50</sup> Whatever term is used, these statutes have one thing in common—no two are the same. Certificates of merit started gaining popularity in the late 1990s and early 2000s as another means of achieving this goal.<sup>51</sup>

Certificates of merit attempt to reduce frivolous lawsuits by requiring plaintiffs to file an affidavit, usually when the suit is commenced or at some time shortly thereafter, certifying that a medical expert has reviewed the case and has a good-faith belief that the case has merit.<sup>52</sup> These statutes provide malpractice defendants with a shield against the monetary and reputational costs associated with frivolous lawsuits.<sup>53</sup> Twenty-seven states have a certificate of merit statute currently in effect, but the specific provisions vary greatly between states.<sup>54</sup>

Certificates of merit exploded on the tort-reform scene in the late 1980s after Maryland enacted its version to somewhat astonishing results. Maryland enacted a certificate of merit statute in 1986.<sup>55</sup> In 1987, medical-malpractice filings in Maryland dropped 36% from the prior year.<sup>56</sup> The sudden and drastic results in Maryland prompted other state legislatures to adopt similar provisions.<sup>57</sup> However, by the mid-1990s, the immediate results Maryland experienced had waned and medical-malpractice filings were back to pre-1987 levels.<sup>58</sup>

Certificates of merit have the same general purpose other tort-reform measures have but are somewhat unique in how they accomplish that purpose. Instead of reducing the monetary costs after the litigation ends, certificates of merit seek to dispose of cases early in the litigation before doctors and insurers accumulate substantial defense costs. Typical statutes try to accomplish this in two primary ways. First, certificates of merit limit the volume of medical malpractice filings by

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<sup>49</sup> Dace A. Caldwell, *Civil Procedure: Medical Malpractice Gets Eerie: The Eerie Implications of a Heightened Pleading Burden in Oklahoma*, 57 OKLA. L. REV. 977, 977 (2004).

<sup>50</sup> This Article uses “certificate of merit” when referencing the entire body of law as some states do not require sworn affidavits. However, this Article also uses the term “affidavit of merit” for statutes that require the expert’s statements be in an affidavit.

<sup>51</sup> *Id.* at 1111. Although this Article focuses on certificate of merit statutes in the medical-malpractice arena, many states, and the United States Congress, have either enacted or proposed similar legislation for products liability claims, professional malpractice actions against professionals other than doctors, and sexual abuse claims. Jefferey A. Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 B.Y.U. L. REV. 537, 539.

<sup>52</sup> Nathanson, *supra* note 5, at 1111.

<sup>53</sup> *Id.*; Vine, *supra* note 5, at 426.

<sup>54</sup> 163 CONG. REC. H5280 (June 28, 2017) (statement of Rep. Hudson). In addition to the twenty-seven statutes in effect, at least four other states have enacted certificate of merit statutes that are no longer effective. See Discussion *infra* at Section II.C. regarding state statutes held unconstitutional in state courts.

<sup>55</sup> Nathanson, *supra* note 5, at 1111.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1122 (text accompanying footnote 282).

discouraging plaintiffs who cannot show that their claim is meritorious from bringing a suit in the first place.<sup>59</sup> Second, requiring certificates of merit provide doctors a quick and inexpensive way to dispose cases filed by plaintiffs who are unable to adequately show their case is meritorious.<sup>60</sup> These statutes, then, act to shield doctors and insurance companies against the costs associated with defending meritless malpractice claims.<sup>61</sup>

This second goal is likely the more important one. Many medical malpractice suits end favorably for the defendant, whether due to lack of merit or otherwise.<sup>62</sup> However, while the case remains open, the defendant-doctors and their insurers incur substantial legal fees. One study showed that “nearly half of one major medical malpractice insurer’s legal costs went to defense of cases that were ultimately resolved without payment to the plaintiff.”<sup>63</sup> This indicates that ultimately unsuccessful malpractice suits, which do not result in the plaintiff recovering, contribute almost as much cost to the healthcare system as those that plaintiffs win. Thus, proponents argue that requiring plaintiffs to show merit at an early stage should reduce the costs of defending these lengthy cases that will not result in compensation.<sup>64</sup> Further, the plaintiff, who will not receive compensation whether the case is dismissed sooner or later, is ultimately no worse off.

Certificate of merit statutes have proven popular among state legislatures since the early 1990s, with no indications that their popularity will decline. Iowa enacted a certificate of merit statute in its 2017 legislative session, becoming the most recent state to do so.<sup>65</sup> But these statutes have encountered issues, especially in state courts. State high courts in Arkansas, Mississippi, Ohio, Oklahoma, and Washington have all held their state’s certificate of merit statute unconstitutional.<sup>66</sup> State legislatures, on the other hand, remain fond of certificates of merit. A state legislature will commonly respond to its supreme court’s decision by re-enacting the statute with curtailed provisions satisfying the court’s prior objections. Oklahoma provides an illustrative example of this practice.

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Vine, *supra* note 5, at 426.

<sup>62</sup> *Id.* (“Approximately 62 percent of all medical malpractice cases filed are resolved in favor of the defense, with the case being either dismissed or dropped without payment to the plaintiff.”); Williams, *supra* note 38, at 482 (stating that, from the late 1980s to early 1990s, 70% of medical malpractice cases resolved without payment).

<sup>63</sup> Vine, *supra* note 5, at 426.

<sup>64</sup> *Id.*

<sup>65</sup> IOWA CODE ANN. § 147.140 (West 2017).

<sup>66</sup> See Crystal Axelrod, *Certificate of Merit Requirement Violates Right of Access to Courts*, 35 AM. J.L. & MED. 692 (2009) (citing Putnam v. Wenatchee Valley Med. Ctr., PS, 216 P.3d 374 (Wash. 2009); Wimley v. Reid, 2007-CA-00593-SCT (Miss. 2008); Summerville v. Thrower, 235 S.W.3d 415 (Ark. 2007); Hiatt v. S. Health Facilities, 626 N.E.2d 71 (Ohio 1994)); Jablow, *infra* note 68, at 16.

Oklahoma enacted its first certificate of merit statute in 2003.<sup>67</sup> In 2006, the statute's validity was challenged.<sup>68</sup> In an 8 to 1 decision, the Oklahoma Supreme Court held that requiring affidavits of merit in medical malpractice cases violated the Oklahoma constitution's "special law" provision and the right of access to the state's court system.<sup>69</sup> Undeterred, the Oklahoma legislature amended the certificate of merit statute in 2009.<sup>70</sup> In 2013, the updated statute was again before the Oklahoma Supreme Court, and it was again held unconstitutional—under the exact same provisions as before.<sup>71</sup> Later that same year, the legislature enacted yet another iteration of the same statute.<sup>72</sup> In November 2017, relying on the same constitutional provisions it did in 2006 and 2013, the Oklahoma Supreme Court once again struck down the statute.<sup>73</sup>

#### E. Survey of State Certificate of Merit Statutes

Although generally enacted for similar purposes, state certificate of merit provisions vary greatly between states.<sup>74</sup> But state certificate of merit provisions can be divided into two broad categories: (1) the substantive requirements and (2) the timing requirements.<sup>75</sup>

##### 1. Substantive Elements of Certificates of Merit

To a greater degree than the timing requirements, states have developed unique approaches to the substantive provisions in their certificates of merit. However, a thorough review of state statutes has gleaned several typical "elements" that most state statutes contain a variation of. These are not an exclusive listing of all possible elements but instead a representation of the most common provisions found in many

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<sup>67</sup> 63 OKL.ST.ANN. § 1-1708.1E (Supp. 2003) (repealed by 2009 Okla. Sess. Laws, § 87, c. 228).

<sup>68</sup> *Zeier v. Zimmer, Inc.*, 2006 WL 3717904 (Okla. Dec. 19, 2006).

<sup>69</sup> Valerie Jablow, *Oklahoma Justices Reject Affidavit of Merit Requirement in Med-Mal Cases*, 43 MAR TRIAL 16, 18 (2007) (the Oklahoma Special Law provision prohibits special laws regulating "the practice or jurisdiction of, or changing the rules of evidence in, judicial proceedings or inquiry before the courts.").

<sup>70</sup> *Wall v. Marouk*, 2013 OK 36, ¶ 9, 302 P.3d 775, 781; *John v. St. Francis Hosp., Inc.*, 2017 OK 81, ¶ 12, 405 P.3d 681, 686.

<sup>71</sup> *See* *Wall v. Marouk*, 302 P.3d at 777.

<sup>72</sup> *John v. St. Francis Hosp., Inc.*, 2017 OK 81 ¶ 15.

<sup>73</sup> *Id.* at ¶ 1.

<sup>74</sup> In addition to the elements discussed in this section, state statutes come in many different forms. For instance, state statutes vary in scope—that is, what claims the statute applies to. In New Jersey, the certificate of merit statute applies to "any action for damages for personal injury, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation. . . ." N.J. STAT. ANN. § 2A:53A-27 (West 2017). Conversely, the Texas affidavit-of-merit statute only applies if a plaintiff asserts "a health care liability claim." Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (West 2017). States also differ regarding where the statute is codified. *See* Parness, *supra* note 51, at 418-19. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (West 2017).

<sup>75</sup> *See* Parness, *supra* note 51, at 419.

state statutes. Further, two states often take the same approach to one element and a very different approach to some, or even all, of the other elements.

*a. Role of the Expert Witness*

States have taken two primary approaches regarding the expert witness's role in the certificate of merit process, with a few states taking hybrid approaches that incorporate aspects of both. On one hand, some states require that the plaintiff's attorney certify that she consulted a medical expert before filing the suit and that the expert expressed a belief that the plaintiff's case is meritorious.<sup>76</sup> For example, New York's certificate of merit statute requires that the plaintiff's attorney provide a certificate declaring that she "has consulted with at least one physician . . . who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded . . . that there is a reasonable basis for the commencement of such action."<sup>77</sup> In addition to New York, states following this approach include: Colorado, Hawaii, Minnesota, Mississippi, North Carolina, and Vermont.<sup>78</sup>

On the other hand, most states require that a medical professional personally make statements in the affidavit or certificate, rather than the plaintiff's attorney merely certifying that a consultation occurred.<sup>79</sup> For instance, in New Jersey, "the plaintiff shall . . . provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care . . . exercised or exhibited in the treatment . . . that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices."<sup>80</sup> Along with New Jersey, fifteen other states also follow this approach: Arizona, Arkansas, Delaware, Georgia, Iowa, Maryland, Michigan, Nevada, North Dakota, Ohio, South Carolina, Texas, Washington, West Virginia, and Wyoming.<sup>81</sup>

Some states take a hybrid approach in that, although the plaintiff's attorney must attest that a consultation occurred, the expert must also make a written report expressing their belief that the case is meritorious, which the attorney must attach to the affidavit. For example, Florida's statute provides that

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<sup>76</sup> See Benjamin Grossberg, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 222 (2010).

<sup>77</sup> N.Y. C.P.L.R. § 3012-a(a)(1) (McKinney 2018).

<sup>78</sup> COLO. REV. STAT. § 13-20-602 (2017); HAW. REV. STAT. ANN. § 671-12.5 (West 2017); MINN. STAT. ANN. § 145.682 (West 2017); MISS. CODE ANN. § 11-1-58 (West 2017); N.C. GEN. STAT. § 1A-1, Rule 9(j)(1)-(2) (2018); VT. STAT. ANN. tit. 12, § 1042 (West 2017).

<sup>79</sup> Grossberg, *supra* note 76, at 222.

<sup>80</sup> N.J. STAT. ANN. § 2A:53A-27 (West 2018).

<sup>81</sup> ARIZ. REV. STAT. ANN. § 12-2603 (2017); ARK. CODE ANN. § 16-114-209 (2017); DEL. CODE ANN. tit. 18, § 6853 (West 2018); GA. CODE ANN. § 9-11-9.1 (West 2017); IOWA CODE ANN. § 147.140 (West 2017); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04 (West 2017); MICH. COMP. LAWS § 600.2912d (West 2017); NEV. REV. STAT. ANN. § 41A.071 (West 2017); N.D. CENT. CODE ANN. § 28-01-46 (West 2017); OHIO CIV. R. 10(D)(2) (West 2018); S.C. CODE ANN. § 15-36-100 (2018); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (West 2017); WASH. REV. CODE ANN. § 7.70.150 (West 2018); W. VA. CODE ANN. § 55-7B-6 (West 2017); WYO. STAT. ANN. § 9-2-1519 (West 2017).

No action shall be filed for . . . medical negligence, . . . unless the attorney filing the action has made a reasonable investigation as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of counsel that such reasonable investigation gave rise to a good faith belief . . . for an action against each named defendant. For purposes of this section, good faith may be shown to exist if . . . counsel has received a written opinion . . . of an expert . . . that there appears to be evidence of medical negligence.<sup>82</sup>

Notably, this section further directs that if the court determines the attorney did not file the certificate in good faith, the court “shall” award attorney’s fees and report the attorney to the Florida Bar for a disciplinary review.<sup>83</sup> Thus, while the statute does not mandate a written expert report, it is the only method the statute mentions by which a litigant can show the required good-faith belief in the action’s merits. And failure to exhibit this good faith carries heavy penalties for the attorney. Other states following this approach include Connecticut, Illinois, and Missouri.<sup>84</sup>

Still other states take slightly different approaches than those already discussed. Oklahoma, Pennsylvania, and Tennessee require that the plaintiff’s attorney sign the affidavit, and the affidavit must certify that the attorney consulted an expert who provided a written report stating a belief that the case is meritorious.<sup>85</sup> However, these states do not require the expert’s report be attached to the affidavit.<sup>86</sup> Finally, Utah requires that both the attorney and the expert sign separate affidavits.<sup>87</sup>

*b. Required Contents of the Certificate of Merit*

Once again, states differ substantially regarding what information the certificate must contain, regardless of whether the expert or the attorney fills out the certificate. Some states are more lenient and only require that the expert express a general belief that a reasonable basis exists indicating the case is meritorious.<sup>88</sup> This approach can apply whether the expert or the plaintiff’s attorney is the one making out the certificate; however, states requiring only that the attorney certify she consulted an expert are more likely to follow this approach. For example, in Illinois, the affidavit must contain a statement by the plaintiff’s attorney that the consulted expert determined “that there is a reasonable and meritorious cause for the filing” the lawsuit

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<sup>82</sup> FLA. STAT. ANN. § 766.104 (West 2017).

<sup>83</sup> *Id.*

<sup>84</sup> CONN. GEN. STAT. ANN. § 52-190a (West 2018); 735 ILL. COMP. STAT. ANN. 5/2-622 (West 2018); Mo. Ann. Stat. § 538.225 (West 2017).

<sup>85</sup> OKLA. STAT. ANN. tit. 12, § 19.1 (West 2017) (held unconstitutional by *John v. St. Francis Hosp., Inc.*, 2017 OK 81); PA. R. CIV. PROC. NO. 1042.3(a) (2017); TENN. CODE ANN. § 29-26-122 (West 2018).

<sup>86</sup> OKLA. STAT. ANN. tit. 12, § 19.1 (West 2017); PA. R. CIV. PROC. NO. 1042.3(a) (2017); § 29-26-122.

<sup>87</sup> UTAH CODE ANN. § 78B-3-423 (West 2017).

<sup>88</sup> Parness, *supra* note 51, at 571-72.

and that, based on the expert's report and consultation, the plaintiff's attorney believes there to be "a reasonable and meritorious cause for filing" the case.<sup>89</sup>

States taking stricter approaches do so in one (or both) of two ways. First, some states require the plaintiff's expert state specific actions the defendant took that constituted malpractice.<sup>90</sup> In Georgia, for instance, a plaintiff's certificate of merit must contain an affidavit signed by an expert setting "forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim."<sup>91</sup>

Second, some states will require specific statements by the affiant that relate to the elements of the plaintiff's claim. In this respect, states take various approaches regarding what elements to which the expert must attest. Some states require that the expert state the appropriate standard of care and the way in which the defendant breached that standard (i.e., duty and breach).<sup>92</sup> Some states, however, go farther and require the expert make statements regarding duty, breach, and causation.<sup>93</sup> This is the strictest approach states take in this regard. states following these approaches include Arizona, Delaware, Maryland, Michigan, Missouri, Pennsylvania, and West Virginia.<sup>94</sup>

*c. Scrutiny of Attesting Expert's Qualifications.*

Regardless of who must make out the certificate, each state requires that the plaintiff's attorney have some degree of confidence that the expert relied upon is qualified to testify. States are all over the spectrum in this regard. At the low end, some states merely require that the plaintiff's attorney have a "reasonable" or "good faith" belief that the expert is qualified to give an opinion in the case.<sup>95</sup> At the high end of the spectrum, some states apply the same standard as an expert who testifies at trial.<sup>96</sup> Thus, if the plaintiff's expert would not qualify as an expert at trial, the expert is also incompetent to fill out the pre-trial certificate of merit. Further, as will be discussed in greater depth later, many states impose heightened expert witness qualifications in medical malpractice cases, making this approach a heavy burden at an early stage of the litigation.<sup>97</sup>

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<sup>89</sup> 735 ILL. COMP. STAT. ANN. 5/2-622(a)1 (West 2018).

<sup>90</sup> Parness, *supra* note 51, at 562.

<sup>91</sup> GA. CODE ANN. § 9-11-9.1 (West 2018).

<sup>92</sup> See, e.g., N.J. STAT. ANN. § 2A:53A-27 (West 2018); and, N.C. GEN. STAT. § 1A-1, Rule 9(j) (2018).

<sup>93</sup> Jeanne M. Scherlinck, *Medical Malpractice, Tort Reform, and The Separation of Powers Doctrine in Michigan*, 44 WAYNE L. REV. 313, 337 (Winter 1998).

<sup>94</sup> ARIZ. REV. STAT. ANN. § 12-2603 (2018); DEL. CODE ANN. tit. 18, § 6853 (West 2017); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04 (West 2017); MICH. COMP. LAWS § 600.2912d (West 2017); Mo. Ann. Stat. § 538.225 (West 2017); PA. R. CIV. PROC. No. 1042.3 (2017); W. VA. CODE ANN. § 55-7B-6 (West 2017).

<sup>95</sup> OHIO CIV. R. 10(D)(2) (West 2018).

<sup>96</sup> VT. STAT. ANN. tit. 12, § 1042 (West 2017).

<sup>97</sup> See Discussion *infra*, at III.D.

## 2. Time of Filing

As to when the plaintiff's certificate of merit must be filed, states have taken three general approaches. Most states require contemporaneous filing of the certificate with the complaint.<sup>98</sup> Some states require that plaintiffs file a certificate of merit as a prerequisite to initiating a medical-malpractice lawsuit.<sup>99</sup> Still other states require plaintiffs to file their certificate of merit after the lawsuit is initiated, but usually before any meaningful discovery has occurred.<sup>100</sup> This future filing date is usually tied to some other procedural step; for instance, within sixty days of the defendant filing its answer.<sup>101</sup>

### *a. Certificate of Merit as a Prerequisite to Filing a Claim*

One state, West Virginia, requires that plaintiffs file a certificate of merit thirty days before commencing a medical malpractice action.<sup>102</sup> Although pre-suit certificates of merit are rare, many states impose a notice of suit requirement, whereby plaintiffs must serve the defendant with a written notice stating the plaintiff's intention to bring a malpractice action, but without requiring the plaintiff to consult an expert.<sup>103</sup>

### *b. Certificate of Merit Filed Contemporaneously with the Pleadings*

The most popular approach is the contemporaneous filing requirement. Currently, eighteen states follow this approach: Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Michigan, Minnesota, Mississippi, Nevada, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Vermont, and Washington.<sup>104</sup>

However, while these states take the same approach regarding timing, they do not agree on much else, and many variations exist between them. For example, in North Carolina, a medical malpractice plaintiff's pleading must "specifically assert[] that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by. . ." either "a person who is reasonably expected to qualify as an expert witness. . ." or "a person

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<sup>98</sup> *Id.* at 552.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Nuveen Mun. Trust v. Withumsmith Brown, P.C.*, 692 F.3d 283, 290 (3d Cir. 2012) (discussing N.J. STAT. ANN. § 2A:53A-27).

<sup>102</sup> W. VA. CODE ANN. § 55-7B-6 (West 2017).

<sup>103</sup> *See, e.g.*, CAL. CIV. PROC. CODE § 364(a) (West 2018) ("No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action.").

<sup>104</sup> CONN. GEN. STAT. ANN. § 52-190a (WEST 2018); DEL. CODE ANN. tit. 18, § 6853 (WEST 2018); FLA. STAT. ANN. § 766.104 (WEST 2008); GA. CODE ANN. § 9-11-9.1 (WEST 2007); HAW. REV. STAT. ANN. § 671-12.5 (WEST 2018); 735 ILL. COMP. STAT. ANN. 5/2-622 (West 2013); MICH. COMP. LAWS § 600.2912d; MINN. STAT. ANN. § 145.682; MISS. CODE ANN. § 11-1-58; NEV. REV. STAT. ANN. § 41A.071; N.Y. C.P.L.R. § 3012-a; N.C. GEN. STAT. § 1A-1, Rule 9(j)(1)-(2); OHIO CIV. R. 10(D)(2); OKLA. STAT. ANN. tit. 12, § 19.1 (held unconstitutional by *John v. St. Francis Hosp., Inc.*, 2017 OK 81); S.C. CODE ANN. § 15-36-100; TENN. CODE ANN. § 29-26-122; VT. STAT. ANN. tit. 12, § 1042; WASH. REV. CODE ANN. § 7.70.150.



that the complainant will seek to have qualified as an expert . . . and who is willing to testify that the medical care did not comply with the applicable standard of care.”<sup>105</sup> Conversely, most states require that the certificate be in the form of an affidavit or written report, rather than specifically alleged in the pleadings. This is likely because North Carolina’s approach may conflict with the *Twombly* and *Iqbal* pleading standard when medical malpractice cases wind up in federal court.<sup>106</sup> However, that issue is outside this Article’s scope.

*c. Certificate of Merit Filed at After the Initial Pleadings*

The third approach requires filing after the complaint is filed but usually well before trial. Eleven states currently follow this approach: Arizona, Arkansas, Colorado, Maryland, Missouri, New Jersey, North Dakota, Pennsylvania, Texas, Utah, and Wyoming.<sup>107</sup>

Within this category, there are two main elements: (1) how the beginning of the filing period is determined and (2) the period’s length. Regarding the first element, most statutes tie the start of the filing period to a specific procedural device, typically the filing of the complaint or the defendant’s answer. Six states use the complaint’s filing date to initiate the plaintiff’s certificate of merit filing period. Those states are Arkansas, Colorado, Maryland, Missouri, North Dakota, and Pennsylvania.<sup>108</sup>

Three states—New Jersey, Texas, and Wyoming—start the certificate of merit filing period when the defendant files her answer.<sup>109</sup> Here again, although these three state statutes share a general characteristic, each has its own nuances, which results in significant variability between them. For example, in Texas, a plaintiff has 120 days from the time the defendant files its original answer to serve the expert report on the defendant.<sup>110</sup> But in New Jersey, a plaintiff alleging malpractice or negligence against

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<sup>105</sup> N.C. GEN. STAT. § 1A-1, Rule 9(j)(1)-(2).

<sup>106</sup> Grossberg, *supra* note 76, at 245.

<sup>107</sup> Ariz. Rev. Stat. Ann. § 12-2603; ARK. CODE ANN. § 16-114-209; COLO. REV. STAT. § 13-20-602; MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04; Mo. Ann. Stat. § 538.225; N.J. STAT. ANN. § 2A:53A-27; N.D. CENT. CODE ANN. § 28-01-46; PA. R. CIV. PROC. No. 1042.3; TEX. CIV. PRAC. & REM. CODE ANN. § 74.351; UTAH CODE ANN. § 78B-3-423; WYO. STAT. ANN. § 9-2-1519.

<sup>108</sup> ARK. CODE ANN. § 16-114-209(b)(3)(A) (2017) (“The plaintiff shall have thirty (30) days after the complaint is filed with the clerk to file the affidavit. . .”); *but see* *Summerville v. Thrower*, 253 S.W.3d 415 (Ark. 2007) (holding § 16-114-209(b)(3)(A) unconstitutional); COLO. REV. STAT. § 13-20-602(1)(a); (“the plaintiff’s or complainant’s attorney shall file with the court a certificate of review . . . within sixty days after the service of the complaint”); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04(b)(1)(i) (requiring that plaintiffs “file a certificate of a qualified expert . . . within 90 days from the date of the complaint”); MO. ANN. STAT. § 538.225 (“Such affidavit shall be filed no later than ninety days after the filing of the petition”); N.D. CENT. CODE ANN. § 28-01-46 (“plaintiff serves upon the defendant an affidavit containing an admissible expert opinion . . . within three months of the commencement of the action”); PA. R. CIV. PROC. No. 1042.3(a) (“the attorney for the plaintiff . . . shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit”).

<sup>109</sup> N.J. STAT. ANN. § 2A:53A-27; Tex. Civ. Prac. & Rem. Code Ann. § 74.351; WYO. STAT. ANN. § 9-2-1519.

<sup>110</sup> Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a).

a licensed professional (not just healthcare professionals, but most professionals licensed by the state) “shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person.”<sup>111</sup> One state, Arizona, requires that the plaintiff’s affidavit of merit be included with the initial pretrial disclosures.<sup>112</sup>

#### F. State Expert Witness Qualifications Statutes

Another increasingly common tort-reform measure are statutes imposing heightened qualifications requirements on expert witnesses. These statutes limit experts who may testify to the applicable standard of care in a medical malpractice case, usually by requiring that the expert and defendant share similar certifications and experience.<sup>113</sup> These statutes commonly apply to trial testimony, but many states also apply the heightened standard to the plaintiff’s certificate-of-merit expert.<sup>114</sup>

Medical malpractice litigation is often extremely complex; thus, as a practical matter, expert testimony is usually necessary to establish the proper standard of care and whether that standard was breached.<sup>115</sup> Consequently, medical experts are the most commonly utilized category of experts.<sup>116</sup> Many states have enacted heightened qualification standards applying exclusively to medical-malpractice experts.<sup>117</sup> These statutes are based on the policy that, given the inherent complexity of medical malpractice cases, only experts with similar training and experience to the defendant are qualified to attest to the appropriate standard of care.<sup>118</sup> This section discusses a few popular metrics states have developed to effectuate these policies.

#### 1. Heightened Expert Witness Qualifications Provisions

##### a. Specialty Matching

Many states impose what this Article refers to as “specialty matching”—requiring that expert witnesses share the same medical specialties as the defendant they intend to offer testimony against. Although some states go farther than others, the typical statute requires that, if the party against whom testimony is being offered is a specialist in a particular medical field, the witness must also specialize in the same or a similar

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<sup>111</sup> N.J. STAT. §2A:53A-27.

<sup>112</sup> Ariz. Rev. Stat. Ann. § 12-2603(B).

<sup>113</sup> Vine, *supra* note 5, at 426.

<sup>114</sup> See, e.g., MICH. COMP. LAWS § 600.2912d (2018) (requiring that the plaintiff’s certificate of merit expert meet the expert witness qualifications contained in MICH. COMP. LAWS § 600.2169 (2018)).

<sup>115</sup> Athan P. Papailiou, *Making Sense of the Linchpin to Medical Malpractice Litigation: Expert Witness Qualification*, 55 ARIZ. L. REV. 539, 540 (2013); Rickee N. Arntz, *Competency of Medical Expert Witnesses: Standards and Qualifications*, 24 CREIGHTON L. REV. 1359 (1991).

<sup>116</sup> Arntz, *supra* note 115, at 1359.

<sup>117</sup> *Id.* at 1360.

<sup>118</sup> Baker v. University Physicians Healthcare, 296 P.3d 42, 46 (Ariz. 2013).

field before the witness may testify regarding the standard of care in that field.<sup>119</sup> Further, some states also require that the witness match any subspecialties of the defendant.<sup>120</sup> Some states additionally require that expert witnesses and defendants share the same board certifications.<sup>121</sup>

The underlying policy of specialty matching is simple—in highly specialized medical fields, only other such specialists know the actual standard of care. At first blush, this policy sounds reasonable. However, due to courts strictly construing these statutes to effectuate the legislature’s intent, absurd results can occur. For example, in *Baker v. United Physicians Healthcare*, seventeen-year-old Tara Baker died after the defendant, Dr. Brenda Wittman, treated her for blood clots.<sup>122</sup> Tara’s father (Baker) sued Dr. Wittman, claiming that Tara’s death resulted from medical malpractice.<sup>123</sup> Dr. Wittman specialized in pediatrics with a subspecialty in pediatric hematology-oncology.<sup>124</sup> Baker retained Dr. Robert Brouillard as an expert witness.<sup>125</sup> Dr. Brouillard specialized in internal medicine and had subspecialties in both hematology and oncology.<sup>126</sup> The defense moved for summary judgement, claiming that Dr. Brouillard did not qualify as an expert under Arizona’s expert witness qualifications statute.<sup>127</sup> Concluding that *pediatric* hematology was the relevant specialty, the court held that Dr. Brouillard was not qualified to testify as an expert in the case and granted the defendant’s motion.<sup>128</sup>

After the appellate court affirmed, the Arizona Supreme Court granted review to address section 12-2604’s application.<sup>129</sup> The court first determined that the statute requires an expert witness to specialize in the same specialty as the defendant “only when the care or treatment at issue was within that specialty.”<sup>130</sup> The court defined “specialty” as “a limited area of medicine in which a physician is or may become board certified.”<sup>131</sup> The court then determined the scope of “specialty” to include all recognized specialties and subspecialties.<sup>132</sup> The court reasoned that excluding subspecialties from the definition of “specialty” (which the court of appeals did in this

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> ARIZ. REV. STAT. ANN. § 12-2604(A)(2); MICH. COMP. LAWS § 600.2169(1).

<sup>122</sup> *Baker*, 296 P.3d at 45.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* In Arizona, the standard of care in a medical malpractice case must be proved through the testimony of an expert who meets the requirements of § 12-2604. Thus, a plaintiff cannot establish an essential element of the claim if her expert is underqualified.

<sup>128</sup> *Baker*, 296 P.3d at 46.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 47.

<sup>131</sup> *Id.* at 48.

<sup>132</sup> *Id.* at 49.

case) too broadly construed section 12-2604 because it would allow, for example, a pediatrician unfamiliar with hematology to testify regarding a pediatric hematologist's care of "a seventeen-year-old patient suffering from a serious blood disorder."<sup>133</sup>

Despite emphasizing Tara's age as it related to a general pediatrician's hypothetical testimony, the court dismissed its relevance in the actual case before it. Applying its newly developed test for section 12-2604, the court determined that because evidence showed that both a pediatric and non-pediatric hematologist could have treated a seventeen-year-old's blood disorder, "Dr. Wittman was practicing within her specialty of pediatric hematology-oncology."<sup>134</sup> Thus, only an expert in that specialty could testify to the appropriate standard of care, even though other specialists could have provided competent treatment.<sup>135</sup>

Specialty matching can sometimes lead to a plaintiff's expert being disqualified as a witness because the expert is over qualified in relation to the defendant. In *Decker v. Flood*, the plaintiff sought treatment for a toothache from the defendant, who was a dentist.<sup>136</sup> Dr. Flood determined that Decker needed a root canal and immediately performed the procedure.<sup>137</sup> After returning home, Decker contacted Dr. Flood after experiencing severe pain.<sup>138</sup> Decker returned to Dr. Flood's office, at which point Dr. Flood administered so much Novocain that Decker stopped breathing and had to be rushed to a hospital.<sup>139</sup> After Decker recovered, he consulted Dr. Michael Gallagher, an endodontist, who completed the procedure Dr. Flood had botched.<sup>140</sup> Decker brought a malpractice suit and, pursuant to Michigan law, attached an affidavit of merit from Dr. Gallagher to the complaint.<sup>141</sup> Dr. Flood moved to dismiss, arguing that because he was only a general practitioner, and Dr. Gallagher specialized in root canals, Dr. Gallagher was not qualified to attest to the appropriate standard of care under Michigan's expert witness qualifications statute.<sup>142</sup> In response, the "plaintiffs argued that the statute 'did not make sense,' because it precluded Dr. Gallagher, whose practice was limited to root canals, from giving expert testimony concerning the standard of practice for root canals."<sup>143</sup> The trial court granted Dr. Flood's motion, noting that Michigan's statute clearly precludes experts from testifying against general practitioners regarding the standard of care for general practitioners.<sup>144</sup>

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<sup>133</sup> *Id.*

<sup>134</sup> *Baker*, 296 P.3d at 50.

<sup>135</sup> *Id.*

<sup>136</sup> *Decker v. Flood*, 638 N.W.2d 163, 164 (Mich. 2001).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Flood*, 638 N.W.2d at 164-65.

<sup>143</sup> *Id.* at 165.

<sup>144</sup> *Id.*

The Michigan expert qualifications statute directs that an expert cannot attest to the appropriate standard of care if the opposing party is a general practitioner unless the expert devoted most of her professional time during the year preceding the incident giving rise to the claim at issue to “active clinical practice as a general practitioner.”<sup>145</sup> On appeal, Decker argued that the trial court’s interpretation created an absurd result whereby an expert eminently qualified to testify concerning the standard of care for performing root canals is unqualified to testify about root canals.<sup>146</sup> The Court of Appeals disagreed and affirmed, stating that “[they] found no absurdity or unreasonableness in the requirement that the qualifications of a purported expert match the qualifications of the defendant against whom that expert intends to testify.”<sup>147</sup>

*b. Recency of Expert’s Experience*

In addition to specialty matching, many statutes require that the expert to have been practicing in that specialty at the time of the events giving rise to the current litigation and been practicing in that specialty for a prescribed number of years beforehand. The requisite number of years preceding the plaintiff’s injury that the witness must have been practicing varies from one to six years depending on the state.<sup>148</sup> These statutes typically apply conjunctively with the specialty matching requirements, further narrowing the number of qualified experts available. Some states further require, not only that the witness have been practicing for the specified number of years, but also that they have devoted a majority of their professional time to the defendant’s specialty during that period.<sup>149</sup>

*c. Expert Licensed in Same Region as Defendant—The Locality Rule*

Although most states no longer restrict where an expert is licensed, a few states require that the expert witness be licensed in the same geographic region as the defendant. States that do impose geographical licensure limitations on expert witnesses take one of two main approaches. First, some states require the expert be licensed in the same state as the defendant or a contiguous state. Second, other states require the expert practice within a certain distance to the defendant, measured in terms of square miles from the defendant’s practice or the location the allegedly negligent care occurred.

Tennessee follows the former approach. Tennessee’s statute, which applies to trial testimony and certificates of merit, provides that “[n]o person in a health care profession . . . shall be competent to testify . . . to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or

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<sup>145</sup> *Id.* at 166; MICH. COMP. LAWS § 600.2169(1) (2018).

<sup>146</sup> *Flood*, 638 N.W.2d at 167.

<sup>147</sup> *Id.* at 168.

<sup>148</sup> *See* MICH. COMP. LAWS § 600.2169 (requiring expert to have been practicing in the defendant’s specialty for one year preceding the incident at issue in the litigation) *see also* 735 ILL. COMP. STAT. ANN. 5/2-622 (“affiant has consulted and reviewed the facts of the case with a health professional who the affiant reasonably believes: . . . (ii) practices or has practiced within the last 6 years or teaches or has taught within the last 6 years in the same area of health care or medicine that is at issue in the particular action)

<sup>149</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2604(A)(2).

a contiguous bordering state. . . .<sup>150</sup> These geographic restrictions have received increased criticism as technological advances create less disparity in the standard of care between regions.<sup>151</sup>

### III. THE PROTECTING ACCESS TO CARE ACT OF 2017

On June 28, 2017, the U.S. House of Representatives passed PACA, a comprehensive tort-reform bill incorporating several controversial provisions.<sup>152</sup> Most Democrats, as well as a few Republicans, staunchly opposed PACA. Many public interest groups also expressed concerns about PACA, including the Center for Justice and Democracy, Consumer Federation of America, Consumer Union, National Association of Consumer Advocates, National Women’s Health Network, and Public Citizen.<sup>153</sup> In addition, the American Bar Association also opposed PACA, stating that for “200 years, the authority to determine medical liability law has rested in the states” and that this “is a hallmark of the American justice system.”<sup>154</sup> On the day it was passed, several amendments were introduced and incorporated into the bill—including an affidavit of merit requirement and heightened expert witness qualifications.<sup>155</sup>

#### A. PACA’s Affidavit of Merit Section

Section 14 of PACA details the affidavit of merit requirements. Under this section, the plaintiff must file, contemporaneously with the complaint, an affidavit signed by an expert meeting section 13’s expert witness requirements.<sup>156</sup> The affidavit must certify that the expert reviewed the plaintiff’s relevant medical records and contain a statement of the following elements: (1) the applicable standard of care; (2) the expert’s opinion that the defendant breached that standard; (3) and how the defendant’s breach proximately caused the plaintiff’s injury.<sup>157</sup> Further, the expert must state the actions or omissions the defendant should have observed to comply with the standard of care and list the medical records the expert reviewed.<sup>158</sup>

Several essential elements can be gleaned from this section that are relevant to the subsequent preemption analysis. PACA’s affidavit of merit section has eight core elements. Those core elements are:

1. The expert (rather than the plaintiff’s attorney) must sign the affidavit;
2. The expert must meet the heightened qualification requirements in section 13;

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<sup>150</sup> TENN. CODE ANN. § 29-26-115(b) (West 2017).

<sup>151</sup> Megan Cloud, *Robots are Coming: A Discussion of Choice-of-Law Issues and Outcomes in Telesurgical Malpractice*, 6 Tex. A&M L. R. \_\_ (forthcoming April 2019).

<sup>152</sup> H.R. 1215, 115th Cong. §1(a) (2017).

<sup>153</sup> H.R. REP. NO. 115–55, pt. 1, at 35 (2017).

<sup>154</sup> H.R. REP. NO. 115–55, pt. 1, at 35 (quoting Letter from Thomas M. Susman, Director of the Governmental Affairs Office, American Bar Association, to Chairman Bob Goodlatte (R-VA) and Ranking Member John Conyers, Jr. (D-MI), H. Comm. on the Judiciary (Feb. 27, 2017)).

<sup>155</sup> 163 CONG. REC. H5279 (June 28, 2017); H.R. 1215, §13–14.

<sup>156</sup> H.R. 1215, §13(a).

<sup>157</sup> *Id.* §13(a)(1)–(4).

<sup>158</sup> *Id.* §13(a)(3)–(5).

3. A statement certifying that the expert reviewed all relevant medical records;
4. The expert must state the applicable standard of care;
5. The expert must state an opinion that the defendant breached the standard of care;
6. The expert must state what actions the defendant should have taken or omitted to comply with that standard;
7. The expert must state how the breach of the standard proximately caused the plaintiff's injury; and
8. The expert must list all medical records reviewed.

#### *B. PACA's Expert Witness Qualifications Section*

Section 13 contains the requirements to qualify as an expert witness. Under this section, a plaintiff's expert must be licensed to practice medicine in any state.<sup>159</sup> If the defendant is or claims to be a specialist, the plaintiff's expert must specialize in the defendant's specialty; and if the defendant is or claims to be board-certified, the expert must also be board certified in the defendant's specialty.<sup>160</sup> Further, the expert must have either actively practiced the defendant's specialty or taught that specialty at an accredited medical school or residency program for a one-year period immediately preceding the alleged malpractice.<sup>161</sup> If the defendant is a general practitioner, however, the expert must have spent the preceding year actively practicing as a general practitioner or teaching the same.<sup>162</sup>

Thus, this section adopts most controversial elements that have developed in the states. The four core elements of this section are:

1. The expert must be licensed to practice medicine.
2. Specialty and board certification matching;
3. The expert was actively practicing or teaching the defendant's specialty for at least one year prior to the alleged malpractice; and
4. Limits experts in a case against a general practitioner to other general practitioners.

#### *C. PACA's "State Flexibility" Provisions*

Both the affidavit of merit and expert witness qualifications sections contain an express preemption provision titled "State Flexibility." Both of these provisions direct that nothing in the respective sections intends to preempt state laws imposing "additional" requirements on plaintiffs.<sup>163</sup> This title is ironic because, as Congressman Steven Cohen points out, the "so-called state flexibility provisions . . . attempt to brush off federalism concerns that these provisions are mostly one-way preemptive. They only preserve state laws that mirror the amendments' requirements and state laws which include requirements in addition to those imposed by the amendment."<sup>164</sup> However, Representative Cohen's statement might be overly generous as the express

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<sup>159</sup> *Id.* §13(a).

<sup>160</sup> *Id.* §13(a)(1).

<sup>161</sup> *Id.* §13(a)(2)(A)–(B).

<sup>162</sup> H.R. 1215, §13(a)(3)(A)–(B).

<sup>163</sup> *Id.* §§ 13(c), 14(c).

<sup>164</sup> 163 CONG. REC. H5281 (daily ed. June 28, 2017) (statement of Rep. Cohen).

language does not specifically preclude identical state statutes from preemption. Rather, as is developed below, even virtually identical state statutes will likely be preempted. As one Congresswoman put it, PACA “would preempt state law in all 50 states with a rigid, uniform set of rules designed to make it more difficult for malpractice victims to obtain relief in the courts.”<sup>165</sup>

*D. Both Sections are Based on Existing State Statutes*

Although the legislative history is silent on the matter, PACA borrows both its affidavit of merit and expert witness qualifications sections from existing state statutes—the affidavit of merit from Michigan<sup>166</sup> and the expert witness qualifications from Arizona.<sup>167</sup> The sections are far too similar for it to be coincidental. As to the affidavit of merit sections, PACA adopts 95%<sup>168</sup> of Michigan’s statutory language, with several of the discrepancies merely phrasing related.<sup>169</sup> Most notably, PACA adopts every substantive provision in the Michigan statute except one. The only part of Michigan’s statute that PACA omits is the provision requiring the plaintiff’s attorney reasonably believe that the expert meets the requirements contained in the separate qualifications statute.<sup>170</sup> PACA omit this language that would give the plaintiff’s attorney an opportunity to show that she reasonably believed the expert met those requirements, when the expert in fact did not. Further, PACA contains an additional requirement absent from Michigan’s statute. PACA’s fifth enumerated provision, requiring a statement of all the medical records the expert reviewed, is wholly the amendment drafter’s creation.<sup>171</sup>

Regarding the expert witness sections, PACA also borrows 95%<sup>172</sup> of Arizona’s statutory language.<sup>173</sup> And in this case, the discrepancies are completely de minimis. However, while section 13 does not omit any of Arizona’s provisions, unlike section 14, it does not add anything absent from the state statute.

When a legislature adopts a statute from another jurisdiction, it is presumed to have also adopted the judicial interpretations of that statute by the jurisdiction’s highest court.<sup>174</sup> Federal courts, then, may look to decisions by the Arizona and Michigan Supreme Courts for guidance on interpreting PACA’s adopted statutory language. Thus, PACA’s expert witness qualifications section likely implicitly adopts the decision in *Baker*, where the court held that, although the expert could have

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<sup>165</sup> 163 CONG. REC. H5267 (daily ed. June 28, 2017) (statement of Rep. Jackson Lee).

<sup>166</sup> MICH. COMP. LAWS § 600.2912d.

<sup>167</sup> ARIZ. REV. STAT. ANN. § 12-2604.

<sup>168</sup> PACA adopts 172 out of 182 words contained in § 600.2912d(1).

<sup>169</sup> For example, PACA uses the term “a health care lawsuit” in place of “an action” and “negligence” instead of “medical malpractice.” Compare, MICH. COMP. LAWS SERV. § 600.2912d(1), and H.R. 1215, §14(a).

<sup>170</sup> Compare, MICH. COMP. LAWS § 600.2912d(1), with, H.R. 1215, § 14(a).

<sup>171</sup> Compare, MICH. COMP. LAWS § 600.2912d(1)(a)–(d), and, H.R. 1215, § 14(a)(5).

<sup>172</sup> PACA adopts 301 out of 318 words in § 12-2604.

<sup>173</sup> Compare, H.R. 1215, § 13(a), and ARIZ. REV. STAT. ANN. § 12-2604(1).

<sup>174</sup> *Zebre v. State*, 583 P.2d 845, 846 (Alaska 1978).



competently treated the patient, he could not testify because the defendant was acting within her unique specialty when she caused the patient's death.<sup>175</sup>

Although this rule is based on stare decisis principles, whereby things that have already been determined do not need to be constantly redetermined, it is not conclusive—it is likely “that if a precedent underlying an adopted statute were no longer vital or were poorly reasoned,” courts will not follow it.<sup>176</sup> So, while those state supreme court decisions may be helpful, it is important to remember that federal courts will not be bound by them.<sup>177</sup> However, these statutes are unambiguous, so even if potentially absurd results occur, courts are likely to enforce them regardless because the legislature is free to mandate absurd results.<sup>178</sup>

#### IV. PACA WOULD PREEMPT ALL STATE CERTIFICATE OF MERIT AND EXPERT WITNESS QUALIFICATIONS STATUTES

Due to the stringent requirements PACA places on medical-malpractice plaintiffs and its vague preemption language, PACA would preempt most, if not all, state certificate of merit and expert witness qualifications statutes. There are many possible effects of this; for certificates of merit, Congress would foreclose states from experimenting to determine the best approach for this relatively new tort-reform measure. Further, regarding expert witness qualifications statutes, Congress would create a rigid standard, robbing trial court judges of their typical gatekeeper role in determining expert qualifications, which would ultimately result in otherwise qualified experts being disqualified based on arbitrary specialty matching. Moreover, PACA's enactment, which would cause these perverse results, directly conflicts with federalism principles and violates state sovereignty.

##### A. *Federal Supremacy and Preemption of State Law*

Federalism is a central component of the United States system of government; it “adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.”<sup>179</sup> The existence of multiple sovereigns creates the possibility that the laws of one will conflict with the other.<sup>180</sup> Foreseeing the inevitable state and federal clash, the Framers provided a solution—the Supremacy Clause.<sup>181</sup> The Supremacy Clause bestows upon Congress the power to preempt state

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<sup>175</sup> *Baker*, 296 P.3d at 50; see Discussion *supra* at Section III.D.1..

<sup>176</sup> *Zebre*, 583 P.2d at 847.

<sup>177</sup> *Id.*

<sup>178</sup> *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., conc.) (“the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity. . . . Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.”)

<sup>179</sup> *Arizona v. United States*, 567 U.S. 387, 398 (2012).

<sup>180</sup> *Id.* at 398-99.

<sup>181</sup> U.S. CONST. art. VI, cl. 2.

laws.<sup>182</sup> However, when state and federal law are at odds, courts—not Congress—decide whether Congress intended to preempt the state law.<sup>183</sup> In making this determination, Congressional purpose “is the ultimate touchstone,”<sup>184</sup> so courts start with the language of the federal statute.<sup>185</sup>

There are two general preemption categories—express preemption and implied preemption. Express preemption is the most straightforward; it exists when Congress explicitly states an intention to limit the application of state law.<sup>186</sup> However, Congress is not required to make this intention explicit; if a court finds that the state and federal laws cannot coexist, the court may deem that the federal law preempts the state law.<sup>187</sup> This scenario leads to the two implied preemption categories—conflict preemption and field preemption.

Conflict preemption arises “when state and federal regulations conflict.”<sup>188</sup> There are two situations in which conflict may occur: (1) when complying with both the federal and state law is impossible and (2) where the state law represents an obstacle to accomplishing the federal statute’s congressional purpose.<sup>189</sup> Alternatively, field preemption exists when Congress determines that regulation of a particular field of activity is within its “exclusive governance” but failed to include any express language manifesting that intention.<sup>190</sup> In such instances, courts have held that “the intent to displace state law altogether can be inferred from a framework of regulation ‘so pervasive . . . that Congress left no room for the states to supplement it’ or where there is a ‘federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.’”<sup>191</sup>

PACA’s “State Flexibility” sections are express preemption clauses, so express preemption is implicated in this discussion. However, even when Congress explicitly states its intention to preempt some state law, situations can arise that necessitate courts relying on implied preemption principles to discern congressional intent.<sup>192</sup> There is a dispute as to whether this is appropriate, but for the purposes of this Article, it is enough to know that this principle exists.<sup>193</sup>

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<sup>182</sup> *Arizona*, 567 U.S. at 399.

<sup>183</sup> Nathan A. Brown & Eli Tomar, *Could State Regulations be the Next Frontier for Preemption Jurisprudence?* 71 *Food & Drug L. J.* 271, 279 (2016).

<sup>184</sup> *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

<sup>185</sup> Brown, *supra* note 183, at 278.

<sup>186</sup> *Id.* at 279.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Arizona*, 567 U.S. at 399.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

<sup>192</sup> See Joseph P. Bauer, *Addressing the Incoherency the Preemption Provision of the Copyright Act of 1976*, 10 *VAND. J. ENT. & TECH. L.* 1, 9 (2007).

<sup>193</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

*B. PACA's Preemption Scope*

The Supreme Court interprets expressly preemptive statutory language methodically. When a statute contains preemptive language, courts need not go beyond the statute's text to determine that Congress intended to preempt state law, to at least some extent; however, courts must still identify the statute's preemption scope.<sup>194</sup> The preemption scope analysis begins with the text, but the court's interpretation "does not occur in a contextual vacuum."<sup>195</sup> Rather, when discerning a statute's preemption scope, the interpretation relies on two preemption presumptions.<sup>196</sup>

The first such presumption finds its roots in federalism. Because states enjoy independent sovereignty in the federal system, courts presume Congress has not "cavalierly pre-empt[ed] state-law causes of action."<sup>197</sup> Further, courts initially assume that federal law does not preempt state police powers unless that was Congress' "clear and manifest purpose."<sup>198</sup> So, while congressional intent remains the focal point of preemption analysis, this presumption "puts a thumb on the interpretive scale" for federal laws in areas traditionally occupied by the states.<sup>199</sup>

The second presumption guides the analysis of a statute's preemption scope.<sup>200</sup> This presumption directs that, in all preemption cases, "the purpose of Congress is the ultimate touchstone."<sup>201</sup> This intent is primarily discerned from the statute's language and surrounding statutory framework.<sup>202</sup> However, the statute's structure and purpose as a whole is also relevant; this is discerned not only from the text, but also from the court's "reasoned understanding of the way in which Congress intended the statute . . . to affect business, consumers, and the law."<sup>203</sup> Both presumptions apply with full force here.

PACA's affidavit of merit and expert witness qualifications sections share similar preemption language. The affidavit of merit section's preemption clause provides that "[n]o provision of this section shall be construed to preempt any State law . . . that establishes *additional* requirements for the filing of an affidavit of merit or similar pre-litigation documentation."<sup>204</sup> Similarly, the expert witness qualifications section provides that nothing in that section "shall be construed to preempt and State law . . . that places *additional* qualification requirements upon any individual testifying as an

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<sup>194</sup> *Id.* (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992)).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Elizabeth A. McCuskey, *Body of Preemption: Health Law Traditions and the Presumption Against Preemption*, 89 TEMP. L. REV. 95, 108 (Fall 2016).

<sup>200</sup> *Lohr*, 518 U.S. 470, 485

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 486.

<sup>203</sup> *Id.*

<sup>204</sup> H.R. 1215, § 14(c) (emphasis added).

expert witness.”<sup>205</sup> It is immediately apparent that these sections intend to set a minimum standard—a legislative floor. The preemption scope, then, is anything below the standard contained in PACA’s substantive subsections.

Accordingly, the issue becomes determining how a state can overcome this standard to avoid preemption. The answer to this question turns on whether Congress contemplated a qualitative or quantitative standard. If Congress intended the standard be qualitative, it will be determined more akin to a totality of the circumstances standard, based on factors as opposed to elements. Conversely, a quantitative standard indicates a conjunctive elements test should apply. This test is analogous to a checklist; if enough elements can be checked off, the standard is met.

In both sections, the word “additional” dictates the preemption scope. “Additional” is vague and, taken out of context, can be ambiguous. In these sections, “additional” acts as an adjective modifying “requirements” and “qualifications requirements.” Although “additional” could indicate a qualitative<sup>206</sup> standard, its dictionary and ordinary meanings are more naturally inclined to a quantitative standard.<sup>207</sup> Further, at least one federal circuit court has interpreted the ordinary meaning of “additional” as “supplemental.”<sup>208</sup> A typical preemption analysis would require courts to compare PACA and the state statute at issue, and at the outset, determine if the state statute contains all of PACA’s core elements.<sup>209</sup> If the state statute is missing one or more of those core elements, PACA would preempt it, regardless of whether the state statute imposes different requirements. For example, Texas’ expert witness qualifications statute requires that the expert be a licensed physician, which is the same basic requirement as PACA’s first core element.<sup>210</sup> However, the Texas statute does not require specialty matching—PACA’s second core element.<sup>211</sup> Thus, the Texas statute could not meet the threshold inquiry and would, therefore, be preempted.

The Texas statute provides a decent example, but it is by no means a close call; PACA would easily preempt it. Michigan’s certificate of merit statute provides a better example, especially since PACA’s affidavit of merit section is based off of it. As

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<sup>205</sup> H.R. 1215, § 13(c) (2017) (emphasis added).

<sup>206</sup> For example, “additional qualifications” could mean a more impressive CV overall (qualitative), and “additional certifications” could indicate an increased number of set prerequisites for a position (quantitative).

<sup>207</sup> Dictionary definitions of “additional” include “more than is usual or expected”<sup>207</sup> (*Additional*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/additional> (last visited Feb. 27, 2018)), and “added, extra, or supplementary to what is already present or available.”<sup>207</sup> *Additional*, Oxforddictionaries.com, <https://en.oxforddictionaries.com/definition/additional> (last visited Feb. 27, 2018). Further, courts have construed the ordinary meaning of “additional” as “supplemental.” *Walker Cty. School Dist. v. Bennett*, 203 F.3d 1293, 1298 (11th Cir. 2000) (quoting *Town of Burlington v. Dep’t of Education*, 736 F.2d 773, 790-91 (1st Cir. 1984), *aff’d.*, 471 U.S. 359 (1985)).

<sup>208</sup> *Town of Burlington v. Dep’t of Educ. For Commonwealth of Mass.*, 736 F.2d 773, 790 (1st Cir. 1984).

<sup>209</sup> See Discussion *supra* at Section III.A.–B.

<sup>210</sup> Compare, *Tex. Civ. Prac. & Rem. Code Ann. § 74.401(a)* (West 2017), and discussion *supra* at Section III.B.

<sup>211</sup> *Tex. Civ. Prac. & Rem. Code Ann. § 74.401*.

previously discussed, PACA adopts 95% of the Michigan statute's language.<sup>212</sup> Consequently, given the statutory language similarity between the two, Michigan's statute undoubtedly meets the first seven core elements. However, the eighth core element is unique to PACA. So despite 95% of Michigan's statutory language being present in PACA, Michigan's statute cannot meet the threshold analysis necessary to avoid preemption. But this leaves open the question of what a state must do to satisfy the additional requirements language. More specifically, is representative Cohen's conclusion that state statutes mirroring PACA's provisions would survive preemption correct?

Luckily, PACA's expert witness qualifications section, and the Arizona statute the drafters borrowed, provide an example. Unlike its affidavit of merit section, PACA's expert witness qualifications section does not add an additional core element to the Arizona statute, and these sections match just as closely—95%. More importantly, both statutes contain the same four core elements.<sup>213</sup> So the threshold question here is met. But PACA's preemption provisions require that the state statutes have additional requirements.<sup>214</sup> For a state statute like Arizona's to survive preemption, "additional" would have to take on a meaning akin to "greater than or equal to." Considering the dictionary and ordinary meanings of "additional," attempting to force such a definition places a meaning on the word that it simply cannot bear.<sup>215</sup> As a result, just like it did the Michigan certificate of merit statute, PACA—the Arizona expert witness qualifications statute's progeny—would ultimately prevail.

As a threshold to avoiding preemption, state statutes must incorporate all of PACA's core requirements. However, because of the presumptions against preemption of state law, particularly in areas of traditional state regulatory primacy, states can probably satisfy PACA's individual core elements with similar provisions. Medical malpractice is a common law claim in an area of traditional state police power—the health and safety of a state's citizens. As such, the "thumb on the interpretive scale" for areas of state police power will likely lead courts to err on the side of allowing state provisions, which are in the same general category as a PACA provision to counterbalance during a preemption analysis.<sup>216</sup> Further, as previously established, state certificates of merit and expert witness qualifications vary greatly. Since PACA's preemption provision leaves room for state laws, courts are unlikely to require that state provisions be identical to PACA's. Thus, if a state's statute incorporates a provision analogous to PACAs, that provision should weigh in favor of the state statute surviving preemption.<sup>217</sup>

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<sup>212</sup> See discussion *supra* at IV.D.

<sup>213</sup> See discussion *supra* at IV.D.

<sup>214</sup> H.R. 1215, §§ 13(c), 14(c).

<sup>215</sup> See *Walters v. Metro. Ed. Enterp., Inc.*, 519 U.S. 202, 207 (1997) (Scalia, J.) (In the absence of an indication to the contrary, words in a statute are assumed to bear their "ordinary, contemporary, common meaning.").

<sup>216</sup> McCuskey, *supra* note 199, at 108.

<sup>217</sup> See discussion *supra* Section IV.B. (discussing the Texas expert witness qualifications section, which met the first PACA core element, but had a different standard than PACA.)

### C. *Extent to Which State Statutes Will Be Preempted*

With PACA preempting the state statutes it is based on, another question emerges—do any state statutes survive? The Arizona and Michigan statutes are again helpful, both contain substantially stringent provisions, of which few, if any states can match. Thus, PACA very likely preempts every state certificate of merit and expert witness qualifications statute currently in effect.

#### 1. PACA Will Preempt All State Certificates of Merit

Michigan's statute is arguably the strictest state statute enacted to date. Returning to the certificate of merit elements identified earlier, Michigan's statute adopts the stricter approach as to every element.<sup>218</sup> First, Michigan's statute adopts the stricter approach regarding the expert witness's role in making the certificate of merit.<sup>219</sup> It requires that the plaintiff's expert, rather than her attorney, sign the affidavit.<sup>220</sup> Next, Michigan's statute requires that the attorney reasonably believe the expert meets the necessary qualifications in Michigan's heightened expert witness qualifications statute.<sup>221</sup> Also, Michigan takes one of the, if not the, strictest approaches of any state regarding what the expert must attest to in the affidavit.<sup>222</sup> Michigan requires that the expert attest to (1) the appropriate standard of care, (2) their opinion that that duty was breached, (3) what actions the defendant should have taken or omitted to comply with the duty, and (4) how the defendant's breach proximately caused the plaintiff's harm.<sup>223</sup> While some states also require similar statements, thorough research has not revealed any states that go farther. Therefore, since no state goes beyond the requirements Michigan imposes, and PACA would preempt Michigan's certificate of merit statute, PACA would also preempt every other state statute, creating a uniform federal standard in every jurisdiction. Further, if a state desires to enact a statute that would survive PACA in the future, that state would need to formulate a new certificate of merit requirement, because PACA incorporates every major provision states currently use.

#### 2. PACA Will Preempt Most Expert Witness Qualifications Statutes

Like Michigan's certificate of merit statute, Arizona's expert witness qualifications section also represents one of the strictest state statutes in effect.<sup>224</sup> Arizona's statute requires that the defendant and expert share, not only the same specialty, but any relevant subspecialties, as well as any board certifications.<sup>225</sup> In this respect, Arizona adopts one of the strictest approaches of any state. However, contrary to Michigan's certificate of merit statute, Arizona takes a laxer approach to some of

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<sup>218</sup> MICH. COMP. LAWS § 600.2912d; *See* discussion *supra* Section III.C.

<sup>219</sup> *See* discussion *supra*, Section III.C.

<sup>220</sup> MICH. COMP. LAWS § 600.2912d(1).

<sup>221</sup> *Id.*

<sup>222</sup> *See* discussion *supra*, Section II.D.1.c.

<sup>223</sup> MICH. COMP. LAWS § 600.2912d(1)(a)–(b)

<sup>224</sup> Mary Markle, *How Affidavit of Merit Requirements are Ruining Arizona's Medical Liability System*, 46 ARIZ. ST. L. J. 407, 421 (Spring 2014).

<sup>225</sup> *Id.*

the other elements. For instance, Arizona requires experts to have been practicing for a one-year period prior to the alleged malpractice by the defendant.<sup>226</sup> Other states, in contrast, require up to six years prior experience leading up to the plaintiff's injury.<sup>227</sup> More importantly, however, Arizona fails to include one of the major state approaches—regional restrictions on experts. Accordingly, PACA also fails to include such a provision. So, it is possible that a state could enact a statute similar to PACA and Arizona's statute and include a regional restriction on expert witnesses. As of yet, however, the states that do impose regional restrictions do not appear to meet PACA's preemption threshold inquiry of first sharing all of the core elements.<sup>228</sup>

### 3. PACA's Negative Effects

In addition to federalism concerns, PACA's vague preemption provisions raise several negative practical implications.<sup>229</sup> First, mandating a uniform tort-reform standard is not sound policy. Commentators have studied and dissected state tort reform measures for decades. But, in spite of this, commentators disagree, first and foremost, that the litigation crises are even real.<sup>230</sup> Among those that believe in the crises, there is no agreement that tort-reform is effective in remedying the problem.<sup>231</sup> And of those commentators that (a) believe the problem exists and (b) agree tort reform may fix it, there is still no consensus on what measures are optimal.<sup>232</sup> There

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<sup>226</sup> ARIZ. REV. STAT. ANN. § 12-2604(A)(2).

<sup>227</sup> 735 ILL. COMP. STAT. ANN. 5/2-622.

<sup>228</sup> See, e.g., TENN. CODE ANN. § 29-26-115(b) (requiring the expert be licensed in either Tennessee or a contiguous state and have been practicing for a one-year period. However, Tennessee does not require strict specialty matching, it only requires that the expert be in a specialty that would make her testimony relevant to the issues in the case).

<sup>229</sup> See Madden, *supra* note 3, at 64 & n.95.

<sup>230</sup> See Beth Rogers, *Legal Reform—At the Expense of Federalism?*, 21 U. Dayton L. R. 513, 523 (1996) (“Federal [tort] reform is unnecessary because there is no ‘litigation explosion’ and because states already have begun to reform these areas of the law.”); Johnston, *supra* note 8, at 184-85 (“A substantial and accumulating body of evidence lends support to the existence of a litigation explosion. While the evidence does not conclusively establish its existence, or define its parameters and implications, the litigation explosion has become a topic at the forefront of current political, legal, and social debate. It has already ‘engaged the attention of all three branches of the federal government as well as many state legislatures.’” Further, “an avalanche of literature, both professional and popular, has addressed the problem and advanced numerous overlapping solutions.” Accumulating evidence and commentary supports the notion that a litigation explosion is occurring within the United States judicial system even if questions as to the cause and desirability of the explosion remain unexplained.”); Penrose, *supra* note 48, at 978-79 (“Today, doctors and lawyers are battling inside and outside of the courtroom to resolve a perceived medical malpractice crisis. There is strong and unyielding rhetoric on both sides. . . . Yet the empirical research guiding those reforms has not produced consistent results.”)

<sup>231</sup> Parness, *supra* note 51, at 545 (“Opponents also deemed legislation unnecessary because there was no evidence presented showing how the civil justice system negatively affected job creation, job retention, or insurance costs. . .”).

<sup>232</sup> See Williams, *supra* note 38, at 514–21 (proposing a comprehensive tort reform package that cherry picks certain reform measures); Nathanson, *supra* note 5, at 1079 (“despite the best intentions of the various and numerous legislatures that passed them, screening and arbitration

is likewise no conclusive evidence that the measures PACA adopts are preferable to the other approaches some states take. As such, allowing states to establish unique standards provides data that can then be evaluated to determine what approaches are superior. However, setting a uniform standard eliminates these useful comparators. Thus, until a clearly preferable approach is identified, Congress should not adopt a uniform standard for uniformity's sake.

Furthermore, by not explicitly stating its intent to preempt all state laws, PACA necessitates a state-by-state preemption analysis. Because no federal cause of action for medical malpractice exists, this analysis will occur primarily in state courts, which are less qualified than federal courts to determine preemption.<sup>233</sup> Thus, if PACA is enacted, state courts in the twenty-seven states with certificate of merit statutes in effect will have to decide whether PACA preempts that state's statute. Given PACA's preemption language ambiguity and the drafter's veiled intent, these state trial and appellate courts will likely reach different interpretations, and it is almost certain that courts of different states that must interpret PACA's provisions in relation to vastly different state statutes will come to different conclusions. PACA's vagueness will create disparate applications across state and local jurisdictions.

#### V. CONCLUSION

“To do nothing is sometimes a good remedy”

—Hippocrates

Extreme diseases often require extreme remedies (cancer is treated with chemotherapy and radiation; doctors will cut off a hand to save an arm). But these extreme remedies are only appropriate after the ailment has been diagnosed. As it stands, the most appropriate remedy for this extreme disease is simple—Congress should do nothing. Before administering a remedy, the disease must be diagnosed. Despite decades of examination, the maladies infecting the healthcare system remain a mystery. Right now, each state represents a laboratory for innovation and experimentation, fifty experimental trials seeking an effective remedy to an extreme disease. Unless and until one of these remedies proves effective, Congress should do nothing. Luckily, in today's political climate, doing nothing is what Congress does best, so the healthcare system might get exactly the medicine it needs.

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panels actually increase litigation costs and considerably reduce insurer profitability. In addition, although capping of damages does not result in any additional economic harm to the insurer, it has had minimal positive impact at best and has exacted enormous social costs. The certificate of merit requirement, on the other hand, has proven effective in reducing insurers' litigation costs without significant social costs. However, because many jurisdictions employ the certificate of merit requirement along with other, less effective, and more damaging means of litigation reform, the benefits of the certificate of merit reform are often cancelled out by the deleterious effects of the more harmful reform approaches.”)

<sup>233</sup> See Bauer, *supra* note 192, at 9.