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First Circuit Application of the Federal Rules of Evidence in Diversity Jurisdiction: A Return to Hanna Analysis

Daniel C. Hohler
Suffolk University Law School

FIRST CIRCUIT APPLICATION OF THE FEDERAL RULES OF EVIDENCE IN DIVERSITY JURISDICTION: A RETURN TO *HANNA* ANALYSIS

I INTRODUCTION

The First Circuit, after being overruled in *Hanna v. Plumer*,[1] has struggled over the application of the Federal Rules of Evidence (FRE) where federal jurisdiction is based upon diversity of citizenship. In *Cameron v. Otto Bock Orthopedic Industry, Inc.*,[2] the First Circuit returned to a traditional *Hanna* analysis, affirming the FRE as "procedural," presumptively mandating their application in cases of diversity jurisdiction. While the First Circuit has previously applied the FRE in diversity, the results are spurious because of the avoidance of the application of *Hanna* analysis. The purpose of this paper, therefore, is to analyze the First Circuit decisions up to *Cameron* which highly suggest the First Circuit's previous improper interpretation and non-application of *Hanna*.

First, federalism and the Supreme Court's conflict-of-law and conflict-of-Federal-Rule decisions will be analyzed, briefly describing both traditional *Erie* analysis and Federal Rule analysis under *Hanna*. Second, the First Circuit decisions will be surveyed for their basis in applying the FRE in diversity actions. Third, the surveyed decisions will be analyzed to demonstrate the potential improper application of *Erie* analysis to a Federal Rule conflict problem under *Hanna*. Finally, a conclusion will be drawn based upon the First Circuit decisions.[3]

II. HISTORY

A. Federalism, Framing the Basic Problem

Federalism juxtaposes federal and state governmental power.[4] For the purposes of this discussion, federalism problems in the United States Courts arise from the Constitution and Judiciary Act of 1789 which allows the Supreme

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[1] Hanna v. Plumer, 380 U.S. 460 (1964).

[2] Cameron v. Otto Bock Orthopedic Industry, Inc., 43 F.3d 14 (1994).

[3] The author recognizes that there are related issues as to the effects of uniformly applying the Federal Rules of Evidence and does not attempt to analyze any such effects nor advocate such application.

[4] Federalism is defined as a system of government under which "there exists simultaneously a federal or central government and several state governments." KERMIT L. HALL, FEDERALISM: A NATION OF STATES, Garland Publishing: New York. p. ix, (c) 1987 (providing articles discussing myriad aspects of federalism beyond scope of this article).

Court to hear cases where jurisdiction is based solely on diversity of citizenship of litigating parties.[5] The federalist justification for diversity jurisdiction is based upon the protection of interstate citizens against possible prejudice being imposed by a forum state court.[6] The necessity for diversity jurisdiction, however, is questionable due to the expansion of federal jurisdiction and significant changes in the political environment between the federal government and the states.[7] While the reasons for the repeal of diversity are strong, diversity jurisdiction remains relatively unchanged in its current form.[8]

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[5] *See* U.S. CONST. art. III, § 2, cl. 1. (giving power to federal courts to adjudicate state matters where jurisdiction is based solely on diversity of citizenship of parties to litigation); The Judiciary Act of 1789, 1 Stat. 73 (recodified by 28 U.S.C. § 1652 (1995) (providing for Supreme Court and lower federal courts to apply power granted in Article III, § 2, cl. 1).

[6] Dolores Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1672 (1992); *see also* AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 99-105 (1969) [hereinafter ALI REPORT]. This report summarizes the three most common federalist reasons for the promotion of general diversity jurisdiction: (1) to combat prejudice against citizens of a foreign state (2) to encourage free trade between the states and combat those jealousies which may play out in a non-federal forum and (3) to make visible and expand the role of the newly formed federal judiciary. *Id.* at 101.

[7] 28 U.S.C. § 1331 (1995) (granting the federal courts federal question jurisdiction). *See* Sloviter, *supra* note 6, at 1673 (citing Federal Courts Committee and Chief Justice Rhenquist's and other legal commentators general denouncement of diversity jurisdiction based upon lack of validity of traditional arguments); ALI REPORT, *supra* note 6. ALI commentators suggest that the incidental nationalizing of the federal government, the imposition on free trade or prejudice arguments are not applicable to conditions as they exist today. *Id.* at 105.; REPORT OF FEDERAL COURTS STUDY COMMITTEE, April 2, 1990, at 38 (supporting repeal of federal diversity jurisdiction). *See also* HALL, *supra* note 4.

[8] *See* 42 U.S.C. § 1332 (1995) (granting federal courts the power to hear cases where subject matter jurisdiction is based upon diversity of citizenship of the parties); Clark, *The Role of National Courts In 200 Years of Evolving Governance*, 18 CUMB. L. REV. 95 (1988). Chief Judge Clark of the Fifth Circuit Court of Appeals reasons:

> Not even a consummate federalist can reasonably argue that the paramount purpose of the Constitution . . . is advanced by reflexively aggregating power in the central government or its courts. It is time that ideals exert more influence over events. Nothing less than a deliberate effort to restore state power and prestige will suffice.

Id. at 109.

Clark contends that federalist ideals are not being served properly under the current expansionism of the federal government. *Id.* at 104. Similarly, political and economic climate prevent the problems anticipated by federalists of the past. *Id.* Political conservatism and Bar opposition, however, make the prospect of the repeal of diversity jurisdiction unlikely. *Id.* at 105.

Historically, diversity jurisdiction benefited foreign state parties involved in interstate litigation.[9] Granting jurisdiction based solely on diversity of citizenship, however, may encourage usurpation of state power by allowing federal courts to intrude into state affairs. In 1848, the United States Supreme Court addressed the issue in *Swift v. Tyson.*[10] In *Swift*, the Court held that federal courts were to apply state law only when not contrary to the federal court's interpretation of what the state law ought to be.[11] The *Swift* holding offered no protection to the state because it gave the federal courts broad discretion to apply federal law. From a federalism perspective, the usurpation of state power was unacceptable.

In 1938, the United States Supreme Court overruled *Swift* in *Erie Rail Road Co. v. Tompkins.*[12] Under the *Erie* Court's analysis, substantive state laws are to be applied over federal laws in diversity actions.[13] The United States Supreme Court held that in order to prevent forum shopping and to promote the uniform application of law, substantive state laws were applicable in conflict situations between state and federal law.[14] The *Erie* court, however, did not adequately define "substantive law."

The United States Supreme Court proposed its first "substantive" test in *Guaranty Trust Co. v. York.*[15] The Court held if application of federal law would change the outcome of the case, the state law should govern. This test was not satisfactory, however, because *any* difference is in some way "outcome determinative."[16] Thus, the Supreme Court, in *Hanna v. Plumer*, held that the "outcome determination" test was to be read in conjunction with the *Erie*

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[9] *See generally* Douglas D. McFarland, *Diversity Jurisdiction: Is Local Prejudice Feared?*, LITIGATION, Fall 1980 p. 38 (explaining while historically valid, the issue of whether the prejudice argument is still valid remains uncertain); *see supra* notes 6-8.

[10] Swift v. Tyson, 41 U.S. 1 (1842). *But see* Gregory Gelfand and Howard B. Abrams, *Putting* Erie *on the Right Track*, 49 U. PITT. L. REV. 937,951. Gelfand and Abrams reason that the *Swift* Court was not concerned with the expansion of federal encroachment upon state autonomy because the law was not developed. It was not until after the Civil War, the Great Depression and the emergence of the New Deal Court that federal encroachment upon state authority to promulgate its own policy became an issue. *Id. Erie* presented itself at the height of the New Deal in 1938 and the federalist ideals came to the forefront, offering protection to what state autonomy still remained. *Id.*

[11] *Swift*, 41 U.S. 1.

[12] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[13] *Id.* at 73.

[14] *Id.* The *Erie* court analyzed Pennsylvania negligence law as "substantive" law. *Id.*

[15] Guaranty Trust Co. v. York, 326 U.S. 99(1945).

[16] *Id.*

doctrine goals of uniform administration of the law and the prevention of forum shopping.[17] Applying the fundamental principles of *Erie* to the "outcome determination" test in *York* would give the test context.[18] Only those outcome changes that would prevent the uniform application of the law or promote forum shopping would be "substantive."[19]

The *Hanna* Court, however, also dealt with the specific issue of federalism with regard to the applicability of a Federal Rule to a diversity action. Under *Hanna*, there is no *Erie* problem when attempting to apply a Federal Rule.[20] Instead, the Rules Enabling Act and the Constitution supply the definition of "substantive" and "procedural." It is the similar parlance and application of the two doctrines that causes application problems.

B. The Supreme Court's Conflict Resolution Models

Legal commentators, practitioners, and judges have displayed dissatisfaction with the use of formalistic "substantive" and "procedural" distinctions in determining what choice of law or rule to apply in diversity actions.[21] Notwithstanding general disfavor of such principles, the United States Supreme Court's holding in *Hanna* established two fundamentally different judicial conflict resolution models. The differing substance/procedure contexts

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[17] *Hanna*, 380 U.S. at 468 (holding outcome determination test must be applied to twin goals of "discouragement of forum shopping and avoidance of inequitable administration of laws").

[18] *Id.*

[19] *Id.*

[20] *Id.* at 469-470. The court held:

> There is, however, a more fundamental flaw in respondent's syllogism: the incorrect assumption that the rule of *Erie R.R. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule. The *Erie* rule has never been invoked to void a Federal Rule of Civil Procedure.

Hanna, 380 U.S. at 469-470. *Erie* analysis is therefore expressly an incorrect test to apply to a FRE conflict.

[21] *See* Gelfand and Abrams, *supra* note 10, at 963 (questioning whether Court has ever considered wisdom of a distinction between substance and procedure). *See also* EHRENZWEIG, EHRENZWEIG ON CONFLICTS OF LAW, 1962, § 114 (determining that the dichotomy between substance and procedure is "analytically meaningless"); Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333,344 (1933) (determining that arbitrary point of distinction changes with legal context reaching seemingly incongruous results); CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE, 1911, § 171 (expressing that no real distinction exists and any distinction between substantive and procedural in any context is "artificial and illusory").

will be referred to as: (1) the conflict-of-laws model (*Erie* analysis) and (2) the conflict-of-Federal-Rules model (*Hanna* analysis).[22]

The *Erie* model is based upon the basic doctrine expressed in *Erie* and its progeny that when a federal statute or practice infringes upon a state law, the court should apply the law of the state. The meaning of "substance" under this test refers to legal concepts or constructs that are enacted into law and effectuated by the state.[23] "Procedure," in the *Erie* context, refers to traditional notions of remedy and matters which promote the proper execution of the corpus of the law.[24] The goal of the *Erie* model is to promote the equitable administration of justice and to discourage forum shopping. [25]

In those limited circumstances where conflicts do occur based upon a FRE, the *Hanna* Court provides an *Erie*-exclusive analysis.[26] Under *Hanna*, the Rule

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[22] *See* John H. Ely, *The Irrepressible Myth of* Erie, 87 HARVARD L. REV. 693 (1962) (construing the application of FRE not as an *Erie* question, but governed by the REA and Constitution). *Contra* Gelfand and Abrams, *supra*, note 10, at 966. These authors contend that the Federal Rules of Evidence are not *Erie* exempt because the *Hanna* decision is inapposite with *Erie*. The *Hanna* Court modified its test under *Erie*, carving out an exception to *Erie*. If not, it would be applying *Erie* doctrine with its limitations to a problem that is limited instead only by the Rules Enabling Act. Gelfand and Abrams assume that the FRE should be applied under some form of *Erie* test. *Id.* at 981. Gelfand and Abrams expose the very problems with applying the *Erie* test to Federal Rules in not being able to resolve Rule-type conflicts. *See id.* at 1004 (conceding that *Erie* does not constitutionally prohibit resulting deference to Federal Rules). For a discussion on which the *Hanna* Court based their discussion of substance/procedure differentiation, *see generally* COOK, LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS, at 150 (1943) (reasoning that substance and procedure have differing meanings in differing contexts).

[23] *Hanna*, 380 U.S. at 472. The example the *Hanna* court used were legal constructs in *Erie* such as the Pennsylvania Negligence law which denied recovery for longitudinal railway trespassers. *Id.*; *see* Carota v. Johns Manville Corp., 893 F.2d 448, 450 (describing procedural laws as prescribing manner in which rights may be exercised and enforced).

[24] *See* GOODRICH, CONFLICT OF LAWS (1927) § 77 (determining distinction between "remedial" or "procedural rights" and "primary and secondary" rights of action which are "substantive" in this context); *see also* Carota v. Johns Manville Corp., 893 F.2d 448, 450 (describing procedural laws as prescribing manner in which rights may be exercised and enforced).

[25] Guaranty Trust Co. v. York, 326 U.S. 99 (1945). In cases of diversity jurisdiction, where a federal statute is in conflict with a State statute, where the application of the federal would result in a different outcome to the litigation, the statute is deemed "substantive" and the federal statute should yield to the state. *Id.* at 109. The York Court's "outcome-determinative" test, however, was only meant to be applied to substantive state statutes and not to the application of a Federal Rule. *Hanna*, 360 U.S. at 467.

[26] Conflicts between the FRE and state rules of evidence should occur infrequently where most of the states have codified their rules of evidence based upon the FRE. *See*

applicability is limited by the Constitution and the Rules Enabling Act (REA) providing a broader analysis than under *Erie*.[27] Congress, under the auspices of the REA and the Constitution can pass "procedural" rules that are presumably constitutionally valid on their face as rules of court, and simultaneously substantive in affecting a state right under *Erie*.[28] Nonetheless, the Federal Rule would still trump the state construct because of the broad grant of power under the Constitution and the REA, without consideration of *Erie*.[29]

Margaret E. Berger, *The Federal Rules of Evidence: Defining and Refining the goals of Codification*, 12 HOFSTRA L. REV. 255,256 nn. 7-9 (1984) (surveying 31 states, Puerto Rico, and the military that have codified their evidentiary statutes as of 1980). It is significant to note that Massachusetts, while having proposed a codification of the evidentiary rules based upon the Federal Rules, propagates most of the litigation in this area, including Hanna v. Plumer in which the Supreme Court overturned the First Circuit Appellate Court. *See* Berger at 267, (holding that Rule-making may obviate the need for the *Erie* analysis). *But see* Gelfand and Abrams, *supra*, note 10, (maintaining that Federal Rule conflicts are merely a species of *Erie* problem and should be attacked under the auspices of *Erie*).

[27] The Rules Enabling Act (REA) allows the Judiciary to adopt rules of practice and procedure to be applied in Federal District Courts and Courts of Appeal within the United States and its Territories. These promulgated rules, however, can only apply to procedural law and cannot compromise or broaden any substantive State law. Similarly, any state laws, procedural in nature, in conflict with Federal Rules enacted under this provision are trumped by the applicable Federal Rule and have no further effect within the federal court. 28 U.S.C. § 2072 (a),(b) (1994). *See* Edson R. Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH.L.REV. 1116 (1934) (explaining Rules Enabling Act in detail); HART & WESCHLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, THIRD EDITION, at 759-762 (1988) (providing an overview of the Rule Enabling Act and its application with regard to Rules of Civil Procedure and Rules of Evidence). *See* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 2 DUKE L.J. 281 (1989) (discussing substance and procedure variations between differing legal contexts with regard to limitations law). The Rules Enabling Act limitations are based upon constitutionality and scope, not substantive legal constructs of the state. This is where the language "arguably procedural" emerges and controls. Where a Federal Rule can be classified as procedural in an REA context and yet substantive under an *Erie* analysis the REA permits the Rule to prevail even if displacement of state policy occurs. *Id.*

[28] Olin G. Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 401 (1994). The validity of the Federal Rules is not based upon either the Rules Enabling Act or the Rules Decision Act. Since the FRE were enacted by Congress, neither of these Acts apply and they are presumptively valid. *Id.* Furthermore, Wellborn suggests that the enacted Federal Rules of Evidence are not legitimately open to attack as modifying "substantive state rights" under the REA. *Id.* at 402.

[29] *See* Gregory Gelfand & Howard B. Abrams, *supra*, note 10, at 947.

C. The First Circuit Decisions

The trend of the First Circuit, as in the majority of the circuits, has been to interpret the *Hanna* doctrine to apply to the FRE as well as the Federal Rules of Civil Procedure.[30] At least two other circuits have uniformly applied the Federal Rules of Evidence in all diversity actions declaring them procedural, as has the First Circuit.[31] Ostensibly, there exists a definite range and scope as to how far the Federal Rules of Evidence apply in any particular jurisdiction.[32] While the United States District Courts within the First Circuit have applied the *Hanna* test uniformly, the First Circuit has struggled with its final stance on the issue.

In 1985, the First Circuit dealt with a pure FRE conflict in *McInnis v. A.M.F., Inc.*[33] The plaintiff, who received severe injuries in a motorcycle accident brought suit against the manufacturer. At issue was whether FRE 403 or a similar state-fashioned rule applied to the admissibility of evidence relating to alcoholic beverage consumption.[34] The Commonwealth rule totally

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[30] *See* FED. R. EVID., Introduction p. III (1993). The Federal Rules of Evidence were enacted by the Supreme Court as Rules of Court effective 1973. 56 F.R.D. 183. The Rules were then enacted into law by Congress on July 1, 1975. 88 Stat. 1926. *See* Washington v. Department of Transp., 8 F.3d (5th Cir. 1993); Milam v. State Farm Mut. Auto. Ins. Co., 972 F.2d 166 (7th Cir. 1992); Leitman v. McAusland, 934 F.2d 46 (4th Cir. 1991); Laney v. Celotex Corp., 901 F.2d 1319 (6th Cir. 1990); Romine v. Parman, 831 F.2d 944 (10th Cir. 1987); Bushman v. Halm, 798 F.2d 651 (3rd Cir. 1986); McInnis v. A.M.F., Inc., 765 F.2d 240 (1st Cir. 1985).

[31] The Fifth and Seventh Circuits are strongest in their blanket application of the Federal Rules of Evidence to diversity actions. For Fifth Circuit decisions, see Washington v. Department of Transp., 8 F.3d 296,300 (5th Cir. 1993) (declaring Federal Rules of Evidence "procedural") and Morris v. Homco Intern., Inc., 853 F.2d 337,341 (5th Cir. 1988) (holding that "diversity cases in federal court are . . . governed by federal, not state, rules of evidence"). In *Morris*, the Fifth Circuit does not discuss the substance/procedure problem. Instead, it avoids it entirely by adopting the Federal Rules of Evidence as entirely procedural where there are provisions made for state rules to apply where Congress intended those rules to apply. *Id.* In the Seventh Circuit, see In Re Air Crash Disaster Near Chicago, Ill., 701 F.2d 1189, 1193 (7th Cir. 1983) (Federal Rules of Evidence are procedural in determining admissibility of evidence because they are Rules and also statutorily created).

[32] *Compare* Rotondo v. Keene Corp., 860 F.2d 436 (3rd Cir. 1992) (applying federal sufficiency standard) *and* Gibraltar Sav. v. Ldbrinkman Corp., 860 F.2d 1275 (5th Cir. 1988) (applying federal sufficiency) *with* Lockley v. Deere & Co., 933 F.2d 1378 (8th Cir. 1991) (applying state sufficiency standard) *and* Laney v. Celotex Corp., 901 F.2d 1319 (6th Cir. 1990) (applying state sufficiency standard of state).

[33] McInnis v. A.M.F., 765 F.2d 240 (1st Cir. 1985). The *McInnis* case, however, is barely a case of conflict. The court held that the rules were procedural because they reached almost identical results. *Id.* at 246.

[34] *Id.* at 245.

prohibiting the admissibility of alcohol consumption evidence mirrored that of Rule 403's prevention of admission of prejudicial evidence.[35] The *McInnis* court held that the FRE, analogous to the FRCP, were clearly intended to apply to diversity actions under *Hanna*.[36] Under the *Hanna* analysis all that is required is to determine that the Federal Rule is (1) constitutionally valid and (2) within the scope of the REA. Applying the *Hanna* analysis, the *McInnis* court held for the first time in the First Circuit that the FRE are presumptively valid and constitutional.[37] The Court held that unless the presumption of constitutionality and scope of the Rule under the REA is rebutted the Federal Rule should prevail.[38]

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[35] *Id.*

[36] *See* 765 F.2d 240 at 245. ("Congress clearly intended that the Federal Rules of Evidence would apply to diversity actions."); *see also* Rioux v. Daniel Intern. Corp., 582 F.Supp. 620 (D.Me. 1984). The *Rioux* court noted that no Federal Rule of Procedure or Evidence had ever been struck down as exceeding the power of Congress and that Congress had specifically intended *Hanna* to apply to a direct Federal Rule conflict. *Id* at 624 (citing Walker v. Armco Steel Corp., 446 U.S. 740,750 n.9 (1980). The district courts are uniform in their application of *Hanna* analysis to Federal Rule conflicts. United States District Court, District of Maine has correctly reaffirmed that the *Hanna* test applies to direct Federal Rule conflict situations exclusive of *Erie* analysis. *See* Wardwell v. U.S., 758 F.Supp. 769,771 (D.Me. 1991) (upholding FRE as constitutionally valid and applicable in diversity actions); French v. Fleet Carrier Corp., 101 F.R.D. 369, (D.Me. 1984) (asserting *Hanna* test in Federal Rules of Civil Procedure context where direct conflict between state and Federal rule); *but see* Pasternak v. Achorn 680 F.Supp. 447, 448 (D.Me. 1988) (disallowing seat belt use as evidence of negligence under Maine state law in direct conflict with FRE admissibility standard). The United States District Court, District of Massachusetts has also reaffirmed that *Hanna* controls in Federal Rule conflict situations. Donovan v. Sears Roebuck & Co., 849 F.Supp. 86 (D. Mass. 1994) (upholding FRE hearsay rule as procedural and applied over state hearsay exception in diversity action); Headley v. Chrysler Motor Corp., 141 F.R.D. 362 (D. Mass. 1991) (admitting evidence based upon FRE in diversity actions).

[37] *McInnis* at 244 and n.5. The court held that the rules are presumptively constitutional. *Id.* In footnote 5 the court further holds that the presumption that the Federal Rules of Evidence are constitutional is stronger based upon the fact that the rules are not simply reviewed, but are actually edited and written by Congress as well as the Judiciary. *Id.*

[38] *See* Carrington, *supra*, note 27:

> Although the "test" addressed the issue of federalism . . . many promptly assumed it meant that the Court had endorsed an unconstrained view of its powers under the [Rules Decision Act] to make rules of court without substantive consequences.

The result, claims Carrington, was for the Federal Rules of Evidence to be drafted and enacted. *Id.*

The *McInnis* court found that the state rule was procedural because the state rule and the Federal Rule both went to the same mechanistic end of preventing the admission of prejudicial evidence.[39] No substantive state policy governed the admission of the contested evidence.[40] The court applied the Federal Rule because there was no state substantive policy being served, the federal relevance rule did not promote forum shopping, and both rules had nearly the same procedural result.[41]

The First Circuit next addressed the issue of FRE applicability in diversity actions two years later in *Ricciardi v. Children's Hospital Medical Center, Inc.*[42] The plaintiff brought suit for medical malpractice, arguing that the doctors and hospital were negligent when an aortic cannula became disconnected from a patient during an operation.[43] The consulting doctor, who was not present during the incident, allegedly scribbled a hand-written note about the incident.[44] The note was the basis of the patient's claim. The consulting doctor, however, did not have personal knowledge of the incident and also did not recall where he obtained the information.[45] The district court ruled that the note was hearsay and that it did not fit any of the exceptions to the federal hearsay rule providing a business records exemption.[46] The plaintiff argued, *inter alia*, that the Massachusetts statute permitting the admission of hospital records applied and would have permitted the admission of the note.[47]

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[39] *McInnis*, 765 F.2d at 245. The "Rule of *Handy*" prohibited the evidence of the consumption of alcoholic beverages. *Id.* The Court argued that the underlying considerations and results were merely procedural monitoring or administration of substantive rights of the defendant. *Id.* Under the *Handy* rule, the evidence would be excluded altogether, whereas Federal Rule would exclude it if it were deemed prejudicial. *Id.*

[40] *Id.*

[41] *Id.*; *but see* Rovegno v. Geppert Bros. Inc., 677 F.2d 327 (3rd Cir. 1982) (holding that Pennsylvania Law with regard to admissibility of blood alcohol content should be employed). The First Circuit, while aware of the decision of Third Circuit, properly held that the Third Circuit did not apply the Congressional mandate for Federal Rule preemption via the *Hanna* doctrine correctly.

[42] Ricciardi v. Children's Hosp. Medical Center, Inc., 811 F.2d 18 (1st Cir. 1987).

[43] *Id.* at 20. An aortic cannula circulates blood from the heart-lung machine back into the body when the heart is being by-passed for surgery. *Id.*

[44] *Id.* The note read: "during surg. episode of aortic cannula accidentally out 40-60 sec." *Id.*

[45] *Id.*

[46] *Id.*

[47] Ricciardi v. Children's Hosp. Medical Center, Inc., 811 F.2d at 20. *See* MASS. GEN. L. ch. 233 § 79 (allowing hospital records into evidence).

The First Circuit held that the exception to the Hearsay rule under the FRE was nearly identical to that of the state rule in question.[48] Both the Federal Rule and the Massachusetts statute applied to regularly conducted business activity. The court however, held that neither rule applied because under either test the source of the information must be known to the person making the record.[49] Finding the evidence inadmissible under both the state and Federal Rule, the court found, as in *McInnis*, that no conflict existed.[50]

The *Ricciardi* court analyzed the issue as a non-conflict between the federal business records exception to the Hearsay Rule and the state Statute allowing admission of hospital records. If there had been a conflict, the court stated in dicta that it would look to see if there were any substantive policy underpinnings. The Court strongly suggests that it would apply the state law over the FRE if any policy could be found.[51]

The *Ricciardi* decision anchored the First Circuit's federalist approach of examining the policy behind a state statute and not solely the statute itself as prescribed in *Hanna*. The application of the *Ricciardi* approach, however, was not utilized until the First Circuit's 1990 holding in *Carota v. Johns Manville Corp.*[52] In *Carota*, defense counsel moved to admit evidence of previous settlement with co-defendant asbestos companies.[53] Carota contended that such evidence was inadmissible under FRE 408.[54] Celotex, the remaining defendant and asbestos manufacturer, contended that the state rule should apply because the policy *behind* the rule was a damages provision and not an evidentiary provision.[55]

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[48] *See* FED. R. EVID. 803(6); MASS. GEN. L. ch. 233, § 79. *See also Ricciardi*, 811 F.2d at 22. The *Ricciardi* court held that the statutes were functionally equivalent and the Federal Rule of Evidence 803(6) was consistent with the Massachusetts legislation. *Id.*

[49] *Id.* at 23. *See* Petrocelli v. Gallison, 679 F.2d 286 (1st Cir. 1982) (holding impossibility of determining source of record fatal to admissibility of that evidence).

[50] *Ricciardi*, 811 F.2d at 22. The court held: ". . . these two rules are very similar in application. In this case the note is inadmissible under both rules. Therefore even if we could discern some substantive policy at stake in the state hospital records exception, there would be no conflict with that policy in applying the federal rule here." *Id.*

[51] *See id.* at 21 ("the question here, then, is whether application of the federal business records exception would impinge upon some substantive state policy embodied in the state rule").

[52] 893 F.2d 448 (1st. Cir. 1990).

[53] *Id.* at 449.

[54] *See* FED. R. EVID. 408 (1993) (prohibiting admissibility of offers of compromise and compromise agreements).

[55] *Carota*, 893 F.2d at 451. The *Carota* court agreed with this reasoning. The court wrongfully applied the *Erie* doctrine where the test "falls within the twilight zone between

The Massachusetts legislative decision to allow such evidence under the state rule was to prevent double recovery and therefore the substantive state rule was incompatible with Rule 408.[56] The plaintiff countered with Fifth Circuit precedent which held that the money already collected would be subtracted from such an award and be consistent with state policy of jury consideration of previous award.[57] The result would lead to neither conflict nor impingement upon substantive state law or state policy behind the statute.[58] The court, however, was not impressed with the plaintiff's argument and held that the issue of out-of-court settlements as evidence was inherently linked to jury entitlement to hear evidence.[59] Thus, the court ruled that the application of Rule 408 conflicted with the substantive law of the Commonwealth of Massachusetts.[60]

While the *Carota* decision represents the first real mutation of the Supreme Court's interpretation of federalist concerns, the 1994 decision of *Daigle v. Maine Medical Center,Inc.*,[61] is a step toward limiting the deference to state law. Under a grotesque fact scenario, Dawn Daigle brought an action against Maine Medical Center (MMC) for injuries incurred from complications while giving birth.[62] Daigle lost on her claim for negligence. On appeal she claimed that federal evidentiary law should have applied and not the Maine Health Act.[63] Daigle claimed that the evidentiary provisions under the Maine Health Act prevented her from invoking hearsay exceptions and the ability to impeach the witness' credibility.[64] At issue was whether Maine's Health Act was in substantive conflict with the FRE.[65] The First Circuit held that the Health Act's

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substance and procedure." *Id.* This is precisely where the Rules Conflict Model should take effect. *Id.*

[56] *Id.*

[57] *Carota*, 893 F.2d at 451; *see also* McHann v. Firestone and Rubber Co., 713 F.2d 161, 166 n.10 (5th Cir. 1983) (subtracting previous award from jury verdict is consistent with state policy of jury consideration of previous award).

[58] *Carota*, 893 F.2d at 451.

[59] *Id.*

[60] *Id.*

[61] Daigle v. Maine Medical Center, Inc., 14 F.3d 684 (1st Cir. 1994).

[62] *Id.* at 686. Daigle was admitted to Maine Medical Center where she underwent surgery. *Id.* During preparation, a catheter that was inserted into the jugular vein punctured her carotid artery. *Id.* The delivery was successful, but the physicians were forced to intubate her while she was awake. *Id.*

[63] *Daigle*, 14 F.3d at 689. The Maine Health act provides an alternative dispute resolution where the parties must undergo pre-litigation screening. *Id.*

[64] *Id.* *See* FED. R. EVID. 803 (allowing exceptions to the hearsay rule); FED. R. EVID. 806 (relating to impeachment of credibility).

[65] *Daigle*, 14 F.3d at 689.

evidentiary portions were procedural in nature, but could co-exist with the FRE.[66] The Maine Health Act was deemed substantive in nature because it is the state's attempt to curtail expensive litigation. The Health Act, however, was independent of the federal court and therefore each could co-exist without interference or conflict.[67]

In late 1994, the First Circuit attempted to resolve the substance/procedure dichotomy in *Cameron v. Otto Bock Orthopedic Industry.* In a products liability action concerning the failure of a pylon in a prosthetic leg, the plaintiff argued that the FRE did not apply to the proceeding where the Commonwealth of Massachusetts' evidence law would conflict.[68] At issue was whether notice of subsequent remedial measures could be admitted.[69] A direct conflict existed and the court held that the FRE controlled.[70] Ignoring precedent subsequent to *McInnis*, the court held that it had been long established that the FRE were presumptively procedural and were to be applied in matters of diversity jurisdiction.[71]

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[66] *Id.* The Court held that, similar to the Supreme Court's determination in *Walker*, there was no conflict and that the Health Act and the Federal Rules of Evidence could co-exist. *Id.* Furthermore, since the Health Act's policy is not to conflict with the Federal Rule, the scope of the rule does not even reach the question of analysis under the Rules Conflict test. *Id.*

[67] *Id.*

[68] *Cameron*, 43 F.3d at 15. Mr. Cameron fell when a pylon in his artificial leg broke into two pieces. *Id.* He fell and fractured his pelvis. *Id.* The plaintiff claimed damages for the fractured pelvis and mental trauma. *Id.* His wife claimed damages for loss of consortium. *Id.*

[69] *Id.* at 17. The prosthetisists were sent letters by the manufacturer of the prosthesis after Mr. Cameron's fall. The plaintiff argued that these letters should be admitted into evidence. *Id.* The court held that these letters were covered by Rule 407 which provides in pertinent part:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FED. R. EVID 407. The court ruled that the letters from the manufacturer to the prosthetisists were "subsequent remedial measures" which evidence was not admissible and did not fall into one of the exceptions categories. *Id.*

[70] *Cameron*, 43 F.3d at 17,18.

[71] *Id.*

III. ANALYSIS

The First Circuit has consistently applied the FRE in diversity actions.[72] The court, however, has relied upon the absence of conflict when applying the FRE. Until recently, the holdings and dicta of the First Circuit's decisions demonstrated a willingness to apply an *Erie* analysis to what is essentially a Rule conflict problem.[73] The First Circuit's decision in *Cameron*, however deems the FRE procedural, reaffirming the *McInnis* decision. Therefore, under either the Federal Rule analysis or the *Erie* analysis, the FRE will be applied over the state rules of evidence in First Circuit diversity actions. While the result of *Cameron* mandates the application of the FRE, it is important to trace the uncertain history of the First Circuit's application analysis.

The *McInnis* decision was a pure rule conflict model discussion and application of *Hanna*.[74] A close reading of the case, however, revealed the First Circuit's general disfavor of federal intrusion upon state autonomy.[75] While deferring to the Supreme Court's decisions in *Erie* and *Hanna*, the court subtly reiterates that federal law should not displace substantive policies of the state.[76] The reasoning of the court suggests that the First Circuit will not be formalistically railroaded into displacing a facially procedural state statute where, from a legal realist perspective, there exist substantive state policies behind the statute.[77] Thereafter, the *McInnis* Court listed examples such as the collateral source rule, the parole evidence rule, or the Statute of Frauds to prove Congress' intent that policy decisions behind otherwise "procedural" state rules should be protected.[78]

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[72] *See* Daigle v. Maine Medical Center, Inc., 14 F.3d 684 (1st Cir. 1994) (applying the FRE based upon non-conflict); Ricciardi v. Children's Hosp. Medical Center, 811 F.2d 18 (1st Cir. 1987) (applying FRE based upon non-conflict); McInnis v. A.M.F., Inc., 765 F.2d 240 (1st Cir. 1985) (applying FRE based on non-conflict). B*ut see* Carota v. Johns Manville Corp., 893 F.2d 448 (1st Cir. 1990) (applying state law based upon policy considerations).

[73] *See supra* notes 27,28 and accompanying text. *But see supra* note 39 (demonstrating United States District Courts' adherence to *Hanna* test).

[74] *See McInnis*, 765 F.2d at 244-245 (1985) (discussing the proper *Hanna* analysis to be used where there is a Federal Rule conflict).

[75] *Id.* at 245.

[76] *McInnis*, 765 F.2d at 245. According to the First Circuit, Congress did not intend for Rules to preempt state statutes that in reality "serve substantive state policies." *Id.* This is a digression from *Hanna* where the word "policy" is not even mentioned.

[77] *Id.*

[78] *Id.*

What is troubling about *McInnis* is the reliance on *Erie* for its conclusive determination that the FRE was to apply.[79] While the *McInnis* decision represents a rule conflict situation, the application of *Erie* in its analysis of the problem is irrelevant and demonstrated the Court's reluctance of applying proper *Hanna* analysis.[80]

Notwithstanding the lack of rule conflict, which is necessary for the *Hanna* test to be applied, the First Circuit attempted to expand upon *McInnis* in *Ricciardi*.[81] The *Ricciardi* Court cited directly to the dicta in *McInnis* which states that federal law should not replace substantive state law.[82] For the first time the court appealed to "policy" considerations of conflicting state statutes.[83] If it could be shown that an underlying substantive policy issue existed, according to that court, the Federal Rule must defer to the state legal construct.[84]

The *Carota* court applied the *Ricciardi* analysis, misinterpreting and misstating the law. The *Carota* court held that application of the federal law which is proper under the *Hanna* analysis would usurp essential power from the jury.[85] The *Carota* court opined that *Erie* analysis was an appropriate method of determining whether a Federal Rule should be displaced by a state rule.[86] The court held, while not a "traditional" *Erie* analysis, the *Erie* doctrine had "evolved beyond its traditional confines" and had been "narrowed," mandating that the Federal Rule be displaced only when the Federal Rule impinged upon a state policy.[87] The problem with the court's analysis is that when there is a conflict between the FRE and a state rule, the conflict resolution is necessarily governed by the *Hanna* rule conflict model and not the *Erie* test.[88] Furthermore, the use of an underlying state policy standard in determining whether a conflict exists is

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[79] *See* 765 F.2d at 246. The court held ". . . the Rhode Island rule cannot reasonably be considered substantive in light of the policies reflected in *Erie*." *Id.*

[80] *See* Hanna v. Plumer, 380 U.S. at 473 ("[I]t cannot be forgotten that the *Erie* rule . . . [was] created to serve a different purpose altogether.").

[81] *Ricciardi*, 811 F.2d at 21.

[82] *Id.* at 21.

[83] *Id.*

[84] *Id.*

[85] *See Carota*, 893 F.2d at 451 ("Allowing a deduction of out of court settlements from a verdict, while not informing the jury of the amounts of those settlements, thwarts the rationales behind the Supreme Judicial Court decisions, and usurps from the court the power to formulate its own policies and to give force to its own law").

[86] *Id.* at 450.

[87] *Id.*

[88] *See supra* text accompanying note 20 (explaining the dichotomous and mutually exclusive relationship between *Hanna* and *Erie*).

analogous to the unmodified "outcome determination test": every statute, even purely procedural statutes, have state policy underpinnings.[89] The result would give the court unreasonably expansive discretion which was not prescribed in the *Hanna* analysis.

Both the Federal Rule and the state rule in *Carota* had the same end result: prevention of "double dipping" in damages determination.[90] The First Circuit became emboldened by the express language of *Ricciardi* and expanded upon it by claiming that there was a substantive state policy being infringed upon and the state's express power was being usurped.[91] The conclusion of the court that the conflict was in the "twilight zone between substance and procedure" was correct.[92] It is precisely under these circumstances that the Rule conflict model should apply. The *Carota* court, however, incorrectly applied an *Erie* analysis.[93]

In *Carota*, the First Circuit took a strong position by deferring to the state law where the state statute was "procedural" under a rule conflict analysis.[94] The reason behind the decision, therefore, could rest only upon federalism ideals of the First Circuit, as nurtured in dictum of the *McInnis* and *Ricciardi* decisions, or more likely, simple confusion about which conflict model to apply.[95] In effect, the *Carota* decision represented another evolutionary step in the First Circuit's misapplication of the *Hanna* doctrine and the promotion of arguably unnecessary guardianship of state autonomy.[96]

The *Daigle* decision demonstrated the First Circuit's effort to avoid the application of the *Hanna* test. The First Circuit after *Daigle*, could, with almost surgical precision, pick and choose which state policies or parts of state policies are in conflict with a Federal Rule.[97] The *Daigle* decision effectively allowed the First Circuit to sidestep the issue by declaring "no conflict" in avoiding possible Rule conflicts.

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[89] *See supra* text accompanying notes 15-17 (explaining the outcome determination test in unmodified form).

[90] *Carota*, 893 F.2d at 451.

[91] *Id.* at 451.

[92] *Id.*

[93] *Id.*

[94] *See supra* text accompanying notes 14-17.

[95] *See, e.g.*, Sloviter, *supra* note 6; *McInnis*, 765 F.2d at 240; *Ricciardi*, 811 F.2d at 18.

[96] *See supra* notes 6-9 (discussing the different governmental climate that no longer requires nor justifies the protection of diversity jurisdiction).

[97] *Daigle*, 14 F.3d at 689.

In *Cameron* the first circuit, in its most recent and surprising decision, reversed its illogical analytical trend holding that it historically has held the FRE to be procedural in nature and presumptively applicable to diversity actions.[98] The Court cited only to *McInnis*, ignoring the improper and problematic analysis employed by interim decisions of the First Circuit.[99] Before *Cameron*, the court had effectively avoided the issue of analyzing the application of the FRE in diversity actions. By deeming the FRE presumptively procedural, the First Circuit now mandates their application, making substance/procedure analysis irrelevant.[100] The court has apparently attempted to return to the basic *Hanna* analysis: that the FRE historically have applied to all diversity actions and that they are presumptively valid. It is safe to assume, for the moment, that the FRE will generally apply in all diversity actions after *Cameron*. What remains to be seen is if the First Circuit will follow *Cameron* in the future and apply the proper *Hanna* test to conflicts between the FRE and state legislation.

IV. CONCLUSION

The First Circuit has generally applied the FRE to diversity actions. The court's reasoning, however, has not been based upon the analysis announced in *Hanna*. Rather, the First Circuit historically side-stepped the issue by claiming no direct conflict existed. The spurious results antedating *Cameron* are conclusions that are based upon factors other than conflict analysis under *Hanna* or *Erie*.

Notwithstanding the controversial analytical nature of the decisions since *McInnis*, the First Circuit has surprisingly reaffirmed *McInnis*, disregarded its interim decisions, and correctly set the standard that the FRE presumptively apply in diversity jurisdiction cases. *Cameron* cements the notion of the general applicability of the FRE in the First Circuit by ignoring the post-*McInnis* decisions. While untested, the *Cameron* decision offers the practitioner a strong presumption that the FRE are inherently procedural, under any application test, and should be applied in cases where federal jurisdiction is based upon diversity of citizenship.

Daniel C. Hohler

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[98] *Cameron*, 43 F.3d at 18.

[99] *Id.* The court held that the Federal Rules of Evidence applied because they "address procedural matters, [were] duly passed by Congress, [and] shall be presumed constitutionally valid unless they cannot rationally be characterized as rules of procedure." *Cameron*, 43 F.3d at 18 (quoting Mcinnis v. A.M.F., Inc., 765 F.2d 240 at 244).

[100] *See supra* notes 21-30 (describing substance/procedure distinctions under both *Erie* and *Hanna* tests).