



FEDERAL COURTS

Wading into *Erie's* Murky Waters in a *Shady Grove*: Must a Federal Court Apply a State Law Requirement That an Expert Witness Affidavit Accompany a Complaint?

CASE AT A GLANCE

The Court will consider whether a federal court in its diversity jurisdiction must dismiss a case where state law requires the plaintiff to support the complaint with an expert witness affidavit.

Berk v. Choy

Docket No. 24-440

Argument Date: **October 6, 2025** From: **The Third Circuit**

by Linda S. Mullenix

University of Texas School of Law, Austin, TX

Issue

Must a federal court in its diversity jurisdiction apply a state law requiring that a complaint be accompanied by an expert witness affidavit?

Facts

This appeal arises from a medical malpractice lawsuit that Harold R. Berk brought in the federal District Court for Delaware, invoking the court's diversity jurisdiction. In August 2020, Berk injured his left ankle and foot in his Delaware home. Dr. Wilson C. Choy originally attended to Berk in the emergency room at the Beebe Healthcare facility owned by Beebe Medical Center, Inc. At that time, Dr. Choy recommended that Berk be treated with a controller ankle monitor boot. The staff had difficulty in fitting Berk with the boot, which they forcibly manipulated to fit his foot, causing further injury. The medical facility subsequently failed to provide an additional X-ray of Berk's ankle, which would have identified the further injury.

Over ensuing days, Dr. Choy saw Berk, who was then transferred to Encompass Health Rehabilitation Hospital.

The Encompass staff noted a deformity in his foot but performed no X-rays. They provided physical and occupational therapy that required Berk to put weight on his injured ankle, contrary to Dr. Choy's orders. After being discharged from the rehabilitation center, Berk returned to Dr. Choy, whose assistant ordered an X-ray of Berk's ankle.

This X-ray indicated that Berk's foot and ankle were severely deformed. After phone consultation, Dr. Choy prescribed immediate surgery. A physician at the Philadelphia Rothman Orthopaedic Institute confirmed the need for urgent surgery. Dr. Raikin at the Thomas Jefferson University Hospital performed the surgery and installed an external fixator device to hold Berk's leg and ankle bones in place.

Berk subsequently endured four months of constant pain from the external fixator and repeated surgeries for leg ulcers. Dr. Raikin performed a second surgery to remove the fixator, and Berk underwent additional months of physical and occupational therapy. More than a year after Berk injured his ankle, he was able to walk short distances with a cane.

In November 2022, Berk, acting *pro se*, sued Dr. Choy, Beebe, and Encompass Health in Delaware federal court, alleging medical malpractice claims. He invoked the court's diversity jurisdiction. Berk is a Florida citizen but owns a house in Delaware, where he was staying when he injured his ankle. The defendant Beebe is a Delaware citizen. Encompass Health settled the litigation and claims no further interest in the litigation.

Berk learned that Delaware state law requires that a plaintiff provide an affidavit of merit in a medical malpractice lawsuit. The Delaware legislature enacted its Health Care and Malpractice Insurance and Litigation Act in 1976 to address the growing number of state medical malpractice claims, which resulted in a tremendous increase in health-care workers, liability insurance. The legislature determined that this situation endangered the ability of Delaware citizens to continue to receive quality health care.

To contain rising medical negligence claims, the legislature required plaintiffs to include a mandatory affidavit from a medical expert to prove the provider's breach of the standard of care and causation. The act also placed constraints on punitive damages and enacted a strict statute of limitations. 60 Del. Laws ch. 373 (1976). Under the Delaware law, a plaintiff's failure to support a medical malpractice complaint with this expert affidavit requires the court to dismiss the case.

In 2003–2004, the Delaware legislature amended the law to address the growing problem of *pro se* medical malpractice claims by patients unhappy with the results of their treatment, which courts subsequently dismissed as meritless. The dismissed *pro se* cases nonetheless were reported to the Delaware Board of Licensure and Discipline, which, even though meritless, resulted in increased medical malpractice insurance premiums. Consequently, the amended law required that a plaintiff consult with a medical expert whose supporting affidavit testified that the plaintiff's claim had merit.

The affidavit had to state that there were reasonable grounds to believe that the defendant health provider had committed medical negligence. In absence of such an expert affidavit, the plaintiff had no right to pursue a medical malpractice claim in Delaware state court and the court had to dismiss the case. Several other states have enacted similar expert affidavit requirements in medical malpractice cases as a condition for adjudicating the litigation at the threshold.

Berk was aware of the Delaware medical expert affidavit requirement and requested an extension of time to comply, which the court granted. Del. Code. Ann. tit. 18, § 6853 (a)(2). For five months, Berk unsuccessfully attempted to provide the required affidavit, but none of the medical providers he approached, including Dr. Raikin, agreed to swear such an affidavit. Because he could not obtain the needed affidavit, in January 2023 Berk instead filed his medical records under seal with printed copies of Dr. Riakin's and another physician's CVs. He asserted that these documents complied with Delaware's medical expert affidavit requirement.

The defendants then sought an *in camera* review of Berk's sealed filings to ascertain whether the documents complied with Delaware law. In response, and to avoid an *in camera* review, Berk argued that Delaware's state affidavit of merit did not apply in federal court diversity actions. Berk subsequently attempted to amend his complaint to state claims for assault and battery, which did not require an affidavit, but because the statute of limitations had run Berk withdrew these claims.

In April 2023, in an unpublished opinion, the Delaware federal district court dismissed Berk's claims concluding that Third Circuit precedents required the district to apply the Delaware state law. The court determined that the medical records and printouts of the physicians' CVs did not comply with the Delaware expert affidavit-of-merit requirement. The district court further determined that the Delaware law was substantive, and therefore *Erie* doctrine required the court to apply the Delaware statute and dismiss the case.

The Third Circuit, in an unpublished opinion, upheld the district court's dismissal of Berk's lawsuit. The court relied on its prior decisions holding that similar state affidavit-of-merit laws apply in federal court. The Third Circuit ruled that the Delaware district court properly dismissed Berk's complaint for his failure to include an affidavit of merit.

The Third Circuit, viewing the issue as an *Erie* doctrine problem, conducted an *Erie* analysis to reach its conclusion. The court first addressed whether the Delaware state law conflicted with a Federal Rule of Civil Procedure. The court held that the Delaware statute did not conflict with Federal Rules 8 or 9 because the affidavit requirement was not a pleading and served another purpose. The court concluded that the Delaware statute did not conflict with Federal Rule 11, because the affidavit

requirement was addressed to experts, and not attorneys. The two rules had different spheres of coverage and did not conflict. Similarly, the court held that the Delaware law did not conflict with Rule 12, addressing the sufficiency of complaints, a rule which served an entirely different purpose than the affidavit requirement.

Finding no conflict with the Federal Rules, the court next evaluated whether the state law was outcome determinative and the failure to apply state law would frustrate *Erie*'s twin aims: discouraging forum shopping and the inequitable administration of law. The court held that the Delaware statute was both outcome determinative and would encourage plaintiffs to forum shop their cases to federal court. This forum shopping in nonmeritorious malpractice cases would force defendants to engage in additional costly litigation.

In footnotes, the Third Circuit declined to acknowledge that the *Erie* analytical framework the Supreme Court set forth in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* would require a different result. 559 U.S. 393 (2010).

Case Analysis

As every first-year law student memorably learns, the problem of ascertaining applicable law in federal court is a somewhat complicated problem since the congressional enactment of the Federal Rules of Civil Procedure in 1938, the same year the Supreme Court decided the landmark case *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Since then, federal courts determine applicable law through analysis and application of *Erie* doctrine rules and principles.

In general, if a plaintiff files a lawsuit invoking the federal court's federal question jurisdiction, then the court will apply the federal substantive law, such as the Constitution or a federal statute, that provides the court's subject matter jurisdiction. The choice-of-law problem, however, is more complicated when a plaintiff files litigation invoking the court's diversity jurisdiction, as Berk did in this case. A federal court has proper diversity jurisdiction if the parties are citizens of different states (or countries). Diversity cases, then, typically are based on state law claims, and therefore the problem arises concerning what state law applies—if any—in diversity-based litigation.

Erie doctrine provides four general analytical frameworks to determine the applicable law in federal diversity litigation. First, basic *Erie* doctrine initially asks whether the underlying state law is substantive or procedural. If the

underlying state law involves substantive state statutory or judge-made common law, then *Erie* doctrine instructs that the federal court apply the state substantive law. *Erie* doctrine is further grounded in its twin aims, to avoid forum shopping and the inequitable administration of the laws. The *Erie* case itself involved this type of an applicable law problem, requiring the Pennsylvania federal court to apply the Pennsylvania substantive common law regarding Erie Railroad's liability for the plaintiff's injuries.

After *Erie*, federal courts struggled to determine how to characterize state law as substantive or procedural. In a series of landmark cases, the Court offered guidance to conduct this inquiry. Shortly after *Erie*, the Court in *Guaranty Trust Co. v. York* issued a clarifying decision distinguishing between substantive and procedural state laws. 326 U.S. 99 (1945). In determining the nature of a state statute of limitations, the Court set forth the "outcome determination test," which broadly asks whether, in applying the state rule, the case would come out differently if litigated in federal court. If the outcome would be different and invite plaintiffs' forum shopping, then the statute is substantive, and the federal court must apply the state law.

The Court announced a third *Erie* paradigm in cases where an important federal interest, such as a constitutional amendment, conflicted with an underlying state law or state policy. In *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, the Court detailed its "Byrd balancing test," which requires courts to balance whether application of federal law would intrude on the state's ability to regulate a legitimate state interest. 356 U.S. 525 (1958). In *Byrd*, the Court determined that the Seventh Amendment right to a jury trial favored federal application of the constitutional amendment and not a competing state jury policy.

The Court set out a fourth *Erie* paradigm when a state procedural rule conflicts with a Federal Rule of Civil Procedure, known as a *Hanna* problem. *Hanna v. Plumer*, 380 U.S. 460 (1965). Generally, if a state rule of procedure conflicts with a Federal Rule of Civil Procedure, the federal court must apply the federal rule. Only if the federal rules and the state provision do not answer the same questions will courts delve further into a complex *Erie* analysis.

Hence, the analytical point of departure for a *Hanna* analysis is to ask whether the federal and state procedural rules conflict. *Hanna* conflicts further implicate the federal judiciary's procedural rulemaking authority under the

Rules Enabling Act, 28 U.S.C. §§ 2071, 2072. The federal judiciary has the right to promulgate rules of procedure for the federal courts so long as they do not enlarge, abridge, or modify substantive rights. 28 U.S.C. § 2072(b).

Federal rules are presumptively valid, and the Supreme Court has never held a Federal Rule to violate the Rules Enabling Act. The rationale requiring federal courts to apply federal procedural rules is because the federal judiciary has a legitimate interest in establishing and maintaining a uniform system of procedural rules within the federal court system. All the parties in Berk's litigation understood the applicable law issue presented a *Hanna* problem. They disagreed, however, with how a *Hanna*–*Erie* analysis applied to resolve their dispute over the Delaware state law.

Berk's appeal also implicates the Court's most recent 2010 *Erie* doctrine pronouncements in *Shady Grove*. In that litigation, Shady Grove sued Allstate in a class action in New York federal district court to recover unpaid statutory interest. New York State law prohibited plaintiffs from using the class-action procedure to recover a penalty. The district court dismissed the litigation and the Second Circuit affirmed, holding that there was no conflict between the New York class-action statute and Federal Rule of Civil Procedure 23.

The *Shady Grove* litigation resulted in a fractured array of confusing majority, plurality, concurring, and dissenting opinions. Justice Antonin Scalia authored the Court's plurality opinion overturning the Second Circuit decision. The plurality concluded that the New York class-action provision did not preclude a federal court in its diversity jurisdiction from adjudicating the action under Federal Rule 23. In construing the *Hanna* conflicts test, the Court rejected the argument that the New York statute and Rule 23 addressed different questions and therefore conflicted. Instead, the plurality concluded that both provisions addressed the same question: whether a class action could be maintained. Rule 23 explicitly empowered federal courts to permit a class action if the criteria for a class action were satisfied.

Four justices wrote separately to indicate that the facts presented a Rules Enabling Act problem under Section 2072(b) and Rule 23 satisfied the criterion as a purely procedural mechanism. Though a rule may incidentally affect a party's rights, it is valid so long as it regulated only the process for enforcing those rights, and not the rights themselves.

On appeal, Berk argues that his litigation requires a straightforward application of *Shady Grove*'s *Hanna* approach, compelling reversal of the Third Circuit's decision. The Court should stick to its plain-meaning approach in *Shady Grove* to procedural conflicts because this respects the purposes behind the federal rules while respecting state prerogatives to determine substantive law that applies in diversity cases.

Berk suggests that *Shady Grove*'s interpretation of the *Hanna* test embraced two fundamental propositions: that a federal court sitting in diversity jurisdiction should not apply a state statute or rule if (1) the Federal Rule answers the same question as the federal provision, and (2) whether the Federal Rule is within the statutory authorization of Congress's rulemaking power. Berk suggests that if these two conditions are met, the Federal Rule applies, and the Court is well-advised not to “wade into *Erie*'s murky waters unless the federal rule is inapplicable or invalid.”

Berk argues that several Federal Rules answer the same question as the Delaware statute, and Congress enacted these federal rules under congressional authority. The Federal Rules and the Delaware statute answer the same questions and therefore conflict, requiring application of the federal rules. Berk maintains that Federal Rules 8 and 9, which govern federal pleading matters, answer the same question as the Delaware statute, which also imposes a pleading requirement. The Delaware statute imposes a pleading requirement not found in the federal pleading rules but is more onerous than federal pleading requirements. Furthermore, the Delaware law goes beyond pleading requirements and imposes expert witness verification, under threat or dismissal, which verification is not found in Federal Rules 3, 11, 12, 26, and 37.

Because the Delaware law attempts to answer the same question as these federal rules, the Delaware rule does not apply unless the federal rules are invalid. Berk argues that the Federal Rules fall squarely within the Congress's statutory rulemaking authority. Quoting *Shady Grove*, Berk cites: “What matters” in determining a Federal Rule's validity “is what the rule itself regulates: If it governs only the manner and means by which the litigant's rights are enforced, it is valid; if it alters the rules of decision by which the court adjudicates those right, it is not.”

Berk contends that the Third Circuit erred in its *Erie* analysis “from start to finish,” finding no conflict between the Delaware statute and the federal rules. The Third

Circuit went astray in failing to identify the question the federal rules seek to answer; it never asked the threshold question under *Shady Grove*: whether the Delaware statute and the federal rules answer the same question. Summarizing Federal Rules 8, 9, 11, and 12, Berk argues that the Delaware statute attempts to answer the same questions, leading to a conflict between the federal and state rules. According to Berk, the Third Circuit failed to find a conflict because it did not begin its *Erie* analysis by asking these questions.

The Third Circuit further erred, Berk claims, after finding no procedural conflict but instead waded into *Erie*'s murky waters to hold that the Delaware statute was the kind of substantive law that federal courts must apply. Berk contends the Third Circuit wrongly concluded that the Delaware law was substantive, countering that it clearly is not. Berk maintains that Delaware's affidavit-of-merit statute is procedural "from tip to tail," and exactly the type of procedural statute that does not apply in federal courts after *Erie*.

Berk endorses the Court's bright-line, plain-meaning approach to applicable law problems in *Shady Grove*. That approach protects the uniformity of federal procedure providing that when federal rules speak to an issue they apply. The *Shady Grove* approach enhances efficiency and predictability, avoids wasteful litigation, and protects federalism: it allows state courts to fashion their own procedural rules "without compelling federal courts to shoehorn arcane and incompatible procedures into the federal system and mangle state procedures in the process."

The respondent, Choy, counters that the Third Circuit inaccurately applied the *Hanna* test to reach the wrong conclusion that disallowed application of the Delaware statute. Choy contends that the Third Circuit misread *Shady Grove* to recognize a conflict and apply a Federal Rule simply whenever a Federal Rule *overlaps* with a state law.

Instead, the respondent argues that the *Hanna* test is more demanding, and a Federal Rule must be so broad as to cause a *direct* collision with a state law, leaving no room for the operation of state law. The first step of a *Hanna* analysis, then, requires that a state law conflict with a Federal Rule only if the conflict is direct, obvious, undeniable, and unavoidable. At the outset, the respondent points out that Rule 11 provides that a federal pleading does not need to be accompanied by an affidavit, "[u]nless a rule or statute specifically states otherwise." The language of Rule 11, excepting rules or statutes that do

require affidavit, clearly indicates that there is no direct conflict between the state and federal pleading rule.

The respondent contends that a proper *Hanna* analysis requires two steps. First, the federal court must ascertain whether the state and federal rules directly conflict. If the state rule does not directly conflict with a federal rule, then *Hanna*'s second step asks whether the application of the state rule in federal court advances underlying *Erie* principles. The respondent argues that Delaware's affidavit-of-merit statute satisfies both steps of *Hanna* analysis: there is no direct conflict with the federal rules, and applying the Delaware statute furthers the twin aims of *Erie* doctrine.

The respondent's brief devotes extensive discussion demonstrating why the Delaware statute does not directly conflict with Federal Rules 3, 4, 8, 9, 11, 12, 26, and 37, as required by the first step of a *Hanna* analysis. This discussion comports with the Third Circuit's same analysis and conclusions in its decision requiring application of the Delaware statute and dismissal of Berk's lawsuit. The respondent disputes the petitioner's attempts to suggest that the Delaware statute overlaps with these federal rules. Instead, the respondent suggests that this argument is unavailing; that merely overlapping with the concerns of these federal rules does not rise to the level of a direct conflict like the conflicting class-action provisions in *Shady Grove*.

Moreover, the respondent maintains that *Erie* doctrine compels the application of Delaware's affidavit-of-merit requirement in federal court. The state requirement is outcome determinative because state law mandates dismissal of a medical malpractice lawsuit in absence of the required affidavit. The state affidavit-of-merit law therefore is substantive law that the federal court must apply. To exempt a plaintiff from this requirement by merely filing a federal diversity action would encourage plaintiffs' forum shopping to avoid the requirement, leading to inequitable administration of the law. Furthermore, no federal interest favors discarding the state requirement in diversity cases.

Alternatively, the respondent argues that adopting Berk's expansive view of the Federal Rules would violate the Rules Enabling Act, which prohibits the Federal Rules from being interpreted or applied to abridge, enlarge, or modify any substantive right. If the federal court failed to apply and enforce Delaware's affidavit-of-merit requirement, this would enlarge a plaintiff's right to

pursue a medical malpractice lawsuit under Delaware law, in violation of the Rule Enabling Act. It would eliminate a state-law requirement, limit a state-law defense, while enlarging a state-law claim.

The respondent centrally attacks the petitioner's reading of *Shady Grove*, claiming that its reading of that decision is inaccurate: "Neither the *Shady Grove* majority, nor the plurality, nor the concurrence (not, for that matter, the dissent), signaled a departure from the 'familiar' *Hanna* framework and its 'direct collision' test, which has governed cases like this one for decades." Thus, "After *Shady Grove*, the goal of *Hanna* remains the same: ensure uniform procedures for federal litigation, while interpreting the Federal Rules to provide some room for state law to operate in federal court absent a direct, unavoidable collision."

The respondent Beebe Medical Center, Inc. sets forth the same arguments that Dr. Choy advances to the Court, beginning with the proposition that there is no direct conflict between Delaware's affidavit requirement and any Federal Rule. Beebe reiterates the point that Rule 11 provides that a federal pleading does not need to be accompanied by an affidavit, "[u]nless a rule or statute specifically states otherwise." For this reason alone, there is no conflict. Like Dr. Choy, Beebe marches through Federal Rules 3, 8, 9, 11, 12, 26, and 37 and concludes that there are no conflicts between those seven federal rules and the Delaware statute.

Beebe argues that if Berk wishes to recover under Delaware law, then he must take Delaware substantive law as he finds it, including the state's evidentiary requirement of an affidavit of merit. A sovereign state's legislative balance that aims to protect the financial health of its hospitals and the physical health of its citizens warrants the respect of federal courts sitting in diversity jurisdiction. Delaware's legislative response to the rising costs of medical malpractice insurance is not a mere idiosyncratic procedural preference. It is substantive law. The state law does not conflict with any Federal Rule and is binding on federal courts under *Erie*'s Rules of Decision Act jurisprudence.

Like Dr. Choy's arguments to the Court, Beebe contends that the petitioner distorted the Court's test for conflicts between federal rules and state laws. Beebe asserts that *Shady Grove* applied and did not abandon *Hanna*'s direct-collision test. Beebe points out that the petitioner describes the conflicts test at such a high level of generality

that a capable litigant will always be able to point to a conflict. In addition, Beebe suggests that interpreting the rules in a way to find a conflict would result in a violation of the Rules Enabling Act. There is little question that, under *Erie*, the Delaware statute is outcome determinative and hence substantive law. Applying a federal rule to disrupt the balance that the Delaware legislature enacted would abridge, enlarge, and modify substantive rights.

Significance

Since the Court's *Erie* decision in 1938, the federal courts have struggled, in case after case, to determine whether state rules, regulations, or policies constitute substantive or procedural law and what tests courts may use to make this determination. The Court has continued to provide evermore layers of doctrinal analysis, and these cases have rightly earned the label of *Erie*'s murky waters. The Court's less than pellucid explication of *Erie* doctrine in *Shady Grove* has compounded the complexity of ascertaining applicable law in federal diversity cases. Thus, Berk's appeal practically invites the Court to reconsider or to clarify its *Shady Grove* decision because the parties contend that each has misconstrued and misapplied the Court's teaching in *Shady Grove*.

This criticism is not unfair because the *Shady Grove* decision presented a confusing array of separate opinions staking out different *Erie* theories. What the Court actually decided in *Shady Grove* has been an object of academic and legal contention since the Court handed it down in 2010. Justice Scalia was able to command a five-justice majority for the proposition that the New York and federal class-action rules attempted to answer the same question, a broad proposition endorsed by the petitioner Berk. Courts and some scholars have interpreted Justice Scalia's opinion to mean that even an arguably procedural federal rule must always trump a conflicting state law. Critics have argued that this approach renders Section 2071(a) of the Rules Enabling Act superfluous.

Justice John Paul Stevens declined to join the part of Justice Scalia's opinion discussing the role of the Rules Enabling Act, so that portion of Justice Scalia's opinion represented only a plurality view. Justice Stevens wrote a separately concurring opinion to stake out a different view of the Rule Enabling Act requirement. Four justices dissented, concluding that the New York state and federal class-action rules did not conflict, arguing that state rules ought to be interpreted with sensitivity to important state interests. There is enough conflicting *Erie* analysis

in *Shady Grove* to support both the petitioner’s and respondents’ arguments to the Court.

If the Court embraces Justice Scalia’s expansive view of conflicts in his *Shady Grove* opinion, this approach will allow other federal courts to decline to apply states’ similar affidavit requirements, as pointed out in the joint state amici brief. Several medical health and insurance entities have filed amici briefs requesting that the Court not overrule the Third Circuit’s decision because this would encourage the proliferation of frivolous medical malpractice litigation in federal courts. The Court may well be more receptive to the Rules Enabling Act problem and the argument that federal courts must be sensitive to important state interests and not undermine the state legislative public policy judgments enacted into law.

ATTORNEYS FOR THE PARTIES

For Petitioner Harold R. Berk (R. Stanton Jones, Andrew T. Tutt, 202.942.5000)

For Respondent Wilson C. Choy (Michael L. O’Donnell, Frederick R. Yarger, 303.638.1131)

For Respondent Beebe Medical Center, Inc. (Sarah E. Harrington, 202.662.6000)

AMICUS BRIEFS

In Support of Petitioner Harold R. Berk

American Association for Justice (Robert S. Peck, 202.944.2874)

Civil Procedure Professors (Alan B. Morrison, 202.994.7120)

Honorables Mark W. Bennett and Royal Ferguson (D. Chanslor Gallenstein, 202.326.7900)

Public Justice (John J. Korzen, 336.758.5832)

In Support of Respondents Wilson C. Choy and Beebe Medical Center, Inc.

American Hospital Association (Colleen E. Roh Sinzdak, 202.835.7500)

American Medical Association, Medical Society of Delaware, Medical Society of New Jersey, and Pennsylvania Medical Society (Jack R. Bierig, 312.258.5500)

DRI Center for Law and Public Policy (Hillary A. Taylor, 503.222.9955)

Insurance Companies, Trade Associations, and Non-Profit Organizations with an Interest in Preserving Access to Quality, Affordable Health Care (Kendra N. Beckwith, 303.623.9000)

Professor Michael T. Morley (Richard A. Simpson, 202.719.7000)

Tennessee and 26 Other States (J. Matthew Rice, 615.532.6026)

Linda S. Mullenix holds the Morris & Rita Atlas Chair in Advocacy at the University of Texas School of Law. She is the author of *Outgunned No More: The New Era of Firearms Industry Accountability* (Cambridge University Press 2025) and *Public Nuisance: The New Mass Tort Frontier* (Cambridge University Press 2024). She may be reached at lmullenix@law.utexas.edu.

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