MODEL ANSWER TO SAMPLE ERIE QUESTION

Is the Illinois statue in "direct conflict" with either Rule 17(b) or Rule 13(a)? If it is, the court must apply the "*Hanna*/REA line" of cases. If not, the "*Erie*/RDA" analysis applies. To determine whether there is a conflict, we must examine the purpose and scope of the statute and also of the two rules.

The statute is part of an Illinois' licensing scheme to protect the public from dishonest and incompetent contractors. It provides a sanction for out-of-state contractors who do business without first obtaining a license. Wesley can argue that the statute gives him an immunity from suit from Cranmer, which would be a substantive right. But the words "in any court *of this state*" imply that there is no such immunity/right; Cranmer might be able to sue Wesley in the courts of *another* state or, arguably, a federal court in Illinois, which is a court "of" the United States, not Illinois. Under this interpretation, the statute is not defining the elements of any particular claim or defense, nor is it providing a special procedure for any particular contract claim involving construction contracts which could be said to be "bound up" with that claim. Instead, Illinois is trying to achieve substantive ends (regulation of contractors) through a procedural means ("closing the doors to the courts") which applies to all cases. Under either interpretation, though, there's no question that the state of Illinois has a substantial substantive interest in having the statute applied here.

Rule 17(b) refers to Ohio law to determine that Cranmer has the capacity to sue or be sued as if it were a real person. Cranmer can argue that the state statute conflicts with Rule 17(b) by taking away Cranmer's capacity to sue in Illinois. But Wesley can counter that the rule and statute address different problems. The statute does not take away Cranmer's *general* capacity to sue/be sued. Indeed, Cranmer is being sued in this very case. It just provides that Cranmer can't pursue *this specific claim* in Illinois courts, as a penalty for starting the work on Wesley's warehouse without a license. It does not even prevent Cranmer from bringing claims in Illinois courts arising from other Illinois contracting jobs, so long as Cranmer obtained the required license before starting *those* jobs.

Rule 13(a) could also be read not to apply here, especially if we read the statute as depriving Cranmer of its claim against Wesley; Cranmer can't assert a counterclaim that it doesn't have. But if we rely on the "in the courts of this state" language, Cranmer may still have its claim against Wesley, so long as it asserts it in another state (or, arguably, in a court of the U.S.). If so, this would frustrate the policy behind Rule 13(a), which is to eliminate the need for two cases from the same transaction. Usually, the failure to assert a counterclaim required by Rule 13(a) precludes that claim in a future suit ("rule preclusion"), except where the party was not permitted to file the counterclaim, reasoning that it would be unfair to penalize a litigant for something beyond its control. So Cranmer might well be able to take advantage of this exception to rule preclusion to assert its claim against Wesley in a future case. Looking at it this way, it's harder for a federal judge to say that there isn't a conflict between the Rule 13(a) and the Illinois statute. But the court might still avoid the conflict by holding that Cranmer should not be allowed to

avoid rule preclusion, since it was Cranmer's fault that the state statute precluded its counterclaim.

So the judge has some leeway to read the two FRCPs not to conflict with the Illinois statute. But she also has reasonable grounds to find that one or both of the FRCPs, especially Rule 13(a), do conflict with the statute. *Gasperini* suggests in footnotes that a federal judge should try to read the federal and states provisions "sensitively" to avoid a conflict in cases where, as here, application of an FRCP would frustrate a state's substantive policies. But other decisions (e.g., the *Walker* footnote) have suggested that the rules be given their "plain meaning," regardless of the effect on state interests.

If neither FRCP is read to conflict with the state statute, the *Erie*/RDA cases probably require that the statute be applied and Cranmer's counterclaim dismissed. First, if we read the statute to give Wesley an immunity from Cranmer's contract claim, it's as substantive as the duty of care issue in *Erie* itself and has to be applied. Even if the statute doesn't give such a right, which it probably doesn't, the state still has a strong substantive interest in having it applied here. If contractors can evade the license requirement by suing in federal court, the state's regulatory scheme could be frustrated.

Second, applying the "modified outcome determinative" analysis of the *Hanna* dictum, if federal courts don't apply the statute in cases like this, non-licensed contractors from outside the state probably will forum shop to avoid the statute, and the result may well be the inequitable application of the laws. Local contractors have to submit to the licensing provisions, while out-of-state ones might escape this duty by litigating in federal court. Illinois residents doing business with local contractors will receive the protections of the licensing scheme, while those dealing with out-of-state firms may not.

Third, there is no strong countervailing judge-made procedural interest in not following the Illinois statute in federal court. The most one could argue is that the state should not be able to block access to federal courts as a procedural means to its substantive means. But it's hard to see how this harms federal courts, and the policies behind the *Erie*/RDA decisions, to support state regulation and provide uniform application of state law within the state, are also important federal policies.

But if either of the two FRCPs is read to conflict with the Illinois statute, the *Hanna*/REA line of case probably dictates that the Illinois statute *not* be applied here. *Hanna* strongly held that an FRCP must be applied, even if it frustrates state substantive policies and promotes forum shopping, etc., so long as Congress could constitutionally authorize the rule and actually did so in the REA. Both rules obviously are at least "arguably procedural" and thus constitutional per *Hanna*'s test.

The harder question is whether reading either rule to "trump" the Illinois statue would abridge Wesley's alleged substantive right under the statute, and thus violate Section (b) of the REA. If he has such a right, applying either rule to permit the counterclaim would abridge it. But as we've seen above, the statute probably doesn't give

Wesley a substantive legal right not to be sued for contract damages by Cranmer. Under that reading, either FRCP could be applied to permit Cranmer's counterclaim without violating the REA, and therefore the counterclaim must be allowed. *Hanna* makes clear that that the definition of "substantive" rights under the REA is very narrow; nothing less than an actual substantive legal right, i.e., a specific claim or defense or, at most, a special procedure "bound up" with a specific claim or defense, counts. *Hanna* also teaches that there is a very strong presumption that all the FRCPs are valid. So if the Illinois statute does not give Wesley a legal immunity to Cranmer's contract claims, either FRCP could preempt it in federal court without violating Section (b) of the REA. On the other hand, if the Illinois statute does provide Wesley with an immunity to suit (unlikely), then reading either FRCP to take that immunity away would probably violate Section (b) of the REA.