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Berk v. Choy: What the Supreme Court's Ruling Means for Medical Malpractice Litigation

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The United States Supreme Court recently resolved a split among federal circuits over the applicability of state "affidavit of merit" requirements in health care liability actions in federal court involving citizens of different states. Such lawsuits, which are usually litigated in state court, can raise complex issues over whether state court laws containing both "procedural" and "substantive" provisions will be applicable in federal court.

Affidavits of merit (in Tennessee, where the authors primarily practice, the term is "Certificate of Good Faith"), which generally require that a medical professional vouch for the legitimacy of the claims of medical negligence at or near the commencement of the case, are commonplace state law provisions. At present, 28 states have such a requirement.

In *Berk v. Choy*, Case No. 24-440, 607 U.S. ____, (January 20, 2026), the Supreme Court unanimously (Justice Jackson concurred in the result but wrote separately) held that Delaware's affidavit of merit requirement for medical negligence cases does not apply when such cases are filed in federal court based on diversity jurisdiction. The decision significantly impacts how state law requirements overlapping with specific provisions of the Federal Rules of Civil Procedure will be treated and has immediate implications for health care providers, insurers, and counsel practicing in states with similar screening mechanisms.

Background

Harold Berk sued his physician and hospital in federal district court in Delaware for medical negligence. Delaware law requires plaintiffs in such actions to file an affidavit from a medical professional attesting to the merit of the claim alongside the complaint.

Berk failed to submit the required affidavit with his case filing. The defendants moved to dismiss, arguing Berk had not complied with Delaware's statutory requirement. The district court dismissed the case, and the Third Circuit Court of Appeals affirmed, concluding that the Federal Rules of Civil Procedure, which are given binding authority under federal legislation, are "silent" on the issue of whether complaints must be "accompanied" by other filings such as an affidavit or merit. Delaware's law, on the other hand, was "substantive" (meaning, in short, outcome determinative) and was therefore applicable in federal diversity cases under the complex series of jurisdictional cases and principles first enunciated in *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938).

The Supreme Court's Decision

The Supreme Court reversed, holding that Federal Rule of Civil Procedure 8 directly conflicts with Delaware's affidavit requirement and therefore displaces it.

The Court, in an opinion authored by Justice Barrett, noted that Rule 8, "reinforced" by Rule 12, prescribes what information a plaintiff must present about the merits of a claim at the outset of the case: "a short and plain statement of the claim showing that [the plaintiff] is entitled to relief." By requiring no more than this statement, Rule 8 establishes – "implicitly, but with unmistakable clarity" – that "evidence" or any separate form of required filing along with the complaint, runs afoul of the rule and will not be enforced in federal court.

The key inquiry, according to the Court, was whether one or more Federal Rules "answers the question in dispute." The Court concluded that, in this case, Rule 8's provisions did.

Practical Implications

For Health Care Providers and Insurers:

1. Loss of Screening Mechanism: Medical malpractice defendants can no longer rely on state affidavit-of-merit requirements to screen out cases filed in federal court. This may result in more federal filings and increased early litigation costs.

2. Forum Shopping Concerns: Plaintiffs unable to secure expert affidavits under state law may increasingly choose federal court to avoid this hurdle, particularly where diversity jurisdiction exists.

3. Discovery Exposure: Without the affidavit requirement serving as a gatekeeping function, defendants may face broader discovery obligations in federal court before plaintiffs must demonstrate expert support.

Potential Limitations of Ruling

Some states, such as Tennessee, impose additional requirements on claimants seeking to pursue health care liability claims based on the negligence of one or more providers. In Tennessee, for example, T.C.A. § 29-26-121 sets forth detailed requirements for "pre-suit notice" of a claim, including an obligation to identify potential defendants and serve them with information including Health Insurance Portability and Accountability Act (HIPAA) compliant medical authorizations permitting all such providers to obtain copies of records potentially relevant to the claim, with the party "mailing the notice" or the person completing personal service of it providing an affidavit confirming the service of the notice.

In Tennessee, a health care liability complaint must be accompanied by "documentation" that the highly technical requirements of the statute have been satisfied – which includes the affidavit establishing service of the notice. In addition, the "pleadings shall state" whether or not the requirements have been met. The court is given a role in determining whether "additional evidence" of compliance may be necessary and whether "extraordinary cause" exists to justify noncompliance. Courts routinely dismiss state court actions where such pre-suit notice requirements have not been satisfied.

What is to become of such pre-suit requirements? In several circuits, similar pre-suit notice provisions were stricken in federal court diversity actions along with affidavits of merit requirements. *See generally* cases listed in *Albright v. Christensen,* 24 F.4th 1039, 1046-1047 (6th Cir. 2022); *Smith v. CoreCivic Inc.,* 618 F. Supp. 4th 695, 704 (M.D. Tenn. 2022). In the Sixth Circuit, where the undersigned authors practice, these cases provide plaintiffs with a strong basis for asserting that it is no longer necessary to comply with those requirements for federal court diversity jurisdiction lawsuits. *See, e.g. Galaz v. Warren Cnty., Tennessee*, No. 4:22-CV-50-DCLC-SKL, 2023 WL 2801178, at *3 (E.D. Tenn. Apr. 5, 2023) (denying motion to dismiss for failure to file a certificate of good faith because the "Sixth Circuit has now ruled that obedience to the enhanced, state-law pleading procedures for medical malpractice is not required in federal court"); *Gallivan v. United States*, 943 F.3d 291, 293–95 (6th Cir. 2019) (holding that Ohio's affidavit-of-merit requirement is inapplicable in federal court because it conflicts with Rules 8, 9, and 12).

But in the words of the legendary College Game Day host Lee Corso, "Not so fast, my friends." There is Federal Rule of Civil Procedure 11 to consider. "Tucked away" in that Rule, the majority opinion in *Berk* notes, is a provision stating that "[u]nless a rule of statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit." Responding to defendants' argument that the Delaware affidavit requirement is an example of a "statute specifically stat[ing] otherwise," Justice Barrett noted that "Rule 11

governs the conduct of those who practice before courts…The sentence has nothing to do with affidavits from third parties." This observation, arguably dicta, appears to implicitly acknowledge an important predicate to the *Berk* defendants' assertion, which the majority opinion said constituted the "bulk" of their argument, that under some circumstances a state law requirement of an affidavit being filed with a complaint does not conflict with the Federal Rules. The *Berk* Court simply pointed out that the nature of the affidavit was different because Rule 11 did not contemplate an affidavit of "a third party."

The Sixth Circuit in *Albright,* which is the currently governing standard in this circuit, also confronted the Rule 11 argument from defendants but resolved it by holding that the Rule references federal, not state statutes. "We acknowledge that Rule 11 states a pleading need not contain a verification '[u]nless a rule of statute specifically states otherwise.' The rule's reference to other rules or statutes, however, means other **federal** rules or statutes." (citing to caselaw, emphasis in original). 24 F.4th 1039, 1045, n. 2.

While certain aspects of Tennessee's pre-suit notice statute appear to run afoul of the *Berk* holding, specifically the requirement of compliance with the notice being specifically referenced in the "pleadings," will this also apply to the "documentation" the statute requires to "accompany" the complaint, specifically the affidavit of the "party mailing the notice" or person confirming personal service? Would this be considered to be the kind of filing that would be considered to fall under Rule 11 because affidavits of an "attorney or party" (or on their behalf) certifying compliance with pre-suit notice requirements may be an enforceable part of a filing requirement, even in federal court? And if so, does that open up permissible inquiry into whether in fact pre-suit notice requirements have been met, on pain of dismissal, since the affidavit implicitly certifies compliance with the statute?

That issue is likely to be tested if and when a plaintiff, in Tennessee at least, chooses to assume that all pre-suit requirements associated with state law health care liability actions are no longer applicable in federal court.

Broader Significance

Berk v. Choy reinforces the Supreme Court's consistent approach to conflicts between state law and the Federal Rules of Civil Procedure. When a valid Federal Rule directly addresses the same question as state law, the Federal Rule governs, regardless of how important or substantive the state's policy objectives may be. The Court has never invalidated a Federal Rule under the Rules Enabling Act, and this decision continues that unbroken streak.

The decision also demonstrates the limits of *Erie* doctrine. While federal courts sitting in diversity must apply state substantive law, the Federal Rules occupy their own domain. States, with the possible exception of the kinds of affidavit or certification requirements contemplated under Rule 11, cannot use procedural requirements, even those with substantive policy goals like reducing frivolous litigation, to alter federal practice in diversity cases

If you have questions about how *Berk v. Choy* affects your current or anticipated litigation, or if you would like to discuss litigation strategy in light of this ruling, please contact any of the undersigned attorneys, your relationship partner, or any member of our Health Care Litigation practice group.