



## AN 'ERIE' CHOICE-OF-LAW RULING FOR MEDICAL MALPRACTICE DEFENDANTS: U.S. SUPREME COURT REJECTS STATE AFFIDAVIT OF MERIT LAWS IN FAVOR OF FEDERAL PLEADING REQUIREMENTS

When healthcare providers are sued for medical negligence in federal court, an affidavit of merit is likely no longer required for the case to survive the pleading stage. This is because of the United States Supreme Court's recent decision in *Berk v. Choy*, answering the long asked – and unevenly applied – question of whether state affidavit of merit laws, or the Federal Rules of Civil Procedure, set the bar for medical negligence pleading requirements.

Twenty-eight U.S. states, including [Missouri](#) and [Illinois](#), have enacted statutes requiring a plaintiff to file an affidavit of merit (also known as a certificate of merit) in medical malpractice lawsuits. These laws require a qualified medical expert to review the case and attest that it has a legitimate basis, essentially screening cases at the pleading stage.

The federal circuit courts have long grappled with whether these state laws apply in federal court and whether they, or the Federal Rules, prevail when there is a conflict. Both the Eighth Circuit, encompassing Missouri, and the Seventh Circuit, encompassing Illinois, have routinely held that affidavit of merit statutes are substantive state law and apply in federal court. However, in *Berk*, the Court settled the split, holding that Federal Rule 8 directly conflicts with Delaware's affidavit requirement and therefore displaces it.

In *Berk*, the plaintiff fractured his ankle while visiting Delaware and filed a medical malpractice suit in federal court against three healthcare providers alleging negligent medical treatment. Delaware law requires an expert affidavit to be filed with the complaint and orders complaints to be rejected or dismissed if the affidavit is absent. The plaintiff failed to provide an affidavit, and the district court dismissed his case. The Third Circuit affirmed.

However, the Supreme Court unanimously disagreed and reversed. In an opinion authored by Justice Amy Coney Barrett, the Court noted that Delaware's law is at odds with the Federal Rules of Civil Procedure, as the authorities provide differing answers to the question of whether the plaintiff's lawsuit was subject to dismissal because it lacked an expert affidavit. The Court held that the Federal Rules' answer to that question prevails. Specifically, Rule 8, in conjunction with 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 pleader is entitled to relief." This language, the Court reasoned, establishes that evidence of the claim is not required, and Delaware's affidavit requirement does not govern pleading requirements in federal court.

Missouri's affidavit of merit requirement, codified at Section 538.225 of the Missouri Revised Statutes, differs from the Delaware statute in two respects: First, under the Missouri statute, the affidavit is to be filed within 90 days of the complaint's filing, rather than attached to the complaint. Second, and more important for purposes of the *Berk* analysis, Missouri's statute requires the plaintiff or his attorney to state that he or she has obtained the opinion of a qualified healthcare provider rather than requiring a healthcare provider to supply the affidavit. In *Berk*, the Court noted that Rule 11, which states that a pleading need not be accompanied by an affidavit "[u]nless a rule or statute

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specifically states otherwise,” may incorporate other state affidavit laws, though not Delaware’s. Even so, given how broadly the *Berk* opinion was written, it is more likely that this fact would not change the Court’s view that the Federal Rules overcome state affidavit of merit laws in setting pleading standards.

The practical effect of the *Berk* opinion is that medical malpractice defendants can no longer rely on state affidavit-of-merit laws to screen federal cases at the pleading stage. Furthermore, this may encourage plaintiffs to choose federal court over state court, provided that they can meet the requirements of federal subject matter jurisdiction.

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*This summary and legal alert is an overview of a recent U.S. Supreme Court decision impacting the health care industry. It is not intended to be, and should not be construed as, legal advice for a specific factual situation. Please feel free to reach out to one of our firm’s Health Care Advisory or Medical Malpractice attorneys should you have questions concerning this case or any other health care matters.*

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