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Berk v. Choy and the Federal Forum Question

By Michele H. Dinterman

“In every professional liability case where diversity jurisdiction is available, counsel must assess whether forfeiting state-court screening mechanisms is worth the other advantages federal court may offer.”

A Strategic Guide for Professional Liability Defense

The Supreme Court’s January 20, 2026 decision in *Berk v. Choy*, 607 U.S. 187 (2026), has drawn considerable attention for what it does: it renders state affidavit of merit and certificate of merit requirements unenforceable in federal court when they conflict with the Federal Rules of Civil Procedure. For defense counsel representing licensed professionals across a wide range of disciplines (physicians, attorneys, engineers, architects, accountants, and others), the more pressing question is what the decision means for strategy: specifically, whether to remove a case to federal court in the first place.

That question does not have a universal answer. *Berk* recalibrates the removal strategy in ways that demand deliberate, case-by-case analysis, and the implications vary depending on the specific screening requirements the relevant state imposes.

WHAT THE COURT HELD

The case arose from a medical malpractice claim filed in federal court under diversity jurisdiction. The plaintiff, Harold Berk, sued his

physician and hospital in the U.S. District Court for the District of Delaware but failed to file the affidavit of merit that Delaware law requires to accompany any medical malpractice complaint. See Del. Code, Tit. 18, § 6853(a)(1). The district court dismissed the case. The Third Circuit affirmed, reasoning that the Federal Rules of Civil Procedure were “silent” on whether a complaint must be accompanied by additional filings, and that Delaware’s affidavit requirement was substantive enough to apply in federal diversity cases under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The Supreme Court reversed. Writing for eight Justices, Justice Barrett held that Federal Rule of Civil Procedure 8 directly conflicts with, and therefore displaces, Delaware’s affidavit requirement. Rule 8 prescribes what a plaintiff must present at the outset of litigation: “a short and plain statement of the claim showing that [he] is entitled to relief.” Fed. R. Civ. P. 8(a)(2). By requiring no more than that statement, Rule 8 establishes, in the Court’s words, “implicitly, but with unmistakable clarity,” that evidence



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of the claim is not required at the pleading stage. Berk, at 187 (quoting *Hanna v. Plumer*, 380 U.S. 460, 470 (1965)). Rule 12 reinforces this conclusion: it provides only one merits-based ground for dismissal, failure to state a claim under Rule 12(b)(6), and prohibits courts from considering “matters outside the pleadings” in evaluating that motion. *Id.*

The analytical framework is straightforward. A court first asks whether a Federal Rule “answers the question in dispute.” *Id.* at 192 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010)). If it does, the Federal Rule governs regardless of how important or substantive the state’s policy objectives may be, unless the Rule exceeds the authority granted by the Rules Enabling Act. *Id.* The Court has never invalidated a Federal Rule on that basis, and Berk continues that unbroken streak.

Justice Jackson concurred in the judgment but wrote separately to argue that the more natural conflicts were with Rules 3 and 12, rather than Rule 8. The bottom line was unanimous: Delaware’s affidavit requirement does not apply in federal court.

WHY PROFESSIONAL LIABILITY DEFENDANTS SHOULD PAY ATTENTION

Although Berk arose in the medical malpractice context, its reasoning is not limited to health care. The Court’s holding turns on the structure of the Federal Rules, specifically Rule 8’s pleading standard and Rule 12’s dismissal framework, and not on anything unique to medical negligence claims. Any state law that requires a plaintiff to file an expert affidavit, certificate

of merit, or similar documentation alongside or as a precondition to a complaint is vulnerable to the same analysis, regardless of the profession involved.

Certificate of merit and affidavit of merit requirements apply across a broad range of professional liability claims in many states, encompassing not only health care providers but also attorneys, engineers, architects, accountants, and other licensed professionals. These requirements exist precisely to screen out meritless claims before litigation gains momentum. In federal court, after Berk, they are very likely unenforceable.

THE REMOVAL STRATEGY HAS CHANGED

Before Berk, defense counsel could generally assume that state-law screening requirements, including certificate of merit requirements, traveled with a case into federal court. Removal was often pursued for independent strategic reasons (perceived jury pool advantages, federal docket management, familiarity with federal practice), with affidavit requirements assumed to remain intact. That assumption is no longer sound.

After Berk, removal to federal court in a diversity case almost certainly means forfeiting any certificate of merit or affidavit requirement that state law would otherwise impose. This is not a trivial concession. These requirements can be among the most effective early-case defense tools available. They are capable of producing a dismissal before significant discovery costs are incurred and before the defendant has had to engage deeply with the merits.

The decision to remove, or to resist a plaintiff’s original filing in federal court, now requires explicitly weighing two competing considerations:

- Staying in state court preserves certificate of merit and affidavit requirements, maintaining powerful early dismissal tools that can resolve weak claims at minimal cost.
- Removing to federal court sacrifices those screening mechanisms but may offer other strategic advantages: different discovery rules, different jury composition, a federal judge’s management style, or the strategic posture that federal court can provide in complex multi-party disputes.

There is no default right answer. The correct choice depends on the strength of the underlying claim, the realistic prospects of a state-court dismissal on certificate grounds, the anticipated cost of federal discovery, and the specific characteristics of the case and forum.

REGIONAL VARIATION MATTERS

Not every state’s screening

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framework is the same, and that variation is directly relevant to the removal analysis. Some states impose certificate of merit requirements that apply broadly across many licensed professions. Others limit similar requirements to specific contexts, such as medical malpractice, or rely primarily on expert testimony requirements that arise later in litigation rather than at the pleading stage. A handful of states also impose pre-suit notice requirements with their own documentation obligations, whose interaction with Berk remains an open question in some circuits.

The threshold question in any professional liability case is whether the relevant state imposes a filing-stage screening requirement, what form it takes, and how vulnerable it is to Berk challenge in federal court. That analysis is fact-specific and should be conducted at the outset of every case where diversity jurisdiction exists.

THE OPEN QUESTION: PRE-SUIT NOTICE AND ATTORNEY AFFIDAVITS

Berk's reach is not unlimited, and one open question is worth monitoring. The Berk majority noted, in what may be considered dicta, that Rule 11 contains a proviso stating that "[u]nless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit." Fed. R. Civ. P. 11(a). The Court's treatment of this language was careful and narrow: it held that Rule 11's proviso does not incorporate affidavits from third parties, such as the medical expert required under Delaware's law, because Rule 11 "governs the conduct of those who practice before courts," not the submissions of outside experts. Berk at 198.

The majority did not resolve whether an affidavit by the attorney or party, certifying compliance with a pre-suit process for example, might stand on different footing. Some states impose pre-suit requirements that include attorney or party certifications as a condition of filing. Whether those certifications survive Berk is unsettled and is likely to generate litigation in circuits that have not yet addressed it.

PRACTICAL GUIDANCE FOR DEFENSE COUNSEL

The following questions should be part of every early case assessment in a professional liability matter where diversity jurisdiction exists:

- Does the relevant state impose a certificate of merit or affidavit of merit requirement for this category of professional liability claim?
- How strong is the plaintiff's claim, and how realistic is early dismissal on certificate grounds in state court?
- What are the anticipated discovery costs in federal court if early dismissal is unavailable?
- Are there independent strategic reasons (jury composition, case management, multi-party dynamics) that favor federal court regardless of the certificate issue?
- Does the state impose any pre-suit notice or attorney certification requirements that may survive Berk analysis?

These questions do not resolve themselves. They require deliberate attention at the outset of litigation, before removal deadlines run and before the forum choice becomes irreversible.

CONCLUSION

Berk v. Choy is a significant development for professional liability defense across all licensed disciplines. Its holding is clear: state certificate of merit and affidavit requirements do not apply in federal court when they conflict with the Federal Rules of Civil Procedure, and under Rule 8 and Rule 12, that conflict will almost always exist. What is equally clear, though sometimes overlooked, is that this creates a strategic dilemma for defense counsel, not just a procedural windfall for plaintiffs.

Removal to federal court is no longer a decision that can be made reflexively. In every professional liability case where diversity jurisdiction is available, counsel must assess whether forfeiting state-court screening mechanisms is worth the other advantages federal court may offer. Getting that analysis right, early, can make a material difference in how a case resolves.



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