

U.S. Supreme Court to Decide Whether Medical Malpractice Certificate of Merit Requirements Apply in Federal Courts

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More than half of the states in the country, including Pennsylvania, New Jersey, Delaware and New York, have passed laws requiring a plaintiff in a medical malpractice action to include an affidavit or certificate of merit along with their complaint attesting to the fact that, prior to initiating suit, the plaintiff already had an expert who could testify that a deviation from the standard of medical care harmed the plaintiff.

For years, federal courts throughout the country have been split on whether state certificate of merit requirements apply to medical malpractice lawsuits brought or transferred to federal court on the basis of diversity jurisdiction. For the first time, in *Berk v. Choy*, the United States Supreme Court is set to consider whether the certificate of merit requirement is "substantive" in nature, and therefore should apply in federal courts, or whether it is merely "procedural" in nature and does not apply. Although the *Berk* case appears to be positioned to resolve this split, in the event the Supreme Court rules that certificate of merit requirements do not apply in federal court, this will upend years of precedent within the Third Circuit, as well as other circuits, that have consistently applied the requirement in federal courts.

In the underlying case, the Supreme Court is specifically reviewing Delaware's affidavit of merit statute. In *Berk*, both the District Court and the Third Circuit held that dismissal of the underlying medical malpractice lawsuit in federal court was appropriate because the plaintiff's *pro se* complaint was not accompanied by the statutorily-required affidavit of merit.

The importance of this issue is underscored by the fact that, since agreeing to hear the case on March 10, 2025, the Supreme Court has received numerous briefs from *amici curiae*. Although the Supreme Court's analysis will undoubtedly include discussions about federalism, dual sovereignty, and doctrinal cohesion, it is critical to note the impetus behind affidavit of merit statutes: for state governments to strike an equitable balance between enabling true victims of medical negligence to bring suit against the need to deter meritless medical negligence claims and the concomitant rises in insurance costs and threats to patient care they cause. A decision rendering affidavit of merit statutes inapplicable in federal diversity suits is likely to have significant negative consequences for healthcare providers and patients throughout the country and will only encourage an uptick of frivolous lawsuits in our federal courts.

Oral argument in *Berk v. Choy* is scheduled for October 6, 2025. We will be following this issue closely.

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