

Berk v. Choy

The End of Pre-Suit Expert Requirements in Federal Court

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AGENDA

What does Berk v. Choy say and do?

History of Certificates of Merit and how the laws look in the 29 states that have them.

Impact of the rules since inception

Implications of Berk v. Choy going forward

Strategy for practitioners, carriers, institutions, MCARE, etc.

Closing, discussion of possible trends going forward

Questions

BERK V. CHOY 607 US _ (2026)

Unanimous Decision, with Concurrence by Justice Brown Jackson.

Acknowledges Reason for Gatekeeping Statutes

The DE Affidavit of Merit Law [18 Del. C. § 6853](#)

SCOTUS held it does not apply in federal court

Choice of laws – [Shady Grove](#)

IMPACT OF THE RULES SINCE INCEPTION

What have District Courts done to date?

- PA
- IL
- MD
- AZ

Will any of the gatekeeping statutes survive?

- Unlikely due to SCOTUS commentary on Rule 56 and Rule 12

Other interesting aspects of the case

- End of heightened pleading standards, period?
- State Anti-Slapp statutes

WHY THE CERTIFICATE OF MERIT RULES WERE ENACTED

- Early 2000's Medical Malpractice crisis
 - Escalating Malpractice premiums
 - Physician departures from the state

GOALS OF CERTIFICATE OF MERIT RULES

Preventing frivolous lawsuits early in the legal process



Lower professional liability insurance premiums



Protect professionals, particularly in the medical field, from the significant time, expense and reputation damage involved in defending meritless professional negligence claims.

TYPES OF STATE MERIT REQUIREMENTS

AFFIDAVIT OF MERIT – SIGNED BY AN EXPERT – OFTEN SWORN

Somes States requiring this:

- New Jersey, Delaware, Minnesota, West Virginia, Ohio, Arkansas, Georgia. Michigan

What is required:

- An affidavit by a qualified medical expert, with strict specialty and recency requirements.

When must it be filed:

- Differs from state to state
- 30 days before suit is filed (West Virginia)
- With the Complaint (Delaware)
- With the Complaint or within 30-90 days of the filing of the complaint

Sanctions for Failure to file

- Dismissal (with or without prejudice)

SAMPLE AFFIDAVIT OF MERIT

I, John Doe, M.D. having been duly sworn, state:

1. I am licensed to practice medicine in _____, and I was also licensed at all times applicable to this litigation.
2. I am board certified in _____, and I was so certified at all times relevant to this litigation.
3. I am engaged in the full-time practice of _____ and I was so engaged at all times relevant to this litigation.
4. I am familiar with the standards of care regarding the surgical care and treatment of a _____
5. I have reviewed the x-rays and medical records submitted to me by counsel for _____
6. The standards of care require that a physician in the speciality of _____
7. Dr. _____ breached the applicable standards in the following ways: _____
8. As a result of the failure to timely and or properly treat _____, _____ sustained the following injuries and damages.

TYPES OF STATE MERIT REQUIREMENTS



CERTIFICATE OF MERIT/ CERTIFICATE OF GOOD FAITH, CERTIFICATE OF REVIEW) (Attorney Signed.)



Somes States requiring this:

Pennsylvania, Texas, New York, Florida, California, Hawaii, Illinois



What is required:

Counsel files an affidavit certifying that he/she has consulted with a licensed professional in the same field, or similar field as defendant and that expert believes that the care deviated from the standard of care.



When must it be filed:

Must be filed with the complaint or within 30-90 days after filing

*In Pa if no COMs are filed by day 30, defendant must file a 30 day notice of intent to take non pros, then if at 60 days Plaintiff has still not filed COMs defendant can take a non pros.



Sanctions for Failure to file

Dismissal (with or without prejudice)

SAMPLE CERTIFICATE OF MERIT (PENNSYLVANIA)

I, _____, certify that:

(Attorney or Party)

an appropriate licensed professional has supplied a written statement to the undersigned that there is a basis to conclude that the care, skill or knowledge exercised or exhibited by this defendant in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm;

AND/OR

the claim that this defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard and an appropriate licensed professional has supplied a written statement to the undersigned that there is a basis to conclude that the care, skill or knowledge exercised or exhibited by the other licensed professionals in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm;

OR

expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim against this defendant.

Date: _____

(Attorney or Party)

TYPES OF STATE MERIT REQUIREMENTS

HYBRID/PRELIMINARY EXPERT OPINIONS

Some states requiring this:

- Arizona

What is required:

- Plaintiff must serve with the claim a certification stating whether expert testimony is necessary and if so, must serve a preliminary affidavit including the factual basis for the claim, the conduct that constituted malpractice and how such conduct caused the alleged harm.

When must it be filed:

- Typically with the Complaint or within 60 days

Sanctions for Failure to file

- Dismissal of action

TYPES OF STATE MERIT REQUIREMENTS

PANEL REVIEW OR PRE-SUIT SCREENING

States requiring this: Indiana, Nevada, Kansas

What is required: (Indiana)

Proposed Complaint: Before filing a lawsuit, a "proposed complaint" must be filed with the [Indiana Department of Insurance \(IDOI\)](#).

Medical Review Panel (MRP): The case is reviewed by a panel comprising one attorney (serving as chairperson) and three healthcare professionals (typically in the same specialty as the defendant).

Panel Opinion: The panel reviews evidence and issues a non-binding, written opinion on whether the provider complied with the standard of care.

Timeframe: The panel process usually takes 6 to 18 months to complete.

Exemption: If the total damages sought are less than $\$15,000$

TYPES OF STATE MERIT REQUIREMENTS

PANEL REVIEW OR PRE-SUIT SCREENING (cont'd)

- **Pre-Suit Notice and Investigation**

- Before submitting the proposed complaint, the plaintiff must provide notice to the potential defendants, which triggers a **90-day waiting period**. During this time:
 - The plaintiff must allow the release of all relevant medical records.
 - The defendant may request an informal investigation or an examination of the patient.
 - The statute of limitations is generally tolled (paused) for 90 days following the receipt of the panel's opinion.

- **Panel Findings**

- The MRP issues a non-binding opinion concluding that the evidence either supports a claim of negligence, does not support it, or that a material issue of fact exists. This opinion is admissible as evidence in later court proceedings.

What is required-Kansas

- A party may request a screening panel by filing a written request with the judge before or after a petition is filed, but no later than 60 days after the defendant subject to the screening panel is served with process.

Have Certificates of Merit worked? Yes!

THE FUTURE OF HOSPITALS



Rely on affidavit statutes to obtain dismissal before discovery begins



Further discovery will be needed



Will affect hospitals closer to state borders due to diversity

PRIMARY INSURANCE

Higher defense costs

More federal-court filings

Longer case lifecycles

Higher premiums

Potential more cases exceed primary limits

Mcare (Medical Care Availability & Reduction of Error Fund)

- Higher settlement costs
- More prolonged litigation
- More cases triggering Mcare layer
- Require larger reserve requirements

Questions/Comments