

Berk v. Choy CLE Handout

As attorneys who defend medical providers and institutions against medical malpractice lawsuits, it is not every day that decisions by the Supreme Court of the United States impact our cases. As practitioners, most of us spend the majority of our time in state Court, but end up – not infrequently - in federal court for a number of reasons, including diversity, having a federally funded client or co-Defendant, or having a case that involves a federal question, such as an Eighth Amendment Claim for deliberate indifference to serious medical needs. It is difficult to recall any other Supreme Court case that had quite the level of impact that Berk v. Choy, 607 U.S. 187, 146 S. Ct. 546 has had. In Berk, Justice Amy Coney Barrett delivered the unanimous opinion of the Court, with Justice Ketanji Brown Jackson concurring, holding that Delaware’s Affidavit of Merit law was inapplicable in a medical malpractice case in federal court.

Delaware’s Affidavit of Merit law requires that any medical malpractice case filed have “an affidavit of merit as to each defendant signed by an expert witness...and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant.” 18 Del. C. § 6853.¹ This law is but one iteration of the various laws enacted in twenty-nine (29) states to prevent the filing of frivolous medical malpractice cases. Justice Barrett recognized the purpose of such laws at the beginning of

¹ Although this specific statute applies specifically to medical malpractice cases, other similar statutes from other states apply to other types of professional liability, e.g., attorneys, engineers, accountants, etc. See, e.g. Pa. R.C.P. No. 1042.3, et seq.

her opinion and stated “[t]he cost of malpractice insurance for doctors and hospitals has significantly increased in some areas of the country. In response, several States have imposed a screening mechanism on malpractice suits, requiring plaintiffs to submit an affidavit from a medical professional attesting to the suit’s merit.” Berk, 607 U.S. at 189-190. Other states, such as Pennsylvania, have a law requiring a “Certificate of Merit,” where the Plaintiff is not required to turn over an affidavit from an expert, but requires the attorney to sign a statement within sixty (60) days of filing a Complaint, affirming that they have consulted with an expert in the same specialty and that based upon their review of the records, there has been a breach in the standard of care, which has caused damage to the Plaintiff. In its strictest form, Indiana and Nevada have medical review panels that assess the merits of malpractice cases before a lawsuit is allowed to proceed. See handout.

The Berk case was brought in federal court based on diversity jurisdiction. Berk, 607 U.S. at 190. Plaintiff was unable to comply with 18 Del. C. § 6853 and instead argued the law did not apply in federal court. Id. at 191. The trial court dismissed his case, and the Third Circuit affirmed the dismissal, and concluded that because the Federal Rules of Civil Procedure were silent on the issue, and where the state law was substantive as opposed to procedural, state law applied. Id. A state law is substantive if (1) it is outcome determinative, and (2) failing to apply it in federal court would promote forum shopping and the inequitable administration of the law. Id. (citing Hanna v. Plumer, 380 U. S. 460, 467-469, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965)).

The Supreme Court disagreed with the Courts below and found that Federal Rule of Civil Procedure 8 (hereinafter “Rule 8”) displaced the Delaware state laws. In doing so, they

held that when there is a Federal Rule on point, Erie choice of law analysis is not conducted, even if the state law is substantive. Id. at 192. All Rule 8 requires in this regard is “a short and plain statement of the claim showing that the pleader is entitled to relief.” Id. at 193. And Federal Rule of Civil Procedure 12 (hereinafter “Rule 12”) only allows for dismissal of a claim for “failure to state a claim upon which relief can be granted.” Id. citing Rule 12(b)(6). “Matters outside of the pleadings,” may not be considered according to Rule 12(d). Id. The Court will allow a matter to proceed to discovery so long as a Plaintiff’s claim is “plausible,” even where a judge might find the claims factually “improbable.” Id. The Court readily acknowledged that it is easy for a plaintiff to proceed to discovery on claims that will ultimately fail. Id. at 194.²

Because the Delaware Affidavit of Merit law addresses the same questions as Rule 8 and requires more than Rule 8 – including evidence on the merits of the claim – the Supreme Court held that Rule 8 supplants 18 Del. C. § 6853. Id. at 194, 199. Therefore, all that the Plaintiff needed to proceed with his case was a plausible theory of liability.

Although we have not pored over each of the twenty-nine (29) state gatekeeping statutes, it is hard to imagine that any of them survive in federal court. In fact, just last month, in DiFraia v. Ransom, 2026 U.S. App. LEXIS 9301, 171 F.4th 622, the Third Circuit Court of Appeals allowed a Pennsylvania-based *pro se* prisoner medical negligence claim to go forward based on Berk v. Choy, holding that Pennsylvania’s Certificate of Merit Rule no

² Notably, the Court rebuked federal district courts for trying to impose heightened pleading requirements in a variety of different contexts, including prisoner matters. We have recently argued for heightened standards on behalf of provider clients in *pro se* prisoner litigation. It will be interesting to see, what, if any impact the Berk v. Choy matter has on districts applying these heightened pleading requirements going forward.

longer applies in federal court. This is so even though Pennsylvania's Certificate of Merit is not due until sixty (60) days after filing the Complaint. It will be interesting to see if anyone is able to meaningfully attempt to differentiate their state's statute from Delaware's version.

While the Supreme Court acknowledged the purpose of the statutes – the harm done to the medical profession (and presumably other professions) – we are left with few options to dispose of a case before a motion for summary judgment can be filed following discovery. We can expect a flood of lower-tier malpractice filings, as well as those filed by *pro se* litigants. When this decision came down, we immediately considered the flood of *pro se* prisoner litigation against hospital providers – both inside of prisons and against outside providers - that will ensue.³ This will have a negative impact on medical providers, health institutions and the insurance industry, both from a human and financial cost perspective. An increase in filings will also have a strain on the courts in disposing of the new influx of cases.

Going forward, consideration should be made as to whether federal court is the defense-friendly option for your cases. On balance, depending on the state court venue, you may still be at an advantage in federal court without state gatekeeping statutes. Practitioners should also be wary of forum shopping for low-tier malpractice claims and those from *pro se* litigants. Additional strategies could be considered, including streamlining fact and expert discovery, early motions for summary judgment, etc.

³ As above, the Court's dicta on heightened standards, generally, may remove the last of the tools to weed out meritless *pro se* prisoner cases.