CLIENT ALERTS & INSIGHTS

Early Evidence? Not in This Court!: Supreme Court Clarifies Federal Rules Govern Over State Law

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Key Takeaways

- The Supreme Court ruled in *Berk v. Choy* that federal courts do not have to enforce state laws requiring plaintiffs to provide early evidence-such as affidavits of merit-in medical malpractice cases, because the Federal Rules of Civil Procedure govern what is needed to state a claim in federal court.
- This decision limits the ability of states to impose extra pre-filing requirements on plaintiffs in federal court, reducing barriers for those bringing claims. It also raises questions about the enforceability of other state laws, like anti-SLAPP statutes, that similarly require plaintiffs to present evidence early or face dismissal and potential fee-shifting risks.
- Plaintiffs bringing medical malpractice or defamation claims in federal court may now face fewer procedural hurdles, as state laws demanding early evidence are less likely to apply.

In Berk v. Choy, the Supreme Court held that a Delaware state law that requires plaintiffs bringing medical malpractice claims to set forth evidence of the suit's merits via an affidavit of merit early in the case was unenforceable in federal court. This case has significant implications for the growing tension over the applicability of state anti-SLAPP laws in federal court.

The Case: Berk v. Choy

States across the country have passed laws that aim to protect doctors from frivolous medical malpractice suits. Many of these state laws require plaintiffs to obtain an affidavit from medical expert verifying the claim's merit. These laws make it harder for plaintiffs to bring medical malpractice suits against allegedly negligent practitioners, since most medical experts are reluctant to sign affidavits accusing colleagues of malpractice.

In Delaware, one such law requires plaintiffs alleging medical malpractice to obtain and file an affidavit of merit that states their claim has a reasonable basis and is signed by a medical expert. Under the Delaware law, a clerk cannot docket the complaint until the plaintiff files an affidavit of merit.

In this case, Berk filed a medical malpractice lawsuit in federal court but did not file the affidavit required under Delaware law. The district court dismissed the lawsuit due to his failure to comply with that Delaware law, and the Third Circuit affirmed.

On Tuesday, the United States Supreme Court unanimously reversed, holding that the Delaware statute conflicted with the Federal Rules of Civil Procedure and could not apply in federal court. The Supreme Court clarified its *Erie* precedent and reaffirmed the test it set forth in *Shady Grove*. Under that test, the Federal Rules of Civil Procedure govern over state law when they "answer the same question."

Here, the Court held that the Federal Rules and Delaware's law both answered the same question: what must a plaintiff do to state a claim in federal court? Because "Rule 8 gives the answer," the Court held that the Federal Rules govern. Specifically, the Court observed that under Federal Rules 8 and 12, a plaintiff opens the door to federal court by providing factual allegations stating a claim; "evidence of the claim is *not* required." Delaware law, however, requires such evidence.

The Court rejected arguments that the Federal Rules and Delaware statute did not conflict because the Federal Rules 8 and 12 discuss pleadings, not affidavits of merit. Rather, the Court "infer[red]" that "by specifying what information about the merits is required in the 'pleading,' Rule 8 excludes the possibility of requiring even more information on the same topic-whether in the 'pleading' itself or on a separate sheet of paper attached to it."

Takeaways

While *Berk v. Choy* most obviously affects medical malpractice claims, it has broader implications for state statutes imposing similar pre-filing conditions on plaintiffs, like anti-SLAPP laws.

Many states have adopted Anti-Strategic Lawsuit Against Public Participation (SLAPP) statutes, which seek to protect individuals and organizations from frivolous lawsuits aimed at curbing their free speech rights, typically when facing defamation suits. But these laws also place burdens beyond those contemplated by the Federal Rules on plaintiffs bringing claims for defamation. The main mechanism these statutes use is a "special motion to dismiss" that shifts the burden to plaintiffs to prove their claim has a probability of success. The plaintiff usually must produce some evidence to show not just that its allegations in the complaint are sufficient to state a claim, but that they will likely *win* the case. The failure to do so can have dire consequences for the plaintiff as many of these same statutes allow the prevailing defendant to recover their attorney's fees and costs.

This burden causes a significant issue when plaintiffs bring defamation actions in federal court. Under the Federal Rules, all the plaintiff needs to do to proceed to discovery is to show they have alleged sufficient facts to support their claim, accepting their facts as true. But defamation defendants have tried to use state anti-SLAPP laws in federal court to increase plaintiffs' burden and force them to produce additional evidence beyond the complaint before moving on to discovery.

The Supreme Court has not addressed one of these laws yet, and there is no unified approach in the Circuits. The Second Circuit, Fifth Circuit, Seventh Circuit, Tenth Circuit and Eleventh Circuit, as well as the D.C. Circuit, have declined to apply state anti-SLAPP statutes.[1] In contrast, the Ninth Circuit has consistently applied state anti-SLAPP statutes, and the First Circuit has applied Maine's anti-SLAPP statute.[2]

The Ninth Circuit, more than two decades ago, determined that the California anti-SLAPP statute did not conflict with the Federal Rules, and in fact, could "exist side by side" with Rules 8, 12, and 56.[3] The court reasoned that if a defendant was unsuccessful with their motion under the anti-SLAPP statute, they would still be free to pursue a Rule 12 or 56 motion. Since that time, the Ninth Circuit has developed specialized approaches for different types of anti-SLAPP motions. If the motion challenges the legal merits of plaintiff's claims, courts treat it as a Rule 12(b)(6) motion. If defendant's motion challenges the evidentiary support for plaintiff's claims, the court permits discovery before ruling and treats it as a Rule 56 motion.

The Ninth Circuit's approach, particularly as it pertains to its treatment of defendant's motions challenging plaintiff's evidentiary support, certainly requires more from plaintiffs than the short plain statement required by Rule 8. As the Court noted in *Berk v. Choy*, requirements that "demand[] more" are at odds with Rule 8. Moving forward, plaintiffs in the Ninth Circuit will certainly use *Berk* to their advantage to up-end the Circuit's practice of applying state anti-SLAPP statutes.

The Court's decision on Tuesday-while not directly about anti-SLAPP-is a significant decision plaintiffs can use to argue anti-SLAPP laws should not apply in federal court. Just as the Delaware malpractice law forced plaintiffs to produce evidence early in a case, so do anti-SLAPP laws. Our team will continue to monitor the fallout from *Berk v. Choy*, and use it in future fights for its defamation clients.

1 *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020); *Klocke v. Watson*, 936 F.3d 240 (5th Cir. 2019), as revised (Aug. 29, 2019); *Intercon Sols., Inc. v. Basel Action Network*, 791 F.3d 729 (7th Cir. 2015); *Los Lobos Renewable Power, LLC v. Americulture, Inc*, 885 F.3d 659 (10th Cir. 2018); *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345 (11th Cir. 2018); *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015)

2 *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999); *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010).

3 *Newsham* 190 F.3d at 972.