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Timely commentary from WLF's blog January 26, 2026

Supreme Court Ruling Signals Trouble Ahead for Anti-SLAPP Statutes in Federal Court

by Travis F. Chance and Sean S. Cuff

On Jan. 20, 2026, the U.S. Supreme Court issued a significant ruling about when certain state statutes may apply in diversity actions in federal court. In *Berk v. Choy*, the Supreme Court addressed a Delaware statute that requires a medical malpractice plaintiff to file an affidavit of merit with its complaint. In a unanimous opinion (with Justice Jackson concurring in the judgment), the Court held that such statutes do not apply in federal court because they conflict with the Federal Rules of Civil Procedure—mainly Rule 8 and Rule 12—and are therefore displaced under the Rules Enabling Act.

The decision will, of course, have immediate consequences for federal court litigants in States with similar affidavit requirements, and those consequences will reach beyond medical malpractice cases to other suits where States have imposed a similar merit requirement at the pleading stage.

But the Court's opinion is useful for another reason: it suggests how the Court may view the applicability of anti-SLAPP statutes in federal court, if the right case makes it to their bench.

Background

While traveling in Delaware, plaintiff Harold Berk suffered an ankle fracture and sought treatment at Beebe Medical Center, where Berk claimed that improper handling during the fitting of a protective boot exacerbated the injury. Berk sued the treating physician and hospital for medical malpractice in Delaware federal court based on diversity jurisdiction.

Delaware law requires a plaintiff to have an affidavit of merit from a qualified medical expert "accompanying" the complaint in any medicalmalpractice action, with only a single 60day extension permitted and only if requested at or before filing. If no affidavit (or timely extension request) accompanies the complaint, the clerk must refuse to file the action.

Although Berk obtained a filing extension, he could not secure an expert's affidavit and instead filed his medical records under seal. The district court dismissed the action for failure to comply with Delaware's affidavit requirement, and the Third Circuit affirmed, with both courts holding the requirement to be substantive, and therefore applicable in federal court, under the *Erie* doctrine.

The Opinion

The majority opinion (written by Justice Barrett) outlined the long-standing rule that a federal court sitting in diversity applies state *substantive* law but federal *procedural* law. But even where a state law is substantive, when a Federal Rule of Civil Procedure "answers the question in dispute," the Rule of Civil Procedure generally controls. That's because the Rules of Decision Act requires federal courts to apply state substantive law, unless it would contradict the Constitution, a treaty or a federal statute, and the Rules

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Enabling Act is a federal statute authorizing the Supreme Court to adopt rules of procedure in federal courts.

The majority began with a reminder that the threshold inquiry is whether the state statute and a federal rule aim to answer the same question. If so, and if they conflict, the state law is displaced, even if it is substantive in nature. The affidavit-of-merit statute, according to the Court, was an attempt to regulate what information about the merits of claims must be provided from the start of a suit. Homing in on FRCP 8, the Court held that it answers the same question because it sets out what is required to be included regarding the merits of claims in a federal court complaint.

The Supreme Court said that, by negative inference, Rule 8 *excludes* the possibility that a plaintiff must provide more than only "a short and plain statement of the claim showing that the pleader is entitled to relief," including any requirement that a plaintiff submit evidence at the pleading stage. By contrast, the Delaware statute imposes a "prima facie evidentiary requirement" and prohibits a malpractice action from proceeding unless supported by expert evidence at, or shortly after, filing. Finding confirmation in FRCP 12, the Court further outlined that nothing outside the pleadings may be considered in ruling on a Rule 12(b)(6) motion to dismiss for failure to state a claim.

The Court ultimately concluded that because Rule 8 and an affidavit-of merit-statute answer the same question—what information a plaintiff must provide about the merits at the start of a case—but reach different results, the federal rule necessarily displaces the state statute. And because Rule 8 is valid under the Rules Enabling Act because it "really regulates procedure" and does not alter substantive rights (a question determined not from considering the substantive nature of the conflicting state law but from the face of the federal rule), it prohibits the application of an affidavit of merit requirement in federal court.

Anti-SLAPP Statutes in Federal Court: An Omen of Things to Come

Berk will find utility and application in various types of state-law cases in federal court. Obviously, *Berk*'s analysis will have implications in medical malpractice actions in States that have an affidavit of merit requirement like Delaware. In addition, many States have similar merit requirements for claims against design professionals (such as architects or engineers) in construction cases, and the *Berk* analysis clearly bars application of those statutes in federal court as well.

But the *Berk* analysis also portends how the Supreme Court may view anti-SLAPP statutes in federal court cases. Many states have enacted such statutes, which generally provide defendants immunity from wholly meritless claims based on First Amendment activity.

The most common form of those statutes, modeled after California's scheme and now largely incorporated into the Uniform Public Expression Protection Act, allows defendants to file a "special" motion to dismiss and sets out a two-step procedure to resolve that motion. First, the defendant carries a burden to show that the claims against it are based on certain, statutorily defined conduct in furtherance of First Amendment rights. Second, if the defendant does so, the burden shifts to the plaintiff to provide sufficient evidence of all the elements of its implicated claims. If the plaintiff fails to do so, the case must be dismissed.

In certain States, the first-step burden is an evidentiary one. For example, Nevada's statute requires defendants to not only show the alleged wrongful communication falls within one of four statutory categories but also that it was either true or made without knowledge it was false, a burden that requires some form of evidence to meet. And even California's version (which is modeled by several States, including Colorado) requires courts to consider both the complaint *and* any affidavits that may be submitted "stating the facts on which the liability" is based. Such evidentiary requirements seemingly go beyond, and therefore conflict with, what is required by Rule 8, as described in *Berk*. On the other hand, the merits of a plaintiff's claim are not relevant to the first-step inquiry and thus *Berk*'s analysis may not find any conflict between

the federal rules and that step.

When it comes to the second step of most anti-SLAPP statutes, the plaintiff is required to come forward with prima facie evidence to support its claims (quite like the Delaware affidavit of merit statute), generally meaning that it must provide sufficient evidence that would allow a trier of fact to find in its favor in the absence of any contrary evidence. But per *Berk*, Rule 8's "negative inference" prohibits requiring plaintiffs to provide anything beyond that set out in the Rule about the merits of its claims. These statutory requirements would also appear to conflict with Rule 12 since, as stated in *Berk*, nothing beyond the complaint is permissibly considered in ruling on a Rule 12(b)(6) motion. And another conflict with Rule 56 is apparent. The point of anti-SLAPP statutes is to test the plaintiff's proof in support of its claims at the outset of a case—but, as *Berk* stated, "the Federal Rules already prescribe a mechanism for putting a plaintiff to his proof: a motion for summary judgment."

Relatedly, many anti-SLAPP statutes have a mandatory stay on discovery while the motion is pending, unless a plaintiff shows a need for discovery to carry its second-step evidentiary burden. In that case, anti-SLAPP statutes allow certain limited discovery to be taken to meet that burden. Yet in *Berk*, the Supreme Court noted that Rule 8, "[b]y design … makes it relatively easy for plaintiffs to subject defendants to discovery, even for claims that are likely to fail." The federal rules have a comprehensive scheme that answers the question of whether and when a plaintiff is entitled to discovery, with which anti-SLAPP statutes' discovery provisions would conflict. And to the extent that a given anti-SLAPP motion could be considered one for summary judgment under Rule 56, plaintiffs must be given adequate time for discovery, which would not be permitted if the statutory schemes apply in federal court—another conflict with the federal rules.

As to those federal courts of appeal that will apply anti-SLAPP statutes in their circuits (the First and Ninth circuits), *Berk* likely precludes the complicated standards they have adopted for handling such motions. The Ninth Circuit, for example, has set out a standard that differs depending on the nature of the anti-SLAPP motion. If it is one challenging the legal merits of claims, a court is to treat it as a Rule 12(b)(6) motion and will rule on it without discovery. If it is one challenging the evidentiary sufficiency of claims, a court is to treat it as a Rule 56 motion and permit discovery before ruling (because of the conflict described above).

The trouble with that approach is that it rewrites the anti-SLAPP statutes themselves. Those statutes do not differ in their approach to resolving motions filed under them. And this approach reads the anti-SLAPP discovery provisions right out of these statutes. The *Berk* defendants offered these sorts of arguments, all of which were rejected by the Court: "That defendants cannot fit the affidavit requirement into the Federal Rules illustrates that it has no place there." The approach taken by the Ninth Circuit would likewise be an attempt to fit the square peg of anti-SLAPP statutory schemes into the round hole of the federal rules.

Conclusion

The *Berk* decision is likely to result in an increased incentive to forum shop and inures to the benefit of medical and design malpractice plaintiffs, among others. But it also portends the end of applying anti-SLAPP statutes in federal courts, as the majority's reasoning for not applying affidavit of merit statutes in federal court is just as applicable and persuasive when it comes to anti-SLAPP schemes. In the meantime, *Berk* provides a roadmap for circuits that have yet to address whether anti-SLAPP statutes should apply in federal court (the Third, Fourth, Sixth and Eighth circuits), as well as the basis for arguing a good faith change in law for litigants in circuits that do apply those statutes in their courts.

