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U.S. Supreme Court Decision May Negate State Law Requirement to File a Certificate of Merit with the Complaint in a Federal Action Against a Design Professional

To deter frivolous and unfounded claims against design professionals, states throughout the country have enacted statutes which generally require litigants to furnish a formal certification of merit ("COM") from a qualified expert or face potential dismissal of their lawsuit. These COM statutes can impose a significant front-end burden on claimants who must pay an expert to review project records, interview the project team, and prepare a formal report before the lawsuit can be filed—often regardless of the amount in controversy. However, in light of a recent U.S. Supreme Court decision in a medical malpractice case, most, if not all of these statutes, may no longer be enforceable in federal court. This article examines the recent decision in Berk v. Choy, 146 S. Ct. 546 (2026), the decisions thus far which have applied Berk to invalidate COM statutes, and other categories of statutes applicable to the construction industry which may face a similar fate.

The U.S. Supreme Court Decision (Berk v. Choy)

In Berk, the plaintiff, Harold Berk, sued a doctor for medical malpractice under Delaware law in Delaware federal court. 146 S. Ct. at 551. Under Del. Code, Tit. 18, § 6853(a)(1), an affidavit of merit (like a COM) must accompany a complaint alleging medical malpractice. Id. Berk failed to include an affidavit of merit with his complaint. Id. at 552. Applying Delaware state law, the federal court dismissed Berk's medical malpractice claim. Berk appealed to the Third Circuit, arguing that the affidavit of merit required by § 6853(a)(1) is unenforceable in federal court because it is more onerous than the Federal Rules of Civil Procedure. The Third Circuit affirmed the District Court's ruling, finding § 6853(a)(1) enforceable in federal court.

On appeal, the Supreme Court addressed whether a federal court applying Delaware state law must adhere to the affidavit of merit requirement in § 6853(a)(1), or the less stringent pleading requirements found in Fed. R. Civ. P. 8. Under Rule 8, a complaint need only include "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. (citing Fed. R. Civ. P. 8(a)(2)). The Supreme Court concluded that because § 6853(a)(1) and Rule 8 address the same question—namely, "what information a plaintiff must provide about the merits of his claim at the outset of litigation"—Rule 8 governs over § 6853(a)(1). Id. at 554, 556. As a result, "Delaware's affidavit law does not apply in federal court." Id.

Berk Applied to Other States' COM Statutes

Relying on Berk, litigants in several jurisdictions have already convinced federal courts in the past two months that other states' COM statutes no longer apply in federal court. See Ramirez v. Bohm, Case No. 25-cv-1660-PHX-KML, 2026 WL 171740 (D. Ariz. Jan. 22, 2026) (holding that the Arizona COM statute (Ariz. Rev. Stat. § 12-2601) requiring a party to provide a preliminary expert opinion when suing for professional negligence, no longer applies in federal court); Allen v. Voorstad, Case No. 25-cv-106, 2026 WL 184276 (M.D. Pa. Jan. 23, 2026) (holding that the Pennsylvania COM rule (Rule 1042.3), requiring a party to file a COM when suing for

malpractice of professional negligence, no longer applies in federal court); District of Columbia Water & Sewer Auth. v. Samaha Associates, PC, Case No. 23-cv-1328-ABA, 2026 WL 654130 (D. Md. Mar. 9, 2026) (holding that the Maryland COM statute (Md. Code Ann., Cts. & Jud. Proc. § 3-2C-02), requiring a party to file a COM when suing certain licensed professionals, no longer applies in federal court).

Although Ramirez and Allen were medical malpractice actions, the underlying COM provisions in both Arizona and Pennsylvania apply to claims filed against any licensed professional, including architects and engineers. See Ariz. Rev. Stat. § 12-2601(3) (defining "licensed professional" to include those licensed under title 32, which includes architects, engineers, geologists, and others); Konold v. Superior Int'l Indus., Inc., 911 F. Supp. 2d 303, 311 (W.D. Pa. 2012) (applying Pa. R. Civ. P. 1042.3 and dismissing a professional negligence claim against architects and engineers for failing to file the COM required by the Pennsylvania rule). The decision in Konold—and similar decisions throughout the country that apply state COM statutes in federal court—will likely no longer be good law in light of Berk.

A recent decision in Maryland proves this point. Unlike Ramirez and Allen, Samaha actually involved a professional negligence claim against a design professional in Maryland federal court. 2026 WL 654130 at *2. Under Maryland's COM statute (also referred to as a Certificate of Qualified Expert (or CQE) statute), section 3-2C-02 of the Courts & Judicial Proceedings Article, a CQE must be submitted within ninety days of filing a complaint based on the negligence of a licensed professional, or else the action may be dismissed. Id. In July 2025, two defendants moved for summary judgment on the grounds that the plaintiff's original complaint did not satisfy the CQE requirement. After briefing was complete, but before the hearing on the motion, the Supreme Court issued the Berk decision. After receiving further briefing from the parties, and relying on Berk, the Maryland federal court held that the Maryland CQE statute was no longer applicable in federal court because "it required more than what is required under Rule 8." Id. at 5. Prior to Berk, Maryland's federal court, sitting in diversity, had applied the requirements of Maryland's CQE statute to negligence claims against design professionals. See XL Insurance America, Inc. v. Kalkreuth Roofing & Sheet Metal, Inc., Civil Action No. ELH-17-384, 2018 WL 3833421, at *6 (D. Md. 2018).

Undoubtedly, there are cases pending in federal district and appellate courts throughout the country (like Samaha) where the adequacy of the claimant's compliance with a state COM statute in connection with their professional negligence claim against an architect or engineer is at issue. There are owners, general contractors, and design professionals actively negotiating contracts with venue provisions that may want to consider the impact of Berk. And there are potential claimants deciding whether to sue design professionals in state or federal court who may now opt to bring suit in federal court based on Berk (assuming there is diversity). These are important considerations for design professionals and their contractual counterparties, and all should be mindful of how federal courts throughout the country are likely to apply Berk.

Application of Berk to Other Statutes

Berk, and the outcomes in Ramirez, Allen, and Samaha Associates, raise the question of whether litigants may be able to successfully challenge other state statutes which purport to impose pleading requirements at odds with Fed. R. Civ. P. 8. In Hawaii, for example, a Design Claim Conciliation Panel reviews tort claims against design professionals, and litigation commences only after rejecting the Panel's decision. See Haw. Rev. Stat.

§§672B-5 to -12. In Oregon and California, an attorney must file a certificate stating that the attorney consulted with a licensed design professional prior to submitting a claim for professional negligence. See Or. Rev. Stat. § 31.300; West's Ann. Cal. C.C.P. § 411.35. It is unknown whether federal courts will find such statutes at odds with Rule 8, and therefore, inapplicable in federal court.

Additionally, construction practitioners should be aware that litigants in federal court may rely on Berk and seek to avoid state procedural rules for establishing and enforcing mechanic's liens. For example, when adjudicating an action to establish a mechanic's lien in Maryland, Maryland federal courts have traditionally applied Md. Rule 12-302, which requires a complaint to be "under oath by the plaintiff or a person making oath on the plaintiff's behalf." Md. Rule 12-302(b); see Royal Plus, Inc. v. Children's Hospital of Baltimore City, Inc., Civil No. JKB-23-2395, 2023 WL 7001759, at *2 (D. Md. 2023). In response, a defendant "may controvert any statement of fact in the plaintiff's complaint by filing an answer under oath." Md. Rule 12-304(c). It is unclear whether a Maryland federal court applying Berk would hold that Md. Rules 12-302 and 12-304 go beyond what is required under Fed. R. Civ. P. 8.

We expect challenges to similar pleading requirements for mechanic's lien and payment bond actions in federal court to be raised by litigants throughout the country, and for district and appellate courts to weigh the same considerations as the U.S. Supreme Court in Berk; namely, whether the challenged procedural requirement "demands more" than Rule 8.

Construction law practitioners and their clients should be mindful of the potential downstream effects of Berk and cases interpreting Berk when litigating cases in federal court—not only those involving claims of professional negligence, but any claims that (traditionally) have been tailored to comply with procedural requirements in state statutes and rules of procedure.