Affidavits of Merit Remain a Critical Barrier to Claims Against Design Professionals and May Encourage Forum Shopping

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Design professionals face litigation for claimed malpractice as frequently as any other professionals. Of course, there are instances where strong claims can be made that support a finding that the standard of care was breached. Many times, however, claims are brought based on weak theories and because the professionals are among the many other project participants that are implicated in the claimed loss regardless of the merits of such claims. Consequently, any tool that disposes of weak or unfounded claims early is invaluable.

One such tool is the affidavit of merit (AOM), which is a sworn statement from a licensed professional stating a claim of malpractice is well founded. An AOM is a requirement in many states and must be submitted either at commencement of the action or shortly thereafter. While a requirement of expert opinion at the summary judgment or trial stage is virtually universal, the AOM has the benefit of preventing, or at least shortening the duration of, invalid claims.

Earlier this year, the US Supreme Court discussed AOMs in *Berk v. Choy*, and we discussed that holding in the article, "SCOTUS Affirms That Affidavits-of-Merit Not Required to Support Professional Malpractice Lawsuits in Federal Court." Here, we provide a deeper analysis of the *Berk* holding, describe subsequent decisions, and survey which states require an AOM.

***Berk* Holds That Delaware Law on AOM Does Not Apply in Federal Court**

Harold Berk filed a complaint in Delaware federal court, asserting diversity jurisdiction and alleging medical malpractice against defendants Dr. Wilson Choy and Beebe Medical Center in 2022. The complaint was dismissed due to a failure to submit an AOM, which was required under Delaware law.[1] The Third Circuit affirmed on appeal.

Under Delaware law, a complaint alleging medical malpractice must include an AOM signed by a medical professional asserting that there has been "health-care medical negligence committed by each defendant."[2] Berk filed his complaint along with a motion for an extension of time to file the AOM, which was granted by the district court. However, he was not able to obtain an AOM in the time allowed and instead submitted his medical records under seal.[3] Defendants filed a motion for the court to complete an *in camera* inspection of the records for confirmation of compliance with Delaware law.[4] Berk contended this Delaware law requiring the AOM did not apply in federal court.[5]

The Third Circuit affirmed the dismissal, holding that when the Federal Rules of Civil Procedure (FRCP) are silent, the state's law will apply in a diversity case in regard to "substantive," as opposed to purely procedural, matters.[6] [7] The Third Circuit found the issue a matter of substantive law in that "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."[8] The Supreme Court granted certiorari.[9]

The Supreme Court addressed the issue of whether the FRCP "answers the question in dispute" and if so, then it would govern unless it "exceeds statutory authorization or Congress's rulemaking power."[10] The Court held that FRCP 8 (which governs required content of a complaint) is explicit in its direction as it states that a plaintiff must

include "a short and plain statement of the claim showing that [he] is entitled to relief."[11] The Court further affirmed that under FRCP 12, the dismissal of a complaint based on merits is only for a "failure to state a claim upon which relief can be granted."[12] The Federal Rules have singled out claims for special treatment, requiring more specificity in filed claims outside the FRCP 8 statement; however, claims that require the affidavit requirement under Delaware law are not one of these categories.[13]

The Court held that because the Delaware law required more than FRCP 8 requires, the law is at odds with that Rule 8.[14] While the Delaware law could be deemed a gatekeeping function, one that sifts out meritless claims and unclogs the court system, the Court further held that it is in fact an evidentiary requirement that could lead to an appropriate dismissal.[15] However, since FRCP 8 regulates procedure, the Court ultimately held that state law requiring an AOM does not apply in federal court.

Implications and Post-Berk Decisions

Berk v. Choy will likely have widespread implications, not only impacting the medical malpractice arena, but also other areas of tort law that currently require peer certification.

There have not been any AOM-related rulings in federal court since *Berk*, but state courts have continued to uphold AOM requirements. For example, in *Charles Blanchard Construction Corp., Inc. v. 480 King Street, LLC*, 447 S.C. 295, 926 S.E.2d 235 (2026), the South Carolina Supreme Court affirmed the necessity of an AOM in that state and noted that an engineer could submit one in support of a claim for professional malpractice of an architect.

Not every claim against a professional, however, must be supported by an AOM in states where such is required in a malpractice action. In *Fulton v. Fayette Community Hospital, Inc.*, 2026 WL 2439931 (Ga. Ct. App. 2026), the Georgia Court of Appeals held that an AOM was not required to support claims alleging fraud and misrepresentation against a physician. Similarly, another Georgia court held that a claim for "ordinary" negligence against a medical facility, as opposed to malpractice, would not require an AOM. *Clark v. Northeast Georgia Medical Center, Inc.*, 2026 WL 2425527 (Ga. Ct. App. 2026).

Survey of AOM States

Thirty-one states (including the District of Columbia) have AOM requirements, but of those states, 17 do not apply the requirements to architects or engineers. The 14 states in which an AOM is required in actions against design professionals are Arizona, California, Colorado, Georgia, Hawaii, Kansas, Maryland, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, South Carolina, and Texas.

Lessons Learned

The *Berk* decision and state AOM requirements may incentivize plaintiffs to forum shop. In particular, where diversity of citizenship may be available, a plaintiff may seek to bring an action in federal court if the state's law otherwise would require an AOM. Nevertheless, the existence of an AOM requirement in a particular state should be a consideration for a choice-of-law provision in a professional services agreement. If the state whose law is chosen to apply in a contract does not have an AOM requirement, then that will apply even if an action is commenced in a state with an AOM requirement.

Plaintiffs may also attempt to frame a malpractice action under a different theory, such as breach of contract or misrepresentation, to avoid the AOM requirement. Though courts will generally consider the basis of the action alleged to have caused injury or damage to properly characterize the actual cause of action, the attempt to reframe a malpractice claim as something else may allow a plaintiff to proceed beyond the pleading stage without the expert

support required in an AOM.

Consequently, it is essential for design professionals and their counsel to know the AOM requirements of their jurisdictions, to be wary of attempts to commence actions in federal court, to scrutinize the elements of the claims asserted, and to consider AOM requirements when drafting a choice-of-law provision in a professional services agreement. In jurisdictions where an AOM is required to support a claim for malpractice, this requirement must be protected and enforced to help ensure that only those claims with merit can proceed.

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[1] Del. Code, Tit. 18, §6853(a)(1). Notably, this applies only to medical professionals.

[2] Id.

[3] 607 U.S. at 2

[4] Id.

[5] Id. at 2–3

[6] Id. at 3

[7] Id. at 3; See also Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)

[8] Id.; See also *Hanna v. Plumer*, 380 U.S. 460, 467–469 (1965)

[9] Id.; See also 604 U.S. 1193 (2025)

[10] Id. at 4; See also Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010)

[11] Id. at 5; See also FRCP 8

[12] Id.; See also FRCP 12(b)(6)

[13] Id. at 6

[14] Id. at 7–8

[15] Id. at 8

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