



## State affidavit-of-merit requirements must apply in federal courts too



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A man is asking the U.S. Supreme Court to let him go forward with a lawsuit against a physician and two medical centers even though he doesn't have an affidavit saying that his case has merit.

Delaware requires that a plaintiff filing a medical liability lawsuit there have an affidavit of merit from an expert certifying that the facts surrounding the case warrant a day in court because there are reasonable grounds that each defendant may have committed medical negligence.

But because plaintiff Harold R. Berk lives in a different state than where he received care from the physician and hospital, the lawsuit was filed in the federal U.S. District Court for the District of Delaware instead of in Delaware state court. His legal team argues that because the case is in federal court, the state law requiring the affidavit of merit should not apply and he is asking the nation's highest court to overturn a lower-court decision that dismissed his case, *Berk v. Choy*.

The Litigation Center of the American Medical Association and State Medical Societies, the Medical Society of Delaware, the Medical Society of New Jersey and the Pennsylvania Medical Society filed an amicus brief urging the U.S. Supreme Court to uphold the 3rd U.S. Circuit Court of Appeals decision to dismiss the lawsuit. These medical associations "strongly support" state statutes that require medical negligence lawsuits to be accompanied by affidavits of merit.

"Such statutes reduce health care costs by foreclosing baseless medical negligence claims," the brief says. "They also protect physicians who have not in any way committed malpractice from incurring the undue expense and reputational harm resulting from meritless cases."

The brief further states that the amici believe that "applicable law and considerations of fairness require that the statutes be enforceable, not only in state court, but in federal court as well," noting that Delaware lawmakers enacted the law to reduce meritless claims and to help make sure that judicial resources were used efficiently.

Find out more about the cases in which the AMA Litigation Center is providing assistance and learn about the Litigation Center's case-selection criteria.



## Evidence supports affidavits' use

Delaware is far from the only state that requires an affidavit of merit for medical liability lawsuits. More than half require it, and empirical evidence backs up why it is important to weed out meritless claims. The evidence also shows that the laws succeed in weeding out meritless cases, while still giving well-founded cases a chance to go forward.

The AMA Litigation Center amicus brief cites a number of studies demonstrating those two points:

- 65% of malpractice claims resolved between 2016 and 2018 were dropped dismissed or withdrawn, a study published in 2019 found. Further, defendants won 89% of cases that were decided after a trial.
- 99% of physicians in high-risk specialties had been subjected to at least one medical liability claim by the time they were 65, a 2011 article reported. Of the claims, only 22% resulted in an indemnity payment.
- 20 months is the average time from when a meritless case is filed until when it is resolved and many claims took more than three years to resolve, according to a 2013 study.

“Apart from the needless costs of defending meritless claims, those claims contribute to the practice of defensive medicine, a practice which serves only to increase the costs of medical care in this country,” the brief tells the court. “The available data supports application of [affidavit of merit] requirements to secure the just, speedy, and inexpensive adjudication of medical negligence cases.”

The case comes as data shows that medical liability insurance premiums are continuing to climb upward. While a dreaded hard market for medical liability insurance is not yet a reality, a 2025 AMA report (PDF) has warned that “there are signs that such conditions may become a reality in the near future.”

Medical liability reforms are essential to ensuring that patients do not lose access to physicians and a full range of health care services and the AMA is committed to keeping medical liability insurance premiums stable through its work with state and specialty medical associations and other stakeholders to pursue traditional and innovative medical liability reforms.

The most recent edition of “Medical Liability Reform NOW!” (PDF) gives physicians the facts they need to address the broken medical liability system, including updates on state laws, innovative reforms, efforts to reform the system at the federal level and high-impact court cases at the federal and state levels.



## State law supports federal goals

Delaware's affidavit-of-merit requirement isn't out of line with the Federal Rules of Civil Procedure, which says that a pleading doesn't have to be accompanied by an affidavit "unless a rule or statute specifically states otherwise."

In fact, state laws like Delaware's boost the mission of the Federal Rules of Civil Procedure, argues the brief filed by the AMA Litigation Center and the three state medical associations.

The law "fairly, quickly and relatively inexpensively results in the determination of malpractice cases that lack sufficient merit even to be accompanied by an [affidavit of merit]—but that, in the absence of the statute, might drag on for months or even years, at considerable expense to the defendants," the brief says.

If the nation's highest court doesn't uphold the affidavit requirements, plaintiffs who couldn't find someone to sign the document "would become incentivized to file their claim in a federal court so that they could skirt around the state requirement," the physician organizations say in the brief. "The result would be an inequitable administration of the laws because an action that would be barred in state courts would be allowed to proceed in federal court."

A date for oral arguments has not been set, but the case is scheduled to be heard in the Supreme Court's next session that begins in October.