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Justices Seen Resolving Circuit Split Over Med Mal Law

By **Y. Peter Kang**

Law360 (March 10, 2025, 10:58 PM EDT) -- The U.S. Supreme Court said Monday it will decide whether a Delaware medical malpractice statute requiring an expert affidavit can apply in federal court, which experts said will give the justices the opportunity to reassess the so-called Erie doctrine and the relationship between state and federal courts.

The high court **granted** Harold Berk's petition for a writ of certiorari in a suit accusing Dr. Wilson Choy and Beebe Medical Center of providing negligent treatment of his ankle. The suit was tossed because of Berk's failure to comply with Delaware's requirement of an affidavit of merit, which is a report from a physician essentially vouching for the plaintiff's claims, and must be submitted when a complaint is filed, or shortly after.

After the Third Circuit affirmed the district court's dismissal, Berk argued on appeal to the Supreme Court that the Third Circuit ruling conflicts with decisions by six sister circuit courts — the Second, Fourth, Fifth, Sixth, Seventh and Ninth circuits — which have all held that similar state laws do not apply in federal court.

Berk said when the Third Circuit issued its unpublished opinion in his case in July, the court "doubled down" on its position for at least the fifth time.

"Further percolation is pointless: the arguments have been fully aired, and there is no realistic chance this split will resolve on its own," Berk said in his cert petition.

The conflict among circuit courts has existed for at least a decade and is one of the major reasons the high court granted cert, according to Suzanna Sherry, a law professor with Vanderbilt University Law School.

"Although the court doesn't resolve as many circuit splits as I think it ought to, this one has been festering for a while, and actually affects quite a few cases, since it relates to medical malpractice, a major source of diversity-jurisdiction cases," Sherry told Law360 via email.

However, this case is all about the Erie doctrine, Sherry said, referring to the landmark 1938 decision in Erie Railroad v. Tompkins, which mandates that a federal court sitting in diversity apply the substantive law of the forum state, and federal procedural law.

"The line between substance and procedure is and always has been fuzzy," she said. "A state certificate-of-merit requirement looks procedural ... and it conflicts with a Federal Rule of Civil Procedure ... but the state rule probably has a substantive purpose: to cut down the number of meritless med mal cases."

Sherry said the justices last touched on the issue in 2010, when it issued a messy opinion in a case referred to as Shady Grove, where Justice Sonia Sotomayor, a liberal, ended up agreeing with the opinion penned by Justice Antonin Scalia, a conservative, while the dissent authored by the liberal Justice Ruth Bader Ginsburg was joined by Justice Samuel Alito, a conservative.

"It will be very interesting to see how this case comes out," Sherry said. "Erie cases make very strange bedfellows. ... So don't expect this case to be decided along political fault lines!"

But Philadelphia-based plaintiffs attorney Eric Weitz of The Weitz Law Firm told Law360 that the conservative-majority Supreme Court could use the case to reach a new interpretation regarding a state's medical malpractice requirements and whether they are substantive or procedural.

"While we certainly hear a lot about the concept of federalism from our executive branch and from Congress these days, we haven't heard a ton from the Supreme Court, and I can't help but to wonder if this is an opportunity for them to kind of put out there in a very clear way their concept of federalism without it having to be some politically charged issue like women's reproductive rights," Weitz said in a phone interview.

From a practical standpoint, Weitz said, should the justices overturn the Third Circuit's decision, it wouldn't impose any onerous burden on plaintiffs attorneys since the bulk of medical malpractice cases are filed in state court and require an affidavit of merit.

"I know very few lawyers who are going to file a lawsuit without having an expert review ahead of time anyway," he said. "The costs and demands of medical malpractice cases these days are so substantial, people aren't just running down to court and filing them without having intensively vetted by experts to begin with."

That sentiment was shared by John Z. Jackson of Greenbaum Rowe Smith & Davis LLP in New Jersey, who said if the Third Circuit decision is affirmed, it will tighten up the requirements for medical malpractice claims to be brought in federal court and could lighten the caseload for federal judges, but will likely be business as usual for the plaintiffs bar.

"In my experience as defense counsel, good medical malpractice plaintiff's lawyers routinely obtain an expert review before commencing the case," he said via email.

Jackson predicted that the justices will let the affidavit of merit requirement stand at the federal level, given that it has a substantive purpose of filtering out dubious cases.

"While the mere granting of certiorari implies a disposition to reverse the decision being presented in this case, I would expect this court to affirm the requirement for an affidavit of merit and not endorse a more wide open access to the courts for malpractice litigation," he said.

However, Alan Morrison, a law professor at George Washington University Law School, predicted that the Supreme Court will go the other way and reverse the Third Circuit decision. He submitted an amicus brief on behalf of group of law professors specializing in civil procedure, saying Delaware's affidavit requirement improperly conflicts with the Federal Rules of Civil Procedure.

"The Rules create a unified approach to resolving civil cases that would be undermined here by the addition of the numerous provisions of Delaware law that district judges will have to follow to implement [the statute]," Morrison's brief states.

He downplayed the notion that the case will lead to an overhaul of legal precedent and said the justices likely granted cert merely to settle the conflict among the circuit courts and to "fill in the fall calendar with a non-political case."

"They need a few of those, right, that no one will pay any attention to except the lawyers and the parties in the case, especially since the other case they took was it was a hot-button case," Morrison said, referring to Monday's other **cert grant** in a case over Colorado's ban on conversion therapy for transgender minors.

Morrison added that the case won't be heard until October or November, so one can expect an opinion to be released by the court in the spring of 2026.

"This is a nonpolitical case, and it's got some [circuit court] conflicts," he said. "The law clerks are probably interested in it because it reminds of their civil procedure course in their first year at law school."

Berk is represented by Jake W. Murphy, Devin M. Adams, R. Stanton Jones, Andrew T. Tutt, Samuel I. Ferenc, Jillian M. Williams and Jennifer F. Kaplan of Arnold & Porter Kaye Scholer LLP.

Beebe Medical Center is represented by John J. Hare of Marshall Dennehey PC.

Choy is represented by Nathan V. Gin of Elzufon Austin & Mondell PA.

The case is Harold R. Berk v. Wilson C. Choy et al., case number 24-440, in the Supreme Court of the United States.

--Editing by Jay Jackson Jr.
