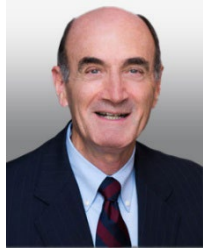


State Law Requiring Notice Before Suit Invalidated by United States Supreme Court

By Hon. Allan Goodman (Ret.)



Hon. Allan Goodman (Ret.) has 24 years of judicial service, including 20 years as a Judge of the Los Angeles Superior Court and 4 years as an Associate Justice Pro Tem of the California Court of Appeal, Second Appellate District. During his legal career, he argued three cases in the United States Supreme Court. Judge Goodman is an exceptionally well-respected and thorough jurist who measures the consequences of his decisions with an even hand. His ability to grasp and disentangle complex legal disputes is aided by his diligent preparation and research into the issues at hand. He brings the same expertise and intelligence to his ADR practice to help litigants resolve their disputes.

Did the U.S. Supreme Court just effectively invalidate the California pre-filing notice requirement for actions against architects, professional engineers and land surveyors?

In *Berk v. Choy* (Jan. 20, 2026) 607 U.S. _ 146 S.Ct. 546 [*Berk*]), the plaintiff, who had sought and obtained medical care while he was visiting Delaware, claimed that the physician who had treated him and the hospital at which he was treated had committed medical malpractice. In filing his complaint in United States District Court for the District of Delaware, he did not comply with Delaware law requiring the filing of an “affidavit of merit.” (Del. Code, Tit. 18 §6853.)

A unanimous United States Supreme Court ruled that there was no need to comply with the Delaware statute. The Court’s ruling was based principally on the “plain language” of Rule 11 of the Federal Rules of Civil Procedure, which states in part: “(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney’s name Unless a rule or statute specifically states otherwise, a

pleading need not be verified or accompanied by an affidavit”

The Court’s opinion makes clear that the sentence just quoted, taken together with Rule 8(a) (which requires only a “short and plain statement” of the claim), excepts only *federal* rules or statutes from the “bare bones” pleading mandate of the FRCP. The Court specifically rejected Delaware’s affidavit or certification requirements as not being within this exception. (One Justice (Jackson)) joined in the ruling but set forth a different set of reasons in reaching the same resolution.)

The decision has immediate implications for the use of California statutes that impose affidavit requirements on parties seeking redress for several categories of claims. For example, California statutes impose affidavit filing requirements in actions against engineers, architects and land surveyors. (Calif. Code of Civil. Proc. § 411.35 [§411.35].) Thus, when an out-of-state investor satisfying federal court diversity requirements (28 USC §1332) sues a California-domiciled engineering firm in District Court in California, for example, for breach of its contract for engineering services the latter has performed on the investor’s multi-million-

dollar project in this state, on the authority of *Berk*, the investor has no obligation to comply with §411.35.

Berk's impact extends beyond the professions subject to §411.35. Other examples include the following: Civil Code section 910 addresses notice (and inspection) requirements prior to commencing construction defect litigation; and Labor Code section 2699.3 sets out pre-filing notice requirements to both the Labor and Workforce Development Agency and the employer under the Private Attorneys General Act. Thus, the particular statutory plan needs to be considered in determining if and, if so, how the holding in *Berk* applies. (And, it is to be recalled that California's medical malpractice statutes do not require the filing of an affidavit or certificate of compliance in court [See Calif. Code of Civil Proced. §§ 364 and 365].)

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