

**24-440 BERK V. CHOY**

DECISION BELOW: 2024 WL 5354482

LOWER COURT CASE NUMBER: 23-1620

QUESTION PRESENTED:

This case presents a clear, recognized, entrenched conflict over an important question about the application of state procedural rules in federal court.

Delaware, like numerous states, requires that in certain actions the plaintiff must also file an affidavit of merit ("AOM") with the complaint. *See* 18 Del. C. § 6853. An AOM is an affidavit signed by an expert stating that there are reasonable grounds to believe that each defendant has committed the alleged misconduct. *See id.* § 6853(a)(l).

The Second, Fourth, Fifth, Sixth, Seventh, and Ninth circuits hold that AOM provisions and comparable statutes do not govern actions in federal court because they answer the same question as-and therefore conflict with-several different Federal Rules of Civil Procedure. The Third and Tenth circuits, in contrast, hold that they present "no conflict" with any Federal Rules.

In the decision below, the Third Circuit, in an unpublished opinion, for at least the fifth time, refused to hold that an AOM statute conflicts with any Federal Rules. Judge Phipps "concur[red] in only the judgment." Third Circuit precedent required him to vote to affirm, he explained, but "writing on a clean slate ... he may not [have] arrive[d] at that same conclusion."

The question presented is:

Whether a state law providing that a complaint must be dismissed unless it is accompanied by an expert affidavit may be applied in federal court.

CERT. GRANTED 3/10/2025