

THE CERTIFICATE OF MERIT STATUTE

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- “(1) is competent to testify;
(2) holds the same professional license or registration . . . ; and
(3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person’s:
 - (A) knowledge;
 - (B) skill;
 - (C) experience;
 - (D) education;
 - (E) training; *and*
 - (F) practice.”

Key provisions in current statute

The affidavit needs to specifically set out

- “For *each theory* of recovery ...the negligence, if any, or other action, error, or omission of the licensed or registered professional . . . and the factual basis of each such claim.”
- The affiant “shall be licensed or registered *in this state* and actively engaged in the practice
.....”

Key provisions in current statute

- The failure to file the affidavit “shall result in dismissal” Such dismissal may be with prejudice.
- An order granting or denying the dismissal may be immediately appealed.
- The court, after hearing, may for good cause “extend such time [to file the affidavit] as it shall determine justice requires” when limitations comes into play.

§150.001 (2009)

- “Licensed or registered professional” means a licensed architect, licensed professional engineer, registered professional land surveyor, registered landscape architect, or any firm in which such licensed or registered professional practices
.....”

Questions about § 150.002

- When does the statute apply?
 - Negligence
 - Contract claims? *Owens v. Hous. Auth. Of City of San Augustine*, 2013 WL 2286079 (Tex. App. – Tyler 2013, no pet.)
 - Breach of warranty claims?
 - Statutory violations?
 - Tortious interference? *Dunham Eng'g. Inc. v. Sherwin-Williams, Co.*, 404 S.W.3d 785, 788 (Tex. App – Houston [14th Dist.] 2013, no pet.)
 - Indemnity? *Childress Eng'g Services, Inc. v. National Mut. Ins. Co.*, 456 S.W.3d 725 (Tex. App – Fort Worth 2013, no pet.)

Key is “provision of potential services”

Questions about § 150.002

- Does the statute apply to third-party claims?

No – see *Jaster v. Comet II Const., Inc.*,
438 S.W.3d 556 (Tex. 2014).

Questions about § 150.002

- What must be included in the affidavit?

Recent Decisions

- *TIC N. Central Dallas 3, L.L.C. v. Envirobusiness, Inc. d/b/a EBI Consulting, et al.* 2014 WL 4722706 (Dallas, Sept. 24, 2014, pet. filed)
 - “May” is significant
 - Related to professional services

Recent Decisions

- *Bruington Engineering, Ltd., v. Pedernal Energy, L.L.C.*, 2014 WL 4211024 (San Antonio, August 27, 2014)
 - First-filed means first filed
- *Miramar Petroleum, Inc. v. Cimarron Engineering, LLC*, 13-15-00251-CV (Tex. App.—Corpus Christi, January 7, 2016)
 - Cannot dismiss a second time with prejudice if first time dismissed without prejudice

Levinson Alcoser Associates LP v. El Pistolon II,
Tex. S. Ct., Cause No. 15-0232

- From the Corpus Christi Court of Appeals
- Argued November 6, 2016
- Still no ruling.

Levinson

- Two Issues:
 - Factual basis
 - Undefined in statute
 - How much needs to be said
 - Does the affiant have expertise in the specific question?

Thank you.

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