THE CERTIFICATE OF MERIT STATUTE IN TEXAS

January 28, 2011

THE 6TH ANNUAL CONSTRUCTION SYMPOSIUM

Prepared by:
Tara Sohlman & Jackie Cooper
2011 Updates by Jack Walters

900 Jackson Street, Suite 100
Dallas, TX 75202
Telephone: 214-712-9578
Telecopy: 214-712-9540

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

I. INTRODUCTION

A certificate of merit statute requires a plaintiff to consult with a design professional and submit an affidavit stating that the plaintiff's claim is meritorious. Some states have enacted legislation that requires that a claim against licensed or design professionals, i.e. architects, engineers, and land surveyors, be supported by an affidavit/certificate of merit attached to or filed shortly after a plaintiff's complaint. Georgia and California were among the first states to require a certificate of merit be filed with a complaint. The trend has grown with the push for tort reform at both the state and federal levels.

The legislation requiring certificates of merit is intended to protect licensed professionals from frivolous and unmeritorious claims and the resultant litigation expenses. A certificate of merit will not prevent a plaintiff from filing a lawsuit or proceeding with the litigation, but it will aid the system in eliminating the those claims against licensed and design professionals with little or no basis.

Although several other states have enacted certificate of merit statutes addressing claims against design professionals, such statutes are still a relatively new trend.[i] The specific provisions vary from state to state, but each statute is presumably designed to eliminate frivolous lawsuits against design professionals. As many of the statutes are fairly recent, there is little case law. However, some states have addressed a few of the legal issues that can arise, particularly those states that require the certificate of merit with regard to any professional malpractice action, including medical malpractice claims.

Texas' certificate of merit statute was first enacted in 2003, modified in 2005 and again in 2009. Examination of Texas' statute and the existing case law, as well as the statutes and case law of other states highlight legal issues and challenges likely to arise in Texas and provide some guidance.

II. THE HISTORY OF TEXAS' CERTIFICATE OF MERIT STATUTE

A. 2003 Version

In 2003, the Texas Legislature passed legislation to bring about tort reform. House Bill 4 applied to registered architects and licensed professional engineers, both defined as "design professionals" under Texas Civil Practice & Remedies Code ("CPRC") §150.001. In an effort to eliminate frivolous lawsuits against these design professionals and reduce the number of lawsuits filed the legislature enacted CPRC §150.002.[ii] That statute provided in part:

> (a) In any action for damages alleging professional negligence by a design professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party registered architect or licensed professional engineer competent to testify and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each claim. The third-party professional engineer or registered architect shall be licensed in this state and actively engaged in the practice of architecture or engineering.

CPRC §150.002(a) (2003). Failure to attach the required affidavit could result in dismissal of the complaint. See CPRC §150.002(d) (2003).

While CPRC §150.002 served the general intention of requiring a certificate of merit, it left open numerous questions. For example, it required that the licensed architect or professional engineer providing the affidavit practice "in the same area of practice as the defendant." See CPRC §150.002(a) (2003). This raises the question as to what constitutes "the same practice area." This could be interpreted as requiring that only a geotechnical engineer could provide an affidavit criticizing the work of another geotechnical engineer. However, the phrase could be more broadly interpreted to allow any type of engineer who

possesses knowledge about geotechnical engineering to offer an opinion on the defendant's work.

Other legal questions arose due to the way the statute was drafted. The statute applied to "any action." However, it failed to define what constituted an "action." The question remained as to whether the statute only applied to lawsuits filed in court or whether the statute applied to arbitrations too. Arbitration is a widely used form of dispute resolution in the construction industry. If the statute did not extend to arbitrations, many plaintiffs would be able to escape the statute's certificate of merit requirement. Further, "design professional," appeared to be defined in terms of individual architects and engineers; architectural or engineering firms were not addressed. CPRC §150.001. The statute left up to the Courts the question of whether the affidavit requirement was applicable to these companies or only the individual architect or engineer.

B. 2005 Version

In 2005, during the regular session of the 79th Legislature, two bills—both amending Chapter 150 of the Texas Civil Practice & Remedies Code—were passed by both the House and Senate and signed by the governor. House Bill 854 originated in the Civil Practices Committee and addressed only Chapter 150 of the Texas Civil Practices and Remedies Code. House Bill 1573 originated in the Licensing and Administrative Procedures Committee and addressed not only Chapter 150 of the Texas Civil Practices and Remedies Code but the "practice of architecture" provisions of the Occupations Code as well.

The HB 854 version of the 2005 amendments—which applies to actions filed after May 27, 2005 but before September 1, 2009—provides as follows:

> CHAPTER 150. LICENSED OR REGISTERED PROFESSIONALS
>
> Sec. 150.001. DEFINITION.
>
> In this chapter, "licensed or registered professional" means a registered architect, registered professional land surveyor, or licensed professional engineer.
>
> Sec. 150.002. CERTIFICATE OF MERIT.
>
> (a) In any action for damages alleging professional negligence by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party registered architect, registered professional land surveyor, or licensed professional engineer competent to testify and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim. The third-party professional engineer, registered professional land surveyor, or registered architect shall be licensed in this state and actively engaged in the practice of architecture, surveying, or engineering.
>
> (b) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party registered architect, registered professional land surveyor, or professional engineer could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.
>
> (c) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

(d) The plaintiff's failure to file the affidavit in accordance with Subsection (a) or (b) may result in dismissal with prejudice of the complaint against the defendant.

(e) This statute shall not be construed to extend any applicable period of limitation or repose.

Acts 2005, 79th Leg., R.S., ch. 189, § 1, 2005 Tex.Gen.Laws 348.

The HB 1573 version of the amendments—which applies to causes of action accruing after September 1, 2005 but before September 1, 2009—provides as follows:

CHAPTER 150. DESIGN PROFESSIONALS

Sec. 150.001. DEFINITIONS. In this chapter:

(1) "Design professional" means a licensed architect, licensed professional engineer, or any firm in which such licensed professional practices, including but not limited to a corporation, professional corporation, limited liability corporation, partnership, limited liability partnership, sole proprietorship, joint venture, or any other business entity.

(2) "Practice of architecture" has the meaning assigned by Section 1051.001, Occupations Code.

Sec. 150.002. CERTIFICATE OF MERIT.

(a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a design professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect or licensed professional engineer competent to testify, holding the same professional license as, and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim. The third-party professional engineer or licensed architect shall be licensed in this state and actively engaged in the practice of architecture or engineering.

(b) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed architect or professional engineer could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

(c) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

(d) The plaintiff's failure to file the affidavit in accordance with Subsection (a) or (b) shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.

(e) An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.

(f) This statute shall not be construed to extend any applicable period of limitation or repose.

(g) This statute does not apply to any suit or action for the payment of fees

arising out of the provision of professional services.

Acts 2005, 79th Leg., R.S., ch. 208, § 2, 2005 Tex.Gen.Laws 370.

If amendments to the same statute are enacted at the same session of the Legislature, one amendment without reference to the other, the amendments shall be harmonized if possible so that effect may be given to each. Tex. Gov't Code § 311.025(b). If the amendments are irreconcilable, the latest in date of enactment prevails. Id. The "date of enactment" is the date on which the last legislative vote is taken on the bill enacting the statute. Tex. Gov't Code § 311.025(d). In this case, the two versions of the 2005 amendments will often be construed together. See, e.g., DLB Architects, P.C. v. Weaver, 305 S.W.3d 407 (Tex.App.–Dallas 2010 ____). However, in the event both apply and conflict, the HB 1573 version will prevail.

Overall, not many changes were made with the 2005 amendments, but the modifications provided some clarification on the questions that arose after the 2003 versions of §150.001 and §150.002 were passed. Specifically, the 2005 changes addressed the following:

- "Design professional" became "licensed or registered professional" under §150.001. The statute was expanded to include registered professional land surveyors and to apply the certificate of merit requirement to firms or companies in which a licensed or registered professional practices.

- Arbitration was added to the scope of §150.002.

- The 2003 version of §150.002 only applied to negligence actions. In 2005, §150.002 was expanded to any cause of action seeking damages "arising out of the provision of professional services."

- The 2005 version of §150.002 added the requirement that an expert providing the affidavit must hold the same professional license as the defendant.

- Failure to comply with §150.002 now results in mandatory dismissal of the plaintiff's complaint. However, dismissal with prejudice remains within the discretion of the court.

III. CURRENT VERSION, EFFECTIVE SEPTEMBER 1, 2009

The current version of Chapter 150 of the Texas Civil Practice & Remedies Code, applicable to all claims arising on or after September 1, 2009, states as follows:

> CHAPTER 150. LICENSED OR REGISTERED PROFESSIONALS
>
> Sec. 150.001. DEFINITIONS. In this chapter:
>
> (1) "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, including but not limited to a corporation, professional corporation, limited liability corporation, partnership, limited liability partnership, sole proprietorship, joint venture, or any other business entity.
>
> (2) "Practice of architecture" has the meaning assigned by Section 1051.001, Occupations Code.(3) "Practice of engineering" has the meaning assigned by Section 1001.003, Occupations Code.
>
> Sec. 150.002. CERTIFICATE OF MERIT.
>
> (a) In any action or arbitration proceeding for damages arising out of

the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:

(1) is competent to testify;

(2) holds the same professional license or registration as the defendant; 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.

(b) The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

(c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

(d) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

(e) The plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.

(f) An order granting or denying a motion for dismissal is immediately appealable as an interlocutory order.

(g) This statute shall not be construed to extend any applicable period of limitation or repose.

(h) This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.

Sec. 150.003. LIABILITY FOR SERVICES RENDERED DURING DISASTER.

(a) This section applies only to a licensed or registered professional who provides architectural or engineering services if the services:

(1) are authorized, as appropriate for the professional, in:

(A) Chapter 1001, Occupations Code;

(B) Chapter 1051, Occupations Code;

(C) 22 T.A.C. Part 6 (Texas Board of Professional Engineers), Chapter 137 (Compliance and Professionalism); and

(D) 22 T.A.C. Part 1 (Texas Board of Architectural Examiners), Chapter 1 (Architects), Subchapter H (Professional Conduct);

(2) subject to Subsection (d), are provided voluntarily and without compensation or the expectation of compensation;

(3) are in response to and provided during the duration of a proclaimed state of emergency under Section 433.001, Government Code, or a declared state of disaster under Section 418.014, Government Code;

(4) are provided at the request or with the approval of a federal, state, or local public official acting in an official capacity in response to the proclaimed state of emergency or declared disaster, including a law enforcement official, public safety official, or building inspection official; and

(5) are related to a structure, building, roadway, piping, or other system, either publicly or privately owned.

(b) A licensed or registered professional who provides the services to which this section applies is not liable for civil damages, including personal injury, wrongful death, property damage, or other loss related to the professional's act, error, or omission in the performance of the services, unless the act, error, or omission constitutes:

(1) gross negligence; or

(2) wanton, wilful, or intentional misconduct.

(c) This section does not apply to a licensed or registered professional who is at the scene of the emergency to solicit business or perform a service for compensation on behalf of the professional or a person for whom the professional is an agent.

(d) The entitlement of a licensed or registered professional to receive compensation for services to which this section applies does not determine whether the services provided by the professional were provided voluntarily and without compensation or the expectation of compensation.

CPRC §150.002 (2009).

Substantive changes between 2005 and 2009 address qualifications of the expert and content of the affidavit. These changes appear to lessen the requirements for the expert to be considered qualified and to broaden the statute's reach, possibly to non-negligence claims. The latter would signal a departure from the current law regarding the applicability of the 2005 version of the statute. (See discussion in section IV.A below, regarding when the statute applies.)

- The expert must only be knowledgeable in the area of practice of the defendant, based in part on their experience and practice. The 2005 version required that the expert be practicing in the same area as the defendant. The slight difference in semantics is likely to result in much debate about qualifications.

- The expert must set forth the "negligence" or "other action, error, or omission" in the affidavit. The 2005 version required only that the expert is to include "at least one negligent act, error or omission." This change may lead to further argument regarding whether a certificate of merit is required in non-negligence claims.

- "Registered landscape architect" is now included in the scope.

IV. TEXAS COURTS' INTERPRETATIONS OF THE CERTIFICATE OF MERIT STATUTE (2003 AND 2005 VERSIONS)

The case law regarding certificates of merit in Texas interprets the 2003 and 2005 versions, as the 2009 version only became effective on September 1, 2009. The 2005 and 2009 amendments have addressed some of the questions that have arisen. However, this area of the law is still developing. The following discussion considers some of the recent rulings on the meaning and scope of the certificate of merit statute in Texas.

A. When does the statute apply?

In 2005, CPRC §150.002 was amended "to expand its application from actions 'alleging professional negligence' by a design professional to any action or arbitration proceeding 'arising out of the provision of professional services.'" Gomez v. STFG, Inc., 2007 Tex. App. LEXIS 7860 *4 (Tex. App.—San Antonio, Oct. 3, 2007, no pet.) (emphasis added). See CPRC §150.002(a) (emphasis added). This language was not changed in the latest amendment.

Texas courts have interpreted this language to mean that "the filing requirement applies only to claims of negligence in provision of professional services." See Gomez at *4; Landreth v. Las Brisas Council of Co-Owners, Inc., 2009 Tex.Ap..LEXIS 740 (Tex.App.Corpus Christi Feb. 5, 2009); Kniestedt v. Southwest Sound & Electronics, Inc., 2007 Tex. App. LEXIS 5163 (Tex. App. San Antonio July 3 2007).

There is an argument to be made that derivative claims for breach of contract, breach of warranty, violations of the DTPA and negligence all arise out of the provision of professional services and as such, are subject to the certificate of merit requirement. The Austin Court of Appeals held that a trial court erred by denying a motion to dismiss a negligent misrepresentation claim because an affidavit of a professional engineer was required to support the claim to the extent the claim arose out of the provision of professional services by a licensed or registered professional. See Consol. Reinforcement v. Carothers Exec. Homes, Ltd., 271 S.W.3d 887, 2008 Tex. App. LEXIS 9075 (Tex. App. Austin 2008).

However, in a claim alleging tortious interference with an existing contract, the court held that the affidavit requirement applied only to actions alleging negligence and the tortious interference action did not involve negligence. See Kniestedt. San Antonio July 3 2007). Additionally, the Austin Court of Appeals relied on the plain language of the statute in its holding that the trial court did not abuse its discretion in dismissing claims for breach of contract, breach of warranty and violations of the DTPA. See Consolidated Reinforcement at 894.

As these cases demonstrate, the exact circumstances in which the plaintiff will be required to provide a certificate of merit are still being decided. The 2009 amendment will create more confusion regarding which claims are subject to the statute.

B. Will the courts consider supplemental, amended or late reports?

Nothing in the design professional statute suggests or anticipates that the trial court may look outside of the four corners of the design professional's report for guidance. Landreth v. Las Brisas Council of Co-Owners, Inc., 2009 Tex. App. LEXIS 740 (Tex. App. Corpus Christi Feb. 5 2009). Further, because the statute does not, by its plain language, allow for amendment to cure a deficiency, the trial court must consider only to the initial affidavit filed by the design professional. See id.

The failure to file the certificate of merit within the prescribed time period "shall result in dismissal of the complaint against the defendant." See CPRC 150.002(e). "The design professional statute specifically requires the initial affidavit to be filed contemporaneously with the complaint by a design professional . . . ." Landreth. However, the statute provides an exception to the contemporaneous filing

requirement in situations "in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit… could not be prepared." CPRC § 150.002(c).

The Corpus Christi Court of Appeals has also recently held that the statute provides the trial court with the discretion to grant an extension of the filing deadline for good cause. See The WCM Group, Inc. v. Brown, 2009 Tex.App.LEXIS 9009 *22 (Tex. App. Corpus Christi Nov. 19, 2009). The plaintiff filed the complaint more than 10 days before the expiration of the statute of limitations. The court determined that the "good cause" exception was not available only through the 10-days-before-expiration exception. Id.

However, if no exception to the contemporaneous filing requirement applies, dismissal may be with prejudice. CPRC § 150.002(e). Because the court is not required to dismiss a claim with prejudice, the claim may be dismissed without prejudice to refiling, and then refiled if permitted by the applicable statute of limitations.

Most courts tend to rely on the plain language of the statute itself in determining what constitutes a certificate of merit in compliance with the statute. There is no provision regarding amended or supplemental reports. However, there appears to be some disagreement regarding the applicability of the exceptions for affidavits not timely filed.

C. Will participation in litigation waive the right to file a motion to dismiss? … The answer appears to be no.

A plaintiff's failure to file the required expert affidavit in accordance Texas' CPRC §150.002 results in dismissal of the complaint, possibly with prejudice. See CPRC §150.002(e). The statute does not include a deadline for filing a motion to dismiss for failure to comply with the certificate of merit requirement. However, plaintiffs have asserted the argument of waiver in response to a motion to dismiss based on 150.002. Some Texas Courts have held, based on the 2003 and 2005 versions of the statute, that participation in litigation does not waive a defendant's right to file a motion to dismiss based on CPRC §150.002.

The Corpus Christi Court of Appeals held that, based on the 2005 version of the statute, the defendant's participation in discovery, depositions and filing of a motion for summary judgment did not waive the right to seek dismissal for failure to comply with the statute. See Landreth. v. Las Brisas.

The Fort Worth Court of Appeals had previously determined, based on the 2003 version of the statute, that participating in the litigation will not waive the right of a defendant to seek dismissal based on a plaintiff's failure to comply with §150.002. In Palladian Building Company, Inc. v. Nortex Foundation Designs, Inc., 165 S.W.3d 430 (Tex.App.—Ft. Worth 2005, no writ.), Palladian sued an engineering firm, Nortex, but failed to file the required expert affidavit. Rather than seeking dismissal, Nortex filed, and later amended, an answer. Palladian argued this action constituted waiver of Nortex's right to seek dismissal of the complaint due to the lack of an expert affidavit. Id. at 432. The actions taken by Nortex did not result in waiver of its right to file a motion to dismiss Palladian's claims based on CPRC §150.002's expert affidavit requirement. Id. at 434.

It appears that most courts addressing the issue of waiver look to the plain language of the statute which does not include a deadline for filing a motion to dismiss for failure to provide a certificate of merit.

Further, recent decisions from the Dallas and Waco Courts of Appeals seem to make it clear that mere delay alone will not waive the right to seek dismissal based on the statute. See DLB Architects, P.C. v. Weaver, 305 S.W.3d 407 (Tex.App.–Dallas 2010, pet. denied); Ustanik v. Nortex Foundation Designs, Inc., 320 S.W.3d 409 (Tex.App.–Waco June 16, 2010, pet. filed). Similar to previous decisions, both addressed the timeframe in which the right to dismissal based on the Certificate of Merit

statute must be asserted and what will constitute waiver of such right—both noting the lack of a time deadline in the statute and in holding that mere delay and/or participation in litigation will not in and of itself constitute waiver.

V. TO BE DECIDED: DOES THE STATUTE APPLY TO CROSS-CLAIMS, COUNTER-CLAIMS AND THIRD-PARTY CLAIMS?

No Texas cases have yet confronted whether a cause of action brought against a design professional in a counterclaim, cross-claim or third-party petition must be supported by an expert's affidavit.

Texas' CPRC §150.002 applies to a plaintiff who brings claims against a design professional. The language of the statute provides, "In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit…" CPRC §150.002(a). While the statute applies to "any action" for damages, the language only refers to a "plaintiff." According to Texas Rules of Civil Procedure 78, the pleadings of a plaintiff are defined as an original petition and supplemental petitions as may be necessary.

Other jurisdictions encountering this issue generally interpret certificate of merit statutes to apply to at least third party petitions and require that an expert affidavit or certificate of review be filed with the claim. Extending a certificate of merit statute to third party petitions is consistent with the intent behind these statutes. As discussed, they are intended to allow meritorious claims against licensed professionals to proceed while protecting the licensed professional from meritless claims and the expense and inconvenience of litigation. See Nagim v. New Jersey Transit, 369 N.J.Super. 103, 115 838 A.2d 61, 68 (2003). In extending the certificate of merit statutes to claims other than those raised in the plaintiff's complaint, the determining factor remains whether the claim alleges professional malpractice.

Cross-claims are unique in that a defendant could rely on a plaintiff's expert affidavit against a design professional.

Similarly to CPRC §150.002, Georgia and New Jersey's certificate of merit statutes apply to "any action" and refer only to plaintiffs. See GA. Code Ann. §9-11-9.1; N.J. Stat. Ann. §2A:53A-27. However, the states' certificate of merit statutes can extend to a third-party complaint if the claims contained therein require proof of professional malpractice.

In Housing Authority of Savannah v. Gilpin Basemore/Architects & Planners, Inc., 191 Ga.App. 400, 381 S.E.2d 550 (1989), a third-party plaintiff sought contribution from an architectural firm as an alleged joint tortfeasor. The third-party complaint was dismissed as an expert affidavit was not filed contemporaneously with the complaint, in accordance with the applicable certificate of merit statute. While the third-party complaint sought contribution from a joint tortfeasor, the claim required proof of professional malpractice. The third-party defendant architectural firm would be liable only if it negligently rendered its professional services under the contract. Id. at 551.

Some New Jersey courts place importance on the word "plaintiff" in New Jersey's certificate of merit statute. Similar to Georgia, a third-party complaint that asserts claims based on professional malpractice must be supported by an expert affidavit. See Nagim, 369 N.J.Super. 103, 838 A.2d 61 (Transit system's third party complaint against engineering company sought indemnification. An Affidavit of Merit was required as the claim required proof of malpractice or professional negligence.) However, a New Jersey appellate court refused to extend the expert affidavit requirement to cross-claims in a medical malpractice claim. Burt v. West Jersey Health Systems, 339 N.J. Super. 296, 771 A.2d 683, 687-688 (2001) (The New Jersey appellate court noted that the statute applied only to plaintiffs.)

In another New Jersey case, an appellate court focused on the applicability of the certificate of merit statute to a "cause of action"

and applied it to a counterclaim. See Charles A. Manganaro Consulting Engineers, Inc. v. Carneys Point Township Sewerage Authority, 344 N.J.Super. 343, 781 A.2d 1116 (2001). In Manganaro, an engineering firm sued the township sewer authority for breach of contract relating to construction and improvement of sewage treatment facilities. The sewer authority filed a counterclaim alleging breach of contract based on the way the engineering firm designed the project, prepared the plans and specifications, and for its failure to properly review shop drawings submitted to the general contractor. The appellate court examined whether §2A:53A-27 applied to the sewer authority's affirmative defenses and counterclaim. Although the court found that a counterclaim constitutes a "cause of action," it declined to extend the statute to affirmative defenses because an affirmative defense does not constitute a cause of action. Id. at 1117-1118.

Texas could follow the lead of Georgia and some courts in New Jersey by requiring that any causes of action based on professional malpractice, including third-party and counter-claims be supported by an expert affidavit. However, Texas courts could also limit the statute's applicability to "plaintiffs" based on the plain language of the statute.

VI. 2010-2011 CASE UPDATE

Of the roughly 35 Federal and State Court opinions addressing Texas' Certificate of Merit statute since it was originally enacted in 2003, more than half were issued since the beginning of 2010, and most of which address the 2005 version of the statute. Notable in these decisions are the following developments: (1) an apparent split in the Texas Courts of Appeals on the procedure for determining which claims are subject to the statute and which are not, and (2) differing opinions from federal district courts in Texas as to whether the Certificate of Merit statute applies to federal court diversity actions.

A. Split in Texas Courts of Appeals as to scope of claims covered by Certificate of Merit Statute

Probably the most significant development in the 2010-2011 timeframe is an apparent split in the Texas Courts of Appeals as to whether non-negligent labeled causes of action can be covered by the statute. Prior to 2010-2011, the Texas Courts of Appeals from San Antonio, Austin and Corpus Christi had held, without making any analysis of the substance of the underlying claims, that non-negligence claims were not subject to the statute. See Landreth v. Las Brisas Council of Co-Owners, Inc. 285 S.W.3d 492 (Tex.App.–Corpus Christi 2009, no pet.); Consol. Reinforcement v. Carothers Exec. Homes, Ltd., 271 S.W.3d 887 (Tex.App.–Austin 2008, no pet.); Gomez v. STFG, Inc., No. 04-07-00223-CV, 2007 WL 2846419, 2007 Tex.App. LEXIS 7860 (Tex.App.–San Antonio Oct. 3, 2007, no pet.). Thus, a claim entitled "breach of contract," regardless of the underlying substantive allegations supporting the claim, was outside the scope of the Certificate of Merit statute. This is no longer the case in at least the jurisdictions covered by the Forth Worth, Houston (1st District), Waco, and Texarkana Courts of Appeals. See Parker County Veterinary Clinic, Inc. v. GSBS Batenhorst, Inc., No. 2-08-380-CV, 2009 WL 3938051, 2009 Tex.App. LEXIS 8986 (Tex.App.–Fort Worth Nov. 19, 2009, no pet.) (mem.); Ashkar Eng'g Corp. v. Gulf Chem. & Metallurgical Corp., No. 01-09-00855-CV, 2010 WL 376076, 2010 Tex.App. LEXIS 769 (Tex.App.–Houston [1st Dist] Feb. 4, 2010) (mem.) (appeal dism'd, 2010 WL 1509287, 2010 Tex.App. LEXIS 2807, April 15, 2010); Ustanik v. Nortex Found. Designs, Inc., 320 S.W.3d 409, 417 (Tex.App.–Waco 2010, pet. denied); Natex Corp. v. Paris Independent School Dist., 326 S.W.3d 728 (Tex.App.–Texarkana 2010, pet. filed). In particular, the Forth Worth, Houston (1st District), Waco, and Texarkana Courts of Appeals have held that they are not bound by the labels of claims used by a plaintiff and have instead looked to the plaintiff's pleadings to determine whether the true nature of additional claims asserted were in fact non-negligence claims.

In determining whether the claim sounds in tort or contract, these courts will use the familiar analysis looking to the source of the duty and the nature of the remedy sought. See Natex Corp., 326 S.W.3d at 733-34 (relying on Parker County Vet'y Clinic, Inc. v. GSBS Batenhorst, Inc., No. 2-08-380-CV, 2009 WL 3938051 (Tex.App.-Fort Worth Nov. 19, 2009, rule 53.7(f) motion granted) (mem. op.) and Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41 (Tex. 1998))

In assessing the source of the duty, a key distinguishing fact is the existence (Parker County and Natex Corp.) or non-existence (Ashkar Eng'g) of a written contract from which the allegedly breached duties arose. When a written contract exists, and the alleged breaches are of duties set forth in the contracts, the claim tends to sound in contract. See Parker County Veterinary Clinic, Inc. v. GSBS Batenhorst, Inc., No. 2-08-380-CV, 2009 WL 3938051, 2009 Tex.App. LEXIS 8986 (Tex.App.–Fort Worth Nov. 19, 2009, no pet.) (mem.); Natex Corp. v. Paris Independent School Dist., 326 S.W.3d 728 (Tex.App.–Texarkana 2010, pet. filed). When no written contract exists, the opposite is true. See Ashkar Eng'g Corp. v. Gulf Chem. & Metallurgical Corp., No. 01-09-00855-CV, 2010 WL 376076, 2010 Tex.App. LEXIS 769 (Tex.App.–Houston [1st Dist] Feb. 4, 2010) (mem.) (appeal dism'd, 2010 WL 1509287, 2010 Tex.App. LEXIS 2807, April 15, 2010).

In assessing the nature of the remedy sought, when the plaintiff seeks damages for repairs and remediation, the claim tends to sound in tort. See Ashkar Eng'g Corp. v. Gulf Chem. & Metallurgical Corp., No. 01-09-00855-CV, 2010 WL 376076, 2010 Tex.App. LEXIS 769 (Tex.App.–Houston [1st Dist] Feb. 4, 2010) (mem.) (appeal dism'd, 2010 WL 1509287, 2010 Tex.App. LEXIS 2807, April 15, 2010). In contrast, when a plaintiff seeks consequential damages and attorneys' fees recoverable in a contract action, the claim tends to sound in contract. See Natex Corp. v. Paris Independent School Dist., 326 S.W.3d 728 (Tex.App.–Texarkana 2010, pet. filed).

B. Does the Certificate of Merit Statute Apply in Federal Court Diversity Cases?

Two federal district courts in Texas have come to different conclusions on this question. Specifically, in Estate of C.A. v. Grier, --- F.Supp.2d ----, 2010 WL 4236865 (S.D. Tex. Oct 15, 2010), the the United States District Court for the Southern District of Texas, Houston Division, found that the certificate of merit statute was a procedural rule not a substantive element of a state-law professional negligence claim. Id. at *6. Thus, the Court held that Texas' Certificate of Merit statute is a procedural rule that does not apply in federal court diversity cases. Id. Interestingly, although the Court noted that several other federal district courts in Texas had applied Tex. Civ. Prac. & Rem. Code § 150.002 in diversity cases asserting Texas negligence claims, the Estate of C.A. court found that "most of those cases assumed, without examination or explanation, that § 150.002 applies." Id. (citing Menendez v. Wal-Mart Stores, Inc., No. Civ. A. No. M-08-348, 2009 WL 2407949, at *5-6 (S.D. Tex. July 31, 2009); Garland Dollar Gen., LLC v. Reeves Dev., LLC, Civ. A. No. 3:09-CV-0707-D, 2010 WL 1962560 (N.D. Tex. May 17, 2010); and Harris Constr. Co. v. GGP-Bridgeland, L.P., No. H-07-3468, 2010 WL 1945734 (S.D. Tex. May 12, 2010).

In contrast, in Garland Dollar General LLC v. Reeves Development, LLC, Slip Copy, 2010 WL 4259818 (N.D. Tex. Oct 21, 2010), the United States District Court for the Northern District of Texas, Dallas Division, reached the opposite conclusion to Estate of C.A. v. Grier finding that the requirements of Texas Civil Practice & Remedies Code Chapter 150 did not conflict with Rule 8 of the Federal Rules of Civil Procedure (The Estate of C.A. v. Grier court concluded that there was a conflict). The Court further found that Texas' Certificate of Merit statute requirements significantly affected the outcome of the case. Thus, they held that the statute does apply in federal court diversity cases.

VII. CONCLUSION

The certificate of merit requirement was designed to preclude a plaintiff from filing an

unmeritorious claim and forcing a licensed professional to defend against it. In many cases, it has served its purpose. However, the case law addressing the statute has demonstrated that a seemingly simple objective does not guarantee clear law. The Texas Legislature's amendments to the certificate of merit statute have clarified many issues for Texas courts. However, unresolved issues remain and the 2009 version of the statute will create additional challenges to interpretation and application of Texas certificate of merit statute.

---

[i]

Arizona
Ariz. Rev. Stat. §12-2602 (2010).

California
Cal. Code §411.35 (2009).

Colorado
Colo. Rev. Stat. §13-20-602 (2009).

Georgia
GA. Code Ann. §9-11-9.1 (2007).

Maryland
MD. Code Ann., Cts. & Jud. Proc. §3-2C-02 (2009).

Minnesota
Minn. Stat. §544.42 (2003).

Nevada
Nev. Rev. Stat. Ann. 40.6884 (2009).

New Jersey
N.J. Stat. Ann. §2A:53A-27 (2010).

Oregon
OR. Rev. Stat. Ann. §31.300 (2007).

Pennsylvania
Penn. R. Civ. P. No. 1042.1 (2009).

[ii] The 2003 version of Texas CPRC §150.002 provided as follows:

(a) In any action for damages alleging professional negligence by a design professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party registered architect or licensed professional engineer competent to testify and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each claim. The third-party professional engineer or registered architect shall be licensed in this state and actively engaged in the practice of architecture or engineering.

(b) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party registered architect or professional engineer could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.

(c) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.

(d) The plaintiff's failure to file the affidavit in accordance with Subsection (a) or (b) may result in dismissal with prejudice of the complaint against the defendant.

(e) This statute shall not be construed to extend any applicable period of limitation or repose.