

**A DEVELOPING AREA OF CONSTRUCTION LAW IN TEXAS:  
THE CERTIFICATE OF MERIT STATUTE**

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## **A DEVELOPING AREA OF CONSTRUCTION LAW IN TEXAS: THE CERTIFICATE OF MERIT STATUTE**

### **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. While a few states such as Georgia and California have had statutes in place requiring a certificate of merit be filed with a complaint for some time now, other states have only recently begun enacting legislation to protect licensed or design professionals, i.e. architects, engineers, and land surveyors. The certificate of merit trend has grown with the push for tort reform that we have seen at both the state and federal levels. Some states have enacted legislation that requires that a claim against a licensed professional be supported by an affidavit/certificate of merit attached to or filed shortly after a plaintiff's complaint.

The legislation is intended to protect licensed professionals from unmeritorious claims and protect them from the expenses of litigation incurred when fighting such frivolous claims. 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 with little or no basis against design professionals. Otherwise, licensed professionals are left to defend themselves against claim that lack merit, costing time and money.

Certificate of merit statutes are still a relatively new trend. Only 11 states have enacted them: Arizona, California, Colorado, Georgia, Maryland, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania<sup>1</sup> and Texas. The specific provisions vary from state to state, but each statute has the same goal of eliminating frivolous lawsuits against design professionals. As many of the statutes are fairly recent, there is little

case law on the statutes. However, some states have addressed a few of the legal issues that can arise with these statutes, 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 and modified in 2005. Examination of other states' statutes and case law will highlight legal issues/challenges that will likely arise in Texas and provide guidance on how they may be resolved.

### **II. Texas' Certificate of Merit Statute's in 2003 and 2005**

#### **A. 2003 Version**

In 2003, the Texas Legislature passed legislation to bring about tort reform. One piece of that legislation was known as House Bill 4 and applied to registered architects and licensed professional engineers, which were both defined as "design professionals" under Texas Civil Practice & Remedies Code ("CPRC") §150.001. In an effort to eliminate frivolous lawsuits and reduce the number of lawsuits filed against these design professionals, the legislature enacted CPRC §150.002.<sup>ii</sup> 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 §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”, CPRC §150.001, appeared to be defined in terms of individual architects and engineers; architectural or engineering firms were not addressed. Many times these companies are named as defendants too. The statute left open the question of whether the affidavit requirement was applicable to these companies or only the individual architect or

engineer. Questions such as these would have to be addressed through Texas courts’ interpretation of §150.001 and §150.002.

## **B. 2005 Version**

In 2005, the Texas Legislature revisited CPRC §150.001 and §150.002 and revised them to address some of the questions. “Licensed or registered professional” was expanded upon:

- (1) “Licensed or registered professional” means a licensed architect, registered professional land surveyor, licensed professional engineer, or any firm in which such licensed professional practices, including but not limited to a corporation, partnership, limited liability partnership, sole proprietorship, joint venture, or any other business entity.

CPRC §150.001(1) (2005). The current version of §150.002, applicable to any and all claims arising on or after September 1, 2005, was modified to state as follows:

- (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, registered professional land surveyor, 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 claim. The third-party professional engineer, registered professional land surveyor, or licensed 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 licensed architect, registered professional land surveyor, or licensed architect 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.

Not many changes were made, but the modifications provided some clarification on the questions that arose after the 2003 versions of §150.001 and §150.002 were past. Specifically, the 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.

CPRC §150.002 (2005).

### III. Other States' Certificate of Merit Statutes

Ten other states possess certificate of merit statutes that are very similar to the Texas statute.<sup>iii</sup> All seek to serve the same purpose of allowing plaintiffs with meritorious claims to proceed with their litigation while eliminating the more frivolous lawsuits against design professionals. However, many of the statutes differ as to who must provide the affidavit, an expert or a claimant's attorney; when the affidavit must be provided; and the consequences for not providing the affidavit. (The certificate of merit statutes for Arizona, California, Colorado, Georgia, Maryland, Minnesota, Nevada, New Jersey, Oregon, and Pennsylvania are set forth in endnote 1.)

Arizona takes a unique approach in that it only requires an affidavit if the plaintiff determines that expert opinion is required to prove the licensed professional's standard of care. In each case, plaintiff or plaintiff's counsel files a written statement with the complaint certifying whether expert opinion is required or not. If expert opinion is needed, then an expert affidavit is to be provided with plaintiff's initial disclosures under Arizona Rule of Civil Procedure 26.1. The affidavit does not have to be filed with the complaint. If a plaintiff certifies that no such expert opinion is needed, the defendant licensed professional may still ask the court for an order requiring such an opinion be provided. *See* Ariz. Rev. Stat. §12-2602 (1999).

Some other states require that plaintiff's attorney file an affidavit with the complaint instead of an expert; however, the attorney's affidavit is based upon that attorney's consultation with an expert. California's certificate of merit statute contains such a requirement. It mandates that the attorney state in the affidavit that he has reviewed the facts of the case, consulted with an expert, and that based on this review and consultation he, the attorney, has concluded there is a "reasonable and

meritorious cause for the filing of this action." Cal. Code §411.35(b)(1) (2004). The expert consulted must render an opinion as to whether the defendant was negligent or not in the rendering of professional services. The California statute offers some protection against attorneys simply filing an affidavit without consulting with an expert. At the end of litigation resulting in a favourable conclusion for the plaintiff, the trial court may, upon a party's motion or its own motion, require the attorney for the claimant reveal the name, address and telephone number of the expert consulted and relied upon. If the court learns the attorney failed to consult with an expert, the court may order reasonable expenses, including attorney fees, be paid to the other party. *See* Cal. Code §411.35(h) (2004). In contrast, while Minnesota also requires that a claimant's attorney file a certificate of review, based on consultation with an expert, with the complaint, its statute also mandates the disclosure of experts by plaintiff's counsel within 180 days after commencement of the action against the defendant. Minn. Stat. §544.42, subds. 2-3 (2003). *See also* OR. Rev. Stat. Ann. §31.300 (2003).

Nevada differs from the other states in that it requires the filing of both the attorney's affidavit and the expert's report. The attorney must file a certificate of merit affidavit similar to that required by California. In addition, the attorney must attach a report from the expert consulted with. The expert's report must address the conclusions of the expert and the basis for those conclusions, and it must include the expert's resume and a copy of each nonprivileged document reviewed by the expert in preparing the report. Both documents must be filed with the complaint. Nev. Rev. Stat. Ann. 40.6884(1) & (3) (2001).

Not all the certificate of merit statutes require that an affidavit be filed with a complaint; sometimes the affidavit, whether from an attorney or expert, can be

provided at a later date. For example, in Colorado, a plaintiff has time to find an expert after a complaint is filed in Colorado; a “certificate of review” from plaintiff’s attorney is not due until 60 days after the complaint has been served. Similar to California’s requirement, the certificate of review must be based upon an expert consultation. *See* Colo. Rev. Stat. §13-20-602 (1999). However, unlike California, the Court can require the identity of the expert consulted with be revealed at any time; however, the opposing party need not be notified of the expert’s identity. Colo. Rev. Stat. §13-20-602(3)(b) (1999). In New Jersey, the plaintiff has 60 days after the defendant files an answer to the claim to provide the defendant with the required expert affidavit. N.J. Stat. Ann. §2A:53A-27 (2004).

Time may also be allowed for necessary discovery to support an expert’s affidavit. In Maryland, a claimant may submit a written request to the defendant design professional, within 30 days of service of the claim, and ask that the defendant produce documentary evidence, which would be otherwise discoverable, that is reasonably necessary to obtain the expert’s affidavit. A defendant shall produce the requested documentary evidence. MD. Code Ann., Cts. & Jud. Proc. §3-2C-02(b)(1) (2005). If the defendant fails to produce the documentation, the plaintiff does not have to file the required certificate of merit. §3-2C-02(b)(3).

Failure to file an expert or attorney affidavit in accordance with the certificate of merit statutes can carry the penalty of dismissal with prejudice, as in Georgia. Like Texas, Georgia requires an expert affidavit addressing the alleged malpractice of the defendant design professional be filed with the claim. If the affidavit is defective, a defendant may file a motion to dismiss on or before the close of discovery asserting that the affidavit is defective. Thereafter, the plaintiff has 30 days to cure the alleged

defect through amendment of the affidavit. A plaintiff may also seek an extension of time; the extension is left to the trial court’s discretion. However, if a plaintiff fails to cure the defect within 30 days, or within the extension of time, the complaint shall be dismissed with prejudice. GA. Code Ann. §9-11-9.1 (2005).

#### **IV. What Questions Remain to Be Answered by the Courts in Texas?**

The Texas Legislature’s modification of CPRC §150.001 and §150.002 certainly addressed some of the issues that were facing the Texas courts, but it did not eliminate all of them. Many areas will still need to be clarified by the courts as the statutes apply to more and more cases and legal challenges are raised. Examination of what has occurred in other states can offer guidance as to what types of questions will come up and how the courts may resolve these issues. Questions that will arise include:

- A. Can a defendant waive the right to seek dismissal of the claimant’s complaint?
- B. Will an affidavit be required for all claims against a licensed or registered professional?
- C. Will §150.002 apply to cross-claims, counterclaims and/or third-party petitions?

#### **A. Can a Defendant Waive the Right to Seek Dismissal of the Claimant’s Complaint?**

A plaintiff’s failure to file the required expert affidavit in accordance Texas’ CPRC §150.002 results in dismissal of the complaint, possibly even dismissal with prejudice. *See* §150.002(d). However, the statute does not address what happens if a design professional proceeds to file an answer, conduct discovery and/or participate in the litigation prior to filing a motion to

dismiss. The Fort Worth Court of Appeals recently determined that participating in the litigation will not waive the right of a defendant to seek dismissal of a complaint based on a plaintiff's failure to comply with §150.002. While its decision addressed the 2003 version of §150.002, the same question could arise under the 2005 version. 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 proceeded to file an answer and amended the 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 §150.002's expert affidavit requirement. *Id.* at 434. The Fort Worth Court of Appeals also determined that the 2003 version of §150.002 did not require that plaintiff complaint be dismissed with prejudice. The statute's language placed the determination of whether to dismiss with or without prejudice within the trial court's discretion. *Id.* at 436. (The 2005 version of §150.002(d) mandates that a complaint be dismissed when the affidavit is not filed, but whether to dismiss the complaint with prejudice remains within the trial court's discretion.)

This is not to say that waiver of the right to seek a dismissal under a certificate of merit statute cannot occur; however, more drastic means than participating in litigation may be required. For example, in *Miller v. Rowtech, LLC*, 3 P.3d 492 (Colo.App. 2000), plaintiff failed to file a certificate of review in accordance with C.R.S. §13-20-602, but, while the case was ongoing, the defendant did not take any steps to demand compliance under §13-20-602(2) nor seek dismissal. Rather, the defendant waited until after the trial to raise the issue of dismissal. The Colorado statute was not

self-executing. It offered a dismissal defense to the defendant, but the defendant must invoke that defense through the procedure set forth in the statute. As a result, the defendant in *Miller* waived the right to seek dismissal under §13-20-602. *Miller*, 3 P.3d at 494-495.

**B. Will an Affidavit Be Required for All Claims Against a Licensed or Registered Professional?**

Texas' CPRC §150.002's expert affidavit requirement appears to extend to all claims against a design professional, except claims for fees. *See* Tex. CPRC §150.002(a) & (g). However, other jurisdictions confronted with this issue have drawn a line at applying the certificate of merit statutes only to those claims that require proof of deviation from the profession's applicable standard of care. Thus, a claim alleging mere negligence, which does not reach the level of examining the exercise of professional judgment, would not fall within a certificate of merit statute's parameters. Texas' CPRC §150.002(a) defines the statute as applying "[i]n any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional." Texas courts have not yet addressed how broadly this language will be interpreted.

Two other states with certificate of merit statutes containing similar language faced this issue and divided the claims between those involving a professional decision and those falling within the realm of simple negligence. Georgia's certificate of merit statute applies to "any action for damages alleging professional malpractice." GA. Code Ann. §9-11-9.1(a). New Jersey provides more specific language in its statute, "[i]n any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation." N.J. Stat. Ann. §2A:53A-27. While Texas

§150.002(a) utilizes broader language than either Georgia or New Jersey, extending to actions arising from “the provision of professional services” as opposed to “professional malpractice”, it is likely that Texas will face the same issue of determining which types of claims the statute applies to. This will be a question of law for the courts to examine. *See Upson County Hospital, Inc. v. Head*, 246 Ga.App. 386, 389, 540 S.E.2d 626, 631 (2000).

Georgia defined the breadth of the claims its statute applied to through medical malpractice cases. Claims such as ordinary negligence or an intentional tort, i.e. battery, fall outside of Georgia’s certificate of merit statute. *MCG Health, Inc. v. Casey*, 269 Ga.App. 125, 127-128, 603 S.E.2d 438, 441 (2004). In contrast, an affidavit must be filed when the claim calls into question whether the professional’s alleged negligence required the exercise of professional judgment and skill. *Head*, 540 S.E.2d at 630. Stated another way, a claim based on professional malpractice, as opposed to mere negligence, requires an examination of a professional’s conduct in one’s area of expertise and challenges the propriety of a professional decision, as opposed to the act of carrying out a decision previously made. For example, simple negligence would be comprised of acts requiring no special expertise, such as clerical acts or routine acts. Whereas, professional malpractice requires the exercise of a professional’s judgment, such as what type of building pad to design. *See Casey*, 603 S.E.2d at 441-442.

An example of when an expert affidavit was not required in a lawsuit against a professional can be found in the New Jersey case of *Couri v. Gardner*, 173 N.J. 328, 801 A.2d 1134 (2002). Therein, a psychiatrist was hired by Couri as a potential expert witness in connection with visitation rights in a matrimonial action. Couri alleged the psychiatrist disseminated his preliminary report to Couri’s wife and the child’s guardian ad litem without his

permission. Couri claimed the psychiatrist breached their contract when he provided the report without Couri’s consent. *See id.* at 1135. The statute in question, N.J. Stat. Ann. §2A:53A-27, did not apply on its face to a breach of contract case where plaintiff was not seeking damages for personal injuries, wrongful death or property damage. *See id.* at 1137-1138. However, Couri’s claim was still filed against a design professional. To determine whether N.J. Stat. Ann. §2A:53A-27 applied to Couri’s claim, the New Jersey Supreme Court examined the nature of the legal inquiry the claim required, as opposed to the label placed on the claim, i.e. breach of contract or tort. “[A]ttorneys and courts should determine if the claim’s underlying factual allegations require proof of a deviation from the professional standard of care applicable to that profession. If such proof is required, an affidavit of merit is required for that claim, unless some exception applies.” *Id.* at 1141. In this case, Couri’s claims did not assert that the psychiatrist erred in any conclusions he reached. Rather, the complaint alleged the psychiatrist acted improperly as an expert witness by disseminating the report to others without Couri’s permission. While this act could involve a deviation from prevailing professional standards of practice, proving the claim would not require that Couri establish that the psychiatrist deviated from the applicable professional standard of care. As a result, no affidavit was required, and §2A:53A-27 was not applicable. *Id.* at 1142.

**C. Will §150.002 Apply to Cross-Claims, Counterclaims and/or Third-Party Petitions?**

While Texas’ CPRC §150.002 clearly applies to a plaintiff’s claims against a design professional, the question remains as to whether the statute will apply to cross-claims, counterclaims and/or third-party petitions. 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. . .” Tex. CPRC §150.002(a). While the statute applies to “any action” for damages, the language only refers to a “plaintiff.” Under the Texas Rules of Civil Procedure 78, the pleadings of a plaintiff are defined as an original petition and supplemental petitions as may be necessary. TRCP 78. 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.

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 besides those raised in the plaintiff’s complaint, the determining factor remains whether the claim involves a claim based on professional malpractice.

Similar to §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. A third-party complaint filed against a design professional in Georgia needs to be supported by an affidavit when the claims are based on 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 *Burt v. West Jersey Health Systems*, 339 N.J. Super. 296, 771 A.2d 683 (2001), a plaintiff filed a medical malpractice case against a hospital and anesthesiologists, and the hospital filed a cross-claim against the anesthesiologists seeking indemnity or contribution. The plaintiff’s claims against the anesthesiologists were dismissed due to the failure to file an expert affidavit. However, even though the hospital’s claims were based on professional malpractice and the hospital failed to file an affidavit with its cross-claim, the cross-claim was not dismissed. The New Jersey appellate court rejected this argument noting that the applicable statute, §2A:53A-27, applied only to plaintiffs, not cross-claimants. The appellate court declined to extend the statute

any further. *Id.* at 687-688. However, the appellate court also held that if the jury found the hospital and anesthesiologists negligent, then plaintiff's recovery must be reduced by the percentage of fault allocated to the anesthesiologists. This latter holding accommodated New Jersey's Affidavit of Merit Act, the Comparative Negligence Act, and the Joint Tortfeasors Contribution Law. *Id.* at 689.

The decision in *Burt* does not mean that only plaintiffs and third party plaintiffs are subject to New Jersey's certificate of merit statute. In a separate case, a New Jersey appellate court focused on the applicability of the certificate of merit statute to a "cause of action" and applied it to a counterclaim. In *Charles A. Manganaro Consulting Engineers, Inc. v. Carneys Point Township Sewerage Authority*, 344 N.J.Super. 343, 781 A.2d 1116 (2001), 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. The court declined to extend the statute to affirmative defenses, even though allegations of professional malpractice were involved, because §2A:53A-27 only applies to causes of action. An affirmative defense does not constitute a cause of action. However, a counterclaim constitutes a "cause of action." As such, a counterclaim based on professional malpractice must be supported by an expert affidavit. *Id.* at 1117-1118.

Rather than aiding in the analysis of what could occur in Texas, the New Jersey opinions on cross-claims and counterclaims with relation to certificate of merit statutes

only appear to cause confusion. The *Manganaro* appellate court explained the difference between that case and *Burt* as follows:

[A] defendant who files a cross-claim generally relies upon the plaintiff's proof of the codefendant's negligence and thus may justifiably assume that the plaintiff will provide an affidavit of merit supporting its claim against the codefendant. A defendant who files a counterclaim against the plaintiff has no comparable basis to assume that any other party will file an affidavit of merit upon which it can rely.

*Id.* at 1118-1119. Further, the *Manganro* court also noted that the anesthesiologists in *Burt* were not facing any monetary liability on the hospital's cross-claim under the *Burt* court's ruling. *Id.*

It is presently unknown how Texas courts will handle the issue of §150.002 and cross-claims, counterclaims and/or third-party claims. It could follow the lead of Georgia and some courts in New Jersey by requiring that any causes of action based on professional malpractice be supported by an expert affidavit. However, Texas courts could also narrow the statute's applicability to "plaintiffs". In addition, cross-claims are more unique in that a defendant could rely on a plaintiff's expert affidavit against a design professional. The applicability of §150.002 to these claims is a question that will likely come before the Texas courts sooner rather than later.

## V. Conclusion

The Texas Legislature's goal of reducing frivolous lawsuits against licensed professional should be accomplished as the certificate of merit requirement prevents a plaintiff from filing an unmeritorious claim and forcing a licensed professional to defend against the claim. The Legislature's

revision of Texas CPRC §150.001 and §150.002 in 2005 clarified many issues that would have come up in the Texas courts. However, numerous issues remain. As shown, other states have enacted very similar statutes, but even other versions of the statute do not eliminate the litigation over the applicability of the statute. Important questions remain to be dealt with and will have to be addressed through the Texas courts.

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<sup>i</sup> **Arizona**

Ariz. Rev. Stat. §§12-2601 and 12-2602.

Ariz. Rev. Stat. §12-2602 (1999). Preliminary expert opinion testimony; certification

A. If a claim against a licensed professional is asserted in a civil action, the claimant or the claimant's attorney shall certify in a written statement that is filed and served with the claim whether or not expert opinion testimony is necessary to prove the licensed professional's standard of care or liability for the claim.

B. If the claimant or the claimant's attorney certifies pursuant to subsection A that expert opinion testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit with the initial disclosures that are required by rule 26.1, Arizona rules of civil procedure. The claimant may provide affidavits from as many experts as the claimant deems necessary. The preliminary expert opinion affidavit shall contain at least the following information:

1. The expert's qualifications to express an opinion on the licensed professional's standard of care or liability for the claim.
2. The factual basis for each claim against a licensed professional.
3. The licensed professional's acts, errors or omissions that the expert considers to be a

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violation of the applicable standard of care resulting in liability.

4. The manner in which the licensed professional's acts, errors or omissions caused or contributed to the damages or other relief sought by the claimant.

C. The court may extend the time for compliance with this section on application and good cause shown or by stipulation of the parties to the claim. If the court extends the time for compliance, the court may also adjust the timing and sequence of disclosures that are required from the licensed professional against whom the claim is asserted.

D. If the claimant or the claimant's attorney certifies that expert testimony is not required for its claim and the licensed professional who is defending the claim disputes that certification in good faith, the licensed professional may apply by motion to the court for an order requiring the claimant to obtain and serve a preliminary expert opinion affidavit under this section. In its motion, the licensed professional shall identify the following:

1. The claim for which it believes expert testimony is needed.
2. The prima facie elements of the claim.
3. The legal or factual basis for its contention that expert opinion testimony is required to establish the standard of care or liability for the claim.

E. After considering the motion and any response, the court shall determine whether the claimant shall comply with this section and, if the court deems that compliance is necessary, shall set a date and terms for compliance. The court shall stay all other proceedings and applicable time periods concerning the claim pending the court's ruling on the motion to compel compliance with this section.

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F. The court, on its own motion or the motion of the licensed professional, shall dismiss the claim against the licensed professional without prejudice if the claimant fails to file and serve a preliminary expert opinion affidavit after the claimant or the claimant's attorney has certified that an affidavit is necessary or the court has ordered the claimant to file and serve an affidavit.

G. A claimant may supplement a claim or preliminary expert opinion affidavit with additional claims, evidence or expert opinions that are timely disclosed under the Arizona rules of civil procedure or pursuant to court order. An action under this chapter does not preclude a party from using a preliminary expert opinion affidavit for any purpose, including impeachment.

### **California**

Cal. Code §411.35 (2004). Malpractice actions; architects, engineers, or surveyors; certificate of review and consultation; res ipsa loquitur exception; failure to file

(a) In every action, including a cross-complaint for damages or indemnity, arising out of the professional negligence of a person holding a valid architect's certificate issued pursuant to Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code, or of a person holding a valid registration as a professional engineer issued pursuant to Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code, or a person holding a valid land surveyor's license issued pursuant to Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code on or before the date of service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision (b).

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(b) A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring one of the following:

(1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross-defendant and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for the filing of this action. The person consulted may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross-defendant was negligent or was not negligent in the performance of the applicable professional services.

(2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.

(3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate architects, professional engineers, or land surveyors to obtain this consultation and none of those contacted would agree to the consultation.

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(c) Where a certificate is required pursuant to this section, only one certificate shall be filed, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.

(d) Where the attorney intends to rely solely on the doctrine of "res ipsa loquitur," as defined in Section 646 of the Evidence Code, or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of "res ipsa loquitur" or failure to inform of the consequences of a procedure or both, and for that reason is not filing a certificate required by this section.

(e) For purposes of this section, and subject to Section 912 of the Evidence Code, an attorney who submits a certificate as required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the architect, professional engineer, or land surveyor consulted and the contents of the consultation. The privilege shall also be held by the architect, professional engineer, or land surveyor so consulted. If, however, the attorney makes a claim under paragraph (3) of subdivision (b) that he or she was unable to obtain the required consultation with the architect, professional engineer, or land surveyor, the court may require the attorney to divulge the names of architects, professional engineers, or land surveyors refusing the consultation.

(f) A violation of this section may constitute unprofessional conduct and be grounds for discipline against the attorney, except that the failure to file the certificate required by paragraph (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.

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(g) The failure to file a certificate in accordance with this section shall be grounds for a demurrer pursuant to Section 430.10 or a motion to strike pursuant to Section 435.

(h) Upon the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the trial court may, upon the motion of a party or upon the court's own motion, verify compliance with this section, by requiring the attorney for the plaintiff or cross-complainant who was required by subdivision (b) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (b) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in-camera proceeding at which the moving party shall not be present. If the trial judge finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply with this section.

(i) For purposes of this section, "action" includes a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms "professional negligence" or "negligence."

### **Colorado**

Colo. Rev. Stat. §13-20-602 (1999). Actions against licensed professionals and acupuncturists-- certificate of review required

(1)(a) In every action for damages or indemnity based upon the alleged professional negligence of an acupuncturist

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regulated pursuant to article 29.5 of title 12, C.R.S., or a licensed professional, the plaintiff's or complainant's attorney shall file with the court a certificate of review for each acupuncturist or licensed professional named as a party, as specified in subsection (3) of this section, within sixty days after the service of the complaint, counterclaim, or cross claim against such person unless the court determines that a longer period is necessary for good cause shown.

(b) A certificate of review shall be filed with respect to every action described in paragraph (a) of this subsection (1) against a company or firm that employed a person specified in such paragraph (a) at the time of the alleged negligence, even if such person is not named as a party in such action.

(2) In the event of failure to file a certificate of review in accordance with this section and if the acupuncturist or licensed professional defending the claim believes that an expert is necessary to prove the claim of professional negligence, the defense may move the court for an order requiring filing of such a certificate. The court shall give priority to deciding such a motion, and in no event shall the court allow the case to be set for trial without a decision on such motion.

(3)(a) A certificate of review shall be executed by the attorney for the plaintiff or complainant declaring:

(I) That the attorney has consulted a person who has expertise in the area of the alleged negligent conduct; and

(II) That the professional who has been consulted pursuant to subparagraph (I) of this paragraph (a) has reviewed the known facts, including such records, documents, and other materials which the professional has found to be relevant to the allegations of negligent conduct and, based on the review of such facts, has concluded that the filing of the claim, counterclaim, or cross claim does

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not lack substantial justification within the meaning of section 13-17-102(4).

(b) The court, in its discretion, may require the identity of the acupuncturist or licensed professional who was consulted pursuant to subparagraph (I) of paragraph (a) of this subsection (3) to be disclosed to the court and may verify the content of such certificate of review. The identity of the professional need not be identified to the opposing party or parties in the civil action.

(c) In an action alleging professional negligence of a physician, the certificate of review shall declare that the person consulted meets the requirements of section 13-64-401; or in any action against any other professional, that the person consulted can demonstrate by competent evidence that, as a result of training, education, knowledge, and experience, the consultant is competent to express an opinion as to the negligent conduct alleged.

(4) The failure to file a certificate of review in accordance with this section shall result in the dismissal of the complaint, counterclaim, or cross claim.

(5) These provisions shall not affect the rights and obligations under section 13-17-102.

## **Georgia**

GA. Code Ann. §9-11-9.1 (2005). Affidavit of expert to be filed with complaint in action for damages alleging professional malpractice

(a) In any action for damages alleging professional malpractice against a professional licensed by the State of Georgia and listed in subsection (d) of this Code section or against any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in subsection (d) of this Code section, the plaintiff shall be required to file

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with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

(b) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing said amendment or response to the motion, or both, as it shall determine justice requires.

(c) If a plaintiff fails to file an affidavit as required by this Code section and the defendant raises the failure to file such an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, such complaint shall not be subject to the renewal provisions of Code Section 9-2-61 after the expiration of the applicable period of limitation, unless a court determines that the plaintiff had the requisite affidavit within the time required by this Code section and the failure to file the affidavit was the result of a mistake.

(d) The professions to which this Code section applies are:

- (1) Architects;
- (2) Audiologists;
- (3) Attorneys at law;
- (4) Certified public accountants;
- (5) Chiropractors;

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- (6) Clinical social workers;
  - (7) Dentists;
  - (8) Dietitians;
  - (9) Land surveyors;
  - (10) Medical doctors;
  - (11) Marriage and family therapists;
  - (12) Nurses;
  - (13) Occupational therapists;
  - (14) Optometrists;
  - (15) Osteopathic physicians;
  - (16) Pharmacists;
  - (17) Physical therapists;
  - (18) Physicians' assistants;
  - (19) Professional counselors;
  - (20) Professional engineers;
  - (21) Podiatrists;
  - (22) Psychologists;
  - (23) Radiological technicians;
  - (24) Respiratory therapists;
  - (25) Speech-language pathologists; or
  - (26) Veterinarians.

### **Maryland**

MD. Code Ann., Cts. & Jud. Proc. §3-2C-02 (2005). Dismissal of claims; filing of certificates of qualified experts

(a)(1) Except as provided in subsections (b) and (c) of this section, a claim shall be

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dismissed, without prejudice, if the claimant fails to file a certificate of a qualified expert with the court.

(2) A certificate of a qualified expert shall:

(i) Contain a statement from a qualified expert attesting that the licensed professional failed to meet an applicable standard of professional care;

(ii) Subject to the provisions of subsections (b) and (c) of this section, be filed within 90 days after the claim is filed; and

(iii) Be served on all other parties to the claim or the parties' attorneys of record in accordance with the Maryland Rules.

(b)(1) Upon written request made by the claimant within 30 days of the date the claim is served, the defendant shall produce documentary evidence that would be otherwise discoverable, if the documentary evidence is reasonably necessary in order to obtain a certificate of a qualified expert.

(2) The time for filing a certificate of a qualified expert shall begin on the date on which the defendant's production of the documentary evidence under paragraph (1) of this subsection is completed.

(3) The defendant's failure to produce the requested documentary evidence under paragraph (1) of this subsection shall constitute a waiver of the requirement that the claimant file a certificate of a qualified expert as to that defendant.

(c)(1) Upon written request by the claimant and a finding of good cause by the court, the court may waive or modify the requirement for the filing of the certificate of a qualified expert.

(2) The time for filing the certificate of merit of a qualified expert shall be suspended until the court rules on the

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request and, absent an order to the contrary, the certificate shall be filed within 90 days of the court's ruling.

(d) Discovery by the defendant as to the basis of the certificate of a qualified expert shall be available.

### **Minnesota**

Minn. Stat. §544.42 (2003). Actions against professionals; certification of expert review

Subdivision 1. Definitions. For purposes of this section:

(1) "professional" means a licensed attorney or an architect, certified public accountant, engineer, land surveyor, or landscape architect licensed or certified under chapter 326 or 326A; and

(2) "action" includes an original claim, cross-claim, counterclaim, or third-party claim. An action does not include a claim for damages requiring notice pursuant to section 605.04.

Subd. 2. Requirement. In an action against a professional alleging negligence or malpractice in rendering a professional service where expert testimony is to be used by a party to establish a prima facie case, the party must:

(1) unless otherwise provided in subdivision 3, paragraph (a), clause (2) or (3), serve upon the opponent with the pleadings an affidavit as provided in subdivision 3; and

(2) serve upon the opponent within 180 days an affidavit as provided in subdivision 4.

Subd. 3. Affidavit of expert review. (a) The affidavit required by subdivision 2, clause (1), must be drafted by the party's attorney and state that:

(1) the facts of the case have been reviewed by the party's attorney with an expert whose

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qualifications provide a reasonable expectation that the expert's opinions could be admissible at trial and that, in the opinion of this expert, the defendant deviated from the applicable standard of care and by that action caused injury to the plaintiff;

(2) the expert review required by clause (1) could not reasonably be obtained before the action was commenced because of the applicable statute of limitations; or

(3) the parties have agreed to a waiver of the expert review required by clause (1) or the party has applied for a waiver or modification by the court under paragraph (c).

(b) If an affidavit is executed under paragraph (a), clause (2), the affidavit in paragraph (a), clause (1), must be served on the defendant or the defendant's counsel within 90 days after service of the summons and complaint.

(c) The certification of expert review required under this section may be waived or modified if the court where the matter will be venued determines, upon an application served with commencement of the action, that good cause exists for not requiring the certification. Good cause includes, but is not limited to, a showing that the action requires discovery to provide a reasonable basis for the expert's opinion or the unavailability, after a good faith effort, of a qualified expert at reasonable cost. If the court waives or modifies the expert review requirements, the court shall establish a scheduling order for compliance or discovery. If the court denies a request for a waiver under this subdivision, the plaintiff must serve on the defendant the affidavit required under subdivision 2, clause (1), within 60 days, and the affidavit required under subdivision 2, clause (2), within 180 days.

Subd. 4. Identification of experts to be called. (a) The affidavit required by

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subdivision 2, clause (2), must be signed by the party's attorney and state the identity of each person whom the attorney expects to call as an expert witness at trial to testify with respect to the issues of negligence, malpractice, or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Answers to interrogatories that state the information required by this subdivision satisfy the requirements of this subdivision if they are signed by the party's attorney and served upon the opponent within 180 days after commencement of the action against the defendant or within 180 days after service of the affidavit required by subdivision 3, paragraph (a), clause (2) or (3).

(b) The parties by agreement, or the court for good cause shown, may provide for extensions of the time limits specified in subdivision 2, 3, or this subdivision. Nothing in this subdivision prevents any party from calling additional expert witnesses or substituting other expert witnesses.

Subd. 5. Responsibilities of party as attorney. If a party is acting pro se, the party shall sign the affidavit or answers to interrogatories referred to in this section and is bound by those provisions as if represented by an attorney.

Subd. 6. Penalty for noncompliance. (a) Failure to comply with subdivision 2, clause (1), within 60 days after demand for the affidavit results, upon motion, in mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a prima facie case.

(b) Failure to comply with subdivision 3, paragraph (b) or (c), results, upon motion, in mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a prima facie case.

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(c) Failure to comply with subdivision 4 results, upon motion, in mandatory dismissal of each action with prejudice as to which expert testimony is necessary to establish a prima facie case, provided that an initial motion to dismiss an action under this paragraph based upon claimed deficiencies of the affidavit or answers to interrogatories shall not be granted unless, after notice by the court, the nonmoving party is given 60 days to satisfy the disclosure requirements in subdivision 4. In providing its notice, the court shall issue specific findings as to the deficiencies of the affidavit or answers to interrogatories.

Subd. 7. Consequences of signing affidavit. The signature of the party or the party's attorney constitutes a certification that the person has read the affidavit or answers to interrogatories, and that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, it is true, accurate, and made in good faith. A certification made in violation of this subdivision subjects the attorney or party responsible for that conduct to reasonable attorney's fees, costs, disbursements, and other damages that may be determined by the court.

## **Nevada**

Nev. Rev. Stat. Ann. 40.6884 (2001). Attorney required to consult expert; required affidavit of attorney; required report of expert

1. Except as otherwise provided in subsection 2, in an action governed by NRS 40.600 to 40.695, inclusive, that is commenced against a design professional or a person primarily engaged in the practice of professional engineering, land surveying, architecture or landscape architecture, including, without limitation, an action for professional negligence, the attorney for the complainant shall file an affidavit with the court concurrently with the service of the

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first pleading in the action stating that the attorney:

(a) Has reviewed the facts of the case;

(b) Has consulted with an expert;

(c) Reasonably believes the expert who was consulted is knowledgeable in the relevant discipline involved in the action; and

(d) Has concluded on the basis of his review and the consultation with the expert that the action has a reasonable basis in law and fact.

2. The attorney for the complainant may file the affidavit required pursuant to subsection 1 at a later time if he could not consult with an expert and prepare the affidavit before filing the action without causing the action to be impaired or barred by the statute of limitations or repose, or other limitations prescribed by law. If the attorney must submit the affidavit late, he shall file an affidavit concurrently with the service of the first pleading in the action stating his reason for failing to comply with subsection 1 and the attorney shall consult with an expert and file the affidavit required pursuant to subsection 1 not later than 45 days after filing the action.

3. In addition to the statement included in the affidavit pursuant to subsection 1, a report must be attached to the affidavit. Except as otherwise provided in subsection 4, the report must be prepared by the expert consulted by the attorney and include, without limitation:

(a) The resume of the expert;

(b) A statement that the expert is experienced in each discipline which is the subject of the report;

(c) A copy of each nonprivileged document reviewed by the expert in preparing his report, including, without limitation, each record, report and related document that the

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expert has determined is relevant to the allegations of negligent conduct that are the basis for the action;

(d) The conclusions of the expert and the basis for the conclusions; and

(e) A statement that the expert has concluded that there is a reasonable basis for filing the action.

4. In an action brought by a claimant in which an affidavit is required to be filed pursuant to subsection 1:

(a) The report required pursuant to subsection 3 is not required to include the information set forth in paragraphs (c) and (d) of subsection 3 if the claimant or his attorney files an affidavit, at the time that the affidavit is filed pursuant to subsection 1, stating that he made reasonable efforts to obtain the nonprivileged documents described in paragraph (c) of subsection 3, but was unable to obtain such documents before filing the action;

(b) The claimant or his attorney shall amend the report required pursuant to subsection 3 to include any documents and information required pursuant to paragraph (c) or (d) of subsection 3 as soon as reasonably practicable after receiving the document or information; and

(c) The court may dismiss the action if the claimant and his attorney fail to comply with the requirements of paragraph (b).

5. An expert consulted by an attorney to prepare an affidavit pursuant to this section must not be a party to the action.

6. As used in this section, "expert" means a person who is licensed in a state to engage in the practice of professional engineering, land surveying, architecture or landscape architecture.

## **New Jersey**

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N.J. Stat. Ann. §§2A:53A-26 to 2A:53A-29.

N.J. Stat. Ann. §2A:53A-27 (2004). Affidavit required in certain actions against licensed persons.

In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in section 7 of P.L.2004, c. 17 (C.2A:53A-41). In all other cases, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice substantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

## **Oregon**

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OR. Rev. Stat. Ann. §31.300 (2003).  
Construction design professionals;  
complaints

(1) As used in this section, "construction design professional" means an architect, registered landscape architect, professional engineer or professional land surveyor.

(2) A complaint, cross-claim, counterclaim or third-party complaint asserting a claim against a construction design professional that arises out of the provision of services within the course and scope of the activities for which the person is licensed may not be filed unless the claimant's attorney certifies that the attorney has consulted a licensed construction design professional who is qualified, available and willing to testify to admissible facts and opinions sufficient to create a question of fact as to the liability of the construction design professional. The certification required by this section must be filed with or be made part of the original complaint, cross-claim, counterclaim or third-party complaint. The certification must contain a statement that a licensed construction design professional who is qualified to testify as to the standard of care applicable to the alleged facts, is available and willing to testify that:

(a) The alleged conduct of the construction design professional failed to meet the standard of professional care applicable to the construction design professional in the circumstances alleged; and

(b) The alleged conduct was a cause of the claimed damages, losses or other harm.

(3) In lieu of providing the certification described in subsection (2) of this section, the claimant's attorney may file with the court at the time of filing a complaint, cross-claim, counterclaim or third-party complaint an affidavit that states:

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(a) The applicable statute of limitations is about to expire;

(b) The certification required under subsection (2) of this section will be filed within 30 days after filing the complaint, cross-claim, counterclaim or third-party complaint or such longer time as the court may allow for good cause shown; and

(c) The attorney has made such inquiry as is reasonable under the circumstances and has made a good faith attempt to consult with at least one licensed construction design professional who is qualified to testify as to the standard of care applicable to the alleged facts, as required by subsection (2) of this section.

(4) Upon motion of the construction design professional, the court shall enter judgment dismissing any complaint, cross-claim, counterclaim or third-party complaint against any construction design professional that fails to comply with the requirements of this section.

(5) This section applies only to a complaint, cross-claim, counterclaim or third-party complaint against a construction design professional by any plaintiff who:

(a) Is a construction design professional, contractor, subcontractor or other person providing labor, materials or services for the real property improvement that is the subject of the claim;

(b) Is the owner, lessor, lessee, renter or occupier of the real property improvement that is the subject of the claim;

(c) Is involved in the operation or management of the real property improvement that is the subject of the claim;

(d) Has contracted with or otherwise employed the construction design professional; or

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(e) Is a person for whose benefit the construction design professional performed services.

### **Pennsylvania**

Penn. R. Civ. P. Nos. 1042.1 to 1042.8, *et. Seq.*

Penn. R. Civ. P. No. 1042.1 (2005).  
Certificate of Merit

(a) In any action based upon an allegation that a licensed professional deviated from an acceptable professional standard, the attorney for the plaintiff, or the plaintiff if not represented, shall file with the complaint or within sixty days after the filing of the complaint, a certificate of merit signed by the attorney or party that either

(1) an appropriate licensed professional has supplied a written statement that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional standards and that such conduct was a cause in bringing about the harm, or

*Note:* It is not required that the "appropriate licensed professional" who supplies the necessary statement in support of a certificate of merit required by subdivision (a)(1) be the same person who will actually testify at trial. It is required, however, that the "appropriate licensed professional" who supplies such a statement be an expert with sufficient education, training, knowledge and experience to provide credible, competent testimony, or stated another way, the expert who supplies the statement must have qualifications such that the trial court would find them sufficient to allow that expert

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to testify at trial. For example, in a medical professional liability action against a physician, the expert who provides the statement in support of a certificate of merit should meet the qualifications set forth in Section 512 of the Medical Care Availability and Reduction of Error (MCARE) Act, 40 P.S. § 1303.512.

(2) the claim that the defendant deviated from an acceptable professional standard is based solely on allegations that other licensed professionals for whom this defendant is responsible deviated from an acceptable professional standard, or

*Note:* A certificate of merit, based on the statement of an appropriate licensed professional required by subdivision (a)(1), must be filed as to the other licensed professionals for whom the defendant is responsible. The statement is not required to identify the specific licensed professionals who deviated from an acceptable standard of care.

(3) expert testimony of an appropriate licensed professional is unnecessary for prosecution of the claim.

*Note:* In the event that the attorney certifies under subdivision (a)(3) that an expert is unnecessary for prosecution of the claim, in the absence of exceptional circumstances the attorney is bound by the certification and, subsequently, the trial court shall preclude the plaintiff from presenting testimony by an expert on the questions of standard of care and causation.

(b) (1) A separate certificate of merit shall be filed as to each licensed professional against whom a claim is asserted.

(2) If a complaint raises claims under both subdivisions (a)(1) and (a)(2) against the

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same defendant, the attorney for the plaintiff, or the plaintiff if not represented, shall file

(i) a separate certificate of merit as to each claim raised, or

(ii) a single certificate of merit stating that claims are raised under both subdivisions (a)(1) and (a)(2).

(c)(1) A defendant who files a counterclaim asserting a claim for professional liability shall file a certificate of merit as required by this rule.

(2) A defendant or an additional defendant who has joined a licensed professional as an additional defendant need not file a certificate of merit unless the joinder is based on acts of negligence that are unrelated to the acts of negligence that are the basis for the claim against the joining party.

(d) The court, upon good cause shown, shall extend the time for filing a certificate of merit for a period not to exceed sixty days. The motion to extend the time for filing a certificate of merit must be filed on or before the filing date that the plaintiff seeks to extend. The filing of a motion to extend tolls the time period within which a certificate of merit must be filed until the court rules upon the motion.

*Note:* There are no restrictions on the number of orders that a court may enter extending the time for filing a certificate of merit provided that each order is entered pursuant to a new motion, timely filed and based on cause shown as of the date of filing the new motion.

The moving party must act with reasonable diligence to see that the motion is promptly presented to the court if required by local practice.

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In ruling upon a motion to extend time, the court shall give appropriate consideration to the practicalities of securing expert review. There is a basis for granting an extension of time within which to file the certificate of merit if counsel for the plaintiff was first contacted shortly before the statute of limitations was about to expire, or if, despite diligent efforts by counsel, records necessary to review the validity of the claim are not available.

<sup>ii</sup> 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.

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(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.

<sup>iii</sup> Hawaii, Kansas and Wyoming also have statutes intended to protect design professionals. However, their statutes require that a claimant submit a claim for professional negligence to a review or screening panel consisting of laypersons and professionals prior to filing a lawsuit in court. *See* Haw. Rev. Stat. Ann. §§672-1 to 672-14 (2003); Kan. Stat. Ann. §§50-3501-3509 (2003); Wyo. Stat. Ann. §§9-2-1801-1812 (2003).