

# EVOLUTION OF TEXAS' CERTIFICATE OF MERIT STATUTE

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# Texas' Certificate of Merit Statute

## WHAT IS IT?

A statutory requirement that a claimant who raises a claim in litigation or arbitration against a licensed or registered professional by seeking recovery of damages, contribution, or indemnification\* arising out of the provision of professional services by the licensed or registered professional, must file contemporaneously a supporting expert affidavit with any petition or other pleading which, for the first time, raises the claim(s) against certain licensed or registered design professionals.

A claimant'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.

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

# Texas' Certificate of Merit Statute

## WHAT IS ITS PURPOSE?

To provide a basis for the trial court to conclude early on in the litigation that the claimant's claims against the design professionals are frivolous or unmeritorious, allowing design professional defendants to save time and money.



# Contemporaneous Filing Requirement

Certificate of Merit must be filed contemporaneously, except:

- ▶ Under Section 150.002, a plaintiff may receive an extension if the period of limitations will expire within 10 days of the date of filing the petition AND, because of such time constraints, the plaintiff has alleged that an affidavit could not be prepared. In such cases, the plaintiff is allowed an extension of 30 days after filing to supplement the pleadings with a certificate of merit. The trial court may extend this deadline beyond 30 days for good cause and after a hearing.
- ▶ “Good cause” exception only applies if BOTH requirements are met.

*Texas Southern Univ. v. Kirksey Architects, Inc.,*  
**577 S.W.3d 570 (Tex.App.–Houston [14th Dist.] 2019)**

- ▶ TSU's new building for its School of Public Affairs was completed on July 31, 2007.
- ▶ December 2007, TSU discovered exterior cracking in masonry, and design professionals acknowledged that moisture content under building was "greater than expected" and paid \$31,000 for repair work
- ▶ Problems persisted, and in 2014 TSU requested OAG to represent the school. OAG assigned counsel, who directed TSU to hire consultants to create COR estimate, which came out to nearly \$5,000,000
- ▶ January 2017 OAG notified TSU that, due to other commitments, would not be able to represent school
- ▶ TSU in-house counsel unable to obtain OAG approval to retain private counsel until July 14, 2017

## *Texas Southern Univ. v. Kirksey Architects, Inc.*

- ▶ New counsel requested extension of 10-yr statute of repose, but design professionals refused
- ▶ TSU filed a lawsuit without COM on July 31, 2017
  - Argued July 31 was not the proper limitations deadline
  - Represented that COM would be supplemented
- ▶ Defendants filed MTDs, which were heard Feb. 8, 2018
- ▶ TSU had still failed to file an amended petition with COMs
- ▶ TSU argued: delay caused by OAG issues, unavailability of consultants who previously assessed building and prepared COR estimate, and Hurricane Harvey = GOOD CAUSE
- ▶ Trial court dismissed design claims with prejudice
- ▶ The appellate court upheld the trial court's decision:
  - ▶ Good cause exception not applicable
  - ▶ Dismissal with prejudice not an abuse of discretion

# Waiver of Certificate of Merit

- ▶ **Because Section 150.002 imposes a mandatory, non-jurisdictional filing requirement, a defendant may waive its right to seek dismissal under the statute.**
- ▶ **Waiver is largely a matter of intent, and for implied waiver to be found through a party's actions, intent must be clearly demonstrated by the surrounding facts and circumstances.**
- ▶ **Evidence of waiver generally takes one of three forms:**
  - **(1) express renunciation of a known right;**
  - **(2) silence or inaction, coupled with knowledge of the known right, for such an unreasonable period of time as to indicate an intention to waive the right; or**
  - **(3) other conduct of the party knowingly possessing the right of such a nature as to mislead the opposite party into an honest belief that the waiver was intended or assented to.**

# Waiver of Certificate of Merit

Some factors considered by Courts:

- ▶ the moving party's degree of participation in discovery;
- ▶ whether the party sought affirmative action or judgment on the merits; and
- ▶ at what time during the judicial process the party sought dismissal.

# Enacting 2003 Statute

- Originally enacted in 2003 as part of the Texas Legislature's tort reform efforts.

§150.002(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.

§150.002(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.

# Enacting 2003 Statute - Scope

- **SCOPE OF STATUTE:**
  - Claims against registered architects and licensed professional engineers (both were defined as “Design Professionals” under the Code at that time).
  - Actions or claims “alleging professional negligence by a design professional”

# 2003 Statute – Qualified Affiant and Scope of Affidavit

## □ AFFIANT QUALIFICATIONS:

- Third-party registered architect or licensed professional engineer;
- Competent to testify;
- Practicing in the same area of practice as the defendant;
- Licensed in Texas;
- Actively engaged in the practice of architecture or engineering

## □ SCOPE OF AFFIDAVIT:

- Required to “set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each claim”

# Enacting 2003 Statute – Questions Raised

- What constitutes “the same practice area”?
  - Example: Can only a Geo-Tech Engineer provide an affidavit criticizing the work of another Geo-Tech Engineer? Or is it more broadly interpreted so as to allow any of type of engineer who possesses knowledge about Geo-Tech Engineering to offer an opinion on the Defendant’s work?
- What does “any action” entail?
  - Limited only to lawsuits filed in Court or Arbitrations too?
    - ❖ Arbitration is a widely used form of dispute resolution in the construction industry. Limiting it just to lawsuits filed Court would provide Plaintiff’s an escape from the statute’s requirement.
- Is the Statutory definition of “Design Professional” limited just to individual architects or engineers; or whether it extends to the companies they were working for as well?

*Questions such as these were left to be addressed by through the Texas court’s interpretation of the statute*

# 2005 Additions to Statute

- The Texas Legislature made the following changes to the Statute and provided some clarifications on the questions that arose after the Statute was enacted in 2003:
  - ❖ 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.
  - ❖ “Any Action” included Arbitration under §150.002.
  - ❖ “Design professional” changed to “licensed or registered professional” which added registered professional land surveyors to the list of types of Defendants the statute covers. It also applies the certificate of merit requirement to any firms in which a licensed professional practices.
  - ❖ Failure to comply with §150.002 resulted in mandatory dismissal of the plaintiff’s complaint. However, dismissal with prejudice remains within the discretion of the court.

# 2009 Amendments

- The most notable change from the 2005 version:

§150.002(b): Expert Affidavit no longer requires the factual basis for “at least one negligent act, error, or omission”, but now 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 service...and the factual basis for each such claim.”

- ❖ Inclusion of the words “each” and “or” appears to clearly encompass more than just negligence claims, but also those sounding in tort or contract.

# 2009 Amendments

## DOES THAT MEAN ALL CLAIMS AGAINST LICENSED AND REGISTERED PROFESSIONALS MUST REQUIRE THE STATUTORY AFFIDAVIT TO ACCOMPANY IT?

No, only those claims that *arise out* of the provision of professional services if the claim *implicates* the professional's education, training and experience in applying special knowledge or judgment.

- ▶ However, Texas Courts apply a broad interpretation in its applicability: *Capital One, N.A. v. Carter & Burgess, Inc.*, 344 S.W.3d 477 (Tex. App.—Fort Worth 2011, no pet.) where Plaintiff sued Defendants for misrepresentation and Court held that statute applies because Defendants alleged false representations were made as part of Defendants' performing a professional service necessary for the ... completion of its engineering services – an activity that expressly constitutes the practice of engineering.

# Professional Services

- ▶ (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.

# 2009 Statute – Covered Parties

## □ DEFENDANTS COVERED:

- Licensed architects;
- Licensed professional engineers;
- 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.

# 2009 Statute – Affiant Qualifications

- A third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:
  - Is competent to testify
  - Holds the same professional license or registration as the Defendant\*
- Affiant now required to be “knowledgeable in the area of practice of the defendant and offer testimony based on the affiant’s:
  - Knowledge;
  - Skill;
  - Experience;
  - Education;
  - Training; and
  - Practice

\* No longer required to be “practicing in the same area of practice as the defendant”

*Eduardo Barrientos v. Jacobs Eng. Group, Inc.*, 2021 WL 3411869 (Tex.App.–Corpus Christi, Aug. 5, 2021)

- ▶ Barrientos sued Jacobs for injuries stemming from a bicycle accident (broken wrist and elbow)
- ▶ Barrientos flipped over his bike upon encountering a raised concrete lip at entry of a parking lot designed by Jacobs
- ▶ With his Petition, he filed a COM prepared by a professional engineer licensed in Colorado
- ▶ Jacobs filed a MTD, arguing the COM did not comply with the statute as the engineer was not licensed in Texas
- ▶ Barrientos argued the contemporaneous filing requirement did not apply because Petition was filed within 10 days of limitations, and time constraints prevented compliance
- ▶ Also claimed his attorney was “busy on another case” and “mistakenly overlooked” the COM requirements

*Eduardo Barrientos v. Jacobs Eng. Group, Inc.*, 2021 WL 3411869 (Tex.App.–Corpus Christi, Aug. 5, 2021)

- ▶ Barrientos sought leave to amend his Petition and filed a new COM from a Texas engineer that same day
- ▶ Trial court granted Jacobs' MTD. Decision affirmed.
- ▶ Court could not find any case law allowing for an extension of time to correct a deficient COM
- ▶ The 30-day extension to file a COM only applies if the party has filed no COM, not a deficient one
- ▶ Barrientos met the first requirement (petition filed within 10 days of limitations), but did not meet the second requirement (he failed to allege that time constraints prevented preparation of COM)
  - He did not address insufficiency of COM until MTD filed

# 2019 Amendments

- Enacted by Senate Bill 1928
- Effective June 10, 2019
- Very impactful on Third-Party practice
- Expanded scope of pleadings that must be filed with a Certificate of Merit
- Expanded the types of parties who must file a Certificate of Merit
- Changed one affiant requirement back to pre-2009 language

# 2019 Amendments – Why?

Response to decisions in *Engineering and Terminal Services, L.P. v. TARSCO, Inc. and Orcus Fire Protection, LLC.* and *Jaster v. Comet II Construction, Inc.*

- ▶ *ETS* (2017): Trial court dismissal of third-party claims reversed because appellate court reasoned that, had the Texas Legislature intended the certificate of merit requirement to apply to a party filing a third-party claim it could have used the broader term “claimant” instead of the using language that ties the requirement solely to the pleading that initiates the lawsuit.
- ▶ *Jaster* (2014): Supreme Court held that section 150.002 does not apply to third-party plaintiffs seeking indemnity and contribution because the affidavit requirement is limited to actions “for damages.”

*Jaster*, 438 S.W.3d 556 (Tex. 2014)

*ETS*, 525 S.W. 3d 394 (Tex. App.—Houston [14th Dist.] 2017, pet. denied)

# 2019 Amendments - Definitions

## 2009 Statute:

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...

- ▶ Courts have construed "plaintiff" to mean the original plaintiff
- ▶ "Complaint" has been interpreted to mean the original petition or any amendment or supplement that, for the first time, brings an applicable cause of action
- ▶ 2019 Amendments include two new definitions that impact this analysis

# 2019 Amendments - Definitions

2019 Amendment replaces "Plaintiff" with "Claimant" and defines "Claimant":

- ▶ **(1–a) "Claimant" means a party, including a plaintiff or third-party plaintiff, seeking recovery for damages, contribution, or indemnification.**

2019 Amendment defines "Complaint" for the first time:

- ▶ **(1–b) "Complaint" means any petition or other pleading which, for the first time, raises a claim against a licensed or registered professional for damages arising out of the provision of professional services by the licensed or registered professional.**

# 2019 Amendments

## OLD

- ▶ ...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...

## NEW

- ▶ ...a **claimant** 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...

# 2019 Amendments – Affiant Qualifications

## OLD

- ▶ (3) is **knowledgeable** in the area of practice of the defendant...

## NEW

- ▶ (3) **practices** in the area of practice of the defendant...

# 2019 Amendments - Summary

- ▶ Certificate of Merit requirements expressly applies to Third-Party Plaintiffs, and appears to apply to Counter-Plaintiffs, Cross-Plaintiffs, Intervenors, and any other Party asserting a claim for the first time
- ▶ Requirements now apply to “any petition or other pleading”
- ▶ Affiant must be actively practicing in the applicable area → no more retirees or professional experts
- ▶ Definition of “claimant” includes those asserting claims for indemnification and contribution

*TRW Engineers, Inc. v. Hussion St. Buildings, LLC*,  
608 S.W.3d 317 (Tex.App.–Houston [1<sup>st</sup> Dist.] 2020)

- ▶ Hussion sued Harris County Housing Authority Public Facility Corporation for damages to adjacent property
- ▶ At temporary injunction hearing, Hussion's engineering expert's deposition testimony was read into the record
- ▶ Hussion then amended its Petition to add TRW Engineers as a defendant, alleging TRW negligently designed drainage and sewer systems at adjacent property
- ▶ However, Hussion did not attach a COM, and TRW filed a Motion to Dismiss for failure to include COM
- ▶ Hussion argued deposition testimony of its engineer expert that was read into the Court's record satisfied requirement
- ▶ Trial court denied MTD. TRW appealed decision.

*TRW Engineers, Inc. v. Hussion St. Buildings, LLC*,  
608 S.W.3d 317 (Tex.App.–Houston [1<sup>st</sup> Dist.] 2020)

- ▶ Appellate court held that deposition testimony does not satisfy COM requirements:
  - Not an affidavit
  - Not filed contemporaneously with Petition
  - Did not set forth specific conduct giving rise to claims against TRW
- ▶ Trial court did not have discretion to waive requirements or to piecemeal requirements through other documents in the Court's record
- ▶ Trial court abused discretion → decision reversed
- ▶ Case remanded for determination re: whether dismissal will be with or without prejudice

# Lessons Learned

- ▶ Don't risk it - get a Certificate of Merit before initiating any potentially applicable claim
- ▶ If approaching limitations deadline, use diligence in trying to get an affidavit → will help support arguments for application of "good cause" exception, if needed
- ▶ Conduct discovery and file Motion to Dismiss promptly, or risk waiver
- ▶ TRW Court: "Absent a properly filed certificate of merit required by statute governing actions against licensed professionals, professionals have the right to avoid litigation entirely."

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