

# TEXAS' CERTIFICATE OF MERIT STATUTE

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# THE BASICS

## WHAT IS IT?

- Codified under Chapter 150 of the TEXAS CIVIL PRACTICE REMEDIES CODE
- IT IS A statutory requirement that in any action or arbitration proceeding for damages arising **out of the provision of professional services by a licensed or registered professional**, a claimant has to consult with a similar design professional and submit an affidavit stating that the claimant's claims are meritorious
- It requires that a sworn "certificate of merit" accompany any lawsuit complaining about a licensed professional (engineer or architect) services.
- Failure to **contemporaneously** file an affidavit from a similarly licensed professional attesting to the lawsuit's merits requires dismissal of the suit

\* The statute's requirement DOES NOT apply to any suit or action for the payment of fees arising out of the provision of professional services.

# THE BASICS

## WHAT IS ITS PURPOSE?

- The certificate-of-merit requirement is a substantive hurdle that helps ensure frivolous claims are expeditiously discharged.
- Its goal is to preclude continuation of frivolous claims in protracted litigation, thus reducing potential unnecessary litigation costs associated with such.



# THE BASICS

## WHAT GOES INTO THE AFFIDAVIT?

- ▶ The statute requires that the expert's affidavit address the lawsuit's "factual basis" (i.e. attesting to the defendant's professional errors or omissions and their factual basis)
- ▶ It need not recite the applicable standard of care and how it was allegedly violated in order to provide an adequate factual basis for the identification of professional errors.
- ▶ It need not address the elements of the Plaintiff's various theories or causes of action.
- ▶ Need not be in the form of admissible or competent evidence; such requirements operate at later junctures in the proceedings, not in regard to the threshold showing of merit required under the statute

# Contemporaneous Filing Requirement

Certificate of Merit must be filed contemporaneously with the claims against the Defendant design professional.

## ***EXCEPTION :***

- ▶ However, a claimant SHALL receive an extension if the statute of limitations will expire within **10 days of the date of filing the claim** AND, because of such time constraints, **the claimant has alleged that an affidavit could not be prepared.** In such cases, the claimant is allowed an extension of thirty (30) days after filing to supplement the pleadings with a certificate of merit. Tex. Civ. P. R. Code 150.002(c)
  - ▶ This is exception is statutory requirement and, therefore, so long as the requirements above are met, this initial extension is not a discretionary matter for the Court to consider.
- ▶ Nonetheless, if needing additional time beyond the initial extension, the trial court may then use its discretion in deciding to extend this deadline even beyond 30 days so long as “good cause” is shown.
  - ▶ Securing the additional statutory thirty-day period to supplement a petition with a certificate of merit requires the claimant to satisfy both that the claimant has (i) filed suit within ten days of the expiration of the applicable limitations period, and that the near-limitations filing prevented the preparation of a certificate of merit.

# Contemporaneous Filing Requirement

CAN CLAIMANT STILL COMPLY WITH THE STATUTE'S CONTEMPORANEOUS FILING REQUIREMENT BY NOT FILING THE AFFIDAVIT OR CERTIFICATE OF MERIT?

- ▶ YES, but in a narrow exception.
- ▶ When a defendant files cross-claims against a co-defendant that is a licensed or registered professional to whom the certificate of merit statutes apply, seeking contribution, indemnity, or a derivative claim, the rules of statutory construction dictate that the cross-claiming defendant may rely on the certificate of merit filed by the plaintiff and is not required to file a second, independent certificate of merit. *CTL/Thompson Texas, LLC v. Morrison Homes*, 337 S.W.3d 437, 445 to 446 (Tex. App.—Fort Worth 2011, pet. denied)
  - If a defendant files a cross-claim for contribution and indemnity against a licensed or registered professional co-defendant to whom chapter 150 applies, the plaintiff will have already filed a certificate of merit concerning the conduct of that same licensed or registered professional; if not, the plaintiff's claims are subject to dismissal.
  - To the contrary, if the defendant files a third-party petition against a licensed or registered professional that the plaintiff has not sued, the defendant, acting as a third-party plaintiff must file a certificate of merit.

# Waiver of Right to Seek Dismissal by Defendants

## CAN A DESIGN PROFESSIONAL DEFENDANT WAIVE ITS RIGHT TO SEEK DISMISSAL FOR THE CLAIMANT'S FAILURE TO COMPLY WITH THE STATUTE?

- ▶ YES, section 150.002's certificate-of-merit requirement is mandatory but not jurisdictional, so notwithstanding the absence of a statutory deadline for dismissal, it can be waived.
- ▶ While there is no statutory set deadline as to when a Defendant can seek dismissal for a Plaintiff's failure to comply with the statute's requirements, it does not preclude *implied* waiver by conduct inconsistent with claiming the right. *LaLonde v. Gosnell*, 593 S.W.3d 212, 220 (Tex. 2019).
- ▶ In determining whether Defendants have waived their complaint regarding the lack of affidavit of merit, courts first consider whether their conduct in the case was inconsistent with their rights under 150.002.
- ▶ The court must determine if, in the **totality of the circumstances**, the right to a threshold certification of merit will be so obviated by a party's litigation conduct as to clearly evince an intent to abandon that requirement and proceed with the litigation.



# Waiver of Right to Seek Dismissal by Defendants

- ▶ Delay is only one of the surrounding facts and circumstances to be considered. The proper focus is on the degree to which a party has chosen to litigate despite the plaintiff's noncompliance with the statutory requirement of a threshold merits certification and the availability of a mandatory dismissal right. *LaLonde v. Gosnell*, 593 S.W.3d 212, 220 (Tex. 2019).
- ▶ In making its determination, the court considers:
  - (1) **Whether and to what extent the defendant has participated in pretrial discovery.** If all the defendant does is “parry a plaintiff's attacks” or attempt to learn more about the case to determine eligibility for dismissal, engaging in such discovery has little bearing on the defendant's intent to waive the right. But actively pursuing discovery oriented toward a resolution on the merits strongly indicates the defendant intends to litigate and, thus, waive the statute's threshold requirements.
  - (2) **The point in the litigation process that the defendant first attempts to seek dismissal.** The more developed a case is, and the closer it is to trial, the stronger the implication becomes that the defendant intended to abandon the certificate-of-merit requirement and, accordingly, the remedy for noncompliance.
  - (3) **Whether the defendant sought and obtained affirmative relief from the trial court, or participated in alternative dispute resolution.** Electing to litigate the case to a merits-based disposition is conduct inconsistent with the right to dismissal of the case without litigation, without regard to the merits, and on terms that are within the trial court's discretion. Also, strategically waiting to seek dismissal until after limitations has expired is also conduct that may be considered in determining intent to waive the right. Whether the defendant participated in mediation is also a factor, but it may be of limited value.



# Waiver of Right to Seek Dismissal by Defendants

- ▶ Not all litigation conduct is necessarily so inconsistent with a party's rights under the statute to imply an intent to relinquish those rights.
  - For example, conduct that is merely defensive or responsive to litigation initiated and carried on by the other party does not in and of itself give rise to waiver. Hence, filing an answer “out of an abundance of caution” is “inconsequential” and “attempting to learn about the case” when the defect in an expert's certification may not be evident would not be “inconsistent with the intent to assert the right to dismissal.”
  - Nor is mere delay, like the eight-month time frame in *Crosstex*, ordinarily sufficient to imply waiver.
- ▶ When the defendant throws itself into the vortex of the merits, either explicitly or implicitly by its unmistakable conduct, waiver is established.
  - The more developed a case is, and the closer it is to trial, the stronger the implication becomes that the defendant intended to abandon the requirement of a professional certification per the statute.
  - For example, extensive participation in discovery on the merits and/or requests for affirmative relief such as filing dispositive motions.

# Waiver of Right to Seek Dismissal by Defendants

## BEST PRACTICES TO AVOID IMPLIED WAIVER:

- ▶ Seek dismissal of claims immediately if non-compliance with the statute is evident (i.e. such as non-filing of affidavit or non-compliance with affiants' statutory requirements).
- ▶ If non-compliance is not evident on its face, seek discovery but avoid engaging proactively on issues dealing with merits of case and instead focus on the issues pertaining to the affidavit and its statutory requirements.

# 2019 Amendments – Why?

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

- ▶ *Jaster* (2014): Supreme Court held that the statute does NOT require a defendant or a third-party defendant who files a third-party claim or cross-claim against a licensed or registered professional because they are not a “Plaintiff” under the statute (at the time).
  - ▶ Court reasoning focused on the express language of the statute and gave deference to the Legislature in their construction of the statute. Did not want to legislate from the bench.
- ▶ *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.
  - ▶ Followed *Jaster* since it was binding.

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

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

# 2019 Amendments – Notable Recent Case Law

- ▶ *TRW Engineers, Inc. v. Hussion St. Buildings, LLC*, 608 S.W.3d 317, 318 (Tex. App.—Houston [1st Dist.] 2020, no pet.)
  - ▶ Plaintiff professional negligence claims against the Defendant design professional. Plaintiff did not file Certificate of Merit and claimed it did not need to because of previous discovery already in the case (which included depositions and other evidence introduced in a temporary injunction hearing before the Defendant made its appearance) qualified as an affidavit under the statute.
  - ▶ The Court disagreed and held that the Plaintiff's interpretation ignores the plain language of the statute, that requires the filing of an affidavit.
- ▶ *Whitaker v. R2M Eng'g, LLC*, 603 S.W.3d 530, 533 (Tex. App.—Amarillo 2020, pet. denied), reh'g denied (July 23, 2020)
  - ▶ The Plaintiff in this lawsuit did not file a Certificate of Merit because he was of the position that the damages he sought did not arise out of the provision of those professional services by the Defendant.
  - ▶ Specifically, the Court focused on the components of 1) professional services, 2) their provision and 3) damages arising from their provision. Because these were not defined by the statute, the Court focused constructing those terms by either looking at other parts of the statute to give guidance and/or its plain meanings from the dictionary.
  - ▶ What is noteworthy is that the Court held that the statute's reference to "damages arising out of" necessarily alludes to the act or omission from which the damages spring. In other words, the damages must be caused by acts or omissions **originating, stemming, or resulting from the engineer's exercise of specialized knowledge, training, or experience while performing the engineering services for which he was hired**. This does not mean that the act or omissions themselves must constitute professional or engineering services encompassed the statute; they need only originate, stem, or result from the engineer's supplying services which utilize his special engineering talents, education, and the like.

# 2019 Amendments – Applicability to Existing Cases

Enabling language of Senate Bill 1928:

The change in law made by this Act applies only to an **action** or arbitration proceeding commenced on or after the effective date of this Act. An action or arbitration proceeding commenced before the effective date of this Act is governed by the law in effect immediately before the effective date of this Act, and that law is continued for that purpose.

Effective Date: June 10, 2019

Which version of statute applies to Third-Party Petitions, Counter-Claims, Cross-Claims, etc., filed AFTER June 10, 2019 in cases that were initiated BEFORE June 10, 2019?

Key question: What is an “action”?

# Texas' Certificate of Merit Statute

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