FOUNDATION PERFORMANCE ASSOCIATION

The Current State of Certificate of Merit Law in Texas

October 14, 2015

Civil Practice and Remedies Code; CHAPTER 150

"Licensed or Registered Professionals"

- **Sec. 150.001. DEFINITIONS**.

- "Licensed or registered professional" means a licensed architect, licensed professional engineer, registered professional land surveyor, registered landscape architect or [the firm in which they practice]."

Occupations Code 1051.003; "Practice of architecture"

Means a service or creative work applying the art and science of developing design concepts, planning for functional relationships and intended uses, and establishing the form, appearance, aesthetics, and construction details for the construction, enlargement, or alteration of a building or environs intended for human use or occupancy, the proper application of which requires education, training, and experience in those matters. The term includes:

- (A) establishing and documenting the form, aesthetics, materials, and construction technology for a building, group of buildings, or environs intended to be constructed or altered;
- (B) preparing, or supervising and controlling the preparation of, the architectural plans and specifications . . .;
- (C) observing the construction, modification, or alteration of work to evaluate conformance with architectural plans and specifications . . .;
- (D) programming for construction projects, including identification of economic, legal, and natural constraints and determination of the scope and spatial relationship of functional elements;
- (E) recommending and overseeing appropriate construction project delivery systems;
- (F) consulting, investigating, and analyzing the design, form, aesthetics, materials, and construction technology used for the construction, enlargement, or alteration of a building or environs and providing expert opinion and testimony as necessary;
- (G) research to expand the knowledge base of the profession of architecture . . .; and
- (H) [teaching architecture]

Occupations Code Sec. 1001.003. PRACTICE OF ENGINEERING.

- . . .
- (c) The practice of engineering includes:
- (1) consultation, investigation, evaluation, analysis, planning, engineering for program management, providing an expert engineering opinion or testimony, engineering for testing or evaluating materials for construction or other engineering use, and mapping;
- (2) design, conceptual design, or conceptual design coordination of engineering works or systems;
- (3) development or optimization of plans and specifications for engineering works or systems;
- (4) planning the use or alteration of land or water or the design or analysis of works or systems for the use or alteration of land or water;
- (5) responsible charge of engineering teaching or the teaching of engineering;
- (6) performing an engineering survey or study;
- (7) engineering for construction, alteration, or repair of real property;
- (8) engineering for preparation of an operating or maintenance manual;
- (9) engineering for review of the construction or installation of engineered works to monitor compliance with drawings or specifications;
- (10) a service, design, analysis, or other work performed for a public or private entity in connection with a utility, structure, building, machine, equipment, process, system, work, project, or industrial or consumer product or equipment of a mechanical, electrical, electronic, chemical, hydraulic, pneumatic, geotechnical, or thermal nature;
- (11) providing an engineering opinion or analysis related to a certificate of merit under Chapter 150, Civil Practice and Remedies Code; or
- (12) any other professional service necessary for the planning, progress, or completion of an engineering service.

- **Sec. 150.002. CERTIFICATE OF MERIT**.
- (a) In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor who:
  - (1) is competent to testify;
  - (2) holds the same professional license or registration as the defendant; and
  - (3) is knowledgeable in the area of practice of the defendant and offers testimony based on the person's:
    - (A) knowledge;
    - (B) skill;
    - (C) experience;
    - (D) education;
    - (E) training; and
    - (F) practice.

- **Sec. 150.002. CERTIFICATE OF MERIT**.
- (b) The affidavit shall set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error, or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim. The third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor shall be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

- (c) The contemporaneous filing requirement . . shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires.
- . . .
- (e) The plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the complaint against the defendant. This dismissal may be with prejudice.
- . . .
- (h) This statute does not apply to any suit or action for the payment of fees arising out of the provision of professional services.

• Changes Over Time

- First enacted in 2003, the CoM statute has been changed four times since (2005, 2007, 2009, 2013).
  - Each change expanded the law.
- The changes in 2009 involved two big items:
  - 1) The affiant's qualifications were reduced from "practicing in the same area" as the defendant to "knowledgeable" in same area.
  - 2) The affidavit requirement was expanded to "each theory of recovery" rather than "at least one negligent act"

• PURPOSE of Statute?

- "The function of the certificate of merit is to provide a basis for the trial court to determine **merely** that the plaintiff's claims are not **frivolous**, and to thereby conclude that the plaintiff is entitled to proceed in the ordinary course to the **next stages of litigation**." (emphasis added)
  - CBM Engineers, Inc. v. Tellepsen Builders, L.P., 403 S.W.3d 339, 346 (Tex. App.—Houston [1st Dist.] 2013).

• Frivolous?

- Not defined in CoM statute, but Chapter 9 of the same Code is titled “Frivolous Pleadings & Claims” and suggests that:
  - Frivolous = Groundless
  - Groundless is defined to include:
    - No basis in fact.

- ***Crosstex Energy Services, L.P.***
- **v.**
- ***Pro Plus, Inc.***

- Texas Supreme Court
- Decided March 28, 2014.

- Gas leak caused explosion and $10 million in damage
- Station owner sued the lead construction contractor, Pro Plus, which was a registered professional engineering firm;
  - Claims were negligence, negligent misrepresentations, breach of warranty, breach of contract;
- No Certificate of Merit was filed with the suit (April 2010).

- In December 2010, after the statute of limitations had run on the plaintiff's claims, Pro Plus moved to dismiss the suit for lack of CoM;
- The plaintiff argued that good cause existed for the court to extend the timeframe for filing a CoM
- The TX Supreme Court disagreed:
  - The "good cause" extension was only available in a very limited circumstance that didn't exist in the case

- The plaintiff then argued that Pro Plus had waived its ability to complain about the lack of a CoM, since it waited too long.

- The TX Supreme Court again disagreed:
  - The Court determined that while it was possible to waive a complaint about a lack of CoM, such waiver required a clear demonstration of intent to do so;
    - It was not enough that ProPlus engaged in discovery and other typical litigation activities; more was needed.

- **Takeaways:**

- 1) With a very limited exception, a plaintiff that fails to file CoM with its claim *will* get its claim dismissed, even if that means it can't refile later (limitations);

- 2) A defendant should object as soon as possible when no CoM is filed, because it might be waiving its ability to complain later;
  - But, it takes a lot to achieve waiver.
    - Do you conduct a little discovery first??

- **Problem with "Dicta"?**

- Dicta - A statement in a court opinion that could be deleted without creating a problem for the rest of the opinion.

  - As a result, dicta "may not have received the full and careful consideration of the court that uttered it."

- **Problem with "Dicta"?**

- The Supreme Court said:
  - "A plaintiff shall file an affidavit of a qualified third party in the same profession; the affidavit must *substantiate* the plaintiff's claim on each theory of recovery."
    - Emphasis added

- ***Toby Paul Couchman and Pro–Surv***
- ***v.***
- ***Elizabeth Cardona***

- Court of Appeals – Houston (1st Dist)
- Decided July 23, 2015 (but not yet permanent)

- Plaintiff sued property surveyors for negligently performing their work (flood plain was not identified), as well as breach of contract, fraud, and deceptive trade practices;
- No CoM was filed with the lawsuit, so the defendants moved for dismissal;
- Plaintiff recognized the problem and filed a nonsuit;

- The next month, plaintiff refiled her claims, this time with a CoM;

- The defendants moved for dismissal, claiming that the statute required the CoM to be filed with the first suit;
  - They argued that plaintiff could not re-file claims she had messed up the first time

- The court disagreed:
  - Even though the claims were the same, they were filed in a new action; thus the plaintiff had a new opportunity to file a CoM “with the complaint.”

- As a backup position, the defendants argued that the CoM did not sufficiently tie the improper action on their part to the claims asserted in the plaintiff's lawsuit.

- But the court denied this argument too, noting that it had already spoken as to the necessary level of specificity in a case decided in 2013 based on the 2005 version of the CoM.

- “Chapter 150 requires only that a [professional qualified under the statute] provide a sworn statement certifying that the defendant's actions were negligent or erroneous and stating the factual basis for this opinion. . . The legislature did not intend to require affiants with expertise in such fields as engineering or architecture to opine regarding such farafield subjects as contract construction or agency.”

- Remember the Timing

- Decided in 2015

- Applied the post-2009 version of the CoM statute
  - "*set forth <u>for each theory of recovery</u>*"

- But referred to "precedent" from a case decided in 2013 that used the 2005 version
  - "*set forth <u>at least one negligent act</u>*"

- PROBLEM

- Contrast that last decision with appellate cases decided in 2008, 2012 and 2013 in Corpus Christi and Beaumont.

- Courts in those jurisdictions held:
  - That CoM should specifically identify actions, errors and/or omissions that deviate from the applicable standard of care and that caused the harm for which the plaintiff is seeking damages;
  - That CoM must identify or otherwise discuss the elements of plaintiff's claims;
  - The CoM must provide a basis for the trial court to conclude that claims have merit.

- Remember the Dicta

- Does the Couchman opinion fail to adequately honor the Texas Supreme Court's "take" as evidenced by the dicta?

- **Takeaways:**

- 1) As long as the applicable statute of limitations/repose has not run, a plaintiff can dismiss claims that require a CoM and refile them later, to correct any problems;

- 2) While some jurisdictions are more relaxed than others, a professional who is drafting a CoM should work very closely with plaintiff's counsel to make sure it is as complete as necessary to **substantiate** claims (more is probably better).
  - This can be very difficult in the pre-litigation stage.
  - If you are working on a matter that seems to implicate professional negligence, you should inform your client so they can get counsel quickly.

- ***Jennings, Hackler & Partners, Inc.***
- ***v.***
- ***North Texas Municipal Water District***

- Court of Appeals - Dallas
  - Decided July 30, 2015

- Jennings, an architectural firm, was hired to perform a building design for a water district.
  - To complete its work, Jennings in turn hired TurkWorks to provide mechanical engineering services under the design contract.

- Once completed, the building experienced many problems with climate control, ultimately linked to inadequate design and installation of HVAC equipment.

- The district sued Jennings and TurkWorks.
- It attached a CoM from a professional engineer, who stated that TurkWorks was negligent.
  - Jennings moved for dismissal since he was an architect and no architect had provided a CoM.
    - The district added a claim against Jennings for “vicarious liability” as the employer/principal of TurkWorks.

- The court dismissed the direct claims against Jennings as an architect (an easy call, since no CoM had been filed by an architect).

- BUT, it allowed the vicarious liability claims to stand, reasoning that those claims arose out of the professional services of (engineer) TurkWorks, not Jennings.
  - Recall the definition of "practice of architecture:" was Jennings unable to tie any of those items to his work with the engineer???

- ***Lantz***
- ***v.***
- ***Higgins, Inc.***

- Court of Appeals – Houston (1st Dist.)
  - Decided March 31, 2015

- Lantz hired architectural firm Higgins to perform design work for the construction of a home.
- Higgins performed calculations, designed the house, specified materials, and prepared drawings of the designs.
- Prior to construction, Higgins sent the drawings to an engineer for review and approval.
- During construction, Lantz noticed problems with the specs and design (sagging beams, incorrect materials, etc.).

- Lantz sued Higgins and the engineer, but no CoM was filed.
  - (We all know what that means by now); **case dimissed**!

- Lantz appealed, arguing that even though Higgins was a licensed architect, he actually agreed to perform structural engineering services, and thus their claim against Higgins did not arise from the provision of architectural services.

- The court held that since the plaintiff alleged that the calculations, plans and design for the house were faulty, and since those activities fall within the practice of architecture, the plaintiff really was making a claim that arose from the provision of architectural services.

- **Takeaways from last two cases:**

- The definitions of practice of engineering/architecture are broad, not exhaustive, and overlapping.
  - It is thus difficult for a plaintiff to isolate legal claims against these professionals that would not require a CoM.

- Nonetheless, it is at least possible for licensed or registered professionals to perform work in connection with a construction project that does NOT implicate the special knowledge and training that makes them a professional in the first place.
  - If you want to stay under the umbrella of protection of the CoM statute, don't go too far afield in your practice!

The End