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The Affidavit/Certificate of Merit Requirement: Avoiding Potential Pitfalls

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Whether you are defending or prosecuting a claim for malpractice against a licensed professional—i.e., architect/engineer, in the context of a construction dispute—counsel is confronted with a multitude of issues to analyze and consider. An evolving issue requiring counsel's initial consideration in this litigation context is the necessity to satisfy a state's affidavit/certificate of merit statutory requirement. Depending upon which jurisdiction the case is venued, counsel needs to be familiar with whether that jurisdiction has enacted legislation, requiring the filing and/or service of an affidavit/certificate of merit, which demonstrates as a threshold matter that the claim is meritorious.

Over the last 10 years, with the clamor for tort reform both nationally and at a statewide level, some jurisdictions have sought to place a new hurdle in the litigation process when plaintiffs bring claims against certain "licensed professionals." Although initially targeting the medical field to afford protection from nonmeritorious malpractice suits, when enacted, the so-called tort reform protections were broadened to encompass several other professions, including architects and engineers. In 1995, five jurisdictions implemented versions of the certificate/affidavit of merit concept. Since that time, several other jurisdictions have followed suit and enacted their own affidavit/certificate of merit legislation.

The purpose of this article is to alert practitioners of this potential hidden pitfall by providing a general overview of these different statutory schemes and, further, providing examples of how these statutory requirements are applied in the context of complex construction litigation.

The Genesis of the Affidavit of Merit

Licensed professionals such as architects and engineers provide critical services to construction projects. Their roles typically begin as early as the concept and design phase of the project and continue through completion. Given the prominent roles they play, these professionals have increasingly found themselves in the center of litigation disputes arising out of construction projects that have gone awry.

During the last 10 years, both at the national and state level, a major push for so-called tort reform resulted in the enactment of statutory schemes designed to protect what the movement considered to be targeted professionals. For example, New Jersey enacted its Affidavit of Merit Statute as part of "a package of five tort reform bills [intended] to 'bring common sense and equity to the state's civil litigation system.'"[1] New Jersey courts have articulated that the purpose of the Affidavit of Merit Statute is "to weed out frivolous [malpractice] lawsuits early in the litigation. . . ."[2]

Similarly, California courts have declared that its statute, the Certificate of Merit Statute, "was enacted to discourage the filing of frivolous lawsuits."[3] Like New Jersey's Affidavit of Merit Statute, California's Certificate of Merit Statute is intended to serve the dual purpose of insulating licensed professionals from potential damages unless the appropriate affidavit/certificate is timely filed and from incurring the expenses and inconveniences of litigation.[4]

Statutory Requirements

Currently 11 states have enacted some form of an affidavit/certificate of merit statute affording protections to engineers and architects. These states include Arizona, California, Colorado, Georgia, Maryland, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, and Texas.[5] Although the specific provisions differ from jurisdiction to jurisdiction, the underlying purpose of each of these statutes remains the same—to protect professionals from vexatious and meritless lawsuits.

These affidavit/certificate of merit statutes establish strict procedures with regard to the filing of professional malpractice actions. For example, in New Jersey, the Affidavit of Merit Statute provides that in any malpractice suit against a member of the designated "licensed" professions, 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.[6]

Architects and engineers are "licensed" persons within the meaning of the statute.[7]

Arizona's certificate of merit legislation applies to claims asserted against a "licensed professional" that are based on the "alleged breach of contract, negligence, misconduct, errors or omissions

in rendering professional services."[8] The term "licensed professional" includes, among other professionals, architects, engineers, and landscape architects.[9]

Arizona's statute is a prime example of a comprehensive certificate of merit statute. The plaintiff is required to file a "preliminary expert opinion affidavit," if expert opinion testimony is necessary to prove a plaintiff's prima facie claim. The opinion affidavit must be filed within 40 days after the filing of a responsive pleading to the lawsuit.[10] One unique feature of Arizona's statute is that the opinion affidavit is required to include not only the expert's qualifications but also the factual basis of the claim and a statement regarding how the defendant violated the applicable standard of care resulting in liability and causing damages to the plaintiff.[11]

California also has a Certificate of Merit Statute.[12] The Act applies to claims of professional negligence against architects, engineers, and land surveyors. Under California's statute, a certificate of merit must be served contemporaneously with or prior to the service of the plaintiff's lawsuit on the defendant.[13] However, as in some other jurisdictions, the certificate need only be executed by the plaintiff's lawyer, not the expert.[14]

California's statute further requires that the plaintiff's attorney must state, among other things, that he or she has reviewed the facts of the case and consulted with a third-party design professional "in the same discipline as the defendant" and "that the attorney has concluded on the basis of this review and consultation that there is a reasonable and meritorious cause for the filing of this action."[15] Failure to comply with this statute provides grounds for a motion to dismiss for failure to state a cause of action.[16]

Georgia's Affidavit of Merit Statute provides that a plaintiff bringing a professional malpractice claim "shall be required to file 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."[17] The statute applies to actions for professional negligence against different professionals, including architects and professional engineers.[18]

To provide "teeth" to these statutes, generally speaking, these jurisdictions have made clear that failure to comply with this threshold requirement of showing a meritorious claim goes to the very heart of the cause of action. Thus, if a plaintiff cannot or fails to meet the threshold requirement, these jurisdictions generally deem that omission as a failure to state a valid cause of action.[19] In New Jersey, the statute expressly provides that "[i]f the plaintiff fails to provide an affidavit or statement in lieu thereof . . . it shall be deemed a failure to state a cause of action."[20] Accordingly, a plaintiff's failure to comply with the statute requires a dismissal with prejudice in all but extraordinary circumstances.[21] Likewise, Georgia's statute provides for dismissal with prejudice when the plaintiff fails to comply with the statute.[22]

How Courts Have Interpreted and Applied These Acts

We will now briefly discuss how courts in a few jurisdictions that have enacted an affidavit/certificate of merit statute applicable to architects and engineers have interpreted and applied this legislation in the context of a professional malpractice claim. Canvassing how every jurisdiction has addressed these issues is well beyond the scope of this article.

While some of the decisions discussed involve medical malpractice claims, they are nevertheless instructive on how those jurisdictions will approach a professional negligence claim against a design professional in the context of construction litigation.

New Jersey. This state has experienced substantial litigation over the proper interpretation to be accorded its Affidavit of Merit Statute. This litigation has spawned numerous decisions that address various permutations in the interpretation of the act in a variety of procedural contexts.

For example, is a party required to file an affidavit of merit against a co-defendant licensed professional when asserting a claim for common law contribution and indemnification? The New Jersey Appellate Division determined that, under such circumstances, a party asserting cross-claims for common law contribution and indemnification against a licensed professional need not file an affidavit of merit.[23] However, a different result would likely be reached under California's statute, which expressly applies to "a cross-complaint for damages or indemnity."[24]

Suppose the plaintiff is a professional and brings an action seeking to collect its fees and, in response, the defendant counterclaims and asserts that the plaintiff professional is not entitled to the fees because the plaintiff committed malpractice. Is an affidavit of merit required in this situation? In *Manganaro Consult. Eng. v. Carneys*,[25] a construction litigation matter involving a professional engineering firm seeking payment of fees, an appellate court held that an affidavit of merit was required, reasoning that a "counterclaim for professional malpractice is an 'action for damages' based on 'an alleged act of malpractice or negligence,'" which is subject to the Affidavit of Merit Act.[26]

Another question raised by the New Jersey courts is whether an affidavit of merit is required in a matter involving a breach of contract. The New Jersey Supreme Court in *Couri v. Gardner*,[27] answered that question by instructing that courts must look beyond the mere legal label appended to a particular claim to determine the statute's application. The court ultimately concluded that the Act should not apply to a claim that is purely an action involving breach of contract. In that regard, the court emphasized that it is not so much the label placed on the action that is pivotal but, rather, whether the claim involved requires proof of a deviation from a professional standard of care. If so, the Act would apply.[28]

In another procedural context, the

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question posed was whether the Act applied when a defendant asserted claims sounding in professional negligence against a new party added to the litigation by way of third-party complaint. In *Diocese of Metuchen v. Prisco & Edwards, AIA*,[29] another appellate panel answered that question in the negative. In *Prisco*, the defendant architect filed a third-party complaint against an engineering firm for contribution and indemnification related to alleged construction defects in the renovation of a former high school into a corporate business center. The architect filed a motion seeking the trial court to declare that it was not required to comply with the Act with respect to its third-party complaint against the engineer.

The appellate court in *Prisco* affirmed the trial court's determination that, in this context, it was unnecessary to require the architect to file and serve an affidavit of merit. As a result, the engineering firm was required to participate in litigation without an affidavit being filed by either the plaintiff owner (which did not assert direct claims against the engineer) or by the architect third-party plaintiff who sought contribution and indemnification from the engineering firm.[30]

California. This state has experienced its fair share of litigation involving its Certificate of Merit Statute. And like other jurisdictions, California courts have been reluctant, at times, to dismiss what appear to be meritorious malpractice claims simply because the statute's literal text was not strictly adhered to by the plaintiff.

For example, a California appellate court reversed the trial court's dismissal of a complaint against an engineering firm despite the fact that the plaintiff did not fully comply with the statute's requirements.[31] In *Price v. Dames & Moore*, the appellate court granted the plaintiff leave to amend its complaint and, thus, the opportunity to file a proper certificate of merit despite the plaintiff's previous technical violation of the statute.

However, there is another side to this coin. The fact that a plaintiff successfully meets this threshold issue by providing a certificate does not translate into an automatic victory. Indeed, if the defendant professional ultimately succeeds in defending against the malpractice action, California courts have the discretion to enforce the Act's counterpart sanctions provision and award the prevailing defendant reasonable attorney fees and costs.[32] Similarly, where a plaintiff fails to satisfy the statute's threshold requirement for the provision of an appropriate certificate of merit by counsel, and where the certificate is determined to be necessary for the action to proceed, California courts have the discretion to award the prevailing defendant professional attorney fees and costs as an appropriate sanction under the Act.[33]

Georgia. The courts in Georgia have demonstrated a willingness to strictly enforce the provisions of that state's Affidavit of Merit Act.

For example, if a party fails to submit an affidavit with a proper jurat, whether it is because the notary's commission had recently expired[34] or because the jurat is altogether missing from the affidavit,[35] Georgia courts have dismissed professional negligence actions under such circumstances.

Like New Jersey, Georgia courts also look to the nature and substance of the claim being asserted against the licensed professional, rather than the nomenclature set forth in the pleadings, in determining whether an affidavit of merit is required.[36] Where the claim being brought truly implicates professional negligence and a breach of the accepted standard of care for that profession, Georgia courts will require the filing of an appropriate affidavit of merit.

Texas. The Texas Affidavit of Merit Statute requires the filing of an affidavit by a nonparty, independent professional. Further, that filing must be contemporaneous with the filing of the complaint.[37]

Unlike some jurisdictions, however, failure to file an appropriate affidavit does not necessarily result in an automatic dismissal of that action with prejudice. Texas courts have the discretion, in such circumstances, to determine whether dismissal should be entered with or without prejudice.[38]

Arizona. From time to time, states have had their certificate/affidavit of merit statutes challenged on constitutional grounds. For example, in *Hunter Contracting Co., Inc. v. Superior Court*, an Arizona court of appeals determined that the state's Certificate of Merit Statute violated the Equal Protection Clause of the Arizona Constitution.[39] The *Hunter* court determined the statute infringed upon an individual's fundamental right to bring an action and, further, failed strict scrutiny analysis. The court expressed particular concern with the mandatory dismissal element of the statute and held that the statute placed parties suing registered professionals "'under a burden or disability to which other tort claimants are not subjected.'"[40]

The Arizona legislature subsequently amended its Certificate of Merit Statute to satisfy the constitutional defects raised by the *Hunter* decision. Other jurisdictions have witnessed similar challenges.[41]

In the wake of significant pressure urging tort reform, several state legislatures responded, in part, by enacting various versions of affidavit/certificate of merit statutes. At the heart of these legislative pronouncements is the notion that licensed professionals should be shielded from frivolous lawsuits before being forced to incur significant expense in defending against unfounded claims. Accordingly, in certain jurisdictions, plaintiffs are now required to make a threshold showing that their professional malpractice claims are meritorious through the filing of an appropriate affidavit or certificate of merit. Essentially, a plaintiff now carries the burden of "legitimizing" his or her cause of action at the inception of the litigation. This requirement has trickled over into the construction litigation context and many of these jurisdictions require the filing

of an appropriate affidavit/certificate when claims are asserted against design professionals such as architects and engineers.

Failure to comply with these statutes' provisions can result in dire consequences. It is, therefore, incumbent upon the practitioner—whether presenting or defending professional malpractice claims involving architects and engineers—to become familiar with the applicable requirements in their respective jurisdictions to ensure that they avoid stepping into these potential hidden pitfalls.

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Endnotes

1. Alan J. Cornblatt, P.A. v. Barow, 153 N.J. 218, 228, 708 A.2d 401, 405 (1998) (citing Office of the Governor, News Release 1 (June 29, 1995)). See N.J.S.A. §§ 2A:53A-27 *et seq.*
2. Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 395, 774 *A*.2d 495, 500 (2001); *see also* Manganaro Consult. Eng'r v. Carneys, 344 N.J. Super. 343, 347, 781 *A*.2d 116, 118 (App. Div. 2001).
3. Ponderosa Ctr. Partners v. McClellan/Cruz/Gaylord & Assoc., 45 Cal. App. 4th 913, 915 (App. 2 Dist. 1996).
4. Ponderosa., 45 Cal. App. 4th at 915; Burt v. West Jersey Health Systems, 339 N.J. Super. 296, 308, 771 *A*.2d 683, 690 (App. Div. 2001).
5. ARIZ. REV. STAT. §§ 12-2601 and 12-2602 (2004); COLO. REV. STAT. § 13-20-602 (2003); GA. CODE ANN. § 9-11-9.1(a) (2002); MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-02 (2003); MINN. STAT. § 544.42, subds. 1 and 2 (2003); NEV. REV. STAT. ANN. 40.6884; N.J. STAT. ANN. §§ 2A:53A-26 to 2A:53A-29; OR. REV. STAT. ANN. § 31.300 (2003); PA. R. CIV. P. NOS. 1042.1 to 1042.8 *et seq.* (2003); TEX. CIV. PRAC. & REM. CODE ANN. §§ 150.001-.002 (Vernon 2004).
6. N.J.S.A. § 2A:53A-27.
7. *See* N.J.S.A. § 2A:53A-26(b), (e) (citing N.J.S.A. §§ 45:8-27 *et seq.*).
8. ARIZ. REV. STAT. § 12-2601(1)(a)(b).
9. *Id*. §§ 12-2601(3); 32-101(B)(2), (11), and (25).
10. *Id*. § 12-2602(B); ARIZ. R. CIV. P. 26.1.
11. ARIZ. REV. STAT. § 12-2602(B)(1)-(4) (2004).
12. Cal. CCP § 411.35.
13. Cal. CCP § 411.35(a).
14. *Id. See also* COLO. REV. STAT. § 13-20-602(3)(a)(I), (II); MINN. STAT. § 544.42, subd. 3(a)(1) (2003); NEV. REV. STAT. ANN. 40.6884(1)(a)-(d); OR. REV. STAT. ANN. § 31.300(2)(a), (b) (2003); PA. R. CIV. P. 1042.3(a) (statutes requiring filing of certificate executed by counsel rather than by an expert).
15. Cal. CCP § 411.35(b)(1).
16. Cal. CCP § 411.35(g).
17. GA. CODE ANN. § 9-11-9.1(a).
18. *Id*. at 9-11-9.1(f).
19. *See, e.g.*, *Cornblatt*, 153 N.J. at 244, 708 *A*.2d at 414.
20. N.J.S.A. § 2A:53A-29.
21. *Cornblatt*, 153 N.J. at 242, 246, 708 *A*.2d at 413, 415.
22. Stamps v. Johnson, 535 S.E.2d 1 (Ga. Ct. App. 2000) (holding that plaintiff's failure to file the requisite affidavit would result in the trial court's dismissal of the action with prejudice); *see also* MINN. STAT. § 544.42, subd. 6(a) (2003) (providing plaintiff's failure to serve requisite affidavit mandates dismissal with prejudice upon the filing of appropriate motion).
23. *See* Burt v. West Jersey Health Systems, 339 N.J. Super. 296, 305, 771 *A*.2d 683, 688 (App. Div. 2001).
24. Cal. CCP § 411.35(a).
25. Manganaro Consult. Eng'r. v. Carneys, 344 N.J. Super. 343, 781 *A*.2d 1116 (App. Div. 2001).
26. *Id.* at 347, 781 *A*.2d at 1118 (quoting Dep't of Transp. v. PSC Res., Inc., 159 N.J.Super 154, 159, 387 *A*.2d 393, 395 (Law Div. 1978)). In *Manganaro*, the court reasoned that "[a] counterclaim is not simply a 'defensive pleading,'" but rather, is "'an affirmative effort to enforce . . . an affirmative claim.'" *Id*. at 347-48 (quoting Gibbins v. Kosuga, 121 N.J. Super. 252, 256 (Law Div. 1972)).
27. Couri v. Gardner, 173 N.J. 328, 801 *A*.2d at 1134 (2002).
28. *Id*. at 340-41, 801 *A*.2d at 1141. The New Jersey Supreme Court "stressed that when a 'literal interpretation of individual statutory terms or provisions would lead to results inconsistent with the overall purpose of the statute, that interpretation should be rejected.'" *Id*. at 339, 801 *A*.2d at 1140 (quoting Hubbard v. Reed, 168 N.J. 387, 392-93, 774 *A*.2d 495, 489-99 (2001)). Thus, "[i]t is not the label placed on the action that is pivotal but the nature of the legal inquiry." *Id*. at 340, 801 *A*.2d at 1141.
29. Diocese of Metuchen v. Prisco & Edwards, AIA, 374 N.J. Super. 409, 864 *A*.2d 1168 (App. Div. 2005).
30. *Id*. at 417-19, 864 *A*. 2d at 1172-73. This result may not obtain in California where, by its express terms, the requirements of the California statute apply to claims against a design professional based upon equitable indemnity. Cal. CCP § 411.35(i).
31. Price v. Dames & Moore, 112 Cal.Rptr.2d 65, 70 (Cal. App. 2001).
32. Cal. CCP § 411.35(h). In determining whether sanctions should be assessed against the plaintiff, California courts will look to see if the Act's requirements have been satisfied. *Id*. *See also* Guinn v. Dotson, 28 Cal. Rptr. 2d 409, 415 (Cal. App. 4th 1994) (holding that trial court erred in failing to award reasonable attorney fees, including paralegal fees, pursuant to certificate of merit statute).
33. Guinn, 28 Cal. Rptr. 2d at 415 (Cal. App. 4th 1994) (holding that defendant engineer was entitled to award of reasonable attorney fees, including paralegal fees, and costs due to plaintiff's failure to comply with Act's requirement that appropriate certificate of merit be timely filed prior to commencing action against professional engineer).
34. Thomas v. Gastroenterology Assoc. of Gainesville, P.C., 2005 WL 1189429 *1 (Ga. App. May 20, 2005).
35. Goodin v. Gwinnett Health System, Inc., 2005 WL 832222 *1 (Ga. App. April 12, 2005).
36. *Id*. at *2.
37. TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a), (b).
38. Palladian Building Co. v. Nortex Foundation Designs, Inc., 2005 WL 1048081 *5 (Tex. App.-Fort Worth May 5, 2005).
39. Hunter Contracting Co., Inc. v. Superior Court, 190 Ariz. 318, 325 (App. 1997).
40. Id. at 324 (quoting Kenyon v. Hammer, 142 Ariz. 69, 76 (1984)).
41. See Cornblatt, 153 N.J. at 247-48, 708 *A*.2d at 415-16 (where New Jersey Supreme Court observed that constitutional challenges to the Affidavit of Merit Statute based upon equal protection, due process and separation of powers were not substantial enough in nature to require definitive conclusions).