



Tort Reform or More Litigation?

PREFACE:

In April, 2004, I wrote this article on the then new Certificate of Merit. Since that time, I have had the opportunity to deal with numerous cases involving Certificates of Merit. In addition to the issues that I highlighted in the article an additional one now appears to exist. The Statute states that Certificates of Merit are required for cases alleging "negligence" against the design professional. What is not clear is whether there is also a requirement for such Certificates in cases involving claims of breach of contract. Initially one might be guided by the clear language of the statute. However, this is not so clear since engineers typically perform their obligations under the terms of a contract. Finally, the situation is even more confusing where the contract requires the engineer to perform his or her services "in accordance with established engineering standards". Does any failure to perform constitute "negligence" or "breach of contract" and if it is "breach of contract", is a Certificate of Merit required. Since the sanction for not having a Certificate is dismissal of the action, I foresee significant battles in courtrooms and arbitration proceedings over Certificates in these circumstances. Overall, having now dealt with these over the past year, I feel that they are generally of assistance to engineers and should result in a reduction of lawsuits in the future.



The 2003 Texas legislative session brought about many bold new laws. One such new statute known as House Bill 4, enacted under the mantle of "tort reform", directly affects engineers and is found in Section 150 of the Texas Civil Practices and Remedies Code. Referred to as the "Certificate of Merit" statute, this new law requires that any legal "action" filed against a design professional (i.e. architect or engineer) must include a sworn affidavit from a Texas licensed architect or engineer practicing in the same area as the defendant. The affidavit must set forth the error or omission complained of and the factual bases for the error or omission. Any failure to attach the sworn affidavit with the legal action can result in dismissal of the claims against the architect or engineer.

The purpose of this new law was to reduce the number of lawsuits filed against architects and engineers or, at the very least,

to make sure that those that are filed have some legal basis.

However, there are many uncertainties and logical inconsistencies associated with House Bill 4 and because there are no reported cases as yet, it is difficult to know how this new law will actually be applied. Some of the problems are discussed below:

- The statute states that the sworn affidavit must be signed by a licensed architect or professional engineer ".practicing in the same are of practice as the defendant.". This seems to mean that at the very least only an engineer can sign the affidavit for claims against engineers (and an architect for claims against architects). It may also mean that for claims against a structural engineer, only a structural engineer may sign the sworn affidavit. However, one can easily see that gamesmanship can result by characterizing the engineering work so narrowly that few, if any, engineers are available to actually sign such an affidavit.

- One of the biggest problems with this statute is whether the requirement for the sworn affidavit exists for claims made in arbitration – the most widely used form of dispute resolution in the construction industry. The law only uses the term "action" rather than lawsuit or arbitration. Furthermore, it uses the terms "plaintiff" and "defendant", terms typically associated with courts rather than arbitration. However, the new statute is virtually identical to a model statute that was touted by the AIA, ASCE and the NSPE all of whom use arbitration in their standard form agreements. It will be interesting to see whether arbitrators will insist on such sworn affidavits and, if not, whether the courts will vacate awards in the absence of such sworn affidavits.

- The law is also unclear whether it applies to the growing number of construction companies that undertake design/build work. If the construction company undertakes the engineering design itself, the law does not seem to apply. Moreover, if the contractor subcontracts for the engineering work, there also does not appear to be a requirement for a sworn affidavit. But the contractor will then be placed into the terrible position of having to obtain such a sworn statement for its own claims against the engineer. However, by doing so, the contractor will be essentially admitting to the errors or omissions with respect to the owner. This is one of those unintended consequences which will surely

lead to significant litigation in the years ahead.

- Another problem is whether the requirement for the sworn affidavit applies where the engineer is the plaintiff (such as a claim against the owner for payment for work performed) and the owner then asserts its claims in the form of a counterclaim against the engineer. The wording of the statute is not clear. Such a lack of clarity will undoubtedly lead to future litigation on the issue.

- One of the biggest unknowns is how the courts will scrutinize the qualifications of those providing the sworn affidavits. Must the person be a current practicing engineer or can they be a consultant? What if they are recently retired? What if they are acting as an expert witness? How closely to the area of the problem must they be aligned? Are they required to be fully informed of all aspects of the matter before swearing out the affidavit? The person providing the sworn affidavit will certainly be subject to extensive examination and cross examination. Indeed, because the sanction for a challengeable affidavit is dismissal of the case, it is likely that cases against engineers will be fought not on the battleground of what the engineer did or did not do – but on the basis of affidavit from the opposing engineer. .

The purpose of the requirement for the filing of a certificate of merit as a condition to all claims against engineers was to reduce litigation. However, given the questions I have raised as well as other problems that still need to be identified, it is more likely that litigation will be increased until the courts can address these uncertainties. It is also likely that constitutional challenges will be made since engineers and architects will now be treated differently that others when it comes to the filing of lawsuits.

Time will only tell whether House Bill 4 will act as a benefit to engineers or be a boon to their lawyers.



Kerry C. Williams is a P.E., member of TSPE and construction attorney with the Houston law firm of Chamberlain, Hrdlicka, White, Williams & Martin. You may E-mail Kerry at kerry.williams@chamberlainlaw.com or call at (713) 654-9626.