



Affidavits of Merit and the Design Professional

By Mark D. Shifton, Gary Strong, and Alexandra Kritzman

The affidavit of merit statutes applying to claims against design professionals in 15 states may offer the opportunity to secure the dismissal of professional negligence claims asserted against clients.

Extricating the Design Professional from Malpractice Litigation at the Earliest Opportunity

Professional negligence actions against architects and engineers are costly, time-consuming, and often emotionally draining for a design professional. Counsel defending design professionals in such actions must

not only possess a deep understanding of his or her client's work, but also the relevant industry standards, the nature of the claims against the client, and any theories advanced by the plaintiff regarding how the alleged violations of relevant industry standards proximately caused damages. Defense counsel must take into account the unique facts of the case at hand, including the expected complexity of the litigation, the experience of one's adversary,

and the alleged value of the claims against the client, and ultimately learn all that can be learned through the discovery process about the strength of the claims against the client and any available defenses. Using this information, counsel must craft a workable strategy to limit the client's exposure, and at long last, either execute a plan to obtain the dismissal of the claims (ideally by dispositive motion) or resolve the action as favorably as possible.

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One important consideration when defending a design professional is the time that it will take to develop and implement such a strategy. Most design professionals are insured by professional liability policies with “eroding limits,” in which expenses incurred by the insurance carrier (such as attorneys’ fees) are deducted from the policy’s overall limits. Should the course of discovery drag on for too long, the design professional may be left with little or no coverage to contribute to a settlement or to satisfy a judgment. Counsel should therefore always consider the amount of time and effort necessary to develop fully a defense strategy and be prepared to explore every available opportunity to extricate a client from litigation, whenever such opportunities present themselves. Every now and then, fortune will smile upon a design professional and such an opportunity will arise long before significant discovery is conducted. One such opportunity may occur when a party asserting claims against a design professional fails to comply with the applicable statute requiring the submission of an “affidavit of merit.” Attorneys defending design professionals must therefore be well acquainted with the relevant affidavit of merit statutes in the states in which they practice.

In an effort to “weed out” frivolous and costly professional negligence actions against design professionals, a number of states have enacted statutes requiring that such claims be supported by an affidavit of a competent expert. While most affidavit of merit statutes generally do not require the party asserting the claim to provide a full-blown expert report at the outset of the litigation, they do require some minimal measure of assurance—based on the anticipated opinion of an expert qualified to offer such an opinion—that the claim against the design professional possesses a degree of merit sufficient to continue through litigation. Notably, many states have enacted affidavit of merit statutes that apply only to professional negligence claims against physicians and similar healthcare providers. This article will discuss only those affidavit of merit requirements applying to professional negligence claims against design professionals.

Affidavit of merit statutes have become more prevalent in recent years, in part due to the expanding push for tort reform at

both state and federal levels. State legislatures and commentators have made it clear that such statutes are being enacted so as to protect licensed professionals from meritless claims, insulate them from incurring unnecessary defense costs, and mitigate rising insurance premiums.

While the requirement of an affidavit of merit will never completely bar a claimant from filing a professional negligence claim against a design professional, it can provide an early basis in litigation for identifying and eliminating claims with little or no merit, and it may provide counsel with a mechanism to achieve a favorable outcome early on. Without the benefit of an affidavit of merit statute, design professionals, and their insurers, would be forced to undertake a defense against every meritless claim asserted. This often results in litigating even frivolous professional negligence claims through completion of discovery, forcing defense counsel to review hundreds of thousands of pages of documents and depose dozens of witnesses with the hope that a motion for summary judgment will finally end the ordeal.

Affidavit of merit statutes are generally simple and straightforward in concept. Therefore, a claimant’s strict compliance, at least in meritorious cases, should be a matter of routine. A failure to comply with an affidavit of merit statute usually occurs because the claimant (often the plaintiff) fails to file a timely affidavit, or the affidavit is substantively deficient. Such failures may lead to the dismissal of all claims asserted against a design professional, often with prejudice, preventing years of time-consuming discovery and litigation.

Although dismissal of all claims for failure to comply with an affidavit of merit statute is rare, it is not unheard of. Additionally, there is often significant disagreement over the “substantive” requirements in such statutes, and an affidavit that appears to comply substantively on its face may ultimately be deemed deficient. These issues often spawn collateral motion practice and appeals regarding the substantive adequacy of the affidavit or the credentials of the expert executing it. Furthermore, in large construction cases, professional negligence claims are often buried among a mass of others, or they are misleadingly pleaded as claims for indemnity, breach of contract, or even *res ipsa loquitor*. Such tactics are often used in

the hope that affidavit of merit requirements will be overlooked or held inapplicable.

Counsel representing design professionals must therefore be able to recognize and consider all of these issues because affidavit of merit requirements can provide a cost-effective way to extricate design professionals from professional negligence claims relatively early in the litigation process.

In an effort to “weed out” frivolous and costly professional negligence actions against design professionals, a number of states have enacted statutes requiring that such claims be supported by an affidavit of a competent expert.

Selected State Affidavit of Merit Statutes

Currently, 15 states have enacted some form of affidavit of merit statute that applies to professional negligence claims against design professionals. The specific provisions, requirements, and effects of each statute differ, but their underlying purpose—to weed out frivolous claims against design professionals at the outset of litigation before significant expenses are incurred—remains the same.

While a full discussion of every affidavit of merit statute applying to claims against design professionals is beyond the scope of this article, a summary and brief analysis of five affidavit of merit statutes (New Jersey, Texas, California, Arizona, and Nevada), which follows, is helpful in providing a general understanding of the common issues these requirements raise. The table at the end of this article provides a compilation of all 15 affidavit of merit statutes, including their relevant citations, seminal cases from each state, and

the significant requirements provided by each statute.

New Jersey – N.J.S.A. 2A:53A-26 et seq.

New Jersey's affidavit of merit statute, first enacted in 1995, states, in pertinent part:

In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of

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Affidavit of merit

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malpractice or negligence by a licensed person in his profession or occupation, 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.

In the case of an action for medical malpractice, the person executing the affidavit shall meet the requirements of a person who provides expert testimony or executes an affidavit as set forth in [citation omitted]. In all other cases, the person executing the affidavit shall be licensed in this or any other state; have particular expertise in the general area or specialty involved in the action, as evidenced by board certification or by devotion of the person's practice sub-

stantially to the general area or specialty involved in the action for a period of at least five years. The person shall have no financial interest in the outcome of the case under review, but this prohibition shall not exclude the person from being an expert witness in the case.

Design professionals such as architects and engineers are "licensed" persons under the meaning of the New Jersey's affidavit of merit statute, and claims against them are thus subject to the statute's requirements. In New Jersey, the affidavit of merit need not be a substantive expert report. In fact, in New Jersey it is common for an affidavit of merit to be based on little more than the initial pleadings and whatever else is available for the expert's review before discovery begins. The affidavit must be filed with the complaint or within 60 days of the filing of the design professional's answer, although this deadline may be extended by the court another 60 days upon a showing of good cause. The consequences of noncompliance is not specifically stated in the statute, but New Jersey courts have made clear such failure to comply will result in dismissal the party's claim with prejudice. *See Galik v. Clara Mass Med. Ctr.*, 771 A.2d 1141, 1152 (N.J. 2001), *superseded by statute on other grounds, Meehan v. Antonellis*, 141 A.3d 1162 (N.J. 2016).

Perhaps to ameliorate this harsh result, the New Jersey Supreme Court has held that shortly after the filing of a design professional's answer, the court must schedule a conference during which the parties discuss issues related to the adequacy of the affidavit of merit, or if no affidavit of merit has been filed, to remind the party asserting the claim against the design professional that one is required. *Ferreira v. Rancocas Orthopedic Assocs.*, 836 A.2d 779, 780–81 (N.J. 2003) (holding that courts are to require case management conferences during the early stages of litigation to ensure compliance with the affidavit of merit statute). The New Jersey Supreme Court subsequently held, however, that the failure of a court to hold such a conference would not excuse a party's failure to timely file an affidavit of merit. *Paragon Contractors, Inc. v. Peachtree Condo. Ass'n*, 997 A.2d 982, 987 (N.J. 2010).

Furthermore, New Jersey courts consider certain mitigating factors that may prevent dismissal when a party has otherwise "substantially complied" with the affidavit of

merit statute. An example of one such instance is when a plaintiff has provided the defendant with all the information normally required by the statute in some form within the relevant time period. *See Hefferon v. Gitler*, 787 A.2d 222, 224 (N.J. App. Div. 2001) (holding that plaintiff who failed to timely file an affidavit of merit nevertheless "substantially complied" with New Jersey's affidavit of merit statute by retaining an expert, who issued expert report prior to filing suit, and attaching the expert's report plaintiff's interrogatory answers).

New Jersey's affidavit of merit statute further requires that the credentials of the expert signing the affidavit be "similar" to those of the professional against whom the claims are asserted. *See Hill Int'l, Inc. v. Atlantic City*, 106 A.3d 487, 506 (N.J. App. Div. 2014) (affidavit of merit executed by engineer could not support claims of professional negligence against architect), *appeal granted*, 116 A.3d 1069 (N.J. 2015). The requirement that an affidavit of merit be executed by a "similar" professional is a recurring theme among the various affidavit of merit statutes nationwide and often presents defense counsel with a useful avenue to attack an otherwise timely filed affidavit of merit.

Texas—V.T.C.A. §150.002

Texas' affidavit of merit statute (called a "certificate of merit" in Texas) states, in pertinent part:

- (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.

- (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 of Subsection (a) 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.
- (d) The defendant shall not be required to file an answer to the complaint and affidavit until 30 days after the filing of such affidavit.
- (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.

A significant quirk in Texas' certificate merit statute is the degree of discretion that it provides to a trial court when the court decides whether a party's failure to timely and adequately file an affidavit of merit results in a dismissal of the complaint with

or without prejudice. While Texas' affidavit of merit statute, by its very text, affords a court the discretion to dismiss a claim with prejudice, several decisions have held that such dismissals should be without prejudice. See *Palladian Bldg. Co., Inc. v. Nortex Foundation Design, Inc.*, 165 S.W.3d 430 (Tex. App. 2005). Other, later decisions, however, have held that claimants may not cure deficiencies in their certificates of merit simply by refileing a new action, effectively meaning that such dismissals are with prejudice. See *CTL/Thompson Tex., LLC v. Starwood Homeowners Ass'n, Inc.*, 461 S.W.3d 627 (Tex. App. 2015).

Arizona—Ariz. Rev. Stat. §12-2602

Arizona's affidavit of merit statute provides, in pertinent part:

- A. If a claim against a licensed professional is asserted in a civil action, the claimant or the claimant's attorney shall certify in a written statement that is filed and served with the claim whether or not expert opinion testimony is necessary to prove the licensed professional's standard of care of liability for the claim.
- B. If the claimant or the claimant's attorney certifies pursuant to subsection A that expert opinion testimony is necessary, the claimant shall serve a preliminary expert opinion affidavit with the initial disclosure that are required by Rule 26.1, Arizona Rules of Civil Procedure. The claimant may provide affidavits from as many experts as the claimant deems necessary. The preliminary expert opinion affidavit shall contain at least the following information:
1. The expert's qualifications to express an opinion on the licensed professional's standard of care of liability for the claim.
 2. The factual basis for each claim against a licensed professional.
 3. The licensed professional's acts, errors or omissions that the expert considers to be a violation of the applicable standard of care resulting in liability.
 4. The manner in which the licensed professional's acts, errors or omissions caused or contributed to the damages

or other relief sought by the claimant.

...

C. If the claimant or the claimant's attorney certifies that expert testimony is not required for its claim and the licensed professional who is defending the claim disputes that certification in good faith, the licensed professional may apply by motion to the court for an order requiring the claimant to obtain and serve a preliminary expert opinion affidavit under this section. In its motion, the licensed professional shall identify the following:

1. The claim for which it believes expert testimony is needed.
2. The prima facie elements of the claim.
3. The legal or factual basis for its contention that expert opinion testimony is required to establish the standard of care of liability for the claim.

Arizona's affidavit of merit statute requirements differ significantly from other states' affidavit of merit requirements; the statute allows a claimant's attorney to determine, at least at the threshold level, whether an affidavit of merit is required. If a claimant certifies that expert testimony is indeed necessary, then the claimant must provide an affidavit of merit that is a bona fide expert report, at least as one could be provided at that early stage of the litigation. In cases involving real (not feigned) claims of deficiencies in a building's design, and thus asserting actual professional negligence claims, the requirement of expert testimony is all but certain. Accordingly, if the party asserting claims against a design professional chooses to certify that it needs no expert opinion to establish its claims, should the claimant's cause of action truly sound in professional negligence, Arizona's affidavit of merit statute allows the design professional's counsel to seek an order that the claimant be required to serve an affidavit of merit. Generally, state affidavit of merit statutes seem to contemplate calling for affidavits of merit whenever claims against design professionals will require expert testimony to establish the relevant standard of care (or to prove the breach of the standard of care by the design pro-

professionals). In contrast, claims sounding in simple negligence or breach of contract have generally been held *not* to require submission of an affidavit of merit. *Merlini v. Gallitzin Water Auth.*, 980 A.2d 502, 508 (Pa. 2009) (holding complaint against engineer asserted claims for ordinary negligence, and thus certificate of merit was not required). Other states have also held that claims against design professionals relying on the doctrine of *res ipsa loquitur* do *not* require support by an affidavit of merit. See *Hunter Contracting Co., Inc. v. Superior Court*, 947 P.2d 892, 895 (Ariz. Ct. App. 1997);

California—Cal. Civ. Proc. Code §411.35
California’s certificate of merit statute states, in pertinent part:

- (a) In every action, including a cross-complaint for damages or indemnity, arising out of the professional negligence of a person holding a valid architect’s certificate... on or before the date of service of the complaint or cross-complaint on any defendant or cross-defendant, the attorney for the plaintiff or cross-complainant shall file and serve the certificate specified by subdivision (b).
- (b) A certificate shall be executed by the attorney for the plaintiff or cross-complainant declaring one of the following:
 - (1) That the attorney has reviewed the facts of the case, that the attorney has consulted with and received an opinion from at least one architect, professional engineer, or land surveyor who is licensed to practice and practices in this state or any other state, or who teaches at an accredited college or university and is licensed to practice in this state or any other state, in the same discipline as the defendant or cross-defendant and who the attorney reasonably believes is knowledgeable in the relevant issues involved in the particular action, and that the attorney has concluded on the basis of this review and consultation that there is rea-

sonable and meritorious cause for the filing of this action. The person consulted may not be a party to the litigation. The person consulted shall render his or her opinion that the named defendant or cross-defendant was negligent or was not negligent in the performance of the applicable professional services.

- (2) That the attorney was unable to obtain the consultation required by paragraph (1) because a statute of limitations would impair the action and that the certificate required by paragraph (1) could not be obtained before the impairment of the action. If a certificate is executed pursuant to this paragraph, the certificate required by paragraph (1) shall be filed within 60 days after filing the complaint.
- (3) That the attorney was unable to obtain the consultation required by paragraph (1) because the attorney had made three separate good faith attempts with three separate architects, professional engineers, or land surveyors to obtain this consultation and none of those contacted would agree to the consultation.
- (c) Where a certificate is required pursuant to this section, only one certificate shall be filed, notwithstanding that multiple defendants have been named in the complaint or may be named at a later time.
- (d) Where the attorney intends to rely solely on the doctrine of “*res ipsa loquitur*,”... or exclusively on a failure to inform of the consequences of a procedure, or both, this section shall be inapplicable. The attorney shall certify upon filing of the complaint that the attorney is solely relying on the doctrines of “*res ipsa loquitur*” or failure to inform of the consequences of a procedure or both, and for that reason is not filing a certificate required by this section.
- (e) For purposes of this section... an attorney who submits a certificate

as required by paragraph (1) or (2) of subdivision (b) has a privilege to refuse to disclose the identity of the architect, professional engineer, or land surveyor consulted and the contents of the consultation. The privilege shall also be held by the architect, professional engineer, or land surveyor so consulted. If, however, the attorney makes a claim under paragraph (3) of subdivision (b) that he or she was unable to obtain the required consultation with the architect, professional engineer, or land surveyor, the court may require the attorney to divulge the names of architects, professional engineers, or land surveyors refusing the consultation.

- (f) A violation of this section may constitute unprofessional conduct and be grounds for discipline against the attorney, except that the failure to file the certificate required by paragraph (1) of subdivision (b), within 60 days after filing the complaint and certificate provided for by paragraph (2) of subdivision (b), shall not be grounds for discipline against the attorney.
- (g) The failure to file a certificate in accordance with this section shall be grounds for a demurrer...
- (h) Upon the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or for whom a certificate of merit should have been filed pursuant to this section, the trial court may, upon the motion of a party or upon the court’s own motion, verify compliance with this section, by requiring the attorney for the plaintiff or cross-complainant who was required by subdivision (b) to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted with pursuant to subdivision (b) that were relied upon by the attorney in preparation of the certificate of merit. The name, address, and telephone number shall be disclosed to the trial judge in an in-camera proceeding at which the moving party shall not be present.

If the trial judge finds there has been a failure to comply with this section, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply with this section.

- (i) For purposes of this section, "action" includes a complaint or cross-complaint for equitable indemnity arising out of the rendition of professional services whether or not the complaint or cross-complaint specifically asserts or utilizes the terms "professional negligence" or "negligence."

California's certificate of merit statute, similar to Arizona's, requires a claimant to serve a certificate of merit at the same time that the complaint is served, but the certificate of merit need not be signed by an expert. Rather, it can be executed by the claimant's attorney, along with a certification that the attorney has reviewed the facts of the case, consulted with a third-party design professional in the same discipline as the defendant, and the attorney has concluded that there is a "reasonable and meritorious cause" for the filing the action.

Under California's certificate of merit statute, if the party asserting claims against a design professional would not have adequate time to consult with the appropriate professional before the statute of limitations runs, the time to which to file the certificate of merit can be extended for a period of up to 60 days after filing the complaint. Furthermore, an attorney that is unable to consult with an appropriate expert—after making three separate good-faith attempts to do so—may certify that he or she was simply unable to obtain the required consultation. California's certificate of merit statute is also unique in that an attorney certifying that he or she was unable to obtain a consultation with an appropriate professional can be ordered to disclose the names of the potential experts who refused to provide a consultation. If it is eventually revealed that the attorney did not, in fact, consult with those experts, the court may order reasonable expenses, including attorneys' fees, in the design professional's favor. *See Guinn v. Dotson*, 28 Cal. Rptr. 2d 409, 413 (Cal. Ct. App. 1994).

Nevada—Nev. Rev. Stat.

§§11.258, 40.6684

Nevada law is unique among the various jurisdictions with affidavit of merit statutes in that it features two distinct statutes. One statute applies to claims against design professionals involved in residential construction projects, and the other applies to cases involving non-residential construction. Section 11.258 of the Nevada Revised Statutes, which addresses claims against design professionals for non-residential construction projects, states in pertinent part:

1. Except as otherwise provided in subsection 2, in an action involving nonresidential construction, the attorney for the complainant shall file an affidavit with the court concurrently with the service of the first pleading in the action stating that the attorney:
 - (a) Has reviewed the facts of the case;
 - (b) Has consulted with an expert;
 - (c) Reasonably believes the expert who was consulted is knowledgeable in the relevant discipline involved in the action; and
 - (d) Has concluded on the basis of the review and the consultation with the expert that the action has a reasonable basis in law and fact.
2. The attorney for the complainant may file the affidavit required pursuant to subsection 1 at a later time if the attorney could not consult with an expert and prepare the affidavit before filing the action without causing the action to be impaired or barred by the statute of limitations or repose, or other limitations prescribed by law. If the attorney must submit the affidavit late, the attorney shall file an affidavit concurrently with the service of the first pleading in the action stating the reason for failing to comply with subsection 1 and the attorney shall consult with an expert and file the affidavit required pursuant to subsection 1 not later than 45 days after filing the action.
3. In addition to the statement included in the affidavit pursuant to subsection 1, a report must be attached to

the affidavit. Except as otherwise provided in subsection 4, the report must be prepared by the expert consulted by the attorney and must include, without limitation:

- The resume of the expert;
 - A statement that the expert is experienced in each discipline which is the subject of the report;
 - A copy of each nonprivileged document reviewed by the expert in preparing the report, including, without limitation, each record, report and related document that the expert has determined is relevant to the allegations of negligent conduct that are the basis for the action;
 - The conclusions of the expert and the basis for the conclusions; and
 - A statement that the expert has concluded that there is a reasonable basis for filing the action.
4. In an action in which an affidavit is required to be filed pursuant to subsection 1:
 - (a) The report required pursuant to subsection 3 is not required to include the information set forth in paragraphs (c) and (d) of subsection 3 if the complainant or the complainant's attorney files an affidavit, at the time that the affidavit is filed pursuant to subsection 1, stating that he or she made reasonable efforts to obtain the nonprivileged documents described in paragraph (c) of subsection 3, but was unable to obtain such documents before filing the action;
 - (b) The complainant or the complainant's attorney shall amend the report required pursuant to subsection 3 to include any documents and information required pursuant to paragraph (c) or (d) of subsection 3 as soon as reasonably practicable after receiving the document or information; and
 - (c) The court may dismiss the action if the complainant and the

complainant's attorney fail to comply with the requirements of paragraph (b).

Claims against design professionals involved in residential construction projects are governed by Section 40.6684 of the Nevada Revised Statutes, which is substantively similar to Section 11.258 (the statute above), and imposes the same

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requirements upon parties asserting claims of professional negligence against design professionals.

Significantly, Nevada's affidavit of merit statutes require the party asserting claims against a design professional to file an affidavit similar to that required in California, but then it takes it a step further. Not only must the certificate of merit attest that the attorney consulted with an appropriate expert, but the claimant must also file the expert's actual report containing the expert's curriculum vitae, attach a copy of each non-privileged document reviewed by the expert, and list the expert's conclusions and the bases for those conclusions.

Important Issues Related to Affidavit of Merit Requirements

While many state affidavit of merit statutes are similar both in concept and intention, they all contain unique requirements concerning the exact materials that need to be filed, the scope and content of what must be filed, and the ultimate effect of a party's failure to comply with the relevant statute. In addition to these state-specific threshold issues, all of which can often be determined simply by carefully reading

the applicable statute, the overall concept of requiring affidavits of merit often results in numerous collateral issues, which will often lead to significant litigation. These collateral issues may contain numerous traps for unwary claimants, as well as potential defenses for counsel defending their clients against professional negligence claims.

These potential issues include such questions as (1) whether the requirements of an affidavit of merit must be met when litigating a case in federal court; (2) when motions challenging the sufficiency or adequacy must or should be filed; (3) whether an affidavit of merit is required to support a cross-claim against a design professional; (4) whether the submission of an affidavit of merit by an expert not retained by that party to testify nevertheless opens up that expert's opinions for discovery; and (5) whether an affidavit of merit may be executed by a design professional who was actually involved in the project at issue. All of these issues must be considered in crafting a defense strategy against professional negligence claims.

Are Affidavit of Merit Statutes "Substantive" or "Procedural"

Litigating professional negligence actions in federal court under diversity jurisdiction often gives rise to an issue implicating the prototypical *Erie* doctrine analysis, such as whether the requirements of a state affidavit of merit statute are substantive rather than procedural. State substantive law must be enforced in federal court, whereas state procedural law will not. Generally, however, federal courts sitting in diversity hold that state affidavit of merit statutes are substantive rather than procedural. Thus, federal courts usually apply state affidavit of merit requirements in diversity cases and in cases in which the court is asserting pendant or supplemental jurisdiction over state professional negligence claims. See, e.g., *Liggon-Redding v. Estate of Sugarman*, 659 F.3d 258, 265 (3d Cir. 2011) (holding that Pennsylvania's affidavit of merit statute was substantive and therefore must be applied by a federal court sitting in diversity); *Chamberlain v. Giampapa*, 210 F.3d 154, 161 (3d Cir. 2000) (same holding pertaining to New Jersey's affidavit of merit statute); *Martinez v. Garcia*, 59 F. Supp. 2d 1097, 1099 (D. Colo.

1999) (same holding pertaining to Colorado's affidavit of merit statute).

A minority of federal courts, however, have held that state affidavit of merit statutes are procedural. Claimants in such jurisdictions may therefore not be required to comply with an otherwise-applicable affidavit of merit requirement. See *Sanders v. Glanz*, 138 F.Supp.3d 1248, 1261 (N.D. Okla. 2015) (holding that Oklahoma's affidavit of merit statute requirements are procedural; plaintiff filing a professional negligence claim in federal court was not required to comply); *Boone v. Knight*, 131 F.R.D. 609, 611-12 (S.D. Ga. 1990) (same holding applied to Georgia's affidavit of merit requirements). Counsel defending design professionals in federal courts should be aware that such statutes are generally considered substantive and litigate the issue as though the matter had been brought in state court absent authority to the contrary.

Even in jurisdictions that would give effect to an affidavit of merit statute, however, defense counsel should be aware of the likely choice of law issues that may arise in cases before federal courts sitting in diversity. In such cases, the primary issue may not be *whether* a particular state's affidavit of merit requirement is given credit, but *which* state's affidavit of merit statute controls. This question is generally resolved by a typical choice of law analysis that considers such factors as the location of the project, the states in which the relevant parties reside, any choice of law provisions contained within relevant contracts, and whether the implicated states have articulated strong public policy interests that favor enforcing its statute over another. See *Nuveen Mun. Trust ex. rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 305 (3d Cir. 2012); *Maye-El v. United States of America*, 59 Fed. Appx. 488, 489-90 (3d Cir. 2003).

Defense counsel therefore must become familiar—as early as possible in the litigation—with the requirements of every affidavit of merit statute that may potentially apply to a dispute, as well as each statute's possible implications for the defense strategy.

Timing and Effect Issues

Issues of timing will be of paramount importance in any case against a design professional that implicates an affidavit

of merit statute. States such as Georgia, Nevada, and South Carolina require the party asserting claims against a design professional to file an affidavit of merit contemporaneously with the complaint. Other states defer this requirement for a short time after the filing of the complaint. New Jersey and Pennsylvania, for instance, both allow a plaintiff 60 days to file the affidavit, while Maryland allows 90 days. In states where the affidavit of merit is to be filed contemporaneously with the complaint, the requirement is often relaxed when the statute of limitations is close to running. In such states (which include Hawaii, South Carolina, and Texas), the claimant will likely be allowed to commence the action within the statute of limitations and file the affidavit shortly afterward.

One potentially significant issue that has not been the subject of much litigation concerns *when* defense counsel should file a motion to dismiss when a claimant has failed to file the requisite expert affidavit in a timely fashion, or when a timely filed affidavit of merit is substantively deficient. One court held that the defendant was equitably estopped from filing a motion to dismiss based on the plaintiff's failure to timely file when the plaintiff had relied on the defendant's failure to file the motion to dismiss, evidenced by the fact that the parties had engaged in extensive discovery in the years since the untimely filing. *Knorr v. Smeal*, 836 A.2d 794, 799 (N.J. App. Div. 2003). In *Knorr*, the court notably did not rely on the doctrine of waiver, but rather held that the defendant's motion to dismiss was barred by the doctrines of equitable estoppel and laches. Other courts, however, have been far more forgiving to design professionals that have delayed filing a motion to dismiss. See *Foundation Assessment, Inc. v. O'Connor*, 426 S.W.3d 827, 833–34 (Tex. App. 2014) (holding that a 22-month delay in filing motion to dismiss did not constitute waiver of right to seek dismissal for failure to file certificate of merit); see also *Gondek v. Bio-Medical Applications*, 919 A.2d 283, 287 (Pa. Super. Ct. 2007). In any event, best practices would seem to dictate that counsel defending design professionals should exploit this defense at the earliest available opportunity rather than waiting to file a motion to dismiss and

thereby risking denial of a motion to dismiss based upon waiver or estoppel.

Most states, such as New Jersey, Georgia, and Oregon, hold that a failure to comply strictly with the affidavit of merit statute results in the dismissal of those claims with prejudice. Other states, such as Maryland and Oklahoma, hold that a failure to timely file an affidavit of merit should not operate as a dismissal on the merits, and these states allow a party to refile its claims against a design professional. Regardless of whether such a motion will result in a dismissal without prejudice or on the merits, defense counsel should file one at the earliest available opportunity.

Who May Execute the Affidavit of Merit?

Some states' affidavit of merit statutes (including California, Colorado, Oregon, Minnesota, and Pennsylvania) permit an affidavit of merit to be executed by the claimant's attorney, often requiring simply an attestation that the attorney consulted with an appropriate expert, who has concluded that there is a basis for the claims asserted against the design professional. Other states, however, (including Georgia, South Carolina, Texas, Maryland, and New Jersey), mandate that the affidavit of merit be executed by a licensed, competent professional with credentials similar to those of the design professional. Whether the executing expert's credentials are sufficiently similar to the design professional defendant's background is an important issue that can spawn significant motion practice and collateral litigation. Defense counsel must always investigate an expert executing an affidavit, even when there appears to be strict compliance with the affidavit of merit statute. By doing so, defense counsel may be able to exert significant leverage against a claimant with a strong showing that an affidavit of merit is substantively deficient.

Similar to most states, New Jersey's affidavit of merit statute requires the credentials of the expert signing the affidavit to be "similar" to those of design professional. In one notable case, the court ruled that an affidavit of merit executed by a licensed engineer did not suffice to support a claim of professional negligence against an architect. See *Hill Int'l, Inc. v. Atlantic City*, 106 A.3d 487, 506 (N.J. App. Div. 2014); *Belve-*

dere Condo. at State Thomas, Inc. v. Meek Design Grp., Inc., 329 S.W.3d 219, 221 (Tex. App. 2010) (holding that certificate of merit submitted by a licensed engineer did not meet statute's requirement that the affiant practice in the same area as the defendant where the affiant did not specify any expertise in landscape architecture). Other courts, however, have applied this

Even in jurisdictions

that would give effect to an affidavit of merit statute, however, defense counsel should be aware of the likely choice of law issues that may arise in cases before federal courts sitting in diversity.

requirement less stringently. See *Ponderosa Ctr. Partners v. McClellan*, 53 Cal. Rptr. 2d 64, 66 (Cal. Ct. App. 1996) (holding that structural engineer was competent to execute certificate of merit asserting professional negligence claims against architect).

Defense counsel therefore must closely examine an affidavit of merit to ensure that it has been executed by an expert with credentials and experience similar to that of the design professional against whom the claims are made. Even a timely filed affidavit of merit, executed by an expert with "impressive" credentials, may nonetheless prove substantively deficient, and it may provide an avenue for the early dismissal of claims against the design professional.

Cross-Claims Against Design Professionals

Another issue that often arises is whether cross-claims against a design professional, including both claims of professional negligence and "boilerplate" claims for common law indemnity and contribu-

tion, must comply with an applicable affidavit of merit statute. Nearly all courts faced with this issue have answered in the affirmative. Some states' affidavit of merit statutes, such as California's, explicitly provide that its provisions apply to both direct and cross-claims filed against design professionals. *See* Cal. C.C.P. §411.35(i). Pennsylvania's certificate of

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merit statute notes, however, that a separate certificate of merit is not required to support a cross-claim unless the basis for the cross-claim is wholly unrelated to the negligence alleged in the complaint. *See* Pa. R. Civ. P. 1042.3(c)(2).

This issue is generally not directly addressed in the statutes themselves. Rather, case law has helped clarify the requirements in various states, and at times, courts have essentially "rewritten" affidavit of merit statutes so as to avoid "absurd" results. *See Jaster v. Comet II Const., Inc.*, 438 S.W. 556, 571 (Tex. 2014) (engaging in detailed analysis of Texas' certificate of merit statute and holding that a party filing cross-claims against design professionals may rely on certificate of merit filed by the plaintiff, despite the text of the certificate of merit statute requiring such certificates of merit by cross-claimants); *Hydrotech Eng'g, Inc. v. OMP Dev., LLC*, 438 S.W.3d 895, 899 (Tex.

App. 2014) (holding that a cross-claimant's failure to file an affidavit of merit along with a contribution claim did not warrant dismissal); *Diocese of Metuchen v. Prisco Edwards, AIA*, 864 A.2d 1168, 1172 (N.J. Super. Ct. 2005) (holding that a third-party claim for contribution did not assert an independent claim of professional negligence and therefore the third-party plaintiff was not required to submit an affidavit of merit). *But see Nagim v. N.J. Transit*, 848 A.2d 61, 69 (N.J. Super. Ct. 2003) (holding that a third-party claim for contractual indemnity, which required proof of the design professional departure's from the standard of care, was required to be supported by an affidavit of merit).

Other states have strictly required affidavits of merit to support third-party claims against design professionals, even for simple contribution or common law indemnity claims. *See Heritage Harbour, LLC v. John J. Reynolds, Inc.*, 795 A.2d 806, 812 (Md. Ct. Spec. App. 2002) (holding that cross-claims against an architect for contribution and common law indemnity required compliance with the affidavit of merit statute); *Housing Authority of Savannah v. Gilpin Basemore/Architects & Planners, Inc.*, 381 S.E.2d 550, 551 (Ga. Ct. App. 1989) (holding that a third-party claim against an architect for contribution required compliance with Georgia's affidavit of merit statute because entitlement to contribution required proof of deviation from professional standard of care).

Unless litigating in a jurisdiction that has clearly held (either by making it clear in the applicable statute of merit itself, or by subsequent case law) that an affidavit of merit is not required to support cross-claims against a design professional, defense counsel should remain cognizant of *all* claims that have been asserted against his or her client and be prepared to move to dismiss any cross-claims that are not supported by an adequately or timely filed affidavit of merit.

The Relationship Between Affidavits of Merit and Testifying Experts

The various affidavit of merit statutes make clear that these requirements are *not* meant as a substantive replacement for the usual course of expert discovery that may be necessary to prove a party's claims. Rather,

affidavit of merit requirements are generally designed solely to weed out meritless claims, and a party is not required to prove its case with an expert opinion at the outset of litigation. The affidavit of merit requirement may, however, give rise to unique issues relating to the eventual course of expert discovery, or at least provide valuable information to defense counsel about the likely scope of expert discovery. After an affidavit has been held to comply with the relevant affidavit of merit statute, defense counsel should immediately begin thinking about how and to what extent the claimant's affidavit can provide a "road map" for the likely course of expert discovery during litigation, and whether the provided affidavit (and expert report, if applicable), can be used during the course of discovery. In nearly all cases, there will ultimately be significant substantive differences between an affidavit of merit or preliminary expert report and the claimant's "final" expert report, which may prove to be valuable for defense counsel to exploit. Arizona's affidavit of merit statute, as an example, explicitly allows the preliminary expert report contained in an affidavit of merit to be used for any purpose at trial, including impeachment. *Ariz. Rev. Stat. §12-2602(G)*.

Most other states' affidavit of merit statutes are not quite as clear, but those jurisdictions requiring claimants to submit preliminary expert reports, or requiring the claimant's expert to execute the affidavit of merit (such as Georgia, Maryland, Nevada or South Carolina), will help provide defense counsel with an early "road map" related to the likely course of expert discovery, and they may permit counsel to exploit potential differences between a preliminary expert report (or affidavit of merit), and the claimant's "final" expert report. In such situations (and in jurisdictions allowing such a broad scope of discovery), defense counsel should aggressively seek discovery of an expert affiant's file because the materials contained in it may prove useful in attacking a claimant's final expert report.

Affidavits of Merit Executed by Potential Parties

One unique issue may arise when the expert executing an affidavit of merit was

personally involved in the project at hand. This issue, which is relatively uncommon, may arise when a claimant, realizing that the best design professional to provide an expert report or to execute an affidavit of merit may be one who was actually involved in the project, obtains and serves an affidavit of merit from that design professional. As the litigation unfolds, however, the probability of that design professional being brought into the case (even under simple contribution or common law indemnity theories) increases substantially, and thus the expert may face the possibility of having rendered an opinion (or executed an affidavit of merit) in a case in which he or she later faces exposure based on his or her own services on the project.

It appears that state affidavit of merit statutes are completely silent on this specific issue, although New Jersey's affidavit of merit statute explicitly forbids experts having a financial interest in the outcome of a matter from executing an affidavit of merit. N.J.S.A. 2A:53A-27. Even without authority explicitly forbidding a person involved in the underlying project from executing an affidavit of merit, as the litigation unfolds, should the expert be named as a defendant, it can be argued that a previously executed affidavit of merit has now become substantively deficient. This potential issue appears to have received very little attention, and it is thus far from settled. Regardless, best practices would strongly suggest that when retaining an expert, defense counsel should steer clear of any experts who participated in the design process in any way; such experts could potentially be named as defendants in the litigation, and any affidavits of merit prepared by such professionals could be subject to attack. Furthermore, defense counsel should also investigate whether an expert executing an affidavit of merit against his or her design professional client is a potential defendant in the litigation and attack such an affidavit of merit on those grounds when it is possible.

The Constitutionality of Affidavit of Merit Statutes

The issue of constitutionality, while resolved in most jurisdictions, is nonetheless interesting. Most states' affidavit of merit statutes have been upheld as

constitutional, such as in 2002, when the Supreme Court of Arizona held that Arizona's affidavit of merit statute did not infringe on a party's fundamental right to sue for damages, implicate a suspect class, or violate the equal protection and separation of powers clauses of the state's constitution. *Bertleson v. Sacks Tierney, P.A.*, 60 P.3d 703 (Ariz. 2002).

Other statutes have faced more creative constitutional arguments and similarly been upheld. In 2000, the Supreme Court of Georgia upheld the constitutionality of Georgia's affidavit of merit statute, rejecting a plaintiff's argument that the statute, originally titled the Medical Malpractice Reform Act of 1987, was unconstitutional because it "referr[ed] to more than one subject matter or contain[ed] matter different from what is expressed in the title thereof," in violation of Article III, Section V, Paragraph III of the state's constitution. *Lutz v. Foran*, 427 S.E.2d 248, 251-52 (Ga. 1993). The court reasoned that the 1997 amendments that renamed the statute effectively mooted the plaintiff's argument. See *Minnix v. Dep't of Transp.*, 427 S.E.2d 248, 251 (Ga. 2000).

Others states' affidavit of merit statutes, however, have not fared as well. In 2012, the Supreme Court of Arkansas declared Arkansas' affidavit of merit statute unconstitutional. See *Summerville v. Thrower*, 253 S.W.3d. 415, 420-21 (Ar. 2007). A similar fate befell Washington's affidavit of merit statute, which was held unconstitutional in 2009 after the Washington Supreme Court held that the statute "unduly burden[ed] the right of access to courts and violat[e]d the separation of powers." *Putnam v. Wenatchee Valley Med Ctr.*, 216 P.3d 374, 377 (Wa. 2009) (holding the affidavit of merit statute that applied only to medical malpractice actions was unconstitutional); see also *State ex rel. Wyoming Ass'n of Consulting Engineers & Land Surveyors v. Sullivan*, 798 P.2d 828 (Wy. 1990) (striking down the Wyoming Professional Review Panel Act, Wyo. Stat. §§9-2-1801 *et seq.*, as unconstitutional, on the grounds that it violated the equal protection guarantees of Wyoming's constitution).

Conclusion

Affidavit of merit statutes applying to claims against design professionals remain in force in 15 states. If read carefully, these

statutory requirements may provide a useful opportunity for defense counsel to secure the dismissal of professional negligence claims asserted against their clients.

Affidavit of merit statutes have generally been enacted as part of tort-reform efforts to "weed out" cases of limited or no merit, and they require those parties asserting professional negligence claims against design professionals to provide some measure of expert support for their claims at an early stage of the litigation, rather than merely "hoping" that discovery will reveal a basis for their allegations. Affidavit of merit requirements vary in scope and application, so experienced defense counsel must be familiar with the statute of each state in which he or she practices. Failure to explore the possibilities for an early dismissal may not only prolong the matter and prove costly for a client, but also constitute an abdication of defense counsel's professional duty of care to his or her design professional client. 