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Construction Law Practice Tip: Certificate of Merit Requirements in Federal Court

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Under Texas law, a plaintiff must file a certificate of merit in any action for damages arising out of the provision of professional services.[1] A certificate of merit is an affidavit from a third-party professional who is knowledgeable about the defendant's practice area that essentially gives credence to the plaintiff's claims.[2] A failure to file a certificate with the first-filed petition will result in the action's dismissal in Texas state courts.[3] But, federal courts are currently divided on whether plaintiffs must also file a certificate of merit when bringing these claims in diversity. No federal Circuit Court has addressed the Texas certificate of merit statute yet, but several federal district courts have considered the issue both for the Texas statute and other comparable state laws and reached conflicting conclusions.[4] Two Texas district court cases discussed below illustrate this conflict well.[5]

Faced with these conflicting results, construction law practitioners bringing claims against professionals in federal court should consult the case law to determine whether the forum court has decided the issue and how. Even if a district judge has previously held that plaintiffs in diversity can dispense with certificates of merit, it is conceivable that another judge might hold otherwise. Moreover, a district judge's decision that no certificate of merit is required might be reversed by the Fifth Circuit Court of Appeals. Considering the time required to appeal, a negligence claim against a professional might be well past its limitations by the time the appellate court remands the case and the district court dismisses it without prejudice. Therefore, the best practice might be to always include a certificate of merit with an initial complaint.

In *Estate of C.A. v. Grier*, the Southern District of Texas held the certificate of merit requirement did not apply to federal diversity cases.[6] The Supreme Court's seminal opinion in *Erie Railroad Co. v. Tompkins* along with its more recent opinion in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.* guided the court's analysis. *Erie* held that courts adjudicating diversity-jurisdiction claims must apply state substantive law but federal procedural law to the proceedings.[7] To determine if Section 150.002 was a substantive or procedural rule, the court applied the two-step test set forth in *Shady Grove*: (1) it determined whether the state law—Section 150.002—conflicted with federal law and, (2) if such a conflict did exist, the court asked if applying the federal rule was valid under the federal Rules Enabling Act, which forbids federal procedural rules from abridging, enlarging, or modifying any substantive rights.[8]

Applying the first step, the court found Section 150.002 conflicted with various Federal Rules of Civil Procedure. The court first found a conflict with federal law because Section 150.002 imposed more stringent pleading requirements than Rules 8 and 9.[9] Specifically, the court found Section 150.002's requirement that the certificate of merit contain the specific factual allegations, including the action, error, or omission by the professional that formed the basis of the suit, created additional pleading requirements beyond Rule 8's requirement that a pleading provide a short and plain statement of the plaintiff's claim. Section 150.002 was, therefore, inconsistent with federal law.[10] The court also found Section 150.002 conflicted with the discretion given to courts by Rule 11 to sanction attorneys for filing meritless claims.[11] The court held the mandatory dismissal requirement took away the court's Rule 11 discretion except as to whether the case should be dismissed with prejudice. Moreover, it concluded the certificate of merit requirement was inconsistent with Rule 26's expert disclosure and report requirements by accelerating the federal procedures regarding experts.[12]

Turning to the second step, the court held that applying Rules 8, 9, 11, and 26 in light of Section 150.002 did not affect any substantive rights (and, therefore, did not violate the Enabling Act) because Section 150.002's "most obvious purposes are procedural." Specifically, Section 150.002 was a procedural rule designed to inform the defendant of the specific conduct the plaintiff is challenging and to assure the court that the claims have merit.

The court found federal law provided other procedural means to accomplish these objectives, namely those offered by Rules 8 and 26(a). Thus, it held that Section 150.002 did not apply to federal diversity cases and denied the defendant's motion to dismiss.[13]

In *State Automobile Mutual Insurance Co. v. Dunhill Partners, Inc.*, the Northern District of Texas reached the opposite conclusion when faced with identical arguments.[14] The court found Section 150.002 did not conflict with Rules 8 or 9 because the statute was not about pleadings, facts, or notice but rather about "rooting out professional negligence claims that lack expert testimony."[15] As to Rule 11, the court found no inconsistency because the Federal rules implicitly mandated dismissal for a procedural deficiency, such as under a Rule 12(b) motion, and because Rule 11 focuses on attorneys, not the claims.[16] The court also found no conflict with Rule 26 because Section 150.002's concurrent filing requirement did not alter the federal schedule for disclosures or discovery. Additionally, the court found the certificate of merit requirement to be substantive because its dismissal requirement had a direct effect on the ultimate result of the litigation.[17] The Court, therefore, held Section 150.002 should apply to federal diversity cases, dismissed all claims without prejudice, and ordered the plaintiff to file an amended petition within 30 days to avoid dismissal with prejudice.[18]

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[1] Tex. Civ. Prac. & Rem. Code § 150.002(a).
[2] *Id.* § 150.002(a)(b).
[3] *Id.* § 150.002(e).
[4] *See Menendez v. Wal-Mart Stores, Inc.*, 364 Fed. Appx. 62, 68 n.7 (5th Cir. 2010) ("express[ing] no views on whether" a certificate is required in diversity); *see also Jones v. Corr. Med. Servs., Inc.*, 845 F. Supp. 2d 824, 854 n.11 (W.D. Mich. 2012) (citing various cases addressing both the Texas certificate of merit requirement and comparable laws from other states).
[5] *See also Ipock v. Manor Care of Tulsa OK, LLC*, 274 F.Supp.3d 1249, 1255 (N.D. Okla. 2017) (no Oklahoma affidavit of merit required in federal court).
[6] 752 F. Supp. 2d 763, 772 (S.D. Tex. 2010).
[7] 304 U.S. 64, 79–80 (1938).
[8] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 409 (2010); *id.* at 421 (Stevens, J. concurring in part and concurring in the judgment); *see also* 28 U.S.C. § 2072(b).
[9] *Grier*, 752 F. Supp. 2d at 770.
[10] *See id.* at 770–71. The court's analysis does not specify the precise reason Section 150.002 conflicted with Rule 9 but this was presumptively based on the fact that it imposed additional pleading requirements beyond those enumerated in Rule 9. *See id.*
[11] *See id.* at 771.
[12] *Id.* at 771.
[13] *Id.*
[14] 3:12-CV-03770-P, 2013 WL 11821466, at *8 (N.D. Tex. May 28, 2013); *see also Garland Dollar Gen. LLC v. Reeves Dev., LLC*, 3:09-CV-0707-D, 2010 WL 4259818, at *6 (N.D. Tex. Oct. 21, 2010) (holding Section 150.002's requirements apply in federal diversity cases).
[15] *Dunhill Partners, Inc.*, 2013 WL 11821466, at **7–8.
[16] *Id.* at *8.
[17] *Id.*
[18] The plaintiff ultimately complied with the court's order, and the court allowed the case to proceed.