

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

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PRACTICES Construction Litigation, Litigation

Under Texas law, a plaintiff must file a certificate of merit in any action for damages arising out of the provision of professional services. 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. A failure to file a certificate with the first-filed petition will result in the action's dismissal in Texas state courts. 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. Two Texas district court cases discussed below illustrate this conflict well.

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. 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. 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.

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