

## Impacts on the Construction Industry from Texas' 86th Legislative Session (Part 3 of 3)

Certificate of Merit Statute, Right to Repair Statute, Texas' 86th Legislative Session / March 1, 2020 / David H. Fisk

### **Right to Repair Statute for Public Buildings/Works**

As of June 14, 2019, with certain exceptions, a governmental entity asserting a claim for damages to real or personal property caused by an alleged construction defect in a public building or public work against a contractor, subcontractor, supplier, or design professional must comply with the a new chapter in the Texas Government Code – Chapter 2272. Public school districts are specifically included in the chapter's definition of governmental entity.

Before filing a lawsuit or making a demand for arbitration, the governmental entity must provide each party with whom the governmental entity has a contract for the design or construction of an affected structure a written report that:

1. identifies the specific construction defect on which the claim is based;
2. describes the present physical condition of the affected structure; and
3. describes any modification, maintenance, or repairs to the affected structure made by the governmental entity or others since the affected structure was initially occupied or used.

Within five days of receipt, a contractor must provide a copy of the report to each subcontractor retained on the construction of the affected structure whose work is subject to the claim. The involved parties must be given an opportunity to inspect any construction defect identified in the report within 30 days after the report was sent and an opportunity to correct or repair any construction defect within 120 days after the inspection. If a governmental entity brings an action and fails to comply with Chapter 2272, the court or arbitrator is required to dismiss the action without prejudice.

### **Changes to the Certificate of Merit Statute**

In certain actions against licensed or registered professionals, including architects and engineers, the plaintiff has been required to file a certificate of merit with its complaint. The certificate of merit is essentially an affidavit by a person who has the same license or registration as the defendant stating that the defendant's actions constitute negligence or malpractice.

As of June 10, 2019, the certificate of merit statute has been revised to clarify that any person, whether a plaintiff or third-party plaintiff, who seeks recovery for damages, contribution, or indemnification must comply with the certificate of merit requirements when filing a petition or other pleading that raises a claim for the first time against a licensed or registered professional for damages arising out of the provision of professional services by that professional. This change significantly affects construction defect claims involving design-build projects because a contractor is now required to file a certificate of merit against any design professional in order to hold the professional responsible for design defects. This in essence forces the contractor to create evidence that can potentially be used against it by the plaintiff.

The revised statute also now requires that the affiant practice in the area of practice of the defendant, which is basically a reversion back to a requirement that was in effect from September 1, 2003 to August 31, 2009. Under the version of the statute that was in effect from September 1, 2009 to June 9, 2019, the affiant was not required to actually practice in the same area as the defendant; the affiant was required to have knowledge in the defendant's practice area and offer testimony based on the affiant's knowledge, skill, experience, education, training, and practice. The latest revision is intended to make sure the affiant has experience in the area rather than just claiming knowledge of it.

### **Related Attorneys**

---

David H. Fisk

### **Related Practices**

---

Construction