

BILL ANALYSIS

C.S.S.B. 1201
By: Carona
Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

In a suit involving claims of professional negligence by a registered architect, registered professional land surveyor, or licensed professional engineer, Chapter 150 (Design Professionals), Texas Civil Practice and Remedies Code, requires that the plaintiff file with the plaintiff's complaint an affidavit of a third party licensed architect, professional land surveyor, or licensed engineer. The affidavit must demonstrate that the third party professional is "competent to testify, and practicing in the same area or practice as the defendant" and must identify at least one negligent act, error, or omission of the defendant.

A problem often encountered for the third party professional offering an affidavit in these cases is the requirement that the professional must practice "in the same area of practice" as the defendant. The wording of the statute is vague and imprecise and leads to the disqualification of affidavits of third party professionals based on tactics rather than on merit. Specifically, there can be difficulty identifying what is meant by the requirement that the professional practice in the "same area." Does it mean, for example, geographic area, focus of practice, size of practice, or something else? Moreover, often in these professions, each professional's experience is unique so that no one professional has exactly the same experience as another. Additionally, where a third party professional may have in the past practiced in the "same area," he or she may now offer services with a different focus. Under the language of the statute, an affidavit of the professional may nevertheless be challenged even though the professional may have the expert knowledge in the area at issue in the suit.

C.S.S.B. 1201 amends current law relating to an affidavit required to be filed in a cause of action against certain licensed or registered professionals.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

ANALYSIS

SECTION 1. Reenacts the heading to Chapter 150, Civil Practice and Remedies Code, as amended by Chapters 189 (H.B. 854) and 208 (H.B. 1573), Acts of the 79th Legislature, Regular Session, 2005, to read as follows:

CHAPTER 150. LICENSED OR REGISTERED PROFESSIONALS

SECTION 2. Reenacts Sections 150.001 and 150.002, Civil Practice and Remedies Code, as amended by Chapters 189 (H.B. 854) and 208 (H.B. 1573), Acts of the 79th Legislature, Regular Session, 2005, and amends those sections, as follows:

Sec. 150.001. DEFINITIONS. Defines "practice of engineering" and redefines "licensed or registered professional."

Sec. 150.002. CERTIFICATE OF MERIT. (a) Requires the plaintiff, in any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, to 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 is competent to testify, holds the same professional license or registration as the defendant, and is knowledgeable in the area of practice for which the person offers testimony based on the person's knowledge, skill, experience, education, training, and practice.

(b) The amendment requires an explanation for each theory of recovery sought, not just one example of negligence. This issue arose out of a couple of 2007 court cases from the San Antonio 4th Court of Appeals, which said that although the statute was broadened in 2005 from “negligence” actions to “any action arising out of the provision of professional services,” the affidavit requirement still spoke only to negligence. Therefore, the court did not agree that it applied to actions other than negligence, despite clear language in the statute and the fact that it was specifically amended to broaden it in 2005 (HB 1573).

(c) Requires that the affidavit set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim. Requires the third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor to be licensed or registered in this state and actively engaged in the practice of architecture, engineering, or surveying.

(d) Redesignates Subsection (b) as Subsection (c). Prohibits the contemporaneous filing requirement of Subsection (a) from applying 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.

(e) Redesignates Subsection (c) as Subsection (d).

(f) Redesignates Subsection (d) as Subsection (e). Requires that the plaintiff's failure to file the affidavit in accordance with this section, rather than Subsection (a) or (b), result in dismissal of the complaint against the defendant.

(g) Redesignates Subsection (e) as Subsection (f).

(h) Redesignates Subsection (f) as Subsection (g).

(i) Redesignates Subsection (g) as Subsection (h).

SECTION 3. Makes application of this Act prospective.

SECTION 4. Effective date: September 1, 2009.

EFFECTIVE DATE

September 1, 2009.

COMPARISON OF ORIGINAL TO SUBSTITUTE

The difference between S.B.1201 and the committee substitute is that C.S.S.B. 1201 requires an explanation for each theory of recovery sought, not just one example of negligence. This issue arose out of a couple of 2007 court cases from the San Antonio 4th Court of Appeals, which said that although the statute was broadened in 2005 from “negligence” actions to “any action arising out of the provision of professional services,” the affidavit requirement still spoke only to negligence. Therefore, the court did not agree that it applied to actions other than negligence, despite clear language in the statute and the fact that it was specifically amended to broaden it in 2005 (HB 1573).