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Comments: The Maryland Certificate of Qualified Expert Requirement: A Flimsy Shield for Corporations Engaged in Architecture and Professional Engineering

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THE MARYLAND CERTIFICATE OF QUALIFIED EXPERT REQUIREMENT: A FLIMSY SHIELD FOR CORPORATIONS ENGAGED IN ARCHITECTURE AND PROFESSIONAL ENGINEERING

I. INTRODUCTION

If an individual sues a licensed professional in Maryland, it is clear that he or she must file a certificate of a qualified expert within ninety days after filing the complaint.[1] Failure to do so entitles the defendant to dismissal without prejudice.[2] This provision applies to "licensed professionals,"[3] which include architects, interior designers, landscape architects, professional engineers, and professional land surveyors or property line surveyors.[4] On the other hand, the Court of Appeals of Maryland has held that a corporate defendant, which offers the above-listed professional services, is not entitled to dismissal without prejudice if the plaintiff fails to file a certificate of a qualified expert.[5] This issue is particularly important to practitioners in construction law, as the Court of Appeals' decision allows a suit against a corporate defendant to be maintained if a certificate of a qualified expert is not filed. Further, if a corporate defendant is not entitled to the protection offered by the certificate of a qualified expert requirement, complainants may be able to engage in legalized blackmail against corporate defendants who have not actually provided services negligently.[6] Although the Court of Appeals of Maryland has ruled on the issue,[7] its decision was erroneous and did not consider the severe impact on corporate defendants.

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1. MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-02(a)(1)-(2) (2002).
2. *Id.*
3. *Id.* § 3-2C-01(b); *see also id.* at § 3-2C-02(a).
4. *Id.* § 3-2C-01(c)(1)-(5).
5. Baltimore County v. RTKL Assocs. Inc., 380 Md. 670, 690, 846 A.2d 433, 445 (2004). This decision can be contrasted with the 2002 decision by the Court of Special Appeals of Maryland, which indicated that if a complainant sues a corporation engaged in professional engineering, failure to file a certificate of a qualified expert does entitle the defendant to dismissal without prejudice. Heritage Harbour, L.L.C. v. John J. Reynolds, Inc., 143 Md. App. 698, 709, 795 A.2d 806, 812 (2002). The U.S. District Court for the District of Maryland, however, has explicitly held that a professional association engaged in engineering is not entitled to dismissal based on the complaining party's failure to file a certificate of a qualified expert. Adams v. NVR Homes, Inc., 135 F. Supp. 2d 675, 716 (D. Md. 2001). Each of these cases will be discussed in greater detail *infra* Parts III.B.1-B.3.
6. This possibility is outlined in detail *infra* Part III.E.
7. *See, e.g. RTKL Assocs., Inc.*, 380 Md. at 689-90, 846 A.2d at 444-45.

This comment will explore whether a corporation practicing architecture should be entitled to the protections offered by the certificate of a qualified expert requirement. Furthermore, this comment will argue that such protections should also extend to a corporation practicing professional engineering even though professional engineering firms are not required to file with the State Board for Professional Engineers.[8]

In Parts II.A.-II.B., this comment outlines the general requirements for architectural and engineering practice in Maryland. In Part II.C., it provides an in-depth analysis of the certificate of qualified expert requirement. In Part II.D., it explores how other states with similar laws have ruled on the issue. Then Part III.A. illustrates how Maryland courts have interpreted a similar provision in the Health Care Malpractice Statute.[9] Part III.B. discusses the cases, in detail, which have interpreted the statute. Part III.C. focuses on the purposes of corporate practice and the rationale behind the statute requiring a certificate of a qualified expert. Part III.D. addresses arguments against the extension of the protection to corporate practice. Part III.E. demonstrates that the protection offered by the certificate of a qualified expert requirement must be extended to corporations practicing architecture and professional engineering. Finally, Part III.F. illustrates that no distinction should be made between corporations that practice architecture and those engaged in professional engineering.

II. BACKGROUND

A. The Practice of Architecture

An individual may practice architecture,[10] provided he or she obtains a license from the State Board of Architects to do so.[11] Maryland requires that an architect obtain a license to practice architecture because of the state's interest in "safeguard[ing] life, health, public

8. *See* MD. CODE ANN., BUS. OCC. & PROF. §§ 14-101 to 14-602 (2004). There are no provisions in the Maryland Professional Engineers Act that require a corporation practicing professional engineering to file anything with the State Board for Professional Engineers. *See id.* Conversely, in the Maryland Architects Act, corporations practicing architecture are required to obtain a permit from the State Board of Architects. *Id.* § 3-403(a).
9. MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04(b) (Supp. 2004).
10. "Practice architecture" is defined as "provid[ing] any service or creative work: (i) in regard to an addition to, alteration of, or construction of a building or an integral part of a building; and (ii) that requires education, training, and experience in architecture." MD. CODE ANN., BUS. OCC. & PROF. § 3-101(l)(1) (2004). Activities that fall within the meaning of practice architecture include architectural design, consultation, coordination of the design, evaluation of the design, investigation of a design, and planning. *Id.* § 3-101(l)(2).
11. *Id.* § 3-302(a).

safety, and property and [in] promot[ing] the public welfare."[12] To obtain a license, the applicant must meet certain preliminary requirements[13] and pass an examination given by the State Board of Architects.[14]

A single architect or group of architects can form a variety of corporate entities. An architect can choose to form a corporation by filing articles of incorporation with the State Department of Assessments and Taxation (SDAT); the corporate existence begins when the SDAT accepts the articles.[15] An architect, or group of architects, also has the option of forming a close corporation by stating the election in the articles of incorporation.[16] Architects can also form a professional corporation.[17]

12. *Id.* § 3-102. Maryland courts have determined that requiring a license for the practice of architecture is not a revenue measure, but rather regulatory in nature. Snodgrass v. Immler, 232 Md. 416, 422, 194 A.2d 103, 106 (1963). Therefore, a suit by an unlicensed architect for architectural fees will not prevail. *Id.* at 424, 194 A.2d at 107.
13. MD. CODE ANN., BUS. OCC. & PROF. § 3-303(a)-(c). The applicant must "be of good character and reputation." *Id.* § 3-303(b). The applicant must also meet minimum education and experience levels. *Id.* § 3-303(c).
14. *Id.* § 3-303(d).
15. MD. CODE ANN., CORPS. & ASS'NS § 2-102(a)-(b) (1999); Bostetter v. Freestate Land Corp., 48 Md. App. 142, 148, 426 A.2d 404, 408 (1981), *modified*, 292 Md. 570, 440 A.2d 380 (1982).
16. MD. CODE ANN., CORPS. & ASS'NS § 4-201(a)-(b)(1). Many architects, when forming corporations, choose to form a close corporation. By forming a close corporation, the shareholders (who will most likely be running the business) may be excused from having to comply with a number of corporate formalities. *See* ROBERT W. HAMILTON & JONATHAN R. MACEY, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 513 (8th ed. 2003). For instance, a corporation that elects to be a close corporation can also elect to operate without a board of directors. MD. CODE ANN., CORPS. & ASS'NS § 4-302. For a complete analysis of close corporation law, see Ronald M. Shapiro, *The Statutory Close Corporation: A Critique and a Corporate Planning Alternative*, 36 MD. L. REV. 289 (1976).
17. MD. CODE ANN., CORPS. & ASS'NS § 5-102(a). A professional corporation is one that offers professional services. *Id.* Architecture is a professional service. *Id.* § 5-101(g)(2)(i). A professional corporation may only issue stock to individuals who are licensed in any state to practice the same profession as that listed in the articles of incorporation, a general partnership consisting solely of licensees with at least one partner licensed in the state of Maryland, or another professional corporation organized to perform the same service. *Id.* § 5-109(a). A majority of the professional corporation's officers and directors (not including the secretary and treasurer) must also be licensed (in any state). *Id.* § 5-117(a). Because of the numerous restrictions on professional corporations and the availability of other forms of corporate entities, it is difficult to see why architects would choose to form a professional corporation.

A licensed architect is authorized to practice architecture through a corporation, partnership, or limited liability company.[18] Nevertheless, a licensed architect is not relieved of any individual liability he or she may have regarding the practice of architecture by virtue of his or her relationship to a corporation.[19] Before a corporation, partnership, or limited liability company may perform architectural services, it must obtain a permit from the State Board of Architects.[20] To be eligible for a permit, at least two-thirds of the corporation's directors must be licensed in Maryland or another state to practice architecture, engineering, or landscape architecture.[21] The corporation must also designate at least one "responsible member" who is a director and licensed to practice architecture in Maryland.[22]

B. The Practice of Professional Engineering

An individual may practice professional engineering[23] in Maryland once he or she receives a license to do so.[24] Maryland requires an engineer to obtain a license to practice professional engineering in order to "safeguard life, health, and property and to promote the pub-

18. MD. CODE ANN., BUS. OCC. & PROF. § 3-402(a)(1). Additionally, a corporation, partnership, or limited liability company is permitted to practice architecture through a licensed architect. *Id.* § 3-402(a)(2).
19. *Id.* § 3-402(c)(2). Similarly, a corporation that practices architecture is not relieved of liability for the acts or omissions of its directors, officers, employees or agents. *Id.* § 3-402(c)(1).
20. *Id.* § 3-403(a). A corporation may, however, perform architectural services for itself or an affiliate without a permit. *Id.* § 3-403(b).
21. *Id.* § 3-404(a), (b)(1).
22. *Id.* § 3-404(c). The responsible member is "in charge of architecture practiced through the corporation." *Id.* § 3-404(c)(2).
23. *Id.* § 14-301(a). The practice of professional engineering is defined as:
    > [P]rovid[ing] any service or creative work the performance of which requires education, training, and experience in the application of:
    >
    > (i) special knowledge of the mathematical, physical, and engineering sciences; and
    >
    > (ii) the principles and methods of engineering analysis and design.
    >
    > (2) In regard to a building or other structure, machine, equipment, process, works, system, project, or public or private utility, "practice engineering" includes:
    >
    > (i) consultation;
    >
    > (ii) design;
    >
    > (iii) evaluation;
    >
    > (iv) inspection of construction to ensure compliance with specifications and drawings;
    >
    > (v) investigation;
    >
    > (vi) planning; and
    >
    > (vii) design coordination.

    Id. § 14-101(f)(1)-(2).
24. *Id.* § 14-301(a).

lic welfare."[25] To be eligible for a license, an individual must meet initial requirements[26] and pass an examination.[27]

Professional engineers have the same options in choosing a corporate form as architects.[28] Unlike a corporation engaged in architecture,[29] a corporation which engages in professional engineering is not required to obtain a permit.[30]

C. *Certificate of Qualified Expert Requirement*

When suing a "licensed professional," a claimant is required to file a certificate of a qualified expert with the court.[31] Failure to file the certificate within ninety days after filing the complaint entitles the defendant to dismissal without prejudice.[32] Upon request and a showing of good cause by the claimant, the court has discretion to waive or modify this requirement.[33] The claimant may request otherwise discoverable information which is "reasonably necessary . . . to obtain a certificate of a qualified expert" within thirty days after the claim is served.[34] A ninety-day time limit for filing the certificate of a qualified expert begins when the defendant complies with the claimant's request.[35] If the defendant fails to comply with the claimant's request, the claimant is excused from the obligation of filing a certificate of a qualified expert.[36]

The requirement to file a certificate of a qualified expert only pertains to civil actions, "originally filed in circuit court against a licensed professional," and arising from that professional's negligent act or omission in connection with the rendering of professional services.[37] A "licensed professional" is defined as:

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25. *Id.* § 14-102. This legislative policy is very similar to the state's interest in regulating architecture. *See supra* text accompanying note 12.
26. MD. CODE ANN., BUS. OCC. & PROF. § 14-304. The applicant must be "of good character and reputation," and meet certain education requirements. *Id.* § 14-304(b), (c). The education requirement for an applicant may be waived if he or she has a significant amount of work experience. *Id.* § 14-305(a), (d).
27. *Id.* § 14-304(c). The examination consists of an eight-hour examination on the "fundamentals of engineering" and an eight-hour examination on the "principles and practice of engineering." *Id.* § 14-307(d)(1).
28. *See* discussion *supra* Part II.A. Corporations are authorized to engage in professional engineering. MD. CODE ANN., BUS. OCC. & PROF. § 14-401(a). The engineer's individual liability is not affected by the fact that he or she practices through a corporate form. *Id.* 14-401(c)(2).
29. *See supra* notes 20-22 and accompanying text.
30. *See* MD. CODE ANN., BUS. OCC. & PROF. §§ 14-101 to 14-602. The Maryland Professional Engineers Act does not mention that a permit is required. *Id.*
31. MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-02(a) (2002).
32. *Id.* § 3-2C-02(a)(1), (2)(ii).
33. *Id.* § 3-2C-02(c)(1).
34. *Id.* § 3-2C-02(b)(1).
35. *Id.* § 3-2C-02(b)(2).
36. *Id.* § 3-2C-02(b)(3).
37. *Id.* § 3-2C-01(b) (defining the term "claim").

(1) An architect licensed under Title 3 of the Business Occupations and Professions Article;
(2) An interior designer certified under Title 8 of the Business Occupations and Professions Article;
(3) A landscape architect licensed under Title 9 of the Business Occupations and Professions Article;
(4) A professional engineer licensed under Title 14 of the Business Occupations and Professions Article; or
(5) A professional land surveyor or property line surveyor licensed under Title 15 of the Business Occupations and Professions Article.[38]

A "qualified expert" is any individual who is a licensed professional in Maryland, or another state, and who is knowledgeable in the standard of care applicable to the same professional service of the defendant.[39] In spite of this, some individuals who meet the above requirement may still not be used as qualified experts.[40] A valid certificate requires that the qualified expert attest that the licensed professional, against whom the claim has been filed, has failed to meet the applicable standard of care.[41]

D. Other States

Several other states have a similar requirement for suits against architects and engineers. The requirements in California, Colorado, and Georgia provide a contrast to the requirements in Maryland.[42]

1. California

An individual who sues a licensed architect, engineer, or land surveyor in California is required to file and serve a certificate.[43] This certificate must be filed "on or before the date of service of the complaint ."[44] The California statute allows some exceptions to the gen-

38. *Id.* § 3-2C-01(c)(1)-(5).
39. *Id.* § 3-2C-01(d)(1). Hence, if someone sued a licensed architect in Maryland for professional negligence, the plaintiff's qualified expert would also have to be a licensed architect, either in Maryland or another state. *Id.* The plaintiff may not use an unlicensed professional engineer as his qualified expert. *Id.*
40. *Id.* § 3-2C-01(d)(2). Namely, parties to the claim, employees or partners of a party to the claim, employees or shareholders of a professional association of which a party to the claim is a stockholder, and individuals having a financial interest in the outcome of the suit may not act as a qualified expert. *Id.*
41. *Id.* § 3-2C-02(a)(2)(i).
42. CAL. CIV. PROC. CODE § 411.35 (West 2004); COLO. REV. STAT. ANN. § 13-20-602 (West Supp. 2003); GA. CODE ANN. § 9-11-9.1 (Supp. 2004). For a full discussion of this provision, see Robert D. Brussack, *Georgia's Professional Malpractice Affidavit Requirement*, 31 GA. L. REV. 1031 (1997).
43. CAL. CIV. PROC. CODE § 411.35(a).
44. *Id.*

eral requirement, unlike Maryland.[45] Failure to comply with the certificate requirement is grounds for a demurrer or a motion to strike.[46]

The Court of Appeal of California has indicated that the certificate requirement is valid in suits against corporate defendants who perform architectural services.[47] The court did not question or analyze whether the certificate requirement applies in cases with corporate defendants. The court did state, however, that the section requiring the certificate was enacted to prevent frivolous lawsuits.[48]

2. Colorado

Claimants suing acupuncturists or other licensed professionals for professional negligence, in Colorado, are required to file a certificate of review with the court.[49] The certificate of review must be filed within sixty days after service of the complaint, unless good cause is shown for extending the time limit.[50] Failure to file a certificate of review results in dismissal of the complaint.[51]

The statute explicitly provides that the certificate of review requirements apply to suits against firms.[52] The requirement has been held to apply when the defendant is a limited liability company,[53] and is

45. In California, the certificate is "executed by the attorney for the plaintiff . . . ." *Id.* § 411.35(b). The attorney attests that he or she has consulted with a licensed professional, and based on this consultation the attorney has determined that in his or her professional judgment, the suit is meritorious. *Id.* § 411.35(b)(1). Alternatively, the attorney may attest that it was impossible to consult with a licensed professional before filing the claim because the statute of limitations would have expired had the attorney done so. *Id.* § 411.35(b)(2). If the attorney attests to this, the certificate must be filed within sixty days after the complaint is filed. *Id.* In a third alternative, the attorney may attest that he or she made three separate, good faith attempts to consult with three separate licensed architects, engineers, or land surveyors, but none of the individuals would agree to the consultation. *Id.* § 411.35(b)(3). Finally, the requirement is waived if the attorney plans to rely solely on the doctrine of res ipsa loquitor. *Id.* § 411.35(d).
46. *Id.* § 411.35(g).
47. Ponderosa Ctr. Partners v. McClellan/Cruz/Gaylord & Assocs., 45 Cal. App. 4th 913 (1996).
48. *Id.* at 915.
49. COLO. REV. STAT. ANN. § 13-20-602(1)(a) (West Supp. 2003).
50. *Id.*
51. *Id.* § 13-20-602(4). Unlike California courts, Colorado courts will not waive the certificate of review requirement when the plaintiff relies solely on the doctrine of res ipsa loquitor, "at least when there is no evidence . . . that the defendant had any control over the instrumentality causing the injury." Bilawsky v. Faseehudin, 916 P.2d 586, 590 (Colo. Ct. App. 1995).
52. COLO. REV. STAT. ANN. § 13-20-602(b).
53. Miller v. Rowtech, LLC, 3 P.3d 492, 494-95 (Colo. Ct. App. 2000) (holding the defendant waived the defense that a certificate of review was required by waiting until a post-trial motion to raise the issue).

required when the defendant is the state government.[54] The Supreme Court of Colorado held that dismissal is required for failure to file a certificate of review when the plaintiff seeks damages against either the licensed professional who is named as a party or against the professional's employer.[55] The court determined that the language of the statute was ambiguous as to whether a certificate of review is required when the state is the defendant.[56] To clarify the ambiguity, the court found that both the legislative history and legislative purpose indicated that the certificate of review requirement applies when the suit is against the professional's employer.[57] Therefore, in Colorado, corporations, employers and individual licensees have the protection of the certificate of review requirement.

3. Georgia

In Georgia, a claimant who sues a licensed professional or a health care facility is required to attach an affidavit of a person competent to testify as an expert to the complaint.[58] If preparation of the affidavit would cause the statute of limitations to expire, the claimant must supplement his claim within forty-five days after filing the complaint.[59] If the affidavit is not filed, the suit is subject to dismissal for failure to state a claim.[60] Georgia, unlike Maryland, permits the affidavit to be filed by the claimant himself.[61]

The Supreme Court of Georgia has held that the protection of the affidavit requirement extends to architectural firms, as well as to individual architects.[62] The Court of Appeals of Georgia has also held

54. Colo. Dep't of Corrs. v. Nieto, 993 P.2d 493, 509 (Colo. 2000). Nieto was an inmate who sought treatment at the prison medical clinic. *Id.* at 497-98. He alleged that the clinic staff was negligent in his treatment, causing him permanent paralysis. *Id.* at 498. The trial court dismissed Nieto's negligence claim against the treating nurse because he failed to comply with the certificate of review requirement in a timely manner. *Id.* The state, however, was held liable on the basis of respondeat superior and ordered to pay $150,000. *Id.* at 498-99. The state appealed, but the Colorado Court of Appeals held that the certificate of review requirement did not apply to the state as an entity since it was not a "licensed professional" within the meaning of the statute. *Id.* at 496, 499.
55. *Id.* at 496.
56. *Id.* at 500.
57. *Id.* at 502-04.
58. GA. CODE ANN. § 9-11-9.1(a) (Supp. 2004). Architects and engineers are specifically listed as professionals to whom the requirement applies. *Id.* § 9-11-9.1(f)(1), (19).
59. *Id.* § 9-11-9.1(b).
60. *Id.*
61. Findley v. Davis, 414 S.E.2d 317, 318 (Ga. Ct. App. 1991). *See also supra* note 40 discussing the comparable Maryland requirement.
62. *See* Hous. Auth. of Savannah v. Greene, 383 S.E.2d 867 (Ga. 1989), *vacated in part by* 429 S.E.2d 174 (Ga. Ct. App. 1993). The Housing Authority of Savannah was sued for the wrongful death of a tenant, who died from exposure to carbon monoxide caused by the faulty design and construction of

that engineering firms, when named as defendants, may assert the defense of the plaintiff's failure to file an affidavit.[63] These cases, however, were decided under a previous version of the current statute, and may no longer be applicable.[64]

III. LEGAL ANALYSIS

This section will first discuss the similarities between the certificate of a qualified expert requirements in suits against architects and engineers and those against "health care providers." Next it will discuss, the cases that have interpreted the provisions requiring a certificate of a qualified expert. This section will also outline the purposes of corporate practice of architecture and engineering, and the legislative history behind the certificate of a qualified expert requirement. Finally, this section will argue that the protection of the certificate of a qualified expert should extend to corporations.

A. Health Care Malpractice Claims

In addition to architects and engineers, Maryland also mandates that a certificate of a qualified expert be filed within ninety days after a complaint for claims against health care providers.[65] The certificate must be filed with the Director of the Health Claims Arbitration Office.[66] Failure to file a certificate of qualified expert results in dismissal of the claim without prejudice.[67] A "health care provider" is defined as:

> [A] hospital, a related institution as defined in § 19-301 of the Health-General Article, a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed practical

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the heating system. *Id.* at 868. The Housing Authority filed a third-party suit against Gilpin + Bazemore/Architects & Planners, Inc., who designed the system. *Id.*

63. S. Eng'g Co. v. Cent. Ga. Elec. Membership Corp., 389 S.E.2d 380, 381 (Ga. Ct. App. 1989), *rev'd on other grounds*, 395 S.E.2d 809 (Ga. 1990).
64. In 1997, the Georgia statute was amended to read: "In any action for damages alleging professional malpractice *against a professional licensed by the State of Georgia* and listed in subsection (f) of this Code section . . . ." GA. CODE ANN. § 9-11-9.1(a) (emphasis added). *Greene* and *Southern Engineering Co.* were decided prior to the amendment when the statute read: "In any action for damages alleging professional malpractice . . . ." *Greene*, 383 S.E.2d at 867. By limiting the affidavit requirement to only those claims against a professional licensed in Georgia, the Georgia legislature may have intended to preclude corporations from receiving the protection of the affidavit.
65. MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04(a)(1), (b)(1)(i) (Supp. 2004). This requirement is waived if the sole issue is the lack of informed consent. *Id.* § 3-2A-04(b). Further, initial jurisdiction belongs exclusively to the Health Claims Arbitration Office. Schwartz v. Lilly, 53 Md. App. 318, 321-22, 452 A.2d 1302, 1304 (1982).
66. MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-04(b)(1)(i).
67. *Id.*

> nurse, a dentist, a podiatrist, a psychologist, a licensed certified social worker-clinical, and a physical therapist, licensed or authorized to provide one or more health care services in Maryland.[68]

The purpose of these provisions is to (1) respond to a perceived "malpractice insurance crisis,"[69] and (2) "screen malpractice claims, [and] ferret out meritless ones."[70] By requiring a certificate of a qualified expert, the legislature sought to prevent frivolous claims from reaching court.[71]

In keeping with this goal, the Court of Appeals of Maryland has held that a claim against an organization, which is not within the literal definition of health care provider, is subject to the requirements of the Health Care Arbitration Act.[72] Specifically, in *Group Health Association v. Blumenthal*,[73] the court found that a health management organization (HMO) did not fall within the meaning of a health care provider.[74] Because the plaintiffs' suit against the HMO was founded on the doctrine of respondeat superior,[75] the court held that the suit was bound by the provisions of the Health Care Malpractice Claims Statute.[76] The court also looked to the legislative history of the act, thereby gleaning legislative intent.[77] By construing the statute in such a way that the certificate of a qualified expert and arbitration provisions would cover as many suits as possible, the court gave effect to the legislature's intent to "establish a 'mechanism to screen malpractice claims prior to the filing of suit.'"[78]

Similarly, Maryland courts should construe the provisions requiring a certificate of a qualified expert in suits against architects and engi-

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68. *Id.* § 3-2A-01(e) (Supp. 2004).
69. Bovey v. Executive Dir., 292 Md. 640, 641, 441 A.2d 333, 334 (1982).
70. Adler v. Hyman, 334 Md. 568, 575, 640 A.2d 1100, 1103 (1994) (citing Group Health Ass'n v. Blumenthal, 295 Md. 104, 113, 453 A.2d 1198, 1204 (1983)).
71. *See id.*
72. *Group Health Ass'n*, 295 Md. at 112, 453 A.2d at 1203. Group Health Association (hereinafter "GHA") was a health management organization, of which Blumenthal was a member. *Id.* at 105-06, 453 A.2d at 1200-01. After informing GHA that she believed she was pregnant, Blumenthal received prenatal care from several GHA employees. *Id.* at 106, 453 A.2d at 1201. After the employees gave her allegedly negligent care, Blumenthal sought to bypass the Health Care Malpractice Claims Statute and sue GHA in federal district court based on diversity of citizenship. *Id.* at 107-08, 453 A.2d at 1201.
73. 295 Md. 104, 453 A.2d 1198 (1983).
74. *Id.* at 110, 453 A.2d at 1203.
75. Since the HMO itself could not have committed a negligent act (as it is a legal fiction), in suits against it for the negligent acts of its employees, it should be entitled to the same treatment that the employee would receive.
76. *Id.* at 111, 453 A.2d at 1203.
77. *Id.* at 112-13, 453 A.2d at 1203-04.
78. *See id.* at 113, 453 A.2d at 1204 (citation omitted).

neers to encompass claims against corporations. Although a corporation does not fit precisely within the definition of a licensed professional,[79] the courts should follow the Court of Appeals' decision in *Group Health Association* to broaden the scope of the statute to encompass as many claims as possible and effectuate the legislative intent.[80]

B. *Court Decisions Interpreting* MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2C-01 and 3-2C-02

1. *Baltimore County v. RTKL Associates, Inc.*[81]

On April 9, 2004, the Court of Appeals of Maryland held that a corporate defendant practicing architecture or engineering was not entitled to the protections of the certificate of a qualified expert requirement.[82] In April of 1996, Baltimore County, Maryland ("Baltimore County"), entered into a contract with RTKL Associates, Inc. (RTKL) for RTKL to provide certain engineering and construction services for Phase I of the Dundee-Saltpeter Environmental Park, a future education center.[83] RTKL retained Andrews, Miller & Associates (AMA) to provide "engineering services associated with the grading of the property."[84] AMA apparently completed its work under the contract in 1998.[85] In 1999, Baltimore County discovered that the benchmarks AMA had set were inaccurate.[86] This caused substantial damages and delays, as more dirt had to be brought in to remedy the problem; foundation walls, already in place, had to be changed; wall panels had to be disassembled; additional concrete had to be laid; and the slab of the grade had to be changed.[87]

Baltimore County brought suit against RTKL and AMA in August of 2001, alleging breach of contract and negligence.[88] RTKL and AMA

79. In this context a licensed professional is defined as "[a]n architect licensed under Title 3 of the Business Occupations and Professions Article." MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-01(c)(1) (2001). A corporation can never be a licensed architect since a licensed architect is an *individual* who is licensed to practice architecture in Maryland. MD. CODE ANN., BUS. OCC. & PROF. § 3-101(b), (i) (2004).
80. These aspects of the law will be discussed in greater detail *infra* Parts III.D and III.E.
81. 380 Md. 670, 846 A.2d 433 (2004).
82. *Id.* at 690, 846 A.2d at 445.
83. *Id.* at 672, 846 A.2d at 434. Specifically, RTKL was to "provide design development, construction documents, and bid assistance." *Id.*
84. *Id.* at 672-73, 846 A.2d at 434 (internal quotes omitted).
85. *Id.* at 673, 846 A.2d at 434. The court notes that "the record is not entirely clear on this point." *Id.*
86. *Id.* Specifically, the benchmarks were inaccurate by 0.092 feet, and hence "all grading of dirt was done 0.092 feet too low." *Id.* (internal quotes omitted).
87. *Id.* at 673, 846 A.2d at 434-35.
88. *Id.* at 673, 846 A.2d at 435.

moved to dismiss, alleging that the suit was subject to arbitration and had not been filed within the statute of limitations.[89] The circuit court denied the defendants' motion concerning arbitration, "but did not expressly rule on the limitations issue."[90] RTKL and AMA filed an interlocutory appeal asking the Court of Special Appeals to rule on both issues.[91] The Court of Special Appeals affirmed the circuit court with regard to arbitration, but held "that no interlocutory appeal lay from [the circuit court's] implied ruling on the limitations issue."[92]

On remand to the circuit court, RTKL and AMA again moved to dismiss based on the statute of limitations and Baltimore County's failure to comply with the certificate of a qualified expert requirement.[93] The circuit court denied the defendants' motion as it related to the certificate of a qualified expert requirement, but granted the motions to dismiss as to the limitations issue.[94] The circuit court held that the certificate of a qualified expert requirement only applied to suits against individual licensed professionals, not corporations.[95] Both the plaintiff and the defendants appealed the court's ruling.[96] The Court of Appeals then granted certiorari on its own initiative, taking the case before the Court of Special Appeals had an opportunity to consider the issues.[97]

The court devoted approximately ninety-three percent of its discussion to the statute of limitations issue, devoting less than one page to the issue of the certificate of a qualified expert requirement.[98] RTKL and AMA based their arguments largely on an unpublished decision by the U.S. District Court for the District of Maryland.[99] The court held that the certificate of a qualified expert requirement applied only to individuals, because the statute defined "licensed professional" as "an architect licensed under Title 3 of the Business Occupations and Professions Article" or a "professional engineer licensed under Title 14" of the same Article.[100] The court then noted that the Business Occupations and Professions Article "makes clear that only an

89. *Id.* The defendants relied on the applicable statute of limitations in suits naming a county as a defendant, however, in the present case, the county was the plaintiff. *Id.* at 677, 846 A.2d at 437.
90. *Id.* at 673, 846 A.2d at 435.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 674, 846 A.2d at 435.
95. *Id.*
96. *Id.*
97. *Id.*
98. *See id.* at 674-90, 846 A.2d at 435-45.
99. *Id.* at 689-90, 846 A.2d at 444-45. Specifically, RTKL and AMA relied on *Ferrell v. American Property Construction Company*. *Id.* at 690, 846 A.2d at 445. This case is discussed *infra* Part III.B.4.
100. *Id.* at 690, 846 A.2d at 445 (internal quotation marks omitted).

individual may be licensed as an architect" or engineer.[101] The court also found this restriction was necessary, because specified education and completion of an examination is required to become a licensed professional.[102] The court therefore held that only individuals may be licensed, and the circuit court had correctly decided the issue.[103]

The Court of Appeals' cursory approach to this issue demonstrates that the court failed to consider several issues in its ruling. While the court devoted fifteen pages to the issue of limitations, it devoted less than one page to the issue of the certificate of a qualified expert requirement.[104] The court did not cite any legislative history or the purpose of the statute in construing the certificate of a qualified expert requirement.[105] The court also did not lay out the possible implications of its ruling, nor did it address the implications if it were to rule in the alternative.[106] The court did not even entertain the possibility that the statute was ambiguous.[107] Despite not dealing with these issues, *in the very same opinion*, the court laid out its professed test for interpreting statutes: to give effect to legislative intent by looking at the plain meaning, the legislative history, and the legal effect of competing constructions.[108] The court thus gave extensive treatment to the words "claim" and "claimant" in the statute of limitations, but no more than a fleeting analysis of the certificate of a qualified expert requirement.[109] Even though the court was erroneous in this decision, the court has demonstrated that it is willing to reverse itself upon a showing that its prior rulings were fallacious interpretations of the law.[110]

2. *Heritage Harbour, L.L.C. v. John J. Reynolds, Inc.*[111]

The Court of Special Appeals of Maryland has also had the opportunity to review whether a corporation is entitled to receive the protection offered by the certificate of a qualified expert requirement.[112] In late 1998, the Council of Unit Owners of South River Condominium filed an action against Heritage Harbour, L.L.C. and several other de-

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 674-90, 846 A.2d at 435-45.
105. *See id.* at 689-90, 846 A.2d at 444-45.
106. *See id.*
107. *See id.*
108. *Id.* at 678, 846 A.2d at 437-38.
109. *Id.* at 674-90, 846 A.2d at 435-45.
110. *See* Harris v. Bd. of Educ., 375 Md. 21, 59, 825 A.2d 365, 387-88 (2003) (overruling a line of cases that read language into the worker's compensation statutes that did not belong there).
111. 143 Md. App. 698, 795 A.2d 806 (2002). It should be noted that the Court of Appeals, in *Baltimore County v. RTKL Associates Inc.*, did not cite *Heritage Harbour, L.L.C.* at all. 380 Md. 670, 846 A.2d 433.
112. *Heritage Harbour, L.L.C.*, 143 Md. App. at 708-09, 795 A.2d at 812.

fendants ("appellants"), alleging various defects in the construction of the condominiums.[113] The appellants then filed a complaint for contribution and indemnification against John J. Reynolds, Inc., and several other defendants ("appellees").[114] Several of the appellees filed motions to dismiss for failure to state a claim, many of which were granted.[115]

In *Heritage Harbour, L.L.C.*, the appellants did not timely file a certificate of a qualified expert as to any of the appellees.[116] Without inquiring into whether the certificate of a qualified expert applies to corporate defendants, the court agreed with the appellees that failure to so file entitled the appellees to dismissal of the suit.[117] Although the court reached the proper conclusion, it did not give enough analysis as to why a corporation offering professional services should be extended the same level of protection as an individual architect or engineer.

3. *Adams v. NVR Homes, Inc.*[118]

Adams was decided in the United States District Court for the District of Maryland.[119] Seventeen families ("plaintiffs"), who were residents of the Calvert Ridge development in Elkridge, Maryland, brought suit against various corporations and individuals for concealing the fact that the plaintiffs' homes were built on a solid waste dump.[120] Some of these defendants[121] filed third party claims against Gutschick—a civil engineering, surveying, and planning firm—for indemnity based on Gutschick's alleged breach of contract and negligence in providing civil engineering services.[122] Gutschick moved for summary judgment, based in part on the third-party plaintiffs' failure to comply with the certificate of a qualified expert requirement.[123]

In deciding the issue, the court first stated that the claim against Gutschick was not a "claim" within the meaning of the statute because the suit was not originally instituted in a Maryland circuit court.[124]

113. *Id.* at 702, 795 A.2d at 808. In total, there were seven of these defendants. *Id.*
114. *Id.* at 703, 795 A.2d at 808-09. There were eighteen of these defendants. *Id.* (not all of these defendants joined in the appeal considered in *Heritage Harbour, L.L.C.*). A number of these parties were architectural or engineering firms. *Id.*
115. *Id.* at 703-04, 795 A.2d at 809.
116. *Id.* at 708, 795 A.2d at 812.
117. *Id.* at 708-09, 795 A.2d at 812.
118. 135 F. Supp. 2d 675 (D. Md. 2001).
119. *Id.*
120. *Id.* at 679-80.
121. Brantley Development and Nantucket (developers and marketers of the homes). *Id.* at 679-81.
122. *Id.* at 712-13.
123. *See id.* at 716.
124. *Id.*

The court also held that Gutschick, as an engineering *firm* and not an individual, would not qualify as a licensed professional.[125] Based, in part, on the fact that only licensed professionals are entitled to the protection offered by the certificate of a qualified expert requirement, and Gutschick is not a licensed professional, the court denied their motion for summary judgment.[126]

This court reached an improper conclusion in *Adams* much the same way the Court of Appeals did in *RTKL Associates.* The court construed the statute much too narrowly and did not consider legislative intent.[127] Instead, it read the statute literally, without taking into account the inherent ambiguity in the statute and the effect of such a narrow interpretation.[128] Further, the decision can be distinguished from any reported case decided in Maryland, as one of the court's reasons for denying Gutschick's motion was that the claim was not originally filed in a Maryland circuit court.[129] Hence, its statement that the certificate of a qualified expert requirement does not apply to suits against engineering firms can be viewed as dictum.[130]

4. *Ferrell v. American Property Construction Co.*[131]

The United States District Court for the District of Maryland, in *Ferrell v. American Property Construction Co.*, directly addressed the issue of whether a firm is entitled to the protection offered by the certificate of a qualified expert requirement.[132] The court first applied the *Erie*[133] doctrine, and, relying on two cases from other federal circuits dealing with similar issues, found that the certificate of a qualified expert requirement applied to suits filed in federal court.[134] The court also cited a Fourth Circuit decision, which held that the Maryland

125. *Id.*

126. *Id.*

127. *See infra* Part III.D (discussing legislative intent).

128. *See infra* Parts III.D-E (discussing the ambiguity present in the statute, the effects of such ambiguity, and the effects of this erroneous interpretation).

129. *Adams*, 135 F. Supp. 2d at 716.

130. *See id.* In other words, by ruling that the certificate of a qualified expert requirement does not apply because the case was not instituted in a Maryland circuit court, the court did not need to answer the question of whether Gutschick would otherwise be entitled to such protection because of its status as a firm. The first decision was all that was necessary to deny Gutschick's motion for summary judgment.

131. Civil Action No. WMN-02-1131 (D. Md. Aug. 15, 2003) (mem.).

132. *Id.* at 1, 3. In this case, the party that sought dismissal because of the claimant's failure to comply with the certificate of a qualified expert requirement was a partnership, not a corporation. *Id.* at 1. Furthermore, the partnership was engaged in architecture, not engineering. *Id.*

133. *See generally* Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

134. *Ferrell*, C.A. No. WMN-02-1131.

Health Care Malpractice Claims Act applied to cases filed in federal court.[135]

The court discredited *Adams* by holding that partnerships engaged in architecture are entitled to the protection offered by the certificate of a qualified expert requirement.[136] To reach this decision, the court relied on *Group Health Association v. Blumenthal*.[137] The court found that, similar to *Group Health Association*, liability could only be imposed on the partnership on the basis of respondeat superior.[138] Hence, the firm should be given the protection of the certificate of a qualified expert requirement.

The court in *Ferrell* reached the correct conclusion, but for the wrong reason. Instead of basing its decision on respondeat superior, the court should have looked to legislative intent to determine that architectural firms are entitled to the protection offered by the certificate of a qualified expert. By basing its decision on respondeat superior, the court muddles the issue of whether a firm is entitled to the protection of the certificate of a qualified expert requirement. Respondeat superior liability only arises when an employee commits a tort while acting within the scope of his employment.[139] For the tortious conduct to be considered "within the scope of employment," the acts must be "in furtherance of the employer's business and . . . 'authorized' by the employer."[140] In order for a corporation to gain the protection of the certificate of a qualified expert requirement under this interpretation of the statute, the corporation would need to prove that liability, if it existed, was based on respondeat superior.[141] By importing this aspect of general tort law into the issue of the certificate of a qualified expert protection for firms, the court has only complicated the issue.

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135. *Ferrell*, C.A. No. WMN-02-1131 at 4-5 (citing Davison v. Sinai Hosp. of Balt., Inc., 617 F.2d 361, 362 (4th Cir. 1980) (per curiam), *aff'g* 462 F. Supp. 778 (D. Md. 1978)).

136. *Id.* at 7.

137. *Id.* at 6-7. Group Health Ass'n v. Blumenthal, 295 Md. 104, 453 A.2d 1198 (1983). This case is discussed in detail *supra* Part III.A.

138. *Ferrell*, C. A. No. WMN-02-1131 at 7.

139. Oaks v. Connors, 339 Md. 24, 30, 660 A.2d 423, 426 (1995). If liability is founded on the doctrine of respondeat superior, the employee and the employer are jointly and severally liable to the claimant. S. Mgmt. Corp. v. Taha, 378 Md. 461, 481, 836 A.2d 627, 638 (2003); *see also* DiPino v. Davis, 354 Md. 18, 47-48, 729 A.2d 354, 369-70 (1999) (suggesting that an aggrieved party may hold either a police officer or her employer liable for the officer's tortious conduct, assuming the officer acted in a proprietary or private capacity).

140. Sawyer v. Humphries, 322 Md. 247, 255, 587 A.2d 467, 470 (1991).

141. Nevertheless, if the corporation were able to prove that the employee acted outside of his or her employment, the corporation could not be held liable for the alleged negligence of the employee. *See Oaks*, 339 Md. at 30, 660 A.2d at 426.

C. *The Purpose of the Corporate Practice of Architecture and Engineering*

The practice of architecture or engineering through a corporation is permitted in Maryland.[142] The stockholders of the corporation are largely relieved of all debts owed by the corporation to outside creditors of the corporation, including creditors in tort.[143] Maryland courts also consider a corporation a separate entity, independent of its shareholders.[144] However, when an individual practices architecture or engineering through a corporation, and that individual is a stockholder, he or she is not relieved of any personal liability related to the negligent performance of the professional service.[145] Hence, the incentive to practice architecture or engineering through a corporate form is significantly less than the incentive for other non-professional industries. Nevertheless, the architect or engineer would still probably prefer to incorporate, as it would relieve him or her of personal liability for certain debts of the corporation, which are not involved with the practice of architecture, such as a lease on office space or contracts with suppliers.[146]

Additionally, incorporation is a popular way in which a business can raise capital through the sale of equity securities.[147] Although architectural firms may choose to raise capital by the sale of equity securities, the composition of the boards of directors of such corporations face restrictions not present in traditional corporations.[148] Furthermore, if the corporation practicing architecture or engineering incorporated as a professional service corporation,[149] only individuals

142. MD. CODE ANN., BUS. OCC. & PROF. § 3-402(a) (2004) (architecture); § 14-401(a) (engineering).

143. *See* Damazo v. Wahby, 259 Md. 627, 633, 270 A.2d 814, 817 (1970). Stockholders may, however, be held liable under Maryland's version of the piercing the corporate veil doctrine "to prevent fraud or enforce a paramount equity." *Id.* at 633-34, 270 A.2d at 817. For a full discussion of the limited liability protections offered by incorporation, see Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80 (1991).

144. Fuller v. Horvath, 42 Md. App. 671, 684, 402 A.2d 134, 142 (1979).

145. MD. CODE ANN., BUS. OCC. & PROF. § 3-402(c)(2) (architecture); § 14-401(c)(2) (engineering).

146. *See* MD. CODE ANN., BUS. OCC. & PROF. § 3-402(c)(2) (architecture); § 14-401(c)(2) (engineering).

147. *See How the Stock Market Works*, *at* http://www.ameritrade.com/educationv2/fhtml/stockmarket/ipos.fhtml (last visited Oct. 25, 2004) (describing how corporations raise capital through the sale of stock, including a description of underwriting).

148. To be eligible for a permit, a corporation practicing architecture must have at least two-thirds of its directors licensed in any state to practice architecture. MD. CODE ANN., BUS. OCC. & PROF. § 3-404(b)(1). Also, the responsible member in charge of the practice must be a Maryland-licensed architect and a director of the corporation. *Id.* § 3-404(c). Firms practicing professional engineering do not have similar requirements.

149. MD. CODE ANN., CORPS. & ASS'NS §§ 5-101(g), 5-102(a) (1999) (defining a professional service).

licensed to provide that same service may be stockholders.[150] Also, a corporate form becomes a necessity when revenues grow large.[151]

D. The Legislative History Behind the Certificate of a Qualified Expert Requirement

The statutes requiring a certificate of a qualified expert in suits against architects, engineers, and other professionals, was enacted in 1998. Similar bills were introduced in 1996 and 1997, but both measures failed.[152] Various professional societies voiced support for the bill, including the Maryland Society of Surveyors,[153] the Maryland Chapter of the American Society of Landscape Architects,[154] the Maryland Society of the American Institute of Architects,[155] the Maryland section of the American Society of Civil Engineers,[156] and the Consulting Engineers Council of Metropolitan Washington.[157] Additionally,

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150. *Id.* § 5-109(a). This limitation on the option of who may own stock in the corporation is the principal reason it makes little sense to incorporate an architectural or engineering corporation as a professional service corporation. *See supra* note 17.

151. In Maryland, the corporate form provides a formalized management structure. *See generally* MD. CODE ANN., CORPS. & ASS'NS § 2-401 (directors); § 2-412 (officers); § 2-507 (stockholders). This formal structure is the only feasible way to ensure all stockholders' interests are protected when revenues and operations grow large, as it provides the stockholders with control over the election of directors. The directors in turn, run the affairs of the corporation and, unless otherwise provided, appoint the officers, who act pursuant to powers granted to them by the bylaws and or resolutions of the board of directors. *Id.* § 2-404(b)(1) (stockholders' votes determine who the directors will be); § 2-401 (directors run the affairs of the corporation); § 2-413(a) (directors appoint officers); § 2-414(a)(1)-(2) (powers of officers).

152. JUDICIARY COMM., BILL ANALYSIS, H.D. 412-188 (Md. 1998) (on file with the author). The 1996 bill required the certificate to contain a statement that the defendant's failure to meet the standard of care caused the plaintiff's injuries. *Id.* The 1997 bill omitted this requirement and was passed by the House of Delegates, but the Senate Judicial Proceedings Committee failed to issue a report. *Id.*

153. Letter from Charles A. Irish, Jr., President, Maryland Society of Surveyors, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Mar. 9, 1998) (on file with the author).

154. Letter from Charles Brenton, Chairman of Legislative Affairs, Maryland Chapter, American Society of Landscape Architects, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Mar. 9, 1998) (on file with the author).

155. Letter from Peter Horton, Legislative Chairman, Maryland Society of the American Institute of Architects, to Delegate Anne Marie Doory, Vice Chairman, House Judiciary Committee (Mar. 10, 1998) (on file with the author).

156. Letter from Daniel T. Cheng, President, Maryland Section of the American Society of Civil Engineers, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Feb. 20, 1998) (on file with the author).

157. Letter from Consulting Engineers Council of Metropolitan Washington, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Mar. 11, 1998) (on file with the author).

the Carroll County,[158] Queen Anne's County,[159] and Maryland[160] Chambers of Commerce all supported the legislation. VIKA Incorporated, a corporation offering engineering, planning, landscape architectural, surveying, and global positioning services also voiced support for the bill.[161] The Maryland Department of Highway Transportation, State Highway Administration, did not take a position on the bill, pending the possible insertion of language that would waive the certificate of a qualified expert requirement when government entities were concerned.[162] The law firm of Freishtat & Sandler is the only entity whose opposition to the bill has been recorded in the legislative history.[163] There are no indications in the legislative history whether the bill's protection was meant to extend to corporate practice of architecture or engineering.

In the eyes of its supporters, the primary intent of the bill was to protect design professionals from frivolous lawsuits.[164] Secondary considerations included: (1) the enhanced competitive position of Maryland design professionals by decreasing the cost of insurance and

158. Letter from Helen C. Utz, Executive Director, Carroll County Chamber of Commerce, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Feb. 10, 1998) (on file with the author).

159. Letter from Robert R. Miller, Chairman, Legislative Committee of the Queen Anne's County Chamber of Commerce, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Feb. 16, 1998) (on file with the author).

160. Memorandum from the Maryland Chamber of Commerce, to the Judiciary Committee (Mar. 11, 1998) (on file with the author).

161. Letter from Charles A. Irish, Jr., Executive Vice President, VIKA Incorporated, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Mar. 9, 1998) (on file with the author).

162. Letter from Elizabeth L. Homer, Deputy Administrator, Maryland Department of Transportation, State Highway Administration, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Mar. 11, 1998) (on file with the author).

163. Letter from David Freishtat, Attorney, Freishtat & Sandler, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Mar. 2, 1998) (on file with the author). Mr. Freishtat objected because he was concerned that (1) the bill violated the Equal Protection Clause of the Constitution and Article 23 of the Maryland Declaration of Rights, (2) the bill's anti-consumer consequences outweighed its purposes, (3) the 20% limitation on professional activities imposed upon an expert to qualify to issue a certificate of a qualified expert was arbitrary, abusive, and provided an unfair advantage to some defendants. *Id.*

164. *E.g.*, Letter from Peter Horton, Legislative Chairman, Maryland Society of the American Institute of Architects, to Delegate Anne Marie Doory, Vice Chairman, House Judiciary Committee (Mar. 10, 1998) (on file with the author) ("The proposed bill is designed to deter meritless lawsuits against licensed professionals . . . .").

administrative time,[165] (2) a reduction in court congestion,[166] and (3) job creation.[167]

E. The Purpose of the Legislation is Best Served by Extending the Protection of a Certificate of a Qualified Expert Requirement to Corporations Practicing Architecture and Engineering

To adequately serve the purpose of the certificate of a qualified expert requirement, the Court of Appeals of Maryland should reverse its recent decision and extend the protection of the certificate of a qualified expert to corporations practicing architecture and engineering. The danger of not extending the protection may be seen from the following hypothetical.

A consumer, *C*, retains an architectural corporation, *AC*, to provide architectural services. *AC* designates designer, *D*, as the architect in charge of the project. After completion of the project, *C* is unhappy with the results and contemplates suing for professional negligence. *C* can sue either *D* (as an individual) or *AC* (as a corporation).[168] Assuming that *C*'s claim is groundless and that no other licensed architect would file a certificate of a qualified expert on *C*'s behalf, *C*'s meritless claim against *D* could not continue.[169] But by refusing this protection to *AC*, *C* could continue her suit, on the same set of facts creating a meritless suit, against *AC*.

Because the plaintiff in a professional malpractice suit can choose whether to sue the individual architect who performed the work, or the architectural corporation that employs the individual architect,[170] it is only equitable that the corporation should have the same protec-

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165. *E.g.*, Letter from Charles Brenton, Chairman, Legislative Affairs, Maryland Chapter of the American Society of Landscape Architects, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Mar. 9, 1998) (on file with the author) (the bill will allow "[l]andscape [a]rchitects practicing in Maryland [to] anticipate reductions to overhead costs such as insurance and administrative time.").

166. *E.g.*, Letter from Robert R. Miller, Chairman, Legislative Committee, Queen Anne's County Chamber of Commerce, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Feb. 16, 1998) (on file with the author) ("The passage of this bill would help eliminate many frivolous lawsuits which take so much of our courts' available time.").

167. *E.g.*, Letter from Consulting Engineers Council of Metropolitan Washington, to Delegate Joseph Vallario, Chairman, Judicial Proceedings Committee (Mar. 11, 1998) (on file with the author) (the bill will "return productive time and revenue to professional services, thereby creating jobs.").

168. *See supra* note 19 and accompanying text.

169. *See* MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-02(a)(1) (2002). If *C* is unable to obtain a certificate of a qualified expert, the claim against the individual architect is dismissed without prejudice. *Id.*

170. *Supra* note 19 and accompanying text.

tion available to the individual.[171] Given that courts should endeavor to apply legislative intent when construing statutes,[172] the only successful way to further the intent of preventing frivolous suits for architectural or engineering malpractice is to extend the protection of the certificate of a qualified expert requirement to suits against corporations engaged in architecture or engineering.

Many architects and engineers in Maryland are employed by corporations. As of 1997, the Census Bureau reported 378 employer architectural firms with 2,372 employees and 1,375 employer professional engineering firms with 30,901 employees operating in Maryland.[173] These numbers can be compared to the 887 non-employer architectural firms[174] and 1,830 non-employer professional engineering firms.[175] With such substantial numbers of architects and professional

171. The above hypothetical is equally applicable to engineers and corporations engaged in engineering. *Supra* note 28 and accompanying text.

172. Pack Shack, Inc. v. Howard County, 371 Md. 243, 253, 808 A.2d 795, 800 (2002).

173. *Economic Census, 1997, Professional, Scientific, and Technical Services, Maryland, at* http://www.census.gov/epcd/ec97/md/MD000_54.HTM (Page generated Sept. 23, 2003) [hereinafter *Economic Census*] (on file with the author). One cannot assume that all of these employees are licensed architects or professional engineers (as some of them are undoubtedly unlicensed support personnel). In 2002, the twenty-five largest architectural firms in the Baltimore area (ranked by billings originating from Baltimore-area offices) employed 428 architects. *Largest Architecture Firms in the Baltimore Area*, BALT. BUS. J., Dec. 19, 2003, at 126 (hereinafter *Largest Architecture Firms*). The local offices of these firms employed a total of 1,409 non-architects. *Id.* Eliminating the outlier (URS Corporation employed eleven architects and 650 other staff in its Hunt Valley, Maryland office), this equates to 759 support staff, or a ratio of approximately 0.549 architects per staff member of any designation. *Id.* Assuming this ratio is accurate for all employer architectural firms, the author estimates that approximately 1,302 architects practice through corporations in Maryland. *Id.*; *see also Economic Census, supra.* Further, the 2002 billings of the largest architectural firms in the Baltimore area exceeded $186 million. *Largest Architecture Firms, supra*, at 126. Likewise, the twenty-five largest engineering firms in the Baltimore area employ 676 local engineers (with the largest firm, Parsons Brinckerhoff, not reporting). *Id.* at 128. Unfortunately, the statistics regarding the ratio of engineers to other local staff is reported in a different fashion, and a similar analysis to that employed for architectural firms cannot be used. Moreover, the twenty-five largest engineering firms reported local billings of more than $460 million. *Id.*

174. *Nonemployer Statistics, 1998, Professional, Scientific, and Technical Services, Maryland, at* http://www.census.gov/epcd/nonemployer/1998/md/MD000_54.HTM (last modified Sept. 23, 2003).

175. *Id.*

> Non-employer firm data is primarily comprised of sole proprietorship businesses filing IRS Form 1040, Schedule C, although some of the data is derived from filers of partnership and corporation tax returns that report no paid employees. This data undergoes complex processing, editing, and analytical review at the Census Bureau to distinguish nonemployers from employers, correct and complete data items, and form the final nonemployer universe.

engineers practicing through corporations and generating such enormous billings, the above-described hypothetical demonstrates that the legislative purpose behind the certificate of a qualified expert requirement would be defeated by refusing its protection to corporations.

Further, a refusal to permit corporations engaged in the practice of architecture and professional engineering to enjoy the protection offered by the certificate of a qualified expert requirement may violate the Equal Protection Clause of the Fourteenth Amendment.[176] The Fourteenth Amendment provides that no state is permitted to "deny to any person within its jurisdiction the equal protection of the laws."[177] By granting protection to *individuals*, but not to corporations, both of which practice in the same field, the statute may be in violation of the United States Constitution; in such circumstances, courts should interpret statutes in a manner that is consistent with the Constitution.[178] It is undoubted that corporations enjoy some constitutional right to equal protection.[179] By granting an extraordinary protection to individuals, the requirement of a certificate of merit, a narrow reading of the statute may require that it be invalidated as denying equal protection to corporations engaged in the same activity.

F. Arguments Against Extending the Protection of the Certificate of a Qualified Expert Requirement to Corporations

The primary argument against extending the protection of the certificate of a qualified expert requirement to corporations is the plain language of the statute. The statute defines a licensed professional as a licensed architect[180] or professional engineer.[181] A corporation, necessarily, cannot obtain a license to practice either of these professions.[182] While courts endeavor to give effect to legislative intent, their primary tool for divining such intent is the words of the statute itself.[183] Although the inquiry into legislative intent usually ends at

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Purpose and Use of Nonemployer Statistics, at http://www.census.gov/epcd/nonemployer/view/intro.html (revised Sept. 8, 2004).

176. U.S. CONST. amend. XIV, § 1.

177. *Id.*

178. *See* Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 465-66 (1989) (noting that when possible, statutes enacted by Congress should be interpreted such that they do not violate the Constitution).

179. *See generally* Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181, 188-89 (1888). The Court determined that equal protection concerns arose when one state charged a tax on corporations formed in another state. *Id.*

180. MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-01(c)(1) (2002).

181. *Id.* § 3-2C-01(c)(4).

182. MD. CODE ANN., BUS. OCC. & PROF. § 3-101(b) (2004) (architecture); § 14-101(h) (engineering).

183. Pack Shack, Inc. v. Howard County, 371 Md. 243, 253, 808 A.2d 795, 801 (2002).

the words of the statute,[184] Maryland courts will also consider the "purpose, goal, or context of the statute" in effectuating the intent of the legislature.[185] The purpose of the statute is to prevent frivolous malpractice claims against architects and engineers,[186] a purpose that can only be effectively served by extending the protection of the statute to corporations.[187] Moreover, the strict construction of the statute by the Court of Appeals defeats the purpose of the statute; because so many architects and engineers practice through corporations and so many millions of dollars are generated by that practice each year.[188] The above hypothetical demonstrates how plaintiffs with meritless claims can bypass the statute.

Another argument against extending the protection of the certificate of a qualified expert requirement to corporations is that the individual architects in a corporation should pay some price for gaining limited liability. An architect who incorporates his practice and is a shareholder gains the benefit of limited liability for the debts of the corporation.[189] In exchange for this, the architect or professional engineer should lose the protection offered him by the certificate of a qualified expert requirement, at least as it relates to the corporation's practice. The United States Supreme Court has held that a corporation does not enjoy the same protections under the United States Constitution as a natural person.[190] The issue of whether protections offered by the Constitution are available to corporations, however, "depends on the nature, history, and purpose of the particular constitutional provision."[191] Even putting aside the fact that the protection offered by the certificate of a qualified expert requirement is not constitutional in nature, the "nature, history and purpose" of the provision is clearly to prevent frivolous lawsuits asserting professional design negligence.[192] Hence, the fact that a corporation is not a natural person should not prevent it from receiving this particular protection.

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184. Oaks v. Connors, 339 Md. 24, 35, 660 A.2d 423, 429 (1995).

185. Prince George's County v. Vieira, 340 Md. 651, 658, 667 A.2d 898, 901 (1995).

186. *Supra* note 164 and accompanying text.

187. *See supra* Part III.E.

188. *Supra* notes 173-75 and accompanying text.

189. *See* Damazo v. Wahby, 259 Md. 627, 633, 270 A.2d 814, 817 (1970). Although for those practicing architecture or professional engineering, liability for negligence relating to the rendering of professional services is not limited by virtue of incorporation. MD. CODE ANN., BUS. OCC. & PROF. § 3-402(c)(2) (2004) (architecture); § 14-401(c)(2) (engineering).

190. Okla. Press Pub. Co. v. Walling, 327 U.S. 186, 204-06 (1946). Specifically, the Court noted that corporations are not entitled to the Fifth Amendment privilege against self-incrimination. *Id.*

191. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

192. *Supra* Part III.D.

G. *Arguments Against Extending the Protection of the Certificate of a Qualified Expert Requirement to Corporations Practicing Professional Engineering*

Unlike corporations practicing architecture,[193] corporations that offer professional engineering services are not required to obtain a permit from the Department of Labor, Licensing and Regulation.[194] Some may argue that, because a corporation practicing architecture must obtain a permit, such a corporation more closely fits the definition of a licensed professional within the meaning of the certificate of a qualified expert requirement.[195] Nonetheless, the Maryland code does not contain *any* language indicating that a corporation with a permit to practice a professional service is within the definition of licensed professional.[196] Therefore, if corporations practicing architecture are entitled to the protection offered by the certificate of a qualified expert requirement based on the notion of giving effect to legislative intent,[197] there is no reason to deny such protection to a corporation engaged in professional engineering.

IV. CONCLUSION

The Maryland legislature took an important step in the direction of tort reform by enacting the certificate of a qualified expert requirement. That protection will prove to be meaningless under the Court of Appeals' recent decision in *RTKL Associates* to not extend to the corporate practice of these professions. On the other hand, an extension of the protection to corporations would be consistent with both legislative intent and prior Maryland case law. Further, the courts' narrow reading of the statute, which denies corporations the protection of the certificate of a qualified expert requirement, may render the statute unconstitutional. Accordingly, the Court of Appeals should reverse the holding of *RTKL Associates* and grant corporations practicing architecture or professional engineering the protection offered by the certificate of a qualified expert requirement.

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193. *See* MD. CODE ANN., BUS. OCC. & PROF. § 3-403.
194. *See* MD. CODE ANN., BUS. OCC. & PROF. § 14-401 to 14-602.
195. MD. CODE ANN., CTS. & JUD. PROC. § 3-2C-01(c)(1), (d)(1) (2002).
196. *Id.* § 3-2C-01(c).
197. Pack Shack, Inc. v. Howard County, 371 Md. 243, 253, 808 A.2d 795, 800 (2002).