



**IRMI**<sup>®</sup>

Preconference Workshop 6

***MANAGING COMPLEX CONSTRUCTION  
CLAIMS***

Presented by

**Gale K. Nordling  
Senior Vice President,  
National Construction Advisor  
Aon Risk Services  
Construction Services Group**

***Monday, November 8, 9 a.m.–4:30 p.m.***

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**Gale K. Nordling, JD**  
**Senior Vice President**  
**National Construction Advisor**  
**Aon Risk Services, Construction Services Group**

Mr. Nordling is a panelist for Monday's Preconference Workshop 6, "What's Hot in Construction Risk Management?" Located in Minneapolis, he is Aon Risk Services, Inc.'s, national adviser to the engineering, construction, product manufacturing, and other industries for issues including legal, contract language and claims, contract insurance language interrelationships, all types of insurance and surety coverage and claim issues, Subguard, professional errors and omissions, pollution, property, auto, business interruption, general liability, construction, OSHA, engineering, subrogation, workers compensation, U.S. Longshoremen and maritime claims, settlement techniques and options, collective bargaining of workers compensation, contract risk management issues, and drafting manuscript insurance and Subguard policy language. He also acts as a liaison to other professional resources.

Mr. Nordling has 33 years' experience as an engineer, practicing attorney, risk manager, insurance broker, and expert witness. He has been involved with the preparation, negotiation, settlement, litigation, arbitration, mediation, and insurance coverage of more than \$500 million of claims and contract disputes for engineers, contractors, suppliers, and owners such as universities, hospitals, states, airlines, casinos, and utilities. Mr. Nordling joined Aon in 1997 after serving as vice president and general counsel (including risk manager) at Cherne Contracting Corporation. He developed early alternatives and improvements to Subguard.

Mr. Nordling served on a national committee to create a national pooled inventory and management of safety-related spare equipment for all nuclear plants. Mr. Nordling worked at S.J. Groves & Sons, an international contractor, and while at Cherne Contracting established a state-of-the-art workers compensation claim management system, and a nationally recognized collective bargained workers compensation program. Mr. Nordling served on the Minnesota Governor's Task Force on Workers' Compensation Reform and has been a local and national speaker.

He has current licenses to practice in Minnesota and federal courts. Mr. Nordling has a B.S.EE from the University of Minnesota Institute of Technology and a J.D. from William Mitchell College of Law and is in the process of completing Chartered Property Casualty Underwriter (CPCU) designation requirements.

## ***Notes***

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.

# MANAGING COMPLEX CONSTRUCTION CLAIMS

**Gale K. Nordling**  
**Aon Risk Services Construction Services Group**

## Typical “Bone Crunching” Complaint Allegations

- ⊖ Breach of Contract
- ⊖ Breach of Implied Warranty
- ⊖ Breach of Express Warranty
- ⊖ Negligence
- ⊖ Negligent Misrepresentation
- ⊖ Fraudulent Misrepresentation
- ⊖ Professional Negligence
- ⊖ Breach of Fiduciary Duty
- ⊖ Spoliation
- ⊖ Intentional Concealment and Suppression of Fact
- ⊖ Conversion
- ⊖ Enforcement of performance and payment bond
- ⊖ Indemnity
- ⊖ Contribution
- ⊖ Reformation of contract
- ⊖ Improper Insurance

## Typical Damages

- ⊖ Damage to structure
  - Wholesale repairs
  - Resultant damages
  - Remediation / cleaning
  - Building contents damaged
  - Extra costs with building in use
- ⊖ Reduction in value
- ⊖ Loss of revenue
- ⊖ Defective product
- ⊖ Defective design
- ⊖ Future repair and replacement costs
- ⊖ Loss of use

## **Damages Resulting From**

- ⇒ Wrong product
- ⇒ Poor workmanship
- ⇒ Failure to follow specification
- ⇒ Defective design
- ⇒ Inadequate inspection
- ⇒ Poor quality control
- ⇒ Improper system setup and balancing
- ⇒ Improper operation
- ⇒ Improper maintenance

## **Defendants / Cross Complaints / Third Parties**

- ⇒ General Contractor
  - Subcontractors
  - Suppliers / distributors
  - Product manufacturers
- ⇒ Architect / Engineer
  - Subconsultants
    - Geotech, Structural, HVAC, Electrical
  - Surveyors
- ⇒ Maintenance Firms
- ⇒ Operational Firms

## **Complex / Multiple Exposures**

- ⇒ Multiple buildings / projects
- ⇒ Multiple periods of constructions
- ⇒ Multiple locations
- ⇒ Multiple states
- ⇒ Multiple subcontractors
- ⇒ Multiple plaintiffs
- ⇒ Change of ownership
- ⇒ Change of use
- ⇒ Long-term tail liability

## **Statutes of Limitations / Repose**

- ⇒ Tort - Negligence
- ⇒ Contract
- ⇒ Uniform Commercial Code
- ⇒ Professional E&O
- ⇒ Product Liability
- ⇒ Improvements to Real Estate
- ⇒ Interstate Conflicts

## **Complex Insurance Considerations Multiple Lines of Insurance**

- ⊖ GL
- ⊖ Builders Risk
- ⊖ Umbrella / Excess
- ⊖ Professional
- ⊖ Pollution
- ⊖ Surety
- ⊖ Subcontractor Default Insurance

## **Insurance Considerations What Law Governs The Policies?**

- ⊖ Case law
- ⊖ Location of project
  - Multiple state exposures
- ⊖ Location of direct parties
- ⊖ Location of third parties
- ⊖ Contract provisions
- ⊖ State insurance purchased in
- ⊖ Insurance policy provisions

## **Complex Insurance Considerations Triggers**

- ⌚ Time on risk
- ⌚ Manifestation
- ⌚ Actual damage
- ⌚ Actual event

## **Other Limitations on Recovery**

- ⌚ Owner / GC contract
- ⌚ Subcontract
- ⌚ Architect / Engineer contract
- ⌚ Supplier contract
- ⌚ Maintenance contract
- ⌚ Operation contract
- ⌚ Insurance policies
- ⌚ State law / lack of privity

## **Insurance Company Response**

- ⇒ Case law, case law, case law
- ⇒ Duty to defend
- ⇒ Reservation of rights
- ⇒ Conflict of interest
- ⇒ Confession of judgment
- ⇒ Independent counsel

## **Additional Insured Endorsements**

- ⇒ CG 2010 / 2026 1985 form
  - “arising out of” -  
*Acceptance Ins. Co. v Syufy Enterprises 81 Cal. Rptr. 2d 557 (1999)*
  - completed operations
- ⇒ CG 2010 1993 / 1997 forms
  - no completed operations
- ⇒ CG 2010 2004 new form
  - no completed operations
  - “caused in whole or part”
  - sole negligence excluded
- ⇒ Residential exclusions
- ⇒ BFPD exclusions

## **Additional Insurance Policy Considerations**

- ⦿ “Other insurance”
- ⦿ Subrogation
- ⦿ Deductibles
- ⦿ Aggregates
- ⦿ SIRs
- ⦿ Primary / non-contributory

## **Use of Experts**

- ⦿ Internal resources
- ⦿ External resources
  - Daubert considerations
  - License to practice
  - Attorney client privilege
- ⦿ Shared experts
  - Joint defense
  - Termination of joint defense agreement
- ⦿ Conflict of interest

## **Spoliation of Evidence**

- ⇒ *Hoffman v Ford Motor Co.*, 587 N.W. 2d (1998)
  - Duty to notify
  - Duty to not alter
  - Duty to preserve evidence
- ⇒ *Boyd v Travelers Ins. Co.*, 652 N.E. 2d 267 (Ill. 1995)
  - Independent tort
- ⇒ Insurance coverage
- ⇒ Sanctions

## **Records**

- ⇒ Corporate records
- ⇒ Job site records
- ⇒ Personal records
- ⇒ Consultant records
- ⇒ Subcontract records
- ⇒ Police reports
- ⇒ Document management system

## **Counsel**

- ⇒ Insurance company appointed counsel
  - Coverage counsel
  - Staff counsel
  - Conflict of interest
- ⇒ Counsel appointed for “Additional Insured”
- ⇒ Joint counsel / joint defense for multiple defendants

## **Settlements**

- ⇒ Global
- ⇒ Partial / carve-outs

## **Class Action vs Traditional Suits**

- ⇒ Traditional litigation in construction defect
  - One or small number of plaintiffs
- ⇒ Class action
  - Large number of plaintiffs
  - Standing
  - Individual issues
  - Damages
  - Venue
  - Single state vs national class

## **Construction Defect “Class Action in Disguise”**

- ⇒ Plaintiff may really be a representative for a whole class of claimants (i.e., Association for development)
- ⇒ Attorney’s fees related to effort in overall case
- ⇒ Multiple defendants
- ⇒ Difficult to get dismissed
- ⇒ Cost of defense high

## **Techniques for Successful Outcomes Pre-project—Project Evaluation**

- Owner
  - Capitalization
- Location
- Quality and completeness of design
  - Performance spec
  - Within area of A/E expertise
  - Value engineering
- Schedule
- Contractor experience, available personnel, resources, capital
- Labor pool and local economy
- Safety standards

## **Techniques for Successful Outcomes Pre-project—Contract Terms and Conditions**

- ⇒ Owner / Contractor
- ⇒ Owner or Contractor / AE
- ⇒ Contractor / Subcontractor
- ⇒ Contractor / Supplier
- ⇒ Insurance policy contracts
  - Project-specific
  - Subcontract
  - Professional

## **Techniques for Successful Outcome Pre-project—Evaluations**

- ⇒ Soils
- ⇒ Survey
- ⇒ Water intrusion
- ⇒ Sound attenuation
- ⇒ Seismic
- ⇒ Structural
- ⇒ MEP
- ⇒ Product selection

## **Techniques for Successful Outcomes Construction Management**

- ⇒ Subcontractor selection
- ⇒ Product selection
- ⇒ Due diligence
- ⇒ Quality control
- ⇒ Corrective actions
- ⇒ Documentation / photos / video

## **Techniques for Successful Outcome Long-Term Obligations**

- ⇒ Construction defect
- ⇒ Statute of limitations /  
statute of repose
- ⇒ Warranties
- ⇒ Contractual requirements
- ⇒ Negligence / third-party  
actions
- ⇒ Surety / CDI
- ⇒ Project insurance policies
- ⇒ Renewals

## **Techniques for Successful Outcomes Alternative Dispute Resolution**

- ⇒ Management meet and confer
- ⇒ Mediation
- ⇒ Arbitration
- ⇒ Statutory (i.e., California SB 800)

## **Techniques for Successful Outcomes Mandatory Arbitration Clauses**

### ⇒ Advantages

- Avoidance of class actions
- Limitation of types and amounts of damages
- Timing for complete resolution
- Expense

## **Techniques for Successful Outcomes Mandatory Arbitration Clauses**

### ⇒ Disadvantages

- May not follow the law
- Discovery
- Right to appeal
- Binding effect / third parties
- Expertise of arbitrator
- Insurance coverage issues

**Techniques for Successful Outcomes  
Contract Drafting Considerations for  
Alternative Dispute Resolution**

- ⇒ Time frames
- ⇒ Discovery
- ⇒ Expertise and selection of neutral arbitrator
- ⇒ Procedure
- ⇒ Costs
- ⇒ Choice of law

**Techniques for Successful Outcomes  
Contract Drafting Considerations for  
Alternative Dispute Resolution – cont.**

- ⇒ Confidentiality
- ⇒ Location of proceeding
- ⇒ Enforcement of award
- ⇒ Conclusiveness