

## Workshop W3

*Wednesday, October 31, 9:00 a.m. – noon*

# **COMPLETED OPERATIONS RISKS**

Presented by



**Owen J. Shean**  
Shareholder  
Akerman Senterfitt Wickwire Gavin

The completed operations exposure raises numerous concerns for contractors. Common issues include identifying who can bring claims against the contractor, when the contractor's exposure ends, whether the exposure differs based on the type of construction, and how completed operations risks are transferred in a merger or acquisition. This session answers all of these and other questions and offers steps for minimizing and managing the completed operations exposure.

- Reviews the protections and limitations of statutes of limitations and statutes of repose.
- Outlines differences in completed operations exposures of different construction methods, such as design-build or construction management.
- Examines potential liability for completed operations when acquiring or merging with another firm.



# 5 reasons CNA is the right insurance solution for contractors.

- 1** We understand the construction business and insure a significant share of the industry.
- 2** We provide enhanced critical coverages for contractors that aren't readily offered by other carriers. These include enhancements like wrap around and excess limits coverages for work performed on Wrap-ups.
- 3** We provide Risk Control programs, information and education—via the Web, printed guides and classroom training—that can help identify and reduce your loss exposures.
- 4** Our experienced claim adjusters process claims quickly and fairly and help injured workers get healthy and return to work sooner. Your agent can access cases—day or night—through our Claim Web site. We make certain claim information available, as permitted by law.
- 5** We actively listen to the needs of contractors and constantly look to refine our products and services. One of the ways we accomplish this is through our association with risk management leaders, such as IRMI.

We're a great insurance **partner** when you need us most.

CNA helps manage the unique risks of construction professionals. Our partnerships with trade associations, industry experts and independent agents ensure that we stay ahead of industry trends and develop coverages based on your needs. And with more than 100 years of experience providing Claim and Risk Control services, we're there.

To find out more about CNA, call your local independent agent or visit [www.cna.com](http://www.cna.com).

One or more of the CNA companies provide the products and/or services described. The information is intended to present a general overview for illustrative purposes only. It is not intended to substitute for the guidance of retained legal or other professional advisors or to constitute a binding contract. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services may not be available in all states. Use of the term "partnership" and/or "partner" should not be construed to represent a legally binding partnership. CNA is a service mark registered with the United States Patent and Trademark Office. Copyright © 2006 CNA. All rights reserved.

**Owen J. Shean**  
**Shareholder**  
**Akerman Senterfitt Wickwire Gavin**

Mr. Shean is copresenting Workshop W3, "Completed Operations Risks," on Wednesday morning. He has more than 20 years' experience representing clients in construction and commercial disputes, including construction claims, construction liens, insurance coverage matters, bond claims, and other contract disputes. Such engagements have involved power generation facilities, semiconductor plants, wastewater treatment plants, chemical processing facilities, and hospitals/medical facilities. Mr. Shean also has substantial experience in contract drafting and contract review. His experience includes preparation of owner-contractor agreements, owners-architect agreements, and design/build agreements. His recent experience includes preparation of construction documents for multi-use condominium projects.

In addition to his many successes representing clients in legal cases, contractual matters, and arbitration/mediation events, Mr. Shean is coauthor of *Construction Insurance: Coverages & Disputes*, The Michie Company, 1994, updated 1995, 1999, 2000, and 2001. He also wrote "Indemnity, Insurance, and Limitations of Liability in Design-Build Contracts," *Insurance Risk Management Institute Publications*, 2002; and "Hard Hat Case Notes," *The Construction Lawyer*, The Journal of the American Bar Association Forum on the Construction Industry, 1999-2004. He coauthored "Insurance Coverage for Design-Build Activities," *Construction Disputes: Representing the Contractor*, Aspen Law & Business.

Mr. Shean has been an adjunct professor at Georgetown University Law Center since 1988. He also has served as an adjunct faculty member in Construction and Government Contract Law at Virginia Tech University, Department of Building Construction, since 2000. He has numerous speaking engagements to his credit, with audiences including, in addition to IRMI, Lorman IRMI Education, Association of General Contractors, American Bar Association, and China Ministry of Construction Delegation.

He is a member of the American Bar Association, District of Columbia Bar Association, Virginia State Bar Association, and Associated General Contractors of America. His court admissions include Virginia Supreme Court, U.S. District Court, District of Columbia; and U.S. Court of Appeals, District of Columbia. Mr. Shean earned his J.D. from the University of Virginia School of Law and his B.A. from the University of Virginia, *magna cum laude*.

He was formerly a Wickwire Gavin, P.C., shareholder.

## ***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.



## 27th IRMI Construction Risk Conference October 31, 2007

### *"Completed Operations Risks/Notice and Repair Statutes"*

Owen J. Shean, Esq.  
Akerman Senterfitt Wickwire Gavin



## Completed Operations Risks

- Contractual vs. Tort Exposures
- Warranty Obligations
- Indemnity Obligations
- Statutory Requirements

2

## **Notice & Repair Statute**

- Statutory Responses to Residential Construction Defects in late 1980s & 1990s
- Statutory Enactments
  - Notice
  - Opportunity to Cure
  - Exchange of Information
- Modeled after Tenant Landlord Statutes
- Incorporate Mediation/ADR Procedures

3

## **Statutory Scope & Definition**

- "Contractor" vs. "Construction Professional"
- "Inspection"
- "Residential Construction"
- "Construction Defect"
- "Good Faith" Obligations
- "Settlement"

4

## **Legal Issues**

- Statute of Limitations
- Warranty on Repairs
- Applicability to Insurers & Subcontractors
- Admissibility of Inspections/Settlements
- Applicability to Subsequent Defects

5

## **Competing Benefits vs. Burdens**

### **BENEFITS**

- Imposition of Discovery/ADR Regime
- Settlement Protocol
- Preservation of Evidence
- Early Opportunity for Third-Party Participation

6

## **Competing Benefits vs. Burdens (cont'd)**

### **BURDENS**

- Statute of Limitation Defenses
- Preservation of Subrogation and Third-Party Claims
- Warranty with Respect to Repairs

7

## **California Right To Repair Statute**

- Outgrowth of protracted construction defect litigation in 1980s and 1990s
- Comprehensive catalogue of "Construction Defects" which are actionable
- Limits damages recoverable for construction defects
- Statutory system developed in wake of Aas decision

8

## California Repair Statute

- Broadly applies to actions against builder/developers, contractors, subcontractors, material supplier, product manufacturer, and design professionals
- Applies to residential construction/renovation but not condo conversion
- Applies to "Claimants" whether homeowners or associations
- Does not apply to personal injury actions

9

## California: Definition of Construction Defects

- Catalogue of Defects
- Water Issues
- Windows, Roofs, and Decks
- Foundation Systems
- Stucco Systems
- Plumbing and Sewer Systems
- Soil Issues
- Electrical Systems

10

## **California Catalogue of Defects**

- ❑ Descriptive and qualitative
- ❑ Incorporation of building codes, ordinances and regulations
- ❑ Incorporation of limitations periods
- ❑ Functions or building components not addressed by standards are actionable if they cause "damage"

11

## **California Definition of Defect "Water Issues"**

- ❑ "Windows, patio doors, deck doors, and their systems shall not allow water to pass beyond, around, or through the window, patio door, or deck door or its designed or actual moisture barriers, including, without limitation, internal barriers within the systems themselves. For purposes of this paragraph, 'systems' include, without limitation, windows, window assemblies, framing, substrate, flashings, and trim, if any."

California Civil Code Section 896-897

12

## **California Definition of Defect "Earthquake/Wind Load"**

- "A structure shall be constructed so as to materially comply with the design criteria for earthquake and wind load resistance, as set forth in the applicable government building codes, regulations, and ordinances in effect at the time of original construction."

California Civil Code Section 896-897

13

## **California Definition of Defect "Electrical Systems"**

- "Electrical systems shall operate properly and shall not materially impair the use of the structure by its inhabitants. However, no action shall be brought pursuant to this subdivision more than four years from close of escrow."

California Civil Code Section 896-897

14

## Other Actionable Defects

- Catalogue of Defects actionable within framework of statute
- Other defects actionable to the extent they cause "damage"
- Preservation of Aas for non-statutory defects

15

## Procedure

- Pre-Litigation procedure
- Written notice to "Builder" of Claim is pre-requisite of filing lawsuit
- Does not apply to or satisfy the requirements of builder's service contract/warranty program
- Notice pursuant to builder's service or warranty program satisfies statutory requirement

16

## **Content of Notice**

- Name, address, and "preferred method of contact"
- Allegation of statutory claim
- Reasonable description of nature, location, and extent of "violations"
- Notice has the same force and effect as notice of commencement of legal proceeding

17

## **California: Disclosure/ Response of "Builder"**

- Duty to "provide," within 30 days of notice, relevant plans, specifications, reports, calculations
- Copying costs borne by Claimant
- No duty to copy
- Obligations excused in event documents unavailable due to loss or destruction not the result of Builder's fault
- Obligation to assist Claimant if documents unavailable

18

## **California: Builder's Written Acknowledgement of Claim**

- ❑ Builder's duty to acknowledge, in writing, the receipt of the claims within 14 days
- ❑ Failure of Builder to acknowledge claim, provide disclosures, or otherwise fail to comply with statutory requirements *then*
- ❑ Claimant is released from pre-litigation requirements of statute

19

## **California: Builder's Election to Inspect and Test**

- ❑ Right of Builder to inspect and test premises within 14 days of acknowledgement of claim
- ❑ Builder responsible for costs of inspection and restoration of property
- ❑ Claimant entitled to observe, videotape or photograph inspection
- ❑ Inspection not admissible to prove spoliation
- ❑ If Builder intends to hold sub, designer, insurance carrier (except its own) responsible for claim, obligation to notify party in sufficient time to attend inspection
- ❑ Builder's right to request second inspection/testing within 40 days of initial

20

## California: Builder's Offer to Repair

- Right to offer in writing to repair defect(s)
- Offer "shall" include compensation for damages recoverable under statute
- Damages recoverable under statute do not include economic loss for "diminution in value" of property
- Obligation to provide detailed repair plan together with applicable plans/drawings
- Obligation to identify in writing the parties to perform the repairs
- Right of Claimant to request the names of up to 3 additional contractors to perform repairs
- Offer must include offer to mediate at option of Claimant
- If mediation is unsuccessful, Builder has right to repair

21

## Builder's Election To Repair

- Right to repair some or all of alleged defects
- If Builder elects to repair some of the defects, obligation to provide written explanation for not repairing all defects
- Failure to complete repair releases Claimant from procedural requirements

22

## **Legal Effect of Repair**

- ❑ Builder not entitled to release or waiver in exchange for repair
- ❑ Claimant retains right to pursue action for violation of statutory standards/inadequate repair, or both
- ❑ Evidence of Repair Effort is admissible in subsequent proceeding
- ❑ Statute of Limitations tolled for 100 days after completion of repair
- ❑ Otherwise, Statute of Limitations is tolled for 45 days after date for Builder's response

23

## **Consequences of Claimant's Failure To Follow Statute**

- ❑ Builder may seek stay of proceedings pending Claimant's compliance with the statutory requirements
- ❑ Court may award costs and attorney's fees to prevailing party on such a motion

24

## Legal/Evidentiary Considerations

- Builder not entitled to release if repairs are undertaken
- Builder may obtain "reasonable" release in the event of cash settlement
- Repair effort/conduct of parties admissible in subsequent proceedings
- Mediation proceedings not admissible

25

## Legal/Evidentiary Considerations

- Codifies affirmative defenses, including:
  - Failure of Claimant to prevent or mitigate damages
  - Failure of Claimant to follow builder/manufacturer's recommendations
  - Alterations, wear and tear
- Preserves defenses available under common law and contract
- Preserves third-party rights against contractors, subcontractors, suppliers, and design professionals

26

## **Scope of Recoverable Damages**

- Reasonable costs for:
  - repair defects
  - repair damages caused by defects or repair efforts
  - relocation and storage
  - investigation costs
- Statute does not provide for recovery of "diminution in value" of property
- Statute does not include punitive damages
- Statute preserves recovery of "costs and fees" recoverable under contract or statute

27

## **Other Limitations**

- Establishes 10-year statute of repose
- Statute applies only to new residential construction purchased on or after January 1, 2003
- Sunset provision repealing statute January 1, 2008, absent later enactment

28

## **Florida "Notice and Opportunity To Repair Statute"**

- Substantially more abbreviated than California
- Includes regime for notice and opportunity to repair as condition for legal action
- Does not explicitly contain process for mediation independent of other rules or statutory provisions
- Does not contain independent limitations upon causes of action or recoverable damages

29

## **Florida Statute**

- Notice and opportunity repair as condition for maintaining legal action
- Action may not proceed absent compliance with statutory requirements
- Court required to abate an action—without prejudice—in absence of compliance

30

## **Florida Statute (cont'd)**

- "Action" includes both legal actions for damages as well as indemnity
- Statute broadly applicable to builders, contractors, subcontractors, suppliers, and design professionals
- "Claimant" defined as homeowner, including associations and subsequent purchasers

31

## **Florida Definition of Construction Defect**

- "Construction Defect" means deficiency resulting from:
  - Defective products or materials
  - Violation of building codes
  - Design deficiencies
  - Failure to adhere to standards of good and workmanlike construction
- Does not contain substantive standards
- Cross-references cause of action under Florida Building Code

32

## Florida Building Code

- "Notwithstanding any other remedies available, any person or party, in an individual capacity or on behalf of a class of persons or parties, damaged as a result of a violation of this part or the Florida Building Code, has a cause of action in any court of competent jurisdiction against the person or party who committed the violation;

33

## Florida Building Code (cont'd)

- however, if the person or party obtains the required building permits and any local government or public agency with authority to enforce the Florida Building Code approves the plans, if the construction project passes all required inspections under the code, and if there is no personal injury or damage to property other than the property that is the subject of the permits, plans and inspections, this section does not apply unless the person or party knew or should have known that the violation existed."

Regulation of Trade, Commerce, Investments, and Solicitations, Florida Statute Section 553.84

34

## **Procedure and Content of Notice**

- Obligation of Claimant to provide written notice of defect prior to filing legal action
- Written notice to contracting party if defect arose from performance of work under a written contract
- Notice must set forth description of defect and damages

35

## **Opportunity for Inspection and Testing**

- Claimant must provide opportunity for inspection and destructive testing
- Recipient must provide written notice of need for inspection and destructive testing
- Notice must provide details of destruction, repair, schedule, and financial responsibility
- Claimant is entitled to object to party proposed to perform destructive testing; entitled to list of 3 other qualified entities

36

### **Consequences of Claimant's Failure To Permit Destructive Testing**

- If Claimant "fails or refuses to agree to destructive testing"
- Claimant "has no claim for damages"
- If:
  - Damages could have been avoided or mitigated had destructive testing been performed and
  - A feasible remedy been promptly implemented

37

### **Recipient's Response to Claimant's Notice**

- Right to forward notice to contractor, subcontractor, supplier, or design professional which it believes responsible for the defect
  - Subsequent recipient in turn has rights and obligations of inspection and testing
  - Subsequent recipient has obligation to provide written response
- Obligation to provide written response to Claimant

38

## **Obligations/Options for Written Response to Claim**

- ❑ Obligation to provide written response within statutory deadlines
- ❑ Five options:
  - Offer to remedy defect at no cost to Claimant
  - Offer to settle and compromise the claim by payment, independent of insurer
  - Combination of repair and payment
  - Dispute the claim and the reasons for dispute
  - Statement that payment will be determined by recipient's insurer within 30 days of notification of insurer

39

## **Mutual Obligation of Parties to Exchange "Available Discoverable Evidence"**

- ❑ Upon "notice," parties have mutual obligation to exchange information
- ❑ Evidence includes expert reports, photographs, and videotapes
- ❑ Expert reports inadmissible in subsequent litigation unless expert testifies or testifying expert relies upon the report
- ❑ Party who fails to comply is subject to sanctions in any subsequent litigation

40

## **Claimant's Written Response**

- Obligation of Claimant to accept or reject in writing any offer of settlement within 45 days
- Offers of settlement may be offer to repair at no expense to Claimant and/or monetary payment
- Partial settlements permitted
- If offer to repair accepted, Claimant must make premises available for repair and Recipient must perform repairs in a timely fashion and in accordance with the terms of the settlement

41

## **Consequences of Failure by Recipient or Recipient's Insurer To Comply with Process**

- Excuses Claimant from further compliance with the statutory and procedural requirements
- Permits the Claimant to proceed "without further notice" with an action against the recipient

42

## Other Legal and Evidentiary Implications

- Notice tolls statute of limitations for claims against recipient and its surety
  - for 120 days *or*
  - 30 days after the repair period or payment period—subject to stipulation of the parties
- Evidence of offer of settlement or refusal to make offer is inadmissible in subsequent litigation

43

## Other Legal and Evidentiary Implications

- In the event of an arbitration clause, the provisions of the statute control
- Statute does not create or bar other rights and defenses except as specifically provided by the statute
- Statute does not create any new or independent causes of action
- Statute does not relieve a party from notice provisions under policy of liability insurance
- Statute does not alter or change existing law in Florida regarding respective rights of insured and insurers except as specifically set forth in the statute

44

### **Broader Significance of Residential Notice and Repair Statutes**

- Expansion of completed operations/tail exposure for residential construction
- Expansion of Mediation/ADR as preferred method for resolution of residential construction defects
- Codification of "construction defects"

45

### **Broader Significance of Residential Notice and Repair Statutes (cont'd)**

- Dilution of "privity/economic loss" doctrines
- Added complexity to "warranty claims"
- Statutory parameters for recoverable damages
- Posture of Insurers and Sureties
- Role of statutory scheme in context of class action litigation and foreclosure proceedings

46

## **Final Observations**

- ❑ Are these protocols and procedures limited to residential construction?
- ❑ Do they foreshadow changes outside simply residential construction?
- ❑ "South Carolina Notice and Opportunity to Cure Nonresidential Construction Defects Act"

47

## **Applicability of South Carolina Nonresidential Notice/Repair Statute**

- ❑ "'Action' means a civil action in any forum, including an arbitration proceeding, for damages or indemnity asserting a claim for damages, injury, or loss arising out of an alleged defect, act, or omission relating to the design, construction, or condition of the alteration, modification, renovation, or repair of a nonresidential building or structure upon real estate including, but not limited to, utility systems, the boring, and equipping of wells, the preparation of plans, specification, and design drawings, and the work of making the real estate suitable as a site for the building or structure, surveying and staking,

48

**Applicability of South Carolina  
Nonresidential Notice/Repair Statute  
(cont'd)**

- the grading, bulldozing, leveling, excavating, and filling of land including the furnishing of fill soil, the grading and paving of curbs and sidewalks and all asphalt paving, the construction of ditches and other drainage facilities, the laying of pipes and conduits for water, gas, electric, sewage, and drainage purposes, and the disposal of any construction and demolition debris, as defined in Section 44-96-40(6) including final disposal by a construction and demolition landfill of nonresidential property."

South Carolina Statutes Section 40-11-510

49

**CONCLUSION**

50

