

Perrin Conferences National Construction Defect Conference



Nov. 9-10, 2023 | New Orleans, LA

Conference Co-Chairs



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Perrin Conferences

National Construction Defect Conference



A Coast to Coast Analysis on CD Trends

Moderator



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*Perrin Conferences – National Construction Defect Conference
Macroeconomic Trends In CD*



Industry Macroeconomic Trends and Data

DISCLAIMERS

WHAT DOES DATA TELL US?

Where we have been.

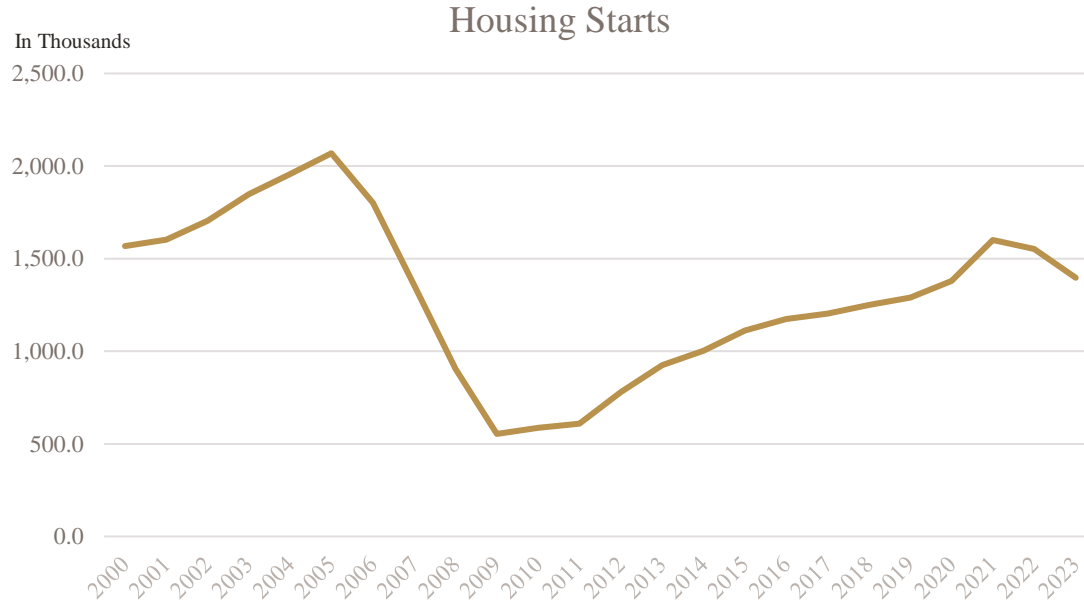
Where we are now.

Where are we going???

HOW WILL OUR BUSINESS BE IMPACTED?

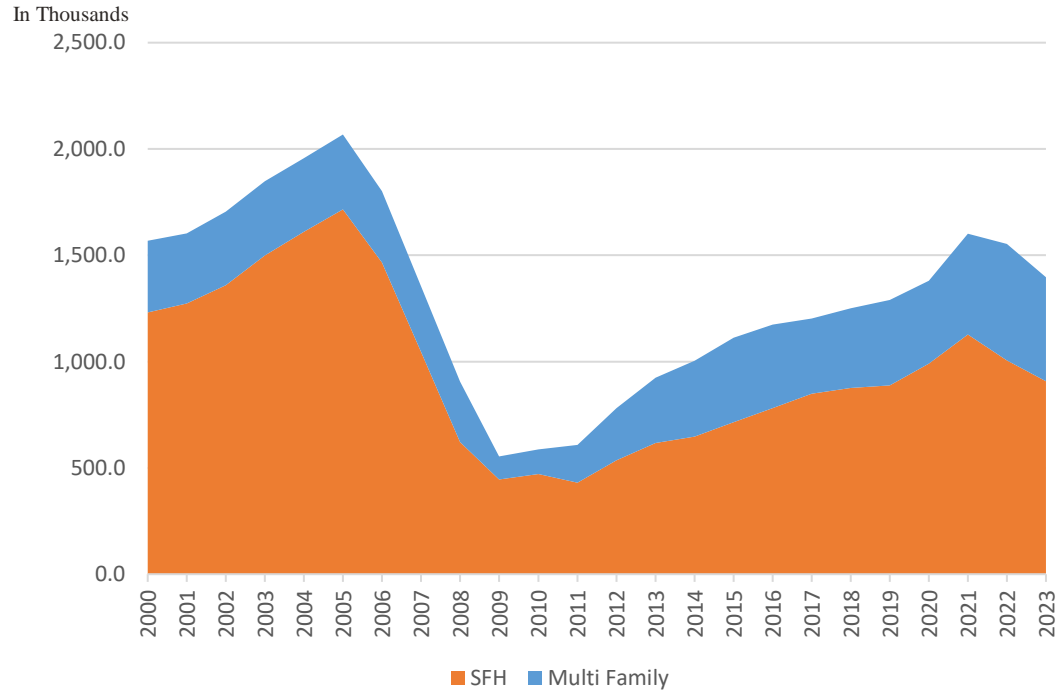


Housing Starts – U.S. Total



Data Source: U.S. Census Bureau
Chart: The RiverStone Group

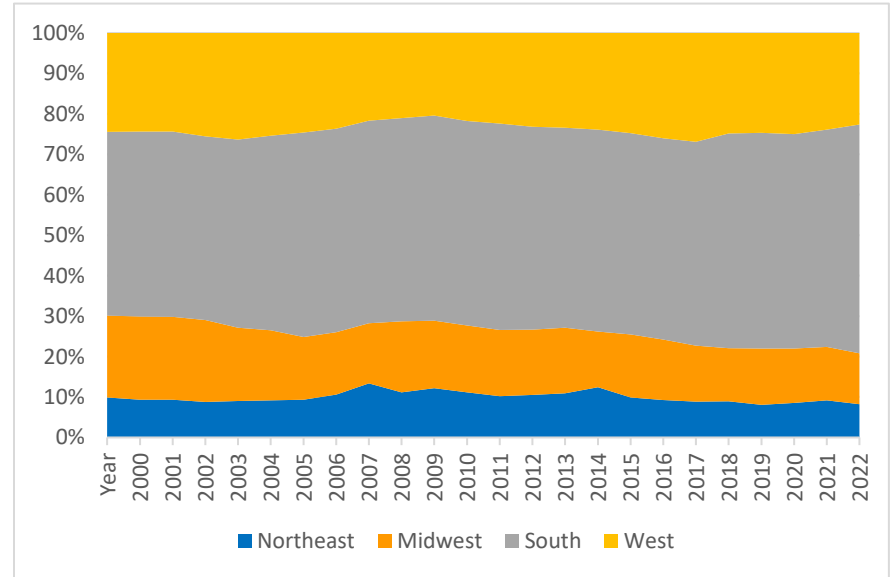
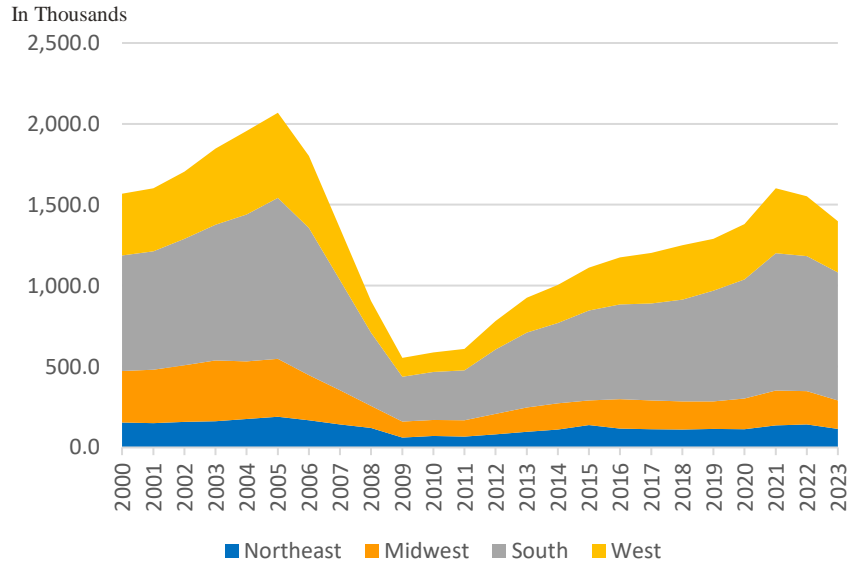
Housing Starts – Single Unit vs. Multi-Family



Legend: SFH (Orange), Multi Family (Blue)

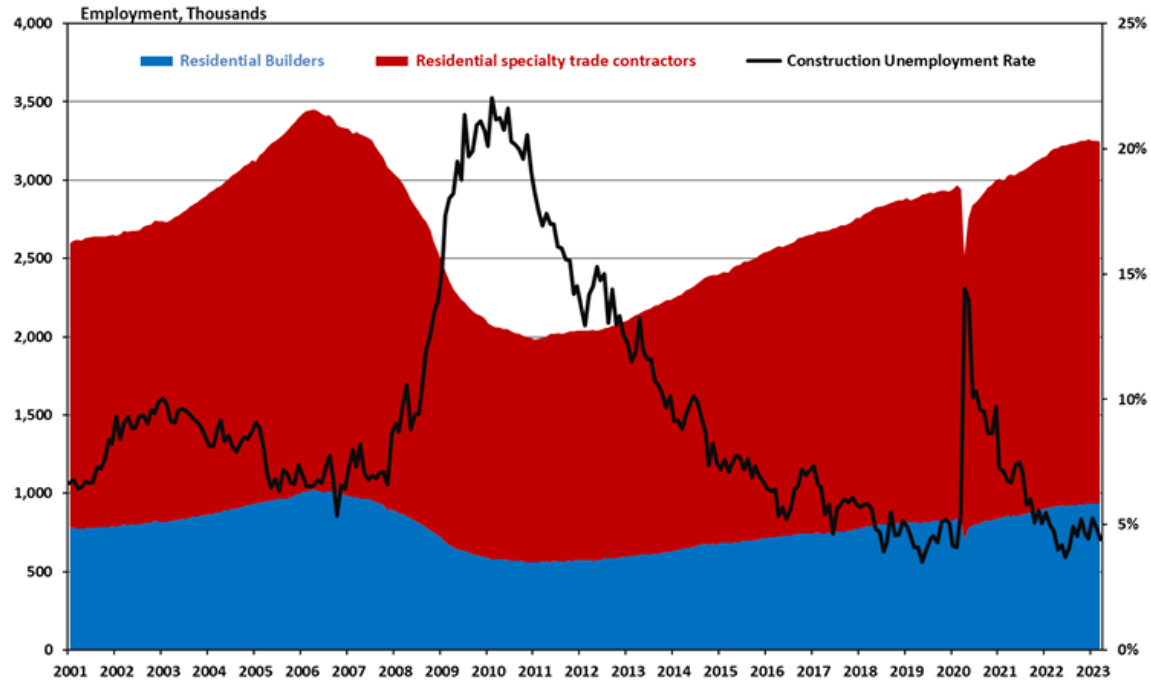
Data Source: U.S. Census Bureau
Chart: RiverStone Resources, LLC

Housing Starts by Region



Regional Housing Starts
Data Source: U.S. Census Bureau
Chart: RiverStone Resources, LLC

Residential Construction Employment & Unemployment



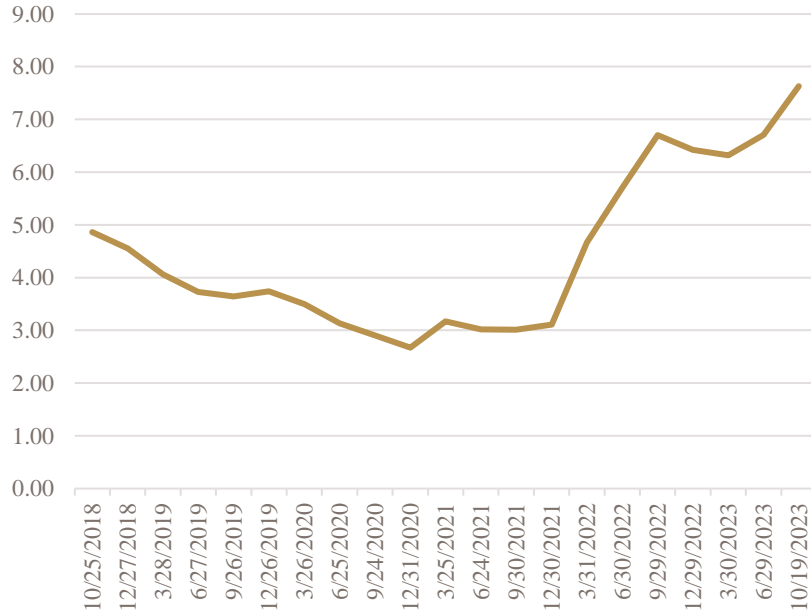
Residential Construction Employment and Unemployment Rate

Data Source: U.S. Bureau of Labor Statistics

Chart Source: Home Builders Institute – The HBI Construction Labor Market Report, June 2023

30 Year Mortgage Rates

5 Year History



50 Year History



30 Year Mortgage Rates

Data Source: Freddie Mac via St. Louis Federal Reserve Bank

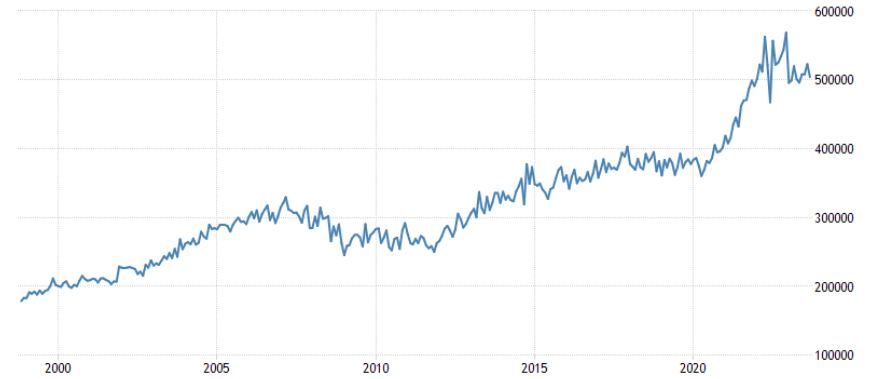
Chart: The RiverStone Group

Housing Inventory & Average House Price

Housing Inventory



Average SFH Price



25 Year Housing Inventory & 25 Year Average Home Price
Data Source: National Association of Realtors & US Census Bureau
Charts: tradingeconomics.com

PPI – Building Materials and Supplies Dealers

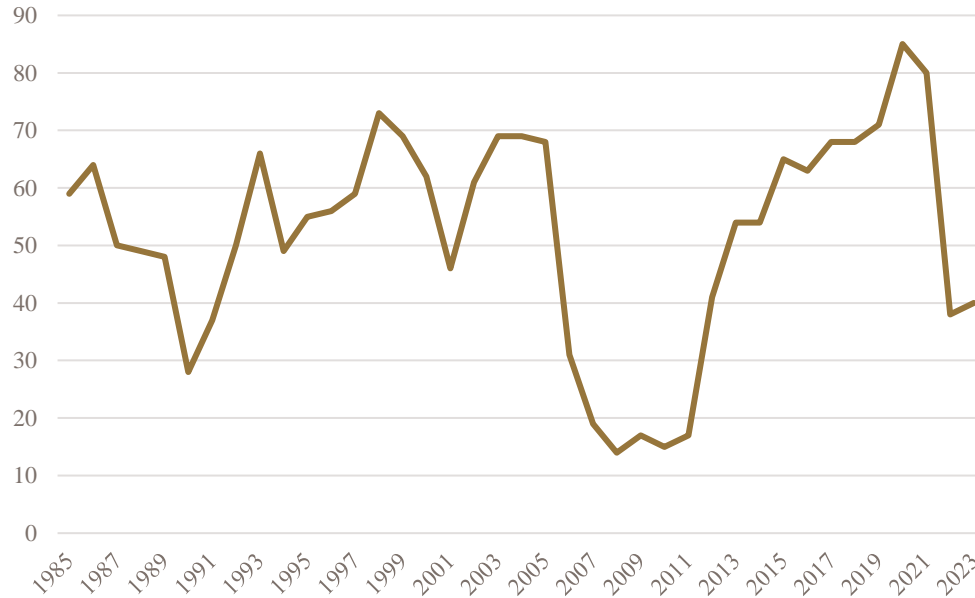


Producer Price Index – Building Materials and Supplies Dealers

Data Source: U.S. Bureau of Labor Statistics

Chart Source: St. Louis Federal Reserve Bank

NAHB/Wells Fargo Housing Market Index



Measures the sentiment of home builders.

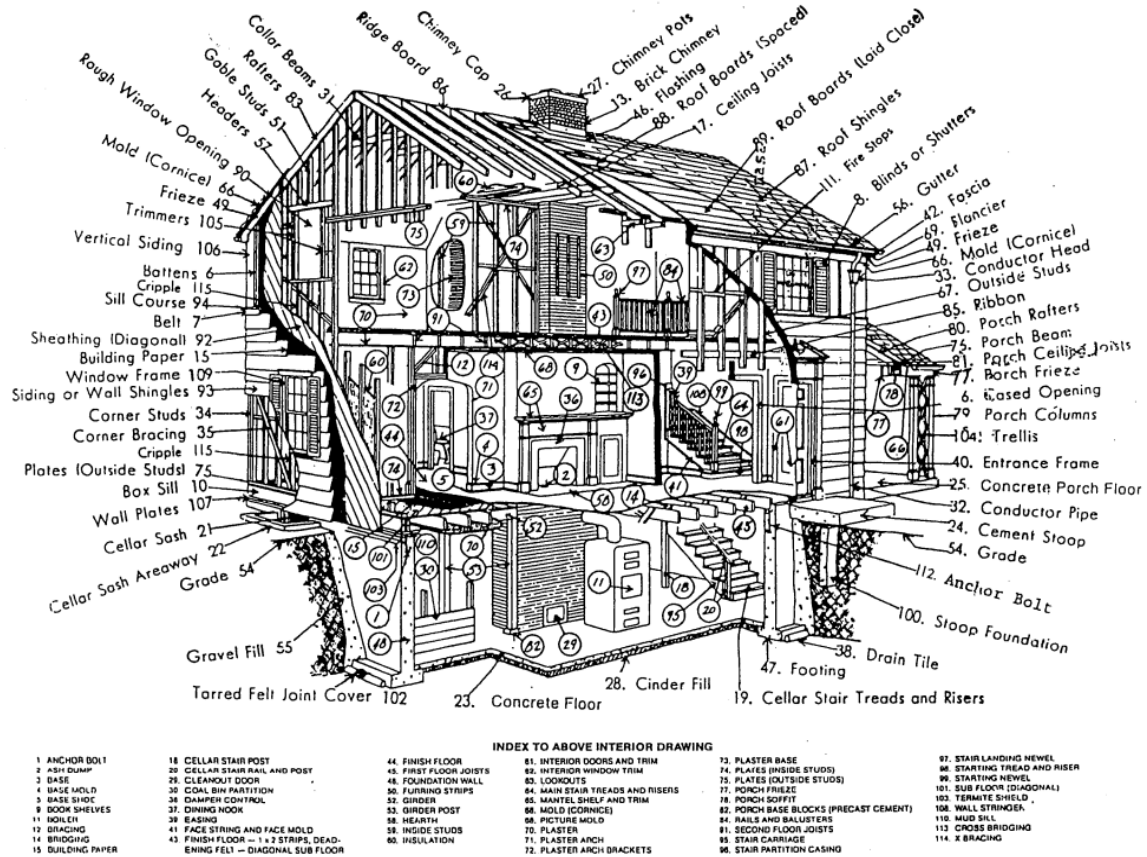
Weighted average of three separate component indices:

- present single-family sales,
- single-family sales for the next six months, and
- traffic of prospective buyers.

Housing Market Index
Data Source: National Association of Home Builders
Chart: The RiverStone Group

DEVELOPMENTS IN CONSTRUCTION LAW

- States we cover:
- Washington
- Oregon
- California
- Nevada
- Arizona
- New Mexico



WASHINGTON

MAJOR ISSUE – QUALIFIED WARRANTY



- For Insurance Carriers, Washington has become a “nightmare jurisdiction”
 - Powerful legislation has remained unutilized for years that could significantly benefit Defendants and their Carriers.
- **Qualified Warranty** – An insurance policy that includes coverage for repair of physical damage caused by the defects covered by the warranty
 - Except to the extent of any of the following exclusions and limitations
- Currently we are unsure why defense counsel has not been bringing up this issue, as it could have a huge impact on Washington. This has been on the statute for years, and the courts have not addressed it.

WASHINGTON

BIG TRENDS IN WASHINGTON



- RCW 64.35.115 – Limits attorney fees further than the general Act in a way that would disincentivize contingency claims.
 - “In no event may such fees exceed the reasonable hourly value of the attorney’s work.”
- RCW 64.35.205 – Kicks claims out of the RCW for Construction defects if:
 - (1) All condo units are subject to qualified warranty, and
 - (2) Association has QW for common elements.
 - No Claims against declarants or construction professionals, leaves open agreement to indemnify insurer from a construction company.

WASHINGTON

BIG TRENDS IN WASHINGTON



- RCW 64.35.210 – Requires all future sales of condos, where a claim has been made, must state a variety of information including the nature of the claim and the date/type of repair.
 - Would prevent recovery for defects that the association/owner subsequently did not repair
- RCW 64.35.305 - Provides a limitation to violations of building code (currently the general condo claim standard) of two years (down from 6 years in general CD claims, and 4 years for implied warranties).
 - Additionally, includes electrical, plumbing, HVAC, exterior cladding, caulking, windows, and doors.

WASHINGTON

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 - Includes: electrical, plumbing, HVAC, exterior cladding, caulking, windows, and doors.
- RCW 64.35.310 – Limits warranty to 5 years for building envelope and extends the warranty from the Act from 4-5 years, but limits non QW claims to 5 years, down from 6.
 - This is a win/loss scenario

WASHINGTON

BIG TRENDS IN WASHINGTON



- RCW 64.35.315 – Address structural issues with 10 year warranty. Longer than others, but rarely comes up in a meaningful way. This also sets the standard much higher than other states
- RCW 64.35.330 – Requires living expenses for repairs under QW – something not currently allowed
- RCW 64.35.335 – Limits subsequent warranty on repairs to 1 year
- RCW 64.35.410/415 – Enumerated list of exclusion, general and defective.
- The Condo Act prevents suits against construction professionals and declarants, allows the ‘insurer’ to limit damages to only those things which will actually be repaired, and limits contingency fee recovery in cases where lodestar rate is greatly below the contingency fee recovery (WA follows American Rule)

OREGON

MSJ ON “AS IS” MIXED USE PROJECT

- Recently an Oregon Court Granted an MSJ on an “as is” clause in a mixed use commercial/residential project, a first in Oregon. Court found the purchaser of a project is restricted from pursuing CD claims against a developer affiliate company because of the “as is” clause. (*LLJ Stratford YHC LLC v. Gateway Nation Corp* 19CV49235)
- Purchase and Sales Agreement: *“The purchaser takes the property as is, where is, with all faults”*
 - Sets contingency date by which the buyer must take or waive all inspections and investigations of the property and vicinity. Buyer also agrees that there were risks of loss caused by unknown conditions.
- Release: *“In consideration of the foregoing (recitation of as is provision) Buyer hereby releases seller and its direct and indirect members, managers, partners, officers, directors, shareholders, agents, affiliates, employees, successors, and assigns from and against any and all claims, obligations, and liabilities arising out of in in connection with the physical condition of the property.”*
 - Each case is fact specific, and sales agreements/contracts must be read very carefully



CALIFORNIA

MAJOR ISSUE – UNDERFUNDED WRAPS



- There has been an increase in wrap policies that are not sufficiently funded for the projects they represent
- No one is monitoring the value of the wrap, and it is created problems for the insured
- We have a project, approximately 20 newly constructed homes
 - Each home is worth over \$1,000,000
 - The total wrap policy is only \$2,000,000 for all of the houses, which works out to about \$100,000
 - The demand for damages is over \$10,000,000
 - This becomes an issues when subcontractor CGL policies are often not available.
- Defense counsel is now coming into multi-million dollar lawsuits that need to be settled within small policy limits, and must try to negotiate settlements within the underfunded wrap.
- This creates a race for settlements, as no one wants to be holding the bag



CALIFORNIA

MIXED PROJECTS



- Not all homes are within the wrap policy, and how these comingled projects are handled are unclear when it comes time for litigation
- We have a case where out of 214 homes only 112 of homes are under a wrap policy.
 - Subcontractors and general contractors mix work between wrap and unwrapped homes during construction
 - Untangling what is covered or uncovered after the fact is a long difficult process
 - Often the documentation produced for trial is insufficient to fully identify the work.
- There is also a rise in vindictive Plaintiffs, who have become more interested in taking a pound of flesh than a settlement.
 - This is especially true with burning limit policies, where a Plaintiff can squeeze a Defendant through legal fees.
 - This comes with the rise of the large corporation developers, who could be motivated by their image than the amount earned in a lawsuit.
 - Plaintiffs may attempt to exhaust these underfunded wrap policies so the developer will have to pay out of pocket.
- Not all homes are within the wrap policy, and how these comingled projects are handled are unclear when it comes time for litigation

CALIFORNIA

THINKING OUTSIDE THE BOX

- CD litigation is a combination of poker and chess
- You need people to believe that you have a strong position, regardless of what you have
- You need to know who you are up against
- You need to know what the plaintiff is going to do, as both sides are aware of the strengths and weaknesses



CALIFORNIA

THINKING OUTSIDE THE BOX

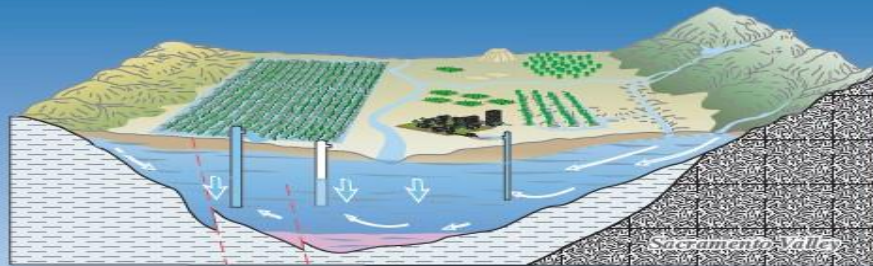
- Generally we need to have clients, counsel and experts enlightened on the issues and values of a case when mediation begins
- Our Ace in the Hole:
 - Our experts come up with a method of repair
 - We place an open bid to licensed contractors to repair the works, have them testify to the fact
 - Once you licensed independent contractor is willing to pay a number, you cut out Plaintiffs strongest position.





GROUNDWATER RESOURCES PROGRAM

Groundwater Availability of the Central Valley Aquifer, California



Professional Paper 1766

U.S. Department of the Interior
U.S. Geological Survey

NEVADA

RULE 68 - ATTORNEY FEES



- In 2021 the Nevada Supreme Court handed down a decision in *Capriati Construction Corp v. Yahyavi*
 - Construction Employee drove a forklift into a public street injuring Plaintiff
 - Plaintiff served an offer of judgment under Civil Procedure Code Rule 68 for \$4 million. It was not accepted.
 - Jury awarded Plaintiffs a verdict for \$5.9 million, and Plaintiff moved for attorney fees after
 - Trial Court awarded plaintiff 100% of it's 40% contingency fee, bringing the total to \$8.26 million
 - The Lower Court found, and Nevada Supreme Court confirmed that attorney fees are to be paid from the Rule 68 offer
 - The contingency fees were found are discretionary because they do not vest until Plaintiff prevails.
 - If a plaintiff receives a greater than the rejected amount, they are entitled to attorney fees
 - Despite this case being a personal injury claim, plaintiffs will now be arguing to collect 100% of contingency fees going forward.

ARIZONA

LITIGATION IS INCREASING



- Pulte cases are now being handled by a new law firm
- With the new firms, a big push for AI to bundle both AI and NI settlements.
 - This makes cases more difficult to settle from a defense perspective
 - This is causing the total demands to increase to subcontractors and general contractors

NEW MEXICO

RULE 68 - ATTORNEY FEES

- New Mexico has a similar issue to Nevada with its “Offer of Settlement”
- In the last few years an Offer of Settlement, if rejected the plaintiffs are entitled to recover double their expert expenses.



Economic Inflation

Construction costs are on the rise



Social Inflation

- ▶ Nuclear verdicts up 27.5%
- ▶ Shifting attitudes towards corporations
- ▶ Increased use of reptile theory by plaintiffs



Judicial Hotspots

- Georgia
- South Carolina
- Louisiana





1.

Florida – CD Trends

Florida – CD Trends

- ▶ Recent Tort Reform
- ▶ Statute of Limitations
- ▶ Statute of Repose
- ▶ Florida Legislature moving the needle
- ▶ What does it mean for CD Cases

Florida – Tort Reform

Florida Tort Reform Act 2023

- ▶ HB-837
 - Negligence – SOL 4 years to 2 years
 - Plaintiff found to be 51% or more at fault – then unable to recover any damages
 - Applies to potential construction injury cases
 - Medical Bills and Damages
 - LOPs
 - Limit on damages

Florida – Statute of Limitations

- ▶ Fla. Stat. §95.11(4)(a)(2023) – reduces negligence from 4 to 2 years
- States “An action founded on negligence”
- But 95.11(3)(b) still provides 4 years for those actions “founded on the design, planning, or construction of an improvement to real property...”

Florida – Statute of Repose

- ▶ House Bill 1089 – July 1, 2006
 - Legislature reduced the SOR from 15 years to 10 years
- ▶ Fla. Stat. 95.11(3)(c) - BEFORE 2018 Revisions
 - ▶ There are four triggering events:
 - Date of abandonment of construction
 - Date of actual possession by the owner
 - Date of the issuance of a CO
 - Date of completion of contract
 - ▶ Different interpretations: condos; townhomes; SFHs
 - *Allan & Conrad, Inc. v. University of Central Fla.*, 961 So.2d 1083 (Fla. 5th DCA 2007) – contract completion
 - *Cypress Fairway Condo v. Bergeron*, 164 So.3d 706 (Fla. 5th DCA 2015) – final payment contract completion

Florida – Statute of Repose

- ▶ Fla. Stat. 95.11(3)(c) AFTER 2018 Revisions
- ▶ House Bill 875 – July 1, 2019
 - Recognized derivative claims
 - Defined “completion of the contract”
 - Excluded “warranty or punchout work”

Florida – Statute of Repose

Date of Actual Possession by “Owner”

- ▶ Developer/General Contractor original owner?
- ▶ First purchaser first owner?
- ▶ Per unit v. Project as a whole
- ▶ Find plaintiff friendly jurisdiction
 - *The Cottages at Argyle v. The Vestcor Companies*, 2019CA022797 (Aug. 17, 2021) – turnover date should control
 - *Summer Key Condominium Association v. DR Horton, Inc.* – Jacksonville, 2020CA00653 – adopts project as a whole
 - *Beacon Park Phase II v. DR Horton, Inc.*, 2020CA007042 – adopts project as a whole

Florida – Statute of Repose

- ▶ *Westpark Preserve Homeowner’s Association, Inc. v. Pulte Home Corporate, 2023 WL 3325821 (Fla. 2d DCA May 10, 2023)* - developer is owner
- ▶ S.B. 360 - legislature clarifies the SOR and stated:
 - The bill specifies that notwithstanding any provision of the statute to the contrary, each dwelling unit within a multi-dwelling building must be considered its own improvement for purposes of determining the limitation periods set forth in the bill.
 - Reduced from 10 years to 7 years – still have 1 year for derivative claims
- ▶ Earliest not the latest

Florida – Statute of Repose

- ▶ Plaintiffs are taking offense
- ▶ Watch for filings Q2 in 2024
 - 7 years becomes effective July 2, 2024
 - Claims between July 1, 2014 and July 1, 2017
 - Plaintiffs will file all 558 matters or omit 558 procedure

Florida – Fla. Stat. §553.84 – 2023 revision

▶ For purposes of this section, the term “material violation” means a Florida Building Code violation that exists within a completed building, structure, or facility which may reasonably result, or has resulted, in physical harm to a person or significant damage to the performance of a building or its systems.



1.

Texas – CD Trends

Texas – CD Trends

- Texas has ranked in top states in population growth since 2020
- CD cases are increasing due to fast-track construction
- Sections 16.008 and 16.009 of the Texas Civil Practice & Remedies Code
- Statute of Repose – 10 years
 - House Bill 3069 (in 2021) reduced SOR to 8 years related to gov. projects – 1 year exception
 - House Bill 3595 (in 2021) sought to reduced SOR from 10 to 5 years – did not pass committee
 - House Bill 2024
 - Shortened to 6 years, but only applies to family homes and townhomes with warranty
 - Does not apply to apartments or condos

Texas – CD Trends

- ▶ *Siplast, Inc. v. Employers Mutual Casualty Company*, 23 F.4th 486 (5th Cir. 2022)
 - All inferences must be read in favor of coverage
 - “If the underlying pleadings allege facts that may fall within the scope of coverage, the insurer has a duty to defend; if the pleading only alleges facts excluded by the policy, there is no duty to defend.”

Texas – CD Trends

- ▶ ERCOT and the blackouts
 - Seeing issues concerning solar panels; wind farms; and residential construction
- ▶ RCLA Texas Residential Construction Liability Act
 - HB 2022:
 - Limits liability for a defective condition
 - "Latent defect" - must prove present on the date of completion or when title conveyed to the original purchaser and the residence unsuitable for its intended use.
 - Requires a claimant to prove the defect existed at the time of completion of the construction, alteration, or repair.
 - HB 2024 – encourages written warranties, if present, then SOR reduced from 10 to 6 years (SFH/townhomes with exceptions)



1.

ENGINEERING ISSUES

Now we're cooking with gas! Or are we?

A horizontal line spanning the width of the slide, composed of dark blue, light blue, dark blue, and green segments.

“

“The new law will not have any loopholes that will undermine the intent of this measure. There will not be any option for municipalities to opt out.”

- New York State Governor’s Representative

Why talk about stoves?

JANUARY 27, 2022

Stanford scientists find the climate and health impacts of natural gas stoves are greater than previously thought

Natural gas stoves release methane – a potent greenhouse gas – and other pollutants through leaks and incomplete combustion. Stanford researchers estimate that methane leaking from stoves inside U.S. homes has the same climate impact as about 500,000 gasoline-powered cars and the stoves can expose people to respiratory disease-triggering pollutants.

Stanford Woods Institute for the Environment

Why talk about stoves?

Have a gas stove? How to reduce pollution that may harm health

Gas stoves are linked to childhood asthma

Cooking with gas stoves **creates nitrogen dioxide** and releases additional tiny airborne particles known as PM2.5, both of which are lung irritants. Nitrogen dioxide has been linked with childhood asthma. During 2019 alone, **almost two million cases worldwide of new childhood asthma** were estimated to be due to nitrogen dioxide pollution.

that raise risk for asthma and other illnesses.

September 7, 2022

Harvard Health Publishing

Why talk about stoves?

JUNE 16, 2023

Study finds combustion from gas stoves can raise indoor levels of chemical linked to a higher risk of blood cell cancers

About 47 million homes use natural gas or propane-burning cooktops and ovens. Stanford researchers found that cooking with gas stoves can raise indoor levels of the carcinogen benzene above those found in secondhand smoke.

Stanford Woods Institute for the Environment

New Laws & Regulations

- ▶ State/Municipality Bans
- ▶ Federal Regulations



New Laws

New York becomes the first state to ban natural gas stoves and furnaces in most new buildings



By [Rachel Ramirez](#) and [Ella Nilsen](#), CNN

Updated 12:31 PM EDT, Wed May 3, 2023

- ▶ Natural gas ban in new construction
- ▶ Exceptions

Staged implementation
In litigation

Federal court tosses California gas ban, but wider impact is unclear

Associated Press // April 20, 2023 // 4 Minute Read



Berkeley, CA

- ▶ Banned installing natural gas piping in new construction
- ▶ Adopted in 2019
- ▶ No exceptions

9th U.S. Circuit Court of Appeals (SF)

Violated federal law giving U.S. government authority to set energy efficiency standards for appliances

New Regulations

CPSC

- ▶ Update indoor IAQ standards/testing
- ▶ World Health Organization
- ▶ NO₂, CO
- ▶ ANSI Z21.1



UNITED STATES OF AMERICA
CONSUMER PRODUCT
SAFETY COMMISSION



**World Health
Organization**

Testing/Standards Update Implementation

First

- Develop new proposed standards and testing protocols
- CPSC work committee
- In progress now

Second

- Test new standards and testing protocols
- ANSI, CSA

Last

- Update ANSI Z21.1

How Might This Affect CD Claims?

▶ Potential for personal injury claims against:

- Builders
- Designers
- Manufacturers

