



## **Be careful how aggressive you are with homeowners' counsel, you may actually get what you want.**

In March of 2010, Developer received a SB 800 notice covering 134 homes in Bakersfield. Within a few months the number of homes grew to 203. Milstein Adelman, LLP represented the homeowners. In response, Developer decided on an aggressive defense strategy and made it clear that Developer would not pay any monies to the homeowners to settle their claims. Developer wanted to force a dismissal from the homeowners and thwart any settlement efforts with the subcontractors.

Through enforcing SB 800 and making repairs, 26 homeowners decided to drop their claims. 177 homes still filed suit. After inspections, Milstein performed destructive testing at 38 homes. They did not find any problems out of the ordinary. Milstein then proceeded to mediate with the subcontractors. We did not assist Milstein with the subcontractors and interfered where we could. In the meantime, we pursued the subcontractors to recover the costs incurred making SB 800 repairs. After three mediations with the subcontractors, Milstein had only raised \$3,200/hm. Once we were able to force written discovery and homeowner depositions, another 61 homes dropped from the lawsuit leaving a total of 116 homes. Milstein then mediated with the subcontractors two more times. Milstein was only able to raise \$3,200/hm from the subcontractors. Not satisfied with the results, Milstein tried to amend their complaint in the wake of *Liberty Mutual v. Brookfield*. We vigorously opposed their efforts and it took Milstein nine months of motion work to get leave to amend their complaint to add common law claims. Milstein then requested the court allow them to conduct additional destructive testing. We again opposed their request and only after 7 months of motion work did the court finally grant their request, with limitations. Before the second round of destructive testing began, the developer made CCP 998 offers to each homeowner in the amount of \$4,000/hm. None of the homeowners accepted.

After the destructive testing, Milstein again mediated with the subcontractors. Some of the subcontractors took money off the table and Milstein raised less than \$2,500/hm. When approached by the mediator to "make a settlement offer to the plaintiffs," the developer responded by demanding that Milstein pay the developer \$300,000 to cover the costs that are recoverable under CCP 998. Weeks before trial, Milstein started settling directly with subcontractors and providing scope of work releases that included a release of the developer. The developer was not a party to the settlements between Milstein and the subcontractors and did not contribute any monies to get the scope of work releases. On the first day of trial, Milstein had settled with all but one subcontractor and the developer. At that time, Milstein had raised approximately \$3,100/hm. After two days of trial, the remaining subcontractor reached a settlement with Milstein contingent on the developer agreeing to waive costs in exchange for a dismissal from the homeowners. Based on the aggressive defense mounted by the developer, Milstein did not believe that the developer would agree to waive costs for a dismissal and that is why they had not ever made the offer to the developer. The developer accepted the offer, brokered by the subcontractor, and received a full dismissal.

The dismissal was a great result given the gaps in coverage and subcontractors in the case. We did not have subcontractors covering any of the framing at any of the homes, roofs at 80% of the homes or shower door enclosures at any homes. The significance of these gaps is that the developer's expert was going to concede there were \$110,000 in damages in the homes related to these scopes of work. Notwithstanding this admission, Milstein still did not want to try the case against the developer and dismissed the developer for no money. Even after reaching settlements with the subcontractors, Milstein still recovered less than the CCP 998 offers.



**Nathan Owens**  
**Partner**

Nathan Owens manages the Las Vegas office. He represents businesses and individuals operating in a wide array of economic sectors including real estate, construction, insurance and health care in all stages of litigation in state and federal court. Nathan has extensive experience in the representation of developers and general contractors on risk management strategies, including contractual and insurance matters outside of litigation. As a former residential developer himself, Nathan understands the complexity of issues builders and developers face in all aspects of development and construction. He uses his firsthand knowledge to bring a unique approach to problem solving.