



[Gregory A. Clark](#)
Orange County
(949) 851-5495
gclark@allenmatkins.com



[Susan Ihrke Johnson](#)
Orange County
(949) 851-5454
sjohnson@allenmatkins.com



Allen Matkins
#1 Real Estate Law Firm
in California
Chambers and Partners
2002 - 2008

Green Building Update

A free Allen Matkins market intelligence publication designed to keep you informed of current green building issues.

[Subscribe](#)

Under Certain Circumstances, Developers May Act As Construction/Development Managers Without A Contractor's License: For Now

Developers who have undertaken construction/development management projects on behalf of third parties without a contractor's license have done so in the past with the risk that the third party would claim that the compensation payable to the developer was barred under Business and Professions Code Section 7031. Section 7031 prohibits payment claims by unlicensed contractors and compels restitution for any payments received.

This alert addresses changing California rules related to developer liability in construction and development management.

Many developers have not held contractor's licenses and have performed construction/development management services through limited liability companies which, under California law, may not hold a contractor's license.

In the March 27, 2009 case of first impression, *Fifth Day, LLC v. Bolotin*, 09 C.D.O.S. 4019, 2009 WL 794516, the Second District Court of Appeal ruled a construction/development manager is not required to maintain a contractor's license for private development projects under certain circumstances.

In *Fifth Day*, the construction manager's duties encompassed a wide array of activities including coordinating the activities of various workers, maintaining financial records and insurance certificates, providing development advice for the project, and conducting daily on-site inspections and reviews during construction. However, the court found that the construction manager did not have any responsibility or authority to perform any actual construction work, interpreting Business and Professions Code Section 7026 somewhat narrowly to hold that a contractor is a person who "undertakes to or offers to undertake to...construct, alter, repair, add to... or demolish any building." The court also relied heavily on the fact that all of the work was in fact performed by licensed contractors.

A spirited dissent in *Fifth Day* would have found that the construction manager was a contractor under the Business and

Professions Code Section 7026.1 on the grounds that the construction manager was a consultant to an owner-builder who "undertakes to construct any building" and therefore was subject to a licensing requirement. According to the dissent, the court's decision opened up a loophole allowing for potential abuse and the possibility of illicit or incompetent activities on the part of unlicensed construction managers.

Fifth Day is on appeal to the California Supreme Court. Developers should be cautious in relying on Fifth Day until the matter is resolved. Further, developers should take pains to ensure that they do not inadvertently cross the line between acting as a construction manager "advisor" on behalf of third parties and acting as a contractor. Given the foregoing, for those developers seeking to ensure their right to bring and maintain an action for payment, obtaining a contractor's license provides a "safe harbor."

Developers should also be aware that their ability to perform construction work and enforce lien rights for nonpayment of reimbursements against third-party purchasers for whom the work is performed may not be enforced without a contractor's license. Vallejo Dev. Co. v. Beck Dev. Co., 29 Cal. Rptr. 2d 669 (1994).

Allen Matkins

[Century City](#)
(310) 788-2400

[Los Angeles](#)
(213) 622-5555

[San Francisco](#)
(415) 837-1515

[Walnut Creek](#)
(925) 943-5551

[Del Mar Heights](#)
(858) 481-5055

[Orange County](#)
(949) 553-1313

[San Diego](#)
(619) 233-1155

© 2009 Allen Matkins Leck Gamble Mallory & Natsis LLP. All rights reserved.

This email is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. This email was sent by: Allen Matkins Leck Gamble Mallory & Natsis LLP, 515 S. Figueroa Street, 7th Floor, Los Angeles, California 90071. To stop receiving this publication, just reply and enter "unsubscribe" in the subject line.