

# **Court of Appeal Case Results in Heightened Scrutiny When Hiring A Construction Manager**

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## **1. Case Summary**

In *The Fifth Day, LLC v. Bolotin* (“*The Fifth Day*”),<sup>1</sup> the court determined that construction managers who do not partake in the construction of a project are not required to be licensed under the Contractors’ State Licensing Law. This means that an unlicensed construction manager on a private project (*i.e.* not a public/governmental project) can file a lawsuit to recover payment for construction management services provided.

## **2. Factual Background of the Case**

In this case, Plaintiff, a construction manager (“Construction Manager”), entered into a Development Management Agreement (“Agreement”) with the owner of real property (“Owner”) to provide “real estate development and construction project management” services for the development of an office park (the “Project”). Under the Agreement, the Construction Manager agreed to create an overall strategic plan for the management and administration of the Project, manage the budget and schedule, coordinate and direct the activities of design professionals, conduct daily on-site inspections and reviews, coordinate the completion and correction of the work, ensure that the performance of the general contractor and its subcontractors is satisfactory. In addition, the Construction Manager represented and warranted that it “held and would hold all licenses, permits or other certifications necessary to perform its duties.”

After entering into the Agreement with the Construction Manager, the Owner entered into a separate construction contract with a general contractor. Upon completion of the Project, the Construction Manager sued the Owner for payment due for providing construction management services. The Owner claimed it did not have to pay the Construction Manager because the Construction Manager was not a licensed contractor and was, therefore, prohibited from filing a lawsuit to get paid.<sup>2 3</sup>

## **3. Court of Appeal’s Discussion of the Case**

The trial court agreed with the Owner that the Construction Manager was a “contractor,” and therefore, needed to be licensed. The Court of Appeal reversed the trial court’s decision and held that the Construction Manager was not a contractor as defined in the licensing statute. As such, the Court allowed the Construction Manager to bring its claim for payment under Section 7031(a).

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<sup>1</sup> This case is cited as *The Fifth Day LLC v. Bolotin, et al.* (2009) 172 Cal. App. 4th 939.

<sup>2</sup> This is because under Business and Professions Code Section 7031, an unlicensed contractor is prohibited from filing a lawsuit to get paid for construction services.

<sup>3</sup> All statutory references in this article are to the Business and Professions Code unless otherwise stated.

This case turned on whether the Construction Manager performed services which required it to be a licensed contractor. The Court summarized the services at issue as follows:

to assist, on behalf of the Owner, in coordinating the activities of the various workers to enable them to complete their assigned tasks in an organized and efficient manner, on time and on budget; to maintain records such as insurance certificates, as well as the financial books and records for the project; to keep the Owner apprised of the status of the project; to be the on-site point person to respond to issues as they arose; and generally to act as the Owner's agent with respect to the various parties connected with the development of the project.

Furthermore, the Court stated that under Section 7026:

“Contractor” [is] a term synonymous with “builder” . . . [and] is any person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct . . . any building . . . or other structure, project, development or improvement, or to do any part thereof. . . .

The Court interpreted the definition of "contractor" very literally, and found that although the Construction Manager's duties included coordinating the activities of various workers to enable them to complete their assigned tasks in an organized and efficient manner, and acting as the Owner's agent with respect to the various parties connected with the development of the Project, the Construction Manager did not contract with the Owner to perform any of the work listed in the above definition of contractor, nor did it directly enter into any contracts or subcontracts for such work.<sup>4</sup> Rather, the Court pointed out that the Owner entered into a contract with a licensed a general contractor to perform and supervise all construction on the Project. Accordingly, the Court held that the Construction Manager did not act as a contractor by providing construction management services and was, therefore, not required to be licensed.

The Court rejected the Owner's argument that, by providing construction management services, the Construction Manager acted as a general building contractor and was required to hold a Class B license under Section 7057, which defines a "general building contractor" as a "contractor whose principal contracting

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<sup>4</sup> One Judge disagreed with the majority opinion, noting that the Construction Manager did act as a contractor and should be licensed under Section 7026.1(b), which defines a "contractor" to include a "consultant to an owner-builder." The dissenting Judge further stated that the intent of the Contractors' State Licensing Law is to protect consumers from unqualified and unlicensed contractors. He stated that this decision would create a loophole in the license requirements because it would permit unlicensed contractors to call themselves "construction managers" to avoid obtaining a license.

business is in connection with any structure . . . being built . . . or superintend the whole or any part thereof."

#### **4. What This Case Means for Community Associations**

As a result of this case, a community association (as a private project owner) should be aware that if it hires a construction manager to act as the community association's agent, and the construction manager does not actually perform construction work or agree to undertake such work, the construction manager is not required to be a licensed contractor. The overriding effect of this holding is that an unlicensed construction manager is not subject to state regulation, which normally would ensure that the construction manager has a minimal level of experience and expertise in the construction management services it will provide.

Therefore, while a community association must be cautious when retaining any contractor or construction manager, it should use heightened scrutiny when hiring a construction manager who will not actually perform construction work. A community association must make sure any construction manager it considers hiring has a level of knowledge and experience sufficient to diligently oversee the type of project at hand by: (1) interviewing the construction manager and owners of other projects the manager supervised to gain an understanding of the construction manager's level of education and experience in the industry; (2) obtaining references from owners of other projects the construction manager worked on; and (3) reviewing the construction manager's portfolio of projects, focusing on the construction manager's experience with project management in community associations.

Conversely, if a construction manager contractually agrees or performs any work within the definition of Section 7026, even if the actual, physical construction work is to be performed by others that are properly licensed as contractors, the "construction manager" must be licensed. In this case, community associations must verify the contractor has a valid license. Contractors' licenses can be checked on the Contractors' State Licensing Board's website, located at [www.cslb.ca.gov](http://www.cslb.ca.gov).

**The above general information is for educational purposes only. If the Board needs further guidance or has specific questions on this issue, please contact your legal counsel.**