Legal Corner

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Legal Update: The *Coghlin v. Gilbane* Appeal and its Impact on Construction Managers at Risk Under Chapter 149A

On March 2, the highest court in Massachusetts heard arguments in the Coghlin v. Gilbane appeal, a case involving the rights and obligations of construction managers on Chapter 149A projects. The case garnered wide attention last summer when the Worcester Superior Court dismissed Gilbane's pass-through claims against DCAM on grounds that the claims were barred by the construction management at-risk ("CMR") contract procured under Chapter 149A. The Massachusetts Supreme Judicial Court ("SJC") took direct appellate review of this first-of-its-kind decision, and is expected to issue a ruling this summer.

The case involved the construction of a psychiatric facility in Worcester, Massachusetts, where Gilbane served as DCAM's construction manager at-risk for the project. When Coghlin – Gilbane's electrical subcontractor – brought suit against Gilbane seeking more than $5 million in damages, Gilbane did what every contractor in Massachusetts has done for decades: it filed a third-party complaint to pass Coghlin's claims through to the project owner.

But this case was different – at least according to the Worcester Superior Court. Acknowledging the traditional construction law principles that make public owners liable for (and protect contractors from) flawed designs, the Superior Court concluded that those bedrock legal rules do not apply to CMR contracts under Chapter 149A. The court differentiated CMR projects from the "traditional design-bid-build project delivery method," stating that a construction manager working under a CMR contract "takes on additional duties and responsibilities for the project," including – in this case – "an ongoing duty to review the design documents for clarity, consistency, constructability, maintainability/operability, coordination among the trades, [and] coordination between the specifications and the drawings." According to the court, this difference was significant, stating that when "something goes wrong," the construction manager has a broad obli-

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gation to indemnify the owner from all types of claims and damages, including those caused by the owner.

For these reasons, the Superior Court stated that the traditional construction law principles – like those holding owners responsible for defective plans and specifications – "simply are inapplicable" to CMR contracts. With this view of CMR contracts, the Superior Court dismissed Gilbane's claims against DCAM, effectively placing design liability on Gilbane. Gilbane appealed.

Apparently sensing the significance of this novel decision, the SJC took the case from the Appeals Court. Hinckley Allen filed an *amicus curiae* or "friend of the court" brief on behalf of AGC of Massachusetts, urging the SJC to overturn the Superior Court's decision. CIM, Columbia Construction, and the Massachusetts Chapter of the AIA also filed *amicus* briefs weighing in on the case.

If upheld on appeal, the Superior Court's decision would have a substantial impact on the rights and obligations of construction managers under Chapter 149A. While the "risk" of CMR contracts has not traditionally been understood to include risk of liability for design, this would be the case in Massachusetts. By extension, any time a contractor has increased involvement in the design process (think: "lean construction"), it would run the risk of being accused of assuming responsibility for design when "something goes wrong."

But, it is not clear how the SJC will rule. While the Superior Court took a different view of owner liability in the case of CMR contracts, DCAM admitted in its appeal brief that it would remain liable to Gilbane for design changes, errors, and omissions that flow from the work of its designer. According to DCAM, if Coghlin's damages flow from design issues, there would have to be an allocation of that liability between Gilbane, DCAM, and DCAM's designer. With this design-liability issue seemingly resolved, much of the oral argument focused on whether the case should be tried in one or multiple lawsuits.

So, while the Coghlin v. Gilbane case came into the SJC like a lion, it may very well go out like a lamb. It is possible that the SJC will decide that the CMR contract did not change the traditional lines of liability in construction cases that have existed in Massachusetts for a hundred years. If true, come summertime, construction managers in Massachusetts may have good news to go along with good weather. ■