Subcontractors Legal Defense Fund
Subcontractors Legal Research Fund
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The courts are a key battleground in the fight for subcontractor rights. ASA's Subcontractors Legal Defense Fund (SLDF) and the Foundation of ASA's (FASA's) Subcontractors Legal Research Fund (SLRF) support ASA's critical legal activities to protect the interests of all construction subcontractors. Both funds invest in precedent-setting litigation to establish subcontractors' rights. This report summarizes ASA's recent legal advocacy activities. For more information, including copies of the supporting documents for these cases, visit www.SLDF.net.

Superior Steel, Inc. and Ben Hur Construction Company, Inc. vs. the Ascent at Roebling's Bridge, LLC, Corporex Development & Construction Management, LLC, Dugan & Meyers Construction Company and Westchester Fire Insurance Company (unjust enrichment; contingent payment)

On Dec. 14, 2017, the Kentucky Supreme Court ruled that a construction owner received substantial benefit in a situation when subcontractors had indisputably performed under the contract and the construction owner had never paid for that work. The ruling was a victory for construction subcontractors and ASA, which urged the state's high court to reverse an appeals court decision in the case of *Superior Steel, Inc. and Ben Hur Construction Company, Inc. vs. the Ascent at Roebling's Bridge, LLC, Corporex Development & Construction Management, LLC, Dugan & Meyers Construction Company and Westchester Fire Insurance Company.*

In its "friend-of-the-court" brief filed on July 18, 2016, ASA urged the Kentucky Supreme Court to overturn an appeals court's ruling that precluded subcontractors from recovering payment for their extra-contractual work under a "pay-if-paid" contract clause and permitted the project owner to benefit from valuable extra-contractual work provided by subcontractors without payment, known as "unjust enrichment."

In its ruling, the Kentucky Supreme Court agreed with ASA concerning "unjust enrichment," observing, "[A]ny recipient of a substantial benefit in the form of authorized extra work should not be surprised that payment will be due, eventually…." Thus, the Court affirmed the trial court's decision that the owner and prime contractor must pay the subcontractors.

The Court, however, demurred on ruling that the pay-if-paid clause should not be enforced, saying that issue is better left to the state legislature. Specifically, the Court said, "After considering the various approaches of our sister states, we decline to hold 'pay-if-paid' terms are unenforceable as a matter of public policy…. While there are valid reasons for disfavoring 'pay-if-paid' provisions, any prohibition against this type of contract clause should come from the legislature rather than this Court."

<ASA and 22 Construction Associations> vs. Occupational Safety and Health Administration, U.S. Department of Labor, et al. (OSHA crystalline silica rule)
In a wide-ranging decision issued on Dec. 22, 2017, the U.S. Court of Appeals for the District of Columbia Circuit decisively rejected the arguments made by ASA and the Construction Industry Safety Coalition on the crystalline silica rule issued by the Occupational Safety and Health Administration in March 2016. The rule, which OSHA started enforcing in the construction industry on Oct. 23, 2017, requires construction employers to limit worker exposure to respirable crystalline silica and to take other steps to protect workers. In a lawsuit filed in April 2016, and in later briefs and oral arguments, the industry coalition had petitioned for a review of five issues: (1) whether substantial evidence supports OSHA's finding that limiting workers' silica exposure to the level set by the rule reduces significant risk of material health impairment; (2) whether substantial evidence supports OSHA's finding that the rule is technologically feasible for the foundry, hydraulic fracturing and construction industries; (3) whether substantial evidence supports OSHA's finding that the rule is economically feasible for the foundry, hydraulic fracturing and construction industries; (4) whether OSHA violated the Administrative Procedures Act in promulgating the rule; and (5) whether substantial evidence supports provisions that allows workers who undergo medical examinations to keep the results confidential from their employers and that prohibits employers from using dry cleaning methods unless doing so is infeasible.

The court rejected all five of industry's challenges. However, the Court did agree with the North America's Building Trades Unions on their petition concerning the absence of medical removal protections. The Court ruled that "OSHA was arbitrary and capricious in declining to require MRP for some period when a medical professional recommends permanent removal, when a medical professional recommends temporary removal to alleviate COPD symptoms, and when a medical professional recommends temporary removal pending a specialist's determination." The court directed OSHA to reconsider or further explain those aspects of its silica rule.

***Manhattan | Vaughn, JVP, Appellant, v. Josefina Garcia, Individually and as Heir to the Estate of Angel Garcia; and Orbelinda Herrera, as Next Friend of A.G. and B.G. (Minors)* (workers compensation as exclusive remedy)**
On Sept. 25, 2017, ASA in collaboration with several other construction groups filed a "friends of the court" brief before the First Court of Appeals in Houston, Texas. The issue before the court is whether the trial court erred when it refused to use the "exclusive remedy" provision of the workers' compensation bar on negligence claims to dismiss lawsuits against the contractor participants in a controlled insurance program. Texas appellate courts almost uniformly validate and uphold CIPs, noting that one of the benefits is to provide workers' compensation coverage for the industry. In this case, however, the trial court rejected the defendants' attempt to use the "exclusive remedy" provision of the workers' compensation laws and the result was an almost $54 million verdict against two contractors who were enrolled in the CIP. ASA and the *amici curiae* urged the Court to reverse the judgment of the trial court.

In the underlying case, Texas A&M University hired Manhattan | Vaughn as a general contractor on a $4.5 million project to expand and renovate Kyle Field, and Manhattan | Vaughn hired Lindamood Demolition as a subcontractor to perform demolition work. The project was insured under an Owner-Controlled Insurance Program, often referred to as a wrap-up insurance policy, purchased by Texas A&M, and both the general contractor and subcontractor were OCIP participants. Such an insurance program provides compensation coverage to all employees on the project site. An employee of the subcontractor, Angel Garcia, fell to his death when a piece

of machinery he was operating was overloaded and tipped over and fell. The family sued. The general contractor and subcontractor have appealed.

Under Texas law, an employer can choose not to subscribe to workers' compensation and therefore can be subject to a civil suit for an employee's injury or death. (This is different from most other states where workers' comp is the exclusive remedy for an employee's injuries or death unless the employer can be found guilty of intentionally bad conduct.) Even though all parties involved in this case were OCIP participants, and the OCIP included workers' compensation coverage for the enrolled participants and their employees, a trial court denied the defendants' motion for summary judgment as to the provision of workers' compensation coverage through the OCIP (and extension of exclusive remedy protection) to all OCIP participants. The jury returned a verdict for $53.8 million against the general contractor (who the jury determined bore 75 percent of the responsibility) and against the subcontractor (who the jury determined was 25 percent responsible) for the circumstances at the stadium that led to Garcia's death.

"Manhattan | Vaughn provided workers' compensation insurance as contemplated by the [Texas Workers Compensation] Act, coverage was in place, and the Garcias received workers' compensation benefits as prescribed for Mr. Garcia's unfortunate death," the *amici curiae* said. "As a result, the exclusive remedy rule applies. The trial court's ruling to the contrary runs afoul of a substantial body of Texas case law and frustrates the purpose of the Act. It also ignores the most recent Texas Supreme Court precedent interpreting OCIPs, which unequivocally extends exclusive remedy protection throughout all tiers on a project and provides an alternate means for extending exclusive remedy protection to Manhattan | Vaughn."

The *amici curiae* continued, "... the death of Angel Garcia was a terrible and heart-rending occurrence. But the mechanism contemplated in the [Texas Workers Compensation] Act performed flawlessly, and Mr. Garcia's family received their statutory benefits in exchange for giving up the right to sue their employer. They were not left without a remedy." The *amici curiae* cited cases in the brief where Texas appellate courts have supported their position: "... by recognizing and approving CIPs, that is, insurance programs in which an upper tier provides compensation coverage to all employees on the project site through the CIP, Texas appellate courts have universally upheld a CIP as a means whereby an upper tier owner, such as Texas A&M, provides workers compensation to employees of a lower tier, such as Manhattan | Vaughn and its subcontractors. The result is that a CIP provides protection for all of the employees on the job site through workers compensation insurance for employee injuries, and at the same time, all parties on the job site are also protected by the exclusive remedy protection conferred under … [the Texas Workers Compensation Act]. By providing workers compensation protection for all workers on the jobsite, a CIP is a perfect vehicle by which to advance to public policy of Texas ... to extend workers compensation insurance to as many workers as possible."