# Subcontractors Legal Defense Fund
# Subcontractors Legal Research Fund
## 2017

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.

***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."

**<ASA and 22 Construction Associations> vs. Occupational Safety and Health Administration, U.S. Department of Labor, et al. (OSHA crystalline silica rule)**
On April 4, 2016, ASA, eventually joined by 22 other construction associations, filed a petition for review of the Occupational Safety and Health Administration's final crystalline silica rule, saying the rule is "technologically and economically infeasible." "The construction industry raised numerous concerns regarding OSHA's proposal, but the agency failed to address many of these issues when promulgating the final rule," the organizations wrote in the petition for review filed with the U.S. Court of Appeals for the Fifth Circuit. "In particular, the industry presented substantial evidence that OSHA's proposed permissible exposure limit (PEL) was technologically and economically infeasible. It is disappointing the agency failed to take into account this evidence and moved forward with the same infeasible PEL in the final rule. Unfortunately, this and other final rule provisions display a fundamental misunderstanding of the real world of construction. The construction industry petitioners continue to be active participants in the rulemaking process and are dedicated to promoting healthy and safe construction jobsites." In June 2016, several lawsuits were consolidated into a single case in the U.S. Court of Appeals for the District of Columbia. OSHA began enforcing the OSHA rule on Sept. 23, 2017. The court heard oral arguments on Sept. 26, 2017.

**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 (contingent payment)**
A Kentucky Court of Appeals ruling in a case involving the construction of a condominium and garage in Covington, Ky., contradicts the Commonwealth's strong public policy that those who furnish construction materials or labor under written agreements must receive just compensation, ASA told the Supreme Court of Kentucky. The appeals court's ruling precluded steel 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.” The appeals court decision, if left standing, could have a profound impact across Kentucky, where billions of dollars of construction work is either in planning or in progress. In an *amicus* brief, filed on July 18, 2016, ASA urged the Supreme Court of Kentucky to reverse the appeals court’s decision in *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*. The Kentucky Court of Appeals has set a “perilous precedent” in its decision, as it currently stands. ASA said the Court of Appeals erroneously reversed the Kenton Circuit Court on two bases: “First, it held that because Appellants entered into subcontracts with the general contractor, Appellee Dugan & Meyers Construction Company (“D&M”), Appellants could not, as a matter of law, prevail on an unjust enrichment theory against the Owner,” ASA wrote. “The Court of Appeals so held *despite the undisputed fact that neither Appellant* ***ever*** *entered into* ***any*** *contract with Owner*. Second, the Court of Appeals held that a pay-if-paid clause in the subcontract between Appellant Superior Steel, Inc. and the D&M (the “Subcontract”) precluded Appellants from recovering payment for their extra-contractual work.” “Thus, in one fell swoop, the Court of Appeals completely and erroneously eviscerated Appellants’ right of recovery for the significant labor and materials incorporated into the project,” ASA wrote. “The Court of Appeals’ decision to deny recovery against the Owner based upon an unjust enrichment theory, even where there was no contract between Appellants and Owner, is contrary to well-established precedent in Kentucky and throughout the nation. Its approval of Appellees’ incorrect claim that no case in the country holds that the owner is responsible under unjust enrichment when a contract is in place is erroneous where, as here, there was no contract in place between Appellants and the party who was unjustly enriched (the Owner in this case).” The equitable doctrine of unjust enrichment “is applicable as a basis of restitution to prevent one person from keeping money or benefits belonging to another.” Pay-if-paid clauses have the effect of stripping a subcontractor of its mechanic’s lien rights and are, therefore, void under Kentucky’s Fairness in Construction Act, ASA told the Supreme Court. “It has been the policy of Kentucky law to construe mechanic’s liens liberally to protect those who furnish labor and materials,” ASA wrote. “Applied here, enforcement of the pay-if-paid clause of the Subcontract has the practical effect of eviscerating Appellants’ lien rights. Appellants’ mechanic’s liens, which have been bonded off, are now left solely dependent on the outcome of this appeal. If the pay-if-paid clause is held applicable, and the Appellees are found not liable as a result, the effect is to strip Appellants of their lien rights. Such a result is wholly incongruous with Kentucky’s strong public policy toward protecting the lien rights of suppliers and laborers.” In the underlying case, the owner—Ascent at Roebling’s Bridge, LLC—entered into a construction management contract in 2006 with the construction management company—Dugan & Meyers Construction Company—to provide construction management services for a 21-story, 72-unit condominium and garage project in Covington, Ky. The CM entered into subcontracts with a number of trade contractors, including steel subcontracts with Superior Steel, Inc. for various elements of the structural steel supply and fabrication and Ben Hur Construction Company, Inc. for the steel and metal decking erection and installation. The steel subcontracts each contained: (1) written change order requirements that all changes were to be in writing; and (2) a “pay-if-paid” provision, stating the owner’s payment to the CM was a condition precedent to the CM’s obligation to pay the steel subcontractors, Superior Steel and Ben Hur. As the project started, the drawings were revised several times. Both Superior and Ben Hur made claims for the additional materials and extra costs related to the changes. Though the CM verbally directed the steel subcontractors to proceed with the extra work and keep track of their time and costs (apparently on the direction of the owner), no change orders to the steel subcontracts were executed. After the work was completed, the owner refused to pay for the extra work and the CM refused to pay the steel

subcontractors, pointing, among other things, to the pay-if-paid clause in the subcontracts. As a result, after providing collectively hundreds of thousands of dollars in additional work, Superior Steel and Ben Hur filed mechanic's liens as security for their claims. The liens were bonded off, and the matter went to trial. At trial, the steel subcontractors asserted breach of contract claims against the CM and unjust enrichment claims against the owner. The jury ultimately found that the steel subcontractors were entitled to over $400,000. The jury found (a) the CM liable to Superior and Ben Hur for the extra work claims, and (b) the owner liable to the steel subcontractors under the equitable doctrine of unjust enrichment. The Kentucky Court of Appeals, however, reversed. The Appeals Court held that the steel subcontractors could not recover against the owner for unjust enrichment because "the contractual relationships that were in place … preclude the application of an equitable remedy." The Appeals Court also reversed the judgment against the CM, holding that the pay-if-paid clauses "are essentially conditions precedent to performance under the contract." Thus it was reversible error for the trial court not to have been "explicitly instructed" about the pay-if-paid clauses, and specifically that the failure of a condition precedent constitutes a legal excuse for non-performance. The Appeals Court brushed off the CM's verbal assurances of payment, saying it did "not agree that [the CM] waived these provisions by agreeing to pay for the extra work," and reversing the judgment "[b]ecause the circuit court did not include such an instruction, the jury could not decide whether [the CM] had breached the contract."