ASA SUBCONTRACTOR LEGAL DEFENSE FUND UPDATE

March 2024 - Our ASA Subcontractor Legal Defense Fund has been active in the past few years, as cases roll back into courts across the country. Below are five of the most recent cases in four different states supported by the Fund on behalf of our subcontractor community.

Pepper Lawson Horizon International Group, LLC v. Texas Southern University, Texas Supreme Court Case

On May 19, 2023, the Texas Supreme Court ruled unanimously in favor of Pepper-Lawson Horizon International Group and against Texas Southern University. The American Subcontractors Association supported a friend-of-the-court brief on behalf of Pepper-Lawson last year, seeking an appeal on a decision that held that an entity could not be sued for prompt payment violations because it had not waived sovereign immunity.

This ruling has a profound impact on all contractors doing business with the State of Texas. Specifically, state government entities will no longer be able to unreasonably stonewall contractor claimants. The often-used defense practice of challenging the Court’s jurisdiction to stall the case has now been properly clarified and limited. As of today, if contractors can properly state a claim under the applicable waiver of sovereign immunity statute, then the case can proceed. Further, contractors are no longer required to disprove all of the State’s defenses in order to proceed with their case. This case sets an important precedent for courts across the country as it applies to prompt payment for our subcontractors. The state’s appeal to the Texas Supreme Court was denied in December of 2023, closing the case as settled law.

Brian Carroll, Sanderford & Carroll, P.C., Belton, TX prepared the brief for ASA. Andrew Myers, Andrew Myers Attorneys at Law, Houston, TX represented Pepper Lawson in this case.

Acuity v M/I Homes of Chicago, LLC, on appeal to the Illinois Supreme Court

In this case, the Illinois First Court of Appeals has invited the Illinois Supreme Court to resolve the question whether an upper tier developer/general contractor has CGL coverage for property damage arising out of the work of its subcontractors. The case at issue involves an appeal by Acuity, a Mutual Insurance company seeking the Illinois Supreme Court’s intervention to reverse an appellate court’s decision. The Court of Appeals concluded that Insurer did have a duty to defend the Developers lawsuit, reversing a trial court’s entry of summary judgment in favor of the Insurer. The trial court said that the Insurer had no duty to defend the Developer in an underlying lawsuit stemming from damages caused by the allegedly defective construction work of one of M/I Homes’ subcontractors. The court had reasoned that there was no duty to defend because the complaint in that case did not allege “property damage caused by an occurrence” but the Appellate Court reversed and instructed the circuit court to enter summary judgment in favor of the Owner on the issue of a duty to defend.

In this case, it was voted that SLDF should join the ABC and NAHB in its amicus brief. In another WIN for SLDF, the Illinois Supreme Court issued an opinion extremely favorable to the construction industry and its broad coalition of support on November 30, 2023. On January 22, 2024, the Illinois Supreme Court denied Acuity’s petition for rehearing so the matter is now concluded.

The brief was primarily authored and filed by Patrick J. Wielinski of Cokinos Young, Dallas, Texas, joined by Clifford Shapiro of Chicago, IL. Patrick and his firm have participated in the filing of such briefs for ASA and the SLDF for many years.

Twigg v. Admiral Insurance Co., Petition for Review to Oregon Supreme Court Case

The dispute at issue concerns whether an insurance company (Admiral Insurance Company) had a duty to indemnify its insured, Rainier Pacific Development LLC (Contractor), and pay a portion of an arbitration award that homeowners Weston and Carrie Twigg obtained against the Contractor for breach of contract.

After the Owners obtained the arbitration award, they sued the Insurer for breaching its insurance policy with the Contractor when it failed to pay a portion of the Contractor’s liability to the Twiggs under the arbitration award.

Both the trial court and Court of Appeals concluded that the Contractor’s insurance policy did not provide coverage for its liability to the Owners. The courts noted that the insurance policy in question applied to property damage caused by an "occurrence," defined as an "accident" but that the Contractor’s liability to the Owners arose instead from a breach of a separate settlement agreement, known as the “Repair Contract.”

In this case, it was voted that SLDF should join the ABC-Oregon Columbia Chapter in its amicus brief for the Twigg case. The Oregon Supreme Court granted review on the case, no doubt in part because of ASA’s participation as amicus. A decision from the Court is expected in early 2024.

Michael E. Farnell, Parsons Farnell & Grein, LLP, Portland, OR prepared the brief for ASA.

White Sands Construction, Inc. v. City of Las Cruces to the Supreme Court of the State of New Mexico

The issue in this case regards calculation of interest on prompt payment claims. New Mexico took its language “1 1/2 percent per month, or fraction thereof” from tax statutes that contain the same language for interest penalties to the government for late payment. Some other states may have, in following New Mexico’s prompt payment and retainage statute, used the same language. The Court of Appeals essentially agreed that the language as drafted reads so that the interest penalty automatically accrues even if the payment is a day or two late and then continues to accrue each following month. They then decided that, despite any legislative history to support it, the interest should actually be calculated at a daily rate, rather than a monthly rate accruing immediately when due.

ASA submitted a quickly turned around amicus in coordination with the ABC & AGC requesting the court accept certiorari in this case. Despite what looked like a good sign from the Supreme Court requesting that the City of Las Cruces respond, the Court denied the petition for writ of certiorari in August of 2023.

Sean Calvert, Calvert Menicucci, P.C., Albuquerque, NM prepared and filed the amicus in this case on behalf of ASA.

Third Coast Services, LLC v Castaneda in the Texas Supreme Court – This dispute involved a fatal multivehicle accident, which resulted in the death of an individual named Pedro Castaneda. The deceased’s family sued SpawGlass Civil Construction, Inc. and Third Coast Services, LLC for negligence and premises liability. While the direct laws at play apply to the state of Texas, it was agreed that the broader interpretation of immunity for construction workers is relevant nationwide. The issues regarding a broad application of statutory immunity are of interest to construction subcontractors and suppliers involved in Projects who believe the Project is covered by a CGL policy.

The Contractor and Subcontractor moved for summary judgment, arguing that they were immune from suit under Texas Code, which provides that a “contractor who constructs or repairs a highway, road, or street for the Texas Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from the performance of the construction or repair if, at the time of the personal injury, property damage, or death, the contractor is in compliance with contract documents material to the condition or defect that was the proximate cause of the personal injury, property damage, or death.”

The trial court denied the motions and the Court of Appeals of Texas, 14th Appellate Division affirmed, holding that neither the Contractor nor Owner had established that they met each requirement of their affirmative defense. ASA is supporting Spawglass and Third Coast in its petition to the Texas Supreme Court for review.

Shaina Swanson and Brian Carroll of Sanderford & Carroll, Belton, TX prepared the brief for ASA.