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THE OFFICIAL EDUCATIONAL JOURNAL OF THE AMERICAN SUBCONTRACTORS ASSOCIATION

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MAY 2016

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- *What Subcontractors Should Know About Lien and Bond Claims*
- *What to Do When You Haven't Been Paid: Recovery Options for Secured and Unsecured Creditors*
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May 2016

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The Contractor's Compass **is the monthly educational journal of the Foundation of the American Subcontractors Association, Inc. (FASA) and part of FASA's Contractors' Knowledge Network. The journal is designed to equip construction subcontractors with the ideas, tools and tactics they need to thrive.**

The views expressed by contributors to ***The Contractor's Compass*** **do not necessarily represent the opinions of FASA or the American Subcontractors Association, Inc. (ASA).**

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FASA was established in 1987 as a 501(c)(3) tax-exempt entity to support research, education and public awareness. Through its Contractors' Knowledge Network, FASA is committed to forging and exploring the critical issues shaping subcontractors and specialty trade contractors in the construction industry. FASA provides subcontractors and specialty trade contractors with the tools, techniques, practices, attitude and confidence they need to thrive and excel in the construction industry.

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ABOUT ASA
ASA is a nonprofit trade association of union and non-union subcontractors and suppliers. Through a nationwide network of local and state ASA associations, members receive information and education on relevant business issues and work together to protect their rights as an integral part of the construction team. For more information about becoming an ASA member, contact ASA at 1004 Duke St., Alexandria, VA 22314-3588, (703) 684-3450, membership@asa-hq.com, or visit the ASA Web site, www.asaonline.com.

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ASA and ASA of Texas Join Industry Groups in Petitioning OSHA's 'Infeasible' Final Silica Rule

ASA and ASA of Texas joined several other construction industry organizations on April 4 in filing 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."

The organizations filing the petition for review were ASA of Texas, the Mississippi Road Builders' Association, Pelican Chapter of Associated Builders and Contractors, Louisiana Associated General Contractors, Associated Masonry Contractors of Texas, Distribution Contractors Association and Texas Association of Builders, and the parent organizations of these groups—ASA, the American Road and Transportation Builders Association, Associated Builders and Contractors, The Associated General Contractors of America, Mason Contractors Association of America, Mechanical Contractors Association of America and National Association of Home Builders.

On March 25, OSHA issued the final rule, which requires construction employers to limit worker exposure to silica and to take other steps to protect workers. Crystalline silica is a common mineral found in many naturally occurring materials and used at construction sites. Inhaling very small crystalline silica particles can cause multiple diseases, including silicosis, lung cancer, chronic obstructive pulmonary disease and kidney disease. Respirable silica is generated by high-energy operations like cutting, sawing, grinding, drilling and crushing stone, rock, concrete, brick, block and mortar. Activities such as abrasive blasting with sand; sawing brick or concrete; sanding or drilling into concrete walls; grinding mortar; and cutting or crushing stone generate respirable dust. In response to ASA and others in the construction industry, OSHA issued a separate standard for construction with the intent of allowing employers to tailor solutions to the specific conditions in their workplaces. "Nonetheless, ASA has serious concerns about the feasibility of implementing the rule in the real-world construction environment," said ASA Chief Advocacy Officer E. Colette Nelson. "While we recognize that OSHA at least acknowledged the many differences between the construction industry and general industry, we're concerned that compliance may be neither economically nor technologically feasible for the typical construction contractor."

For more information, see the ASA Fact Sheet on OSHA's Rule on Respirable Crystalline Silica and the ASA Frequently Asked Questions on the OSHA Standard on Respirable Crystalline Silica.

ASA Asks for Congressional Help with DOL's Overtime Rule

In coalition with more than 100 other associations, ASA has called on Congress to enact the Protecting Workplace Advancement and Opportunity Act (H.R. 4773 / S. 2707). This legislation would require the U.S. Department of Labor to perform a detailed impact analysis prior to implementing changes to the exemptions for executive, administrative and professional employees under the Fair Labor Standard Act's overtime pay requirements.

Under current FLSA regulations, an individual must satisfy three criteria to qualify as exempt from federal overtime pay requirements: (1) an individual must be paid on a salaried basis, (2) that salary must be more than $455/week ($23,660 annually), and (3) the individual's "primary duties" must be consistent with managerial, professional or

administrative positions as defined by DOL.

On June 30, 2015, DOL issued a Notice of Proposed Rulemaking that would increase the salary threshold to $50,440 per year, a 113 percent increase that would occur all at once in 2016, and in all areas of the country regardless of significant regional economic differences.

The Protecting Workplace Advancement and Opportunity Act is consistent with comments submitted by ASA and others, which expressed concern that DOL's economic analysis severely underestimated the impact the proposed rule would have on small businesses. ASA also criticized DOL's analysis for not considering the impact that implementation of its proposal would have on various regions of the country with different costs of living.

The bill does not prevent an increase in the salary threshold; it merely requires DOL to more closely examine the impact of possible changes before proceeding with a final rule.

For more information on the DOL proposed rule, see ASA's Frequently Asked Questions.

ASA and AGC Officers Discuss Top Industry and Public Policy Issues

During an April 8 meeting in New York City, national officers of the Associated General Contractors of America and ASA discussed top industry and public policy issues, including workforce development, ConsensusDocs, federal procurement reform including change orders, challenges with owner payment to prime contractors, OSHA's rule on crystalline silica, Web-based project management systems, lean construction and building information modeling.

The ASA and AGC officers meet each year to discuss issues and explore new ways in which the associations can work together. ASA's representatives were: 2015-16 President Letitia "Tish" Haley Barker, Haley-Greer, Inc., Dallas, Texas; 2016-17 ASA President-Elect and 2015-16 Vice President Robert Abney, F.L. Crane & Sons, Inc., Southaven, Miss.; 2015-16 Secretary Courtney Little, ACE Glass Construction Corporation; Immediate Past President Brian Johnson, Soil Consultants Inc., Charleston, S.C.; and ASA Chief Advocacy Officer E. Colette Nelson.

ASA Calls for Sweeping Changes to DOL's 'Sick and Safe' Rule

On April 12, ASA filed a comment letter with the U.S. Department of Labor calling for sweeping changes in its proposed rule, *Establishing Sick Leave for Federal Contractors*. DOL's proposed rule was published in response to Executive Order 13706, which requires certain parties, including those companies subject to the Davis-Bacon Act, to provide their employees with up to seven days of paid sick leave annually, including paid leave allowing for family care.

ASA's comments recognized that DOL has flexibility to change the goals of rule, given the requirement that it implement the E.O. Nonetheless, the Association expressed concern that DOL had significantly underestimated the cost to businesses, particularly small businesses, in complying with the rule.

ASA made specific suggestions to DOL intended to minimize the economic impact of the proposed rule. These included:

- Requiring that covered employees should only accrue paid leave on hours that they actually work.
- Requiring that employees should only accrue paid leave for work directly-related to a covered contract.
- Expanding and extending the exception for employees performing limited work with respect to covered contracts.
- Allowing an employer to calculate employee leave balances in accordance with the employer's normal payroll schedule.
- Allowing an employer to provide employees information on their paid leave balances on the employer's normal payroll schedule.
- Permitting an employer who opts to take advantage of the so-called up-front rule—that is the provision allowing an employer to provide the maximum amount of leave at the beginning of the year rather than instituting an elaborate tracking system—so that employer can provide such leave on a quarterly, rather than an annual basis.
- Expanding the up-front rule to part-time employees.
- Waiving the rollover rule if an employer elects to take advantage of the up-front rule.

For more information, see ASA's Frequently Asked Questions on DOL's proposed rule.

Illinois Circuit Court Undermines 'Strong' Public Policy of Mechanic's Lien Act, ASA Tells Appeals Court

by the American Subcontractors Association

"There needs to be a 'safety valve' for courts to use to give contractors security in payment for their labor and materials. And there is. The Illinois Mechanic's Lien Act … is a legislatively created safety valve that provides broad payment security to contractors of all tiers to secure their right to payment for labor and materials provided in furtherance of a construction improvement."

An Illinois circuit court erred as a matter of Illinois law, undermining the strong public policy behind the Mechanic's Lien Act, when it summarily dismissed the mechanic's lien claim of a subcontractor, ASA wrote in an *amicus curiae* brief filed on April 1 in the Appellate Court of Illinois, Second Judicial District, in the case of *AUI Construction Group, LLC, vs. Louis J. Vaessen, et al.* The circuit court's ruling, ASA said, unduly erodes mechanic's lien rights to the detriment of the greater public. "Small construction businesses, in particular, will pay the heaviest price. Most of those small businesses will be subcontractors," ASA wrote. "Make no mistake, if the circuit court's ruling goes undisturbed the reasoning and rationale of that case will reverberate across Illinois, to the detriment of this State's economy."

ASA told the appeals court that the lower court's ruling will have devastating effects upon small to mid-sized businesses and it denies a remedy to small- and mid-sized businesses who provide credit (in their labor and materials) to projects of great private and public importance but who can suffer severe harm from developments (an insolvency of their contracting partner or owner/disputes between the owner and prime contractor/loss of project funding from a bank) that they could not control. "There needs to be a 'safety valve' for courts to use to give contractors security in payment for their labor and materials," ASA wrote. "And there is. The Illinois Mechanic's Lien Act … is a legislatively created safety valve that provides broad payment security to contractors of all tiers to secure their right to payment for labor and materials provided in furtherance of a construction improvement."

ASA has extensive knowledge and experience with the interpretation and enforcement of mechanic's lien laws throughout the United States, ASA told the court. "The opinion of the circuit court in this matter in denying mechanic's lien rights to the Appellant is not consistent with the intent of the Illinois Legislature as revealed in the plain language of the mechanic's lien law," ASA wrote. "ASA is deeply concerned that allowing the circuit court decision to stand will have severe implications to payment protection in the construction industry and is contrary to the intent of the Illinois Legislature in enacting the Mechanic's Lien law to provide security for payment to all who improve real property in this State." ASA urged the appeals court to correct the circuit court ruling.

In the underlying case, AUI Construction Group, the appellant in this case, was hired in 2011 by a now financially insolvent design-builder, Postensa Wind Structures U.S., LLC, to construct and erect a 507-foot tall cast-in-place post-tensioned concrete tower and foundation as part of a larger (multi-million dollar) wind energy conversion system project. GSG 7, LLC, the developer, was hired to build the project on land owned by the estate of Louis and Carol Vaessen, the owner, in Sublette, Ill. In 2007, the owner and developer entered into a 50-year Easement Agreement, which authorized the developer to build and operate wind energy systems on the property in exchange for certain benefits, including payments from the revenue generated by the project. The Easement Agreement was not recorded until Dec. 22, 2011. Before the Easement was recorded in the Lee County, Illinois Recorder's Office, a number of things happened: (1) the developer contracted with Clipper Wind Power to design and build the project; (2) Clipper contracted with Postensa for the design and build work for the project; and (3) Postensa subcontracted with AUI to perform the construction portion of the project work, including building the energy system's massive foundation and 507-foot tall tower, and AUI actually started its work on site. AUI Construction's scope of

work included not just building the massive exterior, but an interior with exterior doors, multiple electrical cabinets, electrical outlets, a lighting system, a power supply system, an elevator, 11 work platforms, a hoist and ladders that extend from the base to the top of the structure's tower. The structure was connected to the utility power grid and a nearby transformer through a series of conduits. After completing its subcontract work, AUI was owed over $2 million. To protect its ability to collect its unpaid billings for the improvements to the land, AUI exercised its right under Illinois law to perfect and enforce a mechanic's lien against the improved property. At an arbitration over its claims, AUI received a substantial award for its unpaid bills. When its contracting partner, Postensa, then filed for bankruptcy, AUI moved to foreclose its mechanic's lien and perfect the security interest it had in the improved property. The developer and owner, however, moved to dismiss the lien claims. Without conducting a trial or evidentiary hearing, the circuit court held as a matter of law that the project was not an improvement to real property under the Mechanic's Lien Act and was simply a non-lienable trade fixture.

"This case represents not just a fight for payment by AUI, but a fight for the public good and the financial survival of numerous Illinois small businesses and construction companies," ASA wrote. "It also involves the landmark issue of whether subcontractors and suppliers still maintain lien rights for construction work on commercial construction projects that improve property where the improvement is on property that is subject to an easement and title retention agreement. This Court's decision in the matter will either: (a) further the letter and spirit of the Mechanic's Lien Act, to the benefit of subcontractors, suppliers, and the public at large; or (b) unduly erode those rights, driving prices up, lowering competition for construction projects on easements, and financially stressing—if not bankrupting—future subcontractors."

ASA's Subcontractors Legal Defense Fund financed the brief. Contributions may be made to the SLDF via the ASA Web site.

FEATURE

What Subcontractors Should Know About Lien and Bond Claims

by Scott Wolfe Jr.

In the construction industry, financial risk is inevitable. Until all work has been completed and all payments have been made, someone is in a precarious financial situation. Most of the risk is borne by subcontractors who furnish labor or materials on credit, because late payment or nonpayment is always possible even when all work is completed on time and on budget. The parties financing construction projects have the upper hand since they have what the sub-tier parties want: money. Fortunately, special legal measures exist to provide subcontractors with leverage.

Mechanic's liens and bond claims are the two most powerful tools available for subcontractors to level the playing field. These documents were specifically designed to help subcontractors—and other lower-tier parties on construction projects such as material suppliers and equipment lessors—secure payment. While the ideas at the root of this concept can be traced to the Roman Empire, the modern mechanic's lien was introduced to America by Thomas Jefferson in 1791 to provide builders the financial security to move forward with projects. Lien law has since evolved and broadened in scope and complexity, but the core concept remains the same.

While nearly every party who is unpaid for labor or materials furnished on a construction project has the right to file a mechanic's lien or bond claim, certain steps are required in order to retain that right. It is important for subcontractors to be aware of the process and requirements necessary to preserve the right to file a mechanic's lien or bond claim.

Mechanic's Lien vs. Bond Claim: What's the Difference?

Both mechanic's liens and bond claims are filed when a project participant is not paid. Use of these industry-specific remedies can sometimes avoid the necessity of jumping directly into a lawsuit. With a mechanic's lien or bond claim, the subcontractor can hold everyone up the contracting chain responsible, for example, the property owner, the general contractor, and the surety company bonding the project, and use that pressure to prompt the payment due.

For projects on privately owned property, a mechanic's lien provides the claimant with a security interest in the improved property. The claimant retains this interest until the mechanic's lien expires, is released pursuant to payment or for other reasons, or an enforcement/foreclosure lawsuit is initiated. The mechanic's lien generally prevents the property from being sold, transferred, or refinanced until the claimant is paid, which strongly motivates the property owner to make payment and remove the encumbrance. If the property owner still refuses to make payment, the claimant can initiate a foreclosure action and be compensated from the proceeds of the sale of the property.

A bond claim provides a similar protection on public projects. It works just like a mechanic's lien, but when the project in question belongs to the government, subcontractors don't have the option of securing an interest in the title of the property. Instead, the subcontractor files a claim against the surety bond, which is a sum of money reserved to protect against problems such as project disruptions or failure to meet contract specifications. On a bond claim, an interest in that sum of money replaces the interest in the property itself that a claimant gains through a mechanic's lien on a private project.

Securing the Right to File a Claim

Mechanic's liens and bond claims are rarely standalone documents. Rules vary from one state to the next, but in most cases, notice must be submitted preemptively in order to secure the right to file a mechanic's lien or bond claim in the event of nonpayment. The reason these preliminary notices are required long before a payment issue arises is to protect upper-tier parties from unexpected lien and bond claims. For example, if a subcontractor is hired by the general contractor, the property owner might not know that subcontractor is working on the project or how much they expect to paid. Notice is often required to bridge the gap when top-tier parties are distanced from subcontractors by several degrees of separation. Sending notice promotes communication and transparency, and gives the top-tier parties a chance to make payment before facing a lien or bond claim filing.

It is crucial for subcontractors to stay on top of notice requirements, because failing to submit a preliminary document or missing a notice deadline can limit or invalidate the right to file a lien or bond claim. Even when it is not required, sending notice can benefit subcontractors by prioritizing their invoices and speeding up the payment process.

Securing Mechanic's Lien Rights

A preliminary notice—sometimes called a pre lien notice or a notice to owner—is a document sent preemptively by subcontractors before or shortly after the start of a project to inform other parties that they are furnishing improvements on that project. Preliminary notices are required

in most states, and failing to send one or sending it late can invalidate the right to file a lien later on. Typically, the deadline to send preliminary notice is measured from the date labor or materials were first furnished on a project, and this due date usually occurs long before payment is due.

Notice of intent is similar to a preliminary notice in that it is sent before a lien is filed, but it is sent right before a claim of lien is made rather than at the beginning of the project and is only sometimes required. This document serves as a final warning, giving the party making payment one last chance to settle the bill before a lien is filed on the property.

Securing Bond Claim Rights

The process of filing a bond claim is different from that of filing a mechanic's lien because there are two general types of public projects with two different sets of statutes: state/municipal/local projects and federal projects. The Miller Act applies to federal construction projects, while state-specific "Little Miller Acts" apply to state projects, which includes city and county projects. When researching requirements for securing bond claim rights, it is important to differentiate between project types to determine which requirements apply. In some circumstances, requirements can even change based on the specific type of state project. Preliminary notice is sometimes required, but not as frequently as on private projects. Required and optional notices for subcontractors to secure bond rights vary by name from one state to the next.

Determining Requirements

Certain factors always affect requirements for mechanic's liens, bond claims, and notices. The state in which a project is located has a huge impact on the rules that apply, because lien law varies widely from one state to the next. The project type—whether it is private or public—affects whether a subcontractor should pursue lien or bond rights. This seems obvious, but the project type is rarely announced in a contract, sometimes determining the project type takes a little more research. Another key piece of information is a subcontractor's position in the hiring chain. This is often determined by the hiring party, for example, whether a subcontractor was hired by the GC or by another subcontractor. Both the degree of separation between the claimant and top-of-chain parties (such as the property owner or public entity sponsoring a project), and the claimant's specific role can affect requirements.

Other, state-specific factors come into play in some cases, and for some documents. This may present itself in a situation where a particular document is required only if a project meets some threshold value, or a document may be required only in response to another document that a different party may send or file. Sometimes requirements depend on the type of building, for example a single-family residence versus a condo building. Rules sometimes vary for repairs and alterations versus the construction of a new structure.

Once a subcontractor has determined the requirements for securing lien or bond rights on a specific project, the next step is actually preparing and submitting the required documents. Determining and meeting deadlines is crucial; missing a deadline for submitting a notice or claim can severely limit or negate lien and bond rights. Ensuring that the content of the document in question in correct is also essential. Specific information and language that must be contained in notices and claims is often outlined in state statutes. The recipients of documents can also vary. Mechanic's liens and bond claims are generally filed in the county recorder's office, while notices are typically sent to parties through the mail (although the mail-type changes state-by-state and document-by-document).

Making the Claim

Securing the right to file a mechanic's lien or bond claim is often enough to initiate payment. In most cases, if all preliminary documents and notices are sent correctly and on time, payment is received before the deadline to file a mechanic's lien or bond claim arrives. If a subcontractor still isn't paid by this point, the next step is following through and filing a claim. This can be done by researching and preparing a mechanic's lien or bond claim document and submitting it to the proper entity. Parties may attempt this process themselves manually, hire a construction attorney to prepare and file the document, use a software platform, or outsource to a manual service provider.

Mechanic's liens and bond claims are the most powerful tools available to subcontractors to minimize financial risk and secure payment on construction projects. However, it is essential to note that in most cases certain steps must be taken to secure the right to file these documents. These steps vary in complexity from one state to the next, and the best way for subcontractors to ensure that they are financially protected is to implement a mechanic's lien or bond claim policy that outlines the steps to be taken to secure rights. These policies are not one-size-fits-all—requirements vary widely. A good policy is one that is custom fit to a particular subcontracting business. Establishing an effective policy is the best way subcontractors can ensure payment on all projects.

Scott Wolfe is CEO of zlien in New Orleans, La., a platform that reduces credit risk and default receivables for contractors and suppliers by giving them control over mechanic's lien and bond claim compliance. Wolfe is a licensed attorney in six states with extensive experience in corporate credit management and collections law, including the use of mechanic's liens, UCC filings and other security instruments to protect and manage receivables. He can be reached at (866) 720-5436, Ext. 700, scott@zlien.com, or @scottwolfejr on Twitter.

FEATURE

What to Do When You Haven't Been Paid: Recovery Options for Secured and Unsecured Creditors

by Jerry Bailey and Kristin Alford

You supplied materials or services per the contract or purchase order, now your customer needs to pay for those materials and services. Just because they need to pay you, doesn't mean they will pay you—it's a tale as old as Mr. Jefferson himself *(if he were still alive, of course)*.

Whether you are a secured creditor or an unsecured creditor, slow-paying and non-paying customers are, at the very least, frustrating, time-consuming and often costly burdens.

This article will provide you, the secured or unsecured creditor, with some recovery options in the event you are unpaid. These recovery options may not be "new and groundbreaking." These options may even seem too simple to be effective. But don't underestimate their power and success!

True Cost of Write-Offs

Before delving into tips on collections and the remedies for secured and unsecured creditors, you must understand the true cost of a write-off and weigh that cost against the cost to proceed with collection efforts.

The cost of write-offs to a company can be crippling. A write-off of $50,000 at a 30 percent margin means you would have to generate $166,666 in additional sales to recover that lost profit. If you operate at a 15 percent margin the additional sales mushroom to $333,333.

It may not be an issue when one customer is slow paying, but it's never just one customer; it is several customers and it can have a significant impact on cash flow. If you have 10 accounts paying an average of 20 days late and each is invoicing at $50,000 you could have $500,000 + outstanding.

How to Make the Collection of Unpaid Monies Easier

You have likely heard this dozens of times, if not more, but it's critical to start the collection of unpaid monies the moment they become past due. Here are a few steps on how to make the general collection process easier.

- **Monitor open invoices:** Routinely review open invoices and as soon as an invoice is past due (e.g. if you bill on 30 day terms, day 31) contact your customer and inquire on the invoice.
- **Try multiple mediums:** Use phone calls, emails, demand letters, etc. and make sure you keep track of your communications—good record-keeping is important!
- **Pay attention to cues:** Social cues and non-verbal cues are frequently early warning signs that an invoice (or customer) is going to be an issue. When people stop communicating they are sending a clear signal, "I can't/won't pay the invoice, and maybe if I ignore you, you will go away."
- **Check status:** Note changes with your customer's business, such as a disconnected phone number, undeliverable mail or email, and changes in their corporate status with the Secretary of State.
- Review credit: Credit reports can provide a wealth of information, especially for payment history, DBT changes, recent collection placements or judgments.
- **Cut them off:** If you have invoices that a customer isn't paying, stop extending them additional credit. Debt is like a beast and if you continue to feed it, it will gobble up every last bit and give you nothing in return.
- **Know when to let it go:** Don't immediately toss the invoice into the bad-debt-write-off-pile. "Let it go" from your desk and move it to the desk of a specialized collection agency. Collection agencies are trained and experienced, not to mention, a third-party is sometimes more effective simply because they are a third party—removed from the situation.

Get Paid as a Secured or Unsecured Creditor

Mechanic's liens and UCC filings are two of the greatest fiscal weapons available to the construction credit professional. Mechanic's liens and UCC filings, when properly executed and perfected, provide you with leverage. These remedies put you in the position of a secured creditor and without question, being a secured creditor is the only place to be.

The Power of the Demand

Whether you are a secured creditor or unsecured creditor, a well-crafted demand letter can expedite payment, allow you to maintain control of your collection process and save you money.

The demand letter is a strongly worded request for payment, most often served upon your customer, advising legal action may be taken if payment is not received within a specified time period. In order for a demand letter to be successful, it should contain factual information and be succinct.

The demand letter should include the date of the demand, your company's name and contact

information, your debtor's name and contact information, a reference to the debt (i.e. provide the project name, the UCC filing number or purchase order number), the amount of the outstanding debt, the due date of the debt, how the debt should be paid and the consequence for not paying the debt.

The party(s) involved need to know there is a consequence for not paying you—this is where you can leverage the security of the UCC filing or mechanic's lien. Be specific and provide a realistic ramification for not paying—a few examples:

- If secured by a mechanic's lien: *"… If payment is not received, we may pursue all available legal remedies against you, including, but not limited to, filing a mechanic's lien."*
- If secured by a UCC filing: *"… If payment is not received, we may pursue all available legal remedies available under the Ohio Uniform Commercial Code."*
- If unsecured: *"… If payment is not received, we may pursue all available legal remedies against you, including, but not limited to suit."*

The demand should be served upon your debtor, but it is recommended you also send a copy of the demand to any party that may contribute to you being paid.

- *"I supplied to a construction project"*—If the debt is related to a construction project, the additional parties you may want to include are the project owner, project manager, prime contractor, subcontractor, lender and surety.
- *"I supplied inventory to my customer"*—If you applied for or have filed a UCC as security, serve a copy of the demand solely upon your debtor.

Secured Through Mechanic's Lien/Bond Claim Process

A successful mechanic's lien/bond claim program begins with a successful preliminary notice. Solid project information and complete contractual chain information are the foundation of the preliminary notice—this information should be obtained on every project as standard business practice.

Once a mechanic's lien process is in place, and preliminary notices are being served regularly, 96 percent of the time, properly serving a preliminary notice will get you paid, with no additional action needed. A 96 percent success rate is huge and the primary driver behind that success is that everyone within the contractual chain knows you are supplying to the project and taking steps to secure your rights as a creditor—there is transparency.

Typically, preliminary notices will result in timely payment 96 percent of the time, but that does leave 4 percent unpaid. It is likely that 4 percent of a company's projects will require the filing of a mechanic's lien, and less than 1 percent of projects will require a company to proceed with suit/foreclosure. If you find yourself unpaid and in the frustrating 4 percent:

- **Send a Demand Letter** before proceeding with a mechanic's lien. Oftentimes, slow-paying clients will respond to the force and time constraint of a demand letter, without you having to spend additional funds on a mechanic's lien.
- **File a Mechanic's Lien:** If the preliminary notice and subsequent demand letter do not prompt payment, then it is time to proceed with a mechanic's lien. It is recommended to have copies of invoices, bills of lading, the statement of account and copies of various communications, to support your claim. (Some states actually require the invoices be attached to the mechanic's lien when sent for recording.)
- **Proceed with Suit:** In the event you remain unpaid, the final step is to proceed with suit (also referred to as foreclosure) in a court of law to enforce the mechanic's lien. Suit is typically a slow (and costly) process, due to the various facets of litigation. It is best to utilize an attorney who is well-versed in construction/mechanic's lien laws and familiar with the project itself (including issues surrounding change orders, back charges, etc.).

Don't be afraid! Too often, companies are led to believe that by protecting their rights to get paid, they will jeopardize projects and relationships. Companies fear that sending preliminary/prelien notices and securing mechanic's liens will somehow align stars so that the world implodes. OK, an exaggeration, but the fear is real and it shouldn't be. Mechanic's lien and bond claim laws are there to protect parties supplying to construction projects. If you take the steps to secure rights and get paid without having to enforce those steps, then no harm no foul, but if you don't take steps and don't get paid, well …

Additional Tips

- **Give yourself a fair chance: Negotiate a fair contract.** No-lien clauses, pay-if-paid and pay-when-paid clauses all can limit your ability to collect your money.
- **Make sure you are providing the exact documentation required for payment.** Public projects in particular can have very specific requirements for payment. Waivers of lien, certified payroll reports, and current certificates of insurance all can be required in your invoice package. Make sure you know what documentation is required and provide it. Also know when your payment request must be submitted, and what all can be included. Can you include stored materials? Are you forecasting for a few days? Make sure the weather is going to hold up!
- **Contact other parties on the ladder of supply:** Make sure the story you are hearing is the true story. Every project has different subcontractors, general contractors, and owners. They all can affect your payment. If your

customer is a general contractor and they tell you they have not been paid by the owner, verify this with the owner.

- **Know the prompt pay statutes for the particular state, and use them to your advantage:** Nearly all states have prompt pay statutes for public as well as private projects. They outline how quickly parties on the ladder of supply must remit payments to their customers once they have received payments. They also limit the amount of retainage that can be withheld. Does the statute limit retainage to 5 percent but your customer is holding 10 percent? Make sure the playing field is level.
- **Use exact lien deadlines in collection calls:** Using the exact deadline sends a message to the debtor that you have that particular project on your radar and are serious about filing a lien if you are not paid.

All parties supplying materials or labor to a construction project should take the appropriate steps to secure their mechanic's lien and bond claim rights—all parties, all projects, all the time, no exceptions.

Secured Through a UCC Filing

Just like the mechanic's lien process, serving a demand letter is a great starting point for recovering funds. In the event the demand letter does not prompt payment, you may need to proceed with further legal action and the next action is dictated by the type of UCC you filed.

Did you file a PMSI UCC: If your customer has defaulted on payment(s) and you have filed a Purchase-Money-Security-Interest (PMSI) UCC, you need to determine whether you would like your equipment/inventory (aka goods) back.

- If you do not want your goods back, you can place your claim with an attorney to file suit. By filing suit, you may receive judgment, which allows you to garnish accounts and/or attach to assets.
- If you do want your goods back, and your customer has the goods, you have the right to repossess without disturbing the peace.

If you are unable to peacefully repossess the inventory/equipment, you could take legal action by filing a temporary restraining order or by filing suit against your debtor.

Did you file a Blanket UCC: If your customer has defaulted on payment(s) and you have filed a Blanket UCC, you could place the outstanding debt with a collection agency or file suit against your debtor.

Secured or Unsecured—Seek Assistance from Collections Agency

Managing the overall collections process starts with securing your receivables, so this "last step" may seem a little out of place. As mentioned at the beginning of this article, partnering with a collections agency can save you time and money, not to mention the likely increase in recovery of unpaid funds.

If you have security, like a mechanic's lien in place, choose an agency that knows how to leverage that security in the collection process.

Make sure to provide the collections agency with any and all documentation regarding the past due account. This may include copies of the mechanic's lien or UCC filing (plus a copy of the security agreement), the contract or agreement, the credit application, invoices and statement of account, the proof of delivery, the personal guarantee, correspondence and notes (emails, letters/demand letters, phone conversations), corporate certificate (this should include your debtor's legal identity, including whether it is a corporation, partnership or proprietorship), credit report(s), and your customer's trade references, including bank name and account number (include copies of the returned/NSF check(s)).

Don't Wait

Whatever steps you take, make sure you don't let that receivable age for too long. It is a well-known fact, and long-studied trend, that the longer an account remains past due the harder it becomes to collect.

Per the results from a survey hosted by the Commercial Law League of America, "… the probability of full collection on a delinquent account drops dramatically with the length of delinquency … even after only three months, the probability of collecting a delinquent account drops to 68.6 percent. After six months, collectability drops to 52.1 percent. And after one year, the probability of ever collecting a delinquent account drops to 9.3 percent."

Jerry Bailey is the executive sales and education services manager and Kristin Alford is the education and marketing specialist at NCS. Since 1970, NCS has been the leader in providing credit professionals throughout the United States and Canada with proactive solutions to secure receivables, minimize credit risk and improve profitability. With its distinct service groups—construction, UCC, and collection—NCS develops customized solutions based on your business model and organizational requirements to Secure Your Tomorrow®. NCS has educated more than 400,000 credit professionals on securing their receivables and reducing their risk through NCS events, resources, and social media. NCS offers software and Web-based solutions, such as LienFinder™, The National Lien Digest©, LienTracker®, and Lien Direct Online. These resources help manage credit risk, provide time and information requirements, monitor deadlines and generate notices. For information on how to protect your receivables, contact NCS for assistance in developing a UCC, mechanic's lien or collection program.

FEATURE

ASA Provides Big Protection Tools in Small Packages

by Michael J. Pappas, Esq.

Far too often, language in lien waivers, change orders, payment requisitions, and other contract documents requires construction subcontractors to unnecessarily waive their rights or accept risks. Subcontractors should be wary of the pitfalls of using "form" or "boilerplate" documents and the transfer of risk provisions typically included in those documents.

Often, a subcontractor will execute such documents, despite such language, because of the "take it or leave it" message from the contractor. In many cases, however, subcontractors blindly sign the documents without fully reading them or without fully appreciating the legal implications of the language, which is often buried in fine print. In these latter examples, many subcontractors do not take the time to carefully review the documents because of a misconception that "boilerplate" documents do not merit the same type of attention or present the same risks. Many subcontractors, upon hearing that they have waived their rights or accepted additional risk, often declare: "What are we supposed to do, have a lawyer negotiate every document we sign? We'd go broke!"

While not every document needs to be read or negotiated by an attorney, a subcontractor can take simple steps to avoid waiving or releasing claims and accepting unnecessary risk. One simple step is to be absolutely sure to fully read each document and understand the implications of the language in the document before signing it. When subcontractors have any doubt as to the implications of language in documents, subcontractors should consult their legal counsel. That stated, subcontractors have another tool available to them that is the result of the ASA Attorneys' Council.

The ASA Attorneys' Council examined "form" contracts and the problems subcontractors face with overbroad release language and the transfer of risk in many of these contract documents. The council discussed inserting language on lien waivers to limit the extent of the waivers to the amounts that subcontractors had actually been paid. The discussion resulted in the creation of easy, cost-effective stickers containing uniform language that ASA members could place on documents to reserve their rights and disclaim risk transfer.

These ASA model stickers are designed to be affixed to form contract documents by subcontractors when they sign them or submit them to general contractors and owners. ASA members can access these model stickers on page 6 of the members-only "Contracts and Project Management Documents" section under "Advocacy & Contracts" of the ASA Web site at http://bit.ly/i964DX.

Since each state has unique laws and has made its own public policy decisions regarding the protection of subcontractors and suppliers, no model language can be effective in all situations and in all locations. ASA and its Attorneys' Council, however, have attempted to provide a series of stickers that will preserve rights or, at a minimum, accurately express the intention of the person signing a document at the time it was signed.

The ASA model stickers are intended for the following types of contract documents:

ASA Change Order Reservation of Rights

The ASA Change Order Reservation of Rights Sticker is intended to allow a subcontractor to sign the change order, but attempt to reserve its rights to additional claims for delays, inefficiencies, disruption or suspension, extended overhead, acceleration, and the cumulative impact of the current and other change orders issued through the same date.

Commonly, change orders are printed on forms that attempt to require the subcontractor to disclaim or waive any additional claims that are not included in the pricing of the change order. In many instances, change orders are issued at a time when exact costs cannot be calculated or ascertained. As such, the subcontractor cannot fully express the true costs in a change order. At the same time, other contract language often requires the subcontractor to perform the change order when issued and not to perform unless the change order is in writing and signed by both parties. This scenario puts the subcontractor in the awkward position of being required to perform work, but not being allowed to be paid for the work without a written change order. These stickers enable subcontractors to add common reservation language to any change order they sign.

ASA Lien Waiver Reservation of Rights

The ASA Lien Waiver Reservation of Rights Sticker clearly indicates the subcontractor's intention not to waive any lien or bond rights securing payment of retainage, unbilled changes, and claims that have not been asserted in writing or that have not yet become known to the subcontractor at the time it signs the waiver.

Many "form" partial lien waivers have language that requires a subcontractor to waive its payment security (lien or bond claim) rights for all work performed prior to the date of the waiver. This language is far too broad and is the most common mistake that construction attorneys see clients make on a daily basis. There are fair "form documents" in use that allow for the expression of outstanding claims and require waiver of lien rights only for work on which the subcontractor has actually been paid. Other "form" documents also allow for the subcontractor to expressly exempt open active claims that are known, but don't reserve for the unknown claims. Unfortunately, the more common "form documents" require complete waiver of claims through a certain date without regard to the actual payment for the underlying work. Waiving all claims may be acceptable on a final lien waiver, but it is often an unfair transfer of risk to subcontractors on partial lien waivers. Indicating an intention not to waive rights at the time you sign documents is very persuasive evidence if you end up in court.

ASA Payment Application Reservation of Rights

The ASA Payment Application Reservation of Rights Sticker expresses the subcontractor's intent to release or waive its rights effective only to the extent of payments actually received and attempts to make releases or waivers inapplicable to work performed and/or materials furnished for which payment has not been received.

This sticker is intended to be utilized on payment requisition forms that require subcontractors to waive their rights in order to submit the application. The language most commonly used in these forms is similar to the language discussed above for partial lien waivers. This common language requires a subcontractor to waive and release its claims for compensation or claims related to work performed through a certain date. These stickers are intended to accurately express the intent of the subcontractor at the time the application is signed — to only waive or release amounts for which it has actually been paid in full.

ASA Schedule Approval Reservation of Rights

The ASA Schedule Approval Reservation of Rights Sticker expresses a subcontractor's intent to reserve its right to claims for additional costs with respect to unresolved issues and claims resulting from work that does not proceed in accordance with the schedule because of the actions of others.

This sticker is a response to a requirement included in many contracts that a subcontractor be bound by schedules created by others and for which they have no direct control other than for their own scope of work. It is also in response to a common defense asserted to claims for delay, acceleration or impact — namely, that the subcontractor's required "approval" of a schedule was a waiver of its rights to make claims for the impacts of the same on the costs incurred by the subcontractor. In the most common scenario, the subcontractor is required to sign an acknowledgment of receipt of schedule changes or updates that alter the original planned sequence or timing of the work to be performed. The sticker is intended to clearly articulate the subcontractor's intent to reserve its rights to make such claims despite its compliance with the requirement to sign.

The ASA model stickers are merely one tool that subcontractors can use to attempt to protect their rights to seek compensation and to avoid unnecessary risk transfer. To have the highest potential effect, these stickers should be used in conjunction with sound business practices and solid record-keeping. If used regularly, these simple stickers could help subcontractors ensure that they are paid what they are rightfully owed.

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Legally Speaking

Claim Them—Don't Waive Them—Use Them

by Russell O'Rourke, Esq.

You are being delayed. There is an unknown condition that you have uncovered which requires additional time or work. There are these and many more reasons for claims that you see on every job. What do you do to assure that you: will have additional time to perform your work; and will know how to deal with the condition AND be paid for your work?

Before you even bid, you need to prepare for possible claims. Condition your bid on the use of terms or contract forms that are acceptable to you so that you will be able to negotiate your contract, then negotiate your contract. Going to work after the contractor gives you a contract doesn't work (you actually accept the terms offered to you by your action, even if you didn't sign the contract) and understand that your bid isn't included in the contract, unless you negotiate it into the terms. Know and understand your state laws or have a qualified construction lawyer on call to help you.

It starts with your bid. Always condition your bid so that you have the right to negotiate fair terms into your contract. It has long been the law that if you bid to a contractor, your bid is used in its bid and the contractor is the successful bidder, the contractor can force you to honor your bid. This started with *Drennan v. Star Paving Co.*, 51 Cal.2d 409 (1958). The Court held that Star was bound to its bid and permitted the contractor to insert additional "inferred" terms under the equitable concept of "reliance," that the contractor relied on the sub's bid when making its bid. To permit the sub to withdraw its bid would be inequitable. Since then most states, if not all, have incorporated this rule. Over the years, most have refined the rule to permit the subcontractor to condition their bids requiring the contractor to accept the bid within a certain time period or include/exclude specific terms. *Complete General Construction Co. v. Kard Welding, Inc.*, 182 Ohio App.3d 119 (2009). In *Kard*, the Court also held that the contractor's shopping of the sub's bid would be evidence that the general had not relied on the sub's bid and equity would not bind the subcontractor.

Once you are notified that you are the successful bidder, you must negotiate favorable terms into your contract. If you have conditioned your bid on certain terms you can insist that those terms be in the contract. If the terms are not given to you, you have three choices: Accept the contract as submitted to you; negotiate an acceptable contract; or walk away from the deal. Before you select Option 3, talk to your construction attorney. If you walk away, the contractor may sue you for damages including the difference between your bid and the amount that actually paid to another contractor, (the reason Complete sued Kard). Also, Kard may have won the battle, but may have lost the war since they had to pay an attorney to handle the case through trial and appeal.

Your contract. There are rules in almost every contract that deal with claims and change orders. These rules often require you to notify the contractor: 1) within a specific time period—often very short—of the issue causing a problem; 2) describe the cause of the issue creating the problem; 3) state the date the problem started; 3) identify the activities on the schedule that will be affected; 4) if the issue is a delay, the anticipated duration of the delay and the number of days of extension requested; 5) identify the persons responsible for the delay; 6) calculate anticipated costs; and 7) provide a recovery schedule. Sometimes this is impossible, especially in a short period of time.

To properly manage claims, you need to be prepared. Know the terms so you can react when the need arises. Create a synopsis of various terms of your contract so you can immediately find the provision without searching the entire contract.

What should you look for in your contract and how should you fix problems in the negotiation process? Start with the 50-plus tip sheets published by ASA. These are available to members on the ASA Web site. The tip sheets cover commonly seen troublesome clauses you are likely to find in your contracts, including: No Damages for Delay; Consequential Damages; Claims Notices; Limitation on Damages; Concealed and Unknown Conditions; and many more. With the

tip sheets in hand, read the proposed contract to find the hidden killer clauses in the contract. Below are examples of damage limitation, notice and change order provisions from various sources.

Damages Limitation and Notice Provision in a Proprietary Contract from a GC

CLAIMS FOR DAMAGES: Subcontractor waives its rights to recover exemplary, special or consequential damages from Contractor arising from or related to Contractor's breach or termination of this agreement. Sub shall not be entitled to anticipated profit on any work not performed whether arising from the termination or Contractor's breach of this Contract. Sub waives and releases Contractor from any claims or causes of action for damages or additional costs resulting from any act or omission of Contractor unless Sub has given Contractor notice within two days of the commencement of the alleged damage.

This waives almost all damages, even when caused by contractor's breach and waives claims for damages unless notice of damages is given to contractor within two days of the commencement of the damage. This may be too short a period of time for you to even recognize the issue or it may appear at that time to be too insignificant to make a claim.

Change Order Provision in Proprietary Subcontract

No Change Order shall be valid or enforceable unless signed in writing by [Specific Named Person], President of Contractor and approved by owner. It is expressly understood and agreed to by Subcontractor that no other person has actual or apparent authority to sign Change Orders on behalf of Contractor.

A change order signed by the president of the company, really? It has to be approved by the owner. The owner will not approve if it was a change in your scope of work, but not the contractor's? No one else has the authority to sign a change order—don't take any orders in the field.

The ConsensusDocs 750 Notice Provision

CLAIMS RELATING TO CONSTRUCTOR: The subcontractor shall give the Constructor written notice of all claims not included in subsection 5.3.2 [claims relating to Owner] within 14 days of the Subcontractor's knowledge of the facts giving rise to the event for which claim is made. Thereafter, the Subcontractor shall submit written documentation of its claim including appropriate supporting documentation, within 21 days after giving notice.

Relatively good. This gives you time to recognize a potential claim, give notice, then later supplement with additional information.

ASA Addendum to Subcontract Entitlement to Time and Compensation for Extra Work

Subcontractor shall be entitled to equitable adjustments of the contract time for extra work it performs in accordance with the subcontract documents, and for extra work it performs pursuant to written or verbal instructions of Customer, provided that Subcontractor gives Customer notice (except in an emergency threatening bodily injury or loss of property), prior to starting such extra work, identifying the date and source of the instructions considered as requesting extra work … Subcontractor may also claim damages for cumulative impact of multiple changes on Subcontractor's efficiency. Subcontractor's entitlement to adjustments shall not be contingent upon, or limited to, adjustments received by Customer. Any request of Contractor to Subcontractor without a written order is a breach of the Subcontract.

Broad provision entitling you to compensation for extra work and prohibiting the contractor from giving you verbal change orders.

Your State laws. Some states have statutes that prohibit some unreasonable contract clauses. Ohio, for example, has ORC 4113.62 Construction Contract Provisions Against Public Policy. This statute includes prohibitions against No Damages for Delay Clauses when the delay is caused by the owner or the contractor. Check with your construction law attorney for the laws in your state.

Now that you have started work and are ready to be paid, you must sign a lien waiver. Make sure that it is a waiver of liens only, not a waiver of claims, too. Be forewarned; most standard lien waivers waive all claims, too, such as:

In consideration of the sum of $_____, the receipt and sufficiency is hereby acknowledged, the undersigned does hereby waive all liens, claims, right to lien, right to claim, choses in action that the undersigned now has or may have in the future in connection with the project known as …

You are just being paid, why you waiving claims and what is a "chose in action?" If you are given a lien waiver like this, try using your own form written by your attorney, at very least, add a complete list of exceptions to the waiver to assure that you are protecting what is rightfully yours.

To maintain your right to make and be paid for claims condition your bid, negotiate a fair contract and be careful with your lien waivers.

R. Russell O'Rourke, Esq., is a partner and chair of the Construction Law Group for Meyers, Roman, Friedberg & Lewis in Cleveland, Ohio. O'Rourke has successfully represented a broad range of contractors, subcontractors and suppliers in construction projects including public schools and universities across Ohio, large sporting facilities, water treatment facilities, high-rise office and apartment buildings, health care facilities, and industrial projects. He represents construction subcontractors and suppliers in the areas of bidding, contract negotiation, change orders, claims and claims avoidance, dispute resolution, mechanics' liens and bond claims, and authored the seminal book Ohio Mechanics' Liens and Materialmen's Liens, Third Edition, published by the Thompson/Reuters Publishing Company. He can be reached at (216) 831-0042, Ext. 153, and rorourke@meyersroman.com.

ASA/FASA Calendar

May 2016

10 – **Webinar:** Websites, Email, Social Media and Your Domain Name

June 2016

2–4 – **ASA Board of Directors, Executive Committee and Rap Council Meetings**
Fort Worth, Texas

14 – **Webinar:** Driving Project Success: Keys to Improving Productivity

Contact information for all ASA and FASA events/programs:
www.asaonline.com
education@asa-hq.com

SAVE THE DATE

Coming Up

in the June 2016 Issue of ASA's

THE CONTRACTOR'S Compass

THEME:
Getting Better Contracts

- *Who's Managing Your Contract Risks?*
- *Using the ASA Subcontract Documents Suite*
- *Sleeper Clauses*
- *Legally Speaking: Contract Negotiation*

Look for your issue in June.

PAST ISSUES:
Access online at www.contractorsknowledgedepot.com

How to Stay Lean and Mean
(And Come Back Stronger!)

Subcontractors can't afford to sit around waiting for the economy to recover. Instead, they have to work hard to stay lean and mean.

But how do you run an efficient operation until construction activity rebounds? And how do you do it without sacrificing quality or taking unnecessary risks?

Project DocControl helps subcontractors document their projects in half the time. Created by subcontractors, this unique system automates the process of creating and tracking project documentation. So you can spend more time managing projects ... and less time shuffling through paperwork.

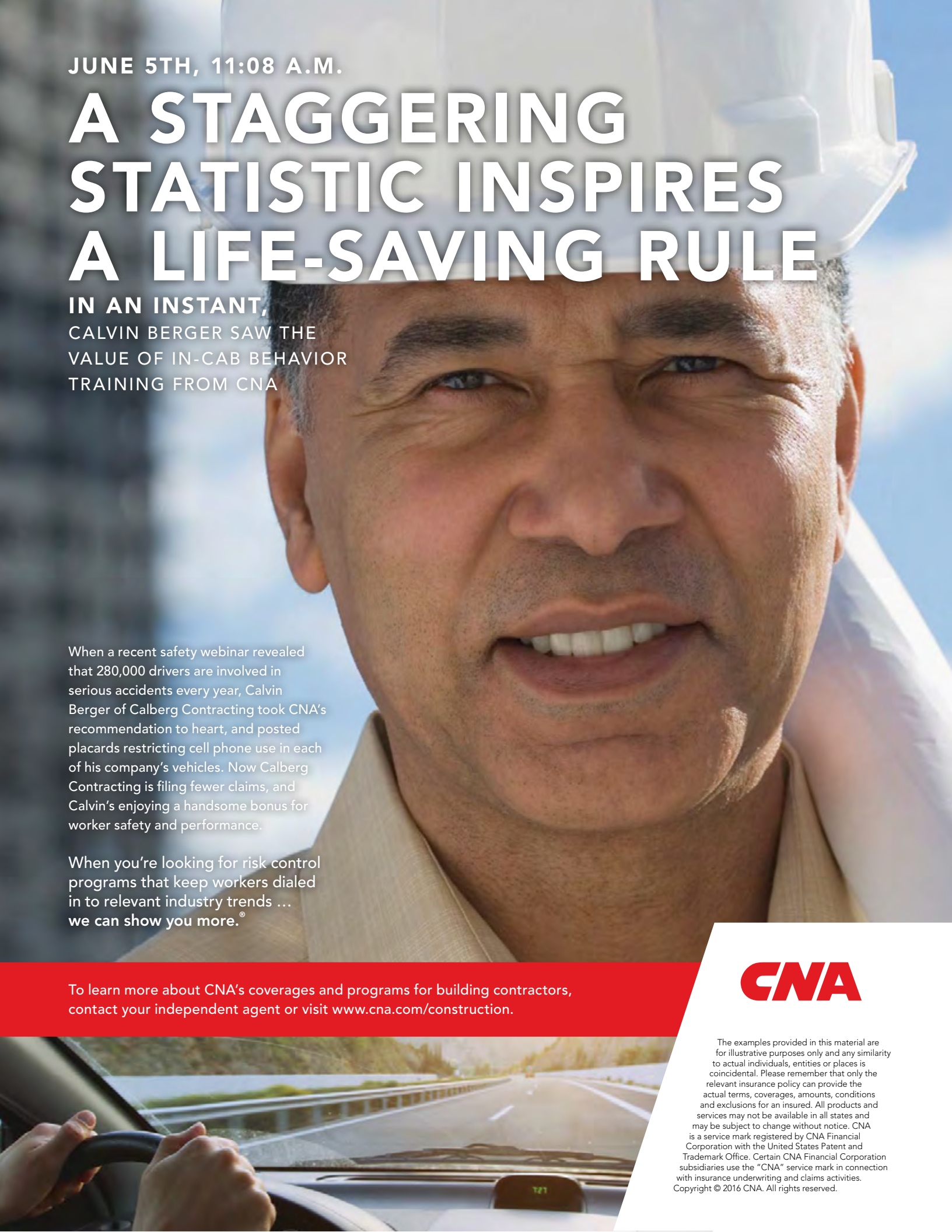
As an ASA Gold Sponsor for more than 10 years, Project DocControl has continued to support all ASA chapter members by providing discount benefits through the ASAdvantage program. For more information, or for a no-obligation online demo, call **813.903.9446** or visit us at **www.ProjectDocControl.com**.

Project™ DocControl

"The flow and consistency of the documentation in Project DocControl was exactly what we had been looking for. We needed a tool that would allow employees to generate documents easily and consistently."

— Stephen Rohrbach, CPC
President
F.A. Rohrbach, Inc.
Past ASA National President

ASA advantage



JUNE 5TH, 11:08 A.M.

A STAGGERING STATISTIC INSPIRES A LIFE-SAVING RULE

IN AN INSTANT,
CALVIN BERGER SAW THE VALUE OF IN-CAB BEHAVIOR TRAINING FROM CNA

When a recent safety webinar revealed that 280,000 drivers are involved in serious accidents every year, Calvin Berger of Calberg Contracting took CNA's recommendation to heart, and posted placards restricting cell phone use in each of his company's vehicles. Now Calberg Contracting is filing fewer claims, and Calvin's enjoying a handsome bonus for worker safety and performance.

When you're looking for risk control programs that keep workers dialed in to relevant industry trends … **we can show you more.®**

To learn more about CNA's coverages and programs for building contractors, contact your independent agent or visit www.cna.com/construction.

CNA