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# PROBLEMS OF PRIVATE CLAIMANTS UNDER MILLER ACT PAYMENT BONDS

PAUL H. GANTT,\* ROBERT D. WALICK\*\* AND JAMES M. PROCTOR\*\*\*

## INTRODUCTION

The Miller Act<sup>1</sup> requires that prime contractors on most U. S. Government construction contracts<sup>2</sup> furnish (1) performance bonds (assuring the Government against failure of the prime contractor to complete construction work), and (2) payment bonds (to assure payment to persons supplying labor and materials in the course of performance of the contract), in prescribed amounts.<sup>3</sup> In this article, the authors will focus their attention only upon the payment aspects of the Act.<sup>4</sup>

At first blush, the Act and its provisions dealing with the payment bond, appear to be a model of simplicity. But it should not come as a surprise, especially to those engaged in the tough, demanding and competitive business of the construction industry, and their advisors, to learn that the Miller Act requirements for payment bonds could match

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The opinions of the authors do not represent those of the U. S. Atomic Energy Commission or of the Federal Bar Association. The advice and cooperation of Kahl K. Spriggs, Esq., is greatly appreciated by the authors.

1. 40 U.S.C. § 270a-270e (1958).

2. The Miller Act applies to advertised as well as to negotiated contracts. 40 U.S.C. § 270e (1958) permits the waiver of the provisions of the Act by the Secretary of Defense as to certain contracts with the Armed Forces. The Secretary of the Department of Defense has issued a general waiver of bond requirements in all cost-reimbursement type contracts. ASPR 10-103.3.

3. ASPR 10-103 and FPR 1-10.104.1, 1-10.105.1 fix the penal sum at 50 per cent of the contract price where such price does not exceed \$1,000,000; 40 per cent where the contract price is between \$1,000,000 and \$5,000,000; and a flat \$2,500,000 where the contract price exceeds \$5,000,000. Additional bonding is required where contract modifications result in an increase in the contract price so that the total payment bond protection amounts to 50 per cent of the revised contract price.

4. The authors leave to further research such problems as those arising under the Capehart Act; and the cumbersome problem of the division of the penal sum of the bond between laborers and materialmen, banks and sureties.

most other provisions of the United States Code in terms of the extent of litigation<sup>5</sup> per statute word. The authors estimate that more than thirty thousand cases have been litigated under the Miller Act since its enactment in 1935. The effect of the Miller Act on the economy was described in 1963 as follows:

The full impact of the Act on our economy is illustrated by the fact that over one-fifth of all the construction surety bonds written in the United States are Miller Act bonds and corporate sureties pay an average in excess of \$250,000 a week in settlement of Miller Act claims.<sup>6</sup>

### *The Payment Bond and Its Problems*

The payment bond required by the Act is, in effect, a substitute for the protection afforded contractors on private construction projects by a mechanics lien, a security device not available against the Government because of the doctrine of sovereign immunity. The federal payment bond has its counterparts in essentially all construction contracts let by state and local governments today. All such bonds guarantee payment to persons supplying labor and materials for the job, provided they satisfy and comply with the requirements of the Act.

The problems essentially are ones of definition, coverage, notice and jurisdiction, with some interesting recent developments concerning the import of the standard federal clauses, such as the one governing "disputes," upon the prime-subcontractor relationship. Before discussing those problems, a general recount of the history of the Act should be helpful.<sup>7</sup>

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5. The following table of statistics has been compiled from the [1965] [1966] and [1967] ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS.

	<i>Miller Act Litigation</i>	
	<i>U. S. District Courts</i>	<i>U. S. Courts of Appeals</i>
Fiscal Year 1967	1158	61
Fiscal Year 1966	1281	37
Fiscal Year 1965	1173	41

6. Lester, *The ABC's of the Miller Act*, [1963] NEGL. & COMP. L. 250, 251 (ABA Section of Insurance Proceedings).

7. For general treatments for the Miller Act payment bond, see also Burgess, *A Commentary on the Miller Act*, 42 BOST. L. REV. 282 (1962); Byrne and Costello, *The Evolution of Coverage Under the Miller Act*, 28 FORD. L. REV. 287 (1959); Easterwood, *Miller Act Problems*, 16 FED. B.J. 264 (1956); Lester, *supra* note 6; Stickells, *Bonds of Contractors on Federal Public Works—The Miller Act*, 36 BOST. L. REV. 499 (1956);

*Historical Background and Purpose of the Act*

The initial attempt by Congress to provide persons dealing with prime contractors on federal construction projects with a measure of financial protection culminated in the passage of the Heard Act in 1894.<sup>8</sup> That Act required prime contractors to provide a single penal bond which served as both the performance and the payment bond.

The chief flaws of the Heard Act proved to be (1) delay, since no recovery could be had until all claims had matured and could be joined in only one proceeding; and (2) inadequacy, since the claim of the Government on the performance section of the bond took precedence over the rights of private claimants.<sup>9</sup> The latter could not bring an action until the whole project was completed, which might be long after their own portion of the work was done. Further, a claimant might have to await the outcome of what often was complex multi-party litigation, at the end of which he might find that only a fraction of the total fund created by the bond was available to private claimants.

#### MILLER ACT

Those (and other) problems led to the passage of the Miller Act in 1935. It separated the payment bond from the performance bond, making the surety liable for the full amount of its obligation under both.<sup>10</sup> The Miller Act gave each claimant a separate cause of action under the payment bond, which could be enforced shortly after default without need for joining in other claimants.

The Miller Act, with certain important, but essentially technical amendments in the intervening years,<sup>11</sup> is still with us. The Act has been recognized consistently by the courts as being "highly remedial in nature" and has in practice been given a very liberal interpretation

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Wallick and Stafford, *The Miller Act: Enforcement of the Payment Bond*, 29 LAW & CONTEMP. PROB. 514 (1964).

8. Act of August 13, 1894, ch. 280, § 1, 28 Stat. 278 (1894).

9. This was the case immediately before 1935, due to an amendment to the Heard Act in 1905. Act of February 24, 1905, ch. 778, 33 Stat. 811 (1905). See *United States ex rel. Caldwell Foundry & Mach. Co. v. Texas Constr. Co.*, 224 F.2d 288 (5th Cir. 1955).

10. *American Casualty Co. v. Brezina Constr. Co.*, 295 F.2d 603 (8th Cir. 1961); *Glen Falls Indemnity Co. v. United States ex rel. Westinghouse Elec. Supply Co.*, 229 F.2d 370 (9th Cir. 1955); *United States ex rel. Edward Hines Lumber Co. v. Kalady Constr. Co.*, 277 F. Supp. 1017 (N.D. Ill. 1964).

11. As amended, Aug. 4, 1959, PUB. L. 86-135, 73 STAT. 279; June 3, 1955, c. 129, 69 STAT. 83.

in favor of diligent claimants. An early Supreme Court case declared that the Act "should be liberally construed in aid of the public object—security to those who contribute labor or material for public works."<sup>12</sup> Apart from the specific differences between the Miller Act and the Heard Act, similarities in wording and purpose permit the two acts to be interpreted largely *in pari materia*.<sup>13</sup>

### PROJECTS COVERED

With exception for foreign and military work, where the Act may be waived,<sup>14</sup> the Miller Act requires bonds on contracts ". . . for the construction, alteration or repair of any public building or public work of the United States. . . ." <sup>15</sup>

This raises an immediate question of definition: What is a "public work of the United States?" It also has raised the more subtle question as to the legal effect of issuing the bond, if it later develops that the project is not such a public work.

Typically the question is raised by a prime contractor or his surety seeking to avoid, in effect, the entire bond obligation by claiming that the project is not a "public work." This caused the courts to construe the term "public work" broadly to prevent avoidance of the bond obligation, since the fact that the bond was voluntarily entered at the outset of the project creates "strong equities" in favor of claimants.<sup>16</sup>

The question, however, may also be raised where the prime contractor or his surety seeks the benefit of terms in the bond which are more restrictive upon the claimant than the terms of the Miller Act. Thus, in a recent case, liability was defeated by proof that notice given by a claimant, which would have been sufficient under a Miller Act bond, was not adequate because the project was not a "public work" and therefore fell outside the provisions of the Act.<sup>17</sup>

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12. *Standard Accident Insurance Co. v. United States ex rel. Powell*, 302 U.S. 442, 444 (1938); *accord*, *United States ex rel. Bruce Co. v. Fraser Constr. Co.*, 87 F. Supp. 1 (D. Ark. 1949). (The Miller Act is named for John E. Miller, a Congressman who later became a District Judge and wrote the opinion in that case.)

13. See *United States ex rel. Calvin Tompkins Co. v. Clifford E. MacEvoy Co.*, 137 F.2d 565 (3d Cir. 1943); *In re Flotation Systems*, 65 F. Supp. 698 (S.D. Calif. 1946).

14. 40 U.S.C. § 270a(b), 270(e) (1958).

15. 40 U.S.C. § 270(a) (1958).

16. *United States ex rel. Noland Co. v. Irwin*, 316 U.S. 23 (1947).

17. *United States ex rel. Miles Lumber Co. v. Harrison & Grimshaw Constr. Co.*, 305 F.2d 363 (10th Cir. 1962). This case involved a bond given for a military housing project under the Capehart Act. See Notes, 111 PA. L. REV. 1014 (1963); 49 VA. L. REV. 174 (1963).

The courts, in such cases, have often been called upon to define the term "public works." They have uniformly held that it is not essential that title to the property be in the United States. The earlier Heard Act applied to "work done on property of the United States, . . . and all fixed works constructed for the public use at the expense of the United States."<sup>18</sup> The congressional reports relating to the Miller Act also reveal the broad intent to include "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the public."<sup>19</sup>

Accordingly, it was held in an early case that construction of a library for Howard University, which had been established by Act of Congress, but was a private institution, was a "public work."<sup>20</sup> In that case, Congress had appropriated the money for the project. The Court held that the library "served the interests of the public."

However, the question of public versus private ownership apparently can be important in the case of work on a project of less obvious general public purpose than a library. It has been held that a military housing project under the Capehart Act was not a "public work" on the ground, *inter alia*, that "the mere possibility that property will later be owned by the United States" does not render it immune from statutory liens.<sup>21</sup> We know of no decision to date involving the question of whether the existence of federal financial assistance to state and local projects such as hospitals and highways is sufficient to bring them within the coverage of the Miller Act. One reason for lack of controversy in this area is that payment bonds on state projects are already required by the laws of most, if not all, of the states. However, an argument in favor of such coverage could be made in situations where the federal contribution is significant.

Contracts to furnish personal property to the Government are not covered where the manufacture of the goods is at the risk of the builder and the goods are owned by him all the time they are being built.<sup>22</sup>

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18. *Peterson v. United States ex rel. Marsh*, 119 F.2d 145, 147 (6th Cir. 1941).

19. This is the language of the National Industrial Recovery Act. Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933). The legislative history of the Miller Act indicates that it was intended to cover projects under that Act. See *United States ex rel. Noland Co. v. Irwin*, 316 U.S. 23, 29 (1942).

20. *United States ex rel. Noland Co. v. Irwin*, 316 U.S. 23, 29 (1942).

21. *United States ex rel. Miles Lumber Co. v. Harrison & Grimshaw Constr. Co.*, 305 F.2d 363 (10th Cir. 1962).

22. *United States ex rel. Mengel Body Co. v. Metropolitan Body Co.*, 79 F.2d 177, 178 (2d Cir. 1935).

In such a case, the work does not become "public" until after completion.

#### ITEMS COVERED GENERALLY

##### *Labor and Materials*<sup>23</sup>

The items covered by the Miller Act are: ". . . labor or material [furnished] in the prosecution of the work provided for in . . . [the] contract, in respect of which a payment bond is furnished. . . ." <sup>24</sup> Of course, any labor or material indispensable to the work contracted to be done is included.<sup>25</sup> Litigation has been plentiful, however, in cases (1) where it is claimed that an expenditure made by a claimant should not properly be charged to the job because it was capital in nature; (2) where it is claimed that the labor or material was not used "in the prosecution of the work provided for," either because it was diverted from such use altogether or because the work performed was not within the plans and specifications; or (3) where there is a dispute about the amount of compensation due for labor or material, if for some reason it cannot be determined from the express language of the contract.

##### *Expense vs. Capital Expenditure*

An obligation for an item capital in nature with a significant useful life beyond the project in question normally is not covered by the Miller Act payment bond. The test as to whether an obligation is for an unallowable capital item generally has been whether or not it is "substantially consumed" during the current job,<sup>26</sup> but this is probably a subjective test. Thus, it has also been held that a reasonable expectation by the supplier that an item will be substantially consumed will entitle him to recovery, whether it is, in fact, so consumed or not.<sup>27</sup>

As to what constitutes substantial consumption, there are no clear

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23. See generally Park, *What Constitutes Labor and Material in a Labor and Material Bond*, 16 Ins. Csl. J. 14 (1949).

24. 40 U.S.C. § 270b(a) (1958).

25. *United States ex rel. Watsabaugh Co. v. Seaboard Surety Co.*, 26 F. Supp. 681 (D. Mont. 1938).

26. *United States ex rel. Chemetron Corp. v. George A. Fuller Co.*, 250 F. Supp. 649 (D. Mont. 1966).

27. *Boyd Callan, Inc. v. United States ex rel. Steves Industries, Inc.*, 328 F.2d 505 (5th Cir. 1964); *United States ex rel. Byrne & Co. v. Fire Assoc.*, 260 F.2d 541 (2d Cir. 1958); *United States ex rel. Tom P. McDermott v. Woods Constr. Co.*, 224 F. Supp. 406 (N.D. Okla. 1963).

guidelines. The question is one of fact and degree. Even though items are not consumed during the performance of the work, the supplier can recover if there is no attempt by the contractor, within the actual or constructive knowledge of the supplier, to build up his capital equipment at the expense of the surety.<sup>28</sup> If a repair part substantially increases the value of machinery<sup>29</sup> or has a useful life far in excess of the duration of the present job, its cost is not recoverable;<sup>30</sup> or, on the other hand, the cost of repairs done after the completion of a job normally has not been allowed,<sup>31</sup> on the premise that the repairs only make the machinery available for use on other work.

The courts to date have not attempted to apply depreciation or other cost allocation principles to the problem. Cost of particular items have either been allowed or disallowed *in toto* rather than apportioned according to the percentage of the useful life of the item expended during the project. It could be urged, however, that an allowance of part of the total cost is reasonable and proper where a significant proportion of the economic life of an item will be used on the job, but where such use does not amount to "substantial consumption" so as to permit a recovery of the entire cost.

### *Rental Equipment.*

The fair rental value of equipment used on the project is covered by the Miller Act payment bond.<sup>32</sup> If the rental is for an extended period, the lessor may recover against the bond, even though the equipment may be idle at times during the period of the lease.<sup>33</sup> Where the lessee

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28. *United States ex rel. J. P. Byrne & Co. v. Fire Assoc.*, 260 F.2d 541 (2d Cir. 1958).

29. *Boyd Callan v. United States ex rel. Steves Industries*, 328 F.2d 505 (5th Cir. 1964).

30. *See United States ex rel. J. P. Byrne & Co. v. Fire Assoc.*, 260 F.2d 541 (2d Cir. 1958); *United States ex rel. Wyatt & Kipper Eng'rs v. Ramstad Constr. Co.*, 194 F. Supp. 379 (D. Alas. 1961).

31. *Continental Casualty Co. v. Clarence L. Boyd Co.*, 140 F.2d 115 (10th Cir. 1944); *United States ex rel. Miller & Bentley Equipment Co. v. Kelley*, 192 F. Supp. 274 (D. Alas. 1961); *American Surety Co. v. Lawrenceville Cement Co.*, 110 F. 717 (D. Me. 1901).

32. *See Friebe and Hartman, Inc. v. United States ex rel. Codel Constr. Co.*, 238 F.2d 394 (6th Cir. 1956) (per curiam); *Basich Bros. Constr. Co. v. United States ex rel. Turner*, 159 F.2d 182 (9th Cir. 1946); *United States ex rel. P. A. Bourguin & Co. v. Chester Constr. Co.*, 104 F.2d 648 (2d Cir. 1939).

33. *Friebe and Hartman, Inc. v. United States ex rel. Codel Constr. Co.* 238 F.2d 394 (6th Cir. 1956) (per curiam).



contracts to pay for loss of the equipment or damages in excess of ordinary wear and tear and fails to do so, the lessor is covered;<sup>34</sup> and the cost of furnishing repair parts to equipment under the lease for use on the project is recoverable if not determined to be a capital expenditure.<sup>35</sup>

If, however, part or all of the "rental" is in fact an installment payment for purchase of the equipment, such portion of the payment as exceeds fair rental value is not recoverable.<sup>36</sup>

### *Fringe Benefits*

All labor costs agreed to be paid on account of the work performed on the job are covered, including fringe benefits. In one Supreme Court case, amounts payable under a collective bargaining agreement to trustees of a union benefit fund were held to be covered by the bond, the actual laborers being beneficial owners of the fund.<sup>37</sup>

### *Freight and Demurrage*

A railroad carrying material to the job site has been held to have furnished labor within the meaning of the Act,<sup>38</sup> and freight and demurrage charges on shipments have also been allowed.<sup>39</sup> As in the case of material, some element of reliance by those providing labor should be required in order to narrow the range of claims.

### *Use "In the Prosecution of the Work"*

If work is defective due to fault of the subcontractor, the subcontractor

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34. *Moran Towing Corp. v. M. A. Gammino Constr. Co.*, 363 F.2d 108 (1st Cir. 1966); *United States ex rel. Llewellyn Mach. Corp. v. National Surety Corp.*, 268 F.2d 610 (5th Cir. 1959). See Note, 45 VA. L. REV. 1243 (1959).

35. *United States ex rel. Wyatt & Kipper Engineers, Inc. v. Ramstad Corp.*, 194 F. Supp. 379 (D. Alas. 1961).

36. *Union Pacific Ins. Co. v. United States ex rel. Mississippi Valley Equipment Co.*, 296 F.2d 160 (8th Cir. 1961); *Continental Casualty Co. v. Clarence L. Boyd Co.*, 140 F.2d 115 (10th Cir. 1944); *United States ex rel. Miller & Bentley Equipment Co. v. Kelley*, 192 F. Supp. 274 (D. Alas. 1961).

37. *United States ex rel. Sherman v. Carter*, 353 U.S. 210 (1957).

38. *Standard Accident Insurance Co. v. United States ex rel. Powell*, 302 U.S. 442 (1938). See also *United States ex rel. Benkart Co. v. John A. Johnson & Sons, Inc.*, 236 F.2d 864 (3d Cir. 1956); *United States ex rel. Wyatt & Kipper Engineer, Inc. v. Ramstad Constr. Co.*, 194 F. Supp. 379 (D. Alas. 1961).

39. *United States ex rel. Chemetron Corp. v. George A. Fuller Co.*, 250 F. Supp. 649 (D. Mont. 1966).

tor may not recover for it under the bond.<sup>40</sup> However, a subcontractor is not a guarantor of the specifications and may recover where defects are of design and not of construction.<sup>41</sup> On the other hand, it has been held that where a subcontractor performs work contrary to the requirements of his subcontract, he may nevertheless recover against the bond if the work is in accord with prime contract plans and specifications.<sup>42</sup> However, the subcontractor can rely on his subcontract, notwithstanding that it calls for work which is in fact at variance with that required by the prime contract. Thus, a subcontractor cannot be "back charged" for expenses borne by the prime contractor in correcting work to meet Government specifications when the subcontractor had performed the work according to the terms of the subcontract.<sup>43</sup>

The subcontractor may recover for extra work and the expense of delays caused by the fault of the prime contractor.<sup>44</sup> But where the subcontractor is on notice that there will be changes ordered by the Government "within the general scope of the contract," he stands in no better position than the prime contractor and will not be compensated for delay and expense caused by such changes.<sup>45</sup>

Similarly, the subcontractor may recover for work if it is requested to be done by the prime contractor and done in good faith, whether or not the prime contractor is ultimately compensated for it.<sup>46</sup> For example, where work is an "extra" under the subcontract but not so under the prime contract: "All that is required is proof that the labor or material was furnished in the prosecution of the work provided for in the prime contract, and that the subcontractor has not been paid therefor."<sup>47</sup>

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40. See *United States ex rel. Lichter v. Henke Constr. Co.*, 157 F.2d 13 (8th Cir. 1946); *Robinson v. United States*, 251 F. 461 (2d Cir. 1918) (where subcontractor could not recover for work rejected by owner).

41. *United States ex rel. Ardmore Concrete Material Co. v. Williams*, 240 F.2d 561 (10th Cir. 1957).

42. *H. B. Zachry Co. v. Travelers Indemnity Co.*, 262 F. Supp. 237 (N.D. Tex. 1966) (where prime contractor specified materials which were not authorized by the terms of the prime contract).

43. *United States ex rel. B's Co. v. Cleveland Elec. Co.*, 373 F.2d 585 (4th Cir. 1967).

44. *Macri v. United States ex rel. Maxwell & Co.*, 353 F.2d 804 (9th Cir. 1965).

45. *McDaniel v. Ashton-Mardian Co.*, 357 F.2d 511 (9th Cir. 1966).

46. See *United States ex rel. Warren Painting Co. v. Boespflug Constr. Co.*, 325 F.2d 54 (9th Cir. 1963); *Macri & Sons v. United States ex rel. Oaks Constr. Co.*, 313 F.2d 119 (9th Cir. 1963).

47. *United States ex rel. Warren Painting Co. v. Boespflug Constr. Co.*, 325 F.2d 54, 62 (9th Cir. 1963).

If materials indispensable to the work are furnished to a subcontractor with the good faith expectation that they will be used in the prosecution of the work, the supplier will not be precluded from recovering on the bond merely because they are not in fact so used.<sup>48</sup> This is true even if the subcontractor diverts the material to another job or to his own use,<sup>49</sup> and the principle extends even to materials that are not delivered directly to the job site.<sup>50</sup> The burden of insuring that subcontractors use materials for their intended purposes is not upon the supplier, but upon the prime contractor.<sup>51</sup> However, if a supplier knows that the subcontractor has many jobs in progress and delivers into a mingled inventory, he may recover only for the materials actually used in the job,<sup>52</sup> presumably because the element of reliance is not present in such a case.

It has not been required that materials be physically installed or incorporated into the project in order to entitle their supplier to compensation under the bond.<sup>53</sup> Because of this, the supplier of tires, tubes and oil for earth moving equipment on a highway project is covered by the bond.<sup>54</sup> In fact, the material furnished may be in no condition to be used at all. Material damage in transit was the basis for a recovery by the supplier where the purchasing subcontractor had assumed the risk of loss in shipment.<sup>55</sup>

### *Measure of Recovery*

The terms of an express contract or accepted purchase order customarily prescribes the amount of compensation. In the absence of a stated price or where there is only part performance not due to the fault of the subcontractor or supplier, recovery under the *quantum meruit* doctrine is normally allowed. However, it has been held that

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48. *Roscoe-Ajax Constr. Co. v. United States ex rel. Tayler Products Corp.*, 351 F.2d 305 (9th Cir. 1965) (per curiam).

49. *Glassel-Taylor Co. v. Magnolia Petroleum Co.*, 153 F.2d 527 (5th Cir. 1946); see also *Commercial Standard Ins. Co. v. United States ex rel. Crane Co.*, 213 F.2d 106 (10th Cir. 1954).

50. *Montgomery v. Unity Electric Co.*, 155 F. Supp. 179 (D. Puerto Rico 1957).

51. *Glassel-Taylor Co. v. Magnolia Petroleum Co.*, 153 F.2d 527 (5th Cir. 1946).

52. *United States ex rel. Chemetron Corp. v. Geo. A. Fuller*, 250 F. Supp. 649 (D. Mont. 1966).

53. *Continental Casualty Co. v. Allsop Lumber Co.*, 336 F.2d 445 (8th Cir. 1964).

54. *United States ex rel. Tom P. McDermott, Inc. v. Woods Constr. Co.*, 224 F. Supp. 406 (N.D. Okla. 1963).

55. *United States ex rel. National U.S. Radiator Corp. v. D. C. Loveys Co.*, 174 F. Supp. 44 (D. Mass. 1959), *aff'd* 275 F.2d 372 (1st Cir. 1960).

it must be possible to infer an actual contract from all the facts and circumstances since a "quasi-contractual obligation to prevent unjust enrichment is not included within the scope of implied contracts as the term is used in the Miller Act."<sup>56</sup>

A substantial agreement on price under an express contract, even though there was a failure to agree on minor items, will not force a claimant to resort to *quantum meruit* as to all the work performed. Thus, failure to agree on one \$9,300 item did not prevent recovery on the express contract for approximately \$1,000,000 of other work.<sup>57</sup>

A subcontractor can recover for partial performance at the contracted price, or under the doctrine of *quantum meruit*, if the prime contractor "accepts" part performance,<sup>58</sup> or where full performance is prevented through no fault of the subcontractor.<sup>59</sup>

#### CLAIMANTS UNDER MILLER ACT PAYMENT BONDS

Although Sec. 1(a)(2) of the Miller Act requires a payment bond "for the protection of all persons supplying labor and material in the prosecution of the work," Sec. 2(a)<sup>60</sup> states that:

Every person who has furnished labor or material . . . shall have the right to sue on such payment bond. . . : *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days. . . .

In *MacEvoy v. United States*,<sup>61</sup> the Supreme Court held that the language of the proviso constituted "plain words of limitation," making it clear that:

the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with

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56. *Fidelity & Deposit Co. of Md. v. Harris*, 360 F.2d 402, 410 (9th Cir. 1966); Note, 35 GEO. WASH. L. REV. 124 (1966).

57. *Purvis v. United States ex rel. Assoc. Sand & Gravel Co.*, 344 F.2d 867 (9th Cir. 1965).

58. *Ill. Surety Co. v. John Davis Co.*, 244 U.S. 376 (1917); *American Surety Co. of N.Y. v. United States ex rel. B & B Drilling Co.*, 368 F.2d 475 (9th Cir. 1966).

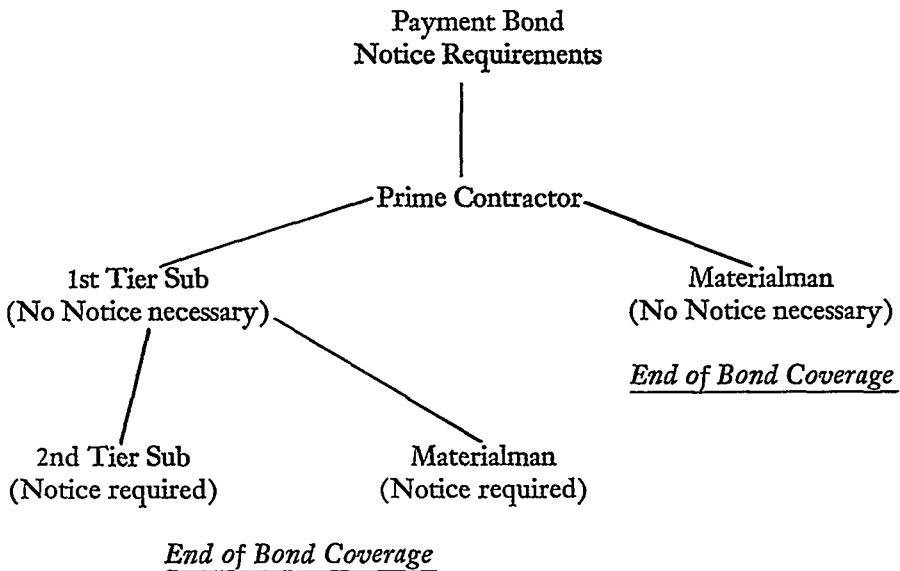
59. See *Premier Roof Co. v. United States ex rel. Alpaca Electric Corp.*, 315 F.2d 18 (9th Cir. 1963); *Narragansett Imp. Co. v. United States ex rel. Mello*, 290 F.2d 577 (1st Cir. 1961).

60. 40 U.S.C.A. 270b(a) (1958).

61. 322 U.S. 102 (1944).

the prime contractor and (2) those materialmen, laborers and subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with the subcontractor and who give the statutory notice of their claims to the prime contractor. . . .<sup>62</sup>

### Extent of Bond Coverage Under Miller Act



Thus, a first tier subcontractor or supplier (materialman) of the prime contractor may bring suit without giving notice. A supplier of a subcontractor, or a sub-subcontractor (second tier) may bring suit, but only if proper notice has been given. Finally, a supplier of a supplier, and a supplier of a sub-subcontractor cannot maintain a claim even by giving notice, because they lack the required direct relationship with the contractor or a first tier subcontractor.

In setting these limitations, the Court in *MacEvoy* said that in the absence of express statutory language, Congress could not have intended to impose liability on the prime contractor in situations where it is difficult or impossible for him to protect himself.<sup>63</sup> The prime contractor who has paid a subcontractor for work, may nevertheless be liable to pay for the second time to unpaid second tier subcontractors or sup-

<sup>62.</sup> *Id.* at 107.

<sup>63.</sup> *Id.* at 110.

pliers. Thus, under *MacEvoy*, even though the prime contractor must be responsible for the subcontractor's failure to pay, the prime contractor cannot reasonably be required to make good a similar failure of a sub-subcontractor or other remote person whom he has probably not chosen for the job and may not even know exists.

It must also be noted that *MacEvoy* denies coverage to a person even though he has direct contractual relationship with an immediate supplier of the prime contractor. This difference between the treatment of subcontractors and suppliers is also grounded in the fact that the subcontractors are relatively few and well known to the prime contractor, whereas there may be a great number of suppliers, not so well known to the prime contractor, who in the case of their business incur "remote and undeterminable liabilities" which the prime contractor cannot be expected to underwrite.<sup>64</sup>

It is not surprising in light of the above that litigation in this area of the Miller Act has usually be directed toward establishing that a party is or is not entitled to the favored status of "subcontractor," as opposed to either supplier or sub-subcontractor.

### *Subcontractor or Supplier*

In *MacEvoy*, the Court held that the proper definition of subcontractor was that "established by usage in the building trades."<sup>65</sup> Under that definition, a subcontractor is "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen."<sup>66</sup> The party for whom subcontractor status was being sought in *MacEvoy* did not fit this definition and was held to be a mere supplier. Subsequent cases have had to deal with and refine the principle in greater depth.

The Tenth Circuit has rested the distinction on "the extent to which, in matters of substance, the prime contractor delegates to the supplier . . . a specific part of the labor or material requirements of the prime contract."<sup>67</sup> A supplier of all of the concrete for a job was not held to be a subcontractor.<sup>68</sup> Concrete being a standard product, the court dis-

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64. *Id.* at 110.

65. *Id.* at 108-109.

66. *Id.* at 109.

67. *United States ex rel. Bryant v. Lembke Constr. Co.*, 370 F.2d 293 (10th Cir. 1966).

68. *United States ex rel. Potomac Rigging Co. v. Wright Contracting Co.*, 194 F. Supp. 444 (D. Md. 1961); *contra*, *Basich Bros. Constr. Co. v. United States ex rel. Turner*, 159 F.2d 182 (9th Cir. 1946).

tinguished the case from others which have held that suppliers of "customized" materials, unique and specially made for the job, are subcontractors even though they do not perform installation services.<sup>69</sup>

The distinction may also arise from the method of payment to the punitive subcontractor. Thus, whether a person furnishing labor or materials to the project is paid on the basis of an estimate, or is given progress payments from which retainage is withheld, or receives payment for goods as delivered, or whether there is a sales tax added to his bill may all be factors in determining his status.<sup>70</sup>

It is also important to establish whether the prime contractor regarded the party in question as a subcontractor or as a materialman. If a prime contractor uses the "Standard Form of Material Contract" for some persons and the "Standard Form of Subcontract" for others, this has probative value.<sup>71</sup> Where all subcontracts and subcontractors' payrolls are normally submitted and approved in the course of its business by the project owner, the fact that a given party did not have to submit to such requirements will be a factor tending to show he is only a supplier.<sup>72</sup> The same will be true if a bond is required of other subcontractors and not of him.<sup>73</sup>

In a recent case,<sup>74</sup> the Ninth Circuit was confronted with a party that had two contracts with the prime contractor. One was clearly a subcontract for the erection of a radar tower; the other was written on a standard form contract for materials. Perhaps out of deference to the "highly remedial" nature of the Miller Act, the court held that the mere existence of two contracts "beclouds the issue" to such an extent that it allowed recovery as to material supplied under both contracts.

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69. See *United States ex rel. Wellman Engineering Co. v. MST Corp.*, 350 F.2d 285 (2d Cir. 1965); *Basich Bros. Constr. Co. v. United States ex rel. Turner*, 159 F.2d 182 (9th Cir. 1946); *United States ex rel. Hardwood Products Corp. v. John A. Johnson & Sons*, 137 F. Supp. 562 (W.D. Pa. 1956).

70. *United States ex rel. Bryant v. Lembke Constr. Co.*, 370 F.2d 293 (10th Cir. 1966); *United States ex rel. Potomac Rigging Co. v. Wright Contracting Co.*, 194 F. Supp. 444 (D. Md. 1961).

71. *United States ex rel. Bryant v. Lembke Constr. Co.*, 370 F.2d 293, 296 (10th Cir. 1966).

72. *United States ex rel. Potomac Rigging Co. v. Wright Contracting Co.*, 194 F. Supp. 444, 447 (D. Md. 1961).

73. *United States ex rel. Bryant v. Lembke Constr. Co.*, 370 F.2d 293 (10th Cir. 1966).

74. *Travelers Indemnity Co. v. United States ex rel. Western Steel Co.*, 362 F.2d 896 (9th Cir. 1966).

*Subcontractor or Sub-Subcontractor?*

Occasionally, the courts have treated a technical sub-subcontractor as a subcontractor, allowing persons who dealt with him to recover against the bond.<sup>75</sup> In one case, this was done because the sub was "one of the relatively few subcontractors who perform part of the original contract, and who accordingly represent in a sense the prime contractor and are well known to him."<sup>76</sup> Courts have "looked through" the existence of punitive subcontractors which they believe have been placed in the contractual chain chiefly to insulate the prime contractor from liability and have done no work themselves,<sup>77</sup> or which are controlled by, or commingle assets and personnel with, the prime contractor.<sup>78</sup>

Attempts to ignore a nominal subcontractor have not always met with success, however. In one case, the fact that first and second tier subcontractors were under substantially common control was not enough to warrant disregarding their separate identities.<sup>79</sup> The formation of a joint venture between the prime contractor and his subcontractor, after the issuance of the bond, was not enough to enable the plaintiff-supplier, who had a contract with the subcontractor/joint-venturer, to bring an action without giving notice.<sup>80</sup> And in denying the right to a supplier of a sub-subcontractor to recover, it being alleged that the subcontractor was the alter ego of the prime contractor, the Ninth Circuit has said that "there must be subterfuge, collusion or interposi-

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75. For a general discussion, see Kirwan, *Telescoping Tiers of Subcontractors in Miller Act Cases: An Exception to the Rule in MacEvoy*, 2 FORUM 173 (1967) (Sec. of Ins. Negl. and Comp. Law).

76. *McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*, 150 F. Supp. 323, 326 (D. Pa. 1957). See *United States ex rel. West Pacific Sales Co. v. Harder Industrial Contractors, Inc.*, 255 F. Supp. 699 (D. Oregon 1963), where the court and AEC treated the prime contractor as mere supervising agent, with the construction subcontractor treated as a prime on his work; *contra*, *Carruth v. Standard Accident Insurance Co.*, 239 F.2d 690 (5th Cir. 1964) is questionable as a precedent since the Court erroneously assumed (at 691) that the AEC cost-type prime contractor furnished Miller Act bonds; see also *Southern Industries, Inc. v. United States ex rel. James Bond Trucking Co.*, 326 F.2d 221 (9th Cir. 1964), where corporate plaintiff was permitted to sue in its own right as an undisclosed principal.

77. *Bushman Constr. Co. v. Conner*, 260 F. Supp. 779 (D. Colo. 1966).

78. *United States ex rel. Way Panama, S.A. v. Uhlhorn International, S.A.*, 238 F. Supp. 887 (D. C.Z. 1965).

79. *United States ex rel. Powers Regulator Co. v. Farina Constr. Corp.*, 261 F. Supp. 278 (D. Mass. 1966).

80. *United States ex rel. A. Teichert & Son, Inc. v. Anchor Contractors, Inc.*, 257 F. Supp. 474 (N.D. Cal. 1966).



tion of a strawman to warrant elimination of a party in a chain of subcontracts.”<sup>81</sup>

In a case with a slightly different emphasis, the prime contractor had formed a joint venture with one of the unsuccessful bidders on the same job, calling him a “subcontractor.” The court, on the other hand, called him a “principal” and held that he could not maintain a Miller Act suit for amounts alleged to be owed to him by his co-venturer.<sup>82</sup>

### *Assignees and Creditors*

Assignees of persons who have furnished labor or material for the job have consistently been allowed to recover under both the Heard and Miller Acts.<sup>83</sup> Of course, an assignee does not gain any greater right than his assignor had.<sup>84</sup> Therefore, where a subcontractor has failed to pay his supplier, the claim of the assignee of the rights of the subcontractor has a lower priority against the fund created by the bond than do the claims of the subcontractor's suppliers.<sup>85</sup> Recovery has been allowed even where there is only an equitable assignment. In one case, where the creditor of a prime contractor had discharged the contractor's obligation by paying wages to his employees, the creditor was allowed recovery notwithstanding the absence of a formal assignment of the employees' claims to him. The court held that the creditor's claim “could be properly allowed on principles of subrogation.”<sup>86</sup> However, in another case where a contractor's employees were paid by checks drawn by the contractor against insufficient funds, the bank had to absorb the loss when the court held that by paying on the checks without assuring that funds were available, the bank had in effect volun-

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81. *Fidelity & Deposit Co. v. Harris*, 360 F.2d 402 (9th Cir. 1966).

82. *United States ex rel. Briggs v. Grubb*, 358 F.2d 508 (9th Cir. 1966).

83. *Clifford E. MacEvoy Co. v. United States*, 322 U.S. 102 (1944); *United States ex rel. Jahn v. Jones Coal Co.*, 368 F.2d 217 (6th Cir. 1966); *United States ex rel. Wolther v. New Hampshire Fire Insurance Co.*, 173 F. Supp. 529 (E.D. N.Y. 1959). See also *United States ex rel. Sherman v. Carter*, 353 U.S. 210, where a defendant sought summary judgment contending that the plaintiff assignor, who had furnished the labor and materials, was not the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure. The Court looked to state law and held that the assignor retained a substantive right to enforce the claim and was a proper party plaintiff; *Bushman Constr. v. Conner*, 260 F. Supp. 779 (D. Colo. 1966).

84. *Peninsula State Bank v. Thompson-Copeland, Inc.*, 346 F.2d 58 (5th Cir. 1965).

85. *Houston Fire & Casualty Ins. Co. v. United States ex rel. First State Bank of Denton*, 217 F.2d 734 (5th Cir. 1954).

86. *Continental Casualty Co. v. Haenn Ship Ceiling & Refitting Corp.*, 134 F. Supp. 602, 605 (E.D. Pa. 1955).

tarily made a loan to the contractor and was not entitled to subrogation.<sup>87</sup>

Granting the premise of a voluntary loan, the preceding case is in accord with other holdings regarding the rights of creditors. The lending of money to the contractor does not constitute the furnishing of "labor and/or materials" and is not covered under the Miller Act.<sup>88</sup>

#### PRESERVATION AND ENFORCEMENT OF RIGHTS UNDER MILLER ACT PAYMENT BONDS

Despite the liberality with which the Miller Act has been interpreted in favor of recovery, claimants must comply strictly with the requirements as to notice and time for bringing suit. These requirements are:<sup>89</sup>

(1) That suit cannot be brought less than ninety days nor more than one year after the last of the labor or material was furnished by the claimant; and

(2) That, unless a claimant has a contractual relationship, express or implied, with the prime contractor furnishing the payment bond, he must give notice of his claim to the prime contractor within ninety days after the last of the labor or material was furnished by him.

Moreover, in at least one case, the prime contractor has been allowed to assert the defense of estoppel against an otherwise valid and timely claim. The supplier of a subcontractor had agreed to notify the prime contractor if prompt payments were not made by the sub, and the prime contractor continued to make progress payments to the sub in reliance on the supplier's silence. It was held that the supplier could not later recover under the bond, since, if supplier had done what it agreed to do, the prime would have made its payments directly to the supplier and the problem would have been avoided.<sup>90</sup>

#### *Time for Bringing Suit*

The date from which the time for bringing suit is measured, is "the day on which the last of the labor was performed or material was sup-

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87. *United States ex rel. First Continental Nat'l Bank & Trust Co. v. Western Contracting Corp.*, 341 F.2d 383 (8th Cir. 1965).

88. *Hardaway v. Nat'l Surety Co.*, 211 U.S. 552 (1909), *Bill Curphy Co. v. Eliot*, 207 F.2d 103 (5th Cir. 1953); *United States ex rel. Dorfman v. Standard Surety & Cas. Co.*, 37 F. Supp. 323 (S.D.N.Y. 1941).

89. 40 U.S.C. § 270b (1958).

90. *United States ex rel. Westinghouse Elec. Supply Co. v. James Stewart Co.*, 336 F.2d 777 (9th Cir. 1964).

plied" by the claimant. Prior to the 1959 amendment,<sup>91</sup> time ran from the "date of final settlement" of the contract under which the claim was being made, as certified by the Comptroller General. The present provision was adopted "to eliminate all responsibility of the government for fixing dates on which the period for filing suits . . . commences to run."<sup>92</sup>

Unless suit is brought within the year, the rights under the bond lapse. Suit within the one-year period is a "condition precedent" to recovery and the one year provision cannot be waived.<sup>93</sup>

The provision that suit cannot be brought *prior* to ninety days after the last work was furnished has never presented a serious problem. Even if suit is prematurely filed, the defect can be corrected by supplemental pleadings.<sup>94</sup> Where a complaint was filed less than ninety days from the last work date and followed by a supplemental complaint filed more than a year later, it was held that the later complaint related back so as to save the suit from the one year limitation, but that it did not relate back to the date of the first complaint so as to make the action premature; and on this basis, the suit was allowed.<sup>95</sup>

### *Ninety Day Notice*<sup>96</sup>

If he has a contractual relationship with the prime contractor, the claimant need not give notice. As noted above, the right to sue of anyone not having a direct contractual relationship with the prime contractor is conditioned on his giving written notice to the prime contractor within ninety days after the date on which the claimant "did or performed the last of the labor or furnished or supplied the last of the

91. Act of August 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279.

92. *United States ex rel. Dover Elevator Co. v. General Ins. Co. of America*, 339 F.2d 194 (6th Cir. 1964); *See S. REP. No. 551, 86th Cong., 1st Sess. 2 (1959)*.

93. *Fleischer Engineering & Constr. Co. v. United States ex rel. Geo. S. Hallenbeck*, 311 U.S. 15, 19 (1940); *United States ex rel. Weitham v. Buckley Union Casualty Co.*, 207 F. Supp. 552 (N.D. Ohio 1962); *United States v. Seaboard Surety Co.*, 201 F. Supp. 630 (N.D. Tex. 1961); *M. A. Hartlett, Inc. v. Enterprise Engineering & Constr. Co.*, 169 F. Supp. 131 (D. Del. 1958).

94. *United States ex rel. C. W. Atkins v. Reiten & Stewart Constr. Co.*, 313 F.2d 673 (9th Cir. 1963); *see also Harry F. Ortlip Co. of Pa. v. Alvey Ferguson Co.*, 223 F. Supp. 893 (E.D. Pa. 1963).

95. *Security Ins. Co. v. United States ex rel. Haydis*, 338 F.2d 444 (9th Cir. 1964).

96. For a general discussion *see Cassemi, The Miller Act—Subcontractor's Materialman Sufficiency of Notice—Remedy Where Notice is Sufficient*, 24 INS. CSL. J., 230 (1957); *Elgin, Notice Requirements of the Miller Act*, 27 INS. CSL. J. 66 (1960); *Hume, The Notice Provision of the Miller Act*, 31 INS. CSL. J. 275 (1964).

material" for which claim is made. Time is computed according to Rule 6(a) of the Federal Rules of Civil Procedure.<sup>97</sup>

A further provision of the statute is that notice be given by registered mail; however, this is not required where actual receipt is shown.<sup>98</sup> The intent of the registered mail provision is "not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received. In the face of such receipt, the reason for a particular mode of service fails."<sup>99</sup> But where the notice is not sent by registered mail, the burden of proving receipt is on the plaintiff and the notice is not considered given unless actually received.<sup>100</sup> On the other hand, if registered mail is used, notice is considered given when mailed.<sup>101</sup>

The notice must "state 'with substantial accuracy' the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed" and must present an affirmative claim requesting payment of the sums due.<sup>102</sup> It must "inform the prime contractor, expressly or by implication, that the supplier is looking to the contractor for payment of the subcontractor's bill."<sup>103</sup> Communications that fail even to intimate or suggest that any claim is being asserted, are insufficient. A mere request by a subcontractor for consent of the prime contractor to an assignment to a materialman of monies due the subcontractor has been held not to preserve the claim of the materialman.<sup>104</sup> But an oral claim later acknowledged by a letter from the prime contractor was held sufficient, since "it plainly appears that the nature and state of the indebtedness was brought home to the general contractor."<sup>105</sup> Thus, substance rather than form will determine the sufficiency of notice.

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97. *United States ex rel. Lakeman Elec. Products Corp. v. Greene Electrical Service*, 252 F. Supp. 324 (E.D. N.Y. 1966).

98. *Fleisher Engineering and Constr. Co. v. United States*, 311 U. S. 15 (1940).

99. *Id.* at 19.

100. *United States ex rel. Twin County Transit Mix, Inc. v. R. P. McTeague Constr. Co.*, 264 F. Supp. 619 (E.D.N.Y. 1967).

101. *United States ex rel. Lincoln Electric Products Co. v. Green Electrical Service*, 252 F. Supp. 324 (E.D.N.Y. 1966); *United States ex rel. Crowe v. Continental Casualty Co.*, 245 F. Supp. 871 (E.D. La. 1965).

102. *United States ex rel. J. A. Edwards & Co. v. Thompson Constr. Corp.*, 273 F.2d 873, 874 (2d Cir. 1959).

103. *United States ex rel. Joyce v. F. A. Bachner, Inc.*, 326 F.2d 556 (2d Cir. 1964).

104. *United States ex rel. J. A. Edwards & Co. v. Thompson Constr. Corp.*, 273 F. 2d 873, 876-877 (2d. Cir. 1959).

105. *Houston Fire & Casualty Ins. Co. v. United States ex rel. Trane Co.*, 217 F.2d 727, 730 (5th Cir. 1954).

*Date Last Labor or Material Was Furnished*

Both the time for giving notice and that for bringing suit run from the time at which the claimant furnished the last labor or material to the job. It should be noted that time starts to run from the date of the last labor or material furnished "for which such claim is made" and the fact that subsequent work was done for which claim is not being made does not prevent time from starting to run.<sup>106</sup>

Where materials are provided over a long period of time, the question arises whether they were provided under separate contracts, in which case notice must be given within ninety days of the last work under each contract,<sup>107</sup> or whether there is a single continuing contract where a single notification at the end of the period covers all the work.<sup>108</sup> The existence of many separate and seemingly unrelated purchase orders indicates that there is no single continuing contract, and this may be true even where credit is extended on open account.<sup>109</sup> The outcome will depend on the precise facts of each case, and a single notification within ninety days after the last work was furnished under various separate purchase orders on a C.O.D. basis, has been held to be sufficient as to all the work, even though the bulk of it was done more than ninety days before notice was given.<sup>110</sup>

As to the time when labor or material is considered "furnished," this has been held to be the time it reaches the hands of the person to whom supplied.<sup>111</sup> Where a sub-subcontractor left materials on the job which much later were installed by the subcontractor who back-charged the sub-subcontractor for the labor costs of installation, time was held to run from the date of installation.<sup>112</sup>

Punch list items are a problem. It has been held that a return to the site for correction of defective work, or furnishing or replacement parts, does not start the period running anew, since a succession of such re-

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106. United States *ex rel.* McGrath v. Travelers Indemnity Co., 253 F. Supp. 330 (D. Ariz. 1966).

107. United States v. Peter Reiss Constr. Co., 273 F.2d 880, 881 (2d Cir. 1959).

108. Noland Co. v. Allied Contractors, Inc., 273 F.2d 917 (4th Cir. 1959).

109. Noland Co. v. Allied Contractors, 273 F.2d 917 (4th Cir. 1959); United States v. Peter Reiss Constr. Co., 273 F.2d 880, 881 (2d Cir. 1959).

110. United States *ex rel.* Chemetron Corp. v. Geo. A. Fuller Co., 250 F. Supp. 649 (D. Mont. 1966).

111. United States *ex rel.* Westinghouse Electric Supply Co., Inc. v. Endebrook-White Co., Inc., 275 F.2d 57 (4th Cir. 1960).

112. United States *ex rel.* P. A. Bourquin & Co., Inc. v. Chester Constr. Co., 104 F.2d 648 (2d Cir. 1939).

turns might keep the time running indefinitely and enable a subcontractor to benefit from his own fault.<sup>113</sup> Where replacement fixtures were provided more than ninety days after the bulk of the labor and material had been furnished, claimant's belief that replacement fixtures were part of this contract was held to be of no consequence since he let the full notice period pass without any assurance that he would ever have to go back to the job. It was plain that he had let his Miller Act rights lapse.<sup>114</sup>

On the other hand, it has been held that time runs from the furnishing of the last labor or material, and not from such earlier time as when there might have been "substantial performance," so that a delay in order to make finishing touches, if the work is called for by the contract, prevents time from beginning to run.<sup>115</sup> Material which was not to be incorporated into the job but was used only to install other material has been considered as "material furnished" which kept the notice period from beginning to run.<sup>116</sup>

Where rental equipment was furnished and remained on the job site during the agreed period of the lease but after the subcontract of the lessee was terminated, one court, stating that the notice period normally runs from the last date on which rental equipment was available for use on the project, held that it was not "available" after termination of the subcontract and that notice more than ninety days after the termination was not sufficient.<sup>117</sup>

In a novel Fifth Circuit case, a subcontractor had been continuously in arrears in paying for paint furnished him by the claimant supplier. The court found that in clearing arrearages, the subcontractor had the right to determine against which shipments of paint his partial payments on account were to be applied; that they were in fact applied against current shipments; and therefore, that the paint for which payment had not yet been received was supplied more than ninety days prior to

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113. See *United States ex rel. McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*, 185 F. Supp. 381 (D. Pa. 1960).

114. *United States ex rel. General Elec. Co. v. H. I. Lewis Constr. Co.*, 375 F.2d 194 (2d Cir. 1967).

115. *United States ex rel. Austin v. Western Elec. Co.*, 337 F.2d 568 (9th Cir. 1964).

116. *United States ex rel. Betts v. Continental Casualty Co.*, 230 F. Supp. 557 (W.D. Pa. 1964).

117. *United States ex rel. Taylinswell v. Bencon Constr. Co.*, 248 F. Supp. 502 (D. Md. 1965), *aff'd* 369 F.2d 405 (1966); *United States ex rel. Miller & Bentley Equipment Co. v. Kelley*, 192 F. Supp. 274 (D. Alas. 1961).

notice being given.<sup>118</sup> The result, a failure to recover for the bulk of the paint supplied, was roughly the same as would have occurred if the various shipments had been treated as separate contracts.

### JURISDICTION, VENUE AND CONFLICT OF LAW PROBLEMS

Sec. 2(b) of the Miller Act provides that payment bond suits "shall be brought . . . in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in each suit. . . ." (Suit upon a bond which was required on an overseas job may be brought in any U.S. District Court.)<sup>119</sup>

That jurisdictional language has been called "unequivocal in its grant of exclusive jurisdiction over suits on Miller Act bonds in the Federal Courts . . ." <sup>120</sup> Such exclusivity is illustrated by an Eighth Circuit case which had been removed from state to federal court. Since the removal gave only derivative jurisdiction to the federal court, depending upon the prior jurisdiction of the state court, it was held that the federal court had no jurisdiction even though it would have had it if the action had been originated there.<sup>121</sup>

Where claims involved both federal jurisdiction and state, a federal court may take jurisdiction over the entire matter if the claims are such as would normally be tried in one proceeding.<sup>122</sup>

State law cannot "condition the rights granted under the Miller Act," and in a case where state law would have rendered a subcontract void because of the failure of the claimant to qualify to do business in the state, it was held that state law did not apply and the party was allowed to bring suit under the Miller Act.<sup>123</sup>

The provision requiring suit to be brought in the district in which the contract was to be performed is considered a venue provision and is not prerequisite to jurisdiction.<sup>124</sup> Thus, where the contract was to

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118. *S. S. Silberblatt, Inc. v. Lambert Corp.*, 371 F.2d 626 (5th Cir. 1967).

119. *United States ex rel. Bryant Electric Co. v. Aetna Casualty & Surety Co.*, 297 F.2d 665 (2d Cir. 1962); Note, 76 HARV. L. REV. 635 (1963).

120. *Id.*

121. *Koppers Co. v. Continental Casualty Co.*, 337 F.2d 449 (8th Cir. 1964).

122. *United States ex rel. Mandel Bros. Contracting Corp. v. P. J. Carlin Constr. Co.*, 254 F. Supp. 637 (E.D. N.Y. 1966).

123. *Aetna Casualty & Surety Co. v. United States ex rel. R. J. Struder & Sons*, 365 F.2d 997 (8th Cir. 1966).

124. *United States ex rel. Capolino Sons, Inc. v. Electronic & Missile Facilities, Inc.*, 364 F.2d 705 (2d Cir. 1966).

be performed in Wyoming and suit was brought in Montana, the court in Montana assumed jurisdiction and transferred the suit to Wyoming, rather than dismiss it.<sup>125</sup>

The venue provision was inserted for the benefit of claimants; thus, an agreement imposed by a prime contractor in which the subcontractor agreed to sue only in the District of Columbia, while the contract was to be performed elsewhere, was held void.<sup>126</sup> Likewise, a provision of the subcontract requiring all disputes to be taken to court only in New York state courts is not effective to oust federal courts of their jurisdiction.<sup>127</sup>

Where the question has arisen whether state or federal law should govern the substantial rights of the parties in Miller Act suits, it has usually been held that the court is free from the restraints of *Erie v. Tompkins* and need not follow state precedents in contract actions.<sup>128</sup> Some courts, however, have taken a contrary position, one court stating that while "the action is brought under a federal statute, it is in the nature of an action on a contract and the construction of the federal statute is not involved."<sup>129</sup> In another case, the amount of recovery in *quantum meruit* was determined under state law.<sup>130</sup>

State law governs the right of a party to a Miller Act suit to recover amounts ancillary to the main claim, such as pre-judgment interest,<sup>131</sup> attorneys' fees<sup>132</sup> and costs.<sup>133</sup>

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125. *United States ex rel. Angell Bros., Inc. v. Cave Constr., Inc.*, 250 F. Supp. 873 (D. Mont. 1966).

126. *United States ex rel. Vermont Marble Co. v. Roscoe-Ajax Constr. Co.*, 246 F. Supp. 439 (N.D. Cal. 1965). If the case had been dismissed, the action would have been barred, since the time for bringing suit had expired.

127. *United States ex rel. Ray Cains, Inc. v. Essential Constr. Co.*, 261 F. Supp. 715 (D. Md. 1966).

128. *Liebman v. United States ex rel. California Elec. Supply Co.*, 153 F.2d 350 (9th Cir. 1946); *R. P. Farnsworth & Co. v. Electrical Supply Co.*, 112 F.2d 150 (5th Cir. 1940).

129. *United States ex rel. Lichter v. Hencke Constr. Co.*, 157 F.2d 13, 24 (8th Cir. 1946).

130. *Central Steel Erection Co. v. Will*, 304 F.2d 548 (9th Cir. 1962).

131. *Ill. Surety Co. v. John Davis Co.*, 244 U.S. 376 (1917); *United States ex rel. Peevy v. Pensacola Constr. Co.*, 257 F. Supp. 131 (W.D. Ark. 1966).

132. *United States ex rel. Hendry Corp. v. Smith Engineering and Constr. Co.*, 240 F. Supp. 189 (N.D. Fla. 1965). See Hume, *What Law Determines Liability of a Miller Act Surety for Attorney's Fees?* 32 INS. CL. J. 134 (1965).

133. *Baker & Ford Co. v. United States ex rel. Urban Plumbing & Heating Co.*, 363 F.2d 605 (9th Cir. 1966).



*Arbitration*<sup>134</sup>

A contractual agreement that the parties to a construction contract will arbitrate their differences will be enforced, even in a Miller Act situation, to the extent that judicial proceedings may be stayed pending the outcome of arbitration.<sup>135</sup> Apparently one court has gone farther by enforcing an arbitration provision as a substitute for the judicial remedy.<sup>136</sup> Where proceedings are merely stayed, a claimant may submit to arbitration, meanwhile protecting itself against the running of the one year limitation by filing a protective suit. Once the arbitration award was made, the claimant would have the right to come into court again, perhaps amending its complaint in light of the award.<sup>137</sup> The enforcement of arbitration provisions will be permitted even if the arbitration is conducted outside the district in which venue is laid.<sup>138</sup>

Consents by potential claimants to extra-judicial settlement of disputes apparently are strictly construed. Thus, in a Ninth Circuit case of significant import, it was held that the standard "disputes" clause in the prime contract, under which the prime contractor agreed to submit all questions of fact under the contract to the contracting officer and the head of the department, did not in any way bind subcontractors and materialmen.<sup>139</sup>

*Procedure*

Consistent with the liberal interpretation of the Miller Act in favor of claimants, technical defects in pleadings have often been overlooked. For example, it was held that if the jurisdictional requirements for a Miller Act suit are in fact present, a complaint will not be dismissed for its failure either to specifically refer to the Miller Act or to name the United States as a party (the interest of the United States being

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134. See generally Hume, *Contract Provisions Requiring Arbitration of Miller Act Claims*, 30 INS. C.S.L. J. 107 (1963); Reeves, *The Application of the United States Arbitration Act to Miller Act Suits*, 50 VA. L. REV. 105 (1964).

135. *United States ex rel. Capolino Sons, Inc. v. Electronic & Missiles, Inc.*, 364 F.2d 705 (2d Cir. 1966).

136. *Electronics & Missiles Facilities, Inc. v. United States ex rel. Moseley*, 306 F.2d 554 (5th Cir. 1962), *rev'd on other grounds*, 374 U.S. 167 (1963).

137. *United States ex rel. Capolino Sons, Inc. v. Electronic & Missiles Facilities, Inc.*, 364 F.2d 705 (2d Cir. 1966); *United States ex rel. Ray Gains, Inc. v. Essential Constr. Co.*, 261 F. Supp. 715 (D. Md. 1966).

138. *United States ex rel. Industrial Engineering & Metal Fabricators, Inc. v. Eric Elevator Corp.*, 214 F. Supp. 947 (D. Mass. 1963).

139. *Central Steel Erection Co. v. Will*, 304 F.2d 548 (9th Cir. 1962).

merely nominal) and that both of these defects may be corrected by supplemental pleadings.<sup>140</sup> In addition, the surety of a prime contractor may be sued alone without joining the prime contractor.<sup>141</sup>

#### SUMMARY

The Miller Act and its payment bond do afford substantial guarantees generally to supplier, subcontractors and other persons furnishing materials or labor on most government construction projects; but, like the mechanics liens for which they are a substitute, they require timely action and there are important limitations on coverage. Persons dealing with prime contractors or others on a government construction job in reliance upon the guarantee of the payment bond should ensure that they are covered from the outset, and must diligently pursue their rights in the event that a claim arises.

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140. *Blanchard v. Terry & Wright*, 331 F.2d 467 (6th Cir. 1964).

141. *United States ex rel. Hudson v. Peerless Ins. Co.*, 374 F.2d 942 (4th Cir. 1967).