Article

Bullies in the Sandbox: Federal Construction Projects, the Miller Act, and a Material Supplier's Right to Recover Attorney's Fees and Other "Sums Justly Due" Under a General Contractor's Payment Bond

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I. INTRODUCTION

The United States' economy is slowly recovering from the "Great Recession," the worst financial crisis since the Great Depression.[1] While some parts of the economy fare better than others, the construction industry shows little, if any, sign of recovery.[2] Private construction, particularly home building, has collapsed and there is little chance of significant and consistent recovery until sometime in 2012.[3]

Federal stimulus money, however, is flowing to federal public works construction projects across the country.[4] From courthouses[5] to border infrastructure[6] and interstate highway construction,[7] federal projects are

1. Editorial, *A Tailspin of Spending*, THE AUGUSTA CHRONICLE (Georgia), Jul. 8, 2010, at A06 (quoting the Pew Research Center as saying that unemployment figures "don't fully convey the scope of the employment crisis that has unfolded during the recession" and that of the 13 recessions since the Great Depression, "none has presented a more punishing combination of length, breadth and depth than this one."), *available at* http://chronicle.augusta.com/opinion/editorials/2010-07-08/tailspin-spending.

2. Sheryl Jean, *Geithner Says Small Business is Key*, THE DALLAS MORNING NEWS, Sept. 25, 2010, at D02, *available at* http://www.dentonrc.com/sharedcontent/dws/bus/stories/DN-geithner_25bus.ART.State.Edition1.248d8df.html#.

3. *See* Alex Kowalski, *Construction Spending in U.S. Decreased More Than Estimated in February*, BLOOMBERG, Apr. 1, 2011, http://www.bloomberg.com/news/2011-04-01/construction-spending-in-u-s-decreased-more-than-estimated-in-february.html (stating that in February 2011 private construction spending fell 1.4% to its weakest pace since April 1997, housing starts declined to the slowest pace since April 2009, and building permits fell to a record low); Press Release, Portland Cement Association (PCA), Housing Start Recovery Pushed Back to 2012; Tepid Growth in 2011 (Jan. 12, 2011), http://www.cement.org/newsroom/2011_IBS_Rel.asp (detailing a report by the PCA estimating that housing starts will not significantly increase until 2012, and that any recovery in home construction will be delayed until 2012).

4. Albert McKeon, *Stimulus Grants Have Boosted Construction in New Hampshire, But Future Isn't as Rosy*, THE TELEGRAPH (Nashua, New Hampshire), Jun. 15, 2010, *available at* http://www.nashuatelegraph.com/news/768151-196/stimulus-grants-have-boosted-construction-in-new.html.

5. Joyce Lobeck, *Local Contractor Vies for Federal Courthouse Project*, THE SUN (Yuma, Arizona), Jul. 2, 2010, *available at* http://www.yumasun.com/articles/pilkington-62128-court house-project.html (noting the construction of the 56,000-square-foot courthouse, with an expected cost of $28 million in federal stimulus money is to include one magistrate court and chamber, bankruptcy court, district clerk's office, U.S. Marshals Service, U.S. Pretrial Services and U.S. Probation Services).

6. Kara Rowland, *House OKs, Obama Signs Aid Bill for States*, THE WASHINGTON TIMES, Aug. 11, 2010, at 3, *available at* http://www.washingtontimes.com/news/2010/aug/10/house-rushes-aid-bill-for-states/. The House also approved $600 million in stimulus money for 1,500 additional border control agents, surveillance vehicles and other border-security measures amid intense criticism from congressional Republicans, who have fought virtually every instance of stimulus spending since Mr. Obama took office. *Id.*

7. Edward Colimore, *Loads of Traffic to Bear: A Record Number of Projects Clog Roads*

currently the primary source of work in the construction industry.[8] For example, in California the first portions of the state's long awaited high-speed rail system are being funded with federal stimulus money.[9] The federal government awarded $2.25 billion in stimulus funds in January 2010 followed by another $715 million in October to begin construction of sections of the rail line.[10] In South Carolina, portions of I-385 near Greenville are being widened from four lanes to six lanes, sections of asphalt will be replaced with stronger, longer lasting concrete, and highway entrance and exit ramps will be remodeled and brought up to code using nearly $36 million in federal funding.[11] Finally, in Ohio, one of the more than 380 stimulus-funded transportation construction initiatives in that state pertains to the Regional Intelligent Transportation System in the region around Cleveland and Akron where $21 million will be spent on a system which will include traffic cameras and the informative, real-time highway message boards for motorists.[12] The purpose of the system is to "provide the information for the boards and Web platforms that will give drivers an idea of congestion before they leave home or work."[13]

The poor economy and the increase in federal funding for construction projects, however, have created intense competition for work.[14] This

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Across the Region, THE PHILADELPHIA INQUIRER, Aug. 29, 2010, at A01, *available at* http://articles.philly.com/2010-08-29/news/24972890_1_stimulus-money-urban-mobility-report-federal-stimulus (noting that "[a]cross New Jersey, Pennsylvania, and the rest of the nation, motorists are running into unprecedented traffic tie-ups caused by a record number of road and bridge projects, many funded with federal stimulus money").

8. Martin Crutsinger, *June Construction Activity Rises 0.1 Percent*, ASSOCIATED PRESS FINANCIAL WIRE, Aug. 2, 2010 (noting that total private construction on both residential and non-residential was down 0.8 percent to a seasonally adjusted annual rate of $527.6 billion).

9. Federal stimulus funds are based on the American Recovery and Reinvestment Act of 2009. See the U.S. Dep't of Transp. website for video testimonials from workers on transportation projects receiving federal funds, *available at* http://www.dot. gov/recovery/voices/index. html (last visited Mar. 14, 2011).

10. Michael Cabanatuan, *First the Tracks - Trains Roll Much Later*, SAN FRANCISCO CHRONICLE, Dec. 3, 2010. Currently, the plan is for an 800-mile rail system, which "will eventually connect San Francisco, Los Angeles, San Diego and Sacramento and other major California cities, and will run through the state's farm-rich Central Valley." See Jesse McKinley, *Worries Follow Route of High-Speed Line*, NEW YORK TIMES, Jan. 3, 2011, at A12, for further discussion of the California high-speed rail line.

11. Nathaniel Cary, *Drivers Face Two-Year Construction Project to Widen I-385*, GREENVILLE NEWS (South Carolina) Nov. 5, 2010. Currently there are approximately 60,000 drivers using a portion of I-385 in Greenville. *Id.* The number of drivers is expected to increase to 80,000 by 2028. *Id.*

12. Brandon C. Baker, *Ohio Spending Stimulus Funds on Jobs, Health Care, Energy, Education, Infrastructure*, THE NEWS-HERALD OF WILLOUGHBY, OHIO, Oct. 3, 2010, *available at* http://www.allbusiness.com/labor-employment/labor-sector-performance/15160998-1.html.

13. *Id.*

14. *See* Rob Farley & Michael Grabell, *ProPublica and PolitiFact Test Obama Claims on Stimulus. Their Verdict Is . . .*, SEATTLE POSTGLOBE, Nov. 11, 2011, http://www.seattlepostglobe.org/2010/11/11/propublica-and-politifact-test-obama-claims-on-stimulus ("The recession deci-

competition for work has resulted in an increase in federal litigation among the parties engaged in federal construction projects: the general contractor, the subcontractor(s), material suppliers, and other third parties.[15] This imbalance in financial resources and power creates the opportunity for larger, more sophisticated and financially secure general contractors to pressure smaller and financially susceptible subcontractors and material suppliers not to file claims and/or settle for pennies on the dollar. Consequently, there is a need for a slight revision to the current federal legislation governing federal construction projects, the Miller Act,[16] which is already designed to protect those supplying labor and materials to a federal project. Based on the number of transportation projects around the country and the amount of taxpayer money funding these federal projects, the Miller Act is an extremely relevant piece of legislation likely to have a prominent role in any litigation stemming from these numerous infrastructure projects.[17]

This article identifies the provisions of the Miller Act enabling a material supplier to recover for the labor and/or materials supplied to a federal construction project when a subcontractor using the labor and materials fails to pay for these resources. Typically, subcontractors either go bankrupt and are unable to complete the project or are unable to complete the project or the general contractor removes the subcontractor from the project for various reasons. Regardless of the circumstances of nonpayment, a material supplier is forced to look to the general contractor and its surety for payment. The intent and purpose of the Miller Act is clear: protection of those supplying labor and materials; however, Con-

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mated the construction industry, which led to intense competition for public projects like those funded by the stimulus."); Press Release, The Associated General Contractors of America, President Obama Announces 2000th Stimulus Funded Transportation Project (Apr. 13, 2010), http://news.agc.org/2009/04/13/president-obama-announces-2000th-stimulus-funded-transportation-project/ ("state departments of transportation around the country have reported . . . intense competition by contractors for ARRA projects.").

15. Barbara L. Jones, *Stimulus Spending Foreshadows a Boom in Business for Some Practitioners in Minnesota*, THE MINNESOTA LAWYER (Minneapolis, MN), Mar. 30, 2009.

16. The Miller Act, 40 U.S.C. §§ 3131 – 3133 (2006) (formerly 40 U.S.C. §§ 270a-270e). A Miller Act claimant must prove the following four elements: (1) The claimant supplied labor or materials in the prosecution of the work; (2) the claimant has not been paid; (3) The claimant had a good-faith belief that the materials were intended for the specific work; and (4) the claimant has timely complied with the notice and filing requirements. H. Bruce Shreves, *Payment Bonds*, in CONSTRUCTION LAW HANDBOOK 1353, 1380 (Richard K. Allen & Stanley A. Martin ed., 2009).

17. As of March 11, 2010, the United States Department of Transportation estimated that there were 15,082 transportation-related projects with funds obligated by the American Recovery and Reinvestment Act of 2009. *See* U.S. Dep't of Transp., http://www.dot.gov/recovery/resources/totalprojects.pdf (last visited Mar. 14, 2011). The obligated funds amounted to approximately $40.7 billion as of March 11, 2011. *See* U.S. Dep't of Transp., http://www.dot.gov/recovery/resources/totalfunds.pdf (last visited Mar. 14, 2011).

gress has failed to clearly lay out the full scope of recovery.[18]

When litigation ensues, the material supplier is left to fight for its unpaid invoices, service charges, repair costs, attorneys' fees, and other related costs. However, service charges and attorneys' fees, unlike "labor" and "materials," are not specifically addressed in the language of the Miller Act. While Congress and courts have deemed these costs as "sums justly due,"[19] the absence of clear, unequivocal statutory language gives large general contractors and their sureties the opportunity to prolong litigation, drive up costs for the claimant, and generally tip the scale in favor of denying, for example, the material supplier full recovery under its contract with the defaulting subcontractor.

This article identifies the problems encountered by material suppliers in recovering costs for not only the labor and materials they supply to federal works projects, but also their attorneys' fees and other "sums justly due." Part one highlights the key aspects of the Miller Act supporting a material supplier's right to recovery and addresses, among other things, the important distinction between a material supplier and a subcontractor, what sums are justly due under the payment bond, and, for counsel representing materials suppliers, whether attorneys' fees are recoverable under the Miller Act. Part two highlights recommendations for Congress to consider in slightly modifying the language of the Miller Act in order to eliminate the ambiguity, even the playing field, and ensure material suppliers are rightly and properly compensated for the risk they take in supplying labor and materials to federal works projects.

II. The Miller Act

Since a lien cannot attach to federal property such as a highway, Congress enacted the Miller Act to provide subcontractors and material suppliers on federal public works[20] projects with an alternate remedy to the mechanics' lien ordinarily available on private construction projects.[21]

The purpose of the Miller Act is "to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the con-

18. *See* The Miller Act, 40 U.S.C. §§ 3131-3133 (2006).

19. Former Miller Act section 40 U.S.C. § 270 (b). While the "sums justly due" language was replaced with the phrase "judgment for the amount due" in the latest revision to the Miller Act, the intent and purpose remains the same; compensating those who furnish labor and materials to a federal project and go uncompensated. 40 U.S.C. § 3133(b)(1) (2006).

20. Generally speaking, "public work" is broadly defined as any project undertaken with federal aid "to serve the interests of the general public." *See* United States *ex rel.* Noland Co. v. Irwin, 316 U.S. 23, 24 (1942).

21. *See* J.W. Bateson Co. v. United States *ex rel.* Bd. of Trs. of the Nat'l. Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 589 (1978).

struction of nonfederal buildings."[22] The Act is "highly remedial" and entitled to a "liberal construction" by the Courts.[23]

The Act requires a person (i.e. a general contractor) performing a contract valued at over $100,000 on any public construction project to obtain both a performance bond and a payment bond.[24] The performance bond protects the federal government by ensuring that there is money to complete the job.[25] The payment bond is "for the protection of all persons supplying labor and material in carrying out the work provided for in the contract."[26] More importantly, for the purpose of this article, the Miller Act provides that "[a] person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action."[27] According to section 3133(b)(1) of the Act, "[e]very person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished . . . and that has not been paid in full within 90 days after . . ." last furnishing the labor or materials, may sue on the payment bond for the outstanding amount "and may prosecute the action to final execution and judgment for the amount due."[28] The provisions of the statute leave the question of what is the proper calculation "for the amount due?"

1. The Legislative History and Purpose of the Miller Act

In 1894, Congress passed the Heard Act based on complaints from subcontractors and material suppliers working on government construction projects.[29] These subcontractors and material suppliers were unable to collect outstanding debts from contractors because the subcontractors and material suppliers could not assert liens against government property.[30] The Heard Act "mandated the provision of a [single] bond by all persons who entered into public works contracts with the United

22. United States *ex rel.* Sherman v. Carter, 353 U.S. 210, 216 (1957); *see also* F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 122 (1974) *superseded in part by statute,* Prompt Payment Act Amendments of 1988, ch. 39, sec. 3905(j), § 9(a)(2)(j), 102 Stat. 2455, *as recognized in* United States *ex rel.* Cal's A/C Elec. v. Famous Const. Corp., 34 F. Supp. 2d 1042, 1043-44 (W.D. La. 1999).

23. *See J.W. Bateson Co.*, 434 U.S. at 594.

24. 40 U.S.C. § 3131(b).

25. Dennis M. Sponer, *United Structures v. G.R.G. Engineering: Set-Off v. Recoupment in Miller Act Payment Bond Disputes*, 1994 BYU L. REV. 697, 697 (1994).

26. United States *ex rel.* Water Works Supply Corp. v. George Hyman Constr. Co., 131 F.3d 28, 31 (1st Cir. 1997) (internal citations omitted); *See also* 40 U.S.C. § 3131(b)(2).

27. 40 U.S.C. § 3133(b)(2).

28. 40 U.S.C. § 3133(b)(1).

29. The Heard Act, 28 Stat. 278 (1894), *amended by* 33 Stat. 811 (1905).

30. J.W. Bateson Co. v. United States *ex rel.* Bd. of Trs. of the Nat'l. Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 589 (1978).

States."[31]

Congress repealed the Heard Act in 1935 and enacted the Miller Act.[32] Problems with the Heard Act encountered by claimants, as noted by the Miller Act House report, were the "undue delay, with resultant hardships, in the collection of moneys due them by suits on bonds."[33] Additionally, the federal government "had priority in making a claim under the bond."[34] The Miller Act of 1935 "remedied these problems by requiring two separate bonds: one covering the performance obligation and one covering the payment obligation."[35] Consequently, "subcontractors and suppliers with claims for nonpayment are no longer forced to compete with the United States' performance claims."[36]

In 1978 and again in 1994, the Miller Act was amended to raise the threshold amount of the federal construction project in question. In 1978 the amount was raised from $2,000 to $25,000[37] and in 1994 the amount was raised from $25,000 to the current requirement of $100,000.[38] In August 1999, the Miller Act was revised to require a penal sum on all payment bonds equal to the sum of the prime contract between the general contractor and the federal government, rather than a mere percentage of the prime contract.[39] Finally, in 2002 the Miller Act was recodified to

31. Jay Cruickshank, *Connecticut's "Little Miller Act": Public Work in Progress*, 17 QUINNIPIAC L. REV. 505, 506 (2004) (citing the Heard Act at Ch. 280, 28 Stat. 278 (1894) (repealed 1935)).

32. Sponer, *supra* note 24, at 697; *see also* Lynn M. Schubert, *Why Obligees Buy Bonds, in* THE LAW OF SURETYSHIP 41 (Edward G. Gallagher ed., 2d ed. 2000) (implying the Miller Act was named after John E. Miller, the Chairman of the U.S. House of Representatives Committee of the Judiciary).

33. Robert J. Duke, *The Tucker Act and Payment Bond Surety's Equitable Claim of Subrogation Post-Blue Fox: Keys to the Courthouse Doors*, 54 CATH. U.L. REV. 267, 268 n.10 (2004) (citing the MILLER ACT HOUSE REPORT, H.R. REP. NO. 74-1263, at 1 (1935)).

34. *Id.* (citing the MILLER ACT HOUSE REPORT, H.R. REP. NO. 74-1263, at 2 (1935).

35. *Id.*

36. *Id.*

37. John J. Aromando, *The Surety's Liability for "Bad Faith": Claims for Extra-Contractual Damages by an Obligee Under the Payment Bond*, 47 ME. L. REV. 389, 407 (1995); *see also* Universities Research Ass'n. v. Coutu, 450 U.S. 754, 758 n.4 (1981) (noting the 1978 increase from $2,000 to $25,000).

38. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4104(b)(1)(A) (1994).

39. Scott D. Baron et al., *Recent Developments in Fidelity and Surety Law*, 36 TORT & INS. L.J. 335, 350 (2001) ("[The Construction Industry Payment Protection Act of 1999 ("CIPP") revised Federal Acquisition Regulation ("FAR") 28.102] and the clauses at FAR 52.228-13, 52.228-15, and 52.228-16 to implement the CIPP Act and to enhance payment protection for contracts on government projects not subject to the Miller Act. The rule provides that the amount of the payment bond must equal the amount of the original contract, unless the contracting officer makes a written determination that this amount is impractical, in which case such officer shall set a different amount that cannot be less than the amount of the performance bond.").

"enact without substantive change certain general and permanent laws, related to public buildings, property, and works."[40]

2. *The Material Supplier – Subcontractor Distinction and Why it Matters*

Distinguishing material suppliers (a.k.a. materialmen) from subcontractors is very important because one of the primary defenses used by general contractors and their sureties in defending Miller Act claims is that the claimant is too remote to make a claim under the general contractor's payment bond. Only first-tier and second-tier Miller Act claimants may recover under the payment bond.[41] First-tier claimants are those parties, either subcontractors or material suppliers, having contractual privity with the general contractor.[42] Second-tier claimants are those parties having contractual privity with a *subcontractor*, who has contractual privity with a general contractor.[43] Those more remote parties having a contract with a material supplier are not covered by the payment bond and cannot recover under the Miller Act.[44] As the Supreme Court noted in 1944, "[m]any such materialmen are usually involved in large projects; they deal in turn with innumerable sub-materialmen and laborers. To impose unlimited liability under the payment bond to those sub-materialmen and laborers is to create a precarious and perilous risk on the prime contractor and his surety."[45]

For example, general contractor A has a contract with subcontractor B to renovate a military barracks. Subcontractor B contracts with sub-subcontractor C for electrical work and with material supplier D for the supply of concrete. Material supplier D then contracts with material supplier E to provide equipment to mix the concrete on site. In this scenario, Subcontractor B is a first-tier claimant while sub-subcontractor C and material supplier D are second-tier claimants based on their contract with subcontractor B.[46] Material supplier E, is outside the scope of the payment bond because it is a material supplier having a contract with a material supplier. If, on the other hand, material supplier E had a contractual relationship with sub-subcontractor B, it would be covered by the payment bond.

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40. H.R. REP. NO. 107-479 (2002). As a result of the recodification, 40 U.S.C. § 270a *et seq.* was recodified as 40 U.S.C. § 3131 *et seq.*.

41. Kelly Allbritton Katzman, *Purpose of the Payment Bond and Who and What is Covered, in* THE LAW OF SURETYSHIP 147, 148 (Edward G. Gallagher ed., 2d ed. 2000).

42. *Id.* at 149.

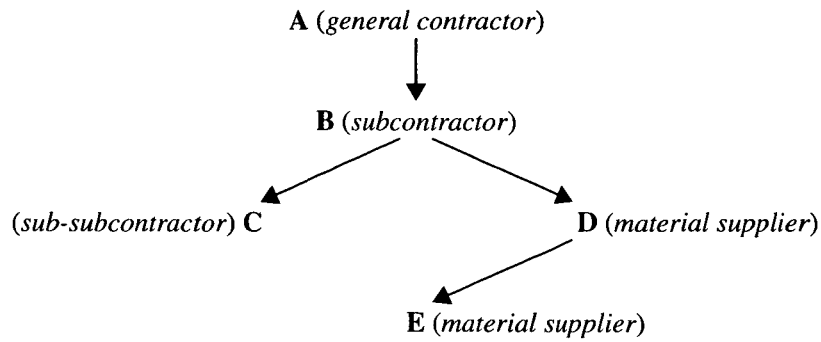
43. *Id.* at 150.

44. *Id.* at 151.

45. Clifford F. MacEvoy Co. v. United States, 322 U.S. 102, 110-11 (1944).

46. Miller Equip. Co. v. Colonial Steel & Iron Co., 383 F.2d 669, 673 (4th Cir. 1967).

FIGURE 1



In light of this chain of claimants, the United States Supreme Court has declared that in distinguishing subcontractors and material suppliers:

> [t]he Miller Act itself makes no attempt to define the word 'subcontractor.' We are thus forced to utilize ordinary judicial tools of definition. Whether the word includes laborers and materialmen is not subject to easy solution, for the word has no single, exact meaning. In a broad, generic sense a subcontractor includes anyone who has a contract to furnish labor or material to the prime contractor . . . 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.[47]

Subsequent case law illustrates the fact that the determination of whether a party is a subcontractor or a material supplier must be determined based on the facts of the case. For example, in *United States ex rel. Bryant v. Lembke Construction Co.*, the plaintiff supplied sand and gravel needed for mixing concrete for a government project pursuant to an oral agreement with Adams Concrete Company.[48] Adams had entered into a written contract with the general contractor to supply all of the concrete necessary for the project.[49] The Tenth Circuit Court of Appeals affirmed the district court's finding that Adams, the concrete supplier to the government, was a materialman rather than a subcontractor because the concrete supplied was neither customized nor represented a specialized job.[50] "All Adams did was deliver concrete."[51] Consequently, the plaintiff supplier furnishing sand and gravel was unable to recover under the payment bond because plaintiff was a material supplier which had contracted with another material supplier and was, therefore, too remote to make a

47. *MacEvoy*, 322 U.S. at 108-09.
48. United States *ex rel.* Bryant v. Lembke Constr. Co., 370 F.2d 293, 293 (10th Cir. 1966).
49. *Id.* at 294.
50. *Id.* at 296.
51. *Id.* at 295.

Miller Act claim.[52]

In a later Tenth Circuit case, a supplier of kitchen cabinets was deemed a subcontractor because the cabinets had to be furnished in accordance with the plans and specifications of the project, and the subcontractor had to verify room dimensions at the job site to insure correct cabinet sizes and furnish shop drawings for approval.[53] As such, the plaintiff company that supplied steel to the kitchen cabinet company was permitted to recover under the Miller Act because it had a contract with a subcontractor.[54]

Each case, however, is unique and courts balance a series of factors to determine whether a party is a material supplier or a contractor.

A. Factors Favoring Material Suppliers

After the two Tenth Circuit Court of Appeals cases noted above, the Ninth Circuit Court of Appeals, in *United States ex rel. Conveyor Rental & Sales Co. v. Aetna Casualty & Surety Co.*, discussed the factors now generally used throughout the country to determine whether a party is a material supplier or a subcontractor.[55] In *Conveyor Rental & Sales*, the Court summarized five general factors weighing in favor of determining the entity is a materialman.[56]

The first factor is simply whether a purchase order form was used by the parties.[57] The Ninth Circuit looked to two cases in support of this factor where the plaintiff's right to recover depended upon the status of the entity, whether a subcontractor or material supplier, which had contracted with the general contractor.[58] In *Miller Equipment Co. v. Colonial Steel & Iron Co.*, plaintiff material supplier Miller Equipment sought the balance of its contract from subcontractor Colonial Steel & Iron re-

52. *Id.* at 294-97.

53. Cooper Constr. Co. v. Pub. Hous. Admin. *ex rel.* Rio Grande Steel Products Co., Inc., 390 F.2d 175, 176 (10th Cir. 1968); *see also* Miller Equip. Co. v. Colonial Steel & Iron Co., 383 F.2d 669, 674 (4th Cir. 1967) (recognizing the requirement for special fabrication and the substantial price of the steel girders involved (fifteen percent) in relation to the total prime contact price made the party agreeing to supply the steel girders a subcontractor); Travelers Indemn. Corp. v. United States *ex rel.* W. Steel Corp., 362 F.2d 896, 898 (9th Cir. 1966) (holding the supplier of materials for two separate contracts was a subcontract under both contracts, one for the supply of steel cut to exact dimensions and specially fabricated and the second contract to erect a radar tower).

54. *Id.*

55. United States *ex rel.* Conveyor Rental & Sales Co. v. Aetna Cas. & Sur. Co., 981 F.2d 448, 450-52 (9th Cir. 1992).

56. *Id.* at 452.

57. *Id.*

58. The second case is United States *ex rel.* Potomac Rigging Co. v. Wright Contracting Co., 194 F. Supp. 444, 447 (D. Md. 1961) (explaining that the purchase order at issue was merely descriptive of what was to be transported rather than what was to be fabricated).

lated to the fabrication and delivery of structural steel to be incorporated in a federal bridge project in Virginia.[59] Miller Equipment was obligated to supply fifteen structural steel girders, each approximately 110 feet in length and weighing between seventeen to twenty tons and fabricated according to shop drawings furnished by Colonial Steel & Iron.[60] The *Miller Equipment* court ruled the contract between the general contractor and subcontractor Colonial Steel & Iron "called not for the mere supply of materials but for the custom fabrication of massive girders and their accessories, key and integral components of the bridge, designed and fabricated to mesh precisely in their final assembly on the job-site."[61] The fact that the general contractor designated its contract with Colonial Steel & Iron as simply a "Purchase Order" was not controlling in the final determination of whether Colonial Steel & Iron was a material supplier or a subcontractor and thus whether material supplier Miller Equipment could recover under the payment bond.[62]

The second factor is whether the materials come from a preexisting inventory.[63] An entity which maintains no inventory and must contract for certain supplies tends to be a factor supporting an argument that the entity is a subcontractor.[64] An entity that maintains a preexisting inventory is more likely to be deemed a material supplier.[65]

The third factor the Ninth Circuit used in weighing in favor of an entity being deemed a material supplier is based on whether the item supplied is relatively simple in nature.[66] In *Aetna Casualty & Surety Co. v. United States ex rel. Gibson Steel Co.*, for example, none of the items supplied were "complex, integrated system[s]."[67] Rather, "[t]he most complex items were prefabricated stairs and ladders."[68] The other items included "trench covers and frames; hand, guard, and wall rails; pipe sleeves; door lintels; soffit frames; floor expansion joint covers; and

59. Miller Equip. Co. v. Colonial Steel & Iron Co., 383 F.2d 669, 670 (4th Cir. 1967).

60. *Id.* at 670.

61. *Id.* at 674.

62. *Id.*

63. United States *ex rel.* Conveyor Rental & Sales Co. v. Aetna Cas. & Sur. Co., 981 F.2d 448, 452 (9th Cir. 1992).

64. *Id.* at 454.

65. *See* Aetna Cas. & Sur. Co. v. United States *ex rel.* Gibson Steel Co., 382 F.2d 615, 618 (5th Cir. 1967) (explaining that an entity did not maintain an inventory and thus constituted a material supplier); United States *ex rel.* Clark v. Lloyd T. Moon, Inc., 698 F. Supp. 665, 667 (S.D. Miss. 1988) (deeming that a material supplier "maintained at least an inventory of 'raw steel used for fabrication.'").

66. *Conveyor Rental & Sales Co.*, 981 F.2d at 452 & n.17 (citing *Gibson Steel Co.*, 382 F.2d at 618; *Lloyd T. Moon, Inc.*, 698 F. Supp. at 668).

67. *Gibson Steel Co.*, 382 F.2d at 618.

68. *Id.*

frames for fire extinguisher cabinet recesses."[69] In finding the company that had furnished these items was a material supplier, the court noted that "[b]oth the variety and the relative simplicity of the items supplied weigh heavily against finding that [the supplier] took over a significant and definable part of the construction project."[70]

A 2007 Fifth Circuit case, however, criticizes *Gibson Steel Co.,* noting that the Miller Act "does not make distinctions based on characteristics such as whether the material supplied was customized or unique."[71] The court explained that "[a]lthough furnishing customized or complex material may in some cases be a helpful indication of the strength of the supplier's relationship with the [general] contractor, it does not follow that the absence of such characteristics in the material supplied establishes a lack of 'subcontractor' status."[72] In light of this case and in consideration of other cases such as *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, the complex or unique nature of the materials supplied may not be as significant a factor in the subcontractor – material supplier analysis as it has in the past.[73]

The fourth factor weighing in favor of an entity being deemed a material supplier is whether the contract was a small percentage of the total construction cost.[74] The smaller the percentage of the total construction cost, the greater the likelihood that an entity will be deemed a material supplier.[75]

Finally, the fifth factor weighing in favor of a determination that the entity is a material supplier is whether sales tax was included in the con-

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69. *Id.*

70. *Id.*

71. United States *ex rel.* E & H Steel Corp. v. C. Pyramid Enters., Inc., 509 F.3d 184, 189 (3d Cir. 2007) (pertaining to the supply of fabricated steel to the general contractor for use in constructing the framework of "a large C-17 Maintenance Hangar and Shops facility at the McGuire Air Force Base in New Jersey.").

72. *Id.* at 189.

73. *See* F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 123-24 (1974) *superseded in part by statute*, Prompt Payment Act Amendments of 1988, ch. 39, sec. 3905(j), § 9(a)(2)(j), 102 Stat. 2455 (involving lumber supplier for federal housing projects, the court stated to "[l]ook at the total relationship between [supplier] and [general contractor] . . . to determine whether [supplier] [is] a subcontractor," in determining that supplier was a subcontractor court noted as additional support that the "management and financial structures of the two companies were closely interrelated . . . .").

74. United States *ex rel.* Conveyor Rental & Sales Co. v. Aetna Cas. & Sur. Co., 981 F.2d 448, 452 & n.18 (9th Cir. 1992) (citing *Gibson Steel Co.*, 382 F.2d at 618; United States *ex rel.* Pioneer Steel Co. v. Ellis Constr. Co., 398 F. Supp. 719, 721 (E.D. Tenn. 1975)).

75. *Id.* at 454 (noting that the percentage of the prime contract supporting a finding of a materialman relationship has ranged from 2% in *Gibson Steel Co.*, 382 F.2d at 618, through 5.15% in United States *ex rel.* Clark v. Lloyd T. Moon, Inc., 698 F. Supp. 665, 668 (S.D. Miss. 1988), to 9% in *Pioneer Steel Co.*, 398 F. Supp. at 721).

tract price.[76] Where a party includes sales tax, the belief is that materials are being sold or supplied.[77]

B. Factors Favoring Subcontractors

In the same seminal 1992 Ninth Circuit case, *Conveyor Rental & Sales*, the court also looked to a series of earlier cases and enumerated thirteen factors used to determine whether or not a party was a subcontractor.[78] Several of these factors are the mirror opposite of the factors used to determine whether an entity is a material supplier, but still bear mention here. The first factor likely to render an entity a subcontractor is whether the product supplied is custom fabricated.[79] In making its determination, the Ninth Circuit again looked to the case of *Miller Equipment*.[80] The court in *Miller Equipment*, which involved a bridge construction project in Virginia, held that "the custom fabrication of massive girders and their accessories, key and integral components of the bridge, designed and fabricated to mesh precisely in their final assembly on the job-site" made the entity which contracted with the general contractor, Colonial Steel & Iron, a subcontractor rather than a material supplier.[81] Consequently, the plaintiff material supplier, Miller Equipment was permitted to recover based on its contract with the subcontractor, Colonial Steel.[82] However, had Colonial Steel & Iron been a material supplier rather than a subcontractor, then plaintiff Miller Equipment would have been precluded from recovery under the Miller Act because it would have been a third-tier claimant and too remote in the chain to recover.[83]

The second fact favoring weighing in favor of a subcontractor rather than a material supplier is whether the product supplied is a complex integrated system.[84] As noted above in the case of *Gibson Steel Co.*, the prefabricated stairs and ladders furnished by the supplier were the most complex items supplied.[85] Most of the other items were construction items such as "trench covers and frames; hand, guard, and wall rails; pipe

76. *Id.* at 452 & n.19 (citing *Gibson Steel Co.*, 382 F.2d at 618; *Pioneer Steel Co.*, 398 F. Supp. at 721; United States *ex rel.* Potomac Rigging Co. v. Wright Contracting Co., 194 F. Supp. 444, 447 (D.C. Md. 1961)).

77. *Id.*

78. *Id.* at 451-52 (internal footnotes omitted).

79. *Id.* at 451 (internal footnote omitted).

80. *Id.* at 453 (citing Miller Equip. Co. v. Colonial Steel & Iron Co., 383 F.2d 669, 674 (4th Cir. 1967)).

81. *Miller Equip. Co.*, 383 F.2d at 674.

82. *Id.*

83. *Id.* at 673.

84. *Conveyor Rental & Sales Co.*, 981 F.2d at 451, 452 n.2 (citing Aetna Cas. & Sur. Co. v. United States *ex rel.* Gibson Steel Co., 382 F.2d 615, 618 (5th Cir. 1967)).

85. *Gibson Steel Co.*, 382 F.2d at 618.

sleeves; door lintels; soffit frames; floor expansion joint covers; and frames for fire extinguisher cabinet recesses."[86] The simple nature of these items weighed against finding that the supplier was in fact a subcontractor.[87]

The third factor is whether there is a close financial interrelationship between the companies.[88] In *F.D. Rich,* the court found that the subcontractor "Cerpac . . . was closely intertwined with [F.D.] Rich."[89] Specifically, F.D. Rich received "much if not all of the plywood and millwork" it required between 1963 and 1966 for its numerous federal housing projects from Cerpac.[90] The court noted that the principals of F.D. Rich "held a substantial voting interest in Cerpac stock, supplied a major share of its working capital, and were thoroughly familiar with its operations and financial condition."[91] Consequently, "[i]t would have been easy for [F.D.] Rich to secure itself from loss as a result of a default by Cerpac" and meant that Cerpac was not a material supplier, but instead a subcontractor.[92]

The fourth of the thirteen factors is whether "a continuing relationship exists with the [general] contractor as evidenced by the requirement of shop drawing approval by the [general] contractor [and/or] the requirement that the supplier's representative be on the job site."[93] As support for this factor, the Ninth Circuit looked to *United States ex rel. Consolidated Pipe & Supply Co. v. Morrison-Knudson Co.*,[94] wherein a pipe fabricator contracted with the general contractor for the supply of pipe necessary for the construction of the Aero Propulsion Test Facility at the Arnold Engineering Development Center, Tullahoma, Tennessee.[95] The pipe fabricator in turn contracted with other entities for the supply of wrapped pipe.[96] When the pipe fabricator failed to pay one of the suppli-

86. *Id.*

87. *Id.*

88. *Conveyor Rental & Sales Co.*, 981 F.2d at 451 (internal footnote omitted).

89. F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 118 (1974), *superseded in part by statute*, Prompt Payment Act Amendments of 1988, ch. 39, sec. 3905(j), § 9(a)(2)(j), 102 Stat. 2455.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Conveyor Rental & Sales Co.*, 981 F.2d at 451, 452 nn.4-5 (citing United States *ex rel.* Consol. Pipe and Supply Co. v. Morrison-Knudsen Co., 687 F.2d 129, 135 (6th Cir. 1982); United States *ex rel.* Clark v. Lloyd T. Moon, Inc., 698 F. Supp. 665, 667 (S.D. Miss. 1988); United States *ex rel.* Pioneer Steel Co. v. Ellis Constr. Co., 398 F. Supp. 719, 721 (E.D. Tenn. 1975)).

94. *Id.*at 453 & nn.22-23 (citing *Consol. Pipe.*, 687 F.2d at 135; *Clark*, 698 F. Supp. at 667; *Pioneer Steel Co.*, 398 F. Supp. at 721).

95. *Consol. Pipe*, 687 F.2d at 130.

96. *Id.*

ers, the supplier sought payment from the general contractor.[97] In the ensuing litigation, the *Consolidated Pipe* court held that the pipe fabricator was in fact a subcontractor based on, among other thing, the fact that it "drafted isometric drawings (three dimensional drawings) which were utilized in preparing shop drawings" for the project and that the "shop drawings gave a more detailed picture of segments of the isometric drawings and were used for actual fabrication of the pipe."[98] The court noted that the "[p]reparation of these drawings by [the pipe fabricator] involved no design work, but did require engineering expertise on behalf of [the pipe fabricator] that [the general contractor] did not have."[99] Additionally, the pipe fabricator "sent a draftsman to the project site when the drawings were first submitted to participate in the interpretation of the drawings."[100] "He stayed approximately six weeks."[101] As a result of this close relationship and the fact that the pipe fabricator had representative on site to interpret its drawings, the *Consolidated Pipe* court held that the pipe fabricator was a subcontractor and that the material supplier was entitled, therefore, to collect from the general contractor and its surety.[102]

The fifth factor is whether the supplier is required to perform on site.[103] When a party does not perform work on site, it is more likely that it will be deemed a material supplier rather than a subcontractor.[104]

The sixth factor enumerated by the Ninth Circuit in *Conveyor Rental & Sales* is whether there is a contract for labor in addition to materials.[105] The case of *Travelers Indemnity Co. v. United States ex rel. Western Steel Co.*,[106] cited by the Ninth Circuit, involved two separate contracts: one for materials and one apparently for labor needed to erect the project. This first contract called for the supply steel to construct a radar tower.[107]

97. *Id.*

98. *Id.* at 133, 135 (citing Aetna Cas. & Sur. Co. v. United States *ex rel.* Gibson Steel Co., 382 F.2d 615, 618 (5th Cir. 1967); United States *ex rel.* Gulfport Piping Co. v. Monaco and Son, Inc., 222 F. Supp. 175, 182 (D. Md. 1963), *rev'd on other grounds*, 336 F.2d 636 (4th Cir. 1964); United States *ex rel.* Parker-Hannifin Corp. v. Lane Constr. Corp., 477 F. Supp. 400, 411 (M.D. Pa. 1979).

99. *Consol. Pipe,* 687 F.2d at 133.

100. *Id.*

101. *Id.*

102. *Id.* at 135-36.

103. United States *ex rel.* Conveyor Rental & Sales Co. v. Aetna Cas. & Sur. Co., 981 F.2d 448, 451, 452 n.6 (9th Cir. 1992) (citing *Gibson Steel Co.*, 382 F.2d at 618; United States *ex rel.* Clark v. Lloyd T. Moon, Inc., 698 F. Supp. 665, 667 (S.D. Miss. 1988)).

104. *Gibson Steel Co.*, 382 F.2d at 618.

105. *Conveyor Rental & Sales Co.*, 981 F.2d at 451, 452 n.7 (citing Travelers Indem. Co. v. United States *ex rel.* W. Steel Co., 362 F.2d 896, 898 (9th Cir. 1966)).

106. Travelers Indem. Co. v. United States *ex rel.* W. Steel Co., 362 F.2d 896 (9th Cir. 1966).

107. *Id.* at 897.

The subsequent, second contract called for the construction of the radar tower itself.[108] As the Court noted, the "subcontract for erection of the radar tower so beclouds the issue as to suggest the fruitlessness of attempting a definition of a subcontract concerned solely with the requirements of the" first contract which called only for the supply of the materials.[109] The party in question was held to be a subcontractor.

The seventh factor is simply whether the term "subcontractor" is used in the agreement.[110]

The eighth factor weighing in favor of deeming an entity a subcontractor is whether the materials supplied come from existing inventory.[111] In *Consolidated Pipe*, the pipe fabricator or middle party simply did not maintain an inventory of pipe and had to purchase it from various suppliers.[112] As the Court noted, the pipe supplied to the project were not inventory items, "a factor denominative for a subcontractor relationship" with a general contractor.[113]

The ninth of the thirteen factors enumerated by the Ninth Circuit in *Conveyor Rental & Sales* is whether the supplier's contract constitutes a substantial portion of the prime contract.[114] In discussing this factor, the Ninth Circuit again looked to *Consolidated Pipe* in which the pipe fabricator or middle party was required to provide a total of nearly forty percent of the pipe used on the total project.[115] In a subsequent case from the United States District Court for the Southern District of Mississippi, the court held that supplying a mere fifteen percent of the steel for a portion of the project was not, in conjunction with other factors, enough to support the argument that the steel supplier was a subcontractor.[116]

The tenth factor is whether the supplier is required to furnish all the material of a particular type.[117] Here, the Ninth Circuit looked to *Basich Brothers Construction Co. v. United States ex rel. Turner*,[118] a 1946 case which, almost as a side note, lists the materials provided as gravel, rock, and sand.[119] The *Basich Brothers* court does not explain how or why

108. *Id.* at 898.

109. *Id.*

110. United States *ex rel.* Consol. Pipe & Supply Co. v. Morrison-Knudson Co., 687 F.2d 129, 134 (6th Cir. 1982).

111. United States *ex rel.* Conveyor Rental & Sales Co. v. Aetna Cas. & Sur. Co., 981 F.2d 448, 451 (9th 1992).

112. *Consol. Pipe*, 687 F.2d at 133.

113. *Id.* at 134.

114. *Conveyor Rental & Sales Co.*, 981 F.2d at 451.

115. *Consol. Pipe*, 687 F.2d at 135.

116. United States *ex rel.* Clark v. Lloyd T. Moon, Inc., 698 F. Supp. 665, 667-68 (S.D. Miss. 1988).

117. *Conveyor Rental & Sales Co.*, 981 F.2d at 451.

118. Basich Bros. Constr. Co. v. United States *ex rel.* Turner, 159 F.2d 182 (9th Cir. 1946).

119. *Id.* at 182.

"furnishing all the material of a particular type" makes one a subcontractor rather than a material supplier.

The eleventh factor is whether the supplier is required to post a performance bond.[120] *Consolidated Pipe* again served to guide the Ninth Circuit in that the facts reveal that that the pipe fabricator or middle man, to the surprise of many of the general contractor's personnel, was not required to obtain a performance bond and thus weighed in favor of a determination the pipe fabricator was a subcontractor.[121]

The twelfth and thirteenth factors both come from *Gibson Steel Co.*[122] The twelfth factor is whether there is a back charge for the cost of correcting the supplier's mistakes. The thirteenth and final factor is whether there is a system of progressive or proportionate fee payment.[123]

Consequently, a party providing, for example, a fixed amount of concrete or pieces of heavy construction equipment to a subcontractor will be deemed a material supplier using the factors enumerated above. Thus, despite the lack of privity with the general contractor, the material supplier shall be able to recover all "sums justly due" pursuant to the payment bond obtained by the general contractor.

3. *How are "Sums Justly Due" Defined by the Courts?*

The Miller Act "is highly remedial in nature. . . . [and] is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects."[124] Given the "highly remedial" nature of the Miller Act, courts are given broad leeway in interpreting the statutory phrase permitting a prevailing Miller Act claimant to recovery all "sums justly due."[125]

Under a prior version of the Miller Act, a Miller Act claimant on a federal construction project was entitled to the "sums justly due" for providing labor and materials.[126] The 2002 amendments to the Miller Act were not intended to change the substance of the Act which revised the phrase from all "sums justly due" to "for the amount due."[127] Courts have interpreted the all "sums justly due" terminology to mean that the

120. *Conveyor Rental & Sales Co.*, 981 F.2d at 451-52.

121. *Consol. Pipe*, 687 F.2d at 135-36.

122. Aetna Cas. & Sur. Co. v. United States *ex rel.* Gibson Steel Co., 382 F.2d 615, 618 (5th Cir. 1967).

123. *Id.*

124. Clifford F. MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 322 U.S. 102, 107 (1944).

125. *See* Sponer, *supra* note 25, at 714.

126. *See* 40 U.S.C. § 270(b)(1) (2000); *see also infra* § II(1).

127. United States *ex. rel.* Tenn. Valley Marble Holding Co. v. Grunley Constr., 433 F. Supp. 2d 104, 116 n.3 (D. D.C. 2006) (citing H.R. REP. NO. 107-479, at 2 (2002), *reprinted in* 2002 U.S.C.C.A.N. 827, 827-28); *see also* 40 U.S.C. § 3133(b)(1) (2006).

scope of the recovery is only as broad as that permitted by the contract between the subcontractor and the material supplier. As one court recently noted, "[i]t is self-evident that the subcontract must be examined to ascertain what amount is due a subcontractor, for it is the subcontract that defines the subcontractor's scope of work and the measure of payment for that work, *i.e.*, whether by fixed price, time and materials, profits, or some other appropriate means."[128]

Consequently, courts look to the contract between the material supplier and the subcontractor to determine the "sums justly due." If, for example, the underlying contract contains an attorneys' fees provision, but not a service charge provision, the "sums justly due" include attorneys' fees, but not service charges. It is the surety's obligation "to pay the compensation to which the parties have agreed, although this amount [may] exceed the cost of labor, materials, and overhead."[129]

4. Attorneys' Fees As "Sums Justly Due"

Provided one of the exceptions to the "American Rule"[130] applies, such as a statute or contractual provision permitting recovery, attorneys' fees are generally recoverable.[131] In Miller Act cases, where a contract between a material supplier and a subcontractor does not provide for fees, the material supplier is not entitled to attorneys' fees as "sums justly due" from either the general contractor or its surety. The United States Supreme Court's decision in *F. D. Rich Co. v. United States ex rel. Indus-*

128. United States *ex rel.* Acoustical Concepts, Inc. v. Travelers Cas. and Sur. Co. of America, 635 F. Supp. 2d 434, 439 (E.D. Va. 2009); *see also* United States *ex rel.* Woodington Elec. Co. v. United Pac. Ins., 545 F.2d 1381, 1383 (4th Cir. 1976) (looking to the underlying contract, not to analyze the contractual liability, but to determine whether "sums justly due" could be measured in terms of profits as opposed to the cost of labor and materials).

129. *Woodington Elec.*, 545 F.2d at 1383.

130. Traditionally, a prevailing party was not entitled to collect its attorneys' fees from the losing party. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). The theory behind having each side bear its own costs was that because of the uncertainties of litigation, a party should not be penalized "merely for defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967), *superseded by statute on other grounds.*

131. Although on rare occasions a court will award attorneys' fees under the Miller Act based on the bad faith of the unsuccessful party, such instances are rare and not addressed in this article. The bad faith exception holds that fees may be awarded where a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." Hall v. Cole, 412 U.S. 1, 5 (1973); United States v. RB Constructors, LLC, No. 07-01949, 2009 U.S. Dist. LEXIS 95329, at *4 (Miller Act case noting that "the bad-faith exception may apply in cases of bad faith occurring during the course of litigation that is abusive of the judicial process, or where a party institutes an unfounded action wantonly or for oppressive reasons, or necessitates an action be filed or defends an action through the assertion of a colorless defense, but will not apply to bad faith in the acts giving rise to the substantive claim.") (internal quotations omitted).

trial Lumber Co. serves as the starting point for consideration of attorneys' fees in Miller Act cases.[132] As the Miller Act itself does not specifically authorize courts to award attorneys' fees to a successful plaintiff, the matter of fees is left to federal law.[133] According to the "American Rule," each side is to bear its own legal fees unless there is a contractual provision or statute permitting fee-shifting.[134] When attorneys' fees are provided for by contract, "the fees are routinely awarded and the contract is enforced according to its terms."[135] However, the Court must determine if the claimed fees are inequitable or unreasonable and has discretion to completely deny or reduce the fee award.[136]

In accordance with the exception to the "American Rule," federal courts have upheld fee awards in Miller Act cases where the relevant contract, in this case a material supplier – subcontractor contract, provided for attorneys' fees. For example, in the 2002 case of *United States ex rel. Casa Redimix Concrete Corp. and Casa Building Materials, Inc. v. Luvin Construction, Corp.*,[137] the Court rejected the general contractor and surety's argument that plaintiff material supplier should be precluded from recovering attorneys' fees based on a lack of contractual privity.[138] The facts of *Casa Redimix* are straightforward and involved claims by Casa Redimix against the general contractor and its surety for the contract price of concrete used in the construction of a Post Office and the claims of Casa Building Materials for the price of various other materials delivered to the same project.[139] The claims of both entities were granted and it was also found that Casa Redimix was entitled, under its contract, to recover from the general contractor, the attorneys' fees it incurred in

132. F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 126 (1974), *superseded in part by statute*, Prompt Payment Act Amendments of 1988, ch. 39, sec. 3905(j), § 9(a)(2)(j), 102 Stat. 2455.

133. *See id.* at 126-27.

134. *Id.* at 126.

135. United States *ex rel.* C.J.C., Inc. v. W. States Mech. Contractors, Inc., 834 F.2d 1533, 1548 (10th Cir. 1987). Courts generally honor contractual rights to attorneys' fees without federal statutory authorization in cases involving an underlying adjudication of federal issues. *E.g.*, Coastal Fuels Mktg., Inc. v. Fla. Express Shipping Co., 207 F.3d 1247, 1251-52 (11th Cir. 2000) (maritime law); Sea-Land Serv., Inc. v. Murrey & Sons Co., 824 F.2d 740, 744-75 (9th Cir. 1987) (same); *C.J.C.*, Inc., 834 F.2d 1533, 1542-43 (Miller Act); United States *ex rel.* Noyes v. Kimberly Constr., Inc., 43 Fed. App'x. 283, 288-89 (10th Cir. 2002) (same); Franklin Fin. v. Resolution Trust Corp., 53 F.3d 268, 273 (9th Cir. 1995) (Financial Institutions Reform, Recovery and Enforcement Act).

136. *Noyes*, 43 Fed. App'x. at 288 (affirming that general contractor was liable for chemical supplier's debt, including attorneys' fees based on contract with subcontractor).

137. United States *ex rel.* Casa Redimix Concrete Corp. v. Luvin Constr., Corp., No. 00-7552, 2002 U.S. Dist. LEXIS 25331 (S.D.N.Y. 2002).

138. *Id.* at **13-15.

139. *Id.* at **2-3.

collecting the price of the concrete.[140] The *Casa Redimix* court, however, apparently based its decision on New York state law which provided that a contract provision that one party to a contract pay the other party's attorneys' fees in the event of breach is enforceable in an amount that is "reasonable."[141] Other federal circuits simply look to the contract between the parties to determine whether attorneys' fees are recoverable.

In the 1977 Fifth Circuit case of *United States ex rel. Carter Equipment Co. v. H.R. Morgan, Inc.*, an equipment supplier was awarded attorneys' fees against the general contractor and its surety based on an attorneys' fees provision in the contract between supplier and subcontractor.[142] The equipment rental contractual provision specifically noted in part that "[s]hould it become necessary that Lessor employ an attorney to enforce any of the provosions (sic) of this Agreement . . . Lessor shall be entitled to recover such reasonable attorney's fees and expenses as shall be incurred in connection therewith."[143] Looking to the specific language of the payment bond, which noted that "if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, . . ." the *Carter Equipment* court found in favor of the equipment supplier, followed the precedent set by *F.D. Rich*, and reversed the district court denial of attorneys' fees.[144]

In rendering its decision, the *Carter Equipment* court cited two earlier cases, the 1964 Eighth Circuit case of *D & L Construction Co. v. Triangle Electric Supply Co.*[145] and the 1966 Ninth Circuit case of *Travelers Indemnity Co. v. United States ex rel. Western Steel, Co.*[146] which both had awarded attorneys' fees to material suppliers as "sums justly due" based on their respective contracts with the subcontractor working on the project. In *Travelers Indemnity Co.*, the court specifically noted that under federal law, it is "settled that such a contractual obligation for attorney fees becomes part of the compensation 'justly due.'"[147]

In the 1989 Eleventh Circuit case *United States ex rel. Southeastern Municipal Supply Co., v. National Union Fire Insurance Co.*,[148] the con-

140. *Id.* at *15.

141. *Id.*

142. United States *ex rel.* Carter Equip. Co. v. H.R. Morgan, Inc., 554 F.2d 164, 165-66 (5th Cir. 1977), *rev'd per curiam*, 554 F.2d 1271.

143. *Id.* at 165 n.3.

144. *Id.* at 165-66.

145. D & L Constr. Co. v. Triangle Elec. Supply Co., 332 F.2d 1009, 1013 (8th Cir. 1964).

146. Travelers Indem. Co. v. United States *ex rel* W. Steel, Co., 362 F.2d 896, 899 (9th Cir. 1966).

147. *Id.*

148. United States *ex rel.* Se. Mun. Supply Co., v. Nat'l Union Fire Ins. Co., 876 F.2d 92, 93 (11th Cir. 1989) (per curiam); *see also* United States *ex rel.* Capps v. Fid. & Deposit Co., 875 F.

tract between the material supplier and the subcontractor contained a provision permitting the recovery of attorneys' fees. The court held the provision was enforceable against the general contractor and its surety,[149] and distinguished another Eleventh Circuit Court of Appeals case, *United States ex rel. Krupp Steel Products, Inc. v. Aetna Insurance Co.*,[150] which had held that despite the contractual terms found on the back of the delivery tickets and on all of the invoices which stated that the supplier could recover attorneys' fees in case of nonpayment for the goods, that the Miller Act did not provide for attorneys' fees.[151]

In the 1992 District of Colorado Court case of *United States ex rel. Trustees of Colorado Laborers Health & Welfare Trust Fund v. Expert Environmental Control, Inc.*,[152] the central issue was whether "a general contractor and its Miller Act surety [were] liable to a third-party for attorney[s'] fees . . . when the terms of the subcontractor's agreement with the third-party provide for such fees."[153] The third-party in the case, however, was not a material supplier, but rather trustees of a state employee benefit fund.[154] In awarding attorneys' fees, the *Trustees of Colorado* Court cited the "majority rule" that "attorney[s'] fees in a Miller Act case can be awarded to [a] third party based on a contractual agreement between that party and a subcontractor."[155] The court explained that the Eleventh Circuit had "adopted the rule that a general contractor

Supp. 803, 809 (M.D. Ala. 1995) (holding that a supplier could seek attorneys' fees and costs from the general contractor pursuant to the express terms of supplier's contract with the subcontractor).

149. *Nat'l Union Fire*, 876 F.2d at 93.

150. United States *ex rel.* Krupp Steel Prods., Inc. v. Aetna Ins. Co., 831 F.2d 978 (11th Cir. 1987), *rev'd*, 923 F.2d 1521 (11th Cir. 1991).

151. *Id.* at 983-84. *Krupp* (1987) was reversed and remanded in 1991 by United States ex rel. Krupp Steel Prods., Inc. v. Aetna Insurance Co., 923 F.2d 1521 (11th Cir. 1991), which noted "the remedial nature of the Miller Act requires that a general contractor do everything that it reasonably can to protect itself 'from possible misapplication of funds with which it parted in order to allow a subcontractor to continue work.'" 923 F.2d at 1526 (citing Graybar Elec. Co. v. John A. Volpe Constr. Co., 387 F.2d 55, 59-60 (5th Cir. 1967)).
Krupp (1991) further noted that "our Circuit subsequently issued a per curiam opinion, United States f/u/b/o Se. Mun. Supply Co. v. Nat'l Union Fire Ins. Co., 876 F.2d 92, 93 (11th Cir. 1989), explicitly repudiating the suggestion in *Krupp* [(1987)] that a contractual provision between a supplier and a subcontractor for the recovery of attorney's fees is not enforceable under the Miller Act against the general contractor or its surety." 923 F.2d at 1527.

152. United States *ex rel.* Trs. of Colo. Laborers Health & Welfare Trust Fund v. Expert Envtl. Control, Inc., 785 F. Supp. 895, 897 (D. Colo. 1992) (dealing with a contract between a subcontractor and the Colorado Laborers Health and Welfare Fund trustees which incorporated by reference terms of the Colorado collective bargaining agreement governing laborers on the federal project. Under the terms of the collective bargaining agreement, the subcontractor could be liable for, among other things, attorneys' fees).

153. *Id.*

154. *See id.*

155. *Id.* at 898 n.1.

and its surety must pay attorney[s'] fees when there is an agreement between a subcontractor and the claimant providing for such fees."[156]

In the 1996 Fourth Circuit case of *United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Insurance Co.*,[157] the Court of Appeals for the Fourth Circuit affirmed a material suppliers' recovery of attorneys' fees and interest against the general contractor and surety based on a contract between a material supplier and subcontractor. The material supplier in *Maddux Supply* provided materials to subcontractor Chapman Electric pursuant to a credit application which had been in place for several years and predated the federal construction project which formed the subject of Maddux's Miller Act claim.[158] Pursuant to the language of the credit application, Maddux as was entitled to "a 1 1/2% monthly service charge" on "all accounts not paid within 30 days" and all costs associated with collecting any outstanding balance, including attorneys' fees.[159] The appellate court upheld the district court's finding that the credit application was part of the contract between Maddux and Chapman Electric and disregarded the general contractor and the surety's argument that the attorneys' fees provision was unenforceable because it was entered into prior to the project.[160]

In conclusion, assuming that the rental agreement, invoice, bill of lading, delivery ticket, credit application or the like contains a contractual provision awarding attorneys' fees, it is established law that a material supplier that does not have contractual privity with the general contractor may recovery attorneys' fees as the prevailing party. Such an outcome was intended by those who drafted the Miller Act and courts enforce the Act to protect material suppliers and other third-parties from aggressive general contractors and their sureties which pressure settlement.

Despite clear court interpretation, however, general contractors and their sureties frequently defend claims by arguing that a party is unable to collect its attorneys' fees. Often, this defense raises concerns for the material supplier and is a significant factor in resolving the case for less than what was originally owed, including attorneys' fees.

5. *Contractual Interest Charges or Late Fees As "Sums Justly Due"*

As noted above, courts treat recovery of contractually agreed to attorneys' fees as "sums justly due" pursuant to the Miller Act. Where there is a valid contract between a material supplier and a subcontractor

156. *Id.* at 897.

157. United States *ex rel.* Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co., 86 F.3d 332, 336 (4th Cir. 1996).

158. *Id.* at 334.

159. *Id.*

160. *Id.* at 336.

permitting the recovery of a reasonable service charges or finance charges,[161] the courts also appear to permit recovery.[162] However, awarding non-contractual interest is matter of court discretion and, as some courts have determined, a matter of state law.[163] Where there is a contractual provision permitting a reasonable "interest" charge, courts award such fees as "sums justly due."

In *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, the Supreme Court addressed remedies available to plaintiffs under the Miller Act. In refusing to apply California law to plaintiff's claim for attorneys' fees, the Court stated: "The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law."[164] Even though *F.D. Rich* dealt with attorneys' fees, courts have used the above noted language to craft a federal remedy to the issue of contractual service charges or finance charges at a prescribed amount for all unpaid amounts.

For example, in the 1996 Ninth Circuit Court case of *Hawaiian Rock Products Corp. v. A.E. Lopez Enterprises, Ltd.*, the court noted that "the terms of the contract were clearly stated on the invoices; those terms stated that failure to pay would result in incurring a 1 % monthly charge simple interest charge."[165] Additionally, in another California case, *United States ex rel. Big 4 Rents, Inc. v. Briggs O. Ogamba*, the Northern District of California found that plaintiff's late fee charge of 1 1/2 percent per month (eighteen percent per annum) on overdue principal was not interest and that "[a] finance charge . . . encourages payment and compensates for . . . delay in payment."[166] Specifically, the general contractor in *Big 4 Rents, Inc.* rented construction equipment directly from Big 4 Rents, to be used in connection with the general contractor's contract with the federal government for the "removal and remediation of underground storage tanks at the United States Coast Guard Training Center in Petaluma, California."[167] The rental agreement between the two par-

161. Courts tend to use these terms interchangeably.

162. *See Maddux Supply*, 86 F.3d at 334, 336.

163. *See* United States *ex rel.* Cableguard Sys. v. Mid-Continent Casualty Co., 73 Fed. App'x 28 (5th Cir. 2003) (applying Louisiana state law); N. Star Terminal & Stevedore Co. v. Nugget Constr., Inc., 126 Fed. App'x 348 (9th Cir. 2005) (applying Alaska state law).

164. F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 127 (1974), *superseded in part by statute*, Prompt Payment Act Amendments of 1988, ch. 39, sec. 3905(j), § 9(a)(2)(j), 102 Stat. 2455.

165. Hawaiian Rock Prods. Corp. v. A.E. Lopez Enters., Ltd., 74 F.3d 972, 976 (9th Cir. 1996) (the Court labels 1 % monthly charge on the unpaid invoices as "pre-judgment interest").

166. United States *ex rel.* Big 4 Rents, Inc. v. Briggs O. Ogamba, No. C-96-4301-VRW, 1997 U.S. Dist. LEXIS 10455 at *2, *4 (N.D. Cal. July 14, 1997). It should be noted that the Court uses the terms "late fee" and "finance charge" interchangeably.

167. *Id.* at *2.

ties stated that the general contractor "would pay within 30 days of the invoice date, and would be charged 1 1/2% of the overdue amount per month (18% annually)."[168] Thus, based strictly on the contractual language involved, plaintiff equipment supplier was entitled to its late fee charge.

Both *Hawaiian Rock* and *Big 4 Rents, Inc.*, however, involve direct contracts between the general contractor and a supplier.[169] Consequently, there is contractual privity between the two parties. In the following cases, however, there is no such privity, yet the courts award late fees or finance charges based on the premise such fees were "sums justly due."

In *Maddux Supply*, discussed above, the Fourth Circuit clearly noted that while the "Miller Act does not, by its own terms, provide for . . . interest. Several circuits have held . . . that interest" is recoverable if "part of the contract between the subcontractor and supplier."[170] Again, in *Maddux Supply*, the equipment supplier's credit application, signed by the subcontractor, contained a provision whereby a 1 1/2% monthly service charge was added to all accounts more than thirty days overdue.[171] The trial court held that the service charges (interest) were "sums justly due" under the Miller Act and that general contractors and their sureties were "obligated to pay amounts owed by their subcontractors to suppliers."[172]

Under the Tenth Circuit case of *United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors, Inc.*, the federal court, relying on the *F.D. Rich* case, also found that "a fair reading of the Court's language" in *F.D. Rich* included an award of interest.[173] However, because no federal law existed with respect to awarding interest, the *Western States* court applied New Mexico law which stated "where the amount of indebtedness under the contract is ascertainable by breaching party, the injured party is entitled to interest as a matter of right on those monies at the legal rate."[174]

168. *Id.* at *2. See also the California Supreme Court case of Sw. Concrete Prods. v. Gosh Constr. Corp., 51 Cal. 3d 701, 709 (Cal. 1990), which noted that "delivery tickets and invoices . . . constituted a contract which included the provision for 1 1/2 percent interest per month on late payments" and the late charge was not subject to usury law.

169. It should be noted that the issue of whether the party contracting with the general contractor was a subcontractor or a material supplier was irrelevant to the outcome of either case.

170. United States *ex rel.* Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co., 86 F.3d 332, 334, 336 (4th Cir. 1996).

171. *Id.* at 334.

172. *Id.* at 336.

173. United States *ex rel.* C.J.C., Inc. v. W. States Mech. Contractors, Inc., 834 F.2d 1533, 1541 (10th Cir. 1987).

174. *Id.* at 1541-42 (quoting Grynberg v. Roberts, 698 P.2d 430, 432 (N.M. 1985).

Consequently, despite being labeled service charges, finance charges, or interest, so long as a contractual provision exists between a material supplier and a subcontractor, the general contractor and its surety are liable for the unpaid amounts owed by the subcontractor to the supplier.

6. Other Construction Costs Also Constitute "Sums Justly Due"

While the Miller Act explicitly notes that "labor" and "materials" may be recovered by a claimant, it is far less explicit about other items which may be recovered. As such, claimants must look to the case law for an interpretation.[175]

A. Equipment Re-Rentals

In the 2010 case of *United States ex rel. Ramona Equipment Rentals, Inc. v. Carolina Casualty Insurance Co.*,[176] the United States District Court for the Southern District of California noted for the first time that a material supplier was also entitled to collect for equipment that it did not own, but had rented from another material supplier and then re-rented to the subcontractor for use on a federal project.[177] The practice of re-renting equipment is common in the construction industry.[178] Re-rental occurs when a source rental equipment company rents equipment to a second rental equipment company, which in turn re-rents the same piece of equipment for use on a construction project.[179] Re-rentals occur for various reasons such as the need for unique pieces of equipment, the need for more equipment than first envisioned, or simply because the rental company supplying equipment to the construction project does not have certain pieces of equipment the subcontractor or general contractor require. Rather than procuring equipment from various sources, the subcontractor or general contractor task the equipment supplier with locating and supplying the equipment.[180]

175. Katzman, *supra* note 41, at 155-56.

176. United States *ex rel.* Ramona Equip. Rentals, Inc. v. Carolina Cas. Ins. Co., 2010 U.S. Dist. LEXIS 91838 at *9-12 (S.D. Cal. Sept. 3, 2010). (The author was the lead associate on this case and drafted the opposition to Defendants' motion for partial summary judgment).

177. The practice of equipment suppliers renting equipment from another supplier and then re-renting it to subcontractors involved in federal construction projects is a common practice.

178. E-Mail from Don Cruikshank, President of the American Rental Association ("ARA"), to author (Oct. 26, 2010) (on file with author). According to Don Cruikshank of A-V Equipment Rentals, Inc. in Newhall, California, "[e]very rental company that I know of, to some degree, re-rents to augment their fleet or rents to other rental companies." *Id.* Mr. Cruikshank is an active member of the American Rental Association ("ARA") of California. *Id.*

179. *Id.* "Equipment re-rental is merely a temporary addition to a company's fleet for the purpose of meeting a customer's short term requirement for material that you are either out of or don't carry." *Id.*

180. *Id.* "The primary reason to re-rent is customer retention. Conveying the message of 'call us, we can handle everything you need' is important in our sales effort. The usual reason to re-

In the case of *Ramona Equipment*, the subcontractor entered into a contract with the equipment supplier.[181] The equipment supplier, however, was required to obtain several pieces of equipment from other sources and then re-rent the equipment to the subcontractor.[182] Despite the removal of the subcontractor from the project and the lack of contractual privity between the equipment supplier and the general contractor or its surety, the district court rejected defendants' argument that the plaintiff's equipment supplier must own the equipment in order to recover under the Miller Act.[183] The equipment supplier, the District Court noted, could seek to recover the costs related to re-rented equipment based on its contract with the subcontractor.[184]

B. Project Delays

The premier case on the issue of recovering damages associated with project delays comes from the Eleventh Circuit. *United States use of Pertun Construction Co. v. Harvesters Group, Inc.*[185] dealt with a contract between a general contractor and a subcontractor and addressed the issue of whether the subcontractor could recover from the general contractor and its Miller Act surety for project delays and increase labor and material costs caused by the general contractor.[186] The Eleventh Circuit held that such increased costs were "sums justly due" and "consistent with both the language and the purpose of the Miller Act."[187]

In the Ninth Circuit case of *Mai Steel Service, Inc. v. Blake Construction Co.*,[188] a plaintiff sub-subcontractor sued to recover out-of pocket delay damages stemming from the subcontractor's tardy and defective steel shipments that resulted in cost over-runs and prevented timely completion of portions of the project.[189] At trial, the sub-subcontractor recovered against the subcontractor, but the subcontractor later filed for bankruptcy forcing the sub-subcontractor to appeal and seek recovery from the general contractor and its surety under the Miller Act.[190] The Ninth Circuit Court of Appeals ruled that "increased out-of-pocket costs

rent is due to a shortage. Most general construction yards have a wide enough variety of tools but may fall short on quantity. Specialized equipment is a secondary reason." *Id.*

181. *Ramona Equipment*, 2010 U.S. Dist. LEXIS 9138, at *2.

182. *Id.* at *2-3.

183. *Id.* at *7-13.

184. *Id.* at *11-13.

185. *See* United States ex rel. Pertun Constr. Co. v. Harvesters Grp., Inc. 918 F.2d 915 (11th Cir. 1990).

186. *Id.* at 916.

187. *Id.* at 918.

188. Mai Steel Serv., Inc. v. Blake Constr. Co., 981 F.2d 414 (9th Cir. 1996).

189. *Id.* at 416.

190. *Id.* at 415.

caused by construction delays fall within the intended coverage of the Miller Act" and that a subcontractor may recover these costs from a Miller Act surety.[191] However, lost profits caused by the delay were not recoverable from the surety.[192]

Where a material supplier – subcontractor contract precludes recovery of delay damages, however, courts will not award them.[193] In a 2006 District of Columbia case, a marble supplier contracted with a subcontractor for the supply of marble to be used in renovating the National Archives in Washington D.C.[194] The contract provided that "[Sub]contractor shall not be independently liable to Supplier for any unforeseeable delay or interference occurring beyond the [Sub]contractor's control or for delay or interference caused by Owner or other contractors or suppliers."[195] Despite plaintiff supplier's efforts to label its losses as "impact damages," the court deemed them delay damages and in light of the contractual provision in the supplier-subcontractor's agreement, neither the general contractor nor the surety were liable for the delay related damages.[196]

C. Rental Equipment Repairs & Parts

An equipment supplier's recovery of costs associated with repairs and/or parts is a complex matter. "Repair parts, appliances, and accessories which add materially to the value of the equipment and render it available for other work are not within the coverage" of a Miller Act payment bond.[197] However, equipment and parts "wholly consumed in the performance" of a project and "current repairs of an incidental and comparatively inexpensive character which do not add substantially to the value of the equipment and compensate only for ordinary wear and tear, are within the coverage of the payment bond."[198]

In the Tenth Circuit case of *Rent It Co. v. Aetna Casualty & Surety Co.*, the court held that plaintiff equipment supplier's claim for recovery

191. *Id.* at 418.

192. *Id.*

193. *See* United States *ex rel.* Tenn. Valley Marble Holding Co. v. Grunley Constr., 433 F. Supp. 2d 104, 110 (D. D.C. 2006).

194. *Id.* at 106.

195. *Id.* at 109.

196. *Id.* at 110.

197. United States *ex rel.* Rent It Co. v. Aetna Cas. & Sur. Co., 988 F.2d 88, 90 (10th Cir. 1993). It should be noted that Tenth Circuit affirmed the district court's ruling denying an award of attorneys' fees despite a contractual provision in the rental agreement due to the "absence of privity of contract between [supplier] and [surety]" in the alternative, the District Court "also ruled that awarding attorney's fees to [supplier] would be inequitable, given that [supplier] demanded over $26,000.00 and only won a judgment of $5,684.05." *Id.* at 90.

198. *Id.*

of its equipment repair expenses under the Miller Act bond "plainly cannot stand. The repairs were not for ordinary wear and tear—they were for damage caused by [subcontractor's] negligent use of the equipment."[199] The court found the repairs "were not current repairs, i.e. repairs done to allow the continued use of the equipment on the project. They were performed after the equipment was returned to the plaintiff and in order to render it available for other work."[200]

III. Recent Miller Act Case Law Regarding Attorneys' Fees

Since January 2008, there have been nearly 200 published federal cases related to Miller Act litigation. Of these, approximately twenty address the issue of recovering attorneys' fees. One of the most recent of these twenty cases (September 2010) is *United States ex rel. Ramona Equipment Rentals, Inc. v. Carolina Casualty Insurance Co.*, discussed above, in which the court denied the defendant's Motion for Partial Summary Judgment and held that a general contractor and its surety could be liable for attorneys' fees based on a contractual provision between the material supplier and subcontractor.[201] In *Ramona Equipment*, the defendants argued that the plaintiff, a small equipment supplier from San Diego County, was not entitled to recover its attorneys' fees despite a contractual provision between the supplier and the subcontractor.[202] The court agreed with the plaintiff, Ramona Equipment, that the rental agreement and its contractual provision for attorneys' fees were enforceable against the defendants.[203]

In the July 2009 case of *United States ex rel. Renegade Equipment v. Western Surety Company* from the District of Alaska,[204] the plaintiff equipment supplier brought suit under the Miller Act.[205] The District Court granted the Surety's Motion for Summary Judgment, but denied the surety's claim that as the prevailing party, it was entitled to attorneys' fees.[206] The surety argued that it was entitled to attorneys' fees based on the language of the subcontract between the equipment supplier and the general contractor.[207] While the subcontract contained an attorneys' fee

199. *Id.* The rental agreement between the supplier and subcontractor held that the subcontractor agreed to be liable for damage to the equipment resulting from negligent use.

200. *Id.*

201. United States *ex rel.* Ramona Equip. Rentals, Inc. v. Carolina Cas. Ins. Co., 2010 U.S. Dist. LEXIS 91838 at *16-17 (S.D. Cal. Sept. 3, 2010).

202. *Id.* at *13.

203. *Id.*

204. United States *ex rel.* Renegade Equip. v. W. Sur. Co., 2009 U.S. Dist. LEXIS 60458 (D. Ala. July 15, 2009).

205. *Id.* at *1.

206. *Id.* at *4.

207. *Id.* at *2.

provision, the subcontract also noted that it was "solely for the benefit of the signatories hereto and represents the entire and integrated agreement between the parties."[208] Therefore, the surety, not being a signatory to the subcontract, was unable to collect its attorneys' fees.[209]

In a September 2009 case from the Western District of New York, the District Court denied the plaintiff subcontractor's claim for attorneys' fees.[210] In *Empire Enterprises JKB v. Union City Contractors, Inc.*, the subcontract in question failed to contain an attorneys' fees provision, so the plaintiff subcontractor pursued an alternate exception to the American Rule permitting recovery of fees where the unsuccessful party "has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[211] While the District Court refused to find the unsuccessful defendant had acted in bad faith and therefore refused to award attorneys' fees, it did award prejudgment interest as sums justly due.[212] However, the court based the award of prejudgment interest not on a provision of the subcontract, but upon state law awarding prejudgment interest to compensate the subcontractor for lack of timely payment.[213]

IV. RECOMMENDATIONS

Despite numerous circuit court decisions permitting recovery of attorneys' fees where the contract between the material supplier and subcontractor contains a valid fee-shifting provision, general contractors and their sureties continue to vigorously challenge not only a party's status as a valid Miller Act claimant, but also the claimant's right to recover reasonable attorneys' fees when they are deemed the prevailing party. In so doing, general contractors and their sureties may prolong litigation and exhaust the financial resources of small, more susceptible material suppliers. Such tactics are contrary to the stated purpose of the Miller Act and are clearly outside the liberal construction applied by the courts. In these dire economic times, where material suppliers are struggling to keep their doors open, the fear of not being able to recover attorneys' fees for a valid claim may force them to either not bring their claims in the first place or simply settle prematurely.[214]

208. *Id.* at *4.

209. *Id.*

210. Empire Enters. JKB v. Union City Contractors, Inc., 660 F. Supp. 2d 492, 512 (W.D.N.Y. 2009).

211. *Id.*

212. *Id.* at 511.

213. *Id.*

214. Anderson v. AB Painting & Sandblasting, Inc., 578 F.3d 542, 545 (7th Cir. 2009) (noting that "[f]ee -shifting provisions signal Congress' intent that violations of particular laws be punished, and not just large violations that would already be checked through the incentives of the American Rule."); City of Riverside v. Rivera, 477 U.S. 561, 578 (1986) ("[t]he function of an

Congress must act to clarify the right of a material supplier to recover sums justly due, primarily attorneys' fees. One way Congress can rectify the situation is to amend the Act to clearly state that an attorneys' fees provision contained in a contract between a material supplier and a subcontractor in contractual privity with the general contractor on a federal construction project shall be entitled to its attorneys' fees, presuming the material supplier is deemed the prevailing party.[215] Clearer statutory language works to deprive the general contractor and its surety of a powerful bullying tactic.[216]

Alternatively, rather than amend the language of the Miller Act itself, Congress can include a clear statement of congressional intent to protect material suppliers and their "sums justly due." One way to do this would be to clearly enumerate what constitute "sums justly due" (i.e. attorneys' fees).

Finally, Congress should eliminate the discretion of the court and make the award of attorneys' fees mandatory. Such a policy would work to lessen spurious claims from material suppliers while eliminating the confusion or speculation about what a trial court may do if the court deems the material supplier as the prevailing party. If a general contractor or it surety believes that the material supplier's claims have merit and that the material supplier – subcontractor contract contains an attorneys' fee provision, meritless defenses fall by the wayside and/or settlement becomes more likely if a general contractor or its surety face the possibility of having to pay attorneys' fees.

Without greater clarification, however, large, established, general contractors with the resources to prolong litigation and wear down smaller material suppliers without the legal or financial resources to compete, will be driven out of business or face bankruptcy.

V. Conclusion

With federal stimulus money still being spent on federal construction projects such as highways, bridges, airports, and rail lines, among other things, and the likelihood of increased Miller Act litigation, Congress should act to amend or clarify the intent of the Miller Act in terms of

award of attorney's fees is to encourage the bringing of meritorious . . . claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel.") (quoting Kerry v. Quinn, 692 F.2d 875, 877 (2d Cir. 1982)).

215. *See* EchoStar Satellite Corp. v. NDS Grp. PLC, 390 Fed. App'x. 764, 767 (9th Cir. 2010) (noting that under federal law, a prevailing party is one that succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit and whether there was a "material alteration of the legal relationship of the parties.").

216. Barrow v. Falck, 977 F.2d 1100, 1103 (7th Cir. 1992) (stating fee-shifting "helps to discourage petty tyranny").

awarding attorneys' fees and other "sums justly due." Like other federal statutes with clear attorneys' fees provisions,[217] Congress should amend the Miller Act to include similar language thereby eliminating any ambiguity regarding the recovery of fees. With economic conditions not likely to improve in the near future and in light of the financial susceptibility of small material suppliers, Congress should do more to protect these business owners from the bullying tactics of large general contractors and their sureties.

217. *See generally* Kenny A. *ex rel.* Winn v. Perdue, 547 F.3d 1319, 1337-39 (11th Cir. 2008) (giving a partial list of Federal statutes providing for the prevailing party to recover a reasonable attorney's fee).