NATURAL RESOURCES JOURNAL

Volume 9
Issue 2 *Spring 1969*

Spring 1969

The Miller Act in New Mexico - Materialman's Right to Recover on Prime's Surety Bond in Public Works Contracts - Notice as Condition Precedent to Action

Bruce Keith

COMMENTS

THE MILLER ACT IN NEW MEXICO—MATERIALMAN'S RIGHT TO RECOVER ON PRIME'S SURETY BOND IN PUBLIC WORKS CONTRACTS—NOTICE AS CONDITION PRECEDENT TO ACTION*

It is not unusual for the sovereign, under controlled circumstances, to waive immunity from suit[1] to enable it to compete in the business community with private interests. The Miller Act[2] and the state carbon copies, including New Mexico's,[3] are a unique approach to solution of the sovereign immunity problem. In place of mechanic's and materialman's liens assertable at common law against the improved property, a right of action against a statutory surety bond is provided the suppliers of subcontractors on public works projects.[4]

The Miller Act has been liberally construed by the federal courts to accomplish its remedial purpose.[5] The purpose of the act is to insure payment of those furnishing labor or materials for public works.[6] Insured payment helps motivate faithful performance for the government. The public interest is further protected by the tendency to lower prices through assured payment of claims.[7]

The other side of the coin is that some protection must be afforded

---

* State *ex rel.* State Elec. Supply Co. v. McBride, 79 N.M. 467, 444 P.2d 978 (1968).

1. *See, e.g.,* Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1482, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80 (1964).

2. 40 U.S.C. §§ 270a-e (1964), *as amended,* (Supp. III, 1965-67).

3. N.M. Stat. Ann. §§ 6-6-11 to -17 (1953). The provision with which this Comment deals, § 6-6-12(a), is, for all practical purposes, identical with § 270b(a) of the Miller Act. *See* note 4, *infra.*

4. N.M. Stat. Ann. § 6-6-12 (1953). Subsection (a) of this Section is divided in two parts: the first deals with subcontractors in privity of contract with the prime, and the second with ". . . any person having direct contractual relationship with a subcontractor, but no contractual relationship, express or implied, with the contractor furnishing such payment bond. . . ." This comment deals only with the second situation, in which the supplier of materials is in privity of contract with the sub, but not with the prime.

5. Clifford F. MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 322 U.S. 102 (1944); McWaters & Bartlett v. United States *ex rel.* Wilson, 272 F.2d 291 (10th Cir. 1959); United States *ex rel.* West v. Peter Kiewit & Sons Co., 235 F. Supp. 500 (D. Alaska 1964).

6. Continental Cas. Co. v. United States *ex rel.* Robertson Lumber Co., 305 F.2d 794 (8th Cir. 1962), *cert. denied,* 371 U.S. 922 (1962); United States *ex rel.* Gutman v. P. J. Carlin Constr. Co., 254 F. Supp. 1001 (E.D.N.Y. 1965).

7. Silver v. Fidelity & Deposit Co., 40 N.M. 33, 53 P.2d 459 (1935), construing N.M. Comp. Stat. § 17-204 (1929), the language of which is quite similar to the present § 6-6-12(a), which replaced § 17-204.

the surety. This is done through the notice provision which requires:

> . . . written notice to said contractor within ninety (90) days from the date on which such person . . . furnished or supplied the last of the material *for which such claim is made,* stating with substantial accuracy the amount claimed, and the name of the party to whom the material was furnished or supplied . . . (emphasis supplied).[8]

It is usually held that notice to the prime is a condition precedent to enforcement of a claim on the surety bond.[9] The supplier, however, is given the benefit of liberal construction in his favor, provided he substantially complies with notice requirements to protect the surety before bringing action.[10] Weighing the surety's interests against the claim of the supplier of the subcontractor is the backdrop for this discussion of the New Mexico law. *State ex rel. State Electric Supply Company v. McBride*[11] involved the effect of the notice provision in New Mexico's "Little Miller Act" on the right of a supplier not in privity of contract with the prime contractor to recover under the Act on the prime contractor's mandatory surety bond on a public works contract.

The prime contractor, McBride Construction Company, undertook to build an annex to the Farmington, New Mexico, high school science building for the School Board. After furnishing the statutory bond, McBride contracted with Fulkerson Electric Company for the required electrical work and materials. State Electric Supply Company ("Electric") agreed to supply materials to Fulkerson for the job. The plans and specifications for the project included a fire alarm system to be wired in with the existing system in the old science building. No voltage was given for either system on the plans and specifications given Electric. Electric ordered, among other things, a 24-volt horn for the alarm system, and Fulkerson installed the system in the annex sometime in November 1964. Because the old system was inoperative, the new one could not be tested. According to the trial court, Electric furnished the last of

8. N.M. Stat. Ann. § 6-6-12(a) (1953). The quoted language corresponds exactly to the language of the Miller Act.

9. Fleisher Eng'r & Constr. Co. v. United States *ex rel.* Hallenbeck, 311 U.S. 15 (1940); United States *ex rel.* Old Dominion Iron & Steel Corp. v. Massachusetts Bonding & Ins. Co., 272 F.2d 73 (3d Cir. 1959); United States *ex rel.* Hargis v. Maryland Cas. Co., 64 F. Supp. 522 (S.D. Cal. 1946).

10. Clifford F. MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 322 U.S. 102 (1944); Fleisher Eng'r & Constr. Co. v. United States *ex rel.* Hallenbeck, 311 U.S. 15 (1940); Continental Cas. Co. v. United States *ex rel.* Robertson Lumber Co., 305 F.2d 794 (8th Cir. 1962), *cert. denied,* 371 U.S. 922 (1962).

11. 79 N.M. 467, 444 P.2d 978 (1968).

the electrical materials on December 7, 1964. In mid-December, an employee of the alarm system manufacturer inspected the system and determined that the 24-volt horn would not operate, since the old system worked on 12 volts. The employee notified Fulkerson and advised he would order a 12-volt horn for the system. Neither Fulkerson nor Electric notified McBride of the inoperative alarm system. While the horn was on order, acceptance of the project and final settlement took place on December 29, 1964.

On February 25, 1965, Fulkerson obtained the 12-volt horn and installed it in the annex in April 1965. On March 26, 1965, Electric mailed a notice of claim to McBride for a $7,759.89 balance due for materials. Though the 12-volt horn was furnished on *February 25,* the notice stated that it was for items furnished between June 30, 1964, and *February 22,* 1965. Electric attached invoices for the other materials delivered, but no invoice for the 12-volt horn was included.[12] The trial court, sitting without a jury, concluded that because no claim was made for the 12-volt horn, then the last item "for which claim was made" was delivered more than 90 days from the date on which the notice of claim was mailed. Since the statutory notice period had elapsed, Electric's claim failed. On appeal to the Supreme Court of New Mexico, *held,* affirmed. Because the 12-volt horn was not an item "for which claim was made," the notice was not timely, and the condition precedent to suit was not met.

Thus the holding of the supreme court is based on a quite narrow, perhaps technical ground. Assuming for a moment that the omission of the 12-volt horn from the items for which claim was made is the basis for decision, how does the holding compare with other cases on the same point? In *United States ex rel. General Electric Company v. Gunnar I. Johnson & Son, Inc.,*[13] which the court in *McBride* carefully distinguished on its facts,[14] the federal trial court, acting under the Miller Act, found that "the reshipment . . . is a furnishing of material *for which no claim is made* and cannot properly be included in use-plaintiff's claim."[15] (emphasis supplied). The ap-

12. 444 P.2d at 980. The notice included a claim for the 24-volt horn supplied in November. The 24-volt horn and the 12-volt horn were the same price. 444 P.2d at 981.

13. 310 F.2d 899 (8th Cir. 1962).

14. In *Johnson,* the subcontractor's supplier contracted to deliver an electrical equipment distribution system, including two bus duct elbows, which were an essential part of the system. The elbows were defective when delivered, and were returned to the factory. More than 90 days later, they were reshipped and installed on a "no charge" basis. The notice of claim was mailed within 90 days of the reshipment. 310 F.2d at 901.

15. 310 F.2d at 902. The first delivery of the elbows was charged in the normal manner. The second delivery, on which plaintiff relied as the "last item for which claim is made" was made on a "no charge" basis. Thus the trial court in *Johnson* interpreted the notice provision strictly as did the New Mexico court in *McBride.*

pellate court, however, summarily reversed this decision saying:

> It is obvious that . . . [the material reshipped] is a part of the material "for which claim is made." Regardless of how these items were handled from a bookkeeping standpoint, or invoiced or billed, it is apparent that, until such time as they were "furnished" in such condition as to meet the engineering requirements and be ready and fit for installation as a part of the system, no enforceable claim did or could arise. . . . An enforceable claim therefor arose for the first time when they were "furnished" in usable condition, subsequent to their necessary alteration, and *regardless of the fact that such reshipment was on a "no charge" basis.*[16] (emphasis supplied).

The *Johnson* court, then, by implication relates the notice requirement to commercial reasonableness. If the contract calls for installation of a commercial unit which has not been completed, then a claim will not arise. This is probably in accord with the thinking of the business community, and appears an excellent standard by which to measure sufficiency of notice. In *Johnson,* of course, there was to be no charge for the item, and it would be wholly unreasonable to require that the last item "furnished" must be one which is charged for. This would introduce an artificial standard into the notice provision which would defeat the purpose of the act, violate the rule of liberal construction and create an unnecessary trap for the unwary.[17]

There are a number of questions raised by the court in *McBride.*[18] In distinguishing *Johnson,* the court apparently relied on purely factual differences without further examining the effect these differences should have on the result. The court mentions the fact that in *Johnson* there was a "redelivery." But in *McBride,* the 12-volt horn

16. 310 F.2d at 903. The appellate court here essentially ignored the contention on which the New Mexico court in *McBride* based its decision. Instead they discussed the question of when the elbows were "furnished," and decided that they were furnished only when delivered in proper condition ready for installation in the system. Since no enforceable claim arose until the items were properly furnished, the 90-day notice period did not begin to run until that time. It is not clear why the "enforceable claim" argument is required here. If the items were not furnished until they were furnished properly, the 90 days begin to run at that time. When a cause of action arose appears immaterial. In most cases of sales of goods, especially when a construction project is involved, as here, a cause of action will normally arise long before the item is furnished.

17. If, for example, the sub in *Johnson* had paid cash for the elbows, under the reasoning of the New Mexico court there would have been no recovery.

18. These questions are discussed at some length in the text. The factual differences found by the New Mexico court between *McBride* and *Johnson* provide a convenient starting point for consideration of various aspects of Miller Act liability.

was "altogether new and different."[19] If, perhaps, Electric had removed the 24-volt horn and modified it, the court would have been satisfied. What effect this should have on the result is entirely unclear, since either course would seem a reasonable one, and recovery need not be based on whether the item is repaired, modified or replaced entirely.

The *McBride* court states that, in *Johnson,* the supplier was "responsible and at fault for the defective items when first delivered. Such is not the case here."[20] This is a rather striking argument on first impression. Because the *Johnson* plaintiff was at fault, he can recover. Since Electric was not at fault, it cannot recover. The fact that Electric was at fault and "should have included an invoice for the 12-volt horn"[21] with the letter of notice seems to have no effect in helping Electric establish its blameworthiness.[22] What the court seems to be getting at is rather that Electric's contract was performed completely by early December, and that the additional supplying of the 12-volt horn was not required because a horn of unspecified voltage was ordered and delivered. Here the question seems to be whether the horn was supplied "under the contract" or not. This is a reasonable test, but, as in *Johnson,* this sort of test may be a mask for other considerations, such as good faith and commercial reasonableness.

Looking at the "under the contract" approach, however, we note that the Uniform Commercial Code,[23] specifically Article 2 dealing with contracts for the sale of goods, was referred to by neither party. Under § 50A-2-315, Implied Warranty of Fitness for a Particular Purpose, the *McBride* situation is described perfectly by the Code language:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods there is . . . an implied warranty that the goods shall be fit for such purpose.

Plans and specifications were furnished Electric by Fulkerson, which

19. 444 P.2d at 983.
20. *Id.*
21. *Id.* at 982.
22. Although the concept of fault is not foreign to contractual liability, the more pertinent concern here would be whether the goods delivered conformed to the contract or not.
23. N.M. Stat. Ann. §§ 50A-1-101 to -9-507 (Repl. 1961), *as amended,* (Supp. 1967).

indicated that the fire alarm system was to be supplied for the particular purpose of extending the old fire alarm system into the new construction. The fact that the purpose was clear, but the details not specified, strongly indicates that Fulkerson was relying on the skill or judgment of the seller (Electric) to select and furnish goods suitable for the specific purpose of extending the old system.[24]

Looking at Electric's obligation to furnish suitable goods, then, it appears that the 24-volt horn supplied was non-conforming. Granting, as the court does,[25] that the 24-volt horn was accepted by Fulkerson, we again look to the Code:[26]

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it
>
> . . .
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced . . . by the difficulty of discovery before acceptance. . . .
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it. . . . It is not effective until the buyer notifies the seller of it.
>
> (3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

Thus, Electric may have been obligated to supply a 12-volt horn or answer in damages. The defect was certainly difficult to discover considering that the old alarm system was inoperative at the time the 24-volt horn was installed, and neither system could be tested. It seems apparent that Fulkerson had the right either to retain the horn supplied and sue for damages or to revoke its acceptance. The court might want to consider further whether he actually did revoke, under the circumstances.

Fulkerson here seems to have agreed to substitute a 12-volt horn.

---

24. *See* Uniform Commercial Code § 2-315, Comments 1, 2 (1962 version), for an explanation of the intended purpose of the warranty of fitness for a particular purpose. Comment 1 is of particular interest:

> Under this section the buyer need not bring home to the seller actual knowledge . . . of his reliance on the seller's skill and judgment, if the circumstances are such that the seller has reason to realize the purpose intended or that the reliance exists.

25. 444 P.2d at 983.

26. N.M. Stat. Ann. § 50A-2-608 (Repl. 1961); *see also* Grandi v. LeSage, 74 N.M. 799, 399 P.2d 285 (1965).

This should operate as an effectively communicated revocation. Otherwise, the supplier could discharge his obligation to supply conforming goods merely by promising to do so. Whether this argument would succeed is not clearly indicated by the facts found, but it is clear that the court gave weight to the consideration of whether there was a legal obligation by Electric to supply the 12-volt horn. The Code seems in point, and it is surprising that it was not mentioned.

One other basis on which the court distinguished *Johnson* is of interest. In the *Johnson* case, contrary to *McBride,* the item resupplied was redelivered before completion and final settlement of the project.[27] It would seem, if this distinction is to have force, that the last items supplied could be supplied only before final inspection of the project. This would do violence to the statutory language. Final settlement is mentioned as an operative consideration under the limitation of actions provision,[28] but its effect one way or another as a measuring point for notice is not evident in the cases.

Difficulties were experienced under the federal act in trying to administer a limitation of actions provision with final settlement as a measure.[29] The Comptroller General recommended that the final settlement provision be changed. The limitation period, he said, should run from "the day on which the last of the labor was performed or material supplied," because claimants under the bond were already required to establish identical dates in connection with accrual of their right to sue. Under the suggested change, "the supplier would know simply by consulting his records the precise time when the 1-year limitation began to run and (by adding 1 year) when his right to sue would expire."[30] The Miller Act was accordingly amended to incorporate the changes.[31]

Convenience provides a compelling reason for administration in this manner. All the supplier must do is check his books to find when the last item was supplied and he knows when his right to sue expires. It is interesting to observe that the Comptroller General seemed under the impression that the lack of the "for which claim is made" language in the amendment made no difference in computing the time for (1) the 90-day notice period, and (2) the period during which

27. 444 P.2d at 983.

28. 40 U.S.C. § 270b (1964), *as amended,* (Supp. III, 1965-67); N.M. Stat. Ann. § 6-6-12(c) (1953).

29. House Comm. on the Judiciary, Government Building Contracts, H. R. Rep. No. 351, 86th Cong., 1st Sess., U.S. Code Cong. & Ad. News 1995 (1959).

30. *Id.* at 1999.

31. 40 U.S.C. § 270b (Supp. III, 1965-67).

suit must be brought.[32] The thought provides an interesting footnote to the New Mexico court's decision in *McBride*.

Triangle Erectors, Inc. v. James King & Son, Inc.,[33] a New York case which involved no government contract, dealt with much the same sort of situation as *McBride*. The supplier instituted action to foreclose a mechanic's lien under New York law. The prime's payment bond provided that, as a condition precedent to action on the bond,[34]

> . . . claimant shall have given written notice . . . within ninety (90) days after such claimant . . . furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed. . . .

A comparison of this language with the language of the New Mexico act[35] yields the conclusion that these are parallel situations. In addition this situation entailed foreclosure of a common-law lien and payment on the prime's bond. The New York court reiterated the liberal construction rule[36] in this case. If liberal construction applied here, even more compelling reasons appear in the case of government contracts to allow the supplier recovery. The provisions of the "Little Miller Act", in replacing the protection afforded by mechanic's and materialman's liens, may be seen as a promise on the part of government to see suppliers paid. Faithful performance of

32. Government Building Contracts, cited *supra* note 29, at 1999. Note the omission of "for which claim is made" language in the amendment the Comptroller General recommended to the Committee:

> Our recommendation . . . is that the language . . . "but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract," should be amended to read "but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him."
>
> "Amendment of the Miller Act in this fashion would eliminate all responsibility of the Government or (sic) fixing the date at which the period of limitation commences to run. At the same time, no difficulties would be placed in the way of claimants under the payment bonds, since they already are required to establish identical dates in connection with accrual of their rights to sue. . . . Under the proposed amendment, such suppliers will not have lost most or all of the protection intended by the Miller Act but will receive full protection for 1 year after furnishing labor or material."

33. 41 Misc. 2d 12, 244 N.Y.S.2d 433 (Sup. Ct. 1963).

34. *Id.* at 435.

35. N.M. Stat. Ann. § 6-6-12(a) (1953) . . . upon giving written notice . . . within ninety (90) days from the date on which such person . . . furnished . . . the last of the material for which such claim is made, stating with substantial accuracy the amount claimed. . . .

36. 244 N.Y.S.2d at 439. It is interesting to note that all the cases cited for the rule of liberal construction by the New York court are Miller Act cases.

public works contracts can be encouraged only by consistent recovery within reasonable bounds. If there should be a different rule of construction on a non-statutory bond as compared to a statutory one, it would seem that the rule of construction for statutory recovery should be the more liberal of the two.

In the New York case, the supplier furnished ventilators under his contract with the sub, and delivered them on or before December 21, 1960. Thereafter, on request of the sub, the supplier furnished one carton of felt pads to be used with the ventilators. The carton was delivered January 19, 1961. The billing to the sub was marked "no charge, included in price of units or prior billing."[37] The supplier's lien was filed April 20, 1961, but notice was sent prior to that date. The notice stated that the last materials were furnished to the job on December 21, 1960. Under these facts, the court concluded that "the last delivery of materials made by . . . [the supplier] to the job was on January 19, 1961."[38] The court also found that "such material was necessary for the completion of the contract."[39] Interestingly, the court remarked that "there is no evidence to support a conclusion that such delivery of material by [supplier] was merely intended to extend the time within which [he] could give notice of [his] claim."[40]

The court's final point was:[41]

> Where additional materials are delivered to the job and shown to be a necessary portion of the service or materials contracted for, the Courts have permitted the *90 days period to be computed from the date of the last delivery of merchandise or performance of service.* (emphasis supplied)

The New York court, then, set the standard slightly differently from the *Johnson* court. Instead of concern with whether the item is one "for which claim is made," they used good faith and the necessity of the item for completion of the contract, *whether the item is one for which claim is made or not.* In this case, no claim was made for the felt pads. Perhaps the New York court approaches a meaningful test in these cases.

The New Mexico test under *McBride* is apparently a mechanical one, subject to all the drawbacks of mechanical decision-making. The test in *Johnson* is less mechanical, and would seem to allow more lee-

37. *Id.* at 437.
38. *Id.*
39. *Id.* at 437-38.
40. *Id.* at 436.
41. *Id.* at 439. Here again the court bases its holding on Miller Act cases.

way for considerations of good faith, necessity, and commercial reasonableness. The New York court, however, has opened the door for the commercial reasonableness argument while foreclosing recovery for those acting unreasonably and in bad faith. These ideas arguably run through the decisions on this point without being explicitly stated.

Thus, for instance, in *Johnson,* the court was faced with a line of decisions holding that correction of "minor defects" would not be considered "the last item furnished" for purposes of extending the time for notice.[42] The court distinguished these cases based on the fact that the items supplied, although not expensive, were an integral part of a "system" which was not complete until operative. Inasmuch as the "system" argument can be made, with more or less accuracy, for a substantial majority of items of supply, the argument at first blush appears to be nothing more than a mask for the commercially reasonable result.

What is the expectation of the business community? Is the question "when did a cause of action arise" really the the issue here? Shouldn't the reasonable notion of the average supplier that he won't be paid until he supplies an operating commercial unit be taken into account? Fit this into the *Johnson* context. It is highly doubtful that the supplier would expect to be paid until the defect was corrected, the item redelivered, and the unit tested to make sure it operated. Thus no claim would be forthcoming until after the defective item was delivered in usable condition. To cut off the supplier's right to recover based on failure to give notice before he reasonably believed he had a right to recover would seem highly unfair, and this notion may have been behind the court's reasoning. The court may be saying, in other words, not that any system must be completed before a cause of action arises, but that the supplier's conduct must be commercially reasonable under the terms of the contract.

To take this a bit further, in *United States ex rel. Westinghouse Elec. Supply Co. v. Endebrock-White Co.*,[43] a Miller Act case, the court held that $2.11 bushings furnished 2½ months after all other items under the contract were furnished, extended the time for no-

42. 310 F.2d at 903. The *Johnson* court summarily dismissed the "minor defects" argument this way:

> Factually and in principle this case is readily distinguishable from those involving the performance of labor and supplying of minor items of materials for the purpose of correcting defects, or making repairs following inspection of the project, and not performed or supplied as a part of the original contract. (citing cases)

43. 275 F.2d 57 (4th Cir. 1960).

tice. The supplier in good faith believed the items supplied to be "under the contract," though they were, in fact, used on another project. These were undoubtedly minor items, but the court made no mention of the fact. At the time the items were supplied, however, the supplier could have given timely notice, and again, there was no evidence that the items were supplied in an effort to extend time. This, although the idea was not completely expressed by the court, was clearly a good faith and commercially reaonable delivery.[44]

From the decisions discussed thus far, it must be apparent that the courts have leaned toward the good faith supplier, even though the notice requirement was designed for the protection of the prime and surety. The New Mexico court in *McBride* has, with its preference for strict construction, in effect made a policy decision in favor of surety companies. The surety company is to be protected at least to the extent that it may be relieved from liability for the subcontractor's defaults if notice is not given in a particular way. Whether the decision is a good one must be seen in the light of the policies behind the legislation involved.

The central consideration behind the act is to provide some sort of protection for suppliers and subcontractors roughly equivalent to the common-law mechanic's lien which may be asserted against an individual. The performance of public construction work is a multi-billion dollar business. It is certainly worthwhile to provide the suppliers and subcontractors some method of ensuring payment for their services. This will encourage faithful performance of their obligations. Without this encouragement, government might have to go begging for its contract work. It is easy to see why. The low bidder on a government contract may be a stranger to local businessmen. The local businessman might be reluctant to deal without some assurance of payment. Or the contractor may be someone with whom the local business community may not want to deal because of past experience. The statutory remedy encourages dealing even with someone of doubtful reputation because of practically assured payment.

It seems in the public interest, then, that the supplier be allowed

44. *But compare* United States *ex rel.* J. A. Edwards & Co. v. Peter Reiss Constr. Co., 174 F. Supp. 264 (E.D.N.Y. 1959), in which an attempt to *revive* the notice period under the Miller Act after the 90 days had passed was held ineffective. The court spoke, not of the commercial reasonableness or good faith of the supplier, but of protection for the prime, who had made substantial payments to the sub, and was apparently relying on the lack of notice. Even though the court failed to express negative feelings about the supplier's actions, no doubt they were present and operative. Had the furnishing been in good faith, commercially reasonable and necessary under the contract, it is quite possible a different result would have been reached.

to recover for items supplied on government projects, particularly since the cost falls on the taxpayer whether the supplier recovers or not. If he is allowed to recover, the surety company increases prices for government construction, paid for out of tax revenues. If the supplier is not allowed to recover, the cost is paid in shoddy materials and workmanship at increased cost because of the increased risk. The cost again comes out of the taxpayer's pocket because of rapid deterioration of construction and necessity for replacement. If the public is to pay in either event, it would seem reasonable that the thumb of the court should come down on the side of ensuring payment of the suppliers within the limits of commercial reasonableness and good faith, if for no other reason than to assure at least a minimum quality of public construction and safety.

It may be that the most equitable and economical method of assuring payment to those doing work on a public project is to provide a direct action against the government, instead of the round-about relief given by the Miller Act. Although there are no known studies on this subject, investigation might show that the cost of the statutory surety bonds (which cost is naturally passed back to the government) exceeds recovery on the bonds.[45] This would mean that the government is supporting surety companies. This is not to imply that government support for business is undesirable. If, however, government is supporting sureties, the decision to do so should be a conscious and informed one.

The notice provision gives some protection to the surety. But the protection is phrased in terms of a limitation on subcontractors and suppliers, and the surety may not reasonably expect that his obligations on the bond will end within 90 days following completion and final acceptance of the project. The subs and suppliers expect that they will have 90 days from the time they supplied the last item under the contract to give notice of their claim. The statute is thus clearly in line with the expectation of the suppliers and subcontractors. It is extremely difficult with the statute in its present form to see how the surety may safely consider himself free until perhaps six months after final completion of the contract. At that point there is probably only a negligible chance of the supplier's receiving or extending the notice period. From the statutory language, however, this seems to be exactly what the provision means. The surety may not escape liability even if he has been prejudiced by a claim more

45. A. Stickells, *Bonds of Contractors on Federal Public Warks: The Miller Act,* 36 Boston U.L. Rev. 499, 506 (1956). This article provides an excellent and comprehensive discussion of the Miller Act background, legislative history and interpretation by the courts.

than 90 days after the project was completed. Even if the surety has released the prime from a security arrangement after the 90 days has passed, he does not seem to be released.

Surely if the legislature has gone this far in protecting the interests of the supplier, strict construction of the notice provision is not indicated. The federal courts have almost uniformly stated that the notice required is notice of the existence of a claim.[46] Because of the remedial purpose of the act, notice has been held sufficient in circumstances in which the prime and surety were notified of the claim in an extremely informal manner.[47]

In developing a working approach to the problem of notice, let us dispense first with the relatively easy case. If an item is supplied after the 90-day period has elapsed, the court should look very closely at the transaction. The natural suspicion here is that the supplying was not in good faith, but was made for the purpose of reviving notice. *Johnson* appears to be the sole case allowing *revival* of the notice period after the expiration of 90 days. The circumstances of the case, however, seem to indicate that the furnishing was in good faith and was clearly the obligation of the supplier under the contract.

The problem cases occur when the last item is furnished during the 90 days from the supplying of the item before, and the furnishing is used to extend the notice period beyond that 90 days. Here perhaps some weight should be given to when the item was ordered. Arrangements made before final acceptance (as in *McBride*), while the project is still "alive" should be considered furnishing "under the contract" unless the contrary clearly appears. The effect of final

46. McWaters & Bartlett v. United States *ex rel.* Wilson, 272 F.2d 291 (10th Cir. 1959). Explaining the notice requirement under the Miller Act, the court stated:

> All the cases hold that the Miller Act, being remedial, must be liberally construed to effectuate the purposes of the Act (citing cases). Written notice there must be. But while the Act requires written notice, it does not require notice in any particular form. In all the cases cited . . . the written notice found sufficient, was more or less informal. 272 F.2d at 294.

The Court goes on to review some of the cases in which highly informal notice was held sufficient under the Miller Act notice provision. Of particular interest is Houston Fire & Cas. Ins. Co. v. United States *ex rel.* Trane Co., 217 F.2d 727 (5th Cir. 1954), in which the court states the rule this way:

> . . . if the proof shows convincingly that *knowledge is brought home to the principal contractor,* . . . every essential requirement of the statute was met and fully complied with. . . . [I]t is sufficient that there exists a writing from which, in connection with oral testimony, it plainly appears that the *nature and state of the indebtedness was brought home to the general contractor.* When this appears the object of the statute, to assure that the contractor will have notice, is attained and the statute is sufficiently complied with. 217 F.2d at 729-30. (emphasis supplied).

47. *Id.*

settlement of a project, however, should be viewed in light of the actual or reasonable knowledge of the supplier. On the one hand, the supplier should have no duty to discover the final settlement date if he is 2,000 miles from the project. On the other, he may not be permitted to plead blindness for work going on under his very nose.

The very fact that the item was supplied within the 90-day period should be considered in light of the idea that, at the time the item was supplied, the supplier could have sent timely notice and was therefore probably not attempting to extend time. If the furnishing, however, is a questionable one, perhaps prejudicial action by the surety in reliance on the lack of notification after 90 days following, let us say, final acceptance, should be thrown into the balance.

This suggestion is not unreasonable, since New Mexico has not adopted the amendment to the federal Miller Act.[48] New Mexico still requires that suit be brought within one year from the date of final settlement as determined by the obligee.[49] If the supplier is required to go to the trouble and expense of determining the final settlement date, then perhaps the date might be considered without undue additional hardship on the supplier in the case of a questionable delivery less than 90 days after final settlement.

Apparently the difficulties in determining final settlement dates have not been so onerous in New Mexico that they required amendment to the Act. The federal amendment, however, not only simplifies the situation greatly for the supplier, it also removes a possible source of administrative problems from the state agency without creating additional problems for the courts. The courts are already required to determine when the last items were supplied under the notice provision.

What then is the practical effect of the decision in *McBride?* In New Mexico, the supplier is not safe in relying on his records to indicate the 90-day notice period. It is not all clear that New Mexico has adopted the flexible and liberal rule of construction of the notice provision evident in federal court decisions, and in other state courts.[50] Those cases generally hold that notice of the existence of the claim is sufficient. No listing of items is normally required (nor indeed is it required by the language of the statute), nor is a date required on which the last item was delivered "for which claim is

48. 40 U.S.C. § 270b (Supp. III, 1965-67).

49. N.M. Stat. Ann. § 6-6-12(c) (1953).

50. *See, e.g.,* cases cited at n. 5 & 6, *supra;* California Elec. Supply Co. v. United Pac. Life Ins. Co., 227 Cal. App. 2d 138, 38 Cal. Rptr. 479 (D.C. App. 1964), a case under the California version of the Miller Act.

made."[51] New Mexico seems to have adopted in *McBride* a test something like the duty to rescue in tort law. There is, generally, no duty to rescue. There is no duty to list the specific items claimed under the Miller Act language. But if the duty is undertaken, either to rescue, or to list the items claimed, then liability arises for negligent failure to complete the job properly.

In order to ensure legal notice under New Mexico's version of the Miller Act, the safest approach is strict compliance with the letter of the statute. Until the liberal construction rule is affirmaively adopted, the best protection seems to be to give notice within 90 days of the day the *first* item is supplied. This way there can be no question about the timeliness of notice. Notice should be given every 90 days thereafter, including every item supplied, whether charged or not. The supplier may omit an item from his notice letter at his peril.

BRUCE KEITH

51. The statute requires only that the supplier shall have a ". . . right of action upon said payment bond upon giving written notice . . ., stating with substantial accuracy the amount claimed, and the name of the party to whom the material was furnished or supplied. . . ." N.M. Stat. Ann. § 6-6-12(a) (1953).