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The National Surety Corporation was surety for a prime contractor which had contracted to build certain works in the Bahama Islands for the United States Government. The contractor had obtained equipment from the appellant on a rental basis with a further stipulation in the rental contract that the contractor would assume all responsibility for loss of the equipment. The equipment was sent by ship to the construction site and while in route was lost at sea without fault of either party and without salvage. The appellants brought suit against the surety under the Miller Act[1] to collect the value of the equipment. The trial court dismissed the complaint on the grounds that the loss was not material furnished in the prosecution of the work, as required by the Miller Act and the bond filed in conformity therewith. *Held:* Judgment reversed.[2]

The court, being unable to cite a case extending the Miller Act to cover such a loss, relied on the highly remedial nature of the act[3] for reason to support their holding and cited the case of *Illinois Surety Co. v. John Davis Co.*[4] In that case the Supreme Court stated:

> . . . Decisions of this court have made it clear that the statute and bonds given under it must be construed liberally, in order to effectuate the purpose of Congress declared in the act. . . . where labor and material were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed . . . .[5]

It should be noted that the *Illinois Surety Co.* case was decided under the Heard Act[6] which was later repealed and replaced by the Miller Act.

The Heard Act required one bond, of good and sufficient surety, with provisions for both payment and performance included in

[1] 40 U.S.C. § 270a (1935).

[2] United States v. National Surety Co., 268 F.2d 610 (5th Cir. 1959).

[3] Glassell-Taylor Co. v. Magnolia Petroleum Co., 153 F.2d 527 (5th Cir. 1946); Coffee v. United States, 157 F.2d 968 (5th Cir. 1946).

[4] 244 U.S. 367 (1916).

[5] *Id.* at 380.

[6] 28 Stat. 278 (1894), as amended, 33 Stat. 811 (1905), as amended, 36 Stat. 1167 (1911).

the one bond. Suppliers of labor and material *used* in the construction were protected under the payment provisions.[7] However, amendments to the act were designed to give priority to Government claims over those of the laborers and materialmen.[8]

The courts interpreted "labor and material used in the prosecution of the work" in the Heard Act to mean "materials necessary to and wholly consumed in the prosecution of the work."[9] The supplier of such materials was required to prove the consumption of the materials to gain relief under the Heard Act.[10]

Under the Miller Act, separate bonds for performance and payment are required;[11] the latter is required to cover, at most, fifty per cent of the total contract price.[12] The main purpose for adoption of the Miller Act was to benefit those furnishing labor and material in the prosecution of the work by giving them a shorter waiting period before claims could be filed against the surety.[13]

With the word "used" omitted from the Miller Act, the test of coverage by the act was broadened from actual consumption[14] to expected consumption[15] of the materials in the construction to be done under the contract. Surely the total cost of lost rental equipment is in no way consumed or reasonably expected to be consumed in the construction dealt with in this case.

It is submitted that the interpretation given to the Miller Act by the present case, in effect, makes the surety on a bond required

[7] *Id.*

[8] H.R. REP. NO. 2360, 58th Cong., 2nd Sess. (1905). See also S. REP. NO. 3918, 58th Cong., 3rd Sess. (1905).

[9] Brogan v. National Surety Co., 246 U.S. 257, 262 (1918). See also *supra* note 4.

[10] *Id.*

[11] 40 U.S.C. § 270a (a) (1), (2) (1935).

[12] 40 U.S.C. § 270a (a) (2) (1935). See *supra* note 8 for a review of the limits as discussed by the House Judiciary Committee prior to adoption of the act.

[13] H.R. REP. NO. 1263, 74th Cong., 1st Sess. 1-2 (1935); S. REP. NO. 1238, 74th Cong., 1st Sess. 1 (1935).

[14] Brogan v. National Surety Co., 246 U.S. 257 (1918); Illinois Surety Co. v. John Davis Co., 244 U.S. 376 (1916).

[15] Massachusetts Bonding & Ins. Co. v. United States, 88 F.2d 388 (5th Cir. 1937); Gassell-Taylor Co. v. Magnolia Petroleum Co., 153 F.2d 527 (5th Cir. 1946); J.P. Byrne & Co. v. Fire Association, 260 F.2d 541 (2nd Cir. 1958).

by the Miller Act a general insurer against loss of equipment used, but not owned, by the contractor. This in turn broadens the scope of liability of the limited surety and reduces the chances of those supplying labor and material used or expected to be used in the construction from collecting their full claims. The penalty required under the bonds required by the Miller Act could be increased to cover these additional claims.[16] However this would in turn raise the premiums payable by the contractor to the surety, a factor anticipated and included in the bid of the contractor and ultimately paid by the government as part of the costs of construction.[17] Either result seems contrary to the purpose of the Miller Act and the intent of Congress in adopting it.

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[16] This could be accomplished by 40 U.S.C. § 270a (c) (1935). However, it seems if this were to solve the problem, Congress would not have included the schedule of amounts in sub-section (a) (2) or would have used the phrase "good and sufficient surety" as was done in the Heard Act.

[17] H.R. REP. NO. 2360, 58th Cong., 2nd Sess. 2 (1905).