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# The Surety's Exposure for Wages and Related Liabilities

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**TWENTY SIXTH ANNUAL  
NORTHEAST SURETY AND FIDELITY  
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**THE SURETY'S EXPOSURE FOR WAGES AND  
RELATED LIABILITIES**

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# **THE SURETY'S EXPOSURE FOR WAGES AND RELATED LIABILITIES**

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## **I. INTRODUCTION**

A surety faces potential exposure to a multitude of liabilities under payment and performance bonds issued for state and federally funded bonded projects as well as from the express obligations imposed by private common law performance and payment bonds. This paper, however, focuses only on a surety's potential exposure for wage and related liabilities.

Under federal law, a surety faces possible liability under a Miller Act Payment Bond to laborers for the bonded principal's failure to pay wages. Union trusts may also recover against a surety under a Miller Act Payment Bond for the bonded principal's failure to remit union dues and benefit fund contributions. Still further, liability may arise under a Miller Act Performance Bond to the federal government for the bonded principal's failure to remit withholding taxes on employee wages.

A surety is also exposed to wage liability under the Davis-Bacon Act for the bonded principal's failure to pay the prevailing wage rate to laborers on a bonded project. Importantly, however, unlike a direct action against a surety under a Miller Act Payment Bond, an action against a surety predicated on a Davis-Bacon Act violation requires exhaustion of administrative remedies delineated in the Davis-Bacon Act prior to a laborer seeking judicial relief.

Under state law, a surety faces similar wage liability to that described above under the Little Miller Acts or prevailing wage laws of the particular state in which the bonded project is located. Moreover, under state law, a surety faces wage and related liabilities under the express terms of various common law bond forms - most often the 1984 and 2010 AIA 312 Payment Bond and Performance Bond. Notably, in certain states, courts have determined that the terms of a common law payment bond also impose liability on a surety for the principal's unpaid withholding taxes. Thus, the wage and related liabilities imposed on a surety under state law are akin to those imposed by federal law.

Ultimately, the goal of this paper is to give the surety a basic understanding of the basis for wage and related liabilities under federal, state and common law. A comprehensive analysis of all relevant federal and state statutes, bond forms and the ever evolving related federal and state case law, however, is beyond the scope of this paper.

## **II. WAGE AND RELATED LIABILITY UNDER THE MILLER ACT**

### **A. The Miller Act**

The Miller Act requires a prime contractor on a federal construction project to post both a performance bond and a payment bond on any contract awarded by the federal government exceeding \$100,000 "for the construction, alteration, or repair of any public building or public

work[.]”<sup>1</sup> 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.”<sup>2</sup> Importantly, federal law, not state law, governs “the scope of the remedy afforded by the Miller Act.”<sup>3</sup>

## **B. Liability for Wages under a Miller Act Payment Bond**

A Miller Act Payment Bond is designed to provide security to laborers and materialmen on a federal construction project by creating “a federal cause of action to satisfy any deficiency in payment by the prime contractor,” because such “suppliers are precluded from filing liens on government facilities[.]”<sup>4</sup> The Miller Act Payment Bond remedy, therefore, provides relief similar to “mechanics’ liens ordinarily available on private construction projects.”<sup>5</sup> Laborers seeking recovery under the Miller Act may obtain unpaid wages, defined as “the basic hourly rate of pay.”<sup>6</sup>

A Miller Act Payment Bond claim is strictly limited to first and second tier subcontractors.<sup>7</sup> In other words, “those with a contractual relationship with the prime contractor or with a subcontractor.”<sup>8</sup> Thus, third tier subcontractors and below are expressly excluded from recovery under direct actions against a Miller Act Payment Bond.<sup>9</sup> Relevant to this paper, only laborers of a first tier subcontractor may assert a claim against a Miller Act Payment Bond.<sup>10</sup> This results because a laborer of a first tier subcontractor is not in privity with the prime contractor and, therefore, classified as a second tier subcontractor.<sup>11</sup> Accordingly, an individual laborer of a second tier subcontractor will be considered, at best, a third tier subcontractor and not eligible to make a claim on a Miller Act Payment Bond.<sup>12</sup>

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<sup>1</sup> 40 U.S.C.A. § 3131(b).

<sup>2</sup> *U.S. for Use & Benefit of Olson v. W.H. Cates Const. Co.*, 972 F.2d 987, 990 (8th Cir. 1992).

<sup>3</sup> *Id.* at 991.

<sup>4</sup> *United States v. Int’l Fid. Ins. Co.*, 200 F.3d 456, 459 (6th Cir. 2000); 40 U.S.C.A. § 3133 (b).

<sup>5</sup> *U.S. ex rel. Polied Env’tl. Servs., Inc. v. Incor Grp., Inc.*, 238 F. Supp. 2d 456, 460 (D. Conn. 2002).

<sup>6</sup> 40 U.S.C.A. § 3141(2)(A).

<sup>7</sup> *U.S. ex rel. Polied Env’tl. Servs., Inc.*, 238 F. Supp. 2d at 459.

<sup>8</sup> *Id.* First tier subcontractors are in direct privity with the prime contractor. Second tier subcontractors, *i.e.*, sub-subcontractors, are in direct privity with the first tier subcontractor, but not the prime contractor.

<sup>9</sup> 40 U.S.C.A. § 3133 (b); *U.S. for Use of Barber-Colman Co. v. U.S. Fid. & Guar. Co.*, 19 F.3d 1431, at \*3 (4th Cir. 1994) (“the Supreme Court has construed the Act as excluding third-tier sub-contractors from recovery”).

<sup>10</sup> 40 U.S.C.A. § 3133 (b).

<sup>11</sup> *See id.*

<sup>12</sup> *See id.* Generally, subcontractors are required to maintain their own bonds, which is the primary avenue to recover unpaid wages for individual laborers of lower-tier subcontractors.

A Miller Act Payment Bond claim may be brought against the prime contractor, the surety and the first tier subcontractor, by a lower tier claimant.<sup>13</sup> In order to establish a *prima facie* claim under the Miller Act, a claimant must prove:

(1) the labor or materials were supplied in prosecution of the work provided in the contract; (2) the supplier has not been paid; (3) the supplier had a good faith belief that the labor or materials were intended for the specified work; and (4) the jurisdictional requisites of the Miller Act have been met.

*Id.* at 460.

The time period in which to assert a Miller Act Payment Bond claim for wages is very narrow. Initially, such a claim does not ripen into a cause of action until “90 days after the day on which the person did or performed the last of the labor... for which the claim is made[.]”<sup>14</sup> Notably, a first tier subcontractor is not required to provide the prime contractor written notice of the claim prior to initiating a lawsuit. *See id.* By contrast, a second tier subcontractor must provide written notice to the *prime contractor* 90 days prior to asserting a claim against a surety under a Miller Act Payment Bond – there is no requirement any notice be given to the surety.<sup>15</sup> A Miller Act Payment Bond claim for wages is statutorily barred “one year after the day on which the last of the labor was performed[.]”<sup>16</sup> In essence, there is only a nine month window after the claimant’s last day of labor to file suit against a surety under a Miller Act Payment Bond.

Generally, there is no set criteria to determine the date of the last day of labor under the Miller Act, but courts agree it “connotes more than mere substantial completion or substantial performance of the plaintiff’s obligations under its contract[.]”<sup>17</sup> Interestingly, at least one court has permitted a first tier subcontractor to measure its last day of performance from the last day of a second tier subcontractor’s performance.<sup>18</sup> By contrast, however, it is well-settled that a second tier subcontractor is prohibited from measuring the limitations period from the last day its sub-subcontractor’s, *i.e.*, 3<sup>rd</sup> tier subcontractor, complete performance.<sup>19</sup> It is also noteworthy that courts reject the position, for the reasons discussed *infra*, that work completed after inspection and acceptance pursuant to a warranty does not extend the last day of labor.<sup>20</sup> This results because if “post-completion work performed pursuant to a warranty could toll the

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<sup>13</sup> *U.S. ex rel. Polied Envtl. Servs., Inc.*, 238 F. Supp. 2d at 461.

<sup>14</sup> 40 U.S.C.A. § 3133(b)(1).

<sup>15</sup> 40 U.S.C.A. § 3133(b)(2).

<sup>16</sup> 40 U.S.C.A. § 3133(b)(4).

<sup>17</sup> *Int’l Fid. Ins. Co.*, 200 F.3d at 459.

<sup>18</sup> *United States ex rel. H.T. Sweeney & Son, Inc. v. E.J.T. Constr. Co.*, 415 F.Supp. 1328 (D. Del.1976).

<sup>19</sup> *U.S. for Use of Barber-Colman Co.*, 19 F.3d at \*4.

<sup>20</sup> *Int’l Fid. Ins. Co.*, 200 F.3d at 459.

Miller Act's statute of limitations, then the surety would have no repose until all such warranties expired."<sup>21</sup>

The term "labor" is also undefined by or otherwise "self-evident" from the Miller Act's language. Generally, courts construe the term "labor" to include "physical toil, but not work by a professional, such as an architect or engineer[.]"<sup>22</sup> The work of a skilled professional, however, may fall under the Miller Act if a particular skilled professional "actually superintends the work as it is done on the job site."<sup>23</sup> The Eight Circuit explained:

It may be true that the term 'labor' in this statute, as generally in statutes relating to mechanics' liens, refers to physical labor rather than technical and professional skill and judgment, but an architect or other skilled man who actually superintends the work as it is done is by the weight of authority furnishing labor...<sup>24</sup>

Courts further recognize that labor may include "a consulting engineer responsible for inspecting a job while *in progress*."<sup>25</sup> Similarly, "the on-site supervisory work of a project manager falls within the purview of the Miller Act if such a superintendent did some physical labor at the job site or might have been called upon to do some on-site manual work in the regular course of his job."<sup>26</sup> In sum, only on-site labor and on-site supervisory work on an ongoing, non-completed project are covered by a Miller Act Payment Bond.

It is well-settled that "labor" under the Miller Act does not include corrective, remedial or warranty work.<sup>27</sup> In analyzing Miller Act claims, the majority rule applied by courts "requires the trier of fact to distinguish whether the work was performed ... as a 'part of the original contract' or for the 'purpose of correcting defects, or making repairs following inspection of the project.'"<sup>28</sup> The majority rule is referred to as the "correction-or-repair versus original-contract test." On this point, the Sixth Circuit opined:

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<sup>21</sup> *Id.* at 459.

<sup>22</sup> *U. S. for Use & Benefit of Naberhaus-Burke, Inc. v. Butt & Head, Inc.*, 535 F. Supp. 1155, 1158 (S.D. Ohio 1982).

<sup>23</sup> *Id.* at 1158; *U.S. for Use of Barber-Colman Co.*, 19 F.3d at \*3 ("an architect or engineer can only recover on the payment bond ... to the extent that [he] performed on-site services") (citations and quotations omitted).

<sup>24</sup> *U.S. for Use & Benefit of Olson*, 972 F.2d at 990 (citations and quotations omitted).

<sup>25</sup> *U. S. for Use & Benefit of Naberhaus-Burke, Inc.*, 535 F. Supp. at 1158 (emphasis added); *U.S. for Use & Benefit of Olson*, 972 F.2d at 990 ("only certain professional supervisory work is covered by the Miller Act, namely, skilled professional work which involves actual superintending, supervision, or inspection at the job site") (citations and quotations omitted); *cf. Int'l Fid. Ins. Co.*, 200 F.3d at 460 ("inspection of work already completed, falls outside the meaning of labor").

<sup>26</sup> *U.S. for Use & Benefit of Olson*, 972 F.2d at 991.

<sup>27</sup> *Id.* ("in connection with the completion of the project and not for the purpose of correcting defects"); *Int'l Fid. Ins. Co.*, 200 F.3d at 459 (work performed under warranty subsequent to completion, inspection and acceptance not covered by Miller Act Payment Bond).

<sup>28</sup> *Int'l Fid. Ins. Co.*, 200 F.3d at 460 (citations and quotations omitted).

Although this line of inquiry has received criticism, this Court concludes the correction-or-repair versus original-contract test presents a useful framework to determine when the Miller Act's statute of limitations begins to run. As set forth in [*United States ex rel. Austin v. Western Elec. Co.*, 337 F.2d 568 (9th Cir.1964)], the correction-or-repair versus original-contract test provides a bright-line rule from which each interested party—the government, contractor, subcontractor, and surety—can gain a clear understanding of what work constitutes labor under [the Miller Act]. Furthermore, the majority rule induces the parties to structure their contractual obligations to account for the statute of limitations. Although the liberal purposes of the Miller Act may not be effectuated in each and every case, the benefits of certainty and administrability afforded by a bright-line rule here outweigh the inherent risk of over or under inclusive results presented by bright-line rules.<sup>29</sup>

Finally, and tangentially related to wage liability, courts have declined to extend the scope of a Miller Act Payment Bond to cover worker's compensation awards. The Fourth Circuit explained:

We do not think, however, that the most liberal construction would justify the holding that a [worker's] compensation award is within its coverage. Such an award is not within the language of the statute as it is neither labor nor materials; and it clearly does not fall within the legislative purpose which was to provide for those supplying labor and materials for government construction protection equivalent to that furnished in the case of private construction by mechanics and materialmen's liens.<sup>30</sup>

### **C. Liability for Union Benefits under a Miller Act Payment Bond**

Unions and their related benefit and trust funds<sup>31</sup> (hereinafter collectively described as "unions" unless otherwise specified) are frequent claimants on Miller Act payment bonds. Such claims usually follow an audit prompted by missed monthly wage and fringe reports and remittances. While the case law is not entirely consistent, *U.S. ex rel. Sherman v. Carter*,<sup>32</sup> is often cited for the proposition that a surety may be liable for certain amounts due to unions and unpaid by bonded principals. Subsequent case law has carved out certain exceptions to this broad sweep of liability.

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<sup>29</sup> *Id.*

<sup>30</sup> *U.S., for Use of Gibson v. Harman*, 192 F.2d 999, 1000-1001 (4th Cir. 1951); see also *U.S. for Use & Benefit of Cobb-Strecker-Dunphy & Zimmerman, Inc. v. M.A. Mortenson Co.*, 894 F.2d 311 (8th Cir. 1990) (insurer unable to recover principal's unpaid worker's compensation premiums under Miller Act Payment Bond).

<sup>31</sup> In addition to unions, who collect dues, common benefit funds include, but are not limited to, health insurance funds, pension funds, severance and annuity funds, vacation savings trusts, apprenticeship and training committees, management and cooperation committees.

<sup>32</sup> 33 U.S. 210 (1957).

The Miller Act defines a claimant as “[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 under section 3131 of this title and that has not been paid in full within 90 days.”<sup>33</sup> Unions clearly do not qualify as “claimants” on their own. They contribute no labor or materials to the bonded project. Standing for these entities has evolved through a combination of Miller Act case law, especially *U.S. ex rel. Sherman v. Carter*, and the contractual arrangements between Unions and union employers, who did in fact contribute labor to the bonded project, by and through its employees.

Multiple courts have found that amounts payable to unions, known as fringes, are part of the wages payable to the laborers who did contribute work to the bonded project.<sup>34</sup> Expanding the definition of “wages,” which are near indisputably within the scope of sureties’ payment bond exposure, to include these additional amounts opens up the door to claims from unanticipated parties and for additional amounts.

Unlike wages, union employers typically agree to pay fringes and dues directly to the unions.<sup>35</sup> Moreover, union workers assign, usually expressly, the portion of their wages intended to cover fringes and also union dues to collection agents for the unions. As a result, union employers make lump sum remittances to the unions rather than union members being required to submit those payments on their own. For each individual union or trust, the amounts due are calculated based on an employee’s hours or wages during the remittance period as opposed to fixed premiums or sliding scale withholdings, so they can readily be processed separately from the employer’s payroll itself.

Permitting unions to pursue payment bond claims in their own names represents a substantial deviation from the plain language of the Miller Act, but serves to reach the intended ends of the Miller Act by ensuring that project laborers are fully compensated. An argument can reasonably be made that the claims by the unions must disclose on notices and pleadings the names of the workers for whom they are seeking to collect. The Miller Act contemplates that the claimant, himself or itself, will bring an action and give the requisite notice, thereby providing sufficient identification.<sup>36</sup> A surety cannot readily investigate a payment bond claim without this basic information.

Unions may also make wage claims on behalf of individual union members which would be analyzed consistently with Section 1.A., *supra*, with the added requirement of a written assignment. Notably, unions do not typically advance wages to their members who have not been paid by the bonded principal employing the union labor, so additional steps are required

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<sup>33</sup> 40 U.S.C. § 3133(b)(1).

<sup>34</sup> See, e.g., *U.S. ex rel. Sherman v. Carter*, 33 U.S. 210, 218-220 (1957); see also *Nat’l Elec. Ind. Fund v. Bethlehem Steel Corp.*, 296 Md. 541 (1983) (regarding mechanic’s lien standing, but also applicable to and addressing bond claimants by analogy); *Bernard v. Indem Ins. Co. of North America*, 162 Cal. App. 2d 47, 484 (1958).

<sup>35</sup> *Nat’l Elec. Ind. Fund v. Bethlehem Steel Corp.*, 296 Md. 541 (1983).

<sup>36</sup> 40 U.S.C. § 3133(b).

to establish standing for those claims. The union can only assert its members claims insofar as those individuals could bring them directly.<sup>37</sup>

Union employers' obligations to pay fringes arise from their collective bargaining agreements ("CBA") with the unions, which set forth formulas and rates. A CBA generally governs the employment terms between the employer and union workers and is in effect for a period of many years. A CBA may predate a bonded project and often bears no relation whatsoever to a specific bonded project.

Unions utilize the federal Employee Retirement Income Security Act<sup>38</sup> (ERISA) to enforce CBA's against employers. ERISA provides a spectrum of remedies for union employees and their representative unions, including but not limited to, unpaid wages, unpaid benefit plan contributions, liquidated damages, interest, and attorney's fees.<sup>39</sup> Most importantly, ERISA permits a union fiduciary to bring claims on behalf of the union and its affiliates, as well as the affected employees, thereby making it more efficient and worthwhile to pursue what would be otherwise cost-prohibitive individual claims.<sup>40</sup> ERISA has broad preemptive power by its own terms,<sup>41</sup> but is rarely read to preempt bond claims, which touch on ERISA only tangentially.<sup>42</sup>

Unions have frequently attempted to assert a surety's liability under ERISA predicated upon a broad interpretation of the term "employer," which is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity."<sup>43</sup> Most, but not all, courts have refused to exercise such an interpretation that would place a surety within the scope of "employers."<sup>44</sup> One court acknowledged the complete disconnect between the surety and the suing union benefit plan in declining to lump the surety in as an employer for ERISA liability, "[T]he duties or obligations assumed by [the surety] were not 'in relation to an employee benefit plan' at all, but instead 'in relation to' one of [the

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<sup>37</sup> *U.S. ex rel. Int'l Bhd. of Elec. Workers, Local Union 692 v. Hartford Fire Ins. Co.*, 809 F. Supp. 523, 525 (E.D. Mich. 1992). ("The union's claim is coextensive with and no greater than would be the individual employee's claim had it been necessary for the employee to file a claim for wages under the Miller Act.")

<sup>38</sup> 29 U.S.C. § 1001 *et seq.*

<sup>39</sup> ERISA § 502, 29 U.S.C. § 1132.

<sup>40</sup> ERISA § 502(a), 29 U.S.C. § 1132(a).

<sup>41</sup> 29 U.S.C § 1144(a).

<sup>42</sup> See, e.g., *Greenblatt v. Delta Plumbing & Heating Corp.*, 68F.3d 561, 573-575 (2d Cir. 1995); *Forsberg v. Bovis Lend Lease, Inc.*, 184 P.3d 610, 620-621 (Utah Ct. App. 2008); *Bd. Of Trustees of Operating Engineers Local 825 Fund Service Facilities v. L.B.S. Constr. Co.*, 148 N.J. 561 (1997).

<sup>43</sup> 29 U.S.C. § 1002(5).

<sup>44</sup> See, e.g., *Greenblatt v. Delta Plumbing & Heating Corp.*, 68F.3d 561, 575-576 (2d Cir. 1995); *Xaros v. U.S. Fidelity & Guar. Co.*, 820 F. 2d 1176, 1180 (11th Cir. 1987); *Ragan v. Tri County Excavating*, 62 F.3d 501, 512-513 (3d Cir. 1985).

principal's] projects. As the connection between the surety bond and the benefit plan is a secondary one, it is insufficient to transform [the surety] into an ERISA 'employer.'"<sup>45</sup>

The Labor Management Relations Act<sup>46</sup> supplements ERISA by providing federal jurisdiction for unions' ERISA claims and is often cited by unions in their pursuit of contractors and sureties.<sup>47</sup> However, with respect to sureties, courts have consistently rejected this approach, concluding that the Labor Management Relations Act applies exclusively to signatories of the applicable CBA.<sup>48</sup>

A surety faced with a claim from a union is best served by raising a variety of different defenses. Depending on the facts and circumstances of the particular case, appropriate defenses may include lack of compliance with bond or statutory notice requirements, inapplicability of ERISA or the Labor Management Relations Act, and limited scope or coverage of the bond. Customary defenses, including untimely notice and suit, will also be available where supported by the facts. It is common for unions to conduct audits of their employers after fringe remittances become delinquent. Until that audit is complete, a union representative will likely not have sufficient information to give proper and sufficient notice and sureties should be mindful of those deficiencies which may give rise to defenses. It is also advisable to obtain and review payroll records and project daily sheets to ensure that wage and wage-related claims are properly attributable to the bonded project and not lumped together with others.

#### **D. Liability for Taxes under a Miller Act Performance Bond**

A Miller Act Performance Bond is required to contain language stating that the surety "shall provide coverage for taxes the Government imposes which are collected, deducted, or withheld from wages the contractor pays in carrying out the contract with respect to which the bond is furnished."<sup>49</sup> To the extent the bond principal fails to withhold and remit the relevant taxes to the federal government, the government must notify the surety of the deficiency "within 90 days after the date when the contractor files a return for the period" but "no later than 180 days from the date when a return for the period was required to be filed[.]"<sup>50</sup> Regarding the level of government notice required, the Fourth Circuit has held the Miller Act "does not require the government to detail with specificity the contracts, bonds, and amount of delinquent taxes. All [§ 3131(c)(2)] requires is timely notice of the contractor's default so the

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<sup>45</sup> *Int'l Union of Operating Engineers Local 57, AFL-CIO v. Seaboard Surety Co.*, 946 F. Supp. 141, 144-145 (D.R.I. 1996).

<sup>46</sup> 29 U.S.C. § 141 *et seq.*

<sup>47</sup> 29 U.S.C. § 185.

<sup>48</sup> See, e.g., *Greenblatt v. Delta Plumbing & Heating Corp.*, 68F.3d 561, 572-573 (2d Cir. 1995); *Int'l Union, United Mine Workers of America v. Covenant Coal Corp.*, 977 F.2d 895, 897-898 (4th Cir. 1992); *Xaros v. U.S. Fidelity & Guar. Co.*, 820 F. 2d 1176, 1180-1181 (11th Cir. 1987).

<sup>49</sup> 40 U.S.C.A. § 3131(c)(1).

<sup>50</sup> 40 U.S.C.A. § 3131(c)(2).

surety is aware that payment from such contractor is not forthcoming.”<sup>51</sup> Subject to satisfying the notice requirements, the federal government must bring an action on the Miller Act Performance Bond against the surety to recover unpaid taxes within “one year after the day on which notice [is] given” to the surety.<sup>52</sup>

Pre-judgment interest on tax liability is, in certain circumstances, permitted under the Miller Act. In *United States v. Am. Mfrs. Mut. Cas. Co.*, a bonded principal filed a quarterly employment tax return reporting a tax liability but entered into Chapter 11 bankruptcy reorganization prior to satisfying its tax liability.<sup>53</sup> To recover the unpaid employment taxes, the federal government filed a lawsuit against the surety. The United States District Court for the District of South Carolina entered judgment in favor of the government in the amount of taxes accrued on the bonded contracts but denied pre-judgment interest. See *id.* at 371. The government appealed.

Regarding the denial of prejudgment interest, the Fourth Circuit opined that because “neither the Miller Act nor any other applicable federal provision provides any explicit standards for the allowance of pre-judgment interest, it is treated as incorporating the applicable state law on this issue.”<sup>54</sup> In reversing the district court on this issue, the Fourth Circuit held that if state law allows an award of prejudgment interest “where amount sued for is liquated,” the Miller Act permits prejudgment interest on unpaid employment tax liability because employment taxes become a “sum certain” at the time they are withheld, and otherwise, “can be calculated based on federal tax tables.”<sup>55</sup> Moreover, “liability for payment of [employment] taxes attach[es] at the time the wages [are] paid.”<sup>56</sup> The Fourth Circuit further opined:

The entire structure of the Miller Act makes it clear that it was enacted to protect the United States Government from the loss it would have to bear as a result of a defaulting contractor’s failure to meet all obligations. Timely payment of taxes is required by law. When such taxes are not timely paid, the government sustains a quantifiable loss that... can be measured by the amount withheld by [the bonded principal] for work done on the secured contracts. The recovery of interest on such delinquent funds fairly compensates the government for the loss of such monies as well as the expense incurred in retrieving it. We believe that the Miller Act requires a surety to bear the burden of compensating the government for the interest and penalties incurred on unpaid taxes when, as here, that amount is liquidated and the applicable state law allows for such recovery. The denial of that sum, if not for some other valid reason, constitutes an abuse of discretion on the part of the district court.<sup>57</sup>

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<sup>51</sup> *United States v. Am. Mfrs. Mut. Cas. Co.*, 901 F.2d 370, 373 (4th Cir. 1990).

<sup>52</sup> 40 U.S.C.A. § 3131(c)(3).

<sup>53</sup> 901 F.2d at 372.

<sup>54</sup> *Id.* at 372-73.

<sup>55</sup> *Id.* at 373.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

Notably, Maryland and Virginia expressly permit the award of prejudgment interest.<sup>58</sup> Thus, *Am. Mfrs. Mut. Cas. Co.* will generally be controlling on this issue on Miller Act Performance Bonds issued in Maryland or Virginia. It should be further noted that the District of Columbia also permits the award of prejudgment interest.<sup>59</sup>

### III. Liability for Wages under the Davis-Bacon Act<sup>60</sup>

The Davis-Bacon Act applies to “every contract in excess of \$2,000, to which the Federal Government or the District of Columbia is a party, for construction, alteration, or repair, including painting and decorating, of public buildings and public works of the Government or the District of Columbia... and which requires or involves the employment of mechanics or laborers[.]”<sup>61</sup> The particular federal agency entering into such a contract bears the initial responsibility for determining whether its contract is subject to the Davis-Bacon Act.<sup>62</sup>

Section 1 of the Davis-Bacon Act requires government contractors to pay laborers “the appropriate prevailing wage rate[.]”<sup>63</sup> The prevailing wage rate “shall be based on the wages the Secretary of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the civil subdivision of the State in which the work is to be performed[.]”<sup>64</sup> Essentially, the Davis-Bacon Act is a minimum wage law benefiting construction workers.<sup>65</sup> As such, the Davis-Bacon Act is not designed to benefit government contractors, “but rather to protect their employees from substandard earnings.”<sup>66</sup>

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<sup>58</sup> Md. Const. art. III, § 57; *Travel Comm., Inc. v. Pan Am. World Airways, Inc.*, 91 Md. App. 123, 188 (1992). Va. Code Ann. §§ 6.2-302 and 8.01-382; *Upper Occoquan Sewage Auth. v. Blake Const. Co. Incorporated/Poole & Kent*, 275 Va. 41, 64 (2008).

<sup>59</sup> D.C. Code § 15-108; 601 F. Supp. 2d 262, 276 (D.D.C. 2009).

<sup>60</sup> The Maryland Prevailing Wage Law is the state counterpart to the Davis Bacon Act and applies to projects funded by Maryland State equal to or exceeding \$500,000.00. See Md. Code Ann., State Fin. & Proc. § 17-201 *et seq.* Notably, eighteen states have no prevailing wage law – Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, and Virginia. See <http://www.dol.gov/whd/state/dollar.htm>. As noted in this section, the District of Columbia is subject to the Davis-Bacon Act.

<sup>61</sup> 40 U.S.C.A. § 3142(a); 29 C.F.R. § 5.5(a).

<sup>62</sup> *Universities Research Ass’n, Inc. v. Coutu*, 450 U.S. 754, 760 (1981).

<sup>63</sup> *Id.*; *U.S. for Benefit & on Behalf of Glynn v. Capeletti Bros.*, 621 F.2d 1309, 1313 (5th Cir. 1980); 40 U.S.C. § 3142 (b).

<sup>64</sup> 40 U.S.C.A. § 3142 (b).

<sup>65</sup> *Castro v. Fid. & Deposit Co. of Maryland*, No. CV 13-818 (JEB), 2014 WL 495464, at \*2 (D.D.C. Feb. 7, 2014).

<sup>66</sup> *Id.* at \*4 (citing *United States v. Binghamton Const. Co.*, 347 U.S. 171, 177 (1954)).

In order for a laborer to recover unpaid Davis-Bacon wages, the Department of Labor must render an administrative determination, on its own or after receiving a claim from a laborer, that the wages paid are below the prevailing wage rate and, therefore, additional wages are owed to cure the deficiency.<sup>67</sup> If such a determination is rendered, Section 1 permits the relevant administrative agency to withhold accrued contract funds to rectify the wage deficiency.<sup>68</sup> The appropriate federal agency then “shall pay directly to laborers and mechanics from any accrued payments withheld under the terms of a contract any wages found to be due laborers and mechanics[.]”<sup>69</sup> This administrative scheme is an attempt to strike a “careful balance” by “providing contractors with a predictable basis upon which to estimate labor costs, and laborers with an effective means to enforce wage stipulations in contracts.”<sup>70</sup>

If funds accrued and withheld pursuant to an administrative determination are insufficient to fully reimburse an underpaid laborer, a laborer has “the same right to bring a civil action and intervene against the contractor and the contractor’s sureties as is conferred by law on persons furnishing labor or materials.”<sup>71</sup> Specifically, Section 3 of the Davis-Bacon Act confers an express “right of action on employees to recover from the contractor the amount due the employees under the minimum wage schedule” under a Miller Act Payment Bond if the withholding provisions of Section 1 fail to generate sufficient funds to cure the wage deficiency.<sup>72</sup> It is crucial to understand, however, that the Davis-Bacon Act requires exhaustion of the Section 1 administrative remedy provisions prior to asserting a private cause of action on a Miller Act Payment Bond under Section 3 against a prime contractor or surety.<sup>73</sup> In this regard, federal courts have stated:

This private right of action is designed to ensure that the unpaid laborer is able to recover what is due him. But, this purely financial remedy is available only after there has been an administrative determination that some money is owed and that insufficient funds have been withheld to compensate the affected laborer.<sup>74</sup>

A claim for Davis-Bacon wages through a Miller Act Payment Bond is limited to the difference between the applicable prevailing wage rate and the wages actually paid. Such an action is distinguishable from direct actions against a Miller Act Payment Bond, discussed

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<sup>67</sup> *U.S. ex rel. Bradbury v. TLT Const. Corp.*, 138 F. Supp. 2d 237, 241 (D.R.I. 2001).

<sup>68</sup> See 40 U.S.C.A. § 3142(c)(3); 29 C.F.R. § 5.5(a)(2); *U.S. ex rel. Bradbury*, 138 F. Supp. 2d at 241.

<sup>69</sup> 40 U.S.C.A. § 3144(a)(1).

<sup>70</sup> *Binghamton Const. Co.*, 347 U.S. at 176, n.12.

<sup>71</sup> 40 U.S.C.A. § 3144 (a)(2).

<sup>72</sup> *Castro v. Fid. & Deposit Co. of Maryland*, No. CV 13-818 (JEB), 2014 WL 495464, at \*4 (citing *United States v. Binghamton Const. Co.*, 347 U.S. at 176 n.12); 40 U.S.C. § 3142.

<sup>73</sup> *U.S. ex rel. Bradbury v. TLT Const. Corp.*, 138 F. Supp. 2d at 241 (“The plain language of the Davis–Bacon Act clearly contemplates that suits pursuant to § 3 may be brought after an administrative determination that such money is owed.”).

<sup>74</sup> See *id* at 241.

*supra* section II.B, for failure to pay any wages or failure to pay wages agreed to in a contract that exceed the Davis-Bacon Act prevailing wage rates, because an administrative determination that a Davis-Bacon minimum wage violation occurred is not required for recovery in those actions.

Regarding the statutory exhaustion of administrative remedies requirement under Section 1, *U.S. ex rel. Bradbury v. TLT Const. Corp.*, provides an example of one of the more restrictive interpretations of the Davis-Bacon Act.<sup>75</sup> In *Bradbury*, the plaintiff sought to recover directly against the prime contractor's Miller Act Payment Bond in federal district court the difference in wages paid by his employer/subcontractor and the prevailing wage rate set by the Secretary of Labor for the type of work the plaintiff performed – prior to obtaining an administrative determination under Section 1 that unpaid wages were owed. Initially, the court rejected plaintiff's argument that such an administrative determination was not required because "plaintiff's case turns on whether a Davis-Bacon Act violation occurred. Therefore, plaintiff's claim is properly classified as a Miller Act claim brought to recover unpaid Davis-Bacon Act wages."<sup>76</sup> The court opined that in such circumstances "it is clear that Congress consciously decided that a laborer cannot bring an action against a contractor's Miller Act bond for unpaid Davis-Bacon Act wages until after he has received an administrative determination that he is owed unpaid wages and that insufficient funds have been withheld to compensate him."<sup>77</sup> Although the court found the plaintiff did not have a direct action against the Miller Act Payment Bond, because the plaintiff had set forth the requisite elements of a Miller Act Payment Bond claim for a Davis-Bacon violation, the court did not dismiss the lawsuit.<sup>78</sup> Rather, the court merely stayed the action pending the plaintiff's attempt to obtain the requisite administrative determination that wages were owed to him under Section 1 of the Davis-Bacon Act.<sup>79</sup>

In *Castro v. Fid. & Deposit Co. of Maryland*, the U.S. District Court for the District of Columbia provided a consistent but less stringent reading of the administrative remedy exhaustion requirements.<sup>80</sup> There, laborers for a third-tier subcontractor filed an administrative complaint with the Department of Labor asserting a Davis-Bacon Act minimum wage violation.<sup>81</sup> The underlying project, however, had previously been completed and all payments released to the prime contractor. As such, "the DOL investigator closed the case without making further findings on Plaintiffs' eligibility for relief under the" Davis-Bacon Act because

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<sup>75</sup> 138 F. Supp. 2d 237.

<sup>76</sup> See *id.* at 240.

<sup>77</sup> *Id.* at 243.

<sup>78</sup> See *id.* at 245.

<sup>79</sup> See *id.*

<sup>80</sup> 2014 WL 495464.

<sup>81</sup> Interestingly, *Castro* also provides another distinction between Miller Act Payment Bond actions predicated on Davis-Bacon Act violations and direct actions on the Miller Act Payment Bond in that the *Castro* plaintiffs were employees of a third-tier subcontractor who would be barred on the latter type of action.

“there were no further payments the government could withhold.”<sup>82</sup> Plaintiffs then initiated a lawsuit in federal district court. Defendants asserted that because the plaintiffs failed to obtain the requisite administrative determination that wages were owed under the Davis-Bacon Act, the court was without subject-matter jurisdiction and the case must be dismissed. In response, the court reviewed numerous opinions from sister courts in which the “formulaic fulfillment” of the *Bradbury* prerequisites were rejected and, instead, “focused principally on the requirement that employees allege that they made a demand on DOL, but were unable to collect due to insufficient funds.”<sup>83</sup> Following this reasoning, the *Castro* court found that the Section 1 administrative remedy requirement may be satisfied without the requisite determination if a plaintiff makes a “concerted effort to exhaust administrative remedies with DOL” and only seeks relief in the courts “if funds are found to be insufficient.”<sup>84</sup> Because the *Castro* plaintiffs sought a Davis-Bacon violation determination but were unable to obtain administrative relief solely because no contract funds remained, the court found “[t]o refuse jurisdiction... would be overly technical and risk undermining the very purpose of the DBA and corresponding bond statutes.”<sup>85</sup> In determining it had jurisdiction to hear plaintiffs’ claims, the court stated:

A rigid approach to § 3144(a) jurisdiction, as a consequence, might mean that a genuinely aggrieved employee could not pursue *any* avenue to recovery unless DOL makes a full set of administrative findings. In addition, refusal to entertain DBA claims in situations like this one may create a perverse incentive for contractors to breach their wage obligations at the end of a project’s lifespan, in hopes that employees will not report the problem until after final payments have been made and any withholdings have been released.<sup>86</sup>

Although *Castro* offers a less strict interpretation of Section 1’s administrative remedy requirements than *Bradbury*, it should not be read to significantly expand the private cause of action under Section 3. Initially, *Castro* is in accord with *Bradbury* in that a plaintiff must first seek administrative remedies before pursuing judicial relief. It is important to note that in *Castro* no finding was made by the Department of Labor that plaintiffs were *not* entitled to unpaid Davis-Bacon wages. Rather, the Department of Labor declined to make any finding as to entitlement to Davis-Bacon wages. *Castro*, therefore, only deviates from *Bradbury* to the extent it permitted an aggrieved laborer to seek judicial relief in the absence of *any* administrative determination solely because no contract funds remained to withhold and reimburse the underpaid laborer.

#### **IV. Wage and Related Liabilities under Little Miller Acts**

Surety liability for wage and wage-related claims under state Little Miller Acts is similar in substance to liability under the Miller Act. In fact, Little Miller Acts often follow the Miller Act

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<sup>82</sup> See *id.* at \*1-2.

<sup>83</sup> See *id.* at \*4.

<sup>84</sup> See *id.* at\*5.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.* at \*5 (emphasis in original).

and state courts across the country routinely rely on federal case law when interpreting their respective Little Miller Act.<sup>87</sup>

The scope of potential claimants, by tier and type of contribution to the project, sufficiency and timeliness of notice, and timeliness of suit in the appropriate court, however, will vary with the state statute. As with the Miller Act, individual employees, or unions as collective assignees, are typically treated as individual subcontractors and, therefore, situated one tier below their employers.

### **A. Maryland**

Maryland's Little Miller Act<sup>88</sup> ("Maryland LMA") provides a slightly broader range of potential claimants than the Miller Act based on tier, defining claimants as "suppliers" of labor or materials who contracted with the prime contractor, a subcontractor, or a sub-contractor.<sup>89</sup> This extra tier brings in many more potential wage claimants and greater likelihood of union participation in the bonded project. Those claimants who do not have a contract with the bonded contractor must give statutory written notice within 90 days of last performing work.<sup>90</sup> All claimants must file suit to enforce their payment bond claims within one year after the public owner finally accepts the project as complete.<sup>91</sup> This meaning of "final acceptance" will vary significantly between various state agencies and has been the subject of litigation itself, as a blended question of law and fact.<sup>92</sup>

### **B. District of Columbia**

The District of Columbia's Little Miller Act<sup>93</sup> (D.C. LMA") is modeled closely after the federal Miller Act and defines claimants consistently therewith, limiting them to subcontractors, material suppliers, and laborers who have direct contracts with either the prime contractor or a first-tier subcontractor.<sup>94</sup> It requires subcontractor and supplier claimants who do not have direct contractual privity with the bonded prime contractor to serve written notice of their claims

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<sup>87</sup> *Law of Payment Bonds* 6 (2ed. 2011); see e.g., *Hartford Fire Ins. Co. v. Trustees of Constr. Indus.*, 2009 WL 1491412, at \*4 (Ne. May 28, 2009); *Granite Constr. Co. v. Am. Motorists ins. Co.*, 29 Cal. App. 4<sup>th</sup> 658 (Cal. Ct. App. 1994); *Blakeslee Arpaia Chapman, Inc. v. El Constructors, Inc.*, 687 A.2d 506, 514 (Conn. 1997); *Bd. of Pub. Instruction, Broward Cnt'y ex rel. Monmouth Plumbing Supply Co. v. Rood Constr. Co.*, 166 So. 2d 701, 702 (Fla. Dist. Ct. App. 1964); *LaGrand Steel Prods. Co. v. A.S.C. Constructors, Inc.*, 702 P.2d 855, 856 (Idaho Ct. App. 1986); *Solite Masonry Units Corp. v. Piland Constr. Co.*, 232 S.E. 2d 759, 761-62 (Va. 1977).

<sup>88</sup> MD. CODE ANN., STATE FIN. & PROC. § 17-101 *et seq.*

<sup>89</sup> MD. CODE ANN., STATE FIN. & PROC. §§ 17-101(e), 17-108.

<sup>90</sup> MD. CODE ANN., STATE FIN. & PROC. § 17-108(b)(1).

<sup>91</sup> MD. CODE ANN., STATE FIN. & PROC. § 17-109(b).

<sup>92</sup> See *Gen. Fed. Constr., Inc. v. D.R. Thomas, Inc.*, 52 Md. App. 700 (1982); see also *Joseph J. Hock, Inc. v. Baltimore Contractors, Inc.*, 252 Md. 61 (1969).

<sup>93</sup> D.C. CODE § 2-2.01.01 *et seq.*

<sup>94</sup> D.C. CODE § 2-201.02.

within 90 days of their last work. A suit on a payment bond claim must be filed within one year of the claimant's last work.

### C. Virginia

Virginia's Little Miller Act, Va. Code Ann. § 2.2-4333 *et seq.* also provides a two-tier limitation that is similar to that set forth in the Miller Act and D.C. LMA. Those claimants who do not have contractual privity with the bonded contractor must give notice of their claims to the bonded contractor within 180 days of their last work, a much more generous time period than the Miller Act and most other Little Miller Acts provide.<sup>95</sup> Suit may be brought at any time between 90 days and one year after a claimant's last contribution of labor to the project.<sup>96</sup>

### V. Wage and Related Liabilities under the AIA A312 Bond Forms

Private Bonds govern non-public constructions projects, which distinguishes such bonds from Miller Act and Little Miller Act payment and performance bonds. The general purpose of private bonds is to limit the scope of recovery against a property owner to lien claims.<sup>97</sup> Private bonds are divided into either statutory or common law bonds. This paper addresses only the common law AIA A312 Payment and Performance Bonds. The AIA bonds are merely private contracts, enforceable only upon their terms.<sup>98</sup>

#### A. A312 Payment Bond

The AIA A312-1984 Payment Bond form, which is still occasionally used in conjunction with its Performance Bond counterpart, defines the scope of bonded obligations as "labor, materials, and equipment furnished for use in the performance of the Construction Contract."<sup>99</sup> The surety's secondary obligation to Claimants hinges on the principal's failing in its primary obligation to make payment "for all sums due."<sup>100</sup> Claimants are defined broadly but with tier limitations as those "having a direct contract with the [principal] Contractor or with a subcontractor of the [principal] Contractor to furnish labor, materials or equipment."<sup>101</sup>

This payment bond form further incorporates by reference the scope and coverage of the applicable mechanic's lien statute in the locale of the project. Notably, it also attempts to carve out the extra amounts which unions often tack on to wage and fringe claims, as discussed in Section II.C., *supra*. The payment bond provides, "The Surety shall not be liable to the Owner, Claimants or others for obligations of the Contractor that are unrelated to the

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<sup>95</sup> VA. CODE ANN. § 2.2-4341.

<sup>96</sup> *Id.*

<sup>97</sup> *Law of Payment Bonds* 7 (2ed. 2011).

<sup>98</sup> *Id.* at 8-9.

<sup>99</sup> AIA A312-1984 Payment Bond § 1.

<sup>100</sup> AIA A312-1984 Payment Bond §§ 2, 3.

<sup>101</sup> AIA A312-1984 Payment Bond § 15.1.

Construction Contract.”<sup>102</sup> Although the “all sums due” language tends to enlarge claims and liability with interest, attorney’s fees, and other damages, this exclusion is helpful in limiting the scope of the bonded obligation to wages and fringes, representing labor furnished to the project, only.

The revised AIA A312-2010 Payment Bond form is one of the most commonly used forms today and has retained much of the language contained in the 1984, but with substantial reorganization and some additions. All provisions relevant to wage-type claims remain. In addition, section 4 instructs that the surety’s obligations to a compliant Owner are to “promptly and at the Surety’s expense defend, indemnify and hold harmless the Owner against a duly tendered claim, demand, lien or suit.” These defense and indemnity obligations apply to all types of claims, including those for wages and otherwise arising from the contribution of labor to the project.

## **B. A312 Performance Bond**

The AIA A312-1984 Performance Bond provides that upon the obligee’s compliance with the conditions precedent of paragraph 3, the surety has, among its performance options: (i) the ability to use its principal to complete the bonded project (frequently by the surety’s financing of the principal); (ii) taking over and completing the bonded project (usually, but not always, with a new and different completion contractor); (iii) tendering a new completion contractor to the obligee; and (iv) paying the obligee’s damages for its completion of the bonded project.<sup>103</sup> Liability for wage and wage-related claims may arise if the surety exercises one of the first two options – taking over and completing the bonded project. Like the 1984 Payment Bond, the Performance Bond attempts to exclude claims which are outside of the construction contracting chain, limiting, at least in part, claims of unions for fringes and related ERISA damages.<sup>104</sup>

The 2010 revisions to the A312 Performance Bond leave some ambiguity as to the surety’s scope of potential liability. While the surety’s ability to takeover and complete the bonded project following default and termination remain the same,<sup>105</sup> option number two above, this version of the bond form does not expressly cap the surety’s liability at the bond’s penal sum.<sup>106</sup> Therefore, the surety’s ultimate costs to complete, including wage and all other claims, may exceed the original obligation.

## **VI. Conclusion**

A surety’s liability for wage and related claims arises from numerous sources. Indeed, a surety may be liable to laborers for various types of wage claims under federal and state law,

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<sup>102</sup> AIA A312-1984 Payment Bond § 9.

<sup>103</sup> AIA A312-1984 Performance Bond §§ 3-4.

<sup>104</sup> AIA A312-1984 Performance Bond § 7.

<sup>105</sup> AIA A312-1984 Performance Bond § 5.

<sup>106</sup> Compare AIA A312-1984 Performance Bond §6 and AIA A312-2010 Performance Bond § 7.

to state and federal entities for unpaid taxes, and to union trusts under federal law. Awareness of the nature and scope of such liabilities is crucial to a surety's ability to assess its total vulnerability on a bonded project.

## **BIOGRAPHIES**

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