TENTH ANNUAL SOUTHERN SURETY AND FIDELITY CLAIMS CONFERENCE

APRIL 15-16, 1999

THE RECOVERY OF ATTORNEY'S FEES UNDER THE MILLER ACT AND SELECTED STATES' PUBLIC WORKS STATUTES

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INTRODUCTION

The Miller Act, 40 U.S.C. §§ 270a-270d, does not explicitly provide for the recovery of attorney's fees to a successful payment bond claimant. Nonetheless, many federal courts traditionally awarded attorney's fees under the Miller Act if a state statute provided for the recovery of such fees. See, e.g., United States ex rel. Weyerhaeuser Co. v. Bucon Constr. Co., 430 F.2d 420 (5th Cir. 1970)(attorney's fees awarded pursuant to a Florida statute); Sam Finley, Inc. v. Pilcher, Livingston & Wallace, 314 F.Supp. 654 (S.D. Ga. 1970); United States Fidelity & Guar. Co. v. Hendry Corp., 391 F.2d 13 (5th Cir.), cert denied, 393 U.S. 978 (1968); Transamerica Ins. Co. v. Red Top Metal, Inc., 394 F.2d 752 (5th Cir. 1967); United States ex rel. Western Steel Co. v. Travelers Indem.Co., 37 F.R.D. 322 (D. Or. 1965), aff'd, 362 F.2d 896 (9th Cir. 1966)(Court agreed that recoverability of attorney's fees was governed by the law of the state in which the Miller Act bond was issued). In so doing, these courts reasoned that because the Miller Act was silent concerning attorney's fees, it was proper for courts to rely on state statutes allowing the recovery of fees to support such awards. Hendry Corp., 391 F.2d at 20; Boyd Callan, Inc. v. United States ex rel. Steves Indus., Inc., 328 F.2d 505, 511-12 (5th Cir. 1964).

All of this changed in 1974 with the United States Supreme Court decision in F.D. Rich Co. v. United States ex rel. Indus. Lumber Co., 417 U.S.116 (1974). There, the Supreme Court expressly held that the Miller Act provides a federal cause of action, "and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law." 417 U.S. at 127. As such, the Supreme Court concluded it was no longer necessary or proper for federal courts to resort to state law to determine whether attorney's fees could be awarded under the Miller Act. The Supreme Court further affirmed that attorney's fees generally are not recoverable under the Miller Act, absent a federal statute or an enforceable contract provision providing for an award of attorney's fees, 417 U.S. at 126, or unless one of the other recognized exceptions to the so-called "American Rule," which provides that each party should bear the cost of litigating its own case, applies.[1] 417 U.S. at 129-30. Since the decision in F.D. Rich, courts have routinely denied efforts to recover attorney's fees under state statutes in a Miller Act suit. See, e.g., United States ex rel. D & P Corp. v. Transamerica Ins. Co., 881 F.Supp 1505 (D. Kan. 1995); United States ex rel. All American Bldg. Systems, Inc., 857 F.Supp. 69 (N.D. Ga. 1994)(Court disallowed recovery of attorney's fees under Georgia suretyship bad faith statute); United States ex rel. Pensacola Constr. Co. v. St. Paul Fire & Marine Ins. Co., 705 F. Supp. 306 (W.D. La. 1988); United States ex rel. Howell Crane Serv. v. United States Fidelity & Guar. Co., 861 F.2d 110 (5th Cir. 1988)(Court reversed lower court's award of attorney's fees under a Texas statute); United States ex rel. Vulcan Materials v. Volpe Constr., 622 F.2d 880 (5th Cir. 1980).

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[1] In addition to a statute or contract provision providing that attorney's fees may be awarded, attorney's fees are authorized as exceptions to the American Rule where (1) the opposing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons, (2) where a successful litigant has conferred a substantial benefit on a class of persons and the award of attorney's fees spreads the costs proportionately among the class members, and (3) when a successful litigant is acting in the capacity of a "private attorney general" to enforce important public policies. 417 U.S. at 129-30.

Many states' public works statutes expressly provide for the recovery of attorney's fees in favor of a prevailing claimant. Absent such provisions, barring unusual circumstances, courts usually will not award attorney's fees to the prevailing party in actions brought under public works statutes in effect in most states.

I. MILLER ACT

A. Contract Provisions Permitting Recovery of Attorney's Fees

Where there is an agreement between the principal and a subcontractor or supplier which expressly provides for attorney's fees, or where the bond itself authorizes such recovery, courts generally will award attorney's fees against the Miller Act surety. See, e.g., United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors, Inc., 834 F.2d 1533, 1548 (10th Cir. 1987); United States ex rel. Micro-King Co. v. Community Science Tech., Inc., 574 F.2d 1292, 1295 (5th Cir. 1978). According to these courts, the attorney's fees incurred in enforcing a subcontract is just another benefit provided by the terms of the subcontract which the surety has undertaken to guarantee. Payment of such expenses "form[s] a part of the consideration which [the contractor] agreed to pay for services performed" by the subcontractor. Thus, "[i]f the [subcontractor is] to be 'paid in full' the 'the sums justly due'" to it, "these items must be included." United States ex rel. Sherman v. Carter, 353 U.S. 210, 220 (1957)(applying this logic to award fees where a contractor's employees sued the Miller Act surety); United States ex rel. Carter Equip. Co. v. H.R. Morgan, Inc., 554 F.2d 164, 166 (5th Cir. 1977) (recognizing that the Carter principles apply to various Miller Act situations).

It also appears the majority of federal courts have held that a contractual provision for attorney's fees between a subcontractor and its supplier is enforceable against a general contractor and its surety under the Miller Act. See, e.g., United States ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co., 86 F.3d 332 (4th Cir. 1996); United States ex rel. Capps v. Fidelity & Deposit Co. of Md., 875 F.Supp. 803 (M.D. Ala. 1995); United States ex rel. Krupp Steel Prods. v. Aetna Ins. Co., 923 F.2d 1521 (11th Cir. 1991)(hereinafter "Krupp II");[2] United States ex rel. Southeastern Mun. Supply Co. v. National Union Fire Ins. Co. of Pittsburgh, 876 F.2d 92 (11th Cir. 1989); United States ex rel. Carter Equip. Co. v. H.R. Morgan, Inc., 554 F.2d 164 (5th Cir. 1977). The rationale of these holdings is that attorney's fees are "sums justly due" under the Miller Act, and because "there appears to be no statutory basis for distinguishing between the recovery allowed to the supplier of a subcontractor and that of a person dealing directly with the general contractor," Morgan, 554 F.2d at 166, attorney's fees should be a recoverable item. But see United States ex rel. L.K.L. Assocs. v. Crockett & Wells Constr.,

[2] It should be noted that an earlier panel of the Eleventh Circuit in United States ex rel. Krupp Steel v. Aetna Ins. Co., 831 F.2d 978 (11th Cir. 1987)(hereinafter Krupp I) held that a contractual provision between the supplier and a subcontractor for the recovery of attorney's fees was *not* enforceable under the Miller Act against the general contractor or its surety. Subsequent thereto, another panel of the Eleventh Circuit in United States ex rel. Southeastern Mun. Supply v. National Union Fire Ins. Co. of Pittsburg, 876 F.2d 92 (11th Cir. 1989) explicitly repudiated the Krupp I holding as "merely dictum" and erroneous. 876 F.2d at 93. See also Krupp II, 923 F.2d at 1527.

Inc., 730 F. Supp. 1066 (D. Utah 1990)(wherein Court relied on Krupp I in denying attorney's fees to supplier where there was no fee provision in the general contract or payment bond).

The Federal Circuits are divided on whether state law or federal law should govern the interpretation of a Miller Act contract between the parties and the standards for determining the amount of attorney's fees awarded. See, e.g., United States ex rel. Reed v. C.E. Callahan, 884 F.2d 1180 (9th Cir. 1989)(state law controls the interpretation of Miller Act subcontracts to which the United States is not a party); United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors, Inc., 834 F.2d 1533 (10th Cir. 1987)(question of attorney's fees is a matter of federal law, not state law). In C.J.C., Inc., for example, the District Court concluded the parties improperly relied upon New Mexico law, rather than federal law, in determining standards for awarding attorney's fees. On appeal, the Tenth Circuit Court of Appeals agreed that federal law should apply, but further held that the District Court's application of standards for awarding fees in federal civil rights actions was overly restrictive, and remanded the case with directions to apply a less stringent standard so as to make the non-breaching party whole. Id. at 1547.

Whether state or federal law applies to the determination of the amount of attorney's fees, the standards actually tend to be relatively similar, typically involving a laundry-list of facts. The federal fee rules, as well as most state fee rules, indicate that a court should consider factors such as: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). The analysis typically begins by calculating the so-called "lodestar" amount, calculated as the number of hours reasonably spent multiplied by a reasonable hourly rate. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)(this is the "most useful starting point"); Norman v. Housing Auth. of the City of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988). Once the lodestar amount is determined, upward or downward adjustments may be appropriate depending on the particular case. Id. Significantly, in Miller Act cases, several courts have noted their inherent power to adjust or even deny a contractual award of fees if such an award would be "inequitable" or "unreasonable" under the circumstances. See, e.g., United States ex rel. Rent It Co. v. Aetna Cas. & Sur. Co., 988 F.2d 88, 91 (10th Cir. 1993); C.J.C., Inc., 834 F.2d at 1549-50 (Court may use factors to assist in determining whether fees claimed are unreasonable or inequitable, but should not independently calculate a "reasonable fee"); United States v. Hankins Constr. Co., 510 F.Supp. 933, 940 (E.D. Mo. 1981)(Court denied award of attorney's fees to Miller Act defendant where it would have been "inequitable"); Cable Marine, Inc. v. M/V Trust Me II, 632 F.2d 1344 (5th Cir. Unit B 1980); United States ex rel. DeBlasio Constr., Inc. v. Mountain States Constr. Co. 588 F.2d 259, 263 (9th Cir. 1978)(Court affirmed trial court's decision to deny fees where recovering party was partly at fault).

B. Bad-Faith Conduct and Courts' Inherent Power to Impose Sanctions

As noted previously, the Supreme Court in F.D. Rich determined that attorney's fees may be recovered, as an exception to the American Rule, when a party has acted "in bad faith, vexatiously, wantonly or for oppressive reasons." 417 U.S. at 129. Both the Supreme Court and numerous Circuit Courts have explicitly recognized the bad-faith exception is applicable to Miller Act cases. See F.D. Rich, 417 U.S. at 126-29; Tacon Mechanical Contractors, Inc. v. Aetna Cas. & Sur. Co., 65 F.3d 486, 489 (5th Cir. 1995); United States ex rel. Yonker Constr. Co. v. Western Contracting Corp., 935 F.2d 936, 942-43 (8th Cir. 1991); United States ex rel. Leno v. Summit Const. Co., 892 F.2d 788, 791 n.3 (9th Cir. 1989); United States ex rel. C.J.C., Inc. v. Western States Mechanical Contractors, Inc., 834 F.2d 1533, 1542-43 (10th Cir. 1987). Moreover, several courts have awarded attorney's fees as a punitive measure against Miller Act sureties under the bad-faith exception. See, e.g., Yonker Constr. Co., 935 F.2d at 942 (wherein Court held that "knowing and unreasonable conduct" constitutes "bad faith" for purposes of justifying an award of attorney's fees); United States ex rel. Treat Bros. Co. v. Fidelity & Deposit Co. of Md., 986 F.2d 1110, 1120 (7th Cir. 1993)(Court affirmed award against contractor under bad-faith exception in Miller Act case).

Although there is some disagreement, most courts have concluded that the bad faith conduct giving rise to attorney's fees must occur during the litigation itself. See, e.g., Towerridge, Inc. v. T.A.O., Inc., 111 F.3d 758, 766 (10th Cir. 1997), citing Chambers v. NASCO, Inc., 501 U.S. 32, 53 (1991)("[t]he imposition of sanctions under the bad-faith exception depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation"). But see Yonker Constr. Co., 935 F.2d at 942 (8th Cir. 1991)(Court, in upholding award of attorney's fees, stated the exception encompasses bad faith acts occurring both before and during litigation).[3] In either event, courts have emphasized that the standards for a finding of bad faith are stringent, and the imposition of sanctions pursuant to the court's inherent power is undertaken only in rare circumstances. See, e.g., United States ex rel. Balf Co. v. Casle Corp, 895 F.Supp. 420, 430 (D. Conn. 1995); United States ex rel. D & P Corp. v. Transamerica Ins. Co., 881 F.Supp. 1505, 1510 (D. Kan. 1995); United States ex rel. Howell Crane Serv. v. United States Fidelity & Guar. Co., 861 F.2d 110, 113 (5th Cir 1988)(to justify an award of attorney's fees under bad-faith exception, there must be a specific finding of bad faith, vexatiousness, or oppression). Indeed, in most of the reported decisions, it appears that courts have rejected requests for attorney's fees under the Miller Act based upon the bad-faith exception to the American Rule. See Towerridge, Inc., 111 F.3d at 769; Tacon Mechanical Contractors, Inc. 65 F.3d at 489 (slow payment of claims by a surety is not sufficient to support a finding of bad faith, vexatiousness or wanton conduct); Balf Co., 895 F.Supp. at 430; United States ex rel. Mid Seven Transp. v. Blinderman Constr. Co., 735 F.Supp. 272, 274 (N.D. Ill. 1990); Howell Crane Serv., 861 F.2d at 113; United States ex rel. A.C. Garrett v. Midwest Constr. Co., 619 F.2d 349, 352 (5th Cir. 1980).

[3] In McLarty v. United States, 6 F.3d 545 (8th Cir. 1993), the Eighth Circuit Court of Appeals later clarified Yonker Constr. Co. by holding that, in determining whether to award an attorney's fee because of bad faith, "[t]he court may consider conduct both during and prior to litigation, although the award may not be based solely on conduct that led to the substantive claim." Id. at 549, quoting Perales v. Casillas, 950 F.2d 1066, 1071 (5th Cir. 1992). See also Lamb Eng'g & Constr. Co. v. Nebraska Pub. Power Dist., 103 F.3d 1422, 1435-38 (8th Cir. 1997); Association of Flight Attendants v. Horizon Air Indus., Inc., 976 F.2d 541, 548-50 (9th Cir. 1992).

II. REGIONAL STATES' PUBLIC WORKS STATUTES

The following is a sampling of attorney's fees provisions from several States' public works acts within the region:

ALABAMA

Under Ala. Code § 39-1-1 (1975), a payment bond claimant who substantially prevails on its claim is entitled to recover "a reasonable attorneys' fee." No attorney's fees are due if the surety or the contractor pays the claim in full within forty-five (45) days from the date the claimant mailed proper notice of the claim to the surety by registered or certified mail.

FLORIDA

Florida's Statutes § 255.05 expressly provides that the prevailing party is entitled to recover reasonable attorney's fees in an action to enforce a payment bond claim on a public works project.[4] This amount may include attorney's fees incurred on appeal or for arbitration in an amount to be determined by the court.

GEORGIA

Georgia's "Little Miller Act," Ga. Code Ann. §§ 13-10-1 and 36-82-104 (1993 & Supp. 1998), does not expressly provide for an award of attorney's fees to a successful payment bond claimant. Several decisions, however, have suggested that recovery may be allowed under Georgia's bad faith suretyship statute, Georgia Code Ann. § 10-7-30 (1994)(which provides for a 25 % penalty and attorney's fees against a surety who refuses in bad faith to make payment to an obligee) where a surety on a public works project refuses to make payment in bad faith. See, e.g., Ayers Enters., Ltd. v. Exterior Designing, Inc., 829 F.Supp. 1330 (N.D. Ga. 1993); Harry S. Peterson Co. v. National Union Fire Ins. Co., 434 S.E.2d 778 (Ga. Ct. App. 1993)(action brought by subcontractor for breach of payment bond obligation plus attorney's fees under Ga. Code Ann. § 10-7-30).

LOUISIANA

Under Louisiana's Public Works Act, any claimant recovering the full amount of a timely and properly recorded or sworn claim will be allowed 10 % attorney's fees on the amount recovered. La. Rev. Stat. Ann. § 38:2246 (West Supp. 1999). In order to be entitled to such fees, the statute requires an "amicable demand" for payment must be made on the principal and surety, and thirty (30) days must elapse without payment being made. Because this statute is penal in nature, its provisions are strictly construed by the courts. See, e.g., National Glass & Glazing, Inc. v. Grimaldi Constr., Inc., 680 So. 2d 56 (La. Ct. App. 1996); Chabanais

[4] Under Fla. Stat. Ann. §§ 627.756 and 627.428 (West 1996), the prevailing claimant may also recover attorney's fees on private bond projects. See also Davis Indus. Corp. v. Ground Improvement Techniques, 629 So. 2d 995 (Fla. Dist. Ct. App. 1993).

Concrete Pumping, Inc. v. Woodrow Wilson Constr. Co., 647 So. 2d 862 (La. Ct. App. 1994). Louisiana's statute also provides that the principal or surety may be awarded a reasonable amount as attorney's fees if the trial court finds that an action was brought by any claimant "without just cause or in bad faith." See La. Rev. Stat. Ann. § 38:2246 (West Supp. 1999).

MISSISSIPPI

Mississippi's Public Works Statutes, Miss. Code Ann. § 31-5-51, et seq. (1972), provides that the trial court, in its discretion, may award a successful claimant a reasonable amount as attorney's fees if the trial court finds the defense raised by the contractor or surety was "not reasonable, or in good faith, or merely for the purpose delaying payment." See Miss. Code Ann. § 31-5-57. Likewise, if the trial court determines the action was brought without just cause or in bad faith, the trial court may, in its discretion, award the contractor or surety a reasonable attorney's fee. Section 31-5-57 does not affect the right of any person to recover attorney's fees where provided by a contract or bond.

NORTH CAROLINA

North Carolina's Public Works Statute, as codified at N.C. Gen. Stat. §§ 44A-25 through 44A-35 (1991), provides for an award of attorney's fees to the "prevailing party" if the court finds that the non-prevailing party unreasonably refused to fully resolve the dispute. See N.C. Gen. Stat. § 44A-35. The determination of whether the non-prevailing party acted unreasonably is within the discretion of the trial court. See Barrett Kays and Assocs. v. Colonial Bldg. Co., 500 S.E. 2d 108 (N.C. App. 1998)(determination not to award fees was not an abuse of discretion where trial court found no unreasonable refusal to resolve dispute) . The prevailing party is defined as a party plaintiff or third-party plaintiff who obtains a judgment of at least 50 % of the monetary amount sought or a party defendant or third-party defendant against whom a judgment of less than 50 % of the full amount sought is recovered.

TEXAS

Public works contracts in Texas exceeding the sum of $25,000.00 are governed by Chapter 2253 of the Texas Government Code. Under § 2253.074, a court may award costs and reasonable attorney's fees that are "equitable" in a proceeding to enforce a claim on a payment bond or in a proceeding to declare that a claim, or any part of the claim, is invalid. Tex. Gov't Code Ann. § 2253.074 (West Supp.1999). See generally S.A. Maxwell Co. v. R. C. & Assocs., Inc., 873 S.W. 2d 447 (Tex. Ct. App. 1994)(decision whether to grant or deny costs or fees in action on payment bond is within trial court's sound discretion, and decision will not be reversed absent a showing of a clear abuse of discretion). On private works projects and public works contracts in amounts of $25,000.00 or less, a court may award costs and reasonable attorney's fees as are "equitable and just." See Tex. Prop. Code Ann. § 53.156 (West 1995).

CONCLUSION

As a general rule, and as clarified by the Supreme Court in F.D.Rich, attorney's fees are not recoverable to a successful claimant under the Miller Act. Where, however, an enforceable contract provision exists which explicitly provides for the recovery of attorney's fees, Courts generally will enforce such provisions against the Miller Act surety. Moreover, in a few instances Courts have awarded attorney's fees where the surety's conduct has been particularly egregious and oppressive.

Public works statutes in many States expressly provide for the recovery of attorney's fees by the prevailing party. Review of the particular State's statute and case law governing public works payment bonds is necessary to determine to what extent attorney's fees are recoverable by the claimant or the defending surety.