EJCDC®

ENGINEERS JOINT CONTRACT DOCUMENTS COMMITTEE

RECENT COURT DECISIONS OF RELEVANCE TO CONTRACT DOCUMENTS

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1. **Issue:** Did a supplier satisfy the requirements for making a payment bond claim by sending the notice of claim by e-mail? *Johnson-Lancaster & Assocs. v. H.M.C., Inc.* United States District Court (Maryland) (2021).

   Summary: Plaintiff Johnson-Lancaster supplied (and apparently installed) food service equipment as part of the renovation of the Prince George's County Courthouse cafeteria. The subcontractor that had engaged Johnson-Lancaster failed to pay for the materials and services, resulting in a reported balance owed of $175,571. Johnson-Lancaster submitted a copy of its claim to the prime contractor, and made repeated requests for a copy of the project's payment bond; eventually the prime contractor complied.

   The payment bond had been issued by Hudson Insurance Company in compliance with the Maryland Little Miller Act. (The Miller Act is a federal law that requires performance and payment bonds on specified federal contracts; most states have enacted similar statutes called "Little Miller Acts.") The Maryland Little Miller Act sets various requirements for making a payment bond claim—for example, an unpaid lower-tier supplier must give written notice to the prime contractor within 90 days after last furnishing labor or materials. Another specific requirement states that a "notice under this subsection…shall be sent by certified mail to the contractor…at a place where the contractor has an office or does business." Johnson-Lancaster plainly complied with all the various procedural requirements, with one exception: it sent the notice of claim and claim form to the prime contractor (and the surety) by e-mail, not certified mail.

   To enforce its claim Johnson-Lancaster initiated a lawsuit contending, in part, that the surety was liable to Johnson-Lancaster under the payment bond. The surety filed a motion for partial summary judgment based on Johnson-Lancaster's failure to comply with the certified mail requirement.

   Decision: The district court denied the surety's motion for partial summary judgment. The court stated that it was not willing to comply with the surety's urging that the court "simply and blindly apply strict construction to the words 'certified mail' without looking to the purpose of the statute." The Maryland Little Miller Act's preamble indicates that the statute's "main purpose" is to provide "greater protection to subcontractors [including suppliers] on contracts awarded by the state." By contrast, the notice requirements serve the lesser purpose of protecting the interests of the sureties and intermediate general contractors.

   The court cited with approval a 1940 U.S. Supreme Court decision in which the high court drew a pertinent distinction between the statutory provisions stating the fundamental conditions necessary to bring a Miller Act claim, on the one hand, and

provisions concerning the manner of service of notice, on the other hand. As to the latter, the Supreme Court had held that Congress's intent in requiring certified mail was to provide a method that would afford sufficient proof of service. Applying that point to the Johnson-Lancaster claim, the Maryland district court concluded:

> The purpose of certified mail is to protect the parties—for a plaintiff that notice was sent and received, and for a defendant the date of receipt of such notice. In this case and under these specific facts, Plaintiff [Johnson-Lancaster] has an email record of that receipt and [Hudson Insurance] was on notice of the claim and had a record of the receipt. There is no showing of prejudice nor can there be since [Hudson] received timely notice.

The court also made the following points in favor of allowing the Johnson-Lancaster claim to proceed:

- To grant summary judgment would provide an "unjust windfall" to the surety.
- Summary judgment would thwart the primary purpose of the Little Miller Act.
- The content of the notice was not at issue.
- The timeliness of the notice was not at issue.
- The surety's and prime contractor's receipt of notice was not at issue. "Receipt of the claim was ensured by email which provided a digital history of delivery."

Comment: At first review, this decision is somewhat jarring—the statute says notice by certified mail, period. However, the court's reasoning is supported by its determination of the fundamental purpose of the Maryland Little Miller Act—to provide a payment bond remedy to unpaid lower-tier contributors—and case law that allowed exceptions to the formalistic notice requirements. The decision may also be a concession to the universal use of email in the 21st century business world.

EJCDC's Standard General Conditions allow written notice "by e-mail to the recipient, with the words 'Formal Notice' or similar in the e-mail's subject line." EJCDC® C-700 (2018), Standard General Conditions of the Construction Contract, Paragraph 18.01.A.3.

EJCDC® C-615, Payment Bond, requires that notices be "mailed or delivered" to the various addresses stated in the bond. See C-615 Paragraph 13. However, the same clause provides leeway for notices: "Actual receipt of notice…however accomplished, will be sufficient compliance as of the date received."

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2. **Issue:** Judicial conversion of a termination for cause to a termination for convenience. *Conway Construction Co. v. City of Puyallup*. Supreme Court of Washington (2021).

   Summary: The City of Puyallup contracted with Conway Construction Company to build a road—reportedly America's first arterial roadway built with pervious concrete. There were problems with the project, including contentions by the City that Conway's work did not meet the requirements of the specifications, and site safety issues. The City eventually issued a notice of suspension and breach of contract, citing nine contract violations.

   Under the contract, Conway had 15 days to remedy the contract breaches. Conway took steps to do so, and at the same time asked to meet with the City to discuss the City's concerns. The City engineer refused to meet, stating that "the required actions seem to be clear, therefore I don't see the need for a meeting." Ultimately the City issued a termination for default (more commonly known as a termination for cause).

   Conway Construction sued the City, arguing that the termination for cause was unjustified and should have been a termination for owner's convenience. A lengthy trial ensued, resulting in the judge finding that Conway had not been in default when it was terminated, and the termination should have been for convenience, not for cause.

   The differences between a termination for cause and a termination for convenience can be significant:

   - Under a termination for convenience, typically the contractor is entitled to be paid for the work that it has performed to date, usually including related overhead and profit, and for termination-related transaction costs.

   - Under a termination for cause, all payments stop until the project (including remedial work) has been completed by replacement contractors, at which time all additional costs of completion are levied against the contractor.

   - Replacement contractors often charge a high, non-competitive price for their services.

- A termination for cause will usually require the involvement of the contractor's performance bond surety (and indeed a surety was apparently indirectly involved in the *Conway v. Puyallup* case).

- A termination for cause can harm the terminated contractor's reputation.

The dispute regarding the termination of the Puyallup-Conway road construction contract eventually reached the State of Washington's Supreme Court.

Decision: The Supreme Court of Washington upheld the trial court's decision in favor of the contractor, ruling that the termination should have been for the owner's convenience, not for cause.

The core of the decision is an analysis of the process that should have been followed for a termination for cause, under the governing contract provisions and principles of contract law:

- A termination for cause must be based on good cause, such as the contractor's failure to meet the requirements of the contract.

- The owner's notice of termination for cause must be accompanied by an opportunity for the contractor to cure the cited defects in its work.

- The contractor must establish that it did not neglect or refuse to cure the cited defects.

- The efforts to cure the defects must be satisfactory to the owner, but the owner must act reasonably and in good faith in deciding whether the corrective work is satisfactory.

The Supreme Court concluded that the trial court was justified in finding that the contractor, Conway, did take appropriate "steps to remedy the defaulting conditions," reached out to the City to determine if its efforts were sufficient, and repeatedly requested a meeting. Thus, "Conway was not neglecting or refusing to correct the defects."

The high court held that under established law there is an "implied duty of good faith and fair dealing" in Washington contracts that "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." The findings of fact from the trial established that the City had been unreasonable or acted in bad faith in handling the termination—in particular, the refusal to meet with the contractor. Also troubling to the Supreme Court was the City engineer's testimony

that he had "lost confidence" in the contractor's ability to perform satisfactorily: "Loss of confidence, however, is not grounds for default termination."

Comment: The published decision mentions repeatedly that there was a lengthy trial that examined the facts concerning the defects, the termination, the contractor's efforts to cure, and the City's lack of satisfaction with those efforts, resulting in extensive findings of fact that were largely adverse to the City. The underlying facts that are specifically mentioned in the decision (declining to meet with the contractor, for example) do not seem especially compelling, but it is noteworthy that the trial judge's findings of fact, viewed in their entirety, were persuasive to both the intermediate court of appeals and the state Supreme Court.

Though having a meeting (or not) may not seem especially significant, in actual practice the value of meetings in avoiding or resolving construction problems or disputes is well recognized. At the project level, regular meetings are a project staple. Of more direct relevance to a potential termination, the industry's standard performance bond encourages a conference (Owner, Contractor, Surety) in response to a notice that the Owner is considering declaring a contractor default. EJCDC® C-610, Performance Bond, Paragraph 3.1. Many construction contracts, including those published by EJCDC, call for direct negotiations between the parties with the intent to reach an early resolution of claims (EJCDC® C-700 (2018), Standard General Conditions of the Construction Contract, Paragraph 12.01.C), or have similar variations of "meet, confer, negotiate." From this broader perspective, the city engineer's refusal to meet with the struggling contractor takes on more weight.

The published decision refers to both "the city engineer" and "the city's engineer." It is not clear whether these are references to a third-party engineering firm under contract to the City, or to a city official—more likely the latter. There is no indication of any City claim against a third-party.

Under an express provision of the Puyallup-Conway construction contract, an improper termination for default is automatically converted into a termination for convenience. The industry's standard contracts do not contain such a provision (see C-700 2018, Article 16; AIA A201™, General Conditions of the Construction Contract, Article 14), but the merits of adding such a provision are worthy of discussion.

Another issue that is discussed in the *Puyallup* case is whether an owner may pursue a claim against the contractor if defective work is discovered after a termination for convenience. The apparent answer is that such a claim is possible, but only if the terminated contractor is given notice and an opportunity to cure the defect. If such is the answer (the wording of the decision is somewhat unclear), it would be consistent with the standard principle that certain obligations survive the termination of the

contract, regardless of whether the termination was for convenience or cause. See C-700 2018, Paragraph 18.06.

In the Puyallup-Conway contract, the notice of default and opportunity to cure were interwoven with the suspension of work clause. In C-700, the Owner's right to suspend the Work is at Owner's discretion, and not linked to default. Instead, Contractor default is a condition of a termination for cause. C-700 2018, Paragraph 16.02.A.

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3. **Issue:** Can an A/E firm invoke the "licensure defense" if sued by an unlicensed contractor? *Wright Construction Services, Inc. v. The Hard Art Studio, PLLC.* Court of Appeals of North Carolina (2020).

   Summary: In 2014 a developer, Hillsborough Lofts, retained an architect to design a mixed-use retail and student housing complex in Raleigh, North Carolina. The architect also took on the task of soliciting bids from construction contractors. The successful bidder, Wright Construction Services, Inc., indicated that it was not licensed as a contractor in North Carolina. Hillsborough Lofts and Wright Construction nonetheless entered into a construction contract; Wright obtained a North Carolina contractor's license a few months later.

   At some point Hillsborough Lofts terminated the first architect and hired a new firm, Hard Art Studio. (The published decision does not elaborate on the exact timeline or the relative degree of involvement of the first architect and Hard Art Studio in preparing the design.) Once underway the project was "plagued by delays" including design problems, the unexpected discovery of an underground storage tank, and constructability concerns with shaft walls and shear walls. Hard Art Studio acknowledged that numerous design issues were preventing the contractor from completing construction, and strongly recommended to its client that the work be stopped "until ALL the design issues are worked out…."

   After the contractor missed the critical completion date (apparently tied to the North Carolina State academic year), Hillsborough Lofts terminated the construction contract, and an arbitration ensued between Hillsborough Lofts and Wright Construction. The arbitrators awarded $1.5 million in damages to Wright Construction, based on Hillsborough's material breach of contract "by failing to provide… a constructible design, by failing to respond to shop drawings and requests for information, and by interfering" with the contractor's work. Either this award was not collectible, or was not sufficient, because the aggrieved contractor subsequently filed a lawsuit against Hard Art Studio, alleging the negligent breach of the professional duty of care owed by the architect to the general contractor.

Hard Art Studio moved for summary judgment, contending that Wright Construction's failure to hold a North Carolina construction license at the time it entered into the construction contract was a bar to Wright pursuing claims against the architect. The trial court agreed, granted the summary judgment motion, and dismissed the lawsuit. Wright Construction appealed.

Decision: Under North Carolina law, architects and engineers owe a duty of care to "those who must reasonably rely" on the A/E's professional performance; the violation of that duty is negligence. This duty of care is owed to a project's construction contractor; the construction contractor, though not in contractual privity with the A/E, may recover "any extra costs resulting from the [A/E's] negligence." Such negligence claims by contractors against A/Es are "entirely separate from any rights and responsibilities that exist between the property owner and the builder under the construction contract."

The licensure defense originates in a North Carolina statute that requires a contractor to be licensed before bidding on or working on a construction project. According to the Supreme Court of North Carolina, this licensing requirement is intended to protect the public from "incompetent builders" and as a result a contractor that is (or at the start of the project was) not properly licensed may not recover for the owner's breach of contract, because of the taint of the illegal act at the conception of the contract.
As to the claims brought against the architect by Wright Construction, however, such claims did not originate with the tainted contract between owner and contractor. Barring the claims would not protect the public; rather, doing so would protect the private interests of the architect. This would actually undermine the public interest, according to the appellate court, by shielding A/Es from:

> [L]egal responsibility for their failure to exercise due care in the critical aspects of the construction process. The public gains nothing from barring the claims [against the A/E]; only the tortfeasor [wrongdoer] benefits.

The appellate court concluded by chastising Hard Art Studio for its:

> [U]nwillingness to see these negligence claims for what they are—claims that they, as architects and engineers, failed to use due care in the exercise of professional knowledge and skill that only they possess.

In sum, the licensure defense in North Carolina is only available for breach of contract claims against the owner.

Comment: The decision does not include any discussion about why the licensure defense did not protect the project owner against Wright Construction's claims in the arbitration. Perhaps the defense was not raised in the arbitration, or the decision was silent on why the defense did not apply; possibly the arbitration decision was not part of the record in the subsequent court case between Wright Construction and Hard Art Studio.

The decision also does not shed any light on whether the owner, having been hit with a $1.5 million arbitration award based at least in part on design and other A/E problems, sought recovery against Hard Art Studio, or for that matter against the first architect on the project.

In most states, there are legal barriers that prevent, or make it difficult, for construction contractors to directly pursue the project A/E for economic losses. In a more typical jurisdiction, a contractor that alleges that it has incurred losses due to design errors would be limited to pursuing its contract rights against the owner (for example, a Spearin Doctrine claim based on the implied warranty of the design); the owner could then pursue its contract rights or a professional negligence claim against the A/E.

The EJCDC standard construction contract documents shield the Engineer from liability to the Contractor for decisions rendered during construction regarding the requirements of the Contract Documents, and regarding the acceptability of the Work. EJCDC® C-700 (2018), Standard General Conditions of the Construction Contract, Paragraph 10.06.A. For equitable and enforceability reasons, the documents do not attempt to require the Contractor to waive claims regarding the design or other Engineer functions.

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4. **Issue:** Does a performance bond require termination of the principal as a condition precedent to the surety's obligations? *Arch Insurance Co. v. The Graphic Builders LLC.* United States District Court (Massachusetts) (2021).

   Summary: The Graphic Builders (TGB) was the general contractor on an apartment building construction project in Boston. TGB retained a subcontractor, RCM Modular, to fabricate, deliver, and assemble modular components of the apartment building. TGB required RCM to furnish a subcontractor's performance bond covering RCM's work. Arch Insurance issued the required bond. Based on excerpts, the bond was based on the standard bond published by AIA (AIA A312) and EJCDC (EJCDC® C-610, Performance Bond), adapted for use at the subcontractor level.

   The subcontractor, RCM, delivered and began installing the modular units. TGB contended that the modules were defective, citing leaking windows and misalignment issues. TGB did not terminate the RCM subcontract, however, stating later that

terminating would have been "the equivalent of shooting [itself] in the face" (an even more gruesome expression than shooting oneself in the foot). Instead, TGB unilaterally arranged for other subcontractors to remediate RCM's defective work, and sent an invoice to RCM and Arch seeking reimbursement of $2.8 million in remedial costs incurred.

Representatives of TGB, Arch, and RCM eventually met in person to discuss the problems but did not reach a resolution. TGB followed up the meeting with a letter declaring RCM in default, but noted that TGB was not yet terminating the subcontract; this letter was followed by more notices of default, and an increased demand of $3 million. Arch rejected the general contractor's demands and denied liability based on TGB's failure to terminate the subcontract, which Arch asserted was a "condition precedent" to a recovery on the performance bond. Arch then filed a lawsuit in federal court, seeking a judicial declaration discharging Arch from liability because by not terminating RCM—a condition precedent to a claim under the bond—TGB had thereby rendered the bond null and void.

Decision: The federal district court's decision explained that under Massachusetts law a "condition precedent" is an event which must occur before an obligation to perform under a contract. (A performance bond is a contract.) The specific performance bond issued by Arch stated that the obligations of the surety would arise only after several express conditions were met; the condition critical to the case is that TGB "declares a Contractor Default, terminates the Construction Contract, and notifies the surety." The court found that it was undisputed that although TGB declared a Contractor Default, TGB never terminated the RCM subcontract. Accordingly, the court held that Arch was discharged from "any and all liability relating to [the Arch Performance Bond]."

In its decision the court also commented on what it called "an apparent last ditch effort [by TGB] to avoid summary judgment." TGB had raised a new argument in its final submittal regarding summary judgment: that it had not been possible for TGB to terminate the subcontract, because RCM had substantially completed its work under the subcontract. The court made short shrift of this contention, pointing out that the subcontract did not contain any such limitation on termination, and pointing out that the argument could not hold up because TGB representatives had stated that they consciously chose not to terminate for other reasons, not because of any perceived obstacle posed by the purported "substantial completion."

Comment: This decision closely adheres to the plain provisions of the standard performance bond. The structure and carefully composed wording of the standard bond do not leave much room for doubt about the need to terminate the contract in order to trigger the surety's core obligations.

The stipulation that there must be a termination of the bonded contract is not an abstract formality—such a requirement assures that the safety net that is the performance bond is reserved for serious lapses in performance/completion. The performance bond is not a device for managing the day-to-day problems and frustrations that accompany most construction projects.

The *Graphic Builders* decision also addresses another issue: an accusation by the general contractor that during the lawsuit the surety engaged in unfair acts or practices by threatening to retaliate, and then actually retaliated by allegedly terminating the surety's bonding relationship with a TGB parent company. The court held that the general contractor's effort to pursue these "threadbare accusations" was "futile" because the allegations were merely conclusory and were unsupported by any factual allegations detailing the alleged retaliation.

The EJCDC standard bonds (C-610, Performance Bond, and C-615, Payment Bond) are drafted to meet the bond requirements of the prime (Owner-Contractor) contract (for example, the bond provisions of EJCDC® C-700 (2018), Standard General Conditions of the Construction Contract, Article 6). However, both these standard bonds contain a simple mechanism for adapting them to use at the subcontract level—presumably this mechanism was used to adapt the bond issued to TGB:

> If this Bond is issued for an agreement between a contractor and subcontractor, the term Contractor in this Bond will be deemed to be Subcontractor and the term Owner will be deemed to be Contractor.

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5. Issue: Enforceability of a lien waiver. *Great Lakes Excavating, Inc. v. Dollar Stores, Inc.* Court of Appeals of Wisconsin (2021).

Summary: Great Lakes Excavating performed the sitework for a commercial parking lot project. The scope of work expanded to include the removal of unsuitable subsoils, importation of stone fill, installation of engineered fabric, and the removal of a concrete pad. The additional work was conducted under one change order with an indeterminate price, and two change orders submitted by Great Lakes Excavating but never signed or returned by AMCON, the project's design-builder.

After successfully completing the work, Great Lakes Excavating submitted an invoice to AMCON for $222,238. AMCON did not pay. The owner of Great Lakes personally went to AMCON's office to attempt to collect payment. AMCON contended that it was only able to pay $33,448 (somewhat less than the original base price), and presented a check for that amount together with a lien waiver form indicating "Waiver of Lien

to Date" and referring to payment of $33,448. The Great Lakes owner crossed out "to Date," inserted the word "Partial," signed the waiver form, and took the check.
Later, Great Lakes Excavating filed a claim for lien and a lawsuit in state court, seeking to recover the balance of $188,790 from the design-builder, the project owner, and the property's primary tenant. The lawsuit sought to foreclose the lien against the owner's property, and also included breach of contract, unjust enrichment, and other routine causes of action. The owner, joined by its tenant, moved for partial summary judgment dismissing the lien claim, based on the lien waiver that Great Lakes' owner had signed. The trial court granted the motion for partial summary judgment, and Great Lakes appealed.

Decision: The Wisconsin Construction Lien Law provides that a lien waiver waives **all** lien rights unless the document "specifically and expressly limits the waiver to apply to a particular portion" of the labor, services, and materials that were provided. The lien law also warns that any ambiguity in a lien waiver will be construed against the party signing the waiver. Great Lakes took the position that by revising the document to state "Waiver of Lien **Partial**," Great Lakes was clearly not making a full waiver of lien; and by referring to the limited amount of $33,448 it had defined "a particular portion" of the work, using dollars to expressly indicate the scope of the waiver.

The court of appeals concluded that Great Lakes had failed to limit the scope of the lien waiver. Inserting the word "Partial" failed to indicate a specific and express limit on the waiver. The monetary amount ($33,448) was not tied to a "particular portion" of the work, such as materials, or labor, or other possible line items of the amount sought. The court also took note of the detailed wording in the lien form, which the owner of Great Lakes Excavating had not revised or altered:

> The undersigned, for and in consideration of $33,448...does hereby waive and release any and all lien or claim of, or right to, lien...on account of labor, services, material, fixtures, apparatus, or machinery furnished to this date….

The court acknowledged that the lien law is generally construed liberally in favor of unpaid claimants, but "we will not disregard a statute that is clear on its face." Presumably this reference was aimed partly at the express clause in the statute that called for construing ambiguities against the signer of a lien waiver.

Comment: Construction contractors, subcontractors, and suppliers typically provide labor and materials before they are paid for their efforts. This is a fundamental feature of the construction process. The willingness of lower-tier contributors to (in effect) extend credit keeps the work flowing. On private sector projects, one reason this system works is that such contractors and suppliers know that if they are not paid,

they will have recourse, through the lien laws, to very valuable collateral: the owner's property. To assure confidence in this system, the law interpreting lien rights has historically been interpreted in favor of lien claimants, as the Wisconsin court of appeals acknowledged.

At the same time, owners have a strong interest in keeping their property free of liens, insulated from lien foreclosures, and shielded from clouds on title. This has led to strict notice requirements, short deadlines for enforcing lien rights, and the insistence on binding waivers of lien.

In the Great Lakes Excavating case, the company contributed to the success of the parking lot project by furnishing labor, services, and materials prior to receiving payment. The exact amount that it was owed was in dispute, but Great Lakes was put in a difficult position by the offer of a clearly partial payment tied to a comprehensive lien waiver. The company owner recognized the need to narrow the lien waiver to "partial" status, but the attempted modifications were not enough to overcome the statutory presumption that a lien waiver eliminates all lien claims.

Lien waivers are part of the payment procedures set out in EJCDC® C-700 (2018), Standard General Conditions of the Construction Contract. See especially C-700, Paragraph 15.02, Contractor's Warranty of Title, and C-700, Paragraph 15.06.A.2, concerning the final application for payment.

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6. **Issue:** Entitlement of contractor's "Project Manager" to recourse under the project's payment bond. *Dickson v. Forney Enterprises, Inc.* United States District Court (Eastern District of Maryland) (2021).

   Summary: Forney Enterprises entered into a contract with the federal government to repair and upgrade staircases in the Pentagon. Forney then entered into a subcontract with Dickson, a professional engineer, under which Dickson, as "Project Manager," performed supervisory duties including coordinating deliveries, inspecting materials, making field measurements, and supervising demolition. After more than three years of the staircase work the Department of Defense terminated the contract with Forney. Forney in turn ended the subcontract with Dickson.

   After the project closed down, Dickson contended that Forney owed him $442,600 for his services, and initiated a payment bond claim and lawsuit against the surety, Fidelity and Deposit Company of Maryland. The surety filed a motion for summary judgment based on the argument that Dickson had not performed "labor" as the term is used in the Miller Act and the related payment bond.

Decision: The U.S. District Court granted the surety's motion for summary judgment, holding that Dickson had not, as a matter of law, furnished "labor" to the Pentagon staircase project. The court stated that the federal courts have concluded that:

- the term "labor" in the Miller Act refers only to "physical toil or manual labor."
- "Supervisory work is generally not recoverable unless the supervisor also performs manual labor."
- The fact that a task is performed on the work site (which was the case with Dickson's Pentagon work) does not assure that it is recoverable under the Miller Act.
- "Clerical or administrative tasks even if performed at the job site, do not involve the physical toil or manual work necessary to bring them within the scope of the Miller Act."

According to the district court, management work is clerical and excluded from the scope of the Miller Act. Taking field measurements and inspecting materials were administrative tasks that required some minor physical exertion, but did not rise to the level of physical toil needed to recover. The court expressed its concern that allowing minor physical activities at the site to bring a claimant within the protection of the Miller Act would "strip essentially all limitation" from the Miller Act's labor requirement:

> Any subcontractor (e.g., an accountant or engineer) would then be a proper claimant under the Miller Act so long as he performed his work [services] at the construction site and tidied his office on occasion.

Comment: Other federal courts have been more generous than the *Dickson* court in allowing Miller Act recovery for hands-on tasks such as field measurements, supervision, and inspection. However, as a general matter technical and professional services, and clerical and administrative tasks, are not "labor" for purposes of a Miller Act recovery. The Miller Act is remedial in nature, but it is not as broad in its protections as many state construction lien (mechanic's lien) statutes; similarly some state "Little Miller" laws applicable to state and local public projects provide specific protection for a broader scope of "labor," sometimes expressly including design services (such as those performed by a design sub on a design-build project).

The analysis of a potential Miller Act claim should always include a review of whether the underlying tasks constituted "labor" as the term has been interpreted by the

courts—in addition to attention paid to meeting statutory deadlines, providing notices, and other common Miller Act issues.

The "physical toil" requirement seems straightforward but may be complicated by the transitions in construction techniques that are presently occurring. For example, is a subcontractor engaged in physical toil if its personnel direct robots or assist the construction team by flying drones?

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7. **Issue:** Triggering additional insured coverage by filing a third-party complaint. *U.S. Specialty Insurance Co. v. Harleysville Worcester Insurance Co.* United States District Court (Southern District of New York) (2021).

   Summary: A subcontractor's employee was injured on an oil-to-gas boiler conversion project in New York. The injured worker sued the project owner for negligence. The owner then filed a third-party complaint against the general contractor, alleging breach of contract and demanding indemnification.

   The owner's commercial general liability (CGL) insurer, U.S. Specialty Insurance Company (USSIC), subsequently filed a lawsuit in federal court against the general contractor's CGL insurance company, Harleysville Worcester, claiming additional insured status under the Harleysville policy, and seeking a declaration that Harleysville was required to defend the owner (USSIC's insured) in the injured worker's lawsuit.

   Decision: The federal district court held in favor of the owner's CGL insurer, ruling that the contractor's CGL carrier had a duty to defend the owner.

   The insurance provisions of the prime contract required the contractor to maintain CGL insurance that named the Owner as an additional insured for claims "caused in whole or in part by the Contractor's negligent acts or omissions during the Contractor's operations." The injured worker's injury lawsuit against the owner did not contain allegations that directly implicated the contractor—the claims were against the owner. Based on the allegations in the original injured worker lawsuit alone, the owner would have struggled to put forward a successful argument in favor of coverage as an additional insured under the contractor's CGL policy. "If the named insured [the contractor] was not a proximate cause of the of the underlying injury, there is no duty to defend" the additional insured.

   The owner's own CGL policy (through USSIC) would have been available, but with adverse consequences for the owner in terms of premium increases, and obvious monetary exposure to USSIC. However, the owner's third-party complaint against the

general contractor, alleging that the injured worker's damages were caused "by reason of the primary, active and affirmative negligence" of the general contractor, provided a more substantial basis for invoking additional insured status.

The district court noted that under New York insurance law an insurer's duty to defend is "exceedingly broad" and is triggered if there is a reasonable possibility of coverage. A claimed loss is brought within the scope of the policy if "the complaint contains any facts or allegations which bring the claim even potentially within the protection purchased." Applying this standard, the district court found that there was a "reasonable possibility" that coverage of the owner was implicated by the owner's third-party complaint.

If it was "indisputable" that the named insured was not responsible for causing the injury, the insurer has no duty to the additional insured. Here, it was plausible that because the injured worker was an employee of a subcontractor working for the contractor, there may have been a sufficient causal connection (proximate cause) between the named insured and the injury.

Comment: It is a misconception that being an additional insured is the same as holding a stand-alone insurance policy against liability. As this case demonstrates, the additional insured will be covered only if there is some degree of possible culpability on the part of the named insured. (There also may be exclusions and exceptions applicable to specific categories of additional insureds, such as those limiting coverage for design professionals that are named an additional insured.)

We may assume that the injured worker was entitled to statutory worker's compensation benefits from the employer's (subcontractor's) worker's compensation carrier. When a claim is covered by worker's compensation, the injured worker is barred from demanding additional damages directly from the worker's employer. However, it is sometimes possible to make plausible claims against other parties on the project. In this case, the injured worker brought claims against the owner; in other cases, injured employees of subcontractors often find a basis for a claim against the general contractor. Apparently no such claim was made here, but the general contractor was nonetheless drawn into the lawsuit as a result of the third-party claim against the general contractor. This expansion of the lawsuit could continue with a "fourth party" complaint by the general contractor against the subcontractor, perhaps based primarily on a contractual indemnification—thus resulting in an end run around the protections offered to the subcontractor/employer by the worker's compensation law.

8. **Recommended Reading.** The decision in *Christopher Glass & Aluminum, Inc. v. Tishman Construction Corporation (*Appellate Court of Illinois, First Judicial District, 2020) examines the application of the Spearin Doctrine to a product requirement in a subcontract. The contractor was held to have warranted a required curtain wall system that proved to be unsatisfactory; the subcontractor had recommended the system prior to entering into the subcontract, but nonetheless was granted the protections of the Spearin warranty. The case was well analyzed in ASCE's *Civil Engineering* magazine in January 2021, and in *The Construction Lawyer* (ABA Forum on Construction Law), Winter 2021.