Beating *Rich*:

Three Ways to Recover Attorney's Fees in Miller Act Cases

By Steven J. Koprince

The Miller Act[1] is a statute applicable to all federal construction projects valued at $100,000 or more. Because sovereign immunity prevents mechanics' liens on public projects, the Miller Act requires the prime contractor on the project to provide a substitute for a mechanic's lien: a payment bond, through a qualified surety, for the protection of first- and second-tier subcontractors. A subcontractor or sub-subcontractor who is not paid may sue on the payment bond to recover unpaid amounts.

Plaintiffs who bring cases under the Miller Act are often small subcontractors and suppliers; the costs of litigation may be particularly burdensome for these parties. But the Miller Act does not provide a statutory right to recover attorney's fees and costs, and any possibility that the courts might construe the Miller Act to include the recovery of attorney's fees seemed to vanish in 1974, when the U.S. Supreme Court issued its ruling in *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*[2] In this case, the Court considered an appeal of a Miller Act decision that had been issued by the Ninth Circuit Court of Appeals, which had awarded attorney's fees to the plaintiff. The circuit court reasoned that the Miller Act "was intended to substitute for the unavailable state remedy of the [mechanic's] lien," and, therefore, "if state [law] allows a supplier on private projects to recover such fees, there is no reason for a different rule to apply to federal projects." Because California law entitled a plaintiff who had successfully recovered on a mechanic's lien to recover attorney's fees and costs, the Ninth Circuit awarded attorney's fees to the plaintiff who had recovered under the Miller Act.[3]

The U.S. Supreme Court held that the Ninth Circuit had erred when it awarded attorney's fees. The Supreme Court wrote that there was no "evidence of congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorney's fees." Instead, the Court held, the "American Rule" that determines who is responsible for attorney's fees—under which each party typically pays its own fees and costs—applies in Miller Act cases. The Court wrote that adopting the American Rule as a "rule of uniform national application" under the Miller Act "avoids many of the pitfalls which have already manifested themselves using state law referents." The Court's ruling noted that many federal contracts "involve construction in more than one State," and that parties may have "little or no contact, other than the contract itself, with the State in which the Project is located." In addition, the "rule of uniform national application" that the Court envisioned would "extricate the federal courts from the morass of trying to divine a 'state policy' as to the award of attorney's fees" when state law was unclear. The Court reversed the Ninth Circuit's award of attorney's fees to the plaintiff.[4]

Citing *F.D. Rich*, a number of courts have rejected attempts by subcontractors and suppliers to recover fees under the Miller Act. For example, in *United States f/u/b/o Vulcan Materials v. Volpe Construction*, the Fifth Circuit upheld the district court's denial of fees to a prevailing Miller Act plaintiff; the circuit court stated that Florida law "provides no authority for the award of attorney's fees under the Miller Act bond."[5]

But despite the absence of a fee-shifting provision in the Miller Act, and in spite of the ruling in *F.D. Rich*, attorney's fees are sometimes awarded to prevailing Miller Act plaintiffs. This article discusses the three main theories upon which pre-

vailing Miller Act plaintiffs recover their attorney's fees: (1) pursuant to contractual fee-shifting provisions; (2) under claims of bad-faith behavior by the general contractor or surety; and (3) pursuant to state law, on which at least one circuit continues to rely in awarding fees in what that court admits to be a decision to sidestep *F.D. Rich*.

Recovery of Attorney's Fees Pursuant to Contractual Provisions

Contractual fee-shifting provisions are a well-recognized exception to the American Rule. In *F.D. Rich*, the Supreme Court noted that the American Rule is not "an absolute bar to the shifting of attorney's fees" and that the American Rule provides for fees to be recovered under a "statute or enforceable contract providing therefor."[6] The *F.D. Rich* Court, therefore, appeared to contemplate awarding attorney's fees in a Miller Act case pursuant to a contractual fee-shifting provision.

But does a contractual fee-shifting provision square with the language of the Miller Act? After all, the Miller Act surety is supposed to reimburse a plaintiff for the unpaid value of "*labor or material*" provided to the project.[7] Would holding a surety liable for attorney's fees impermissibly expand the surety's liability beyond "labor or material"? The courts have answered this question with a resounding "no." Notwithstanding the Miller Act's use of the term "labor or material," courts have routinely required Miller Act sureties to cover attorney's fees and costs when a fee-shifting provision is included in the bond principal's contract with a subcontractor.[8] For example, in *United States ex rel. Noyes v. Kimberly Constr. Inc.*, the Tenth Circuit awarded a prevailing Miller Act plaintiff its attorney's fees, writing that, "[a]lthough the Miller Act itself does not provide for attorney's fees, when they are provided for by contract, the fees are routinely awarded and the contract is enforced according to its terms." A number of other circuits have reached similar conclusions.[9]

Surprisingly, few courts have addressed how an award of fees and costs comports with the language in the Miller Act that relates to "labor or material." An answer is suggested by a Fourth Circuit case, *United States ex rel. Woodington Electric Co. v. United Pacific Insurance Co.*, in which a surety was held liable for costs under its principal's profit-sharing provision, even though the costs were not "labor or material." The Fourth Circuit held that the "surety is liable for the subcontract price" and is "obligated to pay the compensation to which the parties have agreed, although this amount exceeds the cost of labor, materials, and overhead."[10] The *Woodington* court's measure of the surety's liability by the subcontract price (regardless of whether the price includes the cost for items other than "labor or material") is the most likely rationale for holding a Miller Act surety liable for fees and costs provided for by contract.

Another interesting question arises when a sub-subcontractor or supplier attempts to recover attorney's fees from a Miller Act surety on the basis of a fee-shifting provision in a second-tier subcontract. Under common law suretyship principles, a surety's liability is generally co-extensive with that of its principal.[11] Under the common law, therefore, one would expect that a Miller Act surety would not be responsible for attorney's fees owed to a sub-subcontractor or supplier by virtue of a fee-shifting provision in a sub-subcontract, because the surety's principal—the general contractor—is not a party to the sub-subcontract and is not liable for the fees.

But the common law of suretyship appears to have been trumped by the Miller Act. Reasoning that attorney's fees are "justly due" under a sub-subcontract containing a fee-shifting provision, a number of courts have held that a sub-subcontractor or supplier can recover attorney's fees from a Miller Act surety on the basis of the fee-shifting provision, even though the general contractor was not a party to the contract. In *United States f/u/b/o Carter Equipment Co. v. H.R. Morgan, Inc.*, the Fifth Circuit held that a supplier was entitled to recover fees pursuant to a fee-shifting provision in its contract with a subcontractor. The court reasoned that fee-shifting provisions are enforceable in Miller Act cases and that "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." Several other courts have also permitted a Miller Act supplier to recovery attorney's fees pursuant to a fee-shifting provision in the supplier's contract with a subcontractor.[12]

It should be noted, however, that when a sub-subcontractor or supplier makes a Miller Act claim, fees cannot be awarded on the basis of a fee-shifting provision contained in the contract between the general contractor and the subcontractor. In *United States f/u/b/o American Bank v. C.I.T. Construction, Inc. of Texas*,[13] a supplier brought a Miller Act claim against a general contractor's surety and sued the general contractor in quantum meruit. When the supplier's Miller Act claim was dismissed for failing to meet the one-year limitations period, the general contractor argued that it should be entitled to recover fees because its contract with the subcontractor contained a fee-shifting provision. The court declined to enforce this provision against the supplier, holding that "[t]he contract does not impose liability on any party other than … the subcontractor."[14] Although the case involved an attempt by a general contractor to recover fees, the court's reasoning strongly suggests that the same result would have occurred had a sub-subcontractor or supplier sought to recover fees based on a fee-shifting provision in the contract between the general contractor and the subcontractor.

Many subcontractors and suppliers will argue that, from a practical perspective, they generally will be unable to negotiate attorney's fees provisions with more powerful higher-tier contractors. In a number of states, one potential way around this problem is found in statutes that deal with "reciprocal attorney's fees." Under these statutes, if a contract provides that one party (but not the other) is entitled to a fee recovery if that party prevails in litigation, the court is to treat the fee provision as "reciprocal," and award fees to the other party if it prevails.[15] Wily subcontractors and suppliers may be able to take advantage of the statutes that provide for reciprocal attorney's fees by agreeing to provisions that allow for unilateral attorney's fees that favor higher-tier contractors, because these parties know that the court will treat the provision as bilateral.

The effect of a statute that provides for reciprocal

attorney's fees on a purported unilateral fee agreement in a Miller Act case is demonstrated by the Ninth Circuit's ruling in *United States ex rel. Reed v. Callahan*. In *Reed*, the contract between a general contractor and subcontractor provided that the general contractor (but not the subcontractor) was entitled to fees if the general contractor prevailed in litigation. Although the subcontractor prevailed in the district court, the court relied on the contractual clause to deny the subcontractor its attorney's fees. The Ninth Circuit reversed the district court's decision, holding that California law "converts a one-way attorney's fees clause into a two-way avenue of opportunity" and that the statute applies to the case "no matter how unilateral the wording of the contract." Under the law, "the fact that the subcontract expressly limits the availability of fees to the contractor is of no effect."[16] The Ninth Circuit remanded the case to the district court with an order to award fees to the prevailing subcontractor.

Obviously, before agreeing to a unilateral provision allowing for attorney's fees, a subcontractor or supplier should be absolutely sure that the applicable state law provides for reciprocity. Subcontractors and suppliers should be aware that some state statutes *require* courts to treat provisions related to attorney's fees as reciprocal, whereas others merely *permit* courts to deem a provision that grants a unilateral fee to be reciprocal.[17] Nevertheless, the fact remains that in jurisdictions that provide for true "reciprocal" attorney's fees, a subcontractor or supplier who wishes to preserve the ability to recover fees on its Miller Act claim would be well served to accept a provision that purportedly allows for "unilateral" fees. After all, as several California courts have written, statutes that provide for reciprocal attorney's fees have been adopted to protect parties who—like many subcontractors and suppliers—"may be in a disadvantageous bargaining position."[18]

Recovery of Attorney's Fees Because of Bad-Faith Behavior

Although a fee-shifting provision is the most effective way for a subcontractor or supplier to recover fees in a Miller Act case, the practical reality is that fee-shifting provisions will not always be available to Miller Act plaintiffs. In many cases, the higher-tier contractor is in a stronger bargaining provision and will refuse to permit a subcontractor or supplier to include a reciprocal fee-shifting provision in the contract. Many states do not offer the provisions that allow for reciprocal attorney's fees described above, and even in states that do, a higher-tier contractor may not be so easily lured into accepting a provision that includes a purported "unilateral" fee. Even in the absence of a fee-shifting provision, a Miller Act subcontractor or supplier has at least two potential avenues for recovering fees; one of these is the "bad-faith exception" to the American Rule.

The bad-faith exception allows the prevailing party to recover its attorney's fees when the other party has acted in bad faith. Several courts have applied the bad-faith exception to permit a subcontractor or supplier to recover attorney's fees in Miller Act cases. For example, in *Horst Masonry Construction Inc. v. ProControls Corp.*,[19] the Eighth Circuit upheld a district court's decision awarding attorney's fees to the subcontractor when (1) the surety failed to properly investigate the claim and (2) the general contractor and the surety defended the Miller Act claim using a recoupment defense they knew to be without merit. Similarly, in *United States f/u/b/o Treat Brothers Co. v. Fidelity & Deposit Co.*,[20] the Seventh Circuit upheld the district court's award of attorney's fees to a subcontractor after the general contractor had imposed groundless back charges and unrealistic estimates for incomplete work in a bad-faith effort to avoid liability.

Unfortunately for subcontractors and suppliers, several courts have placed an important limit on the bad-faith exception, holding that it applies only to bad-faith conduct occurring during litigation—not to actions taken before litigation began. The ruling in *Towerridge Inc. v. T.A.O. Inc.* is typical of decisions in which the court refused to award attorney's fees on the basis of alleged pre-litigation bad faith. In *Towerridge*, the district court found that the general contractor had acted in bad faith during the course of the project and awarded attorney's fees to the subcontractor. The Tenth Circuit reversed the decision, finding that the bad-faith exception had been created to sanction abuses of the judicial process, not to punish conduct occurring before the litigation commenced. The court wrote that if attorney's fees were to be awarded on the basis of conduct that occurred before litigation, the bad-faith exception would risk "swallowing" the American Rule.[21] The *Towerridge* decision concurs with the Fifth Circuit's earlier ruling in *Tacon Mechanical Contractors Inc. v. Aetna Casualty & Surety Co.* In *Tacon*, as in *Towerridge*, the court refused to award attorney's fees because of alleged bad-faith conduct that occurred before litigation, stating that the court's ability to award attorney's fees stems "not from any substantive provision of the Miller Act" but from the court's "inherent power to sanction abusive and egregious behavior by a litigant."[22]

The Sixth Circuit, however, has rejected the argument that pre-litigation conduct cannot form the basis of an award of attorney's fees. In *Yonker Construction Co. v. Western Contracting Corp.*, the court held that pre-litigation conduct could form the basis of a fee award in a Miller Act case. The argument that fees should only apply to post-litigation conduct "is meritless," the court wrote. "Bad faith may occur during either contract performance or litigation." The court upheld an award of attorney's fees based on a jury's finding that the general contractor had acted in bad faith during the performance of the contract.[23]

Subcontractors and suppliers considering a claim of bad faith as a reason for recovering attorney's fees should determine whether their jurisdiction permits claims based upon pre-litigation conduct. If their jurisdictions do not permit such claims, all is not necessarily lost: the line between pre-litigation conduct and conduct occurring during litigation is not always a bright one. In *Towerridge*, the Tenth Circuit withheld judgment on whether a claim of bad-faith conduct may rely on *both* pre-litigation conduct and conduct occurring during the litigation, writing that "we merely hold the award of fees may not be premised *solely* upon prelitigation abusive conduct."[24] Artful pleading—together

with the court's desire to be equitable—may enable a subcontractor or supplier to cast its claim of bad-faith behavior as one that is not "solely" based on pre-litigation conduct. For example, if a surety, acting in bad faith, fails to investigate a claim properly, the pleadings subsequently filed by the surety may rely on the improper investigation as a way to defend the claim. By knowingly imposing defenses based on an investigation conducted in bad faith, the surety arguably again acts in bad faith—this time during the course of the litigation.

Will courts other than the Fifth Circuit permit Miller Act plaintiffs to recover fees for supplemental claims based on state laws?

Recovery of Attorney's Fees Under State Law

The U.S. Supreme Court's ruling in *F.D. Rich* seemed to be the last word on whether state law could form the basis of an award of attorney's fees in a Miller Act case. In reversing a Ninth Circuit decision that awarded fees based on California law, the *F.D. Rich* Court touted the importance of a "rule of uniform national application."[25] But in one circuit, more than 35 years after the *F.D. Rich* ruling, state law remains fertile ground for basing the recovery of attorney's fees in Miller Act cases, and other courts may be inclined to follow that court's lead.

The Fifth Circuit has interpreted *F.D. Rich* merely as precluding the award of attorney's fees under the Miller Act itself, but not as prohibiting the award of attorney's fees to a Miller Act plaintiff when the fees are awarded pursuant to a supplemental claim based on state law. According to the Fifth Circuit, the *F.D. Rich* Court "announced only that Miller Act claims do not *incorporate* state law remedies such as attorney's fees; it did not read the Act to preclude the pursuit of state causes of action for fees *in addition to* Miller Act claims."[26] The Fifth Circuit has acknowledged that its holdings may circumvent the spirit of the *F.D. Rich* ruling, writing that "[a]dmittedly, in many Miller Act cases supplemental jurisdiction offers a neat sidestep to the broad policy statements of *F.D. Rich*." However, the court held that "the sidestep is available … because Congress has by separate statute … made possible simultaneous prosecution of Miller Act and state law claims."[27]

The Fifth Circuit's ruling in *United States ex rel. Cal's A/C & Electric v. Famous Constr. Corp.*[28] is one of several cases in which the court awarded attorney's fees to a Miller Act plaintiff by relying on the plaintiff's state law claim. In *Cal's A/C & Electric*, a subcontractor, concurrently with its Miller Act claim, brought a state law claim for breach of Louisiana's Prompt Payment Act, under which a subcontractor or supplier can recover fees when payment is withheld for more than 14 days without reasonable cause.[29] The district court held that the Miller Act precluded supplemental jurisdiction over claims for fees based on state law. The Fifth Circuit reversed the lower court's decision, holding that "*F.D. Rich* did not preclude state-based actions for attorney's fees to accompany Miller Act claims."[30]

The Fifth Circuit's willingness to allow supplemental claims for attorney's fees based on state laws is subject to an important limitation: the fees are recoverable only against the general contractor, not the Miller Act surety. In *United States f/u/b/o Howell Crane Service v. U.S. Fidelity & Guaranty Co.*,[31] the district court relied on a Texas statute providing for attorney's fees in contract actions and held that a Miller Act plaintiff was entitled to an award of fees against both the general contractor and the Miller Act surety. The Fifth Circuit reversed the district court in part, holding that the fees could not be recovered against the surety. Citing *F.D. Rich*, the court wrote: "USF&G's only involvement with Howell was its Miller Act bond. No state law claim was asserted by Howell against USF&G. Thus, there is no basis for a pendent jurisdiction award" of attorney's fees against the surety.[32] The *Cal's Electric* court reached the same conclusion, holding that the subcontractor could recover its fees from the general contractor but not from the surety.[33]

Will courts other than the Fifth Circuit permit Miller Act plaintiffs to recover fees for supplemental claims based on state laws? The Ninth Circuit has strongly suggested that it would follow the Fifth Circuit's lead. In *United States ex rel. Leno v. Summit Construction Co.*, the court declined to permit a plaintiff to recover its fees, noting that "the district court found only Miller Act jurisdiction" over the plaintiff's claims. However, the court wrote that, "unless there is a separate state claim at the trial level," attorney's fees are not available to a Miller Act plaintiff—suggesting that if there had been a separate claim, attorney's fees could have been awarded.[34] This view appears to have been confirmed in *Tapat v. Sandwich Islands Construction Ltd.*, in which the Ninth Circuit refused to permit a Miller Act plaintiff to recover fees for its claim but applied a Hawaii statute to allow the plaintiff to recover fees incurred in successfully defending the general contractor's counterclaim, writing that "[b]ecause the district court assumed pendent jurisdiction over the counterclaim, state law governs the availability of attorney's fees."[35]

The district court in Maine has issued a decision suggesting that it may not be open to awarding attorney's fees under supplemental state law claims in Miller Act cases. In *United States ex rel. Great Wall Construction Inc. v. Mattie & O'Brien Mechanical Contracting Co.*, the Miller Act plaintiff argued that, under a state statute dealing with unfair settlement practices, the plaintiff was entitled to attorney's fees, because the

surety had unfairly refused to settle the claim. The court rejected the claim, finding that it was "an attempted expansion of the Miller Act remedy in the exact manner than *F.D. Rich* forbids. …" The court wrote that claims based on state law should proceed in Miller Act cases "only when those claims are not used to expand the Miller Act remedies."[36]

To the extent that *Mattie & O'Brien* is read as prohibiting supplemental claims for recovery of attorney's fees against Miller Act sureties (rather than against general contractors) based on state law, the decision is in harmony with the Fifth Circuit's decisions. But the *Mattie & O'Brien* court went further, writing that the plaintiff did not assert an "additional and separate claim" and did "not seek any substantive relief under Maine law."[37] The notion that the plaintiff did not seek substantive relief under state law does not comport with the language of the applicable state statute, which expressly provides that a person whose insurer unfairly refuses to settle a claim "may bring a civil action and recover damages, together with costs and disbursements, reasonable attorney's fees and interest. …"[38] In light of this clear statutory right, the court's refusal to consider the plaintiff's request that was based on state law as a request for substantive relief may reflect the court's opinion that state law claims ought not to be "tacked on" to Miller Act claims for the sole purpose of seeking attorney's fees. If this is the case, a supplemental claim for fees based on state law may not be successful in a Miller Act case in Maine—even in cases brought against a general contractor.

A final notable case regarding state law claims for attorney's fees under the Miller Act is the Western District of Louisiana's opinion in *United States ex rel. Cal's A/C & Electric v. The Famous Construction Corp.*[39] In that case, the court held that the 1988 amendments to the Prompt Payment Act effectively superseded *F.D. Rich*. The applicable section of the Prompt Payment Act provides that it "shall not limit or impair" any remedies otherwise available to a contractor or subcontractor involved in a dispute over late payment or nonpayment.[40] The court found that the phrase, "shall not limit or impair," applied not only to Prompt Payment claims, but also to claims based on the Miller Act. Accordingly, the *F.D. Rich* decision, which limited or impaired the right to seek state remedies, was no longer good law.

On appeal, however, the Fifth Circuit overruled the district court's decision. Although the Fifth Circuit allowed the subcontractor to recover attorney's fees on a supplemental claim based on state law, as described above, the court held that "[t]his result is not, however, mandated by the Prompt Payment Act Amendments of 1988." The court explained that "the text [of the 1988 amendments] plainly limits itself to one particular section of the Prompt Payment Act. Any bars to additional remedies erected by the Miller Act are left untouched. …" The Ninth Circuit has also rejected the Western District of Louisiana's holding: in *Didomenico v. North American Construction Corp.*,[41] the Ninth Circuit denied a Miller Act plaintiff's claim for attorney's fees, holding that the "plain language" of the 1998 amendments to the Prompt Payment Act "does not incorporate state law remedies into the Prompt Payment Act or Miller Act as Miller Act remedies that can be recovered from the surety or Miller Act bond."[42]

The interpretation of §3905(j) of the Prompt Payment Act offered by the Fifth and Ninth Circuits is likely to prove persuasive to future courts to decide the issue. Nevertheless, the Western District of Louisiana's decision in *Cal's A/C & Electric* may provide a subcontractor or supplier in another jurisdiction an additional argument in favor of being awarded attorney's fees—albeit an argument that has long odds of success.

For Miller Act plaintiffs, state law may offer an alternative means of recovering attorney's fees. A Miller Act plaintiff considering seeking fees under state law should (1) carefully plead its claim for fees under state law as separate and independent of its Miller Act claim; (2) bring its claim for fees against the general contractor, not the surety; and (3) ask the federal court to assert supplemental jurisdiction over the claim under 28 U.S.C. §1367. In addition, recalling *Tapat*, Miller Act plaintiffs should be aware that state law may entitle them to recover fees accrued in defending any counterclaim filed by the defendants.

Conclusion

Even after the Supreme Court's ruling in *F.D. Rich* almost 35 years ago, creative Miller Act plaintiffs still have at least three potential ways of recovering their attorney's fees and costs. First, if the contract provides for them, costs and fees are recoverable under the Miller Act, even though they are not for "labor" or "material." Suppliers can recover fees from the Miller Act surety based on a provision in their contract with a subcontractor, even though the general contractor was not a party to the subcontract. And in some jurisdictions, a subcontractor or supplier may be able to recover fees under a provision for a purportedly "unilateral" fee pursuant to a state statute that provides for reciprocal attorney's fees.

Second, attorney's fees are recoverable when the general contractor or surety has acted in bad faith. In some jurisdictions, allegations of bad faith are limited to actions the defendants took in defending the Miller Act claim. But in other jurisdictions, the general contractor's bad-faith behavior before litigation began can also entitle a Miller Act plaintiff to recover attorney's fees. Even when the jurisdiction does not permit claims based on bad-faith conduct that occurred before litigation commenced, the line between "before litigation" and "during litigation" may not be clear.

Third, despite the Court's ruling in *F.D. Rich*, attorney's fees may be recoverable pursuant to state law. In jurisdictions where such claims have been successful, the plaintiff has sidestepped *F.D. Rich* by bringing its claim for attorney's fees as a supplemental claim based on state law against the general contractor, not the surety. Plaintiffs bringing such supplemental claims must carefully plead their cause of action as one that is separate from and independent of the Miller Act. **TFL**

Steven J. Koprince is an attorney with Piliero Mazza PLLC in Washington, D.C. He welcomes questions and comments about this article to skoprince@pilieromazza.com.

Endnotes

[1]*See* 40 U.S.C. 3133(b)(1).

[2]*F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116 (1974).

[3]Restatement (Third) of Suretyship & Guaranty, §§ 19 & 34; *see also* Philip L. Bruner and Patrick J. O'Connor Jr., 3 Bruner & O'Connor on Construction Law § 8:50 **(**"It is a fundamental principle of suretyship that the surety, as the secondary obligor, is liable to the obligee to no greater extent than that of the principal obligor. Stated another way, the surety is entitled to assert against the obligee all the defenses, with the exception of personal defenses such as insolvency, that its principal possesses.").

[4]*F.D. Rich Co.*, 417 U.S. at 127–131.

[5]*United States f/u/b/o Volpe Constr.*, 622 F.2d 880, 887 (5th Cir. 1980).

[6]*F.D. Rich Co.*, 417 U.S. at 126, 129.

[7]40 U.S.C. 3133(b)(1). (Emphasis added.)

[8]Although this article focuses on the ability of a successful Miller Act plaintiff to recover attorney's fees, it should be noted that fee-shifting provisions can also allow Miller Act defendants to recover their fees. *See, e.g., United States ex rel. U.S. Prefab Inc. v. Norquay Constr. Inc.*, 2008 WL 2026360 (D. Ariz. 2008) (where parties' contract contained a fee-shifting clause, general contractor and surety who successfully defended Miller Act claim were entitled to a fee award).

[9]*United States ex. rel. Noyes v. Kimberly Constr. Inc.*, 43 Fed. Appx. 283, 288. *See also Drill South, Inc. v. Int'l Fidelity Ins. Co.*, 234 F.3d 1232 (11th Cir. 2000) (awarding successful Miller Act plaintiff its attorney's fees pursuant to a contractual provision); *GE Supply v. C&G Enters. Inc.*, 212 F.3d 14 (1st Cir. 2000) (awarding attorney's fees to Miller Act plaintiff where plaintiff's invoices contained a fee-shifting provision); *United States f/u/b/o Micro-King Co. v. Community Science Tech. Inc.*, 574 F.2d 1292 (5th Cir. 1978) (awarding attorney's fees pursuant to contractual fee-shifting provision); *D&L Constr. Co. v. Triangle Elec. Supply Co.*, 332 F.2d 1009 (8th Cir. 1964) (similar).

[10]*United States ex rel. Woodington Elec. Co. v. United Pacific Ins. Co.*, 545 F.2d 1381, 1383 (4th Cir. 1976).

[11]Restatement (Third) of Suretyship & Guaranty, §§ 19 & 34; *see also* Philip L. Bruner & Patrick J. O'Connor Jr., 3 Bruner & O'Connor on Construction Law § 8:50 ("It is a fundamental principle of suretyship that the surety, as the secondary obligor, is liable to the obligee to no greater extent than that of the principal obligor. Stated another way, the surety is entitled to assert against the obligee all the defenses, with the exception of personal defenses such as insolvency, that its principal possesses.").

[12]*United States f/u/b/o Carter Equip. Co. v. H.R. Morgan Inc.*, 554 F.2d 164 (5th Cir. 1977).

[13]*United States f/u/b/o Am. Bank v. C.I.T. Constr. Inc. of Texas*, 944 F.2d 253 (5th Cir 1991).

[14]*Id.* at 256.

[15]*See, e.g.,* Cal. Civ. Code § 1717 and Mont. Code Ann. § 28-3-704.

[16]*United States ex rel. Reed v. Callahan*, 884 F.2d 1180, 1185 (9th Cir. 1989).

[17]*Compare* Cal. Civ. Code § 1717 (requiring courts to treat unilateral fee provisions as reciprocal) *with* Fla. Stat. Ann. § 57.105(7) (permitting courts to treat unilateral fee provisions as reciprocal).

[18]*Int'l Billing Servs. Inc. v. Emigh*, 101 Cal. Rptr. 2d 532, 540 (Cal. Ct. App. 2000), *citing Coast Bank v. Holmes*, 97 Cal. Rptr. 30, 39 (Cal. Ct. App. 1971).

[19]*Horst Masonry Constr. Inc. v. ProControls Corp.*, 208 F.3d 218 (8th Cir. 2000).

[20]*United States f/u/b/o Treat Bros. Co. v. Fid. & Deposit Co.*, 986 F.2d 1110 (7th Cir. 1993).

[21]*Towerridge Inc. v. T.A.O. Inc.*, 111 F.3d 758, 769 (10th Cir. 1997).

[22]*Tacon Mech. Contractors Inc. v. Aetna Cas. & Sur. Co.*, 65 F.3d 486, 489 (5th Cir. 1995).

[23]*Yonker Constr. Co. v. Western Contracting Corp.*, 935 F.2d 936, 942–943 (6th Cir. 1991).

[24]*Towerridge*, 111 F.3d at 767 n.6. (Emphasis in original.)

[25]*F.D. Rich Co. v. United States ex. rel. Indus. Lumber Co.*, 417 U.S. 116, 127 (1974).

[26]*United States ex rel. Cal's A/C & Elec. v. Famous Constr. Corp.*, 220 F.3d 326, 327 (5th Cir. 2000) (emphasis in original).

[27]*United States f/u/b/o Varco Pruden Bldgs. v. Reid & Gary Strickland Co.*, 161 F.3d 915, 919 (5th Cir. 1998).

[28]*Cal's A/C & Elec.*, 220 F.3d at 326.

[29]La. Rev. Stat Ann. § 9:2784(C).

[30]*Cal's A/C & Elec.*, 220 F.3d at 328.

[31]*United States f/u/b/o Howell Crane Serv. v. U.S. Fidelity & Guar. Co.*, 861 F.2d 110 (5th Cir. 1988).

[32]*Id.* at 113.

[33]*Cal'sA/C & Elec.*, 220 F.3d at 329.

[34]*United States ex rel. Leno v. Summit Constr. Co.*, 892 F.2d 788, 791 (9th Cir. 1989).

[35]*Tapat v. Sandwich Islands Constr. Ltd.*, 942 F.2d 794 (9th Cir. 1991).

[36]*United States ex rel. Great Wall Constr. Inc. v. Mattie & O'Brien Mech. Contracting Co.*, 2001 WL 127663 (D. Me. 2001).

[37]*Id.* at *2.

[38]*Id.*

[39]*United States ex rel. Cal's A/C & Elec. v. The Famous Constr. Corp.*, 34 F. Supp. 2d 1042 (W.D. La. 1999).

[40]31 U.S.C. § 3905(j).

[41]*Didomenico v. N. Am. Constr. Corp.*, 94 Fed. Appx. 598 (2004).

[42]*Id.* at 599–600. The Massachusetts District Court has also rejected the decision issued by the Western District of Louisiana, holding that the 1988 amendments to the Prompt Payment Act "in no way limits the holding of *F.D. Rich*." *United States ex rel. Metric Elec. Inc. v. Enviroserve Inc.,* 301 F. Supp. 2d 56, 73 n.10 (D. Mass. 2003).