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United Structures v. G.R.G. Engineering: Set-off v. Recoupment in Miller Act Payment Bond Disputes

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I. INTRODUCTION

Since 1935, the Miller Act[1] has served to protect suppliers on federal construction projects. The Act provides a statutory scheme for payment and performance bonds in connection with federal jobs. The performance bond portion of the Miller Act protects the federal government by ensuring that money will be available should the project remain uncompleted.[2] The payment bond provisions on the other hand ensure compensation to "any person who has . . . furnished labor or material and who has not been paid in full" by a general contractor or subcontractor.[3] Disputes often arise between general contractors and those protected by its payment bond. This note concerns the payment bond portion of the Miller Act and the rights retained by a general contractor supplied with defective materials or labor.

The Miller Act is highly remedial and is subject to a liberal interpretation for the protection of those it shelters.[4] These aspects of the Act clash with other objectives stated by the Supreme Court.[5] Thus, courts must balance general principles when faced with an unpaid materialman[6] in a dispute with a general contractor who claims the supplied materials are defective. In the realm of counterclaims, for example, the Supreme Court wishes "to prevent multiplicity of actions and to achieve

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1. 40 U.S.C. §§ 270a-270d (1988). Before the Miller Act, the Heard Act of 1894, ch. 280, 28 Stat. 278 (codified as amended at 40 U.S.C. § 270 (1934)), *repealed by* Miller Act, ch. 642, 49 Stat. 794 (1935), served the same function by "requir[ing] Government contractors to execute penal bonds for the benefit of 'all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract.'" Clifford F. MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 322 U.S. 102, 104 (1944) (citing the Heard Act).

2. *See infra* note 15 and accompanying text.

3. F.D. Rich Co. v. United States *ex rel.* Indus. Lumber Co., 417 U.S. 116, 118 (1974).

4. *MacEvoy*, 322 U.S. at 107.

5. *F.D. Rich*, 417 U.S. at 124 (citing *MacEvoy*, 322 U.S. at 107).

6. Or another sub or sub-subcontractor. *See infra* notes 24-29 and accompanying text.

resolution in a single lawsuit of all disputes arising out of common matters."[7] However, "the intent [of the Miller Act] was to remove procedural difficulties . . . and thereby make it easier for unpaid creditors to realize the benefits of the [payment] bond."[8] In this manner, the purpose of protecting sheltered parties can at times oppose the goal of preventing unnecessary duplication of actions. Two recent cases, decided in Federal Circuits on opposite sides of the country arrive on opposite sides of the issue by giving weight to different stated objectives.[9] This note will consider both sides of the issue, ultimately siding with those who would give the Miller Act its full remedial powers despite other stated goals of streamlined litigation.

II. BACKGROUND

A. *The Miller Act*

The Miller Act[10] was enacted in 1935 as a replacement for the Heard Act of 1894.[11] It requires contractors to furnish both a performance and a payment bond[12] to the federal government[13] "[b]efore any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States"[14] is awarded. The purpose of the performance bond is to protect the United States Government by ensuring that the work is completed.[15]

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7. Southern Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962).

8. *MacEvoy*, 322 U.S. at 106 (discussing the Miller Act's intent to improve upon the Heard Act).

9. *See* United Structures of America v. G.R.G. Eng'g, S.E., 9 F.3d 996 (1st Cir. 1993); United States *ex rel.* Martin Steel Constructors, Inc. v. Avanti Constructors, Inc., 750 F.2d 759 (9th Cir. 1984).

10. 40 U.S.C. §§ 270a-270d.

11. *MacEvoy*, 322 U.S. at 105; H.R. REP. NO. 1263, 74th Cong., 1st Sess., at 1 (1935). The Heard Act is found at Ch. 280, 28 Stat. 278 (codified as amended at 40 U.S.C. § 270 (1934)), *repealed by* Miller Act, Ch. 642, 49 Stat. 794 (1935).

12. This represents an improvement on the Heard Act, which required the general contractor to post "but one bond . . . which serve[d] as protection both for the United States and for subcontractors, material men, and laborers." H.R. REP. NO. 1263, at 2 (1935). "If suit [was] brought by the United States on the bond, other claimants may [have] intervene[d] and ha[d] their claims adjudicated, subject to the priority of the United States." *Id.*

13. Note that under the Miller Act, "[t]ypically, the performance bond and the payment bond are two separate instruments." ROBERT RUBIN ET AL., CONSTRUCTION CLAIMS PREVENTION AND RESOLUTION 129 (1992).

14. 40 U.S.C. § 270a.

15. United States *ex rel.* Warren v. Kimrey, 489 F.2d 339, 342 (8th Cir. 1974)

The payment bond, on the other hand, "protect[s] those who furnish labor and material to prime contractors."[16] For example, in the case of an insolvent general contractor, the government could collect on the performance bond, thus "ensur[ing] that [it] will receive a completed project at the price set forth in the underlying contract."[17] Likewise, under the payment bond, those serving the general contractor could sue for recompense.[18]

As mentioned above, this note concerns the payment rather than the performance bond portion of the Act. The language of the Miller Act's payment bond provisions protects suppliers to government contracts[19] who furnish "labor or material in the prosecution of the work [and] who ha[ve] not been paid in full . . . sums justly due [them]."[20] Because state-based mechanics' liens cannot attach to government property,[21] these suppliers are "deprived of their usual security interest," absent the protection of the Act.[22] Despite an avowedly liberal interpretation on the part of the federal courts,[23] the Act's remedies are limited to those who have a contractual agreement with either the general contractor or a subcontractor.[24] Thus, Congress has mandated that "[a] sub-subcontractor may avail himself of the protection of the bond . . . but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond."[25]

The United States Supreme Court has defined a subcontractor as "one who contracts with a prime contractor."[26] Only

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("[T]he performance bond . . . under the terms of [40 U.S.C.] § 270a is for the protection of the United States."); Vardaman S. Dunn, *Construction Contract Claims and Litigation—Suits on Public Bonds and Suits on Private Bonds*, 55 MISS. L.J. 431, 437 (1985).

16. 17 AM. JUR. 2D *Contractor's Bonds* § 150 (1990) (footnote omitted).

17. Anthony N. Palladino & Anna P. Clarke, *The Recognition of Sureties' Rights Under Government Contracts*, 25 TORT & INS. L.J. 637, 645 (1990).

18. *Id.*

19. Clifford F. MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 322 U.S. 102, 107 (1944).

20. 40 U.S.C. § 270b(a) (1988).

21. United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947) (citations omitted); F.D. Rich Co. v. Indus. Lumber Co., 417 U.S. 116, 122 (1973).

22. *F.D. Rich*, 417 U.S. at 122.

23. *See infra* notes 110-115 and accompanying text.

24. Clifford F. MacEvoy Co. v. United States *ex rel* Calvin Tomkins Co., 322 U.S. 102, 107-08 (1944).

25. REP. NO. 1263, 74th Cong., 1st Sess., at 3 (1935); S. REP. NO. 1238, 74th Cong., 1st Sess., at 2 (1935).

26. J.W. Bateson Co. v. United States *ex rel.* Bd. of Trustees, 434 U.S. 586,

those in privity with a contractor or subcontractor are afforded the protection of the Miller Act.[27] Employees or those supplying materials to sub-subcontractors cannot take advantage of it.[28] This result is contrary to the plain language of the Act, which protects "*[e]very* person who has furnished labor or material in prosecution of the work."[29] The Court apparently assumed "that Congress did not intend to impose such a burden without explicit language being used to this effect."[30] This preference for bright line tests in Miller Act disputes was embraced by the Ninth Circuit in *United States v. Avanti Constructors, Inc.*[31]

B. United States *ex rel.* Martin Steel Constructors, Inc. v. Avanti Constructors, Inc.

In *United States ex rel. Martin Steel Constructors, Inc. v. Avanti Constructors, Inc.*,[32] the Ninth Circuit dealt with the issue of whether a general contractor has the right of set-off against a supplier in a Miller Act payment bond dispute.[33] Specifically, *Avanti* concerned a supplier not in privity with the general contractor.[34] There, Martin Steel Constructors, Inc. ("Martin") supplied steel to Harvis Construction, Inc. ("Harvis") and subsequently sued Harvis on its Miller Act Payment Bond for monies allegedly due.[35] Avanti Constructors, Inc. ("Avanti") was a subcontractor of Harvis with whom Martin had contracted.[36] As a defense to Martin's action, Harvis con-

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594 (1978).

27. *Id.*

28. *Id.* at 593. This line drawing inspired a fierce dissent from Justice Stevens, who was joined by Justice Brennan. They felt that the legislative intent of the Heard Act, as gleaned from the floor debates, mandated a liberal interpretation such that "the . . . Act cover[] 'all persons supplying [a contractor or contractors] labor and materials in the prosecution of the work . . . .'" *Id.* at 596 (quoting ch. 280, 28 Stat. 278 (as amended at 40 U.S.C. § 270 (1926))).

29. 40 U.S.C. § 270b(a) (emphasis added).

30. Dunn, *supra* note 15, at 443 (footnote omitted). "The reason[] relates to the practical difficulty that would be encountered by the prime contractor in protecting himself against claims of remote material suppliers with whom he has no contractual relationship." *Id.* at 442-43.

31. 750 F.2d 759 (9th Cir. 1984).

32. *Id.*

33. *Id.* at 762.

34. *Id.*

35. *Id.* at 760.

36. Avanti went bankrupt in May of 1982 and was subsequently dismissed as a party to the suit. *Id.*

tended that it was entitled to a set-off because Martin's steel was "late and defective."[37]

The Ninth Circuit rejected this argument, holding that "a set-off defense is not available in a Miller Act claim in the absence of privity."[38] It reasoned that a set-off defense would "unduly burden the enforcement of the rights created under the act."[39] Further, the court concluded that any claims Harvis had for the defective steel were against Avanti, not Martin.[40] The court justified this by reasoning that "the prime contractor selects his own subcontractors and it seems not unjustly harsh that he should be holden for their laxities."[41] Finally, the court cited several cases[42] to support its assertion that the right of set-off is allowed only where "the plaintiff is a subcontractor or materialman of the general contractor and thus is in direct contractual relations with the counterclaimant."[43]

By allowing Avanti, a sub-subcontractor, to categorically recover on the bond, the court gave effect to the general aim of the Miller Act: "[T]o protect those whose labor or material has contributed to the prosecution of the work."[44] Nine years later, the issue was revisited in *United Structures of America v. G.R.G. Engineering, S.E.*[45] There, under similar facts, another Federal Circuit Court of Appeals on the opposite side of the country came to a contrary conclusion.

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37. *Id.* at 762.

38. *Id.*

39. *Id.*

40. *Id.* at 763.

41. *Id.* (quoting Glassel-Taylor Co. v. Magnolia Petroleum Co., 153 F.2d 527, 530-31 (5th Cir. 1946)).

42. United States *ex rel.* Johnson v. Morley Constr. Co., 98 F.2d 781, 790 (2d Cir. 1938); United States *ex rel.* Kashulines v. Thermo Contracting Corp., 437 F. Supp. 195 (D.N.J. 1976); United States *ex rel.* Arlmont Air Condition Corp. v. Premier Contractors, Inc., 283 F. Supp. 343, 348-49 (N.D. Me. 1968).

43. *Avanti*, 750 F.2d at 762.

44. United States *ex rel.* Hill v. American Sur. Co., 200 U.S. 197, 204 (1906); *see also* Dunn, *supra* note 15, at 437-38 ("[T]he Act is highly remedial and entitled to liberal construction and application in order properly to effectuate the congressional intent to protect suppliers of labor and materials for public projects." (footnote omitted)).

45. 9 F.3d 996 (1st Cir. 1993).

III. *UNITED STRUCTURES OF AMERICA V. G.R.G. ENGINEERING, S.E.*

A. The Facts

In *United Structures of America v. G.R.G. Engineering, S.E.*,[46] the First Circuit dealt with a fact pattern similar to that in *Avanti*. G.R.G. Engineering ("G.R.G.") was the general contractor on two projects: one for the United States Government and one for the Puerto Rican Government.[47] Regarding the United States Government project, G.R.G. was required to furnish a payment bond pursuant to the Miller Act "'for the protection of all persons supplying labor and material' to the project"[48] (that is, subcontractors and sub-subcontractors).[49] United Structures of America ("United Structures") supplied steel to one of G.R.G.'s subcontractors.[50] After failing to pay United Structures in full, the subcontractor went bankrupt.[51] United Structures then brought suit against G.R.G. to recover approximately $282,000 allegedly still due under the contracts.[52]

G.R.G. countered that the supplied steel was defective, and that it was therefore entitled to a set-off in the amount of $196,509 on the monies owed.[53] The district court cited *Avanti* for the proposition that "a set-off defense is not available in a Miller Act claim in the absence of privity,"[54] thus denying G.R.G. relief on its defective steel claim.[55] On appeal, however, the First Circuit took exception to *Avanti*, holding that G.R.G. was attempting to assert a right of "recoupment" rather

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46. *Id.*

47. *Id.* at 997.

48. *Id.* (citing the Miller Act, 40 U.S.C. § 270a(a)(2)).

49. J.W. Bateson Co. v. Board of Trustees of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 593 (1978).

50. *United Structures*, 9 F.3d at 997.

51. *Id.*

52. *Id.*

53. *Id.* G.R.G. also alleged that it owed nothing to United Structures because "United [Structures] engaged in a fraudulent billing practice known as 'front loading'." *Id.* The First Circuit Court of Appeals ruled against G.R.G., finding no genuine or material issues of fact in dispute as to that claim. *Id.* at 1000.

54. United States v. Avanti Constructors, Inc., 750 F.2d 759, 762 (9th Cir. 1984).

55. *United Structures*, 9 F.3d at 997 (citing *Avanti*, 750 F.2d at 762).

than one of set-off under the contract.[56] This distinction, the court held, made any determination of privity irrelevant.[57]

B. The First Circuit's Reasoning

In allowing G.R.G. to assert a recoupment defense, the First Circuit drew a distinction between the doctrines of recoupment and set-off.[58] It held that a set-off is a counterclaim which arises out of an unrelated transaction, while recoupment is a reduction by a defendant of a plaintiff's claim because of a right arising out of the same transaction.[59] The court cited *Black's Law Dictionary* to distinguish the two ideas:

> If Smith sues Jones for $10,000 for grain that Smith supplied, and Jones seeks to reduce the judgment by $5,000 representing Smith's (unrelated) unpaid rental of Jones' summer cottage, Jones is seeking a *setoff*. "Recoupment," on the other hand, is "a reduction or rebate by the defendant of part of the plaintiff's claim because of a right in the defendant *arising out of the same transaction*." If Smith sues Jones for $10,000 for grain that Smith supplied, and Jones seeks to reduce the judgment by $5,000 representing Jones' expenditure to dry out Smith's (defectively) wet grain (or the cost of the grain's lost value), Jones is seeking a *recoupment*.[60]

Although the court admitted that the distinction is "somewhat technical,"[61] it noted that it remains alive in a few specialized circumstances, one of which is the realm of bankruptcy.[62]

The First Circuit gave two reasons for allowing G.R.G. the benefit of the distinction under the Miller Act.[63] It first interpreted the language of the Act to allow "a supplier to recover,

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56. *Id.* at 998-99.

57. *Id.* at 999-1000.

58. *Id.* at 998.

59. *Id.*

60. *Id.* (emphasis added) (citations omitted) (quoting BLACK'S LAW DICTIONARY 1230 (5th ed. 1979)).

61. *Id.*

62. *Id.*; *see, e.g.*, Lee v. Schweiker, 739 F.2d 870, 875 (3d Cir. 1984); Sapir v. Blue Cross/Blue Shield (*In re* Yonkers Hamilton Sanitarium, Inc.), 34 B.R. 385, 386-87 (S.D.N.Y. 1983); United States v. Midwest Serv. and Supply Co. (*In re* Midwest Serv. and Supply Co.), 44 B.R. 262, 265 (D. Utah 1983); Waldschmidt v. C.B.S., Inc., 14 B.R. 309, 314 (M.D. Tenn. 1981); Hagan v. Heckler (*In re* Hagan), 41 B.R. 122, 125 n.5 (Bankr. D.R.I. 1984). However, it has by all means not been limited to bankruptcy cases. *See* Rothensies v. Electric Storage Battery Co., 329 U.S. 296, 299 (1946) (federal income tax dispute).

63. *United Structures*, 9 F.3d at 999-1000.

not the full contract price, but the 'sums *justly* due him.'"[64] The court then reasoned that recoupment, as a mechanism for "'do[ing] justice in view of the one transaction as a whole,' would seem to match the statute's requirement[s]."[65] Further, it held that "we do not see how the full contract price of goods supplied can possibly be 'justly due' a person who supplied defective goods."[66]

The second reason the court gave for allowing the recoupment defense stems from "the policies underlying the Miller Act."[67] Although the Supreme Court has regularly held that the purpose of the Miller Act is to "'protect those whose labor or material has contributed to the prosecution of the work,'"[68] the First Circuit decided not to extend this protection to "include payments to which the supplier's underlying contract does not entitle him."[69] The court pointed to the fact that those who are in privity with a general contractor (such as a subcontractor) may be subject to a reduction for "defective articles or work."[70] Because the "defective articles or work" may have been supplied by one not in privity with the general contractor (such as a supplier to the subcontractor),[71] the court reasoned that those who are not in privity with the general contractor (e.g., the sub-subcontractors and suppliers to the subcontractors) should be held to the same standard.[72] In sum, the First Circuit felt that "disallowing recoupment would give the supplier 'rights' to which his contract does not entitle him."[73]

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64. *Id.* at 999 (emphasis added) (quoting the Miller Act, 40 U.S.C. § 270b(a)).

65. *Id.* (citation omitted) (quoting *Rothensies*, 329 U.S. at 299).

66. *Id.*

67. *Id.*

68. Clifford F. MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 322 U.S. 102, 104 (1944) (quoting United States *ex rel.* Hill v. American Sur. Co., 200 U.S. 197, 204 (1906) (construing the Heard Act)); *see also* J.W. Bateson Co. v. United States *ex rel.* Bd. of Trustees, 434 U.S. 586, 596 n.2 (1978) (Stevens, J., dissenting); F.D. Rich Co. v. Indus. Lumber Co., 417 U.S. 116, 124 (1974).

69. *United Structures*, 9 F.3d at 999.

70. *Id.* (quoting 8 JOHN C. MCBRIDE & THOMAS J. TOUHEY, GOVERNMENT CONTRACTS § 49.490[4], at 49-658 (1993)).

71. *Id.*

72. *Id.*

73. *Id.* at 1000.

IV. ANALYSIS

The result reached by the First Circuit in *United Structures* represents a clash of two general governmental policies: that of the courts in attempting to expeditiously consolidate causes of action,[74] and that of Congress in attempting to protect those that supply labor and materials on federal projects.[75] This note will examine these policies in order to determine first whether recoupment is proper in the absence of contractual privity, and second whether the First Circuit's reasoning in *United Structures* can be defended in light of the stated purposes and highly remedial nature of the Miller Act. Finally this note will examine the traditionally low burden of proof placed on those who supply labor and materials and how that burden relates to the result the First Circuit reached in *United Structures*.

A. Recoupment is Improper in the Absence of Privity

The First Circuit was concerned primarily with the payment bond portion of the Miller Act as a method by which a supplier could collect "sums justly due him."[76] In reasoning that "disallowing recoupment would . . . give the supplier 'rights' to which his contract does not entitle him,"[77] the *United Structures* court mentioned that it did not "understand why the existence or nonexistence of privity of contract should make any difference with regard to [the] general policies [of the Miller Act]."[78] However, privity has nothing to do with giving the supplier supplementary rights in a contract—the more sensible question is whether recoupment is proper in the absence of privity in a Miller Act dispute.

As mentioned above, recoupment is a defense based upon a debt arising out of the same transaction while set-off does not necessarily involve a claim arising out of the same transaction or contract.[79] In *United Structures*, the court assumed that it

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74. Montecatini Edison, S.P.A. v. Ziegler, 486 F.2d 1279, 1282 (D.C. Cir. 1973).

75. H.R. REP. NO. 1263, 74th Cong., 1st Sess., at 1 (1935); S. REP. NO. 1238, 74th Cong., 1st Sess., at 1 (1935).

76. *United Structures*, 9 F.3d at 999 (quoting 40 U.S.C. § 270b(a)).

77. *Id.* at 1000.

78. *Id.* at 999.

79. Lee v. Schweiker, 739 F.2d 870, 875 (1984); 80 C.J.S. *Set-Off and Counterclaim* §§ 34 & 35 (1953); *see supra* notes 58-62 and accompanying text.

was dealing with a single transaction.[80] In fact, there were several. United Structures supplied its steel to a subcontractor.[81] The subcontractor in turn used the steel in G.R.G.'s project.[82] When United Structures was not paid, it brought suit against G.R.G. under the provisions of the Miller Act.[83]

Thus, the situation looked less like the example borrowed from *Black's Law Dictionary* by the *United Structures* court[84] and more like the following: Smith supplies grain to Beck who makes it into bread. The bread is in turn sold to Jones. Smith sues Jones for $10,000 for grain that Smith supplied to Beck under an exclusive statutory remedy created expressly for the protection of people in Smith's position. Jones seeks to reduce the judgment by $5,000 representing Jones' loss from the allegedly defective grain. In this example there was not one transaction, but several. Recall that recoupment is a defense arising out of the same transaction that gave rise to the initial claim.

The *United Structures* situation appears to involve multiple transactions despite a liberal definition of the term "transaction" by the courts.[85] In the realm of counterclaims, the Supreme Court holds that "'[t]ransaction' is a word of flexible meaning" which "may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."[86] The theory behind this holding is judicial expediency.[87] Other courts have followed the Supreme Court's lead in interpreting "transaction" broadly:[88] "This concept . . . is not affected by the fact that the

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80. *See United Structures*, 9 F.3d at 998-1000.

81. *Id.* at 997.

82. *Id.*

83. *Id.*

84. *See supra* note 60 and accompanying text.

85. *See* Moore v. New York Cotton Exch., 270 U.S. 593, 609 (1926).

86. *Id.* at 610. The *United Structures* court followed the *Avanti* court in characterizing the attempted set-off by G.R.G. as a defense. However, the Supreme Court notes: "'[I]t is not clear whether set-offs and recoupments should be viewed as defenses or counterclaims . . . .'" Reiter v. Cooper, 113 S. Ct. 1213, 1217 (1993) (quoting 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1275 (2d ed. 1990)).

87. *See, e.g.*, Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620, 625 (D.C. Cir. 1975) ("[T]he term 'transaction' is to be construed generously to avoid the unnecessary expense inherent in multiplicious litigation.") (footnote omitted).

88. May v. Parker-Abbott Transfer and Storage, Inc., 899 F.2d 1007, 1009-10 (10th Cir. 1990) (dealing with claim preclusion and noting that a "'contract' is generally considered to be a 'transaction,'"); Columbia Plaza Corp. 525 F.2d at 625; FSLIC v. Burdette, 696 F. Supp. 1183, 1187 (E.D. Tenn. 1988).

case happens to fall under the Miller Act."[89] The question remains, however, whether the once-removed relationship between G.R.G. and United Structures should be viewed in this broad manner.

Several factors mitigate against concluding G.R.G.'s recoupment arose out of a single transaction. First, the Supreme Court's liberal interpretation of the word has generally been applied to Federal Rule of Civil Procedure 13(a), which deals with compulsory counterclaims.[90] Recoupment is an equitable doctrine[91] and should be applied in a manner which would reinforce the broad remedial policies of the statutory scheme under which relief is sought.[92] For example, recoupment is held inapplicable when it clashes with a legislatively enacted statute of limitations.[93] Likewise, it was improper for the First Circuit to apply recoupment against United Structures when the legislature specifically enacted the payment bond provisions of the Miller Act to protect those in United Structure's position.[94]

Second, "transaction" is not always defined quite as broadly as first mentioned.[95] Many courts which recognize recoupment require that the amounts sought to be recouped arise out of the same "contract" rather than "transaction."[96] In fact, just

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89. United States *ex rel.* Cent. Rigging & Contracting Corp. v. Paul Tishman Co., 32 F.R.D. 223, 225 (E.D.N.Y. 1963) (citations omitted) (dealing with whether a "[c]ourt has ancillary jurisdiction over a counterclaim or cross-claim arising out of the same transaction").

90. Southern Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962).

91. Ashland Petroleum Co. v. Appel (*In re* B&L Oil Co.), 782 F.2d 155, 159 (10th Cir. 1986) (bankruptcy case).

92. It must be noted, however, that the equitable nature of recoupment cuts both ways. An equally compelling argument is raised by the *United Structures* court: "[D]isallowing recoupment would . . . give the supplier 'rights' to which his contract does not entitle him." United Structures of America v. G.R.G. Eng'g, S.E., 9 F.3d 996, 1000 (1st Cir. 1993).

93. "If there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them." Rothensies v. Electric Storage Battery Co., 329 U.S. 296, 303 (1946) (declining to apply recoupment in the realm of tax law); *see id.* (stating "[t]hat claims dead so long can be resurrected under [recoupment], is enough to show its menace to the statute of limitations"); *id.* at 302, (noting that "if we should approve a doctrine of recoupment of the breadth here applied we would seriously undermine the statute of limitations").

94. In a similar situation, the court in Manchester Premium Budget Corp. v. Manchester Ins. & Indem. Co., 612 F.2d 389, 392 (8th Cir. 1980) (applying Ohio law), held that "mutuality of parties [is] 'an essential condition of a valid set-off or counterclaim. That is, the debts must be to and from the same persons and in the same capacity.'"

95. *See supra* notes 85-87 and accompanying text.

96. Davidovich v. Welton (*In re* Davidovich), 901 F.2d 1533, 1538 (10th Cir.

because "'the same two parties are involved [in the claims to be offset], and that a similar subject matter gave rise to both claims . . . does not mean that the two arose from the 'same transaction' for purposes of the doctrine of recoupment."[97] Further, "courts have generally only found this 'same transaction' requirement to be satisfied when the debts to be offset arise out of a single, integrated contract or similar transaction."[98] If we use a single contract analysis, then clearly recoupment was improper in *United Structures*.[99] The relationship between United Structures and G.R.G. was once removed. United Structures contracted only with the subcontractor, which in turn contracted with G.R.G.[100] Because contractual privity was lacking in *United Structures*, there was not a single transaction.[101] Recoupment was therefore improperly applied.

Further, in *Avanti*, the Ninth Circuit was correct in noting that the prime contractor "[is] in the best position to protect

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1990) (per curiam); *see also* Ashland Petroleum Co. v. Appel (*In re* B&L Oil Co.), 782 F.2d 155, 158 (10th Cir. 1986) (assertion by the creditor that "claims arising from a single contract generally qualify for recoupment"); Lee v. Schweiker, 739 F.2d 870, 875 (3d Cir. 1984) ("In bankruptcy, the recoupment doctrine has been applied primarily where the debtor's claims against the creditor arise out of the same contract.") (citations omitted).

But see Bull v. United States, 295 U.S. 247, 262 (1934) ("[R]ecoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded."); Holford v. Powers, 896 F.2d 176, 178 (5th Cir. 1990); *In re* Monongahela Rye Liquors, 141 F.2d 864, 869 (3d Cir. 1944); Sapir v. Blue Cross/Blue Shield (*In re* Yonkers Hamilton Sanitarium), 34 B.R. 385, 386 (S.D.N.Y. 1983); United States v. Midwest Serv. and Supply Co. (*In re* Midwest Serv. and Supply Co.), 44 B.R. 262, 265-66 (D. Utah 1983); Waldschmidt v. C.B.S., Inc., 14 B.R. 309, 314 (M.D. Tenn. 1981); Hagan v. Heckler (*In re* Hagan), 41 B.R. 122, 125-26 n.5 (Bankr. D.R.I. 1984); 80 C.J.S. *Set-off and Counterclaim* § 34 (1953) ("In recoupment defendant's claim must arise out of the same contract or transaction as that on which plaintiff's cause of action is founded.").

97. *In re Davidovich*, 901 F.2d 1533, 1538 (10th Cir. 1990) (per curiam) (quoting Lee v. Schweiker, 739 F.2d 870, 875 (3d Cir. 1984)); *see also* FDIC v. Howse, 802 F. Supp 1554, 1563 (S.D. Tex. 1992) (citing *In re Davidovich*, 901 F.2d at 1538).

98. *In re Davidovich*, 901 F.2d at 1538 (citations omitted); *see also* Rothensies v. Electric Storage Battery Co., 329 U.S. 296, 301 (1946) (in the realm of tax law, criticizing a lower court that "saw no reason for narrowly construing the requirement [of recoupment] that both claims originate in the same transaction," and opining that "this [analysis] misapprehends the limitations on the doctrine of recoupment").

99. In the *Davidovich* case, recoupment was held inapplicable where the obligations of the parties "did not arise out of the same contract, [and were] not limited to the same parties . . . ." 901 F.2d at 1538.

100. United Structures of America v. G.R.G. Eng'g, S.E., 9 F.3d 996, 997 (1st Cir. 1993).

101. *See supra* note 97 and accompanying text.

itself against [the subcontractor's] potential bankruptcy."[102] When examined objectively, it is really the subcontractor that supplied the steel to the general contractor (G.R.G.). It is only through the Miller Act that the general contractor and the sub-subcontractor (United Structures) have any relationship. Among other things, the relationship was created for the benefit of the sub-subcontractor.[103] Allowing G.R.G. to also benefit from that relationship is contrary to legislative intent.

Finally, in both *Avanti* and *United Structures*, the general contractor was attempting to set-off or recoup sums due a sub-subcontractor.[104] These situations are analogous. If, as a general proposition, privity is required for a set-off,[105] it should be doubly required for the more restrictive defense of recoupment.[106] If the First Circuit wished to disagree with the *Avanti* court on this point it should have done so. Instead, it found its way around that decision, further complicating this area of law.[107]

In sum, despite the First Circuit's arguments to the contrary,[108] contractual privity matters very much in a defense of recoupment. To be a part of the same transaction, the party attempting to assert a defense of recoupment cannot, in the absence of privity, base that defense on the Miller Act[109] Although these arguments may seem like splitting hairs, the remedial nature of the Miller Act mandates that they be split in favor of those it was enacted to protect.

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102. United States *ex rel.* Martin Steel Constructors, Inc. v. Avanti Constructors, Inc., 750 F.2d 759, 763 (9th Cir. 1984).

103. H.R. REP. NO. 1263, 74th Cong., 1st Sess., at 1 (1935); S. REP. NO. 1238, 74th Cong., 1st Sess., at 2 (1935).

104. *See* United Structures of America v. G.R.G. Eng'g, S.E., 9 F.3d 996, 997 (1st Cir. 1993); United States *ex rel.* Martin Steel Constructors, Inc. v. Avanti Steel Constructors, Inc., 750 F.2d 759, 762 (9th Cir. 1984).

105. *Avanti*, 750 F.2d at 762.

106. *See generally* 80 C.J.S. *Set-off and Counterclaim* §§ 34 & 35 (1953) (same transaction required for recoupment but not for set-off).

107. *United Structures*, 9 F.3d at 1000 (allowing recoupment in the absence of privity, but not specifically ruling on set-off).

108. *Id.* at 1000-01.

109. For a contrary view, see United States *ex rel.* Kashulines v. Thermo Contracting Corp., 437 F. Supp. 195, 199-200 (D.N.J. 1976), arguing that permissive counterclaims such as set-off (and possibly recoupment) may be asserted under particular causes of action such as the Miller Act. Even this case, however, did not rule out the possibility that an exclusive statutory remedy could overcome a defendant's rights to a permissive counterclaim. *Id.* at 200 ("[P]laintiff . . . bears a heavy burden in seeking to establish that jurisdiction over the permissive counterclaims should not exist . . . . Plaintiff has been unable to carry this burden.").

B. The Miller Act is Highly Remedial in Nature

When the intent of the Miller Act is viewed with the Supreme Court's liberal interpretation and application of it, along with the Court's wishes that the Act be applied uniformly, the flaws in the First Circuit's reasoning are apparent. Despite the court's gloss over legislative intent, the fact remains that the Miller Act was designed specifically to protect those in United Structures' situation.

"The Miller Act . . . is highly remedial in nature. . . . [and] is entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects."[110] With these words, the Supreme Court reiterated the purpose of the Act under which United Structures sought relief. The First Circuit disregarded legislative intent and instead resurrected the doctrine of recoupment[111] in order to reach what it apparently believed to be an equitable result. The Act, however, has a long history of single-minded purpose in protecting those who supply work and materials on federal jobs.[112]

In *MacEvoy v. United States*, the Supreme Court reiterated the intent of the legislature "was to remove the procedural difficulties found to exist under the earlier measure [the Heard Act] and thereby make it easier for unpaid creditors to realize the benefits of the bond."[113] With this intent in mind, it is obvious that any analysis denying the fruits of the bond from those it was enacted to protect is untenable. This is not to say that the general contractor should have no recourse.[114] On

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110. Clifford F. MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 322 U.S. 102, 107 (1944) (citations omitted).

111. *United Structures*, 9 F.3d at 998 (stating that "the distinctions between . . . recoupment and set-off are no longer of much importance." (quoting 20 AM. JUR. 2D *Counterclaim, Recoupment and Setoff* § 10 (1965))). *But see id.* at 1000 ("We have examined the legislative history of the Miller Act . . . but we have found nothing that suggests the conclusion reached in *Avanti*.").

112. In fact, its history reaches back to the original Heard Act of 1894. *See, e.g.*, Illinois Surety Co. v. John Davis Co., 244 U.S. 376, 380 (1917) (a sub-subcontractor may sue on the bond despite the subcontractor having already been paid in full).

113. *MacEvoy*, 322 U.S. at 106.

114. In comparison to the laborers and material suppliers who normally

> have no lien or claim against the government, usually have no right to assert a claim against money withheld by the government on the prime contract, and are not entitled to recover on the performance bond executed by the prime contractor to the federal government on the theory that they are third-party beneficiaries.

the contrary, many avenues are open to one in G.R.G.'s position.[115] Recoupment, however, should not be one of them. In the absence of privity, the First Circuit simply applied the doctrine improperly.

Another flaw in *United Structures* is that the Miller Act should not be subject to technical rules which work to deny the benefits of the payment bond. The rule is simple: "[T]he strict letter of the Act must yield to its evident spirit and purpose when this is necessary to give effect to the intent of Congress."[116] This idea is not new.[117] Early in this century it was applied to a Heard Act dispute in *Illinois Surety Co. v. John Davis Co.*[118] There the Court found that "[i]n every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed."[119] That case further held that "[t]echnical rules protecting sureties from liability have never been applied in proceedings under this statute."[120]

This cuts against the First Circuit's reasoning in two ways. First, the First Circuit admitted the technical nature of the recoupment but employed it anyway. "This technical legal terminology [recoupment] does not necessarily reflect ordinary usage."[121] Second, the *United Structures* court made much of

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17 AM. JUR. 2D *Contractor's Bonds* § 150 (1990) (footnotes omitted). Their "only effective remedy" is the Miller Act payment bond. *Id.*

115. Perhaps a suit against the subcontractor would have been more proper. *See supra* notes 102-104 and accompanying text. On the other hand, under the *United Structures* fact pattern, the subcontractor to whom United Structures supplied the steel had gone bankrupt. United Structures of America v. G.R.G. Eng'g, S.E., 9 F.3d 996, 997 (1st Cir. 1993). This, however, is the price we pay for bankruptcy laws which provide overextended debtors a fresh start. *See* Kansas State and Trust Bank v. Vickers (*In re* Vickers), 577 F.2d 683, 686-87) ("One of the primary purposes of the Bankruptcy Act is the rehabilitation of an honest debtor by discharging his debts to afford him a fresh start in his economic life.") (citations omitted). The Miller Act's broad remedial scheme should not be implicated. *See supra* notes 112-14.

116. Glassell-Taylor Co. v. Magnolia Petroleum Co. 153 F.2d 527, 530 (5th Cir. 1946) (citations omitted).

117. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

118. 244 U.S. 376, 380 (1917).

119. *Id.*

120. *Id.* (footnote omitted).

121. United Structures v. G.R.G. Eng'g, S.E., 9 F.3d 996, 998 (1st Cir. 1993) ("[O]ften the technical legal distinction [between set-off and recoupment] does not

the fact that the Act only allows recovery for "sums 'justly due' a supplier."[122] This is a clear case of allowing the letter of the law to prevail over its reason.[123] One can imagine a team of clerks scrutinizing the statute until finding two words which seem to back the court's preferred holding. The First Circuit's opinion is flawed because it fusses over technicalities and ignores legislative intent.

A final policy argument against the holding in *United Structures* is the need for consistency in construing the Miller Act. "[T]he Act covers most federal works projects,"[124] no matter the state or jurisdiction. The Supreme Court extols the virtues of uniformity in this area.[125] A federal cause of action demands the uniformity commensurate with its universal application. While the *Avanti* court had all but settled the questions in this area, the First Circuit unnecessarily muddied the waters by allowing the recoupment defense. In sum, the general purposes of the Miller Act as defined by both the 74th Congress and the Supreme Court compel a result contrary to that reached by the First Circuit in *United Structures v. G.R.G. Engineering*.[126]

C. *The Good Faith Standard and its Relation to Defenses Asserted by General Contractors*

Even failing the above mentioned arguments, the First Circuit in *United Structures* should have recognized the almost ridiculously low burden of proof to which suppliers caught in Miller Act disputes have traditionally been held. In order to recover,

> material supplier[s] need only prove four elements:
> (1) the materials were supplied in prosecution of the work provided for in the contract;

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matter.").

122. *Id.* at 999.

123. *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 461 (1892) ("'The reason of the law . . . should prevail over its letter.'" (quoting *United States v. Kirby*, 74 U.S. 482, 487 (1868))).

124. IRV RICHTER & ROY S. MITCHELL, HANDBOOK OF CONSTRUCTION LAW AND CLAIMS 209 (1982).

125. F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 127 (1974) (disallowing the award of attorneys' fees to supplier suing under the Miller Act as a matter of uniform application despite probable contrary result under state law).

126. 9 F.3d 996 (1st Cir. 1993).

(2) [the supplier] has not been paid;
(3) [the supplier] had a good faith belief that the materials were intended for the specified work; and
(4) the jurisdictional requisites were met.[127]

Concerning the third prong of the test, material suppliers need not show that materials were "incorporated into the contract work."[128] Nor do they need to prove "that the materials were delivered to the jobsite."[129] In fact, "in order to be covered by the bond, [materials] need . . . [only to have been] intended in good faith, and reasonably believed [to have been] furnished for [the] purpose" of being used in the federal job.[130]

This points to a good faith standard on the part of materialmen such as United Structures. By analogy, if a supplier need only show that the materials were furnished in good faith, then likewise the good faith burden should extend to the quality of the materials. Although beyond the scope of this note, should the First Circuit's recoupment ideas be adopted, it is logical that one asserting the defense of recoupment should be required to prove that the defective materials were not supplied in good faith. This would place the burden of proof on the general contractor and would standardize claims of those supplying materials on federal projects who have gone unpaid.

V. CONCLUSION

It is important to remember that the Miller Act was created to protect laborers and materialmen, not general contractors.[131] General contractors' claims lie either with those to which they are in privity or outside of Miller Act disputes altogether. Neither set-off nor recoupment is proper in the absence of privity. Further, the general contractor is in a position to protect itself. However, those supplying goods and materials in federal jobs have no recourse other than that provided by the Miller Act. The remedial scheme should therefore not be whit-

127. United States *ex rel.* Martin Steel Constructors v. Avanti Constructors, Inc., 750 F.2d 759, 761 (9th Cir. 1984) (citing United States *ex rel.* Carlson v. Continental Casualty Co., 414 F.2d 431, 433 (5th Cir. 1959)).

128. 17 AM. JUR. 2D *Contractor's Bonds* § 159 (1990) (footnote omitted).

129. *Id.*

130. C.C. Marvel, Annotation, *What Constitutes Supplying Labor and Material "in the Prosecution of the Work" Provided for in the Primary Contract Under Miller Act*, 79 A.L.R.2D 843, 847 (1961) (citation omitted).

131. Clifford F. MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 322 U.S. 102, 107 (1944).

tled away. Also, Congress never intended the First Circuit's narrow reading. The two words, "justly due," distilled out of many, cannot overcome the Miller Act's broad remedial nature. Although the Supreme Court encourages judicial expediency, it also recognizes the value of the protections afforded by the Miller Act. Justice requires that equity not rule in favor of technicalities over fairness. Lastly, the customary interpretation of the Miller Act, and the burden of proof those it protects have traditionally been held to, scream against any weakening of its remedial scheme. Although recoupment is a useful tool, the First Circuit in *United Structures* simply applied it improperly. Courts would be wise not to follow the First Circuit in its application of recoupment. Such limitations have no place in Miller Act payment bond disputes.

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