

No. 24-692

---

In the Supreme Court of the United States

---

COVENANT CONSTRUCTION SERVICES, LLC  
AND NORTH AMERICAN SPECIALITY  
INSURANCE CO.,

Petitioners

v.

FIVE RIVERS CARPENTERS DISTRICT COUNCIL  
HEALTH AND WELFARE FUND, et al.,

Respondents.

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT

---

---

**BRIEF IN OPPOSITION**

---

BRANDON E. WOOD

*Counsel of Record*

MICHAEL E. AMASH

BLAKE & UHLIG, P.A.

6803 West 64<sup>th</sup> Street,

Suite 300

Overland Park, KS 66202

(913) 321-8884

mea@blake-uhlig.com

bew@blake-uhlig.com

*Counsel for Respondents*

## **RULE 29.6 STATEMENT**

Respondents Five Rivers Carpenters District Council Health and Welfare Fund and Five Rivers Carpenters District Council Educational Trust Fund, by and through their Trustees, state that no publicly held company owns 10% or more of any stock of the Respondents. Respondents are not subsidiaries or affiliates of a publicly traded corporation. Respondents are employee welfare benefit funds and their respective trustees.

**COUNTERSTATEMENT OF  
QUESTION PRESENTED**

1. Whether the Eighth Circuit Court of Appeals erred in concluding that the Respondents are entitled to recover attorneys' fees under their claims against a Miller Act payment bond, when such fees are recoverable under the contract that creates the payment obligation between the Respondents and the Petitioners' subcontractor.
2. Whether the Eighth Circuit Court of Appeals erred in concluding that the Respondents' notice of their Miller Act bond claims were timely as each notice was provided within ninety (90) days of the date on which the last of the labor which makes up each of Respondents' claim was performed.

**TABLE OF CONTENTS**

RULE 29.6 STATEMENT .....	ii
COUNTERSTATEMENT OF QUESTION PRESENTED .....	iii
TABLE OF AUTHORITIES .....	v
INTRODUCTION .....	1
STATEMENT OF THE CASE .....	3
REASONS TO DENY PETITION.....	6
I.    The Eighth Circuit’s Decision Does Not Conflict with This Court’s Decisions or the Decisions of Other Circuits .....	7
A. The Eighth Circuit Properly Applied Settled Law in Awarding Respondents’ Attorneys’ Fees under their Claim against the Miller Act Payment Bond.....	8
B. The Eighth Circuit Properly Applied Settled Law in Holding that Respondents Timely Provided Notice of their Claim against the Miller Act Payment Bonds .....	14
II.   The Petition Raises No Issues of Substantial Importance Which Warrant This Court’s Review .....	20
CONCLUSION.....	22

## TABLE OF AUTHORITIES

### Cases

<i>Alyeska Pipeline Serv. Co. v. Wilderness Soc’y</i> , 421 U.S. 240 (1975) .....	11
<i>Consolidated Elec. &amp; Mechanicals, Inc. v. Biggs General Contracting, Inc.</i> , 167 F.3d 432 (8th Cir. 1999) .....	15
<i>D&amp;L Constr. Co. v. Triangle Elect. Supply Co.</i> , 332 F.2d 1009 (8 <sup>th</sup> Cir. 1964) .....	8
<i>Diduck v. Kaszucki &amp; Sons Contractors, Inc.</i> , 874 F.2d 912 (2nd Cir. 1989) .....	15
<i>F.D. Rich Co. Inc. v. U.S. for the use of Indus. Lumber Co., Inc.</i> , 417 U.S. 116 (1974) .....	11, 12
<i>Fleisher Engineering Co. v. United States, for Use and Benefit of Hollenbeck</i> , 311 U.S. 15 (1940) ...	16
<i>Krupp Steel Products, Inc. v. Aetna Ins. Co.</i> , 923 F.2d 1521 (11th Cir. 1991) .....	12
<i>Noland Co. v. Allied Contractors, Inc.</i> , 273 F.2d 917 (4th Cir. 1959) .....	19, 22
<i>Owners Ins. Co. v. Fidelity and Deposit Co. of Maryland</i> , 41 F.4th 956 (8th Cir. 2022) .....	10, 13
<i>Paige Int’l, Inc. v. XL Specialty Ins. Co.</i> , 267 F.Supp.3d 205 (D.D.C. 2017) .....	10

<i>Shearon v. Comfort Tech Mech. Co., Inc.</i> , 936 F.Supp.2d 143 (E.D.N.Y. 2013).....	18
<i>Southern Elec. Health Fund v. Heritage Mut. Ins. Co.</i> , 147 Fed.Appx. 497, (6th Cir. 2005) .....	16
<i>Travelers Indem. Co. v. U.S. for Use and Benefit of Western Steel Co.</i> , 362 F.2d 896 (9th Cir. 1966).....	9
<i>U.S. ex re. Carter Equip. Co. v. H.R. Morgan, Inc.</i> , 554 F.2d 164 (5th Cir. 1977) .....	9
<i>U.S. ex rel. Maddux Supply Co. v. St. Paul Fire &amp; Marine Ins. Co.</i> , 86 F.3d 332 (4 <sup>th</sup> Cir. 1996) .....	9
<i>U.S. ex rel. Southeastern Municipal Supply Co., Inc. v. Nat’l Union Fire Ins. Co.</i> , 876 F.2d 92 (11th Cir. 1989) .....	9,10, 12
<i>U.S. ex. Rel. United Bhd of Carpenters &amp; Joiners Loc. Union No. 2028 v. Woerfel Corp.</i> , 545 F.2d 1148 (8th Cir. 1976) .....	18
<i>U.S. for the Benefit and on Behalf of Sherman v. Carter</i> , 353 U.S. 210 (1957). .....	7, 16-17
<i>U.S. for Use of John D. Ahern Co., Inc. v. J.F. White Contracting Co.</i> , 649 F.2d 29 (1st Cir. 1981).....	20
<i>United States ex. rel. Int’l Bhd. Of Elec. Workers Local Union 692 v. Harford Fire Ins.</i> , 809 F.Supp. 523, (E.D. Mich. 1992).....	16

**Statutes**

29 U.S.C. § 186.....	3
29 U.S.C. § 1132.....	4, 17
29 U.S.C. § 1145.....	17
40 U.S.C. § 3133.....	1, 10, 15, 21

## INTRODUCTION

This case concerns a straightforward application of settled principles of law regarding employee welfare benefit funds' ability to bring a claim against a Miller Act payment bond for unpaid employer contributions, and the ability to recover attorneys' fees under such a claim. In this case, the Respondent Funds brought a claim against a Miller Act payment bond for unpaid contributions which were due and owing by Petitioner Covenant's direct subcontractor on a federal construction project. Pursuant to the Miller Act, 40 U.S.C. § 3133(b)(2), the Respondent Funds each provided Petitioner Covenant with notice of its claim within ninety (90) days of the date on which the last of the labor which makes up each Funds' claim was performed.

The Eight Circuit concluded that the Funds' notice of such claims were timely and rejected Respondent's insistence that the claims must be bifurcated into separate claims brought on behalf of the subcontractors' individual employees for the purpose of determining whether such notices were timely. Furthermore, because the collective bargaining agreement which obligated the subcontractor to remit contributions to the Respondent Funds provided for collection of liquidated damages and attorneys' fees upon failure to timely pay such contributions, the Eighth Circuit, applying well-settled law concerning recovery of such fees under a Miller Act payment bond, awarded Respondents their attorneys' fees.



As explained below, the Eighth Circuit's analysis is correct and supported by well-established principles of law concerning claims against Miller Act payment bonds. Furthermore, Petitioners' characterizations of the questions presented do not accurately capture the issues as argued and decided in the proceedings below. Contrary to Petitioners' assertions, the Eighth Circuit's decision does not modify the contractual exception to the American Rule governing attorneys' fees; rather, the court below determined that such amounts were recoverable under the Miller Act, under the well-established rule that the liability of the principal contractor and its surety is coextensive with the liability of its subcontractor to a bond claimant.

Similarly, the Eighth Circuit's decision does not allow a claimant to aggregate otherwise untimely claims in order to avoid dismissal under a theory of assignment. As explained below, the Funds' claims are not dependent upon any assignment of individual claims. Rather, the Funds have standing to assert a claim against the bond for contributions owed directly to the Funds as a result of labor provided to a project. As such, the Eighth Circuit properly held that the relevant date for determining whether the Funds' had timely provided notice under the Miller Act was ninety (90) days from the last date on which any of the labor which made up each of the Funds' claims was performed. Because the Funds timely provided notice within that period, the Eighth Circuit held that the Funds' notice of their claims against the payment bond were timely.

Contrary to Petitioner's assertions, no split of authority exists on any of the questions at issue. Rather, the questions presented by this case amount to nothing more than an assertion that the lower court misapplied a properly stated rule of law. Furthermore, the issues presented by this case are of no significant importance as would justify the Court's review. Because there are no circuit splits on the applicable law, and because the lower court properly applied settled law, the Petition presents no compelling reason for granting review, and the Petition should be denied.

## **STATEMENT OF THE CASE**

### **I. Factual Background**

This case involves a prime contractor and its surety's refusal to pay a claim against a Miller Act payment bond brought by employee fringe benefit funds which are owed contributions by a subcontractor of the prime contractor on a federal construction project.

The Respondents are multi-employer employee fringe benefit funds organized under Sections 3(3) and (37) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002(3) and (37) ("ERISA") and/or Section 186(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5). The Respondent Funds (the "Funds") exist for the sole and exclusive purpose of providing health and welfare and training benefits to participants and their beneficiaries.

Employers who are signatory to various multi-employer collective bargaining agreements are obligated by such agreements to remit contributions to the Funds on a monthly basis, based upon the hours of work performed by the employers' bargaining unit employees which are covered by the terms of the collective bargaining agreements. Such contributions are remitted based on a self-reporting system. Each month, signatory contractors are obligated to report to the Funds' administrator the number of hours of covered work performed by its employees during the preceding month, and remit payment for the contributions due thereon. The trustees of the Funds have the duty and obligation under the trust agreements and under ERISA to enforce contribution obligations of signatory contractors. *See* 29 U.S.C. § 1132(g)(2).

Petitioner Covenant Construction Services, LLC ("Covenant") was the prime contractor on the federal Correct Life Safety Deficiencies Project in Iowa City, Iowa (the "Project"). Calacci Construction Company, Inc. ("Calacci") was a direct subcontractor to Covenant on the Project. Calacci was signatory to a collective bargaining agreement (the "CBA") with various labor unions which, among other obligations, required Calacci to make fringe benefit contributions to the Funds for hours of covered work performed by its employees. Consistent with Section 502(g) of ERISA, 29 U.S.C. § 1132(g)(2), the CBA provides that in the event of a failure to timely remit owed contributions, the Funds are entitled to recover all delinquent contributions, along with interest,

liquidated damages, and attorneys' fees and costs incurred in collection of the delinquent contributions.

Pursuant to its obligations under the Miller Act, Covenant furnished payment and performance bonds for the Project through Petitioner North American Specialty Insurance Co. ("NAS"). The applicable payment bond (the "Bond") provides, in relevant part, that "[t]he above obligation is void if the Principal promptly makes payment to all persons having a direct relationship with the Principal or a subcontractor of the Principal for furnishing labor, material, or both in the prosecution of the work provided for in the contract identified above."

Calacci failed to pay a total of \$125,739.95 in principal contributions to the Funds for 14,745.5 hours of work performed on the Project covered by the CBA. The last date of such work occurred on June 18, 2021.

Due to Calacci's failure to remit the owed contributions, on September 15, 2021, the Funds each sent a notice of their intent to file a claim against the Miller Act payment bond to Covenant concerning the above delinquency. The Funds subsequently, in response to Covenant's request, provided additional information concerning the claim, including certified payroll information and Calacci's reports which it remitted to the Funds.

Despite the above, Covenant and NAS failed and refused to pay any portion of the Funds' claim against the Bond. As such, the Funds brought an

action against Covenant and the Funds to recover all principal, interest, liquidated damages, and attorneys' fees concerning the delinquent contributions.

## **II. Proceedings Below**

The Respondent Funds brought an action against the Bond in the U.S. District Court for the Northern District of Iowa. [Pet. Appx. 16a]. The case was transferred to the U.S. District Court for the Southern District of Iowa. [Pet. Appx. 16a]. The parties filed cross-motions for summary judgment. [Pet. Appx. 14a]. On August 24, 2023, the district court granted summary judgment on Respondents' claims, awarding the Respondent Funds all amounts due and owing by Petitioner Covenant's subcontractor for its work performed on the project, including liquidated damages and attorneys' fees. [Pet. Appx. 14a-33a]. On August 24, 2023, the Eighth Circuit affirmed. [Pet. Appx. 1a-13a]. On September 24, 2024, Petitioners were denied an en banc hearing. [Pet. Appx. 35a].

## **REASONS TO DENY PETITION**

The Petition does not present a compelling justification for granting review. As the Court is aware, Rule 10 emphasizes that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. Rule 10 outlines three compelling reasons that warrant review: (1) a circuit split; (2) a split on an important federal issues between a state court of last resort or a federal court of appeals; and (3) a state court of last resort or federal court decided an important federal question that

either has not been settled by this Court or conflicts with relevant decisions of this Court. *Id.* The Rule further states that where the asserted error consists of a misapplication of a properly stated rule of law, such a Petition is rarely granted. *Id.*

Here, as set forth below, and contrary to Petitioner's assertions, no split of authority exists on any of the questions at issue. Rather, the questions presented by this case amount to nothing more than an assertion that the lower court misapplied a properly stated rule of law. Furthermore, the issues presented by this case are of no significant importance as would justify the Court's review. Because there are no circuit splits on the applicable law, and because the lower court properly applied settled law, the Petition presents no compelling reason for granting review and should be denied.

**I. The Eighth Circuit's Decision Does Not Conflict With This Court's Decisions or The Decisions of Other Circuits**

The Petition argues that the Eighth Circuit's decision conflicts with the decisions of other circuits, as well as with prior decisions of this court. With respect to the first question presented by the Petition, Petitioners argue that there is a split "between Miller Act and non-Miller Act cases" with regards to whether attorneys' fees are recoverable under the Funds' Miller Act bond claim. Petitioner next argues that the lower court's decision conflicts with the Miller Act's assignment principals as set forth by this Court in

*U.S. for the Benefit and on Behalf of Sherman v. Carter*, 353 U.S. 210, 217-220 (1957).

Contrary to Petitioner's assertions, the Eighth Circuit's decision in this case is squarely consistent with settled law both as it relates to the issue of recoverability attorneys' fees, as well as to the issues relating to the timeliness of the Funds' notice.

**A. The Eighth Circuit Properly Applied Settled Law in Awarding Respondents' Attorneys' Fees under their Claim against the Miller Act Payment Bond**

Petitioners urge that the Eighth Circuit decision in this matter creates a circuit split "between Miller Act and non-Miller Act cases" with regards to whether the American Rule applies to the issue of availability of attorneys' fees on payment bond claims.

In awarding attorneys' fees and liquidated damages to the claimant Funds, the Eighth Circuit relied upon the settled rule that principal contractors and their sureties are liable to a Miller Act claimant for attorneys' fees and other amounts if such amounts are recoverable under the contract between a delinquent subcontractor and the claimant supplier. *See D&L Constr. Co. v. Triangle Elect. Supply Co.*, 332 F.2d 1009, 1012-13 (8<sup>th</sup> Cir. 1964).

With respect to recovery of attorneys' fees, courts have consistently held that the liability of a prime contractor and a surety under a Miller Act

payment bond is “governed by the subcontractor’s obligation” to the supplier, and that as such, a prime contractor and surety are liable for attorneys’ fees and interest where the agreement between the supplier and the subcontractor provides for such amounts. *D & L Construction, Co.*, 332 F.2d at 1012-13; *See also U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 336 (4<sup>th</sup> Cir. 1996) (holding that attorneys’ fees and interest are recoverable by a Miller Act bond claimant if they are part of the contract between the subcontractor and the claimant); *See also U.S. ex rel. Southeastern Municipal Supply Co., Inc. v. Nat’l Union Fire Ins. Co.*, 876 F.2d 92, 93 (11<sup>th</sup> Cir. 1989) (holding that where there was an enforceable contractual provision between a supplier and subcontractor for recovery of attorney fees, such fees were recoverable under the Miller Act against the principal contractor and its surety); *See also U.S. ex re. Carter Equip. Co. v. H.R. Morgan, Inc.*, 554 F.2d 164, 166 (5<sup>th</sup> Cir. 1977); *See also Travelers Indem. Co. v. U.S. for Use and Benefit of Western Steel Co.*, 362 F.2d 896, 899 (9<sup>th</sup> Cir. 1966).

As the above decisions explain, the obligation of a surety to pay attorneys’ fees when provided in the contract between a subcontractor and claimant arises from the language of the Miller Act itself, and thus from the language of conforming bonds. *U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 336 (4<sup>th</sup> Cir. 1996); *See also Southeastern Mun. Supply Co., Inc. v. Nat’l Union Fire Ins. Co.*, 876 F.2d 92 (11<sup>th</sup> Cir. 1989) (holding that such amounts were recoverable as “sums justly due” under the Miller Act); *See also U.S. ex re. Carter Equip. Co. v. H.R.*



*Morgan, Inc.*, 554 F.2d 164, 166 (5th Cir. 1977)(holding that suppliers to a subcontractor are entitled to attorneys’ fees when provided in its contract with the subcontractor as amounts which were not paid in full and which were thus “sums justly due” to the supplier). Where attorneys’ fees and other amounts would be owed by the subcontractor to the bond claimant under its contract with the subcontractor in connection with providing labor and/or materials on the project, the above courts have held that such amounts are thus sums which would be due to the claimant, and thus sums which are recoverable under the Bond claim upon nonpayment by such subcontractor. *Id.* Notably, while the language of the Miller Act’s has since been amended to state that an action may be brought to collect “the amount due” as opposed to the “sums justly due,” as the Eighth Circuit has explained, such amendment was “not intended to work a substantive change” in the statute, particularly as it relates to the issue of recovery of attorneys’ fees. *Owners Ins. Co. v. Fidelity and Deposit Co. of Maryland*, 41 F.4th 956, 959 (8th Cir. 2022) (citing *Paige Int’l, Inc. v. XL Specialty Ins. Co.*, 267 F.Supp.3d 205, 213 (D.D.C. 2017); *See also* 40 U.S.C. § 3133(b)(1) (“Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished . . . may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute to final execution and judgment for the amount due.”)).

The Eighth Circuit’s award of attorneys’ fees to the Respondents is consistent with the above well-

established rule, as the CBA to which Petitioner's subcontractor was signatory provides for recovery of attorneys' fees incurred in collecting delinquent contributions owed by the signatory subcontractor.

Petitioner seems to acknowledge that there is no current circuit split in regard to this rule or the Eight Circuit's application of the rule; rather, Petitioner asserts that the above decisions are in conflict with "non-Miller Act cases," in that it is allegedly contrary to the general "American Rule" with respect to the recoverability of attorneys' fees for prevailing claimants.

As Petitioner explains, the American Rule generally provides that a prevailing party is entitled to collect attorneys' fees only if there is a contractual or statutory provision which provides for recovery of such fees. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247-257 (1975).

Contrary to Petitioner's assertion, the decisions set forth above are not in conflict with the American Rule with respect to recoverability of attorneys' fees, and do not constitute a "modification" of such rule. Courts which evaluate the issue of recoverability of attorneys' fees in the Miller Act context have held, consistent with the American Rule, that in absence of contractual language to the contrary, each party is responsible to bear its own attorneys' fees. *See, e.g., F.D. Rich Co. Inc. v. U.S. for the use of Indus. Lumber Co., Inc.*, 417 U.S. 116, 126-27 (1974) (holding that where no contractual provision allows for attorneys' fees, such fees are not recoverable under a Miller Act

bond claim). However, if there is enforceable contractual language which would allow the claimant to collect such fees in a claim against the subcontractor, then courts have consistently held that such fees are also collectable under the bond by virtue of the language of the Miller Act which allows recovery of the amount due to the claimant. *Id.* Thus, the rule as it is applied in the Miller Act context is squarely in line with the American Rule, in that attorneys' fees are recoverable only to the extent that there is enforceable contractual and statutory language allowing for the recovery of such fees. Therefore, the Eighth Circuit's fee award does not create a conflict in authority with respect to this issue, nor does it create any so-called "modification" of the American Rule.

Petitioner next asserts that that the above decisions have created "intra-circuit confusion," relying on a string cite with no explanation as to what the alleged confusion is. The cases contained in the string cite do nothing but reinforce the well-established rule that fees are available to claimants under a payment bond if provided for in the underlying agreement between the claimant and the subcontractor. As noted by Petitioner, the language in the first case of the string site (*Krupp I*) regarding availability of attorneys' fees to a Miller Act claimant was explicitly repudiated as erroneous dicta by two (2) separate cases. *Southeastern Mun. Supply co., Inc. v. National Union Fire Ins.*, 876 F.2d 92, 93 (11th Cir. 1989) (dismissing the language as "merely dictum" and "erroneous"); *See also Krupp Steel Products, Inc. v. Aetna Ins. Co.*, 923 F.2d 1521, 1527 (11th Cir. 1991)

(noting that the decision in *Krupp I* was dismissed as erroneous dicta).

The next case cited is *Owners Ins. Co. v. Fidelity & Deposit Co. of Md.*, 41 F.4th 956, 959 (8th Cir. 2022). Notably, *Owners Ins. Co.* does not involve a Miller Act bond. *Id.* While it involved a private payment bond, the dispute was between a principal contractor and direct subcontractors, as opposed to a claim brought by a supplier or laborer to a subcontractor. *Id.* Nevertheless, the court in *Owners* found that the subcontractors *were* entitled to payment of costs and attorneys' fees in their action against the bond, as the bond provided for payment of "sums justly due" to the subcontractors. *Id.* at 959-60. In doing so, the court applied the reasoning of multiple cases interpreting the Miller Act's provisions, noting that under the Miller Act, attorneys' fees and costs are available to subcontractors provided that the underlying contract allowed for collection of such amounts. *Id.*

The decision in *Owners* does not demonstrate any alleged "confusion" of the rule; rather, the court looked to the consistently applied rule in Miller Act cases to determine whether the private bond language of "sums justly due" allowed recovery of attorneys' fees, given that such fees were provided for in the underlying contract. The decision does not demonstrate any confusion or circuit split on this issue.

Petitioners have failed to cite existing precedent which is contrary to the well-established

rule with respect to the recoverability of attorneys' fees under a Miller Act payment bond. To the contrary, there is clarity and consistency in application of the above rule, under which such fees are recoverable by a bond claimant to the extent they would be recoverable under an enforceable contractual provision between that claimant and the subcontractor. In light of the consistency of the above decisions on this matter, Certiorari should not be granted. Petitioners have failed to properly pose an unsettled question of law to this Court, nor has Petitioner demonstrated that the Eight Circuit's decision created a split in authority which this Court should review. Thus, the Petition should be denied.

**B. The Eighth Circuit Properly Applied Settled Law in Holding that Respondents Timely Provided Notice of their Claim against the Miller Act Payment Bonds**

In their second question presented for review, Petitioners argue that the Eighth Circuit's decision conflicts with the Miller Act's "assignment principles," framing the issue as whether an assignee claimant may "aggregate claims" from assignors in order to avoid dismissal of an otherwise untimely claim, therefore allowing an assignee to have "greater claim rights than the assignors" of a claim.

Petitioners' presentation of the issue in this regard is an entirely inaccurate framing of the lower court's decision and the applicable law on this issue. Additionally, the issue as posed by Petitioner of whether otherwise untimely claims may be

aggregated in order to avoid dismissal is not one that is presented by the facts of this case. This case does not involve an assignment of claims, nor does it involve aggregation of multiple individual claims that individual employees themselves could otherwise have asserted against the bond. To the contrary, the below courts properly held that the Respondent Funds' claim against the bond is not limited to a single employee or instance of providing labor, and that the Funds' notice was thus timely provided under the Miller Act with respect to the entirety of the claim, as notice was provided within ninety (90) days from the date on which the last of the labor which makes up the claim was performed.

In general, with respect to laborers or suppliers of a subcontractor which lack a direct contractual relationship with the principle contractor, the Miller Act requires notice of a claim be provided to that contractor "within 90 days from the date on which the person did or performed *the last of the labor . . . for which the claim is made.*" 40 U.S.C. § 3133(b)(2) (emphasis added).

As a general matter, it is well-established that trustees of employee welfare and fringe benefit funds may maintain a claim against a Miller Act payment bond for delinquent contributions due and owing to such Funds for work performed on a bonded project. Courts have long held that the purpose of the Miller Act payment bond requirement is to ensure that those who provide labor and/or materials to federal projects can recover amounts owed in the event of nonpayment. *Consolidated Elec. & Mechanicals, Inc.*

*v. Biggs General Contracting, Inc.*, 167 F.3d 432, 434 (8th Cir. 1999) (citing *F.D. Rich Co. v. United States for the Use of Industrial Lumber Co.*, 417 U.S. 116 (1974)). As this Court has stated, the “essence of [the Miller Act’s] policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material.” *U.S. for Benefit and on Behalf of Sherman v. Carter*, 353 U.S. 210, 217 (1957). In light of this remedial nature, it has been firmly established that the Miller Act “is to be construed broadly” in order to “protect those whose labor and materials go into public projects.” *Id.*; citing *Fleisher Engineering Co. v. United States, for Use and Benefit of Hollenbeck*, 311 U.S. 15 (1940); *See also Consol. Elec. & Mech., Inc. v. Biggs General Contracting, Inc.*, 167 F.3d 432, 434 (8th Cir. 1999) (“The Act is to be construed broadly because of its remedial nature.”).

Under the above principles of interpretation, courts have long held that trustees of employee benefit funds, while not themselves constituting laborers on federal projects, are nonetheless entitled to bring an action against a Miller Act payment bond to collect contributions which are due and owing to their funds based on hours of work performed by a delinquent contractor’s employees working under a collective bargaining agreement which provides for such contributions. *U.S. for Benefit and on Behalf of Sherman v. Carter*, 353 U.S. 210, 218 (1957); *see also Southern Elec. Health Fund v. Heritage Mut. Ins. Co.*, 147 Fed.Appx. 497, 502 (6th Cir. 2005) (holding that ERISA benefit funds can seek payment of unpaid contributions under Miller Act payment bond); *See*

*also United States ex. rel. Int'l Bhd. Of Elec. Workers Local Union 692 v. Harford Fire Ins.*, 809 F.Supp. 523, 525-26 (E.D. Mich. 1992)(applying *Carter* in a post-ERISA context and holding that trustees of ERISA funds may recover all delinquent contributions owed by a subcontractor under a Miller Act payment bond).

Notably, this Court in *Carter* specifically held that fringe benefit fund trustees' claim for delinquent employer contributions, while "analogous to an assignment," *is not dependent upon whether the trustees are in fact assignees. Id.* at 219-220 ("whether the trustees of the funds are, in a technical sense, assignees of the employees' rights to the contributions need not be decided").

Importantly, Calacci's individual employees themselves have no direct claim to the delinquent contributions which could be assigned to the Respondents. The contributions which make up the Funds' claims are not paid to employees, they are paid directly to the Funds' themselves. Under the Employee Retirement Income Security Act of 1974 ("ERISA"), trustees of employee welfare benefit funds have the right and obligation to bring an action against employers that fail to make contributions to such funds. 29 U.S.C. § 1145; 20 U.S.C. § 1132. Courts have explicitly noted that employees as a general matter lack standing to bring an action against their employer for delinquent fringe benefit contributions for hours of work performed by the employee. *See Diduck v. Kaszucki & Sons Contractors, Inc.*, 874 F.2d 912, 916 (2nd Cir. 1989) (holding that an individual employee who is a participant in a multi-employer



ERISA fund may only bring an action against their employer to collect contributions owed to the Fund if the employee first establishes that the trustees breached their fiduciary duty to collect such contributions); *See also Shearon v. Comfort Tech Mech. Co., Inc.*, 936 F.Supp.2d 143, 158-59 (E.D.N.Y. 2013). Even in circumstances in which an individual has standing to bring such a claim, such an action is a derivative action brought on behalf of the Fund, not the individual employee themselves. *Id.*

Consistent with the above, the Eight Circuit reasoned that, while the Respondents' claims against the Bond are related to hours of work performed by employees that perform covered work on the project, the Funds' claims themselves are properly brought by each Fund as a collective claim. Consistent with prior decisions, the Eighth Circuit correctly noted that, unlike a claim for unpaid wages, the Respondents' claim for employer contributions owed to the funds was one which was based on damages "common to the entire membership" and "shared by all in equal degree." *See U.S. ex. Rel. United Bhd of Carpenters & Joiners Loc. Union No. 2028 v. Woerfel Corp.*, 545 F.2d 1148, 1152 (8th Cir. 1976) (holding that individual employees' wage claims are neither common to the entire membership or shared by all in equal degree).

Thus, the Eighth Circuit correctly held that, under the plain language of the Miller Act, notice of the Funds' claims were timely so long as the notice was provided within ninety (90) days of the last of the labor was performed which makes up each Respondent Fund's claim. Notably, the Eighth

Circuit's decision in this regard is consistent with the well-established rule that a claim against a Miller Act payment bond may cover more than one specific instance of supplying materials to the project. *See, e.g., Noland Co. v. Allied Contractors, Inc.*, 273 F.2d 917, 920–21 (4th Cir. 1959) (finding that the Miller Act notice period did not begin running until the last of the material was supplied under the last contract between the supplier and the subcontractor, in order to construe the act “sensibly” and to avoid defeating “its plain purposes . . . by a narrow interpretation.”). As set forth in *Noland*, a claim for unpaid materials, where more than one instance of supplying such materials occurs, is not properly measured as it relates to each individual instance; rather, notice of such claim is timely if it is provided within ninety (90) days of the last instance of supplying materials which make up the claim. *Id.*

Thus, Petitioners' assertion that the below decision allowed the Respondents' to aggregate otherwise untimely claims into one claim relying upon assignment is a misstatement of the relevant law and a misrepresentation of the Eighth Circuit's decision. The Eighth Circuit did not find that the Funds' claims were dependent upon an assignment of individual claims, and, as set forth above, there were no claims that required such assignment. Rather, relying on the above principles, the Eighth Circuit properly held that the Respondents had standing to assert claims for unpaid contributions to the respective funds, and that notice for the claims were timely in that the notice was provided within ninety (90) days from the date on which the last of the labor which made up the claim

was performed. Contrary to Petitioners' assertions, such a result is consistent with *Carter*, in that *Carter* explicitly held that a funds' claim is not dependent upon an actual assignment of employee claims.

Given the above, Petitioner has failed to properly pose an unsettled question of law in this regard to this Court, nor has Petitioner demonstrated that the Eighth Circuit's decision created a split in authority which this Court should review. As such, the Petition should be denied.

## **II. The Petition Raises No Issues of Substantial Importance Which Warrant This Court's Review**

Petitioner lastly argues that the lower court's decision raises an issue of "substantial importance" for contractors on federal construction projects. Petitioner argues that the Eighth Circuit's decision creates "almost limitless Miller Act liability" if a subcontractors' work on a bonded federal project spans multiple years.

As Petitioner highlights, the Miller Act's ninety (90) day notice requirement exists to provide principal contractors with a "date certain" after which they are no longer at risk of liability to suppliers or second tier subcontractors. *U.S. for Use of John D. Ahern Co., Inc. v. J.F. White Contracting Co.*, 649 F.2d 29, 31 (1st Cir. 1981). Without such a date, prime contractors are potentially exposed to risk of double liability, as they might pay a subcontractor for services rendered, but then be obligated to pay an unpaid supplier or laborer of such subcontractor if a claim is later brought under

the Miller Act. The ninety (90) day notice period provides the contractor with a date on which they can pay the subcontractor without risk of double payment on a bond claim.

Contrary to Petitioners' assertions, the Eighth Circuit's decision does not modify the Miller Act's notice requirement in any way, nor does the decision eliminate the "date certain" described above. Claimants remain obligated to make their notice within ninety (90) days of the last date on which labor or materials were supplied to the project which make up their claim. As such, the ninety (90) day deadline remains a date certain, after which the prime contractor may pay all retainage or other amounts owed to the subcontractor without the risk of double payment, assuming there has been no notice provided to the principal contractor by any potential Miller Act claimant.

Petitioner next complains that the Eighth Circuit's decision allows the claimant to assert a claim against the bond for labor or supplies that were provided to a project dating back multiple years so long as their notice was provided within ninety (90) days of the last date any such labor or supplies were provided. Again, the Eighth Circuit's decision does nothing to modify the Miller Act notice requirement in this regard. To the contrary, this is precisely what the plain language of the Miller Act provides. Under the plain language of the notice requirement, the time limit is only measured from the date on which the *last* of the labor or supplies are provided. *See* 40 U.S.C. § 3133(b)(2). If that notice is timely, and as explained

above, courts have consistently held that a claim may extend back to first instance of supplying labor or materials to the project. *See, e.g., Noland Co. v. Allied Contractors, Inc.*, 273 F.2d 917, 920–21 (4th Cir. 1959). Nothing about the lower’s court decision changes this well-established interpretation of the Miller Act’s notice requirements, nor is this issue properly raised by the questions presented as set forth in the Petition.

Given the above, the Petition raises no issues of substantial importance which warrant this Court’s review regarding the Miller Act’s notice requirements.

## CONCLUSION

For the reasons stated herein, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

BRANDON E. WOOD

*Counsel of Record*

MICHAEL E. AMASH

BLAKE & UHLIG, P.A.

6803 West 64<sup>th</sup> Street,

Suite 300

Overland Park, KS 66202

(913) 321-8884

mea@blake-uhlig.com

bew@blake-uhlig.com

*Counsel for Respondents*