In the

Supreme Court of the United States

F. D. RICH CO., INC.,; TRANSAMERICA INSURANCE COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA, for the use of INDUSTRIAL LUMBER COMPANY, INC.

No. 72-1382

Washington, D. C.
January 9, 1974

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Wednesday, January 9, 1974

The above-entitled matter came on for argument at 1:25 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LAWRENCE GOCHBERG, Esq., 733 Summer Street, Stamford, Connecticut 06901; for the Petitioner.

DENNIS S. HARLOWE, Esq., 2200 One Washington Plaza, Tacoma, Washington 98402; for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1382, Rich v. United States for the use of Industrial Lumber Company.

Mr. Gochberg, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE GOCHBERG, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GOCHBERG: Mr. Chief Justice, and may it please the Court:

This case involves the Miller Act, 40 USC 270b. It involves a suit by a supplier of a middle party, Cerpac, supplied plywood to the general contractor, F. D. Rich Company, for a federal project at the Beale Air Force Base in California.

The district court found in favor of the supplier on a number of issues. It denied attorneys' fees. An appeal was taken by the Rich Company, and Industrial Lumber took a cross appeal. The Court of Appeals for the Ninth Circuit reversed the district court as to the denial of attorneys' fees and also reversed on an interest question as to whether seven percent or eight percent interest should be granted under California law, and affirmed on all other issues against--

Q Are you bringing the interest question here?

MR. GOCHBERG: No, Your Honor, I am not prepared to argue that.

Q Are you abandoning it?

MR. GOCHBERG: I think we briefed it shortly--

Q That is why I am asking.

MR. GOCHBERG: We briefed it. I am not abandoning it. But I do have three other issues that I would like to argue that I think are more--

Q My question is, as I read your brief, you bring off five points here, and yet in your petition for certiorari you cover only three. And, therefore, I ask why they are trying to bring all five. It is a violation of our Rule 40.

MR. GOCHBERG: I am sorry.

Q Maybe that is something you can take up later.

MR. GOCHBERG: If that is true--

Q The two in question are the interest point and the--

MR. GOCHBERG: And the 90 day--the standard.

Q Point number two, the extension of--

MR. GOCHBERG: Yes, the standard of the 90 day.

I think that is true, and I do believe that there has been an inadvertent violation of your rules. If it is so, then I stand corrected.

Q I suspect those two issues are not here.

MR. GOCHBERG: I did not intend to argue them in any event, and I will abide by the Court's rules on the matter. I apologize for the oversight.

The plaintiff below--the contract involved here with Cerpac and Industrial and Cerpac and Rich, Rich being the general contractor, Cerpac being the supplier, and Industrial being supplier, was for standard manufactured plywood. And a simple contract for the furnishing of that plywood was given from Rich to Cerpac and in turn from Cerpac to Industrial and Industrial caused the material, plywood, to be shipped directly to Rich's job at Beale Air Force Base in California.

What happened was that during the course of the job, toward the end of it, Cerpac became in financial trouble, went bankrupt despite the payments from Rich to it. And Industrial has now sought to bring a Miller Act suit seeking to collect for the plywood.

The Court of Appeals in the Ninth Circuit has adverted to the fact that Cerpac was an important member and subcontractor of the Rich Company, relying on the fact that not only does Cerpac have a contract to supply plywood, but it also had a separate contract to supply mill work. The mill work issue was not at all in the case, in this case. It was only introduced and used in this case to point out

that Cerpac was an important supplier and/or "subcontractor of the F. D. Rich Company."

The fact is, however, that in this particular case, Industrial supplied plywood to Cerpac who in turn supplied the same plywood to Rich. It would seem to be that, at least since the MacEvoy decision in 322 US, that relationship can give rise to nothing but a materialman, and a supplier of a materialman under the Miller Act has long been understood to be too far to receive any relief under the Miller Act.

Q A materialman can get relief, but the supplier to the materialman cannot.

MR. GOCHBERG: Yes. Anyone having a direct contract with the general contractor under 270b(a), a direct contract, does not have to give notice. And after 90 days of not being paid may bring a suit against the principal, which is the general contractor, and its surety, here Transamerica. That is whether he be a materialman or a subcontractor, and it is unimportant which he is.

However, if you do not have a direct contract with the general contractor, you can still get relief under the Miller Act bind if you have a contract with the subcontractor. And that goes from the language as interpreted by this Court in MacEvoy v. United States, 322 US 102, I believe. And it really talks about the language in the case, which states that in the proviso that any person having a direct

contractual relationship with a subcontractor but no contractual relationship expressed or implied with a contractor, that is, the general contractor, furnishing said payments, shall give notice, and then it goes on to say he has a right of action.

The court of appeals, in bringing in what was really extraneous matters, the fact that there was a contract between Rich and Cerpac under which Cerpac supplied mill work--by the way, the court--it is not borne out by anything in the findings of the district court, the court held that Cerpac installed the mill work, but that is completely untrue and it is not adverted to an the brief for the respondent.

But be that as it may, we suggest to you that the proper test on the question of whether or not the Cerpac was a materialman or a subcontractor, is the test set forth by the Court of Appeals for the Fifth Circuit in Aetna Casualty Company v. Gibson Steel Company, 382 F.2nd 615. In that case, the supplier or the middle man supplied steel and iron products and in fact customized some of the products. He made ladders and deck plates and switch plates and various steel and iron products, customed for the particular government contract and supplied them, and the court of appeals held there that he was a materialman.

The virtue of adopting the Gibson Steel approach is

that we don't have to get into this almost future interest type of discussion of the law. A man is either a subcontractor or a materialman; in the MacEvoy case this Court held that if he takes over and is important and does a lot of the work, he may become a subcontractor. But if he is one that merely supplies material, he is a materialman. The respondent has seized in his brief on the fact that during a deposition, one of the officers of the F. D. Rich Company stated that Cerpac was a subcontractor for the plywood. I only point out to you that this Court in 322 US in the MacEvoy case in footnote 4 also stated that any use by the Court previous to that time of the misuse of the word "subcontractor materialman" by the Supreme Court would not be binding on it.

I ask the Court to view this, that it is unimportant as to what Mr. Rich, who was giving the deposition happened to call Cerpac. What is important is an examination of what the function he did, not what his relationship was but the function that he performed. And his function was to supply plywood which he bought from Industrial. So, therefore, he is a materialman, of a materialman, and clearly interdicted by the MacEvoy case.

On the question of venue, and then I want to come to the attorney fees question, which is of great interest, on the question of venue, the statute very clearly says, 40 USC

270b(b), "Every suit instituted under this section shall be brought in the name of the United States," et cetera, "in the United States District Court for any district in which the Court was to be performed and executed and not elsewhere."

Starting with the language in the--Justice Brandeis's language in Illinois Surety Company v. The John Davis Company, which this Court then in a dictum used in the MacEvoy case, 322 US, in which you said that this Miller Act is a remedial statute and you ought to liberally construe it, the lower courts have absolutely gone wild, and they have liberally construed it so that they have forgotten the language of the statute and they have forgotten the ratio decidendi of the MacEvoy case. The MacEvoy case, you clearly stated that even though it has to be liberally construed, there is no way to impose liability on a materialman, on a materialman. Plain words in the statute may not be disregarded. The Court of Appeals for the Ninth Circuit does not believe the ratio decidendi of the MacEvoy case, and it has stated that even though two of the shipments involved here were sent by Industrial to South Carolina for a different contract, different federal contract, on which there was a different surety, that venue could be had in the district court for California for recovery of those two shipments.

The Court however realized that it was kind of embarrassing, since Transamerica Insurance Company was not

the surety for the South Carolina job. So, it said, "All right, we are holding that the principle under the Beale bond, i.e., the general contractor, F. D. Rich Company, is liable, but we are excusing Transamerica."

The bond is only one instrument. We are possibly a little bit pregnant about this: We are either liable or we are not liable.

Q The reason you had a different surety is because it was a different job.

MR. GOCHBERG: Yes, sir, they were two different federal jobs.

Q Had these two shipments come to California, clearly it would be under the Transamerica bond.

MR. GOCHBERG: No question, Mr. Justice Blackmun.

I really do not understand the court, because it is a circuit which I have often admired, and I just did not understand their decision here on that issue of saying that the South Carolina shipment for a different job was somehow cognizable under the district court here.

Judge Wollenberg in the Roscoe case, Judge Wollenberg in U.S. v. Roscoe-Ajax in 246 F. Supp. 439, has set down a splendid exposition of the venue statute, and he has said that the venue statute is jurisdictional and cannot be disregarded by the courts.

In other words, the plain language of the statute

which says "and not elsewhere" must be enforced.

Q That is a contradiction in terms so far as normal legal usage is concerned, is it not? I mean, jurisdiction is one thing, venue is another. And venue can be waived.

MR. GOCHBERG: This is a semantic problem. It is a semantic problem. The Congress of the United States did not use the word "venue." The Congress of the United States said that anybody who wants to sue under the Miller Act must sue in the United States district court for any district in which the contract was to be performed and executed and not elsewhere.

We lawyers and we lower courts, and hopefully not the Supreme Court, have introduced concepts of venue and jurisdiction. I agree with you. Judge Wollenberg agrees with you. He said that it is not a venue problem, it is a jurisdictional problem and cannot be waived. In that case he refused to allow two parties to change the venue that they had in a private contract.

You considered this question in passing in the Mosley case. In Mosley you considered it on the question where the contract had an arbitration clause, and you considered the effect of the United States arbitration statute on the Miller Act and on this jurisdictional point. And there you sent it back and it was inconclusive and never

decided because there was a question of fraud and you held that it should go back to the district court. But in a concurring opinion--I think it was concurring--Chief Justice Warren pointed out that there were problems, and Judge Wollenberg has dealt with that issue in the Roscoe-Ajax case.

The most fascinating part of the Court of Appeals decision, aside from the venue question in which I submit they are clearly wrong and on the question of the materialman, is the Court's action on attorneys' fees. The attorney fee question has been plaguing the lower courts and lawyers who represent surety companies as well as contractors for the last ten or fifteen years, for a time there nobody even thought to ask for attorneys' fees and then suddenly lawyers are starting to ask and lo and behold federal courts are beginning to grant attorneyšš fees.

This Court held in the Fleischmann case, Fleischmann v. Maier, involving the Lanham Act, that only Congress, at least in our courts, gives attorneys' fees. And it pointed out that in American jurisprudence attorneys' fees are not granted absent a specific statute or a contract which provides for them.

In that case you held that the Lanham Act set forth the remedy and therefore that was the end of it and attorneys' fees could not be granted, regardless of the public policy to

encourage actions under the Lanham Act or not.

In the Miller Act, in this case, the court of appeals has held, relying on the Red Top Metal, Inc. case, the Fifth Circuit case, and relying on the broad language of Mr. Justice Brandeis's decision in Illinois Surety Company case, that attorneys' fees should be awarded. And this is a curious situation, a curious result. The intermediate appellate court in California in the Richter case, quoted in the opinion of the appellate court, had held in another type of bond, not a Miller Act bond, that the California law had no application to private construction projects or to projects of the United States. The lower court followed that case and the appellate court reversed and approved Judge McBride's--the chief judge of the Eastern District of California--decision, which is cited in the opinion. The court approved this language and it held that under the policy of California law, not its letter, attorneys' fees were recoverable in Miller Act cases to be passed as costs.

This situation was foreseen by the Red Top Metal case in which Judge Wisdom, in a very well written decision with an erroneous result, in the Fifth Circuit, has reasoned through this whole question of the attorneys' fees. He said, "You cannot look at the state statute law because the states are not legislating for Congress, and it really is a federal question." But he found that the Miller Act had an hiatus,

and we looked to the state law to fill in the hiati, if that is the plural, or the hiatuses. He really did something that this Court seems to have done in the Electric Auto Light case involving Section 14a of the Security Act of 1934. In that case, if you recall, in finding that there was a private remedy under Section 14a, this Court also held that you could award attorneys' fees. And it held that it had a right to do so because Congress had left to you the question of interpretation of whether there is a private remedy under Section 14a and therefore you could write the entire remedy, including the attorneys' fees. And you distinguished the Fleischmann case in which you had clearly laid down a very clean line of law saying that where there is a federal statute involved and the statute does not involve attorneys' fees, the lower courts are not to grant them.

Q Mr. Gochberg, on the attorneys' fees point you do have the Richter case going for you, do you not?

MR. GOCHBERG: Yes, but that is an interpretation by a state court of a state law.

Q Is that not something in your favor?

MR. GOCHBERG: I think I have the Fleischmann case, that this Court decided, in our favor. Because I think the remedy under the Miller Act which says exactly what the subcontractor materialman is to recover, is identical with the remedy set forth in the Lanham Act; and you have interpreted

the Lanham Act that way and you ought to interpret the Miller Act that way, and we ought not to get into constant litigation as to whether or not something which is clearly decided by the Supreme Court is to be eroded now. We must have forty cases now on attorneys. In some circuits--a federal contractor now in Texas, you do not have to pay attorneys' fees if you lose.

Q But if you can win on the state ground, you would just as soon win on that ground, would you not, in this case?

MR. GOCHBERG: As an old member of the Department of Justice and an associate of Mr. Friedman, I would hope to win on a broader issue. But I would like to win on anything. I do think was more important than the actual amount of dollars, although I will point out to you that the district court here has awarded 25 percent of the recovery and certainly we have an interesting situation going.

Q Judge Wisdom's opinion in Red Top refers to state law as a source of attorneys' fees, does it not?

MR. GOCHBERG: Yes. And he held there that--he said he is not compelled. You just look at it and you see what the spirit is.

In Texas you do not get it because Texas law does not do it.

In California, by the way, private mechanic's liens

do not give rise to attorneys' fees. You cannot get attorneys' fees.

Q Then one of your arguments, I suppose, is that the Miller Act is really a substitute not for a state Miller act but for the private materialman's lien that you have in a privage job, and there you do not get attorneys' fees under California law.

MR. GOCHBERG: You do not get it under California law and you do not get it under Connecticut law. You do not get it under any law unless you have a statute which gives it to you. And I go further, Mr. Justice--

Q You say Fleischmann ought to apply.

MR. GOCHBERG: I am saying Fleischmann. Why do we have to go see what the 50 states are doing when we have a law enacted by Congress which tells you what the measure of recovery is.

I do not want to look a--

Q A gift horse in the mouth.

MR. GOCHBERG: --a gift horse in the mouth. But I will accept your suggestion, but I do think the statute said you may prosecute said action to final execution and judgment for the sum or sums justly due him. And that is the end of it. That is precisely the kind of language you have in Lanham.

I do not think that your decision in the Electric

Auto Light case really distinguishes Fleischmann, because in that case you granted attorneys' fees, but you did it on a classical basis for granting attorneys' fees.

Q Bad faith.

MR. GOCHBERG: No, no, bad faith you always had.

Q As the fund.

MR. GOCHBERG: As the fund. It was the one stockholder doing that which will be to the benefit of all the stockholders, which the chancellor in equity has always been able to grant attorneys' fees for.

So, I think that you have some unfortunate language, though, in the Electric Auto Light case, because you seem to push Fleischmann too far apart. In Fleischmann you thought, and this Court did write in Fleischmann, that there are exceptions, and one of your exceptions was the fund for doing good for the public good.

I would only point out to the Court that in the Public Accommodation Act, in the Equal Opportunity Act, the Congress meant to give us attorneys' fees. It clearly said that we would get attorneys' fees, 14 USC 2000a 3(b) and 14 USC--I am sorry, I do not have the other quote. It is not cited in the brief. I apologize for that. But it is the Public Accommodations Act and the Equal Opportunity Act.

I will reserve the balance of my time. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Harlowe?

ORAL ARGUMENT OF DENNIS S. HARLOWE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. HARLOWE: Mr. Chief Justice, may it please the Court:

I should like to pick up where counsel left off, namely, with the attorney fee question, and first apologize for an oversight in my brief. I think I should have updated the California Code for the benefit of the Court.

The government code section on attorneys' fees that has been referred to as this case has come forward is the government code section 4207. By the 1970 statutes of California, effective January 1, 1971, that code section you will find today is Civil Code section 3250. It was at this point that the California legislature brought forth, brought together its government and Civil Code as it pertained to mechanic's liens. And I think at this point it would be appropriate to hearken back to the type of question that Justice Rehnquist raised. And that is in California--perhaps it was Justice Blackmun--and that is that in California do you not get attorneys' fees because the appellate court of California says you do not get them, and our answer to that, of course, is no. The intermediate appellate court in California indictio made the comment that attorneys' fees, under their civil code statute, do not apply--that statute does not apply to a project of the United States.

That type of contention was first overcome, in our view, in Chevron Asphalt, the decision by Judge McBride cited in our brief, when he points out that certainly this Court could not be expected to look to a California statute to determine what the remedy is that is afforded by Congress in a federal statute.

What is the remedy that is afforded a claimant on the Miller Act bond under the federal statute?

Q You are not purporting to say, though, that the federal court could override the decision of the California court of appeals with respect to state law in any event?

MR. HARLOWE: No, Your Honor. I think all that we are saying and all that the Chevron Asphalt case has said and all that the Ninth Circuit in our case has said is that case did not make such a decision. It has not for Miller Act purposes determined what "state law is," particularly when state law states, at this section 3250, the current point, that in any action the court shall award to the prevailing party a reasonable attorney's fee to be attached as cost.

The troublesome angle in Chevron Asphalt was that the California legislature had seen fit to make a distinction in its statutory scheme between a state government project and a private state project. Therefore, both in Chevron Asphalt

and in the Ninth Circuit decision in our case, they said, "Look, we have a government project. California on a government project awards attorneys' fees. We are going to do so."

And that is kind of a way to back into the point I want to make. This Court is not being asked to affirm a judgment which says you are entitled to attorneys' fees an a Miller Act case. That is not the point. The point is this Court is being asked to affirm a judgment which says, "Look to state law to make that determination."

Why is that type of judgment necessary? Because the Miller Act does not provide the remedy. As my learned opponent has set forth, you would believe that the Miller Act somehow tells you what the nature of the recovery should be. We submit that it does not. It says that you shall receive the sums justly due.

Contrast that with Maier, Fleischmann. Under the Lanham Act, you are entitled to all sorts of a detailed remedy. You get the defendants' profits, for example, plus your damages, plus there is an elaborate provision whereby discretion in the district judge can increase or decrease the amount of the work. It's a very detailed remedy. And, as pointed out by the Ninth Circuit in this decision, in that instance when Congress has taken the pains to detail exactly hwt is going to happen, you should not imply another remedy.

I think there is another reason for it, and that in a sense is a pure federal situation. It is trademark law and what is the consequence of a violation. That is not our ase here. If this Court or any court were to say you get attorneys' fees automatically--well, I guess this Court is the only one that could do it--were to say you get attorneys' fees in a Miller Act case, that would be unfair in states that do not award Miller Act cases on state projects.

Q Mr. Harlowe, why is it then that you look to state law for deciding whether under the Miller Act you get attorneys' fees?

MR. HARLOWE: Because there is no other way, Your Honor, to define what type of recovery is intended in a Miller Act case. It is at this point that the Ninth Circuit in our case and in Red Top Metals, in an even more definitive statement, I think, in US F. & G. v. Hendry, a Florida case, the co-rts all say, "Well, let us look at the purpose of the act." and at that point they look at Illinois Surety v. John Davis in the language of Justice Brandeis where he points out the Miller Act was intended to be in lieu of the lien customary on private property, customary lien.

Q Then if you look to California law on that kind of lien, you do not get attorneys' fees, do you?

MR. HARLOWE: Yes, you do.

Q On a private materialman's action without

the state being involved in any way? It was my impression that under California law you did not get it.

MR. HARLOWE: Oh, excuse me, yes. Prior to the time that the government code section was extracted and put into the Civil Code, that would have been the case.

Q But you say--

MR. HARLOWE: Now you get them in both sides.

Q Under California law you get attorneys' fees now, even though it is private parties on all sides and private ownership of the land?

MR. HARLOWE: Yes, including, you will notice in that same section I cited you--that is, 3250--they have a nice thing in California. They provide you with some of the legislative notes, and I think I should mention that the legislative note to 3250 points out that it is the intent of the legislature by this act to change the basis for a decision of law denying attorneys' fees on appeal, so as to permit the prevailing party to recover such fees on appeal.

It is that type of statute, that type of statutory determination by a legislature of the foreign state, that clearly expresses the policy of that state, that the businessmen in that state expect to do business under within the boundaries of that state. And the only thing that we are suggesting is that the Miller Act was intended to replace that, not to unfairly benefit government, federal government,

projects.

Q But that is not the ground the court of appeals took, is it? There the court of appeals opinion, it relied on the fact that under California's equivalent of the Miller Act, where you are working on a state project, you get attorneys' fees.

As I read this thing, they did not rely on this section that you cite, that you say now provides for attorneys' fees even on a private action.

MR. HARLOWE: Yes, Your Honor. The one point that we made there that did not prevail in the court of appeals--perhaps I shouldn't say not prevail. You notice in a footnote in their decision they say that we urged at that time that it should be made retroactive if that is necessary. And the Ninth Circuit in this case said, "No, we are not even going to enter into a retroactivity type of question," because they felt it was not necessary.

They took the same position that Judge McBride took in Chevron Asphalt--namely, if you get it on a state government project, you get it on a federal government project. And we are not going to concern ourselves and, as Judge McBride points out, I do not know why California wants to make a distinction like that. And, as it turned out, the state legislature of California subsequently agreed with him. So, even prior to the time of the judgment on remand in

this case, we had that combination where attorneys' fees are available in both sides of the case.

Without cutting this too short, I would like to make an observation on the argument urged by my opponent in connection with the status of Cerpac as a contractor. I think the facts are exhaustively presented in the findings and conclusions. The reason for that was this case was tried as a companion to a prior case with similar parties involved, and it was possible to do it largely by stipulation in the record, and we wanted to set out at that point what it was that this documentation showed and a few of the factors that should be rehearsed are the very ones that counsel has emphasized in the Aetna case as showing the contrary. And that is in this case we have got a contractor who worked under a contract agreement, received progress payments for specific and substantial sections of the work at a fixed price, with progress payments in a continuing relationship and guaranteed against defects and workmanship and material, all of which in addition to a vast number of other details of the relationship that are set forth in our brief, without question show that Cerpac is a subcontractor.

Going behind that, however, is the finding of the district court, again one that was not necessary to the decision at the Ninth Circuit, and that finding was that there was a direct implied relationship between Rich and Industrial.

And that relationship had its germination--you can go back to the fiddigs of the trial judge as early as May. And during the course of their relationship in 1966, it was perfectly clear to the parties at that time what it was that they wanted to contract for, what each party was expecting to have done. Unfortunately our client fulfilled his half of it and did not get paid. That was the implied contract. That was the meeting of the minds that the district judge found, that the Ninth Circuit court did not rely upon; it could not say those findings were clearly erroneous. It simply found that it had another issue to meet, and that is the one of the subcontractor status. And the reason that question came up was principally so our opponents at that time could argue they had not had timely notice of our of claim, when the essence of it was they had had notice far prior to the time they get into conceding to us that they owe us that they owe us for the last two shipments.

As far as the venue question is concerned, urged here as being jurisdictional, I think the authorities set forth in our brief adequately handle that. I would like to emphasize that the bonding company with Miller Act coverage on this project correctly, we believe, by the Ninth Circuit was not subjected to liability for the shipments to South Carolina. The prime contractor was. We feel that was correctly done.

And I think that will be adequate for us. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Gochberg?

MR. GOCHBERG: Yes, I have two.

REBUTTAL ARGUMENT OF LAWRENCE GOCHBERG, ESQ.,
ON BEHALF OF THE PETITIONER

MR. GOCHBERG: On the question of the attorneys' fees raised by Mr. Justice Rehnquist as to the question of local law, I would like to point out to you that the plaintiff here, the real plaintiff, not the United States but the plaintiff here, is a State of Washington corporation. The defendant is a Connecticut corporation. And the work that was performed was not performed under any contract or direct relationship between the defendant and the plaintiff. Had they had a direct contract and had we under a conflict of law looked to that contract, we might be applying the law which we usually write into our direct contracts officially governed by Connecticut law or Washington law or Texas law.

Q The land was in California.

MR. GOCHBERG: Yes.

Q If you are talking about a substitute materialman's bond, you are talking about California law.

MR. GOCHBERG: Yes, I understand that, but I am pointing out to you that there is a vice, in my opinion, in

allowing the various state laws. In Texas you do not get attorneys' fees. In California and Alaska you do. In Louisiana you do not. In Florida, et cetera.

The other point on attorneys' fees then is the spirit of the law. There is a trade secrets case that I sat through this morning, very interesting one, but the Ninth Circuit has considered this question in a trade secrets case, in the Midwest Company v. Kaiser Aluminum, 407 F.2nd 288. This is not in my brief. It is a 1969 case where the court of appeals held against granting attorneys' fees in a trade secrets case, finding there was no compelling public interest.

Why there is a compelling public interest in Miller Act cases escapes me. I've never understood it. I do think it is Mr. Justice Brandeis' words as repromulgated by this Court in MacEvoy which has given a false direction to the lower courts.

I want to bring out the Monroe v. Praught case on the question of the subcontractor and the relationship of Cerpac. There is nothing that was said by my learned brother as to Cerpac's status which applies to the plywood which is here under consideration. There was a separate contract for the plywood. It was simply invoiced separately and shipped. In the Monroe v. Praught case, decided in the First Circuit, you will recall that the First Circuit upheld the necessity

for giving a 90-day notice, even though the Miller Act claimant was a direct subcontractor of the plaintiff. But there he had done some work for another subcontractor, and thus he had for that portion of work been a subcontractor of a subcontractor. He was also a direct subcontractor of the general contractor, and the court of appeals for the first circuit in Monroe v. Praught held that he had to give the 90-day notice. And I hold that whatever Cerpac may have been in relationship to Rich, insofar as the mill work, although I think he is still a materialman there too but those facts are not before you, he certainly cannot be considered to be a subcontractor for plywood.

Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:07 o'clock p.m., the case was submitted.]

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