In the

Supreme Court of the United States

J. W. BATESON COMPANY, INC., et al.,

Petitioners,

Vs.

No. 76-1476

UNITED STATES OF AMERICA, for and on behalf of the Board of Trustees of the National Automatic Sprinkler Industry Pension Fund, et al.,

Respondents.

Washington, D. C.
November 30, 1977

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Washington, D.C.
Wednesday, November 30, 1977

The above-entitled matter came on for argument at 2:16 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JACK REPHAN, Esq., 1775 Pennsylvania Avenue, N.W., Washington, D.C. 20006; for the Petitioners.

DONALD J. CAPUANO, Esq., 1912 Sunderland Place, N.W., Washington, D.C. 20036; for the Respondents.

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 1476, Bateson against the United States.

Mr. Rephan, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JACK REPHAN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The issue before the Court in this case involves an interpretation of the Miller Act, which is of the utmost importance to the construction industry and particularly those contractors doing construction for the federal government. The petitioners maintain that the Court of Appeals for the District of Columbia misconstrued the Miller Act in defining the term "subcontractor" and in holding that the respondents may maintain this action.

We feel, Your Honors, that the decision of the Court of Appeals is contrary to this Court's opinion in Clifford F. MacEvoy which was decided back in 1944, and also the case of F. D. Rich Company which was decided in 1974.

Also, Your Honors, we submit that the Court of Appeals decision for the District of Columbia Circuit is contrary to the holdings of the First, the Fourth, the Fifth, and Ninth Circuits, which have all passed on this issue. We

believe those decisions are consistent with the Rich case and with the MacEvoy case, and they are improper interpretations of the terms of the Miller Act.

The material facts are very simple. The General Services Administration awarded a contract to Bateson to build an addition to the Howard University Hospital here in Washington, D.C. The contract was some $39 million.

Bateson subcontracted to Pierce Associates all of the mechanical work, which consisted of the heating, ventilation, air conditioning, and also included the installation of an automatic fire sprinkler system. Pierce Associates in turn entsred into a subcontract agreement with Colquitt Sprinkler Company for the installation of the automatic sprinkler system. Colquitt had a collective bargaining agreement with the respondent union, and under the terms of the collective bargaining agreement, Colquitt was required to withhold certain union dues and fringe benefits from the pay of its employees and pay it over to the union trustees.

Colquitt got into financial trouble, failed to pay these monies over for the period of May, 1973 through December of '73. And the union trustees thereupon gave notice to Bateson, under the Miller Act--which is required within 90 days after the last of the work is done--and thereafter when Bateson refused to make payment, they brought suit in the United States District Court for the District of Columbia.

Q You question they have the same standing as would the laborers for--

MR. REPHAN: Yse, Your Honor, we will concede that issue, and I think that was resolved in another case by this Court. However, we do maintain they are one tier down and they are in a little bit different position than the one case referred to.

Q Colquitt did do installation work on the job, did they not? They did not simply furnish materials.

MR. REPHAN: That is true, Mr. Justice Rehnquist. They actually performed the installation and furnishing of the sprinkler system itself.

In the MacEvoy case this Court had before it the issue of whether a materialman to a materialman on a federal construction project was covered under the terms of the Miller Act. And after reviewing the statute and the legislative history, the Court said that the bond ran only to those materialmen, laborers and subcontractors who deal directly with the prime contractor and those materialman, laborers and subcontractors who, lacking any express or implied contract with the prime contractor, nevertheless had a direct contractual relationship with a subcontractor and who gave the requisite 90-day notice.

This principle is reaffirmed by this Court, we believe, Your Honors, in the Rich case. The distinction in

Rich was that the materialman or subcontractor in that case--a company by the name of Cerpac--had two contracts with the prime contractor. One contract was to furnish the plywood for the exterior of the project, and the other contract was to detail and install all of the millwork.

There were some other very important facts in that case--namely, that the stockholdings of the two companies were closely interrelated; the management of the two companies was interrelated. They had done work on other projects. And we believe, Your Honors, in that case when the Court said we have got to look beyond the terms of the contract to see whether or not Cerpac was functioning as a materialman or as a subcontractor, that the Court had in mind that distinction; and this was the purpose of applying a substantial relationship test in the Rich case to determine whether or not the middle party was a subcontractor or a material man.

I think, Your Honors, if I might refer you to the opinion of the Ninth Circuit in that case, where the Ninth Circuit said that this distinction between subcontractors and materialmen turns on the substantiality and importance of the ralationship between the middle party and the prime contractor.

Q Does that really make sense to you, what you just quoted?

MR. REPHAN: Your Honor, if you go back to the purpose of the Miller Act, it may make some sense because

historically--and even the District of Columbia mechanic's lien law limits the coverage to a subcontractor and not beyond.

Q Does that not make a lot more sense--instead of talking about the substantiality of the relationship--to draw the line between the traditional materialman who simply furnishes goods to the job site which are installed by another entity and a subcontractor who installs the stuff, actually puts the stuff into the ground that he can no longer lien for because it is public ground?

MR. REPHAN: Yes, Your Honor, I would agree that probably makes more sense than to apply this test in a vacuum. And I think that is what the Court of Appeals did. They misconstrued and misread what this Court was talking about when they used the substantiality test. The Court in the Rich case was trying to ascertain whether this party was a materialman or was a subcontractor, and they left to both contracts the entire relationship between the parties. And Cerpac was doing contract work. They were not limited to supplying material. And that is what the Court had in mind in that case.

The question here is whether or not Colquitt, the sprinkler installer, was a subcontractor. And we feel under the traditional view, in the traditional definition of the term "subcontractor," that Colquitt was not a subcontractor. Sure, they were installing work. They were installing some of

the materials on the job. But if we go back to the definition of subcontractor which this Court referred to in the MacEvoy case, one who takes part of the work of the prime contractor, we maintain Colquitt is not within that category. Colquitt is a sub-subcontractor. And these terms have been used in the construction industry in day-to-day references of the term for many years. We believe there is a distinction between a subcontractor and a sub-subcontractor.

And certainly Congress, we feel, had this distinction in mind in the committee reports because they said a sub-su-contractor is covered by the act, but that is as far as it goes.

Q You said Congress said a sub-subcontractor is covered by the act, but that is as far as it goes?

MR. REPHAN: Yes, Your Honor. I think that was even referred to by this Court in the MacEvoy opinion too.

Q Would that not cut against your argument here?

MR. REPHAN: The sub-subcontractor?

Q You do not concede then that Colquitt was a sub-subcontractor?

MR. REPHAN: Colquitt was a sub-subcontractor, Your Honor, and Colquitt would have been covered by the act. We are talking about the employees of Colquitt, one step removed. Certainly Colquitt could have given notice to Bateson and come in and made a claim under the act. But we are talking about

their employees, which is one step removed from Colquitt as a sub-subcontractor.

Q The employees then, in your view, are a step removed from the subcontractor materialman.

MR. REPHAN: That is correct, Your Honor.

Q What is the materialman furnishing materials to the sub-sub?

MR. REPHAN: Same category, Your Honor. It would not make any difference whether it is employees or whether it was a materialman of the sub-sub. We say that neither of them would be covered. They are all in a third tier or beyond. You have the prime as first tier, you have Pierce the second tier; Colquitt is in the third tier. The third tier people will be covered. Beyond that they are clearly not covered.

Q Of course the difference between the employees and the materialman is the employees were doing work on the project.

MR. REPHAN: That is true, Your Honor, but I do not think the distinction is important here if you look at the language of the statute itself. Certainly the respondents would like to say there is a distinction because these people were actually working on the project. But every bit of labor--

Q And they were doing it for a sub-sub who could recover the contract price, who would be protected by the Miller Act.

MR. REPHAN: The sub-sub was protected, Your Honor, and that is what Congress said in the committee report. And I think if we analyze the Miller's requirement, this would support our position. The statute requires only those persons having a direct contract with a subcontractor to give notice, and only to the prime contractor. This would leave out a subcontractor such as Pierce here. Pierce in effect would have no notice that Colquitt had not paid their employees. The notice would go to the prime contractor. Pierce of course is one of those protected parties under the Miller Act. Pierce has a direct contract with the prime contractor and therefore is expressly covered under the act. And the question that arises in my mind, Your Honors, is, Why then did Congress not provide that those tiers below that first-tier subcontractor give notice give notice to the subcontractor so that he could protect himself?

In fact, in this case, if there is going to be a double payment, it would be by Pierce Associates, the first-tier subcontractor.

I think it is important for the Court to carefully read the Rich decision because I think the Rich decision--and again I think too that all of the cases which were cited in the Rich case, I believe in a footnote, on the principle relied on by the Court to define the term "subcontractor" involved a situation where the party we were talking about,

be it a materialman or be it a subcontractor, had some sort of contractual relationship with the prime.

There are cases where you have a prime contractor. You have another corporation. It may be a wholly owned subsidiary client. And the courts in those cases have more or less pierced a corporate veil. They do not feel where you have a wholly owned, controlled subsidiary--it has no economic reality--that a prime contractor should be able to put this barrier in there and push the materialman and laborers down one tier and therefore exclude them from the coverage of the act.

Q What if Pierce had gone to Bateson and said, "We do not think we are going to be able to do the sprinkler work, and we want your permission to assign that part of our subcontract to Colquitt" and then the same situation had developed? Would the parties be in any different position for Miller Act purposes?

MR. REPHAN: Yes, Your Honor, in that situation they would be because Colquitt then would have a contract with Bateson, and we think this is what the Court is talking about when they talk about those few contractors--

Q I would not think that would give Colquitt a contract with Bateson. Bateson would have notice that--and would have consented to an assignment from Pierce to Colquitt.

MR. REPHAN: If Pierce assigned a portion of its

contract work to Colquitt, then it would seem, Your Honor, that Colquitt would stand on the same contractual tier then with Pierce. They would have a contract with Bateson. They would look to Bateson for payment. Bateson could then control them and protect themselves. They could say to Colquitt, "We want you to put up a bond." And of course if Colquitt could not make the bond, Bateson would then have its choice not to permit the work to be done by Colquitt.

Q In this case Colquitt looked only to Pierce for payment?

MR. REPHAN: Yes, Your Honor. Yes, Your Honor.

Q Did they not submit their payroll to--

MR. REPHAN: That is true, Your Honor, but that is a requirement of most all federal construction projects today, that the payrolls go through the general contractor to the--

Q The issue here is whether the Court below was correct in holding Colquitt to be a sub, not a sub-sub.

MR. REPHAN: That is true, Your Honor. They said that technically Colquitt was a sub-sub contractor. But then they in effect said this makes no difference. In fact, in the--

Q They said Colquitt therefore was a subcontractor within the Miller Act. That was their conclusion.

MR. REPHAN: That is true, Your Honor. You will note in the Court of Appeals opinion too, on page--I have the slip

opinion--on page 4 they said, "In the case before us the union's contract was with Colquitt" which was technically a sub-subcontract. But then they went on and reached the conclusion that they were a subcontractor. We take issue with that, Your Honor.

Q You must, yes, because if he was a sub, you would not be here.

MR. REPHAN: We would not be here, Your Honor.

I think one leading case the Court should look at is the Elmer case, which was the Fifth Circuit case. That case followed MacEvoy, and they discussed MacEvoy in there, and this precise issue is there. And it is simply a question of what did Congress mean when they used the term "subcontractor"? Were they speaking about the traditional subcontractor, one having a contractual relationship with the prime contractor? Or are they talking about any person who does both labor and material as distinguished from a pure materialman?

Q I do not find in the briefs any discussion of what the normal rule is in the mechanic's lien law of the big commercial states like New York and Illinois and California. Would the employees of a sub-subcontractor normally be entitled to protection under state mechanic's lien law in situations like that?

MR. REPHAN: Mr. Justice Stevens, the only

jurisdictions that I did check out were the local jurisdictions, Maryland, Virginia, and the District of Columbia. The D.C. Code--

Q I know you say D.C., they do not--

MR. REPHAN: D.C. has a definition of the term "subcontract" in the statute itself. It is Section 38-103 of the D.C. Code. And it is defined as any person directly employed by the original contractor as a subcontractor, materialman or laborer to furnish work or materials in the completion of work contracted for as aforesaid.

Q I understand that is the rule in the District. Do you have any idea what the law generally is?

MR. REPHAN: Generally, Your Honor, my own experience has been it only goes down to that first level. I know in Virginia it is that way.

Q Mr. Rephan, also I notice you did not cite any law on the fast-growing Southwestern states like Colorado and Arizona. [Laughter]

MR. REPHAN: No slight intended, Mr. Justice Rehnquist. We had our hands full here with the District lobby. We thought this is where we need some clarification.

Q Is it usual for the main contractor to require his own concsent for subcontracting?

MR. REPHAN: In the contracting procedures, Your Honor, normally the--the big contractor is your mechanical,

electrical, the concrete or structural--unless the general contractor does that--and that is 95 percent of the work.

Q How about in this case?

MR. REPHAN: In this case, I think the automatic sprinkler work is sort of a specialized work. Most mechanical subcontractors will not do it.

Q Was the subcontractor free to sub-sublet to anybody else?

MR. REPHAN: True. True, Your Honor.

Q Without the main contractor having anything to say about it?

MR. REPHAN: That is correct, Your Honor.

Q Could the main contractor have required the sub-group to put up a bond?

MR. REMPHAN: They could have required it, but--

Q Then the main contractor could have protected itself.

MR. REPHAN: They could have required a bond here, Your Honor, but it is clear also that Colquitt could never have obtained a bond. And this is one of the problems. As you get down in the lower tiers, these people simply are not bondable. There is no way you are going to be able to get bonds further down. They are usually a small company.

Q If Bateson leaves it to Pierce to do the mechanical and leaves Pierce free to sub out part of the

mechanical, they more or less run that risk, do they not?

MR. REPHAN: That is right. They could not require Pierce to secure bonds from all of their sub-sub people. They had no privity with those people.

Q But they did require Pierce to provide a bond, did they not? And would not Pierce, if it had known--Pierce is really the one who is going to get stuck here, is it not?

MR. REPHAN: That is true, Mr. Justice Stevens.

Q And if Pierce had realized how the Court of Appeals was going to decide this case, it pretty surely would have required a bond from Colquitt, would it not?

MR. REPHAN: They would have, Your Honor. Of course they were relying on what they believed to be the law at the time, the Elmer case and the other cases and the way they interpreted the decisions of this Court.

Q The law as it was then was that they would still be stuck if Colquitt went belly up.

MR. REPHAN: As a practical matter, Your Honor, the only way that someone in Pierce's position could protect themselves would be to withhold payment from Colquitt. And this is really contrary to the intent of the Miller Act. The subcontractor simply cannot afford to man these jobs if the big subs are going to hold up their payment. And that is the only way they can finance these jobs, and this is the only way as a practical matter I think that a major sub, such as Pierce,

could protect itself. Colquitt was not bondable. In fact, there was a requirement under the collective bargaining agreement that Colquitt put up a bond to protect the trustees on the very payments which are in issue in this case. The trustees waived this bond requirement, and they admit that the reason they waived it, there was no way Colquitt could secure a bond. And this is the problem. What would happen is that the industry is going to be limited to those people who have the financial and size ability to man these greater projects.

We believe, Your Honors, that when we are talking about those few contracts that the general contractor can protect himself against, we are speaking of the major subcontractors, the mechanical, the electrical. But you have some very specialized sub-sub-subcontractors, particularly on the federal projects that are being constructed today--security systems, security glass, locks for the jail, and it goes on down the line. These are being furnished and installed. Theoretically they could come within the definition of subcontractor as defined by the D.C. Court of Appeals. But we think that Congress never intended that the prime contractor would have to protect himself against these many hundreds of small subcontractors.

Q Counsel, is it not fair to say though counsel did generally intend to provide the same kind of protection

that would be available under a state's mechanic's lien law if it were not for this argument of immunity of the federal government.

MR. REPHAN: Mr. Justice Stevens, that is exactly correct.

Q So, is it not relevant to know what the general practice is throughout the country on this sort of problem? Nobody seems to have talked about it, and I do not mean to single out any one jurisdiction. But is that not what Congress was trying to do?

MR. REPHAN: That is exactly what they were doing, Your Honor, because there was no way you could enforce a lien against government-owned property. A mechanic's lien law, you enforce your lien by ordering a court sale of the property. This could not be done in the case of federally-owned property.

As I said, Your Honor, the jurisdictions that I am familiar with all have some limitations, and traditionally I think it has only gone down to the first tier, subcontractors. It is that way in the District of Columbia. It is that way in Virginia, and I think it is that way in Maryland. And it seems to us that this was what Congress was replacing when they enacted the Miller Act. And certainly when they put limiting language in there and used the term "sub-subcontractor" as well as "subcontractor" that they are trying to go down to a

specified tier. But the Miller Act goes one tier further than most state mechanic's lien laws. It says any--

Q Most state mechanic's lien laws do not pay off, according to you, any worker who works on the project?

MR. REPHAN: No, Your Honor. That is exactly what I was reading here in the D.C. Code. It is any person directly employed by the prime contractor only--his employees, his subs, his materialmen. That is as far as it goes. I think this is true in Virginia too.

In the Miller Act we have those people who have a direct contract with the prime contractor. That would include the laborers of the prime contractor, the material suppliers, and the subcontractors. Then we have any person having a direct contract with a subcontractor. So, it would be the material suppliers, the sub-subs, laborers to a sub. Did I mention materialmen to the sub? Beyond that we think that that is what this Court meant when they said those are more remote relationships.

Q So, in Virginia, Pierce's employees who had worked on the job installing other mechanical stuff would not have any laborer's lien?

MR. REPHAN: Mr. Justice Rehnquist, I think that is true. There is no mechanic's lien. There is other statutory protection, but it is not under the mechanic's lien law.

Q That would not be true in Arizona, I know; the

law would be different, though they would have a claim.

Q And Pierce would.

MR. REPHAN: Pierce would, Your Honor. Pierce is a subcontract. It becomes even more difficult though in a state like I think Virginia and Maryland where the general contractor has paid the subcontractor. This will extinguish the mechanic's lien rights, so that the rights are somewhat limited. And it was quite obvious that this is what Congress was attempting to do and, as Your Honors realize, it started with the Heard Act, which was the forerunner of the Miller Act. However, the proviso was interjected into the Miller Act, and this is what the Court had to interpret in the MacEvoy case.

Following MacEvoy, as I mentioned earlier, there were at least four circuits that have ruled precisely the way we are asking this Court to rule today. And we think also that the Rich case did not alter the test in the MacEvoy case. All Rich said was here we have an issue. Is this man really a materialman or is he really a subcontractor? The man I am speaking about was Cerpac. Cerpac had a very close relationship with the prime contractor. Obviously the prime contractor could protect himself.

If the Court pleases, I would like to reserve what little time I have.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Capuano.

ORAL ARGUMENT OF DONALD J. CAPUANO, ESQ.

ON BEHALF OF THE RESPONDENTS

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

If I may at this point, I would like to respond to Mr. Justice Stevens before I get into my argument. You asked, sir, whether the state mechanic's lien laws cover this problem, and you did not see any discussion of it in the brief.

It is our view that when Congress adopted the Miller Act, the main purpose--or, in fact, as Chairman Miller stated in the legislative history--the purpose of the act was merely to correct the procedural problems in the Heard Act. So, they were not adopting the Miller Act to try to conform it with state mechanic's lien laws. They were trying to correct the procedural difficulties in the Heard Act. Those difficulties were that there was only one bond. The government had the first opportunity to sue. Contractors had to wait six months before they could sue. All of the suits had to be joined in one proceeding. These items or difficulties made it impossible for contractors to collect their money on government jobs and, as a result, they were forced to settle for a lot less than what their claims are worth. That was the purpose of the Miller Act. And under the Heard Act, anybody who supplied labor or material to the job was entitled to go against the bond.

In other words, there is not a question of privity involved as we submit the petitioners--

Q Was it not correct that the original Heard Act was intended to provide a substitute form of protection for that? Normally they will go under state law by way of mechanic's lien.

MR. CAPUANO: I believe that is generally correct. And of course the Heard Act covered everybody who supplied any labor or material on the job.

Q And your point is the Miller Act liberalized the act by requiring a payment bond as well as a performance bond?

MR. CAPUANO: Yes, in that sense. I do recognize that in the Miller Act a limitation was imposed with regard to this proviso that the petitioner is relying upon. But in our view, the Miller Act did not change in the sense the class of people who could be covered. What the Miller Act did was provide an opportunity for a general contractor or a prime contractor to protect himself from remote claims.

Q Mr. Capuano, if Colquitt had simply delivered sprinkling equipment to the job and Pierce's employees had installed it, would Colquitt's employees or their pension fund have had a claim under (a) the Heard Act or (b) the Miller Act?

MR. CAPUANO: Under the Heard Act, yes. Under the Miller Act, no--because Colquitt's employees would be in the

same situation they are in in this case.

The trustees who brought this suit are trustees of a jointly administered pension, welfare, and apprenticeship fund. In other words, there is an equal number of employer and union trustees on this fund. Actually there are three funds involved. The money that they were trying to obtain was the contribution that Colquitt in his collective bargaining agreement promised to make to these funds every month on behalf of the employees to fund their pension benefits, health insurance benefits, and educational benefits.

In addition, the union is a respondent in this case and was a plaintiff because Colquitt withheld money from the wages of the employess, part of which was to go toward union dues and the other deduction was to go to their vacation savings plan, set up individual savings accounts in banks for each employee. Of course the employees never got this money.

It is our view that what the Court of Appeals did here was look at the facts in the case. For example, it found that the sprinkler system installed by Colquitt was specifically required by Bateson's contract with the government. It found that sprinkler system was an integral and significant part of the whole building. It found the work that Colquitt did was performed over a substantial period of time. And it found that the work was important. And in support of that, it showed--or the Court pointed out that the work done by

Colquitt's employees was taken over by Pierce when Colquitt went broke or was unable to perform anymore.

Q All of those things could be true of an identity that was concededly a sub-sub-sub-subcontractor, which you concede would not be under the terms of the Miller Act.

MR. CAPUANO: No, I would not concede that, Mr. Justice Stewart. No, the point is that applying this Court's test in Rich, the Court of Appeals said you look to determine whether there is a substantial and important relationship between the prime and this other party, the defaulting party.

Q Even though this other party is a subcontractor to the ninth degree?

MR. CAPUANO: Well, the point is you do not--

Q I say let us just concede that.

MR. CAPUANO: All right, say it is to the ninth degree. You look to see whether there is this substantial and important relationship.

Q And if these attributes exist, then he is functionally a sub-subcontractor?

MR. CAPUANO: No, he is a subcontractor.

Q I mean a subcontractor.

MR. CAPUANO: Under the prime his employees or any persons--

Q Are covered by the act.

MR. CAPUANO: --are covered. The reason that this Court, in our view, adopted the substantial and important test was because the legislative history makes clear--and the Court has repeated it many times here--that the purpose of the act was to protect the interest of those who supply labor and material to a federal project or a public project so that they can get their money.

Certainly if that is the purpose of the act, the only reason for having the proviso in the act is to protect a prime contractor from some claims which are totally remote, something he could not protect himself against.

Q Do you not have real difficulty though when you try to break it down under an abstract description like that as to just who is covered and who is not?

MR. CAPUANO: Mr. Justice Rehnquist, no, I do not have any problem with that at all because the test that this Court set up in Rich and followed by the Court of Appeals is really no different than tests the Court has set up in other situations--for example, reasonable man. I do not believe this test is any more difficult than a reasonable man test. There are going to be close cases under this definition. But we submit that if you adopt the mechanical test which the petitioner is proposing here, what you wind up with is the employees and other persons who supply labor and material being

the ones who are suffering as a result of delegation or self-delegation or sub-delegation of work on a construction project.

In other words, if I may, in this particular case Pierce subcontracted out the sprinkler work. It is not at all uncommon in a large government project where the mechanical contractor will sub out the sprinkler work, he will sub out the underground utilities, he will sub out the sheetmetal work, he will sub out the pipe covering work, he will sub out the temperature control--

Q Maybe I did not speak when asking my question. I joined Rich, and I certainly understood it to focus on whether or not the person was a subcontractor as opposed to a materialman. And it used the close and substantial--whatever the language is--which I think had come originally from MacEvoy. But I understood your argument to be that we can more or less disgard this distinction between materialmen and subcontractors and simply focus on this rather abstract descriptive language.

MR. CAPUANO: Mr. Justice, if I understand your point, it is that Rich was only making a distinction between materialman versus subcontractor. If that is so, we would still submit--although I do believe the test goes further than that in Rich--but we would still submit that the approach the Court used in Rich--that is, a functional type test--is the only test that is going to accommodate the two purposes that we

understand to be in the Miller Act. The first and primary purpose is to protect those whose labor and material go into the public projects. The second purpose of the proviso to the Miller Act is simply to make sure that the prime contractor has some means of protecting himself from remote claims--not remote claims in terms of number of tiers people are down, whether they be one, five, or ten, but remote in the sense that the defaulting party does not have a substantial and important relationship with the prime because if he does have that kind of relationship, then there is no reason to eliminate contractors down this--

Q What about security guards hired by the prime who contribute nothing to the on-the-job construction but patrol it regularly while it is under construction?

MR. CAPUANO: If they had a contract direct with the prime, I believe they would be covered under the Miller Act. There would be no issue about that.

Q Do you think they would be covered?

MR. CAPUANO: I do not think that is the same type of case we are talking about.

Q I certainly do not either. But you think they would be covered under Miller?

MR. CAPUANO: Yes, I would, Your Honor.

Q Mr. Capuano, on your remoteness argument, which is very persuasive but the problem that I have is, What about

the House report, which seems to draw the line one step short of where you take it?

MR. CAPUANO: On the language referring to--

Q On the sub-subcontractor.

MR. CAPUANO: The sub-subcontractor.

Q That is as far as it will go. What do you say about that?

MR. CAPUANO: My answer to that would be, first, that at best it is ambiguous because the act itself does not define a subcontractor. So, with the act not defining a subcontractor, it is difficult to assume then that the House report, when it refers to sub-subcontractor, was referring to a definition which the petitioner urges here.

In other words, I think the functional definition that this Court laid out in Rich is a more appropriate one. Furthermore, I believe that--again as this Court has pointed out many times--there is extensive legislative history on the other side of this problem. And that is the legislative history and in fact comments by Chairman Miller, one of which I mentioned earlier, that the basic purpose of the Miller Act was merely to straighten out these problems with the Heard Act. With that being repeated over and over again in the legislative history, I find it difficult to attribute to Congress by that one statement in the House report a wholesale elimination of classes of people who were previously covered.

In effect, to adopt that statement as some kind of controlling criteria would mean that Congress decided they were going to cover just the tip of the iceberg and eliminate all these other people who had previously been covered. I believe that before we could look at that statement as controlling, there would have to be far more legislative history similar to that or at least defining what they meant by subcontractor in that case.

If I may, the point I would like to make with regard to the remoteness argument--and I believe I partially got into it, but I would like to stress the fact that I do not believe that Congress can be assumed--or it can be presumed that Congress intended, when it adopted the Miller Act, to let coverage under that act be controlled by the contractors who are on the job. And basically if we adopt petitioner's contention, that is what happens.

If Pierce decides to do the work himself, Pierce's employees are covered. If Pierce decides to subcontract that work to Colquitt or somebody else to do the work, Colquitt's employees are not covered.

Q What you say Congress did not intend in the Miller Act is true under most states' mechanic's lien statutes, is it not?

MR. CAPUANO: There are many that do that. There are a few, Justice Rehnquist, which we have found which would in effect support our position.

Q And yet did you not say that the Heard Act as originally drafted was intended as a substitute for state mechanic's lien statutes?

MR. CAPUANO: Yes, in the sense that you could not have a mechanic's lien on a federal project, the Heard Act provided for the bond to give the laborers and other persons who supplied material on the job opportunities to collect. But I think this point is particularly crucial, that the rights of both labor and materialmen to seek recovery under the Miller Act bond, under the petitioner's contention rests on how much subdelegation the prime or someone for example in Pierce's condition decides he wants to do on the job. This, we submit, is totally inconsistent with the Rich case and, for that reason, we believe that the Rich case, even if it is not found controlling in this situation because it involves a supplier to a materialman, we believe the test itself is sound and was stated as a general test for determining sub-contractor under the Miller Act, and the functional aspects of it can be applied in this situation.

There are a couple more points I would like to make, if I could.

Another factor which I think demonstrates that the petitioner's privity type argument is not valid in interpreting the Miller Act is the situation we have here where Pierce took over the job after Colquitt was unable to perform. Under the

petitioner's theory of the case on the last day these people worked for Colquitt, they were not covered under the Miller Act. They had no bond coverage. The next day, when they went to work for Pierce, doing precisely the same work--probably hooking one piece of pipe up to the piece of pipe they hooked up yesterday--they were then covered.

Q Yes, but is that not a natural consequence of the kinds of line drawing that we encounter in a whole range of business and commercial relationships?

MR. CAPUANO: That is the kinds of line drawing, yes, Mr. Chief Justice; but my point is that line drawing, based upon these relationships in business--in other words, what Pierce and Colquitt want to do and what Bateson wants to do with them--should not be controlling in interpreting the Miller Act because Congress there said, "Look, we want to make sure people whose labor goes into that building get paid."

Q In states' lien actions frequently the central issue or the only issue is whether the work or the material was completed on Monday of a given week or Tuesday, and there is an arbitrary line drawn under a statute.

MR. CAPUANO: Those lines, as I recollect, Mr. Chief Justice, really are concerned more with whether someone was prompt in getting his claim filed--for example, whether the work was done Monday or Tuesday--

Q It is the same general kind of line drawing, is

it not?

MR. CAPUANO: No, I would respectfully disagree, Mr. Chief Justice, that I think the line drawing there--

Q You do not lose your case if--I am just surprised that you would want to put so much weight on that kind of point. You do not lose your case on it.

MR. CAPUANO: Yes, I realize that.

Q But you want us to draw a line too, do you not?

MR. CAPUANO: No, Mr. Justice Marshall, I do not want--

Q Do you want to let it float?

MR. CAPUANO: Pardon me, sir?

Q Do you want to let it float?

MR. CAPUANO: I want you to adopt a test as the Court of Appeals did below which says we look at the facts to determine if there is this substantial and important relationship because there is only one reason why you want to find out if there is that relationship--because if there is such a relationship, then the defaulter is not remote from the prime.

Q Then how do you compute a Miller Act bond premium if you have got that vague a test?

MR. CAPUANO: The Miller Act bond premium, Mr. Justice Rehnquist, is set in the act. In other words, the act provides the limit of the bond.

Q I am not talking about the amount of coverage.

I am talking about the premium that the general has to pay the insurance company to get the bond.

MR. CAPUANO: The premium, as I recall from the brief submitted by the Surety Association, is based upon a percentage of the bond. In other words, I believe it is one half a percent for the first million or some figure like that.

They did also point out in their brief that they do not compute these premiums on an actuarial type basis. But again I do not believe that is crucial because what we have to keep in mind is what Congress intended to do when it adopted this statute. Certainly, if Congress was concerned, for example, about how the sureties were going to get their premiums or how they were going to base their premiums, it would have been simple to say we are not going to have any bonds; then there would be no premium.

Q Congress could likewise pass a law that had none of the limitations that the Miller Act had in it and simply say that anybody who has come near the project and has not been paid can recover under the bond. We both agree that it has done neither of those things.

MR. CAPUANO: No, it did not go that far, that is correct. But I would point out that if Congress fully intended, as petitioners argue, to limit the bond to the first year, that would have been very simple to say in the proviso. But it did not say so.

On the contrary, however, if again as petitioner argues Congress could easily have said who was covered, it would have been very difficult to put that kind of language in the proviso. You would have then had language sub-sub-sub-sub or sub of the first, second, third, fourth tier, that type of language. I do not believe we can attribute to Congress that intent in view of that.

Q Did Pierce file a bond in this case?

MR. CAPUANO: Did Pierce have a bond?

Q Yes.

MR. CAPUANO: The record does not reflect that, Mr. Justice White. But Pierce had an indemnity agreement with Bateson to indemnify Bateson in the event Bateson did--

Q In any event, these employees have no claim against Pierce.

MR. CAPUANO: They have no claim against anyone at the present time.

Q No bond that Pierce filed covers them.

MR. CALPUANO: No. No, sir.

The problem that Bateson claims exists--and that is how is he going to be able to get all these bonds?--that we are going to be bonding contractors down the road, we do not believe exists because there are several ways that Bateson can protect himself, one of which of course is requiring bonds. He required one of Pierce. That certainly proves he can do it.

He did not have to do it. Pierce could certainly have required one of Colquitt. Why Pierce did not require one to Colquitt the record does not show. Counsel indicates it was because Colquitt could not get bonded. If that is so, in effect then Pierce is telling the employees, "I want Colquitt on the job"--he probably had a low price. "Colquitt cannot get bonded. So, if Colquitt goes belly up, who will bear the risk of that? You employees." I simply cannot attribute that intent to Congress.

With regard to the argument that was somewhat touched on by counsel and argued extensively in the brief--and that is that the interpretation they are suggesting would be more fair to small contractors, that the interpretation we are proposing would in effect eliminate small contractors from coming on jobs because they could not get bonds, and people like Pierce from now on would require small contractors to get bonds--I think the argument is not appropriate in this case, for several reasons.

First, the small contractor can really be on both sides of this question. They could just as easily be claimants as they can defaulters. For example, if Colquitt had subbed out half of his sprinkler system job to a small contractor, that small contractor would be standing in the shoes of Colquitt's employees and also would come up empty handed.

So, I doubt if a small contractor is going to take much comfort in petitioner's argument that "We want to get you on the job even though you cannot be bonded" and then have that same small contractor find out that when he cannot get paid, he cannot go against the bond either.

Furthermore, we do not believe that the philosophy of the Miller Act was that the employee should bear the responsibility for a marginally weak contract. Certainly the federal government has provided other means to get jobs for small contractors on federal projects--

Q But you would make the same argument, I gather, for Colquitt's materialmen.

MR. CAPUANO: Oh, yes, sir. My argument would be precisely the same for Colquitt's materialmen, for anyone who had a contract with Colquitt, because that is the only privity which the act requires, in our view.

Q Because Colquitt, you say, was correctly held to be a subcontractor.

MR. CAPUANO: By the Court below, yes, sir. The only privity that is necessary is the privity between the claimant and the defaulting party. The act does not require privity between the defaulting party and the prime to show that the defaulting party is a subcontractor.

I have concluded my argument, and I would simply like to request that the Court affirm the decision of the Court of

Appeals, which we feel fully adopted the decisions of this Court in Rich and MacEvoy and properly construed the Miller Act. Thank you.

MR. JUSTICE: Do you have anything further, Mr. Rephan?

REBUTTAL ARGUMENT OF JACK REPHAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. REPHAN: May it please the Court, very briefly:

One of the very difficult problems we have with the test urged by the respondents is that it is an unworkable test. Here we have a $39 million contract. The sprinkler work was approximately $155,000, $156,000. If we use the substantiality test, let us assume we had a sprinkler system in one room and it was $10,000 by their subcontractor. Suppose it is $500,000 by their subcontractor. Who is going to make these determinations? Is this going to be the general contractor?--who obviously is not in a position to do so because they are not awarding these sub-sub-sub-sub-sub contracts. It is going to have to be the subcontractor and in turn his subcontractor on down the line. And we believe, Your Honors, it is really truly an unworkable task.

As far as drawing the lines, we think this Court recognized that Congress and the Miller Act drew the line. Rightly or wrongly it may well be that the extension of the Miller Act should be broadened. We feel this is a matter for

Congress. If they feel this way, they can redefine the coverage. But we think the way it is defined right now, this was an attempt by Congress to draw a line to show some definition. And we think the Court of Appeals decision violates that boundary line. In effect, it eliminates the proviso of Section 2 of the act which this Court had before it in the Rich case, in the MacEvoy case, and which was the proviso involved in all of the circuit court opinions who held that a subcontractor is a subcontractor in the usual meaning of this term. And as the term was used in the building trade industry, certainly this Court recognized that in MacEvoy, and we think this is what Congress meant when they said subcontractor.

Thank you.

MR. JUSTICE: Thank you, gentleman, case is submitted.

[The case was submitted at 3:10 o'clock p.m.]

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