

The Preemption Debate: What Is the Scope of the Miller Act Remedial Scheme?

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Introduction

If a contractor in a private construction project defaults on a payment to a supplier of labor, services, or materials, the supplier generally can secure a mechanic's lien¹ against the improved property under state law. A mechanic's lien allows an unpaid supplier of services, labor, or material to secure priority² in receiving payment under a private construction contract. Because a lien cannot attach to government property, this remedy is not available to a supplier in a construction contract with the United States.³ Consequently, Congress enacted the Miller Act⁴ in 1935 to provide suppliers under government contracts with a remedy that is comparable to a mechanic's lien.⁵

Under the Miller Act,⁶ before any contract for the construction, repair, or alteration of any public work is awarded to a contractor, the contractor must give the United States a payment bond with a surety or sureties. This payment bond protects⁷ suppliers of services, labor, or materials under the contract. Furthermore, every person who has furnished labor or material to

a prime contractor under a government construction contract can sue on the payment bond for the amount that is due. This remedy is available if the supplier has not been fully paid within⁸ ninety days after he completed performance under the contract.

The Miller Act also protects suppliers who have a direct contractual relationship with a subcontractor under a government contract, but have no contractual relationship with the prime contractor. The Miller Act⁹ gives these suppliers a right to sue on the payment bond. A claimant who sues under a Miller Act payment bond must bring suit within one year after the last day that he performed his obligations under the contract. In addition, he must bring suit in the name of the United States and in the federal district court where the contract "was to be performed and executed."¹⁰

In recent years, many federal courts have debated the meaning and purpose of the Miller Act.¹¹ Specifically, courts are split on whether the Miller Act preempts a subcontractor or supplier from bringing suit under state law against a surety¹² or other party involved in a government construction contract. In ana-

1. *Blacks Law Dictionary* defines a mechanic's lien as:

[A] claim or lien created by state statutes for the purpose of securing priority of payment of the price or value of work performed and materials furnished in erecting, improving, or repairing a building or other structure. A mechanic's lien attaches to the land as well as the buildings and improvements erected thereon.

BLACKS LAW DICTIONARY 981 (6th ed. 1990).

2. *Id.*

3. *See Illinois Surety Co. v. John Davis Co.*, 244 U.S. 376, 380 (1917).

4. 40 U.S.C.A. § 270(a)-(d)(1)(West 1998).

5. *See F.D. Rich Co. v. United States ex rel. Industrial Lumber Co. Inc.*, 417 U.S. 116, 122 (1974).

6. The Miller Act's requirements only apply to a government construction contract if that contract involves an amount greater than \$100,000. 40 U.S.C.A. § 270d-1. Service secretaries and the Secretary of Transportation may waive Miller Act requirements. *Id.* § 270e.

7. *Id.* § 270(a). The contractor must also furnish a performance bond to the United States that is used to protect the United States from losing money in the event the contractor breaches its duties under the contract. *Id.* This article, however, focuses on the payment bond required of the contractor for the protection of suppliers under the contract.

8. *Id.* § 270(b)(a).

9. A claimant who is not in privity with the prime contractor must give the prime contractor notice of a claim within 90 days from the date on which the claimant last performed under the contract. *Id.* § 270(b)(a). To give sufficient notice under the Miller Act a person must state, with substantial accuracy, the amount claimed and the subcontractor with whom he had a contractual relationship. *Id.*

10. *Id.* § 270(b)(a).

11. *See infra* notes 32-96 and accompanying text.

lyzing whether the Miller Act preempts state law, courts must begin by presuming that Congress did not intend to preempt state law.¹³ Courts must then examine the congressional intent behind the Miller Act.¹⁴ Courts that have taken these steps have uniformly held that the Miller Act does not preempt state law remedies against a surety or other parties involved in a government construction contract.¹⁵ Conversely, the two courts that have held that the Miller Act preempts state law have both mistakenly interpreted the Supreme Court's holding in *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*¹⁶ as requiring a presumption that the Miller Act was intended to preempt state law. Both courts also neglected to review the congressional intent underlying the Miller Act.¹⁷

This article reviews the congressional intent underlying the Miller Act in its historical context. It examines the Miller Act preemption debate among the federal courts. This article argues that the courts holding that the Miller Act does not preempt state law have properly applied the Supreme Court's preemption case law. Finally, this article discusses the impact of the Supreme Court's developing case law on the Miller Act preemption debate.

The Purpose of the Miller Act

In 1894, Congress enacted the Heard Act.¹⁸ This statute required any person who entered into a formal contract with the United States for the construction of any public building or public work to execute a single bond obligating that person to

promptly pay all persons who supplied labor and materials under the contract. United States Supreme Court case law and the legislative history of the Heard Act indicate that Congress enacted the statute to protect subcontractors and materialmen who supplied labor and materials for the construction of public works by giving them the federal equivalent of a state mechanic's lien.

Despite the statute's protective purpose, Congress found that the Heard Act did not adequately protect the supplier of labor and material in a government construction contract.²⁰ Three provisions in the Heard Act allowed sureties to delay and often default in making payments under a bond to a subcontractor. First, the United States had priority over all subcontractors in a claim against the contractor's bond under the Heard Act.²¹ Second, the Heard Act expressly limited a surety's liability to the amount of a bond that the surety posted:

If the recovery on the bond should be inadequate to pay the amounts found due to all said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the surety's liability, to wit, the penalty named in the bond less any amount which said surety may have had to pay to the United States by reason of execution of said bond, and upon so

12. This issue usually arises where a subcontractor sues a surety in tort for a surety's bad faith denial of payments due under a payment bond. See *infra* notes 33-97 and accompanying text.

13. See *Maryland v. Louisiana*, 451 U.S. 725 (1981) (holding that consideration of whether a state provision is preempted by federal law under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law).

14. See *Ingersoll Rand Co. v. McClendon*, 498 U.S. 133, 137-138 (1990) ("[T]he question of whether a certain state action is pre-empted by federal law is one of congressional intent").

15. See *infra* notes 32-69 and accompanying text.

16. 417 U.S. 116 (1974). The courts that have found that the Miller Act preempts state law remedies against a surety have all relied on *F.D. Rich Co.* The issue of whether the Miller Act preempts a separate, state statutory or common-law cause of action against a surety, however, was neither at issue before nor addressed by the Supreme Court in that case. See *id.*; see also *infra* notes 105-120 and accompanying text.

17. See *infra* notes 83-96 and accompanying text.

18. 40 U.S.C. § 270 (repealed 1935).

19. See *United States v. Ansonia Brass & Copper Co.*, 218 U.S. 452, 471 (1910) (reasoning that Congress enacted the Heard Act because mechanics and materialmen under government contracts could not obtain liens against public property); H.R. REP. NO. 53-97, at 1 (1893) ("There is no law in existence for the protection of mechanics and materialmen in this class of cases, as it is contrary to allow mechanic's or materialmen's liens on public buildings or public works, and in many cases person or persons entering into contracts with the United States . . . are without remedy.").

20. See H.R. REP. NO. 74-1263, at 1 (1935) ("This proposed legislation supersedes the Heard Act, which it repeals, dealing with bonds of contractors on public works. After considerable complaint with regard to the working of the Heard Act had come to the Committee on the Judiciary, particularly from subcontractors who have experienced in many cases what seems to be undue delay, with resultant hardships, in the collection of monies due them by suits on bonds under the procedure prescribed by the Heard Act.") (emphasis added); see also S. REP. NO. 74-1289, at 1 (1935).

21. See 40 U.S.C. § 270 (repealed 1935) ("If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of the said claim and demands, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners.")

doing, *the surety will be relieved from further liability.*²²

Third, the Heard Act often forced a contractor to delay bringing suit on a bond because it did not permit a plaintiff to bring suit until six months after completion of a contract and only permitted such a suit if the United States had not made a claim under the bond.²³

In 1935, Congress repealed the Heard Act²⁴ and enacted the Miller Act in its place. In establishing the Miller Act, Congress sought to strengthen the remedies available to a supplier in a government contract. The Judiciary Committees of both the House and the Senate made this intent evident by declaring: “The major purpose of [the Miller Act] seems to be to afford greater protection to subcontractors, laborers, and materialmen.”²⁵

In enacting the Miller Act, Congress essentially recodified the Heard Act with some minor alterations.²⁶ Two fundamental differences between the Heard Act and the Miller Act show that, in drafting the Miller Act, Congress intended to increase a supplier’s remedial power against a surety.²⁷

First, the Miller Act expedited a supplier’s ability to bring suit against a surety on a payment bond. Under the Heard Act, a supplier was required to wait six months after the completion

of a contract before it could bring suit against a surety. Conversely, under the Miller Act, a claimant can bring suit against a surety ninety days after he performs his last obligation under a contract.²⁸

Second, the Miller Act expanded the scope of recovery that was granted to a subcontractor against a surety. Under the Heard Act, if a surety paid the amount specified in its bond to a court, even where the bond was inadequate to repay all creditors, he was “relieved from further liability.”²⁹ Conversely, the Miller Act omits the language that caps a surety’s liability and potentially limits a claimant to a pro rata recovery of money owed to him. In place of this language, the Miller Act provides a claimant with a cause of action to recover “sums justly due him.”³⁰

In summary, the legislative history surrounding the Heard Act suggests that Congress initially created the Heard Act to give suppliers under government contracts protection by providing them with an alternative remedy to a state mechanic’s lien. The legislative history of the Miller Act reveals that the Heard Act was not a strong enough statute to protect subcontractors from strategic behavior on the part of sureties that were paying money due on contractor’s bonds.³¹ Consequently, Congress enacted the Miller Act to grant a subcontractor under a government contract remedial powers against a surety that had not been previously available.

22. See 40 U.S.C. § 270 (repealed 1935) (emphasis added).

23. See *id.* If the United States brought suit on the bond within six months after the end of the contract, a creditor could intervene in the suit and have its rights on the bond adjudicated; however, the creditor’s rights were subject to the priority of the United States’ claim on the bond. See *id.*; see also H.R. REP. NO. 74-1263, at 2 (1935).

If, however, no suit is brought on the bond by the United States, the claimants must wait until 6 months after the completion of the final settlement of the contract before they may initiate suit. . . . This may mean a delay of years before the subcontractors, materialmen, and laborers are even permitted to bring suits the bond, and months more of delay occur before judgment is entered. Under such circumstances, it appears that claimants frequently find themselves under the necessity of choosing whether they will wait years for their money or accept compromises which, if they do not involve greater loss, at least destroy the profitability of the contract. Those in financial stringency, of course, do not have a choice but the latter alternative.

Id.

Under the Heard Act the plaintiff was required to bring suit on the bond in the name of the United States in a federal district court where the contract was to be executed and performed. 40 U.S.C. § 270 (repealed 1935).

24. See 40 U.S.C. § 270 (repealed 1935).

25. See H.R. REP. NO. 74-1263, at 1 (1935); S. REP. NO. 74-1289, at 1 (1935).

26. Compare 40 U.S.C. § 270 (repealed 1935), with 40 U.S.C.A. § 270 (a)-(d) (West 1998).

27. The Miller Act increased a supplier’s protection in relation to the government by requiring a contractor to furnish two separate bonds: a performance bond for the protection of the United States, and a payment bond for the protection of suppliers of material and labor. Consequently, under the Miller Act, a plaintiff’s suit on a payment bond is no longer limited by claims that the United States makes on the same bond. See 40 U.S.C.A. § 270(a)-(b).

28. Compare 40 U.S.C. § 270 (repealed 1935), with 40 U.S.C.A. § 270 (b).

29. 40 U.S.C. § 270 (repealed 1935). In such cases the creditors were paid pro rata on the bond. *Id.*

30. Compare 40 U.S.C. § 270 (repealed 1935), with 40 U.S.C.A. § 270 (b).

31. See *supra* note 23.

The Circuit Debate: Does the Miller Act Preempt a Subcontractor's or Supplier's State Law Remedies Against Other Parties Involved in a Miller Act Project?

Courts Holding that the Miller Act does not Preempt State Law Remedies

Two circuit courts have held that the Miller Act does not preempt state law actions by a supplier against other parties involved in a federal construction project. In *K-W Industries v. National Surety Corp.*,³² National Surety failed to pay a contractor the amount that was due on a Miller Act payment bond.³³ After suing National Surety in a federal district court for the amount due under the bond, the contractor sued National Surety in a Montana state court for bad faith under the state's unfair insurance practices statute.³⁴ The Ninth Circuit rejected National Surety's claim that the Miller Act preempted state law liability against a surety for conduct relating to the performance of its obligations arising out of the Miller Act bond.³⁵ The court noted that the legislative history of the Miller Act did not suggest that Congress intended to protect sureties from liability for torts committed in connection with the payment of claims under Miller Act bonds.³⁶ The court reasoned that the Miller Act's purpose would be advanced if sureties were deterred by state law from bad faith practices in the payment of Miller Act bonds.³⁷ Accordingly, the court concluded that the Miller Act, like the mechanic's lien that it replaced, is not an exclusive remedy for a supplier on a government project. Rather, it consti-

tutes a remedy that is separate and independent from a supplier's personal remedies.³⁸

Similarly, in *United States ex rel. Sunworks Division of Sun Collector Corp. v. Insurance Co. of North America*,³⁹ a supplier to a subcontractor brought a common law action for unjust enrichment against the general contractor on a Miller Act contract after the subcontractor neglected to pay the supplier for its services.⁴⁰ The Tenth Circuit held that the Miller Act did not preempt the supplier's claim for unjust enrichment.⁴¹ The court concluded that the Miller Act was not the supplier's exclusive remedy.⁴² The court noted that the purpose of the Miller Act was to provide suppliers under government contracts with an alternative remedy to a mechanic's lien.⁴³ Consequently, the court concluded that the Miller Act, like the mechanic's lien provided for by state statute, created a statutory remedy⁴⁴ that supplemented other statutory and common law remedies.

At least four district courts have held that state actions against a Miller Act surety are not preempted by the Miller Act. In *Goldman Services Mechanical Contracting v. Citizens Bank and Trust Co.*,⁴⁵ a subcontractor on a federal construction project filed a negligence claim against Citizens Bank and Trust Company after Citizens signed a certificate of sufficiency allowing an individual with insufficient funds and assets to qualify as a surety on a Miller Act payment bond. The court held that the Miller Act did not preempt the subcontractor's tort claim against Citizens.⁴⁶ The court noted that the purpose of the Miller Act is to protect suppliers under federal projects by giving them an alternative remedy to a mechanic's lien.⁴⁷ The

32. 855 F.2d 640 (9th Cir. 1988).

33. *Id.* at 641.

34. *Id.*

35. *Id.* at 642.

36. *Id.* at 643.

37. *Id.*

38. *Id.* (citing *United States ex rel. Sunworks Div. of Sun Collector Corp. v. Insurance Co. of N. Am.*, 695 F.2d 455, 458 (10th Cir. 1982)). The court reasoned that for purposes of deciding whether or not the Miller Act preempts a contractor's common law claims, there was no reason to distinguish between remedies that a supplier might have against an owner, contractor or subcontractor as opposed to a surety. *Id.*

39. 695 F.2d 455 (10th Cir. 1982).

40. *Id.* at 456.

41. *Id.* at 457.

42. *Id.*

43. *Id.* at 457-58.

44. *Id.* at 458.

45. 812 F. Supp. 738 (W.D. Ky. 1992), *aff'd*, 9 F.3d 107 (6th Cir. 1993).

46. *Id.* at 741.

court reasoned that the Miller Act, like the mechanic's lien, is not an exclusive remedy.⁴⁸ The court concluded that the Miller Act's purpose would be undermined if the subcontractor's claim against Citizens was preempted.⁴⁹

In *Alvarez v. Insurance Co. of North America*,⁵⁰ a Miller Act surety only paid the subcontractor, Nueva Castilla, a pro rata share of the amount that was due under a Miller Act bond. Nueva sued the surety for bad faith under a California insurance statute that, by its express terms, covered sureties.⁵¹ The court held that the Miller Act did not preempt Nueva's claim.⁵² The court began its analysis by noting that it would not lightly infer that Congress intended to preempt state law. The court also recognized that the legislative history of the Miller Act demonstrated that the statute was enacted to "protect subcontractors who had previously had difficulty collecting payment on public works."⁵³

The court rejected the surety's argument that Treasury regulations, which allowed the Secretary of the Treasury to revoke a surety's certificate of authority if it failed to make prompt payments to suppliers, evidenced Congress' intent to have delinquent Miller Act sureties regulated by federal law rather than state law.⁵⁴ The court noted that Congress did not state that it intended to preempt state law in the Treasury regulations. The court also noted that the regulations applicable to Miller Act sureties specifically incorporate state law.⁵⁵ Accordingly, the court concluded that the Treasury regulations evidenced a congressional desire to use state regulation in the enforcement

of the Miller Act.⁵⁶ Additionally, the court dismissed the surety's argument that the California good-faith insurance statute conflicted with the purpose of the Miller Act.⁵⁷ The court reasoned that the California statute did not require any conduct that is prohibited by or inconsistent with the Miller Act.⁵⁸ Rather, the court concluded that the California statute strengthened the Miller Act, because it provided sureties with an additional reason to promptly pay claims that are made against bonds.⁵⁹

Similarly, in *C&F Construction Co. v. International Fidelity Insurance Co.*,⁶⁰ C&F, a subcontractor in a federal construction project, sued the surety under the project. In the suit, C&F alleged that the surety's failure to make payments that were due under a payment bond was tortious, malicious, and an act of bad faith. The court held that the Miller Act did not preempt C&F's tort claim.⁶¹ The court reasoned that the legislative history of the Miller Act provided "no plausible basis" for a preemption claim.⁶²

In *United States ex rel. Ehmcke Sheet Metal Works v. Wausau Insurance Co.*,⁶³ Ehmcke Sheet Metal Works a subcontractor on a federal construction contract, brought suit against a surety for breach of the covenant of good faith and fair dealing under California law. The court held that the Miller Act did not preempt Ehmcke's state law claim against the surety.⁶⁴ The court reasoned that the Miller Act simply creates the federal equivalent of a mechanic's lien and does not displace a supplier's other remedies in a federal construction project.⁶⁵

47. *Id.*

48. *Id.*

49. *Id.*

50. 667 F. Supp. 689 (N.D. Cal. 1987).

51. *Id.* at 690-92.

52. *Id.* at 697.

53. *Id.* at 693.

54. *Id.* at 694-95 (citing 31 C.F.R. § 223.18(a) (1998)).

55. For example, the regulations require a Miller Act surety to be licensed in the state where the bond is to be executed. *Id.* (citing 31 C.F.R. § 223).

56. *See id.*

57. *Id.* at 696-97.

58. *Id.* at 697.

59. *Id.*

60. No. 97-1709-LFO (D. D.C. Oct. 21, 1997).

61. *Id.* at 2 n.1.

62. *Id.* (citing H.R. REP. NO. 74-1263 (1935); S. REP. NO. 74-1238 (1935)); *see supra* notes 18-30 and accompanying text.

63. 755 F. Supp. 906 (E.D. Cal. 1991).

Despite its holding on federal preemption, however, the court concluded that California law barred Ehmcke's suit because Ehmcke was not in privity with the surety that it sued.⁶⁶ The court reasoned that allowing such suits would result in an increase in the number of suits and claims for punitive damages. This, in turn, would increase the cost of surety bonds.⁶⁷ The court concluded that the increased surety bond cost would be passed on by sureties to prime contractors, and then by prime contractors to the United States.⁶⁸ Accordingly, the court concluded that California law would bar Ehmcke's suit to minimize the insurance costs to the United States.⁶⁹

Courts Holding that the Miller Act does Preempt State Law Remedies

Courts that hold that the Miller Act preempts a state action against a surety or other party on a federal construction project have uniformly relied on the Supreme Court's holding in *F.D. Rich Co.*⁷⁰ In that case, F.D. Rich, a prime contractor for a California housing project posted a payment bond with its surety. F.D. Rich then entered into a contract with a subcontractor in which the subcontractor agreed to supply and install plywood panels under the project.⁷¹ The subcontractor entered into a contract with Industrial Lumber Company⁷² to supply the plywood needed for the California project.⁷³ When F.D. Rich needed plywood for one of its other contracts, it diverted one of

Industrial's California shipments to a project in South Carolina.⁷⁴

After the subcontractor on the project defaulted in paying Industrial for the plywood it supplied to both the California and South Carolina projects, Industrial brought a claim against F.D. Rich and its surety in the Eastern District of California.⁷⁵ The Ninth Circuit affirmed the district court's judgment that venue was proper and both F.D. Rich and its surety were jointly and severally liable for the amount of unpaid shipments to the California project plus eight percent interest.⁷⁶ The Ninth Circuit further held that recovery under the Miller Act entitled Industrial to attorney's fees, and the surety on F.D. Rich's California project was not liable for amounts owed to Industrial for shipments that were diverted from the California project to South Carolina.⁷⁷

The Supreme Court affirmed the Ninth Circuit's judgment, except the Supreme Court held that attorney's fees were not recoverable under a Miller Act cause of action.⁷⁸ The Court denied Industrial's argument that "sums justly due" under a Miller Act cause of action include attorney's fees.⁷⁹ The Court reasoned that, absent evidence of congressional intent to do so, it would not expand the scope of the Miller Act to incorporate the state law policy of awarding attorneys fees in public works cases.⁸⁰ Additionally, the Court suggested in dicta that a uniform rule of national application would benefit the reasonable expectations of claimants who bring suit under the Miller Act.

64. *Id.* at 909.

65. *Id.*

66. *Id.* at 913; see *United States ex rel. Caps v. Fidelity and Deposit Co.*, 875 F. Supp. 803, 810-11 (M.D. Ala. 1995) (holding that the Miller Act does not bar a claim against a surety for bad faith insurance practices yet refusing to exercise pendant jurisdiction over the suit because it involved novel questions of state law that were properly resolved by a state tribunal).

67. *Ehmcke Sheet Metal Works*, 755 F. Supp. at 911.

68. *Id.*

69. *Id.* The court's analysis of the bad faith claim does not, in effect, preempt state law claims under the Miller Act because the court suggested that Ehmcke could bring a state cause of action against the prime contractor for fraud. *Id.* at 914.

70. 417 U.S. 116 (1974).

71. *Id.* at 118.

72. *Id.*

73. *Id.* at 119.

74. *Id.* at 120.

75. *Id.* at 121 n.5. It is imperative to note that the Miller Act does not provide for prejudgment interest on sums due. Industrial's claim for interest arises from its contract with its subcontractor that interest would be calculated at eight percent per annum from the date payment was due. See Brief for Respondent at 17-18, *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 427 U.S. 116 (1974) (No. 72-1382).

76. *F.D. Rich Co.*, 417 U.S. at 121 n.5.

77. *Id.* at 121.

78. See *id.* at 127-29; Respondent's Brief at 18-22, *F.D. Rich Co.* (No. 72-1382).

The Court further ruled that venue was proper in the Eastern District of California under the Miller Act, because the majority of the contract was performed and executed in California.⁸¹ Additionally, the Court neglected to review the appeals court's award of prejudgment interest to Industrial.⁸²

Relying on *F.D. Rich Co.*, two federal district courts have held that the Miller Act preempts a subcontractor from bringing a claim grounded in state law against a Miller Act surety or against other parties involved in a federal construction project. In *United States ex rel. Pensacola Construction Co. v. Saint Paul Fire & Marine Insurance Co.*,⁸³ Pensacola Construction, a subcontractor on a Miller Act project, sued the general contractor and its surety on a Miller Act bond. They brought a separate state cause of action for attorney's fees and penalties.⁸⁴ The court held that the Miller Act preempted Pensacola's state claims.⁸⁵ The court reasoned that by requiring Miller Act suits to be brought in the federal district court where the contract was to be performed, Congress intended "to shield sureties from a multiplicity of suits, which could lead to liability in excess of the payment bond."⁸⁶ Additionally, the court noted that the Supreme Court's decision in *F.D. Rich Co.* defined the preemptive scope of the Miller Act.⁸⁷ The court concluded, therefore,

that *F.D. Rich Co.* mandated a uniform rule of preemption on claims that relate to Miller Act bonds.⁸⁸

Similarly, in *Tacon Mechanical Contractors, Inc. v. Aetna Casualty & Surety Co.*,⁸⁹ Tacon Mechanical Contractors, a subcontractor on a federal construction project, brought suit against a contractor's surety alleging that the surety's delay in making payments under a payment bond violated state tort laws.⁹⁰ The court held that the Miller Act preempted Tacon's tort claims.⁹¹ The court noted that Tacon was required to show that the Miller Act did not preempt its claim.⁹² Without citing authority, the court suggested that the Miller Act was enacted to keep government costs defined and predictable by limiting the impact that "local risk-increasing rules" could have on Miller Act contractors.⁹³ Accordingly, the court expanded upon the dicta in *F.D. Rich Co.* and concluded that remedies which arise out of a claim on a Miller Act bond should be nationally uniform.⁹⁴

Additionally, the court provided two other rationales for preempting Tacon's claims. First, the court reasoned that Congress created a mandatory federal venue provision in the Miller Act to protect sureties from multiple suits in state courts that could lead to liability in excess of the payment bond.⁹⁵ Second, the

79. *F.D. Rich Co.*, 417 U.S. at 127.

80. *Id.*

81. *Id.* at 124-25.

82. See generally *id.* at 116-33.

83. 710 F. Supp. 638 (W.D. La. 1989).

84. *Id.* at 639.

85. *Id.*

86. *Id.* at 640 (citing *United States ex rel. Aurora Painting, Inc. v. Fireman's Fund Ins. Co.*, 832 F.2d 1150, 1152 (9th Cir. 1987); *United States Fidelity & Guaranty Co. v. Hendry Corp.* 391 F.2d 13, 25 (5th Cir. 1968)). In *Aurora Painting* the court denied a surety's claim that the exclusive jurisdiction provided for under the Miller Act precluded it from being bound by a state court judgment regarding the liability of its insured, the prime contractor. See *Aurora Painting*, 832 F.2d at 1152-53. The court reasoned that the full faith and credit statute, 28 U.S.C § 1738, required it to give preclusive effect to the state court's judgment on the prime contractor's liability. *Id.* at 1152. The court reasoned that the purpose of the Miller Act's venue provision was not to displace all state law claims arising out of a Miller Act contract, but rather, was to provide a single forum in order to avoid conflicting judgments in various different courts. *Id.*

87. *Pensacola*, 710 F. Supp. at 640.

88. *Id.*

89. 860 F. Supp. 385 (S.D. Tex. 1994), *aff'd*, 65 F.3d 4865 (5th Cir. 1995) (affirming the district court on independent and adequate state grounds without addressing the preemption issue).

90. *Id.* at 386.

91. *Id.* at 387.

92. *Id.*

93. *Id.*

94. *Id.* The dicta in *F.D. Rich Co.* suggested only that the federal remedy provided for under the Miller Act should be nationally uniform. See *F.D. Rich Co.*, 417 U.S. at 127.

court concluded that because Congress gave the Secretary of the Treasury the power to revoke a delinquent surety's certificate of authority, it intended for sureties to be regulated administratively rather than by state causes of action.

Case Law Analysis: Which Courts Have Properly Applied Preemption Doctrine in the Miller Act Debate?

The Supremacy Clause of the United States Constitution proscribes any state law that is contrary to federal law.⁹⁷ The Tenth Amendment, however, provides that the states retain all governmental power that is not explicitly reserved to the federal government by the Constitution.⁹⁸ Thus, Congress' power to preempt state law is limited, at least to some degree, by state sovereignty.⁹⁹ In the past twenty years, the Supreme Court has attempted to delineate a coherent set of rules for determining when, and to what degree, a federal statute will preempt state law.¹⁰⁰

Though the Court recites a variety of preemption tests throughout its case law,¹⁰¹ the Court has consistently applied two principles in preemption review.¹⁰² First, the Court has consistently held that the fundamental question in determining whether a federal statute preempts state law is whether there was congressional intent to preempt.¹⁰³ Second, the Court has uniformly presumed, when reviewing congressional intent, that federal statutes do not supersede state law unless Congress has clearly expressed this intent.¹⁰⁴

The courts that have held that the Miller Act does not preempt state law against a surety or against other parties in a federal construction project have properly applied the standards set forth above by the Supreme Court. These courts began their preemption analysis by examining the congressional intent behind the Miller Act.¹⁰⁵ In determining that Congress intended to afford subcontractors greater protection by enacting the Miller Act, the courts in *C&F Construction*¹⁰⁶ and *Alvarez*¹⁰⁷

95. *Tacon Mechanical Contractors*, 860 F. Supp. at 387; *Pensacola*, 710 F. Supp. at 640 (citing *United States ex rel. Aurora Painting, Inc. v. Fireman's Fund Ins. Co.*, 832 F.2d 1150, 1152 (9th Cir. 1987); *United States Fidelity & Guaranty Co. v. Hendry Corp.*, 391 F.2d 13, 25 (5th Cir. 1968)).

96. *Tacon Mechanical Contractors*, 860 F. Supp. at 388.

97. U.S. CONST. art. VI, cl. 2.

98. U.S. CONST. amend. X.

99. Early Supreme Court preemption doctrine is based on principles of statutory interpretation. The Court primarily examined whether or not Congress intended to preempt state law. See *infra* notes 102-105 and accompanying text. However, recent Supreme Court cases have relied on principles of federalism to limit federal preemption of state law, despite congressional intent. See *infra* notes 140-153 and accompanying text.

100. See *infra* notes 102-105 and accompanying text.

101. The Supreme Court has outlined three ways in which Congress can preempt state law. See *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). First, Congress may preempt state law by stating its desire to do so in express terms. *Id.* at 203. Second, in the absence of express congressional intent to preempt state law, Congress may still impliedly preempt state law by creating a scheme of regulation that is so pervasive that the court can infer that Congress left no room for the states to supplement federal law. *Id.* at 204. Third, even in the absence of pervasive federal regulation, state law may be impliedly preempted if it conflicts with federal law or if state law creates an obstacle to "the full accomplishment and execution of the full purposes and objectives of Congress." *Id.*

Significantly, the second and third ways in which Congress can preempt state law are often confused and used interchangeably by the courts. *Palmer v. Liggett Corp.* 825 F.2d 620, 624 (1st Cir. 1987) (noting that the distinction between the different types of implied preemption do not delineate any real differences); *Missouri Pac. R.R. v. Railroad Comm'n*, 833 F.2d 570, 573 (5th Cir. 1987) ("These guides are easier to state than to apply . . ."); see Paul Wolfson, *Preemption and Federalism: The Missing Link*, HASTINGS CONST. L.Q. 69 (1988) (arguing that the Court's obstacle preemption analysis is functionally indistinguishable from its excess federal regulation preemption analysis and noting that the Court, nonetheless, treats the two rules as separate for preemption).

102. See *infra* notes 104-105 and accompanying text.

103. See *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 369 (1986) ("The critical question in any preemption analysis is always whether Congress intended the federal regulation to supersede state law."); see also *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95 (1983) ("In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue.")

104. See *Rice v. Santa Fe Elevator Corp.* 331 U.S. 218, 230 (1947); see also *Maryland v. Louisiana*, 451 U.S. 724 (1981).

105. See *K-W Indus. v. National Sur. Corp.*, 855 F.2d 640 (9th Cir. 1988); *Goldman Servs. Mechanical Contracting v. Citizens Bank and Trust Co.*, 812 F. Supp. 738 (W.D. Ky. 1992); *United States ex rel. Sunworks Division of Sun Collector Corp. v. Insurance Co. of N. Am.*, 695 F.2d 455 (10th Cir. 1982); *United States ex rel. C&F Constr. Co. v. International Fidelity Ins. Co.*, No. 97-1709-LFO (D. D.C. 1997); *United States ex rel. Ehmcke Sheet Metal Works v. Wausau Ins. Co.*, 755 F. Supp. 906 (E.D. Cal. 1991). See also *supra* notes 34-71 and accompanying text.

106. No. 97-1709-LFO, slip op. at 2-3 n.1.

107. *Alvarez v. Insurance Co. of N. Am.*, 667 F. Supp. 689, 693 (N.D. Cal. 1987)..

cited House and Senate Judiciary Committee reports that detailed the problems that subcontractors endured in recovering from sureties under the Heard Act. Additionally, in *K-W Industries*, *Ehmcke Sheet Metal Works*, *Sun Works*, and *Goldman Services* each court acknowledged the Miller Act's protective purpose and noted that, in enacting the Miller Act, Congress intended to provide subcontractors with the federal equivalent of a state mechanic's lien.¹⁰⁸ Consequently, each court concluded that, like the state mechanic's lien, the Miller Act was not intended to be an exclusive remedy for subcontractors.¹⁰⁹ Each court examined the congressional intent behind the Miller Act and found that there was no evidence that Congress intended to preempt a subcontractor's state law cause of action. Consequently, these courts maintained the presumption that Congress did not intend to preempt state law in passing the Miller Act.¹¹⁰

Conversely, the courts in *United States ex. rel. Pensacola Construction Co. v. Saint Paul Fire and Marine Insurance Co.*¹¹¹ and *Tacon Mechanical Contractors v. Aetna Casualty & Surety Co.*¹¹² found that the Miller Act preempted state law remedies. These courts mistakenly relied on the Supreme Court's holding in *F.D. Rich Co.* to reach this conclusion. There are two reasons why *F.D. Rich Co.* does not control the issue of preemption. First, *F.D. Rich Co.* did not involve a state law cause of action.¹¹³ Rather, F.D. Rich urged the Court to incorporate a state policy regarding attorney's fees into the Miller Act (a federal cause of action). In its brief to the Court, F.D. Rich argued:

But the fact that Congress did not detail in the Miller Act the components of the remedy or the elements to be included in "sums justly due," does not preclude the federal courts from doing so, in line with the express purpose of the Act, nor prevent the federal courts from referring to state law to determine the

appropriate elements of Miller Act recovery in a particular state . . . attorney's fees as part of the claim [of] a Miller Act case must represent part of the federal statutory right created by Congress. The claim does not originate in either the common law or the statute of any particular state. When making its determination of sums justly due under federal law, the federal courts should appropriately look to the purpose of the Miller Act.¹¹⁴

Accordingly, the Court in *F.D. Rich Co.* never addressed the issue of preemption.

Second, the *F.D. Rich Co.* Court affirmed the appeals court's award¹¹⁵ of prejudgment interest for the supplier under the contract. The supplier in *F.D. Rich Co.* contracted with a subcontractor that, in the event of default, the supplier would be entitled to prejudgment interest. The parties agreed to this provision even though the Miller Act does not provide for prejudgment interest in its remedial scheme.¹¹⁶ Therefore, the Court permitted state contract law regarding prejudgment interest to supplement the scope of the Miller Act remedy. Consequently, the Court's holding concerning prejudgment interest implicitly acknowledges that the Miller Act is not an exclusive remedy and that it will incorporate some state law in determining "sums justly due" under the Miller Act.

Relying on *F.D. Rich Co.* to define the Miller Act's "preemptive" scope caused the courts in *Pensacola Construction Co.* and *Tacon Mechanical Contractors* to overlook the congressional intent underlying the Miller Act. Both courts constructed a congressional intent for the Miller Act that supported the *F.D. Rich Co.* Court's "preemptive" holding.¹¹⁷ For example, without citing any authority, the *Tacon Mechanical Con-*

108. See *K-W Indus.*, 855 F.2d at 643; *Ehmcke Sheet Metal Works*, 755 F. Supp. at 909; *Sun Works*, 695 F.2d at 457-58; *Goldman Servs.*, 812 F. Supp. at 741. See also *supra* notes 34-71 and accompanying text.

109. *Id.*

110. See, *K-W Indus.*, 855 F.2d at 643 ("National [the surety] has pointed to nothing in the Miller Act or its legislative history to suggest that Congress intended the Act to protect sureties from liability for torts . . . that they may commit in connection with the payment of bonds executed pursuant to the act."); See also *C&F Constr. Co.*, No. 97-1709-LFO, slip op. at 2-3 n.1 (noting that the legislative history of the Miller Act provides no plausible basis for a preemption claim).

111. 710 F. Supp. 638, 640 (W.D. La. 1989).

112. 860 F. Supp. 385, 387 (S.D. Tex. 1994), *aff'd*, 65 F.3d 4865 (5th Cir. 1995).

113. See generally *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co. Inc.*, 417 U.S. 116 (1974).

114. Respondent's Brief at 19-21, *F.D. Rich Co.* (No. 72-1382).

115. *F.D. Rich Co.*, 417 U.S. at 120, 120 n.5.

116. *Id.* at 120 n.5.

117. *United States ex rel. Pensacola Constr. Co. v. Saint Paul Fire & Marine Ins. Co.*, 710 F. Supp. 638, 640 (W.D. La. 1989) ("The preemptive scope of the Miller Act was discussed in *F.D. Rich Co.*"); *Tacon Mechanical Contractors, Inc.*, 860 F. Supp. at 387 ("[T]he remedies available in an action arising out of the bond should be nationally uniform.") (citing *F.D. Rich Co.*, 417 U.S. at 126-31)).

tractors court reasoned that the intent underlying the Miller Act was to minimize the cost of government contracting¹¹⁸ by limiting the impact that local risk-increasing liability rules could have on sureties.¹¹⁹ Both courts, therefore, concluded that the Miller Act¹²⁰ was enacted to limit a surety's liability under a payment bond.

The legislative discussion and the historical context surrounding the Miller Act fails to support any finding that Congress enacted the Miller Act to limit surety liability. Rather, Congress passed the Miller Act in response to the delays and hardships subcontractors endured in collecting money from sureties under the Heard Act.¹²¹ While reviewing the Heard Act, Congress noted the need to provide a remedy that would counter a surety's ability to unreasonably delay payments, forcing a subcontractor to accept less than the amount due under a bond.¹²² In passing the Miller Act, Congress granted a subcontractor the right to bring suit promptly against a delinquent surety and specifically eliminated language in the Heard Act¹²³ that placed a limit on surety costs under a payment bond. Accordingly, a review of the Miller Act in its historical context suggests that it was enacted neither to limit surety liability nor to minimize government costs by reducing surety liability.¹²⁴

The courts in *Pensacola Construction Co.* and *Tacon Mechanical Contractors* manufactured congressional intent behind the Miller Act to fit the Supreme Court's "preemptive" decision in *F.D. Rich Co.* These courts misapplied the preemption doctrine at two levels. First, both courts neglected to acknowledge Congress' intent to afford subcontractors under Miller Act projects greater protection in relation to sureties. Second, both courts defied preemption doctrine by presuming that Congress¹²⁵ intended to preempt state law in enacting the Miller Act.¹²⁵ The *Tacon Mechanical Contractors* court explicitly stated its presumption that the Miller Act preempted state law in requiring the plaintiff to prove that "the congressional enactment does not preempt state law claims."¹²⁶

Both courts' presumption that the Miller Act preempts state law is implicitly evident in their respective analyses of the Miller Act's venue provision.¹²⁷ The Miller Act's venue provision¹²⁷ mandates that suits to recover a payment bond be brought in the federal district court where the contract was performed and executed. Both courts argued that this venue provision evidences a congressional intent to protect sureties from multiple suits¹²⁸ that could lead to liability in excess of the payment bond.¹²⁸ Consequently, both courts presumed that the Miller Act was intended to preempt state law actions against a

118. *Tacon Mechanical Contractors*, 860 F. Supp. at 387 (concluding that the Miller Act created a bond to reduce government contracting costs because without the bond, a subcontractor would be left insecure, and would therefore price his risk into his bid on any government project). The Miller Act, unlike the Heard Act, did not create a bond giving government contractor security. See 40 U.S.C. § 270 (repealed 1935).

119. See *Tacon Mechanical Contractors*, 860 F. Supp. at 388.

If the proliferation of state regulation had been an element of the context of the performance bond pricing, Congress might have appreciated that threat to Congress' attempt to establish an orderly and comprehensive federal scheme for protecting materialmen and sureties alike. To read the Miller Act as limiting the government's own contracting costs through solely protecting subcontractors . . . ignores that the Act regulates sureties to further the purpose of reducing costs. The Miller Act preempts the plaintiff's state law claims.

Id.

See also *United States ex rel. Ehmeke Sheet Metal Works v. Wausau Ins. Co.*, 755 F. Supp. 906 (E.D. Cal. 1991) (denying a state cause of action against a surety for reasons grounded in state law).

120. *Pensacola Constr. Co.*, 710 F. Supp. at 640; *Tacon Mechanical Contractors*, 860 F. Supp. at 887-88.

121. S. REP. NO. 74-1289 (1935); H.R. REP. NO. 74-1263 (1935).

122. H.R. REP. NO. 74-1263 (1935).

123. See *supra* notes 29-31 and accompanying text.

124. Even if the Miller Act was enacted to reduce the cost of government contracting, it does not logically follow that the Act must have intended to employ preemption to limit surety liability. *Tacon Mechanical Contractors* suggested that if sureties were subject to common law liability in addition to their bonds they would have to increase their premiums thereby increasing the overall cost of government contracting. *Tacon Mechanical Contractors*, 860 F. Supp. at 868. However, the court simultaneously noted that subcontractors price the extent of their risk under a government contract into their bids. *Id.* Therefore, if subcontractors are precluded from recovering for torts committed against them in the execution of government contracts, subcontractors' bid prices for contracts will likely increase to account for added risk in proportion to the degree that surety premiums will decrease to discount for reduced risk. Accordingly, it was inaccurate for the *Tacon Mechanical Contractors* court to assume that limiting surety liability through preemption would reduce government costs in contracting.

125. In reviewing preemption issues, courts are bound to examine congressional intent and, in so examining, are bound to presume that Congress did not intend to preempt state law. See *supra* notes 104-105 and accompanying text.

126. *Tacon Mechanical Contractors, Inc.*, 860 F. Supp. at 387.

127. 40 U.S.C.A. § 270b (West 1998). The Supreme Court has held that this provision in the Miller Act is a venue provision and not a jurisdictional provision. See *F.D. Rich Co.* 417 U.S. at 125-26.

surety.¹²⁹ This presumption is flawed for two reasons. First, the Miller Act's venue provision only applies to suits to recoup monies that are due under the Miller Act. This provision does not apply to state or federal causes of action that are distinct from a Miller Act suit.¹³⁰

Second, both courts misconstrued the manner in which the venue provision protects payment bond sureties. Both courts reasoned that Congress acted to protect sureties by making venue *federal*. Consequently, both courts concluded that the venue provision evidenced congressional intent to preempt state law claims. However, *United States ex rel. Aurora Painting, Inc. v. Fireman's Fund Insurance Co.*,¹³¹ the case that both courts relied on for the proposition that the venue provision evidences a congressional intent to preempt state law, suggests that the Miller Act protects sureties by providing for venue in a *single* tribunal. In *Aurora Painting* the Ninth Circuit held that a surety was bound by a state court judgment regarding its principal's liability on a Miller Act contract.¹³² The court reasoned that the Miller Act protects against conflicting judgments that relate to payment bonds by providing a *single* tribunal for adjudicating bond liability.¹³³ Therefore, to the extent the Miller Act protects payment bonds, it does so by limiting the place where a claim can be made to a *single* forum. It does not protect payment bonds by limiting state law actions.¹³⁴

In reasoning that the *federal* nature of the Miller Act's venue provision reflected a congressional intent to preempt state law, both courts employed circular logic. Both courts reasoned that

the venue provision was drafted to protect a surety from state law claims by providing for federal venue. It does not necessarily follow, however, that a suit in a mandatory federal venue shields a defendant from a state cause of action.¹³⁵ That conclusion overlooks the pendent jurisdiction¹³⁶ of the federal courts.¹³⁶ Both courts assumed from the beginning that the Miller Act's mandatory federal venue provision reflected a congressional intent to shield sureties from pendent state claims in federal court. Both courts' analyses of the venue provision assumed the conclusions that they reached.

Conclusion and the Future of Miller Act Preemption

Neither side of the Miller Act preemption debate reviewed the issue of preemption in light¹³⁷ of the Supreme Court's evolving case law on preemption. As the Miller Act preemption debate unfolds, federal courts should take note that the Supreme Court has applied an especially strong presumption against federal preemption in the area of state tort law.¹³⁸ A new prong in the preemption analysis is emerging in cases where the preemption of the common law is at issue. Once the Court identifies a congressional intent to preempt *some* state law, it further requires Congress to make evident which part of the state law is displaced and which part is not.¹³⁹

The distinction between the preemption of the common law and the preemption of other state law began in the early 1980's when the Rehnquist Court began to afford state common law

128. *United States ex rel. Pensacola Constr. Co. v. Saint Paul Fire & Marine Ins. Co.*, 710 F. Supp. 638, 640 (W.D. La. 1989); *Tacon Mechanical Contractors*, 860 F. Supp. at 387-88.

129. *Pensacola Constr. Co.*, 710 F. Supp. at 640; *Tacon Mechanical Contractors, Inc.*, 860 F. Supp. at 387-88.

130. 40 U.S.C.A. § 270(b) (West 1998).

131. 832 F.2d 1150, 1153 (9th Cir. 1987)

132. *Id.* at 1152-53.

133. *Id.*

134. The venue provisions' *singular* nature protects the payment bond, its federal nature adds nothing to its protection. For example, if Congress had the power to provide for venue in a *single* state instead of a single federal court, the surety would benefit from the same level of protection. Unless one assumes, that in making venue federal, Congress intended to preempt state law.

135. Pendent jurisdiction is a principle applied in federal courts whereby a federal court may exercise jurisdiction over a non-federal claim for which no independent jurisdictional ground exists between the same parties who are properly before the court on a federal claim where both claims arise from a common nucleus of operative facts. BLACK'S LAW DICTIONARY 1134 (6th ed. 1990).

136. See CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 109 (1984) ("If a state claim is properly within the pendent jurisdiction of the federal court, it should not be ground for objection that the venue would not be proper if that claim were sued on alone . . .").

137. The majority of the Miller Act preemption cases involve the issue of whether or not the Miller Act preempts a common law remedy against a surety. See *supra* notes 40-50, 90-97 and accompanying text.

138. See, e.g., *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180 (1978) (discussing trespass actions); *Farmer v. United Bhd. of Carpenters and Joiners of Am.*, 430 U.S. 290 (1977) (discussing intentional infliction of emotional distress); *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53 (1966) (discussing malicious defamation); *International Union, United Auto., Aircraft & Agric. Implement. Workers of Am. v. Russell*, 356 U.S. 634 (1958) (discussing malicious interference).

139. See *infra* notes 141-152 and accompanying text.

remedies greater protection from preemption than state imposed regulations, such as a statutes.¹⁴⁰ The recent Supreme Court decision of *Medtronic, Inc. v. Lohr*¹⁴¹ continued this trend. In *Medtronic*, the Court examined whether the Medical Device Amendments of 1978¹⁴² (MDA) preempted a plaintiff's state negligence actions against the manufacturer of an allegedly defective pacemaker.¹⁴³ The MDA provided for considerable federal regulation of the safety of medical devices,¹⁴⁴ and further contained a provision expressing Congress' intent to preempt any state requirements that differed from or added to the MDA.¹⁴⁵ The Court found that the MDA did not preempt the plaintiff's tort claims.¹⁴⁶ The Court conceded that the MDA's language evidenced a congressional intent to preempt some state law; however, the Court nonetheless attempted to identify "the domain" of state law that Congress aimed to preempt.¹⁴⁷ In doing so, the Court reasoned that Congress did not intend to preempt common law causes of actions because this power is traditionally left with the states.¹⁴⁸ The Court further reasoned that a federal statute or regulation would only preempt a general state common law remedy where the federal government specifies the state duties that are in conflict with specific federal interests.¹⁴⁹ The Court found that the general language

of the MDA did not evidence a clear congressional intent to displace all state tort law.¹⁵⁰ Accordingly, the Court concluded that a state damages action merely provided manufacturers regulated by the MDA with another reason to comply with the MDA.¹⁵¹

It is too early to know what effect the *Medtronic* decision will have on the preemption of common law torts, in particular torts arising out of the execution of a Miller Act bond. The opinion, however, does suggest that, despite congressional intent to preempt *some* state law, the Court will not necessarily find that a general common law cause of action is preempted by a federal statute. Rather, Congress must *specifically* state which causes of action are preempted by federal law and which *specific* federal interests are undermined by the preempted state causes of action.¹⁵² Given the Miller Act's somewhat brief legislative history and the minimal number of regulations that apply to the Miller Act,¹⁵³ it seems doubtful that the Miller Act and its regulatory enforcement scheme manifest sufficiently specific congressional intent to preempt all state tort law.

140. See *English v. General Elec. Co.*, 496 U.S. 72, 78-90 (1990). In *English*, an employee at a nuclear power facility operated by General Electric (GE) was discharged for making complaints about alleged GE safety violations. The employees claim to the Secretary of Labor alleged that GE dismissed her in violation of a federal whistleblower statute. An administrative law judge dismissed her claim as untimely. *Id.* at 75. Following the administrative dismissal, the employee filed a claim against GE for intentional infliction of emotional distress. *Id.* at 76-77. Despite that Congress has preempted the nuclear safety field, the Court held that the employee's emotional distress claim was not preempted because Congress did not express a clear and manifest intent to preempt *all* state tort laws. *Id.* at 83. The Court noted that while a state statute or regulation can directly require a party to change behavior that is the subject of federal regulation, a common-law tort action, at most, can only indirectly affect behavior. *Id.* at 84-86. The Court concluded that the only *direct* effect tort law has on behavior is that it forces a party to a suit to pay a judgment. See *id.*

141. 518 U.S. 470 (1996).

142. 21 U.S.C.A. § 360c(a) (West 1998).

143. *Medtronic, Inc.*, 518 U.S. 470 (1996).

144. See 21 C.F.R. § 860.3(c)(1)-(3) (1998).

145. See 21 U.S.C.A. § 360c(a).

146. *Medtronic*, 518 U.S. 503.

147. *Id.* at 484.

148. *Id.* The Court further reasoned that it was required to examine the congressional purpose of the MDA in order to identify the domain of state law that the Act preempted. *Id.* at 477-81. In denying a manufacturer the benefit of a preemption defense, the Court emphasized that the MDA was enacted for consumer protection. *Id.*

149. The court emphasized that a general negligence cause of action applies to all manufacturers and is not specifically targeted at manufacturers of medical devices regulated by the MDA. *Id.* at 500.

150. *Id.*

151. *Id.*

152. See *supra* notes 42-59 and accompanying text.

153. The Treasury Regulations pertaining to the Miller act are only ten pages long. 31 C.F.R. § 223 (1998).