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Payment Bonds—Capehart Act—Miller Act—Jurisdictional Requirements.—*Minneapolis-Honeywell Regulator Co. v. Terminal Constr. Corp.*[1]—One of the defendants, a general contractor, entered into a contract with the United States Navy Department to build military housing. A payment bond, securing payment to suppliers of labor and material, was obtained from the defendant, the American Surety Company. This bond specifically provided for suit in either a state court or a United States district court. The present action was originally brought in the New Jersey Superior Court to recover the value of the materials and labor that plaintiff-materialman furnished defendant's subcontractor. The defendants contended that the New Jersey courts lacked jurisdiction because the Miller Act,[2] which limits suits to a United States district court, applied. At the trial level defendants' motion to dismiss was granted. The Supreme Court of New Jersey reversed and held it was the probable intention of Congress in enacting the Capehart Act[3] to allow bonds furnished by military housing contractors which did not conform with the requirements of the Miller Act, provided the form thereof was satisfactory to the Secretary of Defense, or his designee.

There would be no question of jurisdiction in this case if the Miller Act alone controlled since it clearly provides for exclusive jurisdiction in the United States district courts. The problem exists, however, because the project in question was military housing construction and thus subject to the provisions of the Capehart Act. As a result of these two statutes the court in the principal case was faced with the question of whether the bond requirements of the Miller Act control military housing built under the Capehart Act. At this point it is believed that a brief discussion of these two statutes is necessary in order to adequately perceive the difficulty with which the court was faced.

To divine Congress' intent in enacting the Capehart Act, it is important to consider the legislation preceding this Act. The first such piece of legislation reaches back to the Act of August 13, 1894,[4] commonly known as the Heard Act, which was amended in 1905.

The Miller Act was passed on August 24, 1935.

> [T]he act is remedial in character, therefore, it should be liberally interpreted. The purpose of the Act is to protect those who furnish labor or materials, or both, for public building and works and to insure payment in full for such materials and labor in addition to the object of securing faithful performance for the government.[5]

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1 41 N.J. 500, 197 A.2d 557 (1964).

2 Section 1, 49 Stat. 793, 794, 40 U.S.C. §§ 270a, 270b (1935). The Miller Act sets out what type of bonds are required of building contractors who are engaged in public construction. The substantive and procedural aspects of the required bonds are clearly set forth in the Act.

3 69 Stat. 651, 42 U.S.C. § 1594 (1955). The Capehart Housing Act was designed to provide necessary housing for military personnel in order to attract a higher caliber of man to the armed services. The construction of the houses was completely under the auspices of the United States Government, but it was to be financed with private money.

4 28 Stat. 278 (1894).

5 Stickells, Bonds of Contractors on Federal Public Works, 36 B.U.L.Rev. 499, 508-09 (1956).

Under this act provision was made for two separate bonds, one for performance and one for payment. Suit could be instituted before completion of a project and there was no requirement of one suit only on a bond. The act clearly set out the exclusive forum for litigation to be the United States district court for any district in which the contract was to be performed and executed. Reports[6] from the House Committee on the Judiciary set out the purpose of the Miller Act, tying it into the problems created by the Heard Act.

In 1955, the Capehart Housing Act was passed. It was concerned with military housing and the great need for this type of housing in order to attract a higher caliber of man to the Armed Services. Under this act private financing was to be used for the construction of the houses. Until the Capehart Act was amended, there seemed to be no question that the Miller Act did control, but the court in the principal case had to interpret the 1956 Amendment[7] which provided:

> Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40 [the Miller Act], and no additional bonds shall be required under such section.

In reaching its decision the court examined its previous decision in *Gypsum Contractors, Inc. v. American Sur. Co.*[8] and then proceeded to discuss and rely on two recent federal cases, *United States v. Harrison & Grimshaw Constr. Co.*,[9] and *Continental Cas. Co. v. United States*.[10] To further buttress its point of view, the court relied on a letter[11] written by the Assistant Secretary of Defense to the House Committee on Banking and Currency proposing the 1956 Amendment.

The facts in the *Gypsum* case may be distinguished from those in the

[6] 79 Cong. Rec. 11702, 13382; H.R. Rep. No. 1263, 74th Cong., 1st Sess. (1935); S. Rep. No. 1238, 74th Cong., 1st Sess. (1935). The Miller Act was designed to meet the problems created by the Heard Act. Two bonds were required instead of the one required under the Heard Act. Thus the government was protected by a performance bond, and creditors could now sue without waiting for the government to put in its claims or for the project to be completed since they were protected by the payment bond.

[7] Capehart Housing Act §§ 506(b)-(d), 507, 70 Stat. 1110, 42 U.S.C. § 1594(a) (1956).

[8] 37 N.J. 315, 181 A.2d 174 (1962).

[9] 305 F.2d 363 (10th Cir. 1962).

[10] 305 F.2d 794 (8th Cir. 1962).

[11] Hearings on H.R. 10157 Before House Committee on Banking & Currency, 84th Cong., 2d Sess. 195-96 (1956).

> It is also recommended that H.R. 10157 be amended to make it clear that the provisions of the Miller Act (40 U.S.C. 270a) are not applicable to Title VIII housing. It appears more appropriate to provide for use of F.H.A. dual obligee bond form for both performance and payment bonds. The cost of the F.H.A. bond is substantially less than the cost of bonds required by the Miller Act for public works, so that the proposed amendment will serve to decrease the cost of construction and otherwise facilitate contractual relationships.

principal case. In *Gypsum*, suit was brought on the bond by an unpaid subcontractor in a New Jersey state court, although the project was situated in Syracuse, New York. The bond specifically permitted suit in either a state court or a United States district court, but the suit had to be brought in the district where the project was located. Notwithstanding the applicability of the Miller Act, it is clear the suit could not be brought in New Jersey since the project was in New York. The *Gypsum* court, however, in reaching its decision, held that the Miller Act controlled on the basis of previous decisions in federal circuit courts, and on an interpretation of the 1956 Amendment as set forth in *United States v. Fort George G. Meade.*[12] In the principal case, however, the same court just two years later determined that two subsequent decisions in the Eighth and Tenth Circuits which held contrary to *Gypsum* on the applicability of the Miller Act to Capehart Act construction must be given weight in reaching its decision.

The Tenth Circuit in *Harrison and Grimshaw*[13] held that military housing under the Capehart Act was private enterprise, and therefore the Miller Act was not applicable. It reached this decision through an analysis of the financial structure that underlies Capehart construction. Instead of using public funds, an arrangement has been authorized by the Capehart Act that permits the use of private money in the construction of Capehart projects. There was a dissent by Judge Pickett who pointed out that the reason for the financial arrangement was that funds were not currently available and the plan allowed the United States to build necessary military housing on the installment plan. While the court in the principal case is not in agreement with the premise that Capehart housing is private enterprise, it does agree that Congress intended to confer on the Secretary of Defense, or his designee, discretion as to the type of bond to be required for a Capehart project.

The Eighth Circuit in *Continental Cas. Co.*[14] rejected the concept of private enterprise but held that the Miller Act does not control Capehart housing, stating:

> . . . Congress intended that the procedural provisions of Capehart bonds should be worked out and prescribed by the two agencies [Department of Defense and Federal Housing Administration] involved in light of the unique nature of Capehart construction. . . .[15]

The court decided that the language of the 1956 Amendment clearly took Capehart bonds out of the Miller Act because if Congress had intended the procedural provisions of the Miller Act to apply to Capehart bonds, it simply would have said so.

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12 186 F. Supp. 639, 648 (D. Md. 1960).
As a Capehart Act bond constitutes "compliance" with section 270a of Title 40 and section 270b of said title authorizes suit by materialmen on a payment bond furnished under section 270a, this court can conclude only that section 270b, read in conjunction with section 1594(a) of Title 42, confers jurisdiction upon this court. Ibid.

13 Supra note 9.

14 Supra note 10.

15 Continental Cas. Co. v. United States, supra note 10, at 799.

The court in the principal case, after discussing *Gypsum* and the above two cases, stated its concern for the plaintiff's position since the limitation period for bringing suit under both the Miller Act and the Capehart bond had expired. If the suit were dismissed for lack of jurisdiction, the plaintiff could not bring suit in the United States district court. With this consideration in mind, and aware, also, of the remedial nature of both the Miller and Capehart Acts whose purpose is to aid materialmen, the court decided that the two federal cases cast doubt on its holding in *Gypsum*. The court because of this doubt felt:

> Where a conflict exists among them, [the federal courts] with no final word from the United States Supreme Court, and each of the two conflicting interpretations can find reasonable support in the wording of the statute, thus leaving a choice to the state courts, the path chosen should be that which leads to the more just result under the circumstances of the particular case in light of the basic remedial purposes of the legislation.[16]

Reference was then made to the letter[17] from the Assistant Secretary of Defense to the House Committee on Banking and Currency which proposed the 1956 Amendment. The letter's language in reference to the nonapplicability of Section 270a of the Miller Act and the statement that the F.H.A. bond which permits suit in state or federal courts was to be used, seemed to give force to the point of view held in the Eighth and Tenth Circuit courts. The court on the basis of the foregoing held that the New Jersey state court had jurisdiction of the suit on the bond in question.

It is suggested that the court erred in allowing the New Jersey courts to retain jurisdiction. The hearings[18] before the House Committee on Banking and Currency set forth in plain terms the reasons why private financing was adjudged the best method for construction of military housing. It was entirely a matter of budgetary considerations involving the desire to hold down the Government's cash outlay for the fiscal year. At no point was there any intimation that Capehart housing was to be considered as anything but public building. To call it private enterprise because of its financial structure would be to completely misinterpret Congress' intention. Congress was faced with a need for military housing and a desire to hold down Government expenditure.

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[16] Supra note 1, at 514, 197 A.2d at 565.

[17] Hearings on H.R. 10157, supra note 11, at 195-96.

[18] Hearings on H.R. 10157 Before House Committee on Banking & Currency, 84th Cong., 2d Sess. 171 (1956).

The following is an excerpt of a report to the House Committee by Mr. John Arrington of the Family Housing Division, Office of Assistant Secretary of Defense for Properties and Installations.

> To meet this substantial and urgent requirement, we in the Department of Defense believe . . . the best and cheapest method involves construction of public quarters through use of funds directly appropriated for that purpose.
>
> However, despite the advantages of the appropriated fund method, it has one inherent limitation—budgetary considerations will not permit expenditure in one or two fiscal years of the sums needed to meet the total need. . . . This legislation provided a sound means to do the job quickly, utilizing private capital to be repaid out of quarters allowances over a twenty-five year period.

As a result, a plan was devised whereby the necessary housing could be privately financed, but the housing was at all times considered public work, which was defined by Mr. Justice Holmes in *Title Guar. & Trust Co. v. Crane*,[19] ". . . if it belongs to the representative of the public, it is public. . . ." A further definition of public works can be found in *United States v. Irwin*[20] where it was stated:

> . . . Congress, in the N.I.R.A., specifically defined "public works" as including "any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interest of the general public."

It can not possibly be held in light of the foregoing that Capehart housing is anything but public construction.

Concerning the Amendment to the Capehart Act that was passed in 1956, on May 24, 1956, Senator Sparkman, as Chairman of the Subcommittee on Housing, presented a section by section analysis of the pending bill stating:

> (f) Amends section 403(a) of Housing Amendments of 1955 to clarify the bonding requirements imposed upon contractors who build under this act.[21]

Then on June 4, 1956, the letter[22] referred to earlier in this note was written. It is submitted that when reference is made to the strong emphasis placed on the financial structure of Capehart housing, the real significance of the letter lies in the statement:

> The cost of the F.H.A. bond is substantially less than the cost of bonds required by the Miller Act for public works . . . the proposed amendment will serve to decrease the cost of contruction. . . .[23]

It is clearly stated in the Amendment that only Section 270a of the Miller Act is being superseded, and it is superseded by a bond "with surety or sureties satisfactory to the Secretary of Defense, or his designee."[24] How can it be assumed the phrase "surety or sureties satisfactory" confers on the Secretary of Defense, or his designee, the power to alter the jurisdictional requirements of Section 270b of the Miller Act? In *United States v. Travelers Indem. Co.*,[25] the court determined that the Amendment simply and logically identified the Secretary of Defense or his designee as the only contracting officer authorized to award military housing contracts "with surety or sureties satisfactory" to him on the bond. The reference to the Miller Act in the Amendment showed Congress' clear conviction that the Miller Act applied to all contracts authorized under the 1955 Capehart Act. On its face, the language assumes Miller bonds are legally required for Government contracts

19 219 U.S. 24, 33 (1910).
20 316 U.S. 23, 29 (1942).
21 102 Cong. Rec. 8874 (1956) (remarks of Senator Sparkman).
22 See, Hearings on H.R. 10157, supra note 11.
23 Ibid.
24 Capehart Housing Act §§ 506(b)-(d), 507, 70 Stat. 1110, 42 U.S.C. § 1594a (1956).
25 215 F. Supp. 455 (D. Mo. 1963).

entered into under the 1955 Capehart Act. The Amendment merely authorizes a bond that will comply with Section 270a of the Miller Act and then simply cuts down the power of the contracting officer when it states "no additional bonds shall be required under such section." The Miller Act under Section 270a(c) specifically authorizes the contracting officer to require additional bonds.

The court in the principal case discussed *Travis Equip. Co. v. D&L Constr. Co.*,[26] the most recent federal decision dealing with control of Capehart bonds by the Miller Act. However, it dismissed the applicability of *Travis* to the issue presently confronting it, because the problem in *Travis* was the suit limitation period set out in a Capehart bond and in the Miller Act. The suit in *Travis* had been brought within the time period specified in the Capehart bond, but the time allowed to bring suit under the Miller Act had expired. The court held that the bond was required by the Miller Act which controlled the jurisdictional and substantive law of such bonds. The court in the principal case neglected the fact that both the suit limitation period and the requirement of suit in a United States district court appear in the same section of the Miller Act, that is, in section 270b. How can one part of section 270b be held to control Capehart bonds and another part of the same section be held not controlling? In *Travis* the court stated:

> Congress has not by any legislation, including but not limited to the provisions of the Capehart Act, authorized the Secretary of Defense to vest any State Court with jurisdiction over the causes of action here involved. . . . [W]e believe Congress intended that its long established policy of exclusive federal jurisdiction was to continue and that the vagaries of undeveloped state law were to be thereby avoided.[27]

The Miller Act specifically stated that the forum for litigation was to be a United States district court. There was never any question that the Miller Act covered Capehart Act bonds until the 1956 Amendment to the Capehart Act. Where in the Amendment has the Secretary of Defense been authorized to vest any state court with jurisdiction over the causes of action here involved? The courts, with Capehart construction, are still dealing with public work in which the United States Government has the primary interest regardless of how the housing is financed. Can it be said that Congress in its one sentence Amendment to the Capehart Act intended to allow state courts to invade a domain that has been in the exclusive control of the federal courts? To read such a meaning into the Amendment would necessitate the belief that Congress intended to change its whole policy in regard to public construction bonds. If this were Congress' intent, it would have been stated with far more clarity. If the court in the principal case feels truly bound to give weight to recent federal decisions, it cannot summarily disregard the above case which is clearly in point with the issue facing it.

In summary, it appears evident the court was moved by equitable considerations and sought to substantiate its decision in a legal context by

[26] 224 F. Supp. 410 (D. Mo. 1963).

[27] Travis Equip. Co. v. D & L Constr. Co., supra note 26, at 417-18.

relying on *Grimshaw*[28] and the *Continental Casualty*[29] cases coupled with an interpretation of the Assistant Secretary of Defense's June 4, 1956 letter to overrule its holding in *Gypsum*.[30] In attempting to justify its result the court stated it was the

> probable intention of Congress to permit furnishing of bonds by military housing contractors which did not conform with the requirements of the Miller Act, so long as the form thereof was satisfactory to the Secretary of Defense or his designee.[31]

The court thus has dismissed the important conclusions reached in the most recent federal case, *Travis*, and overlooked the relevant portions in the Hearings before the House Banking and Currency Committee that shed light on Congress' intent in enacting the Capehart Act and its Amendment.

HELEN SLOTNICK

Sales—Liability of Cigarette Manufacturer Under Implied Warranty.—*Ross v. Philip Morris & Co.*[1]—Plaintiff, a resident of Missouri, and a confirmed smoker since 1934, smoked several packages daily of Philip Morris cigarettes from 1934 until 1952. In 1952, plaintiff discovered that he had throat cancer. As a result of an operation for the cancer, plaintiff had to breathe through an opening in his neck and speak with the aid of an electrical device attached to his throat. Plaintiff sued defendant cigarette manufacturer, *inter alia*, for breach of implied warranty. Judgment was entered for the cigarette manufacturer, and plaintiff appealed. In affirming the decision of the district court, the Circuit Court of Appeals HELD: Under Missouri law, a manufacturer's implied warranty means that the product is reasonably fit for its intended use and, under proper circumstances, the manufacturer is an insurer against recognizable dangers, but such implied warranty does not extend to harmful effects which no developed human skills or developed scientific knowledge could have anticipated during the period of plaintiff's use of the product.

The controversy concerning the connection between cigarette smoking and cancer was emphasized with the Report of the Advisory Committee to the Surgeon General of the United States.[2] This Report, after discussing the many aspects of public health and smoking, concluded that smoking and cancer are causally related.[3] By connecting smoking and cancer, this Report will likely promote actions against cigarette manufacturers based on implied

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[28] Supra note 9.
[29] Supra note 10.
[30] Supra note 8.
[31] Supra note 1, at 516, 197 A.2d at 566.

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[1] 328 F.2d 3 (8th Cir. 1964).
[2] Smoking and Health, Report of the Advisory Committee to the Surgeon General of the Public Health Service, Public Health Publication No. 1103 (1964).
[3] Id. at 37.