IADC COMMITTEE NEWSLETTER

FIDELITY AND SURETY

December 2014

IN THIS ISSUE

G. Steven Ruprecht and Diane Hastings Lewis review recent cases interpreting the Miller Act's one-year statute of limitations as nonjurisdictional and subject to waiver and equitable tolling.

Miller Act One-Year Statute of Limitations:

Jurisdictional or Claim Processing Rule?

ABOUT THE AUTHORS

G. Steven Ruprecht is a shareholder in the law firm of Brown & Ruprecht, P.C. in Kansas City, Missouri. Mr. Ruprecht practices in the areas of construction law, surety bond defense, commercial litigation and fidelity insurance. He is a 1973 graduate of the University of Missouri – Kansas City School of Law. He has been a member of the IADC since 1982 and is a past Chairman of the Fidelity and Surety Committee. He can be reached at sruprecht@brlawkc.com.

Diane Hastings Lewis is an associate with the firm of Brown & Ruprecht, P.C. in Kansas City, Missouri. She focuses her practice in the areas of construction law, surety law, commercial litigation, and appeals. Ms. Lewis graduated from the University of Nebraska College of Law, *cum laude* in 2008. Ms. Lewis also served for two years as a Judicial Law Clerk to the Honorable John F. Wright with the Nebraska Supreme Court. She can be reached at dlewis@brlawkc.com.

ABOUT THE COMMITTEE

The Fidelity and Surety Committee serves all members who represent fidelity and surety carriers. Committee members publish newsletters and journal articles, including an annual update of recent developments in the law. Learn more about the Committee at www.iadclaw.org.
To contribute a newsletter article, contact:

Samuel J. Arena, Jr.
Vice Chair of Newsletters
Stradley Ronon Stevens & Young, LLP
sarena@stradley.com

Surety companies issue many payment bonds on federal construction projects in accordance with the Miller Act, the federal statute that requires general contractors to provide bonds guaranteeing payment to subcontractors and suppliers. Claims on Miller Act bonds are subject to the terms of the statute, which includes a requirement that actions be brought "no later than one year after the day on which the last of the labor was performed or material was supplied by the person bringing the action." 40 U.S.C. § 3133(b)(3). Although this seems like a straightforward statute of limitation, some courts are slowly taking a closer look at the import of this time requirement. Sureties will want to be aware of the status of the law in the jurisdictions where they issue Miller Act bonds, and be cognizant of recent shifts.

Historically, courts viewed the one-year time limitation on Miller Act claims as a jurisdictional requirement. *See e.g. United States ex rel. Celanese Coatings Co. v. Gullard*, 504 F.2d 466 (9th Cir. 1974); *U.S. for Use of Soda v. Montgomery*, 253 F.2d 509, 510 (3d Cir. 1958). That is, if suit was filed making a claim on the Miller Act bond a day past a year after the last day the claimant performed work on the job, the federal district court did not have jurisdiction to hear the case and the lawsuit would be dismissed. The case would be dismissed for lack of subject matter jurisdiction regardless of how long the case had been pending, how far along the case had progressed, or whether the claimant had any arguments that the statute of limitations should be equitably tolled. However, some courts are beginning to consider this issue differently in light of United States Supreme Court cases that provide guidance on interpreting statutory requirements.

In *Arbaugh v. Y&H Corporation*, 546 U.S. 500, 126 S. Ct. 1235 (2006), the United States Supreme Court considered a definition in Title VII of the Civil Rights Act of 1964 limiting a private right of action for sex discrimination under the Act to employees making claims against employers with 15 or more employees. The Court noted that the 15-employee minimum could be either jurisdictional or merely a component of a claim under the Act. If the requirement is jurisdictional, the plaintiff's failure to meet the requirement could be raised by any party or the court at any time, could not be waived, and would be grounds for immediate dismissal of all of plaintiff's claims under Fed. R. Civ. P. 12(b)(1). Indeed, in *Arbaugh* the defendant filed its motion to dismiss for lack of federal subject matter jurisdiction after the jury had rendered a verdict in favor of the plaintiff. Conversely, if the 15-employee requirement is simply a component of the claim, it must be raised by the opposing party in a timely motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim under which relief can be granted. Significantly, while courts do not generally raise concerns of the sufficiency of a party's arguments on their own, federal courts do have an independent obligation to ensure that they do not exceed their jurisdiction and thus must raise and decide jurisdictional questions that may be overlooked or not pursued by the parties. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 131 S. Ct. 1197, 1202 (2011) (citing *Arbaugh*, 546 U.S. at 514, 126 S. Ct. 1235).

Though seemingly unrelated to surety and construction law, the principles addressed in *Arbaugh* and *Henderson* have been applied to the interpretation of limitations contained in other federal statutes, including the Miller Act's time limitation on filing actions. In *U.S. ex rel. Liberty Mechanical Services, Inc. v. North American Specialty Ins. Co.*, 2 F. Supp. 3d 610 (E.D. Pa. 2014), the United States District Court for the Eastern District of Pennsylvania was faced with whether the Miller Act's one-year limitation served as a jurisdictional bar, or whether the court was required to consider the subcontractor's allegations that the time requirement was equitably tolled. The court acknowledged that the Third Circuit Court of Appeals had considered the Miller Act time limitation to be jurisdictional in *Soda, supra*, but ultimately determined that the legislature had not conveyed any such intention in the language of the act and thus there was a "strong presumption that the time limit is not jurisdictional, but instead an ordinary statute of limitations, subject to equitable tolling." *Liberty Mechanical*, 2 F. Supp. 3d at 618.

The *Liberty Mechanical* decision came after a similar decision in the Ninth Circuit Court of Appeals, *U.S. ex rel. Air Control Technologies, Inc. v. Pre Con Industries, Inc.*, 720 F.3d 1174 (2013). The court in *Air Control Technologies* likewise cited *Arbaugh* for the proposition that unless Congress has "clearly stated that the statutory limitation is jurisdictional, courts should treat the restriction as nonjurisdictional in character." (citing *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824, 184 L.Ed.2d 627 (2013) (quoting *Arbaugh*, 546 U.S. at 515–16, 126 S. Ct. 1235). Noting that the Miller Act was intended to be highly remedial, the court reasoned that it was "unlikely Congress intended the Miller Act's statute of limitations to be a jurisdictional requirement." *Air Control Indus., Inc.*, 720 F.3d 1174, 1178. *See also U.S. v. Cannon Management Group, LLC*, No. 2:12-CV-881, 2013 WL 4499739 (S.D. Ohio Aug. 21, 2013) (Miller Act time limitation was not jurisdictional, court had jurisdiction to stay lawsuit pending arbitration).

But, some jurisdictions still interpret the one-year requirement to be jurisdictional, meaning that there is nothing a court can do to hear a Miller Act bond claim filed after one year after the day on which the last of the labor was performed or material was supplied. *U.S. ex rel. Allied Associates Commercial Floors Inc. v. Farr Builders Inc.*, No. SA-13-CV-0897, 2014 WL 280396, at *1 (W.D. Tex. Jan. 23, 2014) ("Case law indicates that the statute of limitations in Miller Act claims is jurisdictional."). In these jurisdictions, a surety may have more certainty that a Miller Act bond claim filed beyond one year after the last provision of work or materials will be dismissed, but should also be mindful that the momentum seems to be moving towards finding this requirement nonjurisdictional.

For sureties, the application of the one-year time limitation of the Miller Act as a claim processing rule instead of a jurisdictional requirement means that in some jurisdictions there may be more work associated with getting an untimely Miller Act bond claim dismissed. If the claimant argues that there are circumstances warranting equitable tolling of the one-year limitation, the court will have to make a determination on the equitable tolling claim before it can determine that the claim is out of time. Factual disputes regarding the tolling of a statute of limitations could preclude summary judgment in some cases. The non-jurisdictional nature of the requirement may also serve to keep claims against a principal alive in federal court under the court's supplemental jurisdiction in the event that the Miller Act claim is dismissed as untimely. Thus, an up-to-date analysis of the jurisdiction where a Miller Act is pending will go a long way to determine the risk a surety faces on a Miller Act claim filed more than one year after work was last performed on the project.