# No. 08-0272

IN THE

SUPREME COURT OF TEXAS

AUSTIN, TEXAS

DEALERS ELECTRICAL SUPPLY CO.,

*Petitioner,*

v.

SCOGGINS CONSTRUCTION COMPANY, INC. AND
BILL R. SCOGGINS,

*Respondent.*

**BRIEF OF AMICI CURIAE
THE AMERICAN SUBCONTRACTORS ASSOCIATION, INC.
AND THE HOUSTON HISPANIC CHAMBER OF COMMERCE
IN SUPPORT OF REHEARING**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

The American Subcontractors Association, Inc. ("ASA") and the Houston Hispanic Chamber of Commerce ("HHCC") submit this amicus brief in support of Petitioner Dealers Electrical Supply Co.'s Motion for Rehearing. This Court's recent decision in *City of Waco v. Lopez*, 51 Tex. Sup. Ct. J. 1129, 1132 (July 11, 2008), confirms that the court of appeals erred in holding that "the McGregor Act was Dealers's exclusive and mandatory remedy on this public work contract, thus rendering the Trust Fund Act inapplicable in this matter." *Scoggins Constr. Co. v. Dealers Elec. Supply Co.*, No. 13-06-368-CV, 2007 WL 4442544, at *9 (Tex. App.—Corpus Christi Dec. 20, 2007, pet. filed) (mem. op.). Moreover, the forthcoming article attached at Tab A shows that the court of appeals' decision is unprecedented and will have damaging consequences for the construction industry if allowed to stand. Accordingly, ASA and HHCC respectfully urge this Court to grant rehearing and reverse the court of appeals' judgment.

## INTEREST OF AMICI CURIAE

ASA is a national organization of construction trade contractors. Founded in 1966, ASA leads and amplifies the voice of trade contractors to improve the business environment in the construction industry and to serve as stewards for the community. ASA is dedicated to improving the business environment in the construction industry. The ideals and beliefs of ASA are ethical and equitable business practices, quality construction, membership diversity, integrity, and a safe and healthy work environment. ASA has 5,000 members nationwide, including 520 members from six Texas Chapters in Houston, North Texas, San Antonio, Austin, El Paso, and the Rio Grande Valley.

HHCC is the premier organization for Hispanic business in Houston. The mission of HHCC is to be the leading regional advocate for the economic and civic interests of the Hispanic business community. HHCC was founded on March 2, 1977 by a group of prominent Hispanic business people, and it represents over 2,000 members ranging in size from incubator companies to multi-national corporations. HHCC works with its member businesses to assist them with business educational seminars and important procurement opportunities.

ASA and HHCC submit this brief because their members have a strong interest in ensuring that subcontractors as well as suppliers receive payment for the work and material they provide. That goal is undermined by the court of appeals' decision in this case, which holds that the McGregor Act—contrary to its plain text—is a supplier's *exclusive* remedy for non-payment on a public project. Granting this petition is therefore of vital importance to trade contractors and suppliers who provide the labor and materials for public construction projects.

The fee for preparing this brief will be paid by ASA.

## ARGUMENT

In this case, Dealers was not paid for nearly $80,000 in electrical parts that it supplied for a public school construction project, and it obtained a judgment against Scoggins, the general contractor. Dealers' judgment was based on its claims that Scoggins' failure to pay: (1) violated the Texas Construction Trust Fund Act, TEX. PROP. CODE §§ 162.001 et seq.; and (2) breached the joint check agreement among Scoggins, Dealers, and the electrical subcontractor. Dealers did not pursue a claim against the

payment bond that Scoggins had posted under the McGregor Act, TEX. GOV'T CODE §§ 2253.001 et seq.

The Thirteenth Court of Appeals reversed and rendered judgment for Scoggins, holding that the McGregor Act is "mandatory and provide[s] the exclusive means to establish the existence of a cause of action by laborers or suppliers on a public project." *Scoggins*, at *4. Thus, it held "the Trust Fund Act inapplicable" and concluded that "the 'joint check' agreement does not provide grounds for Dealers to circumvent the remedy provided by . . . the McGregor Act." *Id.* at *9. In addition, the court concluded that Dealers' Trust Fund Act claim failed because a prior version of the act had exempted receipts on a contract covered by a payment bond. *Id.* at *4-*7.

ASA submitted a prior amicus brief in support of Dealers' petition for review, explaining that the court of appeals' exclusive remedy holding is contrary to the text and purpose of the McGregor Act and conflicts with federal courts' interpretation of similar language in the federal Miller Act. ASA also showed that the court of appeals' additional reason for refusing to apply the Trust Fund Act rested on statutory language that no longer exists. These arguments will not be repeated here. Instead, ASA and HHCC submit this additional amicus brief to show that a recent decision by this Court confirms the court of appeals' error and to explain the harmful policy consequences that will result if this decision stands.

## I. *City of Waco*'s Analysis Confirms That The McGregor Act Does Not Displace The Trust Fund Act.

The court of appeals held that the McGregor Act provides an exclusive remedy that bars Dealers' Trust Fund Act and breach of contract claims. With respect to the breach claim, however, this Court has held that "[a]brogating common-law claims is disfavored," and it has "consistently declined to construe statutes to deprive citizens of common-law rights unless the Legislature clearly expressed that intent." *Cash Am. Int'l, Inc. v. Bennett*, 35 S.W.3d 12, 16 (Tex. 2000). In its prior amicus brief (at 4), ASA explained that the McGregor Act's permissive language and remedial purpose do not "clearly indicate the Legislature's intent" to abrogate Dealers' common-law claim for breach of the joint check agreement. *Id.*

As to the Trust Fund Act claim, this Court's recent decision in *City of Waco v. Lopez*, 51 Tex. Sup. Ct. J. 1129 (July 11, 2008), confirms that courts likewise should not lightly interpret one statutory claim to override another. In particular, the Code Construction Act states that conflicting statutory provisions "shall be construed, if possible, so that effect is given to both." *Id.* at 1132 (quoting TEX. GOV'T CODE § 311.026(a)).[1] In deciding whether both can be given effect, the touchstone is whether the Legislature intended one statutory scheme to be the exclusive means of remedying the

[1] *See also* TEX. GOV'T CODE § 311.021 ("In enacting a statute, it is presumed that . . . the entire statute is intended to be effective."); *see generally Burke v. State*, 28 S.W.3d 545, 546-47 (Tex. Crim. App. 2000) (discussing the statutory construction doctrine of *in pari materia* codified in the Code Construction Act).

problem to which it is addressed. *Id.* If the conflict is irreconcilable, then the later-enacted statutory provision prevails. TEX. GOV'T CODE § 311.025(a).[2]

Here, the essential provisions of the Trust Fund Act were enacted long after those of the McGregor Act,[3] though each was subsequently amended and eventually reenacted as part of the codification program. Furthermore, the Legislature has explicitly stated its intent regarding the application of these acts in areas where they overlap, and that intent supports allowing Dealers to sue under the Trust Fund Act. As originally written, the Trust Fund Act did not apply if a payment bond had been posted under the McGregor Act or other laws.[4] The Legislature significantly narrowed this exception in 1987, however, exempting only "a *corporate surety* who issues a payment bond." TEX. PROP. CODE § 162.004(a)(3) (emphasis added). Because Scoggins is not the surety on the McGregor Act payment bond, the Legislature intended for the later-enacted Trust Fund Act to apply to Scoggins.

Moreover, as ASA's prior amicus brief explains (at 3-4, 7), the Legislature passed the McGregor Act to provide an alternative remedy for the protection of subcontractors

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[2] Alternatively, if one statutory provision is general and the other local or special, the special provision prevails in the event of an irreconcilable conflict "unless the general provision is the later enactment and the manifest intent is that the general provision prevail." *City of Waco*, 51 Tex. Sup. Ct. J. at 1132 (quoting TEX. GOV'T CODE § 311.026(b)). This rule does not favor exclusive application of the McGregor Act, which was enacted before the Trust Fund Act and was categorized by the Legislature as a general law. *See* n.3, *infra*.

[3] *See* Act of May 27, 1967, 60th Leg., R.S., ch. 323 (Trust Fund Act); Act of April 2, 1913, 33rd Leg., R.S., ch. 99 (McGregor Act).

[4] *See* Act of May 26, 1983, 68th Leg., R.S., ch. 576, § 1, sec. 162.004(a)(3), 1983 Tex. Gen. Laws 3475, 3721 (amended 1987) ("This chapter does not apply to . . . receipts under a construction contract if the full contract amount is covered by a corporate surety payment bond.").

and suppliers given that they cannot place a lien against public property. Yet the statute authorizing such liens against private construction projects (and giving general contractors the option of preventing liens by posting bonds) has not been interpreted to preclude claims under the Trust Fund Act. TEX. PROP. CODE Ch. 53; *see* Pet. 9-12; Lumbermen's Amicus Br. 6, 11-12; Tab A, at 5. Thus, there is no reason that McGregor Act bonds—which are simply lien substitutes—should have that effect.

Finally, the court of appeals' rationale for holding that the McGregor Act displaces the Trust Fund Act is mistaken even on its own terms. The court reasoned that if subcontractors and suppliers could pursue claims under the Trust Fund Act, "the need for a payment bond . . . would be eliminated" and the general contractor "would be subject to double liability." *Scoggins*, at *4, *7. Not so.

A payment bond is required by statute for the protection of subcontractors and suppliers, *see* TEX. GOV'T CODE § 2253.021(c), and having a bond in place provides additional security and can make collection easier. Moreover, a supplier that obtains a judgment against a general contractor under both McGregor Act and Trust Fund Act theories cannot collect twice. *See Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 8 (Tex. 1991) ("There can be but one recovery for one injury, and the fact that . . . there may be more than one theory of liability[ ] does not modify this rule."); Lumbermen's Amicus Br. 14.[5] For these reasons, the court of appeals erred in holding that the McGregor Act prevents Dealers from bringing a claim under the Trust Fund Act.

[5] In addition, as other amici have explained, the case that the court of appeals cited regarding the risk of double liability involved a completely different factual situation. It is not possible for

## II. The Court Of Appeals' Decision Will Have Damaging Consequences For The Construction Industry.

As the numerous amicus briefs and letters sent to this Court show, subcontractors and suppliers of building materials are united in decrying the court of appeals' decision as a sea change in Texas construction law that will have destructive consequences if allowed to stand. Indeed, the decision is already the subject of an article that will appear in the next issue of the Construction Law Journal published by the State Bar of Texas Construction Law Section. *See* Charles W. Getman, *SEND THE CLAIM NOTICE! Payment Bond Held As* Exclusive *Remedy* (Tab A).[6] This article discusses the lack of legal and logical support for the court of appeals' unprecedented decision, advises subcontractors and suppliers to comply with the McGregor Act's onerous notice requirements if possible, and discusses some of the adverse policy consequences of the decision.

The primary result of the court of appeals' exclusivity holding is that joint check agreements and the Trust Fund Act are no longer enforceable on public construction projects. As the letters attached to the motion for rehearing explain, many electricians, plumbers, masons, roofers, and other tradesmen have insufficient credit to purchase the building materials needed to perform even medium-size subcontracts, so they must rely on joint check agreements to bid for those subcontracts. In a typical joint check agreement, a general contractor agrees to make payments for the labor and materials

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Scoggins to be subject to double liability here. *See* Lumbermen's Amicus Br. 9-10; Forde Amicus Br. 10-11.

[6] Counsel for amici did not solicit this article but instead received a copy of it from the author.

provided under a subcontract by issuing checks payable to both the subcontractor and its supplier of materials. When the supplier has this security that the general contractor will pay, it is willing to provide materials to the subcontractor on credit.

Furthermore, the Trust Fund Act makes the general contractor a trustee of payments received from the owner, providing additional security that the general contractor will honor its contractual obligations to pay its subcontractors and suppliers (who are the trust beneficiaries). TEX. PROP. CODE §§ 162.001-162.003, 162.031. Thus, joint check agreements and the Trust Fund Act are essential tools for the health and growth of small, start-up, and struggling subcontracting businesses and their suppliers—which (as the letters attached to the motion note) are often owned and staffed by people belonging to racial, ethnic, and gender groups historically underrepresented in the construction industry.

The McGregor Act payment bond complements these tools, but it is not—and was never designed to be—an adequate substitute for them. *See* pp. 5-6, *supra*. As the Getman article explains, a subcontractor or supplier seeking payment from the bond must provide the general contractor and its surety with a detailed notice of its claim for unpaid labor or material in as little as 45 days in some cases—75 days in others—after the month in which the labor was performed or material delivered. Tab A, at 2. Yet general contractors on state projects frequently do not pay until 90 days after delivery given the time needed to process pay applications and obtain architectural and engineering approvals. Thus, subcontractors and suppliers often do not know whether they need to pursue a claim against the bond until it is too late. Nor do small subcontractors and

suppliers have sufficient resources to track the McGregor Act deadlines for all of their bills and to prepare and send claim notices before the bills are even past due. Accordingly, as in this case, subcontractors and suppliers often miss the notice deadlines and cannot use the McGregor Act to collect payment for the labor and materials they furnished. *See* Tab A, at 19 n.3.

For these reasons, making the McGregor Act the exclusive remedy on public projects and declaring joint check agreements and the Trust Fund Act unenforceable will have several harmful consequences, as the amicus briefs and letters submitted to this Court confirm. Under the court of appeals' decision, the real risk that suppliers and subcontractors will be unable to compel payment under the McGregor Act is no longer mitigated by the availability of alternative remedies.

In response to this risk, many suppliers will raise their prices and curtail the credit they extend to smaller subcontractors. In turn, many smaller subcontractors will have difficulty bidding jobs at a competitive level given their lack of credit and the risk that they will not be paid for their labor, forcing some out of business and decreasing competition and diversity in the industry. Moreover, subcontractors and suppliers that have the means will hire additional staff to inundate general contractors and their sureties with a flood of McGregor Act notices regarding bills that are not even past due. All of these effects will unnecessarily drive up the construction costs faced by public-sector entities.

Given the widespread and harmful disruption of the construction industry that will result from the court of appeals' unprecedented and legally flawed decision, this case is

sufficiently important to Texas jurisprudence to merit this Court's review. Rehearing should therefore be granted.

## CONCLUSION

For these reasons, as well as those given in ASA's prior amicus brief, The American Subcontractors Association, Inc. and the Houston Hispanic Chamber of Commerce respectfully urge this Court to grant rehearing and reverse the court of appeals' judgment.

Respectfully submitted,

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August 18, 2008

## CERTIFICATE OF SERVICE

I certify that a copy of the Brief Of Amici Curiae The American Subcontractors Association, Inc. And The Houston Hispanic Chamber of Commerce In Support Of Rehearing was served on counsel of record by United States certified mail, return receipt requested, on the 18th day of August 2008, addressed as follows:

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# SEND THE CLAIM NOTICE! Payment Bond Held as *Exclusive* Remedy: Scoggins Construction Co. v. Dealers Electrical Supply Co.

By Charles W. Getman[1]

In a well-familiar transaction for construction projects, a materials vendor ("Vendor") entered into a three-way joint check agreement to secure its sale of materials to a subcontractor ("Sub"), and with the Sub's general contractor ("General"), by which the General agreed to make payments through checks jointly payable to both the Sub and the Vendor. The particular project at issue happened to be a public work for a local school district, for which the General also obtained a payment bond for the benefit of all vendors and subcontractors. In this not atypical case, after the Vendor supplied valuable materials to the Sub, the Sub defaulted on its payment obligations to the Vendor, and in fact abandoned the project. The Vendor then sued the Sub and obtained an agreed interlocutory judgment, but the Sub apparently was judgment-proof. The Vendor also concurrently sued the General in the same lawsuit for breach of the joint check agreement and also under the Trust Fund Doctrine.[2] After a bench trial, the Vendor obtained final judgment against the General for the full principal amount of its claim, with interest and attorney's fees. The General appealed on four points, and the Corpus Christi Court of Appeals reversed the judgment and rendered that the Vendor take nothing,[3] holding all common law and statutory claims asserted by the Vendor against the General were wholly superseded by the General's payment bond issued under the McGregor Act, which the Court held thereby became the Vendor's exclusive remedy; and the Vendor's failure to comply with the notice requirements under the Act precluded any other means of recovery against the General.[4]

The Texas Supreme Court denied the Vendor's petition for review on June 20, 2008, and this now constitutes the law in the twenty counties of Texas's Thirteenth Judicial District,[5] resulting in this article.

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[1] Charles Getman is a principal in the Houston office of Cokinos, Bosien & Young, which firm concentrates its practice in construction and business law and litigation. Mr. Getman graduated from the University of Houston College of Law in 1981. *See* www.cbylaw.com for more information about Mr. Getman and Cokinos, Bosien & Young. The author recognizes the assistance of Cokinos, Bosien & Young's appellate counsel, Diane Guariglia, and Jay Leech, a third-year student at The University of Texas School of Law, for his assistance in preparing this article.

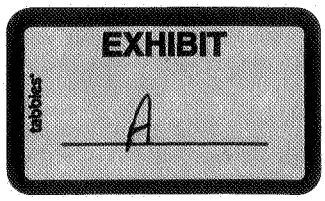
[2] Tex. Prop. Code §§ 162.001, *et seq.*

[3] *Scoggins Constr. Co. v. Dealers Elec. Supply Co.*, 2007 WL 4442544 (Tex. App.–Corpus Christi Dec. 20, 2007, pet. denied).

[4] Tex. Prop. Code §§ 2253.001, *et seq.* In addition to asserting the McGregor Act's claimed exclusivity, the General also asserted on appeal that there was no evidence and/or insufficient evidence of any breach of the joint check agreement, nor violation of the Trust Fund Act, nor any personal liability for the General's principal owner. These latter three appeal points were not the basis of the Corpus Christi court's decision and are not addressed herein.

[5] Aransas, Bee, Calhoun, Cameron, Dewitt, Goliad, Gonzales, Hidalgo, Jackson, Kennedy, Kleburg, Lavaca, Live Oak, Matagorda, Nueces, Refugio, San Patricio, Victoria, Wharton, and Willacy.





## The McGregor Act[6]

Once a project is designed, there usually are at least four sets of parties involved in constructing a project: (i) vendors who supply materials to (ii) subcontractors, who install materials for the (iii) general contractor, who works for the (iv) owner.[7] Vendors and subcontractors typically do not have direct contractual privity with the project owner, but do have the statutory right in a *private* project to file liens against the owner's property.[8] Conversely, vendors and subcontractors may not lien a public work project.[9] Therefore, most *public* work projects require the general contractor to post a payment bond for the benefit of such vendors and subcontractors.[10]

To assert a claim against a public project payment bond, those parties in direct privity with a general contractor (i.e., first-tier subcontractors and first-tier vendors) must provide written notice to the general contractor and its surety no later than the fifteenth day of the *third* month after each month in which any claimed labor was performed, or any claimed material was delivered.[11] The notice must include a sworn statement of account and describe the basis of the claim.[12] Retainage claims have additional notice requirements.[13]

Even more onerous, any claimant without direct privity with the general contractor (e.g., vendors to subcontractors and lower-tier subcontractors to first-tier subcontractors), must submit similar written notice no later than the fifteenth day of the *second* month after the labor was performed or the materials provided; and also send a second notice no later than the fifteenth day of the third month after the labor was performed or the materials provided.[14]

The statute allows an unpaid claimant to sue the payment bond principal (i.e., the general contractor) and/or its surety, jointly or severally, commencing 61 days after the notice was

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[6] Tex. Gov't Code §§ 2253.001, *et seq.* This paper is not an exhaustive review of Texas's lien and payment bond laws, but is only a general overview.

[7] Many projects have lower-tier subcontractors, and sometimes additional general contractors.

[8] Tex. Prop. Code §§ 53.001, *et seq.* *See also* Tex. Const. art. 16, § 37.

[9] Tex. Const. art. 11, § 9; *Featherlite Bldg. Prod. Corp. v. Constructors Unlimited, Inc.*, 714 S.W.2d 68, 69 (Tex. App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.). However, they may lien *money* due to the general contractor from the government. Tex. Gov't Code § 2253.027.

[10] Tex. Gov't Code § 2253.021. Such bonds are not required for public work projects that do not exceed $25,000. Claimants may seek a lien against the monies owed to the general contractor in such projects. Tex. Prop. Code §§ 53.231, *et seq.*

[11] Tex. Gov't Code § 2253.041.

[12] *Id.*

[13] Tex. Gov't Code § 2253.046.

[14] Tex. Gov't Code § 2253.047.

mailed, and expressly allows for recovery of attorney's fees to the extent same are equitable.[15] Importantly, any lawsuit seeking recovery against the payment bond has a relatively short one-year statute of limitations, commencing on the date of mailing the original claim notice.[16]

**Application of McGregor Act**

Many cases have held that the purpose of the McGregor Act's public project payment bond is remedial, and the Act should be provided a liberal interpretation for the protection of vendors and subcontractors.[17] However, that stated liberality has been applied only to the *sufficiency* of the notice and will authorize claims that are in "substantial" compliance with the required content.[18] No such liberality has been allowed for the *timing* of a claimant's notice, regardless of whether it is a public or private project.[19]

The *Century Asphalt* case (cited in the foregoing footnote) is a prime example of the strict timing requirement for public project claims. There, the subcontractor received payments from the general contractor prior to the time that any statutory notices would have been required, and therefore did not serve any statutory notices under the McGregor Act. Unfortunately, the general contractor also declared bankruptcy before the checks cleared, and its trustee subsequently recovered the pre-petition payments to the subcontractor as preferences. The bankruptcy court held the subcontractor's notice requirements were equitably tolled until it was required to return the payments, and thereafter allowed the subcontractor to submit notice to the surety, and ultimately awarded summary judgment against the surety. But the district court reversed, and the Fifth Circuit affirmed, finding timely notice was a "substantive condition precedent to the existence of the cause of action" and that "equitable tolling does not apply to a 'jurisdictional statutory prerequisite.'"[20] Of course, the general contractor was bankrupt, and the subcontractor had no other remedy to pursue.

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[15] Tex. Gov't Code §§ 2253.073 - .074.

[16] Tex. Gov't Code § 2253.078(b).

[17] *See, e.g., Texas Dept. of Mental Health and Mental Retardation v. Newbasis Central, L.P.*, 58 S.W.3d 278, 280 (Tex. App.–Fort Worth 2001, no pet.) (citing *Ramex Constr. Co. v. Tamcon Serv., Inc.*, 29 S.W.3d 135, 139 (Tex. App.–Houston [14th Dist.] 2000, no pet.)).

[18] *See, e.g., Sims v. Williams Baker, Inc.*, 568 S.W.2d 725, 730 (Tex. Civ. App.–Texarkana 1978, writ ref'd n.r.e.) and *United States Fidelity & Guaranty Co. v. Parker Brothers & Co.*, 437 S.W.2d 880 (Tex. Civ. App.–Houston [1st Dist.] 1969, writ ref'd n.r.e.).

[19] *See, e.g., Wesco Distribution, Inc. v. Westport Group, Inc.*, 150 S.W.3d 553, 557-58 (Tex. App.–Austin 2004, no pet.) (timely notice returned for lack of full postage; private project lien denied and attorney's fees awarded against claimant); *S. A. Maxwell Co. v. R. C. Small & Assoc., Inc.*, 873 S.W.2d 447, 453-56 (Tex. App.–Dallas 1994, writ denied) (McGregor Act claim denied; first notice 11 days late; second notice timely but insufficient); *Suretec Ins. Co. v. Myrex Indus.*, 232 S.W.3d 811, 815-16 (Tex. App.–Beaumont 2007, pet. denied) (McGregor Act claim denied when 15th day of month was a Sunday; notice was dated on the 15th but not mailed until following day); and *St. Paul Travelers Ins. Co. v. Century Asphalt Materials, LLC*; 529 F.3d 313 (5th Cir. 2008).

[20] *Id.* at 321 (citing *Bunch Elec. Co. v. Tex-Craft Builders, Inc.*, 480 S.W.2d 42, 45 (Tex. Civ. App.–Tyler 1972, no writ) and *Heart Hosp. IV, LP v. King*, 116 S.W.3d 831, 836 (Tex. App.–Austin 2003, pet. denied) (denying timely unemployment appeal that was filed in wrong court)).

**Is the McGregor Act an *Exclusive* Remedy?**

Considering the strictness of the statutory timing deadlines, and the holding that even timely paid claims may nonetheless result in the forced return of the payment while concurrently resulting in the loss of the statutory remedy, it is apparent that the McGregor Act is not as "remedial" or "liberally construed" as purported. But now the Corpus Christi Court of Appeals has extended this strict construction with the even more Draconian holding that the McGregor Act is the "exclusive" remedy for vendors and subcontractors.

Although the Corpus Christi opinion fails to provide any insight into why that particular vendor, Dealers Electrical Supply Co., failed to provide timely notice of its bond claim to the project's general contractor, Scoggins Construction Company, it is presumed that the materials vendor felt secure upon its common law contract claim arising from its joint check agreement and other statutory claims in lieu of pursuing the payment bond. Nonetheless, the Corpus Christi Court of Appeals has barred the vendor's other common law and statutory rights, finding all of them to have been superseded by the Court's conclusion that "[t]he provisions of the McGregor Act are mandatory and provide the exclusive means to establish the existence of a cause of action by laborers or suppliers on a public project."[21]

**The Legal Basis and Logic of the Corpus Christi Court of Appeals is Flawed.**

Legal Basis. For its conclusion that the McGregor Act is the mandatory and exclusive remedy for a vendor's claim, the Corpus Christi Court of Appeals relied solely upon the case of *Commercial Union Ins. Co. v. Spaw-Glass Corp.*,[22] which relied solely upon the case of *Bunch Elec. Co. v. Tex-Craft Builders, Inc.*[23] However, the actual holding of the *Commercial Union* case was that a surety, as subrogee to a subcontractor for which it unilaterally had made payments to its vendors, could not assert a bond claim against the general contractor without complying with the bond statute, which it did not. Only in dicta did the *Commercial Union* court further hold that the Act is an exclusive remedy, relying solely upon *Bunch Electric*. That case similarly held that claims *against the payment bond* must comply with the statute that required the bond. A review of the McGregor Act and its legislative history finds no basis for the Corpus Christi court's conclusion that it is the exclusive remedy not only for claims against the payment bond (which is logical), but simultaneously supersedes all other common law and statutory claims, and possibly as against all claimed defendants.[24] Surely, claims against the bond must comply with the statute that requires the bond's issuance and details the claims process. But

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[21] *Scoggins*, 2007 WL 4442544 at * 5.

[22] 877 S.W.2d 538, 540 (Tex. App.–Austin 1994, writ denied).

[23] 480 S.W.2d 42, 45 (Tex. Civ. App.–Tyler 1972, no writ).

[24] As noted above, the Vendor's breach of contract claim against the Sub in the *Scoggins Construction* case resulted in the Vendor's judgment against the Sub, which was not appealed. However, taking to its logical conclusion the Corpus Christi court's holding that the McGregor Act provides "the exclusive means to establish the existence of a cause of action by laborers or suppliers," the Vendor's breach of contract claim against the Sub to whom it sold the materials might also be barred by the McGregor Act's "exclusive" remedy.

there is no legal basis for the conclusion that a claimant's other common law and statutory claims should be precluded when the claims do not seek recovery against the statutory bond.

Logic. In the usual course, whether a public or private project, vendors and subcontractors usually have no direct privity with the owner, yet Texas statutes allow vendors and subcontractors to place liens against the owner's property (private project only).[25] To effect the same purpose of protection to vendors and subcontractors not in privity with the owner, the McGregor Act requires general contractors in most public projects to post a payment bond to secure payments owed to vendors and subcontractors in lieu of lien rights.

In a private project, we have found no cases holding that the posting of a bond to secure an owner from the vendor's or subcontractor's lien simultaneously precludes the vendor/subcontractor from concurrently suing each other and/or the general contractor. Posting of the bond does not mandate an exclusive remedy for all claims.

A public project payment bond is required at commencement of the project because the vendors and subcontractors do not have statutory lien rights against public property.[26] Logic suggests that the posting of the bond should not abrogate the vendor/subcontractor's other common law and statutory rights against each other and/or the general contractor any more than they do in private projects, which is none. Moreover, the General's argument in the *Scoggins Electric* case that the McGregor Act should be an exclusive remedy so as to shield the General from having to possibly pay twice for the same materials (both to its subcontractor and again to its subcontractor's vendor) is not persuasive. The General had a separate duty to comply with its separate three-party joint check agreement. If the General performed under that agreement, it should be protected from any possible double payment.

**Interpretation of Similar Federal Statute** [27]

The Texas McGregor Act is substantially similar to the federal Miller Act.[28] Most federal public work projects similarly require the general contractor to issue a payment bond to protect the vendors and subcontractors because the vendors and subcontractors are not allowed to lien the federal property.[29] However, many federal appellate courts have held that the Miller Act is *not* an exclusive remedy:

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[25] Such liens also may be superseded by a payment bond: Tex. Prop. Code §§ 53.201, *et seq.*

[26] *See* footnote 9, *supra.*

[27] 40 U.S.C. §§ 3131, *et seq.* ("Miller Act"). Much of the following argument is credited to the amicus curiae brief filed at the Texas Supreme Court on May 14, 2008, by J. Brett Busby, counsel for The American Subcontractors Association, Inc.

[28] "The material portions of the Texas statute . . . has [sic] been taken from the Miller Act." *Ferrier Brothers v. Brown*, 362 S.W.2d 181, 188 (Tex. Civ. App.–Eastland 1962, writ ref'd n.r.e.).

[29] *See F. D. Rich Co. v. U.S. ex rel. Industrial Lumber Co.*, 417 U.S. 116, 945 S. Ct. 2157 (1974); *Johnson Service Co. v. Climate Control Contractors, Inc.*, 478 S.W.2d 643, 645-46 (Tex. Civ. App.–Austin 1972, no writ).

(a) "The Miller Act was designed to provide an *alternative remedy* to the mechanic's liens ordinarily available on private construction projects . . . [b]ecause a lien cannot attach to government property."[30]

(b) The Miller Act is "an alternative means of recovery, not a replacement of state law causes of action."[31]

(c) "Nothing in the Miller Act evinces a legislative intent to limit remedies available to subcontractors. To the contrary, the Act *expands* upon the remedies previously available to government subcontractors."[32]

(d) "The Miller Act simply provides the equivalent of a mechanic's lien; it does not supplant any other remedies the supplier may have against any party involved in a federal construction project."[33]

(e) "[T]he Miller Act is not an exclusive remedy."[34]

(f) "Recovery under the Miller Act is not a supplier's exclusive remedy against a general contractor."[35]

**Conclusion**

The Corpus Christi Court of Appeals held:

> We conclude that the "joint check" agreement does not provide grounds for Dealers to circumvent the remedy provided by the payment bond provision of the McGregor Act. Based on the foregoing, the "joint check" agreement does not provide an alternate remedy for Dealers considering [Scoggins] executed a valid payment bond.[36]

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[30] *J. W. Bateson Co. v. Board of Trustees of the Nat'l Automatic Sprinkler Industry Pension Fund*, 434 U.S. 586, 589, 98 S. Ct. 873 (1978) (emphasis added).

[31] *United States ex rel. Varco Pruden Buildings v. Reid & Gary Strickland Co.*, 161 F.3d 915, 918-19 (5th Cir. 1998) (awarding damages under Miller Act and also attorney's fees under concurrent state law breach of contract claims).

[32] *Wright v. U.S. Postal Service*, 29 F.3d 1426, 1430-31 (9th Cir. 1994) (emphasis in original).

[33] *K-W Industries v. National Surety Corp.*, 855 F.2d 640, 643 (9th Cir. 1988).

[34] *Active Fire Sprinkler Corp. v. U.S. Postal Service*, 811 F.2d 747, 754 (2d Cir. 1987) (allowed state law breach of contract claim despite failure to timely notice Miller Act claim).

[35] *United States ex rel. Sunworks Div. of Sun Collector Corp. v. Insurance Co. of North America*, 695 F.2d 455, 457 (10th Cir. 1982) (explaining that a payment bond provides security for a claim, but should not preclude a claimant's other non-secured claims).

[36] *Scoggins*, 2007 WL 4442544 at p. 11.

The resulting non-enforceability of joint check agreements will cause most materials vendors to choose between terminating credit sales to subcontractors with questionable credit, or to otherwise hire a new back-office staff capable of preparing and delivering proper and timely notices to general contractors and sureties, often in as little as 45 days after the sale. This result is inconsistent with the remedial intent of the McGregor Act, substantially limits claimants' rights, is based on a fundamental misapplication of Texas law, and is expressly contrary to federal court decisions interpreting the federal statute upon which the Texas statute is patterned. This decision, along with the recent federal Fifth Circuit *Century Asphalt* decision, strongly suggests all counsel should advise their vendor and subcontractor clients to fully comply with the written claim requirements in any public or private construction project for which a payment bond has been posted, even if the vendor/subcontractor client has already been paid. *Seller beware.*