MECHANIC'S LIENS IN IOWA—REVISITED

*Roger W. Stone**

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I. INTRODUCTION

The Iowa Mechanic's Lien Statute started 150 years ago with the premise that improvements to land stand as security for the workers who built the improvements.[1] The statutes' evolving set of rules reflects that construction remains a risky business and costs often cannot be accurately determined when a job starts. The legislative changes during the last twenty years shift risk away from owners of property to contractors, subcontractors, and suppliers, presumably because construction companies are more familiar with and better able to protect themselves from the financial risks of construction.[2] The legislative changes since 1980 substantially

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* Roger W. Stone is a member of Simmons, Perrine, Albright & Ellwood, P.L.C., of Cedar Rapids, Iowa. He graduated in 1980 with highest distinction from the University of Iowa College of Law and clerked for the Honorable Donald P. Lay, Chief Judge of the United States Court of Appeals for the Eighth Circuit.

1. *See* IOWA REV. STAT. ch. 92, § 1 (Terr. 1843) (current version at IOWA CODE § 572.2 (1999)).

2. *See, e.g.*, IOWA CODE § 572.13(2) (subsection 2, amended in 1987 to require contractor of an owner-occupied dwelling to inform the owner by specifically worded written notice that all parties furnishing material to the project may enforce a lien upon the property); § 572.14 (amended in 1998 to provide that, in the case of an owner-occupied dwelling, a mechanic's lien is enforceable only to the extent of the amount due the contractor by the owner, less any payments made under the

curtail the mechanic's lien remedy for almost all contractors.[3] During the same twenty years, the Iowa Court of Appeals and Iowa Supreme Court have considered about sixty mechanic's lien cases.[4] The purpose of this Article is to review the

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contract); § 572.16 (amended in 1987 to extend the period for filing a lien by a subcontractor to ninety days); § 572.30 (amended in 1987 to increase the requirement for notice of non-payment and requiring a court to award exemplary damages in actions against contractors for non-payment unless the contractor's actions fall under either of two exceptions); § 572.31 (amended in 1983 to provide that a lien arising from the construction of an apartment house or apartment building owned on a co-operative basis, or which has been submitted to a horizontal property regime, is unenforceable as against the interests of the owner in an owner occupied dwelling unit contained in an apartment house or apartment building, unless a lien statement specifically describing the apartment is filed); § 572.32(2) (amended in 1999 to provide that, if an owner-occupier of a dwelling successfully challenges a mechanic's lien and a court finds the mechanic's lien was filed in bad faith or the supporting affidavit was materially false, the court shall award the owner "reasonable attorney fees plus an amount not less than five hundred dollars or the amount of the lien, which ever is less"); § 572.33 (amended in 1998 to require that a person furnishing labor or materials meets specific notice requirements within thirty days of furnishing the labor or materials and support the lien with a certified statement indicating the notice was properly given in order to be entitled to a lien).

3. *See* discussion *supra* note 2.

4. *See generally* Schumacher Elec., Inc. v. Brunyn, 604 N.W.2d 39 (Iowa 1999); Builders Kitchen & Supply Co. v. Pautvein, 601 N.W.2d 72 (Iowa 1999); Modern Piping, Inc. v. Blackhawk Automatic Sprinklers, Inc., 581 N.W.2d 616 (Iowa 1998); A&W Elec. Contractors, Inc. v. Petry, 576 N.W.2d 112 (Iowa 1998); Henning v. Security Bank, 564 N.W.2d 398 (Iowa 1997); Sheeder v. Lemke, 564 N.W.2d 1 (Iowa 1997); Schaffer v. Frank Moyer Constr., Inc., 563 N.W.2d 605 (Iowa 1997); Griess & Ginder Drywall, Inc. v. Moran, 561 N.W.2d 815 (Iowa 1997); Clinton Nat'l Bank v. Kirk Gross Co., 559 N.W.2d 282 (Iowa 1997); Midland Sav. Bank FSB v. Stewart Group, LC, 533 N.W.2d 191 (Iowa 1995); Farmers Coop Co. v. DeCoster, 528 N.W.2d 536 (Iowa 1995); Venard v. Winter, 524 N.W.2d 163 (Iowa 1994); Carson v. Roediger, 513 N.W.2d 713 (Iowa 1994); Des Moines Asphalt & Paving Co. v. Colcon Indus. Corp., 500 N.W.2d 70 (Iowa 1993); Conrad Am. v. Coop. Grain & Product Co. of Ringsted, 488 N.W.2d 450 (Iowa 1992); Frontier Properties Corp. v. Swanberg, 488 N.W.2d 146 (Iowa 1992); Metro. Fed. Bank of Iowa v. A.J. Allen Mech. Contractors, Inc., 477 N.W.2d 668 (Iowa 1991); Iowa Supply Co. v. Grooms & Co. Constr., 428 N.W.2d 662 (Iowa 1988); First Cent. Bank v. White, 400 N.W.2d 534 (Iowa 1987); Louie's Floor Covering, Inc. v. De Phillips Interests, Ltd., 378 N.W.2d 923 (Iowa 1985); Henderson v. Millis, 373 N.W.2d 497 (Iowa 1985); Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702 (Iowa 1985); Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498 (Iowa 1985); Home Fed. Sav. & Loan Ass'n of Algona v. Campeny, 357 N.W.2d 613 (Iowa 1984); Econ. Forms Corp. v. City of Cedar Rapids, 340 N.W.2d 259 (Iowa 1983); Union Story Trust & Sav. Bank v. Sayer, 332 N.W.2d 316 (Iowa 1983); First Nat'l Bank v. Smith, 331 N.W.2d 120 (Iowa 1983); I.G.L. Racquet Club v. Midstates Builders, Inc., 323 N.W.2d 214 (Iowa 1982); Chicago & Northwestern Transp. Co. v. Iowa Transp. Regulation Bd., 322 N.W.2d 273 (Iowa 1982); Lennox Indus., Inc. v. City of Davenport, 320 N.W.2d 575 (Iowa 1982); Barker's Inc. v. B.D.J. Dev. Co., 308 N.W.2d 78 (Iowa 1981); Northwestern Nat'l Bank of Sioux City v. Metro Center, Inc., 303 N.W.2d 395 (Iowa 1981); Perez v. Pogge, 303 N.W.2d 145 (Iowa 1981); Pater Painter, Inc. v. William R. Higgins, Jr. Found., Inc., 295 N.W.2d 451 (Iowa 1980); Gem Sprinkler Co. v. Deerfield Constr. Co., No. 98-1830, 2000 WL 504272 (Iowa Ct. App. Apr. 28, 2000); Dewitt Bank & Trust Co. v. Monarch Dev. Co., No. 98-1921, 2000 WL 328040 (Iowa Ct. App. Mar. 29, 2000); Pitstick v. Pritchard Bros., No. 96-827, 1999 WL 975748 (Iowa Ct. App. Oct. 27, 1999); Advance

legislative and judicial developments during the past twenty years and supplement the article entitled *Mechanic's Liens In Iowa* published in 1980.[5]

II. THE ELEMENTS OF A MECHANIC'S LIEN CLAIM

A. *"By Virtue of Any Contract"*

Every mechanic's lien claimant must have a contract.[6] The Iowa Supreme Court has stated: "Fundamental to establishment of a mechanic's lien on property is proof of such an express or implied contractual arrangement binding the person possessing an ownership interest."[7] Where a contractor, without any contract with the owner, removed an old driveway and replaced it with one accessible to a newly paved city street, the mechanic's lien could not be enforced because there was no contract with the owner or its agent.[8]

"The mechanic's lien statute is liberally construed to promote restitution, the prevention of unjust enrichment, and to assist parties in obtaining justice."[9] These equitable principles, however, do not supplant the need for a contract with an owner to recover on a mechanic's lien.[10]

"[A]n action on a mechanic's lien is an action on a contract."[11] The enforcement of a mechanic's lien is not an action *in rem*, but must be commenced

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Elevator Co. v. Four State Supply Co., 572 N.W.2d 186 (Iowa Ct. App. 1997); Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293 (Iowa Ct. App. 1995); Service Unlimited, Inc. v. Elder, 542 N.W.2d 855 (Iowa Ct. App. 1995); Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402 (Iowa Ct. App. 1994); Giese Constr. Co. v. Randa, 524 N.W.2d 427 (Iowa Ct. App. 1994); Hosteng Concrete & Gravel, Inc. v. Tullar, 524 N.W.2d 445 (Iowa Ct. App. 1994); Kissner v. Brown, 487 N.W.2d 97 (Iowa Ct. App. 1992); King v. Gustafson, 459 N.W.2d 651 (Iowa Ct. App. 1990); Gilcrest/Jewett Lumber Co. v. Moyer, 448 N.W.2d 711 (Iowa Ct. App. 1989); Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191 (Iowa Ct. App. 1987); Overhead Door Co. v. Sharkey, 395 N.W.2d 186 (Iowa Ct. App. 1986); Cent. Iowa Grading, Inc. v. UDE Corp., 392 N.W.2d 857 (Iowa Ct. App. 1986); Simmons v. Brenton Nat'l Bank of Perry, 390 N.W.2d 143 (Iowa Ct. App. 1986); Thomas Elec. Co. v. Severson Enters., Inc., 376 N.W.2d 631 (Iowa Ct. App. 1985); I.G.L. Racquet Club v. Midstates Builders, Inc., 367 N.W.2d 267 (Iowa Ct. App. 1985); Cedar Falls Bldg. Center, Inc. v. Vietor, 365 N.W.2d 635 (Iowa Ct. App. 1985); Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188 (Iowa Ct. App. 1984); Williams v. Hair Stadium, Inc., 334 N.W.2d 354 (Iowa Ct. App. 1983).

5. Roger W. Stone, *Mechanic's Liens in Iowa*, 30 DRAKE L. REV. 39 (1980).

6. IOWA CODE § 572.2; Giese Constr. Co. v. Randa, 524 N.W.2d 427, 430-31 (Iowa Ct. App. 1994).

7. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702, 709 (Iowa 1985).

8. Giese Constr. Co. v. Randa, 524 N.W.2d at 430-31.

9. *Id.* at 430 (citing Carson v. Roediger, 513 N.W.2d 713, 715 (Iowa 1994)).

10. *Id.* at 431.

11. Northwestern Nat'l Bank v. Metro Ctr., 303 N.W.2d 395, 401 (Iowa 1981) (citing Soc'y Linnea v. Wilbois, 113 N.W.2d 603, 607 (Iowa 1962)).

against a named defendant.[12] An action for foreclosure of a mechanic's lien must be referable to a contract binding some person who has a beneficial interest in the property.[13] "[A] claim against the property in the absence of such contract could not be maintained."[14]

The contract may be express or implied.[15] The contract is implied in fact when the parties show their assent by their acts.[16] "An express contract and an implied contract cannot coexist with respect to the same subject matter," and "[t]he law will not imply a contract where there is an express contract."[17] One who pleads an express contract cannot ordinarily recover on an implied contract or *quantum meruit*.[18] An implied contract may exist where there is an express contract if the implied contract covers points not covered by an express contract.[19] "An implied contract on a point not covered by an express contract is not superseded by the express contract."[20] Mere knowledge by an owner that a supplier is delivering materials to the property is not sufficient for a contract to be implied in fact.[21] Providing benefit to, or enrichment of, an owner by mistakenly performing labor on the property is not sufficient to imply a contract.[22]

B. *"With the Owner, His Agent, Trustee, Contractor, or Subcontractor"*

The contract required by section 572.2 of the Iowa Code must be with "the owner, the owner's agent, trustee, contractor or subcontractor" to establish a lien.[23] The Iowa Supreme Court has refused to enforce a mechanic's lien when a contractor has performed to the advantage of someone other than the person who has a present and beneficial interest in the property.[24] A contract with a prior owner is insufficient, even if the claimants are not told of the change in the ownership.[25] Even when the

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12. Soc'y Linnea v. Wilbois, 113 N.W.2d at 607.
13. *Id.* at 606.
14. Northwestern Nat'l Bank v. Metro Ctr., 303 N.W.2d at 401.
15. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702, 709 (Iowa 1985); Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188, 191 (Iowa Ct. App. 1984).
16. Guldberg v. Greenfield, 146 N.W.2d 298, 304 (Iowa 1966).
17. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d at 712.
18. Guldberg v. Greenfield, 146 N.W.2d at 301; *see also* Carlson v. Maughmer, 168 N.W.2d 802, 803 (Iowa 1969) ("We have held many times that one who pleads an express oral contract alone cannot ordinarily recover upon an implied contract or quantum meruit.").
19. Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d at 194.
20. *Id.*
21. Overhead Door Co. v. Sharkey, 395 N.W.2d 186, 188 (Iowa Ct. App. 1986).
22. Giese Constr. Co. v. Randa, 524 N.W.2d 427, 432 (Iowa Ct. App. 1994).
23. IOWA CODE § 572.2 (1999).
24. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702, 710 (Iowa 1985).
25. *Id.* at 712.

prior owner is contractually required by the sales documents to improve the property as a condition of the sale, the prior owner has no beneficial interest in the property at the time the contracts are made and the liens cannot be enforced.[26] To subject the property to a lien, the contractor's contract must be with a person who has a present beneficial interest in the property.[27] Should a prior owner act as the current owner's agent, however, the prior owner may qualify as a contractor within the meaning of section 572.2, and the mechanic's lien's claims would succeed.[28]

A person who has an ownership interest in the property is not able to enforce a mechanic's lien against the property for work performed.[29] Even though there were other co-owners, the person with an interest in the property is not entitled to a mechanic's lien.[30]

The result in *Clemens Graf Droste Zu Vischering v. Kading*[31] appears inconsistent with the result in *A & W Electrical Contractors, Inc. v. Petry*.[32] In *A & W Electrical Contractors*, a clause requiring the tenant to obtain all licenses and permits necessary to operate a tavern impliedly required the tenant to improve the property because the tenant could only obtain the license and permit after improving the wiring.[33] Because the lessor had a contractual arrangement impliedly requiring the lessee to improve the property, the mechanic's lien claimant, who had contracted with the lessee, could charge its lien against the lessor's interest.[34] In *Clemens*, the party that purchased the property required the seller to improve the property as a condition of the sale, but the court denied the lien claims by parties who had contracted with the previous owner because the previous owner had no beneficial interest in the property.[35]

1. *Owner's Agent*

The statute permits enforcement of a mechanic's lien against an owner whose "agent" has made a contract with a contractor.[36] For an agency relationship to exist, the agent must have the principal's express or apparent authority to act as agent for

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26. *Id.* at 709-10.
27. *Id.* at 710.
28. *Id.* at 710-11.
29. Thomas Elec. Co. v. Severson Enters., 376 N.W.2d 631, 633 (Iowa Ct. App. 1985).
30. *Id.*
31. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702 (Iowa 1985).
32. A & W Elec. Contractors, Inc. v. Petry, 576 N.W.2d 112 (Iowa 1998).
33. *Id.* at 113.
34. *Id.* at 114.
35. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d at 708-11.
36. IOWA CODE § 572.2 (1999).

the owner in negotiations for labor and material.[37] Agency requires the principal manifest to the agent that it may act on the principal's behalf in addition to the agent consenting to act.[38] For apparent authority to exist, the principal must have acted in such a manner as to lead persons dealing with the agent to believe the agent has authority.[39]

2. *The Lessee as Agent, Contractor, or Subcontractor for the Owner*

Iowa law provides that a contractor is entitled to a mechanic's lien on the lessor's property where there is "an express or implied contract with or on behalf of the lessor or vendor . . . ."[40] The Iowa Supreme Court has held that when the lease is drafted so the improvements may become the property of the lessor after a comparatively short time, when the improvement creates an additional value included in the sums to be paid as rental, and when the lease agreement requires the lessee to improve the property, a mechanic's lien will attach to the lessor's interest.[41] In such circumstances, a mechanic's lien will attach to both the lessee's and the lessor's interest.[42]

In one recent case, however, the test appears to be whether the lessor has contracted for the improvement.[43] In *A & W Electrical Contractors*, a lease clause requiring the tenant to obtain all the licenses and permits necessary to operate a tavern impliedly required the tenant to improve the property because the tenant could obtain the necessary operating license and permit only after improving the wiring.[44] By contrast, in an earlier Iowa Court of Appeals case, the court found a lease requiring the lessee to leave the property in the same condition as it was received insufficient to allow enforcement of a lien by a contractor who furnished ten overhead doors for the repair of the property.[45] These two holdings appear inconsistent. In both cases, lease clauses impliedly required the tenant to improve or

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37. Graf Droste Zu Vischering v. Kading, 368 N.W.2d at 711.
38. *Id.* at 710-11.
39. *Id.* at 711.
40. A & W Elec. Contractors, Inc. v. Petry, 576 N.W.2d 112, 114 (Iowa 1998); *see also* Ringland-Johnson-Crowley Co. v. First Cent. Serv. Corp., 255 N.W.2d 149, 151-52 (Iowa 1977) (stating the "plaintiff had initial burden to show by a preponderance of the evidence an agreement, express or implied, between [the lessor and lessee] whereby [the lessor] was required to remove the subject property"); Stroh Corp. v. K & S Dev. Corp., 247 N.W.2d 750, 752 (Iowa 1976) (same); Overhead Door Co. v. Sharkey, 395 N.W.2d 186, 187 (Iowa Ct. App. 1986) (same) (citing Ringland-Johnson-Crowley Co. v First Cent. Serv. Corp., 255 N.W.2d at 153).
41. Ringland-Johnson-Crowley Co. v. First Cent. Serv. Corp., 255 N.W.2d at 151.
42. *Id.*
43. A & W Elec. Contractors, Inc. v. Petry, 576 N.W.2d at 113.
44. *Id.*
45. Overhead Door Co. v. Sharkey, 395 N.W.2d at 188.

repair the property.[46] In *Overhead Door Co. v. Sharkey*,[47] the Iowa Court of Appeals actually said that by replacing the damaged doors the lessee was acting under the required terms of the lease, but not "as agent, trustee, contractor, or subcontractor" for the owner.[48] In *Overhead Door*, the owner even told the lessee the replacement doors had to have windows, just as the original doors had windows.[49] The owner saw the claimant's truck on the property, but knowledge of the improvement by the owner standing alone is not sufficient to subject the owner's interest to the lien.[50] The Iowa Court of Appeals held that the supplier did not show by a preponderance of the evidence an express or implied agreement existed whereby the lessor was contractually bound to improve the lessor's property.[51]

3. *The Contractor as Agent*

A contractor may be recognized as an agent of the owner for purposes of a mechanic's lien.[52] However, naming the general contractor as the owner does not perfect a mechanic's lien against the true owner.[53] If the contractor is the agent of the owner, arguably, persons who do business with that agent are, in fact, doing business with the owner and would be contractors rather than subcontractors.[54] There are several advantages to being a contractor rather than a subcontractor, including timely filing requirements, attorney's fees, and notice requirements.

4. *Vendee as Agent*

For a vendor's interest to be subject to a mechanic's lien claim arising from a contract with the vendee, the vendor must have had some active involvement in requiring or ordering the work.[55] Mere knowledge the work is being performed is not enough to charge the vendor's interests.[56] If the contract vendor did not impliedly contract for the improvements, then the vendor's interests are not subject to the

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46. *See id.*; A & W Elec. Contractors, Inc. v. Petry, 576 N.W.2d at 113.
47. Overhead Door Co. v. Sharkey, 395 N.W.2d 186 (Iowa Ct. App. 1986).
48. *Id.* at 188.
49. *Id.*
50. *Id.*
51. *Id.*
52. *See, e.g.*, Schumacher Elec., Inc. v. DeBruyn, 604 N.W.2d 39, 42 (Iowa 1999) (recognizing contract terms and conduct can establish an agency relationship but finding no agency relationship was established in the instant case (citing Love Bros. v. Mardis, 176 N.W. 616 (Iowa 1920) (holding an agency relationship was clearly established between owner and contractor))).
53. *Id.* at 42.
54. Love Bros. v. Mardis, 176 N.W. at 619.
55. Sheder v. Lemke, 564 N.W.2d 1, 4 (Iowa 1997).
56. *Id.*

mechanic's lien and only the vendee's interest is subject to the lien.[57] Also, when the vendee has completed the purchase price and received title to the property, persons who subsequently make a contract for improvement of the property with the prior owner do not have rights against a new owner who has paid for the property in full.[58] A contract vendee has sufficient interest in the property such that a contract with the vendee subjects the vendee's interest to the mechanic's lien.[59]

Even when an agency relationship is implied, the court may, nevertheless, find the agent has exceeded the scope of the agent's implied authority.[60] The Iowa Court of Appeals found making a contract for improvement was not an ordinary and necessary expense for operation and maintenance of the land by the implied agent, thus, the mechanic's lien would not apply to the land.[61]

C. *"Furnishing Any Material or Labor"*

1. *The Meaning of "Furnished"*

Section 572.2 of the Iowa Code requires that labor or material be "furnished" for improvement, alteration, or repair.[62] Work performed off the project site that never becomes part of the improvement of the project site is not work that entitles a claimant to a lien.[63]

2. *The Meaning of "Material or Labor"*

The legislature amended section 572.1(2) by adding the word "tools" in the definition of material.[64] This change was done at the same time as the creation of a lien for rented material—including tools—to persons at the site.[65] Accordingly, the furnishing or renting of tools for repair or improvement of real property entitles the person to a mechanic's lien.[66] However, the questions left unanswered by the legislative amendment are many:

(1) How are the tools valued?

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57. Thomas Elec. Co. v. Severson Enters., Inc. 376 N.W.2d 631, 633 (Iowa Ct. App. 1985).
58. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702, 710 (Iowa 1985).
59. Northwestern Nat'l Bank v. Metro Ctr., Inc., 303 N.W.2d 395, 401 (Iowa 1981).
60. King v. Gustafson, 459 N.W.2d 651, 653 (Iowa Ct. App. 1990).
61. *Id.*
62. IOWA CODE § 572.2 (1999).
63. *See, e.g.*, Northwestern Nat'l Bank v. Metro Ctr., 303 N.W.2d at 400 (noting a parapet wall on an adjoining building to prevent water damage was not a lienable item).
64. 1998 Iowa Acts 314, 314 (codified at IOWA CODE § 572.1(2) (1999)).
65. *Id.* (codified at IOWA CODE § 572.2(2)).
66. *See id.*

(2) Is the "reasonable value" of hand tools and other tools lienable?
(3) Is the appropriate charge on tools not rented to the owner the "normal wear and tear" on those tools?
(4) Are these charges duplicative of overhead charges normally included in the contract price?

The legislature added a new section regarding rental of material to an owner, which makes rented items lienable.[67] The purpose of the new section is to give persons who rent material to the owner, or certain others, a lien to secure the rent payment.[68] The chargeable amount is the reasonable rental value for periods of actual use and reasonable periods of nonuse taken into account in the rental agreement.[69] A presumption is created that the delivery of material to a site means the material was used for alteration, construction, or repair of the site.[70] However, the language is unclear whether this presumption applies only to rented material or to all material.[71] Although the first two sentences of section 572.2(2) appear to limit the law to rental situations, there is no express limitation.[72]

An exception to the presumption created by section 572.2(2) is for recoveries under a surety bond.[73] The logic for including this exception is not clear. A claim on a surety bond is not a mechanic's lien claim and would not be covered by this chapter unless a surety bond were a mechanic's lien discharge bond.[74] In the case of a mechanic's lien discharge bond, the reason for eliminating the presumption is still not clear. A party could potentially obtain the advantage of eliminating the presumption by filing a discharge bond, thereby requiring the person furnishing the

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67. *Id.*

> If material is rented by a person to the owner, the owner's agent, trustee contractor, or subcontractor, the person shall have a lien upon such building, improvement, or land to secure payment for the material rental. The lien is for the reasonable rental value during the period of actual use of the material and any reasonable periods of nonuse of the material taken into account in the rental agreement. The delivery of material to such building, improvement, or land, whether or not delivery is made by the person, creates a presumption that the material was used in the course of alteration, construction, or repair of the building, improvement, or land. However, this presumption shall not pertain to recoveries sought under a surety bond.

Id.

68. *Id.*
69. *Id.*
70. *Id.*
71. *See id.*
72. IOWA CODE § 572.2(2) (1999).
73. *Id.* § 572.2.
74. *See id.* § 572.15.

material to prove facts otherwise not required.[75] The origin of this exception for surety bonds is not clear and the reason for the exception is also a mystery.

3. *Non-Lienable Items*

Gasoline, diesel fuel, and petroleum are not lienable materials under the mechanic's lien statute.[76] The Iowa Court of Appeals questioned whether ten new replacement doors, valued at over $17,000, were merely repairs rather than substantial improvements or alterations.[77] The *Overhead Door* case suggests that while improvements or alterations are lienable, items of repair are not.[78] Fortunately, the *Overhead Door* holding was not premised on this basis, but rather on the fact Overhead failed to prove there was an express or implied contract between itself and Sharkey.[79] Under the terms of the statute, there is no distinction between improvements, alterations, or repairs, and all three are equally lienable.[80]

4. *The Requirement of a Visible Improvement*

The Iowa Supreme Court requires the furnished material, or labor, to constitute a visible notice of an improvement.[81] Absent actual, visible improvement, there is no lien. For example, a landsurveryor's markers, used on the premises to survey the property, were visible evidence of the architect's work but did not improve the land within the meaning of the statute and no lien was available.[82] The court considered the work preliminary to, rather than part of, the contemplated improvement.[83] Similarly, a sign notifying the public to construction of an improvement was not lienable because it was "strictly collateral to [the improvement] and would always remain so."[84] A fence around the same project was not part of the improvement because it was part of the demolition process rather than the actual construction.[85] In the court's view, excavation for piling tests allowed for finalization of the plans, and therefore, was preliminary to construction and not part of the construction.[86] In

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75. *See id.*
76. Farmers Coop. Co. v. DeCoster, 528 N.W.2d 536, 537 (Iowa 1995).
77. Overhead Door Co. v. Sharkey, 395 N.W.2d 186, 188 (Iowa Ct. App. 1986).
78. *See id.* at 187-88.
79. *Id.* at 188.
80. IOWA CODE § 572.2 (1999).
81. Northwestern Nat'l Bank v. Metro Ctr., 303 N.W.2d 395, 399 (Iowa 1981).
82. Gollehon, Schemmer & Assoc. v. Fareway-Bettendorf Assoc., 268 N.W.2d 200, 201 (Iowa 1978).
83. *Id.*
84. Northwestern Nat'l Bank v. Metro Ctr., 303 N.W.2d at 400.
85. *Id.*
86. *Id.*

contrast, moving overlying concrete pads above a steamline was a necessary part of the construction of the project and was an actual, visible activity entitling the claimant to a mechanic's lien.[87]

The 1998 amendment to section 572.2(2) of the Iowa Code also creates a presumption that delivery of material means the material was used in the course of alteration, construction, or repair.[88] Under this presumption, the question could arise whether the mere delivery of materials without the accomplishment of any visible improvement is sufficient to allow a lien. Seemingly, the owner could easily rebut the presumption if the materials are removed without any visible improvement remaining.

5. *The Requirement of Substantial Performance*

To enforce a mechanic's lien, the claimant must show he has substantially performed the requirements of his contract.[89] The Iowa Court of Appeals has described "substantial performance" as follows:

> Substantial performance allows only the omissions or deviations from the contract that are inadvertent or unintentional, not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damages to other portions of the building, and may be compensated for through deductions from the contract price.[90]

In another case, the Iowa Court of Appeals held the failure to construct a four-season sunroom usable in winter was not a failure to substantially perform and the mechanic's lien claim entitled the contractor to the contract price less the owner's damages.[91] In another case, the Iowa Court of Appeals held a general contractor did not substantially perform its duties, even though the house was approximately ninety-five percent complete, because the general contractor lost interest in the project and the subcontractors worked directly for the owner.[92] The court held upon substantial compliance with the contract, the contractor is entitled to receive the contract price with deduction for defects or incompletions.[93]

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87. *Id.*
88. 1998 Iowa Acts 314, 314 (codified at IOWA CODE § 572.2(2) (1999)).
89. Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191, 193 (Iowa Ct. App. 1987).
90. *Id.*
91. Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293, 296 (Iowa Ct. App. 1995).
92. Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402, 406 (Iowa Ct. App. 1994).
93. *Id.* at 406.

Although the burden of proof regarding the showing of substantial performance rests with the contractor,[94] the owner has the burden of showing any defects or incompletions.[95] The owner is required to show "legally defective" work to obtain an offset or damages.[96] Even if the owner has some complaints about the work or is not satisfied with it, the work is not necessarily legally defective.[97]

Regarding substantial performance, the Iowa Court of Appeals has stated:

> [T]he doctrine of substantial performance is merely an equitable doctrine that was adopted to allow a contractor who has substantially completed a construction contract to sue on the contract rather than being relegated to his cause of action for *quantum meruit*. The doctrine does not, however, permit the contractor to recover the full consideration provided for in the contract. By definition, this doctrine recognizes that the contractor has not totally fulfilled his bargain under the contract – he is in breach. Nonetheless, he is allowed to sue on the contract, but his recovery is decreased by the cost of remedying those defects for which he is responsible.[98]

When a general contractor commits such a substantial breach whereby it is not entitled to payment, the subcontractor's right to enforce its lien is also lost.[99]

6. *The Owner's Damages*

Damages in a defective construction case may include a combination of diminution in value, cost of construction or completion as required under the contract, and loss of rentals.[100] The general rule is that the cost of correcting defects or completing the omissions is the proper measure of damages.[101] If the cost of correcting the defects is grossly disproportionate to the result or benefit obtained by the owner, or if correcting the defect would involve unreasonable destruction of the builder's work, the proper measure of damage is the reduced value of the building.[102] The diminution in value is the difference between the value of the building if the contract has been fully performed and the value of the performance actually

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94. Farrington v. Freeman, 99 N.W.2d 388, 391 (Iowa Ct. App. 1987).
95. Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d at 194.
96. *Id.*
97. *Id.*
98. *Id.* at 195 (quoting Vance v. My Apartment Steak House, Inc., 677 S.W.2d 480, 482 (Texas 1984) (brackets in original)).
99. Cent. Iowa Grading, Inc. v. Ude Corp., 392 N.W.2d 857, 859 (Iowa Ct. App. 1986).
100. R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d 416, 421 (Iowa 1983).
101. Busker v. Sokolowski, 203 N.W.2d 301, 304 (Iowa 1972).
102. Serv. Unlimited, Inc. v. Elder, 542 N.W.2d 855, 858 (Iowa Ct. App. 1995).

received.[103] Iowa law follows Restatement of Contracts section 346(1) as the appropriate measure of damages in an owner's breach of contract claim.[104] The amount of money needed to finish the work is deducted from the balance due the contractor on the contract.[105]

7. *Calculation of the "Balance Due"*

A subcontractor that fails to perfect a mechanic's lien within ninety days of the last day of work under section 572.9 of the Iowa Code can recover only to the extent of the balance due from the owner to the contractor at the time the subcontractor perfects its lien under section 572.10.[106] Accordingly, late filing subcontractors can only recover the balance due from the owner to the contractor.[107] Computing the balance due to the subcontractor who files late requires deducting payments made by the owner from the contract price, adding extras provided by the contractor to the project, then deducting the owner's damages from omissions and deficiencies in the contractor's work.[108] The determination of the balance due includes deductions for finishing the work.[109] The owner, however, is not allowed to "nit pick" until the balance due is depleted.[110] The deduction is allowed where there is a substantial breach of contract.[111] Subcontractors on owner-occupied dwellings have special rules with respect to amounts they may recover,[112] and the calculation of the balance due described in this section relates only to projects other than owner-occupied dwellings.[113]

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103. *Id.*

104. Conrad v. Dorweiler, 189 N.W.2d 537, 540-41 (Iowa 1971) (citing RESTATEMENT OF CONTRACTS § 346 (1932)); Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293, 296 (Iowa Ct. App. 1995).

105. Carson v. Roediger, 513 N.W.2d 713, 716 (Iowa 1994) (citing Diecke v. Lumber Supply, 149 N.W.2d 822 (Iowa 1967)).

106. IOWA CODE § 572.11 (1999).

107. *See id.*

108. Carson v. Roediger, 513 N.W.2d at 716.

109. Diecke v. Lumber Supply, 149 N.W.2d at 826.

110. Cent. Iowa Grading, Inc. v. Ude Corp., 392 N.W.2d 857, 859 (Iowa Ct. App. 1986).

111. *Id.*

112. IOWA CODE § 572.14.

113. *Id.* § 572.16.

8. *Owner's Other Claims*

In addition to claims based on breach of contract, the owner's claims include breach of express warranty and implied warranty of fitness.[114] "In a construction contract it is implied that the building will be erected in a reasonably good and workmanlike manner and that it will be reasonably fit for the intended purpose."[115] When owners do not rely on the contractor to ensure a project's plans were fit for a particular purpose, and the owner undertakes to provide certain responsibilities, the implied warranty does not apply.[116] An owner can make claims for offsets against the subcontractor, even though the owner is not a party to the subcontract.[117] An owner does not have any defense or claim against the subcontractor for failure of the subcontractor to warn or provide information the subcontractor has about the financial condition of the contractor.[118] There is no duty to warn the owner, rather, the owner has to protect itself from a financially shaky contractor.[119] If the creditor states it will obtain the lien waivers but subsequently fails to do so, the owner may have a claim against a creditor for negligent misrepresentation.[120] When it appears difficult to determine which party is in breach, the court may allow the contractor to claim actual costs, limited by the contract price and reduced by the owner's damages.[121] In such a case, the owner is entitled to offsets for the cost of completing the work and other damages.[122] The court may require the claimant to prove that any discharge of the claimant from the improvement project was without fault on the claimant's part.[123]

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114. Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191, 195 (Iowa Ct. App. 1987).

115. *Id.* (citing Kirk v. Ridgway, 373 N.W.2d 491, 493 (Iowa 1985); Busker v. Sokolowski, 203 N.W.2d 301, 303 (Iowa 1972)).

116. Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188, 195 (Iowa Ct. App. 1984).

117. Williams v. Hair Stadium, Inc., 334 N.W.2d 354, 355 (Iowa Ct. App. 1983).

118. Conrad Am. v. Coop. Grain & Prod. Co., 488 N.W.2d 450, 453 (Iowa 1992).

119. *Id.*

120. *See, e.g.*, Cedar Falls Bldg. Ctr., Inc. v. Vietor, 365 N.W.2d 635, 637-38 (Iowa Ct. App. 1985).

121. Williams v. Hair Stadium, Inc., 334 N.W.2d at 356.

122. *Id.*

123. *See, e.g.*, McDonald v. Welch, 176 N.W.2d 846, 847 (Iowa 1970) (stating that a prerequisite in holding a claimant is entitled to a mechanic's lien is the claimant's burden of proof in showing the claimant's discharge from the work site was without fault on his part).

9. *The Taking of Collateral Security Defeats the Lien*

Any person who takes collateral security at the time of making the contract or during the process of the work shall not be entitled to a mechanic's lien.[124] The taking of personal guarantees from individual owners of the corporation who own the building is collateral security that will defeat a mechanic's lien.[125] A note or promise from a third person who is not otherwise liable for the indebtedness on the contract giving rise to the lien claim will also constitute collateral security.[126] The taking of shares in a limited partnership from the building owner is collateral security and will defeat the mechanic's lien.[127] No intent to waive the mechanic's lien is required to defeat the lien under section 572.3.[128]

The taking of a promissory note from the contractor is not collateral security and will not defeat the subcontractor's lien.[129] If the only security is an additional promise to pay from the party already obligated to pay, then there is no collateral security.[130] The Iowa Supreme Court has stated a security interest constitutes collateral security when a contractor has furnished the security interest to the subcontractor.[131]

The retention of title to the materials and equipment under the original contract was the taking of collateral security in one old Iowa Supreme Court case.[132] The Iowa Supreme Court should overrule this decision. A mechanic's lien is unnecessary on any materials on which the contractor retains title. Because title has not passed, the owner has no claim to those items and the contractor can simply remove them if unpaid. However, the retention of title by a contractor on some materials should not defeat the contractor's right to a mechanic's lien for nonpayment on other materials when title has passed to the owner. If the owner has not paid the contractor for material on which title has passed to the owner, a lien should attach to those items. By definition, a lien does not attach to items in which the contractor has an interest

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124. IOWA CODE § 572.3 (1999).
125. Builders Kitchen & Supply Co. v. Pautvein, 601 N.W.2d 72, 75-76 (Iowa 1999).
126. *Id.* at 76.
127. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702, 713-14 (Iowa 1985).
128. IOWA CODE § 572.3; *see also* Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d at 714 (noting that section 572.3 does not mention intent and prior cases have not required proof of intent to waive a lien).
129. Cent. Ready Mix Co. v. John G. Ruhlin Constr. Co., 139 N.W.2d 444, 447-48 (Iowa 1966).
130. *Id.* at 448.
131. *Id.*
132. Perfection Tire & Rubber Co. v. Kellogg-Mackey Equip. Co., 187 N.W. 32, 33-35 (Iowa 1922).

or title.[133] The lien attaches to another person's property.[134] Under one of the most popular of form contracts, the American Institute of Architects Document A201,[135] title to the work passes to the owner at the time of payment.[136] The contractor retains title under these general conditions when payment has not been received for material.[137] This retention of title should not defeat the mechanic's lien claim, which is otherwise permitted by both the general conditions and Iowa law.[138]

In a later case, the Iowa Supreme Court effectively overruled *Perfection Tire & Rubber Co. v. Kellogg-Mackey Equipment Co.*[139] on title retention, but did not discuss or explicitly overrule *Perfection Tire*.[140] In *First Central Bank v. White*,[141] the removal of two circuit boards by a contractor attempting to force payment was held not to be a taking of collateral security voiding a mechanic's lien.[142] Allowing the exercise of self-help or repossession of collateral by the mechanic's lien claimant would appear to be squarely in conflict with *Perfection Tire*, which held the retention of title to materials and equipment was the taking of collateral security.[143] *First Central Bank* reflects the better view, because collateral security is defined as "something that runs along with and parallel to something else of a similar character" and collateral security should not include those items to which the contractor holds title.[144] In other words, because a lien attaches only to items that are the owner's property, the contractor who retains title to goods does not take something parallel or similar to a lien.[145] A contractor who retains title to items that have not been paid by the owner is not inconsistent with the exercise of a mechanic's lien upon improvements on which the contractor has released title.

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133. Thomas Elec. Co. v. Severson Enters., 376 N.W.2d 631, 633 (Iowa Ct. App. 1985).

134. *See, e.g., id.* (refusing to enforce a mechanic's lien when the contractor has an ownership interest in the property).

135. *See generally* American Institute of Architects, *Document A201, General Conditions of the Contract for Construction* (1997) (recognizing the incorporation of A201-1997 document into numerous other agreements).

136. *Id.* at GC ¶ 9.3.3.

137. *See id.* GC ¶ 9.3.2-9.3.3.

138. IOWA CODE § 572.13 (1999).

139. Perfection Tire & Rubber Co. v. Kellogg-Mackey Equip. Co., 187 N.W. 32 (Iowa 1922).

140. *See generally* First Cent. Bank v. White, 400 N.W.2d 534 (Iowa 1987) (deciding the issue of title retention with citation to *Cent. Ready Mix Co. v. Ruhlin Constr. Co.*, failing to cite or discuss *Perfection Tire*).

141. First Cent. Bank v. White, 400 N.W.2d 534 (Iowa 1987).

142. *Id.* at 538.

143. Perfection Tire & Rubber Co. v. Kellogg-Mackey Equip. Co., 187 N.W. at 33.

144. First Cent. Bank v. White, 400 N.W.2d at 538 (quoting Cent. Ready Mix Co. v. Ruhlin Constr. Co., 139 N.W.2d 444, 447-48 (Iowa 1966)).

145. *See id.*

The collateral security section of the Iowa Code is an anachronism that serves no continuing useful purpose and should be repealed.[146] The idea that equity abhors a forfeiture is a well established principle of law,[147] but the collateral security provision works as a forfeiture to many mechanic's lien claimants who are unaware of its effect until a court denies the mechanic's lien claim.[148] The collateral security section is a strict prohibition that does not require proof of an intent to waive a mechanic's lien for a claimant to lose its rights.[149] This statute should be contrasted with the very generous protection given to contractors and subcontractors who actually sign a mechanic's lien waiver during the course of a job.[150] The Iowa Supreme Court will not favor a forfeiture of mechanic's lien rights when the claimant signs a mechanic's lien waiver unless the evidence shows the claimant intended to waive more than the payment it received.[151] The reasons for protecting contractors and subcontractors who sign mechanic's lien waivers are no different from the reasons for protecting contractors and subcontractors who take collateral security.[152]

Although repeal of the collateral security section would be the best option, the legislature could limit the effect of a claimant's taking collateral security by stating that the amount of the lien waived is only to the extent of the value of the collateral security taken. Under this suggestion, an otherwise valuable and substantial mechanic's lien would not be forfeited because the claimant took collateral security that subsequently proved to be worthless or of little value. The primary drawback of this suggestion is that it adds an unnecessary complication to a mechanic's lien trial by requiring the court to determine the value of the collateral security. Because of this added complication, repeal of the collateral security section is the better option. Alternatively, the legislature could state a person waives the mechanic's lien when collateral security is taken with the intent to substitute it for the lien. This alternative has the advantage of imposing a forfeiture only when the party intended the collateral security apply to the lien as a substitute, but has the disadvantage of adding to a trial

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146. *See* IOWA CODE § 572.3 (1999).

147. Sheeder v. Lemke, 564 N.W.2d 1, 3 (Iowa 1997).

148. *See, e.g.*, Perfection Tire & Rubber Co. v. Kellogg-Mackey Equip. Co., 187 N.W. at 33 (holding there is no right to a mechanic's lien when collateral security has been taken under a contract).

149. IOWA CODE § 572.3.

150. *See, e.g.*, Metro. Fed. Bank v. A.J. Allen Mech. Contractors, 477 N.W.2d 668, 673-74 (Iowa 1991) (providing protection for contractors who had signed periodic waivers for labor and materials "furnished up to and including" certain dates of payment).

151. *Id.* at 674.

152. *See* Perfection Tire & Rubber Co. v. Kellogg-Mackey Equip. Co., 187 N.W. at 34 (holding that the right to establish a lien exists and the taking of collateral security does not affect the right to a lien unless by express agreement the new security is given and received in lieu of such lien).

the need to determine the claimant's intent when the claimant took the collateral security.

Whether or not the legislature repeals the collateral security section, adds a valuation requirement, or adds an intent requirement, the current section is an anachronism two centuries out of place. The collateral securities section is an area of Iowa law in which a debtor forfeits what may be the only effective method of recovery without intending to do so or without receiving any significant value.[153] For this reason, the legislature should repeal or modify Iowa Code section 572.3 as recommended in this Part.

10. *Partial and Final Lien Waivers*

The following are examples of partial and final lien waivers that balance the interest of owners and contractors and comply with current Iowa law:

a. *Partial Lien Waivers.*

Subcontractor hereby acknowledges receipt of payment of $____ as a partial payment for its furnishing of labor and material for the above-referenced project and hereby waives, releases, and discharges any lien claim or lien right it has or could have to the extent of the partial payment made in exchange for this partial lien release. Subcontractor states that this partial lien release is not intended to and does not release any lien claims or rights for work, labor, or materials for which payment has not yet been received by the subcontractor.

b. *Final Lien Waivers.*

The undersigned does hereby waive and release any and all lien or claim of, or rights to, lien under statutes relating to mechanic's and other liens on account of labor, services, materials, fixtures, apparatus or machinery for the above-referenced project or for improvement of real estate.

This full and final lien waiver is intended as a full and complete waiver of any and all lien rights on said project or real estate, as a complete relinquishment of lien rights rather than as a receipt for partial payment, as an acknowledgment of final and full payment of the contract price and all allowable additions or extras, and an affirmation that the undersigned fully releases and discharges the owner (or contractor) of any further claim or obligation for payment of any kind.

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153. *Id.*; *see* IOWA CODE § 572.3.

> The undersigned acknowledges and affirms that it has paid all employees, contractors, subcontractors, suppliers, materialmen, and laborers all payments, claims, and obligations due or that may be due and owing for all work, labor, or materials furnished for work on or improvement of the project.
>
> The undersigned agrees to defend, indemnify, and hold harmless the payor and owner, its agents, employees, representatives, architects, engineers, and consultants from any and all costs, expenses, fees including attorney's fees, claims, demands, lawsuits, actions, liens, foreclosures, judgments, or executions that arise or may arise from claims, demands, or liens of persons with whom the undersigned contracted for the performing of labor or services for the above-referenced project or any person or persons claiming by or through such a person.

The Iowa Supreme Court described the general principles that control the interpretation of mechanic's lien waivers in *Metropolitan Federal Bank v. A.J. Allen Mechanical Contractors.*[154] First, the Iowa Supreme Court stated: "In interpreting the meaning of written instruments such as these lien waiver documents, we seek to give effect to the intention of the parties in conformity with a reasonable application of the circumstances under which the instrument was executed."[155]

The Iowa Supreme Court supported its reasoning by citing *Portland Electric & Plumbing Co. v. Simpson,*[156] which held "[t]he scope and effect of lien release 'is to be determined from the language of the document, the sequence of events and the surrounding circumstances.'"[157] Furthermore, the Iowa Supreme Court stated: "Although there may be a waiver of such a lien, in order for it to be effective, it must be clear, satisfactory, unambiguous, and free from doubt."[158] The final general principle stated by the Iowa Supreme Court was "[a]ll doubts about the waiver must be resolved in favor of the lien."[159]

The Iowa Supreme Court in *Metropolitan Federal Bank* applied these principles of interpretation to the language and circumstances of the mechanic's lien waivers given by the contractors in the case.[160] The lien waivers in the *Metropolitan*

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154. Metro. Fed. Bank v. A.J. Allen Mech. Contractors, 477 N.W.2d at 673.
155. *Id.*
156. Portland Elec. & Plumbing Co. v. Simpson, 651 P.2d 172 (Or. Ct. App. 1982), *aff'd*, 656 P.2d 394 (Or. Ct. App. 1983).
157. *Id.* at 174 (quoting Harding Mech. Contractors v. Fairfield Erectors, 564 P.2d 1356, 1358 (Or. 1977)); Metro. Fed. Bank v. A.J. Allen Mech. Contractors, 477 N.W.2d at 673 (citing Portland Elec. & Plumbing Co. v. Simpson, 651 P.2d at 174, *aff'd*, 656 P.2d 394).
158. Metro. Fed. Bank v. A.J. Allen Mech. Contractors, 477 N.W.2d at 673 (citing Eclipse Lumber Co. v. Bitler, 241 N.W. 696, 698 (Iowa 1932)).
159. *Id.* (citing Eclipse Lumber Co. v. Bitler, 241 N.W. at 698).
160. *Id.*

Federal Bank case contained broad and all-encompassing language. [161] The lien waivers of one contractor purported to release any and all liens stating: "[T]he undersigned hereby waives and releases any lien upon or against the premises . . . and the improvements thereon, on account of any labor, materials and services rendered or furnished[.]"[162] A lien waiver of another contractor purported to release any and all liens up to and including the date of payment stating: "[T]he undersigned . . . does hereby waive and release any and all lien or claim of, or rights to, lien under statutes relating to mechanics' and other liens, . . . on account of labor, services, material, fixtures, apparatus or machinery furnished up to and including . . . upon payment[.]"[163] The court considered the effect of the broad, all-encompassing waiver language in view of the circumstances indicating the contractors merely intended the lien waivers as receipts for partial payments: "None of the contractors testified that they intended to waive anything other than the right to claim liens for the amounts actually paid to them."[164]

The court considered the evidence that the contractors had not received full payments at the time of the waiver because there was always a retainage of ten percent withheld from each monthly progress payment.[165] The court did not believe the contractors intended to waive their rights to mechanic's liens for amounts earned but not yet paid.[166] The court concluded "that the lien waivers periodically submitted to [the property owner] by [the contractors] were intended, as between [the owner] and the contractors, as a waiver of the contractors' rights to assert mechanics' [sic] liens only for that work for which the contractors had been paid from [the construction mortgagee's] construction loan proceeds."[167]

Notwithstanding the broad, all-encompassing language of the lien waivers, the court expressly held the lien waivers, given in recognition of periodic progress payments, waived mechanic's lien rights only to the extent of the payment received.[168] The contractors had a contract that provided for monthly progress payments, provided lien releases to obtain additional progress payments, and did not intend to release their lien rights for amounts not yet paid.[169]

In another similar case, the court held a broad, all-encompassing release of any mechanic's lien was, in fact, only a release of a mechanic's lien to the extent of the

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161. *See id.* at 674.
162. *Id.* at 673.
163. *Id.*
164. *Id.* at 674.
165. *Id.*
166. *Id.* at 675.
167. *Id.*
168. *Id.*
169. *Id.* at 670.

payment that had already been made.[170] In this case, the contractor testified the document was only intended to waive any claim to a mechanic's lien to the extent of such payment.[171] The court stated:

> In interpreting the meaning of written instruments we seek to give effect to the intention of the parties in conformity with a reasonable application of the circumstances under which the instrument was executed. Upon our de novo review of the transaction at issue, we agree with the trial court's finding that the so-called "waiver of mechanic's lien" was intended, as between the defendant contractor and the owners, as a waiver of the contractor's right to assert a lien for work which had been paid for from the construction loan proceeds.[172]

Cases from other states, which the Iowa Supreme Court has cited with approval, also require denial of the motion for summary judgment.[173] In one case, the Oregon Court of Appeals dealt with a lien release which "is broad and susceptible of an all-encompassing interpretation."[174] The Oregon Court of Appeals stated:

> However, given the circumstances of its execution, not as part of a single document referring to the entire construction contract but as part of each progress payment the more reasonable interpretation is that the discharge released plaintiff's lien rights only as to materials for which payment was made by a particular check.[175]

In an Illinois case, the court considered the effect of a lien waiver given in recognition of partial payments.[176] The Illinois Appellate Court held "[t]he execution of lien waivers does not bar any claim for additional payments because the evidence supports the circuit court's findings that these waivers were necessarily executed by [the lien claimant] in order to receive partial payment and were intended to be partial

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170. First Nat'l Bank v. Smith, 331 N.W.2d 120, 122 (Iowa 1983).

171. *Id.*

172. *Id.* (citations omitted).

173. *See, e.g.*, Metro. Fed. Bank v. A.J. Allen Mech. Contractors, 477 N.W.2d at 673-74 (citing Portland Elec. & Plumbing Co. v. Simpson, 651 P.2d 172 (Or. Ct. App. 1982) (using a "reasonable interpretation" to determine that a plausibly "all-encompassing" lien applies to material paid for with a particular check); Lyons Fed. Trust & Sav. Bank v. Moline Nat'l Bank, 549 N.E.2d 933 (Ill. App. Ct. 1990) (interpreting the statement of mechanic's lien to not require a contract date to be alleged and holding that, therefore, the contract date alleged in the statement of mechanic's lien was not a binding judicial admission)).

174. Portland Elec. & Plumbing Co. v. Simpson, 651 P.2d at 174.

175. *Id.*

176. Lyons Fed. Trust & Sav. Bank v. Moline Nat'l Bank, 549 N.E.2d at 935-36.

lien waivers as to particular work."[177] The contractor intended the lien waivers given to be payments for particular work.[178] In view of the circumstances for which the lien waivers were given, the effect of the waivers was limited to the extent of the payment received.[179] The court held the contractor had not waived its lien with respect to other payments due the contractor.[180]

III. LEGISLATIVE RESTRICTIONS ON MECHANIC'S LIENS DURING THE PAST TWENTY YEARS

A. *Mechanic's Liens on Residential Construction*

In 1981, the Iowa Legislature shifted the risk of doing business with financially shaky contractors from homeowners to subcontractors and suppliers. The method of shifting this risk was to prescribe a pre-lien notification requirement for subcontractors and suppliers who provided material or labor for residential construction.[181] The direct lien liability that was previously available to

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177. *Id.* at 936.
178. *Id.*
179. *Id.*
180. *Id.*
181. IOWA CODE § 572.14(2) (1999). The legislature amended section 572.1 to include the term "owner-occupied dwelling," which means the homestead of an owner actually occupied by the owner, and "includes a newly-constructed dwelling to be occupied by the owner as a homestead or dwelling that is under construction and being built by or for an owner who will occupy the dwelling as a homestead." *Id.* § 572.1(5).

Section 572.14(2) was also extensively amended in 1981 to provide:

> In the case of an owner-occupied dwelling, a mechanic's lien perfected under this chapter is enforceable only to the extent of the amount due the principal contractor by the owner-occupant under the contract, less any payments made by the owner-occupant to the principal contractor prior to the owner-occupant being served with the notice specified in subsection 3. This notice may be served by delivering it to the owner or the owner's spouse personally, or by mailing it to the owner by certified mail with restricted delivery and return receipt to the person mailing the notice, or by personal service as provided in the rules of civil procedure.

Id. § 572.14(2).

The notice was required to include the following information:

> The person named in this notice is providing labor or materials or both in connection with improvements to your residence or real property. Chapter 572 of the Code of Iowa may permit the enforcement of the lien against this property to secure payment for labor and materials supplied. You are not required to pay more to the person claiming the lien than the amount of the money due from you to the person with whom you contracted to perform the improvements. You should not make further payments to your contractor until the contractor presents you with a waiver of the lien claimed by the person named in this notice. If you have any questions regarding this notice you

subcontractors and suppliers who timely filed mechanic's liens was eliminated, except for those who followed the strict pre-lien notification requirements.[182] For those who did not follow the pre-lien notification requirements, only derivative lien liability was available.[183] These statutory changes put the burden on the suppliers and subcontractors rather than on the home buyers and owners.

In *Louie's Floor Covering v. De Phillips Interests*,[184] the court stated "the purpose of the 'notice' provision 'is to protect an innocent homeowner.'"[185] The court added: "If an innocent party must be hurt, the materialman is less favored than a homeowner because the materialman is far more sophisticated and familiar with the construction industry and better able to protect himself than is the homeowner."[186]

A question that often arises is whether a home is being built for a developer-contractor or for an owner-occupier. In *Louie's Floor Covering*, the court found that a supplier of materials was required to give notice where a house was under construction and was being built for the buyer.[187] The buyer intended to occupy the dwelling as a homestead, and the statute required notice be given for the supplier to have a lien.[188]

In *Schaffer v. Frank Moyer Construction*,[189] the court held that a carpentry contractor could have a claim against the property if it were shown that the lien was

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should call the person named in the notice at the phone number listed in this notice or contact an attorney. You should obtain answers to your questions before you make any payments to the contractor.

Id. § 572.14(3).

In 1981, the legislature also amended Section 572.16 to protect owner-occupants:

Nothing in this chapter shall be construed to require the owner to pay a greater amount or at an earlier date than is provided in the owner's contract with the principal contractor, unless said owner pays a part or all of the contract price to the original contractor before the expiration of the ninety days allowed by law for the filing of a mechanic's lien by a subcontractor; provided that in the case of an owner-occupied dwelling, nothing in this chapter shall be construed to require the owner to pay a greater amount or at an earlier date than is provided in the owner's contract with the principal contractor, unless the owner pays a part or all of the contract price to the principal contractor after receipt of the notice under section 572.14(2).

Id. § 572.16.

182. *Id.* § 572.14(2).

183. *Id.*

184. Louie's Floor Covering v. De Phillips Interests, 378 N.W.2d 923, 927 (Iowa 1985).

185. *Id.* at 927 (quoting C.W. Stark Lumber Co. v. Sether, 257 N.W.2d 556, 560 (Minn. 1977)).

186. *Id.*

187. *Id.*

188. *Id.* at 925-26.

189. Schaffer v. Frank Moyer Constr., 563 N.W.2d 605 (Iowa 1997).

perfected against the record owner of the property—the developer—who had contracted for the contractor's services and who did not intend to occupy the property as a homestead.[190] So long as the contractor perfected its lien before the prospective owner-occupier had any ownership in the property, the lien would attach to the property.[191] In this case, the contractor's lien was recorded before payment to the primary builder by the owner-occupiers had been made.[192] The court stated section 572.14(2) only protects an owner-occupier from potential subcontractor liens that might be timely perfected after the owner-occupier has made payment to the primary contractor.[193]

The presentation of notice to the owner required under section 572.14 is not sufficient to establish a lien.[194] In *Griess & Ginder Drywall, Inc. v. Moran*,[195] the furnishing of the required notice under the mechanic's lien statute did not relieve the supplier from the duty to perfect its lien.[196] Because the supplier did not perfect its lien within ninety days of the last date of its work, the lien claim was not timely perfected.[197] Furthermore, because the homeowners did not owe the general contractor any money when the lien was perfected, there was no balance due from which the subcontractor could obtain a mechanic's lien recovery.[198] The lien could only be enforced against the Morans' property to the extent of the balance the Morans owed the principal contractor at the time the subcontractor gave the Morans notice of the lien.[199] The failure to perfect the lien within the required ninety days meant no lien could be enforced because no money was owed the contractor.[200] The pre-lien notice under section 572.14(2) did not perfect the lien; the pre-lien notice only informed the owners of the possibility of a mechanic's lien.[201]

In *Henning v. Security Bank*,[202] the homeowners paid twice for the same work, once to a contractor who abandoned the job and once to subcontractors.[203] The homeowners then sued their bank to obtain lien waivers from the subcontractors

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190. *Id.* at 608.
191. *Id.*
192. *Id.*
193. *Id.*
194. Griess & Ginder Drywall, Inc. v. Moran, 561 N.W.2d 815, 817 (Iowa 1997).
195. Griess & Ginder Drywall, Inc. v. Moran, 561 N.W.2d 815 (Iowa 1997).
196. *Id.* at 817.
197. *Id.* at 816.
198. *Id.*
199. *Id.* at 817.
200. *Id.*
201. *Id.*
202. Henning v. Sec. Bank, 564 N.W.2d 398 (Iowa 1987).
203. *Id.* at 399.

before payment to the contractor.[204] The homeowners had no legal obligation to pay the subcontractors because the subcontractors failed to comply with the notice requirements of section 572.14(2).[205] The subcontractors had no statutory or common law right to recover from the homeowners, therefore, the homeowners' payments to the subcontractor were voluntary.[206] The homeowners could not recover the duplicate payment from the bank because indemnity does not cover voluntary payments.[207]

B. *Legislative Amendment of the Amount Due for Owner-Occupied Dwellings*

In 1998, the legislature amended the provision regarding how much a claimant can collect on a mechanic's lien on an owner-occupied dwelling.[208] Section 572.14(2) now provides:

> In the case of an owner-occupied dwelling, a mechanic's lien perfected under this chapter is enforceable only to the extent of the amount due the principal contractor by the owner-occupant under the contract, less any payments made by the owner-occupant to the principal contractor prior to the owner-occupant being served with a notice specified in subsection 3. This notice may be served by delivering it to the owner or the owner's spouse personally, or by mailing it to the owner by certified mail with restricted delivery and return receipt to the person mailing the notice, or by personal service as provided in the rules of civil procedure.[209]

The meaning of this provision is not clear and will require judicial interpretation. The legislature substituted a new term "amount due . . . under the contract" for the customary term "balance due."[210] The reason for the substitution is not clear from the statute. The original term, "balance due," included all remaining monies to be paid under a contract, less payments already made and cost to finish or repair.[211] Perhaps the new term "amount due . . . under the contract" means the same as the previous language, but a more customary meaning would be the amount that was required to be paid at a particular time under the terms of the contract, such as a progress payment less retainage.

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204. *Id.* at 398.
205. *Id.* at 401-02.
206. *Id.*
207. *Id.* at 404.
208. 1998 Iowa Acts 314, 314 (codified at IOWA CODE § 572.14(2) (1999)).
209. IOWA CODE § 572.14(2).
210. 1998 Iowa Acts 314, 314.
211. Carson v. Roediger, 513 N.W.2d 713, 716 (Iowa 1994).

More importantly, the 1998 amendment appears not to specify a time when the amount due is to be calculated.[212] Under the old language, the "balance due" was to be calculated at the time when written notice was given to the owner-occupant.[213] In the amended section, it is unclear whether the calculation of the "amount due . . . under the contract" is to be made at the time of the service of notice or when the trial occurs on the mechanic's lien.[214] The new section redundantly states the amount due under the contract is to be reduced by the payments made by the owner-occupant prior to the service of the notice.[215] Presumably, the legislature inserted the phrase "less any payments made by the owner-occupant to the principal contractor prior to the owner-occupant being served with the notice" to imply payments made after the service of the notice would not be deducted from the amount due.[216] However, the new section provides only a suggestion, not a mandate.[217] The prior language, specifying the determination of the balance due is made at the time written notice is served, was much clearer than the new language.[218] An example illustrates the problem:

(1) Assume the contract price for a house is $270,000.

(2) Assume the owner-occupant had paid the principal contractor $100,000 prior to receiving a subcontractor's subsection 3 notice.

(3) Assume also the principal contractor was owed an additional $90,000 based on work performed prior to the date of the service of the subsection 3 notice.

(4) Assume the balance due to finish the house was $80,000 at the time of the service of the subsection 3 notice.

(5) Assume defects in the construction by the principal contractor and not the subcontractor serving the notice would require $20,000 to repair.

Under the language prior to the 1998 amendment, the "balance due from the owner to the principal contractor at the time the written notice was served" would be $70,000.[219] This amount is the result of subtracting $100,000 for the payments made, $80,000 for the costs of finishing, and $20,000 for the costs of repair from the $270,000 contract price. Under the amended language, the "amount due the

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212. 1998 Iowa Acts 314, 314.
213. *Id.*
214. *See* IOWA CODE § 572.14(2).
215. *Id.*
216. *See id.*
217. *See id.*
218. *See* IOWA CODE § 572.14(2) (1995) (stating "a mechanic's lien perfected . . . is enforceable only to the extent of the balance due from the owner to the principal contractor at the time written notice . . . is served on the owner.").
219. *See id.*

principal contractor by the owner-occupant under the contract" is either $270,000 (total contract price) or $170,000 (payment due plus balance to finish) or $90,000 (amount of payment currently due).[220] Because the payments already made are to be deducted, it would seem the phrase amount due the principal contractor by the owner-occupant under the contract actually means contract price.[221] Because the amendment specifies how previous payments are deducted but is silent as to the cost to finish and the offsets for damages, it is unclear whether the legislature intended the owner-occupant to get credit for these items.[222] The Iowa Supreme Court will have to settle these issues. Section 572.14(2) is simply not clear after the legislature abandoned the original language and replaced it with an ambiguous term.[223]

C. *Requirement of Contractor's Giving Notice Regarding Subcontractors*

As a further protection for owner-occupants, the legislature in 1987 required contractors to give owner-occupants notice of its subcontractors.[224] The contractor is penalized for failure to give notice of its subcontractors to an owner-occupant by losing entitlement to a mechanic's lien for labor performed or material furnished by the subcontractor, which is not included in the notice.[225] This amendment is nonsense. As a result of this amendment, the person contracting directly with the owner-occupant cannot have a full recovery on its mechanic's lien for the agreed contract price. Full recovery would include the amounts to be paid the subcontractors as a result of the general contractor not giving notice of the subcontractors it was using. It should make no difference to the owner-occupant, who has not paid the general contractor the contract price, that the general contractor was going to use subcontractors. Every homeowner should assume a general contractor is going to use some subcontractors, and the failure to specify the names should not prevent recovery of the agreed contract price in a lien action.

When a general contractor has a contract claim and other common law claims against an owner for the amounts of a subcontractor's work,[226] it is a waste of judicial resources and time that these claims cannot be brought in a single mechanic's lien action simply because the contractor did not give the owner-occupant notice it was using subcontractors. Because the contract and common law claims of the contractor

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220. *See* IOWA CODE § 572.14(2) (1999).
221. *See id.*
222. *See id.*
223. *See* 1998 Iowa Acts 314, 314 (codified at IOWA CODE § 572.14(2) (1999)).
224. 1987 Iowa Acts 89, 90 (codified at IOWA CODE § 572.13(2) (1999)).
225. *Id.*
226. *See, e.g.*, Frontier Props. Corp. v. Swanberg, 488 N.W.2d 146, 149 (Iowa 1992) (holding contractors must give notice to have a lien for subcontractor's labor and material but the contractor has common law remedies for the claims of the subcontractor against the owner-occupant).

cannot be joined with the mechanic's lien foreclosure action, the contractor may have to bring two actions: (1) a mechanic's lien foreclosure for the value of the work done by the general contractor, and (2) a contract or other common law claim for the value of the subcontractor's work performed on the job for which the contractor has not been paid.[227] In a mechanic's lien action, the general contractor may be entitled to attorney's fees.[228] In a common law action, however, unless the contract provides for attorney's fees, the contractor would not get attorney's fees for the contractor's efforts to recover the subcontractor's money.[229] Additionally, the contractor will not receive a jury trial in a mechanic's lien case, while a jury trial is available in a common law case.[230]

The notice requirement of section 572.13 is unnecessary to protect homeowners from subcontractors' liens.[231] Any subcontractors who want to establish liens for their nonpayment must do so by giving the notice required in subsection 3 of section 572.14.[232] If the subcontractors give notice, they can preserve their own lien rights.[233] However, if they fail to give notice, they have no lien rights.[234] When the subcontractors have no lien rights, the general contractor might, under common law contract remedy, be able to recover the amounts from the owner-occupant that the general contractor owes the subcontractors, even if the owner-occupant was not told the identity of the subcontractors.[235] When the subcontractors have protected their lien rights, the owner-occupant still only has to pay once, either to the general contractor or to the subcontractors.[236] The protection given owner-occupants by section 572.13 seems unnecessary and elevates irrelevant notice requirements above the reality of the arrangement between a homeowner and a general contractor.[237] The general contractor who has not been paid by the owner-occupant should be able to recover the full amount of its contract price from the owner-occupant in one action,

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227. *See* IOWA CODE § 572.32.

228. *Id.*

229. *See* Ward v. Loomis Bros., Inc., 532 N.W.2d 807, 813 (Iowa Ct. App. 1995) (holding unless attorney's fees are authorized by statute or contract, they are generally not recoverable).

230. *See generally* Conrad v. Dorweiler, 189 N.W.2d 537, 539 (Iowa 1971) (recognizing the entitlement to a jury trial at common law where the issues presented are waiver and estoppel—issues commanding concurrent jurisdiction in law and equity).

231. *See* IOWA CODE § 572.13(2).

232. *Id.* § 572.14(3).

233. *Id.* § 572.14(1).

234. *Id.*

235. *See* Frontier Props. Corp. v. Swanberg, 488 N.W.2d 146, 149 (Iowa 1992) (holding that failure to comply with statutory notice requirements does not "preclude the contractor from asserting common law actions—like express and implied contracts—for work and materials furnished" by suppliers and subcontractors).

236. *See* IOWA CODE § 572.16.

237. *See id.* § 572.13.

including the amounts the general contractor owes to its subcontractors who performed labor on the owner-occupied dwelling but have not been paid for their services or material.

D. *Legislative Protection for Owner-Occupied Dwellings Regarding Payment to Subcontractors*

For owner-occupied dwellings, the principal contractor must pay its subcontractors within thirty days after receiving full payment from the owner.[238] If the principal contractor fails to do so after receiving full payment, exemplary damages in the amount of one-percent to fifteen-percent of the amount not paid shall be charged against the principal contractor.[239]

E. *Notification Requirement for Suppliers to Subcontractors*

The legislature adopted a notification requirement for suppliers of subcontractors in 1998.[240] A year later the legislature revised the requirement.[241] The notification requirement for suppliers to subcontractors does not apply to single-family or two-family dwellings occupied or intended to be used for residential purposes.[242] The notification requirement for suppliers to subcontractors, however, does apply to condominium projects, commercial real estate, and apartment houses.[243]

Under the notification requirement, the supplier to a subcontractor is required to notify the principal contractor in writing with a one-time notice, providing specific information "within thirty days of first furnishing labor or materials for which a lien claim may be made."[244] "Additional labor or materials furnished by the same person to the same subcontractor for use in the same construction project shall be covered by this notice."[245]

The notification requirement also requires that the supplier to a subcontractor include a special notice in its lien claim.[246] The lien claim must be supported by a

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238. *Id.* § 572.30.

239. *Id.*; *see also* Frontier Props. Corp. v. Swanberg, 488 N.W.2d at 150 (holding full payment is a condition precedent to the imposition of the penalty).

240. 1998 Iowa Acts 314, 314-15 (codified at IOWA CODE § 572.33).

241. 1999 Iowa Acts 172, 173 (codified at IOWA CODE § 572.33).

242. IOWA CODE § 572.33(2).

243. *See id.* § 572.33(2) (excluding single-family or two-family dwellings occupied for residential purposes from the notification requirement).

244. *Id.* § 572.33(1).

245. *Id.* § 572.33(1)(a).

246. *Id.* § 572.33(2).

"certified statement that the principal contractor was notified in writing with a one-time notice containing" specified information.[247] This statement must be provided within thirty days after labor and materials were first furnished.[248]

The 1999 amendment eliminated the requirement of giving the pre-lien notice by a supplier to the owner.[249] The pre-lien notice needs to be given only to the principal contractor.[250] The supplier's notice to the principal contractor could help assure the principal contractor pays the suppliers when the subcontractor is in a difficult financial position. However, in the event the principal contractor does not take steps to ensure the supplier is paid by the subcontractor, the supplier still has a lien on the owner's property and the owner may have no notice of the existence or arrangement of the supplier until it receives the lien claim. For this reason, the supplier's notice does not seem well designed to ensure the owner is protected from supplier's liens. The contractor receiving the supplier's notice is not the owner who is most directly interested in seeing that the supplier gets paid. To protect themselves, owners should include in contracts with the principal contractor an indemnity obligation or mechanic's lien discharge bond obligation requiring the principal contractors to assume responsibility for the liens of subcontractors or subcontractors' suppliers. An example of the type of language that may be suitable for an owner's protection clause is contained in General Condition 9.10.2 of American Institute of Architects Document A201.[251]

F. *Attorney's Fees*

From the period of 1983 through 1999, a successful contractor in a mechanic's lien action was assured of recovering its attorney's fees.[252] This provision made mechanic's liens the preferred method of recovery in construction cases, unless the contract also provided for attorney's fees.[253] Additionally, the requirement that an owner had to pay a successful contractor its attorney's fees was settlement leverage, which helped assure most mechanic's lien claims were settled rather than litigated. The requirement that a losing owner pay the amount of the mechanic's lien, interest on the judgment, its own attorney's fees, and the contractor's attorney's fees, created

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247. *Id.*
248. *Id.* § 572.33(1)(b).
249. 1999 Iowa Acts 172, 173 (codified at IOWA CODE § 572.33(1)(a)).
250. *Id.*
251. American Institute of Architects, *Document A201, General Conditions of the Contract for Construction*, ¶ 9.10.2 (1997).
252. *See* 1983 Iowa Acts 185, 185 (stating that a prevailing plaintiff "shall be awarded reasonable attorney fees"); 1999 Iowa Acts 110, 111 (amending the guarantee of attorney's fees and stipulating that a prevailing plaintiff "may be awarded reasonable attorney fees.").
253. IOWA CODE § 572.32.

significant transaction costs for owners and gave them incentives to settle meritorious claims.

The Iowa Court of Appeals rulings established that a party had to actually foreclose the lien to get attorney's fees,[254] a contractor's failure to substantially perform meant it could not receive attorney's fees,[255] and when the owner's damages exceeded the balance due the contractor, attorney's fees could not be awarded because the contractor was not the successful party.[256] However, in 1999, the legislature amended the attorney's fees section to make it discretionary rather than mandatory.[257] Now, a court "may" award a prevailing plaintiff reasonable attorney's fees, but the award is no longer mandatory.[258] The legislature, however, provided no guidance to the courts as to when attorney's fees should be granted on mechanic's liens.[259] Thus, further clarification by the courts is needed. Additionally, the legislature added a new section, allowing a challenge to a mechanic's lien filed on an owner-occupied dwelling.[260] If the person challenging the lien prevails, the court may award reasonable attorney's fees and actual damages.[261]

The elimination of the mandatory attorney's fees provision took away the only real legislative improvement of the mechanic's lien statute for contractors during the past twenty years. Making the award of attorney's fees to successful contractors discretionary will likely create more litigation for the courts, discourage settlements, and further delay payments for work performed. There is some risk that contractors and subcontractors will rely less on mechanic's liens and more on common law remedies. Resolution of construction disputes will take longer because mechanic's lien actions are bench trials, while the parties can request a jury with common law actions.[262] Because the incentive of a losing owner having to pay the other party's fees has been lessened, the determination of construction disputes will also likely become more complicated as parties add claims, including fraud, to create pressure to settle cases. Owners have few, if any, incentives to pay their contractors promptly in Iowa. The removal of the mandatory attorney's fee provision eliminates the only

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254. Advance Elevator Co. v. Four State Supply, 572 N.W.2d 186, 190 (Iowa Ct. App. 1997).

255. Nepstad Custom Homes Co. v. Krull, 527 N.W.2d 402, 407 (Iowa Ct. App. 1994).

256. Bidwell v. Midwest Solariums, Inc., 543 N.W.2d 293, 297 (Iowa Ct. App. 1995).

257. IOWA CODE § 572.32.

258. *Id.*

259. *See id.*

260. 1999 Iowa Acts 110, 111.

261. *Id.* In 1999, the legislature added another protection for owner-occupants: "If the court determines that the mechanic's lien was filed in bad faith or that the supporting affidavit was materially false, the court shall award the owner reasonable attorney fees plus an amount not less than $500 or the amount of the lien, whichever is less." *Id.* (codified at IOWA CODE § 572.32).

262. *See* IOWA CODE § 572.26; IOWA R. CIV. P. 177-78.

statutory incentive for prompt payment. The five percent interest rate, available under section 535.2 of the Iowa Code, for money due on a contract when the contract states an interest rate, makes it unlikely owners will try to resolve disputes promptly or make payments quickly.[263]

G. *Priority of Mechanic's Liens vs. Other Liens*

Iowa law provides that the mechanic's lien "arises on the day work commences under the contract, and attaches for all services and materials furnished" thereafter.[264] A mechanic's lien relates back to the date work commenced, predating the filing of a lien.[265] Partial payment does not restart the priority, and priority of a mechanic's lien dates from the start of work, not merely from the beginning of the period for which payment has not been made.[266]

1. *Mechanic's Lien vs. Mechanic's Lien*

There have been no recent legislative or judicial changes to section 572.17 of the Iowa Code. Priority between competing mechanic's liens is based on the time of filing.[267] Iowa does not follow a pro-rata allocation of available proceeds between mechanic's lienors, but rather accords priority to the first filed mechanic's lien.[268] Section 572.17 leads to the result that first filed mechanic's lien claims have priority over subsequently filed mechanic's liens, even when the earlier filed claims are limited to the balance due and the late filed claims are timely perfected and provide for recovery.[269]

2. *Mechanic's Lien vs. Construction Mortgage*

A construction mortgage covers only money provided for financing the work and improvements.[270] It does not include land acquisition costs.[271] The legislature amended the mechanic's lien statute to give construction mortgagees additional

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263. *See* IOWA CODE § 535.2.

264. Metro. Fed. Bank v. A.J. Allen Mech. Contractors, Inc., 477 N.W.2d 668, 671 (Iowa 1991) (citing Northwestern Nat'l Bank v. Metro Ctr. Inc., 303 N.W.2d 395, 398 (Iowa 1981)).

265. *Id.* at 671 (citing Northwestern Nat'l Bank v. Metro Ctr., Inc., 303 N.W.2d at 398; Soc'y Linnea v. Wilbois, 113 N.W.2d 603, 606-07 (Iowa 1962)).

266. *Id.* at 671.

267. IOWA CODE § 572.17.

268. Lindsay & Phelps Co. v. Zoeckler, 104 N.W. 802, 803 (Iowa 1905).

269. *See* IOWA CODE § 572.17.

270. Midland Sav. Bank FSB v. Stewart Group, L.C., 533 N.W.2d 191, 193 (Iowa 1995).

271. *Id.*

protection against mechanic's lienors.[272] This amendment followed the Iowa Supreme Court's decision in *Barker's Inc. v. B.D.J. Development Co.*[273] Construction mortgage liens are now preferred to all mechanic's liens of claimants who commence their particular work or improvement subsequent to the date of the recording of the construction mortgage lien.[274] The phrase "particular work or improvement" does not refer to only unpaid work, but includes any work of the particular mechanic's lien claimant, whether or not the payment has been made.[275] If a mechanic's lienor commences its particular work prior to the recording of the construction mortgage, then the mechanic's liens ordinarily would take priority over the construction mortgage.[276] If the mechanic's lien claimant starts its particular work after the recording of the construction mortgage, then the construction mortgage takes priority.[277]

3. *Mechanic's Lien vs. Purchase Money Mortgages*

Purchase money mortgages cover money provided for purchasing real estate or acquiring land, regardless of whether the funds are provided to a third party or to the owner.[278] A purchase money mortgage lien has priority over a mechanic's lien,

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272. 1984 Iowa Acts 332, 332 (codified at IOWA CODE § 572.18).

> Mechanics' liens shall be preferred to all other liens that may attach to or upon a building or improvement and to the land upon which it is situated, except liens of record prior to the time of the original commencement of the work or improvements. However, construction mortgage liens shall be preferred to all mechanics' liens of claimants who commenced their particular work or improvement subsequent to the date of the recording of the construction mortgage lien. For purposes of this section, a lien is a "construction mortgage lien" to the extent that it secures loans or advancements made to directly finance work or improvements upon the real estate which secures the lien. The rights of purchasers, encumbrancers, and other persons who acquire interests in good faith and for a valuable consideration, and without notice, after the expiration of the time for filing claims for mechanics' liens, are prior to the claims of all contractors or subcontractors who have not, at the dates such rights and interests were acquired, filed their claims for such liens.

IOWA CODE § 572.18.

273. Barker's Inc. v. B.D.J. Dev. Co., 308 N.W.2d 78, 81 (Iowa 1981) (stating that a mechanic's lien has priority over a mortgage if any work or improvement by any one contractor, not limited to the mechanic's lienor's claim, had been started before the mortgage was recorded).

274. IOWA CODE § 572.18.

275. Metro. Fed. Bank v. A.J. Allen Mech. Contractors, Inc., 477 N.W.2d 668, 672 (Iowa 1991).

276. *Id.*

277. *Id.*

278. Midland Sav. Bank FSB v. Stewart Group, L.C., 533 N.W.2d 191, 195 (Iowa 1995) (citing *In re* Lewis, 298 N.W. 842, 845 (Iowa 1941)).

even when the mortgage was not executed and recorded until after the material and labor were provided.[279]

4. *Priority of Mechanic's Liens as to Building or Land*

Mechanic's liens have priority as to the building or improvement in land to any mortgage upon the land that such building or improvement was erected or is situated.[280] The court may determine under section 572.21 that a building or improvement may be sold separately and the proceeds applied to the mechanic's lien.[281] If the building or improvement cannot be sold separately, the court values the land and the building separately, orders the whole sold, and distributes the proceeds so as to secure the mortgage priority upon the land and the mechanic's lien priority upon the building.[282] Where the mechanic's lienor provided repairs or additions to

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279. *Id.* at 195.

280. IOWA CODE § 572.20 (1999).

> Mechanics' liens, including those for additions, repairs, and betterments, shall attach to the building or improvement for which the material or labor was furnished or done, in preference to any prior lien, encumbrance, or mortgage upon the land upon which such building or improvement was erected or situated.

Id.

281. *Id.* § 572.21.

282. *Id.*

> In the foreclosure of a mechanic's lien when there is a prior lien, encumbrance, or mortgage upon the land the following regulations shall govern:
>
> 1. *Lien on original and independent building or improvement.* If such material was furnished or labor performed in the construction of an original and independent building or improvement commenced after the attaching or execution of such prior lien, encumbrance, or mortgage, the court may, in its discretion, order such building or improvement to be sold separately under execution, and the purchaser may remove the same in such reasonable time as the court may fix. If the court shall find that such building or improvement should not be sold separately, it shall take an account of and ascertain the separate values of the land, and the building or improvement, and order the whole sold, and distribute the proceeds of such sale so as to secure to the prior lien, encumbrance, or mortgage priority upon the land, and to the mechanic's lien priority upon the building or improvement.
>
> 2. *Lien on existing building or improvement for repairs or additions.* If the material furnished or labor performed was for additions, repairs, or betterments upon any building or improvement, the court shall take an accounting of the values before such material was furnished or labor performed, and the enhanced value caused by such additions, repairs, or betterments; and upon the sale of the premises, distribute the proceeds of such sale so as to secure to the prior mortgagee or lienholder priority upon the land and improvements as they existed prior to the attaching of the mechanic's lien, and to the mechanic's lienholder priority upon the enhanced value caused by such additions, repairs, or betterments. In case the premises do not sell for more than

an existing building, the court values the land and buildings before the improvement, separately from the additions, repairs, or betterments, and distributes the proceeds, so as to give the mechanic's lienholder priority upon the value of the enhancements.[283]

A bank's mortgage may secure future advances, which have priority over a mechanic's lien arising before the future advance of money, if the loan documentation contains the notice prescribed by section 654.12A of the Iowa Code.[284] The prescribed notice states: "NOTICE: This mortgage secures credit in the amount of .... Loans and advances up to this amount, together with interest, are senior to indebtedness to other creditors under subsequently recorded or filed mortgages and liens."[285]

IV. PROCEDURAL REQUIREMENTS AND ISSUES

A. *Mechanic's Liens and Arbitration*

Under Iowa law, a party may waive its right to submit issues to binding arbitration through either delay or action in court inconsistent with the right to arbitration.[286] The filing of a mechanic's lien does not constitute sufficient court action to establish a waiver of the right to arbitration.[287] The issue of whether an individual has waived his right at arbitration depends on whether the action taken in the judicial forum is significant.[288] There remains an open question under Iowa law whether foreclosing a mechanic's lien is a sufficient court action to waive the right to arbitrate.[289]

> sufficient to pay off the prior mortgage or other lien, the proceeds shall be applied on the prior mortgage or other liens.

Id.

283. *Id.* § 572.21(2).

284. DeWitt Bank & Trust v. Monarch Dev., No. 98-1921, 2000 WL 328040, at *2 (Iowa Ct. App. Mar. 29, 2000); *see also* IOWA CODE § 654.12A.

285. IOWA CODE § 654.12A.

286. Modern Piping v. Black Hawk Automatic Sprinklers, 581 N.W.2d 616, 621 (Iowa 1998).

287. Clinton Nat'l Bank v. Kirk Gross Co., 559 N.W.2d 282, 284 (Iowa 1997).

288. Modern Piping v. Black Hawk Automatic Sprinklers, 581 N.W.2d at 620.

289. Clinton Nat'l Bank v. Kirk Gross Co., 559 N.W.2d at 284 (holding mere filing of a "statement of account, as the first step in perfecting a mechanic's lien" is not sufficient court action to constitute a waiver of right to arbitration).

B. *Service of a Late Filed Lien*

A lien, filed after the lapse of ninety days following the claimant's last day of work, must be served in the same manner as an original notice is served. This generally requires service by the sheriff or a process server.[290] A timely filed mechanic's lien, however, merely requires the claimant to file the lien with the clerk of the district court.[291] The clerk then mails a copy of the lien to the proper person.[292] It is important that the late-filed lien be personally served to comply with the statute.[293] Personal service is necessary because the balance due from the owner to the contractor, at the time of service of the notice, governs the amount of recovery of a late-filed lien by a subcontractor.[294]

The filing of the pre-lien notification to an owner-occupant does not relieve the subcontractor of its obligation to file the lien and perfect it in accordance with the statute.[295] Complying with the pre-lien notification for owner-occupied dwellings is only one of the steps needed to perfect the lien.[296] The lien must be perfected in accordance with sections 572.8 or 572.9 and 572.10.

C. *Amendment of a Mechanic's Lien*

An action to enforce a mechanic's lien may be amended by leave of court.[297] The allowance of an amendment to a mechanic's lien statement or to a pleading referring to such a statement is a matter of discretion that an appellate court will reverse only upon finding an abuse of discretion.[298] Section 572.26 states the amount of the lien claim may not be amended.[299] Presumably, this means the lien claim may not be increased, as there would appear to be no valid reason for refusing reductions in the lien demand.[300]

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290. IOWA R. CIV. P. 49(d).
291. IOWA CODE § 572.8 (1999).
292. *Id.* § 572.11.
293. *Id.*
294. *Id.*
295. Griess & Ginder Drywall, Inc. v. Moran, 561 N.W.2d 815, 817 (Iowa 1997).
296. IOWA CODE §§ 572.8-.10.
297. First Cent. Bank v. White, 400 N.W.2d 534, 537 (Iowa 1987).
298. Atlantic Veneer Corp. v. Sears, 232 N.W.2d 499, 503 (Iowa 1975).
299. IOWA CODE § 572.26.
300. *Id.*

D. *Acknowledgment of Satisfaction of the Lien*

In 1999, the legislature amended section 572.23 to provide a method for acknowledgment of satisfaction of a lien claim.[301] The claimant is required to acknowledge satisfaction of the mechanic's lien.[302] If the claimant neglected to do so, a demand in writing may be personally served.[303] There is a twenty-five dollar penalty on the claimant.[304] The claimant is also liable for damages that result from failure to satisfy the lien claim.[305] If the acknowledgment of satisfaction is not filed within thirty days after personal service, the party may file proof of service and an affidavit with the clerk of the district court to serve as constructive notice to all parties of the forfeiture and cancellation of the lien.[306]

E. *Action to Challenge Mechanic's Lien*

In 1999, the legislature also added a procedure to challenge a mechanic's lien in the district court or small claims court.[307] The action may be either in district court or small claims if the demand is within the $4000 jurisdictional limit of small claims.[308] Any permissible claim or counterclaim may be joined with the action and the court is required to make written findings regarding both the lawful amount and validity of the mechanic's lien.[309] In an action challenging a mechanic's lien on an owner-occupied dwelling, the person challenging the lien may be awarded attorney's fees and actual damages if the action prevails.[310] Additionally, if the mechanic's lien was filed in bad faith or the supporting affidavit was materially false, a penalty of the lesser of $500 or the amount of the lien shall be awarded.[311]

F. *Demand for Bringing Suit*

In 1999, the legislature also provided for the filing of the proof of service and an affidavit with the clerk of court, following a demand for bringing suit.[312] If the party upon whom a written demand for commencing an action within thirty days does

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301. 1999 Iowa Acts 110, 110 (codified at IOWA CODE § 572.23).
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at 111 (codified at IOWA CODE § 572.24).
306. *Id.* (codified at IOWA CODE § 572.28).
307. *Id.* (codified at IOWA CODE § 572.24).
308. *Id.*
309. *Id.*
310. *Id.* (codified at IOWA CODE § 572.32(2)).
311. *Id.*
312. *Id.* (codified at IOWA CODE § 572.28(2)).

not do so, the party serving the demand may file with the clerk of the district court proof of service and a copy of the demand, which shall serve as constructive notice to all parties of forfeiture and cancellation of the lien.[313]

G. *Constructive Notice*

One fiction which survives in Iowa mechanic's lien law is that contractors and subcontractors have constructive notice of all information contained in recorded documents and have a duty of inquiry concerning circumstances disclosed in those records.[314] For example, a contract of release that is recorded may give notice to all contractors and subcontractors that no mechanic's liens were attached to the property. This provision is an effective bar to the attachment of a lien.[315] Also, contractors have constructive notice of the change in ownership and recorded documents and they are on inquiry of satisfying themselves that the person with whom they are contracting was an owner at the time of the contract.[316] The opportunity to file an action following a thirty day demand by the owner is extended by a day if the last day falls on a holiday or a day when the courthouse is closed because of a holiday.[317]

H. *Time of Filing*

In 1987, the legislature set the period of timely filing for mechanic's liens for contractors and subcontractors at ninety days.[318] Previously, subcontractors had sixty days from their last date of work to timely file their mechanic's lien.[319] The period of time runs from the last date of the subcontractor's work.[320] Where work is done merely to extend the time of filing, and is not performed for completion of the original contract, the extra work will not extend the time for filing the lien.[321] "A subcontractor may not extend the time for filing by performing some trivial amount of work, remedying small defects, or making trifling changes."[322]

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313. *Id.*

314. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702, 709 (Iowa 1985); Queal Lumber Co. v. Lipman, 206 N.W.2d 627, 628 (Iowa 1925).

315. Queal Lumber Co. v. Lipman, 206 N.W.2d at 628.

316. Clemens Draf Droste Zu Vischering v. Kading, 368 N.W.2d at 709.

317. Emmetsburg Ready Mix Co. v. Norris, 362 N.W.2d 498, 500 (Iowa 1985).

318. 1987 Iowa Acts 89, 89 (codified at IOWA CODE § 572.9 (1999)).

319. *See* IOWA CODE § 572.9 (1985).

320. Pater Painter, Inc. v. William R. Higgins, Jr. Found., Inc., 295 N.W.2d 451, 453 (Iowa 1980).

321. *Id.* at 452.

322. *Id.* (citing Casler Elec. Co. v. Carlson, 86 N.W.2d 682, 686 (Iowa 1957); Skemp v. Olansky, 85 N.W.2d 580, 584 (Iowa 1957); Nielson v. Buser, 222 N.W. 856, 858 (Iowa 1929)).

Separate contracts cannot be joined for purposes of extending the time period for filing or obtaining an earlier priority date.[323] "[W]ork performed under separate contracts—one as contractor and one as subcontractor—could not be joined together to extend the time for filing mechanic's liens."[324]

V. CONCLUSION

The legislature has substantially undermined the value of a contractor's mechanic's liens by making attorney's fees discretionary. Reinstating mandatory awards to prevailing contractors will promote settlement, encourage mechanic's lien actions rather than common law actions, reduce the number of jury trials on construction cases, and expedite payments for work performed. The legislature should repeal its 1999 amendment to section 572.32(1) and restore the mandatory award of attorney's fees to a prevailing contractor.

The collateral security prohibition, section 572.3, should be deleted as an anachronistic forfeiture. The provision requiring contractors to give notice of subcontractors, section 572.13, should be deleted as cumbersome, unnecessary, and procedural nonsense. The 1999 amendment changing balance due to amount due in section 572.14(2) should be repealed as confusing, unnecessary, and uncertain as to time of computation.

Mechanic's liens are the most effective remedy contractors have to get payment for the work they have done. The legislature should encourage their use rather than force unpaid contractors to use common law claims in cumbersome jury trials that will continue to clog overcrowded courts, without improving the outcome, encouraging settlement, or expediting payments for work done.

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323. Clemens Graf Droste Zu Vischering v. Kading, 368 N.W.2d 702, 713 (Iowa 1985).
324. *Id.* at 713.